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Collective Criminality and Sexual Violence: Fixing a Failed Approach

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I. Introduction

Unlike domestic crimes, international crimes typically involve the efforts of many individuals, often acting in concert.[1] This poses a challenge for those tasked with trying them: namely, how to hold individuals criminally responsible for offenses requiring collective action.[2] Collective conduct produces unique harms and dynamics which make individual conduct within the group difficult to capture and prosecute under classic theories of criminal responsibility. Firstly, the 'group effect' often enhances the power of each individual to accomplish a particular criminal

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[1] *See, e.g., Prosecutor v Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgement, 15 July 1999, ¶ 190. ('Most of the time [international] crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design.'). *See generally* E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford 2012). Mark Osiel famously referred to crimes committed by the State during the Holocaust and its aftermath as 'administrative massacre' due to the extensive bureaucracy needed to carry out the crimes. M.J. Osiel, 'Ever Again: Legal Remembrance of Administrative Massacre', 144 *University of Pennsylvania Law Review* 463 (1995).

[2] L. Sadat & J. Jolly, 'Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot', 27 *Leiden Journal of International Law* 755, 771 (2014). *See also* M. Aksenova, *Complicity in International Law* (2016).

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objective. Crimes that are difficult to accomplish individually are facilitated when multiple individuals participate.[3] Secondly, the 'group effect' tends to augment the degenerative nature of the criminal conduct. A false sense of impunity derived from the collective presence unleashes 'the worst' in the members of the group, leading them to commit acts they would likely not have committed when acting alone.[4] Thirdly, the group dynamics, whereby many participate and yet few are the physical perpetrators of a crime, allow individuals to plead innocence as regards a particular offense. Participants rely upon the diffuse manner in which criminality spreads across the group – attaching a little to everyone, but not fully to anyone, except, perhaps, the physical perpetrator.[5] This diffuse sense of criminality is heightened when members of the group are geographically apart, act at different times or perform different roles in the crime. As a result, virtually all jurisdictions, both civil and common law, have developed at least some principles that specifically address collective criminality.[6]

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[3] *See e.g.,* C. Gibson, 'Testing the Legitimacy of the Joint Criminal Enterprise Doctrine in the ICTY: A Comparison of Individual Liability for Group Conduct in International and Domestic Law', 18 *Duke Journal of Comparative & International Law* 521 (2008). As the United States Supreme Court has noted, 'concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality.' *Callanan v. United States*, 364 U.S. 587, 593 (1961).

[4] *See generally* Aksenova, *supra* n. 2., at 53-80; van Sliedregt, *supra* n. 1, at 35-37; 65-88; *Iannelli v. United States*, 420 U.S. 770, 778 (1975) (quoting *Callanan v. United States*, 364 U.S. 587, 593-94 (1961) (explaining that a 'collective criminal agreement—[a] partnership in crime—presents a greater potential threat to the public than individual delicts')).

[5] The common law labels 'parties to the crime' those persons who collectively participate in the commission of a criminal offence before, during and after the offence's commission. W. R. LaFave, *Criminal Law: Fifth Edition* 701 (West: 2010). *See also* L.N.Sadat, Commentary, Prosecutor v. Kvoćka , et al., *Judgement* (ICTY 2 Nov. 2001), *in* A. Klip & G. Sluiter (eds.), 8 *Annotated Leading Cases of International Criminal Tribunals* 743 (Intersentia: 2005). *See generally* HLA Hart & J. Gardner, *Punishment and Responsibility: Essays on Philosophy of Law* (Oxford, 2009).

[6] Aksenova, *supra* n. 2; G. Fletcher, *Basic Concepts of Criminal Law* (Oxford, 1998); van Sliedregt, *supra* n. 1. Some common law jurisdictions may hold participants in group-based crime responsible for a separate inchoate crime, such as conspiracy. *See, e.g.*, Criminal Law Act 1977, § 1.1 (England and Wales); Criminal Attempts and Conspiracy, Order 1983, Part IV (Northern Ireland). The United States Code contains dozens of criminal conspiracy provisions, including conspiracy to commit any other federal crime, *see* 18 U.S.C. § 371, and conspiracy to commit some specific form of misconduct, ranging from civil rights violations to drug trafficking, *see* 18 U.S.C. § 241 (civil rights conspiracies); 21 U.S.C. § 846 (drug trafficking conspiracies). These laws recognize the unique harms posed by

International criminal tribunals are no different. They have developed a number of legal theories designed to hold individuals responsible for their role in collective criminal conduct[7] in interpreting their Statutes.[8] These doctrines of criminal participation, known as modes of liability, are the subject of significant scholarly commentary.[9] Yet missing from much of this debate, particularly as regards the International Criminal Court, has been an analysis of how current doctrine on modes of liability responds to the need to hold collective perpetrators criminally responsible for crimes of sexual and gender-based violence (SGBV).[10] Indeed, many writings in

group-based criminal conduct. Although it is often asserted that the civil law systems reject common law conspiracy doctrines, in fact article 450-1 of the French Criminal Code recognizes the notion of an *association de malfaiteurs* (criminal conspiracy); Article 121-7 of the French Criminal Code also recognizes the doctrine of complicity. *See generally* J. Bell, S. Byron & S. Whittaker, *Principles of French Law* 230 (Oxford 2d ed. 2008). *See also Prosecutor v. Ieng Sary* et al., Case No. 002/19-09-2007-ECCC/SC, Co-Prosecutor's Appeal against the Judgment of the Trial Chamber in Case 002/01, 28 Nov. 2014 ¶50 (citing provisions on 'individual criminal responsibility for unintended but foreseeable crimes arising out of joint criminal enterprise' in criminal codes of Australia, Austria, Bangladesh, Bermuda, Botswana, Cambodia, Canada, Egypt, Ethiopia, Fiji, France, Germany, Ghana, Greece, India, Iraq, Israel, Japan, Kenya, Malawi, Malaysia, New Zealand, Nigeria, Pakistan, Papua New Guinea, Philippines, Poland, the Union of Soviet Socialist Republics, Seychelles, South Africa, South Korea, Sri Lanka, Tanzania, Thailand, Uganda, the United Kingdom, the United States of America, Uruguay, Western Samoa, and Zambia).

[7] *See, e.g.*, van Sliedregt, *supra* n. 1; H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Hart Publishing 2009); A. Eser, 'Individual Criminal Responsibility', in A. Cassese et al. (eds.), *The Rome Statute of the Criminal Court: A Commentary* (2002).

[8] *See, e.g.*, Statute 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, Art. 7, *adopted on* 25 May 1993 [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, Art. 6, *adopted on* 8 November 1994 [hereinafter ICTR Statute]. *Compare* Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, *adopted on* 17 July 1998, *entered into force* 1 July 2002, Arts. 25, 28 and 30 [hereinafter Rome Statute].

[9] *See, e.g.*, E. van Sliedregt, 'The Curious Case of International Criminal Liability', 10 *Journal of International Criminal Justice* 1171 (2012); J.G. Stewart, 'The End of "Modes of Liability"', 25 *Leiden Journal of International Law* 165 (2012); J.D. Ohlin, 'Joint Intentions to Commit International Crimes', in F. Tanguay-Renaud & J. Stribopoulos (eds.), *Rethinking Criminal Law Theory* (2011); J. D. Ohlin, 'Three conceptual problems with the doctrine of Joint Criminal Enterprise', 5 *Journal of International Criminal Justice* 69 (2007); A. Danner & J. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 *California Law Review* 75 (2005).

[10] There are some notable exceptions, but much of this commentary is limited to an analysis of the jurisprudence of the *ad hoc* criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) or the Special Court for Sierra Leone (SCSL), and predates some of the critical cases we examine here or focuses on other modes of liability like complicity or superior responsibility. *See, e.g.*, S. Brammertz & M. Jarvis (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Ch. 7 (2016) (focusing on the practice at the ICTY); Andrés Pérez, 'Here to Stay? Extended Liability for Joint Criminal Enterprise as a Tool for Prosecuting Mass SGBV Crimes', *ASIL Insight* Vol.

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this area of the law address perceived shortcomings in the theoretical underpinnings of modes of liability doctrine in the abstract but ignore the application of this doctrine *in concreto*. As a result, facially neutral writings on modes of liability may in fact be gendered in application, either because they fail to account for the specific characteristics of sexual and gender-based violence or because they are applied in a manner that requires higher thresholds for finding culpability for the commission of SGBV crimes. This article fills the gap between theory and practice, examining past and present doctrine, and suggesting ways in which the treatment of modes of liability by international criminal courts and tribunals can both properly respond to the need for personal culpability and the dangers of collective criminal activity, particularly as regards SGBV crimes.

In particular, we examine the various ways in which the *ad hoc* criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the International Criminal Court (ICC) have held individuals liable for their role in collective criminal conduct, including joint criminal

19:13 (June 12, 2015) (analysing use of JCE III in ICTR case law); C. Eboe-Osuji, *International Law and Sexual Violence in Armed Conflicts*, Ch. 2 (Martinus Nijhoff 2012) (focusing on superior responsibility); V. Oosterveld, 'Gender and the Charles Taylor Case at the Special Court for Sierra Leone', 19 *William & Mary Journal of Women & the Law* 7 (2012) (focusing on complicity liability for SGBV crimes in case against Charles Taylor); Rebecca L Haffajee, 'Prosecuting Crimes of Rape and Sexual Violence at the ICTR: the Application of Joint Criminal Enterprise Theory', 29 *Harvard Journal of Law & Gender* 201 (2006) (focusing on the jurisprudence of the ICTR); P. Sellers, 'Individual(s') Liability for Collective Sexual Violence', in Karen Knop (ed.), *Gender and Human Rights* 153 (2004) (focusing on joint criminal enterprise in ICTY jurisprudence). While other commentators have drawn attention to how this issue has been addressed by the International Criminal Court, much of that commentary does not examine the application of *group* forms of liability to SGBV crimes in any significant detail, and also predates some of the critical cases we examine here and/or focuses on other modes of liability or prosecutorial strategies. *See, e.g., Thematic Prosecution of International Sex Crimes* (M. Bergsmo, ed., 2018) (including several chapters that make some reference to modes of liability but for purposes of discussing case selection and prosecutorial strategies); S. Schwartz, 'Wartime Sexual Violence as More than Collateral Damage: Classifying Sexual Violence as Part of a Common Criminal Plan in International Criminal Law', 40 *University of New South Wales Law Journal* 57 (2017) (published before Bemba's acquittal by the ICC Appeal Chamber); L. Kortfält, 'Sexual Violence and the Relevance of the Doctrine of Superior Responsibility in the Light of the *Katanga* Judgment at the International Criminal Court', *Nordic Journal of International Law* (2015) (focusing on application of superior responsibility to SGBV crimes); C. Stahn, 'Justice Delivered or Justice Denied?: The Legacy of the Katanga Judgment', 12 *Journal of International Criminal Justice* 809, 820-827 (2014) (raising in one paragraph – but not discussing in any significant detail – the question of whether the standard required to convict Katanga for SGBV crimes was higher than the standard applied to other crimes).

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enterprise liability (at the *ad hoc* tribunals) and direct and indirect co-perpetration and common purpose liability (at the ICC). Thus, our general focus is on individual – as opposed to superior or command – responsibility, although the ICC Appeals Chamber's decision in the *Bemba* case[11] suggests that the difficulties we identify in the Court's application of these modes of liability also apply to its approach to command responsibility.[12]

As Part II describes, the *ad hoc* international criminal tribunals used a theory of liability, known as joint criminal enterprise (JCE), to prosecute perpetrators who joined together to implement a common criminal objective. First developed in *Prosecutor v. Tadić*,[13] the *Tadić* Appeals Chamber identified three forms of JCE under customary international law, the first two of which, known as JCE I and II, were relatively uncontroversial. An extended form of JCE known as JCE III – described more fully in the next section – was used to successfully convict perpetrators of SGBV crimes, but is contentious, especially in regard to its *mens rea*, which allows liability to attach if the perpetrator assumes the risk that foreseeable crimes will occur.

The Rome Statute, negotiated in 1998, has much longer and complex provisions on criminal responsibility (and modes of liability) than prior instruments. Article 25 of the Statute addresses individual criminal responsibility generally whereas Article 28 addresses command responsibility. As Part III explains, the ICC's judiciary have taken international criminal law in a new direction; applying Article 25(3) of the Rome Statute, they developed a more rigid approach to modes of

[11] *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08 A, Judgement on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', June 8, 2018.

[12] For a gender analysis of the *Bemba* case, *see* S. SáCouto & P. Sellers, 'The *Bemba* Appeals Chamber Judgment: Impunity for Sexual and Gender-Based Crimes?,' 27 *William & Mary Bill of Rights Journal* 599 (2019), https://ssrn.com/abstract=3391421.

[13] *Tadić* Appeals Judgment, *supra* n. 1.

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liability law, engaging in judicial interpretation no less astonishing than the development of the JCE theory of liability by the *ad hoc* tribunals. The ICC's new interpretations have resulted in acquittals of sexual violence counts in every case presented to the Court, except in the recent *Prosecutor v. Bosco Ntaganda* case.[14]

Our study reveals two divergent patterns emerging from the jurisprudence of the *ad hoc* tribunals and the ICC, each of which presents challenges for the successful prosecution of SGBV crimes. *First,* the *ad hoc* international criminal tribunals' prosecution of SGBV crimes under the doctrine of JCE III proved successful when evidence of these crimes was examined in a "contextually comparative" manner to evidence of other atrocity crimes. However, this mode of liability was subject to both judicial dissent and scholarly critique. *Second*, at the ICC, new modes of liability were developed (perhaps as a response to critiques of JCE). Known as direct and indirect co-perpetration – and common purpose liability – these have largely been interpreted restrictively and/or applied differently to acts of sexual violence than to other crimes, leading to acquittals of the accused on the sexual violence counts.

[14] *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Judgment, Trial Chamber VI, 8 July 2019. The Trial Chamber convicted Bosco Ntaganda of rape and sexual slavery as an indirect co-perpetrator pursuant to Article 25(3)(a) of the Rome Statute. *Ibid.* However, the judgment is subject to appeal and it is unclear whether the Appeals Chamber, if seized of the case, will affirm the Trial Chamber's approach. Moreover, the difficulties we identify in the Court's approach to attributing liability for sexual violence crimes are recurrent and extend beyond Article 25(3) to the Court's interpretation of command responsibility under Article 28. Indeed, while a unanimous Trial Chamber originally convicted Jean-Pierre Bemba Gombo of SGBV crimes under command responsibility, *see Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-3343, Judgment pursuant to Art. 74 of the Statute, Trial Chamber III, 21 March 2016, ¶ 752**,** the Appeals Chamber reversed his conviction on June 8, 2018, *see Bemba* Appeals Chamber Judgment, *supra* n.11. Thus, the ICC has yet to see a successful conviction through appeal for SGBV crimes. *See also* SáCouto & P. Sellers, 'The *Bemba* Appeals Chamber Judgment', *supra* n.12.

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The Nuremberg and Tokyo Tribunals set precedents for SGBV prosecutions,[15] as did subsequent World War II proceedings in Europe and Asia.[16] Nevertheless, much of this jurisprudence was ignored and victims of SGBV committed during periods of conflict or repression were rendered largely invisible in the decades after the war.[17] Modern international criminal law, thankfully, has increasingly recognized the need to prosecute SGBV crimes for all the same reasons other atrocity crimes are punished: to deter perpetrators, address specific harms, render justice to the victims, and express official condemnation of the behaviour.[18] Yet there remains a long way to go, even at the ICC, where emphasis on highly technical and scientific explanations of the ICC's modes of liability provisions have tended to side-line SGBV crimes as mere 'incidents' of conflict.[19]

[15] *See*, K. D. Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles', 21 *Berkeley J. Int'l Law* 288 (2003), at 302 [hereinafter 'Askin, Prosecuting Wartime Rape']; K.D. Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, 42-44 (1999); K.D. Askin, 'Treatment of Sexual Violence in Armed Conflict: A Historical Perspective and the Way Forward', in A. de Brouwer, C. Ku, R. Romkens & L. van den Herik (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches*, (Intersentia 2013); P. Sellers, 'The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law', in *Substantive and Procedural Aspects of International Criminal Law*, McDonald & Swaak Goldman (eds.), 263, 274 (2000). Notwithstanding these developments, the Tokyo Tribunal did not prosecute the sexual enslavement of females compelled into the 'comfort' system. *See*, P. Sellers, 'Wartime Female Slavery: Enslavement?,', 44 *Cornell University Journal of International Law* 115-142 (2011), http://128.253.118.14/research/ILJ/upload/Sellers-final-4.pdf.

[16] *See* Dan Plesch, Susana SáCouto, & Chante Lasco,'The Relevance of the United Nations War Crimes Commission to the Prosecution of Sexual and Gender-Based Crimes Today', 25 *Criminal Law Forum* 349–381 (2014).

[17] *See, e.g.* A.-M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and ICTR* 4-9 (Intersentia 2005); *Rape as a Weapon of War: Accountability for Sexual Violence in Conflict*, Hearing Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary, 110th Cong. (2008) (statement of Dr. Kelley Dawn Askin, Senior Legal Officer, Open Society Justice Initiative) ("I was shocked that as we approached the end of the 20th century, there was still confusion about whether international law prohibited wartime sexual violence. There was widespread acknowledgment that atrocities such as massacres, torture, and slave labour were prosecutable, but there was scepticism, even by legal scholars and military officials, as to whether rape was sufficiently serious to be prosecutable in an international tribunal set up to redress the worst crimes."); C. Steains, 'Gender Issues', in R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* 357, 358 (1999).

[18] *See, e.g.*, Askin, 'Prosecuting Wartime Rape,' *supra* n. 15.

[19] *See infra* Parts II & III.

Violence against females and males, whether in detention or during or following attacks, is a pervasive 21st century phenomenon. Examples abound: sexual violence committed against prisoners held by the United States at Abu Ghraib following the invasion of Iraq in 2003;[20] rape as a tool of ethnic cleansing in the Democratic Republic of the Congo;[21] mass rapes against females in the Central African Republic;[22] sexual slavery practiced by members of the Islamic State against the Yazidis (and others);[23] and sexual violence against male and females detainees in Syrian prisons.[24] These SGBV crimes are both 'social and systemic' expressions of domination and power in conflicts where the vulnerable are specifically targeted for violence by those who believe themselves to be beyond the reach of the law, or, worse, within the bounds of conduct tolerated by the law.[25] Indeed, to the extent the law has failed to sanction this violence when directed against females, or even to recognize how it manifests against males, one wonders whether this is not yet again a way in which international law remains a 'thoroughly gendered system'.[26]

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[20] L.N. Sadat, 'International Legal Issues Surrounding the Mistreatment of Iraqi Detainees by American Forces', 8 *Insights* (American Society of International Law) (May 21, 2004), *available at* https://www.asil.org/insights/volume/8/issue/10/international-legal-issues-surrounding-mistreatment-iraqi-detainees.

[21] A. Peterman, T. Palermo & C. Bredenkamp, 'Estimates and Determinants of Sexual Violence Against Women in the Democratic Republic of Congo', *American Journal of Public Health* (June 2011), *available at* https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2010.300070;

[22] '"They Said We Are Their Slaves": Sexual Violence by Armed Groups in the Central African Republic', *Human Rights Watch* (5 October 2017), *available at* https://www.hrw.org/report/2017/10/05/they-said-we-are-their-slaves/sexual-violence-armed-groups-central-african.

[23] 'Iraq: ISIS Escapees Describe Systematic Rape', *Human Rights Watch* (14 April 2015), *available at* https://www.hrw.org/news/2015/04/14/iraq-isis-escapees-describe-systematic-rape.

[24] 'I lost my dignity': Sexual and gender-based violence in the Syrian Arab Republic: Conference room paper of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/37/CRP.3, 8 March 2018, *available at* https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-37-CRP-3.pdf

[25] *See, e.g.*, K. Crenshaw, 43 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*', Stanford Law Review* 1241 (1993).

[26] H. Charlesworth, C. Chinkin & S. Wright, 'Feminist Approaches of International Law', 85 *American Journal of International Law* 613, 615 (1991).

In light of these findings, this Article makes two specific recommendations. *First*, national and international criminal courts and tribunals applying and developing modes of liability jurisprudence under customary international law should accept the customary basis of JCE III and the jurisprudential precedents of the ICTY and ICTR, as well as of other courts that have examined this issue more recently, in particular the Extraordinary African Chambers. *Second*, the ICC should revisit its restrictive approach to Article 25(3)(a), and interpret it consistent with a plain reading of that provision, while addressing what appears to be a discriminatory application of common plan liability in Article 25(3)(d) by more appropriately situating sexual and gender based violence within the context of other crimes. While the recent Trial Chamber decision in *Ntaganda* goes some way toward properly contextualizing sexual violence within other criminal conduct and interpreting Article 25(3)(a) more broadly, the case is still subject to appeal and it is not yet clear that the decision has ushered in a new normative approach to sexual violence crimes at the ICC. Absent a shift in that direction, cases of conflict-based sexual and gender sexual violence may continue to suffer significant obstacles, threatening to render such violence as invisible as it was just decades ago,[27] in spite of provisions in the Rome Statute specifically designed to prevent this result.

II. JCE Liability for SGBV Crimes: Successful Cases, but the Doctrine is Criticized

A. JCE as a Mode of Liability

JCE liability originates in Article 7(1) of the ICTY Statute.[28] In the ICTY's first case,

[27] *See supra* n. 17 and accompanying text.

[28] ICTY Statute, *supra* n.8, art. 7(1) (providing that a person who 'planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation of execution of a crime . . . shall be individually responsible for the crime.').

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Prosecutor v. Tadić, the Appeals Chamber held that JCE is a form of 'commission' that captures instances in which perpetrators implement a common criminal objective[29] to commit an international crime.[30] As the late Antonio Cassese, a member of the *Tadić* Appeals bench, explained:

> [JCE] is crucial more in international criminal law than at the domestic level. In the world community international crimes such as war crimes, crimes against humanity, genocide, torture and terrorism share a common feature: they tend to be expression of collective criminality, in that they are perpetrated by groups of individuals, military details, paramilitary units or government officials acting in unison or in pursuance of a policy. When such crimes are committed, it is extremely difficult to pinpoint the specific contribution made by each individual participant in the collective criminal enterprise.[31]

Indeed, individual liability may be difficult to assign when crimes are the product of collective criminality, as certain individuals physically perpetrate the crime while others contribute to its commission in other ways, such as through planning or preparation.[32] JCE liability recognizes that all participants may be equally culpable.[33] As the Appeals Chamber in *Tadić* explained:

> Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually

[29] *Tadić, supra* n.1, ¶190. The Appeals Chamber interchangeably uses the terms 'common design', 'common purpose' and 'joint criminal enterprise'.

[30] *Ibid.* ¶¶ 190-92 (citing, *inter alia*, United Nations, Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (May 3, 1993)).

[31] A. Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', 5 *Journal International of Criminal Justice* 109 (2007).

[32] *Tadić, supra* n. 1, ¶ 191.

[33] *Ibid.* ¶¶ 191-92; *Prosecutor v. Karemera* et al., Case No. ICTR-98-44-T, Trial Chamber Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Édouard Karemera, André Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, 11, May 2004, ¶ 36, https://www.legal-tools.org/uploads/tx_ltpdb/KaremeraetalICTRTCDecisionontheP reliminaryMotionsbytheDefence_11-05-2004__E__05.html.

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carrying out the acts in question.[34]

The *Tadić* Appeals Chamber reasoned that limiting liability to the physical perpetrator would disregard the role of co-perpetrators who enabled the physical perpetrator to carry out the criminal act.[35] The Chamber considered such liability distinct from aiding and abetting, which, depending on the circumstances, might understate the degree of the co-perpetrators' criminal responsibility.[36] Given the often unorganized, chaotic and decentralized nature of the Yugoslav conflict,[37] JCE liability was an effective way for the ICTY to capture the collective criminality committed during the conflict.

Although concerns arose about the Tribunal's methodology in "gap-filling" outside the express terms of the Statute,[38] there was precedent for the Tribunal's approach. Historically, organizational liability was recognized in post-World War II cases,[39] and forms of liability for

[34] *Tadić, supra* n. 1, at ¶ 191. *See also Prosecutor v. Ieng Sary* et al., Case No. 002/19-09-2007-ECCC/OCIJ (PTC35), ECCC Decision on Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, May 20, 2010 [hereinafter ECCC PTC JCE Decision], ¶ 55.

[35] *Tadić, supra* n. 1, at ¶ 192.

[36] *Ibid.*

[37] Annexes to the Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), U.N. SCOR, 49th Sess., U.N. Doc. S/1994/674/Add.2 ¶ 22, 31 (1994) (noting that the Yugoslav conflict 'was characterized by a multiplicity of combatant forces . . . sometimes operating under no established command and control'.).

[38] Sadat & Jolly, *supra* n. 2 at 758. The gap filling was needed as the Statute was silent regarding any form of common plan liability, a seemingly clear omission (and flaw) in the drafting.

[39] *See Tadić, supra* n. 1, ¶¶ 195-228 (canvassing national legislation and post-WWII cases).

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participation in group crimes, such as complicity, conspiracy,[40] 'common plan' liability;[41] and common purpose liability,[42] were found in other international instruments.

The *ad hoc* tribunals interpreted JCE liability as consisting of: a plurality of persons;[43] the existence of a common plan, which amounts to or involves the commission of a crime provided for in the Statute;[44] and participation of the accused in the execution of the common plan.[45] The ICTY recognized three categories of JCE, commonly referred to as JCE I,[46] JCE II[47] and JCE III,[48] which

[40] *See* Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* 9 Dec. 1948, *entered into force* 12 Jan. 1951; art. III, 78 U.N.T.S. ("The following acts shall be punishable… (b) conspiracy to commit genocide).

[41] *See* Draft Codes of Crimes against the Peace and Security of Mankind, *adopted* by the International Law Commission, *reprinted in* Report of the International Law Commission on the work of its 43rd session, 29 April-19 July 1991, Ch. 2, art. 3(2), U.N. Doc A/46/10, 1991, [hereinafter 1991 Draft Code of Crimes]; Draft Codes of Crimes against the Peace and Security of Mankind, *adopted* by the International Law Commission, *reprinted in* Report of the International Law Commission on the work of its 48th session, 6 May – 26 July 1996, art. 2, U.N. Doc A/51/10, 1996 [hereinafter 1996 Draft Code of Crimes]. The 'common plan' language was used in the commentary to these articles of both the 1991 and 1996 draft codes. *See* 1991 Draft Code of Crimes, Ch. 2, art. 3(2), comment 4; 1996 Draft Code of Crimes, art. 2, comment 15.

[42] International Convention for the Suppression of Terrorist Bombings, art. 2(3), U.N. GAOR, 52nd Sess., Annex, U.N. Doc. A/RES/52/164 (1998) [hereinafter Terrorist Bombing Convention].

[43] *Tadić, supra* n. 1, ¶ 227.

[44] The plan need not have been previously arranged or formulated, but may 'materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.' *Tadić, supra* n. 1, ¶ 227.

[45] The Appeals Chamber noted in *Tadić* that the participation may either take the form of committing a specific crime under the Statute, or, importantly in this case, "may take the form of assistance in, or contribution to, the execution of the common plan or purpose." *Tadić, supra* n. 1, ¶ 227.

[46] JCE I exists when all participants enter into a common plan, share the intent to commit a crime, and one or more actually perpetrates the crime. *Tadić, supra* n.1, ¶¶ 227-8.

[47] JCE II exists when an organized system of ill-treatment occurs, and the accused is aware of the nature of the system, intends to further the system of ill-treatment and in some way actively participates in enforcing the system. *Tadić, supra* n.1, ¶ 228; *see also Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Appeals Chamber Judgment, 17 March 2009.

[48] JCE III requires the participation of an accused in either a basic JCE I or in a systemic JCE II scenario, and recognizes criminal liability for crimes outside the original criminal plan or system of ill-treatment that were the natural and foreseeable consequence of that plan or system, if the accused willingly assumed the risk they would occur. *Tadić, supra* n. 1, ¶ 228.

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were differentiated by their circumstances and their required *mens rea*. JCE I's design or common purpose may take multiple forms, such as a campaign of terror, as long as the participants share the intent to commit the crime.[49] JCE II circumstances often manifest as a system of ill-treatment, such as a concentration camp or police detention centre.[50] This form of JCE requires personal knowledge of the system and an intent to further it,[51] which may be proved directly or indirectly as a matter of inference from an accused's position, tasks or authority within the system.[52] JCE III's *mens rea* focuses on the foreseeability of a criminal act and the willingness of the accused to assume the risk that it will occur.[53]

Important JCE III cases have resulted in convictions for SGBV crimes, especially for non-physical perpetrators. The use of JCE III to hold SGBV perpetrators accountable challenged the misconception that sexual violence committed in the context of conflict or mass violence was often isolated, unrelated to the other crimes, or the unfortunate acts of lone corrupt soldiers.[54] JCE III

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[49] *Ibid.*

[50] *Ibid.*

[51] *Ibid. See also Prosecutor v. Miroslav Kvočka* et al., ICTY, Case No. IT-98-30/1-A, 28, Appeals Chamber Judgment, February 2005, ¶ 208.

[52] *Tadić, supra* n. 1, ¶¶ 220, 228.

[53] *Ibid.*

[54] *See e.g.*, C. Eboe-Osuji, *Rape and superior responsibility: International criminal law in need of adjustment*, International Criminal Court Guest Lecture Series of the Office of the Prosecutor, International Criminal Court (2005) 6 ('the theory of individualistic opportunism proceeds ... from the ... premise that rape is a crime of opportunity which, during conflict, is frequently committed by arms-bearing men, indulging their libidos, under cover of the chaotic circumstances of armed conflict'); Askin, Prosecuting Wartime Rape, *supra* n. 15, at 296-97 ('When customary law began prohibiting rape crimes,… sexual violence did not tend to be officially encouraged, but the crimes were largely ignored or tolerated by commanders, many of whom believed sexual violence before a battle increased the soldiers' aggression or power cravings and that rape after a battle was a well-deserved reward, a chance to release tensions and relax. As rape became explicitly prohibited, the crimes were still deemed mere inevitable consequences or side effects of armed conflict and were rarely punished. Efforts to enforce the prohibitions against rape generated little interest, as most considered sexual violence incidental by products of the conflict.'); Sellers &

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liability furthered a contextualization of crimes that required a non-discriminatory approach to the assessment of evidence of SGBV crimes. Essentially, to establish JCE III crimes as the natural and foreseeable consequence of intended crimes in the JCE I common plan or in the JCE II system of ill-treatment, such crimes had to form part of the context of the initially atrocity-propelled conduct. Thus, evidence of SGBV crimes had to be appraised together with other concurrent criminal conduct rather than be viewed as an abnormality.

B. Comparatively Contextualizing SGBV Crimes: The *Krstić* case

While rarely noted,[55] an early JCE III case, based in part on SGBV crimes, was the case of *Prosecutor v. Krstić*.[56] Radislav Krstić was charged with genocide for the Srebrenica slaughter as well as other killings and sexual violence as persecution.[57] These other crimes occurred just prior to the Srebrenica genocide, in pursuit of a JCE comprised of forcibly displacing Bosnian Muslims into the UN compound in Potočari, creating a 'humanitarian crisis'.[58] In finding Krstić liable under JCE III for rapes committed in the UN compound, the Trial Chamber focused on Krstić's awareness of the 'catastrophic humanitarian situation'.[59] It noted 'the lack of shelter, the density of the crowds,

Okuizumi, *supra* n.10, at 61-62 (noting that '[s]exual assaults committed during armed conflict are often rationalized as the result of a perpetrator's lust, libidinal needs, or stress'). *See also* S. Brownmiller, *Against Our Will: Men, Women and Rape* (Ballantine Books 1975).

[55] *Cf.*, Cassese, *supra* n. 31.

[56] *Prosecutor v Krstić*, Case No IT-98-33-T, Trial Chamber Judgement, 2 August 2001.

[57] *Ibid.*, ¶¶ 150-154.

[58] *Ibid.*, ¶¶ 38-40.

[59] *Ibid.* ¶ 155.

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the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and the sheer lack of sufficient UN soldiers to provide protection'.[60] The crisis environment made it foreseeable to Krstić that other crimes, such as killings and rapes, might occur.[61] Emphasis was placed on contextualizing the sexual violence not only within the intended JCE I crimes, but also within the foreseeability of the other JCE III crimes of killings. Such non-discriminatory assessment concerning the foreseeability of SGBV crimes became a determinant factor in ICTY[62] and ICTR[63] cases using JCE III.

C. *Šainović* and the Foreseeability Standard: Possibility or Probability?

Prosecutor vs. Šainović[64] clarified the *mens rea* standard of foreseeability, namely whether there needed to be a possibility or probability that further crimes would occur, given the JCE I or

[60] *Ibid.* ¶ 616.

[61] *Ibid.* Similarly, the Krstić Appeals Chamber, responded to the Defence's ground of appeal on conviction of the 'other' crimes by opining that, "[G]iven Kristić's role in causing the humanitarian crisis in Potočari, the issuance of orders directing that civilians not be harmed is not sufficient to establish that the crimes which occurred were not a natural and foreseeable consequence of the (JCEI) plan to forcibly transfer civilians". *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeal Chamber Judgement, 19 April 2004, ¶ 149.

[62] *See, e.g., Prosecutor v Šainović* et al., Case No. IT-05-87-A, Appeals Chamber Judgement, 23 January 2014, ¶¶ 1550-1592; *Prosecutor v Đorđević,* Case No IT-05-87/1-A, Appeals Chamber Judgment, 27 January 2014, ¶¶ 904-929. For another example of contextualization of SGBV crimes, but in the context of a JCE II case, *see Prosecutor v. Kvočka* et al., Case No. IT-98-30/1-T, Trial Chamber Judgement, 2 November 2001. There, five accused were convicted of SGBV crimes due in part to a recognition that the environment in which the violence occurred rendered the SGBV crimes intended, if not foreseeable. As the Chamber explained: '[a]pproximately 36 women were held in detention, guarded by men with weapons who were often drunk, violent 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. This is particularly true in light of the clear intent of the [JCE II] criminal enterprise to subject the target group to persecution through such means as violence and humiliation'. *Ibid.*, ¶ 327.

[63] *See, e.g., Prosecutor v. Karemera,* Case No.ICTR-98-44-A, Appeals Judgement, 28 September 2014.

[64] *Prosecutor v. Sainović* et al., Case No. IT-05-87-T Judgement, 26 February 2009 [hereinafter *Šainović* et al. Trial Judgement].

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JCE II context. *Šainović* concerned a JCE I common plan to forcibly displace the Kosovo Albanian population through a persecutory campaign of terror[65] in which sexual assaults had occurred.[66] At trial, Nikola Šainović and his co-accused, Sreten Lukić, were acquitted of rapes charged as persecution because the acts were not considered foreseeable as required for JCE III liability[67] and the Prosecution failed to prove their knowledge of the specific sexual assaults charged.[68] On appeal, the Prosecution argued that the Trial Chamber had confounded the possibility standard of the JCE foreseeability requirement with a probability standard. The Appeals Chamber agreed, characterizing the forcible displacement of the Kosovo Albanian population as an 'environment of ethnic animosity' where 'aggression and violence prevailed'.[69] It recognized the accused's awareness of these circumstances,[70] and their knowledge of sexual assaults committed during the expulsions, even though these were not the same sexual assaults charged against the accused.[71] Given these conditions, the Appeals Chambers held that the rapes were clearly foreseeable and found the accused liable under JCE III for those rapes.[72] Significantly, it recognized that as members of a JCE I, the accused had a privileged position that permitted them to detect possible crimes

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[65] *Ibid*.

[66] *Ibid.*, vol. 3, ¶¶472, 1135; vol. 2 ¶¶ 622, 688, 874, 1187, 1224.

[67] *Ibid*. The Trial Chamber convicted another co-accused, Nebojša Pavković, of persecutions through sexual assaults under JCE III, *ibid.*, vol. 3, ¶¶ 785, 788, which was later upheld on appeal. *Šainović* et al. Appeals Judgement, *supra* n. 62, ¶ 1602.

[68] *Šainović* et al. Trial Judgment, *supra* n. 64, vol. 3, ¶¶ 469, 472, 1133, 1135.

[69] *Ibid.* ¶ 1591.

[70] *Ibid.* ¶¶ 1581-82, 1591-92, 1602.

[71] *Ibid.*

[72] *Šainović* et al. Appeals Judgement, *supra* n. 62, ¶¶ 1582, 1592, 1602.

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triggered by the original common plan. Subsequent appellate jurisprudence affirmed the JCE III *mens rea* standard. As the *Karadžić* interlocutory appeal held:

> [Foreseeability] is not satisfied by implausibly remote scenarios. Plotted on a spectrum of likelihood, the JCE III *mens rea* standard does not require an understanding that a deviatory crime would *probably* be committed; it does, however, require that [whether] a crime could be committed is sufficiently substantial as to be foreseeable to an accused.[73]

D. *Đorđević* and *Karemera:* JCE III Liability for SGBV Crimes of Specific Intent

Whether JCE III liability should apply to specific intent crimes, such as persecution and genocide, has been among the doctrinal issues critiqued by some, including Judge Antonio Cassese.[74] In *Đorđević,*[75] the Appeals Chamber assessed the contentious issue of whether JCE III liability could be extended to persecutory acts. Vlastimir Đorđević was charged with participating in a JCE I that aimed to change the ethnic balance of Kosovo to ensure Serbian dominance in the territory[76] and was convicted of over 700 murders and countless episodes of forced transfer and persecutory acts. He was acquitted of rapes alleged under JCE III liability[77] because the Trial Chamber was not convinced that the SGBV satisfied the discriminatory intent

[73] *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Appeals Decision on the Third Category of Joint Criminal Enterprise Foreseeability, 25 June 2009, ¶ 18 [hereinafter *Karadžić* JCE Appeals Decision].

[74] As Cassese noted, '(r)esorting to JCE III would be intrinsically ill-founded when the crime committed requires a "special" or specific intent. It would thus be in appropriate to apply the extended form of JCE to charges, for example of genocide, persecution or aggression.' Cassese, A., Gaeta P., Baig, L., Fan, M., Gosnell, C. and Whiting, A, eds.. *Cassese's International Criminal Law*, Ch. 9, 172 (2013). Yet, neither Cassese nor other commentators raised objections to Krstić's conviction for persecution, a specific intent crime that consisted of SGBV acts. *See* discussion of *Krstić* case at *supra* Section II. B.

[75] *Đorđević* Appeals Chamber Judgment, *supra* n. 62.

[76] *Prosecutor v. Đorđević,* Case No. IT-05-87/1-T, Trial Judgment, 23 February 2011 [hereinafter *Đorđević* Trial Chamber Judgement].

[77] *Ibid.* ¶ 2230.

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requirement of persecution.[78] On appeal,[79] the Appeals Chamber found that the Trial Chamber committed a legal error when it 'failed to evaluate the surrounding circumstances of Witness K20's and Witness K14's sexual assaults and the broader context in which these crimes occurred'.[80] It meticulously reviewed the specific and contextual circumstances of the five sexual assaults charged as persecution under JCE III. After examining elements such as the ethnicity of the victims and the perpetrators, the status or authority of the perpetrators, the concurrent criminality inflicted on the females and other victims, the verbal abuse, and the location and timing of the physical assaults, the Chamber concluded that the sexual assaults satisfied the discriminatory nature of persecution.[81] It then held that Đorđević had significantly contributed to the JCE I[82] and reiterated that JCE III foreseeability entailed the possibility that the rapes would occur.[83] It found the atmosphere of violence and fear[84] had left the population 'highly vulnerable',[85] particularly given the separation of the community along gender lines, whereby

[78] *Ibid.* ¶¶ 1793-97.

[79] The prosecution appealed the acquittal of the rapes as persecutory acts. Đorđević countered that the rapes were not foreseeable and that no evidence pointed to him being "aware of the possibility that these crimes would occur." *Đorđević* Appeals Chamber Judgment, *supra* n.62, ¶ 917.

[80] *Ibid.*

[81] *Ibid.*, ¶ 897.

[82] *Ibid.* ¶ 902.

[83] *Đorđević* Appeals Chamber Judgement, *supra* n.62, ¶ 907. The Appeals Chamber quoted appellate jurisprudence noting that foreseeability '"is not satisfied by implausibly remote scenarios. Plotted on a spectrum of likelihood, the JCE III *mens rea* standard does not require an understanding that a deviatory crime would probably be committed; it does, however, require that a crime could be committed is sufficiently substantial as to be foreseeable to an accused.'" *Ibid.* (quoting *Karadžić* JCE Appeals Decision, *supra* n. 73).

[84] *Ibid.* ¶ 921.

[85] *Ibid.*

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Serbian forces could act 'with near impunity'.[86] It recalled Đorđević's personal knowledge that Serbian forces reportedly committed crimes during the previous year's military offensive[87] and his knowledge about the dire humanitarian situation through media sources.[88] It, therefore, concluded that Đorđević 'willingly took the risk when he participated in the JCE'[89] and that given the discriminatory nature of the Kosovo campaign, 'it was foreseeable to Đorđević that such sexual assaults might be carried out with discriminatory intent.'[90] The *Đorđević* Appeals Chamber's contextual examination of the JCE III crimes in relation to the common plan, and its contextual analysis of the infliction of sexual violence – including its discriminatory intent – evinces a non-discriminatory and gender-competent approach to JCE III. *Krstić* as well as *Šainović* resonate in *Đorđević*.

The ICTR case of *Karemera* et al. reviewed whether JCE III liability could apply to the specific intent crime of genocide.[91] Two accused were convicted, *inter alia, of* genocide and crimes against humanity.[92] Their liability stemmed from their participation in a JCE I to destroy the Tutsis.[93] Their liability for sexual violence[94] as acts of genocide and as crimes against humanity

[86] *Đorđević* Appeals Chamber Judgement, *supra* n.62, at ¶ 922.

[87] *Ibid.*, ¶ 924.

[88] *Ibid.* ¶ 925.

[89] *Ibid.* ¶ 926.

[90] *Ibid.*

[92] *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Trial Judgement, 2 February 2012 [hereinafter *Karemera* Trial Judgement].

[93] *Ibid.* ¶ 1649-54.

[94] The Prosecutor charged the accused for all rapes and sexual assaults that occurred in Rwanda from early to mid-April 1994 to June 1994 as genocide. The Trial Chamber, however, found Karemera and Ngirumpatse responsible only for the rapes and sexual assaults committed by the Kigali and Gisenyi Interahamwe during the genocide. *Ibid.* ¶¶ 1671, 1683. However, this limited sexual assault crime-base did not apply to their JCE III liability, which did not depend on

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was established *via* JCE III for rapes committed by the Interahamwe militia[95] that were a natural and foreseeable consequence of the JCE I common plan 'to exterminate Tutsis in Rwanda'.[96] The accused appealed.[97] After reiterating the possibility standard for JCE III liability set forth in the *Karadžić* interlocutory JCE decision,[98] the Appeals Chamber affirmed the Trial Chamber's analysis that the rapes had been foreseeable to the accused.[99] Furthermore, it rejected the accused argument that the Interahamwe did not possess a genocidal intent when committing the rapes and sexual assault,[100] explaining:

> Bearing in mind that these rapes and sexual assaults were intricately linked to the killing of members of the Tutsi group and intended to inflict further suffering, the Appeals Chamber finds that the Trial Chamber adequately explained and reasonably concluded that the perpetrators possessed genocidal intent.[101]

Thus, the contextual analysis places the rapes on par with the killings in terms of assessing the presence of genocidal intent. Again, rather than extract and mischaracterize the perpetrators' intent with respect to the rapes as different from their intent with respect to the other acts committed to destroy the Tutsi population, the Chamber understood that the same specific intent permeated the various means to achieve the genocide.

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a superior-subordinate relationship.

[95] *Ibid.* ¶ 1665-71, 1683-84. Each defendant received a sentence of life imprisonment. *Ibid*. ¶ 1762-63.

[96] *Ibid.* ¶ 1477.

[97] *Prosecutor v. Karemera* et al.,Case No. ICTR-98-44-A, Appeal Judgment, 29 September 2014.

[98] *Ibid.* ¶ 623.

[99] *Ibid.* ¶¶ 630- 633.

[100] *Ibid.* ¶ 608.

[101] *Ibid.*

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In sum, a mature judicial reasoning regarding JCE III liability has emerged, as illustrated by the above jurisprudence, and recently confirmed by the judgment of the Appeals Chamber in the *Karadžić* case. Case law over two decades has developed distinct contextual analyses of JCE III that examines the circumstances of the JCE I common plan and/or JCE II ill-treatment system; the foreseeability or possibility of JCE III crimes in those circumstances; and JCE III crimes in view of the continued commission of the specific intent crimes of the JCE I and II. Thoughtful, logical, non-discriminatory reasoning about SGBV evidence amid unfolding criminality has significantly guided the development of JCE III.

E. The Judicial and Scholarly Critique of JCE III Liability

Several prominent commentators have lauded the application of JCE III to atrocity related sexual violence crimes.[102] Nevertheless, JCE III has been subject to judicial dissent and scholarly critiques, challenging its compatibility with the legality principle and the principle of individual culpability.[103]

[102] *See, e.g.,* Askin, Prosecuting Wartime Rape, *supra* n.15, at 340-43; S. SáCouto, 'Gaps in gender-based violence jurisprudence of international and hybrid criminal courts: Can human rights law help?', in C. Ngwena & E. Durojaye (eds.), *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014). *See also* D. Scheffer & A. Dinh, 'The Pre-Trial Chamber's Significant Decision on Joint Criminal Enterprise for Individual Responsibility', *Cambodia Tribunal Monitor* (June 3, 2010) (arguing all three forms of JCE are customary international law).

[103] Some critics have also, as mentioned above, expressed concerns about the ICTY's methodology in 'gap filling' outside the express terms of the Statutes. *See, e.g.*, G. Sluiter, ''Chapeau elements' of crimes against humanity in the jurisprudence of the United Nations ad hoc tribunals', in L. Sadat (ed.), *Forging a Convention for Crimes Against Humanity* (Cambridge 2011).

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With respect to the principle of legality, judicial[104] and scholarly critiques[105] have contested the customary origins of JCE III and the *ad hoc* tribunal's analogy to modes of liability in domestic legal systems. For instance, in 2010, a Pre-Trial Chamber decision of the Extraordinary Chambers in the Courts of Cambodia (ECCC) rejected the customary basis of JCE III as of 1975, the beginning date of the ECCC's temporal jurisdiction.[106] It found that the war crimes cases decided pursuant to Control Council Law No. 10 relied on by the ICTY did not explicitly identify JCE III[107] as the basis for their decisions and that the national jurisprudence they cited was similarly insufficient to establish JCE III's customary international law basis.[108]

[104] *See, e.g., Prosecutor v. Simić et al*., Case No. IT-95-9-T, Trial Chamber Judgment, 17 October 2003, Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, ¶¶ 2-5; *Prosecutor v. Đorđević*, Case No. IT-05-87/1-A, 27 January 2014, Dissenting Opinion of Judge Tuzmukhamedov, ¶ 66. *See also Prosecutor v. Stakić*, Case No. IT-97-24-T, Trial Judgment, 31 July 2003, ¶¶ 436-438 (preferring co-perpetration to JCE liability since co-perpetration 'is closer to what most legal systems understand as "committing" and avoids the misleading impression that a new crime not foreseen in the Statute of this Tribunal has been introduced through the backdoor.'). Judges at other tribunals have also taken issue with JCE III. *See, e,g. Prosecutor v. Sesay, Kallon and Gbao* (RUF), Case No. SCSL-04-15-A, SCSL Appeals Chamber Judgment, 26 October 2009, Dissenting Opinion of Judge Fisher, ¶ 19; ECCC PTC JCE Decision, *supra* n. 34.

[105] *See, e.g.,* Danner & Martinez, *supra* n. 9; L. Marsh & M. Ramsden, 'Joint Criminal Enterprise: Cambodia's Reply to Tadić', 11 *International Criminal Law Review* 148 (2011); Ohlin, 'Three Conceptual Problems with the doctrine of Joint Criminal Enterprise', *supra* n. 9, 76; K. Ambos, 'Joint Criminal Enterprise and Command Responsibility', 11 *Journal of International Criminal Justice* 5 (2007); S. Powles, 'Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*'*, 2 *Journal of International Criminal Justice* 606–619 (2004); J. Easterday, 'Obscuring Joint Criminal Enterprise Liability: The Conviction of Augustine Gbao by the Special Court of Sierra Leone', 3 *Berkeley Journal of International Law Publicist* 36 (2009).

[106] *See* ECCC PTC JCE Decision, *supra* n.34, ¶¶ 79-82. The Trial Chamber and Supreme Court Chamber issued similar decisions, finding insufficient evidence to support the existence of JCE III under customary international law as of 1975, the start the Extraordinary Chamber's temporal jurisdiction. *See Prosecutor v. Ieng Sary* et al, Case No. 002/19-09-2007-ECCC/TC, Trial Chamber Decision on the Applicability of Joint Criminal Enterprise, 12 Sept. 2011, ¶¶ 27-35 [hereinafter ECCC TC JCE Decision]; *Prosecutor v. Ieng Sary* et al., Case No. 002/19-09-2007-ECCC/SCC, Supreme Court Chamber Appeal Judgment, 23 Nov. 2016, ¶ 807 [hereinafter ECCC SCC Appeal Judgement].

[107] ECCC PTC JCE Decision, *supra* n. 34, ¶ 80.

[108] *Ibid.* ¶ 82. The Trial Chamber also found that state practice in this area lacked sufficient uniformity to be considered a general principle of law. *See* ECCC TC JCE Decision, *supra* n. 106, at ¶ 37.

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Moreover, critics have argued that JCE III holds individuals liable for conduct too distant from the actions of the accused, since the perpetrator need not intend the foreseeable crime to be committed nor make any substantial contribution to its commission.[109] According to these critics, JCE III 'endangers the principle of individual and culpable responsibility by introducing a form of collective liability, or guilt by association.'[110] One commentator famously quipped that this extended form of JCE liability might as well be called 'just convict everyone.'[111]

Thus, notwithstanding the continued use of the JCE III by international tribunals, extensive challenges to aspects of JCE persist. [112] Although this mode of liability has been successfully used to hold perpetrators of sexual and gender-based violence accountable, and has parallels in many domestic legal systems,[113] it is not clear whether and to what extent it will continue to be used successfully to prosecute such crimes at international, hybrid or domestic criminal tribunals that rely on customary international law.

[109] M. Summers, 'The Problem of Risk in International Criminal Law', 13 *Washington University Global Studies Law Review* 557, 674 (2014). *See also* Danner & Martinez, n. 9, at 108-09.

[110] *Prosecutor v. Martić*, Case No. IT-95-11-A, Appeals Chamber Judgement, 8 Oct. 2008, Separate Opinion of Judge Schomburg, ¶¶ 2, 5 (describing JCE as imposing criminal liability "primarily… [for] membership in a group"). *See also* S. Manacorda & C. Meloni, 'Indirect perpetration versus joint criminal enterprise: Concurring approaches in the practice of international criminal law?', 9 *Journal International Criminal Justice* 166-67 (2011); Danner & Martinez, supra n. 9, at 133, 137.

[111] M. Badar, ''Just convict everyone!' - Joint perpetration: From Tadić to Stakić and back again', 6 *International Criminal Law Review* 302 (2006).

[112] The ICTY has considered and rejected a number of additional challenges to the JCE doctrine raised by defence counsel after *Tadić,* including, *inter alia*, in *Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Chamber Judgment, 22 March 2006, ¶¶ 99-103 (rejecting the contention that imposition of *dolus eventualis* as the *mens rea* for extended JCE violated *the nullum crimen sine lege* principle) and *Prosecutor v. Milan Martić,* Case No. IT-95-11-A, ICTY Appeal Judgement, 8 Oct. 2008, ¶ 36 (dismissing the argument that the *dolus eventualis mens rea* requirement of JCE III necessarily requires a reduced sentence).

[113] *See e.g., Prosecutor v. Ieng Sary et al*, Co-Prosecutor's Appeal against the Judgment of the Trial Chamber in Case 002/01, *supra* n. 6.

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III. The Impact of the ICC's Modes of Liability Jurisprudence on the Prosecution of SGBV Crimes

At the International Criminal Court, a troubling pattern is emerging in the manner in which the Court's modes of liability jurisprudence is intersecting with crimes of sexual and gender based violence. The ICC Pre-Trial Chambers departed from the jurisprudence of the *ad hoc* tribunals and adopted interpretations of Article 25(3) that were both novel and complex. This may have been a response to the criticism of the *ad hoc* tribunals' approach to JCE, but generally has resulted in an overly restrictive approach that has also been applied differently to acts of sexual violence than to other criminal conduct. This has led to acquittals for those accused of SGVB crimes in all cases, with the exception of *Ntaganda*. The following section explores this phenomenon.

A. The ICC's Restrictive Interpretation of Article 25(3) of the Rome Statute

The drafters of the Rome Statute found the provisions on individual criminal responsibility in the statutes of the *ad hoc* tribunals too laconic.[114] Thus, during the Statute's negotiation, States proposed a more comprehensive provision and eventually adopted Article 25, which sets out a more detailed framework of liability than predecessor instruments. Subparagraph (3)(a) makes criminally liable one who commits a crime whether as an individual, jointly with another or through another person, while subparagraphs (3)(b)–(c) set out a variety of other forms of liability including ordering, soliciting, inducing, aiding and abetting.[115] Subparagraphs (d), (e), and (f) provide liability for contributing to the commission or attempted commission of a crime by a group, incitement to

[114] It is worth noting, however, that virtually all of the doctrinal criticism – and judicial dissents – discussed earlier post-date the adoption of the Statute in 1998.

[115] Rome Statute, *supra* n. 8, art. 25.

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genocide, and attempt, respectively. Per Saland, who chaired the Working Group on General Principles of Criminal Law throughout the ICC negotiations, noted that the provision

> … posed great difficulties to negotiate in a number of ways. One problem was that experts from different legal systems took strongly held positions, based on their national laws, as to the exact content of the various concepts involved. They seemed to find it hard to understand that another legal system might approach the issue in another way: e.g., have a different concept, or give the same name to a concept but with a slightly different content.[116]

While Article 25 has its origins in the work of the ILC on the Code of Crimes against the Peace and Security of Mankind, later drafts more closely representing the final version of Article 25 were proposed by 'an informal group representing various legal systems'.[117] The final version draws on various sources of national criminal law and international law.[118] The vast and divergent literature on Article 25 indicates, as one of us has suggested in earlier writings, that it is like a 'Rorschach blot', in which scholars tend to see and read into the provision their own experience and understanding of criminal liability, based on their national legal system.[119]

The *travaux préparatoires* of the Rome Statute say little about the content of Article 25.[120] Although some scholars have insisted after the fact that Article 25 embodies both a differentiated

[116] P. Saland, 'International Criminal Law Principles', in R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* 198 (1999).

[117] *See Working Paper submitted by Canada, Germany, Netherlands, and the United Kingdom*, UN Doc. A/AC.249/1997/WG.2/DP.1.

[118] *See* van Sliedregt, *supra* n. 1, at 64–5.

[119] Sadat & Jolly, *supra* n. 2.

[120] Sadat & Jolly, *supra* n. 2. *See also* W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 424 (Oxford 2010), ("[c]oncepts and words in one system did not necessarily have the same connotations as they did in others"). C. Bassiouni, *Introduction to International Criminal Law* 286–7 (Martinus Nijhoff 2nd rev'd ed., 2013) (many principles of criminal responsibility contained in the Statute reflect either a common law or civilist approach, with the choice between the two depending on the nature of diplomatic negotiations rather than a comparative legal analysis'.).

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and hierarchical approach to criminal participation,[121] others disagree equally vociferously, noting that 'it is difficult to find an unambiguous answer' to the question of what model of perpetration and participation it adopts.[122] In point of fact, Article 25(3) was a consensus provision that does not embody a strong and logically cohesive theoretical underpinning of the kind that can be found in some domestic jurisdictions.[123] Rather, as William Schabas has suggested, 'the terms in paragraph (b) seem to be drawn from continental models, whereas those of paragraph (c) belong to the common law' and 'should not be viewed as two different or distinct bases of liability, but rather as an effort to codify exhaustively various forms of complicity by drawing upon concepts familiar to jurists from different legal traditions'.[124]

In terms of collective criminal responsibility, or participation in a criminal enterprise, the Rome Statute does not use the term joint criminal enterprise, in part because it was adopted prior to the doctrine's clear emergence at the ICTY.[125] As a response to the critique that the ICTY and

[121] See generally K. Ambos, 'Article 25: Individual Criminal Responsibility', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* 743 (2008); G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute', 5 *Journal of International Criminal Justice* 953, 956-7 (2007). *See also* L. Yanev & T. Kooijmans, 'Divided Minds in the Lubanga Trial Judgment: A Case against the Joint Control Theory', 13 *International Criminal Law Review* 789, at 804 (2013) (suggesting that the *travaux préparatoires* indicate that the drafters aimed to differentiate between principals and accessories on the basis that an early working paper submitted by Canada (UN Doc A/AC.249/L.4) contained a draft article on 'principals' and a separate one on 'the responsibility of other persons in the completed crimes of principals'). However, Article 25 in its final form merges all modes of liability into the one provision and does not contain the language of 'principals' and 'the responsibility of other persons in the completed crimes of principals.' It is thus arguable that the negotiators intended to move *away* from a strict principal/accessory distinction by actually removing such specific language.

[122] Eser, *supra* n. 7, at 786–8.

[123] Further, it has been argued by some scholars that *ordering* (under paragraph 3(b)) is better categorized as belonging to paragraph 3(a) (commission 'through another person'). *See* Ambos, *supra* n.121, at 765; Eser, *supra* n. 7, at 797.

[124] Schabas, *supra* n. 120, at 431.

[125] The Rome Statute was adopted in July 1998, whereas JCE was developed in the *Tadić* case, which was decided by the ICTY Appeals Chamber in July of 1999. *See Tadić*, *supra* n. 1.

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ICTR Statutes had omitted conspiracy (except as regards the crime of genocide), and in search for a form of 'common plan' liability, the Statute incorporated a specific paragraph on common plan liability (paragraph 3(d)), the text of which was drawn from the International Convention for the Suppression of Terrorist Bombings.[126] According to the chair of the Working Group on General Principles of Criminal Law, this avoided divisive discussions about incorporating the concept of conspiracy, which was rejected by most States Parties, although common law countries advocated for it extensively.[127] While some scholars now argue that 25(3)(d) is a 'residual' form of liability, that was not at all apparent in 1998, and following the *Tadić* Appeals Chamber decision, there was at least some thought that this might be a Rome Statute version of JCE, given that the text refers to the individual contributing 'to the commission or attempted commission of . . . a crime by a group of persons acting with a common purpose'.[128] In fact, one leading scholar has recently suggested that JCE I and II may be included in this provision.[129]

No sooner had the Rome Statute become operational, however, than a group of scholars insisted on an interpretation of Article 25 that would cause it to diverge dramatically from the jurisprudence of the *ad hoc* tribunals and customary international law. In *Prosecutor v. Thomas*

[126] *See* Terrorist Bombing Convention, *supra* n. 42, at art. 2(3)(c).

[127] *See* Saland, *supra* n.116, at 199–200('[w]e were helped by the successful negotiations in 1997 of the Convention for the Suppression of Terrorist Bombings, which had been adopted by consensus. In Rome, it was easy to reach agreement to incorporate, with slight modifications, the text from the Convention which we now find in paragraph 3(d) of the Article 25 of the Rome Statute.'). *See* also T. Weigend, 'Intent, Mistake of Law, and Co-Perpetration in the *Lubanga* Decision on Confirmation of Charges', 6 *Journal of International Criminal Justice* 471, 477–8 (2008); Werle, *supra* n. 121, at 970–1, 974–5 (arguing Article 25(3)(d) is a subsidiary mode of participation yielding the weakest form of liability but that it may also broadly cover acts that warranted liability under the ICTY's case law on JCE).

[128] Rome Statute, *supra* n. 8, art. 25(3)(d).

[129] E. van Sliedregt, Lecture, Siracusa (Italy), May 30, 2018.

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Lubanga Dyilo,[130] the ICC's first completed trial and judgment, the majority assigned a complex meaning to Article 25(3)(a), based upon German theorist Claus Roxin's 'control of the crime' theory.[131] Essentially the judges parsed the meaning of the words 'commits such a crime, whether as an individual, jointly with another or through another person' to create three separate forms of 'commission' liability: individual perpetration, direct co-perpetration and indirect co-perpetration. For both direct and indirect co-perpetration, an essential element of the offense would be the establishment of a 'common plan',[132] and the accused's contribution to the plan had to be 'essential'.[133] Indirect co-perpetration added as a requirement (in the *Katanga* case discussed below)[134] that the accused also had control over an organization through which he committed the crime.[135] This, the judges found, was an appropriate use of Roxin's theory.[136]

[130] *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012 [hereinafter *Lubanga* Trial Judgment].

[131] *Ibid.*, at ¶¶ 918–33, 976–1006. *See* in particular ¶ 999, n. 2705 (citing a long line of the Court's jurisprudence in support of its view that "the contribution of the co-perpetrator must be essential").

[132] *Ibid.* ¶ 981.

[133] *Ibid.* ¶ 999.

[134] *See Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07-3319, Trial Chamber II, Judgment pursuant to article 74 of the Statute, 7 March 2014, [hereinafter *Katanga* Trial Chamber Judgment].

[135] *Ibid.*, ¶ 1410-1411.

[136] The control of the crime theory began appearing in Pre-Trial Chamber decisions in the *Lubanga* Decision on the Confirmation of Charges. *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, Pre-Trial Chamber I, 29 January 2012.

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Two judges, Adrian Fulford (in the *Lubanga* case)[137] and Christine Van Den Wyngaert (in *Prosecutor v. Mathieu Ngudjolo Chui*),[138] have taken issue with the elaboration of the Court's modes of liability doctrine, noting that it had improperly imported the control of the crime theory from national law into Article 25 and that this interpretation was inconsistent with the text of the Statute. Many scholars, including one of us,[139] have similarly argued that the Court's interpretation neither comports with the 'plain meaning' of the Statute nor is appropriate under the interpretative methods open to the judges under Article 21 of the Statute.

It is ironic that just as the critiques of the ICTY's JCE doctrine intimated that the Tribunal's judges had engaged in judicial activism and improperly incorporated common law doctrine into international criminal law,[140] the ICC's judges elaborated a stunningly complex interpretation of Article 25, subjecting themselves to the same critique, perhaps even more so.[141] Although the ICC's case law may well be more favourable to the accused than the ICTY's, perhaps in response to the complaint that JCE was overly favourable to the prosecution, it is neither well-grounded in the Statute nor mandated by customary international law. Nor have the critics of JCE established that

[137] *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-2842, Judgement Pursuant to Article 74 of the Statute, Trial Chamber I, 14 March 2012, Separate Opinion of Judge Adrian Fulford [hereinafter *Lubanga* Trial Judgment (Fulford Opinion)].

[138] *Prosecutor v. Mathieu Ngudjolo Chui*, Judgement Pursuant to Article 74 of the Statute, Trial Chamber II, 18 December 2012, Concurring Opinion of Judge Christine Van den Wyngaert to [hereinafter *Ngudjolo* Trial Judgement (Van den Wyngaert Opinion)].

[139] *See* Sadat & Jolly, *supra* n. 2.

[140] *See*, in particular, Judge Wolfgang Schomburg's separate opinion in *Prosecutor v. Gacumbitsi*, where he argued for the control of the crime theory to be used at the ICTR. *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Judgement, 7 July 2006, Separate Opinion of Judge Wolfgang Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide.

[141] Sadat & Jolly, *supra* n. 2.

its application led to any wrongful convictions or a miscarriage of justice,[142] suggesting that the moniker 'just convict everyone' is simply invalid and unfounded.

Finally, this new doctrine has produced, perhaps unintentionally, an additional problem: by restricting the application of Article 25(3)(a) to principal liability and limiting it to those with control over the crime, the Court has had to rely on Article 25(3)(d) in cases of group liability where the facts do not support such a limited interpretation.[143] This has led – as the next section describes – to high rates of impunity for SGBV crimes.

B. The Absence of Gender Competence in the ICC's Application of Article 25(3)(d) of the Rome Statute to SGBV Crimes

As noted above, the additional elements required to establish 'commission' of a crime at the ICC are perhaps more favourable to the accused than analogous ICTY case law. Yet, as the discussion of the *Katanga* case below reveals, this interpretation of 'commission' has led the Court to reject the application of common purpose liability under Article 25(3)(a) in favour of Article 25(3)(d). At the same time, the Court has applied this provision differently to acts of sexual violence than to other crimes, even though the sexual violence occurred simultaneously at the hands of the same group of perpetrators. The result, as *Katanga* illustrates, has been a high level of impunity for sexual violence crimes.

Germain Katanga, the commander of the Ituri-based Walendu-Bindi *collectivité*, a Ngiti militia group in the DRC, was accused of co-orchestrating an attack on the village of Bogoro in the

[142] Indeed, three defence counsel who represented different accused before international tribunals, confirmed that they could not recall a single case in which an accused had been convicted on the basis of JCE III that they felt amounted to a miscarriage of justice. Discussions with defence counsel, *in* The Hague (May 28 and 29 and Jun. 6, 2019) ("Defence counsel Hague discussions").

[143] Note that, as discussed *infra*, the Trial Chamber in *Ntaganda* found that the accused had control over the crime, *see infra* n. 257-258 and accompanying text, and thus did not need to consider his liability under Article 25(3)(d).

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region of Ituri on 24 February 2003 and charged with the war crimes of rape, sexual slavery, outrages upon personal dignity, directing an attack against a civilian population, wilful killings, destruction of property and using child soldiers, and the crimes against humanity of rape, sexual slavery and murder.[144] He was initially charged under Article 25(3)(a) as a co-perpetrator for the crime of using child soldiers and as an indirect co-perpetrator for all other crimes. However, during the deliberation phase at the end of the trial, the majority of the Trial Chamber notified the parties that they would consider whether the evidence presented during the trial actually satisfied a different mode of liability, namely common purpose liability under Article 25(3)(d)(ii).[145]

The Trial Chamber's decision to alter the mode of liability from Article 25(3)(a) to Article 25(3)(d) had to do with the Court's earlier restrictive interpretation of Article 25(3)(a). After reviewing the evidence – in particular evidence relating to Katanga's contribution as coordinator of the preparations for the attack on Bogoro – the Trial Chamber's majority came to the conclusion that the evidence better supported liability under Article 25(3)(d) than under Article 25(3)(a).[146] This was later confirmed in the judgement issued by the Trial Chamber, which having chosen to

[144] In the confirmation of charges decision, the rape and sexual slavery charges were the only crimes not confirmed unanimously as Dissenting Judge Anita Ušacka found that although there were substantial grounds to believe that members of Katanga's militia had committed rape and sexual slavery after the Bogoro attack, there was insufficient evidence linking Katanga to these crimes. *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-717, Pre-Trial Chamber I, Decision on the Confirmation of Charges, Partly Dissenting Opinion of Judge Anita Ušacka, p. 222-24, ¶¶ 27-29 [hereinafter *Katanga* and *Ngudjolo* Decision on the Confirmation of Charges].

[145] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-3319, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 Nov. 2012 [hereinafter *Katanga* Regulation 55 Decision]. The decision to consider Article 25(3)(d)(ii) liability was intended to apply to all crimes except using child soldiers to participate in hostilities. *Ibid.*

[146] *Ibid.*, at ¶¶ 5-7. Of course, the difficulty of recharacterising the mode of liability could have been avoided had earlier jurisprudence not (erroneously) insisted that the Prosecutor choose only one form of criminal participation for the case, and simply allowed the charges to be brought in the alternative (as is now permitted). *See* L.N. Sadat, 'Crimes Against Humanity in the Modern Age', 107 *American Journal of International Law* 334 (2013).

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follow *Lubanga*'s control over the crime approach to distinguish between principals and accessories, found the evidence insufficient to support Article 25(3)(a) liability.[147] As laid out in *Katanga*, indirect perpetration under Article 25(3)(a) requires proof of both 'the existence of an organised and hierarchical apparatus of power, characterised by near-automatic obedience to the orders it hands down' and the perpetrator's 'control and genuine authority over the organization…[such that he is able] to steer it intentionally towards the commission of a crime, without leaving one of the subordinates at liberty to decide whether the crime is to be executed'.[148] Applying this standard, the Chamber concluded that the evidence was insufficient to establish that '(1) in February 2003, the Ngiti militia was an organised apparatus of power; and (2) Germain Katanga, at that time, wielded control over the militia such as to exert control over the crimes for the purposes of article 25(3)(a) of the Statute'.[149]

The Court then turned its attention to Article 25(3)(d), which attaches criminal liability to anyone who '[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose'.[150] The contribution must 'be intentional' and 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

[147] See *Katanga* Trial Chamber Judgement, *supra* n. 134, ¶¶ 1383-1396, 1417-1420.

[148] *Ibid.* ¶¶ 1410-1411.

[149] *Ibid.*, ¶ 1420. Significantly, this restrictive interpretation of Article 25(3)(a) is likely to serve as a particularly high bar for sexual violence charges, as even if the first of these criteria were met, it will likely be difficult to prove that those accused of such crimes 'unquestionably… conceived the crime, oversaw its preparation at different hierarchical levels, and controlled its performance and execution', *see ibid.* ¶1412, given that sexual violence – even when widespread – often occurs because it is tolerated and permitted rather than explicitly ordered or planned.

[150] Rome Statute, *supra* n. 8, art. 25(3)(d).

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jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime'.[151]

The Trial Chamber interpreted this mode as 'a residual form of accessory liability, included in the Statute to vest the Court with jurisdiction over accessories whose conduct does not constitute aiding or abetting the commission of a crime within the meaning of article 25(3)(c)'.[152] According to the Chamber, this mode differs from JCE in that it cannot be used to attach liability to an accused for crimes which form part of the common purpose but to which he or she did not contribute.[153] According to the Trial Chamber, an accused's 'contribution may be connected to either the material elements of the crime' (for instance, the provision of resources such as weapons) 'or their subjective elements' (which may involve tacit or explicit encouragement).[154] Further, it held that although the group of persons acting with a common purpose must harbour the same intent to commit the crime and the contribution must be made in the knowledge of that intent, intent can be demonstrated either by showing the group meant to cause the consequences that constituted the crime or were aware that the crime would occur in the ordinary course of events.[155]

In March 2014, a majority of the Trial Chamber convicted Germain Katanga as an accessory for all crimes with which he was charged except for rape and sexual slavery as war crimes and crimes against humanity and the war crime of using child soldiers. Specifically, the Chamber

[151] *Ibid.*

[152] *Katanga* Trial Chamber Judgement, *supra* n. 134, ¶ 1618.

[153] *Ibid.* ¶ 1619. This may be why it has not engendered the same kind of critique as JCE III.

[154] *Ibid.* ¶ 1635.

[155] *Ibid.* ¶¶ 1627, 1641.

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convicted Katanga as an accessory to the war crimes of directing an attack against a civilian population, pillaging, and destruction of property, as well as murder as a war crime and a crime against humanity, but unanimously acquitted Katanga as an accessory to rape and sexual slavery as war crimes and crimes against humanity, as well as of the war crime of using child soldiers.[156] The acquittal on the sexual violence charges was not due to an absence of credible evidence regarding the acts of sexual violence. In fact, the Chamber recognized that rape and sexual slavery had been committed by Katanga's fighters on the day of the Bogoro attack.[157] What the Chamber found was that the sexual violence crimes were not part of the common purpose of the attack, unlike the crimes of directing an attack against a civilian population, pillage, murder and destruction of property.[158]

The Trial Chamber's application of common purpose liability to the sexual violence crimes is troubling. The Trial Chamber found that the purpose of Katanga's militia was not only to reconquer Bogoro from the opposing (UPC) troops but also to 'wipe out' the 'Hema civilians' from the village.[159] It looked at the manner of the attack – including that it was initiated in the dark against civilians, and that the crimes were committed systematically, with 'great violence' and accompanied by ethnic references – to conclude that the militia did, in fact, have 'a common purpose of a criminal nature'.[160]

[156] *Ibid.* § XII, 7.

[157] *Ibid.* ¶¶ 988-999, 1002-1019.

[158] *Ibid.* ¶¶ 1657-1664.

[159] *Ibid.* ¶ 1654.

[160] *Ibid.* ¶ 1656.

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The Trial Chamber then looked at whether the particular charged acts formed part of the common plan. It found that murder, directing an attack against a civilian population, pillaging, and destruction of property were part of this common purpose, in part because of the scale of the crimes and the fact that Katanga's militia had engaged in these acts prior to the attack on Bogoro, enabling it to conclude that they must have been intended and therefore part of the common purpose.[161] The Chamber went on to note that, in contrast to these crimes, there was no evidence that rape and sexual slavery had been committed on a wide scale or that these crimes had been committed by Katanga's militia before the attack on Bogoro.[162] It found that the 'obliteration' of Bogoro did not, therefore, 'perforce entail[] the commission of [rape and sexual enslavement]'.[163] Oddly, it concluded that 'although rape and enslavement formed *an integral part* of the militia's design to attack the predominantly Hema civilian population of Bogoro',[164] these crimes did not form part of the group's common purpose.[165]

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[161] *Ibid.*, ¶¶ 1658-1662.

[162] *Ibid.* ¶ 1663.

[163] *Ibid.*

[164] *Ibid.* ¶ 1664 (emphasis added).

[165] This conclusion is also surprising in light of the Pre-Trial Chamber's earlier findings that Katanga knew 'that, as a consequence of the common plan, rape and sexual slavery of women and girls would occur in the ordinary course of the events.' *Katanga* & *Ngudjolo* Decision on the Confirmation of Charges, *supra* n. 144, ¶ 567. Significantly, according to the Pre-Trial Chamber, this knowledge 'was substantiated by the fact that:

> (i) rape and sexual slavery against of women and girls constituted a common practice in the region of Ituri throughout the protracted armed conflict;
> (ii) such common practice was widely acknowledged amongst the soldiers and the commanders;
> (iii) in previous and subsequent attacks against the civilian population, the militias led and used by the suspects to perpetrate attacks repeatedly committed rape and sexual slavery against women and girls living in Ituri;
> (iv) the soldiers and child soldiers were trained (and grew up) in camps in which women and girls were constantly raped and kept in conditions to ease sexual slavery;
> (v) Germain Katanga, Mathieu Ngudjolo Chui and their commanders visited the camps under their control, frequently received reports of the activities of the camps by the camps commanders under their command, and were in permanent contact with the combatants during the attacks, including the attack on Bogoro;

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The Trial Chamber's common purpose analysis is problematic for a number of reasons. First, it seems to imply that for an act to be part of the group's common purpose – absent direct evidence that the group agreed to commit the act – it has to both have been committed on a wide scale and repeated basis *and* have occurred prior to the attack in question. Notably, neither of these factors is identified in the Chamber's own findings on what the law requires or what would be sufficient to show that an act is part of the group's common purpose in the absence of direct evidence.[166] In the part of the judgment interpreting the relevant law, the Chamber adopts an approach that excludes from the common purpose only those 'crimes ensuing…from opportunistic acts by members of the group.'[167] It is hard to see how the rape and sexual enslavement of Hema women was merely opportunistic when these crimes were committed on the same day as the crimes committed against other members of the Hema community in Bogoro and, by the Chamber's own

(vi) the fate reserved to captured women and girls was widely known amongst combatants; and
(vii) the suspects and the combatants were aware, for example, which camps and which commanders more frequently engaged in this practice'.

Ibid. at ¶¶ 567-68. Based on this, the Chamber concluded that when the accused 'planned, ordered and monitored the attack on Bogoro and on other villages inhabited mainly by Hema population, the suspects knew that rape and sexual slavery would be committed in the ordinary course of the events.' *Katanga* & *Ngudjolo* Confirmation Decision, *supra* n. 144, ¶ 569.

[166] *See Katanga* Trial Chamber Judgement, *supra* n. 134, at ¶¶ 1624-1631. This is consistent with customary international law, where 'there is no requirement that sexual violence occur on a large scale to be part of a common criminal purpose'. *See* S. Brammertz & M. Jarvis (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, at 6 (Oxford 2016). While scale and prior use of the same acts may help show that sexual violence was part of the common purpose, other factors may also be relevant and sufficient to show this, such as the role sexual violence played in achieving the objectives of the JCE members. *Ibid.* at 5-7, 226. See also M. Jarvis, 'Prosecuting Conflict-Related Sexual Violence Crimes: How Far We Have Progressed and Where Do We Go From Here: Some Thoughts Based on ICTY Experience', in D. Stephens & P. Babie (eds.), *Imagining law: essays in conversation with Judith Gardam* 121 (2016) (noting that in *Prosecutor v. Stakić*, for instance, the focus of the ICTY was not on scale or patterns, but on the objective of the JCE members and the role sexual violence played in achieving that objective).

[167] *Katanga* Trial Chamber Judgement, *supra* n. 134, ¶ 1630.

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assessment, 'formed an integral part of the militia's design to attack the predominantly Hema civilian population of Bogoro'.[168]

Second, even if scale were required, it is unclear why the scale of the sexual violence was insufficient here. Only three witnesses testified to the rape, as opposed to 60 people who the Chamber found had been killed in the attack.[169] However, each of them testified to being raped multiple times, with a total of 17 acts of rape occurring during the attack on Bogoro.[170] Moreover, all of these witnesses were enslaved at a camp run by Katanga's militia following the attack, for a period of one to eighteen months.[171] It is hard to see why 17 acts of rape and subsequent enslavement for months do not qualify as crimes committed on a wide scale or repeated basis. Indeed, the Chamber's failure to consider the number of assaults or the subsequent months of sexual enslavement shows a lack of gender competence in assessing the evidence related to the gender crimes.

Although it did not say so explicitly, perhaps the Chamber had difficulty finding that the sexual violence crimes were crimes the group either intended to commit or would occur within the ordinary course of events, which the accused must have been aware of at the time the crimes were committed.[172] Yet, in its discussion of the law, the Chamber itself notes that a group's common

[168] *Ibid.* ¶ 1664. Although the Chamber may have been using scale and previous commission of crimes as circumstantial evidence from which it could infer whether those crimes formed part of the common purpose, it does not examine – as its statement of the law suggests would be necessary – whether the sexual violence committed in Bogoro was, in fact, merely opportunistic. Had it asked this question and applied its own standard, it might have been prompted to take into account evidence it apparently failed to consider – such as the sexual enslavement of the victims, in some cases, for months after the attack – and conclude that the acts were not opportunistic.

[169] *Ibid.* ¶¶ 841, 950.

[170] *Ibid*, ¶¶988-999.

[171] *Ibid.* ¶¶ 1002-1021.

[172] *Ibid.* ¶ 1630.

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purpose need not have been previously agreed upon; it can 'materialize extemporaneously' and 'be inferred from the subsequent concerted action of the group of persons'.[173] Katanga's militia not only repeatedly raped the women but enslaved them after the attack for up to eighteen months. Even if the militia had not committed prior acts of sexual violence, the repeated acts of rape and subsequent months-long enslavement of Hema victims were evidence from which the Chamber could have inferred that the crimes were either intended or would occur within the ordinary course of events. Again, the failure to do so suggests a lack of gender competence in evaluating the evidence of SGBV crimes.

More significantly, the Chamber's analysis appears to ignore the way in which sexual violence has been used in other conflicts to achieve the very kind of purpose the Chamber indicates the militia wanted to accomplish, i.e. to forcibly displace or wipe out a rival ethnic group. Although the Chamber stated that it would reference the common purpose jurisprudence of the ICTY and the ICTR,[174] it failed to cite cases from these tribunals which had found that sexual violence had been used effectively to destroy or discriminate against a particular group and/or to drive them out of a particular territory and, therefore, formed part of the perpetrators' common purpose. For instance, in the *Stakić* case, the ICTY Appeals Chamber found that the common purpose of Stakić and other JCE members was to deport Bosnian Muslims and Bosnian Croats from the town of Prijedor in Bosnia and to persecute them in order to establish Serbian control over that territory. [175] Importantly, the Trial Chamber had recognized that forcing people to flee required waging a persecution

[173] *Ibid.* ¶ 1626.

[174] *Katanga* Trial Chamber Judgement, *supra* n. 134, at ¶ 1625.

[175] *See*, *e.g.*, *Stakić*, Appeal Judgement, *supra* n.112, ¶¶ 73, 84.

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campaign against Bosnian Muslims and Bosnian Croats, which in turn was accomplished through various acts of violence, including sexual violence.[176] In confirming Stakić's conviction for persecution, including through acts of sexual violence, the Appeals Chamber recognized that sexual violence formed part of the group's common purpose.[177]

In *Katanga*, the Trial Chamber examined the SGBV crimes apart from the other violent acts, as if they were somehow unconnected to the violence targeted against the very same civilians. The Chamber suggested that because the victims denied their ethnicity (which they did to avoid being targeted[178]), the rapes were somehow not connected to the victims' ethnicity, and therefore not a part of the intended attack against the Hema in Bogoro. Yet, as one author has noted, the transcripts of the witness testimonies indicate that they were all 'asked about their ethnic identity repeatedly before and after being raped',[179] suggesting that the issue of ethnicity was clearly related to the rapes irrespective of whether the victims denied their Hema heritage. As in *Stakić*, there was ample evidence in the record from which it could be inferred that that sexual violence was used – like the other crimes – to drive the Hema population from Bogoro.

It is hard to avoid the conclusion that the Chamber in *Katanga* isolated and treated SGBV crimes differently, both factually and legally, from the other charged crimes. Rather than viewing

[176] *Stakić* Trial Judgement, *supra* n. 104, ¶¶ 234-36, 240-41, 244, 791-806, 826 (finding sexual violence committed in the Trnopolje, Keratrem, and Omarska prison camps in Prijedor was a critical part of the persecution campaign).

[177] *See also* Kvočka Trial Judgement, *supra* n. 62, ¶¶ 319-20, 327 (finding a system of ill-treatment at the Omarska camp in Prijedor which aimed to 'persecute and subjugate non-Serb detainees' through the commission of crimes, including rape, thus recognizing sexual violence as part of the common criminal purpose under JCE II). Although two of the accused's convictions were overturned on appeal, these findings were upheld on appeal. *Prosecutor v. Kvočka* et al, Case No. IT-98-30/1-A, Appeal Judgement, 28 February 2005, ¶¶ 84-86.

[178] *See, e.g., Katanga* Trial Chamber Judgement, *supra* n. 134, ¶¶ 829, 1009.

[179] B. Inder, *Partial Conviction of Katanga by ICC Acquittals for Sexual Violence and Use of Child Soldiers:* The Prosecutor vs. Germain Katanga, 7 March 2014, at 7, http://iccwomen.org/images/Katanga-Judgement-Statement-corr.pdf.

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the evidence in the record as linking the sexual violence with the broader context in which it occurred, the Chamber analyses these crimes separately, requiring more concrete evidence than its own findings on common purpose liability suggest is legally required to show that the sexual violence was part of the common plan.

Importantly, even if the Chamber had found that the sexual violence crimes were part of the common plan, it is not clear that the Chamber would have found Katanga liable for these crimes under Article 25(3)(d), as per this provision, Katanga's contribution would have to be 'intentional' and either: '(i) 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) made in the knowledge of the intention of the group to commit the crime.'[180] According to the Chamber's interpretation of Article 25(3)(d)(ii), '[k]nowledge must be established for *each specific crime* and knowledge of a general criminal intention will not suffice to prove … that the accused knew of the group's intention to commit each of the crimes forming part of the common purpose.'[181] Moreover, the accused must be aware this intention existed 'when engaging in the conduct which constituted his or her contribution'.[182] Given the Chamber's refusal to consider the repeated acts of rape during the attack and the subsequent months-long enslavement of Hema victims in its analysis of the militia's common purpose, it is unlikely that the Chamber would find

[180] Rome Statute, *supra* n. 8, art. 25(3)(d).

[181] *Katanga* Trial Chamber Judgement, *supra* n.134, ¶ 1642 (emphasis added).

[182] *Ibid.* ¶ 1641.

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these same facts sufficient to show Katanga had contributed to the attack with the knowledge that the group intended to commit these crimes *at the time he made his contribution*.[183]

The take-away from *Katanga* is clear. First, a restrictive interpretation of Article 25(3)(a) is likely to serve as a particularly high bar for cases involving sexual violence charges. It will likely be difficult to prove that those accused of SGBV 'unquestionably… conceived the crime, oversaw its preparation at different hierarchical levels, and controlled its performance and execution,' as required by the Court's doctrinal construction of indirect perpetration,[184] given that sexual violence – even when widespread – often occurs because it is tolerated and permitted rather than explicitly ordered or planned.[185] Second, even though common purpose liability under Article 25(3)(d) can theoretically be used to hold perpetrators accountable for sexual violence crimes and the provision has not been subject to the same level of critique as JCE III liability, that provision has been applied differently to sexual violence crimes than other crimes, resulting in the acquittal of SGBV charges. Thus, the combination of a restrictive interpretation of Article 23(a) with a lack of gender

[183] While the Chamber does not separately analyse the requirements of Article 25(3)(d)(i), it is not clear that it would find the facts in *Katanga* sufficient to meet the requirements of that provision either, given its analysis of criminal purpose as requiring that the participants in the common purpose "harbour the same intent," meaning "they must mean to cause the consequences which constitutes the crime or be aware that the crime will occur in the ordinary course of events." *Katanga* Trial Chamber Judgement, *supra* n. 134, ¶1627.

[184] *Ibid.* ¶ 1412.

[185] As discussed in Section IV.B. below, however, the *Ntaganda* case demonstrates that this is not impossible. If the Court contextualizes the sexual violence and recognizes it as part of the common plan, as it did in *Ntaganda*, it may be feasible to use Article 25(3)(a) in cases of sexual violence. *See infra* n. 249-257 and accompanying text. However, as noted earlier, that case is still subject to appeal and it is not clear that, if it chooses to review the case, the Appeal Chamber will affirm the Trial Chamber's approach. Moreover, Ntaganda's liability as an indirect co-perpetrator still required the Chamber to assess the accused's control over the crime. While it found such control to be present in that case, cases in which sexual violence unfolds as part of the plan but evidence of the accused's control over the crime is less compelling would still likely fail.

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competence in applying the elements of Article 25(3)(d) to SGBV crimes has led to a high level of impunity for those crimes.[186]

IV. Two Trains Running – Customary International Law and the Rome Legal Regime

The above analysis suggests that accurately capturing and characterizing individual contributions to collective criminal conduct, particularly when that conduct involves sexual and gender based violence, remains a challenge for international courts and tribunals. Despite significant advances in the development of sophisticated theories designed to hold individuals responsible for their role in atrocity crimes and the recognition of rape and other forms of sexual violence as war crimes, crimes against humanity and even acts of genocide, the cases discussed in the previous section demonstrate that judges struggle with how to understand and situate sexual and gender based violence within the context of other atrocity crimes.

The solution, moving forward, will undoubtedly need to operate on several tracks. For various reasons, including perhaps the 'positive complementarity' incentive on States to investigate

[186] To the extent that one of the accused in the group is a military or civilian superior with effective control over his or her subordinates, another alternative could be to charge that accused with command responsibility under Article 28 of the Rome Statute. As noted earlier, however, the one case in which an accused was convicted by a Trial Chamber for SGBV crimes under command responsibility was reversed by the Appeals Chamber, *see Bemba* Appeals Chamber Judgment, *supra* n. 11, suggesting that some of the difficulties we identify in the Court's application of Article 25 also apply to its approach to command responsibility. *See* SáCouto & Sellers, *supra* n.12. More significantly, perhaps, while superior responsibility or other modes of liability such as complicity might be used to hold perpetrators liable for SGBV crimes, these forms of liability do not always capture the full culpability of an accused. The principle of fair labeling – described as fairly representing the nature and magnitude of a wrong by recognizing, through the law, distinctions between kinds of offences and degrees of wrongdoing, A. Ashworth, *Principles of Criminal Law* 86 (1995) – arguably requires that an accused be charged with some form of group or common purpose liability if circumstances so warrant, even if the accused could also be prosecuted under other modes of liability. Yet the ICC's restrictive interpretation of Article 25(3)(a) and lack of gender competence in its application of Article 25(3)(d) makes it difficult to characterize responsibility for SGBV crimes as such.

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and prosecute atrocity crimes within their own domestic systems,[187] we have seen – and may continue to see – an increasing number of States trying atrocity crimes at home.[188] Some have incorporated the Rome Statute into their domestic legal systems, while others rely on existing penal codes and customary international law to try international crimes. Moreover, we will likely continue to see the establishment of new hybrid or internationally-supported tribunals with temporal mandates requiring the application of customary international law. Thus, it is important to explore potential solutions to the problems we have identified under both the Rome Statute and customary international law.

A. JCE III under customary international law

Our first recommendation – relevant primarily to jurisdictions applying customary international law[189] – is to push back against the critique of JCE III. First, we disagree with the scholarly criticism and judicial dissents that reject JCE III's customary basis. As an initial matter, we find the *ad hoc* tribunals' response to these challenges persuasive.

In the *Đorđević* case, for instance, the accused challenged the *bona fides* of JCE's customary origins, arguing that the Appeals Chamber should depart from its previous decisions because the reasoning set out in the *Tadić* Appeal Judgement is "shallow and uncertain"'.[190] In support, he cited,

[187] The ICC's Office of the Prosecutor (OTP) 2006 Report on Prosecutorial Strategy explains: 'the Office has adopted a *positive approach* to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation.' Int'l Criminal Court, Office of The Prosecutor, *Report on Prosecutorial Strategy*, 14 September 2006, at 5 (emphasis in original).

[188] *See, e.g.* 'Part IV: Complementarity in Practice', in C. Stahn & M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (2011).

[189] Note that customary international law may also be relevant to the interpretation of the Rome Statute. *See* Rome Statute, *supra* n. 8, art. 21(1).

[190] *Đorđević* Appeals Chamber Judgement, *supra* n. 62, at ¶ 25.

inter alia, the ECCC's Pre-Trial Chamber decision that concluded that JCE III was not rooted in customary law by the 1970's, the relevant time of the Khmer Rouge genocide.[191] The ICTY Appeals Chamber disagreed and affirmed the customary basis of JCE III.[192] We concur for several reasons.

First, JCE III is rooted in legal instruments and the case law of the post-WWII era. For example, the final clause of Article 6 of the Charter of the International Military Tribunal established that:

> Leaders, organisers, instigators and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes [crimes against peace, war crimes, and crimes against humanity] are responsible for all acts performed by any persons in execution of such plan.[193]

In other words, the IMT Charter provided that a person who participated in a common plan or conspiracy to commit *any* crime under the Charter could be held liable for *all acts* resulting from the execution of that common plan or conspiracy.[194] Similarly, Control Council Law No. 10 provided that a person could be held criminally responsible for a crime if he 'was connected with plans or enterprises involving its commission',[195] without any requirement that the crime in question have been intended.

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[191] *Ibid.* ¶ 46.

[192] *Ibid.* ¶ 58.

[193] *See* Charter of the International Military Tribunal art. 6, *annex to* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6, Aug. 8, 1945, 82 U.N.T.C. 280.

[194] Such liability is broader than JCE I, which provides liability only for those crimes that were within the common plan, and encompasses foreseeable crimes, as the French judge on the IMT confirmed. Indeed, that judge later wrote that Article 6 required 'conduct aimed at the same result' and 'did not embrace crimes "which were not intended *or foreseen*"', suggesting that foreseeable crimes came within the statute. R. Clarke, 'Return to Borkum Island: Extended Joint Criminal Enterprise Responsibility in the Wake of World War II', 9 *Journal of International Criminal Justice* 839, 845 (2011) (quoting Donnedieu de Vabres).

[195] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. II(2)(d), reprinted in 3 *Trials of War Criminals before the Nuernberg Military Tribunals* XVIII (William S. Hein & Co. 1997), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-III.pdf.

The case law of the post-World War II tribunals further confirms that JCE III was a recognized mode of liability well before the establishment of the ICTY. Although the lack of reasoned judgments in many cases makes it difficult to determine with certainty the exact mode of liability applied, a careful review of the facts of those cases strongly supports the conclusion that they applied a mode of liability akin to JCE III. For example, in the *Essen Lynching* case, a Germany Army Captain instructed a private to transport three British prisoners of war through the town of Essen, and not to interfere if the civilian crowd were to 'molest' the prisoners – an instruction given within hearing of the crowd.[196] The crowd then proceeded to beat the prisoners, ultimately killing them.[197] Together, the captain, private, and crowd all implicitly agreed upon a common purpose – to attack the prisoners – thereby causing them injury. Even though it was unclear who struck the fatal blow, the five defendants were found guilty of the war crime of killing – not just assaulting – a prisoner of war, suggesting that the tribunal found them guilty of the foreseeable crime of murder and not just the agreed upon assault.[198] The *Borkum Island* case is similar. There, several airmen were killed by a civilian crowd after the military commander ordered his subordinates not to interfere with any attack by the crowd.[199] Although there was evidence that many of the civilians

[196] Trial of Erich Heyer and Six Others ('The Essen Lynching Case') (Brit. Mil. Ct. for the Trial of War Criminals, Essen, 18th-19th and 21st-22nd Dec., 1945), discussed at I U.N. War Crimes Comm'n, Law Reports of Trials of War Criminals 89 (1947), https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-1.pdf.

[197] *Ibid.* at 88, 90.

[198] There was some evidence that the captain may have suggested that the prisoners of war should be shot, though it is unclear whether the court accepted that evidence. *Ibid.* at 90.

[199] Deputy Judge Advocate's Office, Review and Recommendation at 2 *et seq.*, United States v. Goebell (Aug. 1, 1947), https://www.legal-tools.org/doc/aeb036/pdf/. *See also* R. Clarke, 'Return to Borkum Island: Extended Joint Criminal Enterprise Responsibility in the Wake of World War II', 9 *Journal International of Criminal Justice* 839, 841-43 (2011).

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intended their murder,[200] there was no evidence that the commander intended that the prisoners be killed, rather than assaulted.[201] Nonetheless, the commander was found guilty in their deaths.[202]

Third, we find the ECCC decision rejecting the customary status of JCE III to be unpersuasive.[203] Not only did the ECCC Pre-trial Chamber restrict its examination to sources relied on by *Tadić* rather than consulting other sources of custom,[204] but it did not dispute that the *Essen Lynching* and *Borkum Island* cases might 'indeed be directly relevant to JCE III'.[205] Rather, the ECCC declined to rely on them 'in the absence of a reasoned judgment'.[206] Yet other cases, not relied upon by *Tadić* or considered by the ECCC, support the conclusion that JCE III was a recognized mode of liability in the post-WWII era.

For example, in *The Queen v. Ikeda*, the Batavia Military Tribunal prosecuted a Japanese army colonel for war crimes for his role in the provision of Dutch 'comfort women' to Japanese

[200] Deputy Judge Advocate's Office Review and Recommendation, *supra* n. 199, at 6-7 (describing statements by the mayor to 'beat them dead' and by other civilians to 'kill them dead').

[201] *Ibid.* at 13-16.

[202] *Ibid.* at 13.

[203] *Đorđević* Appeals Chamber Judgement, ¶ 89.

[204] *Ibid.* ¶ 52. At the time of the *Đorđević* Appeals Chamber Judgment, the Extraordinary Chambers in the Courts of Cambodia had not yet issued the Supreme Court's decision in *Nuon*. That case did consider several additional cases not cited by *Tadić*, and found them ambiguous. Co-Prosecutors v. Nuon et al., Case No. 002/19-09-2007-ECCC/SC, Appeal Judgement, ¶¶ 792-94, 799 n.2107, 800-04 (ECCC Supreme Court Chamber, Nov. 23, 2016) (examining the *Renoth*, *Pohl*, *Ikeda*, *Farben*, *Hadamar*, *Mauthausen*, *Russelsheim*, *Tashiro*, *Hatakeyama*, *Matsumoto*, and *Ishiyama* cases). Even if these cases were ambiguous – and the following analysis of the *Ikeda*, *Hatakeyama*, and *Matsumoto* cases suggests that they were not – that would not prove that a mode of liability similar to JCE III was not used in any of the thousands of cases tried in the post-WWII era.

[205] *Co-Prosecutors v. Ieng*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC38), Public Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), ¶¶ 79 (ECCC Pre-Trial Chamber, May 20, 2010).

[206] *Ibid.*

troops who were raped and subjected to enforced prostitution.[207] The tribunal found that Ikeda was responsible, along with others, for planning the establishment of brothels filled with girls and women recruited from internment camps – conduct that, of itself, amounted to a crime against humanity.[208] Although there was no evidence that Ikeda had intended the use of force, the tribunal held that Ikeda was responsible for the additional 'criminal offences committed in the process' because they 'could and should have been anticipated', i.e., they were foreseeable, by Ikeda.[209] The Australian Military Tribunal likewise applied a mode of liability similar to JCE III. For example, in the *Hatakeyama* and *Matsumoto* cases – which concerned the deaths of individuals who had been tortured – the defendants admitted that they had intended to interrogate and/or torture the victims, but the evidence was ambiguous as to whether there had been any agreement to murder the prisoners. Nonetheless, the defendants were convicted of murder, apparently because it was a foreseeable result of their crimes.[210] The conclusion that post-WWII decisions were based on JCE III is buttressed by the arguments of the prosecutors and Judge Advocates in these cases. In *Hatakeyama*, for instance, the Judge Advocate stated before the Australian Military Tribunal that: '[i]f several persons combine for an unlawful purpose, or for a lawful purpose to be effected by unlawful means . . . and one of them, in the prosecution of it, kills a man, it is murder in all who are

[207] *The Queen v. Ikeda*, Case No. 72 A/1947, Batavia War Crimes Tribunal, Judgment, 1 (1947), https://www.legal-tools.org/doc/205dfb/pdf/.

[208] *Ibid.* at 7, 8. The court elaborated that 'even suggesting to these women and girls,' who were 'completely and utterly under the control of occupation authorities,' 'that they should provide these kinds of services to the Japanese already implied a criminal purport, because of the submissiveness and incarceration into which they had been placed.' *Ibid.* at 9.

[209] *Ibid.* at 8. These additional offences included enforced prostitution and abduction of girls and women for the purpose of enforced prostitution. *Ibid.* at 11.

[210] *Ibid.*

present'.[211]

Significantly, even the ECCC's decision appears to leave room for the argument that some form of extended JCE existed under customary law in the post-WWII period. Although the ECCC's Supreme Court Chamber found 'that criminal liability based on making a contribution to the implementation of a common criminal purpose was . . . limited to crimes that were actually encompassed by the common purpose',[212] its discussion of which crimes are encompassed by a common purpose included 'crimes that are *foreseen* as means to achieve a given common purpose, even if their commission is not certain'.[213] The Chamber went on to explain that 'if attaining the objective of the common purpose may bring about the commission of crimes, but it is agreed to pursue this objective regardless, these crimes are encompassed by the common purpose because, even though not directly intended, they are contemplated by it'.[214] In language similar to that used by the *ad hoc* tribunals when assessing foreseeability for purposes of JCE III liability, the Chamber stressed that 'the common purpose may encompass crimes in which the commission is neither desired nor certain, just as it is sufficient for the commission of certain crimes that the perpetrator acted with *dolus eventualis* and therefore neither desired that the crime

[211] Clarke, *supra* n. 194, at 857 (describing the case). Nearly identical language was used by the Judge Advocate in the *Schonfeld* trial before the British Military Tribunal. *See* Tadić Appeals Judgment, *supra* n. 1, at ¶ 198. Similarly, in the *Dachau Concentration Camp* Trial, the Judge Advocate stated that where two or more people join together to commit a criminal act, they are all responsible for the consequences of the execution of that act even if the consequence was not specifically contemplated by the parties. *Minister of the Republic v. Hissène Habré*, Judgement, 30 May 2016, ¶¶ 1881, *available at* http://www.legal-tools.org/doc/98c00a/pdf/ (quoting arguments in the case).

[212] ECCC SCC Appeal Judgement, *supra* n.106, ¶ 807.

[213] *Ibid.* ¶ 808.

[214] *Ibid.*

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be committed nor was certain that it would happen'.[215] Finally, the Chamber explained that '[w]hether a crime was contemplated by the common purpose is primarily a question of fact that – absent an express agreement – has to be assessed taking into account all relevant circumstances, including the overall objective of the common purpose and the likelihood that it may be attained only at the cost of the commission of crimes'.[216] Thus, even under the ECCC's formulation of the JCE standard, a member of a JCE may be held responsible for crimes he or she did not intend and the commission of which was not certain, provided that the crimes were foreseeable.[217] This formulation appears to extend beyond the usual limits of JCE I and II, even if it does not fully encompass the full breadth of JCE III liability.[218]

Fourth, there have been a number of decisions since the ECCC Pre-Trial decision and *Đorđević*'s appeal affirming the customary status of JCE III. Most significantly, the Extraordinary African Chambers (EAC) in Senegal convicted former Chadian dictator Hissène Habré of sexual slavery based on JCE III.[219] The trial chamber painstakingly reviewed the customary basis of JCE,

[215] *Ibid.* The Chamber further explained that liability is appropriate where the member of the JCE views the crime 'as an eventuality treated with indifference'. *Ibid.* ¶ 809. This language mirrors that used by the ICTY, which described JCE III as appropriate where 'the accused was . . . indifferent to th[e] risk' that an additional crime was a 'predictable consequence of the execution of the common design'. *Tadić* Appeals Judgment, *supra* n. 1, ¶ 204.

[216] ECCC SCC Appeal Judgement, *supra* n. 106, ¶ 808.

[217] *Ibid.*

[218] As mentioned earlier, a similar standard is also often employed by domestic courts in criminal cases. *See Prosecutor v. Ieng Sary* et al, Co-Prosecutor's Appeal against the Judgment of the Trial Chamber in Case 002/01, supra n. 6, ¶50 (citing provisions on 'individual criminal responsibility for unintended but foreseeable crimes arising out of joint criminal enterprise' in criminal codes of the Australia, Austria, Bangladesh, Bermuda, Botswana, Cambodia, Canada, Egypt, Ethiopia, Fiji, France, Germany, Ghana, Greece, India, Iraq, Israel, Japan, Kenya, Malawi, Malaysia, New Zealand, Nigeria, Pakistan, Papua New Guinea, Philippines, Poland, the Union of Soviet Socialist Republics, Seychelles, South Africa, South Korea, Sri Lanka, Tanzania, Thailand, Uganda, the United Kingdom, the United States of America, Uruguay, Western Samoa, and Zambia).

[219] Habré Judgement, *supra* n. 211, at ¶¶ 2157-2170.

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examining the post-World War II jurisprudence, ICTY and ICTR jurisprudence and the ECCC decision.[220] In regard to JCE III, the chamber concluded that it was part of customary law as of the time the relevant events occurred in 1982[221] and that it was sufficiently foreseeable and accessible to the accused at that time.[222] In sum, we find persuasive that time and again JCE III has passed the test of judicial scrutiny.[223]

We also find unpersuasive the argument that JCE III liability is tantamount to the imposition of guilt by association or collective guilt. Unlike guilt by association, in which mere membership in an organization is sufficient for liability, a finding that an accused is responsible for crimes committed as part of a joint criminal enterprise requires an intent to commit a crime as well as the participation of the accused in the execution of the JCE's common purpose.[224] Indeed, there can be no JCE III liability without participation by the accused in either a JCE I or II, meaning there must first be a finding that the accused intended and participated in the JCE I common plan or JCE II system of ill-treatment. In other words, an individual charged with JCE is

[220] *Ibid.* ¶¶ 1865-1884.

[221] *Ibid.* ¶ 1885

[222] *Ibid.* ¶¶ 1892,1903.

[223] It is also worth noting that one commentator recently nuanced their critique of JCE III after the UK's decision in *R v. Jogee* case. Now, she would allow that the foreseeability requirement, when coupled with the accused's assumption of the risk, removes JCE III from the realm of pure strict liability. *See* E. van Sliedregt, 'Joint Criminal Confusion: Exploring the Merits and Demerits of Joint Enterprise Liability', *in* B. Krebs (ed.), *Accessorial Liability After Jogee* (2019), 25-27.

[224] *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Judgement, ¶ 424 (ICTY Appeals Chamber, Apr. 3, 2007); *Stakić* Appeals Judgment, *supra* n. 112, ¶ 386 (appellant was convicted because he 'had a management and oversight function in relation to the camps' where the crimes were committed, and not based on 'guilt by association'); *see also* Tadić Appeals Judgment, *supra* n. 1, ¶¶ 220, 227; Kvočka Appeals Judgement, *supra* n.51, ¶ 96; *Prosecutor v. Munyakazi*, Case No. ICTR-97-36A-A, Judgement, ¶ 160 (ICTR Appeals Chamber, Sept. 28, 2011); *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Judgement, ¶¶ 457, 459-61 (SCSL Trial Chamber, May 18, 2012).

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'charged not for his membership in a joint criminal enterprise but *for his part in carrying it out'*.[225] As the *Martic* Appeals Chamber explained,

> when all the elements of JCE are met in a particular case, the accused has done far more than merely associate with criminal persons. He has the intent to commit a crime, he has joined with others to achieve this goal, and he has made a significant contribution to the crime's commission. Thus, he is appropriately held liable also for those actions of other JCE members, or individuals used by them, that further the common criminal purpose (first category of JCE) or criminal system (second category of JCE), or that are a natural and foreseeable consequence of the carrying out of this crime (third category of JCE).[226]

Further, as Antonio Cassese has observed, an accused's participation in the original common plan puts him in a privileged position to foresee the further crimes that could arise out of the original JCE.[227] Thus, imposition of JCE III liability in such cases 'convey[s] the message that [the accused] should have opposed or impeded the crime of the "primary offender."'[228]

In addition to the guilt by association critique, some critics contend that JCE III could lead to unfair convictions, in the sense that its application could lead to the unfair labelling of minor participants as principals.[229] As an initial matter, while theoretically possible, we find it

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[225] *Prosecutor v. Milutinović et al*., Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ¶ 26 (ICTY Appeals Chamber, May 21, 2003) .

[226] *Prosecutor v. Milan Martić,* Case No. IT-95-11-A, ICTY Appeal Judgement, 8 Oct. 2008, ¶ 172.

[227] Cassese et al, *supra* n. 74, at 169.

[228] *Ibid.*. Cassese drew upon an English case to make the point:

> [A] secondary party who foresees that the primary offender might kill with the intent sufficient for murder, and assists and encourages the primary offender in the criminal enterprise on this basis, should be guilty of murder. He ought to be criminally liable for harm which he foresaw and which in fact resulted from the crime he assisted and encouraged. . . . The criminal justice system exists to control crime. A prime function of that system must be to deal justly but effectively with those who join others in criminal enterprises. Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences.

Ibid. (quoting *R. v. Powell (Anthony) and English*, UK House of Lords, 1 A.C. 1, § 14 (Oct. 30, 1997)).

[229] *See, e.g.*, J. Ohlin, 'The Co-Perpetrator Model of Joint Criminal Enterprise', *in* A. Klip and G. Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the former Yugoslavia 2003 – Volume 14* (2008), 739 at 742 ("All participants of joint criminal plans are subject to equal

significant that despite decades of jurisprudence by the *ad hoc* tribunals, critics have failed to establish that, in practice, the use of JCE III has resulted in a serious miscarriage of justice.[230] Moreover, although the *Tadić* Appeals Chamber held that JCE – including JCE III – is a form of 'commission',[231] this need not imply that JCE III must always be viewed as a principal rather than accessorial form of liability.[232] Indeed, domestic or hybrid courts could use JCE III to hold accused liable for crimes that are a natural and foreseeable consequence of a common criminal plan without necessarily characterizing it as principal liability. This would allow courts to use JCE III when other forms of liability, like aiding and abetting or command responsibility, might understate or not fully capture the way in which an accused's participation in a group's common criminal plan was inextricably linked with and led to the foreseeable commission of sexual violence crimes.[233]

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criminal liability according to the doctrine created by the *Tadić* court, regardless of their level of participation in the plan. Therefore, minor participants are just as guilty as architects, hangers-on just as liable as organizers.").

[230] *See* Defence counsel Hague Discussions, *supra* n. 142 (noting that three defence counsel who represented different accused before international tribunals confirmed that they could not recall a single case in which an accused had been convicted on the basis of JCE III that they felt amounted to a serious miscarriage of justice). This may well be because, as mentioned earlier, no conviction for JCE III can stand without participation by the accused in a JCE I or II, meaning anyone convicted of crimes on the basis of JCE III also participated in a JCE I or II atrocity crime typically involving grave abuses against mass numbers of victims.

[231] *See supra* n. 29and accompanying test.

[232] As we have discussed, the Rome Statute has two group liability provisions, joint commission under Article 25(3)(a) and common purpose liability under Article 25(3)(d). The idea here is that domestic or hybrid courts could apply something similar to Article 25(3)(d) but with the JCE III foreseeability *mens rea* rather than the "aim of furthering" or virtual certainty standard required under Article 25(3)(d). *See infra* n. 261 and accompanying text. While this parts from the recognition by *Tadic* of JCE III as a principal form of liability under customary international law, it would not run afoul of the *nullum crimen sine lege principle*, as the only change – characterizing it as accessorial rather than principal – actually favors the accused. *See* Claus Kreβ, *Nulla poena nullum crimen sine lege*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2010), https://www.legal-tools.org/doc/f9b453/pdf/ . "The [*nullum crimen sine lege*] principle of non-retroactivity does not apply to rules that are favourable to the accused.").

[233] Assisting another person to commit a crime (aiding and abetting) and failing to prevent one's subordinates from committing crimes (command responsibility) is different than contributing to a group's common criminal plan

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Significantly, JCE III is critical to capturing how SGBV crimes often unfold during times of mass violence. Sometimes rape is ordered by military or political leaders, but often it is not explicitly planned or orchestrated from the outset. Sexual violence may initially be committed because the atmosphere of war and the violence, lawlessness, and chaos it produces permits it to occur. However, once it becomes clear that superiors do not disapprove of sexual violence, the 'opportunistic rapes typically then become more public, more frequent, and more violent, growing indistinguishable from and becoming part of the organized rapes committed at least in part to inflict widespread terror and/or harm on the targeted group'.[234] Thus, while sexual violence may at first appear unintended, it is often connected to the commission of other intended crimes. JCE III captures the reality of the way in which this violence unfolds.[235]

In sum, in addition to agreeing with the decisions affirming the customary status of JCE III, we believe JCE III's ability to capture the unique contextual circumstances under which sexual violence is often perpetrated in times of conflict or mass violence provides yet another compelling reason to push back against the critique of JCE III. The importance of the JCE III contextual analysis of SGBV crimes is illustrated in the final trial judgment in *Prosecutor v. Karadžić*.[236] In convicting Karadžić for a myriad of JCE III crimes, the Trial Chamber held that it:

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knowing other crimes will probably be committed. As discussed in *infra* Section I, there is a participation and group aspect to the latter that is not necessarily captured by complicity or command responsibility.

[234] K. Askin, 'Prosecuting Gender Crimes Committed in Darfur: Holding Leaders Accountable for Sexual Violence', in S. Totten & E. Markusen (eds.), *Genocide inn Darfur: Investigating the Atrocities in the Sudan* 142 (2009).

[235] As the last Chief Prosecutor of the ICTY observed, '[w]hile rape has historically been considered an opportunistic war crime, we have successfully proved that it is a foreseeable consequence of criminal plans to forcibly expel civilian populations.' ICTY Commemoration: Reflection on 24 Years of Fighting Impunity through International Courts and Tribunals, Statement by S. Brammertz, (New York, 4 Dec. 2017), http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/170512-remarks-by-the-prosecutor.pdf.

[236] *Prosecutor v. Karadžić,* Case No. IT-95-5/18-T, Trial Chamber Judgement, 24 March 2016.

> is convinced beyond reasonable doubt that it was foreseeable to the Accused that persecution through torture, beatings, physical and psychological abuse, rape and other acts of sexual violence, and the establishment and perpetuation of inhumane living conditions in detention facilities as cruel or inhumane treatment, killings, [and] forced labour at the frontline… might be committed by Serb Forces used to carry out the objective of the common plan, during the execution of the common plan, with discriminatory intent.[237]

Thus, we suggest that courts heed customary international law and its attendant liability forms, including JCE III, when assessing liability for SGBV crimes under international criminal law.

B. Article 25(3) of the Rome Statute

Our second recommendation relates to the ICC's interpretation of Article 25(3) of the Rome Statute, in particular the provisions relating to co-perpetration, indirect perpetration, and common purpose liability. As discussed above – and as both scholars and dissenting judges at the ICC have pointed out – the Court's restrictive interpretation of Article 25(3)(a) is neither well-grounded in the Statute nor mandated by customary international law. Moreover, by limiting Article 25(3)(a) to those with control over the crime and, requiring the Court to rely on Article 25(3)(d) in cases of group liability where the facts do not support such a limited interpretation while at the same time applying Article 25(3)(d) differently to crimes of sexual violence than other crimes, the Court has adopted an approach with negative consequences for the prosecution of SGVB crimes. Indeed, although Article 25(3) appears facially neutral in its application to crimes within the jurisdiction of the ICC, the Court's interpretation of these modes of liability, with the recent exception of *Ntaganda*, has adversely impacted the prosecution of SGVB crimes. If the ICC is to fulfil its

[237] *Ibid.* ¶ 3521. Significantly, in its near-final appellate jurisprudence emanating from the armed conflict in the former Yugoslavia, the Appeals Chamber of the Mechanism for International Criminal Tribunals (successor to the ICTY) reaffirmed the *mens rea* and the customary basis of the JCE III doctrine. *See* Prosecutor v. *Karadžić*, Judgment, Case No. MICT-13-55-A, 20 March 2019, ¶ 433.

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mandate, it must recognize and address these issues. We identify here two ways the Court might do this:

1. Adopt a plain reading interpretation of Article 25(3)(a)

One possibility is for the Court to revisit its interpretation of commission under Article 25(3)(a). Rather than interpreting Article 25(3) as requiring a distinction between principals and accessories or importing the control over the crime theory to give effect to this distinction, the Court could adopt a plain reading of the provision, as dissenting judges Fulford and Van den Wyngaert have suggested.[238] There is nothing in the text of Article 25(3) itself that warrants the imposition of the hyper complexity that the Court's early case law has developed, in which the term 'indirect co-perpetrator' is used to describe the responsibility of top-level accused (like Muammar Gaddafi) for crimes committed by their own forces,[239] and the inclusion of a 'common plan' is required for 'committed jointly' under Article 25(3)(a), even though 'common plan' is absent Article from 25(3)(a) and explicitly referenced in Article 25(3)(d). Under standard canons of treaty interpretation, as well as Article 21 of the Rome Statute, looking to plain language should be the starting point of the Court's analysis,[240] as opposed to references to abstract legal theories such as Roxin's control of the crime theory. This might lead not only to 'a simpler, more internationally acceptable and predictable understanding of modes of liability at the ICC'[241] as

[238] Sadat & Jolly, *supra* n.2.

[239] *Situation in the Libyan Arab Jamahiriya*, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, ICC-01/11-13, P.T.Ch. I, 27 June 2011, 6.

[240] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, *entered into force* Jan. 27, 1980, arts. 31 & 32.

[241] Sadat & Jolly, *supra* n. 2, at 785.

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one of us has argued, but also to greater accountability for SGBV crimes. To the extent, for instance, joint commission is interpreted to require some kind of coordinated action[242] (rather than a 'common plan'[243]) and a direct[244] (rather than an 'essential'[245]) contribution, it would likely be more possible to hold perpetrators accountable for the way in which collective sexual violence often unfolds in situations of conflict – again, not necessarily orchestrated, yet nevertheless interconnected with the commission of other intended crimes.[246]

This approach is consistent with that of the *ad hoc* tribunals, which have recognized that perpetrators can be held responsible for sexual violence crimes not only when those crimes clearly form a component of a common plan from the outset, but also when they become part of the group's action over time. In the *Krajišnik* case, for instance, while sexual violence was not part of the group's original plan to forcibly remove Bosnian Muslims and Bosnian Croats from areas of Bosnia, the Trial Chamber found the accused could nevertheless be held liable for the sexual violence, after the prosecution showed that the accused had been informed of the violence, did

[242] *See Lubanga* Trial Judgment (Fulford Opinion, *supra* n.137, at ¶ 16; Ngudjolo Trial Judgment (Van den Wyngaert Opinion, *supra* n. 138, ¶ 32.

[243] *Lubanga* Trial Judgement, *supra* n. 130, ¶ 981.

[244] *See Lubanga* Trial Judgment (Fulford Opinion, *supra* n. 137, at ¶ 16; Ngudjolo Trial Judgement (Van den Wyngaert Opinion, *supra* n.138, ¶ 44.

[245] *Lubanga* Trial Judgement, *supra* n.130, ¶ 999.

[246] While, as we argue in Section IV.B.2. below, a gender competent approach to Article 25(3)(d) might lead to greater accountability for SGBV crimes, we see no reason for the Court to maintain its restrictive approach to Article 25(3)(a), which is not only unsupported by a plain reading of the provision but would unnecessarily limit group-related SGBV crimes to Article 25(3)(d). Reading Article 25(3)(a) in the way we suggest would allow a range of possible forms of liability for SGBV crimes, and permit the Court to use both Articles 25(3)(a) and (d), depending on the facts and circumstances of the case.

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nothing to prevent its recurrence, and persisted in pursuing the group's plan.[247] As the ICTY explained:

> Whether other crimes were "original" to the common objective or were added later is of course a matter of evidence, not logical analysis. The Chamber's preference is for a strictly empirical approach which does not speculate about the crime profile of the original JCE objective, but conceptualizes the common objective as fluid in its criminal means.[248]

While the facts in *Krajišnik* would likely not have met the strict 'common plan' and 'essential' contribution standards required by the control over the crime theory, they would likely be sufficient to hold perpetrators responsible for the sexual violence if the Court adopted a plain reading of Article 25(3)(a).

We underscore that Article 25(3)(a)'s restrictive outcomes depend upon the judicial interpretation of factual evidence admitted by the chamber about the common plan. A tilt toward a broader application of the facts to Article 25(3)(a) is tenable, as demonstrated in *Ntaganda*. There, the Trial Chamber deliberated upon the common plan of the UPC/FPLC, which was to occupy key positions in Ituri through a military operation that involved conducting an attack on Lendu civilians.[249] To understand the common plan, the Chamber examined the overall objective of the

[247] *Prosecutor v. Krajišnik*, Case No IT-00-39-T, Trial Chamber Judgement, 27 September 2006, ¶¶ 1105, 1117-19. Though the Appeals Chamber overturned the conviction for crimes forming part of the expanded plan, this was due to lack of evidence regarding when the common purpose was expanded to include those other crimes and not because of an objection to the notion that an accused can be held liable for an expanded common purpose. *See also Prosecutor v. Radoslav Brđanin*, Case No. IT-, Appeals Chamber Judgement, ¶ 365 (holding that the principal perpetrator does not have to be a member of the JCE as long as there was a common purpose to undertake the crime and one member of the JCE is linked to the perpetrator).

[248] *Prosecutor v Krajisnik* , Case No. IT-00-39-T, Trial Judgement, 27 September 2006, ¶ 1098. The Appeals Chamber confirmed that the means of achieving a common purpose can evolve over time if the JCE members agreed on this expansion of means. *Prosecutor v. Krajisnik*, Case No IT-00-39-A, Appeals Chamber Judgement, 17 March 2009, ¶ 163.

[249] *Ntaganda* Trial Judgment, *supra n*. 14, ¶ 801.

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attacks, including the content of military instructions and direct orders.[250] Likewise, evidence of discussions to plan the operations, months prior to the deployment, and, most notably, a side conversation about infliction of rapes to instil fear on the enemy were contemplated.[251] Accordingly, the *Ntaganda* Chamber viewed the attack to destroy, disintegrate and drive out the Lendu community as an agreement that "inherently involved the targeting of civilians individuals by way of acts of killing and raping as well as … acts of appropriation and destruction" of property.[252] SGBV crimes were integral[253] to execution of the agreement:

> Regarding acts of sexual violence, the Chamber notes that the *unfolding of these acts were like the acts of killings and other acts of physical violence,* a tool used by the UPC/FPLC soldiers and commanders alike to achieve their objectives to destroy the Lendu community The Chamber notes the words pronounced by a UPC/FPLC soldier during a rape and at a moment when many of the victims were raped: he compared the Lendu to non-human elements to be exterminated. It is significant that the UPC/FPLC soldiers killed or attempted to kill many of the civilians they subjected to sexual violence. A survivor compared her experience to dying.[254]

Further, although the Chamber found certain acts of sexual violence not within the co-perpetrators' express understanding of the common plan, it nonetheless found their commission a virtual certainty, given the circumstances prevailing at the time, and therefore part of the plan.[255] As the Chamber stated,

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[250] *Ibid.* ¶ ¶ 802 and 803. The judgment states that Mr. Ntaganda and Salumu Mulenda issued specific and repeated orders to attack the Lendu.

[251] *Ibid.* ¶¶ 293, 799.
[252] *Ibid.* ¶ 809.

[253] The Chambers concluded that by virtue of the agreement to drive the Lendu out of the area, the accused meant beyond reasonable doubt "for civilians be raped and subjected to sexual slavery". *Ibid.* ¶ 810.

[254] *Ibid*, ¶ 805 (emphasis added).

[255] *Ibid*, ¶ 775 ("It is not required that the common plan between individuals was specifically directed at the commission of a crime; it suffices that the common plan contained a critical element of criminality, and that it was virtually certain that the implementation of the common plan would lead to the commission of the crimes at issue.").

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> the co-perpetrators were virtually certain that the implementation of their plan to drive out all the Lendu from the localities targeted during the course of their military campaign… would lead to: (i) the recruitment and active use in hostilities of children under the age of 15 within the UPC/FPLC (Counts 14, 15 and 16); and (ii) the rape and sexual slavery of these children (Counts 6 and 9). Indeed, the Chamber finds that, in the circumstances prevailing in Ituri at the time, the occurrence of these crimes was not simply a risk that they accepted, but crimes they foresaw with virtual certainty.[256]

Thus, *Ntaganda* emphasized the contextualization of all the criminal acts, highlighting the connection between the crimes rather than characterizing the sexual violence as unexpected and unrelated to the other crimes.

Notwithstanding the Chamber's broad approach to the common plan, Ntaganda's liability as an indirect co-perpetrator required the Chamber to assess the accused's control over the crime through his essential contribution to it and resulting ability to frustrate its commission.[257] While it found such control to be present in this case,[258] cases in which sexual violence unfolds as part of the plan but evidence of the accused's control over the crime is less compelling would still likely fail. Moreover, whether *Ntaganda* represents a one-time exception or a partial attempt to correct the Court's previous failures to recognize and understand how sexual violence evolves in the context of collective criminal conduct remains to be seen.

2. *Use gender informed analysis when applying Article 25(3)(d) to SGBV crimes by examining the overall context in which the sexual violence occurred and the role such violence played in the group's common plan.*

The Court appears to be treating SGVB crimes differently than others under Article 25(3)(d), with adverse consequences to their successful prosecution. Yet as the Appeals Chamber underscored in *Đorđević*, sexual violence crimes 'must not be treated differently from other violent

[256] *Ibid,* ¶ 811.

[257] *Ibid.,* ¶¶ 774, 779, 826.

[258] *Ibid.,* ¶ 857.

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acts simply because of their sexual component'.[259] Taking a contextual approach to analysing whether the acts charged formed part of the common plan would help the court avoid isolating and treating SGBV crimes differently from other crimes. As the *Stakić* case discussed above[260] suggests, examining the overall context in which the sexual violence occurred, and the role such violence played in achieving the objectives of the group would allow the Court to properly understand whether sexual violence crimes were part of the common plan, rather than opportunistic or unrelated crimes. Had the Chamber in *Katanga* case taken a similar approach, the result might have been different.

Significantly, taking into account context might also help the Court more accurately assess whether an accused's contribution was made in the knowledge of the intent of the group to commit the crime, an element also required under Article 25(3)(d). According to *Katanga*, this knowledge requirement can be shown either by proving 'the group meant to cause the consequences which constituted the crime' or was 'aware that the crime would occur in the ordinary course of events.'[261] Although the latter phrase – as interpreted by the *Lubanga* Appeals Chamber - requires 'virtual certainty' that the crime will occur[262] (presumably a higher standard than the foreseeability standard in JCE III cases), the factors used by the *ad hoc* tribunals to assess whether SGBV crimes were connected with other crimes, and therefore foreseeable or even

[259] *Đorđević* Appeals Chamber Judgement, *supra* n. 62, ¶ 917.

[260] *See supra* n. 175-176 and accompanying text.

[261] *Katanga* Trial Chamber Judgement, *supra* n. 134, at ¶1627.

[262] *Prosecutor v. Lubanga*, No. ICC-01/04-01/06 A 5, Appeal Chamber Judgement, 1 December 2014, ¶ 447.

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intended, may be equally helpful in meeting this standard.[263] Indeed, while scale and prior commission of SGBV crimes may help show the accused was aware that sexual violence would occur in the ordinary course of events, other factors such as the overall context in which the violence occurred and the objectives of the group may be equally relevant and sufficient to show the requisite knowledge. For instance, in the *Kvočka* case, the ICTY found rape in detention was foreseeable – despite the absence of evidence showing that the accused knew that women had been previously raped in that camp – by drawing common sense inferences from the surrounding circumstances.[264] The Trial Chamber first noted that '[a]pproximately 36 women were held in detention, guarded by men with weapons who were often drunk, violent and physically and mentally abusive and who were allowed to act with virtual impunity." It then concluded that:

> 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. This is particularly true in light of the clear intent of the criminal enterprise to subject the target group to persecution through such means as violence and humiliation.[265]

This approach could be equally helpful in meeting the knowledge requirement in Article 25(3)(d).

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[263] This is because despite differences at the far end of each standard, potentially, there is overlap in the factual situations that are both foreseeable and virtually certain. Moreover, although a full examination of the *mens rea* standard adopted in Article 30 of the Rome Statute is beyond the scope of this article, it is worth noting that the ICC has not always interpreted the phrase 'aware that the crime would occur in the ordinary course of events' as requiring a 'virtual certainty' that it will occur. While this was the standard employed by the *Lubanga* Appeal Chamber, *see supra* n. 262, as well as the *Katanga* Trial Chamber, *Katanga* Trial Chamber Judgement, *see supra* n. 134, at ¶1 776 (citing Prosecutor v. Bemba, Case No. ICC-01/05-01/08-424, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ¶¶ 352-369), an earlier interpretation of this phrase by the *Lubanga* Pre-Trial Chamber included the concepts of *dolus eventualis*. *See* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-803, Decision on the confirmation of charges, 29 January 2009, ¶¶ 351-2. Given the experience of the *ad hoc* tribunals discussed in Section II, the 'virtual certainty' standard may be difficult to prove in SGBV cases, suggesting that the Appeals Chamber may want to revisit this standard and consider adopting the approach taken by the *Lubanga* Pre-Trial Chamber.

[264] *Kvočka* Trial Judgement, *supra* n. 62, ¶ 327.

[265] *Ibid.*

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Interestingly, the Trial Chamber's analysis in *Ntaganda*, although examined under Article 25(3)(a), could be instructive. As discussed earlier, although the Chamber found that the rape and sexual slavery of child soldiers was not within the co-perpetrators' express understanding of the common plan, it nonetheless found the commission of these crimes a "virtual certainty", given the circumstances prevailing at the time, and therefore part of the plan.[266] Indeed, as with *Kvočka*, the Chamber found the overall context in which the violence occurred and the objectives of the group relevant and sufficient to show that the perpetrators were virtually certain that those crimes would be committed. Clearly, if this was adequate to meet the common plan standard under Article 25(3)(a), it would also suffice to meet the knowledge standard under Article 25(3)(d).

V. Conclusion

We conclude by offering a few thoughts about the benefits of adopting these approaches to international criminal law more broadly. Using a contextual approach to assessing foreseeability under JCE III and common purpose liability under the Rome Statute may help international criminal courts and tribunals more accurately apply other modes of liability where foreseeability or constructive knowledge is a required element, such as command responsibility, which makes liable commanders who knew or *should have known* that crimes were – or were about to be – committed by his or her subordinates. In our view, it could have informed the Appeals Chamber in the *Bemba* case, which found that Bemba – who had organized, paid and led a mercenary army – could not be

[266] Ntaganda Trial Judgment, *supra* n. 14, ¶¶ 811.

found liable for the SGBV crimes committed by his troops because, among other things, he was a 'remote' commander.[267]

More generally, acknowledging how sexual violence actually unfolds during times of mass violence and using a contextual approach to assessing common purpose liability or co-perpetration might also help make more visible conduct that is often overlooked in the context of conflict or mass violence, such as sexual violence against males. Although sexual violence against males has been infrequently investigated and prosecuted, it too has played a role in atrocity crimes, especially detention-related violence.[268]

Adopting this approach might also help more accurately explain the motivation of perpetrators, a part of the narrative not often explored by the tribunals. As others have noted, not all perpetrators are deviants. It is sometimes a shockingly ordinary person that participates in atrocity crimes.[269] Taking the time to understand and recognize the context in which violence occurs might help demonstrate more clearly what motivated the perpetrators to act. Understanding these dynamics more clearly will not only help tribunals more accurately characterize the liability of the

[267] *Bemba* Appeals Chamber Judgement, *supra* n. 11. For a critique of the judgement, *see* SáCouto & Sellers, 'The Bemba Appeals Chamber Judgment, *supra* n. 12; L. Sadat, *Fiddling While Rome Burns: The Appeals Chamber's Curious Decision in Prosecutor v. Jean-Pierre Bemba Gombo*, EJIL Talk!, June 12, 2018, *available at* https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo/ ; D. Amann, *In Bemba and Beyond, Crimes Adjudged to Commit Themselves*, EJIL Talk!, June 13, 2018, *available at* https://www.ejiltalk.org/in-bemba-and-beyond-crimes-adjudged-to-commit-themselves/; S. SáCouto, *The Impact of the Appeals Decision in Bemba: Impunity for Sexual and Gender-Based Crimes*, International Justice Monitor, June 22, 2018, *available at* www.ijmonitor.org/2018/06/the-impact-of-the-appeals-chamber-decision-in-bemba-impunity-for-sexual-and-gender-based-crimes/.

[268] *See* P. Sellers and L. Nwoye, 'Conflict-Related Male Sexual Violence and the International Jurisprudence', in M. Zalewski, P. Drumond, E. Prûgl, M. Stern (eds.), *Sexual Violence Against Men and Boys in Global Politics* (Routledge 2018).

[269] *See* S. Mohamed, 'Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law', 124 *Yale Law Journal* 1628 (2015); C. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (Harper Perennial 1998).

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accused but may also help the international community develop more effective prevention strategies.

Finally, it is worth observing that the International Criminal Court is the institution charged with the mandate to carry international criminal law forward at the international level. The ICC is embedded more generally in the international legal system, a legal system in which power imbalances between genders, between rich and poor, between strong and weak play out just as they do in national legal systems. Yet we can and should expect better of the Court – an institution charged with the administration of justice not only for the strong, but especially for the weak. A high level of impunity for SGBV crimes persists at the ICC, even though the situations giving rise to acquittals for SGBV crimes are universally acknowledged to be situations in which rape, sexual slavery and other SGBV crimes are and have been endemic. While much criticism has been directed at the Office of the Prosecutor regarding those acquittals,[270] following the decisions in the *Katanga* and *Bemba* cases, it is now clear that the Court's highly restrictive jurisprudence on modes of liability presents a major obstacle to the successful prosecution of these cases,[271] at least as regards individuals of high rank who did not themselves perpetrate the crimes. This, of course, undermines the very purpose for which the ICC was established, following the Nuremberg and Tokyo precedents. While the Trial Chamber's judgment in *Ntaganda* may represent a partial attempt to right the near-categorical impunity for SGBV crimes seen thus far at the ICC, it is not yet clear if the case will be appealed or what impact it will have on other cases now at trial, such as the *Ongwen*

[270] *See, e.g.*, 'The Bemba Appeals Judgment warrants better investigation and fair trials – not efforts to discredit the decision', *Human Rights in International Justice, Amnesty International* (19 June 2018).

[271] As one scholar wryly observed, the *Bemba* case "arguably completes the unworkability of the system." Niamh Hayes, *comments*, ICC Scholars Forum, Leiden University, June 17, 2018.

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and *Al Hassan* cases.[272] Absent a decisive shift toward – and beyond – the *Ntaganda* approach, the Court's otherwise restrictive jurisprudence presents a cautionary tale about how the elaboration of well-meaning intellectual constructs can deprive legal text of practical force and effect; and how – in spite of the advances made – international criminal law remains, like international law itself, a 'thoroughly gendered system'.[273]

[272] *See Prosecutor v. Dominic Ongwen*, Case No.ICC-02/04-01/15, at https://www.icc-cpi.int/uganda/ongwen, and *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18, at https://www.icc-cpi.int/mali/al-hassan.

[273] Charlesworth, Chinkin & Wright, *supra* n. 26, at 615.