In:	**KSC-CC-2022-13**
Before:	**The President of the Specialist Chambers**
	Judge Ekaterina Trendafilova
Registrar:	Dr Fidelma Donlon
Filing Participant:	Defence Counsel for Jakup Krasniqi
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Krasniqi Defence Referral to the Constitutional Court Panel on the Legality of Charging Joint Criminal Enterprise with public Annex 1

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I. INTRODUCTION

1. Pursuant to Article 49(3) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), Rule 20 of the Rules of Procedure for the Specialist Chamber of the Constitutional Court ("Rules"), and Articles 33(1) and 113(7) of the Constitution of the Republic of Kosovo ("Constitution"), the Defence for Jakup Krasniqi ("Defence") hereby refers his complaint that the Specialist Prosecutor's Office ("SPO") has violated his individual rights guaranteed by the Constitution by charging him with the basic and extended forms of joint criminal enterprise ("JCE")[1] to the Specialist Chamber of the Constitutional Court ("Constitutional Court").

2. Specifically, the fundamental right *nullum crimen sine lege*, which is protected by Article 33(1) of the Constitution and Article 7(1) of the European Convention on Human Rights ("ECHR") has been violated by the SPO for the following reasons:-

1) The extended form of joint criminal enterprise ("JCE III") was not part of customary international law ("CIL") during the indictment period;

2) JCE III was not accessible or foreseeable to Mr. Krasniqi during the indictment period;

3) JCE is not a mode of responsibility prescribed by Article 16(1)(a) of the Law.

3. The Defence requests the Constitutional Court to find that charging Mr. Krasniqi pursuant to the basic and / or extended forms of JCE violates his individual rights

[1] KSC-BC-2020-06, F00455/RED/A01, Specialist Prosecutor, *Annex 1 to Public Redacted Version of 'Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)', KSC-BC-2020-06/F00455, dated 3 September 2021* ("Indictment"), 8 September 2021, public, paras 32-52, 172.

protected by the Constitution and to require the SPO to withdraw those allegations from the Indictment.

II. STATEMENT OF THE FACTS

4. On 15 July 1999, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") held that JCE formed part of CIL.[2] It defined three forms of JCE: the basic form of JCE ("JCE I"), the systemic form of JCE ("JCE II") and the extended form of JCE ("JCE III"). According to the ICTY, the *actus reus* for all forms of JCE requires (1) a plurality of persons (2) a common criminal plan, design or purpose and (3) participation by the accused in the common design.[3] The *mens rea* required, however, differs. In JCE I, the accused must intend to commit the crime. The defining features of JCE III, however, are that the crime falls outside the common plan and the accused is responsible if (1) it was foreseeable that the crime might be perpetrated and (2) the accused willingly took that risk.[4]

5. From 2010 to 2016, three Chambers of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") comprehensively reviewed the alleged precedents for the application of JCE III and concluded that JCE III did not form part of CIL.[5]

6. On 3 August 2015, the Law was adopted which provides at Article 16(1)(a) that the Specialist Chambers ("SC") have jurisdiction over a "person who planned,

[2] ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, *Judgment* ("*Tadić* Appeal Judgment"), 15 July 1999, paras 194-229.
[3] *Ibid.*, para. 227.
[4] *Ibid.*, para. 228.
[5] 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)* ("ECCC PTC Decision"), 20 May 2010; *Co-Prosecutors v. Ieng Sary et al.*, 002/19-09-2007/ECCC/TC, Trial Chamber, *Decision on the Applicability of Joint Criminal Enterprise* ("ECCC TC Decision"), 12 September 2011; *Co-Prosecutors v. Nuon Chea et al.*, 002/19-09-2007-ECCC/SC, Supreme Court Chamber, *Appeal Judgment* ("ECCC SC Judgment"), 23 November 2016.

instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of such a crime".

7. On 26 October 2020, the Pre-Trial Judge confirmed the revised Indictment.[6] The Indictment alleges that Mr. Krasniqi was responsible for various crimes said to be committed between March 1998 and September 1999 on the basis of JCE I and JCE III.[7]

8. On 4 November 2020, Mr. Krasniqi was arrested in Kosovo on the charges set out in the Indictment[8] and brought before the Court. He remains in detention.[9]

9. On 15 March 2021, the Defence filed its Preliminary Motion on Jurisdiction which contended *inter alia* that the SC do not have jurisdiction over JCE, or alternatively do not have jurisdiction over JCE III.[10]

10. On 23 April 2021, the SPO responded to the preliminary motion.[11] On 14 May 2021, the Defence replied.[12]

11. On 22 July 2021, the Pre-Trial Judge dismissed the preliminary motion on jurisdiction,[13] finding that: there was a clear and sufficient basis to conclude that JCE

[6] KSC-BC-2020-06, F00026/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, 19 November 2020, confidential.
[7] Indictment, paras 32-52, 172.
[8] KSC-BC-2020-06, F00044, Registrar, *Notification of Arrest of Jakup Krasniqi Pursuant to Rule 55(4)*, 4 November 2020, public.
[9] *See*, e.g., KSC-BC-2020-06, F00582, Pre-Trial Judge, *Decision on Remanded Detention Review Decision and Periodic Review of Detention of Jakup Krasniqi*, 26 November 2021, confidential.
[10] KSC-BC-2020-06, F00220, Krasniqi Defence, *Krasniqi Defence Preliminary Motion on Jurisdiction* ("Defence Preliminary Motion"), 15 March 2021, public, with Annex 1, public.
[11] KSC-BC-2020-06, F00263, Specialist Prosecutor, *Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE)* ("JCE Response"), 23 April 2021, public.
[12] KSC-BC-2020-06, F00302, Krasniqi Defence, *Krasniqi Defence Reply to Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE)*, 14 May 2021, public.
[13] KSC-BC-2020-06, F00412, Pre-Trial Judge, *Decision on Motions Challenging the Jurisdiction of the Specialist Chambers* ("Jurisdiction Decision"), 22 July 2021, public.

III was part of CIL at the time the offences were committed;[14] JCE was foreseeable to the Accused;[15] and JCE fell within "committed" in Article 16(1)(a) of the Law.[16]

12. On 27 August 2021, the Defence submitted its appeal against the Jurisdiction Decision.[17] On 30 September 2021, the SPO responded[18] and, on 18 October 2021, the Defence replied.[19]

13. On 23 December 2021, a Panel of the Court of Appeals Chamber ("Appeals Chamber") denied the Defence jurisdictional appeals.[20] No further appeals are available.

III. ADMISSIBILITY AND JURISDICTION

14. This referral is admissible and falls within the Constitutional Court's jurisdiction. It relates to the violation of individual rights guaranteed by the Constitution by the SPO and the SC, it is submitted on behalf of an authorised individual and other remedies provided by law have been exhausted.

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[14] Jurisdiction Decision, paras 186-190.
[15] *Ibid*., paras 191-201.
[16] *Ibid*., para. 177.
[17] KSC-BC-2020-06, IA009/F00013, Krasniqi Defence, *Krasniqi Defence Appeal Against Decision on Motions Challenging the Jurisdiction of the Specialist Chambers* ("Appeal"), 27 August 2021, public, with Annex 1, public.
[18] KSC-BC-2020-06, IA009/F00019, Specialist Prosecutor, *Prosecution Response to Krasniqi Defence Appeal Against the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers'*, 30 September 2021, public, with Annex 1, public.
[19] KSC-BC-2020-06, IA009/F00027, Krasniqi Defence, *Krasniqi Defence Reply to Prosecution Response to Krasniqi Defence Appeal Against the 'Decision on Motions Challenging the Jurisdiction of the Specialist Chambers'*, 18 October 2021, public.
[20] KSC-BC-2020-06, IA009/F00030, Court of Appeals Chamber, *Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers"* ("Jurisdiction Appeal Decision"), 23 December 2021, public.

15. The referral falls squarely within the subject matter jurisdiction of the Constitutional Court. Article 49(2) of the Law provides that the Constitutional Court has jurisdiction over a referral "which relates to or directly impacts the work, decisions, orders or judgements of the Specialist Chambers or the work of the Specialist Prosecutor's Office". This referral addresses the modes of responsibility pleaded in the Indictment by the SPO, confirmed by the Pre-Trial Judge and upheld in the Jurisdiction Decision and Jurisdiction Appeal Decision. It therefore relates both to the work, decisions, orders or judgments of the SC and the work of the SPO.

16. Mr. Krasniqi is an authorised person entitled to submit this referral. Article 113(7) of the Constitution provides that "[i]ndividuals" are authorised to refer violations "of their individual rights and freedoms". Mr. Krasniqi is authorised to submit this referral because charging him pursuant to JCE I and JCE III in the Indictment violates his individual rights. Article 49(3) of the Law puts his standing beyond doubt by providing that "individuals, including the accused" are authorised to make referrals. For the avoidance of doubt, the Defence submits that the charging of JCE I and JCE III violates Mr. Krasniqi's rights under Article 33(1) of the Constitution and Article 7(1) of the ECHR.

17. The Defence has exhausted all remedies provided by law. The Defence challenged the SC's jurisdiction over JCE I and JCE III in its preliminary motion[21] and appealed the Jurisdiction Decision to the Appeals Chamber.[22] The Appeals Chamber denied this appeal.[23] The Law does not provide for any further appeals. The Defence cannot seek protection of legality from the Supreme Court because criminal proceedings have not been completed in final form and the Jurisdiction Appeal

[21] Defence Preliminary Motion.
[22] Appeal.
[23] Jurisdiction Appeal Decision.

Decision is not a final decision "ordering or extending detention on remand".[24] Accordingly, all other legal remedies have been exhausted.

18. Further, this referral is submitted in time. Rule 20(1)(b) of the Rules provides that a referral must be submitted within two months of the final ruling concerning the alleged violation. The Jurisdiction Appeal Decision was notified on 23 December 2021. The first working day after this ruling was 28 December 2021. Accordingly, this referral is in time.

19. Finally, in compliance with the formal requirements set out in Articles 58 and 59 of the Registry Practice Direction on Files and Filings before the Kosovo Specialist Chambers, the authorized individual on whose behalf this referral is made is Jakup Krasniqi, a national of Kosovo, born on 1 January 1951, who presently resides in the SC's Detention Unit. This referral is submitted on his behalf by his appointed Counsel.[25]

IV. VIOLATION OF MR. KRASNIQI'S RIGHTS

A. JCE III WAS NOT PART OF CIL AT THE MATERIAL TIME

20. JCE III did not form part of CIL in the period of March 1998 to September 1999. The Defence will demonstrate that there is wholly insufficient consistent State practice to support the existence of JCE III as an established norm of CIL throughout the indictment period. JCE III cannot properly be inferred from a small number of inconclusive post-World War II ("WW2") cases, none of which discussed the existence of specific modes of responsibility in international law. Its existence in CIL is not

[24] Article 48(6) of the Law.
[25] KSC-BC-2020-06, F00058, Registrar, *Notification of the Appointment of Counsel to Jakup Krasniqi*, 6 November 2020, public, with Annex 1, confidential.

supported by international treaties or by general principles of criminal law drawn from State practice. State practice shows diversity, fluctuation and discrepancy rather than a generally consistent adoption of JCE III. As a result, charging Mr. Krasniqi pursuant to JCE III is a violation of his right not to be charged for an act which did not constitute a penal offence under law at the time when it was committed.[26]

21. Article 33(1) of the Constitution provides that "[n]o one shall be charged or punished for any act which did not constitute a penal offense under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law".[27] The principle of *nullum crimen sine lege* which this embodies is an essential element of the rule of the law which must provide an effective safeguard against arbitrary prosecution.[28] Retroactive criminal law is thus prohibited because the criminal law must be determined according to the provisions which were in force at the time when the alleged offence was committed (unless any subsequent provisions are more favourable to the accused).

22. Article 33(1) thus states a principle of legality which applies to all offences and punishments and prohibits the retroactive effect of any criminal law. It is beyond doubt that the protection of Article 33(1) extends to modes of responsibility as well as to offences. First, Article 33(1) is defined by reference to an "act which did not constitute a penal offense under law at the time" and the acts of the accused relate to both the modes of responsibility and the underlying offence. Second, the ICTY and the European Court of Human Rights ("ECtHR") have both expressly accepted that

[26] Article 33(1) of the Constitution.
[27] *See* further the equivalent provisions in Article 7(1) of the ECHR and Article 15(1) of the International Covenant on Civil and Political Rights.
[28] ECtHR, *Vasiliauskas v. Lithuania*, no. 35343/05, *Judgment (Merits and Just Satisfaction)* ("*Vasiliauskas*"), 20 October 2015, para. 153; *Kononov v. Latvia*, no. 36376/04, *Judgment (Merits and Just Satisfaction)* ("*Kononov*"), 17 May 2010, para. 185.

the principle of legality applies to modes of responsibility in cases concerning command responsibility.[29] Third, analogous principles relating to the construction of criminal offences also apply with equal force to modes of responsibility as to the definition of the underlying offence.[30]

23. JCE III is relied upon against Mr. Krasniqi pursuant to CIL not the law of Kosovo. The Law directs the SC to apply CIL.[31] Further, the SC must adjudicate and function in accordance with CIL and must only apply other provisions of the law of Kosovo "as expressly incorporated and applied by this Law".[32] Accordingly, if JCE III was not established in CIL throughout the period March 1998 to September 1999, then charging Mr. Krasniqi with committing crimes through JCE III in this period is a violation of Article 33(1) of the Constitution.

24. The Constitutional Court, as the highest and final authority for the interpretation of the Constitution,[33] must determine for itself whether there is sufficient settled and consistent practice to establish that JCE III existed in CIL at the material time. The Defence respectfully requests the Constitutional Court to carry out its own independent analysis of this issue and of the WW2 jurisprudence, without being blinkered by the ICTY decision in *Tadić*. In carrying out that analysis, unless it is possible to discern that convictions were entered for crimes which were outside a common criminal plan on the basis that they were foreseeable in sufficient number to amount to a settled and consistent practice, then the Constitutional Court must find that there is insufficient basis for JCE III in CIL. The analysis below shows that nothing

[29] ICTY, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-AR72, Appeals Chamber, *Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, 16 July 2003, paras 33-34; *Kononov*, para. 211.
[30] 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* ("Concurring Opinion of Judge Wyngaert"), 18 December 2012, para. 18.
[31] Article 12 of the Law.
[32] Article 3(2)(c) and (d) of the Law.
[33] Article 49(1) of the Law.

in the vague and imprecise WW2 jurisprudence provides sufficient foundation for JCE III.

1. WW2 CASES AND MATERIALS DO NOT SUPPORT JCE III

(A) CASES RELIED UPON BY THE ICTY

25. In *Tadić*, the ICTY relied on the *Essen Lynching* case, the *Borkum Island* case and certain *Italian* national cases.[34] These cases do not support JCE III.

Essen Lynching

26. In the *Essen Lynching* case, prisoners of war were being escorted for interrogation. A captain instructed the private soldier who was escorting them not to intervene if civilians should molest the prisoners. Along the way, the prisoners were beaten and killed by a crowd of civilians. The British Military Court convicted three civilians, the captain and the soldier escort on the charge of being "concerned in the killing"; two other civilians were acquitted.[35]

27. These convictions do not support the existence of JCE III because the limited available records are open to various interpretations.[36] First, the records do not expressly confirm which modes of responsibility were applied. There is no record of the Court's reasoning. There was no Judge Advocate appointed. No summing up was delivered in open court. The Notes on the Case rightly acknowledge that the considerations relied upon by the Court "cannot, therefore, be quoted from the transcript in so many words".[37] This alone renders the *Essen Lynching* case useless as

[34] *Tadić* Appeal Judgment, paras 207-219.
[35] British Military Court for the Trial of War Criminals, *Erich Heyer et al.*, Case No. 8, *Trial of Erich Heyer and Six Others* ("*Essen Lynching* case"), 18-19 and 21-22 December 1945, UNWCC, Law Reports of Trials of War Criminals, Vol. I at 88-92.
[36] *See* Jørgensen, N. H. B., *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* ("Elgar Companion to the ECCC"), Edward Elgar Publishing Limited 2018, p. 299.
[37] *Essen Lynching* case, p. 91.

a precedent for JCE III because submissions about modes of responsibility applied in that case are purely speculative.

28. Second, it cannot safely be inferred that any conviction was entered on the basis that the commission of a crime outside the common purpose was foreseeable to the accused; the convictions could equally be explained by JCE I. To the extent that it is discernible from the records, the Prosecution theory was that the crimes were within the common purpose. The Prosecutor submitted 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".[38] Thus the Prosecution theory was not that the killing was a foreseeable crime outside the common purpose, but that murder was the plan from the outset, beginning with the 'incitement […] to murder'.

29. Third, the Prosecution submission that intent to kill was not necessary for a conviction for murder does not establish that JCE III was relied upon. The Prosecution 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".[39] Thus, for any conviction for murder under any mode of responsibility, the Prosecution submitted that intent was required. That must mean that the Prosecution accepted that foreseeability did not suffice for the crime of murder and hence JCE III was not applied. However, expressly relying on "British law",[40] the Prosecution submission (which may or may not have been accepted by the Court) was that intent to kill was not required for the *mens rea* of manslaughter. Far from evidencing a generally applicable mode of responsibility in CIL, that submission simply reflects the elements of unlawful act manslaughter in the

[38] *Essen Lynching* case, p. 89.
[39] Prosecution Submission reproduced in *Tadić* Appeal Judgment, para. 208.
[40] *Tadić* Appeal Judgment, para. 208.

national law of England and Wales[41] and the *mens rea* of the offences of murder and / or wilful killing. Accordingly, the *Essen Lynching* case provides no support for JCE III.

Borkum Island

30. In the *Borkum Island* case, which was only 1 of around 200 cases considered by the US Army Court,[42] whilst prisoners of war were escorted by soldiers on a pre-planned route through a densely populated area, civilians were encouraged to beat them and they were ultimately shot and killed. The charges were of "wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing]", first, in the killing and, second, in assaults.[43] Some of the accused were convicted of both assault and killing, others solely of assault and one was acquitted altogether.

31. The legal basis for the findings is unclear. Reliance on the Deputy Judge Advocate's review materials does not establish what modes of liability were actually applied by the tribunal.[44] Nothing in the surviving records states that any convictions were entered on the basis of foreseeability of crimes falling outside a common plan.

32. Moreover, it cannot safely be inferred that convictions were entered pursuant to a foreseeability standard; the record of the case is equally consistent with the killings being within the common plan (for those accused convicted of killing).[45] Thus, the Prosecution'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"[46] is consistent with a common plan to kill in which

[41] Namely commission of an unlawful act, which was objectively dangerous and which caused the death of the victim: United Kingdom, *DPP v. Newbury and Jones*, [1977] AC 500, House of Lords, *Judgment*, 12 May 1976.
[42] Elgar Companion to the ECCC, p. 300.
[43] 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, Section II, p. 1.
[44] *See* ECCC SC Judgment, para. 791.
[45] *See* Elgar Companion to the ECCC, p. 307 describing this as the "best reading".
[46] *Tadić* Appeal Judgment, para. 210.

the accused participated in different ways. That is confirmed by the submission that the mob "carried out its purpose". The subsequent statement in the Report of the Deputy 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"[47] is also entirely consistent with killing being within the common plan and inconsistent with crimes falling outside the common plan or foreseeability. In any event, that report is simply one person's subsequent review and carries no more authority than any subsequent commentary.

33. Yet further, the fact that acquittals were entered in relation to certain accused appears to be inconsistent with JCE III. If a standard based on foreseeability was applied to the killings, there is no obvious reason why any accused would have been acquitted. In the circumstances pertaining at the time, the killings would have been foreseeable to all accused.

34. Finally, the reference in the Deputy Judge Advocate's Review to *Rüsselsheim*[48] adds nothing because *Rüsselsheim* itself does not rely on JCE III.[49]

Italian National Cases

35. The primary problem with reliance on the *Italian* cases is that they are not evidence of CIL at all. They were domestic cases applying *Italian* national law. Even taken at their highest, they are not capable of establishing that JCE III was part of CIL.[50] Insofar as they relate to CIL, they only evidence the domestic practice of one State.[51]

[47] European Command, 'Report of the Deputy Judge Advocate for War Crimes', June 1944 to July 1948, p. 66.
[48] *Borkum Island* case, pp. 9-10.
[49] *See* paras 46-48 below.
[50] *See* Jurisdiction Decision, para. 188, finding that a case from England and Wales has "no bearing" on the determination of CIL.
[51] *See* ECCC PTC Decision, para. 82.

Plainly the practice of one State is insufficient to establish the existence of a rule of CIL.

36. In any event, none of the *Italian* cases support a mode of responsibility which resembles JCE III. The SPO has previously relied[52] on *D'Ottavio et al.*[53] In that case, armed civilians shot at an escaped prisoner of war without intending to kill him, but he subsequently died from his wounds. They were convicted of manslaughter. The critical paragraph of the judgment reads:

> [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 […].[54]

37. This passage demonstrates that convictions were <u>not</u> entered based on foreseeability but due to the application of national laws on causation. Specifically, Article 116 of the *Italian* Criminal Code provided that "whenever the crime committed is different from that willed by one of the participants, also that participant answers for the crime, if the fact is a consequence of his action or omission".[55] That is a rule of causation only. Mention of the word 'foreseeability' is only in the context of "psychological causation", an aspect of causation which appears after the primary discussion of the "nexus of objective causation".[56] Clearly, these convictions were not entered on the basis that the accused foresaw the killing but on the basis that, applying *Italian* national law, the killing was a consequence of their actions. Accordingly, the case offers no support to JCE III.

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[52] JCE Response, paras 87-91.
[53] Italian Court of Cassation, *D'Ottavio et al.*, No. 270, Criminal Section I, *Judgment* ("*D'Ottavio et al.*"), 12 March 1947, published in *Journal of International Criminal Justice* 5 (2007), pp. 232-234.
[54] *Ibid.*, p. 233.
[55] *Ibid.*
[56] *Ibid.*, p. 234.

38. None of the remaining *Italian* cases cited in *Tadić* offer any support to JCE III. In particular:-

1) In *Aratano et al.*,[57] the Court of Cassation overturned the conviction of militiamen for the offence of killing in circumstances where they had intended to arrest but not kill certain partisans. The overturning of these convictions on the basis that the killing fell outside the common purpose – without considering whether foreseeability provided sufficient basis for conviction – is inconsistent with JCE III;[58]

2) Cases concerning the application of the *Italian* amnesty law of 22 June 1946 provide no support for the existence of JCE III because, first, the cases do not clearly spell out *mens rea* requirements (as the *Tadić* Appeal Judgment conceded)[59] and, second, because they are inconsistent;[60]

3) Whilst the *Tadić* Appeal Judgment also considered other *Italian* national cases from the same time period in order to consider the *mens rea* standards,[61] these cases have no connection to international crimes and hence are irrelevant.

(B) CASES RELIED ON BY THE STL

39. In addition to the above cases, the Special Tribunal for Lebanon ("STL") found that the *RuSHA* and *Dachau Concentration Camp* cases support JCE III and that

[57] Italian Court of Cassation, *Aratano et al.*, No. 102, Criminal Section II, *Judgment*, 21 February 1949, published in *Journal of International Criminal Justice* 5 (2007), pp. 241-242.
[58] *See* ECCC SC Judgment, para. 796.
[59] *Tadić* Appeal Judgment, para. 218.
[60] *See* ECCC SC Judgment, para. 797.
[61] *Tadić* Appeal Judgment, paras 218-219.

responsibility for additional foreseeable crimes was also considered in *Ulrich & Merkle*, *Wuelfert et al.* and *Tashiro Toranosuke et al.*[62] None of these cases support JCE III.

RuSHA

40. The *RuSHA* case[63] involved accused linked to four organisations (Staff Main Office, VoMi, RuSHA and Lebensborn) said to be concerned in evacuating and resettling conquered territory, 'Germanization' of the population and using other parts of the population as slave labour. The indictment alleged that the accused were "principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations or groups connected with atrocities and offenses".[64] Since the judgment contains no detailed discussion of modes of responsibility, it is impossible to ascertain which of these various modes of responsibility was actually relied upon.

41. Nevertheless, there is nothing in the judgment which suggests that a mode of responsibility based on foreseeability of crimes outside the common plan was contemplated. Notably, officers connected with Lebensborn were acquitted on counts concerning war crimes and crimes against humanity on the basis that Lebensborn "did everything in its power to adequately provide for the children".[65] If a mode of responsibility akin to JCE III had been applied, those acquittals could not have been entered without expressly considering whether those crimes were foreseeable to them.

Dachau Concentration Camp

[62] STL, *Prosecutor v. Ayyash et al.*, STL-11-01/I, Appeals Chamber, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, 16 February 2011, fn. 355.
[63] United States Military Tribunal I, *United States of America v. Greifelt et al*., Case No. 8, *Opinion and Judgment* ("*RuSHA* case"), 20 October 1947-10 March 1948, Trials of War Criminals before the Nuernberg Military Tribunals, Vol. V at 88-167.
[64] *Ibid*., pp. 88-89.
[65] *Ibid*., p. 163.

42. The *Dachau Concentration Camp* case might be an example of JCE I or II but it offers no support to JCE III. The Prosecution allegation was that there was a common design to commit crimes at the concentration camps and to run the camps "in a manner so that the great numbers of prisoners would die or suffer severe injury".[66] All the crimes alleged were part of that common criminal plan. There is no basis for alleging that any convictions were entered for crimes outside the scope of the common design, nor that foreseeability rather than intent was the basis for any conviction.[67]

Ulrich & Merkle and Wuelfert et al.

43. These cases were additional prosecutions arising from the operation of the Dachau Concentration Camp (and camps subsidiary thereto) and both adopt the reasoning of the above 'parent case'.[68] In both cases, the accused were convicted because they significantly participated in a common criminal design to inflict cruelty and mistreatment on the detainees at the Camp.[69] There is no basis for concluding that these convictions were entered on the basis that additional crimes were foreseeable to the accused. Rather, all crimes were part of the common plan. No doubt for that reason, the SPO previously submitted that both cases were examples of JCE I not JCE III.[70]

Tashiro Toranosuke et al.

44. Three members of the medical squad for a prisoner of war camp were prosecuted for inhumane treatment causing physical suffering and contributing to the deaths of

[66] General Military Government Court of the United States Zone, *Martin Gottfried Weiss et al.*, Case No. 60, *Trial of Martin Gottfried Weiss and Thirty-Nine Others* ("*Dachau Concentration Camp*"), 15 November-13 December 1945, UNWCC, Law Reports of Trials of War Criminals, Vol. XI at 5-17, pp. 5, 7.
[67] The ICTY considered this an example of JCE II: *Tadić* Appeal Judgment, para. 202.
[68] General Military Government Court of the United States Zone, *United States v. Ulrich and Merkle*, Case No. 000-50-2-17, *Review and Recommendations* ("*Ulrich and Merkle* case"), 12 June 1947, pp. 10-11; *United States v. Hans Wuelfert et al.*, Case No. 000-50-2-72, *Review and Recommendations* ("*Wuelfert et al.* case"), 19 September 1947, pp. 11-12.
[69] *Ulrich and Merkle* case, pp. 1-2, 10-11; *Wuelfert et al.* case, pp. 1, 11-12.
[70] JCE Response, para. 60.

many.[71] They were convicted of all crimes apart from "contributing to the deaths of many". No written judgment survives. The available records suggest that this case is unrelated to JCE III. The reviewing Judge Advocate presumed that the reason for the acquittals was that "the Prosecution had failed to produce satisfactory evidence of a sufficient number of specific instances of neglect or brutal ill-treatment such as could reasonably be held to have contributed to the deaths".[72] The acquittals were thus entered because the evidence did not establish causation (partly because medical testimony was not led).[73] A foreseeability standard was not applied.

(C) ADDITIONAL CASES PREVIOUSLY RELIED ON BY THE SPO

45. The SPO previously relied on four additional cases.[74] For the very good reasons identified below, no international tribunal has ever found that these cases support JCE III.[75]

Rüsselsheim

46. The *Rüsselsheim* case concerned a mob killing of downed airmen. The records do not expressly say that a foreseeability standard was applied nor can that safely be inferred. It is at least equally likely that the killing was or became part of the mob's common plan.

47. The available records are consistent with the killing being within the common plan. The charge did not plead foreseeability but that the accused did "wilfully,

[71] Hong Kong Military Court for the Trial of War Criminals No. 5, *Tashiro Toranosuke et al.*, Case No. WO235/905, *Judge Advocate's Summing Up and Recommendation to Commander in Forces in Hong Kong* ("*Tashiro Toranosuke et al.*"), 28 October 1946.
[72] *Ibid.*, p. 2 (p. 10 of available records).
[73] *Ibid*.
[74] JCE Response, paras 72-83, 92-93.
[75] Indeed, the ECCC expressly found that they did not support JCE III. ECCC SC Judgment, paras 793-794, 800-801, 804.

deliberately and wrongfully encourage, aid, abet and participate in the killing".[76] Further, 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"[77] is entirely consistent with a common plan to kill. 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".[78] 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 helpless aviators".[79] These passages from the reviewing decisions are perfectly consistent with a common design to kill (JCE I) and inconsistent with JCE III.

48. Nor is a different conclusion compelled by the 1946 US Manual for Trial of War Crimes.[80] 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. The Manual does state 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 […]".[81] Decisively, the authority cited in *Rüsselsheim* for this proposition was "29 Corpus Juris,

[76] 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. 1.
[77] *Ibid.*, p. 2.
[78] *Ibid.*, p. 8.
[79] 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.
[80] JCE Response, paras 74-75.
[81] Deputy Theater Judge Advocate's Office War Crimes Group, *Manual for Trial of War Crimes and Related Cases*, 15 July 1946, Section 410, p. 305.

Sec 46, p. 1073".[82] That is an encyclopaedia of American national law. The same rule appears in the current edition and only applies to homicide.[83] Thus the only proposition from *Rüsselsheim* which mentions foreseeability is not a rule of CIL, but a rule of the national criminal law of one State which relates to the *mens rea* of homicide not a general mode of participation. The existence of a national rule on *mens rea* in relation to one offence cannot prove the existence of a generally applicable mode of responsibility in CIL.

Ikeda

49. The *Ikeda* case is equally inconclusive; it cannot be concluded that the conviction was based on JCE III rather than superior responsibility or JCE I.[84]

50. The *Ikeda* judgment refers repeatedly 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"[85] pleads the superior-subordinate relationship and the *mens rea* of knowledge / constructive knowledge which are the elements of superior responsibility. There are references throughout the judgment to the accused's role as a "heitan officer" or "senior officer".[86] The final operative paragraph focusses on the accused's failure to punish, concluding "if the accused had appreciated and exercised the duties for which he was responsible as a *heitan* officer correctly, it is inconceivable why he did not immediately start an investigation".[87] These references strongly suggest superior

[82] *Rüsselsheim* Deputy Theater Judge Advocate, p. 9.
[83] Common design of participants, 40 C.J.S. Homicide 30; *see also* Common design of participants-To kill, 40 C.J.S. Homicide 31.
[84] Temporary Court Martial in Batavia, *The Queen v. Ikeda*, No. 72 A/1947, *Judgment* ("*Ikeda*"), 30 March 1948.
[85] *Ibid.*, p. 1.
[86] *Ibid.*, pp. 1, 8-10.
[87] *Ibid.*, p. 9.

responsibility. The statement that crimes "could and should have been anticipated and prevented by the accused"[88] is not a reference to JCE III but to the knowledge threshold for superior responsibility.

51. Alternatively, *Ikeda* could be explained by the crimes falling within the criminal plan or that the crimes within the common plan expanded over time.[89] Finding that Ikeda "participated in formulating and elaborating the plan" and was "participating in the further elaboration of the plan"[90] is consistent with JCE I and an expanding plan. Nothing in the finding that he "could and should have" anticipated certain crimes excludes intent; knowledge and acceptance have been held sufficient to infer intent.[91]

52. Finally, *Ikeda* cannot be an example of JCE III since no clear distinction was drawn between which crimes fell within the common plan and which additional crimes were convicted pursuant to a foreseeability standard.

Ishiyama and Yasusaka

53. The evidence in this case included that: 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 responded that '[w]e have gone this far, we may as well finish it' and then shot them.[92] Only Ishiyama was convicted.[93]

[88] *Ikeda*, p. 8.
[89] ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Appeals Chamber, *Judgment*, 17 March 2009, para. 163.
[90] *Ikeda*, p. 8.
[91] ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Appeals Chamber, *Judgment*, 29 November 2017, para. 1800.
[92] Australian Military Court, *Ishiyama and Yasusaka*, AWC No. 2225 and AWC No. 2229, *Trial of Japanese War Criminals* ("*Ishiyama and Yasusaka*"), 8-9 April 1946, p. 30.
[93] *Ibid.*, p. 27.

54. The acquittal of Yasusaka,[94] despite evidence of a common plan to tie up and scare the victims and without considering whether the killing was foreseeable to him, establishes that JCE III was not applied.

55. In one passage, the Judge Advocate suggested 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".[95] On its own, this submission establishes nothing. Without evidence that the Court, which was "the sole judges of fact and also the judges of law",[96] accepted this proposition, the Judge Advocate's words do not establish that JCE III was part of CIL. In any event, the Judge Advocate's approach was not consistent with JCE III. The Judge Advocate also stated 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".[97] That statement is inconsistent with JCE III because it excludes responsibility for the additional crime of the shooting, without any consideration of foreseeability. In any event, the Judge Advocate's comments are limited to homicide cases in the same way as the principle of US national law cited in *Rüsselsheim* and unlawful act manslaughter in the law of England and Wales in the *Essen Lynching* case.

United States v. Tashiro et al.

56. In *Tashiro et al.*, fires had started in a prison and officers were prosecuted for failing to evacuate prisoners of war so that they burned to death. Koshikawa was

[94] *Ishiyama and Yasusaka*, p. 27.
[95] *Ibid*., p. 24.
[96] *Ibid*.
[97] *Ibid*., p. 25.

convicted 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".[98] 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 *mens rea* standard based on gross negligence (at least in circumstances where the accused, as prison officers, had a duty to protect).

(D) OTHER WW2 MATERIAL

57. Control Council Law No. 10 ("CCL10") and the Nuremberg Charter do not support JCE III.[99] First, CCL10 provides that a person who was "connected with plans or enterprises involving" the commission of a crime is criminally responsible for it.[100] That does not support JCE III as it says nothing about foreseeability or responsibility for additional crimes outside the scope of plans or enterprises. Second, Article 6 of the Nuremberg Charter also contains no reference to foreseeability or to JCE III. Significantly, Article 6 was considered at the time to refer to complicity not JCE.[101] Third, the *travaux préparatoires* of the Nuremberg Charter indicates that extended JCE responsibility "was never clearly raised during drafting".[102]

(E) NO SUBSEQUENT SUPPORT FOR JCE III

[98] 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.
[99] *See* further, Elgar Companion to the ECCC, p. 297.
[100] Article II(2)(d).
[101] 'Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal', in ILC, 'Report of the International Law Commission to the General Assembly', A/1316, 5 June – 29 July 1950, Yearbook of the International Law Commission, Vol. II, 1950, pp. 364-385, para. 125.
[102] Clarke, R. C., "Return to *Borkum Island* Extended Joint Criminal Enterprise Responsibility in the Wake of World War II", *Journal of International Criminal Justice* 9 (2011), p. 841; *contra* JCE Response, paras 32-33.

58. Focussing on the WW2 cases is necessary because there was no subsequent development in the period prior to March 1998 which could have established JCE III in CIL. Although the ECCC's temporal jurisdiction was 17 April 1975 to 6 January 1979,[103] the conclusion of three Chambers of the ECCC that JCE III was not part of CIL in this period[104] remains highly relevant because there was no development between January 1979 and March 1998 capable of establishing JCE III in CIL. The practice of the ICTY did not create new rules of CIL relevant to this case, since its first reference to JCE was in *Furundžija* in December 1998[105] (midway through the indictment period) and JCE III was only defined for the first time by the *Tadić* Appeal Judgment in July 1999 (at the end of the indictment period). Unless it can be established that JCE III existed from the WW2 cases, JCE III did not exist in CIL during the indictment period in this case.

2. JCE III IS NOT SUPPORTED BY INTERNATIONAL TREATIES

59. There is no international treaty which expressly incorporates JCE III.[106] The Rome Statute of the International Criminal Court ("ICC") does not incorporate JCE III; Article 25(3)(a) of the Rome Statute relates to co-perpetration and not to JCE.[107] The absence of JCE III from any relevant multi-lateral treaty is significant for two reasons. First, it removes any possible submission that international treaties suggest that JCE III was part of CIL.[108] Second, the absence of JCE III from such treaties undermines any submission that JCE III is part of CIL.[109] It evidences discrepancies in State practice

[103] Article 1, Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).
[104] *See* fn. 5 above.
[105] ICTY, *Prosecutor v. Anto Furundžija*, IT-95-17/1-T, Trial Chamber, *Judgment* ("*Furundžija*"), 10 December 1998.
[106] *Contra Tadić* Appeal Judgment, paras 221-223.
[107] ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, *Decision on the Confirmation of Charges*, 29 January 2007, paras 326-339; *Prosecutor v. Katanga et al.*, ICC-01/04-01/07-717, Pre-Trial Chamber I, *Decision on the Confirmation of Charges*, 30 September 2008, para. 480.
[108] *Contra Tadić* Appeal Judgment, para. 223.
[109] *Contra* Jurisdiction Decision, para. 187.

and the absence of *opinio juris*; if States believed that JCE III was part of CIL they would have agreed to include it as a mode of responsibility in relevant treaties.

3. NO GENERAL PRINCIPLES OF LAW SUPPORT JCE III

60. Nor can the SC find that JCE III was part of CIL as a general principle of law. There is no broad agreement or consistency in national systems as to JCE III. The *Tadić* Appeal Judgment surveyed only nine national systems, finding that two did not allow JCE III and seven did.[110] The ECCC Trial Chamber surveyed seven national legal systems and found "considerable divergence".[111] Neither Court found sufficient consistency in these limited surveys to justify a general principle of law.[112] The Max Planck Institute for Foreign and International Criminal Law surveyed 40 states and concluded that there was a "high degree of variance among the legal systems studied" and that more states applied co-perpetration than JCE.[113] Accordingly, general principles of law cannot be relied upon as a basis for JCE III.

4. CONCLUSION: JCE III IS NOT ESTABLISHED IN CIL

61. Thorough analysis of all the cases and materials previously relied upon by the ICTY, the STL and the SPO in support of JCE III shows that there is no case in which it can reliably be established that responsibility was imposed for crimes outside a common plan on the basis of foreseeability. The same conclusion was reached by three chambers of the ECCC.[114] This analysis cannot be dismissed as terminological

[110] *Tadić* Appeal Judgment, para. 224.
[111] ECCC TC Decision, para. 37.
[112] *Tadić* Appeal Judgment, para. 225; ECCC TC Decision, para. 37.
[113] Sieber, U., Koch, H. G., and Simon, J. M., Office of the Prosecutor Project Coordination, Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks, Expert Opinion, Commissioned by the United Nations – ICTY, 2006, Introduction, p. 3; Part 1, p. 16.
[114] *See* fn. 5 above.

differences;[115] there is no State practice establishing the existence of JCE III at all because there is no case in which a foreseeability standard was applied to convict any accused of crimes falling outside a common plan.[116]

62. Moreover, even if *arguendo* the Constitutional Court considers that one or two cases could be said to support JCE III, that would be insufficient to establish a rule of CIL. The establishment of CIL requires both a "settled practice" and "a belief that this practice is rendered obligatory by the existence of a rule of law requiring it".[117] Although "complete consistency" is not required, it is necessary that "the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule".[118] Where State practice shows uncertainty and contradiction, fluctuation and discrepancy, the requisite settled practice cannot be established.[119] The precedents claimed by the *ad hoc* tribunals and the SPO constitute a very small number of cases (representing a tiny proportion of military tribunal prosecutions). They do not amount to the requisite settled practice.[120] Instead, that a mode of liability akin to JCE III was never expressly identified even in those cases and is entirely absent from the vast majority of WW2 cases prevents any finding that JCE III had attained customary status.

63. Since JCE III was not established in CIL in March 1998, the Constitutional Court should find that charging Mr. Krasniqi with participation in crimes pursuant to JCE III violates his rights pursuant to Article 33(1) of the Constitution.

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[115] Jurisdiction Decision, para. 186.
[116] *See* Elgar Companion to the ECCC, p. 313.
[117] ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, *Judgment of 20 February 1969* ("North Sea Continental Shelf case"), para. 77.
[118] ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, *Judgment of 27 June 1986*, para. 186.
[119] ICJ, *Asylum Case (Colombia/Peru)*, *Judgment of 20 November 1950*, p. 277.
[120] North Sea Continental Shelf case, para. 77.

B. JCE III LIABILITY WAS NOT FORESEEABLE AND ACCESSIBLE TO MR. KRASNIQI

64. In order to satisfy Article 33(1), it is not sufficient that JCE III was established in CIL – it must also have been foreseeable and accessible to Mr. Krasniqi in Kosovo in March 1998.[121] The ECtHR has consistently held that the criminal law must be accessible and foreseeable in the sense that the accused can know (with the benefit of legal advice if necessary) what acts will amount to crimes.[122] Thus in *Vasiliauskas*, the ECtHR found that the international law on genocide was accessible because it was codified in the 1948 Genocide Convention, but that the applicant's rights had been violated because it was not foreseeable that his conduct would have been held to fall within the definition of genocide.[123]

65. Plainly a rule of CIL is capable of being sufficiently clearly defined that it is foreseeable to the accused, however the question before the Constitutional Court is whether the specific rule identifying JCE III was sufficiently clearly defined that it was foreseeable to Mr. Krasniqi in March 1998.[124] At the material time, JCE was in a state of flux.[125] If JCE III was part of CIL at all, in March 1998 it existed only as an inferential deduction from a small number of WW2 cases. As set out above, the limited surviving records of those cases do not clearly define modes of responsibility. It is fanciful to hold that any individual (even with legal advice) could have found those cases amongst the volume of other WW2 cases and understood from them that they could

[121] 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. 37.
[122] *Kononov,* para. 185.
[123] *Vasiliauskas*, paras 148, 170-186.
[124] *Kononov,* para. 185.
[125] Jørgensen, N. H. B., "On Being 'Concerned' in a Crime: Embryonic Joint Criminal Enterprise?", in Linton, S. (ed), *Hong Kong's War Crimes Trials*, Oxford University Press 2013, p. 166.

be liable for crimes outside the scope of a common plan on the basis that the commission of those crimes was foreseeable.

66. Further, the practice of the ICTY did not make JCE III foreseeable at the start of the indictment period in March 1998. The *Furundžija* Trial Judgment, which was the first to refer to JCE, was delivered on 10 December 1998.[126] It was not until July 1999 that the *Tadić* Appeal Judgment systematised the definition of JCE for the first time. Prior to *Tadić*, the elements of JCE III had never been systematically defined and hence no individual could have foreseen which acts would amount to crimes.

67. Moreover, any CIL definition of JCE III was inaccessible. There is no evidence of the translation, publication and dissemination of the WW2 cases in Kosovo.[127] Complete case records are unavailable. Some of the cases relied on in the *Tadić* Appeal Judgment were only available in their original language.[128]

68. Further, JCE III was not foreseeable as a part of the criminal law applicable in Kosovo in March 1998. First, there is no evidence of <u>any</u> authority prior to the alleged offences in March 1998 which shows that a mode of responsibility akin to JCE III reflects the accepted or foreseeable position at that time. Second, practice in Kosovo remains inconsistent. While some cases could be construed as supporting JCE III,[129] other recent Court of Appeals judgments have found JCE / JCE III inapplicable.[130] These judgments are relevant precisely because of their divergence; inconsistent case-

[126] *Furundžija*.
[127] *See* ECtHR, *Korbely v. Hungary*, no. 9174/02, *Judgment (Merits and Just Satisfaction)*, 19 September 2008, para. 75.
[128] *See* for instance, ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-T, Trial Chamber III, *Judgment, Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti*, 29 May 2013, p. 148.
[129] Jurisdiction Decision, para. 200, relying on EULEX, *People v. D.N.*, Ap-Kž-67/2011, Supreme Court of Kosovo, *Judgment*, 29 May 2012, pp. 7-9.
[130] EULEX, *People v. Xh. K.*, PAKR Nr 648/16, Court of Appeals, *Judgment*, 22 June 2017, p. 10; *People v. J.D. et al.*, PAKR Nr 455/15, Court of Appeals, *Judgment*, 15 September 2016, p. 45.

law vitiates the required precision to enable individuals to foresee liability.[131] There is no evidence that the law applicable in Kosovo in March 1998 rendered the application of JCE III, foreseeable to Mr. Krasniqi.

69. The Constitutional Court should therefore conclude that JCE III was not foreseeable or accessible to Mr. Krasniqi in Kosovo in March 1998 and therefore that charging him pursuant to JCE III violates his rights pursuant to Article 33(1) of the Constitution.

C. JCE IS NOT INCLUDED IN ARTICLE 16(1)(A) OF THE LAW

70. Article 33(1) of the Constitution, like Article 7(1) of the ECHR, embodies the principle that only the law can define a crime and the law must not be extensively construed to an accused's detriment.[132] The Law sets out a self-contained code which defines the modes of responsibility applicable before the SC. Article 16(1)(a) does not mention JCE and reading JCE into Article 16(1)(a) would therefore be an unlawful expansive reading of a criminal statute to the detriment of Mr. Krasniqi. In any event, JCE III cannot fall within the meaning of "committed".

71. First, Article 16(1)(a) is a self-contained code which contains no mention of JCE. Five modes of responsibility are stated ("planned, instigated, ordered, committed or otherwise aided and abetted"); five modes of responsibility may be applied by the SC. Article 16(1)(a) does not specify JCE; therefore, applying JCE, or any other mode of responsibility not stated in Article 16, violates Article 33(1) of the Constitution.

[131] ECtHR, *Žaja v. Croatia*, no. 37462/09, *Judgment (Merits and Just Satisfaction)*, 4 January 2017, paras 93, 103.
[132] *Kononov,* para. 185.

72. Second, JCE cannot be implied into the drafting of Article 16(1)(a). The principle of legality requires that "the criminal law must not be extensively construed to an accused's detriment".[133] Further, any doubt about the interpretation of Article 16(1)(a) must be resolved in favour of the accused.[134] Reading JCE into Article 16(1)(a) violates those principles and hence violates Mr. Krasniqi's rights.

73. Third, the word "committed" cannot be construed so broadly that it encompasses JCE III because JCE III is not a form of commission. JCE III cannot conceptually be reconciled with the meaning of commission. His Honour Judge Ambos, writing extra-judicially, exposed the issue in the following terms:

> Perpetration requires that the perpetrator themselves fulfil all objective and subjective elements of the offence. If one or more of element is missing and is only imputed to the person by *vicarious liability (responsabilité du fait d'autrui)*, by making a 'non-actor' responsible for the conduct of another actor, as done by JCE III, the non-actor can only be considered an aider or abettor to the crime in question.[135]

74. That JCE III is not a form of "commission" decisively undermines any construction of Article 16(1)(a) which includes JCE III. It cannot be said that an accused "committed" a crime which they did not physically perpetrate, which did not form part of a common plan and which he did not intend. That is a form of accessory liability not of commission.

75. The Constitutional Court should therefore find that the JCE, alternatively JCE III, do not fall within Article 16(1)(a) and hence relying on JCE (alternatively JCE III) against Mr. Krasniqi violates his rights pursuant to Article 33(1) of the Constitution.

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[133] ECtHR, *Kokkinakis v. Greece*, no. 14307/88, *Judgment (Merits and Just Satisfaction)*, 25 May 1993, para. 52; *Vasiliauskas*, para. 154.
[134] Concurring Opinion of Judge Wyngaert, para. 16.
[135] Ambos, K., "Joint Criminal Enterprise and Command Responsibility" *Journal of International Criminal Justice* 5 (2007), pp. 168-169.

V. CONCLUSION

76. The Defence requests the Constitutional Court to conclude that charging Mr. Krasniqi pursuant to JCE and JCE III in particular violates his rights under Article 33(1) of the Constitution because:-

1) JCE III was not part of CIL at the beginning of and during the indictment period; or
2) JCE III was not foreseeable or accessible to Mr. Krasniqi during the indictment period; or
3) JCE (alternatively JCE III) do not fall within Article 16(1)(a) of the Law.

77. The Constitutional Court should therefore order the SPO to amend the Indictment to remove these allegations.

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