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Individual liability for those who establish or control instruments of government specifically addressing the argument to what extent, and how far can reliance on an accused's participation in the establishment and/or control of the instruments of government that spearheaded/masterminded a genocide and other international crimes, take the prosecutor in establishing the criminal culpability of an accused?

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

ISSUE: INDIVIDUAL LIABILITY FOR THOSE WHO ESTABLISH OR CONTROL INSTRUMENTS OF GOVERNMENT

SPECIFICALLY ADDRESSING THE ARGUMENT TO WHAT EXTENT, AND HOW FAR CAN RELIANCE ON AN ACCUSED'S PARTICIPATION IN THE ESTABLISHMENT AND/OR CONTROL OF THE INSTRUMENTS OF GOVERNMENT THAT SPEARHEADED/MASTERMINDED A GENOCIDE AND OTHER INTERNATIONAL CRIEMS, TAKE THE PROSECUTOR IN ESTABLISHING THE CRIMINAL CULPABILITY OF AN ACCUSED?

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I. Introduction and Summary of Conclusions

A. Scope

This memorandum is to investigate the limits that one can be held liable for their control or establishment of instruments of Government that is involved in the perpetuation of genocide or other international crimes.[*] Instruments of government include state owned radio stations, state supported paramilitary groups, and state operated death sites. Furthermore compliance with the interim government helped to facilitate the genocide. The prosecutor of the International Criminal Tribunal of Rwanda (ICTR) has to indict and prosecute Rwandan nationals who perpetrated the crime of genocide in Rwanda in 1994. Due to the mixture of civilians in the public and private sector along with the military there is the need to prosecute not only those who were actively involved with the government instruments but those who supported them.[1] For this reason this memo seeks to determine what limits the prosecution of the ICTR has in pursuing the prosecution of those individuals involved in the establishment, implementation or control of government instruments that committed acts of genocide or other international war crimes n the scope of individual responsibility.

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[*] Participation in government as establishment of culpability:

> "To what extent, and how far can reliance on an accused's participation in the establishment and/or control of the instruments of Government that spearheaded/masterminded a genocide and other international crimes, take the Prosecutor in establishing the criminal culpability of an accused?"

[1] *See, e.g.*, Mark D. Maxell & Sean M. Watts, *'Unlawful Enemy Combatant': Status, Theory of Culpability, or Neither?'*, 5 J. Int'l. Crim. Just. 19, (2007) (describing the lawfulness of an individual to participate in combat) [reproduced in accompanying notebook at Tab 37]. It may be worth noting that members of militias may be recognized as combatants, thus precluding them from prosecution as long as they do not violate the international laws and customs of war. This is clarified in Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) Adopted by the Conference art. 50, June 8, 1977, 16 I.L.M 1391 [hereinafter Additional Protocol I]. (defining civilian class as 'persons who are not members of the armed forces) [reproduced in accompanying notebook at Tab 4]

B. Summary of Conclusions

i. The Theory of Superior Responsibility Allows for the Prosecution of Commanders for the Actions of their Subordinates

Regardless of whether or not the personal involved are from the military or the civilian sector, the theory of superior responsibility is a venue that allows for the direct indictment of superiors for actions committed by their subordinates. A commander can be punished for the failure to prevent or punish the crimes of their subordinate. The actions of local government officials in particular in the role with the state sponsored militias can be prosecuted under this theory.

ii. The Theory of Superior Responsibility can be Applied to Internal Conflicts

Despite the lack of precedent for international conflicts, it is acceptable to apply the theory of superior responsibility to internal conflicts. Due to the implied application of the theory from international law and the application of the theory by the ICTY Tribunal for events that occurred prior to the Rwandan Genocide, the ICTR has rightfully accepted the theory despite the fact that it is being applied to an internal conflict.

iii. The Joint Criminal Enterprise Theory can be Used by Prosecutors to Indict Individuals who Control or Implement Government Instruments that Participate in the act of Genocide or other International Crimes

The joint criminal enterprise theory as established by the ICTY can and has been used to prosecute individuals who have controlled or established government instruments that implement the act of genocide or other international crimes. The theory of joint criminal enterprise will be useful to assist prosecutors in indicted individuals who worked to achieve a common plan. For example, members of state sponsored radio and local government officials helped to establish and distribute orders to the militias. Under the three categories of joint criminal enterprise there

will be the legal foundation to prosecute those who did not physically perpetrate the crimes yet were involved in a common plan.

iv. The ICTR Recognizes and can Apply the Theory of Joint Criminal Enterprises in the Tribunal

Despite early ruling by the ICTR Trial Chambers that dismissed the theory of joint criminal enterprises, the prosecution can now use the theory of joint criminal enterprise. In particular, case law since 2004 from the ICTR Appeals Chamber has recognized the theory and accepted the premises behind it by applying case law from the ICTY.

v. *Actus Reus* for Type III Joint Criminal Enterprise can be Ddetermined

The *actus reus* requirement for the extended category of joint criminal enterprise can be determined. This can be determined principally from case law developed in the ICTY Chambers and recently applied to the ICTR Chambers. Specifically, the nature of the assistance and the effect of the assistance will be the two major points in determining whether or not an individual can be indicted for their participation in a category three joint criminal enterprise.

vi. Foreseeability requirement for Type III Joint Criminal Enterprise can be Determined

The foreseeability requirement for the extended category of joint criminal enterprises can be determined. Determined principally from the fact that a reasonable outcome taken by the accused would result in the crime being committed, it is sufficient that only one out of a series of crimes was foreseeable.

vii. Unlikely to Prosecute an Individual Under Both Theories of Superior Responsibility and Joint Criminal Enterprise

To successfully indict and prosecute an accused individual for their command role in perpetrating genocide or another international war crime, they can be charged under the theory of joint criminal enterprise or superior responsibility. An indictment under joint criminal enterprise

indicates that the individual actively participated in the common plan or purpose of the crime, whereas an indictment under the theory of superior responsibility indicates that they failed to act to prevent or punish the violation from occurring.

II. Factual Background

Traditional ethnic rivalry between the Hutu and Tutsi ethnic groups dominated the societal landscape of Rwanda since it was colonized by Belgium. The Rwandan Genocide began on April 6 1994 when Hutu President Juvenal Habyarimana's plane was shot down.[2] Returning from negotiations with Tutsi rebels, the assassination resulted in the Hutu population orchestrating the genocide of the Tutsi population along with moderate Hutus. It is estimated that the genocide resulted in the death of roughly 800,000 people[3], or more than ten percent of the population of Rwanda.

All social levels of society perpetrated the genocide. The United Human Rights Council stated "[t]he killers were aided by members of the Hutu professional class including journalists, doctors and educators, along with unemployed Hutu youths and peasants who killed Tutsis just to steal their property."[4] The BBC corroborated that "[t]he early organizers included military officials, politicians and businessmen, but soon many other joined in the mayhem." [5] The high

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[2] C. SCHELTEMA & W. VAN DER WOLF, THE INTERNATIONAL TRIBUNAL FOR RWANDA: FACTS 157 (1999) [reproduced in accompanying notebook at Tab 32].

[3] Genocide in Rwanda, United Human Rights Council, http://www.unitedhumanrights.org/Genocide/genocide_in_rwanda.htm (last visited Nov. 25, 2007) [reproduced in accompanying notebook at Tab 42].

[4] *Id.*

[5] Rwanda: How the genocide happened, BBC News (Apr. 1, 2004), http://news.bbc.co.uk/2/hi/africa/1288230.stm. [reproduced in accompanying notebook at Tab 43].

level of organization amongst the militias and the rapid response to the assassination of President Habyarimana heavily implies that the genocide was planned in advance.

The initial outburst of violence was against opposition politicians, spreading to dissenting civilians, and finally to the general Tutsi population.[6] It is noted that "[i]t thus seems that the killings were no spontaneous outbursts, but followed instructions from the highest levels."[7] Three days after the death of President Habyarimana on April 6, 1994, an interim government was established.[8] It is to be noted that "[t]he interim government did very little to stop, or even oppose, the massacres going on in the country."[9] One example of the government colluding with the militias to coordinate the genocide was through the radio. "In addition, a very efficient and effective campaign of disinformation was being waged by the most active media at that time, TRLMC and Radio Rwanda."[10] Church officials gave their tacit approval to the genocide, as "the Anglican archbishop refused unequivocally to denounce the Rwandan interim government."[11]

Due to the collusion between civilians in the public and private sector with military forces to perpetrate the genocide, there is a need for the prosecution of the ICTR to be able to hold liable those responsible for establishing, implementing and controlling the instruments of government which perpetrated those acts, regardless of their status of civilian or military.

III. Legal Discussion

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[6] *See*, SCHELTEMA, *supra* note 2, at 159-160 [reproduced in accompanying notebook at Tab 32].

[7] *Id.* at 160

[8] *Id.* at 161.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 162

A. Applicable ICTR Statutory Provisions

i. Statutes Affected by Individual Responsibility

Article 2 of the ICTR Statute lists genocide as a crime that is punishable.[12] The Trial Chambers describes the elements of genocide as:

> "proven if it is established beyond a reasonable doubt, firstly, that one of the acts listed under Article 2(2) of the Statute was committed and, secondly, that this act was committed against a specifically targeted national, ethnical, racial or religious group, with the specific intent to destroy, in whole or in part, that group."[13]

Only these elements are met can an individual directly responsible be prosecuted for the crime of genocide.

Article 3 of the ICTR Statute lists crimes against humanity as a crime that is punishable. [14] The Trial Chambers in *Akayesu* describe the elements of crime against humanity as:

> "(i) the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health; (ii) the *act* must be committed as part of a wide spread [sic] or systematic attack; (iii) the act must be committed against members of the civilian population; (iv) the *act* must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds."[15]

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[12] Statute of the International Tribunal for Rwanda art. 2, Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute]. *available at* http://69.94.11.53/ENGLISH/basicdocs/statute/2004.pdf [reproduced in accompanying notebook at Tab 1].

[13] Prosecutor v. Bagilishema, Case No. ICTR 95-1A-T, Judgment, ¶ 55 (Jun. 7, 2001) [reproduced in accompanying notebook at Tab 6]. Cited in GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: TOPICAL DIGESTS OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 12 (Jennifer Trahan & Adela Mall eds., 2004) [reproduced in accompanying notebook at Tab 35].

[14] ICTR Statute, *supra* note 12, art. 3[reproduced in accompanying notebook at Tab 1].

[15] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 578 (Sep. 2, 1998) [reproduced in accompanying notebook at Tab 7]. Cited in GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: TOPICAL DIGESTS OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 33 (Jennifer Trahan & Adela Mall eds., 2004) [reproduced in accompanying notebook at Tab 35].

Only once these elements are met by a direct perpetrator can an individual be prosecuted for crimes against humanity.

Article 4 of the ICTR Statute lists war crimes as a punishable crime.[16] The Trial Chamber in *Kayishema* held there must be:

> (1) "armed conflict … of a non-international character," (2) a "link between the accused and the armed forces," (3) "the crimes must be committed *ratione loci* and *ratione personae*," and (4) "there must be a nexus between the crime and the armed conflict."[17]

Once these elements are met can the direct perpetrator be held responsible for war crimes.

However, in order for a person not directly involved in the perpetration of these acts to be tried individual responsibility must be established for the accused[18]. The ICTY Trial Chambers in Milosevic noted that "it is not alleged that he physically committed the crimes personally, but that he participated in the joint criminal enterprise"[19]

ii. Statutes Applicable to Individual Responsibility

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[16] ICTR Statute, *supra* note 12, art. 4 [reproduced in accompanying notebook at Tab 1].

[17] Prosecutor v. Kayishema, Case No. ICTR 95-1-T, Judgment, ¶ 169 (May 21 1999) [reproduced in accompanying notebook at Tab 8]. Cited in Genocide, War Crimes and Crimes Against Humanity: Topical Digests of the Case law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia 50-51 (Jennifer Trahan & Adela Mall eds., 2004) [reproduced in accompanying notebook at Tab 35].

[18] *See* Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 578 (Sep. 2, 1998) [reproduced in accompanying notebook at Tab 7]. Cited in Genocide, War Crimes and Crimes Against Humanity: Topical Digests of the Case law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia 50 (Jennifer Trahan & Adela Mall eds., 2004) [reproduced in accompanying notebook at Tab 35].

[19] Prosecutor v. Milosevic, Case No. IT-01-51-1, Decision on Review of Indictment, ¶ 7 (Nov. 12, 2001) [reproduced in accompanying notebook at Tab 18].

To prosecute individuals who established, implemented or controlled government instruments that perpetrated the Rwandan Genocide there are two relevant statutory provisions relevant to individuals who may not have directly perpetrated the crime. Article 6(1)[20] and Article 6(3)[21] of the ICTR Statute deal with Individual Criminal Responsibility.

Article 6(1)[22] of the ICTR Statute is used by prosecutors to indict and prosecute individuals under the theory of joint criminal enterprises. The text states that:

> "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime."

This practice was first developed by prosecutors in the ICTY under the corresponding Article 7(1)[23] of the ICTY Statute.

Article 6(3)[24] of the ICTR Statute is used by prosecutors to indict and prosecute individuals under the theory of superior responsibility. The text states that:

> "The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

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[20] ICTR Statute, *supra* note 12, art. 6(1) [reproduced in accompanying notebook at Tab 1].

[21] ICTR Statute, *supra* note 12, art. 6(3) [reproduced in accompanying notebook at Tab 1].

[22] ICTR Statute, *supra* note 12, art. 6(1) [reproduced in accompanying notebook at Tab 1].

[23] Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7(1), May 25, 1993, 32 I.L.M 1192 [hereinafter ICTY Statute], *available at* http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb06-e.pdf. [reproduced in accompanying notebook at Tab 2].

[24] ICTR Statute, *supra* note 12, art. 6(3) [reproduced in accompanying notebook at Tab 1].

Although this was developed to assist prosecutions in the corresponding Article 7(3)[25] of the ICTY Statute, prosecutors in the ICTY it has used the theory of superior responsibility much more sparingly than the theory of joint criminal enterprise.

B. Application of Theories of Individual Responsibility

i. Superior Responsibility

The theory of superior responsibility is another avenue for the prosecutions of individuals in the chain of command. This theory is supported by Articles 6(3)[26] and 7(3)[27] of the ICTY and ICTR statutes respectively.

The theory of holding superiors responsible for the actions of their subordinates first originated in the trials subsequent to the conclusion of World War II. The first use of this would by the *Trial of General Tomoyuki Yamashita*[28] in the Tokyo Tribunals followed by such cases as *The General High Command Trial*[29] in the Nuremburg tribunal for example. These trials cemented the concept that superiors could be held accountable for the actions of their subordinates.

Military leaders were not the only ones who could be held liable for acts committed under their command. Civilian leaders could also be held accountable for those who served

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[25] ICTY Statute, *supra* note 23, art. 7(3) [reproduced in accompanying notebook at Tab 2].

[26] ICTR Statute, *supra* note 12, art. 6(3) [reproduced in accompanying notebook at Tab 1].

[27] ICTY Statute, *supra* note 23, art. 7(3) [reproduced in accompanying notebook at Tab 2].

[28] *See* Trial of General Tomoyuki Yamashita, United States Military Commission, Manila, 35(Dec. 7 1945) [reproduced in accompanying notebook at Tab 30].

[29]*See* The United States of America vs. Wilhelm von Leeb, et al., United States Military Tribunal Case, Nuremberg No. 72 26 (Oct. 28, 1948) [reproduced in accompanying notebook at Tab 31].

directly beneath them.[30] The importance of this is that the civilian leaders would be held accountable in situations where the distinction between military and civilian control blur. For example, in Rwanda, the collusion between the civilian government leaders, military, and militias in perpetrating the crime meant that various parties were responsible for the atrocities that were committed. It is important to note that in the situation of Rwanda, previously existing power structures broke down. This opened the possibility of an individual exercising *de jure* or *de facto* control and being prosecuted on the basis of Superior Responsibility.[31] If liability were to be restricted solely to members of the military organization, civilian leaders who helped to orchestrate and direct the genocide would get away with the crimes incurring no liability.

The theory of superior responsibility contains three elements. First, there must be a superior-subordinate relationship. Next the superior had to have knowledge that their subordinate had or was about to commit the crime. Finally, the superior had to fail to prevent the commission of the crime or punish the perpetrators.[32] Only if all three of these elements are met can one be successfully prosecuted under Article 6(3)[33] of the ICTR statute.

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[30] *See* DARYL A. MUNDIS, Crimes of the commander: Superior Responsibility under Article 7(3) of the ICTY Statute, *in* INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY 254-256 (Gideon Boas & William A. Schabas eds., 2003) [reproduced in accompanying notebook at Tab 34].

[31] *Id.* at 254.

[32] See WILLIAM SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 315 (2006) [reproduced in accompanying notebook at Tab 33], *construed in Kordic* et al. (IT-95-14/2-T), Judgment, 26 February 2001, para. 401; *Blasikic* (IT-95-14-T), Judgment, 3 March 2000, para. 294; *Delalic* et al. (IT-96-21-T), Judgment, 16 November 1998, para. 346; *Stakic* (IT-97-24-T), Judgment, 31 July 2003, para. 457.

[33] ICTR Statute, *supra* note 12, art. 6(1) [reproduced in accompanying notebook at Tab 1].

a. Application of Superior Responsibility in an Internal Armed Conflict

The doctrine of superior responsibility is traditionally only applied to international conflicts in tribunals prior to the ICTY. This was established in the Nuremburg Tribunal along with the Tokyo Military Commission. The concept that internal armed conflicts dealt solely with is inferred from Articles 86[34] and 87[35] of Additional Protocol I which deals with

[34] Art 86. Failure to Act

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result form a failure to act when under a duty to do so.
2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors form penal disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he 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.

Additional Protocol I, *supra* note 1, art. 86 [reproduced in accompanying notebook at Tab 4].

[35] Art 87. Duty of Commanders

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Additional Protocol I, *supra* note 1, art. 87 [reproduced in accompanying notebook at Tab 4].

international armed conflicts and the lack of corresponding provisions in Additional Protocol II[36] that deals with internal armed conflicts. The ICTR itself has indicted people under the theory of joint criminal enterprise despite the fact that it is not explicitly enabled to. As stated by Sonja Boelaert-Suominen:

> " In a similar vein, one should note that the ICTR Statute contains a provision on superior responsibility even though it seems to prejudge the armed conflict in Rwanda as a non-international armed conflict of the type referred to in Common Article 3 to the Geneva Conventions and Additional protocol II. There fore, all ICTR judgments in which accused are convicted on the basis of the principle of superior responsibility can be seen as confirming the view that under contemporary international criminal law, this theory applies to non-international armed conflicts as well.."[37]

The widespread use of this principle by the Prosecution in the ICTR is indicative that it is an accepted practice in international law to prosecute on the basis of participation in a joint criminal enterprise in an internal armed conflict.

The traditional defense against this claim would be one of *nullum crimen sine lege*. *Nullum crimen sine lege* is a "principle of justice,"[38] which means the concept of law in which the accused is being prosecuted for is already established. The fact that "only out of sixteen states surveyed (Belgium) had national legislation providing for such criminal liability" is a deterrent to the theory that criminal liability has widespread acceptance amongst the states and is

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[36] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) Adopted by the Conference, June 8, 1977, 16 I.L.M 1442 [reproduced in accompanying notebook at Tab 5]

[37] Sonja Boelaert-Suominen, "Prosecuting Superiors for Crimes Committed by Subordinates: A Discussion of the First Significant Case Law Since the Second World War", 41 Va. J. Int'l. L. 747, 773 (2001) [reproduced in accompanying notebook at Tab 38] Cited in MUNDIS, *supra note* 30, at 265-266 [reproduced in accompanying notebook at Tab 34]

[38] *See* Prosecutor v. Milutinovic, *et al.*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ¶ 37 (May 21 2003) [reproduced in accompanying notebook at Tab 20].

an international custom.[39] The ICTY recognized the principle of *nullum crimen sine lege* in its prosecutions as:

> "It follows from this principle that a criminal conviction can only be based on a norm which existed at the time the acts or omission with which the accused is charged were committed. The Tribunal must further be satisfied that the criminal liability in question was sufficiently foreseeable and that the law providing for such liability must be sufficiently accessible at the relevant time for it to warrant a criminal conviction and sentencing under the head of responsibility by the Prosecution."[40]

The principle of *nullem crimen sine lege* has also been established for the theory of joint criminal enterprise.[41]

ii. Joint Criminal Enterprises

The application of "common purpose" or joint criminal enterprise to international courts was established in the International Criminal Tribunal for the former Yugoslavia. The *Tadic* case established that there are three types of joint criminal enterprises: basic, systemic and extended. [42]

Regardless of the category of joint criminal enterprise at issue, there are three elements that must be proven.[43] The first element is that there must be a plurality of persons.[44] Secondly, a

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[39] MUNDIS, *supra* note 30, at 267 [reproduced in accompanying notebook at Tab 34].

[40] Prosecutor v. Milutinovic, *et al.*, Case No. IT-99-37-AR72, , Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ¶ 37 (May 21 2003) [reproduced in accompanying notebook at Tab 20].

[41] *cf.* MUNDIS, *supra* note 30, at 269 n.148 [reproduced in accompanying notebook at Tab 34].

[42] *See, e.g.,* Prosecutor v. Tadic, Case No. IT-94-1, Judgment, ¶ 227 (Jul. 15, 1999) [reproduced in accompanying notebook at Tab 19].

[43] *See, e.g.,* Prosecutor v. Brdjanin Case. No. IT-99-36-A, Judgment, ¶ 364 (Apr. 3, 2007) [reproduced in accompanying notebook at Tab 21].

[44] *See* Prosecutor v. Tadic, Case No. IT-94-1, Judgment, ¶ 227 (Jul. 15, 1999) [reproduced in accompanying notebook at Tab 19].

common purpose must exist amongst the group of individuals for the commission of a crime as provided by the ICTY Statute.[45] Finally, the accused had to have participated in the common purpose.[46]

The first category of joint criminal enterprise recognized by the international tribunals is the basic form of joint criminal enterprise. In this case, all of the co-perpetrators collaborated and acted together to perpetrate the crime. The *Ntakirutimana* court described that as "[i]t is represented by cases where all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention."[47]The *mens rea* requirement for the basic category of joint criminal enterprise is that the accused should have participated in the commission of the crime and the intended result of the common plan.[48]

The second type of joint criminal enterprise recognized by the international tribunals is a "systemic" form of joint criminal enterprise. The *Ntakirutimana* court described this as "a variant of the basic form, characterized by the existence of an organized system of ill-treatment."[49] The difference between the "systemic" and "basic" forms of joint criminal liability is that "no

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[45] *See id.*

[46] *See id.*

[47] Prosecutor v. Ntakirutimana, ICTR-96-17-A, Judgment, ¶ 463 (Dec. 13, 2004) [reproduced in accompanying notebook at Tab 10].

[48] *See* Prosecutor v. Kvocka, *et al*., Case No. IT-98-30/1-A, Judgment, ¶. 82 (Feb. 28, 2005) [reproduced in accompanying notebook at Tab 22].

[49] Prosecutor v. Ntakirutimana, Case No. ICTR-96-17-A, Judgment, ¶ 464 (Dec. 13, 2004) [reproduced in accompanying notebook at Tab 10].

previous plan or agreement is required."[50] As long as the individual is part of the system that "*discharges a task of some consequence*"[51] the individual could be prosecuted under this method of joint criminal enterprise. The *mens rea* requirement for the systemic category of joint criminal enterprise is that the accused had to have knowledge of the criminal system and the intent to further it.[52]

Finally there is the "extended" form of joint criminal enterprise. The *Ntakirutimana* Chamber stated that this type of joint criminal enterprise "concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of executing that common purpose."[53] This type of joint criminal enterprise is used to prosecute individuals for collateral damage due to the execution of a common plan.

One key difference between the "extended" form of joint criminal enterprises and the aiding and abetting requirements explicitly stated in the text of Article 6(1)[54] is the lack of knowledge in the perpetrator. As noted by William Schabas,

"[i]t is distinct from aiding and abetting, in that there is no requirement that the accomplice actually have knowledge of the intent of the principal perpetrator. The accomplice must share a

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[50] Antonio Cassese, The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise, 5 J. Int'l. Crim. Just. 109, 112 (2007) [reproduced in accompanying notebook at Tab 39].

[51] *Id*.

[52] *See* Prosecutor v. Tadic, Case No. IT-94-1, Judgment, ¶ 228 (Jul. 15, 1999) [reproduced in accompanying notebook at Tab 19].

[53] Prosecutor v. Ntakirutimana, Case No. ICTR-96-17-A, Judgment, ¶ 464 (Dec. 13, 2004) [reproduced in accompanying notebook at Tab 10].

[54] ICTR Statute, *supra* note 12, art. 6(1) [reproduced in accompanying notebook at Tab 1].

'common purpose' of a criminal nature with the principal perpetrator, and the acts of the principal perpetrator must be a natural and foreseeable consequence of the common purpose."[55]

The issue is trying to determine which acts qualify as sufficient to meet the *actus reus* required of the extended category of joint criminal enterprise and the degree of foreseeability required.

a. Explicit Agreement not Required for Prosecution Under Theory of Joint Criminal Enterprise

The linking theme of a joint criminal enterprise is that there is a common plan or common theme present. The question arises on whether there has to be a formal agreement to participate in the joint venture common plan or whether participation alone is sufficient. The Appeals Judgment from *Krnojelac* addressed this issue:

> "The Appeals Chamber considers that, by requiring proof of an agreement in relation to each of the crimes committed with a common purpose, when it assessed the intent to participate in a systemic form of joint criminal enterprise, the Trial Chamber went beyond the criterion set by the Appeals Chamber in the *Tadic* case. Since the Trial Chamber's findings showed that the system in place at the KP Dom sought to subject non-Serb detainees to inhumane living conditions and ill-treatment on discriminatory grounds, the Trial Chamber should have examined whether or not Krnojelac knew of the system and agreed to it, without it being necessary to establish that he had entered into an agreement with the guards and soldiers – the principal perpetrators of the crimes committed under the system – to commit those crimes."[56]

An individual who participates in a common plan or purpose within the framework of does not require the presence of a stated plan or purpose. The Appeals Chamber in *Kvocka* stated in its Judgment "The common purpose need not be previously arranged or formulated; it may materialize extemporaneously."[57] It is clear that for the prosecution of an individual in a joint

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[55] SCHABAS, *supra* note 32, at 309 [reproduced in accompanying notebook at Tab 33].

[56] Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgement, ¶ 97 (Sep. 17, 2003) [reproduced in accompanying notebook at Tab 23].

[57] Prosecutor v. Kvocka, Case No. IT-98-30/1, Judgement, ¶ 117 (Feb. 28, 2005) [reproduced in accompanying notebook at Tab 22].

criminal enterprise the lack of an explicit agreement amongst the participants is not a bar for prosecution.

b. Application of Joint Criminal Liability to the ICTR

While the *Tadic* case established the acceptance of the theory of joint criminal enterprise' from the get go for the ICTY, the same cannot be said for the ICTR. Two trial chambers initially rejected the application of 'joint criminal enterprises', with one refusing to convict on the basis[58] of joint criminal enterprise. By 2003 however the *Karemera* Appeals Chamber allowed[59] an amendment to allege joint criminal enterprise.[60] The hostile atmosphere to the theory of joint criminal enterprise has lead to the prosecution not indicting the issue at trial. [61]

This result is unexpected due to the sharp similarities between the ICTR and ICTY Statutes. Article 7(1)[62] of the ICTY Statute had been used to successfully indict and prosecute individuals on the basis of joint criminal enterprise.[63] Article 6(1)[64] of the ICTR Statute contains identical language. One could infer that due to the similarity in language that it could be expected that the ICTR would apply the same standards to the ICTY statute.

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[58] *See* Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Judgement, ¶. 289. (Jun. 17, 2004) [reproduced in accompanying notebook at Tab 11].

[59] *See* Prosecutor v. Karemera *et al.*, ICTR-98-44-T, Decision On Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, ¶ 27 (Dec. 19, 2003) [reproduced in accompanying notebook at Tab 12].

[60] *See* SCHABAS, *supra* note 32, at 311 [reproduced in accompanying notebook at Tab 33].

[61] *Id.*

[62] ICTY Statute, *supra* note 23, art. 7(1) [reproduced in accompanying notebook at Tab 2].

[63] *See, e.g.,*Prosecutor v. *Tadic*, Case No. IT-94-1, Judgement, ¶ 228 (Jul. 15, 1999) [reproduced in accompanying notebook at Tab 19].

[64] ICTR Statute, *supra* note 12, art. 6(1) [reproduced in accompanying notebook at Tab 1].

Some of the difference in the application of the law can be attributed to the different legal systems the tribunals incorporate. The Rwandan tribunal has been known to find different decisions that run contrary to the ICTY. For example, in attempting to define complicity the ICTR has found the basis for three different forms of complicity.[65] This result is due to the lack of a definition for the term "complicity" in the ICTR statute, allowing for an ICTR Trial Chamber to adopt the definition of the Rwandan Penal Code.[66]

The Appeals Chamber intervened in *Ntakirutimanai* when it stated that "Given the fact that both the ICTY and the ICTR have mirror articles identifying the modes of liability by which an individual can incur criminal responsibility, the Appeals Chamber is satisfied that the jurisprudence of the ICTY should be applied to the interpretation of Article 6(1) of the ICTR Statute."[67] Due to this ruling in 2004, prosecutors are able to amend charges in the ICTR Trial Chambers to include the theory of joint criminal enterprise.

c. Application of Joint Criminal Enterprise in an Internal Armed Conflict

The only way for one to apply the concept of joint criminal enterprises, which prior to the ICTY had only applied to international armed conflicts, would be if the concept of joint criminal enterprises had previously been applied to internal conflicts.

The ICTR Trial Chamber "note[d] that in the *Tadic* Judgment, the appeals Chamber held the view that the notion of a common design as a form of accomplice liability is firmly established in customary international law. In addition, it is upheld, albeit implicit, in the Statutes

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[65] *See* SCHABAS, *supra* note 32, at 305 [reproduced in accompanying notebook at Tab 33].

[66] *See Id.* at 306.

[67] Prosecutor v. Ntakirutimanai, Case No. ICTR-96-10-A, Judgement, ¶ 467-484 (Dec. 13, 2004) [reproduced in accompanying notebook at Tab 10].

of the International Criminal Tribunals." [68] It is to be noted however, that despite the recognition in *ad hoc* tribunals, the concept of joint criminal enterprises has been indoctrinated into the ICC Statute to formally install it into the international criminal justice system to preclude future claims that the accused were not on notice.[69]

d. Challenges to the Theory of Joint Criminal Enterprise

The application of joint criminal enterprises has not gone unchallenged as a concept of international law. Despite its indoctrination by the ICTY Trial Chambers in the Tadic[70] case and the adoption by the ICTR Appeals Chamber in the *Rwamakuba* when "[t]he Bench concludes that, similar to those ICTY cases, this Appeal challenges the indictment on the ground that it does not relate to any of the violations indicated in Article 6…and may therefore proceed as of right" [71] the theory of joint criminal enterprise is being challenged

In the dissenting opinion of Judge Lindholm, the Trial Chamber in *Simic* stated that "[t]he so-called basic form of joint criminal enterprise does not, in my opinion, have any substance of its own. It is nothing more than a new label affixed to a since long well-known concept or doctrine in most jurisdictions as well as in international criminal law, namely co-

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[68] Prosecutor v. Karemara, Case No. ICTR 98-44-R72, Decision on Defence Motion Challenging the Jurisdiction of the Tribunal – Joint Criminal Enterprise, ¶ 3 (Aug. 5, 2005) [reproduced in accompanying notebook at Tab 9].

[69] Rome Statute of the International Criminal court art. 25, July 17, 1998, 37 I.L.M. 999, *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf [reproduced in accompanying notebook at Tab 3].

[70] *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1, Judgement, ¶ 227 (Jul. 15, 1999) [reproduced in accompanying notebook at Tab 19].

[71] Prosecutor v. Rwamakuba, Case No. ICTR 98-44-AR72.4, Decision on Validity of Appeal of Andre Rwamakuba Against Decision Regarding Application of Joint Criminal Enterprise to the Crime of Genocide Pursuant to Rule 72(e) of the Rules of Procedure and Evidence, ¶ 13 (Jul. 23, 2004) [reproduced in accompanying notebook at Tab 15].

perpetration."[72] While some like Judge Lindholm argue that the co-perpetration and joint criminal enterprise are the same due to the substantial contribution required, it has been countered that the *mens rea* required to prosecute a co-perpetrator differs from that of a member of a joint criminal enterprise, thus leading to the proper separation of the two offenses.[73]

There is also a dispute over whether the theory of joint criminal enterprise properly addresses the issue of intentionality. It is felt that the definition of intentionality is too broad as applied by international law.[74] Associate-in-Law Jens David Ohlin argues "Individuals must be prosecuted for their actions, not for the associations; to do otherwise is to engage in guilt by association."[75] Both of these contentions raise issues that will be addressed as the theory of joint criminal enterprise is further developed in international criminal law.

iii. Joint Criminal Enterprise Liability in Contrast to Superior Responsibility Liability

An individual can be indicted under both Articles 6(1)[76] and 6(3)[77] of the ICTR Statute. However, there is a trend to convict using only one of the articles.[78] The *Blaskic* Trial Chamber noted that "[I]t would be illogical to hold a commander criminally responsible for planning, instigating or ordering the commission of crimes and, at the same time, reproach him for not

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[72] Prosecutor v. Simic, Case No. IT-95-9-T, Separate and Partly Dissenting Opinion of Judge P.-J. Lindholm, ¶ 2 (Oct. 17, 2003) [reproduced in accompanying notebook at Tab 29].

[73] *See* Cassese, *supra* note 52, 116 [reproduced in accompanying notebook at Tab 39].

[74] *See* Ohlin, *supra* note 98, at 80. [reproduced in accompanying notebook at Tab 40].

[75] *Id.* at 81.

[76] ICTR Statute, *supra* note 12, art. 6(1) [reproduced in accompanying notebook at Tab 1].

[77] ICTR Statute, *supra* note 12, art. 6(3) [reproduced in accompanying notebook at Tab 1].

[78] *See* MUNDIS, *supra* note 30, at 268 [reproduced in accompanying notebook at Tab 34].

preventing or punishing them."[79] Depending upon the nature of the crime, the Office of the Prosecutor in the ICTR should select whether to indict upon the basis of Article 6(1)[80] or 6(3)[81] concerning the direct role the individual had on the establishment, implementation or control of the government instrument.

iv. Aiding and Abetting

The text of Article 6(1) of the ICTR Statute includes in the definition someone who "aided and abetted."[82] This raises the issue that an individual can be prosecuted for their involvement in a genocide or other internationally recognized war crime and not be a member of a joint criminal enterprise.

It is to be noted that the ICTR explicitly separates the definitions for "aiding" and "abetting". The Trial Chamber in *Semanza* stated that "The terms 'aiding' and 'abetting' refer to distinct legal concepts. The term 'aiding' means assisting or helping another to commit a crime, and the term 'abetting' means encouraging, advising in the commission of a crime."[83] However,

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[79] Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgement, ¶ 337 (Mar. 3, 2000) [reproduced in accompanying notebook at Tab 24].

[80] ICTR Statute, *supra* note 12, art. 6(1) [reproduced in accompanying notebook at Tab 1].

[81] ICTR Statute, *supra* note 12, art. 6(3) [reproduced in accompanying notebook at Tab 1].

[82] ICTR Statute, *supra* note 12, art. 6(1) [reproduced in accompanying notebook at Tab 1].

[83] Prosecutor v. Semanza, Case No. ICTR 97-20-T, Judgement, ¶ 384 (May 15, 2003) [reproduced in accompanying notebook at Tab 14]. Cited in GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: TOPICAL DIGESTS OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 63 (Jennifer Trahan & Adela Mall eds., 2004) [reproduced in accompanying notebook at Tab 35].

the Trial Chamber in *Akayesu* noted that "either aiding or abetting alone is sufficient to render the perpetrator criminally liable."[84]

The Appeals Chamber in *Vasiljevic* first clarified the discrepancy between aiding and abetting and participation in a joint criminal enterprise in their judgement:

> "(i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design.
> (ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose."[85]

To summarize, the difference between an individual who can be indicted for aiding and abetting and an individual who participates in a joint criminal enterprise is that the individual who is aids and abets merely participates in a single crime. An individual who participates in a series of crimes in a common plan participates in a joint criminal.

The mental and contributive requirements present in the joint criminal enterprise parallel those of one who aids and abets as well. The Appeals Chamber judgment in *Kvocka* stated that:

> "The requirement that an aider and abettor must make a substantial contribution to the crime in order to be held responsible applies whether the accused is assisting in a crime committed by an individual or in crimes committed by a plurality of persons. Furthermore, the requisite mental element applies equally to aiding and abetting a crime committed by an individual or a plurality of persons. Where the aider and abettor only

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[84] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶ 485 (Sep. 2, 1998) [reproduced in accompanying notebook at Tab 7]. Cited in GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: TOPICAL DIGESTS OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 63 (Jennifer Trahan & Adela Mall eds., 2004) [reproduced in accompanying notebook at Tab 35].

[85] Prosecutor v. Vasiljevic, Case No. IT-98-32-A, Judgement, ¶ 102 (Feb. 25, 2004) [reproduced in accompanying notebook at Tab 28].

> knows that his assistance is helping a single person to commit a single crime, he is only liable for aiding and abetting that crime. This is so even if the principal perpetrator is part of a joint criminal enterprise involving the commission of further crimes. Where, however, the accused knows that his assistance is supporting the crimes of a group of persons involved in a joint criminal enterprise and shares that intent, then he may be found criminally responsible for the crimes committed in furtherance of that common purpose as a co-perpetrator."[86]

The difference between charging an individual for aiding and abetting and charging an individual for participation in a joint criminal enterprise appears to solely rely upon the presence of a common plan which elevates the accused to a co-perpetrator.

C. Extended Category of Joint Criminal Enterprise to Determine the Degree Required to Prosecute for the Establishment or Implementation of Government Instruments

The *Tadic* court established that the tribunals recognized an "extended" category of joint criminal enterprises. One of the key differences between the "extended" category and the "basic" and "systemic" categories is that the *mens rea* requirement for the extended category of tribunals differentiates.[87] When prosecuting a 'basic" or "systemic" form of a joint criminal enterprise, it is unnecessary to prove the *mens rea*.[88] The act of participation in the joint criminal enterprise itself has been found to be sufficient to prosecute on that basis.

To find an individual liable for an "extended" participation in a joint criminal enterprise requires a greater burden of proof to prove the *mens rea* requirement. The trial court in *Ntakirutimana* discussed the *mens rea* requirement in greater detail:

> "[T]he extended form of joint criminal enterprise, requires the intention to participate in and further the common criminal purpose of a group and to contribute to the joint

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[86] Prosecutor v. Kvocka *et al*., Case No. IT-98-30/1-A, Judgement, ¶ 90 (Feb. 28, 2004) [reproduced in accompanying notebook at Tab 22].

[87] *See, e.g.,*Prosecutor v. Tadic, Case No. IT-94-1, Judgement, ¶ 203 (Jul. 15, 1999) [reproduced in accompanying notebook at Tab 19].

[88]*See, id.* at ¶ 204.

> criminal enterprise or, in any event, to the commission of a crime by the group. In addition, responsibility for a crime other than the one which was part of the common design arise "only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took the risk – that is, being aware that such a crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise."[89]

This raises two important issues. First, what is the *actus reus* that is required to hold one liable for prosecution? Secondly, what degree of foreseeability is required to hold one liable for their participation in a joint criminal enterprise?

i. Actus Reus

To prove ones participation in a "basic" or "systemic" joint criminal enterprise is to demonstrate that the individual acted to enact a common plan. The *Tadic* appeal judgment noted that "often 'collective criminality will involve situations where all co-defendants, acting pursuant to a common design, possess the same criminal intention."[90] This is in contrast to participation in an "extended" joint criminal enterprise.

In participation of "extended" joint criminal enterprises the acts committed by the perpetrators fall outside of the common design. This results in the dilemma in attempting to define which acts constitute participation in an "extended" joint criminal enterprise. Would participation in a private radio issuing orders to state ran militias constitute the proper actus reus for being indicted under the theory of joint criminal enterprise? What about a local mayor who organizes a militia to help establish a government instrument that commits acts of genocide? Or what if you're a local official who helps to gather the Tutsi in a central location and gives the

[89] The Prosecutor v. Ntakirutimana, ICTR-96-17-A, Judgement, ¶ 467 (Dec. 13, 2004) [reproduced in accompanying notebook at Tab 10].

[90] SCHABAS, *supra* note 32, at 310 [reproduced in accompanying notebook at Tab 33].

order for their execution? An example of the actus reus required for a prosecution under "extended" joint criminal enterprise is described by the *Tadic* court:

> "An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect 'ethnic cleansing') 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 those civilians. Criminal responsibility may be imputed to all participants with in the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk."[91]

The Appeals chamber in *Kvocka* stated that:

"in general, there is no specific legal requirement that the accused make a substantial contribution to the JCE. However, there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the JCE In practice the significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose."[92]

One thing to recognize is that there will be a *mens rea* requirement in determining whether or not the *actus reus* of the act can be prosecuted. The text of Article 6(1)[93] explicitly includes individuals who "aided and abetted" in "the preparation or execution" of a crime listed in Articles 2[94] to 4[95] of the ICTR Statute. To further the understanding of these concepts, it will be necessary to discuss the opinion of the Trial Chamber of the ICTY from the *Furundzija* case.

a. *Furundzija* Trial Chamber Judgment.

[91] Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement, ¶ 196 (Jul. 15, 1999) [reproduced in accompanying notebook at Tab 19].

[92] Prosecutor v. Kvocka, Case No. IT-98-30/1-A, Judgement , ¶ 97 (Feb. 28, 2005) [reproduced in accompanying notebook at Tab 22].

[93] ICTR Statute, *supra* note 12, art. 6(1) [reproduced in accompanying notebook at Tab 1].

[94] ICTR Statute, *supra* note 12, art. 2 [reproduced in accompanying notebook at Tab 1].

[95] ICTR Statute, *supra* note 12, art. 4 [reproduced in accompanying notebook at Tab 1].

The *Furundzija* case involved the prosecution of a member of the special police known as the HVO for his involvement in torture and rape.[96] In this case there was no tangible evidence that he participated in or gave direct tangible assistance to the commission of these acts.[97] To determine whether or not his actions consisted of aiding and abetting the court relied on precedent from the Control Council Law No. 10 in cases heard by U.S. Tribunals and German courts in the occupied zones and from British military courts. [98] From analyzing these cases it was determined that there can be differences between the nature of the assistance rendered, and the effect of the assistance.

To deal with the nature of assistance, the court found that "assistance given by an accomplice need not be tangible and can consist of moral support in certain circumstances."[99] This is important because it explicitly states that an action only has to be encouraging at times in order to qualify as the *actus reus*. A qualifying element would be that the presence of the accused had a "significant legitimising or encouraging effect on the principals."[100]

The effect of the assistance given to the principle need to be *conditio sine qua non*, or have a casual relationship with the acts of the accused.[101] The Trial Chambers here recognized

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[96] Prosecutor v. Furundzija, Case No.IT-95-17/1, Judgement, ¶ 39 (Dec. 10, 1998) [reproduced in accompanying notebook at Tab 25].

[97] *See, Id.* at ¶ 232.

[98] Telford Taylor, Final Report of the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council No. 10, 254 (1949) [reproduced in accompanying notebook at Tab 41].

[99] Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgement, ¶ 232 (Dec. 10, 1998) [reproduced in accompanying notebook at Tab 25].

[100] *Id.*

[101] *See id.* at 233.

that "the relationship between the acts of the accomplice and of the principal must be such that the acts of the accomplice make a significant difference to the commission of the criminal act by the principal."[102] It is further noted that the acts of the accused must have a significant impact upon the actions of the principle for it to be significant enough to qualify for the actus reus principle.[103]

ii. Foreseeability

One of the requirements to prosecute under the "extended" form of joint criminal enterprise is for the contribution to which the defendant gave to the prosecution to be foreseeable. The question here is what exactly is the threshold for the foreseeability of the action taken when dealing with an "extended" form of joint criminal enterprise. Only by determining the types of actions that are foreseeable can we assess whether or not an individual can be held liable.

In determining the issue of what is considered foreseeable, the ICTY case *Furundzija* provided guidance in how to address the issue. It found that "the clear requirement in the vast majority of the cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime."[104] From this definition it will only require for the perpetrators to be aware of the fact that their actions will likely result in the actions taken for them to meet this requirement. Furthermore it was found that it was unnecessary for those to be indicted to have knowledge of all the crimes committed. It is simply sufficient for one crime to

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[102] *Id.*

[103] *See id.*

[104] *Id.* at 245.

have occurred out of several for it to have been a foreseeable risk.[105] The Amended Indictment for *Cermak* reinforces this doctrine as it states "each accused was aware of the substantial likelihood that the execution of his plans and orders, and the carrying out of the acts and conduct which he instigated, would involve or result in the crimes charged in this indictment."[106]

The logic behind this decision at the ICTY has transferred over to the ICTR. The *Karemera* Trial Court adopted the standard of foreseeability from the ICTY.[107] From the ICTY Appeals Chamber in *Hadzihasanovic* stated "[the accused] must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision."[108] This interpretation indicates that one can be found to have met the *mens rea* requirement of the "extended" form of joint criminal enterprise if with the action they took they had any reasonable foreseeability that it would result in a criminal action.

It is acknowledged however that there are issues with the foreseeability requirement. Individuals who participate in a joint criminal enterprise may foresee the actions that they undertake result in a certain consequence. What if however additional members of the conspiracy commit further acts or crimes which are not foreseeable? The problem here is that all

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[105] *Id.* at 246

[106] Prosecutor v. Cermak, Case No. IT-03-73-PT, Amended Indictment, ¶ 32 (Dec. 14, 2005) [reproduced in accompanying notebook at Tab 26].

[107] Prosecutor v. Karemera, Case No. ICTR 98-44-AR72.5, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, ¶ 5 (Apr. 12, 2006) [reproduced in accompanying notebook at Tab 13].

[108] Prosecutor v. Hadzihasanovic, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility¶ 34 (Jul. 16, 2003) [reproduced in accompanying notebook at Tab 27].

members of the joint criminal enterprise are treated equally, regardless of their contribution.[109] It has been argued that reducing the culpability[110] of the individual, for crimes they did not directly participate in would make for a more optimal solution[111].

D. Application of Concepts to Events in Rwanda

i. State Sponsored Radio Stations

Radio Television Libre Mille-Collines (RTLM), also known as "Hate Radio" was used by the Hutu extremists to coordinate the attacks against the Tutsi. For example, as the Trial Chamber in *Nahimana* noted:

> "some RTLM broadcasts, as well as the publication of *Kangura* through March 1994, preceded the widespread and systematic attack that occurred following the assassination of President Habyarimana on 6 April 1994 (see paragraph 121). As set forth in paragraph 120, the Chamber has found that systematic attacks against the Tutsi population also took place prior to 6 April 1994. The Chamber considers that the broadcasting of RTLM and the publication of *Kangura* prior to the attack that commenced on 6 April 1994 formed an integral part of this widespread and systematic attack, as well as the preceding systematic attacks against the Tutsi population. Similarly, the activities of the CDR that took place prior to 6 April 1994 formed an integral part of the widespread and systematic attack that commenced on 6 April, as well as the preceding systematic attacks against the Tutsi population." [112]

[109] *See e.g.*, Jens David Ohlin, Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise, 5 J. Int'l. Crim. Just 69, 83 (2007) [reproduced in accompanying notebook at Tab 40].

[110] *See* Cassese, *supra* note 52, at 120 [reproduced in accompanying notebook at Tab 39].

[111] *See* Ohlin, *supra* note 98, at 83 [reproduced in accompanying notebook at Tab 40].

[112] Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment, ¶ 1058 (Dec. 3, 2003) [reproduced in accompanying notebook at Tab 16].

While it was privately owned, RTLM was "launched [and] backed by family members of the Hutu President Juvenal Habyarimana".[113] It was specifically formed by private interests as to not violate the N'sele Cease-fire Agreement between the Government of the Rwandese Republic and of the Rwandese Patriotic Front.[114] The broadcasts from RTLM gave instructions and coordinated the attacks of the militias. Radio Netherlands reported "[b]etween 1 January 1994 and approximately 31 July 1994, RTLM was used to broadcast messages designed to achieve interethnic hatred and encourage the population to kill, commits acts of violence and persecutions against Tutsi population and others on political grounds.".[115] The question arises as to which theories of individual responsibility could be used to prosecute the members of the radio for their control or establish of an instrument of government that perpetrated genocide or other war crime.

a. Superior Responsibility

To prosecute members of RTLM under the theory of superior responsibility requires the actions of the RTLM steering committee or employees to contain three elements: whether there was a superior-subordinate relationship, whether the RTLM had knowledge that a crime had or was going to occur, and if they failed to punish the crime or prevent it from occurring[116].

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[113] 'Hate Radio' journalist confesses, BBC News, May 15, 2000, http://news.bbc.co.uk/2/hi/africa/749079.stm [reproduced in accompanying notebook at Tab 44].

[114] N'sele Cease-fire Agreement between the Government of the Rwandese Republic and the Rwandese Patriotic Front, Rwan.-RPF, Jul. 12, 1992 [reproduced in accompanying notebook at Tab 45].

[115] Hate Radio: Rwanda, Radio Netherlands Worldwide, Apr. 2, 2004, http://www.radionetherlands.nl/features/media/dossiers/rwanda-h.html. [reproduced in accompanying notebook at Tab 46].

[116] *See* SCHABAS, *supra* note 32, at 315 [reproduced in accompanying notebook at Tab 33].

It will be difficult to assert the first point, in that there was a superior-subordinate relationship between the members of RTLM and the actions of the government instrument. While RTLM may have been instrumental in issuing instructions to the militias over the radio airwaves,[117] it will be difficult to assert that RTLM was the superior to the militias.

b. Joint Criminal Enterprise

To prosecute under the theory of joint criminal enterprise, it will be required to demonstrate that there was a plurality of persons, there is a common plan and there were actions taken in support of that common plan.[118] This theory should be considered in the prosecution of any official involved with radio.

It is clear that RTLM was used in concert with its listeners, to advocate a common plan, and that through its broadcasts actions were taken in support of that plan.[119] For one to be indicted on the charges, the individual would have had to in the first place have a substantial impact. As mentioned in *Furundzija*, the individual has to contribute significantly to the crime which had occurred.[120] Furthermore, as highlighted in the *Kvocka* decision, the contributor has to have the intent to fit within the profile of an individual in a joint criminal enterprise.[121] It is arguable that by broadcasting the locations of targets to the militias, the radio had a substantial

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[117] *See, e.g.*, VIRGINIA MORRIS & MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 238 (1998) [reproduced in accompanying notebook at Tab 36].

[118] *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1, Judgement, ¶ 227 (Jul. 15, 1999) [reproduced in accompanying notebook at Tab 19].

[119] *See e.g.*, MORRIS, *supra* note 117, at 238 [reproduced in accompanying notebook at Tab 36].

[120] Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgement, ¶ 233 (Dec. 10, 1998). [reproduced in accompanying notebook at Tab 25].

[121] *See e.g.*, Prosecutor v. Kvocka *et al.*, Case No. IT-98-30/1-A, Judgement, ¶ 90 (Feb. 28, 2004) [reproduced in accompanying notebook at Tab 22].

impact to the perpetration of the crimes and they had the intent to participate in a joint criminal enterprise. Due to the radio's close ties to the Habyarimana Presidency they effectively had control of the government's propaganda arm. For these reasons it is likely that members of the RTLM can be prosecuted under any of the three categories of joint criminal enterprise

c. Aiding and Abetting

Prosecution of RTLM under the theory of aiding and abetting will require them to meet the definitions of 'aiding' or 'abetting'[122]. To further distinguish them from indictment under the theory of joint criminal enterprise it will require that they lack the status of a co-perpetrator and that they intended to commit solely the single crime.

It is unlikely that the employees of RTLM will qualify for aiding and abetting. Due to the high level of integration with the militia units and numerous contacts with the government officials it is likely that the employees of RTLM had the intent of a common plan which precludes them from indictment under aiding and abiding.

ii. State Sponsored Militias

The prominent role of militias sponsored by various levels of the government provides an example of complicity by government officials in Rwanda. It has been documented that local government collaborated and established the Interahamwe militia prior to the genocide. The Guardian reported that "three[indicted individuals] were allegedly bourgmestres - mayors - of local communes in the country, accused of organising and leading the killing in their areas." [123]

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[122] *See e.g.*, Prosecutor v. Vasiljevic, Case No. IT-98-32-A, Judgement, ¶ 102 (Feb. 25, 2004) [reproduced in accompanying notebook at Tab 28].

[123] Vikram Dodd, British man helped organise Rwandan genocide, court told, Guardian, (Sep. 25, 2007) http://www.guardian.co.uk/rwanda/story/0,,2176395,00.html [reproduced in accompanying notebook at Tab 47].

Once the genocide began in full, there is further evidence that the Rwandan government supplied aid and help to the Interahamwe in carrying out the genocide.[124] It is clear that there was a high level of cooperation between the militia and the government.

a. Superior Responsibility

To prosecute the state sponsored militias would require the militia members to meet three elements: whether there was a superior-subordinate relationship, whether the militia leaders had knowledge that a crime had or was going to occur, and if they failed to punish the crime or prevent it from occurring.[125]

It is conceivable that this theory will prove viable for prosecuting members of a state-sponsored militia. Militias are considered members of armed forces.[126] There is a chain of command, so the superior-subordinate relationship between the commander and his subordinates exists. If individual leaders of the militia knew that there was or had been a crime, and depending upon the response it will be appropriate to prosecute them under the theory of superior responsibility for control of an instrument of the government.

b. Joint Criminal Enterprise

To prosecute members of the militia under the theory of joint criminal enterprise, there has to be proof that the members of the militia involved more than one person, intent to carry out a common plan and the common plan was enacted upon. [127]

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[124] Mark Hubard, Rwanda the Genocide, http://www.crimesofwar.org/thebook/rwanda-the-genocide.html (last visited 11/25/07) [reproduced in accompanying notebook at Tab 48].

[125] *See* SCHABAS, *supra* note 32, at 315 [reproduced in accompanying notebook at Tab 33].

[126] *See, e.g.*, Maxwell, *supra* note 1, at 20 [reproduced in accompanying notebook at Tab 37].

[127] *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1, Judgement, ¶ 227 (Jul. 15, 1999) [reproduced in accompanying notebook at Tab 19].

Since a militia includes more than one person, the first qualification is met. The fact that they are members of a collective organization indicates that they share an active plan and are working towards achieving it. As long as the member of the militia made a substantial contribution to the commission of the crime and the result was foreseeable, they should be found liable for their actions.

Furthermore, the establishment of the militia prior to the genocide are indicative that there was a common plan to arm the Hutu population to kill the Tutsi population. [128]The high level of organization across the country indicates that it was clearly foreseeable that the militias would perpetrate a genocide of the Tutsi population.[129] The act of training and organizing these militias on the local government level indicate that they local mayors gave a substantial contribution to the effort.[130] Local mayors involved in the establishment and control of the militias are individually liable for their role in the Rwandan genocide.

c. Aiding and Abetting

To distinguish a member of a militia from simply aiding and abiding it is imperative that the individual assists in the commission of a single crime. Due to the nature of the membership of the militia and the role that they played in Rwanda, it is unlikely that an individual in a state sponsored militia will qualify for the crime of aiding and abetting.

iii. State Sponsored Death Sites

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[128] *See, e.g.,* SCHELTEMA, *supra* note 2, at 159 [reproduced in accompanying notebook at Tab 32].

[129] *See, e.g., id.* at 157.

[130] *cf. id.* at 157-161.

During the 1994 genocide, schools[131] and churches[132] were used with the complicity of the government officials to massacre Tutsi and moderate Hutu. As stated in indictment against *Nahimana* "[i]n the initial days, the refugees were protected by a few gendarmes and communal police in these various locations, but subsequently, the refuges were systematically attacked and massacred by militiamen, often assisted by the same authorities who had promised to protect the refugees."[133] The issue arises as to which theories of individual responsibility are appropriate for prosecuting the individuals who helped to establish or control the government instruments involved.

a. Superior Responsibility

To prosecute an individual for their participation in a superior-subordinate relationship, there must be a superior-subordinate relationship present, knowledge that a crime had or was about to occur, and the failure to punish the crime or prevent it from occurring.[134] When a state sponsored death site is involved, all of these factors may be present.

For example, in the Nyarubuye Church massacre, "local Mayor, Sylvestre Gacumbitsi, gave orders to the police to shoot."[135] There is a clear chain of command here as the police are

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[131] Kevin Sites, School of Death, Yahoo! (Oct. 12, 2005), http://hotzone.yahoo.com/b/hotzone/blogs1180 [reproduced in accompanying notebook at Tab 49].

[132] Fergal Keane, Massacre at Nyarubuyu Church, BBC News (Apr. 4, 2004), http://news.bbc.co.uk/2/hi/programmes/panorama/3582267.stm [reproduced in accompanying notebook at Tab 50].

[133] Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Amended Indictment, ¶ 5.27 (Nov. 15, 1999) [reproduced in accompanying notebook at Tab 17].

[134] *See* SCHABAS, *supra* note 32, at 315 [reproduced in accompanying notebook at Tab 33].

[135] Keane, *supra* note 132 [reproduced in accompanying notebook at Tab 50].

subordinate to the mayor. He had the knowledge that a crime was about to occur and took no steps to prevent the crime from occurring. However, in this example the mayor instigated the crime, and would be better prosecuted under the theory of joint criminal enterprise.

b. Joint Criminal Enterprise

The theory of joint criminal enterprise is best suited for prosecuting individuals when they act in concert with others to further a common plan, and act upon that plan.[136] That theory would likely lead to the successful indictment of a suspect involved with establishing or controlling a government instrument running a state sponsored death site.

The massacre at Murambi School is one example where prosecution under the theory of joint criminal enterprise would be appropriate.[137] As recorded by journalist Kevin Sites "Hutu officials use bullhorns to encourage the Tutsi to gather at Murambi School."[138] Multiple officials were acting to gather the local Tutsi to one central location. Subsequently:

> "the Interahamwe descend on the school. They are armed with guns, machetes, grenades and lances. They attack the weakened Tutsis, beginning a slaughter that will last from the early morning throughout the next day. Those who attempt to flee are hunted down and killed with the help of the local population."[139]

The high level of coordination used to centralize the location of the Tutsi population and then execute them indicate that there was a common plan to pursue the genocide of the local Tutsi population and the actions of the Interahamwe executed the common plan. Due to the widespread nature of the involvement of government officials in controlling the instruments of

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[136] *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1, Judgement, ¶ 227 (Jul. 15, 1999) [reproduced in accompanying notebook at Tab 19].

[137] Sites, *supra* note 131 [reproduced in accompanying notebook at Tab 49].

[138] *Id.*

[139] *Id.*

government in controlling the protests, prosecution under all three categories of joint criminal enterprise is ideal for those who established and controlled the state sanctioned death sites.

c. Aiding and Abetting

To prosecute an individual of aiding and abetting in the involvement of the state sponsored death sites is another possibility for the prosecutors. It would require the individual to only have the intent to commit the single crime and not have the intent to participate in a common plan.[140] For example, a local mayor in control of a government institution may be found guilty for aiding and abiding if he only controlled a single operation against a Tutsi location independent of all other actions in the genocide. Despite the fact that a common plan existed to eliminate the Tutsi and moderate Hutu population, if he only perpetrated a single crime independent to the common plan he lacks the intent to belong to the common plan.[141]

iv. Church Complicity

During the Rwandan Genocide, "significant numbers of prominent Christians were involved in the killings."[142] The church leaders themselves were known to have been close the Habyarimana Presidency and during the genocide "did nothing to discourage the killing."[143] The question then arises as to which theories of individual responsibility are suitable for determining the liability of those Church officials and their actions to which they coordinated with the government.

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[140] *See, e.g.*, Prosecutor v. Vasiljevic, Case No. IT-98-32-A, Judgement, ¶ 102 (Feb. 25, 2004) [reproduced in accompanying notebook at Tab 28].

[141] *See, e.g.*, Prosecutor v. Kvocka *et al*., Case No. IT-98-30/1-A, Judgement, ¶ 90 (Feb. 28, 2004) [reproduced in accompanying notebook at Tab 22].

[142] SCHELTEMA, *supra* note 2, at 162 [reproduced in accompanying notebook at Tab 32].

[143] *Id.*

a. Superior Responsibility

To determine whether the concept of superior responsibility should be applied to the actions of the church officials in relation to their actions with the government we must consider three elements: whether there was a superior-subordinate relationship, whether the church leaders had knowledge that a crime had or was going to occur, and if they failed to punish the crime or prevent it from occurring.[144]

The largest problem with applying this theory to the complicity of the church officials is establishing a superior-subordinate relationship. The church officials themselves had no official role in the government. The role of the church official was that of a spiritual leader. While they may have advised the government officials, there was no clear role that the church leaders actually held positions of authority within the government that would grant them *de jure* or *de facto* control of individuals below them.[145] For these reasons the theory of superior responsibility would likely not be applicable to church officials.

b. Joint Criminal Enterprise

To determine whether the theory of joint criminal enterprise should be applied to the actions of the church officials it must be determined that there was a plurality of persons there is a common plan and there were actions taken in support of that common plan. This theory presents a higher chance to indict and successfully prosecute a church official.

Due to the widespread nature of the genocide, clearly more than one individual was involved, thus qualifying the actions taken for the first requirement. Next, it would have to be proved that there was a common plan. As previously mentioned, the execution of the genocide

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[144] *See* SCHABAS, *supra* note 32, at 315 [reproduced in accompanying notebook at Tab 33].

[145] *See* MUNDIS, *supra* note 30, at 254 [reproduced in accompanying notebook at Tab 34].

across Rwanda is indicative that there was a common plan at the top levels of the Rwandan society.[146] If a church official was involved with the planning and execution of the genocide he would have been a member of a common plan. Finally, there would have to have been actions undertaken in support of that common plan. The actions taken by church officials, from refusing to denounce the interim government[147] to moving with them to their new capitol[148] implies that the actions taken by the interim government members was in accordance to a plan. Despite the indication that church officials meet the broad requirements for indictment under joint criminal enterprise for all three categories, it will be up to the specific actions of the individual that will determine under which category they are prosecuted under if any at all.

c. Aiding and Abetting

Prosecution of church officials under the theory of aiding and abetting will require them to meet the definitions of 'aiding' or 'abetting'[149]. To further distinguish them from indictment under the theory of joint criminal enterprise it will require that they lack the status of a co-perpetrator and that they intended to commit solely the single crime.[150]

Depending upon the action of the individual, it may be possible for the church leaders to be held accountable to this standard. It is conceivable where a church leader could provide a

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[146] *See* SCHELTEMA, *supra* note 2, at 158-161 [reproduced in accompanying notebook at Tab 32].

[147] *See id.*, at 162.

[148] *See id.*

[149] *See, e.g.*, Prosecutor v. Vasiljevic, Case No. IT-98-32-A, Judgement, ¶ 102 (Feb. 25, 2004) [reproduced in accompanying notebook at Tab 28].

[150] *See, e.g.*, Prosecutor v. Kvocka *et al*., Case No. IT-98-30/1-A, Judgement, ¶ 90 (Feb. 28, 2004) [reproduced in accompanying notebook at Tab 22].

substantial contribution to establish a government instrument that commits genocide or another war crime, yet still lack the intent to belong to a common plan.

IV. Summary and Conclusions

The extent and reliance that one can take the accused's participation in the government's plan or establishment is contingent principally on the nature of the participation. The theories of superior responsibility, joint criminal enterprise and aiding and abetting as developed in international tribunal law have been ruled to be applicable to the Rwandan genocide.

An individual in a position of authority presents the prosecution with two options to prosecute with. Under Article 6(3) of the ICTR Statute the prosecution can charge the individual for a lack of action despite knowledge that the genocide or other crime against humanity had occurred. Either statute presents an appropriate way to indict an accused in a position of authority with a crime.

Under Article 6(1) of the ICTR Statute the prosecution can charge the individual with their involvement in a common plan. The three categories of joint criminal enterprise present the prosecution with the chance to indict other individuals who are involved in a common plan to perpetuate violations of international law. It is a theory refined by the ICTY Chambers and the ICTR Chambers that allows for the indictment and prosecution of individuals who participate in a common plan. The three categories allow for the Office of the Prosecutor to charge the individual despite them not being the principle perpetrators of the crime, as long as they contributed significantly and foresaw the results of their actions.

The Prosecutor also has the option to indict individuals on the charge of aiding and abetting for a crime under Article 6(1) of the ICTR Statute. This provides a viable option to

prosecute those who still violate the ICTR Statute yet lack the common plan required to be a participant of a joint criminal enterprise.

In conclusion, the Office of the Prosecutor has several options and methods to hold an individual liable for their actions in establishing or controlling an instrument of government that masterminds or spearhead an act against the state.