មជ្ឈមណ្ឌលឯកសារកម្ពុជា

MEMORANDUM

TO: Anne Heindel, Legal Advisor, Documentation Center of Cambodia
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RE: Potential Genocide Convictions Under Extended JCE

I. Introduction

The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established "to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible" for international and domestic crimes committed in Cambodia from April 1975 to January 1979.[1] As the Case 002 trial phase approaches, in which the four most senior Khmer Rouge officials still living face charges of specific intent crimes such as persecution as a crime against humanity and genocide,[2] it will be important to determine which modes of liability most accurately reflect the potential culpability of Khmer Rouge leaders for the atrocities committed during the regime's reign. Since the end of World War II, Joint Criminal Enterprise (JCE) has been a useful tool in convicting senior officials involved in large criminal.[3] The JCE doctrine however, has been a source of criticism and debate, especially the third form of JCE, known as extended JCE or JCE III.

JCE III is especially controversial when it comes to the crime of genocide, as critics argue JCE III potentially allows for genocide convictions without proving the crime's defining

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[1] Article 1, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004 (NS/RKM/1004/006)
[2] Order on Request for Investigative Action on the Applicability of the Crime of Genocide at the ECCC, OCIJ, 28 December 2009.
[3] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC35), Decision on the Appeals Against the C0-Investigative Judges Order on JCE (JCE), D97/14/15, ERN: 0048652-00486589 ("PTC Decision").

feature: the specific intent to destroy. To date, international tribunals have proclaimed genocide convictions under JCE III possible and have entered convictions for other specific intent crimes under JCE III, but have yet to enter a conviction for genocide via JCE III. Such tribunals have also entered convictions for genocide under other modes of liability that lack a specific intent requirement, such as superior responsibility and aiding and abetting. Nonetheless, such modes of liability represent an explicitly lesser degree of individual culpability than convictions obtained through JCE, as JCE is considered a form of "commission," whereas superior responsibility and aiding and abetting are lesser, vicarious forms of liability that remain subordinated to commission via JCE.

This paper explores existing convictions for genocide and other specific intent crimes at the international level through the modes of liability of superior responsibility, aiding and abetting and JCE III and discusses what effect this jurisprudence may have on the possibility of future genocide convictions via JCE III. Generally, an examination of available jurisprudence reveals that while genocide convictions under JCE III have been prospectively declared valid, there remains great uncertainty regarding the likelihood and legitimacy of such a conviction.

A. JCE in ECCC Law

Article 29 of ECCC law specifies the modes of criminal liability that fall within the court's jurisdiction, stating: "any suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in [the statute] shall be individually responsible for the crime."[4] Article 29 also provides for superior responsibility.[5] The definition of genocide under Article 4

[4] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Art 29 (amended 2004) [hereinafter ECCC Law].
[5] *Id.* Stating "the fact that any of the acts referred to in [the statute] were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators."

of ECCC law includes additional modes of liability applicable solely to that crime: attempts, conspiracy and participation.[6] While neither article 4 nor 29 explicitly mentions JCE, the ECCC Pre-TC (PTC) has ruled, in keeping with international jurisprudence on the issue, that JCE is a form of "commission" available under the Court's jurisdiction.[7] However, while the PTC held that generally JCE liability is available at the ECCC, the Chamber overturned the Co-Investigating Judges by ruling that JCE III was not part of customary international law in 1975 and is therefore unavailable to the prosecution at the ECCC.[8] This decision is not currently subject to appeal, yet, the prosecution has indicated that it will raise the issue of JCE III before the Trial Chamber (TC), which is not bound by any decision of the PTC, in Case 002. Thus, the TC, subject to appeal to eventual appeals to the Supreme Court Chamber, will make its own determination of JCE III's applicability at the ECCC.

Thus far, the TC has agreed with the PTC that JCE is a form of commission under Article 29 of the ECCC law[9] and that general JCE liability was part of customary international law during the Court's temporal jurisdiction.[10] The TC also found the accused *KAING Guek Eav*, alias Duch, the Chairman and Secretary of S-21 prison, guilty committing crimes against humanity and grave breaches of the Geneva Convention of 1949 via the less controversial "systemic" form of JCE (JCE II).[11] The TC nonetheless, reserved judgment on the applicability

[6] *Id.*, Art. 4.
[7] Prosecutors v. Ieng Thirith, Ieng Sary, & Khieu Samphan, Case 002, Decision on the Appeals Against the Co-Investigating Judges Order on JCE (ECCC Pre-TC, May 20, 2010) ("ECCC JCE Decision).
[8] *Id.*
[9] Prosecutors v. Kaing Guek Eav, Case 001, Judgment ¶ 511 (ECCC TC, July 26, 2010) [hereinafter "Duch Judgment"].
[10] *Id.* ¶ 512.
[11] *Id.* ¶ 516.

of JCE III[12] and will likely examine both the availability of JCE III at the ECCC in general, and its applicability to genocide charges during the Case 002 trial.

B. Tadic and the elements of JCE

The International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber (AC) laid out the doctrine of JCE in its landmark *Tadic* Judgment.[13] While the TC had held that it could not convict Dusko Tadic for the murder of five Bosnian Muslims because there was no evidence that Tadic physically perpetrated the crimes, the AC reversed, holding that there are many modes of liability in customary international law which hold individuals accountable for their involvement in collective crimes, even when others physically perpetrated the crimes.[14] The AC then articulated three types of JCE. The first category, considered "basic" JCE (JCE I), applies to common plans involving the commission of at least one crime. Different members of the plan may play different roles in carrying out the common plan, but all must share a common intent to commit the crime envisioned therein. The second, "systemic" form of JCE (JCE II), applied by the ECCC TC in the *Duch* Judgment, deals with common plans to run organized systems of mistreatment or abuse, such as detention centers or concentration camps. JCE III or extended JCE, which is the focus of this paper, allows courts to hold individuals accountable for crimes that fall outside the common plan to which they agreed, but were nevertheless the natural and foreseeable consequences of implementing the original plan.

1. *Actus Reus*

All forms of JCE have the same *actus reus* requirements: 1) a plurality of persons; 2) agreement to a common plan involving the commission of at least one crime under the jurisdiction of the

[12] *Id.* ¶ 513. "The Chamber . . . considers that it need not generally pronounce on the customary status of the third extended form of JCE during the 1975 to 1979 period."
[13] Prosecutor v. Tadic, Judgment, IT-94-1-I (ICTY AC 1999) [hereinafter Tadic].
[14] Tadic ¶ 195.

prosecuting court; and 3) a significant act by the accused in furtherance of the common plan.[15] Courts have been clear that all forms of JCE are modes of liability that fall under the umbrella of commission[16] and are not separate crimes, but solely "means of committing a crime."[17] All forms of JCE allow for convictions of individuals who did not physically perpetrate the crime of which they are accused. This not only makes it easier for international prosecutors to secure convictions,[18] but also often most accurately reflects the nature of group perpetration of mass crimes. As the AC in *Tadic* explained:

> [t]o hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who is some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate their degree of criminal responsibility.[19]

2. *Mens Rea*

Each category of JCE carries a different *mens rea* requirement. For JCE I, all members must share an intent to commit the planned crime.[20] For JCE II, which is often considered a variation of JCE I, the accused must have actual knowledge of the systemic abuses committed within an organized system and continue to further the system with such knowledge.[21] For JCE III, however, the accused must possess a dual *mens rea* comprising: 1) intent to participate in the underlying common plan and 2) subjective awareness of an objective likelihood of additional

[15] Tadic ¶ 227; *see also* Prosecutor v. Mitar Vasiljevic, Judgment, IT-98-32-A, ¶ 100 (ICTY AC 2004); Prosecutor v. Krnojelac, Judgment, IT-97-25-A, ¶ 31 (ICTY AC 2007).
[16] Prosecutor v. Miroslav Kvocka et al. Judgment, IT-98-30/1-A, ¶ 79 (ICTY AC 2005); Vasiljevic ¶ 102; Prosecutor v. Tihomir Blaskic, Judgment, IT-95-14-A, ¶ 33 (ICTY AC 2004).
[17] Kvocka ¶ 91.
[18] *E.g.* Elies van Sliedregt, *JCE as a Pathway to Convicting Individuals for Genocide*, 5 J. of Intl Crim. Justice 184, 187 (2007); Antonio Cassesse, *The Proper Limits of Individual Responsibility under the Doctrine of JCE*, 5 J. Int'l Crim. Justice 109, 110 (2007).
[19] Tadic ¶ 192.
[20] *Id.*¶ *228*.
[21] *Id*.

crime(s) being committed in furtherance of the original plan.[22] The AC in *Tadic* explained, "[w]hat is required [for JCE III] 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."[23] The AC termed this *mens rea dolus eventualis* or advertent recklessness.[24]

C. The Elements of Genocide

Despite the lack of a *de jure* hierarchy of international crimes, genocide is often referred to as the "crime of crimes"[25] due to its special resonance in popular culture. The *actus reus* of genocide is satisfied by any of the following acts: "killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [or]; forcibly transferring children from one group to another

[22] *Id.* ¶ 220; "In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime *might be* perpetrated by one or other members of the group and (ii) the accused *willingly took that risk." Id.* ¶ 228.

[23] *Id.* ¶ 220 (emphasis in original); *See also* Kvocka ¶ 83; Vasiljevic ¶ 99. There has been some confusion as to whether foreseeability is an objective or subjective standard. Prosecutor v. Radovan Karadzic, Decision on Six Preliminary Motions Challenging Jurisdiction, IT-95-5/18-PT, ¶¶ 45-57 (ICTY TC 2009). While foreseeability in and of itself is considered an objective standard, independent of the accused's actual state of mind, the requirement that the accused *willingly* proceed with the plan despite the potential for additional crimes suggests that the additional crimes must actually be foreseeable for the accused. "There are two requirements in this context, one objective and the other subjective. The objective element does not depend upon the accused's state of mind. This is the requirement that the resulting crime was a natural and foreseeable consequence of the JCE's execution. It is to be distinguished from the subjective state of mind, namely that the accused was aware that the resulting crime was a possible consequence of the execution of the JCE, and participated with that awareness." Prosecutor v. Krajisnik, Judgment, IT-00-39, ¶ 882 (ICTY TC 2006).

[24] Tadic ¶ 220. *See also Id.* ¶204 ("Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk.").

[25] Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment, ¶ 16 (TC I, 4 September 1998). Later, the AC was careful to point out that genocide carries the same gravity as other crimes in the statute. "There is no hierarchy of crimes under the Statute, and that all of the crimes specified therein are 'serious violations of international humanitarian law', capable of attracting the same sentence." Prosecutor v. Kayishema, Case No. Case No. ICTR-95-1-A, Judgment (Reasons) ¶ 367 **(**AC, 1 June 2001).

group."[26] These acts must be "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[27] The ICTY TC in *Stakic* explained that genocide "is, in fact, characterized and distinguished by a 'surplus' of intent."[28]

II. Genocide Convictions Under Inferior Modes of Liability

While no international tribunal has entered a conviction for genocide via JCE III to date, such courts have entered genocide convictions predicated on superior responsibility or aiding and abetting. While such modes of liability are similar to JCE III in that they allow convictions based on a *mens rea* lower than specific intent, the analysis underlying such convictions cannot be transposed directly onto the framework of JCE III, as both superior responsibility and aiding and abetting liability are recognized as attenuated forms of liability that represent a reduced degree of culpability compared to the direct "commission" liability attached by JCE. This reduced culpability is reflected in the typically shorter prison sentences imposed for the same crimes where liability is imputed via superior responsibility or aiding and abetting, rather than commission liability via JCE. Nevertheless, the reasoning underlying such convictions does help

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[26] ECCC law Art 4. Art 4(2) of the ICTY Statute and Art 2(2) of the ICTR statute define genocide as: "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

a) Killing members of the group;
b) Causing serious bodily or mental harm to members of the group;
c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d) Imposing measures intended to prevent births within the group;
e) Forcibly transferring children of the group to another group."

Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), implementing Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 803 (1993), U.N. GAOR, art. 7(1) (1993) [hereinafter ICTY Statute]; Statute of International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between January 1, 1994 and December 31, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., Annex, 3453d mtg. at 15, art. 1, U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598, (1994). These are all based, verbatim, on Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 9, 1948, art. I, 102 Stat. 3045, 78 U.N.T.S. 277, (entered into force Jan. 12, 1951).

[27] *Id.*

[28] Prosecutor v. Stakic, Case No. IT-97-24-T, Judgment ¶ 520 (ICTY TC, July 31, 2003).

to provide insight into the factors considered by judges when deciding when individual liability predicated on genocide is appropriate.

A. Genocide Convictions Under Superior Responsibility

The ECCC, like international tribunals, recognizes superior responsibility as a form of individual culpability.[29] Superior responsibility serves to reinforce humanitarian and international law norms, as "a commander who possesses effective control over the actions of his subordinates is duty bound to ensure that they act within the dictates of international humanitarian law and that the laws and customs of war are therefore respected."[30] While the commander is charged with the substantive crimes of his subordinates, at its core, a charge under superior responsibility is for failure in effective supervision and leadership. Under the doctrine of superior responsibility, a superior (civilian or military)[31] of an organization is vicariously liable for the crimes of his or her subordinates when the following elements are established:

1) The existence of a superior-subordinate relationship;
2) The superior knew or had reason to know that subordinates were about to or had committed a criminal act; and
3) The superior failed to take necessary and reasonable actions to prevent the criminal acts or investigate and punish the subordinates for committing criminal acts.[32]

The *mens rea* of superior responsibility is actual knowledge or reason to know.[33] Actual

[29] ECCC law Art 29.
[30] *Id.* ¶ 39.
[31] Prosecutor v. Delalic et al., Case No.IT-96-21-A, Judgment, ¶¶195—6, 240 (ICTY AC, February 20, 2001) [hereinafter Celebici case]; Prosecutor v. Zlatko Aleksovsk, Case No. IT-95-14/1-A, Judgment, ¶ 76 (ICTY AC, March 24, 2000).
[32] Prosecutor v. Tihomir Blaskic, Judgment, IT-95-14-A (ICTY AC 2004); Prosecutor v. Theoneste Bagosora, Gratien Kabiligi, Aloys Ntabukuze, Anatole Nsengiumva, Case No. ICTR-98-41-T, Judgment, ¶ 2011 (TC, December 28, 2008).
[33] "In order to hold a superior responsible under Article 29 (new) of the ECCC Law for crimes committed by a subordinate, the superior must know, or have reason to know, that the subordinate was about to commit or had committed such crimes. The knowledge of the superior may not be presumed but must be established by direct or

knowledge can be established through circumstantial evidence.[34] The ICTR TC recently summarized different factors that can lead to an inference of actual knowledge, including:

> the number, type and scope of illegal acts committed by the subordinates, the time during which the illegal acts occurred, the number and types of troops and logistics involved, the geographical location, whether the occurrence of the acts is widespread, the tactical tempo of operations, the *modus operandi* of similar illegal acts, the officers and staff involved, and the location of the superior at the time.[35]

Furthermore, the jurisprudence is clear that "reason to know," or constructive knowledge, means that the superior must have "some general information in his possession which would put him on notice of possible unlawful acts by his subordinates."[36] This requirement prevents superior responsibility from entering the forbidden arena of strict criminal liability.[37] Thus, as a vicarious mode of liability, an accused cannot "commit" genocide via superior responsibility, but can only be found guilty of "failing to prevent or punish genocide" a technically distinct, and lesser form of culpability.[38]

While the superior does not need to possess the specific intent to destroy to be convicted of the failure to prevent or punish genocide via superior responsibility, the court must nevertheless

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circumstantial evidence. The superior must have knowledge of the alleged criminal conduct of his or her subordinates and not simply knowledge of the occurrence of the crimes themselves. A superior will be considered to have reason to know that crimes had been or were about to be committed where, in the circumstances of the case, he or she possessed information sufficiently alarming to justify further inquiry. This information may be general in nature and does not need to contain specific details on the crimes which have been or are about to be committed. The superior cannot be held liable for having failed to seek out such information in the first place. A superior may not, however, deliberately refrain from obtaining the relevant information when it is otherwise available to him or her." Duch Judgment, ¶¶ 543—4 (footnotes omitted).

[34] Prosecutor v. Limaj et al., Case No. T-03-66-A, Judgment, ¶ 524 (ICTY TC 2005).

[35] *The Prosecutor v. Bagosora*, ICTR-98-41-T, Judgment, ¶ 2014, (ICTR TC, 2008).

[36] Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic, Case No. IT-96-21-A, Judgment ¶ 238, (ICTY AC, February 20, 2001).

[37] Prosecutor v. Halilovic, Judgment, Case No. IT-01-48, ¶ 71 (ICTY TC 2005).

[38] Krnojelac ¶ 155 ("[I]t cannot be overemphasized that, where superior responsibility is concerned, the accused is not charged with the crimes of his subordinates, but with his failure to carry out his duty as a superior to exercise control."); *see also* Delalic ¶ 197 ("the doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates. A duty is placed upon the superior to exercise power so as to prevent and repress the crimes committed by his subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine."); Prosecutor v. Blagojevic and Jokic, Judgment, Case No. IT-02-60, ¶ 683 (ICTY TC 2005) ("[t]he TC finds that omission under [superior responsibility] is particular: it is a failure to meet one's duty.").

find that the principal perpetrators of the genocidal acts in question did possess genocidal intent.[39] Thus, ultimately, a conviction for genocide under superior responsibility does not circumvent the specific intent to requirement, but simply limits the requirement to the physical perpetrators.

Nevertheless, initially the ICTY TC was hesitant to attach liability for genocide via any mode of liability that could be satisfied by a *mens rea* other than specific intent.[40] Later, the ICTY AC ruled that individual liability for genocide can be imputed via all existing modes of liability. Following the ICTY AC's rulings on the issue, TCs of both the ICTY and ICTR subsequently convicted numerous accused of the failure to prevent or punish genocide and other specific intent crimes under superior responsibility.

The most common specific intent crime prosecuted under superior responsibility has been the crime against humanity of persecution, which requires not only an intent to commit underlying acts, such as imprisonment or beatings, but also an intent to commit these acts with a discriminatory purpose.[41] Similarly, torture as a violation of the laws or customs of war or a crime against humanity requires the intent to inflict pain and suffering for the purpose of obtaining information, a confession, or to punish, intimidate, or coerce the victim or a third person.[42]

For example, in the *Krnojelac* Judgment, the ICTY AC convicted Milorad Krnojelac of the specific intent crimes against humanity of persecution and torture under superior responsibility

[39] *Id*. ¶ 686 ("The [TC] finds that the *mens rea* required for superiors to be held responsible for genocide [via superior responsibility] is that superiors knew or had reason to know that their subordinates (1) were about to commit or had committed genocide and (2) that the subordinates possessed the requisite specific intent.").
[40] *See, e.g.* Stakic ¶ 92 ("It follows from Article 4 and the unique nature of genocide that the *dolus specialis* is required for responsibility under [superior responsibility] as well [as other modes of liability]. The TC notes the legal problems and the difficulty in proving genocide by way of an omission on the part of civilian leaders.").
[41] Cassese, p. 115. The ICTY Statute includes jurisdiction for "persecutions on political, racial, or religious grounds." ICTY Statute Article 5(h).
[42] Kvocka ¶ 289.

despite finding that the accused had not acted with discriminatory intent.[43] The court found that Krnojelac, a warden at the Kazneno-Popravni Dom prison in Bosnia, was aware that prison guards under his command regularly detained and beat prisoners because the prisoners were non-Serb Muslims and for the purpose of obtaining information. The court explained that "Krnojelac had alarming information that was such as to alert him to the risk that acts of torture might subsequently be committed by his subordinates."[44] It further found that "as prison warden, [Krnojelac] retained jurisdiction over all detainees [and] had sufficient information to alert him to the risk that inhumane acts and cruel treatment were being committed against the non-Serb detainees because of their political or religious affiliation."[45]

The AC was able to convict Krnojelac of command responsibility for specific intent crimes even though it did not find that Krnojelac himself possessed specific intent. The AC was not concerned with whether Krnojelac actually shared the discriminatory intent of the physical perpetrators, only that he admitted during trial that he was aware of their intent.[46] Yet, the Chamber was careful to stress that a conviction under command responsibility is ultimately a lesser form of culpability than commission.[47]

The ICTY addressed the issue of genocide under superior responsibility in the *Brdjanin* case, in which the TC departed from the heightened *mens rea* requirement required earlier by the

[43] Krnojelac, ¶ 188.
[44] *Id.* ¶ 170.
[45] *Id.* ¶187.
[46] Krnojelac admitted that he knew many prisoners were initially detained because they were non-Serb. Krnojelac ¶¶ 166; 187.
[47] "Krnojelac had a certain amount of general information putting him on notice that his subordinates might be committing abuses constituting acts of torture. Accordingly, he must incur responsibility pursuant to Article 7(3) of the Statute. It cannot be overemphasized that, where superior responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control. There is no doubt that, given the information available to him, Krnojelac was in a position to exercise such control, that is, to investigate whether acts of torture were being committed, especially since the TC considered he had the power to prevent the beatings and punish the perpetrators." *Id.* ¶ 171.

Stakic TC.[48] In doing so, the TC stated "[i]t is . . . necessary to distinguish between the *mens rea* required for the crimes perpetrated by the subordinates and that required for the superior."[49] Therefore, the TC continued: "[a]s a matter of statutory interpretation, there is . . . no inherent reason why, having verified that it applies to genocide, [superior responsibility] should apply differently to the crime of genocide than to any other crime in the Statute."[50] Nonetheless, the TC failed to convict the accused of failing to prevent or punish genocide based on its inability to legally conclude that "genocide was committed" in the relevant areas during the relevant period, leaving the issue somewhat unsettled.[51]

The ICTR has convicted a number of people of superior responsibility for genocide. In both the *Cyangugu* case and the recent conviction of former Rwandan Minister of Defense Theoneste Bagosora, the ICTR relied on the knowledge requirement for superior responsibility. In *Cynagugu*, the court convicted Samuel Imanishimwe of failing to prevent or punish genocidal acts after finding that his soldiers took part in killing a group of Tutsis with genocidal intent.[52] The Chamber found that Imanishimwe knew or should have known that his soldiers were engaged in these killings and subsequently failed to take any steps to punish them.[53] The court emphasized that Imanishimwe "was criminally responsible for the acts of his subordinates . . . because he failed to prevent the crime" of genocide.[54] The TC similarly found that Bagosora had actual knowledge, and in the alternative, should have known, that his troops were slaughtering

[48] Prosecutor v. Radoslav Brdjanin, Case No. IT-99-36-T, Judgment ¶¶ 711-721 (TC, September 1, 2004) [hereinafter Brdjanin TC Judgment].
[49] Brdjanin TC Judgment ¶ 720.
[50] *Id.*
[51] *Id.* ¶ 989.
[52] Prosecutor v. Andre Ntagerwa, Emmanuel Bagambiki, Samuel Imanishimwe, Case No. ICTR-99-46-T, Judgment ¶ 690 (TC, 25 February 2004).
[53] *Id.* ¶ 654.
[54] *Id.* ¶ 691.

Tutsis[55] and "would have been fully aware of the participants' genocidal intent."[56] Neither TC was particularly concerned with the lower *mens rea* of superior responsibility compared to that of genocide itself, but simply applied superior responsibility as the Chambers had to other crimes in previous cases. The ACs of both the ICTY and ICTR have endorsed this practice of applying modes of liability consistently, without any changes based on the substantive crimes alleged.[57] These courts, however, have simultaneously emphasized that superior responsibility is a form of vicarious liability for the acts of another and that therefore, an accused convicted via superior responsibility of genocide is liable solely for failing to prevent or punish the genocidal acts of the principal perpetrator(s), who must have acted with genocidal intent.

B. Aiding and Abetting Genocide

Aiding and abetting is a type of complicity that it is a lesser form of liability than commission, both due to the limited role of an aider and abettor and the lower *mens rea* required.[58] In this regard aiding and abetting liability is similar to that of superior responsibility and as such, courts have not hesitated to find accused guilty of aiding and abetting genocide. Aiding and abetting liability specifically requires that an accused provide practical assistance to the physical perpetrator(s) and that this assistance have a substantial effect on the ultimate perpetration of the charged crime.[59] The accused does not have to share the intent of the principal perpetrator, but

[55] Bagasora ¶¶ 2038—39.
[56] *Id.* ¶ 2135. It also found in some cases that Bagasora shared the genocidal intent.
[57] *See, e.g. xx*
[58] Kvocka ¶ 92 ("Aiding and abetting generally involves a lesser degree of individual criminal responsibility than co-perpetration in a JCE."); Vasiljevic ¶ 102 ("the participant [in a JCE] is liable as a co-perpetrator of the crime(s). Aiding and abetting the commission of a crime is usually considered to incur a lesser degree of individual criminal responsibility than committing a crime. In the context of a crime committed by several co-perpetrators in a JCE, the aider and abettor is always an accessory to these co-perpetrators, although the co-perpetrators may not even know of the aider and abettor's contribution."). *See also* Brdjanin TC Judgment ¶ 274 ("The fact that the aider and abettor does not share the intent of the principal offender generally lessens his criminal culpability vis-à-vis that of an accused acting pursuant to a JCE who does share the intent of the principal offender.").
[59] Cassese, p. 214.

merely must intend that his actions assist the perpetrator in the commission of the crime.[60] In addition, the accused must have knowledge of the basic elements of the substantive crime in question and be aware of the principal's mental state for specific intent crimes.[61] Nevertheless, the aider and abettor is not required to know about the principal's plans in extensive detail.[62]

The ECCC has taken the same approach in defining the requirements of aiding and abetting under Article 29 of the ECCC law. When examining Duch's individual criminal liability for crimes against humanity, including persecution, the TC explained:

> [l]iability for aiding and abetting a crime requires proof that the accused knew that a crime would probably be committed, that the crime was in fact committed, and that the accused was aware that his conduct assisted the commission of that crime. This knowledge can be inferred from the circumstances. Further, the requirement that the accused be aware of, though need not share, the perpetrator's intent applies equally to specific-intent crimes, like persecution as a crime against humanity.[63]

The TC found a basis for aiding and abetting, stating that Duch "was aware of the discriminatory intent of the perpetrators in committing these crimes."[64]

In many ways, this *mens rea* is similar to *dolus eventualis* required by JCE III,[65] but importantly, aiding and abetting, unlike JCE III, is not a form of commission. This distinction is illustrated by the *Krstic* case, wherein the ICTY AC set aside the TC's conviction for genocide via JCE I and downgraded Krstic's liability to complicity in genocide via aiding and abetting.[66] The AC in *Krstic* based its judgment on its finding that genocide was not envisioned as part of

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[60] *Id.*
[61] Aleksovski ¶ 162.
[62] *See e.g.* Blaskic ¶ 50 ("[I]f [the aider and abettor] is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.").
[63] Duch Judgment ¶ 535.
[64] *Id.* ¶ 537.
[65] In the *Blaskic* case, the AC even stated "the aider and abettor needs to have intended to provide assistance, or at a minimum, accepted that such assistance would be a possible and foreseeable consequence of his actions." Blaskic ¶ 49. This statement, and the use of the work "accepted" in particular, further evokes the element of JCE III that the accused must willingly take the risk that other foreseeable crimes will be committed.
[66] Krstic ¶139.

the common plan which Krstic was a member of, but rather was committed pursuant to a second, distinct JCE, which Krstic was not a member of.[67] In holding as such, the AC explicitly applied a knowledge standard under aiding and abetting, relying heavily on earlier ICTY convictions for aiding and abetting persecution, as well as a survey of the *mens rea* requirements under domestic systems, both civil and common law.[68] The AC explained:

> [i]ntent must always be proved, but the intent of the perpetrator is not the same as the intent of the aider and abettor. The perpetrator's intent is to commit genocide. The intent of the aider and abettor is not to commit genocide; his intent is to provide the means by which the perpetrator, if he wishes, can realize his own intent to commit genocide. Nor does it follow that proof of genocidal intent is in no sense required. But what has to be shown is that the perpetrator had that intent; it does not have to be shown that the aider and abettor himself had that intent. In the case of the aider and abettor what has to be shown is that he had knowledge that the perpetrator had that intent.[69]

The result in *Krstic* illustrates that, as with convictions for superior responsibility, convictions for aiding and abetting genocide do not bypass the requirement of genocidal intent altogether. Instead, such convictions merely acknowledge that persons other than physical perpetrators can contribute to crimes and such persons should be punished accordingly.

Critics of JCE saw the *Krstic* AC Judgment as a necessary limit on the use all forms of JCE and applauded the decision as accurately reflecting Krstic's participation in the Srebrenica genocide. Professors Allison Danner and Jenny Martinez describe the decision as "driven by the [AC]'s obvious discomfort with a theory of liability that led to Krstic's conviction as an equal co-perpetrator in the genocidal JCE at Srebrenica, when it was clear that he played a less culpable role in the massacres than many other individuals who were not in custody."[70]

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[67] *Id.* ¶¶ 137-139; *see also* Ntakirutimana ¶ 500.
[68] *Id.* ¶¶ 140—42.
[69] *Id.* ¶ 66.
[70] Danner and Martinez, *supra* Note 35, 153.

The TC in *Blagojevic and Jokic* adopted the *Krstic* AC Judgment approach in convicting Vidoje Blagojevic, a colonel of the Branuac Brigade at Srebrenica, of aiding and abetting genocide. The court found that Blagojevic provided substantial assistance during the slaughter of Bosnian Muslims at Srebrenica and that he "knew of the principal perpetrators' intent to destroy in whole or in part the Bosnian Muslim group as such."[71]

Recently, the ICTY TC convicted Drago Nikolic, Chief of Security in the Zvornik Brigade of the Bosnian Serb Army (VRS), of aiding and abetting genocide at Srebrenica.[72] The court found that Nikolic, along with Vujadin Popovic, Lieutenant Colonel and Assistant Commander of Security on the staff of the Drina Corps of the VRS, and Ljubisa Beara, Colonel and Chief of Security of the VRS Main Staff, participated in a JCE to murder Bosnian Muslim men.[73] However, while the Chamber found that Popovic and Beara contributed to the JCE to murder with genocidal intent,[74] it found that Nikolic had mere knowledge of the genocidal intent of other perpetrators.[75] Popovic and Beara were convicted of committing genocide[76] whereas Nikolic was convicted of aiding and abetting genocide.[77] In determining whether or not Nikolic possessed the specific intent to destroy, the TC "recall[ed] 'the gravity of genocide is reflected in the stringent requirements which must be satisfied before the conviction is imposed.' In this context, 'the demanding proof of specific intent' is one of the safeguards to ensure that convictions for this crime will not be imposed lightly."[78] The Court ultimately did not convict

[71] Blagojevic and Jokic ¶ 786. The AC later affirmed this conviction, holding that "[i]n cases of specific intent crimes such as persecutions or genocide, the aider and abettor must know of the principal perpetrator's specific intent." *Id.* ¶ 127.
[72] Prosecutor v. Popovic et. al. Judgment, IT-05-88-T ¶ 1415 (ICTY TC 2010).
[73] *Id.*
[74] *Id.* ¶¶ 11181, 1318.
[75] *Id.* ¶ 1407.
[76] *Id.* ¶¶ 1181; 1318
[77] *Id.* ¶ 1418.
[78] *Id.* ¶ 1408.

Nikolic of *committing* genocide, as it found more than one reasonable explanation for his involvement in the murders[79] and reduced his liability to aiding and abetting genocide.

The ICTR has also convicted individuals for aiding and abetting genocide more readily than for committing genocide via JCE. For example, in the *Ntakirutimana* case, the ICTR AC examined ICTR and ICTY precedents, particularly *Krstic*,[80] in evaluating the individual criminal liability of Elizaphan Ntakirutimana, the pastor of the Seventh Day Adventist Church at the Mugonero Complex in Ngoma, Kibuye, who led Hutu militias to a group of Tutsis in hiding. Though Ntakirutimana was convicted of aiding and abetting genocide, the TC held that an aider and abettor of genocide must possess genocidal intent.[81] On appeal, the AC affirmed the conviction, but noted that the accused need only be aware of the principal perpetrator(s)' genocidal intent.[82]

III. JCE III and Specific Intent Crimes

A. Persecution as a Crime Against Humanity

Persecution as a crime against humanity is similar to genocide in that the accused must not only intend to commit the underlying act, but must also intend to discriminate against the victim on the basis of race, religion, or politics.[83] As with genocide, it is persecution's specific intent that

[79] *Id.* ¶ 1414.
[80] Ntakirutimana ¶ 509. In overturning a number of the TC's factual findings that were the basis of the genocide conviction for Gerard Ntakirutimana, the AC turned to the Prosecution's alternative pleading, that the accused was guilty of aiding and abetting genocide.
[81] Ntakirutimana ¶ 495. According to the AC, the Prosecution argued that the TC drew this standard from the *Akayesu* Trial Judgment, the landmark decision involving the first conviction for genocide, when it should have looked at the standard in the Semanza TC. Yet, the AC later pointed out, correctly, that the *Akayesu* TC correctly stated the mens rea for aiding and abetting genocide as knowledge of the perpetrator's genocidal intent "even though the accused himself did not have the specific intent to destroy." The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment ¶ 545 (TC, September 2, 1998).
[82] Ntakirutimana ¶ 501. Though the AC succeeded in clarifying the mens rea required for aiding and abetting genocide, it did not actually affect Ntakirutimana's conviction or sentence. *See also* Prosecutor v. Athanase Seromba, Case No. ICTR-2001-66-A, Judgment ¶ 57 (AC, March 12, 3008) (relying on cases such as *Blagojevic and Jokic* and *Athanase Seromba*, and holding that Seromba only needed knowledge that the principal perpetrators possessed the specific intent to destroy Tutsis to be convicted of aiding and abetting genocide.).
[83] Kvocka ¶ 460.

distinguishes it from other crimes against humanity.[84] The *mens rea* required for persecution however, is still considered less stringent than specific genocidal intent.[85] Nonetheless, as with genocide, tribunals have been hesitant to apply JCE III to persecution charges, but in the case of persecution, unlike genocide, at least one conviction has resulted.

In *Popovic et al.*, the ICTY TC convicted several Serbian officials of committing persecutory acts against Bosnian Muslims in connection with the slaughter at Srebrenica via JCE III.[86] The convictions were predicated on the Chamber's finding of a JCE to murder Bosnian Muslim males at Srebrenica and the foreseeability of additional killings occurring in the area, in addition to killings at planned execution sites.[87] The TC held that "[f]or an accused to be found criminally responsible pursuant to third category JCE for a specific intent crime, the Prosecution needs to establish that it was reasonably foreseeable to the accused that the extended crime would be committed and that it would be committed with the required specific intent."[88] The Chamber was also clear that "[t]he mental state of the person or persons carrying out the *actus reus* of the extended crime is . . . not relevant for the finding of the mental state of the accused, but is determinative to the finding of which extended crime was committed, if any."[89]

Applying this standard, the court convicted Colonel Ljubisa Beara of persecution based on opportunistic killings committed with persecutory intent that were the likely and foreseeable consequences of the original JCE to murder Bosnian Muslim Males in which he participated.[90]

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[84] Prosecutor v. Miroslav Kvocka et al., Case No. IT-98-30/1-T, Judgment ¶ 194 (TC, November 2, 2001).
[85] Brdjanin TC Judgment, ¶ 699 ("The intent to destroy makes genocide an exceptionally grave crime and distinguishes it from other serious crimes, in particular persecution, where the perpetrator selects his victims because of their membership in a specific community but does not necessarily seek to destroy the community as such."); *see also* Prosecutor v. Kupreskic et al., Case No. IT-95-16-T, Judgment ¶ 636 (ICTY TC, January 14, 2000) ("From the view point of mens rea, genocide is an extreme and most inhuman form of persecution.").
[86] Prosecutor v. Popovic et. al. Judgment, IT-05-88-T (ICTY TC 2010).
[87] *Id.* ¶ 1082.
[88] *Id.* ¶ 1195.
[89] *Id.* ¶1031.
[90] *Id.* ¶ 1332.

The TC found that all murders in the area at the relevant time, including the opportunistic killings, were committed with persecutory intent; which the Chamber inferred from to the massive scale of the killings, their horrific nature, and the frequent use of derogatory terms by members of the VRS in reference to Bosnian Muslims.[91] The TC also handed down persecution convictions against other members of the original JCE to murder Bosnian Muslims males using almost identical language.[92] The *Popovic et al.* Judgment suggests that JCE III may be applied to all specific intent crimes, including genocide, provided that the JCE III's *dolus eventualis mens rea* is satisfied and the relevant principal perpetrator(s) acted with the requisite intent.

B. Genocide and JCE III

While tribunals entered convictions for the crime against humanity of persecution via JCE III liability, there has yet to be a single conviction for genocide predicated on JCE III liability. Moreover, the jurisprudence on the issue is inconsistent at best. The ICTY and ICTR have consistently held that genocide convictions via JCE III under their respective statutes are theoretically possible. Nonetheless, no such conviction has occurred and the reasoning behind these decisions is not particularly well-developed and has been the subject of much criticism.

1. The Brdjanin AC Judgment and Its Progeny

In the *Brdjanin* case, the prosecution charged genocide via, *inter alia*, JCE III.[93] When Brdjanin moved for an acquittal on the grounds that such a charge would violate the *mens rea* requirement for genocide, the TC ruled for the accused and dismissed the JCE III-based genocide charges.[94] Following the *Stakic* TC, the TC in *Brdjanin* stated that awareness of the likelihood of genocide

[91] *Id.* ¶ 991.
[92] *Id.* ¶¶ 1195; 1427.
[93] Prosecutor v. Brdjanin, Case No. Case No. IT-99-36-A Sixth Amended Indictment, IT-99-36-A, ¶ 27.1 (ICTY 2003) [hereinafter Brdjanin Indictment].
[94] Prosecutor v. Brdjanin, Case No. IT-99-36-T, Decision on Motion for Acquittal Pursuant to Rule 98bis (ICTY TC, November 28, 2003) [hereinafter Brdjanin TC Decision].

required for JCE III "is a different *mens rea* and falls short of the threshold needed to satisfy the specific intent required for a conviction for genocide."[95] In *Brdjanin*, as earlier in *Stakic*, the TC maintained that modes of liability could not alter the elements of substantive crimes, therefore making a conviction of genocide that does not require proof of the accused's specific intent to destroy a legal impossibility.[96] The AC however, summarily reversed the TC's decision on interlocutory appeal and reinstated the charges.[97] Nonetheless, in the *Brdjanin* TC Judgment, the Chamber acquitted the Brdjanin committing genocide via any form of JCE, finding that neither Brdjanin nor any of the other alleged participants in the JCE possessed genocidal intent.[98] In reaching this conclusion however, the TC did not reach the question of whether the accused was guilty of genocide via JCE III because the Chamber required a showing that both the physical perpetrators of genocidal acts had to be members of the JCE and that the accused must subsequently acquiesce to the commission of additional crimes outside the scope of the original plan before liability can attach.[99]

Again, the AC reversed the TC's findings on JCE III liability, but according to the agreement *inter partes*, only the general law on the issue was discussed and whether Brdjanin himself actually committed genocide via JCE III was not addressed.[100] The AC did however, find that "[t]he TC erred by conflating the *mens rea* requirement of the crime of genocide with the mental requirement of the mode of liability by which criminal responsibility is alleged to attach to the accused."[101] The *Brdjanin* AC further held that JCE III was like other modes of liability, and there was no reason to allow genocide and other specific intent convictions under aiding and

[95] Brdjanin TC Decision ¶ 57.
[96] Stakic ¶ 530; Brdjanin TC Decision ¶ 57.
[97] Prosecutor v. Brdjanin, Case No. IT-99-36-A, Decision on Interlocutory Appeal (ICTY AC, Mar. 19, 2003) [hereinafter Brdjanin AC Decision].
[98] Brdjanin TC Decision ¶ 989.
[99] *Id.* ¶ 263.
[100] Brdjanin AC Decision, ¶¶ 436, 449.
[101] Brdjanin AC Decision ¶ 10.

abetting and superior responsibility, but not under JCE III.[102] The court concluded:

> the fact that the third category of JCE is distinguishable from other heads of liability is beside the point. Provided that the standard applicable to that head of liability, i.e. reasonably foreseeable and natural consequences is established, criminal liability can attach an accused for any crime that falls outside of an agreed upon JCE.[103]

In his partial dissent of the decision, Judge Shahabuddeen did not dispute that that JCE III could apply to genocide, only that the majority did not properly describe the elements of JCE III. Judge Shahabuddeen suggested that JCE III does not eliminate the need to prove intent to commit the additional crimes. Rather, he argued that the *mens rea* requirement for JCE III as defined by *Tadic* is more than awareness[104] and that foresight can establish specific intent.[105] As described by Judge Shahabuddeen, the *mens rea* for genocide under JCE III is the "intent to commit the original crime includ[ing] the specific intent to commit genocide also *if and when genocide should be committed*."[106]

2. *The Trial of Slobodan Milosevic*

The issue of possible JCE III-based genocide charges also arose during the proceedings against former Serbian President Slobodan Milosevic, who was charged with genocide via, *inter alia*, JCE III.[107] Following his indictment, Milosevic moved for acquittal of all JCE III-based genocide charges on the grounds that the *mens rea* for JCE III is incompatible with genocidal intent.[108] The AC dismissed that portion of the motion for acquittal, its Decision on Interlocutory

[102] Brdjanin AC Decision ¶¶ 7-8.
[103] *Id.* ¶ 9.
[104] *Id.*, Partial Dissenting Opinion of Judge Shahabuddeen, ¶ 7.
[105] *Id.* ¶ 2.
[106] *Id.* ¶ 7.
[107] Prosecutor v. Slobodan Milosevic, Amended Indictment "Bosnia and Herzegovina", IT-02-54-T, ¶¶ 8, 32 (ICTY 2002).
[108] Prosecutor v. Slobodan Milosevic, Amici Curiae Motion for Judgment of Acquittal Pursuant to Rule *98bis*, IT-02-54-7, ¶ 161(e) (ICTY 2004) [hereinafter Milosevic Amici Curiae Motion].

Appeal in *Brdjanin* and affirming the foreseeability standard for JCE III.[109] The issue was not pursued further due to Milosevic's death on March 11, 2006.

3. *The Rwamakuba Challenged to JCE Genocide Liability*

The ICTR quickly picked up on the ICTY AC's holdings in the *Brdjanin* case. In *Rwamakuba*, the accused sought dismissal of all JCE-based genocide charges, arguing that no form of JCE was part of customary international law during the Rwandan genocide and therefore any charges predicated on JCE fell outside the ICTR's jurisdiction.[110] The accused was careful to point out that he was not questioning the application of JCE generally to all crimes within the jurisdiction of the tribunal, but solely as a mechanism of imputing commission liability for genocide.[111] The AC was not swayed, holding that "customary international law recognized the application of the mode of liability of JCE to the crime of genocide before 1992"[112] and denying the motion.

4. *The Karadzic Challenge to JCE III Genocide Liability*

More recently, Radovan Karadzic, the former Bosnian Serb President, filed a "Preliminary Motion to Dismiss JCE III - Special-Intent Crimes" challenging the application of JCE III specifically to genocide.[113] Both the ICTY TC and AC denied the motion on a technical issue, finding that Karadzic was actually challenging the "contours of JCE liability" which entails answering substantive, rather than solely jurisdictional questions which must be addressed at

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[109] Prosecutor v. Milosevic, Decision on Motion for Judgment of Acquittal, IT-02-54-T ¶¶ 290—91 (ICTY TC 2004) [hereinafter Milosevic Acquittal Decision]. The TC stated: "The AC in *Prosecutor v. Brdjanin* held that there is no incompatibility between the requirement of genocide and the mens rea requirement for a conviction pursuant to the third category of JCE; it is therefore not necessary for the Prosecution to prove that the Accused possessed the required intent for genocide before a conviction can be entered on this basis of liability. That submission of the Amici Curiae is, therefore, without merit." *Id.* ¶ 291.
[110] Rwamakuba ¶ 7.
[111] *Id.* ¶ 6.
[112] *Id.* ¶ 31.
[113] Prosecutor v. Radovan Karadzic, Preliminary Motion to Dismiss JCE III—Special-Intent Crimes, IT-95-5/18-PT (ICTY 2009) [hereinafter Karadzic Preliminary Motion on JCE III].

trial.[114] Nevertheless, the TC noted that it would have reason to dismiss the claim on the merits regardless, noting that the Chamber is controlled by the AC's *Brdjanin* decision and judgment.[115]

5. *The Continuing Brdjanin Debate*

As illustrated by the failed defense challenges to JCE-based genocide liability in the *Milosevic*, *Rwamakuba* and *Karadzic* cases, attempts thus far to challenge the central holdings of the ICTY AC in *Brdjanin* have been unsuccessful or abandoned. Thus, in theory, at the ICTY/R the issue of genocide convictions via JCE III is a settled question.

Nonetheless, international courts appear reluctant to truly grapple with the issue of whether an accused can "commit" genocide via JCE III and most often simply refer to the *Brdjanin* decision without further discussion when such issues arise. Moreover, scholars have repeatedly criticized the notion of JCE III both generally and specifically its potential application to genocide charges. These critics often accuse JCE III of being a means of bypassing proof of genocidal intent. For example, Antonio Cassese, who initially helped frame the parameters of JCE as president of the ICTY AC that decided *Tadic,* argues that JCE III liability cannot impute liability for specific intent crimes such as genocide. Cassese's objections are twofold. First, he calls JCE III liability for specific intent crimes "a logical impossibility: one may not be held responsible for committing a crime that requires special intent (in addition to the intent needed for the underlying crime) unless that special intent can be proved, whatever mode of responsibility for

[114] Prosecutor v. Radovan Karadzic, Decision on Six Preliminary Motions Challenging Jurisdiction, IT-95-5/18-PT ¶¶ 31-32 (ICTY TC 2009) [hereinafter Karadzic TC Decision]; *Prosecutor v. Radovan Karadzic*, Decision on Motion Challenging Jurisdiction, IT-95-5/18-PT (ICTY AC 2009) [hereinafter Karadzic AC Decision].

[115] Karadzic TC Decision ¶ 32 ("There is clear AC authority to the effect that convictions for genocide, which is a specific intent crime, can be entered on the basis of the third form of JCE liability."). *See also* Popovic Judgment ¶ 1031 (also referring to the *Brdjanin* AC decision: "[f]or third category JCE liability, the accused does not need to possess the requisite intent for the extended crime—the crime falling outside the common purpose. This also applies to specific intent crimes.").

the commission of crimes is relied upon."[116] Second, Cassese argues that:

> whoever is liable under the third category of JCE has a distinct *mens rea* from that of the 'primary offender'; nevertheless, as the 'secondary offender' bears responsibility for the same crime as the 'primary offender', the 'distance' between the subjective element of the two offenders must not be so dramatic as in the case of crimes requiring special intent. Otherwise, the crucial notions of 'personal culpability' and 'causation' would be torn to shreds.[117]

Other critics, such as Danner and Martinez, suggest limiting the applicability of both JCE III and superior responsibility to exclude all specific intent crimes.[118] They argue that the specific intent to destroy or discriminate is the hallmark of crimes such as genocide and persecution and "[t]his distinctive feature of these serious crimes is weakened by the lowering of the mental state to recklessness or negligence, as would occur in a Category Three JCE or under the looser versions of command responsibility."[119]

Danner and Martinez espouse essentially the same position as the ICTY TC in *Stakic*, which held that:

> the application of a mode of liability cannot replace a core element of a crime. The Prosecution confuses modes of liability and the crimes themselves. Conflating the third variant of JCE and the crime of genocide would result in the *dolus specialis* being so watered down that it is extinguished. Thus, the TC finds that in order to 'commit' genocide, the elements of that crime, including the *dolus specialis* must be met.[120]

While the AC ultimately rejected the *Stakic* ruling that genocide charges could not fall under JCE III, just a month after the *Brdjanin* decision, the same Chamber reduced Krstic's conviction from "committing" genocide via JCE I, to aiding and abetting genocide. In finding that Krstic had only knowledge of the genocidal intent of the physical perpetrators of genocide, the AC stated: "[g]enocide is one of the worst crimes known to humankind, and its gravity is reflected in

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[116] Cassese JICJ 5 (2007), 121.
[117] *Id.* 121—22.
[118] Danner and Martinez, supra Note 35, 151.
[119] *Id.*
[120] Stakic ¶ 530.

the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established."[121] Thus, despite its numerous endorsements of the *Brdjanin* decision, even the ICTY AC itself appears hesitant to enter a conviction for committing genocide via JCE III.

6. *Enduring Confusion and the Conviction of Drago Nikolic*

The recent TC Judgment in the case of *Popovic et al.* has added to the confusion surrounding the applicability of JCE III to genocide, as in that case the Chamber seemingly blurs the line between JCE III and aiding and abetting. Most of the confusion stems from the similarity between JCE and aiding and abetting liability.

There are differences in between both the *actus reus* and the *mens rea* requirements of JCE and aiding and abetting. The ICTY AC describes these differences in *Vasiljevic*:

> (i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a JCE to perform acts that in some way are directed to the furtherance of the common design.
> (ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a JCE, i.e. as a co-perpetrator, the requisite mens rea is intent to pursue a common purpose.[122]

Cassese also acknowledges that there are similarities in the *actus reus* for both JCE and aiding and abetting and explains the difference between their *mens reas* as such:

> he who aides and abets does not share, either at the outset or later, the criminal intent of the perpetrator; he only intends to assist the perpetrator in the commission of a crime. Although he is cognizant that the perpetrator intends to commit the crime, he does not share the mens rea. This is why, in principle, the criminal liability of the aider and abettor

[121] Krstic ¶ 134.
[122] Vasiljevic ¶ 102. *See also* Kvocka ¶ 273 (describing the difference between JCE I and aiding and abetting: "a participant in a JCE shares the intent of the criminal enterprise," whereas an aider and abettor "only possesses knowledge.").

is more tenuous (or less weighty) than that of the participant in a common criminal enterprise.[123]

In *Popovic et al.* the ICTY TC appears to have relied on aiding and abetting because it was hesitant to apply JCE III liability to genocide in the absence of an abundance of evidence. In *Popovic et al.* the TC convicted Drago Nikolic, of aiding and abetting genocide, extermination, murder, and persecution and imposed a sentence of 35 years of imprisonment.[124] In many ways, Nikolic's case is similar to the *Krstic* case. The Chamber found that Nikolic, a 2nd Lieutenant and Chief of Security of the Bosnian Serb Army Infantry Brigade in Zvornik, contributed to the deaths of Bosnian Serbs and was aware that those whom he was supporting were killing Bosnian Serbs out of genocidal intent, but he did not himself possess genocidal intent.[125] What distinguishes Nikolic's case and makes it perplexing in the context of genocide charges under JCE III is that Nikolic was found to have participated in a common plan to murder Bosnian Muslim males at Srebrenica by planning and ordering murders.[126] The TC found that Nikolic was not an architect of the genocidal plan,[127] but merely a career officer determined to carry out his orders to murder.[128] Still, the court found that other, higher raking members of the common plan to murder, namely Ljubisa Beara and Vujadin Popovic, pursued the plan with genocidal intent to destroy the Bosnian Muslim males and convicted those officials of genocide.[129]

Nikolic's actions could easily have been characterized as commission of genocide via JCE III. In evaluating Nikolic's case, the TC found that there was a common plan to commit murder and that Nikolic, through his supervision of numerous detention and execution sites was

[123] Cassese JICJ 5 (2007) 116.
[124] Prosecutor v. Popovic et. al. Judgment, IT-05-88-T (ICTY TC 2010) [hereinafter Popovic Judgment].
[125] *Id.*, ¶¶ 1389—1428.
[126] *Id.* ¶1421.
[127] *Id.* ¶ 1410.
[128] *Id.* ¶ 1414.
[129] *Id.* ¶ 1181, 1318.

a member thereof.[130] Thus, Nikolic appears to have made a significant, knowing contribution to a common plan, satisfying the *mens rea* required for general JCE liability. Furthermore, the TC could have found that Nikolic met the *mens rea* requirements for JCE III to commit genocide. Specifically, the Chamber found that Nikolic intended to commit murders, along with other members of the JCE[131] and also found that Nikolic was aware that others were committing the murders with genocidal intent,[132] thus satisfying the *mens rea* requirement for aiding and abetting. As the TC explained earlier in the decision when laying out the standard for JCE III: "[f]or an accused to be found criminally responsible pursuant to third category JCE for a specific intent crime, the Prosecution needs to establish that it was reasonably foreseeable to the accused that the extended crime would be committed and that it would be committed with the required specific intent."[133]

In his acts to carry out the plan to murder after learning that some members of the group were pursuing the plan with genocidal intent, Nikolic appears to have willingly taken the risk that genocide would occur. Yet, the TC ultimately shied away from entering a JCE III genocide conviction against Nikolic, despite the repeated statements from the ICTY AC that such convictions are possible. Ultimately, the TC's conviction conveys a view that Nikolic merely played a secondary, accomplice-level role at Srebrenica. The TC explained that it was not convinced from the facts of the case that the only reasonable inference to draw from Nikolic's involvement was that he possessed genocidal intent, but that his "blind dedication to the Security Service led him to doggedly pursue the efficient execution of his assigned tasks"[134] and that

[130] Popovic Judgment ¶ 1392.
[131] *Id.*
[132] *Id.*, ¶ 1407.
[133] *Id.* ¶ 1427.
[134] *Id.* ¶ 1414.

compared to more senior leaders such as Beara and Popovic, Nikolic's role was "confined to his sphere of responsibility."[135]

The conviction of Nikolic further complicates the prospect of genocide convictions on the basis of JCE III. The TC allowed JCE III convictions for some specific intent crimes, but not genocide, even though there was arguably a basis on which to do so. The TC's decision suggests that aiding and abetting convictions may simply be more suitable, not to mention less complicated and controversial, than JCE III convictions, at least with respect to lower level officials. While aiding and abetting does reflect a lower level of culpability, it is ultimately a more cohesive mode of liability that domestic and international tribunals alike embrace, understand and find well-settled in international jurisprudence.

IV. Conclusion

As Case 002 proceeds, it is becoming increasingly clear that the ECCC Trial and Supreme Court Chambers may have to flesh out the applicability of JCE III to genocide charges.[136] The Court may even follow in the footsteps of the PTC, and reject JCE III as a mode of liability altogether. While this approach would satisfy critics of JCE III, it would also firmly set the ECCC apart from the ICTY/R and its stance on JCE III. The TC may instead follow the *Popovic et al.* approach, and utilize inferior modes of liability where JCE III could possibly apply to genocide charges.

If confronted squarely by the question of JCE III genocide liability however, this option may not be available and the ECCC could be forced to take up the issue head-on if the prosecution pushes the point aggressively. In such a case, the ECCC may do what other courts

[135] *Id.* ¶ 1410.
[136] *See e.g. Case of IENG Sary*, 002/19-09-2007-ECCC/TC, *Co-Prosecutors' Response to Observations to the Co-Prosecutors Notification of Legal Issues it Intends to Raise at the Initial Hearing* 18 May 2011, E9/30/2 (affirming that the Co-Prosecutors intend to raise the issue of JCE at trial).

have thus far been unable to do and grapple with the challenges and complexities of JCE III's interactions with genocide, making a much needed contribution to international criminal law.