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WARTIME SEXUAL VIOLENCE AS MORE THAN COLLATERAL DAMAGE: CLASSIFYING SEXUAL VIOLENCE AS PART OF A COMMON CRIMINAL PLAN IN INTERNATIONAL CRIMINAL LAW

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I INTRODUCTION

In its first final judgment, the International Criminal Court ('ICC') convicted Congolese militia leader, Germain Katanga, for the crimes of murder, directing an attack against a civilian population, destruction of property, and pillaging, committed by members of his militia during an attack on Bogoro village in the eastern region of the Democratic Republic of the Congo ('DRC').[1] However, Katanga was acquitted of individual responsibility for rape and sexual slavery, found to have been committed by his militia during and in the direct aftermath of the attack, as these crimes were considered to be outside the ethnic cleansing common purpose under which the combatants acted.[2] The Court's failure to connect this sexual violence[3] to Katanga and the objectives of the attack is unsurprising. It reflects the longstanding narrative of wartime sexual violence as an inevitable collateral damage of war – a private act of unbridled male lust, not a tool for the achievement of political and military objectives.

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1 *Prosecutor v Katanga (Judgment Pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436-tENG, 7 March 2014) 658–9 ('*Katanga Trial*').

2 Ibid [999], [1023], [1664]. Katanga was also acquitted of charges relating to using child soldiers alleged to have been committed by him in his personal capacity: at [1084]–[1088].

3 In this article, 'sexual violence' refers to a variety of crimes of a sexual nature including rape, sexual assault, sexual mutilation, sexual slavery, forced prostitution and forced pregnancy.

The ad hoc tribunals created by the United Nations Security Council ('UNSC') during and in the direct aftermath of the Yugoslav Wars and Rwandan Genocide, the International Criminal Tribunal for the Former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR'), made significant strides in enabling greater international accountability of political and military leaders for wartime sexual violence. However, their legacy in convicting accused for these crimes has been mixed.[4] The ICC seems poised to fall victim to this same mixed legacy. While the *Rome Statute*[5] was revolutionary for being the first international instrument to include a range of sexual violence and gender-based crimes,[6] the Prosecutor was widely criticised for failing to charge the first indictee before the court, Thomas Lubanga Dyilo, with sexual violence and for acquitting the second indictee, Katanga, of sexual violence.[7]

While there has been substantial academic focus on the international definition of rape and the evidentiary difficulties of proving the physical commission of rape in international criminal trials,[8] there has been a dearth of analysis of the practice of international courts and tribunals in connecting military and political leaders to such crimes once established. As high-level military and political leaders are often not the physical perpetrators of crimes, they must be connected to sexual violence on the ground, through modes of liability, to be convicted. Through an analysis of sexual violence cases at the ad hoc tribunals and the ICC involving common plan modes of liability, this article demonstrates that international courts and tribunals have tended to classify sexual

4 At the ICTY, 51% of those charged with sexual violence have been convicted. At the ICTR, only 25% of those charged with sexual violence have been convicted, compared to a 67% conviction rate for all accused charged. These statistics have been drawn by the author from the ICTR and ICTY Case Law Databases. The Mechanism for International Criminal Tribunals ('MICT')/ICTR/ICTY Case Law Database and general conviction and acquittal statistics can be found at: United Nations Mechanism for International Criminal Tribunals, *MICT/ICTR/ICTY Case Law Database* <http://www.unmict.org/en/cases/ictr-icty-case-law-database>; International Criminal Tribunal for the Former Yugoslavia, *Key Figures of the Cases* (2 August 2016) <http://www.icty.org/en/cases/key-figures-cases>; United Nations Mechanism for International Criminal Tribunals, *Key Figures of ICTR Cases* (7 December 2016) <http://unictr.unmict.org/sites/unictr.org/files/publications/ictr-key-figures-en.pdf>.

5 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

6 *Rome Statute* arts 7(1)(g), 8(2)(b)(xxii), (2)(e)(vi).

7 Letter from Brigid Inder, Women's Initiatives for Gender Justice to Luis Moreno Ocampo, August 2006 <http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf>; REDRESS, 'ICC Prosecutor Leaves Unfinished Business in Ituri, DRC' (Press Statement, 13 February 2008) <http://www.redress.org/downloads/news/08-02-20%20ICC%20DRC%20-%20REDRESS%20Press%20Statement%20-%20Final%20-CORRECTED.pdf>; Women's Initiatives for Gender Justice, 'Partial Conviction of Katanga by ICC: Acquittals for Sexual Violence and Use of Child Soldiers' (Statement, 7 March 2014) <http://www.iccwomen.org/images/Katanga-Judgement-Statement-corr.pdf>.

8 See, eg, Kelly D Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 *Berkeley Journal of International Law* 288, 309–21, 327–41; Alex Obote-Odora, 'Rape and Sexual Violence in International Law: ICTR Contribution' (2005) 12 *New England Journal of International and Comparative Law* 135, 146–51, 156–7; Susana SáCouto and Katherine Cleary, 'The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court' (2009) 17 *American University Journal of Gender, Social Policy & the Law* 337, 349–54.

violence, as opposed to other types of violence, as falling outside of ethnic cleansing or genocidal common plans.

In Part II, the article outlines how narratives of wartime sexual violence have shifted from it being conceptualised as a crime against honour and collateral damage of war, of secondary importance, to a weapon of war, used to advance ethnic cleansing and genocidal campaigns. In Part III, the article examines the use of joint criminal enterprise ('JCE') liability to prosecute leaders for sexual violence at the ad hoc tribunals. While the ad hoc tribunals have successfully used JCE liability to convict numerous leaders for sexual violence, they have shown a tendency to classify these crimes as falling outside of ethnic cleansing or genocidal common plans. Sexual violence has typically been classified as the incidental and/or natural and foreseeable consequence of the execution of such plans and has been prosecuted under the third category of JCE. This section examines and critiques this trend in light of evolving appreciations of the nature of wartime sexual violence.

In Part IV, the article examines the ICC's use of the common plan modes of liability in article 25 of the *Rome Statute* to prosecute sexual violence. In *Katanga*, the ICC followed the trend of the ad hoc tribunals of viewing sexual violence as outside of ethnic cleansing common plans. However, as article 25 does not enable accountability for crimes that are the natural and foreseeable consequence of common plans, if the ICC classifies sexual violence as extraneous to a common criminal purpose, it will be unable to convict leaders for sexual violence under the common plan modes in article 25. The ICC still has significant scope to craft its approach to sexual violence. In order to enhance its sexual violence legacy, it is argued that the ICC must recognise wartime sexual violence as capable of falling within the scope of common criminal purposes to terrorise, destroy and repress civilian populations. In March 2016, the ICC convicted Jean-Pierre Bemba Gombo of superior responsibility for rape committed by his subordinates. This conviction may provide some guidance for the successful prosecution of sexual violence as part of a common criminal plan under article 25.

II NARRATIVES OF WARTIME SEXUAL VIOLENCE: FROM A CRIME AGAINST HONOUR TO A WEAPON OF WAR

From time immemorial, sexual violence has gone hand-in-hand with armed conflict.[9] In many ancient societies, rape was considered to be a property crime against the rightful proprietors of women: men. Women were viewed as the legitimate spoils of war.[10] Early international law narratives of wartime rape saw it classified as a private matter, an opportunistic and lust-driven crime committed

9 For an overview of the history of wartime sexual violence from biblical times through to the Vietnam War, see Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Penguin Books, 1976) 31–114. See also Kelly Dawn Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals* (Martinus Nijhoff, 1997) 49–95, 261–97.

10 Askin, *War Crimes against Women*, above n 9, 21, 33–4; Brownmiller, above n 9, 17–30.

by errant soldiers, or the inevitable result of the chaotic context of war, and thus of secondary importance to other crimes. The 1907 *Hague Conventions* classified rape as an offence against '[f]amily honour and rights'.[11] The *Geneva Conventions* classified it as an '[outrage] upon personal dignity'[12] and an 'attack on … honour',[13] but not as a 'grave breach' of international humanitarian law.[14] This equation of sexual violence with notions of honour and dignity obscured the violent nature of such crimes: 'women were the *object* of a shaming attack, the property … of others … not the *subjects* of rights'.[15] The secondary nature of crimes of sexual violence was made plain during the trials in Nuremberg and Tokyo in the aftermath of World War II, where sexual violence was paid scant attention despite extensive documentation of its occurrence in transcripts.[16]

Undoubtedly, some acts of wartime sexual violence are opportunistic or incidental, with apparently no purpose within the context of a wider conflict. However, the history of wartime sexual violence demonstrates that it is much more than collateral damage of war or a collection of idiosyncratic acts committed by a few errant soldiers. Rather, sexual violence has been used as a tool to terrorise, destroy and repress civilian populations. During World War II, Japanese forces gained notoriety for the 'Rape of Nanking' in which thousands of Chinese women were subjected to horrific sexual violence for 'sport … terror, destruction, and humiliation'.[17] On the eve of *Kristallnacht*, Nazis

11 *Hague Convention (IV) Concerning the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, opened for signature 18 October 1907, 205 ConTS 277 (entered into force 26 January 1910) art 46.

12 *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) art 3 ('*Geneva Convention I*'); *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) art 3 ('*Geneva Convention II*'); *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) art 3 ('*Geneva Convention III*'); *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 3 ('*Geneva Convention IV*'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 75(2)(b) ('*Protocol I to the Geneva Conventions*'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) art 4(2)(e).

13 *Geneva Convention IV* art 27.

14 *Geneva Convention I* arts 49–50; *Geneva Convention II* arts 50–1; *Geneva Convention III* arts 129–30; *Geneva Convention IV* arts 146–7.

15 Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 *McGill Law Journal* 217, 221 (emphasis added).

16 Rape was not charged at Nuremberg and although included in the Tokyo Tribunal judgment, it was considered ancillary to other war crimes: Askin, 'Prosecuting Wartime Rape', above n 8, 295, 300–3, citing International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal, 14 November 1945 – 1 October 1946* (1947); R John Pritchard and Sonia Magbanua Zaide (eds), *The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East in Twenty-Two Volumes* (Garland Publishers, 1981) vol 17.

17 Askin, *War Crimes against Women*, above n 9, 62–8. See also Iris Chang, *The Rape of Nanking: The Forgotten Holocaust of World War II* (Basic Books, 1997).

curbed resistance and incited terror through sexual violence against Jewish women.[18] During and in the aftermath of World War II, Russian troops are estimated to have sexually assaulted two million German women 'with Stalin's blessing that "the boys are entitled to their fun"'.[19] Later, in Vietnam, American soldiers described how raping female civilians was '*expected*' of them.[20]

After decades of campaigning by women's advocacy groups, the 21st century has seen greater recognition of sexual violence as a violent and destructive weapon of war. In 2000, the UNSC called for greater recognition of the unique experience of women in conflict.[21] In 2008, it formally recognised the use of sexual violence 'as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian[s]'.[22] Rape has now been firmly established as a war crime[23] and a crime against humanity.[24] It can constitute other proscribed acts such as genocide,[25] torture,[26] inhuman treatment[27] or persecution,[28] and it has been condemned as a *jus cogens* violation.[29]

All the cases on sexual violence that have come before the ad hoc tribunals, as well as the case of *Katanga*, arose out of situations of ethnically motivated violence, where members of one ethnic group attack, forcibly remove, or detain civilians of another ethnic group. Sexual violence committed during such attacks, detention or forcible removal campaigns, particularly against members of the persecuted ethnic group, is clearly connected to the broader objectives of the campaigns. In the conflicts in the former Yugoslavia, Rwanda and the DRC, it has been widely acknowledged that sexual violence was used to advance the ethnic cleansing and genocide, and was, in many instances, directly calculated to subjugate, terrorise and oppress both the individual victim and the wider community.[30] The rape of Muslim women by the Serbian leadership during the

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18 Brownmiller, above n 9, 49–51; Askin, *War Crimes against Women*, above n 9, 53–4.

19 Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (Penguin Books, 3rd ed, 2008) 392. See also Antony Beevor, *The Fall of Berlin 1945* (Penguin Books, 2003) 434.

20 Peter Karsten, *Law, Soldiers, and Combat* (Greenwood Press, 1978) 54 (emphasis in original). See also Brownmiller, above n 9, 86–113.

21 SC Res 1325, UN SCOR, 4213th mtg, UN Doc S/RES/1325 (31 October 2000).

22 SC Res 1820, UN SCOR, 5916th mtg, UN Doc S/RES/1820 (19 June 2008) Preamble para 6.

23 See *Rome Statute* art 8(2)(b)(xxii).

24 See SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993) art 5(g) ('*Statute of the ICTY*'); SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994) annex art 3(g) ('*Statute of the ICTR*'); *Rome Statute* art 7(1)(g).

25 *Prosecutor v Akayesu (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [706] ('*Akayesu Trial*').

26 *Prosecutor v Delalić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [936]–[938], [940]–[943] ('*Čelebići Trial*').

27 *Prosecutor v Krajišnik (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-00-39-T, 27 September 2006) [800] ('*Krajišnik Trial*').

28 *Prosecutor v Kvočka (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-30/1-T, 2 November 2001) [190] ('*Kvočka Trial*').

29 See Askin, 'Prosecuting Wartime Rape', above n 8, 349; David S Mitchell, 'The Prohibition of Rape in International Humanitarian Law as a Norm of *Jus Cogens:* Clarifying the Doctrine' (2005) 15 *Duke Journal of Comparative & International Law* 219.

30 See Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, 49th sess, Agenda Item 27, UN Doc E/CN.4/1993/50 (10 February 1993) [85]; Askin, *War Crimes against Women*, above n 9, 261–97; SC

Yugoslav Wars has been described as 'an instrument of forced exile, to make you leave your home and never come back … rape as spectacle … rape as torture … rape as a policy of ethnic uniformity and ethnic conquest'.[31] More recently, in the Second Congo War, sexual violence was used to 'spread terror among a particular targeted group, disrupt its social structures, [and] drive the group off its land'.[32] Despite the fact that the sexual violence in these contexts was clearly connected to the wider objectives of the perpetrators, the sexual violence jurisprudence of the ad hoc tribunals and the ICC, under JCE liability and articles 25(3)(a) and (d) of the *Rome Statute*, demonstrates a failure to classify such crimes as part of ethnic cleansing or genocidal common plans.

III THE USE OF JOINT CRIMINAL ENTERPRISE LIABILITY TO PROSECUTE SEXUAL VIOLENCE AT THE AD HOC TRIBUNALS

The Yugoslav Wars and Rwandan Genocide saw widespread and systematic sexual violence used to support devastating ethnic cleansing and genocidal campaigns. In 1998, the ICTR made history by convicting the first person, Jean-Paul Akayesu, for rape as a constitutive act of genocide. In doing so, it underscored that when acts of sexual violence are calculated to terrorise and destroy an ethnic group, they can constitute genocide in the same way as other violent acts.[33] Since then, the ad hoc tribunals have predominantly used two modes of liability to hold leaders accountable for sexual violence committed by the rank and file: superior responsibility and JCE liability. This Part will discuss the use of JCE liability to prosecute leaders for wartime sexual violence.

A An Overview of JCE Liability

JCE liability is an individual form of liability, imposing responsibility on individuals for their participation in a common plan to commit international crimes. This mode of liability was first expounded by the ICTY Appeals Chamber in 2001 in the case against Duško Tadić.[34] It evolved as a result of the need for a theory of liability that captured the collective context of mass atrocity

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Res 789, UN SCOR, 3150th mtg, UN Doc S/RES/798 (18 December 1992); Binaifer Nowrojee, *Shattered Lives: Sexual Violence during the Rwandan Genocide and Its Aftermath* (Human Rights Watch, 1996) 1–2.

31 Catharine A MacKinnon, 'Crimes of War, Crimes of Peace' in Stephen Shute and Susan Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures 1993* (BasicBooks, 1993) 83, 89–90.

32 Alexis Arieff, 'Sexual Violence in African Conflicts' (Report No 40956, Congressional Research Service, 30 November 2010) 8 <http://fas.org/sgp/crs/row/R40956.pdf>. See also Human Rights Watch, 'Soldiers Who Rape, Commanders Who Condone: Sexual Violence and Military Reform in the Democratic Republic of Congo' (Report, July 2009) <http://www.hrw.org/sites/default/files/reports/drc0709web.pdf>.

33 *Akayesu Trial* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [706].

34 *Prosecutor v Tadić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-I-A, 15 July 1999) ('*Tadić Appeal*').

and assigned individual responsibility to persons involved in the orchestration, but not necessarily the physical perpetration, of international crimes.[35] After engaging in a lengthy doctrinal exegesis of post-World War II jurisprudence, the *Tadić* Chamber held that JCE is a form of liability under customary international law and can be implied into the Statute of the ICTY as a form of commission.[36] Since its origins in *Tadić*, JCE emerged as the most frequently used mode of liability at the ICTY.[37]

The *Tadić* Chamber outlined three distinct categories of JCE liability that have been applied in substantially the same terms by subsequent chambers of the ad hoc tribunals. In the first category ('JCE I'), the prosecution must prove that the accused:

1. entered into a common plan to commit one or more international crimes;
2. participated in at least one aspect of this common plan; and
3. shared a common intention to commit the concerted crimes.[38]

In the second category ('JCE II'), the prosecution must prove:

1. the existence of an organised system of repression (such as an internment or concentration camp);
2. that the accused actively participated in the functioning of the system; and
3. that the accused knew of the nature of the system and intended to further the system.[39]

In both of these categories, the accused is criminally responsible for all crimes that fall *within* the common plan or system of repression. The requisite level of intention is that of *dolus directus* in the first degree, ie the accused must specifically intend to commit the crime in question.[40] This intention can be

35 Allison Marston Danner and Jenny S Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 *California Law Review* 75, 138; Antonio Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise' (2007) 5 *Journal of International Criminal Justice* 109, 110.

36 *Tadić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-I-A, 15 July 1999) [188], [190]; *Statute of the ICTY* art 7(1).

37 Danner and Martinez, above n 35, 108. See also Jens David Ohlin, 'Joint Criminal Confusion' (2009) 12 *New Criminal Law Review* 406, 407.

38 *Tadić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-I-A, 15 July 1999) [196]; *Prosecutor v Milutinović (Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-99-37-AR72, 21 May 2003) [23] ('*Milutinović Decision on JCE*'); *Prosecutor v Kvočka (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-30/1-A, 28 February 2005) [82] ('*Kvočka Appeal*').

39 *Tadić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-I-A, 15 July 1999) [203]; *Kvočka Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-30/1-A, 28 February 2005) [82], [599]; *Prosecutor v Krnojelac (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-97-25-A, 17 September 2003) [89] ('*Krnojelac Appeal*').

40 *Tadić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-I-A, 15 July 1999) [220]; *Prosecutor v Vasiljević (Judgment)* (International Criminal Tribunal for

proved directly or inferred from the nature of the accused's position and actions.[41]

Under the third category ('JCE III'), if the prosecution proves that an accused intended to, and did in fact, contribute to a criminal plan, the accused will be liable for a criminal act committed *outside* the intended plan if:

1. the act is objectively a 'natural and foreseeable consequence' of the execution of the common plan; and
2. the accused was subjectively aware that the act was a possible consequence of this execution, but nevertheless 'willingly took that risk' by continuing to participate in the JCE.[42]

The accused will be liable even if non-members of the JCE commit the criminal acts, so long as the physical perpetrators are being 'used' by members to carry out the common plan.[43] Unlike the first two categories, JCE III accepts the lower mens rea of *dolus eventualis* (advertent recklessness) in regard to the specific crime. This lower mens rea is justified on the basis that the common criminal plan, which the accused voluntarily and intentionally engaged in, 'constitutes the preliminary *sine qua non* condition' of the foreseeable crime.[44]

B The Utility of Common Plan Modes of Liability in Prosecuting Wartime Sexual Violence

The historical record reveals that 'the most serious crimes of international concern'[45] are rarely committed by isolated individuals. Rather, these crimes frequently occur in system criminality contexts, whereby groups of individuals acting pursuant to common objectives commit mass atrocity.[46] This system

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the Former Yugoslavia, Appeals Chamber, Case No IT-98-32-A, 25 February 2004) [101] ('*Vasiljević Appeal*').

41 *Tadić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-I-A, 15 July 1999) [220].

42 Ibid [204], [228], [232]; *Kvočka Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-30/1-A, 28 February 2005) [83], [106]; *Prosecutor v Krstić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-33-T, 2 August 2001) [613] ('*Krstić Trial*'); *Milutinović Decision on JCE* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-99-37-AR72, 21 May 2003) [11] (Separate Opinion of Judge Hunt); *Prosecutor v Šainović (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-87-A, 23 January 2014) [1557]–[1558] ('*Šainović Appeal*'); *Prosecutor v Đorđević (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-87/1-A, 27 January 2014) [906] ('*Đorđević Appeal*').

43 *Karemera v Prosecutor (Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014) [605] ('*Karemera Appeal*'); *Đorđević Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-87/1-A, 27 January 2014) [912]–[913]; *Prosecutor v Krajišnik (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-00-39-A, 17 March 2009) [225] ('*Krajišnik Appeal*').

44 Cassese, above n 35, 119. See also *Šainović Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-87-A, 23 January 2014) [1558].

45 *Rome Statute* Preamble paras 4, 9, art 1.

46 Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press, 2012) 21. See also Albin Eser, 'Individual Criminal Responsibility' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of The International Criminal Court: A Commentary* (Oxford University Press, 2002) vol 1, 784.

criminality context presupposes a culpable mastermind or group of masterminds, often connected by some military or political structure, who may be far removed from the physical commission of crimes by the rank and file.[47] In regard to crimes of sexual violence, particularly when used to achieve wider violent objectives, leaders who are involved in facilitating these crimes must be capable of being held to account. Failure to attribute liability to such leaders only serves to reinforce the misconception that wartime sexual violence is a private crime that is inevitable and uncontrollable. In many early cases at the ad hoc tribunals, the focus was exclusively on prosecuting the physical perpetrators of rape.[48] While prosecuting physical perpetrators may be more straightforward, leaders are the predominant focus of international criminal trials. It is thus crucial to consider how to link these leaders to the physical commission of sexual violence on the ground. The common plan modes of liability have been developed to achieve the objectives of international criminal law to hold persons who participate in planning and orchestrating mass violence individually responsible.[49]

One of the main reasons why common plan modes of liability provide a useful tool to prosecute leaders for wartime sexual violence is the limitations of other modes of liability, such as superior responsibility. Superior responsibility enables the attribution of liability to military commanders and superiors for the actions of subordinates who are under their effective control.[50] An accused will be responsible as a superior if they fail to control the criminal actions of subordinates that they knew of or had reason to know of. While there have been a number of successful convictions of superiors for sexual violence,[51] the practical

47 van Sliedregt, *Individual Criminal Responsibility*, above n 46, 21; E van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (TMC Asser Press, 2003) 79.

48 See, eg, *Čelebići Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [943], [965]; *Prosecutor v Kunarac (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001) [630]–[745]; *Prosecutor v Todorovic (Sentencing Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-9/1-S, 31 July 2001) [37]–[40]; *Kvočka Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-30/1-T, 2 November 2001) [559]; *Prosecutor v Nikolić (Sentencing Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-94-2-S, 18 December 2003) [87]–[90]; *Prosecutor v Češić (Sentencing Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-10/1-S, 11 March 2004) [52], [107]; *Prosecutor v Muhimana (Judgment and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-95-1B-T, 28 April 2005) [552], [562]; *Prosecutor v Bralo (Sentencing Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17-S, 7 December 2005) [5], [15], [16].

49 *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), UN Doc S/25704 (3 May 1993) [54]–[55]. See also van Sliedregt, *Individual Criminal Responsibility*, above n 46, 22.

50 *Statute of the ICTY* art 7(3); *Statute of the ICTR* art 6(3).

51 See, eg, *Čelebići Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998); *Prosecutor v Bagosora (Judgment and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 18 December 2008) ('*Bagosora Trial*'); *Prosecutor v Ndindiliyimana (Judgment and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-00-56-T, 17 May 2011) ('*Ndindiliyimana Trial*'); *Prosecutor*

and theoretical difficulties of using this mode of liability demonstrates the need for another mode to capture the personal responsibility of leaders who orchestrate mass atrocity.

First, in regard to practical difficulties, a relationship of effective control is difficult to establish in the absence of formal military authority. For example, in the case of *Čelebići*, concerning crimes against Serbian detainees at the Čelebići prison camp, one accused, Delalić, a Commander who worked at the camp, was not found to have exercised a sufficient degree of control over the personnel at the camp to be liable as a superior for their crimes.[52] Unlike the Nuremburg trials, the chaotic and unstructured nature of the Yugoslav and Rwandan conflicts meant that the tribunals did not have access to vast and detailed documentary evidence that could be used to prove hierarchical command structures.[53] The difficulties of making findings on superior status are particularly pronounced in the context of ill-defined military organisations practising guerrilla warfare, such as in the former Yugoslavia.[54] A relationship of effective control is also difficult to establish where the perpetrators of crimes are not sufficiently identified. For example, in *Bagosora*, the ICTR found that two accused who were commanders only exercised effective control over the soldiers in their specific units. As the physical perpetrators of the crimes, including the sexual violence, were not identified by reference to any unit, a relationship of effective control could not be established.[55]

Even if superior responsibility is practically demonstrable, its focus on an accused's failure to control sexual violence, rather than their personal contribution to it, raises theoretical difficulties. There is a debate as to whether superior responsibility attributes liability for the crimes of subordinates, or

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v Karemera (Judgment and Sentence) (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44-T, 2 February 2012) ('*Karemera Trial*'); *Prosecutor v Hategekimana (Judgment and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-00-55B-T, 6 December 2010).

52 *Čelebići Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) [657]-[658], [686], [718], [721]; *Prosecutor v Delalić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) [266], [268] ('*Čelebići Appeal*'). See also *Akayesu Trial* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [491].

53 Sanja Kutnjak Ivković, 'Justice by the International Criminal Tribunal for the Former Yugoslavia' (2001) 37 *Stanford Journal of International Law* 255, 302.

54 Greg R Vetter, 'Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)' (2000) 25 *Yale Journal of International Law* 89, 127; Matthew Lippman, 'Humanitarian Law: The Uncertain Contours of Command Responsibility' (2001) 8(2) *Tulsa Journal of Comparative & International Law* 1, 57.

55 *Bagosora Trial* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41-T, 18 December 2008) [2061], [2076]–[2083], [2205]–[2206]; *Nizeyimana v Prosecutor (Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-00-55C-A, 29 September 2014) [419]–[420]. See also *Ndindiliyimana Trial* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-00-56-T, 17 May 2011) [61]; *Prosecutor v Nyiramasuhuko (Judgment and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-98-42-T, 24 June 2011) [6083]–[6084]; *Prosecutor v Blaškić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) [613]; *Prosecutor v Kamuhanda (Judgment)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-54A-T, 22 January 2004) [641], [711]–[712] ('*Kamuhanda Trial*').

whether it amounts to a separate offence for failure to control subordinates. It has been argued that in its later years, the ICTY adopted the approach of holding superiors responsible for failure to control subordinates.[56] Given the truth-telling function of international criminal trials, prosecutors should seek to use modes of liability that provide an accurate reflection of the level of involvement and culpability of leaders in international crimes. As Nessersian states:

> The fair labeling principle aims to ensure that the label describing criminal conduct accurately reflects … its wrongfulness … Labels tell the story of the offender's criminality. … A proper label reflects both the *essence* and the *totality* of the criminal conduct.[57]

It may involve a measure of insensitivity to the extent of an accused's personal culpability to find them liable for failing to control subordinates where they played some role in orchestrating an ethnic cleansing campaign and sexual violence was used as a tool for the achievement of the campaign.[58] Indeed, as those charged with superior responsibility are not required to participate in the material elements of the crime or share the perpetrators' intention, some Chambers have considered that superiors are less culpable, and should receive lighter sentences, than those who have personally contributed to the crime, such as participants in a JCE.[59]

JCE liability avoids superior responsibility's practical limitation of having to prove effective control in the absence of a formal hierarchy of responsibility. Unlike superior responsibility, the group of persons who form a JCE 'need not be organised in a military, political or administrative structure'.[60] The common plan need not be prearranged; it can 'materialize extemporaneously' and be inferred from the concerted actions of a group of persons.[61] In this way, JCE liability accounts for the sometimes unstructured, chaotic and unplanned nature of warfare. Where the existence of a common plan is established, JCE liability may

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56 See Chantal Meloni, 'Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?' (2007) 5 *Journal of International Criminal Justice* 619.

57 David L Nersessian, 'Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes against Humanity' (2007) 43 *Stanford Journal of International Law* 221, 255–6 (emphasis in original) (citations omitted).

58 See Mirjan Damaška, 'The Shadow Side of Command Responsibility' (2001) 49 *American Journal of Comparative Law* 455, 456.

59 *Prosecutor v Hadžihasanović (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-01-47-T, 15 March 2006) [2076]; *Prosecutor v Orić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-03-68-T, 30 June 2006) [724].

60 *Kvočka Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-30/1-A, 28 February 2005) [96], quoting *Vasiljević Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-32-A, 25 February 2004) [100].

61 *Kvočka Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-30/1-A, 28 February 2005) [117]; *Tadić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-I-A, 15 July 1999) [227]; *Prosecutor v Furundžija (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-17/1-A, 21 July 2000) [119] ('*Furundžija Appeal*'); *Vasiljević Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-32-A, 25 February 2004) [100]; *Krnojelac Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-97-25-A, 17 September 2003) [97].

capture situations such as that which arose in the case of *Čelebići,* where Delalić was found to have influenced and facilitated the commission of sexual violence, but did not have a sufficient degree of hierarchical control over the physical perpetrators to be liable under superior responsibility.[62] In the ICTR case of *Karemera,* while the accused were liable for *all* of the sexual violence committed by Interahamwe[63] under JCE, they were only liable for the rapes committed by their specific subordinates, the Kigali and Gisenyi Interahamwe, under superior responsibility.[64] In *Kvočka*, the ICTY specifically noted that the accused, who were liable under JCE, would not have been liable as superiors, due to lack of evidence that they exercised effective control over the physical perpetrators of the sexual violence.[65]

JCE liability also somewhat avoids the theoretical limitations of superior responsibility. The focus of JCE is on *personal*, as opposed to *superior*, responsibility, through contribution to a common plan. It is the shared criminal purpose of those behind the plan, and their participation in the plan, that justifies finding them liable as perpetrators, albeit not physical perpetrators. As described above, wartime sexual violence has historically been used as an instrument to inflict terror and violence on a particular ethnic group. The first and second categories of JCE have the potential to accurately reflect this narrative by recognising individual liability for sexual violence committed as part of a broader criminal objective. However, the tribunals have tended to classify sexual violence as falling outside common criminal plans, thereby failing to accurately reflect the nature of sexual violence which is used to carry out ethnic cleansing and genocide.

C Classifying Sexual Violence in Relation to a Common Plan

1 The Tendency to Classify Sexual Violence as Outside of Ethnic Cleansing and Genocidal Common Plans

Two years after the introduction of JCE liability in *Tadić*, the ICTY first applied this mode of liability to convict a military leader for sexual violence. General Krstić, a Commander in the Bosnian Serb Army ('VRS'), was found to have engaged in a JCE to ethnically cleanse Srebrenica, a UN-designated safe haven for Bosnian Muslims, through killing military-aged men and forcibly transferring the population.[66] In the days following the attack, as over 25 000 Bosnian Muslims attempted to escape, VRS forces committed mass killings,

62 *Čelebići Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-96-21-A, 20 February 2001) [268].

63 The Interahamwe were a Hutu paramilitary organisation involved in the Rwandan Genocide.

64 *Karemera Trial* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44-T, 2 February 2012) [1542], [1571], [1670]–[1671], [1684].

65 *Kvočka Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-30/1-T, 2 November 2001) [412], [467], [502]. See also *Kvočka Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-30/1-A, 28 February 2005) [104].

66 *Krstić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-33-T, 2 August 2001) [612], [615].

abuse, rapes and abductions.[67] The Tribunal found that while these crimes did not fall within the scope of the intended enterprise, they were 'foreseeable consequences' of the campaign and could be attributed to the accused under JCE III.[68] Following *Krstić,* there have been 13 accused at the ICTY and three accused at the ICTR who have been convicted under JCE III for sexual violence. In all of these cases, the Chambers found that high-level political or military leaders formed a common plan to commit ethnic cleansing, genocide, or forcible displacement. In contrast to other crimes, which were found to be part of these plans, sexual violence committed *in the context* of the campaigns was ultimately classified as extemporaneous to the common purpose of the campaigns.[69] The following three cases provide examples.

In *Đorđević,* high-level leaders of the Serbian forces were found to have formed a common plan to forcibly displace the Kosovo Albanian population through 'a widespread and systematic campaign of terror and violence'.[70] The Trial Chamber found that as this plan explicitly involved the use of 'terror and violence' to drive out the Albanian population, the crimes of murder and destruction of religious property fell within the common plan.[71] As these crimes were not specifically agreed upon, the Trial Chamber relied on evidence of patterns of collective violence to prove that they were part of the plan. For example, in one instance of mass killing, the Chamber relied on evidence that the killings were widespread, systematic and public and that the Serbian forces made a concerted effort to conceal the crimes.[72] In another instance of the killing of 14 women and children, the Chamber emphasised that the killings were not 'an isolated act' and the perpetrators 'were not out of control'.[73] In regard to the destruction of religious sites, the Chamber found that the sites were symbols of Albanian heritage and identity and their destruction was clearly 'part of the plan to terrorise the … Albanian population into leaving Kosovo'.[74]

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67 Ibid [38]–[51].

68 Ibid [616]–[617].

69 See *Prosecutor v Martić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-11-T, 12 June 2007) [454] ('*Martić Trial*'); *Prosecutor v Milutinović (Judgment Volume 3 of 4)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [94] ('*Šainović Trial*'); *Đorđević Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, IT-05-87/1-A, 27 January 2014) [926], [929]; *Prosecutor v Stanišić (Judgment Volume 2 of 3)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-08-91-T, 27 March 2013) [313], [524]–[525], [776]; *Prosecutor v Prlić (Judgment Volume 4 of 6)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-04-74-T, 29 May 2013) [41], [43] ('*Prlić Trial*'); *Karemera Trial* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44-T, 2 February 2012) [1456], [1460], [1669]; *Prosecutor v Ngirabatware (Judgment and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-54-T, 20 December 2012) [1004], [1305], [1382]–[1393] ('*Ngirabatware Trial*').

70 *Prosecutor v Đorđević (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-87/1-T, 23 February 2011) [2152], [2129]–[2130] ('*Đorđević Trial*').

71 Ibid.

72 Ibid [2146].

73 Ibid [2144].

74 Ibid [2151].

In contrast, after overturning the Trial Chamber's findings that sexual violence by Serbian Forces did not amount to the crime of persecutions, the Appeals Chamber did not apply the same reasoning as was used for murder and destruction of religious sites to infer that sexual violence committed in the context of forcible removals was part of the campaign of 'terror and violence'. The Appeals Chamber found that sexual violence by Serbian forces against four women and one young girl was committed with discriminatory intent, amounted to persecutions and was 'part of a widespread and systematic attack against the Kosovo Albanian civilian population'.[75] However, in its analysis of Đorđević's liability under JCE, rather than finding that the sexual violence was used as a tool to drive out the Albanian population, it found that it was committed due to the fact that the execution of the plan left Kosovo Albanians 'highly vulnerable, lacking protection and exposed to' violence and abuse.[76] The Tribunal classified the sexual violence as a 'foreseeable' consequence of the execution of the common purpose and convicted the accused under JCE III.[77]

In *Prlić,* one of the largest and most complex multi-accused trials at the ICTY, the Trial Chamber found that six senior officers of the Croatian Defence Council ('HVO') were part of a common plan with the purpose of permanently removing, through ethnic cleansing, Muslims and non-Croats from parts of Bosnia and Herzegovina.[78] The Chamber inferred that a wide range of non-sexual crimes such as murder, imprisonment, cruel and inhuman treatment and destruction of property were part of the common purpose. To establish this, the Chamber relied on evidence that these crimes followed 'a clear pattern of conduct' that revealed that they 'were not committed by chance or randomly' and were 'not … the actions of undisciplined soldiers'.[79] For example, the Chamber found that the HVO had severely beaten detainees in many detention centres, causing them to agree to leave the territory, consistent with the purpose of the ethnic cleansing campaign.[80] However, the Chamber found that the multiple acts of rape and sexual violence against Muslim women and girls by HVO forces, although committed while carrying out operations to expel Muslims from their homes and in detention centres,[81] were not part of the common purpose.[82] This is despite findings that the sexual violence as a whole contributed to the 'atmosphere of violence', was 'closely linked' to the eviction operations,[83] and that the accused had received reports or was otherwise informed of the incidents

75 *Đorđević Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-87/1-A, 27 January 2014) [899], [901].
76 Ibid [921]–[922]
77 Ibid [926], [929].
78 *Prlić Trial (Volume 4 of 6)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-04-74-T, 29 May 2013) [24], [41], [43], [586], [926], [1298].
79 Ibid *(Volume 4 of 6)* [65], [586].
80 Ibid *(Volume 4 of 6)* [64].
81 Ibid *(Volume 3 of 6)* [757]–[780].
82 Ibid *(Volume 4 of 6)* [72].
83 Ibid. For a specific example of sexual violence committed in the context of eviction operations, see ibid *(Volume 3 of 6)* [780].

of rape during the evictions.[84] The implication of finding that this sexual violence was not part of the common plan, and convicting the accused under JCE III, is that unlike the non-sexual crimes, the sexual violence *was* 'committed by chance or randomly' and was an act committed by 'undisciplined soldiers', as opposed to being committed in furtherance of the ethnic cleansing campaign.[85]

In the most recent multi-accused trial at the ICTR, *Karemera*, the two highest-ranking leaders of the ruling political party in Rwanda at the time of the genocide were found to have been part of a common plan to destroy the Tutsi population.[86] Although the prosecution did not provide evidence of any direct agreement, the Chamber found that genocide, extermination and serious violations of the *Geneva Conventions* were part of the plan, given their widespread and systematic nature.[87] The Chamber found that widespread and systematic sexual violence against Tutsi women and girls was 'vast in scope and conducted in an open and notorious manner over a long period of time'.[88] It found that this sexual violence was committed 'as part of the widespread attack against Tutsis as an ethnic group', was 'politically motivated', was intended to destroy the Tutsi population, and constituted genocide.[89] However, somewhat incongruously, it ultimately found that this sexual violence did not form part of the plan to destroy the Tutsi population.[90] The Chamber found that the sexual violence was a 'natural and foreseeable consequence of the JCE', convicting the accused under JCE III.[91] In rejecting appeals from both defendants, the Appeals Chamber specifically held that JCE III is designed to capture 'deviatory crimes', such as sexual violence, and does not require proof that the sexual violence furthered the objectives of the common plan.[92] The problem with labelling widespread and systematic sexual violence, particularly that which is politically motivated and intended to destroy an ethnic group, as 'deviatory', is discussed below.

These cases indicate a tendency for sexual violence to be classified as the foreseeable consequence of, and not as part of, common plans to ethnically cleanse and forcibly remove civilian populations through terror and violence. This is contrasted with the tribunal's use of evidence showing patterns of collective violence to prove that non-sexual crimes such as murder, beating, and

84 Ibid *(Volume 4 of 6)* [351], [416], [436], [732], [828], [843], [929], [1013].

85 Ibid *(Volume 4 of 6)* [65], [166], [586], [922], [72], [288], [450], [644], [853], [1021]. The Chamber also found that some other criminal actions, such as murder and plundering in a few specific locations, did not fall within the common plan, but were the foreseeable consequence of the execution of the common plan: at *(Volume 4 of 6)* [72].

86 *Karemera Trial* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44-T, 2 February 2012) [1450].

87 Ibid [1454], [1460].

88 Ibid [1482].

89 Ibid [1473], [1678]–[1680]. See also *Karemera Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014) [606], [608]–[610].

90 *Karemera Trial* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44-T, 2 February 2012) [1456], [1460], [1669].

91 Ibid [1477], [1490].

92 *Karemera Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014) [623], [633], [635].

pillaging have extemporaneously become part of ethnic cleansing common plans.[93] This trend cannot be exclusively attributed to judges. In many cases at the ad hoc tribunals, the prosecution solely charged sexual violence under JCE III, thereby failing to introduce evidence that these crimes were part of the common criminal plan.[94]

2 The Problem with Classifying Sexual Violence as Falling Outside a Common Criminal Plan

While many feminist commentators have lauded the capacity of JCE III to be used to convict leaders of 'foreseeable' wartime sexual violence,[95] there has been no discussion of the implications of the ad hoc tribunals considering sexual violence to lie outside of violent and destructive common plans. The lack of discussion undermines the fact that feminist concern is not simply satisfied by the inclusion of sexual violence in a conviction; the way in which it is described is also important.[96] As discussed above, the concept of fair labelling is important for the truth-telling function of international criminal trials. In regard to prosecuting crimes of sexual violence, the principle requires that the mode of liability used to prosecute sexual violence should meaningfully reflect the nature of wartime sexual violence.[97] As Finlay states:

> Legal language does more than express thoughts. It reinforces certain worldviews and understandings of events. … Through its definitions and the way it talks about

93 See, eg, *Đorđević Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-05-87/1-T, 23 February 2011) [2152]; *Prlić Trial (Volume 4 of 6)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-04-74-T, 29 May 2013) [65], [68]; *Kvočka Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-30/1-A, 28 February 2005) [117]; *Tadić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-I-A, 15 July 1999) [227]; *Furundžija Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-17/1-A, 21 July 2000) [119]; *Vasiljević Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-32-A, 25 February 2004) [100]; *Krnojelac Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-97-25-A, 17 September 2003) [97].

94 *Đorđević Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-87/1-A, 27 January 2014) [913]; *Prlić Trial (Volume 4 of 6)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-04-74-T, 29 May 2013) [36]; *Karemera Trial* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44-T, 2 February 2012) [75]; *Ngirabatware Trial* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-54-T, 20 December 2012) [996].

95 See Navanethem Pillay, 'Sexual Violence: Standing by the Victim' (2009) 42 *Case Western Reserve Journal of International Law* 459, 462–4; Patricia Viseur Sellers, 'Individual(s') Liability for Collective Sexual Violence' in Karen Knop (ed), *Gender and Human Rights* (Oxford University Press, 2004) 193.

96 For a discussion of the importance of the language used to describe sexual violence, see Copelon, above n 15, 230; Dorean M Koenig and Kelly D Askin, 'International Criminal Law and the International Criminal Court Statute: Crimes against Women' in Kelly D Askin and Dorean M Koenig (eds), *Women and International Human Rights Law* (Transnational, 2000) vol 2, 9.

97 See Hilmi M Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (Oxford University Press, 2014) 27–40.

> events, law has the power to silence alternative meanings – to suppress other stories.[98]

The history of wartime sexual violence demonstrates that it has been used, time and time again, as a tool to terrorise, destroy and repress civilian populations. By labelling sexual violence as extemporaneous to common plans, the narrative of sexual violence as a tool to achieve ethnic cleansing and genocidal objectives is suppressed. This story is suppressed through the tribunals classifying sexual violence as 'opportunistic',[99] 'deviatory',[100] committed due to the 'vulnerability' of women,[101] and a 'natural and foreseeable consequence' of ethnic cleansing or genocide.

The tribunals have not provided any justification for treating crimes of sexual violence differently from other types of violence committed in the context of mass atrocity, accepting as almost axiomatic that such crimes are *always* incidental to the achievement of political and military objectives. The sexual violence in all of the aforementioned cases occurred in the context of ethnic cleansing, genocide or forcible removal campaigns. For example, in *Karemera*, the sexual violence was found to be politically motivated and part of the widespread and systematic attack against the Tutsi population.[102] In considering this sexual violence to be disconnected from these larger campaigns, the tribunals simultaneously understate the use of sexual violence as a weapon of ethnic violence and reintroduce historical narratives of sexual violence as unavoidable collateral damage of war.

There are many potential reasons for the prosecutorial and judicial tendency to view sexual violence as falling outside of common plans, even those which materialise extemporaneously. While it is beyond the scope of this article to fully examine feminist or realist critiques that could explain this tendency, this article suggests three possible influential factors. First, this perception of sexual violence appears to echo the traditional international humanitarian law narrative of wartime sexual violence as the opportunistic, private and lust-driven acts of renegade soldiers. This narrative precludes these crimes from being considered to be part of any higher-planned objectives. Indeed, in the context of JCE III, it is the conventional view of sexual violence as a natural and inevitable part of warfare that makes such acts indictable. Second, prosecutors and judges may be influenced by historical domestic conceptions of rape as a private act of humiliation, not a weapon to generate fear and oppression.[103] Third, rape is

98 Lucinda M Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *Notre Dame Law Review* 886, 888.

99 *Prosecutor v Krstić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-33-A, 19 April 2004) [147]–[149], [151].

100 *Karemera Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014) [623], [633], [635].

101 *Krstić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-33-T, 2 August 2001) [616]; *Đorđević Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-87/1-A, 27 January 2014) [921]–[922].

102 *Karemera Trial* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44-T, 2 February 2012) [1473], [1678]–[1680].

103 Brownmiller, above n 9, 16–30; Elizabeth M Schneider, 'The Violence of Privacy' (1991) 23 *Connecticut Law Review* 973, 974.

notoriously difficult to investigate and prosecute in both international and domestic spheres. As stated by MacKinnon, '[b]urdens of proof and evidentiary standards … tacitly presuppose the male experience as normative and credible and relevant'.[104] Indeed, in many common law countries, until the early 1970s, a woman was not considered to be a reliable source of evidence regarding her own sexual abuse.[105] Direct intention to commit rape has proven difficult to establish, particularly given that consent is often assessed from the perspective of the accused rapist.[106] These difficulties may have motivated international prosecutors and judges to rely on the mode of liability that requires the lowest level of mens rea and lowest burden of proof, JCE III, even at the risk of mislabelling the offence. Indeed, in a recent judgment on the elements of JCE III, the ICTR Appeals Chamber noted that where widespread rapes are charged under JCE III, there are lower requirements for specificity in an indictment than if charged under other modes of liability.[107]

3 Going against the Grain: Cases in Which Sexual Violence has been Found to Fall within a Common Criminal Purpose

Two cases at the ICTY have gone against the trend of other cases by classifying sexual violence as part of ethnic cleansing and persecutory common plans. The *Kvočka* case focused on the harrowing crimes committed against non-Serb detainees at the Omarska camp in northwest Bosnia and Herzegovina. Under JCE II, the camp was found to operate as an organised system of repression 'to persecute and subjugate non-Serb detainees'.[108] Sexual violence against female detainees was found to be germane to this system, with the Trial Chamber finding that the physical, mental and sexual abuse of detainees provided 'the primary means of sustaining and furthering the purpose of the criminal enterprise'.[109] However, the Chamber simultaneously posited that the sexual violence was a foreseeable consequence of the system of repression, suggesting that it lay beyond the scope of the system.[110] In finding that the sexual violence was patently predictable, the Chamber reasoned that the women in Omarska were 'guarded by men with weapons who were often drunk, … abusive and who were allowed to act with virtual impunity'.[111] In addressing the Trial Chamber's ostensible reliance on JCE II and III, the Appeals Chamber stated that 'the Trial Chamber did not hold [the accused] … responsible for crimes beyond the common purpose', implying, although unfortunately not explicitly stating, that

104 Catharine A MacKinnon, *Women's Lives, Men's Laws* (Harvard University Press, 2005) 34.
105 Ibid 35–6.
106 Ibid 34; Susan Caringella, *Addressing Rape Reform in Law and Practice* (Columbia University Press, 2009) 138–68.
107 *Karemera Appeal* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-98-44-A, 29 September 2014) [595]. See also *Kvočka Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-30/1-A, 28 February 2005) [106].
108 *Kvočka Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-30/1-T, 2 November 2001) [268], [319]–[320], [324], [407]–[408], [463]–[464], [500], [566], [610].
109 Ibid [323].
110 Ibid [326]–[327].
111 Ibid [327].

the sexual violence lay within the system of ill-treatment.[112] This finding is noteworthy for being the first time an international criminal law Chamber has found sexual violence to be part of a common plan. However, the lack of specific reasoning for this finding may reduce the case's utility to future sexual violence prosecutions.

Another notable case is that of *Krajišnik,* which concerned a common plan for the forcible transfer of non-Serbs from parts of Bosnia and Herzegovina. The Trial Chamber found that, in executing the plan, widespread sexual violence had been used to 'terrorize' Muslim residents and cause them to leave their homes.[113] The Chamber found that the original JCE, which involved deportation and forcible transfer, was expanded over time to include, inter alia, sexual violence.[114] The Chamber based this finding on evidence that Krajišnik had knowledge of the 'expanded' crimes, including the sexual violence, failed to take measures to prevent their occurrence, and nonetheless persisted in the execution of the JCE.[115] The Appeals Chamber affirmed the Trial Chamber's finding that the crimes forming part of a common plan can expand over time, so long as the members of the JCE agree to this expansion. This agreement can 'materialise extemporaneously and be inferred from circumstantial evidence'.[116] However, the Appeals Chamber overturned Krajišnik's conviction for the 'expanded' crimes, including the sexual violence, due to lack of reasoning as to Krajišnik's knowledge of these crimes, or when they came to form part of the common plan.[117] While the precedential value of this case was reduced by the overturning of Krajišnik's conviction for sexual violence, the discussion on the possibility for extemporaneous expansion of a criminal plan may prove useful for the prosecution of sexual violence at the ICC, as discussed further below.

IV THE USE OF COMMON PLAN MODES OF LIABILITY TO PROSECUTE SEXUAL VIOLENCE AT THE ICC

The drafters of the *Rome Statute* evinced a clear intention to accord sexual violence crimes special attention.[118] Despite this intention, the ICC's record in prosecuting sexual violence in its first 14 years of operation has been somewhat disappointing. The former ICC Prosecutor, Luis Moreno Ocampo, was widely criticised for failing to bring charges of sexual violence against the first indictee before the court, Thomas Lubanga Dyilo, despite extensive evidence of rape and

112 *Kvočka Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-30/1-A, 28 February 2005) [86].

113 *Krajišnik Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-00-39-T, 27 September 2006) [800], [1105], [1150].

114 Ibid [1100]–[1118].

115 Ibid [1098], [1100], [1108]–[1109], [1111], [1118].

116 *Krajišnik Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-00-39-A, 17 March 2009) [163].

117 Ibid [171]–[178].

118 See, eg, *Rome Statute* arts 7(1)(g), 8(2)(b)(xxii), (2)(e)(vi), 42(9), 43(6), 54(1)(b). See also Copelon, above n 15, 233–9; Koenig and Askin, above n 96, 12–29.

sexual slavery by Lubanga's militia.[119] The acquittal of Katanga for crimes of sexual violence has also been the subject of strong criticism.[120] This Part will focus on the common plan modes of liability in the *Rome Statute*, articles 25(3)(a) and (d), providing for personal liability based on participation in, or contribution to, a common criminal plan. The failure to connect Katanga to the sexual violence committed by his militia prompts inquiry into whether these modes of liability have been, or will be, interpreted in a way that enables the attribution of liability to leaders for wartime sexual violence. This Part will demonstrate that if the ICC follows the trend of the ad hoc tribunals in classifying sexual violence as extraneous to common criminal plans, the Prosecutor will not be able to prove many of the elements of articles 25(3)(a) and (d).

A Impediments to Prosecuting Sexual Violence under the Common Plan Modes of Liability in the *Rome Statute*

There are three common plan modes of liability in the *Rome Statute*: direct co-perpetration, indirect co-perpetration and contribution to a group crime. Direct and indirect co-perpetration are encompassed in article 25(3)(a), which states that an individual will be criminally responsible if they commit a crime 'jointly with another'. The *Lubanga* Appeals Chamber held that to be liable as a direct co-perpetrator, an accused must:

1. engage in an agreement or common plan with one or more individuals that results in the commission of the crime in question;
2. exercise 'control over the crime'; and
3. satisfy the 'intention' and 'knowledge' requirements under article 30.[121]

The mode of indirect co-perpetration enables an accused to be liable for the actions of perpetrators who are not members of the common plan where any co-perpetrator exerts 'control over the will' of the physical perpetrator/s.[122] The mode of contribution to a group crime is found in article 25(3)(d). It states that an accused will be liable for a crime committed by 'a group of persons acting with a common purpose' that they 'in any other way contribute[d] to', if the contribution is 'intentional' and is:

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119 *Prosecutor v Lubanga (Judgment Pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2842, 14 March 2012) ('*Lubanga Trial*'). See Letter from Brigid Inder to Luis Ocampo, above n 7; REDRESS, above n 7; *Letter Dated 16 July 2004 from the Secretary-General Addressed to the President of the Security Council: Special Report on the Events in Ituri, January 2002–December 2003*, UN GAOR, UN Doc S/2004/573 (16 July 2004) [37], [80], [108]; Amnesty International, 'Democratic Republic of Congo: Children At War' (Report, AFR 62/034/2003, 8 September 2003) 8–9; Human Rights Watch, 'Seeking Justice: The Prosecution of Sexual Violence in the Congo War' (Report, 8 March 2005) 19–20 <http://www.hrw.org/sites/default/files/reports/drc0305.pdf>.

120 Women's Initiatives for Gender Justice, above n 7.

121 *Prosecutor v Lubanga (Judgment on the Appeal of Mr Thomas Lubanga Dyilo against His Conviction)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06-3121-Red, 1 December 2014) [445]–[446], [468]–[473] ('*Lubanga Appeal*').

122 *Katanga Trial* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436-tENG, 7 March 2014) [1399], [1402], [1416]; Ibid [465].

1. 'made with the aim of furthering the criminal activity or criminal purpose'; or
2. 'made in the knowledge of the intention of the group to commit the crime'.[123]

If the ICC follows the trend of the ad hoc tribunals of viewing sexual violence as extraneous to the achievement of political and military objectives, it seems likely that many elements of these modes of liability will not be capable of being established.

First, the relationship of the accused to the common plan under article 25(3)(a), requiring 'control over the crime',[124] may serve as an impediment to sexual violence prosecutions. 'Control over the crime' requires a contribution to the crime that is so 'essential' that the accused has the 'power to frustrate the commission of the crime'.[125] Under all forms of JCE liability, the requisite link between the accused and the common plan is more diffuse; the perpetrator need only be a participant in the JCE.[126] Under JCE III, the accused need only provide the physical perpetrator with the opportunity to commit the foreseeable crime by participating in the JCE.[127] If the ICC is to follow the trend of viewing sexual violence as incidental to a plan devised by an accused, it is unlikely that the accused could be considered to control whether sexual violence will be committed, as it is not directly connected to the accused's plan.

Under article 25(3)(d), the words 'in any other way contributed', setting out the relationship of the accused to the common plan, are more equivocal.[128] The *Katanga* Chamber held that they require the accused's contribution to be significant, in the sense that it has a bearing on the physical occurrence of the crime or the way it was committed.[129] However, two subsequent Pre-Trial Chambers merely required a 'contribution' to the crime.[130] While JCE does not

123 *Rome Statute* arts 25(3)(d)(i)–(ii). See also *Katanga Trial* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436-tENG, 7 March 2014) [1618], [1620]; *Prosecutor v Mbarushimana (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/10-465-Red, 16 December 2011) [270]–[289] ('*Mbarushimana Confirmation of Charges*').

124 See *Lubanga Appeal* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06-3121-Red, 1 December 2014) [469].

125 Ibid; *Lubanga Trial* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2842, 14 March 2012) [994], [997]–[999], [1003].

126 See *Kvočka Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-30/1-A, 28 February 2005) [97].

127 Ibid [106].

128 In *Mbarushimana*, the Appeals Chamber declined to clarify the requisite level of contribution under article 25(3)(d): *Prosecutor v Mbarushimana (Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 Entitled "Decision on the Confirmation of Charges")* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/10-514, 30 May 2012) [65]. See also Ohlin, above n 37, 410–416; Randle C DeFalco, 'Contextualising *Actus Reus* under Article 25(3)(d) of the ICC Statute: Thresholds of Contribution' (2013) 11 *Journal of International Criminal Justice* 715.

129 *Katanga Trial* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436-tENG, 7 March 2014) [1620], [1632]–[1633].

130 *Prosecutor v Ntaganda (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/04-02/06-309, 9 June 2014) [12], [15], [31], [36],

require a 'substantial contribution', in the sexual violence cases at the ad hoc tribunals, most Chambers found that the accused was a 'key participant'[131] or made a 'substantial' or 'significant'[132] contribution to the JCE. Therefore, even if the accused's contribution is required to be 'significant', this may not necessarily impede sexual violence prosecutions, so long as sexual violence is considered to be part of the common plan.

The greatest impediment to prosecuting sexual violence under the common plan modes of liability is likely to be the requirement that the crime fall within the common plan. Under article 25(3)(a), the alleged crime must fall within the common plan such that the co-perpetrators, including the accused, either specifically intend for the crime to occur or are 'aware that it *will* occur in the ordinary course of events'.[133] Various Chambers have explicitly rejected attempts to incorporate reckless indifference, the mens rea applicable to JCE III, into article 25.[134] The *Lubanga* Appeals Chamber resolved the previous divergent interpretations of the requisite minimum level of awareness of the occurrence of the crime.[135] It held that the words 'will occur' in article 30(2), when read with 'in the ordinary course of events', indicate that the co-perpetrators must be aware that the commission of the crime is a virtually certain consequence of the execution of the plan.[136] In other words, it must be 'nigh on impossible for [the co-perpetrator] to envisage that the consequence will not occur'.[137] This common

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[74], [97] ('*Ntaganda Confirmation of Charges*'); *Prosecutor v Gbagbo (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/11-01/11-656-Red, 12 June 2014) [195], [230], [252] ('*Gbagbo Confirmation of Charges*').

131 *Krstić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-33-T, 2 August 2001) [612].

132 *Đorđević Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-87/1-A, 27 January 2014) [371], [456]–[457], [460]–[461]; *Šainović Trial (Volume 3 of 4)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [467], [782], [1131].

133 *Lubanga Appeal* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06-3121-Red, 1 December 2014) [446] (emphasis altered); *Rome Statute* art 30(2)(b).

134 *Katanga Trial* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436-tENG, 7 March 2014) [774]–[775]; *Lubanga Trial* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2842, 14 March 2012) [1011]; *Prosecutor v Bemba Gombo (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08-424, 15 June 2009) [358] ('*Bemba Confirmation of Charges*'); *Prosecutor v Muthaura (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-02/11-382-Red, 23 January 2012) [411]; *Prosecutor v Ruto (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-01/11-373, 23 January 2012) [335]–[336].

135 See *Lubanga Trial* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2842, 14 March 2012) [1012]; *Katanga Trial* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436-tENG, 7 March 2014) [776]; *Bemba Confirmation of Charges* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08-424, 15 June 2009) [362], [369].

136 *Lubanga Appeal* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06-3121-Red, 1 December 2014) [447], [451]; *Katanga Trial* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436-tENG, 7 March 2014) [776]; *Bemba Confirmation of Charges* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08-424, 15 June 2009) [362], [369].

137 *Katanga Trial* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436-tENG, 7 March 2014) [777].

intention amongst the co-perpetrators need not be pre-arranged. As with JCE, it can materialise extemporaneously and be inferred from evidence of 'the group's collective decisions and action[s], or its omissions'.[138]

Article 25(3)(d) contains two mens rea requirements. First, the accused's contribution to the common plan must be intentional, in the sense that it is 'deliberate and made with awareness'.[139] Second, the accused's contribution must be made in the knowledge of the group's intention to commit the crime, in the sense that the accused was 'aware that the intention existed when engaging in the conduct which constituted his or her contribution'.[140] Although under article 25(3)(d) the accused need not be a member of the common plan, it must be established that the participants in the common purpose (who are the physical perpetrators of the crime) hold the same mens rea as that of co-perpetrators under article 25(3)(a).[141] Therefore, under all three common plan modes of liability, the members of the common plan must either specifically intend for the crime to occur or be virtually certain that it will occur as a consequence of the plan's execution.

The *Katanga* Chamber was explicit that the virtual certainty standard does not encompass opportunistic crimes or those that are incidental to the achievement of the common purpose, even if such crimes are reasonably foreseeable.[142] It is thus clear that if the ICC continues the trend of the ad hoc tribunals of viewing sexual violence as opportunistic or merely incidental to the execution of a common purpose, this virtual certainty standard cannot be met. In the case of *Šainović,* when the ICTY Trial Chamber invoked a mens rea requirement close to virtual certainty, that it must be 'foreseeable on the basis of the information available to the accused that the crime … *would* be committed',[143] it held that two accused were not liable for sexual violence. In 2014, the Appeals Chamber only reversed this finding on the basis that the Trial Chamber had applied the wrong mens rea standard for JCE III and sexual violence need only be foreseen as a '*possible* consequence'.[144] This suggests that if the ad hoc tribunals were to apply the standard of virtual certainty, while at the same time considering sexual violence to be incidental to a common purpose, the convictions for sexual violence under JCE III would not have been obtained. The case of *Katanga*, discussed below, may indicate the ICC's willingness to follow the trend of the ad hoc tribunals of classifying sexual violence as outside of common plans.

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138 Ibid [1627]. See also *Mbarushimana Confirmation of Charges* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/10-465-Red, 16 December 2011) [271].

139 *Katanga Trial* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436-tENG, 7 March 2014) [1638].

140 Ibid [1641]–[1642].

141 Ibid [1627]–[1628].

142 Ibid [1630].

143 *Šainović Trial (Volume 1 of 4*) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [111] (emphasis added).

144 *Šainović Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-87-A, 23 January 2014) [1557] (emphasis added).

B The Prosecution of Sexual Violence in *Katanga*

During the First and Second Congo Wars, the presence of Ugandan and Rwandan forces in the eastern DRC province of Ituri intensified the already deteriorating relations between the Hema and Lendu ethnic communities in the region.[145] By 2003, thousands of combatants aligned with the Lendu-affiliated FRPI ('the *collectivité*') were organised in a network of camps throughout Ituri. By the eve of the Bogoro attack, the *collectivité* constituted an organised militia with the common objective to rid the region of the Hema-affiliated UPC army and 'wipe out' the Hema civilian population in Bogoro, in order to ensure control of the region.[146] Germain Katanga, who received military training as a member of the civil guard of President Mobutu, was the President of the FRPI by at least 9 February 2003 and took on the role of Chief of the *collectivité*. In these roles, Katanga had military authority and made military decisions on behalf of the *collectivité*, acted as a facilitator between commanders, and represented the *collectivité* at high-level meetings.[147] In the lead-up to the Bogoro attack, Katanga played a fundamental role in facilitating the receipt, storage and distribution of weapons and ammunition to the *collectivité*.[148]

On 24 February 2003, at approximately 4 or 5 am, Bogoro village was encircled and attacked by combatants of the *collectivité* along with other Lendu-affiliated militias.[149] During the attack, and in its direct aftermath, the combatants killed, raped and enslaved unarmed civilians.[150] The combatants also demolished and set ablaze houses owned by civilians.[151] The Chamber found that the attack, including the murders, pillaging, rapes and enslavement, was part of a widespread and systematic attack conducted under an organised military policy to 'wipe out' the Hema civilian population in the region.[152] It was not established that Katanga was present during or in the direct aftermath of the attack.[153] In finding that the crimes of rape and sexual slavery had been committed by members of the *collectivité*, the Chamber primarily relied on the testimony of three witnesses. All three witnesses had been driven out of hiding places by armed combatants, raped repeatedly by numerous combatants and taken to military camps where they were held captive as sexual slaves for up to one and a half years.[154]

The Chamber found that the crimes of murder and attacking a civilian population clearly fell within the common purpose to 'wipe out' Hema civilians

145 *Katanga Trial* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436-tENG, 7 March 2014) [442]–[515]. See also Herbert Weiss, 'War and Peace in the Democratic Republic of the Congo' (Current African Issues No 22, Nordiska Afrika Institutet [Nordic Africa Institute], 2000) 13–20.
146 *Katanga Trial* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436-tENG, 7 March 2014) [568]–[718], [1150]–[1156].
147 Ibid [1246]–[1269], [1359]–[1361].
148 Ibid [1270]–[1293].
149 Ibid [731]–[748], [755].
150 Ibid [858]–[866].
151 Ibid [941], [950].
152 Ibid [878], [1139]–[1167].
153 Ibid [749]–[754].
154 Ibid [988]–[1019].

in Bogoro.[155] The Chamber further found that pillaging was 'integral' to the plan of wiping out the Hema civilian population and fell within the common purpose. It relied on evidence of collective destruction and past instances of pillaging by the *collectivité* to infer that the destruction of property and pillaging in Bogoro were within the knowledge of the participants.[156] Katanga was convicted of these crimes under article 25(3)(d).

While the Chamber established that rapes and sexual slavery were frequently committed by FRPI combatants in executing the broad campaign to 'wipe out' Hema civilians in Ituri,[157] it did not make the same inferences from this evidence that it had for the crime of pillaging. Rather, the Chamber found that contrary to the other crimes forming part of the common purpose, there was no evidence that *specific* members of the *collectivité* had committed sexual violence prior to the Bogoro attack.[158] Thus, there was insufficient evidence that the participants 'knew' that the sexual violence would occur.[159] This finding may indicate that Chambers will require a high degree of similarity between previous, but related, wartime sexual violence in order to find that combatants have knowledge that sexual violence is virtually certain to occur.

Further, while the Chamber held that the sexual violence was connected to, and formed part of, the widespread and systematic attack, it concluded that the common purpose to 'wipe out' the Hema civilian population did not necessarily occur *through* the commission of the sexual violence.[160] The Chamber reasoned that the women who were raped and forced into sexual slavery escaped certain death by claiming that they were not Hema.[161] For these reasons, the Chamber found that the sexual violence did not fall within the common plan to 'wipe out' the Hema civilian population in Bogoro and Katanga was acquitted of rape and sexual slavery.

The ICC's failure to find Katanga liable for wartime sexual violence cannot be exclusively attributed to judicial reluctance to draw inferences from prior instances of sexual violence. As the *Katanga* Chamber stated:

> no evidence [was] laid before the Chamber to allow it to find that the acts of rape and enslavement were committed on a wide scale and repeatedly on 24 February 2003, or furthermore that the obliteration of the village of Bogoro perforce entailed the commission of such acts.[162]

If the Prosecutor had presented further evidence of the widespread and systematic nature of the sexual violence in the Bogoro attack, linking this to prior instances of sexual violence committed by members of the *collectivité,* the result may have been different. Ultimately, regardless of whether the Chamber was correct in finding the sexual violence to fall outside of the common plan, the judgment perpetuates the trend of the ad hoc tribunals in classifying sexual

155 Ibid [1658].
156 Ibid [1659]–[1662].
157 Ibid [1127].
158 Ibid [1663].
159 Ibid [1664].
160 Ibid [1233]–[1234], [1663].
161 Ibid [989], [997], [1009], [1014], [1663].
162 Ibid [1663].

violence as outside of and incidental to the achievement of ethnic cleansing and genocidal common plans.

V ENHANCING THE SEXUAL VIOLENCE LEGACY OF THE ICC

A Lessons from the ICC's Conviction of Jean-Pierre Bemba Gombo for Sexual Violence

On 21 March 2016, the ICC convicted Jean-Pierre Bemba Gombo, the former Vice-President of the DRC and leader of the Ugandan-backed MLC (the primary force against the DRC government in the Second Congo War), of murder, rape and pillaging as a superior under article 28 of the *Rome Statute*.[163] Article 28 provides for the liability of military commanders and superiors for crimes committed by persons under their effective control that they fail to prevent, repress, or submit to competent authorities for investigation and prosecution. In October 2002, Bemba sent MLC troops to the Central African Republic ('CAR') to assist the President of the CAR, Ange-Félix Patassé, to repress an insurgency.[164] Once MLC troops had established control over the rebel territories, they committed murder, pillaging and rape against the CAR civilian population pursuant to a consistent modus operandi.[165]

The Chamber found that MLC troops committed numerous acts of sexual violence against CAR civilians, with no perpetrator acting alone and each act accompanied by murder and pillaging.[166] In the Sentencing Judgment, delivered on 21 June 2016, the Chamber summarised the many purposes for which the underlying acts of sexual violence were committed, for example, 'for self-compensation', and to punish civilians suspected of being connected to rebel activities.[167] In making findings on whether these acts were crimes against humanity, the Chamber classified both murder and sexual violence as being part of the larger criminal design against the civilian population. It thus rejected any suggestion that sexual violence or murder was 'the result of an uncoordinated and spontaneous decision of the perpetrators, acting in isolation'.[168] Indeed, in sentencing, the Chamber cited the testimony of an expert witness, Dr Tabo, 'that

163 *Prosecutor v Bemba Gombo (Judgment Pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016) ('*Bemba Trial*').

164 Ibid [380].

165 Ibid [630], [638], [648], [673], [676]–[677].

166 Ibid [643], [673]–[674], [676]; *Prosecutor v Bemba Gombo (Decision on Sentence Pursuant to Article 76 of the Statute)* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3399, 21 June 2016) [45] ('*Bemba Decision on Sentence*').

167 *Bemba Decision on Sentence* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3399, 21 June 2016) [47]; *Bemba Trial* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016) [678].

168 *Bemba Trial* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016) [685].

MLC soldiers used sexual violence as a weapon of war'.[169] In regard to Bemba's liability, the Chamber found that Bemba was aware of everything the MLC troops were doing in the CAR, made several trips to the CAR, communicated directly with MLC commanders in the field, had disciplinary power over the MLC and knew that MLC troops were committing or about to commit the crimes of murder, rape and pillaging.[170]

Prior to *Bemba*, commentators had suggested that the fact that article 28 is directly drawn from *Protocol I to the Geneva Conventions* emphasises that the liability it imposes 'is based on the failure to fulfill an official duty and is not an imputation of liability for the acts of subordinates'.[171] This view was advanced in June 2014 when the *Gbagbo* Pre-Trial Chamber noted that article 28, 'which establishes liability for violation of duties', imports a lesser degree of culpability than under the modes in article 25, 'which establish liability for one's own crimes'.[172] However, the *Bemba* Trial Chamber held that '[a]rticle 28 provides for a mode of liability, through which superiors may be held [individually] criminally responsible' for the crimes committed by their subordinates.[173] It noted that article 28 'is not, inherently, a hierarchically lower or higher mode of liability in terms of gravity than commission of a crime' under article 25.[174] This affirmation that article 28 imposes liability for the crimes of subordinates emphasises that sexual violence is not simply an isolated act of renegade soldiers. Rather, it is an international crime, connected to the organisational policy of an armed conflict, for which superiors can be held individually accountable. As discussed below, the treatment and classification of sexual violence in *Bemba*, although not dealing with the common plan modes of liability,[175] provides some guidance for the ICC in prosecuting sexual violence under article 25.

B Classifying Sexual Violence as Part of a Common Plan

Under article 21(3) of the *Rome Statute*, the ICC is obliged to interpret its laws in accordance 'with internationally recognized human rights, and be without any adverse distinction founded on … gender'. Some commentators have argued that this provision enables the Statute to be interpreted in light of internationally

169 *Bemba Decision on Sentence* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3399, 21 June 2016) [44].

170 *Bemba Trial* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016) [399], [423]–[429], [559], [717].

171 Lippman, above n 54, 86.

172 *Gbagbo Confirmation of Charges* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/11-01/11-656-Red, 12 June 2014) [262].

173 *Bemba Trial* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016) [171]–[172].

174 *Bemba Decision on Sentence* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3399, 21 June 2016) [16].

175 The Prosecutor initially charged Bemba as a co-perpetrator under article 25(3)(a). However, the Pre-Trial Chamber found that there was insufficient evidence to establish substantial grounds to satisfy the requirement that the charged crimes fell within the common plan, such that Bemba was aware that by sending MLC troops to the CAR, the crimes would be committed in the ordinary course of events: *Bemba Confirmation of Charges* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08-424, 15 June 2009) [372], [374], [401].

recognised gender concerns.[176] As the international legal sphere has accepted that sexual violence can be used as a weapon of war and ethnic violence,[177] it is arguable that this provision both requires judges to interpret the *Rome Statute* in light of this acceptance and restrains judges from classifying wartime sexual violence in a way that does not reflect its true nature.

The ICC still has scope to craft its approach to sexual violence and the common plan modes of liability. The fact that the *Rome Statute* does not allow for the prosecution of opportunistic or incidental crimes under article 25(3)(a) or (d) provides a chance for the ICC to develop and strengthen new internationally recognised narratives of sexual violence as a method of warfare and repression. In order for the ICC to adopt this narrative and classify sexual violence as falling within a common purpose, it must go against the grain. In many ways, *Bemba* went against the grain in its handling of sexual violence.[178] The *Bemba* Sentencing Chamber emphasised that the *Rome Statute* accorded 'a special status to sexual crimes' given their 'especially grave nature and consequences'.[179] Most importantly for this article, the *Bemba* judgment underlines that wartime sexual violence can be a tool of warfare with distinct military and political purposes and is not simply a 'spontaneous', 'isolated' or opportunistic crime.[180] The description of rape throughout the *Bemba* judgment is a positive step towards the proper classification of wartime sexual violence in international criminal trials.

Experience from both the ad hoc tribunals and the ICC demonstrates that there is often no evidence that sexual violence was explicitly ordered or part of a plan as initially devised by leaders.[181] This means that evidence of patterns of

176 See Rana Lehr-Lehnardt, 'One Small Step for Women: Female-Friendly Provisions in the *Rome Statute of the International Criminal Court*' (2002) 16 *BYU Journal of Public Law* 317, 341–2; Richard P Barrett and Laura E Little, 'Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals' (2003) 88 *Minnesota Law Review* 30, 75.

177 See SC Res 1325, UN SCOR, 4213th mtg, UN Doc S/RES/1325 (31 October 2000); SC Res 1820, UN SCOR, 5916th mtg, UN Doc S/RES/1820 (19 June 2008); *Letter Dated 26 November 2013 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the Secretary-General*, UN GAOR, 68th sess, Agenda Item 28, UN Doc A/68/633 (3 December 2013) annex ('*Declaration of Commitment to End Sexual Violence in Conflict*'); SC Res 2106, UN SCOR, 6984th mtg, UN Doc S/RES/2106 (24 June 2013).

178 See Janine Natalya Clark, 'The First Rape Conviction at the ICC' (2016) 14 *Journal of International Criminal Justice* 667.

179 *Bemba Decision on Sentence* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3399, 21 June 2016) [35].

180 See *Bemba Trial* (International Criminal Court, Trial Chamber III, Case No ICC-01/05-01/08-3343, 21 March 2016) [685].

181 See, eg, *Krstić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-33-T, 2 August 2001) [616]; *Martić Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-95-11-T, 12 June 2007) [454]; *Šainović (Volume 3 of 4)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [94]; *Đorđević Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-87/1-A, 27 January 2014) [926], [929]; *Prlić Trial (Volume 4 of 6)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-04-74-T, 29 May 2013) [41], [43]; *Karemera Trial* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44-T, 2 February 2012) [1456], [1460], [1669]; *Ngirabatware Trial* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-54-T, 20 December 2012) [1004], [1305], [1382]–[1393].

sexual violence or prior instances of sexual violence by the same co-perpetrators must be used to establish the 'virtual certainty' standard. The *Katanga* Chamber recognised that a common purpose to commit crimes, such as sexual violence, may be inferred from the subsequent collective decisions and actions of members of a group.[182] Therefore, as in *Krajišnik,* there is scope for future ICC Chambers to reason that the systematic and open nature of sexual violence and the fact that it was previously committed by co-perpetrators indicates that it has extemporaneously become part of a common purpose.[183] Future ICC Chambers may draw on both the findings in *Bemba*, that sexual violence can be used to further military or political purposes, and in *Krajišnik*, that sexual violence was used to terrorise civilians and force them to leave their homes,[184] to find that sexual violence falls within violent and destructive common plans. In doing so, it will fairly reflect the use of wartime sexual violence to terrorise civilian populations, cause them suffering, force them to leave their homes and carry out ethnic cleansing and genocide.

Even if sexual violence is considered to be part of a common plan, the other elements of articles 25(3)(a) and (d) may impede its prosecution. The difficulty of establishing these other elements in regard to sexual violence has not been tested. The *Katanga* Chamber did not consider whether Katanga would have had control over the sexual violence or the other mental elements in article 25(3)(d). However, it seems reasonable that the same reasoning that was used to convict Katanga for the other charged crimes could be used in regard to sexual violence. For example, in regard to the 'control over the crime' requirement, if the *Katanga* Chamber had classified the sexual violence as part of the ethnic cleansing campaign, it may have been argued that the facilitation of the campaign by Katanga, through supplying weapons, was so 'essential' that he had the capacity to control how the sexual violence was committed. This is particularly so given that the weapons he supplied were used to commit the sexual violence.[185]

182 *Katanga Trial* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436-tENG, 7 March 2014) [1626]–[1630]. See also *Lubanga Appeal* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06-3121-Red, 1 December 2014) [445]; *Mbarushimana Confirmation of Charges* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/10-465-Red, 16 December 2011) [271]; *Kvočka Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-30/1-A, 28 February 2005) [117]; *Tadić Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-I-A, 15 July 1999) [227]; *Krnojelac Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-97-25-A, 17 September 2003) [97].

183 See *Krajišnik Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-00-39-A, 17 March 2009) [163], [171]; *Krajišnik Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-00-39-T, 27 September 2006) [1100]–[1118].

184 *Krajišnik Trial* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-00-39-T, 27 September 2006) [800], [1105], [1150].

185 *Katanga Trial* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436-tENG, 7 March 2014) [988]–[1019].

C Enhancing Investigation and Charging Practices

Responsibility for enhancing the sexual violence legacy of the ICC does not rest solely on the shoulders of judges. At the ad hoc tribunals, many sexual violence convictions were not obtained due to lack of evidence presented by prosecutors[186] and pressure to drop charges of sexual violence in order to obtain guilty pleas.[187] The prosecutor also frequently charged sexual violence under JCE III, thereby failing to introduce evidence that these crimes were part of a common criminal plan.[188] At the ICC, in the case of *Lubanga*, the Prosecutor was strongly admonished for failing to apply to include sexual violence charges at any stage of the proceedings.[189] Indeed, shortly after the Prosecutor filed charges against Lubanga, three staff members of one women's advocacy group, over the course of 21 days, conducted interviews with 31 people alleged to have been victims of sexual violence by Lubanga's militia.[190] In *Katanga*, there were early indications that the evidence linking Katanga to the sexual violence needed reinforcement.[191] At the pre-trial stage of proceedings, Judge Usačka proposed that the hearing be adjourned in order for the Prosecutor to provide further evidence linking Katanga to the crimes.[192] However, as Judge Usačka was in dissent, no adjournment was ordered.

This suggests that the Prosecutor must strengthen its investigation and prosecution of sexual violence, including by bringing sufficient evidence to reinforce charges against leaders at trial. In regard to articles 25(3)(a) and (d), the result in *Katanga* demonstrates that the Prosecutor should focus on bringing evidence of prior instances of sexual violence by co-perpetrators, committed in similar circumstances, as well as of patterns of sexual violence, both of which can be used to show that these crimes were 'virtually certain' to occur and were

186 See, eg, *Musema v Prosecutor (Judgment and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-T, 27 January 2000) [802]–[803], [829], [845]; *Musema v Prosecutor (Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-96-13-A, 16 November 2001) [187]–[194]; *Prosecutor v Kajelijeli (Judgment and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-98-44A-T, 1 December 2003) [923]–[924]; *Kamuhanda Trial* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-95-54A-T, 22 January 2004) [497], [507], [711]–[712].

187 See, eg, *Prosecutor v Serushago (Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-39-S, 5 February 1999) [4]; *Prosecutor v Bisengimana (Judgment and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-00-60-T, 13 April 2006) [228]–[231].

188 *Đorđević Appeal* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-87/1-A, 27 January 2014) [913]; *Prlić Trial (Volume 4 of 6)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-04-74-T, 29 May 2013) [36]; *Karemera Trial* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-98-44-T, 2 February 2012) [75]; *Ngirabatware Trial* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-99-54-T, 20 December 2012) [996].

189 *Prosecutor v Lubanga (Decision on Sentence Pursuant to Article 76 of the Statute)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06-2901, 10 July 2012) [60].

190 Letter from Brigid Inder to Luis Ocampo, above n 7, 6–7.

191 Women's Initiatives for Gender Justice, above n 7, 1.

192 *Prosecutor v Katanga (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/07-717, 30 September 2008) [29] (Partly Dissenting Opinion of Judge Usačka).

committed as part of a common purpose. Following *Katanga,* in June 2014, the ICC Prosecutor released a 'Policy Paper on Sexual and Gender-Based Crimes'.[193] In this paper, the Prosecutor committed to enhancing its investigation and prosecution of sexual violence. It committed to ensuring that charges for sexual violence are brought whenever there is sufficient evidence and to charging sexual violence under the mode/s of liability that reflect the evidence in a particular case. Most importantly in regard to the common plan modes of liability, the Prosecutor recognised that sexual violence is often 'used systematically as a tool of war or repression'.[194] It stated that where there is no evidence of prior orders or agreement to commit sexual violence, 'evidence such as patterns of prior or subsequent conduct or specific notice may be adduced to prove … awareness … that such crimes would occur in the ordinary course of events'.[195] Further, the Prosecutor committed to presenting 'other types of evidence, such as witness testimony and contemporaneous public reports on the crimes, to establish … intent and knowledge'.[196] These commitments demonstrate a step in the right direction and may be reflected in the successful prosecution of Bemba for widespread and systematic sexual violence. Ultimately, we are yet to see whether the Prosecutor will follow through on these commitments when prosecuting crimes of sexual violence under the common plan modes of liability.

VI CONCLUSION

Despite the historical view of wartime sexual violence as a private crime outside the purview of international humanitarian law, the ad hoc tribunals have succeeded in convicting 52 accused of sexual violence.[197] However, in using JCE to prosecute sexual violence, the ad hoc tribunals have tended to classify it as being extraneous to and merely the 'natural and foreseeable consequence' of ethnic cleansing or genocidal common plans, thus relying on JCE III. This classification is incongruous with the international recognition that sexual violence was not incidental to the ethnic cleansing and genocidal campaigns in the Yugoslav and Rwandan conflicts, but was used as a tool for the achievement of these campaigns. It also re-introduces historical narratives of sexual violence as unavoidable collateral damage in war.

As the elements of articles 25(3)(a) and (d) of the *Rome Statute* do not encompass opportunistic crimes or those extraneous to the achievement of common criminal purposes, if the ICC continues to promote the narrative of wartime sexual violence as the opportunistic and incidental acts of deviant soldiers, it will be unable to convict leaders for sexual violence under these

193 Office of the Prosecutor, 'Policy Paper on Sexual and Gender-Based Crimes' (Policy Paper, International Criminal Court, June 2014) [51]–[52], [71]–[83] <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>.

194 Ibid [75].

195 Ibid [81].

196 Ibid [82].

197 See above n 4.

provisions. This article advocates that both judges and prosecutors at the ICC must recognise the capacity of wartime sexual violence to be used as a tool for the achievement of common plans, at least to the same degree as other violent and destructive crimes. In this respect, guidance can be taken from the recent conviction of Bemba for rape and the few cases at the ICTY that have classified sexual violence as part of ethnic cleansing campaigns.

The time is ripe for the ICC to come to terms with the clear public and political will to provide a fair and correct narrative of wartime sexual violence, one which recognises its use as a tool to achieve ethnic cleansing or genocidal purposes. In 2013, 135 countries, as well as the UNSC, endorsed the *Declaration to End Sexual Violence in Conflict*.[198] In 2014, the Global Summit to End Sexual Violence in Conflict brought together representatives from over 120 countries to agree on practical steps to enable greater accountability for sexual violence as a weapon of war and to address misconceptions regarding sexual violence.[199] As described above, in the same year, the ICC Prosecutor's policy paper specifically recognised that sexual violence is often 'used systematically as a tool of war or repression'.[200]

In June 2014, the ICC unanimously affirmed charges of rape and sexual slavery under articles 25(3)(a) and (d) for two accused, Bosco Ntaganda, the Deputy Chief of Staff of the UPC, and Laurent Gbagbo, the former President of Côte d'Ivoire.[201] These ongoing trials provide an opportunity for both prosecutors and judges to present evidence of and classify sexual violence as an intentional act used to further violent and destructive campaigns against civilian populations. Ultimately, this issue is one that has practical effects on the way in which leaders perceive their own responsibility for sexual violence. If the ICC is to fulfil its mandate of holding leaders to account for 'the most serious crimes of international concern',[202] including sexual violence, it must send a clear message to such leaders that they will be responsible for their role in facilitating and perpetuating wartime sexual violence.

198 *Declaration of Commitment to End Sexual Violence in Conflict*, UN Doc A/68/633, annex; SC Res 2106, UN SCOR, 6984th mtg, UN Doc S/RES/2106 (24 June 2013).

199 Foreign & Commonwealth Office (UK), 'Chair's Summary – Global Summit to End Sexual Violence in Conflict' (Policy Paper, 13 June 2014) <https://www.gov.uk/government/publications/chairs-summary-global-summit-to-end-sexual-violence-in-conflict/chairs-summary-global-summit-to-end-sexual-violence-in-conflict>.

200 Office of the Prosecutor, above n 193, [75].

201 *Ntaganda Confirmation of Charges* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/04-02/06-309, 9 June 2014) [12], [15], [31], [36], [74], [97]; *Gbagbo Confirmation of Charges* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/11-01/11-656-Red, 12 June 2014) [195], [230], [252].

202 *Rome Statute* Preamble paras 4, 9, art 1.