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Discuss the relationship between command responsibility and JCE3. Address specifically the argument that if JCE3 applies then any acts of violence committed by service members against civilians (such as rape) will be war crimes because such acts are foreseeable during war. Also address whether the approach of applying JCE3 to war crimes dictates that commanders will always be war criminals when pursuing a war.

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MEMORANDUM FOR THE IRAQI HIGH TRIBUNAL

ISSUE:

Discuss the relationship between command responsibility and JCE3. Address specifically the argument that if JCE3 applies then any acts of violence committed by service members against civilians (such as rape) will be war crimes because such acts are foreseeable during war. Also address whether the approach of applying JCE3 to war crimes dictates that commanders will always be war criminals when pursuing a war.

Prepared by Meredith Wood Bowen
Spring 2007

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issue[1]

The application of the theory of joint criminal enterprise (JCE) has encountered criticism since its inception in 1999. However, JCE has become one of the most frequently charged forms of liability at the International Court for the Former Yugoslavia (ICTY). It is not surprising that the newly created Iraqi High Tribunal (IHT) would attempt to learn from the ICTY and utilize this theory of liability.

Unfortunately, as of late, the theory of JCE, specifically the third or "extended" type (JCE3), has come into conflict with another form of liability, that of command responsibility. There is in fact a great deal of confusion surrounding these two doctrines and the ways that they work together or in opposition to each other. Because the Statute of the Iraqi High Tribunal is not identical to those of the ICTY, the International Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL), the prosecutors and judges of the IHT must chart new territory in their application of JCE to its defendants.

[1]The application of the theory of Joint Criminal Enterprise 3 (JCE 3) to war crimes has elicited a number of law review articles addressing the issues raised in regards to the theory of command responsibility. The armed forces of many countries are concerned that JCE 3 renders a commander responsible for nearly all acts committed by his subordinates (analogous to strict liability) without those protections afforded by the concept of command responsibility. The Iraqi High Tribunal Statute Article 15, Fourth, sets forth the concept of command responsibility as follows; "The crimes that were committed by a subordinate do not relieve his superior of criminal responsibility if he 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 appropriate measures to prevent such acts or to submit the matter to the competent authorities for investigation and prosecution." Discuss the relationship between command responsibility and JCE3. Address specifically the argument that if JCE3 applies then any acts of violence committed by service members against civilians (such as rape) will be war crimes because such acts are foreseeable during war. Also address whether the approach of applying JCE3 to war crimes dictates that commanders will always be war criminals when pursuing a war.

The nuances of both command responsibility and JCE have raised questions as to the guilt or innocence of those leading armed forces in any kind of combat. This memorandum will discuss the relationship between the theories of command responsibility and type 3 joint criminal enterprise. It will also address the question of whether or not commanders of armed forces can be held culpable more easily under JCE3 than under command responsibility.

B. Summary of Conclusions

1. Article 15(2)(D) of the Iraqi High Tribunal Statute encompasses Joint Criminal Enterprise.

Article 15(2)(D) of the Iraqi Special Tribunal ("IHT") Statute provides that liability arises if an individual participates "with a *common criminal intention* to commit or attempt to commit such a crime," provided that "such participation shall be intentional and shall either (1)Be made for the aim of consolidating the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (2) Be made in the knowledge of the intention of the group to commit the crime [2]

It follows from this provision that an individual who in any way contributes to the commission of a crime within the Court's jurisdiction can be held criminally responsible and liable for punishment, even if he does not perpetrate the crime himself. A form of this "common purpose" liability has been involved in a substantial amount of jurisprudence at the ICTY, ICTR and SCSL.

Case law from these courts reveals that "common purpose" liability has become interchangeable with joint criminal enterprise liability, and the evidentiary requirements for the

[2] The Statute of the Iraqi High Tribunal *available at* http://www.cpa-iraq.org/human_rights/Statute.htm [reproduced in accompanying Notebook 1 at Tab 1].

doctrine have been set forth and followed in a large number of cases over more than ten years. Due to the fact that Article 15(2)(D) of the IHT Statute explicitly provides for common purpose liability (specifying "common criminal intention"), it follows that it also encompasses joint criminal enterprise.

2. The specific wording of Article 15(2)(D) and its definition of common purpose liability differs considerably from the ICTY/R and SCSL case law definitions of Joint Criminal Enterprise.

Article 15(2)(D) of the IHT Statute is identical to Article 25(3)(d) of the Rome Statute of the International Criminal Court ("ICC"). However, it differs textually from the provisions used at the ICTY, ICTR and SCSL to impose joint criminal enterprise liability. Article 15 directly provides for common purpose liability, whereas the other courts have had to interpret common purpose liability as being implied by their statutes.

As opposed to the other international tribunals who must rely on the judge-made doctrine, the IHT Statute explicitly spells out the mental states necessary to incur liability for crimes committed by persons acting with a common purpose. However, the IHT *mens rea* requirements are not the same as those set forth in the jurisprudence of the other tribunals.

3. Certain requirements of Article 15(2)(D) seem to exclude the use of JCE3, and therefore, prosecutors could not rely on the IHT Statute as the basis for including JCE3 in their indictments

The IHT Statute explicitly requires the accused to *know* of the group's intention to commit a crime in order to be held liable.[3] This is a higher *mens rea* requirement than that required for JCE by the jurisprudence of the other tribunals. While this higher requirement seems to continue to allow the IHT to prosecute individuals using the first two categories of JCE

[3] IHT Statute, Article 15(2)(D), supra note 2 [reproduced in accompanying Notebook 1 at Tab 1].

liability, which will be described later in this memo (section III A 1, notes 22-27 and accompanying text), it seems to preclude use of the third category, known as the Extended JCE. When utilizing JCE3, one member of the enterprise need *not* have known about the other member's criminal intent as long as the crimes were foreseeable.

4. Regardless of whether the IHT determines that JCE3 is or is not included in the text of Article 15, the IHT may opt to utilize JCE3 based on the jurisprudence of other international courts which have found JCE3 to be customary international law.

The IHT may choose to apply the jurisprudence of the other international tribunals, which allow for JCE3, on the grounds that JCE3 reflects general legal principles and customary international law. By opting to follow the other tribunals' jurisprudence, rather than being limited by specifics of its own Statute, the IHT would be choosing to use every means possible to hold the most blameworthy criminal masterminds liable for atrocities from which they are far removed. The IHT would also be maintaining consistency between the international criminal law courts. However, utilizing JCE3 almost certainly deviates from the IHT Statute, which might give strength to the argument that the proceedings are not legitimate.

5. Article 15(4) of the Iraqi High Tribunal Statute encompasses command responsibility.

Article 15(4) of the Iraqi High Tribunal Statute states that "[t]he crimes that were committed by a subordinate do not relieve his superior of criminal responsibility if he 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 appropriate measures to prevent such acts or to submit

the matter to the competent authorities for investigation and prosecution."[4] This is considered the standard language for a provision of command responsibility, identical to those contained in the Statutes of the ICTY, ICTR, ICC, and SCSL.

6. Regardless of whether the IHT decides to apply JCE3, command responsibility, or both, commanders of armed forces are not subject to war crimes charges for their rolesin pursuing a war unless by omission they fail to prevent or punish the crimes of their subordinates or unless they opt to participate in a common criminal plan.

Pursuing war is not in and of itself a war crime. The Geneva Conventions were created in order to define the rules of war. Only when these war time regulations are not adhered to, does the act of war become criminal. A commander need not worry that simply by participating in a war, he is guilty of war crimes. He is still protected by the requirements of the doctrine of command responsibility. He need be concerned only if he has entered into a common criminal plan. A commander who adheres to the laws of war need not fear the theory of JCE3. Each commander is expected to enforce the laws of war as a vital aspect of his "effective control" over his subordinates. The position of being a high ranking member of the armed forces is in no way a crime in and of itself.

If a commander does not prevent or punish crimes of his subordinates, including but not limited to rape of civilians, the commander could be prosecuted under command responsibility. However, JCE3 would not apply in a situation like this because JCE "culpability implies personal conduct which finds expression in individual contributions to the enterprise."[5]

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[4] Iraqi High Tribunal Statute, Article 15(4) [reproduced in accompanying Notebook 1 at Tab1].

[55] Ambos, Kai, *Joint Criminal Enterprise and Command Responsibility,* 1 J. Int'l. Crim. Jus. 25 (2007) [reproduced in accompanying Notebook 5 at Tab 43].

II. FACTUAL BACKGROUND

War crimes tribunals were created in order to punish those who "orchestrated crimes of such magnitude as to attract international concern" as opposed to those who carried out the crimes.[6] The U.N. Security Council endorsed the policy that "civilian, military and paramilitary leaders should be tried before [the Tribunals] in preference to minor actors."[7] The jurisdiction of international tribunals is often over those *most* responsible for the heinous crimes of war and against humanity. The experience of the tribunals has illustrated the difficulty in prosecuting those who, despite the fact that they induced, ordered or planned mass atrocities, may have stayed great distances from the actual commission of the crimes. The *Kordic* Trial Chamber of the ICTY stated that "a superior who orders the killing of a civilian may be held responsible . . . as might a political leader who plans that certain civilians or groups of civilians should be executed, and passes these instructions on to a military commander."[8] Thus, prosecutors have indicted leaders such as Slobodan Milosevic, Radovan Karadzic, Ratko Mladic, Radislav Krstic, Clemen Kayishema, Charles Taylor, and Samuel Hinga Norman for formulating or endorsing criminal plans even though their subordinates in fact carried out the crimes in question.[9]

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[6] John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 125 (2d ed. 2000) [reproduced in accompanying Notebook 6 at Tab 58].

[7] S.C. Res. 1329 (Nov. 30, 2000) [reproduced in accompanying Notebook 2 at Tab 12].

[8] *Prosecutor v. Kordic et al.*, Case No. IT-95-14/2-T, Judgment, 26 Feb. 2001, para. 373 [reproduced in accompanying Notebook 3 at Tab 20].

[9] *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 140 (Prosecution accused former Serb leader Milosevic of participating in a joint criminal enterprise to destroy Bosnian Muslims as a group) [reproduced in accompanying Notebook at Tab 29]; *Prosecutor v. Karadzic & Mladic*, Case No. IT-95-5-R61 and IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 86 (found that there were reasonable grounds to believe that the former Serb

Former ICTY Judge Antonio Cassese expressed the opinion that "bringing such culprits to justice not only establishes individual responsibility and exonerates the rest of the population from guilt, but it also dissipates the call for revenge, helps victims find reconciliation because they know their tormentors have paid for their crimes, and establishes a fully reliable record of the atrocities so future generations can remember and be made fully cognizant of what happened."[10] These have been the goals of all the international criminal tribunals, beginning with the Nuremberg Trials and extending today to Cambodia and beyond.[11]

Certain aspects of each international tribunal have been criticized since their inception.

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leaders planned and ordered genocide, crimes against humanity, and war crimes or, at the very least, did not prevent or punish them) [reproduced in accompanying Notebook 3 at Tab 19]; *Prosecutor v. Krstic*, Case No. IT-98-33-A, Judgment, 19 April 2004, para. 237-239 (the Appeals Chamber overturned Bosnian Serb General Krstic's conviction as a participant in a joint criminal enterprise to commit genocide but upheld that he willingly participated in the joint criminal enterprise to forcibly transfer Bosnian Muslim women, children and elderly out of Srebrenica, which amounted to persecution, a crime against humanity) [reproduced in accompanying Notebook 4 at Tab 25]; *The Prosecutor v. Kayishema et al.*, Case No. ICTR-95-1-T, Judgment, 21 May 1999, para. 567-568 (the former prefect was convicted on four counts of genocide for ordering and participating in four massacres that resulted in the deaths of thousands of ethnic Tutsis in 1994, upheld on appeal) [reproduced in accompanying Notebook 5 at Tab 33]; *The Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-I, Indictment, 7 Mar. 2003, para.23-25 (charged the former President of the Republic of Liberia with participation in a joint criminal enterprise to gain political power and control over Sierra Leone and its diamond mines, resulting in unlawful killings, abductions, forced labor, physical and sexual violence, and other crimes) [reproduced in accompanying Notebook 5 at Tab 38]; *The Prosecutor v. Samuel Hinga Norman et al.*, Case No. SCSL-03-14-I, Indictment, 5 Feb. 2004, para. 19 (charged the former National Coordinator of the CDF with the participating in the common plan to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone, which led, inter alia, to unlawful killings, looting, terrorizing civilians, destruction of private property, and use of child soldiers) [reproduced in accompanying Notebook 5 at Tab 36].

[10] Antonio Cassese, *Reflections on International Criminal Justice*, 61 Mod. L. Rev. 1, 5-6 (Jan. 199) [reproduced in accompanying Notebook 6 at Tab 50].

[11] Michael P. Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg* (1997) [reproduced in accompanying Notebook 6 at Tab 57].

International law is itself an evolving mode of legal interpretation. Confusion is bound to arise. This memorandum will discuss the situation that has arisen between differing forms of individual criminal responsibility and the ways that these doctrines interact.

III. LEGAL DISCUSSION

A. Theory of Joint Criminal Enterprise

1. Joint criminal enterprisetheory was developedprior to the creation of the Iraqi High Tribunal.

The terminology for judging joint criminal enterprise (JCE) was created by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the case of *Prosecutor v. Tadic*.[12] The Chamber felt the need for a doctrine that dealt with the widespread and systematic planning of war crimes and crimes against humanity. So often, those who act as the impetus for such crimes ultimately become barely connectible to the final act. The theory of JCE rests on the idea that a group of criminals act "in the pursuance of a common criminal design"[13] and therefore, regardless ofeach individual's role in the common design, all are responsible for all of the crimes.

The case of the *Prosecutor v. Tadic* was the first case before the ICTY. Dusko Tadic was a café owner and local politician.[14] He was convicted for the persecution, beatings, and abuse of

[12] *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 181, 188 [reproduced in accompanying Notebook 2 at Tab 16].

[13] *Prosecutor v. Kordic et al.,* Case No. IT-95-14/2-T, Judgment, 26 Feb. 2001. [reproduced in accompanying Notebook 3 at Tab 20].

[14] *Prosecutor v. Tadic*, *supra note* 12 [reproduced in accompanying Notebook 2 at Tab 16].

non-Serbs as part of a Serbian "ethnic cleansing" policy.[15] However, he was acquitted of the murder of five men in the village of Jaskici due to the fact that the Prosecutor could not come up with any evidence to establish that he was personally responsible for executing them.[16] The Prosecutor appealed the acquittal and the Appeals Chamber reversed.[17]

The Appeals Chamber explained that Tadic "actively took part in the common criminal purpose to rid the Prijedor region of the non-Serb population" and therefore, it was foreseeable that non-Serbs would be killed. In addition, the Appeals Chamber declared that Tadic had willingly taken on the risk that the actions of his group would lead to such killings.[18] Thus, Tadic's role in the common criminal plan of "ethnic cleansing" made him liable for the murders, even if he did not kill the men himself. The judges established that liability from participation in a "common purpose" which the judges felt was implicit in the ICTY Statute.

The ICTY Appeals Chamber conceded that liability for participation in a common plan was not one of the Statute's enumerated five forms of direct responsibility, but the Statute did not exclude it, either.[19] It explained that the grave nature of international war crimes justified this interpretation:

> Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.),

[15] Jones, *supra note* 6, at 4-5. [reproduced in accompanying Notebook 6 at Tab 58].

[16] Richard P. Barrett & Laura E. Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 Minn. L. Rev. 30, 39 (Nov. 2003) [reproduced in accompanying Notebook 6 at Tab 49].

[17] *Prosecutor v. Tadic*, supra note 12 [reproduced in accompanying Notebook 2 at Tab 16].

[18] *Id*., para. 231-233.

[19] *Id.*, para. 190.

> the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.[20]

The *Tadic* Appeals Chamber essentially articulated a new theory of individual criminal responsibility not defined by the ICTY Statute, so it devoted a substantial part of its written decision toclarify the contours of the doctrine. First, it concluded that "broadly speaking, the notion of common purpose encompasses three distinct categories of collective criminality," basing its analysis on an extensive scrutiny of post-World War II war crimes case law involving complicit liability.[21]

A collective criminal enterprise is defined as a common agreement or understanding to commit certain criminal acts for an ultimately criminal objective or goal. For example, for those participating in the joint criminal enterprise of genocide, the ultimate destruction of a specifically targeted group is the objective of all involved. Not everyone in the enterprise has the same role, but together their efforts add up to an overall goal. Therefore, the theory of joint criminal enterprise is one of collective responsibility placed on one member of a larger group. This theory developed from the earlier doctrine of conspiracy and from the Nuremberg theory of

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[20] *Id*., para. 191.

[21] *Tadic* Appeals Judgment, *supra note* 12, para. 195 [reproduced in accompanying Notebook 2 at Tab 16]; *see also* Christopher J. Knezevic, *Case Western Reserve University School of Law International War Crimes Research Lab: Joint Criminal Enterprise – What is the Degree of Participation Required for Conviction? An Exhaustive Memo of the Jurisprudence on Joint Criminal Enterprise*, at 10-18, *available at* http://law.case.edu/War-Crimes-Research-Portal/memoranda/Cknezevic.pdf (Spring 2004) [reproduced in accompanying Notebook 6 at Tab 62].

organizational liability. The core of JCE liability is membership/participation in a group that is pursuing a criminal enterprise.[22]

The ICTY Appeals Chamber laid a foundation for three separate categories of collective criminality, commonly referred to as JCE1 or I, JCE2 or II, and JCE3 or III (also referred to as Extended JCE). The basic form of JCE, JCE1, consists of participants acting on the basis of a "common design" or "common enterprise" and with a common "intention." JCE2 is the systemic form of JCE where, for example, in the so-called concentration camp cases, crimes are committed by members of military or administrative units such as those running concentration or detention camps on the basis of a common plan. Finally, JCE3 occurs when one of the co-perpetrators actually engages in acts going beyond the common plan but his or her acts still constitute a "natural and foreseeable consequence" of the realization of the original criminal plan.[23]

Three elements are required for each of the different versions of JCE; a plurality of persons, the existence of a common criminal plan, and the participation of the accused in the JCE by "any form of assistance in, or contribution to, the execution of the common purpose."[24] Each category of JCE has additional requirements specific to it. JCE1 requires that the co-perpetrators share intent, while JCE2 requires that the perpetrator have personal knowledge, not necessarily a shared intent, of the system of ill-treatment. JCE3 requires that the perpetrator have the intention

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[22] E. van Sliedregt, *The Criminal Responsibility of Individuals for Violation of International Humanitarian Law* (The Hague: TMC Asser Press, 2003), at 195 [reproduced in accompanying Notebook 5 at Tab 42].

[23] *Tadic*, *supra note* 12 [reproduced in accompanying Notebook 2 at Tab 16].

[24] Ambos, Kai, *Joint Criminal Enterprise and Command Responsibility*, *supra note* 5 [reproduced in accompanying Notebook 5 at Tab 43].

to participate in the criminal purpose and to contribute to the commission of a crime by a group and that "responsibility for a crime that was not part of the common purpose arises if the commission of the crime was foreseeable and the accused willingly took that risk."[25]

JCE3 assumes some level of participation by the defendant in the initial enterprise, and the criminality of the enterprise. It follows that all members of a criminal enterprise are held accountable for each other's crimes. JCE3 is very similar in this respect to the doctrine of Felony Murder. If two criminals work together for the common goal of robbing a bank, the one who drives the getaway car is equally guilty of murder, if the other criminal shoots and kills someone while inside the bank. Once a common objective has been agreed upon, regardless of each criminal's specific role, everyone who participated in the enterprise is guilty of all crimes committed within the larger objective. This is true even if the acts perpetrated by one were not agreed upon by the whole group. When someone robs a bank with a gun, it is foreseeable that someone could get shot. The driver of the getaway car has willingly taken that risk and therefore, accepts the responsibility for the actions of the person who actually goes into the bank.

The International Criminal Court for the Former Yugoslavia offered its own illustration of what it means to be charged with JCE3. There must exist

> a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region . . . with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of these civilians.[26]

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[25] *Tadic*, *supra note* 12,(emphasis added)[reproduced in accompanying Notebook 2 at Tab 16].

[26] *Id.*

The Appeals Chamber went on to state that in addition to the predictable and foreseeable consequences of any given common plan, the accused needed to be "reckless or indifferent" to the risk of these consequences, therefore, accepting the risk of such an outcome. This "dolus eventualis" or "advertent recklessness" *mens rea* standard has been criticized, but JCE3 has also been widely and successfully charged in cases against individuals with the highest levels of authority when other forms of liability have failed.

JCE has become one of the most important tools of liability at the ICTY.[27] Eighty-one per cent of all indictments between June 25, 2001 and January 1, 2004 at the ICTY based liability on this doctrine.[28] Prosecutors at the SCSL are following the ICTY's example in using JCE to hold defendants liable. The key leaders of the three groups that were involved in the armed conflict in Sierra Leone have all been charged with participating in joint criminal enterprises to gain control over the territory and its diamond mines.[29]

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[27] J.S. Martinez and A.M. Danner, *Guilty by Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 California Law Review (2005) 75, at 102-120 [reproduced in accompanying Notebook 5 at Tab 47].

[28] *Id.* at 107. (Prior to July 2004, phrases like acting "in concert" were read as implicit references to the JCE theory, thus 34 out of 43 indictments in the approximately 2.5 year period incorporated JCE.) *See also* Kelly D. Askin, *Reflections on Some of the Most Significant Achievements of the ICTY*, 37 New Eng. L. Rev. 903, 910-11 (Spring 2003) ("In the last two years, it appears that participating in a joint criminal enterprise has become the principal charging preference in ICTY indictments, and it is particularly effective when charged in conjunction with persecution."). [reproduced in accompanying Notebook 5 at Tab 48]

[29] *The Prosecutor v. Charles Ghankay Taylor*, *supra* note 9, para. 23-25 (charged the former President of the Republic of Liberia and other AFRC leaders with participating in a joint criminal enterprise to gain political power and control over Sierra Leone and its diamond mines, resulting in unlawful killings, abductions, forced labor, physical and sexual violence, and other crimes); *The Prosecutor v. Samuel Hinga Norman et al.*, *supra* note 9, para. 19 (charged former CDF leaders with participating in a common plan to use any means necessary to defeat the RUF/AFRC forces, leading, *inter alia*, to unlawful killings, looting, terrorizing civilians,

2. Article 15(2)(D) of the IHT Statute encompasses Joint Criminal Enterprise.

Article 15(2)(D) of the Iraqi Special Tribunal ("IHT") Statute provides that liability arises if the individual "[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i.) Be made with the aim of furthering the criminal purpose of the group, where such activity or purpose involves the voluntary commission of a crime within the jurisdiction of the Tribunal; or (ii.) Be made in the knowledge of the intention of the group to commit the crime."[30]

It follows from this provision that an individual who in any way contributes to the commission of a crime within the Tribunal's jurisdiction can be held criminally responsible and liable for punishment, even if he does not perpetrate the crime himself. Since Article 15(2)(D) of the IHT Statute explicitly provides for common purpose liability, it follows that it also encompasses joint criminal enterprise, since common criminal purpose and joint criminal enterprise are equivalent theories of liability (see discussion supra note 21 and accompanying text). As long as the original enterprise is not criminal, which a war that adheres to the Laws of War is not, then commanders need not fear charges of JCE3. Common criminal purpose is

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destruction of private property, and use of child soldiers); *The Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-2004-15-PT, Amended Consolidated Indictment, 13 May 2004, para. 36-38 (charged the former RUF leaders with participating in a joint criminal enterprise to gain and exercise political power and control over the territory of Sierra Leone and its natural resources, particularly the diamonds, which led to unlawful killings, abductions, forced labor, physical and sexual violence, use of child soldiers, and other crimes). [*Sesay* is reproduced in accompanying Notebook 5 at Tab 37] [*Taylor* is reproduced in accompanying Notebook 5 at Tab 38] [*Norman* is reproduced in accompanying Notebook 5 at Tab 39]

[30] The Statute of the Iraqi Special Tribunal, *supra note* 2 [reproduced in accompanying Notebook 1 at Tab 1].

equivalent to a Joint Criminal Enterprise, which any war, on its face, is not. Any war in which the Laws of War are applied with a good faith effort by all commanders is not in and of itself a crime and would not subject law-abiding commanders to JCE liability.

3. The specific wording of Article 15(2)(D) differs considerably from the parallel JCE provisions of the other international tribunals.

Article 15(2)(D) of the IHT Statute is identical to Article 25(3)(d) of the Rome Statute of the International Criminal Court ("ICC") and differs textually from the provisions used at the ICTY, ICTR and SCSL to impose joint criminal enterprise liability. Article 15 explicitly provides for common purpose liability, whereas the other courts have had to interpret, in their decisions and judgments, that common purpose liability is implied in their statutes (see discussion supra notes 12-30 and accompanying text).

As opposed to the other international tribunals who must rely on the judge-made doctrine and its contours, the IHT Statute explicitly spells out the mental states necessary to incur liability for crimes committed by persons acting with a common purpose. However, the IHT *mens rea* requirements are not the same as those set forth in the jurisprudence of the other tribunals. According to one expert, the ICC provision (and thus the IHT provision, since they are identical) "'repairs' the technical defaults of complicity liability, which has caused some misunderstanding and resulted in creative law-making at the *ad hoc* Tribunals."[31]

In contrast to the Statutes of the other international tribunals, IHT Article 15(2)(D) contains specific language regarding common purpose.[32] In the other three tribunals, the judges

[31] E. van Sliedregt, *supra note 22* [reproduced in accompanying Notebook 5 at Tab 42].

[32] *See* Iraqi Statute, *supra* note 2, Art. 15 [reproduced in accompanying Notebook 1 at Tab 1].

have held that common purpose (joint criminal enterprise) is *implied* by the statutes. Specifically, the IHT Statute explicitly defines the requisite mental state for crimes committed by persons acting with a common purpose. This mens rea is *knowledge*. In finding JCE implicit in the Statutes of the other tribunals, the *Tadic* Appeals Chamber assigned different mens rea requirements to different types of JCE.[33]

4. Certain requirements of Article 15(2)(D) seem to exclude the use of JCE3, and therefore, prosecutors could not rely on the IHT Statute as the basis for including JCE3 in their indictments.

The IHT Statute explicitly requires that for common purpose liability, the accused must *know* of the group's intention to commit a crime. This is a higher *mens rea* requirement than that required for JCE in the jurisprudence of the other tribunals. While this higher requirement seems to continue to allow the IHT to prosecute individuals using the first two categories of JCE liability, it also seems to preclude use of the third category, known as the Extended JCE, since under JCE3 one member of the enterprise need not have known about the other members' criminal intent as long as 1) the original criminal plan was a common enterprise and 2) the crimes committed outside of that original criminal plan were foreseeable.

Article 15 of the IHT Statute is identical to Article 25(3) of the Rome Statute of the International Criminal Court. Some scholars have pointed out that the Rome Statute leaves no room for JCE3 to be utilized.[34] Article 15(2)(D) of the IHT Statute states that an accused must "know" of the group's intention to commit a crime in order to be held accountable for it. The

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[33] Joint Criminal Enterprise 1, 2, and 3 (also known as Extended JCE).

[34] Harmen vander Wilt, *Joint Criminal Enterprise*, J. Int'l Crim. Justice (2006), 1 of 18. [reproduced in accompanying Notebook 5 at Tab 45] *See also* E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law, supra note* 22 [reproduced in accompanying Notebook 5 at Tab 42].

typical mens rea requirement for JCE3 is foreseeability, not knowledge. Article 15(2)(D) eliminates the advertent recklessness mental state used with defendants in cases at the ICTY where the accused participated in the enterprise in spite of the risk that additional crimes outside the original scope of the enterprise were foreseeable. Thus, the explicit mens rea requirement precludes the charge of JCE3 based on the IHT Statute.

Article 15(2)(D) does allow for the use of JCE1 and JCE2 as forms of liability. Article 15(2)(D) sets the lowest possible standard of *actus reus* to hold perpetrators in a common plan criminally responsible, penalizing a member of a group for the crimes of other members as long as they contributed to the common plan in some way.

5. Even if Article 15 of the IHT Statute does not provide for JCE3, the IHT may allow charges of JCE3 based on the jurisprudence of other international courts which have found JCE3 to be customary international law.

The IHT may choose to apply the jurisprudence of the other international tribunals, which allow for JCE3, because that jurisprudence reflects general legal principles and customary international law. By opting to follow the jurisprudence, rather than being limited by its Statute, the IHT would be choosing to use any means possible to hold the most blameworthy criminal masterminds liable for atrocities from which they are physically far removed. The IHT would also be maintaining consistency among the international criminal law courts. However, utilizing JCE3 almost certainly deviates from the IHT Statute, which might give strength to the argument that the proceedings are not legitimate. JCE3 has been incredibly successful at the ICTY and it might prevent the IHT from prosecuting as successfully as possible.

The ICTY "saw no explicit basis for participation through JCE" in the articles of its Statute, however, "it found an implicit basis in the term 'committed.' Since "the commission of

crimes … might also occur through participation in the realization of a common design or purpose,"[35] the Court found that their Statute included all modes of participation. The wording of the IHT Statute expressly authorizes prosecutors to charge defendants before the Tribunal with common purpose liability, so the IHT will not have to endure the criticism that the other tribunals faced about whether it is fair to use judge-made doctrine to hold defendants criminally liable. Express statutory authorization to employ common purpose liability promotes the legitimacy of its use in IHT proceedings.

As noted above, the IHT Statute allows for the use of JCE1 and JCE2, but not JCE3. However, it is arguable that all forms of JCE have become theories of customary international law and that JCE3 is therefore an available tool despite the wording of the Statute. The *Tadic* Appeals Chamber was not authorized by statute to apply JCE as a form of criminal responsibility, and so it had to justify the theory by finding that it existed as customary international law in 1992 at the time of the alleged crimes which Tadic was accused of participating in. Almost a decade has passed since the *Tadic* Appeals Chamber holding, and an extensive body of subsequent case law now supports the notion that joint criminal enterprise is part of customary international law from 1992 onward.

By overcoming the apparent statutory preclusion of JCE3 through reliance on the jurisprudence of the *ad hoc* tribunals and the general legal principles and customary international law they represent,[36] the IHT would accomplish several important objectives. By utilizing the theory of JCE3, the IHT would be able to hold masterminds of heinous atrocities criminally liable for acts carried out in circumstances from which they were far removed. Also, by adhering

[35] Ambos, Kai, *Joint Criminal Enterprise and Command Responsibility, supra note 5* [reproduced in accompanying Notebook 5 at Tab 43].
[36] Van Sliedgret, *supra note* 2, at 107 [reproduced in accompanying Notebook 5 at Tab 42].

to the precedent of the ICTY, the IHTwould prevent the development of two diverging bodies of international criminal law.[37] Finally, by following the established jurisprudence of the other tribunals, the IHT would be signaling to the international community that it has an interest in upholding the pre-established principles of international law. This would improve the argument that the IHT is as legitimate as any other international proceeding.[38]

It is important, however, that despite the positive aspects of following JCE3 precedent, it is duly noted that a "[d]eviation from adherence to strict principles may augment the chances of conviction but it can also threaten the Tribunal's ability to fulfill its solemn goals."[39] If JCE3 is truly not contained in the IHT Statute, using it anyway might add fuel to the fire of those criticizing the IHT for its lack of legitimacy.

B. Theory of Command Responsibility

The principle of command responsibility declares that the "fact that any of the [illegal] acts . . . was committed by a subordinate does not relieve his superior of criminal responsibility if he 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

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[37] *Id.*

[38] *Id.*

[39] William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 New Eng. L. Rev. 1015, 1015 (Summer 2003) [reproduced in accompanying Notebook 6 at Tab 54].

to punish the perpetrators thereof."[40] This original theory of command responsibility can be traced back at least to the Hague Conventions of 1907.[41]

The 1977 Additional Protocol I to the Geneva Conventions ("Protocol I") addressed command responsibility but phrased it a bit differently. Protocol Istates that superiors are not absolved of criminal responsibility for breaches committed by their subordinates, if "they knew or had information which should have enabled them to conclude in the circumstances at the time, that [the subordinate] was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."[42]

Liability under the theory of command responsibility has three requirements. The first requirement is that there exists a superior-subordinate relationship. The second is that the superior failed to take the necessary and reasonable measures to prevent the criminal acts of his subordinates or punish them for those actions. The third requirement is that the superior knew or had reason to know that a criminal act was about to be committed or had been committed.[43] In many ICTY judgments, the Court emphasized that implicit in the first requirement is the necessity that the superior actually have the ability to exercise control over his subordinates.

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[40] ICTY Statute art. 7(1); ICTR Statute art. 6(1) [reproduced in accompanying Notebook 1 at Tab 4].

[41] Annex to 1907 Hague Convention IV, Regulations Respecting the Laws and Customs of War on Land art. 1 ("laws, rights and duties of war" apply to armies, militias, and volunteer corps that are "commanded by a person responsible for his subordinates.") [reproduced in accompanying Notebook 2 at Tab 13].

[42] Additional Protocol I art. 86(2) [reproduced in accompanying Notebook 2 at Tab 13].

[43] *Judgment, Delalic et al.* (IT-96-21), Trial Chamber, 16 November 1998, § 346 [reproduced in accompanying Notebook 2 at Tab 15].

Therefore, the ICTY has stated that a superior's control over his subordinates must be "effective"[44] in order to hold him responsible for the subordinate's crimes. The level of effective control illustrates the superior's duty to act in situations where crimes need to either be prevented or punished. The ICC Statute goes as far as requiring that the crime was "caused" or allowed to occur because of the superiors failure to either prevent or punish.[45] Commanders are given a high level of responsibility to assure that their subordinates are not violating international humanitarian law, either with direct acts or with omissions.[46]

The U.S. Supreme Court explained the theory of command responsibility in its judgment on the Yamashita habeas petition. "The law of war supposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates."[47] In addition, the Court stated that a military commander has "an affirmative duty to take such measures as are within his power and appropriate in the circumstances to protect prisoners of war and the civilian populations."[48]

C. The Relationship between Command Responsibility and Joint Criminal Enterprise and the lessons learned from the case of *Prosecutor v. Krstic*.

JCE and command responsibility are two kinds of individual responsibility. These two different theories give prosecutors thepossibility of charging a defendant based on differentkinds

[44] *Krstic Appeals Judgment*, *supra note* 9[reproduced in accompanying Notebook 4 at Tab 24].

[45] INTERNATIONAL CRIMINAL COURT STATUTE, Article 24(2), U.N. Doc. A/CONF.183/9*, Rome Statute(c) United Nations 1999-2000, at http://www.un.org/law/icc/statute/romefra.htm [reproduced in accompanying Notebook 2 at Tab 14].

[46] *Id.*

[47] *In re Yamashita*, 327 U.S. 1, 15 (1946) [reproduced in accompanying Notebook 2 at Tab 15].

[48] *Id*.

of available evidence. If a superior-subordinate relationship cannot be established, a charge of JCE is another option in cases where a commander is in no way the perpetrator of a crime but can in fact be held accountable for the actions of his troops.

After the ICTY Appeals Chamber articulated the theory of JCE, many prosecutors opted to charge defendants both with crimes based on a form of JCE and with crimes based on command responsibility. In the case of *Prosecutor v. Krstic*, the defendant was charged under both the theory of command responsibility and that of JCE. Based on the evidence available, the the Court found that his responsibility under JCE "subsumed" his responsibility based on command responsibility and therefore, only the charge of JCE was sustained. This interpretation of JCE's ability to subsume command responsibility was reinforced in the case of the *Prosecutor v. Kvocka*. The Court in *Kvocka* stated that where the legal requirements of both theories are met, a conviction should be based on JCE only, and the superior position should be taken into account as an aggravating factor in sentencing.[49] This approach has often simply saved the ICTY time in proving the differing requirements of both command responsibility and JCE.

The trial of General Radislav Krstic was the first ICTY trial to try the charge of genocide through to completion.[50] When it began, General Krstic was the most senior military official to stand trial at The Hague.[51] The Trial Chamber, in a Judgment rendered after hearing more than

[49] *Judgment, Kvocka et al.* (IT-98-30/1), Appeals Chamber, 28 February 2005, §97, 104 [reproduced in accompanying Notebook 4 at Tab 26].

[50] *Id*.

[51] *Id*. at 453.

110 witnesses, described what it labeled "nine days of hell" in Srebrenica.[52] Despite the horrific evidence of atrocities in Srebrenica, the Trial Chamber stated that "[t]his defendant, like all others, deserves individualized consideration and can be convicted only if the evidence presented in court shows, beyond a reasonable doubt, that he is guilty of acts that constitute crimes covered by the Statute of the Tribunal."[53]

A brief set of facts about the case begins when units of the Bosnian Serb Army ("VRS") launched a 9-day attack on the village of Srebrenica, located in Bosnia-Herzegovina. The area that was attacked was a designated as a U.N. safe area.[54] Approximately 25,000 Bosnian Muslims living in Srebrenica were abducted from their homes and taken on overcrowded buses across conflict lines into Bosnian-Muslim held territory.[55] The military-aged Bosnian Muslim men of Srebrenica, however, were "taken prisoner, detained in brutal conditions and then executed. More than 7,000 people were never seen again."[56] Facts later revealed that:

> [t]housands . . . were slaughtered in 'carefully orchestrated mass executions' that 'followed a well established pattern.' The men were lined up in groups of ten, blindfolded, wrists bound with wire ligatures, shoes removed and then shot. Miraculously, a handful escaped to testify later at The Hague. Immediately afterward and sometimes even during the execution, earth-moving equipment

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[52] *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, 2 Aug. 2001, para. 1-4 [reproduced in accompanying Notebook 4 at Tab 25].

[53] *Id*.

[54] Fran Pilch, *The Prosecution of the Crime of Genocide in the ICTY: The Case of Radislav Krstic*, 12 U.S.A.F. Acad. J. Legal Stud. 39, 39 (2002/2003) [reproduced in accompanying Notebook 6 at Tab 53].

[55] *Krstic* Trial Judgment, *supra note* 52, para. 1 [reproduced in accompanying Notebook 4 at Tab 25].

[56] *Id*.

> arrived and their bodies were buried. Months later they were reburied further north in Serb-held territory to avoid discovery as the Dayton Accord negotiations began.[57]

The area where these events took place fell within the zone of responsibility of the Drina Corps, a formation of the VRS, a formation lead by Chief of Staff and Commander Krstic.[58] Therefore, Prosecutors charged Krstic under Article 7(1) of the ICTY Statute, the implicit JCE provision, but they did not specify a form of direct responsibility.[59] In spite of defense arguments that joint criminal enterprise liability was therefore not available because it had not been pled, the Trial Chamber found that the Indictment contained sufficient references to alleged crimes committed in concert with others to allow it.[60]

For the first time in an international court, the defendant, Krstic, was charged under both Article 7(1) of the ICTY Statute and the command responsibility provision of Article 7(3). The command responsibility theory could hold Krstic criminally liable for crimes committed by his troops if (1) he knew or should have known about the crimes, and (2) he did not take reasonable and necessary steps to either prevent the crimes or punish his subordinates for their misdeeds.[61]

However, rather than find Krstic indirectly liable using command responsibility, the Trial

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[57] *Krstic* Trial Judgment, *supra note*, at 449 [reproduced in accompanying Notebook 2 at Tab 13].

[58] *Id.*

[59] *Id.*

[60] *Id*.

[61] Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 133 (2d ed. 2001) [reproduced in accompanying Notebook 6 at Tab 60].

Chamber wanted to hold Krstic *directly* responsible for the events at Srebrenica.[62] The Court found that "where a commander participates in the commission of the crime through his subordinates, by 'planning', 'instigating' or 'ordering' the commission of the crime, any responsibility under Article 7(3) is subsumed under Article 7(1)."[63]

The evidence established that Krstic had played a significant role in "organizing the transportation of civilians, that he knew it was a forcible, not voluntary, transfer, and that he was fully aware of the ongoing humanitarian crisis and mistreatment of civilians by VRS soldiers."[64] The Trial Chamber concluded that the facts compelled the inference that the political and/or military leadership of the VRS formulated a plan to permanently remove the Bosnian Muslim population from Srebrenica and that General Krstic was a key participant.[65] This inference led the Chamber to declare that the JCE *actus reus* requirements of plurality, a common plan, and participation were established.[66]

The Chamber then turned its attention to the issue of Krstic's mental state. The Chamber examined "which crimes fell within and which fell outside the agreed object of the joint criminal

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[62] Danner & Martinez, *supra note* 27, at 144-45 ("[I]nternational criminal prosecutors appear to be attempting to fit as many political and military leaders under the JCE framework in preference to command responsibility liability, even in cases where the latter arguably better describes the actions of the accused" perhaps for the psychological impact. JCE seems to carry more weight and captures the seriousness of the leader's responsibility for the violent course of events.) [reproduced in accompanying Notebook 5 at Tab 47].

[63] *Krstic* Trial Judgment, *supra note* 52, para. 605 (emphasis omitted) [reproduced in accompanying Notebook 4 at Tab 25].

[64] *Id.*, para. 608-09.

[65] *Id*., para. 612.

[66] *Id*.

enterprise to ethnically cleanse the Srebrenica enclave."[67] The Trial Chamber agreed that the first object of the JCE was the forcible transfer and evacuation of the Muslim civilians out of Srebrenica, and that Krstic's extensive participation in it evidenced his intent for the crime.[68] Krstic, having organized the large scale military operation which would accomplish this criminal goal, was liable.[69] The Trial Chamber then recognized that the murders, rapes, beatings and abuses committed against the refugees by the VRS were not the original objective of the joint criminal enterprise, but they were a natural and *foreseeable* consequence of the ethnic cleansing campaign. Since the foreseability requirement was fulfilled with regard to the murders, rapes, beatings, and abuses, the Chamber found Krstic liable for those crimes under JCE3.[70]

The plan to forcibly transfer Bosnian Muslims was a part of the larger common criminal plan of the entire VRS to ethnically cleanse Srebrenica.[71] The Trial Chamber found that killing the men "became the object of the newly elevated joint criminal enterprise of General Mladic and VRS Main Staff personnel" and that the killing was aimed at permanently eradicating the Bosnian Muslim population from Srebrenica, a prime example of genocide.[72]

The Trial Chamber noted that Krstic fulfilled a keycoordinating role in the genocidal

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[67] *Id*., para. 614.

[68] *Id*., para. 615.

[69] *Id*.

[70] *Id*., para. 617.

[71] *Id.*, para. 619.

[72] *Id*.

campaign at a stage when his participation was "clearly indispensable" in the killings.[73] In view of both his *mens rea* and *actus reus,* he was deemed a principal perpetrator of genocide and other connected crimes.[74] Some commentators suggested that the Tribunal's ruling in *Krstic* might dilute the Extended JCE *mens rea* requirement for the underlying crimes:[75]

> An offender may be convicted of the most serious crimes, and sentenced to lengthy terms in prison, on the basis of what can amount to a negligence-like standard of guilt. General Krstic was convicted of genocide and was sentenced to a term of 46 years in prison, all on the basis of the JCE theory of criminal liability. The Trial Chamber never really concluded that he actually intended to commit genocide—a requirement of the Statute—but only that genocide was a "natural and foreseeable" consequence of a criminal plan to ethnically cleanse Srebrenica, and that a reasonable person would have "surmised" such a development.[76]

The same commentator suggested that diluting the *mens rea* requirements could have far-reaching implications for the trial of Slobodan Milosevic and beyond:

> [I]f it cannot be established that the man who ruled Yugoslavia throughout its decade of war did not actually intend to commit war crimes, crimes against humanity and genocide, but only that he failed to supervise his subordinates or joined with accomplices when a reasonable person would have foreseen the types of atrocities they might commit . . . the door is left ajar for future generations to deny the truth.[77]

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[73] *Id*., para. 644.

[74] *Id*.

[75] Schabas, *supra note* 39, at 1033-34, [reproduced in accompanying Notebook 6 at Tab 54]; *see also* Danner & Martinez, *supra note* 27, at 108-09. ("[A]t least one ICTR Trial Chamber has suggested that the accused may be responsible for crimes that were objectively foreseeable, even if he did not himself foresee them—effectively lowering the mental state still further to negligence.") [reproduced in accompanying Notebook 5 at Tab 47].

[76] *Id*.

[77] *Id*., at 1034.

Krstic appealed his conviction, challenging, *inter alia*, the holding that he was criminally responsible for the crimes that arose from his "individual participation in a joint criminal enterprise to forcibly transfer civilians, and opposing the finding that he shared a genocidal intent of a joint criminal enterprise to commit genocide against the Bosnian Muslims of Srebrenica."[78] On the first challenge, the Appeals Chamber upheld the finding that the forcible eviction and subsequent murders were a part of a joint criminal enterprise, and that Krstic participated in that enterprise.[79] It was unnecessary to establish that he was actually aware other criminal acts were being committed, so the appeal against the second conviction was dismissed.[80]

Regarding the genocide conviction based on the theory of command responsibility, the Appeals Chamber reviewed the evidence relied upon by the Trial Chamber to establish intent to commit genocide and concluded the Trial Chamber's assertion was without a proper evidentiary basis— it established only that "Krstic was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings."[81] The Appeals Chamber emphasized that convictions for genocide can be entered only where intent has been unequivocally established, and knowledge alone could not support such an inference.[82] The Court then reassessed what level of responsibility the evidence did establish, and determined it

[78] *Prosecutor v. Krstic*, *supra note* 52 [reproduced in accompanying Notebook 4 at Tab 25].

[79] *Id.*, para. 149-50.

[80] *Id*., para. 150-51.

[81] *Id*.

[82] *Id*.

was accurately characterized under Article 7(1) as that of an aider and abettor of genocide, not as a perpetrator in a joint criminal enterprise.[83] As a result, command responsibility has never again been used as liability within a charge of genocide.

Ultimately, JCE3 and command responsibility differ in many ways. All three categories of JCE require a "positive act or contribution to the enterprise." However, command responsibility requires less – only that a superior made an omission, either to prevent or to punish.[84] Command responsibility also requires a kind of vertical or hierarchical relationship between those involved, while JCE typically involves a horizontal relationship between co-perpetrators. Therefore, despite the Krstic and Kvocka approach of having the charge of JCE absorb in some way the charge of command responsibility, JCE is not the same as command responsibility and the two terms or charges cannot be used interchangeably.

D. Regardless of whether the IHT decides to apply JCE3, command responsibility, or both, commanders of armed forces are not subject to war crimes charges for their rolesin pursuing a war unless by omission they fail to prevent or punish the crimes of their subordinates or unless they opt to participate in a common criminal plan

Pursuing war is not in and of itself a war crime. The Geneva Conventions were created in order to define the rules of war. Only when these war time regulations are not adhered to, does the act of war become criminal. A commander need not worry that simply by participating in a war, he is guilty of war crimes. He is still protected by the requirements of the doctrine of command responsibility. He need be concerned only if he has entered into a common criminal

[83] *Id.*, para. 138.

[84] Ambos, Kai, *Joint Criminal Enterprise and Command Responsibility supra note* 5 [reproduced in accompanying Notebook 5 at Tab 43].

plan. A commander who adheres to the laws of war need not fear the theory of JCE3. Each commander is expected to enforce the laws of war as a vital aspect of his "effective control" over his subordinates. The position of being a high ranking member of the armed forces is in no way a crime in and of itself.

If a commander does not prevent or punish crimes of his subordinates, including but not limited to rape of civilians, the commander could be prosecuted under command responsibility. However, JCE3 would not apply in that situation because JCE "culpability implies personal conduct which finds expression in individual contributions to the enterprise…."[85]

The case of Prosecutor v. Krstic illustrated the ways in which both command responsibility and joint criminal enterprise can apply to the crimes of one man. Both modes of liability might be applicable but they are in fact not interchangeable. Commanders need not fear that JCE3 makes them strictly liable for all crimes committed during war. As the Appeals Chamber for the ICTY clearly pointed out, each mode of liability has different requirements which a prosecutor must prove in order for the charge to be successful.

V. CONCLUSION

Despite the fact that the Statute of the Iraqi High Tribunal seems to exclude the use of joint criminal enterprise 3 as a mode of liability, the IHT may still be able to successfully prosecute defendants on this theory under customary international law. In any case, the theories of command responsibility and joint criminal enterprise are tools for prosecuting individuals who are guilty of crimes, by participation or omission. Prosecutor v. Krstic illustrated the co-

[85] *Id.*

existence of these two theories and the ways in which they differ in the international criminal legal system.

The IHT has choices to make about how to proceed, based purely on their Statute or more along the lines of ICTY jurisprudence. Their decision will affect their indictments but not the liability, or lack thereof, for commanders of the armed forces. War is itself not a crime. Only when a commander fails to lead or when he engages in a common criminal plan does he fall within the confines of command responsibility or joint criminal enterprise.The IHT would be well advised to follow the jurisprudence of the ICTY and its use of JCE3, implicit in the statute. Consistency among the international courts will afford the IHT the strongest of indictments against war criminals. Based on the precedent of Krstic, JCE and command responsibility are separate theories of liability, with different requirements. This case, as well as others, illustrates the fact that in order for a commander to be found guilty of war crimes under JCE3, he must have participated in a common criminal plan from the outset.