Juxtaposition between the Theory of Joint Criminal Enterprise (JCE) and the Theory of Command/Superior Responsibility under International Law

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Abstract

The recognition of the principle of individual responsibility for crime under international law has made it possibl e to prosecute and punish individuals for serious violations of international law. The legal doctrines or theories u sed by the international courts or tribunals have however depended on the facts and circumstances of each case. This paper is a desk-based research; it relied on both primary and secondary sources which were subjected to c ontent and contextual analysis. This paper holistically examined the expansive theories of Joint Criminal Enterpri se (JCE) as well as Command or Superior Responsibility. It appraised the legal basis, prospects as well as the rat ionale for these theories It also examined the future of these theories, identified some challenges and offered some recommendations.

Keywords: Theories, Individual, Joint Criminal Enterprise, Superior Responsibility, Codification, Application, R ationale, Recommendations.

1.0 Introduction

International criminal law enjoys an array of liability theories with which to prosecute individuals who commit i nternational crimes. The question of individual criminal responsibility has been expanded by developments in the international criminal law arena where open-ended use of theories as Joint Criminal Enterprise (JCE) and Comma nd (Superior) Responsibility seem to be taking centre stage. The concept of individual criminal responsibility, hen ce, goes well beyond the minimum meaning of which the legal literature had confined it. Traditionally, the difficu lty in attributing criminal behavior to individuals derives from the fact that classical criminal law categories are bu ilt on a 'mononuclear' paradigm (one author, one fact, one victim). Such categories, therefore, seem largely inappl icable to macro-criminality. Oversimplifying, one could say that "individual" criminal responsibility as a principle is inadequate for explaining 'collective' criminality. The thinking behind the two theories of JCE and Command Responsibility is that those who contribute to the commission of atrocities without playing cognizably direct role s should in some fashion be held to account for their crimes[1]. The presumption is that individuals who plan, financ e, or otherwise sanction atrocities at the very highest level would normally strive to cover up their tracks and unle ss their responsibility is gauged by more indirect lenses, they are likely to escape prosecution. The argument seem s to be that international criminal justice will be an exercise in futility if planners and financiers of atrocities were to escape justice simply for lack of direct evidence to implicate them, yet this group ultimately bear the greatest re sponsibility for many of the crimes[2].

[1] Manacorda,S. op. cit. p.913; Than ,C.D & Short,E. (2003) International Criminal Law and Human Rights, (London: Swee t & Maxwell), p.7

[2] See for instance Danner and Martinez who argued that in chaotic conditions in which war time violations occur and due to the post war dislocation experienced by many victims, it is often very difficult to locate specific evidence proving that def

Be that as it may, these theories represent, in more than one way, a departure from conventional individual crimin al responsibility as we have hitherto understood it. In their most extended application, the two theories personify a rguably the most radical paradigm shift in criminal liability analysis. The theories focus on the collective as oppos ed to the individual as the target of individual criminal responsibility and tend to attribute criminal responsibility t o an individual for crimes committed by others[3]. Fundamental questions, therefore, arises as to whether a guilty m ind is any longer the basis for apportioning criminal liability[4].

2.0.Joint Criminal Enterprise (Jce) and the Legal Basis.

The Special Rapporteur of the International Law Commission charged with drafting the Code of Crimes against th e Peace and Security of Mankind, Doudon Thiam, described the law of complicity (JCE) as a drama of great com plexity and intensity[5]. The responsibility of accomplices was recognized in the Statute of the International Militar y Tribunal only in a general way,[6] thus: Leaders, organizers, instigators and accomplices participating in the form ulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan[7]. However, the Nuremberg Tribunal seems to have given its Charter a liberal interpretation informed by general principles of law. According to the United States Military Tribunal, This is but an application of general concept of criminal law. The person who persuades another to com mit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pul ls the trigger are all principals or accessories to the crime[8] Many of those convicted at Nuremberg were held respo nsible as accomplices rather than as principals[9]. A provision in Control Council Law (CCL) No. 10, which was us ed for the domestic prosecution of war criminals in post-war Germany, established criminal liability of an individ ual who was an accessory to the crime, took a consenting part therein, was connected with plans or enterprises inv olving its commission, or was a member of any organization or group connected with the commission of any such crime[10]. The concept of JCE or complicity is also recognized in the Convention on the Prevention and Punishmen t of the Crime of Genocide[11], the Convention against Torture and other Cruel, Inhuman or Degrading Treatment o r Punishment[12]. And the International Convention on the Suppression and Punishment of the Crime of Apartheid[13]

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endants have committed particular crimes, Joint Criminal enterprise helps secure convictions when such proof may be lac king. Danner and Martiriez, op.cit. p. 546; Ogetto,K. ; op.cit. 12

[3] This is the point the Appeal Chambers made in Prosecution V Tadic (Case No. IT – 94 – 1 – A),Judgment of ICTY, 15 Jul y 1999, Para 191. When it held that "To hold liable as a perpetrator only the person who materially performs the criminal act would disregard the role of co-perpetrators and all those who in some way made it possible for the perpetrators physic ally to carry out that criminal act. At the same time depending on the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of the criminal responsibility".

[4] Ogetto,K. op. cit. p. 13; Kelsen,(1943) 'Collective and Individual Responsibility in International Law with particular regar d to the Punishment of War Criminals", 31Cal. L. Rev. 530

[5] Ibid. Regarding the extended form of JCE for instance, the hypothetical example is given of three individuals A, B and C officials of a state who agree to conduct a widespread and systematic campaign to exterminate all those opposed to their g overnment policies. In carrying out this agreement, C further intends to conduct this campaign in order to destroy, in whol e or in part a religious group which also opposed the state's policies. Although A and B have no intent to commit genocid e, they may be found to have committed the same too. It was a natural and foreseeable consequence of the execution of th e initial plan. Thus, the extended form of JCE serves to impose criminal responsibility for crimes carried out by others eve n if the former lacks the mens - rea required for the crime.

[6] Eight Report on the Draft Code of Crimes against the Peace and Security of Mankind, by Doudou Thiam, Special Rapport eur, UNDOC A/CN.4/430 and Add. 1, Para 38, p -32. See generally, Joint Criminal Enterprise- Uni Study Guide (2012) a vailable @ www.unistudyguide.com/.../joint ... assessed 17th January,2017.

[7] Schabas, W.A.(2001) 'Enforcing International Humanitarian Law: Catching the Accomplices', Vol.83,No.842,IRRC, p. 439-459.

[8] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Chart er of the International Military Tribunal (IMT) at Nuremberg, 1951, 82 UNTS 279, Article 6.

[9] United States of America v Alstotter et al ("Justice Trial"), 1948, 6 L.R.T.W.C 1, p. 62.

[10] Formulation of Nuremberg Principles Report by Spiropoulous, J. Special Rapporteur, UN Doc. A/CN.4/22, Para 43; In Pr osecutor v Tadic (supra) p. 674 the Trial Chamber noted that the Post-Second World War judgments generally failed to di scuss in detail the criteria upon which guilt was determined.

[11] Article 11.2 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Humanity, Crim es Against Peace, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 194 6, pp 50-55, Article 11.2

[12] Article 111 (e) Convention on the Prevention and Punishment of Crime of Genocide1948.

. Also, Article 2 (3) (c) of the International Convention for the Suppression of Terrorist Bombing adopted via UN Security Council Resolution 52/164 of December 1997 uphold JCE.

The statutes of the adhoc tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra-Leone and the Rome Statute of the International Criminal Court contain general provisions on Complicity or JCE applicable to all the offences over which the Courts and tribunals have subject matter jurisdiction[14].Article 7(1) of the ICTY statute and Article 6 (1) of the ICTR statute provide for five forms or models of "direct responsibility"[15] in the foll owing terms: A person who planned, instigated, ordered, committed or otherwise aided or abated in the planning, preparation, or execution of a crime….. shall be individually responsible for the crime[16]. On its face, this provisio n encompasses five kinds of liability[17]: two principal and three accessories. A defendant can be found guilty if he committed[18] a crime. He may also be liable if he "planned"[19] a crime; whether by himself or with others. Under eit her of these provisions, the defendant must either intend to plan or intend to commit the crime or be aware of the s ubstantial likelihood that a criminal act or omission would occur as a consequence of his conduct[20]. An individual can also be liable for a crime based on his interaction with others: he can "instigate"[21], "order"[22], or "aid and abet" [23] the commission of a crime by another.

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[13] Article 4(1) Convention against Torture and other Cruel Inhuman and Degrading Treatment or Punishment of 10 Decemb er, 1984.

[14] Article 111 International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973.

[15] Article 7 of the Statute of the ICTY 1993; Article 6 Statute of the ICTR; Article 25 of the Rome Statute of the ICC 2002.

[16] In the jurisprudence of the Tribunals, these five forms of liability are usually referred to as "direct responsibility", to distin guish them from command responsibility (or superior responsibility). See e.g. Prosecutor v Delalic, Judgment, case No IT – 96-21-T (Nov. 16, 1998) at 12, (Contrasting "direct" responsibility with "superior" responsibility); Prosecutor v Mucic, Judgment on Sentence Appeal, case No. IT – 96 – A bis (Apr. 8, 2003) at 34.

[17] Article 7 (I) ICTY Statute; Article 6 (1) ICTR Statute.

[18] Danner & Martinez, op. cit. (n.6) p. 22.

[19] Ibid. The actus-reus required for committing a crime is that the accused participated physically or otherwise directly, in th e material elements of a crime under the Tribunal's statute, through positive act or omission. The head of liability of com mitting covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law. Proof is fu rther required that the accused acted in the awareness of the substantial likelihood that a criminal act or omission would oc cur as a consequence of his conduct. See Prosecutor v Tadic, IT – 94 – 1, Appeal Chamber Judgment, 15 July 1999,(Tadi c Appeal Judgment) , Para. 188; Kvoska Trial Judgment, Para. 250 and 251, Prosecutor v Mucic et al; IT-96-21, Trial jud gment, 16 November, 1998, (Celebici Trial Judgment), para. 327.

[20] Planning implies that one or several persons contemplate, designing the commission of a crime at both the preparatory an d execution phases. Moreover, it needs to be established that the accused, directly or indirectly, intended the crime in ques tion to be committed. Where an accused is found guilty of having committed a crime, he or she cannot at the same time ho wever be convicted of having planned the same crime. Involvement in planning may however be considered an aggraving factor. See Prosecutor v Akayesu, ICTR-96-4-T, Trial Judgment , 2 September, 1999, (Akayesu Trial Judgment), para. 48 0, reiterated in Prosecutor V Krstic, IT-95-14, Trial Judgment, 3 March 2000, para 279; in Prosecutor v Kordic et al, IT-9 5-14/2, Trial Judgment,26 February 2001, para. 386 and in Prosecutor v Naletilic et al, IT-98-34, Trial Judgment, 31 Mar ch, 2003, Para.59.

[21] Prosecutor v Kvoska, Judgment ICTY trial Chamber, Case No. IT-98-30/I-T, 251 (2 November, 2001).

[22] Instigating means prompting another to commit an offence. Both an acts and omissions may constitute instigating, which c overs express as well as implied conduct. It is sufficient to prove that the instigation was a factor clearly contributing to th e conduct of other persons committing the crime in question. See Akayesu Trial Judgment, Para.482; Blaskic Trial. Trial J udgment part. 280; Kordic Trial Judgment, Para. 387. Prosecutor v Gulic, IT-(98-29, Trial Judgment, 5 December, 2003, (Gulic trial Judgment), Para. 168.

[23] Responsibility for ordering requires proof that a person in a position of authority uses that authority to instruct another to commit an offence. It is not necessary to demonstrate the existence of a formal superior-subordinate relationship between the accused and the perpetrator, it is sufficient that the accused possessed the authority to order the commission of an offe nce and that that authority can be reasonably implied. The order does not need to be given in any particular form, nor does it have to be given by the person in a position of authority directly to the person committing the offence. The person order ing must have the required mens-rea for the crime with which he or she is charged, he or she must also be aware of the su bstantial likelihood that the crime committed would be the consequence of the execution or implementation of the order. S

These forms of liability are accessorial, in that they rely on someone other than the defendant to commit a crime a nd thus incur liability both to the principal (the person physically committing the crime) and to the accessory (the defendant)[24] The Statute of the International Criminal Court, adopted by a Diplomatic Conference in Rome on 17 July, 1998 ("The Rome Statute"), upholds the doctrine of Complicity/JCE in Article 25 particularly paragraph 3 (a) – (e) which read as follows:

1. The Court shall have jurisdiction over natural persons pursuant to this statute.
2. A person who commits a crime within the jurisdiction of the court shall be individually responsible and liable for punishment in accordance with this statute.
3. In accordance with this statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

a. commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
b. orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
c. for the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
d. in 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 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
ii. be made in the knowledge of the intention of the group to commit the crime; in respect of the crime of genoc ide directly and publicly incites others to commit genocide[25].

2.1. Categories of Joint Criminal Enterprise Cases.

There are three district categories of JCE liability[26] The first category of JCE consists of cases where all co-defend ants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a p lan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carr ies out a different role within it), they nevertheless all possess the intent to kill. The objective and subjective prere quisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (1) The accused must voluntarily participate in one aspect of the common design, (for insta nce, by inflicting non-fatal violence upon the victim, or by providing material assistance or to facilitate the activiti es of his co-perpetrators); and (II) The accused, even if not personally effecting the killing, must nevertheless inte nd this result[27].

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ee generally Akayesu Trial Judgment, Para. 483, Blaskic Trial Judgment, Paras 281 – 282; Prosecutor v Blaskic, IT-95-1 4, Appeal Judgment, 29 July 2004, (Blaskic Appeal Judgment, Paras 41-42).

[24] An accused will incur individual criminal liability for aiding and abetting a crime where it is demonstrated that the accuse d carried out an act that consisted of practical assistance, encouragement or moral support to the principal offender of the crime. The assistance may consist of an act or omission, and it may occur before, during or after the act of the principal of fender. An individual's position of superior authority does not suffice to conclude from his mere presence at the scene of t he crime that he encouraged or supported the crime. However, the presence of a superior can be perceived as an important indicium of encouragement or support.

[25] See Prosecutor v Kordic Judgment, Case No IT-95-14/2-T, 373 (February 26, 2001) where it was noted that the various f orms of participation listed in Article 7 (1) ICTY and ICTR Statutes may be divided between principal perpetrators and ac complices.

[26] As the ICC has not yet ruled on the content of the modes of liability, the following would suffice as mere academic interpr etation of the relevant provisions: Committing whether alone or jointly; instigating – ordering, soliciting, inducing; Aiding , abetting or otherwise assisting (Article 23 (c)); Conspiracy (Article 23 (d)) , Incitement to genocide (Article 23 (e).

[27] Gallmetzer,R. and M. Klamberg, M.'Individual Responsibility for Crimes Under International Law: The UN Ad-hoc Trib unals and the International Criminal Court' being article based on a lecture delivered at the Summer School of the Grotius Centre for International Legal Studies, held in The Hague on 5th July. 2005, pp.1-77, See also Tadic Appeal Judgment Par a. 220;Jasmina, P.O. 'Joint Criminal Enterprise: A New Form of Individual Criminal Responsibility', (Unpublished) 1-15; Danner & Martinez, op. cit; Laughland, J.'Conspiracy, Joint Criminal Enterprise and Command Responsibility in Internat ional Criminal Law', in The Hague, 14 November, 2009, pp. 1-9;Dershowitz,A. 'Brief History of Joint Criminal Enterpris e on Behalf of Momcilo Krajisnik', ICTY Prosecutor v Momcilo Krajisnik, 4 April 2004; Neressian,D.I. 'Whoops! I Com mitted Genocide: The Anomaly of Constructive Liability for Serious International Crimes', in Fletcher Forum of World A

The Second Category of JCE is called "Concentration Camp" cases. This is in many respects similar to the above. The notion of common purpose applied to instances where the offences charged were alleged to have been comm itted by members of military or administrative units such as those running concentration camps; i.e. by groups of persons acting pursuant to a concerted plan[28]. The third category of JCE concerns cases involving common purpos e (common design) where one of the perpetrators commits an act which, while outside the common design, is nev ertheless a natural and foreseeable consequence of the implementation of that common purpose[29].

With regard to the third category of cases, it is appropriate to apply the notion of "common purpose only where th e following requirements concerning menstrual are fulfilled: (1) the intention to take part in a joint criminal enterp rise and to further individually and jointly – the criminal purposes of the enterprise; and (II) the foreseability of th e possible commission by other members of the group of offences that do not constitute the object of the common criminal enterprises[30].

2.2. Elements of Joint Criminal Enterprise (Jce)

The *actus-reus* of JCE comprises the simultaneous existence of three elements which the prosecution must prove [31]. They are:

(I) A plurality of persons. They need not be organized in a military, political or administrative structure[32].

ii. The existence of a common plan, design, or purpose means agreement between two or more persons to commit a crime which is provided for in the statute[33]. There is no necessity for this plan, design or purpose to have been previously arranged or formulated, but may materialized extemporaneously and may be inferred from the fact that a plurality of persons act in union to put the plan into effect[34]. In addition, the common plan need not be expressed and may be inferred from all the circumstances[35].

(I) Participation of the accused in the common design. In order to incur criminal liability, the accused is required to take action in contribution to the implementation of the common plan.

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ffairs (Summer 2006); 'Rourke, A.O.(2006)'Joint Criminal Enterprise and Brdhjanin: Misguided Over Correction' Vol.47 ,No.1, Harvard Int'l L. Rev; Wilt,H.V.D. (2007) 'Joint Criminal Enterprise: Possibilities and Limitations', J. Int'l Crim. Just. 91.

[28] Gallmatzer & Klamber (2013) op. cit. p. 64. Joint Criminal Enterprise - Legal Aid NSW available@www.legalaid.nsw.gov.au/.../joint-crimin... Assessed 29th January,2013.

[29] This category is really a variant of the first category. Cases illustrative of this are the Dachau Concentration Camp case, d ecided by a United States Court sitting in Germany and the Belsen Case, decided by a British Military Court sitting in Ger many. In these cases the accused held some positions of authority within the hierarchy of the concentration camp. Generally speaking, the charges against them were that they had acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes. In his summing up in the Belsen case, the Judge Advocate adopted the three re quirements identified by the prosecution as necessary to establish guilt in each case: (1) the existence of an organized syst em to ill-treat the detainees and commit the various crimes alleged; (II) the accused's awareness of the nature of the syste m; and (III) the fact that the accused in some way actively participated in enforcing the system. The convictions of several of the accused appear to have been based explicitly upon these criteria. See Jasmina,P.O. op. cit. 1- 15.

[30] Ogetto, K. op. cit, p.14;

[31] In Tadic the Trial Chamber had found that Tadic's participation in attacks at two different cities was part of a policy to rid the region of non-Serb population by committing inhumane and violent acts against them in order to achieve the creation of a greater Serbia. Five men were killed at one of the cities after Tadic and his group of attackers had left. Nothing as to t he circumstances of their death was known. The Trial Chamber found that there was no proof beyond reasonable doubt th at the Appellant Tadic had any part in the killing of the five men. The Appeals Chambers overruled the Trial Chambers ho lding that "in the light of the facts found by the Chambers, the Appeals Chambers hold that in relation to the possibility th at another group killed the five men, the trial chamber misapplied the test of proof beyond reasonable doubt. On the facts f ound, the only reasonable conclusion the trial Court could have drawn is that the armed group to which the appellant belo nged killed the five men". Para 183.

[32] Jasmina, P.O. op. cit. p. 5; Gallmetzer & Klamberg, op. cit. p. 65

[33] Tadic Appeal Judgment, para. 227

[34] Vasiljevic Appeal Judgment, paras 97 – 99; Prosecutor v Krnojelac IT-97-25-A, Trial judgment, 15 March, 2002, paras 8 0-82

[35] Tadic Appeal Judgment, para. 227

Responsibility for participation in JCE does not arise by mere membership. Participants in a JCE may contri bute to the common plan in a variety of roles. Participation includes both direct and indirect participation[36]. Unlike the *actus-reus,* the *mens-rea* differs according to the category of JCE applied:

(I) The first category of cases requires the intent to perpetrate a specific crime this intent being shared by all the co-perpetrators[37].

(II) For the second category "concentration camp case" which is a variant of the first, the accused must have personal knowledge of the system of ill-treatment (whether proven by express testimony or inferred from the accused's position of authority) as well as the intent to further this concerted system of ill-treatment[38]

(III) The third category of JCE requires the intent to participate in and further the criminal activity or the criminal purpose of a group. In addition, responsibility for a crime other than the one agreed upon in the common plan arise only if in the circumstances of the case; (a) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (b)the accused willingly took that risk[39]. The first (foreseeable) is an objective element of the crime, and does not depend on the state of mind of the accused, while the second (willingly) is the subjective state of the accused which the prosecution must establish.

2.3. Distinction between Acting in Jce and Aiding & Abetting[40]

In practice, aiding and abetting might be easily confused with JCE, thus, it is important to bear in mind the key dif ferences between them. The aider and abettor is always an accessory to a crime perpetrated by another person call ed principal. Under JCE liability each participant in JCE is a principal perpetrator himself[41]. The case of aiding an d abetting requires no proof of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required. Indeed, the principal may not even know about the accomplices' contribut ion. By contrast to the JCE, the existence of a common plan, design or purpose is considered to be *sine-qua-non.*T he aiders and abettors carry out acts specifically directed to assist, encourage, or lend moral support to the perpetr ation of a certain specific crime (e.g. murder, rape, torture etc), and this support has a substantial effect on the per petration of the crime. By contrast, in the case of JCE, it is sufficient for participants to perform acts that some wa y are directed toward the furtherance of the common plan or purpose[42]. Also, in the case of aiding and abetting, th e requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of JCE, more is required, (i.e. either intent to perpetrate t he crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal com mon purpose were likely to be committed)[43].Finally, it is interesting to underline when an aider or abettor, become s a co-perpetrator. The Trial Chamber in *Kvocka case,* held that an aider or abettor, one who assists or facilitates t he criminal enterprise as an accomplice, may become a co-perpetrator, even without physically committing crimes , if their participation lasts for an extensive period or becomes more directly involved in maintaining the functioni ng of the enterprise. By sharing the intent of the JCE, the aider and abettor becomes a co-perpetrator[44]. Furthermor e, when an accused participates in a crime that advances the goals of the criminal enterprise, it is often reasonable to hold that her form of involvement in the enterprise has graduated to that of a co-perpetrator[45].Finally, once the e vidence indicates that a person who substantially assists the enterprise shares the goals of the enterprise, he becom es a co-perpetrator.

2.4. Application of Jce at the Special Court for Sierra-LEONE (S.C.S.L)[46]

In the RUF trial of the SCSL the accused were charged for various crimes under the JCE liability. The prosecutio n had alleged that the RUF including the accused shared a common plan, purpose or design (JCE) which was to ta ke any action necessary to gain and exercise political power and control over the territory of Sierra-Leone, in parti

[36] Ibid
[37] Ibid para 196
[38] Ibid. para 202 -203
[39] Ibid
[40] Ibid. para 228
[41] Jasmina,op. cit, p. 6
[42] Ibid
[43] Ibid
[44] Ibid
[45] Ibid
[46] Ibid

cular the diamond mining areas[47]. The trial Chamber found that the objective of taking power and controlling the t erritory of Sierra-Leone in and of itself is not criminal and, therefore, does not amount to a common purpose withi n the meaning of the law of JCE[48]. Although, the Chamber concluded that there would be a criminal enterprise wh ere the attainment of the common purpose is through criminal means, the fact that the main objective is not crimin al *perse* ought to have prompted the Chamber to more cautiously approach the accused's alleged responsibility in the JCE. Apparently influenced by the accused's perceived positions of responsibility within the RUF rebel move ment, the Chamber found them liable for every conceivable crime committed throughout the territory of Sierra-Le one over a period of close to one year. This was compounded by the manner in which the indictment was pleaded. JCE was pleaded in two broad paragraphs to the effect that the accused were liable for killings, abductions, force d labour etc which were either within the JCE or were a reasonably foreseeable consequence of JCE[49]

The indictment jointly charged three accused with identical conduct without any attempt to specify the particular c ontribution that the three by their acts or omissions were individually criminally liable pursuant to Article 6 (1) of statute of SCSL incorporating JCE. In all, JCE is a clause for the extension of criminal categorization of offences i mplicating a plurality of agents[50]. The lack of direct evidence against those who are deemed to have participated i n planning large scale crimes may be a potential justification for the application of JCE[51]

2.5. The Future of Joint Criminal Enterprise (Jce)

JCE, however, though a relatively new international law norm, has potentially already assumed the status of custo mary international law through its adoption in every modern international tribunal in the past decade. In any case, JCE, as a continually evolving (and solidifying) international law concept is ripe for a more searching judicial revi ew. JCE, by incorporating the third level of liability for unplanned but "foreseeable" crimes represents an expansi ve reach of legal liability.

3.0.Command Or Superior Responsibility

The idea that international law imposes special duties on an individual by virtue of his or her superior position to prevent the commission of crimes has a long history.

As early as the 15th century, King Charles VII of Orlean decreed that his military commanders were to be held lia ble should those under their command commit crimes against the civilian population, irrespective of the command er's participation in the crimes [52]. In an effort to control the behaviour of armies in the field, in the early 1860s the

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47 Ogetto,K. op. cit. 14-18

48 See case No SCSL – 2004 – 15 – PT Prosecutor v Issa Sesay et. al corrected and amended Indictment paras 36-37

49 See Prosecutor v Sesay et al SCSL – 2004 – 15 – T, Trial Judgment 2 March 2009, para. 1979. In an earlier decision by Tr ial Chambers two of the SCSL, had ruled and dismissed the JCE charge on a similar indictment arguing that the common objective pleaded "that of taking any actions necessary to gain and exercise political control over the territory of Sierra Le one was not inherently criminal – See Prosecutor V Brima et al SCSL – 2004 16 –T, Trial Chamber Judgment 20 June, 20 07 Paras 56 – 58. This holding was however overruled and overturned by the Appeal Chambers which stated that "the req uirement that the common design or purpose of a JCE is inherently criminal means that it must either have as its objective a crime within the statute or contemplates crimes within the statute as the means of achieving its objective. Prosecutor V Brima et al Appeals Chambers Judgment, 22 February, 2008, para. 80. It should be noted that the position at the SCSL is markedly different from that at the ICTY and ICTR, for instance, where indictments have largely charged common purpos es that amount to crimes within the statute of the ICTY. At the SCSL the common purpose is not criminal perse but the m eans used to attain that purpose. Other indictments from SCSL of participation in a Joint Criminal Enterprises to exercise control over Sierra-Leone include: Prosecutor V Fodah Saybana Sankoh, Case No: SCSL – 2003 – 02; Prosecutor V John Paul Koroma, Case No. SCSL – 2003 – 03; Prosecutor V Sam Backarie indictment case No SCSL – 2003 – 04; Prosecuto r V Augustine Gbao, Indictment case No. SCSL-2003-09; Prosecutor v Brima Bazzy Kamara, Indictment, Case No. SCSL -2003-10; Prosecutor V Moinina Fofana, indictment case No. SCSL-2003-11; Prosecutor V Allieu Kondewa indictiment Case No. SCSL-2003-12; Prosecutor V Santigie Borbor Kanu indictment case No SCSL-2003-13; Prosecutor V Sam Hin ga Norman indictment Case No. SCSL-2008-08 etc.

50 Prosecutor V Brima (Supra). Para. 37

51 Manacorda, S.(2007)'The Principle of Individual Criminal Responsibility: A Conceptual Framework', 5 J. Int'l Crim. Jus t. 914

52 Sanders, A.(2010)'New Frontiers in the ATS: Conspiracy and JCE After Sosa', Vol.28:2, Berkeley J. Int'l L., pp – 1-21; Sosa v Alvarez Machian,(2004) 542 U.S. 692. It should be noted that JCE, Complicity and Conspiracy are often used inter

U.S. government worked with Alfred Leiber, a Professor at Columbia University, to codify the rules governing w arfare. The United States adopted the results, a document known as the Lieber Code in 1862, at the outset of the C ivil War. The Lieber Code represents one of the foremost attempts in the history of the modern nation state to codi fy the conduct of armies[53]. This theory begins with a historical survey of command responsibility, from military o rigin, to attribution of responsibility to superiors who failed to prevent or punish crimes committed by their subor dinates. As a concept, it is broader than being just applicable in a military context, as it also extends to political an d civilian superiors[54]. Command responsibility, sometimes referred to as the Yamashita Standard or the Medina St andard, is the doctrine of hierarchical accountability in cases of war crimes[55].

The trial of Peter Von Hagenbach by an ad-hoc tribunal of the Holy Roman Empire in 1474, was the very first "in ternational" recognition of Commander's obligation to act lawfully[56]. Hagenbach was put on trial for atrocities co mmitted during the occupation of Braisach, found guilty of war crimes and beheaded[57]. He was convicted for crim es "he as a knight had a duty to prevent". Hagenbach defended himself by arguing that he was following superior orders from the Duke of Burgundy, Charles the Bold, to whom the Holy Roman Empire had given Braisach. Desp ite the fact that there was no explicit use of the doctrine of "command responsibility" it is seen as the first trial bas ed on this principle[58].

The doctrine of command responsibility was established by the Hague Conventions IV (1907), and X (1907) and applied by the German Supreme Court in Leipzig after World War 1 in the trial of Emil Muller[59].The "Yamashita Standard" is based upon the precedent set by the United States Supreme Court in the case of Japanese General To moyuki Yamashita. He was prosecuted in a still controversial trial for atrocities committed by troops under his co mmand in the Philippines. Yamashita was charged with "unlawfully disregarding and failing to discharge his duty as a Commander to control the acts of members of his command by permitting them to commit war crimes[60]. The "Medina Standard" is based on the prosecution of US Army Captain Ernest Medina in connection with the MyLa i Massacre during the Vietnam War[61]. It held that a commanding officer, being aware of a human rights violation or a war crime, will be held criminally liable when he does not take action. Medina was however acquitted of all t he charges. Also, the relationship between command ability and criminal responsibility came to the fore in a Britis h Military Court in Singapore in 1946 that convicted a Japanese Lt. Col. Hirateru Banmo and six others for deaths of 3,097 British and Australian prisoners of war. Banmo was handed a sentence of three years. Banmo's case too k place a year after the precedent setting trial of General Tomoyuki Yamashita, which appeared to hold command ers to a strict liability for war crimes committed by their subordinates[62]. Command responsibility doctrine allows military and civilian leaders to be held liable for the criminal act of their subordinates.

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changeably by Courts, thus blurring the lines that distinguish them. See Presbyterian Church of Sudan v Talisman Energy Inc., 582 F. 3d 244, 260, (2d Cir 2009). See also Cassesse, A.(2007)'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise' 5 J. Int'l Crim. Just 109, 110; Danner, A.M. (2003) 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', 97 Am.J. Int'l L. 510, 518-522

53 Greppi, E. op.cit, pp. 1-14;Mahle,A.E. (1999) 'Command Responsibility – An International Focus', International Human Right Law Clinic at the University of California, Berkeley; Luban,D.(1999) 'Contrived Ignorance', 87 Geo. L.J, 957, 960.

54 See also Abegunde, B. & Filani,A.O.E.(2010) 'Military Acculturation and War Crimes: Superior Responsibility and the D efence of Superior Order in International Law', 1 EBSUJ. Int'l L.& Jur. Rev. 204 - 210

55 . Ogetto,K. op. cit pp. 18-23. However, some opinions have suggested that omission of a commander may also give rise to aiding and abetting liability under Article 7 (1) of the Statute of the ICTY. See Prosecutor v Kordic, Trial Judgment supra. Para 169, where it was held that "where an omission of an accused in a position of superior authority contribute by encou raging the perpetrators to the commission of a crime by a subordinate, the conduct of the superior may constitute a basis f or liability under Article 7(1)". See, I. Bantekas, I. (1999) 'The Contemporary Law of Superior Responsibility', 3 Am. .J. Int'l L. ; Rangelor, & Nicic, J. (2004) 'Command Responsibility: The Contemporary Law', Humanitarian Law Centre, Fe bruary, 23. See also the Nigerian Supreme Court case of Nigerian Airforce v Kamaldeen (2007) 32 WRN

56 Danner & Martinez, op. cit;R. Rowland, R. (2004) 'Command, Superior, and Ministerial Responsibility', CBC News Onl ine, 6 May 2004.

57 Greppi, E. op. cit. pp. 1 - 3

58 Schabas, W.A. (2011) Introduction to the International Criminal Court, 3rd ed. (London: Cambridge University Press.)

59 Levine,E. (2005) 'Command Responsibility: The Mens-Rea Requirement', Global Policy Forum. February ed.(2005)

60 I. Bantekas, I. (1999) 'The Contemporary Law of Superior Responsibility' 3 Am. J. Int'l L. 40

61 Ibid; United States V Yamashita (1947) 4 L.R.T.W.C.1 at 5.

62 United States v Captain Ernest L. Medina. available@law.umkc.edu. See also Ernest Medina, available at Wikipedi Free Encyclopedia.

The doctrine encompasses two different forms of liability. The first is "direct" or "active" command responsibility – when the leader takes active steps to bring about the crime by, for example, ordering his subordinates to do som ething unlawful. The second type of command responsibility and one more commonly referred to involves, "indir ect" or passive command responsibility[63] where the commander could be shown to be cognizant of the act, and to have acquiesced in their commission, where acquiesce means the failure to prevent the actions or punish their per petrators.

3.1. Elements of Command Responsibility

The criteria to aid in determining whether an individual may be held responsible for the actions of another person allegedly subordinate to him or her have been judicially outlined,[64] thus: (i) Existence of a superior – subordinate r elationship of effective control (ii) The superior must have knowledge that his or her subordinates are committing or are about to commit crimes (iii) the superiors must have failed to take all the necessary and reasonable measure s within his or her control to prevent or punish or submit the matter to the competent authorities[65].Existence of a s uperior – subordinate relationship is characterized by a formal or informal hierarchical relationship between the su perior and subordinate[66].The authority[67].

A superior with *de-jure* authority (formal authority) who does not have effective control over his subordinate wou ld not incur criminal liability pursuant to superior liability doctrine, whereas, a *de-facto* superior who lacks formal authority (letter of appointment) but has effective control over the perpetrators might incur criminal responsibility [68]. As per the *mens-rea* (mental element) of superior responsibility, it must be established that the superior knew o r had reason to know that the subordinate was about to commit or had committed a crime[69]. Superior responsibilit y is not a form of strict liability, hence, actual knowledge or constructive knowledge must be proved. The third ele ment that superior failed to take necessary and reasonable measures to prevent or punish the crime of his subordin ate must be proved. The measures required of the superior are limited to those within his power, that is, those mea sures that are within his material possibility[70].

3.2. Codification of the Doctrine of Command Responsibility.

The doctrine of command responsibility was recognized by the Hague Conventions (IV) & (X) of 1907. The 1907 Hague Convention No IV bothers on Respecting the Laws and Customs of War on Land[71].While the 1907 Hague Convention X Concerns Bombardment by Naval Forces in Times of War[72]. The doctrine was not employed at Nur emberg Tribunal but was used by the subsequent Military Trials at both Nuremberg under the Allied Control Cou ncil Law No 10 and at the 1948 Tokyo tribunal for the 28 former Japanese leaders. It was also used by the Allied Military Courts for lower level superiors who stood trial and whose judgments were documented by the UN War Crimes Commission[73]. The first international treaty to comprehensively codify command responsibility is the Add itional Protocol 1 of 1977 to the Four Geneva Conventions 1949. Article 86 (2) provides that: The fact that a brea

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63 Rowland,R."Command Ability and Command Responsibility: The Case of Lt. Col. Hirateru Banno and the 'F Force' Tria ls," being a paper presented at the David Lean Centenary Conference at Queen Mary University in London in July 2008. Report on the Conference in the Journal of British Cinema and Television, Nov. 2008, Vol. 5. pp. 391 – 395. DOI. The res ponsibility of a Private Military Company (PMC) personnel as Commanders and Superiors has also been recognized unde r International Law. See Lehnardt,C. (2008), 'Individual Liability of Private Military Personnel under International Law',. 19,E.J.I.L,1015 – 1034.

64 However, some opinions have suggested that the omissions of a commander may give rise to aiding and abetting liability under Article 7(1) of the ICTY statute and other international instruments.

65 Prosecutor v Delalic, Mucic, Delic and Landzc, Judgment in case No IT-96-21-T.T.ch. 16 November 1999 (hereinafter Ce lebici Trial judgment).

66 Article 28 Statute of the ICC 2002.

67 Celebici Appeal judgment para. 303

68 Celebici Appeal Judgment para 193

69 Celebici Appeal judgment Para 197

70 Celebici Appeal judgment Para 293

71 Celebici Trial judgment, Para 395. See generally Article 6 of Draft Code of Crimes Against the Peace and Security of Ma nkind, International Law Commission Report, 1996; See also Gallmetzer & Klamberg, op.cit. Pp 68 -70.

72 Article 43, Hague Convention, No.IV, 1907

73 Article 19, Hague Convention, No. X, 1907.

ch of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from res ponsibility if they knew or had information which should have enabled them to conclude in the circumstances at t he time, that the subordinate was committing or about to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach[74] Article 87 obliges a commander to "prevent and w here necessary to suppress and report to competent authority" any violation of the Convention and Additional Prot ocol 1.Article 86 (2) for the first time made provision which "explicitly addressed the knowledge factor of comma nd responsibility". Article 7(3) and 6 (3) of the Statutes of the ICTY and ICTR respectively provide for command responsibility as follows: The fact that any crime 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 committing an offence or about to commit an offence and failed to take necessary or reasonable measures to prevent or repress the perpetrators[75]. I t is pertinent to mention that a few national systems illustrate rules encapsulating concepts analogous to that of su perior responsibility[76].

3.3. Application of Command/ Superior Responsibility.

Command responsibility has been applied at the ICTY to the following cases: the *Prosecutor v Delalic ("the Cele bici case"), the Prosecutor v Blaskic* where the ICTY imposed a stricter standard of *mens-rea.* The concept of co mmand responsibility has developed significantly in the jurisprudence of the ICTY and the Court dealt extensivel y with the concept in Halilovic judgment of 16 November, 2005 para 22 -100[77]. In the ICTR case of *Prosecutor v Alfred Musema,*[78] an ICTR Trial Chamber found the accused, a civilian Tea Factory manager liable under comma nd responsibility rubric for the crimes committed by workers at the factory during the 1994 genocide.

The Chamber explained the accused's liability as follows: The Chambers said that….Musema exercised *de-jure* a uthority over the employee of Gisoun Tea Factory while they were on the Tea Factory Premises and while they w ere engage in their professional duties as employees of the Tea factory even if those duties were perfomed outside the premises of the factory. The Chamber noted that Musema exercised legal and financial control over these em ployees particularly through his power to appoint and remove these employees from their positions at the Tea Fact ory. The Chambers noted that Musema was in a position, by virtue of these powers to take reasonable measures su ch as removing or threatening to remove an individual from his position at the Tea factory if he or she identified with a perpetrator of crime punishable under the statute….[79] Although, the jurisprudence has established that mere *de-jure* position does not suffice to incur command responsibility, some decisions seem to rely simply on the posi tion and or rank of an accused to establish command responsibility. In the ICTR case of *Prosecutor v Bagosora a nd 3 others*[80], the court found one of the accused responsible for the attack by militia on a church simply because he was the military commander of the area. However, there was no evidence linking the accused to that attack.

The Chamber ruled as follows: There is no direct evidence that Nsengiyumwa gave order to attack Nyundo Parish . Furthering it appears that the attacks were perpetrated only by militia men. The manner in which the attack unfol ded reflects co-ordination. Moreover the repeated nature of the attack as well as its target, a major religious institu tion indicates that it was not merely a sporadic violence. In the Chamber's view, the only reasonable conclusion is that it was an organized operation which must have been sanctioned and ordered by the area's military command er, the accused[81]. On the international level, the doctrine of command responsibility clearly has been extended to c ivilian authorities exercising control over military forces. One of the most prominent examples is Koki Hirota the Prime-Minister and Foreign Affair Minister of Japan during World War II. He was held criminally liable as a com

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74 Turack,D.C. op. cit pp 526 – 527; Y.Shanny,Y & Michaeli, K.R.(2002) 'The Case Against Ariel Sharon: Revisiting the D octrine of Command Responsibility', 34 N.Y.U.J. Int'l L. & Pol. 797.

75 Article 86 (2) of Additional Protocol 1 of 1977 to the Four Geneva Conventions 1949.

76 The foregoing provisions are identically provided for in the Statutes of Special Court for Sierra Leone (Article 6 (3); Spec ial Court for East Timor (Article 16); International Criminal Court (Article 28); ILC Draft Code of the Crime Against the Peace and Security of Mankind 1996 (Article 6).

77 There are provisions in the American, British and German Military Manuals that evolve superior responsibility.

78 See generally "the Celebici Case" (Supra)

79 Prosecution V Alfred Musema case No ICTR-96-13-T Judgment of 27 January 2000.

80 Ibid

81 Prosecutor V Bagosora et al case No ICTR-98-41-T Judgment of December 18, 2008, Para. 1203

mander for the atrocities committed by Japanese military despite his position as a civilian leader[82]. Also, in Febru ary 2001 the ICTY found Dario Kordic, a Bosnian Croat political leader, guilty under the theory of command resp onsibility for grave breach of the Geneva Conventions, crimes against humanity, among other crimes committed b y the Bosnian Croat militia forces operating in central Bosnia. He was sentenced to 25 years imprisonment[83]. In 1 998 at the ICTR the former Prime-Minister of Rwanda, Jean Paul Kambanda, pleaded guilty to six criminal count s including genocide and crimes against humanity. He was sentenced to life jail[84]. The extension of command resp onsibility recognizes the important role civilian officials and politicians play in the commission of atrocities durin g armed conflict. Again, Charles Taylor[85] was charged under Article 6(3) of Statute of SCSL with being individua lly responsible for terrorizing civilian population, unlawful killing, sexual and physical violence, child soldier, ab duction and forced labour, and looting while holding positions of superior responsibility and exercising command and control over subordinate members of the Revolutionary Council (the AFRC), and AFRC/RUF Junta or Allian ce, and or Liberian Fighters[86]. In April 26 2012 the SCSL delivered the historic verdict which convicted Charles T aylor followed by a judgment which sentenced him to 50 years imprisonment for war crimes[87].

In a related development, Hosni Mubarak former President of Egypt got a life jail term from an Egyptian Court fo r complicity in the killing of an estimated 850 people by Egyptian Security Agencies during the "Arab Spring" pr otest that swept Mubarak out of office in 2011[88]. The conviction of Mubarak as an "accessory to murder" because he failed to stop the killings of his people who were demanding justice, fairness and equity showed his failure as Commander-in-Chief of Egyptian Armed Forces to prevent his subordinates from committing or furthering the co mmission of atrocious killings.

Hence, his liability as a failed superior commander[89]. The Abu Ghraib Prison Scandal provides a vivid example of the possible application of command responsibility principles. In April, 2004, photographs beamed around the w orld revealed that US soldiers guarding Iraqi detainees at Abu Ghraib Prison Complex near Baghdad had subjecte d some detainees to degrading treatment. Most legal experts agreed that the conduct depicted in the photographs a mounts to violations of international criminal law.[90] Other report suggests that even more serious abuse – not depi cted in the infamous photographs may have occurred[91]. Assuming that senior US officials did not order the condu ct at issue, have President George Bush, Secretary of Defence Donald Rusmfeld, or any of the military or civilian officers that lie upon the chain of command, incurred liability for their failure to prevent or punish the abuses at A bu Ghraib? Given that the U.S. Army is a normally well – functioning hierarchy, with clear lines of formal author ity (as opposed to the sort of ad-hoc militias found in many conflicts), senior officers will be likely to have had "e ffective control" in a legal sense over soldiers under their *de-jure* command and would not be able to claim that th ey lack effective control in the field[92]. The invasion of Iraq has been widely condemned as criminal and a gross vi olation of International Law. Dave Leinsdorf contends that by ignoring the Geneva Conventions, the US administr ation including President Bush, as Commander-in-Chief, is culpable of war crimes[93]. In addition, former Chief Pr

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82 Ibid. It is the opinion that formulation by the Court clearly demonstrates the difficulties defence counsel faces where a cou rt relies on what appears to be speculation as opposed to evidence establishing proof beyond reasonable doubt.

83 Mahle, A. op. cit. p.2

84 Ibid

85 Prosecutor v Jean Paul Kambanda, judgment and sentence (Kambanda and Trial judgment, Case No: ICTR-97-23)4 Sept. 1998. p. 20

86 Prosecutor v Charles Taylor, (Case No SCSL- 2003 – 01 – PT) 29 May 2007 Paras 33-34

87 Powell,C. & Erasmus,A.(2008) 'General Principles of International Criminal Law', in Plessis M.D. (ed) African Guide to International Criminal Justice,(Pretoria : Institute of Security Studies.),pp 143 - 180

88 Adedayo, A. (2002) 'Taylor's Conviction: Implications and Lessons for Africa', in The Law & You, The Punch, Monday 21 May, 2012, p.72

89 Baiyewu, L. (2012) 'Mubarak get Life Jail for Protesters Death', in Politics on Sunday, The Punch, Sunday 3 June, 2012, p. 11

90 Ibid

91 See, e.g. Leila,N.S.(2004) 'Accused Fall under US and International Laws', St. Louis Post Dispatch, 23 May, 2004, at B5

92 Richard, S. & Miller, G. (2004) 'The Conflict in Iraq: Documents provide New Details of Abuse', L.A.Times 23 May, 20 04, at A (describing alleged homicide of two prisoners).

93 Command responsibility principles also apply as a matter of U.S. Law. See U.S. Army Field Manual No 26-10, Section 5 01 (Dept of the Army), July 18; 1956.

osecutor of the Nuremberg Trials, Benjamin Ferencz has called the invasion of Iraq a "clear breach of law", and a s such it constitutes a war crime[94]. On November 14, 2006, invoking universal jurisdiction, legal proceedings wer e started in Germany against Donald Rumsfeld and others for their alleged involvement in prisoner's abuse[95]. This prompted Donald Rumsfeld to cancel a planned visit to Germany. Lt. Ehren Watada refused to be deployed to Ira q. Watada maintained that the invasion of Iraq was illegal, and as such he claimed he was bound by the "comman d responsibility" to refuse to take part in an illegal war[96].

Louis Moreno-Ocampo told the Sunday Telegram on March 7, 2007 that he was willing to start an inquiry by the International Court of Justice (ICC)and possibly a trial, for war crimes committed in Iraq involving British Prime Minister Tony Blair and American President George W. Bush[97]. Though, under the Rome Statute, the ICC has no jurisdiction over Bush since America is not a state party to the relevant treaty unless Bush were accused of crime i nside a state party, or the UN Security Council (where the USA has a veto) requested an investigation. However, Blair does fall under ICC jurisdiction as Britain is a state party.Nat Hentoff wrote on August 28, 2007, that a leake d report by the International Committee of the Red Cross and the July 27 Report by Human Rights First and Physi cians for Social Responsibility, titled: "Leave No Mark: Enhance Interrogation Techniques and the Risk of Crimi nality," might be used as evidence of American War Crimes if there was a Nuremberg like Trial regarding the Wa r on Terror[98].Shortly before the end of President Bush's second term, news media in other countries started opinin g that under the United Nations Convention Against Torture, the US government is obliged to hold those responsi ble for prisoners abuse (at Abu Ghraib) to account under criminal law[99]. This view was corroborated when United Nations Special Rapporteur on Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, – Prof essor Manfred Nowak on January 28, 2008 remarked on German Television that, following the inauguration of B arrack Obama as new President, George W.

Bush had lost his head of state immunity and under International Law the U.S. could be mandated to start criminal proceedings against all those involved in these violations of the UN Convention Against Torture[100]. Law Professo r Dietmar Herz explained Nowak's comments by saying that under U.S. and International Law former President B ush is criminally responsible for adopting torture as interrogation tool. In June 2012, a Learned Senior Advocate o f Nigeria and President of West African Bar Association-Mr. Femi Falana while applauding the Charles Taylor's conviction said[101]: The Campaign to drag ex-US President, George Bush and ex-British Prime-Minister, Tony Bla ir, before the ICC should be intensified by the global human rights community. They should be tried for crimes ag ainst humanity committed in Iraq on the basis of lies on the imaginary weapons of mass destruction.The principle of command responsibility is applicable in internal armed conflicts as well as international armed conflicts[102]. The Sunday Times in March 2006 and the Sudan Tribune in March 2008, reported, that the UN Panel of experts deter mined that Salah Gosh and Abdel Rahim Mohammed Hussen had "command responsibility" for the atrocities co mmitted by the multiple Sudanese Security Services[103]. For his conduct as President of Zimbabwe, including alleg ations of torture or murder of political opponents, it has been suggested that Robert Mugabe is liable under the do

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[94] Lindorff, D.(2006) 'The Real meaning of the Hamdan Ruling Supreme Court: Bush Administration has committed War Cr imes', Counter Punch, 3 July, 2006, p.10

[95] Frel, J. (2006) 'Could Bush Be Prosecuted for War Crimes,' Alter Net,10 July, 2006, p.16

[96] Zagorin, A. (2006) 'Charges Sought Against Rumsfeld Over Prison Abuse,' Time,14 November, 2006; Democracy Now,(2006) 'War Crimes Suit prepared Against Rumsfeld', 9 November, 2006; Jeremy, B. & Smith,B. (2006)'War Criminals Beware', The Nation,3 November , 2006, 12.

[97] Wadata's deployment was not ordered until after UN Security Council Resolution 1511 of 6 October, 2003, which authori zed a multinational force in Iraq. Wadata was later prosecuted for refusing to be part of an illegal war.

[98] Chamberlain, G. (2007) 'ICC can Envisage Blair Prosecution', Sunday Telegraph,17 March , 2007. Apparently both Tony Blair and George Bush could be charge with command responsibility or JCE liability now that both of them are no longer holding offices as British Prime Minister and American President respectively.

[99] Hentoff, N. (2007) 'History will not Absolve US – Leaked Red Cross Report sets up Bush Team for International War Cri me Trial', Village Voice,28 August, 2007, p.17.

[100] Horton, S. (2009) 'Overseas, Expectations Build for Torture Prosecutions', No Comment,19 January, 2009; It is also av ailable at Wikipedia free encyclopedia.

[101] Xinena, M. (2009) 'UN Torture Investigators Call on Obama to Charge Bush for Guantanamo Abuses', JURIST, 21 Janua ry 2009 ;Horton, S.(2009) 'UN Rapporteur: Initiate Criminal Proceedings against Bush and Rumsfeld Now', No Comme nt, 21 January, 20 09, p.8.

[102] Baiyewu, L.(2012) 'Taylor: Lesson for African Tyrants', The Punch, 3 June, 2012, p. 11

[103] Human Right Watch, 20 December 2005, Vol. 17 (A).

ctrine of command responsibility[104]. Using the doctrine of command responsibility it is the humble view of this wr iter that indeed, the Nigerian Leadership both past and present could be made to account for all the crimes against humanity that have been committed against innocent Nigerians[105]. In July 2012, the new Chief prosecutor of the I CC Mrs. Fatou Bensounda visited Nigerian President at the Aso Rock Presidential Villa, Abuja where she describ ed the attacks by the Islamic fundamentalists Boko Haram as crimes against humanity[106]. Hence, very soon, Niger ians may start appearing before International Criminal Court for prosecution. On 21 March,2016, Trial Chamber 1 11 (TC 111) of the International Criminal Court (ICC) issued an historic judgment in the case of the *Prosecutor v Jean-Pierre Bemba.* Hence, ICC entered its first conviction on command responsibility in the Bemba case. Bemba was found guilty of murder as a war crime and crime against humanity, as well as pillaging as a war crime comm itted in the Cenral African Republic (CAR) between 2002-2003 as President of the Movement for the Libration of Congo (MLC- Mouvement de Libration du Congo)and the Commander-in- Chief of its military branch of 20,000 soldiers.109[107]

3.4. Relationship between Jce and Command Responsibility

JCE and Command responsibility are two important theories in the jurisprudence of individual criminal responsibi lity under International Law. Both theories have been recognized by both Conventional regimes and Customary In ternational Law to the extent that they have both attained the status of a *jus-cogens.* As a practical matter, prosecut ors employ JCE and command responsibility theories when direct proof of a defendant's involvement in particular crimes is lacking. In cases where there is little evidence of a commander's affirmative bad acts, a leader's culpabi lity may be better described under the rubric of command responsibility. For crimes in which there is no indicatio n that an accused played a direct part, command responsibility may capture more accurately the true lynch pin of t he individual's guilt: the violation of a duty, based on his position of authority, to prevent such crimes[108].

The relationship between the two theories of JCE and command responsibility is further explained in the case of *P rosecutor v Radislav Krstic*[109], Krstic was the commander of the "Drina Corps" of the Bosnia Serb Army. The Dri na Corps was formally responsible for the area of Bosnia that included the town of Srebrenica during the massacr e of approximately 7000 Bosnian men and boys in July, 1995[110]. Krstic's role in the Srebrenica killings, however was complicated by the fact that the killings appear to have been orchestrated by General Mladic, the commander of the Bosnian Serb Army, and carried out largely by forces which Krstic did not command, including members o f the military Police. On the basis of the evidence it heard at the Trial, the Trial Chamber convicted Krstic of geno

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[104] Human Rights Watch,(2005)'Entrenching Impunity-Government Responsible for International Crimes in Darfur,' Decem ber 200 5, Volume 17, No. 17 (A); Deirdre, J. (2008) 'Sudan President refuses to turn over War Crime Suspects Wante d by ICC,' JURIS T, June 8, 2008. President Omar al-Bashir of Sudan also has command responsibility for the State sp onsored atrocities going on in Sudan. No wonder, former ICC's Prosecutor Luis Moreno Ocampo charged al-Bashir with genocide and crimes against humanity in Darfur. See International Law Observer 14 July, 2008, p.1-2

[105] Mark,E.(2008)'We can do something about Mugabe, International Bar Association', Times Online, 30 April , 2008.

[106] For instance the mindless killings recorder during the protest against the actualization of June 12 election; the killings duri ng the J anuary 2012 protest against fuel subsidy removal attract command responsibility of the president of Nigeria.

[107] Olalekan Adetayo, (2012) 'Boko Haram attacks Constitute Crimes Against Humanity', The Punch, Wednesday 4 July, 20 12, p. 1 0. It is hoped that the prosecutor will help investigate the masterminds and do the needful in the circumstance.

[108] Prosecutor v Jean –Pierre Bemba, ICC-01/05-01/08-3343, Trial Chamber 111 Judgment of 21 March, 2016; Alexander, S . K. (2 016) ' First Ruling on Command Responsibility before the ICC' Case Matrix Network (CMN),29 March,2016 .

Also, on 4th January 2017 the Hague court (ICC), in Prosecutor v Bosco Ntaganda ,ICC-01/04-02/06 delivered an indept h and unanimous ruling which expanded the definition of war crimes (of rape and sexual slavery) to victims from sam e armed forces as perpetrators.This judgement is apparently an application of the theory of command responsibility to Bo sco Ntaganda (a.k.a Bosco the Terminator). See Bosco Ntaganda –the International Criminal Court , available @ www.ic c-cpi.int/.../ntaganda

[109] Danner & Martinez, op. cit. pp. 63

[110] At trial, General Krstic had argued that he did not assume control of the Drina Corps until 20 July, 1995. The killing in Sc rebrenica occurred in mid July, 1995. The Trial Chamber found that Krstic assumed de-facto command of the Drina corps as of 13 July, 1995. See Prosecutor v Krstic, Trial Judgment, Para. 652, see also Prosecutor v Krstic, IT-98-33, Appeals J udgment, 19 April, 2004, Para. 143.

cide for massacre at Srebrenica under the theory of JCE[111]. The Appeal Chamber overturned the Trial Chambers' factual findings that Kristic intended to participate in a JCE to commit genocide. The Appeal Chamber found that the criminal liability of Krstic is more properly expressed as that of an aider and abettor to genocide and not as a c o-perpetrator[112]. Given the General Krstic's principal fault, in view of the Appeal Chamber, by his failure to take s teps to prevent troops under his command from participating in the genocidal plan hatched by others, command re sponsibility rather than aiding and abetting seems to capture more accurately the basis for the liability described b y the Appeal Chambers[113]. In short, given its decision to reduce both the degree of Krstic's liability and his senten ce from forty-five years to thirty-five years, it is humbly believed that a legal analysis of the relationship between JCE and command responsibility rather than a reversal of the Trial Chamber's factual findings would have better r esponded to the Appeal Chambers concern and would have provided an important signal for prosecutorial strategy in future cases. Hence, the liability of Krstic is more properly expressed as that of an aider and abettor to genocid e and not as a co-perpetrator[114]. Given the General Krstic's principal fault, in view of the Appeal Chamber, by his failure to take steps to prevent troops under his command from participating in the genocidal plan hatched by othe rs, command responsibility rather than aiding and abetting seems to capture more accurately the basis for the liabi lity described by the Appeal Chambers[115]. In short, given its decision to reduce both the degree of Krstic's liabilit y and his sentence from forty-five years to thirty-five years, it is humbly believed that a legal analysis of the relati onship between JCE and command responsibility rather than a reversal of the Trial Chamber's factual findings wo uld have better responded to the Appeal Chambers concern and would have provided an important signal for pros ecutorial strategy in future cases.

3.5. Rationale For and Future of Command Responsibility.

Command responsibility promises the possibility of greater deterrence of future violations. It allows for a focus on senior leaders in a way that accords with the expressive functions of transitional justice, and it poses less of a chal lenge to the culpability principle than does the unchecked JCE doctrine[116]. Command responsibility remains a use ful doctrine that should not be discarded by prosecutors and trial Chambers attracted by the more lenient proof req uirement, or dramatic tenor, of a JCE conviction. In situation where criminal liability arises from a political leader 's failure to prevent or punish violations of International Law rather than from any sort of international plan, JCE cannot be used.

Command responsibility is not based on the theory of true respondent superior or vicarious liability[117]. Individual responsibility of superiors is predicated on the fact that they have violated a duty imposed on them, by Customary International Law, to prevent or punish the commission of international crime, it is liability for an omission in the light of an obligation to act[118]. Superior responsibility is also a link between individual responsibility and state res ponsibility[119]. It is pertinent to mention that individual criminal responsibility of military and civilian superiors ne cessarily implicates the responsibility of the state, because the duties that are imposed on superiors to prevent and punish the crimes of their subordinates are in turn derived from the more general obligations that are imposed on s tate to prevent and punish certain violations of International Law by individuals[120]. The Superior responsibility do ctrine is thus a conceptual and practical bridge between state and individual responsibility. Superiors act as "place holder" for the state[121]. Command responsibility, therefore is likely to remain a key weapon in International Law. There is a need to intensify a campaign for the greater use of command responsibility doctrine by international pr osecutors, the impetus required for it to be beneficial to the end users[122].

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111 Ibid.
112 Kristic Appeals Judgment para 137.
113 Krstic Appeals Judgment, para 137. The Appeals Chambers reduced the sentence from 45 years to 35 years imprisonment.
114 Krstic Appeals Judgment para. 268.
115 Krstic Appeals Judgment, para 137. The Appeals Chambers reduced the sentence from 45 years to 35 years imprisonment.
116 Krstic Appeals Judgment para. 268.
117 Danner & Martinez op. cit. pp. 63 – 65
118 Natalie,L.R. (2005) 'Bridging the Conceptual Chasm: Superior Responsibility as a Missing Link between State and Indivi dual Responsibility under International Law', Vol.18, No. 4, Leiden J. Int'l L. pp. 795 - 826
119 Ibid.
120 Ibid.
121 Ibid. This argument applies not only to the highest leaders of a state where it may seem intuitively evident – but also lowe r – level military and civilian superiors.
122 Natalie,L.P. op. cit. p. 824.

The issue of foreign judges and staff gives rise to certain dynamics[123]. There is the barrier of foreign judges not un derstanding the social, cultural and language dynamics in which the alleged offence took place as well as their int erpretation. Again, there is lack of passion of foreign judges, who are not in any way affected by the outcome of t hese trials to see that justice is done. There is also a sense of betrayal that the accused persons feel when they stan d in trial before foreigners. In Sierra-Leone, one of the indictees before the Special court lamented the situation of being judged by a foreigner thus: If I have offended my people they should sit in judgment over me but not hand me over to strangers .Holmes, argued that justice as an ideal is localized rather than universalized and thrives on e motions for its effectiveness. As the passion wanes, justice loses it meaning and offenders get less punishment . T his is probably confirmed by Kofi Annan the former UN Secretary General that: No rule of law reform, justice co nstruction, or transitional justice initiatives imposed from outside can hope to be successful or sustainable .

1.6. Arguments against the Theories.

Grappling with the overtly broad and subjective theories of individual criminal responsibility is a serious challeng e. Perhaps the result of an over-eagerness to convict based on a largely political process, international criminal tri bunals have in some situations interpreted certain theories of criminal responsibility in a manner that disregards fu ndamental elements of individual criminal responsibility[124]. Modern criminal justice which draws its inspiration fr om Kant's individualistic approach to criminal justice and responsibility is informed by the philosophy that indivi duals have free will and are able to make rational self-interested choices and that as autonomous moral agents, the y can fairly be held accountable and punishable for the rational choices they make[125]. However, the question of in dividual criminal responsibility has been rendered questionable by the developments in the international criminal l aw arena where open-ended use of theories such as Joint Criminal Enterprise and Command Responsibility seem t o be taking centre stage[126]. Defense attorneys at the emerging international criminal tribunals often have to deal w ith the challenges posed by overly expansive interpretation of some of these principles, particularly when such int erpretations conflict with the principle of individual culpability.

There has been a lingering concern by the defence and international criminal law scholars over the expansive use of the theories of Joint Criminal Enterprise and Command Responsibility by international criminal tribunals[127]. Th e case with which prosecutors have in some instances secured convictions through the theories of JCE and superio r responsibility must start to raise more frequent questions regarding many of the traditional fair trial rights of an a ccused before international criminal tribunals[128]. In many situations where guilt has been determined purely on su bjective and broad use of certain theories of liability and also improper application of circumstantial evidence, it c an no longer be convincingly argued that proof beyond reasonable doubt is still a meaningful safeguard available t o accused persons before these tribunals[129]. There is considerable merit in the perception that an unchecked applic ation of Joint Criminal Enterprise and Superior Responsibility theories will ultimately obliterate the necessity of " guilty mind" as the *sine-qua-non,* for attributing liability in criminal law[130]. Significantly, these concerns have bee n raised by legal practitioners and leading criminal law scholars but also by some among the critical judges of inte rnational criminal tribunals. The lack of more direct evidence against those who are deemed to have participated i n planning large scale crimes may be a potent justification for the application of JCE and command responsibility [131]. However, this justification is fast losing legitimacy as international tribunals continue to rely on presumptions, hypotheses and overly subjective circumstantial evidence to base their convictions[132].

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[123] Apori – Nkansah, op. cit. p. 7

[124] See The Report of the UN Secretary General on Transitional Justice and Rule of Law, (2004).

[125] Ogetto, K. op.cit. pp. 11-22 at 11

[126] Ibid at 12. See also Dennis, I. (1997) 'The Critical Condition of Criminal Law, 50 Current Legal Problems 237 Quoted in Kamali, J.M. (2003) 'The Challenge Linking International Criminal Justice and National Reconciliation: The Case of ICT R,16, Leiden J. Int'l L. pp. 115-133.

[127] Ogetto, op. cit. p. 12

[128] Ogetto, Ibid

[129] Ibid,p. 22

[130] Ibid, p.22

[131] Ibid, p.22

[132] Ibid,p.23

Concluding Remark and Recommendation

It is self-evident that the prospects of the principle of individual criminal responsibility have exerted considerable influence in shaping international rule of law and human destiny, thus: strengthening universality and restricting s tate sovereignty; strengthening shift from impunity to accountability; and strengthening the jurisprudence of inter national criminal justice. There is a general awareness among members of the international community that peopl es of the world share a common destiny and are joint shareholders in the survival of the planet. The very essence of the principle of individual criminal responsibility is that individuals have international duties which transcend t he national obligations of obedience imposed by the individual state. This paper has extensively examined the the ories of Joint Criminal Enterprise and Superior Responsibility among other issues. It has also sufficiently espouse d the law on this area. It is thus hoped that the analysis has thrown some light on this grey area of international la w.

Recommendations

This paper therefore concludes with the following recommendations: There is the need for a more careful and or li mited use/application of JCE and command responsibility. The theories are advocated as useful for the prosecutio n of terrorists.

The theories are advocated for municipal criminal justice systems, hence the need for domestication and transplan ting of international criminal jurisprudence, as contained in these theories. There is also a need to focus on victi ms. Victims must take a central place in any system of accountability for international crimes and other gross viol ations of human rights. It is recommended that the national civil society groups should be watchdogs over the righ ts of their respective communities and lead in demanding accountability from their governments for their internati onal obligation especially in cases that address impunity within their shores. Also, international civil society grou ps[133] should continue to build and strengthen international justice, promote the expansion and utilization of univer sal jurisdiction, monitor the impact of international justice in ICC situation countries ensure that international justi ce is accountable to victim communities and develop a programme of research and monitoring on international jus tice. It is recommended that states should restructure or amend their municipal laws especially their constitutions t o incorporate Restrictive Sovereignty Clause and reinforce the No-immunity Rule. By so doing, states would be v oluntarily surrendering part of their sovereignty and freedom of action to the international community especially o n issues bothering on human rights. Again, an extension of ICC jurisdiction over legal or juristic persons is desira ble. International criminal law is a rapidly expanding field with much potential for ending impunity relating to cor porate criminality. Furthermore, there is a need to foster an enabling environment for sustainable human develop ment. Sustainable human development is facilitated by a strong rule of law.

The provision and implementation of stable and predictable legal frameworks for businesses and labour stimulates employment by promoting entrepreneurship and the growth of small and medium sized enterprises, and attracting public and private investment including foreign direct investment. The link between economic development and t he rule of law has long been established. Rising inequalities in wealth within and among countries are now a key c oncern with the potential to weaken and destabilize societies. Corruption is another challenge that needs to be add ressed by states. It is also recommended that states should provide adequate resources including funding of the ins titutional mechanisms or frameworks involved in enforcing individuals accountability. Adequate resources should be provided to enable them carry out more effective functions. The current practice under which the institutions r ely on epileptic donations from states and international organizations should be discouraged. It is also recommend ed that the existing international judicial mechanisms should collaborate and complement one another's effort and they should exchange or share information and possibly engage in joint investigation. Domestic institutions too s hould complement the efforts of the sub-regional, regional and international institutions on the enforcement of ind ividual criminal responsibility. Again, states should strengthen the capacity of domestic courts to perform effectiv ely and efficiently. It is hoped that these recommendations if utilized, will enhance the future of accountability, an d move the principle of individual criminal responsibility to the next level.

[133]Ibid