PROSECUTING SEXUAL VIOLENCE IN CONFLICT AND THE FUTURE OF THE COMMON CRIMINAL PURPOSE AT INTERNATIONAL CRIMINAL LAW

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Sexual violence has long been considered an incidental crime, unrelated to the wider context of a conflict. In practice, this misconception can result in sexual violence unconsciously being subjected to a higher standard of proof than other crimes before it can be considered within the common criminal purpose of a criminal group. While the International Criminal Tribunal for the former Yugoslavia (ICTY) has established a robust body of jurisprudence in relation to sexual violence, sexual violence crimes are often relegated to "natural and foreseeable" consequences but outside of the execution of a common criminal plan. Unlike the ICTY, the International Criminal Court (ICC) does not have the luxury of a mode of liability encompassing crimes that fall outside the common purpose.

As the mandate of the ICTY has come to an end at the close of 2017, it is important to reflect on what the legacy of the ICTY might mean for holding accountable those committing atrocities in conflicts today and in the future. This article considers the challenges in prosecuting conflict-related sexual violence in international criminal courts and tribunals. It looks at the manner in which sexual violence was found to fall outside the common purpose in a number of Kosovo cases before the ICTY and puts forward potential tools that could be used to ensure that, in the minds of judges, sexual violence plays a prominent role in the common criminal purpose.

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I INTRODUCTION

Lauded as a demonstration of international law's success in condemning sexual violence, nearly 60 per cent of the 161 individuals indicted by the International Criminal Tribunal for the former Yugoslavia (ICTY) were charged with sexual violence crimes.[1] One third of those convicted have been found guilty of crimes involving sexual violence.[2]

ICTY Chief Prosecutor, Serge Brammertz, attributes the success in prosecuting sexual violence to the mode of liability of extended joint criminal enterprise.[3] Joint criminal enterprise is a form of individual criminal liability, applicable where a group of persons act pursuant to a common criminal purpose.[4] Basic joint criminal enterprise imputes liability to individuals for crimes intended as part of that common purpose.[5] Extended joint criminal enterprise extends liability to crimes that, while outside the common criminal purpose, were natural and foreseeable consequences of its execution.[6]

On 23 January 2014, the ICTY Appeals Chamber in *Prosecutor v Šainović* reversed acquittals of three high-level military and political officials for persecution through sexual violence charged in relation to their role in the forcible displacement of hundreds of thousands of Kosovo Albanians in 1999.[7] Four days later, the Appeals Chamber in the *Prosecutor v Đordević* case also reversed the acquittal of another high-level political official for persecution through sexual violence, arising from his role in the same forcible displacement of Kosovo Albanians.[8] In each instance, the Appeals Chamber found that

1 Interview with Serge Brammertz, Chief Prosecutor of the ICTY (Jamille Bigio, Council on Foreign Relations, Council in the Women and Foreign Policy Program, 13 June 2017) transcript provided by Council on Foreign Relations (New York).

2 See the Legacy website of the ICTY "Crimes of Sexual Violence" (September 2016) <www.icty.org> and the analysis there.

3 Interview with Brammertz, above n 1.

4 *Prosecutor v Tadić (Judgment)* ICTY Appeals Chamber T-94-1-A, 15 July 1999 at [190].

5 At [196].

6 At [204].

7 *Prosecutor v Šainović (Judgment)* ICTY Appeals Chamber IT-05-87-A, 23 January 2014. The accused were Nebojša Pavković, Commander of the 3rd Army of the Vojska Jugoslavije, Nikola Šainović, the Deputy Prime Minister of the Federal Republic of Yugoslavia, and Sreten Lukić, head of the Ministry of Interior Police staff of Kosovo. Vladimir Lazarević, the fourth appellant in the proceeding, appealed his convictions and sentence on grounds unrelated to joint criminal enterprise.

8 *Prosecutor v Đorđević (Judgment)* ICTY Appeals Chamber IT-05-87/1-A, 27 January 2014. The accused

persecution through sexual violence, while falling outside the common purpose, was a natural and foreseeable consequence of the mass forcible displacement to all those accused.

In 2016, the International Criminal Court (ICC) convicted Germain Katanga, leader of the militia group *Forces de Résistance Patriotique d'Ituri* (FRPI) in the Democratic Republic of Congo, of charges of: murder as a crime against humanity; and murder, attacking a civilian population, destruction of property and pillaging as war crimes. General Katanga was convicted on the basis of his role in a common criminal plan to wipe out a village.[9] He was acquitted of sexual violence crimes.[10] The reason he was acquitted was that, under the Rome Statute, where a group of persons acts with a common criminal purpose (for example a militia group executing a massacre) an individual may only be found criminally responsible for those crimes that fall within the common purpose of that criminal group.[11] The ICC found the common criminal purpose did not include sexual violence crimes.[12]

Šainović, *Đordević* and *Katanga* illustrate how sexual violence often appears to fall outside the common criminal purpose. That trend can be attributed to pervasive assumptions about the nature of sexual violence, which relegate sexual violence into the realm of less serious, less violent, and less public crimes.

This perception that sexual violence is somehow less serious cannot be countenanced; not only because it fails to rightfully place sexual violence amongst the most serious crimes, but in practice it results in sexual violence being considered to fall outside the common criminal purpose and consequently, at the ICC, outside the limits of individual liability. This article considers the place of sexual violence in international law, the prejudices that prevent its parity with other violent crimes, and what lessons can be learned for effectively articulating the common criminal purpose to prove why sexual violence should be included within it.

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was Assistant Minister to the Serbian Minister of Internal Affairs and Chief of the Public Security Department, Vlastimir Đorđević.

9 *Prosecutor v Katanga (Judgment)* ICC Trial Chamber II ICC-04/04-01/07, 7 March 2014.

10 At [1664].

11 Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002), art 25(3).

12 *Katanga*, above n 9, at [1664].

II SEXUAL VIOLENCE AND INTERNATIONAL CRIMINAL LAW

Sexual violence has been the subject of centuries of inaction in international law.[13] A historically patriarchal system, international criminal law has "neglected to enumerate, condemn, and prosecute" sexual violence.[14]

Sexual violence has been trivialised compared to the masculine concept of "more serious" physical violence at international law.[15] Trivialisation subordinates sexual violence to other crimes.[16] The perception that sexual violence is less serious than other violent crimes is represented in international humanitarian law instruments. For example, rape and sexual violence are distinctly absent from the grave breaches provisions of the Geneva Conventions and the fundamental guarantees of Additional Protocol I.[17] Where international humanitarian law instruments include sexual violence, those instruments evaluate the crime based on the harm done to the victim's honour, modesty or chastity.[18] For example, the Fourth Geneva Convention describes rape, enforced prostitution and any form of indecent assault as an attack on a woman's "honour".[19] Moreover, Additional Protocols I and II categorise crimes of sexual violence as "outrages upon personal dignity", as distinct from acts of "violence to the life, health, or physical or mental well-being of persons".[20]

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13 Michelle Jarvis and Elena Martin Salgado "Future Challenges to Prosecuting Sexual Violence under International Law: Insights from ICTY Practice" in Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds) *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, Cambridge, 2013) 101 at 102.

14 Kelly D Askin "Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles" (2003) 21(2) Berk J Int L 288 at 295.

15 Alona Hagay-Frey *Sex and Gender Crimes in the New International Law*: *Past, Present, Future* (Martinus Nijhoff Publishers, Leiden, 2011) at 3.

16 At 36.

17 Patricia Viseur Sellers "Individual(s') Liability for Collective Sexual Violence" in Karen Knop (ed) *Gender and Human Rights* (Oxford University Press, Oxford, 2004) 153 at 190.

18 Valerie Oosterveld "Sexual Slavery and the International Criminal Court: Advancing International Law" (2004) 25 Mich J Intl L 605 at 613; and United Nations Division for the Advancement of Women *Sexual Violence and Armed Conflict: United Nations Response* (United Nations Department of Economic and Social Affairs, April 1998) at 6.

19 Hagay-Frey, above n 15, at 69; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) 75 UNTS 287 (opened for signature 12 August 1949, entered into force 21 October 1950), art 27.

20 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3 (opened for signature 12 December 1977, entered into force 7 December 1978), art 75(2); and Protocol Additional to the Geneva

Rape and sexual violence are not secondary to other violent crimes. Sexual violence has grave consequences for victims and their communities.[21] It can include considerable physical violence, including pain, injury, sexually transmitted infection, infertility or unwanted pregnancy. Sexual violence may also elicit a wider range of harms.[22] Psychological trauma includes distress, shame, isolation and guilt, sleeping and eating disorders, depression, and self-harm or suicide. Such harms include psychological damage to the victim and to her body politic.[23] Victims may be ostracised by their families or communities. Victims' spouses, partners or children also experience the trauma of guilt, indignity or shame, particularly if they witnessed the attack.[24]

Despite improvements in recent years, the misconception that sexual violence constitutes less serious offending can still have a considerable impact in practice. For example, at the establishment of the International Criminal Tribunal for Rwanda (ICTR), Human Rights Watch and the International Federation for Human Rights reported there was a widespread perception among the Tribunal investigators that rape is somehow a "lesser" or "incidental" crime not worth investigating.[25] In the early days of the ICTY, investigators were recorded making such observations as: "I've got ten dead bodies, how do I have time for rape?"[26]

Rape and other acts of sexual violence tend to be considered "opportunistic" or unrelated to the wider conflict in which they are committed.[27] Sexual

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Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1125 UNTS 609 (opened for signature 12 December 1977, entered into force 7 December 1978), art 4(2).

21 Rebecca L Haffajee "Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory" (2006) 29 Harv JL & Gender 201 at 218.

22 Fionnuala Ní Aoláin, Dina Francesca Haynes and Naomi Cahn "Criminal Justice for Gendered Violence and Beyond" (2011) 11 Int CLR 425 at 428–429.

23 At 429.

24 Peter Maurer "Q&A: The ICRC's Approach to Sexual Violence in Armed Conflict" (2014) IRRC 96(894) 449 at 450.

25 Rhonda Copelon "Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law" (2000) 46 McGill LJ 217 at 224; and Human Rights Watch Africa, Human Rights Watch Women's Rights Project and *Fédération Internationale des Ligues des Droits de l'Homme Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (New York, Human Rights Watch, 1996). This report was compiled on the basis of research and interviews conducted in Rwanda in March and April 1996, including an interview with the Deputy Prosecutor of the International Criminal Tribunal for Rwanda.

26 Peggy Kuo "Prosecuting Crimes of Sexual Violence in an International Tribunal" (2002) 34 Case W Res J Int'l L 305 at 311.

27 See, for example, Brammertz, above n 1, and his comments in relation to a judicial perception of sexual

violence is often linked to sexual desire and viewed as "a detour, a deviation, or the acts of renegade soldiers … pegged to private wrongs and … [thus] not really the subject of international humanitarian law".[28] As will be discussed, where cases do come before the courts, the perception that rape is less serious, less violent and unconnected to wider conflict makes it difficult to link sexual violence to the common criminal plan or purpose, especially where the accused are high-level senior political or military leaders who are not the direct perpetrators.[29]

Like any crime, an instance of sexual violence during conflict might be an individual act unrelated to the wider conflict. However, rape is often not simply an unfortunate by-product of conflict. It can be directly linked with conflict, and orchestrated and foreseeable.[30] As the ICC Office of the Prosecutor has observed, situations before international criminal tribunals and courts show sexual violence is often widespread and used systematically as a "tool of war or repression".[31] The term "rape as a weapon of war" refers to sexual violence as being systematic, pervasive and orchestrated.[32] Sexual violence can be used to dishonour and demoralise the enemy, to destabilise, disempower and terrorise whole communities, or to effect genocide through deliberate impregnation or termination of existing pregnancies to disrupt the victims' on-going existence as a defined ethnic group.[33]

The United Nations Security Council has made some progress towards acknowledging the seriousness of sexual violence crimes. It has emphasised the obligation on all states to ensure that all victims of sexual violence, particularly

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violence as a kind of "collateral damage".

28 Susana Sacouto and Katherine Cleary "The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court" (2009) 17 AM U J Gender Soc Pol'y & L 339 at 348; and Jarvis and Salgado, above n 13, at 102.

29 Barbara Goy, Michelle Jarvis and Giulia Pinzauti "Contextualizing Sexual Violence and Linking it to Senior Officials: Modes of Liability" in Baron Serge Brammertz and Michelle Jarvis (eds) *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, Oxford, 2016) 220 at 244.

30 Blake Evans-Pritchard "ICC Restates Commitment on Crimes of Sexual Violence" (10 June 2014) Institute for War and Peace Reporting <www.iwpr.net>.

31 Office of the Prosecutor *Policy Paper on Sexual and Gender-Based Crimes* (International Criminal Court, June 2014) at [75].

32 Nicola Henry "The Fixation on Wartime Rape: Feminist Critique and International Criminal Law" (2014) 23(1) S & LS 93 at 95.

33 Lucy Fiske and Rita Shacke "Ending Rape in War: How Far Have We Come?" (2014) 6 CCSJ 123 at 127.

women and girls, have equal protection under the law and equal access to justice, recognising that:[34]

> … women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instil fear in, disperse, and/or forcibly relocate civilian members of a community or ethnic group.

Where sexual violence is seen as a tool of war and considerable violence, it is easier to conceptualise it as part of the tapestry of crimes committed in wartime. The jurisprudence of the ad hoc war crimes tribunals has, to some extent, represented a step forward, because sexual violence crimes have come to be seen as constituting war crimes, crimes against humanity, torture and a form of genocide.[35] After initial strategic and investigative hurdles, the ICTY has concluded a body of successful prosecutions for sexual violence.[36] Moreover, the ICTR's landmark judgment in *Akayesu* significantly advanced the idea that rape is a form of genocide, stating that such acts are one of the "worst ways" to commit "infliction of serious bodily and mental harm on the victims".[37]

However, there is still work to be done. When considering individual criminal liability, sexual violence must be placed within the wider context of armed, and especially ethnic, conflict.[38] Often sexual violence is accepted as a natural and foreseeable consequence of the execution of a common criminal purpose to take, or maintain, control of a particular territory. But, as alluded to, sexual violence is regularly found to fall outside the common purpose. In this respect, the forms of individual criminal liability available at the ICC pose a particular challenge.

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34 Resolution 1820 (2008) S/Res/1820 (2008) at 1.

35 Navanethem Pillay "Address – Interdisciplinary Colloquium of Sexual Violence as International Crime: Sexual Violence: Standing by the Victim" (2012) 35(4) Law & Soc Inquiry 847 at 848; Sellers, above n 17, at 190; *Prosecutor v Akayesu (Judgment)* ICTR Trial Chamber I ICTR-96-4-T, 2 September 1998; *Tadić*, above n 4; *Prosecutor v Furundžija (Judgment)* ICTY Trial Chamber IT-95-17/1-T, 10 December 1998; *Prosecutor v Delalić (Judgment)* ICTY Trial Chamber IT-96-21-T, 16 November 1998; *Prosecutor v Kunarac (Judgment)* ICTY Trial Chamber IT-96-23-T, IT-96-23/1-T, 22 February 2001; and *Prosecutor v Krstić (Judgment)* ICTY Trial Chamber IT-98-33-T, 2 August 2001.

36 Niamh Hayes "Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court" in William A Schabas, Yvonne McDermott and Niamh Hayes (eds) *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate Publishing, Surrey, 2013) 7 at 11.

37 *Akayesu*, above n 35, at [731].

38 Office of the Prosecutor, above n 31, at [75].

III THE CHALLENGE OF PROSECUTING SEXUAL VIOLENCE AT THE ICC

A Individual liability at the ICC

The ICC is a permanent United Nations court with jurisdiction over the most serious crimes of concern to the international community.[39] The Rome Statute, taking effect in 2002, is the founding document of the ICC. The Preamble records "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity" and recognises that such grave crimes "threaten the peace, security and well-being of the world".[40] State signatories are determined to put an end to impunity for the perpetrators of these crimes and thus contribute to their prevention.[41]

To establish liability in relation to a high-level military or political leader at the ICC, the prosecutor must first prove commission of the underlying crime.[42] Individual criminal responsibility of the accused is then triggered for individuals who, by means of formal or informal groups, participate in collective criminal conduct related to that crime.[43] The modes of individual responsibility applied at the ICC are contained in arts 25 and 28 of the Rome Statute.[44]

Article 25(3) differentiates between four levels of participation: commission (art 25(3)(a)); instigation and ordering (art 25(3)(b)); assistance (art 25(3)(c)); and contribution to a group crime (art 25(3)(d)). The two relevant paragraphs involving common purpose liability are arts 25(3)(a)[45] and 25(3)(d). They provide:

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39 Rome Statute, art 1.

40 Preamble to the Rome Statute.

41 Preamble to the Rome Statute.

42 Article 25(3).

43 Article 25(3).

44 Article 28 relates to command responsibility and as such is not relevant for our purposes.

45 Article 25(3)(a) concerns commission of the crime through, again, several different levels: direct perpetration, where the accused physically carries out the elements of the offence; co-perpetration, where two or more people act together; indirect perpetration, where the accused acts through an agent; and indirect co-perpetration, where two or more people act together to bring about their criminal plan by using other persons as their agents: Women's Initiatives for Gender Justice *Modes of Liability: A review of the International Criminal Court's current jurisprudence and practice* (Expert Paper, November 2013) at 29. The formulation of four levels of liability was, however, challenged by Judge Van den Wyngaert in her opinion in *Prosecutor v Ngudjolo (Concurring Opinion of Judge Van den Wyngaert)* ICC Trial Chamber II ICC-01/04-02/12, 18 December 2012.

> Article 25
>
> Individual criminal responsibility
>
> …
>
> 3) In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
>
> …
>
> d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> ii) Be made in the knowledge of the intention of the group to commit the crime;
>
> …

Article 25(3)(a) is a form of principal liability whereas art 25(3)(d) is a form of accessorial liability.[46] Liability under art 25(3)(a) requires essential contribution to the common plan.[47] Article 25(3)(d) is a residual or catch-all mode of liability that encompasses the broad category of contribution "in any other way … to the commission or attempted commission of such a crime by a group of

46 *Prosecutor v Lubanga (Decision on the confirmation of charges)* ICC Pre-Trial Chamber I ICC-01/04-01/06, 29 January 2007 at [337]. The Trial Chamber in *Katanga*, above n 9, at [1384] discusses the distinction between principal and accessorial liability and how that distinction plays out within art 25(3). The Trial Chamber observed the term "principal" describes persons "whose conduct *constitutes* commission of the crime per se" whereas the term "accessory" describes persons "whose conduct is solely *connected* to the commission of a crime by another person".

47 *Lubanga*, above n 46, at [347].

persons acting with a common purpose".[48] Case law requires contribution "in any other way" to at least be "significant".[49]

Aside from different requisite levels of contribution, the *Mbarushimana (Confirmation of Charges Decisio*n) Pre-Trial Chamber defined "a group of persons acting with a common purpose" in the context of art 25(3)(d) as "functionally identical" to an "agreement or common plan between two or more persons" under art 25(3)(a).[50]

In relation to framing the common purpose, the *Katanga* Trial Chamber stated, in the context of art 25(3)(d), that:[51]

> … definition of the criminal purpose of the group presupposes specification of the criminal goal pursued; its scope, by pinpointing its temporal and geographic purview; the type, origins or characteristics of the victims pursued; and the identity of the members of group, although each person need not be identified by name.

The purpose must be to commit a crime or encompass its execution.[52] A political and strategic goal that also entails criminality or the execution of a crime may constitute a common purpose.[53] Proof that the common purpose was previously arranged is not required; it may materialise extemporaneously.[54]

Participants in the common purpose, in the context of art 25(3)(d), must harbour the same intent: they must mean to cause that consequence which constitutes the crime or be aware that the crime will occur in the ordinary course of events.[55] That mens rea requirement reflects art 30 of the Rome Statute, which in turn defines the requirements of intent and knowledge.[56] An accused must intend to engage in the conduct that constitutes a contribution

48 At [337].

49 By use of the term "significant contribution" the Trial Chamber stressed a contribution "which may influence the commission of the crime" and noted "[c]onduct inconsequential and immaterial to the commission of the crime" was not sufficient to constitute contribution within the meaning of art 25(3)(d). See *Katanga*, above n 9, at [1632].

50 *Prosecutor v Mbarushimana (Decision on the confirmation of charges)* ICC Pre-Trial Chamber I ICC-01/04-01/10, 16 December 2011 at [271].

51 *Katanga*, above n 9, at [1626].

52 At [1627].

53 At [1627].

54 At [1626].

55 At [1627].

56 At [1637].

and also must be aware that such conduct contributed to the activities of the group of persons acting with a common purpose.[57] Knowledge is inferred from the relevant facts and circumstances and must be connected to the group's intention to commit the specific crimes.[58]

While the ICTY has considered joint criminal enterprise is "closely akin"[59] and "substantially similar" to art 25(3)(d) of the Rome Statute,[60] the ICC has rejected joint criminal enterprise, instead favouring art 25(3) as an exhaustive list of the modes of liability available.[61] Importantly, therefore, the ICC does not have a direct equivalent to extended joint criminal enterprise, where liability can be founded in crimes that are not within the common criminal purpose but are nevertheless natural and foreseeable consequences of its execution. The framing of the common purpose is therefore crucial for the successful prosecution of sexual violence at the ICC.[62]

B Prosecutor v Katanga

Prosecutor v Katanga and Ngudjolo Chui was the first case involving sexual violence crimes to complete full trial at the ICC, the Court giving judgment in 2014.[63] The case centred on an attack on a village in the Ituri region of the Democratic Republic of Congo by militia groups, the *Force de résistance patriotique en Ituri* (FRPI) and the *Front des nationalistes et intégrationnistes* (FNI) on 24 February 2003. Generals Katanga and Ngudjolo were the alleged commanders of the FRPI and FNI, respectively.[64]

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57 At [1639].

58 At [1642].

59 *Lubanga,* above n 46, at [335].

60 *Tadić*, above n 4, at [222].

61 *Prosecutor v Lubanga (Warrant of Arrest)* ICC Pre-Trial Chamber I ICC-01/04-01/06, 10 February 2006; Stefano Manacorda and Chantal Meloni "Indirect Perpetration *versus* Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?" (2011) 9 JICJ 159 at 163–64.

62 Goy, Jarvis and Pinzauti, above n 29, at 259.

63 *Katanga*, above n 9.

64 On 21 November 2012, Trial Chamber II severed the cases against Ngudjolo and Katanga. Ngudjolo was charged with seven counts of war crimes and three counts of crimes against humanity. However, he was subsequently acquitted of all charges under art 25(3)(a) as the Chamber concluded that the three key witnesses called by the Prosecution to establish Ngudjolo's authority as lead commander of the Lendu militia as required under that article were not credible. The Appeals Chamber confirmed the Trial Chamber's reasoning. See *Prosecutor v Ngudjolo Chui (Judgment pursuant to article 74 of the Statute)* ICC Trial Chamber II ICC-01/04-02/12, 18 December 2012 at [7]–[10]; and *Prosecutor v Ngudjolo Chui (Judgment on the Prosecutor's appeal against the decision of Trial Chamber II*

General Katanga was charged under art 25(3)(a) with seven counts of war crimes[65] and three counts of crimes against humanity.[66] The Trial Chamber unanimously acquitted Katanga of all charges under art 25(3)(a) liability.[67] The Chamber found that the "absence of a centralised and effective chain of command" meant that the militia were not an organised apparatus of power, nor did Katanga have the extent of control requisite for liability under art 25(3)(a).[68] The majority, Judge Van den Wyngaert dissenting,[69] then re-characterised the mode of liability for all charges, with the exception of using child soldiers, in order to consider Katanga's responsibility as an accessory to the crimes under art 25(3)(d).[70]

The majority found the underlying charges were established because the evidence proved beyond reasonable doubt that the Ngiti combatants of the Walendu-Bindi *collectivité* had committed the crimes.[71] The manner in which the village was attacked from all directions, and the fact the villagers were "systematically targeted" in accordance with a "regular pattern and violence" confirmed the "existence of a common purpose of a criminal nature" held by the Ngiti militia with regard to the village population.[72] The Trial Chamber subsequently convicted Katanga as an accessory for the crimes of wilful killing, attacks against the civilian population, pillaging and destruction of property.[73]

The Trial Chamber acquitted Katanga as an accessory for the crimes of rape and sexual slavery.[74] The Chamber concluded that rape and sexual slavery

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entitled "Judgment pursuant to article 74 of the Statute") ICC Appeals Chamber ICC-01/04-02/12-A, 7 April 2015.

65 Wilful killing, directing an attack against a civilian population, destruction of property, pillaging, using child soldiers under the age of 15 years, sexual slavery and rape: *Katanga*, above n 9, at [7].

66 Murder, sexual slavery, and rape: at [7] and [10].

67 *Katanga*, above n 9, at [1421].

68 At [1420].

69 The Judge's view was that the re-characterisation of the facts went well beyond the facts and circumstances of the Confirmation Decision and failed to respect Katanga's rights to a fair trial and dissented fundamentally on the reading of the evidence as a whole, finding that the evidence as to art 25(3)(d) liability was insufficient to meet the standard of beyond reasonable doubt: *Prosecutor v Katanga (Minority Opinion of Judge Van den Wyngaert)* ICC Trial Chamber II ICC-04/04-01/07, 7 March 2014 at [2]–[3].

70 *Katanga*, above n 9, at [1484].

71 At [1652].

72 At [1656]–[1657].

73 At [1691].

74 At [1664].

did not fall within the common purpose.[75] There was no evidence to establish that the sexual violence crimes were committed "on a wide scale and repeatedly" during the attack, or that the "obliteration of the village of Bogoro perforce entailed the commission of such acts". [76] Moreover, it was not established that rape or sexual slavery had been committed by the Ngiti combatants before the attack on Bogoro,[77] which may have pointed towards the necessary inclusion of sexual violence in the Ngiti militia's design to attack the predominately Hema population. Finally, the Chamber found that "women who were raped, abducted and enslaved were specifically 'spared'" and "evaded certain death by claiming to be other than of Hema ethnicity".[78]

A unique challenge in the *Katanga* case was that, in part, the finding that the sexual violence crimes did not fall within the common criminal purpose was a result of the fact that the female victims of the sexual violence were not of the same ethnicity as other victims targeted by the common criminal purpose. While that particular issue poses an extra level of complexity outside the focus of this article, a more general observation can be made: sexual violence, alone, was found to have been outside the common purpose of the Ngiti combatants. Accordingly, General Katanga was not convicted for commission as a principal or as an accessory. This is in contrast to the other violent crimes established to be within the common purpose.

IV INDIVIDUAL LIABILITY AT THE ICTY: JOINT CRIMINAL ENTERPRISE

A Individual liability at the ICTY

The ICTY was a United Nations ad hoc tribunal formally established in 1993 with jurisdiction over the crimes that took place during the conflicts in the Balkans in the late twentieth century. The ICTY was established in an international environment that sought justice for sexual violence crimes in armed conflict.[79] The United Nations Security Council singled rape out as one of the particularly reprehensible crimes committed during the conflict in

75 At [1664].

76 At [1663].

77 At [1663].

78 At [1663].

79 Jarvis and Salgado, above n 13, at 101.

former Yugoslavia and expressed its commitment to establishing accountability for these crimes as a core part of the ICTY's mandate.[80] Despite that political climate, the ICTY faced initial strategic and investigative hurdles.[81] In the early days of the ICTY, the rate of convictions for sexual violence was low compared to other forms of violent crimes.[82]

The turning point, according to the ICTY's Chief Prosecutor, came with the Tribunal's acceptance that military and political leaders could be individually responsible for foreseeable crimes.[83] For example, where a leader sent troops into a village intending that physically violent crimes would be committed it may also have been foreseeable to her or him that sexual violence would take place. If sexual violence is foreseeable, the leader in question can be convicted for those physically violent and sexually violent crimes.[84]

Under the ICTY Statute,[85] personal liability is triggered for individuals who, by means of formal or informal groups, participate in collective criminal conduct. Individual responsibility may involve personal commission or liability for actions of others. Article 7(1) provides:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

The concept of joint criminal enterprise as a mode of liability was established principally in the *Tadić* appeal judgment.[86] Although the Statute makes no explicit reference to "joint criminal enterprise", participation in a joint criminal enterprise is also a form of commission under art 7(1).[87] Joint criminal enterprise imputes criminal responsibility to a defendant for her or his participation

80 SC Res 808, S/Res/808 (1993); and SC Res 827, S/Res/827 (1993).

81 See the comment cited above in Kuo, above n 26, at 311: "I've got ten dead bodies, how do I have time for rape?"

82 See Interview with Brammertz, above n 1.

83 See Interview with Brammertz, above n 1. In fact, William Schabas has described extended joint criminal enterprise as the "magic bullet" of the Office of the Prosecutor, raising his concern regarding the potential for broad interpretation of its liability-imposing provisions: Schabas "Mens Rea and the International Criminal Tribunal for the Former Yugoslavia" (2003) 37(4) New Eng L Rev 1015 at 1032.

84 Interview with Brammertz, above n 1.

85 As adopted by SC Res 827 (1993), above n 80.

86 *Tadić*, above n 4.

87 *Prosecutor v Kvočka (Judgment)* ICTY Appeals Chamber IT-98-30/1-A, 28 February 2005 at [79].

in a group's common criminal purpose. Any person who contributes to the commission of crimes by the group in execution of the common criminal purpose may be liable for crimes within the common purpose and those that, while outside the common purpose, were reasonably foreseeable.[88]

There are three categories of joint criminal enterprise: basic, systemic and extended. The actus reus requirements for all categories are identical:[89]

i) a plurality of persons;

ii) the existence of a common purpose, which amounts to or involves the commission of a crime provided for in the Statute; and

iii) contribution to the common purpose.

A plurality of persons must be identified, but it is not necessary to identify every person by name.[90] The plurality need not be organised in a military, political, or administrative structure.[91] In cases where the principal perpetrator of a particular crime is not a member of the joint criminal enterprise, members of a joint criminal enterprise may still be held liable for crimes committed by the principal perpetrator where the crime in question forms part of the common purpose.[92] More importantly, where the principal perpetrator is not a member of the joint criminal enterprise, the court must establish the crime can be imputed to at least one member of the joint criminal enterprise and that this member acted in accordance with the common plan.[93]

A common criminal purpose can be expressly criminal, for example, a purpose to kill. It may also amount to or involve the commission of a crime, for example to ensure continued control over a territory to be achieved through forcible displacement.[94] The purpose need not be premeditated. It may materialise extemporaneously.[95]

Contribution to the common purpose need not involve the physical commission of a crime. It may take the form of assistance in, or contribution

88 *Tadić*, above n 4, at [190].

89 At [227].

90 *Prosecutor v Brđanin (Judgment)* ICTY Appeals Chamber IT-99-36-A, 3 April 2007 at [430].

91 *Tadić*, above n 4, at [227].

92 *Brđanin*, above n 90, at [410].

93 At [430].

94 Discussed in the context of *Prosecutor v Milutinović* below.

95 *Tadić*, above n 4, at [227].

to, the execution of the common plan or purpose.[96] Although the contribution need not be necessary or substantial, it should at least be a significant contribution to the crimes charged.[97] For example, in a common purpose to kill, participation may involve inflicting non-fatal violence upon the victim or providing material assistance to the perpetrators.

The mens rea requirements differ according to the category of joint criminal enterprise:[98]

i) Basic joint criminal enterprise requires a voluntary contribution to the common purpose and the accused to intend, together with other members, the crime committed as part of the plan.[99]

ii) Systemic joint criminal enterprise addresses the specific subject matter of concentration camps[100] and as such is not relevant for the purposes of this article.

iii) Extended joint criminal enterprise concerns circumstances where a member or tool of a member of the plurality commits an act that, while not a crime intended by the plurality, was nevertheless a natural and foreseeable consequence of executing the common purpose.[101] The *Tadić* Appeals Chamber gave the following example:[102]

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

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96 *Prosecutor v Vasiljević, (Judgment)* ICTY Appeals Chamber IT-98-32-A, 25 February 2004 at [100].

97 *Brđanin*, above n 90, at [430]. The Trial Chamber in *Prosecutor v Milutinović (Judgment)* ICTY Trial Chamber IT-05-87-T, 26 February 2009 at [105] observed that the accused's acts and omissions "must form a link in the chain of causation". Relevant for our purposes, an accused's leadership status and approving silence militates in favour of finding that her or his participation was significant. Other factors to consider include the size of the enterprise, the functions performed by the accused and her or his efficiency in performing them and any efforts made by the accused to impede the efficient functioning of the joint criminal enterprise.

98 *Tadić*, above n 4, at [228].

99 At [196].

100 At [202].

101 At [204].

102 At [220].

Something more than negligence is required for extended joint criminal enterprise.[103] The requisite standard is of advertent recklessness.[104] While the accused need not intend the result, the accused must have been aware the actions of the group were most likely to lead to that result.[105] There need not be a "probability" that a crime would be committed, only that the possibility of a crime being committed is "substantial" such that it is foreseeable to the accused.[106]

B Introduction to the ICTY Kosovo cases

In 1989, the Socialist Federal Republic of Yugoslavia (SFRY) comprised six republics and two autonomous provinces. The autonomous provinces, Kosovo and Vojvodina, also formed part of the Socialist Republic of Serbia. After the SFRY broke apart, a political crisis developed in Kosovo throughout the 1990s, during which time the newly formed Federal Republic of Yugoslavia (FRY) and Serbia sought to restrict the substantial autonomy previously enjoyed by Kosovo.[107]

The crisis culminated in an armed conflict involving forces of the FRY and Serbia and the Kosovo Liberation Army (KLA) from mid-1998. During that armed conflict excessive and indiscriminate force was used by the FRY army, the Vojska Jugoslavije (VJ) and Ministry of the Interior Police force (MUP). Diplomatic efforts failed and, in March 1999, NATO forces began an aerial bombardment campaign against targets in the FRY. During the NATO air campaign, the FRY and Serbian forces implemented a widespread and systemic campaign of terror and violence resulting in mass displacement of the civilian population. In the first week of the NATO bombing, over 300,000

103 *Tadić*, above n 4, at [220].

104 At [220].

105 At [220]. In New Zealand, the term "advertent recklessness" is used to describe subjective recklessness, see for example *Cameron v R* [2017] NZSC 89, [2018] 1 NZLR 161 at [67] and the footnotes there; and *Couch v Attorney-General* [2010] NZSC 27, [2010] 3 NZLR 149 at [46]. However, some questions have been raised as to whether the recklessness standard at the ICTY is objective or subjective. See further Antonio Cassese *International Criminal Law* (2nd ed, Oxford University Press, New York, 2008) at 200–201; and A Danner and J Martinez "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law" (2005) 93(1) CLR 75 at 106.

106 *Prosecutor v Karadžić (Decision on Radovan Karadžić's Motions Challenging Jurisdiction (Omission Liability, JCE-III — Special Intent Crimes, Superior Responsibility))* ICTY Appeals Chamber IT-95-5/18-AR72.1, IT-95-5/18-AR72.2, IT-95-5/18-AR72.3, 25 June 2009 at [18].

107 *Milutinović*, above n 97, Vol I at [213]–[221].

Kosovo Albanians crossed borders to Albania and Macedonia. By 1 May 1999, that number was 715,158.[108]

C Prosecutor v Milutinović

Prosecutor v Milutinović (upon appeal, *Šainović)* involved six accused tried for the forcible displacement of Kosovo Albanians in 1999. The accused were alleged to be responsible for deportation, forcible transfer, murder and persecution through, among other things, sexual violence.[109]

The Trial Chamber was satisfied there was a plurality of persons acting in a joint criminal enterprise.[110] Šainović, Pavković and Lukić were found to have been members of this joint criminal enterprise.[111] Milutinović was acquitted.[112] Ojdanić[113] and Lazarević[114] were deemed not to have been joint criminal enterprise members but rather aiders and abettors.

According to the Trial Chamber findings, the common purpose of the joint criminal enterprise was to ensure continued control by the FRY and Serbian Authorities of Kosovo, which was to be achieved by a widespread and systematic campaign of terror and violence to forcibly displace the Kosovo Albanian population both within and outside Kosovo.[115]

When making this finding, the Trial Chamber considered the wider context of historical and political ethnic divides, including "widespread and systemic" attacks to create an "atmosphere of terror", including the "excessive use of force".[116] Evidence of this common purpose included a discernible pattern of forcible displacement, the destruction of Kosovo Albanian identity

108 *Prosecutor v Milutinović (Judgment Summary)* ICTY Trial Chamber IT-05-87-T, 26 February 2009 at 3.

109 *Milutinović*, above n 97, Vol I at [6]. The crime of persecution consists of an act or omission which discriminates in fact and denies or infringes upon a fundamental right laid down in international customary or treaty law (the actus reus); and was deliberately carried out with the intention to discriminate on one of the listed grounds, specifically race, religion or politics: *Prosecutor v Kvočka*, above n 87, at [320].

110 Vol III at [97].

111 Discussed in more detail below.

112 On the basis the Chamber was not satisfied beyond reasonable doubt he made a significant contribution to the joint criminal enterprise: *Milutinović (Judgment Summary)*, above n 108, at 12.

113 On the basis it was not proved beyond reasonable doubt that he shared the intent to ensure continued state control over the province by way of deportation and forcible transfer: at 13.

114 Also on the basis it was not proved beyond reasonable doubt that he shared the intent to ensure continued state control over the province by way of deportation and forcible transfer: at 13.

115 *Milutinović*, above n 97, Vol III at [95].

116 Vol III at [41], [48] and [90]–[91].

documents, the context of ethnic conflict, the disarming of Kosovo Albanians and the arming of Serbs and Montenegrins, attempts to obstruct justice, and partial responsibility for the failure of international peace negotiations.[117]

The Trial Chamber concluded the common purpose was to be achieved through deportation and forcible transfer alone.[118] As there was no clear pattern of murder, sexual assault or destruction of cultural property, the Trial Chamber was not satisfied those crimes fell within the common purpose.[119]

Following the establishment of the first two actus reus requirements, the Trial Chamber individually assessed the contribution of each member to the joint criminal enterprise and mens rea in the following ways.[120]

1 Pavković

Pavković was Commander of the third army of the VJ. The Trial Chamber was satisfied Pavković's actions were voluntary and that he had the intent to ensure continued control by the FRY and Serbian authorities over Kosovo through forcible displacement.[121] "Ineffective" and "manifestly insufficient"[122] measures to protect civilians "contributed to the creation and maintenance of an environment of impunity" among Pavković's soldiers.[123] Information Pavković received before and during the NATO air campaign combined with his awareness of allegations of "excessive and indiscriminate use of force" were indicative of his intent to participate in forcible transfer and deportation.[124]

Pavković's contribution to the joint criminal enterprise was found to have been significant. He possessed extensive de jure powers and command authority over VJ forces and influence that extended further.[125]

The Trial Chamber found that murder in multiple locations and sexual assaults in Beleg and Ćirez were foreseeable to Pavković. Pavković was "aware of the strong animosity" between the Serbs and Kosovo Albanians and

117 *Milutinović*, above n 97, Vol III at [40], [72], [85], [87]–[88] and [92].
118 At [469], [784] and [1133].
119 At [94].
120 At [98].
121 At [772].
122 At [777].
123 At [782].
124 At [774].
125 At [785].

of the context in which the displacement took place. Pavković's "detailed knowledge of events on the ground" put him on notice that murders and sexual crimes would be committed by the VJ and MUP.[126] Pavković issued specific orders that steps were to be taken to prevent the civilian population from being robbed, raped or mistreated, thereby indicating the foreseeability of the crimes to him. He also wrote reports referring to murder and rape committed by volunteers and MUP forces.[127] Accordingly, Pavković was convicted of sexual assault as persecution for the events that occurred in Beleg and Ćirez.[128]

The Appeals Chamber confirmed the Trial Chamber's reasoning. It also reversed the Trial Chamber's finding that three additional sexual assaults committed in Priština in April and May 1999 were not committed with discriminatory intent.[129]

2 *Šainović and Lukić*

Šainović was the Deputy Prime Minister of the FRY.[130] Lukić was the Head of the MUP Staff for Kosovo.[131] The Trial Chamber was satisfied both Šainović's and Lukić's actions were voluntary.[132] Given their awareness of the humanitarian catastrophe[133] and Lukić's awareness of crimes being committed by MUP and VJ members,[134] as well as their continued involvement in the joint criminal enterprise, they were found to have had the intent to forcibly displace the Kosovo Albanian population.[135]

Šainović contributed significantly to the joint criminal enterprise, as his role was to "orchestrate" events in Kosovo by conveying the FRY President's

126 At [785].

127 At [785].

128 At [788]. I note here the Trial Chamber's analysis applied the "probability" threshold to foreseeability, determining whether it was foreseeable to the accused that the sexual assault would be committed: Vol I at [111].

129 *Šainović*, above n 7, at [579]–[600].

130 *Milutinović,* above n 97, Vol III at [285].

131 At [945].

132 At [462] and [1117].

133 At [462]–[463] in relation to Šainović.

134 At [1117], [1123]–[1124] and [1129].

135 Vol III at [463]–[466], and in regard to Lukić at [1117], [1123]–[1124] and [1129].

instructions and co-ordinating the VJ and MUP.[136] Lukić's contribution was significant because he was directly involved in day-to-day operations as de facto commander over MUP forces. He acted as a bridge between high-level military and political leaders and those on the ground in Kosovo.[137]

The Trial Chamber considered, however, that sexual assaults were not reasonably foreseeable to either of the accused. Evidence of Šainović's and Lukić's knowledge only showed specific knowledge of sexual offences in May 1999. The evidence therefore did not demonstrate that sexual assaults committed in March and April in Beleg and Ćirez were reasonably foreseeable.[138] The Trial Chamber therefore acquitted Šainović and Lukić of committing persecution through sexual assault.[139]

Judge Chowhan issued a partially dissenting opinion regarding the foreseeability of sexual assault of Kosovo Albanian women to Šainović and Lukić. The one paragraph judgment recorded Judge Chowhan's view that, in the context of an armed conflict in which "able-bodied military and security forces" use violence to remove civilians from their homes, "prudence and common sense" as well as instances of sexual violence in historic conflicts in the region meant that sexual assaults "were certainly foreseeable realities".[140]

A majority in the Appeals Chamber reversed both Šainović and Lukić's acquittals for persecution through sexual violence in Beleg, Ćirez and Priština.[141] The Appeals Chamber used the lower threshold of possibility to determine foreseeability, that having been determined in the intervening time as the applicable standard in *Karadžić*.[142] It was therefore the case "that the possibility a crime could be committed is sufficiently substantial as to be foreseeable to the accused".[143]

The majority found that in light of the accuseds' awareness of the atmosphere of aggression, violence, ethnic animosity, and the forcible displacement of Kosovo

136 *Milutinović*, above n 97, Vol III at [467].

137 At [1131].

138 At [472]–[1135]. As in relation to Pavković, the Trial Chamber applied a higher standard of foreseeability, that of "probability".

139 At [472]–[1135].

140 *Prosecutor v Milutinović (Partially dissenting opinion of Judge Chowhan)* ICTY Trial Chamber IT-05-87-T, 26 February 2009.

141 *Šainović*, above n 7, at [1582] and [1592].

142 At [1557].

143 At [1557].

Albanian women, which rendered them especially vulnerable, both Šainović and Lukić "must have been aware" that sexual assaults could be committed on discriminatory grounds.[144] The accuseds were aware of various criminal acts and acts of violence, including allegations of "excessive and disproportionate" force used by police and military, displacement of civilians, property related crimes such as looting and arson, harassment of civilians, breaches of international humanitarian law against the Kosovo Albanian population and the existing "humanitarian catastrophe".[145] In addition, Lukić was regularly informed of events and there was evidence he knew of specific incidents of rapes as well as the general risk of their commission in May and April of 1999.[146] Šainović learned of specific instances of rapes in May 1999.[147] The "inescapable conclusion" was Šainović and Lukić knew Kosovo Albanian women who were forced out of their homes were "rendered particularly vulnerable".[148]

Judge Liu, the Presiding Judge, dissented on the foreseeability of sexual violence to Šainović. According to him, the evidence did not establish Šainović was informed before 17 May 1999 of the commission of rapes or sexual violence against women by the Serbian forces.[149] He considered the majority's reliance on the totality of the circumstances was "unpersuasive and speculative".[150] It was not the only reasonable conclusion on the facts, taking into account Šainović's position as political coordinator, his distance from sites where crimes occurred, his distant relationship to the direct perpetrators and the information available to him.[151] Judge Liu noted he was:[152]

> … mindful that in the context of [extended joint criminal enterprise] liability, it is not essential that an accused be aware of the past occurrence of a crime in order for the same crime to be foreseeable to him.

However, he considered that "foreseeability must be established in light of the

144 At [1581] and [1591]. Judge Liu dissented in relation to Šainović.

145 At [1581] and [1591].

146 At [1589] and [1591].

147 At [1582], [1586] and [1591].

148 At [1581] and [1591].

149 *Prosecutor v Šainović (Partially dissenting opinion and declaration of Judge Liu)* ICTY Appeals Chamber IT-05-87-A, 23 January 2014 at [8].

150 At [7].

151 At [7]–[8].

152 At [8].

information available to the accused and the particular circumstances of the case".[153]

The majority declined to enter new convictions against Šainović and Lukić regarding persecution through sexual violence. They considered the discretion to enter a new conviction must be exercised on proper judicial grounds, balancing factors such as fairness to the accused, the interests of justice, the nature of the offences, the circumstances of the case on the one hand and considerations of public interest on the other.154

Judge Ramaroson dissented from the majority's decision not to enter new convictions. Refusing to enter convictions resulted, in the Judge's view, in leaving unpunished crimes of persecution in the form of sexual violence.[155] The decision not to enter convictions failed to determine the indictments entered by the prosecution, undermined judicial truth and left victims without any real answer.[156]

3 Đorđević

Prosecutor v Đorđević concerned Vlastimir Đorđević, the Assistant Minister of the Serbian MUP responsible for all police units and personnel in Serbia, including Kosovo, between 1 January and 20 June 1999. He was charged for his participation in the deportation and forcible transfer of Kosovo Albanian civilians.[157]

Đorđević was originally charged in the indictment in the *Miluntinović* case but his case was severed when he was not captured.[158] Although tried separately and by a different bench due to his late capture, Đorđević was found to be a member of the plurality of persons involving Šainović, Lukić and Pavković, among others.[159]

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153 At [8].

154 *Šainović*, above n 7, at [1604], citing *Prosecutor v Jelisić (Judgment)* ICTY Appeals Chamber IT-95-10-A, 5 July 2001. As a result, no convictions were entered against Šainović and Lukić despite the Appeals Chamber finding the Trial Chamber incorrectly found the accuseds not guilty of the crimes of persecution through sexual assaults.

155 *Prosecutor v Šainović (Dissenting Opinion of Judge Ramaroson)* ICTY Appeals Chamber IT-05-87-A, 23 January 2014 at [7].

156 At [8].

157 *Prosecutor v Đorđević (Judgment)* ICTY Trial Chamber II IT-05-87/1-T, 23 February 2011 at [2].

158 *Prosecutor v Miluntinović (Order replacing third amended joinder indictment and severing Vlastimir Đorđević from the trial)* ICTY Trial Chamber IT-05-87-PT, 26 June 2006.

159 At [2127].

A common plan was found to have existed among the senior political, military and police leadership to modify the ethnic balance of Kosovo by waging a "campaign of terror" against the Kosovo Albanian civilian population.[160] The Trial Chamber considered the:[161]

> … effect of the actions of Serbian forces to terrorise Kosovo Albanians was so grave that many fled from their homes … it is clear their decision to leave was not a matter of a choice but was driven by fear of the consequences of staying.

The Trial Chamber also held that in order to achieve these goals, forcible transfer, deportation, murder and the destruction of homes and villages, as well as cultural property were all intended by the plurality as a means to implement the plan.[162] These crimes were committed in the course of pre-planned and coordinated actions by Serbian forces. Orders and directives pertaining to the operations did not explicitly order the crimes, but were vaguely framed and deliberately so, such that commanders and units could implement them as they saw fit.[163]

Đorđević was found to have voluntarily and significantly contributed to the campaign of terror given his role as a senior MUP official; his contribution to the deployment of paramilitary units; his concealment of the murder of civilians; and his failure to take any measures to ensure the investigation or punishment of those involved.[164]

The Trial Chamber accepted two instances of sexual assault had occurred in Priština and in Beleg.[165] However, the Trial Chamber was not satisfied that such assaults had been committed with the discriminatory intent required for the crime of persecution, noting that no specific evidence was provided to

160 *Đorđević* ICTY Trial Chamber, above n 157, at [2126].

161 At [2129].

162 At [2135]. Note that, while *Đorđević* involved essentially the same plurality of persons as *Miluntinović*, the Trial Chamber considered the common criminal plan to include murder and destruction of cultural property alongside forcible displacement and deportation. This led to a number of peculiarities and inconsistencies between the cases. See also Judge Güney's dissent in the *Đorđević* Appeals Chamber case where he discusses this inconsistency: *Prosecutor v Đorđević (Partially Dissenting Opinion of Judge Güney)* ICTY Appeals Chamber IT-05-87/1-A, 27 January 2014 at [4]–[11].

163 *Đorđević* ICTY Trial Chamber, above n 157, at [2132].

164 At [2154]–[2157].

165 At [1796]. Five other allegations of sexual assault were found to be unproven in absence of further evidence, see [1792] and [1794]–[1795].

show such intent.[166] While the victims in each of the incidents were Kosovo Albanians and the perpetrators were members of the Serbian forces, the Chamber considered that because of the limited number of incidents relied upon, the ethnicity of two victims alone was not a sufficient basis to establish the perpetrators acted with discriminatory intent.[167]

The Appeals Chamber reversed the acquittals on charges of sexual violence, finding that the crime of persecution had been established with the requisite discriminatory intent.[168] The Appeals Chamber found the Trial Chamber erred in finding the evidence was insufficient to prove sexual assault in three instances of persecution through sexual assault made in relation to a girl in Priština,[169] and two women in Beleg, alongside the sexual violence accepted by the Trial Chamber above.[170] The Appeals Chamber found in all five instances, sexual assault was committed with the requisite discriminatory intent for the crime of persecution.[171]

The Appeals Chamber also had "no doubt" that sexual assaults were a natural and foreseeable consequence of the common purpose.[172] The Appeals Chamber noted the Trial Chamber's finding that a "core element of the common plan was the creation of an atmosphere of violence and fear or terror among the Kosovo Albanian population" by committing violent crimes. The common plan was aimed at modifying the ethnic balance of Kosovo. Women, as well as men and boys, were targeted and killed with the intent to instil fear.[173] Massive columns of displaced Kosovo Albanians left their towns and villages, escorted by Serbian forces who continued to intimidate and abuse the civilians. In these circumstances, the civilians were "left highly vulnerable, lacking protection, and exposed to abuse and mistreatment by members of the Serbian forces".[174] Men and women were frequently separated by Serbian forces acting with near impunity, rendering women especially vulnerable to being

166 *Đorđević* ICTY Trial Chamber, above n 157, at [2150] and [1796].

167 At [1796].

168 *Đorđević* ICTY Appeals Chamber, above n 8, at [901].

169 At [853]–[859].

170 At [860]–[869].

171 At [886]–[901].

172 At [922].

173 At [921].

174 At [921].

subjected to violence, "including violence of a sexual nature as one of the most degrading and humiliating forms".[175]

Given Đorđević's knowledge of the conduct of operations, the overall security situation on the ground in Kosovo, and specific commission of serious crimes (looting, torching of houses, excessive use of force and murder), there was a sufficiently substantial possibility sexual assaults might be committed, which made these assaults foreseeable to him. He willingly took that risk when he participated in the joint criminal enterprise.[176] The Appeals Chamber was satisfied that, in light of his knowledge of the persecutory nature of the campaign, it was foreseeable to Đorđević that sexual assaults might be carried out with discriminatory intent.[177]

The Appeals Chamber, Judge Güney and Judge Tuzmukhamedov dissenting in part, found Đorđević guilty of committing persecution through sexual assaults as a crime against humanity in relation to the five allegations. Convictions were entered accordingly.[178]

Judge Tuzmukhamedov in the Appeals Chamber issued a partially dissenting opinion on the foreseeability of sexual violence crimes to Đorđević. He considered the majority "loosely" connected the general context of the conflict in Kosovo with the accused's position in order to conclude that it was foreseeable to him that these crimes might be committed.[179] The Judge was doubtful whether the majority's inference of the foreseeability of sexual assaults from the commission of other distinct types of crimes was appropriate. He noted the majority did not point to specific evidence establishing Đorđević knew of the factors placing women in a vulnerable position at the relevant time.[180] The outcome was problematic with respect to the principle of individual guilt and Judge Tuzmukhamedov questioned how Đorđević could have successfully defended himself against the majority's generalisations.[181]

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175 At [922].

176 At [924]–[926].

177 At [926].

178 Judge Güney, noting the approach that was preferred by the majority in the corresponding *Šainović* case, considered convictions should not be entered on appeals: *Đorđević (Partially Dissenting Opinion of Judge Güney)*, above n 162, at [6].

179 *Prosecutor v Đorđević (Dissenting Opinion of Judge Tuzmukhamedov)* ICTY Appeals Chamber IT-05-87/1-A, 27 January 2014 at [64].

180 At [66].

181 At [67].

V LINKING SEXUAL VIOLENCE TO THE COMMON PURPOSE

A Evidence: the starting point

It is of course acknowledged that every case must be decided on its particular facts and the evidence before the court or tribunal. There will be some cases in which the prosecutors will not have been able to gather enough evidence upon which to ground a conviction. That is because there are considerable hurdles to gathering evidence that may result in a fruitless investigation. Evidence of sexual violence is not always obvious — it is not a burnt village or dead bodies. Documentary evidence is uncommon in comparison to victim testimony. Victims may not want to re-live trauma and may be unfamiliar with and mistrustful of court processes.[182] Victims and witnesses may also face social ostracism. These factors can all impact upon the willingness of witnesses to participate in criminal proceedings.[183] For example, ICTY Chief Prosecutor Brammertz tells of a victim reporting in 2017 that she had been raped in 1994. The victim reported the crime in 2017 because she waited for her husband to die first. She said she would never have reported the rape while he was alive.[184] This can result in a dearth of evidence upon which the prosecution can rely to establish the requisite legal elements for liability.

In some cases, though, there is evidence pointing towards a common purpose involving sexual violence crimes. The strength of that evidence may vary. This is not an easy line to tread and judicial minds do differ. For example, the concern that the available evidence was not enough to ground a conviction was raised by Judge Van den Wyngaert, who dissented fundamentally in *Katanga* on the reading of the evidence as a whole. The Judge considered the evidence going to art 25(3)(d) liability was insufficient to meet the standard of beyond reasonable doubt.[185] While her comments were not directed specifically at sexual violence crimes, she does provide a poignant warning against the relaxation of legal standards:[186]

182 Michelle Jarvis and Kate Vigneswaran "Challenges to Successful Outcomes in Sexual Violence Cases" in Serge Brammertz and Michelle Jarvis (eds) *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, Oxford, 2016) 33 at 42.

183 Ní Aoláin, Haynes and Chan, above n 22, at 438.

184 Interview with Brammertz, above n 1.

185 *Katanga (Minority Opinion of Judge Van den Wyngaert),* above n 69, at [317].

186 At [310].

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

The same concerns were echoed in the ICTY cases discussed above. Judge Tuzmukhamedov and Judge Liu dissented as to the foreseeability of sexual violence in *Đorđević* and *Šainović*, respectively.[187] Both Judges expressed concerns about the majority's use of general circumstances, rather than specific evidence, when reversing the Trial Chambers' acquittals. To have any legitimacy, a conviction for sexual violence requires an adequate evidential foundation. That is undeniable.

However, even where there is an evidential foundation pointing towards the inclusion of sexual violence within the common purpose, the challenge for the prosecution is well articulated by Barbara Goy, Michelle Jarvis and Giulia Pinzauti as they reflect on their time prosecuting at the ICTY:[188]

> While in principle the foreseeability requirement applies to all categories of crimes—not just sexual violence—in practice we have seen that particular challenges emerge in persuading fact-finders that sexual violence is foreseeable. Our experience suggests a risk that sexual violence crimes may be conceptualized differently from other violent crimes because of their sexual component and that this may result in higher evidentiary standards being applied to prove foreseeability in sexual violence cases.

The ostensible sexual nature of sexual violence crimes can obscure the violence of a violation of bodily integrity.[189] It can mean, as discussed, that sexual violence is viewed as an individual, opportunistic act, unrelated to the wider wartime context and is difficult to conceptualise as falling within the common

187 Judge Tuzmukhamedov also sat on the *Šainović* appeal. In that appeal, he disagreed with the majority that the Trial Chamber found that Šainović made a significant contribution to the common purpose and thus participated in the joint criminal enterprise: *Prosecutor v Šainović (Dissenting Opinion of Judge Tuzmukhamedov)* ICTY Appeals Chamber IT-05-87-A, 23 January 2014 at [2]. Therefore he did not need to consider the issue of foreseeability of sexual crimes in relation to Šainović.

188 Goy, Jarvis and Pinzauti, above n 29, at 245.

189 Jarvis and Vigneswaran, above n 182, at 35.

purpose.[190] Judges may therefore, subconsciously, require a higher level of proof in cases of sexual violence than in other types of cases.[191]

This article does not advocate for entering convictions for sexual violence where there is no evidential basis for it. What it does advocate for is for sexual violence to be treated with parity to other international crimes. In essence, this article does not argue that sexual violence should be treated *differently*, but it advocates for sexual violence to be treated *the same* as other criminal acts.

B Sexual violence as within the common purpose

The ICC cannot afford to treat sexual violence differently. As a crime regularly relegated to the "natural and foreseeable but not intentional", sexual violence will not fall within the stringent common purpose provisions at the ICC. With this in mind, what can be learned from how sexual violence is approached? And how can the law as it stands be utilised to elevate sexual violence to be considered alongside other violent crimes?

A number of factors are relevant to establishing the place of sexual violence within the common purpose. Individually they are unlikely to provide a stand-alone foundation upon which to prove sexual violence fell within the common purpose and, of course, it will depend on the evidence available. But, cumulatively, these factors help to place sexual violence in context.

1 Orders and the ordinary course of events

In the case where sexual violence is explicitly ordered — "kill their men and rape their women" — such an order would evince a clear intention of rape or sexual violence as well as murder. But the experience of international criminal courts and tribunals demonstrates there are often no explicit orders to commit sexual violence (as can also be the case with other violent crimes).[192] It is incorrect, however, to assume sexual violence can only be committed in pursuance of a broad campaign of crimes and intended by senior officials where it has been

190 Goy, Jarvis and Pinzauti, above n 29, at 224.

191 Priya Goplan, Daniela Kravetz and Aditya Menon "Proving Crimes of Sexual Violence" in Baron Serge Brammertz and Michelle Jarvis (eds) *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, Oxford, 2016) 111 at 145.

192 Office of the Prosecutor, above n 31, at [81].

ordered.[193] Pursuant to the Rome Statute, a consequence may also be intended if there is knowledge the consequence will happen in the ordinary course of events.[194] Evidence such as patterns of prior or subsequent sexual violence or specific notice will help the prosecution to prove an awareness on the part of the accused that such crimes would occur in the "ordinary course of events".[195]

In addition to an evidential pattern, evidence of an accused's awareness of environmental factors relating to the wider conflict and facilitating potential sexual violence will be helpful.

Awareness of broader environmental factors was relevant to *Šainović* and *Lukić*. A majority of the Appeals Chamber found in light of Šainović's awareness of the atmosphere of aggression, violence, ethnic animosity, and the forcible displacement of Kosovo Albanian women that rendered them especially vulnerable, both Šainović and Lukić "must have been aware" that sexual assaults could be committed on discriminatory grounds.[196] The "inescapable conclusion" was Šainović and Lukić knew Kosovo Albanian women forced out of their homes were "rendered particularly vulnerable".[197] While the sexual assaults occurred in March and April 1999, Lukić was regularly informed of events and there was clear evidence he knew of specific incidents of rapes as well as the general risk of their commission in March and April 1999.[198] Šainović also learned of specific instances of rapes in May 1999.[199] The accused's awareness of broader contextual factors indicates an awareness sexual violence, as a crime prevalent in wartime, would happen in the ordinary course of events.

As found in *Milutinović*, the strongest evidence establishing foreseeability of sexual violence for Pavković was his reference to sexual violence crimes in his authored reports and orders.[200] But the Trial Chamber also referred to his knowledge of environmental factors, such as "ineffective" and "manifestly insufficient" measures to protect civilians contributing "to the creation and

193 Jarvis and Vigneswaran, above n 182, at 40.

194 Rome Statute, art 30(2)(b).

195 Office of the Prosecutor, above n 31, at [81].

196 *Šainović*, above n 7, at [1581], [1591].

197 At [1581], [1591].

198 At [1589], [1591].

199 At [1582], [1586], [1591].

200 *Milutinović*, above n 97, Vol III at [785].

maintenance of an environment of impunity" among Pavković's soldiers.[201] He was "aware of the strong animosity" between the Serbs and Kosovo Albanians and of the context in which the displacement took place. Pavković's "detailed knowledge of events on the ground" put him on notice murders and sexual crimes would be committed. Where Pavković was shown to have specific knowledge of incidents of sexual violence as well as an awareness of environmental factors facilitating its commission, there is certainly scope to argue he was aware sexual violence would happen in the ordinary course of events.

The Appeals Chamber's findings in relation to Đorđević are grounded in his awareness of the broader conflict rather than direct notice of incidents of sexual violence. Đorđević knew of the conduct of operations, which included the targeting of women, as well as men and boys, with the intent to instil fear.[202] Displaced civilians were left highly vulnerable to Serbian forces acting with near impunity and men and women were frequently separated, rendering women especially vulnerable to being subjected to sexual violence. Without specific knowledge it would be more difficult to show Đorđević had knowledge sexual violence would happen in the ordinary course of events. However, his awareness of the broader conflict, where sexual violence was facilitated by factors such as ill-disciplined forces, would be relevant to his foreseeability of sexual violence.[203]

2 *Violent circumstances of sexual violence*

It is also necessary to link sexual violence to its violent context. Such emphasis is necessary to ensure sexual violence is not subconsciously subjected, due to misconceptions about the nature of sexual violence, to a higher evidential standard of proof than other violent crimes.[204]

ICTY prosecutors pose the question of how realistic it is to conclude a joint criminal enterprise member intended to expel the population without also agreeing on the specific means to induce people to leave.[205] They refer to the approach taken in the *Stakić* Appeals Chamber decision.[206] In that case, the

201 At [777]–[782].

202 *Đorđević* ICTY Appeals Chamber, above n 8, at [921].

203 At [922].

204 Goy, Jarvis and Pinzauti, above n 29, at 258.

205 At 226.

206 They also refer to *Prosecutor v Kvočka (Judgment)* ICTY Trial Chamber ICTY-98-30/1-T, 2 November 2001 at [319]–[320] in which sexual violence was recognised as part of a system of ill-treatment used to persecute and subjugate prisoners in a camp. This was upheld on appeal: *Prosecutor v Kvočka*

common purpose consisted of a discriminatory campaign to ethnically cleanse the Municipality of Prijedor by deporting and persecuting Bosnian Muslims and Bosnian Croats in order to establish Serbian control.[207] Joint criminal enterprise participants were found to have "consented to the removal of Muslims from Prijedor by whatever means necessary".[208] Persecution through sexual violence in the Trnopolje, Keraterm, and Omarska prison camps was part of the discriminatory campaign to ethnically cleanse the Municipality of Prijedor.[209]As a result, Stakić was convicted of persecution through rape and sexual assault pursuant to basic joint criminal enterprise.[210]

The prosecutors' question here is relevant. If Đorđević, Šainović, Pavković and Lukić shared a common plan to modify the ethnic balance of Kosovo by waging a "campaign of terror" against the Kosovo Albanian civilian population (in the case of Đorđević)[211] and wage a widespread and systematic campaign of terror and violence to forcibly displace the Kosovo Albanian population both within and outside of Kosovo (in the case of Pavković, Šainović, and Lukić), can they realistically be said not to have intended murder, sexual violence and destruction of cultural property, or not known these would happen in the ordinary course of events?

There is also some scope for the ICC to adopt the reasoning of the *Krajišnik* Appeals Chamber, where it accepted a crime, while not originally part of the common purpose, can become a common purpose where:[212]

i) leaders are informed of violent crimes;

ii) did nothing to prevent their recurrence;

iii) persisted in the implementation of the common plan (thereby giving rise to an inference they endorsed the expanded means of achieving goals); and

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(*Judgment)*, above n 87, at [84]–[86]. In that case, the Trial Chamber concluded the Omarska camp operated as a system of ill-treatment with the aim to persecute and subjugate non-Serb detainees through a number of crimes, including rape.

207 *Prosecutor v Stakić* (*Judgment*) ICTY Appeals Chamber ICTY-97-24-A, 22 March 2006.

208 At [92], quoting *Prosecutor v Stakić* (*Judgment*) ICTY Trial Chamber II IT-97-24-T, 31 July 2003 at [496].

209 At [73].

210 At [84]–[85].

211 *Đorđević* ICTY Trial Chamber, above n 157, at [2126].

212 *Prosecutorv v Krajišnik* ICTY Appeals Chamber ICTY-00-39-A, 17 March 2009 at [163].

iv) the expanded crimes became incorporated into the common objectives.

Where a leader becomes aware of sexual violence, failure to stop pursuing the common plan does not just show disinterest in preventing crime; it shows the choice to allow these crimes to continue. When rape is seen as a tool to achieve a common purpose, rather than something simply tolerated, it is easier to conceive of sexual violence as falling within the common purpose. Rape, and the fear it invokes, is a means to an end in ethnically motivated conflict.[213]

The Trial Chamber in *Đorđević* explicitly linked murders to the common purpose because murder was used to forcibly displace the civilian population. Murder created an atmosphere of terror by illustrating to those civilians what they would be subjected to if they refused to leave.[214] Civilians were targeted and killed with the intent to instil fear.[215] Moreover, the crimes that fell within the common purpose, being forcible transfer, deportation, murder and destruction of property were not explicitly ordered. Orders were deliberately vague.[216]

The same reasoning can be applied to sexual violence. Men and women were frequently separated by Serbian forces acting with near impunity, rendering women especially vulnerable to being targeted and subjected to violence on the basis of their ethnicity, including sexual violence.[217] The Appeals Chamber considered civilians were "left highly vulnerable, lacking protection, and exposed to abuse and mistreatment by members of the Serbian forces".[218] Sexual assaults arose out of a will to discriminate against women on ethnic grounds,[219] and sexual assault by definition constitutes an infringement of a person's physical or moral integrity.[220]

213 Though, in the factual circumstances in *Prosecutor v Karadžić* ICTY Trial Chamber IT-95-5/18-T, 24 March 2016 at [3466], the ICTY Trial Chamber would tend to disagree.

214 *Đorđević* ICTY Trial Chamber, above n 157, at [2137].

215 *Đorđević* ICTY Appeals Chamber, above n 8, at [921].

216 *Đorđević* ICTY Trial Chamber, above n 157, at [2132].

217 *Đorđević* ICTY Appeals Chamber, above n 8, at [922].

218 At [921].

219 At [892], [893], [895], [897].

220 At [900].

3 *Scale and pattern of violence*

Sexual violence is often evidentially more difficult to prove than a crime such as murder. In both *Đorđević* and *Milutinović,* the number of sexual assaults established beyond reasonable doubt was significantly lower than that of murders and expulsions. However, this does not mean that the rapes did not occur or have the effect of expelling civilians from their homes. There is no reason to require that sexual violence achieve a high numerical threshold to establish it has the effect of striking fear into the hearts of civilians.[221]

In regard to the scale of the sexual assaults, in *Đorđević*, the Appeals Chamber was convinced that five instances of persecution through sexual assault occurred. Three young women held in detention in Beleg were found to have been sexually assaulted or raped multiple times by Serbian forces, and two Kosovo Albanian girls in a convoy in Priština were found to have been raped multiple times.[222]

The Appeals Chamber in *Đorđević* held, in the context of murders, that to assess whether a crime falls within the common purpose on the basis of the number of times it has been committed is to confuse the common purpose with the means by which it is to be achieved.[223] There is no minimum number of killings required in order to support a finding that murder is part of a joint criminal enterprise.[224] The same reasoning can be applied to common plan/purpose liability at the ICC.

Murder and sexual violence fell outside the common purpose to forcibly displace Kosovo Albanians through a widespread and systemic campaign of terror and violence in *Milutinović*.[225] The Trial Chamber concluded the common purpose was to be achieved through deportation and forcible transfer alone.[226] As there was no clear pattern of murder, sexual assault or destruction of cultural property, the Trial Chamber was not satisfied these crimes fell within the common purpose.[227] However, while a clear pattern may evince an intention a crime be committed as part of a common plan, the reverse is not necessarily true. Moreover, even in the context of disparate instances of crime

221 Jarvis and Vigneswaran, above n 182, at 40.

222 *Đorđević* ICTY Appeals Chamber, above n 8, at [869], [879].

223 At [189].

224 At [188].

225 *Milutinović*, above n 97, Vol III at [95].

226 Vol III at [784], [1133], [469].

227 Vol III at [94].

there may still be, in accordance with art 30 of the Rome Statute, knowledge the crime will take place in the ordinary course of events.

4 The temptation to frame the common purpose narrowly

A final observation is a word of caution against over-reliance on analogies with ICTY jurisprudence in the ICC. The burden of identifying, with specificity, the characteristics of the joint criminal enterprise, identification of its members and the crimes that constitute that joint criminal enterprise, combined with the requirement for significant contribution, make it advantageous to the prosecution to frame the joint criminal enterprise narrowly.[228] Given the lower standard of intent required to prove crimes outside the common purpose, combined with the ability to nevertheless convict for those crimes, there is no particular detriment to the prosecution in narrowly framing the common purpose.[229] But as the ICC has no fall-back provision, ICC prosecutors cannot afford to follow the example of their ICTY counterparts in framing the common purpose narrowly because, under the Rome Statute, crimes that fall outside the common purpose are not indictable. If sexual violence is considered to fall outside the common purpose, an accused before the ICC cannot be criminally liable for the commission of sexual violence. ICC prosecutions must therefore be wary of common purpose jurisprudence arising from the ICTY.

5 Guilt by association?

Liability pursuant to joint criminal enterprise "may be as narrow or as broad as the plan in which [the accused] willingly participated … even if the plan amounts to a 'nation wide government-organised system of cruelty and injustice.'"[230] For example, in the *Krajišnik* case, the ICTY Appeals Chamber overruled the Trial Chamber's adoption of a common criminal plan that was "impermissibly vague".[231] There is, therefore, a rightful concern regarding "guilt by association" in the context of common purpose liability.

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228 Jared Watkins and Randle DeFalco "Joint Criminal Enterprise and the Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia" (2010) 63(1) Rutgers L Rev 193 at 248.

229 John Ciorciari "Liberal Legal Norms Meet Collective Criminality" (2011) 109(6) Mich L Rev 1109 at 1113.

230 *Prosecutor v Rwamakuba (Judgment)* ICTR Trial Chamber III ICTR-98-44C-T, 20 September 2006 at [368].

231 *Prosecutor v Krajišnik* (*Judgment)* ICTY Appeals Chamber IT-00-39-A, 17 March 2009 at [156]–[157].

The Appeals Chamber in *Brđanin* addressed the very point of guilt by association in the context of extended joint criminal enterprise. The Appeals Chamber considered the doctrine provided sufficient safeguards against "overreaching or lapsing into guilt by association".[232] The Appeals Chamber emphasised joint criminal enterprise "is not an open-ended concept that permits convictions based on guilt by association".[233] It rehearsed the legal standards that must be met to a standard of beyond reasonable doubt before an individual is found guilty pursuant to joint criminal enterprise: the requisite intent, a plurality of persons; contribution; and the commonly intended or foreseeable crime did in fact take place.[234] The Appeals Chamber then stated:[235]

> Where all these requirements for JCE [joint criminal enterprise] liability are met beyond a reasonable doubt, 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. Pursuant to the jurisprudence, which reflects standards enshrined in customary international law when ascertaining the contours of the doctrine of JCE, he is appropriately held liable not only for his own contribution, but also for those actions of his fellow JCE members that further the crime (first category of JCE) or that are foreseeable consequences of the carrying out of this crime, if he has acted with *dolus eventualis* (third category of JCE).

The standard at the ICC for common purpose liability requires a number of similar hurdles to be passed before an accused can be convicted:

i) A conviction based on common purpose liability can only be established where all necessary elements are satisfied beyond reasonable doubt.[236]

ii) Liability pursuant to art 25(3)(a) requires an essential contribution, and liability pursuant to art 25(3)(d) requires a significant contribution

232 *Brđanin*, above n 90, at [426].

233 At [428].

234 At [426]–[432].

235 At [431].

236 Rome Statute, art 66(3).

to the commission of a crime.[237] At the ICC, a person who stands charged pursuant to art 25(3)(d) will not be individually liable for those crimes which form the common purpose but to which she or he did not contribute.[238] The requirement for a significant contribution limits the context in which an individual may be found liable.

iii) The criminal purpose requires specification of the criminal goal, its scope, the victims pursued and the identity of the members of the group.[239] As we have seen, particular crimes have been found to fall outside the common criminal purpose where no evidential basis for its inclusion has been proved, and that will restrict an individual's liability.

iv) The ICC demands a higher mens rea standard for conviction than the ICTY. It must be shown the accused intended the crime or had knowledge it would happen in the ordinary course of events.[240]

v) Where circumstantial evidence is relied on, a fact will only be proven beyond reasonable doubt where there is only one reasonable finding to be concluded from particular facts.[241] The accused will only possess the requisite intent if that is the only reasonable inference on the evidence.[242]

Therefore, there are a number of evidentially and legally difficult hurdles for the prosecution to overcome before a defendant can be convicted of a crime pursuant to joint criminal liability at the ICTY and even more so at the ICC. Where all the requirements for common purpose liability are met, as the ICTY Appeals Chamber stated, "the accused has done far more than merely associate with criminal persons".[243] Again, this article advocates for no more than the equal treatment of sexual violence alongside other violent crimes. It does not seek a lower standard, or convictions for sexual violence where those convictions are not justified. For those reasons, concerns about guilt by association are misplaced.

237 *Katanga*, above n 9, at [1620].

238 At [1619].

239 At [1626].

240 Rome Statute, art 30.

241 *Katanga*, above n 9, at [109].

242 As noted by the Appeals Chamber in *Brđanin*, above n 90, at [429] in the context of joint criminal enterprise liability.

243 *Brđanin*, above n 90, at [431].

VI CONCLUSION

In a speech shortly after his election as Chief Prosecutor in April 2003, Moreno Ocampo stated:[244]

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

Societies recently scourged by conflict provide sobering cause to believe that "tyranny begins where law ends".[245] Resistance to convictions for sexual violence crimes stems from the belief that these crimes are less serious than other violent crimes or unconnected to armed conflict and therefore outside the realm of international humanitarian law.[246]

A conviction based on systemic mischaracterisation of sexual violence as outside the common purpose cements the secondary status of these crimes at international law.[247] The truth-telling function of the criminal law is undermined when sexual violence is erroneously but regularly categorised as unintended, opportunistic and outside the common purpose.[248] This fails to place sexual violence within the wider conflict and confines these crimes to occurring as back-room, hushed instances of ill-discipline from individual soldiers. In practical terms, misconceptions regarding sexual violence have an even greater impact. The ICC does not have the luxury of confining sexual violence to the backbenches of extended joint criminal enterprise. Sexual violence crimes must be perceived and found to be within the realms to the common purpose for convictions to be entered.

244 Luis Moreno Ocampo "Assembly of States Parties to the Rome Statute of the International Criminal Court: Statement by Mr Luis Moreno Ocampo" (press release, ICC-OTP-20030502-10, 22 April 2003); and Rome Statute, preamble.

245 Diane F Orentlicher "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" (1991) 100 (8) Yale LJ 2537 at 2542; and Michael Broache "The Effects of Prosecutions on Sexual Violence in Armed Conflict during the 'ICC Era' 2002–2009" (paper presented at the Workshop on Sexual Violence and Armed Conflict: New Research Frontiers, Harvard Kennedy School, Harvard University, 2–3 September 2014).

246 Margaret deGuzman "Giving Priority to Sex Crime Prosecutions: The Philosophical Foundations of a Feminist Agenda" (2011) 11 Int CLR 515 at 517.

247 Sellers, above n 17, at 190.

248 See generally, Brigid Inder, Executive Director Women's Initiatives for Gender Justice "Expert Panel: Prosecuting Sexual Violence in Conflict – Challenges and Lessons Learned: A critique of the Katanga Judgment" (Global Summit to End Sexual Violence in Conflict, 11 June 2014).

This article has canvassed some factors that should be taken into account to shift pervasive assumptions that require sexual violence to be proven to a higher standard than other violent crimes. Prosecution of sexual violence crimes is a key component to ending global violence against women: forms of sexual violence must be punished and seen to be punished if the cycle of sexual violence is to be prevented.[249]

249 Linda Bianchi "The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR" in Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds) *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, Cambridge, 2013) 123 at 124.