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Joint Criminal Enterprise in the Kosovo Specialist Chambers[1]

By Felicity Gerry QC[2]

As the Kosovo Specialist Chambers (KSC) moves towards proceedings,[3] one of the issues on the KSC's horizon will be whether it adopts, as a basis for individual criminal responsibility, the extended form of joint criminal enterprise known as 'JCE III'.

By way of background, although the KSC follows a hybrid model composed of international judges and prosecutors based in the Hague but mirroring each level of the Kosovar court system. Article 3.2.d of the Law on the specialist chambers and specialist prosecutor's office (the KSC Statute)[4] gives customary international law (CIL) superiority over domestic law. Specifically, the basis for individual criminal responsibility in relation to Crimes Against Humanity under International Law (Article 13) and War Crimes under International Law (Article 14) is to be found *not* in the domestic substantive criminal laws in force under Kosovo during 1998-2000, but instead in Article 16.1 of the KSC Statute and its proper interpretation including as a matter of customary international law.

The terms of Article 16.1 of the KSC Statute are effectively identical to those in Article 7.1 of the statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute).[5] The interpretation of Article 7.1 of the ICTY Statute in Prosecutor v Tadic IT-94-1-A, 15 July 1999 [6] introduced 'the third category' of joint criminal enterprise cases (or "JCE III"), in which the *mens rea* requirement was said to be fulfilled where a person, although they did not intend

[1] A version of this article first appeared in ANZSIL Perspective Ed.13, 15 May 2020. Felicity is on the list of counsel at the KSC.
[2] This article was previously published as a joint article with Jonathan Rees QC for the IBA.
[3] On 11 December 2020, a Pre-Trial Judge of the Kosovo Specialist Chambers in The Hague confirmed the indictment filed on 30 October 2020 by the Specialist Prosecutor against defendants alleging obstruction of official persons in performing official duties, intimidation of witnesses, retaliation and violation of secrecy of proceedings. The pre-trial phase of their case will now begin, starting with their initial appearances.
[4] Law on the specialist chambers and specialist prosecutor's office available here <https://www.scp-ks.org/en/documents/law-specialist-chambers-and-specialist-prosecutors-office>(last accessed 25 May 2020)
[5] Statute of the International Criminal Tribunal for the Former Yugoslavia available here <https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> (last accessed 25 May 2020)
[6] Prosecutor v Tadic IT-94-1-A, 15 July 1999 available here <https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf.

to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk (see para. 220):

> 220. In sum, the Appeals Chamber holds the view that the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal. As for the objective and subjective elements of the crime, the case law shows that the notion has been applied to three distinct categories of cases. First, in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent). Secondly, in the so-called "concentration camp" cases, where the requisite mens rea comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of illtreatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused's authority within the camp or organisational hierarchy. With regard to the third category of cases, it is appropriate to apply the notion of "common purpose" only where the following requirements concerning mens rea are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to predict this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called dolus eventualis is required (also called "advertent recklessness" in some national legal systems).

This is not to suggest that liability would not apply where there is evidence of leadership liability through joint principalship, accessorial liability or for acts in furtherance of a shared common purpose with a criminal character, including where that common purpose is conditional on certain events. However, essentially the *Tadic* test extended liability of for acts outside of a common purpose, a parasitic extension based on foresight of possibilities. The ICTY Appeals Chamber itself recognised that JCE II is a "variant" of JCE I (Tadić Appeal Judgement (ICTY), para. 203); see also para. 202 ("[t]he second distinct category of cases is in many respects similar to [JCE I]"); Kai AMBOS Amicus Submission (D99/3/27), para. 2 (which maintains that "JCE II can be treated as a sub-category of JCE I if it is interpreted narrowly. In a broad sense of an extension of liability, JCE II rather resembles JCE III"). Superficially attractive to prosecutors, JCEIII extends liability beyond individual conduct or

state of mind without a causal connection or any necessary significant contribution to the crime. It is an extension which arguably came about as an error of law in the Judicial Committee of the Privy Council in *Chan Wing Sui* [1985] AC 168 which was deliberately adopted by the House of Lords in *Powell and English* [1999] 1 AC 1, where their Lordships accepted it was illogical and used across the Commonwealth.[7] These common law developments were rejected as erroneous in *Jogee* [2016] UKSC 8. As an erroneous form of common law constructed liability it has, through *Tadic*, infected customary international law.

The ICTY Appeal Chamber declined to depart from the *Tadic* test in the Radovan Karadžić Appeal,[8] despite submissions from defence counsel and an amicus curiae brief,[9] perhaps because the ICTY was coming to the end of its lifespan. However, there is an opportunity for reconsideration of the foundations of complicity in international law in the KSC.

Will the KSC follow the ICTY in interpreting Article 16.1 of its statute to embrace the same wide constructed liability? We suggest there are good reasons why it should not.

The terms of Article 16.1 of the KSC Statute do not explicitly provide for JCE III. The ICTY Appeals Chamber read JCE III liability into Article 7.1 of the ICTY Statute on the basis that it was "'firmly established in customary international law'", yet JCE III has proved controversial and that robust statement is not entirely accurate.

JCEIII has been rejected by the Special Tribunal for Lebanon (see Prosecutor v Ayash),[10] the Extraordinary Chambers of the Court of Cambodia (ECCC) and does not appear in the Rome Statute of the International Criminal Court[11] (see Articles 25(3)(d) and Article 30 thereof). Particularly cogent criticisms were made by the ECCC in the case of Nuon Chea and Khieu Samphan (see paras 775 onwards):[12]

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[7] For a fuller exposition of the common law, see *Accessorial Liability after Jogee* (Hart 2019) Ed Beatrice Krebs.

[8] MICT-13-55-A 8853 A8853-A8469 20 March 2019 available here < https://www.irmct.org/sites/default/files/casedocuments/mict-13-55/appeals-chamber-judgements/en/190320-judgement-karadzic-13-55.pdf> (last accessed 25 May 2020).

[9] The Amicus Curiae Brief was led by Felicity Gerry QC. It was accepted as validly filed before the Appeals Chamber, without expressing any views on the merits of the Appeal. Decision available at <https://cld.irmct.org/assets/filings/Decision-on-Request-for-Leave-to-Make-Submissions-as-Amicus-Curiae-25.09.2017.pdf> and AC brief available here < https://static1.squarespace.com/static/54f6d8c0e4b0bbd62b4f86d8/t/59c39e4912abd9cd9294da40/1505992337814/KARADZIC+MICT+Submission.pdf>(last accessed 25 May 2020)

[10] STL-11-01/1, 16 February 2011 available here <http://www.worldcourts.com/stl/eng/decisions/2011.02.16_Prosecutor_v_Ayyash.pdf> (last accessed 25 May 2020)

[11] Rome Statute available here < https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> (last accessed 25 May 2020).

[12] See 002/ 19-09-2007-ECCC/SC, 23 November 2016. < https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2016-11-23%2011:55/Case%20002_01%20Appeal%20Judgement.pdf> (last accessed 25 May 2020)

> 791. In this regard, the Supreme Court Chamber notes with approval the Pre-Trial Chamber Decision on JCE (D97/15/9), in which the Pre-Trial Chamber analysed in detail the jurisprudence of the ad hoc tribunals regarding the notion of JCE III and concluded that the decisions upon which the ICTY Appeals Chamber relied in Tadić when finding that JCE III was part of customary international law did not constitute a "sufficiently firm basis" for such a finding.

These rejections are not consistent with the constant and uniform practice.[13] The ICTY's interpretation of its statute to embrace JCE III is therefore a shaky basis upon which to claim a pattern can be discerned or generality of practice identified as the International Law Commission has indicated is required for a rule of customary international law. In our view, it should be 'beyond any doubt' that such a rule is part of customary law so that the problem of adherence of some but not all does not arise (see Secretary general's Report for the ICTY Statute, 3 May 1993 (para.34).[14]

For JCE III, there is therefore a divergence at both international and domestic levels. As the ICTY Appeals Chamber itself has recognised, and was acknowledged subsequently by the UN International Residual Mechanism for Criminal Tribunals (the UNIRMCT) which continues the jurisdiction of the ICTY, there is no common approach amongst major domestic jurisdictions to 'the third form of joint criminal enterprise' (*Tadic*, ante at paragraph 225 and Prosecutor v Karadžić, MICT-13-55-A, 20 March 2019 at paragraph 436)[15]. Even within such domestic jurisdictions, notions of constructed liability along the lines of JCE III have proved controversial and divisive (see *R v Jogee* [2016] UKSC 8. at paragraph 81)[16].

It is true, of course, that many of the arguments against JCE III have been made post-*Tadic* to both the ICTY Appeals Chamber itself and the UNIRMCT, and have been rejected by those chambers (see, for example, Prosecutor v Dordevic, IT-05-87/1-A, 27 January 2014)[17] and *Karadzic*, ante). In rejecting these arguments, however, the ICTY was concerned with whether to reverse its own jurisprudence, stressing the need for legal certainty within its own jurisdiction and a corresponding burden upon appellants to demonstrate 'exceptional circumstances' to justify a departure from its own earlier decisions. A similar approach has been adopted by the UN Residual Mechanism for Criminal Tribunals.

Like the ICTY, whose Appeals Chamber repeatedly stressed that it was not bound by the decisions of other tribunals such as the ECCC, the KSC is not bound by the decisions of the

[13] Draft conclusions of the International Law Commission on identification of customary international law, with commentaries 2018 available here < https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf> (last accessed 25 May 2020).

[14] Available here < https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf> (last accessed 25 May 2020)

[15] Ibid fn. 8

[16] Ibid fn.6.

[17] Available here < https://www.icty.org/x/cases/djordjevic/acjug/en/140127.pdf> (last accessed 25 May 2020)

ICTY Appeals Chamber. Unlike the ICTY, the KSC is not burdened by its own jurisprudence. It will have to find its own interpretation of the scope of Article 16.1 of the KSC Statute and the principles of individual criminal responsibility within customary international law.

A fine starting point would be to look again for that which is universal, constant and uniform and within that to balance the tension in principle between individual and constructed liability. Intention is a universally recognized *mens rea* attracting individual criminal responsibility, at both international and domestic levels. Constructed liability through foresight that another may commit a crime is less universally recognized, and, unlike intention, it should not be elevated to a status within customary international law that it does not deserve.

In *Jogee* it was suggested that foresight of what others might do can be evidence of a participant's true intention. Even in jurisdictions which allow for the application of foresight of probabilities there is a lack of focus on individual responsibility. Ultimately, foresight alone does not act as a legal yardstick of individual criminal responsibility within a joint criminal enterprise. It neither assesses individual conduct nor individual state of mind to allow for causative or contributory roles whether leader or operative, present at the scene or otherwise.

Prosecutors ought to be capable of indicting with precision, based on evidence, those who are complicit without constructing liability or seeking extensions of law which are uncoupled from causation or any significant contribution.

Soon, the KSC may have the opportunity to make that plain and reject JCE III for good.