

Elements of Superior Responsibility for Sexual Violence by Subordinates

G U R G E N P E T R O S S I A N *

ABSTRACT

In certain circumstances, rape and other forms of sexual violence have already been recognised as international crimes (i.e. war crimes, crimes against humanity and genocide). International criminal tribunals usually prosecute those most responsible for the crimes, who are often military commanders or civilian superiors, and not low-level perpetrators. Once it has been established that a sexual crime amounting to an international crime has been committed, the accused can be held accountable for sexual violence perpetrated by his/her subordinates under the doctrine of superior responsibility, providing that certain requirements are met. This paper recalls the elements of crimes of sexual violence developed under international law and the elements of superior responsibility, which serves to draw attention to certain issues pertaining to superior responsibility for sexual violence committed by subordinates.

Keywords: sexual violence; victims; rape; command responsibility; superior responsibility, International Criminal Court, Jean Pierre Bemba

* Dr. Guren Petrossian, LL.M. is a research associate at the International Criminal Law Research Unit (ICLU) at the University of Erlangen-Nürnberg. He holds a Master degree in Law from Heidelberg University and a Bachelor degree in Law from Yerevan State University. He completed his Doctorate in law at the University of Erlangen-Nürnberg in 2018.

Men's faults do seldom to themselves appear.
Their own transgressions partially they smother
This guilt would seem death-worthy in thy brother
Oh, how are they wrapped in with infamies
That from their own misdeeds askance their eyes.

-Rape of Lucretia, 631-637,
Shakespeare 1594

I. INTRODUCTION

Almost every society in the world which has accepted the minimal standards of human rights includes in its penal code the protection of sexual self-determination, which is part of individual freedom, individual integrity, sexual development, honour and dignity. This guiding principle is one of the most important chapters of human rights that are violated from time to time. The most terrifying sex crimes are usually committed during an international or internal armed conflict or during political instability, when the government and appropriate bodies are not able to guarantee the minimal protection of basic rights. From the perspective of the perpetrator, the main purpose of sexual violence is to attain satisfaction by using war tactics, including aggression, force and violence with the aim of humiliating or dominating and subduing the victim.¹ The term sexual violence includes any act of a sexual nature perpetrated by force or by threat of force or coercion.² The sexual violence is a 'weapon' of war,³ and tool of terror and torture during armed conflict based on political and strategic motives in order to repress and to punish

¹ Marita Kieler, *Tatbestandsprobleme der Sexuellen Nötigung, Vergewaltigung sowie des Sexuellen Mißbrauchs Widerstandsunfähiger Personen. Tatbestandsprobleme der §§ 177 bis 179 StGB in der Fassung des 6. Strafrechtsreformgesetzes* (Birkenau, Berlin: Tenea Verlag, 2003), at 22.

² Cp. *Prosecutor v Kunarac et al*, IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment, (22 February 2001) at para 442 (International Criminal Tribunal for the Former Yugoslavia) [*Kunarac* (Trial Chamber Judgment)]; Juliane Kippenberg "Soldiers who Rape, Commanders who Condone. Sexual Violence and Military Reform in the Democratic Republic of Congo" (July 2009) at 12, online (pdf): *Human Rights Watch* <www.hrw.org/sites/default/files/reports/drc0709web.pdf> [perma.cc/8HN4-WHPN].

³ Cp. UNSC, *Resolution on Women and Peace and Security, Conflict-Related Sexual Violence* UN Doc S/RES/1820 (2008), 19 June 2008.

the opponents.⁴ On the other hand, complacency or tolerance of sexual violence as a method of warfare by superiors who either order such acts or allow them to occur without intervention risks the widespread perpetration of such acts. In order to punish the military and civil leaders for their failure to prevent and punish the atrocities conducted by their subordinates, the doctrine of superior responsibility was codified in the Statutes of International Tribunals. Pursuant to the doctrine, the superior is not directly responsible for the crimes committed by his/her subordinates, but for the omission and failure to properly discharge his/her duty.⁵ However, in almost every case brought before the International Tribunals and International Criminal Court (ICC) the prosecution of the superiors for the sexual violence of subordinates went unsuccessful.⁶ The recent appellate acquittal (2018) of Jean Pierre Bemba⁷ from the Democratic Republic of Congo (DRC) at the ICC stands as clear example that the doctrine of the superior responsibility is still under development.

This paper raises two issues 1) the mechanism of punishment of the superiors for their failure to act in order to stop the sexual violence committed by their subordinates and 2) the different legal definitions and forms of sexual violence which might be committed by the subordinates. The definitions of various sexual acts went a long way to be codified internationally. The meaning of sexual violence at the beginning of the work of the courts was restricted to the definition of rape. However, after the observation and examination of the cases, international society demanded

⁴ 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 *Can YB Intl L* 93.

⁵ Article 6(3) ICTR Statute, Article 7(3) ICTY Statute, Article 28 ICC Statute.

⁶ See e.g. *Prosecutor v Katanga*, ICC-01/04-01/07, Trial Chamber: Judgment pursuant to article 74 of the Statute (7 March 2014) at para. 1648.

⁷ Jean-Pierre Bemba Gombo is Congolese politician; he was vice-president of the DRC until 2006. In 2002 the president of Central African Republic (CAR) invited his troops to support him in the fight against coup attempt. In the course of the conflict the Congolese soldiers have committed various crimes against the civilians of CAR, mostly gender-based crimes. *Prosecutor v Bemba*, ICC-01/05-01/08 A, Appeals Chamber Judgment (8 June 2018) (International Criminal Court: Situation in the Central African Republic. See "Jean-Pierre Bemba's war crimes conviction overturned", *The Guardian* (8 June 2018), online: <www.theguardian.com/global-development/2018/jun/08/former-congo-leader-jean-pierre-bemba-wins-war-crimes-appeal-international-criminal-court> [perma.cc/3SZS-K7Q7].

that other types of sexual violence be considered under international criminal law. Accordingly, it forms part of convictions for genocide, crimes against humanity and war crimes. This creates a broad space for superiors to act immediately and properly, in order to prevent or punish any form of illegal sexual act of their subordinates.

II. HISTORICAL OVERVIEW

Historically both concepts of sexual violence and of superior responsibility in the context of international law have been developed separately and independently in the same direction, in order to be codified in the Rome Statute. For a better illustration of the historical development of both concepts, it is possible to distinguish them in three time periods; up to post-WWI, post-WWII and in the course of the establishment of United Nations ad hoc Tribunals (International Criminal Tribunal for former Yugoslavia ICTY, International Criminal Tribunal for Rwanda, ICTR) and the Rome Statute.

The first example of protection from sexual violence during an armed conflict was found during the American Civil War in 1863 with the Instructions for the Army of the United States Federal Government in the Field, known as the Lieber Code or Instructions.⁸ This codification specifically made rape a crime in violation of the laws of war that ought to be punished by death (Articles 44 and 47 Lieber Code). A reference to sexual violence was made almost 40 years later in the Hague Convention (IV) of 1907 through Article 46 by mentioning the importance of family and marriage and their respective roles.⁹ The article implies that the contracting parties should declare their willingness to respect the rights of family and marriage during times of war. Accordingly, any sexual assault against women would violate the provision considered by the Hague

⁸ Patricia Sellers, 'The Context of Sexual Violence', in Gabrielle Kirk MacDonald & Olivia Swaak-Goldman, eds, *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* vol 1: Commentary (Leiden: Brill, 2000) at 273 [Sellers, "Context"]; Stuart Casey-Maslen, *The War Report: Armed Conflict in 2013* (Oxford: Oxford University Press, 2014), at 279.

⁹ Patricia Sellers, "The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation" (2007) at 7, online (pdf): www.peacewomen.org/sites/default/files/paperprosecution_sexualviolence_0.pdf [perma.cc/JA8T-CZW9]; Sara Sharratt, *Gender, Shame and Sexual Violence: The Voices of Witnesses and Court Members at War Crimes Tribunals* (London: Routledge, 2016) at 15.

Convention. This may be considered as the first step in the criminalisation of sexual violence on an international level.

On the other hand, in comparison to the codification of individual responsibility under international law, superior responsibility was not only well known under many national military law codes, but also under international customary and humanitarian law. The Lieber Code from 1863 authorised the shooting of subordinates by military commanders if they did not obey and order the halting of the commission of the crime.¹⁰ The doctrine of superior responsibility was one of the basic norms of the Hague Conventions,¹¹ and was originally used in the Leipzig,¹² and Istanbul Trials after World War I.¹³

It is noteworthy that sexual violence had occurred during the entire course of the Second World War in both the European theatre of war, and in the Pacific, but there was no direct mention of sexual violence either in the Nuremberg Principles or in the London Charter.¹⁴ On the national

¹⁰ Robert Heinsch "Lieber Code" in Alexander Mikaberidze, ed, *Atrocities, Massacres and War Crimes: An Encyclopedia* 1st ed (California: ABC-CLIO, 2013). "A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior", Article 44 Lieber Code and "Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed" Article 71 Lieber Code.

¹¹ Article 1(1) Hague Convention (IV) 1907 & Article 19 Hague Convention (X) 1907. See narrow in Daryl A Mundis, "Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute" in Gideon Boas & William Schabas, eds, *International Criminal Law Developments in the Case Law of the ICTY* (Leiden: Martinus Nijhoff Publishers, 2003) at 241; Hikmahanto Juwana, "The Concept of Superior Responsibility under International Law as Applied in Indonesia" in David K Linnan, ed, *Enemy Combatants, Terrorism, and Armed Conflict Law: A Guide to the Issues* (Westport, Connecticut: Praeger Security International, 2008) at 242.

¹² Simone Grün, *Command Responsibility* (Münster: LIT Verlag, 2017) at 2; See also "Judgment in the Case of Emil Müller, 30 May 1921" in Gideon Boas, James L Bischoff & Natalie L Reid, *Forms of Responsibility in International Criminal Law* (Cambridge: Cambridge University Press, 2011) at 142.

¹³ Gurgun Petrossian, *Staatenverantwortlichkeit für Völkermord* (Berlin: Duncker und Humblot, 2018), at 69-87; Vahagn N Dadrian & Taner Akçam, *Judgment at Istanbul: The Armenian Genocide Trials* (New York: Berghahn Books, 2011) at 293.

¹⁴ Robert J Lilly, *Taken by Force. Rape and American GIs in Europe during World War II* (London: Palgrave, 2007) at 19.

level with Article II 1(c) of the Control Council Law No. 10 of the Control Council, the scope of the definition of crimes against humanity was enlarged by adding the term ‘rape’ to other forms of offences.¹⁵ The same picture of impunity for sexual violence was also to be found in the Far East, but with some additional features. During the Second World War, the Japanese Empire had created “comfort women” sex camps for the sexual pleasure of their soldiers.¹⁶ The camps consisted of women from the occupied local regions (e.g. from China, Korea, the Philippines), who were systematically raped by soldiers of the Japanese Empire Army.¹⁷ The number of forced prostitutes, according to Japanese and Chinese sources, was estimated at between 80,000 and 100,000 victims.¹⁸ In comparison to the Nuremberg Trials, the International Military Tribunal for the Far East has adjudicated on only one case of sexual violence pointing out that the defendant permitted the troops under his command to commit the rape-related offences. This was deemed a breach of international customs of war and thus a war crime.¹⁹ On a national level, the Chinese / Nanking War Crimes Tribunal has confirmed rape as a war crime.²⁰

The doctrine of superior responsibility was however not included in the statute of the International Military Tribunal or the statute of the International Military Tribunal for the Far East,²¹ although it was widely

¹⁵ See Article II(c) of the Control Council Law No 10, online: <avalon.law.yale.edu/imt/imt10.asp> [perma.cc/5G7V-8HK9].

¹⁶ Juliane Kippenberg, *The War within the War: Sexual Violence against Women and Girls in Eastern Congo* (New York: Human Rights Watch, 2002) at 87.

¹⁷ S Hong, "Internationale Kooperative Zusammenarbeit mit Nordkorea zum ‘Trostfrauen’-Problem”, in Barbara Drinck, ed, *Forced Prostitution in Times of War and Peace: Sexual Violence against Women and Girls* (Bielefeld: Kleine Verlag GmbH, 2008) at 217; known also as the ‘Rape of Nanking’, where the International Military Tribunal for Far East found approximately 20.000 cases of rape; See Susan Brownmiller, *Against our Will. Men, Women and Rape* (London: Penguin, 1975) at 57-62.

¹⁸ Yuki Tanaka, *Japan's Comfort Women: Sexual Slavery and Prostitution during World War II and the US Occupation* (London: Routledge, 2003) at 32; Sarah C Soh, *The Comfort Women. Sexual Violence and Postcolonial Memory in Korea and Japan* (Chicago: University of Chicago Press, 2009) at 49.

¹⁹ The United Nations War Crimes Commission, *Law Reports of Trials of War Crimes*, London, 1948, Case No 21, trial of General Tomoyuki Yamashita at 35.

²⁰ Trial of Takashi Sakai, *Chinese War Crimes Military Tribunal of the Ministry of National Defense*, Nanking, 29 August 1946, Case No 83 at 7, online (pdf): <www.worldcourts.com/imt/eng/decisions/1946.08.29_China_v_Sakai.pdf> [perma.cc/NCN6-7D8U].

²¹ Juwana, *supra* note 11 at 242.

practised at a national level. In Nuremberg, under Article 2(2) Control Council Law no. 10, the Tribunal found that the German medical top staff was responsible for inhuman experiments on their subordinates.²² The Tribunal in Nuremberg stated in the High Command Trial that under the basic principles of command responsibility,²³ an officer ignoring the criminal behaviour and criminal conduct of his/her subordinates violates a moral obligation under international law.²⁴

After the Second World War, another indirect reference to sexual violence could be found in Articles 3.1 and 27 of the Fourth Geneva Convention 1949. These articles mostly point out that persons have to be treated humanely under all circumstances and be protected from all acts of violence.²⁵ Apart from these definitions, there is also the prohibition of any attack against women's honour, such as rape and forced prostitution (Article 27 of the Fourth Geneva Convention 1949).

For several years, sexual violence went unnoticed at the international level. The admittance of international treaties such as the Additional Protocols to the Geneva Conventions 1977, Convention on the

²² Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2008) at 238; William H Parks, "Command Responsibility for War Crimes" (1973) 62 *Mil L Rev* 1 at 15.

²³ *Prosecutor v Zlatko Aleksovski*, IT-95-14/1A, Judgement on Sentence Appeal (24 March 2000) at para 76 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber): The Appeals Chamber of Aleksovski stated the definition of the commander, noting the following: "Article 7(3) provides the legal criteria for command responsibility, thus giving the word 'commander' a juridical meaning, in that the provision becomes applicable only where a superior with the required mental element failed to exercise his powers to prevent subordinates from committing offences or to punish them afterwards. This necessarily implies that a superior must have such powers prior to his failure to exercise them. If the facts of a case meet the criteria for the authority of a superior as laid down in Article 7(3), the legal finding would be that an accused is a superior within the meaning of that provision". See also Bing B Jia, "The Doctrine of Command Responsibility Revisited" (2004) 3:1 *Chinese J Intl L* 1 at 5.

²⁴ *United States v Wilhelm von Leeb et al*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law no 10, vol XI (US Govt Printing Office, Washington, DC, 1950), at 510, online (pdf): <www.worldcourts.com/imt/eng/decisions/1948.10.28_United_States_v_Leeb.pdf> [perma.cc/6MDZ-85SX].

²⁵ See Patricia Sellers & Indira Rosenthal, "Rape and Other Sexual Violence" in Andrew Clapham, Paola Gaeta & Marco Sassòli, eds, *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015) at 362; Maria Eriksson, *Defining Rape. Emerging Obligations for States under International Law?* (Boston: Brill, 2011) at 348.

Elimination of All Forms of Discrimination against Women 1979,²⁶ and the Convention on the Rights of Children in 1989,²⁷ confirmed the role of protection from attacks against honour and dignity. These had paved the way for the adaptation of the Vienna Declaration and Program of Action in 1993 during the World Conference on Human Rights,²⁸ in which it was stated that systematic rape, sexual slavery and forced pregnancy are violations of fundamental principles of international human rights and humanitarian law. With this declaration, the States were encouraged to eliminate all forms of crimes based on sexual violence.

Political destabilisation in the 1990's led to bloody insurrections in different parts of the world. The conflicts in the former Yugoslavia and Rwanda could not be solved without international involvement. Therefore, international criminal tribunals were established in order to prosecute the perpetrators in the former Yugoslavia and Rwanda. The statutes of both tribunals included sexual violence, defining it under the crimes against humanity, but alluding to only one definition of sexual violence, 'rape' pursuant to Article 3(g) ICTR Statute, Article 5(g) ICTY Statute.²⁹

With support of civil society organizations,³⁰ the prosecutors of both tribunals have raised the question of other forms of sexual violence before

²⁶ *Convention on the Elimination of All Forms of Discrimination against Women*, UNGA OR Res 34/180, (18 December 1979).

²⁷ *Convention on the Rights of the Child*, UNGA OR Res 44/25 (20 November 1989).

²⁸ Christopher K Hall & Carsten Stahn, "Article 7: Crimes Against Humanity" in Otto Triffterer & Kai Ambos, eds, *Rome Statute of the International Criminal Court: A Commentary*, 3rd ed (Munich: CH Beck, 2016) at 207; see "Vienna Declaration and Programme of Action: Adopted by the World Conference on Human Rights in Vienna" (25 June 1993), online (pdf): <www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf> [perma.cc/ADS8-W8VC].

²⁹ See Article 3(g) ICTR Statute, online (pdf): <legal.un.org/avl/pdf/ha/ictr_EF.pdf> [perma.cc/L8HF-D8HV]; and Article 5(g) ICTY Statute online (pdf): <www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> [perma.cc/Z3D9-8YNH].

³⁰ See the role of civil society organizations in addressing the issue of sexual violence in Julie Freccero et al, "Responding to Sexual Violence: Community Approaches", (May 2011), at 13, online (pdf): *Human Rights Center: University of California Berkeley* <www.law.berkeley.edu/wp-content/uploads/2015/04/Responding-to-Sexual-Violence-Community-Approaches-SV-Working-Paper.pdf> [perma.cc/YWP3-GWYU]; Maria Jarvis & Najwa Nabti, "Policies and Institutional Strategies for Successful Sexual Violence Prosecutions" in Serge Brammertz & Michelle Jarvis, eds, *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford: Oxford University Press, 2016) at 110.

the tribunals,³¹ which also led to significant judgments and enlargements of the definition of sexual violence.³² The result was to include, and attempt to criminalise rape, forced prostitution and other sexual abuses in the ILC Draft Code with Article 18(j),³³ defining it under crimes against humanity.³⁴ The next step was to draft the Rome Statute for the International Criminal Court which was based on practice of ad hoc Tribunals,³⁵ and on precedent from both the Nuremberg and Tokyo Trials. The criminalisation of forms of sexual violence under the Rome Statute involves such offences as rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity as a crime against humanity under Article 7(g) ICC Statute and war crime Article 8(2)(b)xxii, (e)vi ICC Statute.³⁶

III. PROSECUTING THE SUPERIORS

The statistics and reports of various Human Rights NGOs show a high number of sexual crimes committed during armed conflicts.³⁷ On the other hand, the individual interviews with soldier-perpetrators in the Democratic Republic of the Congo (DRC), for example, show their own subjective understanding on committing rape, whereby the ‘hardworking soldier’

³¹ Amrita Kapur, “Complementarity as a Catalyst for Gender Justice” in Fionnuala Aoláin et al, eds, *The Oxford Handbook of Gender and Conflict* (Oxford: Oxford University Press, 2018) at 237.

³² See e.g. *Prosecutor v Furundzija*, IT-95-17/1-T, Trial Chamber Judgment (10 December 1998) (International Criminal Tribunal for the former Yugoslavia) [*Furundzija*]; *Kunarac* (Trial Chamber Judgment), *supra* note 2.

³³ “Report of the Commission to the General Assembly on the work of its forty-eighth session” (UN Doc A/51/10) in *Yearbook of the International Law Commission 1996*, vol 2, part 2 (New York: UN, 1996) at 47 (UNDOC. A/CN.4/SER.A/1996/ADD.1).

³⁴ Cherif M Bassiouni, *Introduction to International Criminal Law* (Leiden: Martinus Nijhoff, 2013) at 158.

³⁵ It is important to note that during the drafting process some important judgments on sexual violence were still pending.

³⁶ See Article 7(g) and Article 8(2)(b)xxii, (e)vi ICC Statute online (pdf): <www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf> [perma.cc/V5LU-DQ4T].

³⁷ See e.g. Tia Palermo, Amber Peterman, *Undercounting, overcounting and the longevity of flawed estimates: statistics on sexual violence in conflict* in Bulletin of the World Health Organization 2011, online: <www.who.int/bulletin/volumes/89/12/11-089888/en/> [perma.cc/7Q4M-LV3P].

deserves and needs sex, therefore the rapes are committed,³⁸ and are furthermore tolerated by the superiors. However, at the same time, the superiors are responsible for the behaviour of their subordinates. They are accordingly obligated to control and discipline their soldiers in accordance with the rules of their command structure. In some matters, the superiors themselves authorise the commission of sexual violence or by their presence encourage their subordinates to commit such offences.³⁹ Examining the judgments of the ad hoc Tribunals and the ICC, it is easy to determine that it was difficult to establish the superior responsibility for sexual violence and, in many cases, it resulted in acquittals.⁴⁰

³⁸ See Jelke Boesten, *Sexual Violence during War and Peace: Gender, Power, and Post-conflict Justice in Peru* (New York: Palgrave, 2014) at 27.

³⁹ See *Prosecutor v Akayesu*, ICTR-96-4-T, Trial Chamber Judgment (2 September 1998) at paras 12 (a), 12 (b) (International Criminal Tribunal for Rwanda) [*Akayesu*]; *Prosecutor v Gacumbitsi*, ICTY-2001-64-T, Trial Chamber Judgment (17 June 2004) at para 282 (International Criminal Tribunal for Rwanda) [*Gacumbitsi*].

⁴⁰ *Prosecutor v Delić*, IT-04-83-T, Trial Chamber Judgment (15 September 2008) at paras 556-557 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia): the Trial Chamber found that the accused failed to take the necessary and reasonable measures to prevent and punish sexual violence as cruel treatment committed by his subordinates; however he was acquitted, because the evidence showed the cruel treatment occurred in a different facility, not as alleged in the Indictment; *Prosecutor v Gotovina et al*, IT-06-90-T, Trial Chamber Judgment, (15 April 2011) at para 1128 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia): the Trial Chamber could not prove the identity of the perpetrators and their belonging to the HV or Special Police. The Appeals Chamber acquitted all of the accused on the basis that the Trial Chamber erred in finding that there was a JCE and they were not liable under any other mode of liability; see *Prosecutor v Gotovina et al*, IT-06-90-T, Appeals Chamber Judgment (16 November 2012) at paras 157-158 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia); ICTY, *Prosecutor v Hadžihasanović & Kubura*, IT-01-47, Trial Chamber Judgment (15 March 2006) at para 1393 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia): the Trial Chamber acquitted the accused of sexual violence crimes, concluding that, while dishonoring the victim, it was not sufficiently serious to constitute cruel treatment; *Prosecutor v Šainović et al*, IT-05-87, Trial Chamber Judgment (26 February 2009) at para 1214 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia): Trial Chamber acquitted Lazarević and

It is more than obvious that the main objectives of the International Tribunals were the prosecutions of high-ranking perpetrators in order to create political pressure and open the path for the prosecution of lower ranking criminals. The high-level defendants are predominantly the 'strategic developers' of the crimes committed and are far removed from the scene of the crimes, which makes it more difficult to prosecute. Generally, the modes of liability in such cases are indirect co-perpetration, ordering, soliciting, plus aiding and abetting. If none of them is established for the principal crime, the doctrine of superior responsibility may be taken into account. Hence, superior responsibility is an effective means to ascertain the liability of persons who hold high rank in organisational structures (i.e. those persons that are of particular interest to international tribunals).⁴¹

In order to establish the superior liability pursuant to international criminal jurisprudence, the hierarchical subordination of the accused in the system should firstly be proven. Furthermore, it has to be clarified whether it was the duty of the accused to prevent,⁴² to repress,⁴³ and to submit,⁴⁴ the matter. At the same time, the causation between the omission of the superior's duty and the criminal conduct of the subordinator should be established. Finally, it has to be proven that the superior was obviously aware of the planned or committed criminal conduct of his/her subordinates.⁴⁵

Ojdanić because of lack of knowledge; *Prosecutor v Mucić et al*, IT-96-21-T, Trial Chamber Judgment (16 November 1998) at para 1285 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia) [*Mucić* (Trial Chamber Judgment)]; *Prosecutor v Bemba*, ICC-01/05-01/08 A, Appeals Chamber Judgment (8 June 2018) at para 194 (International Criminal Court: Situation in the Central African Republic): the superior responsibility of the accused was not established, in contrast, in the *Sikirica* and *Mucić* cases superior responsibility for sexual violence was established; *Prosecutor v Sikirica*, IT-95-8-S, Trial Chamber Judgment (13 November 2001) at para 125 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia): however in other sexual violence cases the accused was acquitted on the grounds that there was no evidence that he knew or was in a position to know about the rapes committed by his subordinates.

⁴¹ Sellers, "Context", *supra* note 8 at 17.

⁴² Before the crime is committed.

⁴³ During the commission of the crime.

⁴⁴ After the commission of the crime.

⁴⁵ Helmut Satzger, *Internationales und Europäisches Strafrecht. Strafanwendungsrecht*,

A. Superior-Subordinate Relationship

Every system, regardless of whether it is a private company, military, paramilitary,⁴⁶ or government one, has an organised hierarchical structure, which implies a superior chief of staff and the executive organs. The head of the structure could be de jure or de facto obligated to control the actions initiated by his/her subordinates. In accordance with Article 43 of Additional Protocol I of 1977 to the Geneva Conventions, the armed forces of the Party to the conflict consist of all organised groups and units which are under a superior responsible to that Party for the conduct of its subordination.⁴⁷ It is much more difficult to determine the de facto hierarchical subordination than in the cases where the subordination of the structure is legally defined. Owing to the lack of centralised organisational frameworks, the prosecutor's main problem in the Rwandan cases was to establish the de jure and de facto relationship between the perpetrators and the commanders. The Tribunal had found in the *Mucić et al.* case that the de facto authority is equivalent to de jure.⁴⁸ At the same time, even if the

Europäisches Straf- und Strafverfahrensrecht, Völkerstrafrecht (Baden-Baden: C.H. Beck, 2018), at 289; *Protocol Additional to the Geneva Conventions of 12 August 1949*, Article 87(1): *Duty of Commanders*, 1977, at 62 (International Committee of the Red Cross); *Rome Statute of the International Criminal Court*, Article 28: *Responsibility of commanders and other superiors*, 17 July 1998, vol 2187, No 38544 at 15 (entered into force 1 July 2002); International Criminal Tribunal for the Former Yugoslavia, *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, UN Res 827, Article 7(3) (25 May 1993) at 6 (as amended 7 July 2007, UN Res 1877); *Statute of the International Tribunal for Rwanda*, Article 6(3): *Individual Criminal Responsibility*, 2007, at 48.

⁴⁶ *Protocol Additional to the Geneva Conventions of 12 August 1949*, Article 4 (A)(2): *Prisoners of War*, 1977, at 33 (International Committee of the Red Cross): describes the subordinated system of the paramilitary, mentioning the fact that the prisoner of war could be the person, who belongs to organised subordinated resistance movements commanded by the person responsible for his subordinates.

⁴⁷ The Militia and volunteer corps which could not be defined as a regular army or part of the army should fulfill the following conditions: they should be commanded by a person responsible for his subordinates, to have a fixed distinctive emblem recognizable at a distance, carry arms openly, conduct their operations in accordance with the laws and customs of war. See Yves Sandoz, Christophe Swinarski, Bruno Zimmermann, eds, *Commentary on the Additional Protocols of June 8 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff Publishers: Geneva, 1987) at 1008.

⁴⁸ *Prosecutor v Mucić et al*, IT-96-21-A, Appeals Chamber Judgment (20 February 2001) at para 188 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia) [*Mucić* (Appeals Chamber Judgment)].

hierarchical subordination is legally clear or de facto determined, it is still not sufficient to establish command responsibility.⁴⁹ The de jure or de facto commander has to have effective control over his/her subordinates.⁵⁰ In the case of *Mucić et al.*, it was held that control and command over the subordinates may be exercised in different ways, such as operationally, tactically, administratively and executively in territories under the control of the superiors.⁵¹ The Tribunal found that there was no legislation to have a de jure superior for the Čelebići camp, where the detainees were kept, tortured, murdered and raped. Therefore, it was rather difficult to find a specific superior to be liable for the atrocities committed in the Čelebići camp. Delalić, who was the coordinator of the Konjic Defense Forces, was charged with having influence on the Čelebići camp's superior, but was found not guilty due to a lack of sufficient command and control over the Čelebići camp.⁵² On the other hand, it was proven that Mucić, who was the de facto commander of the prison camp, failed to prevent the violations of international humanitarian law, especially rape occurring in the camp.⁵³

The attribution of the doctrine of superior responsibility is getting more complicated in relation to the civil superior-subordinate system.⁵⁴ It is obvious that the legalised system of individuals is better organised than civil self-organised initiatives. Accordingly, in case of military or governmental-based hierarchical systems, the identification of the superior is much easier than in the private sector. Even if the superior of the organised initiative could be identified, there is still the need for clarification of effective control

⁴⁹ *Prosecutor v Hadžihasanović & Kubura*, IT-01-47-A, Appeals Chamber Judgment (22 April 2008) at paras 20-22 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia).

⁵⁰ The command responsibility may not be established if the crime was committed before the commander assumed command over that subordinates. See *Prosecutor v. Hadžihasanović & Kubura*, IT-01-47-AR72, Appeals Chamber Decision on Command Responsibility, (16 July 2003) at para. 51; *Prosecutor v Bemba*, ICC-01/05-01/08, Trial Chamber Judgment (21 March 2016) at paras 184-188 (International Criminal Court: Situation in the Central African Republic) [*Bemba* (Trial Chamber Judgment)].

⁵¹ *Mucić* (Trial Chamber Judgment), *supra* note 40 at para 349.

⁵² *Ibid* at para 643.

⁵³ *Ibid* at para 774.

⁵⁴ *Prosecutor v Musema*, ICTR-96-13-A, Trial Chamber Judgment (27 January 2000) at para 919 (International Criminal Tribunal for Rwanda) [*Musema*].

of the identified superior on the self-organised initiative. This leads to further legal difficulties in sexual violence cases.

B. Knowledge

In order to establish command responsibility, it is furthermore important to clarify the mental element, namely whether the commander/superior knew (actual knowledge) or had reason to know/should have known (negligence) of the planned or committed crime of his/her subordinates.⁵⁵ Accordingly, the awareness of the superior may be distinguished in three time perspectives; before, during and after the crime was committed by the subordinates. In each of the aforementioned time periods, the superior has to act as soon as he/she is aware or has actual knowledge of the planned or committed crimes. Actual knowledge is not presumed and is obtained by way of evidence.⁵⁶ However, even at the time when the crimes were still not perpetrated but information, such as the criminal past, sexually violent character or further important factual circumstances,⁵⁷ were available to the superior, it is still possible to raise the question of failure of the command to prevent those crimes.⁵⁸ In the *Bagilishema* case, the Appeals Chamber found that the “had reason to know” standard does not require actual knowledge of the accused about the crimes which were committed or were about to be committed. Rather, it merely requires that the accused had general information in his/her possession, which would put him/her on notice of possible unlawful acts by his/her subordinates.⁵⁹

⁵⁵ Chantal Meloni, "Command Responsibility, Joint Commission and Control over the Crime in the First ICC Jurisprudence" in T Mariniello, ed, *The International Criminal Court in Search of its Purpose and Identity* (London: Routledge, 2016) 1 at 4.

⁵⁶ *Bemba* (Trial Chamber Judgment), *supra* note 50 at para 191.

⁵⁷ E.g. If subordinates had been drinking prior to the mission. See Bakone J Moloto, "Command Responsibility in International Criminal Tribunals" (2009) 3 *BJIL* 12 at 18.

⁵⁸ *Prosecutor v Strugar*, IT-01-42-A, Appeals Chamber Judgment (17 July 2008), at paras 303-304 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia).

⁵⁹ *Prosecutor v Bagilishema*, ICTR-95-IA-A, Appeals Chamber Judgment (3 July 2002) at paras 28, 42 (International Criminal Tribunal for Rwanda); see also Barbara Goy, Michele Jarvis & Giulia Pinzauti, "Contextualizing Sexual Violence and Linking it to Senior Officers" in Serge Brammertz & Michelle Jarvis, eds, *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford: Oxford University Press, 2016) at 244.

C. Duties of the Superior

Each superior is responsible for taking all reasonable and necessary measures to ensure the compliance of his/her subordinates. As stated in Article 87 of the Additional Protocol I of the Geneva Conventions, the main duties of the superior are the prevention, suppression and submission of the crime committed under his/her command.⁶⁰ This implies the high awareness of the subordinates regarding their duties and obligations stated in the Geneva Convention during the conflict. The superior has to act as soon as he receives the information or has reason to suspect that a crime will be committed. Each of the acts that should be foreseen by the superiors is distinguished separately. In order to determine that the superior/commander took all necessary reasonable measures available to him/her, it is necessary to clarify which crimes committed by the subordinates were known or should have been known to the superior and at what point in time.⁶¹ However, it is not the case that a commander should consider every possible step at his/her disposal.⁶² As was held in the case *Bemba*, the commanders are allowed to make a cost/benefit analysis when deciding which measures have to be taken to repress or to punish his/her subordinates. The court in *Bemba* stated that “[s]imply juxtaposing the fact that certain crimes were committed by the subordinates of a commander with a list of measures which the commander could hypothetically have taken does not, in and of itself, show that the commander acted unreasonably at the time”.⁶³

To prevent: The duty of the superior is to control the subordinates and their actions by expeditiously taking all necessary measures to avoid the commission of the crime which might be planned, organised and instigated by his/her subordinates. The superior must intervene as soon as he becomes aware of the preparation of the crime and as long as he has the effective

⁶⁰ See Article 87 of the Additional Protocol I of the Geneva Conventions online (pdf): <www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf> [perma.cc/X3LY-PKKU].

⁶¹ *Prosecutor v Bemba*, ICC-01/05-01/08-3636-Red, Trial Chamber Judgment (21 March 2016) at para 168 (International Criminal Court: Situation in the Central African Republic).

⁶² *Prosecutor v Bemba*, ICC-01/05-01/08 A, Appeals Chamber Judgment (8 June 2018) at para 169 (International Criminal Court: Situation in the Central African Republic).

⁶³ *Ibid* at para 170.

ability to prevent the perpetrators from commencing or continuing.⁶⁴ In the case of *Akayesu*, it was noted that the presence of Akayesu during the rapes, who was the *bourgmestre* (mayor) of that region, had encouraged the perpetrators to continue their acts; moreover, he did nothing to stop the commission of the crimes.⁶⁵ The superior is responsible for the acts committed by his subordinates without the need to prove the criminal intent of the superior; another view holds that negligence that is so serious as to be tantamount to consent or criminal intent is a lesser requirement.⁶⁶ This doctrine was based on the experience of the Tokyo Trial. The former Foreign Minister of Japan, Hirota Koki, was sentenced for his failure to prevent the mass rape in the city of Nanking.⁶⁷

To repress: If the crime is ongoing, the superior is obliged to repress the commission of the crime of his/her subordinates. Furthermore, the superior has to take measures for the disciplinary punishment of the perpetrator.⁶⁸ If there are no effective measures for the disciplinary punishment, the superior must inform the appropriate authorities about the crimes committed by his/her subordinates.⁶⁹

To submit: The above-mentioned duty constitutes the third obligation of the superior - to submit the matter to the competent authorities or to take steps in order to ensure that the perpetrators are brought to justice.⁷⁰

⁶⁴ *Prosecutor v Brima et al*, SCSL-04-16-T, Trial Chamber Judgment (20 June 2007) at para 798 (Special Court for Sierra Leone) [*Brima*].

⁶⁵ *Akayesu*, *supra* note 39 at para 12(b).

⁶⁶ *Ibid* at para 488.

⁶⁷ Shane Darcy, *Collective responsibility and accountability under international law* (New York: Brill, Ardsley, 2007) at 313: "Hirota was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence".

⁶⁸ Christoph Safferling, *Internationales Strafrecht. Strafanwendungsrecht - Völkerstrafrecht - Europäisches Strafrecht* (Berlin: Springer, 2011) at 141.

⁶⁹ *Prosecutor v Bemba*, ICC-01/05 -01/08, Pre-Trial Chamber, Decision on confirmation of charges (15 June 2009) at para 440 (International Criminal Court: Situation in the Central African Republic) [*Bemba* (Pre-Trial Chamber)].

⁷⁰ *Mucić* (Appeals Chamber Judgment), *supra* note 48 at para 190.

D. Causation

The Appeal Chamber in the *Blaškić* case noted that the causation between the superior's omission and the crime is not the main element of superior responsibility.⁷¹ The statutes of the ad hoc tribunals do not include the element of causation in the doctrine of superior responsibility. In contrast, the ICC jurisprudence accepts the principle of causality for the doctrine of superior responsibility. Regarding this matter, the Court stated that Article 28 of the Rome Statute includes an element of causality between a dereliction of duty and the underlying crimes.⁷² The nexus requirement in a case of superior responsibility would be clearly satisfied when it is established that the crimes would not have been committed, if the commander had exercised his/her control properly.⁷³

IV. THE MODE OF LIABILITY OF SUPERIOR

Essentially, the concept of superior responsibility is seen as 1) a special mode of liability for an omission related to the special status of the person in the superior-subordinate relationship, or 2) as a commission by omission,⁷⁴ and 3) sui generis (of its own kind) responsibility for the

⁷¹ *Prosecutor v Blaškić*, IT-95-14-A, Appeals Chamber Judgment (29 July 2005) at para 76 [*Blaškić*]: "...causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offence committed by their subordinates..."

⁷² Otto Triffterer, "Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?" (2002) 15:1 *Leiden J Intl L* 179 at 203; *Bemba* (Pre-Trial Chamber), *supra* note 62 at para 139: a person shall not be found individually criminally responsible for a crime in the absence of some form of personal nexus to it.

⁷³ *Bemba* (Trial Chamber Judgment), *supra* note 50 at para 213; *Bemba* (Pre-Trial Chamber), *supra* note 69 at para 423: despite its significance, the Chamber did not engage in a detailed analysis of the causation issue. It acknowledged that causation is not in the superior responsibility provisions of the statutes of the ad hoc tribunals, the SCSL or the ECCC, and that the case law of the ICTY had expressly rejected it. The only jurisprudence cited by the Chamber in support of this test was the ICTY Appeals Chamber's Judgment in *Hadžihasanović*, para 31, which expressly rejected causation as an element of superior responsibility.

⁷⁴ See Linnea Kortfält, "Sexual Violence and the Relevance of the Doctrine of Superior Responsibility in the Light of the Katanga Judgment at the International Criminal Court" (2015) 84:2 *Nordic J Intl L* 1 533 at 571; Chantal Meloni, "Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence

derelection of duty.⁷⁵ As discussed in academic literature, if the doctrine of superior responsibility is seen as commission by omission or as a mode of liability, the superior becomes responsible for the principle crime. If, however, it is seen as *sui generis*, the superior is accountable for his own failure to prevent, punish or report,⁷⁶ though not for the principle crime. The practice shows that the involvement of the superiors as the strategic developers of international crimes in conflict zones is common.⁷⁷ While the defence attempted to argue on each element of the superior responsibility in order to exclude the defendant's connection to the particular crime, it showed at the same time the actual contribution of the defendant to the commission of the crime. After establishing the elements of superior responsibility in the *Bagosora* case, including his knowledge of the existing crimes, the International Criminal Tribunal for Rwanda stated that he failed in his duty to prevent the crimes because the accused in fact participated in them.⁷⁸ Accordingly, it is not possible to enter conviction under both individual and superior responsibility in relation to the same conduct.⁷⁹

In cases where there is no evidence or allegation of physical contact between an accused and a rape victim, the accused is not known to have explicitly incited or ordered the related sexual crime, and where the physical presence of the accused at a rape scene or other concrete proof of knowledge of rape has not been established, the nexus between the accused and the crime of rape will not be easy to establish.⁸⁰ This relates to the establishment of the 'prevention and punishment' obligation of the superior, which also includes the knowledge about widespread or systematic perpetrations. On this issue, various investigations and prosecutions on sexual violence

of the Superior?" (2007) 5:3 J Intl Crim Justice 619 at 635.

⁷⁵ *Prosecutor v Halilović*, IT-01-48, Trial Chamber Judgment (16 November 2005) at para 42 (International Criminal Tribunal for the former Yugoslavia).

⁷⁶ See Kortfält, *supra* note 74 at 575.

⁷⁷ See e.g. Gacumbitsi, *supra* note 39 at para 289.

⁷⁸ *Prosecutor v Bagosora et al*, ICTR-98-41-T, Trial Chamber Judgment (18 December 2008) at paras 2011-2040 (International Criminal Tribunal for Rwanda) [*Bagosora* (Trial Chamber Judgment)]; *Prosecutor v Bagosora et al*, ICTR-98-41-A, Appeals Chamber Judgment (14 December 2011) at para 668 (International Criminal Tribunal for Rwanda).

⁷⁹ *Blaškić*, *supra* note 71 at paras 91-92.

⁸⁰ Anne-Marie Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Anwerpen: Intersentia nv, 2005) at 168.

conducted at an international or national level confirm the widespread and systematic occurrence of sexual crimes in armed conflict, the presence of which implies public knowledge of the commission of such crimes. This is exactly the binding point where the doctrine of the superior responsibility and the concept of the sexual violence are crossing. As it was historically presented, sexual violence may be practiced in various forms. There is a need to present those forms of sexual violence committed by the subordinates for which the superiors may be held responsible.

V. RAPE, OTHER FORMS OF SEXUAL VIOLENCE AND SUPERIORS

Rape is explicitly included within the jurisdiction of the Yugoslav and Rwanda Tribunals as a crime against humanity.⁸¹ The impact of the ad hoc Tribunals in terms of the development of the definition of rape as an international crime is inescapable. The *Akayesu* case was the key to the international criminal jurisprudence on the matter of rape. In this case, the Tribunal confirmed that the definition of rape was not explicitly underlined by the ICTR Statute. Accordingly, it firstly had to define what the concept of rape stood for. The Tribunal considered rape as a “form of aggression” which could be classified within the scope of torture aiming at intimidating, humiliating, discriminating against, punishing, controlling or destroying a person.⁸² Up to that point rape was specified as a “physical invasion of a sexual nature, committed on a person under circumstances which are coercive”.⁸³ The definition was broad enough to encompass forced penetration by the tongue of the victim’s mouth, which most legal systems would not stigmatise as a rape, although it might well be prosecuted as a form of sexual assault.⁸⁴ Contemporaneously with the *Akayesu* case, the

⁸¹ International Criminal Tribunal for the Former Yugoslavia, *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, UN Res 827, Article 5 (g) (25 May 1993) at 6 (as amended 7 July 2007, UN Res 1877); see also Kelly Askin, “The Jurisprudence of International War Crimes Tribunal: Securing Gender Justice for Some Survivors” in Helen Durham & Tracey Gurd, eds, *Listening to the Silences: Women and War* (Leiden: Brill, 2005) at 128.

⁸² *Akayesu*, *supra* note 39 at para 687; *Brima*, *supra* note 64 at para 718.

⁸³ *Akayesu*, *supra* note 39 at para 688.

⁸⁴ William Schabas, *An Introduction to the International Criminal Court*, 5th ed (Cambridge: Cambridge University Press, 2017) at 104; e.g. in contrast, sexual violence is not limited

ICTY broadened the definition of rape, based on the already existing definition of rape from the ICTR, confirming that rape is a forcible act which represents the use of force against the victim aiming at violating or psychologically oppressing him/her.⁸⁵ The act includes the penetration of the victim's vagina, anus or mouth by the penis, accompanied by force or by the threat of force or coercion against the will of the victim.⁸⁶ Concerning other objects, the Tribunal only considered penetration of either the anus or the vagina as an act of rape.⁸⁷ In this context, it could be summarised that the penetration of the anus, vulva or vagina is not limited to the penis. In the case of *Furundzija*, the ICTY found out that the penetration of the mouth by the male sexual organ is "a most humiliating and degrading attack upon human dignity".⁸⁸

As a result of a dialogue between the two tribunals, the ICTR in the *Musema* case described the definition of rape in the *Akayesu* case as conceptual and in the *Furundzija* case – mechanical, adopting the definition set forth in the *Akayesu* definition.⁸⁹ Shortly after the ICTY in the *Kunarac* case concluded that the definition given before could not be used for other cases referring to the crime of rape, particularly to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.⁹⁰ The Tribunal found that the absence of consent or

by the physical invasion of the human body and could be committed without penetration or physical contact, as for example forcing the victim to undress among a crowd.

⁸⁵ *Furundzija supra* note 32 at paras 173-174.

⁸⁶ Cassese, *supra* note 22 at 112.

⁸⁷ *Furundzija, supra* note 32 at para 174.

⁸⁸ *Ibid* at para 183.

⁸⁹ *Musema, supra* note 54 at para 228; *Prosecutor v Semanza*, ICTR-97-20-T, Trial Chamber Judgment (15 May 2003) at para 345 (International Criminal Tribunal for Rwanda); *Prosecutor v Stakić*, IT-97-24-T, Trial Chamber Judgment (31 July 2003) at paras 757-803 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia); *Prosecutor v Muhimana*, ICTR-95-1B-T, Trial Chamber Judgment (28 April 2005) at paras 550-551 (International Criminal Tribunal for Rwanda).

⁹⁰ Niamh Hayes, "Creating a Definition of Rape in International Law: The Contribution of the International Criminal Tribunals" in Shane Darcy & Joseph Powderly, eds, *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010) at 148; *Kunarac* (Trial Chamber Judgment), *supra* note 2 at para 438; ICTY, *Prosecutor v Kvočka et al*, IT-98-30/1-T, Trial Chamber Judgment (2 November 2001) at paras 175-183 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of

voluntary participation as an element of the crime is equivalently relevant to the force and coercion.⁹¹

Therefore, the Tribunal interprets the definition of the crime of rape given in the *Furundzija* case as follows: The sexual penetration, however slight:

a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or

b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. For this purpose consent must be given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.

The question of guilt was assumed with the intention to effect sexual penetration, and the knowledge that it occurs without the consent of the victim.⁹²

Already in the first case before the ICTR even the Tribunal was aware that the superior/subordinate relationship existed between the accused and

the Former Yugoslavia) [*Kvočka*]; ICTY, *Prosecutor v. Nikolić*, IT-94-2-S, Trial Chamber Judgment (18 December 2003) at para 113 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia); *Gacumbitsi*, *supra* note 39 at para 321; *Prosecutor v Brđanin*, IT-99-36-T, Trial Chamber Judgment (1 September 2004) at paras 1008-1013 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia) [*Brđanin*]; *Bagosora* (Trial Chamber Judgment), *supra* note 78 at paras 2198-2201; *Prosecutor v Renzaho*, ICTR-97-31-T, Trial Chamber Judgment (14 July 2011) at para 5.4 (International Criminal Tribunal for Rwanda); *Prosecutor v Ndindiliyimana et al*, ICTR-00-56-T, Trial Chamber Judgment (17 May 2011) at para 2121 (International Criminal Tribunal for Rwanda); *Prosecutor v Nyiramasuhuko et al*, ICTR-98-42-T, Trial Chamber Judgment (24 June 2011) at para 6072 (International Criminal Tribunal for Rwanda); *Prosecutor v Ndirabaware*, ICTR-99-54-T, Trial Chamber Judgment (20 December 2012) at para 4.6.2.2 (International Criminal Tribunal for Rwanda).

⁹¹ *Kunarac* (Trial Chamber Judgment), *supra* note 2 at para 440; *Prosecutor v Kunarac et al*, IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment (12 June 2002) at paras 129-133 [*Kunarac* (Appeal Chamber Judgment)].

⁹² *Kunarac* (Trial Chamber Judgment), *supra* note 2 at para 460.

the Interahamwe, the Prosecution was convinced with Akayesu's own role in the commission of crimes, especially by his presence at the crime scene, which motivated the members of the Interahamwe to commit the acts of rape. The Tribunal confirmed that the accused by his own words specifically ordered, instigated, aided and abetted the acts of rape.⁹³

The pressure from civil society demanded, parallel to the definition of rape, the inclusion of other forms of sexual violence under international criminal law. If, under the jurisdiction of the ICTY and ICTR, other forms of sexual violence were considered torture, enslavement or other inhuman acts, the ICC Statute codified other forms of sexual violence as separate offences under crimes against humanity and war crimes. These offences include sexual slavery, forced prostitution, forced pregnancy and enforced sterilisation.⁹⁴

The term 'sexual slavery' does not differ much from the definition of 'enslavement', punished under Article 7(1)(c) ICC Statute, which also includes 'forced labour'.⁹⁵ The main difference between them is the concept of individual sexuality and the freedom of sexual self-determination,⁹⁶ such as forced marriage,⁹⁷ domestic servitude or other forced sexual activity.⁹⁸ The perpetrator exercises the power over the victim in order to purchase, sell, lend or barter, or impose deprivation of liberty, forcing him/her to engage in one or more acts of a sexual nature,⁹⁹ which does not necessarily require a financial benefit.¹⁰⁰ Acts of enslavement that include a sexual element could be categorised as both enslavement and sexual slavery.¹⁰¹ The Special Court for Sierra Leone (SCSL - international hybrid court) was the first international institution that considered forced marriage to be covered by sexual slavery.¹⁰²

⁹³ Akayesu, *supra* 39 at paras 691-695.

⁹⁴ See Article 7(1)(g) ICC Statute.

⁹⁵ Brouwer, *supra* note 70 at 172.

⁹⁶ Christoph Safferling, *Internationales Strafrecht. Strafanwendungsrecht - Völkerstrafrecht - Europäisches Strafrecht* (Berlin: Springer, Berlin, 2011), at 202.

⁹⁷ *Prosecutor v Katanga & Chui*, ICC-01/04-01/07, Pre-Trial Chamber: Decision on confirmation of charges (30 September 2008) at para 431.

⁹⁸ Hall & Stahn, *supra* note 28 at 211.

⁹⁹ *Preparatory Commission for the International Criminal Court*, Article 7(1)(g): Elements of the Crimes, 1999, at 5.

¹⁰⁰ Brouwer, *supra* note 80 at 172-173.

¹⁰¹ Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge: Cambridge University Press, 2010) at 213.

¹⁰² Kai Ambos, *Treatise on International Criminal Law* (Oxford: Oxford University Press,

Although there are similarities between sexual slavery and forced prostitution, the reasonable difference is the derivation of advantages for the victim from forcing them to perform the sexual acts. The advantages for sexual access are linked to the exchange of goods or services for sex. On the other hand, one must consider that the person benefitting there from is a victim who is hoping not to be tortured or killed.¹⁰³

Forced pregnancy means rape followed by unlawful confinement for the purpose of affecting ethnic composition.¹⁰⁴ An important feature of this offence is the intent of the individual perpetrator who aimed to affect the ethnic composition.¹⁰⁵ The adoption of this offence was controversial. Several delegates from the Vatican and Ireland were worried that the inclusion of the offence in the Rome Statute would imply the abortion of a child or giving up the child for adoption.¹⁰⁶

The crime of enforced sterilisation includes the deprivation of the person's biological reproductive capacity,¹⁰⁷ which is neither justified by medical nor hospital treatment of the person concerned, nor carried out with the person's genuine consent.¹⁰⁸ If the perpetrator aims to limit or to

2016) at 100; Jennifer Gong-Gershowitz, "Forced Marriage: A 'New' Crime Against Humanity?" (2009) 8:1 *Nw J Intl Human Rights* 53 at 53; *Brima, supra* note 64 at para 697; see also Renate Winter & Stephane Kostas, "Gender-Based Violence Offences and Crimes Against Children at the SCSL", in Roberto Bellelli, ed, *International Criminal Justice. Law and Practice from the Rome Statute to its Review* (Farnham: Routledge, 2010) at 315.

¹⁰³ Valerie Oosterveld, "Gender-Based Crimes against Humanity" in Leila Nadya Sadat, ed, *Forging a Convention for Crimes against Humanity* (Cambridge: Cambridge University Press, 2011) at 89.

¹⁰⁴ Geoffrey Robertson, *Crimes against Humanity. The Struggle for Global Justice* (Princeton: Penguin, 2008) at 331.

¹⁰⁵ Alyson M Drake, "Aimed at Protecting Ethnic Groups or Women? A look at Forced Pregnancy Under the Rome Statute" (2012) 18:3 *Wm & Mary J Women & L* 595 at 597.

¹⁰⁶ Brouwer, *supra* note 80 at 144.

¹⁰⁷ Kelly Askin, "Crimes against Women under International Criminal Law", in Bertram S Brown, ed, *Research Handbook on International Criminal Law* (Cheltenham: Edward Elgar Publishing, 2011) at 101: The crime of enforced sterilisation which was firstly mentioned in the Medical case of US Military Tribunal under Control Council Law No. 10; See also Askin, *supra* note 81 at para 146.

¹⁰⁸ Machelde Boot, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerpen: Intersentia nv, 2002) at 516.

destroy a particular group in whole or in part, enforced sterilisation can imply an act of genocide.¹⁰⁹

The sexual violence is a broad term and it includes acts of any sexual nature, which are committed by force or the threat of force or coercion.

Even considering the development of independent sexual crimes within the Rome Statute, it is still possible to attribute the sexual violence to various forms, ranging from torture to outrages upon personal dignity and serious bodily or mental harm. This accordingly, opens up a new and broader path for the accountability of the superiors under the doctrine of superior responsibility for any illegal sexual act of their subordinates.

VI. SEXUAL VIOLENCE UNDER CRIMES AGAINST HUMANITY AND WAR CRIMES

Meanwhile, the ICTR and ICTY have classified acts of sexual violence using other qualifications than rape, ruling that, as long as the acts met the requirements of international crimes, they could qualify as torture, enslavement or as other inhuman acts.¹¹⁰ Sexual violence is not expressly designated as a grave breach despite the view that sexual violence fits within other categories of grave breaches.¹¹¹ Therefore, acts of sexual violence are also part of war crimes and are charged as various violations of Common Article 3 and grave breaches of the Geneva Conventions. These are torture,¹¹² cruel treatment, outrages upon personal dignity and wilfully causing great suffering or serious injury to body or health. The crime of sexual violence may be considered only when the contextual elements of war crimes or crimes against humanity are met.¹¹³ The superior

¹⁰⁹ Kai. Ambos, *Internationales Strafrecht. Strafanwendungsrecht, Völkerstrafrecht, Europäisches Strafrecht, Rechtshilfe* (Munich: C.H. Beck, 2018) at 267; *Kvočka*, *supra* note 90 at para 343.

¹¹⁰ In case of crimes against humanity, the victim of sexual violence has to be a civilian, the sexual conduct was part of a widespread or systematic attack, the physical perpetrator of the criminal conduct or other relevant actor knew that it was part of this widespread or systematic attack.

¹¹¹ United Nations Division for the Advancement of Women Department of Economic and Social Affairs, "Sexual Violence and Armed Conflict: United Nations Response" (April 1998) at 7, online (pdf): <www.un.org/womenwatch/daw/public/cover.pdf> [perma.cc/5]C9-LXJ5].

¹¹² The main distinction of the torture as a crime against humanity and torture as war crime is based on the difference of *chapeau* of crime against humanity and war crime.

¹¹³ These are the existence of an armed conflict, nexus of the conduct to the armed conflict,

responsibility may be attributed for the other forms of the sexual violence similarly as mentioned above. It is important at this stage to mention the other forms of sexual violence arising from other crimes.

It is internationally accepted that crimes of a sexual nature inflict serious mental and physical damage on the victim and are deemed an aggravating factor, particularly when committed against vulnerable and defenceless women or girls and may constitute torture.¹¹⁴ The Tribunal in the *Mucić et al.* case, held the crime of rape to be torture. The finding of the Tribunal was based upon the fact that the act of rape offends human dignity and physical integrity, which causes severe pain and suffering, both at a physical and psychological level.¹¹⁵ In the *Semanza* case, the Tribunal stated that the encouragement of the crowd to rape women because of their ethnicity inflicts severe physical or mental pain or suffering for discriminatory purposes.¹¹⁶ Accordingly, it is possible to conclude that if sexual violence is committed on the part of the perpetrator, it may still be considered torture, provided that the other elements of torture are met.¹¹⁷

The prohibition of slavery is the oldest principle of customary law and is part of *jus cogens* (compelling law). The definition of the offence goes back to the 1926 Slavery Convention.¹¹⁸ Article 1 of the convention deemed enslavement the status or condition of a person over whom the right of ownership is exercised. This definition was circulated in the case of *Kunarac*,

violation of a specific rule of IHL, material elements of the offence.

¹¹⁴ Michele Jarvis, "An Emerging Gender Perspective on International Crimes" in Gideon Boas & William Schabas, eds, *International Criminal Law Developments in the Case Law of the ICTY* (Leiden: Martinus Nijhoff, 2003) at 180.

¹¹⁵ *Mucić* (Trial Chamber Judgment), *supra* note 40 at para 496; see also *Prosecutor v Češić*, IT-95-10/1-S, Trial Chamber Judgment (11 March 2004) at paras 53-54; *Kvočka*, *supra* note 90 at para 320; ICTY, *Prosecutor v Vasiljević*, IT-98-32-A, Appeals Chamber Judgment (25 February 2004) at para 165; *Prosecutor v Krnojelac*, IT-97-25-T, Trial Chamber Judgment (15 March 2002) at paras 185-186.

¹¹⁶ *Semanza*, *supra* note 89 at para 485.

¹¹⁷ *Akayesu*, *supra* note 39 at para 687; ICTY, *Kunarac* (Appeal Chamber Judgment), *supra* note 91 at paras 142-155; see also ICC, *Prosecutor v Bemba*, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (15 June 2009) at paras 197-199 (International Criminal Court: Situation in the Central African Republic).

¹¹⁸ See *Slavery Convention*: Signed at Geneva on 25 September 1926, Entry into force 9 March 1927, in accordance with article 12, online: <www.ohchr.org/en/professionalinterest/pages/slaveryconvention.aspx> [perma.cc/XY6G-YN3K].

where the Tribunal confirmed the exercise of any or all of the powers attaching to the right of ownership of a person as the *actus reus* (guilty act) and the intention to exercise those powers as the *mens rea* (guilty mind).¹¹⁹ The crime of sexual slavery was not codified in the Statutes of the ad hoc Tribunals. However, slavery for sexual purposes was directly defined under the crime of enslavement.¹²⁰ The Tribunal in the *Kunarac* case described the following acts as power of ownership over a person: control of the individual's movement, control of his or her physical environment, psychological control, measures taken to prevent or deter escape, actual or threatened force or coercion, assertion of exclusive control, subjection to cruel treatment and abuse and control of sexuality.¹²¹ This may refer also to sex as forced labour, prostitution or human trafficking.

In the practice of the ad hoc Tribunals, most of the acts of sexual violence were prosecuted under other inhuman acts of crimes against humanity. This led to a contradiction to the principle of *nullum crimen sine lege* (no penalty without a law) and to difficulties for the interpretation of the definition.¹²² In this matter, the Tribunal in the case against *Tadić* decided that other inhuman acts must consist of acts inflicted upon a human being and must be of a serious nature.¹²³ In the *Kayishema* case, the Tribunal stated that in relation to the ICTR Statute other inhumane acts include those that are similar in gravity and seriousness to the enumerated acts in the Statute on political, racial and religious grounds, which are acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity.¹²⁴ Such acts must not be obviously linked to physical force, e.g. forced undressing in a public area, making the victims perform naked physical exercises in a public area,¹²⁵

¹¹⁹ *Kunarac* (Trial Chamber Judgment), *supra* note 2 at para 540.

¹²⁰ *Brima*, *supra* note 64 at para 706.

¹²¹ *Kunarac* (Trial Chamber Judgment), *supra* note 2 at para 542.

¹²² Terhi A Jyrkkiö, "Other Inhumane Acts' as Crimes against Humanity" (2011) 1 Helsinki L Rev 183 at 184.

¹²³ *Prosecutor v Tadić*, IT-94-1-T, Trial Chamber Opinion & Judgment (7 May 1997) at para 728 [*Tadić*].

¹²⁴ Angela M Banks, "Sexual Violence and International Criminal Law: An Analysis of the Ad Hoc Tribunal's Jurisprudence & the International Criminal Court's Elements of Crimes" (2005) 8 Wm & Mary J Women & L 5 at 28; *Prosecutor v Kayishema et al*, ICTR-95-1-T, Trial Chamber Judgment (21 May 1999) at para 151-153 [*Kayishema*].

¹²⁵ *Akayesu*, *supra* note 39 at para 697.

forcing the prisoner to cut off the testicle of another prisoner,¹²⁶ or cutting off a woman's breast and licking may be interpreted as other inhuman acts under crimes against humanity.¹²⁷

The Tribunal in the *Čelebići* Camp case confirmed that cruel treatment as a war crime may be committed, if the conduct is an intentional act or omission, is deliberate and not accidental and causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.¹²⁸ The sexual cruel treatment may be related to various acts of punishment or mockery against the victims, e.g. tying an electric cord around the genitals of prisoners and forcing prisoners to perform fellatio on one another, kicking in the genitals and repeatedly pulling down their pants while threatening to cut off their penis.¹²⁹

The elements of outrage upon personal dignity as a serious violation of Common Article 3 were also developed by the ad hoc Tribunals. Accordingly, in order to consider the outrages upon personal dignity as a war crime, the perpetrator has to intentionally commit or participate in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and that the perpetrator is aware that the act or omission could have that effect.¹³⁰ In this context the degree of suffering can be established pursuant to subjective and objective elements, such as the cultural background of the victim, objective conditions of the conduct, all factual circumstances, the sexual nature of the conduct, etc.¹³¹ At the same time, it does not matter whether the victim is aware of his/her degradation or humiliation.

The Tribunal in the *Čelebići* Camp has noted that all acts that constitute torture can be automatically qualified as wilfully causing great suffering or serious bodily injury or damage to health, but not vice versa.¹³² Contrary to the crime of torture, wilfully causing great suffering is based on sadism and

¹²⁶ *Tadić*, *supra* note 123 at para 198.

¹²⁷ *Prosecutor v Kajelijeli*, ICTR-98-44A-T, Trial Chamber Judgment (1 December 2003) at paras 678, 936 (International Criminal Tribunal for Rwanda).

¹²⁸ *Mucić* (Trial Chamber Judgment), *supra* note 40 at paras 521-522.

¹²⁹ *Ibid* at para 24; *Prosecutor v Simić et al*, IT-95-9-T, Trial Chamber Judgment (17 October 2003) at para 11.

¹³⁰ *Kunarac* (Trial Chamber Judgment), *supra* note 2 at para 514; *Kunarac* (Appeal Chamber Judgment), *supra* note 91 at paras 163-165.

¹³¹ See Brouwer, *supra* note 80, at 212-213.

¹³² *Mucić* (Trial Chamber Judgment), *supra* note 40 at para 511.

causes extreme pain, suffering or humiliation to a person. In order to observe sexual violence as a wilful infliction of great suffering or injury to body or health under war crimes, it is necessary to take into account all factual circumstances, including the nature of the act in the context in which it occurs, its duration and repetition, sexual nature and moral effects of the act on the victim, his/her personal circumstances, such as age, sex and health.¹³³

VII. SEXUAL VIOLENCE UNDER GENOCIDE

In order to prosecute sexual violence under the crime of genocide, the elements of genocide need to be fulfilled. Although sexual violence is not mentioned either in the genocide convention or in the Statutes of the International Tribunals, the Tribunal in the *Akayesu* case recognised that acts of sexual violence can be a means of achieving genocide,¹³⁴ and it may fall under the category of genocide,¹³⁵ especially under ‘causing serious bodily or mental harm to members of the group’ and ‘imposing measures intended to prevent births within the group’. On these grounds, the International Court of Justice (ICJ) in the *Bosnia and Herzegovina v. Serbia and Montenegro* case decided that sexual violence could well constitute evidence that genocide has been perpetrated, despite the fact that it has not been conclusively established that such atrocities were committed with the specific intent (*dolus specialis*) to destroy the protected group, in whole or in part.¹³⁶ According to international case law, the bodily harm must be serious and inflicted intentionally, meaning the serious damage to health must cause disfigurement or serious injuries to the external and internal organs or senses.¹³⁷ Causing mental harm describes non-physical serious and

¹³³ Michelle Cottier, "Article 8" in Otto Triffterer & Kai Ambos, eds, *Rome Statute of the International Criminal Court: A Commentary* (Munich: CH Beck, 2016) at 310.

¹³⁴ Brouwer, *supra* note 80 at 80; *Akayesu*, *supra* note 39 at para 731.

¹³⁵ See Lisa Sharlach, "Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda" (2000) 22:1 *New Political Science* 89-102.

¹³⁶ ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), 26 February 2007, para. 319.

¹³⁷ *Kayishema*, *supra* note 124 at para 690; *Akayesu*, *supra* note 39 at para 504; *Prosecutor v. Krstić*, IT-98-33-T, Trial Chamber Judgment (2 August 2001) at para 507; Florian Jessberger, "The Definition and the Elements of the Crime of Genocide" in Paola Gaeta, ed, *The UN Genocide Convention: A commentary* (Oxford: Oxford University Press, 2009)

intentional attacks on members of the group that significantly affect the group's social existence.¹³⁸ Sexual violence may be inflicted on a group through living conditions calculated to cause the group's physical destruction or that can prevent births within the group.¹³⁹ In the Akayesu case, the Tribunal found that in patriarchal societies, the membership of the group is determined by the identity of the father. Consequently, the child will not belong to its mother's group, if the woman was impregnated by a man of another group.¹⁴⁰ To date there has been no conviction for sexual violence amounting to a form of genocide under the doctrine of superior responsibility by the international Tribunals. The prosecution of superiors for genocidal crimes by the subordinates led to contradictory discussions on the matter of special intent. On the one hand, a conclusion was made not to include the element of *dolus specialis* in the omission of the superior.¹⁴¹ This conclusion was contradictory to the decision made afterwards in the case of *Stakić*, where the Tribunal found that the special nature of genocide should be considered for the conviction of the superior for his omission.¹⁴² The Tribunal in the *Brđanin* case was unable to agree with the previous decision and stated that the superior does not need to possess the special intent in order to be held liable for genocide under superior responsibility.¹⁴³

at 98.

¹³⁸ Akayesu, *supra* note 39 at para 731.

¹³⁹ Dorothy Thomas, "Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath" (September 1996) at 35, online (pdf): *Human Rights Watch* <www.hrw.org/sites/default/files/reports/1996_Rwanda_%20Shattered%20Lives.pdf> [perma.cc/7GNE-PT55]; e.g. women subjected to sexual violence may be left physically unable to reproduce, or, they may be denied this role by their community given the nature of the attacks they have suffered.

¹⁴⁰ Akayesu, *supra* note 39 at para 507; Tathiana Flores Acuña, "The Rome Statute's Sexual Related Crimes: an Appraisal under the Light of International Humanitarian Law" (2006) 39:1 *Revista IIDH* 169-202.

¹⁴¹ *Prosecutor v Ntagerura et al*, ICTR-99-46, Trial Chamber Judgment (25 February 2004) at paras 653-654, 690, 694-695.

¹⁴² ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24, Trial Chamber, Decision on Rule 98bis Motion for Judgment of Acquittal, 31 October 2002, para. 92.

¹⁴³ *Brđanin*, *supra* note 90 at paras 717-721.

VIII. CONCLUDING REMARKS

Superiors who are prosecuted for the sexual crimes of their subordinates are usually actively involved in the perpetration of the crime, where they either encouraged the commission of the crime with their presence or ignored the violence which was occurring. As strategic developers of mass atrocities, they have committed the same crimes. In order to prove the superior-subordinate relationship element, difficulties arise in cases of a de facto hierarchical system, where the absence of the legal measures cannot guarantee an obligation of the superior towards his/her subordinates. In cases of mass violations, the superiors or commanders cannot avoid information of ongoing violence. Even if they cannot prevent or stop the commission of the crimes, they are still obligated to take all necessary and reasonable measures to punish the perpetrators. Although the Courts are engaged in prosecuting high-ranking superiors in order to motivate the national courts into prosecuting low-ranking perpetrators for the crimes committed, there is still an academic and practical dispute on the matter of the doctrine of superior responsibility.

The enlargement of the definitions of sexual acts under the international criminal law demands the superiors to be wide awake about the possible gender-based perpetrations of their subordinates.