PROSECUTING CRIMES OF RAPE AND SEXUAL VIOLENCE AT THE ICTR: THE APPLICATION OF JOINT CRIMINAL ENTERPRISE THEORY

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I. INTRODUCTION

During the 1994 conflict in Rwanda, rape occurred on a massive scale in the genocide that claimed the lives of between 500,000 and one million Rwandans.[1] Réne Degni-Segui, the Special Rapporteur on the situation of human rights in Rwanda, as appointed by the United Nations Human Rights Commission, estimated that between 250,000 and 500,000 rapes occurred in total. He elaborated that "[r]ape was systemic and was used as a 'weapon' by the perpetrators of the massacres . . . [and a]ccording to consistent and reliable testimony, . . . rape was the rule and its absence was the exception."[2]

Rape and sexual violence were used during the Rwandan genocide as political and military tools to target female Tutsi civilians; the crimes, instrumentalities of war, often had little or no "sexual" component. Though low-level militia members and soldiers generally perpetrated these crimes, military and political leaders instigated, encouraged, oversaw, and, at times, personally committed rape and acts of sexual violence.[3] Thus, these high level officials should be held criminally responsible.

After delays in the United Nations' (UN) post-genocide investigation of crimes of a sexual nature, the Officer of the Prosecutor (OTP) at the Inter-

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[1] HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH (1996), *available at* http://hrw.org/reports/1996/Rwanda.htm [hereinafter SHATTERED LIVES]. The violence was directed predominantly toward the Tutsi minority group and Hutu majority moderates and was perpetrated by Interahamwe Hutu militia members, Rwandan Armed Forces (*Forces Armées Rwandaises*) soldiers, and other civilians. Doctors have attested to the high prevalence of rapes, in particular, after examining numerous victims immediately following the genocide. *Id.*

[2] Special Rapporteur of the Commission on Human Rights*, Report on the Situation of Human Rights in Rwanda*, ¶ 16, U.N. Doc. E/CN.4/1996/68 (Jan. 29, 1996).

[3] SHATTERED LIVES, *supra* note 1.

national Criminal Tribunal for Rwanda (ICTR) finally began prosecuting these crimes.[4] In 1996, the OTP secured a watershed judgment in *Prosecutor v. Akayesu*,[5] in which an ICTR trial chamber adopted broad definitions of rape and sexual violence and convicted on both grounds.[6] However, subsequently, prosecutors have encountered much difficulty in procuring convictions against high-level criminals for crimes of rape and sexual violence, largely because of a lack of evidence directly linking the accused persons to the crimes committed.

In response to successful convictions at the International Criminal Tribunal for the Former Yugoslavia (ICTY),[7] prosecutors at the ICTR have begun to employ a theory entitled joint criminal enterprise (JCE) to prosecute crimes of sexual violence.[8] This theory holds great promise because it views crimes of rape in a larger context—as part of a master plan motivating the mass violence that occurred between April and July of 1994. JCE theory, if used effectively, can not only contribute to the ICTR body of law, but also may be useful to prosecutors in future international criminal cases, such as those tried at the International Criminal Court (ICC). However, in order to maintain the legitimacy of international criminal law and the JCE theory more specifically, the use of this theory must be narrowly tailored. Prosecutors should invoke the JCE doctrine only if an accused actually had control over, and made a substantial contribution to, a crime of rape or sexual violence. Furthermore, a conviction on these grounds should satisfy traditional criminal law theories of punishment (e.g., retribution, deterrence, rehabilitation, and incapacitation).

This Note argues for the targeted use of JCE theory in effectively prosecuting crimes of rape and sexual violence at the ICTR. Part I offers a background to the UN's response to crimes of a sexual nature in the Rwandan, as compared to the former Yugoslavian, context, specifically outlining

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[4] The ICTR was established by Security Council Resolution 955 of November 8, 1994 in recognition of the serious violations of humanitarian law that were committed in Rwanda during the 1994 genocide. The ICTR acts pursuant to its statute in prosecuting persons responsible for genocide, crimes against humanity, and violations of Article III Common to the Geneva Conventions and of Additional Protocol II that occurred between January 1, 1994 and December 31, 1994 both in Rwanda and in neighboring territories. The ICTR is comprised of three organs: the Chambers (including three trial chambers and an appeals chamber), the Office of the Prosecutor, and the Registry. International Criminal Tribunal for Rwanda, About the Tribunal, http://www.ictr.org/default.htm (last visited Nov. 9, 2005).

[5] Prosecutor v. Akayesu (*Akayesu Judgment*), Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998). The full text of the ICTR judgments cited in this Note can be found at http://www.ictr.org under the "CASES" hyperlink.

[6] *Id.*

[7] *See, e.g.*, Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgment (July 21, 2000); Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment (July 15, 1999); Prosecutor v. Kvočka, Case No. IT-98-30/7-T, Judgment (Nov. 2, 2001); Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment (Aug. 2, 2001); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998); Prosecutor v. Tadić, Case No. IT-94-I-T, Judgment (May 7, 1997).

[8] *See, e.g.*, Prosecutor v. Karemera (*Karemera Amended Indictment*), Case No. ICTR-98-44-I, Amended Indictment (Feb. 23, 2005).

the ICTR's investigatory challenges. Part II describes the *Akayesu* groundbreaking judgment and provides a brief history of ICTR rape and sexual violence jurisprudence. The history highlights evidentiary problems inherent in prosecuting these crimes under traditional, statutorily created theories. Part III discusses the JCE doctrine in the context of rape and sexual violence. Part IV directly applies JCE theory to a case formerly prosecuted on other grounds at the ICTR, showing how the theory could have been used to procure a conviction on rape and sexual violence grounds. Finally, Part V discusses desirable limitations in applying the JCE theory going forward, in order to maintain its legitimacy and further international criminal law more generally.

II. ICTR Challenges in Investigating and Prosecuting Sexual Violence Crimes

Historically, crimes of rape and other forms of sexual violence often occur during times of armed conflict.[9] During the 1994 Rwandan genocide, crimes of sexual violence were used to advance military and political goals. Rwandan media sources spread propaganda, targeting Tutsi women for persecution by portraying them as *femmes fatales*, or seductive agents of the enemy.[10] Although Tutsi women were typically the individual victims of rape or sexual violence, the crimes were part of a pattern of criminal activity, associated with the women witnessing the killing and/or torture of their relatives and the destruction of their homes.[11] In other words, rape was used to terrorize the entire minority Tutsi community.

Despite evidence of widespread rape during the genocide, the crime was addressed belatedly by the UN. Sexual violence was neither highlighted in the international media nor discussed by the UN Security Council in connection with the Rwandan conflict in any early reports.[12] After significant delays in the investigations of sexual violence by the Special Rapporteur and the Security Council's Rwanda Commission, it was instead nongovernmental organization (NGO) human rights advocacy efforts that provided information on rapes.[13] Thereafter, criminal investigations and prosecutions of rape and sexual violence took place at the ICTR. In the

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[9] *See* Hilary Charlesworth & Christine Chinkin, The Boundaries of International Law: A Feminist Analysis 252 (2000).

[10] Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment and Sentence, ¶ 1079 (Dec. 3, 2003).

[11] Press Release, Human Rights Watch, Human Rights Watch Applauds Rwanda Rape Verdict: Sets International Precedent for Punishing Sexual Violence as a War Crime (Sept. 2, 1998), *available at* http://www.hrw.org/press98/sept/rrape902.htm [hereinafter Human Rights Watch Press Release].

[12] Judith G. Gardam & Michelle J. Jarvis, Women, Armed Conflict, and International Law 152–53 (2001).

[13] *Id.* at 153; Richard J. Goldstone & Estelle A. Dehon, *Engendering Accountability: Gender Crimes Under International Criminal Law*, 19 New Eng. J. Pub. Pol. 121, 123 (2003).

Akayesu case, for example, the OTP included sexual violence charges in the amended indictment; in the resulting judgment, for the first time in international history, rape was recognized as an instrument of genocide and as a crime against humanity.[14]

Although international criminal law officially recognizes sexual violence crimes,[15] these crimes largely were neglected in practice in international tribunals before the inception of the ICTY and the ICTR.[16] The United Nations Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, described rape as the "least condemned war crime."[17] Rape historically has been characterized as a private crime, committed in isolated and discrete cases. Viewed as an incidental by-product of war, sexual violence has been overlooked by the international community in the past.[18] Rather than an occasional act committed by a delinquent soldier, the conflicts in Rwanda and the former Yugoslavia demonstrate that rape and sexual violence in situations of armed conflict can be systematic and integral to genocidal violence and an overarching political framework; the acts often have no "sexual" element at all. During these conflicts, rape and other forms of sexual violence, such as forced nudity and torture, perpetrated against predominantly female civilians were ordered, encouraged, and overlooked by superiors.[19]

While widespread evidence of rape and sexual violence existed in both the former Yugoslavia and Rwanda, the initial treatment of crimes relating to sexual violence in the ICTY and ICTR differed. For example, the UN resolution establishing the ICTY specifically referenced sexual violence against Muslim women,[20] although the resolution creating the ICTR made no mention of the topic.[21] Possible reasons for the inconsistent response

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[14] *See* Kelly D. Askin, *A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003*, 3 HUM. RTS. BRIEF 16, 17 (2004) [hereinafter Askin, *Decade of Gender Crimes*].

[15] Human Rights Watch Press Release, *supra* note 11. Rape can be a violation of the 1948 Genocide Convention, the 1949 Geneva Conventions, and the 1984 Torture Convention, as well as a crime against humanity under the Nuremberg Charter. Although rape was never prosecuted at the International Military Tribunal at Nuremberg, the International Military Tribunal for the Far-East did convict Japanese officers of rape. *Id.*

[16] Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 288 (2003) [hereinafter Askin, *Prosecuting Wartime Rape*].

[17] Special Rapporteur on Violence Against Women, *Preliminary Report on Violence Against Women, Its Causes and Consequences*, ¶ 263, U.N. Doc. E/CN.4/1995/42 (Nov. 22, 1994).

[18] CHARLESWORTH & CHINKIN, *supra* note 9, at 158; Human Rights Watch Press Release, *supra* note 11.

[19] Askin, *Decade of Gender Crimes*, *supra* note 14, at 16.

[20] *See* The Secretary-General, *Report Pursuant to Paragraph 2 of the Security Council Resolution 808*, ¶¶ 9, 11, 48, 88, 108, *presented to the Security Council,* U.N. Doc. S/25704 (May 3, 1993).

[21] GARDAM & JARVIS, *supra* note 12, at 154. The Statutes of both International Criminal Tribunals did incorporate rape, thereby setting precedent and securing procedural safeguards for rape victims. For further discussion of gender crimes and procedural progress under the

by the UN to sexual violence against women in the two locales include the focus on killings, rather than rapes, in Rwanda; cultural differences, namely taboos about speaking of rape in the African context; and the varying roles of lobbying forces.[22] Whatever the reason, the ICTR caught up quickly in addressing sexual violence crimes with its watershed judgment in *Akayesu*, demonstrating that its prosecutors, too, could successfully bring rape charges against the accuseds.[23]

However, since *Akayesu*, ICTR prosecutors have been unable to procure rape convictions due to a lack of evidence.[24] Physical perpetrators, not personally on trial, are unwilling to confess to committing acts of rape or sexual violence at the ICTR. This is perhaps because in the Rwandan criminal justice system, which was established post-genocide, perpetrators can be charged with a first category offence (i.e., particularly heinous murders or sexual torture), and subject to the death penalty if convicted.[25] Also, rape in Rwanda has been noted as a difficult crime to document because of a dearth of accurate eyewitness testimony, the stigmatization of victims, worries of public shame among victims, and fears of perpetrators still living with the victims.[26] Nonetheless, it is not impossible to collect evidence of sexual crimes and successfully prosecute rape. The probability of effectively documenting crimes of a sexual nature increases when trained female investigators and interpreters, who are sensitive to victim trauma and who can offer victims protection, are employed.[27] Also, the appointment of women in key positions in the ICTR has assisted in the effective prosecution of crimes of sexual violence and rape, and can continue to do so.[28]

Rules of Procedure and Evidence, specifically Rule 96 (Rules of Evidence in Cases of Sexual Assault), see Goldstone & Dehon, *supra* note 13, at 122–23, 132–34.

[22] GARDAM & JARVIS, *supra* note 12, at 154–58.

[23] Prosecutor v. Akayesu (*Akayesu Judgment*), Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

[24] *See, e.g.*, Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment (Nov. 16, 2001); Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T, Judgment (Jan. 22, 2004); Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment and Sentence, ¶ 1079 (Dec. 3, 2003); Prosecutor v. Kajelijeli (*Kajelijeli Judgment and Sentence*), Case No. ICTR-98-44A-T, Judgment and Sentence (Dec. 1, 2003).

[25] Madeleine H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, AM. DIPL. (1998), *available at* http://www.unc.edu/depts/diplomat/AD_Issues/amdipl_6/morris2.html#national.

[26] SHATTERED LIVES, *supra* note 1; Richard P. Barrett & Laura E. Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 MINN. L. REV. 30, 54 (2003).

[27] SHATTERED LIVES, *supra* note 1.

[28] For example, the Secretary General appointed several women to the OTP, including the second Chief Prosecutor (Louise Arbour of Canada) and the third Chief Prosecutor (Carla del Ponte of Switzerland). Also, the first Chief Prosecutor, Richard Goldstone, appointed a Legal Adviser for gender-related crimes (Patricia Viseur-Sellers). In addition, the ICTR appointed several female judges experienced in gender issues, such as Judge Navanethem Pillay of South Africa, Judge Andrezia Vaz of Senegal, and Judge Khalida Khan of Pakistan. These appointments have affected the process and outcomes of criminal proceedings. *See* CHARLESWORTH & CHINKIN, *supra* note 9, at 310–12; Goldstone & Dehon, *supra* note 13, at 123.

In many recent ICTR indictments, sexual violence charges have been brought in various forms.[29] Although this trend reflects the mass rapes that occurred on the ground during the genocide, prosecutors often have lacked appropriate evidence to substantiate the sexual violence charges that consequently resulted in acquittals.[30] These acquittals may prove very damaging to the women who were raped during the Rwandan genocide and to the prospective treatment of rape and sexual violence in international criminal jurisprudence. Not only can they put on the record that rapes did not, in fact, occur, but they also may de-legitimize the theories under which the rape charges are brought, and the investigative techniques used in conjunction with prosecutions.

III. The *Akayesu* Judgment and Its Progeny: Building the Framework

The definitions of rape and sexual violence in ICTR jurisprudence have fluctuated, with the chambers ultimately re-adopting the broad, non-mechanical definitions of these crimes first set forth in *Akayesu*. The trial chambers most recently espoused the view that rape and acts of sexual violence during the genocide occurred in a variety of ways under circumstances that were naturally coercive.[31] Despite the changing definitions of rape, prosecutors struggle to convict on sexual violence grounds largely due to the high evidentiary burdens associated with proving individual or command responsibility for these crimes. In short, prosecutors appear to lack evidence directly or closely linking high-level officials to crimes of sexual violence.

The *Akayesu* judgment has been pronounced as "perhaps the most groundbreaking decision advancing gender jurisprudence worldwide."[32] In this case, brought against the former *bourgmestre* (mayor) of Taba Commune, eyewitness and personal testimony about gang rape and individual rape led Judge Navanethem Pillay, the only female judge at the ICTR at the time, to invite prosecutors to investigate gender crimes in Taba.[33] During a temporary adjournment of trial, an ensuing investigation found evidence of widespread rape and forced nudity that was encouraged or overseen by Akayesu. Consequently, the prosecutor amended the indictment to include

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[29] *See* discussion *infra* Part III.

[30] *See* cases cited *supra* note 24.

[31] Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Summary of Judgment (Apr. 28, 2005).

[32] Askin, *Decade of Gender Crimes*, *supra* note 14, at 17.

[33] *Id.* Judge Pillay's behavior, in tandem with an amicus curiae brief filed by the Coalition for Women's Human Rights in Conflict Situations, encouraging the ICTR to include sexual violence charges in the *Akayesu* indictment, caused the trial to be postponed. Goldstone & Dehon, *supra* note 13, at 124.

charges of rape and other inhumane acts as crimes against humanity, in addition to referencing rape in the genocide counts.[34]

The Trial Chamber I decision in *Akayesu* made several important pronouncements with regard to rape and sexual violence in international criminal law, which subsequently were upheld on appeal. The chamber found the accused guilty of genocide under Article 2(2)(b) of the Statute of the International Criminal Tribunal for Rwanda (ICTR Statute),[35] saying, "rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole."[36] The chamber found that these acts of rape and sexual violence caused serious bodily harm to members of the Tutsi group and were committed with the intent to destroy, in whole or in part, that same group.

Under crimes against humanity, the *Akayesu* chamber also made several critical findings with regards to crimes of sexual violence. Although it did not convict on these grounds, the chamber stated that rape can constitute torture under Article 3(f) of the ICTR Statute[37] because both are used for "purposes such as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity."[38] The chamber did convict the Accused under Article 3(g) of the ICTR Statute,[39] saying that rape is a crime that cannot be summarized in a mechanical description of objects and body parts; rather it is a "physical invasion of a sexual nature, committed on a person under

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[34] Askin, *Prosecuting Wartime Rape*, *supra* note 16, at 319.

[35] Article 2(2)(b) of the ICTR Statute states: "Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: . . . Causing serious bodily or mental harm to members of the group . . . ." S.C. Res. 955, annex, U.N. Doc. S/RES/955 (Nov. 8, 1994).

[36] Prosecutor v. Akayesu (*Akayesu Judgment*), Case No. ICTR-96-4-T, Judgment ¶ 731 (Sept. 2, 1998).

[37] Article 3(f) of the ICTR Statute states: "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: . . . Torture. . . ." S.C. Res. 955, *supra* note 35, annex.

[38] *Akayesu Judgment*, Case No. ICTR-96-4-T ¶ 597. The chamber went on to say that, "rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official, or other person acting in an official capacity." *Id.* ¶ 687. Sexual violence was also found to fall under Article 4(e) of the ICTR Statute (outrages upon personal dignity, in particular humiliating and degrading treatments, rape, enforced prostitution and any form of indecent assault) as a violation of Article 3 Common to the Geneva Conventions and of the Additional Protocol II, although the Chamber did not convict on these grounds. *Id.* ¶ 688.

[39] Article 3(g) of the ICTR Statute states: "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: . . . Rape. . . ." S.C. Res. 955, *supra* note 35, annex.

circumstances which are coercive."[40] In addition, the chamber found that sexual violence, a category that includes rape, is broader because it can involve acts that do not even involve physical contact or penetration.[41] The chamber found sexual violence to fall under the scope of other inhumane acts; it found the accused criminally responsible under Article 3(i)[42] of the ICTR Statute for the forced undressing of women in public and for making them march or perform exercises naked near the bureau communal.[43] Thus, the *Akayesu* judgment was profound in its broad definitions of rape and sexual violence; in its characterization of rape as a violation, rather than an act of penetration; and in its innovative means of prosecuting rape under the ICTR Statute.[44]

In a later case, *Prosecutor v. Musema*, Trial Chamber I affirmed the broad definition of rape asserted in *Akayesu*. The chamber stated that, "the essence of rape is . . . the aggression that is expressed in a sexual manner under conditions of coercion. . . . [T]here is a trend in national legislation to broaden the definition of rape" and "a conceptual definition is preferable to a mechanical definition of rape" because it will "better accommodate evolving norms of criminal justice."[45]

Notwithstanding their adoption of a broad definition for rape, Trial Chamber I and the Appeals Chamber in *Musema* demanded a high burden of proof for the crime of rape. Despite the trial chamber's finding that the accused was individually responsible under Article 3(g) for raping a Tutsi woman,[46] the Appeals Chamber overturned the conviction for lack of evidence beyond a reasonable doubt.[47] On command responsibility charges,[48]

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[40] *Akayesu Judgment*, Case No. ICTR-96-4-T ¶¶ 596, 598.

[41] *Id.* ¶ 686. For a discussion of the traditional, male-centered criminal law definition of "rape" as an act of penetration, see CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 87–88 (1987).

[42] Article 3(i) of the ICTR Statute states: "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: . . . Other inhumane acts. . . ." S.C. Res. 955, *supra* note 35, annex.

[43] *Akayesu Judgment*, Case No. ICTR-96-4-T ¶ 697.

[44] In contrast, the broad definition of rape in *Akayesu* has been criticized for its capacity to detract from the seriousness of the crime and to render the concept less powerful. Goldstone & Dehon, *supra* note 13, at 128.

[45] Prosecutor v. Musema (*Musema Trial Chamber Judgment and Sentence*), Case No. ICTR-96-13-A, Judgment and Sentence, ¶¶ 226–229 (Jan. 27, 2000); *see also* Prosecutor v. Niyitegeka, Case No. ICTR-96-14, Judgment and Sentence (May 16, 2004) (endorsing the *Akayesu* definition of rape).

[46] Article 6(1) of the ICTR Statute on individual criminal responsibility reads, "[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Article 2 to 4 of the present Statute, shall be individually responsible for the crime." S.C. Res. 955, *supra* note 35, Annex.

[47] *Musema Trial Chamber Judgment and Sentence*, Case No. ICTR-96-13-A ¶¶ 193–194.

[48] Article 6(3) of the ICTR Statute on command responsibility reads, "[t]he fact that any of the acts referred to in Article 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

Trial Chamber I found that the prosecution failed to bear its burden of proof that "any act of rape had been committed by any of Musema's subordinates and that Musema knew or had reason to know of this act and failed to take reasonable measures to prevent or punish the perpetrators thereof, following the commission of such act."[49]

In *Musema* and subsequent cases, the ICTR trial chambers have required a high burden of proof on the prosecution to prove rape under both the individual and command responsibility provisions of the ICTR Statute. Trial Chamber I preferred finding individual criminal responsibility for the crime against humanity of "rape" only when there is evidence beyond a reasonable doubt of an accused personally raping a victim[50] or of "other inhumane acts" when there is evidence that an accused was present and directly ordered others to perpetrate sexual violence.[51] In terms of command responsibility, in the absence of a direct order to rape, Trial Chamber II found it impossible to infer that Accuseds knew or had reason to know rapes or "other inhumane acts" were committed based on general orders to kill or to exterminate.[52]

The broad definition of rape pronounced in *Akayesu*, however, was not challenged until an ICTY trial chamber expanded upon the *actus reus* of the crime of rape in international law. ICTY Trial Chamber II found rape to consist of sexual penetration, however slight, of (a) the victim's vagina or anus by the perpetrator's penis or any other object used by the perpetrator, or (b) of the victim's mouth by the perpetrator's penis.[53] The chamber went on to say that consent for these purposes must be voluntarily given (of the victim's free will), as assessed in the context of the surrounding circumstances.[54] The ICTY Appeals Chamber later affirmed and even strengthened this judgment.[55] Although not binding on the ICTR trial or appeals

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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." S.C. Res. 955, *supra* note 35, annex. Under ICTR and ICTY case law, command responsibility requires three elements: "(1) the existence of a superior-subordinate relationship of effective control; (2) the existence of the requisite mens rea, namely that the commander knew or had reason to know of his subordinates' crimes; and (3) that the commander failed to take the necessary steps to prevent or punish the offenses." Allison M. Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 122 (2005).

[49] *Musema Trial Chamber Judgment and Sentence*, Case No. ICTR-96-13-A ¶ 968.

[50] *Id.*

[51] *See* Prosecutor v. Niyitegeka, Case No. ICTR-96-14, Judgment and Sentence ¶ 467 (May 16, 2004); Prosecutor v. Kajelijeli (*Kajelijeli Judgment and Sentence*), Case No. ICTR-98-44A-T, Judgment and Sentence ¶ 937 (Dec. 1, 2003).

[52] *Kajelijeli Judgment and Sentence*, Case No. ICTR-98-44-A-T ¶ 924.

[53] Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶¶ 437–438 (Feb. 22, 2001).

[54] *Id.*

[55] Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶¶ 127–128 (June 12, 2002).

chambers, this new ICTY Appeals Chamber decision held persuasive authority with regards to the definition of rape.

Indeed, this narrower *Kunarac* definition of rape was adopted in a subsequent ICTR case, *Prosecutor v. Semanza*, although the Trial Chamber III did recognize that other acts of sexual violence could still be prosecuted as crimes against humanity (i.e., as torture, persecution, enslavement, or other inhumane acts).[56] The chamber held that the *mens rea* of rape as a crime against humanity is the intent "to effect the prohibited sexual penetration with the knowledge that it occurs without the consent of the victim."[57] The application of this narrowed definition of the *actus reus* of rape and the high standard for *mens rea* seemed to reverse the progress made by the ICTR in *Akayesu* with regards to sexual violence crimes. Instead of recognizing rape as a crime of warfare that is committed in situations that are, by their very nature, likely coercive, *Semanza* effectively narrowed the scope of the crime to include only isolated incidents of a very specific and identifiable act of penetration in which the lack of consent of the victim is demonstrated to the perpetrator. In *Semanza*, the chamber found the accused guilty of rape only in an isolated incident in which he directly instructed a group to rape and an identifiable victim was raped as a result; the chamber found the accused substantially contributed to the actions of the principal perpetrator because his instigation was causally connected to the act.[58]

However, in a recent judgment, *Prosecutor v. Muhimana*, Trial Chamber III re-expanded the definition of rape under international criminal law. The chamber found the accused guilty of rape as both an act of genocide and a crime against humanity. In terms of genocide, the chamber found the accused to have personally targeted Tutsi civilians by shooting and raping Tutsi women with the intent to destroy the Tutsi people.[59] Under the charge of rape as a crime against humanity, and in light of peculiar evidence showing the disembowelment of a victim by using a machete to cut her from her breasts to her genitals, the chamber reassessed its definition of rape.[60] Recognizing that rape historically has been defined in national jurisdictions as "non-consensual sexual intercourse," the chamber reasserted why this mechanical definition based on consent is inappropriate for rapes charged under international criminal law as either acts of genocide, crimes against humanity, or war crimes, in situations that are almost universally coercive.[61] The chamber went on to say, "[c]oercion is an element that may

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[56] Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, ¶¶ 344–345 (May 15, 2003).

[57] *Id.* ¶ 346.

[58] *Id.* ¶ 478.

[59] Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Summary of Judgment, ¶ 15 (Apr. 28, 2005).

[60] *Id.* ¶ 21.

[61] *Id.* ¶¶ 24, 31.

obviate the relevance of consent as an evidentiary factor in the crime of rape."[62]

Even though the *Kunarac* and *Akayesu* definitions of rape could conflict with each other, the *Muhimana* trial chamber ingeniously interpreted the two as compatible.[63] Trial Chamber III found the conceptual definition of rape articulated in *Akayesu* as encompassing the *Kunarac* elements, and it thereby re-adopted the *Akayesu* standard.[64] As such, the chamber found the accused individually responsible for rape as a crime against humanity because he individually committed and abetted rapes, by nature of his presence and direct encouragement, as a part of a widespread or systematic attack against a civilian population.[65] The chamber did not, however, find that the act of disembowelment mentioned above constituted rape, even under its revised definition.[66]

Notwithstanding the re-expansion of the definition of rape, as appropriate for situations of armed conflict, prosecutors still face a significant challenge in procuring convictions for crimes of sexual violence, including rape. As shown above in ICTR jurisprudence—both in the holdings and dicta—rape and sexual violence crimes more generally can be brought under numerous provisions in the ICTR Statute, including as genocide (Article 2(2)(b), "Causing serious bodily or mental harm to members of the group"), as crimes against humanity (Article 3(c), "Enslavement"; Article 3(f), "Torture"; Article 3(g), "Rape"; Article 3(h), "Persecutions on political, racial and religious grounds"; and Article 3(i), "Other inhumane acts"), and as violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Article 4(e), "Outrages upon personal dignity"). Despite the numerous opportunities they have had to charge these crimes of sexual violence, prosecutors have failed to secure many convictions because of evidentiary burdens.

Without evidence of actual distinct rapes or other acts of sexual violence—either from perpetrator, eyewitness, or victim testimony—that can be closely linked to an accused, individual or command responsibility is difficult to prove. Under individual responsibility for rape as a crime against humanity, courts generally demand that the accused actually perpetrated the rape; under command responsibility for rape as a crime against humanity, courts demand direct orders, physical presence of the accused at the crime scene, and evidence of an actual rape occurring;[67] and under genocide, courts demand evidence of rapes that were specifically committed with the specific intent to annihilate the Tutsi population.[68] These are high evi-

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[62] *Id.* ¶ 31.
[63] *Id.* ¶ 34.
[64] *Id.* ¶ 35.
[65] *Id.* ¶¶ 36–45.
[66] *Id.* ¶ 43.
[67] *See supra* text accompanying notes 50, 52.
[68] *See supra* text accompanying note 36.

dentiary burdens to secure rape convictions, even under the broader *Akayesu* definition. The burden is similarly high, though different in nature, for crimes of sexual violence, or if charging rape under other provisions (such as "other inhumane acts").[69] But given the indisputably high prevalence of rapes occurring during the genocide, it seems desirable to convict high-level officials, or the masterminds of the genocide, if they indeed are criminally responsible—even if they did not personally physically commit the crimes in question.

IV. Joint Criminal Enterprise Theory in Sexual Violence Jurisprudence

In an effort to procure more rape and sexual violence convictions, ICTR prosecutors, in line with their peers at the ICTY, began prosecuting these crimes under a relatively new individual responsibility theory in international criminal law, namely joint criminal enterprise, or JCE.[70] Innovative uses of JCE theory may effectively address some of the previous evidentiary barriers prosecutors faced with regards to prosecuting crimes of sexual violence. In particular, prosecutors may secure rape convictions without proving a specific nexus between the accused and the crimes happening on the ground if those crimes were clearly foreseeable by-products of a JCE involving genocidal intent or widespread and systematic attacks. The 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.[71]

JCE is not explicitly mentioned in either the ICTR or ICTY Statutes, although judges have found it to be implicitly included in Article 7(1) on individual criminal responsibility of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute).[72] JCE is a form of crime commission rather than a new crime in and of itself, and it can be used to bring charges under other substantive crimes named in the ICTR Statute. JCE also has been referred to as "common purpose" or "common plan" liability, although the ICTY Appeals Chamber has expressed a preference for the term "joint criminal enterprise" for the sake of consistency.[73] JCE theory refers to crimes committed by a plurality of persons, or co-

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[69] *See supra* text accompanying note 51.

[70] *See supra* notes 7–8.

[71] Danner & Martinez, *supra* note 48, at 98.

[72] *Id.* at 103. By extension, it can be assumed that judges in the ICTR will similarly find JCE to be incorporated in the language of Article 6(1) of the ICTR Statute; it remains debatable whether they will find this liability extended to Article 6(3) for command responsibility. *See supra* notes 46, 48 and accompanying text.

[73] *See* Prosecution v. Ojdanić, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise, ¶ 36 (May 21, 2003); Prosecutor v. Brdjanin & Talić, Case No. IT-99-36-OT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, ¶ 24 (June 26, 2001).

perpetrators, all of whom participate in the same criminal conduct and possess the attendant *mens rea*.[74] The rationale behind this form of liability is that all those who participate in a common criminal action and share criminal intent should also share in criminal liability, no matter their role in the crime, because each is indispensable to the result and it would be difficult to distinguish between their degrees of liability.[75]

There are three categories of JCE theory, first set forth by the ICTY Appeals Chamber in *Prosecutor v. Tadić*.[76] These categories were adopted from customary international law derived from the case law of post-World War II military courts.[77] They were summarized clearly in a Separate Opinion of Judge David Hunt on Challenge by Ojdanić to Jurisdiction—Joint Criminal Enterprise. They are as follows:

> *Category 1*: All of the participants in the joint criminal enterprise, acting pursuant to a common design, possessed the same criminal intention. The example is given of a plan formulated by the participants in the joint criminal enterprise to kill where, although each of the participants in the plan may carry out a different role, each of them has the intent to kill.
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> *Category 2*: All of the participants in the joint criminal enterprise were members of military or administrative groups acting pursuant to a concerted plan, where the person charged held a position of authority within the hierarchy; although he did not physically execute any of the crimes charged, he actively participated in enforcing the plan by aiding and abetting the other participants in the joint criminal enterprise who did execute them. The example is given of a concentration camp, in which the prisoners are killed or otherwise mistreated pursuant to the joint criminal enterprise.
>
> *Category 3*: All of the participants were parties to a common design to pursue one course of conduct, where one of the persons carrying out the agreed object of that design also commits a crime which, whilst outside the "common design," was nevertheless a *natural and foreseeable consequence* of executing "that common

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[74] Antonio Cassese, International Criminal Law 181 (2003).

[75] *Id.* at 182–83.

[76] Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 220 (July 15, 1999).

[77] Danner & Martinez, *supra* note 48, at 105. Note that JCE as a form of liability has been challenged in a "Motion Challenging Jurisdiction" brought by Ojdanić. The ICTY Appeals Chamber noted that although the ICTY Statute does not explicitly provide for JCE, unlike the Rome Statute for the ICC (Article 25(3)(d)), there was sufficient basis for JCE as a form of criminal liability and its elements as set forth in customary international law. The extended form of JCE (third category) is not recognized in many national jurisdictions, although most jurisdictions recognize the first category. Steven Powles, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 J. Int'l Crim. Just. 606, 614–15 (2004).

> purpose." The example is given of a common (shared) intention on the part of a group to remove forcibly members of one ethnicity from their town, village or region (labelled "ethnic cleansing"), with the consequence that, in the course of doing so, one or more of the victims is shot and killed.[78]

Because Category 2 of JCE applies predominantly to concentration camp situations,[79] Category 1 and Category 3 are most generally applicable to ICTR rape and sexual violence prosecutions. Under Category 1, the burden of proof is still relatively high for the prosecution. A prosecutor must prove that a common plan to commit the crime existed, that the defendant voluntarily participated in at least some aspect of that common plan, and that he or she also assisted in committing the crime—even if he or she was not the actual physical perpetrator.[80] In other words, in the case of rape or sexual violence, the agreement under the common plan must be to commit the act itself.

Under JCE Category 3, the most extended form of the theory, the prosecution needs to establish that the crime charged was objectively a natural and foreseeable consequence of the execution of the JCE, and that the accused was subjectively aware that such a crime was a possible consequence of that execution and that he or she participated in the JCE nonetheless.[81] More than negligence is required under this category; instead *dolus eventualis* (sometimes called "advertent recklessness") is necessary.[82] Thus, if a crime of rape goes beyond the intended criminal object of the JCE, which could be to kill members of a group, then rape must have been a natural and foreseeable consequence to a reasonable person. Further, the accused must herself or himself have been aware that rape could follow from the criminal object.

To successfully employ JCE theory in the sexual violence context, prosecutors must ensure that they proffer the appropriate evidence and that they plead the apposite charges. Cooperation between the prosecuting trial attorneys and investigators—including the active participation of trial attorneys from the beginning of an investigation—seems important in proving JCE.[83] The prosecution must offer evidence of both the substan-

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[78] Prosecutor v. Ojdanić, et al. (*Hunt Opinion, Ojdanić*), Case No. IT-99-37-AR72, Separate Opinion of Judge David Hunt on Challenge by Ojdanić to Jurisdiction Joint Criminal Enterprise, ¶ 6 (May 21, 2003) (emphasis added).

[79] Powles, *supra* note 77, at 609.

[80] Danner & Martinez, *supra* note 48, at 105.

[81] *Hunt Opinion, Ojdanić*, Case No. IT-99-37-AR72 ¶ 11.

[82] Powles, *supra* note 77, at 608. Note that to be liable for genocide under Category 3, an accused can enter into the JCE with the specific intent to commit crime *X* with the awareness that in the commission of that agreed upon crime *X*, it was reasonably foreseeable that the resulting crime *Y* would be committed by members of the JCE, and crime *Y* was committed. Prosecutor v. Brdjanin, Case No. IT-99-36-A, Decision on Interlocutory Appeal, ¶ 5 (Mar. 19, 2004).

[83] Nicola Piacente, *Importance of the Joint Criminal Enterprise Doctrine for the ICTY*

tive crimes as well as the conspiracy behind those crimes, but crucial evidence relating to both often only can be obtained from cooperating "insiders" or associates of the accused.[84] There has been some controversy in ICTY case law as to whether JCE need actually be pleaded in an indictment in order to be considered as a theory of liability. In general, if it intends to rely on a JCE theory to prove a charge, the prosecution should plead as much in a precise, timely manner.[85]

JCE as a form of commission can be distinguished from several other substantive crimes. JCE is different from the freestanding crime of aiding and abetting (or complicity) because complicity does not require that a person who participates in a crime share the criminal intent of the principal perpetrator, whereas JCE does. To be complicit in a crime, a person must simply assist in the commission of that crime.[86] An accessory to a crime perpetrated by a principal is always necessary in aiding and abetting, whereas in JCE, all participants are principals.[87] In other words, the level of commitment to be a participant in a JCE is higher than it is to be an aider and abettor.

JCE also can be distinguished from conspiracy, in which two or more persons agree upon a common plan to commit a crime.[88] Under conspiracy, the requisite *mens rea* includes "(i) knowledge of the facts or circumstances making up the crime that the group intend[s] to commit, and (ii) intent to carry out the conspiracy and thereby perpetrate the substantive offense."[89] Thus, conspiracy is similar to JCE Category 1, but it has a lower burden of proof because it does not require evidence that the agreement to commit a crime actually results in the commission by any participant.[90] In addition, conspiracy is distinguishable as a freestanding crime in and of itself, rather than merely a theory of liability, such as JCE.[91]

Finally, JCE also overlaps with, but is distinguishable from, command responsibility in international criminal law. There is overlap in the two doctrines "where a commander participates in the commission of a crime

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Prosecutorial Policy, 2 J. INT'L CRIM. JUST. 446, 450 (2004).

[84] *Id.* at 451.

[85] *See, e.g.*, Powles, *supra* note 77, at 618–19.

[86] CASSESE, *supra* note 74, at 188. For example, in *Akayesu*, the accused was found to have given tacit encouragement to rapes being committed, and thus he was criminally responsible for abetting in the preparation or execution of the killings of members of the Tutsi group and for the infliction of serious harm on that same group, under Article 2(2)(b) ("Complicity in genocide") of the ICTR Statute. *Id.* at 189. Note, however, that the *mens rea* to be complicitous in genocide, as opposed to other crimes not requiring specific intent, is higher. To be complicitous in genocide, an accomplice must have the requisite intent of knowingly aiding or abetting one or more persons to commit genocide. Powles, *supra* note 77, at 614; *see also* Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgment, ¶ 102 (Feb. 25, 2004) (explaining the distinction between JCE Category 1 and aiding and abetting).

[87] Powles, *supra* note 77, at 612.

[88] *Id.* at 613.

[89] *Id.*

[90] *Id.*

[91] Barrett & Little, *supra* note 26, at 42–43.

through the acts of his or her subordinates by 'planning, instigating, or ordering the crime.'"[92] Despite this overlap, the burdens of proof are distinct in the two doctrines. For example, under JCE, the relationship between participants does not have to be superior-subordinate, and under the extended theory, the agreement does not have to actually concern the crime committed, but the crime must be a natural and foreseeable by-product of that agreement.

V. Joint Criminal Enterprise: Retrospective Application in ICTR Jurisprudence

In a recent case currently on appeal at the ICTR, *Prosecutor v. Kajelijeli*, it is possible that had prosecutors brought the relevant rape charges under JCE theory, they could have procured a conviction. Prosecutors charged the accused with rape and other inhumane acts as crimes against humanity; both charges were pleaded under individual and command responsibility statutory provisions.[93] The disappointing outcome, despite convincing evidence linking the accused to crimes of rape and sexual violence, was an acquittal.

The accused, Juvénal Kajelijeli, was the *bourgmestre* of Mukingo Commune in Ruhengeri Prefecture. In this capacity, he exercised authority over subordinates including members of the police forces, Interahamwe youth militia, and civilians.[94] The prosecution brought forth information that the accused and various governmental officials "conspired among themselves . . . to work out a plan to exterminate the civilian Tutsi population and eliminate members of the opposition, so that [the *Mouvement Révolutionnaire National pour le Développement*] could remain in power."[95] Specifically, the accused was found to have made speeches inciting the audience (predominantly MRND members and Hutus) to assault, rape, and exterminate the Tutsis.[96] In the indictment, the prosecution charged that the accused commanded, organized, and supervised attacks within Mukingo Commune during the genocide, during which Tutsi men, women, and children were attacked, abducted, raped, and massacred. Kajelijeli failed to take any steps to stop the rape and sexual assault of Tutsi females that followed from his orders.[97]

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[92] *Id.* at 45.

[93] Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-I, Amended Indictment, ¶ 6 (Jan. 25, 2001).

[94] *Id.* ¶¶ 3.5–3.6.

[95] *Id.* ¶ 4.9. The *Mouvement Révolutionnaire National pour le Développement*, or the MRND, founded in 1975 by former President of Rwanda, Juvenal Habyarimana, set up its own youth wing, the Interahamwe, in 1991. In 1992, numerous youth wings began military trainings with the purpose of exterminating the Tutsis, the known enemies of the MRND. *Id.* ¶¶ 4.1–4.12.2.

[96] *Id.* ¶ 4.18.

[97] *Id.* ¶¶ 5.3, 5.5.

Trial Chamber II acquitted Kajelijeli on all rape and sexual violence charges for lack of appropriate evidence to prove the charges. On the charge of rape as a crime against humanity, the court found the prosecution failed to prove beyond a reasonable doubt that the accused was individually criminally responsible for planning, instigating, ordering, committing, or otherwise aiding and abetting in the planning, preparation, or execution of the rapes that occurred; in other words, there was no evidence directly linking the accused to the rapes committed.[98] In terms of command responsibility, the chamber found that members of the Interahamwe committed the majority of the rapes when Kajelijeli was not personally present, and it was never established that the accused actually ordered the rapes. His instructions were more generally to kill or exterminate. Furthermore, the chamber found it impossible to infer that the accused knew or had reason to know that Interahamwe militiamen were committing the rapes.[99]

On the count of other inhumane acts of sexual violence as crimes against humanity, the trial chamber similarly found evidence to be lacking. The chamber did find that the standard for liability of other inhumane acts was met by acts constituting a serious attack on the human dignity of the Tutsi community as a whole. The chamber said that "[c]utting a woman's breast off and licking it, and piercing a woman's sexual organs with a spear are nefarious acts of comparable gravity to the other acts listed as crimes against humanity," and these acts were committed in the course of a widespread attack upon Tutsi civilians.[100] Kajelijeli was not held liable, however, under the individual responsibility charge because the chamber found no evidence that the accused was present or gave any direct order for these acts to be committed.[101] As in the rape as a crime against humanity charge, the general orders to kill and exterminate, combined with a lack of physical presence during the acts, were insufficient to prove command responsibility of the accused under other inhumane acts.[102]

Given the fact set and the substantial evidence of actual rapes occurring in Mukingo Commune during the genocide, the prosecution could have utilized Category 3 of JCE theory in this case. Although the prosecution asserted that the accused, in his position of authority, acted in concert with others and participated in the planning, preparation, or execution of a common scheme, strategy, or plan to commit the crime listed, the indictment did not clearly set forth any JCE theory.[103] Although JCE Category 1

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[98] Prosecutor v. Kajelijeli (*Kajelijeli Judgment and Sentence*), Case No. ICTR-98-44A-T, Judgment and Sentence ¶ 923 (Dec. 1, 2003).

[99] *Id.* ¶ 924.

[100] *Id.* ¶¶ 933, 936.

[101] *Id.* ¶ 937.

[102] *Id.* ¶ 938.

[103] Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-I, Amended Indictment, ¶ 5.9 (Jan. 25, 2001) (compare to the language in Prosecutor v. Karemera (*Karemera Amended Indictment*), Case No. ICTR-98-44-I, Amended Indictment (Feb. 23, 2005), *see infra* text accompanying notes 104–108).

may have been inapposite in *Kajelijeli*, given the lack of a clear agreement to commit rapes between the accused and the physical perpetrators, JCE Category 3 seems appropriate to the prosecutor's case for individual responsibility.

In this case, rape and other inhumane acts of sexual violence go beyond the proven intended criminal object (to kill and exterminate Tutsis). However, there was widespread rape in Mukingo Commune, and Kajelijeli exerted direct control over his subordinates. It seems likely that the prosecution could have proven—particularly had it worked with investigators to do so from the outset—that rape and sexual violence were objectively natural and foreseeable consequences to the object of the JCE and that the accused himself was aware that these crimes would follow from the criminal object to kill and exterminate. Kajelijeli was more than an aider/abettor because he actually had the criminal intent to kill or exterminate; he was more than a co-conspirator because the crimes were actually carried out. Although Kajelijeli's criminal intent in terms of individual responsibility under JCE theory could likely have been proven, whether this intent could be extended to hold the accused liable under JCE for his failure to prevent or punish his subordinates from committing foreseeable rape and sexual violence crimes remains questionable.

VI. The Future of Joint Criminal Enterprise: Targeted Application for maintaining Legitimacy

Given the prevalence of rape and other forms of sexual violence during the Rwandan genocide, those in positions of power who could have controlled and prevented such crimes from occurring should be held responsible. As international criminal law is beginning to recognize, rape and sexual violence in situations of armed conflict do not represent isolated or incidental occurrences; rather, they constitute grave and serious crimes used to effect genocide and widespread violence against populations. These crimes produce long-term consequences, not only for the victims, but also for their surrounding communities. While the definitions of rape and sexual violence first pronounced in *Akayesu* and reaffirmed recently in *Muhimana* are broad and encapsulate the integral aspects of sexual violence crimes in war situations, the ICTR jurisprudence presents a somewhat weak record of convictions for these crimes. Given the frequency with which prosecutors now bring rape charges, it is necessary that they consider and investigate whether the evidence lends itself to the use of JCE theory. To remain consistent with the broader goals of criminal law, prosecutors and courts alike should be careful to limit the use of this theory to situations in which an accused is truly culpable.

Learning from the failures to procure sexual violence convictions in cases such as *Kajelijeli*, prosecutors at the ICTR began pleading these crimes under JCE theory to hold high-level criminals culpable. For ex-

ample, in the amended indictment filed with the Trial Chamber III, *Prosecutor v. Karemera*, prosecutors charged top government officials with the crime of rape, both as an element of complicity in genocide (Count 4)[104] and as a crime against humanity (Count 5).[105] As a part of the widespread or systematic attacks perpetrated by the three accuseds, the militiamen raped Tutsi women and girls in specified prefectures, and these rapes were the "natural and foreseeable consequence of the object of the joint criminal enterprise to destroy the Tutsi as a group."[106] The indictment also states that all three accuseds were individually responsible because they were *aware* that rape was a natural and foreseeable consequence, given the widespread nature of the crimes, and they knowingly and willfully participated in that enterprise nonetheless.[107] Under command responsibility, the indictment asserts that the accuseds had the capacity to halt or prevent such crimes and failed to do so, or to punish those that committed them.[108]

In *Karemera*, currently in trial, JCE Category 3 applies, as opposed to JCE Category 1, if there is no convincing evidence of the accuseds' intent to commit the specific crimes of rape or sexual violence.[109] According to experience at the ICTY, the prosecution has a high burden of proof and, in order to prevail, should proffer evidence of the following for each accused: (1) the existence of a *plurality* of persons; (2) the existence of a common *purpose* (i.e., JCE) and a common *plan* under that JCE; (3) the accused's *participation* and *specific role* in the JCE; (4) the *intent* of the accused to participate in the JCE; and (5) the *goal* of the JCE.[110] In other words, evidence in *Karemera* that each accused, acting in concert with others, participated as a leader and with the requisite intent to further the purpose of destroying the Tutsi as a group in a specific way seems necessary for the prosecution to succeed. Under JCE Category 3, the prosecution needs to prove that rape and sexual violence were a natural and foreseeable consequence of that JCE to destroy the Tutsi as a group.

While the JCE theory offers exciting possibilities for prosecutors at the ICTR to bring sexual violence charges, increased use of the theory has its drawbacks. JCE Category 3 theory, in particular, has been criticized for its lack of basis in customary international law and because it too broadly holds persons accountable for "committing" crimes spanning several years and

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[104] *Karemera Amended Indictment*, Case No. ICTR-98-44-I ¶ 66.
[105] *Id.* ¶¶ 67–70.
[106] *Id.* ¶ 69.
[107] *Id.*
[108] *Id.* ¶ 70.
[109] Trial Chamber III recently found jurisdiction to prosecute the accused under JCE Category 3 for crimes under Articles 2, 3, and 4 of the ICTR Statute, where the enterprise is alleged to be vast in scope, specifically stating, "the Chamber does not consider that the scale of a joint criminal enterprise has any impact on such form of liability." Prosecutor v. Karemera, Case No. ICTR-98-44, Decision on Defence Motion Challenging the Jurisdiction of the Tribunal—Joint Criminal Enterprise, ¶¶ 7, 10 (Aug. 5, 2005).
[110] Piacente, *supra* note 83, at 449.

extending throughout various regions that were very generally within the scope of crimes to which they actually agreed.[111] If judges too generously convict on JCE grounds, this could result in the de-legitimization of international criminal law and its historical bases generally and, more specifically, wrongly holding individuals accountable for crimes that they did not necessarily "commit." In addition, holding someone accountable for a crime, the perpetration of which they were very attenuated from, could fail to adhere to the culpability principle and to address the traditional criminal law theories of punishment, including those of retribution, deterrence, and incapacitation. For example, prosecuting high-level officials because they led and oversaw the perpetration of crimes not directly foreseeable from their intended criminal goals during genocide may fail to serve the retributive goals of criminal justice, which focus on individual guilt.[112]

However, there are ways to limit the use of JCE that address some of these drawbacks. Only the most culpable, or those high-level officials who masterminded the genocide and oversaw its execution, should be prosecuted and held liable under JCE theory. But for their criminal purposes and plans, the crimes of genocide and against humanity arguably would not have occurred in Rwanda in 1994, despite longstanding ethnic tensions. Richard Goldstone, the first Chief Prosecutor at the ICTR, asserts that ascribing blame to leaders can, in fact, be very important to healing a community: it avoids collective guilt on the part of an ethnic, or other, group, and it allows community members to separate themselves from wrongdoing.[113] In addition, holding genocidal masterminds liable and sentencing them to severe prison terms serves to incapacitate them and to specifically deter them from committing future crimes; it also generally deters future similar crimes among others.

Another way of limiting the use of JCE theory appropriately is to require that an accused made a substantial contribution to the crime charged.[114] The role played by the accused in the JCE is important in determining the size of a contribution: only those perpetrators who were heavily involved in a JCE and closely linked to it should be prosecuted and convicted on these grounds. In practice, this reinforces the idea that high-level criminals be targeted when using JCE theory, because they presumably play a "substantial" part in designing, conveying, and overseeing criminal plans with requisite intent and particular purposes in mind. The substantial contribution limitation also satisfies the retributive theory of punishment in that it punishes the individual most heavily responsible for a crime, even if that individual did not physically perpetrate the crime. Future members of

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[111] *See* Danner & Martinez, *supra* note 48, at 111; *see also* Powles, *supra* note 77, at 611 ("[I]t is difficult to see how someone can be said to have 'committed' a crime that they were perhaps not even aware of, albeit that they should have been.").

[112] Barrett & Little, *supra* note 26, at 51–52.

[113] *Id.* at 51.

[114] Danner & Martinez, *supra* note 48, at 151.

society will be deterred from making substantial contributions to major criminal plans, and those convicted will be unable to do so.

Given the relatively high evidentiary burden to prove crimes using JCE theory—even under Category 3—its practical use should be narrowly tailored. Indictments should be pled with sufficient specificity and supported by evidence such that JCE allegations do not become all-encompassing in nature or a fallback strategy merely because the prosecution is unlikely to succeed on other grounds.[115] With regards to rape and sexual violence specifically, it is especially important that prosecutors do not indict, and judges do not convict, on JCE grounds if cases lack sufficient evidence to meet the evidentiary burdens; otherwise, problems discussed in prosecuting under more traditional statutory theories will resurface. The result will be failure to convict on sexual violence grounds and failure to accurately reflect the rapes that occurred during the genocide in ICTR case law.

Future jurisprudence at the ICTR, ICC, and other international criminal courts should reflect effective use of JCE theory with regard to crimes of rape and sexual violence. The theory should be targeted at high-level officials who made substantial contributions to the JCE in order to maintain consistency with traditional criminal law theories. Still, to uphold legitimacy at the ICTR and in international criminal law, prosecutors and courts should keep in mind the drawbacks of over-utilizing the JCE theory and thus narrowly tailor its application. As a general principle, courts should find those in control who ordered crimes in situations of armed conflict and genocide most culpable. If rape and sexual violence were a part of that criminal intent, or closely resulted from it, then liability should follow.

[115] Powles, *supra* note 77, at 618.