THE APPLICATION OF THE JOINT CRIMINAL ENTERPRISE DOCTRINE IN INTERNATIONAL CRIMINAL LAW FOR THE PROSECUTION OF SEXUAL OFFENCES

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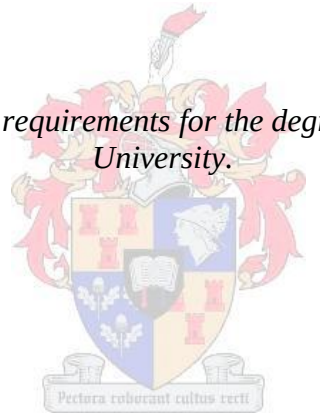

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Declaration

By submitting this thesis electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

December 2015

Abstract

The aim of my thesis is to test Haffajee's propositions in order to determine the most suitable construction of the Joint Criminal Enterprise ("JCE") doctrine to establish a link between an accused and a sexual offence, perpetrated by another, where there is reason to believe that the accused had intent and made a contribution. An evaluation of cases, concerning incidences of sexual violence, from the International Criminal Tribunal for Rwanda ("ICTR") and the International Criminal Tribunal for the Former Yugoslavia ("ICTY") revealed that the reoccurring inability of the prosecution to successfully link the accused to the crime, committed by another, is the cause of the difficulty experienced in securing successful prosecutions. The individual criminal responsibility of the physical perpetrator therefore falls beyond the scope of this thesis.

The JCE doctrine is a mechanism that attributes individual criminal responsibility to an accused for crimes that he or she did not physically perpetrate. The accused's wrongfulness arises from his or her intentional and substantial contribution to the criminal enterprise with the direct intent of furthering the common criminal purpose or plan. JCE category three has been successfully used by the ICTR, ICTY and United Nations Mechanism for International Criminal Tribunals ("MICT") to establish the criminal responsibility of high-ranked officials for acts of sexual violence committed by others. However the JCE doctrine has not been used by the International Criminal Court ("ICC"). My research therefore departed from the primary assumption that the ICC may rely on the jurisprudence of the *ad hoc* tribunals when interpreting provisions of the Rome Statute pertaining to individual criminal responsibility, in order to sustain the continued use of the JCE doctrine within international criminal law. An in-depth investigation revealed that the jurisprudence of the *ad hoc* tribunals is neither expressly listed as an applicable source for interpreting the Rome Statute nor does it amount to binding precedent. Nevertheless, the ICC may have to consider the jurisprudence of the *ad hoc* tribunals when interpreting the Rome Statute because the jurisprudence often reflects principles and rules of international law.

Notwithstanding the usefulness of JCE category three, the doctrine cannot unjustifiably limit the rights of the accused or infringe the principles of legality and the principle of culpability. The original construction of JCE category three, as first applied by the ICTY in the *Prosecutor v Tadić*, poses a threat to the principle of culpability because it imposes equal liability to all contributory JCE members, irrespective of their degree of contribution. Furthermore, it has been used to establish liability for specific intent crimes even though the accused did not possess specific intent. Arguably, the reform of article 25 of the Rome Statute that expressly incorporates and codifies a more detailed construction of JCE category three, as developed by the *ad hoc* tribunals over a decade, which allows for attribution of a varying degrees of liability; relative to the specific accused's intent and contribution, shall ensure the protection of the principle of culpability and the principles of legality.

Opsomming

Hierdie tesis is daarop gemik om Haffajee se voorstel te toets om ‘n gepaste verklaring van die Joint Criminal Enterprise-leerstuk (“die leerstuk”) te skep waar die beskuldigde aan die seksuele misdaad, wat deur ‘n ander persoon gepleeg is, verbind word. ’n Evaluering van regspraak betreffende gevalle van seksuele geweld by die Internasionale Kriminele Tribunaal vir Rwanda (“ICTR”) en die Internasionale Kriminele Tribunaal vir die voormalige Joego-Slawië (“ICTY”) het ’n herhalende neiging ontbloot waar die vervolging nie in staat was om die beskuldigde aanspreeklik te hou nie weens die onvermoë om die misdaad van ’n ander party aan die beskuldigde te verbind en is dus die rede vir die onsuksesvolle vervolgings. Die individuele strafregtelike aanspreeklikheid van die fisiese dader val dus buite die bestek van hierdie tesis.

Die leerstuk is ’n teorie wat individuele strafregtelike aanspreeklikheid aan ’n beskuldigde toereken vir misdade wat hy of sy nie fisies uitgevoer het nie. Die beskuldigde se wederregtelikheid is gegrond in sy of haar opsetlike en wesenlike bydrae tot die kriminele onderneming, tesame met die direkte opset om die gemeenskaplike kriminele doelwit te bevorder. Kategorie drie van die leerstuk is al suksesvol deur die ICTR, ICTY en die Verenigde Nasies Meganisme vir Internasionale Kriminele Tribunale (“MICT”) toegepas om hooggeplaaste amptenare aanspreeklik te hou vir seksuele geweld wat deur ander uitgevoer is. My navorsing het dus afgewyk van die primêre veronderstelling dat die Internasionale Strafhof (“die Strafhof”) op die regspraak van die *ad hoc*-tribunale mag steun wanneer die Strafhof die bepalings van die Statuut van Rome interpreteer om die voortgehoue gebruik van die leerstuk in internasionale strafreg volhoubaar te laat geskied. ’n In-diepte studie het onthul dat die regspraak van die *ad hoc*-tribunale nie uitdruklik gelys is as ’n toepaslike bron om die Statuut van Rome te interpreteer nie en dit kom ook nie neer op ’n bindende presedent nie. Die Strafhof sal nietemin die regspraak van die *ad hoc*-tribunale moontlik in ag moet neem wanneer die Statuut van Rome interpreteer word, omdat die regspraak dikwels beginsels en reëls van internasionale reg weerspieël.

Desnieteenstaande die nut van kategorie drie van die leerstuk, kan die leerstuk nie ’n ongeregverdigde skending maak op die regte van die beskuldigde of inbreuk maak op die legaliteitsbeginsel en die skuldbeginsel nie. Die oorspronklike konstruksie van kategorie drie van die leerstuk, soos dit aanvanklik toegepas is deur die ICTY in *Prosecutor v Tadić*, stel ’n risiko vir die skuldbeginsel omdat dit gelyke aanspreeklikheid aan al die bydraers ingevolge die leerstuk toereken, ongeag elkeen se graad van deelname. Dit is ook verder al gebruik om aanspreeklikheid vir spesifieke opset-misdrywe op te wek, alhoewel daar geen spesifieke opset deur die beskuldigde teenwoordig was nie. Daar kan geargumenteer word dat die hervorming van artikel 25 van die Statuut van Rome, wat ’n meer omvattende konstruksie van kategorie drie van die leerstuk inkorporeer, soos ontwikkel deur die *ad hoc*-tribunale oor die afgelope dekade, aanspreeklikheid toepas relatief tot die beskuldigde se opset en bydrae wat sal verseker dat die skuldleerstuk en die legaliteitsbeginsels beskerm word.

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List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
Berkley J Int'l L	*Berkeley Journal of International Law*
Cal L Rev	*California Law Review*
Can J Afr Std	*Canadian Journal of African Studies*
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishment
CEDAW	Convention for the Elimination of All Forms of Discrimination Against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CJIL	*Chinese Journal of International Law*
Colum J Gender & L	*Columbia Journal of Gender and Law*
ed(s)	editor(s)
ECCC	Extraordinary Chambers of the Courts of Cambodia
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECOSOC	United Nations Economic and Social Council
EJIL	*European Journal of International Law*
German L J	*German Law Journal*
Harv J L & Gender	*Harvard Journal of Law and Gender*
HRC	Human Rights Committee
HVO	*Hrvatsko vijeće obrane*/ Croatian Defence Council
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICL Rev	*International Criminal Law Review*
ICTR	International Criminal Tribunal for Rwanda

ICTY	International Criminal Tribunal for the former Yugoslavia
ILM	International Legal Materials
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East at Tokyo
J	Judge
JCE	Joint Criminal Enterprise
J Int'l Crim Just	*Journal of International Criminal Justice*
LNTS	League of Nations Treaty Series
MRND	National Republican Movement for Democracy and Development
n	footnote
New Eng J Int'l L & Comp L	*New England Journal of International Law and Comparative Law*
Nw J Int'l Hum Rts	*Northwestern Journal of International Human Rights*
para	paragraph
PCIJ	Permanent Court of International Justice
PTC	Pre-Trial Chamber of the International Criminal Court
RPE	Rules of Procedure and Evidence
RPF	Rwandan Patriotic Front
SCSL	Special Court for Sierra Leone
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA/GA	United Nations General Assembly
UNSC/SC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties
vol	volume
VRS	Army of the *Republika Srpska*
WHO	World Health Organisation
WWII	World War II
Yale L J	*Yale Law Journal*

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CHAPTER 1: INTRODUCTION

1 1 Research problem

After reading an article by Haffajee titled: "*Prosecuting crimes of Rape and Sexual Violence at the ICTR: The Application of the Joint Criminal Enterprise Theory*,"[1] it became apparent to me that the successful prosecution of rape and other acts of sexual violence under international criminal law was, and continues to be, a challenge. Haffajee pin-pointed the establishment of individual criminal responsibility as the stumbling block; according to her, the prosecution at the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") struggled to directly or closely link the accused to acts of sexual violence due to the fact that high-ranked officials seldom carry out the *actus reus* of sexual crimes themselves.[2] Furthermore, the prosecution often grappled to link the accused to the commission of other inhumane acts where it could neither prove that the accused directly ordered others to perpetrate acts of sexual violence nor that he or she was present at the scene of the crime.[3] In this thesis the term accused and high-ranked official are hereinafter used interchangeably and the ICTY and ICTR are collectively be referred to as the *ad hoc* tribunals when relevant. Furthermore, sexual violence is a broad term used by the Rome Statute of the International Criminal Court ("Rome Statute") to describe particular crimes against humanity, including "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity".[4] This broad term is used throughout my thesis to encompass all crimes of a sexual nature that amount to serious crimes that concern the international community.

In addition, the fact that acts of sexual violence rarely form an express part of the common criminal plan and high-ranked officials usually ensure that they are absent when these crimes are perpetrated arguably exacerbates the difficultly experienced in establishing individual criminal responsibility. Moreover the element of criminal responsibility has a subjective and objective element; the accused must have intended the commission of the crime and in some manner contributed to its commission. The problem that Haffajee pointed to inspired me to try to find a legal theory that would enable the prosecution, within the framework of international criminal law, to hold high-ranked officials and masterminds liable for their respective contributions despite not having physically carried out the *acts reus* of crime themselves. The ultimate goal being the attribution of principal liability instead of derivative forms of liability where the accused's contribution and degree of intent warranted such attribution, albeit that he or she was not the physical perpetrator. In her article Haffajee proposed that categories one and three of the Joint Criminal Enterprise ("JCE") doctrine could provide such a possible solution to the problem.[5] She argues that the application of JCE category three removes the duty to establish a direct link where the crime was a clearly foreseeable consequence of executing the common criminal plan involving

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[1] RL Haffajee "Prosecuting crimes of Rape and Sexual Violence at the ICTR: The Application of the Joint Criminal Enterprise Theory" (2006) 29 *Harvard Journal of Law and Gender* 201.

[2] Haffajee (2006) *Harv J L & Gender* 206 and 209.

[3] 209 and 211; according to art 7(1)(k) of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) (2003) 2187 UNTS 90: other inhumane acts are "acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".

[4] Art 7(1)(g) of the Rome Statute (2003) 2187 UNTS 90. Note that the ICTR in *Prosecutor v Akayesu* (Judgement) ICTR-96-4-T (2 September 1998) para 686 defined sexual violence as any act of a sexual nature committed during coercive circumstances. This broader definition does not require penetration or physical contact.

[5] Haffajee (2006) *Harv J L & Gender* 214.

genocidal intent or attacks against a civilian population in a widespread or systematic manner.[6] In so doing, her proposal became the springboard for my thesis. Haffajee furthermore set out a test to secure criminal responsibility under category three.[7] In the circumstances where "[o]bjectively the crime is part of the natural and foreseeable consequence of the execution of the JCE"[8] and the accused was subjectively aware of the possible consequence yet he reconciled himself with the possibility and participated nonetheless, the accused is individually criminally responsible.[9]

The aim of my thesis is therefore to further test Haffajee's proposition to find the most suitable construction of JCE to establish a link between an accused and a sexual offence, perpetrated by another where there is reason to believe that the accused had intent and made a substantial contribution. The International Criminal Court ("ICC") has thus far, not used the JCE doctrine, which has arguably generated concerns as to it origin, legitimacy and future use. Consequently I saw a need to on the one hand evaluate the possibility of the ICC adopting the JCE; and on the other explore the possibility of find a legally sound and authoritative construction of JCE that does not limit the human rights of the accused or the principles of criminal law unjustifiably. If such a construction does not exist, the doctrine must arguably be reformed or replaced.

My research departs from four primary theoretical discussions: (i) the nature of sexual violence; (ii) the duty to effectively prosecute rape and other acts of sexual violence; (iii) the nature, origin and categories of JCE; and (iv) the compatibility of principal liability as construed by the ICC and the *ad hoc* tribunals. My pre-study revealed that sexual violence has devastating effects on both the victim and society in which the violence takes place. The ICTR in *Prosecutor v Akayesu* ("*Akayesu*") explained that both rape and torture are used to purposefully humiliate, degrade, intimidate, control, punish, discriminate or destroy people.[10] Thus rape is often used as a weapon of war and genocide; and it is worth noting that some rape victims believe that rape is worse than death.[11]

Significantly, sexual violence that occurs during armed conflict amounts to grave violations of international humanitarian law and international human rights law and therefore can and should be prosecuted under international criminal law. Rape and sexual violence under international criminal law are not however prosecuted as sexual offences instead these offences can be indicted as war crimes, crimes against humanity, genocide and violations of the common article 3 of the Geneva Convention, as listed under article 5 of the Rome Statute.[12] For example, the ICTR in *Akayesu* convicted the accused of genocide and crimes against humanity for the occurrence of sexual violence during the Rwandan genocide.[13] The ICTY in *Prosecutor v Musema* ("*Musema*") equally charged and convicted the accused of committing acts of genocide and crimes against humanity for committing and ordering rape during the Yugoslavian conflict.[14] In addition, the ICTR in *Prosecutor v Semanza* ("*Semanza*") convicted the Mayor of Bicumbi, as an accessory, for

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[6] 212.

[7] 214 cf *Prosecutor* v *Milutinović, Ojdanić & Sainovic* (Appeal Chamber) IT-99-37-AR72 Separate Opinion of Judge David Hunt on Challenge by Ojdanić to Jurisdiction Joint Criminal Enterprise (21 May 2003) 11.

[8] Haffajee (2006) *Harv J L & Gender* 214 cf *Prosecutor v Ojdanić* et al IT-99-37-AR72 (2003) 11.

[9] Haffajee (2006) *Harv J L & Gender* 214 cf *Prosecutor v Ojdanić* et al IT-99-37-AR72 (2003) 11.

[10] AA Obote-Odora "Rape and Sexual Violence in International Law: ICTR Contribution" (2005) 12 *New England Journal of International Law and Comparative Law* 135 148 cf *Prosecutor v Akayesu* ICTR-96-4-T (1998) para 687.

[11] Obote-Odora (2005) *New Eng J Int'l L & Comp L* 139 cf SK Wood "A Woman Scorned for the 'Least Condemned' War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda" (2004) 13 *Columbia Journal of Gender and Law* 274 276.

[12] The Rome Statute (2003) 2187 UNTS 90.

[13] *Prosecutor v Akayesu* ICTR-96-4-T (1998) para 731.

[14] *Prosecutor v Musema* (Judgment and Sentence) ICTR-96-13-A (27 January 2000) paras 933-936 and 967. Note that the conviction was overturned on appeal.

instigating rape as a crime against humanity.[15] The ICTR found that he facilitated rapes by instigating the physical perpetrator with his words and his presence.[16]

The Rome Statute creates an obligation to prosecute "persons for the most serious crimes of international concern".[17] Obote-Odora argues that effective prosecution is the first step in deterring crimes of rape.[18] The aim of International criminal law is not only to convict those responsible as accessories, but to hold them responsible as principal perpetrators. This is especially difficult when the accused was neither present nor the one who carried out the *actus reus* of the crime.[19] In *Prosecutor v Katanga and Chui* ("*Katanga*") the ICC acquitted the accused of all sex-related charges.[20] Judge Usacka warned, during the charge confirmation, that the evidence was not strong enough to establish substantial grounds to believe that the accused was criminally responsible for the crimes of rape and sexual violence.[21] In addition, the ICC stated in *Prosecutor v Katanga* ("*Katanga Confirmation Decision*") that general evidence on the prevalence sexual offences in the area provided an insufficient base to infer the accused's knowledge or intent (subjective elements).[22]

JCE is a form of "common purpose or common plan liability".[23] The JCE doctrine is therefore an "individual criminal responsibility theory in international criminal law"[24] and a "form of crime commission".[25] Goy, in referring to the ICTY Trial Chamber in *Prosecutor v Tadić* ("*Tadić*"), clarifies that committing could include physical perpetration, participation in a JCE or playing an integral part, while carrying out the crime with others.[26] Furthermore, the ICTY Appeal Chamber in *Prosecutor v Tadić* ("*Tadić Appeal*") found that participating in the implementation of the JCE (common purpose or plan) could amount to a commission of war crimes, genocide, crimes against humanity and violations of the Geneva Conventions of 1949.[27]

The JCE doctrine is only applicable to crimes with multiple perpetrators who participate in the same criminal conduct and share the same intent. This doctrine considers each member of the common plan responsible for the crimes committed by other members.[28] There are three categories

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[15] *Prosecutor v Semanza* (Judgment and Sentence) ICTR-97-20-T (15 May 2003) para 479.

[16] Paras 475-478.

[17] Art 1 of the Rome Statute (2003) 2187 UNTS 90. See also art 5 of the Rome Statute (2003) 2187 UNTS 90.

[18] Obote-Odora (2005) *New Eng J Int'l L & Comp L* 139 cf Wood (2004) *Colum J Gender & L* 276.

[19] Haffajee (2006) *Harv J L & Gender* 217 cf *Prosecutor v Kajelijeli* (Judgment and Sentence) ICTR-98-44A-T (1 December 2003) para 937.

[20] *Prosecutor* v *Katanga & Chui* (Pre-Trial Chamber II) ICC-01/04-01/07-717 (7 March 2014).

[21] *Prosecutor* v *Katanga & Chui* (Pre-Trial Chamber) ICC-01/04-01/07-717 Decision on the Confirmation of Charges, Partly Dissenting Opinion of Judge Anita Usacka 19-22 (30 September 2008) paras 19-22 ("*Katanga Confirmation Decision*").

[22] *Katanga Confirmation Decision* ICC-01/04-01/07-717 (2008) paras 568-569.

[23] Haffajee (2006) *Harv J L & Gender* 212.

[24] 212 cf *Prosecutor v Furundžija* (Appeals Judgement) IT-95-17/1-A (21 July 2000); *Prosecutor v Tadić* (Appeal Judgement) IT-94-1-A (15 July 1999); *Prosecutor v KvoČka, Kos, Radić, Zigić & Prcać* (Judgement) IT-98-30/1-T (2 November 2001); *Prosecutor v Krstić* (Judgement and Sentencing) IT-98-33-T (2 August 2001); *Prosecutor v Furundžija* (Judgement) IT-95-17/1-T (10 December 1998); *Prosecutor v Tadić* (Opinion and Judgment) IT-94-1-T (7 May 1997); *Prosecutor v Karemera* (Amended Indictment) ICTR-98-44-I (23 February 2005).

[25] Haffajee (2006) *Harv J L & Gender* 212.

[26] B Goy "Individual Criminal Responsibility before the International Criminal Court A Comparison with the *Ad Hoc* Tribunals" (2012) 12 *International Criminal Law Review* 8 cf *Prosecutor v Tadić* IT-94-1-T (1997) para 188.

[27] *Prosecutor v Tadić* IT-94-1-A (1999) para 188.

[28] Goy (2012) *ICL Rev* 28 cf *Prosecutor* v *Vasiljević* (Appeal Judgement) IT-98-32-A (25 February 2004) para 111.

of the JCE doctrine.[29] Each applies to different circumstances. These categories have different requirements and differ in the scope of involvement required. In *Prosecutor v Haradinaj* ("*Haradinaj*") the ICTY stated that these categories could overlap.[30] Category one is the most widely used and accepted construction.[31] According to category one, the accused is required to participate in implementing the group's common objective that includes the commission of a crime under the Statute for the International Criminal Tribunal for the former Yugoslavia ("ICTY Statute").[32] In *Haradinaj* the ICTY concluded that "[a]n individual intentionally acts collectively with others to commit international crimes pursuant to a common plan."[33] In *Prosecutor v Martić* ("*Martić Appeal*") the ICTY stated that "crimes contemplated in the [ICTY] Statute mostly constitute the manifestations of collective criminality and are often carried out by groups of individuals acting in pursuance of a common criminal design or purpose".[34]

In *Haradinaj* the ICTY concluded that the second category "provides for liability for individuals who contribute to the maintenance or essential functions of a criminal institution or system, such as a concentration or detention camp".[35] In the same case the ICTY concluded further that "[t]he third category provides for extended liability, not only for crimes intentionally committed pursuant to the common design, but also for crimes that were the natural and foreseeable consequence of implementing the common design".[36] In summation, those who participate in the JCE, risk criminal responsibility for the undesired and unintentional yet foreseeable crimes that result from implementing the JCE (common plan or purpose).[37]

Therefore, according to the interpretation of category three found in *Haradinaj*, the crime for which the accused is being tried need not be the crime as desired by the common objective of the group. Category three has been used to establish criminal responsibility where an express order and the presence of the accused were lacking. For example, in *Prosecutor v Martić* ("*Martic*") the prosecution secured a conviction under category one and three of the JCE doctrine for crimes against humanity.[38] The ICTY was able to convict Martić by using category one of the JCE doctrine to establish individual criminal responsibility because deportation and forced transfer formed part of the common plan or purpose. With the help of JCE category three, Martić was found to be individually responsible for murder, extermination, imprisonment, torture and inhumane acts as crimes against humanity.[39] Category three was utilised further to convict Martić of violating the laws and customs of the Geneva Convention by engaging in torture, cruel treatment, wanton destruction of a village and institutions as well as plundering property.[40]

Even though the JCE doctrine has been used by the ICTY and the ICTR there is uncertainty as to its origin and legitimacy.[41] With regards to the latter, contribution to a JCE is not expressly mentioned in the ICTY Statute or the Statute of the International Criminal Tribunal for Rwanda

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[29] *Prosecutor v Haradinaj* (Judgement) IT-04-84-T (3 April 2008) paras 135-139.

[30] Paras 135-139.

[31] *Prosecutor v Zigiranyirazo* (Judgement) ICTR-01-73-T (18 December 2008) paras 407-408 and 468.

[32] FP Bostedt "The International Criminal Tribunal for the Former Yugoslavia in 2006: New Developments in International Humanitarian and Criminal Law" (2007) 6 *Chinese Journal of International Law* 403 417 cf *Prosecutor v Krajišnik* (Judgement) IT-00-39-T (27 September 2006) para 4.

[33] *Prosecutor v Haradinaj* IT-04-84-T (2008) paras 135-139.

[34] *Prosecutor v Martić* (Appeal Judgement) IT-95-11-A (8 October 2008) para 82.

[35] *Prosecutor v Haradinaj* IT-04-84-T (2008) paras 135-139.

[36] Paras 135-139.

[37] Paras 135-139.

[38] Prosecutor v *Martić* (Judgement) IT-95-11-T (12 June 2007) paras 435-455.

[39] Prosecutor v *Martić* IT-95-11-T (2007).

[40] Prosecutor v *Martić* IT-95-11-T (2007).

[41] Haffajee (2006) *Harv J L & Gender* 219.

("ICTR Statute").[42] Yet judges in the ICTY, as indicated above, have found the JCE doctrine to be implicitly included in article 7(1) of the ICTY Statute on individual criminal responsibility.[43] Haffajee furthermore argues that JCE can also be incorporated into, the almost identical article for individual criminal responsibility, article 6(1) in the ICTR.

In order for the ICC to use the JCE doctrine, it would have to be included in article 25 of the Rome Statute like the ICTY included it in article 7(1) of the ICTY Statute. The ICC can only be persuaded to follow the jurisprudence of the *ad hoc* tribunals if it recognises it as an applicable source in interpreting the Rome Statute. It would further require the conceptualisations of individual criminal responsibility and principal liability to be compatible for comparison.

In addition to Haffajee's work, Goy's consideration of individual criminal responsibility before the ICC[44] provided a theoretical base for the analysis of the *ad hoc* tribunal's jurisprudence as a source in interpreting the Rome Statute. His work was essential in the analysis of two of my hypothesis. Firstly, it supported my understanding of the JCE doctrine as a vehicle for establishing individual criminal responsibility in the prosecution of sexual offences. Secondly, it helped me explore whether the ICC may, as Goy disputes, accept participation in a JCE as a form of commission and principal liability.

This, one of the objectives of my research is to establish whether the jurisprudence of the ad hoc tribunals amount to general rules and principles of international law. The ICC and *ad hoc* tribunals serve the same function ie to prosecute violations of international human rights and humanitarian law. The Preamble to the Rome Statute states that the ICC is "[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."[45] The ICC has "the power to exercise its jurisdiction over persons for the most serious crimes of international concern".[46] The *ad hoc* tribunals serve the same general purpose yet apply to specific contexts.[47] Both the ICTY and ICTR Statutes state that the tribunal "shall have the power to prosecute persons responsible for serious violations of international humanitarian law".[48] From this perspective these institutions are arguably eligible for comparison. If it can be established that the jurisprudence of the *ad hoc* tribunals have created principles and rules of international law then the ICC could, arguably, use the jurisprudence of the *ad hoc* tribunals to further its understanding of

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[42] AM Danner & JS Martinez "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law" (2005) 93 *California Law Review* 75 103.

[43] *Prosecutor* v *KvoČka, Omarska, Keraterm & Trnopolje* (Appeal Judgement) IT-98-30/1-A Separate Opinion of Judge Shahabuddeen (28 February 2005) para 41; *Prosecutor v Ojdanić* et al IT-99-37-AR72 Separate Opinion of Judge David Hunt on Challenges by Ojdanić to Jurisdiction *Joint Criminal Enterprise* (2003) para 20; *Prosecutor* v *Ntakirutimana & Ntakirutimana* (Appeal Judgement) ICTR-96-10-A and ICTR-96-17-A (13 December 2004) para 462.

[44] Goy (2012) *ICL Rev* 1.

[45] The Rome Statute (2003) 2187 UNTS 90.

[46] Art 1 of the Rome Statute (2003) 2187 UNTS 90.

[47] Note that differences between the *ad hoc* tribunals and the ICC do exist when you compare their respective statutes. The ICC is a permanent institution. While the Extraordinary Chambers of the Courts of Cambodia ("ECCC"), ICTY and ICTR are *ad hoc*; set up specifically for the prosecution of crimes that occurred in Cambodia, Former Yugoslavia and Rwanda respectively, during a set period of time. The ICC only has the jurisdiction to try the accused who are nationals of a member state to the Rome Statute or the accused who committed a crime within a member state's territory. The United Nations Security Council ("UNSC") on the other hand can impose the tribunal's jurisdiction on individuals by means of UNSC resolution, a prosecutor's suggestion or the state's recommendation.

[48] Art 1 of the Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994, entered into force 8 November 1994) (1994) 33 ILM 1598; art 1 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (entered into force 25 May 1993) (1993) 32 ILM 1159.

the Rome Statute. The Rome Statutes makes it clear that "[n]othing in this Part [referring to Part II 'Jurisdiction, admissibility and applicable law'] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."[49]

1 2 Research aims, questions and hypotheses

In exploring the research problem set out above the primary research question guiding my research was, whether the JCE doctrine could be useful to the ICC in prosecuting crimes of sexual violence? The usefulness in this regard refers to successful prosecutions leading to a conviction of acts of sexual violence under international criminal law. This primary question rests on two assumptions. Firstly, that JCE category three could be an effective tool in prosecuting crimes of sexual violence before the ICC relating to the nature of sexual violence and secondly that the JCE doctrine could be applied within the realm of the Rome Statute. In order for the latter to be true the jurisprudence of the *ad hoc* tribunals would have to be recognisable before the ICC as an applicable source in interpreting the Rome Statute. Furthermore, the construction of their respective provisions that determine the modes of participation and individual criminal responsibility ie article 25 of the Rome Statute, article 7 of the ICTY Statute and article 6 of the ICTR Statute would also have to be compatible for comparison.

I based my first assumption, ie that JCE category three would be the most suitable construction for improving the prosecution of high-ranked-officials for rape and other acts of sexual violence committed by another, on Haffajee's postulation, as indicated above. She explains that category three is most suitable because it attributes liability for crimes that fall outside of the common purpose yet which were a natural and foreseeable consequence of implementing the common criminal plan. In order to further analyse her proposition I had to begin my investigation by exploring the nature of sexual violence.

In light of the primary research question and the related assumptions set out above the following secondary research questions have been central to my research:

1. What is the nature of sexual violence? (Addressed in chapter two)
2. What are the obligations resting on the international community to prosecute acts of sexual violence and to ensure the reasonable prospect of a conviction? (Addressed in chapters two and three)
3. Under which international crimes can acts of sexual violence be prosecuted? (Addressed in chapter three)
4. What are the difficulties experienced in prosecuting acts of sexual violence under international criminal law? (Addressed in chapter three)
5. What is the general theory and application of the JCE doctrine? (Addressed in chapter four)
6. Can JCE category three be used to establish the individual criminal responsibility of an accused who did not physically carry out the acts of sexual violence? (Addressed in chapter four)
7. As the JCE doctrine has been successfully used by the ICTY and ICTR to establish the principal liability of high-ranked officials, can it be accepted and implemented by the ICC? (Addressed in chapter five)
8. Does the application of the JCE doctrine, specifically in establishing principal liability, limit the rights of the accused, infringe the principals of legality or violate the foundational notions criminal law? (Addressed in chapter six)

[49] Art 10 of the Rome Statute (2003) 2187 UNTS 90.

1 3 Methodology and sources

My research was conducted as a desktop study where I reached my findings by discussing and comparing available international instruments and peer-reviewed resources. While I did not engage in a traditional comparative study of one country's legal position against another, I compared the constitutive statutes and jurisprudence of the *ad hoc* tribunals against the Rome Statute and the jurisprudence of the ICC. In doing so, I first relied on the primary constitutive instruments and the interpretation of these instruments through case law to form a theoretical base before relying on the opinions of scholars for deeper understanding.

My thesis generally falls within the sphere of international law and includes discussions about international humanitarian law and international human rights law. However, the focus is predominately on international criminal law. The majority of my sources are international sources, such as international instruments and the case law the *ad hoc* tribunals and the ICC have been central to my findings as described below. International instruments such as the Rome Statute, the ICTY and the ICTR Statutes were used to determine the duty to prosecute rape and other acts of sexual violence. Cases from the ICC, the Extraordinary Chambers of the Courts of Cambodia ("ECCC"), United Nations Mechanism for International Criminal Tribunals ("MICT"), ICTY and ICTR were furthermore used in my chapter three to determine the source of the difficulty experienced in prosecuting rape and other acts of sexual violence and in chapter four to discuss the practical application of JCE doctrine. Furthermore, these cases were used to reveal which category of the JCE doctrine that would be most suitable to the prosecution of rape and others sexual acts under international criminal law. These primary sources were supplemented by secondary sources in the form of academic articles and books, predominately, as indicated above, from the international criminal law genre. Various feminist, legal and socio-political theorist authors were furthermore analysed and discussed in chapter two, which involved a theoretical discussion of the general nature of sexual violence as well as the reasons for its predominance and nature of its use during armed conflict. Additionally, the works of Goy[50] and Cassese[51] formed the theoretical basis for the discussion about whether the ICC may rely on the jurisprudence of the *ad hoc* tribunals to interpret the Rome Statute in chapter five. In chapter six I used and evaluated the varied academic opinions of Ohlin,[52] Cassese, Badar,[53] Werle[54] as well as Danner and Martinez[55] to determine whether the JCE doctrine limits the rights of the accused to fair trial or threatens the principles of legality and other foundational notions of international criminal law.

1 4 Limitations

During my pre-study I came across a number of different factors that hamper the prosecution of rape and other acts of sexual violence. For instance, the cultural and social consequences of rape coupled with the taboo topic of sexual violence, discourages witnesses and victims from coming forward. In addition, the chaotic and violence nature of armed conflict means that evidence is

[50] Goy (2012) *ICL Rev* 1.

[51] A Cassese "Proper Limits of Individual Responsibility under the Doctrine of JCE" (2007) 5 *Journal of International Criminal Justice* 109.

[52] JD Ohlin "Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise" (2007) 5 *Journal of International Criminal Justice* 69.

[53] ME Badar *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (2013) 1.

[54] G Werle "Individual Criminal Responsibility in Article 25 ICC Statute" (2007) 5 *Journal of International Criminal Justice* 953.

[55] Danner & Martinez (2005) *Cali L Rev* 75.

destroyed or lost and the parties involved in the crime or who witnessed the crime may be dead or too traumatised to come forward. While these factors arguably impede the successful prosecution of rape and other acts of sexual violence, the challenges experience by investigators and prosecutors in collecting real and oral evidence fall beyond the scope of this thesis.

In addition, the prosecution of the physical perpetrator of the crime ie the one who carries out the *actus reus* of rape or other acts of sexual violence, equally falls beyond the scope of my thesis. Additionally, my engagement with international human rights law is limited to three aspects. Firstly, the discovery of international obligations that arise when the commission of acts of sexual violence violate human rights. Secondly, the value of internationally recognised human rights when interpreting the Rome Statute, pursuant to article 21(3); and thirdly, the human rights of an accused to a fair trial. With regards to this point, this discussion in itself is not comprehensive, as I have chosen to discuss only the parts of international human rights law that would be directly relevant within the context of JCE category three.

1 5 Overview of the chapters

The first step in my analysis of Haffajee's proposal is to determine why the prosecution of rape and other acts of sexual violence is challenging. In chapter two I by relying on secondary sources, investigate the prevalence of, and reasons for, the commission of rape and acts of sexual violence, particularly during armed conflict. Firstly, the general nature of rape and sexual violence during armed conflict is discussed. Secondly, various feminist, legal, socio–political and socio-economic theories are analysed in order to provide explanations for the occurrence of sexual violence and its prevalence during armed conflict. The works of Buss[56] and Brownmiller[57] was selected to present a feminist perspective. Additionally, the works of Chinkin,[58] Obote-Odora[59] and the "World Report on Violence and Health" by the World Health Organisation ("WHO")[60] was cited to provide an initial international law perspective. Furthermore, the report "Sexual Assault and Male Dominance"[61] by the Advocates for Human Rights was cited to present the human rights perspective. Finally Turshen's chapter on "The Political Economy of Rape"[62] and El Jack's article on "Gender and Armed Conflict"[63] provided a gendered perspective on socio-economic and socio-political influences. The works of these scholars and institutions reveal why the prosecution of rape and other acts of sexual violence committed during armed conflict is more difficult and different to prosecute than those committed within a domestic setting during times of relative peace. Armed conflict exacerbates the difficulty experienced by the prosecution in securing a conviction for acts of sexual violence by impeding their ability to satisfy certain elements of the crime.

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[56] DE Buss "Rethinking 'Rape as a Weapon of War'" (2009) 17 *Feminist Legal Studies* 145.

[57] S Brownmiller *Against our will: Men, women and rape* (1975) 1.

[58] C Chinkin "Rape and Sexual Abuse of Women in International Law" (1994) 5 *European Journal of International Law* 326.

[59] Obote-Odora (2005) *New Eng J Int'l L & Comp L.*

[60] EG Krug, JA Mercy, LL Dahlberg, AB Zwi & R Lozano "World Report on Violence and Health" (2 October 2002) *World Health Organization* 161 <http://whqlibdoc.who.int/publications/2002/9241545615_eng.pdf?ua=1> (accessed 19-07-2015).

[61] Anonymous "Sexual Assault and Male Dominance" (1 February 2006) *Advocates for Human Rights* http://www.stopvaw.org/sexual_assault_and_male_dominance (accessed 2-10-2014).

[62] M Turshen "The Political Economy of Rape: An Analysis of Systematic Rape and Sexual Abuse of Women During Armed Conflict in Africa" in C Moser & F Clarke ed *Victors, Perpetrators or Actors: Gender, Armed Conflict and Political Violence* (2001) 55.

[63] A El Jack "Gender and Armed Conflict" (2003) *Overview Report by BRIDGE (development-gender)* 1.

In addition, I approach the origin of the prohibition of sexual violence within humanitarian and the human rights, in chapter two. In this discussion I mainly rely on primary sources of international law.[64] The aim is to understand the gravity of acts of sexual violence as violations of international humanitarian and human rights law. Thereby unearthing the remedies available to the victim as well as consequences of breaches for state parties. Furthermore, the prosecution of rape and other acts of sexual violence under the Rome Statute as well as the ICTY Statute and ICTR Statute are analysed in chapter three. The point of departure is to determine whether a duty, under international criminal law, to prosecute such crimes exists and if so; under which offenses it can be charged and who can be prosecuted. Subsequently, an analysis of the *ad hoc* tribunals' case law, pertaining to rape and other acts of sexual violence follows; in order to determine which elements, if any, are proving consistently difficult to prove.

The JCE doctrine, as the proposed solution, is then introduced in chapter four. The doctrine is defined and its origin discussed. Thereafter, the three different categories of the JCE doctrine, including; their requirements and fields of application, are set out. In addition, the requirements to establish liability through the JCE doctrine and its application to crimes of a sexual nature are illustrated through the case law of the MICT, ICTY and ICTR. The aim is to determine the doctrine's usefulness and reveal which category of JCE is most suitable for the prosecution of rape and other acts of sexual violence.

Chapter five begins with a discussion on the nature and use of precedent in international law. It is evident from my pre-study, as indicated above, that the ICC has not yet used the JCE doctrine. Furthermore, article 25 of the Rome Statute, which sets out the modes of perpetration and participation does not expressly refer to the JCE doctrine. Before the ICC can theoretically be encouraged to accept of the JCE doctrine, legal authority for a duty or at least a responsibility to look to the jurisprudence of the *ad hoc* tribunals would have to be provided. Moreover, the arena of international law is made of independent actors that elect to behave in a certain manner despite not being bound to do so. Therefore it is important to discuss if and how states and judicial bodies have elected to use jurisprudence or not. The most important instrument in persuading the ICC to take judicial notice of relevant sources is the Rome Statute. All its operations must be consistent with, and authorised by, the Rome Statute. Consequently, I firstly looked to article 21 of the Rome

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[64] In this discussion the provisions that address rape and acts of sexual violence in: the Hague Convention (II) with Respect to the Laws and Customs of war on Land and its Annex: Regulations concerning the Laws and Customs of War on Land and the Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 ("Fourth Geneva Convention") and its two Additional Protocols, the Charter of the International Military Tribunal ("Nuremberg Charter") and the Charter of the International Military Tribunal of the Far East ("Tokyo Charter") will be discussed pertaining to the provisions that address rape and acts of sexual violence. In addition, situations from Human Rights Committee ("HRC"), cases from the *ad hoc* tribunals, the Inter-American Court on Human Rights ("IACtHR"), the Inter-American Commission of Human Rights ("IACHR") and the European Court of Human Rights ("ECtHR") as well as various international and regional human rights instruments, such as; the Universal Declaration of Human Rights ("UDHR"), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("Women's Protocol"), the International Convention on Civil and Political Rights ("ICCPR"), African Charter on Human and People's Rights ("ACHPR"), the American Convention on Human Rights ("ACHR"), Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) ("ECHR"), the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), the United Nations Convention for the Elimination of All Forms of Discrimination Against Women ("CEDAW"), the General Recommendation No 19 of the Committee on the Elimination of Discrimination against Women ("CEDAW Committee") and the VCLT will be relied upon.

Statute that sets out the sources that may be used when interpreting the Rome Statute and the order in which these sources may be used. If the jurisprudence of the *ad hoc* tribunals is found to fit within one of the listed sources, it would certainly promote the ICC's use, or at least acknowledgement, of the JCE doctrine. In addition, any interpretation of the ICC must be consistent with internationally recognised human rights standard. Thus, secondly, I looked to article 21(3) of the Rome Statute that sets out the human rights standard for interpretation. Furthermore, the interpretation of the provisions of the Rome Statute, could not be concluded without referring to the Vienna Convention on the Law of Treaties ("VCLT"). Thirdly, I evaluated article 31 of the VCLT that sets out the general rules for interpreting treaties. If these inquires reveal that the ICC ought to look to the jurisprudence of the *ad hoc* tribunals, the ICC will only do so if article 25 of the Rome Statute is comparable to the relevant provisions within the statutes of the *ad hoc* tribunals. While the ICTY and ICTR Statutes might support the application of the JCE doctrine, it does not necessitate the ICC's acceptance because they are independent judicial bodies that are constituted and authorised by separate instruments. Chapter five will therefore be rounded out with a comparison of article 25 of the Rome Statute to articles 6 and 7 of the ICTR Statute and ICTY Statute, respectively, to determine their compatibility. This will include a comparison of; the modes of participation and perpetration, the requisite subjective and objective elements for commission and the test that distinguishes modes of participation and perpetration that give rise to principal liability from those that result in derivative forms of liability. The aim is to determine whether the Rome Statute can support the same construction of the JCE doctrine as advocated by the *ad hoc* tribunals. Particularly whether a contribution to a JCE can amount to a commission and thereby principal liability.

The legitimacy of the JCE doctrine is evaluated in chapter six by investigating its origin. I furthermore analyse whether it infringes the right of the accused to a fair trial, the principles of legality and the basic norms and principles of criminal law, including the principle of individual culpability. Irrespective of whether the JCE doctrine offers a solution to the perceived problem and the ICC accepts that it should at least consider the jurisprudence of the *ad hoc* tribunals because it is useful and comparable; the ICC should only accept it if this doctrine is legitimate. Thus, in addition, the various criticisms of the JCE doctrine from case law and academic scholars is evaluated. In this regard the most contentious issues: its origin in customary international law, the equal attribution of liability, its application to special intent crimes and whether a contribution to JCE liability can constitute a commission and therefore result in principal liability, are explored. After considering the criticisms and evaluating their strength by comparing them to case law as well as opposing and supporting authors, possible solutions will be discussed and evaluated. Chapter six is concluded by a discussion on the proposed use and reform of the JCE doctrine. Chapter seven concludes my thesis with a summary of all my findings and I make recommendations for the future application of the JCE doctrine within international criminal law.

CHAPTER 2: THE NATURE OF SEXUAL VIOLENCE

2 1 Introduction

As explained in the introduction this thesis is aimed at exploring whether it is possible to improve the conviction rate of hold high-ranked officials and the masterminds for acts of sexual violence that were committed by others. To ensure the efficacy of prosecutorial doctrines or measures the nature of the crime and the environment within which these crimes occur must be considered. In understanding the nature of sexual violence, pursuant to my first research question, measures can arguably be improved to better suit the context and specific challenges faced when prosecuting sexual violence. Furthermore, the nature of a specific crime and context may warrant the use of special prosecutorial or evidentiary rules, inferences and concessions in order to ensure the reasonable prospect of a successful prosecution.

In this chapter I firstly discuss, the general nature of sexual violence during armed conflict. Secondly, I discuss various feminist, legal, socio–political and socio-economic theories. These theories can separately or in combination offer explanations to the occurrence of sexual violence and its prevalence during armed conflict. They also overlap and share common denominators such as the systematic use of sexual violence to achieve a larger goal. As sexual violence is a world-wide phenomenon examples from all over the globe are used in this chapter to illustrate the arguments brought forward by the literature. Thirdly, I approach the origin of the prohibition of sexual violence within international humanitarian law. In this discussion I mainly rely on primary sources of international law. Fourthly, I investigate the impact that the commission of acts of sexual violence have on international human rights. In doing so, I rely on case law from regional human rights courts as well as regional and international human rights instruments. The aim thereof being to determine whether the international community is obliged to prosecute acts of sexual violence and to ensure the reasonable prospect of a conviction, in accordance with my second research question.

2 1 1 The nature of sexual violence

The nature of a crime can arguably either hamper or ease the ability to prosecute. Sullivan states that a remedy or measures' "[e]ffectiveness depends also on the nature of the violation".[65] Therefore, the nature of the crime and the context within which it is committed can and should be considered when interpreting provisions of a statute that set out the elements of the crime. For instance, rape committed during periods of relative peace is traditionally private in nature, which means that there are usually no witnesses except for the two parties involved.[66] The prosecution often finds it difficult to establish the element of non-consent. Context-sensitive and gender-sensitive interpretative and evidentiary rules could be developed to assist the prosecution of sexual violence. For example, rule 96(i) of the Rules of Procedure and Evidence ("RPE") of the International Criminal Tribunal for the Former Yugoslavia, which supplement the Statue of the

[65] DJ Sullivan "Overview of the Rule Requiring the Exhaustion of Domestic Remedies Under the Optional Protocol to CEDAW" (2008) *International Women's Rights Action Watch Asia Pacific* 15 <http://www.iwraw-ap.org/publications/doc/DonnaExhaustionWeb_corrected_version_march%2031.pdf> (accessed 1-10-2014).

[66] World Health Organization "Violence Against Women: Intimate partner and sexual violence against women" (November 2014) *World Health Organization* <http://www.who.int/mediacentre/factsheets/fs239/en/> (accessed 22-06-2015). See also EJ Wood "Sexual Violence during War: Toward an Understanding of Variation" in L Sjoberg & S Via (eds) *Gender, War, and Militarism* (2010) 124 124: "Some acts occur in private setting; many are public, in front of family or community members."

ICTY Statute does not require corroboration of the victim's testimony.[67] Sexual violence is a grave and independent crime, however; harsh cultural and social consequences of rape coupled with the taboos surrounding the topic of sexual violence, often discourage victims and witnesses from coming forward.[68] In addition, the cultural sensitivities together with the trauma experienced, sometimes make it very difficult for the victim or witness to describe the anatomical details that are necessary to discharge the element of penetration, required for a rape conviction.[69] Therefore, as found by the ICTR in *Akayesu,* the definition of rape must be sensitive to the context including the culture of the area.[70] Hence, it is important to include the nature of sexual violence that occurs during armed conflict, when evaluating the prosecution of sexual violence and the respective elements of the crime. In doing so, the reasons for successful or labored prosecution; including which elements of the crime are difficult to satisfy, can be discovered. This knowledge, I argue provides a better foundation for creating, evaluating and proposing solutions, if necessary.

In addition, sexual violence is rarely expressed as the intended objective of armed conflict or expressly ordered. It is however, very often an implicit part of war strategy, which is supported, planned and coordinated by individuals in a position of power.[71] Furthermore, armed conflict is established and maintained by using a chain of command.[72] Arguably, the distance created by the chain of command together with the absence of a direct order to commit rape, makes it difficult to establish any individual criminal responsibility of high-ranked officials. It is therefore unlikely that the participation of high-ranked officials through planning, support or acquiescence can establish individual criminal responsibility as a principal perpetrator because he or she did not physically rape or sexually assault the victim him or herself. This argument is discussed further in chapter three, with reference to case law from the ICTY and the ICTR.

Furthermore, sexual violence during armed conflict is characteristically widespread, often committed by numerous perpetrators and on numerous occasions.[73] The impact is therefore arguably grave. The widespread character hints at its instrumentality and foreseeability.[74] Moreover, if it is occurring so frequently over a large area, the awareness of the incidence or possible occurrence is more likely. Arguably, the widespread nature and gravity creates an obligation to protect, prevent and punish.

Moreover, sexual violence that occurs during armed conflict is different from rape committed during periods of relative peace because it is inflicted predominately in a public manner. Public perpetration is often intentionally used to terrorise local populations.[75] Sexual violence is often committed in front of family members or family members are forced to rape their relative.[76] Due to

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[67] KD Askin "Prosecuting Wartime Rape And Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles" (2003) 21 *Berkeley Journal of International Law* 288 335-336 cf *Prosecutor v Furundžija* IT-95-17/1 (1998) para 109; Rule 96(i) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia IT/32 (adopted 11 February1994, entered into force 14 March 1994).

[68] Haffajee (2006) *Harv J L & Gender* 205 cf JG Gardam & MJ Jarvis *Women, Armed Conflict, and International Law* (2001) 155-158.

[69] *Prosecutor v Akayesu* ICTR-96-4-T (1998) para 687.

[70] Para 687.

[71] Buss (2009) *Feminist Legal Studies* 155 cf UNSC Res 1820 (19 June 2008) UN Doc S/RES/1820.

[72] Chinkin (1994) 5 *EJIL* 328 cf C Enloe "The Gendered Gulf" in C Peters 9 ed *The 'New World Order' at Home and Abroad Collateral Damage* (1992) 97.

[73] *Prosecutor v Akayesu* ICTR-96-4-T (1998) para 731.

[74] Para 12.

[75] Buss (2009) *Feminist Legal Studies* 149.

[76] Wood "Sexual Violence during War" in *Gender, War, and Militarism* 124: "Some acts occur in private setting; many are public, in front of family or community members."

the public nature rape is often witnessed. The witness can help the prosecution establish the occurrence, however; the violent nature of armed conflict may destroy any prosecutorial advantage that the public nature provides. The victim or witness may be killed during the conflict or end up so traumatised that they are unable or unwilling to come forward and testify. The challenges experienced by investigators and prosecutors in obtaining the necessary real and oral evidence for trial, clearly impacts the prosecution's prospect of success, however; these hurdles fall beyond the scope of this analysis.

Additionally, the ICTR in *Akayesu*, acknowledged that both torture and sexual violence have an instrumental nature.[77] Both can be used as tools to intimidate, humiliate, degrade, destroy, discriminate, control or punish.[78] Recognising the deliberate and instrumental nature of sexual violence may assist its prosecution as a crime against humanity or an act of genocide because its instrumentality indicates that it has been intentionally used to fulfill a purpose. The intentional nature of sexual violence impacts the prosecution by influencing the satisfaction of the subjective elements of the crime. The perpetrator's intention includes his or her foresight with regards to the conduct and the victim. During armed conflict the commission is concerned with the perpetrator, the victim and the groups to which they both belong.[79] Sexual violence is therefore a means to target a specific group.[80] Buss posits that "[r]ape follows from the very existence of conflicts understood as occurring between two polarised sides".[81] Rape is thus integral, not incidental, to armed conflict.[82] Rape is systematically and intentionally used as part of a wider strategy or plan.[83]

2 2 Theories explaining the prevalence of sexual violence

2 2 1 Sexual violence as a tool used to gain economic and political power

The struggle for power ie the access to and control over resources, human or otherwise, has been the cause of armed conflict for centuries.[84] War is often concerned with the transfer of assets from the weak to the strong.[85] The control of resources and the exercise of power are both engendered.[86] Gender relations, as further discussed below, are "typically characterised by unequal access to, or distribution of, power".[87] The have-nots are disproportionately female.[88] Yet women, especially while pregnant or lactating, are in need of additional nutritional and medical resources.[89] In addition, the Convention for the Elimination of All Forms of Discrimination Against Women ("CEDAW") by recognising the need to make opportunities available to women, arguably acknowledges that women experience an inferior position in society over-all, which can be

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[77] *Prosecutor v Akayesu* ICTR-96-4-T (1998) para 687.

[78] Para 687.

[79] Chinkin (1994) 5 *EJIL* 328 cf Enloe "The Gendered Gulf" in *The 'New World Order'* 97.

[80] C MacKinnon "Reflections on Sex Equality Under Law" (1991) 100 *Yale Law Journal* 1301-1302.

[81] Buss (2009) *Feminist Legal Studies* 155.

[82] 145; UNSC Res 1820 (2008) UN Doc S/RES/1820.

[83] Turshen "The Political Economy of Rape" in *Victors, Perpetrators or Actors* 55.

[84] El Jack (2003) *Overview Report by BRIDGE* 8.

[85] Turshen "The Political Economy of Rape" in *Victors, Perpetrators or Actors* 59.

[86] El Jack (2003) *Overview Report by BRIDGE* 8.

[87] 11.

[88] 8.

[89] 17.

aggravated by violence.[90] Gender inequality is illuminated by war because people are more sensitive to the allocation and control over resources when lacking. Moser states that sexual violence has been systematically and deliberately used during civil war as a strategy to wrest personal assets, political or economic, from women.[91]

The use of sexual violence as an economic and political tool presupposes society's belief, conscious or unconscious, that women are commodities. Historically women were, and in some places still are, considered the property of a man.[92] Rape would therefore constitute a crime against her brother or father who would in turn be entitled to compensation.[93] A woman's value in these contexts is determined by her productive value as a caregiver, gatherer and worker and by her reproductive value as bearer of children who can grow and strengthen the community.[94] During armed conflict women serve as cooks, cleaners, tailors, farmers and porters, which are necessary for the continued operation of warfare, especially guerrilla warfare.[95] Furthermore, she is valued for her access to assets and her value is closely connected to and determined by her virtue and modesty. A woman's value in this regard, can be illustrated by the cultural practice of paying a bride-price. An amount is paid to the bride's family as compensation for losing her reproductive and productive value when she marries into her husband's family.[96] The amount paid is usually determined by her skills, education, perceived fertility, beauty and reputation. Cultural practices are important because they; form part of a person's perceived identity, have significant meaning and may add value to the woman sense of self yet whenever a value is attached to a women, no matter how noble or complimentary the motivation, that value can also be diminished. In addition, payment may indicate ownership.[97]

Something of value is a commodity; it can be traded, exchanged, bought or sold. Arguably, when a person's value is quantifiable or conditional, not purely based on her existence as a human being, it can be diminished or lost entirely. Any indiscretion can diminish the amount payable or more likely ruin a woman's marriage potential, which would be shameful for her and her family. For example, her rape can diminish her value because of the many social and cultural issues related to women's "cleanliness" and "good behavior".[98] Furthermore, bearing a child out of wedlock, whether as a result of consensual sex or not, in some cultures classifies a woman as "loose" and therefore frees the family from their duties to protect and provide for her.[99] The language of public morality and stereotypes are used as weapons to manipulate and interpret the control over resources.[100] Concepts of virtue and family honour can therefore objectify women.[101]

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[90] M Eriksson "Defining Rape: Emerging Obligations for States under International Law?" (2010) 2 *Orebro Studies in Law* 1 298 and 349 cf the Convention for the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force on the 3 September 1981) 1249 UNTS 13.

[91] Turshen "The Political Economy of Rape" in *Victors, Perpetrators or Actors* 55.

[92] 65. Turshen refers to southern Mozambique as an example.

[93] Anonymous "Sexual Assault and Male Dominance" *Advocates for Human Rights* cf P Miller & N Biele *Twenty Years Later: The Unfinished Revolution, in Transforming a Rape Culture* (eds) (1993) 47 50.

[94] Turshen "The Political Economy of Rape" in *Victors, Perpetrators or Actors* 59.

[95] 56 and 60.

[96] 59.

[97] 65.

[98] 63.

[99] 64 cf V Jefremovas "Loose Women, Virtuous Wives, and Timid Virgins: Gender and the Control of Resources in Rwanda" (1991) 25(3) *Canadian Journal of African Studies* 378 383.

[100] Turshen "The Political Economy of Rape" in *Victors, Perpetrators or Actors* 64 cf Jefremovas (1991) *Can J Afr Stud* 379.

[101] Turshen "The Political Economy of Rape" in *Victors, Perpetrators or Actors* 64.

A woman's perceived value and symbolism is intrinsic to her use as a weapon.[102] Leaders of the opposing side are aware of a community's valuation of women and therefore sometimes intentionally use rape as a tactic to demoralise, segregate and impact the strength and growth of the group.[103] In addition, rape and abduction are ways of obtaining access to a woman's productive and reproductive labour.[104] Women of a child-bearing age were, as an example, specifically targeted during the Rwandan genocide.[105] Furthermore, girls who were abducted in Rwanda were referred to as "*umusanzu*", a term meaning a contribution to the war effort.[106] Furthermore, rape has been used to impregnate women with the enemy's offspring or to injure her so badly that she miscarries or is unable to bear children for her own community.[107]

In addition, inheritance and marriage are interrelated and sometimes connected to warfare; a man's interest in a female relative is comparable to his interest in property.[108] For example, Rwandan militiamen organised bogus weddings to legitimise the seizure of land.[109] Soldiers of the Rwandan Patriotic Front ("RPF") targeted Tutsi women who were married to Hutu men, in order to gain access to the man's property.[110] Due to the nature of civil wars, enemies, who were once neighbours, are aware of the other's family and financial situations. For example, widows and elderly women were abducted during the India and Pakistan Partition in 1947 in order to use the women to gain access to her husband's property.[111] In the alternative, men would forcibly marry widows or become the sons of elderly women in order to lay claim to the property she may access.[112]

Turshen explains that rape, during armed conflict, is a "socially constructed experience;" a series of deliberate policy decisions used to systematically deprive or transfer assets.[113] Moser proposes that we should extend our understanding of rape as an expression of social and cultural violence to an expression of political and economic violence, as well.[114] For example, forced pregnancy and sterilisation by brutal rape are expressions of political and economic violence. Sex work is considered by Turshen to be the "crudest form of asset transfer in civil war".[115] Sex is a commodity and is therefore traded in exchange for protection and survival.[116] El Jack lists Rwanda and Sierre Leone as examples of where sexual favours have been traded for food.[117] Turshen explains that perceived random acts of sexual violence, during a genocide, are not merely "war booty;" these acts fall within a greater and systematic asset stripping strategy. In Rwanda, the Kinyarwandan word for

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[102] 55.

[103] 59.

[104] 60.

[105] 60.

[106] 59.

[107] 60.

[108] 61 cf A des Forges *Leave None to Tell the Story: Genocide in Rwanda* (1999) 1 564.

[109] Turshen "The Political Economy of Rape" in *Victors, Perpetrators or Actors* 62.

[110] 62.

[111] 61 cf U Butalia *The Other Side of Silence* (1998) 135.

[112] Turshen "The Political Economy of Rape" in *Victors, Perpetrators or Actors* 61 cf Butalia *The Other Side of Silence* (1998) 135.

[113] Turshen "The Political Economy of Rape" in *Victors, Perpetrators or Actors* 55-56.

[114] 55.

[115] 60.

[116] El Jack (2003) *Overview Report by BRIDGE* 19.

[117] 17 cf JA Benjamin *"Conflict, Post-conflict, and HIV/AIDS – the Gender Connections: Women, War and HIV/AIDS: West Africa and the Great Lakes"* (2001) *Reproductive Health Care in Crisis Consortium* <www.rhrc.org/resources/sti/benjamin.html> (accessed 11-11-2014).

rape literally means to liberate.[118] The same word for rape was initially used to describe the act of coercing someone to change political parties and later used to describe the act of forcibly taking land or resources.[119] Rape therefore literally refers to the theft of assets. Arguably, rape is inseparable from the general purpose of war; to obtain power and inevitably conquer.

2 2 2 A feminist theory: Sexual violence is used to re-stabilise gender relations

Another explanation for the prevalence of sexual violence is the desire to restore the pre-conflict status quo, with regards to gender relations. Gender relations refer to the relationships, roles, interactions and the power play between genders. The perception of gender appropriate behaviour and roles are determined by social and cultural expectations.[120] The status quo regarding gender relations is one of inequality. According to El Jack, a superior and subordinate gender always exits and their interactions are dependent on a "dominant understanding of gender roles".[121] Women are stereotyped as passive and nurturing, which is perceived to be synonymous with the lesser gender or the victim.[122] This characterisation of women is used to justify the force used by men to protect them.[123] Men are stereotyped as the aggressor, protector or the stronger, which is perceived to be synonymous with the superior gender.[124] The WHO posits that sexual violence is a result of ideologies, which foster a man's sense of entitlement.[125]

Armed conflict usually destabilises stereotypical gender relations.[126] El Jack explains that "conflict breeds distinct types of power relations and imbalances".[127] For example, men fall victim to violence and are emasculated by their inability to protect their communities. In addition, men are also raped.[128] Moreover, some women are elevated to heads of the households through death or displacement and others choose to enlist or fight.[129] Furthermore, war is traditionally perceived as a man's business.[130] Therefore some men feel the need to correct this shift and sex, due to its gendered nature, is often the tool of choice.[131] Advocates for Human Rights explain that: "rape is the male response to social inequality between men and women".[132] Moreover, that "[r]ape has been used historically for the subjugation of women and as a means of ensuring that women conform to

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[118] Turshen "The Political Economy of Rape" in *Victors, Perpetrators or Actors* 61 cf B Nowrojee *Shattered lives: Sexual violence during the Rwandan genocide and its aftermath* Human Rights Watch (1 January 1996) 39.

[119] Turshen "The Political Economy of Rape" in *Victors, Perpetrators or Actors* 61 cf Nowrojee "Shattered lives" Human Rights Watch (1996) 39.

[120] El Jack (2003) *Overview Report by BRIDGE* 6.

[121] 6.

[122] 6.

[123] 11.

[124] 6.

[125] Krug et al "World Report on Violence and Health" *World Health Organization*.

[126] El Jack (2003) *Overview Report by BRIDGE* 6.

[127] 16.

[128] 12.

[129] 6-7, 9 and 12.

[130] 20 cf Anonymous "Extract from the narrative of Nora Miselem" in M Randall (ed) *When I Look Into the Mirror and See You: Women, Terror and Resistance* (2003) 28-29.

[131] El Jack (2003) *Overview Report by BRIDGE* 17.

[132] Anonymous "Sexual Assault and Male Dominance" *Advocates for Human Rights* cf JL Jasinski "Theoretical Explanations for Violence Against Women" in CM Renzetti, JL Edelson & RK Bergen (eds) *Sourcebook on Violence Against Women* (2001) 5 12-13.

the behaviour patterns required by the community".[133] El Jack explains how certain men purposively set out to torture women who break the mould by enlisting. As an example, El Jack refers to a woman who was tortured for "betraying her womanhood" by enlisting.[134] She was raped by men who threatened her with impregnation one day and sterilisation another.[135] Similarly, in a Honduran refugee camp female combatants were punished for breaking female tradition. Rape was used as a tool of psychological torture, reserved for women.[136] El Jack also uses Bosnia-Herzegovina and Kosovo as examples where rape was used as a weapon to punish women belonging to the Kosovo Liberation army.[137]

Rape is "essentially a crime committed against women".[138] This is so, because sexual violence is used to maintain female subordination.[139] The United Nations Economic and Social Council ("ECOSOC"), in reviewing the strategies of Nairobi, acknowledged gender based violence as a human rights violation; a form of gender discrimination, which stems from women's unequal status in society.[140] Women have been historically discriminated against for centuries due to deep-seeded socio-cultural attitudes.[141] Furthermore, the preamble of CEDAW acknowledges that sexual violence is a manifestation of the historically unequal power relations between men and women, which systematically maintains the subordination and inequality of women.[142] Eriksson states that: "the fact that violence against women is a universal phenomenon and pervasive in all cultures points to its roots in patriarchy".[143] MacKinnon avers that sexual violence is both a manifestation of a woman's subordinate status and evidence that gender inequality exists.[144] MacKinnon goes on to describes rape as an "act of dominance, over women, that works systematically to maintain a gender-stratified society in which women occupy a disadvantaged status as the appropriate victims and targets of sexual aggression".[145] Sexual violence is therefore a social mechanism of gender subjugation.[146] The ICTY Trial Chamber in *Prosecutor v Delalic, Mucic, Delic & Landzo*

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[133] Anonymous "Sexual Assault and Male Dominance" *Advocates for Human Rights* cf R Coomaraswamy & LM Kois "Violence Against Women" in KD Askin & DM Koenig (eds) *Women and International Human Rights Law* (1999) 177 179.

[134] El Jack (2003) *Overview Report by BRIDGE* 20 cf Anonymous "Extract from the narrative of Nora Miselem" in *When I Look Into the Mirror and See You* 28-29.

[135] El Jack (2003) *Overview Report by BRIDGE* 20 cf Anonymous "Extract from the narrative of Nora Miselem" in *When I Look Into the Mirror and See You* 28-29.

[136] El Jack (2003) *Overview Report by BRIDGE* 20 cf "Anonymous "Extract from the narrative of Nora Miselem" in *When I Look Into the Mirror and See You* 28-29.

[137] El Jack (2003) *Overview Report by BRIDGE* 16 cf Anonymous "International Justice for Women: The ICC Marks a New Era" (1 July 2002) *Human Rights Watch Backgrounder* <m.hrw.org/reports/2002/07/01/international-justice-women-icc-marks-new-era > (accessed 11-11-2014).

[138] Chinkin (1994) *EJIL* 326.

[139] Anonymous "Sexual Assault and Male Dominance" *Advocates for Human Rights* 160.

[140] Eriksson (2010) *Orebro Studies in Law* 351 cf Annex to the ECOSOC Res 1990/15 (24 May 1990) para 23.

[141] Eriksson (2010) *Orebro Studies in Law* 350 cf the United Nation's Fourth World Conference on Women Beijing Platform for Action for Equality, Development and Peace (15 September 1995) UN Doc A/CONF.177/20 ("Beijing Platform").

[142] Eriksson (2010) *Orebro Studies in Law* 352 cf the preamble of the CEDAW (1981) 1249 UNTS 13.

[143] Eriksson (2010) *Orebro Studies in Law* 354. See also Report of the Secretary-General "In-depth study on all forms of violence against women" (6 July 2006) UN Doc A/61/122/Add.1 para 69.

[144] Eriksson (2010) *Orebro Studies in Law* 349 cf MacKinnon (1991) *Yale L J* 1302.

[145] Eriksson (2010) *Orebro Studies in Law* 349 cf MacKinnon (1991) *Yale L J* 1302.

[146] Eriksson (2010) *Orebro Studies in Law* 352 cf the preamble of CEDAW (1981) 1249 UNTS 13.

("*Celebici Camp"*) confirmed that rape may amount to discrimination because it primarily and intentionally targets women for being women.[147] The Inter-American Commission of Human Rights ("IACHR") in *Maria da Penha Fernandes v Brazil* ("*Fernandes*") found that where the state fails to prevent and protect they effectively perpetuate the violence.[148] The state therefore has a duty to work towards eradicating the gender bias and institutions, which institutionalise and maintain the unequal status of women. Acknowledging sexual violence as a form of gender discrimination therefore acknowledges the systemic root of sexual violence, which is essential for developing effective prevention and protection measures.

Arguably, the rape of a man does not negate the gendered nature of rape. Male rape is designed to "shatter male power".[149] Some male victims of rape are labelled as women or gay.[150] The inability of society to view a heterosexual male as the victim of rape arguably illustrates how femininity is synonymous with the role of a victim. The refusal of former Yugoslavia to acknowledge that males could be victims of rape is an institutional example of the gendered nature of rape.[151] Dolan argues that male rape has an even higher stigma attached to it because the violation undermines his masculinity in addition to the physical assault.[152] The humiliation and feminisation caused by male rape makes it a perfect tool for men to assert their power over other men.

According to Gibson, rape has throughout most of recorded history, been a crime against men.[153] Bennett and El Jack also propose a male-centric approach to rape. According to this approach, as alluded above, the rape of a female is actually targeted at her male counterparts. Rape is a "heinous crime against men" ie "a humiliation inflicted upon a nation, an affront to a man's pride as guardian of his women".[154] Bennett elaborates, rape is a public act of aggression, which violates and demoralises the men in her community by dishonouring *their* women.[155] This interpretation supports the conceptualisation of sexual violence as a tool used to gain economic and political power, as discussed in the previous sub-chapter. Certain Tutsi women, who were the wives of Hutu men, were protected from rape and violence because the Hutu combatants realised that their Hutu brother would be impacted negatively by her rape.[156] Her rape or murder would deprive him of her productive and reproductive capacities and he would therefore be entitled to seek revenge.[157] A male-centric approach does not necessarily trivialise the experience of women, instead it illustrates how "gender-based violence disrupts and destabilises gender relations in often irrevocably

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[147] Eriksson (2010) *Orebro Studies in Law* 354 cf *Prosecutor v Delalic, Mucic, Delic & Landzo* (Judgment) IT-96-21-T (16 November 1998) para 493.

[148] Eriksson (2010) *Orebro Studies in Law* 350 cf *Maria da Penha Fernandes v Brazil,* Inter-American Commission of Human Rights Series L Case No 12.051 Report No 54/01 (16 April 2001) para 58.

[149] El Jack (2003) *Overview Report by BRIDGE* 12.

[150] It should be noted that male victims remain "masculine heroes" to others. See El Jack (2003) *Overview Report by BRIDGE* 12 cf Turshen "The Political Economy of Rape" in *Victors, Perpetrators or Actors* 3.

[151] El Jack (2003) *Overview Report by BRIDGE* 12.

[152] 18 cf C Dolan "Collapsing Masculinities and Weak States – A Case Study of Northern Uganda" in F Cleaver ed *Masculinities Matter! Men, Gender and Development* (2002) 75.

[153] Chinkin (1994) 5 *EJIL* 338 cf S Gibson "The Discourse of Sex/War: Thoughts on Catherine Mackinnon's 1993 Oxford Amnesty Lecture" (1993) 2 *Feminist Legal Studies* 179.

[154] Chinkin (1994) 5 *EJIL* 338 cf Gibson (1993) *Feminist Legal Studies* 179.

[155] El Jack (2003) *Overview Report by BRIDGE* 18 cf O Bennett, J Bexley & K Warnock *Arms to Fight, Arms to Protect: Women Speak Out About Conflict* (eds) (1995) 8.

[156] Turshen "The Political Economy of Rape" in *Victors, Perpetrators or Actors* 59-60.

[157] 59-60 cf des Forges *Leave None to Tell the Story* 296.

damaging ways that negatively impact everyone".[158] Arguably, a male-centric interpretation also illustrates the gendered nature of rape; because it is founded on the gendered stereotype that women require the protection of men. Irrespective of their stereotypical or non-stereotypical roles, "all women experience discrimination, due to unequal power structures that govern their relationships with men".[159] Women are the common victims during armed conflict.

By acknowledging sexual violence as a manifestation of gender discrimination, the focus expands beyond the individual victim to include the victim as part of a group-based harm.[160] Without acknowledging its systemic use and the group-based nature of the harm, the remedies and prevention plans adopted by the state or the ICC will be inadequate because they will only be focused on the individual needs of the one victim instead of the systemic problem.[161] In addition, Eriksson proposes that the group nature of the harm creates a presumption that sexual violence is generally discriminatory, which forgoes the need to establish the individual perpetrator's intent.[162]

2 2 3 A utilitarian theory: Rape is a strategic weapon of war

A third explanation for the prevalence of sexual violence is its purposive use as a weapon of war.[163] Enloe argues that "militarized rape is a distinctly different act because it is perpetrated in a context of institutional policies and decisions," which are directly connected to the functions of a formal institution such as the state's national security or defence apparatus or an insurgency's military arm".[164] The United Nations Security Council ("UNSC") has declared that rape is often part of a "planned and targeted policy".[165] Rape is a "political event".[166] It serves a function.[167] It can be used to further militaristic or nationalist goals.[168] Buss also refers to "'rape as a weapon of war".[169] This phrase indicates that sexual violence has a systematic, pervasive, or officially orchestrated nature. Sexual violence under international criminal law is not random.[170] It forms part of a larger plan.

The instrumentality of rape creates an environment where women are perceived to be "inherently rapable".[171] In addition, victims may be sexually violated by numerous perpetrators on one or many different occasions.[172] The WHO cites Korea during the World War II ("WWII") and Bangladesh

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[158] El Jack (2003) *Overview Report by BRIDGE* 18.

[159] 12.

[160] Eriksson (2010) *Orebro Studies in Law* 350.

[161] 355 cf I Radacic "Rape Cases in the Jurisprudence of the European Court of Human Rights: Defining Rape and Determining the Scope of the state's Obligations" (2008) 13 *European Human Rights Law Review* 357 365 and 375.

[162] Eriksson (2010) *Orebro Studies in Law* 355.

[163] El Jack (2003) *Overview Report by BRIDGE* 17.

[164] Turshen "The Political Economy of Rape" in *Victors, Perpetrators or Actors* 58 cf C Enloe *Maneuvers: The International Politics of Women's Lives* ed (2000) 110.

[165] Buss (2009) *Feminist Legal Studies* 146 cf UNSC Res 1820 (2008) UN Doc S/RES/1820.

[166] Buss (2009) *Feminist Legal Studies* 149 cf R Seifert "War and rape: A preliminary analysis" in A Stiglmayer ed *Mass rape: The war against women in Bosnia-Herzegovina* (1994) 54 68.

[167] Buss (2009) *Feminist Legal Studies* cf Seifert "War and rape" in *Mass rape* 55.

[168] Buss (2009) *Feminist Legal Studies* 149.

[169] 146.

[170] 149 cf CN Narchos "Women, war, and rape: Challenges facing the International Tribunal for the Former Yugoslavia" (1995) 17 *Human Rights Quarterly* 649 658.

[171] Buss (2009) *Feminist Legal Studies* 155 cf S Marcus "Fighting bodies, fighting words: A theory and politics of rape prevention" in J Butler & J Scott (eds) *Feminists theorize the political* (1992) 385 and 388.

[172] *Prosecutor v Akayesu* ICTR-96-4-T (1998) para 731.

during the war of independence, Algeria,[173] India (Kashmir),[174] Indonesia,[175] Liberia,[176] Rwanda and Uganda[177] as examples of where sexual violence was used as a strategy of war.[178]

A mentioned above, sexual violence during armed conflict occurs in public areas, in front of family members or family members are forced to rape their relative.[179] The purpose is two-fold. Firstly, the public nature creates fear and panic; terrorising all women with the possibility of being raped at any moment by any man.[180] In support of this, Brownmiller argues that men are aware that they can use their genitals to generate fear.[181] Secondly, the public nature sends a message to the opposition that the perpetrators have conquered their woman and therefore the group to which she belongs. Women are perceived to be the preservers of family honour and often symbolise a nation's "racial purity and culture".[182] This message, especially when delivered publically, is more than one of victory; it attacks the opposition psychologically, by creating the impression that they are unable to protect their own and therefore emasculates and demoralises them.[183] The WHO posits that sexual violence is used to subvert the perceived enemy by breaking down community bonds.[184] It also incites more violence through what is perceived to be justified retaliation. In addition, male spouses who are "crippled by guilt and anger" through their inability to protect their women may ironically resort to sexual or physical violence to assert their masculinity.[185] Furthermore, sexual violence can be an attack on the entire country, her community, the males within her family and her human rights.[186]

Women are therefore the perfect target of genocide and ethnic cleansing because the enemy can hurt or kill them at the same time as destroying women's ability to produce offspring for the community. During sectarian conflict; conflict between different racial, political, ethnic or religious groups, the rape of women, belonging to opposition, is a common tactical practice.[187] For example, Turshen states that rape, as part of the ethnic cleansing in Bosnia, was designed to drive women from their communities and cripple their ability to grow their ethnicity's population.[188] In

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[173] C Chelala "Algerian abortion controversy highlights rape of war victims" (1998) 345 *Lancet* 1413.

[174] Human Rights Watch "Rape in Kashmir: a crime of war" (1993) *Human Rights Watch* <www.m.hrw.org/reports/1993/05/01/rape-kashmir> (accessed 11-11-2014).

[175] W Xiau "Silent consent: Indonesian abuse of women" (1999) 21 *Harvard International Review* 16–17.

[176] S Swiss, PJ Jennings, GV Aryee, GH Brown, RM Jappah-Samukai, MS Kamara, RD Schaack & RS Turay-Kanneh "Violence against women during the Liberian civil conflict" (1998) 279 *Journal of the American Medical Association* 625–629.

[177] S Swiss & GE Giller "Rape as a crime of war: a medical perspective*"* (1993) 270 *Journal of the American Medical Association* 612–615.

[178] Krug et al "World Report on Violence and Health" *World Health Organization* 156.

[179] El Jack (2003) *Overview Report by BRIDGE* 19.

[180] Buss (2009) *Feminist Legal Studies* 149.

[181] Brownmiller *Against our will* (1975) 13-14 cf Buss (2009) *Feminist Legal Studies* 148.

[182] El Jack (2003) *Overview Report by BRIDGE* 18.

[183] 11. See also United Nations "Women, Peace and Security*"* (2000) *United Nations* 16 <www.un.org/womenwatch/daw/public/eWPS.pdf> (accessed 11-11-2014).

[184] Krug et al "World Report on Violence and Health" *World Health Organization* 156.

[185] El Jack (2003) *Overview Report by BRIDGE* 19 cf A El Jack "Gender Perspectives on the Management of Small Arms and Light Weapons in the Sudan" in V Farr & K Gebre-Wold (eds) *Gender Perspectives on Small Arms and Light Weapons: Regional and International Concerns, Brief 24* (2002) 51.

[186] El Jack (2003) *Overview Report by BRIDGE* 18.

[187] Turshen "The Political Economy of Rape" in *Victors, Perpetrators or Actors* 58.

[188] 58.

Yugoslavia it was used as "a method of ethnic cleansing intended to humiliate, shame, degrade and terrify the entire ethnic group".[189] Additionally, during the Rwandan genocide women were targeted, raped and killed as part of "a policy specifically encouraged and directed to further the goal of the leaders of the genocide to destroy all Tutsi as a social group".[190] The WHO affirms that sexual violence was used in Rwanda and Yugoslavia as a tool for ethnic cleansing.[191]

Turshen explains that extra-legal activity, such as rape, during armed conflict is justified by combatants as serving a sectarian purpose even when the victim does not fall within the targeted group.[192] For example, in Rwanda even Hutu women, with no affiliation to Tutsi men, were raped.[193] Rape therefore became a gender issue; women across political and ethnic lines were targeted.[194] Consequently, the utilitarian theory supports the feminist approach by acknowledging that women are intentionally targeted through the commission of sexual violence; whether the purpose is to maintain female subordination as discussed in the feminist approach, above or to destroy the group that the women form part of, as discussed here.[195]

2 2 4 Sexual violence in armed conflict mirrors pre-existing gender relations

The prevalence of sexual violence can be explained by the aggravating affect that armed conflict has on pre-existing gender relations that exist within a society.[196] El Jack states that "militarisation exacerbates inequalities"[197] and escalates everyday violence.[198] Armed conflict creates a generally violent environment, within which sexual violence occurs.[199] Societies that experience more violence, for example during armed conflict, are more likely to experience high rates of sexual violence.[200] Chinkin posits that rape is not about sex. Sexual violence is an expression of power and control as understood by "male soldiers' notions of their masculine privilege," which are exercised and empowered by "military's lines of command and by class and ethnic inequalities among women".[201] Cultural and subconscious patterns of gender discrimination are institutionalised by patriarchal structures and ideas, which can manifest as violence during armed conflict.

The exacerbation is stimulated by a myriad of factors. A militaristic mentality, similar to a mob-mentality, encourages violence and numbs the communal conscience. Military and patriarchal

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[189] Chinkin (1994) 5 *EJIL* 329 cf UNCHR "Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki Special Rapporteur of the Commission on Human Rights, Pursuant to HRC Resolution 1992/S-1/1 of 14 August 1992" (adopted 18 December 2008, entered into force 19 February 2009) UN Doc E/CN.4/1993/50.

[190] Turshen "The Political Economy of Rape" in *Victors, Perpetrators or Actors* 61 cf D Newbury "Understanding genocide" (1998) 41(1) *African Studies Review* 73 92.

[191] Krug et al "World Report on Violence and Health" *World Health Organization* 156.

[192] Turshen "The Political Economy of Rape" in *Victors, Perpetrators or Actors* 58.

[193] 58.

[194] 58.

[195] See 2 2 2 above: A feminist theory: Sexual violence is used to re-stabilise gender relations.

[196] El Jack (2003) *Overview Report by BRIDGE* 6 and 16.

[197] 8.

[198] 16.

[199] Chinkin (1994) 5 *EJIL* 328.

[200] Advocates for Human Rights "Sexual Assault and Cultural Norms" (1 February 2006) *The Advocates for Human Rights* <www.stopvaw.org/sexual_assault_and_cultural_norms> (accessed 10-11-2014) cf Krug et al "World Report on Violence and Health" *World Health Organization* 162.

[201] Chinkin (1994) 5 *EJIL* 328 cf Enloe "The Gendered Gulf" in *The 'New World Order'* 97.

institutions are based on cultural constructions of manliness.[202] For example, a "proper man" can use a weapon.[203] Advocates for Human Rights posit that "where the ideology of male superiority is strong (…) emphasizing dominance, physical strength and male honour (…) rape is more common".[204] In addition, the general violent nature of a society encourages aggressiveness in men.[205] Society expects all men to be inherently violent.[206] When they do not meet these expectations, their masculinity is attacked and therefore some men resort to public or private violence to assert their position of power and masculinity.[207] Moreover, traditional structures, which maintain and enforce law and order, break down during armed conflict.[208] Therefore perceived as well as actual consequences, which traditionally act as deterrents, are limited. Furthermore, modern-day civil wars are fought among civilians. The distinction between conflict and safe zones is therefore a myth.[209] Women are forced to continue their lives within the battlefield, which expose them to violence. Certain war policies even target homes.[210]

2 3 Sexual violence as a violation of humanitarian law

In 1863, article 44 of the Instructions for the Government of Armies of the United States in the Field ("Lieber Code") banned rape as a punishable act under article 47.[211] Thereafter article 1 of the Annex: Regulations concerning the Laws and Customs of War on Land to the Hague Convention (II) with Respect to the Laws and Customs of war on Land ("the Hague Convention (II)"),[212] article 1 of the Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land ("Hague Convention (IV)")

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[202] El Jack (2003) Overview Report by BRIDGE 13 cf M Turshen & C Twagiramariya *What Women Do in Wartime: Gender and Conflict in Africa* (eds) (1998) 5.

[203] El Jack (2003) *Overview Report by BRIDGE* 13 cf S Jacobs, R Jacobson & J Marchbank *States of Conflict: Gender, Violence and Resistance* (eds) (2000) 11.

[204] Advocates for Human Rights "Sexual Assault and Cultural Norms" *The Advocates for Human Rights* cf Krug et al "World Report on Violence and Health" *World Health Organization* 162.

[205] Advocates for Human Rights "Sexual Assault and Cultural Norms" *The Advocates for Human Rights* cf PR Sanday "The Socio-Cultural Context of Rape: A Cross-Cultural Study" (1981) 37(4) *Journal of Social Issues* 5-27.

[206] El Jack (2003) *Overview Report by BRIDGE* 13 cf Dolan "Collapsing Masculinities and Weak States" in *Masculinities Matter! Men, Gender and Development* 75.

[207] El Jack (2003) *Overview Report by BRIDGE* 13-14.

[208] 16.

[209] 9 cf B Byrne, R Marcus & T Powers-Stevens "Gender, Conflict and Development" (1996) vol I Overview Report 34 *BRIDGE Institute of Development Studies*.

[210] El Jack (2003) *Overview Report by BRIDGE* 9 cf El Jack "Gender Perspectives on the Management of Small Arms" in *Gender Perspectives on Small Arms and Light Weapons* 24.

[211] PV Sellers "The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation" (2007) *Office of the High Commissioner for Human Rights* 7 <http://www.ohchr.org/Documents/Issues/Women/WRGS/Paper_Prosecution_of_Sexual_Violence.pdf> (accessed 23-09-2014) cf art 44 and art 47 of the Instructions for the Government of Armies of the United States in the Field (adopted 24 April 1863).

[212] The Hague Convention (II) with Respect to the Laws and Customs of war on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) 1899 Treaty Series 403.

prohibited all war crimes, including rape.[213] Sellers argues that the prohibition was based on the protection of family honour.[214] Furthermore, the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and the Charter for the International Military Tribunal ("Nuremberg Charter") and the Charter of the International Military Tribunal for the Far East ("Tokyo Charter") prohibited war crimes, crimes against humanity and crimes against peace, however; neither expressly referred to rape.[215] Nonetheless, both tribunals admitted and ruled on evidence of rape.[216] For example, the prosecutors of the International Military Tribunal for the Far East at Tokyo ("IMTFE") indicted the rape of prisoners and nurses.[217] However, the prosecutors at the IMTFE received criticism for failing to lead evidence on the systematic nature of sexual violence, particularly with regard to the sex slavery of girls and women who were used to comfort members of the Japanese army.[218]

In 1949, four Geneva Conventions were signed into existence. Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 ("Fourth Geneva Convention of 1949"), concerning the treatment of civilian populations under enemy occupation, prohibits attacks on women's honour including rape and forced prostitution.[219] According to Pictet's Commentary to the Fourth Geneva Convention of 1949; the focus on sexual crimes as an attack against honour, did not acknowledge the violent nature of sexual crimes.[220] In 1977, the signing of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict ("Additional Protocol I")[221] and the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Additional Protocol II") expanded the

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[213] Sellers "The Prosecution of Sexual Violence in conflict" *Office of the High Commissioner for Human Rights* 7 cf The Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 187 CTS 227.

[214] Sellers "The Prosecution of Sexual Violence in conflict" *Office of the High Commissioner for Human Rights* 7 cf art 46 of the Hague Convention (IV) (1907) 187 CTS 227.

[215] Art 6(a)-6(c) of the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and the Charter of the International Military Tribunal (adopted 8 August 1945, entered into force 8 August 1945) (1945) 82 UNTS 279; art 5(a)-5(c) of the Annex to the Charter of the International Military Tribunal of the Far East (entered into force 19 January 1946), section II.

[216] Sellers "The Prosecution of Sexual Violence in conflict" *Office of the High Commissioner for Human Rights* 7 cf R Pritchard & S Zaide *Tokyo War Crimes Trial: The Complete Transcript of the Proceedings of the International Military tribunal for the Far East* eds (1981) vol 1 Proceedings 1 51-52 ("*IMTFE Docs* (1981) vol 1") cf Tokyo trial documents reprinted in The Tokyo War Crimes Trial: The Complete Transcript of the Proceedings of the International Military tribunal for the Far East 22 vols R Pritchard and S Zaide (eds) 1981 IMTFE Docs vol 20 49 and 605 ("*IMTFE Docs* (1981) vol 20").

[217] Sellers "The Prosecution of Sexual Violence in conflict" *Office of the High Commissioner for Human Rights* 7 cf *IMTFE Docs* (1981) vol 1 744; "International Military Tribunal for the Far East, judgment of 12 November 1948" in R Pritchard & SM Zaide (eds) *The Tokyo War Crimes Trial* vol 22.

[218] Sellers "The Prosecution of Sexual Violence in conflict" *Office of the High Commissioner for Human Rights* 8.

[219] 7 cf Geneva Conventions (IV) relative to the Protection of Civilian Persons in Time of War (Geneva Convention of 12 August 1949) (Geneva) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 973.

[10] JS Pictet *The Geneva Conventions of 12 August 1949, Commentary* ed (1958) 1.

[221] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

prohibition of rape that occurs during civil and international armed conflict.[222] Article 75(2)(b) of the Additional Protocol I prohibits rape, enforced prostitution and indecent assault as an outrage upon personal dignity.[223] Article 76(1) of Additional Protocol I specifies the protection of women, in armed conflict, against rape, forced prostitution and indecent assault.[224] Article 77(1) of Additional Protocol I protects children, in armed conflict, against any form of indecent assault.[225] According to Hevener, article 27 of the Fourth Geneva Convention of 1949 and article 76 of Additional Protocol I do not prohibit sexual violence in armed conflict instead they place a duty on the state to protect women "against attacks on their honour and accord them special respect".[226] Hevener's interpretation makes sense because these are humanitarian instruments, which place a duty on states to protect civilians and regulate conduct during armed conflict, not instruments of international criminal law, which criminalises certain acts. However, the breach of international humanitarian laws and norms does give rise to international criminal law obligations to punish and prosecute.[227] Article 8 of the Rome Statute, expressly criminalises violations of the Geneva Conventions.[228]

2 4 Sexual violence as a violation of international human rights

A person's sexuality and sexual life forms part of their human dignity, right to privacy and sexual autonomy. For instance, the United Nation's Fourth World Conference on Women ("Beijing Platform") put forward that "sexuality is a fundamental aspect of human dignity".[229] Furthermore, the Human Rights Committee ("HRC") as well as the European Court of Human Rights ("ECtHR") in *Dudgeon v United Kingdom* ("*Dudgeon*")[230] and in *X and Y v Netherlands* ("*X and Y*") found that a person's private life includes their physical and moral integrity as well as their sexual life.[231] Moreover article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("Women's Protocol"), acknowledges sexual autonomy by obliging the

[222] Sellers "The Prosecution of Sexual Violence in conflict" *Office of the High Commissioner for Human Rights* 8 cf Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

[223] Sellers "The Prosecution of Sexual Violence in conflict" *Office of the High Commissioner for Human Rights* 9 cf art 75(2)(b) of the Additional Protocol (I) to the Geneva Conventions of 12 August 1949 (1978) 1125 UNTS 3.

[224] Sellers "The Prosecution of Sexual Violence in conflict" *Office of the High Commissioner for Human Rights* 9 cf art 76(1) of the Additional Protocol (I) to the Geneva Conventions of 12 August 1949 (1978) 1125 UNTS 3.

[225] Sellers "The Prosecution of Sexual Violence in conflict" *Office of the High Commissioner for Human Rights* 9 cf art 77(1) of the Additional Protocol (I) to the Geneva Conventions of 12 August 1949 (1978) 1125 UNTS 3.

[226] Chinkin (1994) 5 *EJIL* 332 cf C Hevener "An Analysis of Gender Based Treaty Law: Contemporary Developments in Historical Perspective" (1986) 8 *Human Rights Quarterly* 70.

[227] Arts 5, 6, 7 and 8 of the Rome Statute (2003) 2187 UNTS 90.

[228] Arts 8(2)(a), 8(2)(b)(xxii) and 8(2)(c) of the Rome Statute (2003) 2187 UNTS 90 expressly refer to violating the Geneva Convention.

[229] Eriksson (2010) *Orebro Studies in Law* 299 cf the United Nation's Fourth World Conference on Women Beijing Platform for Action for Equality, Development and Peace (1995) UN Doc A/CONF.177/20.

[230] Eriksson (2010) *Orebro Studies in Law* 336 cf *Dudgeon v United Kingdom*, European Court of Human Rights Series A No 45 (23 September 1981); *Toonen v Australia*, Human Rights Commission Communication No 488 (31 March 1994) UN Doc CCPR/C/50/D/488/1992.

[231] Eriksson (2010) *Orebro Studies in Law* 336 cf *X and Y v The Netherlands*, Pleadings, Oral Arguments and Documents, European Court of Human Rights Series B (1983) para 22.

state to "prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public".[232]

Hence a person's sexuality and sex life forms part of their human rights; consequently the commission of acts of sexual violence violates human rights. For instance, the IACHR in *Maria Dolores Rivas Quintanilla v El Salvador* ("*Quintanilla*") referred to the rape of a seven year old girl as a heinous crime and "contempt for even the most elementary principles of human dignity".[233] The Inter-American Court of Human Rights ("IACtHR") in *Raquel Martín de Mejía v Perú* ("*Meija*") found that the utilisation of rape for punishment and intimidation was an outrage on human dignity including the victim's private life.[234] Consequently, the IACHR in *Mejía* found that sexual violence violated article 11(1) of the American Convention on Human Rights ("ACHR"), which guarantees the right to privacy.[235] Sellers argues that the IACtHR in *Meija* and the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") implicitly provide for the right to be free from sexual violence.[236] Therefore the commission of sexual violence violates the rights to human dignity and privacy.

Furthermore, the IACtHR in *Meija* found that rape satisfies the human rights prerequisites of torture.[237] Additionally, the IACHR stated obiter that rape could violate the safeguards against torture found in article 5 of the ACHR.[238] In support of the inclusion of sexual violence as a form of torture, the General Assembly Resolution 63 of 166 calls upon all states to adopt a gender-sensitive

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[232] Art 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted July 2003, entered into force 25 November 2005) CAB/LEG 66.6: "The Rights to Life, Integrity and Security of the Person 1. Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited. 2. States Parties shall take appropriate and effective measures to: (a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public; (b) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women; (…) (e) punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims; (f) establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women; (g) prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk."

[233] Eriksson (2010) *Orebro Studies in Law* 320 cf *Maria Dolores Rivas Quintanilla v El Salvador,* Inter-American Commission of Human Rights Case No 10.772 Report No 6/94 (11 February 1994).

[234] Eriksson (2010) *Orebro Studies in Law* 320 cf *Raquel Martín de Mejía v Perú,* Inter-American Court of Human Rights Series L No 5/96 (1 March 1996) para 157; the Additional Protocol (I) to the Geneva Conventions of 12 August 1949 (1978) 1125 UNTS 3; the Additional Protocol II to the Geneva Conventions of 12 August 1949 (1978) 1125 UNTS 609.

[235] Sellers "The Prosecution of Sexual Violence in conflict" *Office of the High Commissioner for Human Rights* 31 cf *Raquel Martín de Mejía v Perú,* IACtHR Series L No 5/96 (1996) para 157.

[236] Sellers "The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation" *Office of the High Commissioner for Human Rights* 31-32 cf *Raquel Martín de Mejía v Perú,* IACtHR Series L No 5/96 (1996) para 154.

[237] Sellers "The Prosecution of Sexual Violence in conflict" *Office of the High Commissioner for Human Rights* 31-32. Sellers also noted that the ICTY in the *Prosecutor v Delalic, Mucic, Delic & Landzo* (Judgment) IT-96-21-T (16 November 1998) cited *Mejía* as authority for convicting the accused for rape as an act of torture.

[238] Sellers "The Prosecution of Sexual Violence in conflict" *Office of the High Commissioner for Human Rights* 31 cf *Raquel Martín de Mejía v Perú,* IACtHR Series L No 5/96 (1996) para 157.

interpretation of torture.[239] Therefore when the commission of acts of sexual violence are used for punishment and intimidation then the safeguards against torture are violated.

Moreover, sexual violence is a form of gender discrimination that violates the right to equality. The right to equality and principle of non-discrimination include the prohibition of gender discrimination.[240] General Recommendation No 19 of the Committee on the Elimination of Discrimination against Women ("CEDAW Committee") interpreted the term "discrimination," in article 1 of CEDAW, to include gender based violence on the basis that it is:

> "[V]iolence that is disproportionately directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender violence may breach specific provisions of the Women's Convention, regardless of whether those provisions expressly mention violence."[241]

Therefore in order to establish sexual violence as a form of gender discrimination; the use of sexual violence as targeting women because they are women and as a result her diminished ability to exercise her rights and freedoms, must be established. The inclusion of sexual violence as a form of gender discrimination was reiterated by the CEDAW Committee's communication in *AT v Hungary* ("*AT*") stating that violence against women significantly impacts her ability to exercise her rights and freedoms on an equal basis to men.[242] In 2003, the IACtHR delivered an Advisory Opinion stating that the principle of non-discrimination, equality before the law and equal protection before the law are *ius cogens* and have a peremptory character.[243] Article 53 of the VCLT describes *ius cogens* as:

> "[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[244]

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[239] Eriksson (2010) *Orebro Studies in Law* 311 cf UN Doc A/RES/63/166 (adopted 18 December 2008, entered into force 19 February 2009) para 9.

[240] Art 1 of the CEDAW (1981) 1249 UNTS 13: "For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion restriction, or preference based on certain motives, such as race, color, gender, language, religion, a political or any other opinion, the national or social origin, property, birth or any other social condition, that seeks to annul or diminish, the acknowledgement, enjoyment, or exercise, in conditions of equality, of the human rights and fundamental freedoms to which every person is entitled."

[241] CEDAW General Recommendations Nos 19 and 20, adopted at the Eleventh Session (1992) A/47/38 ("CEDAW General Recommendation No 19").

[242] Annex III Views of the Committee on the Elimination of Discrimination against Women art 7(3) of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, *AT v Hungary*, CEDAW Communication No 2/2003 (26 January 2005) para 9.4.

[243]A Bianchi "Human Rights and the Magic of Jus Cogens" (2008) 19(3) *European Journal of International Law* 491 506 cf *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-American Court of Human Rights Series A No 18 (17 September 2003) ("Advisory Opinion OC-18/03").

[244] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1115 UNTS 331.

In addition, the IACtHR in *Atala Riffo and daughters v Chile* ("*Atala*") also found that the fundamental principles of equality and non-discrimination are *ius cogens*.[245] The equality between genders and the prohibition of gender-based discrimination are therefore recognised as a norms that cannot be exempted and that give rise to an *erga omnes* obligation on all states to prohibit and prevent such violations. Furthermore, the safeguards against torture, including the prohibition of sexual violence, are *ius cogens*.[246]

Consequently, when a fundamental human right or freedom is violated the victim is entitled to effective remedy and equal access to justice. The right to effective remedy is entrenched in the Universal Declaration of Human Rights ("UDHR"),[247] the Women's Protocol,[248] the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"),[249] the ACHR[250] and the ECHR.[251] Furthermore, the right to equality before law is entrenched in the African Charter on Human and Peoples' Rights ("ACHPR").[252] In addition, Annex VII to the United Nations General Assembly Resolution 60 states that the victims' rights to remedies for gross violations of international human rights and humanitarian law include "equal and effective access to justice".[253] The rights of the victim translate into obligations of state members to these human rights instruments. However, *erga omnes* obligations arising from *ius cogens* ie the safeguards against

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[245] *Atala Riffo and daughters v Chile*, Merits, Costs and Reparation, Inter-American Court of Human Rights Series C No 239 (24 February 2012) para 79 cf Advisory Opinion OC-18/03, IACtHR Series A No 18 (2003) para 101.

[246] Bianchi (2008) *EJIL* 306.

[247] Art 8 of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III): "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

[248] Art 25 of the Women's Protocol (2005) CAB/LEG 66.6: "States Parties shall undertake to: (a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated; (b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law."

[249] Art 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

[250] Art 25 of the American Convention on Human Rights (adopted 21 November 1969, entered into force 18 July 1978) 1144 UNTS 143: "1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

[251] Art 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

[252] Eriksson (2010) *Orebro Studies in Law* 297-298 cf the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, particularly; art 3 ie the right to equality before the law and equal protection of the law.

[253] United Nations Human Rights Office of the High Commissioner for Human Rights (OHCHR) "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law Adopted and proclaimed by UNGA Res 60 (16 December 2005)" UN Doc GA/RES/60/147 (2015) *United Nations Human Rights Office of the High Commissioner for Human Rights* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> (accessed 27-08-2015).

torture and principles of non-discrimination are applicable to all states, irrespective if they are party to the human rights instrument or not.[254] The obligations include the duty to enact prohibitive legislation and provide effective remedies including effective prosecution; within the framework of equality.[255] For instance, in *MC v Bulgaria* ("*Bulgaria*"), a fourteen year old girl, with mental disabilities, was raped by two men while on a date.[256] The ECtHR found that the failure to provide appropriate and effective legislative remedies; for rape amounted to a violation of the state's duty to protect private and family life in accordance with article 8 of the ECHR.[257] Additionally, the ICC and the *ad hoc* tribunals have been instituted to prosecute such violations of international humanitarian law and international human rights under international criminal law, which will be discussed in the subsequent chapter.[258]

2 5 Conclusion

The theories explored in this chapter highlight the long-standing historical, wide-spread, systemic, instrumental and intentional use of sexual violence. The intentional use of sexual violence to maintain or re-stabilise female subordination, facilitate ethnic cleansing or genocide, psychologically manipulate the opposition or gain economic and political power, are historically prevalent practices. Arguably, these theories illustrate that the nature of sexual violence indicates

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[254] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 8 ("CAT"): The prohibition of torture is an *ius cogen* rule, which is a non-derogable norm that places an *erga omnes* obligation on all states to prohibit and prevent torture irrespective of whether they are party to the CAT or not.

[255] Art 25 of the ACHR (1978) 1144 UNTS 143: "2. The States Parties undertake: (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; (b) to develop the possibilities of judicial remedy; and (c) to ensure that the competent authorities shall enforce such remedies when granted;" art 2 of the Women's Protocol (2005) CAB/LEG 66.6: "1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall: (a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application; (b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women; (c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life; (d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist; (e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women. 2. States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men."

[256] Sellers "The Prosecution of Sexual Violence in conflict" *Office of the High Commissioner for Human Rights* 32 cf *MC v Bulgaria*, European Court of Human Rights Application No 39272/98 (4 December 2003) 646.

[257] Eriksson (2010) *Orebro Studies in Law* 336 cf art 8 of the ECHR (1953) 213 UNTS 222; Sellers "The Prosecution of Sexual Violence in conflict" *Office of the High Commissioner for Human Rights* 32-33 cf *MC v Bulgaria*, ECtHR Application No 39272/98 (2003) para 646.

[258] Art 1 of the ICTR Statue (1994) 33 ILM 1598; art 1 of the ICTY Statue (1993) 32 ILM 1159; the preamble of the Rome Statute (2003) 2187 UNTS 90: "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured."

the possibility of objective foreseeability of sexual violence in armed conflict and its intentional use as part of a larger plan. I submit that courts and tribunals could use these and other theories when inferring the accused's subjective foresight and intent from the circumstances and facts of a particular case. While it is too burdensome and improper to assume that every combatant and civilian subjectively foresees the occurrence of sexual violence as a reasonably foreseeable consequence of implementing any policies or strategies of armed conflict, these theories can form the factual basis from which the court can infer its objective foreseeability. Consequently, the judiciary should consider the nature of the crime and the context when determining the accused's participation, foresight and intent. As discussed above, acts of sexual violence are carried out by members of group who hold lower positions in the chain of command yet are supported, planned and coordinated by individuals within the highest echelon of officials. In addition, acts of sexual violence are usually committed as an implicit part of a criminal plan or as a consequence of executing the plan. The nature and context of crime therefore makes it inherently difficult to link the high-ranked official to the crime committed by another. Consequently, impeding the ability of the prosecution to secure a conviction for acts of sexual violence under international criminal law. International criminal law should make provision for these prevalent and intentional criminal practices, in order to prevent impunity, by conceptualising the elements of the crime, including; commission, individual criminal responsibility, foresight and intent in a gender-sensitive and context-sensitive manner. The ability to attribute criminal responsibility for these intentional criminal practices is paramount to the pursuit of justice.

Furthermore, the commission of acts of sexual violence are a grave violations of humanitarian norms and human rights including; privacy, human dignity, sexual autonomy and equality. Consequently, the individual whose rights are violated is entitled to effective remedies including effective prosecution and equal access to justice, pursuant to international human rights treaties. Effective prosecution meaning the ability to secure a conviction. Furthermore, the breach of international humanitarian laws and human rights give rise to international criminal law obligations to punish and prosecute these violations. Moreover, all of the above theories confirm that sexual violence is a manifestation of gender-discrimination because sexual violence is intentionally and systematically used to maintain female subordination. This utilitarian character indicates a violation of the principle of non-discrimination, which is an *ius cogen*. Consequently, all states, irrespective of whether party to the relevant human rights treaties or not, are bound to prevent and punish discriminatory practices. I can confirm that the international community is obliged to prosecute acts of sexual violence and to ensure the reasonable prospect of a conviction, in accordance with my second research question. By securing effective legal remedies and ensuring equal access to justice, the international community through international criminal law institutions, can begin to challenge gender discrimination and thereby gender-based violence as well.

CHAPTER 3: THE PROHIBITION AND PROSECUTION OF ACTS OF SEXUAL VIOLENCE UNDER INTERNATIONAL LAW.

3 1 Introduction

Chapter two established that the nature of sexual violence must be considered in the formulation of effective measures, including prosecution. By examining various feminist, legal, socio-political and socio-economic theories it is evident that sexual violence has an instrumental nature. It is systemically used as a weapon of war, a tool of ethnic cleansing and genocide or a mechanism of female subordination, which indicates the existence of intent and the workings of a collective enterprise. Furthermore, sexual violence is rarely expressly ordered or expressly mentioned as the objective of a common criminal plan, which makes it difficult to link the high-ranked officials and masterminds to sexual violence committed by others. Building on the discussion in the previous chapter, I set out the duty as I see it, in this chapter, under international criminal law to prosecute sexual violence and to ensure the reasonable prospect of a conviction in accordance with my second research question. I conduct this discussion by referring to the Rome Statute as well as the ICTR and ICTY Statutes. Within this chapter and in pursuit of my third research question, I furthermore albeit briefly set out under which international crimes, acts of sexual violence have been prosecuted by referring to the above-mentioned international instruments and relevant case law.

Furthermore, each international crime has its own matrix of elements that need to be established beyond a reasonable doubt, before a conviction can be secured. These elements are also set out below. Thereafter, I conduct an investigation into the current manner in which the international community prosecutes acts of sexual violence through an evaluation of cases from the *ad hoc* tribunals. Subsequently, the presumed difficulties experienced in prosecuting acts of sexual violence under international criminal law will be revealed, in pursuit of my fourth research question. The aim being to understand how to better secure convictions for acts of sexual violence.

3 2 The duty to prosecute acts of sexual violence under international criminal law.

As discussed in chapter two, the prevalence and multiplicity of sexual violence worldwide paints a grave picture. Sexual violence is a serious crime that warrants prosecution. The ICC and the *ad hoc* tribunals were created with the specific purpose of prosecuting "serious violations" of international humanitarian law.[259] The preamble to the Rome Statute furthermore states that serious crimes must be punished and prosecuted.[260] In addition, articles 1 and 5 of the Rome Statute create an obligation to prosecute serious crimes.[261] Non-prosecution of sexual violence is therefore damaging to the legitimacy of international criminal law because it breaches an international obligation to prosecute and punish serious violations. Unsuccessful prosecution, arguably lessens confidence in the international justice system.

Ever since the International Military Tribunal at Nuremberg ("IMT") and the IMTFE criminal prosecution under international law has mainly focused on the conduct of high-ranked officials and masterminds who in some manner contribute to the commission of the crime but who are not the physical perpetrators.[262] The criminal responsibility of the physical perpetrator, the one who carries

[259] Art 1 of the ICTR Statute (1994) 33 ILM 1598; art 1 of the ICTY (1993) 32 ILM 1159.

[260] The preamble of the Rome Statute (2003) 2187 UNTS 90: "[T]he most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured."

[261] The Rome Statute (2003) 2187 UNTS 90.

[262] Goy (2012) *ICL Rev* 2.

out the *actus reus* of crime, will appear in the evaluation of the case law, however it falls beyond the scope of this analysis because their criminal responsibility is easier to establish. Instead, I shall focus on high-ranked officials and masterminds who did not physically perpetrate act of sexual violence yet they could nonetheless be viewed as, at least partly, responsible for the act based on their knowledge, intention and contribution. These individuals possess a degree of control over their subordinates, wield influence over the circumstances or the general public, plan or contribute to the execution of an underlying purpose that includes the commission of an international crime. The Rome Statute obligates the international community to hold all those who are responsible for grave crimes liable for their involvement even if they did not physically commit the offence themselves.[263] For instance, the ICTY Trial Chamber in *Prosecutor v Furundžija* ("*Furundžija*") during a discussion on distinguishing the perpetration of torture from aiding and abetting torture, found that in "modern times the infliction of torture typically involves a large number of people, each performing his or her individual function".[264] Furthermore, the ICTY found that there is a modern trend in State practice where each stage of the torture process is the responsibility of a different person, in order to intentionally "compartmentalise and dilute the moral and psychological burden of perpetrating torture".[265] I contend that international criminal law therefore has to "take account of these modern trends" when attributing individual criminal responsibility, in line with the teleological construction of the rules of culpability.[266] Therefore the nature of the crime, the forms it takes and the intensity of the condemnation of such acts require that all who participate in some degree and share in the underlying purpose of the torture must be held equally accountable, albeit their sentences may differ.[267] Arguably, a similar approach should apply to the systemic use of sexual violence. However, while the collective nature of the commission of international crimes must be considered when determining the most suitable remedy, the degree of liability depends on the contribution and intent of the particular accused.[268]

3 3 The different international crimes under which acts of sexual violence are prosecuted

Under international criminal law, rape and sexual violence are not prosecuted as sexual offences as such but instead are indicted as war crimes, crimes against humanity, genocide and violations of article 3 of the Geneva Convention, as listed under article 5 of the Rome Statute.[269] The charge under which the sexual offence is brought depends on the surrounding circumstances and the intent of the accused or a group of accused. The statutes of the ICC and the *ad hoc* tribunals place specific sexual acts under each international crime. The differentiation is important because each international crime holds its own set of elements and standards that need to be satisfied in order to secure a conviction. For instance, the crime of rape is defined by the *ad hoc* tribunals as non-consensual penetration of another person's mouth with the penis of the perpetrator or penetration of

[263] Arts 1, 25, 86 and 93 of the Rome Statute (2003) 2187 UNTS 90. Particularly, art 86 ie the General obligation to cooperate requires that: "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."

[264] *Prosecutor v Furundžija* IT-95-17/1 (1998) para 250.

[265] Para 253.

[266] Para 254.

[267] Para 254.

[268] Para 252: Only the participant who also "partakes of the purpose behind torture" is a co-perpetrator; however, an individual who assists and supports with mere knowledge of the torture being practised is an aider and abettor.

[269] The Rome Statute (2003) 2187 UNTS 90.

the vagina or anus with the penis of the perpetrator or an object.[273] Furthermore, the ICC, in accordance with the Elements of Crimes defines rape as being committed when: "[t]he perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body."[274] Therefore the objective element (*actus reus*) that amounts to the *prima facie* criminal conduct is the unlawful and non-consensual penetration of a sexual organ of another person. The subjective element (*mens rea*) is satisfied where the person committed the crime with knowledge and intent.[275] In general *mens rea* could be satisfied by various states of mind; including, knowledge, intent or a combination of the two. However, article 30 of the Rome Statute, which sets out the general element of *mens rea* as it applies to all the crimes in the statute, requires that the *actus reus* must be committed with intent *and* knowledge.[276]

However, in order for rape and other acts of sexual violence to constitute an international crime, additional requirements must be met. For instance, for rape to amount to a crime against humanity; the conduct must have been "committed as part of a widespread or systematic attack directed against a civilian population" and the perpetrator must be aware thereof.[277] Alternatively, for rape to amount to an act of genocide; the perpetrator must have caused serious bodily of mental harm to persons belonging to "a particular national, ethnical, racial or religious group" with the specific intent to destroy that group as a whole or in part.[278] Without this specific and additional intent, a crime of genocide has not been committed. The accused can then be charged with a lesser crime or

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[273] The ICTY Trial Chamber in *Prosecutor v Kajelijeli* ICTR-98-44A-T (2003) paras 908-909 accepted the *Furundžija-Kunarac* definition of rape, following the *Prosecutor v Kunarac* (Appeal Judgement) T-96-23/1-A (12 June 2002) ("*Kunarac Appeal*") development of the definition. The ICTY in *Kunarac* Appeal para 915 defines rape as: "the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the penetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances." Furthermore, the ICTY in *Kajelijeli* sets out the development of the definition of rape in international criminal law from 1998 to 2002, in paras 910-913: The ICTR in *Akayesu* (paras 597-598) defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, which includes rape is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive". Thereafter, the ICTY in *Furundžija* (para 181) accepted a more detailed definition of rape as the "forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus". Furthermore, the ICTR in *Musema* (para 226) labelled the *Akayesu* definition of rape as a "conceptual definition" whereas it opted for a "mechanical definition". Finally, the ICTY in *Prosecutor v Kunarac, Kovac and Vukovic* (Judgement) IT-96-23-T & IT-96-23/1-T (22 February 2001) para 412 and the *Kunarac Appeal* (para 128) substantially modified *Furundžija* definition.

[274] International Criminal Court (ICC), "Elements of Crimes" (adopted on 9 September 2002) pursuant to article 9(1) of the Rome Statute ICC Doc ICC-ASP/1/3 108, UN Doc PCNICC/2000/1/Add.2 (2000) 8 <www.icc-cpi.int> (accessed 7-05-2015).

[275] 1 cf art 30 of the Rome Statute (2003) 2187 UNTS 90.

[276] Art 30 of the Rome Statute (2003) 2187 UNTS 90.

[277] ICC, "Elements of Crimes" (adopted on 9 September 2002) pursuant to article 9(1) of the Rome Statute ICC Doc ICC-ASP/1/3 at 108, UN Doc PCNICC/2000/1/Add.2 (2000) 8. The Elements of Crimes is a supplementary document to the Rome Statute, which was adopted by two-thirds majority of the members of the Assembly of States Parties. This document assists the ICC in interpreting and applying the international crimes as listed in articles 6 through 8 of the Rome Statute.

[278] 2.

under national jurisdiction for the rape.[279] Otherwise, rape and other acts of sexual violence can amount to war crimes where the crime was directed against protected persons such as civilians, the offence occurred in the context of armed conflict or associated with armed conflict and the accused was aware of these factual circumstances.[281] Consequently, while the latter requires that the act of sexual violence be committed during armed conflict, the international crimes of genocide and crimes against humanity do not require a *nexus* to armed conflict.[282] Nonetheless, all of the international crimes, despite their elements, are offences for conduct that are "impermissible under generally applicable international law" and the "most serious crimes of concern to the international community as a whole".[283]

3 4 The difficulty in securing a conviction for acts of sexual violence under international criminal law

Despite the commission of sexual violence during war being a grave and independent crime, sexual violence during war has traditionally been viewed as collateral damage; the conduct of a rogue individual.[284] Chinkin posits that despite its prohibition, incidences of rape have been ignored as "unfortunate but inevitable side-effects of conflict".[285] Gardam and Jarvis argue that acts of sexual violence that occur during armed conflict are prevalent and prohibited yet not prosecuted.[286] Obote-Odora adds that the IMT and IMTFE did not prosecute rape as an independent crime; rapes were seen as the "spoils of war" not international crimes.[287] According to Chinkin, rape was therefore largely invisible during the IMTFE and IMT.[288] However, in 1998 and 2000, sexual violence was recognised as amounting to an international crime by the ICTR and the ICTY respectively. The *ad hoc* tribunals effectively placed sexual violence on the international agenda by establishing that sexual violence may constitute various international crimes. Nonetheless, the ICC, the ICTY, the ICTR and the ECCC have arguably indicted, successfully prosecuted and upheld very few sexual violence convictions on appeal.[289] Van Schaack referring to the ICC in *Prosecutor v Lubanga*

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[279] Badar *The Concept of Mens Rea in International Criminal Law* 301.

[281] ICC, "Elements of Crimes" (adopted on 9 September 2002) pursuant to article 9(1) of the Rome Statute ICC Doc ICC-ASP/1/3 at 108, UN Doc PCNICC/2000/1/Add.2 (2000) 14, 18 and 28.

[282] 2 and 5.

[283] 5.

[284] Haffajee (2006) *Harv J L & Gender* 204 cf Anonymous "Human Rights Watch Applauds Rwanda Rape Verdict: Sets International Precedent for Punishing Sexual Violence as a War Crime" (3 September 1998) *Human Rights Watch* <http://www.hrw.org/news/1998/09/02/human-rights-watch-applauds-rwanda-rape-verdict> (accessed 31-03-2014).

[285] Chinkin (1994) 5 *EJIL* 334.

[286] Haffajee (2006) *Harv J L & Gender* 203 cf Gardam & Jarvis *Women, Armed Conflict, and International Law* (2001) 152–153.

[287] Obote-Odora (2005) *New Eng J Int'l L & Comp L* 143.

[288] Chinkin (1994) 5 *EJIL* 334.

[289] Haffajee (2006) *Harv J L & Gender* 203 cf Gardam & Jarvis *Women, Armed Conflict, and International Law* (2001) 152–153: argue that acts of sexual violence that occurred during armed conflict were prevalent and prohibited yet not prosecuted; B van Schaack "Atrocity Crimes Litigation: 2008 Year-In-Review" (2009) 7 *Northwestern Journal of International Human Rights* 170 207 cf *Prosecutor v Lubanga* ICC-01/04-01/06-1229-AnxA *Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict Submitted in Application of Rule 103 of the Rules of Procedure and Evidence* (18 March 2008) *ICC* <http://www.icc-cpi.int/iccdocs/doc/doc457039.PDF> (accessed 14-04-2014): "[T]he absence of gender violence crimes in the *Lubanga*

("*Lubanga*") states that "the absence of gender violence crimes in the *Lubanga* indictment prompted criticism from advocates for gender justice, including Radhika Coomaraswamy, the U.N. Special Representative on Children and Armed Conflict".[290]

Haffajee, Van Schaack, Gardam and Jarvis therefore all highlight an existing problem in international criminal law ie that very few acts of sexual violence are successfully prosecuted and upheld on appeal.[291] For example, in *Katanga* the ICC acquitted the accused of all sex-related charges.[292] Usacka J warned, during the charge confirmation, that the evidence was not strong enough to establish substantial grounds to believe that the accused were criminally responsible for the crimes of rape and sexual violence.[293] In addition, the ICC stated in the *Katanga Confirmation Decision* that general evidence on the prevalence acts of sexual violence in the area provided an insufficient base to infer the accused's knowledge or intent (subjective elements).[294] Interestingly, in what appears to be an attempt to develop the law, the prosecutor of the ICC in the Prosecutor's Darfur Submission furthermore attempted to establish that the accused acted with a genocidal intent by relying on evidence of the scale of the violence and witnesses attesting to staggering proof of sexual violence.[295] However, the issuance of an arrest warrant was denied due to the prosecutor's inability to reasonably establish that the accused actually committed the crime.[296] Furthermore, the ICTR in *Musema*, which will be discussed in greater detail below, found that the accused was guilty of rape as a crime against humanity, yet the conviction was overturned on appeal due to the inability to prove a direct link between the accused and the rape, beyond a reasonable doubt.[297] The prosecution was unable to link Musema to the crime because they could not prove; that the physical perpetrator had heard Musema's call to commit rape and acted in response to it.[298] The prosecution were also unable to prove a hierarchical relationship between Musema and the physical perpetrator and Musema's knowledge that rape was occurring.[299] The verdict in *Prosecutor v Kajelijeli* ("*Kajelijeli*") moreover shows that it is presently only possible, within the context of the ICTR, to secure a conviction where the prosecution can establish a clear link between the accused and the sexual offence.[300] Indicators of such a link include physical perpetration, a direct order given by the accused to rape a specific individual or finding a witness who can attest to the high-ranked official's presence and view of the incident.[301] As is evident in *Musema*, *Kajelijeli* and the *Katanga*

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indictment prompted criticism from advocates for gender justice, including Radhika Coomaraswamy, the U.N. Special Representative on Children and Armed Conflict."

[290] van Schaack (2009) *Nw J Int'l Hum Rts* 207 cf *Prosecutor v Lubanga* ICC-01/04-01/06-1229-AnxA Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict (2008) *ICC*.

[291] Haffajee (2006) *Harv J L & Gender* 203 cf Gardam & Jarvis *Women, Armed Conflict, and International Law* (2001); van Schaack (2009) *Nw J Int'l Hum Rts* 207.

[292] *Prosecutor* v *Katanga & Chui* ICC-01/04-01/07-717 (2014).

[293] *Katanga Confirmation Decision* ICC-01/04-01/07-717 Partly Dissenting Opinion of Judge Anita Usacka (2008) paras 19-22.

[294] Paras 568-569.

[295] Prosecutor's Darfur Submission ICC-02/05 21-36 and 45-60.

[296] *Prosecutor v Al Bashir* (Pre-Trial Chamber I) ICC02/05-01/09-3 Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (4 March 2009).

[297] Haffajee (2006) *Harv J L & Gender* 206 cf *Prosecutor v Musema* ICTR-96-13-A (2000) paras 965 and 968. Note that the conviction was overturned on appeal.

[298] *Prosecutor v Musema* ICTR-96-13-A (2000) para 889.

[299] Paras 889, 909 and 968.

[300] Haffajee (2006) *Harv J L & Gender* 217 cf *Prosecutor v Kajelijeli* ICTR-98-44A-T (2003) paras 923 and 937.

[301] Haffajee (2006) *Harv J L & Gender* 217 cf *Prosecutor v Kajelijeli* ICTR-98-44A-T (2003) para 937.

Confirmation Decision, the problem is the apparent inability of international criminal law to offer a successful way of establishing a legal nexus between a sexual offence, committed by another, and a high-ranked official.[302] Two of the biggest hurdles in obtaining a successful conviction is establishing individual criminal responsibility and the requisite intent. The difficulty in holding participants in the crime responsible is worrisome because effective prosecution deters the commission of rape.[303]

Individual criminal responsibility refers to the "direct responsibility" of a principal perpetrator or an accessory.[304] Article 25[305] of the Rome Statute, article 6[306] of the ICTR Statute and article 7[307] of

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[302] *Prosecution v Musema* ICTR-96-13-A (2000) para 968; *Katanga Confirmation Decision* ICC-01/04-01/07-717 (2008) paras 568-569; *Prosecutor v Akayesu* ICTR-96-4-T (1998).

[303] Obote-Odora (2005) *New Eng J Int'l L & Comp L* 139 cf Wood (2004) *Colum J Gender & L* 276.

[304] Danner & Martinez (2005) *Cali L Rev* 102.

[305] Art 25 of the Rome Statute (2003) 2187 UNTS 90: "1. The Court shall have jurisdiction over natural persons pursuant to this Statute. 2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute. 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; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (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."

[306] Art 6 of the ICTR Statute (1994) 33 ILM 1598: "1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime. 2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment. 3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. 4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires."

[307] Art 7 of the ICTY Statute (1993) 32 ILM 1159: "1. 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. 2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment. 3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. 4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."

the ICTY Statute describe individual criminal responsibility. The modes of liability as well as the forms of perpetration and participation are set out under these provisions. The degree of liability attributed to the accused depends on the form of participation and the participants' subjective state of mind. For instance, aiding and abetting are forms of participation that usually indicate accessorial liability, while co-perpetration and physical perpetration indicate principal liability. Haffajee, referring to *Kajelijeli,* avers that establishing principal liability is especially difficult when the accused was neither present nor the one who carried out the *actus reus* of the crime.[308] However, the aim of international criminal law is not only to convict those responsible as accessories but when warranted, to hold those responsible as principal perpetrators. The conviction and punishment should reflect accused's criminal responsibility and therefore the distinction between the degrees of liability is important. Furthermore principal perpetrators generally receive harsher sentences. For example, the Appeal Chamber in the *Prosecutor v Krstić* ("*Krstić Appeal*") overturned Krstić's conviction as a co-perpetrator and replaced with a conviction as an aider and abettor, which in turn decreased his sentencing from forty-five to thirty-five years of imprisonment. [309]

3 5 An analysis of international case law pertaining to rape and other acts of sexual violence

3 5 1 Prosecutor v Furundžija 1998 and 2000

The ICTY Trial Chamber in *Furundžija*, found that Furundžija was the commander of the Jokers, a special unity of the Croatian Community of Herzeg-Bosnia known as the Croatian Defence Council ("HVO"). The HVO arrested and detained Witness A, a Moslem civilian.[310] The Trial Chamber also found that Furundžija was an active combatant who fought against the Muslim community and expelled Muslims from their homes.[311] In addition, Accused B was found to be a commander of one of the HVO units.[312]

On the 15th of May 1993, or there about, at the Jokers Headquarters in Nadioci, Accused B allegedly assaulted and caused Witness D severe physical and mental suffering.[313] In addition, Accused B allegedly threatened, raped, sexually and physically assaulted Witness A, while Furundžija interrogated Witness A and D.[314] The ICTY Trial Chamber found that Furundžija was present in the room where Witness A was interrogated while she was naked.[315] While Furundžija was questioning a naked Witness A, Accused B rubbed his knife along her thigh as he threatened to cut her and to insert his knife into her vagina if she did not answer Furundžija.[316] Furundžija continued to interrogate Witness A and threatened her with the visit of Witness D.[317] Witness A and Witness D were friends, therefore seeing each other being injured would be torturous for both of them.[318] The ICTY Trial Chamber also found that Furundžija was present in the pantry where they

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[308] Haffajee (2006) *Harv J L & Gender* 217 cf *Prosecutor v Kajelijeli* ICTR-98-44A-T (2003) para 937.

[309] *Prosecutor v Krstić* (Appeal Judgment) IT-98-33-A (19 April 2004) paras 137 and 268-275.

[310] *Prosecutor v Furundžija* IT-95-17/1-T (1998) para 262.

[311] Para 262.

[312] Para 262.

[313] Para 263.

[314] Para 263 cf *Prosecutor v Furundžija* (Amended Indictment) IT-95-17/1-PT (2 June 1998) paras 25-26.

[315] *Prosecutor v Furundžija* IT-95-17/1-T (1998) para 264.

[316] Para 264.

[317] Para 264.

[318] Para 267.

later confronted Witness A by bringing Witness D into the same room.[319] Furthermore, the Trial Chamber found that Furundžija interrogated both Witness A and D, while Accused B hit them with batons.[320] In the presence of Furundžija's soldiers and other soldiers, Accused B raped Witness A orally, vaginally and anally before forcing her to lick his penis clean.[321] Furundžija's interrogation of Witness A intensified as Accused B's abuse of Witness A intensified.[322] The interrogation by Furundžija and the abuse by Accused B therefore became one process, according to the ICTY.[323] The physical assault of Witness D together with him being forced to watch the rape and sexual assault of a friend, Witness A, caused the severe physical and mental suffering of Witness D.[324] In addition, the ICTY found that the physical attacks and threats to inflict severe injury, caused physical and mental suffering to Witness A.[325] These harmful acts were inflicted with both Furundžija and Accused B's intent to gain information that would benefit the HVO.[326] The intention to obtain information satisfies one of the listed purposes of torture.[327] The Trial Chamber therefore found Furundžija, "by virtue of his interrogation of [Witness A] as an integral part of torture", guilty as a co-perpetrator under count thirteen ie torture as a violation of laws or customs of war under article 3 of the Statute.[328] The ICTY Appeal Chamber confirmed these factual findings and that Furundžija's actions constituted an act of torture because the context within which the questioning occurred was intimidating, humiliating and devastating for Witness A and therefore amounted to a severe injury that caused severe physical and mental suffering.[329]

The ICTY found that Witness D's evidence supported Witness A's evidence with regards to the rape and concluded that all the elements of Witness A's rape have been satisfied.[330] The sexual assault and rape were committed publically and therefore the ICTY Trial Chamber found that Witness A suffered severe physical and mental harm and endured public humiliation, due to Accused B's actions, which amounted to outrages upon personal dignity and sexual integrity.[331] Furundžija did not physically rape or co-perpetrate the rape of Witness A, however he did encourage Accused B with his presence and continued interrogation, which amounted to a substantial contribution to Accused B's conduct.[332] The ICTY Trial Chamber therefore found that Furundžija aided and abetted the rape of Witness A and he was therefore individually criminally responsible and found guilty under count fourteen of the indictment ie outrages upon her personal dignity, including rape, as a violation of laws or customs of war under article 3 of the ICTY Statute.[333]

Furundžija clearly demonstrates the ICTY's understanding of the distinction between aiding and abetting versus co-perpetration. The prosecution proposed criminal responsibility under article 7(1) of the ICTY Statute, in the indictment and opening statement, but did not refer to the exact form of participation. The prosecution consequentially left the determination to the discretion of the Trial

[319] Para 266.

[320] Para 266.

[321] Para 266.

[322] Para 266.

[323] Para 264.

[324] Para 267.

[325] Para 264.

[326] Para 265.

[327] Paras 267-268.

[328] Paras 267-269.

[329] *Prosecutor v Furundžija* IT-95-17/1-A (2000) paras 113-114 and 120.

[330] *Prosecutor v Furundžija* IT-95-17/1-T (1998) paras 271-272.

[331] Para 272.

[332] Para 273.

[333] Paras 274-275.

Chamber.[334] In the absence of treaty law, the ICTY looked to customary international law to establish whether the presence of the accused, while Witness A was assaulted by another, satisfied the requisite *mens rea* and amounted to participation by fulfilling the *actus reus* of aiding and abetting.[335] Furthermore, the ICTY tried to establish the nature of the assistance and whether this form of assistance could amount to principal or accessory liability, by looking at case law and international instruments. The ICTY Trial Chamber in *Furundžija* referred to the the British Military Court for the Trial of War Criminals ("British Military Court") based on the Royal Warrant, which is similar to the Control Council Law No 10 and the United States Military Tribunal for clarity on the distinction between principal and accessory liability.[336] The British Military Court described an accomplice to murder as one who is "concerned in the killing".[337] The United States Military Tribunal in *The United States of America v Ohlendorf , Jost, Naumann, Rasch, Schulz, Six, Blobel, Blume, Sandberger, Siebert, Steimle, Biberstein, Braune, Haensch, Nosske, Ott, Strauch, Haussmann, Klingelhöfer, Fendler, Radetzky, Rühl, Schubert & Graf* ("*United States v Otto Ohlendorf* et al") found that the acts of an aider and abettor need to have a "substantial effect" on the actions of the principal in order to constitute an *actus reus*.[338] In *United States v Otto Ohlendorf* et al, the United States Military Tribunal found that a menial position *per se* does not prevent his or her liability where the accused knew that the crimes were occurring and the accused could somehow "control, prevent or modify" the activities that amount to the commission of the crime.[339] Where the accused's silence does not "automatically contribute to the success of any executive operation" he is not an accomplice.[340] In *United States v Otto Ohlendorf* et al, Klingelhöfer and Fendler were found guilty of aiding and abetting war crimes and crimes against humanity because they knowingly and intentionally chose to do nothing, despite being in a position to hinder the commission through their actions or words.[341] Whereas, Ruehl and Graf both possessed the requisite knowledge yet they were found not guilty as accessories because they were not in a position to protest against the actions of others.[342]

The ICTY in *Furundžija*, referring to *Tadić*, stated that customary international law attributes criminal responsibility beyond "primary involvement" as the physical perpetrator where the contribution substantially effects the commission of the crime.[343] In addition, the ICTY Trial

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[334] Para 189.

[335] Para 191.

[336] Para 196.

[337] Para 196.

[338] Paras 217 and 221 cf *The United States of America v Ohlendorf , Jost, Naumann, Rasch, Schulz, Six, Blobel, Blume, Sandberger, Siebert, Steimle, Biberstein, Braune, Haensch, Nosske, Ott, Strauch, Haussmann, Klingelhöfer, Fendler, Radetzky, Rühl, Schubert & Graf* U.S. Military Tribunal, Judgement, (8 and 9 April 1948) in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law* No 10 (1950) vol IV 571.

[339] *Prosecutor v Furundžija* IT-95-17/1-T (1998) paras 217-219 cf *United States v Otto Ohlendorf* et al (1948) in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law* No 10 (1950) vol IV 571 and 581.

[340] *Prosecutor v Furundžija* IT-95-17/1-T (1998) para 219 cf *United States v Otto Ohlendorf* et al (1948) in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law* No 10 (1950) vol IV 581.

[341] *Prosecutor v Furundžija* IT-95-17/1-T (1998) paras 217-218 cf *United States v Otto Ohlendorf* et al (1948) in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law* No 10 (1950) vol IV 571-572.

[342] *Prosecutor v Furundžija* IT-95-17/1-T (1998) paras 219-220 cf *United States v Otto Ohlendorf* et al (1948) in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law* No 10 (1950) vol IV 581 and 585.

[343] *Prosecutor v Furundžija* IT-95-17/1-T (1998) para 224 cf *Prosecutor v Tadić* IT-94-1-T (1997) paras 669, 723 and 738.

Chamber in *Tadić* found that in order for post-WWII Trials to establish individual criminal responsibility; the prosecution had to prove that the accused's conduct contributed to the commission of the crime and that the accused's participation "directly and substantially effected the commission of the crime," which it did.[344] In order to further understand these cases, the ICTR in *Furundžija* looked at the Rome Statute and the Draft Code of Crimes against Peace and Security of Mankind, 1996 ("Draft Code"); international instruments that at the time were not binding yet shed light on customary rules and represented the legal views of qualified publicists.[345] The Rome Statute distinguishes participating in a common purpose or common enterprise as a co-perpetrator from aiding and abetting.[346] A co-perpetrator intentionally contributes towards the commission or attempted commission of a crime by a group acting in common purpose, with the aim of furthering the common purpose or with knowledge of the group's intention to commit the crime.[347] An aider and abettor provides the means, assists, aids or abets the commission or attempted commission of the crime in order to facilitate its commission.[348] The Draft Code clearly expresses that direct and substantial facilitation does not exclude "marginal participation" and does not require that the actions of the accused be a *conductio sine qua non* ie but for the actions of the accused the crime would not have occurred.[349] Both the Draft Code and the Rome Statute agree that physical or moral support or encouragement can amount to a direct and substantial contribution or assistance and thereby accomplice liability.[350]

In conclusion, the ICTY Trial Chamber in *Furundžija*, found that an accused's moral support and encouragement displayed through his continued presence amounted to complicity where his or her presence significantly encouraged or legitimised the commission of the crime.[351] In addition, the ICTY confirmed that "directly" did not require that the accused's actions be a *conductio sine qua non* but rather that his or her actions should have a substantial effect on the commission of the crime, which may be satisfied by practical assistance, encouragement or moral support depending on the circumstances and the accused's position.[352] However Furundžija was not merely present; he also interrogated Witness A, while Accused B simultaneously tortured her, with knowledge of each-others' actions and they both shared in the common purpose to obtain information from Witness A.[353] Therefore Furundžija's assistance with knowledge of the torture that would otherwise amount to aiding and abetting, amounted to co-perpetration because Furundžija also partook in the "purpose behind the torture".[354] The ICTY explains that an interrogator, even if he does not lay a hand on the victim, is equally as guilty as the one who physically assaults the victim because they both share in the purpose behind the torture.[355] The criminal law maxim *quls per allum facit per se ipsum facere*

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[344] *Prosecutor v Furundžija* IT-95-17/1-T (1998) para 224 cf *Prosecutor v Tadić* IT-94-1-T (1997) paras 723 and 738.

[345] *Prosecutor v Furundžija* IT-95-17/1-T (1998) para 227 cf ILC, "Report of the International Law Commission on the Work of its 48th session" (6 May-26 July 1996) UN Doc A/CN.4/SER.A/1996/Add.I (Part 2), UN Doc A/51/10 *ILC* <http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_1996_v2_p2.pdf&lang=EFSRAC> (accessed 21-07-2015).

[346] *Prosecutor v Furundžija* IT-95-17/1-T (1998) para 216 cf arts 25(3)(c)-(d) of the Rome Statute (2003) 2187 UNTS 90.

[347] *Prosecutor v Furundžija* IT-95-17/1-T (1998) para 216 cf art 25(3)(d) of the Rome Statute (2003) 2187 UNTS 90.

[348] *Prosecutor v Furundžija* IT-95-17/1-T (1998) para 216 cf art 25(3)(c) of the Rome Statute (2003) 2187 UNTS 90.

[349] *Prosecutor v Furundžija* IT-95-17/1-T (1998) para 231.

[350] Paras 229 and 231 cf arts 25(3)(c)-(d) of the Rome Statute (2003) 2187 UNTS 90.

[351] *Prosecutor v Furundžija* IT-95-17/1-T (1998) para 232.

[352] Paras 232-235.

[353] Para 256.

[354] Paras 252 and 257.

[355] Para 256.

videtur is applicable here; ie "he who acts through others is regarded and acting himself".[356] The ICTY Trial Chamber therefore convicted Furundžija as a co-perpetrator for torture.[357] The tribunal, in cases involving torture, usually attributes liability as a co-perpetrator not complicity to the accused, unless the accused was only the driver or the supplier of food.[358] The broad approach to liability for acts of torture is based on the nature of the crime, the forms that torture can take and the intense international condemnation of torture.[359]

3 5 2 Prosecutor v Musema 2000 and 2001

The Rwandan genocide took place from the 1st of January to the 31st of December 1994.[360] During this time, the ICTR Trial Chamber found that:

> "Musema was a member of the "*conseil préfectorial*" in Byumba *Préfecture* and a member of the Technical Committee in the Butare *Commune*. Both positions of responsibility involved socio-economic and developmental matters and did not focus on *préfectorial* politics."[361]

The ICTR Appeal Chamber in *Prosecutor v Musema* ("*Musema Appeal*") also found that Musema was "a socially and politically prominent person in Gisovu *Commune*".[362] While holding these positions, Musema allegedly ordered and abetted the rape of Annunciata on one day and personally raped Nyiramusugi then proceeded to incite her gang-rape, on another day. Musema was therefore charged with four different counts for the rape of two different women. The first incident occurred on the 26th of April 1994.[363] Musema allegedly ordered the rape of Annunciata, a Tutsi woman, while leading and participating in the attack on Gitwa Hill.[364] For this crime, Musema was charged with genocide and the complicity in genocide for ordering and abetting, in concert with others, the rape of Annunciata.[365] However; the prosecution failed to provide evidence that the order was executed to produce rape.[366]

The second incident was perpetrated on the 13th of May 1994.[367] On this day, during a large-scale attack in Muyira Hill against forty thousand Tutsi refugees, Musema allegedly raped Nyiramusugi.[368] At the time that Musema allegedly contributed to the attack in Muyira Hill and raped Nyiramusugi, he was also the Director of the Gisovu Tea factory.[369] Through his position as Director, he possessed *de jure* and *de facto* power over the factory's employees.[370] The testimony of witnesses evidenced beyond a reasonable doubt that many of the attackers were wearing their

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[356] Para 256.

[357] Paras 268-269.

[358] Para 257.

[359] Para 254.

[360] *Prosecutor v Musema* (Appeal Judgement) ICTR-96-13-A (16 November 2001) para 890.

[361] *Prosecutor v Musema* ICTR-96-13-A (2000) para 16.

[362] Para 140. See also Para 965: The ICTR in *Musema* Appeal adopted the definition of rape as used in *Akayesu*.

[363] Prosecutor v Musema ICTR-96-13-A (2000) para 890.

[364] Para 890.

[365] Para 889.

[366] Para 889.

[367] Para 901.

[368] Paras 890 and 901.

[369] Paras 15 and 932.

[370] Para 905.

Gisovu Tea Factory uniforms and some arrived in Daihatsu vehicles belonging to the Gisovu Tea Factory.[371] In addition, the witnesses testified that Musema was present as one of the leaders of the attack and welding a rifle.[372] Despite his control he failed to take reasonable measures to prevent or punish his subordinates.[373] The ICTR in the *Musema Appeal* found that Musema was individual criminal responsibility, pursuant to article 6(3) of the ICTR Statute, for the non-sexual crimes committed by his employees.[374] During this attack, a policeman told Musema that Nyiramusugi, a Tutsi woman and a teacher, had survived to which Musema requested that she be brought to him.[375] With the help of four other men, Nyiramusugi was dragged to an armed Musema, they proceeded to pin down her limbs and open her legs so that Musema could rape her. [376] Before doing so Musema said loudly: "[t]he pride of the Tutsi is going to end today".[377] Nyiramusugi struggled against her attacker but Musema restricted her breathing and raped her, while the four men watched and thereafter each proceeded to rape her before they left her for dead.[378] Based on Musema's declaration before raping Nyiramusugi, his authoritative positions and his participation, the ICTR inferred his intent to destroy the Tutsi ethnic group, which included rape and sexual violence as an integral part of the plan.[379] The ICTR therefore established that Musema possessed individual criminal responsibility and incurred principal liability, pursuant to article 6(1) of the ICTR Statute, for the rape of Nyiramusugi, in concert with others.[380] The rape was classified as an act of genocide for its causation of serious bodily and mental harm.[381] In addition, the ICTR established the individual criminal responsibility, pursuant to article 6(1) of the ICTR Statute, of Musema for aiding and abetting the other men to rape her by the example he set by carrying out the *actus reus* of rape in front of them.[382] Musema, however; avoided criminal responsibility for sexual violations committed by others, pursuant to article 6(3) of the ICTR Statute, because the prosecution did not lead evidence pertaining to an existing superior-subordinate relationship.[383] However, together with evidence pertaining to non-sexual crimes, Musema therefore incurred individual criminal responsibility under article 6(1) and (3) of the ICTR Statute for the crime of genocide, a crime punishable under article 2(3)(a) of the Statute.[384] Therefore Musema only incurred criminal responsibility, under article 6(3) of the ICTR Statute for the actions of his subordinates, pertaining to non-sexual crimes.

On a separate charge of crimes against humanity, based on the same factual evidence of Nyiramusugi's rape, the defense admitted that the Tutsi population was a racial or ethnic group who were targeted by widespread or systematic attacks throughout Rwanda.[385] The ICTR therefore found that the prosecution was discharged with proving these elements with regards to rape as a

[371] Paras 901 and 904.

[372] Para 902.

[373] Para 905.

[374] Para 906.

[375] Para 907.

[376] Para 907.

[377] Para 907.

[378] Para 907.

[379] Paras 932-934.

[380] Para 908.

[381] Para 908.

[382] Para 908.

[383] Para 909.

[384] Para 936.

[385] Para 964.

crime against humanity.[386] The ICTR in *Musema* found that Musema personally raped Nyiramusugi on the 13th May 1994, while having knowledge of the widespread or systematic attack against the civilian population.[387] In addition, the ICTR found that the rape fell within the ambit of the systemic attack against the Tutsis.[388] The ICTR therefore established Musema's individual criminal responsibility and found him guilty of rape as a crime against humanity, pursuant to article 3(g) and article 6(1) of the ICTR Statute.[389] This conviction, based on the contradictory nature of new witnesses, was overturned on appeal.[390] The Trial Chamber also found Musema not guilty of the rapes committed by his subordinates, pursuant to article 6(3) of the ICTR Statute.[391]

The ICTR Trial Chamber stated that when trying to establish superior responsibility under article 6(3) of the ICTR statute, the prosecution must prove that the accused; possessed *de facto* or *de jure* authority amounting to effective control over the physical perpetrators, that despite his control he did not take reasonable steps to prevent the crime from occurring or punish those who already committed the crime and that he knew or ought to know that said crime was occurring. [392] In addition, the accused must possess the requisite *mens rea* being his or her own personal criminal intent as well as the specific intent required of the international crime under which he or she is being charged.[393] The ICTR in *Musema* found that the prosecution failed to establish that Musema knew or should have known that his subordinates were raping and that he consequently failed to take reasonable measure to prevent further rapes or punish the already committed rapes.[394] The prosecution failed to link Musema to the rape committed by others by failing to establish his superior responsibility pursuant to article 3(g) and article 6(3) of the ICTR Statute.[395]

3 5 3 Prosecutor v Semanza 2003 and 2005

The prosecution in *Semanza* alleged that Semanza "organized, executed, directed, and personally participated in attacks, which included killings, serious bodily or mental harm, and sexual violence, at four locations in Bicumbi and Gikoro communes during the month of April 1994" during the Rwandan genocide.[396] In addition, the prosecution alleged that Semanza acted with the intent to destroy the Tutsi population in Rwanda as an ethnic group and his "acts formed part of a

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[386] Para 964.

[387] Para 966.

[388] Para 966.

[389] Para 967.

[390] Paras 178, 193-194. At the hearing on appeal held on 17 October 2001, the Appellant submitted that the statements of Witnesses CB and EB supported that his conviction of rape, as a crime against humanity, was a miscarriage of justice. In light of the new evidence, the Appeal Chamber found that if a reasonable tribunal of fact had heard the testimonies of N, CB and EB together it would have found that the inconsistencies in the date, time and identity of the perpetrator amount to reasonable doubt. The Appeal Chamber therefore quashed the conviction of rape as a crime against humanity in respect of count seven because the Trial Chamber's legal and factual findings regarding the rape of Nyiramusugi were incorrect. The ICTR in *Musema* Appeal therefore upheld the appeal and quashed Musema's conviction for rape as a crime against humanity; finding him not guilty on count seven pursuant to the Amended Indictment.

[391] *Prosecutor v Musema* ICTR-96-13-A (2000) para 968.

[392] Paras 127 and 141 cf art 6(3) of the ICTR Statute (1994) 33 ILM 1598.

[393] *Prosecutor v Musema* ICTR-96-13-A (2000) para 131.

[394] Para 968.

[395] Para 968.

[396] *Prosecutor v Semanza* ICTR-97-20-T (2003) para 10.

widespread or systematic attack against the Tutsi civilian population on political, ethnic, or racial grounds and that these acts were committed during and in conjunction with a non-international armed conflict in the territory of Rwanda" between its Government and the RPF.[397] Semanza was charged with fourteen counts of genocide, crimes against humanity, and serious violations of Common article 3 and the Additional Protocol I.[398] I however, have only focused on the counts pertaining to sexual violence in the following section. According to the prosecution, Semanza's responsibility arose from crimes committed at four distinct places and times; the Ruhanga church in Gikoro on the 10 April 1994, the Musha church in Gikoro between the 9 and 13 April 1994, the Mwulire Hill in Bicumbi between 7 and 20 April 1994 and the Mabare mosque in Bicumbi commune on about the 12 April 1994.[399] These crimes included the rape and commission of other outrages upon personal dignity against Tutsi women by militiamen, including the *Interahamwe* and the rape of two women and the death of one of them, in Gikoro *commune*, between 7 and 30 April 1994.[400] The relevant incidences involved two victims, Victim A who was raped[401] and tortured[402] and Victim B who was raped and murdered.[403] Semanza contributed to these crimes by delivering a speech to the militiamen, including the *Interahamwe*. According to Witness VV, Semanza delivered a speech on the 13 April 1994 just prior to departing for the attack on Musha church.[404]

For all the counts, except for incitement to commit genocide and complicity in genocide, Musema was charged cumulatively with persona1 responsibility pursuant to article 6(1) and with superior responsibility under article 6(3) of the ICTR Statute.[405] Semanza was a member of the Central Committee of the National Republican Movement for Democracy and Development ("MRND") and elected as the MRND representative to the National Assembly.[406] He had also been the bourgemestre of the Bicumbe *commune* for more than twenty years when he was replaced by Juvenal Rugambarara in 1993.[407] Consequently, he was an influential person in his community; both in the Bicumbe *commune* and the neighbouring Gikoro *commune*. From 1991 to 1994 he chaired meetings, during which he allegedly threatened the Tutsi people who were not MRND members.[408] In addition, from 1991 to 1994 Semanza aided and participated in the distribution of weapons and training of the MRND *Interahamwe*.[409] The ICTR Trial Chamber found that the prosecution failed to prove that Semanza held the position of MRND chairperson as well as the nature and scope of his appointment to the transitional government therefore the prosecution failed to establish *de jure* authority over the alleged perpetrators.[410] The Trial Chamber however found that Semanza was widely viewed as an influential man.[411] Nonetheless the Trial Chamber, referring to *Musema*, stated that the accused's general influence in the community was insufficient to

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[397] Para 8.

[398] Para 7.

[399] Paras 10 and 411.

[400] *Prosecutor v Semanza* (Indictment) ICTR-97-20-I (12 October 1999) paras 3.15- 3.17.

[401] *Prosecutor v Semanza* ICTR-97-20-T (2003) paras 476-477 and 543 cf *Prosecutor v Semanza* ICTR-97-20-I (1999) para 3.17.

[402] *Prosecutor v Semanza* ICTR-97-20-T (2003) para 482.

[403] Paras 475-477 and 543 cf *Prosecutor v Semanza* ICTR-97-20-I (1999) para 3.17.

[404] *Prosecutor v Semanza* ICTR-97-20-T (2003) paras 253-254.

[405] Para 14.

[406] *Prosecutor v Semanza* ICTR-97-20-I (1999) para 3.6.

[407] *Prosecutor v Semanza* ICTR-97-20-T (2003) para 15.

[408] *Prosecutor v Semanza* ICTR-97-20-I (1999) para 3.7.

[409] Para 3.9.

[410] *Prosecutor v Semanza* ICTR-97-20-T (2003) para 412.

[411] Paras 413-414.

establish effective control.[412] Effective control, according to the ICTR Trial Chamber, is only established where a formal or informal hierarchy exists between the accused and the direct participants.[413] In addition, the prosecution failed to establish that Semanza possessed the material ability to prevent crimes or punish the perpetrators.[414] The ICTR Trial Chamber concluded that the prosecution did not establish a superior-subordinate relationship and therefore Semanza did not obtain criminal responsibility under superior liability, pursuant to article 6(3) or for ordering, pursuant to article 6(1).[415]

Semanza was charged with count eight ie rape of civilians as part of a widespread or systematic attack against a civilian population political, ethnic or racial grounds and thereby a crime against humanity.[416] In the indictment the prosecution alleged that Semanza instigated, ordered and encouraged militiamen, including the *Interahamwe*, to rape or commit other outrages upon personal dignity against Tutsi women in Bicumbi and Gikoro *communes*, between the 6th and 30th of April 1994.[417] The ICTR found that Semanza addressed the crowd, including military authorities, asking them how the work of killing the Tutsis was progressing and added that that they must rape the Tutsi women before killing them.[418] Furthermore, the ICTR also found that immediately thereafter, as a result of Semanza's comments, one of the men knowingly raped Victim A as part of a widespread attack against the Tutsi people and two of the men murdered Victim B.[419] The ICTR Trial Chamber found that because insufficient notice was given to the accused pertaining to count eight ie the rape in the Bicumbe and Gikoro *communes*, liability could not be attributed to Semanza for rape as a crime against humanity.[420]

In addition, Semanza was charged with count ten ie instigating rape of Victim A and Victim B as part of a widespread systematic attack against a civilian population political, ethnic or racial grounds and thereby a crime against humanity.[421] The ICTR Trial Chamber found that Victim A's rapist was part of the audience that Semanza addressed.[422] Due to the factual findings that the rape occurred immediately after Musema's speech and that the physical perpetrator heard Semanza's speech, the ICTR Trial Chamber found that Semanza's actions were "causally connected and substantially connected to the actions of the principal perpetrator".[423] In support of this finding the physical perpetrator testified that he thought that Semanza had given him permission to rape.[424] Therefore Semanza's words and actions were clearly linked to the commission of the rape.[425] Furthermore the ICTR Trial Chamber found that Semanza made these comments with the intent and awareness that they would influence and encourage the commission of rape as part of the

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[412] Para 415 cf *Prosecutor v Celebici* (Appeal Judgement) IT-96-21 (20 January 2001) paras 266 and 303; *Prosecutor v KvoČka* et al IT-98-30/1-T (2001) paras 439 and 440; *Prosecutor v Musema* ICTR-96-13-A (2000) para 881.

[413] *Prosecutor v Semanza* ICTR-97-20-T (2003) para 415.

[414] Para 417.

[415] Paras 418-419.

[416] Paras 9 and 473.

[417] *Prosecutor v Semanza* ICTR-97-20-I (1999) para 3.15.

[418] *Prosecutor v Semanza* ICTR-97-20-T (2003) paras 476 and 542 cf *Prosecutor v Semanza* ICTR-97-20-I (1999) para 3.17.

[419] *Prosecutor v Semanza* ICTR-97-20-T (2003) paras 476-477 and 543 cf *Prosecutor v Semanza* ICTR-97-20-I (1999) para 3.17.

[420] *Prosecutor v Semanza* ICTR-97-20-T (2003) para 474.

[421] Paras 9 and 475.

[422] Para 477.

[423] Para 478.

[424] Para 478.

[425] Para 478.

widespread attack against the civilian population.[426] The ICTR Trial Chamber therefore found that Semanza instigated the commission of rape by encouraging such conduct and that he was therefore guilty of rape as a crime against humanity.[427] The ICTR Appeals Chamber confirmed the conviction for rape as a crime against humanity under count ten.[428]

Based on the same set of facts as above, Semanza was also charged with count eleven ie torture as a crime against humanity.[429] The ICTR found that the physical perpetrator inflicted "severe mental suffering sufficient to form the material element of torture" by raping Victim A in circumstances which already cultivated an "extreme level of fear".[430] The rape was committed against Victim A because she was a Tutsi woman. [431] The pain was therefore inflicted on the basis of ethnicity, which is one of the recognised grounds of torture.[432] The perpetrator acknowledged that he acted on the encouragement of Semanza and therefore the ICTR Trial Chamber found that Semanza's comments "had a substantial effect on the rape and torture," which amounted to instigation.[433] Furthermore, Semanza's societal standing and the presence of authority figures while he delivered his speech, legitimised his instigation and gave it greater force.[434] The ICTR Trial Chamber therefore found that Semanza was criminally responsible for instigating the torture of Victim A and he was therefore convicted of torture as a crime against humanity.[435] The ICTR Appeals Chamber affirmed Semanza's conviction for torture.[436]

Additionally, Semanza was also charged with count thirteen ie causing violence to life, health and physical or mental well-being of persons, including rape, as serious violation of article 3 common to the Geneva Conventions, based on the same set of facts as above.[437] The Trial Chamber found that Semanza was responsible for "causing violence to life, health and physical or mental well-being of persons" and thereby committed a serious violation of article 3 common to the Geneva Conventions of 12 August 1949.[438] However, no conviction was entered under count thirteen because of the concurrence with count ten, eleven and twelve.[439] Nonetheless, the ICTR Appeal Chamber reversed the acquittal under count thirteen.

3 5 4 Prosecutor v Kajelijeli 2003 and 2005

Equally during the Rwandan genocide, due to the circumstances surrounding the commission of rape, the ICTR found that the rape of at least four women were committed in the course of a widespread attack against the Tutsi population and therefore amounted to crimes against

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[426] Para 478.

[427] Para 479.

[428] *Prosecutor v Semanza* (Appeal Judgement) ICTR-97-20-A (20 May 2005) para 130.

[429] *Prosecutor v Semanza* ICTR-97-20-T (2003) paras 10 and 480-481 cf *Prosecutor v Semanza* ICTR-97-20-I (1999) paras 3.17-3.18.

[430] *Prosecutor v Semanza* ICTR-97-20-T (2003) para 482.

[431] Paras 483 and 545.

[432] Paras 483 and 545.

[433] Paras 484-485 and 547.

[434] Paras 485 and 547.

[435] Paras 485 and 488.

[436] *Prosecutor v Semanza* ICTR-97-20-A (2005) para 130.

[437] *Prosecutor v Semanza* ICTR-97-20-T (2003) para 10.

[438] Paras 541-542 and 551.

[439] Para 552.

humanity.[440] However, Kajelijeli's individual criminal responsibility for the sexual crimes was in dispute. Therefore I shall, in this specific case, first set out the surrounding circumstances of the widespread attack and Kajelijeli's involvement in the attacks before discussing his criminal responsibility for the acts of sexual violence. From 1988 to 1993, Kajelijeli served as the *bourgmestre* of the Mukingo *commune*.[441] Thereafter from 1988 to 1993 he served as the *bourgmestre* in the Ruhengeri préfecture and he returned to the Mukingo *commune* as the *bourgmestre* in June 1994 until mid-July 1994.[442] The prosecution of Kajelijeli involved the murder and attack of the Tutsi people from the 7th to the 14th of April 1994. At a meeting on the 6th April 1994, in the wake of the death of the President of the Republic of Rwanda, Kajelijeli blamed the Tutsi's for the death and incited revenge by saying: "what are you waiting for to eliminate the enemy?"[443] The next morning Kajelijeli reminded those present at the Nkuli *commune* Office of their decision last night "to act".[444] On the 7th April 1994, approximately eighty Tutsis living in the Kinyababab *cellule* were killed.[445] The ICTR found that this attack was carried out in furtherance of the consensus reached the previous night where the accused was present.[446] Witness GDD and others reported back to Kajelijeli after the attack saying that they had "eliminated everything".[447] In addition, on the same morning at the Byangabo market, Kajelijeli assembled the *Interahamwe* and ordered them to exterminate the Tutsis in Rwankeri.[448] Thereafter, Kajelijeli directed the *Interahamwe* from the Byangabo market towards Rwankeri *cellule* to join the attack in Busogo *cellule*, Mukingo *commune.*[449] The attacks in the broader Busogo area killed approximately eighty Tutsi families.[450] The attackers at Busogo Hill formed part of a group of people who were attacking the 80 Tutsi families in Busogo.[451] Due to Kajelijeli's direction and liaising with the Mukamira camp for military and weapons assistance, the ICTR Trial Chamber found that he participated in the attack.[452]

Furthermore, the ICTR found that Witness GDD, an *Interahamwe* member, murdered eight Tutsis in the Gitwa sector in the Nkuli *commune*, in furtherance of Kajelijeli's order to "fine comb" the Nkuli *commune* for Tutsis. [453] Additionally, children, women and men were attacked and killed on the 7th of April at Munyemvano's compound in Rwankerie *cellule*, Mukingo *commune*.[454] The ICTR found that Kajelijeli was present during the attack and that through his position of authority over the *Interahamwe* he also ordered, supervised and commanded the attack against the Tutsi civilians on the 7th of April 1994 in the Mukingo *commune.*[455] The ICTR found that a massacre of the Tutsi people, involving the *Interahamwe*, also occurred on the 7th of April 1994, at the Nuns'

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[440] *Prosecutor v Kajelijeli* ICTR-98-44A-T (2003) para 922.

[441] Para 6.

[442] Para 6.

[443] Para 819.

[444] Para 820.

[445] Paras 822 and 896.

[446] Paras 822 and 896.

[447] Paras 822 and 896.

[448] Paras 823 and 897.

[449] Para 824.

[450] Para 824.

[451] Para 898.

[452] Paras 824 and 898.

[453] Para 825.

[454] Para 900.

[455] Paras 898 and 900.

compound at Busogo Parish.[456] Later, when searching for survivors, Witness GBH heard the Kajelijeli say that "it was necessary to continue, look for those or hunt those who had survived".[457] The ICTR Trial Chamber found that all the attacks in the Mukingo and Nkuli *communes* were systematically directed at killing the Tutsi civilians.[458] Moreover, the ICTR found that on or near the 14th of April 1994, members of the *Interahamwe* killed approximately three hundred Tutsis at the Ruhengeri Court of Appeal.[459] The ICTR found that Kajelijeli played a "vital role" by organizing and facilitating the *Interahamwe* and other attackers; through the procurement of weapons, mobilizing the *Interahamwe* and providing petrol so that they could get to the Ruhengeri Court of Appeal.[460]

The ICTR Trial Chamber therefore found that mass killings of the Tutsi civilian group took place in Mukingo *commune*, Nkuli *commune* and Ruhengeri Court of Appeal in Kigombe *commune*, during April 1994.[461] The Tutsi population were targeted and intentionally destroyed as a civilian population and an ethnic group.[462] Kajelijelis's words and actions showed that he participated with the intention to destroy the Tutsi group.[463] The ICTR concluded that Kajelijeli was therefore individually criminally responsible for the instigating, ordering, and aiding and abetting the killing and extermination of the Tutsi people in the Mukingo, Nkuli and Kigombe *communes*, pursuant to article 6(1) of the ICTR Statute, with the requisite intent.[464] The ICTR Trial Chamber therefore found Kajelijeli guilty of count two ie genocide pursuant to article 2(3)(a) of the ICTR Statute.[465] In addition, these attacks also constituted a widespread attack against the Tutsi civilian ethnic group.[466] The ICTR found that Kajelijeli, with full knowledge that his actions forming part of the widespread attack based on the circumstances, directed the attacks at areas where large groups of Tutsis had gathered.[467] Consequently, hundreds of Tutsis were therefore exterminated as a result of Kajelijeli's participation by ordering, aiding and supervising the attacks.[468] Accordingly, Kajelijeli was also guilty of count six ie extermination as crime against humanity.[469] In addition, the ICTR found that the accused was a leader of the *Interahamwe*, with control over the *Interahamwe* in the Mukingo and Nkuli *communes* from the 1 January 1994 to July 1994, which resulted in Kajelijeli's liability as a superior for the actions of his subordinates.[470]

Kajelijeli was also charged under count seven ie rape as a crime against humanity, pursuant to article 3(g) of the ICTR Statute.[471] The ICTR found that the murder and rape of a woman named Joyce, on the 7th of April 1994, by *Interahamwe* in Rwankeri was as a result of the *Interahamwe* going to the Rwankeri *cellule* following Kajelijeli's order to "exterminate the Tutsis" at the

[456] Para 901.

[457] Para 827.

[458] Para 828.

[459] Para 902.

[460] Para 902.

[461] Para 903.

[462] Paras 828 and 903.

[463] Para 828.

[464] Paras 842 and 905.

[465] Para 845.

[466] Para 903.

[467] Para 904.

[468] Para 904.

[469] Para 907.

[470] Para 780.

[471] Paras 908-909.

Byangabo Market the previous day.[472] In addition, the ICTR found that on the 7th of April 1994 *Interahamwe* members; raped Witness ACM, a Tutsi woman, in Bugogo Parish in Kabyaza *cellule* at a roadblock and raped and killed Witness GDO's daughter, a handicapped girl, in Rukoma *cellule* Shiringo sector.[473] The ICTR Trial Chamber found that criminal responsibility ensues where the accused physically committed the crime or where the accused participated in the commission of the crime in other ways, ranging from planning to execution.[474] The accused's participation must however, amount to a "substantial" contribution to the commission of the crime in order for criminal responsibility to ensue.[475] Despite Kajelijeli's contributions; his speech on the 6th of April, reminding those present at the Nkuli *commune* Office of their decision to act, his assembly of the *Interahamwe*, his order to exterminate the Tutsis in Rwankeri, the subsequent massacre on the 7th of April and his direction and liaising with the Mukamira camp for military and weapons assistance and subsequent feedback to Kajelijeli, the majority of the ICTR found that Kajelijeli was not criminally responsible for acts of sexual violence.

Kajelijeli evaded individual criminal responsibility because the prosecution neither proved that he specifically instructed the rape and murder of Witness GDO's daughter nor established Kajelijeli's presence at the scene of the crime.[476] However, Ramaroson J, in a dissenting opinion, found that Kajelijeli's instructions on the 6th and 7th of April included the rape of Tutsi women.[477] Furthermore, the ICTR also found that Witness GDT, a Tutsi woman, was raped and sexually mutilated by members of the *Interahamwe* in the Susa sector, Kinigi *commune*, on the 7th April 1994.[478] The ICTR, Ramaroson J dissenting, yet again found that the prosecution did not prove that the accused issued a specific order to rape or sexually assault Tutsi women on that day.[479] Moreover, the ICTR found that on the 10th of April 1994, Witness GDF, a Tutsi woman, was raped by members of the *Interahamwe* in the Susa sector, Kinigi *commune*.[480] The ICTR yet again was not convinced that Kajelijeli was present during the rape of Witness GDF and therefore criminal responsibility did not ensue.[481] Despite the fact that four females were raped, the ICTR found that "the Prosecution failed to prove beyond a reasonable doubt that Kajelijeli either planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of the rapes".[482] The prosecution therefore failed to link Kajelijeli to the crimes. The majority of the ICTR, Ramaroson J dissenting, found Kajelijeli not guilty of rape as a crime against humanity.[483]

On the same set of facts as stated above, the ICTR Trial Chamber found that *Interahamwe* members raped and killed Joyce at the Rwankeri *cellule* on the 7th of April 1994.[484] Kajelijeli was therefore charged with count nine ie other inhumane acts as a crime against humanity.[485] The ICTR also found that *Interahamwe* members pierced her side and sexual organs with a spear and thereafter covered her dead body with her skirt.[486] In addition, the ICTR found that a Tutsi girl

[472] Para 917.

[473] Paras 918-919.

[474] Para 757.

[475] Para 759.

[476] Para 919.

[477] Para 919.

[478] Para 920.

[479] Para 920.

[480] Para 921.

[481] Para 921.

[482] Para 923.

[483] Para 925.

[484] Para 934.

[485] Para 934.

[486] Para 934.

named Nyiramburanga was mutilated by an *Interahamwe* member who cut off her breast and then proceeded to lick it, at Rwankeri *cellule*, on the 7th of April 1994.[487] The Trial Chamber concluded that these inhumane sexual acts constitute "a serious attack against human dignity of the Tutsi community as a whole".[488] Piercing a woman's sexual organs and cutting off her breast were "nefarious acts of a comparable gravity to the other acts listed as crimes against humanity, which would clearly cause great mental suffering to any members of the Tutsi community who observed them".[489] Due to the surrounding circumstances, the ICTR found that the sexually-related acts were committed as part of the widespread attack against the Tutsi civilian population.[490] Despite the commission and gravity of the sexual acts, Kajelijeli avoided liability because the prosecution did not prove that he was present or that he gave a direct order for its commission, pursuant to articles 6(1) and 6(3) of the ICTR Statute.[491] Kajelijeli was therefore not guilty of other inhumane acts as a crime against humanity.[492] In *Kajelijeli v The Prosecutor* ("*Kajelijeli Appeal*"), the ICTR Appeals Chamber confirmed the Trial Chambers convictions and acquittals, as set out above.[493]

Ramaroson J, in her dissenting opinion, found that Kajelijeli was guilty beyond a reasonable doubt of rape as a crime against humanity, pursuant to article 3(g), article 6(1) and article 6(3) of the ICTR Statute based on the evidence presented by the prosecution in the indictment and during the trial.[494] Paragraph 5.3 and 5.5 of the indictment, on the events at the Ruhengeri prefecture, reads as follows:

> "From April to July 1994, many Tutsi men, women and children were attacked, abducted, raped and massacred in their residence or at their place of shelter within the Mukingo *commune* or arrested, detained and later murdered. The Accused commanded, organized, supervised and participated in these attacks. The Accused ordered and witnessed the raping and other sexual assaults on the Tutsi females. At all the times material to this indictment, the Accused, as a person in authority over the attackers failed to take any measure to stop these nefarious acts on the Tutsi females."[495]

According to Ramaroson J, the term "participated" was used in Kajelijeli's indictment to explain his involvement in the charges brought against him, including under count seven ie rape as a crime against humanity.[496] According to the ICTY in *Prosecutor v Celebici* ("*Celebici*"), this term is broad enough to include all the forms of participation under article 6(1) of the ICTR Statute.[497] Ramaroson J proposes that Kajelijeli was an accomplice to rape as a crime against humanity because there was sufficient evidence to establish that Kajelijeli participated in the form of instigation and ordering but not to the extent that he planned the perpetration of rape.[498] Witness GDO testified that Kajelijeli ordered the *Interahamwe* to rape Tutsi women by saying: "it was

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[487] Para 935.

[488] Para 936.

[489] Para 936.

[490] Para 936.

[491] Paras 937-939.

[492] Para 940.

[493] *Kajelijeli v The Prosecutor* (Appeal Judgement) ICTR-98-44A-A (23 May 2005) para 325. The Appeal was dismissed in all respects except for the convictions under superior liability, pursuant to art 6(3) of the ICTR Statute, for genocide and extermination as a crime against humanity.

[494] *Prosecutor v Kajelijeli* ICTR-98-44A-T Dissenting Opinion of Judge Arlette Ramaroson (2003) para 1.

[495] Para 3.

[496] Para 54.

[497] Para 54 cf *Prosecutor v Celebici* IT-96-21 (2001) para 351.

[498] *Prosecutor v Kajelijeli* ICTR-98-44A-T Dissenting Opinion of Judge Arlette Ramaroson (2003) paras 52 and 56.

necessary to look for the Tutsi women, rape them and kill them" and that "they should forcefully rape them and then kill them" because there is a need "to separate the good grain from the bad ones".[499] Ramaroson J found that these words amounted to instigation by: "prompting and stirring up the *Interahamwe* to commit the crimes of rape and murder".[500] In addition, Ramaroson J found that Kajelijeli possessed and exercised effective control over the *Interahamwe* in Mukingo and Nkuli *communes*.[501] His words therefore also amounted to an order, which he expected the *Interahamwe* to carry out. Ramaroson J is adamant that the *Interahamwe* members were acting on Kajelijeli's orders.[502] In addition, Kajelijeli was present with the *Interahamwe* at the scenes where the numerous rapes occurred either at the time or after they were perpetrated because often dropped them off or sent them to these locations.[503]

In addition to ordering, Ramaroson J argued that Kajelijeli aided these rapes by providing transport for the *Interahamwe* and moral support though his presence as an authority figure.[504] This interpretation is consistent with the understanding of participation, discussed above in *Furundžija*. His presence justified and encouraged the rape and therefore amounted to a substantial contribution to the commission of rape.[505] Referring to *Akayesu*, Ramaroson J stated that Akayesu aided and abetted the rape by allowing the attacks to be perpetrated just outside the premises of the *bureau communal*, while he was present and he had reason to know that they were occurring.[506] Witness GBV testified to Kajelijeli's presence at the Rudatinya's house where Joyce was raped.[507] Therefore Kajelijeli abetted and supported the rapists through his presence as an authority figure and by witnessing the crime.[508] Thereby Ramasoron J concluded that "there is substantial, specific and corroborative evidence to sustain the allegation that Kajelijeli committed the crime" by instigating, ordering, aiding and abetting the commission of rape. [509] He is therefore criminally responsible for the rapes of the women, pursuant to article 6(1) of the ICTR Statute.[510] Furthermore, the rape of Joyce and Kizungu happened simultaneous, at the hand of the *Interahamwe*, to the killings of Tutsis on the 7th of April 1994.[511] Arguably, the rapes occurred as a result of Kajelijeli's order to exterminate and kill the Tutsis ie as a result of executing the common criminal plan.

3 6 Conclusion

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[499] *Prosecutor v Kajelijeli* ICTR-98-44A-T (2003) para 680 cf *Prosecutor v Kajelijeli* (Trial Chamber) ICTR-98-44A-T Protective Measures Prosecution Witness Trial Chamber (18 July 2001) paras 38, 47, 51 and 52. The Trial Chamber accepts Witness GDO's testimony as credible insofar as it pertains to the *Interahamwe*'s rape and murder of her handicapped daughter but not with regards to Kajelijeli's presence.

[500] *Prosecutor v Kajelijeli* ICTR-98-44A-T Dissenting Opinion of Judge Arlette Ramaroson (2003) para 57.

[501] Paras 63-64 cf *Prosecutor v Kajelijeli* ICTR-98-44A-T (2003) paras 780-782.

[502] *Prosecutor v Kajelijeli* ICTR-98-44A-T Dissenting Opinion of Judge Arlette Ramaroson (2003) para 61.

[503] Para 61.

[504] Para 66.

[505] Para 66.

[506] Para 68 cf *Prosecutor v Akayesu* ICTR-96-4-T (1998) para 693.

[507] *Prosecutor v Kajelijeli* ICTR-98-44A-T Dissenting Opinion of Judge Arlette Ramaroson (2003) para 71 cf *Prosecutor v Kajelijeli* ICTR-98-44A-T (2003) para 551 cf *Prosecutor v Kajelijeli* (Trial Chamber) ICTR-98-44A-T (4 July 2001) paras 114-115 and 134.

[508] *Prosecutor v Kajelijeli* ICTR-98-44A-T Dissenting Opinion of Judge Arlette Ramaroson (2003) para 69.

[509] Paras 73-74.

[510] Paras 73 and 75.

[511] Para 60.

The field of culpability under international criminal law should arguably be expanded to correctly reflect the broad scope for liability as expressed in the Rome Statute and the Statutes of the *ad hoc* tribunals. The ICC, ICTY and ICTR were created for the purpose of prosecuting serious international violations including rape, sexual violence, mutilation and other inhume acts as crimes against humanity, acts of genocide, war crimes and violations of common article 3 to the Geneva Conventions. The constitutive statutes should therefore be purposely interpreted and used. However, a conviction should not ensue where the evidence is insufficient. The tribunal or court should therefore ensure that all the elements of the crime have been satisfied beyond a reasonable doubt before liability ensues. Where charges based on acts of sexual violence are regularly being acquitted, it is important to the legitimacy of international criminal law and the pursuit of justice to investigate and establish why these prosecutions are unsuccessful. By reading and analysing the cases that successfully and unsuccessfully prosecuted acts of sexual violence it became evident to me that where the prosecution fails to sufficiently link the accused to the crime, the charge results in acquittal. I confirm that the establishment of individual criminal responsibility and the requisite intent are the two difficulties experienced in prosecuting acts of sexual violence, as hypothesised.

In conclusion, the ICTY Trial Chamber in *Furundžija* found that an accused's presence could amount to complicity where his or her presence significantly encouraged or legitimised the commission of the crime. In addition, a direct contribution does not require that the accused's actions be a *conductio sine qua non* but rather that his or her actions should have a substantial effect on the commission of the crime. The prosecution in *Furundžija* successfully convicted Furundžija, as a co-perpetrator, for torture as a violation of the laws and customs of war. Despite not laying a hand on Witness A, he was present during her rape and he continued to interrogate her throughout. The key to the prosecution's success was in establishing that Furundžija and the physical perpetrator (Accused B) both partook and shared in the purpose behind the torture. In addition, their contributions were made simultaneously with knowledge of each other's actions. Therefore despite playing different roles they were both guilty as co-perpetrators. The ICTY, in cases involving torture, usually attributes liability as a co-perpetrator not complicity. Arguably, this same approach should be used against all those who share in the underlying purpose behind the act of sexual violence. For instance, where rape is used as a tool to facilitate a widespread or systematic attack against a civilian population or the destruction of a particular group as a whole or in part. However Furundžija was only convicted as an aider and abettor for outrages upon personal dignity, including the rape of Witness A, as a violation of the laws and customs of war because he did not physically penetrate Witness A or co-perpetrate her rape. Instead he encouraged Accused B with his presence and continued interrogation, which amounts to a substantial contribution to Accused B's conduct.

ICTR in *Semanza* found that rape was committed as part of a widespread attack against the Tutsi people. *Semanza* displays how difficult it is to hold an accused responsible for the actions of others. However, the prosecution successfully convicted Semanza of instigating rape as a crime against humanity and instigating torture as a crimes against humanity for the rape committed by another, soon after his speech. Semanza was sufficiently linked to the crime because the physical perpetrator was an audience member that heard Semanza's incitement, admittedly understood it to be permissive and subsequently proceeded to commit an act of sexual violence due to the accused's encouragement. In addition, the ICTR easily inferred that Semanza foresaw the commission of rape as a consequence of his speech. Yet again the basis for linking the accused's speech to the physical perpetrators commission of rape was their shared underlying purpose to destroy the Tutsi population. However, despite satisfying the requirement for commission on the same evidence, Semanza was not convicted for committing rape because the accused did not receive sufficient notice of this particular charge. Arguably, the fact that the accused and the physical perpetrator shared in the purpose behind the sexual offence, ie the desire to destroy the Tutsi people as an ethnic group, should favour a broadly inclusive approach to equal liability for certain participants, similar to the approach for participation in torture as described in *Furundžija*. *Semanza*, also demonstrated how difficult it is to incur liability as a superior. The accused must possess effective control of the physical perpetrator, stemming from a hierarchical position, and have the material

ability to prevent or punish the commission. In this case, it is clear that the accused's influential standing in the community, alone, did not amount to effective control and therefore did not result in superior liability.

The ICTR in *Musema* furthermore found that the accused's intent can be inferred from the surrounding circumstances ie the accused's declarations, authoritative positions and participation. Moreover, rape and sexual violence can be an *integral* part of the plan to destroy the Tutsi ethnic group. In addition, *Musema* illustrates that establishing individual criminal responsibility is the biggest hurdle in attributing guilt to an accused for acts of sexual violence. Where the prosecution can prove that the accused physically carried out the *actus reus*, he is liable as a principal perpetrator, however where the *actus reus* of rape was physically carried out by others, it is difficult to link the accused to the crimes. For example, Musema was convicted on two counts for the serious bodily and mental harm as an act of genocide for the multiple rape of Nyiramusugi. Firstly, he incurred liability as a principal for personally raping her, in concert with others, and secondly, for aiding and abetting others in raping her; through his position, presence, comments and his example. In addition, the ICTR found that Musema was individual criminal responsibility for personally raping Nyiramusugi and found him guilty of rape as a crime against humanity, however this conviction was overturned on appeal based on the contradictory testimonies of new witnesses. While successfully attributing individual criminal responsibility for Musema raping Nyiramusugi and *his contribution* to the rape of Nyiramusugi by others, the prosecution failed to link Musema to the rape of Nyiramusugi and Annunciata that were committed by others. Musema was acquitted of the charges of genocide and complicity in genocide for the rape of Annunciata despite a witness's testimony that the Musema ordered the rape of Annunciata because the prosecution could neither establish that the order to rape was heard by the physical perpetrator who actually executed the sexual violence nor Musema's knowledge of their actions. Furthermore, Musema was acquitted of superior-liability for the rape of Nyiramusugi because the prosecution failed to establish a superior-subordinate relationship between Musema and the physical perpetrator of her rape as an act of genocide and failed to link the accused to the rape as a crimes against humanity. A person's social and political prominence in a community is not enough to establish his or her control over the physical perpetrators within that community. Conversely, Musema was convicted under superior liability, for the non-sexual genocidal crimes committed by his subordinates at Muyira Hill that same day. When the physical perpetrators are the accused's employees, who arrive in his marked vehicles and in their uniforms, it is enough to establish the accused's control and thereby his liability as a superior for his failure to prevent or punish his subordinates from engaging in the attack on Muyira Hill.

Arguably, instead of unsuccessfully using superior liability the prosecution in *Musema* could have used the JCE doctrine, which will be discussed in the subsequent chapter, to establish the individual criminal responsibility of the accused, for the sexual crimes committed by others. The facts used to establish Musema's liability for non-sexual crimes such as murder as an act of genocide and a crime against humanity already established the existence of a common plan to destroy the Tutsi civilian population, Musema's contribution to the common purpose and his intent. Moreover, the ICTR already found that rape formed an integral part of the plan to destroy the Tutsis based on Musema's humiliating and racist comments. With this approach, the prosecution could have established Musema's responsibility as a principal perpetrator by establishing that the other physical perpetrators were either members of the JCE or used by members of the JCE to further the common purpose and that Musema subjectively foresaw that sexual violence would occur as a result of executing the common purpose. The latter should be easy to infer based on the fact that Musema himself raped a Tutsi women, after the attack at Muyira Hill where thousands of Tutsis were killed. This proposed solution shall be discussed further in chapter three.

The ICTR in *Kajelijeli* clarified that international criminal law provides for the attribution of criminal responsibility to those who make a substantial contribution to the crime despite not carry out the *actus reus* themselves. The prosecution successfully established Kajelijeli's individual criminal responsibility for non-sexual crimes committed by others. His individual criminal

responsibility was evinced by his presence and participation; instigating, ordering, and aiding and abetting the killing and extermination of the Tutsi people in the Mukingo, Nkuli and Kigombe *communes* as an act of genocide and ordering, aiding and supervising the widespread attacks and extermination of the Tutsi civilian ethnic group as crimes against humanity. Despite Kajelijeli's overwhelming encouragement, contributions and involvement in the attacks on the Tutsi people throughout April 1994, including speeches and conversations where he directly yet broadly instructed and encouraged sexual violence, the ICTR found that there was not sufficient evidence to link him to the rape of Witness ACM, the rape and sexual mutilation of Witness GDT, the rape of Witness GDF, the mutilation of Nyiramburanga, the inhumane acts against Joyce and the rape of Witness GDO's daughter, who is handicapped. Therefore, while the ICTR found that the acts of sexual violence did in fact occur, the prosecution did not prove that the specific physical perpetrator was acting on Kajelijeli's instruction. In essence, the ICTR explained that the prosecution failed to prove that Kajelijeli's previous speeches and actions had caused the specific rape of those women because they did not prove that the physical perpetrators had heard him and thereafter acted accordingly. Furthermore, they were unable to prove his presence when the crimes were committed and, or, that he specifically ordered the sexual assault of that specific victim on that day. However, as found in *Furundžija*, the contribution does not have to be a *conductio sine qua non* for liability as an aider and abettor to ensue; it need only have a substantial effect on the commission of the crime. In addition, the ability of the prosecution to establish incitement or superior liability was therefore difficult despite the existence of proof that the rape actually occurred and that Kajelijeli had contributed to the underlying purpose of destroying the Tutsi people on numerous occasions.

Ramaroson J, in her dissenting opinion, opposed these acquittals and found that Kajelijeli was responsible for the rape of Joyce because the commission was a result of the *Interahamwe* going to the Rwankeri *cellule* following Kajelijeli's order to "exterminate the Tutsis" at the Byangabo Market the previous day. Further in her dissenting opinion, Ramaroson J stated that based on the evidence, Kajelijeli's presence, actions and instructions to rape Tutsi women amounted to ordering and instigation and therefore his liability as an accomplice to the acts of sexual violence. In addition, Ramaroson J found that Kajelijeli possessed effective control over the *Interahamwe* yet failed to prevent or punish the commission of sexual violence and is therefore also liable as a superior for ordering the acts of sexual violence.

As discussed in chapter two, the distance created by the chain of command together with the absence of a direct order to commit rape makes it difficult to establish the individual criminal responsibility of the high-ranked officials. The nature and context of crime therefore makes it inherently difficult to link the accused to the crime that is committed by another. It is easier to establish criminal responsibility where the prosecution can prove that the accused carried out the *actus reus* himself, expressly ordered the commission of the crime and was present when the crime was committed. However, where the accused's contribution is more removed from the commission of the crime it is more difficult for the prosecution to establish the link. Furthermore, I conclude that prosecution of sexual violence is more difficult than the prosecution of non-sexual acts because the prosecution was unable to establish the high-ranked official direct involvement in the commission. However I propose that if the ICC approaches rape like the ICTY in *Furundžija* approached torture then accused can be sufficiently linked to crime committed by another. In *Furundžija* the physical perpetrator who raped and assaulted Witness A was linked to the accused who interrogated Witness A by their common criminal purpose of exacting information from Witness A. In the same way, an accused can be linked to the physical perpetrator of rape where they both share in the underlying criminal purpose of genocide or attacks against a civilian population in a widespread or systematic manner. In these instances rape would either have to be used as a weapon to facilitate these underlying criminal purposes or accepted as a reasonably foreseeable consequence of implementing these underlying criminal purposes.

Individual criminal responsibility and liability should ensue where the accused's degree of intent and contribution in its entirety warrants its attribution. Therefore the criminal court or tribunal should consider how the nature of the crime is making it inherently difficult to secure a conviction

for acts of sexual violence. Arguably, exceptional yet necessary measures should be adopted or developed to ensure prosecutorial efficacy. These include specialised prosecutorial and evidentiary tools, which have the ability to ensure the greatest prospect of successful prosecution. The JCE doctrine is one such measure, which is discussed and evaluated in chapters four and six.

CHAPTER 4: THE THEORY AND APPLICATION OF THE JOINT CRIMINAL ENTERPRISE DOCTRINE

4 1 Introduction

In this chapter, I attempt to set out the theory and application of the JCE doctrine in pursuance of my fifth research question. The aim is to understand the JCE doctrine and discover if and how it can be used to establish criminal responsibility of an accused who did not physically perpetrate acts of sexual violence in accordance with my sixth research question. Case law from the ICTY and ICTR is utilised to demonstrate the origin of the JCE doctrine as well as the various characteristics and tests of each category. Academic articles written by Haffajee, Goy, Danner and Martinez are utilised to form a foundation for a discussion about the proposed utilisation of the JCE doctrine in establishing criminal responsibility for acts of sexual violence and its conceptualisation as a form of commission. The first sub-chapter aims at establishing what the JCE doctrine is and its origin. Thereafter the manner in which each of the three categories can be used to construct criminal responsibility and the difference between principal and accessory liability is briefly discussed. Subsequently the application of the JCE is explored. Case law from the *ad hoc* tribunals illustrate the application of the JCE doctrine with regards to acts of sexual violence. The aim is to establish whether the JCE doctrine can be used to address the systematic use of sexual violence and establish the individual criminal responsibility, under international criminal law, of high-ranked officials who did not carry out the *actus reus* of the crime. In addition, I aim to discover which category of the JCE doctrine is most suited to the prosecution of acts of sexual violence. The investigation might also indicate if and where the doctrine is falling short.

4 2 The JCE doctrine and its origin

JCE is a form of "common purpose or common plan liability".[512] The JCE doctrine is therefore an "individual criminal responsibility theory in international criminal law"[513] that enables the attribution of liability for participation in a JCE ie a "form of crime commission".[514] The JCE doctrine is only applicable to crimes with multiple perpetrators who participate in the same criminal conduct, under a common purpose, and who share the same intent. In *Martić Appeal* the ICTY stated that "crimes contemplated in the [ICTY] Statute mostly constitute the manifestations of collective criminality and are often carried out by groups of individuals acting in pursuance of a common criminal design or purpose".[515] This doctrine considers each member of the common plan responsible for the crimes committed by other members.[516]

There is uncertainty as to the origin and legitimacy of the JCE doctrine.[517] With regards to the latter, a contribution to a JCE is neither expressly mentioned as a form of participation nor a mode

[512] Haffajee (2006) *Harv J L & Gender* 212.

[513] 212 cf *Prosecutor v Furundžija* IT-95-17/1-A (2000); *Prosecutor v Tadić* IT-94-1-A (1999); Prosecutor v *KvoČka* et al IT-98-30/1-T (2001); *Prosecutor v Krstić* IT-98-33-T (2001); *Prosecutor v Furundžija* IT-95-17/1-T (1998); *Prosecutor v Tadić* IT-94-1-T (1997); *Prosecutor v Karemera* ICTR-98-44-I (2005).

[514] Haffajee (2006) *Harv J L & Gender* 212.

[515] *Prosecutor v Martić* IT-95-11-A (2008) para 82.

[516] Goy (2012) *ICL Rev* 28 cf *Prosecutor* v *Vasiljević* IT-98-32-A (2004) para 111.

[517] Haffajee (2006) *Harv J L & Gender* 219.

of liability in the Rome Statute or the Statutes of the ICTY or the ICTR.[518] Yet the Appeal Chamber of the ICTY in the *Tadić Appeal* and the Appeal Chamber of the ICTR in *Prosecutor v Ntakirutimana and Ntakirutimana* ("*Ntakiruitmana Appeal*") read participating in a JCE into the respective articles concerning individual criminal responsibility.[519] In addition, both *ad hoc* tribunals found that participating in a JCE is also a form of liability that exists in customary international law.[520] On that note, the ICTY in *Prosecutor* v *Milutinović, Ojdanić & Sainovic* ("*Milutinović Appeal*") argued for the general use of the JCE doctrine, within the context of the individual criminal responsibility, because it finds its origin in customary international law.[521] Cassese also finds authority for the use of JCE in customary international law, pre-dating 1975.[522] His opinion is based on the use of common purpose in case law since WWII and the use of JCE liability in the domestic law of France and Cambodia.[523] In addition, Goy cites the ICTY Appeals Chamber in the *Tadić Appeal*,[524] *Prosecutor v Brđanin*[525] ("*Brđanin Appeal*") and the *Prosecutor v Krajišnik* [526] ("*Krajišnik Appeal*") as well as the ICTR Appeals Chamber in *Karemera & Ngirumpaste v The Prosecutor*[527] ("*Karemera Appeal*") as support for the JCE doctrine's origin in customary international law.[528] This finding gives the JCE doctrine legitimacy because customary international law, although not codified is "evidence of general practice accepted as law" and is therefore legally binding. [529]

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[518] Danner & Martinez (2005) *Cali L Rev* 103. See also *Prosecutor v Karemera & Ngirumpatse* (Judgement and Sentencing) ICTR-98-44-T (2 February 2012) para 1433.

[519] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-T (2012) para 1433 cf *Prosecutor v Tadić* IT-94-1-A (1999) paras 188 and 195-226; *Prosecutor v Ntakirutimana & Ntakirutimana* ICTR-96-10-A and ICTR-96-17-A (2004) paras 461-462, 466 and 468.

[520] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-T (2012) para 1433 cf *Prosecutor v Tadić* IT-94-1-A (1999) paras 188 and 195-226; *Prosecutor v Ntakirutimana & Ntakirutimana* ICTR-96-10-A and ICTR-96-17-A (2004) paras 461-462, 466 and 468.

[521] *Prosecutor v Ojdanić* et al IT-99-37-AR72 Separate Opinion of Judge David Hunt on Challenge by Ojdanić to Jurisdiction Joint Criminal Enterprise (2003) 6; S Powles "Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?" (2004) 2 *Journal of International Criminal Justice* 606 614–615.

[522] Haffajee (2006) *Harv J L & Gender* 223 cf *Prosecutor v Kaing Guek Eav* Invitation to *Amicus Curiae* 001/18-07-2007-ECCC/OCIJ (23 September 2008) 4.

[523] Haffajee (2006) *Harv J L & Gender* 223 cf *Prosecutor v Kaing Guek Eav* 001/18-07-2007-ECCC/OCIJ (2008) 4.

[524] *Prosecutor v Tadić* IT-94-1-A (1999) paras 194-220.

[525] *Prosecutor* v *Brđanin* (Appeal Judgement) IT-99-36-A (3 April 2007) paras 363 and 410.

[526] *Prosecutor* v *Krajišnik* (Appeal Judgement) IT-00-39-A (17 March 2009) paras 290 and 659.

[527] *Karemera & Ngirumpaste v The Prosecutor* (Appeals Decision) ICTR-98-44-AR72 51, ICTR-98-44-AR72 6 Decision on Jurisdictional Appeals: Joint Criminal Enterprise (12 April 2006) para 16.

[528] Goy (2012) *ICL Rev* 27.

[529] RMM Wallace & O Martin-Ortega *International Law* (2009) 1 8-9 cf art 8(1)(b) of the Statute of the International Court of Justice Annexed to the Charter of the United Nations 59 Stat 1055 1060 TS No 993 (18 April 1946): Over time, the interactions between states and practices of states have "crystallised into rules of customary international law". A rule of custom exists where both state practice (*usus*) and the subjective conviction that compliance is mandatory not discretionary (*opinio juris sive neccessitatis*), can be established. See also Wallace & Martin-Ortega *International Law* (2009) 10: State practice should therefore be "extensive and virtually uniform" and should occur in a manner that shows "as general recognition" that a "rule of law or legal obligation is involved".

4 3 The different categories of the JCE doctrine

There are three main categories within the JCE doctrine.[530] Each applies to different circumstances. Danner and Martinez sourced the origin of the three categories of the JCE doctrine in customary international law derived from the case law of post-WWII military courts.[531] The three categories, discussed below, were later set out in the separate opinion of Hunt J in the *Milutinović Appeal.*[532] These categories have different requirements and differ in the scope of the involvement required. Category one (the basic form) is the most widely used and accepted construction.[533] In order to incur liability under category one, the accused is required to participate in implementing the group's common objective that includes the commission of a crime under the ICTY Statute.[534] In *Haradinaj*, the ICTY concluded that liability ensues when "[a]n individual intentionally acts collectively with others to commit international crimes pursuant to a common plan."[535] The ICTY in the *Tadić Appeal* stated that:

> "The first such category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result."[536]

Category one is therefore used to attribute liability to an accused for crimes that fall within the common purpose of the JCE yet are committed by another.

In *Haradinaj*, the ICTY concluded that category two "provides for liability for individuals who contribute to the maintenance or essential functions of a criminal institution or system, such as a concentration or detention camp".[537] Category two falls beyond the scope of this research as it applies in contexts where criminal responsibility can easily be established by the control and responsibility of the official exercised during captivity. In the same case, the ICTY concluded further that category three "provides for extended liability, not only for crimes intentionally

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[530] *Prosecutor v Haradinaj* IT-04-84-T (2008) paras 135-139.

[531] Danner & Martinez (2005) 93 *Cal L Rev* 105.

[532] *Prosecutor v Ojdanić* et al IT-99-37-AR72 Separate Opinion of Hunt J on Challenge by Ojdanić (2003).

[533] *Prosecutor v Zigiranyirazo* ICTR-01-73-T (2008) paras 407-408 and 468: The accused was convicted for participating in JCE to commit genocide, using category one. The ICTR found that "[t]he implementation of the massacre was possible due to prior planning, which gave rise to the inference that a common criminal purpose existed." Furthermore, they "inferred that the accused shared the common purpose due to his conduct and circumstances; his stature, well-received speech and his presence while the massacre was underway." He was sentenced to twenty years imprisonment.

[534] Bostedt (2007) 6 *CJIL* 417 cf *Prosecutor v Krajišnik* IT-00-39-T (2006) para 4.

[535] *Prosecutor v Haradinaj* IT-04-84-T (2008) paras 135-139.

[536] *Prosecutor v Tadić* IT-94-1-A (1999) para 196.

[537] *Prosecutor v Haradinaj* IT-04-84-T (2008) paras 135-139. See also *Prosecutor v Tadić* IT-94-1-A (1999) paras 202-203.

committed pursuant to the common design, but also for crimes that were the natural and foreseeable consequence of implementing the common design".[538]

Consequently, those who participate in the JCE risk criminal responsibility for the undesired yet foreseeable crimes that result from implementing the JCE ie the common plan or purpose.[539] The ICTR, in the *Karemera Appeal* refers to these crimes as "deviatory crimes" because they do not form part of the common purpose yet they are a natural foreseeable consequence of executing the common purpose (executing the *actus reus*).[540] Furthermore, Cassese refers to these crimes as un-concerted crimes.[541] According to the interpretation found in *Haradinaj* of JCE category three, the crime for which the accused is being tried, need therefore not be the crime as desired by the common objective of the group. Haffajee sets out a test to secure criminal responsibility under category three.[542] In the circumstances where "[o]bjectively the crime is part of the natural and foreseeable consequence of the execution of the JCE" and the accused was subjectively aware of the possible consequence yet he or she reconciled himself or herself with the possibility and participated nonetheless, the accused is individually criminally responsible.[543] Furthermore, Cassese describes liability under JCE category three as "incidental criminal liability based on foresight and voluntary assumption of risk".[544] The accused must have subjectively been privy to information or be in "a position to expect with reasonable certainty" that the deviant or incidental crime might occur.[545] Cassese explains that although the accused did not share the *mens rea* of the physical perpetrator, he or she foresaw the event and willingly took the risk that it might come about. [546] The accused's subjective knowledge and foresight should be established or at least inferred from the facts of the case.[547] Alternatively, the accused should at least be "in a position, under the 'man of reasonable prudence' test, to predict the rape".[548] For instance, the ICTY in the *Tadić Appeal* found that all members can incur criminal responsibility for the deviatory crime if he or she foresaw that the crime was a predictable consequence of executing the common plan and thereafter acted recklessly or "indifferent to that risk".[549] The ICTR in the *Karemera Appeal*, in addition to the requirements set out in *Haradinaj*, also required that the accused make a significant contribution to the common purpose of the JCE, with the intention to further the common purpose, before criminal responsibility and liability can ensue.[550] In line herewith, the ICTY in the *Tadić Appeal* found some members responsible for crimes within the common purpose only, while others were deemed responsible for the deviatory crimes as well as the crimes within the common purpose.[551] The ICTY

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[538] *Prosecutor v Haradinaj* IT-04-84-T (2008) paras 135-139.

[539] Paras 135-139. See also *Prosecutor v Tadić* IT-94-1-A (1999) para 204: Category three "concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose".

[540] *Prosecutor v Karemera & Ngirumpatse* (Appeal Judgement) ICTR-98-44-A (29 September 2014) para 623.

[541] Cassese (2007) *J Int'l Crim Just* 113.

[542] Haffajee (2006) *Harv J L & Gender* 214 cf *Prosecutor v Ojdanić* et al IT-99-37-AR72 Separate Opinion of Hunt J on Challenge by Ojdanić (2003) 11.

[543] Haffajee (2006) *Harv J L & Gender* 214 cf *Prosecutor v Ojdanić* et al IT-99-37-AR72 Separate Opinion of Hunt J on Challenge by Ojdanić (2003) 11.

[544] Cassese (2007) *J Int'l Crim Just* 113.

[545] 113.

[546] 113.

[547] 113.

[548] 113.

[549] *Prosecutor v Tadić* ICTY IT-94-1-A (1999) para 204.

[550] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) para 634.

[551] *Prosecutor v Tadić* ICTY IT-94-1-A (1999) para 213.

Appeal Chamber reiterated that it is important to determine guilt based on the accused's particular role, for instance; the accused's status, conduct, role and his or her ability to foresee the deviatory crime.[552] Arguably, both the *Karemera* and the *Tadić Appeals* preserve the principle of personal culpability when applying JCE category three. The principle of culpability, in this context, is discussed in greater detail in chapters five and six.

4 4 Participation in a common purpose as a form of commission

The participation in a common purpose as a form of commission is central to the understanding the JCE doctrine. As discussed in chapter three, article 25 of the Rome Statute, article 6 of the ICTR Statute and article 7 of the ICTY Statute describe the forms of participation that give rise to individual criminal responsibility. [553] The ICTY in *Prosecutor v KvoČka, Omarska, Keraterm & Trnopolje* ("*KvoČka Appeal*")[554] and in the *Milutinović Appeal*[555] as well as the ICTR Appeals Chamber in the *Ntakiruitmana Appeal*[556] stated that participation in a JCE is recognised as a form of commission. Goy, referring to the ICTY in the *Tadić Appeal*, clarifies that committing could include physical perpetration, participation in a JCE or playing an integral part, while carrying out the crime with others.[557] Furthermore, the ICTY found that participating in the implementation of the JCE (common purpose or plan) could amount to a commission of war crimes, genocide, crimes against humanity and violations of the Geneva Conventions.[558] Moreover, the ICTR in *Prosecutor v Karemera and Ngirumpatse* ("*Karemera*") makes it very clear that direct participation, as provided for by article 6(1) of the ICTR Statute, includes but is not limited to physical perpetration.[559] Any act that is as integral to the commission of the crime as the physical perpetration itself amounts to direct participation and, where the other elements have also been satisfied, principal liability.[560] According to the *ad hoc* tribunals, a person's involvement in a JCE is therefore a form of direct criminal responsibility.[561] Haffajee therefore correctly notes that the ICTY Appeals Chamber found that article 7 provides a "sufficient base for JCE as a form of criminal liability".[562]

The ICC recognises three forms of commission, which amount to principal perpetration; committing an act as an individual, committing an act jointly with another and committing an act

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[552] Paras 210 and 213.

[553] Art 25 of the Rome Statute (2003) 2187 UNTS 90; art 6 of the ICTR Statute (1994) 33 ILM 1598; art 7 of the ICTY Statute (1993) 32 ILM 1159.

[554] *Prosecutor* v *KvoČka* et al IT-98-30/1-A (2005) para 41.

[555] *Prosecutor v Ojdanić* et al IT-99-37-AR72 Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction-Joint Criminal Enterprise, Separate Opinion of Judge David Hunt on Challenges by Ojdanić to Jurisdiction *Joint Criminal Enterprise* (2003) para 20.

[556] *Prosecutor* v *Ntakirutimana & Ntakirutimana* ICTR-96-10-A & ICTR-96-17-A (2004) para 462.

[557] Goy (2012) *ICL Rev* 8 cf *Prosecutor v Tadić* IT-94-1-A (1999) para 188: "This provision covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law. However, the commission of one of the crimes envisaged in Articles 2, 3, 4 or 5 of the Statute might also occur through participation in the realisation of a common design or purpose."

[558] *Prosecutor v Tadić* IT-94-1-A (1999) para 188.

[559] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-T (2012) para 1607.

[560] Para 1607. See also *Prosecutor v Furundžija* IT-95-17/1-T (1998) para 252: To be convicted as a co-perpetrator, the accused "must participate in an integral part" of the crime. This was reiterated in *Prosecutor v Furundžija* IT-95-17/1-A (2000) para 118.

[561] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-T (2012) para 1433.

[562] Haffajee (2006) *Harv J L & Gender* 213.

through another.[563] Goy, by referring to *Prosecutor v Lubanga* ("*Lubanga Confirmation Decision*"), explains that article 25(3) of the Rome Statute divides individual criminal responsibility into principal and accessory liability.[564] Article 25(3)(a) amounting to the former and article 25(3)(b)-(d) relating to the latter.[565] This is known as the differentiation model, which will be discussed in greater detail in chapters five and six.[566] Article 25(3)(d)(i)-(ii) of the Rome Statute attributes criminal responsibility to individuals for contributing to the commission or attempted commission of a crime by a group with a common purpose. Additionally, the crime must be prohibited by the Rome Statute and the contribution must be intentional and with the aim of "furthering a criminal activity or purpose"[567] or with the knowledge that the group intended to commit a crime.[568] In the following sub-chapter I dully investigate how the *ad hoc* tribunals have given content to these provisions through their interpretations and application of the law.

4 5 The application of the JCE doctrine

Against the background provided in chapter three, it is clearly challenging to establish the criminal responsibility of high-ranked officials and masterminds for sexual crimes committed by others. The law therefore, in my opinion, needs to develop in order to attribute the relative degree of liability to all individuals who contribute towards the commission of international sexual crimes. The JCE doctrine is the proposed solution to this problem. Haffajee argues that the prosecution in *Prosecutor v Furundžija* ("*Furundžija Appeal*") used the JCE doctrine to resolve "the main evidentiary problem" ie the inability "to directly link the accused to committing the crime".[569] However, the Appeal Chamber did not expressly mention the JCE doctrine pertaining to Furundžija and Accused B. Instead it used the terms "common purpose" and "co-perpetrator" and "acting in concert."[570] Interestingly, van Schaack argues that the *ad hoc* tribunals are still experimenting with the scope of the JCE doctrine.[571] According to Obote-Odora, the JCE doctrine, especially category three, is even more useful for the prosecution of rape than the prosecution of murder as a crime against humanity or an act of genocide.[572] Danner and Martinez state that "[t]he use of JCE theory could offer wide discretion to prosecutors and judges in determining the scope of wrongdoing attributed to high-level defendants in terms of rape and sexual violence crimes".[573] The JCE doctrine is able to do so because it "more completely capture[s] the reality of the commission of

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[563] Goy (2012) *ICL Rev* 8 cf *Prosecutor* v *Lubanga* (Pre-Trial Chamber I) ICC-01/04-01/06-803-tEN (29 January 2007) Decision on the Confirmation of Charges paras 338-339 ("*Lubanga Confirmation Decision*").

[564] Goy (2012) *ICL Rev* 5-6 and 9 cf *Lubanga Confirmation Decision* ICC-01/04-01/06-803-tEN (2007) para 338.

[565] Art 25(3) of the Rome Statute (2003) 2187 UNTS 90.

[566] Werle (2007) *J Int'l C J* 953. See also G Werle & B Burghardt "Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute" in E van Sliedregt & S Vasiliev (eds) *Pluralism in International Criminal Law* (2014) 13.

[567] Art 25(3)(d)(i) of the Rome Statute (2003) 2187 UNTS 90.

[568] Art 25(3)(d)(ii) of the Rome Statute (2003) 2187 UNTS 90.

[569] Haffajee (2006) *Harv J L & Gender* 202 cf *Prosecutor v Furundžija* IT-95-17/1-A (2000); *Prosecutor v Tadić* IT-94-1-A (1999); *Prosecutor v KvoČka* et al IT-98-30/1-T (2001).

[570] *Prosecutor v Furundžija* IT-95-17/1-A (2000) paras 116 and 120. See also *Prosecutor v Furundžija* IT-95-17/1-T (1998) paras 112, 256 and 267-269.

[571] van Schaack (2009) *Nw J Int'l Hum Rts* 218.

[572] Obote-Odora (2005) *New Eng J Int'l L and Comp L* 139.

[573] Haffajee (2006) *Harv J L & Gender* 212 cf Danner & Martinez (2005) 93 *Cal L Rev* 98.

complex crimes involving numerous acts".[574] Haffajee proposes that the use of the JCE doctrine acknowledges rape as part of the master plan.[575] In order to build on the potential that Haffajee, Obote-Odora, Danner and Martinez see in the JCE doctrine, I proceed to examine the application thereof within ICTR and ICTY case law, pertaining to sexual violence, below. This investigation explores which form of JCE is best suited to establish criminal responsibility for acts of sexual violence as a central part of my research.

4 5 2 Prosecutor v Krstić 2001 and 2004

After Srebrenica in Bosnia and Herzegovina had fallen under Bosnian Serbian forces control in 1995, thousands of Bosnian Muslim residents fled to Potočari in order to find protection within the United Nations ("UN") compound.[576] On the 11 of July 1995, approximately 20 000 to 25 000 Bosnian Muslim refugees were gathered in Potočari; some within the UN compound and others seeking refuge at nearby factories and fields.[577] The outcome of the number of refugees in this area at this time and the lack of resources can only be described as a humanitarian crisis.[578] The refugees' suffering in the July heat, was aggravated by the lack of food and water.[579] Furthermore, they were scared; over-crowding and panic even caused some to be trampled.[580] During the humanitarian crisis in Potočari, crimes were committed by Serbian soldiers. The ICTY found that, after the take-over of Srebrenica, the Bosnian Serbs planned and implemented the transfer of Bosnian Muslim women, children and elderly out of the enclave.[581] In addition, the ICTY found that on the 12th of July 1995, the Serbian soldiers engaged in an active campaign of terror by setting houses and haystacks on fire within view of the Bosnian Muslim refugees, which made them panic and want to flee.[582] Over the course of the week, spanning from the 11th to the 16th of July; Bosnian Muslims were terrorised by the Serbian forces; Bosnian Muslim women were raped by Serbian forces, women, children and the elderly were separated from the men and forcibly transported to Tišca by bus, while the males were hunted, captured, detained and executed.[583]

In Potočari, on the morning of the 12th of July 1995, the Bosnian Muslim men were separated from their families and taken to the "White House" by the Bosnian Serbs.[584] The ICTY found that the separation of the men from their families was traumatic.[585] On the 12th and the 13th of July the women, children and elderly were bussed out of Potočari to Kladanj, under the supervision of the Army of *Republika Srpska* ("VRS") soldiers.[586] As they boarded the bus they were beaten by Bosnian Serb soldiers.[587] The busses were hot and over-crowed and the civilians felt fearful because

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[574] van Schaack (2009) *Nw J Int'l Hum Rts* cf *Prosecutor v Kaing Guek* 001/18-07-2007-ECCC/OCIJ (2008) *Eav* Decision on Appeal Against Closing Order Indicting *Kaing Guek Eav* 48.

[575] Haffajee (2006) *Harv J L & Gender* 202.

[576] *Prosecutor v Krstić* IT-98-33-T (2001) para 37.

[577] Para 37.

[578] Para 38.

[579] Para 38.

[580] Para 38.

[581] Para 52.

[582] Para 41.

[583] Paras 42-70.

[584] Para 53.

[585] Para 54.

[586] Para 48.

[587] Para 48.

the villages threw stones at the busses and taunted them with the three-fingered Serb salute.[588] Most of the civilians arrived safely in Tišca but then they were forced to travel on foot for several kilometers to Kladanj.[589] The Dutch Bat soldiers, serving under the UN flag, successfully accompanied the first convoy of busses carrying the women, children and elderly; however on the second trip their vehicles were taken at gunpoint by Bosnian Serbs.[590] Throughout the 12th of July the Serb soldiers mingled through civilian crowds threatening them with death if they did not leave Serb country, committing acts of assault and murder.[591] That same day a witness testified to having found 20 to 30 dead bodies behind the Transport Building in Potočari and another witness saw a child being killed with a knife and the execution of more than a 100 men behind the zinc factory by Bosnian Serbs.[592] On the same day, approximately 1000 men were separated from the women, children and elderly at Potočari and transported to Bratunac, where they met the men who had been captured after attempting to reach Bosnian Muslim-held territory in the north.[593] During their detention in Bratunac, individual men were called out during the night and the others could hear their cries and gunshots.[594] After waiting a few days for the busses that were used to transport the women and children, all the men were transported to a new destination.[595]

On the evening of the 12th of July 1995, cries, screaming and shots could be heard throughout Potočari.[596] Soldiers would take males and female away and some would not return.[597] For instance, Witness T saw three boys being taking away and when they did not return their mother went to search for them only to find their throats slit.[598] That same night, Dutch Bat medical orderly saw two soldiers raping a Bosnian Muslim woman; one was standing guard while the other raped her.[599] The mattress and her legs were covered in blood.[600] Some of the Bosnian Muslims saw her being raped but could not do anything to help because of the soldier standing guard.[601] Additionally, they saw women being carried away and heard their screams.[602] The stories of the rapes and murders transmitted terror throughout the communities, to the extent that some committed suicide.[603] Meanwhile, in Kladanj that evening, no men arrived on the busses with the women and children because the busses were checked on route for men.[604] For example, Witness D was removed from the bus and separated from his family at a bus stop in Tišca.[605]

On the 13th of July, another Dutch Bat officer, saw an unarmed man being executed by Serb soldiers with a single gunshot to the head.[606] This officer also heard gunshots 20-40 times every

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[588] Para 49.

[589] Para 49.

[590] Para 50.

[591] Paras 42-43.

[592] Para 43.

[593] Para 66.

[594] Para 66.

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[596] Para 44.

[597] Para 44.

[598] Para 44.

[599] Para 45.

[600] Para 45.

[601] Para 46.

[602] Para 46.

[603] Para 46.

[604] Paras 56-57.

[605] Para 56.

[606] Para 58.

hour throughout the afternoon.[607] By 20H00 on the 13th of July, all the Bosnian Muslim civilians had been removed from Potočari.[608] During a UN visit to Potočari, on the 14th of July, not one living Bosnian Muslim was found.[609] Thousands of Bosnian Muslim men were executed; some when and where they were captured and others after they had been detained.[610] However, most "were slaughtered in carefully orchestrated mass executions," commencing on the 13th of July 1995.[611] The Army of the *Republika Srpska* ("VRS") soldiers participated in the mass execution on the 16th of July 1995.[612]

The ICTY in *Prosecutor v Krstić* ("*Krstić*") found that the humanitarian crisis, crimes of terror and the forcible transfer of women, children and the elderly, at Potočari, constituted crimes against humanity such as persecution and inhumane acts.[613] Once the commission of these crimes had been established as fact, the prosecution set out to link Krstić to the crime by establishing his criminal responsibility. In this case, the ICTY recalled and confirmed that the accused's participation in a JCE, amounted to a commission under article 7(1) of the ICTY Statute that determines criminal responsibility as a principal perpetrator.[614]

The ICTY concluded that due to the accused's presence at Potočari on the day of the evacuation and his presence at meetings, on the 11th and 12th of July 1995, where the situation was discussed and forcible transfer was organised "he could not but be aware of the piteous condition of the civilians and their mistreatments by VRS soldiers on that day".[615] The ICTY therefore inferred the accused's awareness from the circumstances. On the 12th of July 1995 General Krstić organised the transportation of the civilians from Potočari, he later inquired as to the number of busses in transit and ordered that the road they were travelling be secured. [616] Krstić was therefore a "key participant" in the transfer.[617] Throughout this process he was aware that the transfer was involuntary.[618] The Trial Chamber concluded that these actions amounted to the forcible transfer of civilians from Potočari.[619] Due to factual situation, Krstic's awareness and his significant contribution to the crimes committed in Potočari against the civilian population of Srebrenica, the Trial Chamber agreed that his criminal responsibility was "most appropriately determined under article 7(1)" of the ICTY Statute.[620]

Thereafter, by using the elements as laid out in the *Tadić Appeal*, the Trial Chamber set out to determine whether Krstić participated in the JCE to forcibly cleanse the Srebrenica area of Bosnian Muslims.[621] The ICTY in *Krstić* stated that the facts of the case "compel the inference that the political and/or military leaders of the VRS formulated a plan to permanently remove the Bosnian Muslim population from Srebrenica".[622] The objective of the JCE, implemented from the 11th to the

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[607] Para 58.

[608] Para 51.

[609] Para 51.

[610] Para 67.

[611] Para 67.

[612] Para 69.

[613] *Prosecutor v Krstić* IT-98-33-T (2001) para 607.

[614] Para 601 cf *Prosecutor v Tadić* IT-94-1-A (1999) paras 185-229.

[615] *Prosecutor v Krstić* IT-98-33-T (2001) paras 340, 354 and 609.

[616] Paras 340, 344 and 608.

[617] Para 612.

[618] Para 608.

[619] Para 608.

[620] Para 610.

[621] *Prosecutor v Krstić* IT-98-33-T (2001) para 610 cf *Prosecutor v Tadić* IT-94-1-A (1999) para 227.

[622] *Prosecutor v Krstić* IT-98-33-T (2001) para 612.

13th of July 1995, was to forcibly remove the Bosnian Muslims from the Srebrenica area, constituting ethnic cleansing.[623] In addition, the humanitarian crisis was so closely linked to the forcible transfer that it also formed part of the common purpose of the JCE.[624] The *actus reus* requirements for JCE liability had therefore been met.[625] Consequently due to the seriousness of his contribution to the existing common purpose and his awareness the ICTY deemed Kristć's liability as a principal most suitable.

The ICTY moreover stated that Krstić's "intent for this crime is indisputably evidenced by his extensive participation in it".[626] On the 11th of July 1995, Krstić visited Srebrenica and saw for himself that it was deserted. He found out that a huge number of civilians had fled to Potočari.[627] He later admitted that he had organised the military operation in Srebrenica yet he did not take any measures to ensure the basic needs and safety of the transferred civilians.[628] The Trial Chamber therefore concluded that the "only plausible inference" from Krstić's conduct is that he knowingly and intentionally contributed to the creation of the humanitarian crisis that arose due to the forced transfer that he helped plan and implement.[629] While determining Kristć's criminal responsibility for the humanitarian crisis and crimes of terror committed at Potočari and the subsequent forcible transfer of the women, children and elderly, his criminal responsibility for rape was importantly investigated.

The ICTY stated that rape and sexual abuse can could serious bodily and mental harm.[630] During the trial, credible witnesses reported rape and killings as forms of cruel and inhumane treatment, which is an element of the crime of persecution under crime against humanity.[631] However, rape was not included in the objective of the JCE.[632] Nonetheless the Trial Chamber found that rape was undoubtedly a natural and foreseeable consequence of executing the common purpose ie the ethnic cleansing campaign.[633] Therefore JCE category one was not applicable, however category three was suitable. In addition, the Trial Chamber inferred from the circumstances at the time and his physical presence at the scene that Krstić "must have been aware" that rape was a natural and foreseeable consequence of implementing the common purpose and despite the risk he participated anyway.[634] The ICTY found that the commission of rape was "inevitable" because there was a lack of shelter, not enough UN soldiers to provide protection, many regular and irregular military and paramilitary units present, the vulnerability of the refugees as well as the density of the crowds.[635] The *mens rea* requirement for JCE liability has therefore been met.[636]

The ICTY Trial Chamber therefore found Krstić guilty as a member and participant of the JCE, aimed at forcibly transferring the Bosnian Muslim civilians, which was catalysed by the humanitarian crisis.[637] Finally, Krstić knew that the crimes were related to a widespread or

[623] Paras 612 and 615.

[624] Para 615.

[625] Para 612.

[626] Para 615.

[627] Para 615.

[628] Para 615.

[629] Para 615.

[630] Para 513.

[631] Para 517.

[632] Para 616.

[633] Para 616.

[634] Para 616.

[635] Para 616.

[636] Para 615.

[637] Para 617.

systematic attack against a civilian population which indicated that the accused's additional subjective awareness of the circumstances within which the crimes was committed, as an element of crimes against humanity, was satisfied.[638] He intended to discriminate against the Bosnian Muslims and was therefore liable for inhumane acts and persecution as crimes against humanity.[639] Krstić therefore incurred liability for the deviatory or un-concerted murders, rapes, beatings and abuses committed in the execution of the JCE at Potočari.[640] In summation, the ICTY Trial Chamber found Krstić guilty of genocide, persecution (for murders, cruel and inhumane treatment, terrorising the civilian population, forcible transfer and destruction of personal property of Bosnian Muslim civilians) and murder as a violation of the Laws and Customs of War.[641] The ICTY Appeal Chamber in the *Krstić Appeal* set aside his convictions as a principal and replaced it with aiding and abetting genocide ie count one, aiding and abetting murder as a violation of the laws or customs of war ie count five as well as aiding and abetting extermination and persecution committed between 13 and 19 July 1995 ie counts three and six, respectively.[642]

In conclusion, inferences as to the accused's awareness, knowledge and intent are integral to a successful conviction under the extended form of the JCE doctrine. The circumstances, the accused's position, his or her access to information and the notoriety and expanse of the crime can legitimately be used by the court to establish *mens rea* if it is the only reasonable conclusion. In addition, the significance of the accused's contribution to the common purpose, and other foreseeable yet deviatory crimes warrants criminal responsibility under article 7(1) and thereby liability as a principal perpetrator. Furthermore, the Trial Chamber did not find that sexual violence was included in the common purpose, effectively eliminating JCE category one as a means to establish criminal responsibility. It however, had no doubt that sexual violence was a natural foreseeable consequence of executing the common purpose and therefore JCE category three was the appropriate means to establish criminal responsibility, which it did successfully. The ICTY even described the commission of rape as inevitable. In addition to the objective foreseeability, the Trial Chamber inferred that the accused must have subjectively foreseen the possibility of rape occurring due to his visit to the scene of the crimes and the totality of surrounding circumstances. Therefore Krstić was convicted as an aider and abettor for persecution, including rape, as a crime against humanity pursuant to JCE category three for his intentional and significant contribution to the JCE despite rape being a natural foreseeable consequence of its execution.

4 5 3 Prosecutor v Karemera & Ngirumpatse 2012 and 2014

During the Rwandan genocide, as referred to in *Musema*, *Semanza* and *Kajelijeli* in sub-chapter 3 5 above, attacks against the Tutsis occurred in the Bisesero Hills, resulting in a massacre of the Tutsi people.[643] The ICTR Trial Chamber in *Karemera*, found that both Karemera and Ngirumpatse were

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[638] Para 618.

[639] Para 618.

[640] Para 617.

[641] Para 727.

[642] *Prosecutor v Krstić* IT-98-33-A Partial dissenting opinion of Shahabuddeen J (2004) paras 87 and 96: Despite Shahabuddeen's J Partial dissenting opinion which confirmed Krstić's conviction as a principal perpetrator for genocide, the Appeal Chamber set aside his conviction as a participant in a JCE to commit genocide, ie count one, and replaces it with a conviction for aiding and abetting genocide. The Appeal Chamber resolved that he was guilty of aiding and abetting extermination and persecution, ie counts three and six, committed between 13 and 19 July 1995. The Appeal Chamber set aside Radislav Krstić's conviction as a participant in murder and replaces it with a convictions for aiding and abetting murder under art 3, ie count five, committed between 13 and 19 July 1995.

[643] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-T (2012) para 1210.

involved leading up to and during the massacre. On the 10th of April 1994, Karemera and Ngirumpatse instructed the Provisional National Committee of the Interahamwe to patrol the roadblocks; Karemera drafted a radio broadcast and Ngirumpatse gave a radio address.[644] On the 11th of April 1994 weapons were distributed at the *Hôtel des Diplomates* to the *Interahamwe*, with the consent of Ngirumpatse and Nzirorera and in the presence of Colonel Bagosora.[645] On the 12 of April 1994, Nzirorera[646] arranged with Colonel Bagosora[647] that the weapons be issued to the people manning the roadblocks.[648] Thereafter the Interim Government drafted and sent directives and instruction to the prefects that incited the continued killings of Tutsis and sent Karemera and other party leaders on "pacification tours" to address the population under the Interim Government's control.[649] On or near the 18th of April 1994, Karemera ordered a search and sweep operation against the Tutsis in Bisesero, which was carried out and resulted in the death of many Tutsi civilians.[650] Furthermore, several Interim Government ministers met at the Murambi Training School on the 18th of April 1994 where Karemera and Ngirumpatse "instigated" the Gitarama delegation to stop protecting the Tutsis and to allow the killings.[651] On the 19th of April 1994, Interim President Sindikubwano's speech in Butare "urged the population of Butare to kill Tutsis".[652] In addition, Karemera's decision to replace prefect Nsabinmana with Nteziryayo was based on the latter's support for the implementation of the genocidal policy.[653]

The ICTR in *Karemera*, found that all the members of the JCE shared the common purpose of destroying the Tutsi population.[654] The common purpose, during April of 1994 in Rwanda, included the direct and public incitement to commit genocide as well as the encouragement of non-members to commit murders.[655] The Appeal Chamber confirmed that the destruction of the Tutsi population was the common-criminal purpose.[656] The Appeal Chamber also confirmed that the JCE materialised on the 11th of April 1994 when Ngirumpatse, Nzirorera and Bagosora agreed to distribute weapons to the *Interahamwe* in Kigali.[657] The Trial Chamber found that both Karemera and Ngirumpatse had made a significant contribution to further the common purpose of the JCE.[658] For example, the Appeal Chamber reiterated that Ngirumpatse made a significant contribution when he consented to the distribution of weapons to the *Interahamwe* in Kigali on the 11th of April 1994 and when he intimidated the local officials, who protected the Tutsi population, during a meeting at

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[644] Para 1333.

[645] Para 745.

[646] Nzirorera was Ngirumpaste's successor and co-accused, however the proceeding against him were terminated. Paras 745-746: Nzirorera attended the meeting at the *Hôtel des Diplomates* and consented to the distributions of the weapons to the *Interahamwe*.

[647] Para 274: Colonel Bagosora was the *Directeur de cabinet* for the Minister of Defence, Augustin Bizimana. They both decided to provide training to, and visited, the military camps in Kigali, Byumba, Gisenyi and Ruhengeri. Karemera, Nzirorera and Ngirumpaste were aware of and complicit in, their decisions.

[648] Para 745.

[649] Para 946.

[650] Para 1234.

[651] Para 860.

[652] Para 892.

[653] Para 892.

[654] Paras 1455 and 1600.

[655] Paras 1455 and 1600.

[656] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) paras 136-137.

[657] Para 136.

[658] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-T (2012) paras 1455, 1457, 1458 and 1600.

the Murambi Training School in Gitarama prefecture on the 18th of April 1994.[659] According to the Appeal Chamber, Karemera also made a significant contribution by; intimidating local officials in Gitarama, delivering a speech in Kibuye after the *Interahamwe* had recently massacred over two thousand Tutsis in the area, his connection to the Interim Government who issued documents that planned and encouraged the destruction of the Tutsi population as well as his order to "mop up the operation" in Bisesero.[660] Furthermore, the positions of the accused and their involvement in government meetings and actions indicated a concerted action with government officials and therefore amounted to a significant contribution to the common purpose.[661]

By making a significant contribution to the JCE, Karemera and Ngirumpatse opened themselves up to liability for the foreseeable actions of others that fell outside of the common purpose and for the actions of others; members or non-members, who acted in furtherance of the common purpose.[662] For example, Ngirumpatse initially consented to the distribution of weapons yet after leaving Rwanda his successor, Nzirorera, distributed additional weapons without Ngirumpatse's consent, which facilitated the murder of Tutsis.[663] The ICTR found that Ngirumpatse was equally responsible for the killings that flowed from Nzirorera's distribution, because they had both intentionally and significantly contributed to the execution of the common purpose of the JCE and were therefor liable for each-others' actions during such execution.[664] Ngirumpatse was convicted of genocide, under article 6(1) of the ICTR Statute, for the distribution of weapons that took place on the 11th and 12th of April 1994.[665] However, the ICTR in the *Karemera Appeal* overturned Ngirumpatse's conviction under article 6(1) as an aider and abettor of genocide and a member of the JCE, based on the distribution of weapons in Kigali.[666] The Appeal Chamber did nevertheless confirm the conviction for genocide and extermination as a crime against humanity and murder as a serious violation Common article 3 of the Geneva Convention and the Additional Protocol II pursuant to article 6(3) for the killings committed by the *Interahamwe* on the 12 of April 1994.[667] Additionally, the Appeal Chamber found that Karemera and Ngirumpatse bear superior responsibility for the distribution of weapons by Bagosora and therefore reversed the Trial Chamber's finding.[668] The Appeal Chamber granted the prosecution's third ground of appeal and found that Ngirumpatse incurred superior responsibility for the "mopping-up" operation and the resulting killings in Bisesero Hills.[669] Furthermore, the Appeal Chamber reversed the Trial Chambers acquittal of Karemera and conviction of Ngirumpatse for conspiracy to commit genocide, ie count one, by convicting Karemera and acquitting Ngirumpatse.[670]

During the massacre of the Tutsi people in April 1994, acts of sexual violence against the Tutsi women were also perpetrated by the *Interahamwe* and soldiers on a large scale in the Kigali-ville prefecture, by the *gendarmes* in the Ruhengeri prefecture and by other militias and civilians on a large scale in the Gitarama prefecture, during the same time period.[671] The ICTR found that it was

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[659] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) para 137.

[660] Para 138 cf *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-T (2012) para 1450.

[661] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) para 153.

[662] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-T (2012) para 1600.

[663] Paras 1610-1615.

[664] Para 1616.

[665] Para 1617.

[666] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) para 750.

[667] Para 750.

[668] Para 750.

[669] Para 750.

[670] Para 750.

[671] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-T (2012) paras 1354, 1373 and 1390.

clear from the sheer number of incidences of sexual violence that it qualified as widespread.[672] The prosecution did not lead any evidence pertaining to the physical involvement of Karemera and Ngirumpatse or that either had given a direct instruction to commit rape and other acts of sexual violence.[673] In addition, ICTR found that sexual violence did not form part of the common purpose of the JCE to destroy the Tutsi population.[674] Rather, sexual violence was committed "in the context of a campaign to destroy the Tutsi population".[675] Therefore JCE category one was not applicable.[676] Alternatively, JCE category three offered the ability to hold members of the JCE criminally responsible for the crimes of other members and non-members even when those crimes did not form part of the common purpose *if* they were a natural and foreseeable consequence of executing the common purpose. The ICTR in the *Karemera Appeal* confirmed that a conviction for deviatory crimes is possible under JCE category three.[677] In order to establish liability under JCE category three, the prosecution had to prove that the accused subjectively foresaw the possibility of acts of sexual violence being committed in the execution of the common purpose and despite the risk the accused significantly and intentionally contributed to the common purpose, nonetheless. As discussed above, Karemera and Ngirumpatse made numerous significant contributions in furtherance of the JCE. The Appeal Chamber clarified that the Trial Chamber did not need to establish that the accused had contributed to each crime but rather that he had made a significant contribution to the common purpose.[678]

In order to establish awareness, the ICTR in *Karemera* looked at the position of the accused, the accused's presence, actions and comments as well as his access to information.[679] Ngirumpatse and Karemera held the position of Minister of Defence and Minister of Interiors, respectively, within the MRND; a political party which was operating as Interim Government.[680] Due to their authoritative positions they were privy to the information concerning the security and administration of the area. Karemera was present in Rwanda during the genocide, while Ngirumpatse was absent during certain periods yet this did not disrupt his access to information. In addition, Karemera travelled to the Kibuye prefecture where he addressed the public.[681] Karemera also admitted that "soldiers rape women so it would be ridiculous to think that they do not rape during war".[682] In doing so he admitted that rape was foreseeable and that he was personally aware of the possibility of rape occurring. The ICTR agreed with Karemera stating that there is a "heightened risk that the strong will abuse the weak during a war when law and order is suspended".[683] The ICTR added that: "soldiers and other combatants, if not restricted by superiors, will commit rapes against women and girls of the opposite party to the conflict".[684] In addition, because the very people who were exterminating the Tutsi were also committing acts of sexual violence, the ICTR concluded that sexual violence is a natural and foreseeable consequence of executing the campaign to destroy the

[672] Para 1681.

[673] Paras 1466 and 1669.

[674] Paras 1475 and 1669.

[675] Para 1475.

[676] Para 1449.

[677] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) para 623.

[678] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) para 153 cf *Prosecutor* v *Brđanin* IT-99-36-A (2007) para 418.

[679] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-T (2012) paras 1481 and 1485.

[680] Paras 1481 and 1485.

[681] Para 1485.

[682] Paras 1470 and 1475.

[683] Para 1475.

[684] Para 1475.

Tutsi population.[685] The ICTR in the *Karemera Appeal* found that the Trial Chamber's determination that rape was a natural foreseeable consequence of executing the JCE was reasonable.[686]

The Trial Chamber also established that the accused were aware that acts of sexual violence would be perpetrated by non-members while implementing the common purpose of the JCE.[687] The Appeals Chamber confirmed that in order for a member to incur liability for the actions of *non-members*, one of the members must use the non-member to carry out the *actus reus* of a crime that furthers the common purpose of the JCE.[688] Despite Karemera and Ngirumpatse's awareness, neither submitted evidence with regards to the efforts to stop and punish the perpetrators of sexual violence.[689] Therefore the ICTR concluded beyond a reasonable doubt that Karemera and Ngirumpatse were aware that widespread sexual violence was a possible consequence of executing the JCE, ie the extermination of the Tutsi population, yet they "willingly took a risk by continuing to participate in the campaign despite widespread occurrences".[690]

The Appeals Chamber recalled that knowledge of the deviatory crime, followed by continued participation in the JCE, allows the court to infer the physical perpetrator's intent.[691] The Appeal Chamber explained that the shared intention (*mens rea*) and purpose was established by looking at the scale of the attacks, systematic nature and public targeting, of the Tutsi population.[692] This conclusion was based on; the systematic nature of the attacks against predominantly Tutsi women and girls, the identity of perpetrators for sexual violence and extermination of the Tutsi civilians overlapped, the attacks were large scale and many women were killed after being sexually assaulted or raped.[693] Furthermore, the ICTR inferred from the horrific surrounding circumstances that the acts of sexual violence lacked consent and that the perpetrator would have been aware of this.[694] In addition, the Appeals Chamber found that the rape and sexual assault were used to amplify the level of suffering experienced by the victims, their families and their communities.[695] Therefore sexual violence was found to be "intricately linked" to killing the Tutsi population and inflicting additional suffering to the group.[696] The Appeal Chamber thus concluded that the Trial Chamber had "adequately explained and reasonably concluded" that the perpetrators of rape and sexual assault possessed genocidal intent.[697]

The ICTR in the *Karemera Appeal*, found that the indictment did not need to identify all the physical perpetrators of the crimes yet must identify the members of the JCE.[698] Therefore the broad terms "*Interahamwe*" and "militia", used in the indictment, were acceptable terms to identify the

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[685] Paras 1476-1477 and 1665.

[686] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) para 624.

[687] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-T (2012) para 1487.

[688] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) para 605.

[689] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-T (2012) para 1488.

[690] Paras 1465 and 1486.

[691] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) para 632 cf *Prosecutor* v *Krajišnik* IT-00-39-A (2009) para 692.

[692] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) paras 137 and 154.

[693] Para 608 cf *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-T (2012) paras 1667-1668.

[694] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-T (2012) para 1681.

[695] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) para 608 cf *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-T (2012) para 1665.

[696] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) para 608.

[697] Para 608.

[698] Para 605.

physical perpetrators who were non-JCE members.[699] Furthermore, the indictment had to be specific enough to notify the accused and enable him or her to prepare his or her defence.[700] The degree of specificity required was relaxed where the crime has been committed over a large scale, over a large area and a set period of time by numerous perpetrators.[701] The ICTR had to balance the difficulty of obtaining specifics with the accused's right to be informed.[702] This is supported by the findings of the MICT in *Prosecutor v Ngirabatware* ("*Ngirabatware Appeal*"). In this case, the MICT stated that when determining whether the notice is sufficient one must look at the indictment as a whole.[703] The ICTR Appeal Chamber in the *Karemera Appeal* similarly found that the notice of the use of JCE in the indictment was not defective.[704]

The Trial Chamber found that Karemera and Ngirumpatse were responsible for the commission rape and sexual assault against Tutsi women in Ruhengeri préfecture during early-mid April 1994, Kigali-ville préfecture during April 1994, Butare préfecture during mid-late April 1994, Kibuye préfecture during May-June 1994, Gitarama préfecture during April and May 1994, and elsewhere throughout Rwanda as a crime against humanity ie count five, pursuant to JCE category three.[705] Furthermore, they both incurred superior responsibility, pursuant to article 6(3), for the rape and sexual assault committed throughout Rwanda by the Kigali and Gisenyi *Interahamwe* during the genocide.[706] Their conviction for rape as a crime against humanity also characterised their contributions to the JCE as a form of direct participation under article 6(1) of the ICTR Statute, which amounts to liability as a principal perpetrator not an accessory.[707] The Appeal Chamber found that Karemera and Ngirumpatse incurred liability, under JCE category three, for rape and sexual violence that occurred after the 11 April 1994.[708] In addition, both incurred liability, under JCE category one, for crimes committed after the 18th of April 1994 by the *Interahamwe*, soldiers and militias.[709] Rape and other sexual acts became part of the common purpose after the 18th of April 1994. They were both convicted of crimes against humanity and genocide as principal perpetrators, pursuant to article 6(1) of the ICTR Statute, for the acts of rape and sexual violence committed by others.[710] This liability could not exist if it were not for the prior substantial contributions they had both made in furtherance of the common purpose of the JCE. Furthermore, the Trial Chamber's attribution of superior liability for the rape and sexual assault committed by the Kigali and Gisenyi *Interahamwe* outside of Kigali from April to June 1994 was overturned on

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[699] Para 605.

[700] Para 594.

[701] Para 595.

[702] Para 594.

[703] *Prosecutor v Ngirabatware* (Appeal Judgment) MICT-12-29-A (18 December 2014) para 249 cf *Prosecutor v Bagosora and Nsengiyumva* (Appeal Judgement) ICTR-98-41-A (14 December 2011) para 182; *Prosecutor v Seromba* (Appeal Judgement) ICTR-2001-66-A (12 March 2008) para 27.

[704] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) para 598.

[705] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-T (2012) paras 1682 and 1684.

[706] Para 1684.

[707] Para 1684. See also *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) para 611: The Appeal Chamber did however find that the Trial Chamber erred in using incidence of rape and sexual assault in establishing guilt for rape as a crime against humanity because sexual assault is a broader term which cannot be used to establish this crime. Despite this error the conviction stands because the evidence lead by the prosecution, concerning numerous incidence of rape, was sufficient.

[708] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) paras 635-636.

[709] Para 156: The Appeal Chamber found that the Trial Chamber had not erred in holding the accused responsible on the basic form of joint criminal enterprise for crimes committed after the 18th April 1994.

[710] Paras 608, 610 and 636.

Appeal, while superior liability for rape and sexual committed by the Kigali *Interahamwe in* Kigali was confirmed.[711] However the conviction remained the same due to the conviction being based on JCE liability that impacts the degree of the liability, whereas superior responsibility, only played an aggravating role in sentencing.[712]

Karemera established that the common purpose of the group can be inferred from the surrounding circumstances and that sexual violence did not fall within the common purpose yet it was a natural foreseeable consequence of executing the common purpose. In addition, there was no evidence that the accused physically perpetrated any acts of sexual violence or ordered their commission. The use of JCE category three was therefore necessary to attribute liability to the accused for the deviatory crime. The criminal responsibility of the accused was based on their significant contributions in furtherance of the JCE by consorting with the government who orchestrated the attacks against the Tutsis and their intimidation of opposing forces. The *Karemera Appeal* provides authority for the court's inference of awareness and intent where it is the only reasonable inference from the facts. Furthermore, the ICTR in *Karemera* and the *Karemera Appeal* inferred the physical perpetrators specific intent from the scale of the attacks and the systematic attack of the Tutsi population, which are objective facts. In addition, the ICTR in *Karemera* and the *Karemera Appeal* inferred that the accused was aware that rape was a natural and foreseeable consequence of implementing the common purpose, based on his comments, position and actions. For example, due to his position Karemera was privy to information and the perpetrators of the common criminal purpose and the sexual violence were one and the same. Karemera also admitted that rape occurs during armed conflict which established his subjective awareness of the risk. Despite his awareness Karemera still participated in the common purpose and did nothing to deter non-members from committing acts of sexual violence. Members can therefore clearly incur JCE liability, in the extended form, for acts of sexual violence committed by members and non-members when their awareness, foresight and their contribution despite the risk can be proven or reasonably inferred.

4 5 4 Prosecutor v Ngirabatware 2012 and 2014

During the Rwandan genocide, Ngirabatware was the Minister of Planning for the Interim Government in Rwanda and a member of the Prefecture Committee of the MRND in Gisenyi Prefecture, a member of the National Committee of the MRND as well as the technical committee of Nyamyumba Commune.[713] While holding these positions Ngirabatware participated in the JCE by distributing weapons and addressing the local officials and *Interahamwe*, at roadblocks in the Nyamyumba Commune, on the 7th April 1994.[714] The prosecution argued that the JCE was aimed at killing and destroying the Tutsi population and rape was a natural and foreseeable consequence of the implementation thereof.[715] Ngirabatware was charged with genocide ie count two and extermination as a crime against humanity for his participation in a JCE ie count five and rape as a crime against humanity for his participation in a JCE where rape was a natural and foreseeable consequence of executing the JCE ie count six.[716] Both count five and six alleged "that

[711] Paras 300 and 750.

[712] Paras 300 and 750.

[713] *Prosecutor v Ngirabatware* MICT-12-29-A (2014) paras 2 and 244.

[714] Para 184 cf *Prosecutor v Ngirabatware* (Judgment and Sentencing) ICTR-99-54-T (20 December 2012) paras 839-840 and 1390-1393.

[715] Para 945.

[716] *Prosecutor v Ngirabatware* (Amended Indictment) ICTR-99-54-T (13 April 2009) para 2 ("*Ngirabatware* Amended Indictment").

Ngirabatware participated in a joint criminal enterprise with a common purpose of exterminating Tutsis".[717]

This case involved the rape of a Tutsi women named Chantal Murazemariya by specific *Interahamwe* members, namely; Juma and Makuze.[718] According to the prosecution, this act of sexual violence formed part of a widespread and systematic attack against the Tutsi population based on ethnic grounds.[719] Allegedly Ngirabatware was linked to these sexual crimes by willingly engaging in a JCE, despite the risk, with the *Interahamwe* who acted in concert with Bagango, the *bourgmestre* and *Interahamwe* chairman for Nyamyumba *commune*.[720]

Witness ANAG testified that Chantal Murazemariya, a Tutsi fled to her father's relatives house four days after the President Habyarimana's plane was shot down.[721] She added that ten days after the President's death, Juma and Makuze took Chantal Murazemariya to a banana plantation and raped her.[722] They returned three days later and yet again took her to "a banana plantation" and raped her.[723] Witness ANAM testified that she saw Chantal Murazemariya being removed from her house, a month after the President's death, by Juma and Makuze and that Chantal Murazemariya told her that she had been raped by the *Interahamwe*.[724] Witness ANAO, a Hutu and former *Interahamwe*, testified that he together with other *Interahamwe;* including Juma and Makuze, went to Chantal Murazemariya's uncle's house to find hiding Tutsis.[725] Witness ANAO was then called away, while Makuze and Juma stayed behind and entered the home, which led Witness ANAO to believe that they attacked Chantal Murazemariya.[726] Witness DWAN-2 testified that Chantal was fearful of the *Interahamwe*, especially Juma, because he knew that her mother was a Tutsi.[727] Nonetheless, Witness DWAN-2 concluded that Chantal had not been raped because she did not see or hear that she was raped.[728] The ICTR found that just because they did not see or hear does not mean that it did not happen.[729] Moreover, the ICTR found that Witness ANAG was a generally reliable source due to her "unique position to testify to these events and she provided direct and credible evidence that Murazemariya was raped".[730] The ICTR acknowledged the differences in the testimonies yet deemed the discrepancies minor that thus insufficient to warrant reasonable doubt.[731] In addition, the testimony of Witnesses ANAG and ANAM established the rape of Murazemariya and Witness ANAO provided circumstantial evidence that Juma and Makuze were at the house and that they asked her uncle to turn over Tutsis.[732] Therefore the ICTR found that the

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[717] *Prosecutor v Ngirabatware* MICT-12-29-A (2014) para 244.

[718] *Prosecutor v Ngirabatware* ICTR-99-54-T (2012) para 944 cf *Prosecutor v Ngirabatware* ICTR-99-54-T (2009) paras 61-63.

[719] *Prosecutor v Ngirabatware* ICTR-99-54-T (2012) para 944 cf *Ngirabatware* Amended Indictment ICTR-99-54-T (2009) paras 61-63.

[720] *Prosecutor v Ngirabatware* ICTR-99-54-T (2012) paras 944-945 cf *Ngirabatware* Amended Indictment ICTR-99-54-T (2009) paras 61-63.

[721] Para 961.

[722] Para 961.

[723] Para 961.

[724] Para 962.

[725] Para 964.

[726] Para 964.

[727] Para 966.

[728] Para 967.

[729] Para 980.

[730] Para 972.

[731] Paras 973 and 976.

[732] Para 981.

prosecution proved beyond reasonable doubt that Chantal Murazemariya was abducted from her uncle's house and raped twice by the *Interahamwe*, namely; Juma and Makuze, in Rushubi *secteur* in April 1994.[733] The ICTR also considered the evidence on the general occurrence of the rape "relevant to its determination of Ngirabatware's responsibility in relation to the rape of Chantal Murazemariya" because the prosecution submitted that the rape occurred as a natural and foreseeable consequence of a JCE to destroy the Tutsi population.[734]

The ICTR in *Prosecutor v Ngirabatware* ("*Ngirabatware*"), found that the prosecution's witnesses "consistently and corroboratively testified that Tutsi women were raped amidst a context of violence and killings perpetrated against Tutsis by Hutus".[735] The ICTR concluded, based on specific evidence and the general occurrence of rape, that Chantal Murazemariya was abducted from her uncle's home and raped by *Interahamwe* named Juma and Makuze in Nyamyumba *commune* in April 1994, in the context of a larger attack directed specifically against the Tutsi population.[736]

Furthermore, Witness ANAK saw that Bagango, assisted by Karemera, called the *Interahamwe* and split them into groups that started killing Tutsis and committed rapes in the Nyamyumba *commune*.[737] Witness ANAK testified that Ngirabatware appointed Bagango as *bourgmestre* for Nyamyumba *commune* between 1992 and 1993.[738] Bagango, who was also the leader of the *Interahamwe* and chairman of the MRND, was seen carrying out "unjust acts" by Witness ANAK and his *Interahamwe* murdered Tutsis, raped Tutsis and looted their belongings in Bagogwe and the Nyamyumba *commune*.[739] Consequently, the ICTR found beyond a reasonable doubt that Ngirabatware participated in a JCE with the common criminal purpose of destroying, in whole or in part, the Tutsi ethnic group and exterminating the Tutsi population.[740] The ICTR also found that Juma and Makuze were also members of this JCE and that the circumstances clearly indicated that Ngirabatware was subjectively aware that rape was a possible consequence of implementing the JCE.[741] Furthermore, by significantly contributing by means of distributing weapons, Ngirabatware accepted the risk.[742] The ICTR therefore convicted Ngirabatware of direct and public incitement to commit genocide, instigating and aiding and abetting genocide.[743] These convictions were upheld on appeal.[744] However, due to the prosecution's retraction of evidence from the indictment they were unable to "prove beyond reasonable doubt any of the remaining allegations pleaded in support of the charge of extermination," ie count five.[745] The Trial Chamber therefore acquitted

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[733] Para 981.

[734] Para 996.

[735] Para 997.

[736] Paras 1001 and 1004.

[737] Para 984.

[738] Para 985.

[739] Para 985.

[740] Para 1385.

[741] Paras 1385 and 1388.

[742] Para 1391.

[743] Paras 869-870, 1341 and 1366-1369.

[744] *Prosecutor v Ngirabatware* MICT-12-29-A (2014) paras 278-279.

[745] Para 244 cf *Prosecutor v Ngirabatware* ICTR-99-54-T (2009) para 16: "After the close of the Prosecution case-in-chief, the Chamber granted the Prosecution's request to withdraw 15 paragraphs of the Indictment" pursuant to the *Prosecutor v Ngirabatware* (Trial Chamber) ICTR-99-54-T Decision on Defence Motion for Judgement of Acquittal (14 October 2010) 12 (concerning paragraphs 10 through 12, 15, 31, 32, 34, 37, 38, 47, 54 and 56 through 59 of the Indictment). See also *Prosecutor v Ngirabatware* ICTR-99-54-T (2009) para 17: The Prosecution dropped the charge of Conspiracy to Commit Genocide During Closing Arguments.

Ngirabatware of count five ie extermination as a crime against humanity.[746] The sentence of 35 years in prison was reduced on appeal to 30 years.[747]

However, the Trial Chamber did convict Ngirabatware on count six, ie rape as a crime against humanity for his participation "in a joint criminal enterprise with the common purpose of (…) exterminating the Tutsi civilian population in Nyamyumba Commune".[748] His conviction arose from his participation in a JCE, where rape was a natural and foreseeable consequence of executing the common purpose of the JCE.[749] His conviction "was pursuant to the extended form of JCE enterprise, in relation to the repeated rape of Chantal Murazemariya by Juma and Makuze, two members of the JCE, in the Nyamyumba Commune in April 1994," as discussed above.[750] This conviction was reversed on appeal.[751] Due to Ngirabatware's acquittal on count five ie extermination as a crime against humanity, the Trial Chamber could not use the facts presented in support of this charge; including all the evidence supporting that the accused participated in the extermination of the Tutsis, to support the charge for sexual violations.[752] Consequently, the ICTR looked to evidence supplied in support of count two ie genocide, to establish the accused's contribution to the common purpose of the JCE. The prosecution's use of evidence under one charge to support a different charge formed the basis for Ngirabatware's appeal. The Appellant challenged the conviction because the indictment did not include his contribution to the common purpose, as required by JCE liability, under count six ie rape as a crime against humanity.[753] Ngirabatware correctly alleged that the facts, which established his significant contribution to the common purpose of the JCE, in paragraph sixteen of the indictment, only pertained to count two and three ie the charge of genocide and complicity in genocide.[754] In addition, Ngirabatware challenged the conviction of rape as a crime against humanity because his liability stemmed from his contribution to a specific common purpose ie the exterminating the Tutsi people, for which he was acquitted.[755] The Appeal Chamber explained that because counts five and six of the indictment, pertaining to crimes against humanity, stated that the nature and purpose of the JCE was the extermination of the Tutsi civilian population, the ICTR erred in relying on the evidence under count two, which asserts a genocidal purpose.[756] The Appeal Chamber referred to the ICTR's inclusion of Ngirabatwara's conduct, pleaded under count two ie genocide, in count six as

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[746] *Prosecutor v Ngirabatware* MICT-12-29-A (2014) paras 244 and 251 cf *Prosecutor v Ngirabatware* ICTR-99-54-T (2012) paras 1377-1379 and 1394.

[747] *Prosecutor v Ngirabatware* MICT-12-29-A (2014) paras 3 and 278 cf *Prosecutor v Ngirabatware* ICTR-99-54-T (2012) paras 1419-1420.

[748] *Prosecutor v Ngirabatware* MICT-12-29-A (2014) para 245 cf *Prosecutor v Ngirabatware* ICTR-99-54-T (2012) paras 1305, 1322 and 1392-1394.

[749] *Prosecutor v Ngirabatware* MICT-12-29-A (2014) paras 242-252 and 278-279 cf *Prosecutor v Ngirabatware* ICTR-99-54-T (2012) paras 1305, 1322 and 1392-1394.

[750] *Prosecutor v Ngirabatware* MICT-12-29-A (2014) para 242 cf *Prosecutor v Ngirabatware* ICTR-99-54-T (2012) paras 1393-1394.

[751] *Prosecutor v Ngirabatware* MICT-12-29-A (2014) paras 242-252 and 278-279.

[752] Para 244 cf *Prosecutor v Ngirabatware* ICTR-99-54-T (2012) para 1378.

[753] *Prosecutor v Ngirabatware* MICT-12-29-A (2014) para 246. See also para 248 cf *Simba v The Prosecutor* (Appeal Judgement) ICTR-01-76-A (27 November 2007) para 63; *Prosecutor v Simić* (Appeal Judgement) IT-95-9-A (28 November 2006) para 22: The ICTY found that where the Prosecution wishes to rely on JCE as the form of liability, it must plead the nature and purpose of the enterprise as well as which form of JCE shall be used, in the indictment.

[754] *Prosecutor v Ngirabatware* MICT-12-29-A (2014) para 246.

[755] Para 246.

[756] Para 243.

"impermissibly expanding the charge of rape as a crime against humanity".[757] The accused's contribution to the common purpose, as pleaded in the indictment, was "essential for establishing his responsibility" for deviatory crimes.[758] Therefore the inability of the prosecution to establish Ngirabatware's contribution to the extermination of the Tutsi population, as a crime against humanity, resulted in the conviction being overturned on appeal.[759] The Appeals Chamber reversed his conviction and acquitted Ngirabatware of rape as a crime against humanity.[760]

The Appeals Chamber found that counts five and six of the indictment were narrowly tailored to extermination being the common purpose of the JCE.[761] Therefore the reversal of the conviction under count six ie rape as a crime against humanity could have been avoided if the prosecution had pleaded that the common purpose of the JCE was the murder of the Tutsi people as; an act of genocide and, or extermination as a crime against humanity. The conviction was overturned based on insufficient evidence in the indictment to support the accused's participation in the common purpose, which is the basis of JCE liability. Ngirabatware's conviction for rape but for the incomplete indictment would have resulted in his principal liability, pursuant to JCE category three.

4 6 Conclusion

As is clear from the cases, as discussed above, the MICT, ICTR and ICTY have established a link between an accused and sexual violence by using JCE category one and three. This doctrine has recognised that participation in a JCE gives rise to liability when all the elements have been satisfied. The JCE doctrine has been successfully used by the *ad hoc* tribunals in the *Karemera Appeal*, *Ngirabatware* and the *Krstić Appeal* to establish the criminal responsibility of high-ranked officials and masterminds as contributory members of a JCE, for acts of sexual violence physically perpetrated by others in accordance with my sixth research question. The conviction for sexual violence was however overturned in the *Ngirabatware Appeal* due to insufficient evidence in the indictment to establish the accused's contribution to the common purpose ie extermination as a crime against humanity. As concluded in chapter two, it is difficult to establish the criminal responsibility of an accused who; was not present at the scene of the crime, did not personally carry out the *actus reus* of the crime or did not order the commission of the crime. Despite the difficulty, there is a duty to provide effective remedies, including the prosecution, when serious humanitarian violations are perpetrated, as discussed in chapters one and two. The JCE doctrine clearly provides a solution to this problem by attributing criminal responsibility to those who contributed to a group (JCE) in furtherance of a common criminal purpose. In most of the cases above, sexual violence was not part of the common purpose of the group. Therefore JCE category one could not be utilised in those circumstances. Consequently, category three of the JCE is usually best suited in establishing criminal responsibility for acts of sexual violence as hypothesised.

The *ad hoc* tribunals have made it clear that the accused must subjectively foresee the possibility of sexual violence occurring in the execution of the JCE and despite the foresight, he or she must accept the risk and make a significant contribution to the JCE. These two elements safeguard the principle of individual culpability. Furthermore, these cases have established that the accused's subjective awareness of the possibility of rape occurring and their intent to further the common purpose of the JCE can be inferred from the surrounding circumstances; their position, access to information, presence and the notoriety of the events, as long as it is the only reasonably inference.

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[757] Para 250 cf *Prosecutor v Muvunyi I* (Appeal Judgement) ICTR-2000-55A-A (29 August 2008) paras l54-157.

[758] *Prosecutor v Ngirabatware* MICT-12-29-A (2014) para 251 cf *Prosecutor v KvoČka* et al IT-98-30/1-A (2005) para 83 cf *Prosecutor v Tadić* IT-94-1-A (1999) paras 203, 220 and 228.

[759] *Prosecutor v Ngirabatware* MICT-12-29-A (2014) para 251.

[760] Para 252.

[761] Para 250.

All *ad hoc* tribunals accepted that the accused's awareness of the risk of sexual violence occurring could be inferred from the surrounding circumstances.

In addition, the *ad hoc* tribunals found that before the JCE category three can be utilised, the prosecution must establish the existence of a common purpose. For example, in *Krstić* the ICTY stated that the facts compelled the inference that a common purpose existed between military and political leaders, with the common purpose to transfer all non-Serbians out of the area. Furthermore, the ICTR in *Karemera* found that a common purpose to destroy the Tutsi population materialised on the 11th of April 1994 when weapons were distributed to the *Interahamwe* in Kigali and the ICTY in *Krstić* found that forcible transfer of the Bosnian Muslims was the common purpose of the group. Moreover, these cases have established that common purpose can therefore be inferred from the surrounding circumstance; for instance, where a plurality of persons working together to commit a crime over a period of time. Additionally, it can arise extemporaneously and expand. For instance, ICTR in *Karemera* found that rape and other sexual acts became part of the common purpose after the 18th of April 1994.

Also, the membership of the accused and the accused's significant contribution to the JCE must be established. By significantly contributing to the JCE, the accused opens him or herself up to criminal responsibility for all the actions of members or non-members committed in furtherance of the common purpose or as a natural foreseeable consequence of implementing the common purpose. For example, in *Krstić* the ICTY established that the accused was a key participant in the common purpose because he organised and supervised the forcible transportation of civilians. In addition, the ICTR found that Karemera and Ngirumpatse significantly contributed to the common purpose by distributing weapons to the *Interahamwe*, intimidating those who opposed the attack of the Tutsis and by holding governmental positions. Furthermore the MICT confirmed that Ngirabatware made a significant contribution by distributing weapons and addressing the *Interahamwe* at roadblocks. Liability, however, can only ensue where the accused possesses the requisite *mens rea*.

The accused, as a principal, must possess the direct intent to further the common purpose as well as the specific intent or knowledge of the circumstances as required by the international crime under which the crime is categorised. For example, in *Krstić*, the ICTY inferred that the accused was aware of the humanitarian crisis based on his presence at the scene of the crimes after the forcible transfer and his presence in meetings leading up to the forcible transfer. His intent was therefore evidenced by his extensive participation in the forcible transfer. Furthermore, the ICTR in *Karemera* also inferred the accused's awareness from his position, comments and actions because as a political leader within the Interim Government he was privy to relevant information regarding national security and he also visited the Kibuye Commune where he could see the devastation himself. Moreover, the Trial and Appeal Chamber in the *Karemera Appeal* inferred that the physical perpetrators of rape and sexual assault possessed genocidal intent.

In addition, the crime he or she is charged must have been a natural foreseeable consequence of implementing the common purpose and despite the risk, the accused contributed nonetheless. The various *ad hoc* tribunals have acknowledged that sexual violence is objectively a natural foreseeable consequence of implementing or executing the common purpose of the JCE. For example, in *Krstić*, the ICTY found that rape was undoubtedly a natural foreseeable consequence of implementing the forcible transfer. The ICTY inferred the objective foreseeability by looking at the myriad of circumstances that made rape inevitable, such as the vulnerability of the uprooted women and girls, the prevalence of militia, the lack of shelter and not enough UN personnel. In *Karemera* the ICTR inferred that sexual violence was a natural foreseeable consequence of implementing the common purpose because the identity of the perpetrators were the same for both crimes. In addition, the accused must also have subjectively foreseen the possibility of sexual violence, which is determined on a case to case basis. For example, Karemera admitted during his testimony that it would be ridiculous to think that soldiers do not rape during war, therefore he subjectively foresaw the risk and reconciled himself.

Additionally, Danner and Martinez state that all the criminal tribunals since the ICTY and ICTR have included a command responsibility and a form of JCE liability.[762] For example, despite the Statute of the Special Court for Sierra Leone ("SCSL") not containing any provision that refers to common plan liability or JCE liability, the SCSL and the Special Panel for Serious Crimes established by the United Nations Transitional Administration in East Timor ("UNTAET") have applied the JCE theory liberally.[763] Therefore, most of the indictments that Danner and Martinez have "located from the newest generation of international criminal courts, namely those in Timor Leste and Sierra Leone, rely (at least in part) expressly or implicitly on the theory of JCE liability".[764] They add that these "developments provide evidence that the concept of JCE will continue to play an important role in international criminal law and heighten the stakes of the ICTY's jurisprudence in this area".[765]

Every conviction, by the *ad hoc* tribunals, for sexual violence under JCE category one and three, established criminal responsibility under either article 6(1) of the ICTR Statue or article 7(1) of the ICTY Statute. The attribution of superior responsibility did not hold on appeal. The degree of liability attributed ranges from liability as a principal in *Karemera* to liability as an accessory in *Krstić*. Arguably, the ICC's interpretation of individual criminal responsibility should be consistent with the ICTY and ICTR's interpretation, as established above. In order to encourage the ICC to accept an accused's contribution to a JCE can amount to a form of commission that results in principal liability under article 25 of the Rome Statute, I will attempt to establish that the jurisprudence of the *ad hoc* tribunals is a source of international law that the ICC must consider when making its own decisions. This evaluation, in pursuance of my seventh research question, takes place in the next chapter, chapter five. By analysing and utilising the JCE doctrine to satisfy the objective (*actus reus*) and subjective (*mens rea*) elements of the crime as set out in the judgements discussed above, the ICC should arguably secure convictions for acts of sexual violence as war crimes, crimes against humanity, genocide and violations of Common article 3 of the Geneva Conventions. What follows in the penultimate substantive chapter is a discussion about the difference and similarities between the ICC and the Tribunals' understanding of individual criminal responsibility, the modes of participation and the forms of liability that ensues from each.

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[762] Danner & Martinez (2005) *Cal L Rev* 154.

[763] 155 cf art 6 of the United Nations Statute Of The Special Court For Sierra Leone UN Doc S/2002/246 appendix 11 (2000) <http://www.rscsl.org/documents.html/scsl-statute.pdf> (accessed 16-06-2015): It states that "a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 of 4 of the present Statute shall be individually responsible for the crime".

[764] Danner & Martinez (2005) *Cal L Rev* 156.

[765] 156.

CHAPTER 5: THE *AD HOC* TRIBUNAL'S JURISPRUDENCE AS A SOURCE OF INTERNATIONAL LAW

5 1 Introduction

Thus far the ICC has not used the JCE doctrine in order to secure liability for international crimes of a sexual nature. Instead, the ICC has used accessorial liability and principal liability as a co-perpetrator, to establish individual criminal responsibility for contributing to a group that commits a crime as recognised by the Rome Statute. For example, the ICC in *Katanga* convicted the accused as an accessory for contributing to the commission or attempted commission of a crime by a group with a common purpose.[766] Katanga was convicted, under article 25(3)(d) of the Rome Statute, of one count of crimes against humanity and four counts of war crimes, yet the ICC acquitted him of all sex-related charges.[767] In addition, the ICC in *Lubanga* convicted the accused, as a co-perpetrator for his involvement in a common purpose, for war crimes based on recruiting and enlisting children under the age of fifteen to take part in warfare.[768] Furthermore, the ICTY in the *Furundžija Appeal* stated that article 25(3)(d)(i)-(ii) of the Rome Statute attributes criminal responsibility and liability to those who contribute to the commission or attempted commission of a crime, by persons acting in common purpose, if they possess the requisite knowledge and shared intent to further the common purpose of the group and participate willingly.[769] It is therefore clear, from *Katanga*, *Lubanga* and the *Furundžija Appeal* that contributing to a group, which results in the commission of a crime under the Rome Statute, is a form of participation from which liability ensues.

However, according to my pre-study, it appears that the ICC and the *ad hoc* tribunals disagree as to the form of participation and the degree of liability that should ensue from contributions to a group who share common criminal purpose. The ICC in the *Lubanga Confirmation Decision* found that principal perpetrators included those who physically carried out the *actus reus* and those who were absent from the scene yet who controlled or masterminded the commission.[770] Arguably, the principal perpetrators includes members of a JCE who intentionally and significantly contribute to the execution of the common criminal purpose. However, the ICC Pre-Trial Chamber ("PTC") in *Lubanga* found that participation under article 25(3)(d) of the Rome Statute, which sets out the contribution to a group as a form of participation, neither amounts to a commission nor liability as a principal; but rather a subsidiary form of criminal responsibility.[771]

According to Goy, the distinction between the ICC's and the *ad hoc* tribunals' approach towards attributing liability for contributors to group therefore stands as follows; the ICC only attributes principal liability as a co-perpetrator to contributors who have made an *essential* contribution to the commission of the crime, any lesser form of contribution amounts to accessorial liability.[772] Accessorial liability is a lesser form of liability that warrants more lenient sentencing. Whereas the *ad hoc* tribunals have attributed principal liability where the JCE member has willingly and knowingly made a *significant* contribution in furtherance of the common purpose.773 The *ad hoc*

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[766] *Prosecutor* v *Katanga & Chui* ICC-01/04-01/07-717 (2014).

[767] *Prosecutor* v *Katanga & Chui* ICC-01/04-01/07-717 (2014).

[768] *Prosecutor v Lubanga* (Pre-Trail Chamber I) ICC-01/04-01/06-1049 Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial (30 November 2007).

[769] *Prosecutor v Furundžija* IT-95-17/1-A (2000) para 117.

[770] *Lubanga Confirmation Decision* ICC-01/04-01/06-803-tEN (2007) para 330.

[771] Werle (2007) *J Int'l C J* 971 cf *Prosecutor v Lubanga* ICC-01/04-01/06 (2007) para 337.

[772] Goy (2012) *ICLR* 6.

[773] 7.

tribunals attribute liability equally to all members that contribute in a significant way, where the requisite *mens rea* has been satisfied.[774] Goy's arguments form the basis of the comparison in this chapter between the different understandings of commission and principal liability before the ICC and the *ad hoc* tribunals. Considering the differences in approaches between the judicial forums the following questions, as set out in the introduction, become relevant: whether the ICC is bound, or at least permitted, to consider the jurisprudence of the *ad hoc* tribunals in its interpretation of individual criminal responsibility and principal liability pursuant to my seventh research question and if so, whether their respective tests that distinguish principal from accessorial liability are theoretically reconcilable. The consolidation of these two tests could arguably support the successful prosecution and punishment of sexual offences under the Rome Statute by ascribing principal liability consistently, which ensures predictability and fairness for both parties.

In answering these questions I firstly undertake, a brief theoretical examination of the value of precedent in international law. Thus I hope to discover whether the jurisprudence of the *ad hoc* tribunals amounts to precedent and whether the ICC is bound by, or should at least be persuaded to refer to, the jurisprudence of the *ad hoc* tribunals for its instructive and persuasive value when interpreting article 25 of the Rome Statute. Secondly, I examine article 21 of the Rome Statute to determine whether the jurisprudence of the *ad hoc* tribunals is a source of "applicable law" in the interpretation of the Rome Statute. Thirdly, I evaluate the provisions within article 31 of the VCLT that sets out the general rules for interpreting treaties in order to ascertain whether the jurisprudence of the *ad hoc* tribunals should be used in interpreting the Rome Statute. Lastly, I refer to the human rights standard pursuant to article 21(3) of the Rome Statute and case law, to establish whether it supports the inclusion of jurisprudence of the *ad hoc* tribunals as an applicable source. If legal authority for the inclusion of jurisprudence of the *ad hoc* tribunals as an applicable source is unearthed, I can proceed to determine, based on the elements and tests, whether article 25 of the Rome Statute and article 7 of the Statute for the ICTY Statute and the article 6 of the ICTR Statute are compatible for comparison. If so, the jurisprudence on JCE liability, for contributing to a common purpose that results in the commission of sexual violence, could influence the ICC's interpretation of commission and principal liability, pursuant to article 25 of the Rome Statute.

5 2 The position and use of precedent in international law

5 2 1 International law doctrine

Cohen explains that according to international law doctrine, judicial decisions do not possess special force because they are not themselves law.[775] The ICTY Trial Chamber in *Prosecutor v Kupreškić* ("*Kupreškić*") stated that judicial precedent is not a distinct source of law in international criminal adjudication.[776] Nerlich adds that the ICTY may not rely on a set of cases or on a single

[774] 28 cf *Prosecutor* v *Vasiljević* IT-98-32-A (2004) para 111.

[775] HG Cohen "Theorising Precedent in International Law" in A Bianchi, D Peat & M Windsor (eds) *Interpretation in International Law* (2014) *Forthcoming UGA Legal Studies Research Paper* No 2014-2013 2. See also V Nerlich "The Status of ICTY and ICTR Precedent in Proceedings Before the ICC" in C Stahn and G Sluiter *The Emerging Practice of the International Criminal Court* (2009) 305 315: Nerlich specifies that the jurisprudence of the tribunal's is not a source of law in its own right.

[776] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 309-310 cf *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipoć & Dragan Papić* (Trial Chamber) IT-95-16-T (14 January 2000) para 540.

precedent to establish a principle of law.[777] Furthermore, the ICTY is neither bound by precedents established by other international criminal courts such as IMT or IMTFE nor the adjudication of international crimes brought before national courts.[778] Cohen adds that the decisions of the international tribunals are also denied doctrinal force and are not given precedential weight.[779] Wallace and Martin-Ortega argue that there is "no rule of *stare decisis* in international law whereby the Court is obliged to follow its previous decisions".[780] In international law, judicial decisions are not binding on anyone else except the parties to the particular case. They are furthermore not binding on future cases, or on future parties.[781] For example, article 59 of the Statute of the International Court of Justice ("ICJ Statute") states that: "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case".[782]

Despite the absence of an international rule, the International Court of Justice ("ICJ") and international tribunals have taken previous decisions into consideration during subsequent cases.[783] Cohen explains that "denying the force of precedent, while nonetheless arguing from it, may be a way of calibrating precedent's exact weight".[784] By not giving the judicial institution the express precedential authority yet still referring to case law in support of ones arguments; the states "take advantage of the predictability of precedent, while still retaining some room to argue against a precedent's relevance in a particular case".[785] Cohen suggests that the state parties to the regime prefer an "optimal level of clarity and predictability" over "a system of *de novo* review," ie starting each case a new, but less than one of *stare decisis*.[786] Furthermore, article 38(4) of the Statute of the Permanent Court of International Justice ("PCIJ Statute") states that judicial decisions are a "subsidiary means for the determination of rules of law".787 Judicial decisions can therefore determine rules of law, albeit as subsidiary means. Additionally, the ICTY Appeals Chamber in the *Prosecutor v Aleksovski* ("*Aleksovski Appeal*") found that the Trial Chamber is bound by the decision of the Appeal Chamber.[788] In principle, it would follow its own previous jurisprudence, unless there are "cogent reasons" for a departure.[789] Arguably, this creates authority for the use of precedent within the ICTY.[790] Moreover, article 21(2) of the Rome Statute states that the ICC "may apply principles and rules of law as interpreted in its previous decisions".[791] The Separate Opinion

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[777] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 310.

[778] 309-310 cf *Prosecutor v Kupreškić* et al IT-95-16-T (2000) para 540.

[779] Cohen "Theorising Precedent in International Law" in *Interpretation in International Law* 2.

[780] Wallace & Martin-Ortega *International Law* 26.

[781] Cohen "Theorising Precedent in International Law" in *Interpretation in International Law* 2 cf art 58 of the Statute of the International Court of Justice (1945) 59 Stat 1055 1060.

[782] The Statute of the International Court of Justice (1945) 59 Stat 1055 1060.

[783] Wallace & Martin-Ortega *International Law* 26.

[784] Cohen "Theorising Precedent in International Law" in *Interpretation in International Law* 15.

[785] 15.

[786] 15 (My own emphasis added).

[787] Cohen "Theorising Precedent in International Law" in *Interpretation in International Law* 2 cf art 38(4) of the Statute of the Permanent Court of International Justice (16 December 1920) 6 LNTS 380 (" PCIJ Statute").

[788] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 309 cf *Prosecutor v Aleksovski* (Appeal Judgement) IT-95-14/1-A (24 March 2000) para 113.

[789] Nerlich "The status of ICTY and ICTR precedent" in *The Emerging Practice of the International Criminal Court* 309 cf *Prosecutor v Aleksovski* IT-95-14/1-A (2000) para 107.

[790] One must note however, that if the tribunals do not have the authority to establish principles of law as stated by Nerlich above, then the Trial Chamber would not be bound by this decision of the Appeal Chamber.

[791] The Rome Statute (2003) 2187 UNTS 90.

of Pikis J of the ICC Appeal Chamber in *Prosecutor v Kony* ("*Kony Appeal*") confirmed that the ICC may "afford a degree of precedential value to its *own* decisions".[792] Arguably, the state parties to the constitutive document of the PCIJ and the Rome Statute electively bestowed the PCIJ and the ICC with precedential force.

It is clear that judicial decisions are not a source of law, however according to Cohen, Nerlich, Daillier and Pellet; they may be used to determine or support the existence of an international rule; including rules of customary law.[793] Wallace and Martin-Ortega explain that over time, the interactions between states and the practices of states have "crystallised into rules of customary international law". A rule of custom exists where both state practice (*usus*) and the subjective conviction that compliance is mandatory not discretionary (*opinio juris sive neccessitatis*), can be established.[794] State practice should therefore be "extensive and virtually uniform" and should occur in a manner that shows "as general recognition" that a "rule of law or legal obligation is involved".[795] According to Nerlich, the jurisprudence of a court may; show the existence of *opinio iuris sive necessitates* and thereby provide evidence of a customary rule, display an international practice on a certain matter and indicate the emergence of a general principle of international law.[796] Principles and rules of international law as well as general principles of law are listed as "applicable law" in article 21 of the Rome Statute, which sets out the sources to use when interpreting the Rome Statute. In addition, Goy refers to the jurisprudence of the *ad hoc* tribunals as an "expression of international law".[797] Furthermore, Goy argues that the jurisprudence of the tribunals may be used to compare and guide similar forms of liability, albeit with caution out of respect for the distinct legal systems.[798] The ICTY in *Tadić* found, and the Appeal Chamber confirmed, that the jurisprudence of the tribunals is an expression of international law because the ICTY applied customary international law and referred to general principles of law.[799] While the jurisprudence of the *ad hoc* tribunals does not amount to binding precedent, the ICC may have to consider the jurisprudence of the *ad hoc* tribunals when interpreting the Rome Statute because the jurisprudence displays applicable sources for interpretation.

5 2 2 The emergence of precedent through state practice

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[792] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 316 cf *Prosecutor v Kony, Otti & Odhiambo* (Appeal Judgement) Decision of Appeals Chamber on the Unsealing of Documents ICC-02/04-01/05-266 Separate Opinion of Judge Pikis (4 February 2008) para 9 (My own emphasis added).

[793] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 310 and 313 cf P Daillier and A Pellet *Droit International Public* (2002) 393.

[794] Wallace & Martin-Ortega *International Law* 8-10 cf art 8(1)(b) of the Statute of the International Court of Justice (1945) 59 Stat 1055 1060.

[795] Wallace & Martin-Ortega *International Law* 10.

[796] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 310.

[797] Goy (2012) *ICL Rev* 2 and 4.

[798] 2.

[799] 3 cf *Prosecutor v Tadić* IT-94-1-T (1997) para 669; *Prosecutor v Tadić* IT-94-1-A (1999) paras 194 and 225; *Prosecutor v Blaškić* (Appeal Judgement) IT-95-14-A (29 July 2004) n 1385 and paras 34-39.

According to Cohen, international judicial bodies, interpretative and expert bodies as well as state practice are possible sources of precedent.[800] Nerlich argues that the decisions of international courts develop international criminal law.[801] In addition, the decisions of the tribunals create new norms and therefore impact the development of international law.[802] Nerlich proposes that the decisions of a judicial body bear persuasive authority.[803] Therefore the force of the decision arises out of the "desirability of the rule reflected" in the decision and the "resultant compromise" not the power of the institution or its reasoning.[804] The Trial Chamber of the ICTY in *Kupreškić* cited the Justinian maxim *"non exemplis, sed legibus iudicandum est"* meaning that the persuasive value of another court's finding should be decided on the law not the case.[805] Therefore the judges are not bound to follow the findings of another court based on the authority of that court but they may elect to accept the interpretation of another court as correct, based on the strength of the law or the desirability of the outcome ie the court agrees with the logic and rational of the other court in coming to the finding and therefore elects to follow it. For example, Nerlich argues that the ICC is not bound to accept the *ad hoc* tribunal's interpretation that its jurisprudence amounts to principles and rules of international law.[806] However, Danner and Martinez argue that the jurisprudence of the *ad hoc* tribunals is an important source when determining the scope of liability doctrines because it displays the varying propositions and supportive authorities made by the prosecution, defense and judges in trying to establish the warranted criminal responsibility and corresponding form of liability for the accused's part in the crime.[807] In addition, Damgaard argues that, despite not being bound, the ICC should try to adhere to the jurisprudence of the *ad hoc* tribunals.[808]

Furthermore, Cohen argues that the decision of an impartial yet authoritative third party is useful because it provides a solution where the two parties are unable agree and thereby facilitates harmony.[809] A system of precedent is therefore a beneficial tool for dispute resolution.[810] Wallace

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[800] Cohen "Theorising Precedent in International Law" in *Interpretation in International Law* 10. See also M Reisman "International Incidents: Introduction to a New Genre in the Study of International Law" (1984) 10 *Yale Journal of International Law* 1.

[801] G Werle & F Jessberger *Principles of International Criminal Law* 3 ed (2014) 63-64.

[802] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 315 cf BB Jia "Judicial Decisions as a Source of International Law and the Defence of Duress in Murder or Other Cases Arising from Armed Conflict" in S Yee and W Tieya (eds) *International Law in Post-Cold War World/Essays in Memory of Li Haopei* (2001) 77.

[803] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 310.

[804] Cohen "Theorising Precedent in International Law" in *Interpretation in International Law* 6. However, Cohen warns that the rationalist approach does not explain decisions that go against the state's desire.

[805] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 310 cf *Prosecutor v Kupreškić* et al IT-95-16-T (2000) para 540.

[806] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 313.

[807] Danner & Martinez (2005) *Cali L Rev* 144-145.

[808] C Damgaard *Individual Criminal Responsibility for Core International Crimes* (2008) 1 176.

[809] Cohen "Theorising Precedent in International Law" in *Interpretation in International Law* 6.

[810] 6-7 cf KJ Pelc "The Politics of Precedent in International Law: A Social Network Application" (2013) *APSA Annual Meeting Paper* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2299638> (accessed 22-03-2014): in describing the WTO *Japan–Alcoholic Beverages II* panel's reading of the Dispute Settlement Agreement, Pelc "argues that member states of the [WTO] bring disputes under the Dispute Settlement Understanding for a favorable precedent rather than the value of their claim".

and Martin-Ortega add that the use of a previous case in subsequent decisions of the same judicial forum promotes judicial consistency, which provides a welcome degree of certainty for participants of the legal system.[811] A system of precedent also provides the presiding officer with access to decisions and rationales on which to build his or her own findings instead of starting each case anew.

The weight attached to the jurisprudence of the tribunals depends on: the ICC judges' views of the persuasiveness and the solidity of the legal argumentation of the decision, the reoccurrence of the same finding; ie a reoccurring finding will have greater weight than a once off case,[812] and the type of court; ie a finding of the Appeal Chamber usually carries more weight than a the finding of a Trial Chamber.[813] A precedent is dynamic and therefore the more it is cited the more authority it accrues.[814] Moreover, the weight depends on the availability of the source.[815] For example, it is easier to access the ICJ opinion on the rules of customary law then to look at evidence of *usus* and *opinion juris* that are not codified.[816] Cohen argues that in its "weakest form, precedent simply supplies an argument that one must respond to; one cannot make an argument about the rule's meaning without some reference to why the prior decision is right, wrong, or distinguishable".[817] Whereas: "[i]n its strongest form, precedent creates a strong presumption that the prior interpretation of the rule is in fact the rule."[818] Where prior interpretations do not exist, an interpreter has free reign in choosing a particular interpretation of a rule. However, as a matter of "reasoned legal argument," the existence of prior interpretations cannot be ignored.[819] Depending on a variety of factors that might give the prior interpretation greater weight, as discussed above, that decision might be replaced, "distinguished, narrowed, adopted, or extended, but it must be dealt with".[820] Failing to acknowledge the prior interpretation "might be seen as arbitrary and a violation of rule of law norms".[821] According to Cohen, precedent is the burden a prior interpretation of a rule places on future arguments about that rule.[822]

In addition, Cohen argues that precedent may be cited with regards to the area of law, irrespective of the current forum.[823] For example, Nerlich argues that the decisions of the ICTY might be invoked with regard to an international criminal case in before the ICJ.[824] Arguably,

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[811] Wallace & Martin-Ortega *International Law* 26.

[812] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 314 cf Daillier and Pellet *Droit International Public* 396.

[813] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 314.

[814] Cohen "Theorising Precedent in International Law" in *Interpretation in International Law* 8 and 11.

[815] 11.

[816] 11-12.

[817] 8 cf M Jacob "Precedents: Lawmaking Through International Adjudication" (2011) 12 *German Law Journal* 1005 1019: Jacob suggested that "deliberately ignoring relevant prior decisions is so arbitrary and artificial a suggestion as to verge on farce".

[818] Cohen "Theorising Precedent in International Law" in *Interpretation in International Law* 8 cf Jacob (2011) *German L J* 1019.

[819] Cohen "Theorising Precedent in International Law" in *Interpretation in International Law* 15.

[820] 15

[821] 15-16 cf Jacob (2011) *German L J* 1019.

[822] Cohen "Theorising Precedent in International Law" in *Interpretation in International Law* 15.

[823] 11.

[824] 9 and 11 cf AC Arend "International Law and the Preemptive Use of Military Force" (2003) 26 *Washington Quarterly* 89; AD Sofaer "On the Necessity of Pre-emption" (2003) 14 *European Journal of International Law* 209. For example, "the invocation of the 1837 *Caroline* incident between the United States and the United Kingdom as evidence

because the *ad hoc* tribunals and the ICC both adjudicate on international criminal law, the ICC may refer to the jurisprudence of the tribunals.

Moreover, Cohen posits that state practice might be the original source of international precedent.[825] States are autonomous and sovereign within their respective territories.[826] Yet they act in an international arena, which means that their actions impact other states and relationships between states.[827] Legal arguments are therefore inherently relational because the user tries to manipulate and predict another's behaviour by moderating its own actions and responses.[828] Cohen brings to our attention that states might regulate their own behaviour in line with the findings of international courts and tribunals as if they were bound by them.[829] While the actions of one state do not bind others, they do create behavioural and legal expectations, which I refer to as "peer pressure". A state's obligations are therefore defined by its impression of the expectations of other international actors regarding lawful and unlawful behaviour.[830] Cohen describes this strategic understanding of the use of precedent as soft law.[831]

According this conceptualisation: "[p]recedent becomes a prediction of what other states might expect a rule to require."[832] By acting, states are interpreting the rules they follow.[833] The manner in which states act or react "customarily" may reveal the rule's proper interpretation.[834] Cohen therefore posits that state practice is an indication of precedent.[835] Proof thereof, lies in the embodiment of state practice in the ICJ Statute's definition of customary international law, which is an applicable source for interpretation, and the VCLT's inclusion of "subsequent practice as an interpretive tool for understanding treaties".[836] Therefore, while a prior decision of a legal body is a collection of objective facts, the weight attached to the decision in the future, depending on how actors perceive it, is an institutional fact.[837] The weight of precedent therefore lies in the

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of the standard for legal anticipatory self-defense" in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia & Herzegovina v Serbia & Montenegro*) (Judgment) [2007] ICJ 43 <http://www.icjcij.org/docket/files/91/13685.pdf> accessed 22 March 2014 [223] ("ICJ, Application of Genocide Convention").

[825] Cohen "Theorising Precedent in International Law" in *Interpretation in International Law* 10.

[826] Wallace & Martin-Ortega *International Law* 72.

[827] Cohen "Theorising Precedent in International Law" in *Interpretation in International Law* 4.

[828] 14.

[829] 7.

[830] 7.

[831] 7 cf AT Guzman & TL Meyer "International Common Law: The Soft Law of International Tribunals" (2009) 9 *Chinese Journal of International Law* 515.

[832] Cohen "Theorising Precedent in International Law" in *Interpretation in International Law* 7.

[833] 10.

[834] 10 cf HG Cohen "International Law's *Erie* Moment" (2013) 34 *Michigan Journal of International Law* 249, 256-257 and 270-271.

[835] Cohen "Theorising Precedent in International Law" in *Interpretation in International Law* 10-11.

[836] 10-11 cf art 31(3)(c) of the VCLT (1969) 1115 UNTS 331: "There shall be taken into account, together with the context: … (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

[837] Cohen "Theorising Precedent in International Law" in *Interpretation in International Law* 12 cf FV Kratochwil *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989) 22-28. See also J Ruggie "Epistemology, Ontology, and Regimes" in JG Ruggie ed *Constructing the World Polity* (1998) 90-91.

relationship between states.[838] According to Cohen, precedent is therefore understood as "the *practice* of international law".[839] International law is therefore an on-going dynamic practice shaped by the state actors themselves.[840]

In conclusion, the jurisprudence of the *ad hoc* tribunals, do not in itself create international rules and it does not bind the ICC. However, the jurisprudence might acknowledge and correctly identify a pre-existing states practices or rules of international law including customary international law. Nerlich argued, in the previous sub-chapter, that the jurisprudence of a court displays the existence of *opinio iuris sive necessitates*. Furthermore, the fact that international judicial bodies and parties continue to cite case law in support of their findings and perspectives, displays the emergence of the use of precedent in international law in the form of state practice (*usus*). Together *usus* and *opinion juris* make up a rule of customary international law which is binding.[841] Arguably, the ICC, in interpreting the Rome Statute should use the jurisprudence of the *ad hoc* tribunals. Not because the Rome Statute assigns it precedential power (which is does not) but because in spite of the lack of authority to do so, a practice of doing so has emerged in international law. Rules and practices of international law; including customary international law are applicable sources for interpretation.[842] In addition, the repetition and the availability of a particular finding, for instance; the origin of JCE liability within customary international law and its use by the *ad hoc* tribunals, warrants an acknowledgement. Arguably, the ICC should therefore take the time to acknowledge and understand the arguments of the *ad hoc* tribunals and thereafter provide reasons for agreeing or disagreeing with it.

5 3 Article 21 of the Rome Statute: "Applicable sources" for interpreting the Rome Statute

The ICC PTC II in *Prosecutor v Kony, Otti & Odhiambo* ("*Kony*") stated that the law and practice of the *ad hoc* tribunals "cannot *per se* form a sufficient basis for importing into the Court's [ICC] procedural framework remedies other than those enriched in the [Rome] Statute".[843] The ICC Trial Chamber I in *Lubanga* added that the "[ICTY and ICTR] precedent [on the proofing of witness] is in no sense binding on the Trial Chamber at this Court [ICC]".[844] Furthermore, *Lubanga* echoed that the procedural rules and jurisprudence of the *ad hoc* tribunals are not "automatically applicable to the ICC without detailed analysis".[845] Arguably, *Lubanga* acknowledges an occasion, after detailed analysis, where the jurisprudence of the *ad hoc* tribunals may be applicable. On the one hand, Nerlich doubts the relevance of the jurisprudence of the *ad hoc* tribunals because the ICC has its own jurisdiction, which usually impedes the guidance that other texts could offer.[846] Article 13

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[838] Cohen "Theorising Precedent in International Law" in *Interpretation in International Law* 7.

[839] 4.

[840] 4.

[841] Wallace & Martin-Ortega *International Law* (2009) 8-9 cf art 8(1)(b) of the ICJ Statute 59 Stat 1055 1060 TS No 993 (1946).

[842] Art 21 of the Rome Statute (1998) 2187 UNTS 90.

[843] *Prosecutor v Kony, Otti & Odhiambo* (Pre-Trial Chamber II) ICC-02/04-01/05-60 Decision on the Prosecutor's Position in the Decision of the Pre-Trial Chamber II to Redact Factual Descriptions of Crimes in the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification (28 October 2005) para 19.

[844] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 308 cf *Prosecutor v Lubanga* ICC-01/04-01/06-1049 (2007) para 44.

[845] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 308 cf *Prosecutor v Lubanga* ICC-01/04-01/06-1049 (2007) para 44.

[846] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 317.

of the Rome Statute states that "[t]he Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of *this Statute*."[847] Moreover, the Rome Statute from article 22 through article 33 "provides for relatively refined rules on participation in crime" including the requisite subjective elements, unlike the statutes of the *ad hoc* tribunals that forced the judges to develop the details.[848] Consequently, rendering additional sources generally unnecessary. On the other hand, the ICC PTC II in *Kony* stated that the relevance of jurisprudence of the *ad hoc* tribunals must be assessed against the applicable law provision in article 21 of the Rome Statue.[849] While the jurisprudence of the *ad hoc* tribunals is not binding, it may be useful when interpreting the Rome Statute, depending on the understanding of article 21 of the Rome Statute. Arguably, article 21 of the Rome Statute is therefore the point of departure for the "detailed analysis" required by *Lubanga*.

The plain reading of a provision, supported by Fulford J and Van den Wyngaert J, is the first step in interpreting any provision of the Rome Statute.[850] Firstly, article 21 of the Rome Statute sets out the sources that the ICC must refer to when interpreting the Rome Statute.[851] Secondly, according to Nerlich, article 21(1) of the Rome Statute sets out the order in which the applicable sources must be applied when interpreting the Rome Statute.[852] With this understanding, the Rome Statute, Elements of Crimes and the RPE must be applied first.[853] Thereafter, the principles and rules of international law should be applied second and the general principles of law, should be applied last.[854] Goy argues that one may only look to the secondary sources if, after applying the primary sources, a *lacunae* exists.[855] Should any conflict between the sources arise, the Rome Statue prevails.[856] The Rome Statute is therefore the primary source that sets out the powers, competencies and limitations of the ICC. However, the maxim *lex specialis derogate legi generali* requires that the Regulations

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[847] Art 13 of the Rome Statute (1998) 2187 UNTS 90 (My own emphasis added).

[848] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 322-323 cf Werle *Principles of International Law* mn 266.

[849] *Prosecutor v Kony* et al ICC-02/04-01/05-60 (2005) para 19.

[850] Werle & Burghardt "Establishing Degrees of Responsibility" in *Pluralism in International Criminal law* 24.

[851] Art 21 of the Rome Statute (2003) 2187 UNTS 90: "1. The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards. 2. The Court may apply principles and rules of law as interpreted in its previous decisions. 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."

[852] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 311-312.

[853] 312 cf art 21(1)(a) of the Rome Statute (2003) 2187 UNTS 90.

[854] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 312 cf arts 21(1)(b) and 21(1)(c) of the Rome Statute (2003) 2187 UNTS 90.

[855] Goy (2012) *ICL Rev* 5 cf *Prosecutor v Al Bashir* ICC02/05-01/09-3 Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (2009) para 126.

[856] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 312.

and Rules of the Court that contain more detailed provisions, be applied before the general provisions as contained in the Rome Statute.[857]

The jurisprudence of the *ad hoc* tribunals is not expressly listed as an applicable source. Werle and Burghardt find that according to the plain reading of article 21 of the Rome Statute: "the case law of the *ad hoc* tribunals, as such, has no immediate relevance for the interpretation of the ICC Statute".[858] However Werle and Burghardt add that the jurisprudence of the *ad hoc* tribunals is, "so far, the most important enunciation of International Criminal Law on this issue" and that "it is telling that the *ad hoc* tribunals are approximating the ICC Statute's approach, and it makes sense to interpret the ICC Statute in accordance with this body of law, as long as the Statute allows it".[859] Furthermore, Nerlich states that "principles and rules of international law", as listed in article 21(1)(b) of the Rome Statute, includes customary international law[860] and principles of international criminal law.[861] Nerlich therefore concludes that the ICC may use the jurisprudence of the tribunals to ascertain the existence of rules and principles despite the jurisprudence itself not being binding.[862] In addition, Goy argues that principles and rules of international law and the general principles of law include the jurisprudence of the tribunals.[863] Werle and Burghardt argue that the interpretation may not stop at the plain reading of the provision; judges must, according to article 31(1) of VCLT, also consider the context, object and purpose of the provision.[864]

5 4 Article 31 of the Vienna Convention on the Law of Treaties

[857] 312.

[858] Werle & Burghardt "Establishing Degrees of Responsibility" in *Pluralism in International Criminal Law* 17.

[859] 17.

[860] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 313 cf M McAuliffe de Guzman "Article 21 Applicable Law" in O Triffterer ed *Commentary on the Rome Statute of the International Criminal Court* (1999) mn 14.

[861] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 313 cf A Cassese *International Criminal Law* (2003) 31: "Principles of international criminal law" is a term use by the ICTY.

[862] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 313-314.

[863] Goy (2012) *ICL Rev* 5.

[864] Werle & Burghardt "Establishing Degrees of Responsibility" in *Pluralism in International Criminal Law* 24 cf art 31 of the VCLT (1969) 1115 UNTS 331: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended."

Article 31 of the VCLT sets out the general rules for interpreting treaties, including the Rome Statute.[865] It requires that the text be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[866] The context stems from; the text, any agreement made between parties to the treaty in connection with the conclusion of the treaty or the interpretation and application of the provisions within the treaty, any agreement between parties that arises from practice ie the subsequent application of the treaty and any relevant rules of international law applicable in relation between the parties.[867] Nerlich argues that it is possible that the jurisprudence of the *ad hoc* tribunals could be deemed part of the context in which one interprets the Rome Statue as they both operate within the international criminal law sphere.[868] However, article 31(2) of the Rome Statute defines context narrowly; as arising from the text, its preamble or agreements made with regards to the conclusion of the treaty, only.[869] In addition, Ohlin argues that ICTY's jurisprudence on JCE in the *Tadić Appeal* cannot be used as a precedent to help interpret article 25 of the Rome Statute.[870] The interpretation of the Rome Statute rests with the ICC whereas the ICTY in the *Tadić Appeal* developed the JCE doctrine within the bounds of article 7 of the ICTY Statute.[871] Therefore Ohlin finds that the *Tadić Appeal* is not a meaningful precedent for the interpretation of article 25 of the Rome Statute because its "provisions were born from an entirely different process and its provisions must be interpreted within that context".[872]

Alternatively, the jurisprudence of the *ad hoc* tribunals could fall within "any relevant rules of international law applicable in relation between parties" as stated in article 31(3)(c) of the VCLT.[873] As established above, the jurisprudence may very well display rules of international law, specifically customary international law, through state practice. Goy argues that article 31(3)(c) requires that general customary international law, which is reflected and applied in the jurisprudence of the tribunals, be considered when interpreting the conventional text.[874] Also, that the text should be interpreted in harmony with customary international law unless it indicates an express departure.[875] However it is unclear who the "parties" would be in this context. The ICTY and ICTR Statutes were drafted to apply to the persons responsible for serious violations within the ambit of the *ad hoc* tribunals not the ICC.[876] In addition, the ICTY and ICTR Statutes are constitutional documents of international judicial institutions therefore Nerlich doubts that they

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[865] Art 31 of the VLCT (1969) 1115 UNTS 331.

[866] Art 31 of the VLCT (1969) 1115 UNTS 331.

[867] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 317 cf art 31(2) of the VLCT (1969) 1115 UNTS 331.

[868] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 317 cf art 31(1) of the VLCT (1969) 1115 UNTS 331.

[869] Nerlich "The status of ICTY and ICTR precedent" in *The Emerging Practice of the International Criminal Court* 318.

[870] Ohlin (2007) *J Int'l Crim Just* 77.

[871] 77.

[872] 77.

[873] Art 31(3)(c) of the VLCT (1969) 1115 UNTS 331.

[874] Goy (2012) *ICL Rev* 4 cf ME Villiger *Customary International Law and Treaties, A Manual on the Theory and Practice of the Interrelation of Sources* 2 ed (1997) 265.

[875] Goy (2012) *ICL Rev* 5 cf R Bernhardt "Interpretation" in Bernardt ed *Encyclopedia of Public International Law* vol 2 (2005) 1421.

[876] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 319; art 1 of the of the ICTY Statute (1993) 32 ILM 1159; art 1 of the ICTR Statute (1994) 33 ILM 1598.

quality as "applicable rules".[877] Nerlich therefore finds that the literal and plain reading of articles 31(2) and 31(3)(c) of the VCLT do not support the ICC judges looking to the jurisprudence of the tribunals for guidance when interpreting the Rome Statute and its subsidiary instruments.[878]

However, Nerlich reminds us that the Statutes of the ICTY and ICTR as well as their subsidiary instruments were used when drafting the ICC's legal texts "therefore it would appear consistent to consider their jurisprudence as part of the context for the purpose of interpreting the Rome Statute".[879] Bernhardt suggests that: "[i]n a broader sense systematic interpretation can also include the consideration of texts and events outside the framework of the treaty."[880] The purpose of the VCLT after all, specifically article 31(3)(c), is to "foster coherency between several sources of international law".[881] Therefore a purposive interpretation, ie the avoidance of inconsistencies and fragmentation within international judicial institutions, supports the inclusion of the jurisprudence of the *ad hoc* tribunals.[882] Nerlich concedes that the doctrinal basis for relying on the jurisprudence of the tribunals when interpreting the Rome Statute is weak, however; the purposive interpretation of article 31(3)(c) of the VCLT that accepts a broader understanding of context, provides a methodical basis for its inclusion.[883]

A methodical basis does however has its limits. Because the jurisprudence of the *ad hoc* tribunals is based on the ICTY and ICTR Statutes, the ICC can only look to their jurisprudence for guidance where the text of the Rome Statute is either similar or identical to the provision in the tribunal's statutes otherwise where a *lacunae* exits.[884] This supports yet qualifies Nerlich's statement above, where he argues that there is no need to look to other statutes because the ICC has its own jurisdiction. Furthermore, where the procedural or systematic differences between the ICC and the tribunals differ greatly the ICC cannot look to their jurisprudence for guidance because it would be inappropriate.[885] While the judges of the *ad hoc* tribunals might have correctly identified the customary international rules and principles of general international, due to the *lex specialis* principle the actual provisions within the Rome Statute take preference according to article 21 of the Rome Statute.[886] Therefore, in accordance with a broader systemic and purposive interpretation of article 31 of the VCLT treaty, the ICC can look to the jurisprudence of the *ad hoc* tribunals for guidance where the texts are similar or identical. A comparison of the texts in greater detail follows, below.

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[877] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 319.

[878] 319.

[879] 319.

[880] 320 cf Bernhardt "Interpretation" in *Encyclopedia of Public International Law* 1420.

[881] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 318. See also C Brown *A Common Law of International Adjudication* (2007) 49.

[882] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 320 cf *Al-Adsani v United Kingdom*, European Court of Human Rights Application No 35763/97 (21 November 2001) para 55: The ECtHR used art 31(1)(c) "as a means of achieving harmony with other rules of international law, even though the wording of the provision did not give the occasion to do so, the customary rules of state immunity were invoked by the UK to restrict access to courts in relation to a civil claim of torture brought against Kuwait in English Courts. Kuwait is not party to the [European Convention] and therefore cannot be considered a 'party' to the litigation between the applicant and the UK before the [ECtHR]".

[883] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 320.

[884] 320-322.

[885] 322.

[886] 323.

5 5 The human rights standard

As discussed in chapter two, the commission of sexual violence violates numerous human rights such as: human dignity, the protection against gender discrimination, equality, the protection against torture, sexual autonomy, bodily integrity, and privacy. Which in turn gives rise to obligations on the part of state parties and the international community to ensure access to justice and provide effective remedies for those who have been violated.[887] However, in addition to establishing the gravity of the offence and the obligations that arise when they are violated, human rights provide an addition interpretative function. A human rights standard, which developed through jurisprudence of international and regional human rights forums, is important because it "informs the prosecution of crimes".[888] According to Sellers, the opinions of the regional human rights courts "enlighten the purview of human rights standards that inform the prosecution of gender-based violence."[889] For instance, Sellers interprets *Bulgaria* as the first case to recognise that the right to sexual autonomy and non-discrimination (equality) are relevant to the states obligation to investigate and prosecute sexual violence in order to comply with the substantive and procedural aspects of human rights.[890] In referring to *Bulgaria*, Sellers avers that the state's responsibility to adopt measures which will secure respect for the right to privacy must fall within the broader human right's framework of non-discrimination.[891] For example, the ECtHR in *Bulgaria* interpreted the law in a manner that was sensitive to the surrounding circumstances of the case instead of focusing on the elements of the crime.[892] Arguably, the regional human rights courts have adopted a gender-conscious and non-discriminatory lens through which all rights and obligations are interpreted. In addition, Annex XI to the UN Resolution 60 of 147 requires non-discrimination in the application and interpretation of remedies.[893]

Furthermore, Sellers notes that the law should and does reflect the changing values in society, which have become enlighten to the fundamental worth of sexual autonomy and equality. [894] For instance, the ECtHR and the IACtHR have established that "human rights treaties are living instruments, whose interpretation must go hand in hand with evolving times and current living

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[887] Art 8 of the UDHR (1948) UNGA Res 217 A(III); art 25 of the Women's Protocol (2005) CAB/LEG 66.6; art 6 of the CERD (1969) 660 UNTS 195; art 25 of the ACHR (1978) 1144 UNTS 143; art 13 of the ECHR (1953) 213 UNTS 222.

[888] Sellers "The Prosecution of Sexual Violence in conflict" *Office of the High Commissioner for Human Rights* 33.

[889] 33.

[890] 33 cf *MC v Bulgaria*, ECtHR Application No 39272/98 (2003).

[891] Sellers "The Prosecution of Sexual Violence in conflict" *Office of the High Commissioner for Human Rights* 33 cf *MC v Bulgaria*, ECtHR Application No 39272/98 (2003).

[892] Sellers "The Prosecution of Sexual Violence in conflict" *Office of the High Commissioner for Human Rights* 33 cf *MC v Bulgaria*, ECtHR Application No 39272/98 (2003).

[893] OHCHR UNGA Res 60 (16 December 2005)" UN Doc GA/RES/60/147 and its Annex *United Nations Human Rights Office of the High Commissioner for Human Rights*.

[894] Sellers "The Prosecution of Sexual Violence in conflict" *Office of the High Commissioner for Human Rights* 33.

conditions".[895] According to the IACtHR in *Atala*, this evolving interpretation is consistent with interpretive provisions in the ACHR and the VCLT.[896]

Additionally, Sellers proposes that the progressive interpretation by the regional human rights courts can influence the interpretation by the judges of the ICC.[897] She affirms that the international courts and tribunals need to be alert and "even handed" when applying and interpreting sex-based crimes and their associated forms of liability.[898] She argues that: "[d]ue diligence on the part of the judges to resist any sexist interpretations of laws, elements, procedural rules and evidence remains critical to the endeavour of constructing a non-discrimination international justice system".[899] Thus she posits that the rights that guarantee effective legal remedy and equal access to justice can be used to address discrimination and gender-based violence.[900]

Article 21(3) of the Rome Statute requires that the ICC's interpretation of all its provisions must be consistent with internationally recognised human rights.[901] Pellet describes the interpretive requirements of article 21(3) of the Rome Statute as "a system of super legality" because an interpretation that is consistent with human rights trumps the plain reading of the Roman Statute.902

Therefore the ICC's interpretation and application of the Rome Statute including: the definition of the crime, the elements of the crime, types of criminal responsibility, the forms of liability and remedies must be consistent with the human rights framework based on equal access to justice, sexual autonomy and non-discrimination

For instance, as discussed in chapters two and three, it is difficult to establish the individual criminal responsibility of high-ranked officials and masterminds for acts of sexual violence committed by another. Thus impairing the ability of the court of *ad hoc* tribunal to effectively prosecute acts of sexual violence. Furthermore, because civilian women are the predominate victims of sexual violence the prosecution of sexual violence, becomes an informal yardstick to assess whether the female community actually has the ability to access justice.[903] A context-sensitive and gender-conscious interpretation of the Rome Statute consistent with the human rights standard, including the provisions on individual criminal responsibility, commission and principal liability, is therefore critical in ensuring that the prosecution of sexual violence has a reasonable prospect of

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[895] *Atala Riffo and daughters v Chile*, IACtHR Series C No 239 (2012) para 83 cf *Tyrer v United Kingdom*, European Court of Human Rights No 5856/72 (25 April 1978) para 31; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-American Court of Human Rights Series A No 16 (1 October 1999) para 114 ("Advisory Opinion OC-16/99").

[896] *Atala Riffo and daughters v Chile*, IACtHR Series C No 239 (2012) para 83 cf Advisory Opinion OC-16/99, IACtHR Series A No 16 (1999) para 114.

[897] Sellers "The Prosecution of Sexual Violence in conflict" *Office of the High Commissioner for Human Rights* 33.

[898] 38.

[899] 38.

[900] 38.

[901] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 324; art 21(3) of the Rome Statute (2003) 2187 UNTS 90: "The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."

[902] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 324 cf A Pellet "Applicable Law" in A Cassese, P Gaeta and JRWD Jones (eds) *The Rome Statute of the International Criminal Court, A Commentary* (2002) vol 2 1079.

[903] Haffajee (2006) *Harv J L & Gender* 204; Sellers "The Prosecution of Sexual Violence in conflict" *Office of the High Commissioner for Human Rights* 38.

success. Hence, article 25 of the Rome Statute, must be interpreted in a manner that is consistent with internationally recognised human rights. Arguably, exceptional yet necessary measures should be developed and used to attribute criminal responsibility. As established in chapter four, the JCE doctrine has been successfully used by the *ad hoc* tribunals to attribute criminal responsibility to an accused who significantly contributed to a common purpose that resulted in the commission of sexual violence. Consequently, the JCE doctrine has enabled access to justice, particularly for women as the predominate victim of sexual crimes, and facilitated effective prosecution as a remedy. In furtherance of the human rights standard, the ICC should arguably look to the jurisprudence of the *ad hoc* tribunals because it has developed and applied an effective remedy that facilitates the victim's access to justice.

Moreover, according to the human rights standard, the law should be applied without discrimination. The like treatment of similar situations is a "core principles" of law.904 The principles of legality also requires that like cases be treated alike.[905] The human rights of the accused and the principles of legality will be discussed in greater detail in chapter six.

In conclusion, any interpretation of the provisions within the Rome Statute and the RPE, must be checked against internationally recognised human rights norms; including the principle of non-discrimination.[906] As displayed in chapter four, the JCE doctrine has been used by the *ad hoc* tribunals to resolve the difficulties with establishing criminal responsibility for rape or other acts of sexual violence. Specifically establishing the criminal responsibility of high-ranked officials who contributed to the common purpose of a group that either included, or reasonably foresaw, the commission of sexual violence. It has therefore minimised the number of acquittals for acts of sexual violence, which predominately affects women and therefore satisfies the duty to provide effective remedies for human rights violations together with ensuring greater access to justice. Arguably, the inclusion of JCE liability, as a form of commission that results in the principal liability has diminished gender discrimination and improved access to justice by recognising the unique nature of sexual violence as an international crime and developing an effective remedy. If looking to the jurisprudence of the *ad hoc* tribunals will assist the ICC in developing an understanding of participation in a group as a form of commission in order to provide an effective remedy for the prevalence of sexual violence, then arguably it should. So long as the inclusion of JCE liability respects the text of the Rome Statute and is not contrary to the general principles of criminal law and the accused's right to a fair trial. The application of the JCE doctrine will be tested against the general principles of criminal law and the accused's right to a fair trial in chapter six.

5 6 Application: Is article 25 of the Rome Statute comparable to article 6 and article 7 of the ICTR and ICTY Statutes, respectively?

5 6 1 The differentiation model within article 25(3)

Due to its detail and primacy, the ICC is most likely to use the jurisprudence of the *ad hoc* tribunals to interpret the Rome Statute, where the provision in the ICTY or ICTR Statute is identical or similar to the provision in the Rome Statute.[907] It therefore becomes essential to determine whether article 25 of the Rome Statute and article 6 and 7 of the ICTY Statute and ICTR Statute, respectively, bears a resemblance or not. Article 25 of the Rome Statute lists the forms of

[904] Cohen "Theorising Precedent in International Law" in *Interpretation in International Law* 16.

[905] 16.

[906] Nerlich "The Status of ICTY and ICTR Precedent" in *The Emerging Practice of the International Criminal Court* 324.

[907] 316.

participation that amount to individual criminal responsibility. Article 25(3)(a) of the Rome Statute refers to forms of commission, (b) to inducement, (c) to assistance, (d) to contributions in any other way to the commission of a crime by a group of persons acting in common purpose and article 28 describes superior liability.[908] According to Werle, the modes of participation are divided into four levels by the letters (a) to (d), which create a hierarchy of seriousness that corresponds to two degrees of individual criminal responsibility ie principal or accessorial liability.[909] For instance, the ICC in the *Lubanga Confirmation Decision* found that "'committing' constitutes principal liability, whereas the other forms of liability under [a]rticle 25(3)(b)-(d) [of the Rome] Statute constitute accessorial liability".[910] Furthermore, according to Werle and Burghardt, article 25(3)(a) establishes "a higher threshold than assistance under [a]rticle 25(3)(c)" of the Rome Statute.[911] Additionally, ordering and instigating "yield a higher degree of individual criminal responsibility than aiding and abetting".[912] In summation, article 25(3) of the Rome Statute recognises criminal acts such as planning, ordering and instigating yet it places a higher level of individual criminal responsibility on those who commit.[913] Each level of responsibility has its own test and requirements but the objective and subjective elements are stricter for commission than other acts.[914] The *actus reus* and *mens rea* of the accused therefore determines his or her degree of criminal responsibility.[915] The form of participation therefore has "normative implications for the degree of individual criminal responsibility" that in turn impacts sentencing.[916] The ICC Trial Chamber in *Lubanga* and the *Prosecutor v Chui* ("*Chui*") confirmed that the different modes of participation establish a hierarchy of blameworthiness.[917] Article 25(3) of the Rome Statute therefore introduces a systematisation of modes of participation referred to as the differentiation model.[918] The jurisprudence of the *ad hoc* tribunals also reveals a distinction between principal and accessorial liability.[919] Therefore Goy argues that the jurisprudence of the tribunals may be useful when interpreting the modes of liability before the ICC.[920]

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[908] Werle & Burghardt "Establishing Degrees of Responsibility" in *Pluralism in International Criminal law* 23 cf art 25 of the Rome Statute (2003) 2187 UNTS 90.

[909] Werle (2007) 5 *J Int'l Crim Just* 953. See also Werle & Burghardt "Establishing Degrees of Responsibility" in *Pluralism in International Criminal law* 11, 21 and 23.

[910] Goy (2012) *ICL Rev* 40 cf *Prosecutor* v *Lubanga Dyilo* ICC-01/04-01/06-803-tEN (2007) paras 320 and 323.

[911] Werle & Burghardt "Establishing Degrees of Responsibility" in *Pluralism in International Criminal law* 20.

[912] 16-17 cf *Prosecutor v Lubanga* (Trial Chamber I) ICC-01/04-01/06-2842 Separate Opinion of Judge Adrian Fulford (14 March 2012) 10.

[913] Werle (2007) 5 *J Int'l Crim Just* 964.

[914] Werle & Burghardt "Establishing Degrees of Responsibility" in *Pluralism in International Criminal law* 25-26.

[915] 15.

[916] 14-15 cf *Prosecutor v Ndindabhizi* (Appeals Chamber) ICTR-01-71-A (16 January 2007) 122: the ICTR found that "modes of liability may either augment [for example], the commission of the crime with direct intent or lessen [for example], aiding and abetting a crime with awareness that a crime will probably be committed the gravity of the crime".

[917] Werle & Burghardt "Establishing Degrees of Responsibility" in *Pluralism in International Criminal law* 24-25 cf *Prosecutor v Lubanga* ICC-01/04-01/06-2842 Separate Opinion of Judge Adrian Fulford (2012) para 9; *Prosecutor v Chui* (Trial Chamber II) ICC-01/04-02/12-4 Concurring Opinion of Judge Christine Van den Wyngaert (18 December 2012) paras 6, 22 and 63.

[918] Werle (2007) 5 *J Int'l Crim Just* 953. See also Werle & Burghardt "Establishing Degrees of Responsibility" in *Pluralism in International Criminal law* 13.

[919] Goy (2012) ICL Rev 6.

[920] 6.

5 6 2 The principle of individual culpability

As stated in chapters one and two, sexual crimes are sometimes committed by large groups of people, who operate collectively within an organized network.[921] The ICTY in the *Tadić Appeal* stated that "[m]ost of these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality".[922] The ICTY continued by stating that "the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design".[923] The accused can participate in the commission of such crimes in many different ways, "contributing on various levels and at different stages of the crime".[924] Therefore due to the nature of armed conflict, "the difference between the multiple roles individuals may play in the commission of international crimes, and thus their degree of individual criminal responsibility for these crimes, is enormous".[925] A distinction in the degree of criminal responsibility depending on the accused's mode of participation is therefore important.[926] According to Werle, the "degree of criminal responsibility does not diminish as distance from the actual act increases; in fact, it often grows".[927] According to Fisher, physical perpetrators commit heinous acts yet they are less blameworthy than instigators and masterminds because in the circumstances they are also victims.[928] The greatest degree of responsibility rests with those whose original proposal or design generated the violence.[929]

However, individual criminal responsibility still needs to be established individually, in order to comply with the principle of individual culpability.[930] Werle and Burghardt explain that "the principle of culpability requires that the sentence imposed must not exceed individual guilt for the commission of the crime".[931] The distinction between the different degrees of criminal responsibility is therefore "essential from a normative perspective".[932] The ICTY in the *Tadić Appeal* stated that while certain members of the JCE physically perpetrate the criminal act, "the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question".[933] Consequently, "the moral gravity of such participation is often no less - or indeed no different - from that of those actually carrying out the acts in question".[934] While it is important to hold individuals responsible for serious crimes that "threaten the peace, security and well-being of the world" and concern the international community we cannot compromise on the principle of individual culpability.[935] Therefore, when interpreting commission

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[921] Werle (2007) 5 *J Int'l Crim Just* 953. See also Werle & Burghardt "Establishing Degrees of Responsibility" in *Pluralism in International Criminal law* 17 cf *Prosecutor v Tadić* IT-94-1-A (1999) para 191.

[922] Werle (2007) 5 *J Int'l Crim Just* 954 cf *Prosecutor v Tadić* IT-94-1-A (1999) para 191.

[923] Werle (2007) 5 *J Int'l Crim Just* 954 cf *Prosecutor v Tadić* IT-94-1-A (1999) para 191.

[924] Werle & Burghardt "Establishing Degrees of Responsibility" in *Pluralism in International Criminal law* 17.

[925] 18.

[926] 17.

[927] Werle (2007) 5 *J Int'l Crim Just* 954.

[928] KJ Fisher *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Accountable to the World* (2012) 68 81.

[929] Fisher *Moral Accountability and International Criminal Law* 81.

[930] Werle (2007) 5 *J Int'l Crim Just* 953.

[931] Werle & Burghardt "Establishing Degrees of Responsibility" in *Pluralism in International Criminal law* 18.

[932] 18.

[933] Werle (2007) 5 *J Int'l Crim Just* 954 cf *Prosecutor v Tadić* IT-94-1-A (1999) para 191.

[934] Werle (2007) 5 *J Int'l Crim Just* 954 cf *Prosecutor v Tadić* IT-94-1-A (1999) para 191.

[935] Werle & Burghardt "Establishing Degrees of Responsibility" in *Pluralism in International Criminal law* 17-18.

and principal liability, under article 25(3)(a) of the Rome Statute, the ICC must pay attention to the actual contribution and *mens rea* of the accused.

5 6 3 Principal liability in the ICC versus the *ad hoc* tribunals

The ICC Trial Chamber in *Lubanga* stated that commission in article 25(3)(a) of the Rome Statute are "the only independent and non-derivative modes of participation".[936] While the forms of participation in sub-articles 25(3)(b) to 25(3)(d) attribute criminal responsibility for resultant crimes and attempted crimes, article 25(3)(a) of the Rome Statute only attributes criminal responsibility for crimes actually committed.[937] As stated above, only "committing" gives rise to principal liability; any other form of participation results in a derivative form of liability.[938] Werle explains that because commission entails a higher degree of criminal responsibility, article 25(3)(a) of the Rome Statute, including the *actus reus* and *mens rea*, must be construed strictly.[939] As discussed above, the ICC has attributed principal liability, as a co-perpetrator, for Lubanga's involvement in common purpose, for war crimes based on recruiting and enlisting children under the age of fifteen to take part in warfare.[940] In addition, the ICC convicted Katanga, under article 25(3)(d) of the Rome Statute, of one count of crimes against humanity (murder) and four counts of war crimes (murder, attacking civilian populations, destruction of property and pillaging) yet acquitted him of all sex-related charges, for contributing to the commission or attempted commission of a crime by a group with a common purpose.[941]

The ICTY Appeal Chamber in the *Tadić Appeal* found that participation in a JCE is a form of joint commission in customary international law that results in principal liability.[942] Werle explains that the *ad hoc* tribunals attribute liability as a principal either where the accused is the physical perpetrator of the crime or where the commission is "ascribed to one's own conduct".[943] Cassese argues that the ICC is generally authorised to rely upon the JCE doctrine.[944] In addition, Goy argues that the ICC may consider customary international law and general principles of law, including the jurisprudence of the *ad hoc* tribunals, where a *lacunae* exists in article 25(3) of the Rome Statute.[945] Alternatively, when interpreting the scope of the forms of perpetration and participation in article 25(3).[946] For example, the ICC in the *Lubanga Confirmation Decision*, found that neither the Rome Statute nor the Elements of Crimes provided a definition for "international armed conflict".[947] The ICC PTC therefore looked to article 21(1)(b) of the Rome Statute, with due regards for article 21(3), to fill the *lacunae*.[948] Thereby, the ICC relied on the applicable treaties and

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[936] 13-14.

[937] 13-14 cf *Prosecutor v Lubanga* ICC-01/04-01/06-2842 (2012) paras 996-997. See also FZ Giustiniani "The Responsibility of Accomplices in the Case-Law of the ad hoc Tribunals" (2009) 20 *Criminal Law Forum* 441.

[938] Goy (2012) *ICL Rev* 40 cf *Prosecutor* v *Lubanga Dyilo* ICC-01/04-01/06-803-tEN (2007) paras 320 and 323.

[939] Werle (2007) 5 *J Int'l Crim Just* 957 and 961.

[940] *Prosecutor v Lubanga* ICC-01/04-01/06-1049 (2007).

[941] *Prosecutor* v *Katanga & Chui* ICC-01/04-01/07-717 (2014).

[942] Werle (2007) 5 *J Int'l Crim Just* 955 cf *Prosecutor v Tadić* IT-94-1-A (1999) para 185.

[943] Werle (2007) 5 *J Int'l Crim Just* 955.

[944] Cassese (2007) *J Int'l Crim Just* 132.

[945] Goy (2012) *ICL Rev* 5. Goy's argument pertained to liability for an omission, which is not referred to in article 25 of the Rome Statute (2003) 2187 UNTS 90.

[946] Goy (2012) *ICL Rev* 5.

[947] 6 cf *Lubanga Confirmation Decision* ICC-01/04-01/06-803-tEN (2007) para 205.

[948] Goy (2012) *ICL Rev* 6 cf *Lubanga Confirmation Decision* ICC-01/04-01/06-803-tEN (2007) para 205. Goy argues that the use of article 31 of the VCLT instead of article 21 of the Rome Statute would have probably resulted in the

principles and rules of international law, including the established principles of the international law of armed conflict.[949] In doing so the ICC Pre-Trail Chamber referred to the jurisprudence of the ICTY, namely; *Prosecutor v Bemba Gombo* ("*Bemba Gombo Confirmation Decision*").[950]

According to Goy's interpretation of the case law, the ICC can recognise participation in a JCE as a form of criminal responsibility under article 25(3)(d) as both forms of liability are based on a subjective criterion of shared intent.[951] However, without referencing authority, Goy argues that article 25(3)(d) "appears" to provide solely for accessorial forms of liability.[952] Moreover, Goy suggests that the wording of article 25(3)(d) creates the impression that the contributions listed are residual forms of accessorial liability.[953] Furthermore, Goy interprets the *Lubanga Confirmation Decision* to mean that the JCE doctrine is not included in article 25(3)(a) of the Rome Statute because a *significant* contribution does not amount to an *essential* contribution.[954] According to Goy, a contribution to a JCE cannot amount to a commission and consequently the accused cannot qualify as principal perpetrator in terms of article 25(3)(a) of the Rome Statute.[955] Arguably, Goy limits the degree of liability for making a contribution to a JCE to accessorial liability, a derivative form of liability.

Arguably, article 25(3)(d) of the Rome Statute is not comparable to JCE liability as construed by the case law of the *ad hoc* tribunals because it is a catch all provision that does not require intent. According to Damgaard, article 25(3)(d) of the Rome Statute does not include JCE category three.[956] Werle states that: "[t]his catch-all provision applies to indirect forms of assistance - such as financing the group - that do not warrant liability for either co-perpetration or aiding and abetting, as they have no substantial effect on the commission of the crime under international law."[957] Furthermore, the ICC PTC in *Lubanga* describes contributions under article 25(3)(d) of the Rome Statute as a "subsidiary form of participation" and "the weakest form of liability".[958] According to the differentiation model, a lower degree of guilt ensues from a contribution to a group as described by article 25(3)(d) of the Rome Statute than aiding and abetting as described by article 25(3)(c) of the Rome Statute. Alternatively, the *ad hoc* tribunals attribute accessorial liability where the accused's contribution had a substantial effect on the commission of a crime by someone else.[959] The ICTY Appeal Chamber in the *Prosecutor v Vasiljević* ("*Vasiljević Appeal*"),[960] *Krstić* and

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same outcome, however article 31 of the VCLT "respects the hierarchy of sources better and the systematic interpretation allows for taking into consideration the structure of article 25(3) of the Rome Statute".

[949] Goy (2012) *ICL Rev* 6 cf *Lubanga Confirmation Decision* ICC-01/04-01/06-803-tEN (2007) para 205.

[950] Goy (2012) *ICL Rev* 6 cf *Lubanga Confirmation Decision* ICC-01/04-01/06-803-tEN (2007) paras 208-210 cf *Prosecutor v Bemba Gombo* (Pre-Trial Chamber II) ICC-01/05-01/08-424 Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (15 June 2009) para 220.

[951] Goy (2012) *ICL Rev* 8.

[952] 8.

[953] 8.

[954] 8-9 cf *Lubanga Confirmation Decision* ICC-01/04-01/06-803-tEN (2007) paras 334-337.

[955] Goy (2012) *ICL Rev* 8-9.

[956] Damgaard *Individual Criminal Responsibility for Core International Crimes* 176. According to Damgaard, Sliedregt and Ambos share the same view. See also K Ambos "Remarks on the General Part of International Criminal Law" (2006) 4 *Journal of International Criminal Justice* 660 672-673.

[957] Werle (2007) 5 *J Int'l Crim Just* 970-971 cf J Vogel "Individuelle Verantwortlichkeit im Völkerstrafrecht" 114 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2002) 403-436 and 421.

[958] Werle (2007) 5 *J Int'l Crim Just* 971 cf *Prosecutor v Lubanga* ICC-01/04-01/06 (2007) para 337.

[959] Werle (2007) 5 *J Int'l Crim Just* 955.

[960] Werle & Burghardt "Establishing Degrees of Responsibility" in *Pluralism in International Criminal law* 15 cf *Prosecutor v Vasiljević* IT-98-32-A (2004) para 182.

Prosecutor v Simić ("*Simić Appeal*") found that aiding and abetting warrants a lower sentence than responsibility for co-perpetration and participating in a JCE.[961] For example, in the *Krstić Appeal* the sentence was decreased from 46 to 35 years imprisonment when the conviction was changed on appeal from participating in a JCE to aiding and abetting.[962] The decrease in sentencing was based on the decrease in seriousness of the crime. Furthermore, article 25(3)(d) of the Rome Statute refers to "contribut[ions] to the commission or attempted commission of such a crime by a group of persons acting with a common purpose," in "any other way," after listing committing, inducing and assisting or aiding and abetting.[963] Arguably, by using the phase "[i]n any other way contributes" the Rome Statue acknowledges that committing, inducing and assisting are all forms of contributions, in varying degrees. Moreover that a contribution to the commission of a crime by a group can amount to a commission, an inducement or assistance in certain circumstances yet failing those requirements, a contribution in any other way will be covered under sub-article 25(3)(d) of the Rome Statute. Damgaard argues that it could be argued that JCE category three is encompassed by article 25(3)(a) of the Rome Statute, which sets out criminal responsibility for commission.[964]

Arguably, JCE liability, as understood by the *ad hoc* tribunals, is comparable in severity and in the characterisation of its elements to commission as provided for in article 25(3)(a) of the Rome Statute. As discussed in chapter two, the ICTY in the *Furundžija Appeal* stated that two types of criminal participation exist in international law; co-perpetrators who participate in a JCE and aiders and abettors.[965] Furthermore, the ICTY Appeal Chamber found that article 7(1) of the ICTY Statute includes acting in concert as a form of commission.[966] Arguably, the *Furundžija Appeal* provides support for the inclusion of JCE liability under article 25(3)(a) of the Rome Statute, which lists joint commission or acting in concert "with another" as a form of commission.[967] However, the ICC is not bound to accept the ICTY's jurisprudence when interpreting article 25, nonetheless; the ICC might elect to consider the jurisprudence of the *ad hoc* tribunals if their interpretation of commission and principal liability is consistent with article 25 of the Rome Statute. In order to establish whether a contribution to a JCE can be included in article 25(3)(a) of the Rome Statute, the subjective and objective elements of each must be compared.

5 6 3 1 Mens rea

Article 25(3)(a) of the Rome Statute requires that *"*every co-perpetrator has to act with the requisite mental element himself".[968] The ICTY in the *Tadić Appeal* stated that a participant in a JCE can incur criminal responsibility for crimes that fall beyond the scope of the common plan where they

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[961] Werle & Burghardt "Establishing Degrees of Responsibility" in *Pluralism in International Criminal law* 15 cf *Prosecutor v Krstić* IT-98-33-A (2004) para 268; *Prosecutor v Simić* IT-95-9-A (2006) para 265.

[962] Werle & Burghardt "Establishing Degrees of Responsibility" in *Pluralism in International Criminal law* 15-16 cf *Prosecutor v Krstić* IT-98-33-A (2004) para 275.

[963] Art 25(3)(d) of the Rome Statute (2003) 2187 UNTS 90.

[964] Damgaard *Individual Criminal Responsibility for Core International Crimes* 176.

[965] *Prosecutor v Furundžija* IT-95-17/1-A (2000) para 118.

[966] Para 116.

[967] Art 25(3)(a) of the Rome Statute (2003) 2187 UNTS 90: "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."

[968] Werle (2007) 5 *J Int'l Crim Just* 959 and 961 (My own emphasis added).

are a "natural and foreseeable consequence" of executing the common plan.[969] Werle argues that, when using JCE category three, the accused does not need to "fulfil the *mens rea* of the crime on his [or her] own".[970] However, the ICTY in the *Brđanin Appeal* stated that: "[t]he accused must possess the requisite intent".[971] Therefore the prosecution must prove that the un-concerted crime was objectively foreseeable and subjectively foreseen by the accused.[972] Furthermore, the ICTR in *Karemera* stated that principal liability only ensues after the prosecution has proved that the accused shared the intent to further to the common purpose of the JCE.[973] Moreover, the requisite intent of the accused can only be established beyond a reasonable doubt if it is the only reasonable inference on the evidence.[974] Therefore JCE category three requires that the accused possesses a form of intent (*mens rea*) known as *dolus eventualis.* Where the accused subjectively foresees the possibility that an undesired crime might occur, in substantially the same manner as it does occur, during or as a result of the execution of the concerted crime yet the accused reconciles him or herself with that risk and proceeds nonetheless; he or she possesses *dolus eventualis*.[975] For example, the ICTY Trial Chamber in the *Prosecutor v Brđanin* ("*Brđanin*") stated, with respect to the third category of JCE, that "[a]n accused convicted of a crime under the third category of joint criminal enterprise need not be shown to have intended to commit the crime or even to have known with certainty that the crime was to be committed."[976] The ICTY elaborates further:

> "[i]t is sufficient that the accused entered into a joint criminal enterprise to commit a different crime with the awareness that the commission of that agreed upon crime made it

[969] *Prosecutor v Tadić* IT-94-1-A (1999) para 228; *Prosecutor* v *Vasiljević* IT-98-32-A (2004) para 101; *Prosecutor v KvoČka* et al IT-98-30/1-A (2005) para 83; *Prosecutor v Ntakirutimana & Ntakirutimana* ICTR-96-10-A/ICTR-96-17-A (2004) para 46Z. See also *Prosecutor v Krstić* IT-98-33-T (2001) paras 615-618. Krstić was member of the JCE, aimed at forcibly transferring the Bosnian Muslim civilians despite knowing that the crimes were related to a widespread or systematic attack against a civilian population he participated in the common purpose, which indicated that the specific intent required for a liability for a crime against humanity was satisfied. Krstić therefore incurred liability for the deviatory or incidental murders, rapes, beatings and abuses committed in the execution of the JCE at Potoĉari.

[970] Werle (2007) 5 *J Int'l Crim Just* 959 (My own emphasis added).

[971] *Prosecutor* v *Brđanin* IT-99-36-A (2007) paras 365, 411 and 429.

[972] *Prosecutor v Ojdanić* et al IT-99-37-AR72 Separate Opinion of Judge David Hunt on Challenge by Ojdanić IT-99-37-AR72 (2003) para 11. See also *Prosecutor v Tadić* ICTY IT-94-1-A (1999) para 204; *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A para 627 cf *Prosecutor* v *KvoČka* et al IT-98-30/1-A (2005) para 86.

[973] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-T (2012) para 155; *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) para 608: The Appeal Chamber upheld that the Trial Chamber had "adequately explained and reasonably concluded" that the perpetrators of rape and sexual assault possessed genocidal intent.

[974] *Prosecutor* v *Brđanin* IT-99-36-A (2007) para 429.

[975] J Burchell *Principles of Criminal Law* 3 ed (2005) 152.

[976] Werle (2007) 5 *J Int'l Crim Just* 959 cf *Prosecutor* v *Brđanin* (Trial Chamber) IT-99-36-T (1 September 2004) para 709 cf *Prosecutor* v *Brđanin* (Trial Chamber) IT-99-36-R77 Decision on Motion for Acquittal Pursuant to Rule 98bis (19 March 2004) para 57: *dolus specialis* could not be reconciled with the *mens rea* required for a conviction pursuant to the third category of joint criminal enterprise because the latter only requires awareness of the risk that genocide would be committed by other members of the group. Therefore this *mens rea* and falls short of the threshold needed to satisfy the specific intent required for a conviction for genocide.

> reasonably foreseeable to him that the crime charged would be committed by other members of the joint criminal enterprise, and it was committed."[977]

Furthermore, where the crime charged requires genocidal intent "the Prosecution will be required to establish that it was reasonably foreseeable to the accused that an act specified in [a]rticle 4(2) would be committed and that it would be committed with genocidal intent".[978] In summation, the *ad hoc* tribunals require that the accused must possess the direct intent (*dolus directus*) to contribute to the group and further the commission of the international crime that falls within the common purpose.[979] Also, the accused does not need to possess direct intent with regards to the deviatory crime but must possess *dolus eventualis* before criminal responsibility for the commission of the deviatory crime can ensue.

According to Werle's understanding of *Lubanga*: "[f]oreseeing and reconciling yourself with the risk is enough for JCE liability under ICTY but this is not sufficient for ICC, the accused must act with the specific requisite intent."[980] Article 25(3)(a) of the Rome Statute and the Elements of Crimes, require that the accused act with the requisite *mens rea* for the crime especially where the crime falls within the common purpose.[981] Where the crime falls outside the common purpose of the group, the accused must satisfy the specific *mens rea* (for example, the intent to destroy for genocide) for the crime.[982] If the crime does not involve specific intent (*dolus specialis*), the prosecution must prove that the accused satisfies the general *mens rea*, pursuant to article 30 of Rome Statute.[983] The ICC in *Lubanga* interpreted article 30 of the Rome Statute as including *dolus eventualis*.[984] According to Goy, the ICC PTC has provided different interpretations for article 30 of the Rome Statute and the jurisprudence the tribunals can therefore be helpful in reconciling these differences.[985]

In conclusion, JCE category three arguably fits within the plain reading of joint commission and satisfies its subjective element because article 25(3)(a) of the Rome Statute provides for crimes that fall outside of the common purpose yet which are a natural foreseeable consequence of executing the common purpose. Where the crime does not require specific intent, Werle explains that the subjective element for a commission is satisfied where "the co-perpetrator is aware of the risk that the crime might be committed in the execution of the common plan, and that he accepted that risk" (ie *dolus eventualis*).[986] Werle posits that "this standard seems to be consonant with the threshold established by the ICTY for the third category of the joint criminal enterprise doctrine".[987]

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[977] Werle (2007) 5 *J Int'l Crim Just* 959 cf *Prosecutor* v *Brđanin* IT-99-36-T (2004) para 709 cf *Prosecutor* v *Brđanin* IT-99-36-R77 Decision on Motion for Acquittal Pursuant to Rule 98bis (2004) para 57.

[978] Werle (2007) 5 *J Int'l Crim Just* 959 cf *Prosecutor* v *Brđanin* IT-99-36-T (2004) para 709 cf *Prosecutor* v *Brđanin* IT-99-36-R77 Decision on Motion for Acquittal Pursuant to Rule 98bis (2004) para 57.

[979] *Prosecutor v Haradinaj* ICTY IT-04-84-T (2008) 135-139; *Prosecutor v Tadić* IT-94-1-A (1999) para 196; *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) para 634.

[980] Werle (2007) 5 *J Int'l Crim Just* 963 cf *Prosecutor v Lubanga* ICC-01/04-01/06 (2007) para 349.

[981] Werle (2007) 5 *J Int'l Crim Just* 962 cf art 25 of the Rome Statute (2003) 2187 UNTS 90. See the ICC, "Elements of Crimes" (2002) pursuant to article 9(1) of the Rome Statute ICC Doc ICC-ASP/1/3 at 108, UN Doc PCNICC/2000/1/Add.2 (2000).

[982] Werle (2007) 5 *J Int'l Crim Just* 962.

[983] 962 cf art 25 of the Rome Statute (2003) 2187 UNTS 90. See the ICC, "Elements of Crimes" (2002) pursuant to article 9(1) of the Rome Statute ICC Doc ICC-ASP/1/3 at 108, UN Doc PCNICC/2000/1/Add.2 (2000).

[984] Werle (2007) 5 *J Int'l Crim Just* 962 cf *Prosecutor v Lubanga* ICC-01/04-01/06 (2007) para 323.

[985] Goy (2012) *ICL Rev* 7.

[986] Werle (2007) 5 *J Int'l Crim Just* 963.

[987] 963.

However, where the crime falls outside of the common purpose, as rape usually does, the accused must also satisfy the specific intent if the crime is a specific intent crime. The attachment of specific intent where it does not exist, violates the principle of personal culpability.[988] After the accused has made a substantial contribution, co-perpetration and the JCE doctrine attributes the *contribution* of others to the accused, *not* their *mens rea*.[989] It appears that the subjective requirements of JCE category one are compatible with the subjective requirements for a commission, pursuant to articles 25(3)(a) and 30 of the Rome Statute. Furthermore, the subjective requirements of JCE category three are also compatible if the crime does not require specific intent.

5 6 3 2 Actus reus

The ICTY Appeal Chamber in the *Tadić Appeal* clearly sets out the three objective elements that need to be satisfied before JCE liability can ensue, including; a group of persons, the emergence of a common plan and the contribution of the accused to a crime within the common plan.[990] The ICC in the *Lubanga Confirmation Decision* set out three similar elements; the existence of an agreement or common plan between two or more persons that includes the commission of a crime or an element of criminality and the co-perpetrators' awareness that implementing the common plan will result in the commission of a crime and reconcile themselves with that outcome.[991] Commission, pursuant to article 25(3)(a) of the Rome Statute, includes; the physical perpetration the crime, joint commission and indirect commission.[992] Physical perpetration is where the accused carried out the *actus reus* of the crime himself.[993] Indirect perpetratorship is where the accused uses another as an instrument.[994] Indirect perpetration acknowledges the norm "*tater hinter dem tater*" that attributes criminal responsibility for the perpetrator-behind-the-perpetrator.[995] The indirect perpetrator is criminally responsible because he or she holds a superior position and exercises tight control over the physical perpetrator's will and actions; usually through an organised criminal hierarchy.[996] Joint commission, otherwise known as co-perpetration, is where two or more perpetrator possess joint control over criminal conduct through the essential nature of their separate contributions together with an awareness of their ability to frustrate the commission.[997] Therefore in order to bear the same responsibility as the physical perpetrator of the crime who carries out the *actus reus*, the contribution must be of similar weight.[998]

Like the objective elements of JCE liability, joint commission requires an agreement between co-perpetrators ie the existence of a common plan.[999] Joint commission (co-perpetration) attributes criminal responsibility to "criminal co-operation *within* the framework of a common plan or

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[988] 963 cf *Prosecutor v Lubanga* ICC-01/04-01/06 (2007) para 349.

[989] Werle (2007) 5 *J Int'l Crim Just* 963 cf K Ambos *Internationales Strafrecht* (2006) 134.

[990] *Prosecutor v Tadić* IT-94-1-A (1999) para 227.

[991] Goy (2012) *ICL Rev* 41 cf *Lubanga Confirmation Decision* ICC-01/04-01/06-803-tEN (2007) paras 343-344.

[992] Art 25(3)(a) of the Rome Statute (2003) 2187 UNTS 90.

[993] Werle (2007) 5 *J Int'l Crim Just* 963.

[994] Badar *The Concept of Mens Rea in International Criminal Law* 364.

[995] Werle (2007) 5 *J Int'l Crim Just* 964 cf A Eser "Individual Criminal Responsibility" in A Cassese, P Gaeta and JR WD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary Vol 1* (2002) 767 794.

[996] Werle (2007) 5 *J Int'l Crim Just* 963-964 cf Eser "Individual Criminal Responsibility" in *The Rome Statute of the International Criminal Court* 793. See also Badar *The Concept of Mens Rea in International Criminal Law* 364.

[997] Badar *The Concept of Mens Rea in International Criminal Law* 362.

[998] Werle (2007) 5 *J Int'l Crim Just* 962.

[999] 958.

design".[1000] Due to the "work sharing cooperation each is liable for the actions of others" ie "every co-perpetrator is responsible for the whole crime committed within the framework of the common purpose".[1001] Furthermore, like joint commission, JCE category three also attributes liability for crimes that are foreseeable yet fall outside of the common purpose. It appears that article 25(3)(a) of the Rome Statute might not be able to support liability pursuant to JCE category three due to requisite degree of the contribution unless one can prove that the contribution to the JCE was a contribution to the crime at the preparatory stage. Nonetheless article 25(3)(a) of the Rome Statute may support contributions in terms of JCE categories one and two.[1002] Moreover, the ICC in the *Lubanga Confirmation Decision* expressly rejected the argument that joint commission includes JCE liability.[1003] However, according to Cassese, committing jointly also covers certain contributions to a JCE.[1004] This uncertainty calls for a more detailed discussion of the tests that distinguish a commission from other forms of contributions and thereby principle liability from derivative forms of liability.

5 6 4 Comparing the *ad hoc* tribunals' and the ICC's tests for principal liability

In *Katanga*, *Chui*, the *Bemba Gombo Confirmation Decision* and *Lubanga* the ICC adopted a control-of-the-crime-approach to distinguish commission that amounts to principal liability from other forms of participation in article 25(3)(b) to (d) that amount to accessorial liability.[1005] According to the ICC in the *Lubanga Confirmation Decision*, co-perpetrators jointly control the crime through the essential nature of their contributions or tasks.[1006] An essential contribution can occur during planning, physical perpetration or organising.[1007] The control-criterion is consistent with the German criminal law understanding of co-perpetration ie *Mittäterscaft* based on the functional control over the crime.[1008] However it is broader than Roxin's theory of co-perpetration because the essential contribution can be made at any stage before or during the execution ie during the planning or execution phase.[1009] In the *Lubanga Confirmation Decision* the ICC added that an accused possesses the necessary control when he or she can decide whether and how the offence

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[1000] 958.

[1001] 958.

[1002] 957 and 961.

[1003] Goy (2012) *ICL Rev* 40 cf *Lubanga Confirmation Decision* ICC-01/04-01/06-803-tEN (2007) para 325.

[1004] Cassese *International Criminal Law* 212.

[1005] Werle & Burghardt "Establishing Degrees of Responsibility" in *Pluralism in International Criminal Law* 25 cf *Prosecutor v Lubanga* ICC-01/04-01/06 (2007) para 338. *Katanga Confirmation Decision* ICC-01/04-01/07-717 (2008) para 480; *Prosecutor v Al Bashir* ICC02/05-01/09-3 Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (2009) para 210; *Prosecutor v Bemba Gombo* ICC-01/05-01/08-424 (2009) para 348; *Prosecutor v Banda and Jerbo* (Pre-Trial Chamber I) ICC-02/05-03/09-121-Corr-Red Decision on the Confirmation of Charges' (7 March 2011) para 126; *Prosecutor v Ruto, Kosgey and Sang* (Pre-Trial Chamber II) ICC-01/09-01/11-373 Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute (23 January 2012) paras 291-292; *Prosecutor v Muthaura, Kenyatta and Ali* (Pre-Trial Chamber II) ICC-01/09-02/11-382 Decision on the confirmation of charges (23 January 2012) para 296; *Prosecutor v Lubanga* ICC-01/04-01/06-2842 (2012) para 994: with regards to joint commission.

[1006] Goy (2012) *ICL Rev* 41 cf *Lubanga Confirmation Decision* ICC-01/04-01/06-803-tEN (2007) para 341.

[1007] Werle (2007) 5 *J Int'l Crim Just* 962.

[1008] Badar *The Concept of Mens Rea in International Criminal Law* 407.

[1009] 407 cf C Roxin *Täterschaft und Tatherrschaft* (2000) 294 299.

will be committed.[1010] According to Werle, a "contribution is 'essential' if the common purpose cannot be achieved without it".[1011] Therefore each co-perpetrator possesses effective control when they are equally able to frustrate the commission.[1012] Their contributions are therefore equally interdependent and temporarily irreplaceable. However, each co-perpetrator "need not possess overall control over the offence, because they all depend on one another for its commission".[1013] In addition, the principal perpetrator(s) must be aware that he, she or they control the outcome.[1014] Therefore the control-criterion is an objective-subjective test, which determines whether the accused made an *essential* contribution.[1015] The control-criterion is superior to an approach that focuses predominantly on subjective criteria.[1016] The "[s]ubjective criteria should not be the sole or predominant indicator" of the level of individual criminal responsibility.[1017] If the test focuses solely on the subjective element, the fact that the accused's actions determine the degree of guilt not purely his or her state of mind could be lost.[1018]

According to the *ad hoc* tribunals, the JCE doctrine can be used to establish principal liability.[1019]

The ICTY Trial Chamber in *Prosecutor v Vasiljević* ("*Vasiljević*"), referring to JCE liability, stated that "all participants *to the common purpose*, are equally responsible for the crime committed, 'regardless of the part played by each in its commission'".[1020] The ICTY in the *Vasiljević Appeal* explained that JCE liability would occur when the subjective element has been satisfied, irrespective of the degree of participation.[1021] Furthermore, the ICTY Appeals Chamber in the *KvoĈka Appeal* stated that "in general, there is no specific legal requirement that the accused make a substantial contribution to the joint criminal enterprise".[1022] It also added that it is "not necessary that the accused takes part directly in committing the crime under international law, or that the contribution is indispensable for the realization of the common plan".[1023] It appears from these excerpts that when the accused shares in the intention to further the underlying common purpose individual criminal responsibility arises.[1024] The ICC in the *Lubanga Confirmation Decision* found that a purely subjective test that attributes liability as a principal where the accused's contribution to the JCE was made with the requisite state of mind (intent) was used by the *ad hoc* tribunals.[1025] Goy posits that unlike JCE liability, the role and degree of each perpetrator's contribution is exceptionally relevant under principal liability as conceived by the ICC.[1026] It appears that principal

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[1010] *Lubanga Confirmation Decision* ICC-01/04-01/06-803-tEN (2007) para 330.

[1011] Werle (2007) 5 *J Int'l Crim Just* 962.

[1012] *Lubanga Confirmation Decision* ICC-01/04-01/06-803-tEN (2007) paras 338-339 and 347.

[1013] Goy (2012) *ICL Rev* 41 cf *Lubanga Confirmation Decision* ICC-01/04-01/06-803-tEN (2007) para 342.

[1014] *Lubanga Confirmation Decision* ICC-01/04-01/06-803-tEN (2007) paras 338-339.

[1015] Goy (2012) *ICL Rev* 6 and 9.

[1016] Werle & Burghardt "Establishing Degrees of Responsibility" in *Pluralism in International Criminal Law* 26.

[1017] 26.

[1018] 26.

[1019] Werle (2007) 5 *J Int'l Crim Just* 955 cf *Prosecutor v Tadić* IT-94-1-A (1999) para 185.

[1020] Werle (2007) 5 *J Int'l Crim Just* 959 cf *Prosecutor v Vasiljević* (Trial Chamber) IT-98-32-T (29 November 2002) para 67.

[1021] Goy (2012) *ICL Rev* 27-28 cf *Prosecutor* v *Vasiljević* IT-98-32-A (2004) para 111.

[1022] Werle (2007) 5 *J Int'l Crim Just* 959 cf *Prosecutor v KvoČka* et al IT-98-30/1-A (2005) paras 87, 104 and 187.

[1023] Werle (2007) 5 *J Int'l Crim Just* 959 cf *Prosecutor v KvoČka* et al IT-98-30/1-A (2005) paras 87, 104 and 187.

[1024] Goy (2012) *ICL Rev* 27-28 cf *Prosecutor* v *Vasiljević* IT-98-32-A (2004) para 111.

[1025] Badar *The Concept of Mens Rea in International Criminal Law* 406 cf *Lubanga Confirmation Decision* ICC-01/04-01/06-803-tEN (2007) para 329.

[1026] Goy (2012) *ICL Rev* 28.

liability arises in more limited circumstances before the ICC compared to the *ad hoc* tribunal's interpretation.[1027] Therefore due to the difference between the tests that determine commission, Goy argues that the jurisprudence of the *ad hoc* tribunals will not be of use when interpreting the objective elements of article 25(3)(a) of the Rome Statute ie the degree of the contribution required.[1028]

However, the ICTY in the *Brđanin Appeal* (a more recent case) stated that principal liability only ensues where the accused possessed the requisite intent and made a *significant* contribution to furthering the JCE.[1029] Also, the ICTR in *Gacumbitsi v The Prosecutor* ("*Gacumbitsi Appeal*") and the *Furundžija Appeal* clarifies that "committing" includes physical perpetration or playing an *integral* part in the commission of a crime with others.[1030] Therefore principal liability, established by using JCE doctrine, does not ensue as a result of the accused's control over the physical perpetrator, it does however ensue based on the accused's contribution to the common purpose of the JCE and his or her shared intent with members.[1031] Arguably, principal liability as understood by the *ad hoc* tribunals, like the ICC, is determined by an objective-subjective test. The accused must at least foresee and accept that the crime he or she is being charged with might occur, share the direct intent to execute the crime within the common plan (subjective elements) as well as make a significant contribution to furthering the common purpose of the JCE (objective element) in order to establish liability as a principal. While the subjective element may determine whether the accused incurs JCE liability, as stated in the *Vasiljević Appeal* and confirmed by Goy above, I am of the opinion that it is not sufficient to incur *principal* liability for crimes committed by other members. Therefore while JCE liability may occur as soon as the subjective element is met, liability as a principal only ensues after the objective-subjective test is discharged. Furthermore, the only way to reconcile the seemingly contradictory statements, from the *Brđanin Appeal*, *Vasiljević Appeal* and *KvoĈka Appeal* discussed above, is by clarifying that the JCE doctrine does not always result in liability as a principal. JCE liability attributes equal responsibility to all members of the group; however the degree of liability attributed can be accessorial or principal in nature depending on the degree of participation.

According to the ICC in the *Lubanga Confirmation Decision*, an accused can incur principal liability as a co-perpetrator, pursuant to article 25(3)(a) of the Rome Statute, for making an contribution at the preparatory or execution stage provided that following five elements are met.[1032] Firstly, an agreement or common plan exists between two or more persons.[1033] This objective element is consistent with JCE category one and three. Secondly, "a co-ordinated and essential contribution" must be made by each co-perpetrator "resulting in the realisation of the objective

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[1027] Werle (2007) 5 *J Int'l Crim Just* 963.

[1028] Goy (2012) *ICL Rev* 7.

[1029] *Prosecutor* v *Brđanin* IT-99-36-A (2007) para 430.

[1030] Goy (2012) *ICL Rev* 35 cf *Gacumbitsi v The Prosecutor* (Appeal Judgement) ICTR-2001-64-A Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide (7 July 2006) paras 60-61. See also *Prosecutor v Furundžija* IT-95-17/1-T (1998) para 252: To be convicted as a co-perpetrator, the accused "must participate in an integral part" of the crime. This was reiterated in *Prosecutor v Furundžija* IT-95-17/1-A (2000) para 118. See also the *Prosecutor v Tadić* IT-94-1-A (1999) para 188. The ICTY in the *Tadić* Appeal states that it is possible that the physical perpetration of the crime and the "vital" contribution by another group member may result in the same degree of liability.

[1031] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) para 155.

[1032] Badar *The Concept of Mens Rea in International Criminal Law* 407 cf *Lubanga Confirmation Decision* ICC-01/04-01/06-803-tEN (2007) paras 343-367.

[1033] Badar *The Concept of Mens Rea in International Criminal Law* 407 cf *Lubanga Confirmation Decision* ICC-01/04-01/06-803-tEN (2007) paras 343-345.

elements of the crime".[1034] Arguably, a contribution to a JCE, through which the commission of un-concerted crimes is enabled, is a contribution at the preparatory phase. Therefore in certain circumstances, where the contribution to the JCE is essential in nature therefore resulting in the realisation of the objective elements of the un-concerted crime, principal liability can arguably ensue before the ICC. For instance in *Lubanga*, the accused incurred principal liability as a co-perpetrator for his involvement in the common purpose.[1035] The ICC in *Lubanga* found that the first two objective elements must be assessed on all the relevant evidence before the court.[1036] Thirdly, the co-perpetrators must fulfil "the subjective elements of the crime in question" including specific intent, if required.[1037] Fourthly, the all the co-perpetrators must "be mutually aware and mutually accept" that executing the common plan may result in the realisation of the objective elements of the crime.[1038] The fourth element is characterised by a cognitive element; ie awareness, and a volitional element; ie acceptance.[1039] Arguably, the third and fourth elements of the crime are fulfilled by the accused's intent in the form of *dolus eventualis* ie his or her awareness and acceptance of the commission of the crime as a likely result of his or her contribution to the JCE. However, Badar argues that the third element can only be satisfied by *dolus directus* of the first degree and *dolus directus* of the second degree (*dolus indirectus*) whereas *dolus eventualis* is insufficient.[1040] Furthermore, it appears that the accused's intent in the form of *dolus eventualis* is insufficient to discharge the requisite special intent, from Werle and Badar's understanding of *Lubanga*.[1041] However, Badar adds that the accused can alternatively satisfy the requisite intent by being aware of the factual circumstances that classify a specific crime as a crime against humanity.[1042] Arguably, this statement supports the possibility that *dolus eventualis* is sufficient. The relationship between JCE category three, special intent crimes and principal liability will be discussed in greater detail in the following chapter six. Fifthly, the co-perpetrator "must be aware of the factual circumstances enabling him to jointly control the crime" ie he is aware of his ability to frustrate the commission of the crime.[1043] This subjective element of the control-criterion, is not satisfied by any of the requirements for JCE liability therefore the prosecution would have to prove this additional requirement in the ICC. In conclusion, a contribution to a JCE with the requisite intent can arguably amount to a commission, pursuant to article 25(3)(a) of the Rome Statute, in very particular circumstances. Therefore where the accused's degree of contribution to a JCE and his or her mental state satisfies the control-over-crime criterion then the ICC could attribute principal liability to him or her, in theory, where the crime does not require specific intent. For instance, where the accused's involvement in the common purpose warrants the attribution of principal liability as it did in *Lubanga*.

[1034] Badar *The Concept of Mens Rea in International Criminal Law* 407 cf *Lubanga Confirmation Decision* ICC-01/04-01/06-803-tEN (2007) paras 346-348.

[1035] *Prosecutor v Lubanga* ICC-01/04-01/06-1049 (2007).

[1036] Badar *The Concept of Mens Rea in International Criminal Law* 407 cf *Prosecutor v Lubanga* ICC-01/04-01/06-2842 (2012) para 1006.

[1037] Badar *The Concept of Mens Rea in International Criminal Law* 407 cf *Lubanga Confirmation Decision* ICC-01/04-01/06-803-tEN (2007) paras 349-360.

[1038] Badar *The Concept of Mens Rea in International Criminal Law* 407.

[1039] 408.

[1040] 407.

[1041] Werle (2007) 5 *J Int'l Crim Just* 963 cf *Prosecutor v Lubanga* ICC-01/04-01/06 (2007) para 349. Refer back to *5 6 3 1 Mens rea* above. See also Badar *The Concept of Mens Rea in International Criminal Law* 408 cf *Prosecutor v Lubanga* ICC-01/04-01/06-2842 (2012) para 349.

[1042] Badar *The Concept of Mens Rea in International Criminal Law* 422.

[1043] 407 cf *Lubanga Confirmation Decision* ICC-01/04-01/06-803-tEN (2007) paras 366-367.

5 7 Conclusion

The *ad hoc* tribunals have accepted that a contribution to a JCE, with the requisite intent, may amount to liability as a principal perpetrator by using JCE category three. The ICC has not used the JCE doctrine. The ICC has, however; attributed accessorial liability, pursuant to article 25(3)(d) of the Rome Statute, for contributing to a group that committed a crime. Furthermore, the ICC has attributed principal liability, pursuant to article 25(3)(a) of the Rome Statute, for the co-perpetrator's involvement in a common purpose. Considering the intimate nature of sexual violence, the hierarchy within which combatants operate and the varying manners in which they can contribute to the commission of crimes; it arguably would be insensitive to the nature and context of the crime to limit principal liability to the physical perpetrators of the crime. It would therefore be beneficial for the ICC to take note of developments such as the JCE doctrine when interpreting commission and principal liability, as entrenched in article 25(3) of the Rome Statute. The apparent benefit is however insufficient in obligating or encouraging the ICC to consider the jurisprudence of the *ad hoc* tribunals. I have therefore offered, authority for this proposition by analysing the theoretical foundation and emergence of precedent in international law, customary international law, the primary instrument of the ICC ie the Rome Statute, the VCLT and the human rights standard.

As a point of departure I concluded that the *stare decisis* principle does not generally apply in international law. However, it is apparent from extensive case law that the judiciary and legal practitioners still make use of case law in providing reasons for their findings and in support of their interpretation, respectively. It therefore appears that the use of precedent has emerged as a state practice. From a doctrinal point of view it is clear that judicial decisions are not law and the findings of any judicial institution do not bind any parties other than the parties to the specific case. However an investigation into the emergence of the use of precedent has revealed that; applicable sources for interpretation such as rules and practices of international law might be reflected within the jurisprudence of other judicial institutions. In addition, states prefer predictability and consistency over starting each case a new. Even though they are not bound by the principle of *stare decisis*, they have elected to follow the decisions. By acting, states display their understanding of the rules and practices of international law and over time, with conviction, these practices become part of customary international law. Moreover, certain state parties have expressly elected to authorise the precedence of prior decisions, through the constitutive instruments, to the PCIJ and ICC, over their own subsequent decisions.

After establishing that the use of case law is a generally accepted practice, while not binding in nature, the focus shifted to the Rome Statute. As the primary and constitutive treaty of the ICC; the Rome Statute sets out the power, competencies and limitations of the ICC. Article 21 of the Rome Statute, expressly lists the applicable sources that should be used when interpreting the Rome Statute and the order in which they should be applied. The Rome Statute is the primary source. In addition, principles and rules of international law and general principles of law are listed as applicable sources. Principles and rules of international law include; customary international law and international criminal law. It is evident that the jurisprudence of the *ad hoc* tribunals is neither expressly listed as a source for interpreting the Rome Statute nor deemed to be international law itself. However the jurisprudence of the *ad hoc* tribunals does display principles and rules of international law and general principles of law. Therefore the ICC could look to the jurisprudence of the tribunals when interpreting article 25 of the Rome Statute.

Furthermore, while the plain reading of the VCLT does not expressly include the jurisprudence of the *ad hoc* tribunals as a source of interpretation, a purposive interpretation does. The purpose of the VCLT, pursuant to article 31(3)(c), is to foster coherency between sources of law such as these three constitutive treaties. A broad and systematic view of the "context" of the Rome Statute, beyond the text itself, includes the jurisprudence of the *ad hoc* tribunals. Firstly, the ICC and the *ad hoc* tribunals both adjudicate on matters of international criminal law. Therefore even though the

forums differ they both operate within the context of international criminal law. Secondly, while drafting the Rome Statute the drafters drew from the ICTY and ICTR Statutes and their jurisprudence as the immediate predecessors of the ICC.

According to the human rights system of super legality, pursuant to article 21(3) of the Rome Statute, an interpretation that is consistent with human rights trumps the plain reading of the provision. Any interpretation of the provisions within the Rome Statute and the RPE, must be checked against internationally recognized human rights norms and the principle of non-discrimination. Therefore according to the principles of legality and the principles of non-discrimination; the elements of a crime must be construed strictly and where possible, the law should be applied consistently in order to foster predictability and fairness. The different interpretations offered by the *ad hoc* tribunals and the ICC, regarding the elements and degree of liability for the same crime, are problematic. The different interpretations breed inequality for the accused and the victim, where the same conduct, amounts to accessorial liability in the ICC and principal liability in the *ad hoc* tribunals. Arguably, the interpretation of individual criminal responsibility, commission and principal liability in the ICC should be consistent with the interpretations of the *ad hoc* tribunals. Consistency and predictability are essential to the accused's ability to regulate his or her behaviour in order to avoid prosecution, prepare his or her case and experience a fair trial. The balance between the use of the JCE doctrine and the principles of culpability, the principles of legality and the rights of the accused will be discussed further in chapter six. As a point of departure, like cases should be treated alike and any distinction should not be without due cause. Therefore in order for a judge to justify his or her departure from an existing interpretation, the judge would first need to acknowledge the current construction of the JCE doctrine.

In addition, the JCE doctrine has been used by the *ad hoc* tribunals to resolve the difficulties with establishing criminal responsibility. It has therefore minimised the number of acquittals for acts of sexual violence. Arguably, the inclusion of participation in a JCE, as a form of commission that results in principal liability has diminished gender discrimination and improved access to justice by recognising the specific nature of sexual violence and developing an effective remedy. If looking to the jurisprudence of the *ad hoc* tribunals will assist the ICC in developing an understanding of participation in a group as a form of commission, while respecting the text of the Rome Statute, in order to provide an effective remedy for the prevalence of sexual violence, then arguably it should. It is therefore clear that the ICC is not bound, but may look to the jurisprudence of the *ad hoc* tribunals based on state practice or because the jurisprudence might display applicable sources of law. This construction is supported by the purpose of the VCLT, a systematic interpretation of the context of the Rome Statute and the human rights standard.

The ICC is most likely to use the jurisprudence of the *ad hoc* tribunals to interpret the Rome Statute, where the provisions are identical or similar. In comparing article 25 of the Rome Statute to article 6 of the ICTR Statute and article 7 of the ICTY Statute I found both attribute principal liability to forms of participation that amount to their understanding of a commission. However, the ICC attributes principal liability to commission and accessorial liability for any other contribution to the commission of a crime by a group, while the *ad hoc* tribunals includes a contribution to the common criminal purpose of a group that results in the commission of an international crime (ie JCE liability) as a commission. It is clear that the *ad hoc* tribunals' understanding of JCE liability as a form of principal liability is not reconcilable with article 25(3)(d) of the Rome Statute that construes a contribution to a group as a subsidiary form of criminal responsibility that gives rise to the weakest form of liability. According to its characteristics, as described by both judicial forums; JCE liability for contributing to the common criminal purpose as construed by the *ad hoc* tribunal is arguably consistent with the ICC's conceptualization of commission, pursuant to article 25(3)(a) of the Rome Statute.

The distinction between the ICC and the *ad hoc* tribunal's interpretation of principal liability is the test used by each to distinguish a commission from any other form of participation. The Rome Statute does not set out the test, however the test has clearly been set out in case law. The ICC uses

the control-criterion, while the *ad hoc* tribunals looks at the intention of the accused when making a substantial contribution. Due to the difference in the tests, Goy argues that JCE liability cannot fit into article 25(3)(a) of the Rome Statute that regulates principal liability for joint commission. His argument is based on the interpretation that the ICC uses an objective-subjective test, while the *ad hoc* tribunals use a purely subjective test to distinguish a commission from lesser forms of participation and thereby; principal liability from accessorial liability.

While I accept that the control-criterion is an objective-subjective test and that the basic test for JCE liability is a subjective test, I argue, contrary to Goy, that the *ad hoc* tribunals have also used an objective-subjective test to attribute principal liability. JCE liability is not synonymous with principal liability. Depending on the degree of the contribution, the intent of the accused and the type of crime, JCE liability can be used as a mechanism to attribute principal liability or derivative forms of liability. If correct, article 25 of the Rome Statute and article 6 of the ICTR Statute and article 7 of the ICTY Statute are comparable. Arguably, the ICC should therefore, despite not being bound, consider the jurisprudence of the *ad hoc* tribunals when interpreting commission as a form of principal liability. Thereby the ICC should arguably, endeavour to include JCE liability in articles 25(3)(a) through (d) of the Rome Statute in order to provide for different degrees of liability relative the specific accused's degree of participation and level of intent on the facts of each particular case. Consequently, the JCE doctrine could be accepted and implemented by the ICC to establish the principal liability of high-ranked officials, in accordance with my seventh research question.

CHAPTER 6: THE LEGALITY AND LEGITIMACY OF THE USE OF THE JCE DOCTRINE

6 1 Introduction

As discussed in chapter five, the JCE doctrine, particularly category three, has successfully been used by the ICTY and ICTR *ad hoc* tribunals to hold high-ranked officials criminally responsible for acts of sexual violence despite the fact that the *actus reus* was carried out by another. Notwithstanding its usefulness in the prosecution of crimes involving sexual violence the JCE doctrine must be able to stand the test of criticism. In this final substantive chapter, I test the legality and legitimacy of the JCE doctrine in pursuance of my eighth research question. Firstly, the rights of an accused to fair trial, the principle of legality and the principle of culpability are defined. The right to fair trial protects the accused from unfair practices, including placing the onus on the prosecution to establish all the elements of the crime beyond reasonable doubt.

Moreover, the principles of legality and culpability ensure the legitimacy of any criminal law system. While the international community has a duty to prosecute acts of sexual violence and to hold all those responsible accountable, as discussed in chapters two and three, the desire to secure convictions and appease societies' understanding of justice should not overshadow the fundamental principles of criminal law. Solutions or doctrines, which do not preserve these principles, will eventually fade away because they are not be useful if they lack legal certainty. The legitimacy of the international criminal system as "a fair, impartial and effective system" of justice is being determined by every decision the judiciary makes.[1044] Therefore the use of solutions, which do not preserve the principles of legality and culpability could potentially threaten international criminal law.

To be able to conclude on whether the JCE doctrine should have a place within modern international criminal law seven criticisms of the JCE doctrine and counter-arguments that I have come across in case law and academic articles throughout my research will be discussed and analysed in this chapter. Thereby, I aim to determine the best way to balance the beneficial use of the JCE doctrine against the concerns that it may threaten the rights of the accused and fundamental principles of criminal law. In conclusion, various solutions in response to the criticisms, including the possible reform of the JCE doctrine, are discussed.

6 2 The general principles of criminal law

International criminal law is relatively new and constantly developing. Therefore the accused is usually not aware of all the procedures and only a limited number of cases from the ICC are available when preparing his or her defence.[1045] Furthermore, substantial parts of international law are neither codified because they have developed through customary international law nor are they derived from a central legislative organ.[1046] Despite the infancy of international criminal law and the restricted availability of information for the accused, the *ad hoc* tribunals and the ICC have the

[1044] Danner & Martinez (2005) *Cal L Rev* 143.

[1045] 98.

[1046] 98. According to Danner and Martinez, the fact that there is no centralised legislative body means that it is unlikely that the interpretation of the judges with regards to the definitions of the crime and forms of liability will be challenged even when an oversight body exits. For example, during the first 10 years of the *ad hoc* tribunals' operation UNSC has not "amended any of the definitions of the substantive crimes or liability theories in the Statutes of the ICTY or ICTR".

power to lawfully deprive the accused of their right to freedom once convicted.[1047] Danner and Martinez argue that international criminal law "inherently lacks the security provided by a clearly-articulated and time-tested criminal code, familiar and longstanding criminal procedures, and the certainty that most serious crimes will be punished".[1048] Therefore Danner and Martinez suggest that in order to ensure the legitimacy of international criminal law "the judges should hew closely to the restraining influences of the culpability model when deciding how to construe substantive and procedural rules".[1049] By preserving the culpability principle, as "the cornerstone of the criminal law paradigm," the legitimacy in international criminal law is established and preserved.[1050] Danner and Martinez add that the "[l]imitations derived from criminal principles preserve not only the rights of the defendants, but also the legitimacy of the proceedings in a way that is critical to serving their transitional justice and human rights goals".[1051]

6 2 1 The principles of legality

The Rome Statute does not expressly refer to the principles of legality, however it lists two of its "expressions" in articles 22 and 23, which sets out the general principles of criminal law.[1052] The principles of legality and basic notions of criminal law include; *nullum crimen sine lege* (no crime without law), *nulla poena sine lege* (no punishment without law) and *non-retroactivity ratione personae.*[1053] These principles require that the conduct, at the time it was committed, had to constitute a crime otherwise liability cannot ensue.[1054] Therefore the attribution of liability for conduct committed before the Statute entered into force is prohibited.[1055] It also specifies that a definition of a crime must be interpreted narrowly.[1056] Moreover, if the law changes, prior to a final judgement, the law that favours the accused will apply.[1057] In addition, an accused convicted by the

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[1047] 98.

[1048] 98.

[1049] 96.

[1050] 97.

[1051] 97.

[1052] BS Brown *Research Handbook on International Criminal Law* (2001) 6 cf arts 22 and 23 of the Rome Statute (2003) 2187 UNTS 90.

[1053] Arts 22-24 of the Rome Statute (2003) 2187 UNTS 90.

[1054] Art 15 of the International Convention on Civil and Political Rights (adopted 16 December 1966, entered into for 23 March 1976) 999 UNTS 171: "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal"; art 11 of the UDHR (1948) UNGA Res 217 A(III): "2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed"; art 22(1) of the Rome Statute (2003) 2187 UNTS 90.

[1055] Art 24(1) of the Rome Statute (2003) 2187 UNTS 90.

[1056] Art 22(2) of the Rome Statute (2003) 2187 UNTS 90.

[1057] Art 24(2) of the Rome Statute (2003) 2187 UNTS 90.

ICC can only be punished in accordance with the options provided by the Rome Statute.[1058] Therefore in order not to violate the principles of legality, the crimes for which the accused is being tried, "must be criminal under customary or treaty law and entail individual criminal responsibility" at the time the crime was committed.[1059]

According to the ECCC in *Prosecutor v Kaing Guek Eav* ("*Kaing Guek Eav*"), the principles of legality include the accused's right to know the theories of liability that will be used against him or her.[1060] The Statutes of the ICTY and ICTR were drafted after the genocides in the former Yugoslavia and Rwanda, respectively. In order to prevent the retrospective application of substantive international criminal law, "the ICTY and the ICTR generally test whether their Statutes reflect customary law".[1061] The judges of the *ad hoc* tribunals can only apply the provision if it correctly reflects customary international law.[1062] If it does not, the judges must determine and apply custom instead of the statute.[1063] The ICTY and ICTR have generally relied on customary international law instead of treaty law.[1064] By ensuring that the provisions of the statute are consistent with pre-existing crimes in customary international law, the *ad hoc* tribunals avoided violating the principle of *nullum crimen sine lege*, despite the fact that the statutes were enacted after the crimes were committed.[1065] In the same way, theories of liability; including the JCE doctrine, should be tested against treaty and customary law, as I have done in chapter four, to determine whether it was previously recognised by international customary law and therefore not being applied retrospectively.[1066]

Furthermore, article 22(2) of the Rome Statute requires a strict interpretation of the definitions of the crimes.[1067] Werle and Burghardt argue that article 22(2) of the Rome Statute is of "paramount

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[1058] Art 23 of the Rome Statute (2003) 2187 UNTS 90.

[1059] International Criminal Law Services "Module 3: General Principles of International Criminal Law" (no date) *United Nations Interregional Crime and Justice Research Institute* (13 June 2015) 4 <http://wcjp.unicri.it/deliverables/training_icl.php.Module_3_General_principles_of_international_criminal_law.pdf> (accessed 13-06-2015).

[1060] van Schaack (2009) 7 *Nw J of Int'l Hum Rts* 223 cf *Prosecutor v Kaing Guek Eav* 002/14-08-2006/ECCC/OCP Public Information by the Co-Prosecutors Pursuant to Rule 54 Concerning Their Rule 66 Final Submission Regarding Kaing Guek Eav alias "Duch" (18 July 2008) paras 24-28.

[1061] International Criminal Law Services "Module 3: General Principles of International Criminal Law" *United Nations Interregional Crime and Justice Research Institute* 4.

[1062] International Criminal Law Services "Module 3: General Principles of International Criminal Law" *United Nations Interregional Crime and Justice Research Institute* 4.

[1063] International Criminal Law Services "Module 3: General Principles of International Criminal Law" *United Nations Interregional Crime and Justice Research Institute* 4.

[1064] International Criminal Law Services "Module 3: General Principles of International Criminal Law" *United Nations Interregional Crime and Justice Research Institute* 4.

[1065] International Criminal Law Services "Module 3: General Principles of International Criminal Law" *United Nations Interregional Crime and Justice Research Institute* 4 cf *Prosecutor v Kordić & Čerkez* (Appeal Chamber) IT-95-14/2-A (17 December 2004) para 46: "The original reason for this approach is to avoid violating the principle of *nullum crimen sine lege* in the event that a party to the conflict did not adhere to a specific treaty".

[1066] van Schaack (2009) *Nw J Int'l Hum Rts* 223 cf *Prosecutor v Kaing Guek Eav* 001/18-07-2007-ECCC/OCIJ (2008) paras 24-28.

[1067] Art 22 of the Rome Statute (2003) 2187 UNTS 90: "*Nullum crimen sine lege* 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

importance for interpretation" of the Rome Statute, however; it does not require that the ICC must always adopt the most restrictive interpretation because that would cause unjustifiable results.[1068] Moreover, Van den Wyngaert J, in her Concurring Opinion delivered by the ICC Trial Chamber, in *Chui* argues that the "greatest importance" should be attached to article 22(2) of the Rome Statute when interpreting the Rome Statute.[1069] However, Werle and Burghardt argue that the principle of strict construction only arises where an interpretation in accordance with article 31(1) of the VCLT gives rise to two equally plausible constructions.[1070]

6 2 2 The principle of individual culpability

The principle of culpability "expresses a moral theory of responsibility and punishment".[1071] Parry explains that establishing the accused's criminal responsibility on their moral blameworthiness "is the primary justification for imposing criminal sanctions".[1072] The principle of culpability is broadly accepted as the basis of criminal law.[1073] Pomorski states that European democracies regard the principle of culpability to be "a fundamental precept of criminal law, requiring that the moral culpability be the basis for the imposition of individual criminal responsibility" and the severity of the sentence of imposed.[1074] The principle of individual culpability prevents "harsh outcomes that are incompatible with human dignity, such as imposing criminal liability when no behaviour at all can be attributed to the accused or when his conduct was not voluntary".[1075] In addition, the principle of culpability limits "the punishment for an offense to what is deserved according to the offender's culpability".[1076] As discussed in chapter five, despite the collective nature of many international crimes, criminal responsibility still needs to be established individually, in order to comply with the principle of individual culpability.[1077]

The Rome Statute does not expressly refer to the principle of culpability under the general principles of criminal law, however Brown argues that this principle is reflected in article 30 of the

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3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute."

[1068] Werle & Burghardt "Establishing Degrees of Responsibility" in *Pluralism in International Criminal law* 22 cf G Werle & B Burghardt "Do Crimes Against Humanity Require the Participation of a State or a 'State- Like' Organization?" (2012) 10 *Journal of International Criminal Justice* 1151 1158-1159.

[1069] Werle & Burghardt "Establishing Degrees of Responsibility" in *Pluralism in International Criminal law* 21-22 cf *Prosecutor v Chui* ICC-01/04-02/12-4 Concurring Opinion of Judge Christine Van den Wyngaert (2012) 18-19; *Prosecutor v Lubanga* ICC-01/04-01/06-2842 Separate Opinion of Judge Adrian Fulford (2012) 10.

[1070] Werle & Burghardt "Establishing Degrees of Responsibility" in *Pluralism in International Criminal law* 22 cf art 31 of the VCLT (1980) 1115 UNTS 331: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[1071] Brown *Research Handbook on International Criminal Law* 6.

[1072] 6 cf JT Parry "Culpability, Mistake, and Official Interpretations of Law" (1997) 25 *American Journal of Criminal Law* 1 21.

[1073] Brown *Research Handbook on International Criminal Law* (2001) 6 cf JL Diamond "The Myth of Morality and Fault in Criminal Law Doctrine" (1996) 34 *American Criminal Law Review* 111: Diamond argues that it is not universally regarded as the basis of criminal law.

[1074] Brown *Research Handbook on International Criminal Law* (2001) 6 cf S Pomorski "Review Essay; Reflections on the First Criminal Code of Post-Communist Russia" 46 *American Journal of Comparative Law* 385.

[1075] M Kremnitzer & T Hörnle "Human Dignity and the Principle of Culpability" (2011) 44 *Israel Law Review* 115 115.

[1076] 115.

[1077] Werle (2007) *J Int'l Crim J* 953.

Rome Statute.[1078] Article 30 of the Rome Statute states that criminal responsibility can only ensue where the material elements of the crime are committed with intent and knowledge.[1079]

6 3 Criticisms of the JCE doctrine

6 3 1 Argument one: The JCE doctrine has no foundation in customary international law

Werle argues that the JCE doctrine violates the principles of legality because it has no foundation in customary international law.[1080] Furthermore, Ohlin argues that the cases, referred to by the ICTY in the *Tadić Appeal* during the investigation into the origin of common purpose liability, were disreputable sources.[1081] For instance, Ohlin opposes the repute of the *Trial of Erich Heyer and six others* ("*Essen Lynching*"), delivered by the British Military Court, because some of the war crimes tribunals exercised their "jurisdiction without a written penal statute" whereas the ICTY draws its competence, powers and mandate from the ICTY Statute.[1082] Arguably, this argument has no merit because the rules and practices of customary international law do not stem from a written penal code, either. Ohlin concedes that the ICTY recognised the jurisprudence of the British Military Court as evincing the existence of customary international law.[1083] In addition, Werle argues that the ICTY in the *Tadić Appeal* found that participation in a JCE is a form of commission, originated in post-WWII jurisprudence, which forms part of customary international law.[1084] Furthermore, Scharf concludes that it was the "paradigm-shifting nature" of the IMT precedent, and the "unified

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[1078] Brown *Research Handbook on International Criminal Law* 7.

[1079] 7 cf art 30 of the Rome Statute (2003) 2187 UNTS 90: "1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. 2. For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. 3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly."

[1080] Werle (2007) *J Int'l C J* 960-961. See Ambos *Internationales Strafrecht* 36; A Bogdan "Individual Criminal Responsibility in the Execution of a 'Joint Criminal Enterprise' in the Jurisprudence of the Ad Hoc International Tribunal for the Former Yugoslavia" (2006) 6 *International Criminal Law Review* 63 109; Powles (2004) *J Int'l Crim J* 615.

[1081] Ohlin (2007) *J Int'l Crim J* 76.

[1082] 76: "The cases heard by the IMT were governed by the Nuremberg Charter, which included only a minimalist definition of substantive offences. Subsequent prosecutions were also held under the auspices of Control Council Law No. 10, which governed the administration of Germany after the war before the return of sovereignty. However, these prosecutions rarely involved the interpretation of a sophisticated penal statute that defined war crimes or conspiracy in an explicit fashion." See also 71: Ohlin argues that these three categories are extracted from international cases, some of which he believes are unconvincing sources of precedent. See also 77: Ohlin argues that the criticisms of the *Tadić Appeal* are still relevant because they highlight the "unique circumstances" of the case such as the limited language of art 7 of the ICTY Statute and its purposive expansion yet he finds that the *Tadić Appeal* is not a meaningful precedent for the interpretation of art 25 of the Rome Statute because its "provisions were born from an entirely different process and its provisions must be interpreted within that context".

[1083] 76.

[1084] Werle (2007) 5 *J Int'l C J* 959 cf *Prosecutor v Tadić* IT-94-1-A (1999) para 188.

and unqualified endorsement of the Nuremberg principles by the nations of the world in 1946, rather than the number of cases applying JCE liability at the time, that crystalized this doctrine into mode of individual criminal liability under customary international law."[1085] Therefore the JCE doctrine is rooted in customary international law, as discussed in chapter four. Arguably, because the participation in a JCE and JCE liability originates in customary international law its use is not retrospective and does not violate the principles of legality.

6 3 2 Argument two: JCE category three cannot be applied to crimes that require specific intent

Cassese posits that the main difficulty experienced with JCE category three is not an evidentiary problem; instead it arises from the risk that it poses to the fundamental notions of criminal law; culpability and causation.[1086] Cassese argues that the expansive interpretation of article 25(d) of the Rome Statute to include JCE category three is justified by punishing criminal conduct that would otherwise not lead to culpability, however, the form of intent required by JCE category three is insufficient when the un-concerted crime requires specific intent (*dolus specialis*).[1087] As of late, the ICTY Appeal Chamber in the *Brđanin Appeal* has expanded the application of the JCE category three by attributing criminal responsibility to the "primary offender" for reasonably foreseeable crimes that require specific intent; ie genocide.[1088] Additionally, the ICTY in *Prosecutor v Milošević* ("*Milošević*") used the extended form, JCE category three, for specific intent crimes such as genocide and crimes against humanity.[1089] According to Cassese, JCE category three does not require that the accused possess the specific intent (*dolus specialis*) for the un-concerted crime.[1090] The use of JCE category three may therefore disregard the prerequisite that a person may only be held guilty if his culpability has been proven by establishing that the accused's conduct and *mens rea* caused the subsequent crime.[1091] In addition, Badar argues that special intent crimes require proof of the accused's *dolus directus* of the first degree.[1092] As discussed in chapter five, Werle also argues that JCE category three violates the principle of personal culpability because the accused does not need to possess the requisite intent.[1093] The lesser from of *mens rea,* required by JCE category three, arguably results in causal link being defective.

[1085] MP Scharf "Joint Criminal Enterprise, the Nuremberg Precedent, and Concept of 'Grotian Moment'" in T Isaacs & R Vernon (ed) *Accountability for Collective Wrongdoing* (2011) 119 138.

[1086] Cassese (2007) *J Int'l C J* 117.

[1087] 132-133.

[1088] 133 cf *Prosecutor* v *Brđanin* IT-99-36-A (2007). See also Cassese (2007) *J Int'l C J* 113: Cassese refers to physical perpetrator of the un-concerted crime as the "primary offender" and the accused as the "secondary offender".

[1089] Danner & Martinez (2005) *Cal L Rev* 143 cf *Prosecutor v Milošević* (Trial Chamber) IT-02-54-T Decision on Motion for Judgement of Acquittal (16 June 2004) para 291; *Prosecutor v Brđanin* (Appeal Judgement) IT-99-36-A Decision on Interlocutory Appeal (19 March 2004) para 9: stating "provided that the standard applicable to that head of liability, i.e. 'reasonably foreseeable and natural consequences' is established, criminal liability can attach to an accused for any crime that falls outside of an agreed upon joint criminal enterprise".

[1090] Cassese (2007) *J Int'l C J* 117.

[1091] 117.

[1092] Badar *The Concept of Mens Rea in International Criminal Law* 426.

[1093] Werle (2007) 5 *J Int'l C J* 961 cf ME Badar "Just Convict Everyone! Joint Preparation: from Tadić to Stakić and Back Again" (2006) 6 *International Criminal Law Review* 293 301; V Haan "The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia!" (2005) 5 *International Criminal*

6 3 3 Argument three: The JCE doctrine violates the human rights of the accused and the principles of legality

The accused's human right to a fair trial, including the presumption of innocence and non-compellability, is guaranteed by the International Convention on Civil and Political Rights ("ICCPR") and the UDHR.[1094] The JCE doctrine does not compel the accused to incriminate him or herself. Furthermore, the JCE doctrine neither negates the prosecution's duty to prove all the objective and subjective elements of the crime before liability can ensue nor place a reverse onus on the accused to disprove any elements. According to Shahabuddeen J's, dissenting opinion in the *Prosecutor v Brđanin* ("*Brđanin Decision on Interlocutory Appeal*"), the JCE category three does not remove the prosecution's duty to prove intent.[1095] Instead it "provides a mode of proving intent in particular circumstances" by proving the accused's foresight and acceptance of the risk.[1096] Shahabuddeen J adds that specific intent is an untouchable element of genocide.[1097] Therefore, I argue that the application of the JCE doctrine does not violate the right of the accused to a fair trial. Therefore a limitations enquiry which is used to determine whether one human right justifiably and reasonably limits another human right, is not necessary.[1098]

Furthermore, the accused has the right be aware of the charges against him or her so that he or she can prepare his or her defence. Cassese argues that the application of the JCE doctrine is not contrary to the principles of legality; *nullum crimen sine lege* and *nulla poena, sine lege,* because the accused has or should have sufficient knowledge of the JCE doctrine's applicability in customary international law.[1099] The JCE doctrine is a complex legal doctrine that, as has been discussed in great detail in this thesis, is not codified. It would be an exceptionally high burden on the prosecution to prove that the accused had actual knowledge of the JCE doctrine itself. Arguably,

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Law Review (2005) 195 and 197; G Mettraux *International Crimes and the ad hoc Tribunals* (2005) 292; Powles (2004) *J Int'l C J* 611.

[1094] Art 14 of the ICCPR (1976) 999 UNTS 171: involves the right to fair trial including the presumption of innocence, non-compellability and minimum guarantees; art 10 of the UDHR (1948) UNGA Res 217 A(III): "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him;" art 11 of the UDHR (1948) UNGA Res 217 A (III): "1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense."

[1095] E van Sliedregt "Joint Criminal Enterprise as a Pathway to Convicting Individuals of Genocide" (2007) 5 *Journal of International Criminal Justice* 184 204 cf *Prosecutor v Brđanin* IT-99-36-A Decision on Interlocutory Appeal, Dissenting Opinion of Judge Shahabuddeen (2004) paras 2 and 4-5.

[1096] van Sliedregt (2007) *JICL* 204 cf *Prosecutor v Brđanin* IT-99-36-A Decision on Interlocutory Appeal, Dissenting Opinion of Judge Shahabuddeen (2004) paras 2 and 4-5.

[1097] van Sliedregt (2007) *JICL* 204 cf *Prosecutor v Brđanin* IT-99-36-A Decision on Interlocutory Appeal, Dissenting Opinion of Judge Shahabuddeen (2004) paras 2 and 4-5.

[1098] Human Rights and Constitutional Rights "Limitations on Rights" (26 March 2008) *Human Rights and Constitutional Rights* <www.hrcr.org/chart/limitations+duties_general.html> (accessed 13-07-2015): art 29(2) of the UDHR (1948) UNGA Res 217 A (III): "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society. (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations." The ICCPR (1976) 999 UNTS 171, does not contain a general limitation clause, however certain provisions provide limitations clauses pertaining to that specific right.

[1099] Haffajee (2006) *Harv J L & Gender* 223 cf *Prosecutor v Kaing Guek Eav* 001/18-07-2007-ECCC/OCIJ (2008) 4.

the principles of legality are preserved, where the accused knew that his or her contribution to a criminal enterprise was wrongful and that it could lead to liability under international criminal law instead of arguing that the accused had sufficient knowledge of the applicability of the JCE doctrine.

In addition, the accused can only be charged with crimes that were already criminalised at the time of the alleged commission. Where the mode of participation and form of liability are expressly listed in the Statute, before the crime was committed, then there is no threat of uncertainty or a retrospective application. Ohlin therefore supports the plain reading of article 7 of the ICTY Statute and criticises the purposive expansion in the *Tadić Appeal* to include the JCE doctrine.[1100] According to Ohlin, one cannot retrospectively expand the forms of participation in article 7 of the ICTY Statute purely because the object and purpose of the ICTY Statute calls for the prosecution of all those who are responsible for serious violations of international humanitarian law.[1101] Ohlin finds that the ICTY Statute should only be construed by its terms, which limits the criminal liability of conspirators to aiding and abetting.[1102] According to Ohlin, conspiracy sufficiently acknowledges the collective nature of the crime yet remains "faithful to the basic foundation of criminal law and its commitment to holding individuals responsible".[1103] Cassese acknowledges that some scholars agree that the judges of the ICTY have engaged in unwarranted judicial creativity by including the participation in a common purpose ie JCE liability in article 7 of the ICTY Statue.[1104] This argument ties in with the unwarranted and unbalanced influence that human rights law has had on international criminal law, as further discussed below.

It is true that article 7 does not expressly refer to JCE liability, however Cassese dismantles this criticism by affirming that the ICTY was created with the purpose of prosecuting all those responsible for serious crimes that fall within its jurisdiction.[1105] In order to fulfil its purpose the ICTY must look to customary international law to fill gaps or provide greater detail to the ICTY Statute because, while the ICTY Statute does list the international crimes within its jurisdiction it does not provide the elements of the crime.[1106] Ohlin acknowledges that the ICTY Statute is a limited document that "purposely" leaves room for the Judges to provide greater detail.[1107] Furthermore, customary international law, in accordance with comparative law, calls for the tribunals to look to "general concepts of criminal law" for its persuasive value whenever the statute is silent on matters such as "modes of responsibility".[1108] According to Cassese the Appeals Chamber of the ICTY has correctly stated that "commit" has a broad ambit, it is therefore within the ICTY's mandate to flesh out the JCE doctrine in execution of their proper duties which is to find and interpret the law which enables them to apply it to the issue at hand.[1109] Therefore, I argue that the application of the JCE doctrine does not violate the principles of legality.

[1100] Ohlin (2007) *J Int'l C J* 72.

[1101] 72.

[1102] 74.

[1103] 74.

[1104] Cassese (2007) *J Int'l C J* 113.

[1105] 114.

[1106] 114 cf See Report of the UN Secretary-General (3 May 1993) S/25704 34: "In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the International Tribunal should apply rules of international humanitarian law that are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law."

[1107] Ohlin (2007) *J Int'l C J* 74.

[1108] Cassese (2007) *J Int'l C J* 114.

[1109] 114.

6 3 4 Argument four: An unfettered prosecutorial discretion has over-expanded the JCE doctrine

Danner and Martinez argue that there is limited jurisprudence pertaining to the link between an individual's potential criminal liability and the scope of the relevant enterprise.[1110] The individual's liability therefore depends on "how broadly the prosecutors describe the criminal goal" of the JCE and "how loosely the judges construe foreseeability".[1111] According to Danner and Martinez, the JCE doctrine provides international prosecutors with a broad discretion to determine the scope of wrongdoing.[1112] They therefore argue that, "prosecutorial discretion appears to be the only meaningful limit on the extent of wrongdoing attributable to an individual defendant in JCE".[1113] This is concerning because the prosecution presumably tries to "maximize its chances of conviction" by promoting the broadest construction of the JCE.[1114] They notice, that when international judges of the *ad hoc* tribunals have attempted to limit the scope of JCE they consistently use JCE category three without defining the limits of the enterprise.[1115] For instance, the ICTY in *Milošević* used JCE category three for specific intent crimes such as genocide and crimes against humanity.[1116] In addition, the ICTY Appeals Chamber has also expanded the application of JCE category three to "'vast criminal enterprises' where the fellow participants may be 'structurally or geographically remote from the accused'".[1117] These cases display the willingness of the judges to place the discretion onto the prosecutors.[1118]

While prosecutorial discretion is a feature of many domestic criminal law systems, the concentration of power within the international criminal sphere should arguably be diluted due to the type of the crimes that the accused may be convicted of and their "evolving definitions".[1119] In addition, the Rome Statute is "more complex" than the ICTY Statute and the ICTR Statute.[1120] Danner and Martinez argue that the complexity of the Rome Statute and its differences, compared to the statutes of the *ad hoc* tribunals, will birth new uncertainties.[1121] They add that even the definitions of the crimes call for the exercise of prosecutorial discretion.[1122] Therefore the relatively new international criminal system cannot operate as freely, with regards to doctrine and procedure,

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[1110] Danner & Martinez (2005) *Cal L Rev* 134-135.

[1111] 135.

[1112] 98.

[1113] 135.

[1114] 136.

[1115] 142.

[1116] 143 cf *Prosecutor v Milošević* IT-02-54-T (2004) para 291; *Prosecutor v Brđanin* IT-99-36-A Decision on Interlocutory Appeal (2004) para 9: stating "provided that the standard applicable to that head of liability, i.e. 'reasonably foreseeable and natural consequences' is established, criminal liability can attach to an accused for any crime that falls outside of an agreed upon joint criminal enterprise".

[1117] Cassese (2007) *J Int'l C J* 133.

[1118] Danner & Martinez (2005) *Cal L Rev* 143.

[1119] 98-99.

[1120] 99. See also Ohlin (2007) *J Int'l C J* 77: art 25 of the Rome Statute (2003) 2187 UNTS 90 includes "a more detailed provision on joint criminal enterprise".

[1121] Danner & Martinez (2005) *Cal L Rev* 99. See also Ohlin (2007) *J Int'l C J* 77 for an alternative view: Ohlin argues that the additional judicial doctrine in the Rome Statute, provides less opportunity for judicial creativity and provides greater certainty for state parties pertaining to the court's function and the possible modes of liability. Ohlin praises the Rome Statute for these developments as it "is consistent with the principle of *nullum crimen sine lege*".

[1122] Danner & Martinez (2005) *Cal L Rev* 99.

as well-established domestic forums.[1123] Hunt J's Dissenting Opinion in *Prosecutor v Milošević* stated that the fairness of the trials, not the number of convictions, will determine the legitimacy of the ICTY.[1124] The unfettered discretion of prosecutors, broadly interpreted doctrines and unpersuasive judicial decision-making may therefore threaten the legitimacy of the international criminal system.[1125] Hunt J warned that decisions giving little or no attention to the rights of the accused "will leave a spreading stain on this Tribunal's reputation".[1126]

6 3 5 Argument five: The JCE doctrine violates three concepts of criminal law and in turn the principle of culpability

Ohlin avers that the construction of the JCE doctrine, developed by the ICTY in the *Tadić Appeal*, threatens three key concepts of criminal law, namely; the principle of culpability, intentionality and foreseeability.[1127] I discuss these three concepts separately below.

6 3 5 1 Equal culpability

Ohlin states that an accused must only face criminal liability if he or she "participated in a meaningful way".[1128] The level of culpability must reflect the degree of participation and therefore the imposition of equal culpability for all members of a joint enterprise is philosophically incorrect.[1129] Ohlin adds that "guilt and innocence must be determined relative to the elements of each offence".[1130] However, it is apparent from the numerous domestic and international tribunals referred to in the *Tadić Appeal* that an expansive notion of conspiracy, in the convictions of war criminals, was a prevalent practice.[1131] For instance, the British Military Court in *Essen Lynching* established that "all members of the mob were guilty of the murder irrespective of their degree of participation, because they were 'concerned in the killing'".[1132] Additionally, the ICTY in the *Tadić Appeal* confirmed that:

[1123] 143.

[1124] 143 cf *Prosecutor v Milošević* (Appeals Chamber) IT-02-54-AR73.4 Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statements (21 October 2003) para 22: Hunt J, in dissent from a procedural ruling on the admissibility of written witness statements, stated that "[t]his Tribunal will not be judged by the number of convictions which it enters... but by the fairness of its trials".

[1125] Danner & Martinez (2005) *Cal L Rev* 143.

[1126] 143 cf *Prosecutor v Milošević* IT-02-54-AR73.4 Dissenting Opinion of Judge David (2003) para 22.

[1127] Ohlin (2007) *J Int'l C J* 74 and 81-85.

[1128] 74.

[1129] 85.

[1130] 87.

[1131] 75-76 cf *Prosecutor v Tadić* IT-94-1-A (1999) para 199: "[f]or example, in the Ponzano case, which involved the killing of British prisoners of war, the judge noted that liability attaches in situations where the accused is 'the cog in the wheel of events leading up to the result and that the participation need not be so extensive that the crime would not have happened without his participation." The judge concluded that "liability for a common criminal plan required knowledge of the group's plan". Implicitly this suggests that the intention to further the common criminal plan is not required for liability.

[1132] Ohlin (2007) *J Int'l C J* 76 cf *Prosecutor v Tadić* IT-94-1-A (1999) para 207 cf *Trial of Erich Heyer and six others* British Military Court for the Trial of War Criminals Essen UNWCC vol 1 (18-22 December 1945) para 91.

> "[a]lthough only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less - or indeed no different - from that of those actually carrying out the acts in question".[1133]

The ICTY in the *Tadić Appeal* found that the degree of liability attributed to participants and the physical perpetrators is "often" equal, however this statement is qualified. The degree of liability depends on whether the contribution was vital to the commission of the crime ie whether the moral gravity can be equated to the physical perpetration.

According to Ohlin, the *Tadić*-construction of the JCE doctrine violates the principles of criminal law, namely the principle of culpability by attributing liability to all of members equally irrespective of their degree of participation.[1134] Ohlin adds that treating all members of a conspiracy as equally culpable "ignores the internal structure of the conspiracy and treats it as if it were some kind of group person whose internal structure was morally irrelevant".[1135] However, the internal structure is anything but irrelevant.[1136] According to Ohlin, the "architect, the executioner, and the background supplier all perform distinct functions within the conspiracy and they should be held responsible relative to the importance of their personal conduct".[1137] It may be difficult but Ohlin argues that it "is possible to prove who joined the group first, who directed and planned its activities and who carried out its orders".[1138] Furthermore, any legal doctrine that treats them equally, "does a disservice to the project of codifying difficult moral distinctions into a legal system".[1139]

In addition, Ohlin argues that the attribution of liability, for an un-concerted crime, to an accused other than the physical perpetrator, is "a strong and unwarranted conclusion" and an unnecessarily expansion of article 7 of the ICTY Statute, which restricts liability to planning, instigating, and aiding and abetting.[1140] Ohlin suggests that conspiracy, unlike JCE category three, is the mode of participation that acknowledges the collective nature of the crime yet "still remain[s] faithful to the basic foundation of criminal law and its commitment to holding individuals responsible".[1141] Furthermore, Ohlin argues that the "collective moral guilt suggested by these crimes cannot be used as a justification to blindly impose criminal liability to all members of a conspiracy, regardless of their level of participation".[1142] However, the ICTY in the *Brđanin Appeal* found that the JCE doctrine provides sufficient safeguards against overreaching or lapsing into guilt by association.[1143] Arguably, the JCE doctrine does not blindly impose liability, irrespective of the accused's actions and state of mind. Furthermore, the application of JCE category three does not ignore the moral and legal significance of the internal structure of the criminal enterprise by equally imposing liability on each member irrespective of his or her participation. On the contrary, there is great scope for differentiation; each individual, within the group, may foresee the occurrence of different un-

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[1133] Ohlin (2007) *J Int'l C J* 76-77 cf *Prosecutor v Tadić* IT-94-1-A (1999) para 191.

[1134] Ohlin (2007) *J Int'l C J* 76.

[1135] 77.

[1136] 88.

[1137] 88.

[1138] 88.

[1139] 88.

[1140] 76.

[1141] 74.

[1142] 74.

[1143] *Prosecutor* v *Brđanin* IT-99-36-A (2007) para 426.

concerted crimes and criminal responsible may only accrue for the crimes that he or she foresaw.[1144] For instance, the ICTY in the *KvoĈka Appeal* found that what is natural and foreseeable to the one might not be natural and foreseeable to the other, based on the information to which he or she is privy.[1145] In addition, an accused can contribute in many different ways, yet liability only ensues if the contribution is substantial, according to the ICTY in the *Brđanin Appeal*.[1146] Furthermore, Cassese argues that JCE category three does not infringe the principle of culpability because the prosecution still has to establish beyond a reasonable doubt that the accused intentionally contributed to the criminal enterprise while possessing the requisite "*mens rea* concerning the additional" yet un-concerted crime, in the form of foresight.[1147] Therefore, only once the prosecution has proven all the subjective and objective elements with regards to the specific accused, can the JCE doctrine be used to attribute liability beyond the scope of the accused's own actions. That is the only benefit that the JCE doctrine permits. As previously discussed in chapter five, while the degree of liability is equally attributed to all members, not all members will satisfy the requisite subjective and objective elements for their liability to ensue; especially not principal liability.

Alternatively, Cassese offers three arguments in defence of the attribution of equal liability.[1148] Firstly, he argues that the JCE doctrine was born because of the prevalence and actual commission of crimes by groups with a shared intent.[1149] The foundation of the JCE doctrine is firstly, "found in considerations of public policy, that is the need to protect society against persons who" form groups with the shared intention to commit a crime.[1150] Secondly, Cassese provides a purely legal argument.[1151] Cassese avers that liability arising from JCE category three "is consequential on (and incidental to) a common criminal plan, that is, an agreement or plan by a multitude of persons to engage in illegal conduct".[1152] Cassese explains that the un-concerted crime "is the outgrowth of previously agreed or planned criminal conduct for which each participant in the common plan is already responsible".[1153] The prior joint planning to commit *a crime* has enabled the commission of un-concerted crimes.[1154] In other words, "the additional crime is premised on the existence of a concerted criminal purpose".[1155] Therefore a causal link between the concerted crime and the un-concerted crime exits. [1156] However only the accused "that evinced knowledge and risk" shares the liability with the physical perpetrators of the un-concerted crime.[1157] The Italian Court of Cassation

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[1144] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) para 627 cf *Prosecutor v KvoČka* et al IT-98-30/1-A (2005) para 86.

[1145] Badar *The Concept of Mens Rea in International Criminal Law* 422-423 cf *Prosecutor* v *KvoČka* et al IT-98-30/1-A (2005) para 86.

[1146] *Prosecutor* v *Brđanin* IT-99-36-A (2007) paras 427 and 430 cf *Prosecutor v Tadić* IT-94-1-A (1999) para 192.

[1147] Cassese (2007) *J Int'l C J* 132.

[1148] 117-118.

[1149] 117.

[1150] 117-118: "These policy considerations were aptly spelled out by the House of Lords in 1997, in *Regina v Powell* and another and *Regina v English*, albeit with regard to crimes committed at the domestic level."

[1151] 118.

[1152] 118.

[1153] 119.

[1154] 119. Cassese qualifies his statement by adding that the attribution of criminal responsibility differs where the group has planned to commit a *lawful act* and during the execution of such plan, one commits a crime. In these circumstances the physical perpetrator is solely responsibility for his or her criminal acts.

[1155] 119.

[1156] 119. Cassese adds that the former constitutes the preliminary *sine qua non* condition and the basis of the latter.

[1157] 119.

in *D'Ottavio and others* ("*D'Ottavio*") emphasised that "the incidental crime may be based on a nexus with the concerted crime".[1158] By joining and participating in the criminal enterprise the accused placed him or herself in a position to foresee the possible commission of un-concerted crimes.[1159] Furthermore, despite the risk the accused willingly contributed to the group where he or she could have elected to disassociate or try to prevent the commission of the un-concerted crime.[1160] These aspects culminate in the accused's culpability.[1161]

Arguably, the proof that the accused satisfied the subjective and objective elements together with the premeditative nature of joining a criminal enterprise and the impact and prevalence of criminal enterprises justifies the attribution of equal culpability for an un-concerted crime, committed by another. However, is still unclear whether it is just to attribute principal liability to the physical perpetrator ("primary offender") and the accused ("secondary offender"), equally.[1162] Cassese admits that in a "mature legal system it should be possible to take account of the lesser degree of culpability of the participant at issue by qualifying his culpability through a charge lesser".[1163] Cassese argues that the secondary offender is less culpable for the un-concerted crime, which should be taken into account at the sentencing stage.[1164] However, international criminal law "is rudimentary body of law" and, as of yet, does not provide for this distinction.[1165] In addition, due to its infancy and continuous development, Danner and Martinez argue that international criminal law, unlike its domestic counterparts, cannot significantly relax the requirements that stem from the principles of culpability, just *yet*.[1166] Ohlin, along the same lines, therefore argues for the reform of article 25 of the Rome Statute in order to expressly provide for this distinction.[1167] This proposal is addressed in greater detail, below.

Thirdly, Cassese proposes the qualification of the application of JCE category three in order to defend and limit of the equal attribution of liability.[1168] Cassese argues that where the crime requires a specific intent ("*dolus specialis*"), JCE category three is not applicable.[1169] For instance, JCE

[1158] 119-120 cf *D'Ottavio and others* Italian Court of Cassation (12 March 1947). The Teramo Court of Assize held that "[w]here the crime committed is different from that willed by one of the participants, also that participant answers for the crime, if the fact is a consequence of his action or omission. If the crime committed is more serious than that willed, the penalty is decreased for the participant who willed the less serious offence." On appeal, the Court of Cassation held that: "[i]n order for a criminal event to be held to constitute the consequence of the participant's action, it is necessary that there be a causation nexus which is not only objective but also psychological between the fact committed and willed by all the participants and the different fact committed by one of the participants." "This is so because the participant's responsibility envisaged in [a]rt 116 is grounded not in the notion of collective responsibility ... but in the fundamental principle of concurrence of interdependent causes, upheld and specified in [a]rts 40 and 41 of the Criminal Code." In "accordance with the canon causa *causae est causa causati* [the cause of a cause is also the cause of the thing caused; i.e. whoever voluntarily creates a situation bringing to, or resulting in, criminal conduct is accountable for that conduct whether or not he willed the crime]".

[1159] Cassese (2007) *J Int'l C J* 120.

[1160] 120.

[1161] 120.

[1162] 120.

[1163] 120.

[1164] 132.

[1165] 120.

[1166] Danner & Martinez (2005) *Cal L Rev* 98.

[1167] Ohlin (2007) *J Int'l C J* 89.

[1168] Cassese (2007) *J Int'l C J* 121.

[1169] 121.

category three could not be used to establish liability for genocide, persecution and aggression because they all require specific intent before liability can ensue.[1170] This argument is also discussed in greater detail, below.

6 3 5 2 Intentionality

According to Ohlin, a literal reading the term "intentional" in article 25 of the Rome Statute does not actually require that the contribution be made with the intent of furthering the common purpose of the criminal enterprise.[1171] Ohlin argues that a literal reading of the term "intentional" in article 25(d) of the Rome Statute only requires that the action or omission by the accused is intentional ie the "basic underlying action" cannot be negligent or accidental.[1172] Therefore in order to fulfil this element, the prosecution only has to prove that the accused who contributed to the furtherance to the JCE intended the action or omission that amounted to a contribution.[1173] However, sub-articles 25(3)(d)(i) and (ii) of the Rome Statute require that the contribution be made with the aim of furthering the common purpose of the criminal enterprise *or* with knowledge of the group's criminal intent.[1174]

While a contribution made with the "aim of furthering the criminal activity" satisfies the concept of intentionality, Ohlin argues that an intentional contribution "made in the knowledge of the intention," does not.[1175] Ohlin refers to the latter as imposing "severe criminal liability".[1176] For instance, any person who intentionally sells or gives commodities such as appliances or produce to a criminal enterprise, with the knowledge of their criminal intent, irrespective of his or her disapproval, is eligible for criminal responsibility and liability for the crimes of the conspiracy.[1177] Ohlin describes this application of the JCE doctrine as "a significant example of legislative over-reaching".[1178]

Ohlin posits that the mistake stems from a lack of understanding the differences between intent and knowledge.[1179] Knowledge alone is "rarely morally significant," while the concept of intentionality is "acutely significant".[1180] Crimes committed with intent are the "more significant moral violation" and therefore more morally reprehensible than negligent acts or omissions because

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[1170] 121: According to Cassese, "it is common knowledge that for genocide the intent to destroy a 'protected group' in whole or in part is required; persecution presupposes the intent to discriminate on one of the requisite grounds; aggression […] is grounded in the intent to appropriate a foreign territory or to obtain economic advantages, or to interfere with the internal affairs of the victim state".

[1171] Ohlin (2007) *J Int'l C J* 78.

[1172] 78.

[1173] 78.

[1174] Art 25(3)(d) of the Rome Statute (2003) 2187 UNTS 90: The contribution to a criminal enterprise must be intentional *and* must either: "(i) [b]e 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) [b]e made in the knowledge of the intention of the group to commit the crime" before criminal responsibility and liability can ensue".

[1175] Ohlin (2007) *J Int'l C J* 78.

[1176] 78.

[1177] 79. Ohlin explains that commodities are "readily available on the open market. (Of course, the sale of firearms or explosives is another story.) But if one merchant does not sell the gasoline, another merchant will."

[1178] 79.

[1179] 79.

[1180] 79-80.

they indicate the existence of a "malignant heart" and the execution of calculated steps.[1181] The distinction between these two concepts is destroyed by the disjunctive nature of article 25(3)(d) of the Rome Statute.[1182] Despite the difference in moral reprehensibility, each form "yields the exact same criminal liability" for the acts of the entire conspiracy.[1183] This is unjust because the degree of moral reprehensibility is not reflected in the degree of liability.[1184] In order to resolve this anomaly, Ohlin suggest that article 25(3)(d)(i) and article 25(3)(d)(ii) should not be disjunctive.[1185] The latter should receive the lightest form of liability, while the prior receives the highest; consequently, not attributing equal liability.[1186]

6 3 5 3 Foreseeability

Foreseeability is one of the elements of recklessness or negligence (*culpa*) as well as intent (*dolus*). Irrespective of desire, the accused possesses intent in the form of *dolus eventualis* where he or she subjectively believed that the commission of that crime was a natural and foreseeable consequence of executing the plan and the accused reconciled himself or herself with the risk and continued nonetheless.[1187] Recklessness also requires foresight and a reckless contribution, however it does not requires the volitional element ie the accused is not required to have accepted or reconciled himself or herself with the risk.[1188] An accused's state of mind cannot be established other than by his own admission therefore the court may infer his subjective foresight, and thereby his intent, from the evidence before the court.[1189] Where it is the only rational inference on the facts.[1190]

Ohlin argues that where the commission of an un-concerted crime was objectively foreseeable, all members of the JCE can be charged with the crime.[1191] Therefore, Ohlin avers that the sole constraint for liability arising from the actions of others, under JCE category three, is foreseeability.[1192] In addition, Ohlin opposes the foreseeability standard because conspiracies usually have very few foreseeable limits.[1193] For instance, where the conspiracy involves the intent to commit acts of genocide, such as ethnic cleansing, the foreseeable consequences are extensive.[1194] Otherwise, the common purpose is so broad that most of the attacks do form part of the common purpose, therefore nullifying the need to prove the foreseeability of un-concerted

[1181] 80.

[1182] 80.

[1183] 80.

[1184] 80.

[1185] 81.

[1186] 81.

[1187] Haffajee (2006) *Harv J L & Gender* 214 cf *Prosecutor v Ojdanić* et al IT-99-37-AR72 (2003) 11.

[1188] Badar *The Concept of Mens Rea in International Criminal Law* 431.

[1189] Cassese (2007) *J Int'l C J* 113. See also *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) para 632 cf *Prosecutor* v *Krajišnik* IT-00-39-A (2009) para 692: The Appeals Chamber confirmed that a court can infer the physical perpetrator's intent from his or her knowledge of the deviatory crime, followed by his or her continued participation in the JCE.

[1190] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) paras 629-630 cf *Prosecutor v KvoČka* et al IT-98-30/1-A (2005) para 86.

[1191] Ohlin (2007) *J Int'l C J* 81 cf *Prosecutor v Tadić* IT-94-1-A (1999) para 204.

[1192] Ohlin (2007) *J Int'l C J* 81.

[1193] 81.

[1194] 81.

crimes.[1195] Moreover, Ohlin finds the use of foreseeability by the prosecution more "troublesome" where a specific objective between the conspirators exists and thereafter some of the conspirators engage in criminal conduct that far exceeds the original plan.[1196] In these situations, Ohlin argues that the prosecution may allege that the common objective of the criminal enterprise was the forcible and unlawful removal of civilians within a specific town yet the fact that some of the soldiers or militia opted to extend the scope of their targets or extend their tactics to include rape and torture, means that these crimes were foreseeable.[1197] Ohlin is concerned that the prosecution will always be able to prove that all the members foresaw the possibility of rape occurring as a consequence of the forced removal.[1198] Additionally, Cassese argues that the foreseeability standard is so unreliable that JCE category three amounts to strict liability.[1199]

Arguably, as discussed in chapter two, the commission of acts of sexual violence rarely extends far from the original plan and therefore its commission is usually objectively foreseeable. However, the prosecution must prove the accused's *subjective* foreseeability, by establishing beyond a reasonable doubt that the accused's foresight is the only rational inference on the facts.[1200] Therefore liability for the un-concerted crime only ensues for the ones who *subjectively foresaw* the possibility of *that crime* being committed and despite the risk made a significant contribution with the intent of furthering the common criminal purpose.[1201] Arguably, foresight is not the sole constraint for establishing liability pursuant to JCE category three. Nonetheless, objective foreseeability, alone, is undoubtedly insufficient.

In addition, Badar argues that the reasonable foreseeability test for JCE category three is unjust.[1202] According to Badar, the ICTY in the *Brdanin Appeal* dropped the volitional element, ie the requirement that the accused actually accepted or reconciled himself with the risk and adopted the "reasonably foreseeable" test to establish *dolus eventualis* instead. It consequently lowered the threshold of intent for JCE category three to *culpa* (negligence).[1203] Badar argues that the volitional element should be an element of *dolus eventualis* ie the accused must accept that the objective elements of the crime might be realised during the implementation of the common plan.[1204] Furthermore, Badar argues that the accused must foresee the probability or high probability of the result occurring, not merely its possibility, before liability can ensue.[1205]

Ohlin argues that participation in a criminal enterprise may give rise to a co-conspirator's responsibility to "anticipate the foreseeable actions of his co-conspirators".[1206] By engaging in a criminal enterprise, Ohlin argues that the co-perpetrator must assume the risk that other extreme acts beyond the common purpose, may arise.[1207] According to the American law of torts, where the

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[1195] 82.

[1196] 82.

[1197] 82.

[1198] 82.

[1199] Cassese (2007) *J Int'l C J* 116 cf K Ambos "Joint Criminal Enterprise and Command Responsibility" (2007) 5 *Journal of International Criminal Justice* 159-183.

[1200] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) paras 629-630 cf *Prosecutor v KvoČka* et al IT-98-30/1-A (2005) para 86.

[1201] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) para 627 cf *Prosecutor* v *KvoČka* et al IT-98-30/1-A (2005) para 86.

[1202] Badar *The Concept of Mens Rea in International Criminal Law* 431.

[1203] 431 cf *Prosecutor* v *Brđanin* IT-99-36-A (2007).

[1204] Badar *The Concept of Mens Rea in International Criminal Law* 431.

[1205] 431.

[1206] Ohlin (2007) *J Int'l C J* 82-83.

[1207] 83. See Cassese's justification for the attribution of equal liability above, *6 3 5 1*.

criminal enterprise involves violent crime, it is appropriate to hold the co-conspirator vicariously liable for the foreseeable actions of other co-conspirators.[1208] However, this source only carries persuasive value because domestic law does not bind international actors.[1209] Ohlin acknowledges a co-conspirator's responsibility for the foreseeable yet un-concerted crimes committed by another yet argues that the level of responsibility must alleviated.[1210] The co-conspirator neither "directly engaged in" nor intended the commission of the un-concerted crime.[1211] He behaved negligently by contributing to the criminal enterprise, by neither preventing the commission of the un-concerted crime nor disassociating himself from the criminal enterprise.[1212] Negligence is a lesser form of culpability, which always warrants a lesser form of liability than intentional acts.[1213] In criminal law, this distinction, must be maintained because intent is "the result of the most extreme moral depravity".[1214] Ohlin adds that: "low-level participants in a massacre also deserve stiff sentences" that "may in a practical sense end up being similar to the punishment of the architects," however "we ought to insist that our legal doctrine is sophisticated enough to distinguish between different levels of participation".[1215]

I agree that the distinction between negligent and intentional acts is essential as it preserves the principle of culpability, however as discussed above, JCE category three is arguably not synonymous with negligence. JCE category three does not attribute liability based on a negligent contribution arising from the accused's foresight, instead it attributes liability based on the accused's intentional contribution. Therefore the volitional element of *dolus eventualis* is the source of its characterisation as a form of intent rather than negligence. Badar argues for *dolus eventualis* to be defined as "a foresight of the likelihood of the occurrence of the consequences and not mere indifference towards its occurrence".[1216] Arguably, the confusion arises from the difference between the wording of article 25(3)(d) of the Rome Statute and the *ad hoc* tribunals understanding of JCE category three. JCE category three requires that the accused subjectively foresee (*dolus eventualis*) the execution of the un-concerted crime yet despite the risk makes a significant contribution to the common criminal purpose with the intent of furthering the common criminal purpose (*dolus directus*). Alternatively, article 25(3)(d) of the Rome Statute attributes equal liability to an accused who made an intentional contribution to the crime in furtherance of the common criminal purpose (*dolus directus*) *or* who made an intentional contribution to the crime with knowledge of the

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[1208] Ohlin (2007) *J Int'l C J* 83. American tort law refers to this as "assumption of risk".

[1209] Wallace & Martin-Ortega *International Law* (2009) 8 cf art 38(1)(d) of the Statute of the International Court of Justice (1946) 59 Stat 1055 1060 states that judicial decisions of a nation are a subsidiary means of determining rules of law, however; art 38(1)(d) is subject to art 59, which states that: "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case;" Wallace & Martin-Ortega *International Law* 28: According to Wallace, the decision of a domestic court may be applied if relevant and its weight will depend on the standing of that court; 120: The diminished status of domestic laws in the international law arena stems from the principle of State sovereignty. Jurisdiction, as a characteristic of State sovereignty, is "the competence of a State to govern persons and property by its municipal law". Therefore the domestic laws of one country do not apply to other countries unless that country willingly adopts those laws as its own, binds itself through a treaty or willingly becomes party to an international instrument.

[1210] Ohlin (2007) *J Int'l C J* 83.

[1211] 83.

[1212] 83.

[1213] 83.

[1214] 83.

[1215] 84.

[1216] Badar *The Concept of Mens Rea in International Criminal Law* 425.

group's criminal intent (*culpa*).[1217] Liability pursuant to article 25(3)(d) of the Rome Statute is disjunctive and therefore attributes liability, pursuant to article 25(3)(d) irrespective of whether the accused was negligent or intentional. Therefore in support of the argument made in chapter five, liability under article 25(3)(d) of the Rome Statute is not reconcilable with JCE liability.[1218]

6 3 6 Argument six: Transferring principles, models and norms from international human rights law to international criminal law has over-extended the JCE doctrine

Within the sphere of human rights law, certain models, norms and principles are used to interpret human rights instruments. For instance, expansive, purposive and victim-oriented interpretations are features of human rights law. Danner and Martinez state that models within human rights law may "inform the goals of international criminal law" however, over-reliance on their interpretative techniques may threaten the legitimacy of international criminal law.[1219] The threat to legitimacy of international criminal law stems from the distinct focus of each international legal sphere. While human rights law aims to hold states responsible, international criminal law focuses on the individual's criminal responsibility.[1220] Furthermore, the human rights regime aims to protect against any violation of human life and well-being, while international criminal law aims to punish individuals for the commission of pre-existing crimes.[1221] In addition, it may also threaten the rights of the accused, which are more attentively guarded in a human rights forum.[1222] For instance, the accused is more likely to be used as a "scapegoat," in order appease the society's desire to see justice done and thereby heal, in a criminal forum than in a human rights forum.[1223] Danner and Martinez warned that the influence of certain aspects of human rights law in international criminal law might overpower the restraining force of the criminal law tradition.[1224] For instance, they argue that principles of human rights law catalysed the development and growth of JCE liability to address large scale enterprises ie ethnic cleansing.[1225] Thereby enhancing accountability yet threatening the culpability principle.[1226] Therefore, according to Danner and Martinez, transferring models and norms that are features of international human rights law to international criminal law may threaten the integrity of the system.[1227]

Danner and Martinez argue that the JCE doctrine has the potential to "stretch criminal liability to a point where the legitimacy of international criminal law will be threatened".[1228] The development of the JCE developed by favouring the rights of the victim and community, ie symbolic vindication,

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[1217] Art 25(3)(d) of the Rome Statute (2003) 2187 UNTS 90.

[1218] Refer back to 6 6 4 "Comparing the distinction between principal liability and accessorial liability as understood by the *ad hoc* tribunals to the understanding of the ICC" in chapter six.

[1219] Danner & Martinez (2005) *Cal L Rev* 100.

[1220] 100: Danner and Martinez add that human rights law "can allow for the imposition of liability on a state in situations where imposition of criminal liability on an individual might violate the culpability principle" because it traditionally focuses on the responsibility of states.

[1221] 101.

[1222] 101.

[1223] 101.

[1224] 132.

[1225] 132.

[1226] 134.

[1227] 101.

[1228] 132.

over the rights of the accused.[1229] The victim-oriented, civil law model of human rights, has therefore "diverted attention from the values vindicated by the criminal law-oriented culpability principle".[1230] This in turn may weaken the focus on an accused being held responsible in accordance with his or her actions or part, as protected by criminal law.[1231] Therefore by expanding the scope of actions that result in liability the human rights of the accused and the general principles of criminal law may be threatened.[1232] For example, the ICTY in the *Tadić Appeal* used a purposive interpretation, which relies on the object and the purpose of the instrument, to expand article 7 of the ICTY to include participation in a JCE.[1233] The ICTY justified its inclusion by referring to the object and the purpose of the ICTY Statute ie the prosecution of all those who are "responsible for serious violations of international humanitarian law" under the tribunal's jurisdiction.[1234] According to Danner and Martinez, using the object and purpose of an instrument to broaden the protection afforded by an instrument, is a feature of human right law.[1235] For example, CEDAW and the VCLT both require that all reservations must be compatible with the object and purpose of the treaty.[1236] In addition, the VCLT requires that all treaties be interpreted "in the light of its object and purpose".[1237]

A purposive interpretation is also consistent with the "principle of effectiveness," which also stems from human rights law.[1238] Human rights courts preserve the principle of effectiveness by interpreting human rights in a manner "that make those rights relevant to changing conditions or to ensure that they are practical and effective".[1239] For example, the ECtHR has read implicit rights into the ECHR in order to fulfil its object and purpose ie the protection of human rights.[1240] The result of thereof, being the broader interpretation of the right.[1241] According to Danner and Martinez, the principle of effectiveness and a victim-oriented perspective of human rights facilitated the adoption of JCE.[1242]

Along the same vein, the ICTY and ICTR have used the teleological purpose of "protecting human dignity," which is another one of the interpretive methodologies of human rights

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[1229] 146.

[1230] 146.

[1231] 146.

[1232] 132.

[1233] 132 cf *Prosecutor v Tadić* IT-94-1-A (1999) paras 189-190 cf art 7(1) of the ICTY Statute (1993) 32 ILM 1159.

[1234] Danner & Martinez (2005) *Cal L Rev* 132 cf *Prosecutor v Tadić* IT-94-1-A (1999) paras 189-190 cf art 1 of the ICTY Statute (1993) 32 ILM 1159.

[1235] Danner & Martinez (2005) *Cal L Rev* 132.

[1236] Art 28(2) of CEDAW (1981) 1249 UNTS 13; art 19(c) of the VCLT (1980) 1115 UNTS 33.

[1237] Art 31(1) of the VCLT (1980) 1115 UNTS 331: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[1238] Danner & Martinez (2005) *Cal L Rev* 132.

[1239] 133 cf LR Heifer "Adjudicating Copyright Claims under the TRIPs Agreement: The Case for a European Human Rights Analogy" (1998) 39 *Harvard International Law Journal* 357 403.

[1240] Danner & Martinez (2005) *Cal L Rev* 133 cf JG Merrills *The Development of International Law by the European Court Of Human Rights* 2 ed (1993) 11: stating "what is in issue is the international responsibility of the State" (footnote omitted).

[1241] Danner & Martinez (2005) *Cal L Rev* 133 cf A Orakhelashvili "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights" (2003) 14 *European Journal of International Law* 529 534.

[1242] Danner & Martinez (2005) *Cal L Rev* 133.

proceedings, to broaden the definition of the crime of rape and torture.[1243] For example, the ICTY in the *Furundžija* stated:

> "The Trial Chamber holds that the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d' être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape."[1244]

The ICTY in *Furundžija* stated that the principle of respect for human dignity is not limited to the international human rights sphere. Conversely, it should apply to all spheres of international law, including international criminal law. Furthermore, the ICTR in *Musema*, acknowledged and accepted the ICTY's expansion of the term rape to include forced oral sex in *Furundžija*, because it is a "humiliating and degrading attack on human dignity".[1245] Moreover, the ICTR and ICTY Statutes do not include a definition of torture therefore the ICTY and ICTR adopted the definition from Convention Against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishment ("CAT"), a Human Right's instrument, and even expanded CAT's definition of torture by including additional prohibited purposes.[1246] Conversely, the ICTY Trial Chamber in *Prosecutor v Kmojelac* stated that:

> "There may be a tendency, particularly in the field of human rights, towards the enlargement of the list of prohibited purposes, but the Trial Chamber must apply customary international humanitarian law as it finds it to have been *at the time when the crimes charged were alleged to have been committed.* In light of the principle of legality, the proposition that 'the primary purpose of [humanitarian law] is to safeguard human dignity' is not sufficient to permit the court to introduce, as part of the *mens rea*, a new and additional prohibited purpose, which would in effect enlarge the scope of the criminal prohibition against torture beyond what it was at the time relevant to the indictment under consideration."[1247]

The principle of efficacy keeps the human right's instrument abreast. However, the international courts and *ad hoc* tribunals must apply the law as they find it in customary international law in order to prevent retrospective application.

Nonetheless, Danner and Martinez conclude that the correct definition of a doctrine, is not a choice between the broadening tendency of a human rights perspective and the narrowing potential

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[1243] 133-134 cf WA Schabas "Interpreting the Statutes of the Ad Hoc Tribunals" in LC Vohrah, F Pocar Y Featherstone, O Fourmy, C Graham, J Hocking & N Robson eds *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (2003) 846 865.

[1244] *Prosecutor v Furundžija* IT-95-17/1 (1998) para 183.

[1245] *Prosecutor v Musema* ICTR-96-13-A (2000) para 228.

[1246] Danner & Martinez (2005) *Cal L Rev* 133 cf *Prosecutor v Furundžija* IT-95-17/1 (1998) para 162. See also *Prosecutor v Kunarac* et al IT-96-23-T & IT-96-23/1-T (2001) paras 437-438 and 497, which lists the CAT (1987) 1465 UNTS 85 as a source when formulating its definition of torture.

[1247] Danner & Martinez (2005) *Cal L Rev* 134 cf *Prosecutor v Kmojelac* (Judgement) IT-97-25-T (15 March 2002) para 186.

of criminal law paradigms.[1248] They found that the ICC should consider human rights law, however; the balance should tip "in favor of close adherence to the criminal culpability model in the context of construing liability doctrines".[1249] I agree with their conclusion. The importance of the principle of human dignity as displayed in *Furundžija*, together with the human rights interpretive standard pursuant to article 21(3) of the Rome Statute and a purposive interpretation pursuant to article 31 of the VCLT, does not limit these models of interpretation to the sphere of international human rights law. The application of these models extend to international criminal law as well so long as it does not infringe on the principles of legality and culpability.

6 3 7 Argument seven: Participation in a JCE is not distinguishable from aiding and abetting.

Ambos and Goy propose that the degree of criminal responsibility resulting from aiding and abetting is greater than that arising from participation in a common purpose; based on more stringent objective requirements for adding an abetting.[1250] Cassese disagrees that the objective requirements are the distinctive factor because both forms of participation require a substantial contribution.[1251] According to Cassese, the "major difference" rests with their respective *mens rea*.[1252] On the one hand, an aider and abettor might be aware of the physical perpetrators intent yet he or she does not share in the *mens rea*.[1253] He or she solely intends to assist the physical perpetrator in the commission of the crime. [1254] On the other hand, a participant in a common purpose shares in the common criminal plan and the common intent to perpetrate the crime or by willingly and knowingly participating he or she evidences that he or she shares in the common criminal intent.[1255] A shared intent is therefore paramount. The criminal liability for participation in a criminal enterprise therefore arguably outweighs the liability for aiding and abetting. [1256] As evinced in *Furundžija* as discussed in sub-chapter 3 5 1, above.

6 4 Suggested reform of the JCE doctrine

6 4 1 The limitation of prosecutorial discretion

Cassese argues that application the JCE doctrine has not caused as much abuse and confusion as expected because the *ad hoc* tribunals have interpreted JCE liability cautiously.[1257] Over time the *ad hoc* tribunals have limited the scope of the *Tadić*-construction of JCE as well as the prosecution's discretion by adding additional requirements. Danner and Martinez argue that "strict adherence to the criminal law culpability principle" limits unfettered prosecutorial discretion of attributing

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[1248] Danner & Martinez (2005) *Cal L Rev* 144.

[1249] 101.

[1250] 115-116 cf Ambos (2007) *J Int'l C J* 159-183 argues that: "the aider and abettor carries out substantial acts 'specifically directed' to assist in the perpetration of the (main) crime, while the co-perpetrator must only perform acts (of any kind) that 'in some way' are directed to the furthering of the common plan or purpose".

[1251] Cassese (2007) *J Int'l C J* 116.

[1252] 116.

[1253] 116.

[1254] 116.

[1255] 116.

[1256] 116.

[1257] 133.

wrongdoing to an accused in JCE.[1258] Strict adherence enhances the perceived legitimacy of international criminal trials and thereby its overall effectiveness in achieving human rights goals where.[1259] For instance, the ICTY Chamber in the *Brđanin Appeal* stated that principal liability only ensues where the accused possesses the requisite intent and made a *significant* contribution to furthering the JCE.[1260] In addition, the ICTY Trial Chamber in *Prosecutor v KvoĈka* ("*KvoĈka*") set out the factors that should be considered by the prosecution and the judges when determining if the accused's contribution is significant:

> "The level of participation attributed to the accused and whether that participation is deemed significant will depend on a variety of factors, including the size of the criminal enterprise, the functions performed, the position of the accused... the seriousness and scope of the crimes committed and the efficiency, zealousness or gratuitous cruelty exhibited in performing the actor's function.... Perhaps the most important factor to examine is the role the accused played vis-d-vis the seriousness and scope of the crimes committed."[1261]

By adding these additional requirements, the *ad hoc* tribunals limited the prosecutor's discretion in attribution JCE liability, which is a solution suggested by Danner and Martinez.[1262] This solution addresses Ohlin's concerns that JCE category three attributes liability equally, irrespective of the accused's degree of participation, based on post-WWII cases referred to in the *Tadić Appeal*.

6 4 2 The differentiation between the degrees of participation at the sentencing phase protects the principle of culpability

The ICTY in the *Brđanin Appeal* recognised that the JCE doctrine offers no formal distinction between members who make overwhelmingly large contributions and members whose contributions are significant yet not as great.[1263] The application of the JCE doctrine may therefore lead to some disparities, however the Appeals Chamber recalls that any such disparity are adequately dealt with at the sentencing stage.[1264] Danner and Martinez also argue that any threat posed by the JCE doctrine to the culpability principle can be resolved at the sentencing stage.[1265] The sentencing can therefore reflect the accused's degree of participation. While the ICTY Appeal Chambers in *Vasiljević* found that aiding and abetting, as a form of responsibility, warrants a lower sentence than co-perpetration, the ICTY has never expressly stated that the sentencing should reflect the accused's actual degree of participation or contribution to the JCE.[1266] Even though the distinction between participants in varying degrees can be achieved at the sentencing stage, it is essential to the maintenance of the "transitional justice goals of international criminal trials" that the accused's role be accurately reflected in the conviction.[1267]

[1258] Danner & Martinez (2005) *Cal L Rev* 146.

[1259] 146.

[1260] *Prosecutor* v *Brđanin* IT-99-36-A (2007) para 430.

[1261] Danner & Martinez (2005) *Cal L Rev* 150-151 cf Prosecutor v *KvoČka* et al IT-98-30/1-T (2001) para 311.

[1262] Danner & Martinez (2005) *Cal L Rev* 150.

[1263] *Prosecutor* v *Brđanin* IT-99-36-A (2007) para 432.

[1264] Para 432.

[1265] Danner & Martinez (2005) *Cal L Rev* 141.

[1266] 141 cf *Prosecutor v Vasiljević* IT-98-32-A (2004) para 182.

[1267] Danner & Martinez (2005) *Cal L Rev* 142: The judges of the ICTY "have rejected plea agreements negotiated between the Office of the Prosecutor and individual defendants because they believed the plea agreements did not capture accurately the defendant's role in crimes that occurred in the former Yugoslavia". "Babić initially pleaded guilty

Ohlin argues; that "[t]he minor participant and the chief conspirator" possess different degrees of guilt "and it is this central truth that the current version of joint criminal enterprise obscures".[1268] Therefore "[o]ne cannot solve the conceptual problem by giving the minor participant a reduction in prison time during the sentencing phase".[1269] Furthermore, Ohlin argues that: "[r]elative culpability is not simply a matter of serving the appropriate time in a penal facility. It goes deeper to the very heart of the criminal offence."[1270] In addition, the stigma of a criminal conviction is significant and therefore criminal law "requires that correct determinations of relative culpability be expressed at the level of offences".[1271] Moreover, the judges may exercise more discretion at the sentencing phase, which diminishes the number of sentencing appeals and makes the adjudication of sentencing appeals difficult.[1272] During the trial, the "accused receives the appropriate procedural protections" of a sophisticated criminal law system, while sentencing allows for "gut-level decisions about the severity of each atrocity".[1273] Therefore the distinction between different levels of culpability must be made at the conviction or acquittal stage of the trial.[1274] Arguably, the differentiation at the sentencing phase is an insufficient solution.

6 4 3 Command or superior responsibility is a more suitable than the JCE liability

Danner and Martinez argue that prosecutors should not favour JCE over command responsibility.[1275] For instance, they propose that command responsibility instead of aiding and abetting would have "more accurately" captured the basis for Krstić's liability in *Krstić*.[1276] According to the Appeal Chamber, the Trial Chamber's conviction was based on Krstić's knowledge of Mladić's genocidal intent (ie the intention to execute the Bosnian Muslims of Srebrenica) and his knowledge that Drina personnel, over which he was the Commander, were used to carry out that intention.[1277] Therefore, the Appeals Chamber found that the Trial Chamber had erred in finding that Krstić possessed the intent to participate in a JCE to commit genocide.[1278] The Appeal Chamber chose to not limit the scope of JCE but instead it overturned the conviction on factual grounds by changing Krstić's conviction from co-perpetration to aiding and abetting.[1279] The

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as an aider and abettor of a JCE. After the Trial Chamber 'expressed doubts about the accuracy' of this level of responsibility, Babić pleaded guilty as a co-perpetrator of a JCE." See *Prosecutor v Babić* (Sentencing Judgement) IT-03-72-S (29 June 2004) paras 6-8.

[1268] Ohlin (2007) *J Int'l C J* 88.

[1269] 88.

[1270] 88.

[1271] 88.

[1272] 88.

[1273] 88.

[1274] 88.

[1275] Danner & Martinez (2005) *Cal L Rev* 150.

[1276] 153.

[1277] 152-153 cf *Prosecutor v Krstić* IT-98-33-A (2004) para 134. See also paras 2 and 47: *Krstić* was the commander of the "Drina Corps" of the Bosnian Serb army. "The Drina Corps was formally responsible for the area of Bosnia that included the town of Srebrenica during the massacre of approximately seven thousand Bosnian men and boys in July 1995." Krstić's role in the Srebrenica killings, however, was complicated by the fact that the killings appear to have been orchestrated by General Mladid, the Commander of the Bosnian Serb Army, and carried out largely by forces which Krstić did not command, including members of the military police.

[1278] Danner & Martinez (2005) *Cal L Rev* 152.

[1279] 153.

Appeal Chamber also decreased Krstić's sentencing from forty-five to thirty-five years of imprisonment.[1280] Unlike the Trial Chamber, the Appeal Chamber based Krstić's liability on his failure to prevent his troops from participating in the genocide.[1281] Therefore, Danner and Martinez argue that command responsibility instead of aiding and abetting would have provided a more suitable foundation for Krstić's liability.[1282] In addition, they argue that a legal analysis of the relationship between JCE and command responsibility, instead of reversing the Trial Chamber's factual findings, "would have (…) provided an important signal for prosecutorial strategy in future cases".[1283] They conclude that the *Krstić Appeal* reflects "the ICTY Appeals Chamber's vindication of the culpability principle by calibrating a defendant's individual actions and intent with his liability".[1284] The Appeals Chamber's willingness to overturn the Trial Chamber findings "indicates the degree to which the ICTY itself views adherence to the culpability principle as essential to its legitimacy and the success of its overall mission".[1285] This argument ties in with Cassese's argument in favour of cautious judicial interpretation, as suggested in sub-chapter 6 4 1, above.[1286]

While I agree that JCE should not replace command responsibility, I disagree with the suitability of command responsibility in this case. In order to succeed with superior liability, the prosecution must prove that the accused exercised effective control over the physical perpetrator through a superior-subordinate relationship and that the physical perpetrator had a reciprocal duty to obey the accused.[1287] In *Krstić*, the crimes were "largely carried out by forces which Krstić did not command," which would make it difficult to establish a superior-subordinate relationship.[1288] Even where the crimes were committed by the Drina Corps, who were under Krstić's commanded, it would be difficult to prove which crimes were committed under Krstić and which were committed under Mladić. Alternatively, the JCE doctrine does not require the existence of a superior-subordinate relationship to attribute liability. Furthermore, the analysis of *Semanza* and *Musema* in chapter three, displayed how difficult it to secure a conviction pursuant to superior liability as the prosecution in both cases failed to establish a superior-subordinate relationship. Therefore replacing the JCE doctrine with command responsibility is not the solution because they are not interchangeable forms of liability. By removing the JCE doctrine as a form of liability the perceived threat to the culpability principle is avoided, however; years' worth of progress made by the *ad hoc* tribunals will be undermined.

[1280] 152-153 cf *Prosecutor v Krstić* IT-98-33-A (2004) paras 137 and 268.

[1281] Danner & Martinez (2005) *Cal L Rev* 153.

[1282] 153. They add that: "we do not mean to endorse the Appeals Chamber's overturning of the Trial Chamber's factual findings regarding General Krstić's intent to aid the genocidal plan, nor to suggest that the Trial Chamber's conclusions of law, given its factual findings, were incorrect. Indeed, we view with some scepticism the Appeals Chamber's recent propensity to overturn the Trial Chamber's factual findings. Rather, we simply intend to comment on the appropriate legal categorization, based on the Appeals Chamber's factual findings."

[1283] Danner & Martinez (2005) *Cal L Rev* 153.

[1284] 154.

[1285] 154.

[1286] See 6 4 1, above.

[1287] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) para 119: When relying on the theory of superior responsibility to hold an accused criminally responsible, the Prosecution must establish that "the accused is the superior of subordinates sufficiently identified, over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible" as one of four elements. See also para 155: Unlike superior-liability, JCE liability does not require control of the physical perpetrator in order to attribute liability, it does however attribute liability based on the accused's contribution to the common purpose of the JCE and his shared intent with other members.

[1288] Danner & Martinez (2005) *Cal L Rev* 152-153 cf *Prosecutor v Krstić* IT-98-33-A (2004) paras 2 and 47.

6 4 4 Co-perpetration and the common purpose doctrine should replace the JCE doctrine

Cassese recognises the argument, by the ICTY Trial Chamber in *Prosecutor v Stakić* ("*Stakić*"), that the JCE doctrine should be replaced by co-perpetration.[1289] Furthermore, Lindholm J in his Separate Opinion in *Prosecutor v Simić* ("*Simić*") argued that the doctrine of JCE "does not (...) have any substance of its own".[1290] Lindholm J argues that the JCE doctrine is purely a new term for the pre-existing form of co-perpetration.[1291] As discussed in chapter four, the ICC has not used the JCE doctrine to address contributions to a criminal enterprise. Instead, the ICC has used accessorial liability for contributing to the commission of a crime by a group with a common purpose and principal liability as a co-perpetrator for the accused's involvement in a common purpose.[1292] In addition, the prosecutor of the ICC made use of common purpose doctrine, not the JCE doctrine, by explicitly referencing to this doctrine in charges against *Lubanga* in the PTC.[1293] Moreover, the prosecutor of the ICC in the *Situation in Darfur, The Sudan*, alleged that the accused, Haran and Kushauyb, committed crimes "as part of a group of persons acting in common purpose".[1294] Furthermore, the ICTY in *Stakić* used "co-perpetratorship," which is a mixture of co-perpetration and indirect perpetratorship otherwise known as "committing jointly with another", instead of JCE as the mode of liability.[1295] Perhaps it is important to reiterate that the Rome Statute expressly includes committing "jointly with another" as a form of commission in article 25(3)(a).[1296] To succeed with establishing liability as a co-perpetrator the prosecution must firstly prove; an explicit agreement or silent consent between two or more persons, co-ordination or co-operation and joint

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[1289] Cassese (2007) *J Int'l C J* 114 cf *Prosecutor v Stakić* (Trial Chamber) IT-97-24-T (31 July 2003) paras 436-438.

[1290] Cassese (2007) *J Int'l C J* 115 cf *Prosecutor v Simić & Others* (Trial Chamber) IT-95-9-T Separate and Partly Dissenting Opinion of Judge PJ Lindholm (17 October 2003) para 2.

[1291] Cassese (2007) *J Int'l C J* 115 cf *Prosecutor v Simić & Others* IT-95-9-T Separate and Partly Dissenting Opinion of Judge PJ Lindholm (2003) para 2.

[1292] See *Prosecutor v Lubanga* ICC-01/04-01/06-1049 Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial (2007). See also *Prosecutor* v *Katanga & Chui* ICC-01/04-01/07-717 (2014).

[1293] Damgaard *Individual Criminal Responsibility for Core International* 177 cf *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Thomas Lubanga Dyilo* (Pre-Trial Chamber I) ICC-01/04-01/06 Submission of the Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence Pursuant to Rule 121(3) (28 August 2006) <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%20014%20016/court%20records/chambers/pre%20trial%20chambers%20i/Pages/decision%20on%20the%20confirmation%200f20charges.aspx> (accessed 26-07-2007).

[1294] Damgaard *Individual Criminal Responsibility for Core International Crimes* 177 cf *Situation in Darfur, The Sudan*, (Pre-Trial Chamber) ICC-02/05-01/07 Prosecutor's Application, under Article 58(7), for the issue of summons for *Ahmad Muhammad Haran and Ali Muhammad Ali Abd-Al-Rahman Kushayb* (27 February 2007) <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc%200205%200107/court%20records/chambers/pre%20trial%20chambers%20i/pages/decision%20on%20the%20prosecution%20application%20under%20article%2058%207%20%20of%20the%20statute.aspx> (accessed 26-07-2007).

[1295] Badar *The Concept of Mens Rea in International Criminal Law* 362 cf *Prosecutor v Stakić* IT-97-24-T (2003) paras 438-441.

[1296] Art 25 of the Rome Statute (2003) 2187 UNTS 90.

control over criminal conduct.[1297] Secondly, each co-perpetrator must possess the mutual awareness of substantial likeliness that the crime will occur and the importance of his own role ie the awareness that he or she has ability to frustrate its commission.[1298]

However the ICTY Appeal Chamber in *Prosecutor v Stakić* ("*Stakić* Appeal") found that while co-perpetration is recognised by many domestic legal systems, customary international law does not.[1299] Therefore the inclusion of co-perpetratorship within "committing" is retrospective. On the contrary, Schomburg J, dissenting in the *Simić Appeal*, argued that co-perpetratorship is firmly entrenched in customary international law due to its use in national legal systems, the ICTY has used co-perpetration, both *ad hoc* tribunals were vested with jurisdiction and committing "with another" is expressly referred to in the Rome Statute.[1300] Schomburg J adds that co-perpetratorship suits international criminal law.[1301] Conversely, in his Separate Opinion to the *Gacumbitsi* Appeal, Shahabhuddeen J found that co-perpetratorship has no foundation in customary international law because neither evidence of state practice nor evidence of *opinio juris* exists.[1302] Furthermore the ICTY in the *Simić Appeal* added that JCE is "firmly established in customary international law".[1303] The Appeal Chamber, according to Cassese, found that the JCE doctrine is better suited to international criminality.[1304]

Alternatively, the prosecution can use indirect perpetratorship instead of the JCE doctrine.[1305] Indirect perpetratorship is where the accused uses another as an instrument.[1306] Furthermore, the ICTY in *Furundžija* found that "he who acts through others is regarded and acting himself".[1307] It is perhaps important to reiterate that the Rome Statute expressly includes commits "through another person" as a form of commission in article 25(3)(a).[1308] In order to establish liability for indirect participation the prosecution must prove beyond a reasonable doubt that the accused exercised control over physical perpetrator's will and actions.[1309] This form of commission bridges any physical distance between the accused and the commission yet requires proof of the accused exercising sufficient control and his or her overall involvement.[1310] Arguably, indirect perpetration preserves the principle of individual culpability, while recognising the nature of sexual violence. Schomburg J therefore argues that indirect perpetration is good for international criminal law and

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[1297] Badar *The Concept of Mens Rea in International Criminal Law* 362 cf *Prosecutor v Stakić* IT-97-24-T (2003) para 440.

[1298] Badar *The Concept of Mens Rea in International Criminal Law* 363 cf *Prosecutor v Stakić* IT-97-24-T (2003) paras 495-498.

[1299] Cassese (2007) *J Int'l C J* 115 cf *Prosecutor v Stakić* (Appeal Chamber) IT-97-24-A (32 March 2006) para 62.

[1300] Badar *The Concept of Mens Rea in International Criminal Law* 365 cf *Prosecutor v Simić* IT-95-9-A Judge Schomburg Dissenting Opinion (2006) para 16.

[1301] Badar *The Concept of Mens Rea in International Criminal Law* 365 cf *Prosecutor v Simić* IT-95-9-A Judge Schomburg Dissenting Opinion (2006) para 16.

[1302] Badar *The Concept of Mens Rea in International Criminal Law* 365 cf *Gacumbitsi v The Prosecutor* ICTR-2001-64-A Separate Opinion of Judge Shahabuddeen (2006) para 51.

[1303] Cassese (2007) *J Int'l C J* 115 cf *Prosecutor v Stakić* IT-97-24-A (2006) para 62.

[1304] Cassese (2007) *J Int'l C J* 115.

[1305] Badar *The Concept of Mens Rea in International Criminal Law* 364.

[1306] 364.

[1307] *Prosecutor v Furundžija* IT-95-17/1-T (1998) para 256.

[1308] Art 25 of the Rome Statute (2003) 2187 UNTS 90.

[1309] Badar *The Concept of Mens Rea in International Criminal Law* 364 cf *Gacumbitsi v The Prosecutor* ICTR-2001-64-A Separate Opinion of Judge Schomburg on the Criminal Responsibility of the *Gacumbitsi* for Committing Genocide (2006) para 18.

[1310] Badar *The Concept of Mens Rea in International Criminal Law* 364.

national law.[1311] However, control as an element of indirect perpetrator and co-perpetratorship, will arguably exclude the successful prosecution of many cases that the JCE doctrine can address.[1312] The duty to prove that the accused exercised control over the physical perpetrator was also the reason why command responsibility cannot and should not replace JCE liability, as discussed above.

Schomburg J, in the *Gacumbitsi Appeal* and the *Simić Appeal*, found that JCE and co-perpetratorship "widely overlap and [should therefore] be harmonised in the jurisprudence of both *ad hoc* Tribunals".[1313] According to Schomburg J in the *Simić Appeal*, harmonisation could provide the three categories of JCE with "sharper contours by combining objective and subjective components in an adequate way".[1314] Additionally, harmonisation may lead to greater acceptance of *ad hoc* jurisprudence the ICC in future.[1315] However, Shahabudeen J in the *Gacumbitsi Appeal* and Schomburg J in the *Simić Appeal*, argue that harmonisation is impractical because while these two modes of liability do overlap, at a point are incompatible.[1316] Co-perpetratorship requires that the accused must be able to frustrate the commission thereby requiring that the accused's contribution is a *sine qua non* of the commission whereas the JCE doctrine does not require that it be a *sine qua non*.[1317]

Otherwise, van Sliedregt argues that the JCE doctrine creates a "perpetrator status for those closely involved in the commission of an international crime".[1318] Because the defining characteristic of JCE liability is the existence of a common criminal plan or purpose, a higher degree of culpability than is attributed for aiding and abetting ensues, despite requiring a lesser form of participation, due to the accused's shared criminal intent.[1319] Therefore the JCE doctrine provides for the attribution of a higher degree of culpability than aiding and abetting, which mirrors co-perpetration, as a feature of civil law.[1320] People can participate in the same group with varying

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[1311] 364 cf *Gacumbitsi v The Prosecutor* ICTR-2001-64-A Separate Opinion of Judge Schomburg on the Criminal Responsibility of the *Gacumbitsi* for Committing Genocide (2006) para 21.

[1312] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) para 115: Unlike superior-liability, JCE liability does not require control of the physical perpetrator in order to attribute liability, it does however attribute liability based on the accused's contribution to the common purpose of the JCE and his shared intent with other members.

[1313] Badar *The Concept of Mens Rea in International Criminal Law* 365 cf *Gacumbitsi v The Prosecutor* ICTR-2001-64-A Separate Opinion of Judge Schomburg on the Criminal Responsibility of the *Gacumbitsi* for Committing Genocide (2006) para 22; *Prosecutor v Simić* IT-95-9-A Judge Schomburg Dissenting Opinion (2006) para 17.

[1314] Badar *The Concept of Mens Rea in International Criminal Law* 365 cf *Prosecutor v Simić* IT-95-9-A Judge Schomburg Dissenting Opinion (2006) para 17.

[1315] Badar *The Concept of Mens Rea in International Criminal Law* 365 cf *Prosecutor v Simić* IT-95-9-A Judge Schomburg Dissenting Opinion (2006) para 17.

[1316] Badar *The Concept of Mens Rea in International Criminal Law* 366 cf *Gacumbitsi v The Prosecutor* ICTR-2001-64-A Separate Opinion of Judge Shahabuddeen (2006) para 50; *Prosecutor v Simić* IT-95-9-A Judge Schomburg Dissenting Opinion (2006) para 32.

[1317] Badar *The Concept of Mens Rea in International Criminal Law* 366 cf *Gacumbitsi v The Prosecutor* ICTR-2001-64-A Separate Opinion of Judge Shahabuddeen (2006) para 50; *Gacumbitsi v The Prosecutor* ICTR-2001-64-A Separate Opinion of Judge Schomburg on the Criminal Responsibility of the *Gacumbitsi* for Committing Genocide (2006) para 32.

[1318] van Sliedregt (2007) *JICL* 203. Note that "involvement" was also the term used by the ICC in *Lubanga* to describe the perpetrator's contribution the common purpose.

[1319] 203.

[1320] 203.

degrees of *mens rea* because each person's mental element is distinct.[1321] According to van Sliedregt, JCE is both a form of accomplice liability, as discussed by Hunt J, and a form of co-perpetration because it is a combination of civil and civil law.[1322] It is therefore a *sui generis* concept.[1323] The degree of culpability arguably depends on the accused's particular degree of participation and *mens rea* not which category of JCE was used to establish the existence of these elements. By using a construction of the JCE the doctrine that provides for differentiation, some contributors to the JCE may be participants that incur a derivative form of liability, while others may be perpetrators that incur principal liability.

Arguably, the JCE doctrine does possess substance of its own. The JCE doctrine can attribute different degrees of liability to the members of the same criminal enterprise relative to each accused's contribution and mental state whereas co-perpetrators must incur equal liability due to their shared intent. Furthermore, the additional requirement for co-perpetration, ie the subjective and objective elements of joint control which in turn requires the contribution to the common purpose to be a *sine qua non* of the commission of the crime, limits the types of contributors that can incur criminal responsibility under this form of liability. Therefore co-perpetration could replace the JCE doctrine as the Rome Statute expressly provides for physical perpetrator, joint commission and commission through another. However, the replacement would allow impunity by ignoring the strides made by the *ad hoc* tribunals in establishing the criminal responsibility of those who are responsible yet did not physically perpetrate or control the commission of the crime. Nonetheless, it is apparent from the discussion above that the ICC cannot implement the *Tadić*-construction of the JCE category three. I continue to evaluate other proposed solutions, below.

6 4 5 JCE category three is not applicable to crimes that require specific intent

The ICTR in *Akayesu* described special intent crimes as:

> "[A] crime [where] the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in 'the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.'"[1324]

Danner and Martinez add that specific intent (*dolus specialis*) is a characteristic of these crimes and the source of the stigma that attaches to the perpetrators of these crimes.[1325] The ICTY in *Stakić* referred to *dolus specialis* as "surplus of intent".[1326] Surplus intent is intent ie genocidal intent, beyond the *actus reus* of the crime, ie rape or murder.[1327] For instance, genocide consists of one or several of the listed *actus reus* in sub-articles 4(2)(a) to (e) of the ICTY Statute carried out with the *mens rea* required for the commission of that crime and with the underlying and specific intent "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".[1328] For example, both rape and murder have their own subjective and objective elements which when satisfied,

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[1321] 203.

[1322] 199.

[1323] 199.

[1324] 191 cf *Prosecutor v Akayesu* ICTR-96-4-T (1998) para 498.

[1325] Danner & Martinez (2005) *Cal L Rev* 151 cf *Prosecutor v Krstić* IT-98-33-A (2004) para 134: "Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent."

[1326] Badar *The Concept of Mens Rea in International Criminal Law* 301 cf *Prosecutor v Stakić* IT-97-24-T (2003) para 520.

[1327] Badar *The Concept of Mens Rea in International Criminal Law* 301-302.

[1328] 299.

amount to a crime. This is what Badar refers to as the "offensive package".[1329] Therefore failing to establish *dolus specialis* means that the enumerated acts, which are "offensive packages" in themselves, still maintain its criminal characteristic; however, it either amounts to a lesser offence under ICTY Statute or an ordinary crime under national jurisdiction.[1330] As discussed in chapter three, rape is not a crime within the international criminal sphere unless it falls within one of the listed international crimes ie war crime, crimes against humanity or genocide. However when the accused possessed genocidal intent in addition to satisfying the "offensive package" the crime is elevated to a specific crime. *Dolus specialis* "aggravates the offensive package to fall into the realm of the crime of crimes".[1331] The *ad hoc* tribunals have "unanimously adhered to the fact that genocide is characterised by a *dolus specialis*".[1332]

According to Badar, the ICTY's interpretation of article 4(2) of ICTY Statute, in *Stakić* and *Brdanin*, elevated genocide as it requited that the prosecution prove that the accused both wanted to commit the criminal act and intended to destroy, in whole or in part, a national, ethnical, racial or religious group as two separate and distinct entities.[1333] Therefore, Badar argues that when the commission concerns a specific intent crime, the accused must also have specifically intended that outcome in addition to foreseeing and accepting the likelihood of its commission before liability as a principal can ensue.[1334]

Danner and Martinez argue that JCE category three should not be applicable to crimes that require specific intent; such as genocide and persecution because JCE category three requires negligence (*culpa*) or recklessness in order to satisfy the requisite *mens rea*, which in turn undermines this distinctive characteristic.[1335] I disagree, arguably JCE category three requires more than negligence, requires intent (*mens rea*) in the form of *dolus eventualis*. Badar argues that the ICTY Trial Chamber found that *dolus eventualis* is not the same as recklessness (*culpa*) because it requires a "cognitive element of awareness and a volitional element of acceptance of risk" whereas recklessness only requires the former.[1336] Therefore to establish that the accused possessed *dolus eventualis* the prosecution must prove that he or she foresaw and accepted that risk by reconciling him or herself with the foreseen outcome.[1337] Badar argues that the element of acceptance brings *dolus eventualis* within the ambit of intent and rules out recklessness.[1338]

Nonetheless, *dolus eventualis* falls short of *dolus specialis*. van Sliedregt argues that genocide requires evidence of *dolus specialis*, while liability under JCE category three requires *dolus eventualis*.[1339] The type of *mens rea* is the hurdle when determining whether JCE category three may be used to establish liability for genocidal crimes that have been committed as a natural and

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[1329] 300.

[1330] 301. See also 346: Badar argues that neither *dolus eventualis* nor recklessness is sufficient for "committing" special intent crimes, however; acting with this degree of *mens rea* may still trigger criminal responsibility under lesser forms of participation for same offence.

[1331] 300.

[1332] 300.

[1333] 301 cf *Prosecutor v Stakić* IT-97-24-T (2003) para 520; Badar *The Concept of Mens Rea in International Criminal Law* 301 cf *Prosecutor* v *Brđanin* IT-99-36-T (2004) para 695.

[1334] Badar *The Concept of Mens Rea in International Criminal Law* 346 cf *Prosecutor v Galić* (Trial Chamber) IT-98-29 (5 December 2003) para 136.

[1335] Danner & Martinez (2005) *Cal L Rev* 151.

[1336] Badar *The Concept of Mens Rea in International Criminal Law* 307.

[1337] 396.

[1338] 425.

[1339] van Sliedregt (2007) *J Int'l C J* 190-191.

foreseeable consequence of implementing a common criminal plan.[1340] According to van Sliedregt, genocidal intent comprises of two mental elements; the purpose-element ie the intent to destroy whole or part of a group and the general *mens rea*, which is part of the *actus reus* ie the intent to kill or rape.[1341] According to the ICTY in *Statić* and *Brđanin*, the accused must possess the intent to destroy in order to discharge the purpose-element.[1342] The ICTY in *Brdanin* found that specific intent and the *mens rea* standard of JCE category three is irreconcilable.[1343] In summation, the general *mens rea* can be satisfied by *dolus eventualis*, while the purposive element requires *dolus specialis*. Moreover, according to the ICTY in *Statić* and *Brđanin*, the accused's knowledge of the physical perpetrator's intent to destroy is not sufficient.[1344] The ICTY in *Krstić* used JCE category three to establish liability for genocide, yet the conviction was altered, on appeal, to aiding and abetting genocide.[1345] Furthermore, the ICTY in *Statić* found that:

> "[T]he application of a mode of liability cannot replace a core element of a crime. The Prosecution confuses modes of liability and the crimes themselves. Conflating the third variant of joint criminal enterprise and the crime of genocide would result in the *dolus specialis* being so watered down that it is extinguished. Thus, the Trial Chamber finds that in order to 'commit' genocide, the elements of that crime, including the *dolus specialis* must be met. The notions of 'escalation' to genocide, or genocide as a 'natural and foreseeable consequence' of an enterprise not aimed specifically at genocide are not compatible with the definition of genocide under Article 4(3)(a) [of the ICTY Statute]."[1346]

Badar argues that specific intent can only be satisfied by the accused's direct intent ie *dolus directus* of the first degree.[1347] Furthermore, the ICC stated in the *Katanga Confirmation Decision* that general evidence on the prevalence sexual offences in the area provided an insufficient base to infer the accused's knowledge or intent.[1348] Therefore the prosecution cannot make use of JCE category three when prosecuting rape or sexual violence for "causing serious bodily or mental harm" as an act of genocide.[1349] Arguably, this will have devastating effects on the prosecution of sexual violence as an international crime because only physical perpetrators can be charges with committing acts of genocide.

Conversely, Sliedregt argues that the ICTY in the *Brdanin Appeal*, without precedential support, and the *Prosecutor v Miloević* ("*Miloević Appeal*") found that an accused can be held responsible for committing genocide where genocide is a natural and foreseeable consequence of his acts.[1350] The ICTY's finding in *Brdanin* that specific intent and the *mens rea* standard of JCE category three

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[1340] 190.

[1341] 194.

[1342] *Prosecutor v Stakić* IT-97-24-T (2003) para 530; *Prosecutor* v *Brđanin* IT-99-36-T (2004) para 29.

[1343] Badar *The Concept of Mens Rea in International Criminal Law* 360 cf *Prosecutor* v *Brđanin* IT-99-36-R77 Decision on Motion for Acquittal Pursuant to Rule 98bis (2004) para 57.

[1344] *Prosecutor v Stakić* IT-97-24-T (2003) para 530; *Prosecutor* v *Brđanin* IT-99-36-T (2004) para 29.

[1345] van Sliedregt (2007) *J Int'l C J* 190-191 cf *Prosecutor v Krstić* IT-98-33-A (2004) para 143.

[1346] van Sliedregt (2007) *J Int'l C J* 191 cf *Prosecutor v Stakić* IT-97-24-T (2003) para 530; *Prosecutor v Brdanin* (Trial Chamber) IT-99-36-T Rule 98bis Decision (28 November 2003) para 29: the ICTY took a similar approach, however it was reversed on appeal. *Prosecutor v Brđanin* IT-99-36-A Decision on Interlocutory Appeal (2004) para 7 stated that: JCE, like aiding and abetting and superior liability only requires knowledge, not intent, for liability to ensue.

[1347] Badar *The Concept of Mens Rea in International Criminal Law* 301-302.

[1348] *Katanga Confirmation Decision* ICC-01/04-01/07-717 (2008) paras 568-569.

[1349] Art 6(b) of the Rome Statute (2003) 2187 UNTS 90.

[1350] van Sliedregt (2007) *J Int'l C J* 191 cf *Prosecutor v Milošević* IT-54-02-T Decision on Motion for Judgment of Acquittal (2004) para 291.

are irreconcilable, was versed on appeal.[1351] The ICTY in the *Brdanin Appeal* found that "[t]he Trial Chamber erred by conflating the *mens rea* requirement of the crime of genocide with the mental requirement of the mode of liability by which criminal responsibility is alleged to attach to the accused".[1352] Thereafter the *Brdanin Appeal* clarified that JCE category three is not an element of the particular crime.[1353] It is a mode of liability "through which an accused may be individually criminally responsible despite not being the direct perpetrator of the offence".[1354]

Furthermore, the ICTY in *Krstić* also found that "some legal commentators further contend that genocide embraces those acts whose foreseeable or probably consequences is the total or partial destruction of the groups without any necessity of showing that destruction was the goal of the act."[1355] Yet the ICTY is uncertain whether the latter reflects the status of customary international law.[1356] The Appeal Chamber explained that the shared intention (*mens rea*) and purpose was established by looking at the scale of the attacks, the systematic nature and public targeting, of the Tutsi population, as discussed in chapter three.[1357] The Appeal Chamber therefore concluded that the Trial Chamber had "adequately explained and reasonably concluded" that the perpetrators of rape and sexual assault possessed genocidal intent.[1358] The perpetrators' intent was inferred from; the knowledge of deviatory crime occurring as a result of implementation and the perpetrator's continued participation.[1359] Furthermore, in *Akayesu*, The ICTR inferred the physical perpetrators' specific intent:

> "Owing to the very high number of atrocities committed against the Tutsi, their widespread nature not only in the *commune* of Taba, but also throughout Rwanda, and to the fact that the victims were systematically and deliberately selected because they belonged to the Tutsi group, with persons belonging to other groups being excluded, the Chamber is also able to infer, beyond reasonable doubt, the genocidal intent of the accused in the commission of the above-mentioned crimes."[1360]

According to Cassese, the ICC requiring specific intent for crimes that fall outside of the common purpose appears to annihilate the chances of the JCE category three being applied in the ICC.[1361] However, Cassese argues that JCE category three may be applicable if a "broad interpretation of the expression 'intentional participation'" is accepted.[1362] Article 25 of the Rome Statute, requires that the contribution to the crimes of a group be intentional and made "in the knowledge of the intention

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[1351] Badar *The Concept of Mens Rea in International Criminal Law* 361.

[1352] *Prosecutor* v *Brđanin* IT-99-36-A Decision on Interlocutory Appeal (2004) para 10.

[1353] Badar *The Concept of Mens Rea in International Criminal Law* 361 cf *Prosecutor* v *Brđanin* IT-99-36-A Decision on Interlocutory Appeal (2004) para 5.

[1354] *Prosecutor* v *Brđanin* IT-99-36-A Decision on Interlocutory Appeal (2004) para 5.

[1355] Badar *The Concept of Mens Rea in International Criminal Law* 301 cf *Prosecutor v Krstić* IT-98-33-T (2001) para 571. See also AKA Greenwald "Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation" (1999) 99 *Columbia Law Review* 2259 as one of the commentators.

[1356] Badar *The Concept of Mens Rea in International Criminal Law* 301 cf *Prosecutor v Krstić* IT-98-33-T (2001) para 571.

[1357] *Prosecutor v Karemera & Ngirumpatse* ICTR-98-44-A (2014) paras 137 and 154.

[1358] Para 608.

[1359] van Sliedregt (2007) *J Int'l C J* 192 cf *Prosecutor* v *Krajišnik* IT-00-39-A (2009) para 692.

[1360] van Sliedregt (2007) *J Int'l C J* 193 cf *Prosecutor v Akayesu* ICTR-96-4-T (1998) para 730 (My own emphasis added).

[1361] Cassese (2007) *J Int'l Crim Just* 132 cf art 25 of the Rome Statute (2003) 2187 UNTS 90.

[1362] 132.

of the group to commit the crime".[1363] According to Cassese "[t]he notion of 'knowledge' could well cover that of 'foresight' and 'voluntary taking of the risk' of a criminal action by one or several members of the group".[1364] In other words the requisite intent is satisfied by the accused awareness and acceptance of the likelihood that the un-concerted crimes might be committed and that the physical perpetrators might possess specific intent. Cassese adds that article 25 of the Rome Statute includes JCE category three, so long as the accused was aware and foresaw the commission of the un-concerted crime.[1365] The onus rests with the prosecution to prove that the crime was objectively foreseeable and subjectively foreseen by the accused. The expansive interpretation of article 25(3)(d)(i) as proposed by Cassese therefore includes JCE category three whereby intent is satisfied by the intent to contribute to the common purpose.[1366] van Sliedregt argues that the prosecution need not prove that the accused possessed genocidal intent himself.[1367] The ICTY in the *Brđanin Decision on Interlocutory Appeal* also found that the prosecution need not prove that the accused intended the commission or even knew for definite that it would be committed.[1368] On the contrary, the accused need only be aware that the implementation of the concerted crime might result in the commission of the eventual yet un-concerted crime by others and thereby it was reasonably foreseeable in his own mind.[1369] The accused's criminal responsibility arises from the fact that he intentionally and willingly entered a JCE to commit another crime together with his or her subjective foresight and acceptance of the risk that un-concerted crimes might occur.[1370] Badar argues that fault is a distinctive feature of principal liability arising from participation in a JCE.[1371] Fault is established where the accused foresaw or knew that the un-concerted crime, that materialised, might be committed and willingly took that risk by intentionally contributing to common criminal purpose or criminal enterprise.[1372] Therefore the accused's fault permits the attribution of liability beyond the crimes agreed upon.

Furthermore, van Sliedregt argues that proof of the accused's intentional yet reckless contribution to a criminal enterprise together with his or her foresight with regards to the commission of the un-concerted crime and the physical perpetrator's genocidal intent is sufficient for deviatory forms of liability to ensue from genocidal acts.[1373] According to her, the "purpose element could thus be satisfied by 'knowledge of intent.'"[1374] She furthermore states that *Brdanin* and *Milosević* offer support for this approach.[1375] According to the *Brdanin Interlocutory Appeal*

[1363] 132 cf art 25(3)(d)(ii) Rome Statute (2003) 2187 UNTS 90.

[1364] Cassese (2007) *J Int'l Crim Just* 132.

[1365] 132.

[1366] 132.

[1367] van Sliedregt (2007) *J Int'l C J* 203.

[1368] *Prosecutor* v *Brđanin* IT-99-36-A Decision on Interlocutory Appeal (2004) para 5.

[1369] Para 5.

[1370] Para 5. See also van Sliedregt (2007) *J Int'l C J* 204; See Cassese's justification of the attribution of equal liability at *6 3 5 1* above; See Ohlin's discussion on foreseeability at *6 3 5 3* above.

[1371] Badar *The Concept of Mens Rea in International Criminal Law* 360.

[1372] 359 cf *Prosecutor v Tadić* IT-94-1-A (1999) para 228; Badar *The Concept of Mens Rea in International Criminal Law* 360 cf *Prosecutor* v *KvoČka* et al IT-98-30/1-A (2005) para 83.

[1373] van Sliedregt (2007) *J Int'l C J* 203.

[1374] 194-196 and 203.

[1375] 203 cf *Prosecutor* v *Brđanin* IT-99-36-A Decision on Interlocutory Appeal (2004) para 7; van Sliedregt (2007) *J Int'l C J* 203 cf *Prosecutor v Milošević* IT-02-54-T Decision on Motion for Judgement of Acquittal (2004) para 291.

Decision, where the crime requires specific intent as an element, the accused must have reasonably foreseen that the un-concerted crime might be committed with specific intent ie genocidal intent.[1376]

Badar argues that the ICTY in the *Brđanin* Appeal "lowered the threshold of *mens rea* requisite category of JCE to reach one of negligence" by adopting a "reasonably foreseeable and natural consequences" test.[1377] Furthermore, Badar argues that the accused's liability for a crime that he neither intended nor participated in, is unjust.[1378] However, van Sliedregt explains that "[p]articipatory liability has its own mental element through which the mental element of underlying crime (genocide) is established".[1379] Therefore the JCE doctrine does not water down the requisite *mens rea* for genocidal acts from *dolus specialis* to *dolus eventualis* because they are two distinct elements.[1380] The prior pertains to the physical perpetrators specific intent regarding the commission of the un-concerted crime (mental element for the underlying crime) and the latter pertains to the accused's intent with regards to participating in a criminal enterprise (mental element to participate).[1381] The JCE doctrine merely provides a mode of showing whether the perpetrator or the accused possessed specific intent or not.[1382] The genocidal intent does therefore exist; the physical perpetrator possessed *dolus directus* with regards to his or her genocidal intent and the accused foresaw and reconciled himself with the risk (*dolus eventualis*) that the physical perpetrator may commit a crime with genocidal intent and decided to contribute nonetheless. van Sliedregt concludes that JCE category three can be used to establish liability for un-concerted genocidal acts only where JCE is understood to be a form of participation not perpetration.[1383]

The distinction between perpetrators and participants is therefore important because the prior needs to possess genocidal intent themselves in order to incur liability for genocidal acts while, the latter do not need to possess genocidal intent themselves.[1384] However it is important to note that with a lower threshold comes a lower form of culpability.[1385] van Sliedregt argues that the attribution of a lower form of liability for participants is consistent with post-WWII concepts of "being concerned in" or "participating in a common design," on which JCE liability is based.[1386] The JCE doctrine is therefore based on Anglo-American doctrine of common purpose.[1387] Additionally, the JCE doctrine creates a "perpetrator status for those closely involved in the commission of an international crime".[1388]

In summation, JCE category three is a mechanism used to determine whether the accused foresaw and accepted (*dolus eventualis*) that an un-concerted crime might be committed by another and that he or she might possess specific intent (*dolus specialis*). Consequently, they both incur liability for genocide yet the participant incurs a deviatory form of culpability; relative to the

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[1376] Badar *The Concept of Mens Rea in International Criminal Law* 361 cf *Prosecutor* v *Brđanin* IT-99-36-A Decision on Interlocutory Appeal (2004) para 6.

[1377] Badar *The Concept of Mens Rea in International Criminal Law* 361 cf *Prosecutor* v *Brđanin* IT-99-36-A Decision on Interlocutory Appeal (2004) para 9.

[1378] Badar *The Concept of Mens Rea in International Criminal Law* 361.

[1379] van Sliedregt (2007) *J Int'l C J* 204.

[1380] 204.

[1381] 204.

[1382] van Sliedregt (2007) *J Int'l C J* 204 cf *Prosecutor v Brđanin* IT-99-36-A Decision on Interlocutory Appeal, Dissenting Opinion of Judge Shahabuddeen (2004) paras 2 and 4-5.

[1383] van Sliedregt (2007) *J Int'l C J* 203.

[1384] 201.

[1385] 203.

[1386] van Sliedregt (2007) *J Int'l C J* 202.

[1387] 202.

[1388] 203.

difference in their degree of *mens rea*. The JCE doctrine is arguably a mechanism used to establish the elements of the crime, it is not an element in itself and neither does it exempt the fulfilment of any of the elements. Special intent will always be an element of genocide, however under JCE category three only the physical perpetrator, not the participatory accused, needs to possess the genocidal intent and its existence can be proved by using JCE category three.[1389] The liability of the accused, for genocidal acts committed by another, is established by his or her criminal participation together with foreseeing and accepting the commission of that specific un-concerted crime with specific intent as a result of implementing the JCE. According to van Sliedregt, using JCE category three to establish liability for act of genocide is justifiable.[1390]

6 4 6 The enactment of amendments to article 25 of the Rome Statute

As discussed above, Ohlin argues that the three conceptual problems with the JCE doctrine; ie foreseeability, intentionality and equal culpability, "do not implicate the essential core of the doctrine".[1391] Ohlin therefore suggests four immediate amendments to article 25 of the Rome Statute as the solution.[1392] International judges have a tendency to look to the jurisprudence of the tribunals in coming to a finding.[1393] Therefore the previous application of the JCE doctrine needs to be expressly overwritten before the ICC, as the future of international criminal justice, replicates it along with its conceptual problems.[1394]

Firstly, article 25(3)(d) must expressly require "substantial and indispensable contribution," as required by the ICTY in *KvoĈka*, before criminal liability is invoked.[1395] Secondly, Ohlin suggests that article 25(3)(d)(i) and article 25(3)(d)(ii) should not be disjunctive**.**[1396] Article 25(3)(d)(i)-(ii) should be separated into two distinct categories.[1397] The first of which; provides for individuals who are "considered to be members of the conspiracy and should receive the harshest sentences in accordance with their individual culpability".[1398] The second of which; should be rewritten in a separate category which provides for those, who did not intent to further the criminal goals yet were aware of the group's criminal intent, to be liable for a lower criminal provision.[1399] Ohlin proposes that article 25(3)(d)(ii) could be rewritten in a new provision that creates "an affirmative duty to make reasonable efforts to stop a criminal plan in progress".[1400] In addition, Danner and Martinez,

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[1389] 204: According to van Sliedregt the ICTY in *Brdanin* used JCE category three to establish liability for genocide and in *Ntakirutimana* and *Krstić* used JCE category three to establish liability for aiding and abetting genocide.

[1390] 205.

[1391] Ohlin (2007) *J Int'l C J* 89.

[1392] 89.

[1393] 90.

[1394] 90: Ohlin explains that "[s]o many prosecutions in the past have applied the version of joint criminal enterprise that attributes criminal conduct to all members of the conspiracy, the statute must be explicitly amended in order to displace these precedents".

[1395] 89 cf *Prosecutor v KvoĈka, Kos, Radić, Zigić & Prcać* (Trial Chamber) IT-98-38/1 (2 November 2001) para 309: "requiring a substantial contribution for liability under joint criminal enterprise". Ohlin explains that "it is possible that judges at the ICC may read the 'substantial contribution' requirement into the Rome Statute on the basis of the reasoning in *KvoĈka*. But revisions to the doctrine are preferable at the legislative - rather than judicial - level".

[1396] Ohlin (2007) *J Int'l C J* 81.

[1397] 89.

[1398] 89.

[1399] 89.

[1400] 89.

suggest that limiting responsibility under category three to military and political leaders could resolve the discomfort surrounding its application.[1401] These new provisions should for example protect merchants who solely provide background services to a criminal enterprise from being charged with the crimes of their customers. [1402]

Thirdly, article 25 of the Rome Statute, which is silent on foreseeability, should expressly display "the principle that the foreseeable crimes of one's co-conspirators will carry a lower criminal penalty than crimes that were explicitly or implicitly part of the criminal plan".[1403] Ohlin therefore suggests the addition of a new provision that explicitly codifies "this interpretation of the concept of foreseeability and its appropriate level of culpability" and thereby entrenches the moral hierarchy of intentional acts over unintended yet foreseen acts (negligence).[1404]

The fourth amendment to article 25 expressly address the attribution of equal liability.[1405] The amended provision should expressly state that: "all members of a conspiracy will be judged according to their individual participation and importance in the overall criminal scheme".[1406] In addition, this amendments should include a clause that states that "prosecutions under Article 25 must be relative to an individual's role in the overall criminal organization and that minor players are less culpable than masterminds".[1407] After the judges have engaged in fact finding to determine the hierarchy of positions within the circumstances, they can assign guilt relative to the role that the specific accused played. In addition, Cassese suggests how to qualify and straighten out the application of JCE category three.[1408] For instance, when using JCE category three to establish individual criminal responsibility the "secondary offender" should be charged with a lesser crime than the "primary offender" when it is applicable.[1409]

Ohlin concedes that enacting amendments to the Rome Statute is difficult, however that cannot stand in the way of legitimising the JCE doctrine by formulating revisions within the context of the Rome Statute's article 25 that are consistent with criminal law paradigms, namely; foreseeability, intentionality and culpability.[1410]

6 5 Conclusion

Arguably, the discussions in this chapter have revealed that the JCE doctrine does not violate the principles of legality. JCE liability and a contribution to a JCE, as a form of commission, are recognised by customary international. Therefore a conviction and punishment can arise out of the use of this theory of liability because it exists in law. In addition, the JCE doctrine is evinced to exist in customary law and has been applied in post-WWII criminal tribunals long before the enactment of the ICTY Statute, ICTR Statute an the Rome Statute. The use of the JCE doctrine is not applied retrospectively and the accused is therefore sufficiently aware that a contribution to a criminal enterprise may lead to his or her criminal liability.

[1401] Danner & Martinez (2005) *Cal L Rev* 145-146.

[1402] Ohlin (2007) *J Int'l C J* 89.

[1403] 89-90.

[1404] 90.

[1405] 90.

[1406] 90. Ohlin argues that this provision is a necessary reiteration of art 25(2) of the Rome Statute (2003) 2187 UNTS 90, which implicitly protects the principle of individual culpability: "A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute."

[1407] Ohlin (2007) *J Int'l C J* 90.

[1408] Cassese (2007) *J Int'l C J* 133. See also 114-123.

[1409] 133.

[1410] Ohlin (2007) *J Int'l C J* 89-90.

Furthermore the expansion of article 7 of the ICTY Statute and article 6 of the ICTR Statute to include JCE liability is acceptable because it extended the scope of criminal responsibility to those who would not otherwise be culpable. The expansion was therefore supported by the object and purpose of the ICTY Statute to prosecute all those who are responsible for serious violations of international humanitarian law. It has become apparent that the judges of the ICC and *ad hoc* tribunals must be cautious when adopting human rights law into a criminal law system. Purposive expansions of a right or obligation, interpretations that protect human dignity and victim-oriented constructions have a tendency to threaten the restraining characteristics of criminal law such as the principle of culpability and relative culpability. However the judges of *ad hoc* tribunals have cautiously used human rights law to improve accountability, without limiting the fundamental principles of criminal law. The *ad hoc* tribunals only attribute liability when it is clear that the prosecution has proved beyond a reasonable doubt that all the requisite subjective and objective elements have been met for that specific crime, and thereafter relatively allocating a degree of liability and sentencing that reflects the accused's culpability ie his or her degree of participation and his or her state of mind. Consequently, the application of the JCE doctrine does not remove the prosecution's duty to prove all the elements of the crime beyond a reasonable doubt before liability can ensue. Thus the application of the JCE doctrine does not violate the accused's presumption of innocence. These principles and the onus on the prosecution protect and ensure the accused's right to a fair trial.

It is uncertain whether the Rome Statute will adopt a similar expansive interpretation of commission as the *ad hoc* tribunals, in the future. Article 22 of the Rome Statute requires a strict interpretation of its provisions, including the forms of participation and modes of liability. However, it is clear that article 22 of the Rome Statute does not necessitate the strictest interpretation possible. Moreover, a strict interpretation is usually only necessary when two possible constructions arise from the ordinary meaning of the terms in their context and in the light of its object and purpose, in accordance with article 31 of the VCLT. In addition, it is clear from the investigation above that it is within the ICC's or *ad hoc* tribunals' mandate to look to customary international law to fill the gaps within its constitutive instrument. Commission is a very broad term and therefore the tribunal was fully within its mandate to explore the JCE doctrine as a possible sub-category.

Additionally, numerous legal authors and criminal adjudicators have accepted the JCE doctrine as a justified theory of liability that should be maintained in international law. However, the *Tadić*-construction of the JCE doctrine threatens the principle of culpability. The *Tadić*-construction of the JCE doctrine attributes an equal degree of liability to all its members for crimes committed by members, irrespective of their degree of participation or role in the criminal enterprise. This is clearly against the principle of individual culpability, including relative culpability. However, the ICTY in the *Brđanin Appeal* has limited the prosecution's discretion to attribute wrongdoing equally by requiring that the contribution be vital, substantial or significant before criminal responsibility can ensue. Moreover, it is clear that the *ad hoc* tribunals require that the accused must have made an intentional contribution to a criminal enterprise in furtherance of its criminal purpose and have subjectively foreseen the possibility of the specific un-concerted crime occurring, albeit inferred foresight, before criminal responsibility for the un-concerted crime can occur. While these interpretive developments have limited the scope of JCE liability and the discretion of the prosecution, more recent interpretations have arguably expanded the scope of JCE category three too far. The ICTY in *Milošević* and the *Brđanin Appeal* have extended the application of JCE category three to crimes that requires specific intent. Ohlin, van Sliedregt and Cassese propose that an accused can justifiable incur a derivative form of liability, pursuant to JCE category three, for specific intent crimes commit by another, despite not possessing *dolus specialis* himself or herself. However, this extension, while providing differentiation through the attribution of a derivative form of liability, may still violate the principle of culpability because JCE category three does not discharge the requisite intent and therefore undermines the character of, and stigma attached to, specific crimes. JCE category three requires *dolus eventualis*, an intentional state of mind greater

than negligence or recklessness (*culpa*) yet it falls short of *dolus specialis*. Therefore, JCE category three cannot apply to specific crimes, such as genocide and persecution. The conviction as an accessory to genocide does not rightly reflect an accused's contribution to a common criminal purpose in furtherance of a criminal purpose other than genocide and who furthermore did not possess the intent to destroy a group. Even though the accused intentionally and significantly contributed to a JCE despite foreseeing and accepting that an act of genocide might be committed by another with genocidal intent in the execution of the JCE. According to my findings the application of JCE category three does not limit the accused's right to fair trial or the principles of legality as set out to be determined in my eighth research question. However a broad application of JCE category three can threaten the principle of individual culpability. These conceptual mistakes in the construction of the existing JCE doctrine threaten the principle of culpability and may influence the ICC's interpretation of article 25 of the Rome Statute. Ohlin expressly encourages the ICC to investigate and develop its own version of the JCE doctrine.

Therefore the reform of article 25 of the Rome Statute is an immediate necessity before the ICC adopts the "*Tadić*-version" with all its conceptual uncertainties or worse, dismisses it as a legitimate form of commission and theory of liability entirely. The latter might have occurred already because the ICC, as of yet, has not used the JCE doctrine and has rather opted to rely on co-perpetration or aiding and abetting to attribute liability for the contribution to a common criminal enterprise, depending on the participant's degree of participation and state of mind. The reform of article 25 of the Rome Statute should expressly include the developments made by the *ad hoc* tribunals by firstly, expressly requiring that the contribution to the JCE be "significant or substantial" before liability can ensue. Secondly, article 25(3)(d)(i) and (ii) of the Rome Statute should not be disjunctive but should rather be two separate provisions. The new provisions will provide that intentional and significant contributions to the criminal enterprise, with the intention of furthering the common criminal purpose, will acquire the highest form of liability, while intentional and significant contributions to the criminal enterprise made with knowledge of the common criminal purpose can acquire a lower form of liability akin to negligence. It is important to maintain the distinction between intentional and negligent contributions, as the prior is more morally reprehensible than the latter. The distinction also maintains the principle of culpability. Furthermore, article 25(3)(d)(ii) of the Rome Statute could be rewritten to create an affirmative duty to make reasonable efforts to stop a criminal plan in progress. Thirdly, a member of the JCE should only incur liability, once all the objective and subjective elements have been met, for the concerted crimes perpetrated by other members, ie the crimes that fall within the common purpose, because they were the intended outcomes. Consequently, all the members that subjectively foresaw that the un-concerted crime may occur (in addition to satisfying the other elements for liability) may incur liability for the un-concerted crime yet it must be a lesser degree of liability than ascribed to the concerted crime. This reiterates the principle that liability for intentional crimes must be greater than the liability for negligent crimes. Fourthly, article 25 of the Rome Statute should expressly state that all members of a conspiracy will be judged according to their individual participation and importance in the overall criminal scheme. It is not necessary to list the varying roles and positions in a hierarchy and their respective degree of liability within this new provision, however the ICC should be able to ascertain the accused's role within the hierarchy after engaging in a fact finding investigation and thereafter attach a degree of liability relative to his or her degree of participation.

Finally, the differentiation model in article 25 of the Rome Statute that attributes principle liability to the forms of commission listed in article 25(3)(a) and lesser forms of liability to the forms of participation listed in article 25(3)(b) through (3)(d) protects the principle of culpability by determining the degree of liability based on the accused's degree of participation. The differentiation model should therefore be maintained because it enhances transparency, improves foreseeability and thus overall fairness. Therefore I concede that the *Tadić*-construction of JCE category three as it is currently construed, may only amount to a lesser forms of liability under article 25(3)(c) to (d) of the Rome Statute not joint commission as a co-perpetrator under article 25(3)(a) of the Rome Statute. However, with a reformation of article 25(3) of the Rome Statute as

suggested by Ohlin, the ICC can make distinctions between which contributions to a criminal enterprise result in liability as a principle and which result in lesser forms of liability. This, I argue, would be the ideal outcome of the separation of article 25(3)(d)(i) and 25(3)(d)(ii) of the Rome Statute.

CHAPTER 7: CONCLUSION AND RECOMMENDATIONS

Despite the prohibition and criminalisation of rape and other acts of sexual violence in international criminal law, Haffajee, Van Schaack, Gardam and Jarvis all found that very few acts of sexual violence are successfully prosecuted and upheld on appeal by international courts and tribunals. For example, the ICC in *Katanga Confirmation Decision* acquitted the accused of all sex-related charges. The ICC found that the evidence was not strong enough to establish substantial grounds to confirm that the accused was criminally responsible for crimes of rape and sexual violence. It furthermore concluded that the knowledge or intent of the accused could not be sufficiently inferred from general evidence on the prevalence of acts of sexual violence in the area. Moreover, the ICC in the Prosecutor's Darfur Submission attempted to infer the accused's genocidal intent from the evidence of the scale of the violence and witnesses attesting to staggering proof of sexual violence, however; the issuance of an arrest warrant was denied due to the prosecutor's inability to reasonably establish that the accused actually committed the crime. Additionally, the *Lubanga* indictment did not mention gender violence crimes.

Against this backdrop, the aim of my thesis was to analyse whether the JCE doctrine could facilitate the conviction of high-ranked officials under international criminal law for acts of sexual violence. One of the objectives was therefore to determine whether the JCE doctrine is a legitimate doctrine that can establish a link between an accused who did not carry out the *actus reus* and the act of sexual violence. Consequently, my sixth research question was to determine whether JCE category three could be used to establish the individual criminal responsibility of an accused who did not physically carry out the acts of sexual violence. I hypothesised that JCE category three would be the most suitable construction for prosecuting acts of sexual violence based on the propositions of Haffajee who inspired this thesis. However, before evaluating JCE as a solution, the source of problem had to be unearthed.

Discovering the nature of rape and sexual violence became the research endeavour of chapter two in consonance with my first research question. Based on the readings during my pre-study, I hypothesised that acts of sexual violence are used during armed conflict to terrorise civilians and emasculate the opposition. By looking to various feminist, legal, socio-political and socio-economic theories, in chapter two, for a deeper understanding of the nature of sexual violence in general as well as the reasons for its commission, it became clear that the very nature of the crime and the context within which it is committed, labours the likelihood of a successful prosecution.

A theoretical evaluation revealed that the commission of acts of sexual violence during armed conflict are purposely and intentionally used as tools or weapons of war; whether it be to terrorise or aid war strategies. Furthermore, acts of sexual violence are used during armed conflict or apparent times of peace to aggravate ethnic cleansing or the genocide of a specific group. Additionally, acts of sexual violence have been used as a weapon by one group against another in order to systematically assist or amplify the execution of their criminal enterprise or plan. Therefore the instrumental, strategic and intentional use of acts of sexual violence as part of a bigger plan by one group against another indicates that sexual violence is often perpetrated as a product of a criminal enterprise. Furthermore, it indicates the objective foreseeability of these practices, particularly during armed conflict. In addition, the prevalence and widespread occurrence of acts of sexual violence together with its instrumental and purposive use by one group against another form a factual and circumstantial foundation from which the court may infer the accused's subjective foreseeability and intention. However, as established in chapters three and four, the existence of the accused's intent and foresight may only be established where the accused's intent is the only reasonable inference on the facts.

Furthermore, I found that rape is rarely expressed as an intended objective of a criminal enterprise or expressly ordered. However, it is very often an implicit part or foreseeable consequence of implementing a criminal plan or a war strategy, which is supported, planned and coordinated by individuals in a position of power. It is noteworthy to mention that international

criminal law is concerned with holding high-ranked officials and masterminds responsible for international crimes, albeit that the crimes were committed by another. This is compelled by the reality that high-ranked officials use others to implement their war, or criminal, strategies and the use of a chain of command which facilitates its operation and implementation. Therefore the difficulty experienced in linking the high-ranked official to the crime arises from the distance relating to the absence of a direct order to commit rape, the absence of the accused at the scene of the crime, sexual violence being omitted from the common criminal plan and the use of a chain of command. Consequently, the nature of sexual violence together with the characteristics and operation of armed conflict or criminal enterprises, make it difficult to link high-ranked officials, who did not physically carry out the *actus reus* of the crime, to the crime.

In addition to the theoretical analysis of the nature of acts of sexual violence, I investigated sexual violence as a violation of human rights and international humanitarian law in chapter two. According to the Geneva Conventions and the Additional Protocols, rape, enforced prostitution and indecent assault are prohibited practices during armed conflict. Furthermore, case law from the ECtHR, IACtHR and IACHR and communications from the HRC acknowledge that the commission of sexual violence, irrespective whether committed during armed conflict or apparent times of peace, violates numerous human rights including human dignity, the protection against torture and privacy. The commission of sexual violence is therefore a serious violation of international human rights and international humanitarian law. According to the UDHR, the ACHR, the ECHR, the Women's Protocol and CERD, among other regional and international human rights treaties, these violations give rise to obligations on the part of state parties and the international community to ensure access to justice and the provision of effective remedies including effective prosecution for those who have had their rights violated. It is necessary to reiterate that in order for prosecution to be effective there must be a reasonable prospect of securing a conviction.

Furthermore, the General Recommendation 19 of the CEDAW Committee established that sexual violence is a form of gender discrimination, which is a *ius cogen*. This non-derogable norm requires that all states, even those who are not party to the relevant human rights treaties, are obliged to prevent and punish acts of sexual violence pursuant to *erga omnes* obligations. Chapters two and three, answered my first research question by revealing the nature of acts of sexual violence committed during armed conflict as war crimes and grave violations of international human rights and international humanitarian law. In addition, acts of sexual violence committed without a connection to armed conflict can also amount to grave violations of international human rights and either qualify as crimes against humanity or acts of genocide. My findings confirmed my assumption that acts of sexual violence are systematically and intentionally used to generate terror and facilitate underlying criminal strategies. In addition, the theoretical discussion alluded to the fact that establishing the individual criminal responsibility of the accused is the source of the difficulty experienced in successfully prosecuting sexual violence under international criminal law. Thus answering my fourth research question, ie the source of the difficulties experienced in prosecuting acts of sexual violence, as alluded to in chapter two.

The aim of chapter three was to determine the source of the difficulty experienced in securing a conviction for acts of sexual violence. In order to do so, I had to firstly, determine the obligation under international criminal law to prosecute acts of sexual violence and to ensure the reasonable prospect of a conviction, in accordance with my second research question. Secondly, I had to investigate under which international crimes acts of sexual violence can be prosecuted, pursuant to my third research question. Thirdly, I had to source the difficulties experienced in prosecuting acts of sexual violence under international criminal law as covered by my fourth research question. Based on the Haffajee's averments, I hypothesised that the inability to establish the high-ranked official's individual criminal responsibility was impeding the ability of the prosecution to secure a conviction for acts of sexual violence. An investigation of the ICTY Statute, the ICTR Statute and the Rome Statute revealed that the *ad hoc* tribunals and the ICC were created with the specific purpose of prosecuting serious violations of international humanitarian law and human rights. In addition, articles 1, 25, 86 and 93 of the Rome Statute legally obligates the international community

to hold all those who are responsible for grave crimes that concern the international community even if they did not physically commit the offence themselves. However acts of sexual violence are not prosecuted as sexual offences, instead they are indicted as war crimes, crimes against humanity, acts of genocide and violations of common article 3 of the Geneva Conventions. Consequently, in addition to satisfying all the elements of the acts of sexual violence, the prosecution must also establish all the objective and subjective elements of one of these international crimes before liability can ensue under international criminal law. For instance, the ICTR in *Semanza* found that rape was committed as part of a widespread attack against the Tutsi people. Therefore in addition to proving the elements of rape, the prosecution had to prove that rape was committed as part of a widespread or systematic attack against a particular civilian group and that the accused was aware of those circumstances. Alternatively, for rape to amount to an act of genocide; the accused must have caused serious bodily or mental harm to persons belonging to a particular national, ethnical, racial or religious group with the specific intent of destroying that group as a whole or in part. For example, the ICTR in *Musema* found that rape and sexual violence was an integral part of the plan to destroy the Tutsi ethnic group. Consequently, without the accused's knowledge of the circumstances within which crimes against humanity are committed or the accused's possession of specific intent, an international crime has not been committed. Thus, the accused can only be convicted of a lesser crime or under national jurisdiction. These factors also contribute to the difficulty in securing a conviction for acts of sexual violence under international criminal law. It is important to reiterate that, unlike war crimes, the international crime of genocide and crimes against humanity do not require that the act of sexual violence be committed within the context of armed conflict, which means that these international crimes can be committed during everyday life.

Furthermore, in support of the theoretical evaluation in chapter two, cases from the ICTY and ICTR, which involved charges concerning rape and other acts of sexual violence, were discussed and evaluated in chapter three. This analysis was carried out in order to confirm or oppose the hypothesis that the difficulty experienced in successfully prosecuting these crimes is being caused by the inability to link the high-ranked official to the crime that is committed by another; as alluded to in chapter two. A deeper analysis of the case law revealed that Furundžija incurred a derivative form of liability as an aider and abettor for outrages upon personal dignity; including the rape of Witness A. Furundžija's individual criminal responsibility ensued from his substantial contribution to the physical perpetrator's acts of raping, sexually assaulting and torturing Witness A by means of encouraging the physical perpetrator with his presence and continuing to interrogate Witness A during her assault. Nonetheless, Furundžija only incurred a derivative from of liability, not liability as a principal, because he did not physically penetrate Witness A or co-perpetrate her rape. However, on the same evidence, despite not laying a hand on Witness A, Furundžija incurred principal liability as a co-perpetrator for torture as a violation of the laws and customs of war. Furundžija incurred principal liability as a co-perpetrator of the torture of Witness A because he and the physical perpetrator (Accused B) both partook and shared in the purpose behind the torture and made their contributions simultaneously with knowledge of each other's actions.

Furthermore, the ICTR in *Semanza* found that the accused incurred a derivative form of liability. Semanza was found guilty of instigating rape as crimes against humanity and guilty of instigating torture as a crimes against humanity for the rape committed by another. Semanza was sufficiently linked to the crime because the prosecution proved beyond reasonable doubt that the physical perpetrator heard Semanza's inciteful speech, admitted that he understood Semanza's speech to be permissive and subsequently proceeded to commit an act of sexual violence due to the accused's encouragement. Nonetheless, *Semanza* displays how difficult it is to hold an accused responsible as a principal perpetrator for crimes committed by another even where a clear and an extraordinary causal link can be established. Analogous to *Furundžija*, the basis for linking Semanza's contribution in the form of a speech to the physical perpetrator's commission of rape was their shared underlying purpose to destroy the Tutsi population. Despite satisfying the requirements for principal liability, Semanza was not convicted as a principal for committing rape because the accused did not receive sufficient notice of this particular charge.

In this regard, it is moreover important to note that the ICTY, usually attributes principal liability as a co-perpetrator instead of accessorial liability for complicity in cases involving torture, because despite playing different roles both the physical perpetrator and the substantial contributor partook and shared in the purpose behind the torture. It is clear from these two cases that the prosecution of sexual crimes differs from the prosecution of non-sexual crimes. Despite not laying a hand on the victim Furundžija incurred principal liability for torture yet derivative liability for rape as a violation of the laws and customs of war. Arguably, where the prosecution can prove that the accused and the physical perpetrator of rape shared an underlying criminal purpose, akin to cases involving torture, then the prosecution should be able to attribute principal liability to the accused despite the accused not physically carrying out the *actus reus* of the crime. Whether the underlying criminal purpose is the genocidal desire to destroy an ethnic group or attacks against a civilian population in a widespread or systematic manner, principal liability should arguably ensue from the intentional and significant contribution to further the common criminal purpose. However this is clearly not the case.

The ICTR in *Musema* also illustrated that establishing individual criminal responsibility is the biggest hurdle in attributing guilt to an accused for acts of sexual violence. Where the prosecution can prove that the accused physically carried out the *actus reus*, he or she usually incurs liability as a principal perpetrator. However, where the *actus reus* of rape was physically carried out by others, it is difficult for the prosecution to link the accused to the crime. For example, Musema incurred liability as a principal for personally raping Nyiramusugi in concert with others and for aiding and abetting others in raping Nyiramusugi through his presence as a high-ranked official, his comments and the example he portrayed through his actions. However, the prosecution failed to link Musema to the rape of Nyiramusugi and Annunciata that were committed by others. Despite a witness's testimony that the Musema ordered the rape of Annunciata, Musema evaded liability because of the prosecution's inability to prove that the physical perpetrator had heard Musema's call to rape Annunciata and acted in response to it. Unlike the evidence in *Semanza*, the prosecution in *Musema* did not have the benefit of the physical perpetrator's admission that he understood the accused's speech to be permissive and therefore acted as a result thereof. That admission was essential yet a rare piece of evidence that the prosecution used to link the accused to the crime.

The ICTR in *Kajelijeli* in the same vein demonstrated that it is only possible to secure a conviction where the prosecution establishes a clear link between the accused and the act of sexual violence. The ICTR listed physical perpetration, a direct order given by the accused to rape a specific individual and an eye-witness who can attest to the high ranked official's presence and view of the incident as indicators of a clear link. Nonetheless the ICTR clarified that international criminal law also provides for the attribution of individual criminal responsibility to those who make a substantial contribution to the crime despite not carry out the *actus reus* themselves. While the ICTR found that the rape of Witness ACM, the rape and sexual mutilation of Witness GDT, the rape of Witness GDF, the mutilation of Nyiramburanga, the inhumane acts against Joyce and the rape of Witness GDO's daughter did in fact occur, the prosecution failed to prove that Kajelijeli's previous speeches and actions had caused the rape and sexual assault of those women because they could not prove that the physical perpetrators had heard him and thereafter acted accordingly. Furthermore, the prosecution was neither able to prove Kajelijeli's presence at the scene of the crime nor that he specifically ordered the sexual assault of those specific victims on that day despite overwhelming evidence of Kajelijeli's encouragement, contributions and involvement in the attacks on the Tutsi people throughout April 1994. These contribution included speeches and conversations where he directly yet broadly instructed and encouraged sexual violence. Conversely, the prosecution successfully established Kajelijeli's individual criminal responsibility for non-sexual crimes committed by others. Yet again, like in *Furundžija*, there is a clear distinction between linking an accused to crimes of a non-sexual nature and crimes of a sexual nature. Arguably if the prosecution viewed Kajelijeli's contributions to the underlying criminal purpose of genocide and extermination as a crime against humanity as facilitating the foreseeable commission of sexual violence then he could incur liability for the commission of acts of sexual violence committed by

others. These facts are exacerbated by the fact that Kajelijeli found to have expressly encouraged sexual violence.

The evaluation of *Furundžija, Musema*, *Semanza, Kajelijeli* and the *Katanga Confirmation Decision* answered my fourth research question by revealing that the difficulty experienced in securing convictions for acts of sexual violence is the inability of international criminal law to offer a successful way of establishing a legal nexus between a crime, committed by another, and a high-ranked official. Establishing principal liability, for a crime committed by another, is particularly burdensome. Therefore establishing individual criminal responsibility and the requisite knowledge and intent are the two biggest hurdles in obtaining a successful conviction. An in-depth evaluation of cases from the ICTY and ICTR in chapter three confirmed my assumption that establishing individual criminal responsibility of the high-ranked official was and continues to impede convictions. However it unexpectedly revealed that establishing the accused's intent is also a hurdle.

After establishing the nature of sexual violence in chapter two and determining the duty to effectively prosecute acts of sexual violence in chapters two and three. Then pin-pointing the ability to prove the accused's individual criminal responsibility as the problem with securing a conviction for acts of sexual violence and recognising that linking an accused to crimes of a sexual nature is more difficult than linking an accused to non-sexual crimes that are expressly included in the common criminal purpose in chapter three. I consequently, proceeded to use this information to evaluate the JCE doctrine as an effective remedy, in chapter four. The aim within chapter four was to firstly, set out the general theory and application of the JCE doctrine, pursuant to my fifth research question. In doing so, I also analysed the three different categories of the doctrine and the circumstances in which each are applicable. I hypothesised that JCE category three would be the most suitable construction for the prosecution of acts of sexual violence because liability extends to crimes that fall outside of the common purpose yet which are a foreseeable consequence of implementing the common purpose. Building on that hypothesis, I secondly set out to determine whether JCE category three could be used to establish the individual criminal responsibility of an accused who did not physically carry out the acts of sexual violence, in accordance with my sixth research question.

My research revealed that the JCE doctrine is only applicable to crimes with multiple perpetrators who share the same intent. As established in chapter two, the commission of rape is usually used by members of one group to terrorise and harm members of another group; in pursuance of a broader common criminal purpose such as torture, ethnic cleansing, genocide, forced transfer or persecution. Therefore as I departed from the notion that the JCE doctrine caters to the collective, instrumental and purposive nature of this crime it could prove to be instrumental to convicting high-ranked officials for acts of sexual violence committed by others. Haffajee argues that the JCE doctrine removes the prosecutor's responsibility to prove a direct link between the accused and the un-concerted yet reasonably foreseeable crime committed by another. I however found that the JCE doctrine does not remove the prosecution's duty to establish all the elements of the crime beyond a reasonable doubt. It does, however assist in establishing a link where the accused intentionally contributed to the common criminal plan of a JCE that involves genocidal intent or attacks against a civilian population in a widespread or systematic manner. The JCE doctrine is therefore a form of common purpose or common plan liability. Therefore, I argue that the JCE doctrine provides a solution by establishing a link between the accused and the crime through the accused's intentional involvement in a criminal enterprise together with his or her foresight and acceptance that acts of sexual violence might be committed in execution thereof. The ICTY in the *Vasiljević Appeal* found that this doctrine considers each member of the common plan responsible for the crimes committed by other members.

In each case that I evaluated, I applied five requirements of JCE category three to the facts of the case. Firstly, the prosecution has to establish the existence of a common criminal purpose that concerns the commission of an international crime. The common plan need not be express and can arise, or expand, extemporaneously. In *Karemera* the ICTR found that rape and other sexual acts

became part of the common purpose to destroy the Tutsi people after the 18th of April 1994. It found that a common purpose to destroy the Tutsi population, ie genocide, materialised on the 11th of April 1994 when weapons were distributed to the *Interahamwe* in Kigali. Furthermore, the ICTY in *Krstić* found that the common criminal purpose was the forcible transfer of the Bosnian Muslims. Furthermore, both cases established that the existence of the common plan could be inferred from the surrounding circumstances.

Secondly, the prosecution has to establish that the accused made a significant contribution to the common criminal plan. In *Krstić* the ICTY confirmed that the accused was a key participant in the common purpose because he organised and supervised the forcible transportation of civilians. Moreover, the ICTR in *Karemera* found that Karemera and Ngirumpatse significantly contributed to the common purpose by distributing weapons to the *Interahamwe*, intimidating those who opposed the attack of the Tutsis and by holding governmental positions. Furthermore, the MICT confirmed that Ngirabatware made a significant contribution by distributing weapons and addressing the *Interahamwe* at roadblocks. The Appeal Chamber in *Karemera* clarified that the accused's criminal responsibility, pursuant to JCE liability, arises from his or her intentional contribution to the common criminal purpose.

Thirdly, the prosecution has to establish that the contribution must have been made with the direct intent of furthering the criminal purpose. In *Krstić* the ICTY inferred that the accused was aware of the humanitarian crisis based on his presence at the scene of the crime after the forcible transfer and his presence in meetings leading up to the forcible transfer. His intent was therefore evidenced by his extensive participation. The ICTR in *Karemera* also inferred the accused's awareness from his position, comments and actions. As a political leader within the Interim Government, Karemera was privy to information regarding national security and he also visited the Kibuye Commune where he must have seen the devastation for himself.

Fourthly, the prosecution has to establish that the accused either possessed specific intent where the crime is categorised as an act of genocide or persecution or had been aware that the crime was committed as part of a widespread or systematic attack against a civilian population if the crime is categorised as a crime against humanity. In *Karemera* the ICTR found that sexual violence qualified as widespread based on the sheer number of incidences. Moreover, the Appeal Chamber confirmed that the Trial Chamber in *Karemera* had correctly inferred that the physical perpetrators of rape and sexual assault possessed genocidal intent. The physical perpetrators' genocidal intent was inferred from the fact that sexual violence was purposely used to intensify the Tutsi's level of suffering and sexual violence was committed in the context of a campaign to destroy the Tutsi population by the same perpetrators that were committing concerted crimes of a non-sexual nature.

Fifthly, the prosecution has to establish that the accused subjectively foresaw that sexual violence was a natural and foreseeable consequence of implementing the common purpose and that the accused accepted the risk and chose to contribute nonetheless. For example, Karemera admitted during his testimony that it would be ridiculous to think that soldiers do not rape during war, therefore his admission proved that he subjectively foresaw and reconciled himself with the risk. However, admissions are very rare therefore the ICTR in the *Karemera Appeal*, the MICT in *Ngirabatware* and the ICTY in the *Krstić Appeal* found that the accused's subjective foresight or awareness can be inferred from the surrounding circumstances, as long as it is the only reasonably inference. The ICTR in *Karemera* found that surrounding circumstances include the accused's position, his or her access to information, presence and the notoriety of the events. In summation, by making a significant contribution to the common criminal plan with the direct intent of furthering the criminal purpose together, the accused opened himself up to criminal responsibility for crimes that were natural foreseeable consequence of implementing the common purpose, albeit that they were committed by another.

My findings revealed that JCE category three has arguably been successfully used by the *ad hoc* tribunals in the *Karemera Appeal*, *Ngirabatware* and the *Krstić Appeal* to establish the criminal responsibility of high-ranked officials and masterminds as contributory members of a JCE, for acts of sexual violence physically perpetrated by others. Whereas category one was only used in the

Karemera Appeal to establish liability for the commission of rape and other acts of sexual violence after the common criminal purpose extemporaneous expanded on the 18th of April to include these sexual practices. Furthermore the MICT in *Ngirabatware*, the ICTR in *Karemera* relating to crimes committed before the 18th of April 1994 and the ICTY in the *Krstić Appeal* found that acts of sexual violence were not included in the common criminal purpose. For example, the ICTY in *Krstić* found that rape was not included in the objective of the JCE, however; it was undoubtedly a natural foreseeable consequence of implementing the common purpose, ie ethnic cleansing through forcible transfer. The ICTY in *Krstić* went as far as categorising the commission of rape as "inevitable" due to the dire circumstances of armed conflict. Thereby confirming my assumption that JCE category three is most suitable construction for prosecuting acts of sexual violence. Moreover, by using the JCE category three, Krstić incurred principal liability for persecution, including the un-concerted commission of rape as a crime against humanity. However on Appeal the conviction was replaced with aiding and abetting extermination as a crime against humanity. Additionally, Karemera and Ngirumpatse incurred principal liability for genocide, including rape and rape as a crime against humanity, pursuant to JCE category three. Furthermore, Ngirabatware incurred principal liability for rape as a crime against humanity, pursuant to JCE category three, for his participation in a joint criminal enterprise intended to exterminate the Tutsi population. However his conviction was overturned on appeal because the relevant paragraphs in the indictment, concerning his charge for rape as a crime against humanity, did not contain sufficient evidence to establish Ngirabatware's contribution the common criminal purpose. Despite Ngirabatware acquittal, *Ngirabatware* and *Krstić* illustrate the *ad hoc* tribunals' recognition that participation in a JCE can amount to a commission and thereby principal liability, in particular circumstances. The *ad hoc* tribunals have therefore clearly used JCE category three to attribute principal liability and derivative forms of liability to high-ranked officials for un-concerted yet foreseeable crimes of a sexual nature, committed by one other than the accused. My findings therefore exceeded my expectations and met my ultimate goal of arguably using JCE category three to establish principal liability.

The ICC has not used JCE category three to attribute liability for contributions to criminal enterprise, instead it has opted to utilise co-perpetration and aiding and abetting to attribute liability. Consequently, my research departed from the primary assumption that the ICC may rely on the jurisprudence of the *ad hoc* tribunals when interpreting article 25 of the Rome Statute in order to sustain the continued use of the JCE doctrine within international criminal law. Article 25 of the Rome Statute, article 6(1) of the ICTR Statute and article 7(1) of the ICTY Statute lists the forms of perpetration and participation that result in individual criminal responsibility. Moreover, my ultimate goal was to determine whether the ICC, like the *ad hoc* tribunals, could also use JCE category three to attribute principal liability for participation in a common criminal enterprise as illustrated by my seventh research question.

Consequently, I had to establish whether the ICC was either obliged or at least permitted to rely on the jurisprudence of the *ad hoc* tribunals as a source for interpreting the Rome Statute, in chapter five. In order to do so, I firstly examined article 21 of the Rome Statute to determine whether the jurisprudence of the *ad hoc* tribunals is a source of "applicable law" in the interpretation of the Rome Statute. Secondly, I evaluated the provisions within article 31 of the VCLT that sets out the general rules for interpreting treaties in order to ascertain whether the jurisprudence of the *ad hoc* tribunals should be used in interpreting the Rome Statute. Thirdly, I referred to the human rights standard pursuant to article 21(3) of the Rome Statute and case law, to establish whether they support the inclusion of jurisprudence of the *ad hoc* tribunals as an applicable source. If the jurisprudence of the *ad hoc* tribunals is found to constitute an applicable source for interpreting the Rome Statute, the ICC will only consider jurisprudence that is based on provisions that are similar to the provisions found in the Rome Statute. Hence, I would thereafter have to determine whether the provisions concerning individual criminal responsibility in the ICTY and ICTR Statutes are comparable to the respective provision in the Rome Statute. Moreover whether their respective tests that distinguish principal from accessorial liability are theoretically reconcilable. Based on Goy's interpretation of article 25 of the Rome Statute, I presumed that the *ad hoc* tribunals'

conceptualisation of a contribution to a JCE as a form of commission that ensues in principal liability could not be supported by the ICC.

An in-depth investigation revealed that the jurisprudence of the *ad hoc* tribunals is neither expressly listed as an applicable source for interpreting the Rome Statute, pursuant to article 21 of the Rome Statute, nor does it amount to binding precedent. Judicial decisions are not a distinct source of law in international criminal adjudication. They are not binding on anyone else except the parties to the particular case; they are furthermore not binding on future cases, or on future parties, unless the constitutive instrument of that judicial body states otherwise. Nevertheless, the ICC may, I argue, have to consider the jurisprudence of the *ad hoc* tribunals when interpreting the Rome Statute because the jurisprudence often reflects applicable sources for interpretation, pursuant to article 21 of the Rome Statute, ie principles and rules of international law as well as general principles of law. Furthermore, I submit that the fact that international judicial bodies and parties continue to cite case law in support of their findings and perspectives, despite not being bound to do so, indicates the emergence of the use of precedent in international law as a custom. A rule of customary international law is binding and arises where a state practice developed over a relative period time in conjunction with the conviction that the states are required to do so. Arguably, the prevalent and intentional use of case law within various international institutions based on relevance, usefulness, legal certainty and uniformity displays the existence of rule of customary international law. While the actions of one state do not bind others, repetitive behaviour do create behavioural and legal expectations that form customs.

Additionally, article 21(3) of the Rome Statute requires that every interpretation must be consistent with international recognised human rights. Moreover, Pellet argues that an interpretation that is consistent with human rights trumps the plain reading of the Rome Statute. Therefore I conclude that when interpreting and applying the Rome Statute including the definition of the crime, the elements of the crime, types of criminal responsibility, the forms of liability and remedies; the ICC must ensure that the interpretation preserves equal access to justice, sexual autonomy and non-discrimination. The JCE doctrine offers a solution to the impunity of high-ranked officials for rape and other acts of sexual violence that predominantly impact women. Consequently, by reading participation in a JCE into article 6(1) of the ICTR Statute and article 7(1) of the ICTY Statute, the *ad hoc* tribunals improved the prosecution of crimes that would otherwise maintain gender discrimination thereby improving women's access to justice and providing an effective remedy. Therefore I submit that the ICC should be encouraged to do the same.

In addition, a broad interpretation of "context" in article 31 of VCLT, which provides the rules for interpreting treaties, arguably includes the jurisprudence of the *ad hoc* in the context of the Rome Statute. The ICC, ICTY and ICTR are judicial bodies within the sphere of international criminal law. All three institutions were created with the specific function of prosecuting serious crimes and the Statutes of the ICTY and ICTR as well as their subsidiary instruments were used when drafting the Rome Statute and the RPE. It is therefore plausible, I argue, that the statutes of the *ad hoc* tribunals fall within the context of the Rome Statute. After all, the purpose of the VCLT, pursuant to article 31(3)(c), is to ensure the coherency between various sources of international law. However the operations of the ICC are nonetheless primarily regulated by the Rome Statute, the Rules of Procedure and the Elements of Crimes not the statutes of the ICTY and ICTR. Consequently, a systematically broad and purposive interpretation of article 31 of the VCLT supports that ICC could look to the jurisprudence of the *ad hoc* tribunals for guidance only where article 25 of the Rome Statute is either similar or identical to the article 6 of the ICTR Statute and article 7 of the ICTY Statute. Alternatively where article 25 is silent on a matter.

Goy argued that these three articles concerning individual criminal responsibility are generally comparable because all three provisions provide for differentiation between contributions that amount to principal liability and contributions that amount to derivative forms of liability. Furthermore, he argued that the ICC could recognise participation in a JCE as a form of criminal responsibility under article 25(3)(d) of the Rome Statute because both forms of liability are based on a subjective criterion of shared intent. However, article 25(3)(d) of the Rome Statute only results

in a derivative form of liability, whereas article 25(3)(a) of the Rome Statute attributes principal liability for commissions. Goy clarified his argument by adding that the jurisprudence of the *ad hoc* tribunals cannot be used to interpret article 25(3)(a) of the Rome Statute because the ICC uses an objective-subjective test ie the control-over-crime criterion to distinguish a commission from lesser forms of participation, while the *ad hoc* tribunals have used a purely subjective test to attribute principal liability for a commission. Goy appeared to answer my seventh research question with a resounding no, however after comparing the respective tests that are used by the ICC and the *ad hoc* tribunals to distinguish a commission from lesser forms of participation, I found that the test used by the *ad hoc* tribunals is also an objective-subjective test.

The ICTY Trial Chamber in *Vasiljević* found that all participants JCE are equally responsible for the crime committed irrespective of the part each played in its commission. However ICTY in the *Brđanin Appeal* stated that principal liability only ensues where the accused possessed the requisite intent and made a *significant* contribution to furthering the JCE. Furthermore, the ICTR in the *Gacumbitsi Appeal* and the ICTY the *Furundžija Appeal* found that committing includes physical perpetration or playing an *integral* part in the commission of a crime with others. Therefore, the accused must at least foresee and accept that the crime he or she is being charged with might occur, share the direct intent to execute the crime within the common plan (subjective elements) as well as make a significant contribution to furthering the common purpose of the JCE (objective element) in order to establish liability as a principal. Consequently, while the subjective element may determine whether the accused incurs JCE liability, as stated in the *Vasiljević Appeal* and confirmed by Goy, I am of the opinion that it is not sufficient to incur *principal* liability for crimes committed by other members. Therefore while JCE liability may occur as soon as the subjective element is met, liability as a principal only ensues after the objective-subjective test is discharged.

Furthermore, after comparing the objective and subjective requirements for a commission as required by the ICC against the requirements of the *ad hoc* tribunals I found that while article 25(3)(d) of the Rome Statute is not comparable to JCE liability as construed by the *ad hoc* tribunals, article 25(3)(a) is comparable. The ICC Pre-Trial Chamber in *Lubanga* interpreted participation in a group, pursuant to article 25(3)(d) of the Rome Statute, as a catch all provision that does not require intent and results in weakest form of liability. Furthermore, according to the structure of article 25(3) of the Rome Statute ie the differentiation model, the degree of liability that arises from article 25(3)(d) is even weaker than the liability that ensues from aiding and abetting. Whereas the ICTY Appeal Chamber in three separate cases, namely: the *Vasiljević Appeal*, the *Krstić Appeal* and the *Simić Appeal* found that aiding and abetting warrants a lower sentence than for co-perpetration and participating in a JCE. Furthermore, article 25(3)(a) of the Rome Statute lists joint commission as a form of commission, which on its ordinary meaning appears to include intentional contributions to a group which are made with the intention of furthering the common criminal purpose. The objective requirements (*actus reus*) for participation in a JCE and joint commission pursuant to article 25(3)(a) of the Rome Statute are, I argue, identical except for the fact that the latter requires an essential contribution, while the prior requires a substantial contribution. Moreover, the subjective requirements are compatible to a certain extend. Before principal liability can ensue pursuant to JCE category three, the prosecution must prove beyond a reasonable doubt that the accused made a substantial contribution to the JCE with the direct intent (*dolus directus*) of furthering the common criminal purpose and the accused must have subjectively seen and accepted that rape or other acts of sexual violence are a natural and foreseeable consequence of executing of the JCE (*dolus eventualis*). Article 30 of the Rome Statute, which stipulates the general subjective requirements that must be establish before principal liability can ensue for an international crime, recognises that *dolus eventualis* discharges the requisite intent where the crime falls within the common criminal purpose of the group. However as I established in chapters two through three, rape and other acts of sexual violence are usually not included in the common criminal purpose. In these instances article 30 of the Rome Statute requires that the accused must have possessed the specific intent (*dolus specialis*) to commit the foreseeable yet un-concerted sexual crime before the subjective element can be discharged. Therefore I conclude that

participation in a JCE as construed by the *ad hoc* tribunals is consistent with subjective requirements of the ICC for commission, where rape or other sexual acts do not amount specific intent crimes such as genocide or persecution. My hypothesis that the *ad hoc* tribunals' conceptualisation of a contribution to a JCE as a form of commission that ensues in principal liability could not be supported by the ICC was consequently repudiated.

In conclusion, it is true that the requirement for commission as construed by the *ad hoc* tribunals are more lenient that the requirements of the ICC. However, participation in a JCE may, I argue, theoretically amount to principal liability, pursuant to article 25(3)(a) of the Rome Statute, where the un-concerted yet foreseeable crime is not a specific intent crime and the accused's degree of participation and level of intent satisfies the control-criterion. According to the ICC in the *Lubanga Confirmation Decision*, an accused can incur principal liability as a co-perpetrator, pursuant to article 25(3)(a) of the Rome Statute, for making an contribution at the preparatory or execution stage provided that certain circumstances are met. Arguably, a contribution to a JCE through which the commission of un-concerted crime is enabled, is a contribution at the preparatory phase. Therefore the contribution to the JCE can amount to principal liability where: (i) the contribution to the JCE is essential in nature therefore resulting in the realisation of the objective elements of the un-concerted crime, (ii) the accused's contribution was made with the direct intent of furthering the common criminal purpose, (iii) the accused is aware that he or she can frustrate the commission of the crime and (iv) if the crime does not require specific intent. For example, the ICC in *Lubanga* attributed principal liability to an accused as a co-perpetrator for his involvement in the common purpose. This argument rests on the supposition that a contribution to the common criminal plan is a contribution to the un-concerted crime during the preparatory phase. This argument is therefore consistent with the arguments discussed by Cassese as well as the findings of the ICTY in *Furundžija* and the ICTR in *Karemera*. Cassese argues that the attribution of liability for an un-concerted crime is justified by the accused intentional contribution to the concerted crime or common criminal purpose because the common criminal plan enables or is consequential to the perpetration of the un-concerted crime. I agree.

It is important to reiterate that JCE liability is not synonymous with principal liability. Arguably, participation in a JCE can amount to accessorial liability or principal liability depending on the specific accused's degree of contribution and intent. I submit that this proposition is consistent with the case law of the ICC and the *ad hoc* tribunals. As discussed in chapter three, the ICTY in the *Furundžija Appeal* stated that participation can either constitute aiding and abetting or co-perpetration where the accused intentionally and substantially participates in a JCE with the aim of furthering the common criminal purpose. The ICC also displayed differentiation in *Katanga* and *Lubanga* by attributing different degrees of liability for contributions to a common criminal purpose. The ICC convicted Katanga as an accessory for contributing to the commission or attempted commission of a crime by a group with a common purpose, pursuant to article 25(3)(d) of the Rome Statute, whereas the ICC convicted Lubanga, as a co-perpetrator for his involvement in a common purpose. Therefore, participation in a JCE can, I argue, amount to principal liability or derivative forms depending on, and relative to, the accused's degree of contribution and intent.

Notwithstanding the usefulness of JCE category three, the doctrine cannot unjustifiably limit the rights of the accused or infringe the principles of legality and the principle of culpability. Consequently, in chapter six, I set out to determine whether the application of the JCE doctrine, specifically in establishing principal liability, limits the rights of the accused, infringes the principals of legality or violates the foundational notions criminal law in accordance with my eighth research question. My conclusions were that the JCE doctrine neither violates the principles of legality nor the human rights of the accused. As discussed by the ICTY in the *Tadić Appeal*, the use of the JCE doctrine and similar constructions of common purpose liability originates from post-WWII jurisprudence. Therefore the inclusion of participation in a JCE in article 6 of the ICTR Statute and article 7 of the ICTY Statute as a form of participation and a mode of liability is not retrospective because its origin in customary international law precedes the commission of the crimes that were tried by the *ad hoc* tribunals and the ICC. Furthermore, the use of the JCE doctrine

does not remove the prosecution's duty prove all the elements of the crime, including the intent and individual criminal responsibility of the accused, beyond a reasonable doubt. On the contrary, the JCE doctrine is a mechanism that helps establish whether the accused did satisfy the objective and subjective elements of the crime. Consequently, the accused's right to a fair trial is safeguarded because the presumption of innocence is preserved.

However, I found that the *Tadić*-construction of JCE category three threatens the principle of culpability because it attributes equal degrees of liability to all the contributory members of the JCE, irrespective of the degree of participation. Furthermore, it attributes equal liability for crimes that falls within and outside the common criminal purpose, irrespective of the distinction that the prior involves *dolus directus*, while the latter requires *dolus eventualis*. Moreover, it attributes liability for specific intent crimes where the accused neither carried out the *actus reus* of the specific intent crime nor possessed specific intent (*dolus specialis*) himself. Instead, the requisite special intent is satisfied by the accused's subjective foresight and acceptance of the possibility that a specific-intent crime might be committed by another as a consequence of executing the JCE and that the physical perpetrator might possess specific intent.

However over the decade of jurisprudence since the ICTY first applied the JCE doctrine in *Tadić*, the *ad hoc* tribunals have limited the prosecutor's discretion to determine the scope of wrongdoing by stipulating additional requirements. For instance, the ICTR in the *Karemera Appeal* and the ICTY in the *KvoČka Appeal* found that the accused could only incur liability for the un-concerted crimes that he or she subjectively foresaw being committed as a reasonable consequence of implementing the JCE. In addition, ICTY in the *Brđanin Appeal* found that the accused could only incur liability if his or her contribution to the JCE is substantial or vital and made with the direct intent (*dolus directus*) of furthering the common criminal plan. Consequently, the additional requirements arguably make provision for differentiation in the degree of liability attributed to contributory members of the same JCE. In turn, the ability to attribute the degree of liability relative to each accused's degree of contribution and level of intent safeguards the principle of culpability.

Nonetheless, all the arguments offered by Cassese, van Sliedregt, Danner and Martinez to justify the attribution of liability for specific intent crimes, pursuant to JCE category three, do not appease the fact that the accused did not possess specific intent himself. Therefore in order to preserve the principle of culpability, I conclude that JCE category three cannot be justifiably used to attribute liability for rape and other acts of sexual violence that constitute an act of genocide or persecution. Alternatively, to incur principal liability for acts of sexual violence committed by another that constitute acts of genocide or persecution the accused must possess the requisite specific intent. In these circumstances JCE category one is applicable. The prosecution can establish the accused's specific intent by proving that the accused contributed to the group with the direct intent of further the common genocidal criminal purpose that either included or extemporaneously expanded to include acts of sexual violence as it did in *Karemera*.

I now proceed to provide my recommendations in order to codify the developments made by the *ad hoc* tribunals over a period of a decade. I suggest that a more detailed construction of the JCE doctrine should be incorporated in article 25 of the Rome Statute. In this regard the ICC may opt to read "participation in or contributions to a JCE" into article 25 of the Rome Statute. However, an amendment of article 25 of the Rome Statute to expressly include a revised version of the JCE doctrine is preferable because it will improve legal certainty. The express inclusion of participation in a JCE as a form of commission and other forms of participation in article 25 of the Rome Statute respects the principles of legality and protects the accused's right to be informed of the possible modes of liability that can be used against him or her. Furthermore, the express inclusion of a more detailed construction of JCE categories one, two and three will prevent the ICC from reading in an immature construction of JCE that threatens the principle of culpability. The arguments that the *Tadić*-construction of JCE category three threatens the principal of culpability by: (i) attributing equal degrees of liability to all members of a JCE irrespective of their degrees of participation and intent, (ii) attributing equal degrees of liability for crimes that fall inside and crimes that fall outside

of the common purpose yet that are a foreseeable consequence of implementing the common purpose and (iii) attributing liability for specific intent crimes, were discussed in sub-chapter 6 3 5.

Arguably, the amendment of article 25 should expressly include a contribution to a JCE in articles 25(3)(a) through 25(3)(d) of the Rome Statute in order to maintain the differentiation model that fosters the culpability principal. Subsequently, when the accused's contribution to the JCE satisfies the control-over-crime criterion then the contribution can amount to a commission and the accused can incur liability as a principal. Alternatively, where the accused's contribution and intent does not satisfy the control-criterion the judge can decide whether the contribution amounts to incitement in terms of article 25(3)(b), aiding and abetting pursuant to article 25(3)(c) or any other form of contribution pursuant to article 25(3)(d) of the Rome Statute. Additionally, the amendment of article 25, must include a separation of article 25(3)(d)(i) and 25(3)(d)(ii) of the Rome Statute. The disjunctive nature of article 25(3)(d) attributes liability equally for contributions made with direct intent ie in furtherance of the common criminal purpose and negligent contributions ie contributions made with knowledge of the groups common criminal plan. The disjunctive nature is unfair, I argue, according to the foundational notions of criminal law that intentional criminal acts should always result in a higher degree of liability and heavier sentencing than negligent acts due to the malevolent desires that accompany calculated criminal actions. Finally, the amendment must stipulate that only JCE categories one and two can be used to establish principal liability for acts of sexual violence as a specific intent crime such as genocide and persecution, not JCE category three.

The successful prosecution of rape and other acts of sexual violence under international criminal law was, and continues to be, a challenge. The commission acts of sexual violence are a grave violation of international humanitarian law and human rights that require effective prosecution to remedy these breaches. However the reality is that acts of sexual violence rarely form an express part of the common criminal plan and high-ranked officials intentionally and systematically use others to implement their war strategies while usually ensuring that they are absent when these atrocities are committed. It is therefore the responsibility of international criminal law to address these practices and prevent impunity by developing mechanisms like the JCE doctrine that can address the reality of rape, by capturing the reality of the commission of complex crimes involving numerous acts and actors. Consequently, attributing liability where it is due.

List of Cases

International Court of Justice

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia & Herzegovina v Serbia & Montenegro*) (Judgment) [2007] ICJ 43 <http://www.icjcij.org/docket/files/91/13685.pdf> accessed 22 March 2014 [223]

International Criminal Court

Prosecutor's Darfur Submission ICC-02/05

Prosecutor v Al Bashir (Pre-Trial Chamber I) ICC02/05-01/09-3 Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (4 March 2009)

Prosecutor v Banda and Jerbo (Pre-Trial Chamber I) ICC-02/05-03/09-121-Corr-Red Decision on the Confirmation of Charges' (7 March 2011)

Prosecutor v Bemba Gombo (Pre-Trial Chamber II) ICC-01/05-01/08-424 Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (15 June 2009)

Prosecutor v Chui (Trial Chamber II) ICC-01/04-02/12-4 Concurring Opinion of Judge Christine Van den Wyngaert (18 December 2012)

Prosecutor v *Katanga & Chui* (Pre-Trial Chamber) ICC-01/04-01/07-717 Decision on the Confirmation of Charges, Partly Dissenting Opinion of Judge Anita Usacka (30 September 2008) ("*Katanga Confirmation Decision*")

Prosecutor v *Katanga & Chui* (Pre-Trial Chamber II) ICC-01/04-01/07-717 (7 March 2014) ("*Katanga*")

Prosecutor v Kony, Otti & Odhiambo (Appeal Judgement) ICC-02/04-01/05-266 Decision of Appeals Chamber on the Unsealing of Documents, Separate Opinion of Judge Pikis (4 February 2008)

Prosecutor v Kony, Otti & Odhiambo (Pre-Trial Chamber II) ICC-02/04-01/05-60 Decision on the Prosecutor's Position in the Decision of the Pre-Trial Chamber II to Redact Factual Descriptions of Crimes in the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification (28 October 2005)

Prosecutor v Lubanga ICC-01/04-01/06-1229-AnxA Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict Submitted in Application of Rule 103 of the Rules of Procedure and Evidence (18 March 2008) *ICC* <http://www.icc-cpi.int/iccdocs/doc/doc457039.PDF> (accessed 14-04-2014)

Prosecutor v Lubanga (Pre-Trial Chamber I) ICC-01/04-01/06-1049 Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial (30 November 2007).

Prosecutor v Lubanga (Trial Chamber I) ICC-01/04-01/06-2842 Separate Opinion of Judge Adrian Fulford (14 March 2012).

Prosecutor v *Lubanga* (Pre-Trial Chamber I) ICC-01/04-01/06-803-tEN Decision on the Confirmation of Charges (29 January 2007)

Prosecutor v Muthaura, Kenyatta and Ali (Pre-Trial Chamber II) ICC-01/09-02/11-382 Decision on the confirmation of charges (23 January 2012)

Prosecutor v Ruto, Kosgey and Sang (Pre-Trial Chamber II) ICC-01/09-01/11-373 Decision on the Confirmation of Charges Pursuant to Art 61(7)(a) and (b) of the Rome Statute (23 January 2012)

Situation in Darfur, The Sudan, (Pre-Trial Chamber) ICC-02/05-01/07 Prosecutor's Application, under Article 58(7), for the issue of summons for *Ahmad Muhammad Haran and Ali Muhammad Ali Abd-Al-Rahman Kushayb* (27 February 2007) <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc%200205%200107/court%20records/chambers/pre%20trial%20chambers%20i/pages/decision%20on%20the%20prosecution%20application%20under%20article%2058%207%20%20of%20the%20statute.aspx> (accessed 26-07-2007)

Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Thomas Lubanga Dyilo (Pre-Trial Chamber I) ICC-01/04-01/06 Submission of the Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence Pursuant to Rule 121(3) (28 August 2006) <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%20014%20016/court%20records/chambers/pre%20trial%20chambers%20i/Pages/decision%20on%20the%20confirmation%200f20charges.aspx> (accessed 26-07-2007)

International Criminal Tribunal for Rwanda

Gacumbitsi v The Prosecutor (Appeal Judgement) ICTR-2001-64-A (7 July 2006)

Kajelijeli v The Prosecutor (Appeal Judgement) ICTR-98-44A-A (23 May 2005)

Karemera & Ngirumpaste v The Prosecutor (Appeals Decision) ICTR-98-44-AR72 51, ICTR-98-44-AR72 6 Decision on Jurisdictional Appeals: Joint Criminal Enterprise (12 April 2006)

Prosecutor v Akayesu (Judgement) ICTR-96-4-T (2 September 1998)

Prosecutor v Bagosora and Nsengiyumva (Appeal Judgement) ICTR-98-41-A (14 December 2011)

Prosecutor v Kajelijeli (Judgment and Sentencing) ICTR-98-44A-T (1 December 2003)

Prosecutor v Kajelijeli (Trial Chamber) ICTR-98-44A-T (4 July 2001)

Prosecutor v Kajelijeli (Trial Chamber) ICTR-98-44A-T Protective Measures Prosecution Witness Trial Chamber (18 July 2001)

Prosecutor v Karemera (Amended Indictment) ICTR-98-44-I (23 February 2005)

Prosecutor v Karemera & Ngirumpatse (Appeal Judgement) ICTR-98-44-A (29 September 2014)

Prosecutor v Karemera & Ngirumpatse (Judgement and Sentencing) ICTR-98-44-T (2 February 2012)

Prosecutor v Musema (Appeal Judgement) ICTR-96-13-A (16 November 2001)
Prosecutor v Musema (Judgment and Sentence) ICTR-96-13-A (27 January 2000)

Prosecutor v Muvunyi I (Appeal Judgement) ICTR-2000-55A-A (29 August 2008)

Prosecutor v Ndindabhizi (Appeals Chamber) ICTR-01-71-A (16 January 2007)

Prosecutor v Ngirabatware (Judgment and Sentencing) ICTR-99-54-T (20 December 2012)

Prosecutor v Ngirabatware (Trial Chamber) ICTR-99-54-T Decision on Defence Motion for Judgement of Acquittal (14 October 2010)

Prosecutor v Ntakirutimana & Ntakirutimana (Appeal Judgement) ICTR-96-10-A and ICTR-96-17-A (13 December 2004)

Prosecutor v Semanza (Appeal Judgement) ICTR-97-20-A (20 May 2005)

Prosecutor v Semanza (Indictment) ICTR-97-20-I (12 October 1999)

Prosecutor v Semanza (Judgment and Sentence) ICTR-97-20-T (15 May 2003)

Prosecutor v Seromba (Appeal Judgement) ICTR-2001-66-A (12 March 2008)

Prosecutor v Zigiranyirazo (Judgement) ICTR-01-73-T (18 December 2008)

Simba v The Prosecutor (Appeal Judgement) ICTR-01-76-A (27 November 2007)

International Criminal Tribunal for the former Yugoslavia

Prosecutor v Aleksovski (Appeal Judgement) IT-95-14/1-A (24 March 2000)

Prosecutor v Babić (Sentencing Judgement) IT-03-72-S (29 June 2004)

Prosecutor v Blaškić (Appeal Judgement) IT-95-14-A (29 July 2004)

Prosecutor v *Brđanin* (Appeal Judgement) IT-99-36-A (3 April 2007)

Prosecutor v Brđanin (Appeal Judgement) IT-99-36-A Decision on Interlocutory Appeal (19 March 2004)

Prosecutor v *Brđanin* (Trial Chamber) IT-99-36-R77 Decision on Motion for Acquittal Pursuant to Rule 98bis (19 March 2004)

Prosecutor v *Brđanin* (Trial Chamber) IT-99-36-T (1 September 2004)

Prosecutor v Brdanin (Trial Chamber) IT-99-36-T Rule 98bis Decision (28 November 2003)

Prosecutor v Celebici (Appeal Judgement) IT-96-21 (20 January 2001)

Prosecutor v Delalic, Mucic, Delic & Landzo (Judgment) IT-96-21-T (16 November 1998)

Prosecutor v Furundžija (Amended Indictment) IT-95-17/1-PT (2 June 1998)

Prosecutor v Furundžija (Appeals Judgement) IT-95-17/1-A (21 July 2000)

Prosecutor v Furundžija (Judgment) IT-95-17/1 (10 December 1998)

Prosecutor v Galić (Trial Chamber) IT-98-29 (5 December 2003)

Prosecutor v Haradinaj (Judgement) IT-04-84-T (3 April 2008)

Prosecutor v Kmojelac (Judgement) IT-97-25-T (15 March 2002)

Prosecutor v Kordić & Čerkez (Appeal Chamber) IT-95-14/2-A (17 December 2004)

Prosecutor v *Krajišnik* (Appeal Judgement) IT-00-39-A (17 March 2009)

Prosecutor v Krajišnik (Judgement) IT-00-39-T (27 September 2006)

Prosecutor v Krstić (Appeal Judgment) IT-98-33-A (19 April 2004)

Prosecutor v Krstić (Judgement and Sentencing) IT-98-33-T (2 August 2001)

Prosecutor v Kunarac (Appeal Judgement) IT-96-23/1-A (12 June 2002)

Prosecutor v Kunarac, Kovac and Vukovic (Judgement) IT-96-23-T & IT-96-23/1-T (22 February 2001)

Prosecutor v KvoČka, Kos, Radić, Zigić & Prcać (Judgement) IT-98-30/1-T (2 November 2001)

Prosecutor v KvoĈka, Kos, Radić, Zigić & Prcać (Trial Chamber) IT-98-38/1 (2 November 2001)

Prosecutor v *KvoČka, Omarska, Keraterm & Trnopolje* (Appeal Judgement) IT-98-30/1-A (28 February 2005)

Prosecutor v Martić (Appeal Judgement) IT-95-11-A (8 October 2008)

Prosecutor v *Martić* (Judgement) IT-95-11-T (12 June 2007)

Prosecutor v Miloŝević (Appeals Chamber) IT-02-54-AR73.4 Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statements (21 October 2003)

Prosecutor v Milošević (Trial Chamber) IT-02-54-T Decision on Motion for Judgement of Acquittal (16 June 2004)

Prosecutor v *Milutinović, Ojdanić & Sainovic* (Appeal Judgement) IT-99-37-AR72 Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction-Joint Criminal Enterprise, Separate Opinion of Judge David Hunt on Challenges by Ojdanić to Jurisdiction *Joint Criminal Enterprise* (21 May 2003)
Prosecutor v Simić (Appeal Judgement) IT-95-9-A (28 November 2006)

Prosecutor v Simić & Others (Trial Chamber) IT-95-9-T Separate and Partly Dissenting Opinion of Judge PJ Lindholm (17 October 2003)

Prosecutor v Stakić (Appeal Chamber) IT-97-24-A (32 March 2006)

Prosecutor v Stakić (Trial Chamber) IT-97-24-T (31 July 2003)

Prosecutor v Tadić (Appeal Judgement) IT-94-1-A (15 July 1999)

Prosecutor v Tadić (Opinion and Judgement) IT-94-1-T (7 May 1997)

Prosecutor v *Vasiljević* (Appeal Judgement) IT-98-32-A (25 February 2004)

Prosecutor v Vasiljević (Trial Chamber) IT-98-32-T (29 November 2002)

Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipoć and Dragan Papić (Trial Chamber) IT-95-16-T (14 January 2000)

United Nations Mechanism for International Criminal Tribunals

Prosecutor v Ngirabatware (Appeal Judgment) MICT-12-29-A (18 December 2014)

British Military Court for the Trial of War Criminals

Trial of Erich Heyer and six others British Military Court for the Trial of War Criminals Essen UNWCC vol 1 (18-22 December 1945)

Extraordinary Chambers in the Courts of Cambodia

Prosecutor v Kaing Guek Eav ("Duch") 001/18-07-2007-ECCC/OCIJ (23 September 2008)

Prosecutor v Kaing Guek Eav 002/14-08-2006/ECCC/OCP Public Information by the Co-Prosecutors Pursuant to Rule 54 Concerning Their Rule 66 Final Submission Regarding Kaing Guek Eav alias "Duch" (18 July 2008)

European Court of Human Rights

Al-Adsani v United Kingdom, European Court of Human Rights Application No 35763/97 (21 November 2001)

Dudgeon v United Kingdom, European Court of Human Rights Series A No 45 (23 September 1981)

MC v Bulgaria, European Court of Human Rights Application No 39272/98 (4 December 2003)

Tyrer v United Kingdom, European Court of Human Rights No 5856/72 (25 April 1978)

X and Y v The Netherlands, Pleadings, Oral Arguments and Documents, European Court of Human Rights Series B (1983)

Inter-American Court of Human Rights

Atala Riffo and daughters v Chile, Merits, Costs and Reparation, Inter-American Court of Human Rights Series C No 239 (24 February 2012)

Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-American Court of Human Rights Series A No 18 (17 September 2003) ("Advisory Opinion OC-18/03")

Raquel Martín de Mejía v Perú, Inter-American Court of Human Rights Series L No 5/96 (1 March 1996)

The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-American Court of Human Rights Series A No 16 (1 October 1999) para 114 ("Advisory Opinion OC-16/99")

Inter-American Commission of Human Rights

Maria da Penha Fernandes v Brazil, Inter-American Commission of Human Rights Series L Case No 12.051 Report No 54/01 (16 April 2001)

Maria Dolores Rivas Quintanilla v El Salvador, Inter-American Commission of Human Rights Case No 10.772 Report No 6/94 (11 February 1994).

Other cases

D'Ottavio and others Italian Court of Cassation (12 March 1947)

"International Military Tribunal for the Far East, judgment of 12 November 1948" in R Pritchard & SM Zaide (eds) *The Tokyo War Crimes Trial* vol 22

Pritchard R & Zaide S *Tokyo War Crimes Trial: The Complete Transcript of the Proceedings of the International Military tribunal for the Far East* eds (1981) vol 1 Proceedings

The United States of America v Ohlendorf , Jost, Naumann, Rasch, Schulz, Six, Blobel, Blume, Sandberger, Siebert, Steimle, Biberstein, Braune, Haensch, Nosske, Ott, Strauch, Haussmann, Klingelhöfer, Fendler, Radetzky, Rühl, Schubert & Graf U.S. Military Tribunal, Judgement, (8 and 9 April 1948) in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law* No 10 (1950) vol IV

Toonen v Australia, Human Rights Commission Communication No 488 (31 March 1994) UN Doc CCPR/C/50/D/488/1992.

Tokyo trial documents reprinted in The Tokyo War Crimes Trial: The Complete Transcript of the Proceedings of the International Military tribunal for the Far East 22 vols R Pritchard and S Zaide (eds) 1981 IMTFE Docs vol 20

List of Treaties

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217

Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and the Charter of the International Military Tribunal (adopted 8 August 1945, entered into force 8 August 1945) (1945) 82 UNTS 279

American Convention on Human Rights (adopted 21 November 1969, entered into force 18 July 1978) 1144 UNTS 143

Annex to the Charter of the International Military Tribunal of the Far East (entered into force 19 January 1946)

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85
Convention for the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force on the 3 September 1981) 1249 UNTS 13

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222

Geneva Conventions (IV) relative to the Protection of Civilian Persons in Time of War (Geneva Convention of 12 August 1949) (Geneva) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 973

International Convention on Civil and Political Rights (adopted 16 December 1966, entered into for 23 March 1976) 999 UNTS 171

International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195

International Criminal Court (ICC), "Elements of Crimes" (adopted on 9 September 2002) pursuant to article 9(1) of the Rome Statute ICC Doc ICC-ASP/1/3 108, UN Doc PCNICC/2000/1/Add.2 (2000) 8 <www.icc-cpi.int> (accessed 7-05-2015)

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted July 2003, entered into force 25 November 2005) CAB/LEG 66.6

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90

Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia IT/32 (adopted 11 February1994, entered into force 14 March 1994)

Statute of the International Court of Justice Annexed to the Charter of the United Nations 59 Stat 1055 1060 TS No 993 (18 April 1946)

Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994, entered into force 8 November 1994) (1994) 33 ILM 1598

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (entered into force 25 May 1993) (1993) 32 ILM 1159

The Hague Convention (II) with Respect to the Laws and Customs of war on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) 1899 Treaty Series 403
The Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 187 CTS 227

The United Nation's Fourth World Conference on Women Beijing Platform for Action for Equality, Development and Peace (15 September 1995) UN Doc A/CONF.177/20 ("Beijing Platform")

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III)

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1115 UNTS 331

List of United Nations Resolutions

Annex to the ECOSOC Res 1990/15 (24 May 1990)

UNCHR "Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki Special Rapporteur of the Commission on Human Rights, Pursuant to HRC Resolution 1992/S-1/1 of 14 August 1992" (adopted 18 December 2008, entered into force 19 February 2009) UN Doc E/CN.4/1993/50

UN Doc A/RES/63/166 (adopted 18 December 2008, entered into force 19 February 2009) UNSC Res 1820 (19 June 2008) UN Doc S/RES/1820

United Nations Human Rights Office of the High Commissioner for Human Rights (OHCHR) "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law Adopted and proclaimed by UNGA Res 60 (16 December 2005)" UN Doc GA/RES/60/147 and its Annex (2015) *United Nations Human Rights Office of the High Commissioner for Human Rights* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> (accessed 27-08-2015)

United Nations Statute Of The Special Court For Sierra Leone UN Doc S/2002/246 appendix 11 (2000) <http://www.rscsl.org/documents.html/scsl-statute.pdf> (accessed 16-06-2015)

Report of the UN Secretary-General (3 May 1993) S/25704 34
Report of the Secretary-General "In-depth study on all forms of violence against women" (6 July 2006) UN Doc A/61/122/Add.1.

Other International communications and Recommendations

Annex III Views of the Committee on the Elimination of Discrimination against Women art 7(3) of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, *AT v Hungary*, CEDAW Communication No 2/2003 (26 January 2005)

CEDAW General Recommendations Nos 19 and 20, adopted at the Eleventh Session (1992) A/47/38 ("CEDAW General Recommendation No 19")

Instructions for the Government of Armies of the United States in the Field (adopted 24 April 1863)

Bibliography

Books

Ambos K *Internationales Strafrecht* (2006)

Badar ME *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (2013) 1

Bennett O, Bexley J & Warnock K *Arms to Fight, Arms to Protect: Women Speak Out About Conflict* (eds) (1995) 8

Brown BS *Research Handbook on International Criminal Law* (2001) 1

Brown C *A Common Law of International Adjudication* (2007) 49

Brownmiller S *Against our will: Men, women and rape* (1975) 1

Burchell J *Principles of Criminal Law* 3 ed (2005) 1

Butalia U *The Other Side of Silence* (1998) 135

Cassese A *International Criminal Law* (2003) 1

Daillier P and Pellet A *Droit International Public* (2002) 1

Damgaard C *Individual Criminal Responsibility for Core International Crimes* (2008) 1

des Forges A *Leave None to Tell the Story: Genocide in Rwanda* (1999) 1

Enloe C *Maneuvers: The International Politics of Women's Lives* ed (2000) 110

Fisher KJ *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Accountable to the World* (2012) 68

Gardam JG & Jarvis MJ *Women, Armed Conflict, and International Law* (2001)

Jacobs S, Jacobson R & Marchbank J *States of Conflict: Gender, Violence and Resistance* (eds) (2000) 11
Kratochwil FV *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989)

Merrills JG *The Development of International Law by the European Court Of Human Rights* 2 ed (1993)

Mettraux G *International Crimes and the ad hoc Tribunals* (2005) 1

Miller P & Biele N *Twenty Years Later: The Unfinished Revolution, in Transforming a Rape Culture* (eds) (1993) 47

Nowrojee B *Shattered lives: Sexual violence during the Rwandan genocide and its aftermath* Human Rights Watch (1 January 1996)

Pictet JS *The Geneva Conventions of 12 August 1949, Commentary* ed (1958) 1

Roxin C *Täterschaft und Tatherrschaft* (2000) 294

Turshen M & Twagiramariya C *What Women Do in Wartime: Gender and Conflict in Africa* (eds) (1998) 5

Villiger ME *Customary International Law and Treaties, A Manual on the Theory and Practice of the Interrelation of Sources* 2 ed (1997)

Wallace RMM & Martin-Ortega O *International Law* (2009)

Werle G & Jessberger F *Principles of International Criminal Law* 3 ed (2014)

Chapters in a books

Anonymous "Extract from the narrative of Nora Miselem" in M Randall (ed) *When I Look Into the Mirror and See You: Women, Terror and Resistance* (2003) 28-29

Bernhardt R "Interpretation" in Bernardt ed *Encyclopedia of Public International Law* vol 2 (2005) 1421

Cohen HG "Theorising Precedent in International Law" in A Bianchi, D Peat & M Windsor (eds) *Interpretation in International Law* (2014) *Forthcoming UGA Legal Studies Research Paper* No 2014-2013 2

Coomaraswamy R & Kois LM "Violence Against Women" in KD Askin & DM Koenig (eds) *Women and International Human Rights Law* (1999) 177

Dolan C "Collapsing Masculinities and Weak States – A Case Study of Northern Uganda" in F Cleaver ed *Masculinities Matter! Men, Gender and Development* (2002) 75

El Jack A "Gender Perspectives on the Management of Small Arms and Light Weapons in the Sudan" in V Farr & K Gebre-Wold (eds) *Gender Perspectives on Small Arms and Light Weapons: Regional and International Concerns, Brief 24* (2002) 51

Enloe C "The Gendered Gulf" in C Peters 9 ed *The 'New World Order' at Home and Abroad Collateral Damage* (1992)

Eser A "'Individual Criminal Responsibility" in A Cassese, P Gaeta and JR WD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary Vol 1* (2002) 767

Jasinski JL "Theoretical Explanations for Violence Against Women" in CM Renzetti, JL Edelson & RK Bergen (eds) *Sourcebook on Violence Against Women* (2001) 5

Jia BB "Judicial Decisions as a Source of International Law and the Defence of Duress in Murder or Other Cases Arising from Armed Conflict" in S Yee and W Tieya (eds) *International Law in Post-Cold War World/Essays in Memory of Li Haopei* (2001)

Marcus S "Fighting bodies, fighting words: A theory and politics of rape prevention" in J Butler & J Scott (eds) *Feminists theorize the political* (1992) 385

McAuliffe de Guzman M "Article 21 Applicable Law" in O Triffterer ed *Commentary on the Rome Statute of the International Criminal Court* (1999)

Nerlich V "The Status of ICTY and ICTR Precedent in Proceedings Before the ICC" in C Stahn and G Sluiter *The Emerging Practice of the International Criminal Court* (2009) 305

Pellet A "Applicable Law" in A Cassese, P Gaeta and JRWD Jones (eds) *The Rome Statute of the International Criminal Court, A Commentary* (2002) vol 2

Ruggie J "Epistemology, Ontology, and Regimes" in JG Ruggie ed *Constructing the World Polity* (1998)

Schabas WA "Interpreting the Statutes of the Ad Hoc Tribunals" in LC Vohrah, F Pocar Y Featherstone, O Fourmy, C Graham, J Hocking & N Robson eds *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (2003) 846

Scharf MP "Joint Criminal Enterprise, the Nuremberg Precedent, and Concept of 'Grotian Moment'" in T Isaacs & R Vernon (ed) *Accountability for Collective Wrongdoing* (2011) 119

Seifert R "War and rape: A preliminary analysis" in A Stiglmayer ed *Mass rape: The war against women in Bosnia-Herzegovina* (1994) 54

Turshen M "The Political Economy of Rape: An Analysis of Systematic Rape and Sexual Abuse of Women During Armed Conflict in Africa" in C Moser & F Clarke ed *Victors, Perpetrators or Actors: Gender, Armed Conflict and Political Violence* (2001) 55

Vogel J "Individuelle Verantwortlichkeit im Vö1kerstrafrecht" 114 *Zeitschrift fűr die gesamte Strafrechtswissenschaft* (2002)

Werle G & Burghardt B "Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute" in E van Sliedregt & S Vasiliev (eds) *Pluralism in International Criminal Law* (2014)

Wood EJ "Sexual Violence during War: Toward an Understanding of Variation" in L Sjoberg & S Via (eds) *Gender, War, and Militarism* (2010) 124

Articles in Journals

Ambos K "Joint Criminal Enterprise and Command Responsibility" (2007) 5 *Journal of International Criminal Justice* 159

Ambos K "Remarks on the General Part of International Criminal Law" (2006) 4 *Journal of International Criminal Justice* 660

Arend AC "International Law and the Preemptive Use of Military Force" (2003) 26 *Washington Quarterly*

Askin KD "Prosecuting Wartime Rape And Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles" (2003) 21 *Berkeley Journal of International Law* 288

Badar ME "Just Convict Everyone! Joint Preparation: from Tadić to Stakić and Back Again" (2006) 6 *International Criminal Law Review* 293

Bianchi A "Human Rights and the Magic of Jus Cogens" (2008) 19(3) *European Journal of International Law* 491

Bogdan A "Individual Criminal Responsibility in the Execution of a 'Joint Criminal Enterprise' in the Jurisprudence of the Ad Hoc International Tribunal for the Former Yugoslavia" (2006) 6 *International Criminal Law Review* 63

Bostedt FP "The International Criminal Tribunal for the Former Yugoslavia in 2006: New Developments in International Humanitarian and Criminal Law" (2007) 6 *Chinese Journal of International Law* 403

Buss DE "Rethinking 'Rape as a Weapon of War'" (2009) 17 *Feminist Legal Studies* 145

Byrne B, Marcus R & Powers-Stevens T "Gender, Conflict and Development" (1996) vol I Overview Report 34 *BRIDGE Institute of Development Studies*

Cassese A "Proper Limits of Individual Responsibility under the Doctrine of JCE" (2007) 5 *Journal of International Criminal Justice*

Chinkin C "Rape and Sexual Abuse of Women in International Law" (1994) 5 *European Journal of International Law* 326

Cohen HG "International Law's *Erie* Moment" (2013) 34 *Michigan Journal of International Law* 249

Danner AM & Martinez JS "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law" (2005) 93 *California Law Review* 75

Diamond JL "The Myth of Morality and Fault in Criminal Law Doctrine" (1996) 34 *American Criminal Law Review* 111

El Jack A "Gender and Armed Conflict" (2003) *Overview Report by BRIDGE (development-gender)* 21

Eriksson M "Defining Rape: Emerging Obligations for States under International Law?" (2010) 2 *Orebro Studies in Law* 1

Gibson S "The Discourse of Sex/War: Thoughts on Catherine Mackinnon's 1993 Oxford Amnesty Lecture" (1993) 2 *Feminist Legal Studies* 179

Giustiniani FZ "The Responsibility of Accomplices in the Case-Law of the ad hoc Tribunals" (2009) 20 *Criminal Law Forum*

Goy B "Individual Criminal Responsibility before the International Criminal Court A Comparison with the *Ad Hoc* Tribunals" (2012) 12 *International Criminal Law Review* 1

Greenwald AKA "Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation" (1999) 99 *Columbia Law Review* 2259

Guzman AT & Meyer TL "International Common Law: The Soft Law of International Tribunals" (2009) 9 *Chinese Journal of International Law*

Haan V "The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia!" (2005) 5 *International Criminal Law Review* (2005) 195

Haffajee RL "Prosecuting crimes of Rape and Sexual Violence at the ICTR: The Application of the Joint Criminal Enterprise Theory" (2006) 29 *Harvard Journal of Law and Gender* 207

Heifer LR "Adjudicating Copyright Claims under the TRIPs Agreement: The Case for a European Human Rights Analogy" (1998) 39 *Harvard International Law Journal* 357

Hevener C "An Analysis of Gender Based Treaty Law: Contemporary Developments in Historical Perspective" (1986) 8 *Human Rights Quarterly* 70

Jacob M "Precedents: Lawmaking Through International Adjudication" (2011) 12 *German Law Journal* 1005

Jefremovas V "Loose Women, Virtuous Wives, and Timid Virgins: Gender and the Control of Resources in Rwanda" (1991) 25(3) *Canadian Journal of African Studies* 378

Kremnitzer M & Hörnle T "Human Dignity and the Principle of Culpability" (2011) 44 *Israel Law Review* 115

MacKinnon C "Reflections on Sex Equality Under Law" (1991) 100 *Yale Law Journal* 1301

Narchos CN "Women, war, and rape: Challenges facing the International Tribunal for the Former Yugoslavia" (1995) 17 *Human Rights Quarterly* 649

Newbury D "Understanding genocide" (1998) 41(1) *African Studies Review* 73
Obote-Odora AA "Rape and Sexual Violence in International Law: ICTR Contribution" (2005) 12 *New England Journal of International Law and Comparative Law* 135

Ohlin JD "Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise" (2007) 5 *Journal of International Criminal Justice* 69

Orakhelashvili A "Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights" (2003) 14 *European Journal of International Law* 529

Parry JT "Culpability, Mistake, and Official Interpretations of Law" (1997) 25 *American Journal of Criminal Law* 1

Pomorski S *"*Review Essay; Reflections on the First Criminal Code of Post-Communist Russia*"* 46 *American Journal of Comparative Law* 385

Powles S "Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?" (2004) 2 *Journal of International Criminal Justice* 606

Radacic I "Rape Cases in the Jurisprudence of the European Court of Human Rights: Defining Rape and Determining the Scope of the state's Obligations" (2008) 13 *European Human Rights Law Review* 357

Reisman M "International Incidents: Introduction to a New Genre in the Study of International Law" (1984) 10 *Yale Journal of International Law* 1

Sanday PR "The Socio-Cultural Context of Rape: A Cross-Cultural Study" (1981) 37(4) *Journal of Social Issues*

Sofaer AD "On the Necessity of Pre-emption" (2003) 14 *European Journal of International Law*

Swiss S & Giller GE "Rape as a crime of war: a medical perspective*"* (1993) 270 *Journal of the American Medical Association* 612

Swiss S, Jennings PJ, Aryee GV, Brown GH, Jappah-Samukai RM, Kamara MS, Schaack RD & Turay-Kanneh RS "Violence against women during the Liberian civil conflict" (1998) 279 *Journal of the American Medical Association* 625

V

an Schaack B "Atrocity Crimes Litigation: 2008 Year-In-Review" (2009) 7 *Northwestern Journal of International Human Rights* 170

van Sliedregt E "Joint Criminal Enterprise as a Pathway to Convicting Individuals of Genocide" (2007) 5 *Journal of International Criminal Justice* 184

Werle G & Burghardt B "Do Crimes Against Humanity Require the Participation of a State or a 'State- Like' Organization?" (2012) 10 *Journal of International Criminal Justice* 1151

Werle G "Individual Criminal Responsibility in Article 25 ICC Statute" (2007) 5 *Journal of International Criminal Justice* 953

Wood SK "A Woman Scorned for the 'Least Condemned' War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda" (2004) 13 *Columbia Journal of Gender and Law*

Xiau W "Silent consent: Indonesian abuse of women" (1999) 21 *Harvard International Review* 16

Websites

Advocates for Human Rights "Sexual Assault and Cultural Norms" (1 February 2006) *The Advocates for Human Rights* <www.stopvaw.org/sexual_assault_and_cultural_norms> (accessed 10-11-2014)

Anonymous "International Justice for Women: The ICC Marks a New Era" (1 July 2002) *Human Rights Watch Backgrounder* <m.hrw.org/reports/2002/07/01/international-justice-women-icc-marks-new-era > (accessed 11-11-2014)

Anonymous "Human Rights Watch Applauds Rwanda Rape Verdict: Sets International Precedent for Punishing Sexual Violence as a War Crime" (3 September 1998) *Human Rights Watch* <http://www.hrw.org/news/1998/09/02/human-rights-watch-applauds-rwanda-rape-verdict> (accessed 31-03-2014)

Anonymous "Sexual Assault and Male Dominance" (1 February 2006) *Advocates for Human Rights* http://www.stopvaw.org/sexual_assault_and_male_dominance (accessed 2-10-2014)

Benjamin JA *"Conflict, Post-conflict, and HIV/AIDS – the Gender Connections: Women, War and HIV/AIDS: West Africa and the Great Lakes"* (2001) *Reproductive Health Care in Crisis Consortium* <www.rhrc.org/resources/sti/benjamin.html> (accessed 11-11-2014)

Chelala C "Algerian abortion controversy highlights rape of war victims" (1998) 345 *Lancet* 1413

Human Rights and Constitutional Rights "Limitations on Rights" (26 March 2008) *Human Rights and Constitutional Rights* <www.hrcr.org/chart/limitations+duties_general.html> (accessed 13-07-2015)

Human Rights Watch "Rape in Kashmir: a crime of war" (1993) *Human Rights Watch* <www.m.hrw.org/reports/1993/05/01/rape-kashmir> (accessed 11-11-2014)

ILC, "Report of the International Law Commission on the Work of its 48th session" (6 May-26 July 1996) UN Doc A/CN.4/SER.A/1996/Add.I (Part 2), UN Doc A/51/10 *ILC* <http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_1996_v2_p2.pdf&lang=EFSRAC> (accessed 21-07-2015)

International Criminal Law Services "Module 3: General Principles of International Criminal Law" (no date) *United Nations Interregional Crime and Justice Research Institute* (13 June 2015) 4 <http://wcjp.unicri.it/deliverables/training_icl.php.Module_3_General_principles_of_international_criminal_law.pdf> (accessed 13-06-2015)

Krug EG, Mercy JA, Dahlberg LL, Zwi AB & Lozano R "World Report on Violence and Health" (2 October 2002) *World Health Organization* 161 <http://whqlibdoc.who.int/publications/2002/9241545615_eng.pdf?ua=1> (accessed 19-07-2015)

Pelc KJ "The Politics of Precedent in International Law: A Social Network Application" (2013) *APSA Annual Meeting Paper* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2299638> (accessed 22-03-2014)

Sellers PV "The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation" (2007) *Office of the High Commissioner for Human Rights* 1 <http://www.ohchr.org/Documents/Issues/Women/WRGS/Paper_Prosecution_of_Sexual_Violence.pdf> (accessed 23-09-2014)

Sullivan DJ "Overview of the Rule Requiring the Exhaustion of Domestic Remedies Under the Optional Protocol to CEDAW" (2008) *International Women's Rights Action Watch Asia Pacific* 19 <http://www.iwraw-ap.org/publications/doc/DonnaExhaustionWeb_corrected_version_march%2031.pdf > (accessed 1-10-2014)

United Nations "Women, Peace and Security*"* (2000) *United Nations* 16 <www.un.org/womenwatch/daw/public/eWPS.pdf> (accessed 11-11-2014)

World Health Organization "Violence Against Women: Intimate partner and sexual violence against women" (November 2014) *World Health Organization* <http://www.who.int/mediacentre/factsheets/fs239/en/> (accessed 22-06-2015)