

# Extended JCE and Genocide Liability at the ECCC in Case 002

Randle DeFalco, DC-Cam Legal Consultant  
Abridged from a longer article by Elizabeth Shutkin  
Columbia Law School Class of 2012  
DC-Cam Legal Associate 2010  
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## A. 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.<sup>1</sup> 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, 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 utilized to convict senior officials for committing international crimes through their participation in large-scale criminal plans.<sup>2</sup>

In July of 2010, the ECCC’s Trial Chamber (TC) convicted Kaing Guek Eav, alias “Duch” of international crimes via JCE.<sup>3</sup> Despite JCE’s utility, the doctrine has been a source of much criticism and debate, especially the third form of JCE, known as extended JCE (JCE III). This criticism intensifies when the prospect of imputing

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<sup>1</sup> 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. 1.

<sup>2</sup> See Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ (PTC35), Decision on the Appeals Against the CO-Investigative Judges Order on Joint Criminal Enterprise, D97/14/15, PTC.

<sup>3</sup> ECCC Case 001 TC Judgment, ¶ 516.

genocide liability via JCE III is raised. This article provides a brief overview of this debate and analysis of some of the available relevant jurisprudence.

## **B. JCE Elements and Variations**

The International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber (AC) laid out the doctrine of JCE in its landmark *Tadic* Judgment.<sup>4</sup> While the TC acquitted Tadic of the murders 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. 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.

### ***Actus Reus***

All forms of JCE have the same *actus reus* requirements: 1) a plurality of persons; 2)

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<sup>4</sup> Tadic, ICTY AC Judgment, ¶¶ 185 *et seq.*

agreement to a common plan involving the commission of at least one crime under the jurisdiction of the prosecuting court; and 3) a significant act by the accused in furtherance of the common plan.<sup>5</sup> Courts have been clear that all forms of JCE are modes of liability that fall under the umbrella of commission and are not separate crimes, but solely “means of committing a crime.”<sup>6</sup> 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, but also often most accurately reflects the nature of group perpetration of mass atrocities.

### *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.<sup>7</sup> For JCE II, the accused must have actual knowledge of the systemic abuses committed within an organized system and continue to further the system with such knowledge.<sup>8</sup> 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 crime(s) being committed in furtherance of the original plan.<sup>9</sup> 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*

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<sup>5</sup> Tadic AC Judgment, ¶ 227.

<sup>6</sup> E.g. Kvočka et al., ICTY AC Judgment, ¶¶ 79, 91.

<sup>7</sup> Tadic AC Judgment, ¶ 228.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

that risk.”<sup>10</sup> The Chamber termed this mental state “*dolus eventualis*” or advertent recklessness.

### C. JCE and 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.” Article 29 also provides for superior responsibility. The definition of genocide under Article 4 of ECCC law includes additional modes of liability applicable solely to genocide: attempts, conspiracy and participation. While neither article 4 nor 29 explicitly mentions JCE, the ECCC Pre-TC (PTC) has ruled, following the lead of the ICTY AC, that JCE is a form of “commission” available under the Court’s jurisdiction.<sup>11</sup> However, while the PTC held that JCE liability is generally 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.<sup>12</sup> In the *Duch* Judgment, the TC agreed with the PTC that JCE is a form of commission under Article 29 of the ECCC law and that general JCE liability falls under the ECCC’s jurisdiction and convicted Duch of crimes against humanity and grave breaches of the Geneva Convention of 1949 via JCE II.<sup>13</sup> The TC nonetheless reserved judgment on the applicability of JCE III<sup>14</sup> and will

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<sup>10</sup> *Id.* ¶ 220 (emphasis in original); *see also* ¶ 228.

<sup>11</sup> ECCC Case 002, Decision on the Appeals Against the Co-Investigating Judges Order on JCE, PTC (2010).

<sup>12</sup> *Id.*

<sup>13</sup> ECCC Case 001 TC Judgment, ¶¶ 511-516.

<sup>14</sup> *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.”).

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

#### **D. The JCE Genocide Controversy**

Of the three forms of JCE discussed above, JCE III is by far the most controversial and oft-criticized, as it can impute “commission” liability for the reckless acts of an accused. This lowered *mens rea* standard appears incongruous with the crime of genocide, which requires the commission of specified acts, such as killing or causing serious harm, committed with the special “intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”<sup>15</sup> The ICTY TC in *Stakic* explained that genocide “is, in fact, characterized and distinguished by a ‘surplus’ of intent.”<sup>16</sup> Despite this apparent incongruity, international tribunals have proclaimed genocide convictions under JCE III possible, but nevertheless, have yet to enter a single conviction for genocide via JCE III.

#### **E. Genocide and Specific Intent Crimes Under Other Modes of Liability**

International criminal tribunals have entered convictions for genocide under modes of liability other than JCE III that similarly 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, indirect forms of liability that remain explicitly subordinated to commission via JCE. Therefore, the analysis underlying such convictions cannot be transposed directly onto the framework of JCE

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<sup>15</sup> ECCC Law, Art 4; *see also* Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, (entered into force Jan. 12, 1951).

<sup>16</sup> *Stakic*, ICTY TC Judgment, ¶ 520.

III. Nevertheless, the reasoning underlying such convictions does help to provide an overview of the factors considered by judges when deciding when individual liability predicated on genocide is appropriate.

### 1. Superior Responsibility

Under the doctrine of superior responsibility, a superior (civilian or military)<sup>17</sup> 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.<sup>18</sup>

The *mens rea* of superior responsibility is actual knowledge or reason to know. Actual knowledge can however, be established through circumstantial evidence.<sup>19</sup> The “reason to know” alternative requires that the superior have “some general information in his possession which would put him on notice of possible unlawful acts by his subordinates.”<sup>20</sup>

When applied to genocide, superior responsibility liability does not require specific intent on the part of the accused; however, the subordinate physical perpetrator(s) of the genocidal acts in question must have acted with genocidal intent.<sup>21</sup> Thus, ultimately, a conviction for genocide under superior responsibility does not circumvent the specific intent to requirement, but simply limits the requirement

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<sup>17</sup> E.g. Delalic et al., ICTY AC Judgment, ¶¶195-196, 240.

<sup>18</sup> E.g. Blaskic, ICTY AC Judgment.

<sup>19</sup> E.g. Limaj et al., ICTY AC Judgment, ¶ 524.

<sup>20</sup> Delalic et al. AC Judgment, ¶ 238.

<sup>21</sup> E.g. Blagojevic & Jokic, ICTY TC Judgment, ¶ 686.

to the physical perpetrators. This is reflected in the very nature of superior responsibility, which technically results in a conviction for failing to prevent or punish genocidal acts of subordinates, rather than actual commission of genocide by the accused.

## 2. Aiding and Abetting

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.<sup>22</sup> In this regard, aiding and abetting liability is similar to that of superior responsibility and 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) of the imputed crime and that this assistance have a substantial effect on the ultimate perpetration of such crime.<sup>23</sup> The accused does not have to share the intent of the principal perpetrator, but merely must intend that his actions assist the perpetrator in the commission of the crime.<sup>24</sup> This *mens rea* appears similar to the *dolus eventualis* required by JCE III, 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, predicated on Krstic's apparent lesser degree of culpability when compared to the original architects of the Srebrenica genocide, such as Slobodan Milosevic or Ratko Mladic.<sup>25</sup>

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<sup>22</sup> Kvočka et al., ICTY AC Judgment, ¶ 92.

<sup>23</sup> E.g. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW, 214 (2d ed. Oxford 2008).

<sup>24</sup> *Id.*

<sup>25</sup> Krstic, ICTY AC Judgment ¶139.

The ICTR has also convicted individuals for aiding and abetting genocide. For example, in the *Ntakirutimana* case, the ICTR AC examined ICTR and ICTY precedents, particularly *Krstic*,<sup>26</sup> 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. Ntakirutimana was convicted of aiding and abetting genocide; however, the TC held that an aider and abettor of genocide must possess genocidal intent. On appeal, the AC affirmed the conviction, but noted that the accused need only be aware of the principal perpetrator(s)' genocidal intent.<sup>27</sup>

#### F. JCE III and Specific Intent Crimes Generally

Although JCE III has never been successfully applied to genocide charges, both the ICTR and ICTY have imputed liability for other specific intent crime, such as the crime against humanity of persecution, via JCE III. Persecution 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.<sup>28</sup> As with genocide, it is persecution's specific intent that is the crime's defining feature.<sup>29</sup> The *mens rea* required for persecution however, is still considered less stringent than specific genocidal intent.<sup>30</sup>

In *Popovic et al.*, the ICTY TC convicted several Serbian officials of committing persecutory acts against Bosnian Muslims in connection with the Srebrenica massacre via JCE III. The convictions were predicated on the Chamber's finding that a JCE to

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<sup>26</sup> *Ntakirutimana*, ICTR AC Judgment, ¶ 509.

<sup>27</sup> *Id.* ¶ 501.

<sup>28</sup> *Kvocka et al.*, AC Judgment, ¶ 460.

<sup>29</sup> *Kvocka et al.*, ICTY TC Judgment ¶ 194.

<sup>30</sup> *Brdjanin*, ICTY TC Judgment, ¶ 699.



murder Bosnian Muslim males at Srebrenica existed and that additional discriminatory killings and mistreatment of Muslims in the area were foreseeable to the accused.<sup>31</sup> 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.”<sup>32</sup> Thus, the *Popovic et al.* Judgment appears to lay the foundation for future genocide convictions via JCE III.

### G. JCE III and Genocide Charges to Date

The ICTY AC has explicitly held in the *Brdjanin* case that JCE III is like any other mode of liability and therefore there exists no reason not to allow genocide and other specific intent convictions under aiding and abetting and superior responsibility, but not under JCE III.<sup>33</sup> This holding has been affirmed despite various challenges in cases at the ICTY and ICTR such as *Milosevic*, *Rwamakuba* and *Karadzic*. 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* AC holdings on the issue 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, arguing JCE III is a possible means of bypassing necessary proof of genocidal intent.

### H. Conclusion

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<sup>31</sup> Popovic et al., ICTY TC Judgment, ¶ 1082.

<sup>32</sup> *Id.* ¶ 1195.

<sup>33</sup> Brdjanin, ICTY AC, Decision on Interlocutory Appeal (JCE), ¶¶ 7-8.

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. 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 on the issue of 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 have thus far shied away from, and grapple with the challenges and complexities of JCE III's interactions with genocidal intent.

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