

ESSAY

THE GREATEST MEASURE OF DETERRENCE: A CONVICTION FOR
JEAN-PIERRE BEMBA GOMBO

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“Justice is coming for the victims, for the victims of the Central African Republic, for the victims of massive sexual violence worldwide . . . we listened to them, and we transformed their painful stories into evidence. There will be no impunity . . .

Jean-Pierre Bemba was a Vice-President and is a Senator, but has no immunity before the International Criminal Court; he will face justice.”

— ICC prosecutor Luis Moreno-Ocampo¹

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¹ *Former DRC Rebel Arrives in The Hague to Face War Crimes Charges*, ASSOCIATED FOREIGN PRESS, July 3, 2008, available at http://afp.google.com/article/ALeqM5i_UpRXsRzI0faSrO5BLx1IEI2CZA [hereinafter *War Crimes Charges*].

I. INTRODUCTION

The landscape of modern warfare has changed dramatically over the past ninety years since World War I. In that time, there have been great technological advances in ground, naval and air engagements. From the development of the nuclear bomb to the advent of cyber warfare, the landscape of the modern battlefield has completely changed from the trench warfare that permeated World War I. While the weapons systems have all changed dramatically, many of the crimes perpetrated in warfare have remained the same. Although almost all of these crimes have been punished by various national and international courts, one crime – rape – has escaped prosecution until very recently.²

Rape has always been a tool of terror and subjugation – a hallmark of war dating back to antiquity. Euripides' tragedy, *The Trojan Women*, details the rape and subjugation of the women who survived the famous sacking of Troy in 415 B.C.³ Until very recently, rape was seen more as a consequence of war and less as something that must be punished.⁴ In modern times, however, there has been an increasing shift in the way that the crime of rape has been viewed.⁵

During the 1994 Rwanda genocide, hundreds of thousands of rapes allegedly took place. In its 1998 verdict against Jean-Paul Akayesu, the International Criminal Tribunal for Rwanda (hereinafter ICTR) handed down not only the first genocide conviction by an international court but also the first conviction for rape as an act of genocide.⁶ Building upon this conviction, in the prosecution of crimes committed during the Yugoslavian War by Serbian Forces against the Muslim population at Foča, the International Criminal Court for the former Yugoslavia (hereinafter ICTY) held that rape was not only a war crime, but a crime against humanity.⁷

² See Prosecutor v. Kunarac, Kovac & Vukovic, Case Nos. IT-96-23 & IT-96-23/1-T, Judgment, (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf> [hereinafter Kunarac Judgment]; *International Justice Failing Rape Victims*, INST. FOR WAR & PEACE REPORTING (Feb. 15, 2010), <http://iwpr.net/report-news/international-justice-failing-rape-victims> (rape had been tried as a war crime and as a crime of genocide in Rwanda) [hereinafter *Justice Failing Rape Victims*].

³ NEIL T. CROALLY, EURIPIDEAN POLEMIC: THE TROJAN WOMEN AND THE FUNCTION OF TRAGEDY 55, 98-99, 132-33 (1994).

⁴ See generally Phyllis Chesler, *What is Justice for a Rape Victim?*, ON THE ISSUES MAG. (Winter 1995), available at <http://www.phyllis-chesler.com/116/what-is-justice-for-a-rape-victim>.

⁵ See *id.*

⁶ See *Justice Failing Rape Victims*, *supra* note 2.

⁷ See Serbian War Crimes Prosecutor's Office, *Facts about Foča*, JUST. IN TRANSITION, Dec. 2005, available at http://www.icty.org/x/file/Outreach/view_from_hague/jit_foca_en.pdf [hereinafter *Facts about Foča*].

The International Criminal Court (ICC) is currently hearing the case of former Democratic Republic of the Congo (DRC) Vice-President Jean-Pierre Bemba Gombo. What makes Bemba Gombo's case so unique is that, unlike the Serbians who were tried and sentenced for their crimes at Foča, Bemba Gombo is not accused of actually committing the rapes himself.⁸ Instead, the Prosecutor of the International Criminal Court has charged Bemba Gombo with failing to prevent soldiers under his command from committing mass crimes of rape, among other alleged war crimes.⁹ To be clear, Bemba Gombo has not been found guilty by the ICC, and this paper rests on the presupposition that forces under Bemba Gombo in fact committed these war crimes.

If Bemba Gombo were to be found guilty, a conviction would make a tremendous statement in the effort to prevent rape as a consequence of war. Military and civilian leaders everywhere would be forced to exert greater control over their military forces to prevent this heinous crime that has pervaded the landscape of war since time immemorial.

II. RAPE IS A WAR CRIME FOR THE FIRST TIME

In the *Prosecutor v. Gragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (hereinafter *Kunarac et al.*), the ICTY heard evidence of Serbian forces taking women from detention centers in the town of Foča and repeatedly raping them.¹⁰ In 2001, the prosecutors at the ICTY secured a conviction for rape in the groundbreaking 2001 Foča verdict. For the first time, the Court's ruling confirmed the use of rape as a crime against humanity.¹¹

On the morning of July 3, 1992, Serbian forces captured Foča and the surrounding areas, killing many of the village men as well as anyone who attempted to flee; the women and children were immediately taken to impromptu detention facilities such as high schools and sporting complexes.¹² The conditions of the detention centers were deplorable – the food was meager and irregular, the sanitary conditions were inhumane, and there was no medical care.¹³ While the women were interned at the various detention facilities, armed guards patrolled the area making escape

⁸ See *War Crimes Charges*, *supra* note 1.

⁹ See *id.*

¹⁰ See *Facts about Foča*, *supra* note 7.

¹¹ See *supra* note 2 and accompanying text.

¹² See *Facts about Foča*, *supra* note 7.

¹³ See *id.*

impossible.¹⁴ The women of Foča were detained for nearly eighteen months by members of the Serbian Army and paramilitary groups.¹⁵

During the trial of *Kunarac et al.*, hundreds of witnesses testified that they were repeatedly raped – often more than once a day by multiple Serbian soldiers.¹⁶ One witness whose identity was protected in accordance with ICTY criminal procedure poignantly described the horror to which she and the women of Foča were subjected:

Q. What did the soldiers do when they came to this house?

A. Usually they would select one of the girls and take her off to the second floor.

Q. How long were you kept at Karaman's house?

A. I can't remember that exactly. A month and a half, two months perhaps, although I'm not quite sure.

Q. During that time, what happened to you there?

A. I, like all the other girls in Karaman's house, was raped by the Serb soldiers. I think that after a certain amount of time, that two other girls were brought in, or three, but at any rate, all of them were raped either every night or every other night often.

Q. Are you able to count how many times you were raped in Karaman's house?

A. I don't think that is possible.¹⁷

The Partizan Sports Hall, perhaps the most infamous of the detention centers in Foča, was allegedly set up and maintained with the purpose of providing sexual enslavement of the Muslim women under the control of the Serbian paramilitary soldiers.¹⁸ Certainly, one of the most important aspects of *Kunarac et al.* was that in addition to providing the first prosecution of rape as a crime against humanity, the case also established sexual enslavement as a crime against humanity for the first time in history.¹⁹ The Court wrote that, "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter

¹⁴ *See id.*

¹⁵ *See id.*

¹⁶ *See Kunarac Judgment, supra* note 2.

¹⁷ *Prosecutor v. Kunarac, Kovac & Vukovic*, Case Nos. IT-96-23 & IT-96-23/1-T, Trial Transcript, 1661 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), <http://www.icty.org/x/cases/kunarac/trans/en/000404ed.htm>.

¹⁸ *See Facts about Foča, supra* note 7.

¹⁹ *See id.*

escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour,” constituted a crime against humanity.²⁰

The Trial Court also found that the rapes at Foča were systemic – that while the accused soldiers were the ultimate perpetrators of crimes, many in the town of Foča were also culpable to a certain degree.²¹ The Court stated that:

What the evidence shows, is that the authorities who were meant to protect the victims, such as the local police which had been taken over by the Serbs, turned a blind eye to their suffering. Instead, they helped guard the women, and even joined in their maltreatment when approached by them for help against their oppressors.²²

As with a great majority of the war crimes committed during the Yugoslavian War, the rapes at Foča were ethnically and religiously motivated.²³ The ICTY Trial Court summarized the damage that the numerous sexual assaults caused with great candor and eloquence: “What the evidence shows, are Muslim women and girls, mothers and daughters together, robbed of the last vestiges of human dignity, women and girls treated like chattels, pieces of property at the arbitrary disposal of the Serb occupation forces”²⁴ Indeed, the one of the most damaging aspects of these heinous crimes is the cultural and religious importance that the Islamic faith places on celibacy prior to marriage.²⁵

On appeal, the ICTY Appellate Court affirmed the trial court’s ruling and dismissed the Serbian soldiers’ claims that sexual satisfaction was the object of their actions and not torture.²⁶ The Court further found that for rape to be categorized as torture, as it was in this case, and thereby a crime against humanity, all of the elements of rape and of torture must be

²⁰ Kunarac Judgment, *supra* note 2, ¶ 543.

²¹ See Prosecutor v. Kunarac, Kovac & Vukovic, Case Nos. IT-96-23 & IT-96-23/1-T, Summary of Judgment (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), http://www.icty.org/x/cases/kunarac/tjug/en/010222_Kunarac_Kovac_Vukovic_summary_en.pdf [hereinafter Kuranac Summary of Judgment].

²² *Id.*

²³ See *Facts about Foča*, *supra* note 7.

²⁴ Kunarac Summary of Judgment, *supra* note 21.

²⁵ See generally Abdul Kasem, *Sex and Sexuality in Islam Part I*, ISLAM WATCH (Nov. 20, 2005), http://www.islam-watch.org/AbulKasem/SexInIslam/sex_and_sexuality_in_islam.htm (quoting *008 Sahih Muslim, Verse 3459*) (passage between Prophet Muhammad and Jabir bin ‘Abdullah demonstrates the origins of the Islamic religious importance of virginity prior to marriage).

²⁶ See Kunarac Judgment, *supra* note 2, ¶ 180.

present.²⁷ In discussing why it viewed the actions of the defendants as rising to the level of torture, the ICTY Appellate Court stated that:

The physical pain, fear, anguish, uncertainty and humiliation to which the Appellants repeatedly subjected their victims elevate their acts to those of torture. These were not isolated instances. Rather, the deliberate and co-ordinated commission of rapes was carried out with breathtaking impunity over a long period of time. . . . Whether rousted from their unquiet rest to endure the grim nightly ritual of selection or passed around in a vicious parody of processing at headquarters, the victims endured repeated rapes, implicating not only the offence of rape but also that of torture.²⁸

By enumerating the impact on the victims and the calculated, frequent acts of forced intercourse as well as by dismissing the sexual satisfaction argument of the appellants, the ICTY Appellate Court has provided a clear and articulable standard that affords prosecutors the ability to try similar actions by military or paramilitary forces in the future.

While some of the crimes committed at Foča were prosecuted, other crimes such as the involvement of local authorities went unpunished.²⁹ Correspondingly, the prosecution of *Kunarac et al.* stands as the only prosecution of rape as a crime against humanity by the ICTY despite many thousands of other similar offenses committed in the Yugoslavian War. The budgetary and manpower restrictions placed on the ICTY, as well as the difficulty of obtaining solid evidentiary foundation to prosecute make it very difficult to indict and try many of the crimes committed in this war.³⁰ These limitations will always pose a hindrance to holding the perpetrators of crimes against humanity accountable. In particular, prosecution of the crime of rape is especially challenging when it occurs outside the chaos of war – let alone in the midst of a turbulent armed conflict.

Providing greater deterrence through criminal prosecution against the crime of rape offers the most effective way to combat the psychology, during war, that rape is somehow an acceptable consequence of war – because prosecution of the military commanders ensures that the message will be received throughout the military chain of command. Military Commanders will enforce much tighter restrictions on the actions of their

²⁷ See *id.* ¶ 182.

²⁸ *Id.* ¶ 185.

²⁹ See *Facts about Foča*, *supra* note 7.

³⁰ See *The Cost of Justice*, U.N. INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/325> (last visited Nov. 18, 2011); see also Laura Monchak, *Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY*, 31 YALE J. INT'L L. 477, 478-79 (2006).

soldiers if they feel that they themselves may be prosecuted for the crimes of rape committed by their Soldiers.

III. A MILITARY COMMANDER TRIED FOR CRIMES COMMITTED BY HIS SOLDIERS

A conviction in the trial of Jean-Pierre Bemba Gombo offers the unique possibility of providing the greatest possible deterrence to the crime of rape. His rise to power and visibility through his government positions as both a political and military leader of the DRC make his case of even greater import in the fight against impunity for the crime of rape. He rose to power through his control of the Movement for the Liberation of Congo (MLC), a Congolese political party that emerged from a militia group of the same name.³¹ A conviction would be significant because it would send a clear message to military commanders that they are accountable for rapes committed by their subordinates in the same way that they are currently accountable for other heinous war crimes.

In 2003, Bemba Gombo and his paramilitary MLC assisted in quelling a coup in the Central African Republic (CAR) at the behest of that country's President.³² Subsequently, Bemba Gombo became one of the four Vice-Presidents of the Congo after the assassination of President Laurent Kabila.³³ In 2008, the Prosecutor of the International Criminal Court subsequently charged Bemba Gombo with two charges of crimes against humanity – murder and rape – and three charges of war crimes – murder, rape, and pillaging – for crimes that allegedly occurred in the CAR between October 26, 2002 and March 15, 2003.³⁴ MLC forces allegedly carried out a widespread and systematic attack against the civilian population in the CAR towns of Bossangoa, Bossembele, Damara and Mongoumba.³⁵

Because the CAR ratified the Rome Statute³⁶ in 2001 before these alleged crimes took place in the CAR and because the CAR referred these

³¹ See *Who is Jean-Pierre Bemba Gombo?*, THE TRIAL OF JEAN-PIERRE BEMBA GOMBO, <http://www.bembatrial.org/trial-background/who-is-jean-pierre-bemba-gombo> (last visited Nov. 9, 2011).

³² See *id.*

³³ See *id.*

³⁴ See *id.*

³⁵ See *id.*

³⁶ The Rome Statute is the treaty that established the International Criminal Court. The statute allows for the prosecution of the gravest of international crimes: genocide, crimes against humanity, war crimes, and crimes of aggression. Currently, 119 countries are parties to the Statute, and crimes that occur within their jurisdiction may be investigated and prosecuted by the ICC. See generally Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force on July 1, 2002), available at <http://untreaty.un.org/cod/icc/statute/romefra.htm> [hereinafter The Rome Statute].

crimes to the ICC in 2004 due to their inability to try Bemba Gombo once he fled the CAR, the International Criminal Court has jurisdiction over the matter.³⁷ On June 15, 2009, the Pre-Trial Chamber II found that there was sufficient evidence to establish the criminal responsibility of Bemba Gombo and referred the case to the ICC Trial Court.³⁸ The trial began on November 22, 2010³⁹ and is still ongoing.⁴⁰

The main theory of the case for ICC Chief Prosecutor, Luis Moreno-Ocampo, relies on the theory that Bemba Gombo knew that MLC troops were committing crimes, but did not take any or all necessary and reasonable measures within his power to prevent or repress their commission.⁴¹ The Prosecution intends to prove that Bemba Gombo had a responsibility as a military commander under Article 28(a) of the Rome Statute, and that his dereliction of command responsibility ultimately led to the five war crimes with which he is now charged.⁴²

Article 28(a) of the Rome Statute, which was created in the International Criminal Court on July 1, 2002, deals with the responsibilities of a military commander over subordinate soldiers in an armed conflict.⁴³ It states that:

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

³⁷ See *Case Information Sheet: Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, INT'L CRIM. CT., <http://www.icc-cpi.int/iccdocs/PIDS/publications/BembaEng.pdf> [hereinafter *Case Information Sheet*].

³⁸ See *id.*

³⁹ See *ICC – Press Conference on the Opening of the Jean-Pierre Bemba Trial*, INT'L CRIMINAL COURT (Nov. 18, 2010), <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/icc%200105%200108/press%20releases/ma80?lan=en-GB> [hereinafter *Bemba Gombo Press Release*].

⁴⁰ See *ICC Hearing Schedule*, INT'L CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Hearing+Schedule/> (last visited Nov. 18, 2011).

⁴¹ See *Case Information Sheet*, *supra* note 37.

⁴² See *Bemba Gombo Press Release*, *supra* note 39.

⁴³ See *The Rome Statute of the International Criminal Court*, *supra* note 36, art. 28(a).

prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.⁴⁴

For Jean-Pierre Bemba Gombo to be found guilty by the ICC, the prosecutors will have to prove that the actions of the MLC forces were so systematic and widespread that it would have been impossible for Bemba Gombo, as the leader of these forces, not to realize that these crimes were being committed.⁴⁵ Furthermore, the prosecution must show that Bemba Gombo failed to restrain his forces from committing these crimes – it is not necessary to show that he ordered or condoned the rapes of women and men in the CAR, but merely that he did not prevent them from occurring.⁴⁶ There is also no requirement that a policy of forcible rape, torture, murder or any aspect of the charges be formalized by Bemba Gombo to his troops.⁴⁷

The case against Jean-Pierre Bemba Gombo has not been decided; however, the findings of the ICC Pre-Trial Chamber, which referred the case to the ICC Trial Court, are instructive as to what the prosecution seeks to admit into evidence during trial as well as to providing a baseline for how the judges viewed the evidence presented during the Pre-Trial investigation.⁴⁸ The Pre-Trial Court easily found that the attacks were “widespread” both by the number of victims and the large geographical area covered, and that it would have been impossible for Bemba Gombo—as the commander of the MLC—not to know what his soldiers were doing.⁴⁹ In fact, the Court found that the acts perpetrated by MLC soldiers against the CAR civilian population were conducted “pursuant to an organizational policy.”⁵⁰

Because the alleged crimes have characteristics that fall within the court’s definition of “widespread,” something that the Court notes even the defense did not dispute during the Pre-Trial hearings,⁵¹ the question becomes whether the crimes themselves were committed. Bemba Gombo faces two separate charges for the crimes of rape – first, as a crime against humanity under Article 7(1)(g) of the Rome Statute, and second, as a war crime under

⁴⁴ *Id.*

⁴⁵ *See id.*

⁴⁶ *See id.*

⁴⁷ *See* Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, The ICC Pre-Trial Chamber II, ¶ 81 (June 15, 2009), <http://www.iclklamberg.com/Caselaw/CAR/Bemba/PTCII/424.pdf> [hereinafter Pre-Trial Findings] (citing Prosecutor v. Tadić, Case No. IT-94-I-T, Opinion and Judgment, ¶ 653 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>).

⁴⁸ *See id.*

⁴⁹ *See id.* ¶ 117.

⁵⁰ *See id.* ¶ 110.

⁵¹ *See id.* ¶ 118 (during the pre-trial, the defense referred to several hundred instances of alleged war crimes).

Article 8(2)(e)(vi) of the Rome Statute.⁵² In addition to facing charges for rape as a war crime and a crime against humanity, Bemba Gombo faces charges for murder as a war crime and a crime against humanity as well as the war crime of pillaging.⁵³

The key differences between a war crime and a crime against humanity are that a war crime must occur during an armed conflict while a crime against humanity can but need not occur during an armed conflict; however, a crime against humanity must be “widespread” and/or “systematic” while these would be additional and unnecessary elements of a war crime.⁵⁴ Both Article VII and VIII forbid “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence.”⁵⁵ Rape under the Rome Statute is gender neutral, and contains the following definitional requirements:

(1) The 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;

(2) The invasion was committed by force, or by 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 another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.⁵⁶

The testimony from witnesses and victims of the heinous crimes committed by MCL soldiers provides an extremely enlightening picture of the disturbing latitude given by Bemba Gombo to his subordinates.⁵⁷ In almost every instance of a rape allegation by citizens of the CAR, the MCL soldiers threatened to kill the victim or members of the victim’s family, and often placed their weapons next to the victims or aimed directly at the victims as a further means of coercion.⁵⁸ The rape victims were as young as ten years old, and many of the rapes occurred in front of family members,

⁵² *See id.*

⁵³ *See id.*

⁵⁴ *See* Micaela Frulli, *Are Crimes Against Humanity More Serious Than War Crimes?*, 12 EUR. J. INT’L. L. 329, 334 (2001); *see also* F. MANTOVANI, DIRITTO PENALE 815-17 (3d ed. 1999).

⁵⁵ The Rome Statute, *supra* note 36, §§ 7(1)(g), 8(2)(e)(vi).

⁵⁶ Pre-Trial Findings, *supra* note 47, ¶¶ 7-8 n.15-16.

⁵⁷ *See id.*

⁵⁸ *See id.* ¶¶ 181-82.

including spouses and children.⁵⁹ The victims were often gang-raped and sometimes contracted HIV or became pregnant.⁶⁰

While rape has historically been used a tool of fear and subjugation against women, as was the case in Foča, in the Central African Republic, MLC troops raped both women and men, which is significant because rape is probably most frequently viewed solely as a male-on-female crime; clearly, this case demonstrates that rape victims in international conflict are not always of one archetype. One witness testified that he was raped by three separate soldiers in the presence of his wife and children.⁶¹ Soon thereafter, at least two of this victim's daughters were also raped by MLC soldiers.⁶²

In light of the detailed and overwhelming testimony, the Pre-Trial Chamber found that the soldiers had the requisite *mens rea*, in other words knowledge and intent, to support referring this case to the ICC Trial Court.⁶³ As is the case with most criminal trials, the credibility and testimony of these witnesses is certain to be the linchpin for conviction or acquittal at trial, and if convicted, will likely provide the impetus for the type of sentence that Bemba Gombo would receive.

IV. ISSUES RAISED BY THE DEFENSE

In addition to the many criticisms of witness credibility that are often a part of the defense's case in criminal trials, the defense for Bemba Gombo has raised a few defenses and challenges to the credibility of the prosecution's case that might be more akin to a war crimes trial.⁶⁴ The Defense contradicts the prosecution's assertion that Bemba Gombo had any control over of the MLC soldiers under his command, but rather that these soldiers received their orders directly from President of the CAR, Mr. Ange-Félix Patasse, who recently died.⁶⁵ This position lacks merit based on previous precedent holding all levels of commanders culpable dating all the way back to Nazi leaders at Nuremberg.⁶⁶ The prosecution's logical response at trial on this issue, based on the charging language of the

⁵⁹ See *id.* ¶¶ 174-85.

⁶⁰ See *Who is Jean-Pierre Bemba Gombo?*, *supra* note 31.

⁶¹ See Pre-Trial Findings, *supra* note 47, ¶ 171.

⁶² See *id.*

⁶³ See *id.* ¶ 187.

⁶⁴ See Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-T-11, Pre-Trial Chamber III, at 45-50, 52 (Jan. 14, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc618933.pdf> [hereinafter Pre-Trial Chamber III].

⁶⁵ See *id.*

⁶⁶ See generally *Judgment of the International Military Tribunal for Germany*, PROCEEDINGS OF THE INT'L MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY, (Oct. 1, 1946), available at http://avalon.law.yale.edu/subject_menus/judcont.asp.

offenses, is likely to be that the President of the CAR and Bemba Gombo acted “jointly” and therefore are both criminally culpable for all war crimes perpetrated against the civilians of the CAR.⁶⁷

Interestingly, while the defense asserted that Bemba Gombo had no prior knowledge of the murders that his MLC troops committed,⁶⁸ the defense made no such complaint about the rapes – at least in the pre-trial proceedings. Instead, the defense has chosen to attack the credibility of many of the victims who are anonymous in accordance with ICC procedures.⁶⁹ The defense has also claimed that certain victims had sex with soldiers on a voluntary basis.⁷⁰ Based on the volume of testimony of victims the Pre-Trial Court justifiably found this argument unpersuasive.⁷¹

The defense has alleged that this “is the most unfair trial that international justice has ever seen” due in large part to the fact the panel of judges is made up entirely of women.⁷² This assertion was made in the media, and it would make sense that the defense might use this alleged bias as grounds for an appeal of a conviction on any of the charged offenses.⁷³ It is hard to imagine the ICC Appellate Court overturning a conviction for this issue; however, there does appear to be a certain degree of irony that this could be the first time that a military commander has been held accountable for the rapes committed by his troops, and his fate lies completely in the hands of the gender that has frequently been at the mercy of male commanders like Jean-Pierre Bemba Gombo.

V. CONCLUSION

Rape has been an unfortunate tool of terror often sanctioned by military commanders and used against the most defenseless during times of war. Until the crimes in Foča and Rwanda were tried and punished by their respective tribunals, impunity for this crime had been accepted as a reality for as long as war had existed – in other words, since the beginning of time. The conviction in *Kunarac et al.* sent an important message that the

⁶⁷ See Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-395-Anx3, Office of the Prosecutor, at 37 (Mar. 30, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc652083.pdf>.

⁶⁸ Pre-Trial Chamber III, *supra* note 64, at 55-56.

⁶⁹ See Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-T-11, Pre-Trial Chamber II Judgment, at 59 (July 15, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf> (citing Pre-Trial Chamber III, *supra* note 65, at 51).

⁷⁰ See *id.* (citing Pre-Trial Chamber III, *supra* note 64, at 54).

⁷¹ See *id.* at 60.

⁷² See *Landmark Bemba Trial Hears First Evidence*, HAGUE JUST. PORTAL (Nov. 27, 2010), <http://www.haguejusticeportal.net/smartsite.html?id=12305>.

⁷³ See *id.*

international legal community would no longer tolerate the act of rape as a spoil of war. A conviction in the case of Jean-Pierre Bemba Gombo would be an even further step in the prevention of rape.

Yet despite these recent successes, many international humanitarian experts argue that international justice is still failing the victims of sexual violence.⁷⁴ For every rape that is punished, tens of thousands go either unreported or unprosecuted because of the investigatory or evidentiary difficulties that experts face.⁷⁵ Of course, the difficulty that many prosecutors face in domestic rape cases is certain to be faced by International Criminal Court prosecutors in their various trials: a lack of strong evidence that will convince a jury and/or a victim who is unable to provide credible testimony for a myriad of reasons.

Unlike many crimes that are alleged to have been committed during a time of war, *The Prosecutor v. Jean-Pierre Bemba Gombo* offers an unusually large volume of detailed and credible victims' and witnesses' testimony. A conviction in this case would provide the greatest tool to human rights advocates in their fight against impunity for rape during armed conflicts – deterrence. Military commanders will be more likely to prevent future rapes because they will hold their troops accountable if they themselves are held accountable by the International Criminal Court.

Article 28(a) of the Rome Statute holds military commanders accountable for the widespread and systematic crimes of their subordinates. The soldiers of the MLC perpetrated many brutal murders and rapes against the citizenry of the CAR. Convicting former Congolese Vice-President Jean-Pierre Bemba Gombo in his capacity as commander of these war criminals will send a powerful message to all military commanders that they are responsible for the actions of their subordinates – even if the crime of rape during an armed conflict has historically been neglected by prosecutors. While unable to assuage the terrible pain and suffering caused by rape, this type of deterrence would be a powerful step in ensuring that there are far fewer victims of rape in the future.

⁷⁴ *See id.*

⁷⁵ *See id.*