

Sexual Violence and the relevance of the Doctrine of Superior Responsibility
- in the light of the Katanga judgment at the ICC

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Abstract

In this article, I set out to investigate the interplay between sexual violence and various linking theories in international criminal law. I will demonstrate some of the possibilities and shortcomings of various modes of liability available to the ICC with regard to cases involving sexual violence. In so doing it is necessary to thoroughly explain and discuss the potential reasoning of the Court in these matters. Since the case against Germain Katanga presents a perfect illustration of the distinction in application and analysis of the modes of liability with regard to sexual violence as opposed to other crimes, the reasoning provided in said judgment will be used as a springboard for such an analysis.¹ Therefor the background to the case against Katanga will firstly be presented and the modes of liability as used in this particular case will subsequently be scrutinized. Considering the fact that Katanga was acquitted of sexual violence, this investigation will mostly demonstrate the deficiencies of these modes of liability and in the vacuum left after such an analysis, I will show the potential benefits of utilizing the doctrine of superior responsibility in cases involving sexual violence. In my opinion, though fraught with complexities, this doctrine presents the perfect avenue to prosecute the higher echelons of organizations, i.e. the persons that international criminal courts and tribunals are intent on convicting, for sexual violence in particular. The aim of this article is thus finally to highlight the potential benefits of utilizing broad charging strategies and more particularly, the importance of including the doctrine of superior responsibility, in sexual violence cases.

Keywords

international criminal law; ICC; sexual violence; individual criminal responsibility; mode of liability; indirect perpetration; superior responsibility; command responsibility; Katanga; article 25 and 28 of the rome statute

¹ *Le Procureur c. Germain Katanga*, (ICC-01/04-01/07), 7 mars 2014, 'Jugement rendu en application de l'article 74 du Statut'.

1 Introduction

The judgment against Germain Katanga last year, and especially the decision of the prosecutor to discontinue the appeal against the acquittal on all charges relating to sexual violence, once again demonstrated the difficulties concerning individual criminal responsibility with regard to these particular crimes in international criminal law.² As briefly explained in the judgment, the reason for the acquittal was lack of evidence of Katanga's direct participation in the clearly established occurrences of sexual violence and the failure to, in any other way, *link* him to said crimes.³ This conclusion may not *prima facie* seem to be that disturbing. It does however become increasingly more interesting when considering the fact that Katanga was also absent during the commission of the other crimes for which he was found guilty.⁴ The conviction for these crimes was based on article 25(3)(d) in the Rome Statute, i.e. *contribution to a group crime*. Article 25(3)(d) is an assessorial mode of liability and Katanga was hence not convicted as a direct participant or principal perpetrator of these crimes either.⁵ It is thus very interesting to further investigate and analyze what prompted the judges to treat sexual violence so differently. The fact that there *in general* seems to be such staunch reluctance towards using alternative modes of liability broadly with regards to sexual violence but NOT when it comes to other international crimes makes this issue even more intriguing.⁶ Of further interest is the question as to why the doctrine of superior responsibility, seemingly designed for these kinds of situations, has not been utilized in this case, particularly in order to convict Katanga of the charges of sexual violence.⁷

2 Brief background to the case

Katanga was the alleged commander-in-chief and president of an armed militia called the "Force the Résistance Patriotique en Ituri" (hereinafter the FRPI) operating in the Ituri region of the DRC. On the 24 February, 2003, this militia orchestrated an attack on the village of Bogoro, which thereto forth was under the control of a Hema militia led by Tomas Lubanga. The primary aim of the attack was to stop the Hema militia from attacking nearby villages

² *Le Procureur c. Katanga*, *supra* note 1, pp. 709-711.

³ *Ibid.*, paras. 1663-1664.

⁴ I.e. killing as a crime against humanity and murder, attacking a civilian population, destruction of property and pillaging as war crimes. *Le Procureur c. Katanga*, *supra* note 1, pp. 709-711.

⁵ Rome Statute, *supra* note 2, article 25(3)(a-d).

⁶ Kelly D. Askin, 'The Trial of Germain Katanga & Mathieu Ngudjolo Chui – Katanga judgment underlines need for stronger ICC focus on sexual violence', *International Justice Monitor*, <<http://www.ijmonitor.org/2014/03/katanga-judgment-underlines-need-for-stronger-icc-focus-on-sexual-violence/>>, as visited on 11 Mars 2014. Askin points out that judges in general seem to accept that leaders and others can be convicted of killings, torture and pillage when being far removed from the scene of the crimes, however when it comes to sex crimes the attitude is very different. With regards to sexual violence, Askin states that the defendants are not convicted unless they are the physical perpetrators, present when the crimes were committed or if evidence show that they encouraged the crimes.

⁷ Under the doctrine of superior responsibility, military and semi-military commanders as well as civilian leaders are not convicted for their active contribution to the crime, but rather because of their omission to act, i.e. their failure to prevent or punish the subordinates' crime. The Rome Statute, article 28(2)(a-b).

It should be noted that Superior Responsibility cannot without difficulty be referred to as a mode of liability. See Linnea Kortfält, 'Article 28 Responsibility of commanders and other superiors', in Mark Klamberg, *International Criminal Law online Database and Commentary*, <<http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-3/#c3080>>, as visited on 10 April 2014.

which predominately had a Ngiti and Lendu population. The case against Katanga was limited to his responsibility with regard to the crimes perpetrated during this particular attack.

Originally the Office of the Prosecutor *solely* charged Katanga as a *principal perpetrator*.⁸ The Pre-Trial Chamber thus held that there was sufficient evidence to establish substantial grounds to believe that Katanga, through other persons within the meaning of article 25(3)(a) of the Statute, amongst other crimes also committed: (1) rape as a war crime (article 8(2)(b)(xxii)), (2) rape as a crime against humanity (article 7(1)(g)), (3) sexual slavery as a war crime (article 8(2)(b)(xxii)) and (4) sexual slavery as a crime against humanity (article 7(1)(g))

However on the 21 of November 2012, Trial Chamber II notified the parties and participants that the mode of liability under which the defendant initially stood charged, could and should be re-characterized. Accordingly the mode of liability was changed to enable the prosecution of Katanga as an *accessory* under article 25(3)(d) in addition to the charge under article 25(3)(a).⁹

On the 7 March 2014, Katanga was consequently found guilty within the meaning of article 25(3)(d) of the Statute, as an accessory to: murder as a crime against humanity (article 7(1)(a)); murder as a war crime (article 8(2)(c)(i)); attack against a civilian population as such or against individual civilians not taking direct part in hostilities as a war crime (article 8(2)(e)(i)); destroying the enemy's property as a war crime (article 8(2)(e)(xii)) and pillaging as a war crime (article 8(2)(e)(v)).¹⁰

However, Katanga was found *not guilty* within the meaning of article 25(3)(d) of the Statute, as an accessory to the crimes of: rape and sexual slavery as crimes against humanity (article 7(1)(g)) as well as rape and sexual slavery as war crimes (article 8(2)(e)(vi)).¹¹

3 Findings with regard to the sexual violence charges

3.1 Did sexual violence occur on the time and place in question

Despite the fact that the defendant accordingly was acquitted of all the charges relating to sexual violence, Trial Chamber II actually established that crimes of sexual violence had indeed been committed by the FRPI on 24 February 2003. The sexual violence was proved primarily by relying on the evidence of three witnesses. These witnesses testified as direct victims of rape and sexual slavery; they had been raped on the day of the attack and had subsequently been taken to Ngiti military camps, where they were held captive for several weeks and were raped repeatedly.¹² The Chamber found this evidence to be so convincing as

⁸ These charges were confirmed by Pre-Trial Chamber I in a decision rendered on 26 September 2008. *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, (ICC-01/04-01/07), Pre-Trial Chamber I, 30 September 2008 (Public Redacted Version), 'Decision on the Confirmation of Charges', paras. 576, 580.

⁹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, (ICC-01/04-01/07), Trial Chamber II, 21 November 2012, 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against accused persons', paras 6-7. This change was, according to the Chambers, in line with regulation 55 of the Regulations of the Court. The decision has however been heavily criticized. It is important to note that the criticism did not concern the possibility to charge defendants under several alternative modes of liability in general.

¹⁰ *Le Procureur c. Katanga*, *supra* note 1, p. 709.

¹¹ *Ibid.*, p. 710.

¹² *Ibid.*, pp. 384-412. Witness P-132, P-249 and P-353.

to furthermore use the testimonies in support of the conviction under article 8(2)(e)(I) i.e. to establish that the crime “attack against civilians as a war crime” had occurred.¹³

3.2 Why was Katanga acquitted of the sexual violence charges?

Katanga was thus acquitted on all charges relating to sexual violence despite the fact that the Chamber clearly established that crimes of sexual violence had occurred. The reasoning of the Chamber with regard to the acquittal of these charges was briefly addressed in paragraphs 1663-1664 of the judgment. The reasons therein stated are based on that the Chamber was of the view that there was insufficient evidence enabling it to conclude that (1) the acts of sexual violence were widespread and systematic, (2) the destruction of the village necessarily was committed through *these* acts and that (3) the combatants previously had committed acts of sexual violence. The Chamber furthermore took particular notice of that the victims of sexual violence had their lives *saved* by claiming that they were non-Hema.¹⁴

Based on these points, the Chamber thence concluded that, even if the sexual violence was an integral part of the attack in question, it was not possible to conclude that it was a part of the *common purpose* of the group that carried out the attack.¹⁵ Establishing that the crime fits within the common purpose is a constituent element of article 25(3)(d). This element does thus accordingly have to be proven if a defendant should be convicted for *participation in a group crime*. The acquittal is thus entirely based on that the elements of this specific mode of liability are not fulfilled, i.e. that it was not possible to *link* the defendant via *this* particular mode of liability to these specific crimes.¹⁶

Consequently the Chamber established that *all* of the crimes charged in the indictment had occurred. However, it was only possible to *link* the defendant to murder, attacking civilians, destruction of property and pillaging. Whereas it was not possible to *link* the defendant to the crimes of sexual violence. This does not only indicate that sexual violence may be deemed and treated differently than other international crimes and thereby also demonstrating the importance of highlighting the specific nature and attitude towards sexual violence in international trials. It furthermore shows the crucial role that the “*linking-theories*”, e.g. the modes of liabilities, play in the prosecution. It moreover points to that the modes of liability may function differently in relation to different crimes as well as the specific difficulties in linking defendants, especially those in the higher echelons of organizations and society, to crimes of sexual violence in particular.

In the following I will therefor analyze some of the *linking theories* (e.g. modes of liability) available to the ICC. Since the case against Katanga provides an important illustration of the potential reasoning of the Chamber in this regard, I have chosen to limit my analysis to the modes of liability that the Court has focused on in said case.¹⁷ In order to

¹³ *Ibid.*, para 1663.

¹⁴ *Ibid.*, para. 1663.

¹⁵ *Ibid.*, para. 1664.

¹⁶ Interesting to note already here is that there is no “common purpose”-element in the doctrine of Superior Responsibility. Therefore this would not have been a predicament would Katanga have been charged under article 28.

¹⁷ For a more thorough analysis of other modes of liability please refer to my dissertation: Linnea Kortfält, Sexual Violence against Children and International Criminal Law – The role of the doctrine of Superior Responsibility, (forthcoming).

provide a more complete picture of the discrepancy between sexual violence and the other crimes, I will focus on the analysis relating to the acquittal of these charges and any issue which has bearing on this acquittal. After providing a presentation of the relevant mode of liability, the Chambers argumentation and analysis hereof, I will present the doctrine of superior responsibility and some thoughts and reflections regarding the possibilities of its application in both this case and in other cases pertaining to charges of sexual violence.

4 Considering the applicable mode of liability

4.1 Background

The modes of liability, i.e. conduct undertaken in relation to a crime for which criminal liability may arise, are listed in article 25(3) of the Rome Statute. Of crucial importance is the distinction made between principal perpetrators and mere accessories. In the Lubanga decision the Trial Chamber specified three various approaches to this distinction; the subjective, the objective and the control-over-the-crime- approach.¹⁸ When it comes to the issue of the distinction between the various participants in a crime, the Chamber in the Katanga case chose the “control-over-the-crime”-approach.¹⁹ This entails that the amount of control the participant possesses over the crimes determines his or her level of guilt rather than the extent of contribution to the physical acts carried out (*actus reus*) or the various/degree of the mental state (*mens rea*) of the person. The distinction between the principal perpetrators and the accomplices is thus that the former wields (1) control over the commission of the crime (alternatively is the one who determines whether or how the crime should proceed) and (2) possesses the knowledge of the factual circumstances enabling them to exercise this control whereas the latter does not possess such control.²⁰

Upon establishing whether the defendant could be held liable as a principal perpetrator under article 25(3)(a) (or merely as an associate) it is hence necessary to determine whether or not he passes a control-test. In the following the parameters chosen by Trial Chamber II in respect of this test and other elements of indirect co-perpetration will be presented.

4.2 25(3)(a) Indirect perpetration

As previously explained, Katanga was originally solely charged as a principal perpetrator for having committed the acts through others. The particular mode of liability relied upon in this regard is articulated in article 25(3)(a) through the words committing a crime *through another*.²¹ This particular mode of liability has at times been referred to as perpetration by means or intermediary perpetration.²² In the following this mode of liability will be referred to as *indirect perpetration*. Under this mode of liability the direct perpetrator of the crime is

¹⁸ *The Prosecutor v. Lubanga Dyilo*, (No. ICC-01/04-01/06), 14 March 2012, para 920.

¹⁹ *Le Procureur c. Katanga*, *supra* note 1, paras 1393-4. This approach is chosen primarily through looking at the structure of the Rome Statute and how the operation of its various articles will reach their full potential or (produce their full effect), rather than through an analysis of customary international law.

²⁰ *Ibid.*, para 1996.

²¹ The Rome Statute, *supra* note 2, Article 25(3).

²² Kai Ambos, Individual Criminal Responsibility, Article 25 Rome Statute, in Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article* -, Second Edition, C.H. Beck Hart Nomos, p. 752. Albin Eser, Individual Criminal Responsibility, in Cassese, Gaeta, Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 793.

hence merely used as an instrument or tool by the indirect perpetrator where the latter acts as a mastermind of the former.²³ This could therefore have been a befitting mode of liability for Katanga to incur responsibility for the crimes perpetrated by the FRPI. The Chamber in the present case addressed this issue by first specifying the elements of indirect perpetration: The defendant has to (1) have *control over the crime* of which the material elements has been committed by one or more other persons, (2) meet the mental elements referred to in Article 30 of the Statute and the mental element of the specific crime in question and (3) be aware of the factual circumstances enabling him to exercise control over this crime.²⁴

4.2.1 Control over the crime

Of fundamental significance for the application of indirect perpetration is thus that the defendant has control over the crime. Since this issue holds some relevance for the application of the doctrine of superior responsibility it is important to provide some additional information on this point. It was furthermore on this specific matter that the Chamber in the Katanga case found that there was insufficient evidence. The latter two elements of indirect perpetration will thus not be covered in the context of this article.

In order to understand the level of control necessary to incur responsibility for indirect perpetration, it is important to fully understand the fundamental idea behind this mode of liability. The original application of and hence most common form of indirect perpetration is the situation in which the direct perpetrator (i.e. the executor or the person who physically carries out the principal crime) merely is an *innocent agent* of the indirect perpetrator. In these situations the indirect perpetrator acts as a mastermind who, in one way or the other (due to e.g. duress, low age, disability or mental illness), controls the entire *will* of the direct perpetrator. The level of control is thus so extensive that the indirect perpetrator legally could be considered as the principal, consequently possibly shifting roles with the direct perpetrator. As such the indirect perpetrator could even be punishable *regardless* of whether the direct perpetrator is criminally responsible.²⁵ The level of control required under article 25(3)(a) is thus much greater than that of a person who induces or solicits a person to commit a crime as articulated in article 25(3)(b).²⁶ It is arguably also much greater than the level of control required for superior responsibility under article 28.²⁷ The distinction between these levels of control will be presented below under section “The Control-test under article 28 as compared to the Control-test under article 25(3)(a)”.

Whereas the direct perpetrator usually merely is an *innocent agent*, international criminal law arguably opens up for the possibility of utilizing indirect perpetration also in cases where the direct perpetrator could be fully aware of and responsible for his or her criminal endeavors.²⁸ The idea of indirect perpetration where the direct perpetrator is *not* an innocent agent was briefly addressed by e.g. Ambos in Triffterers commentary to the Rome Statute

²³ Eser, *supra* note 22, p. 793.

²⁴ *Le Procureur c. Katanga*, *supra* note 1, para 1399.

²⁵ Gerhard Werle, *Principles of International Criminal Law*, TMC Asser Press (2005), p. 124.

²⁶ Eser, *supra* note 22, p. 794.

²⁷ Compare Ambos, *supra* note 22, p. 754 and Eser, *supra* note 22, p. 795. Noting the use of the words “sufficiently tight control over the direct perpetrator, *similar* to the relationship between the superior and subordinate in the case of command responsibility”. Similar but it is of course not *the same*.

²⁸ Ambos, *supra* note 22, p. 753.

where he explained the potential application of a German theory developed by Claus Roxin in 1963.²⁹ Even if Ambos warned that this theory “is not uncontroversial” and that “it must not be overlooked that attribution in these cases may go too far if the indirect perpetrator cannot dominate the direct perpetrator sufficiently”, the theory has been further cited and advanced in many instances.³⁰ Interestingly, it is moreover this theory that the Trial Chamber in the Katanga case has chosen to focus *all* its argumentation on while investigating the possible application of indirect perpetration. The Chamber actually cautioned that the Roxin-theory merely is *one* way of many to establish “control over the crime” for indirect perpetration under article 25(3)(a), but since it deemed the theory befitting to this specific situation, it was the only theory that the Chamber chose to turn to in this particular case.³¹

The critical issue is however still whether the requisite level of control of the crime, equal to the control described previously, could be established in these situations. According to the Roxin-theory one way in which the requisite level of control for indirect perpetration can manifest itself is within context of a so called “organized power structure”.³² In order for a defendant to be held criminally liable as an indirect perpetrator under the premise of “an organized power structure” certain very specific conditions have to be met. The nature of the organization must be such as to ensure that its members always carry out the elements of the crime, as prescribed by the indirect perpetrator, in an *automatic* fashion.³³ Secondly, the alleged indirect perpetrator needs to hold such a position within the organization as to be able to set criminal activities in motion.³⁴

4.2.1.1 Nature of the organization and Position within the organization

The key element in establishing whether the requisite level of control for indirect perpetration is thus defining the nature of the organization. For liability to arise under this theory, the nature of the organization must be such as to enable it to ensure the interchangeability of the potential direct perpetrators within the organization. The decisive factor under this theory lies in the fungible nature of those carrying out the act. Should one member refuse or fail to carry out the crime, the top layer of the organization should be able to rely on that another of the members will fill his or her place. Consequently the orders of the superiors will automatically be carried out within such an organization. Control over the crime thus flows from this very specific nature of the organization.

However, ultimately, it is only the ones that exercise authority in the sense that they can affect the members of the organization to perform the material elements of the crime, that may be considered as authors and consequently be convicted as principal perpetrators within the meaning of article 25(3)(a). Hence, the factor determining whether the defendant should

²⁹ Ibid., pp. 753-4.

³⁰ Eser, *supra* note 22, p. 793. Gerhard Werle and Boris Burghardt, ‘Claus Roxin on crimes as Part of Organized Power Structures’, 9 *Journal of International Criminal Justice*, (2011) p. 191-193.

³¹ *Le Procureur c. Katanga*, *supra* note 1, para 1406. Regrettably the Chamber did not specify the other possible methods of establishing control for indirect perpetration where the direct perpetrator is not an innocent agent. In hindsight, it is furthermore regrettable that the theory was not as befitting as originally perceived, considering that it did not hold up under evaluation.

³² This idea was originally presented within German law in an article 1963 by Claus Roxin, ‘Crimes as Part of Organized Power Structures’ republished in *Journal of International Criminal Justice*, 9 (2011), p. 198.

³³ Roxin, *supra* note 32, p. 198.

³⁴ Ibid., p. 201.

be considered as a mere participant or an indirect perpetrator within the meaning of article 25(3)(a) is “the fact that he can direct the part of the organization that is subordinate to him, without having to leave the execution of the offence to the decision of the agent”.³⁵

4.2.2 Findings with regard to Katanga as an indirect perpetrator

In the case against Germain Katanga it was hence this very specific version of control that was evaluated. The Chamber thus first investigated the organization of the Ngiti combatants who carried out the crimes on the 24 February 2003 and secondly Katanga’s level of control within this organization.

Even though it was established that the Ngiti combatants was an organized militia which demonstrated the existence of certain discipline, it had not satisfactorily been established that it was an organized power structure that lived up to the nature of an organization as described above.³⁶ At a later point, the Chamber even held that it was unable to decide on the existence of a centralized and effective chain-of-command in the Ngiti militia.³⁷

It had however been demonstrated that the Ngiti militia had a president and at least from early February 2003, Germain Katanga bore this title. As president, Katanga held the highest position within the organization and yielded administrative-, management-, security- and public order authority across the community. He was moreover considered to have undeniable military authority in the “community” (*collectivité*). The Chamber found that he was received as an authority figure who was able to issue orders to both commanders and combatants.³⁸

However, the Chamber held that it had not sufficiently been established that Katanga was vested with effective hierarchical power over *all* the commanders and combatants of the Ngiti militia.³⁹ The Chamber was also unable to find beyond reasonable doubt that Katanga wielded powers of control in *all* areas of military life and over *all* commanders and combatants in the Walendu-Bindi collectivité.⁴⁰ Furthermore it had not been proven that he had the material ability to issue and ensure compliance with orders or had the power to (punish) impose disciplinary sanctions on commanders from *various* camps.⁴¹ The Chamber could therefore not make a determination on the existence of a *centralized* command within the Ngiti militia and consequently that the defendant could have held such a position.⁴²

It is furthermore of importance to point out that whereas Katanga could issue orders to commanders and combatants within the *collectivité*, the Chamber stated that it was impossible to ascertain the exact nature of the orders or whether they were obeyed.⁴³ The Chamber thus concluded that the defendant failed to live up to the control-test in accordance with the Roxin-theory.⁴⁴

³⁵ Ibid., pp 201-202.

³⁶ *Le Procureur c. Katanga*, *supra* note 1, paras. 1417-18.

³⁷ Ibid., paras. 1419-20.

³⁸ Ibid., paras. 1360, 1361, 1363, 1419-20.

³⁹ Ibid., para. 1365.

⁴⁰ Ibid., para. 1363.

⁴¹ Ibid., para. 1419.

⁴² Ibid., para. 1419.

⁴³ Ibid., para. 1364.

⁴⁴ Ibid., para. 1420. Translation from “Summary of judgment”, § 51.

4.3 25(3)(d)(ii) – Participation in a group crime (accessorship)

4.3.1 Elements of Participation in a Group Crime

The other mode of liability utilized by the Chamber in the Katanga case was *participation in a group crime*. In the following, this mode of liability and the argumentation provided by the Chamber, in relation to the responsibility for participation in a group crime under article 25(3)(d), shall briefly be presented.⁴⁵

The text of this article criminalizes “any other” contribution to a crime, consequently providing the lowest objective threshold for participation of the modes of liability listed in article 25.⁴⁶ This mode of liability does thus go beyond the mode of liability in both 25(3)(b) (i.e. ordering, soliciting or inducing) and 25(3)(c) (i.e. aiding, abetting or otherwise assisting).⁴⁷ 25(3)(d) is however severely limited by the subjective element i.e. that the group has to act with a common purpose.⁴⁸

Contribution to a group crime should furthermore be compared and distinguished from the theory of joint criminal enterprise (hereinafter JCE) as developed in the *ad hoc* tribunals. Briefly put, JCE I deals with the criminal liability of all the people who substantially contribute to a crime as long as the participants share the common purpose. JCE II covers the participation in crimes that take place in concentration camp situations. JCE III on the other hand concerns situations where the common plan under JCE I, extemporaneously develops into the commission of yet another crime. If this additional crime is a natural and foreseeable consequence of the first common plan, then a participant in the first plan may be held liable for the additional crime as well, even when he/she was not part in its actual commission.⁴⁹ The Chamber in the Katanga case concluded that the difference between participation in a group crime under 25(3)(a) and JCE is that the defendant under 25(3)(a) will not be considered responsible for *all* the crimes that are part of the “common purpose”, but only for the crimes to which he has contributed.⁵⁰ It is hence significant to investigate the actual contribution to each crime that has been committed within the realm of the “common purpose” (and whether they fall within the common purpose). This will be examined in the following within the context of each constituent element of the present mode of liability.

The constituent element of article 25(3)(d)(ii) are (1) a crime falling within the jurisdiction of the Court had been committed; (2) the persons who committed the crime formed part of a group of persons acting in concert in furtherance of a common purpose; (3) the accused made a significant contribution to the commission of the crime; (4) the contribution was intentional

⁴⁵ Rome Statute, *supra* note 2, article 25(3)(d).

⁴⁶ Eser, *supra* note 22, p. 803. Kai Ambos, *supra* note 22, p. 761.

⁴⁷ *Le Procureur c. Katanga*, *supra* note 1, para. 1618.

⁴⁸ Kai Ambos, *supra* note 22, in Triffterer, p. 761.

⁴⁹ *The Prosecutor v. Tadić* (Case no. IT-94-1-A), ICTY A Ch., ‘Judgment’, 15 July 1999, para. 196.

⁵⁰ *Le Procureur c. Katanga*, *supra* note 1, para. 1619. For further information concerning JCE see; Harmen van der Wilt, ‘Joint Criminal Enterprise – Possibilities and Limitations’, *Journal of International Criminal Justice*, (2007) vol 5 issue 1, pp. 91-108. General arguments as to the relationship between JCE III and article 25(3)(a) and article 25(3)(d) are briefly developed in Heller’s article, Kevin Jon Heller, ‘JCE III, the Rome Statute, and Bashir’, <http://opiniojuris.org/2009/02/11/jce-iii-and-the-rome-statute/J>, as visited on 15 February 2015. The current author concurs with these sources concerning the inapplicability of JCE III to the current case.

and (5) the contribution of the accused was made in full knowledge of the intention of the group to commit crime.⁵¹

Of particular importance with regard to sexual violence in the Katanga case was the second element. It is hence only this element that will be studied in this article.

4.3.2 The persons who committed the crime formed part of a group acting with a common purpose

The second constituent element of article 25(3)(d)(ii) can be broken down into 5 steps; (1) identification of the physical perpetrators; (2) whether they formed part of a group; (3) whether they acted with a common purpose; (4) identifying the content of this common purpose and lastly; (5) the crimes were committed within the common purpose.

Hence it was firstly established that the direct perpetrators of the above listed crimes were the Ngiti combatants from the Walendu-Bindi collectivité.⁵² Secondly, the Chamber concluded that these Ngiti combatants were part of a militia which constituted an organization within the meaning of article 7(2) of the Statute and an organized armed group within the meaning of the law of armed conflict.⁵³ Thirdly, the Chamber recalled that it had already established that this militia harbored its own design while investigating whether the contextual elements of article 7 were fulfilled.⁵⁴ In line with the argumentation thus previously provided within the judgment, the Chamber concluded that the group did indeed act with a common purpose. The existence of this common criminal purpose had been established by considering the conditions under which the attack was launched, the manner in which it proceeded and the treatment of the civilian population, in particular women, children and elderly persons.⁵⁵ Subsequently, the Chamber made some remarks as to the content of the common purpose of the group in the following quotations:

“In this case, the Chamber has several pieces of evidence proving the existence of a common purpose for the group’s own Ngiti combatants [...] to erase from Bogoro, not only the military elements of the UPC, but also *the civilian population, mostly Hema*, who were there [...]”⁵⁶

“This militia harboured its own design, which albeit part of a wider design to reconquer territory, was to attack Bogoro and wipe out from that area the UPC soldiers, but also, and *first and foremost*, to wipe out the *Hema civilians* who were there.”⁵⁷

In the subsequent paragraph, the Chamber made further pronouncements about the content of the common purpose by again stating that: “[t]o illustrate the existence of a purpose seeking to regain Bogoro through the elimination of its *civilian population* (...)”⁵⁸

The Chamber was thus stating that the ultimate goal was to reconquer territory or regain Bogoro. However this larger aim was to be accomplished through not only eliminating the enemy combatants i.e. the UPC, but also through eliminating civilians.

⁵¹ Ibid., para. 1620.

⁵² Ibid., para. 1652.

⁵³ Ibid., para. 1654.

⁵⁴ Ibid., paras. 1142-1149.

⁵⁵ Ibid., para. 1654.

⁵⁶ Ibid., para. 1142. Authors translation. *Emphasis added.*

⁵⁷ Ibid., para. 1654. Authors translation. *Emphasis added.*

⁵⁸ Ibid., para. 1655. Authors translation. *Emphasis added.*

Demonstrated in the quotes provided above is however the fact that these civilians are described differently in different paragraphs of the judgment. It is therefore not clear whether the Chamber believes that the common purpose of the group was to eliminate from the village of Bogoro (1) only the Hema part of the civilian population, (2) the civilian population which mostly consisted of Hema or (3) to eliminate the civilian population in general.

The reason for stressing this ambiguity is as herein lies the entire foundation for the acquittal of Katanga of the sexual violence charges as opposed to the conviction of the other crimes. Considering the crucial role that is placed on the content of the common purpose, it is highly regrettable that the Chamber is not clear or consistent in how it describes or refers to this common purpose.

Speaking for the interpretation that the Chamber is referring to the civilian population in its entirety, is the fact that the Chamber often times refers to the common purpose in such terms. Furthermore it should be noticed that, after the attack, the village was completely emptied of its population.⁵⁹ Speaking against such a conclusion is that the Chamber at one point emphasizes that the Ngiti militia equates the Hema UPC combatants and the Hema civilians.⁶⁰ The Chamber furthermore stressed that the civilian population mainly consisted of Hema and that the combatants were adamant in asking whether the victims were Hema or non-Hema. The ones that stated that they were non-Hema had their lives saved.⁶¹ Of the ones whose lives thus were saved, some were raped and put into sexual slavery instead.⁶²

4.3.2.1 The reason why Katanga was convicted of other crimes but not sexual violence

The Chamber then, finally, went on to analyze whether each of the crimes charged against Katanga were committed within the common purpose.⁶³ It established that murder had been part of this common purpose as it furthermore was confirmed that the Ngiti combatants intended to commit these particular crimes since they had used this tactic previously.⁶⁴ Destruction of property and looting was also a common practice by the Ngiti combatants. Since the property in question was essential to the daily life of the villagers, the Chamber accordingly concluded that these crimes were done in furtherance of the common purpose to wipe out the civilian population from the village.⁶⁵ The Chamber did not provide argumentation in the judgment for whether the war crime of attacking civilians was part of the common purpose. Perhaps the reason here fore is that a common purpose to wipe out civilians necessarily would entail attacking these civilians.

The argumentation regarding the crimes of sexual violence and their relation to the common purpose was contained in two rather brief paragraphs of the judgment.⁶⁶ According to these paragraphs the Chamber concluded that the crimes of sexual violence, as opposed to

⁵⁹ Ibid., para. 1656. When referring to this fact, the Chamber does however point out that the population *mainly* consisted of Hema.

⁶⁰ Ibid., para. 1144.

⁶¹ Ibid., para. 1656.

⁶² I would like to point out that there is a distinct possibility of interpreting this last point in two different ways. Either “the non-Hema lives saved” points to that the common purpose only included the killing of Hema civilians. Another interpretation is that the common purpose included all civilians however the combatants saw an alternative use for these victims, namely to rape and sexually enslave them instead.

⁶³ *Le Procureur c. Katanga, supra* note 1, paras. 1658-1665.

⁶⁴ Ibid., para. 1658.

⁶⁵ Ibid., paras. 1659-1661.

⁶⁶ Ibid., para. 1663-1664.

the other crimes, did not fit within the common purpose of the group. This conclusion was based on that the Chamber did not consider itself as having sufficient evidence enabling it to determine that (1) the acts of sexual violence were widespread and systematic, (2) the destruction of the village necessarily was committed through these acts and (3) the combatants had previously committed acts of sexual violence. The Chamber furthermore stressed that the victims had their lives *saved* by claiming that they were non-Hema.

Remarks with regard to the sexual violence argumentation

Even if it is not part of the general aim of this article, it is important to raise some thoughts and levy some criticism with regard to the various points mentioned in the judgment concerning the sexual violence acquittal. To start with, I believe that it may be of interest to point out that the reasoning behind this acquittal only covers merely one page out of the entire 711 page judgment. The reasoning is thus very brief and condense. I also have to concede that, since the arguments have not been very well developed or elaborated, I find these paragraphs to be rather vague and difficult to comprehend, not only legally but to some extent also morally.

The first point mentioned by the Chamber is that there was insufficient evidence to enable it to conclude that the acts of sexual violence were widespread and systematic.⁶⁷ Any reasoning regarding the relevance of this point is however sorely lacking. It seems as if the Chamber is trying to indicate that the acts of sexual violence thus could not constitute crimes against humanity for which the “threshold” or “contextual” element is that the crimes should be “widespread and systematic”.⁶⁸ It is important to point out however that the text of the Rome statute as well as the Elements of Crime states that the rape should be “committed as part of a widespread or systematic attack”. It is accordingly the *attack* that has to be widespread and systematic and not the rapes in and by themselves. The common understanding of this contextual element is that only *one* act of rape (alternatively e.g. *one* act of murder or *one* act of torture) could constitute a crime against humanity, as long as it is committed in the context of an *attack* which otherwise is widespread or systematic.⁶⁹ Under the heading “Éléments contextuels - Une attaque généralisée ou systématique”, the Chamber did however clearly analyze the systematic character of the armed conflict and concluded that this contextual element was fulfilled.⁷⁰ Furthermore, the Chamber applied this conclusion in its conviction of the defendant for murder as a crime against humanity. It is rather disconcerting should this judgment indicate that sexual violence should be treated differently in this regard than e.g. torture or any other act listed in article 7(2).

The second point made by the Chamber is that the destruction of the village of Bogoro was not necessarily accomplished through the acts of sexual violence. It is also a bit difficult to

⁶⁷ The language used by the Chamber was “nombre et facion répétée”.

⁶⁸ It is however important to note that the terminology used in the judgment differs from the terms used in article 7(1) of the Rome statute; i.e. “généralisée ou systématique”. The discrepancy in wording may indicate that the Chamber was referring to something else altogether.

⁶⁹ Elements of Crime, article 7(1)(g). Kai Ambos, ‘Sexual Offences in International Criminal Law’, in Bergsmo, Skre, Wood (eds.), *Understanding and Proving International Sex Crimes*, (Torkel Opsahl EPublisher Beijing, 2012), p. 148. Dyani, ‘Sexual Violence, Armed Conflict and International Law in Africa’, *African Journal of International and Comparative Law* (2007), vol. 15, p. 233.

⁷⁰ *Le Procureur c. Katanga*, *supra* note 1, paras. 1157-1162. Having established that the attack was systematic, the Chamber did not also have to investigate whether it also was widespread.

fathom what the Chamber actually is trying to establish upon relaying this second point. Most likely the Chamber is referring to that the “common purpose” of the group in question was to destroy the village of Bogoro. As briefly described above, the defendant can only be criminally liable for acts which fall within this, the common purpose of the group under article 25(3)(d). Hence if the acts of sexual violence did not lead to the destruction of the village of Bogoro, then perhaps the Chamber is of the view that sexual violence may not be a part of this common purpose which consequently would mean that the defendant could not be held liable for those particular acts. In relaying this point, the Chamber would thus have to have made a conclusion that whereas murder, destruction of property and pillaging could have led to the aim of destroying the village, the sexual violence did not. It is however highly questionable that the Chamber, without offering a further explanation as to why, would be of the view that pillaging and destruction of property would be more destructive to a village than raping and sexually enslaving its population. I hold a very different opinion considering that property and houses can be replaced, the lives of these women and their families are irreparably damaged for generations to come. There are not many means or weapon of war that are more effective in destroying a village than sexual violence.⁷¹ Reaching a conclusion that the destruction of the village not necessarily was done through sexual violence, without any further explanation, is thus interesting to say the least. I would welcome an elaboration of this reasoning.

Thirdly the Chamber concluded that it had not been sufficiently demonstrated that the Ngiti combatants involved in the attack on Bogoro, in contrast to the other crimes, had committed sexual violence prior to this particular incident. The Chamber is here likely attempting to establish that the defendant could thus not have foreseen the acts of sexual violence whereas he could have foreseen the other crimes. This point may have legal relevance. There are two easily discernable avenues of interpretation of this point.

Either this statement is merely a general comment related to the *mens rea* of the defendant. The Chamber could be referring to that it reached an alternative conclusion compared to what the pre-trial chamber stated in the decision on 26 September 2008, i.e. that the defendant had the knowledge that these crimes would occur in the ordinary course of events (i.e. with *dolus indirectus*). If the combatants never had committed sexual violence previously, Katanga may not have known that such acts would occur in the ordinary course of events.

It may also be that the Chamber was making a comment in lines with the test found under *joint criminal enterprise III*, i.e. that a defendant could be held criminally liable for crimes that are natural and foreseeable consequences of the common purpose. Hence, the Chamber could be alluding to the possibility for Katanga to foresee that the Ngiti combatants would fulfill the common purpose (i.e. the destruction of the village of Bogoro) through murder, destruction of property and pillaging, whereas it would not be foreseeable that they would use sexual violence to achieve this aim.

Finally the Chamber stressed the fact that the victims of sexual violence had their lives “saved” from an otherwise certain death by claiming that they were “non-Hema”. It may be questioned why the Chamber placed such relevance on this matter.

⁷¹ Christopher Horwood, ‘Perpetrators and motivation: understanding rape and sexual violence in war’, in United Nations Office for the Coordination of Humanitarian Affairs OCHA/IRIN, *The shame of war – sexual violence against women and girls in conflict* (2007), p. 38.

It could *not* be that the Chamber is of the view that crimes of sexual violence should be deemed as less serious since the victims lives were saved by “only” being raped and placed into sexual slavery instead. It is true that the women themselves stated this point in their testimonies. However, that the Chamber as a consequence of this testimony would choose to weigh the gravity of these particular crimes against one another; i.e. murder vs. sexual violence, would be rather disturbing. There are many that would argue that sexual violence at times could be considered worse than murder. Even if these particular victims did not relay this information, other women often testify to that they wish they would have been killed rather than have been subjected to the sexual violence that they had to endure.⁷² Furthermore a Court on this level could not possibly make an argument that a crime of “less gravity” should not be considered since the victims thus were spared from a “more serious” crime. It would be as if an abuse charge in a national court would not be considered because the victim expressed some degree of relief concerning the fact that he/she was at least still alive. Such a conclusion would be inconceivable. Thus the Chamber must have had something else in mind upon writing this sentence into its final judgment.

Either the Chambers thus concluded that since the lives of the women were “saved”, the sexual violence could not constitute a means of destroying the village in general i.e. that the village could only be destroyed if the property or the lives are taken from said village. For the irrationality of this conclusion, I refer back to the argumentation provided under point two above.

More likely the Chamber, with respect to this part of the judgment, is of the understanding that the “common purpose” of the attack was much narrower and more precise than previously stated in the judgment.⁷³ If the common purpose was merely to target the UPC and the Hema-population, then the sexual violence against non-Hema could potentially fall outside of this narrower common purpose. This would make perfect sense, if the Chamber clearly had stated that so was the case and not, to the contrary, as mentioned in the previous section, on multiple occasions held that the common purpose was to destroy the village in its entirety and drive out all of the civilians.⁷⁴ Or even more noteworthy, that the Chamber in the paragraph directly following this argumentation, states that the common purpose is *primarily* to destroy the UPC and the Hema civilian population and it is *mostly* targeting the Hema. This language is far too vague and leaves room for the inclusion of non-Hema civilians within the common purpose. The Chamber does never state that the common purpose is *only* directed at the UPC and the Hema population. Therefore I again am astonished as to why the Chamber chooses to stress that the lives of the sexual abuse victims were *saved* by the fact that they claimed to be non-Hema.

Criticism can thus be levied upon the argumentation provided by the Chamber in respect of that it did not consider sexual violence to be a part of the common purpose. However, considering the fact that this was the final conclusion reached in the judgment, it is even more important to look further at other linking theories that may have been useful in this case in

⁷² Jeanne Ward, ‘Sexual violence against women and girls in conflict’, United Nations Office for the Coordination of Humanitarian Affairs OCHA/IRIN, *The Shame of War – sexual violence against women and girls in conflict*, (2007), p. 27.

⁷³ See the argumentation provided under “The person who committed the crime formed part of a group with a common purpose”.

⁷⁴ *Le Procureur c. Katanga*, *supra* note 1, e.g. paras. 1142 and 1655.

order to learn how to proceed in future cases involving charges of sexual violence. The most obvious avenue is looking further at the doctrine of superior responsibility. This doctrine does not require proof of a common purpose and it arguably requires a rather low control-test, i.e. the two points which made it impossible for Katanga to incur responsibility under 25(3)(a) and 25(3)(d)(ii).

5 The doctrine of Superior Responsibility

5.1 *Why Superior Responsibility is of particular importance in Sexual Violence cases*

As has been demonstrated in this article, Katanga was acquitted of all charges relating to sexual violence due to the fact that there was insufficient evidence to prove certain elements of the *modes of liability* under which the Office of the Prosecutor had decided to charge him. In sum, the Chamber deemed that it could not conclude that (1) Katanga had sufficient control over the crime in order to incur responsibility as an indirect co-perpetrator under 25(3)(a) nor was the prosecutor able to establish that (2) sexual violence fell within the common purpose of the group which would have been necessary should Katanga have incurred responsibility for participating in a group crime under 25(3)(d)(ii). Article 28 consists of neither of these two elements which automatically begs the question whether the doctrine of superior responsibility would not have been a possible alternative charging strategy in the present case. Before examining this question further, I will however address *why* the doctrine of Superior Responsibility may be of particular interest to cases involving sexual violence in international criminal tribunals in general.

International criminal tribunals in general and the ICC in particular are mostly concerned with cases involving high level defendants. Defendants in the upper echelons of organizations are generally further removed from the scene of the crimes than the direct perpetrators. The fact that the defendants before these tribunals in general are far removed from the scene of the crime, makes these cases all the more difficult to prosecute. The modes of liability available in such circumstances are indirect co-perpetration, ordering, soliciting as well as aiding and abetting.

The case against Katanga has demonstrated some of the difficulties encountered when attempting to prosecute the defendant under indirect co-perpetration and participation in a group crime. Obviously it is equally or even more difficult to prove ordering since there has to be evidence to support the existence of such an order. For aiding and abetting there is a much lower threshold of direct involvement however there is a need to prove that the defendant acted in a way as to facilitate the commission of the crime as well as proving a double intent i.e. (1) that the defendant was aware of the criminal endeavor and (2) intended to facilitate said crime.

Accordingly all of these modes of liability consists of several constituent elements that are difficult to prove. The doctrine of superior responsibility also has certain elements that needs to be established in order for a defendant to incur responsibility under the doctrine, however, they are arguably much lower than the ones presented above.⁷⁵ Consequently, the doctrine of superior responsibility provides an alternative when all of the *modes of liability* in article

⁷⁵ See presentation of elements in the following section.

25(3) fails in holding high ranking people responsible for crimes perpetrated by people lower down in the chain of command or organizational structure. Hence, superior responsibility is an extremely appropriate means to ascertain the liability of some persons who reside very high in organizational structures i.e. those persons that are of particular interest in international tribunals.⁷⁶ However, the question still remains, why is the doctrine of superior responsibility of particular importance when dealing with cases involving *sexual violence*?

It has often been suggested that the role of superiors is of extreme importance in combating sexual violence.⁷⁷ It is the superiors that hold the ultimate responsibility to ascertain that their subordinates do not commit acts of sexual violence and/or are held accountable for any such transgression. An example indicating the importance of the role of the superior in suppressing these acts is research showing that, in conflicts where the superior views sexual violence as counterproductive to their interests (and the groups are sufficiently strong), little sexual violence will be observed. Accordingly, this research further demonstrates that it is beneficial, when trying to diminishing the occurrence of sexual violence, to increase the costs and consequently increase the incentives for the superior to prohibit sexual violence.⁷⁸ Holding the superiors accountable for sexual violence would strengthen the incentives for commanders to prohibit its occurrence. Accountability furthermore signals that the international community will not tolerate the explicit or implicit approval/acquiescence by superiors or even their indifference to these acts, thus creating yet another incentive for the superior to prohibit sexual violence.⁷⁹

Research furthermore demonstrates that high level superiors rarely are directly involved in acts of sexual violence. ICC investigations suggests that it is less likely that senior military commanders and leaders *personally* commit acts of sexual violence.⁸⁰ In a study carried out by the Sexual Violence Program at Berkeley Law it was further explained that those who physically commit sexual violence are often relatively low in the chain of command entailing that they thus fall outside the Court's mission (i.e. to ensure accountability at the highest levels).⁸¹ It is thus particularly difficult or impossible to prove that the superior was directly involved in or even explicitly ordered sexual violence. As demonstrated in the case against

⁷⁶ Patricia V. Sellers, 'The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation', p. 17.

⁷⁷ E.g. Margot Wallström, 'Kvinnornas krig - Sexual Violence in Armed Conflict', Speech delivered on 31 Maj 2012, Stockholm. Wood, 'Rape in War is not Inevitable, Variations in Wartime sexual violence', in Bergsmo, S kyr, (eds.) *FICHL Publication Series No. 12* (2012), p. 409. Sellers, *supra* note 76, p. 17. The importance of accountability for superiors and the relevance of the doctrine of command responsibility in respect of sexual violence is furthermore stressed in Security Council Resolution 1820. Department of Peacekeeping Operations, "Review of the sexual violence element of the judgments of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court of Sierra Leone in the Light of Security Council Resolution 1820".

<http://www.unrol.org/files/32914_Review%20of%20the%20Sexual%20Violence%20Elements%20in%20the%20Light%20of%20the%20Security-Council%20resolution%201820.pdf>, p. 27. Security Council Resolution 1820, S/RES/1820, 19 June 2008, para. 3.

⁷⁸ Wood, *supra* note 77, p. 417.

⁷⁹ *Ibid.*

⁸⁰ Patricia Wildermuth and Petra Kneuer, 'Addressing the Challenges to Prosecution of Sexual Violence Crimes before International Tribunals and Courts', in Bergsmo, S kyr, (eds.) *FICHL Publication Series No. 12* (2012), p. 126.

⁸¹ Alexa Koenig, Ryan Lincon, Lauren Groth, 'The Jurisprudence of Sexual Violence', in *Sexual Violence and Accountability Series - Working Paper Series*, (Human Rights Center, University of California, Berkeley, May 2011), p. 21.

Katanga, it is also difficult to establish that the defendant share the intent to commit sexual violence or that there exists a common plan to commit these particular crimes.⁸²

In sum, while it thus is of utmost importance in the fight against sexual violence to increase the accountability for these crimes, it has proven to be exceedingly difficult to hold the high level superiors, i.e. those very people who fall within the ICC's mission, responsible under the modes of liability available under article 25(3).

A linking theory beyond those provided in article 25 may thus be necessary in order to hold high ranking defendants accountable for sexual violence. Fortunately, such a possibility has been provided in article 28 – an extremely appropriate means to establish liability for people residing higher in command than the direct perpetrators.⁸³

Regrettably, the office of the prosecutor made a mistake when initially deciding not to charge Katanga under both article 25(3)(a) and 25(3)(d). This mistake was fortunately corrected by the Chamber through the decision issued on the 21 November 2012. However, I would also like to suggest that it was a mistake not to charge Katanga under the doctrine of superior responsibility in the alternative. It would be an even greater mistake not to learn from this experience in future cases involving sexual violence. As the ensuing case against Bosco Ntaganda seemingly demonstrates, the prosecution has indeed taken this aspect into consideration, as it has charged him under not only 25(3)(a), (b), (d) and (f) but also under article 28.⁸⁴ It will be very interesting to monitor the outcome of that trial.

In the following, I will briefly present the doctrine of superior responsibility as it appears under article 28 of the Rome Statute and, in light of the case against Katanga, explain the importance of and possibilities provided by the doctrine especially with regard to crimes of sexual violence.

5.2 The Elements of the doctrine of Superior Responsibility

5.2.1 Introduction

As previously explained, the doctrine of superior responsibility adds to the *modes of liability* that are specifically listed in article 25.⁸⁵ Superior responsibility is thus distinct from e.g. “ordering” under article 25 which requires the superior to have *actively* contributed to the crime in question.⁸⁶ With regards to accountability under article 28, there need not be proof of any order or action undertaken by the superior him- or herself. Rather, under this doctrine, the superior incurs responsibility on the basis of his or her *inaction*, or more precisely, for the *failure* or *omission* to prevent, punish or report the actions of the perpetrators.⁸⁷ However, the exact nature of the doctrine of superior responsibility has long been discussed and differing opinions on the subject have emerged in both academic debate and case law.⁸⁸

⁸² *Le Procureur c. Katanga*, *supra* note 1, para.

⁸³ Sellers, *supra* note 76, p. 17.

⁸⁴ *Prosecutor v. Bosco Ntaganda*, (ICC-01/04-02/06), ‘Document containing the Charges’, 10 January 2014, para. 147-151.

⁸⁵ Rome Statute, Article 28.

⁸⁶ *Prosecutor v. Bemba*, (Case no. ICC-01/05-01/08), ICC PT Ch. II, ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo’, 15 June 2009, § 405.

⁸⁷ *Prosecutor v. Orić*, (Case no. IT-03-68-T), ICTY T Ch., ‘Judgment’, 30 June 2006, para. 293.

⁸⁸ See section “The Characterization of the Doctrine”.

Accordingly to the text of the article in order to incur responsibility under the article, the following elements need to be established: (1) the defendant is either a military commander, person effectively acting as such or a civilian superior, (2) existence of a superior-subordinate relationship, (3) subjective element (*mens rea*), (4) the superiors failure to prevent, punish or report the crimes and (5) causality. Lets briefly look at each of these elements in the following sections. The elements that holds particular relevance to the case against Katanga will be addressed in a bit more detail whereas the others merely will be covered cursively.

5.2.2 Military commanders, persons effectively acting as such or civilian superiors

Article 28 has revived the previously longstanding distinction between the responsibility of military commanders and persons effectively acting as military commanders on the one hand and other superiors (often referred to as ‘non-military’ or ‘civilian superiors’) on the other.⁸⁹ The responsibility of the former is addressed in article 28(a) whereas the responsibility of the latter, non-military superiors, is regulated in article 28(b).

Military commanders are those members of the armed forces that are assigned to (*de jure*) or who have assumed (*de facto*) command over one or more units of the armed forces.⁹⁰

Persons effectively acting as military commanders (hereinafter quasi-military superiors) covers a broader category of commanders. These may include either *de jure* or *de facto* commanders of for instance armed police units or paramilitary units.⁹¹

It is still highly uncertain exactly who can be considered a civilian superiors within the meaning of article 28(b). It has been suggested that the article may include political leaders, business leaders and senior civil servants.⁹²

In order to incur responsibility under article 28, the defendant does accordingly either have to be a military, quasi-military or non-military superior i.e. in the sense that he/she has forces or subordinates under his or her command.⁹³ There is no specific requirement placed on which status or level the superior has to hold within the hierarchy. Hence, the doctrine can confer responsibility upon anyone who was in a superior position, from superiors at the highest level to leaders with only a few men under their command.⁹⁴ The responsibility under article 28 is thus neither limited to immediate superiors nor those in the highest echelons of

⁸⁹ This distinction was not made in the corresponding articles in the statutes of the ICTY and ICTR, i.e. 7(3) and 6(3) respectively.

⁹⁰ William Fenrick, ‘Article 28 – Responsibility of commanders and other superiors’, in Otto Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article*, (Nomos Verlagsgesellschaft, Baden-Baden, 1998), p. 517. This view is in contrast to the definition given to military commanders as expressed by the Chamber in the Bemba Case, *supra* note 86, para. 408. Herein the Chamber states that military commanders can solely be “persons who are formally or legally appointed to carry out a military commanding function (i.e. *de jure* commanders)”.

⁹¹ Fenrick, *supra* note 90, p. 518. This is also in contrast to the understanding in the Bemba case, *supra* note 86, para. 409.

⁹² Fenrick, *supra* note 90, p. 521. For further information about the specific requirements concerning civilian superiors please refer to Maria L. Nybondas, ‘Command Responsibility and its Applicability to Civilian Leaders’, (Asser Press., Amsterdam, 2010).

⁹³ Kai Ambos, ‘Superior Responsibility’, in Cassese (ed.), *The Rome Statute of the International Criminal Court – A Commentary*, (Oxford University Press, 2002), p. 849.

⁹⁴ *Ibid.*, p. 855. *Prosecutor v. Bemba*, *supra* note 86, para. 408.

command. What matters is thus not the particular rank of the superior, but rather that the person is in command.⁹⁵ This leads to the second element of the doctrine.

5.2.3 Effective ‘Command and Control’ or ‘Authority and Control’

The second element of the doctrine consists of that the defendant (*military, quasi-military or non-military*)⁹⁶ as described above) has to have either *de jure* or *de facto*⁹⁷ “command and control” or “authority and control” over subordinates in order for criminal responsibility to arise. If these elements are fulfilled, the relationship between the defendant and the direct perpetrator qualifies as a so called *superior-subordinate relationship*. The “command and control” or “authority and control” has to be *effective* in the sense that the defendant has to *possess a material ability* to prevent, repress or report (to the competent authorities) subordinates who are about to or who have committed international crimes.⁹⁸

Whether the superior actually possesses such a material ability must be determined on a case by case basis. Factors that may be indicative hereof are more a matter of evidence than substantial law. Such evidence may be the defendant's capacity to issue orders, the position within the military/political/business-structure, the conduct of combat operations, the authority to apply disciplinary measures, the capacity to transmit reports to competent authorities for the taking of proper measures, the authority to promote or remove subordinates, the fact that subordinates show greater discipline in the superior's presence than when he is absent, the participation of the defendant in negotiations regarding the subordinates in question or the actual tasks performed by the superior in general.⁹⁹ It has also been stated that “an accused's high public profile, manifested through public appearances and statements or by participation in high-profile international negotiations, although not establishing effective control *per se*, is an additional indicator of effective control”.¹⁰⁰ It is again important to stress that it is not e.g. the authority to issue binding orders or undertake disciplinary sanctions as such which is of relevance, but rather proof of the ability to maintain or enforce compliance of others. Of importance is thus that the superior would have means to

⁹⁵ Fenrick, *supra* note 90, p. 517.

⁹⁶ Even if it lacks relevance to the Katanga case, it ought to be mentioned that there is a clear distinction with respect to this element between military and civilian superiors. A civilian superior does not normally have the power to sanction subordinates in the same way as does a military superior. Civilian *authority and control* is furthermore limited to “activities that were within the effective responsibility and control of the superior”. (Rome Statute, Article 28 (b)(ii)) This normally entails that the civilian superior is considered to only be responsible for work related activities. (Kai Ambos, *supra* note 93, p. 858)

⁹⁷ *Prosecutor v. Mucić et al.*, (IT-96-21), ICTY T. Ch., ‘Judgment’, 16 November 1998, para. 370. *Prosecutor v. Mucić et al.*, (IT-96-21), ICTY A. Ch., ‘Judgment’, 20 February 2001, para. 197. *Emphasis added.*

⁹⁸ The idea of describing the effectiveness of this element as a “material ability to prevent and punish” was first introduced by the Celebici Trial Judgment, which also was the first case that thoroughly examined the concept of superior responsibility in current international criminal tribunals, *Prosecution v. Mucić*, TC, paras. 377-378. Since the Rome Statute also includes a third duty, namely, to submit the matter to the competent authorities (see below), the Chamber in the Bemba case also included this aspect in the evaluation of the superiors “command and control”. *Prosecutor v. Bemba*, *supra* note 86, para. 415.

⁹⁹ *Prosecutor v. Halilović*, (Case no. IT-01-48-T), ICTY T. Ch., ‘Judgment’, 16 November 2005, para. 58. *Prosecutor v. Hadžihasanović*, (Case no. IT-01-47), ICTY T. Ch., 15 March 2006, paras. 83. *Prosecutor v. Orić*, TC, *supra* note 87, para. 312.

¹⁰⁰ *Prosecutor v. Orić*, TC, *supra* note 87, para. 312.

prevent the relevant crimes from being committed *or* to take efficient measures for having them sanctioned.¹⁰¹

As mentioned above, the “command and control” or “authority and control” can be either *de jure* (i.e. the superior has been formally appointed to the position) or *de facto* (i.e. the superior has assumed alternatively informally taken or been granted the position). A few words should be mentioned in this regard. The relationship between *de jure* or *de facto* is partly demonstrated by the following quotes from the Celebici Trial and Appeals Chambers respectively:

“[...] formal designation as a commander should *not* be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person’s *de facto*, as well as *de jure*, position as a commander”¹⁰²

“In general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may *presume* that possession of such power *prima facie* results in effective control unless proof to the contrary is produced.”¹⁰³

These quotes, especially the latter, has some bearing on the case against Katanga who, being assigned as the commander in chief and president of the FRPI, wields *de jure* command over these combatants. There is thus a *presumption* that the possession of such power would result in effective control, unless proof to the contrary is produced. In accordance herewith, would Katanga have been charges under the doctrine of superior responsibility, the burden of proof would thus have been reversed in this respect.¹⁰⁴

Furthermore it should be noted that the issues of disobedient and/or undisciplined subordinates have been under discussion in a few instances. It has been suggested that the *de jure* superior could not be held responsible for subordinates who clearly do not obey him or her.¹⁰⁵ The Hadžihasanović Trial Chamber chose an alternative, but yet very reasonable, approach.¹⁰⁶ According to this approach, if a *de jure* (i.e. formally assigned) commander indeed possesses the powers to use force to ensure compliance with international humanitarian law by virtue of his official position, he/she may be compelled to do so in order to prevent or punish subordinates who refuse to obey orders.¹⁰⁷ In situations where a superior consciously chooses to use subordinates who are known to be undisciplined or has reason to know that they will commit international crimes (as was the situation in the case against Katanga)¹⁰⁸, such a superior may be held criminally responsible for the crimes committed by

¹⁰¹ *Ibid.*, para. 311.

¹⁰² *Prosecutor v. Mucić et al.*, TC, *supra* note 97, para. 370. *Emphasis added.*

¹⁰³ *Prosecutor v. Mucić et al.*, AC, *supra* note 97, para. 197. *Emphasis added.*

¹⁰⁴ Hence a stark contrast to the application to the control test under the Roxin-theory.

¹⁰⁵ *Ambos*, *supra* note 93, p. 857. *Ambos* holds that it is solely in cases where there is no control at all that a duty to act may be rejected. In the *Blaškić* case it was stated that in these situations it is the actual material ability of the commander that needs to be considered and the disobedience of the subordinates can instead be counted as evidence of the lack of effective control. *Prosecutor v. Blaškić*, (Case no. IT-95-14-A), ICTY A Ch., Judgment, 29 July 2004, §§ 69, 399.

¹⁰⁶ *Prosecutor v. Hadžihasanović*, TC, paras. 85-89.

¹⁰⁷ *Ibid.*, TC, paras. 86-87.

¹⁰⁸ These combatants had frequently violated IHL, even if it could not be established that the specific violations concerning sexual violence had been perpetrated previously. See above “The reason why Katanga was convicted of other crimes but not sexual violence”.

the subordinates.¹⁰⁹ Furthermore, if a superior uses subordinates while knowing that there is a serious risk that they will not comply with his orders to regard IHL in the operation, he/she may not claim lack of effective control as a defense against responsibility under the doctrine.¹¹⁰ In this respect it is also important to note that the subjective incompetence of a particular commander is not a basis for an argument that the forces were not under his or her effective command and control.¹¹¹

It should be noted that simply *powers of influence*, which is much lower than *effective control*, is not sufficient in order to incur responsibility under the doctrine.¹¹²

As to the issue of the identity of subordinates, divergent views have been presented in the case law of the various *ad hoc* tribunals. The ICTR case law has held a somewhat more stringent view of this issue whereas the ICTY case law is more lenient.¹¹³ According to case law emanating from the ICTR, the prosecutor is required to link a particular defendant to the specific individual who committed the sexual act if the “effective control”-test is to be considered fulfilled.¹¹⁴ Whereas i.e. the Krnojelac Trial Chamber held that “if the Prosecution is unable to identify those directly participating in such events by name, it will be sufficient for it to identify them at least by reference to their ‘category’ as a group”.¹¹⁵ This view was subsequently endorsed by the Hadžihasanović Trial Chamber which held that it is “sufficient to specify to which group the perpetrators belonged and to show that the accused exercised effective control over that group.”¹¹⁶

5.2.3.1 The Control-test under article 28 as compared to the Control-test under article 25(3)(a) As presented under the section titled “4.2 25(3)(a) Indirect perpetration”, establishing that the indirect perpetrator has control over the crime is of fundamental importance for responsibility that mode of liability. There is thus a control-test involved in both the evaluation of the application of indirect perpetration as well as within the doctrine of superior responsibility. It is important to stress, however, that there is a significant differences between the control-test under article 25(3)(a) and the “command and control” element under article 28. Let’s look a bit further at the distinction between the two control-tests in order to elucidate this point further.

In order to incur responsibility as an indirect perpetrator under 25(3)(a), the defendant is tested for his or her control over *the crime* whereas for the doctrine of superior responsibility, under article 28, the test solely focuses on the defendants material ability to prevent, punish or report *the subordinates*. The level of control that needs to be demonstrated in the former is so

¹⁰⁹ *Prosecutor v. Hadžihasanović*, TC, paras. 89. On the other hand, here the reasoning with regard to the third point addressed in the sexual violence acquittal may be of relevance i.e. that the Chamber considered that it had not sufficiently been proven that the combatants who committed the sexual violence had done so previously.

¹¹⁰ *Ibid.*, TC, paras. 89.

¹¹¹ Fenrick, *supra* note 90, p. 518.

¹¹² *Prosecutor v. Hadžihasanović*, TC, paras. 80-81. *Prosecutor v. Halilovic*, *supra* note 99, para. 59.

¹¹³ Wildermuth, *supra* note 80, p. 131.

¹¹⁴ *Prosecutor v. Gacumbitsi*, (Case No. ICTR-2001-64-T), ICTR T.Ch. III, ‘Judgment’, 17 June 2004. “prosecution failed to establish the relationship between the accused and the specific person who committed the rapes.” Wildermuth, *supra* note 80, p. 132.

¹¹⁵ *Prosecution v. Krnojelac*, (IT-97-25), ICTY PT Ch., ‘Decision on the Defense Preliminary Motion on the Form of the Indictment’, 24 February 1999, para. 46.

¹¹⁶ *Prosecutor v. Hadžihasanović*, TC, paras. 90. This view was furthermore supported by the Orić TC, *supra* note 87, para. 311.

extensive that it needs to be established that the defendant is the actual author behind the crime and as such, for example, either (1) controls the *will* of the direct perpetrator while the crime is perpetrated alternatively (2) the organization is structured such as to enable the superior to be in full control over every step of the criminal endeavor even if he/she is not present at the scene of the crime. As explained in section 2.4, Claus Roxin actually went through extreme lengths in order to explain how indirect perpetration could expand from being limited to *innocent* direct perpetrators to also include a fully functioning and potentially criminally responsible direct perpetrator. The key to this expansion being an extremely specific control-test.¹¹⁷

In contrast, the control-test within the doctrine of superior responsibility is solely limited to the material ability of the superior to either prevent, punish *or* report the *subordinates'* involvement in the criminal endeavor, that is, it does not have to be demonstrated that the defendant was in control of the criminal endeavor as such and that his/her orders were obeyed in an automatic fashion by fungible subordinates. In my opinion, the test under the doctrine of superior responsibility is hence much more limited than the control-test for an indirect perpetrator even if, *similarly* to indirect perpetration, there is a form of control-test involved in article 28 as well. Consequently, even if some authors have made comments as to the effect that the two control-tests may be *similar*¹¹⁸, I would strongly argue that these statements of course do not mean that these tests are *the same*.

The relevance of this argumentation with regard to the case against Germain Katanga is self-evident. It could *prima facie* be argued that since a control-test already has been undertaken with regard to Katanga's role as an indirect perpetrator, there is no need to make any further inquiry about the potential application of the doctrine of superior responsibility. However, informed with the discrepancy between the two control-tests, one realizes the irrelevance of such argumentation. However, it may still be of interest to recap some of the argumentation provided in the case and compare this to the control-test for the doctrine of superior responsibility.

The Chambers evaluation of Katanga's level of control for the application of 25(3)(a) has briefly been presented in section 4.2. As thus demonstrated, the Chamber choose to focus on (1) whether the organization could qualify as "an organized power structure" within which the members are interchangeable to the extent that an order given by the superior will be automatically carried out and (2) the level of control exercised by the defendant within this organization was sufficient to qualify him as a *principal perpetrator*.

The result of the assessment failed in both steps. Firstly, the organization of the Ngiti combatants did certainly not live up to the "organized power structure" as explained by the Roxin-theory. Secondly, even if Katanga bore the title of "president" over the Ngiti militia (i.e. *de jure* authority) and as such was the highest ranking person within the organization, was received as an authority figure, had an undeniable military authority to the extent that he could issue orders to commanders and combatants (i.e. *de facto* authority), the Chamber deemed that it was not sufficiently demonstrated that Katanga wielded powers of command and control in *all* areas of military life or that he possessed effective hierarchical power over

¹¹⁷ Roxin, *supra* note 32, p.p. 193-205. See section titled 'Control over the crime' for a brief summary of this argumentation.

¹¹⁸ Ambos, *supra* note 93, p. 795.

all the commanders and combatants of the Ngiti militia. The Chamber furthermore noted that Katanga did not have the power to punish commanders from *various* camps and that it therefore could not make a determination as to the existence of a *centralized* command within the Ngiti militia.¹¹⁹

It thus seems to me as if the Chamber (consciously or unconsciously) have made an assessment of the level of control yielded by Katanga in three steps. Firstly the Chamber determined whether Katanga held *de jure* powers of control, which was answered in the affirmative. Secondly it assessed whether Katanga possessed *de facto* control, which also could be interpreted as being answered in the affirmative.¹²⁰ Lastly the Chamber made a third assessment. The last assessment was made with regard to the level of control needed to pass the control test in the Roxin-theory, namely whether the level of control was such as to make the obedience to the orders automatic. In this last step the Chamber examined whether Katanga's control extended to (1) *all* areas of military life, (2) *all* commanders, (3) *all* combatants and (4) *all* camps within the organization as well as whether he could be viewed as having a *centralized* command authority.¹²¹

It is likely that the fallout would have been the same would Katanga have been charged under article 28, i.e. that the Chamber reached the conclusion that Katanga lacked the required command and control over the subordinates. However, it ought to be noted that for the doctrine of superior responsibility to apply, it is merely necessary to answer the question as to whether or not the defendant has (1) *de jure* or (2) *de facto* control (in the sense that he/she can take measures to prevent, punish *or* report) the subordinates. The control-test under the doctrine of superior responsibility does not concern itself with whether the superior had centralized command authority over *all* aspects of military life, *all* commanders, *all* combatants and *all* camps. It seems to me as if it is on this last step that the Chamber has lingered and subsequently reached its conclusion entailing the acquittal of the Katanga of the charges in relation to article 25(3)(a).

Furthermore, even if the Chamber made pronouncements to the fact that it had not been sufficiently established that the defendant "had the material ability to issue and ensure compliance with orders" or that it was "impossible to ascertain the exact nature of the orders or whether they were obeyed", it can always be questioned whether the Chamber made this assessment with the strict realm of the Roxin-theory in mind.

Moreover, it is not merely the Roxin-theory that may have affected the Chamber to adjudicate in this direction. Another issue that may point to the fact that the Chamber (accurately) has chosen a very strict way of looking into the control that the defendant possessed in this step of the analysis, i.e. where it determined whether or not the defendant could be found guilty as a principal under article 25(3)(a), is the "control-over-the-crime"-approach. As mentioned previously the Chamber choose this particular approach when making a distinction between principals and accessories to the crime. The person that has total control over the criminal endeavor may be considered a principal, whereas a person who lacks such control is merely an accessory. A very high level of control is hence important also in this regard. For the application of the doctrine of superior responsibility the Chamber would

¹¹⁹ *Le Procureur c. Katanga*, *supra* note 1, para 1365.

¹²⁰ It could also be argued that the Chamber partly reached a negative conclusion in this matter.

¹²¹ It should be noticed that it is not a clear divide between these three steps in the judgment.

not have been interested in issues regarding whether or not the defendant could be considered as a principal or merely an accomplice (accessory). Consequently the analysis would not have concerned itself with the possibility of holding the defendant *responsible for the crime as such*. The Chamber would merely have been concerned with whether the defendant could be responsible for *his own failure to prevent, punish or report* the subordinates who committed the crime.¹²² The control test under this doctrine, again, only concerns the defendant's material ability to prevent, punish or report the subordinates – not his control over the perpetration of the *crime* as such.

The Chamber was never concerned with the more limited control-test as provided by the doctrine of superior responsibility and did therefor never weigh the evidence in the light of this doctrine. Neither the Prosecutor nor the Defense were furthermore able to provide argumentation in respect of this theory. Therefore, even if the conclusion *may* have been the same, i.e. that Katanga lacked the material ability to control the subordinates, we will never know the answer hereto. It would hence, in my view, have been preferable if the office of the prosecutor, in its initial indictment, would have included responsibility of Katanga under article 28.

The fact remains that the prosecutor believed that even the control-test under article 25(3)(a) would hold ground. Considering the fact that initially the defendant was solely charged as a principal, the office of the prosecutor went so far as to even base the entire case on the belief that this test could be sufficiently proven. What would have happened if the prosecution indeed was able to provide additional evidence that established that even the strict level of control as dictated by the Roxin-theory was met? Under the current premise, the Chamber did not even start to analyze whether the prosecutor had met its burden of proof for the last two elements of indirect perpetratorship; i.e. (2) requisite *mens rea* under article 30 and the crime in question and (3) awareness of the factual circumstances enabling him to exercise control over this crime.¹²³ What would have happened if the Chamber concluded that the defendant had control but did not meet the mental elements of the crimes? The defendant would, in such a case also have been acquitted under article 25(3)(a). However, there would not have been any question as to the applicability of the doctrine of superior responsibility under article 28. As will be explained in the following, article 28 provides for a very low *mens rea* threshold. Therefor it is very possible that the office of the prosecutor would have succeeded in providing sufficient proof hereof even if it failed in securing the proof for the *mens rea* standard under article 25(3)(a).

5.2.4 Subjective Element (Mens rea) of article 28

As already indicated, the subjective element for the doctrine of superior responsibility is rather low. It has however been consistently stressed that superior responsibility is not a matter of strict liability and consequently that a subjective element must be present in order to incur responsibility under the doctrine.¹²⁴

¹²² For further information about this distinction see the section below titled 'The Characterization of the Doctrine'. Even more information can be found in Kortfält, *supra* note 2.

¹²³ *Le Procureur c. Katanga*, *supra* note 1, para. 1421.

¹²⁴ See e.g. *Prosecutor v. Bemba*, *supra* note 86, para. 427. Roberta Arnold, Responsibility of commanders and other superiors, in in Triffterer (ed.), 'Commentary on the Rome Statute of the International Criminal Court',

There are two alternative subjective element standards available for both military (and quasi-military) and civilian superiors; the *actual knowledge*-standard and the *should have known*-standard (or *consciously disregarded information which clearly indicated*-standard).

The *actual knowledge*-standard simply entails that the superior has actual knowledge of that his subordinates are about to commit or have committed crimes. The actual knowledge can be proven with direct or circumstantial evidence. Some factors which may be indicative of actual knowledge are the number of illegal acts, whether their occurrence is widespread, the type and number of forces involved, the location of the commander etc.¹²⁵

The *should have known*-standard (which at times have been referred to as *constructive knowledge*¹²⁶) is, on the other hand, a bit more complicated.¹²⁷ According to the Trial Chamber in the Bemba case, the *should have known*-standard merely requires the superior to have been *negligent* in failing to acquire knowledge of his subordinates' illegal conduct.¹²⁸ In the same case the Chamber furthermore concluded that this element may be considered fulfilled if the superior (i) "had general information to put him on notice of crimes committed by subordinates or of the possibility of occurrence of the unlawful acts; and (ii) such available information was sufficient to justify further inquiry or investigation".¹²⁹

If fulfilled, *either* of these subjective elements would give rise to responsibility under the doctrine of superior responsibility.

5.2.4.1 The *mens rea* of Katanga under article 28 as compared to article 25(3)(d)

The Chamber did not directly consider Katanga's *mens rea* in relation to the crimes of sexual violence. It is therefore difficult to make an assessment as to the knowledge of the accused in relation to these particular crimes and consequently how such an evaluation would have turned out in the light of article 28. However, as already discussed under "4.3.2.5. The subjective element of article 25(3)(d)", the pronouncements about the knowledge of the crimes may arguably also relate to sexual violence. If these pronouncements extends to the crimes of sexual violence, then this element would consequently also be fulfilled if the defendant was charged under article 28.

It should however be noted that the subjective element under the doctrine of superior responsibility is much lower than the one addressed in the current case and relayed in the

Second Edition, (Nomos Verlagsgesellschaft Baden-Baden, 2008), p. 828. Rome Statute, article 28(b)(i). There are several differences of the elements between 28(a) and 28(b) which are beyond the scope of this article. Please see Linnea Kortfält, *supra* note 2, or Maria Nybondas, *supra* note 92, for further information about these distinctions.

¹²⁵ The first point mentioned by the Chamber with regard to Katanga's responsibility for sexual violence may here be of some relevance, i.e. the consideration of that there was insufficient evidence to conclude that the sexual violence was widespread and systematic. This conclusion would thus speak against the fact that Katanga possessed *actual knowledge* before or during the attack on Bogoro. However, it does not make any assessment of Katanga's *actual knowledge* after the attack or during the period of sexual enslavement.

¹²⁶ Ambos, *supra* note. 93, p. 865.

¹²⁷ It should be noted that the wording of this element in the Rome Statute differs from that used in the corresponding article in the *ad hoc* tribunals. In the latter a *reason to know*-standard has been applied. It has however been argued that the extra phrase "owing to the circumstances at the time" in article 28, raises the level of *mens rea* under the *should have known*-standard to equate the one set out in the *ad hoc* tribunals. Arnold, *supra* note 124, p. 830.

¹²⁸ *Prosecutor v. Bemba*, *supra* note 86, para. 432. This is a somewhat controversial statement, see e.g. Kai Ambos 'Critical Issues in the Bemba Decision', *Leiden Journal of International Law*, 22 (2009), p. 722.

¹²⁹ *Prosecutor v. Bemba*, *supra* note 86, para. 434.

above mentioned section. Thus, even if the sexual violence would not be included in the above mentioned analysis, this element *could* still have been fulfilled if the assessment was made under article 28. One example hereof is related to the fact that the responsibility of the superior, under the doctrine, does not merely extent to his or her failure to prevent the crimes but also to his/her the responsibility to punish or report the subordinates *after* the commission of the crime (a matter which will be addressed in the following section). Hence, the *mens rea* of the accused under the doctrine also covers the knowledge of the accused *after* the commission of the crimes. An evaluation was consequently never undertaken in respect of Katanga's knowledge of the sexual violence *after* their commission and his subsequent failure to punish these acts.

5.2.5 Failure to 'prevent', 'repress' or 'submit to the competent authorities'

As already stated, the superior does not incur responsibility because of acts that he/she has undertaken but rather due to his or her *non-action* in relation to acts that *others* have undertaken. The superior is thus held liable based on a *failure* to act.

According to the text of the article the superior could *either* be held accountable for *failing* to (1) prevent, (2) repress *or* (3) submit the matter to the competent authorities.¹³⁰ The obvious distinction is that if a crime has yet not been committed (or is in the process of being committed), the superior is obliged to take measures to prevent the crime (*as well as* undertake subsequent relevant repressive action), whereas if the crime has already been committed, the options available are limited to repressive measures. These measures need to be *necessary and reasonable* and *within the superiors power*. Simply put, the superior is not asked to do anything beyond his or her *legal competence* or *material possibility*.¹³¹ The legal competence and material possibility of the superior is evaluated on a case by case basis since it will vary greatly according to the circumstances of the case and the superior's position in the chain of command or organizational structure.¹³²

Repressive measures could either be that the superior (1) stop *ongoing* crimes from continuing to be committed in order to interrupt possible chain effects which may lead to other similar events and/or (2) punish the subordinates *after* the commission of crimes; either him/herself, through initiating investigations or by submitting the matter to competent authorities.¹³³ Hence, if the superior lacks the possibilities to sanction the subordinates properly, he/she is still under a duty to ensure that the perpetrators are brought to justice by submitting the matter to others that do possess such powers.

It is very likely, if the previously described elements of the doctrine of superior responsibility are fulfilled, that Katanga would also have been considered to have failed in either of these aspects; i.e. to prevent, repress or submit the matter to competent authorities. It was concluded that Katanga had made a significant contribution to the commission of the crimes *within the common purpose*, by virtue of his position in Aveba which enabled the militia to operate in an organized and efficient manner and by equipping the Ngiti combatants

¹³⁰ Rome Statute, article 28(a)(iii).

¹³¹ Ambos, *supra* note 93, p. 861.

¹³² *Prosecutor v. Bemba*, *supra* note 86, para. 438, *references omitted*.

¹³³ *Ibid.*, para. 439, *references omitted*.

with weapons and ammunition.¹³⁴ There is thus proof of his positive action and contribution but nothing is mentioned about Katanga's omissions to prevent, repress or report the Ngiti combatants' acts of sexual violence. There is accordingly not sufficient information provided in the judgment that would allow for even an initial analysis of Katanga's failure to act. Moreover, there is one last element that needs consideration, namely causality.

5.2.6 Causality

Article 28 arguably adds a new element to the doctrine of superior responsibility which has not been present in previous wordings of corresponding articles that regulate the application of the doctrine.¹³⁵ The article establishes an element of causality between the superior's dereliction of duty and the underlying crimes.¹³⁶ However, clearly this causal element can only apply when considering the superiors failure to *prevent*. As the Chamber explained in the Bemba case, it is illogical to conclude that a failure to *repress* or *submit the matter to the competent authorities retroactively* could cause or, in any way, influence the perpetration of the crime.¹³⁷ The extent of the causal element is thus highly debatable.

The level of the causality required is also highly questionable. Considering that a "*sine qua non*"- level (i.e. "but for"-level) of causality is highly improbable and impracticable in relation to acts of omission, it is more likely and reasonable that the level required is solely that the omission of the superior to take measures to prevent the criminal endeavor "increased the risk of the commission of the crimes". This is the level chosen in the Bemba case which furthermore has been supported in the academic debate.¹³⁸

Considering this restrictive interpretation of the causal element, it is more than likely that Katanga would also have lived up to this element if an alternative charge under the doctrine of superior responsibility had been added in the initial indictment. The causality element would not even be under consideration with regard to an investigation of the defendant's failure to repress or submit the matters to the competent authorities.

5.2.7 No Common Purpose Element

As previously demonstrated, the whole case against Katanga, with regards to sexual violence, fell on one particular element under article 25(3)(d) (i.e. accessorial liability for participation in a group crime). The element in question was showing that the crimes of sexual violence was a part of the "common purpose" of the group. This has been discussed in a previous section, thus, as for now, I will merely reiterate this fact and stress that the doctrine of superior responsibility does not consist of a "common purpose" -element. Charging the defendant for responsibility under article 28, could very likely, thus have helped in securing a conviction for sexual violence where both accessorial liability for participation in a group crime and indirect co-perpetration failed.

¹³⁴ See the section titled: "Significant contribution".

¹³⁵ Rome Statute, article 28(a).

¹³⁶ *Prosecutor v. Bemba*, *supra* note 86, para. 423.

¹³⁷ *Ibid.*, para. 424.

¹³⁸ *Ibid.*, paras. 425-6. This view was furthermore supported by Ambos. Kai Ambos, *supra* note 93, p. 860. Ambos, *supra* note 128.

5.3 Challenges to the doctrine - The Character of Superior Responsibility

So far, this article has only highlighted the positive aspects of using the doctrine of superior responsibility in cases involving sexual violence. It is however necessary to address some of the criticism that may be raised with regard to the doctrine.

As with most modes of liability in international criminal law, the doctrine of superior responsibility is also fraught with complexities. There are differing opinions ranging from the precise content of the various constituent elements of the doctrine to the very nature and the exact contours of the doctrine.¹³⁹ My argument however, is that even if there are difficulties involved in the application of the doctrine, it would still serve an important function in the prosecution of sexual violence cases involving high level defendants.

Firstly, some authors have pointed out that prosecutors may exhibit reluctance in using the doctrine of superior responsibility due to the difficulties that have arisen when some judges in the ICTR have chosen to apply the elements of the doctrine in a rather inflexible and stringent manner.¹⁴⁰

As a counterargument to these cautionary notes, it should however be clarified that there is no *star decisis* between the International Criminal Court and the *ad hoc* tribunals. The Rome Statute only states that the ICC “*may* apply principles and rules of law as interpreted in *its own* previous decisions”, thus solely placing such a requirement (or rather possibility) in respect of its own judgments.¹⁴¹ However, evidently it is important to respect the knowledge and conclusions reached within these highly esteemed legal institutions. They may indeed have done a thorough analysis of the applicable law and consideration thereof is highly advisable. It should however not be held for certain, that all international tribunals apply these theories correctly.¹⁴²

Finally I would like to offer one last note on this issue.¹⁴³ The underlying reason for the rigidity mentioned above, may be based on differing opinions as to the interpretation of the character of the doctrine of superior responsibility. Let me explain this point a bit more thoroughly.

The quote from Wildermuth and Kneuer above, states that “[s]uccessful prosecution at the ICTR under this *mode of responsibility* has been problematic for a number of reasons [...]”¹⁴⁴.

¹³⁹ For a more in-depth analysis hereof please refer to Linnea Kortfält, *supra* note 2.

¹⁴⁰ E.g.: “Successful prosecution at the ICTR under this *mode of responsibility* has been problematic for a number of reasons. The court appears to have applied a ‘rigid and highly technical approach to the law of superior responsibility’ requiring findings of ‘effective control’ that are outdated and that have failed to keep pace with developments in command structures in ongoing military, paramilitary and warlord operations in armed conflicts.” Wildermuth, *supra* note 80, p. 126, 131.

¹⁴¹ Rome Statute, Article 21(2). *Emphasis added*.

¹⁴² Looking at one of these examples, the Kajelijeli case, for instance, it could with good reason be questioned whether the judges have misunderstood or misapplied the doctrine of superior responsibility under article 6(3) (i.e. the equivalent of article 28 in the Rome Statute), with ordering under article 6(1) of the ICTR statute (i.e. the equivalent of article 25(3) in the Rome Statute). In the conclusions of *mens rea*, great emphasis have been placed on that the defendant was not present at the scene of the crime, an element that is not relevant to the application of the doctrine of superior responsibility. The application of the doctrine could hence be skewed in some cases and it would therefore be unadvisable to take guidance from such cases. *Prosecutor v. Kajelijeli*, (Case no. ICTR-98-44A-T), ICTR T. Ch., ‘Judgement’, 1 December 2003, paras. 770-779, 937-9. Wildermuth, *supra* note 80, p. 131.

¹⁴³ For further analysis hereof please refer to my forthcoming dissertation; Linnea Kortfält, ‘Sexual Violence against Children and International Law - The role of the doctrine of Superior Responsibility’.

¹⁴⁴ Wildermuth, *supra* note 80, p. 131. *Emphasis added*.

This statement may not look problematic at first glance, however the characterization of superior responsibility as a *mode of responsibility* is highly controversial. There is namely a raging debate concerning the very character and nature of the doctrine which has bearing not only on a theoretical and academic level, but more importantly, it influences the practical application of the constituent elements of the doctrine.¹⁴⁵ Hence, categorizing the doctrine as a mode of responsibility/liability, may lead to the conclusion that there ought to be a more stringent approach in its application as opposed to if one would choose an alternative classification. The following may provide some further explanation as to why this is the case.

5.3.1 The Characterization of the Doctrine

There are at least three main categories in which one may choose to view the doctrine and consequently the defendant who subsequently may be convicted thereunder.¹⁴⁶

5.3.1.1 Superior responsibility as “commission by omission”

The first possible interpretation as to the nature of the doctrine is that the superior is responsible for actually having participated in the *principal crime*. As such the superior becomes responsible for the *principal crime* under the theory of “commission by omission”.¹⁴⁷

The general rules pertaining to criminal omission are complicated. Therefore a few words about their meaning seem to be called for in this respect. A simplified explanation of the concept (or rather one variant hereof) is that, where there is a duty to act prescribed by law, a person omitting to fulfil such a duty could be held criminally responsible for the crime.

An article dealing with a general responsibility for omission as suggested in the Draft Statute, was excluded from the final version of the Rome Statute. It could be argued that the only remnants of a rule on omission in the Statute is enshrined in article 28.¹⁴⁸

The basis of the doctrine of superior responsibility is, unquestionably, the superior’s legal duty to control subordinates. Since the adoption of article 86(2) of AP I from 1977 there has been a clear, codified legal duty in international humanitarian law for a superior to prevent and punish criminal activities undertaken by his or her subordinates. Omitting to fulfil this legal duty gives rise to criminal responsibility. It could thus be argued that these rules are in line with general rules on commission by omission.¹⁴⁹

However, whether the criminal responsibility covers solely the superiors *own failure to supervise* or the *principal crime*, with respect to theories of omission, is still under debate.

¹⁴⁵ See e.g.: C. Meloni, ‘Command Responsibility – Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?’, *Journal of International Criminal Justice*, vol 5, 3 (2007): 619-637.

Volker Nerlich, ‘Superior Responsibility under Article 28 ICC Statute – For what Exactly is the Superior Held Responsible’, *Journal of International Criminal Justice*, vol 5 (2007): 665.

Guénael Mettraux, ‘The law of command responsibility’, *Oxford University Press*, Oxford/New York, 2009, p. 38.

¹⁴⁶ C. Meloni, *supra* note 145, p. 619. Exactly how the ICC has decided to or will characterize the doctrine is not clear at this point. See e.g. *Prosecutor v. Bemba*, *supra* note 86, para. 405.

¹⁴⁷ This first possible interpretation is thus contrasted to the more widely accepted option, where the superior is held responsible for his/her omission to control the subordinates as a “separate crime of omission to control”, i.e. the superior is *not* held responsible for the “principal crime”.

¹⁴⁸ Ambos, *supra* note 93, p. 850.

¹⁴⁹ One problem that should be noted is however the differing approaches to the need for causality with respect to the doctrine of superior responsibility.

The idea that superior responsibility should give rise to direct responsibility for the *principal crime* under the theory of commission by omission, has been heavily criticized.

5.3.1.2. Superior responsibility as a *mode of liability*

Another possible interpretation of the nature of the doctrine is that superior responsibility is a *mode of liability* and the superior consequently is convicted as a participant in the “principal crime”. Superior responsibility shares common feature with other *modes of liability* in that they are accessory to the principal crimes committed by other perpetrator/s. The difference however is that in respect of the other *modes of liability* there needs to be a positive act or, at least, a certain level of contribution to the commission of the principal crime. As stated earlier, superior responsibility is rather characterized by the non-action of the superior. Despite this fact, there have been strong proponents for an interpretation that superior responsibility should be interpreted as a *mode of liability*, one example being Wildermuth and Kneuer mentioned above.¹⁵⁰

Case law emanating from the aftermath of WWII tends to view the doctrine of superior responsibility as a *mode of liability* and the superiors were thus convicted for the principal crime committed by the subordinates.¹⁵¹

The early case law from the ICTY also tends to treat superior responsibility as a *mode of liability* or at least that the superior is responsible *for* the principal crime.¹⁵² According to a survey undertaken by the Trial Chamber in the Halilović judgement, it was concluded that, up to that date, the superior had consistently been “responsible for the crimes of his subordinates [when convicted] under article 7(3)” i.e. responsible *for the principal crime*.¹⁵³ Exactly what is meant by the fact that the superior is responsible for “the crimes of his subordinates” is however still not clear.

In the Halilović judgement, the Trial Chamber did however reach a different conclusion than what had been indicated in previous case law. The interpretation given in that case was that the superior is ‘merely responsible for his neglect of duty *with regard to* the crimes committed by subordinates’.¹⁵⁴ The Chamber further stated that “[t]hus ‘*for the acts of his subordinates*’ as generally referred to in the jurisprudence of the Tribunal does not mean that the commander *shares the same responsibility* as the subordinates who committed the crimes, but rather that *because of the crimes* committed by his subordinates, the commander should bear responsibility for his failure to act.”¹⁵⁵ This view was subsequently reiterated in e.g. the Orić and Hazihasanovic Trial Chamber judgements (*see below*).

A shift does accordingly seem to have occurred from the early case law, where superior responsibility was viewed as a *mode of liability*, alternatively that the superior in some other

¹⁵⁰ See e.g. Arnold, *supra* note 124, p. 843, Otto Triffterer, *Causality*, p. 186. Orić Prosecution Appeal Brief, 18 October 2006, para. 162.

¹⁵¹ *Re Yamashita*, 371 US 1, para. 13. *US v. Leeb* (Hostage Case), TWC vol. XI, 512-543. *US v. List* (High Command Case), TWC, vols. X and XI, 1271. A possible differing view is presented in the case against Toyoda, *Toyoda Case*, p. 5006.

¹⁵² E.g. *Prosecutor v. Mucić et al.*, TC, *supra* note 97, para 333. *Prosecutor v. Mucić et al.*, AC, *supra* note 97, para. 198, *Prosecutor v. Aleksovski*, (Case no. IT-95-14/1-T), ICTY T. Ch., Judgement, § 67.

¹⁵³ *Prosecutor v. Halilović*, *supra* note 99, TC, § 53.

¹⁵⁴ *Ibid.*, para. 293. *Emphasis added.*

¹⁵⁵ *Ibid.*, para. 54, *Emphasis added.*

form was held responsible for the *principal crime*, to later case law purporting a more restrictive view concerning the nature of the doctrine.

5.3.1.3. Superior responsibility as a "sui generis" responsibility

A third possible interpretation of the nature of the doctrine is that the criminal responsibility of the superior is limited to his/her own failure to act *with regard to*, or in relation to, the *principal crime*. In accordance with this interpretation, the superior is convicted, not for the *principal crime*, but *merely* for his/her own failure to act or.¹⁵⁶

The ICTY Appeals Chamber seemed to agree with this interpretation in the Krnojelac case where it held that "[i]t cannot be overemphasised that, where superior responsibility is concerned, and accused is not charged with the crimes of his subordinates but for his failure to carry out his duty as a superior to exercise control".¹⁵⁷

This view is supported by the Halilović, Hadžihasanović and Orić Trial judgements which deemed that the superior does not share the same responsibility as the subordinates but that rather the superiors responsibility solely is restricted to his/her own failure to perform the duties prescribed by international law.¹⁵⁸ The Trial Chamber did however stress the connection to the gravity of the principal crime in e.g. the *Halilović* judgement.¹⁵⁹

The connection between the responsibility of the superior and the gravity of the "principal crime" is further developed in the Hadžihasanović Appeal Judgement.¹⁶⁰

The conclusion of some is that command responsibility is a *sui generis* form of culpable omission which is incomparable to any other responsibility in either domestic or international criminal law.¹⁶¹

5.3.2.1 How the Characterization of the Doctrine relates to Crimes of Sexual Violence

The existing uncertainty in the classification of the doctrine is a problem in its own right. However, as will be demonstrated in the following, this uncertainty opens up for a different analysis and potential possibilities as to how the doctrine can be applied to crimes of sexual violence.

As described above, there are (at least) three potential characterizations of the doctrine; (1) as commission by omission, (2) as a *mode of liability* or (3) as a *sui generis* responsibility for the superiors own failure to control the subordinates. If the doctrine is characterized as a principal liability for commission by omission or as a mode of liability, the superior becomes responsible for the principal crime whereas if the doctrine is seen as a *sui generis* responsibility, the superior is merely held accountable *for* his/her own failure to prevent, punish or report *with regard to* the principal crime. There are *pros* and *cons* to each of these classifications as they relate to the prosecution of crimes of sexual violence.

¹⁵⁶ Within this interpretation one does however evaluate *both* the gravity of the superiors own failure as well as the gravity of the *principal crime*.

¹⁵⁷ *Prosecutor v. Krnojelac*, (Case no. IT-97-25-A), ICTY A. Ch., 'Judgment', 17 September 2003, para. 171.

¹⁵⁸ *Prosecutor v. Orić*, TC, *supra* note 87, para. 293. *Prosecutor v. Halilović*, TC, para. 78. *Prosecutor v. Hadžihasanović*, TC, para. 75.

¹⁵⁹ "The imposition of responsibility upon a commander for breach of his duty is to be weighed against the crimes of his subordinates; a commander is responsible not as though he had committed the crime himself, but his responsibility is considered *in proportion to the gravity of the offences committed*." *Prosecutor v. Halilović*, *supra* note 99, § 54. *Emphasis added*.

¹⁶⁰ *Prosecutor v. Hadžihasanović*, (Case no. IT-01-47-A), ICTY A. Ch, Judgement, 22 April 2008, §§ 312–318.

¹⁶¹ Guénael Mettraux, 'The law of command responsibility', *Oxford University Press*, Oxford/New York, 2009.

The first two avenues of characterization may lead to a greater level of culpability as well as stigmatization of the superior for incurring responsibility under the doctrine for crimes of sexual violence. In contrast, responsibility that is limited to the superiors own actions (or rather non-action) for failing to prevent, repress or report the sexual violence is not as grave as if said superior would be held responsible for the responsible for the sexual violence as such (i.e. principal crime) or as a form of accomplice to the sexual violence.

If the aim of international criminal law is to hold people accountable under as grave a responsibility as possible, there could thus be a desire to strive for that the doctrine of superior responsibility leads to as high level of culpability and stretches as far as possible. However, it may be just as desirable to have a lower responsibility under the doctrine. Needless to say, such an approach seems to be more in line with general criminal law theories, e.g. that a person should merely be held responsible for his or her own actions or omissions. It is moreover the approach that currently seems to reign in the *ad hoc* tribunals. More importantly, however, this latter approach may make it more likely to hold superiors responsibility for sexual violence. Let me briefly develop this thought.

If the doctrine of superior responsibility *merely* holds the superior responsible for his/her failure to prevent, repress or report subordinates that commit sexual violence, the tribunals need not go through such length in trying to make the elements of superior responsibility so stringent. I believe that the cases in which there have been a very stringent application of the elements, the Chamber has either confused the doctrine with *ordering* or it has, in some other way, believed that the superior was held responsible *for the principal crime*. If the doctrine is seen as a *sui generis* responsibility, there may be a less rigid application. Consequently, in such a scenario, there could be more possibilities of holding superiors responsible for sexual violence.¹⁶² In fact, it is very likely that Katanga would have been convicted for sexual violence would he have been charged under the doctrine of superior responsibility as a *sui generis* responsibility. It would have been interesting and valuable to see which approach to the characterization the ICC would have chosen.

5.4 Remarks concerning the application of the Doctrine in the Katanga Case

In this subchapter I have presented the doctrine of superior responsibility as well as discussed some of the benefits of the doctrine to sexual violence charges in general. I have consecutively also analyzed the possible application of and potential benefits would the doctrine have been utilizing in the case against Katanga in particular.

The result of this analysis was that, even if the information provided in the judgment was insufficient as to draw any specific conclusions, each element under article 28 could possibly have been fulfilled had Katanga been charged under the doctrine. Katanga could qualify as a quasi-military leader and it is rather possible to argue that Katanga should have known (at least after the fact) of the sexual violence and that he failed to punish or report these crimes. The last element, i.e. causality, as has been elaborated above, is not applicable to the repressive measures under the article and thus not of relevance.

¹⁶² For further argumentation please see my forthcoming dissertation, Linnea Kortfält, 'Sexual Violence against Children and International Criminal Law – The role of the Doctrine of Superior Responsibility'.

The only potential challenge may have been to establish the superior-subordinate relationship. As explained previously in this article, the relationship between Katanga and the direct perpetrators was evaluated in relation to the application of indirect co-perpetration under article 25(3)(a) whereas the Chamber deemed that Katanga did not live up to the *stringent* control-test thereunder. However, as thoroughly explained above, the control-test under article 25(3)(a) is entirely different from/than the ‘command and control’-element required to establish the superior-subordinate relationship under article 28. I thus argue that the pronouncements made in respect of the control-test for indirect co-perpetration consequently should not prejudice an evaluation of the superior’s ability to prevent, repress or report the subordinates under article 28. In my opinion, there may thus have been a greater chance to find Katanga guilty of sexual violence should he have been charged under article 28 in the alternative.

Furthermore, even if an alternative charge under article 28 would have proven futile in securing a conviction, at least *all* possible avenues would have been tested. As the case stands today, there is a glaring void left after the judgment and the question still remains; “what if?”. Another important disadvantage to excluding this charge is the lost opportunity for the Court to contribute to the elucidation of the law in this respect and hence to lay the groundwork for future convictions. I hence believe that it is highly regrettable that the Prosecutor did not utilize the doctrine of superior responsibility in the case against Germain Katanga.

6 Concluding remarks

In this article, I set out to illustrate the interplay between sexual violence and various linking theories through explaining and analyzing the reasoning of Trial Chamber II with regard to both sexual violence and the application of various *modes of liability* in the case against Germain Katanga. In so doing, the limitations of the *modes of liability* provided for in article 25(3) and especially their constraint in relation to crimes of sexual violence were described. I first explained how the Chamber deemed that indirect co-perpetration under article 25(3)(a) was inapplicable to the entire case since it was not sufficiently proven that Katanga fulfilled the very strict control-test developed under the Roxin-theory. Subsequently, I described the reasoning of the Chamber concerning the applicability of article 25(3)(d) to all crimes *except* sexual violence, finding that the reason hinged on that the Chamber considered it as insufficiently established that the sexual violence was a part of “the common purpose of the group”. The reasons relayed in the judgment in support of such a conclusion were examined and discussed. After concluding that neither of the *modes of liability* under article 25 were applicable to the sexual violence charges in the case against Katanga, I went on to examine the potential application of the doctrine of superior responsibility under article 28. Once the particular benefits of utilizing the doctrine in cases involving sexual violence were explained, the elements of the doctrine were elucidated in a bit more detail after which the direct relationship of each element to the current case consecutively were evaluated. The result of this analysis was that, even if the information provided in the judgment was insufficient as to draw any specific conclusions, each element under article 28 could possibly have been fulfilled had Katanga been charged under the doctrine.

However, even if the case against Katanga may not provide a *perfect* example of a situation where the doctrine of superior responsibility would have provided a solution to a

conviction of sexual violence, the value of this case with regard to the question of sexual violence and the doctrine of superior responsibility lies elsewhere. The case has provided an astounding example of the deficiencies in the attitude towards sexual violence and consequently how difficult it is to convict people of these particular crimes if they are far removed from the actual event. It furthermore points to the particular difficulty regarding the general interplay between the type of crime and the ability to link a defendant to those crimes. It moreover shows a few of the various pitfalls of the *modes of liability* provided in article 25(3) in respect of sexual violence and consequently demonstrates how important the doctrine of superior responsibility under article 28 may be for sexual violence convictions.

The point of this article is not as much a critique of this particular case as it is a warning and a strong wish to provide guidance with regards to future cases. My hope is of course that sexual violence will be viewed just as detrimental and destructive a crime as pillaging and destruction of property, that in certain armed conflicts it is used just as frequently and deliberately as any other method or means of war, and that it should not be treated as anything less. But for now, when attitudes unfortunately lead to unsuccessful convictions for sexual violence in cases like the present, it is important to cast a broad net. This net should always include the doctrine of superior responsibility since this doctrine, though not perfect, provides a very important alternative charge when sexual violence is concerned.

Fortunately the office of the prosecutor seems to have learnt from this mistake as it has included charges under not only article 25(3)(a), (b), (d) and (f) but also under article 28 in the impending case against Bosco Ntaganda.¹⁶³ In this case the Office of the Prosecutor has thus decided to utilize all possibilities that exists in the Rome Statute to convict the people involved in these horrendous crimes and fight, as pledged by the chief prosecutor Bensouda, with additional vigor impunity for international crimes involving sexual violence.¹⁶⁴ It will be exceedingly interesting to follow the outcome of that case.

However, I still believe that it is highly regrettable that the Prosecutor decided to discontinue the appeal against Germain Katanga.¹⁶⁵ Needless to say, the Prosecutor would never have been able to extend the charges to also cover article 28, however it would have been very interesting to see the OTP's argumentation against and subsequently the Appeals Chambers elaboration (or preferably reversal) of the reasoning with regard to the argumentation provided in the Trial Chamber's judgment in respect of the sexual violence acquittal.¹⁶⁶ Even if the Prosecutor thus argues that the victims in this manner will be able to focus on reconciling and healing from the past¹⁶⁷, (a fact that has been heavily criticized by

¹⁶³ *Prosecutor v. Bosco Ntaganda*, *supra* note 84, paras. 147-151.

¹⁶⁴ Fatou Bensouda, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, providing an update on the ICC-OTP Policy Paper on Sexual and Gender-Based Crimes', 07/03/2014.

¹⁶⁵ *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07, 25 June 2014, 'Notice of Discontinuance of the Prosecution's Appeal against the Article 74 Judgment of Conviction of Trial Chamber II dated 7 March 2014 in relation to Germain Katanga', p. 2.

¹⁶⁶ Prosecutors notice of appeal.

¹⁶⁷ Fatou Bensouda, (Statement: 25/06/2014), 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on Germain Katanga's Notice of Discontinuance of his Appeal against his Judgment of Conviction', <http://icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-25-06-2014.aspx>, as visited on 3 July 2014.

the legal representative of the general victims¹⁶⁸) I still believe that it is unfortunate that the first case in the ICC to deal with sexual violence failed on this particular point. I am of the view that this runs counter to the ICC-OTP Policy Paper on Sexual and Gender-Based Crimes which was issued by the Chief Prosecutor, Fatou Bensouda, as late as the month of February this year.¹⁶⁹ Hopefully the future will prove something different altogether.

¹⁶⁸ Jennifer Easterday, 'Lack of Appeal in Katanga is Unjust, Victims' Lawyers Say', *International Justice Monitor*, 14/07/14. <http://www.ijmonitor.org/2014/07/lack-of-appeal-in-katanga-is-unjust-victims-lawyers-say/?utm_source=rss&utm_medium=rss&utm_campaign=lack-of-appeal-in-katanga-is-unjust-victims-lawyers-say>, as visited on 14 July 2014.

¹⁶⁹ Fatou Bensouda, (Statement: 07/03/2014), 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, providing an update on the ICC-OTP Policy Paper on Sexual and Gender-Based Crimes', <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/statement-otp-07-03-2014.aspx>.