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SEXUAL VIOLENCE AND THE COMMON PURPOSE AT THE INTERNATIONAL COURT AND AD HOC TRIBUNALS

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Abstract

The impunity of high-level military and political leaders sits at the heart of the challenge for feminist legal advocates to champion sexual violence's equal recognition of a crime at international law. Repetitively, sexual violence crimes are a particular risk of the failure of the criminal law to surpass a number of pervasive assumptions about the nature of these crimes. In 2014, the International Criminal Court (ICC) and International Criminal Tribunal for the former Yugoslavia (ICTY) issued three judgments that analysed the relationship between sexual violence and common purpose liability in ground criminal conduct. This paper provides a critique of these judgments by drawing out the inconsistent and limited interpretation of the law and engendering legal concepts for a crime that is inherently gendered.

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I Introduction

On 7 March 2014, General Katanga, leader of the *Forces de Résistance Patriotique d'Ituri* (FRPI), was convicted for charges of murder as a crime against humanity; and murder, attacking a civilian population, destruction of property and pillaging as war crimes for his involvement in a common criminal plan to wipe out the village of Bogoro in the Democratic Republic of Congo.[1] Under the International Criminal Court's (ICC) Rome Statute, where a group of persons acts with a common criminal purpose, for example a militia group executing a massacre Bogoro village, an individual may only be found criminally responsibility for those crimes that fall within the common purpose of that criminal group.[2] Therefore, Katanga was acquitted of charges relating to sexual violence, as the Court considered these crimes alone fell outside that common criminal plan.[3]

On 23 January 2014, the International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber reversed acquittals pertaining to sexual violence crimes for three accused: Pavković, Commander of the 3rd Army of the Vojska Jugoslavije (VJ), Šainović, the Deputy Prime Minister of the Federal Republic of Yugoslavia (FRY), and Lukić, head of the Ministry of Interior Police staff of Kosovo (MUP) for their role in the ethnic cleansing of Kosovo in 1999.[4] Furthermore, four days later on 27 January 2014, the ICTY Appeals Chamber also reversed the acquittal of Đordević, the Assistant Minister to the Serbian Minister of the Internal Affairs and Chief of the Public Security Department, for sexual violence charges arising from his role in that ethnic cleansing.[5] In both of these cases, the Court found that instances of persecution through sexual violence, while considered to fall outside the common criminal purpose to ethnically cleanse Kosovo, were a natural and foreseeable consequence of its execution.[6] Following the theory of extended joint criminal enterprise applied at the ICTY, a member of a group acting with a common criminal purpose, may be found guilty from

[1] *Prosecutor v Katanga (Judgment*) ICC Trial Chamber II ICC-04/04-01/07, 7 March 2014.
[2] Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature July 1998, entered into force 1 July 2002), art 25(3).
[3] *Prosecutor v Katanga (Judgment)* at [1664].
[4] *Prosecutor v Šainović (Appeal Judgment)* ICTY Appeals Chamber IT-05-87-A Appeals Chamber, 23 January 2014.
[5] *Prosecutor v Đordević (Appeal Judgment)* ICTY Appeals Chamber IT-05-87/1-A, 27 January 2014.
[6] *Prosecutor v Đordević (Appeal Judgment)* at [921]; *Prosecutor v Šainović (Appeal Judgment)* at [1581], [1591].

crimes that, while not part of the common purpose, were a natural and foreseeable consequence of its execution.[7]

Undeniably, conviction for sexual violence crimes is a positive step towards justice for victims of sexual violence and the reconstruction of post-conflict societies. However, this paper intends to look past the binary of conviction versus acquittal to draw out the limited and inconsistent interpretation of the law and engendering of legal concepts of sexual violence crimes, which is prevalent in all three judgments. In particular, the paper will analyse the three judgments for indicia of an inconsistent factual treatment of sexual violence as compared to other violent crimes; failure to utilise legal concepts to reflect the nature of sexual violence crimes; incomplete assessment of the scale and harm of sexual violence crimes; and failure to place sexual violence crimes within the wide context of armed conflict.

The paper will proceed in several parts. The first part will provide a brief outline of the multifaceted purposes of international criminal trials and the challenges that are posed to the trial and conviction of sexual violence crimes by pervasive historical assumptions about the nature of these crimes. The second part will provide the reader with the legal foundation of the mode of individual criminal responsibility applied at the ICC in the *Katanga* case, namely art 25(3)(d) of the Rome Statute. The third part will then analyse the *Katanga* judgment, highlighting the failure of the ICC Trial Chamber to take a consistent and gendered approach to the trial of sexual violence crimes. The fourth section will move on to outline the law of joint criminal enterprise as applied at the ICTY, in order to provide the reader with a basic understanding of this mode of individual criminal responsibility and in preparation to compare the jurisprudence of the ICC with the ICTY. The fifth section will analyse the approach of the ICTY Trial and Appeal Chambers toward sexual violence in *Šainović* and *Đorđević* to illustrate that, despite the different mode of liability employed at the ICTY, the same inconsistent approach to sexual violence can be found in these judgments. The paper will conclude with some final comments and possible means to address the pervasive inconsistency with which sexual violence is treated as regards other violent crimes.

[7] *Prosecutor v Tadić (Appeal Judgment)* ICTY Appeals Chamber IT-94-1-A, 15 July 1999.

II The Trial of Sexual Violence

This part of the paper will discuss the role that international criminal law performs in post-conflict reconstruction. It will then consider the evolution of sexual violence crimes at international law and highlight some of the challenges in achieving criminal justice for these crimes at the supranational level.

A The Role of International Criminal Law

Individual criminal prosecution for crimes at the international level serves multiple functions. Retributive justice emphasises the just deserts of the perpetrator, as the accused's deserving of punishment for the commission of atrocities.[8] Prosecution may also document crimes for the historical record, provide closure to victims, their families, or on the past more generally, and promote national reconciliation.[9] Trials may inspire transition societies to adopt and affirm the rule of law, the inherent dignity of individuals, and human and legal rights that are denied at the domestic level.[10] Prosecution of sexual violence during armed conflict is crucial to restoring the dignity and integrity of individuals who have experienced a deeply injurious mental and physical crime that requires acknowledgement and punishment of the perpetrator. Such punishment may also support the removal of stigma surrounding sexual violence and affirm women's value and equal social standing.[11] Moreover, international trials may provide an exemplar from which domestic courtrooms of observing and participating states may learn, thereby remaking practice at the local level.[12]

Furthermore, criminal punishment is an effective insurance against future criminal activity.[13] The function of international criminal law as a deterrent is reflected prominently in the Preamble to the Rome Statute, which highlights the "prevention…of

[8] Margaret M deGuzman "Giving Priority to Sex Crime Prosecutions: The Philosophical Foundations of a Feminist Agenda" (2011) Int C L R 11 515 at 521.
[9] Antonio Cassese "Reflections on International Criminal Justice" (2003) MLR 61(1) 1.
[10] Diane F Orentlicher "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" (1991) 100(8) Yale LJ 2537 at 2542.
[11] Finnuala Ni Aolain, Dina Francesca Haynes and Naomi Chan "Criminal Justice for Gendered Violence and Beyond" (2011) Int C L R 11 425 at 442.
[12] At 440.
[13] Leslie Vinjamuri "Deterrence, Democracy, and the Pursuit of International Justice" (2010) Ethics Int Aff 24(2) 191.

the most serious crimes of concern to the international community" as a central purpose of the Court.[14] This rationale has also been reflected in statements of the ICC's current Prosecutor, Fatou Bensouda and her predecessor, Luis Moreno Ocampo.[15] For example, in a speech shortly after his election as the ICC's first Prosecutor in April 2003, Moreno Ocampo stated:[16]

> I deeply hope that the horrors humanity has suffered during the twentieth century will serve us as a painful lesson, and that the creation of the International Criminal Court will help us to prevent those atrocities from being repeated in the future.

The opposite side of the coin for law as a deterrent is that, if law is unavailable to punish crimes committed on a massive scale, no lesson can be offered for the future. Failure to bring charges and achieve convictions vitiates the authority of law itself, sapping its power to deter proscribed conduct. Respect for international humanitarian law will suffer where criminal conduct can be practiced with impunity, in the words of Herbert Fingarette, unless society imposes sanction when its laws are violated, the law "becomes functionally a mere appeal, "the concept of law as a requirement becomes unintelligible."[17] Societies recently scourged by widespread criminal violence provide sobering cause to believe that tyranny begins where law ends.[18] Consequently, prosecution of sexual violence crimes is a key component to ending global violence against women: forms of sexual violence must be punished and seen to be punished, if sexual violence is to be prevented.[19]

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[14] Rome Statute, preambular par 5.
[15] See Fatou Bensouda "Reflections from the International Criminal Court Prosecutor" (2012) Case W Res J Intl L 45(1) 509.
[16] Luis Moreno Ocampo "Election of the Prosecutor, Statement by Mr Moreno Ocampo" (press release, ICC-OTP-20030502-10, 22 April 2003).
[17] Herbert Fingarette "Review: Rethinking Criminal Law Excuses" (1980) Yale LJ 89(5) 1002 at 1014.
[18] Orentlicher, above n 8, at 2542. Michael Broache "The Effects of Prosecutions on Sexual Violence in Armed Conflict during the 'ICC Era' 2002–2009" (paper presented at the Workshop on Sexual Violence and Armed Conflict: New Research Frontiers, Harvard Kennedy School, Harvard University, 2–3 September 2014).
[19]Linda Bianchi "The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR" in Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik "(eds) *Sexual Violence as an International Crime: Interdisciplinary Approaches* (intersentia, Cambridge, 2013) 123 at 124.

B Sexual Violence at International Criminal Law and Ongoing Challenges

Sexual violence crimes have been the subject of centuries of inaction at international law.[20] However, human experience has come to reveal the link between armed conflict, violent crime and the rape of women and girls as irrefutable and well established.[21] Rape may be used during armed conflict to dishonour and demoralise the enemy, to destabilise, disempower and terrorize whole communities, or the effect genocide through deliberate impregnation or termination of existing pregnancies to disrupt the victims' on-going existence as a defined ethnic group.[22] Sexual violence during armed conflict has been wrested from the sphere of private wrongs, where it was once considered linked to sexual desire, to the public echelons of association with power, dominance and abuse of authority.[23] The term "rape as a weapon of war" thus refers to sexual violence as having a systematic, pervasive, or orchestrated aspect.[24]

Moreover, feminist literature has highlighted the full range of harms resultant from the infliction of sexual violence.[25] These crimes produce pervasive and serious consequences, not only for the victims, but also for their surrounding communities.[26] Physical harm includes pain, injury, sexually transmitted infections, and the risk of infertility or unwanted pregnancy. Psychological trauma can include distress, shame, isolation and guilt, sleeping and eating disorders, depression, and a number of other behavioural disorders which can lead to self-harm or even suicide. Victims' spouses, partners or children also experience the trauma of guilt, indignity or shame, particularly if they witnessed the attack. Victims may also be ostracized by their families or

[20] Michelle Jarvis and Elena Martin Salgado "Future Challenges to prosecuting Sexual Violence Under International Law: Insights from ICTY Practice" in Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik "(eds) *Sexual Violence as an International Crime: Interdisciplinary Approaches* (intersentia, Cambridge, 2013) 101 at 102.
[21] Lucy Fiske and Rita Shacke *Ending Rape in War: How Far Have We Come? (*Sydney Law School Legal Studies Research Paper No 15/21, March 2015) at 127; Peter Maurer "Q&A: The ICRC's Approach to Sexual Violence in Armed Conflict" (2014) IRRC 96(894) 449 at 450.
[22] Lucy Fiske and Rita Shacke, above n 21, at 127.
[23] Gloria Gaggioli "Sexual violence in armed conflicts: A violation of international human rights law and human rights law" (2014) IRRC 96(894) 503 at 503.
[24] Nicola Henry "The Fixation on Wartime Rape: Feminist Critique and International Criminal Law" [2014] S & LS 23(1) 93 at 94.
[25] Ni Aolain et al, above n 11, at 429.
[26] Rebecca L Haffajee "Prosecuting Crimes of Rape and Sexual Violence at the ICTR: the Application of Joint Criminal Enterprise Theory" (2006) Harvard JLG 29 201 at 218.

communities. [27]

Human experience and feminist literature has had some impact on international criminal law, such that the perception of sexual violence as an international crime worthy of prosecution advanced in the 20th century.[28] Principally, the jurisprudence of the ad hoc war crimes tribunals has represented a step forward for sexual violence, through which these crimes have come to be seen as constituting war crimes, crimes against humanity, torture and an element of genocide.[29] After initial strategic and investigation hurdles, the ICTY has established a robust body of prosecutions for sexual violence. [30] Moreover, the Rwanda Tribunal's marquee judgment in *Akayesu* significantly advanced the status of rape as a form of genocide, stating that such acts are of the "worst ways" to commit "infliction of serious bodily and mental harm on the victims."[31]

However, despite advances championed by the ad hoc tribunals, international criminal law in relation to sexual violence continues to poignantly lag behind human experience. Jurisprudence as to interpretation and integration of gender concepts into international criminal law has been limited and inconsistent.[32] Principally, sexual violence crimes are at a particular risk of failure of international criminal law to surpass pervasive assumptions about the nature of these crimes that holdover from the period up until the 1990s in which men "neglected to enumerate, condemn and prosecute" sexual

[27] Maurer, above n 21, at 450.
[28] Bianchi, above n 19 at 124.
[29] Navanethem Pillay "Address – Interdisciplinary Colloquium of Sexual Violence as International Crime: Sexual Violence: Standing by the Victim" (2012) 35(4) L & Soc Inquiry 847 at 848; Patricia Viseur Sellers "Individual(s') Liability for Collective Sexual Violence" in Karen Knop (ed) (Oxford University Press, Oxford, 2004) 153 at 190. *Prosecutor v Akayesu (Judgment)*; *Prosecutor v Tadić (Judgment)*; *Prosecutor v Furundžija (Judgment)* ICTY Trial Chamber IT-95-17/1-T, 10 December 1998; *Prosecutor v Delalić (Judgment)* ICTY Trial Chamber IT-96-21-T, 16 November 1998; *Prosecutor v Kunarac (Judgment)* ICTY Trial Chamber IT-96-23-T, IT-96-23/1-T, 22 February 2001; *Prosecutor v Krstić (Judgment)* ICTY Trial Chamber IT-98-33-T, 2 August 2001; *Prosecutor v Akayesu (Judgment)* ICTR Trial Chamber I ICTR-96-4-T, September 1998.
[30] Niamh Hayes "Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court" in William A Schabas, Yvonne McDermott and Niamh Hayes (eds) *The Ashgate Research Companion to International Law: Critical Perspectives* (Ashgate, Surrey, 2013) 7 at 11.
[31] *Prosecutor v Akayesu (Judgment)* ICTR Trial Chamber I ICTR-96-4-T, September 1998 at [731].
[32] Brigid Inder, Executive Director Women's Initiatives for Gender Justice "A critique of the Katanga Judgment" (Global Summit to End Sexual Violence in Conflict, 11 June 2014) at 1; Susana Sacouto and Katherine Cleary "The importance of effective investigation of sexual violence and gender-based crimes at the International Criminal Court" (2009) Am Univ J Gen Soc Policy Law 17(2) 337 at 357.

violence.[33]

Within the judicial structures of international criminal law there persists a public-private dichotomy that assigns gendered domains to international law.[34] In other words, historically, acts of sexual violence have been viewed as "a detour, a deviation, or the acts of renegade soldiers… pegged to private wrongs and [thus] not really the subject of international humanitarian law".[35] This assumption is compounded by rape and other sexual assaults' explicit absence from the grave breaches provisions of the Geneva Conventions and the fundamental guarantees of Additional Protocol I.[36] While progress has been made towards the view that sexual violence is something that is "public or political in the traditional sense" following discussion of the link between armed conflict and these crimes at the ICTY, sexual violence continues to be dogged by a subconscious bias towards the view that these crimes are "opportunistic" or unrelated to the wider ethnic conflict.[37]

The hold-over conception of sexual violence as a private wrong may also be illustrated in the framing of international humanitarian law instruments that confine these crimes to evaluations based on the harm done to the victim's honour, modesty or chastity.[38] For example, the Fourth Geneva Convention describes rape, enforced prostitution and any form of indecent assault as an attack on a woman's "honour".[39] Moreover, Additional Protocols I and II categorise crimes of sexual violence as outrages on personal dignity, as distinct from acts of "violence to the life, health and physical or

[33] Kelly D Askin "Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles" (2003) Berk J Int L 21(2) 288 at 295. Vincent Bernard and Helen Durham "Sexual Violence in Armed Conflict: From Breaking the Silence to Breaking the Cycle" (2014) IRRC 96(894) 427 at 432; Jarvis and Salgado, above n 20, at 102.
[34] Sellers, above n 29, at 189.
[35] Sacouto and Cleary, above n 32, at 347; Jarvis and Salgado, above n 20, at 102.
[36] Sellers, above n 29, at 190.
[37] See also Rhonda Copelon "Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law" (2000) McGill LJ 46 217 at 223. Sellers, above n 29, at 190.
[38] Valerie Oosterveld "Sexual Slavery and the International Criminal Court: Advancing International Law " (2004) Mich J Intl L 25 605 at 613; United Nations Division for the Advancement of Women *Sexual Violence and Armed Conflict: United Nations Response* (1998) (United Nations Department of Economic and Social Affairs, April 1998) at 6.
[39] Alona Hagay-Frey *Sex and Gender Crimes in the New International Law*: *Past, Present, Future* (Martinus Nijhoff Publishers, Leiden, 2011) at 69; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) 75 UNTS 287 (opened for signature 12 August 1949, entered into force 21 October 1950), art 27.

mental well-being of persons".[40] Where the orthodox perception of harm at international law remains a vestige of historical male-dominated articulation, such framing directly reflects and reinforces the trivialisation of sexual violence crimes as compared with a "more serious" physical injury.[41] For example, in the early days of the ICTY investigators were noted making such statements as: "I've got ten dead bodies, how do I have time for rape?"[42] Similarly, at the establishment of the International Criminal Tribunal for Rwanda, Human Rights Watch and the *Fédération Internationale des Ligues des Droits de l'Homme* (FIDH) reported that there was a widespread perception among the Tribunal Investigators that rape is somehow a "lesser" or "incidental" crime not worth investigating.[43]

The public-private dichotomy can also be drawn out of judgments within the international criminal judicial structure. To illustrate, when the ICC issued its first conviction against Thomas Lubanga Dyilo, one of the founding members of the *Union des Patriotes Conglais*, despite the ample preliminary evidence of rape, other forms of sexual violence, torture, and mass murder, the Office of the Prosecutor instructed ICC investigators only to pursue evidence relating to the conscription and use of child soldiers.[44] The Office of the Prosecutor laid no charges for crimes of sexual violence. The Office gave no official reason for the failure to bring charges, but they have been mooted to include lack of resources and barriers to evidence.[45] However, feminist academics and advocates slammed this decision, stating that this omission could have occurred because of the systemic belief that rape in war is the exception; and there was

[40] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3 (opened for signature 12 December 1977, entered into force 7 December 1979), art 75(2); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1125 UNTS 609 (opened for signature 12 December 1977, entered into force 7 December 1978), art 4(2).
[41] Hagay-Frey, above n 39, at 3.
[42] deGuzman, above n 8, at 516. Peggy Kuo "Prosecuting Crimes of Sexual Violence in an International Tribunal" (2002) Case W Res J Intl L (34) 305 at 311.
[43] Copelon, above n 37, at 224. Human Rights Watch Africa, Human Rights Watch Women's Rights Project and *Fédération Internationale des Ligues des Droits de l'Homme Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (New York, Human Rights Watch, 1996).
[44] *Prosecutor v Lubanga (Trial Judgment)* ICC Trial Chamber I ICC-01/04-01/06, 14 March 2012; Hayes, above n 30, at 11.
[45] Lisa Gambone "Failure to Charge: The ICC, *Lubanga* and Sexual Violence Crimes in the DRC" (22 July 2009) Foreign Policy Association <www.foreignpolicyblogs.com>; Letter from Brigid Inder (Executive Director of Women's Initiatives for Gender Justice) to Luis Moreno Ocampo (Chief Prosecutor International Criminal Court) regarding failure to bring charges for sexual violence in the *Lubanga* case (August 2006) at 6.

no indication that gender-based crimes were ever a serious subject of investigation, and that such investigations were "limited in scope, poorly directed and displayed a lack of commitment" to gather the evidence requisite for charges to be laid.[46] Moreover, Judge Odio Benito issued a dissenting opinion expressing her criticism of failure to include sexual violence within the existing charges of child soldiers, stating that:[47]

> invisibility of sexual violence in the legal concept leads to discrimination of the victims… who systematically suffer from this crime as an intrinsic part of the involvement with the armed group.

Similarly, sexual violence may be characterised as "incidental" or "opportunistic" in relation to other "core" crimes, and is instead rationalised on the basis of the perpetrator's lust, libidinal needs, or stress.[48] An example of this perception is prevalent in the ICTR *Rukundo* case, in which a military chaplain was indicted for his role in the Rwandan genocide in 1994.[49] Among other charges, Rukundo was charged with sexual assault for taking a young Tutsi refugee woman as an act of genocide.[50] At first instance, the Trial Chamber found Rukundo guilty of the sexual assault, and, given the "general context of mass violence against the Tutsi" and specifically that Rukundo stated that the woman's "entire family had to be killed for assisting the *Inyenzi* [Tutsi]", the assault occurred with genocidal intent.[51] On appeal, the Appeals Chamber reversed this decision by holding that the sexual assault was "qualitatively different" from other acts of genocide perpetrated by Rukundo. In contrast to the "systematic, repeated searches" for Tutsis and the subsequent killing or assault of individuals, the Appeals Chamber found that Rukundo's sexual assault was "unplanned and spontaneous". Therefore, the sexual assault could "reasonably be construed as an opportunistic crime that was not accompanied by the specific intent to commit genocide".[52]

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[46] Gambone, above n 45; Inder, above n 45, at 6.
[47] *Prosecutor v Lubanga (Separate and dissenting opinion of Judge Odio Benito)* ICC Trial Chamber I ICC-01/04-01/06-2842, 14 March 2012 at [16].
[48] Patricia Viseur Sellers and Kaoru Okuizumi "International Prosecution of Sexual Assaults" (1997) Transnatl L & Contemp Probs 45 at 61-62.
[49] *Prosecutor v Rukundo (Trial Judgment)* ICTR Trial Chamber II ICTR-2001-70-T, 27 February 2009 at [2].
[50] At [276].
[51] At [574]-[575].
[52] *Prosecutor v Rukundo (Appeal Judgment)* ICTR Appeals Chamber ICTR-2001-70-A, 20 October 2010 at [236].

Judge Pocar's dissent strongly highlights concerns in the position of the Appeals Chamber, stating that "[t]he core of the Majority's reasoning on this point indicates that it does not fully appreciate the seriousness of his crime" which is "not qualitatively different from other killings or serious bodily injury".[53] Moreover, Pocar argued that the Majority's suggestion that the sexual assault was merely "opportunistic" did not fully appreciate the distinction between motive and intent, arguing that even where motive is entirely sexual, this does not mean that there is not intent to commit an act of torture or the conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a "likely and logical consequence" of such conduct.[54] As a result, Judge Pocar found that the sexual assault was of "similar gravity and fits squarely within [the] larger context of violence targeting Tutsis".[55] Moreover, several commentators expressed disappointment with the Appeals Chamber's decision, including Clair Duffy, former Appeals Counsel for the Office of the Prosecutor at the ICTR, who described the Majority judgement as a "striking example of a step backwards in the field of gender justice."[56]

This part has made some reference to the manner in which historical assumptions can lead to an inconsistent and limited interpretation and failure to engender legal concepts as applied to sexual violence crimes at international criminal trial. The following sections will seek to apply a similar critical lens to three very recent judgments from the ICC and ICTY.

III Article 25(3)(d) of the Rome Statute

The *Katanga* judgment is illustrative of an incomplete interpretation of the law and integration of gender concepts into art 25(3)(d) of the Rome Statute. This section will provide an overview of the law as it relates to art 25(3)(d) liability in order to set a foundation for an analysis of the Trial Chamber's reasoning in the *Katanga* case.

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[53] *Prosecutor v Rukundo (Dissenting Opinion of Judge Pocar)* at [4].
[54] At [4], [10].
[55] At [11].
[56] Clair Duffy "Gender Crime Prosecution and the ICTR Legacy" (2011) *Australian Red Cross International Humanitarian Law Magazine* (Australia, 2011) at 18. See also in support of Judge Pocar Chile Eboe-Osuji *International Law and Sexual Violence in Armed Conflicts* (Brill, Leiden, 2012) at 164; Valerie Oosterveld "The Influence of Domestic Legal Traditions on the Gender Jurisprudence of International Criminal Tribunals" (2013) CJICL 2(4) 825 at 843.

In the context of trying senior political and military leaders for international crimes, it is often the case that these leaders have directed, or at least tolerated, a massive campaign of crimes. However, proving culpability to the criminal law standard is challenging and depends on a large and complex web of circumstantial evidence and inferences that can reasonably be drawn from this evidence.[57] International crimes, moreover, often involve collective conduct dependent on the coordinated or simultaneous acts of multiple perpetrators acting with a collective criminal purpose.[58]

To achieve a criminal conviction at the ICC, the Prosecutor must first prove, regardless of the collective nature of the acts, the commission of the underlying crime.[59] The individual criminal responsibility of the accused is then triggered for individuals who, by means of formal or informal groups, participate in collective criminal conduct related to that crime.[60] The Rome Statute is the treaty that establishes the International Criminal Court. Among other things, it sets out the crimes falling within the jurisdiction of the ICC, the modes of individual responsibility, and the rules of procedure. The modes of individual responsibility are contained in arts 25 and 28 of the Statute. Article 25(3) differentiates clearly between four levels of participation: (a) commission; (b) instigation and ordering; (c) assistance; and, (d) contribution to a group crime.[61] Article 25(3)(a) concerns commission of the crime through several different levels: direct perpetration, where the accused directly commits the crime; co-perpetration, as commission of the crime jointly with another person; indirect perpetration, as commission through another person; and indirect co-perpetration, where the essential contribution assigned to a co-perpetrator is carried out by another person who does not share the common plan or through a hierarchical organisation.[62] Article 25(3)(b) concerns ordering, soliciting or inducing in terms of exerting influence on the direct perpetrator.[63] Article 25(3)(c) aiding and abetting or otherwise assisting where the accused acts with intent and intends his or her conduct will facilitate and assist the

[57] Jarvis and Salgado, above n 20, at 107.
[58] Bianchi, above n 19, at 124.
[59] Rome Statute, art 25.
[60] Art 25(3).
[61] Art 25.
[62] International Criminal Law Services *Modes of Liability: Commission and Participation* (United Nations Interregional Crime and Justice Research Institute, 2011) at 20-23.
[63] At 7.

commission of the crime. [64] Article 25(3)(d) is residual or catch-all mode of liability that encompasses the broad category of "contribution in any other way to the crime committed by a group of persons acting with a common purpose."[65] Article 28 provides for individual criminal responsibility through command responsibility, in which liability is imposed for a leader's omission to take necessary and reasonable measures to prevent and punish subordinates' offences.[66]

The ICC Trial Chamber in *Katanga* used art 25(3)(d) as a form of commission through contribution to a common purpose to ground Katanga's liability for the alleged crimes. In full, art 25(3)(d) requires that the accused, in any way other than commission, instigation or assisting:[67]

> …contributed to the commission or attempted commission of [a crime within the jurisdiction of the Court] by a group of persons acting with a common purpose. Such contribution shall be intention and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime.

A Actus Reus

The objective elements are of art 25(3)(d) include:[68]

(i) A crime within the jurisdiction of the Court is attempted or committed;

(ii) The commission or attempted commission of such a crime was carried out by a group of persons acting with a common purpose;

(iii) The individual contributed to the crime in any way other than those set out in Article 25(3)(a) to (c) of the Statute.

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[64] At 24.
[65] Rome Statute, art 25(3).
[66] Art 28.
[67] Art 25(3)(d).
[68] *Prosecutor v Mbarushimana (Decision declining to confirm the charges)* ICC Pre-Trial Chamber I ICC-01/04-01/10, 16 December 2011 at [135].

The first objective requires a commission of a crime within the jurisdiction of the Court and to date has not elicited significant discussion.[69] The objective and subjective elements specific to crimes and their contextual elements must be established.[70]

As regards the second objective, the *Mbarushimana* Confirmation of Charges Decision found that a common purpose "must include an element of criminality" but did not need to be "specifically directed at the commission of a crime".[71] The agreement need not be explicit, "and its existence can be inferred from the subsequent concerted action of the group of persons".[72]

The ICC Trial Chamber in *Katanga* viewed the definition of common purpose to presuppose specification of the criminal goal pursued and its scope by pinpointing its temporal and geographic purview; the characteristics of the victim pursued; and the identity of the members of the group, although each person need not be identified by name. A group of persons acting with a common purpose may arise outside of a military, political or administrative structure. Proof that the common purpose was previously arranged or formulated is not required. It may materialise extemporaneously and be inferred from the subsequent concerted action of the group of persons.[73] The *Katanga* Trial Chamber also emphasised that the accused's contribution must be towards crimes that fall within the common purpose. Crimes ensuing "solely from opportunistic acts by members of the group and which fall outwith the common purpose" cannot be attributed to the group's concerted plan.[74]

The third objective requires contribution in any way other than the other articles of art 25(3). The accused's contribution must be "significant" in the sense that conduct inconsequential and immaterial to the commission of the crime cannot be considered sufficient to constitute a contribution.[75] The significance of a contribution is to be determined "by considering the person's relevant conduct and the context in which this

[69] Women's Initiatives for Gender Justice *Modes of Liability* (Expert Paper, November 2013) at 79.
[70] *Prosecutor v Katanga (Judgment*) at [1622].
[71] *Prosecutor v Mbarushimana (Decision declining to confirm the charges),* at [271].
[72] At [271].
[73] At [1626].
[74] *Prosecutor v Katanga (Judgment*), at [1630].
[75] *Prosecutor v Mbarushimana (Decision declining to confirm the charges),* at [277]-[278], [283]; *Prosecutor v Katanga (Judgment*), at [1632].

conduct is performed".[76] This is a slightly lower standard than the "essential contribution" standard required for art 25(3)(d) co-perpetration and indirect co-perpetration.[77] Moreover, the accused will not be responsible for all of the crimes which formed the common purpose, but only those crimes that the accused contributed to.[78]

B Mens Rea

The subjective elements of art 25(3)(d) are:[79]

(i) The contribution shall be intentional; and

(ii) Shall either:

a. Be made with the aim of furthering the criminal activity or criminal purpose of the group; or

b. In the knowledge of the intention of the group to commit the crime.

Article 30 of the Statute is used to help define the requirements of intent and knowledge.[80] It requires that criminal responsibility shall only lie where the material elements of a crime are committed with intent and knowledge.[81] "Intent" will be found where: (a) in relation to conduct, the person means to engage in the conduct; and (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.[82] "Knowledge" means "awareness that a circumstance exists or a consequence will occur in the ordinary course of events".[83]

As regards the first mens rea requirement, art 25(3)(d) demands that the contribution of the accused to the commission of the crime be intentional, in addition to one of the specific mental elements in the paragraphs (i) and (ii). In other words, it must be shown that the accused's contribution must be voluntary and performed in the awareness that such conduct contributed to the activities of the group of persons acting with a common

[76] *Prosecutor v Mbarushimana (Decision declining to confirm the charges)*, at [285].
[77] International Criminal Law Services, above n 62, at 23-24.
[78] *Prosecutor v Katanga (Judgment*), at [1619].
[79] Rome Statute, art 25(3)(d).
[80] *Prosecutor v Katanga (Judgment*), at [1638].
[81] Rome Statute, art 30(1).
[82] Rome Statute, art 30(2).
[83] Art 30(3).

purpose.[84] It need not be proven that the accused shared the group's intention to commit the crime.[85]

As to the second mens rea requirement, noting its disjunctive nature, the Pre-Trial Chamber in the *Mbarushimana* case found that knowledge was sufficient to incur liability under Article 25(3)(d). [86] Under this limb, the accused must be aware that the intention of the group to commit the crime existed when engaging in the conduct that constituted his or her contribution.[87] Knowledge of such circumstance must be established for each specific crime and knowledge of a general criminal intention will not suffice. Knowledge is inferred from the relevant facts and circumstances and must be connected to the group's intention to commit the specific crimes.[88]

Literature generally regards the overriding concern with modes of liability concerning group crime as the need to flexibly account for group criminal dynamics while simultaneously avoiding the imposition of guilt by association, problems most commonly attributed to the level of contribution to the crime involved. For example, argument surrounding the appropriate level of contribution required, as a standard of significance or essential contribution.[89] However, as the *Katanga* case analysis will illustrate, sexual violence is not at risk of over-inclusiveness, but under-inclusiveness: a risk of failure to appreciate how sexual violence crimes fit within the common purpose due to incomplete interpretation and engendering of the law of art 25(3)(d).[90]

IV Trial of Sexual Violence at the ICC

The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui is the first and only case including crimes of sexual violence that has completed full trial at the ICC.[91] The

[84] *Prosecutor v Katanga (Judgment*), at [1639].
[85] At [1638].
[86] *Prosecutor v Mbarushimana (Decision declining to confirm the charges)* at [289].
[87] *Prosecutor v Katanga (Judgment*), at [1641].
[88] At [1642].
[89] Randle C DeFalco "Contextualizing *Actus Reus* under Article 25(3)(d) of the ICC Statute: Thresholds of Contribution" (2013) J Int Criminal Justice 11(4) 715 at 715.
[90] Jarvis and Salgado, above n 20, at 113.
[91] The *Lubanga (Judgment)* case discussed above failed to bring charges for sexual violence. Subsequent charges have been lodged for sexual violence in several cases: *Prosecutor v Gombo (Confirmation of Charges)* ICC Pre-Trial Chamber II ICC-01/05-05/08, 15 June 2009, which is now at the trial stage; *Prosecutor v Kenyatta (Confirmation of Charges)* ICC Pre-Trial Chamber II ICC-01/09-02/22, 23

case centred on an attack on the village of Bogoro in the Ituri region of the Democratic Republic of Congo by the *Front des nationalistes et intégrationnistes* (FNI) and the *Force de résistance patriotique en Ituri* (FRPI) on 24 February 2003. Katanga and Ngudjolo were the alleged commanders of the FRPI and FNI, respectively. On 21 November 2012, Trial Chamber II severed the cases against Ngudjolo and Katanga.[92] Ngudjolo was charged with seven counts of war crimes and three counts of crimes against humanity.[93] However, he was subsequently acquitted for all charges under art 25(3)(a) as the Court concluded that the three key witnesses called by the Prosecution to establish Ngudjolo's authority as lead commander of the Lendu militia as required under that article were not credible.[94] The Appeals Chamber confirmed the Trial Chamber's reasoning.[95]

Prosecutor v Katanga concerned the trial of Germain Katanga for his role as the commander of the Walendu-Bindi *collectivité*, which together with the FNI, attacked Bogoro in February 2003. Katanga was charged under art 25(3)(a) with seven counts of war crimes: wilful killing, directing an attack against a civilian population, destruction of property, pillaging, using child soldiers under the age of 15 years, sexual slavery and rape; and three counts of crimes against humanity: murder, sexual slavery, and rape.[96] Only a majority of the Pre-Trial Chamber found that there was sufficient evidence to establish substantial grounds to believe that during the attack on Bogoro,

January 2012, but charges were subsequently withdrawn, see *Prosecutor v Kenyatta (Decision on the withdrawal of charges)* ICC Trial Chamber V(B) ICC-01/09-02/11, 13 March 2015; *Prosecutor v Gbagbo (Decision on the confirmation of charges)* ICC Pre-Trial Chamber I ICC-02/11-01/11, 12 June 2014; *Prosecutor v Ntaganda (Decision on the confirmation of charges)* ICC Pre-Trial Chamber II ICC-01/04-02/06, 9 June 2014; *Prosecutor v Mbarushimana (Decision declining to confirm the charges); Prosecutor v Gbagbo (Warrant of Arrest)* ICC Pre-Trial Chamber III ICC-02/11-01/12, 29 February 2012; *Prosecutor v Harun (Warrant of Arrest)* ICC Pre-Trial Chamber I ICC-02/05-01/07, 27 April 2007; *Prosecutor v Kony (Warrant of Arrest)* ICC Pre-Trial Chamber II ICC-02/04-01/05, 27 September 2005; *Prosecutor v Al Bashir (Second Warrant of Arrest)* ICC Pre-Trial Chamber I ICC-02/05-01/09, 12 July 2010.

[92] *Prosecutor v Katanga and Ngudjolo Chui (Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons)* ICC Trial Chamber II ICC-01/04-01/07, 21 November 2012.

[93] *Prosecutor v Ngudjolo Chui (Trial Judgment)* ICC Trial Chamber II ICC-01/04-02/12,18 December 2012 at [7-10].

[94] At [503].

[95] *Prosecutor v Ngudjolo Chui (Appeal Judgment)* ICC Appeals Chamber ICC-0104-02/12-A, 7 April 2015.

[96] *Prosecutor v Katanga (Judgment*) at [7-10].

the sexual and gender-based violence crimes were jointly committed with the knowledge that they would occur in the ordinary course of events.[97]

The Trial Chamber unanimously acquitted Katanga of all charges under 25(3)(a) liability.[98] The Court found that the "absence of a centralised and effective chain of command" meant that the militia were not an organised apparatus of power or that Katanga had the extent of control requisite for liability under art 25(3)(a).[99] The majority, Judge Van den Wyngaert dissenting, then recharacterised the mode of liability for all charges except using child soldiers, in order to consider Katanga's responsibility as an accessory to the crimes under Article 25(3)(d) of the Statute.[100] It subsequently convicted Katanga as an accessory for the crimes of wilful killing, attacks against the civilian population, pillaging, and destruction of property.[101] However, the Chamber acquitted Katanga as an accessory for the crimes of rape and sexual slavery.[102]

A Actus Reus

The Chamber established that the underlying crimes charged had been established as evidence proved beyond reasonable doubt that the Ngiti combatants of the Walendu-Bindi *collectivité* had committed the crimes.[103]

It further recalled the finding that the combatants were part of a militia that constituted an organised armed group that had a plan to attack Bogoro and to "wipe out… not only the UPC military elements but also, and first and foremost, the Hema civilians present".[104] The manner in which the village was attacked from all directions, that the villagers were "systematically targeted" in accordance with a "regular pattern and violence" confirmed the "existence of a common purpose of a criminal nature" with regard to the population of the village.[105]

[97] At [10].
[98] At [1421].
[99] At [420].
[100] At [1484].
[101] At [1691].
[102] At [1664].
[103] At [1652].
[104] At [1401]-[1415], [1654].
[105] *Prosecutor v Katanga (Judgment*) at [1656]-[1657].

The Chamber next assessed Katanga's contribution to the commission of the crimes, concluding that Katanga had made a "truly significant" contribution to the crimes of murder, pillage and destruction of property by traveling to Beni on behalf of the Ngiti militia, establishing military alliances and defining a military strategy there; thereby helping the militia group by making a case to the military authorities for their interested in the struggle against the "Hema enemy"; assuming a position of authority and the role of facilitator, and settling disputes between local commanders and military authorities; and receiving and distributing arms and munitions. In this regard, it underscored Katanga's contribution to the preparations for the attack, and the importance of the arms and munitions he obtained for the success of the attack.[106]

The Chamber then moved to consider which crimes fell within this common purpose. It found that the manner in which Bogoro was attacked and that in which Hema civilians "who had no part in combat, were pursued and killed" confirmed that murder as a crime against humanity and war crime and attack against civilians as a war crime were part of the common purpose. The scale of the crimes were emphasised, in which "villagers were targeted in a systematic manner" and the crimes were committed with "great violence".[107] The Chamber found that at least 60 persons were killed during the attack, including at least 33 civilians.[108] Moreover, the habitual nature of the conduct in the attack and thereafter confirms intent to commit those crimes. [109]

The Chamber also established that the militia intended to pillage property and livestock, in that they knew that such acts of pillaging would occur in the ordinary source of events during the attack.[110] The scale of the crimes were again emphasised, such that Chamber stressed that the acts of destruction of property, including the burning down of houses occupied mainly by Hema civilians, "occurred within the full locality and during the whole day", and that Bogoro was pillaged "in great proportions". The Chamber added that goods destroyed and pillaged, including sheet metal roof covering and livestock, belonged mainly to the Hema civilian population and were "essential to [their] daily life".[111]

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[106] At [1671]-[1672], [1676], [1679], [1681].
[107] At [1656].
[108] At [838]-[840], [869].
[109] At [1658].
[110] At [1662].
[111] *Prosecutor v Katanga (Judgment)* at [1659]-[1660].

Two paragraphs dismissed Katanga's criminal responsibility for the crimes of rape and sexual slavery.[112] The Chamber concluded that the crimes did not fall within the common purpose.[113] It firstly recalled that that women claimed to be non-Hema so as to be spared certain death and that they were sexually enslaved.[114] The Chamber found that there was no evidence to establish that the sexual violence crimes were committed "on a wide scale and repeatedly" during the attack, or that the "obliteration of the village of Bogoro perforce entailed commission of such acts". [115] Moreover, the Court found that it was not established that rape or sexual slavery had been committed by the Ngiti combatants before the attack on Bogoro.[116] Finally, the Chamber found that "women who were raped, abducted and enslaved were specifically spared" and evaded certain death by claiming to be other than of Hema ethnicity."[117] Accordingly, rape and sexual slavery did not fall within the common purpose and Katanga was acquitted for their commission.[118]

B Mens Rea

The Chamber established that Katanga intended to contribute to the common purpose due to Katanga's testimony that his acts were made with awareness, that he had a part in the attack's conception, and that he voluntarily remained during the assault on Bogoro and considered it his "duty" to take part in the operation.[119]

Concerning Katanga's knowledge of the group's intent to commit the crimes, the Chamber found that the evidence demonstrated that he knew of the plan to attack Bogoro as of November 2002 and knew that the arms and munitions, the delivery of which he facilitated, would be used in that attack.[120] It further found that he was aware of the nature of the war in Ituri during the period and the ensuing suffering of the civilian population, including specific instances of murder and property damage in

[112] At [1663]-[1664].
[113] At [1664].
[114] At [1663].
[115] At [1663].
[116] At [1663]-[1664].
[117] At [1663].
[118] At [1664].
[119] At [1682].
[120] *Prosecutor v Katanga (Judgment)* at [1684].

which his militia had participated.[121] Finally, the Chamber found that Katanga knew about, and 'fully shared', the Ngiti's anti-Hema ideology.[122] Thus, the Chamber found beyond reasonable doubt that Katanga significantly and intentionally contributed to the crimes of murder as a war crime and a crime against humanity, as well as attacking a civilian population, destruction of property and pillage as war crimes, in full knowledge of the group's intention to commit the crimes.[123]

Judge Van den Wyngaert dissented on two principle grounds. The first was that the recharacterisation of the facts violates arts 74 and 67 of the Rome Statute and therefore was not open to the Trial Chamber.[124] The Judge argued that the recharacterisation of the facts went well beyond the facts and circumstances of the Confirmation Decision and failed to respect Katanga's rights to a fair trial.[125] Secondly, Judge Van den Wyngaert dissented fundamentally on the reading of the evidence as a whole, finding that the evidence as to art 25(3)(d) liability was insufficient to meet the standard of beyond reasonable doubt.[126] While her comments were not directed specifically at sexual violence crimes, she does provide a poignant warning against relaxation of legal standards:[127]

> Sympathy for the victim's plight and an urgent awareness that this Court is called upon to "end impunity" are powerful stimuli. Yet, the Court's success or failure cannot be measured just in terms of "bad guys" being convicted and innocent victims receiving reparation. Success or failure is determined first and foremost by whether or not the proceedings, as a whole, have been fair and just.

C Analysis

The Majority's failure to consider sexual violence as a crime within the common purpose can be attributed to a inconsistent and limited assessment of the law and failure to engender legal concepts: sexual violence was implicitly subjected to a

[121] At [1685]-[1689].
[122] At [1688].
[123] At [1691].
[124] *Prosecutor v Katanga (Minority Opinion of Judge Christine Van den Wyngaert)* ICC Trial Chamber II ICC-01/04-01/07-3436-AnxI, 7 March 2014 at [2].
[125] At [129]-[132].
[126] *Prosecutor v Katanga (Minority Opinion of Judge Christine Van den Wyngaert)* at [317].
[127] At [310].

higher evidentiary standard than other violent crimes; fails to apply the same legal standards to sexual violence as other violent crimes; the scale of sexual violence crimes failed to be assessed through a gender lens; and the judgment lacks appreciation for the established link between sexual violence and ethnic conflict. [128]

First, the Majority judgment is illustrative of inconsistency between application of the law to sexual violence as compared with other violent crimes in three instances.[129] First, while the majority accepted that rape and sexual slavery form part of the Ngiti strategies, it held that they were not instrumental in the taking of the village of Bogoro.[130] This reasoning implies that physical destruction carried greater weight in the purpose than the destruction of community structures through acts of sexual violence.[131] Second, majority decision found that the intensity of the fire power deployed in the attack "compelled [the civilian population] to flee, leaving it vulnerable to shooting and forcing it to abandon its property".[132] However, the Chamber did not consider the terrorizing impact of sexual violence upon the civilian population, or that attempts by the population to flee may have also made it vulnerable to rape, capture and enslavement.[133] Finally, according to the majority, transporting, stockpiling and distributing weapons and ammunition demonstrated planning, intent and preparation for the attack and proved Katanga's contribution to the common purpose.[134] The majority also explicitly connected the amassing and distribution of weapons with the combatants to commit the crimes of murder, destruction of property, pillaging and an attack on the civilian population.[135] Such analysis begs the question: if not this, what form of contribution would the court require to demonstrate the intent to commit sexual violence, in order for this crime to be considered part of the common purpose?[136]

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[128] Brigid Inder "Expert Panel: Prosecuting Sexual Violence in Conflict – Challenges and Lessons Learned: a Critique of the Katanga Judgment" (Global Summit to End Sexual Violence in Conflict, 11 June 2014) at 1.
[129] Kelly Askin "Katanga Judgment Underlines Need for Stronger ICC Focus on Sexual Violence" (11 March 2014) Open Society Foundations < <www.opensocietyfoundations.org>.
[130] *Prosecutor v Katanga (Judgment*) at [1663]-[1664].
[131] Carsten Stahn "Justice Delivered or Justice Denied? The Legacy of the *Katanga* Judgment" (2014) JICJ 12(4) 809 at 821. Linnea Kortfelt "Sexual Violence and the Relevance of the Doctrine of Superior Responsibility in the Light of the Katanga Judgment at the International Criminal Court" (2015) Nord J Intl L 4 533 at 546.
[132]*Prosecutor v Katanga (Judgment*), at [1678].
[133] Inder, above n 128, at 4. See *Prosecutor v Kunarac (Judgment)* ICTY Trial Chamber IT-96-23-T, IT-96-23/1-T.
[134] *Prosecutor v Katanga (Judgment*), at [1672]-[1673].
[135] At [1676]-[1681].
[136] Inder, above n 128, at 4.

Secondly, in articulating the common plan, the Majority relied in part upon the volume of the crimes of murder and pillaging to establish that these crimes were part of the common plan. According to the judgment, more than 60 people were killed in the attack, destruction of property occurred on a grand scale, and pillaging was widespread.[137] Three women testified to being raped multiple times and, according to their testimonies, at least 17 acts of rape were committed during the attack.[138] However, while the Majority accepted that rape and sexual slavery crimes had been committed during the attack, the insufficient number of these crimes was a factor that led the Majority to conclude that these crimes were not part of the common purpose.[139] This finding is in conflict with a body of jurisprudence relating to common purpose liability at the ICTY despite the *Katanga* Trial Chamber stating that ICTY common purpose jurisprudence is of the "utmost pertinence" to the art 25(3)(d) analysis.[140] ICTY jurisprudence suggests that the argument that the number of crimes committed fall short of showing that that crime was part of the common purpose is fallacious and is to conflate the objective of the joint criminal enterprise with the means through which it was to be achieved.[141] Moreover, the issue of numbers is complex, as Inder states "for what we count and how we count it reflects what we value".[142] To find that the number of sexual assaults confine these crimes to fall outwith the common purpose fails to comprehensively recognise the wider range of harms elicited by these crimes.[143]

Thirdly, in its finding of the existence of a common purpose and Katanga's contribution to that common purpose, the Chamber found that the sexual violence crimes were not ethnically motivated and were not an integral part of the plan to wipe out the Bogoro village.[144] Such a conclusion refutes the body of jurisprudence from the ICTY and ICTR which establish that sex and gender crimes are commonly used and effective

[137] *Prosecutor v Katanga (Judgment*), at [841], [950].
[138] At [988]-[1037].
[139] At [1663]; Inder, above n 128, at 5.
[140] *Prosecutor v Katanga (Judgment*), at [1625].
[141] *Prosecutor v Đordević (Appeal Judgement)* ICTY Appeals Chamber IT-05-87/1-A, 27 January 2014 at [204].
[142] Inder, above n 128, at 5.
[143] Doris Buss "Is International Criminal Law Feminist?" (2011) Int C L J 11(3) 409-423.
[144] *Prosecutor v Katanga (Judgment*), at [1663].

means through which ethnically motivated attacks may be undertaken.[145] Notably, the majority stated that "women who were raped, abducted and turned to slavery had their life spared and escaped a certain death because they pretended to belong to an ethnicity other than Hema".[146] This conclusion clearly reinforces the traditional hierarchy of crimes at international law.[147] Moreover, if the comment was to contrast the common purpose as confined to the targeting of the UPC and Hema population with sexual violence directed at women who claimed to be non-Hema, this section of the judgment is confusing and unprincipled as the Chamber on multiple occasions held that the common purpose was to destroy the village in its entirety and drive out the civilians.[148]

Lastly, the Chamber did not consider *dolus directus* in the second degree as regards rape and sexual slavery, meaning whether Katanga knew that in the ordinary source of the attack, crimes of sexual violence would occur.[149] However, such an analysis was undertaken in regard to pillaging and destruction of property, finding these crimes within the common purpose as Katanga was found to know that these crimes would be committed in the ordinary course of events.[150] It is arguable that the Chamber's finding that it had not been sufficiently demonstrated that the Ngiti combatants involved in the attack on Borogo had committee sexual violence prior to this incident goes to the foreseeability in the ordinary course of events.[151] However, the finding that it was not established that the combatants had committed rapes and crimes of sexual slavery before the attack on Bogoro was established without sufficient or transparent analysis as cited only the Defence closing submissions and did not consider the Pre-Trial Chamber finding to the contrary.[152]

D Response of the Office of the Prosecutor

In July 2014, the Prosecutor's Office released a policy paper on sex and gender-based crimes to affirm the Office's commitment to an emphasis on sexual and gender-based

[145] See eg *Prosecutor v Akayesu (Judgment)*; *Prosecutor v Tadić (Judgment)*; *Prosecutor v Furundžija (Judgment)*, above n 29; *Prosecutor v Kunarac (Judgment)* above n 29; *Prosecutor v Krstić (Judgment)* above n 29.
[146] *Prosecutor v Katanga (Judgment*), at [1663].
[147] Inder, above n 128, at 7.
[148] Korrtfalt, above n 131, at 547.
[149] Inder, above n 128, at 7.
[150] *Prosecutor v Katanga (Judgment*), at [1662], [1690]-[1691].
[151] Korrtfalt, above n 131, at 546.
[152] At *Prosecutor v Katanga (Judgment)* footnote 3677; *Prosecutor v Katanga and Ngudjolo Chui (Decision on confirmation of charges)* at [568]. Stahn, above n 131, at 821.

crimes, and to provide guidance on effective investigation and prosecution, contribute to advancing a culture of best practice, and contribute to the ongoing development of international jurisprudence.[153] The policy was the result of a two-year process of extensive internal and external consultations.[154] The Office made several prudent comments as to how to improve the prosecution of sexual violence at international criminal law.

First, the Office addressed the manner in which crimes are charged. The burden of deciding which charges to bring is that of the Prosecutor's, and as such the Office stated that it will ensure that charges for sexual and gender-based crimes are brought wherever there is sufficient evidence to support such charges.[155] This is to be achieved directly, by charging such acts as crimes in and of themselves, and indirectly, through charging these acts as forms of other violence within the Court's jurisdiction where the material elements are met, such as torture, persecution, and genocide.[156] The Office also confirmed its commitment to charge acts of sexual violence as different categories of crimes – war crimes, crimes against humanity, and genocide - within the Court's jurisdiction, in order to "properly describe the nature, manner of commission, intent, impact, and context".[157]

Second, the Office addressed the manner in which modes of liability and mental elements are brought an established in order to secure conviction. The Office noted that situations before the Court have tended to show that sex and gender violence crimes are often widespread and used systematically as a "tool of war or repression".[158] Such is a distinctly positive development as it shows that the Office of the Prosecutor is beginning to shake off the historical assumptions that reduce sexual violence to the private sphere.

[153] The Office of the Prosecutor *Policy Paper on Sexual and Gender-Based Crimes* (International Criminal Court, June 2014) at [6].
[154] Fatou Bensouda, International Criminal Court Prosecutor "The investigation and prosecution of sexual and gender-based crimes: reflections from the Office of the Prosecutor" (Hague Academy of International Law, The Hague, Netherlands, 24 August 2015).
[155] The Office of the Prosecutor, above n 153, at [71].
[156] The Office of the Prosecutor, above n 153, at [72].
[157] At [73].
[158] At [75].

Thirdly, the Office stated that these crimes may be committed as a result of explicit or implicit orders; as a consequence which the individual is aware will occur in the ordinary course of events during military operations, for instance, as a result of omission to protect civilians, or failure to punish similar crimes; or by a combination of other relevant factors, such as a culture of tolerance.[159] The Office also noted that the experience of the ICC and other international tribunals demonstrates that there is often no evidence of orders to commit sexual and gender violence and, in such circumstances, evidence such as patterns of prior or subsequent conduct or specific notice may be adduced to prove an awareness on the part of the accused that such crimes would occur in the ordinary course of events, which would satisfy the mental element of art 30(2)(b).[160]

The acknowledgement of the Office of the Prosecutor that new approaches must be taken towards the prosecution of sexual violence reflects leadership in the development of a more gender-inclusive approach to the application of international criminal law. This kind of approach is crucial in order to meaningfully address impunity for sexual violence crimes in armed conflict.[161] Moreover, elevation of sexual violence crimes increases the prospects of justice for survivors in post-conflict reconstruction.[162] In practical terms, the Office is to "systematically" ensure the inclusion of charges for sexual and gender-based crimes in cases.[163] Bensouda gave the example that the Office is working to advance international humanitarian law in the case of Bosco Ntaganda by bringing charges in relation to sexual violence against one's own troops.[164] Moreover, in the case of Jean-Pierre Bemba Gombo, acts of sexual violence became to focus of the investigations and prosecutions.[165]

V Joint Criminal Enterprise

[159] At [75].
[160] At [81].
[161] Chris Dolan, Stephen Oola, Shayne Henry, Abigail Ludwig, Sahar Maali and Lauren E Fletcher *Comments on the ICC Draft Policy Paper on Sexual and Gender Based Crimes* (Refugee Law Project and International Human Rights Law Clinic, 23 February 2014) at [4].
[162] Kelly Askin, above n 129.
[163] Bensouda, above n 154, at 5.
[164] At 6.
[165] At 6.

Having drawn out the inconsistent and limited jurisprudence interpretation of the law and engendering of the legal concepts of individual criminal responsibility at the ICC, the following parts will apply a similar analysis to two very recent appellate cases at the ICTY: *Šainović* and *Đorđević*. This part will provide an outline of the law of joint criminal enterprise, as the mode of common purpose liability applied in these cases, in order to provide a foundation from which the analysis of these cases can begin.

The Statute of the ICTY obliges the Prosecutor to prove, regardless of the collective nature of the acts, the underlying crime.[166] Personal jurisdiction is then triggered for individuals accused who, by means of formal or informal groups, participate in collective criminal conduct.[167] This may include personal commission, or liability for actions conducted by others.[168]

Although the Statute of the ICTY makes no explicit reference to "joint criminal enterprise" as a mode of liability, the Appeals Chamber has held that participation in a joint criminal enterprise is a form of commission under art 7(1) of the Statute.[169] Joint criminal enterprise confers criminal responsibility on a defendant for his or her participation in a group's common plan to embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Anyone who contributes to the criminal activity in order to carry out a common criminal purpose may be held criminally liable.[170]

Notably, the Pre-Trial Chamber in the *Lubanga* decision held that the concept of joint criminal enterprise formulated by the ICTY is "closely akin" to art 25(3)(d) of the Rome Statute.[171] In addition, the Appeals Chamber in *Tadić* referred to Article 25(3)(d) as incorporating a substantially similar concept to joint criminal enterprise.[172] The extent to which art 25(3)(d) liability overlaps is debatable. However, the ICC has rejected joint

[166] Sellers, above n 29, at 153.
[167]At 154.
[168] Sofia Lord "Joint Criminal Enterprise and the International Criminal Court" (Thesis, Stockholm University, 2013) at 11.
[169] *Prosecutor v Kvocka (Appeal Judgment)* ICTY Appeals Chamber IT-98-30/1-A, 28 February 2005 at [79], [334].
[170] *Prosecutor v Tadic (Appeal Judgment)*, above n 7, at [190].
[171] *Prosecutor v Lubanga (Decision on the confirmation of charges)* ICC Pre Trial Chamber I ICC-01/04-01/06, 29 January 2007 at [335].
[172] *Prosecutor v Tadić (Judgment)* at [222].

criminal enterprise, instead favouring art 25(3) as an exhaustive list of the modes of liability available.[173]

A Actus reus

The actus reus requirements for all categories of joint criminal enterprise are identical, requiring: [174]

i. A plurality of persons
ii. The existence of a common plan, design or purpose, which amounts to or involves the commission of a crime provided for in the Statute of the Court or Tribunal; and
iii. Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. Participation need not involve commission of a specific crime, but make take the form of assistance in, or contribution to, the execution of the common plan or purpose.

As regards the first requirement, the group of persons must be identified, however it is not necessary to identify every person by name and it is not necessary that the people in the group know one another.[175] They need not be organised in a military, political, or administrative structure.[176]

The second requirement considers the existence of a common plan, design or purpose that amounts to or involves the commission of a crime within the Statute of the Court. A joint criminal enterprise may exist whenever two or more people participate in a common criminal endeavour. The common plan itself need not amount to a crime, but its execution must involve the commission of crimes. There is no necessity for this plan, design or purpose to have been previously arranged or formulated and it may materialise extemporaneously. It will be inferred from the fact that a plurality of persons

[173] *Prosecutor v Lubanga (Warrant of Arrest)* ICC Pre-Trial Chamber I ICC-01/04-01/06, 10 February 2006. Stefano Manacorda and Chantal Meloni "Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?" (2011) JICJ 9 159 at 164.
[174] *Prosecutor v Tadic (Judgment)* at [227].
[175] *Prosecutor v Brđanin (Judgment)* ICTY Appeals Chamber IT-99-36-A, 3 April 2007 at [430].
[176] *Prosecutor v Tadic (Judgment)* at [227].

acts in unison to put into effect a joint criminal enterprise.[177] The framing of the common purpose has implications for the liability of the accused at trial.

The third criteria requires the participation of the accused in the execution of the common design. Participation of an accused in the joint criminal enterprise need not involve the physical commission of the material elements of the crime, as long as the accused contributes to the execution of the common objective.[178] Although the contribution need not be necessary or substantial, it should at least be a significant contribution to the crimes charged.[179]

B Mens Rea

The mens rea requirements, or the mental elements of the crime, differ according to the category of joint criminal enterprise under consideration.[180]

Basic joint criminal enterprise requires the intent to perpetrate a certain crime that was part of the common purpose. The accused does not have to physically perpetrate the crime, he or she only needed to have voluntarily participated in one aspect of the common design and intended the result.[181] For crimes that in addition to the general subjective element also require an ulterior intent (*dolus specialis*) such as genocide, the participant in the basic joint criminal enterprise also must be motivated by an ulterior intent.[182]

The second category – "systemic joint criminal enterprise" – embraces the specific subject matter of concentration camps.[183] The mens rea requirement comprises: (i) knowledge of the nature of the system; and (ii) the intent to further the common concerted design to ill-treat inmates. In these cases, the requisite intent could be inferred from the position of authority held by the camp personnel or organized hierarchy. The

[177] At [227].
[178] At [227].
[179] *Prosecutor v Brđanin (Judgment)* at [430].
[180] *Prosecutor v Tadic (Judgment)*, at [228].
[181] *Prosecutor v Tadic (Judgment)*, at [196].
[182] At [228].
[183] At [202].

individual's high rank or authority, in and of itself, indicates an awareness of the common design and intent to participate therein.[184]

The third category is extended joint criminal enterprise. This category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits and act which, while outside the common design, was nevertheless a natural and foreseeable consequence of effecting that common purpose.[185] It need not be shown that there was intent to commit crimes that were outside the common purpose. Rather, what is required is the intention to participate in and further the criminal purpose and to contribute to the joint criminal enterprise. Responsibility for a crime other than the one agreed upon in the common play arises only if, under the circumstances of the case, it was: (i) foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.[186] Extended joint criminal enterprise does not require a "probability" that a crime would be committed, only that the possibility of a crime being committed is substantial enough that it is foreseeable to the accused.[187] The *Tadic* Appeals Chamber gave the following example:[188]

> …the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to predict this result.

The *Tadic* Appeals Chamber emphasised that more than negligence is required for liability under basic joint criminal enterprise, which rather requires a standard of advertant recklessness. The criterion to establish advertant recklessness can be summarized as follows:[189]

i. the intention to take part in and further the initial criminal purpose of a joint criminal enterprise;

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[184] At [203].
[185] At [204].
[186] At [228].
[187] *Prosector v Karadžic (Judgment)* ICTY Appeals Chamber IT-95-5/18-AR72.4, 25 June 2009 at [18].
[188] *Prosecutor v Tadic (Judgment)* at [220].
[189] At [204], [220], [228].

ii. that the crime charged was a *natural and foreseeable consequence* of the execution of that enterprise; and

iii. that the *accused was aware* that such a crime was a possible consequence of the execution of that enterprise, and that, with that awareness, he participated in that enterprise.

Since the Tribunal in *Tadic* first mooted the theory of joint criminal enterprise it has become what Schabas has described as the "magic bullet" of the Office of the Prosecutor, raising concern regarding the potential for broad interpretation of its liability-imposing provisions.[190] The doctrine has been criticised for its "elasticity" and "dangerously illiberal tendencies" that leave defendants potentially liable for a vast range of crimes.[191] For example, in the *Kraijisnik* case, the ICTY Appeals Chamber found it necessary to overrule the Trial Chamber adoption of an articulation of the composition of the common criminal group as "impermissibly vague".[192] Similarly, the adoption of a requirement for "significant contribution" to the joint criminal enterprise is an attempt by the Tribunal to balance the principal of personal culpability while also retaining sufficient flexibility to address the unique circumstances of group crimes.[193] Moreover, Schabas has raised concerns of a "negligence-like standard of guilt" that increases the risk the accused will be found liable for guilt by association.[194] The implications of guilt by association was outlined in the first Annual Report of the Tribunal, which stated:[195]

> If responsibility for the appalling crimes perpetrated in the former Yugoslavia is not attributed to individuals, then whole ethnic and religious groups will be held accountable for these crimes and branded as criminal. In other words, "collective responsibility" - a primitive and archaic concept - will gain the upper hand; eventually whole groups will be held guilty of massacres, torture, rape, ethnic cleansing, the wanton destruction of cities and villages. The history of the region clearly shows that clinging to feelings of "collective responsibility" easily degenerates into resentment,

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[190] Schabas,"Mens Rea and the International Criminal Tribunal for the Former Yugoslavia" (2003) 37(4) New Eng L Rev 1015 at 1032.
[191] John D Ciorciari "Liberal Legal Norms Meet Collective Criminality" (2011) Mich L Rev 109(6) 1109 at 1114.
[192] *Prosecutor v Krajisnik* (*Appeal Judgment)* ICTY Appeals Chamber IT-00-39-A, 17 March 2009 at [156]-[157].
[193] DeFalco, above n 89, at 720.
[194] Schabas, above n 190, at 1033. *Prosecutor v Kordic (Trial Judgment)* ICTY Trial Chamber IT-95-14/2-T, 26 February 2001 at [219].
[195] *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991* A/49/342 (1994) at [16].

hatred and frustration and inevitably leads to further violence and new crimes.

V Trial of Sexual Violence at the ICTY

The ICTY was established in an international environment that encouraged the pursuit of justice for sexual violence crimes in armed conflict.[196] The United Nations Security Council had singled rape out as one of the particularly reprehensible crimes committed during the conflict in the former Yugoslavia and expressed its commitment to establishing accountability for these crimes as a core part of the ICTY's mandate.[197]

Jurisprudence of the ICTY confirmed that sexual violence is among the most serious crimes of war.[198] Additionally, convictions for sexual violence at the ICTY have been secured as an integral part of the ethnic cleansing campaigns.[199] Notably, in the *Broanin* case, the Appeals Chamber expressly dismissed defence arguments that rapes were "individual domestic crimes" unconnected to the armed conflict and to the widespread or systematic attack against the civilian population.[200] It found that the rapes of Bosnian Muslim women by Bosnian Serb soldiers and placement occurred in the context of the armed conflict and as part of a widespread or systematic attack.[201]

In limited cases, sexual violence has been found to consist part of the common purpose: under the first category of joint criminal enterprise through persecution[202] and the second category of joint criminal enterprise at first instance.[203] However, it is more often that sexual violence has fallen to be considered under the third category of joint criminal enterprise, as illustrated in the two cases that will next be analysed.[204]

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[196] Jarvis and Salgado, above n 20, at 101.
[197] SC Res 808, S/Res/808 (1993); SC Res 827, S/Res/827 (1993).
[198] Jarvis and Salgado, above n 20, at 103. *Prosecutor v Furundžija (Judgment)*, above n 29; *Prosecutor v Kunarac (Judgment)* above n 29; *Prosecutor v Krstić (Judgment)* above n 29.

[199] For example, *Prosecutor v Stakic (Judgment)* ICTY Appeals Chamber IT-97-24-A, 22 March 2006.
[200] Jarvis and Salgado, above n 20, at 103, 108. At 108; *Prosecutor v Brdanin (Judgment)* ICTY Appeals Chamber IT-99-36-A, 3 April 2007 at [253], [256]-[257].
[201] *Prosecutor v Brdanin (Judgment*) at [256]-[258].
[202] *Prosecutor v Stakic (Judgment)*, above n 199, at [73], [84]-[85], [92]-[98], [104].
[203] *Prosecutor v Krajisnik (Trial Judgment)* ICTY Trial Chamber I IT-00-39-T, 27 September 2006.
[204] *Prosecutor v Krstic (Judgment)* at 29. Jarvis and Salgado, above n 20, at 114.

A Šainović

The *Milutinovic* case involved six accused tried concerning ethnic cleansing of Kosovar Albanians in 1999. Specifically, the accused were alleged responsible for deportation, forcible transfer, murder and persecution as crimes against humanity, and murder as a war crime.[205] Four of the accused appealed the verdict of the Trial Chamber in *Milutinovic*, leading to the appeal judgment delivered in *Šainović* in 2014.[206]

1 Actus reus

The Trial Chamber established that the requirement of a plurality of persons acting in the joint criminal enterprise was established.[207]

Secondly, the Trial Chamber established that the group operated with a common purpose to ensure the FRY and Serbian authority's continued control over Kosovo: through "a widespread and systematic campaign of terror and violence, the Kosovo Albanian population was to be forcibly displaced both within and without Kosovo.[208] It considered the destruction of Kosovar Albanian identity documents, the disarming of Kosovo Albanians and the arming of Serbs and Montenegrins, attempts to obstruct justice and partial responsibility for the failure of international peace negotiations were suggestive of this common purpose.[209] Moreover, the Court looked to the wider context of historical and political ethnic divides, including "widespread and systemic" attacks to create an "atmosphere of terror" including the "excessive use of force".[210]

The Trial Chamber concluded that the common purpose was to be achieved through deportation and forcible transfer alone.[211] While the Trial Chamber found murders, sexual assaults and destruction of property was established beyond reasonable doubt,

[205] *Prosecutor v Miluntinovic (Trial Judgment)* at Vol 1 [6].
[206] *Prosecutor v Šainović (Appeal Judgment)*, above n 4.
[207] *Prosecutor v Miluntinovic (Judgment)* at Vol III [97].
[208] *Prosecutor v Miluntinovic (Trial Judgment)* at [95].
[209] At [40], [72], [85], [87]-[88], [92].
[210] At [41], [48], [90]-[91].
[211] At [784], [1133], [469].

given that there was no clear pattern of murder, sexual assault and destruction of property, the Trial Chamber was not satisfied these fell within the common purpose.[212]

Following establishment of the first two actus reus requirements, the Court moved on to individually assess the third physical requirement, as being a significant contribution, and the mens rea requirements individually.[213] This brief will consider three accused whose charges are relevant to sexual assault: Pavković, Šainović, and Lukić.

2 Mens rea

(a) Pavković

Pavković was Commander of the 3rd Army of the VJ.

The Trial Chamber established that all of Pavković's actions were voluntary and that he had the intent to ensure continued control by the FRY and Serbian authorities over Kosovo through the crimes of forcible displacement.[214]

It was established that Pavković intended to participate in the common purpose and that his contribution was significant.[215] Pavković possessed extensive *de jure* powers and command authority over VJ forces, and influence that extended further. The Chamber found that information received by Pavković before and during the NATO air campaign combined with his continuing ordering of and participation in the joint operations and awareness of "allegations of excessive and indiscriminate use of force" by the international community was indicative of his intent that the crimes occur.[216] Pavković's "frequent presence" on the ground, in conjunction with the "widespread practice" of displacing Kosovo Albanians and "ill-discipline and misconduct" amongst VJ members, supports the contention that he was aware of criminal offences.[217] Pavković also engaged in under-reporting of crimes, arming of the non-Albanian

[212] At [94].
[213] At [98].
[214] *Prosecutor v Miluntinovic (Judgment)* at Vol III at [772].
[215] At [785].
[216] At [774].
[217] At [775].

population and disarming of the Kosovo Albanian population, and "ineffective measures" to protect civilians that were "manifestly insufficient" and "contributed to the creation and maintenance of an environment of impunity".[218]

The Court established that murders and sexual assaults were foreseeable to Pavković as it placed the commission of crimes within the wider ethnic armed conflict. Pavković was "aware of the strong animosity" between the Serbs and Kosovo Albanians and of the context in which the displacement took place and his "detailed knowledge of events on the ground" coupled with knowledge of specific instances of murder and rape committed by these forces made it reasonably foreseeable that VJ and MUP forces would commit murder and sexual assault during the forcible displacement in Beleg and Cirez.[219]

The Appeals Chamber confirmed the Trial Chamber's reasoning and, given Pavković's awareness and specific knowledge of the widespread criminal violence committed against the Kosovo Albanian population, widened Pavković's liability to include sexual assaults committed in Prishtina in April and May 1999.[220] This Appeals Chamber decision has been considered an example of successful conviction for sexual violence crimes and a step towards ending impunity at the supranational level.[221]

(b) Šainović and Lukić

Šainović was a Deputy Prime Minister of the FRY.[222] The Trial Chamber established that Šainović contributed significantly to the joint criminal enterprise as his role was to "orchestrate" the events in Kosovo by conveying Milosevic's instructions and co-ordinating the VJ and MUP.[223] Lukić was the Head of the MUP Staff for Kosovo.[224] The Trial Chamber also concluded that Lukić's contribution was significant because he was a directly involved in day-to-day operations as *de* facto commander over MUP

[218] At [777]-[779], [782].
[219] At [785].
[220] *Prosecutor v Miluntinovic (Judgment)* at Vol III [1602].
[221] Jarvis and Salgado, above n 20, at 114.
[222] *Prosecutor v Miluntinovic (Judgment)* at Vol III [285].
[223] At [467].
[224] At [945].

forces, acted as a bridge between policy planners such as Milosevic and Đorđević, and those on the ground in Kosovo.[225]

The Chamber established that Šainović's actions were voluntary.[226] It also concluded that, given his awareness of the humanitarian catastrophe but continued participation in the joint criminal enterprise, he had the intent to forcibly displace part of the Kosovo Albanian population.[227] The Trial Chamber also established that Lukić's actions were voluntary and he had intent to participate in the common purpose given his specific awareness of the large numbers of civilians leaving Kosovo and the large number of crimes being committed by MUP and VJ members.[228]

As regards to murder, the Trial Chamber established that Šainović and Lukić were aware of the "strong animosity" between ethnic Serbs and Kosovo Albanians and of the context in which the forcible displacement took place, and each possessed "detailed knowledge of events on the ground". It was thus reasonably foreseeable that murder would be committed.[229] Specific evidence drawn from meetings in which Šainović was informed of and personally discussed mass graves and killing supported his conclusion.[230]

The Trial Chamber also found that destruction of or damage to religious property was reasonably foreseeable to both Šainović and Lukić as the conflict was one that involved ethnic divisions and, moreover, the common purpose was to be achieved through a campaign of terror and violence against the Kosovo Albanian civilian population. These conditions coupled with their "detailed knowledge" of events on the ground provided the "inescapable conclusion" was that such damage was reasonably foreseeable.[231]

However, the Trial Chamber considered that the evidence did not establish sexual assaults were reasonably foreseeable to either of the accused. It found that sexual offences were only discussed at meetings at which Šainović attended after those crimes

[225] At [1131].
[226] At [462].
[227] At [463]-[466].
[228] At [1117], [1123]-[1124], [1129].
[229] *Prosecutor v Miluntinovic (Judgment)* at Vol III [470], [1134].
[230] At [470].
[231] At [473], [1136].

had been committed in Beleg and Cirez. [232] Similarly, despite Lukić submitting a report detailing the sexual assault of a Kosovo Albanian woman in May 1999, the evidence did not demonstrate that sexual assaults committed in March and April were reasonably foreseeable to him.[233] Moreover, as regards both accused, the evidence in *Krstic* and *Kvocka* findings were "significantly more compelling" than those in relation to this case. Therefore, both were acquitted on grounds of lack of foreseeability.[234]

Krstic involved the conviction of General Krstic, Commander of the Drina Corps of the VRS, as a member of a joint criminal enterprise to forcibly transfer the bulk of Bosnian Muslim civilians out of Srebrenica.[235] The Trial Chamber was satisfied that murders, rapes, beatings and sexual violence committed against refugees "inevitable" given the Krstic's firsthand knowledge of the lack of shelter, density of the crowds, vulnerable conditions of the refugees, the presence of many regular and irregular military and paramilitary units, and lack of sufficient numbers of UN soldiers.[236] The Appeals Chamber upheld the Trial Chamber's reasoning.[237] Moreover, the accused in the *Kvocka et al.* case were found responsible for persecutions, including through rape and sexual assault, committed in the Omarska death camp in Prijedor.[238] Although the accused were found guilty at trial level under systemic joint criminal enterprise, the Trial Chamber stated:[239]

> …any crimes that were natural and foreseeable consequences of the joint criminal enterprise of the Omarska camp, including sexual violence, can be attributable to the participants in the criminal enterprise. In Omarska camp, approximately 36 women were held in detention guarded by men with weapons who were often drunk, violence and physically and mentally abusive and who were allowed to act with virtual impunity. Indeed, it would be unrealistic and contrary to all rational logic to expect that none of the women held in Omarska, placed in circumstances rendering them especially vulnerable, would be subjected to rape or other forms of sexual violence.

[232] At [472].
[233] At [1135].
[234] At [472], [1135].
[235] *Prosecutor v Krstić (Trial Judgment)*, above n 29, at [612], [615].
[236] *Prosecutor v Krstić (Trial Judgment)*, above n 29, at [616].
[237] *Prosecutor v Krstić (Appeal Judgment)* ICTY Appeals Chamber IT-98-33-A, 19 April 2004 at [149].
[238] *Prosecutor v Kvocka (Trial Judgment)* ICTY Trial Chamber IT-98-30/1-T, 2 November 2001, at [752], [755], [758], [761], [764].
[239] At [327].

Judge Chowhan of the Trial Chamber in *Milutinovic* issued a partially dissenting opinion regarding the foreseeability of sexual assault of Kosovo Albanian women to Šainović and Lukić. Chowhan stated that in the context of armed conflict in which "able-bodied military and security forces" use violence to remove civilians from their homes, "prudence and common sense" as well as the past history of the conflicts in the region give the result that sexual assaults "were certainly foreseeable realities".[240]

The Appeals Chamber reversed both Šainović and Lukić's acquittals for sexual violence charges.[241] The Appeals Chamber, Judge Liu dissenting, found that in light of the accused's awareness of the atmosphere of aggression, violence and ethnic animosity, and the forcible displacement of Kosovo Albanian women rending them especially vulnerable, both Šainović and Lukić "must have been aware" that sexual assaults could be committed on discriminatory grounds.[242] Judge Liu considered that the Majority's reliance on the totality of the circumstances to find that commission of sexual assaults were foreseeable as "unpersuasive and speculative" and does not reflect the only reasonable conclusion on the facts.[243]

3 Analysis

The Trial Chamber must be commended for treating sexual violence as among the ranks of other violent crimes in terms of the framing of the common purpose. However, the Trial Chamber judgment is illustrative of a limited and inconsistent approach to the interpretation and the engendering of legal concepts within joint criminal enterprise as a mode of liability, in this case the element of foreseeability. The Trial Chamber decision is demonstrative of the limited ability of the court to interpret and consider individual criminal responsibility for sexual violence crimes through a gender lens.[244] However, as the trial judgment was overruled upon appeal, a critique of this judgment

[240] *Prosecutor v Kvocka (Appeal Judgment, Dissenting Opinion of Judge Chowhan)* at 481.
[241] *Prosecutor v Šainović (Judgment)* ICTY Appeals Chamber IT-05-87-A Appeals Chamber, 23 January 2014.
[242] *Prosecutor v Šainović (Judgment)* at [1581] and [1591].
[243] *Prosecutor v Šainović (Dissenting Opinion of Judge Liu)* at [7]-[8].
[244] Gabriela Mischkowski and Gorana Mlinarevic *…and that it does not happen to anyone anywhere in the world: the trouble with rape trials* (Open Society Institute, December 2009) at 37.

will only briefly touched upon and the focus of this part will be upon the commendable approach of the Appeals Chamber.

The Trial Chamber treated sexual violence as not foreseeable to the accused on the facts because specific knowledge of the commission of these crimes was not established.[245] However, the approach of the Appeals Chamber was to consider the foreseeability of sexual violence to the wider context of armed conflict.[246] The Appeals Chamber explicitly linked the "atmosphere of aggression and violence", environment of "ethnic animosity" and knowledge the forcible deportation of Kosovo Albanian civilians, particularly women, to the foreseeability of such crimes.[247]

Moreover, the Appeals Chamber did not compare the facts of the present case with the finding of foreseeability in *Krstic* or *Kvocka*.[248] The Trial Chamber's analogy with *Krstic* was concerning as, in that case, the foreseeability of murders and rapes were both found on the same facts: the lack of shelter, density of the crowds, vulnerable conditions of the refugees, the presence of many regular and irregular military and paramilitary units, and lack of sufficient numbers of UN soldiers.[249] Moreover, the *Kvocka* case comments as to the foreseeability of sexual violence were obiter given the case was decided under systemic joint criminal enterprise, and therefore were coloured by the factual context of a camp of systemic ill treatment.[250]

However, at no point did the Trial or Appeals Chamber consider the question of expansion of the common purpose to include these crimes, such that both Chambers appeared content to consider murder, property damage and sexual violence as falling outside the common purpose.[251] Given jurisprudence of the ICTY, these convictions may still be lodged for these crimes under the extended form of joint criminal enterprise.[252] However, reluctance to consider these crimes as within the common purpose poses the question: to what extent is the framing of the common purpose at the

[245] *Prosecutor v Šainović (Dissenting Opinion of Judge Liu)* at [7-8].
[246] Jarvis and Salgado, above n 20, at 114.
[247] *Prosecutor v Šainović (Judgment)* at [1581] and [1591].
[248] *Prosecutor v Šainović (Judgment).*
[249] *Prosecutor v Krstić (Trial Judgment)*, above n 29, at [616]; Jarvis and Salgado, above n 20, at 114.
[250] *Prosecutor v Kvocka (Trial Judgment)* at [323]; Jarvis and Salgado, above n 20, at 114.
[251] Mischkowski and Mlinarevic, above n 244, at 37.
[252] *Prosecutor v Tadic (Judgment)*, at [204].

ICTY shaped, or limited, by its ability to render convictions for those crimes that fall outside of the common purpose but remain natural and foreseeable consequences of that common purpose?

For example, the ICTR in *Rwamakuba* held that liability under joint criminal enterprise "may be as narrow or as broad as the plan in which [the accused] willingly participated . . . even if the plan amounts to a 'nation wide government-organized system of cruelty and injustice.'" [253] However, the burden of identifying, with specificity, the characteristics of the joint criminal enterprise, identification of its members and the crimes that constitute that joint criminal enterprise, combined with the requirement for significant contribution make it advantageous to frame the joint criminal enterprise narrowly.[254] Given the lower standard of evidence required to charge crimes outside the common criminal combined with the ability to convict for those crimes, the ICTY may more readily frame the common purpose and its encompassing crimes narrowly.[255] Such an approach may be contrasted with the jurisprudence of the ICC, as a judicial entity that may only convict an accused for crimes that fall within the common purpose, therefore is incentivised to frame that purpose widely in order to convict an individual.[256]

Another concern with the manner in which this case was brought includes the limited charges of sexual assault. The prosecution charged all rapes as a crime against humanity through the crime of persecutions.[257] As the Statute of the ICTY requires the additional elements of discriminatory intent to grounds of ethnicity, some rapes were considered to fall outside the common purpose because witnesses did not explicitly refer to any verbal insult concerning their ethnicity.[258] Due to the failure of the prosecutor to bring sexual violence as a charge independently, the accused were not held responsible for them.[259] Both this concern, and the aforementioned, play out more poignantly in the next case to be addressed, *Đorđević*.

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[253] *Prosectuor v Rwamakuba (Judgment)* ICTR Trial Chamber III ICTR-98-44C-T, 20 September 2006 at [368].
[254] Jared L Watkins and Randle C DeFalco "Joint Criminal Enterprise and the Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia" (2010) Rutgers L Rev 63(1) 183 at 247.
[255] Ciorciari, above n 191, at 1113.
[256] Rome Statute, art 25(3)(d).
[257] *Prosecutor v Miluntinovic (Trial Judgment)* at Vol 1 [6].
[258] At Vol 1I [1245].
[259] Mischkowski and Mlinarevic, above n 244, at 37.

B Đorđević

The case of *Đorđević* concerned the Assistant Minister of the Serbian Ministry of Interior responsible for all units and personnel in Serbia, including Kosovo, between 1 January and 20 June 1999. He was charged for his participation in the deportation and forcible transfer of approximately 800,000 Kosovo Albanian civilians, and persecutions directed at the Kosovo Albanian population.[260]

1 Actus reus

The Trial Chamber found that a common plan existed among the senior political, military and police leadership to modify the ethnic balance of Kosovo by waging a "campaign of terror" against the Kosovo Albanian civilian population.[261] The common plan included murder, deportation, forcible transfer and the destruction of religious and culturally significant property.[262] The crimes were committed in the course of pre-planned and coordinated actions by Serbian forces who were given deliberately vague instructions such that they could implement them as they saw fit.[263] The practice of Serbian forces expelling Kosovo Albanian villagers, accompanied by executions of the male villagers of fighting age, became "typical".[264]

The Trial Chamber found that the accused contributed significantly and voluntarily to the campaign of terror and extreme violence given his role as a senior MUP official, contribution to the deployment of paramilitary units, the concealment of the crime of murder of civilians and failure to take any measures to ensure the investigation of punishment of those involved in their commission.[265]

The Chamber accepted that two instances of sexual assault had occurred.[266] However, the Trial Chamber elected not to consider whether sexual assault was part of the

[260] *Prosecutor v Đordević (Trial Judgment)* ICTY Trial Chamber II IT-05-87/1-T, 23 February 2011 at [2].
[261] *Prosecutor v Đordević (Trial Judgment)* at [2126].
[262] At [2126], [2149].
[263] At [2132], [2135], [2151].
[264] At [2136].
[265] At [2154-2157].
[266] At [1796].

criminal purpose as it was not satisfied in the first instance that such assaults had been committed with the discriminatory intent required for the crime of persecution.[267] The Appeals Chamber reversed acquittals on charges of rape and sexualised violence, finding that the crime of persecution as a crime against humanity had been established with the requisite discriminatory intent.[268] The Appeals Chamber considered specific circumstances of sexual assaults, as well as the broader context of sexual assault that took place in the context of the systematic campaign of terror and violence involving the commission of numerous persecutory acts against Kosovo Albanians.[269] The evidence suggested that the sexual assaults arose out of a will to discriminate against women on ethnic grounds.[270] It concluded that the crime of persecution as a crime against humanity was established through sexual assault.[271]

2 Mens rea

The Trial Chamber considered Đorđević acted with the requisite intent for basic joint criminal enterprise liability as regards deportation, forcible transfer and the destruction of religious and culturally significant property given his knowledge of the crimes committed, attempts to obstruct justice, and failure to ensure investigation and sanction.[272]

On appeal, sexual violence through persecution was charged and assessed under extended joint criminal enterprise.[273] The Appeals Chamber noted the Trial Chamber's findings that "[a] core element of the common plan was the creation of an atmosphere of violence and fear or terror among the Kosovo Albanian population" through the commission of violent crimes. Women, as well as men and boys, were targeted and killed with the intent to instil fear.[274] Massive columns of displaced Kosovo Albanians left their towns and villages, escorted by Serbian forces who continued to intimidate and abuse them. In these circumstances, the Appeals Chamber considered the civilians were "left highly vulnerable, lacking protection, and exposed to abuse and mistreatment

[267] At [2150], [1796].
[268] *Prosecutor v Đordević (Appeal Judgement),* above n 5, [901].
[269] At [891].
[270] *Prosecutor v Đordević (Appeal Judgement)* at [892], [893], [895], [897].
[271] At [901].
[272] At [2158].
[273] At [914], [920].
[274] At [921].

by members of the Serbian forces."[275] Moreover, the Appeals Chamber noted that men and women were frequently separated by Serbian forces acting with near impunity, rendering women especially vulnerable to being subjected to violence, "including violence of a sexual nature as one of the most degrading and humiliating forms". The Appeals Chamber therefore had "no doubt" that sexual assaults were a natural and foreseeable consequence of the common purpose.[276]

Given Đorđević's knowledge of the conduct of operations, overall security situation on the ground in Kosovo and specific commission of serious crimes, the possibility that sexual assaults might be committed was sufficiently substantial as to be foreseeable for him and he willingly took that risk when he participated in the joint criminal enterprise.[277]

Judge Tuzmukhamedov in the Appeals Chamber issued a partially dissenting opinion on the foreseeability of sexual violence crimes to Đorđević. He found that the Majority "loosely" connected the general context of the conflict in Kosovo with the accused's position within the MUP to conclude that it was foreseeable to him that these crimes must be committed.[278] The Judge was doubtful whether the Majority's inferring of the foreseeability of sexual assaults from other distinct types of crimes were appropriate and noted that the Majority did not point to evidence that Đorđević knew of the factors that were placing women in a vulnerable position at the relevant time.[279]

3 Analysis

At the trial stage, the relationship between sexual violence and the common purpose was not analysed because it was not established at first instance that sexual violence through persecution had been committed.[280] Again, we see a failure of the Prosecutor to allege sexual violence crimes as a charge independent of persecution, therefore risking the acquittal of the accused for these crimes because of the failure of the Prosecution case to make out elements of the crime of prosecution unrelated to

[275] At [921].
[276] At [922].
[277] *Prosecutor v Đordević (Appeal Judgement)* ar [924]-[926].
[278] *Prosecutor v Đordević (Dissenting Opinion of Just Tuzmukhamedov)* at [64].
[279] At [66].
[280] *Prosecutor v Đorñević (Trial Judgment)* at [2150], [1796].

established elements of sexual violence.[281] Fortunately, the Appeals Chamber concluded that the crime of persecution as a crime against humanity was established through relevant sexual assaults, and that their commission, while outside the common purpose, amounted to a natural and foreseeable consequence of the common purpose.[282] This conviction is the first step to equal acknowledgement of sexual violence as a crime worthy of interest at international criminal law.[283]

However, the judgment is illustrative of a limited application of gender principles to the trial of sexual violence. Principally, the election to bring charges for sexual violence under extended joint criminal enterprise severely restricted the ability of the Court to advance jurisprudence in this area: there was no analysis of whether sexual violence may have, or may not have, fallen within the common purpose. While it is appreciated that prosecutors must need to be selective, since international criminal tribunals may not have the resources to extend difficult legal arguments, such discretion must be exercised in a transparent and principled manner.[284] Moreover, Prosecutors cannot fall into a trap of trying challenging crimes, such as sexual violence, under extended joint criminal enterprise because this mode of liability is easier to prove and still results in a conviction.[285]

However, a conviction based on systemic mischaracterisation of sexual violence as outside the common purpose erroneously cements the secondary status of these crimes at international law.[286] The functions of international criminal law in post-conflict reconstruction requires that the application of law in judicial proceedings is not limited in its articulation of the nature of the crimes that were committed.[287] This part will argue that there were grounds to consider sexual violence as a constituent crime of the common purpose of "creation of an atmosphere of violence and fear or terror among the Kosovo Albanian population".[288] There are four grounds upon which this argument will be made: sexual violence was necessary to achieve the common purpose, along

[281] Monica Hauser "Blind in One Eye? The International Criminal Court 10 years on" (8 August 2012) Gunda Werner Institute < www.gwi-boell.de>.
[282] *Prosecutor v Đordević (Appeal Judgment*) at [901], [926].
[283] Inder, above n 46, at 2.
[284] At 2.
[285] Ciorciari, above n 191, at 1113.
[286] Sellers, above n 29, at 190.
[287] Inder, above n 46, at 3.
[288] *Prosecutor v Đordević (Appeal Judgment*) at [921.

with the other violent crimes charged; *dolus directus* in the second degree suggests that these crimes could fall within the common purpose as occurring in the ordinary course of events; the scale of sexual violence lends itself to a finding that these crimes were part of the common purpose; and the sexual violence crimes must be seen in light of the wider context of ethnic conflict.

First, women, as well as men and boys, were targeted and killed with the intent to instil fear.[289] The Appeals Chamber noted that men and women were frequently separated by Serbian forces acting with near impunity, rendering women especially vulnerable to being targeted and subjected to violence on the basis of their ethnicity, "including violence of a sexual nature as one of the most degrading and humiliating forms".[290] In these circumstances, the Appeals Chamber considered the civilians were "left highly vulnerable, lacking protection, and exposed to abuse and mistreatment by members of the Serbian forces."[291] Moreover, the Trial Chamber explicitly linked murders to the common purpose by finding that these crimes were used to force the civilian population to leave by illustrating to those civilians what they would be subjected to if they refused to leave and creating an atmosphere of terror.[292] The same reasoning can be applied to the use of sexual violence: widespread rape and sexual abuse may contribute to the atmosphere of terror and violence and induce civilians to leave their homes, given rape is an established weapon of ethnic conflict and a tool of terror.[293]

Second, while sexual violence crimes may not have been explicitly pre-planned, there is room to consider whether sexual violence fell within the common purpose following *dolus directus* in the second degree, as whether the criminal enterprise participants knew that such crimes would occur in the ordinary course of events.[294] A finding of knowledge in the ordinary course of events is challenged by lack of evidence as to the accused's specific knowledge of the commission of these crimes during the execution of the common purpose.[295] However, given Đorđević's knowledge of the conduct of operations, overall security situation on the ground in Kosovo including vulnerability

[289] *Prosecutor v Đordević (Appeal Judgment*) at [921].
[290] At [922].
[291] At [921].
[292] At [189].
[293] Korrtfalt, above n 131, at 546.
[294]Inder, above n 46, at 7.
[295] *Prosecutor v Đordević (Dissenting Opinion of Just Tuzmukhamedov)* at [66].

of civilians, the specific commission of serious crimes, and the irrefutable link between sexual violence both violent crime and armed conflict, there is room to argue that sexual violence was an ordinary consequence of the common purpose.[296]

Third, as regards to the scale of the sexual assault, the Appeals Chamber was convinced of four instances of sexual assault beyond reasonable doubt. Three young women held in detention in Beleg were sexually assaulted or raped multiple times by Serbian forces, and the Appeals Chamber further found established the multiple rape of a Kosovo Albanian girl in a convoy in Pristina.[297] Moreover, according to one witness testimony, 20 further women were removed from detention in Beleg by Serbian forces, in circumstances that suggested their sexual assault or rape.[298] This evidence suggests that not only were specific instances of sexual assaults and rape established, but there was circumstantial evidence to suggest such crimes were widespread. Moreover, the ICTY Appeals Chamber has stated that there is no legal requirement that a minimum number of crimes are committed before a finding that that crime is part of a joint criminal enterprise.[299] To argue numbers meant that a crime did not amount to part of the common purpose is to conflate the objective of the joint criminal enterprise with the means through which it was to be achieved.[300] Moreover, to find that the number of sexual assaults confine these crimes to fall outwith the common purpose fails to comprehensively recognise the wider range of harms elicited by these crimes.[301]

Finally, and as repeated multiple times throughout this thesis, there is a well-established link between sexual violence and ethnic conflict. To consider sexual assault as not part of a common criminal plan to create an atmosphere of violence in order to modify the ethnic balance of Kosovo to ensure Serbian control over the province refutes an abundance of jurisprudence and empirical evidence that suggests sexual violence is a commonly used tactic to undertake ethnically motivated attacks.[302]

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[296] Hauser, above n 281.
[297] *Prosecutor v Đordević (Appeal Judgement)* at [869], [879].
[298] *Prosecutor v Đordević (Trial Judgment*) at [1152].
[299] At [4], [188].
[300] At [204].
[301] Buss, above n 143, at 409-423.
[302] *Prosecutor v Furundžija (Judgment),* above n 29; *Prosecutor v Kunarac (Judgment)* above n 29; February 2001; *Prosecutor v Krstić (Judgment)* above n 29.

The long-term success of post-conflict societal reconstruction and deterrence of future repetitions rests upon understanding and legally articulating crimes. Where the law only shallowly addresses sexual violence and fails to engender equality and nullify discrimination, the practical and symbolic importance of criminal accountability is undermined. [303] The following section will provide some comments that intend to give meaningful guidance to the bringing of charges, interpretation of the law and engendering of legal concepts at international criminal law in order to advance the prospects of justice for the victims of sexual violence and post-conflict reconstruction.

VI Where to from here?

Despite the positive steps toward justice for sexual violence crimes at international criminal law, challenges lie ahead as to be best possible interpretation and application of the law.[304] These cases illustrate the manner in which the ongoing practice of gender inequality distorts and impedes the possibility of gender justice.[305] This part will seek to provide prosecution and judges with meaningful guidance for the interpretation and application of modes of individual criminal responsibility.

First, the prosecution of sexual violence still requires significant external lobbying and advocacy.[306] It is vital that charges for sexual and gender-based crimes are brought wherever there is sufficient evidence to support such charges, both directly and indirectly, and as different categories of crimes.[307] As one of the principal functions of international courts are to deter the commission of crimes, failure to bring charges may send the signal that such crimes may be committed with impunity.[308]

Moreover, if prosecutions are to be fair and just from the perspective of the accused, victims and local and international communities, it is necessary that charges for sexual violence must be framed to allow legal argument to fully canvas the true relationship between sexual violence crimes and the common purpose. This may be achieved at the

[303] Ni Aolain et al, above n 11, at 425.
[304] Anne-Marie LM de Brouwer *Supranational Criminal Prosecution of Sexual Violence* (intersentia, Oxford, 2006) at 23.
[305] Inder, above n 46, at 7.
[306] Ni Aolain et al, above n 11, at 437.
[307] Office of the Prosecutor, above n 153, at [71].
[308] Inder, above n 46, at 2.

ICTY through bringing charges dually under the heads of basic, and extended joint criminal enterprise in the alternative. Convictions based on the systemic mischaracterisation of sexual violence crimes as outside the common purpose do not result in meaningful progress towards the equal integration of sexual violence crimes into international criminal law. While conviction is the first step to achieving proper recognition of sexual violence at international criminal law, as Judge Hunt of the ICTY recently opined in dissent from a procedural ruling on the admissibility of written witness statements, "[t]his Tribunal will not be judged by the number of convictions which it enters... but by the fairness of its trials."[309]

Further, while the ICC Trial Chamber in *Katanga* stated that the similarity of the common purpose doctrine between joint criminal enterprise and art 25(3)(d) jurisprudence meant that rulings of the ad hoc tribunals were of the "utmost pertinence" to the art 25(3)(d) analysis, it is important to distinguish the jurisprudence of the two different institutions.[310] The ICC Chambers must take a cautious approach to adopting the jurisprudence of ad hoc tribunals that employ extended joint criminal enterprise as a mode of liability, as there is some ground to believe that the ability to convict without crimes falling within the common purpose will result in a more narrowly framed joint criminal enterprise.

Finally, charges for sexual violence must be brought independently of other crimes such as persecution in order to reduce the risk that an accused may be acquitted of sexual violence charges due to failure to achieve a legal standard that is in addition to the actus reus and mens rea of sexual violence.[311]

Second, both art 25(3)(d) and joint criminal enterprise are premised on the articulation of a common purpose. At the ICTY, a secondary consideration is the foreseeability of the crime. However, jurisprudence from both the ICC and ICTY are suggestive of a higher evidentiary standard applied to sexual violence in order to establish the same relationship with the common purpose or foreseeability as other violent crimes. The

[309] *Prosecutor v Milogevid (Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statements)* ICTY Appeals Chamber IT-02-54-AR73.4, 21 October 2003 at [22].
[310] *Prosecutor v Katanga (Judgment*), at [1625].
[311] Hauser, above n 281.

Courts must place an emphasis on applying consistent reasoning to both sexual violence and other violent crimes. For example, where murder and property damage are linked to the forcible deportation of civilians, sexual violence should also be considered as a tool of terror to force civilians out of their homes.[312]

Third, the ICC and ICTY must move beyond the distinctly gendered approach towards sexual violence that assesses these crimes in terms of numbers and a masculine conception of harm.[313] There is no legal requirement for a minimum number of crimes to be committed before that crime may fall within the common purpose, as to consider these crimes by numbers is to confuse the common purpose with the means by which it is to be achieved.[314] This lends support to an emphasis on sexual violence crimes where evidence of specific instances is low due to structural barriers to investigating sexual violence crimes and the social ostracism faced by victims and witnesses that restrict willingness to participate in criminal law proceedings.[315] Moreover, sexual violence cannot continue to be considered a secondary crime due to a masculine conception of harm that does not encapsulate the full range of harms caused by these crimes. Rape and sexual violence can include considerable physical violence, but also elicit a wider range of harms, including emotional and psychological to the woman and the body politic she represents that is not comprehensively recognised in legal systems.[316] "Massacres kill the body. Rape kills the soul".[317]

Fourth, particular importance must be placed on sexual violence because it is easy for judges to see such crimes as an unfortunate by-product of conflict, rather than something directly linked with the armed conflict, orchestrated and foreseeable.[318] When applying the common purpose modes of individual criminal liability to sexual

[312] Korrtfalt, above n 131, at 546.
[313] Ni Aolain et al, above n 11, at 428.
[314] *Prosecutor v Đorđević (Appeal Judgment)* at [188].
[315] Ni Aolain et al., above n 11 at 428.
[316] At 429.
[317] At 428; Binaifer Nowrojee "A Lost Opportunity for Justice: Why Did the ICTR Not Prosecute Gender Propaganda?" in Allan Thompson (ed) *The Media and the Rwanda Genocide* (Pluto, London, 2007) 362 at 364.
[318] Blake Evans-Pritchard "ICC Restates Commitment on Crimes of Sexual Violence" (10 June 2014) Institute for War and Peace Reporting <iwpr.net> quoting Clair Duffy, senior legal advisor at the International bar Association's ICC programme.

violence crimes, it is vital to place the crimes within the wider context of armed, and especially ethnic, conflict. [319]

Lastly, criminal tribunals must explore the full potential of the evidence and different modes of liability to ensure high-level political and military leaders can be linked to crimes that are not necessarily directly sanctioned.[320] For example, *dolus directus* in the second degree, or knowledge that the crime with happen in the ordinary course of events, in order to prove that crimes fall within the common purpose and are within the accused's awareness may be an avenue through which sexual violence may be established as part of the common purpose.[321]

VII Conclusion

Criminal accountability is a central component of the rebuilding process that accompanies the end of entrenched violence between and within states. The United Nations Security Council has recently emphasised the obligation on all states to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice, recognising that "[w]omen and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instil fear in, disperse, and/or forcibly relocate civilian members of a community or ethnic group."[322] Crime and mode of liability selection are two of the most important decisions at international criminal courts because it helps to determine the role such courts play in the global legal order.[323] Throughout history, there has been resistance to investigating and prosecuting sexual violence crimes, due to the belief that these crimes were less serious than other violent crimes or unconnected to the armed conflict and outside the realm of international humanitarian law.[324] However, since post-World War II trials, advocates have sought increased attention to sex crimes. International courts have, to some extent, heeded their call.[325]

[319] Office of the Prosecutor, above n 153, at [75].
[320] At [75].
[321] At [32].
[322] SC Res 1820, S/Res/1820 (2008).
[323] De Guzman, above n 8, at 528.
[324] De Guzman, above n 8, at 517.
[325] Ni Aolain et al, above n 11, at 415.

Prosecution of sexual violence crimes is a key component to ending global violence against women: forms of sexual violence must be punished and seen to be punished, if the cycle of sexual violence is to be prevented.[326] Undeniably, conviction for sexual violence crimes is a positive step towards justice for victims of sexual violence and the reconstruction of post-conflict societies. However, there remains a need for better implementation and prosecution of sexual violence at the international criminal level.[327] This paper looks past the binary of conviction versus acquittal to draw out the limited and inconsistent interpretation of the law and engendering of legal concepts of sexual violence crimes, which is prevalent in all three judgments. In particular, the paper will analyse the three judgments for indicia of an inconsistent factual treatment of sexual violence as compared to other violent crimes; failure to utilise legal concepts to reflect the nature of sexual violence crimes; incomplete assessment of the scale and harm of sexual violence crimes; and failure to place sexual violence crimes within the wide context of armed conflict.

This paper has sought to illustrate that steps must still be taken to ensure equal recognition for sexual violence crimes at international criminal law. Where sexual violence becomes a predictable pattern in an armed conflict, the lack of convictions that reflect genuinely the place of sexual violence within the conflict's structure is another obstacle in sexual violence crimes slow road to equal recognition at international criminal law: "How is it that survivors of rape can have their attack acknowledged by the international community while at the same time justice does not apply?"[328]

The final section of this paper has sought to provide some meaningful guidance for the interpretation of the law of individual criminal responsibility law in sexual violence cases through a gendered lens. The first is a plea to prosecutors and judges at the international courts and ad hoc tribunals alike to ensure a legal articulation of sexual violence crimes that accurately reflects the role that sexual violence plays within common criminal purposes and the greater armed conflict. The second is to approach the relationship of sexual violence with the common purpose and foreseeability with

[326] Bianchi, above n 28, at 124.
[327] Gloria Gaggioli "Sexual violence in armed conflict: A violation of international humanitarian law and human rights law" (2014) IRRC 96(894) 503 at 535.
[328] Lauren Wolfe "Why do convictions for the world's worst crimes neglect survivors of rape?" (13 March 2014) *Foreign Policy* <foreignpolicy.com>.

the same logic that is applied in other instances of violent crimes. The third is to take a gendered approach to the assessment of the harm and scale of sexual violence, such that these crimes may be appreciated on an equal level with other violent crimes. The fourth is to place particular importance on the relationship between sexual violence and wider armed conflicts. Finally, a wider range of legal concepts, such as *dolus directus* in the second degree must be utilised to link sexual violence to the common purpose.

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