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Linking High-level Accused to Sexual and Gender-Based Crimes in International Criminal Law

Sammie, Sylvester

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Linking High-level Accused to Sexual and Gender-Based Crimes in International Criminal Law

Theory and Practice of the ICTY, ICTR, and ICC

PhD thesis

to obtain the degree of PhD at the
University of Groningen
on the authority of the
Rector Magnificus Prof. C. Wijmenga
and in accordance with
the decision by the College of Deans.

This thesis will be defended in public on

Thursday 4 November 2021 at 14.30 hours

by

Sylvester S. Sammie

born on 4 December 1978
in Monrovia, Liberia

Supervisor
Prof. A.L. Smeulers

Co-supervisor
Dr. A.L.M. de Brouwer

Assessment Committee
Prof. C.I. Fournet
Prof. V. Oosterveld
Prof. H.G. van der Wilt

Acknowledgment

The idea of writing a doctoral thesis on Linking High level Accused to Sexual and Gender-Based Crimes in International Criminal Law first crossed my mind while working for the International Criminal Tribunal for Rwanda in 2008-2011. While the job did not permit me at the time to pursue my studies, the idea lived on until I attended a presentation by Dr. Denis Mukwege (gynecologist and founder of Panzi Hospital in Bukavu, DRC) in 2016 on the sufferings of the victims of Sexual and Gender-Based Crimes and the large-scale impunity of the perpetrators, especially top military and civilian officials. I then started to ask myself why these top military and civilian officials are often not being held accountable for their roles in the commission of these crimes. I hope that the writing of this book will contribute to this field, and, for that reason, I feel honored to have carried out this research.

This research could not have been possible without the firm support of my supervisors and the University of Groningen. First, a special word of thanks goes to my supervisor Prof. dr. A.L. Smeulers of the University of Groningen, and my co-supervisor Dr. mr. A.L.M. de Brouwer of Impact: Center against Human Trafficking and Sexual Violence in Conflict. I profoundly appreciate their valuable comments and suggestions, which were crucial to the completion of this book. I am grateful to the University of Groningen for granting me the opportunity to carry out this research at this noble academic institution. I am also thankful to my wife Alexandra for checking the manuscript to maintain consistency, and for the unwavering love and care during this remarkable journey. I also want to recognize a few people who are special to me. I am grateful to my parents, Weedor and James, and my mother-in-law, Marina, for their support and love.

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Abbreviations

AFRC	Armed Forces Revolutionary Council
AP	Additional Protocol
ARK	Autonomous Region of Krajina
Art	Article
BiH	Bosnia and Herzegovina
CAR	Central African Republic
CBOZ	Central Bosnia Operative Zone
CCL	Control Council Law No. 10
CDF	Civil Defence Force
CRSV	Conflict-Related Sexual Violence
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
EoC	Elements of Crimes
FARDC	Armed Forces of the Democratic Republic of the Congo
FDS	Defence and Security Forces of Ivory Coast
FIDH	International Federation for Human Rights
FNI	Nationalist and Integrationist Front
FPLC	Patriotic Forces for the Liberation of Congo
FRY	Federal Republic of Yugoslavia
GC	Geneva Convention
HRW	Human Rights Watch
HVO	Croatian Defence Council (the Croatian Community of HZ-HB armed forces)
ICC	International Criminal Court
ICL	International Criminal law
ICRC	International Committee of the Red Cross

ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDPs	internally displaced persons
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IMT	International Military Tribunals
IMTFE	International Military Tribunal for the Far East
JCE	Joint Criminal Enterprise
KLA	Kosovo Liberation Army
LRA	Lord's Resistance Army
MLC	Moverment for the Liberation of Congo
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
MRND	National Republican Movement for Democracy and Development
MUP	Ministry of Internal Affairs of Serbia
NGO	Non-Governmental Organization
No.	Number
OTP	Office of the Prosecutor
P.	Page
Para	Paragraph
Paras	Paragraphs
PNC	Congolese National Police
POW	Prisoner of war
pp.	Pages
PRK	Prištinski korpus (Pristina Corps)
PTSD	Post-traumatic Stress Disease
RCD-K/ML	Congolese Rally for Democracy Kisangani/ Liberation Mouvement

RPE	Rules of Procedure and Evidence
RPF	Rwandan Patriotic Front
RS	Republic of Serbia
RSK	Republic of Serbian Krajina
RTLM	Radio Télévision Libre des Mille Collines
RUF	Revolutionary United Front
SAO	Serbian Autonomous Oblast
SCR	Security Council Resolutions
SCSL	Special Court for Sierra Leone
SDC	Supreme Defence Council
SDB	State Security Service of Serbia
SDS	State Security Service of Croatia
SGBCs	Sexual and Gender-Based Crimes
SJB	Public Security Station
STDs	sexually transmitted diseases
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNPROFOR	United Nations Protection Force
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
UPC	Union of Congolese Patriots
VJ	Jugoslav Army
vol.	Volume
VRS	Army of the Republika Srpska
WHO	World Health Organization
WWII	World War II

Chapter I: The Investigation and Prosecution of Sexual and Gender-Based Crimes

General Introduction

> *'I took refuge in a bamboo forest with my three children. A group of Interahamwe began to search the forest for Tutsis and found my 15-year-old handicapped daughter. Interahamwe threw my daughter on the ground, undressed her, raped her, and killed her. From my hiding place, about 50 meters, I could see the accused Kajelijeli in his vehicle with the remaining Interahamwe. The accused ordered the Interahamwe to rape Tutsi women and specifically, the accused told the Interahamwe that "it was necessary to look for the Tutsi women, rape them and kill them" and "that they should forcefully rape them and then kill them, that he had to separate the good grain from the bad ones." The same Interahamwe after raping my daughter also beat me and stripped me naked; at one point I lost consciousness due to the beating. When I regained consciousness, I saw the body of my dead daughter, with her mouth open and her legs apart.'*[1]

These are the words of witness GDO, one of the many witnesses who provided evidence in the ICTR *Prosecutor* v. *Kajelijeli* trial. Because of inconsistencies found between the witness' written statement (in which she located the accused at a distance of 50 meters and recalled the time of the rape to be 4:00 am) and her testimony at trial (in which she insisted that she did not know how to estimate distance in meters and recalled the time as early in the morning), and the fact that the events took place in a forest, which, in the majority opinion of the Chamber, makes visibility and hearing more complicated, the Chamber found that there was reasonable doubt as to her identification of the accused under these circumstances. Consequently, the Chamber found that the Prosecutor did not prove beyond a reasonable doubt that the accused was present at the scene during the time of the rape or that he specifically instructed the rape and the killing of the witness' daughter, thus acquitting the accused of the charge of planning.[2]

Just like witness GDO's daughter, every day, thousands of males and females become victims of Sexual and Gender-Based Crimes (hereinafter referred to as SGBCs). According to an estimate by the United

[1] See Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence (1 December 2003), para. 680 referring to testimony of Witness GDO, T. 9 July 2001, p. 36.
[2] Ibid.

Nations and international experts, between 250,000 and 500,000 males[3] and females suffered rape and other forms of SGBCs during the three months of genocide in Rwanda in 1994.[4] Further, United Nations agencies estimate that more than 60,000 males and females were raped during the civil war in Sierra Leone (1991-2002), more than 40,000 in Liberia (1989-2003), up to 60,000 in the former Yugoslavia (1992-1995), and at least 200,000 in the Democratic Republic of the Congo (DRC) since 1998.[5] A survey conducted by Johnson et al. in the eastern regions of DRC found that out of 1005 households, 39.7% of women and 23.6% of men reported having experienced some form of SGBCs.[6]

The March 2021 Report of the United Nations Secretary-General estimated that 2,542 cases of Conflict-Related Sexual Violence (CRSV) occurred in 18 countries in 2020, with the highest number recorded in the DRC (1,053), Somalia (400), CAR (221), and over 100 in Ethiopia during the military operations in the Tigray region.[7] Previous reports have also highlighted similar trends, severity, and brutality of the incidents. For instance, in a meeting held on 15 April 2015, the Secretary-General's Special Representative on Sexual Violence in conflict informed the Security Council members about what she called "shocking" incidents in more than 19 conflict-affected countries that merited the concerted focus of the Security Council.[8] Women organizations represented at that meeting highlighted the targeting of "ethnic and religious minorities," for instance, the abduction of 276 Christian Chibok girls from Nigeria by Boko Haram on 14–15 April 2014,[9] including the new trend of extremist groups using CRSV as a "tactic of terror" in Iraq, Syria, Somalia, Nigeria, and Mali.[10] It is thus apparent that SGBCs in conflicts are a terrible and widespread scourge that deserves our full attention.

---

[3] See Usta Kaitesi, Genocidal Gender and Sexual Violence, The Legacy of the ICTR, Rwanda's ordinary courts and Gacaca Courts. Cambridge, UK: Intersentia, 2014, p. 179 (noting that 'Tutsi men and boys were sexually mutilated, raped by women, forced to have sexual intercourse with other victims including their close relatives like daughters, sisters and mothers or with other victims deemed to have HIV/AIDS.').

[4] See UN Special Rapporteur to the Commission on Human Rights, Report on the Situation of the Human Rights in Rwanda (E/CN.4/1996/68) 1996, para. 16; see also Bijleveld, Catrien, Aafke Morssinkhof, and Alette Smeulers. "Counting the Countless: Rape Victimization During the Rwandan Genocide." International Criminal Justice Review 19, no. 2 (2009), pp. 208-224 where it is estimated that there were just over 350,000 rape victims during the Rwandan genocide.

[5] See Report of the Secretary-General on Conflict-related Sexual Violence, United Nations, (S/2014/181), 2014, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/181&referer=http://www.un.org/; See also Women under Siege, Women's Media Center, available at http://www.womenundersiegeproject.org/conflicts/profile/bosnia; Shana Swiss and Joan Giller, Rape as a Crime of War: A medical perspective, Journal of American Medical Association 270, no. 5 (1993), pp. 612-615; Shada Islam, "Fact Sheet on Sexual Violence in Conflict." Security and Defence Agenda, 2014. <https://www.files.ethz.ch/isn/180309/Fact%20Sheet_SDA_Sexual%20Violence 2014_For%20Printer.pdf> accessed 24 June 2020.

[6] See Kirsten Johnson et al., Association of Sexual Violence and Human Rights Violations with Physical and Mental Health in Territories of the Eastern Democratic Republic of the Congo, Journal of American Medical Association 304, no 5 (2010), pp. 553–562.

[7] See UN Report of Secretary-General on Conflict-Related Sexual Violence, S/2021/312 30 March 2021; For the total figures and breakdown, see Factsheet: 12th Annual Report of the SG on Conflict-Related Sexual Violence (CRSV), 13 April, 2021, available at https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2021/04/factsheet-12th-annual-report-of-the-sg-on-conflict-related-sexual-violence-crsv/factsheet2020-1.pdf.

[8] See UN Report of Secretary-General on Conflict-Related Sexual Violence, S/2015/203, (2015); S/2016/361/Rev.1(2016); S/2017/249 (2017); S/2018/250 (2018); S/2019/280 (2019); S/2020/487 (2020).

[9] Hamsatu Allamin of the Non-Governmental Organization Working Group on Women, Peace and Security drew attention to the plight of women and girls in Nigeria's North-East, a region that had been at the centre of a two-year insurgency, 15 April 2015, available at http://www.un.org/press/en/2015/sc11862.doc.htm.

[10] See UN Action against Sexual Violence in Conflict, Analytical & Conceptual Framing of Conflict-Related Sexual Violence, May 2011.

Perpetrators of this violence might be male and female members of state and non-state armed forces/groups or civilian government administration.[11] Nonetheless, because women are usually underrepresented within militarized units and amongst political leadership, and thus are less often in a position to commit such crimes,[12] generally, far fewer women than men are involved in mass atrocities.[13] Of all the individuals convicted by international criminal courts and tribunals, only a tiny percentage (1%) is constituted by women.[14] For example, the first female perpetrator ever to be convicted by an international criminal court or tribunal for SGBCs was Biljana Plavsic, a Serbian politician, who pleaded guilty before the ICTY for planning SGBC as a crime against humanity in 2003.[15] Later, in 2011, Pauline Nyiramasuhuko, the Rwandan Minister for Family Welfare and the Advancement of Women was found guilty by the ICTR for her leading role in the genocide and commission of widespread rape in Butare (although not for rape as a form of genocide).[16] As of May 2021, the ICTY has convicted 43 individuals (42 men and 1 woman) for SGBC charges out of 94 indicted for SGBCs;[17] the ICTR has convicted 14 accused (13 men and 1 woman) out of 45 individuals indicted for SGBCs; and at the ICC[18], only 2 men have so far been convicted (the appeal of Dominic Ongwen is pending as of May 2021) out of 22 individuals indicted for SGBCs.[19]

International crimes are manifestations of collective violence in which many different individuals are involved. These individuals have different positions, roles, and motives and can be grouped into two main types of perpetrators: those who control the context in which international crimes are committed and those who merely operate within this context.[20] It is the context itself that compels individual subordinates to conform and obey, making them believe that they are doing the right thing, even when obeying illegal

[11] See Suk Chun and Inger Skjelsbæk, "Sexual Violence in Armed Conflicts." PRIO Policy Brief 1 (2010). < https://www.prio.org/utility/DownloadFile.ashx?id=235&type=publicationfile> accessed 17 May 2020.
[12] Ibid.
[13] See Alette Smeulers, Female Perpetrators: Ordinary or Extra-ordinary Women?, International Criminal Law Review 15, no. 2 (2015), pp. 207–253.
[14] Ibid.
[15] See Prosecutor v. Plavsic, Case No. IT-00-39&40-PT, Amended Consolidated Indictment (7 March 2002), paras. 19-21; Prosecutor v. Plavsic, Case No. IT-00-39&40/1-S, Judgment and Sentence (27 February 2003).
[16] See Prosecutor v. Nyiramasuhuko, Case No. ICTR-98-42-T, Judgment and Sentence (24 June 2011); Prosecutor v. Nyiramasuhuko, Case No. ICTR-98-42-A, Appeals Judgment (14 December 2015).
[17] Figures were double-checked manually in May 2021, by comparing Vigneswaran Kate, Annex B: Charges and Outcomes in ICTY cases Involving Sexual Violence, p. 429-483, in Prosecuting Conflict-Related Sexual Violence at the ICTY edited by Serge Brammertz and Michelle Jarvis (Oxford University Press, 2016) and the latest figures of the ICTY cases available at https://www.icty.org/en/cases. As Brammertz and Jarvis' book dates back to 2016, all the cases that, at the time, were still at trial or appeal level were double-checked and the outcome is now shown in the list.
[18] The International Criminal Court was established by the Rome Statute of the International Criminal Court, so called because it was adopted in Rome, Italy on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, with 120 States voting in favor, seven states voting against the treaty (including the United States, Israel, China, Iraq and Qatar) and 21 states abstaining. The Statute entered into force on 1st July 2002, following the deposit of ten ratifications on 11 April 2002, which brought the total number of ratifying States to 66, surpassing the statutory requirement of 60 ratifications. The Rome Statute is an international treaty, binding only on those States which formally express their consent to be bound by its provisions. These States then become "Parties" to the Statute. In accordance with its terms, the Statute entered into force on 1 July 2002, once 60 States had become Parties. The States Parties meet in the Assembly of States Parties which is the management oversight and legislative body of the Court.
[19] Figures were double-checked manually in May 2021 by consulting the list of cases available at https://www.icc-cpi.int/Pages/cases.aspx#Default=%7B%22k%22%3A%22%22%2C%22r%22%3A%5B%7B%22n%22%3A%22MngInitialOrderEN%22%2C%22t%22%3A%5B%22%5C%22%C7%82%C7%8257617272616e74206f66206172657374%5C%22%22%5D%2C%22o%22%3A%22and%22%2C%22k%22%3Afalse%2C%22m%22%3Anull%7D%5D%7D#2ae8b286-eb20-4b32-8076-17d2a9d9a00e=%7B%22k%22%3A%22%22%7D.
[20] See Alette Smeulers, A Criminological Approach to the ICC's Control Theory, Perpetrators of International Crimes, in The Oxford Handbook of International Criminal Law, edited by Kevin Jon Heller et al. Oxford: Oxford University Press, 2020, pp. 389-391.

orders.[21] With Smeulers, I agree that, when trying to attribute responsibility based on the role played by these actors, it is crucial to clearly distinguish between those creating the political, ideological, and social context and those operating within it.[22] This will help differentiate the level of participation and their implications in the context of mass and system criminality.

Furthermore, sometimes, international crimes are state-run. The chain of command then starts with a so-called criminal mastermind, who can be the head of state, strong political powerholder, a military leader, or any other high-ranking member within the government, a military unit, rebel organization, or terrorist group.[23] Depending on if the mastermind is military or police, the chain of command then follows through the respective military or police organization. It might sometimes run through the entire state apparatus (e.g., Nazi Germany).[24] In that case, those at the top of the chain of command decide on the overall policy, while top leaders within the state bureaucracy, the military, the police, and the specialized units organize and plan the policies' execution.[25] They are usually far removed from the crime scene, while those low-ranking foot soldiers near the crime scenes are the physical perpetrators who rape women and men. Indeed, we cannot deny the role and responsibility of these low-ranking foot soldiers, but it is clear that the masterminds are the 'main' wrongdoers because they are the ones who design the context that influenced the actions of those who operate within it. On this point, Steer agrees that leaders are the actors who have the most influence over creating social norms of violence within which individuals become perpetrators and, therefore, they should be the ones most responsible.[26] It follows that the criminal masterminds, the so-called *auctores intellectualis*, share the weightiest burden of guilt because they created a context in which the commission of international crimes has become the natural or unavoidable consequence of the ordinary course of events.[27] Rather than the low-ranking foot soldiers, they should be considered the persons most culpable, and the foot soldiers as their instruments or killing tools.[28] The effectiveness of convicting the foot soldiers in these scenarios as equally liable is limited, precisely because these individuals at the bottom of the pyramid have less influence over the culture of hatred and violence and less ability to act outside of it.[29] Still, these foot soldiers should be prosecuted either through domestic court or international court for their role in the crime since the masterminds' liability is derivative of the foot soldiers' action.

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[21] Ibid; for more discussion on subordinates obeying orders, see also Herbert Kelman, and Lee Hamilton, Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility. New Haven, CT: Yale University Press, 1989.
[22] See Smeulers, supra note 20, p. 389.
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] See Cassandra Steer, Translating Guilt - Identifying Leadership Liability for Mass Atrocity Crimes, International Criminal Justice Series 9 (2017), p. 32.
[27] See Smeulers, supra note 20, p. 391.
[28] Ibid, pp. 389-391; see also Harmen van der Wilt, Het Kwaad in Functie (Vossiuspers 2005).
[29] See Steer, supra note 26, p. 33. It thus appears that only the leaders should be prosecuted, leaving others involved in mass atrocity crimes unpunished which often mean impunity for the physical perpetrators.

This book focuses on prosecuting SGBCs and how to link them to high-level officials. At the ICTY, ICTR, and ICC, most SGBC cases have so far often included direct perpetrators or others close to the scenes of the crimes and not necessarily the above mentioned *auctores intellectualis*.[30] The study's primary focus is to analyze whether the current legal theories and practices in international criminal law (ICL) appropriately attribute criminal responsibility to those who, although far removed from the crime scene, were responsible for shaping the context that influenced the direct perpetrators to commit the crime. The international courts and tribunals have often struggled to obtain evidence linking the high-level officials to the SGBCs. Case law seems to show that identifying what the high-level officials did or did not know, or did or did not order, if they were or were not present, can be challenging for the prosecution to establish. As SGBCs continue to be used as effective weapons of war, it is essential to focus our attention on the best ways to address these crimes by bringing those most responsible to account. In particular, the study will examine how modes of liability can be used to reflect connections between SGBCs and the broader context and link the SGBCs to high-level officials.

A description will be presented in the following paragraphs of what this research aims to do, the main research question, the methodology, the structure, and the research's scope and limitations. First of all, the focus will be on SGBCs and how they can be defined. This introductory chapter will provide some examples of the many different forms and manifestations of SGBCs in today's world. A description of SGBCs will follow a non-exhaustive list of their consequences from a social and legal perspective. A brief picture will be presented of how SGBCs are criminalized in ICL with some facts and figures concerning their incidence and prevalence levels. It will also explain why it is crucial to prosecute high-level officials and low-ranking perpetrators for SGBCs. This will be followed by an initial introduction to the general concept of individual criminal responsibility in ICL before going more in-depth into its application to SGBCs.

1. Definitions and Concepts of the Different Forms of Sexual and Gender-Based Crimes

1.1 What are Sexual and Gender-Based Crimes?

Different societies have given different interpretations of what can be considered appropriate sexual behavior and what should be qualified as SGBCs.[31] For instance, the different interpretations and legal

[30] Anne-Marie de Brouwer remarks at NIOD/Kriterion, Amsterdam, Sexual Violence and International Justice: How to Move Forward? (10 March 2013), avalable at http:// www.niod.nl/sites/niod.nl/files/Presentation%20Anne-Marie%20de%20Brouwer.pdf. Also cited in Anne-Marie de Brouwer, The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes. Cornell International Law Journal 48 (2015), p. 662.

[31] See Patricia Rozee, Forbidden or Forgiven: Rape in cross-cultural perspective, Psychology of Women Quarterly 17 (1993), pp. 507–508. Despite universal human rights norms, not all countries and cultures respect them and certain local practices exist that violate these rules and norms. For instance, in some societies, sexual access to women is granted to guests, brothers, or other associates of the husband (and the women are beaten or

meaning of the term rape vary significantly across the world; it is narrowly defined as forced penetration of the vagina by a penis or, more broadly to include anal penetration and vaginal penetration by other objects, forcible compulsion or simply lack of consent to engage in sexual intercourse or sexual activities.[32] Context matters too: in some countries, rape within a marriage is not considered rape.[33] Some practitioners doing research use different definitions of sexual violence,[34] which may lead to different outcomes and different understandings of the problem.[35] Without a common meaning, it is impossible to monitor the prevalence of SGBCs and examine trends over time, including determining their magnitude.[36]

In ICL, international courts and tribunals describe and differentiate between two concepts: 1) Gender-based crimes–those committed against persons, whether males or females, because of their sex and/or socially constructed gender roles. They are rarely recognized as a form of sexual violence and may include non-sexual attacks on women, girls, men, and boys, because of their gender. 2) Sexual crimes–those requiring the perpetrator to have committed a sexual act against a person or to have caused another to engage in such an act, by force, or by threat of force or coercion. They are not limited to physical violence, and may not involve any physical contact–e.g., forced nudity. Thus, sexual crimes cover both physical and non-physical acts with a sexual element.[37]

When the above two terminologies are combined, they are collectively referred to as Sexual and Gender-Based Crimes. This study relies on their definitions given in the Rome Statute of the International Criminal Court[38] and the ICC Elements of Crimes because they are the most progressive and comprehensive definitions available so far in ICL. The Elements of Crimes (EoC) are documents relating to genocide,

killed if they refuse). And in some societies, female transgression of social norms (such as women seeing ceremonial artefacts strictly reserved for males) is punished by rape, sometimes group rape in a public place.

[32] Ibid.

[33] See Dubravka Simonovic and Yasmeen Hassan, Rape as A Grave & Systematic Human Rights Violation & Gender-Based Violence Against Women: Expert Group Meeting Report, 27 May 2020, pp. 7, 16, 20, 26. < https://www.ohchr.org/Documents/Issues/Women/SR/Call_on_Rape/EGM_EN-SR_Report.pdf> accessed 14 May 2021; Jennifer Bennice and Patricia Resick, Marital Rape: History, Research, and Practice, Trauma, Violence & Abuse 4, no. 3 (2003), p. 229; Diana Russell, Rape in marriage (expanded and rev. ed.), Indiana University Press, 1990, p. 17.

[34] See Elisabeth Wood, "Variation in Sexual Violence during War." *Politics and Society* 34, no. 3 (2006), p. 318. See also Dara Cohen, Amelia Green, and Elisabeth Wood. Wartime Sexual Violence Misconceptions, Implications, and Ways Forward. Special Report 323. Washington, DC: United States Institute of Peace, 2013, p. 11. < https://www.usip.org/sites/default/files/wartime%20sexual%20violence.pdf> accessed 3 January 2020.; Elizabeth Rowley et al.: A research agenda for sexual violence in humanitarian, conflict and post-conflict settings, 2012, p. 2.

[35] See Shana Swiss and Peggy Jennings, Documenting the Impact of Conflict on Women Living in Internally Displaced Persons Camps in Sri Lanka: Some Ethical Considerations. Health and Human Rights 21, no. 1 (2019); Elisabeth Wood, The Ethical Challenges of Field Research in Conflict Zones, Qualitative Sociology 29 (2006), pp. 373–386.

[36] See Kathleen Basile et al., Sexual Violence Surveillance: Uniform Definitions and Recommended Data Elements, Version 2.0. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention 2014. < https://www.cdc.gov/violenceprevention/pdf/sv_surveillance_definitionsl-2009-a.pdf> accessed 9 December 2020.

[37] Art. 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi), Rome Statute and their respective Elements of Crimes; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment (2 September 1998), para. 688; Prosecutor v. Kvocka et al., Case No. IT-98-30/1-T, Trial Judgment (2 November 2001), para. 180; Prosecutor v. Furundzija, Case No.: IT-95-17/1-T, Trial Judgment (10 December 1998), para. 186; Anne-Marie de Brouwer, Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR. Cambridge, UK: Intersentia, 2005, p. 149; ICC OTP Policy Paper on Sexual and Gender-Based Crimes, June 2014, p. 3; ICTR Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda, 30 January 2014.

[38] The Rome Statute of the International Criminal Court is the treaty that established the International Criminal Court. It was adopted at a diplomatic conference in Rome, Italy on 17 July 1998 and it entered into force on 1 July 2002.

crimes against humanity, and war crimes adopted by the Assembly of the States Parties to the Rome Statute to assist in interpreting and applying Articles 6, 7, and 8.[39] Article 7(1)(g) considers acts such as rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity. Article 7(1)(h)) lists gender-based persecution (7(1)(h)), Article 7(1)(f) lists torture when used to inflict severe pain and to suffer the victim, and 7(1)(c) describes the category of enslavement and footnote 11 of Element 1 states that the conduct includes, in particular, the trafficking of women and children.[40] Forced marriage as an inhumane act was added to the crime against humanity list in 2008, following the SCSL *AFRC* Appeals Chamber Judgment.[41] All of the crimes mentioned above may amount to crimes against humanity if committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Article 8(2)(b)(xxii) enlists rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence as constituting Grave Breaches of the Geneva Conventions (GCs)[42] and Serious Violation of the laws and customs of war in international armed conflict. Article 8(2)(e)(vi) also enumerates the same crimes as constituting a Serious Violations of Article 3 common to the four GCs and Serious Violation of the laws and customs of war in non-international armed conflict. Although the genocide definition in Article 6 (b) 'causing serious bodily or mental harm' does not make a specific reference to SGBCs, footnote 3 in the EoC clarifies that 'this conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.'[43] Article 6(d) also lists the crime of imposing measures intended to prevent births, which could amount to SGBCs if interpreted in the context of sexual mutilation, sterilization, forced birth control, separation of the sexes, and prohibition of marriages or when members of a group can be led through threats or trauma, not to procreate.[44] The crime of forcibly transferring children of the group under Article 6(e) may as well amount to SGBCs through, for instance, forced pregnancy and the manipulation of patriarchal norms, which determine group identity by the identity of the father and imposing the identity of the enemy on the children born of that group. Article 6(a) lists killing members of a group, and SGBCs can be the means of causing death if, for instance, the rape of the victims was accompanied by the intent to kill them.[45] Lastly, Article 6(c), 'deliberately inflicting life conditions calculated to bring about the physical destruction of the group', did not specifically refer to SGBCs. However, the ICTR *Akayesu* Trial Chamber

[39] The ICC Elements of the Crime assist the Court in the interpretation and application of Arts. 6, 7, and 8 of the Rome Statute and were adopted in the 2002 by the Assembly of State Parties and later amended by the Review Conference in 2010. The document is available at https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf.
[40] Element 1 of footnote 11 of Art. 7 (1) (c). For instance, when the perpetrator reduces a person to servile marriage to such an extent that the action degenerates into the exercise of any or all of the powers attaching to the right of ownership.
[41] See Prosecutor v. Brima, Kamara, & Kanu, Case No. SCSL-04-16-T, Trial Judgment (20 June 2007), para. 713.
[42] The Geneva Convention (I) Relative to the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention (II) Relative to the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention (III) Relative to the Treatment of Prisoners of War; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War. The 1949 Geneva Conventions supersedes the 1864, 1906, and 1929 Geneva Conventions.
[43] See De Brouwer, supra note 37, pp. 46-47.
[44] See Akayesu Trial Judgment, supra note 37, paras. 507-508.
[45] Ibid., para. 733.

recognized that rape and sexual violence, with its combination of physical and psychological harm, could be inflicted on the victims to destroy the spirit to bring about the group's physical destruction.[46] Thus, the Rome Statute and EoC consolidate significant advancements and reinforcements of the normative framework on the definition of SGBCs.

1.2 The Incidence and Prevalence of Sexual and Gender-Based Crimes

A 2013 analysis conducted by WHO used existing data from over 80 countries and found that worldwide, 1 in 3, or 35%, of women have experienced physical and or sexual intimate partner violence or non-partner sexual violence in their lifetime.[47] SGBCs in peacetime often take place in the context of pervasive discrimination, coercion, or violence against females. Many SGBCs' victims find it difficult to disclose what happened to them due to the shame and stigma.[48] This indicates that SGBCs are a general problem already in peacetime, which will be worsened in a period of armed conflict because more SGBCs are committed in discriminatory and violent ways in wartime.[49]

SGBCs take many forms and manifestations (see Section 1.1 above and Chapter 2). The crimes are mainly used as a weapon and for sexual gratification.[50] Some leaders also allow systematic rape to enhance group morale amongst their soldiers (e.g., comfort women, as discussed in Chapter 2). The reasons for committing SGBCs vary considerably from perpetrator to perpetrator and from conflict to conflict.[51] To give you an idea, during ethnic or political cleansing operations, combatants usually target females belonging to particular groups. In other wars, attacks are much less discriminatory, where for instance, combatants target all females or all males.[52] In her study, Park argues that perpetrators of SGBCs target their victims not only because of their group membership but, sometimes, and uniquely on the basis of gender.[53] In some conflicts, all or nearly all forms described above occur.[54] For instance, SGBCs may be an effective form of ethnic cleansing or genocidal violence, destroying society's social fabric when used against groups that understand

[46] Ibid., paras. 505, 732.
[47] See WHO Report, Department of Reproductive Health and Research, London School of Hygiene and Tropical Medicine, South African Medical Research Council, Global and regional estimates of violence against women - Prevalence and health effects of intimate partner violence and non-partner sexual violence, 2013, available at https://www.who.int/reproductivehealth/publications/violence/9789241564625/en/.
[48] See Michelle Jarvis, Overview: The Challenge of Accountability for Conflict-Related Sexual Violence Crimes, in Prosecuting Conflict-Related Sexual Violence at the ICTY, edited by Serge Brammertz and Michelle Jarvis. Oxford; Oxford University Press, 2016, pp. 12-14.
[49] See Megan Bastick, Karin Grimm, Rahel Kunz, Sexual Violence in Armed Conflict Global Overview and Implications for the Security Sector. Geneva Centre for Security Sector Governance, 2007, p. 23.
[50] See Cohen et al, supra note 34.
[51] For detailed discussion on variation, see Elisabeth Wood, Sexual Violence During War: Toward an Understanding of Variation, in Order, Conflict, and Violence, edited by Stathis N Kalyvas, Ian Shapiro, and Tarek Masoud. Cambridge: Cambridge University Press, 2008, pp. 321-351.
[52] See Dara Kay Cohen, Wartime Rape During Civil War: Cross-National Evidence (1980–2009), forthcoming, American Political Science Review. For a description of the data, see also Amelia Hoover Green, Dara Cohen, and Elisabeth Wood, Is Wartime Rape Declining on a Global Scale? We Don't Know—And it Doesn't Matter, Political Violence @ a Glance (blog), November 1, 2012.<www.politicalviolenceataglance.org/2012/11/01/is-wartime-rape-declining-on-a-global-scale-we-dont-know-and-it-doesnt-matter.> accessed 13 March 2016.
[53] See Jennifer Park, Sexual Violence as a Weapon of War in International Humanitarian Law. International Public Policy Review 3, no. 1 (2007), p. 13.
[54] Ibid.; see also Wood, supra note 51.

rape against a female as a violation of the family's honour, as well as hers, and as a humiliation of her male relatives.[55] Enloe argues that if military strategists understand that females provide the backbone of the enemy's culture and consider females as males' property and symbols of males' honour, communities depend on females' work, they will be lured to the idea of devising an overall military campaign that includes their male soldiers' sexual assault of females.[56] Males are also targeted purposely because of their gender and to exercise power, dominance, and emasculation.[57] For instance, a study on the prevalence of SGBCs perpetrated against male victims described how, in Liberia, 32.6% of the surveyed male combatants reported being subjected to some form of sexual violence,[58] while in a camp in the borough of Sarajevo, 80% of 5,000 male detainees reported being raped or sexually assaulted.[59] As Grey notes, 'recognizing these male experiences of sexual violence is important, especially when contrasted with the inattention to this issue in the past.'[60] This recognition is not only crucial for the victims; it is also essential for a global audience of policy-makers, healthcare providers, humanitarian actors, and accountability mechanisms because 'without envisioning the violated male body we can neither hope to prevent its violation nor seek redress for violence committed against it.'[61]

SGBCs in conflict usually form part of a pattern of abuse and violence, along with other crimes, such as killing, child recruitment, destruction of property, and looting.[62] Some categories of individuals may be more vulnerable to SGBCs than others, for example, internally displaced persons (IDPs), refugees, migrants, widows and female heads of households, detainees, those associated with armed forces or armed groups, and those belonging to a particular ethnic group. It affects witnesses, human rights defenders, service providers, journalists, justice officials, and others who seek to ensure that SGBCs' victims no longer suffered in silence.[63]

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[55] See Lisa Sharlach, Rape as Genocide: Bangladesh, the former Yugoslavia, and Rwanda, New Political Science 22, no. 1 (2000), pp. 89-102; see also Mia Bloom, War and the Politics of Rape, Ethnic versus non-ethnic conflicts, unpublished manuscript cited in Elizabeth Wood, Variation in sexual violence during War, Politics and Society 34 (2006), pp. 307-341.

[56] See Cynthia Enloe, Maneuvers: The International Politics of Militarizing Women's Lives. Berkeley: University of California Press, 2000, p. 134.

[57] See Sandesh Sivakumaran, Sexual Violence Against Men in Armed Conflict, European Journal of International Law 18, no. 2 (2007), pp. 253–76. Elsewhere, Sivakumaran argues that homophobia may be one reason that male-male rape has not received more attention from the policy community; see Sandesh Sivakumaran."Male/Male Rape and the 'Taint' of Homosexuality," Human Rights Quarterly 27, no. 4 (2005), pp. 1274–306.

[58] See Kirsten Johnson et al., Association of Combatant Status and Sexual Violence with Health and Mental Health Outcomes in Post conflict Liberia, Journal of American Medical Association 300 (2008), p. 676.

[59] See Zeljka Mudrovcic, Sexual and Gender-Based Violence in Post-Conflict Regions: the Bosnia and Herzegovina Case, in The Impact of Armed Conflict on Women and Girls: A UNFPA Strategy for Gender Mainstreaming in Areas of Conflict and Reconstruction (2001), p. 64.

[60] See Rosemary Grey, Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court: Practice, Progress and Potential. Cambridge: Cambridge University Press, 2019, p. 255.

[61] See Rosemary Grey and Laura Shepherd, "Stop Rape Now?" Masculinity, Responsibility, and Conflict-Related Sexual Violence, Men and Masculinities 16, no. 1 (2013), pp. 115, 122; Grey, supra note 60.

[62] See, in particular, UN SC Res. 1261 (1999), 1265 (1999), 1296 (2000), 1314 (2000) and 1325 (2000) and the Aide-Memoire, which identifies 13 core objectives for protecting civilians in conflict situations (S/PRST/2002/6): See also Report of the United Nations Secretary-General on Conflict-related sexual violence (S/2015/203) 13 March 2014.

[63] See Mudrovcic, supra note 59; see also Art. 1, Declaration on the Elimination of Violence Against Women, 20 December 1993, A/RES/48/104 (The Preamble also identifies groups of women who are especially vulnerable to violence, including women belonging to minority groups, refugee women, migrant women, women living in rural or remote communities, destitute women, women in detention, female children, women with disabilities, elderly women and women in situation of armed conflicts.): Amnesty International and CODESRIA, Monitoring and Investigating Sexual Violence, 2009.

To give an overview of the level of the incidents, the United Nations reported, in 2018, 1,049 SGBC incidents in the DRC. Most of the incidents (741) were attributed to armed groups, 308 of which were perpetrated by the Congolese law enforcement agencies, in particular, the Armed Forces of the Democratic Republic of the Congo (FARDC) and to the Congolese National Police (PNC). In most incidents, combatants targeted women and girls while going to school or gathering firewood or drinking water. A quarter of the cases attributed to the Congolese police were committed while victims were detained in temporary holding cells.[64]

As explained, during armed conflict, the level at which SGBC incidents occur varies considerably. In some conflicts, 'the pattern of SGBCs is symmetric, with all parties to war engaging in SGBCs to roughly the same extent; in other conflicts, it is very asymmetric.'[65] It means that SGBCs committed by combatants are widespread in some conflicts but not in others, or even armed groups taking part in the same war do not necessarily carry out SGBCs of the same scale or in the same style. It also means that an armed group, which restrained its members from committing SGBCs during a particular period of war, might still commit these crimes on a massive scale during another given period.[66] For instance, a study by Cohen analyzed reports of SGBCs within all the 48 conflicts that took place in Africa between 1989 and 2009 – including both internal and international armed conflicts – and all the 236 active, organized armed groups – including armed state organizations, rebel groups, and pro-government militias. Cohen concluded that 64% of the armed groups analyzed were not reported to have engaged in any form of SGBCs.[67] In short, this indicates that organized armed forces are much more likely to commit SGBCs on a larger scale than armed rebel groups. However, the fact that SGBCs are not reported is not proof that the crimes did not happen. Cohen also analyzed 86 major civil wars in the world between 1980 and 2009 and concluded that 38% of rape had occurred in asymmetric conflicts. In sum, it was most common for both states and non-state actors to perpetrate SGBCs, whereas SGBCs by only armed state actors were less frequent, and finally, SGBCs by only rebel actors were relatively rare.[68]

The analysis conducted above shows that SGBCs have a significant prevalence in times of conflict and that the rates of SGBCs are probably much higher than current estimates. The sensitive nature of the crimes,

[64] See Report of the UN Secretary-General on Conflict-Related Sexual Violence (S/2019/280), 29 March 2019, para. 46, available at annual_report_of_the_sg_on_crsv_2018.pdf (un.org).
[65] See Elisabeth Wood, Variation in Sexual Violence during War, Politics & Society 34, no. 3 (2006), pp. 307–42.
[66] Ibid.
[67] See Dara Kay Cohen and Ragnhild Nordås, Sexual Violence in African Armed Conflicts: Introducing the SVAC-Africa Dataset, 1989–2009. Journal of Peace Research 51, no.3 (2014), pp. 418-428, available at http://jpr.sagepub.com/content/51/3/418.abstract. However, the fact that it is not reported is not proof that it did not happen.
[68] See Cohen, supra note 52; Cohen et al., supra note 34.

stigma, shame, trauma, insecurity, fear of reprisals, and limited medical services contribute to the underreporting, which will be discussed immediately below.

1.3. Impact of Sexual and Gender-Based Crimes on Victims and Societies

SGBCs have a long-term impact on victims and societies.[69] Several years of war can give rise to dysfunctional societies, weakened institutions, inadequate judicial systems, and a destroyed social fabric. Consequently, victims' needs are not addressed adequately or promptly, making them suffer physical and mental problems, even after the conflict.

Sometimes SGBCs' victims are killed while, in other cases, they are socially ostracized or stigmatized in the society they live in, the effects of which are very long-term and still often underestimated.[70] Furthermore, rape often leads to infection with sexually transmitted diseases (STDs), unwanted pregnancies, and damages to reproductive organs.[71] These health consequences also have a socio-economic impact on society. Most post-conflict societies lack the support services needed by the victims, such as medical care, psychological support, economic assistance, and legal redress (including holding perpetrators accountable),[72] which means that the impact of SGBCs persists even far beyond war.[73] Survivors battle with "secondary diseases," which may even lead to their death many years after the conflict and the children (born of rape and also other children of the women) may have fewer possibilities in life, especially when their mothers die as a result of the rape.[74] Sometimes, women are also rejected by their own families and societies for losing their honour, which affects their means of livelihood. For instance, in the DRC, women are sometimes avoided by their customers who do not want to buy their fruits and vegetables at the market after being raped.[75] Even worse, in some countries, women are killed by their families or communities for carrying children born out of rape.[76]

Furthermore, in the U.N. Slavery Special Rapporteur Report, McDougall underscores that '[while SGBCs affect both women and men] women are more at risk of being victims of sexually violent crimes and face

[69] For more discussion, see Cohen et al., supra note 34.
[70] See LaShawn Jefferson, In War as in Peace: Sexual Violence and Women's Status, Human Rights Watch World Report 1 (2004).<https://www.hrw.org/legacy/wr2k4/download/15.pdf> accessed 10 August 2020.
[71] See Cohen et al., supra note 34, p. 10; Jefferson, supra note 70.
[72] See Women & War Women & Armed Conflicts and the issue of Sexual Violence (Report Colloquium ICRC – EUISS), 30 September 2014.
[73] Report of the Secretary-General on Conflict-Related Sexual Violence, 13 March 2014. Noting that 'link to conflict may be evident in the profile of the perpetrator, the profile of the victim, the climate of impunity or State collapse, any cross-border dimensions or violations of the terms of a ceasefire agreement.'
[74] See Anne-Marie de Brouwer et al., And I Live On, The Resilience of Rwandan Genocide Survivors of Sexual Violence. Tilburg, The Netherlands: Wolf Legal, 2019.
[75] For more discussion on the Sexual Violence in the Democratic Republic of the Congo, see the work of Dr. Denis Mukwege on ending sexual violence in DRC and worldwide available at https://www.mukwegefoundation.org/story/dr-denis-mukwege/.
[76] For example, women in Iraq were killed for having born children out of rape. See, for detailed discussion, David Sverdlov, Rape in War: Prosecuting the Islamic State of Iraq and the Levant and Boko Haram for Sexual Violence Against Women. Cornell International Law Journal 50 (2017), p. 333.

gender-specific obstacles in seeking redress.'[77] Some of the specific effects on women might include: not being perceived anymore by the rest of society as real women or potential wives; they might not be able to have children anymore or be allowed to work (particularly in a patriarchal society); they might be divorced and not be allowed to marry/remarry, hence can no longer provide for themselves.[78] Male victims are also subjected to rape, forced sterilization, forced nudity, forced masturbation, sexual slavery, forced marriage, and genital mutilation in very brutal manners.[79] Carlson writes that blunt genital trauma against men is common during wartime.[80] The impact of SGBCs on male victims has been documented by several scholars, from physical impact to severe mental and emotional harm.[81] For example, Stemple observes that male victims suffer from low self-esteem and depression, sexual dysfunction, destabilization of gender and sexual identity, including the psychosocial impact of being physically unable to work, disrupted relationships with spouses and children, as well as stigmatization and resultant marginalization from the community and public life.[82]

Due to the fear of rejection and stigmatization, women and men prefer to suffer in silence, without having recourse to justice, and sometimes (especially the women) little means to survive.[83] Understanding the impact of the SGBCs on victims and societies is essential for justice and accountability, but there should also be programs and services to address victims' psychological and physical injuries and assist their reintegration into the broader community.[84]

2. The Criminalization of Sexual and Gender-Based Crimes

SGBCs are prohibited under different international legal frameworks. These include international human rights law (which obliges States to ensure full protection of all people to be able to live their lives and effectively enjoy their human rights, including the freedom to bodily integrity), international humanitarian law (hereinafter referred to as IHL – when connected to an armed conflict), and ICL (to hold perpetrators accountable).

[77] UNCHR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery and Slavery like practices during Armed Conflict: Final report submitted by Ms. Gay J. McDougall, Special Rapporteur, 22 June 1998, E/CN.4/ Sub.2/1998/13 ('UNCHR Final Report McDougall'), para. 24.
[78] See Priya Gopalan, Daniela Kravetz, and Aditya Menon, Proving Crimes of Sexual Violence, in Prosecuting Conflict-Related Sexual Violence at the ICTY edited by Serge Baron Brammertz and Michelle Jarvis. Oxford: Oxford University Press, 2016, p. 113.
[79] See Sivakumaran, supra note 57, p. 254.
[80] See Eric Carlson, The Hidden Prevalence of Male Sexual Assault During War: Observations on Blunt Trauma to the Male Genitals, British Journal of Criminology 46, no. 1 (2005), pp. 16–25.
[81] See e.g., Hilmi M. Zawati, Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime against Humanity, Journal on Rehabilitation of Torture Victims and Prevention of Torture 17, no. 1 (2007), pp. 27, 34; Charli Carpenter, Recognizing Gender Based Violence Against Civilian Men and Boys in Conflict Situations, Security Dialogue 37, no.1 (2006) pp. 83, 83– 86, 90– 94; Sivakumaran, supra note 57; Carlson, supra note 80, pp. 16–18.
[82] See Lara Stemple, Male Rape and Human Rights. Hastings Law Journal 60, no. 3 (2008-2009), pp. 605-646.
[83] See Jefferson, supra note 70.
[84] Ibid.

A well-grounded principle of IHL, embodied in the GCs (Article 51 GCI, Article 52 GCII, Article 131 GCIII, and Article 148 GCIV), as well as in international customary law, binds States to ensure legal protection in armed conflict and to prosecute perpetrators of Grave Breaches of the GCs, including acts of SGBC, at all times and in all places.[85] The GCs (Articles 49 GCI, Article 50 GCII, Article129 GCIII, and Article 146 GCIV) further contain the *aut dedere aut judicare* principle, whereby 'each High Contracting Party is obligated to search for persons alleged to have committed, or to have ordered to be committed, Grave Breaches, and to bring such persons, regardless of their nationality, before its courts. However, it may also, if it prefers, and per its domestic legislation, hand such persons over for trial to another High Contracting Party concerned, provided that the latter has established a prima facie case.'[86] On this matter, the United Nations Security Council affirmed:

> *'the responsibilities of States to end impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes, and other egregious crimes perpetrated against civilians and, in this regard, noting with concern that only limited numbers of perpetrators of sexual violence have been brought to justice...'*[87]

These principles are reinforced by the Rome Statute of the ICC, in which Article 1 states that the Court is complementary to national jurisdictions. According to Article 17.1(a)(b), the Court therefore supports (or substitutes) the national justice system only when the State concerned proves to be unwilling or unable to try the accused,[88] for instance, when proceedings are unduly delayed or intended to shield individuals from their criminal responsibility.

The abovementioned developments in recognizing and addressing SGBCs are noteworthy, but in addition to this, the explicit criminalization and prosecution of SGBCs by the ICTY, ICTR, and ICC represent landmark developments in ICL.[89] They did so by providing their definitions of SGBCs and qualifying them as one of the international crimes, and prosecuting perpetrators of SGBCs. Some of the prosecutions and trials that significantly contributed to the development of the definitions and criminalization of SGBCs at

[85] See extract from the ICRC publication: International Humanitarian Law: answer to your question. 1 January 2004. In particular, Art. 51 GCI, Art. 52 GCII, Art. 131 GCIII and Art. 148 GCIV all affirm that: 'No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.'
[86] Final Report of the International Law Commission, the obligation to extradite or prosecute (aut dedere aut judicare), 2014, p. 5, available at https://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf.
[87] UN SC Res. 1960, 16 December 2010.
[88] Complementarity is one of the foundational principles of the Rome Statute system. What was envisioned by the drafters of the Rome Statute was not simply a self-standing Court, but rather a comprehensive system of international justice, where the duty on States Parties to investigate and prosecute international crimes is clearly reinforced. Consequently, the International Criminal Court (ICC) is a court of "last resort" and will step in where national jurisdictions have failed to address international crimes.
[89] For more discussion, see Anne-Marie de Brouwer et al., Interdisciplinary Approaches to Recognizing, Investigating and Prosecuting Sexual Violence as an International Crime. In Sexual Violence as an International Crime: Interdisciplinary Approaches, edited by Anne-Marie de Brouwer et al. Cambridge, UK: Intersentia, 2013, pp. 3-13.

the international level are the *Akayesu* trial[90] at the ICTR, the *Furundzija* trial[91] at the ICTY, the *Kunarac et al.*[92] at the ICTY, the *AFRC* trial[93] at the SCSL, the *Kaing Guek Eav* (alias Duch) trial[94] at the ECCC, the *Bemba* trial[95] at the ICC, the *Yamashita* case,[96] the *Iwane Matsui* case,[97] *Shunroku Hata* trial,[98] and Foreign Minister *Hirota* trial[99] brought before the IMTFE. In doing so, the international criminal courts and tribunals collectively defined SGBCs to encompass rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization, forced nudity, forced marriage, sexual mutilation, forced abortion, and any other form of sexual violence of comparable gravity, which may include indecent assaults, trafficking, inappropriate medical examinations, and strip searches.[100] According to the contextual elements attached to their commission, the acts mentioned above may form part of crimes against humanity, war crimes, or genocide (see Section 1.1 above).[101]

However, prosecuting SGBCs before the international tribunals and courts has proven difficult, especially when establishing the link between the crime or the physical perpetrator and the high-level accused who was far removed from the crime scene. For instance, at the ICTY, in the *Delalic et al.* case, both Delalic and Delic were acquitted of all sex crimes charges because the Prosecutor failed to prove that they had superior responsibility over the Celebici prison camp, its commander, deputy commander, or guards.[102] In the ICTY *Dordevic* case, the accused was acquitted because the Prosecutor's evidence did not establish a nexus between the accused's instigation and the SGBCs.[103] In the ICTY *Sainovic et al.* case, the accused Ojdanic was acquitted because the Prosecutor failed to prove that he was aware that VJ and MUP forces were going into the specific crime sites to commit sexual assaults.[104] The Appeals Chamber acquitted the accused Kvocka because the evidence linking him to the crime[105] could not be relied upon to conclude that these

[90] See Akayesu Trial Judgment, supra note 37.
[91] See Furundzija Trial Judgment, supra note 37, para. 176.
[92] See Prosecutor v. Kunarac et al., Trial Judgment, Case No. IT-96-23-T& IT-96-23/1-T (22 February 2001).
[93] See Prosecutor v. Brima et al., Case No. SCSL-2004-16-A, Appeal Judgment (22 February 2008), paras. 200-201.
[94] See case 001 Trial Judgment, Case File/Dossier No. 001/18-07-2007/ECCC/TC (26 July 2010), para. 361-365.
[95] See Prosecutor v. Bemba, Trial Judgment, Case No. ICC-01/05-01/08 (21 March 2016), paras. 98-112.
[96] The Yamashita Case or the Decision of the United States Military Commission at Manila (7 December 1945) is reproduced in Leon Friedman, The Law of War: A Documentary History. Vol. 2. Westport, CT: Greenwood, 1972; the order of general Douglas MacArthur Confirming Death Sentence of General Tomoyuki Yamashita, 6 February 1946 (in this trial, the accused was held responsible for command responsibility for rape among other crimes).
[97] The Tokyo Judgment: The International Military Tribunal for the Far East (B.V.A. Roling & C.F. Ruter eds.), 1977, pp. 446-54 (in this trial, the accused was held responsible for command responsibility for rape among other crimes).
[98] Ibid.
[99] Ibid.
[100] For definition and concept, see Section 1.1 above; see also De Brouwer et al., supra note 89; UN Action against Sexual Violence in Conflict. Analytical & conceptual framing of conflict-related sexual violence. http://www.un.org/womenwatch/feature/wps/StopRapeNow_Brochure.pdf.
[101] Ibid.
[102] See Prosecutor v. Delalic et al., Case No. IT-96-21-T, Judgment (16 November 1998), paras. 605-720, 721, 776-810, 1285.
[103] See Prosecutor v. Dordevic, Case No. IT-05-87/1-T, Trial Judgment (23 February 2011), para. 2168 (see witness K14, witness K20).
[104] See Prosecutor v. Sainovic et al., Case No. IT-05-87-T, Trial Judgment Volume 3 of 4 (26 February 2009), paras. 629, 1209.
[105] See Prosecutor v. Kvocka et al. Trial Judgment, supra note 37, para. 413 footnote 686 – see e.g., the evidence of sexual violence, T. 5385-5387, noting that the crimes occurred during the time that Kvocka worked in the camp. It is not necessary to prove that each crime was committed in Kvocka's presence or that he had specific knowledge of each crime. For example, if there were people raped or sexually assaulted during the period when Kvocka worked at the camp, that is sufficient to incur responsibility in light of his position and continued presence.

crimes were committed during the time he was employed in the camp.[106] Also, the accused, Milan Milutinovic, was acquitted because the Prosecutor failed to prove that he made a significant contribution to the JCE or he had actual control over the actions of the soldiers who committed the SGBCs.[107]

Similarly, at the ICTR, Kajelijeli was acquitted of rape because the Prosecutor failed to prove his presence on the crime scene.[108] It was the same for the accused Gatete, whom the Trial Chamber acquitted because the Prosecutor failed to prove that he ordered, participated, or played any role in the rape of women and young girls in Kiziguro parish.[109] The Appeals Chamber in *Musema* acquitted the accused because the eyewitnesses' testimonies were too conflicting and could not be relied on to convict him.[110] In the *Muvunyi* case, the accused was acquitted of rape because the Prosecutor failed to prove that soldiers from the Ngoma Camp committed rape under his command.[111] In *Ngirabatware*, the Prosecutor did not provide sufficient evidence to prove that the accused made an essential contribution to the common purpose of the JCE.[112]

At the ICC, in *Bemba*, the Prosecutor's evidence did not prove that the accused possessed investigative powers, and the Appeals Chamber deemed that his physical remoteness from CAR also impeded his ability to punish the troops for the SGBCs committed.[113] In the ICC *Gbagbo* case, the accused was acquitted because the Prosecutor did not prove that the "pro-Gbagbo forces" constituted an organized and hierarchical apparatus of power[114] or that Gbagbo was involved at the operational level, i.e. whether he could issue direct orders to the commanders and ensured the orders were complied with or whether he could discipline them if the orders were disobeyed.[115] The Trial Chamber also acquitted Ngudjolo Chui because the Prosecutor's evidence did not establish that he was the leader of the FNI/Lendu combatants who committed the SGBCs during the 24 February 2003 attack on Bogoro.[116] Finally, in the *Katanga* case, the Prosecutor failed to prove that in that collectivité, the accused had the material ability to issue and ensure execution of orders or that he had the power to mete out disciplinary action against commanders.[117] These commanders and leaders could not be found guilty for two main reasons: either they were not guilty and had little to do with the violence or were involved, but it was too hard to find the evidence. The latter point is often the case and can be attributed to many factors, such as the modes of liability chosen and the standard of proof they required,

[106] See Prosecutor v. Kvocka et al., Case No. IT-98-30/1-A, Appeal Judgment (28 February 2005), para. 333 (Witness J).
[107] See Sainovic et al. Trial Judgment, supra note 104, para. 284.
[108] See Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence (1 December 2003), paras. 680, 682, 923.
[109] See Prosecutor v. Gatete, Case No. ICTR-2000-61-T, Judgment and Sentence (31 March 2011), para. 346.
[110] See Prosecutor v. Musema, Case No. ICTR-96-13-A, Appeals Judgment (16 November 2001), paras. 193-94.
[111] Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-T, Judgment and Sentencing (12 September 2006), para. 525.
[112] See Prosecutor v. Ngirabatware Case No. MICT-12-29-A, Appeal Judgment (18 December 2014), para. 251.
[113]See Prosecutor v. Bemba, Case No. ICC-01/05-01/08 A, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute (8 June 2018), paras. 167-169, 170-172.
[114] See Prosecutor v. Gbagbo and Blé Goudé, Case No. ICC-02/11-01/15-1263-AnxB-Red, Reasons of Judge Geoffrey Henderson (16 July 2019), para. 864.
[115] Ibid., para. 454.
[116] See Prosecutor v. Ngudjolo Chui, Case No.: ICC-01/04-02/12, Judgment pursuant to Art. 74 of the Statute (18 December 2012), para. 503.
[117] See Prosecutor v. Katanga, Case No.: ICC-01/04-01/07, Judgment pursuant to Art. 74 of the Statute (7March 2014), para. 1365.

or the difficulty of establishing the leaders' role. It is challenging to prove leaders' role because they are often away from the crime scene and do not leave any traces to connect them to the crime committed by the physical perpetrators. Furthermore, proving that crimes have been committed according to all the standards of proof required in international criminal law (ICL) generally is hard. However, proving SGBCs is more complicated because the prosecutor must satisfy three different evidentiary criteria: 1) SGBCs themselves must be proven, 2) the linkage to the accused must be proven (e.g., was he present, did he order the crime, did he participate in the planning, knowledge, and intent, reporting and disciplinary systems, control over subordinates, or ability to punish), 3) the contextual element must be proven (e.g., whether the incident happened during mass displacement, population expulsion, ethnic cleansing). Proving these factors can be challenging because of the misconceptions surrounding SGBCs by court officials, including judges, prosecutors, and defense attorneys: SGBCs are matters of honor rather than violent crimes; SGBCs are not as severe as other crimes; SGBCs are necessarily "personally motivated" and or "opportunistic" crimes; SGBCs can only be prosecuted if they are systematic or widespread or committed pursuant to orders.[118] Removing the misconceptions is an essential step to improving accountability for these crimes. The cases mentioned above will, amongst others, be discussed in detail later in Chapters 5 and 6.

3. The Need to Investigate and Prosecute High-level Officials for Sexual and Gender-Based Crimes

As explained above in Section 1, this study aims at analyzing how, during war, the role of high-level officials in the commission of SGBCs can and should be investigated and prosecuted. The ICC's Preamble states that it is essential to successfully prosecute international crimes so that 'the most serious crimes of concern to the international community as a whole must not go unpunished.'[119] Moreover, it is vital to ensure that superiors are successfully prosecuted and held responsible for rapes and other SGBCs committed by their subordinates to avoid sending the wrong notion that they bear responsibility only for their actions and not for the ones undertaken by their subordinates.

There is a deterrent effect to ICL, which requires the prosecution[120] of high-level officials who committed, masterminded, or failed to prevent or punish persons who committed SGBCs as the best way to limit or halt the commission of SGBCs.[121] As explained, perpetrators can be convicted for SGBCs as a war crime, a

[118] See Michelle Jarvis and Kate Vigneswaran, 'Challenges to Successful Outcomes in Sexual Violence Cases.' In Prosecuting Conflict-Related Sexual Violence at the ICTY edited by Serge Baron Brammertz and Michelle Jarvis. Oxford: Oxford University Press, 2016, pp. 34-41.
[119] Preamble of the Rome Statute, (stating that in order to ensure proper prosecution of serious international crimes, measures must be taken at the national level and there must be enhanced international cooperation).
[120] Art. 25(2), Rome Statute.
[121] The need to prosecute perpetrators is of absolute importance, but the process also requires melding a more comprehensive strategy. One way of achieving this is to combine prosecution and support services for victims and campaigns against sexual violence in an all-inclusive manner. This would ultimately decrease the number of individuals who perpetrate sexual violence and the number of individuals who are victims of it. See Kai Ambos, Treatise on International Criminal Law, Vol. 1: Foundations and General Part. Oxford: Oxford University Press, 2013, pp. 83-101; Robert

crime against humanity, or genocide, provided that the connection between the individual offense committed and the contextual (also known as chapeau) elements are met. In these contexts, the prosecution of SGBCs is essential and necessary to enforce ICL and deliver justice to the victims.

After World War II (hereinafter WWII), the Allies established the International Military Tribunal (hereinafter IMT) at Nuremberg[122] and the International Military Tribunal for the Far East (hereinafter IMTFE) in Tokyo,[123] in order to prosecute criminals of the Major Axis. Both Charters exercised jurisdiction over conventional war crimes, in particular 'violations of the laws and customs of war as well as crimes against humanity and crimes against the peace.'[124] Evidence of rapes was presented before each military tribunal (see Section 2.2 of Chapter 2 for more discussion on what both Tribunals did in terms of SGBCs prosecution),[125] but the judges did not focus on these incidents as SGBCs *per se* and subsumed them under other categories of crimes.[126] For example, the prosecutors of the IMTFE presented evidence on the rape of prisoners and female nurses[127] and the judges issued cumulative convictions, subsuming the charges of sexual violence under the broader category of war crimes of "murder, rape, and other cruelties."[128] In other instances, no charges were brought at all. For example, the Tokyo prosecutors neither indicted nor presented any evidence on the systemic military sexual slavery conducted by the Japanese Army against tens of thousands of Koreans, Indonesian, Chinese, Burmese women (euphemistically called "comfort women") from Japanese conquered and occupied territories in Asia.[129]

Early in the 1990s, the civil war in the former Yugoslavia[130] and the genocide in Rwanda[131] resulted in unimaginable atrocities, among which widespread and systematic rapes and other forms of SGBCs targeting

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Cryer, Frontmatter. In Prosecuting International Crimes: Selectivity and the International Criminal Law Regime, Cambridge Studies in International and Comparative Law. Cambridge: Cambridge University Press, 2005, pp. 1-6; Art. 25(2), Rome Statute.

[122] See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal (IMT Charter) 8 August 1945.

[123] Charter of the International Military Tribunal for the Far East (IMTFE Charter) 19 January 1946.

[124] Arts. 26, 82 IMT Charter; Art. 17, IMTFE Charter.

[125] Trial of the Major War criminals Before the International Military Tribunal, 14 November 1945 - 1 October 1946, 542 Vols., 1947, at vol. 1, 43, 51-52. One specific example of sexual assault included occurred in the Stalingrad region where the mutilated bodies of women were found with their breasts sliced off. See, Tokyo trial documents reprinted in The Tokyo War Crimes Trial: The Complete Transcript of the Proceedings of the International Military tribunal for the Far East, 22 Vols., in John R. Pritchard and Sonia Zaide (eds.) 1981, IMTFE Docs, vol. 20, pp. 49, 605.

[126] For example, in the Nuremberg judgment the forced deportation of 500,000 females should have at least been examined as a gender-based crime of massive female enslavement, irrespective of any overt sexual component.

[127] See Pritchard & Zaide, supra note 125, p. 13; see also Patricia Viseur Sellers, The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation. Women's Human Rights and Gender Equality. New York: United Nations (2007).

[128] See Pritchard & Zaide, supra note 125, p. 1029.

[129] Civil society trial conducted to "prosecute" the perpetrators of military sexual slavery that rendered a substantive judgment evaluating criminal conduct and civil liability, "Comfort Women Judgment," 4 December 2001, Women's Caucus for Gender Justice, available at http://www.icc.org/archive/tokyo/summary.htm On 28 December 2015, noting Japan has apologized to South Korea and will pay about $8.3 million as compensation for its use of Korean "comfort women" who were forced to work in Japanese brothels during World War II, available at http://www.theatlantic.com/international/archive/2015/12/japan-korea-comfort-women/422016/. However, it should be noted that the victims did not accept the compensation offered by Japan and Supreme Court dismissed the claims.

[130] See De Brouwer et al., supra note 89, estimated death toll of 150,000 to 200,000 during the Yugoslavia conflict.

[131] The UN estimate the number killed as 800,000. The Rwandan Government estimate is 1,071,000. Rwanda: No consensus on genocide death toll, Agence France-Presse, April 6, 2004. See also 'Rwanda: How the genocide happened', *BBC News*, 17 May 2011, http://www.bbc.co.uk/news/world-africa-13431486.

both males and females.[132] Women's associations and civil society groups took the matter into their own hands, demanding international action to end impunity and ensuring accountability. Until that time and before 1990, SGBCs in wartime had been largely ignored, and rape and other SGBCs as international crimes were still not fully established under international law.[133] As a result of the strong lobby by women's associations and human rights nongovernmental organizations across the world, declarations, resolutions, reports, commissions, preparatory meetings, and other precursors expressly mandated international criminal courts and tribunals, created in the 1990s and early years of the twenty-first century, to include SGBCs.[134] Thus, recognizing rape and other forms of SGBCs during war were underpinned as international crimes by their listing in the statutes of international courts and tribunals and their modern judicial interpretation.[135] Since then, the governing statutes of the ICTY, ICTR, the Special Panels for Serious Crimes in Dili East Timor,[136] the SCSL, the ICC, and the ECCC list different forms of SGBCs.

As explained above, contradictions in the definitions of SGBCs and the lack of standard provisions also compound the problem of linking SGBCs to high-level officials and successfully prosecuting them. MacKinnon opines that part of the problem lies in the fact that, although the nature of conflicts has changed and groups do not always display a chain of command or formal hierarchical order that characterized traditional armed conflicts, 'the liability rules for these crimes have observably remained subliminally stuck in their original wartime setting.'[137] Cole also argues that another main challenge to evidence gathering is that 'forensic evidence is rarely available and the perpetrator(s) may be unknown.'[138] She further argues that there is over-reliance on the use of the victims' oral testimony to prove most rape cases, and it is often difficult for the prosecutor to connect this with expert or insider witnesses to pass the threshold tests and demonstrate the linkage to the accused.[139] Often, the accused – not necessarily the physical perpetrator – is someone far removed from the battlefield who masterminded this type of violence, for example, by ordering, instigating, planning, or aiding and abetting the physical perpetrators to commit the crime.[140] As explained, it can be more challenging to find appropriate linkage evidence when SGBCs occurred in such contexts.

[132] See Final Report of the Commission of Experts on former Yugoslavia Established Pursuant to Security Council Resolution 780 (1992) and also Report on the situation of human rights in Rwanda submitted by René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Resolution S-3/1, 25 May 1994.
[133] See Rhonda Copelon, Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law. McGill Law Journal 46 (2000). Note that this point is illustrated by examples of the "comfort women" in Japan during the 1930s and 1940s and the initial failure to prosecute SGBCs in the *ad hoc* tribunals for the former Yugoslavia and Rwanda.
[134] For instance, in contemplation of the establishment of the ICTY, Security Council Resolution 820 of 17 April 1993 condemned: 'all violations of international humanitarian law, including in particular, the practice of "ethnic cleansing" and the massive, organized and systematic detention and [SGBCs], and reaffirms that those who committed or who have committed or order or ordered the commission of such acts will be held individually responsible.'
[135] See Viseur Sellers, supra note 127.
[136] Establishment of Panels with the Exclusive Jurisdiction Over Serious Criminal Offences, UNTAET/Reg/2000/15, 6 June 2000.
[137] See Catherine MacKinnon, The ICTR's Legacy on Sexual Violence, New England Journal of International & Comparative Law 14 (2008), p. 217.
[138] See Alison Cole, Making the Perpetrators of Mass Sexual Violence Pay: International Justice for Gender-Related Crimes. Openspace, Johannesburg: OSISA, 2011.
[139] Ibid.
[140] Ibid.

The prosecutor is required to prove the SGBC act itself (through the crime-based evidence), the linkage evidence (did he order it, did he participate in planning the crime, did he encourage it or assisted the physical perpetrators), as well as the context of a campaign of other violent crimes (e.g., during forced displacement, expulsion).[141] Finding the necessary links for such imputation will be the subject of discussion in Chapters 5 and 6.

4. Overview of the Basic Concepts of Individual Criminal Responsibility in International Criminal Law

Individual criminal responsibility is a universally recognized concept adopted and developed within the framework of IHL, which postulates that an individual can and will be held personally accountable if he commits an international crime.[142] The IMT affirmed that: 'Enough has been said to show that individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[143] The concept of international criminal responsibility was then reinforced by various war crimes trials that have taken place since WWII,[144]including the ICTY under Articles 7(1)(3), the ICTR under Articles 6(1)(3), ICC under Articles 25 and 28, ECCC under Articles 4-8, and SCSL under Articles 2-5. For example, in the ICTY *Tadic* case, the Chamber affirmed that 'all of these factors confirm that customary international law imposes criminal liability on individuals who commit or perpetrate international crimes.'[145]

Commission or perpetration is the physical carrying out of the prohibited conduct, accompanied by the requisite psychological element (i.e. *mens rea*).[146] This definition encompasses two fundamental principles: the *actus reus,* i.e. an act or omission contrary to a rule imposing specific behavior; and the *mens rea,* i.e., a psychological element required by the legal order for the conduct to be blameworthy and consequently punishable.[147] As enshrined in Article 30 of the Rome Statute, a person shall be held liable for punishment for a crime only if the material elements are committed with the intent and knowledge; a person has intent

[141] See Michelle Jarvis and Elena Martin Salgado, Future Challenges to Prosecuting Sexual Violence Under International Law: Insights from ICTY Practice. In Sexual Violence as an International Crime: Interdisciplinary Approaches, edited by Anne-Marie de Brouwer, Charlotte Ku, Renee Romkens, and Larissa Van Den Herik. Cambridge, UK: Intersentia, 2013, p. 103.
[142] See Ambos, supra note 121, p. 103.
[143] See the IMT Trial vols. 22, supra note 125, p. 447; See also the statement of English Chief Prosecutor Sir Hartley Shawcross in IMT, Trial, vol. 3 (1946), pp. 123-4; for a recent critical analysis of the concept of individual criminal responsibility in international law, see Gideon Boas, "Individual Criminal Responsibility." In Future Perspectives on International Criminal Justice, edited by Carsten Stahn and Larissa van den Herik. The Hague: T.M.C. Asser, 2010, pp. 501-19; also, the basis of trials proceedings in the IMT and IMTFE are laid down in Arts. 6 and 10 of the IMT Charter; Art. 2, Control Council Law No. 10; Art. 5, IMTFE Charter.
[144] For historical analysis, see Timothy Mccormack and Gerry Simpson, The Law of War crimes: National and International Perspectives. Kluwer Law International, 1997, pp. 31-63.
[145] See Prosecutor v. Tadic, Case No. IT-94-1-AR72. Decision on the Defence Motion for Interlocutory Appeal on jurisdiction (2 October 1995), paras. 128-37, 134.
[146] See Antonio Cassese, International Criminal Law. 2nd ed. Oxford: Oxford University Press, 2008, p. 188.
[147] Ibid., p. 53.

where in relation to a conduct, that person means to engage in the conduct; in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events; knowledge, on the other hand, means awareness that a circumstance exists or consequence will occur in the ordinary course of events.[148] Moreover, to constitute criminal behavior, the *actus reus* and the *mens rea* must have transpired simultaneously. As Schabas articulates, 'guilty thoughts must be linked to an act and an act that is not the result of a guilty mind is not a crime.'[149]

ICL separates between principal perpetrators and accomplices. The principal is someone who physically commits the crime, while the accomplice (e.g., orderer) is the primary or secondary participant in the commission of a crime, which is not the physical perpetrator. For instance, if the superior issue an order to the physical perpetrator that results in a crime, the orderer may be considered an accessory or accomplice to that crime. Therefore, 'if the defendant is charged as an accomplice or accessory, his liability is derivative of the principal's liability; if the principal is deemed not to have committed a crime, the defendant, too, will go free.'[150] Either way, both principal and accomplice can be held individually responsible for the different roles they played in the commission of the crime. However, the responsibility of the accomplice could be more substantial than that of the principal. For instance, if the accomplice is the superior who controls the context (as opposed to being a mere transporter of weapons) in which the principal acted to commit the crime, he will be the more culpable person. This is because the accused's position of influence or authority carries a legitimizing effect on the principal's actions or the accused provided the means necessary for the principal to commit the crime.

Individuals may commit international crimes either acting alone as "an individual" or "jointly with other persons" or "through another person."[151] Thus, ICL can attribute criminal responsibility to individuals in two different ways: 1) Direct modes of liability and 2) indirect modes of liability. Direct modes of liability are applicable when someone directly commits a crime by himself or directly participates in the commission of a crime. There are five modes of liability applicable under this concept: planning, ordering, committing, instigating, and aiding and abetting. Indirect modes of liability are applicable when someone commits a crime through other persons or when someone participates in the commission of a crime in concert with others or fails in his duty as a superior to prevent, repress, or report the crimes committed by his subordinates. There are five modes of liability applicable under this concept: JCE (I, II, and III), superior/command responsibility, co-perpetration, indirect perpetration, and indirect co-perpetration. To

[148] Art. 30, Rome Statute.
[149] See William Schabas, Unimaginable Atrocities: Justice, Politics, and Rights at the War crimes Tribunals. Oxford: Oxford University Press, 2012, p. 125.
[150] See David Luban, Julie O'Sullivan, and David Stewart, International and Transnational Criminal Law. New York: Aspen, 2010, p. 862.
[151] Art. 25(2), Rome Statute.

give an example of how modes of liability work in practice, let us imagine a civil war, where a violent soldier, whose colleague was killed by a hand grenade from an enemy combatant, shot and killed a prisoner of war (POW) in an apparent reprisal for the death of his comrade. The soldier in question is individually liable to punishment for the commission of a war crime (for killing a prisoner of war). Similarly, a soldier who goes on a rampage, raping enemy civilians, as part of a widespread or systematic attack on the civilian population, that soldier in question is individually liable for a crime against humanity of rape.

When multiple individuals commit these international crimes, they give rise to the notion of co-perpetration. When whole organizations are involved in the commission of a crime, it is referred to as system criminality.[152] Either way, there is a plurality of persons (two or more co-perpetrators) with different criminal tasks that contribute to the commission of the crime and without which the commission would not be possible.[153] In many cases, the co-perpetrators are "linked" by a common plan or agreement.[154] Sometimes in this criminal system, the leader at the top of the chain of command (the indirect perpetrator, the master-mind, the perpetrator behind the perpetrator, or "individual in the background") uses people as an instrument or tool (intermediary) to commit a crime.[155]

System criminality is more often the result of the combined efforts of different groups of individuals, operating in or through complex institutional networks, rather than a single person's acts.[156] The larger the scale of the crime and the more individuals involved in its orchestration, coordination, and execution, the more obscure the link becomes between personal acts and resulting crimes. For example, imagine that, after an exhausting day on the battlefield, a retreating first infantry unit, after sustaining heavy losses and casualties, enters village x and massacres the entire civilian population, leaving behind no survivors but scores of dead bodies. Given this joint criminal operation steered by the whole infantry unit, it is difficult to assess who did what – and who was responsible for which killings. Suppose the unit leader is the alleged perpetrator. In that case, it becomes difficult for the prosecutor to determine, at trial, how many civilians he physically killed, how many civilians were killed by other soldiers of the infantry unit, who ordered the

[152] For detailed discussion, see Andre Nollkaemper, "Introduction." In System Criminality in International Law, edited by Harmen Van der Wilt and André Nollkaemper. Cambridge: Cambridge University Press, 2009, pp. 12-13; Alette Smeulers and Fred Grunfeld, International Crimes and Other Gross Human Rights Violations: A Multi-and Interdisciplinary Textbook. Dordrecht, the Netherlands: Martinus Nijhoff, 2010, p. 408; Neha Jain, Perpetration and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes. Oxford: Hart, 2014, pp. 2-6; Hans Vest, 'Problems of Participation: Unitarian, Differentiated Approach, or something Else?' Journal of International Criminal Justice 12 (2014), p. 302; Marjolein Cupido, Facts Matter. A Study into the Casuistry of Substantive International Criminal law. The Hague: Eleven International, 2015, p. 69; Paola Gaeta, International Criminalization of Prohibited Conduct. In Oxford Companion to International Criminal Justice, edited by Antonio Cassese. Oxford: Oxford University Press, 2009, p. 63; Elies van Sliedregt, "System Criminality at the ICTY." In System Criminality in International Law, edited by Harmen Van der Wilt and André Nollkaemper. Cambridge: Cambridge University Press 2009, p. 183.
[153] See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges (29 January 2007), para. 342; Prosecutor v. Stakić, Case No. IT-97-24-T, Trial Judgment (31 July 2003), para. 440.
[154] See Kai Ambos, "Article 25: Individual Criminal Responsibility." In Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, edited by Otto Triffterer. 2nd ed. Baden-Baden, Germany: Nomos, 2008.
[155] Generally, for perpetration by means, see George Fletcher, Basic Concepts of Criminal Law. New York: Oxford University Press, 1998, pp. 197-200; Hans-Heinrich Jescheck and Thomas Weigend, Strafrecht. Allgemeiner Teil. 5th ed. Munich: Verlag Franz Vahlen, 1996, pp. 62, 662 ff.
[156] See Prosecutor v. Tadic, Case No.: IT-94-1-A, Appeal Judgment (15 July 1999), para. 191.

killing of the civilians, and who are the high-level officials of the government involved? What would happen to the unit leader if the evidence shows that, although he murdered many civilians, the massacres took place in a coordinated and prearranged fashion to wipe out all the civilians? What if the unit leader did not physically murder any civilian but instead masterminded the massacres by, e.g., coordinating the line of attack and advising on precise civilian targets?

To make matters worse, imagine that the massacres also took place concomitantly in three other nearby villages, using the same modus operandi. Envisage that the infantry commanders and few other high-level officials and trusted mid-level soldiers devised the plan. What would happen to each one of these high-level officials and commanders? Should they be held criminally liable for the massacres, albeit the evidence demonstrating that none of them physically executed a single civilian and were not even at the scenes? Cassese notes that not all participants may have acted in the same way. Each individual may have played a different role in planning, organizing, instigating, coordinating, executing, or otherwise contributing to the criminal conduct; secondly, the evidence relating to each individual's conduct may prove too difficult, if not impossible, to obtain.[157] Indeed, it can be challenging to determine the degree of blameworthiness of the different roles played by individuals functioning in such institutionalized systems.[158]

The main difficulties in determining individual criminal liability for the above-mentioned group crimes have been the enormity and complexity of the crimes themselves, the collective nature of criminal activities that involve many individuals at different levels of state hierarchy, and the combined organizational elements involved in the commission of international crimes.[159] These are the realities that ICL is facing today. The masterminds who intellectually prepare and direct the commission of international crimes are most often not the physical perpetrators. They are usually situated far away from the scene of these horrific crimes,[160] leaving the commission to low-ranked foot soldiers. Therefore, it is only through the modes of liability that we can hold them responsible for their role and individual contribution in the commission of the crimes, regardless of whether they are geographically or structurally remote from the scenes where the crimes occurred.

[157] See Cassese, supra note 146, pp. 189-190.
[158] For a detailed discussion on the inherent challenges of assigning liability in a context of mass criminality, see Lachezar Yanev, Theories of Co-perpetration in International Criminal Law. Boston: Brill, 2018, pp. 6-8.
[159] The former IMTFE Judge Röling underlined the complexity of the matter by calling international crimes "system criminality." See Elies Van Sliedregt, Individual Criminal Responsibility in International Law, Oxford University Press, 2012, p. 20; Nollkaemper, supra note 152.
[160] See State of Israel v. Eichmann (Criminal Case No.40/61), Judgment, District Court of Jerusalem (11 December 1961), para. 197 (these crimes were committed *en masse*, not only in regard to the number of the victims, but also in regard to the numbers of those who perpetrated the crime, and the extent to which any one of the many criminals were close to, or remote from, the actual killer of the victim, means nothing as far as the measure of his responsibility is concerned. On the contrary, in general, the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher ranks of command).

5. Research Question

The study focuses on the investigation and prosecution of SGBCs within ICL and, more in particular, on the problem of linking high-level accused to SGBCs at the ICTY, ICTR, and ICC. ICL imposes criminal responsibility and obligations on states and non-state actors (including individuals, senior military, and political and religious figures) who commit or fail to prevent or punish the commission of SGBCs. The research aims, therefore, at answering the following question:

How can and should high-level officials be investigated and prosecuted for their role in the commission of Sexual and Gender-Based Crimes?

The research, in particular, focuses on the following sub-questions:

1. What are Sexual and Gender-Based Crimes, and how and where are they criminalized in international criminal and humanitarian law?
2. What are the laws prohibiting Sexual and Gender-Based Crimes during war, and which are their various forms/manifestation?
3. What are the legal theories and requirements in international criminal law necessary to attribute Sexual and Gender-Based Crimes to high-level officials?
4. How can high-level officials be practically prosecuted for Sexual and Gender-Based Crimes and be appropriately linked to these crimes?
5. How can these challenges be countered to investigate and prosecute high-level officials more effectively?
6. What are the types of evidence or means available to prove Sexual and Gender-Based Crimes and the modes of liability before the ICTY, ICTR, and ICC?
7. How can the evidence be improved to ensure effective prosecution of high-level officials for Sexual and Gender-Based Crimes?

6. Methodology and Structure

The study used descriptive and analytical approaches by mainly analyzing the case law at the ICTY, ICTR, and ICC and examining published reports, scholarly articles, and the available facts and figures on the prevalence of SGBCs. It comprehensively assessed all relevant provisions, treaties, and case law within ICL. References are also made to international human rights law and, where necessary or helpful to the jurisprudence and decisions of international and regional human rights monitoring organs.

The study also used several other research materials, such as resolutions of international organizations – particularly UN Bodies and open debates on SGBCs and manuscripts on the subject matter from various institutions and governmental and non-governmental organizations. The materials are sources of law and instruments of interpretation of international law, including treaties, international customs, general principles of law as recognized worldwide, decisions of international and national courts, and scholarly writings that scrutinize arguments and opinions that support or not the criminalization of SGBCs.

The book is divided into 8 chapters: Chapter 1 provides a general introduction to the topic, with definitions and concepts of Sexual and Gender-Based Crimes, a general introduction to individual criminal responsibility, how SGBCs are criminalized, including an overview of the incidence and prevalence of this phenomenon. It discusses the need to investigate and prosecute high-level officials for SGBCs, including the research questions, methodology and structure, and the study's scopes and limitations. After this introduction, Chapter 2 reviews the historical development of international laws most relevant to SGBCs during war, most prominently IHL, arguing that treaties and customary practices overwhelmingly failed for centuries to take SGBCs into account. It then examines the treatment of SGBCs in the post-World War II trials held in Nuremberg and Tokyo and the relevant case law related to SGBCs at the ICTY, ICTR, ICC, SCSL, and ECCC. Chapter 3 discusses the concept of direct modes of liability, particularly planning; instigating; ordering; committing (direct perpetration); and aiding and abetting in the planning, preparation, or execution of a crime. It provides information on how crimes can be attributed to high-level officials generally and when involved in SGBCs in particular. It also discusses the achievements and the shortcomings of the criminalization of SGBCs by analyzing the relevant case law. Chapter 4 discusses the concept of indirect modes of liability, including joint criminal enterprise (JCE I, JCE II, JCE III), superior and command responsibility, co-perpetration (joint perpetration), indirect perpetration, and indirect co-perpetration. It examines the achievements and the shortcomings of the criminalization of SGBCs through the analysis of the relevant case law. It provides information on how SGBCs can be attributed to high-level officials based on their level of participation or the role played in the commission of the crime. Chapter 5 further elaborates how practically SGBCs have been investigated and prosecuted in the ICTY, ICTR, and ICC, through the concept of direct modes of liability enshrined in Article 25(3)(b)-(d) ICC Statute, Article 7(1) ICTY Statute, and Article 6(1) ICTR Statute: planning; ordering; commission; instigation; aiding and abetting. It examines the elements of each form of individual criminal liability and pairs them with the relevant case law to explain how their application works in practice. Chapter 6 analyzes the investigation and prosecution of SGBCs in the ICTY, ICTR, and ICC, through the concept of indirect modes of liability enshrined in Articles 7(1)/ (3) ICTY Statute, Articles 6(1)/ (3) ICTR Statute, and Articles 25(3)(a) and 28(a)/(b) of the Rome Statute: joint criminal enterprise, superior and command responsibility, co-

perpetration, indirect perpetration, and indirect co-perpetration. It further examines the elements of each mode of liability and case law to describe in practice how these courts have prosecuted and linked high-level officials to SGBCs. Chapter 7 discusses the types of evidence the prosecutor relied upon in Chapters 5 and 6 to prove SGBC cases and the modes of liability charged, including victims, eyewitnesses, perpetrator testimonies, expert witnesses, and documentary evidence. It further describes the relationships and differences among the sources of evidence and how the chambers have used them to draw linkages. According to the Rules of Procedures and Evidence, it assesses how the courts dealt with some of the credibility and reliability issues about victims and witnesses. Chapter 8 draws a general summary from all the chapters discussed, makes concluding observations on the pieces of evidence accepted by the judges to convict the accused, and proposes legal guidelines for the effective prosecution of SGBCs in the future.

7. Scope and Limitations

Analyzing a vast topic like the investigation and prosecution of SGBCs in the context of ICL requires the setting of clear academic boundaries. The study thus focused on legal analysis of cases related to the investigation and prosecution of SGBCs and the complexities of linking high-level officials to these crimes in the context of war crimes, crimes against humanity, and genocide in international criminal courts and tribunals. It did not entail field research or address views of individual witnesses and victims or social, political, economic, and psychological root aspects of SGBCs, including consequences on the victims and the perpetrators' lives and communities. This study was focused on applying ICL in ICTY, ICTR, and ICC and did not address the implementation of ICL in the national judicial systems. Thus, the study examined all the 100 SGBC cases adjudicated by the ICTY, ICTR, and ICC from the trial to appeal stages to answer the research questions adequately.

Chapter II: Sexual and Gender-Based Crimes in International Criminal Law

1. Introduction

Combatants and noncombatants have, throughout the history of warfare, committed SGBCs for opportunistic and/or for strategic reasons.[1] SGBCs are already a general problem for societies in peacetime, but this phenomenon worsens specifically during wartime.[2] Historically, females were mostly regarded as lawful rewards or legitimate spoils of war, along with livestock and other chattels, and rape was considered for a long time as an almost acceptable by-product of armed conflicts.[3] In this context, international law scholars only and firstly decided to create rules on regulating warfare and soldiers' behavior in battle by distinguishing between general rules in combat and specific regulations related to sexual and gender-based violence. As a matter of interest, these scholars focused more on the prohibition of SGBCs during war than the traditional war crimes, such as killings or attacks on civilians or civilian objects. Besides, after the horrendous atrocities committed by nations against their own civilians or civilians of other nations during WWII,[4] the international community responded by establishing the IMT and IMTFE to try those most responsible. The aim was to put an end to impunity to secure better enforcement of international (humanitarian) law and make the enforcement of human rights an international concern.

Despite these groundbreaking judicial and legal precedents, armed conflicts and the perpetration of international crimes continued for more than five decades until the United Nations Security Council created the ICTY[5] in 1993 and the ICTR[6] in 1994. The United Nations Security Council created these two *ad hoc* tribunals in response to the mass atrocities committed in the Former Yugoslavia and Rwanda to prosecute the individuals most responsible for serious international humanitarian and criminal law violations.[7]

This chapter seeks to discuss how the laws prohibiting SGBCs in armed conflicts have evolved over the past decades and progressed to form part of internationally recognized customs and legal principles of international criminal and humanitarian law.[8] It will provide a brief account of the laws that prohibit SGBCs

[1] See Kelly Askin, Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles. Berkeley Journal of International Law 21, no.2 (2003), p. 288.
[2] See Susan Brownmiller, Against Our Will, Men, Women and Rape. New York: Fawcett, 1975.
[3] See, e.g., Alexandra Wald, What's Rightfully Ours: Toward a Property Theory of Rape, Columbia Journal of Law & Social Problems 30, 1997, p. 459; see also Askin, supra note 1, p. 296.
[4] It is important to note here that many of the crimes committed in Nazi Germany and by Nazi Germany were also against their own citizens
[5] UN SC Res. 827,25 May 1993.
[6] UN SC Res. 955, 8 November 1994.
[7] UN SC Res. 827,25 May 1993 and UN SC Res. 955, 8 November 1994.
[8] Rule 93 of the 1949 Geneva Conventions on prohibition of rape and other forms of sexual violence, Customary International Humanitarian Law, available at https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule93.

during armed conflict, from the 1863 Lieber Code during the American Civil War to the 1949 GCs and its 1977 Additional Protocols I & II (hereinafter API & APII).[9]

The chapter will give an overview of SGBCs in the IMT, including the insertion of rape as a crime against humanity under Control Council Law No.10. It will examine crimes in the IMTFE, including the SGBCs, committed during World War II by the Japanese army and General Yamashita's war crimes trial. It will further analyze how the international criminal tribunals and courts developed the SGBC laws since the early 1990s. It will also explain the characterization and the 8 different forms and manifestations of SGBCs, including rape, forced marriage,[10] sexual slavery, forced prostitution, enforced pregnancy, enforced sterilization, gender-based persecution, and any other form of sexual violence comparable gravity. Concluding remarks will be provided summarizing the main findings and the challenges of SGBCs in armed conflicts.

2. Legal History and Developments of Laws on Sexual and Gender-Based Crimes

As Wells states, 'before there could be crimes of war there had to be laws of war; before there could be laws of war there had to be customs of war; before there could be customs of wars, there needed to be some sense that war had limits.'[11] In fact, as early as 500 BC, rules already existed in warfare to care for combatants and non-combatants on the battlefields, although they were not written into official codes[12] and primarily consisted of customs, domestic military codes, and religious instructions.[13] Cicero, for instance, cautioned combatants to respect the rules of war because such compliance was considered necessary for parting the "men" from the "brutes"; since war was waged by humans, it should be conducted with as little cruelty as possible, in order to reduce its horrifying effects on humanity.[14] He concluded that war was just if the motive was combat glory, and war should be conducted with a "minimum of hatred."[15]

Until the eighteenth century, females have generally been considered men's lawful possessions and could do nothing without their male counterparts' consent.[16] Women were placed under severe restrictions, to the

[9] Protocol Additional to the Geneva Conventions of 12 August 1949 relative to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977 and Protocol Additional to the Geneva Conventions of 12 August 1949 relative to the Protection of Victims of Non-International Armed Conflicts (AP II), 8 June 1977.
[10] It should be noted that the crime of forced marriage as such is not prohibited in ICL and the Rome Statute.
[11] See Donald Wells, War Crimes and Laws of War. 2nd ed. Lanham, MD: University Press of America, 1991, p. 91.
[12] See Cherif Bassiouni, International Criminal Law: A Draft International Criminal Code. Alphen aan den Rijn, Netherlands: Sijhoff & Noordhoff, 1980, p. 5.
[13] See Adam Roberts, "Land Warfare: From Hague to Nuremberg." In The Laws of War: Constraints on Warfare in the Western World, edited by Michael Howard, George J. Andreopoulos, and Mark R. Shulman. New Haven, CT: Yale University Press, 1994, pp. 116, 119.
[14] See Marcus Thullius Cicero, Cicero's Three Books of Officers, or Moral Duties. Reprinted, New York: Harper & Bros, 1897, pp. 21-22.
[15] Ibid., p. 161.
[16] See Renee Hirschon, Women and Property: Women as Property. London: Croom Helm,1984; Lewis Okun, Woman Abuse: Facts Replacing Myths. Albany: State University of New York Press, 1986, pp. 3-5.

extent that they did not have control over their own bodies or sexual honor, with the result that the rape of a woman was considered a property crime – a crime committed against the man that "owned" her (could be father, husband or even son or brother).[17] Rape by their lawful husbands would then not be considered rape, nor would it be considered a violation of their rights if the husbands consented to sexual violence against the women they "own" by others. As explained above, during periods of war, women had to endure even more sexual violence.[18] For example, in Ancient Greece, rape was 'socially acceptable behavior recognized within the rules of warfare and conquered females were considered legitimate booty, wives, concubines, slaves or battle-camp trophies.'[19] Chants taken up in battle, for example 'to the victors go the spoils,' resonated for many centuries, proclaiming the women of the losing party as part of the spoils of war and often using this strategy as an incentive for capturing a town or village.[20] This was all very much reinforced by the generally existing patriarchal structure of the militaries that formed part of larger patriarchal societies.

During the Middle Ages, jurists, writers, and scholars affirmed that, although there were reasonable grounds for nations to wage wars against others, including self-defense, wars could result in mass brutality and cruelty against the human race. They advocated that as long as war was considered "just", the methods towards victory were without bounds.[21] As females were sexually assaulted as "part and parcel" of war,[22] for these scholars, restraining measures were necessary to protect captured enemy women and limit or prevent atrocities against civilians of an enemy state. Their strong arguments against females being property to their male counterparts and supporting females' legal protection domestically during peacetime contributed to enhancing respect for women in the Middle Ages.[23]

Although these assertions did not automatically improve females and civilians' protection during war, they, nevertheless, highlighted the distinction between the right to wage war (*jus ad bellum*) and the rights and duties invoked once war had begun (the *jus in bello*).[24] These restrictions created limits about fighting a war even if a State was actively participating in a just war. Unfortunately, these restrictions did not generally include the protection of women nor imposed a duty of care towards civilians, as most of these restrictions only applied to weapons and to the treatment of those considered lawful combatants.

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[17] See Roy Porter, "Rape: Does It Have a Historical Meaning?" In Rape: An Historical and Social Enquiry, edited by Roy Porter and Sylvana Tomaselli. Oxford: Basil Blackwell, 1986, p. 217.
[18] See LaShawn Jefferson, "In war as in peace: Sexual violence and women's status." Human Rights Watch World Report 1 (2004). <https://www.hrw.org/legacy/wr2k4/download/15.pdf> accessed 10 August 2020.
[19] See Brownmiller, supra note 2, p. 33.
[20] See Peter Karsten, Law, Soldiers, and Combat. Westport, CT: Greenwood, 1978, p. 5.
[21] See Michael Walzer. Just and Unjust Wars: A Moral Argument with Historical Illustrations. New York: Basic, 1977; Sheldon Cohen. Arms and Judgment: Law, Morality, and the Conduct of War in the Twentieth Century. Boulder, CO: Westview, 1989.
[22] See Brownmiller, supra note 2, pp. 31-113.
[23] Ibid., pp. 28-113.
[24] See William O'Brien, The Conduct of Just War and Limited War. New York: Prageger, 1981, pp. 13-70; Theodore Meron, Shakespeare's Henry the Fifth and the Law of War. American Journal of International Law 86 (1992), pp. 5-12; Christopher Greenwood, The Relationship Between Jus Ad Bellum and Jus in Bello. Review of International Studies 9 (1983), p. 221.

In the fifteenth and sixteenth centuries, scholars and jurists explored and systematized practices in armed conflicts.[25] These practices revealed that females were usually not respected during wars; however, many jurists were relentless in their pursuits to include the protection of females in the laws of war. Among them, eminent jurist Gentili surveyed the literature on wartime rape and contended that it was unlawful to rape women in wartime, no matter whether the women were combatants or civilians.[26] He insisted that women, including female combatants, be protected from sexual assaults during wars. Women could be killed lawfully for fighting in battle, but it is unlawful to rape them.[27] This understanding did not thrive though, mainly because of the pervasive notion that unarmed females and children in the captured territory were enemies, with belligerents having conquering rights over them.[28] Nowadays, international human rights law obliges occupying powers to protect women and children belonging to the civilian population who live in occupied territories. They shall not lose their protection status, not be raped, or deprived of shelter, food, medical aid, or other inalienable rights.[29]

Furthermore, De Penna, a jurist, and judge in the fourteenth century, campaigned in the same way, arguing that 'in war, the belligerents are not at liberty to act without restraints and soldiers should not be licensed to murder, rob, plunder, rape, or constrain civilians. […] once the enemy has been captured and is therefore incapacitated of doing further harm, he should be treated humanely.'[30] Also, Belli, a soldier and jurist in the sixteenth century, described in his treatise on military law that, although rape during war could be punished by death, soldiers' lust was really not deterred (by these rules or the consequences thereof) 'but at the present time, how few there are - even common and ordinary soldiers - who do not have an eye upon the mother or daughter of the family, plotting to defile her, and, though guests, leaving no stone unturned until the things [are] accomplished!'[31]

Rules governing warfare became more explicit and rigid as decades passed, although official war crimes prosecution rarely took place until the late Middle Ages.[32] For example, in 1419, Seigneur de Barbasan[33] was tried by a military court for breaches of the laws of war.[34] As the laws progressed over the centuries into a more global set of rules, the first record of an official international trial for violations of the rules or

[25] See Leon Friedman, The Law of War: A Documentary History. Vol. 2. Westport, CT: Greenwood, 1972, p. 11.
[26] See Aberico Gentili, De Jure Belli Libri Tres. Translated by John Rolfe. 1612. Buffalo, NY: Hein, 1995, pp. 258-259.
[27] Ibid.
[28] See Richard Hartigan, The Forgotten Victim: A History of the Civilian. Chicago: Precedent, 1982, p. 155.
[29] UN GA Res. 3318, 14 December 1974. Declaration on the Protection of Women and Children in Emergency and Armed Conflict. These provisions are laid down in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration of the Rights of the Child or other instruments of international law.
[30] See Hartigan, supra note 28, p. 50; see also Meron, supra note 24, p. 25.
[31] See Pierino Belli, De Re Militari Et Bello Tractatus. Vol. 2: A Treatise on Military Matters and Warfare. Translated by Herbert C. Nutting. 1563. Reprint, Buffalo, NY: W. S. Hein, 1995, p. 178 (this treatise is one of the most comprehensive examinations of the rules of war in the 1500s).
[32] See Wells, supra note 11.
[33] Counsellor and butler to Charles VII of France and later a general during the Hundred Years' War.
[34] See Lyal Sunga, Individual Responsibility in International Law for Serious Human Rights Violations. Dordrecht, the Netherlands: Martinus Nijhoff, 1992, p. 18.

customs of wars occurred in 1474, when twenty-eight international judges tried Sir Peter Hagenbach[35] for, *inter alia*, murder, rape, and perjury.[36] Sir Hagenbach was tried for having unleashed a reign of terror in Breisach[37] without formally declaring war. A formal declaration of war would have meant that rules had come into effect, and soldiers could have killed and wounded females and children. They could not have taken spoils (rape victims), although raping the women could have been legitimate if the soldiers captured the cities they lived in after refusing to surrender.[38] Even if the declaration is deemed sufficient to trigger warfare, it is still illegal for the soldiers to commit rape during wartime, and such acts, when perpetrated, should be punished.

In the 1600s, international law pioneer Grotius wrote the first comprehensive work on systematizing the international laws of war[39] in which he concluded that, based on views of states, natural law, and historical practice, there were only the three just causes for going to war: defending one's sovereign territory, recovering property, and punishing unlawful behavior, whereas unacceptable reasons included the desire to conquer other lands and other peoples.[40] He asserted that, while natural law and the laws of nations did not utterly outlaw all wars, conflicts that violated others' rights should not be tolerated.[41] On his assertion on rape, Grotius affirmed: 'You may read in many places that the raping of women in a time of war is permissible and in many others that it is not acceptable. Those who sanction rape considered only the injury done to the [victims] and have judged that it is not inconsistent with the law of war that everything that belongs to the enemy [including the females] should be at the victor's disposition. It is better to consider injury to the victims and the unrestrained lust of the act[rape] and punish such acts in wartime as in peacetime.'[42] Therefore, Grotius insisted that SGBCs committed both in wartime and peacetime should be punished.[43] Still, while progressive nations formally forbid SGBCs in armed conflicts, rape in war, unfortunately, continued to occur.[44] Also, one of the most critical figures insisting that civilians should be immune from the ravage of war is De Vattel,[45] who affirmed that, as a rule, noncombatants were to be left

[35] Von Hagenbach was born in about 1420, a native of Alcace, France and became a favorite of Charles the Bold (aka Charles the Terrible). He died on May 9, 1474, drawn and quartered.
[36] See Cherif Bassiouni, The Time Has Come for an International Court, Indiana International & Comparative Law Review 1(1991), p. 1. (The trial of Peter van Hagenbach was the first international criminal trial that took place 471 years before Nuremberg trial. The trial was held in Breisach, Germany, with twenty-seven judges of the Holy Roman Empire presiding); see Bassiouni, supra note 12, p. 8.
[37] Breisach is a town along the Rhine in the Rhine Valley, in the district of Breisgau-Hochschwarzwald, Baden-Württemberg, Germany.
[38] See Wells, supra note 11, pp. 93-94; see also Maurice Keen, The Laws of war in the Late Middle Ages. London: Routledge & Kegan Paul, 1965.
[39] See Hugo Grotius, The Law of War and Peace. 1646. Reprint, Oxford: Clarendon, 1925; see also Friedman, supra note 25, p. 14.
[40] See Wells, supra note 11, pp. 20-25; see also Keren, supra note 38.
[41] See Remigiusz Bierzanek, "War Crimes: History and Definitions." In A Treatise on International Criminal Law, edited by Cherif M. Bassiouni and Ved P. Nanda. Vol. 1. Springfield, IL: Thomas, 1973, p. 560.
[42] See Hugo Grotius, De Jure Belli Ac Pacis Libri Tres. Translated by Francis W. Kelsey. 1646. Buffalo, NY: Hein, 1995, pp. 656-657; see also Leslie Green, "What One May Do in Combat: Then and Now." In Humanitarian Law of Armed Conflict, edited by Astrid Delissen and Gerard Tanja. Dordrecht, The Netherlands: Martinus Nijhoff, 1991, p. 283.
[43] See Grotius, supra note 39.
[44] See Brownmiller, supra note 2, pp. 31-113; see also Meron, supra note 24, p. 15; Keen, supra note 40.
[45] See Emmerich de Vattel, The Law of Nations or the Principles of Natural Law. 1758. 1758. Reprint, Washington, DC: Carnegie Institution, 1916; Emmerich de Vattel, The Law of Nations. Bk. 3, Of War. 1758. Reprint, Buffalo, NY: Hein, 1995.

un-harmed during armed conflicts.[46] As Askin notes, these developments resulted in a growing number of trials of political and military leaders who violated the laws and customs of war over the centuries, giving rise to the progressive expansion of IHL and the prosecution of those most responsible for breaching those rules.[47] This seems to suggest that many political and military leaders have already been prosecuted successfully for SGBCs, but that is not really the case. Unfortunately, these trials were held in lower numbers and at a slower pace, and most of the prosecutions and trials held at that time did not primarily focus on SGBCs.

2.1 Overview of Laws Prohibiting Sexual and Gender-Based Crimes

One of the first sets of laws explicitly prohibiting SGBCs in warfare was the Lieber Code proclaimed by President Abraham Lincoln of the United States on 24 April 1863 as General Orders No.100.[48] Drafted by Francis Lieber, the code derived from international customs and usage and became the official US Army regulation guide on land warfare laws to control soldiers' behavior on the battlefields.[49] Article 44 of the Lieber Code provided punishment for crimes, including rape committed by any soldier, while commanders were responsible for enforcing the law.[50] Article 37 specifically required soldiers to protect women in enemy states during times of war,[51] while Article 47 stipulated punishment for soldiers who did commit SGBCs.[52]

The Lieber Code placed the direct authority of enforcement upon the senior military commanders since, at the time, there was no established enforcement mechanism for such military codes. The Lieber Code was promulgated in 1864 and internationalized at the 1907 International Peace Conference in Copenhagen.[53] Therefore, the Lieber Code became the basis of The Hague - IV Convention on the Respect of Laws and Customs of War on Land.[54] However, there was no explicit mention of rape either in the Convention itself or in the Convention's Regulations.[55]

[46] See Hartigan, supra note 28, pp. 107-09.
[47] See Kelly Askin, War Crimes against Women: Prosecution in International War Crimes Tribunals. Dordrecht, The Netherlands: Martinus Nijhoff, 1997.
[48] Instruction for the Government of the United States in the Field by Orders of the Secretary of War 24 April 1863 (Lieber Code; also known as General Orders No.100); Rules of Land Warfare Dept. Doc No. 467, Office of the Chief of Staff, approved on 25 April 1914 (G.P.O. 1917); Army Field Manual, The Law of Land Warfare (FM 27-10, 1956).
[49] See Taylor Telford, The Anatomy of the Nuremberg Trial. New York: Knopf, 1992, pp. 8-9 (Lieber spoke of the difficulties in achieving his unique objective: 'I have earnestly endeavored to treat of these grave topics conscientiously and comprehensively … nothing of the kind exists in any language. I had no guide, no groundwork, no textbook'); see Kelly Askin, "Treatment of Sexual Violence in Armed Conflicts: A Historical Perspective And The Way Forward." In Sexual Violence as an International Crime: Interdisciplinary Approaches, edited by Anne-Marie de Brouwer et al. Cambridge, UK: Intersentia, 2013, p. 26.
[50] Art. 44, Lieber Code.
[51] Art. 37, Lieber Code.
[52] Art. 47, Lieber Code.
[53] See Perry Gulbrandsen, "A Commentary on the Geneva Conventions of August 12, 1949." In A Treatise on International Criminal Law, edited by M. Cherif Bassiouni and Ved P. Nanda. Vol. 1. Springfield, IL: Thomas, 1973, p. 375.
[54] See Friedman, supra note 25, p. 15.
[55] See Theodor Meron, War Crimes Law Comes of Age. Oxford: Oxford University Press, 1998, p. 206.

The Hague Conventions, drafted in 1899 and revised in 1907, dealt predominately with prisoners of war (POWs). It provided a distinction between military personnel of an occupying power and the noncombatant civilian population. The primary purpose was to prevent unnecessary suffering in war and primarily regulate the methods of warfare.[56] The Convention outlawed war in certain respects, at certain times, and imposed certain formal obligations.[57] In fact, the Preamble of the 1899 Hague Convention contains the famous "Martens Clause", which states that:

> *'Unlike a more complete code of the laws of war is issued, The Hague Contracting parties think it right to declare that in cases not included in the Regulations adopted by them, population and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.'*[58]

The Hague Convention was amended in 1906 and 1929, and eventually, in 1949, the GCs were adopted upon the initiatives of the International Committee of the Red Cross (ICRC). The purpose was to improve the victims' conditions during wartime, following WWII's atrocities. Three supplementary protocols to the GCs, including API & APII and Additional Protocol III – adopted on 8 December 2005 to provide additional protection of distinctive emblem (hereinafter APIII),[59] were adopted to extend specific protection measures to civilians and distinctive emblems during war. In fact, all or parts of these instruments are now recognized as comprising customary international law.[60]

Common Article 3 (1)(c) applies in non-international armed conflicts, and it contains the non-derogable rules that protect persons not taking part in the hostilities. Under these rules, SGBCs are implicitly prohibited within the category of 'outrages upon personal dignity, particularly humiliating and degrading treatment.'[61] Many states feel they are not under a rigorous duty to suppress SGBCs in non-international armed conflicts. In this light, Article 4(2) APII thus reaffirms and supplements Common Article 3, prohibiting 'outrages upon personal dignity in particular humiliating and degrading treatment, rape, enforced prostitution and any

[56] 1907 Hague Convention with Respect to the Laws and Customs of war on Land (First Hague, II) (29 July 1899) (entered into force 4 September 1900); "Convention Respecting the Laws and Customs of war on Land" (Second Hague, IV), 18 October 1907 (entered into force 26 January 1910); Ingrid Detter De Lupis, The Law of War. Cambridge: Cambridge University Press, 1987, p. 178.
[57] See Ahmed Rafaat, International Aggression, A Study of the Legal Concept: Its Development and Definition in International Law. Stockholm, Sweden: Almqvist &Wiksell International, 1979, p. 29.
[58] Professor Martens was the Principle Russian negotiator at The Hague Peace Conferences of 1899 and 1907. Hilaire McCoubrey, International Humanitarian Law, The Regulation of Armed Conflict. London: Dartmouth, 1990, pp. 190-91.
[59] See Protocol additional to the Geneva Conventions of 12 August 1949 relative to the Adoption of an Additional Distinctive Emblem (AP III), 8 December 2005.
[60] E.g., Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, (2 October 1995), paras. 96-137.
[61] Art. 3 (1)(c), Common Art. 3 to the GC.

form of indecent assaults.'[62] However, none of the provisions explicitly aimed at protecting women and children, and the limited protection they afford is not an absolute one.[63]

The GCs describe SGBCs as honor crimes, i.e., crimes that tarnish the honor of the victim. For example, Article 27 GCIV notes that 'women shall be protected against any attack against their honor, particularly against rape, enforced prostitution, or any form of indecent assault.'[64] Similarly, Article 75(2) API prohibits outrages upon personal dignity,[65] and Article 76(1) clarifies that 'women shall be the object of special respect and protection against rape, forced prostitution, and any other form of indecent assault.'[66] Moreover, Article 75 (2) (b) API contains minimum rules that forbid acts committed against civilians that, without directly causing harm to the integrity and physical and mental well-being of persons, aim to humiliate and ridicule them, forcing them to perform degrading acts.[67] Concerning the protection afforded to females, the additional Protocols seem to have departed from the "honor system" to "personal dignity," explicitly recognizing the personal physical and mental harm suffered by victims of SGBCs. However, as Gardam notes, these provisions do not sufficiently address the reality of women's sufferings during war, nor do they effectively protect women, mainly from SGBCs.[68] Therefore, their primary focus is to regulate the battlefield and state that rape is not acceptable as part of war.[69]

Article 50 GCI, Article 40 GCIV, and Article 11 API list certain types of acts as Grave Breaches. They oblige States to search for the alleged perpetrators and, if found within their territory, bring them before their domestic courts or otherwise extradite them for prosecution (*aut dedere aut judicare*).[70] As stated in Article 40 GCIV, the main reason for creating the Grave Breaches regime was to identify which crimes are considered more egregious than others and to be able to prosecute the perpetrators of the most extreme offenses.[71] Nonetheless, as explained, SGBCs were not expressively listed as one of the Grave Breaches, thus creating the impression that the international community underestimated the seriousness of SGBCs in armed conflicts.

The duty bestowed on States by the GCs and API to exercise their criminal jurisdictions over those responsible for international crimes led to establishing national legislations and military codes to investigate

[62] Art. 4(2), APII.
[63] See Giulia Biancotto, The Emergence of Gender Justice in International Criminal Law: Towards the Recognition of FGM/C as Crimes Against Humanity? Padova, IT: Padova Digital University Archive, 2014.
[64] Art. 27, GCIV.
[65] Art. 75(2) API.
[66] Art. 76(1), API.
[67] Art. 75 (2) (b), API.
[68] See Judith Gardam, "Women and Armed Conflict: The Response of International Humanitarian Law." In Listening to the Silences: Women and War, edited by Helen Durham and Tracey Gurd. Dordrecht, the Netherlands: Martinus Nijhoff, 2005, pp. 114-123.
[69] Ibid.
[70] Art. 50 GCI, Art. 40, GCIV and Art. 11, API.
[71] Art. 40, GCIV.

and prosecute alleged perpetrators. Some of the written military regulations and instructions set at the national army levels expressly prohibited SGBCs, such as rape, enforced prostitution, and indecent assaults, and labeled them as war crimes when committed in the context of armed conflict.[72] In addition to these military codes, most countries also passed national legislation criminalizing SGBCs in armed conflicts and, in some cases, explicitly categorized them as war crimes.[73] These military codes have been essential for the domestic prosecution of SGBCs in several countries. For instance, rape was recognized as a war crime in the 1946 Chinese Ministry of National Defense War Crimes Military Tribunal during the *Takashi Sakai* case.[74] In the *John Schultz* case in 1952, the United States Uniformed Code of Military Justice (UCMJ) held under appeal that rape was a 'crime universally recognized as properly punishable under the laws of war.'[75] These processes have undoubtedly created a positive effect on the universality principle. Several states (e.g., Belgium, France, UK, Switzerland, USA, Argentina, Gambia, the Netherlands) have recently shown willingness to prosecute atrocities committed abroad, even when crimes were not committed by or against their own nationals.

2.2 Sexual and Gender-Based Crimes in the IMT & IMTFE

At the end of WWII, the Allied Powers established the IMT in Nuremberg and the IMTFE in Tokyo to primarily prosecuting leaders who had committed crimes against peace, war crimes, and crimes against humanity.[76] They were the first international tribunals to conduct these kinds of trials on a larger scale. However, they mainly focused on what was considered the "supreme" crimes: crimes against peace (i.e., aggression).[77] Neither the Charter of the IMT nor the one of the IMTFE listed rape as a crime. Rape committed against the civilian population was later listed as a crime against humanity only by the approved Control Council Law Number10 (CCL10).[78] Article (2)(1)(c) CCL10 gave the Council explicit jurisdiction to prosecute rape as a crime again humanity (which will be explained in-depth in Section 2.3 below).[79] This document represented an advancement over the Nuremberg and Tokyo Tribunals' Charters in that rape was explicitly listed and recognized as one of the crimes over which the Control Council had jurisdiction. Notwithstanding, some of the trials of war criminals did not include senior leaders. Those prosecuted were mainly low-ranking personnel such as medical doctors and concentration camp guards charged with forced

[72] Jean-Marie Henckaerts et al., "Military Manuals of Countries under National Practice." Customary International Humanitarian Law. Vol. 2, Practice; Part 2. International Committee of the Red Cross. Cambridge: Cambridge University Press, 2005, pp. 249-251.
[73] Ibid, pp. 251-252.
[74] See Case No. 83, Trial of Takashi Sakai Responsibility for Crimes against Peace and other offences. Chinese War Crimes Military Tribunal of The Ministry of National Defence, Nanking, 1946.
[75] See John Schultz, Appeals Judgment, United States Court of Military Appeals, 5 August 1952.
[76] Arts. 26, 82, IMT Charter; Art. 17, IMTFE Charter.
[77] See, e.g., John Murphy, Crimes Against Peace at the Nuremberg Trial. In The Nuremberg Trial and International Law. George Ginsburg & V.N. Kudriavtsev eds. Boston: M. Nijhoff, 1990, p. 141.
[78] Art. 2(1)(c), CCL10.
[79] Art. (2)(1)(c), CCL10.

sterilization, forced abortion, and sexual mutilation against the victims in several concentration camps.[80] These SGBCs and others were mentioned but only given cursory treatment[81] because there was no explicit mention of them in the Nuremberg Judgment, and they remained hidden.[82] As a result, SGBCs had mainly been ignored[83] also for many other crimes. In any case, in Nuremberg, 22 Nazi leaders were tried, and none of them explicitly for SGBCs, despite overwhelming evidence of their commission during war and occupation, as recognized in the trial records.[84] Professor Robertson states that the Allies declined to indict Nazi war criminals for sexual violence because they themselves committed the worst abuses: '[T]he worst example of tolerated and systematic rape was during the Russian army advance on Germany through Eastern Europe, during which an estimated two million women were sexually abused with Stalin's blessing that 'the boys are entitled to their fun.'[85]

Bassiouni argues that rape was implicitly included in both the Nuremberg and Tokyo Charters as a crime against humanity, 'subsumed within the words of other inhumane acts.'[86] He also argues that rape and sexual violence 'clearly constitute "inhumane acts"'[87] and that rape was also implicitly included as a war crime, subsumed within the term "ill-treatment."[88] Further, in her treatise on the prosecution of war crimes against women before international criminal tribunals, Askin asserts that French and Soviet prosecutors actually introduced evidence of SGBCs, which she describes as 'evidence of vile and tortuous rape, forced prostitution, forced sterilization, forced abortion, pornography, sexual mutilation, and sexual sadism.'[89] Despite this evidence, no defendants were explicitly prosecuted or convicted for SGBCs neither before the Nuremberg Tribunal nor among the twelve follow-up procedures.[90] Askin further explains that the failure to prosecute these crimes explicitly was compounded by the prosecutors' inability to document them thoroughly.[91] She concluded that '[w]hether it was out of shyness, prudishness, reserve, ignorance,

[80] E.g., U S. v. Brandt; U S. v. Greifelt, Trials of War Criminals Before the Nuremburg Military Tribunals Under Control Council Law No. 10, Washington, vol.2 and vol.4-5, 1949-53; John Pritchard, Sonia M. Zaide (eds.), The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East. 22 Vols. New York: Garland, 1981, pp. 31, 111-117.
[81] Ibid.
[82] See Kelly Askin, International Gender Justice Dialogue, Conference Session II, Prosecutions and Jurisprudence - What we have achieved? Mexico, IntLawGrrls, 2010.< http://www.intlawgrrls.com/2010/04/international-gender-justice-dialogue.html> accessed 17 April 2020; see also Richard Goldstone, Prosecuting Rape as a War Crime. Case Western Reserve Journal of International Law 34 (2002), p. 279; Theodor Meron, Rape as a Crime Under International Humanitarian Law. American Journal of International Law 87 (1993), pp. 424-426.
[83] See Askin, supra note 1; see also Machteld Boot, "Crimes Against Humanity, Article 7(1)(g): Rape … or Any Other Form of Sexual Violence of Comparable Gravity." In Commentary on The Rome Statute of The International Criminal Court: Observers' Notes, Article by Article, edited by Otto Triffterer and revised by Christopher Hall. 2nd ed. Munich: C. H. Beck, 2008, pp. 159, 207.
[84] For arguments on how sex crimes could have been prosecuted in the Nuremberg Trial if there had been the political will to do so, see Askin, supra note 47, pp. 129-63; Geoffrey Robertson, Crimes Against Humanity: The Struggle for Global Justice. London: Allen Lane, 1999, p. 306. However, it should be noted here that the crime by Nazi Germany were not specifically characterized by extensive sexual violence. It is more striking that it wasn't prosecuted at the IMTFE.
[85] See Robertson, supra note 84.
[86] See Cherif Bassiouni, Crimes Against Humanity in International Criminal Law. 2nd ed. London: Kluwer Law International, 1999, p. 349.
[87] Ibid.
[88] Ibid; see also Tamara Tompkins, Prosecuting Rape as a War Crime: Speaking the Unspeakable. Notre Dame Law Review 70 (1995), p. 883 (stating that sexual atrocities were proscribed by Principle IV(b) of the Nuremberg Charter, which referred to ill treatment, and Principle IV(c), which referred to inhumane acts).
[89] See Askin, supra note 47, pp. 1, 97.
[90] See Goldstone, supra note 82, pp. 277, 279; see also Bassiouni, supra note 86, pp. 345-346. This is equally true for the 12 follow up procedures.
[91] See Askin, supra note 47, pp. 1, 97.

revulsion, confusion, or intentional omission, the lack of both public documentation and official prosecution gave impetus to the notion that sexual assaults were less important crimes at the time.'[92] Brownmiller states that Soviet prosecutors tried to show that the rape of Russian women was part of 'a systematic Nazi campaign of terror and genocide'[93] and that the French prosecution showed how rape was used as a form of "military retaliation or reprisal."[94] Another type of SGBCs being implicitly recognized before the IMT is the torture of teenage girls who were separated from the rest of the internees and locked up in separate cells and subjected to particularly outrageous forms of torture, rape, and cut off their breasts.[95] Not even pregnant females were spared. They were lashed and ill-treated and subjected to a particular form of brutality that led to miscarriages, often left without any due care, and exposed to all the hazards and complications of these criminal abortions.[96] As explained, some SGBCs were mentioned[97] in the subsequent IMT trials of other groups of war criminals held by the Allied Forces under the auspices of CCL10.[98] Many scholars nowadays generally agree that, during WWII, soldiers committed many forms of SGBCs and that they should have prosecuted them.[99]

The IMTFE similarly prosecuted rape crimes but only connected to family honor, as provisions in the Statute prohibited ill-treatment, abduction of the civilian population, and inhumane acts constituting a war crime.[100] In total, the IMTFE charged 28 Japanese Axis defendants with various war-related crimes.[101] Despite the IMTFE's Charter not specifically enumerating any SGBCs, the prosecution still managed to include some of these allegations in the indictments. The rape of noncombatant women and medical personnel was characterized as "inhumane treatment," "mistreatment," "ill-treatment," and a "failure to respect family honor and rights," and succeeded in prosecuting these crimes under the "Conventional War Crimes" provision in the Charter.[102] Also, a substantial number of SGBCs committed in Asia during the war were admitted into evidence of atrocities.[103] For example, rape was subsumed under the general charges of

[92] Ibid.
[93] See Brownmiller, supra note 2, p. 69 (stating that captured German documents presented at Nuremberg corroborated the 'routine use of rape as a weapon of terror').
[94] Ibid., p. 56.
[95] Ibid; The official documents of the Nuremberg Trial are contained in Trial of the Major War Criminals Before the International Military Tribunal, 14 November 1945 to 1 October 1946 (1947). For documentation of Sexual Violence by the Tribunal, see, e.g., vol. 7, transcript p. 494, ibid.
[96] Ibid. These SGBCs are contained in the trial documents in vol. 6, transcript p. 170.
[97] See, e.g., U.S. v. Brandt, Trials of War Criminals Before the IMT under CCL10 (1946) vol. 2 (forced sterilization and castration); U.S. v. Pohl, vol.5 (1947) (evidence of forced abortion and concentration camp "brothels"); U.S. v. Greifelt, vols. 4-5 (1947) (forced abortion, gender/ethnic persecutions, genocide, and reproductive crimes).
[98] See Kevin Heller, The Nuremberg Military Tribunals and the Origins of International Criminal Law. Oxford: Oxford University Press, 2011; see also CCL10.
[99] See Askin, supra note 47, pp. 129-63; Robertson, supra note 84; Brownmiller, supra note 2, p. 69; Goldstone, supra note 82; Meron, supra note 82.
[100] See Pritchard & Zaide, supra note 80.
[101] Ibid. For some examples of documentation of Sexual Violence by the Tribunal, see, e.g., IMTFE Docs, vol. 1.
[102] Ibid.
[103] See Askin, supra note 1, p. 302. Sexual Violence was documented in the IMTFE transcripts vol. 2, transcript pp. 2568-73, 2584, 2593-95, 3904-44, 4463-79, 4496-98, 4501-36, 4544, 4559, 4572-73, 4594, 4602, 4615, 4638, 4642, 4647, 4660; see also IMTFE Docs vol. 6, transcript pp. 12521-48, 12995, 13117, 13189, 13641-42, 13652.

command responsibility for Nanking atrocities[104] and as ancillary to other war crimes.[105] As a result of these charges, the IMTFE held some high-level officials (General Iwane Matsui, Commander Shunroku Hata, and Foreign Minister Hirota) criminally responsible for several crimes, including rape committed by their subordinate soldiers.[106] Moreover, during the war crimes trials held in Batavia (Jakarta) after the war, some Japanese defendants were also convicted for "enforced prostitution" for forcing women into sexual servitude to the Japanese military (see Section 2.4 below for a detailed discussion on Comfort women).[107]

Finally, the United States Military commission held also a war crimes trial in Asia against General Tomoyuki Yamashita,[108] commander of the 14th Area Army of Japan, charged for failure to exercise effective command and control over his troops that had committed widespread rape, murder, and pillage in Manila (known as the "rape of Manila")[109] during the war. His trial, which was the first war crimes trial held by the Allied powers of WWII,[110] was considered a revolutionary development in the law of command responsibility.[111] The Yamashita trial will be discussed in-depth in Section 2.5 below.

2.3 Control Council Law No.10 and the Insertion of Rape as a Crime Against Humanity

On 20 December 1945, the Control Council for Germany enacted a law known as the Control Council Law No. 10 (see Section 2.2 above).[112] It provided the framework for the prosecution of lower-level war crime suspects (for the accused persons who were not the prominent masterminds of the war), such as commanders of concentration camps, commanders of the Einsatzgruppen, and medical doctors, accused of war crimes, crimes against peace, and crimes against humanity.[113] Twelve US trials at Nuremberg were held against low-level war criminals under the CCL10.[114] As enshrined in its Preamble, the CCL10 was adopted to give

[104] See Goldstone, supra note 82.
[105] See Bassiouni, supra note 86, p. 348.
[106] See Bernard V. A. Roling and Christiaan F. Ruter. The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946–12 November 1948. Amsterdam: APA-University Press, 1977, pp. 446-54.
[107] See, e.g., Trial of Washio Awochi, Law Reports of Trials of War Criminals volume 13 (1949), pp. 122-25 (a Japanese hotel/club/restaurant manager was found guilty of the war crime of enforced prostitution for forcing women into sexual servitude in his club from 1943-1945).
[108] See generally Richard Lael, The Yamashita Precedent: War Crimes and Command Responsibility. Wilmington, DE: Scholarly Resources,1982.
[109] See re Yamashita, 327 US, volume 1, 1946. Yamashita was convicted and later executed; William Parks, Command Responsibility for War Crimes. Military Law Review 62, 1973, pp. 69-73; Gordon Ireland, Uncommon Law in Martial Courts. World Affairs Yearbook 4, 1950.
[110] See Philip Piccigallo, The Japanese on Trial, Allied War Crimes Operations in the East, 1945-51. Austin: University of Texas Press, 1979, p. 49.
[111] The Yamashita Case or the "Decision of the United States Military Commission at Manila, 7 December 1945" is reproduced in Friedman, supra note 25, p. 1596; the order of general Douglas MacArthur Confirming Death Sentence of General Tomoyuki Yamashita, 6 February 1946", is reproduced in The Law of War, ibid, p. 1598. For the appeal to the US Supreme Court, including dissenting opinions, see re Yamashita reproduced in The Law of War, ibid, p. 1599; "Judicial Decisions" In re Yamashita, American Journal of International Law 40, 1946, p. 432; Askin, supra note 49, p. 46.
[112] Arts. 1 and 2 of CCL10 provide the purpose of this law, but see Section 2.2 above for explanation of Control Council Law No. 10.
[113] See Heller, supra note 98.
[114] The twelve trials were: Case No.1, Medical Case; Case No.2, Milch Case; Case No.3, Justice Case; Case No.4, SS, Pohl Case; Case No.5, Flick Case; Case No.6, Farben Case; Case No.7, Hostages Case; Case No.8, Rusha Case; Case No.9, Einsatzgruppen Case; Case No.10, Krupp Case; Case No.11, Ministries Case; and Case No.12, High Command Case.

effect to the terms of the 1943 Moscow Declaration,[115] the 1945 London Agreement,[116] and the Nuremberg Charter. It also meant to establish a consistent legal basis in Germany for the prosecution of war criminals and other offenders alike, other than those dealt with by the IMT.[117] Article I CCL10 provided, *inter alia*, that the London Agreement was an integral part of the law, and Article II recognized each of the following acts as a crime: (a) crimes against peace, (b) war crimes, (c) crimes against humanity, and (d) membership in a category of criminal groups or organizations that were declared criminal by the International Military Tribunal.[118] Of the categories of crimes, only crimes against humanity introduced a provision on rape, which was not contained in the IMT Charter, namely, "imprisonment, torture, and rape."[119] In particular, the provision concerning crimes against humanity stated that:

> *'Crimes against Humanity are atrocities and offenses that include but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.* '[120]

Nevertheless, as Askin notes, despite the explicit provision on rape, 'gender crimes were given only cursory treatment,'[121] and no rape charge under crimes against humanity was ever brought against any of the multiple accused. In the twelve subsequent Nuremberg Military Trial of the so-called "lesser" war-criminals, SGBCs mentioned against medical doctors performing unethical experiments in camps included 'forced sterilization, forced abortion, and sexual mutilation'[122] (e.g., Case No.1 (Medical Case) confirmed forced sterilization in Auschwitz and Ravensbruck).[123] Indeed, SGBCs were not dealt with thoroughly and the legal principles enshrined in CCL10 were not put into practice. Despite this failure, CCL10 had a fundamental role in establishing three main principles in ICL: (1) that rape committed during wartime on a wide scale could amount to a war crime, (2) that SGBCs committed during peacetime or wartime could constitute crimes against humanity, (3) responsibility for SGBCs can be attributed to both military and civilian

[115] See Moscow Declaration signed on 30 October 1943, but published on 1 November, 1943, noting, *inter alia*, the war criminals of the Axis powers be punished by a cooperative justice of the signatory Allied powers.
[116] See Charles Bevans, ed. Treaties and Other International Agreements of the United States of America (1776–1949). Vol. 3, Multilateral, 1931–1945. Washington, DC: Department of State Publication, 1969, pp. 1238-1247 (agreement by the Government of the United States of America, the provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the prosecution and punishment of the major war criminals of the European Axis).
[117] Chapter IX Developments in the Concepts of Crimes Against Humanity, War Crimes and Crimes Against Peace; Crimes Against Humanity (Development of Concept of Crime Against Humanity), 1945, p. 212; Arts. 1 and 2, CCL10.
[118] Arts. 1 and 2, CCL10.
[119] Art. 2(1)(c), CCL10.
[120] Art. 2(1)(c), CCL10.
[121] See Askin, supra note 1, p. 302.
[122] Ibid.
[123] See Heller, supra note 98, p. 85.

officials.[124] As explained, these crimes can only be war crimes or crimes against humanity if the contextual elements are proven.

2.4 Discussion on National Prosecution of Sexual and Gender-Based Crimes in Japan

In December 1937, the Japanese Imperial Army marched onto the Chinese city of Nanking, where its troops horrendously massacred almost half of the about 600,000 civilians.[125] It all started with the killing of the prisoners of war (POWs), and shortly after, the soldiers began searching for females in every household of Nanking. Women, including older women over the age of 70 years, and little girls under 8 years old, were violently dragged out of their homes to be sexually abused.[126] This became known as the Rape of Nanking, representing one of the worst atrocities committed during WWII.[127] Many women were killed after being raped and their bodies mutilated. Estimates show that between 20,000 and 80,000 cases[128] of rape occurred within the city. Press reports of the "rape of Nanking" reached Emperor Hirohito, who asked his Ministers to find a way to restore "the honor of Japan." The Ministers devised two means to avoid new incidents of this sort: the Japanese Military code's reform and the creation and extension of the "comfort stations" system.[129] Approximately 200,000 women, predominantly from Korea, the Philippines, Indonesia, Thailand, and China,[130] were forced into sexual slavery for the Japanese Imperial Army's pleasure between 1931 and 1945.[131]This became known as the "comfort women system."[132] The Japanese Government recruited and transported comfort women to military brothels known as "comfort stations" where they were raped, beaten,

[124] See Dustin Lewis, Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under International Law. Wisconsin International Law Journal, 2009, pp. 22-23 citing Catherine N. Niarchos, "Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia," Human Rights Quarterly 17 (1995), p. 672.
[125] The History Place, Genocide in the 20th Century, the Rape of Nanking 1937-1938 300,000 Deaths, available at https://www.historyplace.com/worldhistory/genocide/nanking.htm; see also Carmen Argibay, Sexual Slavery and the "Comfort Women" of World War II, Berkeley Journal of International Law 21 (2003), p. 376.
[126] Ibid.
[127] Ibid.
[128] See Friedman, supra note 25, p. 1061.
[129] See Argibay, supra note 125, p. 376.
[130] Since 1991 many survivors have come forward to testify about the sex crimes committed against them. See, for example, Yoshimi Yoshiaki, "Japan Battles its Memories." New York Times (11 March 1992): 23; Jake Doherty, 'Conference to Focus on Plight of Wartime 'Comfort Women'; Japan: Activists Say Victims Used as Sex Slaves in World War II Should be Compensated by the Government that forcibly Recruited Them.' Los Angeles Times (20 February 1993): B3; Teresa Watanabe, 'Japan Admits that WWII Sex Slaves Were Coerced; Apology: Government Statement Overturns Decades of Denial; Yet the Questions or Redress for Victims Remains.' Los Angeles Times (5 August 1993): A1.; George Hicks, The Comfort Women: Japan's Brutal Regime of Enforced Prostitution in The Second World War. New York: W. W. Norton, 1995, p. 16, stating that, since the Korean Peninsula had been a Japanese colony, Koreans were regarded as Japanese subjects. A speculation as to why it took so long for these victims to come forward has been ventured by Hicks: Then as now, rape was never an easy charge to sustain. Given the high moral value attached to chastity, the comfort women invariably emerged from their war time experiences defiled, yet unable to accuse their abusers. They had everything to gain by keeping silent and everything to lose by making accusations. From the patriarchal point of view, it was seen almost as a kindness to the comfort women to pretend that this systematic brutalization had never taken place; See also Askin. supra note 49, pp. 42-3; David Andrew Schmidt, Ianfu: The Comfort Women of The Japanese Imperial Army of The Pacific War; Broken Silence. Lewiston, NY: Edwin Mellen, 2000, pp. 90-93. 'Social ranking and discrimination were encouraged and pervasive among the Japanese Ianfu at the top of the social scale and Koreans, Taiwanese/Chinese and other Asians following below in said order.'
[131] See Christine Wawrynek, World War II Comfort Women: Japan's Sex Slaves or Hired Prostitutes? New York Law School Journal of Human Rights 19, no. 3, Art. 13 (2003), p. 913.
[132] For more discussion, see Kelly Askin, Comfort Women: Shifting Shame and Stigma from Victims to Victimizers. International Criminal Law Review 1, no. 1 (2001), pp. 5-32.

tortured, mutilated, and sometimes murdered by Japanese soldiers.[133] They recruited the women in different ways. Some were deceived with job offers in factories or promised positions as cooks, nurse assistants, and cleaners.[134] In other villages, "recruiters" of comfort women resorted to kidnapping and herded 'young mothers [as well as young women] into trucks, separating them from clinging, wailing... children.'[135] Finally, women were also bought from economically destitute families or became debt bonded, i.e. indentured servants.[136] Victims lived into barracks-style stations, divided into small cubicles[137] measuring approximately three-by-five feet.[138] There, they were forced to sleep and have sex with as many as thirty soldiers per day.[139] Comfort stations operated around the clock: '9 a.m. to 3 p.m. for ordinary soldiers; 3 p.m. to 6 p.m. for non-commissioned officers, and 8 p.m. through the next morning at 7 a.m. for officers.'[140] The thirty minutes allotted for each soldier constituted thirty-minute increments of sufferings and unimaginable horror for the women, many of whom had been virgins, some had been mothers, before being forced into a life of sexual enslavement.[141] After several decades, Hwang Keum-Ju, one of the few survivors, still remembers the day she was first raped:

> *'[The officer] told me to follow his instructions. Then he told me to take off my clothes.... It was like a bolt from the sky. My long braided hair clearly showed that I was a virgin. How was it possible that I could take off my clothes in front of a man?... I told him no. He told me then I would be killed.... Then he grabbed my skirt and tore it at the seams. He ordered me again, but I was so shocked I just sank to the floor. Then he grabbed his knife and cut my underskirt and underpants. I was totally exposed. I was so shocked, I just fainted. When I woke up, I found myself lying in a pool*

[133] See Maki Arakawa, A New Forum for Comfort Women. Fighting Japan in United States Federal Court. Berkeley Women's Law Journal 16, no. 1 (2001), pp. 178-79. Initially, the government relied on volunteers, like former prostitutes, to "recruit" young women. In addition, 'the government also recruited Korean women under general mobilization directives, which were part of the labor draft for factory work in war industries.' Later, 'the military, with the help of local government or police, conducted slave raids of local populations where the women were threatened with physical harm to themselves or their family members.'; see also Timothy Tree, Comment, International Law. A Solution or a Hindrance Towards Resolving the Asian Comfort Women Controversy? UCLA. Journal of International Law & Foreign Affairs 5 (2000-2001), pp. 467-468, citing Kazuko Watanabe, Militarism, Colonialism, and the Trafficking of Women: Comfort Women Forced into Sexual Labor for Japanese Soldiers. Bulleting of Concerned Asian Scholars, 1994, pp. 3, 5 (quoting unnamed comfort woman).
[134] See Yvonne Park Hsu, "Comfort Women" From Korea: Japan's World War II Sex Slaves and the Legitimacy of Their Claims for Reparations. Pacific Rim Law & Policy Journal 2 (1993), p. 100; Chin Kim and Stanley Kim, Delayed Justice: The Case of the Japanese Imperial Military Sex Slaves. UCLA Pacific Basin Law Journal 16 (1998), p. 266; see Tree, supra note 133, p. 468.
[135] See Park Hsu, supra note 134.
[136] See Argibay, supra note 125, p. 378.
[137] See Ustinia Dolgopol and Snehal Paranjape, Comfort Women: An Unfinished Ordeal. Geneva: International Commission of Jurists, 1994, pp. 48, 105 (As one survivor recalls, 'each room had one straw mat, one blanket and a pillow, which was essentially dirty cotton stuffed with rags.').
[138] Ibid., p. 48.
[139] Ibid. See also Arakawa, supra note 133, pp. 174, 179, citing Chin-sung Chung, An Overview of the Colonial and Socio-Economic Background of Japanese Military Sex Slavery in Korea. MUAE: A Journal of Transcultural Production 1, no. 3 (1995), pp. 204, 212.
[140] See Dolgopol & Paranjape, supra note 137, p. 105.
[141] See Nathalie Johnson, Comment, Justice for "Comfort Women": Will the Alien Tort Claims Act Bring Them the Remedies They Seek? Penn State International Law Review 20 (2001), pp. 253, 260, explaining that soldiers would pay at a reception area for a ticket and condom, then wait in long lines outside ianfu quarters.

of blood. I could not get up for a week afterward. I was so sick I could not even drink water.'[142]

Infection was prevalent because soldiers did not use condoms, and, thus, many women became pregnant and or infected with STDs.[143] Although military doctors regularly examined the women, as many of the comfort women recall, 'they carried out these regular checks to only prevent the spread of venereal diseases [to soldiers]. Doctors took a little notice of the frequent cigarette burns, bruises, bayonet stabs, and even broken bones inflicted on the women by soldiers.'[144]

Comfort women who survived the horror and attempted to resist or escape from the comfort stations were physically tortured and severely beaten at the hands of the Japanese military.[145] Their suffering did not stop when the war came to an end. Many comfort women did not survive the poor conditions at the comfort stations, but most women died at the end of the war, when Japanese soldiers forced them to commit suicide with them,[146] intentionally murdered them[147] or abandoned them in dangerous military terrains, without any mean of returning to their homes.[148] As a result, fewer than 30% of the approximate 200,000 comfort women actually survived.[149]

Still, the IMTFE never specifically prosecuted these crimes. Many decades have passed, and several lawsuits filed, yet Japan did not really apologize formally or compensate survivors (see explanations on the lawsuits in the following paragraphs).[150] Since the sex slave issue surfaced publicly in 1978, the Japanese Government persistently denied the military's involvement with the comfort women system.[151] Kim Hak-Sun became the first victim in 1991 to publicly tell the uncomforting story of her life as a Korean sex slave of the Japanese Imperial Army.[152] The stories of Hak-Sun, Ruff-O'Herne, and other survivors, along with scholarly research, revealed that the military had established these brothels with the government's knowledge.[153]

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[142] See Dolgopol & Paranjape, supra note 137, pp. 6-7.
[143] See Johnson, supra note 141, pp. 253, 261.
[144] See Dolgopol & Paranjape, supra note 137, p. 117.
[145] See Arakawa, supra note 133, pp. 174, 179, citing Chung, supra note 139; see also Karen Parker and Jennifer Chew, Compensation for Japan's World War II War-Rape Victims. Hastings International and Comparative Law Review 17 (1994), pp. 497, 508 ('Women who resisted their violators were beaten, mutilated, or murdered, frequently with their fellow women forced to watch. They were very poorly fed and lived under extremely difficult conditions.').
[146] See Taihei Okada, Translations, The "Comfort Women" Case: Judgment of 27 April 1998, Shimonoseki Branch, Yamaguchi Prefectural Court, Japan. Pacific Rim Law & Policy Journal 8 (1999), pp. 63, 70, stating that Koreans, Chinese, Taiwanese, Filipinos, Indonesians, and Dutch, as well as Japanese women were forced into sexual slavery.
[147] See Hicks, supra note 130, p. 154.
[148] Ibid., p. 157.
[149] See David Boling, Mass Rape, Enforced Prostitution, and the Japanese Imperial Army. Japan Eschews International Legal Responsibility? Columbia Journal of Transnational Law 32, no. 3 (1993), pp. 533, 542.
[150] See Goldstone, supra note 82.
[151] Japan Says Army Forced Korean Women to Serve as Prostitutes, San Diego Union-Tribune, 14 January 1992, at A2.
[152] See Hicks, supra note 130, pp. 148-149.
[153] Ibid., pp. 205-9; Jan Ruff-O'Herne, 50 Years of Silence. Melbourne: Bolinda Press, 1998.

In December 1991, Kim Hak-Sun and two other survivors filed the first lawsuit by former sex slaves against the Japanese Government.[154] The Tokyo District Court dismissed their case in March 2001, holding that claims for damages against Japan made by individual victims were unacceptable under international law since a 1965 bilateral agreement had already settled the redress issue between Japan and South Korea. The plaintiffs appealed, but the Tokyo High Court confirmed the dismissal of the case, declaring that 'even though the Japanese Government at that time had failed to fulfill its obligation to provide security for the comfort women, their right to demand compensation had expired.'[155] Other suits subsequently followed,[156] but the Japanese Government used its influence to successfully dismiss them,[157] except *Ha* v. *Japan,*[158] which was filed in a lower court that represented the only courtroom victory for the comfort women.[159] Despite the past failures, on 25 December 1992, ten Korean women, including three comfort women, filed a new lawsuit with the Yamaguchi Prefectural Court, seeking an official apology and compensation from the Japanese Government.[160] It was only in 1992 that the Japanese Government decided to launch an inquiry into these accusations.[161] Later in 1996, the Japanese Government established a fund in honour of "The Asian Women's Friendship and Peace Foundation" to collect donations from the public and private "sympathy" money (*Mimaikin*).[162] However, as the money did not directly come from the Japanese Government, some comfort women did not consider this initiative as sufficient and real and accused the government of dishonesty and lack of remorse.

Japan responded that the 1992's lawsuits were invalid and represented an ex post facto application of international law. Accordingly, 'international law was not codified until after WWII, several years after establishing the comfort women stations in 1931.'[163] The Government brought forward three theoretical

[154] See Eric Yamamoto et al., Race, Rights and Reparation: Law and the Japanese American Internment. Gaithersburg, MD: Aspen, 2001, p. 436.
[155] Columbia Law School, Lawsuits brought against Japan by former Korean "comfort women", Filed 6 December 1991. < https://kls.law.columbia.edu/content/lawsuits-brought-against-japan-former-korean-comfort-women.>accessed 2 May 2021.
[156] See Boling, supra note 149, pp. 16-17. (Numerous lawsuits immediately followed, including lawsuits filed by the Korean Council for Women Drafted for Sexual Slavery, and a suit by a Dutch former comfort woman.); Barry Fisher, Japan's Postwar Compensation Litigation, Whittier Law Review 22 (2000), pp. 35, 44.
[157] See Fisher, supra note 156, p. 44.
[158] Christopher Meade, Note: From Shanghai to Globocourt: An Analysis of the "Comfort Women's" Defeat in Hwang v. Japan. Vanderbilt Journal of Transnational Law 35 (2002), pp. 211, 233-236.
[159] See Kirsten Orreill, Who are the Ianfu (Comfort Women)? New Voices 2 (2008), pp. 128-152 (Ianfu is Japanese word which means a woman forced into prostitution for Japanese servicemen during World War II).
[160] See Shellie Park, Comment, Broken Silence: Redressing the Mass Rape and Sexual Enslavement of Asian Women by the Japanese Government in an Appropriate Forum. Asian-Pacific Law & Policy Journal 3 (2002), p. 40.
[161] See Hicks, supra note 130, p. 265. The inquiry found that Japanese government was involved in operating comfort women stations during the war as acknowledged by Cabinet Chief Secretary Kono Yohei who expressed apologies and pledged compensation to the victims on behalf of the Government of Japan.
[162] Japan Ordered to Compensate three Sex Slaves. Los Angeles TIMES, 28 April 1998, at A2; Yuri Kageyama, One-Time Sex Slaves Win Fight in Court: Japanese Judge says three Korean Women are Entitled to Payments. San Diego Union-Tribune, 28 April 1998, at A2. As to critical views expressed on the creation of the fund, see Totsuka etsuro, Kan-Pu Saiban de moto "ianfu" ni shoso hanketsu [Winning decision on former "Comfort Women" in the Kan-Pu Trial] Hogagu Seminar 523 (1998), p. 39 (many comfort women expressed outrages at the Japanese Government who had planned to avoid its confession of wrongdoing using the private foundation as a shield, of which some think, was an attempt to stop the restoration of the victims' dignity as human beings. Having realized this, many of the women in fact declined to accept money from the fund but preferred expressed genuine remorse from the Government of Japanese. In an angry response, the South Korean government decided to directly compensate the South Korean former sex slaves by their own initiatives).
[163] See Park, supra note 160, p. 43.

augments in an attempt to counter the argument by the comfort women: 1) Japan claimed that international customary law in those days did not recognize an individual victim's right to claim compensation against the state; 2) procedural grounds, such as the statute of limitations, arguing that the comfort women's claims were time-barred because over fifty years have passed since the alleged acts occurred; and 3) post-war settlement treaties, such as the San Francisco Peace Treaty, settled all war claims, thereby waiving a citizen's right to bring individual war claims against Japan.[164]

The plaintiffs' lawyers argued that Japan was bound by the "duty to be a moralistic society"[165] under the Constitution. They presented three counter legal arguments: 1) that the 1941 Cairo[166] and the 1945 Potsdam Declarations[167] called for "expulsion of militarism", an 'elimination of barriers to restore the strength of Democratic tendency', and a 'freedom of press, religion, and thought and the respect of fundamental human rights;'[168] 2) that the preamble of the Japanese Constitution '... resolved that never again shall [Japan] be visited with the horrors of war throughout the action of government,'[169] arguing that this expression in light of the Potsdam Declaration, was not a mere denial of war based on humanitarian ideals but should also be interpreted as the expression of Japan's reflection on its past invasions, wars, and Colonial rule;[170] and 3) Article 9 of the Japanese Constitution states that 'the Japanese people forever renounce war as a sovereign right of a nation.'[171] The renouncement of war did not merely mean achieving peace without war, but, instead, it imposed a duty on Japan to engage in a positive purging of structural violence, like wars waged by the State.[172] In short, these three arguments compelled Japan to be morally responsible for these acts.

After five years of extensive deliberations, on 27 April 1998, the Shimonoseki Branch of the Yamaguchi District Court in Japan, basing its decision on the State Liability Act,[173] ordered the Japanese government to pay Y300,000.00 (equivalent to U.S $2,270.00 at the time)[174] each to three South Korean comfort women.[175] Upon examining the evidence, the court ruled that the comfort women system was unlawful and outright discrimination based upon gender and ethnicity because the system violated fundamental human

[164] See Kan-Pu Trial, Written Judgment in Its Entirety - Inclusion of Final Preparatory Documents by Plaintiffs, Hanabusa Toshio, ed., 1998, p. 94.
[165] Ibid.
[166] As to the Japanese text of the Cairo Declaration, see Mohan Roppo [Model Six Codes] Ohsumi Kenichiro ed., 1991, p. 2168.
[167] As to the Japanese text of the Potsdam Declaration, see Roppo, ibid. The Cairo and Potsdam Declarations defined the terms for Japanese surrender by the Allied powers.
[168] Kan-Pu Trial, supra note 164, pp. 92-93.
[169] As to the English text of the 1946 Constitution, see Kodansha Encyclopedia of Japan, Kodansha. 2nd ed., 1983, pp. 9-13
[170] See Kan-Pu Trial, supra note 164, p. 93.
[171] For the English text of the 1946 Constitution at supra note 169, p. 10.
[172] See Kan-Pu Trial, supra note 164, p. 94.
[173] See Meade, supra note 158, pp. 233-236 (the State Liability Act requires Japan to compensate individuals injured by a public servant's violation of his professional duties. A 1985 [Japanese] Supreme Court judgment had held that 'except when Diet members directly and clearly violate the Constitution,' the legislature is immune from suit from individuals for their legislative acts).
[174] See Kan-Pu Trial, supra note 164, p. 46.
[175] Jugun means "attached" (or accompanying or following) the military. The word Ian (comfort) is adequate to convey the meaning that the soldiers who received sexual pleasure but quite contrary to express Fu (women) who are actually sex slaves of the soldiers to endure the forced prostitution and sexual subjugation with continuous rape on an everyday basis during the war.

rights guaranteed by Article 13 of the Japanese Constitution.[176] In his ruling, presiding Judge Hideaki also opined that the government should have pushed legislation through the Japanese legislature, the Diet, to compensate the women, after it had admitted in 1993 that it was involved in the planning of front-line brothels.[177]

Based on the discussion above, it can be concluded that the crimes committed against the "comfort women" were widespread, systematic, and highly regulated. The Japanese troops committed these crimes against women and girls who were non-combatants and part of the civilian population. The IMTFE should have pursued multiple charges against the perpetrators (mainly high-level officials) for war crimes and crimes against humanity of rape, imprisonment, murder, inhumane treatment, torture, and enslavement. The failure to prosecute these crimes makes it one of the most unacknowledged and unremedied injustices in ICL.

2.5 The War Crimes Trial of General Yamashita

Tomoyuki Yamashita, former Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands, was arraigned before a United States Military Commission on 8 October 1945.[178] The *Yamashita* case was a landmark precedent in the doctrine of command responsibility.[179] The trial was held before IMTFE, and it was the first war crimes trial of a high-ranking military official by the WWII Allied Powers.[180] However, doubts have been raised on its fairness, with Justice Rutledge, for instance, affirming in his dissenting opinion: 'The commission thus condemned the general to death, with findings based substantially on "untrustworthy, unverified, unauthenticated evidence" not questioned – or even effectively questionable – by cross-examination or other means of testing credibility, probative value, or authenticity.'[181]

During the proceeding, the prosecution asserted that, between 9 October 1944 and 2 September 1945, in Manila and other places in the Philippine Islands, members of the Armed Forces of Japan, under the command of Yamashita, committed the following crimes, which were grouped into three categories by the president of the Military Commission: 1) Starvation, execution or massacre without trial and maladministration generally of civilian internees and prisoners of war; 2) Torture, rape, murder and mass execution of vast numbers of residents of the Philippines, including women and children and members of

[176] See Kan-Pu Trial, supra note 164, p. 42 (Art. 13 reads: 'All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs'). See the English text of the 1946 Constitution at supra note 167, pp. 9-13.
[177] See Kan-Pu Trial, supra note 164, p. 45 (legislative nonfeasance, according to the ruling, meant that the government was negligent in fulfilling its obligation to help the plaintiffs recover for their wartime suffering).
[178] See Lael, supra note 108.
[179] See Yamashita Case, supra note 111; Friedman, supra note 25, p. 1596; see also Askin, supra note 49, p. 46.
[180] See Piccigallo, supra note 110.
[181] See John Ferren, General Yamashita and Justice Rutledge. Journal of Supreme Court History 28 (2002), p. 67.

religious orders, by starvation, beheading, bayoneting, clubbing, hanging, burning alive, and destruction by explosives; 3) Burning and demolition without the adequate military necessity of large numbers of homes, places of business, places of religious worship, hospitals, public buildings, and educational institutions.[182] The Prosecutor alleged that, as a superior officer, Yamashita was responsible for the crimes committed by soldiers under his command and that he failed to maintain adequate supervision over his subordinates' actions.[183]

The prosecution also asserted that these crimes occurred on a large scale. In terms of time, the offenses extended throughout the period Yamashita was in command of Japanese troops in the Philippines. In terms of area, the crimes spread throughout the Philippine Archipelago, although beyond a reasonable doubt, most of the appalling acts occurred in Luzon.[184] The offenses also occurred systematically. The prosecution further asserted that 'specifically, the period from 1 January 1945 until 1st March 1945, Yamashita's troops planned and organized the extermination, massacre, wanton, indiscriminate killing of large numbers of unarmed non-combatant civilians of the city of Manila and its environs. They were brutally mistreating, wounding, mutilating, killing and attempting to kill large numbers of them, and raping or attempting to rape large numbers of female civilians in that city.'[185]

The defense argued the crimes did not amount to a war crime, lack of jurisdiction of the Commission, lack of the accused's knowledge about the crimes, absence from the crime scenes, and the lack of proof of a plan to commit these crimes. It concluded that the US army's military offensive and guerrilla activities prevented Yamashita from maintaining adequate supervision of his troops' actions in the vast islands and could not be held responsible as a superior.[186]

Following his nonguilty petition, the Commission concluded that the widespread Commission of crimes over an extended period was enough to impute Yamashita's knowledge that subordinates were perpetrating crimes. Yamashita could have or should have known of them unless he intentionally remained willfully blind to them and deliberately ignored them, which, in any case, could not absolve him of his duty as a commander.[187] It means that, under the doctrine of command responsibility, the commanders or superiors do not necessarily have to order the crime, and it is not, in fact, necessary to prove that the commander had actual knowledge of the crimes perpetrated by persons under his command. It surfaces that the widespread

[182] See Yamashita case, supra note 111; see also re Yamashita, supra note 109; Parks, supra note 109; Ireland, supra note 109.
[183] See Antonio Cassese, Violence and Law in the Middle Age. Princeton, NJ: Princeton University Press, 1986 (noting that the judgment in Nuremberg did not pay much attention to the concept of responsibility for omission…that there were so many criminal orders that they had no need to do so).
[184] See Yamashita case, supra note 111, p. 4.
[185] Ibid., p. 6.
[186] Ibid.
[187] Ibid., p. 6.

nature, the commission of the crime over a long period, the notoriety of the crime, and previous knowledge can be conclusive that the accused knew or should have known about the crimes. Therefore, the judges found him guilty of failing his command responsibility and sentenced him to death by hanging.[188] In its decision of 7 December 1945, the Commission held: 'It is absurd [. . .] to consider a commander a murderer or rapist because one of his soldiers commits a murder or rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.'[189] The Supreme Court of the United States confirmed the decision, and Yamashita was executed on 23 February 1946.[190] *Yamashita's* trial demonstrated that the IMTFE prosecuted SGBCs; however, as the Commission found that the crimes were widespread, it should have instead tried many more of such cases against other high-level officials involved.

2.6 Overview of the Laws Developed by the International, Hybrid, and Internationalized Criminal Tribunals and Courts since the 1990s

In the1990s, widespread and systematic rapes occurred in former Yugoslavia and Rwanda, which shocked the international community and caught the United Nations Security Council's attention. The lack of development in ICL between the end of WWI and the early nineties was mostly due to the ongoing cold war. The atrocities in Rwanda and Yugoslavia led to the subsequent creation of the ICTY and the ICTR to prosecute international crimes committed in the respective territories. They became the first international criminal tribunals, after the Nuremberg and Tokyo Tribunals, to deal exclusively with war crimes, crimes against humanity, and genocide.[191] Later, the ICC was established by the Rome Statute in 1998 as a permanent International Criminal Court to prosecute individuals most responsible for serious international crimes of concern to the international community.[192] The creation of the ICTY, ICTR, and ICC[193] represented a significant breakthrough in SGBC prosecution. This was the first time that SGBCs were broadly recognized and explicitly mentioned as war crimes or as Grave Breaches of the GCs (under Articles 2 and 3 ICTY Statute, Article 4 ICTR Statute, and Article 8 Rome Statute), as crimes against humanity (under Article 5 ICTY Statute, Article 3 ICTR Statute, and Article 7 Rome Statute), and as genocide (under

[188] See re Yamashita, supra note 109.
[189] See Friedman, supra note 25, p. 1597.
[190] See Yamashita case, supra note 111.
[191] E.g., Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Trial Judgment (September 2, 1998); Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Judgment (7 May 1997).
[192] Rome Statute of the International Criminal Court was established on 17 July 1998 and entered into force 1 July 2002.
[193] The outcome documents leading to the final Rome Statute by PreCom did not, however, adequately reflect gender concerns, but through the resilience and lobby of the Women's Caucus for Gender Justice, gender and sexual violence crimes and fair gender representation were advocated for and reproduced in the Rome Statute. Through the women's lobby, gender was formulated in the context of society, including sociological differences between men and women and non-discrimination provision on gender basis.

Article 4 ICTY Statute, Article 2 ICTR Statute, and Article 6 Rome Statute), thus providing the prosecutor with leverage to indict SGBC under multiple headings.

Since their creation, the *ad hoc* international criminal tribunals have focused on the prosecution of perpetrators of SGBCs, which helped to develop the law on SGBCs further. For example, the ICTY and ICTR have devoted substantial resources to the prosecution of rape and explicitly recognized rape as torture as well as an act of genocide, a crime against humanity, and a war crime.[194] Following the adoption of the ICTY and ICTR Statutes, the Security Council singled out rape as one of the most reprehensible crimes committed and expressed its commitment to establish accountability for these crimes as a core part of the ICTY's and ICTR's mandate.[195] Thus, Article 5 (g) ICTY Statute lists rape as a crime against humanity. Article 3 (g) ICTR Statute also lists rape as a crime against humanity, and Article 4 lists rape, enforced prostitution, and indecent assault of any kind as a serious violation of Article 3 common to the GCs and APII relative to the protection of war victims. From early on, the ICTY and ICTR Rules of Procedure and Evidence (hereinafter referred to as RPE) contained provisions to ensure sensitive approaches to gathering evidence in SGBC cases.[196] The tribunals' case law on gender jurisprudence exemplified that SGBCs can also satisfy the elements of other international crimes. For example, torture and enslavement, as well as conditions under which non-consent can be inferred from coercive circumstances were part of the tribunals' early judgments.[197]

The ICTY and ICTR indicted several individuals in leadership positions, including senior military commanders, top politicians, senior civilian administrators, the clergy, and senior media experts.[198] According to the court reports, 94 individuals (58%) of the 161 accused had charges of SGBC included in their indictments, 43 (46%) were convicted, 3 (3%) are still on appeal, 33 individuals (35%) were acquitted, 5 (5%) of suspects whose indictments included SGBC charges had those withdrawn. Finally, of the 17

[194] See Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgment (12 June 2002). The ICTY Appeals Chamber held that the numerous rapes of Bosnian Muslim women in both Bosnian Serb private homes and detention centers constituted torture, and the accused were convicted for rape, enslavement, and inhumane acts; See Special Rapporteur on Torture, Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Comm'n on Human Rights, U.N. Doc. E/CN.4/ 1986/15, 1986, p. 119; Akayesu Trial Judgment, supra note 191. In the Akayesu case, the ICTR for the first time accepted that acts of sexual violence can be qualified as acts of genocide. Akayesu, the mayor of Taba, was convicted of genocide because of 'aiding, abetting, ordering, or encouraging, and sometimes witnessing, more than two dozen rapes and other sexual assaults at the bureau communal where, by virtue of his authority, he could have prevented them.' According to the ICTR sexual violence can be constitutive of genocide by being acts causing serious bodily and mental harm, by imposing conditions calculated to bring about physical destruction (rape victims are often expelled from the community so that its connectedness is weakened and ultimately destroyed), by preventing births (for instance through sexual mutilation, sterilization and forced birth control, but also through rape because of its physical and psychological consequences) and by forcibly transferring children from one group to another group (such as forced pregnancy through rape in patriarchal societies); Tadic Trial Judgment, supra note 191, para. 40; Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Trial Judgment (10 December 1998), paras. 65, 68, 120, 262, 263.

[195] UN SC Res. 808, 22 February 1993 (noting also with grave concern the report of the European Community investigative mission into the treatment of Muslim women in the former Yugoslavia); UN SC Res. 827, 25 May 1993 (expressing grave alarm at the systematic detention and rape of women); UN SC Res. 955, 8 November 1994.

[196] Rule 96, ICTY Rules; Rules 96, ICTR Rules.

[197] E.g., Furundijza Trial Judgment, supra note 194; see also Tadic Judgment, supra note 191.

[198] See Barbora Holá and Alette Smeulers, "Rwanda and the ICTR: Facts and Figures." In The Elgar Companion to the International Criminal Tribunal of Rwanda, edited by Alette Smeulers and Anne-Marie de Brouwer. Cheltenham, UK: Edward Elgar, pp. 57-63.

suspects who died before or after transfer to the ICTY, 10 (11%) had SGBC charges listed in their indictments.[199] The ICTR had indicted 93 individuals for genocide and other serious violations of IHL committed in 1994.[200] A manual checking and analysis of all the cases revealed that 45 (48%) out of 93 individuals were indicted with SGBC charges: 14 accused (31%) were convicted of one or multiple SGBC charges (including Ladislas Ntaganzwa who was referred to Rwanda's jurisdiction for trial); 20 (44%) were acquitted from the SGBC charges brought against them (including Bernard Munyagishari who was referred to Rwanda's jurisdiction for trial); 5 (11%) had their SGBC charges withdrawn (either they were removed from the amended versions of the indictments or withdrawn as part of a plea bargaining); 1(2%) was indicted and sent to trial but died before judgment; 1(2%) was indicted with SGBC charges but died before trial; 1 (2%) was indicted with SGBC charges (Laurent Bucyibaruta) and referred to national jurisdiction in France for trial; and, finally 3 (7%) are indicted with SGBC charges (Phénéas Munyarugarama, Aloys Ndimbati, and Ryandikayo) and referred to Rwanda's jurisdiction but they are still fugitives[201] as of May 2021. At the ICC, out of a total of 44 indicted persons, only 22 (50%) were charged for SGBC in their indictments. Of those 22, only 2 (9%) has so far been convicted at the trial stage (the appeal of Dominic Ongwen still ongoing as of May 2021);[202] 6 (27%) were acquitted of the SGBC charges;[203] 1(5%) died while still fugitive;[204] 4 (18%) charged with SGBC are currently on trial for as of May 2021;[205] 6 (27%) are indicted for SGBC charges but are still fugitives;[206] and, finally, 3 (14%) were initially charged but the charges were withdrawn from the indictments.[207]

As explained, the ICTY, ICTR, and ICC Statutes are landmark institutions in codifying SGBCs and establishing procedures to ensure that victims are adequately treated or cared for within the court's

[199] Figures were double-checked manually in May 2021, by comparing Kate Vigneswaran, Annex B: Charges and Outcomes in ICTY cases Involving Sexual Violence. In Prosecuting Conflict-Related Sexual Violence at the ICTY, edited by Serge Brammertz and Michelle Jarvis. Oxford: Oxford University Press, 2016, pp. 429-48, and the latest figures of the ICTY cases available at https://www.icty.org/en/cases. As Brammertz and Jarvis' book dates back to 2016, all the cases that, at the time, were still at trial or appeal level were double-checked and the outcome is now shown in the list.

[200] Figures were double checked manually in May 2021, by comparing the latest figures of the ICTR cases updated October 2019 available at https://unictr.irmct.org/sites/unictr.org/files/publications/ictr-key-figures-en.pdf with the article written by Holá and Smeulers, supra note 198, and the United Nations Department of Peace-Keeping Operations, Review of the Sexual Violence elements of the Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the lights of UN SC Res. 1820, 2008, 2010, pp. 50-59, as well as individual cases analyzed throughout the research.

[201] Ibid.

[202] See Prosecutor v. Ntaganda, Case No. CC-01/04-02/06, Trial Judgment (08 July 2019).

[203] See Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Appeal Judgment (8 June 2018); Prosecutor v. Ngoudjo, Case No. No.: ICC-01/04-02/12, Trial Judgment (18 December 2012); Prosecutor v. Katanga, Case No. No.: ICC-01/04-01/07, Trial Judgment (7 March 2014); Prosecutor v. Gbagbo and Blé Goudé, Case No. ICC-02/11-01/15; Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10 (23 December 2011).

[204] Prosecutor v. Otti, Case No.ICC-02/04-01/05.

[205] See Prosecutor v. Al Hassan, Case No. ICC-01/12-01/18; Prosecutor v. Ongwen, Case No.ICC-02/04-01/15; Prosecutor v. Yekatom and Ngaïssona, Case No. ICC-01/14-01/18; Prosecutor v. Ali Kushayb, Case No.ICC-02/05-01/20.

[206] See Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09; Prosecutor v. Hussein, Case No.ICC-02/05-01/12; Prosecutor v. Mudacumura, Case No.ICC-01/04-01/12; Prosecutor v. Ahmad Harun, Case No. ICC-02/05-01/07; Prosecutor v. Joseph Kony, Case No.ICC-02/04-01/05; Prosecutor v. Simone Gbagbo, Case No. ICC-02/11-01/12.

[207] See Prosecutor v. Muthaura, Kenyatta and Hussein Ali, Case No. ICC-01/09-02/11 (23 January 2012). Figures were double-checked manually in May 2021 by consulting the list of cases available at https://www.icc-cpi.int/Pages/cases.aspx#Default=%7B%22k%22%3A%22%22%2C%22r%22%3A%5B%7B%22n%22%3A%22MngInitialOrderEN%22%2C%22t%22%3A%5B%22%5C%22%C7%82%C7%8257617272616e74206f66620617272657374%5C%22%22%5D%2C%22o%22%3A%22and%22%2C%22k%22%3Afalse%2C%22m%22%3Anull%7D%5D%7D#2ae8b286-eb20-4b32-8076-17d2a9d9a00e=%7B%22k%22%3A%22%22%7D

jurisdictions. These procedures form part of the essential pillar of the ICTY, ICTR, and Rome Statutes in the sections that define the crimes.[208] For instance, Article 7 (1)(g) of the Rome Statute lists rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity as a crime against humanity. Article 8(2)(b)(xxii) lists rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence as serious violations of the laws and customs of war (Grave Breaches of the GCs) applicable in international armed conflict. Article 8(e)(vi) lists rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence as a serious violation of Article 3 common to the four GCs within armed conflict not of an international character. Moreover, except for rape, it is for the first time that sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity are explicitly laid down in an international instrument as a crime against humanity and a war crime.[209] As stated above, all of these crimes are also listed and defined in the ICTR and ICTY Statutes.

The civil war in Sierra Leone between 1991-2002 and the reign of terror imposed by the Khmer Rouge in Cambodia between 1975 and 1979 led to the establishment of hybrid tribunals in these countries to try the persons most responsible for the commission of international crimes. The Special Court for Sierra Leone (SCSL) became the first treaty-based hybrid international war crime tribunal, resulting from a bilateral treaty, established pursuant to Security Council Resolution 1315(2000) of 14 August 2000, to prosecute persons who bore the greatest responsibility for serious violations of IHL, including war crimes and crimes against humanity, committed during the conflict in Sierra Leone.[210] Article 2(g) of the SCSL Statute lists rape, sexual slavery, enforced prostitution, forced pregnancy, and any other form of sexual violence as a crime against humanity. Article 3(e) lists outrages upon personal dignity, particularly humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault, as serious violations of Article 3 common to the GCs and APII. Its jurisdiction included crimes committed under the Sierra Leonian domestic law that constituted offenses relative to girls' abuses, namely the Prevention of Cruelty to Children Act of 1926[211] and offenses relative to the wanton destruction of property under the malicious Damage Act of 1861.[212]

[208] For more information on the definition of the crimes, see the sections on Jurisdiction, Admissibility and Applicable Law in Arts. 2, 3, 4, 5 ICTY Statute; Arts. 2, 3, 4 ICTR Statute; Arts 6, 7, 8 Rome Statute.
[209] Art. 7 (1)(g), Art. 8(2)(b)(xxii), and Art. 8(2)(vi), Rome Statute.
[210] UN SC Res. 1315, 14 August 2000.
[211] An Ordinance to Prevent Cruelty to Children in Sierra Leone, Chapter 3124 December 1926, stating that whosoever shall unlawfully and carnally know and abuse any girl under the age of thirteen, whether with or without her consent, shall be guilty of felony, and shall be liable on conviction before the Supreme Court to imprisonment, with or without hard labour, for any period not exceeding fifteen years.
[212] An Act to consolidate and amend the Statute Law of England and Ireland relating to Malicious Injuries to Property, 24 and 25 Vict.C.97, 6 August 1861 (these sections are mentioned in Art. 5(b) of the Statute of the Special Court for Sierra Leone).

The SCSL issued 13 indictments: 12 individuals associated with the Civil Defence Force (CDF),[213] Armed Forces Revolutionary Council (AFRC),[214] and Revolutionary United Front (RUF),[215] and 1 against Charles Taylor,[216] former Head of State of the neighboring country of Liberia. The court charged 10 out of the 13 accused with crimes against humanity of rape and sexual slavery and the war crime of outrages upon personal dignity.[217] The court also charged 6 of the accused with forced marriage under the crime against humanity of other inhumane acts.[218] The *RUF* Trial Judgment represents the first-ever international conviction for the crime against humanity of sexual slavery and forced marriage (as an inhumane act).[219] The *RUF* Trial Chamber began its analysis of sexual slavery by noting that the inclusion of this prohibited act, first in the Rome Statute and then in the SCSL's Statute, codified actions that were already criminal.[220] This codification was 'designed to draw attention to serious crimes that have been historically overlooked and to recognize the particular nature of sexual violence that has been used, often with impunity, as a tactic of war to humiliate, dominate, and instill fear in victims, their families, and communities during armed conflict.'[221] The Trial Chamber went on to identify three elements of crimes of sexual slavery: (i) the accused exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending, or bartering such a person or persons, or by imposing on them a similar deprivation of liberty; (ii) The accused caused such a person or persons to engage in one or more acts of a sexual nature; and (iii) The accused intended to exercise the act of sexual slavery or acted in the reasonable knowledge that this was likely to occur.[222] The first two elements replicate those found in Articles 7(1)(g)2, 8(2)(b)(xxii)-2, 8(2)(e)(vi)-2 of the EoC,[223] with a slight change of the ICC's wording "perpetrator" to the term "accused." The *AFRC* Trial Chamber also adopted this approach.[224] Still, neither the *RUF* nor the

[213] Civil Defence Force indictees include Sam Hinga Norman, Monina Fofana, and Allieu Kondewa.
[214] Armed Forces Revolutionary Council indictees include Johnny Paul Koroma, Alex Tamba Brima, Brima Bazzy Kamara and Sntigie Borbor Kanu.
[215] Revolutionary United Front indictees include Foday Saybana Sankoh, Sam Bockarie, Issa Hassan Sesay, Morris Kallon and Augustine Gbao.
[216] See Prosecutor v. Taylor, Case No.: SCSL-03-01-T, Trial Judgment (26 April 2012). On 26 April 2012 the Trial Chamber found Charles Taylor guilty on all eleven counts (including rape and sexual slavery under counts 4 & 5 as crimes against humanity), on the modes of liability of Planning of crimes and for Aiding and Abetting of crimes committed by rebel forces in Sierra Leone. On 30 May 2012 the former Liberian president was given a single sentence of 50 years in prison. The Appeals Chamber upheld Charles Taylor's conviction and 50-year sentence.
[217] The ten charged with these crimes included Charles Taylor; three Armed Forces Revolutionary Council (AFRC) accused, including Brima, Kamara, Kanu; three Revolutionary United Front (RUF) accused including Sesay, Kallon, Gbao; Sam Bockarie, Johnny Paul Koroma, and Foday Sankoh. The indictments against Bockarie and Sankoh were later withdrawn due to their deaths. See Prosecutor v. Bockarie, Case No. SCSL-03-04-I, Indictment (7 March 2003), paras. 33, 41-45 (charging Sam Bockarie with rape, sexual slavery and any other form of sexual violence, and outrages upon personal dignity) withdrawn, Case No. SCSL 03- 04-I-022, Withdrawal of Indictment (8 December 2003) (withdrawing Bockarie's indictment due to his death).
[218] The AFRC accused and the three RUF accused were charged with forced marriage. See Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-T, Corrected Amended Consolidated Indictment (2 August 2006), paras. 54-60 (charging the RUF members with rape, sexual slavery and any other form of sexual violence, and other inhumane acts, specifically forced marriages where the "wives" were forced to perform a number of conjugal duties under coercion by their "husbands"); Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment (18 February 2005), paras. 51-57 (charging the three members of the AFRC with rape, sexual slavery and any other form of sexual violence, and other inhumane acts, specifically forced marriages with members of the AFRC).
[219] See Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao, Case No. SCSL-04-15-T, Trial judgment (2 March 2009).
[220] Ibid., paras. 154 – 56.
[221] Ibid., para. 156.
[222] Ibid., para. 158.
[223] Arts. 7(1)(g)2, 8(2)(b)(xxii)-2, 8(2)(e)(vi)-2, Elements of Crimes.
[224] See Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Trial Judgment (20 June 2007), para. 708. It is unclear why the AFRC Trial Chamber chose to follow the ICC's elements for sexual slavery but not its elements for rape. The Trial Chamber may have followed the ICC's elements for

AFRC Trial Chambers adopted the ICC's original footnote explaining the breadth of the term "deprivation of liberty."[225]

The Extraordinary Chambers in the Courts of Cambodia (ECCC) were established in 2004, pursuant to UN Commission on Human Rights Resolution 1997/49,[226] with mixed jurisdiction to prosecute the persons most responsible for the crimes and serious violations of Cambodian penal law, genocide, war crimes, and crimes against humanity, between 17 April 1975 and 6 January 1979.[227] The ECCC is the first internationalized court dealing with mass atrocities to grant victims the role of third parties to the proceedings, which created a unique opportunity to have victims become actively involved in the international or internationalized judicial process affecting them.[228] This is a good development because it allows the victims to participate directly or through their lawyers without seeking the chamber's permission. For instance, Rule 91.2 of ECCC Rules makes it possible for them to question witnesses or question the accused under Rule 90.2. However, the delay in developing a victim participation model led to uncertainties about the civil parties' procedural rights. The rules had to be amended several times, leading to the gradual improvements in victims' participation as civil parties to the proceedings.

Although there was a reluctance to investigate and prosecute SGBCs from the beginning,[229] the ECCC later included SGBC charges in four cases: case *001* (Kaing Guek Eav alias Duch), case *002* (Nuon Chea and Khieu Samphan), case *003* (Meas Muth), and case *004* (Yim Tith). SGBCs were not the focus of the original prosecutorial strategy during Kaing Guek Eav*'s* first trial in case *001*.[230] After lengthy awareness-raising and advocacy during the investigations stage by Civil Party lawyers, along with the discovery of evidence for the charge, the court included the factual allegations of forced marriages into the investigation after the Office of the Prosecutors (OCP) had filed an additional submission. The accused was tried and convicted

sexual slavery for two reasons: first, the ICC's Elements on Sexual Slavery are the only such elements codified in international criminal law; and second, the Special Court for Sierra Leone's Statute included sexual slavery due to the inclusion of this prohibited act in the Rome Statute.

[225] The Elements of Crimes include this footnote following the phrase "similar deprivation of liberty" in the first element: 'It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.' Art. 7 (1) (g)-2 footnote 18, Art. 8 (2) (b) (xxii)-2 footnote 53, Art. 8 (2) (e) (vi)-3, footnote 66, Elements of Crimes.

[226] UN Commission on Human Rights Resolution 1997/49 (11 April 1997); see also Commission on Human Rights Report on The Fifty-Fourth Session (16 March-24 April 1998).

[227] Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003, available at https://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf.

[228] See Silke Studzinsky, "Victims of Sexual and Gender-Based Crimes Before the Extraordinary Chambers in the Court of Cambodia: Challenges of the Rights to Participation and Protection." In Sexual Violence as an International Crime: Interdisciplinary Approaches, edited by Anne-Marie de Brouwer et al. Cambridge, UK: Intersentia, 2013, pp. 173-174; Elisa Hoven, Cases Before International Courts and Tribunals: Civil Party Participation in Trials of Mass Crimes: A Qualitative Study at the Extraordinary Chambers in the Courts of Cambodia. Journal of International Criminal Justice 12 (2014), pp. 81-107.

[229] Art. 3 new of Chapter II Competence of the ECCC, Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004. 'The Extraordinary Chambers shall have the power to bring to trial all suspects who committed any of these crimes set forth in the 1956 Penal Code, and which were committed during the period from 17 April 1975 to 6 January 1979.'

[230] The trial of Kaing Guek Eav alias Duch defendant in case 001 commenced in 2009. He served as former chairman of the Khmer Rouge S-21 Security Center in Phnom Penh under the Khmer Rouge regime.

for rape as torture committed in the S-21 prison. However, in February 2012, the Supreme Court Chamber overturned the Trial Chamber's Judgment on appeal. The Chamber recognized rape as a war crime under international law but not as a separate crime against humanity from April 1975 to January 1979.[231]

The crimes of forced marriage and rape within the context of forced marriage also appeared in the indictment against the accused in case *002* that involved Nuon Chea and Khieu Samphan. In this case, the closing order included one charge of rape as a crime against humanity, but only in the context of forced marriage. The co-investigating judges excluded rape in other contexts. They considered that sexual violence committed outside of forced marriage did not form part of the regime's common purpose; therefore, rape could not be attributed to Chea and Samphan. The Pre-Trial Chamber, adopting similar reasoning to the Supreme Court Chamber in Case *001*, concluded that rape did not constitute a separate crime against humanity in customary international law at the time the crimes were committed[232] and dismissed the charge of rape from the closing order. Later, the investigation of SGBCs was included in case *003*, involving Meas Muth, and in case *004*, involving Yim Tith, after the international Co-Prosecutor filed a supplementary submission requesting investigations. The Co-Prosecutor's Office requested that investigations of sexual violence and rape, both within and outside forced marriage, be held in key districts, including 'instances where women were raped before been executed and instances where they executed them for reporting rapes during the regime.'[233] Proceedings in these two cases were still ongoing as of 08 March 2021.

3. Sexual and Gender-Based Crimes Recognized in International Criminal Law as of Today

This section will discuss the forms and manifestations of SGBCs, including their evolution in ICL. It will analyze rape, sexual slavery, forced marriage, enforced prostitution, forced pregnancy, enforced sterilization, persecution based on gender, and any other form of sexual violence of comparable gravity.

3.1 Rape

Several studies have historically revealed that rape is the oldest recognized form of SGBCs, but it has usually not been prosecuted thoroughly as a crime.[234] It was not until the unspeakable abuse of thousands of women in Rwanda and the former Yugoslavia that shocked the international community and brought it into

[231] Case 001, Appeals Chamber Judgment (3 February 2012), para. 183.
[232] Case 002, Decision on appeal by Nuon Chea and Ieng Thirith against the Closing Order (Pre-Trial Chamber), 15 February 2011.
[233] Press Release, International Co-prosecutor requests investigation of alleged Sexual and Gender-Based Violence in Case 004, 24 April 2014, available at www.eccc.gov.kh/en/articles/internationalco-prosecutor-requests-investigation-alleged-sexual-and-gender-based-violence.
[234] See Christine Chinkin, Rape and Sexual Abuse of Women in International Law. European Journal of International Law 5, no.3 (1994), p. 326; Timothy Mccormack and Gerry Simpson, The Law of War Crimes: National and International Approaches. The Hague: Kluwer Law International, 1997, p. 210; Robert Cryer et al., An Introduction to International Criminal Law and Procedure. Cambridge: Cambridge University Press, 2007, p. 208.

rethinking the crucial need to vigorously prosecute rape as a crime under the laws of war.[235] This does not in itself mean evidence of rape had not been brought before a court of law or prohibited by international instruments before 1993. As explained in Section 2.1 of Chapter 2, the GCs implicitly prohibited SGBCs within the category of 'outrages upon personal dignity, particularly humiliating and degrading treatment[236] and explicitly as attacks on the women's honour.'[237] Therefore, it was only under the auspices of the ICTY and ICTR that the definition and recognition of rape as an international crime *per se* thoroughly advanced.[238]

However, before establishing these tribunals, rape had never been legally codified in any international instrument.[239] After their establishments, neither statute of the ICTY and ICTR provided a consistent or comprehensive definition of rape. Therefore, it became a task for the judges of the chambers to develop definitions of rape. The ICTY and ICTR sought, through the interpretation of case law,[240] to adopt a wide-reaching acceptable definition of rape. The ICTR Trial Chamber first discussed the subject matter in the *Akayesu* Judgment, which opted for a conceptual definition rather than a technical one, holding that rape is a form of aggression, the central elements of which 'cannot be captured in a mechanical description of objects and body parts.'[241] The Chamber, therefore, defined rape as:

> *'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."*[242] *"Sexual violence, [which includes rape], is any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."*[243]

The conceptual definition of rape preserved in *Akayesu* was first affirmed by the ICTY in *Delalic*,[244] while the ICTY adopted a more technical meaning in the *Furundzija* Judgment. The *Furundzija* definition is more

[235] See Meron, supra note 55, p. 205; see also Noelle Quinovet, Sexual Offences in Armed Conflict and International Law. Leiden, The Netherlands: Brill Nijhoff, 2005, p. 152.
[236] See, for example, Art. 3 common to the four Geneva Conventions; Geneva IV art. 147 GCIV; Art. 85(4)(c), API; Arts. 4(1) and (2)(a), APII; see also Bassiouni, supra note 86, p. 355.
[237] See, for example, Art. 27, GCIV; Art.76(1), API; Art. 4(2)(c), APII. See also Ilias Bantekas and Susan Nash, International Criminal Law. 2nd ed. London: Routledge-Cavendish, 2003, p. 365; Larissa Van den Herik, The Contribution of the Rwanda Tribunal to the Development of International Law. Leiden, The Netherlands: Brill Academic, 2005, p. 364.
[238] See e.g., Rules 34 and 96, ICTY Rules.
[239] See Carrie McDougall, "The Sexual Violence Jurisprudence of The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda: The Silence Has Been Broken but There's Still a Lot to Shout About." In The Challenge of Conflict: International Law Responds. edited by Ustina Dolgopol and Judith G. Gardam. International Humanitarian Law Series 13 (2006), p. 335; see also Bantekas and Nash, supra note 237, p. 364; Van den Herik, supra note 237, p. 192.
[240] See Van den Herik, supra note 237, p. 192.
[241] See Akayesu Trial Judgment, supra note 191, paras. 597, 687; see also e.g., Kriangsak Kittichaisaree, International Criminal Law. Oxford: Oxford University Press, 2001, p. 112.
[242] See Akayesu Trial Judgment, supra note 191, para. 688; Prosecutor v. Musema, Case No ICTR-96-13-A, Appeal Judgment (27 January 2000), para. 226.
[243] Ibid.
[244] See Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Trial Judgment (16 November 1998), para. 478.

"mechanical" as it involves an explicit description of acts and body parts, something that the judges did not do in *Akayesu*. The Chamber took this approach when deciding whether forced oral sex fell within the definition of rape[245] and wanted a specific description of rape to be in line with the *nullum crimen sine lege* principle.[246] The Chamber thus defined rape as:

> *'[….] the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; [….] by coercion or force or threat of force against the victim or a third person.'*[247]

The *Kunarac* Trial Chamber, while defining rape for the third time, relied on the existing definitions in *Akayesu* and *Furundzija*, although both descriptions did not have the element of consent. Therefore, the Chamber decided to take the mechanical approach[248] by adding consent as a necessary element to the definition of rape.[249] It noted that the lack of the element of consent in *Furundzija* created a gap in the law,[250] where a situation might exist in which someone might not consent to the sexual act without there being any coercion, force, or threat.[251] Thus, the Chamber widened the definition to include cases in which the victim was, *inter alia*, drugged or incapacitated.[252] It took this approach because the coercive element related to detention or captivity cases was lacking.[253] The two main conflicts between *Kunarac's* definition on the one hand and *Akayesu* and *Furundzija's*, on the other hand, is that the definitions are mechanical as opposed to conceptual[254] and consensual as opposed to coercive, respectively. *Kunarac* Chamber thus defined rape as follows:

> *'the sexual activity is accompanied by force or threat of force to the victim or a third party; the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly*

[245] See Wolfgang Schomburg and Ines Peterson, Genuine Consent to Sexual Violence under International Criminal Law. American Journal of International Law 101 (2007), pp. 121, 133.
[246] See Furundzija Trial Judgment, supra note 194, para. 177.
[247] Ibid, para. 185; see also Prosecutor v. Semanza, Case No ICTR-97-20-T, Trial Judgment (15 May 2003), para. 344.
[248] See Alison Cole, Prosecutor v. Gacumbitsi: The New Definition for Prosecuting Rape under International Law. International Criminal Law Review 8 (2008), pp. 81–82.
[249] See Prosecutor v. Kunarac et al., Case No. IT-96-23-T & IT-96-23/1-T, Trial Judgment (22 February 2001), para. 446; Anne-Marie de Brouwer, Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR. Cambridge, UK: Intersentia, 2005, p. 117.
[250] See Sandra Fabijanić, The Crime of Rape in the ICTY's and the ICTR's Case-Law. Zbornik Pravnog fakulteta u Zagrebu 60 (2010), p. 1323.
[251] See Kunarac et al. Trial Judgment, supra note 249, para. 438.
[252] See De Brouwer, supra note 249.
[253] See Kunarac et al. Trial Judgment, supra note 249, para. 542; Nina Tavakoli, A Crime That Offends the Conscience of Humanity: A Proposal to Reclassify Trafficking in Women as an International Crime. International Criminal Law Review 9 (2009), p. 86.
[254] See De Brouwer, supra note 249, p. 115.

vulnerable or negated her ability to make an informed refusal; or the sexual activity occurs without the consent of the victim.'[255]

Thus, rape, as a physical invasion of a sexual nature, must not be a matter of lack of consent by the victim, but there must have been duress or coercion. Further, the Trial Chamber in the *Akayesu* Judgment opined that coercion needs not be evidenced by a demonstration of physical force.[256] Threats, intimidation, psychological oppression, extortion, and other forms of duress that bring fear or desperation upon the victim or a third person may constitute the element of coercion.[257] Moreover, Article 6(e)-1 of the EoC states that coercion may be inherent to certain circumstances, such as armed conflict or detention.[258]

The ICTR *Gacumbitsi* case extensively discussed the definition of rape in ICL. The Appeals Chamber held that non-consent and the accused's knowledge thereof are elements of rape as a crime against humanity. Consequently, the prosecution bears the burden of proving this element beyond a reasonable doubt, which is very detrimental to the victim in light of secondary victimization. The prosecution may prove non-consent by proving the existence of coercive circumstances under which meaningful consent is impossible. Although rule 96 of the RPE refers to consent as a defense, this must be interpreted as merely defining the circumstances in which evidence of consent will be admissible.[259] Correspondingly, since rape does not necessarily involve sexual intercourse in the conventional sense, men may also be victims of rape. The ICTY held that forcing two men to perform fellatio on one another could constitute rape 'if pleaded appropriately.'[260] Forced penetration of a male victim's mouth by the genital organ, which humiliates and degrades the victim, could also constitute rape.[261]

Article 7 (1) (g)-1 of the Elements of Crimes and footnote 16 of Element 2 do mention consent, but in specific circumstances such as any physical invasion of a sexual nature of persons incapable of giving genuine consent, such as children or persons with a mental disability also constitutes coercion and thus rape.[262] However, there have been four ICC cases where "lack of consent" was rejected as an element of the

[255] See Kunarac et al. Trial Judgment, supra note 249, para. 442; Art. 7(1)(g)-1, element 1 and Art. 7(1)(g), Elements of Crimes; see also Claire De Than and Edwin Shorts, International Criminal Law and Human Rights. London: Sweet & Maxwell, 2003, p. 491; Cryer et al., supra note 234, p. 209 (explaining that the crime of rape has two elements: a physical invasion of a sexual nature and, secondly, the presence of coercive circumstances).
[256] See Akayesu Trial Judgment, supra note 191, para. 688.
[257] Ibid.
[258] Art. 6(e)-1, Elements of Crimes. Genocide by forcibly transferring children; See also footnote 5 of Element 1, which states that the term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.
[259] See Prosecutor v. Gacumbitisi, Case No. ICTR-2001-64-A, Appeal Judgment (7 July 2006), paras. 153-157.
[260] See Prosecutor v. Delalic et al., Case No IT-96-21-A, Appeal Judgment (20 February 2001), para. 1066.
[261] Ibid.; see also Elizabeth Odio-Benito, "Sexual Violence as a War Crime." In The New Challenges of Humanitarian Law in Armed Conflicts, edited by Pablo Antonio Fernández Sánchez. Leiden, The Netherlands: Nijhoff, 2005, p. 168 (stating that oral rape is 'the worst humiliation and the most disgraceful assault against human dignity', quoting the Prosecutor v. Furundzija Trial Judgment with approval).
[262] Art. 7 (1) (g)-1, Elements of Crimes; see also footnote 16 of Element 2, which states that it is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of Art. 7(1)(g)-3, 5 and 6.

crime. For instance, in *Lubanga*, the Trial Chamber rejected the defense of consent of a child under fifteen of using, conscripting, or enlisting children as soldiers. However, it noted that 'the manner in which a child was recruited, and whether it involved compulsion or was "voluntary, are circumstances that may be taken into consideration by the Chamber at the sentencing reparations phase, as appropriate. Still, a child's consent to his or her recruitment does not provide an accused with a valid defense.'[263] Also, in *Katanga*, the Trial Chamber rejected the defense of consent, noting that 'save the very specific situation of a person whose "incapacity" was "taken advantage of", the EoC does not refer to the victim's lack of consent, and therefore the prosecutor need not prove this.'[264] The *Bemba* Trial Chamber[265] and the *Ntaganda* Trial Chamber[266] endorsed the same reasoning. The issues discussed in these cases have the effect of undermining or constraining the victims' free will; therefore, the absence of consent should be presumed and need not be independently proven. Indeed, the judges stated that the prosecution need not prove consent in these circumstances and rejected consent as an element of the crime. There is a need for a consistent interpretation by the ICC judges when consent may be considered a defense. The judges must be guided in their interpretations by the principles enshrined in rules 70(a-c), all of which state that consent cannot be inferred where there was a coercive environment or circumstances.[267]

3.2 Sexual Slavery and Forced Marriage

Article 7(1)(g)-2 of the EoC defined sexual slavery as a phenomenon where the perpetrator(s) exercises any or all of the powers attaching to the right of ownership over one or more persons. These include purchasing, selling, lending, or bartering such a person or persons or imposing a similar deprivation of liberty.[268] Commission of sexual slavery could involve multiple perpetrators who form part of a common criminal design and the *actus reus* includes human trafficking.[269] Victims of this crime are treated as personal property, including submitting them to activities of a sexual nature at the perpetrator's pleasure. Sexual services are offered forcefully and may amount to forced labor under the 1930 Forced Labour Convention. These acts include all work or services extracted from any person under the menace of any penalty for which

[263] See Prosecutor v. Lubanga, Case No.: ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute (14 March 2012), para. 617
[264] See Katanga Trial Judgment, supra note 203, para. 965.
[265] See Prosecutor v. Bemba, Case No.: ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute (21 March 2016), paras. 105-6
[266] See Ntaganda Trial Judgment, supra note 202, paras. 933-35.
[267] Rules 70(a-c), ICC Rules; Namely: (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent; (b) Consent cannot be inferred by reason of any words of conduct of a victim where the victim is incapable of giving genuine consent; (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence; see also Goldstone, supra note 82, p. 284 (citing Rule 96, ICTY and ICTR Rules, both of which deal with consent).
[268] Art. 7(1)(g)-2, Elements of Crimes; see also David Weissbrodt, Joan Fitzpatrick, and Frank Newman, International Human Rights Law, Policy and Process. 3rd ed. Cincinnati, OH: Anderson, 2001, p. 789; see De Than and Shorts, supra note 255.
[269] See De Than and Shorts, supra note 255, p. 516; see also Julia Chill and Susan Kilbourne, "The Rights of the Girl Child." In Women, Gender, and Human Rights, edited by Marjorie Agosin. New Brunswick, NJ: Rutgers University Press, 2001, p. 165.

the person has not offered himself or herself voluntarily.[270] In this light, if the perpetrator causes the victim to engage in acts of sexual nature as providing or part of providing services, the sexual element (element 2) in this case would be satisfied.

Sexual slavery is not a new phenomenon. Combatants and rebel militias have practiced it in armed conflicts for a long time.[271] The United Nations report that 'internally displaced women and girls in areas controlled by armed or terrorist groups are particularly vulnerable to sexual violence, including in the context of sexual slavery. Local populations may be trafficked for sexual exploitation by armed and non-armed groups.'[272] For instance, as explained in Section 2.4 of Chapter 2, the Japanese Government and the military forced at least 200,000 "comfort women" into sexual slavery during WWII.[273] Further, during the 1994 Rwandan genocide, Tutsi women were acquiesced into forced temporary marriages and sexual services to their so-called 'husbands,' not only to save themselves or their relatives from the on-going genocide but because they were also forced.[274] The SCSL *AFRC* Appeals Chamber distinguished forced marriage from sexual slavery. It described forced marriage as a situation where the perpetrator obliges someone by force, the threat of force, or coercion to enter into a conjugal relationship leading to serious suffering or physical, mental, or psychological harm to the victim.[275] It added that 'while forced marriages may involve nonconsensual sex and deprivation of liberty (same as the elements of sexual slavery), they have additional elements. The elements include forced conjugal association resulting in great physical and mental suffering and a relationship of exclusivity between the "couple," with potential disciplinary repercussions for breach of the arrangement.[276] This implied that forced marriages, unlike sexual slavery, were not predominantly a sexual crime. Therefore, they should be separated from sexual slavery and treated as a separate international crime.[277]

Forced marriage broke new ground in 2005 when the SCSL[278] recognized that it amounted to an inhumane act, requesting the prosecution to amend the indictment and include the charge of forced marriage as a crime against humanity against the three accused in the *Brima et al.* case.[279] The *Brima et al.* Appeals Chamber

[270] Art. 2(1), Forced Labour Convention, No. 29, 1930; De Than and Shorts, supra note 255, p. 264; see also Bantekas and Nash, supra note 237, p. 115.
[271] United Nations Office on Drugs and Crime, Countering Trafficking in Persons in Conflict Situations - Thematic Paper, 2018, p. 10, <available at https://www.unodc.org/documents/human-trafficking/2018/17-09063_Briefing_Note_TIP_in_conflict_A4_Ebook.pdf.> accessed 23 September 2020.
[272] Ibid.
[273] See Arakawa, supra note 133.
[274] See Kittichaisaree, supra note 241, p. 113; see also Chakravarty Anuradha, "Inter-ethnic Marriages, the Survival of Women, and the Logics of Genocide in Rwanda." Genocide and Prevention: An International Journal 2, no. 3, Art. 4 (2007), p. 238.
[275] See Prosecutor v. Brima et al., Case No. SCSL-2004-16-A, Appeal Judgment (22 February 2008) paras. 195-196. See also Neha Jain, Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution. Journal of International Criminal Justice 6 (2008), pp. 1013, 1021.
[276] See Brima et al. Appeal Judgment, supra note 275.
[277] Ibid.; see also Jain, supra note 275.
[278] The SC-SL was established by the United Nations and the Government of Sierra Leone to try those bearing the greatest responsibility for serious violations of international humanitarian law that have occurred within Sierra Leone's territory since 30 November 1996.
[279] See Prosecutor v. Brima, Case No. SCSL-2004-16-PT, Decision on Prosecution Request for Leave to Amend the Indictment, 6 May 2004.

handed down a Judgment considering, for the first time, forced marriage as a crime against humanity.[280] The majority of the Trial Chamber dismissed the charge for duplicity, reasoning that the evidence indicated that the crime of sexual slavery completely subsumed the crime of forced marriage.[281] In 2008, the Appeals Chamber reversed that decision and convicted the three accused of forced marriage for a distinct inhumane act that constituted a crime against humanity.[282]

The concept of forced marriage is not unique to Sierra Leone. In Rwanda, for example, Hutu males often forced Tutsi females to marry them. Instead of killing the females, the Hutu males would take them home and force them to perform household duties and sexual acts.[283] One woman described the actual wedding: 'In a bizarre "marriage ceremony,"[284] of which the militia leader officiated over four marriages of young females between the ages of sixteen and nineteen years to members of his militia group.'[285] Moreover, in Cambodia between 1975 and 1979, forced marriage was introduced by the Khmer Rouge as a policy. As explained by Haenen, 'marriages by the Khmer Rouge regime especially after 1976 were often devoid of family involvement and were conducted *en masse*, usually without the parents or other family members of the spouses.[286] Refusal could be met with severe punishment, such as imprisonment, torture, rape or death, depending on the status of the individual (base person or new person, soldier or civilian) and how strict the local Communist Party was.'[287] The marriage served as a reward and compensation system for soldiers. Soldiers who contributed to the revolution, including amputees, were allowed to choose a husband or wife.[288] Oosterveld draws attention to how the SCSL's Prosecutor secured an indictment, charging the three members of the *RUF* case with a crime against humanity of other inhumane acts (under which the act of forced marriage was considered).[289] This was the first-ever conviction in an international or internationalized tribunal for forced marriage as a crime against humanity (as an inhumane act).[290]

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[280] See Brima et al. Appeal Judgment, supra note 275, paras. 175-203; Brima et al. Trial Judgment, supra note 224, para. 713.
[281] See Brima et al. Trial Judgment, supra note 224, para. 713.
[282] See Brima et al. Appeal Judgment, supra note 275, paras. 175-203.
[283] For example, the indictment against Jean-Paul Akayesu was amended to include rape after a witness testified about sexual assault. This amendment resulted from pressure from Judge Pillay and human rights groups. Diane Amann, Prosecutor v. Akayesu, American Journal of International Law, vol. 93, no 1 (1999), p. 58.
[284] See Monika Kalra, Forced Marriage: Rwanda's Secret Revealed. Davis Journal of International Law & Policy 7 (2001), p. 201 (but forced marriages also encompassed situations in which the actual ceremony was not performed).
[285] Ibid.
[286] For detailed discussion, see Iris Haenen, Force and Marriage: The Criminalization of Forced Marriage in Dutch, English, and International Criminal Law. Cambridge, UK: Intersentia, 2014, p. 91. See also Haing S. Ngor, Surviving the Killing Fields. The Cambodian Odyssey of Haing S. Ngor, Pan Books, 1989, p. 292.
[287] See Haenen, supra note 286. See also Peg LeVine, Love and Dread in Cambodia: Weddings, Births, and Ritual Harm under the Khmer Rouge. Singapore: National University of Singapore Press, 2010, p. 122; Nakagawa Kasumi, Gender Based Violence During the Khmer Rouge Regime: Stories of Survivors from the Democratic Kampuchea (1975–1979). 2nd ed. Phnom Penh: Nakagawa Kasumi, 2008, pp. 18–19, 44; Kaylanee Mam, "The Endurance of the Cambodian Family under the Khmer Rouge Regime: An Oral History." In Genocide in Cambodia and Rwanda: New Perspectives, edited by Susan. E. Cook. New Brunswick, NJ: Transaction, 2006, p. 139.
[288] See Haenen, supra note 286, p. 92. See also LeVine, supra note 287, p. 97; Kasumi, supra note 286, p. 19.
[289] For detailed discussion, see Valerie Oosterveld, The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments. Cornell International Law Journal 44 (2011), p. 50. See also Prosecutor v. Sesay et al., Case No. SCSL-04-15-PT, Corrected Amended Consolidated Indictment (2 August 2006), para. 60.
[290] See Prosecutor v. Sesay et al., Case No. SCSL-04-15-A, Appeal Judgment (26 October 2009), para. 19; Hannah Baumeister, Forced Marriage Real Simple. Journal of Human Trafficking, Enslavement and Conflict-Related Sexual Violence 1, no.1 (2020), pp. 25-47.

In defining forced marriage, the SCSL Prosecutor incorporated the broader conception of coercion and consent as adequate to achieve the aim of recognizing the specific effects of the conferral of the status of marriage on the victim, whether that victim is male or female. In so doing, the Prosecutor defined forced marriage as:

> *'Words or other conduct intended to confer a status of marriage by force or threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against the victim, or by taking advantage of a coercive environment, with the intention of conferring the status of marriage.'*[291]

This definition means that, what might appear a choice for victims during armed conflict may, in reality, not come from valid or true consent. While some people were forced directly and physically or threatened with force, others married to ward off starvation or obtain protection against rape or murder.[292] On this, Justice Doherty points to an "overwhelming environment of coercion" to indicate that even if the victims received some benefits, it was not enough to prove consent under the circumstances.[293] She argues further that a victim's decision to remain in the union does not in itself mitigate the criminality of the original act, stating 'I am of the opinion that a decision to remain in the forced marriage or its transformation into a consensual situation does not retroactively negate the original criminality of the act.'[294]

The recognition of sexual slavery and forced marriage as two independent crimes is a positive development in ICL. The distinction is that, in the crime of sexual slavery, the perpetrator's control over the victim comes from attaching the right of ownership to the victim. In contrast, in forced marriages, the perpetrator obtains control over the victim by attaching a spouse's obligations to the victim. The victim of forced marriage is bound by the force exerted over her by the perpetrator and the shift in legal, social, religious rights, and the status arising from that marriage.[295] As forced marriage sometimes leads to sexual slavery or enslavement, Sellers notes 'these crimes could also be charged under the general heading of "enslavement" which perhaps

[291] See Brima et al. Trial Judgment, supra note 224, para. 701.
[292] Ibid.
[293] Ibid., para. 590. Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 ('Forced Marriages'). Note that Justice Doherty went on to consider forced marriage as a crime against humanity, concluding, at ibid., para. 594 (by vitiating the will of one party and forcing him or her to enter into and remain in a marital union the victim is subject to physical and mental suffering the phenomenon of forced marriage transgresses the internationally accepted conventions that both parties must consent to a marriage. It is contrary to principles of criminal law shared by common law and civil law systems alike, as well as Islamic law and the legal systems of some Asian and African states. I consider, on the evidence before me, that the act of forced marriage is of similar gravity and nature to the other enumerated crimes against humanity and that the act causes serious bodily or mental harm. Accordingly, I consider and hold that forced marriage constitutes a crime against humanity).
[294] Ibid, para. 45. Separate Opinion of Justice Doherty.
[295] See Michael Scharf and Suzanne Mattler, "Forced Marriage: Exploring the Viability of the Special Court for Sierra Leone's New Crime against Humanity." Case Research Paper Series in Legal Studies Working Paper 05-35 (October 2005), pp. 18-19; Elena Gekker, Rape, Sexual Slavery, and Forced Marriage at the International Criminal Court: How Katanga Utilizes a Ten-Year-Old Rule but Overlooks New Jurisprudence. Hastings Women's Law Journal 25 (2014), p. 105.

best describes and captures the reality and the entirety of the crimes.'[296] In terms of evidence, the problem will be separating the sexual nature of the crime from the perpetrator's intent to form true marital relations. As discussed throughout this study, it is problematic to subsume a separate charge under a different heading based on the same facts. Thus, as the definitions of sexual slavery and forced marriage are different, or even if the legal elements of forced marriage are included within the legal elements of sexual slavery or enslavement, these crimes may not concur on the basis of the same facts.

3.3 Enforced Prostitution

Article 8 (2) (b) (xxii)-3 and Article 7 (1) (g)-3 EoC provide the first explicit prohibition by an international criminal court or tribunal on enforced prostitution as both a war crime and a crime against humanity.[297] The 1919 Peace Conference Commission Report mentioned it as a violation of the laws of humanity.[298] Article 27 GCIV recognized the need for women to be protected against attacks on the woman's honor, such as enforced prostitution, but not explicitly referred to it as a Grave Breach of the GCs.[299] Further, at the national level, the crime was also punishable, for instance, under Australian and Chinese war crimes laws of 1945 and 1946.[300] Both API and APII to the GCs also referred to enforced prostitution as one of the prohibited acts,[301]while the 1996 Draft Statute of the International Law Commission listed it and other SGBCs as crimes against humanity.[302] Enforced prostitution has been described as a form of sexual slavery or enslavement and one of the first SGBCs prohibited under international law.[303] The difference is that sexual slavery does not require a commercial exchange or pecuniary advantage in exchange for the conduct, contrary to the crime of enforced prostitution.[304] Moreover, if most so-called "forced prostitution" during armed conflict constitutes sexual slavery, there might be situations where it is not the case. Therefore, enforced prostitution could include these "less then slavery-like conditions" and, in this sense, could cover

[296] For more discussion, see Patricia Viseur Sellers, Wartime Female Slavery: Enslavement? Cornell International Law Journal 44 (2011), pp. 115, 118.
[297] See Art. 8 (2) (b) (xxii)-3 and Art. 7 (1) (g)-3, Elements of Crimes.
[298] See Boot, supra note 83, pp. 206-207 (citing the 1919 Peace Conference Commission Report).
[299] Ibid, p. 207; see also Eve La Haye, "Article 8(2)(b)(xxii): Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilization, and Sexual Violence." In the International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, edited by Roy S. Lee. Ardsley, NY: Transnational, 2001, p. 192 (highlighting that 'enforced prostitution appears in Art. 27(2) of Geneva Convention IV" as an attack upon personal dignity and causing "humiliating and degrading treatment').
[300] See the Commonwealth of Australia War Crimes Act of 1945, V Law Reports 94-95 (1948), and Chinese Law Governing the Trial of War Criminals of 24 October 1946, 14 Law Reports of Trials of War Criminals 154 (1949) (determining that under Australian and Chinese law the abduction of women and girls for the purpose of prostitution was defined as a crime).
[301] See Boot, supra note 83, p. 207 (citing Art. 75(2)(b) API, prohibiting at all times outrages upon personal dignity, enforced prostitution, and any form of indecent assault, Art. 76 API, claiming special protection of women from rape, forced prostitution and any other form of indecent assault, neither of which are Grave Breach provisions. Art. 4(2)(e) II, outrages upon personal dignity, in particular, rape, enforced prostitution or any other form of indecent assault, which extends protections of common Art. 3 to the GCs).
[302] Ibid., p. 208.
[303] Ibid, p. 212 (referring to the argument made by the U.N. Slavery Special Rapporteur 'that sexual slavery encompasses most, if not all form of "forced prostitution," which 'generally refers to conditions of control over a person who is coerced by another to engage in sexual activity'). The U.N. Slavery Special Rapporteur observes 'that older definitions of enforced prostitution are nearly indistinct from definitions that more accurately describe the condition of slavery.'
[304] See Valerie Oosterveld, Sexual Slavery and the International Criminal Court: Advancing International Law. Michigan Journal of International Law 25 (2004), p. 646. The crimes require "the perpetrator or another person" to obtain or expect to obtain pecuniary or advantages in exchange of the sexual conduct, see sub-paragraph 2, Art. 7(1)(g)-3, Elements of Crimes.

situations that would fall outside of the prohibition of sexual slavery.[305] During wartime, women may be forced to be raped by several militias in exchange for their safety or for the protection of others that follow them or just to survive. While the women would not, strictly speaking, be prostitutes, they would be compelled to have sexual intercourse in exchange for something valuable for one or more men in a dominant power position. However, even in instances where women are free to go home at night or even to escape, the threatening and controlling armed conflict environment might make them sex slaves the same.[306] Therefore, in terms of evidence, the judges need to interpret the facts to clearly distinguish the elements of forced prostitution from sexual slavery from the perspectives of the women victimized by these crimes.

3.4 Forced Pregnancy

Although the concept of forced pregnancy as a crime is a relatively new one,[307] forced impregnation had been used in the past as a tool of integration or subjugation of the enemy, minority, or slave populations.[308] In the past, the ancient Athenians used it against the Melians,[309] and in more recent times, 'thousands of outcast children were born as a result of the rapes of Bengali women by the West Pakistani army.'[310] Nevertheless, it was not until the 1990s when the mass rapes in Bosnia and Rwanda caught legal scholars' attention.[311] The issue of forced pregnancy also began to capture public consciousness.[312] Estimates differ, but victims of rape gave birth to an estimated 2,000 - 5,000 "children of hate"[313] in Rwanda and about 400 - 600 in Bosnia.[314]

The establishment of the ICC fortified the stance on forced pregnancy as an international crime. Article 7(2)(f) Rome Statute defines forced pregnancy as 'the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other violations of international law.'[315] In practice, confinement is how the perpetrator will prevent the victim

[305] Ibid, p. 621, referring to Women's Caucus for Gender Justice at the ICC negotiation (Paper 1997).
[306] Ibid, referring to Women's Caucus for Gender Justice at the ICC negotiation (Paper 1997); Women's Caucus for Gender Justice in the International Criminal Court: "rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization and other sexual and gender violence...." Women's Caucus for Gender Justice in the International Criminal Court, Recommendations and Commentary for December 1997 Prep. Com., Part III: War Crimes, Recommendation 11 (1-12 December 1997).
[307] See Kristen Boon, Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent. Columbia Human Rights Law Review 32 (2001), pp. 625, 656.
[308] See Robyn Carpenter, Forced Maternity: Children's Rights and the Genocide Convention. Journal of Genocide Research 2, no. 2 (2000), p. 656.
[309] Ibid, p. 223; see also Milan Markovic, Vessels of Reproduction: Forced Pregnancy and the ICC. Michigan State Journal of International Law 16 (2007), p. 439.
[310] See Carpenter, supra note 308, p. 223.
[311] Ibid, p. 431 ('Overnight, it seemed the plight of Bosnian women had become a domestic issue to American feminists'); see also Catharine MacKinnon, Rape, Genocide, and Women's Human Rights. Harvard Women's Law Journal 17 (1994), p. 5; Beverly Allen, Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina And Croatia. Minneapolis: University of Minnesota Press, 1996; Siobhan Fisher, Occupation of the Womb: Forced Impregnation as Genocide. Duke Law Journal 46 (1996), p. 91.
[312] See Carpenter, supra note 308, p. 223.
[313] For explanation of this term, see, generally, Carpenter, ibid, p. 223.
[314] Ibid, p. 223; see also Markovic, supra note 309, p. 439; Soh Jessie, Forced Pregnancy: Codification in The Rome Statute and its Prospect as Implicit Genocide. New Zealand Journal of Public and International Law 4 (2006), p. 33.
[315] Art. 7(2)(f), Rome Statute.

from terminating the pregnancy, including physical lock-up of the victim in a room and other coercive circumstances.[316]Article 7(1)(g)-4 EoC crime against humanity provision of forced pregnancy clarifies that the prosecutor must establish that the perpetrator confined one or more women forcibly made pregnant with the intent of affecting the ethnic composition of the population or carrying out other grave violations. The prosecutor must also establish that the conduct was committed as part of a widespread or systematic attack directed against a civilian population. For knowledge, the prosecutor must prove that the perpetrator knew the conduct was part of or intended it to be part of a widespread or systematic attack directed against a civilian population[317]or carrying out other grave violations.[318] Forced pregnancy is also prosecuted under Article 8(2)(b)(xxii) of the Rome Statute's war crimes provision. Even if the genocide provision did not explicitly treat it as such, one could still argue that forced pregnancy can constitute genocide under Article 6(e) or (d).[319]

The definition of forced pregnancy in Article 7(2)(f) Rome Statute makes clear that the *actus reus* of the crime of forced pregnancy is not the rape and impregnation itself[320] but rather the "unlawful confinement."[321] The perpetrator of forced pregnancy is the person who confined 'one or more women forcibly made pregnant,'[322] not the one who necessarily committed the rape.[323] As Boon notes, 'the legal harm of forced pregnancy is that women are kept pregnant through confinement.'[324] The confinement must also be "to a certain location,"[325] and the crucial period is between the time a woman is pregnant and the termination of the pregnancy.[326] From the reading of this element, it would seem there is a dual character of the *actus reus* of forced pregnancy, consisting of rape followed by imprisonment or confinement.[327] Therefore, while it is essential to prosecute the person who confined the women, the principle of individual guilt requires that the person who physically commits the rape (without which the perpetrator would not have achieved the objective) should be held accountable.[328]

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[316] See Guenael Mettraux, International Crimes: Law and Practice: Vol. 2: Crimes Against Humanity. Oxford: Oxford University Press, 2020, p. 777.
[317] Art. 7(1)(g)-4, Elements of Crimes.
[318] Art. 8, (2)(b)(xxii)-4, Elements of Crimes.
[319] Art. 6(e) or (d), Rome Statute; Allen, supra note 311; MacKinnon, supra note 311, p. 11.
[320] See Boon, supra note 307, p. 660.
[321] Art. 7(2)(f), Rome Statute ("Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant).
[322] Arts. arts. 7(1)(g)(4)(1), 8(2)(b)(xxii)(4)(1), Elements of Crimes.
[323] See. e. g. Jonathan Short, Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court. Michigan Journal of Race and Law 8 (2003), pp. 503, 512 ('Forced pregnancy is accomplished by impregnating a woman, whether by rape or other medical means, with the sperm of a man of a different ethnicity'); see also Robyn Carpenter, Surfacing Children: Limitations of Genocidal Rape Discourse. Human Rights Quarterly 22, no.2 (2000), pp. 445-449 (discussing how MacKinnon and others failed to differentiate forced impregnation from forced pregnancy).
[324] See Boon, supra note 307, p. 660.
[325] Arts. 8(2)(a)(vii)(2)(1), Elements of Crimes.
[326] See Boon, supra note 307, pp. 662-63.
[327] Annexes to the Final Report of the United Nations Commission of Experts Established Pursuant to UN SC Res. 780 (1992), S/1994/674/ Add. 2 (vol. II) 28 December 1994, p. 336, para. 1021, citing John Burns, 150 Muslims Say Serbs Raped Them in Bosnia. New York Times. IHRLI Sarajevo Source File, 3 October 1992.
[328] For a recent critical analysis of the concept of individual criminal responsibility in international law, see Gideon Boas, "Individual Criminal Responsibility." In Future Perspectives on International Criminal Justice, edited by Carsten Stahn and Larissa van den Herik. The Hague: T.M.C. Asser, 2010, pp. 501-519.

3.5 Enforced Sterilization

The crime of enforced sterilization was defined in Article 7(1)(g)-5 EoC. It entails that: 'The perpetrator deprived one or more persons of biological reproductive capacity, and that the conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.'[329] It is understood that "genuine consent" does not include consent obtained through deception[330] of which the second Element notes that necessary medical treatment and genuine and informed consent exclude the crime.[331] De Brouwer asserts that the removal of genitalia would be sufficient to prove the deprivation of biological reproduction and considers that acts of rape or the insertion of objects may under certain circumstances also satisfy this criterion: 'While this may include the surgical removal of the reproductive organs (including the cutting off or taking out of genitals), it could also include cases where women have been raped so viciously that their reproductive system has been destroyed. In these instances, the penetration as provided for in the other enumerated crimes of Article 7(1)(g) is surely existent. Also, the insertion of objects in order to sterilize a person can be considered penetration.'[332]

Footnote 19 to Element 1 states that 'deprivation is not intended to include birth–control measures which have a non-permanent effect in practice.'[333] However, some scholars argued that footnote 19 is questionable and inconsistent with international law since such measures violate one's right to self-determination based on the principle of personal autonomy and may even amount to genocide if carried out with the required specific intent to destroy.[334] The second element of the *actus reus* states that conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.[335] This element has two components: the deprivation of a person's biological reproductive capacity without any justified medical reason or the person's genuine medical consent.[336] On this issue, Cottier and Mzee agree that sterilization may be justified on health grounds but would still amount to a crime if it were conducted without the consent of the victim.[337]

According to Element 3 of Article 7(1)(g)-5 EoC, enforced sterilization may constitute a crime against humanity if the conduct was committed as part of a widespread or systematic attack directed against a

[329] Art. 7(1)(g)-5, Elements of Crimes.
[330] Element 2, footnote 20 of Art. 7(1)(g)-5, Elements of Crimes; For further discussion on this subject, see Michael Cottier and Sabine Mzee, "Article 8(2)(b)(xxii)." In The Rome Statute of the International Criminal Court: A Commentary, edited by Otto Triffterer and Kai Ambos. 3rd ed. Munich: C. H. Beck/Hart/Nomos, 2016, p. 500.
[331] Element 2, Art. 7(1)(g)-5, Elements of Crimes.
[332] See De Brouwer, supra note 247, pp. 148-149, referring to footnote 291.
[333] Element 1, footnote 19 of Art. 7(1)(g)-5, Elements of Crimes. See also Cottier and Mzee, supra note 330, p. 500.
[334] See Kai Ambos, Treatise on International Criminal Law, Vol. 2: The Crimes and Sentencing. Oxford: Oxford University Press, 2014, p. 103; Boot, supra note 83, p. 52.
[335] Element 2, Art. 7(1)(g)-5, Elements of Crimes.
[336] See De Brouwer, supra note 249, pp. 172-173.
[337] See Cottier and Mzee, supra note 330, p. 500.

civilian population.[338] The perpetrator must have known that the conduct was part of or intended to be part of a widespread or systematic attack directed against a civilian population.[339] This crime may also include, for example, policies of racial hygiene and medical experiments on prisoners, both practiced by the Nazi regime.[340] Article 8(2)(b)(xxii)-5 EoC states that the crime of enforced sterilization may as well constitute a war crime if carried out in the context of an armed conflict, and the prosecutor needs to prove the link between the crime and the armed conflict itself.[341] From the discussion above, consent is the central element, and there are several human rights implications to consider in this regard. For instance, performing sterilization without informed consent could violate the victim's rights, among other things, to dignity, humane treatment, health, family, privacy, and to freely decide the number and spacing of children.

3.6 Gender-Based Persecution

Gender-based persecution as a crime against humanity was first codified in the Rome Statute and EoC.[342] Articles 7(1)(h) and 7(2)(g) prohibit persecution 'against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, and gender grounds. It also applies to other grounds that are universally recognized as impermissible under international law in connection with other crimes against humanity or crimes within the jurisdiction of the Court.'[343] "Gender" was first included as a prohibited ground of persecution in the Rome Statute's crimes against humanity draft text in February 1997, following international refugee law's recognition of gender as grounds for persecution.[344]At that time, the term "gender" was put in "brackets"[345] as part of the debate over whether to include an illustrative (open-ended) list of prohibited grounds of persecution or an exhaustive (closed) list.[346] A lengthy negotiation on the description of "gender"[347] led to the acceptance of gender as a prohibited ground within the crime of

[338] Elements 3, Art. 7(1)(g)-5, Elements of Crimes.
[339] Elements 4, Art. 7(1)(g)-5, Elements of Crimes.
[340] See Gerhard Werle, Principles of International Criminal Law. The Hague: Asser, 2009, p. 885; see also Boot, supra note 297, p. 52.
[341] Art. 8 (2) (b) (xxii)-5, Elements of Crimes.
[342] Art. 7(1)(h), Elements of Crimes.
[343] Art. 7(1)(h), Elements of Crimes and 7(2)(g), Rome Statute.
[344] See Valerie Oosterveld, The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice? Harvard Human Rights Journal 18 (2005), p. 59; see also Preparatory Commission on the Establishment of an International Criminal Court, Decisions Taken by the Preparatory Committee at its Session held from 11 to 21 February 1997, UN Doc, 12 March 1997, pp. 4-5.
[345] See Valerie Oosterveld, Gender, Persecution, and the International Criminal Court. Duke Journal of Comparative & International Law 17 (2006), p. 58, stating that in international negotiations, square brackets are used to indicate text that has not achieved acceptance by consensus.
[346] See Oosterveld, supra note 344, p. 59, stating in other words, the bracketing of the term "gender" at that time did not relate to the concerns eventually raised at the Diplomatic Conference.
[347] Ibid, pp. 58-66.

persecution in the final days of the Conference.[348] Many scholars have acclaimed the recognition of gender-based persecution as a significant advancement in the field of ICL.[349]

The ICTY and ICTR have also deliberated the connection of gender with racial, religious, and political-based persecution. For example, the *Krstic* Judgment found that SGBCs could constitute persecution when committed with the required discriminatory intent based on race, religion, or politics.[350] The judges in *Kvocka* found the accused guilty of persecution through rape and sexual assault.[351] However, the Appeals Chamber acquitted Kvocka, stating that he was not in the camp or employed there when the perpetrators committed the crime.[352] In the ICTR *Nahimana* case, the judges deliberated on the relationship between gender identities and persecution on political or racial/ethnic grounds,[353] finding that Tutsi women were portrayed as 'femmes fatale . . . seductive agents of the enemy.'[354] This made the sexual attacks of Tutsi women a foreseeable consequence because of the role attributed to them.[355]

As explained, gender-based persecution can be prosecuted in the ICC as a crime against humanity. The crux of gender-based persecution can be located in two of the six enumerated elements of the EoC. The first key element of the crime against humanity of gender-based persecution under Article 7(1)(h) states that 'the perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.'[356] The second key element is that the perpetrator's targeting was based on gender grounds.[357] The grounds introduced by the Rome Statute worried some states during the conference, stating that an activist Court might interpret this crime to take into account any discriminatory practice, thus turning the ICC from a criminal into a human rights court.[358] As a result, a definition was drafted under Article 7(2)(g) to indicate that gender-based persecution had a specific threshold due to 'intentional and severe deprivation of

[348] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15-July 17, 1998, Report of the Working Group on Applicable Law, U.N. Doc, July 14, 1998, p. 1 (indicating agreement that "gender" be defined as the following: 'For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from above').
[349] E.g., Barbara Bedont, "Gender-Specific Provisions in the Statute of the International Criminal Court." In Essays on The Rome Statute of The International Criminal Court, edited by Flavia Lattanzi and William Schabas. Ripa Fagnano Alto, Italy: Sirente, 1999, pp. 183, 201; Cate Steains, "Gender Issues." In The International Criminal Court: The Making of The Rome Statute; Issues, Negotiations, Results, edited by Roy S. Lee. The Hague: Kluwer Law International, 1999, pp. 357, 371; Rhonda Copelon, Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law. McGill Law Journal 46 (2000), pp. 217, 237.
[350] See Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Judgment (2 Augusts 2001), paras. 617-18 (including rape as one of a number of crimes directed against Bosnian Muslims constituting persecution).
[351] See Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Trial Judgment (2 November 2001), paras. 752, 755, 758, 761, 764; Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Appeal Judgment (28 February 2005), para. 334; Prosecutor v. Brdjanin, Case No. IT-99-36-T, Trial Judgment (1 September 2004), paras. 1008,1012-13 (finding that the act of rape is of sufficient gravity to constitute persecution). It also noted that sexual assault, such as forced sex between detainees, running a knife along a Bosnian Muslim female detainee's breast, or forcing a Bosnian Croat woman to undress herself in front of cheering Bosnian Serb police officers and soldiers, can amount to persecution; Prosecutor v. Stakić, Case No. IT-97-24-T, Trial Judgment (31 July 2003), para. 806 indicating similar findings on gender ground.
[352] See Kvočka Appeal Judgment, supra note 351, para. 334.
[353] See Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Trial Judgment (3 December 2003), para. 1079 (discussing persecution of Tutsi women).
[354] Ibid., paras. 1071, 1079.
[355] Ibid.
[356] Art. 7(1)(h), Elements of Crimes.
[357] Ibid.
[358] See Darryl Robinson, Defining Crimes Against Humanity at the Rome Conference. American Journal of International Law 93 (1999), pp. 43, 46, 53. These concerns are to some extent true of every crime and prosecution by international criminal courts.

fundamental human rights contrary to international law.'[359] Moreover, under Article 7(1)(h), the drafters ensured that persecutory acts were required to be connected with other crimes within the jurisdiction of the court.[360] This high threshold of intention, severe deprivation, and connection to other ICC crimes may have provided comfort to these states, which then agreed to the inclusion of gender-based persecution as a prohibited act within the Rome Statute.[361]

Despite this development, the prosecution of gender-based persecution initially at the ICC has been rare. The problem is that gender-based persecution is often part of a broader campaign of ethnic or political persecution, making it difficult for the prosecutors to focus on gender grounds. Grey argues that the 'prosecutors may at first have chosen to focus only on that "main" ground of persecution [campaign of ethnic or political persecution] to simplify the case. They are not tactically trying to raise the profile of gender-based persecution and establish legal precedents on that crime.'[362] The ICC *Al-Hassan* case was the first in November 2019 to charge persecution on the grounds of gender. In the *Al-Hassan* Decision on the Confirmation of Charges, the judges affirmed that, between 1 April 2012 and 28 January 2013, the accused targeted women in Timbuktu on gender grounds.[363] Consequently, the Pre-Trial Chamber found substantial grounds to believe that the crime of persecution on gender grounds had been committed as a crime against humanity.[364] It remains to be seen whether and how the ICC will interpret and prove this charge as a crime against humanity.

3.7 Any Other Form of Sexual Violence of Comparable Gravity

Article 7(1)(g) Rome Statute lists any other form of sexual violence of comparable gravity. It legally implies that the list of forms of sexual conduct is not an exhaustive one. It is a residual category that allows for the prosecution of crimes against humanity for acts of sexual violence that the Rome Statute does not expressly list.[365] Three requirements must be fulfilled to charge this residual category as defined:[366]

> *'The perpetrator committed an act of sexual nature against one or more persons or caused such person(s) to engage in an act of sexual nature by force, or by threat of force or coercion, such as that caused by fear of*

[359] Art. 7(2)(g), Rome Statute.
[360] Art. 7(1)(h), Elements of Crimes.
[361] See Robinson, supra note 358, pp. 43, 46, 53-54.
[362] See Rosemary Grey, Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court: Practice, Progress and Potential. Cambridge: Cambridge University Press, 2019, p. 279.
[363] See "Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud", ICC-01/12-01/18-461-Corr-Red (13 Novembre 2019), para. 697.
[364] Ibid., para. 707.
[365] Art. 7(1)(g), Rome Statute.
[366] See De Brouwer, supra note 249, pp. 148-51. Rather, the narrower point is that international law does not fully or adequately recognize that men, too, are vulnerable to sexual violence in armed conflict.

> *violence, duress, detention, psychological oppression or abuse of power, against such person(s) or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.'*[367]

The definition and legal elements of this form are too broad and vague.[368] However, Element 1 of Article 7(1)(g)-6 EoC clarifies that the definition covers both acts of a sexual nature perpetrated against another person or persons and acts causing a person or persons to engage in the act of a sexual nature, either by threat of force or coercion.[369] In the second Element, the act must reach a certain gravity threshold. The threshold must be comparable to rape, sexual slavery, enforced prostitution, forced pregnancy, or enforced sterilization.[370] This is an objective test that introduces a low amount of comparable gravity threshold but not including lesser forms of sexual violence.[371] The third requirement is about the mental elements of which the 'perpetrator was aware of the factual circumstances that established the gravity of the conduct.'[372]

Some experts noted the potential exclusion of forced nudity and sexual mutilation from 'any other form of sexual violence of comparable gravity' as a crime against humanity.[373] As a corrective measure, it was taken into account that the definition encompassed conduct previously subsumed under the residual clause of other inhumane acts under Article 5(i) ICTY Statute.[374] Thus, the crime of 'any other form of sexual violence of comparable gravity' may as well constitute acts not requiring penetration or physical contact.[375] For example, in the *Akayesu* case,[376] victims were compelled to perform naked dance and forced nudity in front of a crowd, which amounts to 'sexual violence of comparable gravity'[377] and constitutes a violation of human dignity under Article 8(2)(c)(ii) Rome Statute.[378] The ICTY later followed the *Akayesu* approach on this issue, in *Kvocka et al.* and *Furundzija,* explicitly stating that sexual violence may include acts that do not involve actual penetration or even physical contact.[379] Article 8(2)(e)(vi)-6 EoC states that the perpetrator could directly commit the sexual act or the victim could be forced or coerced, including taking advantage of a coercive environment or the victim's incapacity to give genuine consent.[380] These case laws and the EoC provide meaningful interpretations for the judges to follow and clarify the confusion in many

[367] Art. 7(1)(g) and Art. 8(2)(b)(xxii)-6 and e(vi)-6, Elements of Crimes.
[368] See Ambos, supra note 334.
[369] Element 1 of Art. 7(1)(g)-6, Elements of Crimes.
[370] Elements 2 of Art. 7(1)(g) and Art. 8(2)(b)(xxii)-6 and (e)(vi)-6, Elements of Crimes.
[371] See Cottier and Mzee, supra note 330, p. 503.
[372] Elements 3 of Art. 7(1)(g)-6, Elements of Crimes.
[373] See De Brouwer, supra note 249, pp. 148-49.
[374] See Werle, supra note 340, p. 886; Ambos, supra note 334, p. 103.
[375] See De Brouwer, supra note 249, p. 149.
[376] See Akayesu, Trial Judgment, supra note 191, para. 688.
[377] See Boot, supra note 83, p. 53; see also De Brouwer, supra note 249, p. 149.
[378] Art. 8(2)(c)(ii), Rome Statute.
[379] See Kvocka et al. Trial Judgment, supra note 351, para. 180; Furundzija Trial Judgment, supra note 194, para. 186.
[380] Art. 8 (2) (e) (vi)-6, Elements of Crimes.

people's minds that any other form of sexual violence of comparable gravity would have to, in the strictest sense, look like rape.[381] Interpreting this crime in the strictest sense as requiring penetration would render it baseless, making it impossible to bring charges against high-level accused. Consequently, there would be no prosecution conducted for this crime. Therefore, the only possible ground could be prosecuting it as other inhumane treatment, under the crime against humanity category. This crime category refers to the offenses specifically enumerated in Article 7(1)(g) and covers all crimes listed in the crime against humanity provision. Lastly, all the crimes discussed above are recognized as both war crimes and crimes against humanity.

4. Concluding Remarks

From ancient times through the greater part of the Middle Ages, rape was commonly considered a property crime – a crime committed against the man who owned the woman, not a crime against the woman herself.[382] Rape was not even considered a violation of the woman's right to bodily integrity. Thus, sexual violence committed against women by their husbands was not considered a crime at all. Further, free access to the women of a subjugated population was seen as a war trophy and an inevitable and acceptable consequence of war.[383] Only a few states and some scholars during this era believed that rape during wartime was a crime deserving punishment.[384] Even when the laws of war started to progress,[385] albeit slowly, provisions intended to protect women were somewhat vague, stipulating that 'women and children…shall not be molested in their person and honour and rights of the family should be protected.'[386]

The reluctance to prosecute SGBCs continued after WWII with the establishment of the IMT and IMTFE, which prosecuted SGBCs only implicitly. However, they could and should have done much more (i.e., robustly prosecuting high-level officials who masterminded or failed in their superior responsibility), given the overwhelming rate both in figures and in the viciousness of these crimes (e.g., the rape in Nanking). In reality, the cases prosecuted represent a comparatively modest level of redress for the victims.[387]

[381] See Valerie Oosterveld, "Gender-Based Crimes Against Humanity." In Forging A Convention for Crimes Against Humanity, edited by Leila Nadya Sadat. Cambridge: Cambridge University Press, 2011, pp. 78-101.
[382] See Wald, supra note 3; see also Askin, supra note 47, p. 296.
[383] See Askin, supra note 49, pp. 21-22.
[384] See Askin, supra note 47, pp. 29-33 (referring to Hugo Grotius who campaigned that rape committed in peace and wartime should be punished; Jean-Jacques Rousseau campaigned that sexual assault is not "necessary to its end" or justified by military necessity; Emmerich de Vattel specifically urged protection of women during war).
[385] Lieber Code; GCIV reprinted in Adam Roberts and Richard Guelff, Documents on the Laws of War. 3rd ed. Oxford: Oxford University Press, 2000, p. 67; GCII reprinted in Dietrich Schindler and Jirí Toman, The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents. 3rd rev. ed. Leiden, The Netherlands; Brill, 1988, p. 63; see also Askin, supra note 47, pp. 38-40.
[386] See Askin, supra note 47, p. 34 (these provisions are listed in the treaty of Amity and Commerce of 1785 and The Declaration of Brussels of 1874).
[387] See De Brouwer, supra note 249.

It was only when the *ad hoc* tribunals were established in 1993 and 1994 and the signing of the Rome Statute in 1998 that SGBCs were explicitly criminalized and vigorously investigated and prosecuted. The *ad hoc* tribunals undertook to prosecute these crimes and recognized the 'systematic and harmful nature of rape.'[388] The ICTY and ICTR were instrumental in developing SGBCs' jurisprudence in ICL.[389] For instance, the ICTR in the landmark case of *Prosecutor* v. *Akayesu* recognized rape and sexual violence as constituting acts of genocide and rape as a form of torture.[390] The ICTY in the *Celebici* case held that rape constituted torture[391] and that rape in the *Foca* case was a crime against humanity and convicted the defendant of sexual enslavement.[392] Of these developments, Askin describes their significance, in terms of the law developed, as "unparalleled."[393]

The creation of the ICC was hailed as the most advanced articulation in the history of SGBCs legal codification,[394] whereas the *ad hoc* tribunals served as an essential foundation for the codification of SGBCs in the Rome Statute.[395] The statutes of the ICTY and ICTR did not comprehensively list SGBCs, which led the Rome Statute to enlist sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other forms of sexual violence of comparable gravity. Moreover, the court established that these SGBCs, depending on the modes of commission, may amount to war crimes (including Grave Breaches of the GCs), crimes against humanity, and genocide and ensured adequate procedural guidelines on the protection of victims and witnesses appearing before the court.[396] Therefore, the comprehensive listing of SGBCs is an essential recognition of the varied forms of SGBCs may take, and the specific enumeration highlights them as among the most severe crimes in ICL.[397] The judges' interventions at the *ad hoc* tribunals brought SGBCs into mainstream international jurisprudence; women NGOs have also played a crucial role in putting it on the agenda, ensuring that the courts prosecuted the perpetrators and victims finally received justice.[398]

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[388] See Clare McGlynn, Rape as "Torture"? "Catharine Mackinnon and Questions of Feminist Strategy," Feminist Legal Studies 16 (2008), p. 72. noting that the international criminal tribunals did not initially include rape as a crime.
[389] See Brigid Inder, Women's Initiatives for Gender Justice, making a Statement: A Review of Charges and Prosecutions for Gender Based Crimes before the International Criminal Court, February 2010. < http://www.iccwomen.org/publications/articles/docs/MaS22-10web.pdf.> accessed 3 December 2019.
[390] See Akayesu Trial Judgment, supra note 191.
[391] See Delalic et al. Trial Judgment, supra note 244.
[392] See Kunarac et al. Trial Judgment, supra note 249.
[393] See Kelly Askin, Gender Crimes Jurisprudence in the ICTR: Positive Developments. Journal of International Crime Justice 3, no. 4 (2005), p. 1012.
[394] See Inder, supra note 389.
[395] See Copelon, supra note 349, p. 231.
[396] See Inder, supra note 389.
[397] See La Haye, supra note 299, p. 814; see also Askin, supra note 1, p. 347.
[398] The outcome documents leading to the final Rome Statute by PreCom did not, however, adequately reflect gender concerns, but through the resilience and lobby of the Women's Caucus for Gender Justice, gender and sexual violence crimes and fair gender representation were advocated for and reproduced in the ICC Statute. Through the women's lobby, gender was formulated in the context of society, including sociological differences between men and women and non-discrimination provision on gender basis.

The study also discussed eight recognized forms and manifestations of SGBCs. Although discussed extensively in ICL, some aspects of the crimes still need to be improved to ensure effective prosecution of SGBCs in the future. Rape, for example, has been extensively deliberated in ICL, but the issue of consent is still a highly contested issue at the ICC. The EoC mentions consent but only in specific circumstances, such as the physical invasion of a sexual nature of persons incapable of giving genuine consent, e.g., children or persons with mental disability constitutes coercion and thus rape.[399] Four ICC cases (*Lubanga, Bemba, Ntaganda, Katanga*) rejected "lack of consent" as an element of the crime, stating that EoC does not refer to the victim's lack of consent and that there was no need to prove it.[400] The ICC's interpretation of this issue remains problematic, which calls for the judges to provide consistent guidance regarding when consent may be considered a defense. Any further guidance must be compatible with rules 70(a-c) ICC Rules, all of which state that consent cannot be inferred where there was a coercive environment or circumstances.[401]

Forced marriage and sexual slavery are overlapping concepts, but there is a clear distinction. In the crime of sexual slavery, the perpetrator's control over the victim comes from attaching the right of ownership to the victim. In contrast, in forced marriages, the perpetrator obtains control over the victim by attaching a spouse's obligations to the victim. Thus, the victim of forced marriage is bound not only by the force exerted over him by the perpetrator but also by the shift in legal, social, and religious rights and status arising from that marriage. However, the inherent complications of separating the sexual nature of the crime from the perpetrator's intent to form true marital relations will make it difficult for the prosecutor to clearly separate the elements of sexual slavery from forced marriage.

Furthermore, the distinction between forced prostitution and sexual slavery is not too clear. During armed conflict, most forced prostitution crimes constitute sexual slavery, but there might be situations where it is not the case. For instance, during wartime, women may "agree" to have sexual intercourse with several men in exchange for their safety or others' safety that accompanied them or does so just to survive. While the women would not, strictly speaking, be prostitutes, they would be compelled to have sexual intercourse in exchange for something valuable from one or more men who have power over them. But even in instances where women are free to go home at night or even escape, the threatening and controlling armed conflict

[399] Element 2 of Art. 7 (1) (g)-1, Elements of Crimes; see also footnote 16 of Element 2, which states that it is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of Art. 7 (1) (g)-3, 5 and 6.
[400] See Lubanga Trial Judgment, supra note 263, para. 617; Katanga Trial Judgment, supra note 203, para. 965; Bemba Trial Judgment, supra note 263, paras. 105-6; Ntaganda Trial Judgment, supra note 202, paras. 933-35.
[401] Rule 70(a-c), ICC Rules; In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles: (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent; (b) Consent cannot be inferred by reason of any words of conduct of a victim where the victim is incapable of giving genuine consent; (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence; see also Goldstone, supra note 80, p. 284 (citing Rule 96, ICTY/ICTR Rules, which deal with consent).

environment might render them little more than sex slaves.[402] Therefore, enforced prostitution could include these 'less then slavery-like conditions' and, in this sense, could cover situations that would fall outside of the prohibition of sexual slavery. What is essential in the future is for the judges to interpret the facts distinguishing the elements of forced prostitution from sexual slavery from the women's perspectives.

With regard to forced pregnancy, the perpetrator is the person who confined 'one or more women forcibly made pregnant,'[403] not necessarily the one who physically committed the rape.[404] However, from the reading of this element, it would seem there is a dual character of the *actus reus* of forced pregnancy, consisting of rape followed by imprisonment or confinement.[405] Therefore, while it is essential to prosecute the person who confined the women, the principle of individual guilt requires that the person who physically commits the rape (without which the perpetrator would not have achieved the objective) should also be held accountable. Similarly, under enforced sterilization, footnote 19 in the Elements states that 'deprivation is not intended to include birth–control measures which have a non-permanent effect in practice.'[406] However, some scholars argue that footnote 19 is questionable and inconsistent with international law because these measures violate one's right to self-determination based on the principle of personal autonomy and may even amount to genocide if carried out with the required specific intent to destroy.[407] There are also several human rights implications in this regard, e.g., performing sterilization without informed consent could violate the victim's rights to dignity, humane treatment, health, family, privacy, and freely decide the number spacing of children.

Any other form of sexual violence of comparable gravity is a crime meant to capture those SGBCs committed outside the enumerated SGBCs but with the same level of seriousness. This is not free from controversy either. In the second element, the act must reach a certain gravity threshold. Elements 2 of Art. 7(1)(g) and Art. 8(2)(b)(xxii)-6 and (e)(vi)-6 state that the threshold must be comparable to rape, sexual slavery, enforced prostitution, forced pregnancy, or enforced sterilization.[408] This is an objective test that introduces a low amount of comparable gravity threshold but not lesser forms of sexual violence.[409] But many people are still confused by the definition and scope of this crime,[410] while others think that any other

[402] See Oosterveld, supra note 304, p. 621.
[403] See Report of the Preparatory Commission, supra note 322.
[404] See Short, supra note 323; See also Carpenter, supra note 323.
[405] See Final Report of the United Nations Commission of Experts, supra note 327.
[406] Element 1, footnote 19 of Art. 7(1)(g)-5, Elements of Crimes. The war crime of enforced sterilization thus requires intent to permanently deprive of reproductive capacity. For more discussion, see Cottier and Mzee, supra note 330, p. 500.
[407] See Ambos, supra note 334.
[408] Elements 2 of Art. 7(1)(g) and Art. 8(2)(b)(xxii)-6 and (e)(vi)-6, Elements of Crimes.
[409] See Cottier and Mzee, supra note 330, p. 503 (noting that 'for this crime to come under ICC jurisdiction [as war crime], it must reach the minimum threshold of gravity comparable to Grave Breaches of the Geneva Conventions, such as torture, inhuman treatment, biological experiments, wilfully causing great suffering or serious injury to body or health, or, arguably, one of the five specific forms of sexual violence listed under Art. 8 para. 2 (b) (xxii), insofar these are deemed to per se constitute Grave Breaches').
[410] See De Brouwer, supra note 249, p. 149.

form of sexual violence of comparable gravity would have to, in the strictest sense, look like rape.[411] It has now been settled in ICL that any other form of sexual violence of comparable gravity may include acts that do not involve actual penetration or even physical contact. The judges need to interpret what type of SGBCs not in the list meets the threshold test, which would have to be assessed on a case-by-case basis.

Finally, gender-based persecution, on the other hand, is less controversial among the enumerated SGBCs. The crux of gender-based persecution can be found in two of the six elements. The first key element is that 'the perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.'[412] The second key element is that the perpetrator's targeting was based on gender grounds.[413] Despite this development, gender-based persecution has so seldomly been charged in the ICC's early cases because prosecutors may have first chosen to focus only on that 'main' ground of persecution to simplify the case.'[414] The *Al-Hassan*'s case was the first in November 2019 to charge persecution on the grounds of gender at the ICC. It will be interesting to see how the prosecution will prove that the accused targeted women based on their gender.

[411] See Oosterveld, supra note 381.
[412] Art. 7(1)(h), Elements of Crimes.
[413] Ibid.
[414] See Grey, supra note 362.

Chapter III: Linking Sexual and Gender-Based Crimes to High-level Officials through Direct Modes of Liability

1. Introduction

This chapter aims to address one of the main problems in ICL, i.e., how to appropriately attribute criminal responsibility to individuals when a plurality of actors has committed international crimes. These different actors might have played various roles with varying extents of blameworthiness, making it challenging to attribute criminal responsibility to them appropriately. The study will adopt the general concept of direct and indirect modes of liability applied in ICL. As explained in Section 4 of Chapter 1, there are differences between these two concepts: direct modes of liability do apply in instances where the accused directly perpetrates a crime by himself or directly participates in the commission of a crime. In contrast, indirect modes of liability apply when the accused perpetrates a crime through other persons or when he participates in the commission of a crime in concert with others or fails in his duty as a superior to prevent, repress, or report the crimes committed by his subordinates.

This chapter will focus on attributing crimes to individuals using the direct modes of liability, where the accused either directly planned, ordered, committed, instigated a crime, or aided or abetted the commission of the crime. For each of the direct modes, a general overview will be given explaining how the mode was developed, its scope and limitations, and the legal and jurisdictional framework, by concentrating primarily on the jurisprudence of the ICTY, ICTR, and ICC, as well as scholarly articles on the theories of individual criminal responsibility. The next chapter (Chapter 4) will then focus on the indirect modes of liability.

This chapter will also provide a brief analysis of case law on how high-level officials can be charged appropriately under the direct modes of liability for the different roles they played in the commission of SGBCs. It will discuss a few emblematic cases from the ICTY, ICTR, and ICC to explain this context. Next, a table will be provided under each mode of liability to explain the legal elements that need to be proven. It will also provide clarity where two or more modes of liability overlap each other. The chapter will then summarize what measures are there to hold an accused criminally responsible for crimes committed under direct modes of liability. It will highlight the elements that need to be proven under each mode of liability and pointing out some of the central debates and gaps that still need to be addressed in the modes of liability discussed.

2. Planning

Planning is when someone devises, prepares, or arranges criminal, or non-criminal acts (although in the latter event, the implementation of the plan still results in the commission of a crime).[1] The ICTY *Tadic* Trial Chamber was the first to conclude that planning: '[…] has a requirement of intent, which involves awareness of the act of participation coupled with a conscious decision to participate in planning […] in the commission of a crime. Second, the prosecution must prove that there was participation in that the conduct of the accused contributed to the commission of the illegal act.'[2] The elements outlined in *Tadic* were further elaborated by the ICTY *Kordic and Cerkez* Trial and Appeals Chambers. The *Kordic and Cerkez* Appeals Chamber, while upholding Dario Kordic's conviction for approving a plan to commit crimes in the Kiseljak municipality, held that it was necessary to set out and clarify two elements of planning, which must be established for a conviction to arise:

> *'The actus reus of "planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated. It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct."*[3] *"The mens rea for planning mode of responsibility is established if the perpetrator acted with direct intent in relation to his own planning. Whereas a person who plans an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that plan, has the requisite mens rea for establishing responsibility under Article 7(1) of the Statute pursuant to planning. Planning with such awareness has to be regarded as accepting that crime."*[4]

Planning can be done by one person acting alone or by several persons working together.[5] It includes those who formulate the plan themselves and those who 'endors[e] a plan proposed by another.'[6] Thus, an accused may incur criminal liability for planning, in two different ways: (1) where he designs criminal conduct with the intent that a crime is committed in the execution of that design; or (2) where he designs an act [or

[1] See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment (2 September 1998), para. 480.
[2] See Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment (7 May 1997), para. 674.
[3] See Prosecutor v. Kordic´ and Cerkez, Case No. IT-95-14/2-A, Appeal Judgment (17 December 2004), para. 29 (holding that the accused must have 'acted with direct intent in relation to his own planning'). See ibid., para. 26 (holding that 'one or more persons [must] design criminal conduct constituting one or more statutory crimes').
[4] Ibid., para. 31.
[5] See Akayesu Trial Judgment, supra note 1, para. 480.
[6] See Prosecutor v. Bagilishema, Case No. ICTR-95-lA-T, Trial Judgment (7 June 2001), para. 30 ('The level of participation must be substantial, such as formulating a criminal plan or endorsing a plan proposed by another.'); Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T, Trial Judgment (22 January 2004), para. 592; Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Trial Judgment (1 December 2003), para. 761; Prosecutor v. Semanza, Case No. ICTR-97-20-T, Trial Judgment (15 May 2003), para. 380.

omission] aware of the substantial likelihood that a crime will be committed in the realization of that act [or omission].[7]

As laid out in the *Tadic* Trial Judgment and further articulated by the *Kordic and Cerkez* Trial Chamber, the definition of planning and its elements were all endorsed by subsequent ICTY and ICTR trial chambers as reflective of customary laws.[8] For instance, the ICTR *Akayesu* Trial Chamber acknowledged *Tadic*'s forms of responsibility enshrined in Article 6(1), opting, however, for a slighter distinctive approach to the physical elements of planning.[9] It defined it as 'implying that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.'[10] Boas notes that one possible meaning of planning 'at both the preparatory and execution phases' could be that the planner must design all aspects of the criminal activity, including not only when and how the planned conduct will be carried out, but also the preliminary steps the physical perpetrator must take to carry through with the conduct at a later time.[11]

Although planning is considered typical for higher military or civilian authorities, it could also apply to lower-ranked officials – the persons then will be held liable for commission for executing the plan. This is because when a plan is enacted, whoever participated in it is liable for the relevant or resulting crime, irrespective of his or her rank in the hierarchy and the level of his or her participation.[12] However, the rank and role may still be relevant for punishment. As Cassese notes, the higher the planner's status and the intensity of his participation in the planning, the harsher his penalty should be.[13] It is the prosecutor's responsibility to decide, after having analyzed the evidence available, which mode better fits the behavior or the role played by the accused between planning and the various types of commission.

The controversy about this mode is whether planning an international crime is punishable by itself, or, instead, if it is punishable only if the commission of the crime follows the planning phase. The ICTY and the ICTR gave a conflicting interpretation on the issue. Several ICTR trial chambers ruled that planning must lead to its commission[14] and has applied this rule in many cases.[15] In contrast, the ICTY ruled that an accused may be held criminally liable for planning alone, reasoning that planning a crime already constitutes

[7] See Kordic´ and Cerkez Appeal Judgment, supra note 3, paras. 26, 29, 31.
[8] See Prosecutor v. Delalic et al., Case No. IT-96-21-T, Trial Judgment (16 November 1998); Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Trial Judgment (25 June 1999), paras. 60–61. Both chambers drew on Tadic's holding that an accused aider and abettor's contribution must have a 'direct and substantial effect on the commission of the illegal act', see Tadic Trial Judgment, supra note 2, para. 689, and appear to have extended it to planning, instigating, and ordering (see Delalic et al. Trial Judgment, ibid., para. 326 and Aleksovski Trial Judgment, ibid., para. 61.
[9] See Akayesu Trial Judgment, supra note 1, para. 477.
[10] Ibid., para. 480.
[11] See Gideon Boas et al., Forms of Responsibility in International Criminal Law, International Criminal Law Practitioner Library Series. Vol. 1. Cambridge: Cambridge University Press, 2007, pp. 356.
[12] Art. 7(1), ICTY Statute.
[13] See Antonio Cassese, International Criminal Law. 2nd ed. Oxford: Oxford University Press, 2008, p. 225.
[14] See Prosecutor v. Musema, Case No. ICTR-96-13-T, Trial Judgment (27 January 2000), para. 115; Art. 6(1), ICTR Statute.
[15] See e.g., Akayesu Trial Judgment, supra note 1, para. 475; Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Trial Judgment (6 December 1999), para. 34; Musema Trial Judgment, supra note 14, para. 115.

a 'discrete form of responsibility.'[16] The ICC is relatively mute on this issue, as Article 25(3) of the ICC Statute does not mention 'planning' as a specific mode of liability.[17] However, the conduct covered by planning at the ICTY and ICTR could be encompassed by other modes of liability under Article 25(3) ICC Statute (i.e. aiding, abetting, or otherwise assisting), provided that the requisite subjective elements are met.[18]

In as much as this subject remains a matter of open debate in the case law, one may still reason that, given the seriousness (large-scale nature) of international crimes and the fact that ICL aims not only at punishing those guilty of these crimes but also at preventing persons from engaging in such serious criminal conduct, it seems reasonable that planning the commission of international crimes should be already punishable by itself, regardless of whether the crime is actually perpetrated or not.[19]

2.1 Applying Planning in the Context of SGBCs

The prosecutor needs to prove that the plan designed by the accused included the commission of SGBCs.[20] In practice, however, the prosecutor does not need to prove that SGBCs *per se* were planned or would not have taken place outside of the planning itself. It suffices that another crime (e.g., forced transfers of the population) or even legal conduct (e.g., relocating internally displaced persons (IDPs) under imminent danger to a safer location) is planned and that the accused knows that SGBCs are substantially likely to be committed in the implementation of that plan.[21] Let's imagine a situation in a war-ravaged country where, as a result of ongoing armed conflict, the battalion commander planned to evacuate an entire IDP camp for imperative security reasons.[22] He is aware of the substantial likelihood that, in the course of the evacuation, the personnel so assigned (usually lower-ranked soldiers) would, in the end, sexually assault some IDPs because they have in the past intermittently done the same thing. In these circumstances, the elements of planning SGBCs will be met.[23]

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[16] See Prosecutor v. Kordic´ and Cerkez, Case No. IT-95-14/2-T, Trial Judgment (26 February 2001), para. 386 (although it cautioned that a person found to have perpetrated a crime would not be found responsible for planning the same crime and an accused would only be held liable for planning a crime, if he or she directly or indirectly intended that the crime be perpetrated).

[17] Preparatory Committee on the Establishment of an International Criminal Court (11–21 February 1997), Paper on criminal responsibility submitted by informal group representing various legal systems, 14 February 1997, printed in William Schabas, The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press, 2010, p. 423, which included criminal responsibility for a person who "intentionally participates in the planning to commit such a crime [which in fact occurs]."

[18] See Gideon Boas et al., supra note 11, p. 371. They also suggest that the conduct is covered by Art. 25(3)(d) Rome Statute, although limited to criminal activity by a group of persons; Elies van Sliedregt, The Criminal Responsibility of Individuals for Violations of International Humanitarian Law. The Hague, Netherlands: Asser, 2003, p. 87, noting that the conduct of planning can come under perpetration by means (Art. 25(3)(b) Rome Statute third option, or inducing (Art. 25(3)(c), Rome Statute.

[19] See Cassese, supra note 13, p. 226.

[20] See generally Prosecutor v. Milutinovic et al., Case No. IT-05-87-T, Trial Judgment (26 February 2009), vol. 1, para. 81, footnote 84; Kordic and Cerkez, Appeal Judgment, supra note 3, paras. 26, 31.

[21] See Kordic and Cerkez, Appeal Judgment, supra note 3, paras. 26, 29, 31.

[22] E.g., Art 49, GCIV (which allows for total or partial evacuation of a given area in occupied territory if the security of the population or imperative military reasons so demand).

[23] See Prosecutor v. Krstic, Case No. IT-98-33-T, Trial Judgment (02 August 2001), para. 616.

For these reasons, planning is not only limited to cases where SGBCs are used strategically as part of the criminal plan *per se*; it includes circumstances where it is foreseeable.[24] Therefore, a person who plans criminal conduct and is aware of the likelihood that SGBCs would follow can be held liable under planning and also under the third form of Joint Criminal Enterprise (JCE III),[25] which will be discussed in depth in Section 2 of Chapter 4. These flexibilities provide the prosecutor enough leverage to charge and prosecute high-level officials for planning SGBCs under planning or JCE III. However, proving the elements of planning can be a difficult task, as will be revealed in Chapter 5. The ICTY *Kordic and Cerkez*, ICTY *Krstic*, ICTY *Stakic*, and *Kajelijeli* are some of the landmark cases that Chapter 5 will analyze along with all other SGBC cases to show what evidence is needed to hold a high-level accused accountable for SGBCs under planning.

2.2 Table of What Needs to be Proven to Hold the Accused Responsible for Planning

1	That one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated. It is sufficient to prove that the planning was a factor substantially contributing to such criminal conduct.
2	The accused acted with direct intent in relation to his own planning.
3	The one who planned an act was aware of the substantial likelihood that a crime will be committed in the execution of that plan. SGBCs would fall under this in case the SGBCs were not part of the actual plan but occurred nevertheless.

3. Ordering

Ordering is instructing someone to do something lawful or unlawful. Article 8 of the IMT Charter established that the fact that an individual was following the order of his Government or a superior does not free him from responsibility.[26] Further, the Nuremberg judges decided that those who follow such orders cannot escape justice either.[27] In the modern era, some scholars see those who give orders as perpetrators acting through another person in the modern era.[28] The ICTY, ICTR, and ICC consider it as a separate form

[24] For detailed information on foreseeability, see Barbara Goy, Michelle Jarvis, and Giulia Pinzauti, Contextualizing Sexual Violence and Linking it to Senior Officials. In Prosecuting Conflict-Related Sexual Violence at the ICTY, edited by Baron S. Brammertz and Michelle Jarvis. Oxford: Oxford University Press, 2016, p. 246.
[25] JCE III is an "extended" form of joint criminal enterprise. It concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of executing that common purpose. For more discussion on how someone can be held liable under planning and also under JCE III, see Krstic Trial Judgment, supra note 23, para. 616; see also Goy, Jarvis, and Pinzauti, supra note 24, p. 233.
[26] See Art. 8, IMT Charter.
[27] See e.g., Nuremberg IMT Judgment, American Journal of Internal Law 41 (1947), pp. 172, 221; see, also Lassa Oppenheim, International Law. Vol.2, War and Neutrality. London: Longmans Green, 1906, pp. 264–5.
[28] See Kai Ambos, "Article 25: Individual Criminal Responsibility." In Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, edited by Otto Triffterer. 2nd ed. Baden-Baden, Germany: Nomos, 2008, pp. 480, 491.

of liability.[29] It entails that a 'person in a position of authority (*de jure* or *de facto* superior (military or civilian hierarchy)) issues a command to subordinate(s) to the effect that he or she must take a certain course of action to commit a criminal offense.[30]

The elements of ordering have been a contentious issue in the ICTY and ICTR jurisprudence. For example, the prosecution in *Semanza* argued on appeal that the Trial Chamber had erroneously required that there be a formal relationship between Semanza and the physical perpetrators.[31] While clarifying the matter, the *Semanza* Appeals Chamber endorsed the position established by the ICTY Appeals Chamber in *Kordic and Cerkez* regarding the elements of ordering and held that:

> *'The actus reus of "ordering" is that a person in a position of authority instruct another person to commit an offense. No formal superior-subordinate relationship between the accused and the perpetrator is required. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order. The mens rea of ordering is established if the perpetrator acted with direct intent in relation to his own ordering.'*[32]

The descriptions above show that a person who had been ordered can be either a subordinate or another person whom the accused had authority (formally or informally) over; the accused thus can use said position explicitly or implicitly to convince the person ordered to commit a crime.[33] Thus, an accused may incur criminal liability for ordering in two different ways: (1) where the accused instructs another person(s) to engage in criminal conduct,[34] with the intent that a crime be committed in the execution of that instruction;[35]

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[29] Art. 25(3)(b), Rome Statute; Art. 7(1), ICTY Statute; Art. 6(1), ICTR Statute; Art. 6(1), SCSL Statute.

[30] See Akayesu Trial Judgment, supra note 1, para. 483; Prosecutor v. Blaškic, Case No. IT-95-14-T, Trial Judgment (3 March 2000), para. 601; Krstic Trial Judgment, supra note 23, para. 601; Prosecutor v. Naletilic and Martinovic, Case No. IT-98-34-T, Trial Judgment (31 March 2003), para. 61; Prosecutor v. Stakic, Case No. IT-97-24-T, Trial Judgment (31 July 2003), para. 445; Semanza Trial Judgment, supra note 6, para. 382; Bagilishema Trial Judgment, supra note 6, para. 31; Rutaganda Trial Judgment, supra note 15, para. 39; Kamuhanda Trial Judgment, supra note 6, para. 594.

[31] See Prosecutor v. Semanza, Case No. ICTR-97-20-A, Appeal Judgment (15 May 2003), paras. 349–351.

[32] See Kordic and Čerkez Appeal Judgment, supra note 3, paras. 28-29; Semanza Appeal Judgment, supra not 31, para. 361.

[33] See Prosecutor v. Nyiramasuhuko et al., Case No. ICTR-98-42-A, Appeal Judgment (14 December 2015), para. 976.

[34] See Prosecutor v. Galic, Case No. IT-98-29-A, Appeal Judgment (30 November 2006), para. 176; Semanza Appeal Judgment, supra note 31, para. 361; Kordic´ and Cerkez Appeal Judgment, supra note 3, para. 28; Prosecutor v. Muvunyi, Case No. ICTR-00-55A-T, Trial Judgment (11 February 2010), para. 467; Prosecutor v. Mpambara, Case No. ICTR-01-65-T, Trial Judgment (11 September 2006), para. 19; Prosecutor v. Limaj et al., Case No. IT-03-66-T, Trial Judgment (30 November 2005), para. 515; Prosecutor v. Brdanin, Case No. IT-99-36-T, Trial Judgment (1 September 2004), para. 270; Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Trial Judgment (17 June2004), para. 281; Kamuhanda Trial Judgment, supra note 6, para. 594; Prosecutor v. Galic´, Case No. IT-98-29-T, Trial Judgment (5 December 2003), para. 168; Kajelijeli Trial Judgment, supra note 6, para. 763; Stakic Trial Judgment, supra note 30, para. 445; Semanza Trial Judgment, supra note 6, para. 382; Krstic Trial Judgment, supra note 23, para. 601; Bagilishema Trial Judgment, supra note 6, para. 30; Blaškic Trial Judgment, supra note 30, para. 281; Musema Trial Judgment, supra note 14, para. 121; Rutaganda Trial Judgment, supra note 15, para. 39; Akayesu Trial Judgment, supra note 1, para. 483.

[35] See Prosecutor v. Ntagerura et al., Case No. ICTR-99-46-A, Appeal Judgment (7 July 2006), para. 365; Kordic˘ and Cerkez Appeal Judgment, supra note 3, para. 29; Limaj et al. Trial Judgment, supra note 34, para. 515; Prosecutor v. Strugar, Case No. IT-01-42-T, Trial Judgment (31 January 2005), para. 333; Brdanin Trial Judgment, supra note 34, para. 270; Stakic Trial Judgment, supra note 30, para. 445; Bagilishema Trial Judgment, supra note 6, para. 30; Kordic´ and Cerkez Trial Judgment, supra note 16, para. 386; Blaškic Trial Judgment, supra note 30, para. 278.

or (2) where the accused instructs another person(s) to engage in an act or omission, aware of the substantial likelihood that the person will commit the crime in the realization of that act or omission.[36]

Ordering to commit a crime must be specific, and there should be instructions to perform a particular criminal act. Cassese notes that a very generic or reckless order or even gross negligence (e.g., instructing subordinates that "prisoners could be abused") may still be considered sufficient to impute liability for ordering.[37] Suppose the accused issues a lawful order to bomb a military facility near civilian quarters with all the necessary precautions. The person ordered does not comply with the order, commits a war crime for bombing civilian dwellings with intent, or failing to take the necessary precautions. In that case, the ordering official may not be held criminally liable for that war crime. Instead, a commander who instructs his or her recruits to raid a particular village and kill all its inhabitants is accountable for ordering a war crime. In some cases, nonetheless, even a lawful order may evoke liability of the accused. Supposed a military commander ordered to bomb a military target, an enemy hideout, located close to a primary school that operates 9:00 am-1:00 pm daily. On a particular day at around noon, soldiers informed the commander that the enemies are about to relocate and, although he knows that the school is in use, he still orders the attack. The drone hits the hideout, and the impact destroys the school, the enemies and killed some students. It surfaces that the execution of his order would almost certainly lead to the commission of a crime, but he willingly took this risk. The commander in question has committed a war crime of killing and destruction of a civilian object.[38]

The order from the accused need not be given directly to the person who physically executed the crime.[39] It can also be issued through an intermediary person, although it cannot absolve the person acting as an intermediary from ordering liability.[40] Imagine in a military camp where the commanding officer passed on unlawful order to the battalion commander to instruct the unit commander on the ground to kill all POWs captured from the frontline before retreating from the village. In this case, the battalion commander and the unit commander are liable for ordering, in addition to the commanding officer.

[36] See Galic Appeal Judgment, supra note 34, para. 152; Kordic˘ and Cerkez Appeal Judgment, supra note 3, para. 30; Prosecutor v. Blaskic, Case No.: IT-95-14-A, Appeal Judgment (29 July 2004) para. 42; Limaj et al. Trial Judgment, supra note 34, para. 515; Strugar Trial Judgment, supra note 35, para. 333; Brdanin Trial Judgment, supra note 34, para. 270; Galic Trial Judgment, supra note 34, para. 172; Stakic Trial Judgment, supra note 30, para. 445; Kordic and Cerkez Trial Judgment, supra note 16, para. 386; Blaskic Trial Judgment, supra note 30, para. 278.
[37] See Cassese, supra note 13, p. 231.
[38] For more details, see Blaskic Trial Judgment, supra note 30, para. 474.
[39] See Strugar Trial Judgment, supra note 35, para. 331; Brdanin Trial Judgment, supra note 34, para. 270; Naletilic and Martinovic, Trial Judgment supra note 30, para. 61; Kordic and Cerkez Trial Judgment, supra note 16, para. 388; Blaskic Trial Judgment, supra note 30, para. 282.
[40] See Prosecutor v. Kupreskic et al., Case No.: IT-95-16-T, Trial Judgment (14 January 2000), paras. 827, 862.

Furthermore, an order from a superior officer needs not to be written nor issued in any particular form,[41] as it can either be explicit or implicit.[42] Like planning, the prosecutor may prove an order through direct or circumstantial evidence.[43] The ICTR *Kamuhanda* Trial Chamber affirmed that '[t]he position of authority of the person who gave an order might be inferred from the fact that the order was obeyed'.[44] Lastly, liability for ordering cannot ensue on the basis of an omission because one cannot 'imagine a situation in which an order would be given by an omission in the absence of a prior positive act.'[45]

The possession of authority of the accused, i.e., whether the accused is required to have enjoyed formal or informal authority over the person(s) to whom the order was given, is an additional requirement that the prosecutor needs to prove in comparison to the mode of planning. The ICTY and ICTR had different approaches to the issue. The ICTR Trial Chamber in *Akayesu* affirmed that 'ordering implies a superior-subordinate relationship between the person giving the order and the one executing it,'[46] which many ICTR trial chambers subsequently endorsed.[47] Instead, in a swift departure from this formulation, the ICTY Trial Chamber in *Kordic and Cerkez* held that ordering is not limited to military settings, therefore 'no formal superior-subordinate relationship is required, provided 'the accused possessed the authority to order.'[48] The ICC seems to agree with the ICTY's formulation that ordering under Article 25(3)(b) of the Rome Statute requires the superior (i.e., someone in authority) to have actively contributed to the crime in question, but did not explicitly mention the superior-subordinate relationship. Therefore, except for superior responsibility cases, it is not required for the prosecutor to prove the existence of a superior-subordinate relationship in ordering cases before the ICC.

Furthermore, under the ICTY, ICTR, and ICC Statutes, liability for ordering can only take effect when the ordered crime "occurs or is attempted."[49] This agreement satisfies the first objective element, which requires

[41] See Prosecutor v. Kamuhanda, Case No. ICTR-99-54A-A, Appeal Judgment (19 September 2005), para. 76; Limaj et al. Trial Judgment supra note 34, para. 515; Strugar Trial Judgment, supra note 35, para. 331; Brdanin Trial Judgment, supra note 34, para. 270; Galic Trial Judgment, supra note 34, para. 168; Naletilic´ and Martinovic Trial Judgment, supra note 30, para. 61; Kordic and Cerkez Trial Judgment, supra note 16, para. 388; Blaškic Trial Judgment, supra note 30, para. 281.
[42] See Naletilic´ and Martinovic Trial Judgment, supra note 30, para. 61; Blaskic Trial Judgment, supra note 30, para. 281.
[43] See Galic Appeal Judgment, supra note 34, para. 178; see also Galic Trial Judgment, supra note 34, para. 171 (it may be inferred from an array of factors, for example the number of illegal acts, the number, identity and type of troops involved, the effective command and control exerted over these troops, the logistics involved, the widespread occurrence of the illegal acts, the tactical tempo of the operations, the modus operandi of similar acts, the officers and staff involved, the location of the superior at the time, and the knowledge of that officer of criminal acts committed under his command); Kamuhanda Appeal Judgment, supra note 41, para. 76; Muvunyi Trial Judgment, supra note 34, para. 468; Limaj et al. Trial Judgment, supra note 34, para. 515; Strugar Trial Judgment, supra note 35, para. 331; Galic Trial Judgment, supra note 30, para. 171; Kordic and Cerkez Trial Judgment, supra note 16, para. 388; Blaskic Trial Judgment, supra note 30, para. 281.
[44] See Kamuhanda Trial Judgment, supra note 6, para. 594.
[45] See Galic Appeal Judgment, supra note 34, paras. 176-77. The Appeals Chamber added in a footnote that '[i]t would thus be erroneous to speak of ''ordering by omission.''
[46] See Prosecutor v. Akayesu, case No. ICTR-96-4-A, Appeal Judgment (1 June 2001), para. 483.
[47] See Semanza Trial Judgment, supra note 6, para. 382; Blaškic Trial Judgment, supra note 30, para. 281 (quoting Akayesu); Musema Trial Judgment, supra note 14, para. 121; Rutaganda Trial Judgment, supra note 15, para. 39.
[48] See Kordic and Čerkez Trial Judgment, supra note 16, para. 388 (however, the Trial Chamber remarked that it 'disagree[d] with the Blaskic´ and Akayesu Trial Chambers in this respect').
[49] See Blaškic Trial Judgment, supra note 30, paras. 281–2; Kordic and Cerkez Trial Judgment, supra note 16, para. 388; Akayesu Trial Judgment supra note 1, para. 483; see Art. 25(3)(b), Rome Statute.

that the accused's conduct must have a direct and substantial effect on the perpetration of the crime in question.[50] It means that liability for ordering cannot be inchoate (i.e. the crime must be perpetrated in the execution of the accused's order).[51] A causal connection must be shown between the accused's conduct and that of the physical perpetrator,[52] but the prosecution need not prove that the crime would not have been committed without the accused's contribution.[53] Some scholars think it is inappropriate to characterize the orderer as a mere "accessory" to the physical perpetrators' crimes.[54] For example, Ambos argues that '[a] person who orders a crime is not a mere accomplice but rather a perpetrator by means, using a subordinate to commit the crime.'[55] Thus, ordering 'actually belongs to the forms of perpetration provided for in Article 25(3) (a) Rome Statute, being a form of commission "through another person."'[56] Cryer agrees with this conceptualization, noting that ordering in such a manner would have the advantage of allowing the issuance of orders, which were not acted upon, to be considered attempts.[57] Moreover, Van Sliedregt notes that ordering is the form of complicity that is particularly similar to superior responsibility.[58] However, the crucial difference is that in ordering the person gives orders while under command or superior responsibility the superior can be held responsible for his subordinates' behavior, which is usually a crime of omission.[59] Moreover, one of the major factors distinguishing ordering from superior responsibility is the clarification that an accused-orderer needs merely to possess informal and temporary authority over the person ordered. In superior responsibility, while the superior-subordinate relationship between the accused and his subordinate may be *de jure* or *de facto*, the accused must at all times possess "effective control" over the

[50] See Kamuhanda Appeal Judgment, supra note 41, para. 75; Kamuhanda Trial Judgment supra note 6, para. 590 (holding that the accused's conduct must have 'substantially contributed to, or have had a substantial effect on the completion of a crime'); Galic Trial Judgment, supra note 34, para. 169 (holding that the accused's conduct must have had 'a positive effect in bringing about the commission of crimes'); Kajelijeli Trial Judgment, supra note 6, para. 759 (same as Kamuhanda Trial Judgment, ibid); Semanza Trial Judgment, supra note 6, para. 379 (same as Kamuhanda Trial Judgment, ibid).

[51] See Brdanin Trial Judgment, supra note 34, para. 267; Kajelijeli Trial Judgment, supra note 6, para. 758; Semanza Trial Judgment, supra note 6, para. 378; Musema Trial Judgment, supra note 14, paras. 115–116; Rutaganda Trial Judgment, supra note 15, paras. 34, 38; Akayesu Trial Judgment, supra note 1, para. 473.

[52] See Strugar Trial Judgment, supra note 35, para. 332 ('a causal link between the act of ordering and the physical perpetration of a crime, analogous to that which is required for ''instigating'', also needs to be demonstrated as part of the actus reus of ordering').

[53] Ibid.

[54] See, e.g., Ambos, supra note 28, p. 753 (arguing that ordering is principal, as opposed to accessorial liability); Rod Rastan, Review of ICC Jurisprudence 2008. Northwestern Journal of International Human Rights 7 (2009), p. 11 ('Why should a superior who orders the commission of a crime by his subordinates not be held to be liable as a principal of the crime?'); Kevin Jon Heller, "The Rome Statute in Comparative Perspective." Melbourne Law School Legal Studies Research Paper No. 370 (2008), p. 24 ('categorizing ordering as a form of accessory liability… fails to reflect the fact that the superior's culpability for the crime is greater than the subordinates, because the superior not only violates his duty to control his subordinates, but also misuses his power in order to ensure that the crime is committed').

[55] See Ambos, supra note 28, p. 753.

[56] Ibid.

[57] See Robert Cryer et al., An Introduction to International Criminal Law and Procedure. 2nd ed. Cambridge: Cambridge University Press, 2010, p. 379

[58] See Elies Van Sliedregt, Individual Criminal Responsibility in International Law. Oxford: Oxford University Press, 2012, p. 106; See also Robert Cryer et al., supra note 57, p. 379.

[59] For detailed discussion on omission liability, see Héctor Olásolo et al., The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes. Oxford: Hart, 2009, pp. 82-84.

subordinate (i.e., the material ability to prevent or punish the subordinate's criminal conduct).[60] By contrast, ordering has no requirement of effective control.[61]

3.1 Applying Ordering in the Context of SGBCs

In the context of SGBCs, ordering requires a person in a position of authority to instruct others to commit SGBCs or an act or omission in the execution of which SGBCs are carried out.[62] Ordering is not limited to military settings. Therefore it is not required for the prosecutor to prove a formal superior-subordinate relationship between the accused and the perpetrator who physically committed the SGBCs.[63] Also, like planning, ordering does not require the prosecutor to show that SGBCs *per se* were ordered; instead, it is sufficient to order other criminal or even legal conduct, with the awareness of the substantial likelihood that SGBCs will occur in the implementation of that order.[64] This means that the accused should be in a position to foresee the occurrence of SGBCs in the circumstances he operates.[65] Therefore, a person who gives an order and is aware of the likelihood that SGBCs would follow can be held liable under ordering and also under JCE III.[66] These flexibilities present an opportunity for the prosecutor to charge and prosecute high-level officials for SGBCs under ordering or under JCE III. Chapter 5 will analyze the ICTR *Akayesu*, ICTR *Nyiramasuhuko et al.*, ICTY *Todorovic*, ICTR *Niyitegeka* case, and ICTY *Cesic* with all other SGBC cases to show what evidence is needed to hold a high-level accused accountable for SGBCs under ordering.

3.2 Table of What Needs to be Proven to Hold the Accused Responsible for Ordering

1	The accused instructed another person(s) to engage in criminal conduct or (2) to engage in an act or omission.
2	The accused was in a position of authority. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order.
3	The accused acted with (1) direct intent in relation to his own ordering or (2) that he was aware of the substantial likelihood that a crime will be committed in the realization of that act or omission.

[60] See Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, Appeal Judgment (7 July 2006), para. 143; Kordic´ and Cerkez Appeal Judgment, supra note 3, para. 840.
[61] See Kamuhanda Appeal Judgment, supra note 41, para. 75.
[62] See generally Kordic and Cerkez Appeal Judgment, supra note 3, para. 28; Blaškić Appeal Judgment, supra note 36, para. 471.
[63] See Kordic and Cerkez Appeal Judgment, supra note 3, para. 28.
[64] Ibid., para. 30; see also Blaskic Appeal Judgment, supra note 36, para. 471.
[65] See Goy, Jarvis, and Pinzauti, supra note 24, pp. 245-55.
[66] JCE III is an "extended" form of joint criminal enterprise. It concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of executing that common purpose. For more discussion on how someone can be held liable under ordering and also under JCE III, see Blaškić Trial Judgment, supra note 30, para. 474.

4	The order was specific. It needs not to be given directly to the person who physically executed the crime but can also be issued through an intermediary person. It need not be written nor issued in any particular form, as it can either be explicit or implicit.
5	The ordered crime has occurred or has at least been attempted.

4. Committing

Direct commission or physical perpetration is when someone executes all the elements of a crime without assistance from others. It is the most direct and concrete form of liability, a concept that has existed in ICL for a very long time. For example, in the *Jaluit Atoll* trial, held in 1945, the court convicted three Japanese soldiers for personally shooting POWs.[67] In the modern era, direct commission, as contained in Articles 7(1) of the ICTY Statute, 6(1) of the ICTR, and 25(3)(a) of the ICC Statute, constitutes the most direct form of involvement, which is the basis of all modes of liability.[68] However, criminal liability for commission not only attaches to the physical perpetrator of a particular crime but, in certain circumstances, commission may extend to those who participate in and contribute to a crime in various ways.[69]

Commission has come to be defined by the ICTY *Tadic* Appeals Chamber as "first and foremost the physical perpetration by the offender himself."[70] *Celebici* described it as "primary or direct perpetration"[71] and *Stakic* as participating "physically or otherwise directly or indirectly."[72] Following the *Tadic* Appeals Judgment, the expression committing has come to be agreed primarily as physical perpetration, i.e. the commission of the crime by the perpetrator himself with his or her own hands.[73] Later, a comprehensive and widely accepted meaning of committing was introduced by the ICTR *Seromba* Appeals Chamber.[74] It

[67] See US v. Masuda and others (The Jaluit Atoll Case), Law Reports of Trials of War Criminals, 7-13 December 1945, p. 71.
[68] See e.g., Prosecutor v. Tadic, Case No. IT-94-1-A, Appeal Judgment (15 July 1999), para. 191; Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Trial Judgment (21 May 1999), para. 203. For comparative analysis, see Athanasios Chouliaras, "Organizational Parameter." In Future Perspectives on International Criminal Justice, edited by Carsten Stahn, and Larissa van den Herik. The Hague: T.M.C. Asser, 2010, p. 545; Prosecutor v. Krajisnik, Case No. IT-00-39-T, Trial Judgment (27 September 2006), para. 655; Prosecutor v. Popovic et al., Case No. IT-05-88-T, Trial Judgment (10 June 2010), para. 1021; Prosecutor v. Gotovina, Cermak, Markac, Case No. IT -06-90-T, Trial Judgment (23 February 2011), paras. 1860-5. For detailed presentation of the history, development and establishment of the JCE doctrine and relationship with direct commission, see Verena Haan, Joint Criminal Enterprise: Die Entwicklung einer mittäterschaftlichen Zurechnungsfigur im Völkerstrafrecht. Berlin: Duncker & Humblot Gmbh, 2008, pp. 44ff., 73ff., 96 ff.
[69] See Kordic and Cerkez Trial Judgment, supra note 16, para. 373; Tadic Appeal Judgment, supra note 68, para. 192, noting in other instances the person who forces or made it possible for the perpetrator to physically carry out that criminal act is the most culpable.
[70] See Tadic Appeal Judgment supra note 68, para. 188; Kordic and Cerkez Trial Judgment, supra note 16, para. 376 (direct personal or physical participation); Prosecutor v. Krnojelac, Case No. IT-97-25-T, Trial Judgment (15 March 2002), para. 73; Prosecutor v. Vasiljevic, Case No. IT-98-32-T, Trial Judgment (29 November 2002), para. 63; Naletilic and Martinovic Trial Judgment, supra note 30, para. 62; Prosecutor v. Blagojevic and Jokic, Case No. IT-02-60-T, Trial Judgment (17 January 2005), para. 695; Muvunyi Trial Judgment supra note 34, para. 463; Prosecutor v. Mrksic et al., Case No. IT-95-13/1-T, Trial Judgment (27 September 2007), para. 542.
[71] See Prosecutor v. Delalic et al., Case No. IT-96-21-A, Appeal Judgment (20 February 2001), paras. 342-3, 346.
[72] See Kai Ambos, "International Criminal Law at the Crossroads: From Ad Hoc Imposition to a Treaty Based Universal System." In Future Perspectives on International Criminal Justice, edited by Carsten Stahn and Larissa van den Herik. The Hague: T.M.C. Asser, 2010, pp. 165-8.
[73] See Tadic Appeal Judgment, supra note 68, para. 188; see also Sabine Gless, Internationales Strafrecht: Grundriss für Studium und Praxis. Basel, Switzerland: Helbing Lichtenhahn Verlag, 2011, pp. 230-1.
[74] See Prosecutor v. Munyakazi, Case No. ICTR -97-36A-T, Trial Judgment (5 July 2010), para. 430 (committing is not limited to direct and physical perpetration); Prosecutor v. Lukic and Lukic, Case No. IT-98-32/1-T, Trial Judgment (20 July 2009), para. 899; Prosecutor v. Ndindabahizi, Case No. ICTR-01-71-A, Appeal Judgment (16 January 2007), para. 123; Prosecutor v. Nyirasmasuhuko et al., Case No. ICTR-98-42 –T, Trial Judgment (24 June 2011), para. 5594; Prosecutor v. Kalimanzira, Case No. ICTR-05-88-A, Appeal Judgment (20 October 2010), para. 219; Prosecutor v.

clarified that committing is not only limited to direct and physical perpetration, but it rather encompasses whether the actions carried out were as much an integral part of the crime as the direct and physical actions.[75] This means direct and physical perpetration does not include only actions such as physical killing. It also includes "other acts" [in the context of genocide] such as personal supervision of massacre of refugees sheltering at a church may constitute direct participation in the *actus reus* of the crime of genocide.[76]

The ICTY *Simic et al.* Trial Chamber defined commission similarly when addressing the controversy raised by the Simic's defense team that the prosecution pleaded Article 7(1) against the three accused, without specifying that they were charged under commission.[77] In so doing, the Chamber reviewed the evidence with the view that commission responsibility could apply to the acts charged in the indictment against the three accused.[78] In defining the elements that the prosecutor must prove to hold them responsible under this liability, the Chamber held the following:

> *'The meaning to be attached to "committed", the highest degree of participation in a crime, is not controversial. Any finding of commission requires the personal or physical, direct or indirect, participation of the accused in the relevant criminal act, or a finding that the accused engendered a culpable omission to the same effect, where it is established that he had a duty to act, with the requisite knowledge. An accused person will be held criminally responsible if he actually carries out the actus reus of the enumerated crimes. There can be several perpetrators in relation to the same crime where the conduct of each of them fulfils the elements of the definition of the substantive offence. The requisite mens rea is that the accused intended that a criminal offence occur as a consequence of his conduct.'*[79]

Undeniably, a volitional element on the accused's part is necessary to satisfy both intent and knowledge requirements. It encompasses situations where the accused knows that his or her actions or omissions will

Karemera and Ngirumpatse, Case No. ICTR- 98-44-T, Judgment and Sentence (2 February 2012), para. 1432; Prosecutor v. Munyakazi, Case No. ICTR- 97-36A-A, Appeal Judgment (28 September 2011), para. 135.

[75] See Prosecutor v. Seromba, Case No. ICTR-2001-66-A, Appeals Judgment (12 March 2008), para. 161; Gacumbitsi Appeal Judgment supra note 60, para. 60.

[76] See Seromba Appeals Judgment, supra note 75, para. 161. See Flavia Zorzi Giustiniani, Stretching the Boundaries of Commission Liability. Journal of International Criminal Justice 6 (2008), p. 783, noting at ibid pp. 787–8, that a majority of the Appeals Chamber also thought that this would apply to the crime against humanity of extermination; Gacumbitsi Appeal Judgment supra note 60, para. 60, asserting that 'in the context of genocide, however, direct and physical perpetration need not mean physical killing; other acts can constitute direct perpetration in the actus reus of the crime.'

[77] See Prosecutor v. Simic et al., Case No. IT-95-9-T, Trial Judgment (17 October 2003), para. 136.

[78] Ibid.

[79] Ibid., para. 137.

lead to the objective elements of the crime and, nevertheless, undertakes such acts or omissions with clear intent to bring about the objective elements of the crime (*dolus directus*).[80]

The direct commission mode raises two critical issues regarding the concept of perpetration. The first issue is whether or not perpetration can take place through omission. Taking a look at customary law, it would seem possible, provided that the charge relates to a "failure to a duty to act" and if omission has a "concrete influence" on the crime in question.[81] Ambos agrees that perpetration by omission is thought to be recognized in the ICC Statute,[82] to which Von Hebel and Kelt opine that the EoC consciously avoided the term 'acts' in favor of 'conduct', because the latter term includes acts or omissions.[83] The second controversy concerns the concept of perpetration "jointly with another" in Article 25(3)(a) of the Rome Statute. It describes the circumstances of the accused's level of participation and when he can be considered to have committed a crime "jointly" with another rather than having aided or abetted it. Many scholars have agreed that this problem is now settled through the differentiated participation approach endorsed by the international criminal justice systems.[84] For example, if two soldiers guarding a checkpoint to an IDP camp together beat an IDP to death, they should be held as having equally participated in the IDP's murder. Ascertaining who actually delivered the fatal blow to distinguish between participation and perpetratorship would instead make the case extremely hard to prove and seems unnecessary.

4.1 Applying Committing in the Context of SGBCs

In the context of SGBCs, direct commission means that the accused himself or herself physically committed rape or other SGBCs, with intent and knowledge to engage in that conduct. Therefore, the prosecutor must prove that SGBCs were committed by the accused himself, with the intent and knowledge to commit the SGBCs charged. Additionally, in the case of knowledge, the prosecutor might be required to specifically prove whether the accused had knowledge of a widespread or systematic attack against the civilian population and that the SGBCs he committed were, in fact, consistent with the pattern of this attack and formed a part of it.[85] For torture, the prosecutor must prove that rape occurred in a context of an interrogation

[80] See Prosecutor v. Lubanga, Case No.ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges (29 January 2007), para. 351.
[81] See Prosecutor v. Oric, Case No.: IT-03-68-A, Appeal Judgment (3 July 2008), para. 94. For a list of positive obligations in humanitarian law, see Yves Sandoz, Christoph Swiniarski, and Bruno Zimmermann (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 8 August 1949. Geneva: International Committee of the Red Cross, 1987, p. 1009. For an example of a conviction for omission, see Delalic´ et al. Trial Judgment, supra note 8, paras. 1092–6, 1101–5.
[82] See Ambos, supra note 28, pp. 475, 492; see also Kerstin Weltz, Die Unterlassungshaftung im Völkerstrafrecht. Freiburg im Breisgau, Germany: Iuscrim, 2004, pp. 320.
[83] See, e.g., Maria Kelt and Hermann von Hebel, "The Making of the Elements of Crimes." In The International Criminal Court: elements of crimes and rules of procedure and evidence, edited by Roy S. Lee. Ardsley, NY: Transnational Publishers, 2001, p. 14.
[84] See Albin Eser, "Individual Criminal Responsibility." In The Rome Statute of the International Criminal Court: A Commentary, edited by Antonio Cassese, Gaeta Paola, and John R.W.D Jones. Vol. 1. Oxford: Oxford University Press, 2002, p. 782; Olásolo et al., supra note 59, pp. 15-18; Cassese, supra note 13, p. 162.
[85] See Musema Trial Judgment & Sentencing, supra note 14, paras. 966-67.

to obtain a confession or to punish the victim.[86] In other instances, identification of the perpetrator is crucial, and the prosecutor must prove this link, which may be more challenging due to the elapsed time between the event and the trial, and the memory issues – the victim's ability to correctly identify the rapist after so many years if not decades.[87]

The ICTY and ICTR have prosecuted many of these cases, including the ICTR *Nyiramasuhuko et al*., ICTR *Musema*, ICTY *Kunarac et al.,* ICTY *Celebici*, ICTR *Musema*, ICTY *Haradinaj et al.,* and the ICTR *Niyitegeka* case. Moreover, the ICC Trial Chamber IX recently convicted Dominic Ongwen at the trial level for SGBCs under this mode of liability. In that case, the initial indictment did not include any SGBCs,[88] but the prosecution later expanded the charges that included the physical commission of SGBCs by the accused himself.[89] Chapter 5 will analyze these cases, along with other SGBC cases, to show how high-level accused can be prosecuted and how a chamber can interpret the commission requirements in light of the evidence produced.

4.2 Table of What Needs to be Proven to Hold the Accused Responsible for Committing

1	The accused personally perpetrated the crime by him or herself.
2	The accused intended that a criminal offence occur as a consequence of his conduct.

5. Instigating

Instigating is when someone encourages another person to commit a crime.[90] Liability for instigation (or incitement) has constantly featured in every major international instrument since the creation of the IMT and IMTFE.[91] It is described in the ICTY as "prompting,"[92] ICTR as "urging or encouraging,"[93] and in the ICC as "soliciting or inducing"[94] another to commit a crime. Instigating at the ICTY and ICTR is a similar concept to soliciting and inducing at the ICC, all of which interpret the object elements the same way.[95] An example of instigation can best be described by the events in Rwanda on 4 June 1994. In one of many similar

[86] See Delalic et al. Trial Judgment, supra note 8, paras. 934, 936-937, 943, 946-948, 954, 956-957, 965.
[87] See Prosecutor v. Haradinaj et al., Case No. IT-04-84-T, Trial Judgment (3 April 2008), paras. 466-469; Prosecutor v. Kunarac et al., Case No.: IT-96-23-T & IT-96-23/1-T, Trial Judgment (22 February 2001), paras. 792, 798; Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Judgment and Sentence (16 May 2003), para. 301.
[88] See Prosecutor v. Ongwen, Case No. ICC-02/04, Warrant of Arrest (8 July 2005).
[89] See Prosecutor v. Ongwen, Case No.: ICC-02/04-01/15, Notice of intended charges against Dominic Ongwen (24 September 2015); Prosecutor v. Ongwen, Case No.: ICC-02/04-01/15, Decision on the confirmation of charges (23 March 2016), para. 157.
[90] See Naletilic and Martinovic Trial Judgment, supra note 30, para. 60.
[91] Art. 6(c), IMT; Art. 2(13)(ii), Draft Code of Offenses against the Peace and the Security of mankind, 1954; Art 5, IMTFE Charter; Art. II (2), CCL10.
[92] See Blaškic Trial Judgment, supra note 30, para. 280.
[93] See Prosecutor v. Bagilishema, Case No. ICTR-95-IA, Appeal Judgment (3 July 2002), para. 30.
[94] See Gerhard Werle, Principles of International Criminal Law. The Hague, Netherlands: Asser, 2005, p. 125, noting that instigation is synonymous to soliciting or inducing.
[95] See William Schabas, The International Criminal Court: A Commentary on the Rome Statute. Oxford: Oxford University Press, 2010, p. 432.

broadcasts on Radio -Television Libre des Mille Collines (RTLM), Kantano Habimana called for 100,000 young men to be "recruited rapidly":

> *'[…] should all stand up so that we will kill the Inkotanyi and exterminate them … [T]he reasons that we will exterminate them is that they belong to one ethnic group. Look at the person's height and his or [her] physical appearance. Just look at his or [her] small nose and then break it.'*[96]

The incitement mentioned above in a public announcement provoked the massacres that ignited the Genocide against the Tutsi in Rwanda in 1994.[97] Instigation and incitement are similar concepts but, where it is public, incitement takes on a very different meaning and consequence. The ICTY and ICTR considered both terms to refer to the same speech act, punishable only when the perpetrators committed the incited substantive crime. However, only direct and public incitement has been interpreted as being an inchoate offense,[98] applicable only in connection with the crime of genocide.[99] Ambos notes that the difference between instigation and incitement ordinarily 'lies in the fact that the former is more specifically directed towards a certain person or group of persons in private while the latter is directed to the public in general.'[100] Eser agrees that instigation is addressed to a particular individual(s), incitement is directed towards an undefined group of people.[101] The instigation is punishable because of 'the inciter's participation (as an accessory) in the criminal act of another. In contrast, public incitement is criminalized because of the special dangerousness associated with the incitement of an indeterminate group of people.'[102] Moreover, incitement is more dangerous because 'the more it carried over into the social sphere and to the general public, the more it leads to a decrease in the controllability of the spoken and written words.'[103]

The above discussion shows that only direct and public incitement to genocide is considered punishable as an inchoate crime, while instigation is generally penalized where it has been successful.[104] The question then is why incitement to genocide should incur individual criminal responsibility if the intended harm does not result in crime? As Ashworth explains, one rationale lies in the fact that 'the concern [in criminal

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[96] See Prosecutor v. Nahimana et al., Case No. ICTR-99-52-T, Judgment and Sentence (3 December 2003), para. 396.
[97] For a detailed information on the genocide in Rwanda, see, generally, Usta Kaitesi, Genocidal Gender and Sexual Violence, The Legacy of the ICTR, Rwanda's ordinary courts and Gacaca Courts. Cambridge, UK: Intersentia, 2014.
[98] The crime can be considered not inchoate only when the criminal wrongdoing is just at the early preparatory phase, meaning that it has not yet been completed and no harm has been caused. For detailed information, see Cassese, supra note 13, p. 219; see also William Schabas, "Le genocide." In Droit International Penal, edited by H. Ascencio, E. Decaux, and A. Pellet. Paris: Editions A. Pedone, 2000, pp. 319, 326.
[99] For a more discussion on this subject, see Cassese, supra note 13, pp. 218-220.
[100] See Ambos, supra note 28, p. 486.
[101] See Eser, supra note 84, pp. 767, 804.
[102]See Albin Eser, "The Law of Incitement and the Use of Speech to Incite Others to Commit Criminal Acts: German Law in Comparative Perspective." In Freedom of Speech and Incitement against Democracy, edited David Kretzmer and Francine K. Hazan. London: Kluwer Law International, 2000, pp. 119, 124
[103] Ibid., p. 146.
[104] See Reinhart Maurach, Friedrich-Chr Schroeder, Manfred Maiwald, Strafrecht: Besonderer Teil, Teilband 2: Straftaten und Gemeinschaftswerte. 7th ed. Heidelberg, Germany: C. F. Muller Juristischer Verlag, 2012, p. 360.

liability] is not merely of the occurrence of harm but also with its prevention.'[105] Because direct and public incitement is particularly dangerous, once words of hatred and incitement are circulated in the public sphere, they tend to spread very quickly and dangerously, becoming difficult if not impossible to control. It is essential to reduce the inciter's influence over the persons incited and prevent the effectiveness and likelihood leading to criminal acts. One means of doing this is by suppressing hate speech online and offline from the onset not allowing incitement to continue for a long time in the public domain. In defining the elements of instigating of which the Prosecutor specifically charged the accused Mladen Naletilic and Vinko Martinovic for the crimes alleged in the Indictment under Article 7(1), the Chamber held that:

> *'Instigating has been defined as "prompting another to commit an offence" either through an act or an omission. The actus reus requires a clear contribution to the act of the other person, but it needs not to be shown that the offence would not have been perpetrated without the participation of the accused. The requisite mens rea is that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts.'*[106]

Unlike direct and public incitement to commit genocide, instigation need not be direct and public.[107] Thus, an accused may incur criminal liability for instigation in two different ways: (1) where he prompts criminal conduct with the intent that a crime is committed as a result of that prompting; or (2) where he prompts an act or omission aware of the substantial likelihood that a crime will be committed in the realization of that act or omission.[108] The urging, encouraging or prompting that constitutes instigation may take place verbally or by other means of communication, but it would seem that verbal instigation is the usual method endorsed by the ICTY and ICTR chambers.[109] Also, an omission, as well as an act, can constitute instigation,[110] which may also include explicit and implicit conduct of the accused.[111] In this regard, a mere presence at the time and place where a crime is being committed could amount to instigation or encouragement, particularly when the accused occupies a position of authority.[112] The person instigating must act intentionally means that the accused must have 'intended to provoke or induce the commission of the crime' or must at least

[105] See Andrew Ashworth, Principles of Criminal Law. 4th ed. Oxford: Oxford University Press, 2003, p. 446.
[106] See Naletilic and Martinovic Trial Judgment, supra note 30, para. 60.
[107] See Akayesu Appeal Judgment, supra note 46, paras. 478–83; Kamuhanda Judgment and Sentence, supra note 6, para. 593.
[108] See Naletilic and Martinovic Trial Judgment, supra note 30, para. 60.
[109] See Mpambara Trial Judgment, supra note 34, para. 18; Prosecutor v. Ndindabahizi, Case No.: ICTR-2001-71-I, Trial Judgment (15 July 2004), para. 456.
[110] See Kordic and Cerkez Trial Judgment, supra note 16, para. 387; Blaskic Trial Judgment, supra note 30, para. 280.
[111] See Blaskic Trial Judgment, supra note 30, para. 280.
[112] See Musema Judgment and Sentence, supra note 14, para. 865; see also Tadic Opinion and Judgment, supra note 2, para. 690.

have been 'aware of the substantial likelihood that the commission of a crime would be a probable consequence of his or her acts.'[113] At the same time, the prosecutor must prove that the accused 'directly or indirectly intended that the crime in question be committed.'[114] Several high-level officials have been prosecuted for instigating others to commit criminal offenses. For example, Akayesu was convicted of instigating rape as a crime against humanity for his verbal encouragement by stating to the Interahamwe, 'never ask me again what a Tutsi woman tastes like.'[115] Also, Aleksovski was convicted of instigating outrages upon personal dignity as war crime for verbally prompting guards at the prison he commanded to mistreat detainees.[116]

5.1 Applying Instigating in the Context of SGBCs

In the context of sexual violence, instigating requires that the accused prompts another person to commit rape or other SGBCs through acts or omission.[117] The prosecutor must also prove that the accused intended to provoke or induce the commission of the SGBCs or was aware of the substantial likelihood that the SGBCs would be a probable consequence of his acts. This can also take place without the accused having a position of authority over the direct perpetrator since, like in planning and ordering, it is sufficient to show that the instigation was a factor substantially contributing to the commission of the SGBCs.[118] Prompting can also be explicit or implicit.[119] It can also take different forms, such as speeches, or create an environment permissive of SGBCs by subordinates, such as by giving *carte blanche* to inflict these crimes, setting an example through their conduct, or by notorious and persistent tolerance.[120]

The ICTR *Gacumbitsi* Trial Judgment serves as a strong precedent where instigation has been applied to prosecute SGBCs. *Gacumbitsi* (a mayor of the commune of Rusumo in Rwanda) was convicted for having instigated the rape of eight Tutsi women and girls. Gacumbitsi drove around in Rubare cellule, Nyarubuye secteur, calling out through a megaphone for young Hutu men to search for the [Tutsi] girls who had refused to marry them and rape them. He specifically mentioned that 'in the event that they [the young Tutsi girls] resisted, they should be killed atrociously.'[121] Following his speech, many attackers assaulted several Tutsi

[113] See Naletilic´ and Martinovic Trial Judgment, supra note 30, para. 60; see also Prosecutor v. Kvocka et al., Case No. IT-98-30/1-T, Trial Judgment (2 November 2001) para. 252.
[114] See Blaskic Trial Judgment, supra note 30, para. 278; see also Kordic and Cerkez Trial Judgment, supra note 16, para. 386; Bagilishema Trial Judgment, supra note 6, para. 31.
[115] See Akayesu Trial Judgment, supra note 1, paras. 422, 692.
[116] See Aleksovski Trial Judgment, supra note 8, para. 88.
[117] See Kordic and Čerkez Appeal Judgment, supra note 3, para. 27.
[118] Ibid., para. 27.
[119] See Milutinovic et al., Trial Judgment, supra note 20, para. 83; Prosecutor v. Tolimir, Case No. IT-05-88/2-T, Trial Judgment (12 December 2012), para. 902.
[120] See Galic Trial Judgment, supra note 34, para. 168; see also Xabier Agirre Aranburu, Sexual Violence Beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases. Leiden Journal of International Law 23 (2010), pp. 609, 614.
[121] See Gacumbitsi Trial Judgment, supra note 34, para. 215.

women and girls and violently raped them in their hideouts.[122] The Trial Chamber held that such an expression from the accused, directed at this group of attackers on which he had influence, constituted an incitement.[123] It held that prompting substantially contributed to the commission of rape and other SGBCs. The physical perpetrators were influenced considerably by the accused's conduct and were aware of and influenced by his speeches.[124] The *Gacumbitsi* Trial Chamber emphasized the closeness in time between the accused's instigation and the rapes and the accused's influence over the physical perpetrators.[125]

However, the difficulty in this trial concerns whether or not the instigation had a substantial contribution to certain SGBC cases or whether the instigation was a *conditio sine qua non* for the commission of the SGBCs in question. For instance, this problem arose when it appeared that the *Gacumbitsi* Trial Chamber had erred in law by requesting the prosecution to establish that the accused's instigation was a *conditio sine qua non* of the commission of the rapes.[126] In response to this question, the prosecution noted that a substantial contribution suffices.[127] Because of this lack of clarity, as a result, 'no evidence could be proven to establish a link' – whether substantial or otherwise – between the accused's words and a number of rapes recounted by witnesses, for which the Trial Chamber acquitted the accused.[128] However, the error in the law allowed jurisprudence, since the *Gacumbitsi* case, to agree on a consistent interpretation that the instigation needs only to have contributed substantially to the commission of the crime. For example, the Trial Chamber found Semanza guilty of instigating rape and held that immediately after his speech, one of the men in the audience raped the victim.[129] The Chamber concluded that the fact that the rape of the witness occurred directly after the accused instructed the group to rape means that the accused's verbal encouragement constituted instigation because it was causally connected and substantially contributed to the actions of the principal perpetrator.[130] The ICTY and ICTR have prosecuted many other cases in addition to *Gacumbitsi* and *Semanza*. They include the ICTY *Sikirica* case,[131] ICTR *Akayesu* case, ICTY *Dordevic* case,[132] and ICTY *Seselj* case.[133] Chapter 5 will examine these cases and all other SGBC cases to show how tribunals and courts can prosecute high-level officials under this mode of liability.

[122] Ibid., paras. 215, 224, 327-8, 330.
[123] Ibid., para. 215.
[124] Ibid., paras. 40, 227.
[125] Ibid., para. 227.
[126] See Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, Prosecution Appeal Brief (20 July 2004) para. 120.
[127] See Gacumbitsi Appeal Judgment, supra note 60, paras. 127-128.
[128] Ibid., paras. 127-130.
[129] See Semanza Judgment and Sentence, supra note 6, paras. 261, 476.
[130] Ibid., para. 478.
[131] See Prosecutor v. Sikirica et al., Case No. IT-95-8-S, Sentencing Judgment (13 November 2001), paras. 19, 125.
[132] See Prosecutor v. Dordevic, Case No. IT-05-87/1-T, Trial Judgment (23 February 2011), para. 2168. (witness K14, witness K20).
[133] See Prosecutor v. Seselj, Case No.: IT-03-67-T, Trial Judgment (31 March 2016), para. 330.

5.2 Table of What Needs to be Proven to Hold the Accused Responsible for Instigating

1	The accused prompted another to commit an offence through acts or omission.
2	A clear contribution [of the accused's instigation] to the act of the other person.
3	The accused intended to provoke or induce the commission of the crime or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts.

6. Aiding and Abetting

Aiding and abetting is when someone provides assistance or support to others to commit a crime.[134] It was initially theorized during the IMT trials. For example, in the 946 Trial of *Bruno Tesch et al.* (*Zyklon B* case), Bruno Tesch (owner of a poison gas firm), Karl Weinbacher, and Joachim Drosihn were charged with the war crime of 'having supplied poison gas used for killing allied nationals interned in concentration camps, knowing that it was so to be used.'[135] The accused (Tesch and Weinbacher) were convicted and sentenced to death and Drosihn was acquitted of his charge. The *Zyklon B* case was decided on the principle that civilians who are accessories to war crimes have themselves committed war crimes.[136] Thus, as Van der Wilt notes, these cases show 'a symbiotic relationship between big business and a criminal regime that could not have survived without the former's unfaltering support.'[137] Liability of this kind can be attributed to a person who may participate in a crime without necessarily sharing the principal perpetrator's criminal intent by only assisting him in the commission. Suppose X lends a General-Purpose Machine Gun to Y, a renowned criminal in town, who had already been convicted of murder, without knowing what actual crime Y intends to commit, but fully aware that he will use the weapon to engage in a criminal act. In that case, X could be held liable for aiding and abetting whatever crime Y might, in the end, commit with the weapon issued him. The rationale is that, in ICL, for being liable for aiding and abetting, it is neither necessary to be aware of the crime the perpetrator precisely intends to commit nor to share the required mental element of that crime.[138]

Aiding and abetting is well recognized in Article 25(3)(c) of the Rome Statute, Article 7(1) ICTY Statute, and Article 6(1) ICTR Statute, all of which criminalize 'a person who aided and abetted in the planning, preparation or execution' of an international crime. However, to date, there are still many controversies

[134] See Tadic Trial Judgment, supra note 2, paras. 674, 688-92.
[135] See the Zyklon B Case, CASE No.9, Trial of Bruno Tesch and Two Others, British Military Court, Hamburg, Law Reports of Trials of War Criminals, 1-8 March 1946, p. 93 (complicity of German industrialists in the murder of interned allied civilians by means of poison gas).
[136] Ibid., p. 103.
[137] See Harmen van der Wilt, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities.' Chinese Journal of International Law 12 (2013), pp. 43, 52.
[138] See Prosecutor v. Brima et al., Case No. SCSL-04-16-T, Trial Judgment (20 June 2007), para. 776.

about aiding and abetting's precise ambit in ICL.[139] For instance, in determining the right mode of liability for which the accused Vasiljevic stood charge, the Trial Chamber held that if the chamber is not satisfied that the prosecution has proven that the accused shared the state of mind required for the commission of any of the crimes in which he is alleged to have participated pursuant to a JCE, the chamber will then consider whether it had nevertheless been proven that the accused incurred criminal responsibility for any of those crimes as an aider and abettor to their commission.[140] In doing so, the *Vasiljevic* Trial Chamber held that an accused would incur individual criminal responsibility for aiding and abetting a crime under Article 7(1) of the Statute if the prosecutor proves the following elements:

> *'The Actus Reus of aiding and abetting, is that the accused carried out an act which consisted of practical assistance, encouragement or moral support to the principal offender of the crime. The act of assistance need not have caused the act of the principal offender, but it must have had a substantial effect on the commission of the crime by the principal offender. The act of assistance may be either an act or omission, and it may occur before or during the act of the principal offender. Mere presence at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated to have a significant encouraging effect on the principal offender.[141] The mens rea of aiding and abetting, is that the aider and abettor knew (in the sense that he was aware) that his own acts assisted in the commission of the specific crime in question by the principal offender. The aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal offender's state of mind. However, the aider and abettor need not share the intent of the principal offender.'*[142]

The above description points out several legal issues: Firstly, the actions that aid and abet the commission of the crime must have a direct and 'substantial' effect on the commission of the crime.[143] As Ambos defines,

[139] There is also a question as to whether complicity in genocide, criminalized in Art. 3(e) of the Genocide Convention, is different from this form of liability; the Appeals Chamber in Krštic´ hinted that the two differ. Since then, the case has been read by the Appeals Chamber as establishing that 'the prohibited act of complicity in genocide, which is included in the Genocide Convention and in Art. 2 of the Statute, encompasses aiding and abetting. See Prosecutor v. Krštic, Case No: IT-98-33-A, Appeal Judgment (19 April 2004), paras. 138–44; Prosecutor v. Ntakirutimana and Ntakirutimana, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Appeal Judgment (13 December 2004), paras. 371, 500. It however, leaves the door open for 'other forms of complicity' than aiding and abetting; Blagojevic´and Jokic Trial Judgment, supra note 70, para. 679. See Chile Eboe-Osuji, "Complicity in Genocide" versus "Aiding and Abetting Genocide." Journal of International Criminal Justice 3, no. 1 (2005), p. 56; Payam Akhavan, The Crime of Genocide in the ICTR Jurisprudence. Journal of International Criminal Justice 3, no.4 (2005), p. 989.
[140] See Vasiljevic Trial Judgment, supra note 70, para. 69.
[141] Ibid., para. 70.
[142] Ibid., para. 71.
[143] See Tadic Trial Judgment, supra note 2, paras. 674, 688-92.

substantial means any assistance which is more than *de minimis*.[144] It means that the contribution must have an effect on the commission of the crime requiring the existence of a causal relationship between the act and the result,[145] which usually calls for a fact-based inquiry.[146] Ambos stresses that an attribution nexus between the main offense and the act of assistance is required for aiding and abetting; therefore, an *ex post facto* link would usually consist of a prior common agreement.[147] In this view, the *actus reus* of aiding and abetting may only arise after the fact, if the *mens rea* existed before the commission of the crime. Secondly, the objective element must consist of practical assistance, encouragement, or moral support by the accessory to the principal. These must have also contributed substantially to the commission of the crime.[148]

The ICTY and ICTR, while endorsing this definition, explain, *inter alia*, that standing near victims while armed to prevent them escaping amounts to aiding and abetting.[149] This is also the case when providing weapons to a principal,[150] or taking principals to a crime scene and finger-pointing at people to be killed.[151] Further, allocating resources for which a person is responsible for being used for crimes may also be sufficient to evoke this liability.[152] Moreover, although mere presence *per se* does not automatically amount to encouragement,[153] a superior being present at the scene of the crime may evoke liability for abetting by tacit approval.[154] Omissions may also suffice for aiding or abetting if there is a legal duty bestowed upon the accused to prevent the crime from happening and the accused could intervene but refused to do so.[155] Also, the principal offender needs not to be aware of the assistance for liability for aiding and abetting to arise,[156] as it is possible to abet someone without them being aware of such assistance. Lastly, it should be noted that 'the lending of practical assistance, encouragement, or moral support may be provided in the form of positive action or omission before, during, or after the crime or underlying offense occurs.'[157]

[144] See Ambos, supra note 28, p. 481.
[145] See Tadic Trial Judgment, supra note 2, para. 688; Dordevic Trial Judgment, supra note 132, para. 1874.
[146] See Blagojevic and Jokic Trial Judgment, supra note70, para. 134; Prosecutor v. Boskoski and Tarculovski, Case No. IT-04-82-T, Trial Judgment (10 July 2008), para. 401.
[147] See Ambos, supra note 28, pp. 491-92.
[148] See Prosecutor v. Vasiljevic, Case No.: IT-98-32-A, Appeal Judgment (25 February 2004), para. 102.
[149] Ibid., para. 134. Judge Shahabuddeen in that case considered this to suffice for coperpetratorship through joint criminal enterprise liability: see Partially Dissenting Opinion of Judge Shahabuddeen, ibid para. 40.
[150] See Ntakirutimana and Ntakirutimana Appeal Judgment, supra note 139, para. 530.
[151] Ibid., para. 532.
[152]See Krštic Appeal Judgment, supra note 138, para. 137.
[153] See Prosecutor v. Oric, Case No. IT-03-68-T, Trial Judgment (30 June 2006), para. 283.
[154] See Prosecutor v. Aleksovski, Case No.: IT-95-14/1-A, Appeal Judgment (24 March 2000), paras. 36–7; Prosecutor v. Brdanin, Case No. IT-99-36-A, Appeal Judgment (3 April 2007), para. 273; Prosecutor v. Mrksic et al., Case No. IT-95-13/1-A, Appeal Judgment (5 May 2009), paras. 148–52 (the question remains open as to whether or not the duty to act must be based on criminal law, or may be based on a general duty).
[155] See Oric Trial Judgment, supra note 153, para. 283; Milutinovic et al. Trial Judgment, supra note 20, para. 90.
[156] See Tadic Appeal Judgment, supra note 68, para. 229.
[157] See Milutinovic et al. Trial Judgment, supra note 20, para. 91.

6.1 Applying Aiding and Abetting in the Context of SGBCs

Liability can arise when the accused aids or abets SGBCs through practical assistance, encouragement, or moral support.[158] The prosecutor only needs to prove that the accused was aware of the SGBCs and assisted in the commission by some means.[159] The assistance provided by the accused need not be criminal in nature,[160] and that the accused don't need to be physically present at the scene where the SGBCs took place.[161]

The ICTY and ICTR have prosecuted several high-level officials for aiding and abetting SGBCs. For instance, the ICTY Trial Chamber convicted Brdanin, head of the war-time Crisis Staff of the Autonomous Region of Krajina (ARK), for aiding and abetting persecution. It included rapes and sexual assaults committed by Serb forces, based on ARK Crisis Staff decisions on disarmament, attributed to Brdanin.[162] According to the Trial Chamber, the ARK Crisis Staff decisions had a substantial effect on the commission of the crimes, including SGBCs, by Bosnian Serb Soldiers and police officers during and after the armed attacks on non-Serb townships.[163] Brdanin knew about these attacks, and he rendered practical assistance to the forces carrying out the attacks.[164]

It was difficult to establish the element of moral encouragement in Brdanin concerning the SGBCs committed in the prisons. The Trial Chamber based Brdanin's conviction for aiding and abetting SGBCs committed in prisons on his moral encouragement, which provoked the physical perpetrators. Accordingly, the Trial Chamber relied on Brdanin's inaction concerning conditions in the prisons, along with his public attitude towards them, which might have created the impression in the minds of the personnel running the prisons that they indeed enjoyed the full support of the ARK Crisis Staff and its leader.[165] However, the Appeals Chamber overturned Brdanin's conviction for the SGBCs committed in prison[166] because the Prosecutor did not establish that the personnel running the prisons were aware that Brdanin failed to condemn the conditions in the camps.[167] Instead, the Prosecutor established this element in the ICTY *Furundzija* case, the commander of a Croatian Defence Council unit known as the Jokers. The Chamber

[158] See Prosecutor v. Sainovic et al., Case No. IT-05-87-A, Appeal Judgment (23 January 2014), para. 1649 (specific direction not an element under customary international law); But see also Prosecutor v. Perisic, Case No. IT-04-81-A, Appeal Judgment (28 February 2013), para. 36.
[159] See Sainovic et al. Appeal Judgment, supra note 158, para. 1649.
[160] See e.g., Prosecutor v. Blagojevic and Jokic, Case No.: IT-02-60-A, Appeal Judgment (9 May 2007), para. 196.
[161] See Prosecutor v. Lukic and Lukic, Case No. IT-95-32/1-A, Appeal Judgment (4 December 2012), para. 425 citing Prosecutor v. Simic et al., Case No. IT-95-9-A, Appeal Judgment (28 November 2006), para. 85 and Blaskic Appeal Judgment, supra note 36, para. 48. The exception is the situation of an approving spectator, who aids and abets the principal's crime by encouraging the physical perpetrators through their presence at (or near) the crime scene. See e.g., Prosecutor v. Nzabirinda, Case No. ICTR-2001-77-T, Sentencing and Judgment (23 February 2007), para. 18.
[162] See Brdanin Trial Judgment, supra note 34, paras. 1056-8.
[163] Ibid., para. 1057.
[164] Ibid., para. 1057; Brdanin Appeal Judgment, supra note 154, paras. 263-4 (Brdanin appealed against his conviction and the Trial Chamber decision was upheld on appeal).
[165] See Brdanin Trial Judgment, supra note 34, para. 1058.
[166]See Brdanin Appeal Judgment, supra note 154, paras. 259-89.
[167] Ibid., para. 284.

convicted him for aiding and abetting SGBCs as an outrage upon personal dignity, including rape, for his role in encouraging the rape of a victim by another soldier. The Chamber held that because of his presence and continuous interrogation of the victim while being sexually assaulted, Furundzija encouraged the soldier and substantially contributed to his crime.[168] This decision proved that an accused's presence at the crime scene alone could also satisfy the *actus reus* of aiding and abetting by moral encouragement, provided the prosecutor can prove that the accused's presence had a substantial effect on the commission of the SGBCs.[169]

Furthermore, proof of the mental element is essential in aiding and abetting cases. For example, the prosecutor must prove that the accused was aware that his forces were going into the specific crime sites to commit SGBCs, a failure of which would result in an acquittal.[170] The ICTY and ICTR have prosecuted many cases under aiding and abetting. Chapter 5 will analyze the ICTY *Brdanin*, ICTY *Furundzija,* ICTY *Kunarac et al.,* ICTR *Muhimana*, ICTY *Sainovic et al*., and other SGBC cases to demonstrate how courts can prosecute high-level officials for SGBCs under this mode of liability.

6.2 Table of What Needs to be Proven to Hold the Accused Responsible for Aiding and Abetting

1	The accused carried out an act which consisted of practical assistance, encouragement or moral support to the principal offender of the crime.
2	The act of assistance (act or omission) had a substantial effect on the commission of the crime by the principal offender.
3	The aider and abettor knew (in the sense that he was aware) that his own acts assisted in the commission of the specific crime in question by the principal offender.
4	The aider and abettor was aware of the essential elements of the crime committed by the principal offender, including the principal offender's state of mind.

7. Concluding Remarks

When the accused directly planned, ordered, committed, instigated an international crime, or aided or abetted in the commission of such crime, the best way to link him to it will be through the concept of direct modes of liability. The chapter discussed five of these legal theories and analyzed their elements of crimes, which the prosecution must prove beyond a reasonable doubt. In planning, liability hinges on several key issues: proof of the existence of a concrete plan designed by the accused; the planning was a factor that

[168] See Prosecutor v. Furundzija, ICTY-95-17/1-T, Trial Judgment (10 December 1998), para. 273.
[169] See Brdanin Appeal Judgment, supra note 154, para. 277.
[170] See Prosecutor v. Sainovic et al., Case No. IT-05-87-T, Trial Judgment Volume 3 of 4 (26 February 2009), paras. 928, 935, 1211.

substantially contributed to such criminal conduct; the substantial likelihood that the crime would occur. Controversially, the doctrine has said that if the crime the accused had planned is not later perpetrated, the accused cannot be held liable for planning. However, the ICTY and the ICTR gave a conflicting interpretation on the issue, affirming that, from the ICL point of view, it does not matter whether the crime was committed; the fact that the crime was planned is enough to consider and qualify it as criminal offense. For SGBCs, there is no need to prove that such crime *per se* were planned or would not have taken place outside of the planning itself. It suffices that another crime (e.g., forced transfers of the population), or even legal conduct (e.g., relocating vulnerable population to a safer location) is planned and that the accused is aware of the substantial likelihood that SGBCs would be committed in the implementation of that plan.

For liability to arise under the ordering mode of liability, three main issues must be addressed: the accused ordered another to commit the crime; the crime ordered was committed; the authority or influence over the person ordered to commit the crime. One central question was what form an order should have and if it should be written or oral. The doctrine clarifies that an order from the accused can either be explicit or implicit. It does not need to be written or be issued in any particular form; it can also be issued directly or through an intermediary. The main contentious issue was whether it is necessary to prove a superior-subordinate relationship since the orderer must have some form of authority over the one ordered to commit the crime. The study clarifies that it is not required to prove a formal superior-subordinate relationship between the accused and the perpetrator. What is needed is proof of some authority position on the part of the accused that would compel another to commit a crime in following the accused's order. One way of knowing that the accused had authority over the person's ordered is by showing that the person obeyed the order. In this regard, the prosecutor must establish some causal connection between the accused's conduct and that of the physical perpetrator's action. In the context of SGBCs, ordering does not require the prosecutor to show that SGBCs *per se* were ordered; rather, it is sufficient to order other criminal or even legal conduct, with the awareness of the substantial likelihood that SGBCs will occur in the implementation of that order.

On the other hand, commission seems less controversial, as any such finding must show that the crime was committed directly by the accused himself. It is the highest degree of participation in a crime, so it is not restricted to physical commission *per se*. It overlaps with all the modes of liability, such as aiding and abetting the commission of a crime or committing it through other persons. One primary debate under this mode is whether or not commission can take place through omission. According to international customary law, it is possible, provided that the charge relates to a "failure to a duty to act" and if omission has a "concrete influence" on the crime in question. However, no such cases have been adjudicated by the ICTY,

ICTR, and ICC to date. For SGBCs, the prosecutor must show that the SGBCs were committed by the accused himself, with the intent and knowledge.

The ICTY and ICTR considered instigation as a speech act, punishable only when the perpetrator committed the incited substantive crime. Liability for instigating international crime may arise in two different ways: the accused prompts another person to commit a crime, and the offense is committed as a result of that prompting; the accused prompting is a factor that substantially contributes to the commission of the crime. Also, the accused must have intended to provoke or induce the commission of the crime, or must have at least been aware of the substantial likelihood that the commission of a crime would be a probable consequence of his prompting. Instigating overlaps with aiding and abetting through "prompting", i.e., both can take place by creating an environment permissive of subordinates to commit crimes freely or by setting an example through their conduct or by notorious and persistent tolerance. The ICTY and ICTR chambers endorsed that the 'urging, encouraging, or prompting' that constitutes instigation may occur verbally or by other means of communication. Still, it would seem that verbal instigation is the most common method. In the context of SGBCs, this would require the prosecutor to show that the accused intended to provoke or induce the commission of the SGBCs or was aware of the substantial likelihood that the SGBCs would be a probable consequence of his acts.

Aiding and abetting seems to be quite a flexible mode of liability because it is neither necessary to be aware of the crime the perpetrator precisely intends to commit nor to share the required mental element of that crime. For liability to arise for aiding and abetting, the accused must have provided practical assistance, encouragement, or moral support to the physical perpetrator of the crime. It also holds that the accused cannot be held liable if his conduct did not substantially affect the crime committed, including whether the accused knew that his conduct would assist the principal perpetrators in committing the crime. Under this mode of liability, the key factor is the "direct and substantial effect clause" and the presence at the crime scene. For the accused's contribution to have an effect on the commission of the crime, there must have also been the existence of a causal relationship between the act and the result, which usually calls for a fact-based inquiry, as will be seen in Chapter 5. As to the issue of the presence of the accused at the crime scene, the ICTY and ICTR chambers endorsed that a superior being present at the location of the crime may evoke liability, provided that the prosecution can demonstrate that the accused's presence had a substantial effect on the commission of the crime. The controversy that remains unresolved today is that, in theory, liability for aiding and abetting does not require demonstrating that the physical perpetrator knew of the aider and abettor's assistance, but the situation is different in cases of aiding and abetting by moral encouragement. In such a situation, the prosecutor must demonstrate that the physical perpetrators were aware of the aider and abettor's encouragement and were driven by it to meet the substantial effect requirement. This is a

higher standard threshold, and it will be tough for the prosecution to meet such requirements in practice, especially in SGBC cases. In the context of SGBCs, liability can arise when the accused aids or abets rape through practical assistance, encouragement, or moral support. The prosecutor only needs to prove that the accused was aware of the SGBCs and assisted in the commission by some means. The assistance provided by the accused needs not to be criminal in nature, and that the accused don't need to be physically present at the scene where the SGBCs took place. The next chapter will discuss the various legal theories under indirect modes of liability and how courts and tribunals can use these theories to attribute criminal responsibility to high-level officials.

Chapter IV: Linking Sexual and Gender-Based Crimes to High-level Officials through Indirect Modes of Liability

1. Introduction

This chapter will examine the legal theories used to attribute crimes to individuals through the indirect modes of liability, encompassing joint criminal enterprise (JCE), superior/command responsibility, co-perpetration, indirect perpetration, and indirect co-perpetration theories. These modes aim to address collective or mass criminality involving senior leaders and others who committed crimes indirectly through other persons or who acted in concert to commit crimes or those leaders who failed to prevent, repress, or report the crimes committed by their subordinates.

A general overview will outline how these legal theories were developed, their scope, and their limitations. The study will also examine the jurisprudence of the *ad hoc* tribunals and the ICC and scholarly commentaries on individual criminal responsibility to try to understand the legal and jurisdictional framework of these modes of liability.

The chapter will also analyze how each of these modes can respond to the need to hold high-level officials criminally responsible for SGBCs by mentioning the emblematic cases from the ICTY, ICTR, and ICC. After that, a table will be provided under each mode of liability to pinpoint/identify the legal elements that the prosecutor must prove. Additionally, the table will explain the differences between the modes of liability that seem to overlap each other.

The chapter will conclude by highlighting the measures available to the *ad hoc* tribunals and ICC to hold an accused criminally responsible for an offense committed under the indirect modes of liability, the main arguments in the laws, and the gaps today in the legal theories.

2. Joint Criminal Enterprise

The ICTY and ICTR used the joint criminal enterprise (JCE) to prosecute individual members of a group for the crimes committed by that group within a common plan or purpose. Before the *Tadic* case, the first judicial pronouncement from the *ad hoc* tribunals as to the definition and scope of JCE was the *Furundzija* Trial Judgment rendered in December 1998.[1] The Trial Chamber cited three sources of law

[1] See Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Trial Judgment (10 December 1998). The first explicit reference from a chamber of the ICTY to the so-called 'common-purpose' doctrine in the law of individual criminal responsibility occurred in the Celebici Trial Judgment, rendered a few weeks prior to Furundzija, in the following terms: [W]here a [pre-existing plan to engage in criminal conduct] exists, or where there otherwise is evidence that members of a group are acting with a common criminal purpose, all those who knowingly participate in, and directly and

when distinguishing between 'participation in a common plan or enterprise, on the one hand, and aiding and abetting a crime, on the other: the *Dachau Concentration Camp* case, the *Auschwitz Concentration Camp* case, and Articles 25(3)(c) and (d) of the Rome Statute, which had been opened for signature at the time.[2] Upon review of the *Dachau* case, the *Furundzija* Trial Chamber held that 'the real basis of the charges [in *Dachau*] was that all the accused had "acted in pursuance of a common design" to kill and mistreat prisoners.'[3] The various accused's roles ranged from camp commanders to guards, and each accused made a tangible contribution to the commission of crimes in the camp. Thus, the Chamber convicted each for his 'participation' in the crimes, not for aiding and abetting them.[4] After a detailed analysis of these three sources, the Trial Chamber concluded that 'two separate categories of liability for criminal participation appear to have crystallized in ICL – co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other.'[5]

The *Tadic* pronouncement emerged after eight months of the *Furundzija* case when the *Tadic* Appeals Chamber took on developing comprehensively the form of responsibility labeled "joint criminal enterprise" and "common design" in *Furundzija*.[6] The *Tadic* case concerned the events that happened in the township of Jaskici in June 1992, when the armed Serb group Tadic was a member allegedly killed five Muslim men.[7] Tadic was accused of killing the men, but the Prosecutor's evidence did not show who and in what circumstances the men were killed.[8] As there was no evidence that Tadic was directly involved in the killing himself, he was therefore acquitted of alleged participation in killing the five civilians.

Although Tadic was acquitted of the murder charges, the Trial Chamber nevertheless found him guilty of cruel treatment and other inhumane acts.[9] The acquittal decision was overturned by the *Tadic* Appeals Chamber, which set out its interpretation of commission on account of participation in a JCE. The Appeals

substantially contribute to, the realization of this purpose may be held criminally responsible under Article 7(1) for the resulting criminal conduct. See Prosecutor v. Delalic et al., Case No. IT-96-21-T, Trial Judgment (16 November 1998), para. 328. The Chamber did not opine further on the elements or applicability of this doctrine. See also Prosecutor v. Kayishema and Ruzindana, Case No. ICTR 95-1-T, Trial Judgment (21 May 1999), para. 203 (quoting and endorsing this passage in Celebici).

[2] See Furundzija Trial Judgment, supra note 1, paras. 211, 214 (citing Trial of Martin Gottfried Weiss and Thirty-Nine Others, 16 Law Reports of Trials of War Criminals, 1949, p. 5 ('Dachau Concentration Camp case'); Massenvernichtungsverbrechen und NS-Gewaltverbrechen in Lagern; Kriegsverbrechen. KZ Auschwitz, 1941–1945, reported in 21 Justiz und NS-Verbrechen, 1979, pp. 361–887 ('Auschwitz Concentration Camp case'). The Furundzija Trial Chamber cites three elements applied by the IMT as 'necessary to establish guilt in each case': 'the existence of a system to ill-treat the prisoners and commit the various crime alleged; ... the accused's knowledge of the nature of this system; and ...that the accused encouraged, aided and abetted or participated in enforcing the system'. Ibid., para. 212. These elements are substantially similar to JCE II as defined by the Tadic´ Appeals Chamber after reviewing, among other cases, the Dachau Concentration Camp case. See Prosecutor v. Tadic´, Case No. IT-94-1-A, Appeal Judgment (15 July 1999), paras. 202–203; Furundzija Trial Judgment, supra note 1, para. 216, citing Art. 25(3)(c)–(d)), Rome Statute.

[3] See Furundzija Trial Judgment, supra note 1, para. 211.

[4] Ibid., paras. 212-213.

[5] Ibid, para. 216, citing Art. 25(3)(c)–(d)), Rome Statute.

[6] See generally Tadic Appeal Judgment, supra note 2, paras. 185-229. Curiously, Tadic´ does not rely on the JCE discussion in Furundzija or acknowledge the existence of that discussion in any way, and only cites Furundzija as having employed the proper approach in determining the persuasive value of the Rome Statute. Ibid, para. 223.

[7] See Prosecutor v. Tadic, Case No. IT-94-1-I, Amended Indictment, 14 December 1995.

[8] See Prosecutor v. Tadic Case No. IT-94-1-T, Trial Judgment (7 May 1997), para. 373; Tadic Appeal Judgment, supra note 1, paras. 182-184.

[9] See Tadic Trial Judgment, supra note 8, paras. 759-765.

Chamber started by inquiring 'whether criminal responsibility for participating in a common criminal purpose falls within the ambit of [this provision].'[10] It then engaged in a teleological analysis of the Statute, with the intent to cover 'all those who have engaged in serious violations of IHL, the manner in which they may have perpetrated, or participated in the perpetration of those violations.'[11] Following a lengthy discussion, the Appeals Chamber concluded that Article 7 ICTY Statute does not explicitly establish common purpose liability. However, it 'does not exclude the modes of participating in the commission of crimes where several persons with a common purpose undertake criminal activity that is executed either jointly or by some members of this plurality of persons.'[12] To support its finding, the Appeals Chamber then appraised the scope of many international crimes, insisting that they are committed jointly by large numbers of people.[13] Moreover, as the *actus reus* and *mens rea* were not at the time specified in the ICTY Statute, the Appeals Chamber then looked to customary law primarily as evidenced in case law,[14] to set out the required elements of the JCE doctrine.

Following an extensive review of post-WWII proceedings,[15] for example, the *Almelo* case[16] and the *Essen Lynching* trial,[17] the *Tadic* Appeals Chamber then determined that there was a customary basis for such liability in three types of cases: the first being cases where 'all co-defendants, acting pursuant to a common design, possess the same criminal intention,'[18] now known as the 'basic' category or JCE I. While giving examples of this category, the Chamber pointed at 'the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill.'[19] For this reason, JCE I allows 'imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing.'[20] The second type concerns 'instances where the offenses charged have been committed by members of military or

[10] See Tadic Appeal Judgment, supra note 2, para. 187.
[11] Ibid., paras. 189-90. Another case has, controversially, determined that Art. 7(1) ICTY Statute is not exhaustive: Prosecutor v. Milutinovic et al. Case No. Case No.: IT-99-37-AR72, Appeals Chamber Decision on Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise (21 May 2003), para. 20. Still, the Appeals Chamber in Stakic´ appeared to frown on new doctrines being introduced into the tribunal's jurisprudence; Prosecutor v. Stakic´, Case No. IT-97-24-A, Appeals Chamber Judgment (22 March 2006), para. 59.
[12] See Tadic Appeal Judgment, supra note 2, para. 190.
[13] Ibid., para. 191: See also ibid., para. 195, where the judges note that many post-WWII cases concerning war crimes proceeded upon the principle that when two or more persons act together to further a common criminal purpose, offences perpetrated by any of them may entail the criminal liability of all the members of the group. A closer look of the relevant case law shows that broadly speaking, the notion of common purpose encompasses three distinct categories of collective criminality.
[14] The Report containing the proposed statute of the ICTY stated that 'in the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law' Report of the Secretary General Pursuant to paragraph 2 of UN SC Res 808, 1993, 3 May 1993, para. 34. In his work as an academic, Judge Shahabuddeen has also confirmed that 'the jurisdiction of the ICTY Statute was confined to customary international law and to statutory provisions which had mature into customary international law.' Mohamed Shahabuddeen, International Criminal Justice at the Yugoslav Tribunal: The Judicial Experience. Oxford: Oxford University Press, 2012, p. 67.
[15] See Robert Cryer et al., An Introduction to International Criminal Law and Procedure. 2nd ed. Cambridge: Cambridge University Press, 2010, p. 369 (noting 'not all of which firmly based their forms of liability in international law').
[16] See Trial of Otto Sandrock and Three Others 1 Law Reports of Trials of War Criminals. 26 November 1945 (The Almelo case), p. 35.
[17] See Trial of Erich Heyer and Six Others, 1 Law Reports of Trials of War Criminals, 22 December 1945 (The Essen Lynching Case), p. 88.
[18] See Tadic Appeal Judgment, supra note 2, para. 196.
[19] Ibid.
[20] Ibid.

administrative units, such as those running concentration camps: i.e. by groups of persons acting pursuant to a concerted plan,'[21] now known as the "systemic" form or JCE II. The judges acknowledged that JCE II is in practice "a variant of JCE I,"[22] and its constituting elements were firstly identified by the IMT. In fact, the IMT qualified as co-perpetrators those who had a position of authority within the system of ill-treatment (i.e., the Nazi concentration camps) but failed to protect the lives of inmates.[23] Therefore, what distinguishes JCE II from JCE I is that the former's common design is institutionalized: i.e., it takes place in a detention center, a prison, or a concentration camp setting. Finally, the third type, JCE III, concerns those 'involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of achieving the common purpose.'[24]

The *Tadic* Appeals Chamber thus went on to describe the *actus reus* requirements that the prosecutor must prove for liability to arise under the three categories of the JCE:

> *'(i) a plurality of persons; (ii) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute; (iii) the participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.'*[25]

While elaborating on these criteria, the Appeals Chamber in *Tadic* noted, for example, that plurality 'need not be organized in a military, political or administrative structure.'[26] The Appeals Chamber went further to explain that the common plan or purpose may materialize extemporaneously and be inferred from the fact when a plurality of persons acts in unison to put into effect a JCE.[27] Furthermore, when discussing the individual level of involvement in the common design, the Appeals Chamber noted that participation of such 'need not involve the commission of a specific crime under one of those provisions, but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.'[28]

After the *Tadic* case, other subsequent cases have made a significant contribution to the understanding of the *actus reus* requirements. In *Milutinovic*, the Appeals Chamber made it clear, for example, that

[21] Ibid., para. 202.
[22] Ibid., para. 203.
[23] Ibid.
[24] Ibid., para. 204.
[25] Ibid., para. 227.
[26] Ibid.
[27] Ibid., para. 227.
[28] Ibid.; see also Prosecutor v. Krajišnik, Case No. Case No. IT-00-39-A, Appeal Judgment (17 March 2009), para. 695.

membership in the group *per se* is not really sufficient to ground liability for JCE.[29] While further clarifying this point, the *Brdanin* Trial Chamber held that there must be some form of action by the accused to contribute to the implementation of the plan,[30] including direct and indirect participation.[31]

Although *Kvocka et al*. Appeal Chamber stated that the accused's contribution should be a 'necessary or substantial one,'[32] some appeals chamber decisions took another approach. They affirmed that it needs to be "significant"[33] which seems to modify the threshold standard. It was also discussed whether or not those who physically commit the relevant crimes need to be parties to the JCE for other participants in that enterprise to be found guilty through this principle.[34] However, the *Brdanin* Appeals Chamber appears to have resolved this issue. The Chamber clarified that the direct perpetrators "on the ground" do not have to be a part of the enterprise, provided that the crimes can be attributed to one member of the enterprise acting in pursuant to the common plan when he uses the direct perpetrators to commit crimes.[35] The *Krajisnik* Appeals Chamber clarified that there must be a link to show that the JCE member directly or indirectly invited the non-JCE member to commit the crime or instigated, ordered, encouraged, or otherwise availed himself of the non-JCE member to commit the crime. Accordingly, it is not decisive that the non-JCE member shared the *mens rea* of the JCE member or that he was actually aware that the JCE existed.[36]

To understand what has been explained above, imagine that X, Y, and Z have decided that they want to attack a certain village whose chief recently accused the three of them in a public statement of conniving with the Government to obtain public positions. They plan to raid every house in it, get as much food as possible to continue their fight against the Government, and kill the chief and his entire family as punishment for the perceived betrayal. Since they are currently far from the targeted village, Z contacts a small armed group commander that operates in the area and permits the raid. In this case, the armed group enacted the attack, whose members will face charges for direct commission. Moreover, the fact that the armed group's commander was instructed by Z, and X, Y, and Z have together planned the attack, all three are liable for the JCE, even though the raid was ordered only by Z. Under the principle of personal culpability, the armed group commander might also face charges for ordering the attack.

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[29] See Milutinovic et al. Decision on Ojdanic's Motion Challenging Jurisdiction, supra note 11, para. 26; see also Prosecutor v. Brdanin, Case No. IT-99-36-T, Trial Judgment (1 September 2004), para. 263.
[30] See Brdanin Trial Judgment, supra note 29, para. 263.
[31] Ibid.
[32] See Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Appeal Judgment (28 February 2005), para. 97.
[33] See Prosecutor v. Brdanin, Case No. IT-99-36-A, Appeal Judgment (3 April 2007), para. 430 (the exact difference between 'substantial' and 'significant' is not entirely clear, but has been repeated); see also Krajišnik Appeal Judgment, supra note 28, para. 215.
[34] See Prosecutor v. Krštic´, Case No. IT-98-33-T, Trial Judgment (2 August 2001), para. 612; see also Milutinovic et al. Decision on Ojdanic's Motion Challenging Jurisdiction, supra note 11, para. 26; Brdanin Trial Judgment, supra note 29, paras. 18-24, the Separate Opinion of Judge Bonomy is clear that liability may lie in such a situation. At ibid para. 13 he asserts that 'there is certainly no binding decision of the Appeals Chamber that would prevent the Trial Chamber from finding an accused guilty on that basis.'
[35] See Brdanin Appeal Judgment, supra note 33, paras. 410–14, but see the Dissent of Judge Shahabudeen, ibid., paras. 4–20. Nor does there have to be an agreement with the direct perpetrator for them to commit the crime, ibid., paras. 418–9.
[36]See Krajišnik Appeal Judgment, supra note 28, para. 226.

However, one should note that the common plan needs to be kept tight. When it is fundamentally altered, it automatically becomes a new plan or purpose, which cannot merely be regarded as a continuation or mutation of the old one.[37] The doctrine, in fact, only holds a person responsible for crimes which relate to the plan or purpose he or she subscribed to;[38] but of course, if they agree to the expansion (by altering the plan), they all can be responsible for the new crimes that will surface. However, in such circumstances, 'it is not necessary to show that the JCE members explicitly agreed to the expansion of criminal means, as this agreement may materialize extemporaneously and be inferred from circumstantial evidence.'[39]

After extensively deliberating on the *actus reus* element, the *Tadic* Appeals Chamber then turned to determine the *mens rea* element of the JCE. By contrast, the conduct element of all of JCE liability forms is the same, but the difference between them is the mental element. The Appeals Chamber thus affirmed that:

> *'. . . the mens rea element differs according to the category of common design under consideration. With regard to JCE I, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to JCE II (a variant of JCE I),[40] personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to JCE III, what is required is the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the JCE or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.'*[41]

JCE III constitutes the most extensive form of liability, where the foreseeability of a crime is considered the standard test. The second aspect of the test (the accused "willingly took that risk") means that the person

[37] See Prosecutor v. Blagojevic and Jokic Case No. Case No. IT-02-60-T, Trial Judgment (17 January .2005), para. 700.
[38] See Prosecutor v. Krajišnik Case No. IT-00-39-T, Trial Judgment (27 September 2006), paras. 1903, 701, although if the later plan or purpose is broader, he may still be liable for those crimes that fall within the narrower aspect agreed to.
[39] See Krajišnik Appeal Judgment, supra note 28, para. 163.
[40] See Prosecutor v. Martic, Case No. IT-95-11-A, Appeal Judgment (8 October 2008), paras. 301-14. See also Prosecutor v. Mrkšic´, Case No. IT-95-13/1-A, Appeal Judgment (5 May 2009), paras. 29-33.
[41] See Tadic Appeal Judgment, supra note 2, para. 228.

was reckless (*dolus eventualis*) towards the crime.[42] Therefore, 'a person may be found responsible for such acts even if it is not proven that he knew they had occurred.'[43] Suppose A is the commander of a detention camp where three other military officers have repeatedly tortured detainees. A knows about the ongoing disciplinary cases but keeps allowing the military officers to work. One day, four men are arrested during a search operation and brought in to question their link to a rebel group. While waiting for interrogation, they are held in separate rooms of the detention camp. A is aware of the four new inmates and understands that the three military officers will be on duty that night. Nonetheless, he leaves them on guard and goes home to sleep to find out the next day that the inmates have been tortured, and one of them died in the hospital due to his injuries. The fact that A had knowledge about the men's past torture experience and knew they could again commit torture but still willingly took the risk makes him accountable for JCE III of all the crimes committed against the inmates.

The doctrine of JCE has come under critical assessments, falling into three broad categories: first that the *Tadic* interpretation of and reliance upon the post-WWII case law, as establishing customary international law is incorrect; second, the doctrine itself, particularly JCE III, is too indefinite, lacks clarity, excessively broad and inconsistent with basic tenets of ICL; and, third, equal culpability imposed by the doctrine violates the most fundamental principle of individual criminal responsibility.[44]

As Ohlin argues, 'the arguments offered by the ICTY Appeals Chamber for an expansive reading of Article 7 on the object and purpose of the ICTY Statute to prosecute the architects of war crimes, the collective nature of genocide and war crimes, and the international case law on collective criminal action each contain "deficiencies that cast doubt on the version of the JCE doctrine constructed by the *Tadic*'s court,'[45] of having no basis under international customary law. This is one of the main reasons why JCE is not integrated into the Rome Statute. Damgaard notes that ICC is not bound by the decisions of the ICTY or ICTR chambers and the ICC State Parties were under no obligation *per se* to incorporate the JCE doctrine into the Rome Statute. [46] Moreover, the Rome statute's legal basis is that it is an international treaty, as opposed to the *ad hoc* tribunals, and the State parties thereto were, in fact, free to determine the contents of such treaty, based on the applicable law of the ICC.[47]

[42] Ibid., para. 220; Stakic Appeals Judgment, supra note 11, paras. 99-103.
[43] See Prosecutor v. Miloševic, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal (16 June 2004), para. 150.
[44] The JCE III has been a controversial doctrine even within the ICTY itself. See, e.g., Prosecutor v. Stakic, Case No. IT-97-24-T, Trial Judgment (31 July 2003) (espousing a doctrine of co-perpetration at odds with the JCE doctrine). This decision was overturned on appeal. See Stakic Appeals Judgment, supra note 11.
[45] See Jens David Ohlin, Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise. Journal of International Criminal Justice 5 (2007), p. 71.
[46] See Ciara Damgaard, Individual Criminal Responsibility for Core International Crimes. Berlin: Springer, 2008, p. 173.
[47] Art. 21(b) and Art. 22, Rome Statute.

The second category of the critical assessment focuses on the deficiencies of the JCE doctrine itself (e.g., that members of a JCE are criminally responsible for their co-conspirators' actions, even if these actions were not agreed upon in advance or fell outside the common purpose). Danner and Martinez object to the scope of the doctrine, arguing that 'extended JCE has expanded the notion of individual criminal responsibility to the extent that there is no clear definition of where the limits are. Besides creating the condition to attribute guilt (without proof) to individuals because the people they associate with are guilty, the liability could go so far as to find every defendant who participates, for example, in genocide, and who foresees the killings that occurred, liable for the murder of the entire ethnic group. They conclude that this expansion gives rise to "guilt by association."'[48] The *Tadic* Appeals Chamber itself conceded that the vicarious liability's sole constraint is that the co-conspirators' actions must be foreseeable to the defendant.[49] In other words, if it is objectively foreseeable that other members of the enterprise might extend their actions beyond the agreement, then all members of the conspiratorial group can be charged with the crime. On this understanding, Ohlin opines that equal criminal liability should be restricted to acts that were part of the criminal plan, as it was formulated, and for non-agreed foreseeable acts, a lower level of liability is warranted. [50] Therefore, the failure of the ICTY *Tadic* Appeals Chamber to narrow the definition of an "enterprise," and its application to a "*dolus specialis*" or "specific intent" crimes rendered the JCE application [on foreseeability] superfluous.[51] This is precisely one of the reasons why JCE III does not fall in Article 25(3)(d) of the Rome Statute either.

Finally, equal culpability is considered the most fundamental problem of the JCE doctrine because of the burden that all members of a JCE bear the same level of blameworthiness.[52] Ohlin opines that this is entirely wrong on a philosophical level because the principle of culpability requires that responsibility be relative to the contribution involved.[53] Van der Wilt also argues that the ICTY has opened itself up to criticism for not adhering to the appropriate bounds of culpability.[54] The fact of the matter is that, under ICL, a defendant who makes a small contribution is not as guilty as someone who makes a significant contribution to a crime. To hold liable otherwise is to violate the principle of individual moral responsibility endorsed by the ICTY, ICTR, and ICC.[55] Moreover, as JCE is constructed on a group plan or design, the problem with imposing equal culpability is that it ignores the group agent's internal structure, creating the tendency to view the

[48] See Allison Marston Danner and Jenny Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', California Law Review 93, no.75 (2005), p. 137.
[49] See Tadic Appeal Judgment, supra note 2, para. 204.
[50] See Ohlin, supra note 45, p. 81.
[51] For a detailed discussion on these arguments, see Danner & Martinez, supra note 48, pp. 102–51.
[52] See e.g., Prosecutor v. Vasiljevic, Case No. IT-98-32-T, Trial Judgment (29 November 2002), para. 67 ('if the agreed crime is committed by one or other of the participants in a joint criminal enterprise such as has already been discussed, all of the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission').
[53] See Ohlin, supra note 45, p. 85.
[54] See Harmen van der Wilt, Joint Criminal Enterprise: Possibilities and Limits. Journal of International Criminal Justice 5 (2007), p. 91.
[55] Art. 7, ICTY Statute, Art. 6, ICTR Statute and Art. 25, Rome Statute.

group agent as a single entity whose internal deliberative structure is either inscrutable or irrelevant. As Kutz notes, the only alternative is, therefore, to impose liability at the group level and administer punishment equally to its parts.[56]

2.1 Applying JCE in the Context of SGBCs

The creative use of the JCE doctrine has led to an increase in the prosecution of SGBC cases at the ICTY and ICTR,[57] which offers broad discretion to prosecutors and judges in determining the scope of wrongdoing attributed to high-level officials concerning SGBCs.[58] For example, prosecutors may secure rape convictions without proving a specific nexus between the accused and the crimes happening on the ground if those crimes were foreseeable by-products of a JCE, involving genocidal intent or widespread and systematic attacks.

Concerning SGBCs under JCE I, the prosecutor must prove that the JCE members shared the intent to commit the SGBCs. This entails SGBCs were used to destroy a particular ethnic group, discriminate against people of different ethnicities, or drive them out of a specific territory. This requires the prosecutor to charge SGBCs as part of a common criminal purpose when it involves, for example, genocide, persecution, expulsion, deportation or forcible transfer of people, mass displacement, and ethnic cleansing, to name a few.[59] It further requires proving that a common plan to commit the crime existed. The accused must have voluntarily participated in some aspects of the plan and assisted in committing the crime – regardless of whether he is the physical perpetrator.[60] This is also applicable to all JCE II cases, which involve instances where SGBCs occur in prison or concentration camps.[61] SGBCs under these JCE categories can become part of the common purpose either from the onset or over time. For SGBCs happening from the outset, the *Stakic* Appeals Chamber held that SGBCs were part of the violent technique used by the Bosnian Serbs to cleanse Prijedor municipality of non-Serbs.[62] In *Kvocka et al.,* the Trial Chamber recognized that SGBCs

[56] For a detailed discussion of the philosophical implications of collective action and responsibility, see Christopher Kutz, Ethics and Law for a Collective Age. Cambridge: Cambridge University Press, 2000.
[57] See, e.g., Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Appeal Judgment (July 21, 2000); Tadić Appeal Judgment, supra note 2; Prosecutor v. Kvocka, Case No. IT-98-30/7-T, Trial Judgment (Nov. 2, 2001); Krstić Trial Judgment, supra note 34; Furundžija Trial Judgment, supra note 1; Tadić Trial Judgment, supra note 8; Prosecutor v. Karemera, Case No. ICTR- 98-44-I, Amended Indictment (23 February 2005).
[58] See Danner & Martinez, supra note 48, p. 98.
[59] See e.g. Prosecutor v. Karadzic; Prosecutor v. Mladic; Prosecutor v. Hadzic; Prosecutor v. Slobodan Milosevic; Prosecutor v. Stakic; Prosecutor v. Krajisnik; Prosecutor Brdanin; Prosecutor v. Milutinovic et al.; Prosecutor v. Dordevic; Prosecutor v. Haradinaj et al.; Prosecutor v. Prlic et al.; Prosecutor v. Stanisic and Zupljanin; Prosecutor v. Stanisic and Simatovic; Prosecutor v. Krstic where evidence of sexual violence substantiated the charge of terrorizing civilians as an underlying act of persecution.
[60] See Danner & Martinez, supra note 48, p. 105.
[61] See e.g., Prosecutor v. Kvocka et al., Case No. IT-98-30/1, Amended Indictment (26 October 2000), paras. 9, 12, 24-6, 28, 30, 32, 42 (prosecution charged the accused with committing persecution through sexual assault and rape of civilians confined in the camps of Omarska, Kerater, and Trnopolje in the Prijedor area).
[62] See Stakic Appeal Judgment, supra note 11, para. 73 (the Appeals Chamber confirmed that the common purpose consisted of a discriminatory campaign to ethnically cleanse the Municipality of Prijedor by deporting and persecuting Bosnian Muslims and Bosnian Croats in order to establish Serbian control).

were part of a system of ill-treatment used to persecute and suppress prisoners in a camp.[63] It is complicated for the prosecutor to prove this element. First of all, the prosecutor must prove that the SGBCs occurred as part of the plan from the beginning or SGBCs happened from the beginning while carrying out that plan.[64] It is sufficient to prove that the SGBCs were based on a discriminatory intent and were committed consistently and in a widespread manner.[65] In that regard, the evidence must show that the accused made a substantial contribution in the implementation of the Common Purpose from the beginning and shared the intent to further it.[66]

Moreover, for SGBCs occurring over time, the *Krajisnik* Appeals Chamber held that the means of realizing the common purpose of the JCE could evolve overtime only if the JCE members agreed on this expansion of means.[67] However, proving that SGBCs became part of the original plan overtime is not an easy task. For example, to attribute liability for expanded crimes, the prosecution must prove that the JCE members shared the intent for the expanded crimes. This entails proving that the leading members of the JCE were informed of the crimes and did nothing to prevent their recurrence and persisted in implementing the expansion of the common objective (giving rise to an inference that they endorsed the expanded means of achieving the goals). Also, the prosecutor must prove when precisely the expanded crimes became incorporated in the common objective.[68] A conviction might not be possible if these criteria are not met. For example, despite the conviction of Krajisnik by the Trial Chamber, the Appeals Chamber overturned Krajisnik's conviction for all crimes, including SGBCs, which were not included in the original common criminal plan.[69] Therefore, in as much as it is possible to expand the plan beyond its original setting, obtaining the necessary evidence to convince the court can be a tough task for the prosecutor to achieve.

The JCE category II requires proof that the SGBCs were part of a common purpose and were implemented in organized systems of ill-treatment. The prosecutor must also prove that the accused was aware of the SGBCs, the systems of ill-treatment (under which the SGBCs occurred), and had the intent to further the JCE. The ICTY *Kvocka et al*. Trial Chamber articulated this form of liability. In that case, the Trial Chamber heard that SGBCs were committed in Omarska camp[70] and that the Omarska camp functioned as a system

[63] See Kvocka et al. Trial Judgment, supra note 57, paras. 319-20 (note that the Trial Chamber found that the Omarska camp in Prijedor functioned as a system of ill-treatment with the aim to persecute and subjugate non-Serb detainees through the commission of crimes including rape. The finding was upheld on appeal).
[64] See Stakic Trial Judgment, supra note 44, para. 818.
[65] Ibid., para. 806.
[66] See Stakic Appeal Judgment, supra note 11, paras. 73, 84-85.
[67] See Krajisnik Appeal Judgment, supra note 28, para. 163.
[68] Ibid., para. 171.
[69] Ibid., paras. 175-8. Regarding crimes of which Krajisnik was convicted see ibid., paras. 277-8, 283 (Krajisnik's conviction included sexual violence only as conduct underlying the commission of the crimes forming part of the original common criminal purpose – deportation and inhumane acts (forced transfer), as well as persecution based on deportation and forced transfer – and where the sexual violence could be linked to one of the JCE members).
[70] See Kvocka et al. Trial Judgment, supra note 57, para. 108.

of ill-treatment, with the aim to persecute and subjugate non-Serb detainees through crimes, including SGBCs.[71] The Trial Chamber found that the three accused were well aware of the terrible conditions and intended to further the JCE by their continued presence. Their contributions were substantial to the maintenance and functioning of the Omarska camp, and they knew and intentionally contributed to the furtherance of the JCE.[72] However, the Appeals Chamber overturned Miroslav Kvocka and Zoran Zigic's convictions.[73] These cases will be further discussed and analyzed in Chapter 6 to show what evidence is needed to hold high-level officials accountable under this form of liability.

Under JCE III, the prosecution needs to establish that SGBCs were objectively a natural and foreseeable consequence of the execution of the JCE and that the accused was subjectively aware that such crimes were a possible consequence and still participated in the JCE nonetheless.[74] The common criminal purpose of the JCE members in this category usually concerns the "agreed crimes" (e.g. killing members of a specific ethnic group or genocide, persecution, expulsion, deportation or forcible transfer of people, mass displacement, and ethnic cleansing). It considered SGBCs as falling outside the common purpose. In these cases, liability for SGBCs hinges on proving to the chamber that SGBCs were natural and foreseeable consequences of achieving the common purpose.[75] Suppose a crime of rape goes beyond the intended criminal object of the JCE, which could be to kill members of a specific ethnic group. In that case, rape must have been a natural and foreseeable consequence of the killing. Further, the accused must herself or himself have been aware that rape could follow from that killing. Further, the accused must have been aware that rape could follow from that killing.

In any event, there are critiques that JCE III was too easily applied in SGBC cases to get convictions, and in many cases, SGBCs should have been prosecuted as JCE I in the first place rather than JCE III.[76] The ICTR *Karemera et al.* shed light on this problem. Karemera and Ngirumpatse were convicted for JCE III after the Trial Chamber found that the evidence did not support a finding of liability for SGBCs under JCE I (which imputes liability to an accused whenever he intentionally participates in the commission of crimes

[71] Ibid., paras. 319-20. Trial findings upheld on appeal: Kvocka et al. Appeal Judgment, supra note 32, para. 84-6.
[72] See Kvocka et al. Trial Judgment, supra note 57, paras. 413, 463-4, 499-500,566, 610, 684.
[73] See Kvocka et al. Appeal Judgment, supra note 32, paras. 334, 599.
[74] See, e.g., Krajišnik Appeal Judgment, supra note 28, paras. 171-7; Brđanin Appeal Judgment, supra note 33, para. 432; Prosecutor v. Ntakirutimana, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Appeal Judgment (13 December 2004), para. 465; Martic Appeal Judgment, supra note 40, para. 83 regarding punishment for various levels of participation in JCE III; Milutinovic et al. Decision on Ojdanic's Motion Challenging Jurisdiction, supra note 11, para. 11; Tadić Appeal Judgment, supra note 2, paras. 195-6, 204; Prosecutor v. Vasiljevic, Case No.: IT-98-32-A, Appeal Judgment (25 February 2004), paras. 95-101.
[75] See Prosecutor v. Stanisic and Zupljanin, Case No. IT-08-91-T, Trial Judgment (27 March 2913), vol 2, paras. 313, 525, 776; Martic, Case No. IT-95-11-T, Trial Judgment (12 June 2007), paras. 445, 454; Krstic Trial Judgment, supra note 34, paras. 616-7.
[76] For a detailed discussion, see Michelle Jarvis and Elena Martin Salgado, "Future Challenges to Prosecuting Sexual Violence Under International Law Insights from the ICTY Practice." In Sexual Violence as an International Crime: Interdisciplinary Approaches, edited by Anne-Marie de Brouwer et al. Cambridge, UK: Intersentia, 2013, pp. 101-122; Kelly Askin, "Treatment of Sexual Violence in Armed Conflicts: A Historical Perspective And The Way Forward." In Sexual Violence as an International Crime: Interdisciplinary Approaches, edited by Anne-Marie de Brouwer et al. Cambridge, UK: Intersentia, 2013, pp. 49-55.

with a plurality of actors). Despite the facts and the accused's knowledge and indifference to the widespread SGBCs during the genocide in Rwanda, the Trial Chamber still concluded that the evidence did not 'expose a shared intent by JCE members to cause serious bodily or mental harm through rape and sexual assaults of Tutsis.' [77] For example, the Trial Chamber found that despite Ngirumpatse's absence from the country during part of the genocide, he was nevertheless informed and aware of the rapes and sexual assaults. This is because 'the rapes and sexual assaults on Tutsi women and girls were vast in scope and conducted openly and notoriously over a long period.'[78] The Chamber made similar findings regarding Karemera, except that he was physically present in the country during the material time and had informed the Chamber that he assumed people would be raped.[79] The Chamber also found that both accused 'continued to participate in the JCE to destroy the Tutsi population of Rwanda despite the widespread occurrence of rapes and sexual assaults on Tutsis.'[80] In light of these conclusions, it is unclear why the Chamber characterized these crimes as natural and foreseeable consequences of the intended crimes rather than part of the original or an expanded JCE. Also, it is unclear why the Appeals Chamber did not resolve these issues. While JCE III is entirely based on the notion of foreseeability, there are exceptional reasons or indications the prosecutor could use to plead that SGBCs fall under JCE I rather than JCE III. These include 'vast scope and conducted openly and notoriously over a long period'[81] or a high number of victims or a clear and compelling pattern of SGBCs conduct serving either as an integral part of genocide, deportation, and or forcible transfer crimes.[82]

Chapter 6 will analyze all the SGBC cases adjudicated by the ICTY and ICTR to show what evidence is needed to hold high-level officials accountable under the JCE doctrine. However, the ICC does not recognize this doctrine and has excluded it from the Rome Statute. Therefore, applying this mode of liability to pursue SGBCs might only be applicable in future hybrid/international tribunals if they choose to include this approach in their statutes.

[77] See Prosecutor v. Karemera et al., Case No. ICTR-98-44-T, Trial Judgment (2 February 2012), para. 1456.
[78] Ibid., para. 1482.
[79] Ibid., paras. 1470, 1475.
[80] Ibid., paras. 1483, 1486.
[81] Ibid., para. 1482.
[82] The classification of strategic use is often erroneously limited to cases where sexual violence is committed frequently. However, strategic use (in pursuit of the common purposes) and large-scale use are two different concepts. For a detailed information see Elisabeth Jean Wood, Conflict-Related Sexual Violence and the Policy Implications of Recent Research. International Review of the Red Cross 96, no. 894 (2015), pp. 1, 19.

2.2 Table of What Needs to be Proven to Hold the Accused Responsible for JCE

	JCE I • Plurality of persons; • Existence of a common plan/design; • Participation of the accused in the common design; • Intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators).
	JCE II • Plurality of persons; • Existence of a common plan/design; • Participation of the accused in the common design; • Personal knowledge of the system of ill-treatment is required (either by express testimony or a matter of reasonable inference from the accused's position of authority); • Intent to further this common concerted system of ill-treatment.
	JCE III • Plurality of persons; • Existence of a common plan/design; • Participation of the accused in the common design; • Intent to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the JCE or in any event to the commission of a crime by the group; • For a crime outside the common plan: (i) proof that it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) proof that the accused willingly took that risk.

3. Superior Responsibility

Superior responsibility is the failure of a superior to prevent or punish crimes perpetrated by subordinates. As explained in Chapter 1, the earliest origins of superior (or command) responsibility can be traced back to the fifteenth century.[83] However, the modern doctrine did not fully develop until after WWII, when the *Yamashita* case brought recognition to superior responsibility theory.[84] Following these developments, the ICTY and ICTR articulated its elements of responsibility, and the ICC later codified the practice and theory of the doctrine. Article 7(3) ICTY Statute, Article 6(3) ICTR Statute, and Article 28 Rome Statute define superior or command responsibility as a form of indirect liability. It is based on the notion that the superior or commander can be held responsible for his subordinates' criminal acts, even if he hasn't ordered

[83] See, e.g., William Parks, Command Responsibility for War Crimes. Military Law Review 62 (1973), pp. 4 –5.
[84] Ibid., pp. 22-38.

them.[85] This indirect form of liability needs to be distinguished from the direct forms of liability that a commander is responsible for when he plans, orders, or assists in a crime. A superior liability draws from the failure of the superior to prevent and punish such acts and exercise proper supervision and control over subordinates. According to *Blaskic* Appeals Chamber, a commander cannot be held responsible for both the direct forms of liability (e.g., planning, ordering, assisting) and this indirect form (command responsibility) at the same time for the same crimes.[86] They are mutually exclusive.[87] In any case, subordinates who committed the crimes must themselves be investigated and prosecuted. As Cryer notes, holding superiors or commanders responsible does not mean that the subordinates are absolved from all blame; they too as individuals, are bound to respect IHL and will be held personally liable for IHL breaches.[88]

The main reason for the development of this form of responsibility lies in the recognition that crimes are often committed by low-level officials or military personnel (referred to as subordinates) because the higher-ranking officers (referred to as superiors or commanders) failed to prevent or repress them.[89] That's why the doctrine of command responsibility is needed to enable prosecutions beyond the direct perpetration of the crimes. Without this form of responsibility, superiors could absolve themselves of any wrongdoing, for instance, by arguing that the subordinates were not following orders when they committed crimes or that they were at no time at the scene when the crimes took place.

It is recognized that the exercise of supervision and control over subordinates is by default inherent in the superiors. This is because they are in a position of authority and have influence over troops and subordinates.[90] For example, as established by the Hague Convention of 1889 and 1907[91] and Article 87(1) API, superior or command responsibility under IHL entails that commanders or superiors must ensure that their troops respect IHL during armed conflict[92] and failure to do so may give rise to criminal liability.[93] In this respect, Olasolo opines that a superior possesses the status of a supervising guarantor, with duties to observe and control his subordinates who constitute a potential source of danger or risk.[94]

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[85] Art. 7(3), ICTY Statute; Art. 6(3) ICTR Statute; Art. 28 Rome Statute.
[86] See e.g., Prosecutor v. Blaskic, Case No.IT-95-14-A, Appeal Judgment (29 July 2004), paras. 91-2. This matter will be further analyzed in the following paragraphs within this section.
[87] Ibid.
[88] See Cryer et al., supra note 15, p. 387 (The superior or commander is not charged with committing the crime, but for his or her failure to prevent or punish the subordinates who in fact did commit the crime; Art. 6(3), ICTR Statute.
[89] See Antonio Cassese, International Criminal Law. Oxford: Oxford University Press, 2003, p. 205.
[90] See Prosecutor v. Hadzihasanoviic and Kubura, Case No. IT-01-47-T, Trial Judgment (15 March 2006), para. 66.
[91] The Hague Conventions of 1899 and 1907 are a series of international treaties and declarations negotiated at two international peace conferences at The Hague in the Netherlands. The First Hague Conference was held in 1899 and the Second Hague Conference in 1907.
[92] Art. 87(1), API.
[93] In re Yamashita, 327 U.S. 1 (1946). The relevant charge held against General Yamashita was that 'the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery; and he may be charged with personal responsibility for his failure to take such measures when violations result.'
[94] See Hector Olásolo, Unlawful Attacks in Combat Situations. Dordrecht, The Netherlands: Martinus Nijhoff, 2008, p. 193; Arts. 87(1) and 43(1), API, duty of commanders.

As superior responsibility is a form of liability that does not exist in most national systems.[95] At the international level, the first instrument to expressly address a superior's duty and responsibility were API, which served as a basis for further codifications (foremost Article 7(3) of the ICTY Statute,[96] Article 6(3) of the ICTR Statute,[97] and then Article 28 of the ICC Statute)[98] and their modern judicial interpretations. Article 86(1) of API was crucial in the formulation of the doctrine of superior responsibility as it set forth very broad requirements upon States to repress grave breaches of the four GCs concerning the protection of victims of armed conflict, 'which result from a failure to act when under a duty to do so.'[99] Therefore, the responsibility bestowed upon states automatically becomes the superior or commander's onus.

Furthermore, Article 86(2) API explains that a superior can only be held liable if two conditions are met: firstly, that the subordinates have perpetrated such breaches and, secondly, that the superior had the duty to act concerning these breaches, which further explains the factual nature and conditions of a superior's responsibility in ICL:

> *'The fact that a breach of the [Geneva] Conventions or of [API] was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he or [she] was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.'*[100]

Moreover, Article 87 API clarifies three conditions that are precisely expected of a superior: the first one being that a military commander, who commands troops and other persons under his or her control, has the responsibility to prevent and suppress these breaches and to, as well, ensure they are reported to competent judicial authorities; secondly, the commander must ensure his or her troops are fully aware of their obligations under the GCs and API; lastly, any commander, who is aware that subordinates or other persons under his control are going to commit or have in fact committed these breaches, is required to take the necessary steps to prevent such breaches and to start disciplinary or penal proceedings against the alleged

[95] See Cryer et al., supra note 15, p. 387.
[96] Art. 7(3), ICTY Statute. The fact that any of the acts referred to in Arts. 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
[97] Art. 6(3), ICTR Statute The fact that any of the acts referred to in Arts. 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof; Delalic et al. Trial Judgment, supra note 1, para. 343.
[98] Art. 28, Rome Statute.
[99] Art. 86(1), API.
[100] Art. 86(2), API.

perpetrators.[101] Finally, these provisions are akin to Article 7(3) of the ICTY and Article 6(3) ICTR Statutes, which have been very influential in establishing the laws on superior responsibility.[102] On the other hand, Article 28 of the Rome Statute provides a much more detailed formulation of the different categories of superior, setting aside separate conditions imposed for military commanders and other (civilian) superiors.[103] Thus, in establishing the elements of superior responsibility, the ICTY and ICTR agreed that, in addition to the commission of crimes by subordinates as a necessary prerequisite of superior responsibility to arise, the prosecutor must prove three key elements:

> *'The existence of a superior-subordinate relationship; the superior knew or had reason to know that crimes were about to be or had been committed; the superior failed to take the necessary and reasonable measures to prevent these crimes or punish their perpetrators.'*[104]

According to the ICTY, having effective control over a subordinate means the accused must possess a material ability to prevent or punish criminal conduct.[105] Although endorsed by the ICTR, it emphasized that general influence is not necessary to establish a superior-subordinate relationship.[106] Further, even if the accused has to be senior in some formal or informal hierarchy to the physical perpetrator, it is unnecessary to show a direct or formal subordination.[107] The ICTY and ICTR have underscored that an official position is not decisive for superior duty to arise because it is the actual possession or non-possession of powers to control subordinates that may lead to a conviction or a dismissal.[108] The ICC *Bemba* Pre-Trial Chamber endorsed these viewpoints,[109] which provided a list of reasons that may show the existence of a position of authority and effective control.[110]

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[101] Art. 87, API. To be precise, the article imposes upon States an obligation to ensure that superiors carry out these duties; it is also vital for the clarification of a superior's duties.
[102] Art. 7(3), ICTY Statute and Art. 6(3), ICTR Statute.
[103] Art. 28, Rome Statute: (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
[104] See Delalic et al. Trial Judgment, supra note 1, para. 344.
[105] See Prosecutor v. Delalic et al., Case No IT-96-21-A, Appeal Judgment (20 February 2001), para. 256.
[106] See Prosecutor v. Semanza, Case No ICTR-97-20-T, Trial Judgment (15 March 2003), para. 415.
[107] See Prosecutor v. Halilovic, Case No. IT-01-48-A, Appeal Judgment (16 October 2007), para. 59.
[108] See Delalic et al. Appeal Judgment, supra note 105, paras. 186-198.
[109] See Prosecutor v. Bemba, Case No ICC-01/05-01/08, Decision on the Confirmation of Charges (15 June 2009), paras. 414-416.
[110] Ibid., para. 417. (These include a person's official position, the power to issue or give orders, the capacity to ensure compliance with the issued orders, the capacity to order units under his command to engage in hostilities, the capacity to re-subordinate units or to make changes to command structure and the power to promote, replace, remove or discipline any member of the forces).

As to the knowledge element, the ICTY establishes that a superior may possess the *mens rea* in two ways. Firstly, the accused had actual knowledge (established through direct or circumstantial evidence) that his subordinates were committing or about to commit crimes. Secondly, the accused had in his possession information of a nature to put him on notice of the risk of such wrongdoings requiring him to take measures to investigate whether subordinates had committed or about to commit the crimes.[111]

Accordingly, the superior has no duty to know, as articulated in the *Yamashita* case.[112] The mental element is determined only by reference to the information available to the superior.[113] However, it is not necessary to prove that the superior had precise information about the crimes. Even broad information in his or her possession that would put him or her on notice of possible unlawful acts committed by his or her subordinates is sufficient to prove that the accused had reason to know.[114] API emphasizes the information available to a superior, which should have enabled him to conclude in the circumstances that subordinates committed crimes.[115] In that regard, constructive knowledge, therefore, should not be assessed with hindsight, in the light of information that became available afterward. The ICTR underscored the need to distinguish between information about the general situation prevailing in a specific area at the time and broad information that should put the superior on notice that his or her subordinates might commit crimes.[116] The awareness of a general form of criminality is not enough,[117] although such information can be relevant for proof that the superior had reason to know.[118]

Article 28 of the Rome Statute approaches the mental element a little bit differently. First, it has separate rules for military commanders and civilian superiors. In the case of military commanders in Article 28(a)(i), the prosecution must establish that they knew or, owing to the circumstances at the time, should have known.[119] The standard is higher in Article 28(b)(i) for civilian superiors because the prosecution must demonstrate that they knew or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such crimes.[120] Second, the standard for military commanders is higher than in the ICTY and ICTR Statutes. While the ICTY and ICTR have stressed that the mental element is not about negligence (had reason to know), the Rome Statute instead introduces negligence (should have known), i.e. the failure to look for information may lead to criminal liability.[121] In

[111] See Delalic et al. Trial Judgment, supra note 1, para. 383.
[112] See Delalic et al. Appeal Judgment, supra note 105, paras. 228-239.
[113] See Prosecutor v. Strugar, Case No IT-01-42-T, Trial Judgment (31 January 2005), para. 369.
[114] See Delalic et al. Appeal Judgment, supra note 105, para. 238.
[115] Art. 86(2), API.
[116] See Prosecutor v. Bagilishema, Case No ICTR-95-1A-A, Appeal Judgment (3 July 2002), para. 42.
[117] See Prosecutor v. Krnojelac, Case No IT-97-25-A, Appeal Judgment (17 November 2003), para. 155.
[118] See Prosecutor v. Strugar, Case No IT-01-42-A, Appeal Judgment (17 July 2008), para. 301.
[119] Art. 28(a)(i), Rome Statute.
[120] Art. 28(b)(i), Rome Statute.
[121] See Bemba Decision on the Confirmation of Charges, supra note 109, paras. 432-433.

the *Bemba* case, the Pre-Trial Chamber confirmed that the 'he had reason to know and should have known standard' is different, but the interpreting criteria developed by the ICTY and ICTR may still be applicable when applying the should have known standard.[122]

The *Oric* Trial Chamber deliberated on the element as to whether a superior took all the necessary and reasonable measures to prevent or punish the crimes, holding that it depends on the degree of effective control over the conduct of subordinates.[123] The doctrine clarifies that if the superior knowingly does not avert the crimes from happening, then the perpetrators' subsequent punishment does not relieve the superior of responsibility.[124] When a superior learns about the crimes, he is obliged to punish the perpetrators, or else he will be held liable for implicitly accepting the crimes.[125] This includes, consistent with Article 28(a)(ii), taking all necessary and reasonable measures within the superior's power to submit the matter to the competent authorities for investigation and prosecution, or else that superior will be held liable.[126] Moreover, the ICTY[127] and Article 87(3) of API instead stressed that the duty to punish commences when the commission of a crime by a subordinate can be reasonably suspected,[128] which is rather a controversial standard given the gravity and complexity of international crimes.

Although superior responsibility is recognized as part of customary international law,[129] its exact legal character is still very much open to debate. One of the main issues concerns the question as to what precisely the superior is responsible for: is this a responsibility for complicity?[130] Or is it a separate crime for dereliction of a superior's duty to control, prevent or punish?[131] Or is it a special mode of liability for the crimes committed by subordinates?[132] Although all of these questions are indeed relevant, the most interesting one concerns the latter. As explained above, the superior is not directly responsible for the crimes committed by his subordinates but his own omission or failure to properly discharge his own duty. As was

[122] Ibid., para. 34.
[123] See Prosecutor v. Oric, Case No IT-03-68-T, Trial Judgment (30 June 2006), para. 329.
[124] See Prosecutor v. Blaškic, Case No. IT-95-14-T, Trial Judgment (3 March 2000), para. 336; Strugar Appeal Judgment, supra note 118, para. 373; Bemba Decision on the Confirmation of Charges, supra note 109, para. 436.
[125] See Prosecutor v. Halilovic, Case No. IT-01-48-T, Trial Judgment (16 November 2005), para. 95.
[126] Art. 28(a)(ii), Rome Statute; See also Bemba Decision on the Confirmation of Charges, supra note 109, para. 438. (These include measures: (i) to ensure that superior's forces are adequately trained in international humanitarian law; (ii) to secure reports that military actions were carried out in accordance with international law; (iii) to issue orders aiming at bringing the relevant practices into accord with the rules of war; (iv) to take disciplinary measures to prevent the commission of atrocities by the troops under the superior's command).
[127] See Oric Trial Judgment, supra note 123, para. 336.
[128] Art. 87(3), API.
[129] See, e.g., Leslie Green, Command Responsibility in International Humanitarian Law. Transnational Law and Contemporary Problems 5, no. 2 (1995), p. 350; Antonio Cassese International Criminal Law. 2nd ed. Oxford: Oxford University Press, 2008, p. 241; Delalic et al. Trial Judgment, supra note 1, paras. 333, 343.
[130] See e.g., United Kingdom's International Criminal Court Act, Section 65, 2001.
[131] See Kai Ambos, "Superior Responsibility." In The Rome Statute of the International Criminal Court: A Commentary, edited by Antonio Cassese, Paola Gaeta, and John R. W. D. Jones. Oxford: Oxford University Press, 2002, pp. 851,
[132] See Hadžihasanovic and Kubura Trial Judgment, supra note 90, para. 75.

correctly stated in the *Yamashita* trial: 'it is absurd.… to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape.'[133]

Concerning whether the doctrine overlaps with other modes of liability, Schabas argues that it is similar to complicity and JCE, but unlike aiding and abetting, there is no requirement that the superior knew what the subordinates were doing, and unlike a JCE, there is no requirement of a plan or common purpose.[134] However, it is essential to note these debates are in no way meant to describe superior responsibility as an "easy catch" mode of liability. Past superior responsibility cases at the ICTY, ICTR, and ICC have shown how difficult it can be to prove the elements of this mode of liability (as will be discussed in Chapter 6). As Schabas notes, the past practice has shown that superior responsibility has not turned into a "silver bullet" that delivers convictions where traditional grounds of liability are inadequate – as once was predicted.[135]

The ICTY and ICTR have discussed many theories on superior responsibility, all of which consider that a superior's blameworthiness is for omission concerning subordinates' crimes.[136] Several trials and appeals chambers have endorsed this common position.[137] Direct commission and superior responsibility are indeed two distinct grounds for criminal responsibility. Therefore, a court cannot secure a conviction under both grounds for the same count. In such an event, the court should convict the accused for direct responsibility and consider his superior position an aggravating factor in sentencing.[138]

In contrast, Article 28 Rome Statute requires the crimes of the subordinates to be a result of the superior's 'failure to exercise control properly,' i.e., setting aside the ICTY case law – a causal link between the commander's failure and the subordinate's perpetration of offenses must exist.[139] The causation requirement also follows from the fact that the underlying offenses of the subordinates constitute the source of the commander's failure of supervision, i.e., the commission of the crimes was "caused" by the failure of the supervision.[140] This could be interpreted to mean that subordinates' crimes are actually attributable to the

[133] Text reprinted in Leon Friedman, The Law of War: A Documentary History. Vol. 2. Westport, CT: Greenwood, 1972, p. 1597; see also Cherif Bassiouni, Crimes against Humanity: Historical Evolution and Contemporary Application. Cambridge: Cambridge University Press, 2011, p. 535.
[134] See William Schabas, The United Nations International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone. Cambridge: Cambridge University Press, 2006, p. 315.
[135] See William Schabas, An Introduction to the International Criminal Court. 4th ed. Cambridge: Cambridge University Press, 2011, p. 234.
[136] See Halilovic Trial Judgment, supra note 125, para. 54, Command responsibility is responsibility for an omission. The commander is responsible for the failure to perform an act required by international law. This omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates. Thus, "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. 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.
[137] See e.g., Prosecutor v. Aleksovski, Case No IT-95-14/1-T, Trial Judgment (25 June 1999), para. 67; Krnojelac Appeal Judgment, supra note 117, para. 171; Prosecutor v. Hadžihasanovic and Kubura, Case No IT-01-47-A, Appeal Judgment (22 April 2008), para. 39.
[138] See Blaskic Appeal Judgment, supra note 86, para. 91.
[139] See Oric Trial Judgment, supra note 123, para. 338; For critical analysis, see Boris Burghardt, Die Vorgesetztenverantwortlichkeit im völkerrechtlichen Straft atsystem. Berlin: Berliner Juristische Universitätsschriften Strafrecht, 2008, p. 206 ff.
[140] See Marc Osiel, The Banality of the Good: Aligning Incentives against Mass Atrocity. Columbia Law Review 105 (2005), p. 1779 ff.; Olásolo, supra note 94, p. 190; see also Chantal Meloni, Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of

superior, which resembles more closely complicity (e.g., aiding, abetting) rather than superior responsibility. In other words, at the ICC, the superior is responsible and should be punished for the principal crime perpetrated by subordinates.

Some scholars criticized this standard in that it violates the principle of individual capability. For example, as Meloni notes, it is necessary to avoid the risk of holding someone guilty for an offense committed by others, in violation of the principle of individual and culpable criminal responsibility.[141] However, the *Bemba* Trial Chamber clarifies that a commander's responsibility under Article 28 Rome Statute is different from that of a person who "commits" a crime within the Court's jurisdiction.[142] Article 28 Rome Statute states that 'the crimes for which the commander is held responsible are "committed" by forces, or subordinates, under his or her effective command and control, or effective authority and control, rather than by the commander directly.'[143] This is precisely the reason why Article 28 Rome Statute is regarded as a form of *sui generis* liability, of which a commander's same conduct may be considered as a satisfying material element of one or more modes of liability.[144] Lastly, the ICTY made clearer that the superior responsibility evenly applies to armed conflicts of non-international character, despite API being mainly concerned with international armed conflicts, which was acknowledged both by the ICTR Statute and the Rome Statute.[145]

3.1 Applying Superior/Command Responsibility in the Context of SGBCs

The prosecutor must prove that a superior failed to prevent or punish the SGBCs perpetrated by his subordinates. While, in principle, superior responsibility is a constructive instrument to prosecute high-level officials for SGBCs committed by subordinates, in practice, successes in securing convictions have been relatively rare.[146] The first problem of the doctrine regarding the treatment of SGBC cases lies in the prosecution's ability to prove the effective control requirement and establishing the superior-subordinate relationship. An ideal example concerns the ICTY *Delalic et al.* case involving Mucic (*de facto* camp commander), Delic (deputy camp commander), and Delalic (military coordinator). They were all accused

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the Superior? Journal of International Criminal Justice 5 (2007), pp. 629–30; Volker Nerlich, Superior Responsibility under Art 28 ICC Statute. Journal of International Criminal Justice 5 (2007), p. 673; Robert Kolb, Droit International Pénal, edited by Robert Kolb. Basel, Switzerland: Helbing & Lichtenhahn, 2008, p. 189; see also the different approach adopted by Burghardt, supra note 139, pp. 225, 261, 405, 463 ff.

[141] See Meloni, supra note 140, p. 633.

[142] See Prosecutor v. Bemba, Case No.: ICC-01/05-01/08, Trial Judgment (21 March 2016), paras. 173-174.

[143] Art. 28, Rome Statute.

[144] See Bemba Trial Judgment, supra note 142, para. 174 (regardless of possible differences, the chamber notes the jurisprudence of the *ad hoc* tribunals which have repeatedly stressed the residual nature of superior responsibility in declining to enter a conviction on the basis of it where another mode of liability has been satisfied by the same conduct); Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-T, Trial Judgment, (26 February 2001), para. 371; Blaškić Appeal Judgment, supra note 86, para. 91; Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-A, Appeal Judgment (23 May 2005), para. 81.

[145] See Prosecutor v. Hadžihasanovic and Kubura, Case No IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility (16 July 2003).

[146] The research conducted in chapter 6 analyzed 21 superior/command responsibility cases and only six accused were convicted under this mode of liability for SGBC charges.

of superior responsibility for the SGBCs committed by the prison guards against detainees of the Celebici prison camp in central BiH.[147] The Trial Chamber convicted Mucic as a superior, based on his admission that he was the *de facto* camp commander,[148] and had exercised this authority, which was deemed sufficient to incur this criminal responsibility.[149]

However, the prosecution failed in proving effective control in *Delalic* and *Delic* cases. The Chamber noted that the prosecution was unable to prove his interactions with the personnel at the Celebici prison camp and with the guards[150] that Delalic was the commander of the commander prison camp and the guards and that they were subordinate to him.[151] Although Delic was found guilty of rape as torture under Article 7(1) of the Statute, the Chamber held that he was not part of the chain of command of the camp and that he did not have the power to issue orders to subordinates or to prevent or to punish them.[152] Thus, the Chamber acquitted both Delalic and Delic of the charges under Article 7(3), which was upheld on appeal.[153] In the ICTY *Blaskic* case, the Trial Chamber found that General Blaskic exercised effective control over the HVO soldiers and military police members who committed the SGBCs.[154] However, the Appeals Chamber overturned the Trial Chamber's verdict, finding that the appellant could not be held accountable for failing to punish members of the units over which he did not exercise effective control.[155] Moreover, in the ICTR *Muvunyi* case, the accused was acquitted of rape as a superior because the Prosecutor did not prove that the accused exercised effective control over the soldiers who committed the SGBCs.[156] Similarly, in the ICTR *Nizeyimana* case, the accused was acquitted of rape as a superior because the accused's exercise of effective control over the soldiers who committed the rapes could not be proven.[157]

The second problem of the doctrine lies with the fact the prosecutor has to satisfy the trial chamber that an accused had reason to know of the risk that subordinates might commit SGBCs. The *mens rea* standard for holding superiors responsible for SGBCs requires the prosecution to show that the accused knew or had reason to know of the subordinates' SGBCs, where "knew" denotes actual knowledge and "reason to know"

[147] See Prosecutor v. Delalic et al., Case No. IT-96-21, Indictment (19 March 1996), para. 7. At ibid., para. 8, Delic was charged under Art.7(1) for his individual responsibility in some of the sexual assaults.
[148] See Delalic et al. Trial Judgment, supra note 1, para. 775.
[149] Ibid., para. 736. The Appeals Chamber upheld the Trial Chamber conclusion on appeal. See Delalic et al. Appeal Judgment, supra note 105, paras. 214, 241.
[150] See Delalic et al. Trial Judgment supra note 1, paras. 719- 720.
[151] Ibid.
[152] Ibid., paras. 810,1071.
[153] See Delalic et al. Appeal Judgment, supra note 105, paras. 293, 313-14.
[154] See Blaskic Trial Judgment, supra note 124, para. 722-724.
[155] See Blaskic Appeal Judgment, supra note 138, para. 612.
[156] See Prosecutor v. Muvunyi, Case No. ICTR-00-55A-T, Judgment and Sentence (12 September 2006), paras. 525-526. The Appeals Chamber confirmed this decision. See Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-A, Appeal Judgment (29 August 2008), para. 166.
[157] See Prosecutor v. Nizeyimana, Case No. ICTR-2000-55C-T, Judgment and Sentence (19 June 2012), paras. 1027, 1038, 1051. This finding was confirmed on appeal. See Prosecutor v. Nizeyimana, Case No. ICTR-00-55C-A, Appeal Judgment (29 September 2014), para. 419.

denotes receiving sufficiently alarming information.[158] Moreover, the prosecution is always required, under the tribunal case law, to prove that the accused had notice of the risk of the type of crime in question.[159] For example, in ICTY, *Krnojelac* Appeals Chamber held that to be convicted for torture, it is not sufficient that the accused was aware that beatings occurred, without having noticed that it was for one of the prohibited purposes required for torture.[160]

The ICC *Bemba* Trial Chamber convicted the accused for the SGBCs committed by soldiers of the Mouvement de Libération du Congo (MLC), who were acting under his command, in the Central African Republic (CAR) in 2002-2003. The Trial Chamber affirmed that Bemba had effective authority and control over the MLC forces.[161] It stated that he knew that the MLC forces were committing or about to commit crimes including SGBCs,[162] but failed to take all necessary and reasonable measures within his power to prevent the SGBCs or to punish the perpetrators who committed these acts.[163] Having been convicted of rape as both a war crime and a crime against humanity, as a result, the Trial Chamber on 21 June 2016 sentenced Bemba to 18 years imprisonment for rape.[164] The Chamber emphasized that Bemba's failure to prevent, repress, or punish the SGBCs underscored the gravity of his conduct.[165] However, the *Bemba* Appeals Chamber overturned the Trial Chamber's verdict, finding that the accused did not have actual knowledge of the crimes, including SGBCs, committed by MLC (in these locations) and emphasized that conviction of the accused under this provision must be based on what specific criminal acts the commander knew or should have known about and at what point in time.[166] Also, in ICTR *Kajelijeli,* the Trial Chamber acquitted the accused, finding that the prosecution failed to show that the accused knew or had reason to know that the Interahamwe was committing SGBCs.[167] In the ICTY *Sainovic et al.* case, the accused Ojdanic was acquitted of SGBCs under command responsibility. The Chamber did not consider that information regarding the specific sexual assaults for which it had been proven that the VJ was responsible was available to Ojdanic or that he had reason to know about them.[168] In the ICTR *Bagosora et al* (*Military I* trial), concerning the SGBCs committed at the Kabgayi religious center for which the accused (Bagosora, Kabiligi, and Ntabakuze) stood charge under command responsibility, the Trial Chamber acquitted all the three accused because they were not aware of the specific SGBCs committed at Kabgayi.[169]

[158] See Prosecutor v. Nahimana et al., Case No. ICTR-9952-A, Appeal Judgment (28 November 2009), para. 791; Bagilishema Appeal Judgment, supra note 116, paras. 42-3; Hadzihasanovic and Kubura Appeal Judgment, supra note 137, paras. 27-8.
[159] See Jarvis and Salgado, supra note 76, pp. 108, 109.
[160] See Krnojelac Appeal Judgment, supra note 117, para. 155.
[161] See Bemba Trial Judgment, supra note 142, paras. 178, 343, 696, 698, 699, 700,703.
[162] Ibid., paras. 710-5, 707-9, 716-717.
[163] Ibid., paras. 720-728, 733-734.
[164] Ibid., para. 752.
[165] Ibid., paras. 202-210.
[166]See Prosecutor v. Bemba, Case No. ICC-01/05-01/08 A, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute (8 June 2018), paras. 6, 103-104, 136, 183-184.
[167] See Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Trial Judgment (1 December 2003), paras. 924- 925.
[168] See Prosecutor v. Sainovic et al., Case No. IT-05-87-T, Trial Judgment Volume 3 of 4 (26 February 2009), paras. 633, 1209.
[169] See Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, Judgment and Sentence (18 December 2008), para. 1776.

The third problem is for the prosecutor to prove that the superior failed to take the necessary and reasonable measures to stop or prevent the crimes or punish their perpetrators or refer the matters for prosecution. The cases had usually failed the test in instances where the prosecution failed to prove that the accused had the authority or the material ability to prevent or punish subordinates or that he had knowledge about specific criminal acts of subordinates. For example, the ICTY *Blaskic* Appeals Chamber acquitted the accused of SGBCs, finding that the Appellant did not have the material ability to prevent or punish the men responsible for the crime.[170] Furthermore, in the ICTR *Renzaho* case, the Appeals Chamber acquitted the accused[171] because he was not found to have possessed the material ability to prevent if the dates and locations of the rapes and the names of the victims were not specified.[172]

Lastly, as this applies to all superior responsibility cases, including SGBCs before the tribunals, the doctrine requires that when the accused's conduct also satisfies the elements of both direct participation and superior responsibility, the conviction under superior responsibility should be set aside in favor of a conviction under direct participation only.[173] However, in this sense, the accused's responsibility as superior is treated as aggravating factor in sentencing.[174] Nevertheless, this is not the case at the ICC, where a commander's same conduct may be considered a satisfying material element of one or more modes of liability.[175] Despite these complexities, it is still essential to pursue superior responsibility in order to ensure full compliance with IHL.[176] This is particularly important for SGBC cases, as the superior's tolerance could establish an escalating practice of SGBCs within the hierarchy that he controls.[177] The superiors hold the ultimate responsibility to ascertain that their subordinates do not commit SGBCs and are held accountable for any such wrongdoings. The cases mentioned above and all other SGBC cases will be analyzed in Chapter 6 to show how in practice, high-level officials can be held accountable for SGBCs under superior/command responsibility.

[170] See Blaskic Appeal Judgment, supra note 86, para. 610.
[171] See Prosecutor v. Renzaho, Case No. ICTR-97-31-A, Appeal Judgment (1 April 2011), para. 138 (for the rapes of Witnesses AWO and AWN, and Witness AWN's sister).
[172] Ibid., para. 128.
[173] See e.g., Blaskic Appeal Judgment, supra note 86, paras. 91-2.
[174] See Prosecutor v. Setako, Case No. IT-04-81-A, Appeal Judgment (28 September 2001), para. 266; Blaskic Appeal Judgment, supra note 86, para. 91; Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeal Judgment (24 March 2000), para. 183; Delalic et al. Appeal Judgment, supra note 105, para. 745.
[175] See Bemba Trial Judgment, supra note 142, para. 174 (regardless of possible differences, the Chamber notes the jurisprudence of the *ad hoc* tribunals which have repeatedly stressed the residual nature of superior responsibility in declining to enter a conviction on the basis of it where another mode of liability has been satisfied by the same conduct.); Kordić and Čerkez Trial Judgment, supra note 144, para. 371; Blaškić Appeal Judgment, supra note 86, para. 91; Kajelijeli Appeal Judgment, supra note 144, para. 81.
[176] See Prosecutor v. Blagojevic and Jokic, Case No.IT-02-60-A, Appeal Judgment (9 May 2007), para. 281.
[177] For a detailed information see Wood, supra note 82, p. 26.

3.2 Table of What Needs to be Proven to Hold the Accused Responsible for Superior/Command Responsibility

1	The existence of a superior-subordinate relationship.
2	The superior knew or had reason to know that crimes were about to be or had been committed.
3	The superior failed to take the necessary and reasonable measures to prevent the crimes or punish their perpetrators.

4. Co-Perpetration

Co-perpetration is when two or more persons act in a concerted manner to commit a crime. The ICTY *Stakic* Trial Chamber introduced the concept of co-perpetration for the first time in 2003, following events that occurred in Bosnia's city of Prijedor during 1992. The Prosecutor alleged, *inter alia*, that Stakic participated in a JCE, by way of persecution, to forcibly remove Bosnian Muslim and Bosnian Croat residents from the would-be Serbian State.[178] The Trial Chamber found three distinct political and military structures which closely co-operated in pursuance of a common goal to consolidate Serbian control in the city of Prijedor:[179] (1) Crisis Staff, presided over by the accused and constituting Prijedor's governing body, (2) the Police headed by the Chief of Police Simo Drljaca, and (3) the military forces based in Prijedor under the command of Colonel Vladimir Arsic.[180] The Trial Chamber held that the crime of persecution was a shared plan committed by members of the Police and Military units, that the accused 'facilitated coordination between the police, the military, and with the other civilian authorities,'[181] as well as providing logistical and financial support for their functions.[182] In its ruling, the Trial Chamber relied on Roxin's work, affirming that this form of liability requires 'an explicit agreement or silent consent to reach a common goal by coordinated co-operation and joint control over the criminal conduct.'[183] In the Chamber's opinion, the accused must individually 'possess skills or authority' making him capable of frustrating the entire criminal undertaking by refusing to play his part in it.[184] Therefore, the Trial Chamber viewed the co-perpetrators as 'essential for the achievement of the common goal,'[185] and they must all operate with 'the same degree of control over the execution of the common acts.'[186]

[178] See Prosecutor v. Stakic, Case No. IT-97-24-PT, Fourth Amended Indictment (10 April 2002), para. 26; for detailed discussion on the history and concept of co-perpetration, see Lachezar Yanev, Theories of Co-perpetration in International Criminal Law. Boston: Brill, 2018, pp. 24-35.
[179] See Stakic Trial Judgment, 44, para. 470.
[180] Ibid., paras. 469, 479-481, 488.
[181] Ibid., para. 482.
[182] Ibid., paras. 482-488.
[183] Ibid., para. 440.
[184] Ibid., para. 440.
[185] Ibid., para. 442.
[186] Ibid., para. 440.

However, following this development, the ICC decided to approach this matter using Roxin's well-known Control Theory of Perpetration[187] based on the notion of control of the crime, which includes "control of the action," "control of the will" and those other cases of co-perpetration based on joint (functional) control of the crime.[188] Under this theory, the perpetrator is defined as the individual who has control or "hegemony" over the act, who decides whether the criminal operation will take place or not.[189] If there are two or more individuals who can control the execution of the act jointly, they are labeled as co-perpetrators. There are two grounds behind this reasoning. Firstly, international crimes are almost always perpetrated by a plurality of persons, making co-perpetration crucial to the prosecutorial strategy.[190] Secondly, the person in control of the crime usually does not perform the acts that constitute the international crime. Rather, he is higher up the chain of authority, directing a hierarchy that executes the *actus reus* of the crime in question.[191]

When the ICC first introduced this concept in *Lubanga* and *Katanga* and *Ngudjolo* cases, both Pre-Trial Chambers explained the notion of co-perpetration based on joint control of the crime in the following way:

> *'[I]s rooted in the principle of the division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner [. . .] Although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task.'*[192]

Although the Rome Statute codified co-perpetration as a mode of liability in Article 25(3)(a), it did not refer to control. It asserts that a person is liable if he 'commits such a crime whether as an individual, jointly with another, or through another person, regardless whether that other person is criminally responsible.'[193] Eser describes the concept of co-perpetration as 'the joint commission of a crime by knowingly and voluntarily

[187] See Claus Roxin, Täterschaft und Tatherrschaft. 8th ed. Berlin: de Gruyter, 2006.
[188] See Claus Roxin, Taterschaft und Tatherrschaft. 7th ed. Berlin: de Gruyter, 2000, p. 451; see also Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (29 January 2007), para. 332; Prosecutor v. Katanga and Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges (1 October 2008), para. 488; Yanev, supra note 178, pp. 24-35.
[189] Generally, see Roxin, supra note 188; See also George Fletcher, Rethinking Criminal Law. Oxford: Oxford University Press, 2000, who prefers to translate Roxin's concept of Tatherrschaft as 'hegemony over-the-act.'
[190] For a detailed discussion, see Jens Ohlin, Joint Intentions to Commit International Crimes. Chicago Journal of International Law 11 (2011), p. 693.
[191] See Jens Ohlin, Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability. Leiden Journal of International Law 25 (2012), p. 771; Kai Ambos, "Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to the 'Most Responsible.'" In System Criminality in International Law, edited by Andre Nollkaemper and Harmen van der Wilt. Cambridge: Cambridge University Press, 2009, pp. 127, 152.
[192] See Lubanga Decision on the Confirmation of Charges, supra note 188, para. 342; Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, paras. 521, 525; see also Roxin, supra note 188, p. 451; Hans-Heinrich Jescheck and Thomas Weigend, Lehrbuch des Strafrechts. 5th ed. Duncker and Humblot, 1996, p. 674; Harro Otto, Strafrecht Allgemeiner Teil. 6th ed. Munich: Franz Vahlen, 2000, p. 57; Perez Cepeda, La responsabilidad de los administradores de sociedades: Criterios de atribucion. Barcelona: Cedecs Editorial, 1997, p. 417.
[193] Art. 25(3)(a), Rome Statute.

working together.'[194] Moreover, according to Ambos, this liability is characterized by a functional division of the criminal tasks between the different at least two co-perpetrators, usually interconnected by a common plan or agreement.[195] Therefore, the critical element of co-perpetration based on joint control is that, due to the division of the essential functions for the commission of the crime, none of the co-perpetrators alone controls the execution of the crime, but all of the co-perpetrators share control. Furthermore, they depend on one another, meaning that the objective elements of the crime will only be completed if all of them carry out their respective contributions in a coordinated way. Suppose three military commanders tasked to destroy a school building allegedly used by the opposing armed forces to launch attacks. One commander's function is to locate the GPS coordinates of the school. The other officer is situated in the control room to communicate the coordinates to the artillery officer on the ground who is supposed to blow down the building. The school in question would only be destroyed if the officer finds the correct coordinates, the officer at control communicates to the artillery squad the necessary coordinates to attack the school, and the artillery officer pulls the trigger against the school.

Consequently, each co-perpetrator has the power to upset the implementation of the objective elements of the crime. For example, as stated above, the GPS coordinates' effort is null if the artillery squad stops the shelling. If the officer at control fails to communicate the correct coordinates to the artillery squad, the latter will not destroy the school. For this reason, joint control of the crime is inherent in the essential function of each co-perpetrator in the implementation of the overall common plan,[196] which makes all co-perpetrators liable for the crime.[197] However, it should be noted that there can be many supplementary tasks completed at the preparatory and execution stages that are not essential for the overall execution of the common plan (e.g., advising to take precaution or to stop the shelling). Further, even if it is coordinated with the co-perpetrators in furtherance of a common plan, the fulfillment of such functions will only give rise to accessorial liability.[198]

While confirming the charges in *Lubanga*, the ICC Pre-Trial Chamber observed that, although some authors have linked the essential character of a task – and hence the ability to exercise joint control over the crime – to its performance at the execution stage of the crime, the Statute does not contain any such restriction.[199]

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[194] See Albin Eser, "Individual Criminal Responsibility." In The Rome Statute of the International Criminal Court: A Commentary, edited by Antonio Cassese, Gaeta Paola, and John R.W.D Jones. Vol. 1. Oxford: Oxford University Press, 2002, p. 791.
[195] See Kai Ambos, Treatise on International Criminal Law Vol. 1: Foundations and General Part. Oxford: Oxford University Press, 2013, p. 149.
[196] See Kristian Kuhl, Strafrecht Allgemeiner Teil. 4th ed. Munich: Vahlen Franz GMBH, 2002, p. 99; Herbert Trondle and Thomas Fischer, Strafgesetzbuch Kommentar. 51st ed. Munich: Verlag Franz Vahlen, 2003, para. 25; Johannes Wessels and Werner Beulke, Strafrecht Allgemeiner Teil, 31st ed. Heidelberg, Germany: Muller, 2001, p. 526; Yanev, supra note 178, pp. 24-35.
[197] See Roxin, supra note 187, pp. 242-52, 653-4; See also Eser, supra note 194, p. 789ff; Yanev, supra note 178, pp. 24-35.
[198] See Lubanga Decision on the Confirmation of Charges, supra note 188, para. 347; Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, para. 525; see also Roxin, supra note 188, p. 541; Francisco Munoz Conde and Mercedes Garcia Aran, Derecho Penal: Parte General. 5th ed. València, Spain: Tirant lo Blanch, 2002, pp. 452–3; Kuhl, supra note 196, pp. 103,112; Wessels and Beulke, supra note 196, p. 528.
[199] See Lubanga Decision on the Confirmation of Charges, supra note 188, paras. 348.

It follows that, for the accused to be held accountable as a co-perpetrator, the following elements must be proven by the prosecutor:

> *'For the actus reus, the co-perpetrators must fulfill the subjective elements of the crime in question, including any requisite ulterior intent or dolus specialis;*[200] *the co-perpetrators must all be mutually aware and mutually accept that implementing their common plan may result in the realization of the objective elements of the crime;*[201] *the co-perpetrators must be aware of the factual circumstances enabling them to jointly control the crime.*[202] *For the mens rea, the existence of an agreement or common plan between two or more persons;*[203] *Coordinated essential contribution by each co-perpetrator resulting in the realization of the objective elements of the crime. '*[204]

The *Lubanga* Pre-Trial Chamber noted that the co-perpetrators must have agreed to start the common plan to achieve a non-criminal goal and only commit the crime if certain conditions are met. The co-perpetrators must be aware of the risk that implementing the common plan (precisely directed at achieving a non-criminal goal) will result in the commission of the crime and accept such an outcome.[205] However, the agreement in question "need not be explicit," since its existence can be inferred from the co-perpetrators' subsequent concerted action.[206] Further, the common plan 'must include an element of criminality, although it does not need to be specifically directed at the commission of a crime.'[207] Committing the crime need not be the "overarching goal" of the co-perpetrators, and the plan need not be "intrinsically criminal."[208] Rather, the common plan must include a "critical element of criminality," by which its implementation 'embodied a sufficient risk that, if events follow the ordinary course, a crime will be committed.'[209] Lastly, while the ICC Statute requires that the common plan be between two or more leaders, the *Mbarushimana* Pre-Trial Chamber clarified that the common plan could also be made with 'low ranked physical perpetrators of the

[200] Ibid., paras. 349-60; see also Stakic Trial Judgment, supra note 44, para. 495.
[201] See Lubanga Decision on the Confirmation of Charges, supra note 188, paras. 361–5; Stakic Trial Judgment, supra note 44, para. 496.
[202] See Lubanga Decision on the Confirmation of Charges, supra note 188, paras. 366–7; Stakic Trial Judgment, supra note 44, paras. 397-8.
[203] See Lubanga Decision on the Confirmation of Charges, supra note 882, paras. 343-5; Katanga and Ngudjolo Decision on the confirmation of charges, supra note 188, paras. 522-3; Stakic Trial Judgment, supra note 44, paras. 470-77.
[204] See Lubanga Decision on the Confirmation of Charges, supra note 188, paras. 346-8; Katanga and Ngudjolo Decision on the confirmation of charges, supra note 188, paras. 524-5; Stakic Trial Judgment, supra note 44, paras. 478-91.
[205] See Lubanga Decision on the Confirmation of Charges, supra note 188, para. 344.
[206] See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Trial Judgment (14 March 2012), para. 988; see Lubanga Decision on the Confirmation of Charges, supra note 188, para. 345; Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, para. 523.
[207] See Lubanga Decision on the Confirmation of Charges, supra note 188, para. 344; Prosecutor v. Banda & Jerbo, Case No. ICC-02/05-03/09 Decision on the Confirmation of Charges (7 March 2011) para. 129; Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, para. 523.
[208] See Lubanga Trial Judgment, supra note 206, paras. 984-985.
[209] Ibid., para. 984.

alleged crimes' for co-perpetration.[210] Finally, some scholars have frowned upon the notion of the common plan of having no basis in the Rome Statute, its formulation as overly rigid, and turned the focus away from the accused's conduct to the role he played in the common plan.[211]

The essential contribution requirement applies to 'only those to whom essential tasks have been assigned and who, therefore, have the power to frustrate the commission of the crime by not performing their tasks can be said to have joint control over the crime.'[212] Thus, this threshold is met where the co-perpetrator performed 'an essential role consistent with the common plan.'[213] For the causal link, the ICC *Lubanga* Pre-Trial Chamber declined to link the essential task to the physical perpetration of the crime at its execution stage.[214] Judge Fulford argues that the Statute required only an 'operative link between the individual's contribution and the commission of the crime', not that the accused's involvement was essential.[215] This reasoning is based on the fact that Article 25(3) did not require 'proof that the crime would not have been committed without the accused's involvement (namely that his role was essential). Rather, the prosecution must demonstrate that the individual contributed to the crime by committing it with another or others.'[216] However, Judge Van den Wyngaert found this causality to be too 'elastic,'[217] and instead proposed that, for co-perpetration, there must be 'a direct contribution to realizing the material elements of the crime' to be determined in the specific circumstances of each case.[218]

Lastly, the *Lubanga* Pre-Trial Chamber deliberated that the cumulative intent and knowledge requirements foresaw the suspect's volition (namely: (i) knowing that his 'actions or omissions will bring about the objective elements of the crime', and (ii) undertaking 'such actions or omissions with the concrete intent to bring about the objective elements of the crime').[219] These volitional elements within Article 30 are also referred to as *dolus directus* of the first degree, which is similar to the concept of *dolus*' applied by the *ad hoc* tribunals.

[210] See Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Arrest Warrant (28 September 2010), para. 31.
[211] See e.g., Concurring Opinion of Judge Fulford in Lubanga Trial Judgment, supra note 206, para. 16 and Concurring Opinion of Judge Van den Wyngaert in Prosecutor v. Ngudjolo Chui, Case No.: ICC-01/04-02/12, Trial Judgment (18 December 2012), paras. 31-35.
[212] See Lubanga Decision on the Confirmation of Charges, supra note 188, para. 347; Banda & Jerbo Decision on the Confirmation of Charges, supra note 207, para. 136; Mbarushimana Arrest Warrant, supra note 210, para. 35.
[213] See Lubanga Trial Judgment, supra note 206, para. 1000.
[214] See Lubanga Decision on the Confirmation of Charges, supra note 188, para. 348. See also Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, para. 526.
[215] See Concurring Opinion of Judge Fulford in Lubanga Trial Judgment, supra note 206, para. 15. See also Prosecutor v. Ruto & Sang, Case No.: ICC-01/09-01 /11, Prosecution's Submissions on Indirect Co-perpetration (3 July 2012), para. 12.
[216] See Concurring Opinion of Judge Fulford in Lubanga Trial Judgment, supra note 206, para. 15.
[217] Concurring Opinion of Judge Van den Wyngaert in Ngudjolo Trial Judgment, supra note 211, para. 43.
[218] Ibid., paras. 44, 46, 47.
[219] See Lubanga Decision on the Confirmation of Charges, supra note 188, paras. 351, 352.

4.1 Applying Co-Perpetration in the Context of SGBCs

Co-perpetration requires the prosecutor to prove the existence of a common plan and the essential contribution made by each of the co-perpetrators in the commission of the crime. In the context of SGBCs, this would require the prosecutor to prove that SGBCs committed by a group did fall within the common plan, and the co-perpetrators essentially contributed to the commission of the SGBCs in question. These elements were extensively discussed in the ICC *Katanga* case, where it appears that the incomplete judicial interpretation and engendering of the law of Article 25(3)(d) of the Rome Statute by the judges were the decisive factors leading to the acquittal of the accused of the SGBC charges.[220]

The *Katanga* case concerned the trial of Germain Katanga for his role as the commander of the Walendu-Bindi collectivité, which, together with the Nationalist and Integrationist Front (FNI), attacked Bogoro in February 2003. The Prosecutor charged Katanga under Article 25(3)(a) Rome Statute with war crimes and crimes against humanity of sexual slavery and rape.[221] Only a majority of the Pre-Trial Chamber found substantial grounds to believe that, during the attack on Bogoro, SGBCs were jointly committed with the knowledge that they would occur in the ordinary course of events.[222] At the decision stage, the Trial Chamber unanimously acquitted Katanga of all charges under Article 25(3)(a) liability.[223] It affirmed that the 'absence of a centralized and effective chain of command' meant that the militia was not an organized apparatus of power or that Katanga had not the extent of control required for liability under Article 25(3)(a).[224] The majority, Judge Van den Wyngaert dissenting, then re-characterized the mode of liability for all charges except using child soldiers to consider Katanga's responsibility as an accessory to the crimes under Article 25(3)(d) of the ICC Statute.[225] It subsequently convicted Katanga as an accessory for willful killing, attacks against the civilian population, pillaging, and destruction of property. However, the Chamber acquitted Katanga as an accessory to the crimes of rape and sexual slavery.[226]

The main difficulty for SGBCs had been for the prosecutor to prove that the persons who committed these crimes formed part of a group, acting with a common purpose. The Chamber stated that the direct perpetrators of the crimes were the Ngiti combatants from the Walendu-Bindi collectivité.[227] These Ngiti combatants were part of a militia that constituted an organization,[228] harboring its own design[229] and that the

[220] See Prosecutor v. Katanga, Case No.: ICC-01/04-01/07, Judgment pursuant to Art. 74 of the Statute (7 March 2014), paras. 1679, 1684; see also Jarvis and Salgado, supra note 76, pp. 112-113.
[221] See Katanga Trial Judgment, supra note 220, paras. 7-10.
[222] Ibid., para. 10.
[223] Ibid., para. 1421.
[224] Ibid., para. 1365.
[225] Ibid., para. 1484.
[226] Ibid., para. 1691.
[227] Ibid., para. 1652.
[228] Ibid., para. 1654.
[229] Ibid., paras. 1142-1149.

group did indeed act with a common purpose.[230] It first held that the common purpose was 'to erase from Bogoro, not only the military elements of the UPC but also the civilian population, mostly Hema, who was there.[231] 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.'[232] Moreover, it later emphasized the common purpose's content by stating that: 'to illustrate the existence of a purpose seeking to regain Bogoro by eliminating its civilian population.'[233]

The civilians described firstly as mostly Hema civilians and then more generally as the civilian population is not consistent in the Judgment.[234] It is not clear whether the group's common purpose was to eliminate the village of Bogoro only the Hema segment of the civilian population, or the civilian population that mainly consisted of Hema, or to eliminate the civilian population generally. This ambiguity highlights why Katanga was acquitted of the SGBC charges and convicted of the other crimes.

Before excluding SGBC charges against Katanga, the Chamber analyzed whether each of the crimes charged against Katanga was committed within the common purpose.[235] The Chamber concluded that the SGBCs did not fall within the common purpose.[236] The SGBCs were not committed "on a large scale and repeatedly" for the duration of the attack, and that the 'obliteration of the village of Bogoro did not entail commission of [SGBCs].'[237] Moreover, the Trial Chamber held that it was not aware of and it had not been established that in the past the Ngiti combatants committed rape or sexual slavery before this attack on Bogoro village.[238] It then concluded by saying that 'women who were raped, abducted and enslaved were specifically spared and avoided certain death by claiming to be non-members of Hema ethnicity.'[239] For these reasons, rape and sexual slavery did not fall within the common purpose and acquitted Katanga of the charges.[240]

In articulating the common plan, the Trial Chamber relied on the volume of murder and pillaging crimes to establish that these crimes were part of the common plan. While the Trial Chamber accepted that rape and sexual slavery crimes had been committed during the attack, the insufficient number of these crimes was a factor that led the Chamber to conclude that these crimes were not part of the common purpose. Indeed, during the trial, three victims said they were raped multiple times, and at least 17 acts of rape were

[230] Ibid., para. 1654.
[231] Ibid., para. 1142.
[232] Ibid., para. 1654.
[233] Ibid., para. 1655.
[234] Ibid., paras. 1144, 1656.
[235] Ibid., paras. 1658-1665.
[236] Ibid., para. 1664.
[237] Ibid., para. 1663.
[238] Ibid., paras. 1663-1664.
[239] Ibid., para. 1663.
[240] Ibid., para. 1664.

committed during the attack.[241] This contradicts a body of jurisprudence relating to common purpose liability at the ICTY and ICTR, which raises a question on what the threshold requirement is concerning numbers. For example, the ICTY jurisprudence suggests that the argument that the number of crimes committed falls short of showing that the crime was part of the common purpose is fallacious, as it conflates the objective of the JCE with the means through which it was to be achieved.[242] Lastly, contrary to what has been stated in the JCE section above, the Trial Chamber did not consider *dolus directus* in the second degree regarding rape and sexual slavery, meaning whether Katanga knew that in the ordinary course of the attack, SGBCs would eventually occur. However, such an analysis was undertaken concerning pillaging and property destruction, finding these crimes within the common purpose, and knowing that these crimes would be committed in the ordinary course of events.[243]

Lubanga case is another example where SGBCs did not fall within the common purpose. The Prosecutor in *Lubanga* instead opted not even to bother to include SGBC charges, for example, rape and sexual slavery, at any stage of the proceedings, including in the original charges.[244] The Prosecutor had actively opposed adding such charges during the trial, even when approved by the majority of the Trial Chamber, due to the Regulation 55 proceedings.[245] The reasons might have been fear of the burden of proof and the complexity and risk of failure to appreciate how SGBCs fit within the common purpose. Due to this failure, the Chamber was unable to conclude that the SGBCs committed against the population in Ituri district and child soldiers were sufficiently widespread to form part of the common plan. Further, these crimes could not be characterized as occurring in the ordinary course of implementing the common plan of which Lubanga could have been responsible as a co-perpetrator.

The ICC Chief Prosecutor appears to have changed approach[246] in the most recent cases before the ICC, where many high-level officials have been charged with rape and sexual slavery under 25(3)(d) Rome Statute. [247] Chapter 6 will address the *Katanga* case and analyze the evidence against the elements mentioned above to show how the judges address the issue of SGBCs forming part of the common purpose or plan.

[241] Ibid., paras. 988-1037.
[242] See Prosecutor v. Đordević, Case No.: IT-05-87/1-A, Appeal Judgment (27 January 2014), para. 204.
[243] See Katanga Trial Judgment, supra note 220, paras. 1662, 1690-1691.
[244] See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2901, Sentencing Decision (10 July 2012), para. 60.
[245] Ibid.
[246] For a detailed information, see the OTP Policy Paper on Sexual and Gender-Based Crimes, 20 June 2014, available at https://www.icc cpi.int/iccdocs/otp/Policy_Paper_on_Sexual_and_Gender-Based_Crimes-20_June_2014-ENG.pdf.
[247] See e.g., Prosecutor v. Ongwen, Case No.: ICC-02/04-01/15, Decision on the confirmation of charges (23 March 2016), para. 44.

4.2 Table of What Needs to be Proven to Hold the Accused Responsible for Co-Perpetration

1	The existence of an agreement or common plan between two or more persons.
2	A coordinated essential contribution by each co-perpetrator to the common purpose to commit the crime.
3	The accused acted with requisite *mens rea* of the crime as enshrined in Article 30 of the Statute (individual act with both intent and knowledge).
4	The co-perpetrators were mutually aware and mutually accepted that implementing their common plan will result in the commission of the crime.
5	The co-perpetrators were aware of the factual circumstances enabling them to jointly control the crime.

5. Indirect Perpetration

Indirect perpetration is when someone commits a crime through another person. It is a form of individual criminal responsibility explicitly provided in Article 25(3)(a) of the Rome Statute.[248] It requires that the indirect perpetrator uses another person who carries out the *actus reus* of a crime as a mere tool to realize the commission of the crime.[249] This form of liability derives from the German legal doctrine based on the early works of Roxin that are identified by the term: "perpetrator behind the perpetrator" (*Täter hinter dem Täter*)[250] and the notion of *Organisationsherrschaft*,[251] i.e. an organizational variant of the control theory.[252] Ambos opines that the *Organisationsherrschaft* doctrine can be applied when an indirect perpetrator commits a crime through another by means of control over an organization.[253]

Indirect perpetration requires that if the innocent tool acted under a mistaken belief, duress, or lacking the capacity for blameworthiness, he may not be fully criminally responsible for his actions.[254] Suppose X, a local militia commander, recruits children to be his soldiers, instructs his recruit Y, an 8-year-old child, to shoot his parents dead, and set ablaze his siblings locked in the house. In this situation, the child cannot be

[248] Art. 25(3)(a), Rome Statute ('Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible').
[249] See Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, para. 496.
[250] See Claus Roxin, Straftaten im Rahmen organisatorischer Machtapparate. Goltdammer's Archiv für Strafrecht, 1963, pp. 193-207.
[251] See Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, para. 499.
[252] See Elies van Sliedregt, Individual Criminal Responsibility in International Law. Oxford: Oxford University Press, 2012, p. 86.
[253] See Ambos, supra note 191, p. 142.
[254] See Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, para. 495; Kai Ambos, "Article 25: Individual Criminal Responsibility." In Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, edited by Otto Triffterer. 2nd ed. Baden-Baden, Germany: Nomos, 2008, p. 752.

held liable because he is an innocent agent. However, Judge Schomburg argues that indirect perpetration could also be applied where the tool is criminally responsible: the indirect perpetrator is then referred to as the "perpetrator behind the perpetrator."[255] This implies that the indirect perpetrator (or mastermind) is responsible for "committing" the crime because he or she has control over the crime by virtue of the control over the will of the tool.[256] The "man in the background" usually dominates the direct perpetrators through an organizational apparatus of hierarchical power that is based on a concept of control or domination of the act (*Tatherrschaft*).[257] According to the Rome Statute, it is also possible to hold both perpetrators liable as principals under certain circumstances, i.e. the principal liability of the direct perpetrator for the fulfillment of the subjective or objective elements of the crime, and principal liability of the indirect perpetrator for control over the crime or the will of the direct perpetrator.[258]

It is worth noting that the indirect perpetrator's culpability becomes even greater amid his position in the organization's hierarchy and level of control.[259] Whether civil or military, the leader has authority and power over the apparatus, which is evident by the subordinates' compliance and obedience with his order.[260] In *Katanga and Chui*, the ICC Pre-Trial Chamber held that the person in authority could demonstrate signs of power in various forms, among which can hire, train, impose discipline and provide resources to subordinates.[261] The leader exerts his authority and control over subordinates to secure compliance to commit a crime, thus deciding whether and how they will perpetrate the crime.[262]

Lastly, concerning the overlaps of the doctrine to other modes of liability, for example, instigation, Ambos clarifies that the *Organisationsherschaft* doctrine is distinct from instigation, where there is no superior-subordinate relationship requirement.[263] It is also different from ordering. As stated by the *Katanga and Chui* Pre-Trial Chamber: 'a leader or commander who orders the commission of a crime may be regarded as an accessory.'[264] Indirect perpetration and JCE are similar in the broader sense of "committing," i.e., where the accused has participated directly or indirectly in the material elements of the crime charged through positive acts or, based on a duty to act, omissions, whether individually or jointly with others. The

[255] See Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, Appeals Judgment (7 July 2006), para. 20 regarding separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide.
[256] See Ambos, supra note 254, pp. 743-770, 752-755; see also Lubanga Decision on the Confirmation of Charges, supra note 188, para. 330.
[257] See Lubanga Decision on the Confirmation of Charges, supra note 188, para. 322 where the co-perpetration in the sense of Art. 25(3)(a) Rome Statute is characterized by the 'joint control over the crime as a result of the essential contribution,' and based on the 'concept of control over the crime' (ibid., para. 338); see Roxin, supra note 187, pp. 242-52, 704-17; Kai Ambos, Der Allgemeine Teil des Völkerstrafrechts. Berlin: Duncker und Humboldt, 2004; Markus Dubber, Criminalizing Complicity. Journal of International Criminal Justice 5, no, 4 (2007), p. 982 translates it as 'dominion over the act.'
[258] See Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, para. 497.
[259] Ibid., para. 503; see also Harmen Van der Wilt, The Continuous Quest for Proper Modes of Criminal Responsibility. Journal of International Criminal Justice 7, no. 2 (2009), pp. 5-6.
[260] See Van der Wilt, supra note 259.
[261] See Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, para. 513.
[262] Ibid., paras. 514, 518.
[263]See Ambos, supra note 257; see also Roxin, supra note 187, pp. 242-52, 704-17.
[264] See Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, para. 517.

connection is that, as an indirect perpetrator, the accused does not have to participate in all aspects of the alleged criminal acts, and does not have to be the direct perpetrator of the crimes.[265]As the high-level official, he is charged as the perpetrator behind the direct perpetrator and considered the co-perpetrator of those crimes together with other persons with whom he co-operated the crime.'[266]

While confirming the charges against the accused, the *Katanga and Chui* Pre-Trial Chamber decided to define the elements of indirect perpetration that the prosecutor must prove to hold the accused liable for the crimes:

> *'For the actus reus, proof of the intent to bring about the actus reus of the crime, with the awareness that this will be a consequence of his or her acts in the ordinary course of events;[267] awareness of his[…] essential role in the commission of the crime, with the ability to prevent the crime from occurring by refusing to trigger the necessary measures that would lead almost automatically to its commission.[268] For the mens rea, proof of the accused's awareness of the factual circumstances permitting control of the crime through another person;[269] knowledge of the character of the organized and hierarchical apparatus of power;[270]authority in the organization, and the factual circumstances enabling near automatic compliance with his or her orders in the execution of crimes.'[271]*

These elements are fully described in Section 6 under indirect co-perpetration below since they are common to both modes of liability (indirect perpetration and indirect co-perpetration).

5.1 Applying Indirect Perpetration in the Context of SGBCs

As explained above, defining the nature of the organization (group) and the control over the crime are the key elements in establishing indirect perpetration.[272] 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.[273] In other words, the organizer must be a capable person ready to replace or change

[265] See Stakic Trial Judgment, supra note 44, para. 741; see also Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, paras. 500-510.
[266] See Stakic Trial Judgment, supra note 44, para. 439; see also Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, paras. 500-510.
[267] See Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, paras. 533-534.
[268] Ibid., para. 539.
[269] Ibid., para. 534.
[270] Ibid., para. 534.
[271] Ibid., para. 534.
[272] See Katanga Trial Judgment, supra note 220, para. 1407.
[273] Ibid., paras. 1408-1412.

the direct perpetrator with someone else willing to commit rape and other SGBCs without loss of his or her function in that organization.[274] Under this theory, the critical issue lies in the expendable nature of those committing the SGBCs. It must be such that the accused could replace the perpetrator with another person anytime to ensure compliance with his order automatically. It means that the subordinates will mechanically execute the superiors' orders to commit the SGBCs within the organization. This is how control over the crime flows from the nature of the organization in the context of SGBCs.[275]

The ICC *Katanga* case explains how complex it can be in practice to determine control over the crime and nature and position within the organization. The Chamber recognized that Katanga was received as an authority figure, capable of issuing orders to both commanders and combatants,[276] but did not possess or exercise effective hierarchical power over all the commanders and combatants of the Ngiti militia.[277] Moreover, the Chamber found that Katanga could issue orders to commanders and combatants within the collectivité but could not ascertain the exact nature of the orders or whether subordinates obeyed them.[278] Also, the Chamber found that Katanga did not possess any material ability to issue and ensure compliance with orders or had the power to punish or impose disciplinary sanctions on commanders from various camps.[279]

Consequently, the Prosecutor failed to prove Katanga's effective hierarchical power and control over the Ngiti militia as per the Roxin theory.[280] This failure appears to have frustrated efforts to attribute liability to the accused of the SGBCs allegedly committed by the Ngiti combatants during the attack on Bogoro. Another issue was that the Prosecutor could not satisfactorily meet the requirements because indirect perpetration was combined with co-perpetration, making the case even more complex. As the Trial Chamber affirmed, even if a leader is at the apex of an organization, it does not necessarily follow that the *actus reus* requirements of indirect perpetration have been fulfilled.[281] The absence of a "centralized and effective" chain of command militates against the conclusion that a group was an organized apparatus of power or that the leader wielded control over the subordinates.[282] Chapter 6 will analyze the *Katanga* case and show how to prosecute a high-level official for SGBCs in practice as an indirect perpetrator.

[274] Ibid., paras. 1408,1411-12.
[275] Ibid., paras. 1408-1409,1420.
[276] Ibid., paras. 1360,1361,1363,1419-20.
[277] Ibid., para. 1365.
[278] Ibid., para. 1364.
[279] Ibid., para. 1419.
[280] Ibid., para. 1420.
[281] Ibid.
[282] Ibid.

5.2 Table of What Needs to be Proven to Hold the Accused Responsible for Indirect Perpetration

1	The accused's intent to bring about the *actus reus* of the crime, with the awareness that this will be a consequence of his or her acts in the ordinary course of events.
2	The accused's awareness of his essential role in the commission of the crime, with the ability to prevent the crime from occurring by refusing to trigger the necessary measures that would lead almost automatically to its commission.
3	The accused's awareness of the factual circumstances permitting control of the crime through another person.
4	The knowledge of the character of the organized and hierarchical apparatus of power.
5	The accused possessed authority in the organization, and the factual circumstances enabling near automatic compliance with his or her orders in the execution of crimes.

6. Indirect Co-Perpetration

Indirect co-perpetration is when two or more leaders join forces to commit crimes through other persons. The ICC established indirect co-perpetration as a mode of liability to hold high-level officials responsible as principals. For example, in *Katanga and Ngudjolo*, the ICC Pre-Trial Chamber applied indirect co-perpetration to overcome the difficulties of categorizing the two accused as principals for the crimes committed by members of two military organizations under their control during a joint attack on a village.[283] In this case, the difficulty was that some of the members of the organizations only accepted orders from the leader of their own ethnic group.[284] As a result, indirect perpetration as a mode of liability was not seen as applicable because of the difficulty of identifying to which specific armed group the direct perpetrators of each crime belonged. In the same vein, the Prosecutor could not apply the co-perpetration mode of liability because neither of the accused directly committed the crimes during the attack. As Manacorda and Meloni note, in the end, the accomplishment of the attack was reliant on the common plan between Katanga and Ngudjolo to combine their forces in a coordinated manner and use their respective subordinates to carry out the atrocities.[285] The judges, therefore, affirmed that:

[283] See Stefano Manacorda and Chantal Meloni, Indirect Perpetration versus Joint Criminal Enterprise Concurring Approaches in the Practice of International Criminal Law? Journal of International Criminal Justice 9, no. 1 (2011), pp. 172.
[284] See Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, para. 493.
[285] See Manacorda and Meloni, supra note 283, p. 172.

> *an individual who has no control over the person through whom the crimes would be committed cannot be said to commit the crimes by means of that other person. However, if he or [she] acts jointly with another individual—one who controls the person used as an instrument—these crimes can be attributed to him or [her] on the basis of mutual attribution.*[286]

The defense for Katanga raised the question of whether Article 25(3)(a) Rome Statute includes the notion of "indirect co-perpetration."[287] The Chamber clarified that there are no legal grounds for restricting the joint commission of the crime exclusively to exerting direct control over it. Instead, by combining individual liability for perpetrating crimes through another person along with the mutual attribution among the co-perpetrators at the leadership level, a mode of liability arises, which allows the Court to assess the blameworthiness of "senior leaders" adequately.[288]

This was not the first occasion for an international court to combine modes of liability in this way. As noted in the above section under co-perpetration, the ICTY tried to apply the notion of indirect co-perpetration in *Stakic*, using the term "coperpetratorship."[289] However, the Appeals Chamber reversed the Trial Chamber's verdict, declaring that indirect co-perpetration did not have any legal basis in customary international law or the settled jurisprudence of the ICTY.[290] In *Katanga and Ngudjolo*, the judges were adamant that the ICTY rejection was immaterial. They stated that the Rome Statute explicitly provides for this mode of liability; therefore, the Court does not need to pay credence on the ICTY questioning whether customary law admits or discards the concept of indirect co-perpetration.[291]

Finally, it remains unclear whether indirect co-perpetration is recognized by ICL,[292] and the question of whether the court can combine special modes of liability is still open to debate. For instance, in Ngudjolo's acquittal, Judge Van den Wyngaert concluded that there was nothing in the text of Article 25 Rome Statute to justify or make possible such an *ad hoc* combination of two modes of liability.[293] Scholars have also argued that this combination is a novel judicial development that has no basis in Roxin's original theory.[294] Moreover, as Ohlin notes, not even the national legal systems that have relied on Roxin's control theory

[286] See Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, para. 493.
[287] Ibid., para. 490.
[288] Ibid., para. 492.
[289] See Stakić Trial Judgment, supra note 44.
[290] Ibid., para. 62.
[291] See Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, para. 507.
[292] For a detailed discussion, see Manacorda and Meloni, supra note 283, p. 174.
[293] See Ngudjolo Trial Judgment, supra note 211, para. 60.
[294] See generally Claus Roxin, Crimes as Part of Organized Power Structures. Journal of International Criminal Justice 9 (2011), p. 193; Roxin, supra note 188, pp, 242–52, 704-17.

have applied the concept of indirect co-perpetration.[295] Many scholars have noted that the concept's critical issue is identifying the accused's source of "control,"[296] whether through an essential contribution or control over an organized structure of power. Moreover, at the theoretical level, having two objective elements centered on the idea of control creates difficulty determining the nature of attribution, as one cannot know what controlling act by the high-level officials makes him liable as a principal.

Practically, the ICC has had problems in trying to identify this source of control precisely. Concerning proving control via an organized structure of power, Judge Van den Wyngaert has strongly affirmed that requiring the prosecution to prove such a structure has created an unnecessary and burdensome element.[297] Van den Wyngaert further argues that the Statute specifies that liability can be assigned when an individual commits a crime "through another person", but that there is no mention of an organized structure of power.[298] Despite these criticisms, the ICC has embraced the notion of indirect co-perpetration and indicted many high-level officials (e.g. *Ntaganda* case[299] *Gbagbo and Blé Goudé* case,[300] *Al-Bashir* case,[301] and the *Kenya* case[302]) as principals to the crimes committed by their subordinates under indirect co-perpetration.

The Pre-Trial Chamber then determined the elements of indirect co-perpetration in the ICC *Katanga and Ngudjolo* case during the confirmation of charges against the two accused. While confirming the charges, the Pre-Trial Chamber outlined the *actus reus* and *mens rea* elements that the prosecutor must prove to hold the accused responsible as an indirect co-perpetrator:

> *'For the actus reus, the accused must carry out the subjective elements of the crimes;[303] the accused persons must be mutually aware that implementing their common plan would result in the realization of the objective elements of the crime;[304] the accused persons must be 'aware of the factual circumstances enabling them to exercise control over the crime through another person', including awareness of the character of their*

[295] See Ohlin, supra note 191, p. 777.
[296] See generally Thomas Weigend, Perpetration through an Organization: The Unexpected Career of a German Legal Concept. Journal of International Criminal Justice 9 (2011), pp. 110-11; Héctor Olásolo et al., The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes. Oxford: Hart, 2009, pp. 306-30.
[297] See Ngudjolo Trial Judgment, supra note 211, paras. 52-55.
[298] Ibid., paras. 52-55.
[299] Ibid.
[300] See Prosecutor v. Gbagbo, Case No.: ICC-02/11-01/11, Decision on the Confirmation of Charges against Laurent Gbagbo, 12 June 2014.
[301] See Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-3, Warrant of Arrest (4 March 2009).
[302] See Prosecutor v. Ruto and Sang, Case No. ICC-01/09-01/11, Decision on Confirmation of Charges (23 January 2012); Prosecutor v Muthaura, Kenyatta & Ali, Case No. ICC-01/09-02/11, Decision on Confirmation of Charges (23 January 2012).
[303] See Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, paras. 527-532; Ruto and Sang Decision on Confirmation of Charges, supra note 302, para. 333; Bemba Confirmation of Charges, supra note 109, para. 360; Muthaura, Kenyatta & Ali, Decision on Confirmation of Charges, supra note 302, para. 411.
[304] See Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, para. 533; Ruto and Sang Decision on Confirmation of Charges, supra note 302, para. 333 (the second subjective requirement involved 'specific intent, where certain crimes require that the suspect fulfils the subjective elements together with an additional one known as ulterior intent or dolus specialis').

organizations, their authority within the organization, and the factual circumstances enabling near automatic compliance with their orders;[305] *the accused persons must be 'aware of the factual circumstances enabling them to exercise joint control over the crime or joint control over the commission of the crime through another person', which required that each suspect was aware: '(i) of his essential role in the implementation of the common plan; (ii) of his ability — by reason of the essential nature of his task — to frustrate the implementation of the common plan, and hence the commission of the crime, by refusing to activate the mechanisms that would lead almost automatically to the commission of the crimes.'*[306] *For the mens rea, the existence of an agreement or common plan between two or more persons;*[307] *coordinated essential contribution by each co-perpetrator resulting in the realization of the objective elements of the crime;*[308]*control over the organization;*[309]*organized and hierarchical apparatus of power;*[310] *execution of the crimes secured by almost automatic compliance by the subordinates with the orders given by the leader.'*[311]

The *Katanga and Ngudjolo* Pre-Trial Chamber held that the common plan could exist between those who physically commit the crimes or those who carried it out through another individual.[312] The plan must include the commission of a crime but need not be explicit;[313] the prosecutor can infer the existence of the agreement from the subsequent concerted actions of the co-perpetrators of the existence of the alleged essential contribution.[314] The essential contribution of those committing the crimes through others may

[305] See Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, para. 534.
[306] See Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, paras. 538-539; Ruto and Sang Decision on Confirmation of Charges, supra note 302, para. 333; Muthaura, Kenyatta & Ali Decision on Confirmation of Charges, supra note 302, para. 297; Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06-36-Red, Arrest Warrant Decision (13 July 2012), para. 67; Prosecutor v Abu Minyar Gaddafi, Saif Gaddafi and Alsenussi, Case No. ICC-01/11-01/11-1, Arrest Warrant Decision (27 June 2011), para. 69; Prosecutor v. Simone Gbagbo, Case No. ICC 02/11-01/12-2-Red, Arrest Warrant Decision (2 March 2012), para. 28.
[307] See Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, para. 522.
[308] Ibid., paras. 524-526.
[309] Ibid., para. 500.
[310] Ibid., paras. 511-512.
[311] Ibid., para. 515; see also Mbarushimana Arrest Warrant, supra note 210, para. 31; Muthaura, Kenyatta & Ali Decision on Confirmation of Charges, supra note 302, para. 297; Ntaganda Arrest Warrant Decision, supra note 306, para. 67; Abu Minyar Gaddafi, Saif Gaddafi and Alsenussi Arrest Warrant Decision, supra note 306, para. 69; Simone Gbagbo Arrest Warrant Decision, supra note 306, para. 28.
[312] See Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, para. 522.
[313] Ibid, para. 523. See also Ruto and Sang Decision on Confirmation of Charges, supra note 302, para. 301; Muthaura, Kenyatta & Ali Decision on Confirmation of Charges, supra note 302, para. 399; Ntaganda Arrest Warrant Decision, supra note 306, para. 69; Prosecutor v. Mudacumura, Case No. ICC-01/04- 01/12, Arrest Warrant Decision (13 July 2012), paras. 60, 62.
[314] See Prosecutor v. Abu Garda, Case No. ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges (8 February 2010), para. 231; Muthaura, Kenyatta & Ali Decision on Confirmation of Charges, supra note 302, para. 399.

consist of activating the mechanisms to ensure the automatic compliance with their orders and, thus, the commission of the crimes.[315]

Furthermore, the notion of "control over the organization" was interpreted in the context of "control over the crime" with reference to Article 25(3)(a) Rome Statute, which recognized that a person who acts through another might be individually held responsible (irrespective of whether the executor is responsible).[316] The most relevant cases are the circumstances where the perpetrator behind the perpetrator commits the crime through another by means of "control over an organization" (*Organisationsherrschaft*).[317] The control over the crime approach is based on a notion of a principal's "control over the organization."[318] The Chamber reasoned that the concept had been incorporated into the Rome Statute,[319] and was widely endorsed by both national jurisdictions[320] and international jurisdictions,[321] as well as several other ICC chambers, including *Bemba,*[322] *Ruto, Kosgey and Sang*,[323] and the *Muthaura, Kenyatta and Ali*.[324]

The Chamber further held that hierarchical apparatus of power and automatic compliance by subordinates 'must be based on hierarchical relations between superiors and subordinates' and "be composed of sufficient subordinates to guarantee that superiors" orders will be executed, if not by one subordinate, then by another.'[325] Since 'the leader must use his control over the apparatus to execute the crimes', the Chamber further characterized control over the organization by the ability of the highest authorities to secure automatic compliance with their orders.[326] Fundamentally, the leader's control over the apparatus allows him to utilize his subordinates as "a mere gear in a giant machine" to produce the criminal result "automatically."[327] Such "mechanization" ensures that the execution of the plan would not be compromised by any particular subordinate's failure to comply with an order from the leader.[328] Any subordinate who refuses to obey may simply be replaced by another who will comply; the actual executor of the order is merely a fungible individual, implying that the organization must be large enough to provide a sufficient

[315] See Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, para. 525. See also Ruto and Sang Decision on Confirmation of Charges, supra note 302, para. 306; Muthaura, Kenyatta & Ali Decision on Confirmation of Charges, supra note 302, para. 402; Ntaganda Arrest Warrant Decision, supra note 306, para. 71; Ruto & Sang Prosecution's Submissions on Indirect Co-perpetration, supra note 215, para. 12 (prosecutor called into question the 'essential contribution' requirement, arguing rather that it should be 'substantial).
[316] See Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, paras. 496-497.
[317] Ibid., para. 498.
[318] Ibid., para. 500.
[319] Ibid., para. 501(noting that 'by specifically regulating the commission of a crime through another responsible person, the Statute targets the category of cases which involves a perpetrator's control over the organization').
[320] Ibid., paras. 500, 503, 506, citing e.g., Jerusalem District Court. The Attorney General v. Eichmann, Case No. 40/61, Judgment, 36 I.L.R. 5-14, 18-276 (12 December 1961), para. 197.
[321] See Stakić Appeal Judgment, supra note 11, para. 62.
[322] See Katanga and Ngudjolo Chui Decision on the Confirmation of Charges, supra note 192, para. 509, citing Prosecutor v. Bemba, Case No. ICC-01/05-01/08-14-tENG, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean– Pierre Bemba Gombo (10 June 2008), para. 78.
[323] See Ruto and Sang Decision on Confirmation of Charges, supra note 302, paras. 291-292.
[324] See Muthaura, Kenyatta & Ali Decision on Confirmation of Charges, supra note 302, paras. 296-297.
[325] See Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, para. 512.
[326] Ibid., paras. 514, 517; see also Ruto and Sang Decision on Confirmation of Charges, supra note 302, paras. 313-314.
[327]See Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, para. 515.
[328] Ibid., para. 516.

supply of subordinates.[329] This "automatic compliance" with the leader's orders, which might be secured 'through intensive, strict, and violent training regimes, renders him a principal to the crime.[330]

For knowledge, the Chamber confirmed the charges based on *dolus directus* in the first and second degree. It concluded that both Katanga and Ngudjolo co-perpetrated the crimes in question through their troops, who complied with their orders, concluding that both leaders were aware of this fact and knew subordinates would commit the crimes during the attack on the village of Bogoro.[331]

6.1 Applying Indirect Co-Perpetration in the Context of SGBCs

At the ICC, one of the most convincing ways to show the connection between SGBCs and the broader strategic plans has been to charge it as part of a common purpose and show that the perpetrators committed the crime through an organization controlled by the indirect co-perpetrators. The prosecution will have to prove that two or more high-level officials have effective control over their organizations and members of these organizations committed the SGBCs. The control over these organizations represents the *conditio sine qua non* of each high-level official's contribution as an indirect co-perpetrator.

Proof of the organized and hierarchical apparatus of power is one of the main difficulties that the Prosecutor had to deal with in the ICC *Gbagbo and Blé Goudé* case under indirect co-perpetration. The Trial Chamber found that Gbagbo did not exercise command and control over the groups (jeunes patriotes and other youth groups) through Blé Goudé. Even if Blé Goudé had considerable influence and capable of mobilizing young people, it was impossible to conclude that he issued specific operational instructions to particular groups or individuals and that those individuals felt compelled to comply with his instructions. Whatever sway Blé Goudé may have held over the youth groups was not based on accepted chains of command and reporting lines.[332] Therefore, the Chamber could not conclude that the "pro-Gbagbo forces" constituted 'an organized and hierarchical apparatus of power.'[333] Similarly, in the ICC *Ngudjolo* case, the Trial Chamber acquitted the accused of the SGBC charge, concluding that the Prosecutor did not establish that he was the leader of the FNI/Lendu combatants that took part in the 24 February 2003 attack on Bogoro.[334]

[329] Ibid.
[330] Ibid., para. 518; see also Prosecutor v. Ongwen, Case No.: ICC-02/04-01/15, Trial Judgment (4 February 2021), paras. 2856, 2858 (Appeal case pending).
[331] See Katanga and Ngudjolo Decision on the Confirmation of Charges, supra note 188, paras. 540-541, 551 (concerning sexual violence crimes committed by the militia, the majority of the judges held that the defendants knew that in the ordinary course of events, the realization of the common plan would inevitably result in the rape or sexual enslavement of civilian women, but note also that Judge Usacka dissented that there was insufficient evidence linking the accused to these offences.
[332] See Prosecutor v. Gbagbo and Blé Goudé, Case No. ICC-02/11-01/15-1263-AnxB-Red, Reasons of Judge Geoffrey Henderson (16 July 2019), para. 863.
[333] Ibid., para. 864.
[334] See Ngudjolo Chui Trial Judgment, supra note 211, para. 503.

The second essential element, the accused had control over the organization that committed the crimes, was well articulated in the ICC *Ntanganda* Trial. The Trial Chamber convicted Ntaganda for SGBCs committed by the UPC/FPLC, finding that Ntaganda exercised control over the crimes, and the rape and sexual slavery committed by UPC/FPLC troops, pursuant to a common plan, were attributable to him as indirect co-perpetrator.[335] In the same vein, the Trial Chamber convicted Ongwen as indirect co-perpetrator for SGBCs committed by members of the Sinia brigade. The Chamber stated that he acted according to a common plan and had control over the crimes through his essential contribution and the power to frustrate their commission.[336] However, this element failed the test in the *Gbagbo and Blé Goudé* case. In that trial, the Chamber held that the accused did not exercise command and control over irregular forces, the youth groups, militia, or mercenaries.[337] Similarly, while acquitting Ngudjolo, the Trial Chamber noted that the accused did not control the organization through which the perpetrators committed the crimes.[338] These four ICC cases (*Ngudjolo, Gbagbo and Blé Goudé, Ntaganda,* and *Ongwen*) will be examined in greater detail in Chapter 6 to show what evidence is needed to hold high-level officials accountable for SGBCs under indirect co-perpetration.

6.2 Table of What Needs to be Proven to Hold the Accused Responsible for Indirect Co-Perpetration

1	The accused carried out the subjective elements of the crimes.
2	The accused persons were mutually aware that implementing their common plan would result in the realization of the objective elements of the crime.
3	The accused persons were aware of the factual circumstances enabling them to exercise control over the crime through another person', including awareness of the character of their organizations, their authority within the organization, and the factual circumstances enabling near automatic compliance with their orders.
4	The accused persons were aware of the factual circumstances enabling them to exercise joint control over the crime or joint control over the commission of the crime through another person', which required that each suspect was aware: (i) of his essential role in the implementation of the common plan; (ii) of his ability — by reason of the essential nature of his task — to frustrate the implementation of the common plan, and hence the commission of the crime, by refusing to activate the mechanisms that would lead almost automatically to the commission of the crimes.

[335] See Prosecutor v. Ntaganda, Case No.: ICC-01/04-02/06, Trial Judgment (8 July 2019), para. 857.
[336] See Ongwen Trial Judgment, supra note 330, paras. 212, 3089, 3095 (Appeal case pending).
[337] See Gbagbo and Blé Goudé, Reasons of Judge Geoffrey Henderson, supra note 332, para. 861.
[338] See Ngudjolo Chui Trial Judgment, supra note 211, para. 496.

5	The existence of an agreement or common plan between two or more persons.
6	The coordinated essential contribution by each co-perpetrator resulting in the realization of the objective elements of the crime.
7	Control over the organization.
8	An organized and hierarchical apparatus of power.
9	The execution of the crimes was secured by almost automatic compliance by the subordinates with the orders given by the leader.

7. Concluding Remarks

When a high-level official commits a crime through other persons or acts in concert to commit crimes or fails to prevent, repress, or report the crimes committed by his subordinates, the best way to link him to it will be through the concept of indirect modes of liability. This includes JCE theories, superior/command responsibility, co-perpetration, indirect perpetration, and indirect co-perpetration. Through these modes of liability, the prosecution can press various criminal charges to best capture the high-level accused's roles in the commission of the crime.

The JCE doctrine presents the possibility of charging an accused person in three different ways: JCE I, JCE II, and JCE III. These three forms have three common *actus reus* elements that the prosecutor must prove, including a plurality of persons, a common plan or design, and participation of the accused in the common design. There are instead various *mens rea* elements that must be established, depending on the prosecutor's choice. For JCE I, the prosecutor must prove that the accused intended to perpetrate the crime (this being the shared intent for all co-perpetrators). In contrast, in JCE II cases, the prosecutor must prove that the accused possessed personal knowledge of the ill-treatment system (either by expressed testimony or a matter of reasonable inference from the accused's position of authority) and the intent to further this common concerted system of ill-treatment. The most controversial of the three forms is the JCE III, which requires proof that the accused intended to participate in the criminal purpose and contribute to the group JCE. On the latter, the doctrine holds that, although the contribution need not be necessary or substantial, it should be a significant contribution to the crimes for which the accused is to be found accountable. Also, for a crime outside the common plan, the prosecutor must prove that it was foreseeable that one or other group members will commit the crimes and that the accused willingly took that risk. Suppose the physical

perpetrator was not part of the JCE. In that case, the prosecution can attribute the crime to one member of the JCE but must establish that this member acted per the common plan when using the physical perpetrator. JCE III received criticisms, the central debates being the issues of equal culpability and the arguments that the doctrine lacks proper legal foundation in customary law. Furthermore, there are two main criticisms in the case of SGBCs: firstly, that JCE III has been too easily applied in SGBC cases to obtain convictions, and secondly, that, in many cases, SGBCs should have been prosecuted as JCE I rather than JCE III.

Superior or command responsibility assigns criminal responsibility to higher-ranking civilian and military officials for their subordinates' crimes. For liability to arise under this doctrine, the prosecutor must establish the following elements, beyond a reasonable doubt: Existence of a superior-subordinate relationship; the superior knew or had reason to know; the superior failed to take the necessary and reasonable actions to prevent the crimes or punish the perpetrators or refer the matters for prosecution. All the elements mentioned above apply in SGBC cases. While, in principle, superior responsibility is a constructive instrument to prosecute high-level officials for SGBCs committed by subordinates, in practice, successes in securing convictions have been relatively rare. The primary debate remains whether it is a special mode of liability for subordinates' crimes. This study clarifies that the superior is not directly responsible for the crimes committed by his subordinates but for his omission or failure to discharge his duty as a superior or commander properly.

Co-perpetration is focused on each member of the group's essential contribution to the crime and the awareness of the circumstances relating to joint control over the offense. The crux of the doctrine is that none of the group members exclusively controls the commission of the crime but that the objective elements of the crime are fulfilled through the division of essential functions among them. They, therefore, possess joint control over the commission of the crime. To hold liable, both the objective and subjective elements must be established: The existence of an agreement between a plurality of persons and a coordinated essential contribution by each co-perpetrator; the individual acted with requisite *mens rea* of the crime; the individual and the other members of the group were mutually aware and mutually accepted that implementing their common plan might result in realizing the objective elements of the crime; the individual was aware of the factual circumstances enabling him to control the crime jointly. In the context of SGBCs, this would entail proving that the SGBCs committed by a group did fall within the common plan and that the co-perpetrators essentially contributed to the commission of the SGBCs in question. The primary debate under this doctrine is that the causality link between the individual's contribution and the commission of the crime is too "elastic." The study proposes that, for co-perpetration, there must be a direct contribution to realizing the material elements of the crime to be determined on a case-by-case basis.

Indirect perpetration is based on the notion that leaders can be held liable as perpetrators for using a subordinate as a "tool" or "instrument" to commit the crime. They do so by exercising control over the will of the tool. As developed in the ICC's jurisprudence, the main elements the prosecutor must establish for liability to arise are: The organization must consist of an organized and hierarchical apparatus of power. It entails proving the accused's control over the organization, and that the accused secured the execution of the crimes through automatic compliance. In the context of SGBCs, the prosecutor must prove that the accused was the leader at the top of the organization, and subordinates obeyed his orders to commit the SGBCs automatically. This is how control over the crime flows from the nature of the organization in the context of SGBCs.

Indirect co-perpetration is a combination of two modes of liability. The notion applies in the context of crimes committed in an organization, whereby a senior leader jointly controls the commission of a crime through subordinates who physically perform the tasks. As developed in the ICC's jurisprudence, the main elements the prosecutor must prove are control over the organization, organized and hierarchical apparatus of power, and that subordinates committed the crimes through automatic compliance with orders. Proof of the existence of a common plan or agreement and the essential coordinated contribution by each co-perpetrator in realizing the objective elements of the crime are critical elements to be established under this doctrine. Additionally, the prosecutor must prove that the co-perpetrators carried out the subjective elements of the crimes and how they were mutually aware and mutually accepted that implementing their common plan will realize the objective elements of the crimes. Lastly, the accused persons must be aware of the factual circumstances enabling them to control the crimes jointly. Whether the court can combine special modes of liability is still a matter of open debate. Indeed, at the theoretical level, having two objective elements centered on control creates difficulty determining the nature of attribution because one cannot know what controlling act by the high-level officials makes him liable as a principal. In the context of SGBCs, the prosecution will have to establish that two or more high-level officials had effective control over their organizations and members of these organizations committed the SGBCs. The control over these organizations represents the *conditio sine qua non* of each high-level official's contribution as an indirect co-perpetrator.

The next chapter (Chapter 5) will discuss the evidence needed to prosecute high-level officials under the modes of liability discussed in Chapter 3 and will more closely analyze case law of the ICC, ICTY, and ICTR relating to SGBCs' prosecution.

Chapter V: Investigating and Prosecuting Sexual and Gender-Based Crimes through Direct Modes of Liability

1. Introduction

This chapter will discuss the investigation and prosecution of SGBCs before the ICTY, ICTR, and ICC through the concept of direct modes of liability enshrined in the Rome Statute Article 25(3)(b)-(d),[1] Article 7(1) ICTY Statute, and Article 6 (1) ICTR Statute.[2] As explained in Chapter 3, the ICTY and ICTR confirmed that direct commission is first and foremost 'the physical perpetration by the offender himself,' which also clarifies multiple other forms of commission, some of which do not necessarily require that a perpetrator commit a physical offense directly.[3] Either way, as described in Chapter 3, these forms of liability have come to be known in ICL as the most straightforward forms of "committing" a crime, namely: planning; ordering; commission; instigation; aiding, and abetting.[4]

The study will discuss each form of individual criminal liability and its elements by pairing them with the relevant SGBC case law adjudicated by the courts mentioned above. This will show how high-level officials can be investigated and prosecuted in practice. The study will also attempt to establish a link between the perpetrators and the SGBCs committed by identifying the pieces of evidence brought by the prosecutor and those accepted by the chamber to prove the perpetrators' guilt. Further, it will analyze how the prosecutor managed to prove certain cases beyond a reasonable doubt and how in other instances, it was too difficult to achieve positive results, and why this happened. Thus, in these discussions, the study will attempt to cover every individual alleged to have committed or contributed to the commission of SGBCs adjudicated by the ICTR, ICTY, and ICC from the trial to the appeal phase. Thus, in this chapter, a total of 53 SGBC cases will be examined for all the direct modes of liability charged: 5 in planning (4 ICTY, 1 ICTR), 11 ordering cases (2 ICTY, 9 ICTR), 14 commission cases (8 ICTY, 5 ICTR, 1 ICC), 8 instigation cases (3 ICTY, 5 ICTR), and 15 aiding and abetting cases (10 ICTY, 5 ICTR).

Furthermore, the chapter will include a table to clarify the fundamental differences among modes of liability where they may appear to overlap each other, mainly in terms of what elements need to be proven and the pieces of evidence accepted by the chambers. A conclusion will be provided at the end of these discussions,

[1] Art. 25(3)(b)-(d), Rome Statute.
[2] Art. 7(1), ICTY Statute and Art. 6(1) ICTR Statute.
[3] See Prosecutor v. Delalic et al., Case No. IT-96-21-A Appeal Judgment (20 Feb 2001), para. 345. The chamber has emphasized, in the case of 'primary or direct responsibility, where the accused himself commits the relevant act or omission, the qualification that his participation must "directly and substantially affect the commission of the offence" is an unnecessary one.'
[4] Art. 7(1), ICTY Statute and Art. 6(1) ICTR Statute.

pinpointing the judges' most critical decisions on the prosecutor's evidence to prove the SGBCs and linkage to the accused through the mode of liability charged.

1.1 List of SGBC Cases - Direct Modes of Liability

Modes of liability/ charges	Convictions	No.	Success rate	Acquittals	No.	Unsuccessful rate
Planning	• Stakic • Krstic • Plavsic	3	60%	• Kordić & Čerkez • Kajelijeli	2	40%
Ordering	• Akayesu • Ntahobali in Nyiramasuhuko • Nyiramasuhuko • Niyitegeka • Cesic • Todorovic	6	54.5%	• Muhimana • Kamuhanda • Musema • Gatete • Bikindi	5	45.5%
Committing	• Celebici (Delic) • Muhimana • Kunarac • Rukundo • Bralo • Kovac in Kunarac • Vukovic in Kunarac • Simic • Ongwen	9	64%	• Kamuhanda • Niyitegeka • Musema • Balaj in Haradinaj et al. • Vukovic in Kunarac et al.	5	36%
Instigating	• Gacumbitsi (for witness TAQ and 7 other victims) • Semanza (for witness VV) • Sikirica • Akayesu	4	50%	• Gacumbitsi (for witnesses TAP, TAS, and TAO) • Semanza (for victim B) • Dordevic • Seselj	4	50%
Aiding and Abetting	• Furundzija • Muhimana (for three different acts • Akayesu • Kovac in Kunarac et al. (for the A&A the rape of FWS-75 and FWS-87 by other soldiers) • Tadic • Nyiramasuhuko • Zelenović • Nikolic	10	67%	• Brdanin • Kunarac • Kovac in Kunarac (for A&A the rape of FWS-87 by Kostic) • Lazarevic in Sainovic et al. • Ojdanic in Sainovic et al.	5	33%
TOTAL		**32**	**60%**		**21**	**40%**

2. Prosecuting SGBCs through Planning

2.1 Existence of a Concrete Plan

The first element to prove under planning is the existence of a concrete plan. This can be proven by:

- eyewitnesses stating when and how the plans were made;
- eyewitnesses indicating the role of the accused in the organization and the extent to which he decided on the goals and aims of the organization;
- eyewitnesses showing the extent to which the accused was actually in control and in charge;
- eyewitnesses stating that they saw or heard the accused give orders;
- authenticated documents containing recorded statements of the accused, such as televised interviews, radio intercepts admitting to the existence of a plan;
- accused's admissions stating that he helped to establish camps and purchased means of transport such as buses and trucks;
- testimonies and guilty pleas by co-defendants and other people involved admitting to the existence of a plan and the accused's participation in it;
- authenticated documents, such as minutes from a meeting chaired/attended by the accused, policy statements, or statements on the strategic goals.

The concrete nature of the evidence and the combination of certain pieces of it should show that the accused was involved or even the plan's main initiator. In *Stakic*, the Trial Chamber relied on a document containing instructions issued by the Main Board of the Serbian Democratic Party of Bosnia and Herzegovina on 19 December 1991, which provided a blueprint for the Serbian people in Bosnia and Herzegovina to live in a single state.[5] It also relied upon a document containing six strategic goals, a goal to separate Serbs from the other communities,[6] and decisions of a meeting chaired by the accused on the final agreement for the police and armed Serbs to take over power in Prijedor municipality.[7] The Chamber examined statements by the accused in a television interview that he ordered and agreed to establish the detention camps.[8] At least seven subordinates testified about the inner working and the accused's involvement in the organization and coordination of activities leading up to the takeover. This included logistics, transportation, and convoy arrangements to transport the non-Serb civilian population out of the municipality.[9] Finally, the judges also considered the testimony of an eyewitness who testified that the victims were transported in convoys as a result of the attack and were raped while fleeing from Prijedor.[10] Consequently, the Trial Chamber found that the accused and others designed an oppressive campaign with the intent to discriminate against all those

[5] See Prosecutor v. Stakic, Case No. IT-97-24-T, Trial Judgment (31 July 2003), para. 470.
[6] Ibid., para. 471.
[7] Ibid., para. 472.
[8] Ibid., para. 477.
[9] Ibid., paras. 471, 694-700.
[10] Ibid., paras. 133, 693 (witness Ivo Atlija).

who were non-Serb or who did not share the plan to consolidate Serbian control and dominance in the Municipality of Prijedor.[11]

Also, in *Krstic*, the accused was alleged to have designed a plan, in concert with others, to deport forcibly and then massacre Bosnian Muslims at Srebrenica. The Trial Chamber relied on documentary evidence of radio intercepts, which showed General Krstic ordering a subordinate to procure 50 buses.[12] These intercepts showed General Krstic's involvement in the organization and planning to transfer the civilian population from Potocari.[13] The intercepts were further corroborated by the testimony of a subordinate who stated that, on 12 July 1995, General Krstic ordered the requisition of buses and trucks from local companies to transport the Bosnian Muslim civilians out of Potocari.[14] Furthermore, two subordinates testified that General Krstic attended two important meetings convened by General Mladic at the Hotel Fontana to plan the evacuation. It was decided in this meeting that the VRS would organize the evacuation of the Bosnian Muslim women, children, and elderly.[15] The accused himself admitted that he was the organizer of the military operation and led the massacres on Srebrenica, including the holding and transfer operation at Potocari.[16] Consequently, the Trial Chamber found that the accused designed a plan in concert with others to deport and then massacre Bosnian Muslims at Srebrenica forcibly.[17] Additionally, in the ICTY *Plavsic* case, the Prosecutor presented Plavsic's statement before the Trial Chamber, where she admitted to the existence of a concrete plan and participated in it was repeatedly informed of allegations of cruel and inhuman conduct against non-Serbs, including rapes. However, she had refused to accept them or even to investigate them.[18] Based on this admission and guilty plea, the Chamber found her guilty of planning SGBCs.[19]

2.2 Planning was a Factor that Substantially Contributed to the Occurrence of SGBCs

The next element that needs to be proven is that the accused's planning was a factor that substantially contributed to the occurrence of SGBCs. This can be proven by:

- victims and eyewitnesses stating that the accused ordered or assisted in the crimes;
- victims and eyewitnesses stating that the accused was in control;
- victims and eyewitnesses showing that the crimes were committed by the accused's subordinates;

[11] Ibid., para. 819.
[12] Ibid., para. 344.
[13] Ibid.
[14] Ibid., para. 345 (see e.g., testimony of Witness II, T. 9122-9123).
[15] Ibid, paras. 339-340 (witness Mandzic, witness B).
[16] Ibid., para. 615.
[17] Ibid.
[18] See Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, Sentencing Judgment (27 February 2003), para. 51.
[19] Ibid., paras. 17-18.

- victims and eyewitnesses saying that the decision taken by the accused left the people who were victimized in a vulnerable position.

All the evidence needs to show that the accused planning made it possible for the subordinates to commit the crimes. For example, the *Stakic* Trial Chamber relied on the accused's admission that he ordered and assisted in setting up the Omarska, Keraterm, and Trnopolje camps, where subordinates eventually committed the SGBCs.[20] The Trial Chamber also heard the testimony of three victims and the compelling hearsay testimony of five eyewitnesses, including two physicians, who testified on the occurrence of SGBCs in detention places.[21] These multiple accounts were found to be reliable and credible, and other witnesses corroborated them. The Chamber found that the accused's subordinates executed the plan designed by the accused to consolidate Serbian control and dominance in the Municipality of Prijedor[22] and that, by carrying out this plan, SGBCs occurred in the camps.[23] In other words, the testimony of five eyewitnesses and three victims confirmed that Stakic substantially contributed to the commission of SGBCs by his subordinates, who executed the plan to cleanse the Prijedor area ethnically. By separating women and encamping them without protection from their captors, substantially contributed to the rape by his subordinates.[24]

2.3 Substantial Likelihood that SGBCs Would Occur

The substantial likelihood that SGBCs would occur is an essential element to prove in planning. This element can be established by:

- eyewitnesses stating that the victims were put in a vulnerable position without protection (e.g., UN soldiers) and thus exposed to mistreatment and rape by armed soldiers;
- eyewitnesses attesting that the accused was present at the scene and saw first-hand the abuse;
- eyewitnesses stating that the victims were raped in public view and others could see what was happening but could do nothing because of the presence of the soldiers;
- eyewitnesses showing that the accused received reports about the abuse, which shows that he knew what was going on and was aware of the likelihood that rape would occur and continue;
- victims testifying that the crime happened because of the vulnerable position they found themselves in at that time.

All the evidence needs to consider the circumstances at the time the accused formed the plan and then show that these factors should have made him aware beforehand that SGBCs would occur. In *Krstic*, the Trial Chamber heard the testimony of six eyewitnesses who described the lack of shelter, food, and water for the

[20] See Stakic Trial Judgment, supra note 5, para. 477.
[21] Ibid., paras. 234-236, 240-241, 244, 793-794 (see testimonies of Witness H, Witness B, Witness F, Witness I, Dr. Idriz Merdţanić, Dr. Duško Ivić, and Witness Q).
[22] Ibid., para. 819.
[23] Ibid., paras. 234-236, 240-241, 244, 793-794.
[24] Ibid., para. 143 (see e.g., Jusuf Arifagić, T.7075; Nusret Sivać, T. 6767-68.).

refugees, thus creating a humanitarian crisis at Potocari.[25] Five eyewitnesses also stated that the refugees were left unprotected and were exposed to mistreatment and abused by armed elements present in the area before the takeover.[26] Three subordinates outlined that, on 12 July, the VRS organized and implemented the transportation of the women, children, and elderly outside the enclave. General Krstic was himself on the scene and exposed to first-hand knowledge that VRS or other armed forces mistreated the refugees' women.[27] Additionally, three eyewitnesses testified that Serb soldiers raped women as Bosnian Muslim refugees nearby could see the rapes but could do nothing about it because of Serb soldiers standing nearby.[28] Based on the evidence mentioned above, the Chamber found that SGBCs were committed against the refugees at Potocari by the Army of the Republika Srpska (VRS) under the command of the accused and in the fulfillment of the accused's plan (to deport and then massacre Bosnian Muslims at Srebrenica forcibly).[29] The Chamber concluded that, given the circumstances when the accused formed the plan, Krstic must have been aware beforehand that an outbreak of these crimes, including SGBCs, would be inevitable. It stated that given the lack of shelter, the crowds' density, the refugees' vulnerable condition, the presence of many regular and irregular military and paramilitary units in the area, and the sheer lack of sufficient UN soldiers to provide protection.[30]

2.4 Accused's Role/Leadership Position

The accused's leadership position is a fundamental factor in planning and can be proven by:

- authenticated documents showing the accused's position of power and how he used his power;
- authenticated documents showing instructions given by the accused;
- eyewitnesses stating that they heard the accused give orders orally;
- authenticated documents with orders signed by the accused with official stamps;
- eyewitnesses and authenticated documents showing meetings he chaired, appointments and decisions he made;
- authenticated documents and eyewitnesses (subordinates) showing how the group was structured and how tasks were assigned or distributed;
- eyewitnesses testifying that the accused was highly respected by the people;
- eyewitnesses stating that the accused was present on the crime scene.

All the evidence must establish that the accused was in a position of authority or influenced people in the design or implementation of the plan. For example, in *Stakic,* the Trial Chamber reviewed several documents that the Prosecutor had introduced as evidence. This includes the decision on appointments of

[25] See Prosecutor v. Krstic, Case No. IT-98-33-T, Trial Judgment (02 August 2001), paras. 38-40 (testimony of Captain Eelco Koster, Vaasen, Kingori, Karremans, Van Duijn, Camila Omanovic).
[26] Ibid, paras. 143-144 (Testimony of Van Duijn, Kingori, Rutten, Witness C, Franken).
[27] Ibid., paras. 339-340, 616 (witness II, Mandzic, Witness B).
[28] Ibid., paras. 45- 46 (see e.g., testimonies of Vaasen, Omanovic, and Ademovic).
[29] Ibid., para. 46.
[30] Ibid., paras. 616-617.

the accused as president to the Prijedor Municipal Crisis Staff.[31] The Prosecutor also presented documents with an official stamp of the Municipal Assembly of Prijedor, instructing the establishment, composition, and tasks of the municipality's local crisis staff, which referred to the accused as president of the Crisis Staff of Prijedor Municipality.[32] Additionally, two subordinates testified that Stakic was the highest authority and everyone respected him.[33] Moreover, to establish the leadership position of Krstic, the Trial Chamber relied on documentary evidence containing the hand-over ceremony on 13 July 1995. This document was corroborated by two eyewitness accounts, confirming that General Mladic appointed General Krstic as commander of the Drina Corps during a ceremony at the Vlasenica Headquarters.[34] The Chamber also relied on the 13 July 1995 search order, which General Krstic signed as commander.[35] Two subordinates testified that, from early July 1995, General Krstic began to assume more and more *de facto* responsibility within the Drina Corps in General Ivanovic's absence. After two of the meetings he chaired, two subordinates left with the impression that General Krstic was the Drina Corps commander.[36] Based on the evidence mentioned above, the Chamber found that the accused was in a leadership position with authority over the Drina Corps.[37] Moreover, in the ICTY *Plavsic* case, the accused pleaded guilty by which she admitted that she was one of the leaders with subordinates assigned to her and that she participated in planning the crimes.[38] She also admitted making public statements defending the perpetrators of SGBCs and denying the commission of those crimes.[39] The Chamber found that, although Plavsic did not directly participate in the conception or planning of the rapes and had a small role in their execution, she was nevertheless found guilty of planning the SGBCs.[40]

The accused's presence at the scene is not crucial, but being present coupled with his position of authority are a compelling piece of evidence showing planning and the accused's role. For example, in *Krstic*, the Chamber held the accused responsible for planning thanks to four eyewitnesses' testimony stating that the accused was present at the scene, giving soldiers instructions to move civilians out of the city and separating women before subsequently raping them.[41] In *Stakic*, five eyewitnesses testified that the accused was present in the camps, and subordinates informed him about the violence.[42] Although the eyewitnesses gave different accounts about his presence in the camps, the Chamber nevertheless found them credible, holding that the

[31] See Stakic Trial Judgment, supra note 5, paras. 88-90.
[32] Ibid., para. 96.
[33] Ibid., para. 352 (see e.g., testimony of Slavko Budimir, T. 12887-88, 12919; Ranko Travar, T. 13273.).
[34] See Krstic Trial Judgment, supra note 25, para. 329.
[35] Ibid., paras. 318-319.
[36] Ibid., para. 328 (testimony of Witness C, witness Mandzic).
[37] Ibid., para. 331 (testimony of Witness C, witness Mandzic).
[38] See Plavšić Sentencing Judgment, supra note 18, paras. 17-19.
[39] Ibid.
[40] Ibid.
[41] See Krstic Trial Judgment, supra note 25, paras. 350, 322, 344, 616 (testimony of Colonel Kingori, Major Franken, Witness II, Witness F).
[42] See Stakic Trial Judgment, supra note 5, para. 396 (see e.g., testimony of Nusret Siva}, T. 6640, 6648, 6697, 10276-77, 10289 as confirmed in part by two Defence witnesses, Nada Markovska and Cedo Vuleta: Nada Markovska, T. 9930, 9970, 10004; Cedo Vuleta T. 11559, 11617-19).

discrepancy did not impact the Trial Chamber's assessment of the accused's presence and knowledge.[43] Consequently, the Trial Chamber was satisfied that the accused was present in the camps and was aware that non-Serbs were discriminated against and detained in the camps based on ethnic grounds and that foreseeable crimes, including SGBCs, were being committed against them in the camps.[44] However, unlike the *Krstic* and *Stakic* cases, the Prosecutor could not prove Kajelijeli's presence on the crime scene. In that trial, two victims and two eyewitnesses testified that the accused was present when they were raped.[45] The Chamber found some contradictions in the witnesses' written prior statements and oral testimonies at trial about the time of the rape, the distance from the scenes, and the accused's presence in the locations where these crimes occurred.[46] The Chamber found that, while the rape occurred, the evidence could not prove the accused's presence at the scene during the time of the rape; therefore, he could not be held responsible for planning the SGBCs.[47]

2.5 Execution and Oversight of the Plan

The execution and oversight of the plan are essential factors that the prosecutor should endeavor to prove. These factors can be proven by:

- authenticated documents showing that the accused had people working for him to supervise the local communities;
- authenticated documents and eyewitnesses declaring that the accused appointed the military and police to detention camps and was informed about the crimes committed;
- authenticated documents containing radio intercepts showing that the accused ordered his subordinates to purchase buses to transport civilians out of the city and to detention centers;
- authenticated documents showing the deployment of soldiers at the scene and that the accused ordered the soldiers to secure the area;
- eyewitnesses stating that the accused was present on the scene separating women who were subsequently raped;
- accused own admission that he was involved.

All the pieces of evidence, together with the accused's admission that he was involved in these activities, can be decisive in proving that there was a plan to commit a crime, and the subordinates executed the plan. For instance, the *Stakic* Trial Chamber relied on documents showing that the accused established a local crisis staff to help him administer the local territory to execute the plan in these areas.[48] Documents were

[43] Ibid, paras. 397- 400.
[44] Ibid., para. 401.
[45] See Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence (1 December 2003), paras. 677, 680-682 (testimonies of Witnesses GDF, GDO, GDT, GAO).
[46] Ibid., para. 680, referring to testimony of Witness GDO, T. 9 July 2001, p. 36.
[47] Ibid., paras. 680, 682, 923.
[48] See Stakic Trial Judgment, supra note 5, paras. 95-97.

presented showing that, to administer the detention camps, the accused appointed military and police commanders who reported to him regularly about the crimes committed in these camps, including SGBCs.[49] Moreover, the Prosecutor presented documents showing that the accused approved the purchase of logistics and ordered the Police and the army to transport non-Serb civilians to the detention camps (see Section 2.1).[50] These documents were corroborated by the testimony of at least seven subordinates stating that the accused was actively involved in supervising, organizing, and coordinating activities to transport the non-Serb civilian population out of the municipality.[51] Further, the accused admitted that he assisted in establishing detention centers to keep non-Serb civilians there.[52] Based on the evidence mentioned above, the Trial Chamber found that SGBCs were committed by the accused's subordinates in the detention centers while executing the plan designed by the accused.[53]

In *Krstic*, the Trial Chamber relied on documentary evidence containing radio intercepts that show the accused ordering his subordinates to purchase logistics to transport the Bosnian Muslim civilians out of Potocari. The evidence indicates that he deployed soldiers at the scene and issued orders to secure the road along which the busses would travel.[54] These intercepts were corroborated by the accused's subordinate, who testified that the accused ordered the requisition of logistics and assigned soldiers at Potocari to assist with the movement of Bosnian Muslim civilians.[55] Additionally, four eyewitnesses testified that the accused was present on the scene, giving instructions to soldiers on the movement of the people out of the enclave, thus overseeing the execution of the plan (see Section 2.4).[56] Although there was no evidence showing that he personally observed SGBCs occurring while he was on the ground, the evidence indicates that he witnessed other violent acts, such as beatings and murder and the separation of women – which eventually led to their rape.[57] Based on the evidence mentioned above, the Chamber found that the VRS soldiers, while executing the accused's plan, committed SGBCs and that Krstic was responsible for these crimes.[58] In the *Plavsic* case, the accused admitted that she participated in the execution of the SGBCs. She stated that she inspired and led the forces to commit these crimes during the war, and was regularly appraised of the situation, and knew that subordinates went to specific locations to commit these crimes as planned.[59] Instead of preventing and punishing them, she ignored the crimes and conspired with other leaders, and started making public statements of denial.[60] Known that these denials were, in fact, untrue, she still did not recant

[49] Ibid., paras. 159-171, 821, 823.
[50] Ibid., para. 697.
[51] Ibid., paras. 471, 694-700.
[52] Ibid., para. 823.
[53] Ibid., paras. 234-236, 240-241, 244, 793-794, 819.
[54] See Krstic Trial Judgment, supra note 25, paras. 344, 352, 354.
[55] Ibid., para. 345 (witness II).
[56] Ibid., paras. 350, 322, 344, 616 (testimony of Colonel Kingori, Major Franken, Witness II, Witness F).
[57] Ibid., paras. 352, 354, 616.
[58] Ibid., para. 46.
[59] See Plavšić Sentencing Judgment, supra note 18, para. 19.
[60] Ibid., paras. 17-18.

or correct them, allowing the subordinate to continue committing the crimes for which she was held responsible.[61]

2.6 Link Between the Accused's Planning and the SGBCs

The link between the accused planning and the SGBCs can indicate how subordinates executed the plan and his role in that implementation. This factor can be proven by:

- victims and eyewitnesses stating that the person who committed the crime is the subordinate to the accused;
- victims attesting the identity of the perpetrator or saying that the physical perpetrator belongs to particular military or police or armed group controlled by the accused;
- eyewitnesses and victims saying that the accused was present on the scene;
- victims stating that they heard the accused give specific orders to rape the victims;
- statements of the physical perpetrators attesting that the accused instructed them to rape the victims;
- authenticated documents showing that the accused knew about certain locations where the subordinates had gone to rape the victims.

As explained in Sections 2.4 and 2.5, in *Krstic*, four eyewitnesses stated that the accused was present at the scene, giving soldiers instructions to move civilians out of the city and separating women before raping them.[62] In *Stakic*, documents were presented showing that the police and soldiers appointed by the accused to manage the detention camps raped the detained victims.[63] Five eyewitnesses also stated that the accused was present in the camps and was informed about the crimes.[64] Consequently, the Trial Chamber found that the accused's subordinates committed SGBCs in the detention centers,[65] and he was present in the camps and was aware of these crimes, thus convicting him of planning SGBCs.[66] While the prosecution established this factor beyond a reasonable doubt in *Stakic* and *Krstic*, it could not prove the same in *Kajelijeli*. As explained in Section 2.4, in the *Kajelijeli* trial, two victims and two eyewitnesses testified that the accused was present when subordinates raped the victims.[67] Even though the Chamber acknowledged that indeed the rape had taken place, it could not establish that the accused was present at the scene during the time of the rape. [68] Based on the facts presented, the Chamber emphasized that the rape took place in a forest, which, in the majority opinion, makes visibility and hearing more difficult for the witness to be able to identify the

[61] Ibid., paras. 17-18.
[62] See Krstic Trial Judgment, supra note 25, paras. 350, 322, 344, 616 (testimony of Colonel Kingori, Major Franken, Witness II, Witness F).
[63] See Stakic Trial Judgment, supra note 5, paras. 159-171, 821, 823.
[64] Ibid, para. 396 (see e.g., testimony of Nusret Siva}, T. 6640, 6648, 6697, 10276-77, 10289 as confirmed in part by two Defence witnesses, Nada Markovska and Cedo Vuleta: Nada Markovska, T. 9930, 9970, 10004; Cedo Vuleta T. 11559, 11617-19).
[65] Ibid., paras. 234-236, 240-241, 244, 793-794, 819.
[66] Ibid., para. 401.
[67] See Kajelijeli Judgment & Sentence, supra note 45, paras. 677, 680-682 (testimonies of Witnesses GDF, GDO, GDT, GAO).
[68] Ibid., paras. 680, 682, 923.

accused,[69] thus acquitting the accused of planning.[70] In the *Kordic and Cerkez* case, the Trial Chamber acquitted the accused of planning because the evidence was too general without clearly indicating whether the accused instructed the physical perpetrator to commit the rape. In that case, a victim testified that armed men came into her house in Vitez looking for weapons, sexually assaulting her, and stealing her jewelry.[71] The Chamber found that the witness only testified about the rape that the perpetrators had committed and said nothing about the accused's role. The evidence did not specify the perpetrators' identity, as it did not show whether they were civilians or soldiers or which unit these soldiers belonged to – therefore, the accused could not be held responsible for the SGBCs committed as part of the plan designed by the accused.[72] This case clearly shows why it is essential for the prosecutor to prove the link between the SGBCs and the accused by showing the accused's role in the commission of the crimes (whether he was present or ordered the rape or was aware of it but did nothing about it) and the planning itself. The evidence must be as specific as possible, showing the physical perpetrator's identity, the unit he belongs to, and if that unit is headed by the accused to help the judges demonstrate that the person who perpetrated the crime is the subordinate of the accused.

2.7 Conclusion

In conclusion, the case law analyzed shows that the existence of a plan is crucial. The accused's leadership position can indicate the role he played in designing the plan. The evidence must show the accused's position of power and how he used the power, including instructions or orders he gave orally, documents he signed with official stamps, meetings he chaired, appointments and decisions he made, the group's structure, and the tasks distributed.[73] In that regard, the *Stakic, Krstic*, and *Plavsic* Chambers established that the accused's leadership position is a critical factor in planning, which must be proven beyond a reasonable doubt to hold the accused criminally responsible for the SGBCs.[74] The presence of the accused at the scene can be a strong and compelling piece of evidence, and the case law (*Stakic, Krstic, Kajelijeli*) shows that conviction can almost not do without. Only in exceptional cases where the chamber convicted the accused without being physically present at the crime scene (*Plavsic*).[75] Furthermore, the *Stakic, Krstic, Kordic and Cerkez,* and *Plavsic* cases confirmed that it is essential to identify the role the accused played in drawing up the plan or

[69] Ibid., para. 680.
[70] Ibid., paras. 680, 682, 923.
[71] See Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-T, Trial Judgment (26 February 2001), para. 644 (see footnote 1251); Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-A, Appeal Judgment (17 December 2004), para. 463.
[72] See Kordic and Cerkez Appeal Judgment, supra note 71, para. 462.
[73] See Stakic Trial Judgment, supra note 5, paras. 352, 821, 823; Krstic Trial Judgment, supra note 25, paras. 318-319, 328-329; Plavšić Sentencing Judgment, supra note 18, paras. 17-18.
[74] Ibid.
[75] See Krstic Trial Judgment, supra note 25, para. 616; Kajelijeli Judgment & Sentence, supra note 45, paras. 680, 682, 923; Stakic Trial Judgment, supra note 5, para. 401; Plavšić Sentencing Judgment, supra note 18, paras. 17-18.

his contribution in its execution (including the cover-up after the crimes). The prosecutor must establish these factors beyond reasonable doubt for the accused to incur criminal responsibility for the planning of SGBCs. In that regard, either the accused's admission or his presence on the scene would be a particularly compelling piece of evidence.

The case law also shows that SGBCs do not explicitly have to be part of the accused's plan. Rather, it is sufficient that there is a plan to deport or transfer the civilian population, and SGBCs were thus a foreseeable consequence. If a person plans criminal conduct and is aware of the likelihood that SGBCs would follow and willingly took that risk can be held liable under planning (and JCE III).[76] In that regard, an inference that the accused had witnessed in the past similar behavior that led to the SGBCs can be a strong indication that he must have expected that the SGBCs would happen again under similar circumstances (Krstic).[77] Moreover, the circumstances in which the plan was implemented (such as the victims' vulnerability, the presence of irregular military personnel, and the lack of protection of the victims) could be conclusive as to the substantial likelihood that SGBCs would occur furtherance to the accused's plan.[78] Furthermore, separating women and encamping them, and leaving them vulnerable in the hands of their captors without any protection, can be a compelling piece of evidence to show that the accused's planning was a factor that substantially contributed to the occurrence of SGBCs (Stakic).[79] The above discussion shows that it is essential for the prosecutor to prove the link between the SGBCs and the accused by establishing the accused's role in the commission of the crimes and the planning itself.

The table below shows the elements the prosecutor must prove and the evidence accepted by the chambers to prove SGBCs in planning. At the minimum, the prosecutor must prove the existence of a concrete plan, the substantial likelihood that SGBCs would occur, or that planning was a factor that substantially contributed to the occurrence of SGBCs.

[76] See Krstic Trial Judgment, supra note 25, para. 616,
[77] Ibid.
[78] Ibid.
[79] See Stakic Trial Judgment, supra note 5, para. 143 (see e.g. testimony of Jusuf Arifagić, Nusret Sivać , witness P, Slavica Popovic),

Elements to prove	How elements can be proven	Types of evidence
Existence of a concrete plan	• Proving when and how the plans were made; • Proving what was the role of the accused in the organization and the extent to which he decided on the goals and aims of the organization; • Proving the extent to which, the accused was in control and in charge; • Proving that the defendant gave orders; • Minutes from a meeting attended by the accused on the plan; • Policy statements; • Statements on strategic goals; • Admission of co-defendants and other people involved that a concrete plan existed; • Admissions by the accused stating that he helped to establish detention camps and purchased necessary equipment for the implementation of the plan.	Eyewitnesses' testimonies Documentary evidence Testimony and guilty pleases by co-defendants and other people involved Accused's admission/statements of the accused (through televised interviews, radio intercepts). Victims' testimonies
Planning was a factor that substantially contributed to the occurrence of SGBCs	• The accused ordered or assisted in the crimes; • The accused was in control; • The crimes were committed by the accused's subordinates; • The decision taken by the accused left the people who were victimized in a vulnerable position; • The accused's planning made it possible for the crime to be committed.	
Substantial likelihood SGBCs would occur	• Proving that victims were put in a vulnerable position without protection and thus exposed to mistreatment and rape; • Proving that the accused received reports about the ongoing abuse; • Proving that the crime happened because of the victims' vulnerable position	
Accused's role/leadership position	• Proving the accused's position of power; • Proving how the accused used his power; • Instructions or orders given orally or documents signed by the accused with official stamps; • Meetings that the accused chaired or participated in; • Appointments and decisions he made; • How the group was structured; • How tasks were assigned or distributed; • Proving how the accused was considered and respected by the people; • Proving if the accused was present on a crime scene.	

Execution and oversight of the plan	• Proving that the accused had people working for him to supervise the local communities; • Proving that the accused appointed the military and police to detention camps and was informed about the crimes committed; • Collecting evidence (such as radio intercepts) showing that the accused ordered his subordinates to purchase equipment to implement the plan; • Proving that the accused deployed soldiers at the scene and ordered the soldiers to secure the area. • Accused's own admission that he was involved in the above activities	
Link between the accused's planning and the SGBCs	• Proving that the person who committed the crime is the subordinate to the accused; • Proving the identity of the perpetrator; • Proving that the physical perpetrator belongs to particular military or police or armed group controlled by the accused; • Proving that the accused was present on the scene; • Proving that the victim or witness heard the accused gave specific order to rape people; • Proving that the accused instructed the perpetrator to rape the victim; • Proving that the subordinates raped the victims in certain locations that the accused knew about	

3. Prosecuting SGBCs through Ordering

3.1 The Accused Gave the Order to Commit SGBCs

The first element to prove is that the accused ordered another to commit SGBCs. This element can be proven by:

- eyewitnesses and victims who heard the direct and explicit orders to rape the victims;
- eyewitnesses and victims who heard the accused give implicit directions and suggestions;
- Eyewitnesses stating that they heard the accused make derogatory remarks against the victims;
- the accused's own admission that he ordered the rape.

Indeed, all the pieces of evidence together with the accused's admission can make the evidence even more substantial and easier to prove this element. For example, in the ICTR *Akayesu* case, an eyewitness and a victim testified that the accused ordered Interahamwe to commit SGBCs on or near Taba commune's premises.[80] On the first occasion, the eyewitness testified that she heard the accused ordered the

[80] See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment (2 September 1998), para. 429.

Interahamwe to undress a woman and march her around so that she could do gymnastics naked.[81] Afterward, he told the Interahamwe, 'you should, first of all, make sure that you sleep with this girl.'[82] On a second but separate occasion, the victim testified that the accused ordered the Interahamwe to take her and two other girls away and rape them.[83] Although the Chamber found inconsistencies between the pre-trial statement and in-court testimony of the witnesses about the exact time/dates of these events, the Chamber considered that these inconsistencies were not of material consequence and were not substantial enough to impeach the credibility of the witnesses.[84] It held that the discrepancies between pre-trial and witness testimony could be explained by the difficulties of recollecting precise details several years after the events.[85] It also attributed the inconsistencies to the trauma experienced by the witnesses to these events, the problems of translation, and the fact that several witnesses were illiterate and unable to read their written statements.[86] Based on the victim and eyewitness accounts mentioned above, the Trial Chamber found that the accused issued orders to commit SGBCs.[87]

Similarly, the ICTR *Nyiramasuhuko et al.* Trial Chamber relied on the testimony of two victims who testified that they heard Arsène Shalom Ntahobali giving orders to eight Interahamwe to rape a woman.[88] Based on this evidence, the Chamber found that the accused issued orders to commit SGBCs.[89] The Chamber considered that, based upon the obvious intensity of experiencing multiple gang rapes at the hands of Interahamwe, this discrepancy was understandable and did not adversely affect the Chamber's credibility assessment of the witness.[90] Here, the Chamber seems to have adopted the same approach as in the *Akayesu* case, i.e., accepting some inconsistencies between the pre-trial statements and the testimonies in court, justifying them with the level of trauma experienced by the victims in keeping with the RPE specific to SGBCs. In the same *Nyiramasuhuko et al.* case, the Trial Chamber relied on two victims and seven eyewitnesses who reported about Nyiramasuhuko giving orders to Interahamwe or militiamen to rape the victims at the Butare Prefecture Office, which the Chamber found that Nyiramasuhuko issued orders to rape.[91] In the same vein, in the ICTR *Niyitegeka* case, an eyewitness testified that he heard and saw the accused ordered one Interahamwe to undress a dead Tutsi woman and fetch a piece of wood and insert it in her genitalia.[92] Based on the above-mentioned evidence, the Trial Chamber found that the accused ordered

[81] Ibid.
[82] Ibid.
[83] Ibid., para. 424.
[84] Ibid., para. 455.
[85] Ibid.
[86] Ibid.
[87] Ibid., para. 452.
[88] See Prosecutor v. Nyiramasuhuko et al., Case No. ICTR-98-42-T, Judgment and Sentence (24 June 2011), paras. 2631, 2648.
[89] Ibid., paras. 2631, 2653.
[90] Ibid., para. 2635.
[91] Ibid., paras. 2165, 2178, 2302-2304, 2329-2331; Prosecutor v. Nyiramasuhuko et al., Case No. ICTR-98-42-A, Appeal Judgment (14 December 2015), paras. 518, 848, 1217.
[92] See Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Judgment & Sentence (16 May2003), para. 273.

the SGBCs.[93] The Chamber recalled some inconsistencies in the witness' evidence regarding the colour of the accused's vehicle but noted that the discrepancy did not affect the substance and credibility of his testimony.[94] This means that the judges considered the inconsistencies in the witness' evidence as minor and that the witness adequately explained them.[95] Moreover, in the ICTR's *Muhimana* case, an eyewitness testified that standing just five meters away from the accused in a cemetery, she heard him ordering the Interahamwe to rape five girls before killing them.[96] However, the witness stated that she shortly fled the scene out of fear and did not see the rape herself,[97] but a young man later informed her that the Interahamwe raped the girls, took them to the road, and "cut them up into pieces."[98] Although the judges found the witness credible, they considered testimony as hearsay evidence and found that this particular piece lacked reliability to prove that the girls were raped.[99] This means that the hearsay statement and the circumstances around it did not indicate that it is reliable and trustworthy. Therefore, the charge concerning ordering the rape of five Tutsi girls at the cemetery near Mubuga church was dismissed. In the ICTY *Cesic* case, the Chamber heard a victim's testimony and the accused's admission that he ordered two brothers to perform *fellatio* on each other under humiliating circumstances.[100] Consequently, the Chamber found that the accused issued the order to commit SGBCs.[101]

3.2 SGBCs Ordered by the Accused Were Committed

The second element is to prove that the crime ordered was committed. This element can be proven by:

- victims stating that they were raped on orders of the accused;
- eyewitnesses saying victims were raped following the accused's order;
- eyewitnesses attesting that they first heard the accused issuing the order as they left the scene and later, they came back and saw the rape had been committed;
- The accused's admission that the crime was committed because of his order.

Certainly, all the evidence with the accused's admission must establish that the perpetrators committed the rape based on the accused's order. For example, after Akayesu's order to take women, a victim testified that she was separated from the other girls and raped by one Interahamwe.[102] An eyewitness further testified that the accused ordered that a victim performed gymnastics naked, which the Interahamwe and the accused were laughing and happy to be watching.[103] Based on the victim and eyewitness' testimonies, the Chamber

[93] Ibid., para. 316.
[94] Ibid., para. 280.
[95] Ibid., para.78.
[96] See Prosecutor v. Muhimana, Case No. ICTR- 95-1B-T, Judgment & Sentencing (28 April 2005), paras. 170, 197-199.
[97] Ibid., para. 171.
[98] Ibid.
[99] Ibid., para. 200.
[100] See Prosecutor v. Cesic, Case No. IT-95-10/1-S, Sentencing Judgment (11 March 2004), para. 14.
[101] Ibid., para. 36.
[102] See Akayesu Trial Judgment, supra note 80, para. 424 (witness OO).
[103] Ibid., para. 429 (witness KK).

found that the accused ordered the SGBCs, and others had followed up on his orders.[104] The Chamber found the victim and eyewitness accounts reliable and credible, given the accuracy and consistency in their statements, including the fact that one was the victim of the resulting crime and the other directly witnessed the crime.[105] Consistent with the RPE, this shows that even one eyewitness or victim's account is sufficient to establish that the rape occurred, as long as the chamber finds the evidence reliable and credible. Equally, the *Nyiramasuhuko et al.* Trial Chamber heard a victim who testified that 8 Interahamwe raped her after Ntahobali had ordered them to do so.[106] As already stated above, the Chamber found the victim's testimony credible and reliable and found that the Interahamwe executed the accused's order to rape the victim.[107] In the same *Nyiramasuhuko et al.* case, the Trial Chamber relied on two victims and seven eyewitnesses who testified about Nyiramasuhuko giving orders to Interahamwe or militiamen to rape the victims at the Butare Prefecture Office and that Interahamwe obeyed these orders.[108] For instance, an eyewitness testified that she was not farther than 10 meters from Nyiramasuhuko's vehicle when she heard her telling the Interahamwe to take the victims and rape and kill them because they had refused to marry Hutus.[109] Another eyewitness said that she recognized Nyiramasuhuko from close proximity standing 2.5 meters away from her[110] when she heard her issuing orders to the Interahamwe to rape all women and girls and kill the rest.[111] One eyewitness' summary reported Nyiramasuhuko ordering Ntahobali and Interahamwe to commit rapes at the Butare Prefecture Office.[112] Two eyewitnesses testified that Nyiramasuhuko was present at the Butare Prefecture Office, leading the attack and observing the rapes.[113] The Chamber found the witnesses credible and reliable, finding that Nyiramasuhuko issued orders to rape, and the perpetrators implemented the orders.[114]

Likewise, in the *Niyitegeka* case, an eyewitness testified that he heard the accused issuing the order, but he did not see the rape itself being committed because he left the scene before the act was carried out and had only noticed the piece of wood in the woman's genitalia after he returned from the camp.[115] The Trial Chamber still found that it was sufficient that the witness heard the order being issued by the accused (the act which the Interahamwe then executed according to his instructions)[116] and later saw the woman lying on the road with wood sticking out of her genitalia.[117] Like the other cases mentioned above,

[104] Ibid., para. 452.
[105] Ibid., para. 453.
[106] See Nyiramasuhuko et al. Judgment & Sentence, supra note 88, para. 6086.
[107] Ibid., para. 6086.
[108] Ibid., paras. 2165, 2178, 2302-2304, 2329-2331; Nyiramasuhuko et al. Appeal Judgment, supra note 91, paras. 518, 848, 1217.
[109] See Nyiramasuhuko et al. Judgment & Sentence, supra note 88, paras. 2302-2304.
[110] Nyiramasuhuko et al. Appeal Judgment, supra note 91, para. 848.
[111] See Nyiramasuhuko et al. Judgment & Sentence, supra note 88, para. 2329-2331, p. 576.
[112] See Nyiramasuhuko et al. Appeal Judgment, supra note 91, para. 1217.
[113] See Nyiramasuhuko et al. Judgment & Sentence, supra note 88, paras. 2165 (referring to footnote 5754), 2178.
[114] Ibid., para. 5884.
[115] See Niyitegeka Judgment & Sentence, supra note 92, para. 279 (Witness KJ).
[116] Ibid., para. 316.
[117] Ibid., para. 316.

the *Todorovic* Trial Chamber heard the testimony of five victims who testified that the accused ordered six men to perform *fellatio* on each other at the police station in Bosanski Samac on three separate occasions to which the accused pled guilty.[118] The Trial Chamber found that the accused ordered the SGBCs, which his order was implemented.[119] In the ICTY *Cesic* case, following the victim testimony and the accused's admission that he ordered two brothers to perform *fellatio* on each other,[120] the Chamber found that the perpetrators implemented the accused's orders to commit the SGBCs.[121]

In some instances where the prosecution had failed to prove that the witness heard the accused issuing orders or perpetrators executed the orders issued by the accused, the charges have usually been dismissed. For example, the Chamber acquitted Kamuhanda for ordering the rape of Tutsi women. Two eyewitnesses testified of having heard girls being hand-selected and raped later,[122] but did not specify the accused's role nor indicated whether he gave any instructions to rape these girls and if others followed up the orders. The Chamber found that the testimony of the two witnesses was based purely on hearsay. The witnesses did not hear the accused giving orders to rape or had seen the actual rapes occurred, so the evidence could not be relied on to support a finding that the accused ordered SGBCs and the perpetrators executed his orders.[123] These are significant findings by the Chamber because it also describes how specific the evidence needs to be. Like *Kamuhanda* case, in the ICTR *Musema* case, two eyewitnesses testified that they heard the accused issuing an order to rape a victim.[124] Although they did not see the rape occurred, they were sure that the victim was raped because one of them heard the Interahamwe say, 'you slept with the Tutsi now you have slept with the Twa'[125] and Musema telling the Interahamwe that they had done an excellent job.[126] In this case, the Trial Chamber did not find the two witnesses' testimony reliable because they had heard the order and rumors (hearsay without specific or concrete details) about the rape committed but did not see the rape themselves.[127] These are important findings by the chambers because they provide precise details of what makes evidence reliable and acceptable in such cases. Moreover, the eyewitness in the ICTR *Muhimana* case testified that she heard the order but did not personally see the rape occurred but was later informed by a man that the Interahamwe raped the girls.[128] The Chamber received hearsay evidence of what happened to the girls but found that the evidence (the eyewitness and the hearsay) lacked sufficient indicia of reliability to establish that the rape occurred based on the accused's orders or committed in the

[118] See Prosecutor v. Todorovic, Case No. IT-95-9/1-S, Sentencing Judgment (31 July 2001), paras. 9, 17, 38-40 (see e.g., testimonies of Witness A, Witness D, Witness C, Witness E, and Witness F).
[119] Ibid., para. 17.
[120] See Cesic Sentencing Judgment, supra note 100, para. 14.
[121] Ibid., para. 36.
[122] See Prosecutor v. Kamuhanda, Case No. ICTR-99-54A-T, Judgment and Sentence (22 January 2004), paras. 36-43, 47, 60, 61.
[123] Ibid., para. 497.
[124] See Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence (27 January 2000), paras. 809, 815.
[125] Ibid.
[126] Ibid., para. 809.
[127] Ibid., paras. 828-829, 889.
[128] See Muhimana Judgment & Sentencing, supra note 96, paras. 170-171 (witness AV).

presence of the accused. It could not be inferred from the evidence that the girls were raped – neither the witness nor the third person whose hearsay the witness relied on provided any probable cause to believe that the rape occurred).[129] The study will discuss general conclusions on the reliability of evidence in Chapter 7.

Furthermore, in the ICTR *Gatete* case, the Trial Chamber relied on two eyewitnesses' testimony, who testified that Interahamwe raped women and girls at Kiziguro parish.[130] The first eyewitness saw Interahamwe take women and girls to a place not far from the refugees. She subsequently heard screams coming from that location but did not look in that direction.[131] She concluded from the screams that the victim had been raped.[132] One woman, who had been taken away, subsequently told the witness that she had been raped.[133] However, the Prosecutor did not elicit further details on what the woman said to the witness. The Chamber found the witness's brief evidence to be of limited probative value, as she did not see the rapes committed, nor did she testify that Gatete issued orders to the Interahamwe or other assailants to commit the rape.[134] She did not suggest that he was present when the perpetrators took the victims away or during the alleged rapes.[135] Although the second eyewitness testified that she saw Interahamwe raped victims at Kiziguro parish, she did not state that Gatete was present or issued orders to commit these crimes.[136] Her evidence was also extremely brief and vague on this point, and could not support a conviction beyond a reasonable doubt.[137] Based on this evidence, the Chamber found that the prosecution failed to prove that Gatete ordered, participated, or played any role in the rape of women and young girls at Kiziguro parish.[138] Similarly, in the ICTR *Bikindi* case, the Trial Chamber heard the testimony of two eyewitnesses who testified about the rape of a victim.[139] The first eyewitness stated that he learned from those who came from the house that a victim had been raped immediately afterward.[140] The second eyewitness, allegedly present when the woman was taken out from her home, did not even allude to the victim's rape.[141] Both witnesses did not state whether the accused issued orders to rape the woman or the role the accused played in the commission of the rape.[142] The Chamber did not find the witnesses credible and reliable due to the significant discrepancies between their accounts of the incident and whether the woman was raped before

[129] Ibid., paras. 200, 205.
[130] See Prosecutor v. Gatete, Case No. ICTR-2000-61-T, Judgment and Sentence (31 March 2011), para. 343.
[131] Ibid., para. 344.
[132] Ibid.
[133] Ibid.
[134] Ibid.
[135] Ibid.
[136] Ibid., para. 345.
[137] Ibid.
[138] Ibid., para. 346.
[139] See Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Trial Judgment (2 December 2008), para. 345.
[140] Ibid.
[141] Ibid.
[142] Ibid.

being killed.[143] Based on this evidence, the Chamber found that the Prosecutor failed to prove that the accused ordered the crimes or that anyone under Bikindi's command participated in the rape.[144]

3.3 The Accused Had Authority Over the Person Being Ordered to Commit SGBCs

The third element of ordering is to prove that the accused had authority over the person receiving the order. This element can be proven by:

- authenticated documents confirming the accused's position;
- authenticated documents containing orders signed by the accused as the leader;
- eyewitnesses and victims stating that the accused was in charge and respected by everyone;
- eyewitnesses attesting that the accused issued orders and people followed and respected his orders;
- accused own admission that he was in charge and had authority over people.

Without a doubt, all the pieces of evidence, together with the accused's admission that he was in charge, would make it even more compelling and easier to prove this element. For example, in *Akayesu*, the ICTR Trial Chamber examined documentary evidence containing the result of the local elections held in April 1993 and other administrative documents that he signed and stamped as the Mayor of Taba, which confirmed that he was the bourgmestre of Taba commune.[145] The Trial Chamber also relied on three eyewitnesses' testimony and an expert witness who felt that the accused was in charge. The evidence confirmed that he was the most respected and prominent figure of authority in the Taba commune, and people followed and respected his orders, even if those orders were illegal or wrongful.[146] In *Nyiramasuhuko et al.*, the Trial Chamber relied on a victim and two eyewitnesses' testimony, stating that it had appeared to them that Ntahobali was in charge of the Interahamwe because when Ntahobali said "stop", the Interahamwe took their car and left, as they feared and obeyed him.[147] Along these same lines, the ICTY *Todorovic* Trial Chamber relied on documentary evidence that confirmed the accused's appointment as Chief of Police in Bosanski Samac, including orders signed by him in such capacity, prohibiting free movement and public gathering of Muslims and Croats.[148] The accused admitted that he was in charge of the Police Unit and occupied a position of superior authority to all other police officers in Bosanski Samac.[149] Moreover, in the ICTR *Muhimana* case, the Trial Chamber relied on the testimony of at least nine eyewitnesses who stated that the accused was in charge, led several attacks, and gave subordinates orders to attack and kill Tutsis.[150] At least five eyewitnesses said that the accused was a well-known person in the Gishyita Commune, where

[143] Ibid.
[144] Ibid., para. 350.
[145] See Akayesu Trial Judgment, supra note 80, para. 54.
[146] Ibid., paras. 72-74, 77, 704 (see testimony of expert witness Alison DesForges, witness E, Witness S, Witness V).
[147] See Nyiramasuhuko et al. Judgment & Sentence, supra note 88, paras. 2178, 2212, 3858 (witness TA, witness TK, witness RE).
[148] See Todorovic Sentencing Judgment, supra note 118, para. 46.
[149] Ibid., para. 14.
[150] See Muhimana Judgment & Sentencing, supra note 96, paras. 53, 135, 156, 340, 370 (witness BB, witness AF, witness AV, Witness TQ28, witness AP, witness AW, witness W, witness BH, witness BI).

perpetrators committed most of the crimes and occupied a position of influence in the community.[151] The Chamber also relied on documentary evidence on the accused's appointment and confirmed that he was the Conseiller of the Gishyita Commune.[152] In the ICTY *Cesic* case, the Chamber heard a victim's testimony and the accused's admission that he instructed guards to force two brothers to perform fellatio on each other. The victims specified that threats preceded the assault and that the accused ordered the guards to keep the door open so that the other guards could watch and laugh at them as they perform the act.[153] Based on the evidence mentioned above, the Chamber found that the accused exercised authority over the guards and the persons he ordered to commit the SGBCs against each other.[154]

3.4 Conclusion

In many instances, the chamber could not convict the accused because the prosecution failed to prove that the accused's order to commit rape was carried out (*Musema, Kamuhanda,* and *Muhimana*).[155] For a conviction to arise, the evidence must show a direct causal link between the order of the accused and the crime, i.e., the accused gave an order to commit SGBCs, perpetrators followed up the order, and the SGBCs were committed. The case law confirmed that the eyewitnesses to the SGBCs must be close to the accused and must have heard the accused ordered the perpetrators to commit the SGBCs (*Niyitegeka, Nyiramasuhuko, Akayesu,* and *Muhimana*).[156] Many chambers have also insisted that the eyewitnesses physically see the perpetrators committing the SGBCs according to the accused's orders. However, it is also enough to know that the accused first gave the orders to commit SGBCs and afterward be proven that the SGBCs were eventually committed (*Akayesu, Nyiramasuhuko, Niyitegeka, Todorovic, Kamuhanda, Musema,* and *Muhimana*).[157] This shows that circumstantial evidence can be as strong as direct evidence. In Niyitegeka, the witness was not present when the SGBCs occurred but first heard the accused issued the order to commit the crime. Afterward, he saw that the perpetrators had committed the SGBCs, which the judges deemed enough to link those acts together in one continuum.[158] In other cases where the chambers did not accept this standard, the study concluded that the judges indeed opted to use a high evidentiary standard. Lastly, when proving that the accused was in a position of authority over the perpetrators, it is not

[151] Ibid., paras. 53, 135, 156, 241, 340 (witness BB, witness AF, witness AV, Witness TQ28, witness AP).
[152] Ibid., para. 604.
[153] See Cesic Sentencing Judgment, supra note 100, paras. 11, 14, 16.
[154] Ibid., para. 16.
[155] See Musema Judgment & Sentence, supra note 124, paras. 828-829, 889; Kamuhanda Judgment & Sentence, supra note 122, para. 497; Muhimana Judgment & Sentencing, supra note 96, paras. 200, 205.
[156] See Niyitegeka Judgment & Sentence, supra note 92, para. 316; Nyiramasuhuko et al. Judgment & Sentence, supra note 88, para. 2631; Akayesu Trial Judgment, supra note 80, para. 452; Muhimana Judgment & Sentencing, supra note 96, paras. 198-199.
[157] See Akayesu Trial Judgment, supra note 80, para. 452; Nyiramasuhuko et al. Judgment & Sentence, supra note 88, para. 6086; Niyitegeka Judgment & Sentence, supra note 92, para. 316; Todorovic Sentencing Judgment, supra note 118, para. 17; Kamuhanda Judgment & Sentence, supra note 122, para. 497; Musema Judgment & Sentence, supra note 124, paras. 828-829, 889; Muhimana Judgment & Sentencing, supra note 96, paras. 200, 205.
[158] See Niyitegeka Judgment & Sentence, supra note 92, para. 316.

just the official position that matters but others' impressions that the accused was in charge. In other words, although evidence of the *de jure* position is essential, it is enough to prove that the accused wielded influence over others and respected him in the community *de facto* (*Akayesu, Nyiramasuhuko, Todorovic,* and *Muhimana*).[159] *Gatete* and *Bikindi*'s cases underscored the importance of choosing the right mode of liability. In fact, in both cases, the eyewitnesses brought by the prosecution could not confirm that the accused had issued the order to rape nor that he was even on the scene when the rapes took place.[160] As explained above, to find the accused guilty under this mode of liability, the evidence must show a direct causal connection between the accused's order and the SGBCs committed, without which there can be no conviction.

The table below shows the elements the prosecutor must prove and the pieces of evidence accepted by the chambers to prove SGBCs in ordering. At the minimum, the prosecutor must prove that the accused issued the order to commit SGBCs, and the perpetrators committed the SGBCs as ordered by the accused.

Elements to prove	**How elements can be proven**	**Types of evidence**
The accused gave the order to commit SGBCs	• Direct and explicit orders given by the accused to rape the victims; • Implicit directions and suggestions given by the accused to the physical perpetrators; • Derogatory remarks made by the accused; • Accused's admission that he ordered the rape.	Victims' testimonies Eyewitnesses' testimonies Documentary evidence Statement of the accused/accused's admission
SGBCs ordered by the accused were committed	• Victims were raped on order of the accused or following the accused's order; • Witnesses saying that they first heard the accused issuing the order as they left the scene and later, they came back and saw the rape had been committed; • Accused's admission that the SGBCs ordered were committed.	
The accused had authority over the person being ordered to commit SGBCs	• The accused's position of authority; • Orders signed by the accused as the leader; • The accused was in charge and respected by everyone; • The accused issued orders and people followed and respected these orders; • The accused admits that he was in charge and had authority over people.	

[159] See Akayesu Trial Judgment, supra note 80, para. 704; Nyiramasuhuko et al. Jugement & Sentence, supra note 88, para. 2178; Todorovic Sentencing Judgment, supra note 118, para. 14; Muhimana Judgment & Sentencing, supra note 96, para. 604.
[160] See Gatete Judgment & Sentence, supra note 130, para. 346; Bikindi Trial Judgment, supra note 139, para. 350.

4. Prosecuting SGBCs through Committing

4.1 SGBCs Were Committed Physically by the Accused

The first element to prove is that the SGBCs indeed happened and that the accused physically committed the crimes. This element can be established by:

- victims stating that they were raped by the accused;
- eyewitnesses declaring that they saw the accused physically raping the victims;
- eyewitnesses saying that they saw the accused take victims away to his house, and later heard the victims scream mentioning the accused's name;
- eyewitnesses indicating that they saw the accused leading the victims from his house walking naked with their legs apart;
- the accused's admission that he raped the victim by himself.

All the available facts and information, together with clear identification of the accused or the accused's admission, must establish that the accused physically committed the rape. For example, in the ICTY *Celebici* case, two victims testified that Delic raped them in the course of an interrogation.[161] The Chamber found some contradictions in their in-court testimonies and prior statements because they could not vividly recollect certain facts after several years. However, the Chamber accepted their evidence noting that they consistently stated under cross-examination that when they made those prior statements, they were experiencing the shock of reliving the rapes they had kept inside for so many years. The Trial Chamber found their testimony compelling and truthful, particularly in light of the detailed recollection of the circumstances of each rape and their demeanors in the courtroom in general. Further, the Trial Chamber noted that Sub-rule 96(i) of the Rules provides that no corroboration of the victim's testimony is required and found, therefore, that the accused physically committed the crime of rape.[162]

In the ICC *Ongwen* case, seven victims testified that the accused raped them and they were not allowed to leave and were placed under guard by the accused.[163] Five of the victims stated that they were considered so-called "wives" and maintained an exclusive marital relationship with him.[164] Two victims also said that they became pregnant and gave birth.[165] Based on the evidence mentioned above, the Chamber convicted the accused of directly committing rape, sexual slavery, and forced pregnancy as war crimes and crimes against humanity and forced marriage as inhumane acts.[166] The Chamber primarily relied on direct victim testimony to prove the mode of liability, and the SGBCs. The case is relevant because it is the first time the

[161] See Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Trial Judgment (16 November 1998), paras. 937, 946-948.
[162] Ibid., paras. 934, 936, 943, 954, 956-957, 965.
[163] See Prosecutor v. Ongwen, Case No.: ICC-02/04-01/15, Trial Judgment (4 February 2021), paras. 206-211.
[164] Ibid., para. 206.
[165] Ibid., para. 207.
[166] Ibid., paras. 3100, 3059, 3062.

ICC entered a conviction for such a wide-ranging charge of SGBCs, including sexual slavery, rape, forced marriage, and forced pregnancy. In particular, forced pregnancy is considered the first-ever conviction at the trial level at the ICC. The case is pending appeal at the time of writing.

In the ICTR *Muhimana* case, the Trial Chamber heard the testimony of four eyewitnesses and two victims[167] and found that the accused personally raped seven persons.[168] For example, an eyewitness testified about the rape of two women by the accused in the accused's house. Although the witness did not see the rape occur in person, she stated that she saw the accused taking the girls into his house. She said that she heard the victims scream, mentioning the accused's name and saying that they "did not expect him to do that" to them. Finally, the witness saw the accused leading the victims out of his house stark naked, and she noticed that they were walking "with their legs apart."[169] This concatenation of events convinced the Chamber that the rapes had indeed happened.[170] The Chamber found the witness credible because she knew the accused and recognized him during the event, including her proximity to the crime scene, and the fact that her statements were internally consistent. Although she was visibly disturbed in recounting the circumstances, the Chamber noted that her answers were straightforward and did not exaggerate the evidence.[171] The significance of this Judgment is that it provides a clear explanation as to when the evidence of an eyewitness who did not directly see the rape can nevertheless be sufficient to convict the accused of physically committing rape.

In *Kunarac et al.*, two victims testified that Kunarac personally raped them on two separate occasions, forcing one of the victims in the process to touch his penis, and he rejoiced at the idea of being the "first" in taking away her virginity.[172] Consequently, the Trial Chamber found that the accused personally raped two women.[173] Moreover, in the ICTR *Rukundo* case, a victim testified that the accused pulled down her skirt and tried to spread her legs to rape her.[174] She testified that, as she continued to resist, the accused gave up having sexual intercourse but only lay on top of her and rub himself against her body until he ejaculated.[175] The Chamber found the witness' testimony to be credible because she was the victim of the crime itself and her account of the event was clear and consistent with the accused's admission. Based on

[167] See Muhimana Judgment & Sentencing, supra note 96, paras. 19, 90, 170, 264, 285, 297, 552 (see e.g., testimonies of Witness AP, Witness AQ, Witness AV, Witness AT, Witness AU, and Witness BJ).
[168] Ibid., paras. 32-33, 108, 204, 275, 292, 308.
[169] Ibid., para. 32.
[170] Ibid.
[171] Ibid., para. 23.
[172] See Prosecutor v. Kunarac et al., Case No.: IT-96-23-T& IT-96-23/1-T, Trial Judgment (22 February 2001), paras. 711, 720, 724, 727.
[173] Ibid., paras. 714, 727.
[174] See Prosecutor v. Rukundo, Case No. ICTR-2001-70-T, Trial Judgment (27 February 2009), para. 373.
[175] Ibid.

this victim testimony, the Trial Chamber concluded that Rukundo committed sexual assault as genocide.[176] In the ICTY *Bralo* case, the Chamber heard a victim's testimony and accused's admission that he raped the witness when interrogating her in Anto Furundzija's presence,[177] to which the accused pled guilty to personally committing rape as a war crime.[178]

In the ICTY *Kunarac et al.* case, two victims testified that the accused Kovac repeatedly raped the witness in an apartment.[179] Based on the evidence mentioned above, the Chamber found that Kovac raped the witness.[180] In the same *Kunarac et al.* case, a victim testified that the accused Vukovic took her and another woman to an abandoned apartment and raped her.[181] Regarding the accused's identification, the victim stated that she knew Vukovic and saw him at Buk Bijela, where he raped her for the first time.[182] The Trial Chamber found that the victim knew Vukovic personally and convicted him for raping the witness.[183] In the ICTY *Simic* case, the Chamber established that the accused committed sexual assaults based on the analysis of four victims' testimony and the accused's admission, all of which show that he kicked four men in their genitals.[184]

In the nine cases analyzed above, the prosecutor used both direct and circumstantial evidence to show that the accused physically committed SGBCs. In the five cases below, the prosecution's evidence was insufficient to establish this fact, and the accused was acquitted. For instance, in the ICTR *Kamuhanda* case, the Chamber heard the testimony of two eyewitnesses who testified that about 20 girls were picked up and loaded in a vehicle carrying the accused. The witnesses testified that they heard the assailants telling the girls that "we are going to rape you and taste Tutsi women," to which the girls replied, "instead of raping us, it is better that you kill us once and for all.' A moment later, they learned from people in the camp that all the girls were raped, except one.[185] The Chamber found the witnesses to be credible but the hearsay nature of the evidence (the witnesses did not see the accused committing rape, and the people from the camp who informed the witnesses did not mention that the accused raped the women) did not convince the Chamber that the alleged rapes were committed by the accused during or in relation to the attack.[186]

[176] Ibid., para. 385 (however, it should be noted here that the Appeals Chamber overturned this conviction in the context of genocide, finding that, while the sexual assault occurred, CCH's evidence was insufficient to establish that Rukundo possessed genocidal intent when committing it. See Prosecutor v. Rukundo, Case No. ICTR-2001-70-A, Appeals Judgment (20 October 2010), para. 237.
[177] See Prosecutor v. Bralo, Case No. Case No. IT-95-17-S, Sentencing Judgment (7 December 2005), paras. 3, 39.
[178] Ibid., paras. 3, 97.
[179] See Kunarac et al. Trial Judgment, supra note 172, para. 761.
[180] Ibid., para. 761.
[181] Ibid., para. 812.
[182] Ibid., para. 814.
[183] Ibid., para. 817.
[184] See Prosecutor v. Simic, Case No. IT-95-9/2-S, Sentencing Judgment (17 October 2002), paras. 11,53, 63 (Hasan Bicic, Muhamed Bicic, Perica Misic, and Ibrahim Salkic).
[185] See Kamuhanda Judgment & Sentence, supra note 122, paras. 367, 376.
[186] Ibid., paras. 497, 711-713.

Similarly, the ICTR Trial Chamber in the *Niyitegeka* case heard the testimony of an eyewitness who stated that he saw Interahamwe caught a young girl and took her to the accused and put her in his vehicle. The accused was seated in his vehicle, a red Jeep, with the door open. The distance between the witness and the car was about 37 meters.[187] The accused shut the door and was alone with the girl in his vehicle for about 30 minutes.[188] The witness could not see what the accused did to the girl in the vehicle because the door was closed.[189] The witness testified that the accused raped the girl and killed her. Later, he overheard the Interahamwe discussing that the girl was raped.[190] When the witness came out of the bush after the Interahamwe had left the area, he found the girl in that place spread out on the ground dead.[191] The Chamber found that the witness did not see the rape, and he only guessed that the girl had been raped by the accused in a closed vehicle.[192] There was no evidence that the Interahamwe had peered into the vehicle. Nor did the witness testify that the Interahamwe, during the conversation, had named the accused as the perpetrator.[193] From the judges' reasoning, it can be inferred that the witness should be a close proximity to the car to see the events directly with his own eyes. It means that in this case, hearsay or circumstantial evidence was not enough to convict the accused for SGBCs.[194]

In the ICTR *Musema* case, an eyewitness testified that he saw two people holding down a woman while standing on a little hill at Muyira, close to the accused. Musema placed himself between her legs and then raped the young woman.[195] The Trial Chamber found that the eyewitness's testimony established that Musema raped the woman.[196] However, the Appeals Chamber heard additional evidence presented by another eyewitness who testified that a man named "Mika" raped the woman and that when he left his hiding place, he found the woman who told him, "Mika raped me."[197] Another eyewitness's testimony described the circumstances in which Musema had allegedly raped the woman on a day other than the date of the incident.[198] The Appeals Chamber found that the eyewitnesses' testimonies were too conflicting and could not be relied on to convict the accused.[199] The same thing happened to the charge of rape against another young woman in the same *Musema* case. An eyewitness testified that she had five children aged 25, 23, 19, 12, and 9 and that the perpetrators killed the three eldest ones. Yet she also testified that one of the five young women raped with her at Muyira hill was her 18-year-old daughter, but on cross-examination, she

[187] See Niyitegeka Judgment & Sentence, supra note 92, para. 292.
[188] Ibid.
[189] Ibid.
[190] Ibid.
[191] Ibid.
[192] Ibid., para. 301.
[193] Ibid.
[194] Ibid.
[195] See Musema Judgment & Sentence, supra note 124, paras. 847-855.
[196] Ibid., paras. 861-862 (Witness N).
[197] See Prosecutor v. Musema, Case No. ICTR-96-13-A, Appeals Judgment (16 November 2001) para. 191.
[198] Ibid., paras. 190-192, referring to Musema Trial Judgment, supra note 124, paras. 849, 851-853.
[199] Ibid., paras. 193-94.

failed to explain how this was possible (by saying first that her 19 years old daughter had been killed and that her 18 years old daughter had been raped). It was not clear to the Chamber how she could be raped if she was already dead.[200] The Trial Chamber did not find the witness to be credible and reliable because of this inconsistency,[201] consequently acquitting the accused of this charge.[202]

Also, in the ICTY *Haradinaj et al*. case, a victim and an eyewitness testified that Idriz Balaj personally raped the victim. The victim testified that she was taken to a house by two of the other men, while the eyewitness stated that Toger (Balaj) took her to the house. The eyewitness was not able to see who brought the victim into the room where she was raped. However, the Trial Chamber found that this evidence left reasonable doubt about whether Toger or another KLA soldier raped the victim. As the victim testified that it was too dark for her to see the soldiers who came to her house, she might have confused Toger with someone else. Furthermore, the victim did not recognize Idriz Balaj on an ICTY photo board during the identification process and stated that when seeing Idriz Balaj on television in 2005, he did not look like the man who raped her as he looked older. She also testified in court that she would no longer recognize the man who raped her.[203] The Trial Chamber concluded that her memory of the perpetrator was either insufficient for the purpose of identification or did not fit the likeness of Idriz Balaj, consequently acquitting the accused of committing rape against the victim.[204]

Similarly, in the ICTY *Kunarac et al.* case, on the charge that the accused Vukovic personally raped a woman, the victim herself testified that Vukovic ordered her to lie down, took off her clothes, and raped her.[205] During her in-court testimony, the victim identified the accused but with hesitation. In her testimony, she stated that she did not know Vukovic from before the war and that she got to know his name from some other women in Foca High School who knew him. Similarly, in her prior statement to the prosecution dated 4-5 May 1998, she did not know Vukovic personally before the war. However, this contradicts her statement to the prosecution, dated 19-20 January 1996, when she recounted having known him and his wife by sight. When asked in court about the discrepancies, the victim explained that she might have seen Vukovic before the war.[206] The Trial Chamber did not doubt the witness's credibility but questioned the reliability of identifying the accused Vukovic as the perpetrator of this particular rape.[207] An eyewitness testified that she knew the accused very well and described him as the man who killed her uncle and subsequently raped

[200] See Musema Judgment & Sentence, supra note 124, para. 843.
[201] Ibid., para. 844.
[202] Ibid., para. 845.
[203] See Prosecutor v. Haradinaj et al., Case No. IT-04-84-T, Trial Judgment (3 April 2008), paras. 466-469.
[204] Ibid.
[205] See Kunarac et al. Trial Judgment, supra note 172, para. 787.
[206] Ibid., para. 788.
[207] Ibid., para. 787.

her,[208] clarifying that the victim was raped at Foca High School that night by a man whom she (the eyewitness) did not know.[209] The Trial Chamber found that the uncertainty and inconsistencies in the identification of Zoran Vukovic made it impossible to convict him as the perpetrator of the rape and whether he was present at Foca High School during the incident.[210]

4.2 The Accused Had the Intent and the Knowledge to Commit SGBCs

The second element that needs to be proven is that the accused had the intent and the knowledge to commit the SGBCs. In this context, the intent and knowledge are relevant to SGBCs in determining whether the crimes committed were based on one of the prohibited purposes of torture or persecution. It is necessary to determine whether the accused's motivation to commit the SGBCs was meant to obtain information or to extract a confession from the victim or to illtreat the victim in particular, or as a way to show his hatred against a particular ethnic group that the victim belongs. This element can be established by:

- victims stating that the accused asked her to confess while raping her and threatened to kill her if she did not comply;
- victims attesting that they were raped by the accused because of their ethnic identity;
- victims saying that they were raped as punishment for refusing to provide information;
- victims declaring that they came out of the room with the impression that the accused wanted certain information from them during the course of the rape.

In the ICTY *Kunarac et al.*, a victim testified that three soldiers took her to a riverbank. The accused Kunarac asked her to confess about her alleged sending of messages to the Muslim forces and provide information about her valuables. During this interrogation, she testified that the accused raped her violently while he threatened to kill her and her son if she did not comply.[211] Based on this victim's account, the Chamber found that Kunarac intended to obtain information and intimidate the victim, to show her his hatred for Muslims and his intent to discriminate against them in general.[212] In the same *Kunarac et al.* case, a victim testified that, when the accused Zoran Vukovic raped her, he knew that she was just 16 years old Muslim refugee girl at the same age as his daughter, and because of this, he did not do worse things to her.[213] Based on this evidence, the Chamber found that the accused raped the girl with the knowledge and intent to discriminate against the victim herself and her ethnic group.[214] In the ICTY *Celebici* case, a victim testified that she was taken to a room where she was interrogated by the accused (Delic), who asked her about her husband's whereabouts, who was considered an armed rebel. When she refused to comply, the accused

[208] Ibid., para. 789.
[209] Ibid., para. 790.
[210] Ibid., paras. 792, 798.
[211] Ibid.
[212] Ibid., paras. 711, 715.
[213] Ibid., paras. 814-815.
[214] Ibid., para. 816.

raped her, saying that she was detained because of her husband and she would not have been there if he had been around.[215] Based on this victim's testimony, the Chamber found that the purpose of the rape committed by the accused was to obtain information about the whereabouts of her husband, who was considered an armed rebel. It also concluded that the accused meant to punish her for refusing to provide information about her husband, coerce and intimidate her into providing such information, and punish her for her husband's acts.[216] Another victim testified that the accused (Delic) raped her while interrogating her upon her arrival at the Celebici prison-camp. It became apparent to her that the accused wanted certain information from her.[217] Based on this victim's testimony, the Trial Chamber found that the purpose of the rape was to obtain information from the woman, as it was committed in the context of interrogation.[218]

4.3 Conclusion

Both direct and indirect evidence can establish that the SGBCs have been committed and that the accused himself committed the crimes (*Ongwen, Delalic, Muhimana, Kunarac, Bralo,* and *Simic*).[219] The SGBCs committed by the accused can be established without the witness's physical presence at each stage of the crimes, provided the evidence can account for the events that took place right before, during, and after the SGBCs (*Niyitegeka*).[220] As long as the evidence is reliable, the chamber can even count on just one victim's testimony, since Sub-rule 96(i) of the Rules provides no corroboration of the victim's testimony shall be required (*Muhimana*).[221] It is even better for the prosecution's case if the victim is the person testifying as a witness (*Ongwen, Delalic, Muhimana, Kunarac* (the accused Kovac), *Kunarac* (the accused Vukovic), *Simic*).[222]

It makes it harder to obtain a conviction if another eyewitness contradicts the evidence saying it was another person who committed the crime other than the accused himself. Similarly, the charge will be dismissed if the witnesses cannot account for one part of the story and no additional evidence to fill the gaps. For instance, in *Haradinaj et al.*, the victim could not recognize her alleged rapist (Balaj) either in the courtroom or previously (when she was shown a picture or saw him on tv).[223] In this case, the prosecution should have gathered additional corroborating evidence to fill the gaps in the victim's testimony, such as other witnesses

[215] See Delalic et al. Trial Judgment, supra note 161, paras. 925, 937.
[216] Ibid., paras. 940, 941, 943.
[217] Ibid., para. 946.
[218] Ibid., para. 963.
[219] Ibid., paras. 943, 963; Muhimana Judgment & Sentencing, supra note 96, paras. 32-33, 108, 204, 275, 292, 308; Kunarac et al. Trial Judgment, supra note 172, paras. 714, 727; Bralo Sentencing Judgment, supra note 177, paras. 3, 97; Simic Sentencing Judgment, supra note 184, paras. 11,53, 63 (Hasan Bicic, Muhamed Bicic, Perica Misic, and Ibrahim Salkic); Ongwen Trial Judgment, supra note 163, paras. 206-211.
[220] See Niyitegeka Judgment & Sentence, supra note 92, para. 316.
[221] See Muhimana Judgment & Sentencing, supra note 96, para. 90.
[222] See Delalic et al. Trial Judgment, supra note 161, paras. 937, 946-948; Muhimana Judgment & Sentencing, supra note 96, para. 552; Kunarac et al. Trial Judgment, supra note 172, paras. 761, 817; Simic Sentencing Judgment, supra note 184, paras. 11, 53, 63 (Hasan Bicic, Muhamed Bicic, Perica Misic, and Ibrahim Salkic); Ongwen Trial Judgment, supra note 163, paras. 206-211.
[223] See Haradinaj et al. Trial Judgment, supra note 203, paras. 466-469.

who were present at the crime scene. Also, in *Kunarac et al.,* a victim could not identify the accused Vukovic as her rapist.[224] She contradicted herself in the courtroom about knowing him or not before the war, the same as in two separate witness statements released previously to the Investigators. The prosecution should have cleared this contradiction before bringing the victim to the stand. In *Kamuhanda*, for instance, the prosecution should have produced additional witnesses to testify about what happened to the women who had been picked and taken away.[225]

Furthermore, when the prosecution establishes that the SGBCs had been committed by the accused himself, it is also essential to specify whether the crimes happened for one of the prohibited purposes of torture or persecution. This will help the judges understand whether the accused's motivation to commit the SGBCs was to obtain information or extract a confession from the victim or to illtreat the victim in particular, or as a way to show his hatred against the victim's ethnic group (*Kunarac, Delalic,* and *Rukundo*).[226] Moreover, generally, the evidence adduced must be credible and reliable. Whether the evidence is produced only in the form of witness' testimony or documentary evidence, the prosecution needs to ensure that all the pieces tell the same story on who, where, when, why (relevant for genocide or torture to prove special intent), and how the crime happened (*Musema, Hardinaj et al.* and *Kunarac et al.*).[227]

The table below shows what elements need to be proven and which pieces of evidence to present to the chambers to prove SGBCs in direct commission. At the minimum, the prosecutor must prove that the accused physically committed the SGBCs by himself.

Elements to prove	**How elements can be proven**	**Types of evidence**
SGBCs were committed physically by the accused	• Victims saying they were raped by the accused; • Victims stating that they were sexually enslaved, forced into marriage, and made pregnant; • Eyewitnesses who saw the accused physically raping the victims; • Eyewitnesses who saw the accused take victims away, heard the victims scream mentioning the accused's name, and later saw the accused leading the naked victims out and walking with their legs apart; • Clear identification of the accused; • Accused's admission that he committed SGBCs.	Victims' testimonies Eyewitnesses' testimonies

[224] See Kunarac et al. Trial Judgment, supra note 172, paras. 792, 798.
[225] See Kamuhanda Judgment & Sentence, supra note 122, paras. 497, 711-713.
[226] See Kunarac et al. Trial Judgment, supra note 172, paras. 711, 715; Delalic et al. Trial Judgment, supra note 161, paras. 940, 941, 943, 963; Rukundo Appeals Judgment, supra note 176, para. 236.
[227] See Musema Appeal Judgment, supra note 197, paras. 193-94; Musema Judgment & Sentence, supra note 124, para. 843; Haradinaj et al. Trial Judgment, supra note 203, paras. 466-469; Kunarac et al. Trial Judgment, supra note 172, paras. 792, 798.

The accused had the intent and the knowledge to commit SGBCs	• Victims saying that they were raped by the accused because of their ethnic identity; • Victims stating that they were raped as punishment for refusing to provide information; • Victims saying they came out of the room with the impression that the accused wanted certain information from them during the course of the rape. • That the accused hates the victim and raped the victim to show his hatred.	Statement of the accused/accused's admission

5. Prosecuting SGBCs through Instigating

5.1 Link Between Instigating and the SGBCs

The first element to be proven under this mode of liability is the link between the instigation and the SGBCs. This element can be established by:

- victims stating that they were raped on the same day or immediately after the accused's speech;
- eyewitnesses indicating that the victims were raped on the same day or immediately after the accused's speech;
- the admission of the accused that he prompted the rape against the victims

The evidence must establish that the accused verbally prompted the physical perpetrator to commit SGBCs, and the perpetrators committed the SGBCs because of the accused's prompting. In the ICTR *Gacumbitsi* case, a victim (witness TAQ) testified that she saw the accused on 17 April 1994 driving around using a megaphone, saying that Tutsi girls who refused to marry Hutu should be looked for, raped, and if they resisted, killed.[228] She stated that she and other women were raped later that same day.[229] Based on her testimony, and because of the closeness in time and space between the instigation by Gacumbitsi on 17 April 1994 and the rape (which happened the same day), the Chamber found that the rape committed against the witness and seven other Tutsi women was a direct consequence of the accused's instigation.[230] Also, in the ICTR *Semanza* trial, a victim testified that she heard the accused say to a small group of men to rape Tutsi girls before killing them, 'you should do that, and even if they have some illness, you should do it with sticks.'[231] She testified that, immediately after this speech, one of the men who heard the accused's instructions stormed the witness' refuge place and raped her, saying he had permission from the accused to rape her.[232] Based on the victim's testimony, the Chamber found that the accused directed a group of people to rape Tutsi women before killing them, and immediately after Semanza's speech, one of the men in the

[228] See Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Trial Judgment (17 June 2004), para. 200 (witness TAQ).
[229] Ibid., para. 203 (witness TAQ).
[230] Ibid., paras. 227, 330.
[231] See Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment & Sentence (15 May 2003), para. 253(witness VV)).
[232] Ibid., para. 254 (witness VV).

audience raped the witness.[233] The Chamber concluded that the fact that the rape of the witness occurred directly after the accused instructed the group to rape means that the accused's verbal encouragement constituted instigation because it was causally connected and substantially contributed to the actions of the principal perpetrator.[234] Moreover, the assailant's statement that the accused permitted him to rape the witness proved a clear link between the rape and the accused's statement, which was intentionally made with the awareness that he was influencing the perpetrator to commit the crime.[235] Moreover, in the ICTY *Sikirica* case, the accused pleaded guilty to instigating rape as he admitted to having prompted rape against certain detainees at Keraterm camp. His admission was confirmed by a victim who testified that she was raped multiple times by men at Keraterm camp immediately following the event.[236] The Trial Chamber accepted the evidence and the guilty plea of instigating rape and convicted the accused of this crime.[237]

The closeness in time and space between the instigation and the commission of the SGBCs seems a crucial factor in holding high-level officials liable for instigation. In fact, in those instances where the connection between the events was too loose, the accused was acquitted. An example of this is again the *Gacumbitsi* case. Although the instigation was established for witness TAQ, the testimonies of three other victims (witnesses TAP, TAS, and TAO) did not achieve the same result. The Chamber found that the evidence provided by these witnesses did not establish a link between the rapes and the accused's possible speeches.[238] For example, witness TAS testified that an attacker told her that he was acting by the accused's instructions, but the Chamber found that this part of her account was unreliable.[239] Therefore, the Trial Chamber concluded that the uncorroborated hearsay testimony of witness TAS concerning Gacumbitsi's instructions was insufficient to prove that he had instigated the rape.[240] Unfortunately, the judges did not explain why that part of witness TAS's testimony was unreliable. Overall, the judges had found witness TAS a credible witness in proving the rape, but her evidence did not establish what her attackers said. Further, the judges ruled that the prosecution did not prove that the rapes recounted by witness TAP occurred on the same day or immediately after the accused's instigation.[241] It means that the prosecution failed to substantiate the closeness in time and space between the accused's statements and the rape.[242] Regarding witness TAO, the prosecution did not prove a link between Gacumbitsi's statements made on 17 April 1994 and the rapes recounted.[243] In the *Semanza* case, while the instigation of the rape of a victim (witness VV)

[233] Ibid., paras. 261, 476.
[234] Ibid., para. 478.
[235] Ibid.
[236] See Prosecutor v. Sikirica et al., Case No. IT-95-8-S, Sentencing Judgment (13 November 2001), paras. 22, 99.
[237] Ibid., paras. 19, 125.
[238] See Gacumbitsi Trial Judgment, supra note 204, para. 329.
[239] Ibid., paras. 226-227, 327.
[240] Ibid.
[241] Ibid., para. 329.
[242] Ibid.
[243] Ibid.

was established, the Chamber could not do the same for the alleged rape of victim B. The Chamber reasoned that witness VV only assumed that victim B had been raped since she heard her scream that she preferred to be killed instead but could not see what the other two assailants were doing to her.[244] Although the witness did not physically see what happened to the woman, the Chamber should have inferred from the witness's statement that victim B had indeed been raped before being killed. This is because the attackers verbally told both victim B and the witness that they came purposely to rape them according to the accused's instigation.[245] After that, victim B was separated and taken into a house by the same assailants and, shortly after, the witness heard victim B screaming that she preferred to be killed, which, finally, she was. [246]

Similarly, in the ICTY *Dordevic* case, the Trial Chamber found that the evidence of two eyewitnesses who testified about the rapes committed by policemen and VJ soldiers did not establish a nexus between the accused's instigation and the SGBCs.[247] Also, in the ICTY *Seselj* case, the numerous eyewitness testimonies and the documentary evidence in the form of exhibits, describing the circumstances and the content of the speech made by the accused on 6 May 1992 in Hrtkovci,[248] did not make any mention of rape or sexual assaults.[249] The Chamber deemed that the documents did not clarify whether this speech was the reason for the campaign of persecution, including sexual assaults. It also noted that the unreliability of the eyewitnesses could not allow the Chamber to establish a connection between the accused's speech and the sexual assaults (for instance, the judges cited a witness who "was severely tested during cross-examination").[250] This means that the prosecution failed to present evidence of a causal link between the accused's speeches of 6 May 1992 and the sexual assaults committed in May 1992. Therefore, the sexual assaults committed could not be attributed to the accused, even indirectly, as acts of instigation.[251] Judge Lattanzi filed a dissenting opinion in this Judgment, commenting that the judges and the prosecutors might have made some mistakes. Firstly, concerning the unreliability of witnesses, she explained that, throughout the proceeding, prosecution witnesses had been subjected to intimidation, blackmail, threats, and fear.'[252] She noted that most of the judges should have concentrated on the witness's prior written statements rather than the *viva voce* testimonies at trial.[253] Secondly, concerning the instigation mode of liability, she reasoned that the majority failed to consider the speeches made outside the period of the indictment,' which they should have

[244] See Semanza Judgment & Sentence, supra note 231, para. 254.
[245] Ibid.
[246] Ibid.
[247] See Prosecutor v. Dordevic, Case No. IT-05-87/1-T, Trial Judgment (23 February 2011), para. 2168. (witness K14, witness K20).
[248] See Prosecutor v. Seselj, Case No.: IT-03-67-T, Trial Judgment (31 March 2016), para. 330. The chamber relied on the following evidence: Ewa Tabeau; Yves Tomic; Katica Paulic; Aleksa Ejic; Franja Baricevic; Goran Stoparic; VS-007; VS-034; VS-061; VS-067; VS-1134; C10; C26 under seal; P31; P164; P537 under seal; P547; P548 under seal; P549; P550; P551 under seal; P554; P555; P556; P557; P558; P559; P560; P561; P564 under seal; P565; P566; P571; P631; P836; P1049 under seal; P1050 under seal; P1056 under seal; P1104 under seal; P1201; P1215; P1300; P1330.
[249] Ibid., para. 331.
[250] Ibid., para. 333.
[251] Ibid.
[252] See Prosecutor v. Seselj, Case No.IT-06-67-T, Partially Dissenting Opinion of Judge Flavia Lattanzi- Amended Version (31 March 2016), para. 5.
[253] Ibid., para. 22.

instead analyzed according to the Tribunal's jurisprudence.[254] The seven cases discussed above establish that nexus is crucial, and the prosecution needs to prove the closeness in time and space. For time, rapes should have occurred on the same day or after the accused's instigation.

5.2 Existence of Positive Acts, Omissions, Express or Implied Conduct

The importance of the existence of positive acts, omissions, express or implied conduct of the accused is the second element that must be proven by the prosecutor. This element can be established by:

- victims and eyewitnesses stating that the accused was present when the victims were taken away to be raped but did nothing to stop it;
- eyewitnesses and victims saying the accused had the authority and power to stop the rape but refused to act;
- victims and eyewitnesses attesting that the accused was making encouraging statements or gestures to rape the victims;
- victims and eyewitnesses describing that the accused was talking and telling people what to do as if he was supervising the rape;
- victims showing how the accused granted permission for victims to be taken away and raped.

The evidence must establish that the accused was in a position of authority, refused to act, and instead encouraged the rape. In the ICTR *Akayesu* case, a victim testified that when she was brought on two occasions at the cultural center to be raped, the accused looked at her and did nothing to prevent the SGBCs from happening. On the second occasion, he said to the Interahamwe, 'never ask me again what a Tutsi woman tastes like.'[255] The witness also described the accused 'talking as if someone were encouraging a player and supervising the acts of rape.'[256] Another victim testified that when the Interahamwe took her and two other girls, they went to the accused and told him they were taking the girls away to sleep with them. The witness testified that the accused said to the Interahamwe, "take them."[257] Based on the victims' testimonies, and because of his superior position as a bourgmestre, the Chamber found that the accused committed instigation by verbally encouraging these rapes.[258]

5.3 Conclusion

The eight cases discussed above establish that nexus is crucial, and the prosecution needs to prove the closeness in time and space. For time, the evidence must show that the rapes occurred on the same day or

[254] Ibid., para. 24.
[255] See Akayesu Trial Judgment, supra note 80, para. 422 (Witness JJ).
[256] Ibid.
[257] Ibid., para. 424 (Witness OO).
[258] Ibid., para. 693.

immediately after the accused's instigation (*Gacumbitsi, Semanza,* and *Akayesu*).[259] For space, the evidence must establish a connection between the accused's speech or encouragement and the SGBCs committed (i.e., proof that the perpetrator committed the crime according to the accused's instigation) (*Gacumbitsi, Semanza, Dordevic,* and *Gacumbitsi*).[260] The prosecutor can establish the accused's intent to instigate SGBCs from his positive acts, omissions, or implied conduct, for example, making encouraging statements or gestures to rape the victims (*Gacumbitsi, Semanza,* and *Akayesu*).[261] However, in the case of a plea agreement, even if the accused admits the SGBCs happened, it is still better for the prosecution to find corroborating evidence that rapes occurred due to the accused's instigation, which could contribute to the victims' healing process (*Sikirica*).[262] Lastly, to analyze instigation properly and its gravity, it is necessary for the judges to go back to the past to consider the speeches and actions of the accused together with those charged in the Indictment period (*Seselj*). [263]

The table below shows the elements to prove and the pieces of evidence accepted by the chambers in instigation. The prosecution must prove the accused's instigation and the SGBCs and link between them as a minimum.

Elements to prove	**How elements can be proven**	**Types of evidence**
Link between instigation and the SGBCs	• Victims were raped on the same day or immediately after the accused's speech; • The rapes occurred because of the accused's verbal encouragement; • The admission of the accused that he prompted the rape that occurred.	Victims' testimonies Eyewitnesses' testimonies Statement of the accused/accused's admission
Existence of positive acts, omissions, express or implied conduct	• The accused was present when victims were taken away to be raped but did nothing to stop it; • The accused made encouraging statements or gestures to rape victims; • The accused told people what to do as if he was supervising the rape; • The accused granting permission for victims to be taken away and raped.	

[259] See Gacumbitsi Trial Judgment, supra note 228, para. 227; Semanza Judgment & Sentence, supra note 231, para. 254; Akayesu Trial Judgment, supra note 80, para. 422, 692.
[260] See Gacumbitsi Trial Judgment, supra note 228, paras. 226-227, 327, 329; Semanza Judgment & Sentence, supra note 231, para. 254; Dordevic Trial Judgment, supra note 247, para. 2168; Gacumbitsi Appeal Judgment, supra note 241, para. 135.
[261] See Gacumbitsi Trial Judgment, supra note 228, para. 200; Semanza Judgment & Sentence, supra note 231, para. 253; Akayesu Trial Judgment, supra note 80, para. 422.
[262] See Sikirica et al. Sentencing Judgment, supra note 236, paras. 22, 99.
[263] See Seselj Trial Judgment, Partially Dissenting Opinion of Judge Flavia Lattanzi, supra note 252, para. 24.

6. Prosecuting SGBCs through Aiding and Abetting

6.1 The Accused Provided Practical Assistance or Moral Support to the Physical Perpetrator to Commit SGBCs

The first element that the prosecutor needs to prove is that the accused provided practical assistance or moral support to the physical perpetrator to commit SGBCs. This element can be proven by:

- victims stating that the accused was present and continued to interrogate the victim while she was being raped;
- victims saying that the accused permitted the physical perpetrators to take the victims away and rape them;
- victims and eyewitnesses testifying that as the accused was raping the victims, his subordinates accompanying him were also raping other persons nearby and he did not stop them;
- victims and eyewitnesses attesting that the accused was standing and watching as the perpetrators drag the victims to be raped, without saying anything;
- victims showing that the accused first raped the victims and then handed them over to others to rape them;
- Victims and eyewitnesses saying that the accused transported the physical perpetrator in a vehicle to the scene and finger-pointing at victims to be picked up and raped.

The accused's position of authority and his presence and behavior at the scene can signal an official tolerance for SGBCs. In the ICTY *Furundzija* case, the Trial Chamber heard the testimony of a victim and an eyewitness who testified that, while the witness was being interrogated by the accused, she was forced by accused B to undress and remain naked before a large number of soldiers. The witness was left by the accused in the custody of accused B, who proceeded to rape her.[264] The Chamber found that the accused's position of authority, combined with his presence and continued interrogation of the witness, encouraged accused B to rape the witness.[265] The *Muhimana* Trial Chamber held the accused responsible for aiding and abetting three separate SGBCs involving five victims. The Trial Chamber relied on the testimonies of two victims and one eyewitness to prove these charges. In the first instance, a victim stated that the accused permitted the assailant to take her away and rape her. During the next two days, the assailant kept the witness at his house and raped her multiple times.[266] The Chamber found that, by allowing his subordinate to take the witness home, the accused aided and abetted the rape committed against the witness.[267] In the second instance, the Trial Chamber heard another victim's testimony stating that, while being raped by the accused, she saw the accused's subordinates raping two other girls nearby and did nothing to stop them.[268] The Trial Chamber found the witness credible and reliable, based on her straightforward and detailed testimony and

[264] See Prosecutor v. Furundzija, Case No.: IT-95-17/1-T, Trial Judgment (10 December 1998), paras. 125, 127 (Witness A, Witness D).
[265] Ibid., para. 274.
[266] See Muhimana Judgment & Sentencing, supra note 96, paras. 308-310 (Witness BG).
[267] Ibid., para. 318.
[268] Ibid., para. 285 (witness BJ).

her demeanor in court.[269] Based on the evidence mentioned above, the Chamber found that the accused, by his presence during the rape of the two women, coupled with his own action of raping the witness, aided and abetted the rape of the two women (Murekatete and Mukasine).[270] In the third instance, an eyewitness testified that he was in the vicinity when the accused raped a woman. He said that, during this incident, he witnessed the Interahamwe raping two other women (daughters of Amos Karera) nearby, stating that, from his hideouts, he could see everything that was happening to the women.[271] The Chamber found the witness' account of the rape credible and reliable because he gave a detailed description of the rapes. He was at the crime scene, explaining that the accused and the other perpetrators could not see him as he lifted his head up and down from his hiding place because 'they were busy raping those young girls.'[272] Based on the evidence mentioned above, the Chamber found that the accused, by his presence during the rape of the two women, coupled with his own action of raping a woman, aided and abetted the Interahamwe to rape the two women (daughters of Amos Karera).[273]

Along these same lines, the *Akayesu* Trial Chamber relied on the testimonies of two victims and two eyewitnesses who testified about the occurrence of seven different SGBCs involving at least twenty-two victims, in or around the premises of the communal office.[274] For instance, in one of the rape incidents, a victim testified, 'she saw the accused […] moving to the place where two Interahamwes were dragging a victim to rape her […]. The accused was standing, watching the men drag the victim and, later on, he entered the office without saying anything.'[275] Further, the witness affirmed in her testimony that she believed that the accused had the power to oppose the rapes and that, by not giving refuge to anybody at the bureau communal, he authorized the rapes which took place.[276] Consequently, the Chamber ruled that the accused aided and abetted these SGBCs by allowing them to take place on or near the premises of the bureau communal. The Chamber stated that his presence on the premises facilitated the commission of these acts through his moral support, which, by virtue of his authority, sent a clear signal of official tolerance for SGBCs.[277] Additionally, in the ICTY *Kunarac et al.*, in the accused Kovac's apartment, two victims testified that, after the accused had finished raping them, he handed them over to several other soldiers to rape them.[278] The Trial Chamber found that the accused, Radomir Kovac, had sexual intercourse with the two women in the knowledge that they did not consent and that he substantially assisted other soldiers in raping

[269] Ibid., para. 289.
[270] Ibid., para. 553.
[271] Ibid., paras. 274-275.
[272] Ibid., para. 272.
[273] Ibid., para. 553.
[274] See Akayesu Trial Judgment, supra note 80, paras. 421-423, 429-437, 449 (e.g., testimonies of Witnesses JJ, NN, KK, PP).
[275] Ibid., para. 433.
[276] Ibid., para. 436.
[277] Ibid., para. 693.
[278] See Kunarac et al. Trial Judgment, supra note 172, paras. 757-759.

them. [279] He did this by allowing other soldiers to visit his apartment and rape the women or encourage the soldiers to do so.[280] He handed the girls over to other men knowing that the soldiers will rape them without consent.[281] Finally, the Trial Chamber proved beyond a reasonable doubt that, after about a week, Kovac handed the two women over to other soldiers whom he knew would rape and abuse them. Kovac eventually sold one of the women to an unidentified soldier and handed over the other woman to another soldier with certainty that they would be raped again, thus convicting him of these crimes.[282]

The ICTR *Nyiramasuhuko et al*. illustrates how to prove practical assistance in the contexts of SGBCs. In that trial, a victim testified that Ntahobali and Nyiramasuhuko transported ten armed Interahamwe in a camouflaged vehicle and indicated to the Interahamwe to take Tutsi refugees, including women and children, onboard the pickup. As they arrived, Nyiramasuhuko started pointing out Tutsi refugees to the Interahamwe, saying as she pointed, 'this is another one, and another one and another one, and why are you leaving that one?'[283] During the course of this event, the Interahamwe raped the witness and other women. The Chamber found the accused responsible for aiding and abetting because they provided practical assistance (by transporting them to the crime scene and providing instructions) to the physical perpetrators who committed these crimes.[284]

6.2 The Accused's Conduct Had a Substantial Effect on the Commission of the Crime

The second element requires proof that the accused's conduct had a substantial effect on the commission of the crime. This can be proven by:

- eyewitnesses testifying that the accused was present at the scene beating or raping the victims while subordinates were also raping other persons;
- victims showing that the accused raped the victims first and then invited other soldiers to rape them too;
- victims stating that the accused transferred the victims to a room where they were raped by soldiers in the presence of the accused during the course of an investigation;
- victims attesting that the accused handed the victims over to the soldiers whom he knew would rape them.

The accused's authority and his action and presence on the scene are strong indicators to conclude that his conduct had a substantial effect on the SGBCs. In the ICTY *Tadic* case, two victims testified that they were

[279] Ibid.
[280] Ibid.
[281] Ibid.
[282] Ibid., para. 759.
[283] See Nyiramasuhuko et al. Judgment & Sentence, supra note 88, para. 978.
[284] Ibid., paras. 2628-2632, 6085-6088, 6093-6094 (Ntahobali was convicted for aiding and abetting these rapes, but Nyiramasuhuko was only charged with rape as a crime against humanity pursuant to Art. 6 (3) of the Statute, which the chamber considers to be a serious omission on the part of the prosecutor… (also for not charging it as aiding and abetting ibid 6087). This case is however included here to illustrate proof of the element of practical assistance in SGBC cases).

ordered to jump down into a pit along with a naked man, who had been badly beaten and soaked in blood. One witness was ordered to lick his naked bottom, and the other witness to suck his penis and then bite his testicles.[285] The Chamber found that the accused participated in beating detainees, and immediately after that beating, the victims were ordered to perform oral sex on a naked man and mutilate him.[286] Based on this evidence, the Trial Chamber found that the role Tadic played in the prior incident (beatings), the close temporal proximity between the two incidents (beatings and sexual assaults), and his presence at the scene of the crime were sufficient to have a substantial effect on the SGBCs.[287]

Likewise, in the ICTR *Nyiramasuhuko et al.*, a victim testified that the accused repeatedly raped her and invited several Interahamwe to rape the witness, which they did.[288] While being raped on these occasions, the witness testified that she saw Interahamwe raping several other women nearby.[289] Based on the victim's testimony, the Chamber found that the accused's presence at the scene, coupled with his actions (raping of the witness and beating of refugees) and the handing over of the witness to Interahamwe to be raped, encouraged the Interahamwe to rape the witness and many other women at the Butare Prefecture Office.[290] In the ICTY *Zelenovic* case, a victim testified that Zelenovic and another man interrogated her about her village and whether the villagers had weapons.[291] She testified that the other man warned her that the soldiers would rape her if she did not answer truthfully.[292] In the course of her interrogation, she was taken by a soldier to another room where ten soldiers raped her in turn.[293] The Chamber found that Zelenovic knew that his action in respect of the interrogation and his omission to act with regard to the threats of rape, and the eventual transfer of the witness to the room where she was raped, had a substantial effect on the commission of the rape.[294]

In a similar vein, a victim in the ICTY *Nikolic* case stated that she and other female detainees at the Susica camp were often removed and returned from the camp by the accused, who handed them over to men he knew would sexually abuse or rape them.[295] By virtue of his authority, the Chamber found that Nikolic facilitated the removal of female detainees by allowing guards, soldiers, and other males to access these women regularly and by otherwise encouraging the sexually abusive conduct, which substantially contributed to the rapes committed in the camp.[296] Additionally, in *Kunarac et al.,* as explained, two victims

[285] See Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment (7 May 1997), para. 206.
[286] Ibid., paras. 206, 242.
[287] Ibid., paras. 690, 726, 730.
[288] See Nyiramasuhuko et al. Jugement & Sentence, supra note 88, paras. 2183-2184.
[289] Ibid., paras. 2180, 2182, 2186.
[290] Ibid., para. 199.
[291] See Prosecutor v. Zelenovic, Case No. IT-96-23/2-S, Sentencing Judgment (4 April 2007), para. 21.
[292] Ibid.
[293] Ibid.
[294] Ibid.
[295] See Prosecutor v. Nikolic, Case No. IT-94-2-S, Sentencing Judgment (18 December 2003), para. 194.
[296] Ibid., paras.115-119.

testified that, after the accused Kovac had finished raping them in his apartment, he handed them over to several other soldiers, who would come to Kovac's apartment to rape them.[297] Based on the evidence mentioned above, the Chamber found that, by personally raping the women and inviting soldiers in his apartment and handing over the women to them to be raped, Radomir Kovac substantially assisted the other soldiers in raping the two women.[298]

An accused will be acquitted if his contribution did not substantially affect the SGBCs. In the ICTY *Brdanin* case, five eyewitnesses testified that Bosnian Muslim and Bosnian Croat male and female detainees were forced by army and police officers to perform sexual acts against each other in the camps and detention facilities.[299] Two subordinates' testimony and documents containing newspaper articles and transcripts of television interviews revealed that the accused visited the camps and knew about the SGBCs, including public statements made acknowledging the crimes committed in the camps.[300] The Trial Chamber relied on authenticated documents and testimonies of eyewitnesses and subordinates to establish the accused's leadership position and critical role. For example, the evidence included documents containing telephone intercepts, dated 7 January 1992, on the accused's appointment as ARK Crisis Staff president. Among the evidence, five subordinates, including high-ranking officials of the ARK Crisis Staff, testified that the accused was the one who set the agenda, chaired the meetings, and very often proposed conclusions.[301] The Chamber also examined a document containing decisions of the ARK Crisis Staff signed by the accused as president of the ARK Crisis Staff, including public speeches he made on behalf of the ARK Crisis Staff during his propaganda campaign.[302] Based on the evidence mentioned above, the Chamber found that the accused's position as president of the ARK Crisis Staff, his inactivity concerning the camps and detention facilities, together with his public attitude towards them, constituted encouragement and moral support to the army and the police running these camps.[303] However, the Appeals Chamber reversed this decision,[304] finding that encouragement and moral support can only form a substantial contribution to a crime when the principal perpetrators are aware of it, which, in this case, had not been proven.[305] The Chamber might have interpreted his statements on the detention camps in various manners. Perhaps the judges were not certain that the principal perpetrators were really aware that Brdanin supported and aided

[297] See Kunarac et al. Trial Judgment, supra note 172, paras. 757-759.
[298] Ibid., para. 759.
[299] See Prosecutor v. Brdanin, Case No. IT-99-36-T, Trial Judgment (1 September 2004) paras. 824, 1018 (see e.g., testimonies of Witness BT-71, Witness BT-76, Witness Samir Poljak, Witness BT-42, Witness Zijad Ramic).
[300] Ibid., para. 1058, referring to footnotes 2654 & 2655 (e.g., testimony of Milorad Sajic, T. 23684-23685; testimony of Predrag Radic, T. 21996-22008; Ex. P284, "Kozarski Vjesnik newspaper article", entitled "Representatives of the Krajina in Prijedor dated 17 July 1992; ex. P291, "Glas newspaper article", dated 26 July 1992).
[301] Ibid., paras. 296-299, referring to footnotes 796, 797,798,799,800, 801,802 (e.g., testimony of BT-94, T. 18096. Milorad Sajic, T. 23673, 23676, 23649. Boro Blagojevic, T. 21892-21893, 21846, T. 21893-21902, 21788-21798; Zoran Jokic, T. 24090; BT-95, T. 19523-19524 (closed session).
[302] Ibid.
[303] Ibid., para. 1058.
[304] See Prosecutor v. Brdanin, Case No. IT-99-36-A, Appeal Judgment (3 April 2007), paras. 259-89.
[305] Ibid., para. 277.

their crimes. In other words, it was sure that Brdanin knew what was happening in the camps, but it was not sure that the subordinates were aware of Brdanin's knowledge and support.

In the ICTY *Kunarac et al.*, the Trial Chamber heard the testimonies of two victims who testified that the accused and a soldier (known as DP 6) kept both of them in a house for about five or six months.[306] During this time, DP 6 continuously raped one of the women, and each time the accused came to the house, he would rape the other woman.[307] The evidence provided by both witnesses was reliable because the testimonies of other witnesses corroborated it.[308] However, although the evidence established that rape occurred, the Chamber found that the prosecution failed to show that the accused was present while DP 6 was raping the woman and whether Kunarac's presence or actions had assisted or substantially contributed to DP 6's raping of the woman.[309] The Chamber concluded that the connection between the events at the house and Kunarac's sporadic presence was too loose to link the accused to the crime.[310] Similarly, in the same *Kunarac et al.* case, two victims (FWS-87 and AS) testified that in Kovac's apartment, Jagos Kostic constantly raped A.S, and he took advantage of Kovac's absence to rape FWS-87 too, threatening to kill her if she reported this to Radomir Kovac.[311] Although the Chamber established that both Kovac and Jagos Kostic raped FWS-87, it noted that the evidence did not prove beyond a reasonable doubt that the accused Kovac aided and abetted the rape of FWS-87 by Jagos Kostic because the evidence indicated that Jagos Kostic raping of FWS-87 was hidden from Kovac.[312] Considering the two men's relationship and Jagos Kostic's threats to FWS-87, it seems very unlikely that Kovac could have envisaged the possibility that Jagos Kostic would rape FWS-87, thus acquitting the accused of this charge.[313]

6.3 The Accused Knew His or Her Conduct Would Assist the Commission of SGBCs by the Principal Perpetrators

The third element is the knowledge of the accused, which requires proof that the accused knew his or her conduct would assist the commission of SGBCs by the principal perpetrators. This can be established by:

- authenticated documents, victims, and eyewitnesses (subordinates) indicating that the accused chaired meetings where the SGBCs were discussed;
- eyewitnesses (subordinates) saying that the accused visited the scene where he acknowledged the crimes and expressed thanks to the physical perpetrators;
- authenticated documents containing transcripts of public statements, including newspaper articles and a television interview, made by the accused admitting to the crime;

[306] See Kunarac et al. Trial Judgment, supra note 172, paras. 733-736.
[307] Ibid., para. 741.
[308] Ibid., para. 736.
[309] Ibid., para. 741.
[310] Ibid.
[311] Ibid., para. 761.
[312] Ibid.
[313] Ibid.

- victims saying the accused raped them first and handed them over to others knowing they would be raped again.

All the evidence must show that the accused knew his conduct would assist the principal perpetrators in committing SGBCs or that he tolerated the crimes. Although the Appeals Chamber ultimately overturned Brdanin's conviction for aiding and abetting SGBCs in detention camps, it is still worth mentioning the Trial Chamber's findings concerning Brdanin's knowledge of the crimes to illustrate how the prosecutor can prove this requirement. In that trial, a subordinate (a high-ranking officer of the ARK Crisis Staff) testified that they discussed the situation and the crimes in the prisons during the ARK Crisis Staff meetings chaired by the accused.[314] Another subordinate testified about Brdanin's visits to the camps and his attitude and statements during these visits, 'what we have seen in Prijedor is an example of a job well done.'[315] Documents containing transcripts of public statements and newspaper articles and a television interview by the accused revealed that he was aware of the crimes and situations in the prisons.[316] The Chamber interpreted these and concluded that the accused knew his conduct would assist the principal perpetrators in committing SGBCs.[317] In *Kunarac et al.*, as explained in Section 6.2, two victims testified that the accused Kovac first raped them, and then he handed them over to other soldiers who came to Kovac's apartment to rape them.[318] The Trial Chamber found that Kovac handed the two women over and eventually sold one of them, with the knowledge that they would be raped again.[319]

In instances where the mental element of aiding and abetting has not been established, the cases usually collapse. In the ICTY *Sainovic et al.* case, the prosecution presented documentary evidence containing a report from a "military post," dated 18 April 1999, which informed the Pristina Corps Command that four soldiers had committed rape.[320] Also, in the PRK report on non-compliance with the re-subordination order dated 24 May 1999, the accused Lazarevic pointed out that the MUP and the Military Police units tolerated rapes.[321] Two subordinates and several documents also show that, despite the accused's awareness that the VJ and MUP were committing rapes in specific locations, he continued to approve the VJ and MUP operations.[322] The Chamber found that, although the accused was aware of VJ members killing Kosovo Albanians in some instances, the evidence did not prove that Lazarevic was aware that VJ and MUP forces were going into the specific crime sites to commit sexual assaults.[323] Consequently, in *Lazarevic*'s case, the

[314] See Brdanin Trial Judgment, supra note 299, paras. 174, 1058, footnote 2654 (see e.g., testimony of Milorad Sajic).
[315] Ibid., para.1058, footnote 2655 (see e.g., testimony of Predrag Radic).
[316] Ibid., para. 1058.
[317] Ibid.
[318] See Kunarac et al. Trial Judgment, supra note 172, paras. 757-759.
[319] Ibid., para. 759.
[320] See Prosecutor v. Sainovic et al., Case No. IT-05-87-T, Trial Judgment Volume 3 of 4 (26 February 2009), para. 847. 5D1148 (Report of the military post 1936, 18 April 1999).
[321] Ibid., para. 848. P1458 (Report on non-compliance with Resubordination Order, 24 May 1999), p. 2, also admitted as 4D192 and P1723.
[322] Ibid., para. 848. witnesses Krsman Jelić and Fadil Vishi.
[323] Ibid., paras. 928, 935, 1211.

mental element of aiding and abetting was not established, thus acquitting the accused.[324] Similarly, in the same ICTY *Sainovic et al.* case, the prosecution presented the testimony of subordinate and documentary evidence containing various reports to the Supreme Command chief of staff dated 8 June 1999, showing that the accused Ojdanic was aware of the rapes committed by VJ and MUP forces.[325] Although the accused Ojdanic was aware of VJ members killing Kosovo Albanians in some instances, the Chamber found that the evidence did not prove that he was aware of VJ and MUP forces going into the specific crime sites to commit sexual assaults.[326] Consequently, in *Ojdanic*'s case, the mental element of aiding and abetting has not been established, thus acquitting the accused.[327]

6.4 Conclusion

The 15 cases analyzed above show that the accused's authority position can be a decisive factor because this can influence the physical perpetrators of the crime, thus indicating that the accused's contribution to the SGBCs was substantial. This is true, especially if the accused saw what was happening at the scene with his own eyes and did nothing to prevent it, despite his authority to do so.[328] Further, the accused's physical presence or proximity to the scene of the SGBCs is a crucial factor to consider when establishing that the accused provided practical assistance or moral support to the physical perpetrators (*Furundzija, Akayesu, Muhimana*).[329] The actions of the accused and the temporal proximity between these actions and the crimes are crucial, especially if he was raping, beating, or interrogating the victims or invited others to commit rape or handed over victims to be raped (*Tadic, Muhimana, Nyiramasuhuko et al., Zelenovic, Nikolic, Kunarac et al.*).[330] Moreover, compelling evidence includes words of encouragement or permission given by the accused to the physical perpetrators to take women and rape them (*Akayesu, Muhimana, Nikolic*).[331] Additionally, transporting the physical perpetrator in a vehicle to the scene and finger-pointing at the victims to be picked up and raped could potentially amount to practical assistance (*Nyiramasuhuko et al.*).

[324] Ibid., paras. 928, 935, 1211.
[325] Ibid., para. 607. 3D487 (Tasks set by the Chief of Supreme Command Staff, 8 June 1999), p. 1; witness Geza Farkaš, T. 16306 (25 September 2007); 3D493 (Reports to the Supreme Command and Chief of Staff, 8 June 1999), p. 5.
[326] Ibid., paras. 629, 1209.
[327] Ibid.
[328] See Akayesu Trial Judgment, supra note 80, paras. 693-694; Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Appeal Judgment (1 June 2001), para. 418; Furundzija Trial Judgment, supra note 264, para. 274; Muhimana Judgment & Sentencing, supra note 96, para. 318; Nikolic Sentencing Judgment, supra note 295, paras. 115-119.
[329] See Furundzija Trial Judgment, supra note 264, para. 274; Akayesu Trial Judgment, supra note 80, paras. 693-694; Akayesu Appeal Judgment, supra note 328, para. 418; Muhimana Judgment & Sentencing, supra note 96, paras. 274-275.
[330] See Tadic Opinion & Judgment, supra note 285, paras. 690, 726, 730; Muhimana Judgment & Sentencing, supra note 96, paras. 274-275, 290-291; Nyiramasuhuko et al. Appeal Judgment, supra note 88, para. 199; Zelenovic Sentencing Judgment, supra note 291, para. 21; Nikolic Sentencing Judgment, supra note 295, paras. 115-119, Kunarac et al. Trial Judgment, supra note 172, paras. 757-759.
[331] See Akayesu Trial Judgment, supra note 80, paras. 693-694; Akayesu Appeal Judgment, supra note 328, para. 418; Muhimana Judgment & Sentencing, supra note 96, para. 318; Nikolic Sentencing Judgment, supra note 295, paras. 115-119.

The *Brdanin* case shows that, while in principle aiding and abetting liability does not require showing that the physical perpetrators knew of the aider and abettor's assistance,[332] the situation is different in cases of aiding and abetting by moral encouragement. In such a situation, the prosecution must lead evidence, showing that the physical perpetrators were aware of the encouraging conduct of the aider and abettor and were motivated by it to meet the requirement of substantial effect.[333] Further, Kovac (in *Kunarac et al*.) was cleared from the charge of aiding and abetting the rape of FWS-87 by Kostic because he was not aware of it.[334] Finally, the mental element of the aider and abettor remains a crucial factor, i.e., the accused cannot be convicted unless the prosecution proves that he knew that the physical perpetrators were going on the crime sites to specifically commit SGBCs (*Sainovic et al*. (the accused Lazarevic and Ojdanic)).[335]

The table below shows the elements the prosecutor must prove and the pieces of evidence accepted by the chambers in proving SGBCs, and the mode of liability of aiding and abetting. The prosecutor must establish all the elements listed below.

Elements to prove	How elements can be proven	Types of evidence
The accused provided practical assistance or moral support to the physical perpetrator to commit SGBCs	• The accused was present and he continued to interrogate the victim while he was being raped; • The accused permitted the physical perpetrators to take victims away and rape them; • As the accused was raping the victims, his subordinates accompanying him were also raping other persons nearby and he did not stop them; • The accused was standing and watching as the soldiers drag the victim to be raped, without saying anything; • The accused first raped the victims and then handed them over to other soldiers to rape them; • The accused transported the physical perpetrators in a vehicle to the scene and finger pointed at victims to be picked up and raped; • The accused's position of authority and his presence at the scene	Victims' testimonies Eyewitnesses' testimonies Documentary evidence Statement of the accused/accused's admission
The accused's conduct had a substantial effect on the commission of the crime	• The accused continued interrogation of the naked victim in the presence of soldiers who proceeded to rape the victim; • The accused's presence on the crime scene (which could mean moral support/encouragement); • The accused committing rape or other crimes while on the scene (which could mean moral support/encouragement);	

[332] See Brdanin Appeal Judgment, supra note 304, paras. 263, 349.
[333] Ibid., paras. 263, 3491.
[334] See Kunarac et al. Trial Judgment, supra note 172, para. 761.
[335] See Sainovic et al. Trial Judgment, supra note 320, paras. 629, 928, 935, 1209, 1211.

	• Victims saying the accused raped them first and then invited other soldiers to rape them too; • Victims stating that they were transferred to a room and raped by soldiers in the presence of the accused, during an investigation; • Victims attesting the accused handed them over to men whom he knew would rape them.	
The accused knew his conduct would assist the commission of SGBCs by the principal perpetrators	• The accused interrogated the naked victim and left her in the presence of soldiers who proceeded to rape her; • The accused chaired meetings where the SGBCs were discussed; • The accused visited the scene where he acknowledged the crime and expressed thanks to the physical perpetrators for it; • The accused raped victims first and handed them over to others knowing they would be raped again; • Transcripts of public statements, including newspaper articles and television interviews made by the accused admitting to the crime.	

7. Concluding Remarks

Prosecuting SGBCs and linkage to high-level officials via direct modes of liability is a complicated task. The prosecutor must prove the acts through the crime-based evidence, including eyewitnesses, victims, perpetrator witnesses, expert witnesses, documents showing that the SGBCs occurred. A linkage to the accused must then be established, indicating the accused's role in the crimes. This includes, for example, whether he was present at the scene, knew about the crimes, ordered the crime, physically committed the crime, assisted or encouraged it, or participated in the planning. Although the prosecutor managed to prove more cases under direct modes of liability successfully, there were still many acquittals where the prosecutor had failed to prove the linkage to the accused of the SGBCs committed.

Among the cases analyzed in this chapter (53), slightly more than half (60%) resulted in a conviction, with aiding and abetting cases being the highest as the prosecutor secured ten convictions out of a total of 15 cases. The prosecutor also had a high achievement rate in planning regarding the evidence accepted to prove the SGBCs and the accused's presence at the scene (*Stakic, Krstic,* and *Kajelijeli*).[336] Under this mode of liability, the prosecutor's evidence effectively established the accused's leadership position, the accused's role in drawing up the plan or contribution in the execution.[337] All of these show that SGBCs do not explicitly have to be part of the plan designed by the accused but they can be a foreseeable consequence. When there is no proof of the accused's presence at the scene (*Bralo*), an admission of guilt by the accused

[336] See Krstic Trial Judgment, supra note 25, para. 616; Kajelijeli Judgment & Sentence, supra note 45, paras. 680, 682, 923; Stakic Trial Judgment, supra note 5, para. 401.
[337] See Stakic Trial Judgment, supra note 5, paras. 352, 821, 823; Krstic Trial Judgment, supra note 25, paras. 318-319, 328-329.

can make up for it (*Plavsic*).[338] *Stakic*[339] and *Krstic*[340] cases confirmed that it is possible to infer from the testimony of eyewitnesses, victims, and subordinates how the accused planning substantially contributed to the commission of the SGBCs. The acquittals of *Kordic and Cerkez*,[341] and *Kajelijeli*[342] cases show that establishing a nexus between the planning and the SGBCs remains the biggest challenge. For instance, in *Kordic and Cerkez*, the Prosecutor could not prove the physical perpetrator's identity and the accused role in the crime. Also, the Prosecutor did not prove that the accused had issued an order to rape Tutsi in the *Kajelijeli* case.

For ordering, out of the 11 cases analyzed, six resulted in convictions and 5 in acquittals. The acquittals underscored the importance of proving a direct causal relationship between the accused's order and the SGBCs. This means that efforts should be made to establish that the accused's order to commit SGBCs was followed up, and the SGBCs were committed because of it.[343] In doing so, the victims or eyewitnesses must have been in close physical proximity to the accused when the accused issued the orders. The victims or eyewitnesses must have personally heard the accused giving the orders to commit the SGBCs and later saw that the physical perpetrators committed the crimes following the accused's order.[344] Apart from direct evidence, circumstantial evidence is also sufficient to prove that orders were given to commit rape and that the rape was eventually committed (like hearing the order being issued and witnessing the result of its execution after).[345] Although evidence of the *de jure* position is essential, case law established that it is also sufficient to prove that the accused wielded influence over others who respected him in the community *de facto*.[346] Lastly, it is always crucial to choose the right mode of liability and be prepared to navigate the evidentiary problems. In fact, in those cases in which the eyewitnesses brought by the prosecution could confirm the accused issued the order to commit SGBCs nor that the SGBCs ordered were executed, or he was even on the scene when the SGBCs occurred, the accused was acquitted.[347] This does not mean that the SGBCs did not happen, but the mode of liability was probably not the right one or because the threshold of the evidentiary requirements in these cases was too high.

[338] See Plavšić Sentencing Judgment, supra note 18, paras. 17-18.
[339] See Stakic Trial Judgment, supra note 5, para. 143 (see e.g., testimony of Jusuf Arifagić, Nusret Sivać, witness P, Slavica Popovic).
[340] Ibid., paras. 45- 46 (see e.g., testimonies of Vaasen, Omanovic, and Ademovic).
[341] See Kordic and Cerkez Appeal Judgment, supra note 71, para. 462.
[342] See Kajelijeli Judgment & Sentence, supra note 45, para. 920.
[343] See Musema Judgment & Sentence, supra note 124, paras. 828-829, 889; Kamuhanda Judgment & Sentence, supra note 122, para. 497; Muhimana Judgment & Sentencing, supra note 96, paras. 200, 205.
[344] See Niyitegeka Judgment & Sentence, supra note 92, para. 316; Nyiramasuhuko et al. Jugement & Sentence, supra note 88, para. 2631; Akayesu Trial Judgment, supra note 77, para. 452; Muhimana Judgment & Sentencing, supra note 96, paras. 198-199.
[345] See Akayesu Trial Judgment, supra note 80, para. 452; Nyiramasuhuko et al. Jugement & Sentence, supra note 88, para. 6086; Niyitegeka Judgment & Sentence, supra note 92, para. 316; Todorovic Sentencing Judgment, supra note 118, para. 17; Kamuhanda Judgment & Sentence, supra note 122, para. 497; Musema Judgment & Sentence, supra note 124, paras. 828-829, 889; Muhimana Judgment & Sentencing, supra note 96, paras. 200, 205.
[346] See Akayesu Trial Judgment, supra note 80, para. 704; Nyiramasuhuko et al. Jugement & Sentence, supra note 88, para. 2178; Todorovic Sentencing Judgment, supra note 118, para. 14; Muhimana Judgment & Sentencing, supra note 96, para. 604.
[347] See Gatete Judgment & Sentence, supra note 130, para. 346; Bikindi Trial Judgment, supra note 139, para. 350.

For direct commission, out of the 14 cases analyzed, 9 resulted in convictions and 5 in acquittals. Although direct commission, among all the modes, at a first look, would seem the easiest mode to prove, lessons need to be learned from the cases that failed. Kamuhanda's acquittal, for instance, underscored the need for the prosecution to provide enough evidence to cover all the facts, since, in that case, the Prosecutor provided only hearsay evidence on what had happened to the women who had been picked and taken away.[348] The *Musema* case stressed, in two SGBC cases at the trial and appeal levels, the need for the testimonies to be consistent, as conflicting information could negatively affect the witnesses' reliability and credibility.[349] In *Haradinaj et al*.,[350] the victims could not identify their rapists. As these gaps had already surfaced before the trial, the prosecution should always attempt to clear these contradictions before testimony or look for additional pieces of evidence to back up the charge. The *Niyitegeka* case reinforced the need to secure eyewitnesses, once again, who were physically close or adjacent to the victims to see the SGBCs directly happening.[351]

For instigation, out of 8 SGBC cases analyzed, 3 resulted in convictions and 5 in acquittals, which shows the difficulty the prosecutor went through to prove the SGBCs and the mode of liability. Gacumbitsi[352] and Semanza's[353] acquittals underscored the importance of establishing a direct causal relationship between the accused's instigation and the SGBCs. The prosecutor must prove the closeness in time and space between the instigation and the SGBCs, i.e., the instigation, nexus in space and time, and SGBCs. The evidence must establish that rapes occurred because of the accused's speech on the same day or immediately after the speech. Lastly, to analyze instigation properly and its gravity, it is necessary for the judges to go back to the past to consider the accused's speeches and actions together with those charged in the Indictment period (*Seselj*). [354]

Out of 15 cases analyzed for aiding and abetting, 10 resulted in convictions and only 5 in acquittals, which makes this form of liability the most effective one among the direct modes. However, the cases have usually failed the test in instances where the accused's contribution did not have a substantial effect on the commission of the SGBCs. For example, in *Brdanin*, the Appeals Chamber emphasized that encouragement and moral support can only form a substantial contribution to a crime when the principal perpetrators are aware of it.[355] Kovac's acquittal (*Kunarac et al*.) teaches us that the accused cannot be held accountable for

[348] See Kamuhanda Judgment & Sentence, supra note 122, paras. 497, 711-713.
[349] See Musema Judgment & Sentence, supra note 124, para. 844; Musema Appeal Judgment, supra note 197, paras. 193-94.
[350] See Haradinaj et al. Trial Judgment, supra note 203, paras. 466-469.
[351] See Niyitegeka Judgment & Sentence, supra note 92, para. 301.
[352] See Gacumbitsi Trial Judgment, supra note 228, para. 329.
[353] See Semanza Judgment & Sentence, supra note 231, para. 254.
[354] See Seselj Trial Judgment, Partially Dissenting Opinion of Judge Flavia Lattanzi, supra note 252, para. 24.
[355] See Brdanin Appeal Judgment, supra note 299, para. 277.

aiding and abetting rape if he was not aware that the rape was happening.[356] *Kunarac*'s case underscored the importance of the accused's physical presence during the commission of the SGBCs; hence, if the connection between the SGBCs and the accused is too loose, the judges will dismiss the case.[357] Also, establishing the mental element of the aider and abettor remains a crucial factor, i.e., the accused cannot be convicted unless the prosecution proves that he knew that the physical perpetrators were going on the crime sites to specifically commit SGBCs (*Sainovic et al.* (Lazarevic and Ojdanic)).[358]

Finally, there is no doubt that the direct modes of liability are difficult to prove, but they also have flexibilities that the prosecutor could utilize. For instance, it is not required that SGBCs as such are planned, instigated, or ordered. Rather, it is sufficient to prove that the accused was aware of a risk of SGBCs occurring in the execution of his plan, instigation, or order. Further, even in the absence of direct evidence of planning, instigating, or ordering, prosecutors should consider whether the accused can be charged for SGBCs based on circumstantial evidence, using these modes of liability. For example, ordering could be charged if there is reliable hearsay information, not necessarily from the victim, that the accused issued the order first and proof that the perpetrators later followed up and committed the crime. Finally, in some instances, the prosecutor might be unable to prove the accused's direct involvement. In that case, the prosecution could consider charging the accused with aiding and abetting by omission, provided he had the duty and material ability to act. Tables have been provided above under each mode of liability that proposes ways to strengthen the prosecution of SGBC cases in the future. The next chapter (Chapter 6) will analyze case law focusing on prosecuting high-level officials for SGBCs through indirect modes of liability.

[356] See Kunarac et al. Trial Judgment, supra note 172, para. 761.
[357] Ibid., para. 741.
[358] See Sainovic et al. Trial Judgment, supra note 320, paras. 629, 928, 935, 1209, 1211.

Chapter VI: Investigating and Prosecuting Sexual and Gender-Based Crimes through Indirect Modes of Liability

1. Introduction

Chapter 6 will examine how the ICTY, ICTR, and ICC apply the indirect modes of liability (joint criminal enterprise, superior and command responsibility, co-perpetration, indirect perpetration, and indirect co-perpetration) to prosecute SGBC cases. These theories are in Articles 7(1)/(3) ICTY Statute, Articles 6(1)/(3) ICTR Statute, and Articles 25(3)(a) and 28(a)/(b) Rome Statute. This chapter will explore how the *ad hoc* tribunals used indirect modes of liability to attribute responsibility to members of the JCE in implementing the common objective. It will further explore how these courts used the modes to impute liability to the superior/commander for crimes committed by the subordinates that were not the result of an order issued by him, but for failing to prevent or punish subordinates' crimes that the commander knew or had reasons to know. Additionally, this chapter will analyze how the judges at the ICC have used indirect modes to prosecute high-level officials for SGBCs committed through another person, regardless of whether that other person is criminally responsible as long as he exercises control over the commission of the crimes. Lastly, the study will examine how the ICC chambers have applied indirect modes of liability to attribute responsibility to high-level officials for SGBCs physically carried out by persons they use as tools to commit the crimes.[1]

To understand in practice how liability could be attributed to high-level officials for the SGBCs committed through indirect modes, a total of 47 cases are analyzed: 20 JCE cases (17 ICTY, 3 ICTR), 21 superior and command responsibility cases (8 ICTY, 12 ICTR, 1 ICC), 1 co-perpetration case at the ICC, 1 indirect perpetration case at the ICC, and 4 indirect co-perpetration cases at the ICC. As in Chapter 5, the author analyzed all the cases involving SGBC charges adjudicated at the ICTY, ICTR, and ICC. Of a particular note, the primary reason for the limited number of cases in co-perpetration, indirect perpetration, and indirect co-perpetration modes of liability is that the ICC has not yet prosecuted enough SGBC cases. The chapter will provide analysis at the end of each mode, showing what we have learned, including the prosecutor's shortcomings and difficulties during the investigation and prosecution of these cases. Furthermore, tables provided for each mode of liability will clarify what elements are needed to be proven and the pieces of evidence accepted by the chambers. The tables show only the cases brought to a conviction

[1] Albin Eser, "Individual Criminal Responsibility." In The Rome Statute of the International Criminal Court: A Commentary, edited by Antonio Cassese, Gaeta Paola, and John R.W.D Jones. Vol. 1. Oxford: Oxford University Press, 2002, p. 791; Gerhard Werle and Florian Jessberger, Tratado de Derecho Penal Internacional. València, Spain: Tirant lo Blanch, 2005, p. 217; Kai Ambos, La Parte General del Derecho Penal Internacional: Bases para una Elaboracion Dogmatica. Berlin: Duncker & Humblot; Montevideo: Fundación Konrad-Adenauer, 2005, p. 196.

or where the evidence was accepted, apart from the modes of co-perpetration and indirect perpetration, where only the Katanga case is analyzed. The reason for this exception is that, for these two modes, there have not been any convictions yet. Therefore, it is important to outline, at least, the pieces of evidence that the judges have requested the prosecutor to produce to link the accused to the SGBCs. Concluding remarks outlining the judges' main points on the evidence produced by the prosecutor will be provided at the end of these discussions.

1.1 SGBC Cases - Indirect Modes of Liability

Modes of liability/ charges	**Convictions**	**No.**	**Success rate**	**Acquittals**	**No.**	**Unsuccessful rate**
JCE I	• Stakic • Mladic	2	40%	• Krajisnik • Haradinaj et al. • Mrksic et al.	3	60%
JCE II	• Radic (Kvocka et al.)	1	33%	• Zigic (Kvocka et al.) • Kvocka (Kvocka et al.)	2	67%
JCE III	• Karemera et al. • Ngirumpatse (Kamerera et al.) • Krstic • Pavkovic (Šainović et al.) • Šainović (Šainović et al.) • Lukic (Šainović et al.) • Karadzic • Martic • Prlic et al. • Stanisic in Zupljanin et al.	10	83%	• Ngirabatware • Milutinovic (Šainović et al.)	2	17%
Command Responsibility	• Mucic (Celebici case) • Bagosora et al. • Hategekimana • Bizimungu (Ndindilyimana et al.) • Nyiramasuhuko et al. • Rajic	6	29%	• Delalic (Celebici case) • Delic (Celebici case) • Kabiligi and Ntabakuze (Bagosora II) • Muvunyi • Nizeyimana • Kajelijeli • Blaskic	15	71%

				• Bemba • Prlic et al. • Ojdanic (Šainović et al.) • Lazarevic (Šainović et al.) • Nsengiyumva (Bagosora et al.) • Mugenzi (Bizimungu et al.) • Bicamurnpaka and Mugiraneza (Bizimungu et al.) • Renzaho		
Co-perpetration			0%	• Katanga	1	100%
Indirect Perpetration			0%	• Katanga	1	100%
Indirect co-perpetration	Ntaganda Ongwen	2	50%	• Ngudjolo • Gbagbo and Ble' Goude'	2	50%
TOTAL		**21**	**45%**		**26**	**55%**

2. Prosecuting SGBCs through Joint Criminal Enterprise

2.1 JCE I

2.1.1 SGBCs Were Part of the Common Purpose from the Beginning or Over Time

The first element under JCE I requires proof that SGBCs were part of the common purpose, either from the beginning or that it became part of the common purpose over time. SGBCs were part of the common purpose from the beginning can be established by:

- victims and eyewitnesses stating that SGBCs were committed in multiple detention camps;
- accused's admitting that he established multiple detention camps where the rapes occurred;
- eyewitnesses (subordinates) saying the accused arranged the transport of women to these camps;
- eyewitnesses (subordinates) attesting the accused chaired meetings to take power by force and ordered to commit the crime;
- authenticated documents containing speeches and statements showing the existence of a common purpose;
- victims saying that JCE members raped the victims indicating that the objective of the JCE was also carried out through the commission of rape;
- eyewitnesses (subordinates) and authenticated documents showing equipment and materials purchased and reports received about the crime.

The second part of this element, the SGBCs became part of the common purpose over time, can be proven by:

- accused's admission and statements of co-accused/subordinates showing an agreed-upon original plan to deport or transfer;
- victims and eyewitnesses indicating that widespread and systematic rapes occurred while implementing the original plan;
- adjudicated facts from other judgments confirming the widespread and systematic rapes;
- authenticated documents showing that leading members of the JCE were informed of the new SGBCs but did nothing about the crimes.

The *Stakic* Trial Judgment provides a clear example of proving that SGBCs were part of the common purpose from the beginning. As discussed in planning in Section 2.1 of Chapter 5, the Chamber found that the common plan was to persecute Bosnian Muslims and Bosnian Croats to establish Serbian control in the Municipality of Prijedor and, by carrying out the plan from the beginning, the SGBCs occurred in the Omarska, Keraterm, and Trnopolje camps.[2] To establish that SGBCs occurred, the Trial Chamber heard three victims' testimony and compelling hearsay testimony of five witnesses, including two physicians who testified about SGBCs committed in the camps mentioned above.[3] The Trial Chamber found these multiple accounts reliable and credible, finding that rape, based on discriminatory intent, was committed consistently and in a widespread manner in the camps.[4] It further held that the SGBCs formed part of the common purpose from the beginning headed by the accused, thus convicting him as a co-perpetrator.[5] To determine the accused's substantial contribution to the common purpose, the Trial Chamber relied on the accused's admission that he assisted his co-perpetrators to set up the camps mentioned above where subordinates committed the widespread rapes.[6] It also heard a subordinate's testimony (a member of the JCE) who testified that the accused arranged transport and logistics to remove civilians from Prijedor municipality to the detention camps.[7] It further relied on the subordinate's testimony and documents showing that the accused set the agenda and chaired the Crisis Staff's meetings and coordinated activities for the forcible takeover of power on 30 April 1992, including ordering attacks against non-Serbs.[8] Consequently, the Appeals Chamber confirmed Stakic's conviction for acts of persecution, including SGBCs under JCE I, finding that his participation in the JCE made a substantial contribution to the implementation of the Common Purpose (from the beginning) and shared the intent to further it.[9]

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[2] See Prosecutor v. Stakic, Case No. IT-97-24-T, Trial Judgment (31 July 2003), para. 818.
[3] Ibid., paras. 235-236, 240-241, 244 (see e.g., testimonies of witness Q, Witness H, Witness A, and compelling hearsay evidence of Dr. Idriz Merdzanic, Dr. Dusko Ivic, Witness F, Witness I, and Witness B).
[4] Ibid., para. 806.
[5] Ibid., paras. 440, 818, 826.
[6] Ibid., para. 477.
[7] See Prosecutor v. Stakic, Case No.: IT-97-24-A, Appeal Judgment (22 March 2006), paras. 77, 386; Stakic Trial Judgment, supra note 2, paras. 694-695 (see testimony of Slobodan Kuruzovic, the commander of the Trnopolje camp).
[8] See Stakic Trial Judgment, supra note 2, paras. 353, 906.
[9] See Stakic Appeal Judgment, supra note 7, paras. 73, 84-85.

Furthermore, in the ICTY *Mladic* case, the Trial Chamber relied on six eyewitnesses, including key insiders and documentary evidence containing speeches and statements that show an overarching JCE.[10] Four subordinates and documents were also tendered before the Trial Chamber showing Mladic's role in purchasing equipment and materials and receiving reports about the crimes, including rape.[11] To prove that the objective of the JCE was carried out through the commission of crimes, including rapes, three victims testified that detainees were forced to rape and engage in other degrading sexual acts with one another and, in some instances, members of the JCE raped women.[12] For example, at Karaman's House in Foča Municipality, several women and girls as young as 12 years old were routinely and brutally raped.[13] Based on the evidence mentioned above, the Trial Chamber concluded that there existed a JCE to permanently remove the Bosnian Muslims and Bosnian Croats from Bosnian-Serb-claimed territory in Bosnia-Herzegovina through persecution, including rape.[14] It found that the accused's contribution to this effort was significant,[15] thus convicting the accused.[16] From the *Stakic* and *Mladic* cases, it can be concluded that to tie the accused to the SGBCs, the prosecutor needs to prove that the objective of the JCE was carried out from the beginning through the commission of crimes including SGBCs, and the accused's contribution to this criminal objective was indeed significant.

The SGBCs became part of the common purpose overtime was discussed by the ICTY *Krajisnik* Trial Chamber. The Chamber first established the original common objective of the JCE, to which the accused subscribed. In doing so, the Trial Chamber relied on the testimony of the accused when he called for 'implementing what we have agreed upon, the ethnic division on the ground' and the testimony of a subordinate who reported ethnic cleansing to the Bosnian-Serb leadership where thousands of Muslims and Croats were forced to cross into Croatia.[17] Based on the evidence mentioned above, the Trial Chamber found that deportation and forced transfer were the original crimes to achieve the common objective of the forcible removal of Bosnian Muslims and Bosnian Croats from Bosnia-Herzegovina.[18] While implementing this common objective, many other new crimes, including SGBCs, were committed on a widespread basis in various detention centers[19] on discriminatory grounds.[20] On whether SGBCs occurred on a widespread basis, the Chamber relied on the testimony of four victims and one eyewitness who testified about rapes committed

[10] See Prosecutor v. Mladic, Case No. IT-09-92-T, Trial Judgment Vol. 5 (22 November 2017), para. 3710. Regarding the documents see e.g., exhibits P2004 and P3774 discussed in chapter 9.2.2.
[11] Ibid., vol. 5, paras. 3748, 4420-4421, 4685, 4688.
[12] Ibid., vol.1, paras. 551,565.
[13] Ibid., vol.1, paras. 658-665.
[14] Ibid., vol.5, para. 4232.
[15] Ibid.
[16] Ibid., vol.5, para. 5214.
[17] See Prosecutor v. Krajišnik, Case No: IT-00-39-T, Trial Judgment (27 September 2006), para. 1097 (Witness 583).
[18] Ibid., para. 1097.
[19] Ibid., para. 800.
[20] Ibid., para. 804 (Witness 295 testified that when Dragoljub Kunarac was raping a Muslim woman in a Foča detention center, he expressed his verbal and physical aggression that rapes against Muslim women were one of the many ways in which the Serbs could assert their superiority and victory over the Muslims).

in multiple detention places,[21] as well as the adjudicated facts from other judgments, confirming the commission of rapes in various detention centers.[22] To show that leading members of the JCE were informed of the new types of crimes (SGBCs) committed under the common objective's implementation, the Trial Chamber relied on the military situation and intelligence reports submitted to the leadership about multiple rapes committed by the forces against Muslim residents between April - June 1992.[23] Based on the evidence mentioned above, the judges found that leading members of the JCE were informed of new types of crime committed under the implementation of the common objective but took no effective measures to prevent recurrence of such crimes, and persisted in the implementation of the common objective of the JCE.[24] Based on the evidence mentioned above, the Chamber found that SGBCs were committed as part of the common purpose over time.[25] However, the Appeals Chamber acquitted the accused on appeal due to lack of proof of the mental element, which will be discussed below in the section shared intent to commit the SGBCs.

In instances where the prosecution failed to prove that a JCE existed and that one of the members indeed committed SGBCs, the case usually failed the test. For example, in the ICTY *Haradinaj et al.*, the Trial Chamber acquitted all the three accused (Haradinaj, Balaj, Brahimaj) under JCE I, where the prosecution argued that, by virtue of Idriz Balaj's actions (raping of a Roman/Egyptian woman), the JCE later came to include rape.[26] To assess the existence of the common purpose of the JCE, the Chamber first heard the testimony of 3 subordinates[27] and documentary evidence, containing KLA's policy statement and communiqués showing the existence of a common purpose.[28] However, the judges considered this direct evidence insufficient to conclude that there existed a JCE to commit the crimes charged in the indictment.[29] Therefore, the Chamber turned to the circumstantial evidence (including the ones presented to prove the alleged rape committed by the accused) to see if the only reasonable conclusion would be that there was indeed a JCE aimed at committing those crimes.[30] As was discussed in Chapter 5 in the section under direct commission, a victim and two eyewitnesses testified that Idriz Balaj, a member of the JCE, had committed rape against a Roman/Egyptian woman.[31] However, the evidence did not show that the witnesses saw the rape, and the victim herself testified that it was too dark and unable to recognize Idriz Balaj as the man who raped her.[32] Based on the evidence mentioned above, the Trial Chamber concluded that the Prosecutor failed

[21] Ibid., paras. 493, 638, 640 (see e.g., testimonies of rape victim (witness 295), rape victim (Witness 224), eye witness 3, eye witness 335, and the rape victim and eyewitness (witness 141)).
[22] See Prosecutor v. Krajisnik, Case No. IT-00-39, Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and for the Admission of Written Statements of Witnesses Pursuant to Rule 92bis rendered on 28 February 2003.
[23] See Krajišnik Trial Judgment, supra note 17, para. 1105.
[24] Ibid., para. 1098.
[25] Ibid., paras. 1097, 1105, 1118.
[26] See Prosecutor v. Haradinaj et al., Case No. IT-04-84-T, Trial Judgment (3 April 2008), paras. 460-461.
[27] Ibid., paras. 471, 473-474.
[28] Ibid., paras. 471- 472.
[29] Ibid., para. 475.
[30] Ibid., para. 475.
[31] Ibid., para. 469 (testimony of Witness 61, witness 1, and Witness 56).
[32] Ibid.

to establish that the accused Idriz Balaj committed the rape.[33] It further found that the Prosecutor did not prove that rape was committed by the JCE members systematically according to a single objective and that a JCE existed,[34] thus acquitting all three accused of this charge.[35] This raises the question as to why a prosecutor would bring to the stand a victim who cannot clearly identify her rapist and two witnesses that, it turned out, were not actually present during the rape incident and no other pieces of evidence to show who the perpetrator was. It is even more surprising that this particular rape formed not only a charge for direct commission against Balaj but the pivotal crime upon which the alleged JCE started to incorporate SGBCs within its common purpose.

Similarly, in the ICTY *Mrksic et al.* case, concerning the Vukovar Hospital's incident, the prosecution charged the three accused (Mile Mrksic, Miroslav Radic, Veselin Sljivancanin) with JCE I, based on allegations that the accused were responsible for acts of sexual assault against one female detainee.[36] Only one insider eyewitness gave evidence that the woman was taken outside and shot dead by Zoran but did not mention that the woman was raped before being killed and if any of the accused played a role in the crime.[37] The Chamber did not consider the witness reliable unless confirmed by independent evidence.[38] However, neither the autopsy report nor other pieces of evidence brought by the Prosecutor could corroborate the allegation that the woman was sexually assaulted before being killed.[39] Based on the evidence mentioned above, the Chamber found that the prosecution failed to lead evidence to establish that the woman was raped before being killed,[40] thus acquitting the three accused of this charge.[41] The inferences that could be drawn here are two: firstly, as already been stated, the act of rape has to be formally proven (someone has to have seen it or the victim has to recount it in court, or there must be some reliable forensic evidence); secondly, the witnesses have to be credible and reliable, and this sometimes proves to be a challenge when it comes to insider witnesses because insider witnesses have most of the time committed crimes themselves and might lie in court due to shame, self-preservation or to seek pardon. Relying solely on one eyewitness's testimony is always a gamble for the prosecution, but relying on only one insider witness to prove a rape, at least, in this case, made the charge collapse.

[33] Ibid., para. 469 (testimony of Witness 61, witness 1, and Witness 56).
[34] Ibid., para. 476.
[35] Ibid., para. 478.
[36] See Prosecutor v. Mrkšić et al., Case No. IT-95-13/I, Third Consolidated Amended Indictment (15 November 2004), paras. 41-42.
[37] See Prosecutor v. Mrkšić et al., Case No. IT-95-13/1-T, Trial Judgment (27 September 2007), para. 529.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Ibid.

2.1.2 Shared Intent to Commit SGBCs

The second element to prove is the shared intent to commit SGBCs, which can be established by:

- victims, eyewitnesses, and authenticated documents showing that the accused and others were aware of the new SGBCs and did not stop the crimes;
- authenticated documents and eyewitnesses (subordinates) confirming that the accused was in a leadership position;
- accused's admission that he designed and adopted the strategic goals for separation;
- eyewitnesses (subordinates) stating that the accused arranged with others to implement the objective.

Indeed, all the pieces of evidence must show the time when the accused knew the crime had expanded to incorporate the new crime and the JCE members agreed on this expansion. To infer that Krajisnik shared the *mens rea* required for the commission of the expanded crimes,[42] the Chamber relied on documentary evidence, showing that the accused and other JCE members were made aware of the commission of SGBCs in pursuit of the common objective (see above Section 2.1.1).[43] The Chamber found that the documents were submitted to the Bosnian-Serb leadership, including the accused, informing them about the crimes.[44] Despite this awareness and his power to intervene, the accused did not discontinue the mass detention and expulsion of civilians in light of the increasing number and range of crimes (including SGBCs) reported.[45] The Trial Chamber interpreted these factors as confirmation that the accused knew about the expanded crime and accepted it.[46] In determining the accused's central position in the JCE, the Chamber relied on documents and reports containing an agreement on a formula for the distribution of power, referring to the accused as the president.[47] It also relied on a letter signed by the accused as president of the Bosnian-Serb Assembly,[48] including a decision proclaiming the Bosnia Serb Constitution, which referred to the accused as president, outlining his authority.[49] Three subordinates and a higher-ranking official testified that municipal officials frequently sought consultations with the accused in his capacity as president of the Bosnian-Serb Assembly.[50] Moreover, other high-ranked colleagues testified they referred to him and regarded him as the president with strong influence in the community.[51] Lastly, documents were presented containing minutes of sessions of the Bosnia-Serb presidency chaired by the accused as the president.[52] Based on the

[42] See Krajisnik Trial Judgment, supra note 17, para. 1118.
[43] Ibid., paras. 1105.
[44] Ibid., paras. 1105, 1117-18.
[45] Ibid.
[46] Ibid., para. 1119.
[47] Ibid., para. 29 (referring to Treanor report paras. 10-11; Treanor testimony T. 1300; P280 (Witness 623 statement), paras. 23-6).
[48] Ibid., para. 82 (see e.g., Testimony of Babić, T. 3399-400; 3594; P154 (Babić statement), para. 3).
[49] Ibid., para. 134.
[50] Ibid., paras. 140, 1017 (see e.g., testimony of Witness D9; Nedjeljko Prstojević; Đerić, the Prime Minister in 1992; Biljana Plavšić; Nešković; Hrvačanin; Trbojević; Ključić; Đokanović; Mandić; Witness 680; Witness 528; Okun; Wilson; Prstojević; Babić; Čengić).
[51] Ibid., paras. 140, 1017 (see e.g., testimony of Witness D9; Nedjeljko Prstojević; Đerić, the Prime Minister in 1992; Biljana Plavšić; Nešković; Hrvačanin; Trbojević; Ključić; Đokanović; Mandić; Witness 680; Witness 528; Okun; Wilson; Prstojević; Babić; Čengić).
[52] Ibid., para. 166.

documentary and testimonial evidence mentioned above, the Chamber found that the accused had a central position in the JCE.[53] Further, to determine the accused's crucial role, the Chamber relied on the accused's admission, stating he designed and adopted the strategic goals on the separation from the other two national communities – separation of states.[54] The Chamber also relied on the testimony of seventeen subordinates who testified that the accused arranged logistics, gave orders to engage in combat operations, participated in military operations, and coordinated with local authorities, military, police, and paramilitary groups to implement the objective of the JCE.[55] Consequently, the Chamber found that the accused played a crucial role in the JCE and was one of the driving forces behind it.[56]

However, the Appeals Chamber reversed the Trial Chamber's verdict, finding that the Judgment entirely lacked findings of when the common purpose of the JCE had expanded to include other crimes.[57] Moreover, to hold liable for the expanded SGBCs, the prosecution should have provided evidence showing when the accused knew the crimes had expanded[58] and at which point in time did the JCE members agree on this expansion of means.[59] The Appeals Chamber requested the Trial Chamber to make a finding on whether leading JCE members were informed of the crimes and did nothing to prevent and persisted in the implementation of the expansion of the common objective (giving rise to an inference that they endorsed the expanded means of achieving the goals).[60] It also stated that the Chamber should determine when the new crimes became incorporated into the common objective.[61] The Appeals Chamber underscored that judges could not consider the common objective as "fluid," as the trial judges did.[62] They, and therefore the prosecution in the first place, need to justify in detail how and when it broadened.[63] Therefore, pieces of evidence need to be admitted, clarifying when the JCE members were notified of the new SGBCs happening, which SGBCs they were notified of, what they did (or did not do) after being notified.[64]

The *Stakic* Appeals Chamber, differently from the *Krajisnik* case, confirmed the Trial Judgment. The Appeals Chamber reviewed the Trial Chamber's findings on the evidence (see Section 2.1.1) and heard the

[53] Ibid., para. 1119.
[54] Ibid., para. 994.
[55] Ibid., paras. 992-993, 1158, (see e.g., testimony of Trifko Radić, P1136, p. 46; T. 25502-4.; testimony of Nedjeljko Prstojević, T. 14574-81, 14827-32; testimony of Nešković, T. 16605-7, 16843; Đerić, T. 27092; Hrvačanin, T. 19330, 19344; Trbojević, T. 11425, 12157-9, 12169-73, 12177, 12179; P583.B (Prosecution interview with Milan Trbojević), pp. 22-3, 33; Kljuić, T. 6104, 11827; Đokanović, T. 10620-1, 10626-7, 10723-5, 10672-5; D39 (Đokanović statement), pp. 7-8; Mandić, T. 8621, 8628, 8635, 9109, 9282-7, 9304-7; Čengić, T. 8119-20, 8169-70; Witness 623, T. 5876 5887-8; P280 (Witness 623 statement), para. 88; Babić, T. 3396; P154 (Babić statement), paras. 7-8; Witness 680, T. 15033; Witness 528, T. 14917-21, 14924-5; 14931-4; P811 (Witness 528 statement), para. 31; Okun, T. 4154-56, 4333-4, 4237-9; P210 (Okun's diary, entry for 6 January 1993); Wilson, T. 13079; Prstojević, T. 14566-7).
[56] Ibid., para. 1119.
[57] See Prosecutor v. Krajišnik, Case No: IT-00-39-A, Appeal Judgment (17 March 2009), para. 175.
[58] Ibid.
[59] Ibid., para. 163.
[60] Ibid., para. 171.
[61] Ibid.
[62] Ibid., para. 176.
[63] Ibid.
[64] Ibid.

testimony of the accused's subordinate, who described the appellant's role and importance in the Municipality of Prijedor.[65] The Appeals Chamber held that the accused, as the highest representative of the civilian authorities, played a significant role in planning and coordinating the forcible takeover of power on 30 April 1992.[66] He did so by setting the agenda and chairing meetings of the Crisis Staff, ordering attacks against non-Serbs, establishing the camps, and arranging the removal from Prijedor municipality non-Serbs whose lives were to be spared.[67] Consequently, the Appeals Chamber confirmed that Stakic's participation in the JCE made a substantial contribution to the implementation of the common purpose from the beginning and shared the intent to further it.[68] Similarly, as stated above, the ICTY *Mladic* Trial Chamber also relied on the testimony of 4 subordinates and documents which show Mladic's role in procuring materials from the VJ to further the criminal objective.[69] The Chamber held that he was the commander of the VRS Main Staff and received detailed reports about the crimes, including rape,[70] finding that he made a significant contribution and shared the intent to achieve the overarching JCE.[71]

2.1.3 Conclusion

For a conviction to arise under JCE I (SGBCs forming part of the common purpose from the beginning), it is crucial first to establish that the crime in question was committed on a widespread or systematic basis[72] and that it formed part of the group's common purpose.[73] The accused's position or authority in the JCE is an essential factor. The prosecutor should establish this by showing how he used his role to plan, coordinate or influence the agenda, decisions, and important meetings he chaired.[74] This includes the actions of the accused during these events, such as ordering attacks, coordinating with other co-perpetrators to establish camps, or arranging with them to remove the targeted civilian group or discriminate against them.[75] The other JCE members' actions should also be established, such as whether any JCE members raped the victims in a discriminatory manner.[76] The chambers can interpret these factors to mean that the accused's participation in the common purpose was substantial, and he shared the intent to further it.[77]

[65] See Stakic Appeal Judgment, supra note 7, para. 77.
[66] Ibid., paras. 77, 386; Stakic Trial Judgment, supra note 2, paras. 822, 906.
[67] Ibid.
[68] See Stakic Appeal Judgment, supra note 7, paras. 84-5.
[69] See Mladic Trial Judgment, vol.5, supra note 10, paras. 3748, 4420-4421.
[70] Ibid.
[71] Ibid., paras. 4685, 4688.
[72] See Stakic Trial Judgment, supra note 2, para. 806.
[73] Ibid., paras. 440, 818, 826.
[74] Ibid., paras. 822, 906; see also Stakic Appeal Judgment, supra note 7, paras. 77, 386; Krajišnik Trial Judgment, supra note 17, para. 1119.
[75] See Stakic Appeal Judgment, supra note 7, paras. 77, 386; Stakic Trial Judgment, supra note 2, paras. 822, 906.
[76] See Stakic Trial Judgment, supra note 2, paras. 90, 793, 818.
[77] See Stakic Appeal Judgment, supra note 7, paras. 84-5.

For SGBCs forming part of the common purpose over time, the case law explains that the evidence must clearly establish three important factors: whether the JCE members knew about the new SGBCs;[78] whether the JCE members did nothing to prevent the recurrence of the SGBCs and persisted in executing this new expansion of the common objective;[79] when the expanded SGBCs became part of the common objective.[80] Finally, the key to understanding whether SGBCs were part of the common purpose from the beginning or if they were incorporated over time requires a careful analysis of the particular sex crime itself, i.e., the prosecution's ability to prove when and where it happened, who did it, why and how, and how widespread was it. As already seen in previous sections, in those cases where the SGBCs could not be proven, like in *Haradinaj et al*.[81] and *Mrksic et al*.,[82] the judges dismissed both the SGBCs and the mode of liability charged.

The table below shows the elements that the prosecutor must establish and the pieces of evidence accepted by the chambers to prove the SGBCs and the JCE I mode of liability. The prosecutor must prove all the elements listed below to convict the accused.

[78] Ibid., para. 171.
[79] Ibid.
[80] Ibid.
[81] See Haradinaj et al. Trial Judgment, supra note 26, para. 469 (testimony of Witness 61, witness 1, and Witness 56).
[82] See Mrkšić et al. Trial Judgment, supra note 37, para. 529.

Elements to prove	How elements can be proven	Types of evidence
SGBCs were part of the common purpose from the beginning or over time	• SGBCs were committed in multiple detention camps; • Proving that the accused arranged movement of victims to these camps; • Proving that the accused chaired meetings to take power by force and ordered to commit the crimes; • Proving that JCE members raped the victims indicating that the objective of the JCE was also carried out through the commission of rape; • Subordinates showing an agreement upon original plan to deport or transfer; • Widespread or systematic rapes occurred while implementing the original plan; • Documents proving equipment and materials purchased; • Reports received about commission of SGBCs; • Speeches and statements showing the existence of a common purpose; • Adjudicated facts from other judgments confirming the widespread or systematic rapes; • Documents showing that leading members of the JCE were informed of the new SGBCs but did nothing about the crimes; • Admission of the accused that he established multiple detention camps where the rapes occurred; • Accused's admission showing an agreement upon original plan to deport or transfer.	Victims' testimonies Eyewitnesses' testimonies (subordinates) Documentary evidence Statement of the accused/accused's admission
Shared intent to commit SGBCs	• The accused and others were aware of the new SGBCs while implementing the objective and did not stop the crimes; • The accused was in a leadership position and was informed of SGBCs committed in several places by subordinates and other JCE members to implement the objective; • The accused arranged with others to implement the objective; • The accused arranged logistics such as buses to transport victims; Gave orders to commit crimes and sometimes participated in their commission. Coordinated with local authorities, military, police, and paramilitary groups to implement the objective of the JCE; • Accused's admission that he designed and adopted the strategic goals.	

2.2 JCE II

2.2.1 SGBCs Were Part of a Common Purpose and Were Implemented in Organized Systems of Ill-Treatment

JCE II requires proof that the SGBCs were part of a common purpose and were implemented in organized systems of ill-treatment. This element can be proven by:

- victims and eyewitnesses stating that SGBCs were committed in the prison;
- eyewitnesses attesting that the detainees were kept in inhuman and violent conditions by personnel in the camps;
- victims and eyewitnesses attesting that the accused knew about the abusive treatment and conditions of detainees;
- victims and eyewitnesses confirming that the accused was often present when the crime was committed and sometimes physically participated in it.

It is essential for the evidence to clearly show that the accused committed concrete crimes or participated significantly in the overall effect in the functioning/maintenance of the camp and that he was present when the SGBCs were committed and knew about the crimes. In the ICTY *Kvocka et al.*, the Trial Chamber heard compelling evidence from six victims who testified that SGBCs were committed in Omarska.[83] Moreover, at least seven eyewitnesses, held in that prison, testified that detainees were kept in inhuman conditions, and an atmosphere of extreme mental and physical violence pervaded the camp, including intimidation, extortion, beatings, and torture, that were systematically inflicted on detainees by personnel of the camp.[84] Based on the evidence mentioned above, the Chamber found that SGBCs were committed in the camp,[85] noting that the camp functioned as a system of ill-treatment, intending to persecute and subjugate non-Serb detainees through crimes, including SGBCs.[86] Additionally, at least seventeen victims, seven eyewitnesses, and a subordinate testified that the three accused were aware of the abusive treatment and conditions prevailing in the camp.[87] The evidence revealed that crimes of extreme physical and mental violence and sexual assaults were routinely inflicted upon the non-Serbs imprisoned in the camp in a discriminatory manner.[88] It further disclosed the accused's presence in the camp when the crimes were committed, and, in some instances, they personally and directly participated in the crimes.[89] Based on the evidence mentioned above, the Trial Chamber found that the three accused knew about the camp's terrible conditions and

[83] See Prosecutor v. Kvocka et al., Case No. IT-98-30/1-T, Trial Judgment (2 November 2001), paras. 98-100, 102, 104-105, 108 (see e.g., testimonies of Sifeta Susic, Witness J, Witness F, Witness U, Witness Nedzija Fazlic and Witness B).
[84] Ibid., paras. 45, 49, 50 (see e.g., testimony of Witness T, Witness J, Witness B, Witness AM, Azedin Oklopic, Mirsad Alic, Kerim Mesanvic).
[85] Ibid., para. 108.
[86] Ibid., paras. 319-20. Trial findings upheld on appeal: Prosecutor v. Kvocka et al., Case No. IT-98-30/1-A, Appeal Judgment (28 February 2005), para. 84-6.
[87] See Kvocka et al. Trial Judgment, supra note 83, paras. 379-382, 443-447, 487, 541-544, 547,550, 592-593, 601 (see e.g., testimonies of Azedin Oklopic, Ervin Ramic, witness AI, Mirsad Alic, witness AK, witness J, Nedzija Fazlic, witness B, witness F, Nusret Sivac, witness AJ, Ermin Strikovic, Omer Mean, Hase Iic, witness DD/10, Sifeta Suic, Zlata Cikota, witness K, witness AT, witness A, Emir Beganovic, Asef Kapetanovic, witness T, Kerim Mesanovic, Abdulah Brkic).
[88] Ibid.
[89] Ibid.

intended to further the JCE through their continued and extensive presence and direct participation in the crimes.[90] Further, their contributions to the camp's maintenance and functioning were substantial, finding that they knowingly and intentionally contributed to the furtherance of the JCE to persecute the non-Serb population in the camp.[91]

On appeal, however, the Appeals Chamber overturned Miroslav Kvocka and Zoran Zigic's convictions.[92] Regarding Kvocka's acquittal, the Appeals Chamber reasoned that the victims' testimony linking the accused to the crime[93] could not be relied upon to conclude that these crimes were committed during the time Kvocka was employed in the camp[94] because their testimonies did not provide the exact dates as to when SGBCs against them actually took place.[95] Kvocka's defense team, instead, was able to provide the exact dates on which Kvocka was assigned in the camp and the exact dates when the three victims arrived in the camp.[96] It is, however, not entirely unreasonable for a detainee to lose track of time while imprisoned and, therefore, that the three victims did not know when they were raped, is normal under the circumstances. The only inference that could be drawn from this example is that, whenever possible, the prosecution should try to gather additional evidence from eyewitnesses or documents to fill the gaps of the victims' stories. Regarding Zigic's acquittal, the Appeals Chamber concluded that there was no concrete fact supporting the testimony of the eyewitness relied upon by the Trial Chamber. [97] It held that the idea that Zigic was one of the worst perpetrators in the camp remained the witness's personal opinion.[98] It alluded this to the fact that the witness could only recall one incident where Zigic took part in a single detainee's beating.[99] Therefore, the prosecution failed to prove that the accused committed concrete crimes or participated significantly in the overall effect on the camp's functioning.[100]

2.2.2 Conclusion

For JCE II cases, it is fundamental to prove, for each SGBC charged, the timeline when the crime happened and whether the accused was present in the camp at that time. Kvocka was acquitted because the Appeals Chamber found that the prosecution failed to establish that he was present at the time and date the SGBCs

[90] Ibid., paras. 413, 463-4, 499-500,566, 610,684.
[91] Ibid.
[92] See Kvocka et al. Appeal Judgment, supra note 86, paras. 334, 599.
[93] See Kvocka et al. Trial Judgment, supra note 83, para. 413, footnote 686 – see e.g., the evidence of sexual violence, T. 5385-5387. These crimes occurred during the time that Kvocka worked in the camp. It is not necessary to prove that each crime was committed in Kvocka's presence or that he had knowledge of each crime. For example, if there were dead bodies lying about during the period when Kvocka worked at the camp, that is sufficient to incur responsibility in light of his position and continued presence.
[94] See Kvocka et al. Appeal Judgment, supra note 86, para. 333(Witness J).
[95] Ibid., para. 99 (Witness J).
[96] Ibid., para. 329.
[97] Ibid., para. 597 (witness Azedin Oklopčić).
[98] Ibid.
[99] Ibid.
[100] Ibid., para. 599.

occurred in the camp.[101] The evidence showing that the accused contributed significantly to the camp's overall functioning is also an essential factor for the prosecutor to prove. Zigic was acquitted because the Appeals Chamber found that the prosecution failed to provide evidence that his participation was substantial to the overall effect of the camp.[102] This means that an "opportunistic visitor" who enters the camp and mistreats the detainees or abuses women at random will not surface to incur criminal responsibility for JCE, but he could still be criminally responsible for committing SGBCs as such.[103] A high number of reliable eyewitnesses confirming several SGBC incidents involving Zigic would have been sufficient to prove his significant participation in the camp. Other decisive factors to consider include proof of the accused awareness of ill-treatment conditions, continued and extensive physical presence, direct involvement in the crime, a substantial contribution to the camp's maintenance and functioning, and knowledge and intent to further the JCE.[104]

Lastly, the JCE II doctrine seems too restrictive. It applies only to crimes committed in prison and concentration camp settings and scenarios in which soldiers commit SGBCs as part of an ill-treatment system. The doctrine should expand beyond prison and concentration camps' scope to include any structure or system where criminal abuse is integral to its functioning, such as military or police training camps.

The table below shows what elements need to be proven and the evidence accepted by the chambers to prove SGBCs and the JCE II mode of liability. The prosecutor must prove all the elements listed below for a conviction to arise.

Elements to prove	**How elements can be proven**	**Types of evidence**
SGBCs were part of the common purpose and were implemented in organized systems of ill-treatment	• SGBCs were committed in the prison/concentration camp; • Prove that detainees were kept in inhuman and violent conditions by personnel in the camps; • The accused knew about the abusive treatment and conditions of detainees; • The accused was often present when the crime was committed and sometimes physically participated in it.	Victims' testimonies Eyewitnesses' testimonies (including subordinates) Documentary evidence

[101] Ibid.
[102] Ibid.
[103] Ibid.
[104] See Kvocka et al. Trial Judgment, supra note 83, paras. 413, 463-4, 499-500, 566, 610, 684.

2.3 JCE III

2.3.1 SGBCs Were Natural and Foreseeable Consequences of Executing the Common Purpose

JCE III offers the possibility to hold members of the JCE criminally responsible for the crimes of other members and non-members, even when those crimes did not form part of the common purpose if they were a natural and foreseeable consequence of executing the common purpose. This element can be proven by:

- authenticated documents containing letters from humanitarian organizations, press releases, NGO reports, military security service reports, and internal reports showing that rape occurred and the accused was informed about it;
- eyewitnesses and authenticated documents showing the accused's position and meetings attended where SGBCs were discussed that made him privy to information about the crimes;
- victims and eyewitnesses stating that the SGBCs were widespread and they happened notoriously over a long period of time;
- accused's admission that he knew people would be raped during war;
- eyewitnesses saying that the accused was present at the scene;
- victims and eyewitnesses indicating that the women displaced from their homes were left peculiarly vulnerable in the presence of soldiers/militia without shelter and protection;
- eyewitnesses and authenticated documents confirming orders issued by the accused to prevent the rapes;
- authenticated documents showing that soldiers had been detained for rape;
- authenticated documents indicating the accused awareness of the animosity and context of the forcible displacement.

The accused's participation in the JCE, coupled with the circumstances of the events – the vulnerability of the victims, the atmosphere of aggression, and the prevailing violence can be sufficient to infer that the SGBCs were foreseeable and that the accused took that risk anyway. In the ICTR *Karemera et al.*, the Trial Chamber relied on the testimony of the accused's subordinate (a high-ranking Interahamwe leader), stating that the MRND national secretariat was informed that Interahamwe leaders were committing rapes against Tutsi women.[105] He also noted that the accused participated in cabinet meetings and confirmed the accused's leadership position in the MRND, which made them privy to information concerning the events.[106] The accused acknowledged that women would be raped during the war,[107] of which the Chamber took judicial notice that the SGBCs occurred in a vast scope, open, and notorious manner over a long period.[108] Based on the circumstances mentioned above, the Chamber found that Karemera and Ngirumpatse were aware that

[105] See Prosecutor v. Karemera et al., Case No. ICTR-98-44-T, Trial Judgment (2 February 2012), para. 1478.
[106] Ibid., paras. 1482, 1485.
[107] Ibid., para. 1485.
[108] Ibid., para. 1482.

SGBCs were at least a possible consequence of the JCE and willingly took the risk.[109] The ICTY *Krstic* Trial Chamber also relied on the testimony of seven eyewitnesses and a subordinate who testified about the accused's presence in various high-level meetings.[110] At these meetings, General Mladic and Colonel Karremans of Dutchbat discussed the urgency of the situation and decided that the VRS would organize the evacuation of the Bosnian Muslim women, children, and elderly.[111] The evidence also revealed Krstic's physical presence at Potocari during the events,[112] which made him aware of the civilians' terrible conditions and their mistreatment by VRS soldiers.[113] Further, the Chamber relied on the testimony of nine eyewitnesses who testified about the lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of regular and irregular military and paramilitary units, and lack of sufficient UN soldiers to provide protection.[114] The Chamber inferred from the evidence and noted that the SGBCs committed were foreseeable to Krstic and willingly took that risk.[115]

Furthermore, in the ICTY *Sainovic et al.*, the Trial Chamber relied on the evidence of an order issued by the accused Pavkovic, instructing the Nis Corps to prevent soldiers from raping the civilians.[116] Also, the Prosecutor presented a document containing a report from Pavkovic, indicating that seven volunteers had been detained for rape.[117] The evidence revealed Pavkovic's awareness of the strong animosity between ethnic Serbs and Kosovo Albanians and the context in which the forcible displacement took place.[118] Further, a document containing a Supreme Command Staff report shows that Serbian Ministry of Interior (MUP) forces committed SGBCs against the Kosovo Albanian population[119] and the accused's presence on the ground.[120] Moreover, the testimony of a subordinate described meetings Pavkovic attended with the FRY and Serbian military and civilian leadership about the crimes and prevailing security situations.[121] The Chamber examined all the evidence to infer that the SGBCs committed by the VJ and MUP in Cirez/Qirez and Beleg were foreseeable to Pavković and that he willingly took the risk.[122] Regarding Pavkovic's knowledge of the SGBCs in Pristina/Prishtina, the Appeals Chamber referred to Pavkovic's 4 April 1999 order and his 10 April and 25 May 1999 reports,[123] and meeting he held on 17 May 1999 with Milosevic

[109] Ibid., paras. 1483, 1486, 1490.
[110] See Prosecutor v. Krstic, Case No. IT-98-33-T, Trial Judgment (02 August 2001), paras. 134, 350, 351, 609 (see e.g., testimonies of Witness II, Major Franken, Colonel Kingori, Witness F, Krstic, Mandzic, Witness C, and Karremans).
[111] Ibid.
[112] Ibid.
[113] Ibid., paras. 134, 350, 351, 609.
[114] Ibid., paras. 38-41 (see e.g., testimonies of Vaasen, Rutten, witness F, Captain Eelco Koster, Kingori, Karremans, Van Duijn, and Omanovic).
[115] Ibid., para. 616.
[116] See Prosecutor v. Sainovic et al., Case No. IT-05-87-T, Trial Judgment, vol. 3 (26 February 2009), para. 785.
[117] Ibid.
[118] Ibid.
[119] Ibid.
[120] Ibid., para. 775.
[121] Ibid.
[122] Ibid., para. 785.
[123] See Prosecutor v. Šainović et al. Case No. IT-05-87-A, Appeal Judgment (23 January 2014), para. 1597; see also Sainovic et al. Trial Judgment, supra note 116, para. 785.

and others to discuss a report about SGBCs committed by VJ forces and volunteers against civilians.[124] The Appeals Chamber also referred to the Trial Chamber's finding that Pavkovic received a report from Lazarevic on 24 May 1999, which detailed SGBCs committed by MUP members against Kosovo Albanian civilians.[125] Based on the evidence mentioned above, the Appeals Chamber found that the SGBCs committed in Pristina/Prishtina were foreseeable to Pavkovic, and he willingly took the risk.[126] Likewise, regarding Sainovic's responsibility for the SGBCs committed in Beleg, Cirez/Qirez, and Pristina/Prishtina, the Appeals Chamber reviewed the testimony of Frederick Abrahams, a Human Rights Watch researcher. The latter stated that Human Rights Watch press releases on SGBCs were produced daily and released to the public in the same manner as the report.[127] Further, the press release published by Human Rights Watch on SGBCs was examined[128] together with internal VJ reports and documents about SGBCs committed before or after the 17 May 1999 meeting.[129] Based on the above, the Chamber found insufficient evidence to demonstrate that the accused was aware of such communication that should have put him on prior notice.[130]

However, in determining Sainovic's liability, the Appeals Chamber considered his participation in the JCE, including his role in coordinating joint VJ and MUP operations and the circumstances surrounding the forcible displacement of the Kosovo Albanian population.[131] The Chamber also heard the testimony of an eyewitness who testified that Kosovo Albanian women forced from their homes were particularly vulnerable[132] under an intense atmosphere of aggression and prevailing violence.[133] The Chamber examined all the evidence to infer that the SGBCs committed were foreseeable to him, and he willingly took that risk.[134] Although the Appeals Chamber eventually convicted Sainovic, a problem existed in the Prosecutor's evidence regarding the communication allegedly putting the accused on notice. The prosecution generally relied on internal VJ reports and documents concerning cases processed by the military judicial organs and the accused's role and knowledge of other crimes to say that he was privy to communication that put him on notice of the SGBCs, which the Chamber rejected. The prosecution should have produced specific

[124] See Sainovic et al. Appeal Judgment, supra note 123, para. 1600; Sainovic et al. Trial Judgment, supra note 116, paras. 739, 775.
[125] See Sainovic et al. Appeal Judgment, supra note 123, para. 1600; Sainovic et al. Trial Judgment, supra note 116, para. 741.
[126] See Sainovic et al. Appeal Judgment, supra note 123, para. 1602; Sainovic et al. Trial Judgment, supra note 116, paras. 694-695, 697-698, 705-708, 710, 712-713, 736, 742, 782.
[127] See Sainovic et al. Appeal Judgment, supra note 123, para. 1580.
[128] Ibid., para. 1580.
[129] Ibid., para. 1579.
[130] Ibid., paras. 1579-1580.
[131] Ibid., para. 1581. The Appeals Chamber made similar findings with regards to Lukić, Ibid., paras. 1591-1592, and Pavković, Ibid., paras. 1602-1603. Judge Liu, dissenting, '[took] issue with the fact the Majority simply relies on 'the totality of the circumstances surrounding the forcible displacement of the Kosovo Albanian population and Šainović's knowledge thereof' to find that the commission of sexual assaults by Serbian forces was reasonably foreseeable to him.' Ibid., Judge Liu opined that such knowledge 'could not have, *per se*, demonstrated to [the Appellant] that sexual violence might be committed' noting that awareness of an atmosphere of insecurity, rendering the Kosovo Albanian population, including namely women, vulnerable to a wide range of criminality does not lead to the reasonable inference that he accordingly foresaw the possibility of commission of sexual assaults in particular'. Ibid.
[132] Ibid., para. 1581.
[133] Ibid.
[134] See Sainovic et al. Trial Judgment, vol.3, supra note 116, para. 467.

evidence showing that the accused was aware of the particular SGBC allegations or was present and witnessed the separation of women from men or the mistreatment of women before their transfer. Furthermore, when relying on a widely disseminated report about rapes to the media and government organizations, it is good for the prosecution to prove precisely that the accused was, in fact, aware of the contents of that report. Further, the rape allegations outlined in the report must be specific to indicate that the accused was indeed put on notice that SGBCs might have been or are being committed, and he must have been served with said report, where possible.[135] Similarly, *Lukic* Appeals Chamber reviewed the evidence of his participation in the JCE, his leadership position as Head of the MUP Staff in Pristina/Prishtina, and the various meetings he attended.[136] The Chamber further examined the evidence on the totality of the circumstances of the forcible displacement of the Kosovo Albanian population[137] and the prevailing atmosphere of aggression and violence or ethnic animosity.[138] The Chamber also heard the testimony of an eyewitness who testified that Kosovo Albanian women forced from their homes were particularly vulnerable,[139] including the existing humanitarian catastrophe.[140] The Chamber analyzed all the evidence to infer that the SGBCs committed were foreseeable to him and he willingly took that risk.[141]

The ICTY *Karadzic* Trial Chamber adopted a similar approach. The prosecution adduced numerous victims and eyewitnesses who testified that women and girls, and sometimes men, were raped by Serb Forces in various detention facilities on a widespread basis.[142] Based on this evidence, the Chamber found that Serb forces committed SGBCs against Bosnian Muslim and Bosnian Croat women and men in Bijeljina, Brčko, Foca, Novo Sarajevo, Prijedor, Rogatica, Vlasenica, Vogosca, and Zvornik.[143] Regarding the accused's knowledge of these crimes, the prosecution tendered documentary evidence containing a letter from Bijeljina CSB to the accused dated 29 July 1992, which shows that the Bijeljina SJB informed the accused about the SGBCs.[144] The accused also admitted that he had only heard of 18 allegations of rape.[145] The prosecution also presented documents containing UNPROFOR reports, press statements, minutes of meetings chaired by the accused, UNHCR protest letter, statement of Anthony Banbury, and a letter from the humanitarian organization, all of which informed the accused about SGBCs.[146] Based on the evidence

[135] See Sainovic et al. Appeal Judgment, supra note 123, paras. 1579–1580.
[136] Ibid., para. 1592; see also Sainovic et al. Trial Judgment, vol.3, supra note 116, paras. 1052-1057, 1059 (Lukic's role in reporting to the MUP in Belgrade). Ibid., vol. 3, para. 1000 (Lukic's involvement at the meeting on 4 April 1999). Ibid., vol. 3, paras. 1038, 1095 (Lukic's involvement in the meeting in Belgrade on 4 May 1999). Ibid., vol. 3, paras. 1006-1009, 1066, 1096, 1126-1127; Exh. 6D082, para. 19 (Lukic's involvement in the MUP Staff meetings of 7 and 11 May 1999). Ibid. vol. 3, para. 1040 (Lukic's presence at the Joint Command meeting on 1 June 1999).
[137] Ibid., para. 1592.
[138] Ibid., para. 1591.
[139] Ibid.
[140] Ibid.
[141] Ibid., para. 1592; see also Sainovic et al. Trial Judgment, vol.3, supra note 116, paras. 1052-1057, 1059.
[142] See Prosecutor v. Karadzic, Case No.: IT-95-5/18-T, Trial Judgment Vol. 2 (24 March 2016), paras. 2502-2503.
[143] Ibid, paras. 2500, 2504-2506.
[144] Ibid., para. 3335. Referring to footnote 10759 [P2900 (Letter from Bijeljina CSB to Radovan Karadžic, 29 July 1992), p. 2.
[145] Ibid., para. 3356.
[146] Ibid., para. 3360. D704 (UNPROFOR report re meeting with Radovan Karadžic, 19 August 1994), p. 3; D3145 (UNPROFOR report, 6 September 1994; UNPROFOR press statement, 5 September 1994), p. 1; P2087 (UNHCR protest letter to Radovan Karadžic, 5 September 1994); D1136

mentioned above, the Chamber found that the accused was informed of the SGBCs[147] committed by the Serb forces, which were foreseeable to him, and that he willingly took that risk.[148] Also, in the ICTY *Martic* case, two eyewitnesses reported that guards sexually abused non-Serb detainees.[149] Regarding the accused's knowledge and awareness of the SGBCs, two subordinates testified that the prison leadership, including the accused, was informed that detainees had been sexually assaulted and mistreated by guards without adequate disciplinary action taken against them.[150] Based on the evidence mentioned above, the Chamber found that the accused was aware that the guards committed SGBCs against the detainees, and he willingly took that risk.[151] In the ICTY *Prlic et al.* case, the Prosecutor tendered documentary evidence containing a military security service report recounting that in Podgrade, Lapsunj, and Duge, women, and girls were taken daily from collection centers and raped.[152] The Trial Chamber also relied on this evidence and the testimony of 3 eyewitnesses who testified that HVO soldiers repeatedly raped more than 30 women, and the authorities within the Department of Defense, including the accused, knew about it.[153] The Chamber concluded that the rapes committed by the HVO soldiers were entirely foreseeable and that Prlic, Stojic, Petkovic, and Coric knew these crimes were happening or would be committed and accepted that risk.[154]

Furthermore, in the ICTY *Zupljanin et al.* case, the accused Stanisic was convicted of rape under JCE III. The prosecution argued that the rapes committed against non-Serb civilians in the course of the unlawful detentions were foreseeable to him. Regarding the accused's knowledge and awareness of this SGBC, a subordinate testified that Stanisic was aware of the rape and ill-treatment of women in the context of prisoner exchanges with Markovic.[155] Five subordinates also stated that the RS MUP, including the accused, received reports about rapes committed by Police Officers,[156] adding that the forces removed over 2,000 Muslims from the municipality in an organized manner.[157] The Prosecutor also presented documentary evidence that revealed that, because of Stanisic's senior position, he was present with Radovan Karadzic at various sessions.[158] At these meetings, they discussed removing Muslims out of the RS and relocating citizens and villagers.[159] In reaching its decision, the Chamber considered the accused's authority position, close

(UNPROFOR report, 9 September 1994), p. 2; P2458 (UNPROFOR Weekly BiH Political Assessment, 11 September 1994), p. 4; Anthony Banbury, T. 13356 (15 March 2011); P5421 (Letter from humanitarian organization to Radovan Karadžic, 16 September 1993), pp. 1–2 (under seal); P5423 (UNPROFOR report, 20 September 1994), p. 2; D3500 (UNPROFOR report, 7 October 1994), pp. 3-4.

[147] Ibid., para. 3363.

[148] Ibid., paras. 3521, 3523.

[149] See Prosecutor v. Martic, Case No. IT-95-11-T, Trial Judgment (12 June 2007), para. 288. See footnote 899.

[150] Ibid., paras. 291-292. See e.g., Witness MM-090; Stevo Plejo.

[151] Ibid., paras. 454, 413-415, 454-455, 480, 518. Conviction was confirmed by the Appeals Chamber. See Prosecutor v. Martic, Case No. IT-95-11-A, Appeal Judgment (8 October 2008), para. 355.

[152] See Prosecutor v. Prlic et al., Case No.: IT-04-74-T, Trial Judgment Volume 2 of 6 (29 May 2013), para. 235, citing exhibits P04161 and P04177.

[153] Ibid., paras. 233-234. See e.g., testimony of witnesses BR, Nijaz Islamovic and BP.

[154] Ibid., para. 253. The conviction was upheld on appeal, see Prosecutor v. Prlic et al., Case No.: IT-04-74-A, Appeal Judgment (29 November 2017).

[155] See Prosecutor v. Stanišić & Zupljanin, Case No. IT-08-91-T Trial Judgment Vol. 2 of 3 (27 March 2013), para. 764. Witness Radulovic.

[156] Ibid., paras. 425, 462-463, 503 (testimony of Predrag Radulovic, Gojko Vasićv, Vinko Kondić, Đekanović).

[157] Ibid., para. 768.

[158] Ibid., paras. 764-765.

[159] Ibid.

relationship with Radovan Karadzic, continued support and participation in implementing the policies of the Bosnian Serb leadership and the SDS.[160] The Trial Chamber found that the only reasonable inference is that Stanisic was aware of the Bosnian Serb leadership's persecutory intentions to transfer and deport Muslims and Croats from BiH territories forcibly, of which Stanisic shared the same intent.[161] It further held that the accused knew of the large-scale detention of the non-Serb civilians in prisons, SJBs, detention centers, and camps.[162] These centers were guarded by the RS's armed forces, with the support of both active and reserve forces of the SJBs in individual municipalities approved by his direct orders, as stated by one subordinate.[163] The Trial Chamber found that the subsequent rapes committed in the course of unlawful detentions were foreseeable to Stanisic and that he willingly took that risk.[164]

2.3.2 The Accused's Contribution to the Common Purpose Was Essential

The next element to prove is the accused's essential contribution to common purpose, which can be established by:

- authenticated documents containing expert report, minutes of meetings, and adjudicated facts from other trials showing the accused's position in the JCE and action taken by him to implement the JCE;
- eyewitnesses (subordinates) and authenticated documents containing various financial and logistics reports indicating that the accused participated in the JCE by creating, financing, supplying, training, and directing the physical perpetrators;
- authenticated documents and eyewitnesses (subordinates) confirming that the accused participated in the planning, preparation, and execution of the common purpose and expulsion of the civilians;
- eyewitnesses (subordinates) saying that the accused distributed weapons to them and encouraged them to commit the crime;
- eyewitnesses stating that SGBCs were committed while implementing the common purpose.

Indeed, all the pieces of evidence must show the accused's contribution to the common purpose was essential, and the crimes committed beyond that common purpose were foreseeable to him, and he accepted that risk. In the ICTY *Karadzic* case, the Trial Chamber relied on documents containing exhibits and adjudicated facts, which show the accused's functions as Supreme Commander, SDS president, SNB president, president of the presidency, and president of the RS, including the impact of the accused conduct in implementing the JCE.[165] Based on the evidence mentioned above, the Chamber found that the accused significantly contributed to the overarching JCE through his functions and positions and acts and

[160] Ibid., paras. 769, 771.
[161] Ibid.
[162] Ibid., para. 602. Testimony of Milorad Davidovic.
[163] Ibid.
[164] Ibid., para. 776.
[165] See Karadzic Trial Judgment, supra note 142, paras. 88-111, 2707-2714 (e.g., Patrick Treanor's expert report on the Bosnian Serb Leadership and minutes of various sessions to which the Accused participated, as well as adjudicated facts).

omissions.[166] In the ICTY *Martic* case, the Trial Chamber relied on the testimony of at least 15 subordinates and various financial and logistics documents.[167] The evidence shows that Martic participated in the JCE by creating, financing, supplying, training, directing the "Martic's Police" and the TO of the SAO Krajina and the RSK, and developing training and directing special police forces of the SDB of Serbia.[168] The evidence also shows that Milan Martic participated in the planning, preparation, and execution of the take-over of territories in the SAO Krajina and RSK territory, including by personally participating in the subsequent removal of the non-Serb population.[169] Based on the evidence mentioned above, the Trial Chamber found that the accused actively participated in the furtherance of the common purpose of the JCE.[170]

The cases usually failed when the prosecutor could not prove the accused's essential contribution to the common purpose. In the ICTR *Ngirabatware* case, the Trial Chamber heard the testimony of two subordinates (two members of the JCE) who testified that the accused distributed weapons to them and encouraged them to kill Tutsis.[171] Three eyewitnesses also testified that, while pursuing the common purpose to kill Tutsis, the two JCE members committed rape against Tutsi women.[172] The Chamber found that the accused encouraged two members of the JCE to kill and distributed weapons to them, which substantially contributed to the crimes, and the rapes they subsequently committed were entirely foreseeable to the accused.[173] The Chamber also found that, by significantly contributing through distributing weapons, Ngirabatware accepted the risk.[174] However, upon reviewing the evidence mentioned above, the Appeals Chamber considered that it was insufficient to infer from the evidence that the SGBCs committed were foreseeable to the accused.[175] It reasoned that the prosecution failed to provide sufficient evidence to establish that the accused made an essential contribution to the common purpose of the JCE (being the extermination of Tutsis).[176] The Appeals Chamber emphasized that the evidence must establish the accused's essential contribution to the common purpose as a means for establishing the accused's criminal responsibility for crimes committed beyond that common purpose, which are nevertheless a natural and foreseeable consequence thereof.[177]

[166] Ibid., para. 3475.
[167] See Martic Trial Judgment, supra note 149, paras. 140-148, 447-453.
[168] Ibid.
[169] Ibid.
[170] Ibid., para. 453.
[171] See Prosecutor v. Ngirabatware, Case No. ICTR-99-54-T, Trial Judgment (20 December 2012), paras. 1386-1390; Prosecutor v Ngirabatware, Case No. MICT-12-29-A, Appeal Judgment (18 December 2014), paras. 162-164, 238-240 (Witness ANAN, Witness ANAT).
[172] See Ngirabatware Trial Judgment, supra note 171, paras. 961-962, 964, 981 (Witness ANAG, Witness ANAM, and Witness ANAO).
[173] Ibid., paras. 1386-1390; see also Ngirabatware Appeal Judgment, supra note 171, paras. 242-252, 278-279.
[174] See Ngirabatware Appeal Judgment, supra note 171, para. 1391.
[175] Ibid., para. 251.
[176] Ibid.
[177] Ibid.

Similarly, in the ICTY *Sainovic et al.* case, the prosecution submitted that, since the common purpose was to be achieved through forcible displacement alone, the SGBCs committed were foreseeable to the accused Milutinovic.[178] It argued that the accused participated in the JCE and accepted that Kosovo Albanian women and girls would be raped and sexually assaulted in executing the common purpose.[179] The Prosecutor tendered at least twelve eyewitnesses and various documents to prove that the accused significantly contributed to the JCE. The evidence shows the accused's position as Serbia president, although a subordinate stated that he did not know about all the meetings Milutinovic attended outside of the Office.[180] The evidence also indicated the authority held over the armed forces, but five subordinates, including senior military and political figures, testified that Milosevic was the FRY president and was the "Supreme Commander" of the VJ, not Milutinovic.[181] Documentary evidence containing minutes and the stenographic notes of the SDC sessions shows the decisions he made as a Supreme Defense Council member.[182] However, none of the SDC records indicated formulation or implementation of the common purpose articulated in the Indictment and rather major decisions were exclusively within Milosevic's jurisdiction, according to Article 136 of the FRY Constitution.[183] Five eyewitnesses testified about Milutinovic membership to the Supreme Command, but stated that they never heard of him attending the "Supreme Command" meetings,[184] declaring that the Supreme Commander, Slobodan Milosevic, did the real commanding at that point.[185] Eyewitness statement and a document containing a promotion letter signed by the accused showed that he had the power to promote MUP officials.[186] However, a subordinate stated that promotion was made through the Minister of Interior's recommendations, which were then copied into a memorandum signed by Milutinovic.[187] Upon reviewing the evidence mentioned above, the Chamber found that the prosecution had not proven that the former Serbian president, Milan Milutinovic, made a significant contribution to the JCE, nor that he had actual control over the actions of the VJ and MUP forces in Kosovo.[188] It further held that Milutinovic did not have direct individual control over the VJ, a federal institution.[189] In practice, Slobodan

[178] See Prosecutor v. Sainovic et al., Case No. IT-05-87-PT, Third Amended Joinder Indictment (21 Jun 2006), paras. 27, 72.
[179] Ibid.
[180] See Sainovic et al. Trial Judgment, supra note 116, para. 105. Witness Jovan Kojić statement.
[181] Ibid., para. 106 (witnesses Aleksandar Vasiljević, Milorad Obradović, Milovan Vlajković, Branko Gajić, Miodrag Simić).
[182] Ibid., para. 110. Referring to 1D691 (Minutes of 1st SDC session, 28 October 1997); 1D692 (Minutes of 2nd SDC session, 10 November 1997); P1573 (Minutes of 3rd SDC session, 24 December 1997); 1D550 (Minutes of 4th SDC session, 8 January 1998); P1574 (Minutes of 5th SDC session, 9 June 1998); P1575 (Minutes of 6th SDC session, 4 October 1998); P1576 (Minutes of 7th SDC session, 24 November 1998); P1000 (Minutes of 8th SDC session, 25 December 1998); P1577 (Minutes of 9th SDC session, 23 March 1999); 1D756 (Shorthand notes of 1st SDC session, 28 October 1997); 1D757 (Shorthand notes of 2nd SDC session, 10 November 1997); 1D758 (Shorthand notes of 3rd SDC session, 24 December 1997); 1D759 (Shorthand notes of 4th SDC session, 8 January 1998); 1D760 (Shorthand notes of 5th SDC session, 9 June 1998); P2381 (Shorthand notes of 6th SDC session, 4 October 1998); 1D761 (Shorthand notes of 8th SDC session, 25 December 1998).
[183] Ibid., para. 126.
[184] Ibid., para. 130. See witnesses Spasoje Mučibabić, Miodrag Simić, Milovan Vlajković.
[185] Ibid., para. 131.
[186] Ibid., para. 153. See witness Jovan Kojić and Stojiljković's suggestion and subsequent ordinance on promotions.
[187] Ibid.
[188] Ibid., para. 284.
[189] Ibid.

Milošević, sometimes termed the "Supreme Commander," exercised actual command authority over the VJ during the NATO campaign, thus acquitting Milutinović of the SGBC charge.[190]

2.3.3 Conclusion

In conclusion, inferences about the accused's awareness, knowledge, and intent are the most decisive factors to a successful conviction under JCE III (*Krstic*, *Karemera et al.*, *Karadzic*, *Martic, Prlic et al.*, and *Zupljanin et al.*).[191] The chamber can legitimately use the following factors to establish *mens rea* if it is the only reasonable conclusion to its disposal: the accused's presence at the scene (*Krstic, Sainovic et al.*);[192] the totality of the circumstances including the prevailing atmosphere of aggression and violence (*Sainovic et al.*);[193] the accused's leadership position (*Karemera et al., Sainovic et al., Martic*, *Prlic et al., Zupljanin et al., Karadzic*);[194] the access to information that put the accused on prior notice (*Karemera et al., Sainovic et al., Karadzic, Zupljanin et al.)*;[195] the notoriety and expansion of the crime (*Karemera et al., Prlic et al., Zupljanin et al.*);[196] the high-level meetings attended by the accused where the SGBCs were discussed (*Krstic, Karemera et al., Sainovic et al.*);[197] the presence of many regular and irregular combatants in the area (*Krstic*);[198] and the lack of protection and vulnerability of the civilians (*Sainovic et al.*).[199] Finally, the evidence needs to show that the accused's contribution to the common purpose was essential for liability to arise for SGBCs committed beyond that common purpose (*Ngirabatware* and *Martic*).[200]

Furthermore, proving the foreseeability of SGBCs is a critical requirement for JCE III in the ICTY and the ICTR. In most of the cases analyzed, the judges accepted the pieces of evidence, and the accused was convicted. However, in some instances, the defense argued that SGBCs were "opportunistic" or "personally motivated" crimes or that they were not widespread. It is worth noting that, in reality, the crimes are often time connected to a broader pattern of other violent conduct, and SGBCs do not have to be widespread before they are prosecuted. A single SGBC act could form part of a violent criminal pattern intended, for

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[190] Ibid.
[191] See Krstic Trial Judgment, supra note 110, paras. 134, 350, 351, 613; Karemera et al. Trial Judgment, supra note 105, para. 1482; Karadzic Trial Judgment, supra note 142, para. 3363; Martic Trial Judgment, supra note 149, paras. 454, 413-415, 454-455, 480, 518. Conviction was confirmed by the Appeals Chamber. See Martic Appeal Judgment, supra note 151, para. 355; Prlic et al. Trial Judgment, supra note 152, paras. 233-234; Stanišić & Zupljanin Trial Judgment, supra note 155, paras. 769, 771.
[192] See Krstic Trial Judgment, supra note 110, paras. 134, 350, 351, 609; Sainovic et al. Trial Judgment, supra note 116, para. 775.
[193] See Sainovic et al. Appeal Judgment, supra note 123, paras. 1581, 1591.
[194] See Karemera et al. Trial Judgment, supra note 105, paras. 1482, 1485; Sainovic et al. Appeal Judgment, supra note 123, para. 1591; Martic Trial Judgment, supra note 149, paras. 291-292; Prlic et al. Trial Judgment, supra note 152, paras. 233-234; Stanišić & Zupljanin Trial Judgment, supra note 155, paras. 764-765; Karadzic Trial Judgment, supra note 142, paras. 88-111, 2707-2714.
[195] See Sainovic et al. Appeal Judgment, supra note 123, paras. 1579-1580; Karemera et al. Trial Judgment, supra note 105, paras. 1482, 1485; Karadzic Trial Judgment, supra note 142, para. 3360; Stanišić & Zupljanin Trial Judgment, supra note 155, paras. 425, 462-463, 503.
[196] See Karemera et al. Trial Judgment, supra note 105, para. 1482; Prlic et al. Trial Judgment, supra note 152, para. 253. The conviction was upheld on appeal, see Prlic et al. Appeal Judgment, supra note 154; Stanišić & Zupljanin Trial Judgment, supra note 155, para. 602.
[197] See Krstic Trial Judgment, supra note 110, paras. 134, 350, 351, 609; Karemera et al. Trial Judgment, supra note 105, paras. 1482, 1485; Sainovic et al. Appeal Judgment, supra note 123, paras. 1597, 1600; Sainovic et al. Trial Judgment, supra note 116, paras. 739, 775.
[198] See Krstic Trial Judgment, supra note 110, para. 616.
[199] See Sainovic et al. Appeal Judgment, supra note 123, para. 1591.
[200] See Ngirabatware Appeal Judgment, supra note 171, para. 251; Martic Trial Judgment, supra note 149, paras. 140-148, 447-453.

example, to persecute a civilian population leading to mass displacement. As Sellers notes, 'characterizing sexual violence as natural and foreseeable consequences of other violent crimes dispels the belief that they are the result of unrelated conduct of individuals.'[201]

The table below shows what elements need to be proven and which pieces of evidence accepted by the chambers to prove SGBCs under JCE III. The prosecutor must establish all the elements listed below to convict the accused.

Elements to prove	How elements can be proven	Types of evidence
SGBCs were natural and foreseeable consequences of executing the common purpose	• The accused's position and meetings attended where SGBCs were discussed made him privy to information about the SGBCs; • The SGBCs were widespread and it happened in a notorious manner over a long period of time; • The accused was present at the scene; • The victims displaced from their homes were left peculiarly vulnerable in the presence of soldiers/militia men without shelter and protection; • Orders issued by the accused to prevent the rapes; • Letters from humanitarian organizations, press releases, NGO reports, military security service reports, and internal reports showing that rape occurred and the accused was informed about it; • Documents showing that soldiers had been detained for rape; • Document confirming that the accused was aware of the animosity and context of the forcible displacement; • The accused admitting that people would be raped during war.	Victims' testimonies Eyewitnesses' testimonies Documentary evidence Statement of the accused/accused's admission

[201] See Patricia Viseur Sellers, "Individual(s') Liability for Collective Sexual Violence." In Gender and Human Rights, edited by Karin Knop. Oxford: Oxford University Press, 2004, p. 84.

The accused's contribution to the common purpose was essential	• Testimonies of subordinates stating that the accused participated in the JCE by creating, financing, supplying, training, and directing the physical perpetrators; • Subordinates saying that the accused participated in the planning, preparation, and execution of the take-over and expulsion of the civilians; • Subordinates stating that the accused distributed weapons to them and encouraged them to commit the crime; • Eyewitnesses attesting that SGBCs were committed in many places while implementing the common purpose; • Documents containing expert report, minutes of meetings, and adjudicated facts from other trials showing the accused's position in the JCE and action taken by him to implement the JCE; • Financial and logistics documents indicating that the accused participated in the JCE by creating, financing, supplying, training, and directing the movement of the physical perpetrators; • Documents showing that the accused participated in the planning, preparation, and execution of the take-over and expulsion of the civilians.	

3. Prosecuting SGBCs through Superior/Command Responsibility

3.1 Existence of a Superior-Subordinate Relationship

The first element to establish is the existence of a superior-subordinate relationship. This can be proven by:

- victims, eyewitnesses, and admission of co-accused showing that the accused was in charge and was present giving instructions to commit the crime;
- authenticated documents showing signatures on orders issued by the accused, appointments made by him, and meetings presided over showing that he was in charge;
- victims and eyewitnesses stating that victims were sexually assaulted at checkpoints and other places openly and notoriously;
- accused's admission that he was present in the camp daily and exercised authority over subordinates that followed his orders in the camp;
- victims and eyewitnesses attesting that the accused was the camp commander and that he could transfer prisoners and stop mistreatment against prisoners;
- authenticated documents containing letters that identified the accused as the camp commander;
- eyewitnesses (subordinates) saying that the accused could discipline and punish or refer subordinates for investigation;
- eyewitnesses (subordinates) stating that the accused had control and influence over the subordinates that committed the crime;
- eyewitnesses declaring that the accused was present when the rape was committed by the soldiers that he dropped off at the scene;

- authenticated documents containing radio broadcasts showing that the accused used to maintain remote command and control of the operation.

The prosecutor's evidence must show that the accused exercised effective control over the subordinates, i.e., material ability to issue orders and ensured compliance, punish, or refer subordinates for investigation or prosecution. In the ICTY *Celebici* case, a victim, nine eyewitnesses, and the co-accused (Esad Landzo) testified that certain detainees were forced to perform *fellatio* on each other, and the perpetrators placed a burning fuse around their genitals.[202] The Chamber considered the witnesses reliable and credible because their statements were internally consistent and corroborated by other witnesses, finding that SGBCs occurred in the camp.[203] To assess Mucic's superior-subordinate relationship over the persons who committed these crimes, the Trial Chamber examined Mucic's admission that he went to the prison camp daily from 20 May 1992 onwards and exercised authority over the camp from 27 July 1992.[204] He declared he had subordinates assigned to him, including his deputy commander, Hazim Delic, and guards who executed his orders.[205] Furthermore, the Chamber heard the evidence of five eyewitnesses, three victims, and two subordinates who testified that the accused was the camp commander.[206] For example, many witnesses said they saw the accused arranging prisoners' transfer and felt his authority because sometimes guards stopped mistreating prisoners when they heard that Mucic was coming.[207] The Chamber reviewed documentary evidence containing a letter from the ICRC, which identified the accused as the camp commander.[208] Based on the evidence mentioned above, the Chamber found that Mucic exercised authority over the Celebici prison camp and served as the prison camp commander.[209] Further, he had all the powers of a commander to discipline camp guards and take every appropriate measure to ensure the maintenance of order,[210] as evidenced by Mucic's admission that he had all such necessary disciplinary powers.[211] Moreover, the accused could confine guards to barracks as a form of punishment, and, for serious offenses, he could make official reports to his superior authority at military headquarters.[212] The Chamber also found that he could remove guards, as evidenced by his removal of a subordinate (Esad Landzo) in October 1992.[213]

[202] See Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Trial Judgment (16 November 1998), paras. 1062, 1064-1065 (see e.g., testimonies of Esad Landzo, Vaso Đordic, Witness N, Mladen Kuljanin F and Risto Vukalo).
[203] Ibid., para. 1066.
[204] Ibid., para. 737.
[205] Ibid., para. 739.
[206] Ibid., paras. 746-749 (see e.g., testimonies of Witness P, Witness N, Stevan Gligorevic and Vaso Đordic, Grozdana Cecez, Witness D, Witness Assa'ad Taha, witness Bajram Demic, Mirko Dordic, Branko Sudar).
[207] Ibid.
[208] Ibid., para. 749.
[209] Ibid., paras. 745, 750, 765-766.
[210] Ibid., para. 767.
[211] Ibid.
[212] Ibid.
[213] Ibid.

Similarly, in the ICTR *Bagosora et al.* (*Military I*), the Prosecutor charged Bagosora for the SGBCs committed at checkpoints in the Kigali area. The Trial Chamber relied on the testimony of 3 key eyewitnesses who testified that, at the checkpoints, many female victims were left lying on their back with their legs spread and stained with semen, objects crushed or implanted in vaginas, breasts cut off, and mutilated genitals.[214] Two eyewitnesses testified that Bagosora could influence the Interahamwe at the roadblocks and that he told one of the witnesses that he had control over them.[215] The Chamber found that he was the leading authority in the Ministry of Defense from 6 to 9 April, with effective control over the Rwandan army and gendarmerie.[216] It further held that the accused was aware of these crimes, given the open and notorious manner they occurred at the roadblocks and the presence of military personnel at some of the primarily civilian checkpoints.[217] Therefore, the Chamber convicted the accused for the rapes committed between 6 and 9 April 1994, at Kigali area roadblocks, including at the Saint Josephite Centre and Gikondo Parish.[218] Additionally, in the ICTR *Hategekimana* case, the accused was found to have exercised effective control over a soldier who committed rape and was convicted as a superior for this charge. In that trial, an eyewitness testified that he saw a Ngoma Camp soldier rape his daughter.[219] According to the witness, Hategekimana was present at the scene and was the one who dropped off soldiers, brought in reinforcement, and then left, as the attackers remained and committed the crimes, including rape.[220] Three eyewitnesses testified that they saw Hategekimana when he came with his subordinates - four Ngoma Camp soldiers to attack the victim's house.[221] They stated that the accused was present when the victim and her family were forced from their home and when the Interahamwe and armed civilians brutally attacked the residents.[222] They also stated that soldiers perpetrated the rape from the Ngoma Camp, and the victim died immediately after the rape.[223] Based on the evidence mentioned above, the Chamber found that Hategekimana was present when the soldiers he dropped off at the scene committed the rape.[224] In the Chamber's view, even if Hategekimana was not present during the rape, he had reason to know that his soldiers were about to commit rape or had committed rape.[225] Moreover, Hategekimana took no necessary or reasonable measures to prevent the rape or punish the perpetrators.[226] Insofar as the evidence established

[214] See Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, Judgment and Sentence (18 December 2008), paras. 1906, 1908 (e.g., testimony of Dallaire, witness XAB, Major Donald MacNeil).
[215] Ibid., para. 1917 (Dallaire, Major Donald MacNeil).
[216] Ibid., paras. 1924, 2254.
[217] Ibid.
[218] Ibid.
[219] See Prosecutor v. Hategekimana, Case No. ICTR-00-55B-T, Judgment and Sentence (6 December 2010), para. 459.
[220] Ibid.
[221] Ibid., paras. 725-729.
[222] Ibid.
[223] Ibid.
[224] Ibid., para. 463.
[225] Ibid., paras. 728-729.
[226] Ibid.

that the rape was committed by one of the Ngoma Camp soldiers, Hategekimana exercised effective control over them and was responsible as a superior.[227]

In instances where the prosecution failed to prove that the accused exercised effective control over the subordinates, the accused was acquitted. For example, in the ICTY *Blaskic* case, the Chamber relied on a subordinate's testimony to establish the accused's effective control over the perpetrators of the crimes, i.e., HVO soldiers and military police. The witness stated that the accused could discipline subordinates for up to 15 days' detention.[228] If a military police officer committed a criminal act, he could refer them to the military disciplinary judiciary, or the chief of the military police, or the head of the military police administration for further actions.[229] The Trial Chamber interpreted this evidence to mean that the accused had the material ability to issue orders to the Military Police and HVO soldiers, ensure compliance with orders, discipline, punish or make a referral for investigation and prosecution.[230] The Trial Chamber also relied on documentary evidence on the Military Police's training and activities to affirm that the Military Police was under the accused's authority as commander of the Operative Zone (CBOZ) when it came to accomplishing daily operational tasks.[231] The accused admitted that, from 27 June 1992, he was the commander of the detention centers in the CBOZ, where the Military Police and HVO soldiers committed the rapes, but he clarified that he did not exercise effective control over the men who committed the SGBCs.[232] Based on the evidence mentioned above, the Trial Chamber found that General Blaskic exercised effective control over the HVO soldiers and military police members who committed the SGBCs.[233] On appeal, however, the Appeals Chamber reviewed the documents consisting of a report from Coric (Chief of Military Police Administration) confirming that the accused did not have effective control over the Military Police assigned there.[234] It also reviewed a UNPROFOR Report dated 6 February 1993 showing that the accused had no effective control over the Vitez Brigade assigned in the area.[235] It considered the testimony of six subordinates, including members of the Military Police and soldiers of the HVO,[236] who testified that the Appellant did not have effective command and control over the men who committed the SGBCs.[237] Based on the evidence mentioned above, the Appeals Chamber established that the special units, i.e., Jokers and Military Police, each had *de facto* commanders who refused to report to Blaskic or accept the accused's authority in any event. It also established that the physical isolation from some locations and emanation of

[227] Ibid.
[228] See Prosecutor v. Blaskic, Case No. IT-95-14-T, Trial Judgment (3 March 2000), para. 724 (referring to PT pp. 24020-24021).
[229] Ibid.
[230] Ibid.
[231] Ibid.
[232] Ibid., para. 722.
[233] Ibid., para. 722-724.
[234] See Prosecutor v. Blaskic, Case No.: IT-95-14-A, Appeal Judgment (29 July 2004), para. 610.
[235] Ibid.
[236] Ibid., (see e.g., testimonies of Witness BA3, Witness BA4, Witness BA5, Witness Watkins, Witness Morsink, and Witness Slavko Marin).
[237] Ibid.

"local" leaders in each locality hindered the Appellant's ability to project his command.[238] The Appeals Chamber further affirmed that Blaskic had normal (*de jure*) command over Croatian Defence Council regular troops and the Military Police who were responsible for these crimes[239] but did not enjoy or exercise effective command and control over all the units "nominally" subordinated to him.[240] Therefore, the Appeals Chamber overturned Blaskic's conviction, finding that the Appellant could not be held accountable for failing to punish members of the units over which he did not exercise effective control.[241]

The ICC *Bemba* Trial Chamber relied on documentary and testimonial evidence in determining superior-subordinate relationships over the MLC soldiers who committed SGBCs during the CAR Operation.[242] The Chamber examined documents containing radio broadcasts showing that Bemba maintained remote command and control of the CAR Operation from the DRC.[243] The evidence revealed that he communicated orders directly with commanders in the field,[244] including Colonel Moustapha, who led the CAR Operation.[245] Moreover, at least nine subordinates stated that Bemba had a satellite phone he used to issue direct orders and received daily reports via radio about operations in the CAR and ensure subordinates implemented these orders.[246] Additionally, three subordinates and a military officer from the CAR army testified that Bemba had primary disciplinary authority over the MLC soldiers, including commanders on the ground, as he could sanction MLC troops and launch an investigation related to their activities in the CAR.[247] Bemba also made several visits to the CAR and received numerous written reports on the crimes committed, the insufficient training of MLC troops, and speeches he delivered to his troops warning them about war crimes, including SGBCs.[248] Based on the evidence mentioned above, the Trial Chamber found that Bemba had operational control over MLC forces in the CAR[249] and knew that the MLC forces under his effective authority and control were committing or about to commit crimes, including SGBCs.[250] However, the Appeals Chamber reviewed four subordinates' testimony who testified that any investigation carried out in the CAR was limited and depended on the CAR authorities' cooperation.[251] The Chamber also

[238] Ibid.
[239] Ibid., para. 609.
[240] Ibid., para. 612.
[241] Ibid.
[242] See Prosecutor v. Bemba, Case No.: ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute (21 March 2016), paras. 465, 472, 488, 508, 516, 545, 633 (e.g., testimonies of Witness P22, Witness P23, Witness P29, Witness P42, Witness P68, Witness P87).
[243] Ibid., para. 707.
[244] Ibid., para. 399.
[245] Ibid., para. 423.
[246] Ibid., paras. 397-401, 427 (see testimony of Witness P15, Witness P32, Witness P33, Witness P36, Witness P45, Witness P169, Witness P173, Witness P178, and Witness P213).
[247] Ibid., paras. 447-449 (e.g., testimonies of Witness P36, Witness P45, Witness P173, and Witness CHM1).
[248] Ibid., paras. 426, 594-597.
[249] Ibid., para. 446.
[250] Ibid., para. 717.
[251] See Prosecutor v. Bemba, Case No. ICC-01/05-01/08 A, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute (8 June 2018), paras. 146, 153, 170, 172 (see e.g., testimonies of witness P15, witness P36, witness P45, witness D48); Bemba Trial Judgment, supra note 242, paras. 604-605 (see e.g., testimonies of witness P15, witness P45). See also Witness P36 transcript of 20 March 2012 of testimony of CAR-OTP-PPPP-0036, ICC-01/05-01/08-T-218-Red2-Eng, p. 39, lines 15-19.

relied on documents containing the Zongo Commission's Report and General Seara's Report, which showed that the investigation conducted in CAR had heavily relied on the CAR authorities' support.[252] The Chamber found that Bemba's investigative power over subordinates depended on the CAR authorities, noting that the operational realities on the ground as a remote commander operating in a foreign country impeded his material ability to investigate, punish or discipline subordinates.[253]

Furthermore, in the ICTY *Celebici* case, to determine Delalic's superior-subordinate relationship over the persons who committed the SGBCs, the Trial Chamber relied on a subordinate's testimony who stated that Delalic telephoned Dr. Ahmed Jusufbegovic and asked him to treat the subordinate so that he could return to work.[254] However, Dr. Jusufbegovic testified that he was not bound to obey Delalic's order because he was not superior to him, stating he could only receive orders from the War presidency.[255] The prosecution also presented the signatures on orders issued by Delalic,[256] appointments made by him in the Celebici prison camp,[257] and meetings he held with members of the Military Investigative Commission, where they discussed the guidelines for detention and release.[258] Based on the evidence mentioned above, the Chamber found that the prosecution failed to prove that Delalic was in a position of command authority or superiority,[259] noting the evidence did not establish that Delalic exercised authority over the Celebici prison camp, its commanders, and personnel.[260] Regarding Delic's superior-subordinate relationship, the Trial Chamber relied on the co-accused testimony who stated that Delic was in charge of the camp when Mucic was not present.[261] The co-accused and a subordinate also testified that Delic was present during the incident,[262] ordering his subordinate to force the detainees to perform *fellatio* on each other.[263] The Chamber also assessed whether the tasks executed by Delic could amount to superior responsibility. On this issue, a subordinate testified that a list of detainees to be interviewed, drawn up by the commission, was usually given to Mucic and, if he was not there, to Delic, so that he could take further action, which was corroborated by another subordinate's testimony.[264] The Trial Chamber found that Delic was tasked with assisting Mucic by organizing and arranging the daily activities in the Celebici prison camp, but the evidence did not indicate that he had actual command authority to issue orders and punish or prevent the criminal acts of subordinates.[265] Consequently, the Trial Chamber found that the prosecution had failed to establish that

[252] See Bemba Appeal Judgment, supra note 202, para. 146.
[253] Ibid., paras. 167-169, 170-172.
[254] See Delalic et al. Trial Judgment, supra note 202, para. 670.
[255] Ibid.
[256] Ibid., para. 671.
[257] Ibid., paras. 674-675, 681.
[258] Ibid., para. 683.
[259] Ibid., paras. 669, 719- 720.
[260] Ibid., para. 682; Prosecutor v. Delalic et al., Case No.: IT-96-21-A, Appeal Judgment (20 February 2001), para. 267.
[261] See Delalic et al. Trial Judgment, supra note 202, para. 801.
[262] Ibid., para. 1062.
[263] Ibid., para. 1065.
[264] Ibid., para. 807.
[265] Ibid., para. 809.

Delic falls within the chain of command in the Celebici prison-camp, with the power to issue orders to subordinates or to prevent or punish criminal acts of subordinates thus acquitting him of this charge.[266] Additionally, the Prosecutor in the ICTR *Bagosora et al.* (*Military I*) charged Bagosora, Kabiligi, and Ntabakuze for the SGBCs committed at the Kabgayi religious center. The Prosecutor presented two eyewitnesses who testified that individuals in military uniforms and Interahamwe repeatedly raped some Tutsi women at the complex.[267] An expert witness Alison Des Forges, who was not an eyewitness to the event at the center, stated that rape occurred at the center without providing specific details.[268] The Chamber found that the evidence of the two eyewitnesses and the expert witness was too general for the Chamber to make any specific findings on their scope.[269] Moreover, there was little evidence indicating the military personnel as part of the army or the gendarmerie or which unit they belonged.[270] The Chamber concluded it could not establish whether the three accused had superior-subordinate relationships, exercised command or control over the perpetrators, their presence at the scene, awareness of or connected to the specific SGBCs committed at Kabgayi, thus acquitting the three accused of this charge.[271]

Moreover, in the ICTR *Muvunyi* case, the accused was acquitted of rape as a superior because the prosecution failed to prove that the accused exercised effective control over the soldiers who committed the SGBCs. In that trial, the prosecution presented evidence of three victims who stated that they were raped and sexually assaulted by soldiers from the Ngoma camp.[272] The prosecution also presented three eyewitnesses who said that the accused received information notifying him about the widespread rape of Tutsi women in the Butare area.[273] The Chamber found that the evidence mentioned above did not prove that the soldiers who allegedly committed these crimes were from Ngoma camp, finding that the soldiers who committed the rape were from the ESO camp.[274] Also, the evidence did not prove the accused's role, whether he exercised effective control over these soldiers to incur superior responsibility, thus acquitting the accused.[275] Similarly, in the ICTR *Nizeyimana* case, the accused was acquitted of rape as a superior because the prosecution failed to establish that the accused exercised effective control over the soldiers who committed the rapes. In that case, three victims testified that soldiers raped them at the Butare University Hospital.[276] The witnesses could not distinguish or identify whether the soldiers who raped them were from

[266] Ibid., paras. 810,1071 (it should be noted despite, Delic was found guilty of rape as torture under Art. 7(1) of the Statute); Delalic et al. Appeal Judgment, supra note 260, paras. 313-314.
[267] See Bagosora et al. Judgment & Sentence, supra note 214, para. 1775.
[268] Ibid., para. 1775.
[269] Ibid., para. 1776.
[270] Ibid.
[271] Ibid.
[272] See Prosecutor v. Muvunyi, Case No. ICTR-00-55A-T, Judgment and Sentence (12 September 2006), para. 408.
[273] Ibid., paras. 408-409.
[274] Ibid., para. 526.
[275] Ibid., paras. 525-526. The Appeals Chamber confirmed this decision. See Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-A, Appeal Judgment (29 August 2008), para. 166.
[276] See Prosecutor v. Nizeyimana, Case No. ICTR-2000-55C-T, Judgment and Sentence (19 June 2012), paras. 1012, 1028-1030, 1039-1043(witnesses MKA, ZBL, DCO).

ESO camp, the presidential guards, Ngoma camp, or gendarmes, nor directly implicated Nizeyimana as involved in the commission of the crimes.[277] Based on the evidence mentioned above, the Chamber found that the ambiguity on the perpetrators' identity created doubts about whether Nizeyimana exercised effective control over them or that he knew or should have known about these crimes, thus acquitting the accused of this charge.[278]

3.2 The Superior Knew or Had Reason to Know that SGBCs Were About to Be or Had Been Committed

The second element to prove is that the superior knew or had reason to know that crimes were about to be or had been committed. This element can be established by:

- victims and eyewitnesses stating that the accused was present and was informed about the crime during his visits;
- victims and eyewitnesses describing the frequency and notoriety of the SGBCs;
- authenticated documents containing telephone conversation, transcripts, and reports that put the accused on notice about the crime committed by subordinates;
- accused's admission that he knew a large number of women had been assembled in a certain location in the presence of soldiers;
- eyewitnesses (subordinates) attesting that the accused received daily reports through radio communication about the crimes.

All the evidence must show the specific criminal acts the commander knew or should have known at a particular place and time. In the *Celebici* case, the Trial Chamber relied on Mucic's admission, along with the evidence of three eyewitnesses who testified that the accused was often present, informed of the crimes, and personally witnessed the SGBCs occurred in the camp.[279] Based on the evidence mentioned above, the Chamber found that Mucic was fully aware that the camp guards were committing SGBCs.[280] Further, he witnessed the sexual abuse of the detainees during this period,[281] and subordinates informed him of the SGBCs during his visits to the camp in July 1992.[282] The frequent and notoriety of the SGBCs means that he knew or heard about it, yet he did not institute any monitoring and reporting system, thus convicting the accused.[283] Similarly, in the ICTR *Ndindilyimana et al.* (*Military II*) case, concerning the rapes at Cyangugu Stadium, a victim and an eyewitness testified about several incidents where soldiers selected Tutsi women

[277] Ibid., paras. 1022, 1035, 1036-1037, 1048-1049.
[278] See Nizeyimana Judgment & Sentence, supra note 276, paras. 1027, 1038, 1051. This finding was confirmed on appeal. See Prosecutor v. Nizeyimana, Case No. ICTR-00-55C-A, Appeal Judgment (29 September 2014), para. 419.
[279] See Delalic et al. Trial Judgment, supra note 202, para. 769 (e.g., testimonies of Witness Milenko Kuljanin, Witness Milovan Kuljanin, Witness Novica Đordic).
[280] Ibid., para. 770.
[281] Ibid., para. 769.
[282] Ibid.
[283] Ibid., para. 770.

at Cyangugu Stadium and rape them.[284] The Chamber found their testimonies internally consistent and credible.[285] The Prosecutor also tendered a document containing declassified telephone conversation between Prudence Bushnell and Bizimungu about the crimes, including SGBCs, committed at the stadium, which puts Bizimungu on notice his subordinates had committed these crimes against refugees at the stadium.[286] Further, Bizimungu acknowledged in cross-examination that he knew, in May 1994, that there were about 5,000 refugees at the stadium.[287] Based on the evidence mentioned above, the Chamber found that Bizimungu knew or had reason to know about the crimes, including SGBCs, committed against refugees at the stadium, thus convicting the accused.[288]

In those instances where the accused did not have actual knowledge or information about the crimes or was not present at the scene of the SGBCs, the accused was acquitted. In *Bemba,* the Trial Chamber relied on documents containing media, NGO, and MLC intelligence reports showing that the MLC soldiers committed SGBCs in Bangui, PK12, and PK22 in the CAR.[289] At least nine subordinates testified that the accused received daily reports through radio communication about the crimes,[290] including visits made to the CAR where he received information and reports about the crimes committed by MLC.[291] The Trial Chamber found that, in light of the above factors and the notoriety of the crimes and Bemba's position, the accused knew that the MLC forces were committing or about to commit the crimes, including SGBCs.[292] The Appeals Chamber reviewed the evidence mentioned above and the trial records concerning the specific locations of the crimes (e.g., Bangui, PK12, and PK22), finding that there was "reliable evidence" more generally MLC committed crimes at these locations.[293] However, the evidence in question, on its face, appeared, for the most part, very weak, often consisting of media reports, including anonymous hearsay.[294] It held that, importantly, the Trial Chamber failed to properly analyze this evidence and address its potentially extremely low probative value.[295] It also noted that the Trial Chamber was unable to indicate the approximate number of crimes the perpetrators committed at these locations, stating it was unclear to the Chamber how widespread the criminal behavior of the MLC troops in the 2002-2003 CAR Operation was.[296]

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[284] See Prosecutor v. Ndindilyimana et al. (Military II), Case No: ICTR-00-56-T, Judgment and Sentence (17 May 2011), paras. 1517-1518 (Witnesses LBC and LAV).
[285] Ibid.
[286] Ibid., para. 1524.
[287] Ibid., para. 1525.
[288] Ibid., para. 1527.
[289] See Bemba Trial Judgment, supra note 242, paras. 711-712, 714.
[290] Ibid., paras. 397-401, 427 (e.g., testimonies of Witness P15, Witness P32, Witness P33, Witness P36, Witness P45, Witness P169, Witness P173, Witness P178, and Witness P213).
[291] Ibid., paras. 426, 594-597.
[292] Ibid., para. 717.
[293] See Bemba Appeal Judgment, supra note 251, paras. 183-184 (referring to Bemba Trial Judgment, supra note 242, para. 461, footnote 1304 regarding Bangui; ibid., para. 486, footnote 1408 regarding Bangui; ibid., para. 520, footnote 1567 in relation to PK22; ibid., para. 525, footnote 1585 regarding Damara; ibid., para. 527, footnote 1591 regarding the Bossembélé-Bozoum axis; ibid., para. 531, footnote 1607 regarding Sibut; ibid., para. 534, footnote 1619 regarding the Bossembélé-Bossangoa axis).
[294] See Bemba Appeal Judgment, supra note 251, paras. 183-184.
[295] Ibid.
[296] Ibid.

The Appeals Chamber concluded that the accused did not have actual knowledge of the crimes, including SGBCs, committed by MLC in these locations, emphasizing that conviction of the accused must be based on what specific criminal acts the commander knew or should have known about and at what point in time.[297]

Similarly, in ICTR *Kajelijeli,* the Trial Chamber heard the testimonies of three victims and two eyewitnesses who stated that Interahamwe, under the accused's command, committed rape.[298] Although the Chamber confirmed that the Interahamwe committed SGBCs, it held that the prosecution failed to show that the accused knew or had reason to know that the Interahamwe was committing these crimes.[299] The Chamber reasoned that the evidence mentioned above did not establish that the accused was physically present when the perpetrators committed the SGBCs or that the accused ever gave an order for the Interahamwe to rape.[300] Likewise, in the ICTY *Prlic et al.* case, the accused Prlic stood charge for rapes committed during the eviction operations in July 1993. The prosecution presented nine eyewitnesses who stated that three military police members responsible for Jadranko Prlic's security raped two girls in West Mostar.[301] The Chamber found that, while the evidence showed that the two girls were raped, it could not establish that the crimes occurred during or in connection to the expulsion campaign in West Mostar.[302] In this case, the Prosecutor should have produced evidence situating the rape in the context of the expulsion campaign and the accused's awareness thereof.[303] This shows that not every SGBC committed by a subordinate gives rise to superior responsibility. Hence there must be a nexus to the context in which the crime took place, and the prosecution must prove that link or else the evidence would fail. The same thing happened in the ICTY *Sainovic et al.,* where the accused Ojdanic was acquitted of SGBCs under command responsibility. In determining the accused's knowledge of the crime, the prosecution tendered documentary evidence containing reports to the Supreme Command chief of staff, dated 8 June 1999, indicating the rapes committed by VJ and MUP soldiers.[304] The documents also had tasks set by the Chief of Supreme Command Staff dated 8 June 1999, which showed that the accused was aware of the crimes, including rapes, committed by VJ and MUP forces and the recommended measures to be taken.[305] A subordinate also testified that he briefed the accused on 8 June about the crimes, including rape.[306] Based on the evidence mentioned above, the Chamber noted that the Prosecutor had not established beyond a reasonable doubt that sexual assaults were the intended aims of

[297] Ibid., paras. 6, 103-104, 136, 183-184.
[298] See Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Trial Judgment (1 December 2003), paras. 677, 679-682 (see e.g., testimonies of Witness GAO, Witness ACM, Witness GDO, Witness GDT, and Witness GDF).
[299] Ibid., paras. 924- 925.
[300] Ibid.
[301] See Prlic et al. Trial Judgment, supra note 152, para. 926 (see testimony of witnesses P 03508; P 03483; P 03513; P 03482; P 03497; P 03523; P 03571; P 11240; P 03536).
[302] Ibid., para. 927.
[303] Ibid.
[304] See Sainovic et al. Trial Judgment, supra note 116, para. 607 (3D487 - Tasks set by the Chief of Supreme Command Staff, 8 June 1999, p. 1; Geza Farkaš, T. 16306, 25 September 2007; 3D493 - Reports to the Supreme Command and Chief of Staff, 8 June 1999, p. 5).
[305] Ibid.
[306] Ibid.

the forcible displacement campaign.[307] Therefore, the Chamber did not consider that information regarding the specific sexual assaults (of which the evidence established the VJ was responsible) was available to Ojdanic or that he had reason to know about the crimes, thus acquitting the accused as a superior.[308]

In the same vein, in the same ICTY *Sainovic et al.* case, the accused Lazarevic was acquitted of sexual assaults under command responsibility. In determining the accused's awareness of the sexual assaults, the prosecution adduced several documents showing that Lazarevic was informed about the crimes, including sexual assaults committed against civilians by members of the Pristina Corps units.[309] In the PRK report on non-compliance with re-subordination order dated 24 May 1999, the accused Lazarevic stated that mixed checkpoints of the MUP and the Military Police units tolerated rapes of its members against the Albanian civilian population.[310] Two subordinates and several documents also revealed that, despite the accused's awareness that the VJ and MUP were committing rapes and other crimes in specific locations, he continued to approve the VJ and MUP operations, which also involved the forcible displacement of Kosovo Albanians.[311] Based on the evidence mentioned above, the Chamber found that the Prosecutor failed to establish beyond a reasonable doubt that sexual assaults were the intended aims of the forcible displacement campaign. [312] Therefore, the Chamber did not consider that information regarding the specific sexual assaults (of which the evidence established VJ was responsible) was available to Lazarevic or that he had reason to know about the crimes, thus acquitting the accused of this charge as a superior.[313] Furthermore, in the ICTR *Bagosora et al.* (*Military I*), the accused Nsengiyumva was acquitted of superior responsibility because the prosecution failed to prove that he was aware or specifically knew of the rapes committed by his subordinates. The prosecution presented two main eyewitnesses who testified about rapes committed by militiamen and soldiers at the Commune Rouge in Gisenyi without providing specific details as to the involvement of the accused and whether he specifically knew about the rapes, nor demonstrating that these witnesses had first-hand or direct knowledge of the rapes.[314] One of the eyewitnesses also stated that Nsengiyumva never issued any orders to commit rape, but he was generally aware of these crimes because he was the operations commander, traveled around the area, and likely received reports.[315] The Chamber found that the evidence on this point was second-hand and lacked specific details.[316] Further, the Chamber held that one of the witnesses was an accomplice of the accused, declining to accept these parts of his

[307] Ibid., paras. 633, 1209.
[308] Ibid.
[309] Ibid, para. 847 (e.g., 5D1061 -37 Motorised Brigade Combat Report to PrK, 20 May 1999, p. 2; 5D1148 (Report of the military post 1936, 18 April 1999).
[310] Ibid., para. 848.
[311] Ibid.
[312] Ibid., paras. 933, 935, 1211.
[313] Ibid.
[314] See Bagosora et al. Judgment & Sentence, supra note 214, paras. 1729-1730.
[315] Ibid., para. 1726.
[316] Ibid., para. 1731.

testimony without corroboration.[317] The Chamber concluded that the prosecution did not prove that Nsengiyumva was aware or specifically knew of the rapes, thus acquitting the accused of this charge.[318]

Equally, in the ICTR *Bizimungu et al.* (*Government II*) case, the accused, Justin Mugenzi, was acquitted of rape under superior responsibility. Only one eyewitness who testified that he heard about the rape of a woman and some refugees said that Justin Mugenzi was responsible for the rape and the church's attack.[319] Upon reviewing this evidence, the Chamber found no link to implicate Justin Mugenzi with the rape of the said Tutsi woman.[320] According to the Chamber, the witness' testimony did not provide a connection between the accused and the alleged perpetrator of the woman's rape to establish a superior-subordinate relationship.[321] Further, the evidence did not show that the accused knew or had reason to know about the rape, thus acquitting him of this charge.[322] In the same ICTR *Bizimungu et al.* case, the accused Jérôme-Clément Bicamurnpaka and Prosper Mugiraneza were absolved of superior responsibility for rape, where the Chamber noted that none of the witnesses who presented evidence mentioned Bicamurnpaka or Mugiraneza in connection with any crime of rape. In support of this charge, the prosecution produced Expert witness testimony showing the widespread and systematic nature of rapes between April and July 1994 in Rwanda.[323] However, the Chamber could not rely on this information to infer knowledge to the accused of these crimes without direct evidence, thus acquitting the two accused of the charge.[324] The cases discussed above generally show that the prosecution must prove that the defendant carried out certain acts or omission leading to the crime and the specific mental state, i.e., proof of the awareness or knowledge of the rapes committed by his subordinates in particular locations.

3.3 The Superior's Failure to Prevent or Punish or Refer the Matters for Prosecution

The third element to prove is that the superior failed to take the necessary and reasonable measures to prevent the crimes or punish their perpetrators or refer the matters for prosecution. This element can be proven by:

- victims and eyewitnesses stating that no action was taken against subordinates when the specific crime was reported to the accused;
- authenticated documents containing UN reports, situation reports, media reports, letters, and correspondences alerting the accused about the crime and the accused's admission that he received information about it;

[317] Ibid.
[318] Ibid., para. 2257.
[319] See Prosecutor v. Bizimungu et al., Case No. ICTR-99-50-T, Decision on defence motions pursuant to rule 98 bis (22 November 2005), paras. 87-90.
[320] Ibid., paras. 89-90.
[321] Ibid.
[322] Ibid.
[323] Ibid., para. 96; see also Prosecutor v. Bizimungu et al., Decision on the Admissibility of the Expert Testimony of Dr. Binaifer Nowrojee, 8 July 2005 (in which this Chamber ruled 'inadmissible those portions of Dr. Nowrojee's evidence that fall outside the scope of her expertise or express opinions on ultimate issues before the chamber').
[324] Ibid.

- authenticated documents, eyewitnesses including statements of high-ranking officials and subordinates showing that the accused had the power and authority and was held in high regard among the soldiers (e.g., accused helped resolve a number of problems including the evacuation and exchange of refugees);
- authenticated documents containing exhibits indicating authority wielded by the accused over subordinates;
- accused's admission that he could recommend appointment and dismissal/suspension of personnel;
- victims and eyewitnesses saying that when the accused said to the perpetrators to stop, they immediately stopped;
- accused's admission that he was physically present and visited the scene of the crime.

All the pieces of evidence must prove the accused's material ability, coupled with his knowledge about subordinates' specific criminal acts and failure to take action to punish or genuinely investigate them. In the ICTY *Celebici* case, the Trial Chamber heard four eyewitnesses' testimony showing that when subordinates reported the crimes to Mucic, he took no action against the perpetrators and never instructed the guards on how to treat the detainees properly.[325] The Chamber found that the evidence did not show that Mucic ever took appropriate action to prevent or punish the guards for SGBCs and other prisoners' mistreatments, despite his authority and the material ability to prevent or punish his subordinates.[326] Similarly, in the ICTR *Ndindilyimana et al.* (*Military II*) case, concerning Bizimungu's superior responsibility for the rapes committed by his subordinates in Butare, the prosecution presented several documents showing that Bizimungu was alerted of these crimes. For example, the Prosecutor presented Ayala-Lasso's UN Human Rights High Commissioner report regarding his mission to Rwanda from 11 to 12 May 1994, describing how 'General Bizimungu recognized the fact, and expressed regret about these crimes.'[327] The documents also showed that the accused received situation reports twice daily (between April and July 1994) from his subordinates about the crimes, which Bizimungu acknowledged during his testimony before the Chamber.[328] Two eyewitnesses and a victim testified that soldiers under the command of the accused raped women at the center regularly, from mid-April until early June 1994, which the Chamber found to be broadly consistent and credible.[329] Upon reviewing the evidence mentioned above, the Trial Chamber found that Bizimungu admitted that he received information about the crimes committed in Butare at that time means he knew about them.[330] It held that Bizimungu certainly possessed information that was sufficiently alarming to put him on notice of the risk that crimes of this nature might be carried out by his subordinates in Butare, thus necessitating further inquiry.[331] Despite this information, Bizimungu did not take reasonable

[325] See Delalic et al. Trial Judgment, supra note 202, paras. 772-773 (e.g., testimonies of Witness Milovan Kuljanin, Witness T, Witness N, and Witness Mirko Đordic).
[326] Ibid., paras. 774-775.
[327] See Ndindilyimana et al. Judgment & Sentence, supra note 284, para. 1453.
[328] Ibid., para. 1454.
[329] Ibid., paras. 1449-1451, 1456 (Witnesses LN, XY and QBP).
[330] Ibid., para. 1457.
[331] Ibid.

and necessary measures to prevent these crimes or punish the perpetrators.[332] Regarding Bizimungu's *de jure* authority, the prosecution presented documents which showed that Bizimungu was appointed Chief of Staff of the Rwandan Army and promoted to the rank of Major General on 16 April 1994 and that he took up his position as Chief of Staff on 19 April 1994.[333] The Chamber found that, while occupying the position of Chief of Staff, Bizimungu was legally authorized to exercise overall command over soldiers of the Rwandan Army,[334] finding that he exercised *de jure* authority over soldiers of the Rwandan Army, who were legally considered his subordinates.[335]

Regarding Bizimungu's *de facto* authority, four subordinates and a top military official stated that Bizimungu was held in high regard among the soldiers because he was considered a good commander with a considerable reputation.[336] Romeo Dallaire also noted that, between April and July 1994, the accused connected him with the national leaders of the Interahamwe and helped him in resolving some problems, including the evacuation and exchange of refugees between the government forces and the RPF.[337] Prudence Bushnell, the United States Deputy Secretary of State for African Affairs, stated that she personally contacted Bizimungu and asked him to prevent civilians' massacres in Rwanda.[338] Several prosecution Exhibits indicated the authority that Bizimungu wielded over members of the Interahamwe.[339] Bizimungu also admitted that he had the material ability to restrain members of the Interahamwe and recommended appointment and dismissal/suspension of personnel.[340] Based on the evidence mentioned above, the Chamber found that Bizimungu exercised authority over soldiers and Interahamwe during the period that he served as Chief of Staff of the Rwandan Army.[341] The Chamber further held that he had the material ability to prevent soldiers and Interahamwe from committing crimes and could punish them for having committed the crimes.[342] However, the accused did not take the necessary and reasonable measures to prevent or punish his subordinates, given the means available to him.[343]

Furthermore, in the ICTR *Nyiramasuhuko et al.,* the accused Pauline Nyiramasuhuko was found guilty as a superior for failing to prevent and punish rapes perpetrated by Interahamwe at the Butare Prefecture Office. The Trial Chamber relied on the testimony of two victims and seven eyewitnesses who testified that Nyiramasuhuko ordered Interahamwe to rape women at the Butare Prefecture Office and obeyed her orders,

[332] Ibid.
[333] Ibid., para. 1964.
[334] Ibid., para. 1965.
[335] Ibid.
[336] Ibid., para. 1969 (Witness Silas Gatambiye, witness DB15-6, witness DB8-19, and witness DE4-33).
[337] Ibid., paras. 1980, 1974.
[338] Ibid., para. 1973.
[339] Ibid., para. 1979.
[340] Ibid., paras. 1981, 1997.
[341] Ibid., para. 1982.
[342] Ibid.
[343] Ibid., paras. 2008-2009.

stating when she told the assailants to stop, they immediately stopped.[344] However, Nyiramasuhuko was only charged with rape as a crime against humanity under Article 6 (3) of the Statute, which the Chamber considered a serious omission on the part of the prosecution for not charging it as ordering.[345] Based on the evidence mentioned above, the Chamber found that Nyiramasuhuko had effective control over the subordinates[346] and she knew Interahamwe were about to or had committed rape.[347] It further stated that the accused had the material ability to punish the perpetrators or prevent the crimes, but she failed to do so,[348] thus convicting the accused.[349] Similarly, in the ICTY *Rajic* case, the accused admitted and pleaded guilty that forces under his command committed SGBCs.[350] He stated that he knew about the crimes and was present at the scenes when the subordinates committed them or visited the crime sites immediately after.[351] Based on the evidence mentioned above, the Trial Chamber convicted Rajic for his failure to prevent or punish subordinates for the SGBCs committed.[352]

In instances where the prosecution failed to prove that the accused had the authority or the material ability to prevent or punish subordinates or had knowledge about subordinates' specific criminal acts, the case usually fails the test. In the ICTY *Blaskic* case, the Trial Chamber relied on the evidence of the accused's subordinate and the accused admitting about the presence of criminals in the Military Police ranks.[353] Although the accused had issued orders that all the soldiers involved should refrain from criminal conduct, that order remained without effect, and the situation deteriorated after that.[354] Nonetheless, the Trial Chamber found that the accused did not duly carry out his duty to investigate the crimes and imposed disciplinary measures or sent a report about the perpetrators of these crimes to the competent authorities, thus convicting the accused.[355] On appeal, the Appeals Chamber heard additional documentary evidence, including the Coric report relating to the problems associated with the Military Police's lack of control.[356] Also, a UNPROFOR report showed that Cerkez normally controlled the Vitez Brigade, and the command and control of external troops were unclear.[357]At least six subordinates, including personnel from the Military Police, testified that the Appellant did not exercise authority over the Military Police, noting that

[344] See Prosecutor v. Nyiramasuhuko et al., Case No. ICTR-98-42-T, Judgment and Sentence (24 June 2011), paras. 2165, 2178, 2302-2304, 2329-2331; Prosecutor v. Nyiramasuhuko et al., Case No. ICTR-98-42-A, Appeal Judgment (14 December 2015), paras. 518, 848, 1217.
[345] See Nyiramasuhuko et al. Judgment & Sentence, supra note 344, para. 6087.
[346] Ibid., para. 5884.
[347] Ibid., para. 5885.
[348] Ibid.
[349] Ibid., para. 5886. The conviction was upheld on appeal. See Nyiramasuhuko et al. Appeal Judgment, supra note 344, paras. 515, 520, 539.
[350] See Prosecutor v. Rajic, Case No. IT-95-12-S, Sentencing Judgment (8 May 2006), paras. 13, 38, 48-49, 53, 89, 103, 123.
[351] Ibid.
[352] Ibid.
[353] See Blaskic Trial Judgment, supra note 228, para. 474 (see testimony of the witness Marin and Blaskic).
[354] Ibid.
[355] Ibid., para. 734.
[356] See Blaskic Appeal Judgment, supra note 234, paras. 610-611 referring to footnotes 1236 - 1247 (e.g., testimonies of Witness BA3, Witness BA4, Witness BA5, Witness Watkins, Witness Morsink, and Witness Slavko Marin).
[357] Ibid.

the Military Police often ignored Blaskic and heeded to Kordic.[358] Based on the evidence mentioned above, the Appeals Chamber found that the appellant did not have the material ability to prevent or punish the men responsible for the crime.[359]

In the ICC *Bemba* case, the Trial Chamber relied on documentary and testimonial evidence to prove that the accused failed to take the necessary and reasonable measures to prevent the crimes or punish their perpetrators or refer the matters for prosecution. The Chamber examined documents on the establishment of the Mondonga Inquiry to investigate crimes, but noted that the Inquiry did not address reports of any rape committed by the MLC.[360] It also reviewed the report of the accused's visits to the CAR and meetings held with the UN representative in the CAR and president Patassé about the crimes,[361] including speeches he delivered at PK12 about the crimes including SGBCs.[362] The Prosecutor presented the trial record of Lieutenant Bomengo and others on crimes committed, including rape, which resulted in establishing the Gbadolite court-martial that eventually convicted all the seven accused and sentenced them to between three and twenty-four months of detention.[363] It also considered the report on the establishment of the Zongo Commission to investigate crimes, although both the remit and the composition of the Zongo Commission were highly restricted and did not include rapes.[364] It examined the letter written by Bemba to the UN representative about the crimes, including SGBCs, claiming that he had taken appropriate remedial and preventive measures, thus requesting assistance in investigating allegations of crimes by MLC soldiers in the CAR.[365] However, the Chamber held that there was no evidence showing that Bemba ever took General Cissé up on this offer of assistance or otherwise took any concrete measures concerning his correspondence with General Cissé.[366] Correspondence in response to the FIDH Report about crimes indicated rape, but there was no evidence showing that Bemba took any concrete measures in conjunction with or in light of his correspondence,[367] Finally, the accused established the Sibut Mission in response to media reports of MLC abuses against the civilian population in Sibut and Bozoum, but the Chamber noted that the scope did not include SGBCs.[368] Upon reviewing the evidence mentioned above, the Chamber found that the measures taken by Bemba were "grossly inadequate response,"[369] noting that these measures did not reflect his genuine desire to deal with the situation but to repair the MLC's public image.[370] Furthermore, three

[358] Ibid.
[359] Ibid., para. 610.
[360] See Bemba Trial Judgment, supra note 242, paras. 582, 589.
[361] Ibid., paras. 590-591.
[362] Ibid., para. 594.
[363] Ibid., paras. 599, 600, 712.
[364] Ibid., paras. 602-603. 722.
[365] Ibid., para. 723.
[366] Ibid.
[367] Ibid., paras. 600, 610-611, 724.
[368] Ibid., paras. 715, 725.
[369] Ibid., para. 727.
[370] Ibid., paras. 727-728.

subordinates and an eyewitness testified that Bemba, not the CAR authorities, had primary authority to decide whether to sanction MLC troops or launch an investigation related to their CAR activities.[371] The Chamber found their testimonies credible and reliable because they were internally consistent and generally corroborated each other and were found to be consistent with the Chamber's findings concerning Bemba's authority over discipline within the MLC generally.[372] Therefore, the Trial Chamber found that Bemba, not the CAR authorities, had the primary authority to decide whether to sanction MLC troops or launch an investigation related to their activities in the CAR.[373] The Chamber interpreted this to mean that Bemba possessed the material ability to prevent and repress the crimes.[374] As a commander, he should have ensured that the MLC troops in the CAR were adequately trained in the rules of IHL, adequately supervised them, and initiated genuine and complete investigations into the crimes.[375] Moreover, the accused should have properly tried and punished soldiers alleged of having committed crimes and issued explicit orders to the troops' commanders in the CAR to prevent the commission of crimes.[376] Additionally, he should have altered troops' deployment to minimize contact with civilians and ensure the removal, replacement, and dismissal of officers and soldiers who committed or condoned crimes.[377] Lastly, he should have shared relevant information with the CAR authorities or others and supported them in any efforts to investigate criminal allegations.[378]

The *Bemba* Appeals Chamber disagreed with the Trial Chamber's findings. It held that the Trial Chamber did not consider the evidence indicating that the MLC troops were operating in a foreign country with the attendant difficulties on Bemba's ability, as a remote commander, to take measures.[379] For example, a subordinate testified about MLC having a mixed investigation commission composed of personnel from the CAR and Congolese persons.[380] Further, the Appeals Chamber stated that the Trial Chamber ignored a portion of the subordinate's testimony, demonstrating that the MLC's investigative efforts depended on the CAR authorities, not on Bemba.[381] For example, a subordinate stated that a commission would comprise personnel from the CAR, as they would have easier contact with people and provide guidance.[382] Additionally, the Trial Chamber failed to address Bemba's statement in Court that he wrote to the CAR Prime Minister requesting an international commission of inquiry to be set up or the accused's subordinate's

[371] Ibid., para. 447 (see testimonies of witness P36, witness P45, witness P173, and witness CHM1).
[372] Ibid.
[373] Ibid.
[374] Ibid., para. 729.
[375] Ibid.
[376] Ibid.
[377] Ibid.
[378] Ibid.
[379] See Bemba Appeal Judgment, supra note 251, paras. 171-172 (witness P36).
[380] Ibid.
[381] Ibid., para. 172 (witness P36).
[382] Ibid.

testimony that explained the existence and content of the letter.[383] Furthermore, in response to the Trial Chamber's findings on the measures Bemba could have taken, the Appeals Chamber expressed a different opinion. It noted that the Trial Chamber should have instead based its findings on considerations of what specific criminal acts the commander knew or should have known about and at what point in time.[384] Moreover, it should have considered the measures at the commander's disposal, as evidenced by the testimony of two subordinates,[385] including the operational realities on the ground at the time faced by the commander,[386] as stated by the accused's subordinate.[387] Finally, the Trial Chamber should have specifically identified what a commander should have done in concrete terms available to him, which a reasonably diligent commander in comparable circumstances would have taken.[388]

Moreover, in the ICTR *Renzaho* case, the accused was acquitted by the Appeals Chamber for rape as a superior after the Trial Chamber found that he failed in his duty to prevent or punish the rapes. At the trial stage, two victims testified that they were repeatedly raped by Interahamwe, police officers, and soldiers following the accused's encouragement.[389] The Prosecutor presented various documents showing that Renzaho was a high military ranked officer, in addition to his appointment as prefect, confirming that he had *de jure* authority over the forces that committed these crimes.[390] The Prosecutor also presented documents that showed that the accused had the material ability to discipline all soldiers below him in the hierarchy, even where the soldiers were not under his operational authority.[391] Five subordinates also testified that the accused exercised authority over the bourgmestres.[392] He issued instructions to the conseillers and ensured compliance, supervised and replaced local officials, and assigned police officers to the conseillers as bodyguards.[393] Based on the evidence mentioned above, the Trial Chamber found that soldiers who engaged in rapes were Renzaho's *de facto* subordinates, given his rank and instructions and their attacks on the victims.[394] It concluded that the accused knew that the crimes would occur and condoned them,[395] thus convicting the accused based on his failure to prevent the rapes.[396] However, on appeal, the Appeals Chamber reviewed the evidence of the two victims who testified that Renzaho encouraged rapes of

[383] Ibid., para. 174 (witness D48).
[384]Ibid., paras. 6, 184.
[385] See Bemba Trial Judgment, supra note 242, para. 604 (witness P15 and witness P45).
[386] See Bemba Appeal Judgment, supra note 251, para. 170.
[387] Ibid., para. 172 (witness P36).
[388] Ibid., para. 170.
[389] See Prosecutor. Renzaho, Case No. ICTR-97-31-T, Trial Judgment (14 July 2009), paras. 717, 709, 712, 774, 718, 775. The Trial Chamber found that Witness AWN's Tutsi neighbor was also repeatedly raped (ibid., para. 718, but does not appear to have convicted Renzaho for failing to prevent or punish this (ibid., paras. 779, 794, 811).
[390] Ibid, paras. 754-755. See footnotes 838, 840. See also Prosecution Exhibit 11 (Rules of Discipline of Rwandan army, 13 December 1978) Rule 10.
[391] Ibid., para. 755.
[392] Ibid., para. 754. See footnotes 838, 840.
[393] Ibid.
[394] Ibid., para. 777.
[395] Ibid., para. 778.
[396] Ibid., paras. 779, 794, 811.

Tutsi women, and subordinates regularly informed him of the rapes.[397] The Appeals Chamber found that the prosecution failed to specify the dates and locations of the meetings at which Renzaho encouraged the rapes, the dates and locations of the rapes, and the victims' names.[398] Therefore, the Appeals Chamber reversed Renzaho's convictions.[399] The defect of this case was caused by the extreme broadness of the evidence adduced by the Prosecutor. Some parts of the evidence or material facts were only introduced in the post-indictment documents without sufficient notice to the accused.[400]

3.4 Conclusion

In conclusion, for the accused to be held responsible under superior/command responsibility, it is essential to establish whether there exists a superior-subordinate relationship between the accused and the subordinates who physically committed the SGBCs. The prosecutor must show that the accused exercised effective control over the subordinates (*Blaskic, Delalic*),[401] i.e., the material ability to issue and ensure compliance with orders,[402] discipline,[403] punish,[404] and refer for prosecution (*Blaskic, Delalic et al.*).[405] This entails establishing the actual chain of commands,[406] and demonstrating whether, in the meantime, subordinates had *de facto* commanders on the ground who refused to report to the accused or accept his authority (*Blaskic*).[407] The evidence must also show whether the accused was physically isolated from specific locations and if local leaders in each locality became the subordinates' *de facto* commanders, which hindered the accused's ability to project his command (*Blaskic*).[408] Further, when proving a superior-subordinate relationship, the prosecutor must establish the authority the accused had over the subordinates (*de jure* or *de facto*, i.e., formal appointment or influence).[409] This includes whether the accused exercised his authority to issue orders and ensure compliance (Mucic in *Celebici* case, Bizimungu in *Ndindilyimana et al.*).[410]

[397] See Prosecutor v. Renzaho, Case No. ICTR-97-31-A, Appeal Judgment (1 April 2011), para. 126.
[398] Ibid., para. 128.
[399] Ibid., para. 138 (for the rapes of Witnesses AWO and AWN, and Witness AWN's sister).
[400] Ibid., paras. 128-129 (for the rapes of Witnesses AWO and AWN, and Witness AWN's sister).
[401] See Blaskic Appeal Judgment, supra note 234, para. 612; Delalic et al. Trial Judgment, supra note 202, para. 682; Delalic et al. Appeal Judgment, supra note 260, para. 267.
[402]See Delalic et al. Trial Judgment, supra note 202, paras. 670, 767.
[403] Ibid., para. 767.
[404] Ibid., paras. 810,1071.
[405] Ibid., para. 767.
[406] See Blaskic Appeal Judgment, supra note 234, para. 610.
[407] Ibid.
[408] Ibid.
[409] See Delalic et al. Trial Judgment, supra note 202, paras. 746-749 (e.g., testimonies of Witness P, Witness N, Stevan Gligorevic and Vaso Đordic, Grozdana Cecez, Witness D, Witness Assa'ad Taha, witness Bajram Demic, Mirko Dordic, Branko Sudar).
[410] Ibid., para. 749; see also Ndindilyimana et al. Judgment & Sentence, supra note 284, para. 1969 (Witness Silas Gatambiye, witness DB15-6, witness DB8-19, and witness DE4-33).

Furthermore, to determine that the accused knew or had reasons to know about the subordinates' SGBCs, the judges often rely on the frequency and notoriety of the SGBCs (*Delalic et al.; Bagosora et al.*).[411] This includes a presence on the scene ((*Delalic et al*., *Kajelijeli, Bemba*, *Hategekimana),*[412] access to information (e.g., reports sent to the accused about the conduct of subordinates and the SGBCs) that put the accused on notice about the SGBCs (*Delalic et al*., *Bemba, Ndindilyimana et al., Ndindilyimana* (the accused Bizimungu)).[413] Further, the evidence must show that the accused personally witnessed SGBCs first-hand,[414] including any orders issued by him to commit SGBCs (*Kajelijeli, Nyiramasuhuko*).[415] Additionally, the accused's necessary and reasonable measures he could have taken depend on the commander's material ability to prevent or punish his subordinates' criminal conduct (*Delalic et al.*, *Blaskic, Bemba*).[416] The crucial factors to consider are whether the accused investigated subordinate misconduct, genuinely established the facts, submitted the investigative findings to the competent authorities, and steps taken to prosecute subordinates (*Delalic et al., Bemba*).[417] Also, the accused must have acquired actual knowledge of the specific SGBCs committed by the subordinates, i.e., the SGBCs were planned and going to happen, had occurred, or suspected the subordinates would commit these crimes but failed to prevent or stop or punish the subordinates' conducts (*Bemba*).[418] The prosecutor must determine the exact measures at the commander's disposal to prevent or punish the SGBCs (*Bemba*),[419] including specific actions the commander could have taken available to him (*Bemba*).[420] All of these factors must consider the operational realities on the ground faced by the commander when operating remotely from a different location (*Bemba*).[421]

The table below shows what elements the prosecutor needs to prove and the pieces of evidence accepted by the chambers to prove SGBCs under superior/command responsibility. The prosecutor must establish all the elements listed below to convict the accused.

[411] See Delalic et al. Trial Judgment, supra note 202, para. 770; Bagosora et al. Judgment & Sentence, supra note 214, paras. 1924, 2254.
[412] See Delalic et al. Trial Judgment, supra note 202, paras. 769, 1062; Kajelijeli Trial Judgment, supra note 298, paras. 683, 924; Bemba Trial Judgment, supra note 242, paras. 426, 594-597; Hategekimana Judgment & Sentence, supra note 219, para. 463.
[413] See Delalic et al. Trial Judgment, supra note 202, para. 769; Bemba Trial Judgment, supra note 242, paras. 426, 594-597; Ndindilyimana et al. Judgment & Sentence, supra note 284, paras. 1524, 1453.
[414] See Delalic et al. Trial Judgment, supra note 202, para. 769.
[415] See Kajelijeli Trial Judgment, supra note 298, para. 924; Nyiramasuhuko et al. Judgment & Sentence, supra note 344, paras. 2165, 2178, 2302-2304, 2329-2331; Nyiramasuhuko et al. Appeal Judgment, supra note 344, paras. 518, 848, 1217.
[416] See Blaskic Appeal Judgment, supra note 234, para. 610; Delalic et al. Trial Judgment, supra note 202, paras. 774-775; Bemba Trial Judgment, supra note 242, paras. 447, 729.
[417] See Blaskic Appeal Judgment, supra note 234, para. 734; Bemba Appeal Judgment, supra note 251, paras. 170, 604; Delalic et al. Trial Judgment, supra note 202, paras. 774-775.
[418] See Bemba Appeal Judgment, supra note 251, paras. 6, 184.
[419] See Bemba Trial Judgment, supra note 242, para. 604.
[420] See Bemba Appeal Judgment, supra note 251, para. 170.
[421] Ibid., para. 170.

Elements to prove	How elements can be proven	Types of evidence
Existence of a superior-subordinate relationship	• Testimonies of victims and eyewitnesses showing that the accused was in charge and was present giving instruction to commit the SGBCs; • Victims and eyewitnesses stating that the accused was the camp commander and that he could transfer prisoners and stop mistreatment against prisoners; • Eyewitnesses, including subordinates, attesting that the accused could discipline and punish or refer subordinates for investigation; • Eyewitnesses, including subordinates, saying that the accused had control and influence over the subordinates that committed the SGBCs; • Documents proving that the accused was in charge and was present giving instruction to commit the crime; • Documents showing signatures on orders issued by the accused; • Appointments made by the accused; • Meetings presided over showing that the accused was in charge; • Documents containing letters that identified the accused as the camp commander; • Documents containing radio broadcasts showing that the accused used to maintain remote command and control of the operation; • Admission of co-accused proving that the accused was in charge and was present giving instruction to commit the crime; • Co-accused's admission that the accused was present in the camp daily and exercised authority over subordinates that followed his orders in the camp;	Victims' testimonies Eyewitnesses' testimonies Documentary evidence Statement of the accused/accused's admission/Co-accused's admission

The superior knew or had reason to know that SGBCs were about to be or had been committed	• Victims and eyewitnesses stating that people were sexually assaulted and brutally raped and genital parts mutilated at checkpoints and other places openly and notoriously; • Eyewitnesses saying that the accused was present when the rape was committed by the soldiers that he dropped off at the scene; • Testimonies of subordinates indicating that the accused was present and informed about the crime during his visits; • Testimonies of victims and eyewitnesses describing the frequency and notoriety of the SGBCs; • Subordinates showing that the accused received daily reports through radio communication about the crimes; • Documents proving that the accused was present and informed about the crime during his visits; • Telephone conversation, transcripts, and reports that put the accused on notice about the crime committed by subordinates; • Accused's admission that he was present and informed about the crime during his visits; • Accused's admission that he knew a large number of women had been assembled in a certain location in the presence of soldiers;	
The superior's failure to prevent or punish or refer the matters for prosecution	• Testimonies of eyewitnesses and victims showing that no action was taken against subordinates when the specific crime was reported to the accused; • Subordinates and statements of high-ranking officials showing that the accused had the power and authority and was held in high regard among the soldiers; • Subordinates indicating authority wielded by the accused over subordinates; • Victims and eyewitnesses saying that when the accused said to the perpetrators to stop, they immediately stopped; • Documents containing UN reports, situation reports, media reports, letters, and correspondences alerting about the crime; • Documents showing that the accused had the power and authority and was held in high regard among the soldiers; • Accused's admission that he received information about the crime; • Accused's admission that he could recommend appointment and dismissal/suspension of personnel; • Accused's admission that he was physically present and visited the scene of the crime.	

4. Prosecuting SGBCs through Co-Perpetration

4.1 Existence of an Agreement or Common Plan Between Two or More Persons

The first element which requires proof is the existence of an agreement or common plan between two or more persons. This can be established by:

- eyewitnesses and documents showing that the accused planned and organized the attack and liaised with commanders on the ground to implement it;
- victims and eyewitnesses stating that SGBCs were committed by combatants during the attack on a widespread or systematic basis.

All the pieces of evidence must show that the SGBCs formed part of the common plan pursued by the perpetrators or that the perpetrators meant to cause that consequence or were aware that SGBCs would occur in the ordinary course of events. In the ICC *Katanga* case, the Trial Chamber relied on a document containing minutes of the accused's meetings to plan the attack and cooperation between the commanders to implement the plan.[422] The Chamber found that the group's common purpose or plan was to wipe out from Bogoro the UPC military elements and the Hema civilians through murder, an attack against civilians, pillage, and property destruction.[423] The Trial Chamber then heard three victims' testimony and an eyewitness who testified that combatants committed SGBCs during the attack.[424] Based on the evidence mentioned above, the Chamber found that SGBCs occurred during the attack.[425] However, the Chamber could not establish that these crimes formed part of the common purpose or plan pursued by the assailants.[426] Consistent with Article 30(2)(b) of the Rome Statute, the Chamber should have nevertheless assessed the evidence to determine whether the accused or the physical perpetrators meant to cause that consequence or were aware that SGBCs would occur in the ordinary course of events (during the attack).[427]

4.2 The Accused Made an Essential Contribution to the Common Purpose to Commit SGBCs

The second element is to prove that the accused made an essential contribution to the common purpose which resulted in the commission of the crimes. This element can be established by:

- eyewitness stating that the accused designed the attack;
- eyewitness (subordinates) indicating that the accused was the leader and respected figure of authority among the ranks;

[422] See Prosecutor v. Katanga, Case No.: ICC-01/04-01/07, Judgment pursuant to Art. 74 of the Statute (7 March2014), para. 1515; Prosecutor v. Katanga, Case No, ICC-01/04-01/07 OA 13, Judgment on the appeal of Mr. Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the Accused persons' (27 March 2013), paras. 40, 102.
[423] See Katanga Trial Judgment, supra note 422, para. 1672.
[424] Ibid., paras. 989, 991, 1002, 1004, 1009, 1011,1014 (e.g., testimony of witnesses P132, P233, P249, P353, D02-148).
[425] Ibid., paras. 999, 1023.
[426] Ibid., paras. 1663-1664.
[427] Art. 30(2)(b), Rome Statute.

- eyewitnesses (subordinates) saying that the accused visited military headquarters where he assisted in defining the military strategy to attack the village;
- eyewitnesses (subordinates) attesting that the accused played a central role by facilitating, transporting, and distributing weapons and ammunition to combatants and various commanders;
- accused's admission and eyewitnesses (subordinates) stating that he coordinated activities between the local commanders and the headquarters to implement the common objective, i.e., he communicated instructions from headquarters to the commanders on the ground and issued orders to commanders and combatants to implement these instructions.

The evidence must clearly show that the accused's contribution to the common purpose was essential to the commission of the SGBCs–whether as part of the common purpose or outside of it. In the ICC *Katanga* case, the Trial Chamber relied on the accused's admission, where he stated that he contributed to the design to attack Bogoro.[428] At least eight subordinates testified that the accused was the commander-in-chief and a respected figure of authority in Aveba.[429] Further, a subordinate mentioned that the accused visited Beni, where he helped define the military strategy to attack Bogoro.[430] At least four subordinates said that the accused played a central role in Aveba by facilitating, transporting, and distributing weapons and ammunition to combatants and various commanders in the collectivité.[431] The accused's admission and testimony of two subordinates stating that he coordinated activities between the local commanders and the APC on the implementation of the common objective, i.e., he relayed instructions from Beni to the commanders on the ground, and he, in turn, issued orders to commanders and combatants to implement these instructions.[432] Based on the evidence mentioned above, the Chamber found that the accused's contribution to the common purpose was essential to the commission of the crimes, i.e. murder, the attack against civilians, pillage, and property destruction.[433] The Chamber's finding means that the SGBCs felt outside the common purpose. The accused's contribution to the common purpose, even if significant, was not considered essential to the commission of the SGBCs in question.[434] Still, as stated above, the Chamber should have assessed the evidence to see whether the accused or the physical perpetrators meant to cause that consequence that constitutes the SGBCs or were aware that SGBCs would occur in the ordinary course of events.[435]

Despite the above findings, the Chamber acquitted Katanga of all charges relating to SGBCs.[436] The Chamber reasoned that there was insufficient evidence that the SGBCs were widespread or systematic.[437]

[428] See Katanga Trial Judgment, supra note 422, para. 1682.
[429] Ibid., paras. 1294-1297 (e.g., testimony of D02-160, D02-161, D02-350, D02-228, D02-300, D02-129, P-28, D03-88).
[430] Ibid., paras. 357, 363 (see testimony of D03-88).
[431] Ibid., paras. 357, 363, 1273, 1275-1276, 1281-1287, 1342(e.g., testimony of D03-88; D02-161; P28; D02-228).
[432] Ibid., paras. 1336, 1339-1343 (see e.g., testimony of D02-300, P-28).
[433] Ibid., paras. 1679, 1684.
[434] Ibid., paras. 1679, 1684.
[435] Art.30(2)(b), Rome Statute.
[436] See Katanga Trial Judgment, supra note 422, para. 1696.
[437] Ibid., para. 1663.

The village's obliteration was not essentially committed through SGBCs but by murder, attacks against civilians, pillage, and property destruction.[438] Further, before this attack, the combatants had not committed SGBCs, finding that the SGBCs' victims had their lives saved by claiming that they were non-Hema.[439] The women who claimed to be non-Hema were spared from death and, consequently, "only" raped and sexually enslaved.[440] Based on these findings, the Chamber concluded that, even if the SGBCs were an integral part of the attack in question, it was not possible to conclude from the evidence mentioned above[441] that it was part of the common criminal purpose pursued on 24 February 2003 of the group that executed the attacks on Bogoro.[442] The Chamber emphasized that to be held liable as an accessory to a crime that ensued from a group of persons' concerted action, the prosecutor must establish that the persons who committed the crime belonged to the group. [443] Further, the evidence must show that the common purpose participants harbored the same intent, i.e. they must mean to cause that consequence that constitutes the crime or be aware that the crime will occur in the ordinary course of events.[444] Such shared intent may be established by, *inter alia*, the group's collective decisions and actions or omissions.[445] Therefore, the prosecution must lead evidence that the physical perpetrators of the material elements of the crime shared the common purpose with the indirect perpetrators.[446] The Chamber also held that to be satisfied that the common purpose encompassed the perpetrator's acts, it would also be necessary for the evidence to show that the crime at hand formed part of the common purpose.[447] Crimes ensuing solely from "opportunistic acts" by group members and which fall out with the common purpose cannot be attributed to the group's concerted action.[448] Only those crimes that the group harbored the intent to commit (the common purpose being to commit the crime or encompassing its execution), and falling within the ordinary course of events, can be attributed to the said group and incur the accused's liability as co-perpetrator.[449]

[438] Ibid.
[439] Ibid.
[440] Ibid.
[441] Ibid., paras. 1002, 1004, 1011,1014 (e.g., testimonies of witness P132, witness P233, witness P249, witness P353, and witness D02-148).
[442] Ibid., para. 1664.
[443] Ibid., para. 1628.
[444] Ibid., para. 1627.
[445] Ibid.
[446] Ibid., para. 1628.
[447] Ibid., para. 1630.
[448] Ibid.
[449] Ibid.

4.3 Conclusion

Under co-perpetration, it is more important to show that SGBCs form part of a common plan or common purpose. The *Katanga* Trial Chamber specified that the evidence must establish that the SGBCs committed formed part of the common purpose, showing that the perpetrators wanted to commit SGBCs or knew these crimes would happen, and not that they committed SGBCs only because they had the opportunity to do so.[450] In other words, SGBCs committed by members of the group by chance or based on the opportunity that arose during the events, which are not part of the common purpose, cannot be attributed to the accused.[451] Other factors the judges can consider conclusive include the evidence indicating that the physical perpetrators who committed the SGBCs belonged to the group.[452] Further, the physical perpetrators of the SGBCs and or the indirect perpetrators must have shared a common purpose.[453] Lastly, the evidence must show that all the participants in the common purpose shared the same intent or aware that the SGBCs will occur in the ordinary course of events,[454] and this same group had previously committed SGBCs.[455]

The table below shows what elements need to be proven and the pieces of evidence the judges requested the prosecutor to provide to prove SGBCs under co-perpetration.[456] The prosecutor must prove all the elements listed below to convict the accused.

Elements to prove	How elements can be proven	Types of evidence
Existence of an agreement or common plan between two or more persons	• Victims and eyewitnesses stating that SGBCs were committed by combatants during the attack in several locations in a widespread or systematic way; • Documents containing minutes of meetings showing that the accused planned and organized the attack and liaised with commanders on the ground to implement the attack.	Victims' testimonies

[450] Ibid., para. 1664.
[451] Ibid., paras. 1630, 1663.
[452] Ibid., para. 1628.
[453] Ibid.
[454] Ibid., para. 1627.
[455] Ibid., para. 1663.
[456] Since there has not yet been a conviction for this mode of liability, it is important to outline, at least, the pieces of evidence that the judges have requested the prosecutor to produce during the trial to link the accused to the SGBCs.

The accused made an essential contribution to the common purpose to commit SGBCs	• Subordinates and victims stating that the accused was the leader and was a highly respected figure of authority among the ranks; • Subordinates confirming that the accused visited military headquarters where he assisted in defining the military strategy to attack the village; • Subordinates saying that the accused played a central role by facilitating, transporting, and distributing weapons and ammunition to combatants and various commanders; • Testimony of subordinates indicating that he coordinated activities between the local commanders and the headquarters to implement the common objective; • Accused's admission whether in the courtroom or the news/press releases confessing that he contributed to the design to attack the village; • Accused's admission that he coordinated activities between the local commanders and the headquarters to implement the common objective.	Eyewitnesses' testimonies Documentary evidence Statement of the accused/accused's admission

5. Prosecuting SGBCs through Indirect Perpetration

5.1 Authority in the Organization and Compliance with Orders Automatically to Commit SGBCs

The first element to prove is the accused's authority in the organization and the subordinates' compliance with his orders to automatically commit SGBCs. This can be established by:

- victims and eyewitnesses stating that the victims were raped and sexually enslaved by combatants;
- testimony of subordinates and documents containing letters showing that the accused possessed authority in the organization;
- eyewitnesses (subordinates) saying that the accused issued orders and subordinates complied with his orders automatically to commit the crimes;
- eyewitnesses (subordinates) confirming that the accused could discipline soldiers who disobeyed his orders.

The evidence must show that the accused controlled the part of the group that was subordinate to him, without having to leave the perpetration of the crime to the subordinates' decision. In the ICC *Katanga* case, the Trial Chamber heard the testimony of three victims and two eyewitnesses who testified that women were raped and sexually enslaved by combatants during the 24 February 2003 attack.[457] Based on the evidence mentioned above, the Chamber found that the Ngiti combatants committed SGBCs during the 24 February

[457] See Katanga Trial Judgment, supra note 422, paras. 991, 989, 1009, 1002, 1004, 1011, 1014 (P132, P233, P249, P353, D02-148).

2003 attack on Bogoro.[458] For Katanga to be held accountable, the prosecution needed first to prove the accused's leadership position in the group. The Trial Chamber relied on documentary evidence containing the 29 January 2003 evangelization letter[459] and the 9 February 2003 prohibition on bearing arms letter,[460] all of which referred to the accused as president. The 3rd March 2003 gold tax levy letter also referred to the accused as president,[461] including the testimony of at least eight subordinates who testified that the accused was a respected figure of authority in the collectivité (see Section 4.9).[462] The Chamber found that by 9 February 2003, Germain Katanga was the Ngiti militia president (or FRPI) in Walendu-Bindi collectivité.[463]

Subsequently, the Chamber assessed the nature and effectiveness of the power wielded by Katanga militarily and whether he could exercise such power. The Chamber relied on the testimony of two victims and six subordinates, saying that the accused received a warm welcome from the soldiers as a "figure of authority" and saluted and referred to him as the president or supreme commander.[464] They stated that as the supreme leader, the accused issued orders to combatants and commanders.[465] However, the Chamber could not ascertain from the evidence the type of orders issued by the accused, whether commanders could prohibit their men from disobeying the accused's orders and whether the accused took orders from a superior above him.[466] Nevertheless, the Chamber considered the witnesses reliable because the evidence carried significant probative value and several other witnesses corroborated their statements.[467] Based on the evidence mentioned above, the Chamber found that Katanga was the most important authority figure and was accorded due respect by the militia members.[468] However, the Chamber noted it could not determine whether the accused could discipline the commanders, including oversight and disciplinary procedures and if the accused took any disciplinary actions against the various camps' commanders in the collectivité.[469] Further, even if Katanga could issue orders to commanders and combatants within the collectivité, it was impossible to ascertain from the evidence mentioned above the exact nature of the orders or whether they were obeyed[470] or implemented.[471] Consequently, the Chamber concluded that the

[458] Ibid., paras. 999, 1023.
[459] Ibid., para. 1315, referring to EVD-OTP-00238: "Evangelization" letter.
[460] Ibid., paras. 1315, 1320, referring to EVD-OTP-00278: "Prohibition on bearing arms" letter.
[461] Ibid., para. 1326, referring to EVD-OTP-00239: "Gold tax levy" Letter.
[462] Ibid., paras. 1294-1297 (see e.g., testimony of D02-160, D02-161, D02-350, D02-228, D02-300, D02-129, P-28, D03-88).
[463] Ibid., para. 1334 in particular the "Ties forged by the local combatants with the FRPI and representatives of the RCD-ML, the APC and EMOI between November 2002 and February 2003."
[464] Ibid., paras. 1344-1346 (see e.g., testimonies of Witness P132, Witness D02-129, Witness P28, Witness D02-01, and Witness P353).
[465] Ibid., paras. 1336, 1346 (see testimony of witness P-28, testimony of witness D03-88, witness D02-148).
[466] Ibid.
[467] Ibid., para. 1345.
[468] Ibid., para. 1364.
[469] Ibid., para. 1337.
[470] Ibid., para. 1364.
[471] Ibid., para. 1347.

defendant failed to live up to the control test,[472] i.e., the material ability to direct the part of the subordinate group to him without having to leave the execution of the crimes to the decision of the agent.[473]

5.2 Knowledge of the Character of the Organized and Hierarchical Apparatus of Power

The second element to prove is the knowledge of the character of the organized and hierarchical apparatus of power. This element can be proven by:

- eyewitnesses (subordinates) stating that soldiers underwent military training and that a military disciplinary regime existed;
- eyewitnesses (subordinates) saying that an effective chain of command existed with the accused at the top;
- eyewitnesses attesting that subordinates complied with orders issued by the accused;
- authenticated documents containing letters and eyewitnesses (subordinates) showing that militia were distributed among several camps headed by commanders who reported to the accused as the overall commander;
- authenticated documents and eyewitnesses (subordinates) indicating that the military units were structured into administration, intelligence, operations, and logistics reporting to the accused.

Indeed, all the pieces of evidence must show that the accused, as the leader of the armed group, performed the role of a superior and possessed the material ability to issue and ensure compliance with orders. In this context, the *Katanga* Trial Chamber relied on a victim and at least seven subordinates, who testified that soldiers underwent military training and held military parades in Aveba.[474] They stated that military disciplinary regimes existed in the camps overseen by local commanders.[475] The Ngiti militia was distributed among several camps, all headed by at least one commander.[476] The military units were structured as "S1" (staff responsible for administrative matters), "S2" (staff responsible for intelligence), "S3" (staff responsible for operational matters), and "S4" (staff in charge of logistics).[477] The Chamber also relied on a document containing a letter showing that the military leaders and soldiers underwent military training at the Lendu Liberation Movement Training Centre.[478] Further, it examined a MONUC report on the events in Ituri during 2002 and 2003, indicating that the Ngiti and Lendu militias underwent training either in their home villages or nearby.[479] The Chamber found that in the immediate run-up to the battle of Bogoro, the commanders and the local combatants constituted an organized armed group with a president

[472] Ibid., para. 1420. Translation from "Summary of judgment", § 51.
[473] This notion was originally presented within German law in an article of 1963 by Claus Roxin, 'Crimes as Part of Organized Power Structures.' Journal of International Criminal Justice 9 (2011), pp. 201-202.
[474] See Katanga Trial Judgment, supra note 422, paras. 639, 672, 674-675, 1418 (see e.g., testimonies of Witness D02-01, Witness D02-161, Witness D02-300, Witness P28, Witness P132, witness D02-228, witness D02-148, Witness D03-88).
[475] Ibid.
[476] Ibid.
[477] Ibid.
[478] Ibid., para. 639.
[479] Ibid.

located in Aveba.[480] However, the evidence mentioned above did not establish that the armed group president performed a superior role.[481] It means that being a president is not sufficient but whether the accused had the material ability to issue and ensure compliance with orders is what matters.[482] Consequently, the Chamber concluded that the prosecution failed to prove that in the collectivité, the accused had the material ability to issue and ensure execution of orders or had the power to mete out disciplinary action against commanders.[483] This finding militates against the existence of a centralized command within the Ngiti militia of Walendu-Bindi collectivité.[484] Although the evidence established that Katanga was at the apex of the organization, there was an absence of a centralized and effective chain of command. This finding thus led to the conclusion that the evidence did not establish that, in February 2003, the Ngiti militia was an organized apparatus of power, nor show that the accused wielded control over the militia as a way to exert control over the crimes.[485] Consequently, although the evidence established that SGBCs had occurred, the Chamber found that the prosecution failed to show that Germain Katanga was responsible for these crimes.[486]

5.3 Conclusion

The evidence needs to show that the accused possessed authority in the organization and that the subordinates automatically complied with his orders to commit SGBCs. The *Katanga* case under indirect perpetration underscored that being at the apex of an organization does not necessarily mean that the accused possessed the material ability to issue and ensure execution of orders.[487] The Trial Chamber made it clear that it is crucial to show from the evidence the existence of a centralized command within the group, i.e., the accused wielded effective control over the group at that time as means to exercise control over the SGBCs.[488] It is also essential to show that in the group, the accused had the material ability to issue and ensure compliance with orders or that he had effective hierarchical power over all the commanders and combatants, and he could mete out disciplinary action against them.[489] Other decisive factors include evidence showing the exact nature of the organization[490] or the group was an organized apparatus of power during the attack,[491] and that the armed group leader performed a superior role.[492]

[480] Ibid., paras. 678-679, 1360.
[481] Ibid., para. 1365.
[482] Ibid., para. 1420. Translation from "Summary of judgment", para. 51.
[483] Ibid., para. 1365.
[484] Ibid.
[485] Ibid., para. 1420.
[486] Ibid., paras. 1420-1421.
[487] Ibid., para. 1420.
[488] Ibid., paras. 1365, 1420.
[489] Ibid., paras. 1364-1365.
[490] Ibid., paras. 678-679, 1360.
[491] Ibid., para. 1420.
[492] Ibid., para. 1365.

The table below shows what elements need to be proven and the pieces of evidence the judges required the prosecutor to provide to prove SGBCs under indirect perpetration.[493] At the minimum, the prosecutor must prove that the accused possessed authority in the organization and that the subordinates automatically complied with his orders to commit SGBCs.

Elements to prove	How elements can be proven	Types of evidence
Authority in the organization and compliant with orders automatically to commit SGBCs	• Testimony of victims and eyewitnesses stating that victims were raped and sexually enslaved by combatants; • Testimony of subordinates saying that the accused possessed authority in the organization; • Testimony of subordinates attesting that the accused issued orders and subordinates complied with his orders automatically to commit the SGBCs; • Testimony of subordinates confirming that the accused could discipline soldiers for disobeying orders. • Documents containing letters showing that the accused possessed authority in the organization;	Victims' testimonies Eyewitnesses' testimonies Documentary evidence
Knowledge of the character of the organized and hierarchical apparatus of power	• Testimonies of victims and subordinates, indicating that soldiers underwent military training and that a military disciplinary regime existed with an effective chain of command; • Testimony of subordinates saying that militia were distributed among several camps, all headed by a commander and that the military units were structured into administration, intelligence, operations, and logistics, headed by the accused. • Documents containing letters showing that militia were distributed among several camps, all headed by a commander and that the military units were structured into administration, intelligence, operations, and logistics, headed by the accused.	

6. Prosecuting SGBCs through Indirect Co-Perpetration

6.1 The Accused Had Control Over the Organization that Committed the SGBCs

The first element to prove is that the accused had control over the organization that committed the crimes. This element can be established by:

- victims and eyewitnesses saying that victims were raped and held captive;

[493] Since there has not yet been a conviction for this mode of liability, it was important to outline, at least, the pieces of evidence that the judges have requested the prosecutor to produce during the trial to link the Accused to the SGBCs.

- eyewitnesses (subordinates), victims, and agreed facts from other judgments showing that the accused was in position of authority and exercised command and control over individuals in the organization;
- eyewitnesses (subordinates) stating that there was an agreement among leaders to commit the crime;
- authenticated documents containing various exhibits showing the creation of operational zones with each headed by a commander;
- authenticated documents containing minutes of meetings indicating that the accused regularly met with the commanders;
- eyewitnesses (subordinates) stating that the accused issued specific orders which were obeyed;
- eyewitnesses (subordinates) attesting that the accused delivered weapons and gave orders to commit the crime.

The prosecutor's evidence must show that the accused was in a position of authority and effectively exercised such power over the subordinates as means of controlling the organization through which the crime was committed. In the ICC *Gbagbo and Blé Goudé* case, the prosecution failed to prove this element, and the two accused were acquitted of the SGBC charges. The Prosecutor produced several documents and eyewitnesses (including subordinates) who testified about the accused's authority and their power over the organization. Documents containing various exhibits showed the creation of operational zones, each headed by a commander.[494] However, the documents did not reveal what role the commanders of these zones played at various intervals during the 2010/11 crisis, nor did they indicate how strong discipline was throughout the relevant period.[495] Additional documents were presented showing that Gbagbo held several meetings with senior FDS commanders, although the evidence could not prove the extent to which Gbagbo was involved at the operational level or whether he issued direct orders to any of these commanders to conduct military operations.[496] Three subordinates stated that the accused, Gbagbo, gave direct orders to certain commanders of parallel structures (in circumvention of the regular chain of command), and subordinates obeyed the orders.[497] The Chamber noted that their testimonies were hearsay, lacking specificity and probative value, therefore not credible and reliable.[498] Based on the evidence mentioned above, the Chamber found that Gbagbo was the formal supreme commander of the FDS and that the Chief of Staff frequently briefed him, and he provided strategic instructions sometimes.[499] However, the evidence did not show Gbagbo's involvement at the operational level, i.e., whether he could issue direct orders to the commanders and ensured compliance or whether he could discipline commanders who disobeyed.[500] Regarding the parallel structures, there was no evidence indicating the existence of an operational order originating from

[494] See Prosecutor v. Gbagbo and Blé Goudé, Case No. ICC-02/11-01/15-1263-AnxB-Red, Reasons of Judge Geoffrey Henderson (16 July 2019), paras. 382-453.
[495] Ibid.
[496] Ibid.
[497] Ibid., paras. 413, 417-418.
[498] Ibid.
[499] Ibid., para. 454.
[500] Ibid.

the two accused or other "inner circle" members that bypassed the existing chain of command.[501] Regarding the accused Blé Goudé's authority and control over the youth, several eyewitnesses testified that he called upon the youth to establish roadblocks and many heeded to his call.[502] The Chamber found that Blé Goudé was thus clearly a leading figure and a very influential person.[503] However, although he enjoyed a certain level of power and could influence the behavior of a group of people, it did not follow that he was in a position to exercise command and control over these individuals.[504] Therefore, there was not enough evidence to prove that either accused had exercised command and control over irregular forces, be they youth groups, militia, or mercenaries, thus acquitting the accused.[505]

Similarly, in the ICC *Ngudjolo* case, the Prosecutor's evidence could not link the accused to the crime, and the Chamber thus acquitted him of the SGBC charges. The Trial Chamber heard the testimony of two victims who stated that during the 24 February 2003 attack on Bogoro, women were raped, abducted, held captive, and repeatedly raped during their captivity.[506] Based on this evidence, the Chamber found that SGBCs were committed by Lendu and Ngiti combatants (FNI) during the attack on Bogoro on 24 February 2003.[507] To attribute these crimes to the accused, the Trial Chamber first decided to establish the accused's leadership position in the FNI and if he had control over that organization. In this context, two victims, three eyewitnesses, and at least six subordinates testified that the accused was the leader of the FNI, either before or during the attack.[508] However, the witnesses did not specify precisely how he exercised the power he held.[509] The Chamber found that, except for two eyewitnesses, all the witnesses who testified about the accused's position did so based on hearsay, meaning none were present in the Bedu-Ezekere Groupement before the attack.[510] The Chamber further stated that the witnesses in question did not provide any other details on the authority allegedly held by Ngudjolo or how he exercised it.[511] Therefore, the Chamber held that it could not discount the possibility that some witnesses linked Ngudjolo's status in the FNI in late March 2003 with the position he actually held before the attack on Bogoro on 24 February 2003.[512] From the judges' reasoning, the prosecution should have produced specific evidence on the exact position of authority occupied by the accused at the time of the event itself (not before or after). The evidence needed

[501] Ibid., para. 455.
[502] Ibid., para. 860. See footnote 2108.
[503] Ibid.
[504] Ibid.
[505] Ibid., para. 861.
[506] See Prosecutor v. Ngudjolo Chui, Case No.: ICC-01/04-02/12, Judgment pursuant to Art. 74 of the Statute (18 December 2012), para. 333 (see e.g., testimonies of Witness P268 and Witness P233).
[507] Ibid., para. 338.
[508] Ibid., paras. 128, 431, 434, 436-439, 441- 442 (see e.g., testimonies of Witness P-250, Witness D02-176, Witness P317, Witness P28, Witness D03-340, Witness D02-161, Witness V-2, Witness V-4, Witness P12, Witness P160, and Witness D02-129).
[509] Ibid.
[510] Ibid., para. 496.
[511] Ibid.
[512] Ibid.

to show how he went about exercising such authority over the subordinates as means to control the organization through which subordinates committed the crimes.[513]

Bosco Ntaganda is the first high-level military commander to be convicted as indirect co-perpetrator for rape and sexual slavery as a war crime and crime against humanity at the trial level. The Trial Chamber heard the testimony of more than five victims and found that UPC/FPLC soldiers committed rape and sexual slavery.[514] In determining the accused responsibility, the Chamber first determined whether he and other military leaders of the UPC/FPLC entered in a common agreement to commit the crimes or whether he possessed the knowledge that engaging in such conduct, in the ordinary course of events, would result in the commission of the crimes.[515] The statements provided by eight subordinates showed that the accused agreed with other leaders to remove all the Lendu from the village.[516] Based on the evidence mentioned above, the Chamber concluded that Ntaganda agreed with other leaders to drive out all the Lendu, finding that the SGBCs committed during the first and second operations must be attributed to the accused as indirect co-perpetrator.[517]

The Chamber then determined the level of control the accused had over the organization that committed the SGBCs. In so doing, the Chamber noted that the Prosecutor must prove the accused's position of authority and the level of control he had over the organization by which the perpetrators committed the SGBCs. These factors were predominantly established by the testimony of victims, eyewitnesses, and documentary evidence. Firstly, the Trial Chamber reviewed the agreed facts of the case and found that, in early September 2002, Thomas Lubanga formally appointed the accused as Deputy Chief of Staff in charge of Operations and Organization, a position he held until 8 December 2003.[518] Seven eyewitnesses testified that the accused was the chief of general staff effectively in charge of deployment and operations[519] and military training.[520] A subordinate testified that the accused issued orders to subordinates and ensured these orders were obeyed[521] and that soldiers disobeying such orders were severely punished.[522] The Chamber also examined documentary evidence containing a letter sent by Ntaganda in his capacity as Deputy Chief of Staff to a subordinate officer, asking to send him any disobedient soldier to put in a central prison.[523] Two subordinates

[513] Ibid.
[514] See Prosecutor v. Ntaganda, Case No.: ICC-01/04-02/06, Trial Judgment (8 July 2019), paras. 409, 518-523, 535, 545, 579, 599 - 601, 606-608, 611, 618, 622-623, 627, 629, 631- 632, 940, 954, referring to e.g., testimony of witnesses P-0018, P-0019, P-0022, P-0113, P-0883.
[515] Art. 25(3)(a), Rome Statute.
[516] See Ntaganda Trial Judgment, supra note 514, paras. 309-315. See e.g., testimony of witnesses P-0055, P-0901, P-0012, P-0014, D-0300, D-0038, P-0031, P-0116.
[517] Ibid., paras. 857, 781.
[518] Ibid., para. 321, referring to Agreed Fact pp. 78-79. On that date, following the dismissal of Floribert Kisembo, Thomas Lubanga appointed Mr. Ntaganda as Chief of Staff ad interim (DRC-OTP-0132-0237, at 0238; and D-0300: T-226, p. 17).
[519] Ibid., para. 322, referring to testimony of witnesses P-0014, P-0055, P-0768, P-0963, P-0901, D-0207, P-0907.
[520] Ibid., para. 323, referring to testimony of witnesses P-0014, P-0768, P-0963, P-0016.
[521] Ibid., para. 322, referring to testimony of witness P-0963.
[522] Ibid., para. 323, referring to testimony of witness D-0300, P-0017.
[523] Ibid., referring to footnote 860.

also testified that the accused was very influential.[524] He was responsible for planning and operations and had control over the personnel who followed and implemented his instructions.[525] Five subordinates testified that Ntaganda instilled fear amongst the troops and the population to ensure discipline.[526] Moreover, a subordinate testified that everyone in the army and community respected the accused, stating that people were afraid to break the law because they feared him.[527] Concerning whether the role he played was essential, three subordinates testified that Ntaganda had a heavy weapons unit under his command.[528] He delivered the weapons from Rwanda to the soldiers on the ground[529] and gave them orders to commit the crimes, including SGBCs.[530] Based on the evidence mentioned above, the Chamber concluded that Ntaganda exercised control over the crimes, finding that the rape and sexual slavery committed by UPC/FPLC troops under the common plan were attributable to him as indirect co-perpetrator.[531]

Similarly, in the ICC *Ongwen* case, seven victims stated that they were abducted and distributed as so-called "wives" to the accused, who proceeded to rape them and prevented them from leaving.[532] Five of the victims testified that the accused considered them his "wives" and maintained an exclusive marital relationship with him.[533] Two victims also said they became pregnant and gave birth out of the forced marriage.[534] Several other victims and subordinates testified about the abduction system and subsequent distribution of women and girls to other LRA soldiers as "wives."[535] The Chamber also relied on documentary evidence containing photographic material, police investigation reports, forensic reports, official documentation, and documents obtained from the LRA showing the commission of crimes and the accused level of involvement.[536] Several insider witnesses testified about the structure, inner workings of the LRA and Sinia Brigade, including the accused position, orders issued, subordinates compliance with orders, and the existence of a disciplinary system to punish those disobeying orders.[537] The Chamber found Ongwen and the Sinia brigade leadership engaged in a coordinated and organized effort, relying on the LRA soldiers under their control, to abduct women and girls to serve in the Sinia brigade as so-called "wives" of members of Sinia brigade and as domestic servants.[538] Further, the evidence revealed that Sinia brigade soldiers abducted civilian women and girls in executing Ongwen's orders.[539] In the exercise of his authority, Ongwen personally decided on

[524] Ibid., para. 322, referring to testimony of witnesses P-0012, and P-0768.
[525] Ibid.
[526] Ibid., referring to testimony of witnesses P-0002, P-0016, P-0888, P-0046, D-0300.
[527] Ibid., referring to testimony of witness D-0300.
[528] Ibid., para. 323, referring to testimony of witnesses P-0012, P-0768.
[529] Ibid., referring to witness P-0016.
[530] Ibid., para. 851.
[531] Ibid., para. 857.
[532] See Prosecutor v. Ongwen, Case No.: ICC-02/04-01/15, Trial Judgment (4 February 2021), paras. 206-211.
[533] Ibid., para. 206.
[534] Ibid., para. 207.
[535] Ibid., paras. 310, 420, 437, 462.
[536] Ibid., para. 847.
[537] Ibid., paras. 847-873.
[538] Ibid., para. 212.
[539] Ibid., para. 214.

the "distribution" of abducted women and girls.[540] He assigned women and girls as so-called "wives" and used his authority as LRA commander to enforce the so-called "marriage" in the Sinia brigade.[541] Within Sinia, his role was crucial and indispensable, as he helped define the system of abduction and victimization of civilian women and girls in the LRA.[542] Based on the evidence mentioned above, the Chamber concluded that Ongwen had control over the crimes by virtue of his essential contribution and the resulting power to frustrate their commission.[543] Further, the Chamber found that there existed among them an agreement to engage in conduct that amounted to rape, sexual slavery, forced marriage, and forced pregnancy, which must be attributed to him as direct and indirect co-perpetrator.[544]

6.2 Organized and Hierarchical Apparatus of Power

The organized and hierarchical apparatus of power is the second essential element that the prosecutor needs to prove. This element can be proven by:

- eyewitnesses (subordinates) and authenticated documents showing the creation and organization of groups and instructions given by the accused to commit crimes;
- eyewitnesses (subordinates) stating that the accused exercised command and control over the groups through the co-accused;
- authenticated documents containing logbooks with messages from the accused and subordinates showing that the group possessed military camps arranged in a single organizational structure, with combatants serving under the orders of the accused;
- eyewitnesses (subordinates) saying that the structure of the group mimicked a formal military structure;
- eyewitnesses (subordinates) stating that members of the group underwent military training and were issued military ranks;
- eyewitnesses (subordinates) and authenticated documents showing the existence of a disciplinary system in the group.

All the evidence must show that the group was arranged with enlisted individual foot-soldiers and officers under the orders of the accused as the superior. In the ICC *Gbagbo and Blé Goudé* case, the prosecution relied on various documents containing minutes of meetings, financial transactions, and purported recruitment of volunteers showing the accused's role as leaders (e.g., financial contributions).[545] Seven eyewitnesses testified about creating certain groups and the organization's level of groups, including the instructions given by the accused to commit crimes, including SGBCs.[546] The Chamber pointed out several

[540] Ibid., para. 214.
[541] Ibid., para. 216.
[542] Ibid., para. 3094.
[543] Ibid., para. 3095.
[544] Ibid., paras. 212, 3089.
[545] See Gbagbo and Blé Goudé, Reasons of Judge Geoffrey Henderson, supra note 494, paras. 496-540. See e.g., testimony of witnesses P-0048, P-0097, P-0449, P-0500, P-0435, P-0625, P-0176.
[546] Ibid.

shortcomings of the evidence adduced by the Prosecutor. It found that although Gbagbo was at the center of the political alignment of certain youth groups, the evidence is insufficient to conclude that he contributed to the creation of these groups.[547] Further, even if they may have pursued largely similar goals, their ideology and methodology differed considerably.[548] The evidence did not show the membership of the various groups and how becoming a member was formalized, nor to what extent members of different groups overlapped.[549] It was not also established whether some or all the groups had recourse to violence as one of the means contemplated to fulfilling their objectives.[550] Consequently, the Chamber found that the Prosecutor's evidence could not support a finding that Gbagbo exercised command and control over the groups (jeunes patriotes or other youth groups) through Blé Goudé.[551] Even if Blé Goudé had considerable influence on individuals in the groups or could mobilize large groups of young people, there was nothing from the evidence suggesting he issued specific operational instructions to particular groups or individuals, and those individuals felt compelled to comply with his instructions.[552] Whatever sway Blé Goudé may have held over the youth groups was not based on accepted chains of authority and reporting lines.[553] Therefore, the Chamber could not conclude that the "pro-Gbagbo forces" constituted 'an organized and hierarchical apparatus of power.'[554] From the judges' reasoning, the position of influence is not enough, and the Prosecutor should have provided precise evidence showing that the accused exercised effective command and control over the groups or individuals within the groups, i.e., the accused issued specific instructions to particular groups or individuals and these instructions were complied with, or punished the individuals for failing to do so.[555]

Likewise, in the ICC *Ngudjolo* case, the Prosecutor's evidence could not tie the accused to the crimes, and he was acquitted of the SGBC charges. The Trial Chamber heard the evidence of three subordinates who testified about the existence of military camps in the Bedu-Ezekere Groupement to which groups of combatants were assigned, each headed by a commander, although these military camps were not created in a conventional sense.[556] The Chamber found that it could not be established from the evidence that the Groupement possessed military camps with combatants serving under the orders of a hierarchical superior and receiving training.[557] Likewise, the Chamber found that the evidence could not support a finding that the Lendu combatants in the Groupement were arranged in a single organizational structure

[547] Ibid., paras. 540-541.
[548] Ibid.
[549] Ibid.
[550] Ibid., para. 510.
[551] Ibid., para. 863.
[552] Ibid.
[553] Ibid.
[554] Ibid., para. 864.
[555] Ibid.
[556] See Ngudjolo Chui Trial Judgment, supra note 506, paras. 378-380 (see e.g., testimony of Witness P-250, Witness P-279 and Witness P-280).
[557] Ibid., para. 388.

divided into sectors and battalions, companies, platoons, and sections.[558] Nor is it able to rule on the exact powers and roles of the various commanders mentioned by the witnesses.[559] Based on the above, the Chamber concluded that the evidence did not establish that the accused was the leader of the FNI/Lendu combatants that took part in the 24 February 2003 attack on Bogoro.[560] Specifically, the Chamber reasoned that the evidence mentioned above supported a finding that the accused held a commander's role in March 2003, i.e., after the 24 February 2003 attack on Bogoro – therefore, he could not bear responsibility for SGBCs committed on 24 February 2003.[561] Although the Chamber found that SGBCs occurred, it did not make specific findings of these crimes. Instead, it ruled only on the accused's position as the leader and ultimate control over a hierarchical organization (the FNI) that participated in the attack.[562]

The Prosecutor established this element in the ICC *Ntaganda* case, where the Trial Chamber found beyond a reasonable doubt that the UPC/FPLC was organized hierarchically, in a conventional sense. The Chamber heard the testimony of seven subordinates who testified that the FPLC was composed of Chief of General Staff, Deputy Chief of Staff in charge of Operations and Organization, and a General Staff, consisting of five specialized units headed by a designated officer.[563] They stated that the FPLC structure consisted of a "G1" in charge of administration, a "G2" in charge of military intelligence services, a "G3" in charge of operations, a "G4" in charge of logistics, and a "G5" in charge of ideology/public relations.[564] The Chamber noted that these witnesses provided a general overview of the FPLC General Staff while describing each specialized unit's competence slightly differently. Nevertheless, the Chamber considered that the witnesses' statements were consistent in terms of the units' substantive roles and found that their testimonies were credible and reliable.[565] Concerning the hierarchy below the General Staff level, five subordinates testified that, further down the scale, the organization of the FPLC replicated that of a conventional modern army, whose members underwent training and ranks were made official in the FPLC in April/May 2003 ceremony.[566] The Chamber also reviewed the documentary evidence containing a logbook consisting of a message by the accused to all stations announcing a "new setup" in February 2003, reorganizing five brigades, composed of a total of 13 battalions, each headed by a commander.[567] There existed in the organization a disciplinary system. As stated by two subordinates, the commanders and leaders of the FPLC could punish subordinates for violations or failure to execute orders through imprisonment and or violent

[558] Ibid.
[559] Ibid.
[560] Ibid., para. 503.
[561] Ibid., para. 197; Prosecutor v. Ngudjolo Chui, Case No. ICC-01/04-02/12 A, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II (7 April 2015), para. 296.
[562] See Ngudjolo Chui Trial Judgment, supra note 506, para. 338.
[563] See Ntaganda Trial Judgment, supra note 514, paras. 316-317, 319, referring to testimony of witnesses P-0901, P-0012, P-0016, P-0907, P-0963, D-0300, P-0055.
[564] Ibid.
[565] Ibid., para. 319, footnote 838.
[566] Ibid., para. 324, referring to testimony of witnesses P-0901, P-0963, P-0017, P-0055, D-0300.
[567] Ibid., para. 329, footnote 879.

beatings.[568] However, three subordinates testified that they were not aware of any instances when the UPC/FPLC soldiers or commanders were punished for raping women in the group.[569] Based on the evidence mentioned above, the Trial Chamber found that the UPC/FPLC was a well-organized armed group, consisted of a high number of trained soldiers, and possessed a significant arsenal of weapons, resembled a conventional army, and had a formal military structure.[570] The UPC/FPLC functioned as a tool in the hands of the co-perpetrators, through which they were able to commit the crimes, including SGBCs.[571] Therefore, the conduct of the individual UPC/FPLC soldiers in executing the crimes must be attributed to the accused as co-perpetrator.[572]

In establishing this element in the *Ongwen* case, the Trial Chamber relied extensively on several insider witnesses and documentary evidence, including radio intercepts and logbook messages. The insider witnesses testified about the hierarchical structure of the LRA, with Joseph Kony being the highest authority.[573] They stated that the LRA was divided into four brigades, including Sinia, Stockree, Gilva, and Trinkle, each headed by a commander.[574] The evidence revealed that brigades were divided into battalions and further into companies, each led by a commander.[575] Joseph Kony generally communicated orders directly or through his deputy, Otti, to the brigade commanders, which cascaded down to the battalion commanders and subordinates.[576] They stated that the subordinates generally complied with orders to commit crimes.[577] Simultaneously, when Joseph Kony was away, brigade and battalion commanders took the initiative to issue orders and ensure compliance.[578] Recruits underwent violent military training in various forms.[579] The evidence also revealed the Sinia Brigade's inner workings, including the accused position, orders issued, subordinates' compliance with orders, and the existence of a disciplinary system to punish those disobeying orders.[580] On the latter, the Trial Chamber emphasized that the accused must rely on the soldiers under their control to execute their agreement and the material elements of the crimes.[581] Upon reviewing the testimonial and documentary evidence showing the level of organizations of the LRA, the Chamber found that the conditions of recruitment, initiation, and training, and service in the LRA of its members were such that LRA commanders could rely for obedience in the execution of orders on a reliable

[568] Ibid., paras. 331-332, referring to the testimony of witnesses D-0300, P-0769, P-0016.
[569] Ibid., para. 332, referring to testimony of witnesses P-0017, P-0907, P-0963.
[570] Ibid., para. 814.
[571] Ibid., paras. 818-819.
[572] Ibid.
[573] See Ongwen Trial Judgment, supra note 532, paras. 854-970.
[574] Ibid.
[575] Ibid.
[576] Ibid
[577] Ibid.
[578] Ibid.
[579] Ibid.
[580] Ibid., paras. 847-873.
[581] Ibid., paras. 212, 3090.

pool of persons.[582] This means that the will of the individual Sinia brigade members was immaterial in executing a given order. Therefore, the Chamber concluded that the individual Sinia brigade members' conduct in committing the crimes must be attributed to Dominic Ongwen as his own.[583]

6.3 Conclusion

In conclusion, when proving the accused's level of control over the organization, the prosecutor must prove the accused's leadership position and the level of control he had over the organization and the personnel as a means of exercising control over the crime. The position of the accused can be proven either *de jure* or *de facto* through formal appointment or as a respected and influential figure of authority in the army and the community.[584] It is also decisive to show from the evidence the role or leadership position held by the accused during the attack (not before or after the events),[585] including how he exercised the authority he had.[586] For control over the SGBCs, several chambers stressed that the prosecutor must prove that the accused had the material ability to issue and ensure compliance with orders.[587] This entails establishing that subordinates followed and implemented his orders[588] and that he could discipline soldiers disobeying orders through severe punishment, imprisonment, dismissal, or personnel replacement.[589] For the organized and hierarchical apparatus of power, some chambers emphasized the prosecutor must prove that the group was a well-organized armed group (in particular on its internal organization and hierarchical apparatus of power)[590] under the orders of a hierarchical superior, including the involvement of the accused and this group in the attack.[591] The organized group must consist of many trained soldiers, sufficient weapons, and well-structured, which resembled a conventional army with a formal military structure.[592] The prosecutor must show that the group functioned as a tool in the hands of the co-perpetrators, through which they were able to commit the crimes, including SGBCs.[593] Lastly, several chambers emphasized that even if proven that SGBCs occurred, the prosecutor must establish that the accused entered a common plan with the other

[582] Ibid., paras. 2856, 2858.
[583] Ibid., para. 3091.
[584] See Ntaganda Trial Judgment, supra note 514, paras. 321-322; see also Gbagbo and Blé Goudé, Reasons of Judge Geoffrey Henderson, supra note 494, para. 1944.
[585] See Ngudjolo Chui Trial Judgment, supra note 506, para. 503.
[586] Ibid., para. 496.
[587] See Ntaganda Trial Judgment, supra note 514, para. 322, referring to testimony of witness P-0963; see also Gbagbo and Blé Goudé, Reasons of Judge Geoffrey Henderson, supra note 494, para. 1944.
[588] Ibid.
[589] See Ntaganda Trial Judgment, supra note 514, para. 323, referring to testimony of witness D-0300, P-0017; see also Gbagbo and Blé Goudé, Reasons of Judge Geoffrey Henderson, supra note 494, para. 1944.
[590] See e.g., Ngudjolo Chui Trial Judgment, supra note 506, para. 388.
[591] Ibid.
[592] See Ntaganda Trial Judgment, supra note 514, para. 814; see also Gbagbo and Blé Goudé, Reasons of Judge Geoffrey Henderson, supra note 494, para. 1944; see Ongwen Trial Judgment, supra note 532, paras. 854-970.
[593] See Ntaganda Trial Judgment, supra note 514, paras. 818-819; see also Gbagbo and Blé Goudé, Reasons of Judge Geoffrey Henderson, supra note 494, para. 1944; see Ongwen Trial Judgment, supra note 532, para. 3091.

alleged co-perpetrators to commit the SGBCs or show that these crimes formed part of the common purpose.[594]

The table below shows what elements need to be proven and the pieces of evidence accepted by the chambers to prove SGBCs under indirect co-perpetration. At the minimum, the prosecutor must prove that the accused had control over the organization and the personnel that committed the SGBCs.

Elements to prove	**How elements can be proven**	**Types of evidence**
The accused had control over the organization that committed the SGBCs	• Testimonies of eyewitnesses, victims, subordinates, stating that the accused was in position of authority and exercised command and control over individuals in the organization; • Subordinates saying that there was an agreement among leaders to commit the crime; • Subordinates stating that the accused issued specific orders which were obeyed; • Subordinates attesting that the accused delivered weapons and gave orders to commit the crime; • Agreed facts from other judgments indicating that the accused was in position of authority and exercised command and control over individuals in the organization; • Documents containing various exhibits, showing the creation of operational zones each headed by a commander; • Documents containing minutes of meetings showing that the accused regularly met with the commanders;	Victims' testimonies Eyewitnesses' testimonies Documentary evidence

[594] See Ntaganda Trial Judgment, supra note 514, para. 781; see also Gbagbo and Blé Goudé, Reasons of Judge Geoffrey Henderson, supra note 494, para. 1944.

Organized and hierarchical apparatus of power	• Testimonies of eyewitnesses describing creation and organization of groups and instructions given by the accused to commit crimes; • Subordinates saying that the accused exercised command and control over the groups through the co-accused; • Subordinates stating that the group possessed military camps arranged in a single organizational structure, with combatants serving under the orders of the accused; • Subordinates attesting that the structure of the group mimicked a formal military structure and members underwent training and were issued military ranks; • Subordinates confirming the existence of a disciplinary system in the group; • Documents containing logbooks with messages from the accused showing that the group possessed military camps arranged in a single organizational structure, with combatants serving under the orders of the accused; • Documents describing the existence of a disciplinary system in the group.	

7. Concluding Remarks

Prosecuting international crimes through indirect modes of liability is more complicated than direct modes of liability. Regarding SGBCs, there are many actors involved, and the SGBCs are often committed by collective entities, in which individual actors of these acts are embedded. Individual attribution is very difficult to determine, which involves a painstaking process. It entails, for instance, careful proof of both the SGBCs through the crime-based evidence and linkage to the accused, i.e., the accused's level of control over the subordinates/organization that committed the crime, knowledge and intent, action, or omission. The latter requires proof whether the accused ordered, punished, or investigated subordinates' crimes, including establishing the character/structures of the organizations, existence of an agreement, and essential contribution of the accused. As seen above, out of the 47 cases analyzed, only 21 led to a conviction, 10 of them charged through JCE III, which shows that many people indicted for SGBCs through the JCE III mode of liability were indeed found guilty. The remaining convictions concerned 10 cases: 2 charged as JCE I, 1 as JCE II, 6 command responsibility cases, and 2 indirect co-perpetration cases. All the cases relating to the three new modes of liability introduced by the ICC (co-perpetration, indirect perpetration, and indirect co-perpetration) have so far failed to survive the trial stage, except for *Ntaganda* and *Ongwen* (pending appeal), who were convicted as indirect co-perpetrator for SGBCs as a war crime and a crime against humanity.[595]

[595] See Ntaganda Trial Judgment, supra note 514, paras. 818-819; see Ongwen Trial Judgment, supra note 532, paras. 212, 3089.

For the Joint Criminal Enterprise, 20 cases were analyzed, which resulted in 13 convictions and 7 acquittals. For JCE I, 2 convictions and 3 acquittals were recorded. The acquittals stressed the need to secure enough evidence to prove that the SGBCs happened (*Haradinaj et al., Mrksic et al., Krajisnik*). In fact, in *Haradinaj et al.*, the victim could not identify the accused, Balaj, as the person who raped her.[596] In *Mrskic et al.*, the only eyewitness was considered unreliable, and the account he made in court was deemed inconsistent with the other evidence available.[597] The 3 cases analyzed for the JCE II resulted in 1 conviction and 2 acquittals, and they all belong to the *Kvocka et al*. case. Two of the three accused, Kvocka and Zigic, were acquitted at the appeal stage. Kvocka was acquitted because the witnesses' testimonies did not provide the exact dates when SGBCs took place,[598] which underscored the difficulty to prove that Kvocka was in Omarska camp when the crimes occurred. In *Zigic*'s case, the prosecution provided only one witness that could recall only one incident, involving Zigic in a beating,[599] thus making it impossible for the judges to draw the inference that Zigic contributed significantly to the functioning of the camp or that he committed concrete crimes.[600] JCE III analyzed 12 cases involving 10 convictions and 2 acquittals. In the *Milutinovic* case, the documentary and testimonial evidence the prosecution brought was not convincing enough to prove that Milutinovic exercised actual command authority over the VJ and contributed significantly to the JCE.[601] The *Ngirabatware* case reminds us that, apart from the SGBCs, it is also vital to prove the accused's essential contribution to the common purpose, risking otherwise the case's dismissal. [602]

For superior/command responsibility, 21 cases were analyzed, 6 of which resulted in convictions and 15 in acquittals. The low rate of conviction indicates that this mode is particularly difficult to prove. *Blaskic, Bemba, Delalic,* and *Delic* cases were all dismissed because of the prosecution's inability to prove that the accused enjoyed effective control over the physical perpetrators of the SGBCs. For instance, in *Bemba*, the documentary and testimonial evidence showing how the accused did not have investigative powers. His physical remoteness from CAR also impeded his ability to punish troops for the SGBCs committed.[603] In *Delalic,* a phone call with a medical doctor,[604] introduced by the prosecution to prove that Delalic was in charge of troops, became an instrument in the defense's hands to prove that, instead, Delalic had no control.[605] In the *Delic* case, a detainee list given to Delic in the absence of Mucic did not indicate that Delic could punish and discipline the troops in the Celebici prison camp.[606] In *Bagosora* and *Kajelijeli*, the

[596] See Haradinaj et al. Trial Judgment, supra note 26, para. 469 (testimony of witness 61, witness 1, and witness 56).
[597] See Mrkšić et al. Trial Judgment, supra note 37, para. 529,
[598] See Kvocka et al. Appeal Judgment, supra note 86, para. 99 (Witness J).
[599] Ibid., para. 597 (witness Azedin Oklopčić).
[600] Ibid., para. 599.
[601] See Sainovic et al. Trial Judgment, supra note 116, para. 284.
[602] See Ngirabatware Appeal Judgment, supra note 171, para. 251.
[603] See Bemba Appeal Judgment, supra note 251, paras. 167-169, 170-172.
[604] See Delalic et al. Trial Judgment, supra note 202, para. 670.
[605] Ibid.
[606] Ibid., para. 807.

prosecution could not prove the accused's presence on the crime scenes, which resulted in acquittal.[607] In *Bagosora, Muvunyi,* and *Nizeyimana*, the prosecution neither specified the identity of the perpetrators (i.e., which unit the perpetrators belonged to), which made it impossible to link the SGBCs committed by the perpetrators to the accused,[608] nor clarified the roles of the accused in the perpetration of the SGBCs.[609] Also, in *Mugenzi* case (*Bizimungu et al.* (*Government II*)), the only witness could not provide a link between the accused and the alleged perpetrator of the woman's rape[610] or prove that the accused knew or had reason to know of the rape.[611]

The prosecutor must prove the accused's knowledge of the crime, a failure of which will result in an acquittal. In the *Ojdanic* and *Lazaravic* cases, the judges were not convinced that either Ojdanic or Lazarevic knew about the specific sexual assaults committed by the VJ or that they had reason to know about them.[612] Nsengiyumva's acquittal underscores that the (witnesses) have to have first-hand or direct knowledge of these rapes.[613] Further, when a witness is an insider, the judges will always ask for corroboration of his testimony, especially if he is an accomplice of the accused.[614] The acquittal of Jérôme-Clément Bicamurnpaka and Prosper Mugiraneza, in the same case, also highlights that the SGBC charge will not stand if, to prove the accused's knowledge of the crimes, only an expert witness is brought forward without direct or concrete evidence.[615] The acquittal of the accused Prlic in *Prlic et al.* underscore the need to contextualize the SGBCs within the other international crimes (i.e., whether it took place in the course of expulsion campaign, forcible displacement, or deportation), as the eyewitnesses presented by the prosecution only helped to prove that two girls were raped but they did not establish that this was done during an operation to expel them from West Mostar,[616] nor the accused's awareness of them.[617] In both Lazarevic and Ojdanic's acquittals (*Sainovic et al.),* the documentary evidence and the subordinates' testimonies, presented by the prosecution, were not considered sufficient to prove that sexual assaults were intended aims of the campaign of forcible displacement.[618] Finally, Renzaho's acquittal underscores the need to specify dates and locations of the SGBCs charged. The Chamber acquitted him at the appeal stage

[607] See Bagosora et al. Judgment & Sentence, supra note 214, para. 1776; Kajelijeli Trial Judgment, supra note 298, paras. 924- 925.
[608] See Bagosora et al. Judgment & Sentence, supra note 214, para. 1776; Muvunyi Judgment & Sentence, supra note 272, para. 526.
[609] See Bagosora et al. Judgment & Sentence, supra note 214, para. 1776; Muvunyi Judgment & Sentence, supra note 272, paras. 525-526. The Appeals Chamber confirmed this decision. See Muvunyi Appeal Judgment, supra note 275, para. 166; Nizeyimana Judgment & Sentence, supra note 276, paras. 1022, 1035, 1036-1037, 1048-1049.
[610] See Bizimungu et al. Decision on defence motions pursuant to rule 98 bis, supra note 319, paras. 89-90.
[611] Ibid.
[612] See Sainovic et al. Trial Judgment, supra note 116, paras. 633, 933, 935, 1209, 1211.
[613] See Bagosora et al. Judgment & Sentence, supra note 214, paras. 1729-1730.
[614] Ibid., para. 1731.
[615] See Bizimungu et al. Decision on defence motions pursuant to rule 98 bis, supra note 319, para. 96; see also Bizimungu et al. Decision on the Admissibility of the Expert Testimony, supra note 323 (in which this chamber ruled "inadmissible those portions of Dr. Nowrojee's evidence that fall outside the scope of her expertise or express opinions on ultimate issues before the chamber).
[616] See Prlic et al. Trial Judgment, supra note 152, para. 927.
[617] Ibid.
[618] See Sainovic et al. Trial Judgment, supra note 116, paras. 633, 1209.

because the prosecution failed to establish the dates and locations of the meetings at which Renzaho encouraged the rapes, the dates and locations of the rapes, and the victims' names.[619]

For co-perpetration, there was only 1 SGBC case, the *Katanga* case at the ICC that ended in an acquittal. The judges specified that the evidence must establish that the SGBCs committed formed part of the common purpose, showing that the perpetrators wanted to commit SGBCs or knew these crimes would happen, and not that they committed SGBCs only because they had the opportunity to do so.[620] Katanga is also, so far, the only SGBC case prosecuted under indirect perpetration. His acquittal reminds us that being at the apex of an organization does not necessarily mean that the accused possesses the material ability to issue and ensure compliance with orders.[621] Therefore, the prosecutor must prove that the accused had the material ability to issue and ensure compliance with orders.[622] This entails proving that the accused wielded effective control over the group as a way to exercise control over the SGBCs.[623]

For indirect co-perpetration mode, 4 cases at the ICC have been analyzed, 2 of them resulting in acquittals and 2 in a conviction at the trial stage. Gbagbo and Blé Goudé's acquittal show several mistakes made by the prosecution. The evidence could not prove whether Gbagbo could issue direct orders to the commanders and ensured compliance or whether he could discipline commanders who disobeyed.[624] The three witnesses' testimonies were deemed as hearsay, lacking specificity and probative value.[625] Further, there was no evidence indicating the existence of an operational order originating from the two accused or other "inner circle" members that bypassed the existing chain of command.[626] Also, the evidence could not prove that Gbagbo had contributed to creating different groups (jeunes patriotes and/or other youth groups).[627] The evidence could not support a finding that Gbagbo exercised command and control over the groups through the co-accused, Blé Goudé.[628] Whatever sway Blé Goudé may have held over the youth groups was not based on accepted chains of authority and reporting lines.[629] Therefore, the Chamber could not conclude that the "pro-Gbagbo forces" constituted 'an organized and hierarchical apparatus of power.'[630] Ngudjolo's acquittal shows that the evidence introduced was insufficient to prove that the Bedu-Ezekere Groupement possessed military camps with combatants serving under the orders of a hierarchical superior and receiving

[619] See Renzaho Appeal Judgment, supra note 397, para. 128.
[620] See Katanga Trial Judgment, supra note 422, para. 1664.
[621] Ibid., para. 1420.
[622] Ibid.
[623] Ibid., paras. 1365, 1420.
[624] See Gbagbo and Blé Goudé, Reasons of Judge Geoffrey Henderson, supra note 494, para. 454.
[625] Ibid., paras. 413, 417-418.
[626] Ibid., para. 455.
[627] Ibid., paras. 540-541.
[628] Ibid., para. 863.
[629] Ibid.
[630] Ibid., para. 864.

training.[631] The evidence did not also prove that the Lendu combatants were arranged in a single organizational military structure or clarify the various commanders' exact powers and roles.[632] The Chamber found that, except for two witnesses, all the witnesses who testified about the accused's position did so based on hearsay, and none were actually present in Bedu-Ezekere Groupement before the attack[633] or provided any other details on the authority allegedly held by Ngudjolo or on how he exercised it.[634] Lastly, the *Ntaganda* and *Ongwen* trials underscore that it is essential to establish that the group functioned as a tool in the hands of the co-perpetrators, through which they were able to commit the crimes, including SGBCs.[635]

Given the above, it can be concluded that the provisions laid down in the ICTY, ICTR, and Rome Statutes on indirect modes of liability are well elaborated and sufficient to secure convictions of high-level officials. However, the main challenge seems to be anchored to the choice of the modes of liability charged and the evidence required to faithfully evaluate the chosen mode's legal requirements. In particular, at the ICC, the analysis of the *Katanga, Ngudjolo, Gbagbo, Ntaganda*, *Ongwen*, and *Bemba* Judgments show several difficulties, such as assessing the evidence to establish the mental state of the accused, constructing the link between the accused and the SGBCs, proving the accused's level of control (both over the subordinates and over the SGBCs), and defining the "group" requirement. The high level of acquittals calls for the reinforcement of the way evidence is gathered and assessing the accused's role. Tables have been provided above under each mode of liability that proposes ways to address these problems in the future. The next chapter will provide a detailed analysis of the types of evidence used in the cases described in Chapters 5 and 6.

[631] See Ngudjolo Chui Trial Judgment, supra note 506, para. 388.
[632] Ibid.
[633] Ibid., para. 496.
[634] Ibid.
[635] See Ntaganda Trial Judgment, supra note 514, paras. 818-819; see Ongwen Trial Judgment, supra note 532, para. 3091.

Chapter VII. Types of Evidence for Proving Sexual and Gender-Based Crimes and Modes of Liability

1. Introduction

This chapter will discuss the types of evidence used to prove SGBCs and the modes of liability charged in the cases analyzed in Chapters 5 and 6. In the first section, the chapter will discuss the victim's testimony by defining who is a victim and the specific rules of evidence and procedures that aim to protect victims from psychologically harmful attacks on their integrity and sexuality, namely corroboration, consent, and prior or subsequent sexual conduct. In this section, the types and nature of victims' testimonies will be discussed, including the judges' criteria to assess inconsistencies and reliability of victim's testimony and the usefulness of victims' testimonies in proving the crime and modes of liability charged. In the next section, the study will examine the eyewitness' testimony by defining who is an eyewitness, the nature and types of eyewitnesses, such as bystanders, insider witnesses, informants or members of the perpetrator group or people victimized by the circumstances, who directly saw or heard what precisely occurred. This section will also discuss the judges' criteria to assess eyewitness inconsistencies and reliability and the usefulness of eyewitnesses' testimonies in proving the crime and modes of liability charged. This will be followed by a discussion on perpetrators' testimonies in SGBC cases. This section will define the perpetrator's testimony, nature, and the types of perpetrators' testimonies, such as statements from the defendants, co-defendants, accomplices, and co-conspirators. An analysis will follow on the criteria used by the judges to assess the credibility of perpetrators' testimonies and how valuable they are in proving the crime and modes of liability charged.

Expert testimony will be discussed next, including its definition, the difference between an expert and an ordinary witness, the nature and types of expert witnesses, and the qualification required to be an expert witness. It will also examine the judges' assessment criteria when determining whether expert testimony is relevant and trustworthy and the usefulness of expert testimonies in proving SGBC acts and modes of liability charged. This discussion will be followed by examining documentary evidence, including the nature and types of documents that the prosecution and defense could present to prove their case. It will also analyze the judges' criteria to assess the authenticity, genuineness, and relevance of documentary evidence specific to the case at issue. The section will also evaluate the documents presented by the prosecution and the defense and assess their usefulness in proving the crime and the modes of liability charged. Finally, at the end of these discussions, the chapter will draw analysis on the means available before the ICTY, ICTR, and ICC to prove SGBCs and the modes of liability charged, in particular victims' testimonies, eyewitnesses' testimonies, perpetrators testimonies, expert testimonies, and documentary evidence. It will

also analyze the judges' assessment criteria on credibility and reliability of evidence as to whether these are adequate or not and any improvement needed going forward.

2. Victims' Testimony in SGBC Cases

2.1 The Type and Nature of Victims' Testimonies

The definition of victim in ICC rule 85 of the RPE is guided by the 1985 United Nations Victims Declaration, which covered protection, participation, and reparations.[1] ICC rule 85(a) distinguishes between natural persons and organizations or institutions. A victim is someone who has suffered harm as a result of the commission of any crime within the jurisdiction of the court.[2] However, since this notion seems not too clear and might be understood in many different ways, the court has resorted to the Van Boven and Bassiouni principles and international human rights courts' practice for further guidance.[3] Harm to natural persons[4] denotes hurt, injury, and damage, and the definition covers material, physical, and psychological (or emotional) harm, but only insofar as the harm is suffered personally by the victim (personal harm).[5] Although the harm must be suffered personally, direct victims and indirect victims, such as family members of someone killed or a child soldier, are covered by the definition.[6] According to ICC rule 85(b), "legal persons" may as well qualify as victims, but the definition requires that they have sustained direct harm and that this relates to particular property dedicated to religion, education, art or science or charitable purposes, and to historic monuments, hospitals, and other places and objects for humanitarian purposes.[7] Anyhow, the harm must relate to a crime within the jurisdiction of the court in substantive, territorial, and temporal terms, which means there must be a nexus between the harm and a crime actually investigated or prosecuted by the tribunals and courts.[8]

The experience of testifying about traumatic, violent incidents can impact victims differently. Obviously, each victim will have his or her own reasons for testifying or not. Victims could be prevented from coming

[1] Rule 85, ICC Rules. See generally, Silvia Fernández de Gurmendi, "Definition of Victims and General Principle." In The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, edited by Lee S. Roy, and Hakan Friman. Ardsley, NY: Transnational, 2001, pp. 427–34.
[2] Rule 85(a), ICC Rules.
[3] See Prosecutor v. Lubanga, Case No.: ICC-01/04-01/06, Decision on victim participation (18 January 2008), para. 92 (see Judge Blattmann's dissent, paras. 4-5), and Prosecutor v. Lubanga, Case No.: ICC-01/04-01/06 OA 11, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008 (11 July 2008), paras. 20, 33.
[4] Practice varies from chamber to chamber concerning whether deceased persons are included or not: see e.g., Situation in Darfur, Case No. ICC-02/05-1 I 1-Corr, Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants (14 December 2007), para. 36 (excluded deceased person); Prosecutor v. Bemba, Case No.: ICC-01/05-01708, Fourth Decision on Victims' Participation (12 December 2008), para. 40 (included deceased person).
[5] See Lubanga Appeal Judgment, supra note 3, paras. 31–32. Hence, personal harm, not collective harm, is decisive for the right to participate: ibid., paras. 35 and 37.
[6] Ibid., para. 32 (see Judge Pikis dissent, para. 3). See also Lubanga Decision on victim participation, supra note 3, para. 91; Prosecutor v. Lubanga, Case No.: ICC-01/04-01/06, Decision on indirect victims (8 April 2009).
[7] Rule 85(b), ICC Rules; See Robert Cryer et al., Victims in the International Criminal Process, in An Introduction to International Criminal Law and Procedure. 2nd ed. Cambridge: Cambridge University Press, 2010, p. 481.
[8] Rule 85(a), ICC Rules.

forward to give evidence to the prosecutors for various personal reasons. Some victims of SGBCs may be reluctant due to fear of being ostracized by their communities and families or condemned to not being able to find a partner and get married.[9] Some may suffer from trauma that affects their ability to coherently or comprehensively recount their experience - their memory may suffer, and emotional shock may affect their reactions to questioning.[10] Others may want to avoid any chance of remembering the past, and some may not have faith in the legal system.[11] Gender roles and identities within their communities may also affect victims' willingness to come forward and talk about what happened.[12] The hesitance to speak could be compounded if the victims live in the same community with perpetrators and fear retaliation for speaking against them. Notwithstanding the above, many victims still would want to testify and each victim coming forward has various reasons for testifying. Some have come looking for justice or public recognition of their sufferings,[13] while others come forward so that no one else will have to suffer as they did.[14] Some feel they have the moral obligation to speak for those who did not survive the violence,[15] while some may see this as an opportunity to help them recover from their sufferings.[16] While some victims have been willing to testify in court, others have been unwilling and needed to be encouraged and supported by the court itself.[17] The prosecutors must be aware of these factors and adopt appropriate approaches to address these challenges when seeking evidence from victims. The various motivations, needs, and expectations of victims require careful individual assessment and assistance throughout the judicial process.[18] It is also essential for the court to be aware of the specific reasons why victims have been reluctant to testify and not always assume or generalize that the reasons are, by ground, shame and stigma. This will help to eradicate stereotypes that credible SGBCs' victims respond in the same way when testifying.

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[9] See Priya Gopalan, Daniela Kravetz, and Aditya Menon, "Proving Crimes of Sexual Violence." In Prosecuting Conflict-Related Sexual Violence at the ICTY, edited by Baron S. Brammertz and Michelle Jarvis. Oxford: Oxford University Press, 2016, p. 113.

[10] See Wakabi Wairagala, "Expert Describes Trauma Among Central African Rape Victims." International Justice Monitor, 29 November 2010. < https://www.ijmonitor.org/2010/11/expert-describes-trauma-among-central-african-rape-victims/> accessed 16 April 2020; see also Stuart Lustig, Symptoms of Trauma Among Political Asylum Applicants: Don't Be Fooled. Hastings International & Comparative Law Review 31 (2008), p. 725; Karl Hanson, The Psychological Impact of Sexual Assault on Women and Children: A Review. Sex Abuse 3 (1990), pp. 187-232. Additional resources are available on the Sexual Violence Research Initiative website about mental health consequences of sexual assault, at http://www.svri.org/mental.htm.

[11] Ibid.

[12] See Michael Peel, "Men as Perpetrators and Victims." In Rape as a Method of Torture, edited by Michael Peel. London: Medical Foundation for the Care of Victims of Torture, 2004, pp. 61-69; Jayne Walker, John Archer, and Michelle Davies, Effects of Rape on Men: A Descriptive Analysis. Archives of Sexual Behavior 34, no. 1, (2005), pp. 69-80; Sandesh Sivakumaran, Lost in Translation: UN Responses to Sexual Violence against Men and Boys in Situations of Armed Conflict. International Review of the Red Cross 92 (2010), pp. 259-277; Kathy Doherty, and Irina Anderson, Making Sense of Male Rape: Constructions of Gender, Sexuality and Experience of Rape victims. Journal of Community & Applied Social Psychology 14 (2004), pp. 85-100.

[13] See Gabriela Mischkowski and Gorana Mlinarevid, The Trouble with Rape Trials: Views of Witnesses, Prosecutors and Judges on Prosecuting Sexualized Violence During the War in the Former Yugoslavia. Cologne: Medica Mondiale, 2009, p. 55.

[14] Ibid., p. 52.

[15] See Eric Stover, The Witnesses: War Crimes and the Promise of Justice in The Hague. Philadelphia: University of Pennsylvania, 2005, p. 76; Wendy Lobwein, The Work of the Victims and Witness Section of the International Criminal Tribunal for the Former Yugoslavia. In Der Internationale Strafgerichtshof: Funf Jahre nach Rom. Berlin: Dt. Inst. für Menschenrechte, 2003, p. 70.

[16] See Gopalan, Kravetz, and Menon, Proving Crimes of Sexual Violence, supra note 9, p. 113.

[17] Ibid.

[18] While referring to witnesses who have testified before the ICTY, Stover notes that, when prosecutors paid more attention to the needs of their witnesses, a higher degree of witness satisfaction resulted.' See Stover, The Witnesses, supra note 15, p. 90.

To resolve the issues listed above, ICTY/ICTR rule 96 and ICC rules 70 and 71 of the RPE have incorporated mechanisms that aim to shield victims from psychologically harmful attacks on their integrity and sexuality.[19] For instance, these rules generally exclude or restrict the admission of information of a rape victim's prior sexual conduct to infer that she consented to have sex with the defendant.[20] Further, the ICTY/ICTR rule 96(i) and ICC rule 63(4)) state that 'sexual assault shall require no corroboration of the victim's testimony.'[21]The rules draw attention to the particular difficulties associated with gathering evidence to prove SGBCs because these cases often occur several years before trial. Hospitals or medical records of rape are often unavailable during war, and sexual assault cases often occur without direct eyewitnesses or neutral eyewitnesses to the events.[22] The rule highlights distinctive procedural and evidentiary elements. First of all, although the judges cannot corroborate the victim testimony in sexual assault cases, it is 'not a rule on admissibility or exclusion; it rather concerns reliability and assessment of the evidence.'[23] Moreover, it confers upon the judges the power to rule on a single testimony provided such testimony is relevant and credible.[24] This is the very reason why SGBC cases should not be subjected to higher evidentiary standards than any other type of crime.[25] No corroborating evidence of a rape victim is indeed helpful in SGBC cases, but, in practice, there have been some cases where the judges did not apply this rule by refusing to convict the accused on the basis of a single victim's testimony (see Section 2.2 below for in-depth discussion).[26] As explained, corroboration is not a legal requirement in SGBC cases. However, leading corroborative evidence to support a victim's account in situations where the evidence is weak could still help the judges reach their findings (the same as for other crimes).[27] For instance, in the *Kunarac et al.* case, the Trial Chamber found that the rape victim's evidence identifying Kunarac was supported by an eyewitness present at the house where the victim was raped. The eyewitness testified that she saw a man there being addressed by Kunarac's nickname Zaga.[28] The eyewitness's ability to place Kunarac at the

[19] Rules 70-71 ICC Rules; Rule 96, ICTY/ICTR Rules.
[20] Kate Fitzgerald, Problems of Prosecution and Adjudication of Rape and Other Sexual Assaults under International law. European Journal of International Law 8 (1997), p. 646.
[21] Rule 96(i), ICTY and ICTR and 63(4), ICC Rule; Prosecutor v. Delalic et al., Case No. IT-96-21-T, Trial Judgment (16 November 1998), para. 936. This means that victim's testimony, supported by a physical and psychological assessment of harm and assessed alongside existing evidence, should not require further corroboration to be considered as proof.
[22] See Daniel Nsereko, Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia. Criminal Law Forum 5 (1994), pp. 507, 547. See also Mischkowski and Mlinarevid, supra note 13, p. 18 (noting that because most rapes happen without witnesses many women do not report the attack. This is one of the reasons why rape is one of the most underreported crimes worldwide in domestic jurisdictions).
[23] See Patricia Viseur Sellers, "Rule 89(C) and (D): At Odds or Overlapping with Rule 96 and Rule 95?" In Essays on ICTR Procedure and Evidence in Honour of Gabrielle Kirk McDonald, edited by Richard May, David Tolbert, and John Hocking. The Hague: Kluwer, 2001, p. 280; Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion & Judgment (7 May 1997), para. 536; Virginia Morris and Michael Scharf, An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia. Ardsley, NY: Transnational,1995, p. 263.
[24] See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment (2 September 1998), para. 135; Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence (6 December 1999), para. 18; Rule 63 (4), ICC Rule; Prosecutor v. Delalic et al., Case No.: IT-96-21-A, Appeal Judgment (20 February 2001), paras. 504, 506; Prosecutor v. Aleksovski, Case No. ICTY-95-14/1-A, Appeal Judgment (24 March 2000), para. 62; Prosecutor v. Kupreskic et al., Case No. ICTY-95-16-A, Appeal Judgment (23 October 2001), para. 220.
[25] See Prosecutor v Dordevic, Case No.: IT-05-87/1-A, Appeal Judgment (27 January 2014), para. 887.
[26] See e.g., Prosecutor v. Haradinaj et al., Case No. IT-04-84-T, Trial Judgment (3 April 2008), paras. 465-469; Prosecutor v. Kunarac et al., Case No.: IT-96-23-T & IT-96-23/1-T, Trial Judgment (22 February 2001), paras. 787-788.
[27] See Gopalan, Kravetz, and Menon, supra note 9, pp. 151-2.
[28] See Kunarac et al. Trial Judgment, supra note 26, paras. 318, 677.

location where the victim was raped assured the Chamber of the reliability of the victim's identification of the accused.[29] Therefore, as with all categories of crimes, it would be helpful for prosecutors to gather any available supporting evidence to ensure the presentation of the strongest possible case in court. The prosecutor should assess this on each case's merits without attaching any significance to the victim's sex or nature of the crime.[30] This rule is important because, apart from protecting the integrity and sexuality of the victim, it addresses the difficulties associated with collecting evidence in SGBC cases and provides the possibility to rule on one single reliable testimony.[31]

The concept of non-consent was established to protect the victim from questions relating to giving consent to the sexual act, i.e., the emphasis has been shifted away from having to prove an absence of consent towards establishing the presence of coercive circumstances.[32] ICTY/ICTR rule 96 (ii) and ICC rules 70(a-c) state that there is no need to establish consent where there was a coercive environment or circumstances.[33] This has created a presumption of non-consent. This is satisfied if the victim 'has been subjected to or threatened with or has reason to fear violence, duress, detention, or psychological oppression, or if the victim reasonably believes that any refusal to submit, another might be so subjected, threatened, or put in fear.'[34] As many scholars and experts have enlightened, genuine consent under circumstances of mass violence, duress, detention, threats, and coercion is viewed as being essentially impossible. In contrast, coercion may be inherent in certain circumstances, such as detention, armed conflict, military presence, or crimes committed against persons incapable of genuine consent, such as a child or persons with intellectual disability.[35] The *Kunarac et al.* Appeals Chamber, for instance, concluded that the circumstances of detention in the case were so coercive they negated any possibility of consent.[36] It added that circumstances

[29] Ibid., para. 677.
[30] See Anne-Marie de Brouwer, Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR. Cambridge, UK: Intersentia, 2005, p. 263.
[31] See Tadic Opinion & Judgment, supra note 23, para. 536; Karim Khan et al., Archbold International Criminal Courts: Practice, Procedure, and Evidence. London: Sweet & Maxwell, 2013, p. 476.
[32] See Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Trial Judgment (10 December 1998), paras. 175-86.
[33] Rule 96(ii), ICTY/ICTR Rules and Rules 70(a-c), ICC Rules; In cases of Sexual Violence, the Court shall be guided by and, where appropriate, apply the following principles: (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent; (b) Consent cannot be inferred by reason of any words of conduct of a victim where the victim is incapable of giving genuine consent; (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence; see also Richard Goldstone, Prosecuting Rape as a War Crime. Case Western Reserve Journal of International Law 34 (2002), pp. 277, 279, 284 (citing Rule 96 of the ICTY and ICTR, both of which deal with consent).
[34] Rule 96(ii), ICTY/ICTR Rules and Rules 70(a-d), ICC Rules; see also Akayesu Trial Judgment, supra note 24, para. 688; William Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone. Cambridge: Cambridge University Press, 2006, p. 342.
[35] See Wolfgang Schomburg and Ines Peterson, Genuine Consent to Sexual Violence under International Criminal Law. The American Journal of International Law 101 (2007), pp. 121, 140; Serge Brammertz and Michelle Jarvis, "Lessons Learned in Prosecuting Gender Crimes under International Law: Experiences from the ICTY." In Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay, edited by Chile Eboe-Osuji. Boston: Martinus Nijholff, 2010, pp. 106-8; Kirsten Campbell, The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia. International Journal of Transitional Justice 1, no. 3 (2007), p. 418; Prosecutor v. Kunarac, Case no. IT-96-23 & IT-96-23/1-A, Appeal Judgment (12 June 2002), para. 126.
[36] See Kunarac et al. Appeal Judgment, supra note 35, para. 132.

prevailing in most cases charged as either war crimes or crimes against humanity would be almost universally coercive, making true consent impossible.[37]

Consent under coercive circumstances cannot be used as a defense, but, exceptionally, the accused who chooses to raise the consent as a defense must first show that the evidence of consent is material and probative to disproof the charge of rape.[38] ICTY/ICTR rule 96 (iii) and ICC rule 72(2) provide clear procedures the accused must follow in this regard. The rules require the accused to please the chamber *in camera* that the evidence of consent is, in fact, relevant and credible before such evidence is admitted.[39] ICC rule 72(1) states that before the proceeding takes place *in camera*, prior notification must be lodged with the court, which shall then define the substance of the evidence intended to be presented and the weight such evidence has on the case at issue.[40] Moreover, ICC rule 72(2) authorizes the chamber, during the *in camera* proceeding, to review the victim's evidence and consider the views of the prosecution and the defense. This entails determining whether that evidence in question has a sufficient degree of probative value to an issue in the case and the prejudice that such evidence may cause in keeping with Article 69(4) of the Statute.[41] Article 69(4) of the Rome Statute, which is similar to ICTY/ICTR Rule 89(c), thus stipulates that 'the court may rule on the relevance or admissibility of any evidence, taking into account the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or a fair evaluation of the testimony of a witness, in accordance with the RPE.'[42] The *in camera* proceeding is considered a higher admissibility standard in SGBC cases than is needed in ICTY/ICTR rule 89(c) and Rome Statute Article 69(4). The latter narrows the presumption for other crimes' admissibility under the general rule, which states 'a chamber may admit any relevant evidence which it deems to have probative value.'[43] Obviously, these rules require the defendant to overcome the burden of proving to the chamber that the evidence is relevant and credible by establishing why, in that war situation, consent is at all relevant to the defense.[44] In practice, this means the defense would have to prove that the SGBC victim actually consented to the act, and thus the SGBC act was not a crime. Consequently, when the accused uses this right, the SGBC victim will be confronted by the defense. This had happened in quite a few cases. For instance, in the ICTY *Kunarac et al*., the defense brought forward that the victim consented to the sexual intercourse because she participated

[37] Ibid., para. 130. The Appeals Chamber in Gacumbitsi confirmed non-consent' as an element of the crime of rape though evidence of coercive circumstances under which no meaningful consent would be possible would suffice to prove non-consent. Prosecutor. v. Gacumbitsi, Case No. ICTR-2001-64-A, Appeal Judgment (7 July 2006), paras. 152-7.
[38] See Patricia Viseur Sellers and Kaoru Okuizumi, Intentional Prosecution of Sexual Assaults. Transnational Law & Contemporary Problems 7 (1997), p. 53.
[39] Rule 96 (iii), ICTY/ICTR Rules, and Rule 72(2), ICC Rules.
[40] Rule 72(1), ICC Rules.
[41] Rule 72(2), ICC Rules.
[42] Art. 69(4), Rome Statute; Rule 89(c), ICTY/ICTR Rules.
[43] See Viseur-Sellers, supra note 23, p. 287.
[44] See Goldstone, supra note 33, p. 283 (noting that the provision that corroboration is not required for Sexual Violence testimony is a departure from domestic practice of many countries).

in it actively. However, the victim stated that she was threatened with death if she did not satisfy the accused's desire. The Chamber accepted the victim's evidence, noting that she only initiated sexual intercourse because she was afraid of being killed. The Chamber also rejected the defense that the accused was unaware that the victim only initiated intercourse with him because of fear.[45] The defense did not specifically raise the issue of consent in the *Furundzija* case. Still, the Chamber noted that, even if the defense had introduced consent, it would have been clear that the victim was held in captivity, which would entirely vitiate consent.[46]

Proof of coercion or threat of force is the leading element if no *in camera* proceedings have been initiated by the accused.[47] Consequently, as a matter of evidence, any form of coercion, such as acts or threats of (physical or psychological) violence, abuse of power, any other forms of duress, and generally oppressive circumstances, may indicate a lack of consent.[48] Even when a victim actively seeks sexual contact with the accused, the conditions surrounding the act(s) can vitiate consent. For instance, this may be the case when a victim, held captive and targeted for multiple acts of SGBCs, initiates contact with the accused only because she had been threatened with death if she did not satisfy the sexual desires of the accused.[49] Other examples include evidence that the SGBCs took place in captivity,[50] detention,[51]during attacks on towns,[52] during ongoing expulsion,[53] or genocide campaigns.[54] It is now widely accepted in ICL that if the evidence establishes coercive circumstances that make consent impossible, there is no need to elicit further specific evidence from the victim to prove an absence of consent (such as questions about whether the victim physically resisted the perpetrator or not).[55]

Collecting and admitting evidence based on prior or subsequent sexual conduct of victims of sexual assaults is prohibited under ICTY/ICTR rule 96(iv) and ICC rules 71 and 70(d).[56] ICC rule 71 states that evidence of other sexual conduct 'in the light of the definition and nature of the crimes within the jurisdiction of the

[45] See Kunarac et al. Trial Judgment, supra note 26, paras. 645-646.
[46] See Furundzija Trial Judgment, supra note 32, para. 271(…any form of captivity vitiates consent).
[47] See Kunarac et al. Appeal Judgment, supra note 35, para. 409.
[48] See Dordevic Appeal Judgment, supra note 25, para. 852, citing Prosecutor v. Milutinovic et al., Case No. IT-05-87-T, Trial Judgment, vol. 1 (26 February 2009), para. 200.
[49] See Kunarac et al. Trial Judgment, supra note 26, paras. 644-7.
[50] See Furundzija Trial Judgment, supra note 32, para. 271 (any form of captivity vitiates consent).
[51] See Kunarac et al. Appeal Judgment, supra note 35, paras. 132-3; Prosecutor v. Kvocka et al., Case No. IT-98-30/1-A, Appeal Judgment (28 February 2005), para. 396; Milutinovic et al. Trial Judgment, supra note 48, para. 200; Prosecutor v. Stanisic and Zupljanin, Case No. IT-08-91-T, Trial Judgment, vol. 1 (27 March 2013), paras. 430, 432,489,587, 603, 629-30; Prosecutor v. Krajisnik, Case: IT-00-39-T, Trial Judgment (27 September 2006), para. 333.
[52] See Krajisnik Trial Judgment, supra note 51, para. 309; Prosecutor v. Prlic et al., Case No. IT-04-74-T, Trial Judgment, vol.3 (29 May 2013), paras. 426-9.
[53] See Stanisic and Zupljanin Trial Judgment, supra note 51, vol. 1 paras. 428, 633.
[54] See Gacumbitsi Appeal Judgment, supra note 37, para. 155 (consent may be inferred from the background of circumstances such as an ongoing genocide campaign or the detention of the victim.).
[55] See Schomburg and Peterson, supra note 35, pp. 121.140; Brammertz and Jarvis, supra note 35, 106-8; Campbell, supra note 35, p. 418; Kunarac et al. Appeal Judgment, supra note 35, para. 126.
[56] Art. 69(4), Rome Statute; Rule 70(d) and Rule 71, ICC Rules; Rule 96 (iv), ICTY/ICTR Rules.

court, and subject to Article 69, paragraph 4, a chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness.'[57] This suggests that, even though prior or subsequent sexual conduct is generally not relevant or admissible, a different conclusion might be drawn on the basis of Article 69(4), vis-à-vis probative value and prejudice the evidence may cause to fair trial or evaluation of testimony.[58] The fact of the matter is that, according to the rules, evidence on prior or subsequent conduct has no probative value nor causes any prejudice to fair trial or evaluation of a witness.[59] Some scholars and practitioners have argued that the correct reading of rule 71 should, therefore, be that 'the chamber should be guided by the general rule that prior or subsequent sexual conduct cannot be admitted into evidence and that the evidence shall be evaluated on the basis of Rome Statute Article 69(4) only in exceptional cases.'[60] This seems a good interpretation because if the evidence on prior or subsequent sexual conduct were considered relevant or admitted, they could not, in any case, be used to infer the bad character, the untrustworthiness, or the witness tolerance to sexual intercourse.[61] In fact, ICC rule 70(d) excludes any such attempts,[62] explicitly protecting against the victim's character assassination and strictly prohibiting the collection of evidence on the basis of questioning victims on previous or subsequent sexual conduct.[63] The main aim is to adequately protect the victims from harassment, embarrassment, and humiliation and from the potential danger of further causing distress and emotional damage to the witnesses.[64] Without this rule, victims would be even more reluctant to come forward to testify for fear that they would be questioned on their sexual history and their private lives be put on trial.[65] It, therefore, serves as 'an exclusionary rule which totally forbids the introduction of evidence concerning prior sexual conduct in sexual assaults cases and there can be no waiver of its imperative application.'[66]

Overall, however, the rule has not often been invoked. In one case at the ICTY in *Delalic et al.,* a victim stated in a private session that she had in her possession contraceptive pills during her detention in the camp. Subsequently, during cross-examination in an open session, the defense asked the victim whether she had been pregnant and whether or not she had been prescribed contraceptive pills. At that moment, the victim

[57] Rule 71, ICC Rules.
[58] See De Brouwer, supra note 30, p. 269.
[59] Ibid.
[60] See Donald Piragoff, "Evidence." In The International Criminal Court: Elements of Crime and Rules of Procedure and Evidence, edited by Roy S. Lee and Hakan Friman. Ardsley, New York: Transnational Publishers, 2001, pp. 407-408; De Brouwer, supra note 30, p. 269.
[61] See De Brouwer, supra note 30, p. 269.
[62] See Piragoff, supra note 60, pp. 384-391.
[63] Rule 70(d), Rules (credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness).
[64] See Prosecutor v. Delalic et al., Case No. IT-96-21-T, Decision on the Prosecution's Motion for the Redaction of the Public Record (5 June 1997), para. 52.
[65] See Fitzgerald, supra note 20, pp. 646-7.
[66] See Delalic et al. Decision on the Redaction of the Public Record, supra note 64, para. 58; Khan et al., supra note 31, pp. 477-8; John Ackerman and Eugene O´Sullivan: Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia: With Selected Materials from the International Criminal Tribunal for Rwanda. The Hague and Boston: Kluwer Law International, 2000, pp. 456-7; Goldstone, supra note 33, p. 284 (observing that Rule 96 of the Rules of Procedure and Evidence of the ICTY and ICTR excluded admissibility of prior sexual conduct of the victim 'dispensing with the implication that a woman with a sexual history is an unreliable witness').

stated that she had an abortion at the beginning of April 1992.[67] The Chamber held that the information about the victim's abortion constituted prior sexual conduct and ought to be excluded, noting that the rule was not susceptible to waiver.[68] Apart from protecting the victim from harassment and re-traumatization, the exclusion also aims to ensure that the victim's past sexual conduct should not be misunderstood as consent or the mistaken belief by the accused in the victim's consent not influence the decision-making of the judges. However, one disadvantage of this rule could be that even relevant evidence with probative value will, at least in theory, be suppressed or excluded, which Sellers notes, such exclusion is based on a policy choice that overrules the admissibility criteria laid down in the rules.[69] These specific gender-sensitive rules are important guidelines meant to cover comprehensive protection for SGBCs' victims by encouraging them to come forward to tell their stories freely without fear. They are enumerated to regulate the types of evidence that should be collected or admissible and the ones that should not be collected or are inadmissible.

2.2 Assessing the Victims' Testimonies

As explained, inconsistencies in the victims' testimonies are a major problem, which could be caused by the difficulty to testify when traumatized or victimized.[70] These factors could affect the victims' ability to coherently or comprehensively recount their experiences. An inconsistency may or may not be significant, depending on whether such errors are normal and expected by the witness or if they are unlikely to be mistaken and demonstrate a carelessness with the truth or raise reliability issues.[71] A victim's testimony is considered credible only if the inconsistencies are not of material consequence or substantial to impeach the witness's credibility. Further, the testimony should not contain serious chronological discrepancies between written and oral statements. Moreover, the testimony must clearly or adequately identify the accused's role or the perpetrators' identity and provide specific details of the rape incident.

For instance, the *Akayesu* Trial Chamber stated that a victim's evidence could be admitted if the inconsistencies between the victim's accounts were not of material consequence and were not substantial enough to cast doubt on the credibility of the witness. On this point, victims in the *Akayesu* trial testified that the accused ordered Interahamwe to commit SGBCs.[72] The Chamber found inconsistencies between the pre-trial statement and in-court testimony of the witnesses regarding the exact dates and time of the rapes

[67] See Delalic et al. Decision on the Redaction of the Public Record, supra note 64, para. 2.
[68] Ibid., paras. 58-60.
[69] See Viseur-Sellers, Rule 89(C) and (D), supra note 23, p. 288.
[70] See Akayesu Trial Judgment, supra note 24, para. 455.
[71] See R. v. Smith, ABQB 199, Canadian Legal Information Institute, 2018, as per Justice J.H. Goss, para. 50 (noting that one of the most valuable means of assessing witness credibility and reliability is to examine the consistency between what the witness said in the witness box and what he or she has said on other occasions. Inconsistencies on minor matters or matters of detail are normal and are to be expected. Where the inconsistency involves a material matter about which an honest witness is unlikely to be mistaken, it can demonstrate a carelessness with the truth or raise reliability issues).
[72] See Akayesu Trial Judgment, supra note 24, paras. 424, 429.

but considered that the events took place long ago, finding that the discrepancies were not significant to affect the case (see Section 3.1 of Chapter 5).[73] Along the Rules of Procedures and Evidence, the Chamber held that the inconsistencies could be explained by the difficulties of recollecting precise details several years after the occurrence of the events.[74] It also considered the trauma experienced by the witnesses to these events, the difficulties of translation, and the fact that several witnesses were illiterate and stated that they had not read their written statements.[75] Similarly, a victim in *Nyiramasuhuko et al*. testified that the accused gave orders to Interahamwe to commit rape.[76] The Chamber recalled some inconsistencies in the victim's prior statement (that she was not raped anally) and her in-court testimony (that she was raped both anally and vaginally).[77] The Chamber considered the witness reliable and noted that the discrepancies were caused by the intensity of experiencing multiple gang rapes and the difficulties of remembering all the details after several years (see Section 3.1 of Chapter 5).[78] These decisions are essential as the SGBC cases prosecuted in international courts have occurred several years before trial. Evidence from victims is not readily available, and they may have partially lost their memories over time.[79] However, there have been quite some medical researches done on the memory's approach to evidence assessments.[80] The ICC, for instance, has presented expert witnesses to provide their expert opinions on the ability of a witness to remember and communicate the past accurately.[81] For example, in the *Ntaganda* case, the Chamber considered that the events took place several years before, and some witnesses were younger at the time of the events and or suffered trauma.[82] Therefore, they may have had particular difficulties in providing a coherent, complete, and logical account.[83] The Chamber considered the evidence of the Forensic Psychology Expert, Professor John Yuille, and his expertise on the impact of trauma on memory, concluding that trauma on memory does not render a witness' account unreliable in its entirety.[84] The judges should not assume that a victim of trauma memory issues will not have sufficient recall because witnesses tend to remember details

[73] Ibid., para. 455.
[74] Ibid.
[75] Ibid.
[76] See Prosecutor v. Nyiramasuhuko et al., Case No. ICTR-98-42-T, Judgment and Sentence (24 June 2011), paras. 2631, 2648.
[77] Ibid., para. 2635.
[78] Ibid., para. 2635.
[79] Rule 96, ICTY/ICTR and Art. 63(4), Rome Statute.
[80] See e.g., Mark Howe, Lauren Knott, and Martin Conway, Memory and Miscarriages of Justice. London: Routledge, 2018; Daniel Schacter and Elizabeth Loftus, 'Memory and Law: What Can Cognitive Neuroscience Contribute?' Nature Neuroscience 16 (2013), pp. 119–123; Geoffrey Loftus, 'What Can a Perception Memory Expert Tell a Jury?' Psychonomics Bulletin & Review 17 (2010), pp. 143–148; Gary Wells et al., Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence. Law and Human Behavior 44, no.1 (2020), pp. 3-36.
[81] See e.g., Prosecutor v. Ntaganda, Case No.: ICC-01/04-02/06, Trial Judgment (8 July 2019), para. 79; Prosecutor v. Lubanga, Case No.: ICC-01/04-01/06, Trial Judgment (14 March 2012), para. 103; Prosecutor v. Bemba et al., Case No.: ICC-01/05-01/13, Trial Judgment (19 October 2016), para. 203; Prosecutor v. Bemba, Case No.: ICC-01/05-01/08, Trial Judgment (21 March 2016), para. 230; Prosecutor v. Katanga, Case No.: ICC-01/04-01/07, Trial Judgment (7 March 2014), para. 83; Prosecutor v. Ngudjolo, Case No.: ICC-01/04-02/12, Trial Judgment (18 December 2012), para. 49.
[82] See Ntaganda Trial Judgment, supra note 81, paras. 79-80.
[83] Ibid.
[84] Ibid.

that were meaningful to them at the time of the events. Therefore, the judges must seek expert views on how trauma impacts memory to inform their decision-making process on the testimony's reliability.

In other instances, the chambers rendered the victim unreliable because of serious chronological inconsistencies found between the written statements and statements made at trial. In the *Kajelijeli* trial,[85] the Chamber found reasonable doubt about whether the accused was present at the scene and noted inconsistencies between the victim's written statement and her testimony at the trial (see Section 2.4 of Chapter 5).[86] Similarly, in the *Musema* trial, a victim during cross-examination could not reconcile two contradicting statements that she made about one of her daughters. She stated that the Interahamwe had raped her daughter but, at the same time, that the daughter was one of the victim's 3 eldest children who had been killed (see Section 4.1 of Chapter 5).[87] The Trial Chamber did not find the witness credible and reliable because of this unexplained inconsistency about her daughter's rape and killing.[88]

In some other instances, insufficient identification of the accused was the primary reason why the victims who testified were considered unreliable. In the ICTY *Haradinaj et al.*, a victim testified that she could not recognize the accused as the man who raped her several years ago because of changes in his physical appearance.[89] The Trial Chamber concluded that the victim's memory was unreliable to identify the accused (see Section 4.1 of Chapter 5).[90] A contradiction between the victim's statements on identifying the accused can render the identification evidence inadmissible. In *Kunarac et al.* case, a victim gave contradicting versions in the statement to the Prosecutor and during the in-court testimony on the issue if she knew the accused from before the war or not (see Section 4.1 of Chapter 5).[91] The Chamber raised doubts about the reliability of the identification of the accused as the perpetrator of this particular rape because of this contradiction.[92]

Furthermore, if the victim cannot clearly remember the specific details, such as dates and time of the rape, the judges could dismiss the evidence. For instance, in *Kvocka et al.*, victims testified they were raped when

[85] See Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence (1 December 2003), para. 680, referring to testimony of Witness GDO, T. 9 July 2001.
[86] Ibid.
[87] See Prosecutor v. Musema, Case No. ICTR-96-13-T, Trial Judgment (27 January 2000), para. 843.
[88] Ibid., para. 844.
[89] See Haradinaj et al. Trial Judgment, supra note 26, paras. 465-469.
[90] Ibid., paras. 466-469.
[91] See Kunarac et al. Trial Judgment, supra note 26, paras. 787-788.
[92] Ibid., para. 787.

the accused was present in the camp,[93] but the Appeals Chamber acquitted the accused because the dates and time of the rapes were missing from the evidence (see Section 2.2 of Chapter 6).[94]

The study shows how, in various cases, victim's testimonies were deemed reliable or unreliable due to the judges' personal discretionary assessment of the inconsistencies found in the evidence due to the passing of time or trauma. The credibility assessment standard seems to vary case by case/chamber to chamber and can significantly affect the case in the proceeding, especially if the SGBC charge mainly relies on the victim's account. The judges seem to assess differently because of the various legal systems they represent, i.e., *ad hoc* reliance on personal and professional experiences and preferences rather than consistent methodology. Therefore, the judges should establish a standardized assessment criterion to facilitate accurate assessment of witness testimonies.[95] Section 4 of Chapter 8 below will discuss suggestions on how to address this problem.

2.3 The Usefulness of Victims' Testimonies Related to the Modes of Liability

The victims' evidence can be valuable in many ways. It can help prove the actual commission of the rape, the accused's order, how the order was followed up, and the accused's presence on the crime scene. It can also help establish the identity of the physical perpetrator of the rape if it was not the accused himself, shows that the accused was in control, demonstrates the prompting/encouragement and the rape committed because of it and establishes the widespread commission of rape in multiple locations.

For instance, in *Kunarac et al.*, victims testified that Kunarac physically raped them on two separate occasions.[96] In the same *Kunarac et al.*, a victim testified that the accused Zoran Vukovic raped her while stating that he was doing so because he knew that she was a Muslim.[97] These victims' testimonies clearly show that the SGBCs were physically committed by the accused himself with the intent to discriminate and show hatred against specific ethnic or religious groups. This type of testimony could be relevant in proving the mode of liability of direct commission in SGBC cases. In *Stakic,* victims' testimonies showed that the accused was in control and ordered or assisted in the commission of the SGBCs that were eventually perpetrated by his subordinates.[98] These statements could be relevant in proving that the accused gave the

[93] See Prosecutor v. Kvocka et al., Case No. IT-98-30/1-T, Trial Judgment (2 November 2001), para. 413, footnote 686 (see e.g., the evidence of sexual violence, T. 5385-5387. These crimes occurred during the time that Kvocka worked in the camp. It is not necessary to prove that each crime was committed in Kvocka's presence or that he had knowledge of each crime. For example, if there were dead bodies lying about during the period when Kvocka worked at the camp, that is sufficient to incur responsibility in light of his position and continued presence).
[94] See Kvocka et al. Appeal Judgment, supra note 51, para. 99 (Witness J).
[95] For a detailed discussion, see Gabrielė Chlevickaitė, Barbora Holá, and Catrien Bijleveld, Judicial Witness Assessments at the ICTY, ICTR and ICC: Is There 'Standard Practice' in International Criminal Justice? Journal of International Criminal Justice 18, no. 1 (2020), pp. 185–210.
[96] See Kunarac et al. Trial Judgment, supra note 26, paras. 711, 720, 724, 727.
[97] Ibid., paras. 814-815.
[98] See Prosecutor v. Stakic, Case No. IT-97-24-T, Trial Judgment (31 July 2003), paras. 234-236, 240-241, 244, 477, 793-794 (see testimonies of Witness H, Witness B, Witness F, Witness I, Dr. Idriz Merdţanić, Dr. Duško Ivić, and Witness Q).

order and that the rape was committed because of it; the accused's planning was a factor that substantially contributed to the occurrence of SGBCs. These testimonies could also be relevant in proving modes of liability, such as planning and ordering. In *Krstic*, for instance, victims testified they were left in a vulnerable situation without any protection in the presence of soldiers and militia who proceeded to rape them.[99] These types of statements could help prove the substantial likelihood that SGBCs would occur in furtherance of the accused's planning and SGBCs as natural and foreseeable consequences of executing the common plan. These testimonies could be relevant in proving modes of liability, such as planning and JCE III.

Furthermore, in *Nyiramasuhuko et al.* case, a victim testified that the accused raped her and then invited the Interahamwe to rape her and other women (see Section 6.2 of Chapter 5).[100] This testimony could be useful in proving that the accused had ordered the commission of SGBCs, and the crimes were committed because of his order. It could also help establish the accused's moral encouragement to the physical perpetrators to commit rape. This testimony could also be relevant in proving the modes of liability, such as ordering and aiding, and abetting. In the *Gacumbitsi* case, a victim testified that the accused used a megaphone to encourage Interahamwe to rape Tutsi women verbally,[101]and on that same day, she was raped (see Section 5.1 of Chapter 5).[102] The victim was one of the few who could testify to this kind of event, showing the close link between instigation, the accused's presence on the crime scene, and the rape. This type of evidence could be particularly useful in proving the instigation mode of liability.

In the *Muhimana* case, a victim also stated that the accused gave the assailant permission to take her away to rape her, and they raped her.[103] In *Akayesu*, victims showed they and other women were raped and sexually assaulted in or around the communal office premises.[104] In these cases, victims clearly testified about the moral support given by the accused because of his authority and presence, which could be relevant for modes of liability such as aiding and abetting. Also, in the *Zelenovic* case, a victim testified that the accused and another man interrogated her. She said they took her to another room where the other soldiers raped her while telling her to tell the truth (see Section 6.2 of Chapter 5).[105] This type of victim's testimony could help prove that the accused's conduct had a substantial effect on the commission of the crime, which could also be relevant to prove modes of liability such as aiding and abetting.

[99] See Prosecutor v. Krstic, Case No. IT-98-33-T, Trial Judgment (02 August 2001), paras. 38-40, 45- 46.
[100] See Nyiramasuhuko et al. Judgment & Sentence, supra note 76, paras. 6086, 2631.
[101] See Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Trial Judgment (17 June 2004), para. 200 (witness TAQ).
[102] Ibid., para. 203 (witness TAQ).
[103] See Prosecutor v. Muhimana, Case No. ICTR- 95-1B-T, Trial Judgment (28 April 2005), paras. 308-310 (Witness BG).
[104] See Akayesu Trial Judgment, supra note 24, paras. 421-423,429-437, 449 (e.g., testimonies of Witnesses JJ, NN, KK, PP).
[105] See Prosecutor v. Zelenovic, Case No. IT-96-23/2-S, Sentencing Judgment (4 April 2007), para. 21.

In *Stakic*, *Krajisnik*, and *Mladic,* victims testified about the occurrence of SGBCs in detention places and many various locations.[106] These testimonies could be relevant in proving that the SGBCs were widespread and that they formed part of the common purpose from the beginning or over time. This could also be relevant to prove modes of liability, such as JCE I. In *Kvocka et al.,* victims' testimonies showed how people were raped and sexually assaulted in the accused's presence, who sometimes participated in the crime, including the ill-treatment and harsh living conditions in the camp.[107] This kind of evidence could help prove the common purpose of the JCE, the intent to further it, and the awareness of the SGBCs in the detention camp, which could also be relevant to prove the JCE II mode of liability. In the *Celebici* case, the victims testified that the accused was often present and acted as the camp commander.[108] In *Nyiramasuhuko et al.*, the victims testified that the accused was present and giving orders to Interahamwe to rape women, and when she told them to stop, they immediately stopped.[109] The testimonies of the victims stating that a commander was present at the scene could make it so much easier to prove the superior-subordinate relationship, knowledge/the reason to know about the crimes, and the failure to prevent or punish subordinates. These testimonies could help establish modes of liability, such as superior/command responsibility.

Victims in the *Katanga* case testified that women were raped and sexually enslaved by combatants.[110] They stated that the group was well organized, with the accused at the top of the chain of command, including the existence of a disciplinary regime within the group.[111] These testimonies could help prove that the SGBCs were part of the common plan or the crimes occurred in the ordinary course of events. It could also establish the accused's authority in the organization, the compliance with orders to automatically commit SGBCs, the organized and hierarchical apparatus of power of the group, and the accused's authority. These testimonies could be relevant in proving modes of liability, such as co-perpetration and indirect perpetration. Also, victims in *Ongwen, Ntaganda,* and *Ngudjolo* testified that women were raped and held captive by the militia in the organization the accused commanded.[112] These testimonies could help prove that the accused was in a position of authority and exercised command and control over individuals in the organization that committed the crime, which could also be relevant in proving the mode of liability of indirect co-perpetration.

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[106] See Stakic Trial Judgment, supra note 98, paras. 235-236, 240-241, 244 (see e.g., testimonies of witness Q, Witness H, Witness A, and compelling hearsay evidence of Dr. Idriz Merdzanic, Dr. Dusko Ivic, Witness F, Witness I, and Witness B).
[107] See Kvocka et al. Trial Judgment, supra note 93, paras. 379-382, 443-447, 487, 541-544, 547,550, 592-593, 601.
[108] See Delalic et al. Trial Judgment, supra note 21, paras. 746-749.
[109] See Nyiramasuhuko et al. Judgment & Sentence, supra note 76, paras. 2165, 2178, 2302-2304, 2329-2331; Prosecutor v. Nyiramasuhuko et al., Case No. ICTR-98-42-A, Appeal Judgment (14 December 2015), paras. 518, 848, 1217.
[110] See Katanga Trial Judgment, supra note 81, paras. 991, 989, 1009, 1002, 1004,1011,1014.
[111] Ibid., paras. 639, 672, 674-675, 1418 (see e.g., testimonies of Witness P132, witness D02-148).
[112] See Prosecutor v. Ongwen, Case No.: ICC-02/04-01/15, Trial Judgment (4 February 2021), paras. 310, 420, 437, 462; Ntaganda Trial Judgment, supra note 81, paras. 409, 518-523, 535, 545, 579, 599 - 601, 606-608,611, 618, 622-623, 627, 629, 631- 632, 940, 954; Ngudjolo Chui Trial Judgment, supra note 81, para. 333.

In the cases discussed above, victims' testimonies were particularly useful in proving that the accused committed the SGBCs by himself, issued orders to rape, and the perpetrators committed the rape following his order, as well as the moral encouragement provided by the accused to commit rape. They were also helpful in establishing the superior-subordinate relationship, knowledge/reason to know about the crimes, and the failure to prevent or punish subordinates, including that SGBCs were widespread, forming part of the common purpose. The victims' evidence was crucial in proving modes of liability, such as direct commission, aiding and abetting, ordering, instigating, JCE I, and superior/command responsibility. However, in some instances, victim testimony was not useful in proving the modes of liability charged and the accused's criminal responsibility but confirmed that the SGBCs were indeed committed. For example, in the ICTY *Kunarac et al.,* although the testimony of two victims[113] established that the rape occurred, the Chamber stated that the actions of the accused Kunarac did not have a substantial effect on the rape.[114] In *Gacumbitsi*, the testimonies of three victims established that the rape occurred, but the Chamber stated that a link between the rapes and the possible speeches made by the accused could not be established, thus acquitting the accused of instigation of this charge.[115] In *Vukovic,* a victim testified that she was raped by the accused, but she could not clearly remember the accused during the identification process due to the passage of time, thus acquitting the accused of committing rape.[116] In *Kovac* case, although the testimony of two victims established that the rape occurred, the Trial Chamber noted that the evidence had not shown that the accused Kovac had aided and abetted Jagos Kostic in committing the rape.[117]

3. Eyewitnesses' Testimonies in SGBC Cases

3.1 The Type and Nature of Eyewitnesses' Testimonies

Eyewitnesses are individuals who have seen or heard about a crime.[118] The testimony of direct victims of specific crimes is excluded from this category because it has been extensively discussed in Section 2 above. The category of eyewitnesses addressed in this section includes bystanders, insider witnesses, informants, or members of the perpetrator's group or people victimized by the circumstances that directly saw or heard what precisely occurred.[119] Bystanders are people within societies close to and often physically present at the events but who did not participate or intervene in the crime.[120] Insider or informant witnesses are

[113] See Kunarac et al. Trial Judgment, supra note 26, paras. 733-736.
[114] Ibid., para. 741.
[115] See Gacumbitsi Trial Judgment, supra note 101, para. 329.
[116] See Kunarac et al. Trial Judgment, supra note 26, paras. 792, 798.
[117] Ibid., para. 761.
[118] See Leora Bilsky, The Eichmann Trial; Towards a Jurisprudence of Eyewitness Testimony of Atrocities. Journal of International Criminal Justice 12 (2014), p. 27.
[119] Ibid., p. 40.
[120] Ibid.

witnesses who worked alongside the accused or the organization and who can testify about how the accused operated within the political or military structures so that the judges can correctly determine their actions and mental states.[121] Informants or insiders can provide context and critical background information on individual experiences, identify issues requiring further investigation, and capture vital information to support the prosecution or the defense case.[122]

Generally, there are two groups of eyewitnesses: those that directly saw the events with their own eyes (direct or original eyewitnesses) and those who did not see but only heard about the events from the direct eyewitnesses (indirect eyewitnesses or second-hand witnesses).[123] Most of the time, indirect eyewitness receives information from direct eyewitnesses or from a third party who talked to the direct eyewitness. This should be clearly stated during the testimony so that the judges can focus on what was actually stated by the direct eyewitness, i.e., what the indirect eyewitness heard precisely to allow the judges to arrive at a consensus as to what was said.[124] Most experts agreed that an indirect eyewitness is far less reliable than a direct eyewitness, which laid the basis for the hearsay rules in criminal trials.[125] In this rule, hearsay evidence is not automatically excluded, but the prosecution must prove its relevance and probative value beyond a reasonable doubt.[126] The chambers may allow hearsay evidence, but the hearsay statements must be corroborated, especially if the testimony invokes what the witness "heard" not "saw."[127]

As explained in the section on victims' testimonies, eyewitnesses' testimonies are also susceptible to inaccuracy for many reasons. The crimes eyewitnesses are testifying about may have occurred five to ten years ago,[128] and their memories might have faded over time.[129] Eyewitnesses might be unable to recollect events because of the trauma.[130] Sometimes, their stories might have changed form over the years[131] and

[121] See Carla Del Ponte, Investigation and Prosecution of Large-scale Crimes at the International Level: The Experience of the ICTY. Journal of International Criminal Justice 4 (2006), pp. 539-558; see also Gherardo Colombo, Investigating and Prosecuting Large-Scale Corruption: The Italian Experience. Journal of International Criminal Justice 4, no. 3 (2006), pp. 510-521 (describes cooperation by a participant in a crime as useful and often necessary); William Nardini, The Prosecutor's Toolbox: Investigating and Prosecuting Organized Crime in the United States. Journal of International Criminal Justice 4, no. 3 (2006), pp. 528-538, 2006 (stating that it is often the cooperating insider witness who can 'finger higher ups in the criminal enterprises for their management role in particular offences).
[122] See Bemba et al. Trial Judgment, supra note 81, para. 21 (the prosecution filed an anonymous statement obtained from informant who tipped off the prosecution that the Congolese politician was bribing witnesses...Bemba and its associates were only found guilty on the first three counts of the six enumerated conducts. Trial Chamber qualified for the first time the conducts of Art. 70. It clarified that Art.70(1)(a) addresses the offence of giving false testimony when the witness is under an oath to tell the truth according to Art. 69(1) of the Statute. Trial Chamber interpreted broadly such offence, according to the plain wording of Art. 70(1)(a) and its teleological meaning and argued that Art. 70(1)(a) of the Statute includes both positive actions and omissions that are taken into account by a Chamber when assessing the evidence as a whole).
[123] See Bilsky, supra note 118, p. 226.
[124] Ibid.
[125] Ibid.
[126] See Prosecutor v. Oric, Case No. IT-03-68, Trial Judgment (30 June 2006), para. 23; see also Prosecutor v. Brdjanin, Case No. IT-99-36, Trial Judgment (1 September 2004), para. 29.
[127] See Oric Trial Judgment, supra note 126, para. 23.
[128] See Patricia Wald, Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal. Yale Human Rights and Development Law Journal 5 (2002), p. 20.
[129] National Research Council 2014. Identifying the Culprit: Assessing Eyewitness Identification. Washington, DC: The National Academies Press, 2014, p. 1. < https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification.> accessed 21 January 2021.
[130] Ibid.
[131] See Wald, supra note 128, p. 20.

details from one version become different or cannot be recalled at all in other versions.[132] If they have witnessed multiple crimes, they may confuse one perpetrator for another or what happened in one place for what happened somewhere else, which poses a danger of "misattribution" of witnesses' memories to the wrong time or place.[133] Distortion may also arise from essential changes in the eyewitness's perception. The perceptions of eyewitnesses as to what they saw may be altered by whether they realized at the time that they were witnessing a criminal act.[134] Perceptions can also be affected radically by whether the eyewitness was a passive observer, the victim of the crime, or an active participant in the crime.[135] Even an eyewitness on the scene who heard something rather than saw may be more prone to putting his own background experience into the conclusions he draws on what he heard than one who views it with both eyes and ears.[136] The events may be interpreted very differently by different hearers, and, sometimes, witnesses tend to remember only those words in a conversation that attracted their attention in the first place.[137] Therefore, the evaluation of eyewitness' testimonies must be mindful of the possible subjectivity of the witnesses.

3.2 Assessing the Eyewitness' Evidence

As explained, eyewitnesses' testimonies are also susceptible to inaccuracies or inconsistencies due to the passing of time, memory issues, trauma, or changes in perception. These factors could affect the eyewitnesses' ability to coherently or comprehensively recount their experiences. Eyewitnesses' testimonies are considered reliable only when such inconsistencies or inaccuracies are not of material consequence or substantial enough to impeach the eyewitness's credibility. The judges could exclude the evidence if it lacks sufficient probative value and corroborating statements or lacks specificity. Moreover, the judges tend to exclude the evidence if it lacks sufficient indicia of reliability, serious contradiction among the eyewitnesses' testimonies, and grave mistakes or errors in the eyewitness's identification of the accused.

For instance, the Trial Chamber in *Gatete* stated that a lack of sufficient probative value and corroborating statements could render hearsay evidence inadmissible. An eyewitness, in that case, testified that she saw Interahamwe take women to a place. She subsequently heard screams coming from that location but did not look in that direction. She concluded from the screams that the women had been raped. A survivor later told the witness what had happened to her but did not further elaborate on this point. The Chamber noted that the evidence lacks probative value because the Prosecutor did not obtain further details on what the witness was told (see Section 3.2 of Chapter 5).[138] Assessing the evidence on its face value, if the prosecution had

[132] Ibid.
[133] Ibid.
[134] Ibid., p. 10.
[135] Ibid.
[136] Ibid.
[137] Ibid.
[138] See Prosecutor v. Gatete, Case No. ICTR-2000-61-T, Judgment and Sentence (31 March 2011), para. 344.

further inquired on what the witness was told by the survivor (i.e., providing corroborating witness on the presence of the accused or orders issued by him), the hearsay evidence would have been very compelling and probative. According to the RPE, the witness doesn't need to see the rape being committed with his or her own eyes, as long as the evidence demonstrates that the woman was raped.

Contradiction among the testimonies of the eyewitnesses can render the witnesses unreliable and the evidence inadmissible. In the *Bikindi* case, one of the eyewitnesses testified that he learned from people who had just come out of the woman's house that she was raped immediately afterward. The second witness stated that he was present when the woman was taken out from her home but did not mention any rape. One said it happened in the morning, the other one in the evening. One said that the accused was in the house, the other one that he was outside. The Chamber did not find the witnesses credible and reliable because of these contradictions, thus acquitting the accused (see Section 3.2 of Chapter 5).[139] The prosecution should have adduced more evidence on this point, especially from those who came from the woman's house, to corroborate the evidence. The prosecution should have inquired more from the eyewitnesses who saw the woman coming out of the house whether, for instance, she was walking with her legs apart when he saw her coming from the house.[140]

Serious mistakes or errors in the eyewitness' identification of the accused and doubts about the occurrence of the rape itself can render the evidence inadmissible. In the *Niyitegeka* case, an eyewitness stated that the accused raped a girl in a closed vehicle and subsequently killed her (see Section 4.1 of Chapter 5). However, the Chamber found that the witness could not see the rape nor identify the accused because the door of the vehicle was closed.[141] The judges' decision means that the prosecution should have presented a witness standing closer to the car to see the accused and the rape happening directly with his own eyes.[142] This means that, in this case, hearsay or circumstantial evidence was not enough to convict the accused for SGBCs. However, according to the RPE, the witness doesn't need to see the rape happening with his own eyes. It surfaces that the circumstantial evidence provided demonstrates that the victim was indeed raped.

Lack of sufficient indicia of reliability of the hearsay testimonies of the eyewitnesses can render the evidence inadmissible. This rule concerns hearsay evidence admission in the form of live testimony by witnesses on events that they had not witnessed personally. Before admitting into evidence, the statements and the circumstances around said statement must indicate that it is reliable and trustworthy.[143] In the *Muhimana*

[139] See Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Trial Judgment (2 December 2008), paras. 345, 350.
[140] See Muhimana Trial Judgment, supra note 103, para. 32 (a standard which was accepted by the *Muhimana* Trial Chamber when the accused took the two women in the house and the witness saw them coming back out with their legs walking apart).
[141] See Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Judgment and Sentence (16 May 2003), paras. 292, 301.
[142] Ibid., para. 301.
[143] Rule 89 (C), ICTR Rules.

case, an eyewitness testified that she heard the order but did not see the rape happening, and a man told her that the Interahamwe raped the girls.[144] The Chamber received hearsay evidence as to what happened to the girls but found that the evidence lacked sufficient indicia of reliability to prove that the girls were raped (see Section 3.2 of Chapter 5).[145] From the judges' reasoning, one can infer that the hearsay evidence in question needed to indicate that the accused ordered the rape or the accused was present when the rape occurred or an indicium from the hearsay testimony that the women were in fact raped, following the accused's orders.[146] In *Kamuhanda,* eyewitnesses testified that they saw girls being collected and loaded in the accused's vehicle. They heard the assailants said they were going to rape the girls. After some time, they were told the girls had been raped.[147] The hearsay character of the evidence made the Chamber conclude that the alleged rapes were not committed by the accused (see Section 4.1 of Chapter 5).[148] The problem here is that the witnesses did not directly see the rape, and the prosecution did not prove that the people in the camp, who informed the witnesses, saw the rape happening first hand. Therefore, from the judges' reasoning, the hearsay testimony of the witnesses should have placed the accused at the scene of the crime and should have indicated that they saw the accused physically committing the rape.[149] In the alternative, for this hearsay evidence to have probative value, the witnesses should have seen by themselves the rape of the girls or, at least, heard what happened to them from the girl who survived the massacre. Although it is well established in the ICTY, ICTR, and ICC jurisprudence that hearsay evidence is admissible, the cases discussed above show that the judges did not accept most hearsay testimonies in SGBC cases. Therefore, when presenting hearsay evidence, the prosecutor should pay particular attention not only to the evidence itself but also to the context and the conditions in which it was obtained, with due regard that the source of information is able to pass the reliability test during cross-examination.

Lack of specificity of the evidence can be a ground for inadmissibility. In the ICC *Gbagbo and Blé Goudé* case, subordinates stated that the accused Gbagbo gave orders to some commanders of the parallel structures, which were obeyed. The Chamber considered the evidence hearsay and unreliable because it did not specify to whom he issued the orders and if the subordinates followed the orders or whether those persons were operating outside the chain of command (see Section 6.1 of Chapter 6).[150] The witness was not a direct eyewitness of the orders given but was only reportedly told by another subordinate who claimed that he received orders from the accused.[151] Therefore, one could reason that the situation would have been

[144] See Muhimana Trial Judgment, supra note 103, paras. 170-171.
[145] Ibid., paras. 200, 205.
[146] Ibid., paras. 200, 205.
[147] See Prosecutor v. Kamuhanda, Case No. ICTR-99-54A-T, Trial Judgment (22 January 2003), paras. 367, 376.
[148] Ibid., paras. 497, 711-713.
[149] Ibid.
[150] See Prosecutor v. Gbagbo and Blé Goudé, Case No. ICC-02/11-01/15-1263-AnxB-Red, Reasons of Judge Geoffrey Henderson (16 July 2019), paras. 413, 417-418.
[151] Ibid., para. 412.

substantially different if the prosecutor had proven that the orders issued were specific, the persons' identity and if they belonged to the parallel structures outside the chain of command, and if the persons implemented the orders.[152]

The cases discussed in this section are only an indication of some of the credibility and reliability problems witnesses faced when testifying in SGBC cases. There are numerous instances in Chapters 5 and 6 in which eyewitness testimonies were accepted and admitted into evidence. In the reliability and credibility cases discussed above, the court declared that such evidence was inadmissible because it lacked sufficient indicia of reliability or specificity. It also excluded the evidence because of major contradictions found among the testimonies and the lack of sufficient probative value and corroborating elements, including serious mistakes or errors in the eyewitness' identification of the accused. Therefore, it is essential for the prosecution or defense relying on eyewitness' testimony to adopt these reliability and admissibility standards to avoid the evidence from being excluded.

3.3 The Usefulness of Eyewitnesses' Testimonies Related to the Modes of Liability

Eyewitnesses' testimonies can help prove the existence of a common plan, rape committed by the accused himself or by the subordinates in various locations notoriously over a long period. They can also effectively prove the accused's role and the actions taken, the extent to which he decides on the organization's goals and aims, and the accused's presence and authority. Eyewitnesses can be vital in establishing that the orders issued by the accused were implemented by subordinates, including demonstrating that women were raped immediately after the accused's speech. Moreover, the evidence can be valuable in proving the accused's moral support to perpetrators to commit rape, the accused's knowledge of the crime, and other ill-treatments in camps, as well as the vulnerability of the victims. The evidence can be relevant in demonstrating that the accused was in charge and proving reporting mechanisms, disciplinary system, and the group's internal network and structure. Overall, the evidence collected from eyewitnesses could be crucial in establishing the SGBCs and the modes of liability charged.

For instance, in *Krstic*, eyewitnesses, including people victimized by the circumstances, bystanders, and perpetrator group members, testified about when and how the plan was designed, including the accused's role. They testified about the extent to which he decided on the organization's goals and aims. They testified about the lack of shelter, food, water, protection of the refugees who were exposed to mistreatment and abused by armed elements present in the area.[153] They also testified that the VRS organized and implemented

[152] Ibid., para. 455.
[153] See Krstic Trial Judgment, supra note 99, paras. 38-40; 143-144.

the transportation of the women outside the enclave who were raped and how the accused was present and saw the mistreatments of the refugees by armed elements.[154] These testimonies could help prove the elements of the existence of a concrete plan, the substantial likelihood that SGBCs would occur, and SGBCs as natural and foreseeable consequences of executing the common plan. This could be relevant in proving modes of liability, such as planning and JCE III.

In the *Muhimana* case, [155] eyewitnesses testified that they saw the accused physically raping the victims. In one example, an eyewitness testified that he saw the accused grabbing some girls and taking them into his home where he raped them, as they were crying calling the accused's name. After a while, the witness saw the victims walking naked out of the accused's house (see Section 4.1 of Chapter 5).[156] These testimonies could prove that the accused physically committed rape, which could also be relevant in establishing the direct commission mode of liability.

Furthermore, in *Akayesu* and *Nyiramasuhuko et al.,* eyewitnesses, including people victimized by the circumstances and bystanders, testified that they heard direct and explicit orders issued by the accused to rape women,[157]and women were raped following the accused's order.[158] These testimonies could help prove that the accused gave orders to commit the crime, and the crime was committed because of the accused's order. This kind of evidence could also be relevant in establishing the mode of liability of ordering. In *Gacumbitsi*, an eyewitness testified that victims were raped immediately after the accused's speech (see Section 5.1 of Chapter 5).[159] This kind of testimony could be useful in proving the link between instigation and SGBCs, which could be relevant also in establishing the instigation mode of liability.

In *Furundzija*, an eyewitness who was a member of the perpetrator's group testified that, while the witness was being interrogated by the accused, she was forced by the physical perpetrator to undress and remain naked before a large number of soldiers. The witness was left by the accused in the perpetrator's custody, who proceeded to rape and sexually assault her.[160] In *Muhimana*, an eyewitness testified that he was in the vicinity when a woman was raped by the accused. During this incident, he saw the Interahamwe raping two other victims nearby.[161] These testimonies could be useful in proving the elements of moral support to the physical perpetrator, which, by virtue of their presence and authority, had a substantial effect on the commission of the SGBCs. This could be relevant in proving modes of liability such as aiding and abetting.

[154] Ibid., paras. 45- 46; 339-340, 616.
[155] See Muhimana Trial Judgment, supra note 103, paras. 19, 32, 90, 170, 264, 285, 297, 552.
[156] Ibid.
[157] See Akayesu Trial Judgment, supra note 24, para. 429; Nyiramasuhuko et al. Judgment & Sentence, supra note 76, paras. 2165, 2178, 2302-2304, 2329-2331; Nyiramasuhuko et al. Appeal Judgment, supra note109, paras. 518, 848, 1217.
[158] See Nyiramasuhuko et al. Judgment & Sentence, supra note 76, para. 6086.
[159] See Gacumbitsi Trial Judgment, supra note 101, para. 203.
[160] See Furundzija Trial Judgment, supra note 32, paras. 125, 127.
[161] See Muhimana Trial Judgment, supra note 103, paras. 274-275.

In the *Stakic* case, eyewitnesses, including members of the perpetrator's group, testified that SGBCs were committed in multiple detention camps on a widespread basis by JCE members[162] and that the accused chaired meetings to take power by force and ordered to commit the crime.[163] In the *Mladic* case, eyewitnesses, including key insiders, testified to the existence of an overarching JCE.[164] They stated that the accused purchased equipment and materials and received reports about the crimes, including rape.[165] These testimonies could help prove that SGBCs were part of the common purpose from the beginning and the accused's contribution to this criminal objective was indeed significant. They could also be relevant in proving the JCE I mode of liability.

In *Kvocka et al.,* eyewitnesses, including members of the perpetrator's group, testified that the accused was aware of detainees' mistreatment[166] and that he was present when women were raped and physically participated in the crime.[167] These testimonies could help establish that SGBCs were part of a common purpose implemented in organized systems of ill-treatment, which could also be relevant to prove modes of liability such as JCE II.

In the *Karemera et al., Karadzic,* and *Krstic* cases, eyewitnesses, including members of the perpetrator's group and bystanders, testified that rape notoriously occurred on a widespread basis over a long period and that the accused was informed about it.[168] They testified about the vulnerability of the women displaced from their homes without protection, and soldiers raped them in the accused's presence.[169] In *Martic,* eyewitnesses, including members of the perpetrator's group, testified that the accused created, financed, supplied, trained, and directed the perpetrators to commit crimes and physically participated in removing the non-Serb population.[170] These testimonies could help prove that SGBCs were natural and foreseeable consequences of executing the common purpose, of which the accused's contribution was essential. This could be relevant in proving modes of liability such as JCE III.

In the *Celebici* case, eyewitnesses, including members of the perpetrator's group, testified that the accused was in charge and was present giving instructions to commit the crime.[171] They stated that the accused was

[162] See Stakic Trial Judgment, supra note 98, paras. 235-236, 240-241, 244.
[163] Ibid., paras. 353, 906.
[164] See Prosecutor v. Mladic, Case No. IT-09-92-T, Trial Judgment Vol. 5 (22 November 2017), para. 3710. Regarding the documents see e.g., exhibits P2004 and P3774.
[165] Ibid., paras. 3748, 4420-4421, 4685, 4688.
[166] See Kvocka et al. Trial Judgment, supra note 93, paras. 45, 49, 50.
[167] Ibid., paras. 379-382, 443-447, 487, 541-544, 547,550, 592-593, 601.
[168] See Prosecutor v. Karemera et al., Case No. ICTR-98-44-T, Trial Judgment (2 February 2012), para. 1478; Prosecutor v. Karadzic, Case No.: IT-95-5/18-T, Trial Judgment Vol. II (24 March 2016), paras. 2502-2503.
[169] See Krstic Trial Judgment, supra note 99, paras. 38-41, 134, 350, 351, 609, 616.
[170] See Prosecutor v. Martic, Case No. IT-95-11-T, Trial Judgment (12 June 2007), paras. 140-148, 447-453.
[171] See Delalic et al. Trial Judgment, supra note 21, paras. 1062, 1064-1065.

the commander and could discipline, transfer prisoners, and stop mistreatment against prisoners.[172] However, the accused took no action against the perpetrators when subordinates informed him of the crimes.[173] In *Bagosora et al.,* eyewitnesses, including members of the perpetrator's group, testified that victims were raped and sexually assaulted at checkpoints and other places openly and notoriously over a long period and that the accused was aware of it.[174] They stated that the accused could discipline and punish or refer subordinates for investigation and that he had control and influence over the subordinates that committed the crime.[175] In the *Hategekimana* case, eyewitnesses testified that the accused was present when the rape was committed by the soldiers that he dropped off at the scene.[176] These types of testimonies could help prove the existence of a superior-subordinate relationship, that the superior knew or had reason to know, and the superior's failure to take the necessary and reasonable measures to prevent or punish or refer the matters for prosecution. This could be relevant in proving modes of liability such as superior/command responsibility.

In *Katanga*, eyewitnesses, including members of the perpetrator's group, testified that the accused was the leader and a respected figure of authority.[177] They stated that the accused visited military headquarters where he helped define the military strategy to attack the village.[178] The accused played a central role by facilitating, transporting, and distributing weapons and ammunition to combatants and commanders[179] who committed SGBCs during the attack.[180] These testimonies could help prove the existence of an agreement or common plan and the essential contribution made by the accused to the common purpose. This could be relevant in proving modes of liability, such as co-perpetration.

In *Katanga*, eyewitnesses, including members of the perpetrator's group, testified that women were raped and sexually enslaved by combatants.[181] They stated that the accused possessed authority in the organization,[182] and he issued and ensured compliance with orders.[183] The accused could discipline soldiers for disobeying orders.[184] Soldiers underwent military training, and that a military disciplinary regime and an effective chain of command existed.[185] These testimonies could be useful in proving the authority of the accused in the organization and compliance with his orders to automatically commit the crime, including

[172] Ibid., paras. 746-749.
[173] Ibid., paras. 772-773.
[174] See Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, Judgment and Sentence (18 December 2008), paras. 1906, 1908.
[175] Ibid., para. 1917.
[176] See Prosecutor v. Hategekimana, Case No. ICTR-00-55B-T, Judgment and Sentence (6 December 2010), para. 459.
[177] See Katanga Trial Judgment, supra note 81, paras. 1294-1297.
[178] Ibid., paras. 357, 363 (see testimony of D03-88).
[179] Ibid.
[180] Ibid., paras. 989, 991, 1002, 1004, 1009, 1011, 1014.
[181] Ibid.
[182] Ibid., paras. 1294-1297.
[183] Ibid., paras. 1336, 1346.
[184] Ibid.
[185] Ibid., paras. 639, 672, 674-675, 1418.

knowledge of the character of the organized and hierarchical apparatus of power. This could be relevant in proving modes of liability such as indirect perpetration.

In *Gbagbo* and *Blé Goudé*, *Ngudjolo*, and *Ntaganda* cases, eyewitnesses, including members of the perpetrator's group and bystanders, testified that the accused was in a position of authority and exercised command and control over individuals in the organization.[186] They said that the group's structure resembled a formal military structure and that members underwent training and were issued military ranks.[187] The evidence revealed an agreement among leaders to commit the crime.[188] Additionally, the accused delivered weapons and issued and ensured compliance with orders, and disciplined soldiers disobeying orders.[189] These testimonies could help prove the level of control the accused had over the organization that committed the crimes and the organized and hierarchical apparatus of power. This could be relevant in proving modes of liability, such as indirect co-perpetration.

The cases discussed above show how eyewitnesses helped prove cases against high-level accused by establishing the existence of a superior-subordinate relationship, the superior knew or had reason to know, the failure to take the necessary and reasonable measures to prevent or punish subordinates. Eyewitnesses were crucial in establishing the accused level of control over the organization, including its hierarchical apparatus of power. Further, the evidence helped show that SGBCs formed part of the common purpose or were natural and foreseeable consequences in implementing the common purpose. The evidence also significantly helped establish the accused's essential contribution to the common purpose, the moral support, and the substantial effect on the crime. It was effective in proving the order issued by the accused and the crimes committed because of it. These eyewitnesses were particularly useful in establishing modes of liability, such as superior/command responsibility, JCE III, indirect co-perpetration, JCE I, aiding and abetting, and ordering. However, in some cases, eyewitness testimony did not help prove the modes of liability charged, despite confirmation that the SGBCs were committed. For example, in *Gbagbo and Blé Goudé* case, eyewitnesses stated that the accused Gbagbo issued orders to commit crimes, but the Chamber noted that their testimonies were not specific and unclear if subordinates obeyed the orders.[190] In that case, the SGBCs charged under indirect co-perpetration could not be proven. In *Kajelijeli,* eyewitnesses testified that the accused's subordinates committed rape,[191] however, the Chamber ruled that the accused did not know or had reason to know that his subordinates were committing SGBCs.[192] In that case, the SGBCs

[186] See Gbagbo and Blé Goudé, Reasons of Judge Geoffrey Henderson, supra note 150, paras. 382-453, 413, 417-418, 860. See footnote 2108; Ngudjolo Chui Trial Judgment, supra note 81, paras. 128, 431, 434, 436-439, 441- 442.
[187] See Ntaganda Trial Judgment, supra note 81, paras. 316-317, 319, 324.
[188] Ibid., paras. 309-315.
[189] Ibid., paras. 322-323, 851.
[190] See Gbagbo and Blé Goudé, Reasons of Judge Geoffrey Henderson, supra note 150, paras. 413, 417-418.
[191] See Kajelijeli Judgment & Sentence, supra note 85, paras. 677, 679-682.
[192] Ibid., paras. 924- 925.

charged under command responsibility could not be proven. In *Ngirabatware,* eyewitnesses testified that the two JCE members committed rape,[193] but the Appeals Chamber considered that the SGBCs committed were not foreseeable to the accused.[194] In that case, the SGBCs charged under JCE III could not be proven. In *Kvocka et al.*, an eyewitness stated that the accused Zigic committed crimes, but the Appeals Chamber ruled that the accused did not commit concrete crimes and his participation was not significant to the overall effect of the functioning of the camp.[195] In that case, the SGBCs charged under JCE II could not be proven. In *Brdanin,* eyewitnesses testified that detainees were forced to perform acts of SGBC against each other in the camps,[196] although the Appeals Chamber stated that it was not proven that Brdanin's encouragement and moral support had a substantial contribution to a crime.[197] In that case, the SGBCs charged under aiding and abetting could not be proven. The Prosecutor needed to properly construct all the pieces of information to prove both Brdanin's knowledge and the principal perpetrators' awareness of Brdanin's moral support/encouragement i.e., showing that Brdanin knew what was happening in the camps and that the perpetrators were aware of Brdanin's knowledge and moral support/encouragement.

4. Statements or Testimonies by Perpetrators in SGBC Cases

4.1 The Type and Nature of Perpetrators' Testimonies

Perpetrator witnesses are the accused themselves who pleaded guilty or admitted to specific facts about their involvement in the crime in their own trials.[198] It often comes in the form of guilty pleas or admission of guilt by the accused himself but includes statements from co-defendants, accomplices, and co-conspirators.[199] These testimonies aim to provide an insight into the attitudes, moral values, and motives of the perpetrators, but they also help capture "internal truth" and reconstruct historical facts.[200] This can help the judges establish the truth in arriving at their decision. However, the risk for a perpetrator to give a false statement is high since they have a direct motivation to appear in a more favorable light[201] and or distort the factual truth.[202] If the false report is accepted as a piece of historical evidence, it could also contribute to historical misrepresentation.[203] Browning's writings on Adolf Eichmann's memoirs emphasize that using

[193] See Prosecutor v. Ngirabatware, Case No. ICTR-99-54-T, Trial Judgment (20 December 2012), paras. 961-962, 964, 981.
[194] See Prosecutor v. Ngirabatware Case No. MICT-12-29-A, Appeal Judgment (18 December 2014), para. 251.
[195] See Kvocka et al. Appeal Judgment, supra note 51, para. 599.
[196] See Brdanin Trial Judgment, supra note 126, paras. 824, 1018.
[197] See Prosecutor v. Brdanin, Case No. IT-99-36-A, Appeal Judgment (3 April 2007), para. 277.
[198] For more discussion, see Nancy Combs, Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach. Stanford, CA: Sandford University Press, 2006, pp. 59-62.
[199] See Catherine Eagles, Co-defendants, Accomplices, and Co-conspirators: Common Evidence Issues and Selected Cases. Paper presented to the Superior Court Judges Conference, Fall, 2005. < https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/200510EaglesCoD.pdf> accessed 02 February 2021.
[200] See Combs, supra note 198, pp. 193-199; Sibylle Schmidt, Perpetrators' Knowledge: What and How Can We Learn from Perpetrator Testimony? Journal of Perpetrator Research 1, no.1 (2017), p. 97.
[201] See Schmidt, supra note 200, p. 95.
[202] Ibid., p. 101.
[203] Ibid., p. 95.

Eichmann's testimonies as historical sources requires a special justification and verification process since they are very probably a 'conglomeration of faulty memories on the one hand and calculated lies for legal defense and self-justification on the other.'[204] Any eyewitness's reports could be unreliable, but the perpetrator's statement is considered to be even more unreliable, as the perpetrator usually has a direct reason to conceal the factual truth or certain details.[205] However, perpetrators' testimonies have been widely used as evidence in international trials, and sometimes they have proven even more reliable, informative, and accurate than other evidence.[206] Either way, the motive and bias of the perpetrators' statements should be assessed on the basis of corroboration or a directive to provide a reasoned opinion as to why the chamber accepted the evidence.[207]

In a judicial context, the accused's right to remain silent is the right not to incriminate him or herself, but it also denotes how the testimony of an accused person has to be treated differently from the statements of bystanders or victims.[208] The positions of other witnesses (eyewitnesses or victims) and the perpetrator generally seem mutually exclusive. In court, the testimony of an accused person is subject to a different assessment than a third person. Generally, any person called as a witness in court must appear and give his or her testimony and can be compelled to do so – except the accused person.[209] According to Article 67 of the Rome Statute, the accused has a right to remain silent – that is, a right to refuse to give evidence – without such silence being a consideration in the determination of guilt or innocence.[210] It protects the accused person from self-incrimination (and after all, this person has a legal representative who can articulate his or her views and interests in the trial).[211]

Article 65 of the Rome Statute and ICC rule 139 provide clear guidelines on the defendants' admission of guilt. When the accused makes an admission of guilt, the chamber shall determine whether he or she understands the nature and consequences of the admission of guilt and if it was made voluntarily.[212] An analysis will then follow whether the admission of guilt is supported by the facts of the case vis-à-vis the

[204] See Christopher Browning, Collected Memories: Holocaust History and Postwar Testimony. Madison: University of Wisconsin Press, 2003, p. 5.
[205] See Combs, supra note 198, pp. 195-199; Schmidt, supra note 200, p. 97.
[206] During the 1945-1946 Nuremberg Trial, prosecution was mainly based on documentary evidence, official reports and personal recordings of the accused, since they were considered to be more reliable and compelling than the victims' testimonies. See Whitney Harris, Tyranny on Trial: The Evidence at Nuremberg. Dallas: South Methodist University Press, 1954. As is generally known, documents and testimonies from the perpetrators were also favored sources of evidence in historiography, until historians such as Saul Friedländer challenged this paradigm and argued for a more integrated history including the voices of the surviving victims; see Saul Friedländer, 'History, Memory, and the Historian: Dilemmas and Responsibilities.' New German Critique 80 (2000), pp. 3-15; Schmidt, supra note 200, p. 88; Combs, supra note 198, pp. 193-199.
[207] See Prosecutor v. Muvunyi, Case No. ICTR-00-55A-T, Trial Judgment (11 February 2010), paras. 14-15; Prosecutor v. Niyitegeka, Case No. ICTR-96-14-A, Appeal Judgment (9 July 2004), para. 98; Prosecutor v. Krajišnik, Case No. IT-00-39-A, Appeal Judgment (17 March 2009), para. 146.
[208] See Schmidt, supra note 200, p. 97.
[209] See Sumner Twiss, 'Can a Perpetrator write a Testimonio? Lessons from the Dark Side.' Journal of Religious Ethics 38, no. 1 (2010), pp. 5-42.
[210] Art. 67, Rome Statute.
[211] See Schmidt, supra note 200, p. 87.
[212] Art. 65, Rome Statute; Rule 139, ICC Rules.

charges and the evidence brought by the prosecutor, which the accused accepted.[213] The trial chamber may reject the guilt if it is not satisfied that the criteria had been met or where the trial chamber finds that a complete presentation of the case's material facts is required in the interests of justice, specifically the interests of the victims.[214] The trial chamber may request the prosecutor to present additional evidence, including witnesses' testimony, or order that the trial is continued under the ordinary trial procedures.[215]

4.2 Assessing the Perpetrators' Evidence

As explained, perpetrators' statements are not infallible. The judges should assess the motive and bias of their statements based on corroboration or a reasoned opinion as to why the chamber accepted the evidence.[216] The perpetrator's testimony can be considered reliable and genuine only when the facts of the case support it. It means the testimony should be consistent with the charges against him and corroborated by other evidence (particularly of the victims) brought by the prosecutor.

For instance, in *Rukundo*, the Chamber found the accused's admission that he committed the sexual assault consistent with the victim's testimony, stating that the accused sexually assaulted her.[217] The accused's admission was found to be relevant and supported the facts and the charges brought against him, which the Chamber found to be reliable and genuine.[218] Similarly, in *Sikirica*, the accused admitted that he prompted rape against certain detainees in the camp. His admission was confirmed by a victim who testified that she was raped multiple times by men at Keraterm camp immediately following the event.[219] The Trial Chamber found the accused's evidence and his guilty plea to be genuine and consistent with the facts and the charges against him. In the *Katanga* case, the accused admitted that he helped design the common plan to attack Bogoro that resulted in the commission of SGBCs,[220] which was corroborated by subordinates who stated that the accused assisted in defining the military strategy to attack Bogoro.[221] The Trial Chamber found the accused's statement truthful and consistent with the facts and the charges brought against him.[222] In *Blaskic,* the accused admitted that he was the commander of the detention centers where the rapes were committed but clarified that he did not have power and control over the men who committed the SGBCs.[223]

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[213] Ibid.
[214] Ibid.
[215] Ibid.
[216] See Muvunyi Trial Judgment, supra note 207, paras. 14–15; Niyitegeka Appeal Judgment, supra note 207, para. 98; Krajisnik Appeal Judgment, supra note 207, para. 146.
[217] See Prosecutor v. Rukundo, Case No. ICTR-2001-70-T, Trial Judgment (27 February 2009), para. 385. However, it should be noted here that the Appeals Chamber overturned this conviction in the context of genocide, finding that, while the sexual assault occurred, CCH's evidence was insufficient to establish that Rukundo possessed genocidal intent when committing it. See Prosecutor v. Rukundo, Case No. ICTR-2001-70-A, Appeal Judgment (20 October 2010), para. 237.
[218] Ibid.
[219] See Prosecutor v. Sikirica et al., Case No. IT-95-8-S, Sentencing Judgment (13 November 2001), paras. 22, 99.
[220] See Katanga Trial Judgment, supra note 81, para. 1682.
[221] Ibid., paras. 357, 363, 1294-1297.
[222] Ibid.
[223] See Prosecutor v. Blaskic, Case No. IT-95-14-T, Trial Judgment (3 March 2000), para. 722-724.

His statement was corroborated by testimonies of members of the perpetrator's group and various documents showing that the accused did not have effective control over the men who committed the crime.[224] The Chamber found the accused's admission truthful and consistent with the facts and the charges brought against him.[225] The cases discussed above show that the judges mainly evaluated the perpetrators' testimonies based on honesty and whether the accused made the statements in line with the case's existing facts and the charges brought against the accused.

4.3 The Usefulness of Perpetrators' Testimonies Related to Modes of Liability

The perpetrators' testimonies can be valuable in proving the order issued by the accused and the crime committed because of it, the existence of a common plan, knowledge, and awareness of the crime committed. It could assist in establishing that the accused physically committed rape or prompted/encouraged the rape. Further, the evidence could support the judges to prove that the plan was designed and executed by the accused, the exercise of effective control, presence, and visits made to the scene, or the accused was in charge. The evidence could be relevant in proving that the accused issued and ensured compliance with orders, that he saw SGBCs happening, and the disciplinary system and reporting mechanism.

For instance, in *Stakic, Krstic,* and *Plavsic* cases, the accused admitted during a television interview that he ordered and agreed to establish the detention camps and purchased buses and trucks to transport women there who were eventually raped.[226] He stated that he organized the military operation and led the massacres on Srebrenica, including holding and transferring the population.[227] The accused admitted to the existence of a concrete plan and participated in it, was informed about the crime, but refused to accept them or even investigate them.[228] These types of guilty pleas and testimonies from the accused could be useful in proving the existence of a concrete plan and the accused's planning as a factor that substantially contributed to the crime. This could be relevant in proving modes of liability, such as planning.

In *Cesic*, the accused admitted that he ordered two brothers to perform *fellatio* on each other, which they did,[229] while Todorovic admitted that he ordered six men to perform *fellatio* on each other, which they did.[230] These types of guilty pleas and testimonies could help prove that the accused gave an order to commit SGBCs, and the crimes were committed because of the order, which could be relevant in establishing the

[224] See Prosecutor v. Blaskic, Case No.: IT-95-14-A, Appeal Judgment (29 July 2004), paras. 610, 612.
[225] Ibid.
[226] See Stakic Trial Judgment, supra note 98, para. 477.
[227] Ibid., para. 615.
[228] See Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, Sentencing Judgment (27 February 2003), para. 51.
[229] See Prosecutor v. Cesic, Case No. IT-95-10/1-S, Sentencing Judgment (11 March 2004), para. 14.
[230] See Prosecutor v. Todorovic, Case No. IT-95-9/1-S, Sentencing Judgment (31 July 2001), paras. 9, 17, 38-40.

ordering mode of liability. Guilty pleas and acknowledging the wrongdoings by the perpetrators are also crucial for the victims' healing process.

In the *Bralo* case, the accused admitted that he physically raped a victim when he was interrogating her in the presence of Anto Furundzija and pled guilty to the crime.[231] In the *Simic* case, the accused admitted that he sexually assaulted four men.[232] These types of testimonies could be useful in proving that the SGBCs were physically committed by the accused himself, which could also be relevant in proving modes of liability such as direct commission.

In the *Sikirica* case, the accused pleaded guilty to instigating rape as he admitted to having prompted rape against certain detainees in the camp.[233] The accused's admission and guilty plea could help prove the link between instigation and the SGBCs, which could also be relevant in proving the instigation mode of liability.

In *Krajisnik,* the accused testified that he called for 'implementing what we have agreed upon, the ethnic division on the ground' where thousands of Muslims and Croats were forced to cross into Croatia.[234] He said he designed and adopted the strategic goals on separating from the other two national communities – separation of states.[235] These testimonies could help prove the common purpose and the intent to commit the crime, thus establishing modes of liability, such as JCE I.

In *Karemera et al.*, the accused acknowledged that women would be raped during the war.[236] In *Karadzic*, the accused admitted that he heard about allegations of rape committed by subordinates.[237] These testimonies could help prove that SGBCs were natural and foreseeable consequences of executing the common purpose, which could also prove modes of liability such as JCE III.

In the *Celebici* case, the accused (Mucic) admitted that he was in charge[238] and exercised authority over the subordinates[239] who obeyed and executed his orders to commit the crime.[240] He also admitted that he was present and saw the crime happening or he was informed of the crimes (see Section 3.1 of Chapter 6).[241] Also, in *Ndindilyimana et al.* (*Military II*), the accused Bizimungu admitted that he knew the refugees were at the stadium and received reports about the crime;[242] the accused admitted that he had the material ability

[231] See Prosecutor v. Bralo, Case No. Case No. IT-95-17-S, Sentencing Judgment (7 December 2005), paras. 3, 39, 97.
[232] See Prosecutor v. Simic, Case No. IT-95-9/2-S, Sentencing Judgment (17 October 2002), paras. 11,53, 63.
[233] See Sikirica et al. Sentencing Judgment, supra note 219, paras. 19, 22, 99, 125.
[234] See Krajisnik Trial Judgment, supra note 51, para. 1097 (Witness 583).
[235] Ibid., para. 994.
[236] See Karemera et al. Trial Judgment, supra note 168, para. 1485.
[237] See Karadzic Trial Judgment supra note 168, para. 3356.
[238] Ibid., para. 801.
[239] See Delalic et al. Trial Judgment, supra note 21, para. 737.
[240] Ibid., para. 739.
[241] Ibid., para. 769.
[242] See Prosecutor v. Ndindilyimana et al. (Military II), Case No: ICTR-00-56-T, Judgment and Sentence (17 May 2011), paras. 1454, 1525.

to restrain subordinates and appoint or dismiss or suspend subordinates.[243] In Rajic's guilty plea, he admitted that forces under his command committed SGBCs and that he was present, visited the scene, and knew about the crimes.[244] These testimonies and guilty pleas could help prove the existence of a superior-subordinate relationship, that the superior knew or had reason to know that crimes were about to be or had been committed and the superior's failure to prevent or punish or refer the matters for prosecution. This could be relevant in proving superior/command responsibility.

In *Katanga*, the accused admitted that he designed the attack on the village[245] and that he coordinated the implementation of the common objective by issuing instructions/orders to combatants and commanders to commit the crime.[246] These testimonies could help prove the accused's essential contribution to the common purpose, which resulted in the commission of the crime. This could be relevant in proving modes of liability such as co-perpetration.

Most of the evidence by the accused came by way of confession during a guilty plea. Although admission is always helpful towards the healing of the victims and the establishment of the historical truth, during this research, it was observed that to seal a plea bargain, prosecutors have sometimes agreed to drop charges of SGBCs *in lieu* of other types of crimes (e.g., murder) or they have dropped some SGBC charges because they had already secured a confession for other crimes. In the event that the SGBC charges could not totally be dropped, the accused had no other option but to still confess to them. For instance, Rajic was accused, among other charges, of committing and/or in the alternative of superior responsibility for inhuman treatment (including sexual assault) and outrages upon personal dignity, in particular inhuman and degrading treatment (including sexual assaults), as war crimes.[247] He agreed to plead guilty to four of the ten charges.[248] This means that he pleaded guilty to the count of inhuman treatment (including sexual assaults) but not to the one on outrages upon personal dignity. In *Zelenovic,* a number of SGBC charges were instead dropped because of difficulties linked to the evidence. When the Trial Chamber asked for clarification on which incidents in the Plea Agreement were qualified as rape and torture, the prosecution explained that the exclusion from the Plea Agreement of certain rape victims and charges, referred to in the Indictment, was based on a consideration of the available evidence.[249] Another example is Ranko Cesic, who, in October 2003, pleaded guilty to all the 12 counts entered against him, including the two concerning

[243] Ibid., paras. 1981, 1997.
[244] See Prosecutor v. Rajic, Case No. IT-95-12-S, Sentencing Judgment (8 May 2006), paras. 13, 38, 48-49, 53, 89, 103, 123.
[245] See Katanga Trial Judgment, supra note 81, para. 1682.
[246] Ibid., paras. 1336, 1339-1343.
[247] See Prosecutor v. Rajic, Case No. IT-95-12-PT Amended Indictment (13 January 2004).
[248] See Rajic Sentencing Judgment, supra note 244, para. 8; see also Prosecutor v. Zeljko Meakic, Momcilo Gruban, Dusan Fustar, Predrag Banovic, and Dusko Knezevic, Case No. IT-02-65, Consolidated Indictment (Omarska and Keraterm camps) (5 July 2002), paras. 18-22, 23-27, where the accused Banovic, through a plea bargaining, ended up never being convicted for SGBCs.
[249] See Prosecutor v. Zelenovic, Case No. IT-96-23/2-S, Sentencing Judgment (4 April 2007), para. 11.

SGBCs,[250] which had been proven through excerpts from two statements of one of the victims and the full statements confidentially filed.[251] Interestingly, the prosecution also presented evidence that Ranko Cesic allegedly raped two other women in May and June 1992. The prosecution submitted confidential statements from the victims to support the allegation. However, the prosecution chose not to indict Cesic for these acts, although they were presumably committed during the period covered in the Indictment.[252] In this case, the prosecution might have decided to drop the two additional SGBC charges because it lacked the means of assessing the victims' accounts alongside existing evidence or because it had already ensured a conviction for the other crimes. Interestingly, during Cesic's trial, the evidence of SGBCs were only used to counter the evidence presented by the defense on the accused's good character.[253]

Several high-level officials admitted that they committed or were made aware of the SGBCs and the admissions of guilt were accurate and relevant to the charge, thus leading to a conviction.[254] The admissions of guilt of the perpetrators' witnesses provide unique insights into their own attitudes, moral values, and motives to commit the crime. Their testimonies were mainly helpful in proving the existence of an agreement/common plan, the accused's involvement in designing and implementing the plan, and knowledge that the SGBCs would be or had been committed by subordinates. They were instrumental in proving superior/command responsibility, planning, JCE III, ordering, and direct commission modes of liability. However, there have been some SGBC cases where the accused was not convicted following his admission of guilt. For instance, in the ICTY *Blaskic,* the accused admitted that he was the camp commander where the rapes occurred, but he clarified that he did not have power and control over the soldiers who committed the SGBCs.[255] Consequently, the Appeals Chamber acquitted the accused of command responsibility of rape, stating that he did not have effective control over the subordinates who committed the crime. [256] In the ICC *Katanga* case, although the accused admitted to having helped design the village's attack that subsequently led to the commission of SGBCs,[257] he was not convicted of these acts because the SGBCs committed were not part of the common purpose.[258]

[250] See Cesic Sentencing Judgment, supra note 229, para. 4.
[251] Ibid., para. 14.
[252] Ibid., para. 73.
[253] Ibid., paras. 70-3, 76.
[254] E.g., Rukundo, Sikirica, Celsic, Bralo, Simic, Mucic, Rajic, Karemera, & Plavšić.
[255] See Blaskic Trial Judgment, supra note 223, para. 722-724.
[256] See Blaskic Appeal Judgment, supra note 224, para. 612.
[257] See Katanga Trial Judgment, supra note 81, para. 1682.
[258] Ibid., paras. 1336, 1339-1343 (see e.g., testimony of D02-300, P-28).

5. Experts' Testimonies in SGBC Cases

5.1 The Type and Nature of Experts' Testimonies

An expert witness is a person acknowledged by a court to have expertise in a given field or on a topic. These experts provide their professional opinions as a testimony to a case to offer the judges information or interpretation on specific matters outside of the judges' immediate experience and knowledge.[259] The expert witness differs from the ordinary witness in that the former can state his opinions or conclusions based on ultimate fact, whereas the latter can testify only to things that he saw, heard, tasted, smelled, or felt.[260] The expert must possess solid qualifications, including education, experience, articles published, lectures delivered, membership in professional societies and organizations, awards, and recognition as an expert by others in the same field.[261]

Both the prosecution and the defense have the right to seek expert evidence from specialists who may present their expert advice on a particular technical subject matter to the judges without being witnesses to the same crimes as charged in the indictment.[262] Testimony by an expert witness may be offered to prove or disprove the existence of certain facts that may relate to direct or circumstantial evidence. Although direct evidence can be the subject of expert testimony, in most instances, professional interpretations may be necessary for several forms of circumstantial evidence.[263] As explained, an expert may be called upon to determine whether trauma affects a witness' testimony[264] or whether SGBCs were widespread, including social-cultural or historical contexts of targeted ethnic groups that the victims belonged.[265] The expert may help determine a physical perpetrator's identity by matching fingerprints on the rape victim's neck to an existing database[266] and the authentication of certain documents, including photographs, letters, contracts, audio recordings, or video recordings that may connect a defendant to the crime.[267] Expert evidence at the ICTY and ICTR is overseen by rule 94*bis,*[268] in conformity with the principle of flexibility balanced against the

[259] See William Mantle and Joselyne Chenane, Expert Witness: The Encyclopedia of Criminology and Criminal Justice. 1st ed. Oxford: Blackwell, 2014, p. 1; International Criminal Tribunal for Rwanda, Prosecution of Sexual Violence Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post- conflict Regions,2014, p. 60; Prosecutor v. Norma et al., Case No. SCSL-04-14-T, Decision on Fofana Application for Leave to Call Additional Witness (17 July 2006), para. 5; Prosecutor v. Akayesu, Case No. ICTR-96-04-T, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness (9 March 1998); Artur Appazov, Expert Evidence and International Criminal Justice. Cham, Switzerland: Springer International, 2016, p. 32.
[260] See Benjamin Cantor, The Expert Witness. American Bar Association Journal 52, no.10 (1966), p. 946.
[261] See Mantle and Chenane, supra note 259; Norma et al. Decision to Call Additional Witness, supra note 259, para. 5; Akayesu Motion for the Accused to appear as Expert Witness, supra note 259; Appazov, supra note 259, p. 32.
[262] For more information, see Appazov, supra note 259, pp. 23-62.
[263] See Mantle and Chenane, supra note 259.
[264] See e.g., Ntaganda Trial Judgment, supra note 81, paras. 79-80; Lubanga Trial Judgment, supra note 81, para. 103; Bemba et al. Trial Judgment, supra note 81, para. 203; Bemba Trial Judgment, supra note 81, para. 230 Katanga Trial Judgment, supra note 81, para. 83; Ngudjolo Chui Trial Judgment, supra note 81, para. 49; Mantle and Chenane, supra note 259, p. 1.
[265] See Mantle and Chenane, supra note 259, p. 1.
[266] Ibid.
[267] Ibid.; see also Appazov, supra note 259, p. 32.
[268] Rule 94bis, ICTY/ICTR Rules.

proceedings' integrity.[269] At the ICC, expert evidence is not entirely mute;[270] it is governed by the regulations of the court and regulations of the Registry, which permits the appointment of experts. In particular, regulation 44 of the regulations of the court provides that the court can, at participants' request, appoint an expert or a group of experts; thus, the court may direct the joint instruction of an expert by the participants, or the court may appoint an expert *proprio motu.*[271]

5.2 Assessing the Experts' Evidence

When the prosecution or defense decides to use expert testimony, the judges must determine whether such testimony is relevant and trustworthy. The expert evidence only becomes reliable and admissible if it is relevant to assess a contested fact's validity. The opinion must be based on accurate, verifiable, and impartial data. Further, the geographic scope of the expert's evidence must be closely linked with the charges in the indictment and must be specific and supported by direct evidence.

For instance, in the *Kunarac et al.,* the Trial Chamber held that inaccurate, unverified, and prejudiced data could render the expert opinion inadmissible. In that trial, expert witness Dr. Christine Cleiren shared the Commission of Experts' findings to the judges that the SGBCs committed in BiH were widespread.[272] The Trial Chamber questioned that the expert's evidence was purely based on unverified allegations and excluded that part of her testimony.[273] In the same way, in the *Milutinovic et al.*, the prosecution adduced expert evidence of a psychotherapist who affirmed that rapes happened on a widespread basis in Kosovo.[274] The Trial Chamber questioned the reliability of the psychotherapist and expressed doubt as to whether the veracity of the allegations underlying the psychotherapist's report had been tested.[275] The Chamber raised concerns because of the expert's affiliation with the organization that provided support to the same victims she provided data on allegations of sexual violence.[276] Being affiliated with an organization does not necessarily make an expert a biased professional unless a demonstrable partiality has been proven. Rather, the test should be whether the expert is unwilling or unable to comply with their duty to the court.

The expert evidence can be excluded if it is far too general and unsupported by direct evidence to link the accused or to contribute to the case. For instance, in *Bagosora et al.* (*Military I*), the Chamber found that

[269] See Avi Singh, "Expert Evidence." In Principles of Evidence in International Criminal Justice, edited by Karim Khan, Caroline Buisman, and Chris Gosnel. Oxford: Oxford University Press, 2010, p. 603.
[270] See Roger Derham, From Ad hoc to Hybrid: The Rules and Regulations Governing Reception of Expert Evidence at the International Criminal Court. International Journal of Evidence and Proof 14 (2010), p. 29; Singh, supra note 269, p. 606.
[271] Regulation 44 of the Regulations of the Court, Rome Statute.
[272] See Prosecutor v. Kunarac et al., Case No. IT-96-23-T, Pre-Trial Conference (29 May 2000) transcript pp. 4146, 4154-5; Prosecutor v. Kunarac et al., Case No. IT-96-23-PT, Prosecutor's Submission of Expert Witness Statement under Rule 94bis (12 November 1999), para. 2.
[273] See Kunarac et al. Pre-Trial Conference, supra note 272, transcript pp. 4148-9, 4155-62.
[274] See Prosecutor v. Milutinovic et al. Case No. IT-05-87-PT, Pre-Trial Conference (7 July 2006) transcript p. 292.
[275] Ibid.
[276] Ibid.

the evidence presented by a prosecution expert witness (Des Forges)[277] was too general to make any specific findings on its scope (see Section 3.1 of Chapter 6).[278] The expert also stated that some refugees were raped as they were marched to Nyanza, but the judges noted that the parties did not specifically question her on this point, her evidence did not indicate the identity of the perpetrators, and there was no corroboration by direct evidence in the present case.[279] Similarly, the Chamber in *Bizimungu et al.* excluded expert testimony because the evidence lacked specificity, could not be supported by direct witnesses, finding that part of the opinion fell outside the scope of expertise.[280] The Chamber stated that it could not rely on this information (that SGBCs were widespread) to infer knowledge on the part of the accused of these crimes without any specificity or direct evidence.[281] The expert also expressed opinions on the culpability of the authorities in her book and made reports that lay outside her field of expertise and in respect of which she lacked first-hand knowledge.[282] Consequently, the Chamber ruled 'inadmissible those portions of the expert's evidence that [fell] outside the scope of her expertise or express[ed] opinions on ultimate issues before the Chamber.'[283]

The analysis above shows that it is very difficult to get expert testimony accepted by the judges. The credibility assessment varies depending on the subject the expert has been called to provide expert opinions on and the expert's affiliation with the organization. To be accepted, the evidence by the expert should be as specific as possible, and it must contribute to the case. The judges are more likely to draw inferences from expert evidence that provides contextual background only if the underlying data's impartiality and reliability criteria have been assessed. Therefore, the prosecution should devise better strategies to present expert evidence that is probative and based on strong and accurate data that are clear and reliable to encourage or allow judges to make sound inferences.

5.3 The Usefulness of Experts' Testimonies Related to Modes of Liability

Expert evidence can help prove the accused's authority, that subordinates committed rape, and the pattern or widespread commission of rape. Expert witnesses can be valuable to establish the accused's awareness of the rape, superior-subordinate relationship, and the credibility of victims who have PTSD.

[277] See Bagosora et al. Judgment & Sentence, supra note 174, para. 1775.
[278] Ibid., para. 1776.
[279] Ibid., para. 1354.
[280] See Prosecutor v. Bizimungu et al., Case No. ICTR-99-50-T, Decision on defence motions pursuant to Rule 98 bis (22 November 2005), para. 96; see also Prosecutor v. Bizimungu et al., Decision on the Admissibility of the Expert Testimony of Dr. Binaifer Nowrojee (8 July 2005), p. 6, in which the chamber ruled 'inadmissible those portions of Dr. Nowrojee's evidence that fall outside the scope of her expertise or express opinions on ultimate issues before the chamber.'
[281] Ibid.
[282] See Bizimungu et al. Decision on Admissibility of Expert Testimony, supra note 280, para. 4.
[283] Ibid., p. 6.

For instance, in *Akayesu*, an expert witness, Alison DesForges, testified that the accused, as the bourgmestre, was the most important authority for the ordinary citizens of a Commune, who in some sense exercised the powers of a chief in pre-colonial times.[284] This type of evidence could be useful in proving that the accused had authority over the person receiving the order, which could also be relevant in proving modes of liability, such as ordering. In *Bagosora*, the Chamber admitted Binaifer Nowrejee as an expert concerning her investigations of SGBCs in Rwanda, based on her interviews and field investigations. It concluded that her evidence was relevant to the patterns of SGBCs in 1994 and that SGBCs were widespread, public, and brutal and appeared organized, which the accused should have known.[285] Similarly, Binaifer Nowrojee testified, as a prosecution's expert witness in *Bizimungu et al.* (*Government II*), that SGBCs were committed on a widespread and systematic basis, between April and July 1994 in Rwanda, as a way of making an inference that the accused knew about them.[286] The Chamber accepted her accounts of widespread and systematic SGBCs but rejected portions of her statement on the culpability of the authorities that fell outside the scope of her expertise.[287] The cases mentioned above show that admission of credible expert evidence on the widespread or systematic nature of SGBCs could lead to the accused's conviction based on "should have known." These expert testimonies could be valuable in proving superior-subordinate relationships and that the superior knew or had reason to know that crimes were about to be or had been committed by subordinates. This evidence could also be relevant in proving modes of liability such as superior/command responsibility.

Another useful way could be eliciting an expert witness with expertise in pattern evidence who could explain to the judges how to infer an accused's intent and knowledge from a pattern of acts of similar gravity to establish the mental element.[288] For example, in the ICC's *Bemba* case, the prosecution called expert witness Andre Tabo to explain the pattern of SGBCs and the use of SGBCs as a tool of war in the CAR's conflict.[289] The evidence was accepted by the Trial Chamber, noting that SGBCs were committed on a widespread basis and that the victims were considered to be "war booty", the objective being to destabilize, humiliate, and punish suspected rebels and rebel sympathizers.[290] Also, in the *Karadzic* and *Mladic* rule 61 proceedings, the prosecution presented an expert, Dr. Christine Cleirens, to explain the patterns of SGBCs in that case. The Trial Chamber relied[291] upon her evidence to infer

[284] See Akayesu Trial Judgment, supra note 24, paras. 73, 77.
[285] See Bagosora et al. Judgment & Sentence, supra note 174, para. 1728, referring to footnote 1883.
[286] See Bizimungu et al. Decision on Rule 98 bis, supra note 280, para. 96; Bizimungu et al. Decision on Admissibility of Expert Testimony, supra note 280, para. 11.
[287] See Bizimungu et al. Decision on Admissibility of Expert Testimony, supra note 280, para. 11.
[288] For more discussion, see Xabier Aranburu, Sexual Violence Beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases. Leiden Journal of International Law 23 (2010), p. 626; Bemba Trial Judgment, supra note 81, para. 221.
[289] See Prosecutor v. Bemba, Case No. ICC 01/05-01/08-T-100-ENG, Testimony of Andre Tabo (13 April 2011), transcript pp. 3-9.
[290] See Bemba Trial Judgment, supra note 81, paras. 563, 564, 567.
[291] See Prosecutor v. Karadzic and Mladic, IT-95 18-R61 & IT-95-5-R61, Rule 61 Decision Hearing (11 July 1996), transcript p. 919.

that SGBCs had occurred systematically and were part of a general policy of ethnic cleansing.[292] As explained, proof of a widespread commission of SGBCs can help establish the mental element requirement (had reason to know) and possibly lead to the accused's conviction. The population-based survey method can also help prove the widespread nature of SGBCs. An expert with such knowledge could help the court understand prevalence estimates and other generalizable data, showing patterns of SGBCs and indicating their widespread and systematic character.[293] For instance, an expert witness in the *Ntaganda* case, Dr. Lynn Lawry, an epidemiologist, testified about SGBCs based on population surveys she conducted in the Democratic Republic of Congo, Ituri region, to show a pattern of SGBCs and other crimes committed by various armed groups. The evidence provided a good understanding of how SGBCs were widespread in DRC during the events, although the Chamber ruled that the expert did not sufficiently focus the research on the relevant timeframe or victim groups.[294]

The use of forensic evidence, i.e., evidence 'obtained through scientific testing,'[295] can play an important role in establishing the magnitude or pattern of SGBCs and in holding high-level officials accountable for these crimes.[296] For example, in *Milutinovic et al.*, forensic experts testified that the bodies of two victims excavated from the wells in Cirez/Qirez showed signs suggesting sexual assaults.[297] The Trial Chamber found the evidence credible and reliable and held that the two victims were sexually assaulted, before being thrown into the wells while still alive.[298] Moreover, forensic experts in both the *Karadzic* and *Mladic* cases assisted the Trial Chambers in determining the number of victims, their gender, their civilian character, and the cause and time of their deaths.[299] The samples from forensic evidence, when appropriately analyzed, could be useful in establishing whether SGBCs occurred on a widespread and systematic basis, the existence of superior-subordinate relationships, and the superior knew or had reason to know that crimes were about to be or had been committed by subordinates. This evidence could also be relevant in proving modes of liability such as JCE and superior/command responsibility.

[292] Ibid., transcript pp. 959-60, 992.
[293] See Lynn Lawry et al., The Use of Population-Based Surveys for Prosecutions at the International Criminal Court: A Case Study of Democratic Republic of Congo. International Criminal Justice Review 24, no. 1 (2014), pp. 5-21.
[294] See Prosecutor v. Ntaganda, Case No.: ICC-01/04-02/06, Supplementary submission on behalf of Mr. Ntaganda in relation to proposed Expert witnesses (23 February 2016) paras. 40-43.
[295] For detailed discussion on forensic evidence, see Caroline Fournet, Forensic Evidence in Atrocity Trials: A Risky Sampling Strategy? Journal of Forensic and Legal Medicine 69 (2020), pp. 1-6; see also Gopalan, Kravetz, and Menon, supra note 9, pp. 157-158.
[296] See Janice Du Mont and Deborah White, The Uses and Impacts of Medico-Legal Evidence in Sexual Assault Cases: A Global Review. Geneva: World Health Organization, 2007, pp. 9-10. < https://apps.who.int/iris/handle/10665/43795> accessed 27 October 2020.
[297] See Milutinovic et al. Trial Judgment, supra note 48, paras. 645, 688-9, 1224.
[298] Ibid., paras. 688-9, 1224.
[299] See Fournet, supra note 295; Karadzic Trial Judgment, supra note 168; Mladic Trial Judgment, supra note 164.

Expert evidence was introduced to support the victim's credibility in the *Furundija* case.[300] In that case, two expert testimonies were tendered by the defense and the prosecution. The defense expert's evidence stated that PTSD had an adverse effect on people's memory; therefore, witnesses suffering from this disorder were susceptible to more significant inconsistency in their testimony.[301] On the other hand, the prosecution expert's evidence stated that PTSD does not render a person's memory of traumatic events unworthy of belief; therefore, to the contrary, a person remembers more meaningful experiences with greater accuracy.[302] After assessing the two experts' accounts, the Trial Chamber found that PTSD does not render a person's memory of traumatic events unworthy of belief.[303]

Experts can provide valuable opinions on various topics that can help the chamber establish facts on specific aspects of the case, such as supporting the credibility of victims who have PTSD, the widespread or systematic nature of the SGBCs, and the accused's authority over their subordinates. The analysis above shows that it is indeed very difficult for the judges to accept expert testimony, but when such evidence is admitted, it could influence the judge's decisions and positively impact the case. A possible strategy to improve this situation could be for the prosecutor to engage earlier on with the organizations and individuals working with SGBCs' victims to train and guide their work to collect information that can be used as evidence at a later stage.

6. Documentary Evidence in SGBC Cases

6.1 The Type and Nature of Documentary Evidence

Most international criminal trials depend on a large number of documents as evidence to prove cases in court.[304] Documentary evidence refers to the physical material recording of information in a written or documentary format.[305] The actual evidence is not the document itself but the information recorded in it; it is considered real physical evidence only if, for example, it has official stamps or signature, which can help authenticate it or if there is blood on it.[306] Documents may come in various forms, such as reports by the local authorities, armed forces, and international observers.[307] They may also contain an affidavit or sworn declaration, communication records, written directives and orders, maps, charts, diagrams, written war plans and strategies, minutes of meetings, official archives, and previous case law, forensic medical certificates,

[300] See Furundzija Trial Judgment, supra note 32, paras. 110-116.
[301] Ibid., paras. 102-3.
[302] Ibid., para. 104.
[303] Ibid., para. 108.
[304] Evidence Law: Documentary Evidence and Judicial Notice, Preliminary Paper/Law Commission Wellington, NZLC PP22, 1994, para. 1. <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20PP22.pdf> accessed 6 March 2021.
[305] International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law. 2nd ed., 2017, p. 148.
[306] Ibid.
[307] See Gopalan, Kravetz, and Menon, supra note 9, p. 155.

or newspaper articles containing perpetrator responses about the crime.[308] Documents are not infallible. They could be outweighed by any potential prejudice, easily be altered or lack dates and signatures, lack relevance or not fit into cases, or have a false stamp on it.[309] Even if these features exist, documents cannot automatically be admitted into evidence until a party offers some proof of their authenticity through witnesses.[310] In the absence of such authentication, the document is inadmissible and should be excluded. Authentication is a procedural requirement, similar to proving the reliability of a witness. Once a document is authenticated, it becomes provisionally admissible, but the applicable law governs the actual use to which a document may be put under the RPE:

> *'it considers the admissibility of a document on the basis of its relevance, probative value, and any prejudice that its admission may cause to a fair trial or to the evaluation of the testimony of a witness; its assessment of both relevance and probative value is conducted on a prima facie basis; and its assessment of material for the purposes of admissibility is distinct from the evidentiary weight which the [c]hamber may ultimately attach to admitted evidence in its final assessment, based on the entire case record before it.'*[311]

Documents can be authenticated or proven in many ways. Direct evidence of authentication can consist of oral testimony by the author of the document, a signatory, or an eyewitness to the signing of that document.[312] It is also possible to prove the document through indirect or circumstantial evidence that may involve handwriting or other identification by an expert witness who did not see the making or signing of the document but who can testify to the signatory's identity.[313] As explained, expert witnesses can be utilized for authentication by attesting to the identity of handwriting on a document.[314]

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[308] See Schabas, supra note 34, p. 471, footnote 116; Patrick Hassan-Morlai, Evidence in International Criminal Trials: Lessons and Contributions from the Special Court for Sierra Leone. African Journals of Legal Studies, 2009, p. 112; Tan Yock Lin, Making Sense of Documentary Evidence (Part I). Singapore Journal of Legal Studies, 1993, pp. 504-37; International Protocol on investigating Sexual Violence in Conflict, supra note 305, pp. 148-149.
[309] See Prosecutor v. Ntaganda, Case No.: ICC-01/04-02/06, Decision on Prosecution's request for admission of documentary evidence (28 March 2017) paras. 7-15.
[310] Ibid., para. 6.
[311] Ibid.
[312] Ibid., paras. 9, 13, 31.
[313] See Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Case No: ICC-01/05-01/13, Response to Prosecution's First Request for the Admission of Evidence from the Bar Table (15 July 2016), para. 27; see also Ntaganda, Request for admission of documentary evidence, supra note 309, paras. 9, 13.
[314] See Prosecutor v. Bemba et al., Case No: ICC-01/05-01/13, Response to Prosecution's First Request for the Admission of Evidence from the Bar Table (15 July 2016), para. 27.

6.2 Assessing the Documentary Evidence

Documentary evidence can be considered reliable and admissible only if the origin and genuineness are established, provides sufficient clarity, and has reliable authorship. It must be relevant to the case, and the author or source must have explained its contents. Further, it must be authenticated or corroborated by similar documents and sufficiently indicates or points to the existence of a given fact as probable.

For instance, the *Gbagbo and Ble' Goude*'s Trial Chamber held that documents could be excluded if they do not have signs, indications, or circumstances that could point to the existence of a given fact as probable, such as the location of the rape. In that trial, the Prosecutor presented a report from Human Rights Watch showing that female "pro-Ouattara" campaigners were raped by the FDS members in Abobo on 25 February 2011.[315] The judges considered the evidence as having low probative value because it was based exclusively upon anonymous hearsay, finding that it was not clear from the report which Abobo's area women were taken and allegedly raped.[316]

The documentary evidence can also be barred due to insufficient clarity or unreliable authorship. In the *Seselj* case, the prosecution tendered documents containing exhibits describing the circumstances and the content of the accused's speech[317] but without mentioning if SGBCs were committed after this speech.[318] The Chamber deemed that the documents did not clarify whether this speech was the reason for the campaign of persecution, including sexual assaults.[319] Further, the witness who was the source of the document and brought to support this document was not considered reliable. Therefore, the judges could not establish a connection between the accused's speech and the SGBCs.[320]

Furthermore, a document cannot be admitted into evidence if the author or source is not consulted to provide more information on its contents or if a similar document could not be produced to authenticate the evidence. In *Gbagbo and Blé Goudé,* documents were presented showing that Gbagbo held many meetings with senior FDS commanders and that he was the commander in control.[321] However, the prosecution did not show these documents to the putative authors or asked them to clarify their contents, or pointed the Chamber

[315] See Prosecutor v. Gbagbo, Case No.: ICC-02/11-01/11, Decision on the confirmation of charges against Laurent Gbagbo (12 June 2014), para. 74 (see footnote 183 – HRW press release, CIV- OTP-0002-0173 at 0176-0177 (same information in HRW report, CIV-OTP-0004-0072 at 0127-0129); They Killed Them Like It Was Nothing The Need for Justice for Cote d'Ivoire Post-Election Crimes, 6 October 2011.<https://reliefweb.int/report/c%C3%B4te-divoire/%E2%80%98they-killed-them-it-was-nothing%E2%80%99-need-justice-c%C3%B4te-d%E2%80%99ivoire%E2%80%99s-post-election> accessed 2 October 2020.
[316] See Gbagbo and Blé Goudé, Reasons of Judge Geoffrey Henderson, supra note 146, para. 1372.
[317] See Prosecutor v. Seselj, Case No.: IT-03-67-T, Trial Judgment (31 March 2016), para. 330.
[318] Ibid., para. 331.
[319] Ibid., para. 333.
[320] Ibid.
[321] See Gbagbo and Blé Goudé, Reasons of Judge Geoffrey Henderson, supra note 150, paras. 387-388.

to similar documents that could authenticate them.[322] The Chamber held that, given this lack of authentication, these documents could not be admitted; even if accepted, their evidentiary weights would be of limited probative values due to the absence of authentication.[323] Further, the documents could not specifically prove the involvement of the accused operationally or the level of control he had over these commanders.[324]

The reliability of documents is often questioned on their authorship and relevance to the case at issue. In the cases analyzed, the judges excluded several documents because the prosecutors could not sufficiently meet these assessment criteria. Therefore, the relevance and authenticity of each document submitted into evidence must be established, including their origin, genuineness, authorship, integrity, and specificity.[325]

6.3 The Usefulness of Documentary Evidence Related to Modes of Liability

Documents can be helpful in so many ways, including proving the existence of a common plan and strategic goals and the accused's authority and level of control over subordinates and the organizations. Documents could be valuable in proving the establishment of detention centers and transfer of population, including the orders signed and stamped by the accused showing he was in charge and the accused's knowledge/awareness of SGBCs committed by subordinates. Documents can be essential in showing that the accused purchased materials and equipment and issued instructions to implement the plan. Additionally, documents could help establish that SGBCs were committed on a widespread basis for a long time or prove that the victims were collected in various locations and raped by soldiers. Documents could be crucial in establishing that the accused attended meetings where they discussed the crimes, the existence of disciplinary system and reporting mechanisms, the group's structure, including the military education/ training of soldiers.

For instance, in *Stakic* and *Krstic*, the prosecution presented documents containing recorded statements of the accused, such as televised interviews and radio intercepts showing that the accused helped establish detention camps (where the rapes were committed) and purchased buses and trucks.[326] The documents also showed his involvement in transferring the civilian population.[327] The prosecution also presented documents, such as minutes of meetings held,[328] policy statements, statements on strategic goals showing the strategy to separate Serbs from the other communities.[329] Documents with the official stamp showing

[322] Ibid.
[323] Ibid.
[324] Ibid., paras. 382-453.
[325] Ibid., para. 32.
[326] See Stakic Trial Judgment, supra note 98, para. 477; Krstic Trial Judgment, supra note 99, para. 344.
[327] See Krstic Trial Judgment, supra note 99, para. 344.
[328] Ibid., para. 472.
[329] Ibid., para. 471.

the accused giving instructions and decision on the accused's appointment as president were also presented as evidence.[330] These documents could help prove the existence of a concrete plan and the accused's role and leadership position, which could also be relevant in proving modes of liability such as planning.

In *Akayesu, Muhamana*, and *Todorovic* cases, the prosecution tendered documents containing orders signed and stamped by the accused as the leader[331] and documents confirming the accused's appointment as the leader.[332] These documents could help prove that the accused had authority over the person receiving the order, which could also be relevant in proving modes of liability such as ordering. In the same way, in *Krajisnik* and *Mladic*, the prosecution tendered documents showing that leading members of the JCE were informed of the new SGBCs but did nothing about the crimes.[333] The documents presented also show how the accused purchased equipment and materials and reports he received about the crime.[334] These documents could help prove that the SGBCs were part of the common purpose and the accused shared the same intent to commit the crimes, which could also be relevant to prove modes of liability such as JCE I.

In *Karadzic* and *Sainovic et al.,* documents were presented showing that soldiers had been detained for rape.[335] The prosecution also presented documents containing reports and letters written to the accused showing that the SGBCs were widespread and happened notoriously over a long period, and the accused was aware of the crimes.[336] Also, in *Prlic et al.* case, documents containing a military security service report presented by the Prosecutor showed how women and girls were collected and raped daily.[337] In *Zupljanin et al.*, the Prosecutor presented documents showing that the accused *Stanisic* was present in various high-level meetings where the leaders discussed the crime and movement of civilians.[338] In *Martic*, documents containing financial and logistics records showed that the accused participated in the JCE by creating, financing, supplying, training, and directing the physical perpetrators.[339] These types of documents could help prove that the SGBCs were natural and foreseeable consequences of executing the common purpose, of which the accused's contribution was essential. This could be relevant in proving modes of liability such as JCE III.

[330] Ibid., paras. 88-90, 96.
[331] See Akayesu Trial Judgment, supra note 24, para. 54.
[332] See Todorovic Sentencing Judgment, supra note 230, para. 46; Akayesu Trial Judgment, supra note 24, para. 54; Muhimana Trial Judgment, supra note 103, para. 604.
[333] See Krajisnik Trial Judgment, supra note 51, paras. 1105.
[334] See Mladic Trial Judgment, supra note 164, paras. 3748, 4420-4421, 4685, 4688.
[335] See Prosecutor v. Sainovic et al., Case No. IT-05-87-T, Trial Judgment, vol. III (26 February 2009), para. 785.
[336] See Karadzic Trial Judgment, supra note 168, para. 3360; Sainovic et al. Trial Judgment, supra note 335, para. 785; Prosecutor v. Šainović et al., Case No. IT-05-87-A, Appeal Judgment (23 January 2014), paras. 1579, 1580.
[337] See Prlic et al. Trial Judgment, supra note 52, para. 235.
[338] See Stanisic and Zupljanin Trial Judgment, supra note 51, paras. 764-765.
[339] See Martic Trial Judgment, supra note 170, paras. 140-148, 447-453.

In *Delalic et al.,* documents were presented by the prosecution showing signatures on orders issued by the accused, appointments made by him, and meetings he presided over, showing that he was in charge.[340] Documents containing letters were also presented, which identified the accused as the camp commander.[341] In *Ndindilyimana et al.* (*Military II*), the prosecution presented documents containing UN reports, situation reports, media reports, letters, and correspondences, showing that the accused was informed about the crimes.[342] Documents were presented showing the accused's appointment as the one in charge, which proved that the accused had the material ability to discipline all soldiers below him in the hierarchy.[343] These types of documents could help prove the existence of a superior-subordinate relationship and the failure to take the necessary and reasonable measures to prevent the crimes or punish their perpetrators or refer the matters for prosecution. They could help prove superior/command responsibility.

In *Katanga*, a document was presented containing minutes of meetings attended by the accused, which showed how he planned the attack and instructed commanders and combatants to implement the plan.[344] This type of evidence could help prove the existence of an agreement or common plan between leaders, which could also be relevant in proving modes of liability such as co-perpetration. Also, in *Katanga*, the prosecution presented documents containing letters showing that the accused possessed authority in the organization.[345] Documents containing letters submitted showed that militias were distributed to several camps headed by the accused, and the military units were structured and trained, resembling a conventional army.[346] These documents could help prove that the accused possessed authority in the organization to ensure compliance with his orders to automatically commit the crime and the knowledge of the character of the organized and hierarchical apparatus of power. This could be relevant in proving the indirect perpetration mode of liability.

In *Ntaganda*, the prosecution's documents containing logbooks with messages from the accused and subordinates showed that the group possessed military camps arranged in a single organizational structure with combatants serving under the accused's orders.[347] The documents also showed the existence of a disciplinary system in the group.[348] These documents could help prove that the accused had control over the

[340] See Delalic et al. Trial Judgment, supra note 21, paras. 671, 674-675, 681, 683.
[341] Ibid., para. 749.
[342] See Ndindilyimana et al. Judgment & Sentence, supra note 242, para. 1453-1454.
[343] Ibid., para. 1964.
[344] See Katanga Trial Judgment, supra note 81, para. 1515; Prosecutor v. Katanga, Case No, ICC-01/04-01/07 OA 13, Judgment on the appeal of Mr. Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the Accused persons' (27 March 2013), paras. 40, 102.
[345] See Katanga Trial Judgment, supra note 81, paras. 1315, 1320, 1326.
[346] Ibid., para. 639.
[347] See Ntaganda Trial Judgment, supra note 81, para. 329, see footnote 879.
[348] Ibid., para. 323, footnote 860.

organization that committed the crimes and that the group was organized and hierarchically under the leadership of the accused. This could be relevant in proving the indirect co-perpetration mode of liability.

An authentic and reliable document can be a useful tool in proving SGBC cases against high-level accused by establishing the existence of a concrete plan and that SGBCs were natural and foreseeable consequences. Documents can be essential in proving the accused's essential contribution to the common purpose, the accused's leadership position, the existence of a superior-subordinate relationship, the failure of the superior to take the necessary and reasonable measures to prevent the crimes or punish the subordinates. Documentary evidence was crucial in proving modes of liability, such as JCEIII, superior/command responsibility, planning, and JCE I. However, in some cases, documentary evidence did not help prove the modes of liability charged. For example, in *Gbagbo and Blé Goudé*, the Prosecutor tendered documents describing SGBCs committed by the FDS in Abobo,[349] but the documents did not show the exact location SGBCs occurred.[350] The evidence was rendered inadmissible and could not, therefore, support the charge of indirect co-perpetration against the accused. Similarly, in the *Seselj* case, the prosecution tendered documents describing the content of the accused's speech[351] but did not show its connection to the SGBCs.[352] The evidence was rendered inadmissible and could not support the charge of instigation against the accused (see Chapters 5 and 6 for more examples).

7. Concluding Remarks

The research shows that the means available to prove the SGBCs, the modes of liability charged, and the linkage to the high-level officials at the ICTY, ICTR, and ICC, are mainly victims' testimonies, eyewitnesses' testimonies, perpetrators' testimonies, expert testimonies, forensic, and documentary evidence.

Victims' testimonies were particularly useful in proving that SGBCs occurred and that it was the accused that physically committed the crimes, the accused issued an order, and rape was committed because of it. Victims were fundamental in proving the accused's moral encouragement to commit rape, the superior-subordinate relationship, knowledge/the reason to know about the crimes, and the failure to prevent or punish subordinates. Further, the evidence was crucial in establishing that the SGBCs were widespread forming part of the common purpose, and the rape was committed because of the accused's prompting. The victim's evidence was much stronger in proving modes of liability, such as direct commission, aiding and abetting, ordering, instigating, JCE I, and superior/command responsibility. The "non-corroboration rule"

[349] See Gbagbo Decision on Confirmation of Charges, supra note 315, para. 74 (Human Rights Watch Report).
[350] See Gbagbo and Blé Goudé, Reasons of Judge Geoffrey Henderson, supra note 150, para. 1372.
[351] See Seselj Trial Judgment, supra note 317, para. 330.
[352] Ibid., para. 331.

adopted by the tribunals and courts, in particular, made the testimonies of the victims more powerful because they need not be corroborated, as long as the evidence is credible. Whereas, as we have seen with the other types of evidence, corroboration is often used to clear doubts, especially in proving the crime and linkage to the accused. However, memory was the major weakness found in this type of evidence. Many victims could not remember precise details. As a result, many chronological inconsistencies were identified between the victims' testimonies at trial and their prior statements, which led to the exclusion when not cured. In other instances, a serious contradiction between the victim statements on the identification of the accused was identified, which rendered the identification evidence inadmissible. As explained, the victim's evidence can be admitted if the inconsistencies between the victim accounts are not of material consequence and that they are not substantial enough to impeach the witness's credibility. The prosecution should be as thorough as possible to provide all the missing details and ensure to ask all the necessary questions to the victim to fill this gap.

Eyewitnesses' testimonies helped prove cases against high-level accused by establishing the existence of a superior-subordinate relationship, that the superior knew or had reason to know, the failure of the superior to take the necessary and reasonable measures to prevent or punish subordinates. Eyewitnesses were vital in proving the accused's level of control over the organization, the organized and hierarchical apparatus of power, that SGBCs were natural and foreseeable consequences of executing the common purpose or part of the common purpose. The evidence produced by eyewitnesses was crucial in proving the accused's essential contribution to the common purpose, the moral support and substantial effect on the crime, and the order given and the crime committed because of it. These eyewitnesses' testimonies were particularly useful in proving modes of liability such as superior/command responsibility, JCE III, indirect co-perpetration, JCE I, aiding and abetting, and ordering. Although eyewitnesses' evidence can help develop leads, identify the accused, and exonerate the innocent, this evidence is not infallible. The prosecution relied too heavily on hearsay statements by many witnesses who did not directly hear or see the crime occurred nor indicate much-needed probative values. For instance, the evidence's assessment showed some mistakes, such as identifying the wrong person or failing to identify the perpetrator of the crime, doubts about whether the rape was actually committed, and the corroborating evidence did not help prove these defects. The rule says that if the hearsay testimonies of the eyewitnesses lack sufficient indicia of reliability to confirm that the rape occurred, or, in other words, if the standards of probative value for hearsay evidence are not met by the prosecution (relevance and corroboration), the judges will exclude the testimonies. In those instances where the inconsistencies were considered serious enough to impact the material facts, the evidence was rendered unreliable, thus excluded by the judges.

Perpetrators' witnesses are instrumental because they provide unique insights into the perpetrators' attitudes, moral values, and motives. Their testimonies were mainly beneficial in establishing the existence of an agreement/common plan, the accused's involvement in designing and implementing the plan, and knowledge that the SGBCs will be or had been committed by subordinates. Their testimonies were particularly valuable in proving modes of liability, such as superior/command responsibility, planning, JCE III, and JCE I. Perpetrators' testimonies could also help capture "internal truth" and reconstruct historical facts.[353] Confessing their crimes can provide victims with acknowledgment of the ordeal they went through, but the research shows that SGBC charges were often dropped due to plea bargaining in favor of certain crimes, such as murder. Another issue with this type of evidence is that the risk of a perpetrator giving a false statement is high since he or she might have a direct motivation to appear in a more favorable light.[354] heir testimonies demand special caution since the perpetrators may have a direct reason to distort the factual truth.[355] In collecting perpetrators' testimonies, the court should always consider the relevance of such testimonies to the facts of the case, including the direct evidence available and the victims' interest.

Experts can provide their opinions on various topics that can help the chamber establish facts on specific aspects of the case. Experts have supported the credibility of victims who have PTSD, forensic analysis of SGBCs' evidence, proving the widespread or systematic nature of SGBCs, and the accused's authority over subordinates. The expert testimonies discussed above were essential in establishing superior/command responsibility and JCE. Despite their contribution, judges are likely to exclude the expert evidence if not found in conformity with the credibility assessment standard. For instance, the rule states that the expert opinion should be based on impartial and verified data. The geographic scope of the expert's evidence should be linked to the charges in the indictment, failure of which will lead to dismissal of the expert opinions. If the expert witness's evidence is too general, the prosecutor will have to corroborate it with direct evidence supporting the link, or else the judges will dismiss evidence.[356] In many instances, the judges excluded the expert testimonies on these grounds.[357] Therefore, the prosecution should devise better strategies to present expert evidence with substantial probative value based on strong and accurate data that is clear and reliable to allow judges to make sound inferences.

An authentic and reliable document can be a useful tool in proving SGBC cases against high-level accused by establishing the existence of a concrete plan, and showing that SGBCs were natural and foreseeable

[353] See Schmidt, supra note 200, p. 97.
[354] Ibid., p. 95.
[355] Ibid., p. 101.
[356] See Bizimungu et al. Decision on Rule 98 bis, supra note 280, para. 96; Bizimungu et al. Decision on Admissibility of Expert Testimony, supra note 280, p. 6.
[357] See Prosecutor v. Kunarac et al. Case No. IT-96-23-T (29 May 2000), transcript pp. 4148-9, 4155-62; Bizimungu et al. Decision on Rule 98 Bis, supra note 280, para. 96; Bizimungu et al. Decision on Admissibility of Expert Testimony, supra note 280, para. 4, p. 6; Bagosora et al. Judgment & Sentence, supra note 174, para. 1776.

consequences. Documents were crucial in proving the accused's essential contribution to the common purpose, the accused's leadership position, the existence of a superior-subordinate relationship, the failure of the superior to take the necessary and reasonable measures to prevent the crimes or punish the subordinates. Documentary evidence helped prove modes of liability, such as JCE III, superior/command responsibility, planning, and JCE I. However, despite their usefulness, documentary evidence's reliability is often questioned on their authorship and relevance to the case. The judges excluded several documents because these assessment criteria could not be sufficiently met. Therefore, the relevance and authenticity of each document submitted into evidence must be established, including their origin, genuineness, authorship, integrity, and specificity.[358]

This chapter has highlighted some of the credibility assessment problems articulated by the judges during the research. The study shows how different types of evidence (victims' testimonies, eyewitnesses' testimonies, perpetrators' testimonies, expert testimonies, and documentary evidence) were deemed reliable or unreliable due to the judges' personal discretionary assessment of the honesty, inconsistencies, errors, relevance, genuineness, or mistakes found in the evidence. The credibility assessment standard seems to vary case by case and chamber to chamber, significantly affecting the case. The research revealed that the judges had applied the rules inconsistently, which calls for a standardized approach in the future prosecution of SGBC cases. The judges assess differently because of the various legal systems they represent and the *ad hoc* reliance on personal and professional experiences and preferences rather than consistent methodology. Therefore, in certain areas, such as assessment of trauma, time-lapse, memory and stress disorders, and validity of identifications, the objective inputs of psychologists and psychiatrists from cross-cultural perspectives should be sought instead of judges' personal beliefs or discretions (see Section 4 of Chapter 8 for suggestions on the credibility assessment standards for future prosecution of SGBCs).

Moreover, as the above analysis has shown, it is difficult for the judges to accept expert testimony. A possible way to improve this situation is for the prosecutor to increase interaction from the outset with the concerned organizations and individuals who worked with victims of SGBCs. The prosecutor can use this interaction to leverage their research, train, and advise the staff, for instance, how to interview victims, obtain informed consent, and collect relevant data on location, perpetrators, and timeframe of events. The prosecution can work closely with these organizations and individuals to guide their work in the direction of collecting statistical data and information that can be used as evidence at a later stage.

Overall, the various types and methods of collecting evidence of SGBCs discussed above can be considered adequate although gaps still exist. As the former ICC Chief Prosecutor, Moreno-Ocampo notes, '[the] goal

[358] See Gbagbo and Blé Goudé, Reasons of Judge Geoffrey Henderson, supra note 150, para. 32.

is to go… further: a case with no witnesses, no victims.'[359] To achieve this scope, certain areas need more improvements, such as pattern evidence and evidence drawn from population-based surveys. These two methods have been effective in proving the widespread or systematic nature of SGBCs and in inferring the accused's mental element (should have known). However, they need to be further strengthened to better 'describe the patterns of the crime, correlate the crime with command structures that produced it, and explain what caused it.'[360] This will undoubtedly show the level of seriousness of the crimes, but the most important thing is to ensure that the evidence is credible and accepted by the judges. In this regard, more training needs to be provided to the judges and prosecutors to help them understand what types of data to collect and how to use the data and statistics as evidence in the courtroom.

[359] See John Hagan, Richard Brooks, and Todd Hauge, "Reasonable Grounds' Evidence Involving Sexual Violence in Darfur." In Sexual Violence as an International Crime: Interdisciplinary Approaches, edited by Anne-Marie de Brouwer et al. Cambridge, UK: Intersentia, 2013, p. 276. Luis Moreno-Ocampo delivered a key note Address at the Interdisciplinary Colloquium on Sexual Violence as International Crime on 16 June 2009.
[360] Ibid.

Chapter VIII. Concluding Observations and Way Forward

1. Investigating and Prosecuting Sexual and Gender-Based Crimes in International Criminal Law

Tribunals and courts did not sufficiently prosecute SGBCs from the Middle Ages until the WWII era because they did not consider SGBCs as a crime. During WWII SGBCs were widespread (e.g., The Rape of Nanking) but the IMT and IMTFE only implicitly prosecuted these crimes and did not robustly try high-level officials, while they could and should have done much more. While the development of the law was relatively a new concept at that time, it was already sufficient to prosecute high-level officials of these crimes.[1] From the 1990s to the present day, the ICTY, the ICTR, and the ICC have made a significant advancement in terms of the law and prosecution of SGBCs. These tribunals and courts comprehensively enlisted 8 types of SGBCs in their Statutes as international crimes, i.e., rape, forced marriage, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, gender-based persecution, any other form of sexual violence of comparable gravity.[2] Their specific enumeration elevates them among the most serious crimes in ICL,[3] although these achievements did not eradicate the problems of attributing responsibility to the masterminds of these crimes.

Consequently, this study analyzes the problem of linking high-level accused to Sexual and Gender-Based Crimes at the ICTY, ICTR, and ICC. The main question was: How can and should high-level officials be investigated and prosecuted for their role in the commission of Sexual and Gender-Based Crimes? A total of 100 SGBC cases have been analyzed from the ICTY, ICTR, and ICC case law to provide a comprehensive answer to this question: 5 in planning (4 ICTY, 1 ICTR), 11 ordering cases (2 ICTY, 9 ICTR), 14 direct commission cases (8 ICTY, 5 ICTR, 1 ICC), 8 instigation cases (3 ICTY, 5 ICTR), 15 aiding and abetting cases (10 ICTY, 5 ICTR), 20 JCE cases (17 ICTY, 3 ICTR), 21 superior/command responsibility cases (8 ICTY, 12 ICTR, 1 ICC), 1 co-perpetration case at the ICC, 1 indirect perpetration case at the ICC, and 4 indirect co-perpetration cases at the ICC. The table below shows the breakdown of the number of SGBC cases per the mode of liability and institutions.

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[1] For early developments, see Art. 37, Lieber Code (Instructions for the Government of Armies of the United States in the Field, 24 April 1863). The specific protection provided by the 1949 Geneva Conventions and its 1977 and 2005 Additional Protocols can be found in GCI, GCII, GCIII, GCIV (all of which supersedes the 1864, 1906, and 1929 Geneva Conventions), Art. 76 (1) API, Art. 4(2) APII, and Art.1 APIII. Further details on the development of the laws and principles can be found in the IMT Charter and IMTFE Charter and their respective judgments.

[2] For a detailed discussion, see chapter 2 of this research.

[3] See Eve La Haye, "Article 8(2)(b)(xxii): Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilization, and Sexual Violence." In The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, edited by Roy S. Lee. Ardsley, NY: Transnational, 2001, p. 814; see also Kelly Askin, Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles. Berkeley Journal of International Law 21, no. 2 (2003), p. 347.

MODE OF LIABILITY	ICTY	ICTR	ICC	Total
Planning	4	1		5
Ordering	2	9		11
Committing	8	5	1	14
Instigating	3	5		8
Aiding and Abetting	10	5		15
Joint Criminal Enterprise	17	3		20
Superior/Command responsibility	8	12	1	21
Co-perpetration			1	1
Indirect perpetration			1	1
Indirect co-perpetration			4	4
TOTAL	52	40	8	100

In defining what SGBCs are, the study relied on the Rome Statute and the EoC. This is because it is one of the most comprehensive definitions and is mostly gender-neutral, except for forced pregnancy (which, by definition, can only be committed against women), so that victims and perpetrators may be of either sex or gender. A gender-neutral definition is important because it reflects the understanding that the invasion of the body might be committed against any individual not only by force, but also by the threat of force or coercion, by fear of violence, duress, detention, psychological oppression, or abuse of power.[4] It is submitted that SGBCs encompasses rape, sexual slavery, enforced prostitution, forced pregnancy, sexual violence, and persecution. However, for rape, enforced prostitution, and sexual violence, the perpetrator must have committed an act of a sexual nature. An act of sexual nature covers both physical (e.g., the threat of force or coercion) and non-physical acts with a sexual element (e.g., forced nudity).[5]

The main difficulty of investigating international crimes stems from their very nature, i.e., the crimes happen *en masse* and involve a network of multiple perpetrators, including those higher up in the echelons. Further, the objective of committing SGBCs varies considerably among different perpetrator groups and from conflict to conflict.[6] SGBC cases can be widespread in some conflicts but not in others. Armed groups taking part in the same war do not necessarily carry out sexual assaults on the same scale or in the same style. An armed group, which restrained its members from committing SGBCs during a particular period of war, might still commit them on a massive scale at another given period.[7] SGBCs in conflict may form part of a

[4] Arts. 8(2)(b)(xxii) and 8(2)(e)(vi), Elements of Crimes.
[5] Art. 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) Rome Statute and Elements of Crimes; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment (1998), para. 688; Prosecutor v. Kvocka et al., Case No. IT-98-30/1-T, Trial Judgment (2 November 2001), para. 180; Prosecutor v. Furundzija, Case No.: IT-95-17/1-T, Trial Judgment (10 December 1998), para. 186; Anne-Marie de Brouwer, Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR. Cambridge, UK: Intersentia, 2005, p. 149.
[6] For a detailed discussion, see Elisabeth Wood, Sexual Violence During War: Toward an Understanding of Variation. In Order, Conflict, and Violence, edited by Stathis N. Kalyvas, Ian Shapiro, and Tarek Masoud. Cambridge: Cambridge University Press, 2008, pp. 321-351.
[7] See Elisabeth Wood, Variation in Sexual Violence during War. Politics & Society 34, no. 3 (2006), pp. 307–342.

pattern of widespread abuse and mass violence, such as mass displacement, human trafficking, or forced population transfer, or maybe more incidental and opportunistic.

In ICL, SGBCs can be qualified as war crimes, crimes against humanity, and genocide. For all three categories of crimes, the general contextual elements must be established, and the specific SGBC acts need to be proven to fit each context. This is more difficult in practice because sometimes it is not clear if the perpetrator of the SGBCs acted in furtherance of the armed conflict[8] or whether the SGBCs were committed as part of the widespread or systematic attack or SGBCs were carried out with the intent to destroy the specific group the victim belongs.[9] Also, it is sometimes unclear whether the SGBCs were "isolated" or connected to the "large-scale" or "organized" violence.[10]

The ICTY, ICTR, and ICC indicted several individuals in leadership positions, including senior military commanders, top politicians, senior civilian administrators, the clergy, and senior media experts for SGBCs. However, the results of these indictments varied greatly. The statistics and figures that I manually counted have revealed, for instance, that at the ICTY, 94 individuals (58%) out of the 161 accused had SGBC charges included in their indictments, 43 (46%) of them were convicted, 3 (3%) are still on appeal as of May 2021, 33 individuals (35%) were acquitted, 5 (5%) suspects whose indictments included SGBC charges had those withdrawn. Finally, of the 17 suspects who died before or after transfer to the ICTY, 10 (11%) had SGBC charges in their indictments.[11] This means that 67 accused never had one single SGBC charge in their indictments and that out of the 94 who were instead charged with SGBCs, not even a half were convicted for SGBCs, leaving an overall conviction rate for SGBCs (out of the total number of accused within the ICTY) at 27% (see table below).

SGBC CHARGES AT THE ICTY		
Convicted	43	46%
On Appeal	3	3%
Acquitted	33	35%
Charges withdrawn	5	5%

[8] See Prosecutor v. Kunarac et al., Case No. IT-96-23&23/1, Appeal Judgment (12 June 2002), para. 58.
[9] Art. 6, Rome Statute.
[10] See Kunarac et al. Appeal Judgment, supra note 8, para. 94.
[11] Figures were double checked manually in May 2021, by comparing Kate Vigneswaran, Annex B: Charges and Outcomes in ICTY cases Involving Sexual Violence. In Prosecuting Conflict-Related Sexual Violence at the ICTY, edited by Baron S. Brammertz and Michelle Jarvis. Oxford: Oxford University Press, 2016, pp. 429-483 and the latest figures of the ICTY cases available at https://www.icty.org/en/cases. As Brammertz and Jarvis' book dates back to 2016, all the cases that, at the time, were still at trial or appeal level were double-checked and the outcome is now shown in the list.

Deceased	10	11%
TOTAL	**94**	

A manual count and analysis of all the cases at the ICTR showed that out of a total of 93 individuals who were accused of genocide and other serious violations of IHL committed in 1994,[12] 45 (48%) were indicted with SGBC charges (less than a half). Of the 45 indicted, 14 accused (31%) were convicted of one or multiple SGBC charges; 20 (44%) were acquitted from the SGBC charges brought against them; 5 (11%) had their SGBC charges withdrawn (either they were withdrawn in the amended versions of the indictments or they were withdrawn as part of a plea bargaining); 1 (2%) was indicted and sent to trial but died before judgment; 1 (2%) was indicted with SGBC charge but died before trial; 1 (2%) was indicted with SGBC charge and transferred to national jurisdiction in France for trial; and, finally 3 (7%) are indicted with SGBC charges but they are still fugitives[13] as of May 2021. This means that 48 accused never had one single SGBC charge in their indictments and that of the 45 who had, not even one third were convicted for SGBCs, leaving an overall conviction rate for SGBCs (out of the total number of accused within the ICTR) to only 15% (see table below).

SGBC CHARGES AT THE ICTR		
Convicted	14	31%
Fugitives	3	7%
Acquitted	20	44%
Charges withdrawn	5	11%
Indicted but deceased before the judgment	1	2%
Indicted but deceased before trial	1	2%
Transferred to national jurisdiction	1	2%
TOTAL	**45**	

[12] Figures were double checked manually in May 2021, by comparing the latest figures of the ICTR cases updated October 2019 available at https://unictr.irmct.org/sites/unictr.org/files/publications/ictr-key-figures-en.pdf with the article written by Barbora Holá and Alette Smeulers, "Rwanda and the ICTR: Facts and Figures." In The Elgar Companion to the International Criminal Tribunal of Rwanda, edited by Alette Smeulers and Anne-Marie de Brouwer. Cheltenham, UK: Edward Elgar, 2016, and the United Nations Department of Peace-Keeping Operations, Review of the Sexual Violence elements of the Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the lights of Security Council Resolution 1820, 2008, p. 50-59, as well as individual cases analyzed throughout the research.

[13] Ibid.

Furthermore, a manual count and analysis of all the cases at the ICC showed that, out of a total of 44 indicted persons, only 22 (50%) were charged with SGBCs in their indictments. Of those 22, only 2 (9%) has so far been convicted (Dominic Ongwen pending appeal as of May 2021) for SGBCs; 6 (27%) were acquitted; 1(5%) died while still fugitive; 4 (18%) are currently on trial as of May 2021; 6 (27%) are indicted for SGBC charges but are still fugitives as of May 2021; and, finally, 3 (14%) were initially charged but the indictments were withdrawn.[14] This means that, as of the time of writing, 22 accused did not have SGBC charges in their indictments, and that of the 22 who had, only 2 were convicted for SGBCs, leaving an overall conviction rate for SGBCs to only 9% (see table below).

SGBC CHARGES AT THE ICC		
Convicted at trial stage	2	9%
Fugitives	6	27%
Acquitted	6	27%
Charges withdrawn	3	14%
Deceased while fugitive	1	5%
On trial	4	18%
TOTAL	**22**	

To conclude, the ICTY, ICTR, and ICC were established to try persons "most" responsible for the international crimes of genocide, crimes against humanity, and war crimes. These three general categories of crimes include SGBCs committed against civilians, including women, men, girls, and boys. As the statistics have shown, 161 individuals have so far been charged with SGBCs out of the 298 persons indicted, since the creation of the ICTY, ICTR, and ICC. This makes more than half of the total number of indicted persons, and, at first glance, it would seem that great strides have been made in the prosecution of SGBC cases. However, for the various reasons outlined throughout this study, in reality, the prosecutors cannot and do not prosecute all high-level officials who are alleged to have committed SGBCs. As a result, the judgments of the ICTY, ICTR, and the ICC cannot be taken to be a comprehensive reflection of the SGBCs committed against civilians in reality.

[14] Figures were double checked manually in May 2021 by consulting the list of cases available at https://www.icc-cpi.int/Pages/cases.aspx#Default=%7B%22k%22%3A%22%22%2C%22r%22%3A%5B%7B%22n%22%3A%22MngInitialOrderEN%22%2C%22t%22%3A%5B%22%5C%22%C7%82%C7%8257617272616e74206f66206172657374%5C%22%22%5D%2C%22o%22%3A%22and%22%2C%22k%22%3Afalse%2C%22m%22%3Anull%7D%5D%7D#2ae8b286-eb20-4b32-8076-17d2a9d9a00e=%7B%22k%22%3A%22%22%7D.

Concerning the 161 individuals charged with SGBCs, the analysis has shown a fundamental problem with the ability of the prosecutors of the three mentioned courts to obtain convictions, in particular at the ICC. The high numbers of acquittals, withdrawal of charges, and fugitives show that the road to achieving redress for SGBCs is still very steep and full of obstacles. The study has indeed identified a number of these obstacles that will be addressed in the general conclusion. Among them, there are, for instance: the wrong characterization or selection of the modes of liability to attribute SGBCs to suspects; the excessive use of cumulative charges; the different treatment or approaches to the linkage evidence (particularly SGBCs' victims) both by the prosecution and the judges; and the failure to utilize other types of evidence apart from oral testimonies to prosecute SGBC cases. With the closure of the ICTY and ICTR, one can only hope that the ICC prosecution will improve on the issues mentioned above and obtain convictions for SGBCs in the future and the ongoing cases (e.g., Al Hassan, Ali Kushayb, Alfred Yekatom, and Patrice Edouard Ngaissona).

2. Prosecuting Sexual and Gender-Based Crimes and Linking Them to High-level Officials through Direct Modes of Liability

One way of attributing criminal responsibility to high-level officials within the ICTY, ICTR, and ICC Statutes is through direct modes of liability (planning, ordering, committing, instigating, and aiding and abetting). From the 53 SGBC cases analyzed in Chapter 5, 60% resulted in a conviction and 40% in an acquittal, which highlights the difficulties of attributing SGBCs to the high-level officials through the direct modes of liability.

The study's findings in Chapter 3 show that planning is, in theory, the most flexible tool to hold high-level officials responsible for SGBCs. This is because it allows the prosecutor to either charge SGBCs under planning itself or, in the alternative, under JCE III, if the accused is aware of the substantial likelihood that SGBCs will occur because of his planning. It is possible to prove this by obtaining circumstantial evidence to infer the accused's knowledge requirement that the risk of SGBCs occurring in the execution of his (legal or illegal) plan was reasonably foreseeable to him. This leads to the conclusion that it is not necessary to look for direct evidence to prove that the accused specifically intended to plan SGBCs. While this is an important advantage in the SGBCs' prosecution, in reality, no charges have ever been brought against any person on the basis that he explicitly planned to commit SGBCs, which makes this part of the doctrine superfluous. The main gap or controversy about this mode is whether planning an international crime is punishable by itself or if it is punishable only when the commission of the crime follows the planning phase. Both the ICTY and ICTR gave conflicting interpretations. The ICTR trial chambers ruled that planning a

crime must lead to its commission,[15] while the ICTY ruled that an accused may be held criminally liable for planning alone, reasoning that planning an international crime already constitutes a separate form of responsibility.[16] The ICC is rather mute on this issue, as Article 25(3) of the Rome Statute does not mention "planning" as a specific mode of liability.[17] With the ICTY, I agree that planning in itself should constitute a criminal offense, regardless of whether the crime is actually perpetrated or not. This is because ICL aims not only at punishing those guilty of serious crimes but also at preventing persons from engaging in such serious criminal conduct.[18]

In ordering, the accused's conduct must have a direct and substantial effect on the commission of the crime in question.[19] On this basis, it can be concluded that liability for ordering cannot be inchoate (i.e., the crime must be perpetrated in executing the accused's order).[20] As in planning, the gap or defect in ordering to date is that the accused cannot be convicted if the order was not carried out. As explained in planning, issuing an unlawful order in itself should constitute a criminal offense, irrespective of whether the order is carried out or not. The most decisive factor to look for to prove this mode is the causal connection between the accused's order and the resulting SGBCs (i.e., the order was given and the rape occurred because of it). However, in practice, proving the direct causal link is almost impossible because the judges often require that the accused's order be specific and that the witness must have directly heard the order itself.[21] The victim and eyewitness' testimonies are usually relied upon by the prosecutor to prove this link since they are most likely the only ones to be placed at the scene or close enough to the accused to directly hear the accused's order and to see that the SGBCs were committed because of that order.[22] This means direct evidence is the usual way to prove these crimes and that the judges rarely accept circumstantial evidence. Instead, it should be possible, for example, to prove the link through the testimony of someone who was

[15] Art. 6(1), ICTR Statute; see e.g., Akayesu Trial Judgment, supra note 5, para. 475; Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Trial Judgment (6 December 1999), para. 34; Prosecutor v. Musema, Case No. ICTR-96-13-T, Trial Judgment (27 January 2000), para. 115.
[16] See Prosecutor v Kordic´ and Cerkez, Case No. IT-95-14/2-T, Trial Judgment (26 February 2001), para. 386 (although it cautioned that a person found to have perpetrated a crime would not be found responsible for planning the same crime and an accused would only be held liable for planning a crime, if he or she directly or indirectly intended that the crime be perpetrated).
[17] Preparatory Committee on the Establishment of an International Criminal Court, 11 February – 21 February 1997. Paper on Criminal Responsibility Submitted by Informal Group Representing Various Legal Systems, printed in William Schabas, The International Criminal Court: A Commentary on the Rome Statute. Oxford: Oxford University Press, 2010, p. 423 which included criminal responsibility for a person who 'intentionally participates in the planning to commit such a crime [which in fact occurs].'
[18] See Antonio Cassese, International Criminal Law. 2nd ed. Oxford: Oxford University Press,2008, p. 226.
[19] See Prosecutor v. Kamuhanda, Case No. ICTR-99-54A-A, Appeal Judgment (19 September 2005), para. 75; Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T, Trial Judgment (22 January 2004), para. 590 (holding that the accused's conduct must have 'substantially contributed to, or have had a substantial effect on, the completion of a crime'); Prosecutor v. Galic, Case No. IT-98-29-T, Judgment and Opinion (5 December 2003), para. 169 (holding that the accused's conduct must have had 'a positive effect in bringing about the commission of crimes'); Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Trial Judgment (1 December 2003), para. 759 (same as Kamuhanda Trial Judgment); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Trial Judgment (15 May 2003), para. 379 (same as Kamuhanda Trial Judgment).
[20] See Prosecutor v. Brdanin, Case No. IT-99-36-T, Trial Judgment (1 September 2004), para. 267; Kajelijeli Trial Judgment, supra note 19, para. 758; Semanza Trial Judgment, supra note 19, para. 378; Musema Trial Judgment, supra note 15, paras. 115-116; Rutaganda Trial Judgment, supra note 15, paras. 34, 38; Akayesu Trial Judgment, supra note 5, para. 473.
[21] See Musema Trial Judgment, supra note 15, paras. 828-829, 889; Kamuhanda Trial Judgment, supra note 19, para. 497; Prosecutor v. Muhimana, Case No. ICTR- 95-1B-T, Trial Judgment (28 April 2005), paras. 200, 205.
[22] See Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Judgment & Sentence (16 May2003), para. 316; Prosecutor v. Nyiramasuhuko et al., Case No. ICTR-98-42-T, Judgment and Sentence (24 June 2011), para. 2631; Akayesu Trial Judgment, supra note 5, para. 452; Muhimana Trial Judgment, supra note 21, paras. 198-199.

reliably informed that the accused had issued the order and proof that later the subordinate followed up the order.[23]

The prosecutor may charge the accused of directly committing SGBCs, provided it is proven that he committed the crime by himself with the intent and knowledge to commit such crime. This looks straightforward and less problematic from a theoretical standpoint. However, the difficulty arises when proving the accused's identity as the crime's direct perpetrator in practice. Often, the judges require that the witnesses have seen the crime happening with their own eyes, which is sometimes impossible to achieve. Generally, this mode of liability is quite easily proven because the prosecutor often relies on statements from victims who testify as witnesses.[24] The no corroboration rule of the victim's testimony plays a significant role in the judicial process and finding of guilt because it enables the chamber to count on just one victim's testimony, as long as the witness's account is reliable.[25] However, it becomes difficult to convict the accused if another eyewitness contradicts the evidence and affirms, for instance, that the accused did not commit the crime and it was another person who did it. Despite its frequent use in ICL, gaps remain in the interpretation of the concept "commission by omission" as a "failure to a duty to act" and if the omission has a "concrete influence." This subject remains vague or unclear, and, as a result, no such cases have been brought forth by any international tribunals yet.

The accused can also be charged for instigating SGBCs, provided the prosecutor can prove that the accused intended to provoke or induce the commission of the SGBCs or that he was aware of the substantial likelihood that the SGBCs would be a probable consequence of his acts.[26] The instigation must be by way of verbal communication,[27] which means that proof of a connection between the instigation and the SGBCs is required for liability to arise. The scope of this mode of liability still needs further clarity on the time and space between the speech acts and the resulting crime and how far the prosecutor can go back to the past to consider the accused's speeches and actions together with those charged in the Indictment period. In practice, the main difficulty in prosecuting high-level officials for SGBCs stems from the prosecutor's ability to prove the nexus between the accused's speech and the SGBCs and the closeness in time and space. For time, the evidence must prove that the rapes happened immediately or on the same day after the

[23] See Akayesu Trial Judgment, supra note 5, para. 452; Nyiramasuhuko et al Judgment & Sentence, supra note 22, para. 6086; Niyitegeka Judgment & Sentence, supra note 22, para. 316; Prosecutor v. Todorovic, Case No. IT-95-9/1-S, Sentencing Judgment (31 July 2001), para. 17; Kamuhanda Trial Judgment, supra note 19, para. 497; Musema Trial Judgment, supra note 15, paras. 828-829, 889; Muhimana Trial Judgment, supra note 21, paras. 200, 205.
[24] See Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Trial Judgment (16 November 1998), paras. 937, 946-948; Muhimana Trial Judgment, supra note 21, para. 552; Prosecutor v. Kunarac et al., Case No.: IT-96-23-T & IT-96-23/1-T, Trial Judgment (22 February 2001), paras. 761, 817; Prosecutor v. Simic, Case No. IT-95-9/2-S, Sentencing Judgment (17 October 2002), paras. 11, 53, 63 (Hasan Bicic, Muhamed Bicic, Perica Misic, and Ibrahim Salkic).
[25] See Muhimana Trial Judgment, supra note 21, para. 90.
[26] See Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-A, Appeal Judgment (17 December 2004), para. 27.
[27] See Prosecutor v. Mpambara, Case No. ICTR-01-65-T, Trial Judgment (11 September 2006), para. 18; Prosecutor v. Ndindabahizi, Case No.: ICTR-2001-71-I, Trial Judgment (15 July 2004), para. 456.

accused's speech.[28] For space, the evidence must establish the connection between the place where the accused's speech was held and the location where the SGBCs were committed.[29] Finding evidence to prove time and space remains problematic because this requirement is still open for interpretation by the judges. The time nexus is often interpreted as "immediate" or "on the same day", while the territorial nexus is usually confined to the immediate environment where the speech was made. Incitement is dangerous and may spread quickly or slowly, depending on the circumstances. Therefore, time should cover many days after such speech and space should cover beyond the immediate environment where the speech was made, as long as it is proven that the SGBCs were committed in furtherance to the accused's prompting.

The prosecutor may charge the accused of aiding and abetting SGBCs for the practical assistance, encouragement, or moral support he provided to the physical perpetrators to commit the crimes.[30] The prosecutor must prove that the accused was aware of the SGBCs and assisted in the commission by some means.[31] The assistance provided by the accused needs not be criminal in nature,[32] and it is not required that the accused be physically present where the SGBCs took place.[33] It is neither necessary for the accused to be aware of the crime the physical perpetrator precisely intends to commit nor to share the required mental element of that crime. However, in practice, the judges have often insisted that the mental element be established, i.e., the accused knew or was aware that the physical perpetrators were going to specific crime sites to commit SGBCs.[34] In theory, liability for this mode does not require demonstrating that the physical perpetrator knew of the aider and abettor's assistance, but the situation is different in cases of aiding and abetting by moral encouragement. In such a situation, it must be demonstrated that the physical perpetrators were aware of the encouragement of the aider and abettor and were driven by it to meet the requirement of substantial effect.[35] This is a higher standard threshold and it will be very difficult for the prosecution to meet such requirements in reality, especially in SGBC cases. In terms of practice, aiding and abetting is considered one of the least complicated modes of liability to prove. The evidence must be decisive in establishing the accused's authority that is critical in influencing the physical perpetrators to commit the

[28] See Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Trial Judgment (17 June 2004), para. 227; Semanza Trial Judgment, supra note 19, para. 254; Akayesu Trial Judgment, supra note 15, para. 422, 692.
[29] See Gacumbitsi Trial Judgment, supra note 28, paras. 226-227, 327, 329; Semanza Trial Judgment, supra note 19, paras. 254, 258; Prosecutor v. Dordevic, Case No. IT-05-87/1-T, Trial Judgment (23 February 2011), para. 2168; Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, Appeal Judgment (7 July 2006), para. 135.
[30] See Prosecutor v. Sainovic et al., Case No. IT-05-87-A, Appeal Judgment (23 January 2014), para. 1649 (specific direction not an element under customary international law). But see also Prosecutor v. Perisic, Case No. ICTY-04-81-A, Appeal Judgment (28 February 2013), para. 36.
[31] See Sainovic et al. Appeal Judgment, supra note 30, para. 1649.
[32] See e.g., Prosecutor v. Blagojevic and Jokic, Case No.: IT-02-60-A, Appeal Judgment (9 May 2007), para. 196.
[33] See Prosecutor v. Lukic and Lukic, Case No. IT-95-32/1-A, Appeal Judgment (4 December 2012), para. 425 citing Prosecutor v. Simic et al., Case No. IT-95-9-A, Appeal Judgment (28 November 2006), para. 85; Prosecutor v. Blaskic, Case No.: IT-95-14-A, Appeal Judgment (29 July 2004), para. 48. The exception is the situation of an approving spectator, who aids and abets the principal's crime by encouraging the physical perpetrators through their presence at (or near) the crime scene. See e.g., Prosecutor v. Nzabirinda, Case No. ICTR-2001-77-T, Sentencing and Judgment (23 February 2007), para. 18.
[34] E.g., Prosecutor v. Sainovic et al., Case No. IT-05-87-T, Trial Judgment, vol. 3 of 4 (26 February 2009), paras. 928, 935, 1211.
[35] See Prosecutor v. Brdanin, Case No. IT-99-36-A, Appeal Judgment (3 April 2007), para. 277.

crime, representing the accused's substantial contribution to the SGBCs.[36] The accused's physical presence at the scene[37] and his behavior of gestures and handing over victims or transporting the perpetrators can be crucial in establishing that the accused provided practical assistance or moral support to the physical perpetrator to commit SGBCs. However, proving the mental element of the aider and abettor is the biggest problem, as the prosecutor often cannot prove that the accused knew that the physical perpetrators would commit SGBCs.[38] Looking at the scope of this doctrine, it can be concluded that the judges' interpretation of the mental element in this manner largely contradicts the principle establishing the "guilty mind" since the accused is neither required to be aware of the physical perpetrator's intent nor to share the required mental element of that crime.[39]

Overall, the direct modes of liability framework are sufficient to hold high-level officials responsible for SGBCs. However, the main difficulty is the prosecutor's tendency to charge several modes of liability cumulatively, under Article 7(1) and 6(1) of the ICTY/ICTR Statutes and Article 25(3) Rome Statute, when the evidence supported different forms of involvement. While it is true that the direct modes are not mutually exclusive and it is legally possible to charge more than one mode in relation to a crime, the practice of cumulative charging has sometimes led to a disconnection between the modes chosen and the evidence required to establish the role of the leaders and commanders, i.e., to prove all the elements of all the modes alleged in the indictment. Consequently, the chambers often do not consider the alternative modes charged because the modes and the evidence required did not fit the leaders' and commanders' roles. Another reason is that they had already convicted the accused for SGBCs under, for example, aiding and abetting, and declined to address the other modes of liability charged. Therefore, rather than pursuing cumulative charges, the prosecution should instead plead only the specific forms of individual criminal responsibility, which it believes best capture the accused's role in light of the facts alleged.

While there have been notable achievements in holding high-level officials accountable under these theories, the analysis of the case law in Chapter 5 shows that there is still a problem with the way linkage evidence is elicited. For instance, during the trial of Gacumbitsi*,* in the cases where the Prosecutor could not prove the instigation charge, there seemed to be over-reliance on victims to prove all the three elements (crime based, linkage, and contextual elements). In fact, in some of the cases analyzed in this study, the prosecutor presented a single victim to prove all the three elements outlined above. When, however, the victim's

[36] See Akayesu Trial Judgment, supra note 5, paras. 693-694; Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Appeal Judgment (1 June 2001), para. 418; Furundzija Trial Judgment, supra note 5, para. 274; Muhimana Trial Judgment, supra note 21, para. 318; Prosecutor v. Nikolic, Case No. IT-94-2-S, Sentencing Judgment (18 December 2003), paras. 115-119.
[37] See Furundzija Trial Judgment, supra note 5, para. 274; Akayesu Trial Judgment, supra note 15, paras. 693-694; Akayesu Appeal Judgment, supra note 36, para. 418; Muhimana Trial Judgment, supra note 21, paras. 274-275.
[38] See Sainovic et al. Trial Judgment, supra note 34, paras. 629, 928, 935, 1209, 1211.
[39] See Sainovic et al. Appeal Judgment, supra note 30, para. 1649.

testimony only managed to prove the rape itself but not the linkage, it consequently led to the acquittal of the accused of the SGBC charges. It is not a good practice, and it cannot be expected to collect all the evidence from a single victim. However, it should also not be assumed that only insiders can provide proof about linkage and structure (as victims may have valuable information to prove this aspect too) or that insiders cannot provide evidence to establish the crime base (insiders may have useful information to prove the crime). The best approach would be to elicit various types of evidence (e.g., victims and eyewitnesses, including members of the perpetrator's group) and check with the individuals what information they can provide on the three elements and then obtain the statements as may be appropriate.

Apart from the issue of over-reliance on one type of evidence, however, the most notable problem with eliciting linkage evidence lies with the nature of the crime themselves and the excessive requirements of proving SGBCs, as opposed to other crimes (e.g., murder). When SGBCs are committed, the prosecutor is required to demonstrate through the crime-based evidence (e.g., victims or eyewitnesses) that the SGBCs were committed. Concurrently, the prosecutor must establish links to the high-level officials through the linkage-based evidence, showing the role played by the accused in the commission of these crimes (e.g., was he present, did he know about the crimes, did he order them, did he physically commit them by himself, did he assist or encourage them, was there a plan or did he participate in the planning). Lastly, the prosecutor must prove the context in which the SGBCs happened (e.g., ethnic cleansing or genocide). The analysis conducted in Chapter 5 shows that proving the SGBC acts is not enough to obtain a conviction; the prosecutor must prove the causal link between the crimes and the accused and the contextual elements.

The presence of the accused at the scenes of the crime is another serious issue affecting the prosecution of high-level officials for SGBCs. The fundamental problem is the chambers' tendency to treat the "presence" of the accused at the "scene" as a legal requirement or almost a *conditio sine qua non* that the prosecution must prove. Conferring the accused's presence as a legal requirement is problematic for two reasons: it appears to deviate from the legal requirements laid down in ICL, and it negates the notion that masterminds are not always present at the scenes. The fact is that ICL does not impose the presence of the accused at the crime scene to be a required element of planning, instigating, ordering, or aiding and abetting.[40] However, it can be one of the factors to be considered in determining the *mens rea* of the planner, instigator, orderer, or the aider or abettor. The study revealed that masterminds are rarely present at the scene, so it is unnecessary to assign too much significance or weight to their physical presence. Doing so sends a

[40] For the *mens rea* of planning see e.g.: Prosecutor v. Martic, Case No. IT-95-11-A, Appeal Judgment (8 October 2008), para. 222, footnote 553; Kordic and Cerkez Appeal Judgment, supra note 26, paras. 29, 31; Prosecutor v. Nahimana et al., Case No. ICTR-9952-A, Appeal Judgment (28 November 2009), para. 479. Instigating: Martic Appeal Judgment ibid, para. 222, footnote 553; Kordic and Cerkez Appeal Judgment ibid., paras. 29, 32; Nahimana et al. Appeal Judgment ibid., para. 480. Ordering: Martic Appeal Judgment ibid., paras. 221-222; Blaskic Appeal Judgment, supra note 33, para. 42; Kordic and Cerkez Appeal Judgment ibid., paras. 29-30; Nahimana et al. Appeal Judgment ibid., para. 481.

dangerous message that perpetrators can continue to evade justice as long as they adequately cover their tracks away from the scenes. To address this problem, the judges should stick to the law and consider presence as a compelling factor and not as an absolute legal requirement. This would also reinforce the concept that justice for international crimes is not location or position-dependent; masterminds could be held accountable for their roles in the crimes regardless they are present on the scenes or not.

With regard to the types of evidence, the analysis conducted in Chapter 7 leads to the conclusion that victim and eyewitness testimonies are the most effective means of proving both SGBCs and direct modes of liability. However, the prosecutors' over-reliance on these types of evidence sometimes leads to the acquittal of the accused or the dismissal of the SGBC charges. For victims, the primary issue is that judges sometimes apply different credibility assessment standards that often lead to the exclusion of the evidence. Instead of applying a consistent scientific method, they assess the evidence differently, based on the various legal systems they represent and their personal and professional experiences and preferences. If the prosecutor relied solely on the victim's account, this could affect the case. To resolve this problem, it is recommended to establish a standardized approach in the future prosecution of SGBC cases. The study proposes that certain areas, such as assessment of trauma, time-lapse, memory, and stress disorders, should be assessed at all times by the objective inputs of psychologists and psychiatrists, from cross-cultural perspectives. The expert inputs, combined with specific reference to jurisprudence, can help the judges make an informed and standardized judicial assessment of the witness's credibility or reliability. When it comes to eyewitnesses, the major shortcoming is that their testimonies sometimes rely too heavily on hearsay. The lack of sufficient indicia of reliability of hearsay statements and inconsistencies or contradictions among statements are the main factors that can easily lead to the exclusion of this type of evidence. Therefore, when presenting hearsay evidence, it is critical to ensure its relevance, i.e., that it is sufficiently valuable to the case in the proceeding. Overall, instead of the prosecution relying too heavily on victims or eyewitnesses alone, the best practice should be to collect evidence from a broad array of other sources, including, but not limited to, victims' testimonies, eyewitnesses' testimonies, perpetrators' testimonies, expert testimonies, and documentary evidence.

Finally, as explained, 40% of acquittals call for improvements in the collection of SGBCs' linkage evidence. In some instances, the prosecution failed to collect the required pieces of evidence, while in other cases, the standards of proof have proven to be too high. However, the situation could change using the below recommendation on the types of evidence to seek when establishing SGBCs' linkage. The list is a suggestion on the standard that the prosecutor should be looking for to prove future SGBCs and linkage to the accused. It is based on the analysis of the evidence presented in Chapter 5 and the author's expert view on the subject matter.

In order to prove that an accused designed or participated in a plan to commit crimes including SGBCs, the prosecution must provide the following types of evidence for each of the elements identified in this research.

Elements to prove	**What the prosecutor needs to look for**
Existence of a concrete plan	• Authenticated and reliable documentary evidence proving the existence of the plan, possibly signed by high authorities, including the accused; • Operational documentary evidence, such as meeting minutes of the accused with his subordinates, with practical information on how the plan would be implemented; meetings with subordinates on the implementation of the plan can also be proved through the testimony of eyewitnesses who were present, such as subordinates; • Interviews released on radio, tv, newspapers, declarations made, speeches, articles written by the accused discussing the plan, admitting knowledge of it, ordering the execution of parts or the whole plan; • Admission of the accused themselves, whether in the Courtroom or as part of a plea bargaining, that a plan existed, and he participated in its design or implementation; • Radio intercepts of the accused or other means showing his involvement in the organization and planning; • Testimony of subordinates on the practical implementation of the plan and the accused's involvement in the organization and coordination of activities;
Planning was a factor that substantially contributed to the occurrence of SGBCs	• Testimony of victims who were themselves raped or eyewitnesses who saw the rape incidents in the specific locations charged in the indictment, for example, detention camps; • Statements from eyewitnesses or insiders or the accused's admission about when and how the plan was developed, who was involved, who did what, the accused's level of involvement. The prosecutor should collect documents including minutes of meetings held in specific locations and the subject of such meetings, news articles or press statements or interviews granted by the accused, where he talked about the plan or admitted that he designed the plan or participated in the design; • Eyewitnesses and subordinates who can testify in court that they were present and saw the accused putting in place measures (e.g., refusing to assign security to protect the women) that would make the victims vulnerable to SGBCs; • Eyewitness and subordinates' testimony on how the plan designed by the accused was practically carried out by the subordinates in the specific locations charged in the indictment;

Substantial likelihood SGBCs would occur	• Testimony of eyewitnesses and victims on the gravity of the conditions in which victims were, including the crimes they had been subjected to and by which perpetrators, in particular, SGBCs; • Testimony of eyewitnesses (particularly subordinates) and victims on the accused's presence on the scene while victims were mistreated and identification of the accused's subordinates as the physical perpetrators;
Accused's leadership position	• Authenticated documents on the appointment of the accused to his official capacity or referring to the accused in his official position or signed by the accused in his official position; • Testimony of eyewitnesses (in particular subordinates) describing the accused's role and the authority he had over subordinates, how he behaved during meetings, including if he was respected or not; • Admission of the accused himself, whether in the Courtroom or as part of a plea bargaining, of their position;
Execution and oversight of the plan	• Operational authenticated documents, signed by the accused, implementing the plan such as appointing managers, creating units or organs for specific purposes, instituting reporting lines leading directly to himself, logistical and practical decisions; • Testimony of eyewitnesses (in particular subordinates) on the accused supervising, organizing, coordinating activities, giving orders to implement the plan, and material assistance to crimes being committed against the victims (not necessarily SGBCs but that finally led to the commission of the SGBCs); • Radio intercepts or other means on orders given by the accused to implement the plan; • Admission of the accused himself, whether in the Courtroom or as part of a plea bargaining, about their role and their actions;
Presence of the accused at the scene	• Testimony of eyewitnesses (in particular subordinates) and victims on the accused being present on the scene when the SGBCs were committed or being informed of the SGBCs while on the scene (precision is required on time and place of the accused's presence as much as consistency between written statements and in-court testimony);
Link between the accused's planning and the SGBCs	• Proved through all the elements above but, in particular, importance is stressed on the identity of the perpetrators and the relationship between the perpetrators and the accused, as well as the accused's involvement (e.g., did he send him or instruct him to commit the crime?)

For the mode of ordering, out of an analysis of eleven cases, of which six resulted in convictions and five in acquittals, the conclusion was that to prove that an accused has ordered SGBCs, the prosecution has to provide the following types of evidence for each of the elements identified in this research.

Elements to prove	**What the prosecutor needs to look for**
The accused gave the order to commit SGBCs	• Testimony of eyewitnesses (including subordinates) and victims who heard the defendant verbally give direct orders, instructions, or permission to commit SGBCs (physical proximity of the witness to the accused has to be ensured). The order must be specific. • Admission of the accused himself, whether in the Courtroom or as part of a plea bargaining, or orders of SGBCs given
The SGBCs order was executed	• Testimony of victims and eyewitnesses of SGBCs that they were subjected to or that they saw happening (special attention should be paid to the inconsistencies between the statements and the in-court testimony vis-à-vis the trauma experienced, the passing of time, the difficulty of translation, and/or literacy problem). Even only one victim, if found credible and reliable, can prove an SGBC charge, according to the "non-corroboration" rule. • SGBCs can also be proven if the eyewitness has heard the order being given and, after a short amount of time, he has ascertained that, indeed, the order was implemented (for instance seeing the corpse of the victim with her legs spread apart or stick inserted into her virginal after the eyewitness heard the order); • Admission of the accused himself, whether in the Courtroom or as part of a plea bargaining, of orders given to commit SGBCs;
The accused had authority over the person being ordered to commit SGBCs	• Authenticated documents on the appointment of the accused to his official capacity or referring to the accused in his official position or signed by the accused in his official position; • Testimony of eyewitnesses (in particular subordinates but also experts) and victims describing the accused's role and the authority he had over subordinates, the influence he had in the community, how he behaved during meetings, including if he was respected or not; • Admission of the accused himself, whether in the Courtroom or as part of a plea bargaining, of their position;

In order to prove that an accused has directly committed SGBCs, the prosecution has to provide the following types of evidence for each of the elements identified in this research.

Elements to prove	What the prosecutor needs to look for
SGBCs were committed personally by the accused	• Testimony of victims and eyewitnesses who saw the accused committing SGBCs (no corroboration required for credible and reliable evidence from SGBCs' victims and the parties to the proceedings are prohibited at all times from raising questions on the prior sexual activities of a victim of SGBC). Victims should be able to identify their perpetrators, whether because they knew them from before the incidents or from the incidents themselves. • Eyewitnesses should have been physically close to the crime scene and, possibly, they should have known the accused from before the events. Further, if the eyewitnesses cannot testify on the actual SGBC, they should be able to recount what happened right before (e.g., saw the accused taking victims in the house), during (e.g., heard victims screaming from that direction calling the accused name), and right after the alleged SGBC acts (e.g., saw victims came out walking with their legs apart), in order to allow the judges to infer the reconstruction of the events. • If the eyewitnesses recount hearsay evidence, the hearsay should, at least, clearly identify the accused as the perpetrator of the SGBCs. The date and time of the SGBCs as indicated in the indictment should be clearly established and there should be no inconsistencies between the written statements and the in-court testimonies of both victims and eyewitnesses. • Admission of the accused himself, whether in the Courtroom or as part of a plea bargaining, of having personally committed SGBCs
The accused had the intent and the knowledge to commit the SGBCs	• Testimony of victims and eyewitnesses to establish the intent of the accused, such as, for instance, to obtain information, to intimidate, to punish, to discriminate, to show his own hatred against the victim and/or against the group the victim belonged to. • Admission of the accused himself, whether in the Courtroom or as part of a plea bargaining, of his intent/knowledge to commit SGBCs

In order to prove that an accused has instigated SGBCs, the prosecution has to provide the following types of evidence for each of the elements identified in this research.

Elements to prove	What the prosecutor needs to look for
Link between instigating and the SGBCs	• Testimony of victims and eyewitnesses on how they saw the accused instigating SGBCs by communicating through the microphone and how, later, they were subjected or saw SGBCs being committed (closeness in space and time between the instigation and the SGBCs is crucial); • Statements of the physical perpetrators on how they received permission by the accused to commit SGBCs, if collected, constitute an added value to establish the connection.

	• Documentary evidence of speeches made in public and on television or newspaper interviews, etc. in which the accused clearly instigates others to commit SGBCs (prosecutor should also look at speeches made by the accused over an extended period and not only during the indictment period); • Admission of the accused himself, whether in the Courtroom or as part of a plea bargaining, of having personally instigated SGBCs;
Existence of positive acts, omissions, express or implied conduct	• Testimony of victims and eyewitnesses on how the accused, after having being informed that SGBCs were about to be committed, whether stood and watch and did nothing to prevent it, acted to facilitate it, or even verbally encouraged it.

In order to prove that an accused has aided and abetted SGBCs, the prosecution has to provide the following types of evidence for each of the elements identified in this research.

Elements to prove	**What the prosecutor needs to look for**
The accused provided practical assistance or moral support to the physical perpetrator to commit SGBCs	• Testimony of victims and eyewitnesses on the accused presence and not doing anything to prevent SGBCs from happening or on the encouragement of the accused towards the physical perpetrators, for instance: by remaining on the scene and continuing to interrogate a victim while she was being raped; by permitting a subordinate to take the victim away to rape him; by committing SGBCs next to the subordinates who were also committing SGBCs; or by handing over victims to the subordinates to subject them to SGBCs.
The accused's conduct had a substantial effect on the commission of the SGBCs	• Testimony of victims and eyewitnesses on the accused being present on the scene in his official capacity; on the accused committing crimes against victims (e.g. beating – the prosecutor should then provide prove through victims and eyewitness regarding the close temporal proximity between the two incidents (beatings and sexual assaults)) right before or during the commission of the SGBCs; on the accused handing over the victims to the subordinates to be raped; on the accused not doing anything to prevent the commission of the SGBCs. The prosecution must prove that the principal perpetrators were aware of the accused's substantial contribution and were motivated by it and that the accused was actually aware of the SGBCs being committed (only in moral encouragement).
The accused knew his or her conduct would assist the commission of SGBCs by the principal perpetrators	• Testimony of eyewitnesses (in particular subordinates) on the accused participating in meetings in which the commission of SGBCs by the accused's subordinates was discussed; or on the accused being present on the scene and, for instance, making statements of appreciation for the 'work' of the subordinates; • Documentary evidence on statements made by the accused, interviews released on TV and newspapers showing appreciation for the 'work' of the subordinates; • Documentary evidence sent to the accused and testimony of eyewitnesses (in particular subordinates) that the accused had been put on notice that SGBCs

	were being committed (it is important here to demonstrate that the accused was specifically put on notice by these documents (e.g., receipt of copy received or minutes documenting receipt or subordinates' testimonies that the accused was informed) that the principal perpetrators were going into the specific crime sites to commit sexual assaults). • Testimony of victims and eyewitnesses on the accused's actions, such as handing over victims to subordinates after having first raped them, in the knowledge that they would be raped again.

3. Prosecuting Sexual and Gender-Based Crimes and Linking Them to High-level Officials through Indirect Modes of Liability

Indirect modes of liability (JCE, superior/command responsibility, co-perpetration, indirect perpetration, and indirect co-perpetration) offer various options to prosecute high-level officials for the role played in the commission of the SGBCs but they present many challenges. Of the 47 cases analyzed in Chapter 6, 45% resulted in a conviction and 55% acquittal. The 55% of acquittals show that prosecuting SGBCs through the indirect modes of liability is far more complicated than pursuing charges through the direct modes. This is because the crimes are committed by many actors and by various entities operating in a complex, undefined network. In this system, it is hard in theory to determine the correct mode of liability to reflect the exact role played by each individual in the commission of the crimes, and the establishment of the linkage evidence in practice can be an even more complex and painstaking exercise. For instance, the prosecutor must establish the reporting or disciplinary procedure, knowledge and intent, organizational structure and character, accused's authority, material ability and level of control, common plan or agreement, and essential contribution. Further, the contextual elements within which the SGBCs occurred must be proven, by showing, for example, whether the SGBCs happened in the context of a population expulsion or mass displacement.

Concerning the JCE doctrine, its flexibility led to an increase in the prosecution of SGBC cases at the ICTY and ICTR[41] because it offers broad discretion to prosecutors and judges in determining the scope of wrongdoing attributed to high-level officials.[42] The prosecutors may even secure rape convictions without proving a specific nexus between the accused and the crimes happening on the ground if those crimes were clearly foreseeable by-products of the JCE. But each JCE form has its own complications. For the accused to be charged with JCE I, the prosecutor must first be sure that the JCE members shared the intent to commit

[41] E.g., Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Appeal Judgment (July 21, 2000); Prosecutor v. Tadić, Case No. IT-94-1-A, Appeal Judgment (15 July 1999); Kvocka Trial Judgment, supra note 5; Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Judgment (2 August 2001); Furundzija Trial Judgment, supra note 5; Prosecutor v. Tadić, Case No. IT-94-I-T, Trial Judgment (7 May 1997); Prosecutor v. Karemera, Case No. ICTR- 98-44-I, Amended Indictment (23 February 2005).

[42] See Allison Danner and Jenny Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law. California Law Review 93, no. 75 (2005).

SGBCs and be able to prove that SGBCs were used as one of the means to destroy a particular ethnic group, discriminate against them, or drive them out of a certain area. This may look easy in theory, but it is difficult to find evidence that high-level officials of certain armed groups reached an agreement with many other foot soldiers to commit SGBCs as a means to achieving these aims. Furthermore, the practical application of JCE I hinges on two essential elements – proof that SGBCs formed part of the common purpose from the beginning or that they became part of it over time. The problem is that the prosecutor is often not able to link the crime with a member of the JCE or to show that the crime was committed on a widespread or systematic basis,[43] hence forming part of the group's common purpose from the beginning.[44] It is even more challenging to prove that SGBCs became part of the JCE over time because it is often unclear when the accused and the other JCE members were informed of the new SGBCs but ignored them.[45]

The JCE II requires proof that the SGBCs were part of a common purpose implemented in organized systems of ill-treatment. This entails proving that the accused was aware of the SGBCs, the systems of ill-treatment, and the intent to further the JCE. From the analysis conducted in Chapter 4, it can be concluded that unlike JCE I, JCE II does not require proof of an expressed or implied agreement to commit a crime. Rather, it is more important for the prosecutor to prove the accused's significant contribution to the ill-treatment system under which the SGBCs occurred. While JCE II is an effective tool in charging high-level officials for SGBCs, it has been less frequently used by the ICTY and ICTR. This is because it is too restrictive and does not effectively apply to factual scenarios (e.g., Military or Police barracks) other than the "normal" circumstances of prison or concentration camps. In practice, while it is easier for the prosecutor to prove the crimes, time, ill-treatment system, awareness, and the accused's continued presence, the major issue remains establishing the camp's overall effect requirement.[46] A substantial contribution to the camp's overall effect is the most crucial element to prove but, in most cases analyzed, the prosecutor instead unnecessarily focused on establishing the accused's substantial contribution to the JCE.[47]

The JCE III is the least complicated mode of liability to prove, allowing the judges to make inferences from the evidence to conclude that the SGBCs committed were objectively a natural and foreseeable consequence of the execution of the JCE and that the accused was subjectively aware that such a crime was a possible consequence of that execution and that he participated in the JCE nonetheless.[48] Notwithstanding its frequent

[43] See Prosecutor v. Stakic, Case No. IT-97-24-T, Trial Judgment (31 July 2003), para. 806.
[44] Ibid., paras. 440, 818, 826.
[45] See Prosecutor v. Krajišnik, Case No. IT-00-39-A, Appeal Judgment (17 March 2009), para. 171.
[46] See Prosecutor v. Kvocka et al., Case No. IT-98-30/1-A, Appeal Judgment (28 February 2005), para. 599.
[47] Ibid.
[48] See, e.g., Krajišnik Appeal Judgment, supra note 45, paras. 171-7; Brdanin Appeal Judgment, supra note 35, para. 432; Prosecutor v. Ntakirutimana, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Appeal Judgment (13 December 2004), para. 465; Martic Appeal Judgment, supra note 40, para. 83 regarding punishment for various levels of participation in JCE III; Prosecutor v. Milutinovic et al., Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise (21 May 2013), para. 11; Tadić Appeal Judgment, supra note 41, paras. 195-6, 204; Prosecutor v. Vasiljevic, Case No.: IT-98-32-A, Appeal Judgment (25 February 2004), paras. 95-101.

usage and flexibility, this mode is viewed by many scholars as lacking any basis in customary international law and holding persons accountable too broadly for "committing," even if these actions were not agreed upon in advance or fell outside the common purpose.[49] Another criticism about JCE and SGBCs prosecutions has been that JCE III was often used despite the evidence clearly pointing in the JCE I's direction.[50] Even if the ultimate aim is to gain a conviction, it is wrong to charge or convict someone under a certain mode of liability (because it is perceived to be easy to prove) if the evidence instead strongly justifies using a different mode.

Superior/command responsibility assigns criminal responsibility to higher-ranking civilian and military officials in *de jure* or *de facto* positions at every level for their subordinates' crimes. In the context of SGBCs, the prosecution must prove the existence of a superior-subordinates relationship, the superior knew or had reason to know that SGBCs were about to be or had been committed, and the superior's failure to prevent or punish or refer the matters for prosecution. The main debate still surrounding the doctrine today is whether it is a special mode of liability for the crimes committed by subordinates. This research has clarified that the superior is not directly responsible for the crimes committed by his subordinates but for his own omission or failure to properly discharge his own duty as a superior or commander. While, in theory, superior responsibility is a constructive instrument to prosecute high-level officials for SGBCs committed by subordinates, in practice, successes in securing convictions have been quite rare.[51] The prosecutor has often found it challenging to prove the accused's degree of effective control, specific or actual knowledge of the subordinates' crimes, and material ability to prevent or punish the subordinates. The analysis conducted in Chapter 6 shows that SGBC charges tend to be more easily proven with military commanders than civilian superiors when using evidence of failure to act to establish effective control. Despite this finding, generally, effective control remains the most challenging element to prove against military commanders. Part of the problem lies in the fact that the nature of conflicts where these atrocities are committed has changed and groups do not always display a chain of command or formal hierarchical order that characterizes traditional armed conflicts.[52] Thus, the presence of someone lower in the hierarchy leads to difficulties in establishing effective control and power to prevent, repress, or punish. For the "had reason to know," the standard of proof seems to be that the accused sufficiently possessed alarming information

[49] See Danner & Martinez, supra note 42, p. 111; see also Steven Powles, Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity? Journal of International Criminal Justice 2 (2004), p. 611 ('it is difficult to see how someone can be said to have "committed" a crime that they were perhaps not even aware of, albeit that they should have been').
[50] For a detailed discussion, see Michelle Jarvis and Elena Martin Salgado, "Future Challenges to Prosecuting Sexual Violence Under International Law Insights from the ICTY Practice." In Sexual Violence as an International Crime: Interdisciplinary Approaches, edited by Anne-Marie de Brouwer et al. Cambridge, UK: Intersentia, 2013, pp. 101-122; Kelly Askin, "Treatment of Sexual Violence in Armed Conflicts: A Historical Perspective And The Way Forward." In Sexual Violence as an International Crime: Interdisciplinary Approaches, edited by Anne-Marie de Brouwer et al. Cambridge, UK: Intersentia, 2013, pp. 49-55.
[51] The research conducted in chapter 6 analyzed 21 superior/command responsibility cases and only six accused were convicted under this mode of liability for SGBC charges.
[52] See Catherine MacKinnon, The ICTR's Legacy on Sexual Violence. New England Journal of International & Comparative Law 14 (2008), p. 217.

but failed to inquire or punish the crime in question.[53] This indicates that the accused could even walk free if the SGBCs committed by his subordinates did not meet the threshold of "alarming information." While the "alarming information" requirement is important in establishing the accused's mental element, the standard should instead be based on the "actual knowledge" of the subordinates' crimes. The latter sends a clear signal to the accused of the precise subordinate's offense and the need to take action to punish or refer for further investigation. In any case, this is an important aspect of the doctrine because the accused's failure to punish a crime of which he has actual knowledge could be understood by subordinates as acceptance or encouragement of such conduct, with the effect of increasing the risk of new crimes being committed.[54] Proof of the "necessary and reasonable measures" the accused should have taken actually depends on whether he possesses the material ability to stop or penalize.[55] Of course, it is sometimes complicated, during wartime, for a commander to diligently exercise this duty, by initiating proper investigation mechanisms when the conflict is still ongoing. However, the accused need not dispense punishment personally against the subordinates to satisfy this criterion. It is sufficient that he discharges his duty to punish by reporting said subordinates to the competent authorities.[56] Overall, proving the accused's intent and knowledge remains the central problem among the three elements mentioned above. The high-level official has often argued that he did not have specific or actual information about the subordinate's crimes, even if the crimes were notorious. A proactive strategy to address this problem could be for the prosecutor to send advanced notifications about specific SGBC acts to the potential perpetrators (most likely to be effectively in control) and properly document those communications. This proactive measure and the documentation of notifications would make it almost impossible for an accused to argue that he did not have the requisite knowledge about the SGBCs. It would be even more helpful if the prosecutor could request information on the actions taken by the potential perpetrators in order to be able to prove later that the high-level official had the knowledge but failed to act.

Co-perpetration is based on the notion of control of the crime, in the sense that a person can become a co-perpetrator of a crime only if he has joint control over the crime, as a result of the essential contribution ascribed to him.[57] In the context of SGBCs, the prosecution must prove that SGBCs committed fall within the common plan, or the perpetrators meant to cause that consequence or were aware that SGBCs would occur in the ordinary course of events. Additionally, the prosecutor must establish the co-perpetrators

[53] See Delalic et al. Trial Judgment, supra note 24, para. 769; Prosecutor v. Bemba, Case No.: ICC-01/05-01/08, Trial Judgment pursuant to Article 74 of the Statute (21 March 2016), paras. 426, 594-597; Prosecutor v. Ndindilyimana et al. (Military II), Case No: ICTR-00-56-T, Judgment and Sentence (17 May 2011), paras. 1453, 1524.
[54] See Prosecutor v. Krnojelac, Case No.: IT-97-25-A, Appeal Judgment (17 September 2003), para. 169.
[55] See Blaskic Appeal Judgment, supra note 33, para. 610; Delalic et al. Trial Judgment, supra note 24, paras. 774-775; Bemba Trial Judgment, supra note 53, paras. 447, 729.
[56] See Prosecutor v. Blaskic, Case No. IT-95-14-T, Trial Judgment (3 March 2000), para. 734; Prosecutor v. Bemba, Case No. ICC-01/05-01/08 A, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute (8 June 2018), paras. 170, 604; Delalic et al. Trial Judgment, supra note 24, paras. 774-775.
[57] See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-803-tEN, Decision on the Confirmation of Charges (29 January 2007), para. 322.

essential contribution to the SGBCs committed, which means that liability can only arise from the shared control of the crime. Under this theory, all co-perpetrators can frustrate the execution of the common plan or purpose, withholding their contribution to the crime.[58] The main debate under this doctrine is that the causality link between the individual's contribution and the commission of the crime is too "elastic."[59] As a solution, there must be a 'direct contribution to the realization of the material elements of the crime' to be determined on a case-by-case basis.[60] In terms of evidence, for other crimes, it is easier for the prosecutor to prove the "essential" nature of the contribution and the ability to frustrate the crime that falls within the common plan/purpose. However, for SGBCs, the prosecutor is often unable to prove that the SGBCs were part of the common plan/purpose or that the accused's contribution to the common purpose was essential to the commission of the SGBCs that fell outside the common purpose.[61] This leads to the conclusion that, given the difficulty of proving that SGBCs were part of a common plan, prosecutors should instead focus on proving that SGBCs occurred in the ordinary course of events. To achieve this, it is advisable to charge this mode in instances involving a series of attacks, by members of the same armed group, over a sustained period, and not for a single attack, on a single town, on one particular day.

Indirect perpetration is the commission of a crime by leaders through another person.[62] In the context of SGBCs, it must be proven that the superiors' orders at the top of the organization to commit SGBCs were automatically executed by the agents, which shows that the accused had control over the crimes.[63] This entails proving the accused's material ability, i.e., whether or not he could effectively direct the part of the group subordinate to him to commit the SGBCs.[64] This doctrine applies when the tool is an innocent agent or criminally responsible (perpetrator behind the perpetrator). Despite this flexibility, there are still doubts surrounding the agents' characterization as an innocent tool since they are sometimes actively and viciously involved in the crime. Moreover, the agents' fungibility may suggest that sometimes even the commander of a tightly controlled organization does not dominate the agents' will and does not have sufficient actual control over the subordinates' criminal acts, for which he is to be held accountable. Thus, the high-level official should only be held responsible as the indirect perpetrator when it is proven that he completely controls the will of the subordinates.[65] Therefore, only proving that the accused was the leader at the apex of the organization is not sufficient.[66] The prosecutor must prove the presence of a centralized and effective

[58] Ibid., para. 341.
[59] See Prosecutor v. Ngudjolo Chui, Case No.: ICC-01/04-02/12, Trial Judgment (18 December 2012), para. 43. Concurring Opinion of Judge Van den Wyngaert.
[60] Ibid., paras. 44, 46, 47.
[61] See Prosecutor v. Katanga, Case No.: ICC-01/04-01/07, Judgment pursuant to Art. 74 of the Statute (7 March 2014), paras. 1679, 1684.
[62] See Lubanga Decision on the Confirmation of Charges, supra note 57, para. 318.
[63] See Katanga Trial Judgment, supra note 61, paras. 1408-1409, 1420.
[64] See Claus Roxin, 'Crimes as Part of Organized Power Structures.' Journal of International Criminal Justice 9 (2011), pp. 201-202.
[65] See Prosecutor v. Katanga and Ngudjolo Chui Case No. ICC-01/04-01/07-717, Decision on the Confirmation of the Charges (30 September 2008) paras. 515, 516.
[66] See Katanga Trial Judgment, supra note 61, para. 1420. Translation from "Summary of judgment", § 51.

chain of command, showing that the high-level official had the material ability to issue and ensure execution of orders and discipline subordinates who disobeyed orders,[67] such as to exert control over the crimes.[68]

Indirect co-perpetration was created as a result of a combination of two modes of liability (co-perpetration and indirect perpetration). The notion applies in the context of crimes committed in an organization, whereby senior leaders jointly control the commission of a crime through the use of subordinates who physically perform the tasks.[69] If the prosecutor charges the accused with SGBCs under this theory, it will have to be established that two or more high-level officials had effective control over their organizations and members of these organizations committed SGBCs.[70] The control over these organizations represents the *conditio sine qua non* of each high-level official's contribution as an indirect co-perpetrator. Despite the heavy criticisms that this mode of liability has no basis in the text of Article 25[71] or Roxin's original theory,[72] Ongwen and Ntaganda's convictions may be considered a further validation of the construction of indirect co-perpetration doctrine in the Rome Statute and ICL. Further, the two Judgments are significant judicial developments because they clarify how to properly attribute individual soldiers' conduct to the accused in an organization, the crux being proving that the group as a whole functioned as a tool in the hands of the co-perpetrators.[73] In practice, it is difficult to find evidence to convict high-level officials under this theory because these crimes can be attributed to each high-level official based on mutual attribution, and often, it is not clear how these leaders relate to each other and whether they exercise effective control over their respective troops.[74] It is even more complex because the prosecutor will not have only to prove the crimes of the forces of one accused but also the crimes of each other's subordinates.[75] The most important lesson to be considered is that the prosecutor needs to focus more on proving that the group collectively functioned as a criminal tool in the co-perpetrators hands, through which they could commit the SGBCs.[76] This entails proving the accused's source of control through an essential contribution[77] or control over an organized structure of power.[78] It surfaces that, by creating the context that influenced the subordinates' behavior, the SGBCs committed by the group could be attributed to the accused.

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[67] Ibid.
[68] Ibid.
[69] See Stefano Manacorda and Chantal Meloni, Indirect Perpetration versus Joint Criminal Enterprise Concurring Approaches in the Practice of International Criminal Law? Journal of International Criminal Justice 9, no.1 (2011), p. 172.
[70] Ibid.
[71] See Ngudjolo Chui Trial Judgment, supra note 59, para. 60.
[72] See generally Roxin, supra note 64, p. 193; Claus Roxin, Taterschaft und Tatherrschaft. 7th ed. Berlin: de Grutyer, 2000, pp. 242-52, 704-17.
[73] See Prosecutor v. Ongwen, Case No.: ICC-02/04-01/15, Trial Judgment (4 February 2021), paras. 212, 3089, 3091; Prosecutor v. Ntaganda, Case No. CC-01/04-02/06, Trial Judgment (08 July 2019), para. 819.
[74] See Katanga and Ngudjolo Chui Confirmation of the Charges, supra note 65, para. 493.
[75] Ibid., para. 484.
[76] See Ntaganda Trial Judgment, supra note 73, paras. 818-819; see also Prosecutor v. Gbagbo and Blé Goudé, Case No. ICC-02/11-01/15-1263-AnxB-Red, Reasons of Judge Geoffrey Henderson (16 July 2019), para. 1944; Ongwen Trial Judgment, supra note 73, paras. 212, 3089, 3091.
[77] See Ntaganda Trial Judgment, supra note 73, paras. 323, 851.
[78] Ibid., paras. 321-322; see also Gbagbo and Blé Goudé, Reasons of Judge Geoffrey Henderson, supra note 76, para. 1944; Ngudjolo Chui Trial Judgment, supra note 59, para. 388.

Overall, the indirect modes of liability provide sufficient means to charge high-level officials for SGBCs. However, a notable shortcoming of these theories has been that they often cannot represent or reflect the full coordination, cooperation, and actions that usually take place among the various high-level officials involved in the criminal system. Even if every member of the group was somewhat involved, there might be no certainty as to who actually committed what, and the roles and links among the actors might remain undefined. This difficulty significantly undermines the prosecutor's ability to pick the correct mode of liability. It also impedes the systematic collection of the evidence required to clearly prove the link between the modes selected and the accused's role. Thus, the overall consequence is that the accused could be wrongly charged for a crime he did not commit or end up not being charged at all for the crime he actually committed. Therefore, reliance on these theories alone can sometimes make it very difficult, if not impossible, to appropriately assign to such individuals liability for the role played in the entire crime. If the evidence is not sufficient to prove the roles and links of the accused, it could be a wise prosecutorial strategy to scale back from using an indirect mode to the most similar direct mode that best captures the accused's actions (e.g., from command responsibility to aiding and abetting by omission).

While these theories have proven to be effective instruments, establishing the linkage to the accused remains the biggest problem. This is because most of the crimes are committed in an informal military structure, where the actual chain of command is undefined, making the effective control over subordinates or the control over the crimes challenging to prove. In this structure, it is often unclear whether the subordinates had *de facto* commanders on the ground who refused to report to the accused or accept the accused's authority. In other cases, it is not clear whether the accused was physically isolated from some locations and, in the meantime, local leaders had become the *de facto* commanders of the subordinates, which hindered the accused's ability to project his command. Consequently, sometimes the evidence presented does not adequately reflect the accused's specific role (*de jure* or *de facto*). This is because it is inherently difficult to find the proper link among the people who are indirectly involved with each other and understanding under whose effective control the physical perpetrators committed the crimes. Consequently, the accused may be wrongfully convicted for crimes he did not commit or acquitted for the crimes he indeed participated in. Section 4 will discuss recommendations to address this problem.

Regarding the types of evidence, the analysis conducted in Chapter 7 shows that, while it is essential to prove the SGBC acts, the main emphasis should be proving the structures, full coordination, cooperation, and actions of the various high-level officials involved in the criminal system. Documentary evidence, perpetrators' testimonies, and eyewitnesses' testimonies are among the most effective means of drawing critical linkages, such as the existence of a concrete plan, knowledge/awareness, reporting, and disciplinary mechanisms, ability to punish, and the essential contribution of the accused. They can be conclusive and

compelling pieces of evidence in establishing certain modes of liability, such as JCE I, II, and III, superior/command responsibility, co-perpetration, indirect perpetration, and indirect co-perpetration. Even if they are effective, these types of evidence come with their own intrinsic difficulties. For documentary evidence, the main problem lies with authentication, which means that to be admitted into evidence, the prosecutor must verify the authorship of the document and its relevance to the case at issue. Evidence from perpetrator witnesses provides unique insights into the attitudes, moral values, motives of the perpetrators, structures, and roles of the accused. This type of evidence is valuable in light of the accused's confession (resulting from plea bargain), the acknowledgment it provides to the victims of the ordeal they went through, and the contribution to restorative justice. The main problem is the prosecutor's tendency to routinely drop SGBC charges during plea bargaining in favor of certain other crimes, such as murder. This not only sends the wrong message that SGBCs are less important than other crimes but also that those who perpetrate these crimes will not be held to account. Obtaining information from expert witnesses is another effective way to establish the accused's mental element from the widespread or systematic nature of SGBCs and to support the credibility of victims who have PTSD. However, it is hard for the judges to accept expert statements because of impartiality and reliability concerns. One way to improve this in future cases could be for the prosecutor to engage with potential experts earlier in the proceeding to ensure that the SGBC issues they are working on are more appropriately tailored, to be used in the courtroom later. For the judges to accept such evidence and make sound inferences from it, the prosecutor should work with these individuals to address any possible questions and concerns on the impartiality and reliability of the underlying SGBC data. This will ensure that the evidence is based on strong, accurate, clear, and reliable data that the judges would most likely accept.

Lastly, as explained, 55% of acquittals call for a significant improvement in collecting SGBCs' linkage evidence. The cases usually failed the test because of the prosecutor's inability to gather the relevant linkage evidence. Occasionally, the judges require that the prosecution meet higher evidentiary standards than in other types of cases. This means that the need for comprehensive and effective investigative strategies is critical to prosecuting high-level officials of these crimes adequately. A list has been provided below to guide the effective prosecution of SGBC cases through indirect modes of liability in the future. The list is a suggestion on the standard that the prosecutor should be looking for to prove SGBCs and linkage to the accused. It is based on the analysis of the evidence presented in Chapter 6 and the author's expert view on the subject matter.

In order to prove that an accused participated in a joint criminal enterprise including SGBCs, the prosecution has to provide the following types of evidence for each element identified in this research.

1. JCE I

Elements to prove	What the prosecutor needs to look for
SGBCs were part of the common purpose from the beginning or overtime	• Testimony of victims and reliable eyewitnesses (including insiders and subordinates) on SGBCs being committed in the locations identified in the indictment (the widespread or systematic nature of the SGBCs needs to be proved) by the physical perpetrators (subordinates) connected to the members of the JCE; • The existence of a plan that entails the commission of SGBCs from the beginning or that included SGBCs over time; • For overtime, it is very important to prove at which point in time the accused knew the common objective had expanded to include new SGBCs and at which point in time did the JCE members agree on this expansion of means, i.e., analyzing the sexual crime to prove when and where it happened, who did it, why and how); on whether the JCE members did nothing to prevent the recurrence of the SGBCs and persisted in the execution of this new expansion of the common objective; • Admission of the accused himself, whether in the Courtroom or as part of a plea bargaining, of having contributed to the setting up of the systems in which SGBCs were committed and/or explaining the purpose of the JCE in which SGBCs were committed in the fulfillment of the common purpose; • Authenticated documents and subordinates' testimony on activities and meetings of the accused to further the plan that substantially contributed to its implementation; • For overtime, authenticated official reports informing the members of the JCE and of the new types of SGBCs committed pursuant to the implementation of the common objective; • Authenticated documents on the appointment of the accused to his official capacity or referring to the accused in his official position or signed by the accused in his official position to prove the accused's position in the JCE;
Shared intent to commit SGBCs	• Testimony of victims and eyewitnesses (particularly of subordinates) on the role and the importance of the accused and on their positive actions to further the plan, e.g., taking part in ordering attacks, coordinating with other co-perpetrators to establish detention camps, and arranging with them for the removal of the targeted civilian group, or separating women; • Authenticated documents showing that the accused and other JCE members were made aware of the commission of SGBCs in pursuit of the common objective and shared the intent.

2. JCE II

Elements to prove	What the prosecutor needs to look for
SGBCs were part of a common purpose and were implemented in organized systems of ill-treatment	• Testimony of victims and eyewitnesses (including subordinates) on SGBCs and other crimes being committed in the system of ill-treatment; The dates in which the SGBCs were committed need to be established. Testimony should also focus on the knowledge by the accused of these crimes and their physical presence during that time and, how often they participated in their commission (evidence on their participation in multiple SGBCs or other criminal acts need to be recorded to prove that the accused's participation was significant to the functioning of the system); • Authenticated documents (e.g., logbook) proving when the accused were present in the camp and their role; • Victims/eyewitness showing how their contribution was substantial to the functioning of the system; authenticated documents on the accused's knowledge of the commission of SGBCs in the systems.

3. JCE III

Elements to prove	What the prosecutor needs to look for
SGBCs were a natural and foreseeable consequence of executing the common purpose	• Testimony of eyewitnesses (including insiders and subordinates) on the accused being informed of the commission of SGBCs by their subordinates; on the accused's participation in meetings, on the accused's leadership position and his presence at the crime scenes; on the accused being informed of commission of SGBCs by their subordinates without any disciplinary measure being taken; • Testimony of victims and eyewitnesses on the terrible conditions imposed on the victims' groups that made the commission of SGBCs foreseeable; or the commission of SGBCs by the accused's subordinates; • Admission of the accused himself, whether in the Courtroom or as part of a plea bargaining, for instance, stating that SGBCs to be expected during the war; • Authenticated documents showing the accused's knowledge of the commission of SGBCs, such as orders to subordinates issued by the accused themselves to rape or not to rape; reports by the accused on measures taken to tackle commission of SGBCs by the subordinates; documents proving the accused's presence on the crime scenes; NGO reports, press statements, newspaper article describing the commission of SGBCs (prosecution must be able to demonstrate that the accused was specifically put on notice of SGBCs in these documents - e.g. signed receipts), UN and humanitarian organizations' reports and protest letter directed to the accused informing of the SGBCs.

The accused's contribution to the common purpose was essential	• Testimony of eyewitnesses (including subordinates), authenticated documents (including operational financial and logistical ones), and adjudicated facts from other related cases (if available) proving: the official position of the accused; his acts or omissions to implement the JCE; the authority held over the subordinates and the powers to impose disciplinary actions; • Eyewitnesses (including subordinates) and authenticated documents showing, for example, that the accused distributed weapons or gave orders to commit crimes in pursuit of the common purpose, which made the accused's contribution to the overall purpose of the JCE essential; • The prosecution must then obtain the necessary evidence from rape victims and eyewitnesses to the rape, showing that while pursuing the common objective to kill or murder civilians based on the accused's actions/essential contribution to the overall purpose of the JCE, the subordinates then committed SGBCs outside the common purpose.

In order to prove the accused's superior and command responsibility in the commission of SGBCs, the prosecution has to provide the following types of evidence for each of the elements identified in this research.

Elements to prove	**What the prosecutor needs to look for**
Existence of a superior-subordinate relationship	• Testimony of victims and eyewitnesses on the SGBCs being committed in a widespread and systematic manner in the locations indicated in the indictment (the principal perpetrators need to be identified – e.g. which unit they belonged, and the accused's presence or not on the scene needs also to be clarified) and on the authority exercised by the accused (e.g. the accused's practical actions such as transporting the principal perpetrators, giving subordinates orders which were implemented, the feeling that abuses stopped when the accused was about to arrive or told them to stop and they did so immediately, declarations made directly by the accused to the victims); • Testimony of subordinates describing the accused's power to investigate allegations of misconducts of their subordinates; if the accused had to rely on others to investigate; if he was physically removed or not; subordinates describing if the accused had the authority to investigate and punish them (it is not enough to demonstrate that the accused could organize and arrange daily activities); testimonies regarding the accused's reputation among his subordinates and if his order was respected or not; if the accused could make official reports to the competent authority for prosecution; and subordinates who could describe the actual chain of commands; • Authenticated Documents, such as a letter from international organizations, addressing the accused with his official position; documents and reports defining clearly the chain of command (prosecution should pay attention if the accused was really able to project his command in every location or if

	some locations were, e.g., physically isolated with their own local leaders in place de facto); the prosecution should obtain dated transcripts of radio conversations to prove the accused's official position and the operational chain of command down the line; • Accused's admission, whether as part of a plea bargain or within in-court testimony, that he used to go regularly on the crime scenes and that he exercised authority over the personnel present and that he had subordinates assigned who used to execute the accused's orders.
The superior knew or had reason to know that SGBCs were about to be or had been committed	• Testimony of eyewitnesses (including humanitarian workers and UN personnel) and victims on the accused's presence on the crime scene or that he was informed of the SGBCs happening or the accused personally witnessed the SGBCs; • Authenticated documents (among which conversation transcripts between the accused and other persons) proving that the accused was put on notice of the commission of SGBCs; • Authenticated documents, victims, and eyewitnesses should detail where and when the SGBCs were committed and by whom. They should also indicate how many SGBC incidents happened in different locations in order to prove the widespread character of the SGBCs. Documents showing general media reports describing hearsay information about SGBCs in different locations would be deemed of too low probative value, so the prosecutor must be sure that documents specifically put the accused on notice about SGBCs in specified locations (e.g., evidence of receipts) and whether they were committed by the accused's subordinates; • Accused's admission (during in-court testimony or through plea bargaining) that he was aware that there were groups of victims in a specified location (where the SGBCs would later be perpetrated).
The superior failure to prevent or punish or refer the matters for prosecution	• Testimony of victims and eyewitnesses (particularly subordinates) on how the accused never took action against the subordinates who committed SGBCs and how he never instructed them on how to properly treat detainees or refugees; • Authenticated documents (including UN reports or internal daily reports,) showing that the accused knew about the SGBCs but did nothing to prevent or punish them; • Accused's admission, whether through plea bargaining or in-court testimony, that he had the material ability to restrain subordinates and that he could recommend appointment and dismissal/suspension of personnel and that he never did it; • Generally, the evidence should clarify what specific SGBC acts the commander knew or should have known about and at what point in time; the measures at the commander's disposal; the operational realities on the ground at the time faced by the commander; and by specifically identifying what a

	commander should have done in concrete terms that were available to him, which a reasonably diligent commander in comparable circumstances would have taken. Further, the evidence needs to specify the dates and locations of the rapes; the names of the victims, and the dates and locations of the meetings to which the accused participated.

In order to prove that the accused co-perpetrated SGBCs, the prosecution has to provide the following types of evidence for each of the elements identified in this research.

Elements to prove	What the prosecutor needs to look for
Existence of an agreement or common plan between two or more persons	• Authenticated documents, such as minutes of the meetings attended by the accused on the planning of the attack and cooperation between the commanders on the ground; • Testimony of victims and eyewitnesses on SGBCs being committed by combatants during the attack and on how they were part of the common purpose (the evidence needs to prove that the SGBCs were widespread or systematic and that it was committed by members of the group under the accused's leadership and as co-operators, they shared the same purpose); • The evidence the prosecutor needs to gather from eyewitnesses (including subordinates), victims, and documents should primarily focus on the group's collective decisions, action or omissions; this evidence must show that the SGBCs were part of the agreement or the common plan; if the SGBCs fell outside the common purpose, the evidence must show that the accused was aware that the crimes would occur in the ordinary course of events (which means prove of prior knowledge of SGBCs); that the physical perpetrators who committed the SGBCs belonged to the group and that all the participants in the common purpose shared the same intent or were aware that the SGBCs would occur in the ordinary course of events (prior knowledge of SGBCs is important); and SGBCs have previously been committed by this same group.
The accused made an essential contribution to the common purpose to commit SGBCs	• Accused's admission, whether through plea bargaining or in-court testimony, that he contributed to design the agreement or the common plan; • Testimony of victims and eyewitnesses (particularly subordinates) showing the accused's official position and if he was a respected figure of authority; testimony on the accused's travels to the scene of the crimes to contribute to the implementation of the plan; • Authenticated documents and testimony of eyewitnesses (including subordinates) showing that the accused facilitated, transported, and distributed weapons and ammunition to combatants and various commanders in the group; • Eyewitnesses (including subordinates) showing how the accused issued orders to commanders and combatants to attack places indicated in the indictment.

In order to prove that the accused indirectly perpetrated SGBCs, the prosecution has to provide the following types of evidence for each of the elements identified in this research.

Elements to prove	What the prosecutor needs to look for
Authority in the organization and compliant with orders automatically to commit SGBCs	• Testimony of victims and eyewitnesses on SGBCs being committed in the locations and during the incidents specified in the indictment; on the accused being a highly respected figure, being saluted by subordinates, and being openly referred to as leader; • Authenticated documents to prove the accused's leadership position in the group, such as official documents referring to the accused in his official capacity; • Testimony of eyewitnesses (including subordinates) must establish if the accused could discipline the subordinates or whether there was any oversight of disciplinary procedures or disciplinary action imposed by the accused, including the exact nature of the orders that the accused could impose and whether they were obeyed or implemented.
Knowledge of the character of the organized and hierarchical apparatus of power	• Testimony of victims and eyewitnesses on soldiers undergoing military training, the existence of disciplinary regime overseen by commanders, military structure of the group; • Authenticated documents in the form of internal documents or international reports, showing military training carried out by the group; • The evidence from eyewitnesses (including subordinates) and documents needs to show, apart from the official position, that the accused had the material ability to issue and ensure compliance with orders and the existence of a centralized command within the group, i.e., at that time of the attack the accused wielded effective control over the group as a mean to exercise control over the SGBCs.

In order to prove that the accused indirectly co-perpetrated SGBCs, the prosecution has to provide the following types of evidence for each of the elements identified in this research.

Elements to prove	What the prosecutor needs to look for
The accused had control over the organization that committed the SGBCs	• Authenticated documents and eyewitnesses (including subordinates) showing the structure of the organization, including the role played by the accused, the level of the discipline applied, and how the accused exercised the power he held; • Testimony of victims and eyewitnesses (including subordinates) and internal documents on orders issued directly by the accused which were obeyed, on how the accused inspired fear amongst the troops and the population and how his order was respected; on the actions the accused implemented to further the plan and on how the accused exercised control over the SGBCs;

	• Authenticated documents and eyewitnesses (including subordinates) showing that the accused was involved at the operational level, i.e., whether he could issue direct orders to the commanders and ensured the orders were complied with or whether he could discipline them if the orders were disobeyed at the time of the incidents.
Organized and hierarchical apparatus of power	• Authenticated documents showing that the accused was involved in the creation of groups/ the apparatus of powers (such as minutes of meetings, financial transactions, recruitment of volunteers, etc.) which had a consistent ideology and methodology; on how the process of becoming a member was formalized and if the apparatus of power used violence to fulfill its objectives; • Testimony of victims and eyewitnesses (including subordinates) showing the creation of the group and its organization, including the structure, the hierarchy, the competence of each specialized unit, the disciplinary system, and if SGBC incidents had ever been punished; the role played by the accused as leaders, e.g., financial contributions, instructions to commit SGBCs, purchase of weapons, disciplinary actions, appointment/recruitments or assignments.; • Testimony of eyewitnesses (including subordinates) showing that the organized group consisted of a high number of trained soldiers and sufficient weapons were made available, which resembled a conventional army with a formal military structure; that the group as a whole functioned as a tool in the hands of the co-perpetrators through which they were able to commit the SGBCs; that the accused entered in a common plan with the other alleged co-perpetrators to commit the SGBCs.

4. Final Thoughts and Way Forward

The ICTY, ICTR, and ICC have made tremendous efforts since 1993 to investigate and prosecute persons most responsible for international crimes. International criminal prosecution relies on individual criminal liability theories and, more specifically, the ways of linking high-level officials to the atrocities committed on the ground. Linkage problems inevitably arise since international crimes' prosecution targets the most responsible perpetrators higher-up in the political and military structures that are not always well-defined and meticulously documented and people that are usually most removed from the scenes of the crimes.

The study has aimed to answer the central question of how can and should international tribunals and courts investigate and prosecute high-level officials for their role in the commission of SGBCs. Before answering this question, emphasis should be made on the complexity of holding top military and political leaders accountable for international crimes. These leaders operate in a criminal or legitimate system – but one which commits crimes – that is the combined effort of different groups of individuals, operating in or

through complex institutional networks, rather than a single individual's acts.[79] The crimes themselves are enormous and complex, and the nature of the criminal activities is collective and involves many individuals at different levels of the state hierarchy. The organizational element involved in the commission of the crimes is well-coordinated, albeit discretely.[80] Therefore, the degree of blameworthiness of individuals' involvement in such institutionalized systems cannot be easily categorized.[81] Indeed, as with all crimes, proving the link to the commander is hard, but it is even more complex concerning the practical task of finding the pieces of evidence to attribute the specific SGBC acts committed on the ground to the high-level officials who are away from the scenes. For instance, when the high-level officials are charged with SGBCs, proof of the SGBC act itself is required through the crime-based evidence, mainly victims and eyewitnesses. Subsequently, the linkage to the accused must be established by showing whether, for instance, the accused ordered the crime, present at the scene, participated in planning the crime, encouraged it or assisted the physical perpetrators in committing it, reported the subordinate for investigation, or had him disciplined. At the same time, the prosecutor must establish the contextual elements in which SGBCs happened (war crimes, crimes against humanity, genocide) or a campaign of other violent crimes, which involves, for example, determining whether the SGBCs happened during forced displacement or the expulsion of the population.[82] The three elements mentioned above are most often not proven by the prosecutor, thus leading to a higher acquittal rate than convictions.

Despite these difficulties, the ICTY, ICTR, and ICC Statutes revealed that it is possible to hold these high-level officials responsible through the modes of liability, for their role and individual contribution in the commission of the crimes, regardless of whether that person is geographically or structurally remote from the crime scenes. Based on the analysis conducted in Chapters 5 and 6, it can be concluded that one of the least complicated ways to prosecute high-level officials is through the JCE III mode of liability. In most of the cases analyzed under JCE III, the judges made strong inferences from the evidence about the accused's awareness, knowledge, and intent, which shows that the SGBCs committed were indeed foreseeable to him, but he still took that risk. The direct commission was also one of the least complicated modes to prove. In most cases analyzed, the victim's evidence was pivotal in establishing that the accused himself physically committed the SGBCs. In this type of mode of liability, the evidence is even more compelling when the

[79] See Tadic Appeal Judgment, supra note 41, para. 191.
[80] The former IMTFE Judge Röling underlined the complexity of the matter by calling international crimes 'system criminality'. See Elies Van Sliedregt, Individual Criminal Responsibility in International Law. Oxford: Oxford University Press, 2012, p. 20. Nollkaemper developed the notion of system criminality to include the wide variety of actors. See Andre Nollkaemper, "Introduction." In System Criminality in International Law, edited by Harmen Van der Wilt and André Nollkaemper. Cambridge: Cambridge University Press (2009), pp. 1-25.
[81] See State of Israel v. Eichmann (Criminal Case No.40/61), Judgment, District Court of Jerusalem (11 December 1961), para. 197 ('these crimes were committed *en masse*, not only in regard to the number of the victims, but also in regard to the numbers of those who perpetrated the crimes, and the extent to which any one of the many criminals were close to, or remote from, the actual killer of the victim, means nothing as far as the measure of his responsibility is concerned. On the contrary, in general, the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher ranks of command,' ibid.).
[82] See Jarvis and Salgado, supra note 50, p. 103.

victim is the person testifying as a witness. Compared to the others, aiding and abetting was one of the most flexible and effective tools in holding high-level accused responsible for SGBCs. The judges established from the evidence that the accused act or omission had a substantial effect on the commission of the crime, knowledge, and awareness of the accused, and the accused's authority and presence at the scene. Proving the ordering mode of liability was indeterminate, meaning that it was not too hard and not too easy to prove. In half of the cases analyzed, the evidence clearly established that the perpetrators followed up the order issued by the accused to commit the SGBCs and the crimes were committed because of it; while in other instances, it was difficult to prove the causal connection at all and the accused was acquitted.[83] Planning was comparably easy to establish thanks to the circumstantial and direct evidence produced, which effectively proved the plan's existence, the accused's position, and role in the planning.[84] The evidence also showed the separation and encampment of victims, which indicated that the accused's planning was a factor that substantially contributed to the occurrence of SGBCs.[85]

The biggest problem surfaced under the superior/command responsibility doctrine, where the majority of the cases analyzed led to acquittals.[86] The cases failed the test because the prosecutor's evidence could not sufficiently prove the effective control over subordinates[87] and the knowledge element (knew or had reason to know) of the SGBCs committed.[88] JCE II was one of the most challenging modes of liability to prove. Most cases failed because the judges could not draw any conclusive inferences from the evidence presented to show the accused's presence or that the accused contributed significantly to the overall effect of the camp's functioning or committed concrete crimes.[89] JCE I was hard to prove as the prosecutor often failed to show that the SGBCs were committed on a widespread basis and formed part of the common purpose.[90] The main conclusion that can be drawn from these cases is that proving the SGBC acts is not sufficient. The prosecutor must endeavor to situate or connect these acts within the common purpose or the broader campaigns of violence through the appropriate linkage evidence. Furthermore, the analysis conducted in

[83] See Musema Trial Judgment, supra note 15, paras. 828-829, 889; Kamuhanda Trial Judgment, supra note 19, para. 497; Muhimana Trial Judgment, supra note 21, paras. 200, 205.
[84] See Stakic Trial Judgment, supra note 43, paras. 352, 821, 823; Krstic Trial Judgment, supra note 41, paras. 318-319, 328-329; Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, Sentencing Judgment (27 February 2003), paras. 17-18.
[85] See Stakic Trial Judgment, supra note 43, para. 143.
[86] Noting that of the twenty-one cases analyzed, fifteen resulted in acquittals and six in convictions.
[87] See Bemba Appeal Judgment, supra note 56, paras. 167-169, 170-172; Delalic et al. Trial Judgment, supra note 24, paras. 670, 807; Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, Judgment and Sentence (18 December 2008), para. 1776; Kajelijeli Trial Judgment, supra note, 19, paras. 924-925; Prosecutor v. Muvunyi, Case No. ICTR-00-55A-T, Judgment and Sentence (12 September 2006), paras. 525-526. The Appeals Chamber confirmed this decision. See Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-A, Appeal Judgment (29 August 2008), para. 166; Prosecutor v. Nizeyimana, Case No. ICTR-2000-55C-T, Judgment and Sentence (19 June 2012), paras. 1022, 1035, 1036-1037, 1048-1049; Prosecutor v. Bizimungu et al., Case No. ICTR-99-50-T, Decision on defence motions pursuant to rule 98 bis (22 November 2005), paras. 89-90.
[88] See Sainovic et al. Trial Judgment, supra note 34, paras. 633, 933, 935, 1209, 1211; Bagosora et al. Judgment & Sentence, supra note 87, paras. 1729-1731; Bizimungu et al. Decision on rule 98 bis, supra note 87, para. 96; Prosecutor v. Bizimungu et al., Decision on the Admissibility of the Expert Testimony of Dr. Binaifer Nowrojee, 8 July 2005, para. 11, p. 6; Prosecutor v. Prlic et al., Case No.: IT-04-74-T, Trial Judgment Vol. 2 of 6 (29 May 2013), para. 927; Prosecutor v. Renzaho, Case No. ICTR-97-31-A, Appeal Judgment (1 April 2011), para. 128.
[89] See Kvocka Appeal Judgment, supra note 46, paras. 99, 597.
[90] See Stakic Trial Judgment, supra note 43, paras. 440, 818, 806, 826.

Chapter 5 shows that instigation is one of the most problematic modes of liability to prove[91] because it is often too hard to prove the direct causation between the accused's instigation and the SGBCs. Based on this analysis, the prosecutor must prove the closeness in time and space between the instigation and the SGBCs, i.e., the instigation, the nexus in space and time, and the SGBCs that took place.[92] It is difficult to arrive at any fair conclusions concerning the co-perpetration and indirect perpetration since only the *Katanga* case had been adjudicated so far at the ICC, which ended in acquittal in both instances without Appeals Judgments to draw appropriate lessons from. However, as presented in Chapters 4 and 6, the main problems under co-perpetration have been the prosecutor's failure to prove that the SGBCs committed formed part of the common purpose or occurred in the ordinary course of events.[93] For indirect perpetration, proving that the accused is at the apex of the organization is not sufficient. It is crucial to establish that the accused possessed the material ability to issue and ensure execution of orders[94] and that he wielded effective control over the group as a means to exercise control over the SGBCs.[95] The recommendations made by the trial judges and the list provided in Section 3 of Chapter 8 may be considered promising aspects of prosecuting high-level officials in future SGBC cases under these two modes of liability.

Proving SGBCs under indirect co-perpetration has enormously improved in recent times. The analysis conducted in Chapter 6 shows that, since the initial failures, the prosecution has learned important lessons and has strengthened its ability to effectively gather and prove linkage evidence under this mode of liability, as the recent convictions show. However, there is still a need to strengthen the way linkage evidence is elicited to prove the accused's coordinated essential contribution to the common plan and to show that the group functioned as a tool in the co-perpetrators hands to commit the SGBCs.[96] The table provided in Section 3 of Chapter 8 offers clear guidance to the prosecutor on addressing this problem in future SGBC cases.

Although the modes of liability discussed in this study are sufficiently represented under ICL, the ICTY, ICTR, and the ICC practices have revealed that applying the appropriate modes of liability sometimes leaves more to desire. The study has shown the prosecution's habit to charge the accused with several alternative modes of liability to enable the chamber to decide which one is the most appropriate to use after reviewing all of the evidence brought before it. This approach of charging multiple alternative modes of liability may potentially lead to the recharacterization of the evidence by the judges, which Judge Van den Wyngaert

[91] Noting that out of the eight SGBC cases analyzed, five resulted in acquittals and three in conviction.
[92] See Gacumbitsi Trial Judgment, supra note 28, para. 329; Semanza Trial Judgment, supra note 19, para. 254; Prosecutor v. Seselj, Case No. IT-06-67-T, Partially Dissenting Opinion of Judge Flavia Lattanzi- Amended Version (31 March 2016), para. 24.
[93] See Katanga Trial Judgment, supra note 61, para. 1664.
[94] Ibid., para. 1420. Translation from "Summary of judgment", § 51.
[95] Ibid., paras. 1365, 1420.
[96] See Ntaganda Trial Judgment, supra note 73, paras. 818-819; Ongwen Trial Judgment, supra note 73, para. 3091.

opposed from the beginning.[97] This could further lead to acquittal if that same evidence does not support the new mode selected (e.g., *Katanga* - from indirect co-perpetration to indirect perpetration). The solution could be for the prosecution to try to be as accurate as possible in deciding which mode of liability to charge in the indictments from the elements of the specific case. For example, moral encouragement in aiding and abetting is a different element to establish than verbal encouragement in instigation and, therefore, should not be considered substitutable. For this to happen, the evidence must be obtained as early as possible in order to ensure from the very beginning of the case that a smaller selection of the most appropriate modes of liability are chosen so that investigators can focus their attention on collecting the evidence required to prove the SGBCs, the linkage, and the modes selected. In fact, it should be the practice not to charge until the evidence is sufficient, and there should be no rush to issue arrest warrants if the evidence does not reflect the charges.

The study has also revealed, on many occasions, that the chambers applied different credibility assessment standards for SGBCs' evidence. For instance, the research shows how, in various cases, victims' testimonies were deemed reliable or unreliable, due to the judges' beliefs or personal discretionary assessment of the inconsistencies found in the evidence, based on the passing of time or of trauma, without any reference to scientific facts. The credibility assessment standard seems to vary case by case/chamber by chamber and can lead to the acquittal of the accused of the charges, especially if the SGBC charge mainly relies on the victim's account. The research revealed that the rules had been applied inconsistently by the judges and calls for a standardized approach in assessing witnesses' credibility in the future prosecution of SGBC cases. The standardized guidelines should be informed by a proven methodology to scientifically understand witnesses' memories and facilitate witnesses' recollection of what happened to them in the courtroom. Moreover, to make an informed judicial assessment, certain aspects such as assessing trauma, time-lapse, memory stress disorders, and validity of identifications should be measured by psychologists and psychiatrists' contributions from cross-cultural perspectives. Therefore, the experts' inputs should be combined with specific reference to case law to ensure an informed judicial assessment of the witness's reliability and credibility.

In terms of the law, it can be concluded that the rules dealing with SGBCs in armed conflict are established, but they are not flexible or modernized enough to meet the present-day reality and therefore require a number of improvements. The nature of conflicts where SGBCs are committed has changed, and groups do not always exhibit a proper chain of command (or formal hierarchical order or structure) used to characterize traditional armed conflict. However, the liability rules continue to apply to the original wartime laws, even

[97] See Katanga Trial Judgment, supra note 61, para. 1484.

today.[98] With Mackinnon, I agree that the prosecutorial strategy of pursuing only the top of hierarchies (and ignored subordinates) meant that prosecutions have been, generally speaking, seeking liability for acts that the accused did not commit himself but that were attributed to him, i.e., acts committed by others for him.[99] The major risk is that, given the lack of organization and a proper chain of command in informal military structures, this approach could lead to the physical perpetrators' impunity (often not prosecuted in international courts) or the wrongful conviction of a so-called commander who may not have effective control over the subordinates. The best way to solve this problem is for the prosecutor to change course from only pursuing high-level officials to a narrower case approach. This would allow the prosecutor to concentrate on building cases upwards by focusing on notorious or mid-level perpetrators first in order to reach the level of the most responsible persons (high-level officials) at a later stage.[100] The recent ICC *Al Hassan* case shows a shift in the ICC prosecutorial strategy toward this direction.[101] This narrower case approach is good because it ensures the prosecution of both the high-level officials and the physical perpetrators and should be further strengthened, not only at the ICC but also in other international criminal courts and tribunals.

Another area that needs to be addressed in the law of armed conflict is the interpretation of the mode of command responsibility, following the Appeals Chamber Judgment in the ICC *Bemba* case. The majority decision seemed to endorse the idea that commanders who are physically removed from their own troops cannot remotely control them effectively.[102] This is not generally the case, and as the research has shown, the circumstances and the facts will have to be assessed on a case-by-case basis. With Sadat, I agree that a commander in those circumstances should be required to exercise an even higher level of due diligence and supervision precisely because of the risks involved. Also, it is a fact that most modern commanders have almost immediate access to their forces through cell and satellite phones and other modern communications methods.[103]

This study started with the story of witness GDO, one of the many witnesses who provided evidence in the ICTR *Prosecutor* v. *Kajelijeli*, stating that she heard the accused ordered Interahamwe to rape victims, and thereafter her daughter was raped because of the order. She said the accused was present at the scene, and she recognized him from 50 meters from where she was hiding in the forest. Still, the judges excluded her

[98] See MacKinnon, supra note 52, p. 217.
[99] Ibid., p. 214.
[100] ICC Office of the Prosecutor Strategic Plan 2019-2021, 17/07/2019, p. 19.
[101] See Prosecutor v. Al Hassan, Case No. ICC-01/12-01/18. He was alleged member of Ansar Eddine and *de facto* chief of Islamic police and alleged to have been involved in the work of the Islamic court in Timbuktu.
[102] See Bemba Appeal Judgment, supra note 56, para. 171.
[103] See Leila Sadat, Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in Prosecutor v. Jean-Pierre Bemba Gombo. European Journal of International Law: TALK!, 2018.<https://www.ejiltalk.org/fiddling-whileromne-burns-the-appeals-chainbers-curious-decision-in-prosecutor-v-jean-pierre-beinba-goinbo/> accessed 21 January 2021.

evidence because of inconsistencies found between her written statement and her testimony at trial and doubts raised on visibility and hearing, given that the rape occurred in a forest. Consequently, the Chamber found that it was not proven that the accused was present at the scene during the time of the rape or that he specifically instructed Interahamwe to rape the witness' daughter, thus acquitting the accused of this charge.[104] Just like witness GDO, there have been many such similar cases at the ICTY (e.g., *Krajisnik, Kvocka, Milutinovic, Brdanin*), ICTR (e.g., *Ngirabatware, Niyitegeka, Muvunyi, Kajelijeli*), and ICC (e.g., *Bemba, Katanga, Ngudjolo, Gbagbo*). The evidence brought in these cases could not sufficiently establish a link between the accused and the crime committed on the ground, resulting in acquittal. The prosecution should use those past failures as an opportunity to reinforce, in the future, the collection of linkage evidence from a variety of sources, including victims' testimonies, eyewitnesses' testimonies, documentary evidence, expert testimonies, and perpetrators' testimonies. This will ultimately prove, for example, whether the accused was present on the crime scene, issued orders, moral or practical assistance, assisted in the design or execution of a plan, reporting, and disciplinary mechanisms, ability to prevent, repress, and punish, knowledge of the crime and refusal to take action. However, as explained, there is a danger that, without a standardized approach to the credibility assessment of, for example, the victims' evidence, which is often relied on to prove both crime based and linkages, we could be missing an opportunity to convict the real criminal masterminds of these crimes. Further, it is only by using the appropriate modes of liability and - rationally applying the available laws that we can prosecute high-level officials of SGBCs, regardless of where they are located. With the departure of the ICTY and ICTR, it is time for the ICC to set the standard and for the judges of the court and lawyers to act on the basis of the law.

[104] See Kajelijeli Trial Judgment, supra note, 19, para. 680.

SUMMARY

The topic of this study is linking high-level accused to Sexual and Gender-Based Violence Crimes at the ICTY, ICTR, and ICC. The study sought to answer the question of how can and should high level-officials be investigated and prosecuted for their role in the commission of SGBCs in armed conflict. It is based on the premise that ICL imposes criminal responsibility and obligations on individuals, including senior military and political figures, who planned, ordered, committed, instigated, and aided and abetted in the commission of the SGBCs. The same applies to high-level officials who committed the SGBCs indirectly through individuals or organizations or who failed to prevent or punish the commission of SGBCs. The study relied primarily on Articles 7(1) and 7(3) ICTY Statute, Articles 6(1) and 6(3) ICTR Statute together with their Rules of Procedures and Evidence and case law, and Articles 25(3) and Article 28 Rome Statute together with the EoC and case law, that set out the modes of liability in ICL. The study critically analyzed 10 modes of liability (planning, ordering, committing, instigation, aiding and abetting, JCE, superior/command responsibility, co-perpetration, indirect perpetration, and indirect co-perpetration) and their theoretical and practical application to SGBCs. The study reviewed all the gender jurisprudence (from trial to appeal levels) articulated by the ICTY, ICTR, and ICC to determine the evidence accepted by the judges to convict the accused and the ones that failed the test and why this happened. It concluded that the modes of liability make it possible to prosecute high-level officials, based on their level of contribution, regardless of whether they were present at the scenes or whether they committed the crimes themselves or through someone else.

The study used descriptive and analytical methods. It analyzed published reports, scholarly articles, statistics of SGBCs in ICL, and jurisprudence on SGBCs. It also analyzed research materials, such as resolutions of international organizations, particularly UN Bodies, the jurisprudence of the ICTY, ICTR, and ICC, and open debates on SGBCs and manuscripts on the subject matter from various institutions, including governmental and non-governmental organizations. To better understand the relationship between modes of liability and SGBCs, the study discussed all the SGBC case laws at the ICTR, the ICTY, and the ICC. The general count of SGBC cases in this study sometimes includes the same accused multiple times because he might have been charged with many different acts of SGBC in the same case under the same mode of liability or under different modes of liability with other SGBC charges. For instance, in the section on direct commission in Chapter 5, the case *Kunarac et al.* has been counted 4 times because the following charges were identified: a conviction for rape against the same Kunarac; a conviction for rape against Kovac; a conviction for rape against Vukovic; and an acquittal for rape against the same Vukovic. A total of hundred (100) SGBC cases have been analyzed in this study, stemming from the ICTY, ICTR,

and ICC jurisprudence: 5 in planning (4 ICTY, 1 ICTR), 11 ordering cases (2 ICTY, 9 ICTR), 14 commission cases (8 ICTY, 5 ICTR, 1 ICC), 8 instigation cases (3 ICTY, 5 ICTR), 15 aiding and abetting cases (10 ICTY, 5 ICTR), 20 JCE cases (17 ICTY, 3 ICTR), 21 superior and command responsibility cases (8 ICTY, 12 ICTR, 1 ICC), 1 co-perpetration case at the ICC, 1 indirect perpetration case at the ICC, and 4 indirect co-perpetration cases at the ICC (see table on all the cases analyzed in annex A). Additionally, tables have been provided in Chapters 3, 4, 5, and 6 to clarify the fundamental differences among modes of liability where they may appear to overlap each other. The tables also show what elements need to be proven and the pieces of evidence accepted by the chambers.

To give a clearer picture of the various roles high-level officials may play in the commission of SGBCs and how these can be investigated and prosecuted, the book is divided into 8 chapters. Chapter 1 provides a general introduction to the topic, with the definition of SGBCs, a general introduction to individual criminal responsibility, how SGBCs are criminalized, including an overview of the incidence and prevalence of this phenomenon. It discusses the need to investigate and prosecute high-level officials for SGBCs, including the research questions, methodology and structure, and the study's scopes and limitations. After this introduction, Chapter 2 reviews the historical development of international laws most relevant to SGBCs, most prominently IHL, arguing that treaties and customary practices overwhelmingly failed to take SGBCs into account for centuries. It then examines the treatment of SGBCs in the post-World War II trials held in Nuremberg and Tokyo (IMT and IMTFE) and the relevant case law related to SGBCs at the ICTY and ICTR, in the SCSL, ECCC, and at the ICC. Chapter 3 discusses the concept of direct modes of liability, in particular: planning, instigating, ordering, committing (direct perpetration), and aiding and abetting in the planning, preparation, or execution of a crime. It provides information on how crimes can be attributed to high-level officials generally and when involved in SGBCs in particular. It also discusses the achievements and shortcomings of the criminalization of SGBCs by analyzing the relevant case law. Chapter 4 discusses the concept of indirect modes of liability, including joint criminal enterprise (JCE I, JCE II, JCE III), superior/command responsibility, co-perpetration (joint perpetration), indirect perpetration, and indirect co-perpetration. It also discusses the achievements and shortcomings concerning the criminalization of SGBCs by analyzing the relevant case law. It provides information on how SGBCs can be attributed to high-level officials based on their level of participation or the role played in the commission of the crimes. Chapter 5 further elaborates how practically the investigation and prosecution of SGBCs have been implemented in the ICTY, the ICTR, and the ICC, through the concept of direct modes of liability enshrined in Article 25(3)(b)-(d) ICC Statute, Article 7(1) ICTY Statute, and Article 6(1) ICTR Statute namely: planning; ordering; commission; instigation; aiding and abetting. It examines the elements of each form of individual criminal liability and pairs them with the relevant case law to explain how their application works in

practice. Chapter 6 deals with the investigation and prosecution of SGBCs through the indirect modes of liability, including joint criminal enterprise, superior and command responsibility, co-perpetration, indirect perpetration, and indirect co-perpetration. These theories are enshrined in Articles 7(1)/(3) ICTY Statute, Articles 6(1)/(3) ICTR Statute, and Articles 25(3)(a) and 28(a)/(b) of the Rome Statute. It further examines the elements of each mode of liability by using case law from the ICTY, ICTR, and ICC to describe in practice how these courts have managed to prosecute and link high-level officials to the SGBCs committed. Chapter 7 discusses the types of evidence the prosecutor relied upon in Chapters 5 and 6 to prove SGBC cases and the modes of liability charged, including victims, eyewitnesses, perpetrator testimonies, expert witnesses, and documentary evidence. It describes the relationships and differences among the sources of evidence and how the chambers have used them to draw linkages. It also assesses how the courts dealt with some of the credibility and reliability issues pertaining to victims and witnesses in keeping with the RPE. Chapter 8 draws a general summary from all the chapters discussed, makes concluding observations on the pieces of evidence accepted by the judges to convict the accused, and proposes legal guidelines for the effective prosecution of SGBCs in the future.

Chapter 1 of the study introduced the concepts and definitions of Sexual and Gender-Based Crimes in the context of ICL. The study relied on the definitions of SGBCs enshrined in the Rome Statute and the EoC, which submits that SGBCs encompass rape, sexual slavery, enforced prostitution, forced pregnancy, sexual violence, and persecution. All of the forms of SGBCs, except for forced pregnancy (which by definition can only be committed against women), are defined in gender-neutral terms so that victims and perpetrators may be of either sex or gender. Regarding rape, enforced prostitution, and sexual violence, the EoC requires the perpetrator to have committed an act of a sexual nature against a person or to have caused another to engage in such an act, by force, or by the threat of force or coercion. The latter may be caused by fear of violence, duress, detention, psychological oppression, or abuse of power, or by taking advantage of a coercive environment or a person's incapacity to give genuine consent. Thus, an act of a sexual nature covers both physical and non-physical acts with a sexual element like, for example, forced nudity.[1]

The chapter discussed the SGBC nexus requirement to the armed conflict, submitting that not all SGBCs committed during an armed conflict constitute war crimes. The relationship between armed conflict and conduct, termed 'nexus' (or 'link'), serves to distinguish between war crimes, on the one hand, and 'ordinary' crimes committed during – but unrelated to – an armed conflict, on the other. The nexus derives from several elements: the identity of the perpetrator (a military leader), the identity of the victim (a person

[1] Art. 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi) Rome Statute and Elements of Crimes; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment (1998), para. 688; Prosecutor v. Kvocka et al., Case No. IT-98-30/1-T, Trial Judgment (2 November 2001), para. 180; Prosecutor v. Furundzija, Case No.: IT-95-17/1-T, Trial Judgment (10 December 1998), para. 186; see also Anne-Marie de Brouwer, Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR. Cambridge, UK: Intersentia, 2005, p. 149.

detained for reasons related to the armed conflict), and the context (situation of vulnerability of detainees to the Detaining Power).[2] However, as specified by the ICTY *Blaskic* Trial Judgment and *Kunarac* Appeal Judgment, substantial clashes don't need to be going on at the time and place in which the crimes were allegedly committed.[3] It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.[4] Hence, if the perpetrator (of the SGBCs) acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.[5] Further, SGBCs committed in armed conflict, or non-armed conflict circumstances may also qualify as genocide. This is possible only if the conduct took place in the context of a manifest pattern of similar conduct directed against that group or conduct that could itself cause such destruction.[6] The SGBCs may also qualify as crimes against humanity if the crimes were connected to the "large-scale" or "organized" violence within which the SGBCs took place.[7]

In this chapter, the study also discussed mass criminality and how it involves a network of perpetrators who can be either men or women and where the victims can be men or women. It also looked at the motives behind these crimes and of the perpetrators to commit SGBCs. It noted that the objective might vary considerably among different perpetrator groups and from conflict to conflict.[8] It gave an overview of the extent of the phenomenon in different conflict regions where SGBC cases occurred in various ways, either in symmetrical and asymmetrical forms. This means that SGBCs committed by combatants can be widespread in some conflicts but not in others, or even armed groups taking part in the same war do not carry out sexual assaults of the same scale or in the same style. It also means that an armed group, which restrained its members from committing SGBCs during a particular period of war, might still commit these crimes on a massive scale at another given period.[9] Moreover, SGBCs in armed conflict usually form part of a pattern of widespread abuse and mass violence, along with other crimes, such as killing, child recruitment, destruction of property, looting, mass displacement, human trafficking, or forced population transfer.[10]

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[2] For a detailed discussion on nexus, see Gloria Gaggioli, Sexual Violence in Armed Conflicts: A violation of International Humanitarian Law and Human Rights Law. International Review of the Red Cross, 2015, p. 515.
[3] See Prosecutor v. Blaškić, Case No. IT-95-14, Trial Judgment (3 March 2000), para. 69; Prosecutor v. Kunarac et al., Case No. IT-96-23&23/1, Appeal Judgment (12 June 2002), para. 57; For further discussions on the difficulties in identifying the contours of the nexus and attempting to clarify (in a restrictive manner) the concept, see Harmen van der Wilt, War Crimes and the Requirement of a Nexus with an Armed Conflict. Journal of International Criminal Justice 10, no. 5 (2012), pp. 1113-1128.
[4] Ibid.
[5] See Kunarac et al. Appeal Judgment, supra note 3, para. 58.
[6] Art. 6, Rome Statute.
[7] See Kunarac et al. Appeal Judgment, supra note 3, para. 94.
[8] For a detailed discussion, see Elisabeth Wood, Sexual Violence During War: Toward an Understanding of Variation. In Order, Conflict, and Violence, edited by Stathis N. Kalyvas, Ian Shapiro, and Tarek Masoud. Cambridge: Cambridge University Press, 2008, pp. 321-351.
[9] See Elisabeth Wood, Variation in Sexual Violence during War. Politics & Society 34, no. 3 (2006), pp. 307–342.
[10] See, in particular, UN SC Res. 1261 (1999), 1265 (1999), 1296 (2000), 1314 (2000), 1325 (2000) and the Aide-Memoire, which identifies 13 core objectives for protecting civilians in conflict situations (2002): see also Report of the United Nations Secretary-General on Conflict-Related Sexual Violence (S/2015/203), 13 March 2014.

It is submitted further that one of the most effective ways to halt or limit the commission of SGBCs is by ensuring that those who committed, masterminded, or failed to prevent or punish these terrible crimes, particularly high-level officials, are brought to justice.[11] In that regard, the ICTY, ICTR, and ICC have made immense strides in the path towards accountability, e.g., the prosecution of Akayesu at the ICTR, Furundzija at the ICTY, Kunarac at the ICTY, and Ntaganda at the ICC, among others.

Chapter 2 presented an overview of the developments of the laws to prosecute SGBCs from the early Middle Ages to the modern-day era's international criminal courts and tribunals. It examined some of the obstacles encountered during the early days, such as the failures in the early Middle Ages to investigate and prosecute individuals and State officials for SGBCs committed during warfare because, for instance, rape was seen as a reward for the victors and, as such, not prosecuted as a crime.[12] The study submitted that the laws of war were still at the nascent stage at that time, and provisions intended to protect women from SGBCs were equivocal. Rules governing warfare became more explicit and rigid as decades passed, although official war crimes prosecution rarely took place until the late Middle Ages.[13] For example, in 1419, Seigneur de Barbasan[14] was tried by a military court for breaches of the laws of war.[15] The first record of an official international trial for violations of the rules or customs of wars occurred in 1474 when twenty-eight international judges tried Sir Peter Hagenbach[16] for *inter alia*, murder, rape, and perjury.[17]

The reluctance to prosecute continued even after WWII. During that time, SGBCs were a widespread phenomenon, but the establishment of the IMT and IMTFE did not robustly prosecute high-level officials who masterminded these crimes or failed in their superior responsibility to punish, prevent, or prosecute subordinates.[18] Generally, one of the most recognized efforts undertaken by the tribunals during this period was General Yamashita's war crimes trial, a landmark precedent in the doctrine of command

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[11] See an extract from the ICRC publication: International Humanitarian Law: Answer to Your Question. 1 January 2004. < https://www.icrc.org/en/publication/0703-international-humanitarian-law-answers-your-questions> accessed 23 February 2018. In particular, Art. 51 GCI, Art. 52 GCII, Art. 131 GCIII, and Art. 148 GCIV, all affirm that: 'no High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.' Rule 149 of international customary law reads: 'A State is responsible for violations of international humanitarian law attributable to it, including: (a) violations committed by its organs, including its armed forces; (b) violations committed by persons or entities it empowered to exercise elements of governmental authority; (c) violations committed by persons or groups acting on its instructions, or under its direction or control; and (d) violations committed by private persons or groups which it acknowledges and adopts as its own conduct.´

[12] See Kelly Askin, "Treatment of Sexual Violence in Armed Conflicts: A Historical Perspective And The Way Forward." In Sexual Violence as an International Crime: Interdisciplinary Approaches, edited by Anne-Marie de Brouwer et al. Cambridge, UK: Intersentia, 2013, pp. 21-22.

[13] See Donald Wells, War Crimes and Laws of War. 2nd ed. Lanham, MD: University Press of America, 1991, p. 91.

[14] He was Counsellor and butler to Charles VII of France and later a general during the Hundred Years' War.

[15] See Lyal Sunga, Individual Responsibility in International Law for Serious Human Rights Violations. Dordrecht, The Netherlands: Martinus Nijhoff, 1992, p. 18.

[16] Von Hagenbach was born in about 1420, a native of Alcace, France and became a favorite of Charles the Bold (also known as Charles the Terrible). He died on 9 May1474, drawn and quartered.

[17] See Cherif Bassiouni, The Time Has Come for an International Court. Indiana International & Comparative Law Review 1 (1991), p. 1 (the trial of Peter van Hagenbach was the first international criminal trial that took place 471 years before Nuremberg trial. The trial was held in Breisach, Germany, with twenty-seven judges of the Holy Roman Empire presiding); see also Cherif Bassiouni, International Criminal Law: A Draft International Criminal Code. Alphen aan den Rijn, Netherlands: Sijhoff & Noordhoff,1980, p. 8.

[18] For a detailed discussion, see De Brouwer, supra note 1.

responsibility.[19] The study submitted even if the IMT and IMTFE implicitly prosecuted SGBCs, they could and should have done much more, given the widespread and notoriety of these crimes, such as the Rape of Nanking.

Furthermore, the study systematically examined the bodies of law promulgated by scholars, institutions, and States prohibiting SGBCs in armed conflict and how these laws have evolved to form part of internationally recognized customs and legal principles of international criminal and humanitarian law. Among these laws, the 1863 Lieber Code specifically required soldiers to protect women from rape during warfare.[20] Further, the 1949 Geneva Conventions and its 1977 and 2005 Additional Protocols were enacted to improve the victims' conditions and provide special protection for civilians and distinctive emblems during wartime.[21] Similarly, the IMT and IMTFE developed laws and principles to prosecute leaders who had committed crimes against peace, war crimes, and crimes against humanity,[22] whereas the ICTY, ICTR, and ICC comprehensively enlisted SGBCs in their Statutes as an international crime. In that regard, the study reviewed the 8 underlying acts or forms of SGBCs recognized in ICL as of today: rape, forced marriage, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, gender-based persecution, any other form of sexual violence of comparable gravity.[23]

Therefore, the comprehensive listing of SGBCs is an important recognition of the varied forms these crimes may take, and their specific enumeration highlighted them as among the most serious crimes in ICL.[24] Moreover, these courts have established in their respective jurisprudence that the enumerated SGBCs, depending on the modes of commission, may indeed amount to war crime (or Grave Breaches), a crime against humanity, and genocide. And by ensuring evidence is obtained to prosecute these crimes, the courts have developed adequate procedural guidelines to protect victims and witnesses coming forward to testify in court.[25]

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[19] The Yamashita Case or the "Decision of the United States Military Commission at Manila, 7 December 1945" is reproduced in Leon Friedman, The Law of War: A Documentary History. Vol. 2. Westport, CT: Greenwood, 1972, p. 1596; the order of general Douglas MacArthur Confirming Death Sentence of General Tomoyuki Yamashita, 6 February 1946", is reproduced in Friedman, ibid., p. 1598. For the appeal to the US Supreme Court, including dissenting opinions, see re Yamashita reproduced in Friedman, ibid., p, 1599; "Judicial Decisions" In re Yamashita, American Journal of International Law 40 (1946), p. 432; see also Askin, supra note 12, p. 46.

[20] Art. 37, Lieber Code.

[21] GCI for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; GCII for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; GCIII Relative to the Treatment of Prisoners of War; GCIV Relative to the Protection of Civilian Persons in Time of War, all of which supersedes the 1864, 1906, and 1929 Geneva Conventions; Art. 76 (1) API Relating to the Protections of Victims of International Armed Conflict; Art. 4(2), APII Relating to the Protections of Victims of Non-International Conflicts; APIII Relating to the Adoption of an Additional Distinctive Emblem.

[22] The laws and principles are laid down in the IMT Charter and IMTFE Charter and their respective judgments.

[23] See detailed discussion in Chapter 2 of this research.

[24] See Eve La Haye, "Article 8(2)(b)(xxii): Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilisation, and Sexual Violence." In The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, edited by Roy S. Lee. Ardsley, NY: Transnational, 2001, p. 814; see also Kelly Askin, Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles. Berkeley Journal of International Law 21, no.2 (2003), p. 347.

[25] See Brigid Inder, Women's Initiatives for Gender Justice: Making a Statement: A Review of Charges and Prosecutions for Gender Based Crimes before the International Criminal Court, 2010<http://www.iccwomen.org/publications/articles/docs/MaS22-10web.pdf>accessed 3 December 2019.

The creation of the ICTY, ICTR, and ICC has led to significant jurisprudential developments in ICL concerning SGBCs. For example, the ICTR, in the landmark case of *Prosecutor* v. *Akayesu,* recognized rape and sexual violence as constituting acts of genocide and crimes against humanity and rape as a form of torture,[26] while the ICTY, in the *Celebici* case, held that rape constituted torture.[27] In the *Foca* case, the Trial Chamber ruled that rape was a crime against humanity and convicted the defendant of the crime against humanity of sexual enslavement.[28] However, there was no specific provision for 'sexual enslavement' back then, but it existed for enslavement as a crime against humanity, including sexual slavery. Also, the ICC recently convicted Bosco Ntaganda*,* at the trial level, of sexual slavery and rape as war crimes and crimes against humanity committed against children under 15.[29] At the SCSL, the *AFRC* trial was the first one in which the crime of forced marriage was recognized as an international crime, of which the Appeals Chamber determined that forced marriage had occurred as a crime against humanity of other inhumane acts and convicted Brima, Kamara, and Kanu of these acts.[30] Also, at the ECCC, in case *002*, Nuon Chea and Khieu Samphan were both convicted of a crime against humanity (through attacks against human dignity and conduct characterized as forced marriage and rape in the context of forced marriage).[31] In terms of the law developed, these legal developments can be regarded as significant and unparalleled in the history of gender justice.

Chapters 3 and 4 analyzed the modes of liability (planning, ordering, direct commission, instigation, aiding and abetting, JCE, superior/command responsibility, co-perpetration, indirect perpetration, indirect co-perpetration) used at the ICTY, ICTR, ICC to attribute criminal responsibility to high-level officials. It is submitted that, although the modes of liability have proven to be a useful tool to attribute liability to high-level officials, difficulties remain when it comes to prosecuting SGBC cases and connecting the accused to these crimes. For example, SGBCs in planning, ordering, and instigation modes of liability are difficult to prove because of limited or no direct evidence to show that the accused intended to plan, order, or instigate SGBCs.[32] Likewise, the most difficult aspect in aiding and abetting is for the prosecutor to prove the element of moral encouragement, to show that the physical perpetrators were aware of the encouragement of the aider and abettor and that they were driven by it, to meet the requirement of substantial effect.[33] Moreover, the main complication in superior responsibility stems from the prosecutor's ability to sufficiently prove

[26] See Akayesu Trial Judgment, supra note 1.
[27] See Prosecutor v Delalic et al., Case No.: IT-96-21-T, Trial Judgment (1998).
[28] See Prosecutor v. Kunarac et al., Case No. IT-96-23-T, Trial Judgment (2001).
[29] See Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Trial Judgment (8 July 2019), para. 536.
[30] See Prosecutor v. Brima et al., Case No. SCSL-2004-16-A, Appeals Judgment (22 February 2008), paras. 200-201.
[31] See Case File No. 002/19-09-200T7/ECCC/TC, Summary of Trial Judgment (16 November 2018), paras. 71-72.
[32] See Barbara Goy, Michelle Jarvis, and Giulia Pinzauti, "Contextualizing Sexual Violence and Linking it to Senior Officials." In Prosecuting Conflict-Related Sexual Violence at the ICTY, edited by Baron S. Brammertz and Michelle Jarvis. Oxford: Oxford University Press, 2016, p. 232.
[33] See Prosecutor v. Brdanin, Case No. IT-99-36-A, Appeal Judgment (3 April 2007), paras. 259-89.

the requirement of the accused's degree of effective control (which entails also establishing the superior-subordinate relationship), without which conviction for SGBCs cannot be attained.[34] Proving the accused's knowledge of the subordinates' crimes and the accused's material ability to prevent, suppress, or punish them have proven to be quite difficult at times. For co-perpetration, indirect perpetration, and indirect co-perpetration cases at the ICC, the prosecution had been unable to prove that SGBCs formed part of the common plan sufficiently.[35] It has also been hard to establish that the accused (who did not physically commit the SGBCs) did enjoy a certain degree of control over the organizations or the will of the physical perpetrator[36] or that the accused's contribution to the SGBCs was essential.[37]

In this field, the judges and legal practitioners extensively criticized the scopes and limitations of these modes of liability. One of the most criticized theories is the JCE doctrine, which is viewed by many as lacking any basis in customary international law because it holds persons accountable too broadly for "committing," even if these actions were not agreed upon in advance or fell outside the common purpose.[38] Another criticism about JCE and SGBCs' prosecutions is that often JCE III was used in place of JCE I, despite the evidence clearly suggesting to use the JCE I rather than the JCE III.[39] The concepts of co-perpetration, indirect perpetration, and indirect co-perpetration have come under heavy criticism as well. For instance, Judge Van den Wyngaert argued that the causality requirement in co-perpetration is too 'elastic,' while noting that indirect co-perpetration has no basis in the text of Article 25 to justify such an *ad hoc* combination of two modes of liability.[40] Some scholars have also disputed the creation of indirect co-perpetration, terming it as a novel judicial development that has no basis in Roxin's original theory.

Chapter 5 addressed how to practically investigate and prosecute high-level officials who planned, ordered, committed, instigated, or aided and abetted the commission of SGBCs using the direct modes of liability.

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[34] 'The determination of whether a person has effective authority and control rests on that person's material power to prevent or repress the commission of crimes or to submit the matter to a competent authority. This need not be an exclusive power and multiple superiors can be held concurrently responsible for their subordinates' actions.' Prosecutor v. Bemba, Case No. No.: ICC-01/05-01/08, Trial Judgment (21 March 2016), para. 698.

[35] E.g., Prosecutor v. Muthaura, Kenyatta and Ali, Case No.: ICC-01/09-02/11, Decision on the Confirmation of Charges (23 January 2012), para. 266.

[36] E.g. Prosecutor. v. Katanga, Case No.: ICC-01/04-01/07, Judgment pursuant to Art. 74 of the Statute (7 March 2014), para. 1420.

[37] E.g., Prosecutor v Katanga and Ngudjolo Chui, Case No. ICC-01/04-01/07, Confirmation of Charges (1 October 2008), para. 525; Prosecutor v. Ruto and Sang, Case No. ICC- 01/09-01/11, Decision on Confirmation of Charges (23 January 2012), para. 306; Muthaura, Kenyatta and Ali Decision on Confirmation of Charges, supra note 35, para. 402; Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06-36-Red, Arrest Warrant Decision (13 July 2012), para. 71; Prosecutor v. Ruto & Sang, Case No.: ICC-01/09-01 /11, Prosecution's Submissions on Indirect Co-perpetration (3 July 2012), para. 12 (prosecution called into question the 'essential contribution' requirement, arguing rather that it should be 'substantial).

[38] See Allison Danner & Jenny Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law. California Law Review 93, no. 75 (2005), p. 111; see also Steven Powles, Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity? Journal of International Criminal Justice 2 (2004), p. 611 ('it is difficult to see how someone can be said to have 'committed' a crime that they were perhaps not even aware of, albeit that they should have been').

[39] For a detailed discussion, see Michelle Jarvis and Elena Martin Salgado, "Future Challenges to Prosecuting Sexual Violence Under International Law Insights from the ICTY Practice." In Sexual Violence as an International Crime: Interdisciplinary Approaches, edited by Anne-Marie de Brouwer et al. Cambridge, UK: Intersentia, 2013, pp. 101-122; Askin, supra note 12, pp. 49-55.

[40] See Prosecutor v. Ngudjolo Chui, Case No.: ICC-01/04-02/12, Judgment pursuant to Art. 74 of the Statute (18 December 2012), paras. 43, 60.

In this chapter, 53 SGBC cases were examined: 5 in planning (4 ICTY, 1 ICTR), 11 ordering cases (2 ICTY, 9 ICTR), 14 commission cases (8 ICTY, 5 ICTR, 1 ICC), 8 instigation cases (3 ICTY, 5 ICTR), and 15 aiding and abetting cases (10 ICTY, 5 ICTR). The analysis has led to several conclusions. For instance, to prove SGBCs under planning, the prosecutor must first prove the plan's existence. The prosecutor relied on eyewitnesses, the accused's admission, co-accused statements, and authenticated documents to prove this element. Without a doubt, the concrete nature of the evidence and the combination of certain pieces should show that the accused was involved or was even the main initiator of the plan. The prosecutor also relied on victims and eyewitnesses to prove the second element (the accused's planning was a factor that substantially contributed to the occurrence of SGBCs). The study submits that the evidence must show that the accused's planning made it possible for the crime to be committed or show that the accused's decision left the people vulnerable and consequently raped. Similarly, the prosecutor relied on victims and eyewitnesses to prove the third element (the substantial likelihood that SGBCs will occur). Indeed, all the pieces of evidence must show that the accused knew what was happening and was aware of the possibility that SGBCs would occur or are happening or that the crimes occurred because of the vulnerable situations the victims found themselves in at that time. The accused's leadership position is a fundamental factor in planning, and the prosecutor relied on eyewitnesses and authenticated documents to prove it. It submits that the evidence must show the accused's position of power and how he used his power to influence decisions during the planning or execution of the plan. It is even more compelling if the evidence shows that the accused was present at the crime scene. Lastly, the plan's implementation and oversight are also fundamental factors because such evidence can show that there was a plan to commit a crime, and the plan was executed. The prosecutor relied on eyewitnesses, the accused's admission, and authenticated documents to prove this factor. To establish this factor, the evidence must show that the accused was involved in the supervision of tasks/activities and gave others instructions on what to do and was present at the scenes.

The chapter discussed ordering mode of liability to show how high-level officials can be prosecuted under this mode of liability. For liability to arise, the prosecutor must prove three main legal elements: The accused ordered another to commit SGBCs; the SGBCs ordered were committed; the accused had authority over the person receiving the order. The prosecutor relied on victims, eyewitnesses, and the accused's admission to prove the first element (the accused ordered another to commit SGBCs). Without a doubt, all the pieces of evidence must show that the accused directly and explicitly ordered another person to commit SGBCs. The evidence showing that people heard the accused gave implicit directions and suggestions to another person to commit the crime may also be sufficient to prove this element (circumstantially). The prosecutor also relied on victims, eyewitnesses, and the accused's admission to establish the second element

(the crimes ordered were committed). It submits that the evidence must prove that the accused's order was followed-up, and because of it, the SGBCs were committed. Similarly, the prosecutor relied on victims, eyewitnesses, and the accused's admission to prove the third element (the accused had authority over the person receiving the order). Clearly, all the pieces of evidence collected must show that the accused was in charge and had authority or influence over the person he ordered to commit the crimes.

Direct commission was examined to show how high-level officials can be prosecuted under this mode of liability. For liability to arise, the prosecutor must prove that the SGBCs indeed happened and the accused physically perpetrated the crimes, with the intent and the knowledge of the crimes. The prosecutor relied on victims, eyewitnesses, and the accused's admission to prove the first element (the SGBCs indeed happened and that the accused physically committed the crimes). Undoubtedly, all the evidence must identify the accused and clearly show that he physically raped the victim by himself. The prosecutor also relied on victims, eyewitnesses, and the accused's admission to prove the second element (the accused had the intent and the knowledge to commit the SGBCs). This element is relevant to SGBCs when determining whether the crimes committed by the accused himself were for one of the prohibited purposes of torture or persecution. It is worth examining if the accused used the rape to obtain information, extract a confession, mistreat the victim, or show his hatred against the ethnic group the victim belongs. In this light, the evidence must show that the accused coerced the victims to confess while raping them and threatened to kill them if they did not comply. It is sufficient to show that the victims were raped by the accused because of their ethnic identities or as punishment for refusing to provide information. Another compelling piece of evidence in the absence of coercion can be if the victims came out of the room with the impression that the accused wanted certain information from them during the rape. Usually, these types of evidence can only be provided by the victims. The no corroboration rule makes it possible to convict the accused, relying solely on a single victim's evidence, as long as the victim's account is reliable.

The study discussed instigation to show how high-level officials can be prosecuted under this mode of liability. For liability to arise, two essential legal elements must be proved: the link between instigation and the SGBCs and the existence of positive acts, omissions, express or implied conduct of the accused. The prosecutor relied on victims, eyewitnesses, and the accused's admission to prove the first element (the link between instigation and the SGBCs). The pieces of evidence put together should clearly show the direct causal connection between the accused's instigation and the SGBCs, i.e., the accused verbally prompted the physical perpetrator to commit SGBCs, and the crimes were committed because of this. The case law discussed above established that the nexus is crucial and that the prosecution needs to prove the closeness in time and space. For a time, rapes should have occurred on the same day or immediately after the

accused's instigation.[41] For space, the evidence must establish a connection between the accused's speech or encouragement and the SGBCs committed (i.e., proof that the perpetrator committed the crime pursuant to the accused's instigation).[42] On the latter, the judges prefer the crime scene and location of the prompting not to be too far apart. The prosecutor also relied on victims and eyewitnesses to prove the second element (positive acts, omissions, or implied conduct of the accused). The case law revealed that the evidence must show that the accused was present and refused to prevent the SGBCs from happening, and he instead verbally encouraged them or stood by and watched as the victims were taken away to be raped, without doing anything about it.

Aiding and abetting was analyzed to show how high-level officials can be prosecuted under this mode of liability. For liability to arise, the prosecutor must prove three main legal elements: the accused provided practical assistance or moral support to the physical perpetrator to commit SGBCs; the accused's conduct had a substantial effect on the commission of the crime; the accused knew his conduct would assist the commission of SGBCs by the principal perpetrators. The prosecutor relied on victims and eyewitnesses to prove the first element (practical assistance or moral support to the physical perpetrator). The study submits that all the pieces of evidence must show that the accused was in a position of authority and was present at the scene. His presence could encourage the perpetrators to rape other victims, especially if he continued interrogating the victim during the rape or was himself raping. It also surfaces if he transported the perpetrators and encouraged them to rape the victims. All of these serve to establish that the accused's position of authority and presence can be interpreted as providing moral support and official tolerance for SGBCs. The prosecutor also relied on victims and eyewitnesses to prove the second element (the accused's conduct had a substantial effect on the commission of the crime). The evidence comprising the accused's authority, his presence at the scene, and his actions during the event (e.g., beating or raping) must show that the accused's conduct has a substantial effect on the SGBCs.[43] As explained above, in some instances, the accused's authority and presence can substantially affect the crime and may signal an official tolerance for SGBCs, without which the acts would not have taken place.[44] The prosecutor also relied on victims, eyewitnesses, and authenticated documents to prove the third legal element (the accused knew his or her conduct would assist the commission of SGBCs by the principal perpetrators). The pieces of evidence must clearly show that the accused was aware that his conduct would assist the perpetrators in committing the

[41] See Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Trial Judgment (17 June 2004), para. 227; Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence (15 May 2003), para. 254; Akayesu Trial Judgment, supra note 1, paras. 422, 692.
[42] See Gacumbitsi Trial Judgment, supra note 41, paras. 226-227, 327, 329; Semanza Judgment & Sentence, supra note 41, para. 254; Prosecutor v. Dordevic, Case No. IT-05-87/1-T, Trial Judgment (23 February 2011), para. 2168; Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, Appeal Judgment (7 July 2006), para. 135.
[43] See Akayesu Trial Judgment, supra note 1, paras. 693-694; Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Appeal Judgment (1 June 2001), para. 418; Furundzija Trial Judgment, supra note 1, para. 274; Prosecutor v. Muhimana, Case No. ICTR- 95-1B-T, Trial Judgment (28 April 2005), para. 318; Prosecutor v. Nikolic, Case No. IT-94-2-S, Sentencing Judgment (18 December 2003), paras. 115-119.
[44] See Akayesu Trial Judgment, supra note 1, para. 693.

SGBCs. This includes proving that the accused was aware and tolerated the crimes committed by his forces in specific crime sites. Finally, when the chamber assesses SGBC charges, the main problem is not usually a lack of evidence to prove the SGBC acts but establishing the linkage to the accused and the contextual elements. For instance, in some cases analyzed, while the SGBC acts were proven, the judges nevertheless acquitted the accused. In these instances, the judges cited a lack of linkage evidence as it was not clear whether he participated in the plan, ordered the crime, was present, or encouraged the crime. To improve this situation, recommendations have been provided in Chapters 5 and 8 on the types of evidence to seek when proving SGBCs' linkage.

Chapter 6 continued with the analysis on prosecuting high-level officials for SGBCs through indirect modes of liability (JCE, superior responsibility, co-perpetration, indirect perpetration, and indirect co-perpetration). In total, this research has analyzed 47 SGBC cases: 20 JCE cases (17 ICTY, 3 ICTR), 21 superior and command responsibility cases (8 ICTY, 12 ICTR, 1 ICC), 1 co-perpetration case at the ICC, 1 indirect perpetration case at the ICC, and 4 indirect co-perpetration cases at the ICC. To hold the accused responsible for JCE I, the prosecutor must prove two essential elements: that SGBCs were part of the common purpose either from the beginning or over time and proof of a shared intent to commit SGBCs. The prosecutor relied on victims, eyewitnesses, the accused's admission, and authenticated documents to prove that SGBCs were part of the common purpose from the beginning. The prosecutor's evidence must show the existence of a common purpose and how the SGBCs were committed on a widespread or systematic basis. The evidence gathered must indicate that the SGBCs were part of the common purpose from the beginning, or the JCE members raped victims, signifying that the objective of the JCE was also carried out through the commission of rape. The prosecutor also relied on victims, eyewitnesses, the accused's admission, and authenticated documents to prove that SGBCs became part of the common purpose over time. The evidence submitted by the prosecutor must show that widespread and systematic rapes occurred while implementing the original plan and that leading members of the JCE were informed of the new SGBCs but did nothing about the crimes. The prosecutor relied on victims, eyewitnesses, and authenticated documents to prove the second element (shared intent to commit SGBCs). The pieces of evidence put together to prove this element must show the time when the accused knew the crime had expanded and the time when the JCE members agreed on this expansion.

For JCE II, the prosecutor must prove that the SGBCs were part of the common purpose and were implemented in organized systems of ill-treatment. The prosecutor relied on victims, eyewitnesses, and authenticated documents to prove this element. All the pieces of evidence must clearly show that the accused committed concrete crimes or participated in a significant way to the overall effect in the

functioning/maintenance of the camp and that he was present when the crimes were committed and knew about them.

The study also analyzed JCE III to show how criminal responsibility can be attributed to high-level officials under this mode of liability. The prosecutor must prove that SGBCs were a natural and foreseeable consequence of executing the common purpose and that the accused's contribution to the common purpose was essential. The prosecutor relied on victims, eyewitnesses, the accused's admission, and authenticated documents to prove the first element (SGBCs were a natural and foreseeable consequence). The study submits that all the pieces of evidence must clearly show the accused's participation in the JCE, the vulnerability of the victims, and the notoriety of the crimes over a long period. The evidence must also establish the circumstances of the events, the atmosphere of aggression and the prevailing violence, accused's awareness either by physical presence at the scenes or by way of information. All these pieces of evidence can be sufficient to infer that the SGBCs were foreseeable and that the accused took that risk anyway. The prosecutor also relied on victims, eyewitnesses, authenticated documents, and adjudicated facts from other trials to prove the second element (the accused's contribution to the common purpose was essential). The study submits that the evidence presented by the prosecutor must show that the accused's contribution to the common purpose was essential, and the crimes committed beyond that common purpose were foreseeable to him, and he accepted that risk.

Superior/command responsibility was discussed to show how criminal responsibility can be attributed to high-level officials. The prosecutor is required to prove three essential legal elements: the existence of a superior-subordinate relationship; the superior knew or had reason to know that crimes were about to be or had been committed; the superior failed to take the necessary and reasonable measures to prevent the crimes or punish their perpetrators or refer the matters for prosecution. The prosecutor relied on victims, eyewitnesses, admission of the accused and co-accused, and authenticated documents to prove the first element (existence of a superior-subordinate relationship). Beyond doubt, all the pieces of evidence must show that the accused exercise effective control over the subordinates, i.e., he issued orders and ensured compliance, punished, or referred subordinates for prosecution. The prosecutor also relied on victims, eyewitnesses, the accused's admission, and authenticated documents to prove the second element (the superior knew or had reason to know that crimes were about to be or had been committed). The prosecutor's evidence must show the specific criminal acts the commander knew or should have known about and at what place or point in time. The prosecutor also relied on victims, eyewitnesses, the accused's admission, and authenticated documents to prove the third element (the superior failed to take the necessary and reasonable measures to prevent the crimes or punish their perpetrators or refer the matters for prosecution). All the pieces of evidence to prove this element must show that the accused possessed the material ability

to punish subordinates or prevent the crimes from happening. This entails establishing that he knew about the subordinates' specific criminal acts and failed to punish or genuinely investigate these criminal acts despite his power to do so.

The study examined how high-level officials can be prosecuted under the co-perpetration mode of liability. For liability to arise, the prosecutor must prove two essential legal elements: the existence of an agreement or common plan between two or more persons; the accused made an essential contribution to the common purpose, which resulted in the commission of the crimes. The prosecutor relied on victims, eyewitnesses, and authenticated documents to prove the first element (the existence of an agreement or common plan between two or more persons). The evidence adduced by the prosecutor must show that the SGBCs formed part of the common plan pursued by the perpetrators or that the perpetrators meant to cause that consequence or were aware that SGBCs would occur in the ordinary course of events. The prosecutor also relied on eyewitnesses (subordinates) and the accused's admission to prove the second element (the accused made an essential contribution to the common purpose, resulting in the commission of the crimes). The study submits that all the pieces of evidence must clearly show that the accused's contribution to the common purpose was essential to the commission of the SGBCs – whether as part of the common purpose or outside of it.

The indirect perpetration was assessed to show how criminal responsibility can be attributed to high-level officials under this mode of liability. For liability to arise, two essential legal elements must be proven by the prosecutor: the accused's authority in the organization and the subordinates' compliance with his orders to automatically commit SGBCs; knowledge of the character of the organized and hierarchical apparatus of power. The prosecutor relied on victims, eyewitnesses, and authenticated documents to prove the first element (the accused's authority in the organization and the subordinates' compliance with his orders to commit SGBCs automatically). Obviously, all the evidence must show that the accused controlled the part of the group that was subordinate to him, without having to leave the perpetration of the crimes to the subordinates' decision. The prosecutor also relied on victims, eyewitnesses, and authenticated documents to prove the second element (knowledge of the character of the organized and hierarchical apparatus of power). The study submits that the evidence adduced by the prosecutor must show that the accused, as the leader of the armed group, performed the role of a superior and that he possessed the material ability to issue and ensure compliance with orders.

Indirect co-perpetration was also examined to show how criminal responsibility can be attributed to high-level officials under this mode of liability. For liability to arise, the prosecutor must prove two legal elements: The accused had control over the organization that committed the crimes; the organized and

hierarchical apparatus of power. The prosecutor also relied on victims, eyewitnesses, authenticated documents, and agreed facts from other judgments to prove the first element to prove (the accused had control over the organization that committed the crimes). The evidence must show that the accused was in a position of authority and effectively exercised such authority over the subordinates. This serves as the means to control the organization through which the crime was committed. The prosecutor also relied on eyewitnesses and authenticated documents to prove the second element (organized and hierarchical apparatus of power). The evidence must demonstrate that the group was arranged with enlisted individual foot-soldiers and officers under the accused's order as the superior. Finally, the indirect modes of liability were harder to prove because of the enormity and complexity of the crimes and the difficulty of determining the degree of blameworthiness of individuals' involvement. In many cases analyzed in this chapter, although the evidence proved the SGBCs, it could not establish the reporting/disciplinary systems, knowledge and intent, character/structures of the organizations, accused's authority, material ability, and level of control, the existence of an agreement, or essential contribution. To mitigate this situation, recommendations have been provided in Chapters 6 and 8 on the types of evidence to seek when proving SGBCs' linkage.

Chapter 7 examined the types of evidence used in the case law analyzed in Chapters 5 and 6 to prove the SGBC acts, and the modes of liability charged. The study has shown that the means available to prove the SGBCs, the modes of liability charged, and the linkage to the high-level officials at the ICTY, ICTR, and ICC, are mainly victims' testimonies, eyewitnesses' testimonies, perpetrators' testimonies, expert testimonies, and documentary evidence. Victims' testimonies were particularly relevant in proving that SGBCs occurred and that it was the accused that physically committed the crimes. It also helped establish the order issued by the accused and the rape committed because of it, including moral encouragement, superior-subordinate relationship, knowledge or had reason to know, and the failure to prevent or punish. Victims were fundamental in establishing that the SGBCs were widespread, which formed part of the common purpose, and the crimes were committed because of the accused's prompting. The victim's evidence was much more vital in proving modes of liability, such as direct commission, aiding and abetting, ordering, instigating, JCE I, and superior/command responsibility. On the other hand, eyewitnesses' testimonies helped establish the existence of a superior-subordinate relationship, the superior knew or had reason to know, and the failure of the superior to take the necessary and reasonable measures to prevent or punish subordinates. Eyewitnesses were crucial in proving the accused's level of control over the organization, the organized and hierarchical apparatus of power, SGBCs as a natural and foreseeable consequence of executing the common purpose, and that SGBCs were part of the common purpose. The evidence was also crucial in proving the accused's essential contribution to the common purpose, the moral

support, and the substantial effect on the crimes and the order issued by the accused and the SGBCs committed because of it. These eyewitnesses' testimonies played a significant role in proving modes of liability, such as superior/command responsibility, JCE III, indirect co-perpetration, JCE I, aiding and abetting, and ordering.

Perpetrators' witnesses were instrumental because they provide unique insights into the perpetrators' attitudes, moral values, and motives. They were mainly useful in proving the existence of an agreement/common plan, the accused's involvement in designing and implementing the plan, and knowledge that the SGBCs would be or had been committed by subordinates. Their testimonies were particularly helpful in proving modes of liability, such as superior/command responsibility, planning, JCE III, and JCE I. Perpetrators' testimonies can also help capture internal truth and reconstruct historical facts.[45] Confessing their crimes can provide victims with acknowledgment of the ordeal they went through. The main drawback of this type of evidence is that SGBC charges are often dropped due to plea bargaining in favor of certain crimes, such as murder.

Expert witnesses provided valuable opinions on various topics that helped the chambers establish facts on specific aspects of the case, such as supporting the credibility of victims who have PTSD, witness memory issues, forensic analysis, the widespread or systematic nature of the SGBCs. For instance, experts with knowledge on pattern evidence helped explain to the judges how to infer an accused's intent and knowledge from a pattern of SGBC acts of similar gravity.[46] Experts with experience in population-based surveys helped the judges understand prevalence estimates and other generalizable data that show patterns of SGBCs, indicating their widespread and systematic characters.[47] The use of experts to explain forensic evidence, i.e., evidence 'obtained through scientific testing,'[48] can also play an essential role in establishing the magnitude or pattern of SGBCs and holding high-level officials accountable for these crimes.[49] The expert testimonies discussed in Chapter 7 were crucial in proving superior/command responsibility.

Furthermore, authentic and reliable documents were useful in proving SGBC cases against high-level officials by establishing the existence of a concrete plan, the natural and foreseeable consequence of SGBCs

[45] See Sibylle Schmidt, Perpetrators' Knowledge: What and How Can We Learn from Perpetrator Testimony? Journal of Perpetrator Research 1, no. 1 (2017), p. 97.
[46] For more discussion, see Xabier Aranburu, Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases. Leiden Journal of International Law 23 (2010), p. 626; see Bemba Trial Judgment, supra note 34, para. 221.
[47] See Lynn Lawry et al., The Use of Population-Based Surveys for Prosecutions at the International Criminal Court: A Case Study of Democratic Republic of Congo. International Criminal Justice Review 24, no.1 (2014), pp. 5-21.
[48] For detailed discussion on forensic evidence, see Caroline Fournet, Forensic Evidence in Atrocity Trials: A Risky Sampling Strategy? Journal of Forensic and Legal Medicine 69 (2020), pp. 1-6; see also Priya Gopalan, Daniela Kravetz, and Aditya Menon, Proving Crimes of Sexual Violence. In Prosecuting Conflict-Related Sexual Violence at the ICTY, edited by Baron S. Brammertz and Michelle Jarvis. Oxford: Oxford University Press, 2016, pp. 157-158.
[49] See Janice Du Mont and Deborah White, The Uses and Impacts of Medico-Legal Evidence in Sexual Assault Cases: A Global Review. Geneva: World Health Organization, 2007. < https://apps.who.int/iris/handle/10665/43795> accessed 27 October 2020.

occurring, and the accused's essential contribution to the common purpose. Documentary evidence also played a crucial role in proving the accused's leadership position, the existence of a superior-subordinate relationship, and the superior's failure to take the necessary and reasonable measures to prevent the crimes or punish the subordinates. Documentary evidence helped prove modes of liability such as JCE III, superior/command responsibility, planning, and JCE I.

This chapter identified some problems with how the judges went about assessing the credibility of victims and witnesses. For instance, victims' testimonies were deemed reliable or unreliable due to the judges' personal discretionary assessment of the inconsistencies found in the evidence. The credibility assessment standard seems to vary case by case/chamber by chamber and greatly affects the case. The research revealed that the judges had applied the rules inconsistently, which calls for a standardized approach in the future prosecution of SGBC cases. Certain areas, such as assessing trauma, time-lapse, memory and stress disorders, and validity of identifications, should be evaluated by psychologists and psychiatrists' objective inputs from cross-cultural perspectives. This evaluation report should be combined with specific case law references to allow the judges to make an informed credibility assessment.

Chapter 8 summed up the research done from Chapters 1 to 7 and drew the general conclusion and final thoughts. In this study, the main difficulty stemmed from the prosecutor's failure to prove the linkage evidence. For instance, in some cases analyzed in Chapters 5 and 6, while the SGBC acts were proven, the judges nevertheless acquitted the accused because of lack of linkage evidence. It can be concluded that the modes of liability provide sufficient options to comprehensively prosecute high-level officials for their roles in the commission of the SGBCs. However, to effectively make use of these modes of liability, the prosecutor must obtain the evidence as early as possible to ensure that a smaller selection of the most appropriate modes of liability is chosen from the very beginning of the case. In this way, investigators can focus their attention on the evidence required to prove the crime, the linkage, and the modes selected. Yet, it is no longer whether the modes of liability are sufficient to prosecute SGBCs within the international criminal courts and tribunals. It is rather a question of selecting the most appropriate modes of liability and eliciting the most suitable linkage evidence to tie the accused to the SGBCs. A proposed legal framework has been presented in Chapters 5, 6, and 8 to assist future prosecution of SGBCs.

Annex A- Table of SGBC Charges Analyzed as per Mode of Liability

SGBC Charges through Direct Modes of Liability

Modes of liability/ charges	Convictions	No.	Success rate	Acquittals	No.	Unsuccessful rate
Planning	• Stakic • Krstic • Plavsic	3	60%	• Kordic & Cerkez • Kajelijeli	2	40%
Ordering	• Akayesu • Ntahobali in Nyiramasuhuko et al. • Nyiramasuhuko • Niyitegeka • Cesic • Todorovic	6	54.5 %	• Muhimana • Kamuhanda • Musema • Gatete • Bikindi	5	45.5%
Committing	• Celebici (Delic) • Muhimana • Kunarac • Rukundo • Bralo • Kovac in Kunarac et al. • Vukovic in Kunarac et al. • Simic • Ongwen	9	64%	• Kamuhanda • Niyitegeka • Musema • Balaj in Haradinaj et al. • Vukovic in Kunarac et al.	5	36%
Instigating	• Gacumbitsi (for witness TAQ and 7 other victims) • Semanza (for witness VV) • Sikirica • Akayesu	4	50%	• Gacumbitsi (for witnesses TAP, TAS, and TAO) • Semanza (for victim B) • Dordevic • Seselj	4	50%
Aiding and Abetting	• Furundzija • Muhimana (for three different acts) • Akayesu • Kovac in Kunarac et al. (for the rape of FWS-75 and FWS-87 by other soldiers) • Tadic • Nyiramasuhuko • Zelenovic • Nikolic	10	67%	• Brdanin • Kunarac • Kovac in Kunarac et al. (for the rape of FWS-87 by Kostic) • Lazarevic in Sainovic et al. • Ojdanic in Sainovic et al.	5	33%
TOTAL		**32**	**60%**		**21**	**40%**

SGBC Charges through Indirect Modes of Liability

Modes of liability/ charges	Convictions	No.	Success rate	Acquittals	No.	Unsuccessful rate
JCE I	• Stakic • Mladic	2	40%	• Krajisnik • Haradinaj et al. • Mrksic et al.	3	60%
JCE II	• Radic (Kvocka et al.)	1	33%	• Zigic (Kvocka et al.) • Kvocka (Kvocka et al.)	2	67%
JCE III	• Karemera et al. • Ngirumpatse (Kamerera et al.) • Krstic • Pavkovic (Sainovic et al.) • Sainovic (Sainovic et al.) • Lukic (Sainovic et al.) • Karadzic • Martic • Prlic et al. • Stanisic in Zupljanin et al.	10	83%	• Ngirabatware • Milutinovic (Sainovic et al.)	2	17%
Command Responsibility	• Mucic (Celebici case) • Bagosora et al. • Hategekimana • Bizimungu (Ndindilyimana et al.) • Nyiramasuhuko • Rajic	6	29%	• Delalic (Celebici case) • Delic (Celebici case) • Kabiligi and Ntabakuze (Bagosora II) • Muvunyi • Nizeyimana • Kajelijeli • Blaskic • Bemba • Prlic et al. • Ojdanic (Sainovic et al.) • Lazarevic (Sainovic et al.) • Nsengiyumva (Bagosora et al.) • Mugenzi (Bizimungu et al.)	15	71%

				• Bicamurnpaka and Mugiraneza (Bizimungu et al.) • Renzaho		
Co-Perpetration			0%	• Katanga	1	100%
Indirect Perpetration			0%	• Katanga	1	100%
Indirect Co-Perpetration	• Ntaganda • Ongwen	2	50%	• Ngudjolo • Gbagbo and Ble' Goude'	2	50%
TOTAL		**21**	**45%**		**26**	**55%**

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