

RECENT DEVELOPMENTS

In the Case of the Prosecutor v. Jean-Pierre Bemba Gombo: Cementing Sexual Violence and Command Responsibility Within International Criminal Law

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I. OVERVIEW

The government of the Central African Republic dismissed General Francois Bozizé from his position in the nation's armed forces in October of 2001.¹ A large number of soldiers subsequently deserted their posts in support of Bozizé and began an armed rebellion against the government of the Central African Republic (CAR) the following year.² At the time this rebellion emerged, Jean-Pierre Bemba headed a political and military organization known as the Mouvement de Libération du Congo (MLC) in the neighboring Democratic Republic of the Congo (DRC).³ President Ange-Felix Patassé of the CAR made a request to Bemba for the assistance of the MLC's military wing in defending the government from

1. Prosecutor v. Bemba, ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶ 379 (Mar. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF.

2. *Id.*

3. *Id.* ¶¶ 1-2, 453.

the rebels, and Bemba subsequently agreed to the requested intervention.⁴ MLC troops crossed into the Central African Republic in October 2002, and their campaign to aid in suppressing the rebellion lasted until their withdrawal in October 2003.⁵ Within this span of time, the MLC soldiers committed various atrocities against the civilian population of the Central CAR, including murder, rape, and pillaging.⁶

The Pre-Trial Chamber of the International Criminal Court (ICC) issued a warrant for the arrest of Bemba in May 2008.⁷ The Pre-Trial Chamber ultimately confirmed charges of war crimes for rape, murder, and pillaging, and crimes against humanity for both rape and murder.⁸ The prosecution sought to hold Bemba personally culpable for these crimes because of his position as the leader of the MLC applying the “command responsibility” doctrine.⁹ The trial to determine Bemba’s guilt finally began in November 2010 and lasted until November 2014, when evidence established the MLC’s perpetration of various violent and atrocious acts.¹⁰ The ICC *held* that Bemba derived individual culpability for the war crimes and crimes against humanity committed by MLC forces pursuant to the doctrine of command responsibility. *Prosecutor v. Bemba*, ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute (Mar. 21, 2016).

II. BACKGROUND

A. *Pre-World War II Origins of War Crimes and Crimes Against Humanity*

In the mid-1800s, a general push to establish international standards for the manner in which States waged war emerged.¹¹ One document reflecting this developing concern is the Lieber Code, a document the U.S. government promulgated during the Civil War in hopes that its regulations of combat activities would encourage more humane

4. *Id.* ¶¶ 379-80, 560-61.

5. *Id.* ¶¶ 379-80, 453.

6. *Id.* ¶¶ 630, 638, 648.

7. *Id.* ¶ 5. Belgium arrested Bemba while he was in the country before turning him over to ICC custody. *Id.*

8. *Id.* ¶ 7. War crimes are crimes committed in an armed conflict not of international character. *Id.* ¶ 142. Crimes against humanity are the commission of multiple acts against a civilian population “pursuant and in furtherance of a State or organizational policy to commit such an act.” *Id.* ¶ 148 (quoting Rome Statute of the International Criminal Court, art. 7(2)(a), July 17, 1998, 2187 U.N.T.S. 3).

9. *Id.*

10. *Id.* ¶¶ 455-554.

11. See ARNOLD KRAMMER, WAR CRIMES, GENOCIDE, AND THE LAW: A GUIDE TO THE ISSUES 31-33 (2010).

warfighting and punishment for departing from humane standards.¹² The Lieber Code influenced thought surrounding armed conflicts, and individuals drafting the new model for regulating international wars, the Oxford Manual, based their work on the Lieber Code.¹³ This interest in regulating warfare continued with the creation of the Hague Conventions of 1899 and 1907, which sought to regulate the ways armies could engage each other on the battlefield.¹⁴ For example, the 1889 Convention required states to treat prisoners of war humanely and barred the use of poison and poisoned arms in combat.¹⁵ Similarly, the Geneva Convention of 1929, in part a reaction to the ghastly events of World War I, put forth more detailed rules for the treatment of prisoners of war.¹⁶

The Hague Convention of 1907 was the first document to assert the international law requirement that states respect transcendent humanitarian notions.¹⁷ The preamble to the 1907 document declares that, until the creation of a more exhaustive code on the laws of war, “the laws of humanity and the dictates of the public conscience” should protect all people.¹⁸ The horrors committed during World War I, particularly the Ottoman Empire’s massacre of the Armenians, motivated the initial effort to create genuine and punishable offenses of crimes against humanity.¹⁹ A group of Allied governments condemned the Ottomans’ actions and declared their intent to bring the perpetrators responsible to bear for their crimes against humanity and civilization.²⁰ However, these efforts to establish a tribunal to hold parties and individuals responsible for any such crimes committed during World War I failed.²¹

12. See *id.* at 31-32; FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD REVISED BY A BOARD OF OFFICERS (1863).

13. See KRAMMER, *supra* note 11, at 32-33.

14. Convention (IV) Respecting the Laws and Customs of War on Land, pmbl., Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague IV]; Convention (II) with Respect to the Laws and Customs of War on Land, pmbl., July 29, 1899, 32 Stat. 1803, T.S. No. 403 [hereinafter Hague II].

15. Hague II, *supra* note 14, arts. 4, 23.

16. Geneva Convention of July 27, 1929 Relative to the Treatment of Prisoners of War, arts. 1-9, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343; KRAMMER, *supra* note 11, at 83.

17. Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT’L L. 787, 795-796 (1999).

18. Hague IV, *supra* note 14, pmbl.

19. Van Schaack, *supra* note 17, at 789.

20. See *id.* at 796.

21. See *id.* at 796-98.

B. An Incomplete Paradigm Shift Follows World War II

During World War II, the Allied powers again sought to create tribunals to try individuals for war crimes committed by Axis powers, leading to the subsequent enactment of the London Agreement.²² This agreement formed the International Military Tribunal and gave it jurisdiction over war crimes and crimes against humanity committed by individuals associated with the European Axis nations.²³ It identified war crimes as primarily those “violations of the laws and customs of war” and provided slave labor, as well as the murder of prisoners of war, as examples.²⁴ The agreement specified that crimes against humanity are crimes committed against a civilian population; offenses falling under that category included extermination, slavery, and persecution based on political, religious, or racial grounds.²⁵ Its inclusion in the agreement marked the first time crimes against humanity surfaced in positive international law and allowed the tribunal to convict some Nazi leaders solely on those grounds.²⁶ The cases before the tribunal at Nuremberg were the first instances of war crime charges leveled against political and military leaders of defeated nations, leaving a legacy for future generations to follow in prosecuting international crimes.²⁷

Another legal concept that emerged out of the post-World War II criminal prosecutions is the command responsibility doctrine, which asserts that a military commander can be held responsible for crimes his subordinates commit.²⁸ Though this general requirement that a military commander exercise control over his forces has existed throughout history, the most significant push to hold commanders criminally accountable for their troops’ actions occurred after World War II.²⁹ The generally accepted origin for its use is the trial of Japanese General Yamashita, whom the prosecution aimed to hold accountable for the atrocities that his troops committed in the Philippines.³⁰ The commission trying Yamashita did not require that actual knowledge of the events or

22. See KRAMMER, *supra* note 11, at 83.

23. Charter of the International Military Tribunal art. 6(b)-(c), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

24. *Id.* art. 6(b).

25. *Id.* art. 6(c).

26. See Van Schaack, *supra* note 17, at 789, 805.

27. See KRAMMER, *supra* note 11, at 110-12.

28. See GUÉNAËL METTRAUX, *THE LAW OF COMMAND RESPONSIBILITY* 5 (2009). This doctrine moves in the opposite direction of the development at Nuremberg of not allowing subordinates to shift responsibility to their superiors. See KRAMMER, *supra* note 11, at 113-14.

29. Maj. William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 1-14, 19-20 (1973).

30. See METTRAUX, *supra* note 28, at 5-7.

even actual control of troops was necessary to convict him under this doctrine, departing significantly from traditional notions of criminal responsibility.³¹ The defense contested the doctrine's application to find such criminal liability because it was absent from customary international law, but the United States Supreme Court denied Yamashita's writ of *habeas corpus*.³² Later trials at Nuremburg used versions of the command responsibility doctrine that some view as more nuanced and justifiable than the original formulation.³³ However, the generally negative view of the particular legal formula used to convict Yamashita in addition to the strong dissenting opinions in the Supreme Court's denial of *habeas corpus* prevented the doctrine from achieving full legitimacy following World War II.³⁴ Consequently, the doctrine remained weak and almost unused for five decades following World War II tribunals.³⁵

Unfortunately, concern for rape and other sexual violence committed during war remained virtually absent amidst the increasing focus on war crimes and crimes against humanity in the pre- and post-World War II era.³⁶ Almost all attempted codifications of those crimes treated rape implicitly or as merely a supplemental offense that could fall under a more general offense.³⁷ A damning example of prosecutorial disregard for sexual violence perpetrated during World War II involves the abduction and exportation of more than 200,000 women and girls from occupied territories by Japanese military forces.³⁸ Although known to the Allied forces, the plight of those abducted and used as sexual slaves in an extensively structured and managed system did not give rise to any independent charges in the tribunals established to prosecute crimes perpetrated by Japanese military and political personnel.³⁹ Similarly, those responsible for prosecuting mid-level Nazis in occupied Germany never charged any person with rape, even though there was the rare opportunity to treat rape as a crime against humanity under the prosecutions' guiding statute.⁴⁰ The world at large did not begin to give

31. *See id.* at 7.

32. *See In re Yamashita*, 327 U.S. 1, 25 (1946); METTRAUX, *supra* note 28, at 7.

33. *See Parks*, *supra* note 29, at 38, 40-45.

34. *See METTRAUX*, *supra* note 28, at 7-8.

35. *See id.* at 13.

36. Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Law*, 46 MCGILL L.J. 217, 220-21 (2000).

37. *See id.*

38. *See id.* at 221-22.

39. *See id.*

40. *See id.* at 221.

serious attention to prosecuting sexual violence in armed conflict until several decades after World War II.⁴¹

C. Laying the Foundation for a New Approach to International Crimes

In reaction to the reports of atrocities occurring in the former Yugoslavia and Rwanda in the 1990s, the United Nations Security Council created two tribunals specifically designed to hold individuals who perpetrated horrific acts criminally responsible.⁴² These situations brought greater visibility to rapes occurring during conflict and rape's use as a tool of war.⁴³ Seeking a heightened focus on sexual violence within the tribunals, feminist interest groups exerted significant influence on the process of forming statutes to govern tribunals and their subsequent administration of cases.⁴⁴ Consequently, the statute for each tribunal explicitly included rape as an independent and distinct crime against humanity.⁴⁵ Though not listed as a separate and freestanding breach of the laws of war, rape was listed as an explicit example of the war crime of "outrages to personal dignity" in the International Criminal Tribunal For Rwanda (ICTR) statute.⁴⁶ Still, the statute for the International Criminal Tribunal for the Former Yugoslavia (ICTY) failed to unequivocally mention rape in the section addressing violations of the laws and customs of war.⁴⁷

The cases tried by both tribunals demonstrated an increased emphasis on rape as an act that incurs criminal culpability under international law.⁴⁸ The tribunal found the accused in *Prosecutor v. Anto Furundzija* guilty of violating the prohibition against torture under the laws and customs of war, on two counts, as a co-perpetrator to rapes

41. See *id.* at 223-224.

42. See S.C. Res. 955 (Nov. 8, 1994) [hereinafter ICTR Statute]; S.C. Res. 827 (May 25, 1993). The establishment of the tribunal for crimes in the former Yugoslavia adopted the recommendations of a report by the Secretary-General and its outline for crimes subject to the tribunal's jurisdiction. See U.N. Secretary-General, *Rep. of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, Annex, U.N. Doc. S/25704 (May 3, 1993) [hereinafter ICTY Statute].

43. See Copelon, *supra* note 36, at 223-224. However, the initial concern arose from rape's role in ethnic cleansing, and not from concern for violence against women. See *id.* at 223.

44. See Janet Halley, *Rape in Berlin: Reconsidering the Criminalization of Rape in International Armed Conflict*, 9 MELB. J. INT'L L. 78, 81-82 (2008).

45. See ICTR Statute, *supra* note 42, art. 3(g); ICTY Statute, *supra* note 42, art. 5(g).

46. ICTR Statute, *supra* note 42, art. 4(e).

47. ICTY Statute, *supra* note 42, art. 3.

48. See Copelon, *supra* note 36, at 231.

committed as part of an interrogation.⁴⁹ This conclusion was not an outlier, as the ICTY held multiple individuals guilty of torture by committing rape and sexual violence in a separate instance.⁵⁰ The convictions of individuals in *Prosecutor v. Kunarac, Kovac & Vukovic* were for charges arising solely from the accused's rapes of multiple women.⁵¹ This case marked the first instance that an indictment for war crimes consisted entirely of charges based on sexual violence against women.⁵² The ICTY also helped expand its reach over rape as a potential war crime by defining "armed conflict" in a manner encompassing combat that occurs without two states opposing each other.⁵³

The ICTR oversaw the case of *Prosecutor v. Akayesu*, in which it rendered history's first criminal conviction for genocide.⁵⁴ The *Akayesu* court also found the accused guilty of rape as a crime against humanity.⁵⁵ In doing so, the court's decision elaborated on the physical and nonphysical elements of rape and sexual violence, as well as the coercive forces that play a role in their perpetration.⁵⁶ The court explained that inherent coercion may exist in certain circumstances such as armed conflict or the presence of military personnel.⁵⁷ Although it took efforts from outside advocate groups and internal pressure from those within the adjudicative process to get the prosecution to bring charges of rape along with the original charges, their eventual inclusion and the evidence that came along with rape charges added some of the most convincing proof of genocide in *Akayesu*.⁵⁸ That impact is present in the court's judgment, which emphasized that targeting a particular group of people for rape and

49. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 264-75 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>.

50. *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, ¶¶ 942-43, 965 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf.

51. *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶¶ 4-11, 687, 704, 715, 782, 822 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>.

52. Rosalind Dixon, *Rape as a Crime in International Humanitarian Law: Where to from Here?*, 13 EUR. J. INT'L L. 697, 697-98 (2002).

53. See *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 70-71 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

54. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 674, 734 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998), <http://www.un.org/en/preventgenocide/rwanda/pdf/AKAYESU%20-%20JUDGEMENT.pdf>; see also Copelon, *supra* note 36, at 227.

55. *Akayesu*, ICTR-96-4-T, ¶ 696.

56. *Id.* ¶¶ 686-88.

57. *Id.* ¶ 668.

58. See Copelon, *supra* note 36, at 224-27.

sexual assault is a legitimate means of attempting to end that group's existence.⁵⁹

The formation of the two tribunals also led to the resurgence of the command responsibility doctrine.⁶⁰ Article 7(3) of the ICTY Statute and Article 6(3) of the ICTR Statute created potential individual liability for superiors in relation to crimes perpetrated by their subordinates.⁶¹ The charges brought against some of the accused in *Prosecutor v. Delalic* based individual culpability on Article 7(3) of the ICTY statute and supported by the doctrine of command responsibility.⁶² Since Article 7(3) does not give a specific formula to find liability, the Court defined the particular elements of command responsibility as it deemed appropriate.⁶³ The Court decided that liability by command responsibility requires the existence of a superior-subordinate relationship, actual or constructive knowledge of the crimes, and a failure of a superior to take appropriate measures to prevent them.⁶⁴ Under this formulation of command responsibility, the Court found certain defendants guilty of crimes committed by individuals considered the defendants' subordinates.⁶⁵

D. *The Emergence of the International Criminal Court*

As the ICTY and ICTR worked to bring those perpetrators of crimes subject to their jurisdiction to justice, efforts were underway to create a permanent body to try individuals for violations of the most serious international crimes.⁶⁶ These efforts resulted in the adoption of the Rome Statute in July 1998, which eventually entered into force in July 2002.⁶⁷ The Rome Statute created the ICC and gave it jurisdiction over individuals for the commission of war crimes, crimes against humanity, and genocide.⁶⁸ The parties to the Statute created the Elements of Crimes (Elements) in 2002 to further assist the Court's interpretation

59. *Akayesu*, ICTR-96-4-T, ¶¶ 731-33.

60. See METTRAUX, *supra* note 28, at 13-15.

61. ICTR Statute, *supra* note 42, art. 6(3); ICTY Statute, *supra* note 42, art. 7(3).

62. *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, ¶¶ 330-32 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf.

63. *Id.* ¶¶ 343-47.

64. *Id.* ¶ 346.

65. *Id.* ¶¶ 1010, 1047, 1072.

66. See LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW: CASES AND MATERIALS 1328 (6th ed. 2014); Halley, *supra* note 44, at 82-83.

67. See DAMROSCH & MURPHY, *supra* note 66, at 1328-29.

68. Rome Statute of the International Criminal Court, arts. 5, 25, 28, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

of the crimes under its jurisdiction.⁶⁹ It provides the actus reas, mens rea, and contextual elements necessary to prove culpability for every potential crime under the Rome Statute.⁷⁰ The Statute details the applicable law for the ICC in Article 21.⁷¹ Though it permits the use of sources such as treaties and general principles of international law, the Statute holds itself supreme, along with its Elements of Crimes and Rules of Procedure and Evidence.⁷² Article 21 also allows the Court to look to its past decisions for guidance but does not require that it do so in every instance.⁷³

Various aspects of the Statute demonstrate the evolved and refined understanding of international crimes held among the countries and organizations that assisted in its drafting.⁷⁴ The Statute includes an article dedicated solely to codifying individual culpability for crimes under the command responsibility doctrine.⁷⁵ That article states that a person can be individually responsible for crimes committed by others while acting as a military commander or a superior in some other form of superior-subordinate relationship.⁷⁶ The Statute also gives the context in which an act must occur to constitute a crime against humanity or a war crime.⁷⁷ For any particular act to constitute a crime against humanity, it must occur as “part of a widespread systematic attack directed against any civilian population,” and the perpetrator must know of circumstances indicating the existence of such an attack.⁷⁸ War crimes occur within various scenarios depending on the type of armed conflict, but the Elements require that the crime must occur in association with and in the course of a particular conflict.⁷⁹

The jurisprudence of the ad hoc tribunals and the influence of feminist interest groups played a significant role in shaping the Statute and the codification of sexual violence as under the ICC’s jurisdiction.⁸⁰

69. See International Criminal Court [ICC], Elements of Crimes, ICC-ASP/1/3 (Part II-B), at 112 (Sept. 9, 2002) [hereinafter ICC Elements].

70. *Id.*

71. Rome Statute, *supra* note 68, art. 21.

72. *Id.* art. 21(1)(a).

73. *Id.* art. 21(2).

74. See DAMROSCH & MURPHY, *supra* note 66, at 1328; Copelon, *supra* note 36, at 233-36; Halley, *supra* note 44, at 81-82.

75. Rome Statute, *supra* note 68, art. 28.

76. *Id.*

77. *Id.* art. 7(1), 7(2)(a), 8.

78. *Id.* art. 7(1), 7(2)(a).

79. Rome Statute, *supra* note 68, art. 8; ICC Elements, *supra* note 69, art. 8.

80. See Copelon, *supra* note 36, at 231-36; Halley, *supra* note 44, at 82-83. The Rome Statute also included gender as a new potential basis for which mass prosecution could be considered a crime against humanity. Rome Statute, *supra* note 68, art. 7(1)(h).

The Statute gave the ICC much broader jurisdiction over sexual violence compared to that given by the statutes of the ICTY and the ICTR.⁸¹ Article 7(1)(g) lists rape as a crime against humanity but also adds crimes like sexual slavery, forced pregnancy, and “any other form of sexual violence of comparable gravity.”⁸² Additionally, Article 8(2)(e)(vi) explicitly includes rape as a separate and distinct war crime, which both ad hoc tribunal statutes failed to include.⁸³ Under the Elements of Crimes, the initial material elements of rape as a war crime and as a crime against humanity are identical, requiring that:

[t]he perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.⁸⁴

Additionally, the Elements require that the perpetrator commit the invasion using force, the threat of force, or coercion, or in the context of a coercive environment.⁸⁵ The Rules of Procedure and Evidence also includes several articles that deal with the protection of victims of sexual violence and the necessary accommodations for their testimony.⁸⁶

The ICC found only two individuals guilty of crimes under the Rome Statute prior to the noted case.⁸⁷ The charges against the defendants in both instances sought findings of guilt for co-perpetrators, responsible for crimes under Article 25(3).⁸⁸ The charges brought against the defendant in *Prosecutor v. Lubanga* sought culpability for war crimes related to enlisting and conscripting individuals under the age of fifteen into armed forces.⁸⁹ Using the ICTY’s definition of armed conflict from *Tadic* as a starting point, the Court in *Lubanga* examined the meaning of armed conflict and how to differentiate between the various forms it

81. Compare Rome Statute, *supra* note 68, art. 7(1)(g), 8(2)(e)(vi), with ICTR Statute, *supra* note 42, art. 4(e), and ICTY Statute, *supra* note 42, art. 3.

82. Rome Statute, *supra* note 68, art. 7(1)(g).

83. *Id.* art. 8(2)(e)(vi).

84. ICC Elements, *supra* note 69, arts. 7(1)(g)-1(1), 8(2)(e)(vi)-1.

85. *Id.* art. 7(1)(g)-1(2).

86. ICC, Rules of Procedure and Evidence, ICC-ASP/1/3 (Part II-A), arts. 16(1)(d), 63(4), 70, 71, 86, 88 (Sept. 9, 2002) [hereinafter ICC RPE].

87. See *Prosecutor v. Katanga*, ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute, 658-59 (Mar. 7, 2014), https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF; *Prosecutor v. Lubanga*, ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶ 1358 (Mar. 14, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF.

88. *Katanga*, ICC-01/04-01/07, ¶¶ 7-10; *Lubanga*, ICC-01/04-01/06, ¶¶ 1-3.

89. See Rome Statute, *supra* note 68, art. 8(2)(b)(xxvi); *Lubanga*, ICC-01/04-01/06, ¶¶ 1-3.

takes.⁹⁰ After determining that the defendant's actions took place in association with an armed conflict not of an international nature, the Court found him guilty of war crimes under Article 8(2)(e)(vii).⁹¹

In *Prosecutor v. Germain Katanga*, the prosecution charged the defendant with a multitude of crimes under the Statute, including murder, rape, and pillaging.⁹² When interpreting the contextual requirements of crimes against humanity in the Statute, the *Katanga* court determined the attack must be intentional on the part of a State or organization and that patterns of action or significant orchestration may infer this intention.⁹³ The Court applied the Elements of Crimes definition of rape and surmised that any coercive circumstance coupled with the initial physical requirements constitutes a rape crime.⁹⁴ The Court stated the Rules of Procedure and Evidence confirmed its interpretation because Rule 70 asserts that consent cannot be inferred from a victim's words or actions if a coercive circumstance is present.⁹⁵

III. THE COURT'S DECISION

In the noted case, the ICC looked to the Rome Statute and the Elements of Crimes along with its own jurisprudence and the decisions of the ad hoc tribunals to find Jean-Pierre Bemba guilty of war crimes and crimes against humanity.⁹⁶ The Court first examined the initial elements necessary to conclude that actions taken by MLC forces in the CAR could constitute the war crimes of murder, rape, and pillaging, and the crimes against humanity of murder and rape.⁹⁷ The Court subsequently examined the contextual elements required to elevate the MLC troops' actions to war crimes and crimes against humanity under the Statute.⁹⁸ The final examination of applicable law involved the conditions and circumstances necessary to hold Bemba individually responsible for these crimes as the commander of the MLC.⁹⁹ Applying

90. *Lubanga*, ICC-01/04-01/06, ¶¶ 531-42 (citing *Prosecutor v. Tadic*, Case No. IT-94-I-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995)).

91. *Lubanga*, ICC-01/04-01/06, ¶¶ 1351-58.

92. *Katanga*, ICC-01/04-01/07, ¶¶ 7-10.

93. *Id.* ¶¶ 1108-09.

94. *Id.* ¶¶ 964-65.

95. *Id.* ¶¶ 965-66 (citing ICC, Elements of Crimes, ICC-ASP/1/3 (Part II-B), art. 70 (Sept. 9, 2002)).

96. *Prosecutor v. Bemba*, ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶ 752 (Mar. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF.

97. *Id.* ¶¶ 87-125.

98. *Id.* ¶¶ 126-69.

99. *Id.* ¶¶ 170-213.

the elements to the facts, the Court concluded that the actions taken by the MLC met every initial requirement for all the charged crimes.¹⁰⁰ The Court also determined that the circumstances of the MLC campaign satisfied the contextual elements necessary to elevate the MLC's actions to war crimes and crimes against humanity subject to the Statute.¹⁰¹ Finally, the Court determined that the surrounding circumstances indicated that Bemba's position as the MLC's leader and commander made him individually liable for the crimes committed by MLC personnel.¹⁰²

A. *Initial and Contextual Elements of Crimes and Elements of Command Responsibility*

The Court looked to the Elements to establish that murder as a crime against humanity and as a war crime both require that a perpetrator kill or cause the death of one or more person, but the war crime version distinctly requires the killing of someone not taking part in the active hostilities.¹⁰³ The Court stated that the mens rea for murder under both categories is that of intent and knowledge.¹⁰⁴ When addressing the requirements for pillaging, the Court noted that it must occur on a large scale and used the *Katanga* decision for guidance on the type of property relevant to pillaging.¹⁰⁵ Noting that the "military necessity" exception to pillaging in the Elements is undefined, the Court looked to the approach in *Katanga* to settle the ambiguity.¹⁰⁶ To examine the charges of pillaging before it, the *Katanga* Court utilized the Lieber Code's definition of "military necessity" as measures indispensable for securing the denouement of a war and lawful under the modern law and usage of war.¹⁰⁷ The Court agreed with that decision's use of the Lieber Code and concluded that if a perpetrator takes property for personal or private use,

100. *Id.* ¶¶ 630, 638, 648.

101. *Id.* ¶¶ 668, 692.

102. *Id.* ¶¶ 741-42.

103. *Id.* ¶¶ 87-88, 91-94 (citing Int'l Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3 (Part II-B), arts. 7(1)(a)(1) and 8(2)(c)(i)(1)(1) (Sept. 9, 2002)).

104. *Id.* ¶¶ 89-90, 95-97. This is also the default mental state required for any crime under the Statute if none other is listed. *See* Rome Statute, *supra* note 68, art. 30.

105. *Bemba*, ICC-01/05-01/08, ¶¶ 115-117 (citing Prosecutor v. Katanga, ICC-01/04-01/07, Judgment, ¶ 904 (Mar. 7, 2014)). The initial requirements for pillaging under the Elements are: a perpetrator appropriated property, the perpetrator intended to deprive the owner of such property and appropriate it for private or personal use, and the perpetrator obtained the property without the owner's consent. ICC Elements, *supra* note 69, art. 8(2)(e)(v).

106. *Bemba*, ICC-01/05-01/08, ¶¶ 122-24 (citing ICC, Elements of Crimes, ICC-ASP/1/3 (Part II-B), art. 8(2)(e)(v)(2) n.62 (Sept. 9, 2002)).

107. *Katanga*, ICC-01/04-01/07, ¶ 894 (citing LIEBER, *supra* note 12, art. 14).

then the appropriation cannot be viewed as though the property was taken for military necessity.¹⁰⁸

The Court examined the initial elements of rape as a war crime and a crime against humanity together since they are identical.¹⁰⁹ Noting that the Elements state the “invasion” required for rape is meant to be gender neutral, the Court states that perpetrator and victim can each be of any gender identity and that oral penetration could constitute such an invasion.¹¹⁰ For the threatening and coercive aspect of rape, the Court stated that several factors contribute to a coercive environment and looked to the ICTR’s decision in *Akayesu* for additional guidance to define such an environment.¹¹¹ The Court then stated that rape under the Statute does not require proof of a victim’s lack of consent and noted that drafters purposefully excluded that requirement due to the practical hurdle it presents for prosecuting potential offenders.¹¹² Similarly, this Court concluded that proving a victim’s lack of consent is unnecessary if the prosecution proves the elements regarding force, coercion, or taking advantage of coercive circumstances.¹¹³

The Court then evaluated the contextual elements for war crimes to determine if the acts committed by MLC forces occurred under circumstances that would raise them to the status of war crimes.¹¹⁴ First, the Court noted that the particular crimes charged must occur in the context of an armed conflict not of an international character.¹¹⁵ The Court stated that neither the Statute nor the Elements define “armed conflict” and proceeded to look to the ICTY’s jurisprudence for an interpretation.¹¹⁶ The Court adopted the ICTY’s definition from *Tadic*, that an armed conflict can take the form of a resort to armed force between States, a protracted conflict between a State and an organized armed group, or a protracted conflict between organized armed groups.¹¹⁷ The Court also referred to its decision in *Katanga* to reaffirm that acts

108. *Bemba*, ICC-01/05-01/08, ¶¶ 123-25.

109. *Id.* ¶ 98; *see also* ICC Elements, *supra* note 69, arts. 7(1)(g-1), 8(2)(e)(vi-1).

110. *Bemba*, ICC-01/05-01/08, ¶¶ 99-101 (citing *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, ¶ 1066 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); and ICC, Elements of Crimes, ICC-ASP/1/3 (Part II-B), art. 8(2)(b)(vi-1)(1) n.63 (Sept. 9, 2002)).

111. *Id.* ¶¶ 102-04 (citing *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 688 (Sept. 2, 1998)).

112. *Id.* ¶ 105.

113. *Id.* ¶ 106.

114. *Id.* ¶ 126.

115. *Id.* ¶ 127.

116. *Id.* ¶ 128.

117. *Id.* (citing *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995)).

must be closely associated with the armed conflict and that the conflict be a major influence on the perpetrator's decision to commit the crimes.¹¹⁸

For the contextual elements of crimes against humanity, the Court noted that the Statute requires crimes against humanity take place within "a course of conduct involving the multiple commission of acts . . . pursuant to or in furtherance of a State or organizational policy to commit such attack."¹¹⁹ The Court declared that the multiple acts discussed must exceed a certain quantitative amount that goes beyond several occurrences.¹²⁰ The Court also specified that the attacks must be against a civilian population as a whole and that the population needs to be the primary target of the attacks.¹²¹ For the requirement that an attack "be pursuant to an organizational policy," the Court asserted that "policy" means active promotion or encouragement of the attack in question, that the policy need not be formalized and may be inferable from aspects such as planning, patterns, and motivation.¹²² The Court stated that the requirement that the attacks be widespread indicates the attacks must occur on a large scale and target a large number of individuals.¹²³

To determine whether Bemba derived individual criminal responsibility for the war crimes and crimes against humanity committed by MLC forces, the Court surveyed the material elements of command responsibility.¹²⁴ To decide if an individual has "effective control" over forces, the Court relied on the ICTY's interpretation of effective control in *Delalic* as the material ability to prevent or suppress the crimes, where any lower capacity, such as substantial influence, is inadequate to meet the standard.¹²⁵ Next, the Court noted that the commander must have possessed knowledge of the crimes' commission and failed to take the necessary steps to prevent or repress the crimes.¹²⁶ Finally, the Court stated that crimes result from a commander's failure to exercise proper

118. *Id.* ¶ 142 (citing Prosecutor v. Katanga, ICC-01/04-01/07-3436, Judgment ¶ 1176 (Mar. 7, 2014)).

119. *Id.* ¶ 148 (citing Rome Statute of the International Criminal Court art. 7(2)(1), July 17, 1998, 2187 U.N.T.S. 3).

120. *Id.* ¶¶ 149-51.

121. *Id.* ¶¶ 152-56.

122. *Id.* ¶¶ 157-61.

123. *Id.* ¶¶ 162-63 (citing Prosecutor v. Katanga, ICC-01/04-01/07-3436, Judgment ¶ 1176 (Mar. 7, 2014)).

124. *Id.* ¶ 170.

125. *Id.* ¶ 183 (citing Prosecutor v. Delalic, Case No. IT-96-21-T, Appeal Judgment, ¶ 266 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001)).

126. *Id.* ¶¶ 170, 190, 197, 202, 205.

control if it is proven that the crimes would not have been committed if there had been appropriate control.¹²⁷

B. Application of Elements to Facts and Circumstances and the Court's Conclusion

With respect to the allegations of murder, the Court used evidence about the perpetrators' identities, such as their spoken language, uniforms, alongside witnesses' experiences, to conclude that MLC forces killed certain civilians in the CAR.¹²⁸ Determining that those killed were not taking part in active hostilities and that the perpetrators killed those individuals intentionally or knowingly, the Court found that the actions of the MLC met every initial requirement for the charges of murder.¹²⁹ The Court noted that the same evidence indicating MLC personnel committed murder also indicated that the MLC personnel perpetrated several instances of property appropriation beyond a reasonable doubt.¹³⁰ The Court concluded that the evidence proved MLC personnel also took the property from individuals for personal use and not out of necessity and did so knowingly and intentionally.¹³¹ Consequently, the Court concluded that the MLC troops' appropriations satisfied the initial requirements for pillaging.¹³²

The Court also explained that much of the evidence conclusively implicating the MLC as perpetrators of murder and pillaging also indicated that it perpetrated the rapes that occurred in the CAR.¹³³ Evidence gathered also demonstrated that MLC troops committed multiple "invasions" of a sexual nature using "force" against civilians during its campaign that clearly constituted rape.¹³⁴ The Court further stated that the rapes were committed by MLC forces knowingly or intentionally, and therefore the evidence satisfied every initial requirement for the rape crime.¹³⁵

Since the hostilities in the CAR during the time relevant to the charges never involved two states in opposition, the Court determined that the hostilities were not of an international character.¹³⁶ The Court

127. *Id.* ¶¶ 210, 213.

128. *Id.* ¶¶ 624-628.

129. *Id.* ¶¶ 625, 629-30.

130. *Id.* ¶¶ 640, 642.

131. *Id.* ¶¶ 643-47.

132. *Id.* ¶ 648.

133. *Id.* ¶¶ 633-34.

134. *Id.* ¶¶ 637-38.

135. *Id.* ¶¶ 634, 637-38.

136. *Id.* ¶¶ 652-56.

also determined that these hostilities were between the government authorities and an organized armed group, because of the MLC's participation on behalf of the CAR government in an effort to combat the capable and structured force of General Bozizé's rebels.¹³⁷ Next, the Court concluded that the crimes perpetrated were significantly related to the armed conflict because engagement in the conflict allowed MLC troops access to and control over areas within the CAR.¹³⁸ Lastly, the Court stated that MLC perpetrators possessed awareness of the circumstances creating the armed conflict and then concluded that the murders, rapes, and pillaging constituted war crimes within the Court's jurisdiction under the Statute.¹³⁹

Regarding crimes against humanity, the evidence establishing the large number of rapes and murders led to the Court's conclusion that these acts were part of a course of conduct, not just sporadic or isolated occurrences.¹⁴⁰ The Court determined that the MLC committed the acts against civilians because of its inclusive and indiscriminate victimization of the population.¹⁴¹ Next, the Court determined that the MLC's structural qualities indicated it was an organization and that the crimes it perpetrated were part of its organizational policy.¹⁴² The Court also determined that the attacks were sufficiently widespread and pursuant to this policy.¹⁴³ Thus, the Court concluded that the rapes and murders committed by the MLC during its campaign satisfied the requirements necessary to elevate them to crimes against humanity under the Statute.¹⁴⁴

The Court subsequently applied the elements of command responsibility to the facts and circumstances to determine Bemba was individually liable for the crimes already established.¹⁴⁵ The Court concluded that Bemba acted as an effective commander and possessed effective control as a result of his broad powers and decision-making authority within the MLC and his capacity to both issue orders to and

137. *Id.* ¶¶ 659-61. The Court found the requirement that the conflict be protracted easily satisfied in this instance because the regular hostilities lasted almost five months. *Id.* ¶ 663.

138. *Id.* ¶¶ 664-66. The Court determined that this played a major role in the troops' decision to commit the crimes and the manner in which they committed them. *Id.* ¶¶ 664-65.

139. *Id.* ¶¶ 667-68.

140. *Id.* ¶¶ 671-72.

141. *Id.* ¶¶ 673-74.

142. *Id.* ¶¶ 675-87. Evidence used by the Court to conclude so included the MLC's consistent methods targeting citizens, the length of time over which its forces committed the crimes, and the explicit orders given to troops to use force against civilians. *Id.* ¶¶ 676-85.

143. *Id.* ¶¶ 688-90.

144. *Id.* ¶ 692.

145. *Id.* ¶ 693.

commence disciplinary actions against its troops.¹⁴⁶ The Court found that this control extended over the MLC troops deployed into the CAR due to his initial orders sending them in, his communications with subordinates regarding the operation, and his representation of those troops in external matters during the campaign.¹⁴⁷ The Court also determined that Bemba knew of the crimes committed by MLC troops, evidenced by the constant communication he maintained with personnel operating in the CAR and the reports he received from his staff regarding the ongoing operation.¹⁴⁸ The Court concluded that Bemba did not take the steps necessary to prevent or suppress the crimes because the sparing efforts to curtail the acts, such as disciplinary trials, were grossly inadequate and likely motivated by public image concerns.¹⁴⁹ The Court noted several alternative measures available to Bemba, such as an attempt to establish more thorough disciplinary proceedings and to give clearer orders to subordinates to stop the commission of the crimes, as evidence that he did not take all steps necessary to control his forces.¹⁵⁰ Finally, the Court concluded the crimes resulted from Bemba's failure to exercise proper control over MLC forces because unutilized measures within his power would have prevented them.¹⁵¹ The Court emphasized that the withdrawal of the MLC forces ultimately ended the commission of the crimes and that Bemba possessed authority to order this withdrawal at any time during the campaign.¹⁵² Consequently, pursuant to Article 28 of the Statute, the Court found Bemba individually culpable for the crimes committed by MLC troops.¹⁵³

Due to the established facts and its analysis of legal principles, the ICC found Bemba individually guilty of the war crimes of murder, rape, and pillaging, and the crimes against humanity of rape and murder due to his status as commander of the MLC forces that perpetrated those crimes in the CAR.¹⁵⁴

146. *Id.* ¶ 697.

147. *Id.* ¶¶ 700, 702.

148. *Id.* ¶¶ 707-09. The Court specifically points to the MLC's attack on the entirely civilian filled town of Mongoumba as proof of Bemba's knowledge since he maintained communications with the leader of the assault the day it occurred. *Id.* ¶ 716.

149. *Id.* ¶¶ 720-721, 727-728.

150. *Id.* ¶¶ 729-30.

151. *Id.* ¶¶ 738, 740.

152. *Id.* ¶ 740.

153. *Id.* ¶ 742.

154. *Id.* ¶ 752.

IV. ANALYSIS

The noted case is intriguing for the way the Court reached its conclusion and for the case's contribution to the overall evolution of international criminal law. The reasoning and conclusions in the noted case rest on a strong foundation of codified material, with the Court's resort to its own prior decisions and the decisions of ad hoc tribunals to settle ambiguities. The Court's decision is noteworthy for being the first to charge rape as a war crime and utilize command responsibility for individual liability under the Statute and will provide a model for any future prosecutions based on similar charges. Despite this decision's significance in that regard, it is unlikely to have a practical impact on preventing future transgressions.

The exhaustive nature of the Statute and Elements and the Court's use of its jurisprudence to resolve any ambiguities rendered Bemba's conviction legally sound.¹⁵⁵ Article 21's requirement of applying the Elements to every charged offense strictly guided the Court's approach and created a thorough justification for every conclusion.¹⁵⁶ When confronted with ambiguities in applicable segments of the Elements, the Court looked to the approaches it took in prior decisions and adopted consistent views, such as when it consulted *Katanga* to define "military necessity."¹⁵⁷ Though use of the Lieber Code may create skepticism due to the age of that document, the Court's conclusion that items taken for personal use are categorically not necessary for military use is a reasonable solution to a narrow question.¹⁵⁸ The Court's adoption of the approach in *Lubanga* and *Katanga* to define "armed conflict" created consistency with its own decisions and also linked this Court's reasoning to that of the ad hoc tribunals that served as prototypes for the ICC.¹⁵⁹ The Court and its prior decisions' use of the ICTY's "armed conflict" definition from *Tadic* helps the judgment build a sense of cohesion with the general evolution of the law in this domain.¹⁶⁰ The Court's use of *Akayesu* as a guide for interpreting the "coercive circumstances" related

155. See generally Rome Statute, *supra* note 68; ICC Elements, *supra* note 69.

156. See Rome Statute, *supra* note 68, art. 21.

157. See *Bemba*, ICC-01/05-01/08, ¶¶ 123-24.

158. *Id.* ¶¶ 124-25.

159. *Id.* ¶¶ 128-29 (citing Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgment, ¶ 1176 (Mar. 7, 2014); and Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶¶ 535-42 (Mar. 14, 2012)).

160. See Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

to rape is another example of such consistency built into this decision.¹⁶¹ Though Article 21 of the Statute does not require the Court to apply these prior decisions, doing so in order to supplement the already comprehensive Elements adds both predictability and legitimacy to the Court's conclusions.¹⁶² The Court should maintain this approach of having one eye on the foundational jurisprudence when applying the Statute so that it keeps all decisions anchored in both a rigid textual framework and a respect for the analytical lineage of the various tribunals.

While the manner by which the Court reached its decision is of interest, the most significant aspect of the noted case is that it is the first instance in which the ICC convicted an individual for rape as a war crime and found individual culpability under the doctrine of command responsibility. Those two features of the decision represent the culminations of efforts to build certain policies into the Statute to address rape in armed conflict and the individual culpability of military leaders. The Court's conclusion that the MLC committed war crimes through rape during its campaign in the CAR is a substantial development from the disregard for the sexual enslavement perpetrated during WWII and the hesitation to charge rape in Rwanda prosecutions.¹⁶³ Comparing the multitude of ways the Statute criminalizes sexual violence along with the thoroughness of the Elements to prior codifications demonstrates the emphasis the international community is placing on making sexual violence prosecutable.¹⁶⁴ Perhaps the clearest illustration of the strides of this increased effort is the explicit inclusion of rape as a freestanding war crime in the Statute after the statutes for the ad hoc tribunals failed to do the same.¹⁶⁵ This codification can be viewed as moving sexual violence up the hierarchy of international law to give it equal, but distinct, prominence among other actions considered war crimes and crimes against humanity.¹⁶⁶ Bemba's conviction pursuant to the ICC's first ever

161. *Bemba*, ICC-01/05-01/08, ¶ 103 (citing *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 688 (Sept. 2, 1998)).

162. Rome Statute, *supra* note 68, art. 21.

163. *See* Copelon, *supra* note 36, at 221-27.

164. *Compare* Rome Statute, *supra* note 68, arts. 7, 8, and ICC Elements, *supra* note 69, arts. 7, 8, with ICTR Statute, *supra* note 42, arts. 3, 4, and ICTY Statute, *supra* note 42, arts. 2, 3.

165. *Compare* Rome Statute, *supra* note 68, arts. 8(2)(b)(xxii), 8(2)(e)(vi), with ICTR Statute, *supra* note 42, art. 4, and ICTY Statute, *supra* note 42, arts. 2, 3.

166. *See* Halley, *supra* note 44, at 83-84. The additions of protective measures for victims of sexual violence in the Rules of Procedure and Evidence is also notable and seems quite prescient in light of Bemba's recent conviction for attempting to interfere with the witnesses during the trial in the noted case. *See* ICC RPE, *supra* note 86, arts. 16(d), 63(4), 70, 71, 86, 88; *Prosecutor v. Bemba*, ICC-01/05-01/13, Public Redacted Version of Judgment Pursuant to

usage of the Statute's codification of rape as a war crime represents a significant victory in that pursuit. In light of the inattention ordinarily granted to sexual violence in armed conflict, the guilty finding of an individual for employing rape as an illegal weapon of war by the permanent tribunal established to prosecute individuals for mankind's worst crimes is no small event. By finding Bemba guilty of war crimes, the Court reaffirmed that the international community wants rape to stand equally among the world's most condemned crimes and provides a triumph for those striving to establish that recognition.

Bemba's culpability under Article 28 of the Statute also reflects the acceptance that has developed over time for extending liability for crimes beyond the immediate perpetrators. Though the manner in which post-World War II tribunals applied command responsibility varied, these tribunals did establish an overall perspective that eventually found its way into the ICTY and ICTR statutes.¹⁶⁷ The Statute's version of command responsibility significantly remedies past confusion and provides a greater sense of fairness because of the explicit requirement that the crimes have a causal relation to the acts of the superior.¹⁶⁸ The Court's strongest premise for finding Bemba guilty referenced the absolute control he exerted in sending the MLC into the CAR and subsequently commanding their withdrawal after many months.¹⁶⁹ That clear-cut illustration demonstrates that Bemba bears responsibility for the crimes his troops committed because he possessed the power to remove all forces at any moment, yet he failed to do so, despite knowledge of the ongoing crimes.¹⁷⁰ That distinction alleviates general concerns about how the doctrine could focus too closely on the position of a superior rather than on their actual contribution to the crimes.¹⁷¹ While more complex situations will lack the straightforward causality of this situation, Bemba's conviction provides a clear application of command responsibility and illustrates the justification underlying the doctrine's emergence. Perhaps most importantly, the Court now has a model conviction to examine and compare with any future situations that call for individual culpability based on command responsibility.

Article 74 of the Statute, ¶¶ 13, 933 (Oct. 19, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_18527.PDF.

167. See Parks, *supra* note 29, at 22-45; ICTR Statute, *supra* note 42, art. 6(3); ICTY Statute, *supra* note 42, art. 7(3).

168. See Rome Statute, *supra* note 68, art. 28.

169. Prosecutor v. Bemba, ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶¶ 738-40 (Mar. 21, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF.

170. *Id.* ¶ 717.

171. See METTRAUX, *supra* note 28, at 16-17.

However, any claims that the Court's decision will act as a deterrent for future violations of the Statute rest on naive assumptions. Even with the ICTY and ICTR prosecutions of individuals and the creation of the ICC, individuals and governments continue to commit acts that violate the Rome Statute.¹⁷² Theoretically, the fact that Bemba's conviction is the ICC's first to utilize command responsibility for culpability ought to serve as a deterrent, because one of the underlying beliefs of the doctrine is that it erodes the impunity often felt by those who have the most influence over these crimes committed on a large scale.¹⁷³ As the former head prosecutor of the ICC opined, the purpose of the ICC and its trials is to prevent future perpetrations of crimes through making an example of those before the Court.¹⁷⁴ However, heads-of-state like Bashar al-Assad in Syria and Rodrigo Duterte in the Philippines do not show hesitation in ordering and condoning actions that violate the Statute on a scale far beyond those discussed of the MLC forces in the CAR. The ICC attempted to bring the leader of a state to answer for crimes committed while that individual held that position when it issued an arrest warrant for Sudanese President Omar al-Bashir, but to date African nations continue to ignore the warrant.¹⁷⁵ In light of the apparent ineffectiveness of the ICC to reign back violations of the Statute by those with the greatest capacity to oversee and facilitate such crimes, the most practical impact of Bemba's conviction is the potential consolation and closure it gives to the victims of the MLC's brutal campaign.

172. See Jack Moore, *Philippine Senator Calls for ICC To Investigate Duterte's War on Drugs*, NEWSWEEK (Oct. 24, 2016, 7:09 AM), <http://www.newsweek.com/philippine-senator-calls-icc-investigate-dutertes-war-drugs-512983>; Kareem Shaheen, *Russia or Syria Was Behind Deadly Idlib School Attack, Says US*, GUARDIAN (Oct. 27, 2016, 2:46 PM), <https://www.theguardian.com/world/2016/oct/27/airstrike-on-syrian-village-kills-26-people-reports-say>; Michael Astor, *Group Calls for Darfur Chemical Weapons Investigation*, PHILA. TRIB. (Sept. 30, 2016), http://www.phillytrib.com/ap/international/group-calls-for-darfur-chemical-weapons-investigation/article_0e04d89c-a0b5-5d43-9521-1c434e088225.html.

173. See METTRAUX, *supra* note 28, at 15-16.

174. James Verini, *The Prosecutor and the President*, N.Y. TIMES MAG. (June 26, 2016), https://www.nytimes.com/2016/06/26/magazine/international-criminal-court-moreno-ocampo-the-prosecutor-and-the-president.html?_r=0. The difficulty inherent in prosecuting an individual who is a head of state, even if the crimes alleged were committed before taking that position, is illustrated in the ICC's attempted prosecution of Kenyan President Uhuru Kenyatta for acts related to election violence. See *id.*

175. Owen Bowcott, *Sudan President Omar al-Bashir Leaves South Africa as Court Considered Arrest*, GUARDIAN (June 15, 2015, 11:01 AM), <https://www.theguardian.com/world/2015/jun/15/south-africa-to-fight-omar-al-bashirs-arrest-warrant-sudan>.

V. CONCLUSION

The international community created the ICC out of a desire to seek justice for the gravest crimes of mankind. The Court's decision in the noted case affirms that rape and sexual violence no longer occupy a subordinate status among that highest class of transgressions. The decision reaffirms the recent increased acceptance of rape as a heinous tool of war and the devastating impact on the individuals it is wielded against. Bemba's own conviction also provides hope that the Court might find others accountable for the crimes committed by those under their command in the future. Unfortunately, many African nations are withdrawing from the ICC because Bemba and all others charged or convicted by the ICC since its founding are Africans, claiming the ICC has a disproportionate focus on African prosecutions.¹⁷⁶ These potential withdrawals threaten to undermine the legitimacy and effectiveness of the ICC in addressing new situations and violations that will undoubtedly arise. However, the political discontent and emerging doubts about the ICC's future cannot undermine the legal and social significance of the first instance in which the world's permanent criminal court designated an individual as a war criminal for acts of sexual violence.

Clay Anthony*

176. Alexandra Zavis and Robyn Dixon, *Only Africans Have Been Tried at the Court for the Worst Crimes on Earth*, L.A. TIMES (Oct. 23, 2016, 2:20 PM), <http://www.latimes.com/world/africa/la-fg-icc-africa-snap-story.html>.

* © 2017 Clayton Anthony. J.D. candidate 2017, Tulane University Law School; B.A. 2013, Tulane University. This Case Note is dedicated to my mother, who proved humanity is indispensable in law and the pursuit of justice.