Trial and Error: Holding Leaders Responsible for Conflict-Related Sexual Violence at International Criminal Law

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I Introduction

In 2016, the International Criminal Court (ICC) handed down its first conviction for sexual violence. Jean Pierre Bemba-Gombo, the President of the *Mouvement de Libération du Congo* (MLC) was found guilty of rape as both a war crime and as a crime against humanity.[1] Bemba was charged under article 28 of the Rome Statute, which codifies the doctrine of command responsibility: superiors who fail to prevent their subordinates from committing international crimes, or who fail to punish them after the fact, will be held responsible for those crimes.[2]

The *Bemba* conviction was hailed as a turning point in the fight against impunity for conflict-related sexual violence.[3] It was also the first ICC conviction based on command responsibility, and the decision was praised for making clear the duty of superiors to prevent and punish sexual offending among their subordinates.[4] However, in 2018, a three-two majority of the ICC Appeals Chamber acquitted Bemba of all charges. Although it was accepted that acts of sexual violence had been committed by MLC troops, the Majority held that these acts could not be attributed to Bemba because he had taken "all necessary and reasonable measures in response to MLC crimes".[5]

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[1] *Prosecutor v Bemba (Trial Judgment)* ICC Trial Chamber III ICC-01/05-01/08, 21 March 2016.

[2] Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002), article 28. See also Gerhard Werle and Florian Jessberger (eds) *Principles of International Criminal Law (3rd ed, Oxford University Press, Oxford, 2014) at 223.*

[3] See for example Samira Daoud "International Criminal Court: Bemba verdict a historic step forward for victims of sexual violence" (21 March 2016) Amnesty International <https://www.amnesty.org/en/latest/news/2016/03/international-criminal-court-bemba-verdict-a-historic-step-forward-for-victims-of-sexual-violence/>; Dieneke De Vos "Historic day for the ICC: first command responsibility and sexual violence conviction" (22 March 2016) European University Institute <https://me.eui.eu/dieneke-de-vos/blog/historic-day-for-the-icc-first-command-responsibility-and-sexual-violence-conviction/>.

[4] Daoud, above n 3; Owen Bowcott "Congo politician guilty in first ICC trial to focus on rape as a war crime" (21 March 2016) The Guardian < https://www.theguardian.com/world/2016/mar/21/icc-finds-ex-congolese-vice-president-jean-pierre-bemba-guilty-of-war-crimes>.

[5] *Prosecutor v Bemba (Appeal Judgment)* ICC Appeals Chamber ICC-01/05-01/08 A, 8 June 2018 at [194].

Bemba's acquittal is not an anomaly. The international criminal tribunals have demonstrated a marked reluctance to attribute sexual violence to superiors, particularly under the doctrine of command responsibility.[6] This reluctance is problematic, as high-level military and political leaders are the primary targets of international criminal prosecutions.[7] If they cannot be held responsible for conflict-related sexual violence, such crimes will simply go unpunished.[8]

Using feminist legal theory as its methodology, this dissertation will critically evaluate the jurisprudence of the ICC and of the *ad hoc* international criminal tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR). It will identify concrete examples of judicial reluctance to convict leaders of sexual violence under the doctrine of command responsibility, compared to other types of violence. Its central argument is that this reluctance can be attributed to enduring misconceptions about the nature of conflict-related sexual violence.

The dissertation will proceed in four chapters. Chapter II outlines how narratives regarding conflict-related sexual violence have evolved over time. Although sexual violence is now firmly recognised as a weapon of war, this chapter will identify three key misconceptions that continue to affect outcomes in international sexual violence prosecutions.

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[6] Kelly Dawn Askin "Holding Leaders Accountable in the International Criminal Court (ICC) for Gender Crimes Committed in Darfur" (2006) 1 Genocide Studies and Prevention: An International Journal 13 at 24; Catharine McKinnon "The ICTR's Legacy on Sexual Violence" 14 New Eng. J. of Int'l & Comp. L. 101 at 104.

[7] Cassandra Steer *Translating Guilt: Identifying Leadership Liability for Mass Atrocity* Crimes (Springer, Berlin, 2017) at 2, 10-11. The International Criminal Court in particular has expressed its commitment to "focus[ing] its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes." (Office of the Prosecutor *Paper on some policy issues before the Office of the Prosecutor* (International Criminal Court, September 2003) at [7].

[8] Diane Marie Amann "In *Bemba* and Beyond, Crimes Adjudged to Commit Themselves" (13 June 2018) EJIL *Talk!* <https://www.ejiltalk.org/in-bemba-and-beyond-crimes-adjudged-to-commit-themselves/>; McKinnon, above n 6, at 106-107.

Chapter III discusses the use of command responsibility to prosecute leaders of sexual violence in the international criminal tribunals. It will refute the claim that command responsibility is a second-rate mode of liability when it comes to prosecuting conflict-related sexual violence, and will affirm the importance of applying a feminist critical lens to the application of this doctrine.

Chapter IV examines the jurisprudence of the *ad hoc* tribunals and of the ICC with regard to command responsibility and sexual violence. It will highlight the operation of enduring misconceptions about the nature of conflict-related sexual violence in a selection of decisions.

Finally, Chapter V explores possible ways of combating these enduring misconceptions in future ICC prosecutions. Meaningful justice cannot be achieved by simply improving the conviction rate. It is necessary to address the background assumptions that underlie international criminal law in order to effect lasting change for victims of conflict-related sexual violence.

II A Feminist Critical Approach to International Sexual Violence Prosecutions

Conflict-related sexual violence has a long and shameful history.[9] Women and girls especially have been subjected to myriad forms of sexual violence in times of war, including rape, sexual assault, sexual enslavement, forced prostitution, forced pregnancy and sexual mutilation.[10] However, despite a long history of criminalisation, international

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[9] Susan Brownmiller, *Against Our Will: Men, Women and Rape* (1st Ballantine Books ed, Fawcett Books, New York, 1993) 31-114.

[10] Kelly D. Askin "Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles" (2003) 21 Berkeley Journal of International Law 288 at 297. Men are also frequent victims of sexual violence, and the trauma they suffer as a result should not be ignored or downplayed. Nevertheless, especially in conflict, men do not generally experience systematic sexual violence to the same extent as women, nor with quite the same social implications. See further: Fionnuala Ní Aoláin, Dina Francesca Haynes and Naomi Cahn "Criminal Justice for Gendered Violence and Beyond"

law has been extraordinarily slow to "enumerate, condemn and prosecute" sexual violence that occurs in conflict.[11] Indeed, sex crimes have been described as the "forgotten" crimes of international law.[12] This chapter will begin by discussing the importance of prosecuting sexual violence in the international criminal tribunals. It will then use feminist legal theory to explain why sexual violence has been trivialised, justified or ignored altogether by the international legal community.

A Sexual Violence On Trial

Meaningful justice for conflict-related sexual violence cannot be achieved by international criminal prosecutions alone. Criminal accountability must be accompanied by policy-making and institutional reform, both on the domestic and international levels, to address the deeply ingrained structural inequalities experienced by women in both war and peacetime.[13]

Nevertheless, sexual violence prosecutions still play a key role in the process of transitional justice and post-conflict reconstruction.[14] Firstly, prosecutions serve an important deterrent function.[15] Sexual violence is less likely to occur in the future if it is consistently

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(2011) 11 International Criminal Law Review 425 at 429; Christine Chinkin "Rape and Sexual Abuse of Women in International Law" (1994) 5 EJIL 326 at 326.

[11] Askin, above n 10, at 295. The prohibition on wartime rape has existed for centuries, see Theodor Meron "Rape as a Crime Under International Humanitarian Law" (1993) 87 American Journal of International Law 424 at 425.

[12] Christine Chinkin "Gender-related Violence and International Criminal Law and Justice" in Antonio Cassese (ed) *The Oxford Companion to International Criminal Justice* (Oxford University Press, Oxford, 2009) 75 at 76.

[13] Ní Aoláin et al., above n 10, at 440; Louise Chappell "The Role of the ICC in Transitional Gender Justice: Capacity and Limitations" in Susanne Buckley-Zistel and Ruth Stanley (eds) *Gender in Transitional Justice* (Palgrave MacMillan, New York, 2012) 37 at 54.

[14] Ní Aoláin et al. at 440. Transitional justice is the process of implementing judicial and non-judicial measures to redress large-scale human rights violations after a period of conflict ("What is Transitional Justice?" (1 January 2009) International Centre for Transitional Justice <www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> at 1).

[15] Diane F. Orentlicher "Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime" (1991) 100 Yale Law Journal 2437 at 2542-2543.

condemned and prosecuted on the international stage.[16] Furthermore, successful prosecutions can play a critical role in restoring the dignity of victims, who have suffered a serious invasion of their autonomy. In the long term, consistent punishment of sexual violence may help reduce the additional stigma suffered by victims of sexual violence. [17] In societies that accord women an unequal social status, a conviction sends the crucial message that these crimes are serious and worthy of international attention.

Finally, there is a performative element to international criminal justice. The international criminal tribunals play a key role in affirming and expressing social values, including ideas about gender and sexual violence.[18] They are uniquely placed to hear women's voices and to accurately capture their experiences of harms, especially in light of enhanced victim participation mechanisms in the ICC.[19] Even if a trial ultimately results in a conviction, it is a hollow victory if the judgment nevertheless reinforces erroneous ideas and stereotypes about the nature of conflict-related sexual violence. As Simon Chesterman puts it, "there remains an obligation for such public expositions of outrage to remain true to the experiences that form their subject matter."[20] Otherwise, justice cannot truly be done. Nevertheless, erroneous narratives of conflict-related sexual violence continue to pervade the judgments of the international criminal tribunals.

B Enduring Misconceptions

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[16] Ní Aoláin et al., at 440.

[17] At 440.

[18] Doris Buss "Performing Legal Order: Some Feminist Thoughts on International Criminal Law" (2011) 11 Int'l Crim. L. Rev. 409 at 415.

[19] Judge Patricia Wald "What do women want? International law that matters in their day-to-day lives" (7 October 2009) IntLawGrrls <http://www.intlawgrrls.com/2009/10/what-do-women-want-international-law.html>.

[20] Simon Chesterman "Never Again…Law, Order and the Gender of War Crimes in Bosnia and Beyond" (1997) 22 Yale J. Int'l L. 299 at 343.

Feminist legal theory challenges the idea that the law "operates on the basis of abstract rationality".[21] Its central claim is that background assumptions about gender operate ideologically in the law to reinforce the unequal status of women in society.[22] This critical approach can also be applied at the international level, to reveal "how the structures, processes, and methodologies of international law marginalise women by failing to take account of their lives or experiences."[23] The feminist legal project is twofold. Firstly, it seeks to expose underlying gender biases and silences in the law. Secondly, it has the overtly political agenda of harnessing the law to promote the advancement and empowerment of women.[24]

The remainder of this chapter will apply the first limb of the feminist legal project. It will highlight three enduring misconceptions about conflict-related sexual violence that continue to influence the jurisprudence of the international criminal tribunals. Firstly, that sexual violence is a less serious crime compared to other to other types of violence. Secondly, that sexual violence in wartime is inevitable. Thirdly, that sexual violence is a 'private' crime unrelated to the wider conflict. Chapters III and IV will explain how these misconceptions have resulted in a judicial reluctance to hold leaders responsible for sexual violence under the doctrine of command responsibility. Finally, Chapter V will consider the second limb of the feminist legal project: how can these enduring misconceptions be combated to promote better outcomes for victims of conflict-related sexual violence?

1 Sexual Violence as a Less Serious Crime

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[21] Hilary Charlesworth, Christine Chinkin, Shelley Wright "Feminist Approaches to International Law" (1991) 85 American Journal of International Law 613 at 613.

[22] Gary Minda *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (NYU Press, New York, 1995) at 128-129; Charlesworth, Chinkin and Wright, at 613.

[23] Christine Chinkin "Feminist Theory as Critical Analysis of International Law" (October 2010) Oxford Public International Law <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e701>.

[24] Chinkin, above n 12; Charlesworth, Chinkin and Wright, above n 21, at 615.

The crime of rape has its roots in property law. In many early societies, women were seen as the property of men, 'owned' first by their fathers and then by their husbands. Rape therefore developed not as a crime against the female victim, but as a violation of male property rights.[25] In times of conflict, women were recognised as the legitimate spoils of war.[26]

Over time, the prohibition on sexual offending crystallised in international law.[27] However, early humanitarian law instruments tended to characterise sex crimes as attacks on the victim's "family honour and rights,[28] as "outrages upon personal dignity" or as "humiliating and degrading treatment."[29] This characterisation fails to recognise that sex crimes are crimes of violence. It reinforces the erroneous idea that rape and other sexual assaults are merely offences against honour, that belong lower down in the hierarchy of harms compared to more serious physical injuries.[30] This conception of sexual violence as a 'lesser' harm is inherent in the construction of the Fourth Geneva Convention of 1949. Article 27 provides that "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[31] However, violation of the prohibition on rape does not constitute a "grave breach" of the

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[25] Askin, above n 10, at 296, Julia R. Schwendinger, Herman Schwendinger, "Rape, the Law and Private Property" (1982) 28 Crime and Delinquency 271 at 272; Brownmiller, above n 9, at 18.

[26] Askin, above n 10, at 296, Brownmiller, above n 9, at 35.

[27] Meron, above n 11, at 425.

[28] Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land 187 CTS 227; 1 Bevans 631 (signed 18 October 1907, entered into force 26 January 1910), art 46.

[29] Convention for the Amelioration of the Wounded and sick in Armed Forces in the Field 75 UNTS 31 (signed 12 August 1949, entered into force 21 October 1950), art 3 (Geneva Convention I); Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea 75 UNTS 85 (signed 12 August 1949, entered into force 21 October 1950), art 3 (Geneva Convention II); Convention Relative to the Treatment of Prisoners of War 75 UNTS 135 (signed 12 August 1949, entered into force 21 October 1950), art 3 (Geneva Convention III); Convention Relative to the Protection of Civilian Persons in Time of War 75 UNTS 287 (signed 12 August 1949, entered into force 21 October 1950), art 3 (Geneva Convention IV).

[30] Rhonda Copelon "Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law" (2000) 46 McGill Law Journal 218 at 221; Rhonda Copelon "Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law" (1994) 5 Hastings Women's L. J. 243 at 264.

[31] Geneva Convention IV, above n 29, art 27.

Convention, and thus does not trigger the obligation on parties to the Convention to prosecute those perpetrators within their jurisdiction.[32]

Sexual violence is properly understood not as a second-class harm, but as a serious invasion of the victim's bodily integrity and sexual autonomy.[33] It can result in significant physical trauma, including sexually transmitted infections such as HIV, unwanted pregnancy, serious internal injuries and infertility.[34] This is particularly true of conflict-related sexual offending, which often involves extraordinary physical violence. Sexual violence can also have debilitating psychological effects, such as post-traumatic stress disorder, depression, self-harm or suicide.[35] Such mental trauma is often exacerbated by harmful cultural and religious attitudes towards female chastity, which cause the victim to be treated as "spoiled goods" and isolated within her own community.[36] Given that sexual violence encompasses such a broad spectrum of harms, the idea that it is a less 'serious' crime cannot be justified.[37] "Massacres kill the body. Rape kills the soul." [38]

2 Sexual Violence as Inevitable

Sexual violence has long been viewed as an inevitable by-product of war. [39] The hyper-masculine nature of military culture, combined with the chaos of conflict, is said to provide

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[32] Articles 146 and 147. Any other instance of "wilfully causing great suffering or serious injury to body or health" constituted a "grave breach" under Art 147. See also Hilary Charlesworth "Worlds Apart: Public/Private Distinctions in International Law" in Margaret Thornton (ed) *Public and Private: Feminist Legal Debates* (Oxford University Press, Melbourne, 1995) 243 at 249.

[33] Copelon "Surfacing Gender", above n 30 at 249.

[34] Chinkin "Rape and Sexual Abuse of Women in International Law", above n 10, at 330.

[35] At 330; World Health Organisation "Mental health and psychosocial support for conflict-related sexual violence: principles and interventions" (Report, WHO, 2012) at 2.

[36] Askin, above n 10, at 298.

[37] Ní Aoláin et al., above n 10, at 429.

[38] Binaifer Nowrojee "A Lost Opportunity for Justice: Why Did the ICTR Not Prosecute Gender Propaganda?" in Allan Thompson (ed.) *The Media and the Rwanda Genocide* (Pluto Press, London, Ann Arbor, 2007) 362 at 364.

[39] Copelon "Surfacing Gender", above n 30, at 243; Brownmiller, above n 9, at 31.

"the perfect psychological backdrop" for sexual violence.[40] In essence, there exists a presumption that soldiers, given the opportunity, will rape.[41] However, the inevitability of wartime sexual violence has been called into question.

Although history is replete with cases of wartime sexual violence, there have been a significant number of conflicts where sexual violence was remarkably limited.[42] For example, the civil wars in Peru and El Salvador both involved relatively low levels of sexual violence. While there were isolated reports of sexual offending during both conflicts, sexual violence was far less prevalent compared to wider patterns of non-sexual violence. [43]

The use of sexual violence as a tool of genocide in the Former Yugoslavia and in Rwanda captured global attention in the 1990s. As a result, sexual violence is now especially associated with ethnic conflict.[44] However, the Sri Lankan civil war, which was a secessionist ethnic conflict in a similar vein to those in Yugoslavia and Rwanda, did not involve rampant sexual offending. Displaced Tamil women and girls were occasionally subjected to sexual violence at the hands of government forces, but such offending was not widespread or systematic in character.[45] Israel-Palestine is another example of an ethnic conflict where sexual violence was extremely limited.[46]

The degree and scale of wartime sexual offending can therefore vary significantly between conflicts. Although sexual violence often forms an integral part of many conflicts, this is not always the case. Nevertheless, the idea that conflict-related sexual violence is inevitable

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[40] Brownmiller at 32.

[41] Elisabeth J. Wood "Rape During War is Not Inevitable: Variation in Wartime Sexual Violence" in Morten Bergsmo, Alf Butenschøn Skre and Elisabeth J. Wood (eds) *Understanding and Proving International Sex Crimes* (eBook ed, Torkel Opsahl Academic EPublisher, Beijing, 2012) 389 at 402.

[42] At 389.

[43] Elisabeth J. Wood "Variation in Sexual Violence During War" (2006) 34 Politics and Society 307 at 316-317.

[44] Copelon "Surfacing Gender", above n 30, at 245-246.

[45] Wood, above n 43, at 313-314.

[46] At 314.

has proved extremely pervasive and has worked to limit the possibility for legal redress. Treating sexual violence as inevitable underplays the importance of military culture and institutions in preventing sexual violence.[47] Because of this misconception, the international criminal tribunals have been reluctant to hold superiors responsible for sexual violence committed by subordinates in the absence of explicit orders.[48]

3 Sexual Violence as Incidental

International criminal law is underpinned by a public/private dichotomy.[49] It is concerned with public wrongs, such as genocide and crimes against humanity, and is reluctant to interfere with 'private' issues properly within domestic jurisdiction.[50] However, this public/private distinction is inherently gendered: "in all societies men dominate the public sphere of politics and government and women are associated with the private sphere of home and family."[51] Thus, when mass atrocities are directed against women, especially in the form of sexual violence, they are viewed as 'private' matters outside the purview of international criminal law.[52]

This mischaracterisation has fuelled the pervasive narrative that conflict-related sexual violence is a 'private' crime, committed by rogue soldiers taking advantage of the chaos of war. Historically, the international legal community has overlooked the connection

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[47] Wood, above n 41, at 409, 412.

[48] Patricia Viseur Sellers "Individual(s') Liability for Collective Sexual Violence in Karen Knop (ed) *Gender and Human Rights* (Oxford University Press, Oxford, 2004) 153 at 189, 192.

[49] Hilary Charlesworth "The Public/Private Distinction and the Right to Development in International Law" (1988-1989) 12 Aust. YBIL 190 at 190.

[50] Charlesworth, Chinkin and Wright, above n 21, at 625, Sellers, above n 48, at 189-190, Nicole Laviolette "Commanding Rape: Sexual Violence, Command Responsibility, and the Prosecution of Superiors by the International Criminal Tribunals for the Former Yugoslavia and Rwanda" (1998) 36 Canadian Yearbook of International Law 93 at 133.

[51] Hilary Charlesworth "Feminist Methods in International Law" (1999) 93 American Journal of International Law 327 at 393.

[52] Sellers, above n 48, at 189-190.

between sexual violence and broader patterns of crime during armed conflict.[53] Sex crimes were viewed as opportunistic acts that were incidental to, but inherently disconnected from, the broader conflict.[54]

However, there is considerable evidence that sex crimes have been and continue to be committed systematically and strategically in times of conflict, forming "a central and fundamental part of the attack against an opposing group".[55] In short, sexual violence is unquestionably a weapon of war. Sexual violence was employed as a deliberate strategy throughout (and in the lead-up to) the Second World War, perhaps most notoriously at Nanking. In 1937, the civilian population of the Chinese city was subjected to unspeakable atrocities at the hands of Japanese troops, including approximately 20,000 cases of rape.[56]

More recently, sexual violence was used as an instrument of ethnic cleansing during the conflicts in the Former Yugoslavia and Rwanda. During the Bosnian War, sexual violence was perpetuated against Bosnian Muslim women "with the conscious intention of demoralising and terrorising communities, driving them from their home regions and demonstrating the power of the invading forces."[57] Sexual violence also formed an integral part of the Rwandan Genocide. Mass rape, sexual mutilation and sexual slavery were used systematically to degrade, humiliate, punish and torture Tutsi women.[58]

The jurisprudence of the ICTY and ICTR was instrumental in giving legal significance to the idea of sexual violence as a weapon of war.[59] The ICTR's decision in *The Prosecutor*

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[53] Michelle Jarvis and Kate Vigneswaran "Challenges to Successful Outcomes in Sexual Violence Cases" in Serge Brammertz and Michelle Jarvis (eds) *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford, Oxford University Press, 2016) 33 at 34.

[54] Jarvis and Vigneswaran at 5 and 37; Nancy Farwell "War Rape: New Conceptualisations and Responses" (2004) 19 Affilia: Journal of Women and Social Work 389 at 389.

[55] Askin, above n 10, at 297.

[56] Brownmiller, above n 9, at 61.

[57] Pierre Hazan *Justice in a Time of War: The True Story Behind the International Criminal Tribunal for the Former Yugoslavia*. (Texas A & M University Press, College Station, 2004) at 34.

[58] Patricia A. Weitsman "The Politics of Identity and Sexual Violence: A Review of Bosnia and Rwanda" (2008) 30 Human Rights Quarterly 567 at 572-577.

[59] Sellers, above n 48, at 190.

v Akayesu was the first judgment to recognise rape and sexual violence as constitutive acts of genocide.[60] In the ICTY, sexual violence was recognised as a war crime[61] and as a crime against humanity,[62] as well as constituting torture[63] and enslavement.[64] Today, it is widely accepted that sexual violence often forms part of a planned and targeted policy, making it integral rather than incidental to the conflict in question, and placing it firmly within the realm of 'public' wrongs.[65]

4 Justice for Conflict-Related Violence: Progress and Stagnation

International criminal law has come a long way in recognising the gravity of conflict-related sexual violence. The advances made in the *ad hoc* criminal tribunals played a key role in the negotiations on the gender provisions of the Rome Statute.[66] Feminist advocates saw the ICC negotiations as an opportunity to build on the work of the ICTY and ICTR by "codify[ing] the integration of gender in international law".[67] The Women's Caucus for Gender Justice worked with delegates to secure "the most advanced articulation of sexual and gender-based crimes of any international criminal tribunal."[68] Under the Rome Statute, acts of rape, enforced prostitution, sexual slavery, forced pregnancy, enforced sterilisation,

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[60] *Prosecutor v Akayesu (Trial Judgment)* ICTR Trial Chamber ICTR-96-4-T, 2 September 1998 at 1.2.

[61] *Prosecutor v Furundžija (Trial Judgment)* ICTY Trial Chamber IT-95-17/1-T, 10 December 1998 at [172].

[62] *Prosecutor v Kunarac et al. (Trial Judgment)* ICTY Trial Chamber T-96-23-T & IT-96-23/1-T, 22 February 2001.

[63] *Prosecutor v. Delalić et al. (Trial Judgment)* ICTY Trial Chamber IT-96-21-T, 16 November 1998 at [495]-[496].

[64] *Kunarac,* above n 62.

[65] Doris Buss "Rethinking 'Rape as a Weapon of War'" (2009) 17 Fem Leg Stud 145 at 145-146; Kerry F. Crawford *Wartime Sexual Violence : From Silence to Condemnation of a Weapon of War* (Georgetown University Press, Washington, 2017) at 2-3; Catherine N. Niarchos "Women, war, and rape: Challenges facing the International Tribunal for the Former Yugoslavia" 17 Human Rights Quarterly 649 at 658; Office of the Prosecutor *Policy Paper on Sexual and Gender-Based Crimes* (International Criminal Court, June 2014) at [75].

[66] Cate Steains "Gender Issues" in Roy S. Lee (ed) *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (Kluwer Law International, The Hague; Boston, 1999) at 359.

[67] Copelon "Gender Crimes as War Crimes", above n 30, at 233.

[68] Louise Chappell *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (Oxford University Press, New York, 2015) at 32.

sex trafficking and other crimes of sexual violence can be the constitutive elements of war crimes and crimes against humanity.[69]

However, while significant progress has been made on the substantive level, international criminal law continues to lag behind when it comes to accountability for conflict-related sexual violence. Conviction rates for sexual violence in the *ad hoc* tribunals were still relatively low compared to indictments for other crimes.[70] Despite its ground-breaking gender mandate, the ICC has only secured one conviction for sexual violence since it was established in 2002.[71] Sexual violence prosecutions at the ICC have been characterised by mistakes, missed opportunities and a general failure to fully integrate "concepts of gender within the structure of justice."[72] In short, the international criminal tribunals' poor conviction rates are a symptom of a much deeper problem. International criminal law has yet to fully overcome the influence of enduring misconceptions about the nature of conflict-related sexual violence.[73]

The following chapters will focus on the challenge of holding high-level military and political leaders responsible for sexual violence. A feminist critical approach will be applied to command responsibility jurisprudence in the *ad hoc* tribunals and the ICC, to expose the operation of underlying assumptions about the nature of wartime sexual violence.

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[69] Rome Statute of the International Criminal Court, articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi).

[70] Ní Aoláin et al., above n 10, at 439-440; Buss, above n 65, at 145-163.

[71] *Prosecutor v Ntaganda (Trial Judgment)* ICC Trial Chamber IV ICC-01/04-02/06-2359, 8 July 2019; see further Wairagala Wakabi "Ntaganda Convicted at ICC for Rape, Sexual Violence and Murder" (8 July 2019) International Justice Monitor <https://www.ijmonitor.org/2019/07/ntaganda-convicted-at-icc-for-rape-sexual-violence-and-murder/>.

[72] Brigid Inder, Executive Director Women's Initiatives for Gender Justice "A critique of the Katanga Judgment" (Global Summit to End Sexual Violence in Conflict, 11 June 2014) at 1; Niamh Hayes "Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court" in William A Schabas, Yvonne McDermott and Niamh Hayes (eds) *The Ashgate Research Companion to International Law: Critical Perspectives* (Ashgate, Surrey, 2013) 7 at 11.

[73] McKinnon, above n 6, at 105; Sellers, above n 48, at 189-190; Interview with Brigid Inder, Executive Director, Women's Initiatives for Gender Justice (Rebecca Tansley, University of Otago Magazine, November 2014, Issue 39, at 13-16).

III Superior Responsibility for Sexual Violence

A Introduction to Modes of Liability

The international criminal tribunals have neither the mandate nor the resources to prosecute every person who might act in violation of international criminal law.[74] It is therefore necessary to be pragmatic, and to focus prosecutorial efforts on those who bear the greatest responsibility for international crimes.[75] In the context of international criminal law, which deals with large-scale, collective crimes, there is a general consensus that those most responsible are those who orchestrate atrocities and who lead others into criminality.[76] Therefore, the international criminal tribunals are primarily concerned with cases involving high-level military and political leaders.[77]

However, high-ranking defendants are seldom the direct perpetrators of international crimes. Indeed, they are often far-removed from the crime scene.[78] International criminal law has therefore developed various 'linking theories' or 'modes of liability' in order to attribute criminal responsibility to defendants other than the physical perpetrators.[79]

B The Importance of Prosecuting Leaders for Conflict-Related Sexual Violence

[74] Diane Marie Amann "In Bemba and Beyond, Crimes Adjudged to Commit Themselves", above n 8.
[75] Cassandra Steer "Translating Guilt: Identifying Leadership Liability for Mass Atrocity Crimes" (Springer, Berlin, 2017) at 2; James G. Stewart "The End of 'Modes of Liability' for International Crimes" (2012) 25 Leiden Journal of International Law 165 at 166.
[76] Steer at 18-19.
[77] Office of the Prosecutor *Paper on some policy issues before the Office of the Prosecutor,* above n 7, at [7].
[78] Linnea Kortfält "Sexual Violence and the Relevance of the Doctrine of Superior Responsibility" (2015) 84 Nordic Journal of International Law 533 at 552-553, Steer at 2, Werle and Jessberger *Principles of International Criminal Law*, above n 2, at 221-222.
[79] Stewart at 166-167.

The primary task of a commander is to prevent his or her subordinates from violating the laws of war.[80] As part of this duty, military superiors must ensure that their subordinates comply with the provisions of international humanitarian law that prohibit wartime sexual violence.[81] Military leaders are uniquely placed to combat conflict-related sexual violence. They hold the ultimate responsibility for ensuring that their subordinates do not commit acts of sexual violence, and for holding those who do commit such crimes to account.[82] Although elements of military culture are said to exacerbate the occurrence of sexual violence, especially in times of conflict, the hierarchical nature of military discipline has also been proven to play a crucial role in preventing sexual violence.[83] If military leaders consider sexual violence to be counter-productive to their interests, and if their organisation's disciplinary and intelligence institutions are strong enough, little sexual violence will be observed in a given conflict.[84]

It is therefore extremely important that superiors are held responsible, through modes of liability, for conflict-related sexual violence when it does occur. Failure to do so reinforces the misconception that sexual violence is a private crime and an inevitable by-product of conflict, rather than an officially sanctioned weapon of war.[85] It also undermines the deterrent function of international criminal law.[86] If the international criminal tribunals are exclusively concerned with prosecuting superiors, and if superiors are not being convicted, this sends the message that sexual violence can be committed with impunity, and international criminal law loses much of its normative force.[87]

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[80] Elies van Sliedregt "Command Responsibility at the ICTY – Three Generations of Case Law and Still Ambiguity" in Bert Swart, Alexander Zahar and Göran Sluiter (eds) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, Oxford, 2011) 377 at 386.

[81] Patricia Viseur Sellers and Kaoru Okuizumi "International Prosecution of Sexual Assaults" (1997) 7 Transnat'l L. & Contemp. Probs 45 at 67.

[82] Kortfält, above n 78, at 553-554.

[83] Sellers and Okuizumi, above n 81, at 67; Wood, above n 41, at 409-412.

[84] Wood, above n 41, at 409-412.

[85] Sarah Schwartz "Wartime Sexual Violence as More than Collateral Damage: Classifying Sexual Violence as Part of a Common Plan in International Criminal Law" (2017) 40 UNSW Law Journal 57 at 65.

[86] Kate Cronin-Furman "Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity (2013) 7 International Journal of Transitional Justice 434.

[87] Amann, above n 8; McKinnon, above n 6, at 106-107;. Orentlicher, above n 15, at 2542-2544.

Regrettably, such a pattern has been identified in the jurisprudence of the *ad hoc* tribunals and the ICC. [88] There is a distinct judicial reluctance to hold high-level leaders responsible for acts of sexual violence committed by subordinates, compared to other types of violence:[89]

> …when attacks on village after village involve murder, torture, rape, pillage and forced displacement, in prosecutions, all but sex crimes will typically be attributed to the leaders as part of their official policy.

The remainder of this chapter will focus on the use of command responsibility to prosecute military and political leaders for sexual violence. Chapter III will then identify specific instances of this judicial reluctance in decisions on command responsibility in the ICTR and ICC.

C The Use of Command Responsibility to Prosecute Leaders for Conflict-Related Sexual Violence

1 Introduction to Command Responsibility

When it comes to prosecuting military and political leaders for sexual violence, one of the primary modes of liability used is the doctrine of command responsibility.[90] Command responsibility is a mechanism through which superiors are held criminally responsible for failing to prevent or punish international crimes committed by their subordinates.[91]

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[88] McKinnon, above n 6, at 104; Susana SáCouto and Katherine Cleary "Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court" (2009) 17 Journal of Gender, Social Policy and the Law 337 at 353-358.

[89] Askin, above n 6, at 24.

[90] Nicole Laviolette "Commanding Rape: Sexual Violence, Command Responsibility, and the Prosecution of Superiors by the International Criminal Tribunals for the Former Yugoslavia and Rwanda" (1998) 36 Canadian Yearbook of International Law 93 at 118.

[91] Elies van Sliedregt *Individual Responsibility in International Criminal Law* (Oxford University Press, Oxford, 2012) at 240.

Although the concept of command responsibility originated in the 15th century, it was not until the post-World War II war crimes prosecutions that the doctrine was clearly linked to criminal liability, as opposed to military disciplinary responsibility.[92]

The trial of General Tomoyuki Yamashita, the Japanese Supreme Commander in the Philippines, produced the first and leading contemporary judgment based on command responsibility.[93] Yamashita was brought before a United States Military Commission and found guilty of failing to prevent his troops from committing "brutal atrocities and other high crimes" during the Battle of Manila in 1945.[94] While the defending the city from American forces, soldiers under Yamashita's command waged a "systematic campaign of brutality" against its inhabitants.[95] Tens of thousands of civilians were tortured and murdered, and hundreds of women were raped.[96]

The defence argued that Yamashita, as a remote commander, did not and (due to battle conditions) could not have known of the crimes.[97] However, the Commission found that the atrocities committed at Manila "were so extensive and widespread…they must either have been wilfully permitted by the accused, or secretly ordered by the accused."[98] Thus, according to the Commission, Yamashita had "failed to discharge his duty as commander to control the operations of the members of his command".[99] This verdict was upheld on appeal to the United States Supreme Court, where the Majority confirmed that military

[92] Kai Ambos "Superior Responsibility" in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, Oxford, 2002) vol 3 805 at 807.
[93] Ambos, at 807.
[94] *Trial of General Tomoyuki Yamashita* (1946) 4 Law Reports of the Trials of War Criminals, Case no. 21 at 35.
[95] Laviolette, above n 50, at 94.
[96] Bruce Landrum "The Yamashita War Crimes Trial: Command Responsibility Then and Now" (1995) 149 Military L. Rev. 293 at 295.
[97] *Yamashita,* at 18, 26-27.
[98] At 34.
[99] At 3.

commanders are under an affirmative duty to ensure that their subordinates act in accordance with international legal standards.[100]

The *Yamashita* precedent was followed and refined in subsequent World War II war crimes prosecutions. The International Military Tribunal for the Far East extended the doctrine to apply to civilian commanders. At the Nuremberg trials, it was confirmed that command responsibility is not a doctrine of strict liability.[101] The *mens rea* standard was held to be actual or imputed knowledge,[102] and the actus reus was characterised as one of "negligent omission".[103] Command responsibility was subsequently codified in article 86(2) of Additional Protocol I to the Geneva Conventions, and in the statutes of the ICTY and ICTR.[104] The doctrine was thus cemented as a principle of customary international law.[105] The Rome Statute negotiations of 1998 resulted in the most comprehensive codification of the command responsibility doctrine.[106] Article 28 of the statute affirms the three core elements of command responsibility as enunciated in the *ad hoc* tribunals. Criminal liability will attach to commanders where: [107]

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[100] *In Re Yamashita,* 327 U.S. 1 (1946) at 14, 16.

[101] There is debate as to whether the *Yamashita* case was decided on the basis of strict liability, or whether Yamashita's liability depended on his (constructive) knowledge of the crimes. See Guénaël Mettraux *The Law of Command Responsibility* (Oxford University Press, Oxford, 2009) at 7; Landrum, above n 96, at 297-298.

[102] *The United States of America v. Wilhelm List, et al. (Judgment)* Trials of War Criminals before the Nuremberg Military Tribunal, The United Nations War Crimes Commission, Law Reports of Trials of War Criminals, vol VIII, 1949, 34-76 (*"Hostage Case"*).

[103] *The United States of America vs. Wilhelm von Leeb, et al. (Judgment)* Trials of War Criminals before the Nuremberg Military Tribunals, The United Nations War Crimes Commission, Law Reports of Trials of War Criminals, vol XII, 1949 (*"High Command Case").*

[104] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) 1125 UNTS 3 (signed 12 December 1977, entered into force 7 December 1978); Statute of the International Criminal Tribunal for the Former Yugoslavia SC Res 827, S/Res/827 (1993), article 7(3); Statute of the International Criminal Tribunal for Rwanda SC Res 955, S/Res/955 (1994), article 6(3).

[105] *Delalić et al.,* above n 63, at [340].

[106] Ambos, above n 92, at 830; Mettraux, above n 101, at 12.

[107] These core elements taken from Additional Protocol I and the ICTY and ICTR statutes (above n 104), as confirmed in *Delalić et al. (Trial Judgment)* at [346].

1) There was a superior/subordinate relationship;
2) The superior knew, or had reason to know, that his or her subordinates were committing or about to commit breaches of international humanitarian law; and
3) The superior failed to take necessary and reasonable measures to prevent the crimes or to punish the perpetrators thereof.

The superior/subordinate relationship must be one of effective control.[108] A commander need not have *de jure* authority, as long as he or she possessed the "material ability to prevent and punish" the commission of offences.[109] Nevertheless, if the defendant is in a *de jure* position of command, there is a presumption of effective control unless evidence to the contrary can be produced.[110]

Knowledge of subordinates' crimes can be actual or constructive. However, article 28 of the Rome Statute introduces different standards of *mens rea* for military and civilian leaders. While military commanders will be liable if they "should have known" that their subordinates were committing or about to commit an international crime,[111] civilian leaders must have had actual knowledge.[112] A superior has "reason to know" if he or she had "some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates."[113] Thus, command responsibility does not require direct personal knowledge of particular crimes committed or about to be committed.[114] However, the accused must be aware of the category of crime that was about to be committed, for example crimes of sexual violence.[115]

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[108] *The Prosecutor v Delalić et al. (Appeal Judgment)* ICTY Appeals Chamber IT-96-21-A, 20 February 2001 at [196].
[109] *Delalić et al. (Appeal Judgment)* at [197]; *Prosecutor v Bemba (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* ICC Pre-Trial Chamber ICC-01/05-01/08-424, 15 June 2009 at [415].
[110] *Delalić et al. (Appeal Judgment)* at [197].
[111] Rome Statute of the International Criminal Court, art 28(a)(i).
[112] Art 28(b)(i).
[113] *Delalić et al. (Appeal Judgment*) at [238].
[114] *The Prosecutor v Nahimana et al. (Appeal Judgment)* ICTR Appeals Chamber ICTR-99-52 A, 28 November 2007 at [791].
[115] *The Prosecutor v Krnojelac (Appeal Judgment)* ICTY Appeals Chamber IT-97-25-A, 17 September 2003 at [155].

Article 28 of the Rome Statute has codified the need for a causal nexus between the superior's failure to act, and the commission of the underlying crimes.[116] A causal nexus is inherent in the case of failure to prevent, but at first glance it is difficult to see how causation could be required in the case of failure to punish.[117] However, it has been suggested that the requirement of causation may be compatible with failure to punish in cases involving a series of crimes.[118]

2 *Is Command Responsibility an Effective Tool for Prosecuting Conflict-Related Sexual Violence?*

The modern doctrine of command responsibility was established in the context of a sexual violence case – evidence of mass rape featured prominently at the *Yamashita* trial.[119] However, the doctrine's utility as a tool for holding leaders responsible for sexual violence has been called into question. It has been argued that common plan modes of liability, particularly joint criminal enterprise (JCE) liability, are more effective and appropriate ways of prosecuting leaders for conflict-related sexual violence. [120]

(a) JCE Liability

[116] The Crimes must have occurred "as a result of" the superior's failure to take necessary and reasonable measures (Rome Statue of the International Criminal Court, arts 28(a) and (b)). There is no precedent for this new requirement in customary international law. The *ad hoc* criminal tribunals repeatedly rejected recognising causation as a separate element (Werle and Jessberger, above n 2, at 232-233).

[117] Werle and Jessberger, above n 2, at 233.

[118] Darryl Robinson "How Command Responsibility Got So Complicated: A Culpability Contradiction, its Obfuscation and a Simple Solution" (2012) 13 Melbourne Journal of International Law 1 at 16.

[119] Laviolette, above n 50, at 118-119.

[120] Schwartz, above n 85, at 65-69; McKinnon, above n 6, at 107-108; Rebecca L. Haffajee "Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory" (2006) 29 Harvard Journal of Law & Gender 201; Selma Kafedžić "Determining Modes of Liability in International Criminal Law: Why the Common Purpose Doctrine is the Strongest Legal Response to Mass Atrocity Crimes" (2016) 14 New Zealand Yearbook of International Law 134.

The principle of JCE liability was primarily established by the ICTY in the *Tadić* appeal judgment.[121] Duško Tadić was charged with crimes against humanity, grave breaches of the Geneva Conventions and war crimes for his alleged involvement in the ethnic cleansing of Bosnian Muslims during the Bosnian War. In its decision, the Appeals Chamber grappled with a legal problem inherent to many international criminal prosecutions: the challenge of assigning individual criminal responsibility for mass atrocities, particularly to defendants who were not necessarily the physical perpetrators of the crimes in question.[122] The Chamber sought to articulate a theory of individual criminal responsibility that takes into account the "collective, widespread and systematic" nature of international crimes.[123]

Article 7 of the ICTY Statute, which deals with individual criminal responsibility, does not explicitly mention participation in a joint criminal enterprise as a mode of liability. However, after undertaking an extensive survey of post-World War II jurisprudence, the Appeals Chamber held that that JCE liability existed as a norm of customary international law, and that it could be read into Art 7(1) of the ICTY statute as a form of commission.[124] Defendants who participate in a collective criminal enterprise may be liable for crimes that occur in the prosecution of that common purpose, even if they do not personally carry out the crimes.[125]

The Chamber identified three categories of JCE liability:

1) The 'basic' form where all co-defendants, acting pursuant to a common criminal design, possess the same criminal intention (JCE I).[126]

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

[122] Allison Marston Danner and Jenny S Martinez "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law" (2005) 93 California Law Review 75 at 138; Kai Ambos "Joint Criminal Enterprise and Command Responsibility" (2007) 5 Journal of International Criminal Justice 159 at 159-160; Schwartz, above n 85, at 62.

[123] Ambos, above n 122, at 159.

[124] *Tadić*, at [188], [190].

[125] Ambos, above n 122, at 167.

[126] At [196].

2) The 'systemic' form, which captures the scenario where members of military or administrative units, such as those running concentration camps, commit crimes on the basis of a common plan (JCE II).[127]

3) The 'extended' form, where a member of the group commits a crime that was outside the common purpose, but "was nevertheless a natural and foreseeable consequence of the effecting of that common purpose." (JCE III)[128]

The *actus reus* for all categories of JCE liability is the same. There must be:

1) A plurality of persons;

2) The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the ICTY Statute; and

3) Participation of the accused in the common purpose, which may take the form of assistance in, or contribution to, the execution of the common purpose.[129]

However, the *mens rea* varies according to the category of JCE. JCE I requires all co-perpetrators to share the same intention to commit a certain crime. JCE II requires "personal knowledge of the system of ill-treatment…as well as the intent to further this common concerted system of ill-treatment." Finally, JCE III requires "the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute…to the commission of a crime by the group."[130]

JCE quickly became the favoured mode of liability at the ICTY, particularly for linking sexual violence to senior officials.[131] It captured a scenario common to the Yugoslavian

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[127] At [202].
[128] At [204].
[129] *Tadić* at [227].
[130] At [228].
[131] Danner and Martinez, above n 122, at 108.

conflict (and to armed conflicts in general) in which many individuals work together to commit "massive and logistically complex" crimes, but not all of them are the physical perpetrators.[132]

(b) Liability Under Article 25(3) of the Rome Statute

Article 25 of the Rome Statute,[133] which deals with individual criminal responsibility, also provides for common purpose liability. Under article 25(3)(a), a person is criminally responsible if that person "Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible". Thus, article 25(3)(a) is a form of principal liability: it captures the situation where the defendant's conduct "*constitutes* commission of the crime per se".[134]

Article 25(3)(d), on the other hand, provides for accomplice liability.[135] A person is criminally responsible if he or she "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 must 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;
>
> …

[132] Barbara Goy, Michelle Jarvis and Giulia Pinzauti "Contextualising Sexual Violence and Linking it to Senior Officials" in Serge Brammertz and Michelle Jarvis (eds) *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, Oxford, 2016) 220 at 221.

[133] Above n 2.

[134] *Prosecutor v Katanga (Trial Judgment*) ICC Trial Chamber II ICC-04/04-01/07, 7 March 2014 at [1384].

[135] Bert Swart "Modes of International Criminal Liability" in Antonio Cassese (ed) *The Oxford Companion to International Criminal Justice* (Oxford University Press, Oxford, 2009) 83 at 86.

Article 25(3)(d) therefore imposes liability on persons "whose conduct is solely *connected* to the commission of a crime by another person".[136]

Article 25(3)(d) is very similar to JCE liability.[137] Both require a plurality of persons, the existence of a common purpose, and contribution to that purpose. However, unlike the JCE doctrine, article 25(3)(d) does not provide for an extended form of common purpose liability. There is no Rome Statute equivalent to JCE III, which imposes liability for crimes outside the common purpose that were still a natural and foreseeable consequence of effecting that purpose.[138] Thus, when it comes to prosecuting sexual violence under article 25(3)(d), it is important to frame the common purpose broadly. The ICC does not have the benefit of a 'fall-back' in the form of JCE III.[139] In order to successfully prosecute sexual violence, the common purpose must include sexual violence.[140]

(c) The Difference Between Common Purpose Liability and Command Responsibility

JCE is a form of commission, and thus results in principal liability.[141] Article 25(3)(a) also results in principal liability, while article 25(3)(d) imposes accessory liability. Command responsibility, on the other hand, is a form of indirect omission liability. It criminalises a

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[136] *Katanga (Trial Judgment),* above n 134.

[137] This similarity has been acknowledged by the ICTY in *Tadić*, above n 121, at [222]; and by the ICC in *Prosecutor v Lubanga (Decision on the confirmation of charges)* ICC Pre-Trial Chamber ICC-01/04- 01/06, 29 January 2007 at [335].

[138] The Rome Statute was signed in 1998, before the *Tadić* judgment of 1999, which might explain why extended joint criminal enterprise was left out of art 25. There is a general consensus among commentators that JCE III cannot be read into the Rome Statute. (Stephen Ranieri "Extended Joint Criminal Enterprise in International Criminal Law: From Foreseeability, to Intention, to Control over the Crime" (2016) 80 The Journal of Criminal Law 436 at 443; Stefano Manacorda and Chantal Meloni "Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?" (2011) 9 Journal of International Criminal Justice 159 at 173; Antonio Cassese *International Criminal Law* (3rd ed, Oxford University Press, Oxford, 2013) at 175.)

[139] Katherine Guilford "Prosecuting Sexual Violence in Conflict and the Future of the Common Criminal Purpose at International Criminal Law" (2018) 2 NZWLJ 168 at 178.

[140] Goy, Jarvis and Pinzauti, above n 132 at 259.

[141] Goy, Jarvis and Pinzauti at 242; Ambos, above n 122, at 180.

commander's failure to prevent or punish crimes committed by his or her subordinates.[142] The defendant's position as a superior forms the basis of liability, as opposed to contribution to a common criminal purpose under the JCE doctrine or article 25(3)(d).[143]

Both JCE and command responsibility have been used to successfully prosecute leaders for conflict-related sexual violence in the *ad hoc* tribunals. In many cases, either JCE or command responsibility could be applied to the offending in question. However, it was the practice of the tribunals not to enter convictions under both modes of liability for the same conduct. Thus, choosing the appropriate mode of liability was a crucial consideration for prosecutors.[144] While JCE became the most commonly used mode of liability at the ICTY, ICTR prosecutors favoured command responsibility.[145] It has been argued that the practical and theoretical limitations of the command responsibility doctrine make it the weaker tool for attributing conflict-related sexual violence to leaders.[146] Nevertheless, it is submitted that neither mode of liability is necessarily better-suited to sexual violence prosecutions.

(d) Common Purpose Liability vs Command Responsibility in Sexual Violence Prosecutions

(i) Practical Difficulties

When it comes to securing convictions for sexual violence under the doctrine of command responsibility, the main practical difficulty is establishing the existence of a superior/subordinate relationship of effective control.[147]

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[142] Sellers and Okuizumi, above n 81, at 63.
[143] Ambos, above n 122, at 167-168.
[144] Guilford, above n 139; Goy, Jarvis and Pinzaui, above n 132, at 242.
[145] Danner and Martinez, above n 122, at 108; Van Sliedregt *Individual Responsibility in International Criminal Law,* above n 91, at 143.
[146] Schwartz, above n 85, at 65.
[147] Schwartz, above n 85, at 66; Laviolette, above n 50, at 126; Sellers and Okuizumi, above n 81, at 65-66.

In the context of conflicts such as the Second World War, which involved formal state militaries, establishing a chain of command was relatively straightforward. However, more contemporary conflicts have tended to involve armed groups that do not necessarily conform to traditional military structures. This was especially true of the conflicts in the Former Yugoslavia and in Rwanda, which were "chaotic and unstructured", involving ill-defined paramilitary groups, unofficial militias, and locally organised armed groupings.[148]

In *Delalić et al.*, four defendants were tried in relation to atrocities perpetuated against Bosnian Muslims detained in the Čelebići prison camp.[149] Two of the accused, Delalić and Mucić, were charged with command responsibility for acts of sexual violence committed by guards at the prison camp.[150] However, the Trial Chamber held that the prosecution had failed to establish that Delalić had the requisite authority over prison personnel. According to the Chamber, the evidence did not show that Delalić's position as 'Muslim Co-Ordinator' of the camp was one of effective control.[151] Although the Trial Chamber acknowledged the dangers of taking an overly formalistic approach to the superior/subordinate element, it emphasised the need for caution: [152]

> While the Trial Chamber must at all times be alive to the realities of any given situation and be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility for heinous acts, great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote.

In the *Akayesu* case, the Trial Chamber of the ICTR found the defendant guilty of individual criminal responsibility for inciting the *Interahamwe* (an extremist Hutu paramilitary group) to rape Tutsi women.[153] However, he was acquitted of superior responsibility. As mayor of the Taba commune, Akayesu did not have formal authority

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[148] Schwartz at 66; Laviolette at 126.
[149] *Delalić et al. (Trial Judgment),* above n 63.
[150] At [5].
[151] At [686].
[152] At [140].
[153] Above n 60, at [692]

over the *Interahamwe.* The Chamber implied that the evidence may have supported a finding of *de facto* authority, but was unwilling to make such a finding because the prosecution failed to explicitly make this argument.[154] Thus, the *Čelebići* and *Akayesu* decisions highlight the difficulty of establishing chains of command outside the traditional military context.

On the other hand, JCE and article 25(3)(d) avoid this problem as liability does not depend on the existence of a superior/subordinate relationship. Therefore, it arguably better accounts for the unstructured realities of contemporary conflict. For example, Delalić still "influenced and facilitated the commission of sexual violence" at the Čelebići camp, even if he did not exercise effective control over camp personnel. Thus, he might have been successfully prosecuted for sexual violence under the JCE doctrine, for contributing to a common criminal purpose.[155]

However, it is submitted that the difficulty of proving a superior/subordinate relationship should not preclude the use of command responsibility to prosecute sexual violence. One of the main problems faced by the *ad hoc* tribunals was the dearth of documentary evidence that could be used to establish command structures.[156] However, the ICTY's approach to Mucić's liability in the *Čelebicí* case demonstrates a willingness to adapt in the absence of documentary evidence. Although Mucić was not formally identified as the camp's commander, the Trial Chamber instead relied on oral evidence to find that he "was at all times the *de facto* authority in the Čelebići prison camp."[157]

Furthermore, in later decisions, the ICTY in particular has taken a more liberal approach to establishing a superior/subordinate relationship. For example, in the *Orić* case, it was held that the direct perpetrator does not have to be a subordinate of the superior. Rather, "it is only required that the relevant subordinates, by their own acts or omissions, be criminally

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[154] *Akayesu*, above n 60, at 691.
[155] Schartz, above n 85, at 67-68.
[156] Schwartz at 66; see also Sanja Kutnjak Ivković, "Justice by the International Criminal Tribunal for the Former Yugoslavia" (2001) 37 Stanford Journal of International Law 255 at 302.
[157] *Delalić et al.,* above n 63, at [739].

responsible for the acts or omissions of the direct perpetrator."[158] In other words, as long as the superior's subordinates somehow participated in the crime, for example through aiding or abetting, the superior can be liable for their criminal actions.

In *Hadžihasanović*, the question was whether a superior can be liable for the criminal acts of unidentified subordinates. The ICTY held that the alleged perpetrators do not have to be identifiable by name, as long as it can be proved that they belonged to a group over which the defendant exercised effective control.[159] Although the ICC is not bound by the decisions of the *ad hoc* tribunals,[160] the jurisprudence on this point has proved persuasive, as demonstrated in the *Bemba* case.[161] Thus, there is a degree of flexibility when it comes to determining a superior/subordinate relationship of effective control.

Finally, although a superior/subordinate relationship may be difficult to establish in some cases, this does not mean that the elements of JCE liability necessarily pose a lower threshold. In some cases, it may be equally (if not more) difficult to establish the existence of a common criminal plan, or of shared intent, in the context of chaotic contemporary conflicts.[162] This is particularly true in sexual violence prosecutions. The *ad hoc* tribunals and the ICC have typically been reluctant to find that a common plan encompassed sexual violence, or that the superior shared his or her subordinates' intention to commit acts of sexual violence.[163]

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[158] *Prosecutor v Orić (Trial Judgment)* ICTY Trial Chamber IT-03-68-T, 30 June 2006, at [478]. Confirmed in *The Prosecutor v. Nahimana (Trial Judgement)* ICTR Trial Chamber CTR-99-52-T, 3 December 2003 at [485].

[159] *The Prosecutor v Hadžihasanović (Trial Judgment)* ICTY Trial Chamber IT-01-47-T, 15 March 2006, at [90].

[160] Rome Statute of the International Criminal Court, art 21(2).

[161] *Bemba (Trial Judgment)*, above n 1, at [186].

[162] Kortfält, above n 78, at at 553-554, 569.

[163] This reluctance is evidence in the cases of *Katanga (Trial Judgment*), above n 134; *The Prosecutor v Đordević (Trial Judgment)* ICTY Trial Chamber IT-05-87/1-T, 23 February 2011; *The Prosecutor v Šainović (Appeal Judgment)* ICTY Appeals Chamber IT-05-87-A, 23 January 2014. Katherine Guilford (above n 139) and Sarah Schwartz (above n 85) also attribute this reluctance to enduring misconceptions about the nature of conflict-related sexual violence.

(ii) Theoretical Difficulties

Command responsibility has also been criticised for its uncertain theoretical basis.[164] It is unclear whether the doctrine imposes liability on superiors *for the crimes* committed by their subordinates, or whether the superior is only held liable for failing to control their subordinates. In short, is command responsibility a true mode of liability, or an offence of omission *sui generis*?[165]

In the jurisprudence of the post-World War II war crimes tribunals, command responsibility developed as a mode of liability. The commander was generally held responsible for the same crimes committed by his subordinates.[166] This approach was followed in the early case law of the ICTY.[167] However, in later decisions, the Tribunal began to treat command responsibility as a separate offence of omission.[168] This idea took root in the case of *Halilović*, in which the Trial Chamber held that:[169]

> 'for the acts of his subordinates' as generally referred to in the jurisprudence of the Tribunal does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act.

This characterisation of the doctrine is problematic, as it implies that commanders are less morally responsible than their subordinates. In other words, a commander who is only held responsible for failing to act appears to be less culpable than if he or she were held

[164] Schartz at 66-67, Ambos, above n 92, at 806; Mirjan Damaška, "The Shadow Side of Command Responsibility" (2001) 49 American Journal of Comparative Law 455.
[165] Chantal Meloni "Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?" (2007) 5 Journal of International Criminal Justice 619.
[166] Meloni at 622.
[167] At 624.
[168] The key cases are *Prosecutor v Halilović (Trial Judgment)* ICTY Trial Chamber IT-01-48-T, 16 November 2005, *Hadžihasanović*, above n 159 and *Orić*, above n 158.
[169] *Halilović* at [54].

responsible *for* the crimes in question.[170] This notion appears to have influenced the jurisprudence of the ICTY, particularly when it comes to sentencing.[171] In *Orić*, the defendant was convicted for failing to prevent the murder and cruel treatment of Serb prisoners, rather than for the crimes themselves.[172] The ICTY imposed a sentence of just two years, as opposed to the 18 requested by the Prosecutor. [173]

Treating leaders as less culpable sends an unsavoury normative message. Again, if the international criminal tribunals are primarily concerned with leaders, and leaders are held less responsible, the implication is that the 'real' crime has gone unpunished. This approach undermines a core function of international criminal law: the proper "attribution and calibration of individual responsibility for mass atrocities."[174] Furthermore, this approach is inherently contradictory. The tribunals focus their prosecutions on leaders because those who 'mastermind' atrocities are said to bear more responsibility than those who actually commit them. Thus, treating leaders as less culpable under the doctrine of command responsibility is fundamentally incompatible with this idea.

On the other hand, the theoretical foundations of JCE and article 25(3)(d) of the Rome Statute are more settled. JCE is generally accepted to be a form of commission,[175] while article 25(3)(d) imposes accessory liability.[176] In order to be liable, the defendant must have actively contributed to the furtherance of the common criminal purpose. Arguably, this mode of liability better reflects the true nature of a superior's liability for the crimes of their subordinates. Where leaders play a key role in the orchestration of atrocities, merely holding them responsible for omissions fails to recognise the true extent of their

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[170] Chile Eboe-Osuji *International Law and Sexual Violence in Armed Conflicts* (Martinus Nijhoff Publishers, Leiden, 2012) at 107.

[171] Eboe-Osuji at 113-115, Meloni, above n 165, at 620-621.

[172] Above n 158.

[173] *The Prosecutor v Orić (The Prosecution's Appeal Brief)* Office of the Prosecutor IT-03-68-A/A688-A559, 16 October 2006, at [10].

[174] Danner and Martinez, above n 122, at 78-79.

[175] Swart, above n 135, at 84.

[176] *The Prosector v Katanga (Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against accused persons)* ICC Trial Chamber II ICC-01/04-01/07, 21 November 2012 at [6]-[7].

culpability.[177] Given the truth-telling function of international criminal prosecutions, it is important that the mode of liability chosen accurately reflects the nature and of degree of the offending in question.[178]

However, when it comes to prosecuting sexual violence, it is submitted that command responsibility captures the appropriate level of culpability. It is very rare for leaders to explicitly order or actively encourage sexual violence.[179] However, failing to take measures to prevent or punish sexual violence can create a culture of tolerance that facilitates further offending.[180] Thus, by criminalising *inaction*, command responsibility more accurately reflects the nature of a superior's contribution to the offence in the majority of sexual violence cases.

Furthermore, concerns about the theoretical nature of command responsibility and its implications for moral culpability are less pressing in light of the ICC's recent decision in *The Prosecutor v Bemba*. Bemba was charged under article 28 of the Rome Statute, which codifies the doctrine of command responsibility. Article 28 states that commanders "shall be criminally responsible for crimes within the jurisdiction of the Court." A literal reading of this provision suggests that commanders are held responsible *for the crimes* of their subordinates, and that command responsibility under the Rome Statute is not a separate offence of omission. This view was confirmed by the Trial Chamber in *Bemba*.[181] Thus, future command responsibility prosecutions will not be faced with the same theoretical uncertainty and moral implications that emerged in the ICTY. By treating command responsibility as a mode of liability, rather than as a crime of omission *sui generis*, the Trial

[177] Schartz, above n 85 at 67; Damaška, above n 164, at 56.
[178] Schwartz at 67, citing David L Nesserian "Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes against Humanity" (2007) 43 Stanford Journal of International Law 221, 2556.
[179] Elisabeth J. Wood "Rape During War is Not Inevitable", above n 41, at 417; SáCouto and Katherine Cleary, above n 88, at 348.
[180] Askin "Holding Leaders Accountable in the International Criminal Court (ICC) for Gender Crimes Committed in Darfur", above n 6, at 14, 22.
[181] *Bemba (Trial Judgment),* above n 1, at [171].

Chamber highlighted "that sexual violence is not just a frolic of unruly soldiers but a core international crime which demands positive actions by superiors."[182]

Concerns about sentencing are also less pressing in light of *Bemba*. Before his subsequent acquittal on appeal, Bemba was sentenced to 18 years imprisonment for rape under article 28, the longest ever to be handed down in the ICC.[183] Thus, it does not appear that the ICC treats command responsibility as being less morally culpable than direct participation, as was the case in the ICTY.

Finally, command responsibility serves an important function in its own right, especially when it comes to prosecuting sexual violence. Because command responsibility imposes criminal liability on leaders in their capacity as leaders, a conviction has a particularly strong deterrent effect. It incentivises other leaders to take active measures to prevent and punish sexual offending among their subordinates.[184] In short, command responsibility recognises the responsibilities that attach to positions of power in a way that JCE liability or article 25(3)(d) do not. A conviction under the doctrine sends the message that, when it comes to conflict-related sexual violence, doing nothing is not enough.

Ultimately, it is submitted that command responsibility is not necessarily a weaker tool for prosecuting sexual violence. The practical and theoretical difficulties associated with the doctrine do not preclude its value as a mode of liability. In particular, because command responsibility criminalises failure to act, it can capture passive (but nonetheless criminal) behaviour that might slip through the cracks of JCE or article 25(3)(d). This is crucial in the case of sexual violence, which leaders tend to wilfully ignore or tacitly condone, rather than actively encourage. It is therefore important examine command responsibility through

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[182] Janine Natalya Clark "The First Rape Conviction at the ICC: An Analysis of the *Bemba* Judgment" (2016) 14 Journal of International Criminal Justice 667 at 672-673.

[183] Wairagala Wakabi "Bemba Given 18-Year Jail Sentence at ICC" (June 21, 2016) International Justice Monitor <https://www.ijmonitor.org/2016/06/bemba-given-18-year-jail-sentence-at-icc/>.

[184] Wood, above n 41, at 418; Niamh Hayes "The Bemba Trial Judgment – A Memorable Day for the Prosecution of Sexual Violence by the ICC" (21 March 2016) PhD Studies in Human Rights <http://humanrightsdoctorate.blogspot.com/2016/03/hayes-bemba-trial-judgement-memorable.html>.

the same feminist critical lens that has already been applied to common plan modes of liability.[185] The following chapter will highlight how enduring misconceptions about the nature of conflict-related sexual violence have affected outcomes in command responsibility prosecutions.

IV Enduring Misconceptions At Work in the International Criminal Tribunals

The influence of misconceptions about the nature of conflict-related sexual violence can be identified in the following command responsibility cases. This chapter focuses exclusively on jurisprudence from the ICTR and ICC. Although command responsibility has been used to prosecute sexual violence in the ICTY, most notably in *Delalić et al*.,[186] JCE was by far the favoured mode of liability in that tribunal, so the jurisprudence on command responsibility is sparse.

A Misconceptions At Work in the ICTR

1 The Prosecutor v Kajelijeli

Juvénal Kajelijeli was *bourgmestre* of the *Mukingo* commune in Rwanda.[187] He was also a leader of the *Interahamwe*, a paramilitary group which helped carry out the Rwandan genocide against the Tutsi in 1994.[188] It was alleged that from April to July 1994, Kajelijeli "commanded, organised, supervised and participated in" attacks against Tutsi in *Mukingo* and in neighbouring communes.[189] These attacks included the rape and sexual assault of Tutsi women, which Kajelijeli was alleged to have ordered and witnessed.[190]

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[185] For example by Schwartz, above n 85, and Guilford, above n 139, who examine the influence of assumptions about sexual violence on JCE jurisprudence.
[186] Above n 63.
[187] *The Prosecutor v Kajelijeli (Judgment and Sentence)* ICTR Trial Chamber II ICTR-98-44A-T, 1 December 2003 at [268]-[269]
[188] At [404].
[189] *The Prosecutor v Kajelijeli (Amended Indictment)* ICTR-98-44A-I, 25 January 2001 at 5.3.
[190] At 5.5.

Kajelijeli was charged with 5 counts of crimes against humanity: murder, extermination, rape, persecution and other inhumane acts. He was also accused of crimes relating to genocide, along with serious violations of the Geneva conventions. For each count, Kajelijeli was charged as a participant under article 6(1) of the ICTR Statute, and as a superior under article 6(3).[191] However, while he was found guilty of genocide and incitement to commit genocide, as well as extermination as a crime against humanity, he was acquitted of rape as a crime against humanity.[192]

(a) Jurisdictional Elements of Crimes Against Humanity

The Prosecution first had to establish the general elements of crimes against humanity under article 3 of the ICTR Statute.[193] The underlying crime (e.g. rape or extermination) must have been "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds".

The Chamber found that the killing of Tutsi occurred on a mass scale in *Mukingo* and its neighbouring communes from April to July 1994. These attacks were directed against victims on the basis of their Tutsi ethnicity. Whole populations of Tutsi were targeted, such as neighbourhoods or places of shelter, and entire families were eliminated. Thus, the Chamber held that there was a widespread attack against civilian Tutsi on ethnic grounds.[194]

(b) Superior/Subordinate Relationship of Effective Control

In light of reliable evidence that he was "always with the *Interahamwe*", that he "supervised them and gave them orders"[195] and that he had the power to stop them from

[191] At 6.
[192] *Kajelijeli (Judgment and Sentence)* at [942].
[193] At [863].
[194] At [882].
[195] At [404].

doing things,[196] the Chamber was satisfied that Kajelijeli exercised effective control over the relevant chapters of the *Interahamwe*. In other words, that he had the "material ability…to prevent or punish offences" committed by the *Interahamwe*.[197] Thus, the Chamber found that Kajelijeli was in a superior/subordinate relationship with the *Interahamwe* at the time the alleged crimes were committed. [198]

(c) Rape as a Crime Against Humanity

The Chamber unanimously found that multiple Tutsi women were raped by members of the *Interahamwe* from 7-10 April 1994, and that these assaults were committed in the course of a widespread attack against the Tutsi civilian population.[199] As Judge Ramaroson put it, "Rape [was] a component of the process to destroy the Tutsi ethnic group, especially its mind and its very existence."[200]

The Prosecution alleged that Kajelijeli ordered the rapes, and that he was present when some of them occurred.[201] Thus, he was liable under article 6(1) for participating in the rapes, and under article 6(3) for failing to take reasonable measures to prevent or punish them.[202] However, the Majority (Judge Ramaroson dissenting) found that Kajelijeli never gave the express order to rape. Rather, his instructions were limited to killing or extermination.[203] Additionally, the Majority was not satisfied that the Accused was present at any of the rapes.[204] Thus, he could not be liable for instigating, ordering, aiding or abetting acts of rape committed by the *Interahamwe* under article 6(1).

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[196] At [405].
[197] At [774], applying the test established in *Delalić (Appeal Judgment)* above n 108, at [186], as confirmed in the ICTR in *The Prosecutor v Bagilishema (Judgment)* ICTR Appeals Chamber ICTR-95-1A-A, 3 July 2002 at [58]-[61].
[198] *Kajelijeli (Judgment and Sentence)* at [781].
[199] At [917]-[922].
[200] *The Prosecutor v Kajelijeli (Dissenting Opinion of Judge Arlette Ramaroson)* ICTR Trial Chamber II ICTR-98-44A-T, 1 December 2003 at [98].
[201] *Kajelijeli (Amended Indictment)* at 5.5.
[202] At 6.
[203] *Kajelijeli (Judgment and Sentence* at [917], [920], [924].
[204] At [919], [921].

The Majority also held that Kajelijeli was not responsible for the rapes as a commander under article 6(3), because he lacked the requisite *mens rea*. According to the Majority, Kajelijeli could not have known about the rapes because he neither explicitly ordered nor personally witnessed them. There was no other evidence to suggest that he knew or had reason to know about the assaults. Thus, Kajelijeli was also acquitted of rape under article 6(3).[205]

Judge Ramaroson disagreed with the Majority's factual findings regarding the rapes.[206] She accorded more credibility to the witnesses, and was satisfied both that Kajelijeli was present when certain rapes occurred, and that he gave the express order to rape.[207] She was therefore convinced beyond reasonable doubt that Kajelijeli was guilty of ordering, instigating, aiding and abetting rape under article 6(1).[208] Furthermore, because Kajelijeli ordered the rapes and witnessed some of them, he necessarily knew about them for the purposes of article 6(3). Thus, he could also be guilty as a commander for failing to take necessary and reasonable measures to prevent the rapes.[209]

However, Judge Ramaroson considered it inappropriate to hold Kajelijeli responsible under two heads of liability for the same conduct. Thus, she only found him liable under article 6(1):[210]

> … there is no point discussing [article 6(3)], because it is difficult to see how [Kajelijeli] could have prevented the crime, or punished his subordinates when he himself had given the orders that Tutsi females be sought, raped and killed.[211]

(d) Discussion

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[205] At [924]

[206] *Kajelijeli (Dissenting Opinion of Judge Arlette Ramaroson)*, above n 200 at [1]-[2].

[207] At [15]-[42].

[208] At [75].

[209] At [83].

[210] At [83]-[92].

[211] At [84].

It is submitted that Kajelijeli's acquittal for rape, particularly under article 6(3), can be attributed to the influence of enduring misconceptions about the nature of conflict-related sexual violence. The Majority appears to have subliminally held sexual violence to a higher evidentiary standard, both in its assessment of witness credibility, and in its reluctance to infer Kajelijeli's *mens rea* from circumstantial evidence. There was also a general failure to situate the sexual violence in the context of the wider conflict, reinforcing the erroneous notion that wartime sexual violence is incidental or opportunistic unless explicitly ordered.

(i) Witness Credibility

The Prosecution called five witnesses, including rape victims, who testified that Kajeliejli was either present when certain rapes occurred, or that he had knowledge of other rapes committed by the *Interahamwe* under his command.[212] Although the Majority generally accepted the testimony, it was not convinced of Kajelijeli's alleged role in the rapes.[213] For example, witness GDO gave evidence that the Accused was present at the rape and killing of her disabled 15-year-old daughter. However, the Majority rejected the part of her testimony that placed Kajelijeli at the scene, citing inconsistencies between her written statement and her testimony at trial, as well as the fact that the attack occurred in a forest. The Majority was not convinced that the witness was able to properly see and hear what was going on.[214]

However, Judge Ramaroson fundamentally disagreed with the Majority's assessment of witness GDO's testimony. She considered the evidence to be "detailed and informative", and found that the forest setting did not preclude witness GDO from recognising Kajelijeli.[215] Thus, the Majority and Minority took very different views of the same evidence. Arguably, the Majority implicitly required a higher standard of credibility for

[212] *Kajelijeli (Judgment and Sentence)* at [632], [634], [636]-[638], [[652]-[656], [659]-[665].
[213] At [676]-[683].
[214] At [680]
[215] *Kajelijeli (Dissenting Judgment)* at [36]-[37].

witnesses to sexual violence than witnesses to other types of violence.[216] The credibility of the witnesses to rape was the only evidentiary issue on which the Majority and Minority differed.

(ii) Evidence of Knowledge

For the purpose of command responsibility, it is possible to establish actual or constructive knowledge of subordinates' crimes solely on the basis of circumstantial evidence.[217] However, it is submitted that the Majority tacitly imposed a higher evidentiary standard for proving knowledge of sexual violence. According to the Majority, Kajelijeli did not know or have reason to know that rapes were being committed by the *Interahamwe* because he did not witness any of the assaults, and he never gave the direct order to rape. However, the Majority failed to infer knowledge from the range of circumstantial evidence that was also available.[218]

In her dissenting judgment, Judge Ramaroson was satisfied that Kajelijeli did in fact give the express order to rape. However, she also highlighted pieces of circumstantial evidence that suggested he knew or had reason to know about the rapes. Kajelijeli gave the order to "exterminate the Tutsis" on 7 April 1994. After this order, the rapes immediately began alongside the killings.[219] Kajelijeli supervised the overall attack, and frequently moved within the *prefecture* to pick up and drop off his *Interahamwe*.[220] Kajelijeli was in direct contact with his *Interahamwe*, who were required to give him a report as to what they had done.[221] In light of this evidence, it is difficult to argue that Kajelijeli had no possible reason to know that the *Interahamwe* were committing rape.[222]

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[216] McKinnon, above n 6, at 105; Daniel J. Franklin "Failed Rape Prosecutions at the International Criminal Tribunal for Rwanda" (2008) 9 Georgetown Journal of Gender and the Law 181 at 193.
[217] *Prosecutor v Galić (Judgment)* ICTY Appeals Chamber IT-98-29-A, 30 November 2006 at [171], [239].
[218] SáCouto and Cleary, above n 88, at 19-20.
[219] *Kajelijeli (Dissenting Opinion of Judge Arlette Ramaroson)* at [73].
[220] At [73].
[221] At [39], see also the Majority decision at [474], [739]-[740] for general evidence of reporting in the *Interahamwe*.
[222] *Kajelijeli (Dissenting Opinion of Judge Arlette Ramaroson)* at [77].

Nevertheless, the Majority disregarded this circumstantial evidence. It was not satisfied that Kajelijeli knew about the rapes in the absence of direct evidence. This approach is inconsistent with settled jurisprudence about how actual or constructive knowledge may be proved under the doctrine of command responsibility.[223] Sexual violence is rarely expressly ordered, making circumstantial evidence crucial when it comes to proving knowledge. However, the *Kajelijeli* decision is just one example of the tribunals' general tendency not to link sexual violence to commanders in the absence of direct evidence such as explicit orders.[224] This approach reflects the erroneous notion that sexual violence is an inevitable and opportunistic crime unrelated to the wider conflict, unless it is expressly sanctioned.

(iii) Failure to Contextualise Sexual Violence

The attacks in *Mukingo* and its neighbouring communes were part of a broader campaign of genocide against Tutsi in Rwanda. This conflict was characterised by widespread patterns of sexual violence. Elsewhere in Rwanda, other chapters of the *Interahamwe* would rape and sexually assault women in the course of attacks on Tutsi civilians. In short, rape was the *modus operandi* of the *Interahamwe*.[225] Given that Kajelijeli was a leader of the *Interahamwe* (albeit a local wing), it seems unlikely that he had no reason to suspect his troops might commit rape when he gave the order to "exterminate". By linking the *Mukingo* attacks to broader patterns of sexual violence in Rwanda, and by focusing on Kajelijeli's awareness of such patterns, the Prosecution might have been more successful in establishing *mens rea*. If Kajelijeli knew about other acts of rape committed by the *Interahamwe*, this might suggest he had reason to know that his own troops were about to do something similar.

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[223] SáCouto and Cleary, above n 88, at 20.

[224] SáCouto and Cleary at 16; Sellers and Okuizumi, above n 81, at 66-67.

[225] Jennie E. Burnet "Situating Sexual Violence in Rwanda (1990-2001): Sexual Agency, Sexual Consent, and the Political Economy of War" (2012) 55 African Studies Review 97 at 108.

In *The Prosecutor v Karemera et al.,* the OTP (Office of the Prosecutor) relied on a transcript of a radio broadcast, and other media reports of rape committed against Tutsi women by the *Interahamwe*, as evidence of the Accused's knowledge that crimes of sexual violence were being committed.[226] In the ICTY, knowledge and foresight of sexual violence has been inferred from evidence of broader environmental factors, and the accused's awareness of these factors.[227] For example, in *Šainović,* a majority of the Appeals Chamber found that the defendant knew about the atmosphere of terror, violence and ethnic animosity in the area. He also knew that displaced Kosovo Albanian women were particularly vulnerable. Thus, he "must have been aware" that ethnically-motivated sexual assaults could be committed in that environment.[228]

Arguably, the failure to contextualise the sexual offending in *Kajelijeli* reaffirms the misconception that sexual violence is a 'private' crime incidental to the broader conflict. It ignores the well-established link between genocide and sexual violence, particularly in the context of the Rwandan genocide. Nevertheless, the occurrence of wartime sexual violence and leaders' knowledge thereof should not be treated as 'a given'. This approach reinforces another misconception that sexual violence is inevitable in wartime, and thus obscures the role that commanders play in preventing or enabling sexual violence. ICTY judges have also raised concerns about the use of general circumstances, rather than specific evidence, to prove knowledge or foresight of sexual violence.[229] Naturally, care should be taken to ensure that the evidence supports a finding of actual or constructive knowledge beyond reasonable doubt. Nevertheless, ICTY and ICTR jurisprudence confirms that it is perfectly legitimate to infer knowledge from circumstantial evidence. Given that sexual violence is

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[226] *The Prosecutor v Karemera et al. (Trial Judgment)* ICTR Trial Chamber III ICTR-98-44-T, 2 February 2012 at [1413]-[1414], [1416], [1473]-[1490].

[227] For example, in the cases of *The Prosecutor v Šainović (Appeal Judgment)* ICTY Appeals Chamber IT-05-87-A, 23 January 2014; *The Prosecutor v Milutinović (Trial Judgment)* ICTY Trial Chamber IT-05-87-T, 26 February 2009 and *The Prosecutor v Đorđević (Judgment)* ICTY Appeals Chamber IT-05-87/1-A, 27 January 2014. For further discussion of inferring knowledge of sexual violence from contextual evidence, see Guilford, above n 139, at 196-198 and Goy, Jarvis and Pinzauti "Contextualising Sexual Violence and Linking it to Senior Officials, above n 132, at 245-255.

[228] *Šainović (Appeal Judgment)* at [1581].

[229] See Judge Tuzmukhamedov's dissenting opinion in *Đorđević*, above n 227, at [58]-[67], and Judge Liu's dissenting opinion in *Šainović* , above n 227, p 744 at [7]-[19].

seldom explicitly ordered or witnessed by leaders, knowledge should be assessed in light of wider patterns of sexual violence, and the accused's awareness of these patterns, where appropriate.

2 Further Rape Acquittals at the ICTR

Kajelijeli is not the only case that demonstrates a judicial reluctance to hold leaders responsible for sexual violence in the ICTR. Although Alfred Musema was found guilty of personally raping a Tutsi woman under article 6(1), he was acquitted of failing to prevent his subordinates from committing rape under article 6(3).[230] The Trial Chamber held that the Prosecutor failed to prove beyond reasonable doubt that crimes of rape had been committed by 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".[231] As in *Kajelijeli*, the Chamber demonstrated a distinct scepticism regarding the credibility of the witnesses to rape.[232] On appeal, Musema was acquitted of the remaining rape conviction for lack of evidence beyond a reasonable doubt, despite the Trial Chamber's finding to the contrary.[233]

Similar evidentiary issues were encountered in *The Prosecutor v Niyitegeka*, another case where a leader was accused of personally committing rape under article 6(1), rather than as a superior for rapes committed by others under article 6(3).[234] Relying on the testimony of one witness, the Prosecution alleged that Niyitegeka raped a girl who had been forced

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[230] *The Prosecutor v Musema (Judgment and Sentence)* ICTR Trial Chamber I ICTR-96-13-A, 27 January 2000 at 966-968.

[231] At 968.

[232] At [797]-[862]. See also Rebecca L. Haffajee, above n 120, at 209: "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."

[233] *The Prosecutor v Musema (Appeal Judgment)* ICTR Appeals Chamber ICTR-96-13-A, 16 November 2001.

[234] *The Prosecutor v Niyitegeka (Judgment and Sentence)* ICTR Trial Chamber I ICTR-96-14-T, 16 May 2003. Niyitegeka was also charged for rape as a superior under art 6(3), but the Chamber did not consider the allegations under this mode of liability [455]-[458].

into his car. Although the Trial Chamber considered the witness to be credible,[235] it was not convinced that the testimony established Niyitegeka's guilt because the witness did not see the rape actually occur.[236] Rather, the witness saw Niyitegeka shut the victim in his car, open the door approximately thirty minutes later, and shoot her dead.[237]

In *The Prosecutor v Rukundo*, the defendant was found guilty of raping a young Tutsi refugee woman with genocidal intent.[238] However, this conviction was reversed on appeal. The Appeals Chamber did not dispute that Rukundo committed the rape. However, it considered the sexual assault to be "qualitatively different" from the other acts of genocide of which Rukundo was accused. While the killings and assaults were held to be systematic, the rape was "unplanned and spontaneous", and thus "incidental" to the general campaign of genocide.[239] The Appeal Chamber's reasoning is a textbook example of the misconception that sexual violence is a 'private' crime that is inherently disconnected from the conflict.

In *The Prosecutor v Kamuhanda*, the Trial Chamber dismissed all command responsibility charges against the Accused under article 6(3), including rape.[240] The Trial Chamber found that there was insufficient evidence to prove that the defendant was in a relationship of effective control over the attackers.[241] However, Kamuhanda was also acquitted of rape under article 6(1). Two witnesses, whom the Trial Chamber deemed credible, gave evidence that they heard about rapes committed during a certain massacre. However, the Chamber held that the hearsay nature of the evidence was insufficient to sustain a rape charge against the Accused.[242]

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[235] At [168].
[236] At [301]-[302].
[237] At [90]-[91].
[238] *The Prosecutor v Rukundo (Trial Judgment)* ICTR Trial Chamber II ICTR-2001-70-T, 27 February 2009.
[239] *The Prosecutor v Rukundo (Appeal Judgment)* ICTR Appeals Chamber ICTR-2001-70-A, 20 October 2010 at [236].
[240] *The Prosecutor v Kamuhanda (Trial Judgment)* ICTR Trial Chamber II ICTR-95-54A-T, 22 January 2004.
[241] At [611]-[613].
[242] *Kamuhanda* at [497].

The defendant in *The Prosecutor v Muvunyi* was the most senior military officer in Rwanda's Butare *préfecture*.[243] The Prosecution alleged that several women and girls were violently raped during attacks against Tutsi in the area.[244] It was further alleged that:[245]

> Lieutenant Colonel Muvunyi by reasons of his position of authority and the widespread nature of these acts, knew or had reason to know, that these acts were being committed and he failed to take measures to prevent, or put an end to these acts, or punish the perpetrators.

The Trial Chamber found that the accounts of rape were reliable, and expressed sympathy for the victims. However, it dismissed the charges against Muvunyi on procedural grounds. The indictment alleged that rapes were committed by the *Interahamwe* and by soldiers from the Ngoma Camp, over which the Accused had effective control. However, the Prosecution later adduced evidence to suggest that soldiers from another camp under Muvunyi's command, the ESO, also committed rape. By failing to include this allegation in the indictment, the Prosecution had not discharged its obligation to "give clear and timely notice in order to put the Defence on alert with respect of this charge." [246]

In light of the above cases, it is clear that the ICTR has proved reluctant not only to hold leaders responsible for sexual violence committed by subordinates, but also for acts of sexual violence they are alleged to have committed themselves. In particular, several of the judgments are characterised by a tendency to hold crimes of sexual violence to a higher standard of proof. A greater degree of credibility appears to be required of witnesses, and there is a distinct reluctance to infer rape from circumstantial evidence. Had these cases been examined through a more gender-sensitive lens, and the crimes of sexual violence held to the same standard of proof as other crimes, it seems possible that many of them might have been decided differently. Additionally, cases such as *Muvunyi* highlight the

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[243] *The Prosecutor v Muvunyi (Judgement and Sentence)* ICTR Trial Chamber II ICTR-2000-55A-T, 12 September 2006.

[244] *The Prosecutor v Muvunyi (Indictment)* ICTR Office of the Prosecutor ICTR-95-54A-I, 22 December 2003 at 3.41, 3.41(i).

[245] At 3.41.

[246] *Muvunyi (Judgment and Sentence)* at [400].

importance of procedural accuracy on the part of the Prosecution. It is crucial that the facts supporting charges of sexual violence are consistent with the evidence adduced at trial.[247] The *Muvunyi* acquittal represents a frustrating missed opportunity for the prosecution of sexual violence, particularly under the doctrine of command responsibility.[248]

B Misconceptions At Work in the ICC

The early days of the ICC were characterised by a similar pattern of acquittals for sexual violence, if sexual violence was included in the charges at all. In the case against Thomas Lubanga Dyilo,[249] ICC investigators uncovered significant evidence of rape, torture and enslavement. Nevertheless, then-Prosecutor Luis Moreno-Ocampo decided only to pursue evidence relating to the conscription and use of child soldiers.[250] Arguably, the failure to bring charges of sexual violence in *Lubanga* was symptomatic of the pervasive idea wartime rape is unrelated to the wider conflict.[251]

In *Prosecutor v Katanga*, the defendant was convicted of murder, directing an attack against a civilian population, destruction of property and pillaging under article 25(d) of the Rome Statute.[252] However, he was acquitted of rape and sexual slavery. These crimes were held to fall outside the common purpose to commit ethnic cleansing.[253] Katanga's acquittal has also been attributed to enduring misconceptions about the nature of conflict-related sexual violence, namely the idea that conflict-related sexual violence is something inevitable and incidental, rather than being a potent weapon of war.[254] Katanga's co-

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[247] SáCouto and Cleary, above n 88, at 353.
[248] McKinnon, above n 6, at 104-105.
[249] *The Prosecutor v Lubanga (Trial Judgment)* ICC Trial Chamber I ICC-01/04-01/06, 14 March 2012.
[250] Hayes, above n 72, at 11.
[251] Brigid Inder "Reflection: Gender Issues and Child Soldiers – The Case of Prosecutor v Thomas Lubanga Dyilo" (August 31 2011) International Justice Monitor <https://www.ijmonitor.org/2011/08/reflection-gender-issues-and-child-soldiers-the-case-of-prosecutor-v-thomas-lubanga-dyilo-2/>.
[252] *The Prosecutor v Germain Katanga (Trial Judgment*), above n 134.
[253] At [999], [1023], [1664].
[254] See for example Guilford, above n 139; Kortfält, above n 78; Schwartz, above n 85; Interview with Brigid Inder, above n 73.

commander, Mathieu Ngudjolo Chui, was separately acquitted of all of the charges against him, including rape, due to issues with witness credibility.[255]

In light of the Katanga acquittal, ICC Prosecutor Fatou Bensouda issued a policy paper on sexual and gender-based crimes.[256] The paper affirmed the OTP's commitment to closing the impunity gap for conflict-related sexual violence, and provided guidance for ensuring the effective investigation and prosecution of such crimes.[257] However, the OTP suffered another blow with the acquittal of Jean-Pierre Bemba on appeal in 2018.[258] The remainder of this chapter will examine the application of the command responsibility doctrine in the *Bemba* case, and highlight the influence of enduring misconceptions about the nature of conflict-related sexual violence in the decision.

1 The Prosecutor v Bemba

Jean-Pierre Bemba Gombo was the President and founder of MLC, a rebel group turned political party. He was also the Commander-in-Chief of its military branch, the *Armée de Libération du Congo* (ALC).[259] The MLC was established in 1998 with the goal of overthrowing the government of the Democratic Republic of the Congo (DRC) during the Second Congo War.[260] In 2002, President Ange-Félix Patassé of the Central African Republic (CAR) invited the MLC to come and help his government overthrow a coup attempt. Bemba agreed to intervene, and deployed his troops in the CAR in late October of that year.[261] In the course of the conflict, MLC troops were accused of committing

[255] *Prosecutor v Ngudjolo Chui (Trial Judgment)* ICC Trial Chamber II ICC-01/04-02/12, 18 December 2012; *Prosecutor v Ngudjolo Chui (Appeal Judgment)* ICC Appeals Chamber ICC-0104-02/12-A, 7 April 2015.
[256] The Office of the Prosecutor *Policy Paper on Sexual and Gender-Based Crimes,* above n 65.
[257] At 10.
[258] Above n 5.
[259] *Bemba (Trial Judgment),* above n 1, at [1].
[260] At [382].
[261] At [453]-[546].

numerous atrocities against the civilian population of the CAR, including widespread sexual violence.[262]

The Prosecution initially sought to charge Bemba as a principal under article 25(3)(a).[263] However, at the confirmation of charges hearing, the Pre-Trial Chamber noted that the evidence appeared to establish a different mode of liability. It invited the Prosecution to consider amending the charges to address article 28 (command responsibility) as a possible mode of liability.[264] The Prosecution complied, and on 15 June 2009, the Pre-Trial Chamber confirmed the charges. Bemba was charged with the crimes of humanity of murder and rape, and the war crimes of murder, rape and pillaging, under article 28(a).[265]

(a) Trial Chamber

The Trial Chamber held that the jurisdictional elements of both war crimes and crimes against humanity were satisfied.[266] It also found beyond reasonable doubt that MLC soldiers had committed crimes within the jurisdiction of the Court, including rape.[267] The question was whether these crimes could be attributed to Bemba under article 28.

The Chamber held that Bemba was in a superior/subordinate relationship of effective control over the MLC. As President of the MLC and Commander-in-Chief of the ALC, he

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[262] *Bemba (Trial Judgment)* at [576].

[263] *Prosecutor v Bemba (Document Containing the Charges)* ICC Pre-Trial Chamber III ICC-01/05-01/08, 1 October 2008.

[264] *Prosecutor v Bemba (Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute)* ICC Pre-Trial Chamber III ICC-01/05-01/08, 3 March 2009.

[265] *Prosecutor v Bemba* (*Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo)* ICC Pre-Trial Chamber III ICC-01/05-01/08, 15 June 2009.

[266] In relation to war crimes, the Chamber confirmed the existence of an "armed conflict not of an international nature", between government authorities and organised armed groups, that was "intense and protracted". There was a clear nexus between the conflict and the alleged crimes (*Bemba (Trial Judgment)* at [650]-[668]). In relation to crimes against humanity, the Chamber was satisfied that there was an attack "directed against any civilian population", of a widespread nature, committed pursuant to an organisational policy to commit such an attack. The crimes alleged were committed as part of this attack (at [673]-[690]).

[267] At [694].

"had broad formal powers, ultimate decision-making authority, and powers of appointment, promotion and dismissal."[268] He also controlled the MLC's funding and could issue operational orders.[269] Furthermore, he had primary disciplinary powers over MLC members, and the ability to send or withdraw troops to and from the CAR.[270] Thus, the Chamber found that Bemba was acting as a military commander, and had effective authority and control over the MLC throughout the CAR conflict.[271]

The chamber was also satisfied that Bemba knew, or had reason to know, that MLC forces were committing or about to commit the crimes in question. Although Bemba remained in the DRC as a remote commander, he was in regular and direct communication with commanders in the field, and visited the CAR on a number of occasions.[272] He was provided with regular reports which referred to crimes committed by the MLC, including rape.[273] He also followed and discussed international media reports, which detailed allegations of rape, pillaging and murder.[274] The chamber therefore held that Bemba had actual knowledge of the crimes for the purposes of article 28(a)(i).[275]

Finally, the Chamber found that Bemba failed to take all necessary and reasonable measures to prevent the crimes or to submit the perpetrators to competent authorities. Although Bemba did take some measures, including the Mondonga Inquiry, a meeting with the UN representative in the CAR, the Gbadolite court-martial and the Zongo Commission, these were "limited in mandate, execution, and/or results", and were "not properly and sincerely executed".[276] The measures were primarily motivated by Bemba's desire to restore the MLC's public image, rather than to genuinely prevent or repress the commission

[268] At [697].
[269] At [699]-[702].
[270] At [703]-[704].
[271] At [705].
[272] At [707].
[273] At [708].
[274] At [709].
[275] At [717]-[718].
[276] At [720], [727].

of crimes.[277] Importantly, none of the measures were directed specifically towards the allegations of sexual violence.[278]

The Chamber went on to list a number of measures that Bemba could have taken, such as ensuring that his troops were properly trained in the rules of international humanitarian law, or altering the deployment of troops to minimise contact with civilians.[279] In light of the wide range of measures at his disposal, the Chamber held that the measures Bemba did take "patently fell short" of all necessary and reasonable measures to prevent and repress the commission of crimes by the MLC.[280] Thus, Bemba was found guilty of all charges in his capacity as commander under article 28(a).[281]

(b) Appeals Chamber

Bemba appealed on 6 grounds, the primary being that the convictions exceeded the charges, and that he was not liable as a superior under article 28(a).[282] The Majority restricted its assessment to these grounds, as it considered them to be determinative of the appeal.[283]

(i) Standard of Review

The Majority began by establishing what standard of review applied to the issues on appeal.[284] Controversially, the Majority modified the standard of review for factual errors. Previously, the Appeals Chamber's task was to:[285]

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[277] At [729].
[278] At [589], [591], [594]-[595], [597], [720]-[726].
[279] At [729]-[730].
[280] At [731], [734].
[281] At [742].
[282] *Bemba* (*Appeal Judgment)* above n 5 at [29].
[283] At [33].
[284] Under art 83(2), the Appeals Chamber may intervene only if it "finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error".
[285] At [38], citing *The Prosecutor v Lubanga (Appeal Judgment)* ICC Appeals Chamber ICC-01/04-01/06 A 5, 1 December 2014 at [27].

> determine whether a reasonable trial chamber could have been satisfied beyond reasonable doubt as to the finding in question, thereby applying a margin of deference to the factual findings of the trial chamber.

The Appeals Chamber would not intervene with the Trial Chamber's factual findings "unless it [was] shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts."[286] However, the Majority in Bemba considered that the "the idea of a margin of deference…must be approached with extreme caution."[287] It held that the Appeals Chamber "may interfere with the factual findings of the first-instance chamber whenever the failure to interfere may occasion a miscarriage of justice".[288] Thus, when reviewing the Trial Chamber's factual findings under article 28, the Appeals Chamber had much more discretion to assess the evidence anew.

(ii) Bemba's Liability Under Article 28(a)

According to the Majority, the Trial Chamber's conclusion that Bemba failed to take all necessary and reasonable measures in response to MLC crimes was materially affected by errors. Thus, Bemba could not be held responsible under article 28 for crimes committed by the MLC in the CAR. The crux of the Majority's reasoning was that the Trial Chamber failed to appreciate the logical difficulties faced by Bemba as a remote commander when it came to investigating and prosecuting crimes among his subordinates.[289] The fact that the measures were primarily motivated by self-interest did not "intrinsically render them any less necessary or reasonable in preventing or repressing the commission of crimes."[290] The Trial Chamber also erred in attributing the shortcomings in execution to Bemba,

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[286] *Lubanga (Appeal Judgment)* at [21].
[287] *Bemba (Appeal Judgment)* at [38].
[288] At [40].
[289] At [173]-[171].
[290] At [176]-[179].

simply because he initiated the measures.[291] Moreover, the Trial Chamber erred by assessing the measures taken against the totality of crimes allegedly committed by the MLC, when only a limited number were actually proved beyond reasonable doubt.[292] Bemba was therefore acquitted of all charges.[293]

(iii) Dissenting Opinion of Judge Monageng and Judge Hofmański

Dissenting, Judges Monageng and Judge Hofmański upheld Bemba's convictions.[294] First, the Minority considered that the Majority's modifications to the standard of review for factual errors were "unwarranted and contrary to the corrective model of appellate review and, in some aspects, potentially inconsistent with the statute."[295] Furthermore, the Majority did not correctly apply this new standard of review. It did not appear to have conducted a comprehensive review of the Trial Chamber's findings, but instead focused on individual pieces of evidence. Thus, in the view of the Minority, any conclusion that the Majority reached could only be "impressionistic" and would "[provide] an insufficient basis to overturn findings of the Trial Chamber."[296]

With regard to article 28, the Minority was "unable to identify any error in the Trial Chamber's findings or any unreasonableness in the overall conclusions."[297] In the Minority's view, the Majority was too quick to accept Bemba's claims of logistical difficulties. Its conclusions were based on an incomplete assessment of the evidence.[298] The Minority also held that it was reasonable for the Trial Chamber to take Bemba's

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[291] At [180]-[181].
[292] At [183]-[183]. According to the Appeals Chamber, the Trial Chamber also erred by failing to take into account Bemba's argument that he sent a letter referring some of the allegations to the CAR authorities [174]-[175], by finding that Bemba failed to empower other MLC officials to fully and adequately investigate and prosecute crimes [182] and by
[293] At [195]-[200].
[294] *The Prosecutor vs Bemba (Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański)* ICC Appeals Chamber ICC-01/05-01/08 A 8 June 2018.
[295] At [4].
[296] At [18].
[297] At [43].
[298] At [54].

motivations into account.[299] With regard to the number of crimes committed, the Majority failed to appreciate that the individual convictions represented only a portion of the total number of crimes committed by the MLC.[300]

Furthermore, the Minority disagreed with the Majority's finding that shortcomings in the measures taken could not be attributed to Bemba. This finding, according to the Minority, was based on a misreading of the Trial Chamber's decision, and a misinterpretation of the nature of liability under article 28. Firstly, the Trial Chamber did not criticise Bemba for the limited results of the measures. Rather, it considered the measures themselves to be inadequate – there was much more he could have done.[301] Secondly, the Majority failed to appreciate the rationale of the command responsibility doctrine, which holds commanders responsible for their failures to act, not their actions.[302] Therefore, the Minority would have confirmed the Trial Chamber's conclusion.[303]

(c) Discussion

The *Bemba* trial judgment was hailed as "a turning point in the ICC's history".[304] As the first command responsibility conviction in the ICC, the decision provided some welcome clarification of previously unsettled aspects of the doctrine.[305] Bemba was also the first defendant to be convicted of rape in the ICC, and the decision was praised for its nuanced

[299] At [70]-[78].
[300] At [87].
[301] At [79].
[302] At [45], [79]-[80].
[303] At [110].
[304] Yvonne McDermott "Prosecutor v. Bemba" (2017) 110 AJIL 526 at 530.
[305] For example, it confirmed that command responsibility under art 28 is a mode of liability, rather than a crime of omission *sui generis*: *Bemba (Trial Judgment)* above n 1 at [171]. In other words, the superior is held responsible *for the crimes* of his or her subordinates, rather than for failing to prevent those crimes. It also clarified what constitutes a causal nexus for the purposes of art 28: the crimes must have been committed *as a result of* the commander's omission (at [210]-[213]).

and sensitive treatment of sexual violence issues.[306] The Trial Chamber was at pains to highlight the seriousness of the harms suffered by victims, particularly the long-term physical, mental and social effects of sexual violence.[307] It also emphasised the clear nexus between the sexual assaults and the wider conflict,[308] as well as the commander's role in creating a "climate of acquiescence" that perpetuates sexual violence.[309] Thus, the Trial Chamber clearly refuted the misconceptions that sexual violence is less serious, incidental and inevitable.

Furthermore, the decision provided long-overdue recognition of male victims of sexual violence. Rape committed against males in the CAR conflict was charged as rape, rather than as torture, cruel or inhuman treatment or outrages upon personal dignity, as was often the case in other international criminal tribunals.[310] Ultimately, after a series of false starts and missed opportunities, it appeared that the impunity gap for conflict-related sexual violence in the ICC was finally beginning to close.

However, Bemba's acquittal on appeal was seen as a disappointing step backwards in the fight against impunity for conflict-related sexual violence.[311] Worryingly, enduring

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[306] McDermott, above n 304, at 532; Janine Natalya Clark, above n 182; Marie-Alice D'Aoust "Sexual and Gender-based Violence in International Criminal Law: A Feminist Assessment of the *Bemba* Case" (2017) 17 International Criminal Law Review 208.

[307] *Bemba* (Trial Chamber) at e.g. [465], [491], [495], [498], [516], [546], [551].

[308] At [142]-[144], [164]-[165].

[309] At [723].

[310] Sandesh Sivakumaran *"Sexual Violence Against Men in Armed Conflict"* (2007) 18 EUR. J. INT'L L. 253; Sophia Ugwu "Men and Boys as Hidden Victims of Sexual Violence" (5 July 2018) Peace Palace Library <https://www.peacepalacelibrary.nl/2018/07/men-and-boys-as-hidden-victims-of-sexual-violence/>; Janet H. Anderson "The sexual and gender-based crime that few talk about" (18 February 2018) International Justice Tribune <https://www.justicetribune.com/blog/sexual-and-gender-based-crime-few-talk-about>.

[311] See for example Kerstin Carlson "Bemba acquittal overturns important victory for sexual violence victims" (15 July 2018) The Conversation <https://theconversation.com/bemba-acquittal-overturns-important-victory-for-sexual-violence-victims-99948>; Nadia Carine Fornel Poutou and Luci Boalo Hayali "A Belief Shattered: The International Criminal Court's Bemba Acquittal" (25 June 2918) Just Security <https://www.justsecurity.org/58386/belief-shattered-international-criminal-courts-bemba-acquittal/>; Amnesty International "CAR: Acquittal of Bemba a blow to victims" (8 June 2018) <https://www.amnesty.org/en/latest/news/2018/06/car-acquittal-of-bemba-a-blow-to-victims/>.

misconceptions about the nature of conflict-related sexual violence appeared to resurface in the appeal judgment. It is submitted that these underlying assumptions played a key role in Bemba's acquittal for rape.

(i) Standard of Review

The Appeals Chamber was widely criticised for modifying the standard of review for factual errors. The new standard of review represents a "significant and unexplained departure" from precedent.[312] It rejects the previous focus on deference, and gives the Appeals Chamber a much broader discretion to interfere with the findings of the Trial Chamber. The Majority in *Bemba* cited no legal authorities in support of this modification.[313]

This standard of review has particular implications for the prosecution of conflict-related sexual violence. Sexual violence cases tend to require a comprehensive review of the evidence. It is very rare for rape and other sexual assaults to be explicitly ordered, so patterns of sexual violence must often be inferred from the totality of the evidence. [314] It is widely accepted that trial chambers are "best placed to hear, assess and weigh…the evidence presented at trial.[315] This is the rationale behind the "margin of deference"

[312] Office of the Prosecutor "Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo" (13 June 2018) International Criminal Court <https://www.icc-cpi.int/Pages/item.aspx?name=180613-OTP-stat>.

[313] Leila Sadat "Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in *Prosecutor v Jean-Pierre Bemba Gombo*" (12 June 2018) EJIL *Talk!* <https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo/>.

[314] Susana Sácouto "The Impact of the Appeals Chamber Decision in *Bemba*: Impunity for Sexual and Gender-Based Crimes?" (22 June 2018) International Justice Monitor <https://www.ijmonitor.org/2018/06/the-impact-of-the-appeals-chamber-decision-in-bemba-impunity-for-sexual-and-gender-based-crimes/>.

[315] Leila Sadat "Prosecutor v. Jean-Pierre Bemba Gombo" (2019) 113(2) AJIL 353 at 357; see also *The Prosecutor v. Aleksovski (Judgment)* ICTY Appeals Chamber IT-95-14/1-A, 24 March 2000 at [63].

previously accorded the ICC Trial Chamber.[316] Over the course of nearly four years,[317] the Trial Chamber in *Bemba* heard testimony from 77 witnesses and admitted 733 items of documentary evidence.[318] The Appeals Chamber is not properly equipped to conduct such an extensive review for itself.[319] This was made patently clear in *Bemba*, where the Appeals Chamber appeared to misapply its own standard of review, and undertook an extremely selective assessment of the evidence. Without a rigorous and holistic review of all of the evidence, there is a significant risk that future courts will treat acts of sexual violence as isolated offending, and fail to appreciate systematic patterns that might indicate its use as a weapon of war.

(ii) Necessary and Reasonable Measures

The Majority found that the Trial Chamber failed to give due consideration to Bemba's status as a remote commander. He remained in the DRC for the majority of the conflict, making occasional trips to the CAR.[320] Thus, according to the Majority, Bemba was limited in the measures he could take to prevent, repress and investigate crimes committed by his troops in another country. The Majority's deference to Bemba's claims of logistical difficulties has been called into question. In effect, the Majority seemed to imply that a remote commander will be held to a lower standard of responsibility than that of a commander 'on the ground'.[321] This approach is problematic, as international criminal law

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[316] Jeniger Trahan "Bemba Acquittal Rests on Erroneous Application of Appellate Review Standard" (25 June 2018) Opinio Juris < http://opiniojuris.org/2018/06/25/bemba-acquittal-rests-on-erroneous-application-of-appellate-review-standard/>.

[317] *Bemba (Trial Judgment)* at [10]-[16].

[318] At [221].

[319] Fritz Streiff "The Bemba Acquittal: Checks and Balances at the International Criminal Court" (18 July 2018) International Justice Monitor <https://www.ijmonitor.org/2018/07/the-bemba-acquittal-checks-and-balances-at-the-international-criminal-court/>; Nadia Alhadi "Bemba and Its Troubling Implications for Factual Review in International Criminal Cases" (2018) MJIL Online < http://www.mjilonline.org/bemba-and-its-troubling-implications-for-factual-review-in-international-criminal-cases/>.

[320] *Bemba (Trial Judgment)* at [707].

[321] Sadat, above n 314 at 358; Joseph Powderly "Prosecutor v. Jean-Pierre Bemba Gombo: Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment Pursuant to Article 74 of the Statute'" (2018) 57 International Legal Materials 1031 at 1033.

accords the greatest responsibility to those who 'mastermind' atrocities.[322] Such defendants are seldom physically present when atrocities are actually committed, and so responsibility often increases with distance.[323] The Majority's approach also allows commanders to shield themselves from responsibility by physically distancing themselves from the conflict. Furthermore, in light of current advances in communication technology, a commander's influence does not necessarily decrease the further he or she is from the battlefield. Arguably, given the inherent risks of supervising subordinates from afar, remote commanders should be expected to exercise a higher level of due diligence and supervision.[324]

Nevertheless, the Majority was satisfied that the measures Bemba took were enough to discharge his duty under article 28 to prevent and punish crimes committed by the MLC. This conclusion was strongly contested by the Minority, who agreed with the Trial Chamber that there was much more Bemba could have done. Crucially, the Majority did not assess whether Bemba's measures met the "necessary and reasonable" standard for each specific crime.[325]

The Majority failed to appreciate that none of the measures Bemba took were specifically directed towards sexual violence. Neither the Mondonga Inquiry nor the Gbadolite trials nor the Zongo Commission pursued reports of rape. In a speech to MLC troops, Bemba condemned the MLC's "misbehaviour" and "brutalis[ing]" of the civilian population, but never expressly mentioned sexual violence.[326] Indeed, the only measure Bemba took with regard to sexual violence was to refute the allegations in a letter to the president of the International Federation of Human Rights.[327]

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[322] Steer, above n 7, at 18-19.
[323] Kortfält, above n 78.
[324] Sadat, above n 315 at 358.
[325] Powderly, above n 321, at 1034; Susana SáCouto and Patricia Viseur Sellers "The *Bemba* Appeals Judgment: Impunity for Sexual and Gender-Based Crimes?" (2019) 27 William & Mary Bill of Rights Journal 599 at 612-618.
[326] *Bemba (Trial Judgment)* at [594].
[327] At [600], [610]-[611].

Thus, even if Bemba's measures were necessary and reasonable to prevent, punish and investigate acts of murder and pillaging, they were patently insufficient to address the crimes of rape.[328] There is nothing in article 28 to suggest that taking measures for a handful of crimes is enough to absolve a commander of responsibility for all of the crimes alleged. Commanders are under a duty to take *all* necessary and reasonable measure to prevent, repress or investigate crimes committed by subordinates. In *Bemba*, the majority of the crimes proved beyond reasonable doubt were rapes.[329] Given that sexual violence constituted a very significant portion of the offending, Bemba clearly failed to fully discharge his duty as commander to prevent or punish crimes committed by his subordinates.[330] Why, then, did the Majority in *Bemba* so blatantly overlook the crimes of sexual violence? The unsavoury inference is that it did not consider the allegations of rape to be as 'serious' as those of murder or pillaging. At the very least, the Majority failed to address the question of necessary and reasonable measures though a gender-sensitive lens.[331]

Nevertheless, as ICC Prosecutor Fatou Bensouda emphasised in her response to the *Bemba* acquittal, the Majority did not overturn the Trial Chamber's substantive findings with regard to sexual violence:[332]

> The *Bemba* case will always represent an important recognition of the crimes of rape, murder and pillaging suffered by victims in CAR at the hands of *Mouvement de Libération du Congo* troops that were effectively under the authority and control of Mr Bemba who had knowledge of the crimes during the 2002 to 2003 CAR conflict.

The Prosecutor concluded by reaffirming the OTP's commitment to fighting impunity for perpetrators of conflict related sexual violence. The following chapter will explore some possible strategies for closing this impunity gap, combating judicial reluctance to convict

[328] Powderly, above n 321, at 1034,
[329] *Bemba (Trial Judgment)* at [633]-[634].
[330] SáCouto and Sellers, above n 325, at 615.
[331] At 621.
[332] Above n 311.

leaders for sexual violence (particularly under the doctrine of command responsibility) and ensuring meaningful justice for victims of conflict-related sexual violence.

V Next Steps

When it comes to prosecuting conflict-related sexual violence in the international criminal tribunals, progress has undeniably been made. In sharp contrast to the post-World War II tribunals, where sexual violence was largely ignored, crimes of sexual violence have been consistently recognised, articulated and prosecuted in the *ad hoc* tribunals and in the ICC.[333]

Nevertheless, the above cases demonstrate the enduring influence of pervasive misconceptions about the nature of conflict-related sexual violence. The erroneous ideas that sexual violence is less serious, inevitable and incidental to the wider conflict continue to influence judges in the international criminal tribunals. This is particularly true when it comes to linking sexual violence to high-level military and political leaders. This chapter will suggest methods of combating these misconceptions at each stage of the trial process, with particular reference to the doctrine of command responsibility. It is only through addressing the background assumptions that underlie the law of wartime sexual violence that meaningful, lasting justice can be ensured for victims going forward.

A Knowledge

Perhaps the biggest challenge in command responsibility prosecutions is proving that the defendant knew, or had reason to know, that his or her subordinates were committing or about to commit crimes of sexual violence.[334] As cases such as *Kajelijeli* demonstrate, the international criminal tribunals have been reluctant to infer knowledge in the absence of

[333] Askin, above n 10.
[334] Anne-Marie de Brouwer "The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes" (2015) 48 Cornell Int'l L. J. 649 at 663.

specific orders, or evidence that the commander in question personally witnessed the crimes.[335]

Given that rape is seldom officially sanctioned in times of conflict, it is crucial that prosecutors adduce evidence from which knowledge can be inferred. Where appropriate, connections should be drawn between wider patterns of sexual violence in a conflict, and the defendant's knowledge thereof. Doing so makes it harder for commanders to deny that they had reason to know of possible sexual offending committed by their subordinates. In her *Policy Paper on Sexual and Gender-Based Crimes*, the ICC Prosecutor has highlighted the importance of presenting "other types of evidence, such as witness testimony and contemporaneous public reports on the crimes, to establish ... intent and knowledge".[336] Notably, in the *Karemera* and *Bemba* cases, evidence of media coverage detailing sexual violence was used to successfully establish *mens rea*.[337]

In general, regardless of the mode of liability, prosecutors should adduce evidence that situates specific acts of sexual violence in the wider context of the conflict in question. Such evidence makes it harder to characterise incidents of sexual violence as opportunistic attacks by rogue soldiers that are inherently disconnected from the wider conflict.

B Effective Control

Many command responsibility prosecutions for sexual violence also fall at the hurdle of effective control.[338] When it comes to prosecuting commanders for sexual violence, a holistic approach to identifying chains of command can (and should) be taken. In the absence of direct evidence of a superior subordinate relationship, analysis of local patterns

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[335] SáCouto and Cleary, above n 88 at 355.

[336] The Office of the Prosecutor *Policy Paper on Sexual and Gender-Based Crimes,* above n 65 at [82].

[337] *Karemera (Trial Judgment),* above 226*; Bemba (Trial Judgment)*, above n 1, at [709]. See also The Office of the Prosecutor *Best Practice Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post Conflict Rwanda* (International Criminal Tribunal for Rwanda, 30 January 2014) at [104]-[104].

[338] For example *Musema*, above n 230; *Delalić*, above n 63; *The Prosecutor v Blaškić (Trial Judgment)* ICTY Trial Chamber IT-95-14-T, 3 March 2000.

of sexual violence can shed light on the question of effective control. "If prosecutors can show that rape occurred only where and when it was strategically beneficial, and did not occur when it was not", it is easier to infer a superior/subordinate relationship with regard to sexual violence.[339]

C Necessary and Reasonable Measures

The much-criticised appeal decision in *Bemba* highlights the need to focus explicitly on crimes of sexual violence when assessing the question of necessary and reasonable measures. The Courts must recognise that commanders who do not take measures specifically directed towards sexual offending cannot have discharged their duty to prevent or punish crimes committed by their subordinates. Failure to do so simply reinforces the flawed notion that sexual violence is inevitable and therefore not really the commander's fault.[340] It also erodes the deterrent function of the command responsibility doctrine. If commanders who fail to take measures regarding sexual violence are not held responsible, the incentive on other commanders to take similar measures is severely diminished. In short, decisions such as *Bemba* send the unsavoury message that commanders who passively condone sexual offending among their subordinates can effectively escape liability.

D Charging

In its policy paper, the OTP has also committed to "consider[ing] the full range of modes of liability" and entering alternative charges where appropriate.[341] This charging strategy provides a valuable safety net. An alternative charge of command responsibility, for example, might capture offending that common purpose liability under article 25 does not,

[339] Wood, above n 41, at 418.
[340] McKinnon, above n 6, at 105.
[341] Above n 65, at [83].

and *vice versa*.[342] In the *Bemba* and *Ntaganda* cases, the defendants were charged under both modes of liability.[343]

However, the practice of the ICC Pre-Trial Chamber is to limit cases to one mode of liability before they go to trial. Charges were only confirmed under article 28 in *Bemba*, and under article 25 in *Ntaganda.* This practice is problematic as it makes choosing a mode of liability a gamble for prosecutors.[344] This was especially true in *Bemba*, where the mode of liability on which the Prosecution relied was subsequently misinterpreted by a Majority of the Appeals Chamber. [345]

Furthermore, in light of the truth-telling function of international criminal law, it is important that the mode of liability accurately reflects the nature of the offending. [346] Truth-telling is particularly important in sexual violence prosecutions, where misconceptions persist as to the role played by high-level leaders in enabling wartime sexual offending. Confirming charges under both article 25 and article 28 would allow the Court to fully evaluate the offending in relation to both modes of liability, to see which best captures the defendant's conduct. Where the requirements of both article 25 and article 28 are met, concerns about cumulative charging can be allayed by entering a conviction under one mode of liability and treating the other as an aggravating factor in sentencing.[347]

E Victim Participation and Reparations

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[342] Kortfält, above n 78, at 553, 578.

[343] *The Prosecutor v Bemba* (*Amended Document Containing the Charges*) ICC Office of the Prosecutor ICC-01/05-01/08, 30 March 2009; *The Prosecutor v Ntaganda (Document Containing the Charges)* ICC Office of the Prosecutor ICC-01/04-02/06, 10 January 2014.

[344] Mc Dermott, above n 304, at 360.

[345] *Bemba (Dissenting Opinion)* at [45], [79]-[80]. See also Sadat, above n 313.

[346] Schwartz; Nesserian, above n 178.

[347] This was the practice of the ICTY (Goy, Jarvis and Pinzauti, above n 132, at 242).

To ensure meaningful prosecutions of conflict-related sexual violence, it is also necessary to take a victim-centric approach.[348] Without the participation of victims, who often give evidence at great personal cost, international sexual violence prosecutions would not be possible.[349] Hearing testimony from a wide range of victims increases the visibility of survivor's lived experiences.[350] When courts are alive to the realities of conflict-related sexual violence, they are less likely conceptualise it as a less serious crime. As one witness poignantly testified in the *Bemba* trial: "With what they did to me, I knew I was dead. I could no longer feel like a human being."[351]

Thus, in future sexual violence prosecutions, it is important that the ICC embraces the full range of victim-participation schemes available. These include the ability for victims to act as participants in the proceedings, rather than just as witnesses,[352] and to have a legal representative present their views and concerns to the Court where appropriate.[353]

In the *Bemba* case 5,229 victims were authorised to participate.[354] However, because Bemba was ultimately acquitted, the ICC was not mandated to make a reparations order against him.[355] In response to Bemba's acquittal, the Trust Fund for Victims accelerated the launch of its assistance programme to victims in the CAR.[356] However, Trust Fund

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[348] In its *Policy Paper on Sexual and Gender-Based Crimes,* the OTP affirmed its commitment to taking a victim responsive approach when prosecuting sexual violence (above n 65, at [22]).

[349] Jonneke Koomen "'Without These Women, the Tribunal Cannot Do Anything': The Politics of Witness Testimony on Sexual Violence at the International Criminal Tribunal for Rwanda" (2013) 38 SIGNS 253.

[350] Susana SáCouto "Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project" (2012) 18 Michican Journal of Gender and Law 297 at 300-304.

[351] *The Prosecutor v Bemba (Transcript)* ICC Pre-Trial Chamber III ICC-01/05-01/08-T-51-Red2-ENG CT2 WT 21-01-2011 1/53 SZ T, 21 January 2011 at p 32.

[352] Rome Statute of the International Criminal Court , article 68(3).

[353] Rules of Procedure and Evidence, International Criminal Court 2002 ICC-ASP/1/ and Corr.1, part II.A, Rule 90.

[354] Wairagala Wakabi "Bemba's Acquittal Raises Concerns on Reparations to Victims in the Central African Republic" (18 July 2018) International Justice Monitor <https://www.ijmonitor.org/2018/07/bembas-acquittal-raises-concerns-on-reparations-to-victims-in-the-central-african-republic/>.

[355] Rome Statute, Article 75(2).

[356] Trust Fund for Victims "Following Mr Bemba's acquittal, Trust Fund for Victims at the ICC decides to accelerate launch of assistance programme in Central African Republic" (press release, 13 June 2018).

compensation is discretionary and resource-dependent, so it is not a given in every case.[357] The Victims' Legal Representative in *Bemba* advocated for the dissociation of criminal responsibility and reparations in the judicial body of the ICC, but this submission was inevitably rejected.[358] Nevertheless, reform of the ICC reparations system is certainly 'food for thought', particularly in the case of sexual violence. Where rape and similar crimes are found to have been committed, but cannot be linked to a high-level defendant, victims should still be guaranteed compensation. Otherwise, judicial acknowledgment of their victimhood rings hollow.

F The Future of International Sexual Violence Prosecutions

Ultimately, there is hope for the future of international sexual violence prosecutions. In the *Bemba* trial judgement, there were several indications that the influence of enduring misconceptions about sexual violence is beginning to wane. In deciding whether acts of rape formed part of a widespread and systematic attack against civilians, the Chamber categorically rejected the argument that such crimes were "the result of an uncoordinated and spontaneous decision of the perpetrators, acting in isolation".[359] At sentencing, the Chamber endorsed expert witness testimony "that MLC soldiers used sexual violence as a weapon of war".[360]

This shift in thinking is also evident in the recent case of *Ntaganda*, were the defendant was successfully prosecuted for crimes of sexual violence under article 25(3)(a). That case

[357] Me Douzima, Evelyne Ombeni and Lydia El Halw "Victims' participation in reparations proceedings in the Bemba case" in International Federation for Human Rights *Victims at the Centre of Justice – From 1998-2018: Reflections on the Promises and the Reality of Victim Participation at the ICC* (Report, FIDH, 2018) 75 at 78-79.
[358] *The Prosecutor v Bemba (Final decision on the reparations proceedings)* ICC Trial Chamber III ICC-01/05-01/08 , 3 August 2018 at [4], [11].
[359] *Bemba (Trial Judgment)* at [685].
[360] *The Prosecutor v Bemba (Decision on Sentence pursuant to Article 76 of the Statute)* ICC Trial Chamber II ICC-01/05-01/08-3399, 21 June 2016 at [44].

involved sexual offending committed by members of an armed group against members of that same armed group. In its decision, the Trial Chamber emphasised: [361]

> the fact that the military leaders did not create the necessary conditions to ensure a safe environment for the female members of the UPC/FPLC, in which they would not be sexually abused by other members of the group.

Thus, there appears to be increasing recognition of the role military leaders play in creating a culture of tolerance that enables sexual offending.[362] The next step in the fight against impunity for conflict-related sexual violence is ensuring that such gender-sensitive judgments are upheld on appeal, and that victims receive appropriate compensation.

VI Conclusion

Today, women and girls especially continue to face unspeakable forms of sexual violence in times of conflict. Despite widespread efforts to condemn and prosecute these crimes, including in the *ad hoc* criminal tribunals and the ICC, there remains an undeniable impunity gap for conflict-related sexual violence. In particular, the international criminal tribunals have demonstrated a distinct reluctance to hold high-level defendants responsible for sexual violence, as opposed to other types of violence. Using feminist legal theory as its methodology, this dissertation has argued that the tribunals' reluctance can be attributed to the influence of enduring misconceptions about the nature of conflict-related sexual violence. Sexual violence has been consistently viewed as a less serious form of violence, as an inevitable by-product of conflict and as a 'private' crime that is inherently disconnected from the wider conflict.

This dissertation has focused on the application of the command responsibility doctrine to sexual violence. Command responsibility has the potential to be an invaluable tool for

[361] *The Prosecutor v Bosco Ntaganda (Trial Judgment)* ICC Trial Chamber IV ICC-01/04-02/06, 8 July 2019 at [792].
[362] Brigid Inder, Executive Director Women's Initiatives for Gender Justice "How the Ntaganda trial advances thinking on sexual violence" (press release, 11 July 2019).

prosecuting wartime sexual violence. The doctrine criminalises failure to act, and thus catches the all-too-common situation where leaders passively condone sexual violence, creating a culture of tolerance that allows it to continue. Nevertheless, command responsibility prosecutions in the ICTR and the ICC have been blighted by the pervasive influence of these enduring misconceptions, resulting in a string of acquittals for sexual violence.

Since the international criminal tribunals are almost exclusively concerned with prosecuting high-level leaders, it is imperative that convictions are secured, particularly for sexual violence. Failure to do so severely erodes the deterrent function of international criminal prosecutions, and thus helps perpetuate the vicious cycle of violence against women and girls in conflict. The final chapter of this dissertation has suggested various ways to combat enduring misconceptions about conflict-related sexual violence, with particular reference to the doctrine of command responsibility. These measures include adducing evidence that places sexual violence in the context of the wider conflict, analysing local patterns of sexual offending to identify chains of command, emphasising the need for "necessary and reasonable measures" specifically related to sexual violence and enhancing victim participation in sexual violence of proceedings. Ultimately, convictions alone are insufficient to close the impunity gap for conflict-related sexual violence. Few lessons can be offered for the future if judgments continue to perpetuate erroneous ideas about wartime sexual offending. Unless prosecutors and judges are alive to the realities of conflict-related sexual violence, meaningful and lasting justice for victims cannot be achieved.

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