THE USE OF COMMAND RESPONSIBILITY IN THE PROSECUTION OF SEXUAL AND GENDER-BASED CRIMES IN NON-INTERNATIONAL ARMED CONFLICT

By Anika Bratzel, LL.M.

TABLE OF CONTENTS

A. INTRODUCTION..... 4

B. FACTUAL AND LEGAL BACKGROUND 6

I. Command responsibility; definition, scope of liability and purpose 6

II. Prosecutions using command responsibility 8

1. An overview of statutory and judicial developments 8

2. Command responsibility and sexual and gender-based crimes; a historical perspective 10

a) Sexual and gender-based crimes generally 10

b) Holding commanders responsible for sexual crimes; obstacles and challenges 11

C. APPLICABLE LAW 14

I. Command Responsibility under the Rome Statute of the International Criminal Court (ICC) 14

II. Command Responsibility under the *Völkerstrafgesetzbuch* (VStGB) 15

D. THE ICC AND GERMANY'S HIGHEST COURT; A COMPARATIVE LOOK.... 17

I. The Bemba Case (ICC) 17

1. Factual Background, Indictment and Proceedings 17

2. The Bemba Decision 18

a) Bemba's effective control of forces 19

b) Bemba's knowledge of the commission of the crimes 20

c) Bemba's failure to take necessary and reasonable measures 21

II. The FDLR Case (OLG Stuttgart) 22

1. Factual Background, Proceedings and Decision 22

E. ANALYSIS AND EVALUATIONS; REVISITING THE CHALLENGES OF COMMAND RESPONSIBILITY AND SEXUAL AND GENDER-BASED CRIMES.. 24

I. Preliminary observations 24

II. Problems with the nature of command responsibility and proving the elements in the context of sexual crimes 25

1. Establishing sexual violence; ongoing evidentiary difficulties 25

2. Establishing a superior-subordinate relationship and effective control; the problems of political, physical and cultural distance 28

a) Effective control and the material ability of a commander to prevent the commission of crimes 28
b) The problems caused by geographical remoteness and non-traditional command structures 32
3. Establishing constructive knowledge in cases of non-strategic sexual violence; difficulties with wider forms of violence and the "private sphere" 36
F. FINAL REFLECTIONS AND RECOMMENDATIONS 39
G. CONCLUSIONS 41
APPENDIX 1: hierarchical structure and composition of the FDLR 43
BIBLIOGRAPHY 44

List of Abbreviations

Am. J. Int'l L.	American Journal of International Law
AJCL	American Journal of Comparative Law
BJIL	Berkeley Journal of International Law
BRIT. J. CRIMINOL	British Journal of Criminology
CAR	Central African Republic
CJIL	Chinese Journal of International Law
CYIL	Canadian Yearbook of International Law
ECCHR	European Center for Constitutional and Human Rights
FDLR	*Forces démocratiques de libération du Rwanda* or Forces for the Liberation of Rwanda
FOCA	*Forces Combattantes Abacunguzi*
HRQ	Human Rights Quarterly
HRW	Human Rights Watch
ICC	International Criminal Court
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IHL	International Humanitarian Law
JICJ	Journal of International Criminal Justice
LJIL	Leiden Journal of International Law
Melb. J. Int'l L	Melbourne Journal of International Law
MLC	*Mouvement de libération du Congo* or Movement for the liberation of the Congo
MPEPIL	Max Planck Encyclopedia of Public International Law
NULR	Northwestern University Law Review
OLG	*Oberlandesgericht* or Higher Regional Court
OTP	Office of the Prosecutor (of the ICC)
UN	United Nations
VStGB	*Völkerstrafgesetzbuch* or International German Code of Crimes
ZIS	*Zeitschrift für Internationale Strafrechtsdogmatik*

A. INTRODUCTION

In March 2016 the permanent International Criminal Court (the "ICC") in the Hague convicted Jean-Pierre Gombo Bemba for sexual and gender-based crimes committed by forces during a non-international armed conflict in the Central African Republic ("CAR").[1] The *Prosecutor v. Jean-Pierre Bemba Gombo* ("the Bemba case") was a landmark decision, not only because it was the first ICC case to focus primarily on sexual and gender-based crimes but also the Court's first conviction on the basis of command responsibility. Broadly speaking command responsibility refers to holding a military or civilian superior liable for the crimes of their subordinates.[2] This unique form of individual criminal liability comes from a commander's duty to ensure their soldiers respect the rules of international humanitarian law ("IHL") during armed conflict.[3] Although not a new concept, command responsibility is gaining contemporary recognition in international criminal law ("ICL"), partly due to the potential it has to address a broader range of crimes committed by perpetrators at the lowest levels of military hierarchy.[4] Prosecutions on this basis demonstrate that commanders, such as Jean-Pierre Gombo Bemba, will not be able to escape liability for acts committed by soldiers who are under their effective command and control.[5]

The ability to hold the highest level of military and civilian leaders accountable is also significant, not only as a means of maximising superiors' incentives to ensure compliance with IHL,[6] but also for the prevention of sexual and gender-based crimes.[7] It is accepted, for example, that commanders can have influence in suppressing the commission of sexual crimes during armed conflict;[8] crimes which have been historically underrepresented before international courts and tribunals. The UN Security Council attempted to remedy this deficit in 2001 by enacting Resolution 1325 (reaffirmed in 2010), which re-emphasised the obligation on all States to prosecute those responsible for sexual and other violence (see § 10,

[1] *Bemba Case* (Judgment) ICC-01/05-01/08 (21 March 2016).
[2] *Robinson*, How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution, Melb. J. Int'l L. 13/2012, p.1, 6
[3] *Williamson*, Some considerations on command responsibility and criminal liability, International Review of the Red Cross 90/2008, p. 303, 303.
[4] *Meloni*, Command Responsibility in International Criminal Law, 2010, p. 31.
[5] *Vetter*, Command Responsibility of Non- Military Superiors in the International Criminal Court (ICC*)*, Yale J. Int'l L. 25/2000, p. 89, 93.
[6] *Dunnaback*, Command Responsibility: A Small-Unit Leader's Perspective, 108/NULR 2014, p. 1385, 1385.
[7] *Laviolette*, Commanding Rape: Sexual Violence, Command Responsibility, and the Prosecution of Superiors by the International Criminal Tribunals for the Former Yugoslavia and Rwanda, CYIL 36/1998, 96.
[8] *Kortfält*, Sexual Violence and the relevance of the Doctrine of Superior Responsibility - in the light of the Katanga judgment at the ICC, Nordic Journal of International Law 84/2015, p. 1, 16.

U.N. Doc. S/RES/1325 Oct. 31, 2001). Further, in 2014 the Office of the Prosecutor ("OTP") of the ICC, in the wake of the criticism for the failure to secure a conviction for rape and sexual slavery in the *Prosecutor v. Katanga*,[9] released a Policy Paper on sexual and gender-based crimes. This paper declared that addressing various obstacles and pervasive challenges to the effective investigation and prosecution of sexual and gender-based crimes was one of the key strategic goals in the future work of the ICC.[10] In this context, and in terms of increasing recognition and justice for these crimes through a systematic application of the command responsibility doctrine, the Bemba judgment has been proclaimed a success.

In order to holistically assess progress in the prosecution of international sexual and gender based crimes it becomes necessary to juxtapose the Bemba case with domestic cases of a similar nature. In late 2015, the *Oberlandesgericht* ("OLG") or Higher Regional Court in Stuttgart attempted to prosecute political commanders of the *Forces démocratiques de libération du Rwanda* (Democratic Forces for the Liberation of Rwanda or "FDLR") for various international crimes including rape and sexual slavery that were committed during a non-international armed conflict in the Democratic Republic of Congo ("DRC").[11] Despite the initial indictment, during the proceedings the Stuttgart Court dropped all charges of command responsibility and crimes of sexual violence, demonstrating the ongoing challenges not only with the prosecution of sexual and gender-based crimes but also with establishing the corresponding liability of commanders.

A comparative examination of these decisions suggests that there still are important questions as to the legal, practical and to some extent moral, tenability of prosecutions made on the basis of command responsibility, particularly when it comes to the scope of its application to sexual and gender-based crimes. Such questions relate to, for example, the evidentiary thresholds required for establishing not only that international sexual crimes occurred but also for showing that a superior who was neither physically present, nor in a clearly ascertainable hierarchy of power, nonetheless had control over and knowledge of those crimes. Other issues include the extent to which a commander may be responsible for broader forms of sexual violence in conflict. This relates to the role of "dual-purpose violence" and the notion that

[9] *Katanga Case* (Judgment) ICC-01/04-01/07-3436 (21 March 2014).
[10] *Office of the Prosecutor*, Policy Paper on Sexual and Gender-Based Crimes June 2014 https://www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf (last accessed on 3/02/2017).
[11] See OLG Stuttgart Judgment from 28.9.2015, 5 - 3 StE 6/10.

sexually violent crimes may be perpetrated with both political and personal motivations.[12] The crime of rape, for example, may be committed, not only as a strategic weapon of war targeting certain groups of civilians of a particular religion or ethnicity, but by opportunistic individuals taking advantage of temporary civil unrest and chaos.[13] The precise scope of application of command responsibility becomes crucial in such cases in terms of identifying the degree to which a superior is able to separate himself from crimes committed by subordinates and thereby shield himself from liability.[14]

This paper traces the historical development of command responsibility as a form of liability in international criminal law generally, as well as more specifically in relation to sexual and gender-based crimes. It re-examines the practical challenges that can arise in prosecutions based on this unique legal nexus, in the context of both the Bemba and OLG Stuttgart cases, in order to determine the extent to which command responsibility represents a concrete strategy for ending impunity for sexual and gender-based violence.

B. FACTUAL AND LEGAL BACKGROUND

I. Command responsibility; definition, scope of liability and purpose

As prefaced above, command responsibility refers to holding military or civilian superiors criminally liable for crimes committed by their subordinates.[15] More specifically, according to the ICRC Advisory Service on IHL, a successful conviction on the basis of command responsibility generally involves a superior who has control or authority over his subordinates, who knew or should have known crimes were committed by those subordinates, who had the ability to prevent such crimes and who failed to take all necessary and reasonable measures to do so.[16] It is clear from this classification that command responsibility goes beyond punishing superiors for ordering their soldiers or subordinates to commit crimes. Indeed the ordering, soliciting or inducing of the commission of such crimes by the superior

[12] *Green and Ward*, The Transformation of Violence in Iraq, BRIT. J. CRIMINOL 49/2009, p. 1, 3.
[13] *Askin*, Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles, BJIL 2003, p. 288, 288.
[14] *Vetter*, fn. 5, p. 93.
[15] *ICRC Advisory Service on International Humanitarian Law*, Command responsibility and failure to act https://www.icrc.org/eng/assets/files/2014/command-responsibility-icrc-eng.pdf (last accessed on 15/09/2016).
[16] ibid.

typically attracts a more direct type of individual criminal liability (see for example Art. 25(3)(b) of the Rome Statute). Although in such circumstances command responsibility may be used as an alternative form of liability, it is primarily used to enliven the accountability of commanders for crimes committed by subordinates in cases where the commander should be held responsible, despite the fact that there was no direct issuing of unlawful orders.[17] This sort of accountability is based on the so-called failure to act;[18] a form of indirect or omission liability that punishes a superiors' failure to prevent, repress or punish crimes for which they had actual or constructive knowledge.[19] As is often the case for omission liability under various national laws, accountability for an omission arises not from a commander's actions, but rather as a result of the dereliction of a recognised duty, in this case the duty of commanders to control their subordinates.[20]

The precise parameters of this duty were expressed by the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in the *Delalić* case, which stated that "international law imposes an affirmative duty on superiors to prevent persons under their control from committing violations of international humanitarian law, and it is ultimately this duty that provides the basis for, and defines the contours of, the imputed criminal responsibility [of commanders]."[21] Further, Judge Steiner noted in a separate opinion in the Bemba case that the rules of IHL, for example, Art. 87(2) of Additional Protocol I, which identifies that commanders should ensure that members of their forces are aware of and trained in the rules of war under the Geneva Convention and its protocols, may assist in providing some guidance for commanders in terms of what is required of them to fulfil this duty.[22]

The broader purpose of this form of liability is to reinforce a commanders responsibility to protect civilians and other persons from the criminal acts of their subordinates during armed conflict,[23] whether this be by providing adequate training in the rules of IHL, by responding appropriately to crimes as they occur, by thoroughly investigating and punishing offenders or, ideally, all three. The failure of a commander to punish subordinates for crimes is also an aspect of a commanders' duty as, although not relevant in terms of crime prevention, a

[17] *Dinstein*, Command Responsibility, MPEPIL 9/2015.
[18] *Moloto*, Command Responsibility in International Criminal Tribunals, BJIL 2009, p. 12, 12.
[19] *Delalić Case* (Trial Chamber Judgment) ICTY IT-96-21-T (16 November 1998), 333.
[20] *Dinstein*, fn. 17.
[21] *Delalić*, fn. 19, p. 334.
[22] See separate opinion of Judge Sylvia Steiner, *Bemba Case*, fn. 1, p. 15.
[23] *Halilović Case* (Judgment) IT-01-48-T (16 November 2005), 39.

commander's conduct in this context does facilitate the further commission of crimes and is therefore seen as contributing to an ongoing culture of impunity.[24] It is also important to note, however, that the measures a commander must take in order to fulfil their overarching duty of responsible command may vary according to the precise role and functions of the specific commander.[25]

There are also certain pragmatic hopes for the progress of such a unique concept of liability, particularly when it comes to the principle of complementarity and the successful domestic prosecution of international crimes.[26] This is because superiors who exercise control and authority over their subordinates, and who are in reality often displaced from the area of conflict, may nonetheless be found criminally responsible for sexual and gender-based crimes, and indeed all international crimes, committed during non-international armed conflict.[27]

II. Prosecutions using command responsibility

1. An overview of statutory and judicial developments

Command responsibility, as a form of individual criminal responsibility, has long since existed in various domestic and military laws and criminal codes. While tracing the development of the doctrine, the Trial Chamber of the ICTY in the *Delalić* case noted the influential nature of domestic laws such as the US Army Field Manual of the Law of Land Warfare or the British Manual of Military Law, both of which explicitly reference a form of superior or command responsibility.[28] Although already existing in various domestic forms, command responsibility was first given clear and express codification at an international level in the 1977 Additional Protocol I to the 1949 Geneva Convention.[29] Specifically, Art. 86 requires state parties to not only "repress grave breaches…take measures necessary to suppress other breaches, of the Conventions or of this Protocol, which result from a failure to act when under a duty to do so" but also confirmed to States that such a breach "committed

[24] *Robinson*, fn. 2, p. 28.
[25] See separate opinion of Judge Sylvia Steiner, *Bemba Case*, fn. 1, 15.
[26] *Jia*, The Doctrine of Command Responsibility Revisited, CJIL 3/2004, p. 1, 1.
[27] *Boas*, in: Tanaka, McCormack and Simpson (eds), 164.
[28] *Delalić*, fn. 19, p. 341.
[29] *Meloni*, The Evolution of Command Responsibility in International Criminal Law, FICHL Publication Series 2015, p. 10.

by a subordinate [would] not absolve…superiors from penal or disciplinary responsibility, if they knew, or had information which should have enabled them to conclude" that such a breach could occur (see Art. 86, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)).

Since this codification there have been a number of formative international cases that have contributed to the judicial development of command responsibility.[30] One such case was the High Command Trial, between the United States and Wilhelm von Leeb (as well as 13 other commanders) at the US Military Tribunal in Nuremberg between 1947 and 1949.[31] This case, which found senior officers liable for their role in implementing extermination programmes,[32] served as clarifying jurisprudence on the importance of authority and control in determining the relevant standard of responsibility to attribute to a commander.[33] Also internationally influential was the so-called *Hostage* case, in which a United States Tribunal convicted high-ranking commanders for their acquiescence to the execution of civilians in Greece, the former Yugoslavia, Norway and Albania during the second World War.[34] This case relied for the most part on the High Command judgment but also extended the requisite mental element from actual knowledge of the commission of crimes committed by subordinates to constructive knowledge or the "should or must have known" standard.[35] Specifically, in reaching a conviction the Court, in that case, relied on sustained, almost daily communications creating a chain of command that was enough to establish this type of imputed knowledge.[36]

The statutes of the international *ad hoc* criminal tribunals, notably Yugoslavia and Rwanda, have also since included provisions outlining the liability of commanders (see Arts. 7(3) ICTY and 6(3) ICTR). A similar codification was developed in Art. 28 of the Rome Statute of the ICC, which also outlines the precise parameters of international criminal responsibility and which will be discussed in more detail below. In addition to the various manifestations of command responsibility in ICL, it is also cemented in the rules of customary international law ("CIL"). In the *Delalić* case, the aforementioned decision that was also the first international judgment rendered in relation to the modern doctrine of command responsibility, it was also

[30] *Meloni*, fn. 4, p. 52.
[31] ibid.
[32] *Bantekas*, The Contemporary Law of Superior Responsibility, Am. J. Int'l L. 93/1999, p. 1, 1.
[33] *Meloni*, fn. 4, p. 54 ff.
[34] *Bantekas*, The Contemporary Law of Superior Responsibility, Am. J. Int'l L. 93/1999, p. 1, 1.
[35] *Meloni*, fn. 4, p. 55.
[36] ibid.

stated that "[…] the failure to prevent or repress the crimes committed by subordinates forms part of customary international law."[37]

2. Command responsibility and sexual and gender-based crimes; a historical perspective

a) Sexual and gender-based crimes generally

Sexual crimes under international law include such offences as rape, sexual violence and enforced prostitution but also include both physical and non-physical acts that possess a sexual element.[38] Gender-based crimes, on the other hand encompass those crimes, both sexual and non-sexual in nature, that are committed against a person "because of their sex and/or their socially constructed gender roles."[39] For the purposes of this paper these crimes will be dealt with together.

Although it is widely accepted that war and conflict can increase "the opportunity for sexual violence",[40] sexual and gender-based offences have historically been underrepresented in the international prosecution of crimes before various courts and tribunals.[41] A 1994 UN Special Rapporteur Preliminary Report found, for example, that "[rape]" remains the least condemned of all war crimes; throughout history, [although] the rape of hundreds of thousands of women and children in all areas of the world has been a bitter reality".[42] Some prominent examples that reflect this historical treatment of sexual and gender-based crimes include the Nuremberg Trials, from which the war crime of rape and other sexual violence were omitted completely.[43] Further, during the post-WWII Nuremberg and Tokyo International Military Tribunals rape, although dealt with to some extent, was also widely neglected and subject to inconsistent prosecution.[44] The reason for this was, to some extent, based on pervasive views

---

[37] *Delalić,* fn. 19, p. 343.
[38] *Office of the Prosecutor*, Policy Paper on Sexual and Gender-Based Crimes, https://www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf (last accessed on 28/10/2016).
[39] ibid.
[40] *Wood*, Variation in Sexual Violence during War, Politics & Society 2006, p. 307, 321.
[41] *Kroker*, Universal Jurisdiction in Germany? The Congo War Crimes Trial: First Case under the Code of Crimes against International Law (Executive Summary), ECCHR 2016, 21.
[42] *Csete and Kippenberg*, The War Within the War: Sexual Violence Against Women and Girls in Eastern Congo, Human Rights Watch 2002, 84.
[43] *Mischkowski and Mlinarevic*, The Trouble with Rape Trials – Views of Witnesses, Prosecutors and Judges on Prosecuting Sexualised Violence during the War in the former Yugoslavia, Open Society Institute 2009, p. 5.
[44] *Sellers and Okuizumi*, Intentional Prosecution of Sexual Assaults, Transnational Law & Contemporary Problems 7/1997, p. 45, 47.

as to the nature of sexual violence as well as the desire to focus on more "supreme" crimes,[45] such as genocide and mass murder.

Despite earlier omissions and partial-omissions in the post-war prosecutions of sexual crimes, the profile of such crimes under ICL has gradually increased. Modern international prosecutions and legal regimes have been vigilant in ensuring greater emphasis is placed on taking into account the particular needs of women and girls in armed conflict.[46] The widespread atrocities committed in contravention of IHL during the conflict over the former Yugoslavia, for example, led to the establishment of the International Criminal Tribunal ("ICTY") in 1993, which had the express intention of prosecuting sexual war crimes, including rape (see Art. 5(g) of Updated Statute of the ICTY). Indictments before the ICTY also marked a significant development in terms of the treatment of sexual offences as the Statute made the step of elevating rape from a war crime to a crime against humanity: a reflection of its gravity and proclivity for strategic use by armed forces as a weapon of war.[47] Further, the International Criminal Tribunal for Rwanda ("ICTR") convicted Jean-Paul Akayesu in 1998 for numerous crimes including rape, which also marked the first conviction for mass rape amounting to genocide under international criminal law.[48] Finally, in 1998, the Rome Statute of the International Criminal Court was adopted, which explicitly refers to rape, sexual slavery and enforced prostitution as war crimes and crimes against humanity (see Art. 7(g)). All of these developments have contributed to the recognition and prosecution of sexual and gender based crimes committed during non-international armed conflict.

b) Holding commanders responsible for sexual crimes; obstacles and challenges

Despite the historical prevalence of sexual and gender-based violence in non-international armed conflict, it is also important to understand that the commission of such crimes is not always an inevitable consequence of war.[49] Rather, "war-time sexual violence is a crime that can be commanded, condoned or condemned."[50] The use of command responsibility in the

[45] *Askin*, fn. 13, p. 288.
[46] *Gaggioli*, Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law, IRRC 2014, p. 503, 511.
[47] *The Hague Justice Portal*, The Foca Rape Camps: a dark page read through the ICTY's jurisprudence http://www.haguejusticeportal.net/index.php?id=8712 (last accessed on 29/10/2016).
[48] *Csete and Kippenberg*, fn. 42, p. 85.
[49] *Margot Wallström*, Women, Peace and Security: Sexual Violence in Situations of Armed Conflict http://www.stoprapenow.org/uploads/features/StatementofSRSGWallstromSecurityCouncilOpenMeeting27April2010.pdf?v=h1wnEb3xrBE (last accessed on 17/04/2017).
[50] ibid.

context of sexual crimes is therefore particularly significant, as effective command can serve to diminish the perpetration of these crimes.[51] Perhaps in recognition of this fact, the use of command responsibility in the prosecution of sexual and gender-based offences is not a novel approach in international criminal law. Indeed it was used as early as 1474 during the trial of Sir Peter von Hagenbach, Governor of the Duke of Burgundy's Alsatian territories, who was convicted by a quasi-international tribunal for not preventing soldiers under his command as committing crimes of murder and rape.[52] Since then there have been numerous cases of sexual and gender-based violence brought before national courts and international tribunals, to which the doctrine of command responsibility has been applied, which cement this particular mode of liability as being conducive to providing justice for crimes that can otherwise remain unpunished.[53] One of these cases include, for example, the trial of General Yamashita Tomoyuki, Commander General of the 14th Army Group of the Imperial Japanese Army in the Philippine Islands in the 1940s, who was tried and convicted by the US Military Commission for failing in his duty to control those under his command and allowing them to commit widespread war crimes, including rape.[54] More recently the ICTY charged Dragoljub Kunarac, the commander of a special reconnaissance unit of the Bosnian Serb Army in Foča, for rape as a war crime and crime against humanity on the basis of both direct and command responsibility, although the latter was ultimately not accepted by the Trial Chamber.[55]

Notwithstanding that command responsibility has often been raised in relation to sexually violent war crimes and crimes against humanity, as well as the recent successful prosecution in the Bemba case, academics have contemplated whether this mode of individual criminal responsibility offers a practical way to overcome the apparent marginalisation of sexual and gender-based crimes in criminal prosecutions.[56] In other words, to what extent can this form of liability increase the international prosecution of sexual offences, thereby ending impunity for such crimes? Is it possible, for example, for command responsibility to increase compliance with IHL and reduce the commission of crimes, which are arguably often committed in a context where the mindset of the perpetrator is based on the notion of offsetting individual guilt with collective action?[57] Indeed the practical ability of command

[51] See discussions in *Aranburu,* Sexual violence beyond reasonable doubt: using pattern evidence and analysis for international cases, LJIL 23/2010, p. 609, 611.
[52] *Laviolette*, fn. 7, p. 118.
[53] ibid, p. 123.
[54] *Boas*, in: Tanaka, McCormack and Simpson (eds), 166.
[55] *Kunarac Case* (Trial Chamber Judgment) ICTY 96-23 (12 June 2002), 629.
[56] *Laviolette*, fn. 7, p. 95.
[57] *Drumbl*, Pluralizing International Criminal Justice, MLR 103/2005 p. 1295,1305.

responsibility to suppress the commission of sexual crimes in armed conflict is one of the central questions associated with this doctrine.[58] Further, under command responsibility the perpetrator of the crime is not the person ultimately held accountable,[59] which in some circumstances, particularly in the context of sexual crimes, may provide an insufficient, or even uncomfortable, notion of justice.[60] Such issues can be more moral than legal in nature and are ultimately beyond the scope of this paper, particularly as the concept of holding one person liable for the crimes of many is in accordance with the prosecutorial policy of the ICC, which is to only bring charges against those with the "greatest responsibility for such crimes."[61]

This paper is more concerned with other legal problems identified in this context, such as whether command responsibility represents a concrete strategy for redressing sexual crimes committed in conflict. Matters of scope and factual application of the doctrine raise persistent questions relating to the judicial treatment of certain crimes. Can this form of liability overcome, for example, pervasive views that certain sexual crimes committed during armed conflicts are actually committed within a "private sphere"; views that can cause obvious challenges in terms of establishing that a commander should be held criminally responsible.[62] These sorts of challenges, addressed further below in the context of recent decisions of the ICC and the OLG Stuttgart, should also be considered in light of the historical prevalence of sexual violence in international and non-international armed conflict.[63]

[58] *Wood*, fn. 40, p. 333.
[59] *Damaska*, The Shadow Side of Command Responsibility, AJCL 49/2001, p. 455, 456.
[60] *Robinson*, fn. 2, p. 12.
[61] *Public Affairs Unit of the ICC*, Understanding the International Criminal Court https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf (last accessed on 04/03/2017).
[62] *Sellers and Okuizumi*, fn. 44, p. 66.
[63] ibid.

C. APPLICABLE LAW

I. Command Responsibility under the Rome Statute of the International Criminal Court (ICC)

Before proving the specific elements of command responsibility under Article 28(a) of the Rome Statute, it is up to the Prosecution to first establish, beyond reasonable doubt, that a crime within the jurisdiction of the Court was committed (see for example Art. 22 of the Rome Statute). In other words the Prosecution must first confirm the separate contextual elements of, for example, rape as a war crime, crime against humanity or genocide.[64] From here, criminal liability as a military or civilian commander under Art. 28(a) must be established, in accordance with the aforementioned legal duty of commanders under IHL and involving the following elements:

a. The existence of a military or civilian commander;
b. The effective command and control, or effective authority and control, over the forces that committed the crime(s);
c. Knowledge of the commander, actual or constructive, that the forces were committing or about to commit such crimes;
d. The failure to take all necessary and reasonable measures to prevent or repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution; [65]

The first three elements will be discussed in more detail below with respect to their practical application however it is relevant at this point to note the difference in mental element for military versus civilian commanders.[66] Art. 28(a)(i) requires that military commanders "knew or should have known that the forces were committing or about to commit such crimes" whereas Art. 28(b)(i) requires that civilian commanders "knew or consciously disregarded" relevant information. Further a conviction under both Art. 28(a) and (b) also requires a

[64] *Public Affairs Unit of the ICC*, Understanding the International Criminal Court https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf (last accessed on 23/03/2017).
[65] *Bemba Case*, fn. 1, p. 170.
[66] *Robinson*, fn. 2, p. 6.

causative element, that is not required by the *ad hoc* tribunals.[67] In other words it must be established that the specific failure or omission of the commander contributed to the commission of the crimes.[68]

As for the fourth and final element, the ICC has interpreted the failure to take all necessary and reasonable measures (see Art. 28(a)(ii) of the Rome Statute) as imposing three distinct duties on commanders: (i) the duty to prevent the commission of crimes; (ii) the duty to repress the commission of crimes; and (iii) the duty to submit matters to relevant authorities for investigation and prosecution.[69] It is relevant to note that Judge Steiner, in her separate opinion in the Bemba case, recently stated that this duty on commanders "may extend both temporally and substantively beyond the specific Art. 28(a)(ii) duties."[70]

II. Command Responsibility under the *Völkerstrafgesetzbuch* (VStGB)

Germany has jurisdiction over international crimes under Section 1 of the Code of Crimes against International Law (*Völkerstrafgesetzbuch* or "VStGB") even where these crimes occur abroad and where there is no apparent direct link with Germany.[71] The duty to exercise this universal jurisdiction for genocide, crimes against humanity and war crimes, however, is regulated under Sections 152(2) and 153 of Germany's Law of Criminal Procedure (*Strafprozessordnung* or "StPO") and applies without discretion where there is a specific link to Germany.[72] The German law on command responsibility is contained in Sections 4, 13 and 14 of the VStGB, as introduced by the Act to Introduce the Code of Crimes against International Law in June 2002.

In drafting the relevant articles of VStGB, the decision was made to separate the various duties of commanders under IHL that were mentioned briefly above. For example, Section 4 of the VStGB prescribes that a military or civilian supervisor who fails to prevent subordinates from committing an international crime will be criminally liable as though he or

[67] *Boon*, Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines, Melb. J. Int'l L. 15/2014, p. 331, 394.
[68] *Robinson*, fn. 2, p. 6.
[69] *Bemba Case*, fn. 1, 201.
[70] See separate opinion of Judge Sylvia Steiner, *Bemba Case*, fn. 1, p. 15.
[71] *Jessberger*, The Principle of Universal Jurisdiction in German Criminal Law https://www.jura.uni-hamburg.de/ueber-die-fakultaet/professuren/professur-jessberger/forschung/landesbericht-jessberger-2007.pdf (last accessed on 28/03/2017).
[72] ibid.

she had committed the offence.[73] At the same time, Section 4 of the VStGB expressly prohibits the dual application of Section 13(2), which provides a lesser level of criminal liability for the negligent or intentional failure of commanders to fulfil their duty of supervision. To be successful Section 13 of the VStGB requires the establishment of discernible knowledge of the commander as well as the practical ability to prevent its commission. Finally, Section 14 of the VStGB provides for the separate offence of omission to report a crime to the relevant authorities for appropriate investigation and/or prosecution. The difference between Sections 4 and 13 is that Section 13 provides criminal liability for the violation of a commander's duty of supervision or failure to act, whereas Section 4 punishes the commanders' intentional failure to prevent the commission of a crime,[74] and thereby was deemed by the legislator as deserving a punishment equal to that of the subordinate who committed the offence.[75]

Although changing the law to bring it in line with international criminal standards,[76] German drafters made a clear decision to frame superior responsibility differently from what is found in Art. 28 of the Rome Statute. The decision to structure this type of omission liability into three separate provisions was apparently designed to reflect the independent responsibility of civil and military commanders vis-à-vis the separate crimes committed by subordinates.[77] Some German academics venture that this decision was based on concerns that Art. 28 runs counter to the concept of criminal culpability.[78] This somewhat more cautious division of crimes of omission into the duty of prevention, the duty of supervision and the duty to report and their corresponding varying degrees of penalties are designed to reflect actual blameworthiness and fault in individual cases.[79]

[73] *Duffet*, Translation of the Act to Introduce the Code of Crimes against International Law of 26 June 2002 http://www.iuscomp.org/gla/statutes/VoeStGB.pdf (last accessed on 23/04/2017).
[74] *Meloni*, fn. 4, p. 206.
[75] *Van Sliedregt*, p. 202.
[76] *Meloni*, fn. 4, p. 203
[77] ibid, p. 207.
[78] *Burghardt*, Die Vorgesetztenverantwortlichkeit nach Völkerstrafrecht und deutschem Recht (§ 4 VStGB), ZIS 2010, p. 695, 695.
[79] *Van Sliedregt*, fn. 75, p. 205.

D. THE ICC AND GERMANY'S HIGHEST COURT; A COMPARATIVE LOOK

I. The Bemba Case (ICC)

1. Factual Background, Indictment and Proceedings

Jean-Pierre Bemba Gombo ("Bemba") was President and Founder of the *Mouvement de libération du Congo* ("MLC"), a movement for the liberation of Congo militia as well as Commander-in-Chief of the *Armée de Libération du Congo* ("ALC"). The conflict that formed the primary subject matter of this case, occurring approximately between October 2002 and March 2003, was between government authorities in Central Africa, supported by Bemba and MLC and other forces on the one hand and armed rebels of General François Bozizé and the *Forces armées centrafricaines* ("FACA") on the other.[80] Bemba and the MLC deployed approximately 1,500 soldiers to CAR at the request of former CAR President Ange Félix Patassé in order to counter the rebel forces loyal to the former-chief-of-staff Bozizé.[81]

During the conflict various media, NGOs and other sources reported numerous acts of rape, murder and pillaging being committed against civilians by MLC soldiers in various areas including Bangui, PK12, PK22, Bozoum, Damara, Sibut, Bossangoa, Bossembélé, Dékoa, Kaga Bandoro, Bossemptele, Boali, Yaloke, and Mongoumba.[82] These same reports alleged that MLC soldiers were indiscriminately targeting civilians, who in statements later collectively referred to MLC soldiers as *Banyamulengué*, who were identifiable to them through characteristics such as language, weapons and uniforms.[83] It was further testified and confirmed during trial, by CAR Prosecutor Mr Firmin Findiro, investigative Judge Mr Pamphile Oradimo and other witnesses, that during these attacks on civilian MLC troops were following a particular *modus operandi* or course of conduct: they would first confirm by various means that enemy forces, namely General Bozize's rebels, had left the targeted area before commencing their attacks.[84] The alleged motivations behind these attacks included a

[80] *Clark*, The First Rape Conviction at the ICC – An Analysis of the Bemba Judgment, 14/JICJ 2016, p. 667, 669.
[81] *International Criminal Court*, Situation in Central African Republic https://www.icc-cpi.int/car/bemba/Documents/BembaEng.pdf (last accessed on 29/10/2016).
[82] *Bemba Case*, fn. 1, p. 564.
[83] ibid, p. 563.
[84] ibid, p. 565.

desire to issue punishment to suspected sympathisers or aiders of the enemies as well as the application of the so-called Art. 15: a way for soldiers to compensate themselves for what they saw as inadequate salaries and insufficient rations.[85] Throughout the conflict, Bemba reportedly remained at his home in the Congo and during this time also reportedly ran as a candidate in the country's presidential election.[86]

Bemba was ultimately arrested in Belgium in 2008 and transported to the ICC in the Hague to await trial.[87] He was charged with two counts of crimes against humanity of murder and rape, and three counts of war crimes of murder, rape and pillaging of the civilian population during the CAR 2002-2003 operation, all on the basis of command responsibility under Article 28(a) of the Rome Statute.[88] The primary issue before the Trial Chamber was therefore whether Bemba was liable, as a commander of the MLC forces, for the alleged crimes committed in the CAR. It is interesting to note here, and perhaps demonstrative of the then rudimentary understanding of command responsibility as a mode of liability under international criminal law, that the Prosecution originally purported to charge Bemba under Art. 25(3)(a) and co-perpetration of the above-mentioned crimes.[89] However after intervention and advice from the Pre-Trial Chamber, the indictment was amended to include command responsibility under Art. 28(a).[90]

2. The Bemba Decision

Bemba was convicted in March 2016 by ICC Trial Chamber III and sentenced to 18 years' imprisonment.[91] The Chamber found, in accordance with the elements of Art. 28(a), that Bemba was effectively acting as a military commander who knew that MLC forces were committing crimes of rape, murder and pillaging and failed to take adequate measures to prevent, repress or punish the crimes his subordinates.[92]

---

[85] ibid, p. 565.
[86] *Clark*, fn. 80, 670.
[87] *International Criminal Court*, Situation in Central African Republic https://www.icc-cpi.int/car/bemba/Documents/BembaEng.pdf (last accessed 29 October 2016).
[88] ibid.
[89] *Bemba Case*, fn. 1, p. 35.
[90] ibid.
[91] *ICC Press Release*, ICC Trial Chamber III sentences Jean-Pierre Bemba Gombo to 18 years imprisonment https://www.icc-cpi.int/Pages/item.aspx?name=PR1223 (last accessed on 30/10/2016).
[92] *ICC*, Situation in Central African Republic https://www.icc-cpi.int/car/bemba/Documents/BembaEng.pdf (last accessed on 29/10/2016).

The most important aspects of this case, and indeed the most important aspects in the majority of cases brought under command responsibility, were whether there was effective command or control over the forces who committed the crimes and whether there was actual or constructive knowledge that the crimes were being, or had been, committed. As a result, the apparent strategy of the Bemba Defence was to attempt to disconnect Bemba from the commission of the alleged crimes,[93] both geographically and politically. The significance and impact of this strategy will be discussed further below.

a) Bemba's effective control of forces

The effective control element requires the Trial Chamber to examine the commander's general position and functions. To this end, the Court will consider whether the commander had the "material ability to prevent or punish the commission of th[e] offences", [94] or to submit the matter to competent authorities. This is a relatively high threshold and according to the Chamber excludes lower forms of control such as the ability of a commander to exercise substantial influence over those committing the crimes.[95] In addition to examining the Commander's powers and abilities the Court must consider whether the effective control of the Commander extended to the specific forces committing the alleged offences at the relevant time, which is particularly relevant in situations of geographical remoteness. [96]

In anticipation of these requirements, the Bemba Defence team argued that when MLC troops were sent to CAR they were actually "resubordinated to the CAR authorities" and that as a result it could not be concluded that Bemba was the one who had effective control.[97] The Chamber did not accept the argument that the troops committing the crimes were controlled more by others than by Bemba, noting that in this particular case the "effective control of one commander does not necessarily exclude effective control being exercised by another."[98] The Chamber qualified this statement by adding that cases involving command responsibility, and in particular the question of whether a commander had effective control over forces, require a

[93] *Open Society Justice Initiative*, The Trial of Jean-Pierre Bemba at the ICC: Closing Arguments https://www.opensocietyfoundations.org/sites/default/files/briefing-bemba-closing-arguments-11112014.pdf (last accessed on 30/10/2016).
[94] *Delalić Case* (Appeal Judgment) ICTY IT-96-21-A (20 February 2001), 378.
[95] *Bemba Case*, fn. 1, p. 183.
[96] ibid, p. 698.
[97] ibid, p. 185.
[98] ibid.

fact-specific analysis.[99] Accordingly the Chamber noted that while there certainly was some level of necessary coordination between the MLC forces and CAR authorities on the ground, there was sufficient and consistent testimony confirming that the ultimate commands and therefore effective control still lay with Bemba.[100] The Chamber were careful to add here that although Bemba was kept informed about the progress of operations by the MLC's General Staff, who also implemented his orders and provided him with military advice, the more complex chain of command that this inevitably created did not minimise his ultimate authority.[101] The Chamber also pointed to a number of other factors that contributed to Bemba's authority. These factors included his formal powers such as the ability to appoint and dismiss members of the MLC, his control over military logistics in acquiring, financing and distributing weapons and ammunition as well as disciplinary authority such as powers of arrest and the ability to establish inquiries.[102] Also relevant for the Trial Chamber in this context was the fact that Bemba addressed groups of MLC troops on numerous occasions and that they knew and referred to him as their president.[103] In light of this cumulative evidence the Trial Chamber was satisfied beyond reasonable doubt that Bemba had effective control and authority over the MLC forces in CAR at the time the offences occurred.[104]

b) Bemba's knowledge of the commission of the crimes

The Chamber also established, through similar direct and indirect circumstantial evidence as was used to establish effective control, that Bemba knew that the MLC forces were committing or about to commit the crimes; thereby satisfying another crucial element required under Art. 28(a). Although it is possible under Art. 28(a)(i) to establish command responsibility for crimes on the basis that a superior "should have known" about the commission of crimes, consideration of this alternative form of constructive knowledge was not necessary based on the evidence in this case.[105] The Chamber stated that some of the relevant factors for establishing the requisite knowledge under Art. 28(a) include direct orders, the nature, scope and location of crimes, the means of communication as well as the

[99] *Bemba Case*, fn. 1, p. 185.
[100] ibid, p. 426.
[101] ibid, p. 701.
[102] ibid, p. 387-9.
[103] ibid, p. 387-9.
[104] ibid, p. 705.
[105] ibid, p. 196.

notoriety of the acts at the time.[106] With respect to communication, for example, the Chamber made note of the "phonie system"; a radio transmission network used in addition to satellite telephones, *Thurayas* and mobile phones in order to maintain communication between those in the field and command.[107] This allowed Bemba, who had a phonie and two satellite telephones at his house, to speak directly with field commanders.[108] The evidence produced to the Court also showed that Bemba visited the CAR on more than one occasion.[109] The Chamber were further satisfied from various witness testimonies that Bemba received intelligence with respect to various stages of the conflict including "the combat situation, troop positions, politics, and allegations of crimes via intelligence services, both military and civilian".[110] The Chamber stated the factual evidence establishing Bemba's power in matters of military operations and strategies reinforced the reasonable conclusion that he knew of certain attacks on civilians taking place.[111] The various methods of communication along with corroborative testimony were enough to establish Bemba's actual and direct knowledge in this case. [112]

c) Bemba's failure to take necessary and reasonable measures

The final element of command responsibility, to which the Chamber paid particular attention, was whether Bemba took all necessary and reasonable measures within his power to "prevent, repress or punish" the alleged crimes in accordance with the aforementioned duty under Art. 28.[113] The Chamber acknowledged Bemba's contention that as soon as he heard from the various media reports of the alleged crimes he ordered an investigation into the matter (the "Mondonga Inquiry") with the intention of arresting and trying soldiers and thereby preventing further crimes.[114] However the Chamber noted the insufficiency of this as a preventative measure with testimonial evidence that only seven soldiers were arrested and tried, that the inquiry did not pursue reports of rape that were brought up during questioning and that the inquiry was "operated in a haphazard fashion."[115] Ultimately the Chamber found

[106] ibid, p. 193.
[107] ibid, p. 394.
[108] ibid, p. 397.
[109] ibid, p. 707.
[110] ibid, p. 425.
[111] ibid, p. 541.
[112] ibid, p. 710.
[113] ibid, p. 201.
[114] ibid, p. 583.
[115] ibid, p. 589.

that the measures taken by Bemba were "limited in mandate, execution and/or results".[116] The Chamber also noted that the evidence showed that any action by Bemba was primarily motivated by a desire to improve the public's perception of the MLC,[117] rather than a genuine effort to take all necessary and reasonable steps to prevent, repress or punish crimes.

The Chamber went on to identify possible measures that Bemba could have taken in order to fulfil his duties as a commander under Art. 28. These included ensuring that forces were adequately trained in the rules of IHL, ensuring any military manoeuvres were taken in areas without civilians, issuing appropriate orders to the MLC forces, initiating investigations into crimes or submitting matters to the relevant CAR authorities.[118] As a result of the foregoing, the Chamber found that Bemba did not take the appropriate measures, which were reasonably within his power and ability as commander, to prevent or repress the crimes committed by his subordinates.

II. The FDLR Case (OLG Stuttgart)

1. Factual Background, Proceedings and Decision

The Democratic Forces for the Liberation of Rwanda or FDLR were, at that time, a primarily Rwandan Hutu rebel group operating in the eastern Democratic Republic of Congo ("DRC") and fighting for political influence and power in Rwanda.[119] Since 1996 the FDLR were one party in the Congolese civil war, which intensified in 2009 with the joint involvement of DRC and Rwandan government forces who combined efforts in an attempt to control the conduct of the FDLR.[120] The first Defendant, Ignace Murwanashyaka, was the appointed President in 2001 and remained in this position until his arrest in late 2009.[121]

The precise nature and scope of this conflict is complex, involving a number of different sub-conflicts motivated by ethnic and economic interests as well as control over natural

[116] ibid, p. 719.
[117] ibid, p. 728.
[118] ibid, p. 203.
[119] *Human Rights Watch*, The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands, HRW 2014, p. 1, 53.
[120] *Kroker*, Universal Jurisdiction in Germany? The Congo War Crimes Trial: First Case under the Code of Crimes against International Law (Executive Summary), ECCHR 2016, 8.
[121] *Mbarushimana Case* (Pre-Trial Judgment) ICC-01/04-01/10-465 (16 December 2011), 4.

resources.[122] Notwithstanding alleged abuses by all parties, various reports evidenced the brutal treatment of civilians by FDLR forces totalling 1,199 violations of human rights law and IHL between February and October 2009.[123] Similar to circumstances in the CAR, many of these actions were considered "reprisal attacks" on individuals and villages who were suspected or accused of supporting opposition forces.[124] These attacks involved numerous instances of rape and sexual slavery. To be precise, 15 instances of rape were confirmed during the proceedings however it is important to note that the actual number is likely much higher given the media reports detailing the general nature and brutality of the attacks.[125] Such reports documented, for example, that particular instances of rape lasted for days, were accompanied by additional injuries caused by knives and rifle butts and in some cases ended with the death of the victim, while others were enslaved and raped repeatedly by FDLR soldiers.[126]

A 2009 UN Expert Report identified that the political and military leaders and commanders of the FDLR ordered the aforementioned attacks on civilians.[127] In 2010, as a result, two leaders of the FDLR who were living in Germany since the 1980s, Ignace Murwanashyaka ("Murwanashyaka") and Straton Musoni ("Musoni"), the vice-president of the FDLR, were arrested and charged as commanders under Section 4 of the VStGB for 26 counts of crimes against humanity and 39 counts of war crimes, five of which involved crimes of sexual violence.[128] Specifically, the FDLR leaders were charged with issuing orders as well as directing actions and tactics from their positions in Germany via a comprehensive communication network including a satellite phone, the internet, radio and text messages, which contributed to the commission of the aforementioned crimes.[129] Arrests and charges of the two leaders were made simultaneously to the arrest of Callixte Mbarushimana, Executive Officer of the FDLR, by French authorities acting subject to an arrest warrant authorised by the ICC, in accordance with the ICC policy of addressing crimes of eastern DRC in

[122] *Kroker*, fn. 120, p. 8.
[123] *United Nations Security Council*, Final Report of the Group of Experts on the Democratic Republic of the Congo, S/2009/603, 23/11/2009, 345.
[124] ibid.
[125] *Kroker*, Weltrecht in Deutschland? Der Kongo-Kriegsverbrecherprozess: Erstes Verfahren nach dem Völkerstrafgesetzbuch, ECCHR 2016, 54.
[126] ibid.
[127] *United Nations Security Council*, fn. 123, p. 346.
[128] *Kroker*, fn. 120, p. 11 ff.
[129] ibid.

cooperation with States,[130] although in that case charges before the ICC were not confirmed.[131]

Despite the accusation of command responsibility there was not enough evidence to establish the two leaders' liability with respect to the commission of the war crimes.[132] Further, although the original indictment included 15 separate charges, the Defendants Murwanashyaka and Musoni were ultimately only convicted of aiding five war crimes and leadership of a terrorist organisation respectively.[133] Neither was ultimately held liable for the alleged sexual crimes, nor on the basis of command responsibility. Indeed these crimes were dropped from the indictment during the course of proceedings.

E. ANALYSIS AND EVALUATIONS; REVISITING THE CHALLENGES OF COMMAND RESPONSIBILITY AND SEXUAL AND GENDER-BASED CRIMES

I. Preliminary observations

Notwithstanding the success of the Bemba decision, which was a conviction based on overwhelming evidence obtained through substantial and extensive investigations,[134] the FDLR case before the Stuttgart Court provides a catalyst for examining the inherent difficulties involved in proving the commission of sexual and gender-based crimes in non-international armed conflict, particularly within the context of command responsibility. Firstly, it should be recognised that the specific requirements of command responsibility are not precisely tailored to meet the type of crime allegedly committed.[135] Rather, the constituent elements that must be established for a commander to be held responsible for the crimes of his or her subordinates are the same whether the criminal acts involve murder, pillaging or rape.

[130] *International Criminal Court*, Factsheet: Situation in the Democratic Republic of the Congo https://www.icc-cpi.int/NR/rdonlyres/DEB862E4-1E38-4C6E-9197-2953EC6D7EC9/282525/FactsheetENG2.pdf (last accessed on 09/04/2017).
[131] *Mbarushimana Case,* fn. 121.
[132] *Kroker,* fn. 125, p. 73.
[133] *Kroker,* fn. 120, p. 13 ff.
[134] *International Justice Monitor*, Jean Pierre Bemba Gombo at the International Criminal Court https://www.ijmonitor.org/jean-pierre-bemba-gombo-background/ (last accessed on 21/02/2017).
[135] *Sellers and Okuizumi*, fn. 44, p. 67.

This means that some of the challenges that are inherent in prosecutions relying on command responsibility are not necessarily unique to crimes of sexual violence. However, given the historical difficulties encountered in the prosecution and conviction of sexual and gender-based crimes, the abovementioned connection between responsible command and the suppression of sexual crimes in conflict as well as the importance of developing concrete strategies that assist states in fulfilling their duty of trying serious crimes, it becomes necessary to consider whether a charge of sexual violence based on command responsibility requires a more nuanced prosecutorial approach under international criminal law.

It is immediately clear from the juxtaposition of the ICC and OLG Stuttgart decisions that challenges can arise at every stage of the process of establishing the elements of command responsibility, and that these challenges can be exacerbated in cases of sexual and gender-based crimes.[136] The next section of this paper will examine the difficulties encountered, by the Stuttgart Court in particular, in proving international crimes of sexual violence before moving on to the more specific challenges of establishing command responsibility, both generally and more specifically in the context of sexual and gender based crimes.

II. Problems with the nature of command responsibility and proving the elements in the context of sexual crimes

The FDLR case before the Stuttgart Court highlighted some of the challenges for national jurisdictions in terms of proving, not only the occurrence of international sexual crimes, but also the constituent elements of command responsibility in the context of such crimes, namely the superior-subordinate relationship, effective control and constructive knowledge, each of which will be discussed in more detail in the following.

1. Establishing sexual violence; ongoing evidentiary difficulties

Before considering the specific elements of command responsibility a court must first establish the commission of a crime within its jurisdiction i.e. a crime under international law.[137] Unlike the domestic prosecution of sexual crimes in peacetime, the international prosecution of sexual crimes requires proof not only of the crime itself, but also that the crime

[136] ibid.
[137] *Bemba Case*, fn. 1, p. 170.

occurred in the context of an armed conflict (if it concerns the charge of rape as a war crime), that it was committed as part of a widespread or systematic attack (if it concerns the charge of rape as a crime against humanity) or that it was committed with the intention of destroying a particular section of the population (if it concerns the charge of rape as a genocide).[138] Although this contextual requirement provides an additional evidentiary burden on the prosecutors, separate from proving the elements of command responsibility, it is proving the occurrence of the sexual violence itself that can prove the most challenging.

According to a Report undertaken by the European Center for Constitutional and Human Rights ("ECCHR"), which closely monitored the Stuttgart trial, issues of *Beweisbarkeit* or "provability" in the context of a superior's responsibility were a major factor in the decision to drop the charges of sexual violence during the course of proceedings in the FDLR case.[139] This particular ECCHR Report clarified that the decision to set aside multiple charges of mass rape, sexual slavery and individual attacks on civilians could primarily be attributed to the role that anonymous witnesses statements played in proceedings.[140] Witness protection measures meant that the statements made by the victims, as well as authors of expert UN and Human Rights Watch reports, did not include precise (or perhaps sufficient) details of the alleged crimes, such as the name of the town where they took place or the time they occurred.[141]

According to the Court, the anonymised character of these witness statements, a result of the application of various sections of the German Code of Civil Procedure (*Strafprozeßordnung* or "StPO") such as Section 68 which relates to matters of witness identity or Section 53(1)(5) pertaining to right of refusal to testify,[142] significantly diminished their probative value to the extent that they were deemed insufficient to secure a conviction, or at least a conviction based on such statements alone.[143] The reluctance of the Court to convict on the basis of such statements is a result of the accused being unable to sufficiently verify the relevant

[138] *Seelinger, Silverberg, Mejia* (Human Rights Center University of Berkeley), The Investigation and Prosecution of Sexual Violence https://www.law.berkeley.edu/wp-content/uploads/2015/04/The-Investigation-and-Prosecution-of-Sexual-Violence-SV-Working-Paper.pdf (last accessed on 06/02/2017).
[139] *Kroker*, fn. 125, p. 90.
[140] ibid, p. 58.
[141] *Weinbrenner*, Weltrecht in Deutschland? Der Kongo-Kriegsverbrecherprozess: Erstes Verfahren nach dem Völkerstrafgesetzbuch http://info.brot-fuer-die-welt.de/blog/weltrecht-deutschland-kongo (last accessed on 13/02/2017).
[142] See in particular the Court's comments with respect to the testimony of "Witness VW" in OLG Stuttgart Judgment, fn. 11, 1918, I, 4.
[143] *Kroker*, fn. 125, p. 94.

information,[144] presumably in accordance with fundamental principles of criminal law such as the right to fair trial and the right of reply. The assumption here is that the Court was only willing to proceed with the charges of sexual violence if they could base such findings on statements corroborating the anonymised victim witness statements.[145] Further, the ECCHR Report intimated that this is usual practice in criminal law cases, at least in Germany, stating that the legal accuracy of factual findings of the OLG Stuttgart and other courts have not previously been based solely on witness statements.[146]

While this may be legitimate in terms of adequately safeguarding the procedural rights of the accused, particularly in cases of command responsibility where the accused was not the physical perpetrator of the alleged crime and therefore cannot answer the allegations in the same way, the rules of evidence and procedure adopted by the ICC as well as those of the *ad hoc* tribunals in the area of sexual and gender-based offences should be noted. Rule 96(i) of the Rules of Procedure and Evidence of the ICTR, for example, states that with respect to sexual assault that "no corroboration of the victim's testimony shall be required." Further Rule 63(4) of the ICC Rules of Evidence and Procedure similarly provides that "a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence." Although the assumption here is that courts must be wary of the difficulties associated with proving sexual crimes when assessing the available evidence, it is also important to note that the ICC has indicated that the application of this provision is dependent on the type of evidence concerned, i.e. whether it is direct or indirect, as well as a preliminary assessment of its probative value.[147] It is apparent from the judgment of the Stuttgart Court that this reluctance to accept uncorroborated accounts of victims' statements as a sufficient basis for a conviction in this case was not solely due to the anonymous nature of the witness statements. The ECCHR Report also stated that the inability of foreign witnesses to attend the proceedings, either in person or via video link, also served to diminish the evidence's value.[148] It is unfortunate that the purpose of allowing for anonymous victim statements, for example, to prevent the re-traumatisation of victims and to protect cultural sensitivities,[149] is particularly

[144] OLG Stuttgart Judgment, fn. 11, 1918, V. (6), bb).
[145] *Kroker*, fn. 125, p. 94.
[146] ibid.
[147] *Bemba Case* (Confirmation of Charges) ICC-01/05-01/08-424 (15 June 2009), 50-3.
[148] *Kroker*, fn. 125, p. 94.
[149] *Harvard Law Review*, International Criminal Law - Sexual and Gender-based Crimes - ICC outlines policies to improve prosecutorial outcomes. - The Office of the Prosecutor of the ICC, policy paper on sexual and gender-based crimes (2014), Harvard Law Review 128/2014, p. 793, 800.

likely to apply to cases involving sexual and gender-based crimes during and following an armed conflict.

In light of this recent experience in the Stuttgart Court, it is crucial that prosecutors not only seek a broader range of evidence in such cases but that they also refrain from misrepresenting difficulties with obtaining sufficient evidence as justification for neglecting to consistently incorporate sexual crimes into indictments for war crimes and crimes against humanity.[150] Overall, this decision by the OLG Stuttgart to abandon the charges of sexual violence reinforces the fundamental challenges involved with not only investigating international sexual crimes committed in armed conflict but also proving such crimes on the basis of indirect, hearsay and circumstantial evidence.

2. Establishing a superior-subordinate relationship and effective control; the problems of political, physical and cultural distance

a) Effective control and the material ability of a commander to prevent the commission of crimes

It is generally understood and accepted, and indeed it was by the parties and Trial Chamber in the Bemba case, that the factors to be taken into account when establishing the individual elements of a commander (or person acting as a commander) and effective control under Art. 28 of the Rome Statute are inherently linked.[151] To this end the Pre-Trial Chamber in the Bemba proceedings stated, and the Trial Chamber agreed,[152] that effective control is "generally a manifestation of a superior-subordinate relationship between the [commander] and the forces or subordinates in a *de jure* or *de facto* hierarchical relationship (chain of command)."[153]

Admittedly, establishing these overlapping elements of a superior-subordinate relationship and effective control was, in the case of Bemba, relatively axiomatic. Although the Trial Chamber dedicated a brief paragraph of the judgment to describing Bemba's broad formal

[150] See in particular discussions regarding prevalent attitudes towards evidence of sexual violence in *Aranburu*, fn. 50, p. 610.
[151] *Bemba Case*, fn. 1, 178.
[152] ibid, 184
[153] *Bemba Case*, fn. 147, p. 414.

powers, decision-making authority and direct line of communication to field commanders, all of which cumulatively led to the conclusion that Bemba acted as the supreme commander with effective control,[154] this was not a contentious aspect of the proceedings. Conversely, the concepts of superior-subordinate relationship and effective control were formative in the OLG Stuttgart case against Murwanashyaka and Musoni, the respective accused President and Vice President of the FDLR.[155] In fact, the ECCHR Report documenting this case stated that the extent to which Murwanashyaka had military power or control over the soldiers who committed the crimes in the DRC was one of the most critical questions during the proceedings.[156]

The Stuttgart Court began its determinations by defining a commander, according to the previous jurisprudence of the Federal Supreme Court (*Bundesgerichtshof*), as someone who has the practical ability as well as the legal basis to issue and enforce binding orders.[157] Accordingly, the Federal Prosecutor in Stuttgart attempted to prove that Murwanashyaka had significant strategic authority over military operations of the FDLR by showing that he was accepted as the Chief by the field commanders and that he stayed in close contact from Germany with the military wing of the organisation, for example via satellite phone,[158] which were similar factors to those used to demonstrate effective control in the Bemba case. However, unlike the Trial Chamber in the Bemba case, the OLG in Stuttgart were not convinced that this evidence was sufficient to satisfy the criminal responsibility of Murwanashyaka as superior for the acts committed by the FDLR armed forces (the *Forces Combattantes Abacunguzi* or FOCA).[159]

Although the Court were satisfied that the first Defendant Murwanashyaka was the formal President of the FDLR, they were not able to establish that this formal position also made him the chief commander of the military wing at the relevant time.[160] As can be seen by the Stuttgart Court's findings, command responsibility is not interpreted as a form of strict liability,[161] meaning that a commander is not automatically responsible simply by virtue of his

[154] *Bemba Case*, fn. 1, p. 697.
[155] See generally OLG Stuttgart Judgment, fn. 11.
[156] *Kroker*, fn. 125, p. 46.
[157] OLG Stuttgart Judgment, fn. 11, 1947, 2. a).
[158] *Kroker*, fn. 125, p. 46.
[159] ibid.
[160] OLG Stuttgart Judgment, fn. 11, 1937 III, 2).
[161] *Moloto*, fn. 18, p. 17.

de jure position or official authority.[162] This meant that despite arguments by the Defence that Murwanashyaka was, according to Art. 24 of the FDLR's internal regulations and Art. 40 of its Constitution, tasked with exercising supreme authority over the military and subsequently the FDLR's armed forces, the Court refused to accept that he had actual control or the practical possibility to prevent the crimes.[163] The Court found that although he possessed this theoretical power of supreme command, a title and position that Murwanashyaka publicly bestowed upon himself on German state television in 2008,[164] the evidence did not show he had given concrete military orders. Further, it was the Court's assessment that witnesses and reports to the contrary had unrealistically represented and exaggerated his role.[165]

Such difficulties were no doubt perpetuated by the Defence's argument that Murwanashyaka was a political leader and therefore entirely separate from the military wing; a factor that was more or less accepted by the Court.[166] This was a problematic argument for the Prosecution from the outset in terms of satisfying the requirements of Section 4 of the VStGB; a provision that punishes a superior in the same way as a perpetrator; as someone who intended for the subordinates to commit the crimes.[167] In making their determinations the Stuttgart Court noted the stricter requirements of hypothetical causation postulated by the German law.[168] The Court stated that such requirements, while not universally accepted by international tribunals, meant that a commander could not be convicted under Section 4 unless it could be shown that a soldier would have observed a prohibition order given by the accused.[169]

Despite the Court's factual determinations, it is in some respects difficult to reconcile the official powers of Murwanashyaka and the various public representations he made about the nature of his position, [170] with the Court's assessment that he was not liable as a commander. This is particularly so given the contradictory evidence presented in the 2009 UN Security Council commissioned Expert Group Report, which identified the significant role that

---

[162] *Kortfält*, fn. 8, p. 20.
[163] OLG Stuttgart Judgment, fn. 11, 1937 III 1. a), aa).
[164] *Wegner*, Universal Jurisdiction in Germany: The FDLR Trial in Stuttgart https://justiceinconflict.org/2011/12/27/universal-jurisdiction-in-germany-the-fdlr-trial-in-stuttgart/ (last accessed on 13/04/2017).
[165] OLG Stuttgart Judgment, fn. 11, 1937 III 2. b).
[166] *Kroker*, fn. 125, p. 75.
[167] *Meloni*, fn. 4, p. 205 ff.
[168] OLG Stuttgart Judgment, fn. 11, 1937 IV. A. 2. b).
[169] OLG Stuttgart Judgment, fn. 11, 1937 IV. A. 2. d).
[170] Indeed in some *ad hoc* jurisprudence the high public profile of the accused can be an additional factor indicative of effective control, see *Kortfält*, fn. 8, p. 19.

Murwanashyaka played in the conflict.[171] Specifically, the UN Report pointed to over 240 telephone communications between Murwanashyaka and military field commanders as well as accounts from former FDLR soldiers who witnesses military commands given by Murwanashyaka during these communications.[172] Notwithstanding these findings, testimony given during the Stuttgart proceedings on the basis of this Report was, again, found to have limited probative value.[173] Reasons for this included the fact that much of the conclusions made in the Report and repeated on the witness stand were based on hearsay and independent source verification was not possible.[174] It is relevant to note that the ICC made similar observations to those found in the UN Report in their non-confirmed case against FDLR Executive Secretary, Callixte Mbarushimana.[175]

Ultimately the Stuttgart's Court's approach, focused on the apparent distinction between the political and military wings of the FDLR and the demonstrated practical ability to enforce those orders, has the potential to subvert the importance of Murwanashyaka's role and public profile as President and the (perhaps less onerous) duties that arise under IHL with respect to this non-military position. Although the Stuttgart Court's decision was appropriately based on factual determinations as weighed by the strength of the evidence presented, it is crucial in borderline cases for the Court to consider concepts of formalism and other circumstances that may shield the person most responsible for the crimes, while at the same time adhering to norms of criminal law that require a sufficient connection between the acts of the accused and the crimes themselves.[176] This is demonstrated, for example, by the Trial Chamber in the Bemba case, who refused to accept that the fact that MLC soldiers' had been resubordinated under local authorities as a factor that disrupted the ultimate control of Bemba as commander in chief. [177]

[171] *United Nations Security Council*, fn. 123, p. 92.
[172] ibid, p. 91 ff.
[173] See in particular the Court's discussions on "Annex 18", a transcript identified in the UN Report detailing military instructions issued in March 2009 by FDLR high command. The Stuttgart Court ultimately only attributed limited value to this evidence, see OLG Stuttgart Judgment, fn. 11, 1929, V., (2), aa), (b).
[174] OLG Stuttgart Judgment, fn. 11, 1918, I., 3., a.
[175] *Mbarushimana Case*, fn. 121, p. 120.
[176] *Delalić Case*, fn. 19, p. 377.
[177] *Bemba Case*, fn. 1, p. 185.

b) The problems caused by geographical remoteness and non-traditional command structures

Two circumstances that may cause additional problems in the course of attempting to establish a clear superior-subordinate relationship and effective control, both of which were pertinent during the FDLR case and to a lesser extent in the Bemba case, are geographical remoteness and non-traditional command structures. Both of these factors can frustrate the very notion of command responsibility in terms of the potential to not only blur the lines of a superior's *de facto* responsibility but also to give the appearance of a precarious or tenuous connection between the commission of the alleged offences and the duty of a commander under IHL to control the actions of subordinates. In other words, the existence of these circumstances may dilute the relationship between the commander and the alleged injustice: a connection that is a crucial condition of attributing criminal responsibility.[178]

Further it is generally accepted in international jurisprudence that lower degrees of control such as the ability to exercise influence over subordinates will not reach the threshold of control required to establish responsibility as a commander.[179] Although this is consistent with the norms of criminal law and responsibility, as will be discussed further below, such a link may be more difficult to establish in particular cases of sexual violence. The inevitable impact of such a threshold approach is a presumed reluctance by prosecutors to pursue cases without more direct evidence of a connection between the commander and the alleged crime, "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."[180]

Specifically, the geographical proximity of the accused, in terms of being displaced from the actual conflict, has both demonstrable case management and normative consequences with respect to the ability to establish command responsibility. Case management consequences include the practical ability to conduct a thorough and efficient investigation of crimes committed in another jurisdiction as well as the ability to build a sufficient evidentiary foundation, particularly problematic in cases of sexual and gender-based crimes occurring in different social and cultural contexts.

[178] *Kroker*, fn. 125, p. 72.
[179] *Bemba Case* (Judgment) ICC 01-05 (21 March 2016), 183; *Delalić Case* (Appeal Judgment) ICTY IT-96-21-A (20 February 2001), 266; *Halilović Case* (Judgment) ICTY IT-01-48-T (16 November 2005), 59.
[180] *Delalić Case*, fn. 19, p. 377.

With respect to normative consequences, it is clear that traditional norms of fault in criminal law that require a sufficient connection between the injustice or crime charged and the accused also make the apportionment of criminal liability more complicated.[181] Although such norms are modified slightly by international criminal law to include individual liability for collective crimes, the inevitable product of such a form of liability is a conscious detachment between the commander and the victim;[182] a vacuum all the more pronounced by significant geographical distance. For example, as mentioned, the OLG Stuttgart in their determinations put emphasis on the concept of "practical powers of prevention" and the fact that this possibility was limited as the accused Murwanashyaka was living in Germany and had not visited the conflict region since 2006.[183] Further the Court stated that because he had not lived on location, he could not really know the goings on, nor could he give timely instructions on any acts that should be stopped.[184] Although this factor clearly complicates the conduct of proceedings, the Bemba case also showed that the notion of distance should not materially impact upon the ability to hold a commander liable. Indeed the Trial Chamber in Bemba noted that in circumstances where the superior is in a geographically remote location vis-à-vis the armed conflict, the prosecutorial emphasis will generally be placed on the conduct of the accused and the prosecution will ordinarily rely on this conduct to establish responsibility.[185]

Adding to the difficulties of proving the effective control of commanders who are displaced from the relevant armed conflict are the issues associated with proving effective chain of command in the context of non-traditional groups or structures.[186] As mentioned, effective control usually manifests itself in a superior-subordinate relationship in an established hierarchy. International jurisprudence tells us that the superior or commander should be in a relatively senior position "in some sort of formal or informal hierarchy to those who commit the crimes."[187]

[181] *Kroker*, fn. 125, p. 72.
[182] ibid.
[183] OLG Stuttgart Judgment, fn. 11, 1937 III. 2. (c).
[184] ibid.
[185] *Bemba Case* (Judgment) ICC 01-05 (21 March 2016), 43. See also *Kupreškić Case* (Appeal Judgment), ICTY IT-95-16-A (23 October 2001), 89; *Kvočka Case* (Appeal Judgment), ICTY IT-98-30/1-A (28 February 2005), 65.
[186] *Laviolette*, fn. 7, p. 127.
[187] *Bemba Case*, fn. 1, p. 184.

Despite this, it is apparent that focusing on the formal internal hierarchy of a given group or entity and using a structured chain of command as a guide for establishing a superior-subordinate relationship and effective control may prove problematic in the case of non-linear command or a non-hierarchical structure. This is because the command responsibility doctrine does not apply unless it can be proven that the accused occupies a *de jure* or *de facto* superior position within a recognisable structure that gives him or her the required level of authority.[188] That being said, it is also clear that courts will take a wide view of concepts such as "hierarchy" and "chain of command", with the understanding that they may be difficult to ascertain in certain circumstances.[189]

Notwithstanding such jurisprudence, the question arises whether there are still certain presuppositions that only a traditional superior position will have the corresponding effective control required in order for military or civilian commanders to be found liable.[190] Such a presumption would not bode well, particularly in terms of the ability of international criminal law to attribute responsibility to commanders who operate within a looser structure, or groups that do not fit within the confines of the traditional or usual hierarchical model. In the case of the FDLR, for example, the Stuttgart Court accepted that Murwanashyaka was known as President and Commander-in-Chief by the soldiers on the ground in the DRC.[191] The Court even made specific attempts to delineate the precise command structure of the FDLR on the basis of the group's written policies and *de facto* organisation (see Appendix 1).[192] However, at the same time the Court did not consider that there was sufficient proof of a "practical power of prevention" with respect to the crimes committed.[193] The ECCHR Report submitted that proof of such practical powers was much more difficult to ascertain due to the nature of the FDLR-FOCA; a militia with a more complex command structure, which meant a chain of command, from the lower level factions of the militia to the higher level political leader, was less ascertainable than that of a more traditional army or group.[194]

A further example of where the makeup of non-traditional groups fails to meet the threshold of effective control required for establishing culpability in the context of command

[188] *Karsten*, Distinguishing military and non-military superiors; Reflections on the Bemba case at the ICC, JICJ 2009, p. 983, 993.
[189] *Delalić Case*, fn. 94, p. 254.
[190] *Karsten*, fn. 188, p. 993.
[191] *Kroker*, fn. 125, p. 75.
[192] OLG Stuttgart Judgment, fn. 11, 1897, 2).
[193] *Kroker*, fn. 125, p. 75.
[194] *Kroker*, fn. 125, p. 75.

responsibility was the case of *The Prosecutor v. Moinina Fofana and Allieu Kondewa*, tried before the Special Court of Sierra Leone.[195] In considering whether commander Fofana had the necessary control for superior liability and in examining the Kamajor/CDF movement, the Trial Chamber were faced with a decentralised system that did not lend itself to a traditional analysis with respect to establishing effective control.[196]

Expert testimony from the Defence focusing on the cultural and historical context of the conflict and the operation of such groups found that there was no discernible hierarchy system, even between various factions of the group, and that the relationship between such factions was "…not a fixed one and […] to some degree tenuous."[197] One expert examined the social and cultural context of the group, particularly the fluid and loose nature of its patronage relationships, which made it demonstrably difficult for one individual to exert the requisite level of command and control.[198] Further, according to the Defence's brief the localised efforts and tactics of the group meant that Fofana often had no knowledge of the particular crimes nor the ability to consent.[199] Ultimately, as in the FDLR case, the Appeal Chamber found that the evidence adduced was not able to establish the existence of a superior-subordinate relationship and effective control to the requisite standard.[200]

It is clear from the foregoing that the resolution of practical difficulties associated with establishing certain elements of command responsibility depends on finding sufficient evidence of a connection between the superior and the crimes committed. The failure to establish such a connection on evidentiary grounds ultimately reinforces the notion that superiors may avoid culpability where they are able to separate or isolate themselves, geographically or politically, from the particular acts and crimes of their subordinates or even from the armed conflict more generally.[201] This was the strategy utilised by the Defence in both the Bemba and FDLR cases, with such arguments proving successful in rebutting the presumption of *de jure* command in the latter case.

[195] *Fofana Case* (Judgment) SCSL-2004-14-T (24 November 2006).
[196] Fofana Defence Final Trial Brief, *Fofana Case*, fn. 195, p. 271.
[197] ibid, p. 279.
[198] ibid, p. 294.
[199] ibid, p. 275.
[200] *Fofana Case*, fn. 195, p. 733.
[201] *Van Schaack*, Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson, Journal of Gender, Social Policy & The Law 2009, p. 361, 393.

3. Establishing constructive knowledge in cases of non-strategic sexual violence; difficulties with wider forms of violence and the "private sphere"

As already mentioned, a commander who has control over his subordinates will only be held responsible for the crimes of those subordinates if he or she knew that they were, or were about to be, committed.[202] Courts will typically use various indicia to determine whether the commander had actual or constructive knowledge, including the nature, sum and scope of crimes, the number and type of people involved, their geographical location, the available communication as well as the nature of the commander's position in the organisation's hierarchy.[203] It is also understood that the greater the physical distance between the commander and the crimes committed, the more evidence of knowledge is required to establish the requisite mental element.[204] This introduces yet another threshold requirement in the determination of a commander's subjective responsibility in that an "adequate level of a supervisor's culpability must be established."[205]

The lower of these thresholds, or the point at which a commander will not be held criminally responsible may be, for example, in cases of isolated offences of which the commander has no knowledge.[206] An example of this can be found in the *Prosecutor v. Naletilić,* which was tried before the ICTY.[207] In this case, the Prosecutors were able to establish that the accused was a commander who had control over the actions of his subordinates but were unable to prove that he possessed knowledge of each crime that occurred during his command.[208] Specifically, the Appeal Chamber was unable to accept beyond a reasonable doubt that Naletilić "had reason to know" that two of his men were independently involved in the abuse of prisoners.[209] The assumption here was that the scale and extent of the crimes were not sufficient to put the commander on notice to act.

As a result of this threshold approach, the qualitative and quantitative aspects of international crimes necessarily become more relevant. Perhaps due to the connection required between

[202] *Moloto*, fn. 18, p. 17.
[203] *Meloni*, fn. 4, p. 180 ff.
[204] *Moloto*, fn. 18, p. 18.
[205] *Ambrož*, Command Responsibility in International and Domestic Criminal Law, Zbornik Znanstvenih Razprav 2008, p. 62, 62.
[206] *UN Security Council*, fn. 123, p. 59.
[207] *Naletilić Case* (Appeal Judgment) IT-98-34-A (3 May 2006).
[208] *Moloto*, fn. 18, p. 24.
[209] *Naletilić Case*, fn. 207, p. 305.

constructive knowledge and the commission of the crime, it is possible that the gravity or severity of the alleged acts will unwittingly become part of the factual assessment of a particular commanders' liability. Consider, for example, arguments in the Yamashita case in which the Prosecution successfully submitted that the scope and widespread notoriety of the crimes meant that it was not possible for General Yamashita to claim he was unaware of their commission.[210] Such arguments mean that it becomes important to consider the difference between so-called strategic rape, that is, rape used intentionally to target and destroy certain civilian populations or groups and broader forms of violence experienced by women during conflict.[211] This can include seemingly random or isolated sexual offences that, although still committed in a conflict context, may appear remote through the fact that they physically occur in a more private setting.[212] Studies conducted on particular situations of conflict such as that in Northern Ireland, for example, have revealed that acts of sexual violence such as rape and sexual slavery committed by soldiers took place in women's homes, independent from any organised political strategy and without direction from a commander.[213] Further, it has also been established that various forms of sexual violence are committed in conflicts, not only by soldiers but also by individuals taking advantage of opportunity arising during a time of post-conflict societal breakdown (*Gelegenheitsvergewaltigungen*).[214]

What are the implications then for the liability of commanders, as in the FDLR case, where the victims of sexual war crimes are sometimes reported as being in the tens and not the thousands?[215] What evidence is required, for example, to impute the knowledge and duty of a commander in relation to a single act of rape committed by a soldier in non-international armed conflict? Such questions remain unanswered in the German context as the Court in Stuttgart were unable to establish with sufficient certainty that the various sexual crimes occurred, nor the ultimate control of the commander, and so did not go on to consider the evidence in relation to knowledge of these crimes.[216]

---

[210] *Laviolette*, fn. 7, p. 100.
[211] *Swaine*, Beyond Strategic Rape and Between the Public and Private: Violence Against Women in Armed Conflict, Human Rights Quarterly 37/2015, p. 755, 756.
[212] *Wood*, fn. 40, p. 308.
[213] *Swaine*, fn. 211, p. 766.
[214] *Kroker*, fn. 125, p. 87.
[215] *Laviolette*, fn. 7, p. 126.
[216] The judgment did consider the knowledge of the President and Vice-President but only with respect to the charge of aiding war crimes of murder and pillaging committed against civilians during the military operations, *Umoja Wetu* and *Kimia II*. The Court found, primarily through SMS, email, telephone conversations and media reports that Murwanashyaka must have known of the crimes that occurred during the fighting by various FDLR officials including field commanders. See OLG Stuttgart Judgment, fn. 11, 1939, V., 4, a), aa) ff.

However generally speaking the extent to which commanders may be held liable for such wider forms of sexual violence depends on the scope of the doctrine as well as its application to the facts of the case. As shown by the Yamashita case, the threshold required for fulfilling command responsibility is more easily reached in cases of widespread, organised and strategic rape committed with a political motive,[217] as it will presumably be a simpler task to establish that a commander knew, or should have known, his subordinates were committing such crimes. In this sense formal recognition that other forms of sexual violence are within the responsibility of a military or civilian commander may ultimately depend on whether they are considered as being "conflict related."[218][219]

Overall the concern here is that the application of international legal frameworks, including those purporting to make commanders criminally liable, can in come cases fail to capture wider, variant forms of sexual violence committed in the conflict context.[220] This could lead prosecutors to engage in a type of selective justice or the perpetuation of a "hierarchy of harms",[221] whereby international crimes considered less "provable", due to the particular context or circumstances surrounding their perpetration, fall by the wayside. Whether this occurs at the investigation or charging stage or even, as occurred in the FDLR case before the Stuttgart Court, during the proceedings themselves, it is clear that a narrow formulation or understanding of sexual crimes committed in connection with an armed conflict may shield perpetrators of sexual violence and thereby reduce accountability.[222]

While the Stuttgart Court ultimately dropped all of the charges of sexual violence as it was not possible to establish with the requisite certainty that accusations of rape and other forms of sexual violence by FDLR-FOCA soldiers occurred during the various attacks and operations,[223] such issues are inextricably bound with the nature, context and circumstances of the offences themselves. Accordingly, it is clear that the notions of purpose or gravity of offences should not be determinative factors, at least in the establishment of a commander's responsibility. *Ad hoc* tribunal jurisprudence, for example, has found that the question of

[217] It is relevant to note the historical criticisms of the Yamashita decision and the Court's determination of actual knowledge in that case as discussed in: *Sepinwall*, Failures to Punish: Command Responsibility in Domestic and International Law, Michigan Journal of International Law 30/2009, p. 251, 262.
[218] *Swaine*, fn. 211, p. 774.
[219] See also discussions on the boundaries of the operation of IHL when it comes to sexual violence in *Gardam and Charlesworth*, Protection of Women in Armed Conflict, HRQ 22/2000, p. 148, 159 ff.
[220] *Swaine*, fn. 211, 759.
[221] ibid, p. 770.
[222] ibid, p. 784.
[223] See in particular the Court's comments on the Busurungi attack on 10 May 2009 in OLG Stuttgart Judgment, fn. 11, 1933, c).

whether a commander had reason to know of the crimes of subordinates may be determined by merely asking whether he was put on notice of such crimes, without the need for specific details about the offences themselves.[224] The hope is that focusing more generally on crimes committed in the context of an armed conflict, in other words, irrespective of quantitative or qualitative traits, will serve to decrease the perceived protection of low-level perpetrators by the notion of collective action as well as increase the deterrent power of international criminal law.

It is understandable for resource-poor national jurisdictions to prioritise charges with a greater evidentiary foundation in international criminal cases. However it is likewise important not to perpetuate the idea that certain sexual crimes, such as those not reaching a perceived evidentiary or severity threshold or satisfying preconceived notions of sexual violence in conflict, remain in the so-called private sphere of harm; and are thus unconnected to the relevant conflict and outside of the scope of duty of a commander.[225]

F. FINAL REFLECTIONS AND RECOMMENDATIONS

As already mentioned, in 2014 the ICC adopted a new prosecutorial strategy, which has its foundations in the desire to achieve gender justice for crimes committed during international and non-international armed conflict.[226] The investigative and prosecutorial strategy and the ultimate decision in the Bemba decision reflect the initial fruits of this labour, while at the same time producing a judgment that provides welcome clarification of the tenets of command responsibility. It is unclear, however, whether States such as Germany, despite having a sound legal framework for exercising universal jurisdiction with respect to international crimes, have sufficiently adopted this strategy.

The FDLR case before the OLG Stuttgart demonstrated that there are significant barriers to the investigation and successful prosecution of international crimes. The Court were not able to affirmatively establish that the commander was in control of his subordinates and struggled when it came to adequately and appropriately addressing crimes of sexual and gender-based

[224] *Moloto*, fn. 18, p. 18.
[225] *Van Schaack*, fn. 201, p. 376.
[226] *Office of the Prosecutor*, Policy Paper on Sexual and Gender-Based Crimes, https://www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf (last accessed on 03/02/2017).

violence. The question therefore necessarily arises: how can these barriers be overcome? It is difficult to see how practical inroads could be made with respect to the matter of proving sexual war crimes and crimes against humanity, particularly when some academics even suggest that international criminal prosecutions rely on a state-centric system that is fundamentally inept at addressing, atoning and preventing violence against women in situations of armed conflict.[227]

Notwithstanding such views, there is an obvious need to re-examine the challenges involved in domestic criminal policies that allow for the refusal to prosecute and convict sexual and gender-based crimes as well as potential judicial hurdles to holding commanders responsible for such crimes. To this end, states should re-affirm their commitment to the prosecution of sexual and gender-based crimes in line with ICC policy as well as through the implementation of measures that address the underlying conditions leading to unsuccessful prosecutions in such cases, including the interrogation strategies of the defence.[228] There will clearly often, if not always, be evidentiary difficulties involved in proving the commission of sexual crimes, particularly those perpetrated during armed conflict, but this fact alone as well as the inability to obtain corroborative testimony must not overshadow the significance of the context of the conflict itself. Specifically, the potential for conflict to result in not only politically motivated strategic sexual violence, but also isolated, opportunistic and individually motivated sexual and gender-based crimes,[229] should not be overlooked nor underestimated in the context of establishing a commander's responsibility.

In terms of insufficient evidence and probative limitations, such as those caused by anonymous testimony, which impact upon the ability to prove sexual violence as well as the control and knowledge of the commander, pre-trial investigations and prosecutors should cooperate in their attempts to focus on wider forms of data collection that may provide corroboration to evidence considered to have less probative value, including surveys, medical data, crime reports, public reports, internal records and proxy data.[230] This is in line with the proposed ICC policy, which advocates using creativity in the collection of a variety of

[227] *Pritchett*, Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Inquiry into Charges for Gender-Based Violence at the International Criminal Court, Transnational Law & Contemporary Problems 17/2008, p. 265, 271.
[228] See comments on defence interrogation strategy in OLG Stuttgart Judgment from 28.9.2015, 5 - 3 StE 6/10, 1918, I., and in *Kroker*, fn. 123, p. 13.
[229] *Swaine*, fn. 211, p. 766.
[230] *Aranburu*, fn. 50, p. 612 ff.

evidence.[231] In terms of finding evidence of control and command, investigators and prosecutors should also be broadly aware of strategies used to shield commanders from liability or other factors that have the tendency to weaken an existing connection between the commander and the alleged crimes.

On a policy level it is also imperative that the long-held assumptions that armies and groups primarily use rape and sexual violence in conflict as a strategic weapon be cast aside; an assumption that can cause misdirection in investigations as well as in the requisite standards of proof.[232] In terms of more concrete judicial responses, the risk of sexual and gender crimes in conflict has led to proposals that the interests of victims of such crimes be a priority under the doctrine of command responsibility and should provide a counterweight to questions associated with the chain of command.[233] More broadly it is of fundamental importance to continue to critically assess and evaluate the application of command responsibility to sexual violence, both at an international and national level. Such evaluation should inform all future prosecutorial investigations and strategies, so that sexual and gender-based crimes in armed conflict crimes may be appropriately penalised.

G. CONCLUSIONS

The Bemba decision is significant for a number of reasons, the greatest perhaps being its contribution to international criminal jurisprudence in the areas of command responsibility and sexual and gender-based crimes. By reference to the case law of the various *ad hoc* tribunals, the Trial Chamber in this case solidified Art. 28 of the Rome Statute as a legitimate way to hold commanders liable for atrocities committed during non-international armed conflict, which will hopefully pave the way for further prosecutions of a similar nature. The FDLR case was likewise helpful in establishing the parameters of the German parallel law on command responsibility, which set similar standards when it comes to punishing superiors for failing to fulfil their duties under IHL. Despite the outcome in this case, the collaboration between Germany and the ICC with respect to the DRC cases is particularly important in

[231] *Harvard Law Review*, International Criminal Law - Sexual and Gender-based Crimes - ICC outlines policies to improve prosecutorial outcomes. - The Office of the Prosecutor of the ICC, policy paper on sexual and gender-based crimes (2014), Harvard Law Review 128/2014, p. 793, 795.
[232] *Aranburu*, fn. 50, p. 612.
[233] *Laviolette*, fn. 6, p. 96.

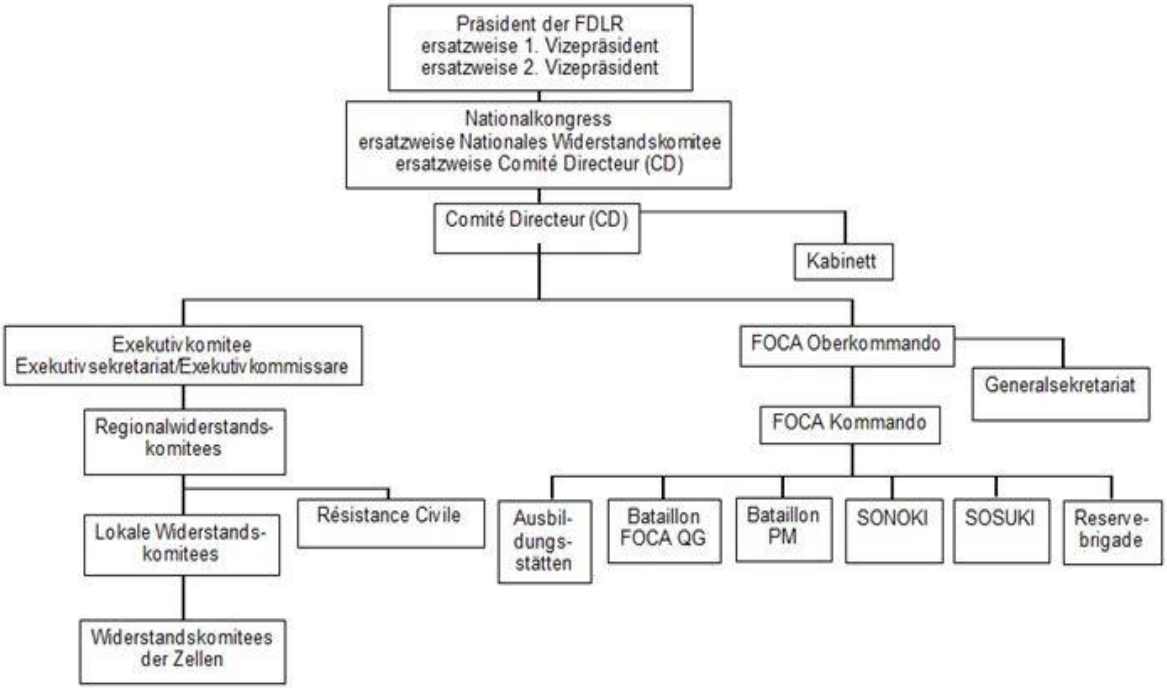
demonstrating that European commanders are not beyond reproach for international crimes committed abroad.

The juxtaposition of the Bemba and FDLR cases shows, however, that the requirements of command responsibility can be onerous, especially for domestic jurisdictions lacking the resources, strategies and investigative powers of the ICC. Notwithstanding the merits of the decision, the FDLR case before the Stuttgart Court emphasised the pragmatic obstacles to exercising extraterritorial jurisdiction over international crimes. It is precisely within this context that the nuances of combining crimes of sexual and gender-based violence with command responsibility become apparent, with unresolved questions as to the extent to which superiors can be held responsible for these categories of crimes.

It is clear that the absence of concrete strategies aimed more precisely at the investigation and prosecution of sexual and gender-based crimes before national courts will continue to impede access to justice for victims of such crimes. It is important, therefore, that the relevant legal authorities, when considering cases of command responsibility, conduct investigations and deliberations in a manner that maintains a proper balance between ensuring a judgment is based on sufficient evidence and not allowing high-level superiors to hide behind layers of formalism, perception of political and geographical distances and non-linear hierarchies of command.

The difficult question of how to translate the abovementioned challenges into strategies that can be practically implemented should not prevent states from developing long-term goals to this end. Moreover, the correlation between responsible command and the effective suppression of sexual violence in conflict mean that it is crucial that states are not deterred from exercising their duties under the principle of complementarity to prosecute commanders for international sexual and gender-based crimes committed by their subordinates in non-international armed conflict.

APPENDIX 1: hierarchical structure and composition of the FDLR



Source: OLG Stuttgart Judgment from 28.9.2015, 5 - 3 StE 6/10, 1897, 2.

BIBLIOGRAPHY

Ambrož, Matjaž	Command Responsibility in International and Domestic Criminal Law, Zbornik Znanstvenih Razprav 2008.
Aranburu, Xabier Agirre	Sexual violence beyond reasonable doubt: using pattern evidence and analysis for international cases, LJIL 23/2010, 609-627.
Askin, Kelly D.	Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles, BJIL 2003.
Bantekas, Ilias	The Contemporary Law of Superior Responsibility, Am. J. Int'l L. 93/1999.
Boas, Gideon	Command Responsibility for the Failure to Stop Atrocities: The Legacy of the Tokyo Trial' in: Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), Beyond victor's justice? : The Tokyo War Crimes Trial revisited, Leiden/Boston, 2011, 145-170.
Boon, Kristen E.	Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines, Melb. J. Int'l L. 15/2014.
Burghardt, Boris	Die Vorgesetztenverantwortlichkeit nach Völkerstrafrecht und deutschem Recht (§ 4 VStGB), ZIS 2010.
Clark, Janine Natalya	The First Rape Conviction at the ICC – An Analysis of the Bemba Judgment, JICJ 14/2016, 667-687.
Csete, Joanne and Kippenberg, Juliana	The War Within the War: Sexual Violence Against Women and Girls in Eastern Congo, Human Rights Watch 2002.
Damaska, Mirjan R.	The Shadow Side of Command Responsibility, AJCL 49/2001, 455-496.
Dinstein, Yoram	Command Responsibility, MPEPIL 9/2015.
Drumbl, Mark A.	Pluralizing International Criminal Justice, MLR 103/2005, 1295-1328.

Duffet, Brian — Translation of the Act to Introduce the Code of Crimes against International Law of 26 June 2002 http://www.iuscomp.org/gla/statutes/VoeStGB.pdf (last accessed on 23/04/2017).

Dunnaback, Jeremy — Command Responsibility: A Small-Unit Leader's Perspective, 108/NULR 2014, 1385-1422.

Gaggioli, Gloria — Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law, IRRC 2014.

Gardam, Judith and Charlesworth, Hilary — Protection of Women in Armed Conflict, HRQ 22/2000, 148-166.

Green, Penny and Ward, Tony — The Transformation of Violence in Iraq, BRIT. J. CRIMINOL 49/2009, 1-19.

Harvard Law Review — International Criminal Law - Sexual and Gender-based Crimes - ICC outlines policies to improve prosecutorial outcomes. - The Office of the Prosecutor of the ICC, Policy Paper on sexual and gender-based crimes (2014), Harvard Law Review 128/2014, 793-800.

Human Rights Watch — The Long Arm of Justice: Lessons from Specialized War Crimes Units in France, Germany, and the Netherlands, HRW 2014.

ICC Case Database — Situation in Central African Republic https://www.icc-cpi.int/car/bemba/Documents/BembaEng.pdf (last accessed on 29/10/2016).

ICC Press Release — ICC Trial Chamber III sentences Jean-Pierre Bemba Gombo to 18 years imprisonment https://www.icc-cpi.int/Pages/item.aspx?name=PR1223 (last accessed on 30/10/2016).

ICRC, Advisory Service on IHL — Command responsibility and failure to act https://www.icrc.org/eng/assets/files/2014/command-responsibility-icrc-eng.pdf (last accessed on 23/03/2017).

International Justice Monitor Jean Pierre Bemba Gombo at the International Criminal Court, https://www.ijmonitor.org/jean-pierre-bemba-gombo-background/ (last accessed on 21/02/2017).

Jessberger, Florian The Principle of Universal Jurisdiction in German Criminal Law https://www.jura.uni-hamburg.de/ueber-die-fakultaet/professuren/professur-jessberger/forschung/landesbericht-jessberger-2007.pdf (last accessed on 28/03/2017).

Jia, Bing Bing The Doctrine of Command Responsibility Revisited, Chinese JIL 3/2004, 1-42.

Karsten, Nora Distinguishing military and non-military superiors; Reflections on the Bemba case at the ICC, JICJ 2009.

Kortfält, Linnea Sexual Violence and the relevance of the Doctrine of Superior Responsibility - in the light of the Katanga judgment at the ICC, Nordic Journal of International Law 84/2015.

Kroker, Patrick Weltrecht in Deutschland? Der Kongo-Kriegsverbrecherprozess: Erstes Verfahren nach dem Völkerstrafgesetzbuch, ECCHR 2016.

Kroker, Patrick Universal Jurisdiction in Germany? The Congo War Crimes Trial: First Case under the Code of Crimes against International Law (Executive Summary), ECCHR 2016.

Laviolette, Nicole Commanding Rape: Sexual Violence, Command Responsibility, and the Prosecution of Superiors by the International Criminal Tribunals for the Former Yugoslavia and Rwanda, CYIL 36/1998, 93-149.

Meloni, Chantal Command Responsibility in International Criminal Law, The Hague, 2010.

Meloni, Chantal The Evolution of Command Responsibility in International Criminal Law, FICHL Publication Series 2015.

Mischkowski, Gabriela and Mlinarevic, Gorana — The Trouble with Rape Trials – Views of Witnesses, Prosecutors and Judges on Prosecuting Sexualised Violence during the War in the former Yugoslavia, Open Society Institute 2009.

Moloto, Bakone Justice — Command Responsibility in International Criminal Tribunals, BJIL 3/2009, 12-25.

Office of the Prosecutor of the ICC — Policy Paper on Sexual and Gender-Based Crimes June 2014 https://www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf (last accessed on 3/02/2017).

Office of the Prosecutor of the ICC — Situation in Central African Republic https://www.icc-cpi.int/car/bemba/Documents/BembaEng.pdf (last accessed on 29/102016).

Office of the Prosecutor of the ICC — Factsheet: Situation in the Democratic Republic of the Congo https://www.icc-cpi.int/NR/rdonlyres/DEB862E4-1E38-4C6E-9197-2953EC6D7EC9/282525/FactsheetENG2.pdf (last accessed on 09/04/2017).

Open Society Justice Initiative — The Trial of Jean-Pierre Bemba at the ICC: Closing Arguments https://www.opensocietyfoundations.org/sites/default/files/briefing-bemba-closing-arguments-11112014.pdf (last accessed on 30/10/2016).

Pritchett, Suzanne — Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Inquiry into Charges for Gender-Based Violence at the International Criminal Court, Transnational Law & Contemporary Problems 17/2008, 265-306.

Public Affairs Unit of the ICC — Understanding the International Criminal Court https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf (last accessed on 04/03/2017).

Robinson, Darryl — How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution, Melb. J. Int'l L. 2012.

Seelinger, Kim Thuy, Silverberg, Helene and Mejia, Robin — The Investigation and Prosecution of Sexual Violence https://www.law.berkeley.edu/wp-content/uploads/2015/04/The-Investigation-and-Prosecution-of-Sexual-Violence-SV-Working-Paper.pdf (last accessed on 06/02/2017).

Sellers, Patricia Viseur, and Okuizumi, Kaoru — Intentional Prosecution of Sexual Assaults, Transnational Law & Contemporary Problems 7/1997, 45-80.

Sepinwall, Amy J. — Failures to Punish: Command Responsibility in Domestic and International Law, Michigan Journal of International Law 30/2009, 251-303.

Swaine, Aisling — Beyond Strategic Rape and Between the Public and Private: Violence Against Women in Armed Conflict, Human Rights Quarterly 37/2015, 755-786.

The Hague Justice Portal — The Foca Rape Camps: a dark page read through the ICTY's jurisprudence http://www.haguejusticeportal.net/index.php?id=8712 (last accessed on 29/10/2016).

UN Security Council — Final Report of the Group of Experts on the Democratic Republic of the Congo, S/2009/603, 23/11/2009.

UN Security Council — Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), S/1994/674, 27/05/1994.

Van den Berg, Stephanie — Ntaganda trial is a test of OTP's sexual violence strategy https://www.justicetribune.com/blog/ntaganda-trial-test-otps-sexual-violence-strategy (last accessed on 16/04/2017).

Van Schaack, Beth — Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson, Journal of Gender, Social Policy & The Law 17/2009, 361-406.

Van Sliedregt, Elies — Individual Criminal Responsibility in International Law, Oxford, 2012.

Vetter, Greg R. Command Responsibility of Non- Military Superiors in the International Criminal Court (ICC), Yale J. Int'l L. 25/2000, 89-143.

Wallström, Margot Women, Peace and Security: Sexual Violence in Situations of Armed Conflict http://www.stoprapenow.org/uploads/features/StatementofSRSGWallstromSecurityCouncilOpenMeeting27April2010.pdf?v=h1wnEb3xrBE (last accessed on 17/04/2017).

Wegner, Patrick Universal Jurisdiction in Germany: The FDLR Trial in Stuttgart https://justiceinconflict.org/2011/12/27/universal-jurisdiction-in-germany-the-fdlr-trial-in-stuttgart/ (last accessed on 13/04/2017).

Weinbrenner, Sieglinde Weltrecht in Deutschland? Der Kongo-Kriegsverbrecherprozess: Erstes Verfahren nach dem Völkerstrafgesetzbuch, Blog-Beitrag 2016.

Williamson, Jamie Allan Some considerations on command responsibility and criminal liability, International Review of the Red Cross 90/2008, 303-317.

Wood, Elisabeth Jean Variation in Sexual Violence during War, Politics & Society 2006, 307-341.