

THE PERPETRATOR BEHIND THE PERPETRATOR: A CRITICAL ANALYSIS OF THE THEORY OF PROSECUTION AGAINST OMAR AL-BASHIR

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I. INTRODUCTION

The prosecution of the current President of the Republic of Sudan, Omar Hassan Ahmad Al Bashir, for the crime of rape represents a significant moment in the history of the International Criminal Court (ICC). First, the criminal indictment issued by Luis Moreno-Ocampo, the Prosecutor for the ICC, marks the first time that an international body has indicted a sitting head of state. Second, Bashir's arrest warrant also marks the first time that an international criminal tribunal has invoked perpetration-by-means as the *only* theory underlying the charge.¹

Perpetration-by-means is a theory of liability rooted in German Law; it imputes individual liability to an indirect perpetrator for the crimes committed by people over whom the indirect perpetrator had complete control.² Under this theory, the indirect perpetrator uses others to physically commit crimes. According to the theory, it is justifiable to hold the indirect perpetrator liable for such crimes as though he committed them himself.³ The ICC expressly codified this doctrine in Article 25(3)(a) of the Rome Statute.⁴

This Comment discusses several concerns regarding the Prosecutor's choice to rely only on this theory of liability and argues in favor of including an alternate theory for three main reasons. First, the ICC has never applied perpetration-by-means to a civilian leader, such as a sitting head of state. Thus, Bashir's case is not analogous to prior ICC jurisprudence. Second, the Prosecutor may face significant evidentiary hurdles in demonstrating that Bashir, as the sitting head of state, exerted the amount of control over the entire military apparatus that application of the perpetration-by-means doctrine requires. Third, even though the ICC need not look to any other international tribunal when interpreting and applying its own

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1. Prosecutor v. Omar Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest, (Mar. 4, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>.

2. Florian Jessberger & Julia Geneuss, *On the Application of a Theory of Indirect Perpetration in Al Bashir: German Doctrine at the Hague?*, 6 J. INT'L CRIM. JUSTICE 853, 854-55 (2008).

3. *Id.* at 855.

4. Rome Statute of the ICC, Art. 25, Jul. 17, 1998, U.N. Doc. A/CONF.183/9, (Jul. 17, 1998), available at <http://untreaty.un.org/cod/icc/statute/rome.htm> [hereinafter Rome Statute of the ICC].

statute, diverging from well-established customary international legal norms may undermine the legitimacy of the court at a crucial juncture in its existence.

Bashir's indictment is particularly important because of the atrocities that have taken place in the Sudan. Women in the Darfur region of Sudan are the victims of rampant and pervasive sexual violence allegedly perpetrated by members of the government-backed militia.⁵ For years, women have gone without recourse, aid, or justice.⁶ The ICC's decision to indict Bashir on rape, among other charges,⁷ is momentous and symbolic for both victims and the ICC.

By criminalizing the actions of a state leader for his purported involvement in these horrific crimes, the ICC has entered uncharted territory that will undoubtedly have an impact on the ability of the international community to bring all perpetrators of large-scale, international crimes to justice, regardless of their high-ranking governmental position. Because of the heightened importance of this case, the Prosecutor should use a theory of liability that makes it more likely that Bashir will be convicted of rape crimes. This Comment does not object to the use of a theory of perpetration-by-means at all. Instead, it argues that the Prosecutor should proceed cautiously and not rest his case solely on this infrequently used theory of liability. For this reason, he should also include a theory of Command Responsibility to reduce the likelihood that these concerns will hamper his prosecutorial strategy.

Part A of this Comment will explain the prevalence of rape in the context of war and highlight the prosecutorial challenges that are unique to rape crimes, with particular focus on perpetration by superiors. Part B will provide the background of the ICC, the structure of its governing law (the Rome Statute), and the components of Bashir's arrest warrant. The following section, Part C, will set forth theories of liability in international law and discuss the historical context of perpetration-by-means. Part D will explain arguments in favor of perpetration-by-means and analyze the development of the theory of indirect perpetration by examining its use in an ad-hoc tribunal, as well as two cases before the ICC. This section will also offer arguments in support of including another theory of liability, one that does not emphasize control over the organization and apparatus. By using the crime of sexual violence as the focal point for the weaknesses in indirect perpetration, this article concludes that Prosecutor Moreno-Ocampo should not have used perpetration-by-means as the only theory of liability. In order to thoroughly prosecute Bashir, Prosecutor Moreno-Ocampo should have included a theory of Command Responsibility.

II. SEXUAL VIOLENCE DURING TIMES OF WAR

The indictment of Bashir is particularly important due to the history of

5. HUMAN RIGHTS WATCH, FIVE YEARS ON: NO JUSTICE FOR SEXUAL VIOLENCE IN DARFUR I (2008), available at <http://www.hrw.org/en/node/62269/section/1> [hereinafter HUMAN RIGHTS WATCH].

6. *Id.*

7. See *infra* note 80 for other charges for which Bashir was indicted.

longstanding and widespread sexual violence against Sudanese women by the government-controlled militia.⁸ Rape has been present in war for centuries.⁹ Although international law has explicitly criminalized rape:

the security of women in situations of armed conflict or mass repression is little improved and in fact may have worsened. Indeed, violence against women continues to be employed as a deliberate ‘tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group.’¹⁰

The pervasiveness of violence against women during wartime underscores the need for the international community to bring those responsible to justice.¹¹

Since 2003, Sudanese women have been the targets of sexual violence allegedly perpetrated by the Janjaweed militia,¹² a group that is supposedly controlled by the Sudanese government.¹³ Although there are many harrowing accounts of women’s experiences in the Sudan, accurate statistics on the amount of sexual violence are difficult to obtain because victimized women do not openly discuss their experiences for fear that they will be further harassed, stigmatized, and ostracized by their families and community.¹⁴ As a result, statistics on this subject may be grossly underestimated.¹⁵

There are many reasons why sexual violence is employed during the time of war. For example, some scholars believe that the motivation behind mass rape is the desire to terrorize and displace the population.¹⁶ Another alleged motivation behind the rape is forced impregnation.¹⁷ This strategy is a form of ethnic

8. HUMAN RIGHTS WATCH, *supra* note 5, at 1.

9. Rana Lehr-Lehnardt, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 BYU J. PUB. L. 317, 317 (2002).

10. Beth Van Schaak, *Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson*, 17 AM. U.J. GENDER SOC. POL’Y & L. 361, 363 (2009) (quoting S.C. Res. 1820, intro., U.N. Doc. S/RES/1820 (June 19, 2008)).

11. HUMAN RIGHTS WATCH, *supra* note 5, at 2-3.

12. *Id.* at 6-9

13. *Omar Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest at 4-5.

14. AMNESTY INT’L, RAPE AS A WEAPON OF WAR: SEXUAL VIOLENCE AND ITS CONSEQUENCES 11 (2004), *available at* <http://www.amnesty.org/en/library/asset/AFR54/076/2004/en/f66115ea-d5b4-11dd-bb24-1fb85fe8fa05/afr540762004en.pdf> [hereinafter AMNESTY INT’L]. “Women will not tell you easily if they have been raped. In our culture, it is a shame. Women hide this in their hearts so that men don’t hear about it.” *Id.* at 17. Married women are also disowned by their husbands after they are raped. *Id.* at 18. To encourage family members, particularly husbands, to accept their wives back into the marriage, victims are given a certificate that they were raped and husbands are informed that they might someday receive compensation. Alfred de Montesquiou, *Darfur Women Describe Gang-Rape Horror*, WASH. POST, May 28, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/27/AR2007052700634.html>.

15. HUMAN RIGHTS WATCH, *supra* note 5, at 10-11.

16. *Id.* at 6.

17. AMNESTY INT’L, *supra* note 14, at 26. On the flipside, there is testimony of women being killed because the members of the Janjaweed believed they were carrying civilian babies.

cleansing that breaks down strong ethnic ties and prevents certain ethnicities from procreating.¹⁸ These forced pregnancies have severe consequences for women; many have actually been disowned by their husbands and families for giving birth to an “enemy” baby.¹⁹

Amnesty International reports that, over the course of a six-year period, women in Sudan were systematically and continuously raped by the government supported militia.²⁰ Several reasons are cited for the mass rapes in the Darfur region of Sudan.²¹ Some believe that mass rape is used there to tear apart communities and families by causing people to flee and never return.²² In this context, rape not only humiliates and degrades women, but can also be used to destroy the fabric of society.²³ In some cases, women were intentionally raped in public, in front of their husbands and children.²⁴

The need for foreign assistance in lending medical and psychological support to victims of rape is enormous.²⁵ However, once the ICC issued a warrant for Bashir’s arrest, the Sudanese government allegedly responded by further depriving civilians of foreign assistance.²⁶ This outcome was an enormous setback for the

One victim recounts, “I was with another woman, Aziza, aged 18, who had her stomach slit on the night we were abducted. She was pregnant and was killed as they said: “It is the child of an enemy.”” *Id.* at 12.

18. *Id.* at 29-30.

19. *Id.* at 17. See also Emily Wax, “We Want to Make a Light Baby” *Arab Militiamen in Sudan Said to Use Rape as a Weapon of Ethnic Cleansing*, WASH. POST FOREIGN SERVICE, June 10, 2004, at A01. Forced impregnation has severe consequences for Sudanese women. They are disowned by their community if they give birth to a Janjiweed militia man’s baby. As a result, women are forced to undergo not only the traumatic experience of rape, but facing the extremely difficult choice of giving birth. AMNESTY INT’L, *supra* note 14, at 17. One woman in a refugee camp explained the cultural beliefs of rape and reproduction:

Some women were raped. We heard about this. But only those who are not married can talk about it. We believe that nobody can become pregnant when raped, because this is unwanted sex and you cannot have a child from unwanted sex. For those who are in the camps in Darfur, those whom they rape day and night, they might become pregnant. Then only Allah can help the child to look like the mother. If an Arab child is born, this cannot be accepted.

AMNESTY INT’L, *supra* note 14, at 17.

20. See generally AMNESTY INT’L, *supra* note 14, at 11.

21. *Id.*

22. See *id.* (describing mass rape as a form of humiliation). “There was also another rape on a young single girl aged 17: M. was raped by six men in front on her house in front of her mother. M’s brother, S., was then tied up and thrown into the fire.” *Id.* “In July 2003, the Arabs raped M, 14 on, on the market square and threatened to shoot on the witnesses if they tried to intervene.” *Id.*

23. *Id.* at 15.

24. *Id.* at 11.

25. See generally *id.* at 14.

26. Andrew Heavens, *Expulsions hit Darfur rape victim: Aid groups*, REUTERS AFRICA, (Nov. 11, 2009), <http://af.reuters.com/article/topNews/idAFJ0E5AA0DY20091111>. It was reported that Sudan expelled thirteen foreign aid groups that were helping victims of sexual violence. *Id.* A United Nations Report from July to August 2009 documented the frequency rapes occurred after humanitarian groups were ousted. Fifty cases of sexual assault have been reported. *Id.* In one camp, thirty-five cases of rape per week were reported that took place when

people of Sudan, particularly women.²⁷ Even though there was a lull in violence at the time of the arrest, the sexual violence against women had not ceased.²⁸ Not only were women still being assaulted, but the Sudanese government also restricted their access to the outside world.²⁹ Moreover, the government allegedly arrested foreign individuals attempting to gather information on the systematic sexual violence occurring in the country.³⁰ This had a chilling effect on the humanitarian effort in Darfur, further isolating women from much needed medical and psychological support.³¹ Given such widespread abuse of women during his time in power, it is clear that Bashir should be charged with crimes related to sexual violence.

However, in addition, there is another reason why Bashir should be charged with crimes related to sexual violence: despite the widespread reporting of rape, Bashir's government indicated that it did not intend to provide support to affected civilians.³² Five years after the Darfur crisis began, the Sudanese government refused to publicly acknowledge even the *possibility* that rape could be occurring.³³ The government claims that these stories are fabricated and blown out of proportion.³⁴ Bashir has publicly maintained that rape has not taken place in Darfur:

[t]he women inside the camps are under the influence of the rebels and some are even relatives of the rebels. That's why they make these claims. We are fully convinced that no rape took place . . . these [claims] are all false allegations. It is not in the culture of the Darfuris. The Darfurian society does not have rape. It's not in the tradition.³⁵

Such statements demonstrate the necessity of charging Bashir with crimes of sexual violence. The government also tried to persuade the international

women left the camp to go farming. *Id.*

27. Michael Bear, *Omar Bashir Wants to Set the Record Straight: "No Rape" In Darfur*, CHANGE.ORG NEWS, (Oct. 14, 2008), <https://news.change.org/stories/omar-bashir-wants-to-set-the-record-straight-no-rape-in-darfur>.

28. *Id.*

29. Heavens, *supra* note 26. "Rape victims in Sudan's Darfur region have lost vital medical and psychological support since Khartoum expelled aid agencies working against sexual violence this year." *Id.*

30. Bear, *supra* note 27.

31. *Id.* "This and similar intimidation has had a chilling effect, making it difficult for humanitarian agencies even to discuss the issue." *Id.*

32. *See id.* (describing Bashir's denial of rapes and strategies for thwarting victims' efforts at accurate reporting).

33. Heavens, *supra* note 26. In a statement, Sudan's State Minister for Humanitarian Affairs, Abdel Baqi al-Jailani said that "[r]ape is against our culture, against our religion . . . If any NGO wants to work in this sector, the road is open for them. No one is placing anything in their way." *Id.*

34. *Id.* Sudanese officials have dismissed official reports on the widespread rape, calling them "propaganda" and reiterating their invitation to foreign officials to perform their own investigations. *Id.*

35. Bear, *supra* note 27.

community that it was ready to offer humanitarian assistance in response to the accusation that the government was unwilling to render support.³⁶ However, nearly six years after the conflict, women still endure repeated sexual assault and physical violence, even after fleeing to refugee camps in Chad.³⁷

Despite the factual support for charging Bashir with crimes related to sexual violence, proving such conduct may not be an easy task from a practical perspective. As the sitting head of state, Bashir is far removed from the actual commission of these crimes. On an international level, prosecutors face many challenges in obtaining rape convictions at all stages of the investigation and prosecution.³⁸ In general, crimes with a sexual component are far more difficult to investigate than other crimes.³⁹ Though always problematic, victims of this atrocity have greater difficulty coming forward and discussing these crimes.⁴⁰

Another troubling limitation is the Prosecutor's desire to charge and prosecute the most senior defendant he can hold responsible.⁴¹ This is a particularly strong concern when the charged individual is distant from the crimes.

Where superiors ordered their subordinates to commit gender-based crimes, or otherwise instigated such crimes, the direct liability of supervisors for any crimes committed is usually clear. By contrast, where superiors are prosecuted according to forms of derivative or secondary liability, such as pursuant to the doctrines of superior responsibility, linking the defendant to acts of sexual violence may raise particular challenges.⁴²

In Bashir's case, the Prosecutor must not only demonstrate the widespread and systematic rape of women by government-supported counter-insurgent groups during the period in question, but he must also prove Bashir's direct involvement in these horrific acts.⁴³

Having already discussed why sexual violence should be prosecuted, it is important to analyze the relevant law. There are several provisions within the Rome Statute, the governing instrument of the ICC, that criminalize rape and hold military commanders, as well as civilian leaders, responsible for acts perpetrated by their subordinates. The following section will discuss the relevant statutory provisions in detail.

36. *Sudan 'to accept some Darfur aid'*, BBC NEWS, April 16, 2009, <http://news.bbc.co.uk/2/hi/8003465.stm>.

37. HUMAN RIGHTS WATCH, *supra* note 5, at 6 (stating that the militia stationed in bases near refugee camps in Chad continued to taunt, harass, assault, and rape the women who attempted to pursue outside activities).

38. Van Schaak, *supra* note 10, at 368-69.

39. *Id.*

40. *Id.* at 369.

41. *Id.* at 390-91.

42. *Id.*

43. *See infra* Part (b)(2).

III. THE INDICTMENT OF BASHIR UNDER THE ROME STATUTE

The ICC⁴⁴ was established for the primary purpose of bringing individuals to justice for committing atrocities of grave concern to the international community.⁴⁵ The ICC was founded on the principle that perpetrators should not receive immunity by hiding behind high ranking titles within their respective countries.⁴⁶ Instead, the ICC seeks to arrest, prosecute, and bring to justice any individual found to be in violation of the crimes set forth in the Rome Statute.⁴⁷

Based in The Hague, Netherlands, the ICC is an independent institution made up of four different bodies: The Presidency, the Judicial Divisions, the Registrar, and the Office of the Prosecutor.⁴⁸ The Office of the Prosecutor is currently headed by Prosecutor Luis Moreno-Ocampo. He is responsible for investigating cases and prosecuting crimes before the Court; he also issued the arrest warrant for Bashir.⁴⁹ Currently, in addition to the conflict in Sudan, the Court is handling three other major ongoing investigations in Uganda, the Democratic Republic of Congo, and the Central African Republic.⁵⁰

A. The Rome Statute

In July 1998 the ICC was established under the Rome Statute, which, after being ratified by the requisite 60 states, entered into force on July 1, 2002.⁵¹ Articles 7 and 8 of the Rome Statute proscribe rape.⁵² It is considered both a crime against humanity and a war crime.⁵³ Article 7 defines a crime against humanity as “any of the following acts when committed as a part of a widespread or systematic

44. On July 1, 2002 the Rome Statute was ratified by sixty states. *Ratification of the Rome Statute*, COALITION FOR THE INT’L CRIMINAL COURT (Mar. 15, 2011), <http://www.iccnw.org/?mod=romeatification>.

45. Article I of the Rome Statute established the International Criminal Court and its jurisdiction:

The International Criminal Court is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Rome Statute of the ICC, *supra* note 4, art. 1.

46. *Id.*

47. The ICC prosecutes war crimes and crimes against humanity. *See infra* part (b)(1).

48. *Structure of the Court*, INT’L CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/> (last visited Mar. 28, 2011).

49. For general information on the Office of the Prosecutor, *see* INT’L CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/> (last visited Mar. 19, 2011).

50. *See Cases and Situations*, COALITION FOR THE INT’L CRIMINAL COURT, <http://www.iccnw.org/?mod=casessituations> (last visited Mar. 19, 2010).

51. Rome Statute of the ICC, *supra* note 4.

52. *See id.* arts. 7, 8.

53. *Id.*

attack directed against any civilian population, with knowledge of the attack,”⁵⁴ including “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”⁵⁵ Rape also appears in Article 8, the war crimes section of the Rome Statute. There, war crimes are defined as “serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law.”⁵⁶ War crimes are further defined as “rape, sexual slavery, enforced prostitution, forced pregnancy . . . enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.”⁵⁷

Because it is difficult to prosecute high-ranking perpetrators for crimes committed by their subordinates, the Rome Statute imputes criminal liability to superiors for crimes committed by subordinates and inferiors.⁵⁸ For instance, Article 28 embodies the command theory of liability,⁵⁹ under which the actions of a superior’s subordinate are imputed to the superior.⁶⁰ It states that a military commander may be liable “for crimes . . . committed by forces under his or her effective command and control . . . as a result of his or her failure to exercise control properly over such forces.”⁶¹ However, the military commander will only be liable when he “knew” or “should have known that the forces were committing or about to commit such crimes; and . . . failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission”⁶²

As the sitting head of state for the Republic of Sudan, Bashir is a civilian leader.⁶³ The Rome Statute treats crimes committed by military and non-military commanders differently.⁶⁴ It requires a slightly higher level of culpability and knowledge in order to impute liability to a non-military superior.⁶⁵ A non-military superior will be criminally responsible:

[F]or crimes . . . 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 indicates, 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 (iii) the superior failed to take all necessary and reasonable measure within his or her power to prevent or

54. *Id.* art. 7.

55. *Id.* art. 7(1)(g).

56. *Id.* art. 8(b).

57. Rome Statute of the ICC, *supra* note 4, art. 8(b)(xxii).

58. *Id.* art. 28(a).

59. *See id.* art. 28.

60. *See infra* part I.C.

61. Rome Statute of the ICC, *supra* note 4, art. 28(a).

62. *Id.* art. 28(a)(i)-(ii).

63. *See generally Omar Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest.

64. Rome Statute of the ICC, *supra* note 4, art. 28.

65. *See id.*

repress their commission or to submit the matter to the competent authorities for investigation and prosecution.⁶⁶

B. The Indictment of Bashir

Bashir's rise to power began in 1989, when he led a military group that overthrew the coalition government.⁶⁷ Bashir slowly gained power and political influence in the Sudan. He was appointed to President of the Republic of Sudan on October 16, 1993.⁶⁸ As of spring 2011, he is still the current President of Sudan and head of the National Congress party.⁶⁹

The Sudanese government is widely regarded as supporting the Janjaweed militia, who represent the "Arabic" ethnicity in a war against the Sudanese Liberation Army (SLA) and the Justice and Equality Movement (JEM), both of whom claim to protect the "black African" population against attacks from the Janjaweed.⁷⁰ The African Tribesman initially formed the SLA and JEM as a means to arm themselves against the Sudanese Government, in response to several decades of perceived discrimination by the Government.⁷¹ The government then established the Janjaweed militia to counter this "rebel" upsurge.⁷² However, during the long and bloody Darfur crisis, the Janjaweed are believed to be responsible for "the worst atrocities against Darfur's local communities."⁷³ An

66. *Id.* art. 28(b)(i)-(iii).

67. Peter Walker, *Profile: Omar al-Bashir*, THE GUARDIAN, July 14, 2008, <http://www.guardian.co.uk/world/2008/jul/14/sudan.warcrimes3>.

68. *Omar Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest.

69. Scott Baldauf, *President Omar al-Bashir Presses Sudan Election Despite Boycott*, THE CHRISTIAN SCIENCE MONITOR, Apr. 5, 2010, <http://www.csmonitor.com/World/Africa/2010/0405/President-Omar-al-Bashir-presses-Sudan-election-despite-boycott/>. However, in February of 2011 Bashir's spokesperson stated that Bashir would not be running for President for the 2015 term. Jeffrey Gettleman, *Sudan's President, in Power since 1989, won't run again, Spokesperson says*, NEW YORK TIMES, February 21, 2011, <http://www.nytimes.com/2011/02/22/world/africa/22sudan.html>.

70. Rainer Chr. Hennig, *Eritrea, Chad Accused of Aiding Sudan Rebels*, AFROL NEWS, <http://www.afrol.com/articles/13898> (last visited Mar. 19, 2011).

71. *Darfur History*, AMNESTY INT'L, <http://www.amnestyusa.org/darfur/darfur-history/page.do?id=1351103> (last visited Mar. 19, 2011).

72. Walker, *supra* note 67. The ICC asserted that the Sudanese government mobilized the Janjaweed to quell the insurgency:

That there are reasonable grounds to believe: (i) that soon after the attack on El Fasher airport in April 2003, the GoS issued a general call for the mobilisation of the Janjaweed Militia in response to the activities of the SLM/A, the JEM and other armed opposition groups in Darfur, and thereafter conducted, through GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the National Intelligence and Security Service ("the NISS") and the Humanitarian Aid Commission ("the HAC"), a counterinsurgency campaign throughout the Darfur region against the said armed opposition groups; and (ii) that the counter-insurgency campaign continued until the date of the filing of the Prosecution Application on 14 July 2008.

Omar Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest at 4.

73. *U.N.: 100,000 More Dead in Darfur than Reported*, CNN.COM (Apr. 22, 2008),

estimated 200,000 to 400,000 people have died in the conflict.⁷⁴ Incredibly, Bashir adamantly maintains that the number of those killed is around 10,000.⁷⁵

On March 31, 2005, the United Nations Security Council referred the situation in Darfur, Sudan to the Office of the Prosecutor.⁷⁶ A few months later, the Prosecutor initiated an investigation into the Darfur situation. As a result of the investigation, the Prosecutor determined that between March 2003 and July 14, 2008, the “apparatus” of the State of Sudan (GoS)⁷⁷ committed acts constituting war crimes against civilians and towns inhabited by the Fur, Masalit, and Zaghawa groups.⁷⁸ With respect to the charges of rape, the Prosecution alleged that for five years, the government-supported militia raped thousands of women belonging to the above mentioned groups:

[T]housands of women and girls belonging to the target groups were raped in all three States of Darfur by members of the Armed Forces and Militia/Janjaweed. Girls as young as five and women as old as 70 have been raped. Gang rape – the rape of one or more victims by more than one perpetrator – has been a distinctive feature of sexual violence in Darfur . . . Rape has been used as a weapon during attacks on villages and has been ‘*a critical element in the sweeping, scorched-earth campaign by the Janjaweed and the GoS against the non-Arab Darfurians.*’ Rape has also been a characteristic of the abuses in and around the camps for the internally displaced persons. Most of these rapes have been attributed by victims to members of the Armed Forces, Militia/Janjaweed and other GoS agents.⁷⁹

Based on these accounts, the ICC Chamber agreed there was enough evidence to support an arrest warrant for Bashir’s alleged involvement in the commission of crimes against humanity and war crimes.⁸⁰ An arrest warrant was issued against

http://www.cnn.com/2008/WORLD/africa/04/22/darfur.holmes/index.html?eref=rss_topstories .

74. *Death toll of 200,000 disputed in Darfur*, ASSOCIATED PRESS (Mar. 28, 2008), http://www.msnbc.msn.com/id/23848444/ns/world_news-africa/.

75. *Bashir Genocide Charge Under Review*, ALJAZEERA, Feb. 3, 2010, <http://english.aljazeera.net/news/africa/2010/02/20102355920514636.html>.

76. *UN: Press for Surrender of Sudanese President*, HUMAN RIGHTS WATCH (June 4, 2009), <http://www.hrw.org/en/news/2009/06/04/un-press-surrender-sudanese-president>.

77. Prosecutor v. Omar Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest ¶ 55 (Mar. 4, 2009), <http://www.icc-cpi.int/icedocs/doc/doc639096.pdf>

(alleging that “GoS” includes Government of Sudan forces, the allies of which include the Sudanese Armed Forces, the Janjaweed militia, the Sudanese Police Forces, the National Intelligence and Security Service and the Humanitarian Aid Commission).

78. *Id.* ¶ 56.

79. *Id.* ¶ 38 (quoting The Prosecution Application, ICC-02/05-157-Anx.A ¶¶ 121, 122) (emphasis in original).

80. *Id.* ¶ 92. Initially, in a 2-1 decision, the court determined that there was insufficient evidence to determine the government acted with intent to commit genocide. *See id.* ¶ 196 (Usacka, J., dissenting on the issue of whether “there are reasonable grounds to believe that Omar Al Bashir . . . is criminally responsible for genocide”). However, in February of 2010, the appeals Chamber determined that the pre-trial Chamber decision to exclude genocide charges was based on an “erroneous standard of proof.” *Bashir Genocide Charge*, supra note 70. On July 12, 2010, Pre-Trial Chamber I issued a second warrant of arrest for three counts of genocide. In its “Second Decision on the Prosecutor’s Application for a Warrant of Arrest,” the Chamber held

Bashir on March 4, 2009.⁸¹ He was charged with five counts of crimes against humanity for murder, extermination, forcible transfer, torture, and rape, two counts of war crimes for pillaging and attacks against the civilian population, and three counts of genocide.⁸² Bashir was not granted immunity for being the sitting head of state.

Pursuant to the arrest warrant, Bashir was charged under Article 25(3)(a)⁸³ of the Rome Statute.⁸⁴ Unlike the Command Responsibility sections, this section makes indirect perpetration of crimes a mode of individual liability:⁸⁵

[i]n accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.⁸⁶

The warrant further accuses Bashir of “play[ing] an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation of the . . . GoS counter-insurgency campaign”⁸⁷ The warrant states that aside from coordinating and designing the common plan, Bashir was “in full control of all branches of the ‘apparatus’ of the State of Sudan . . . and . . . he used such control to secure implementation of the common plan.”⁸⁸ Thus, Bashir is accused of using the GoS forces to carry out the criminal conduct for which he has been charged.

Bashir was not the only individual charged in relation to the Darfur situation. Arrest warrants were also issued against two other people.⁸⁹ On April 27, 2007 Ahmad Muhammad Harun (Ahmad Harun) and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb) were also charged with crimes under the Rome Statute.⁹⁰ Ahmad Harun is the former Minister of State for the Interior of the Government of Sudan, which is informally referred to as the “Darfur Security Desk.”⁹¹ Ahmad Harun is allegedly responsible for recruiting, funding, and arming the Janjaweed

that it was satisfied Bashir could be charged for committing genocide under 25(3)(a). Prosecutor v. Omar Al Bashir, Case No. ICC-02/05-01/09, Second Warrant of Arrest, (Jul. 12, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf>.

81. Marlise Simons & Neil MacFarquhar, *Court Issues Arrest Warrant for Sudan's Leader*, N.Y. TIMES, Mar. 4, 2009, <http://www.nytimes.com/2009/03/05/world/africa/05court.html>.

82. *Omar Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest at 7-8. For an explanation of the genocide charges see *supra*, note 80.

83. *Id.* at 3.

84. Rome Statute of the ICC, *supra* note 4, art. 25(3)(a).

85. *Id.*

86. *Id.*

87. *Omar Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest at 7.

88. *Id.*

89. Prosecutor v. Ahmad Harun & Ali Kushayb, Case No. ICC-02/05-01/07, Warrant of Arrest, (Apr. 27, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc279813.pdf>.

90. *Ahmad Harun & Ali Kushayb*, Case No. ICC-02/05-01/07, Warrant of Arrest at 1.

91. *Ahmad Harun & Ali Kushayb*, Case No. ICC-02/05-01/07, Warrant of Arrest at 5.

militia, and for giving direct orders to carry out attacks on the civilian population in 2003.⁹² He was charged under 25(3)(d) of the Rome Statute, which imputes criminal liability to an individual who contributes to the commission of a crime by a group of people acting with a “common purpose.”⁹³

An arrest warrant was also issued against Ali Kushayb, the alleged leader of the Janjaweed militia.⁹⁴ Like Harun, Kushayb was charged under Article 25(3)(d) of the Rome Statute based on his status as a senior Janjaweed leader and for “implement[ing] the counterinsurgency strategy of the Government of Sudan that also resulted in the commission of war crimes and crimes against humanity in Darfur, Sudan”⁹⁵

IV. THEORIES OF CRIMINAL LIABILITY IN THE ROME STATUTE

The Prosecutor’s likelihood of success will depend on the theory he employs to demonstrate criminal responsibility. As mentioned above, the Prosecutor opted for a theory of indirect perpetration, which would hold Bashir individually liable for using a state apparatus to commit the crime of rape against the civilian population.⁹⁶ The Prosecutor chose this theory of liability over command responsibility, which would make Bashir liable by virtue of his high-level position as the President.

A. Command Theory and Joint Criminal Enterprise

Several theories have developed in international law for holding individuals responsible for criminal conduct. Generally, the international legal community recognizes two different theories of liability. The first theory recognizes criminal responsibility when the perpetrator is personally liable for his direct commission of the crime.⁹⁷ Under the second, typically referred to in the international community as “command” or “superior” responsibility, an individual is liable through the acts of another.⁹⁸ Command responsibility is defined “as the responsibility of commanders for war crimes committed by subordinate members of their armed forces or other persons subject to their control.”⁹⁹ This theory became popular after World War II and is typically employed by international courts when prosecuting mass atrocities.¹⁰⁰

92. *Id.*

93. Rome Statute of the ICC, *supra* note 4, art. 25(3)(d); *Ahmad Harun & Ali Kushayb*, Case No. ICC-02/05-01/07, Warrant of Arrest at 6.

94. *See generally Ahmad Harun & Ali Kushayb*, Case No. ICC-02/05-01/07.

95. Rome Statute of the ICC, *supra* note 4, art. 25(3)(d); *Ahmad Harun & Ali Kushayb*, Case No. ICC-02/05-01/07, Warrant of Arrest at 5.

96. *Omar Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest at 6, 8.

97. *See* Rome Statute of the ICC, *supra* note 4, art. 25 (discussing individual liability).

98. Eugenia Levine, *Command Responsibility: The Mens Rea Requirement*, GLOBAL POLICY FORUM (Feb. 2005), <http://www.globalpolicy.org/component/content/article/163-general/28306.html>.

99. *Id.*

100. Anne E. Mahle, *Command Responsibility – An International Focus*, PBS.ORG,

Generally, to demonstrate command responsibility, the Prosecutor has the burden of proving three elements: (1) that the perpetrator had command over those who committed the crime, (2) the commanders “knew or should have known” that subordinates were committing the crimes and (3) the commanders did not try to stop such crimes from being committed or punish those who committed them.¹⁰¹ The principle driving the command responsibility theory is that when subordinates commit criminal acts, the commander is also responsible for failing to prevent or punish his subordinates.¹⁰²

The Command Responsibility theory is codified in Article 28 of the Rome Statute.¹⁰³ Article 28(a) states that a military commander will be responsible for the crimes of the military forces under his command or control when he knew or should have known about the crimes and failed to address them.¹⁰⁴ Article 28(b) expands the command theory from the military context to superiors and subordinates in a non-military context, such as government officials.¹⁰⁵

Although not explicitly embodied in the Rome Statute, the international community also recognizes a theory of joint perpetration known as Joint Criminal Enterprise. The Joint Criminal Enterprise theory of criminal liability developed because of the difficulties experienced by international courts when attempting to impose criminal liability on individuals involved in widespread, large-scale, and systematic crimes.¹⁰⁶ At its most basic form, this theory of liability holds those who act “in pursuance of a common criminal design” accountable for the results of those actions.¹⁰⁷ International prosecutors developed this theory because, as a general matter, traditional domestic criminal law concepts are not applied to international conflicts.¹⁰⁸ Where many different people are involved in only one aspect of a massive atrocity, this theory has been utilized to impose liability on a person’s individual contribution to overarching criminal conduct.¹⁰⁹

http://www.pbs.org/wnet/justice/world_issues_com.html (last visited Mar. 19, 2011). This theory was first popularized during the World War II prosecutions held in Nuremburg and Toyko. It was used to hold commanders responsible for actions of their military forces. A popular example of this strategy was when Koki Hirota, the Prime Minister and Foreign Minister of Japan during WWII, was held liable for crimes committed by the Japanese military despite being a civilian leader. *Id.*

101. *Id.*

102. *Id.*

103. Rome Statute of the ICC, *supra* note 4, art. 28.

104. *Id.*

105. *Id.*

106. Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT’L CRIM. JUST. 159, 159 (2007).

107. *Id.* at 160.

108. Allen O’Rourke, *Recent Development: Joint Criminal Enterprise and Brdanin: Misguided Overcorrection*, 47 HARV. INT’L L.J. 307, 310 (2006).

109. *Id.* at 315.

B. Individual Commission under Article 25(3)

Article 25(3)(a) – (d) expressly defines methods of individual criminal responsibility.¹¹⁰ This section of the Rome Statute is regarded as an expansion of individual accountability because it sets forth detailed regulation of individual responsibility for crimes committed by groups of people.¹¹¹ This part of the statute enumerates various modes of participation in criminal activity by an individual and classifies them by laying out four elements of criminal responsibility: the commission, ordering and instigating, assistance, and contribution to a group crime.¹¹²

The first paragraph of Article 25 states that the ICC will hold natural persons criminally responsible and not just states or organizations.¹¹³ The second paragraph states the principle of criminal responsibility and paragraph three sets forth and distinguishes between different modes of criminal participation.¹¹⁴ Article 25(3)(a) specifically states that liability will be imposed when an individual “[c]ommits such a crime, whether as an individual, jointly with another or *through another person*, regardless of whether that person is criminally responsible”¹¹⁵ It has been noted that Article 25(3)(a) can be further broken down into three different modes of direct commission of a crime.¹¹⁶ The levels are “commission as an individual, joint commission and commission through another person.”¹¹⁷ In the first method, the perpetrator directly commits the crime.¹¹⁸ In the second method, an individual is responsible for the action he commits jointly with others, acting together with a common plan or purpose.¹¹⁹ This is typically referred to as co-perpetration.¹²⁰ The third method, which is referred to here as perpetration-by-means, is the commission of a crime through another person.¹²¹

It is this third provision of Article 25(3)(a) that is relevant to Bashir’s indictment. As mentioned previously, this provision imputes direct criminal liability on those who commit a crime “through another person.”¹²² To date, the Rome Statute is the first international law to specifically regulate indirect perpetration of a crime by explicitly embodying the perpetration-by-means

110. Gerhard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 J. INT’L CRIM. JUST. 953, 953 (2007).

111. *Id.* at 956-57. Werle also points out that the structure of article 25(3) is a very useful tool for finding individual liability in large scale atrocities perpetrated by numerous individuals. *Id.*

112. *Id.* at 957. The provisions of Article 25(3) do not provide for any gradation among the various levels of participation. *Id.*

113. *Id.* at 956.

114. *Id.*

115. Rome Statute of the ICC, *supra* note 4, art. 25 (emphasis added).

116. Werle, *supra* note 110, at 957.

117. *Id.*

118. *Id.* at 958.

119. *Id.*

120. *Id.* at 963-64.

121. *Id.*

122. *Id.*

theory.¹²³ “The importance of the provision lies in clarifying that perpetration-by-means is a sub-category of commission, and therefore involves a particularly high degree of responsibility for the crime.”¹²⁴ This is because individual “commission entails the highest degree of individual criminal responsibility” and has therefore traditionally been construed strictly.¹²⁵ Earlier ad hoc tribunals rejected perpetration-by-means as a possible criminal theory of liability because it was not an established principle in international criminal law.¹²⁶

In its original German form, the perpetration-by-means theory was premised on control over the organization.¹²⁷ The theory is rooted in the doctrine of ‘*Organisationsherrschaft*,’ developed by German criminal lawyer Claus Roxin.¹²⁸ This doctrine was notoriously recognized on an international level during the trial of Adolf Eichmann, where the Jerusalem District Court conceived of it as a way to criminalize acts by those who perpetrated Holocaust crimes without actually physically laying a hand on anyone.¹²⁹ The doctrine holds that an individual effectively controls the crime based on a discernable hierarchical organization.¹³⁰ This conception gives rise to two possible variations of the perpetration-by-means theory. The first is perpetration-by-means of an “innocent agent” and the second is the “perpetrator behind the perpetrator” theory.

German law recognizes the traditional concept of perpetration-by-means of an innocent agent.¹³¹ According to this variation, the actual perpetrator of the crime may be excused for a reason such as age or mental capacity.¹³² However, the individual who “intentionally uses the innocent agent as ‘human tool’ has full control” over the crime and thus, is charged as though he physically committed the crime on his own.¹³³

In addition to the “innocent agent” variation, perpetration-by-means may also be evoked under the “perpetrator behind the perpetrator” theory of liability. This is the variation codified in the Rome Statute. Although previous drafts of this section included the “innocent agent” theory, the ultimate version dropped that

123. Jessberger & Geneuss, *supra* note 2, at 857. The ICC also invoked the perpetration-by-means doctrine in the case of Thomas Lubanga Dyilo. *Id.* at 858. However, it was not a part of the original charge. *Id.*

124. Werle, *supra* note 110, at 964.

125. *Id.* at 957, 974.

126. Jessberger & Geneuss, *supra* note 2, at 859. The International Criminal Tribunal for the Former Yugoslavia rejected this theory. *Id.*

127. *Id.* at 859-61.

128. *Id.* at 860. (stating that *Organisationsherrschaft* translates to “dominion over an organizational apparatus”).

129. Werle & Burghardt, *Claus Roxin on Crimes as Part of Organized Power Structures: Introductory Note*, 9 J. INT’L CRIM. JUST. 191, 200 (2011).

130. Jessberger & Geneuss, *supra* note 2, at 860.

131. *Id.*

132. *Id.* at 857 n. 19; Werle, *supra* note 110, at 964.

133. Jessberger & Geneuss, *supra* note 2, at 860.

language.¹³⁴ Article 25(3)(a) of the Rome Statute expressly rejects the “innocent agent” theory, instead stating that the perpetrator behind the perpetrator can be liable regardless of whether the person who committed the crime is innocent.¹³⁵

The perpetrator behind the perpetrator theory can be likened to an agency theory of liability. The actual perpetrator is the agent, as he is the one who physically carries out the crime, but he does so at the direction and under the control of the principal. Thus, the principal stands as the perpetrator behind the perpetrator.¹³⁶ When applied to the Bashir situation, the military forces that physically carried out the rapes are the perpetrator and agent, while Bashir is the principal and perpetrator behind the perpetrator. However, to convict Bashir, Moreno-Ocampo will have to demonstrate that the military forces were acting under Bashir’s direct command and were completely controlled by him.¹³⁷ Moreno-Ocampo will ultimately need to gather evidence demonstrating this relationship.

To best understand the relationship between the direct and indirect perpetrator, it is important to understand the concept underlying perpetration-by-means. The ICC made a strong statement by choosing to include perpetration-by-means as a subset of individual commission.¹³⁸ It is an attempt by the ICC to criminalize the actions of the direct perpetrator and the indirect perpetrator as one in the same.¹³⁹ The direct perpetrator is responsible for his commission of the criminal acts directly, whereas the indirect perpetrator is responsible for using the organization to the commit his crimes.¹⁴⁰ The theory underlying this level of culpability is based on the power and authority asserted by the indirect perpetrator:

The indirect perpetrator’s control over the ‘organizational apparatus’ enables

134. 2 M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: AN ARTICLE-BY-ARTICLE EVOLUTION OF THE STATUTE FROM 1994-1998 200 (2005). The “regardless of whether the perpetrator is innocent” language in Article 25(3)(a) has been present in several drafts of the individual culpability. *See, e.g., id.* at 192 (providing that a person will be liable for a crime committed through another person “regardless of whether that other person is criminally responsible”). The only alternate proposal occurred in the 1996 Preparatory Committee, Proposal 2, wherein different language was used to articulate the perpetration-by-means doctrine. *Id.* at 200. Part 3 of that Proposal states “[a] person shall be deemed to be a principal where that person commits the crime through an innocent agent who is not aware of the criminal nature of the act committed, such as a minor, a person of defective mental capacity or a person acting under mistake of fact or otherwise acting without *mens rea*.” *Id.* The legislative history went on to say that “[a] question was raised whether this article is required, and whether sufficient merely to state that a person who commits a crime under the Statute is criminally responsible and liable for punishment? On the other hand, it was noted that specificity of the essential elements of the principle of criminal responsibility was important; it serves as a foundation for *many* of the other subsequent principles and avoids the need to elaborate defences (sic) within the Statute that merely constitute negations of the existence of essential mental or physical elements.” *Id.* at 201.

135. Rome Statute of the ICC, *supra* note 4, art. 25(3)(a).

136. Jessberger & Geneuss, *supra* note 2, at 860-63.

137. *Id.* at 862-64.

138. Werle, *supra* note 110, at 963-64.

139. Jessberger & Geneuss, *supra* note 2, at 857.

140. *Id.*

him to utilize the intermediary ‘as a mere cog in the wheel’ to produce the criminal result ‘automatically.’ For the control over the apparatus it even makes no difference if membership of the group shifts over the time The decisive factor of this specific mode of liability is the fungibility, the unlimited replaceability of those who execute the plan; if a particular subordinate does not comply with the order, another will immediately replace him or her so that the plan’s execution will not be compromised.¹⁴¹

Commentary to Article 25 suggests that earlier drafts of the Article questioned whether this doctrine presupposes that the actual direct perpetrator lacks culpability, in that he is a minor or is of diminished mental capacity.¹⁴² However, this question was ultimately answered in the negative; it has been argued that there are actually multiple levels of culpability that can attach to the direct perpetrators and still permit the indirect perpetrator to be charged with indirect commission.¹⁴³ The first is the main perpetrator, the person who plans and organizes the criminal events.¹⁴⁴ The second is the mid-level perpetrator, who has some control over the organization but who does not have complete control.¹⁴⁵ The third level is the accomplice, or the replaceable individual who only carries out the act.¹⁴⁶ In Bashir’s case, it is clear that those who actually raped women were not “innocent agents” and are therefore responsible for their crimes. However, under Article 25(3)(a), the perpetrators need not be innocent agents; they can be deemed as culpable as the indirect perpetrator.

Under the perpetration-by-means doctrine it is crucial that the Prosecutor prove absolute control over the apparatus that committed the crimes in order to justify attributing the conduct of the direct perpetrator to the indirect perpetrator.¹⁴⁷ Attribution will be more likely if those actually committing the crime (in this case, the accused members of the Janjaweed militia) are as replaceable as cogs in a wheel, while the person exercising dominion over the group is irreplaceable.¹⁴⁸ For this reason, the Prosecutor must show that Bashir’s actions were indispensable to the chain of events that lead to the commission of these crimes. Although Bashir may have been significantly removed from the execution of the acts, the Prosecutor must be prepared to demonstrate that he manifested such control over the group that he has, in essence, acted through them.

141. *Id.* at 860.

142. Kai Ambos, *Article 25 Individual Criminal Responsibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 752 (Otto Triffterer ed., 2008).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. Jessberger & Geneuss, *supra* note 2, at 863 n. 48.

148. Ambos, *supra* note 142, at 149-50, 154-55.

V. PROSECUTION OF BASHIR UNDER PERPETRATION-BY-MEANS

As one author aptly points out, “the degree of criminal responsibility does not diminish as distance from the actual act increases; in fact, it often grows.”¹⁴⁹ In order to assess the viability of this method of liability for crimes of sexual violence, it is important to analyze how perpetration-by-means has been received in international law and ICC jurisprudence.¹⁵⁰ As was discussed above, Bashir was charged under Article 25(3)(a) for his commission of crimes against the Sudanese people.¹⁵¹ More specifically, the Prosecutor alleged that Bashir “committed crimes through members of the state apparatus, the army and the militia.”¹⁵² Under this theory of liability, the Prosecutor will have to demonstrate that Bashir had tight control over the people directly involved in the commission of the crime, which is normally apparent in circumstances where there is a definite criminal hierarchy.¹⁵³

The perpetrator behind the perpetrator doctrine has also come under recent criticism, particularly in cases where the actual perpetrator is not an “innocent agent.”¹⁵⁴ It has been suggested that the perpetrator behind the perpetrator should be charged under a theory of co-perpetration or superior responsibility.¹⁵⁵ This is because if the person who commits the crime is not an innocent agent and is a direct perpetrator, it does not seem that the indirect perpetrator (the perpetrator behind the perpetrator) could have full control over the crime.¹⁵⁶ According to this criticism, it is more appropriate to charge such an individual as a co-perpetrator.¹⁵⁷

On the other hand, some scholars have argued that perpetration-by-means is the most accurate theory of liability under which to charge Bashir.¹⁵⁸ Contrary to the co-perpetrator argument, these authors also contend that this theory of liability is rooted in both customary international law and ICC jurisprudence.¹⁵⁹ They maintain that this theory of indirect perpetration is the preferable theory of liability, even when compared to other more established theories, for three general reasons.¹⁶⁰ The reasons are: (i) the explicit provision of Article 25(3)(a) in the

149. Werle, *supra* note 110, at 954.

150. Jessberger & Geneuss, *supra* note 2, at 857-59. Jessberger and Geneuss both argue that perpetration-by-means is an “emerging” theory in international criminal law. *Id.* at 859. They argue that the *Lubanga*, *Katanga* and *Chui* cases demonstrate the Chamber’s favorability to perpetration-by means. *Id.* at 858-59. The authors also recognize that ICTY Appeals Chamber in *Stakic* expressly stated that indirect perpetration had no foundation in customary international law. *Id.* at 859.

151. *See generally Omar Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest.

152. *See* Jessberger & Geneuss, *supra* note 2, at 854.

153. Werle, *supra* note 110, at 964.

154. Jessberger & Geneuss, *supra* note 2, at 862 n. 44 (quoting T. Rotsch, *Neues zur Organisationsherrschaft*, 25 NEUE ZEITSCHRIFT FÜR STRAFRECHT 13 (2005)).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 866. (arguing that, while the Prosecutor has “good reasons” to use perpetration-by-means, alternate modes of liability might be available).

159. Jessberger & Geneuss, *supra* note 2, at 864.

160. *Id.*

Rome Statute, which permits perpetration-by-means, (ii) the interpretation of Article 25(3)(a) in the *Lubanga* case, and (iii) the Pre-Trial Chamber's remarks regarding the theory of indirect perpetration in *Katanga and Chui*.¹⁶¹ More importantly, these authors rejected the use of command responsibility under Article 28 because they feel it only criminalizes omission and not commission of crimes.¹⁶²

It must be noted that the ICC is not bound to apply the law of other ad hoc tribunals.¹⁶³ The legal authority for indirect perpetration for the individual commission of the crime is found within article 25(3)(a) of the Rome Statute.¹⁶⁴ However, it remains to be seen whether a prosecution based solely on perpetration-by-means will gain acceptance and legitimacy in the international community. Despite the relative non-existence of ICC authority interpreting this provision, Jessberger and Geneuss argue that prior ICC Judgments demonstrate that the Chamber is willing to explicitly recognize perpetration-by-means as a form of commission.¹⁶⁵ The following section will analyze these arguments more fully.

A. *Prior Case Law*

Recently, the *Prosecutor v. Milomir Stakic* was adjudicated by the International Criminal Tribunal for the Former Yugoslavia (ICTY).¹⁶⁶ Stakic, a former Serbian leader, was indicted for his alleged involvement in crimes such as genocide, extermination, and murder.¹⁶⁷ Instead of deciding the case under the well established Joint Criminal Enterprise¹⁶⁸ theory of commission, the Trial Chamber opted to carve out another meaning of commission that it believed adequately captured his involvement.¹⁶⁹

In order to attribute the conduct of subordinates to the superior (in this case Stakic), the Trial Chamber stated that it preferred “to define ‘committing’ as meaning that the accused participated, physically or otherwise 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.”¹⁷⁰ Next, the Trial Chamber went on to define “indirect” co-perpetration according to

161. *Id.*

162. *Id.*

163. *Prosecutor v. Milomir Stakic*, Case No. IT-97-24-A, Judgment of the Appeals Chamber, (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006), <http://www.icty.org/x/cases/stakic/acjug/en/sta-aj060322e.pdf>.

164. Rome Statute of the ICC, *supra* note 4, art. 25(3)(a).

165. Jessberger & Geneuss, *supra* note 2, at 864.

166. *Stakic*, Case No. IT-97-24-A.

167. *Id.* ¶ 4.

168. *See supra* Part (C).

169. *Stakic*, Case No. IT-97-24-A ¶ 4.

170. Wolfgang Schomburg, *Jurisprudence on JCE - revisiting a never ending story*, INTERNATIONAL CENTER FOR ETHICS, JUSTICE, AND PUBLIC LIFE, <http://www.brandeis.edu/ethics/pdfs/internationaljustice/Schomburg1.pdf> (last visited Apr. 11, 2011).

the definition used in German law,¹⁷¹ referred to here as “the perpetrator behind the perpetrator” theory.¹⁷² This case marked the first attempt by an ad-hoc tribunal to attempt use of the German doctrine of perpetration-by-means.¹⁷³

However, the appeals chamber completely rejected the perpetrator-by-means theory of liability and pointed out that the introduction of a “new” mode of liability might generate confusion as to the state of the law.¹⁷⁴ In invalidating the mode of liability employed by the Trial Chamber, the Appeals Chamber emphasized that:

This mode of liability, as defined and applied by the Trial Chamber, does not have support in customary international law or in the well settled jurisprudence of this Tribunal, which is binding on the Trial Chamber. By way of contrast, joint criminal enterprise is a mode of liability which is ‘firmly established in customary international law’ and is routinely applied in the tribunal’s jurisprudence. . . . the Trial Chamber erred in employing a mode of liability which is not valid law within the jurisdiction of this tribunal.¹⁷⁵

Despite this blatant rejection of perpetration-by-means by an ad-hoc tribunal, the Prosecutor has attempted to make use of Article 25(3)(a).¹⁷⁶ Bashir’s indictment was not the first time the Prosecutor made use of, or expressed an

171. For a description of the German roots of indirect perpetration, *see* Jessberger & Geneuss, *supra* note 2, at 863-67. German criminal law requires the following elements:

(i) as the indirect perpetrator must have full control over the crime, the key element of this doctrine is whether the indirect perpetrator exercises effective control over the organizational apparatus. Therefore, the apparatus must be hierarchically organized, and created and dominated by the indirect perpetrator himself. This tight control can only be assumed in very few cases, namely with regard to those persons who belong to the leadership of the organization or at least control a part of it.

(ii) The next crucial element is that the organization must be characterized by the fungibility of its members, This unlimited replaceability essentially enhances the probability of the crime to be executed ‘automatically.’

(iii) The indirect perpetrator must further have the will to control the perpetration of the crime. He must be aware of his power within the organization and take advantage of it, being sure that his orders initiate rule-like mechanisms that automatically lead to the execution of the crimes and the unfolding of his criminal plan.

(iv) Additionally, the indirect perpetrator must have the required mens rea, including any required dolus specialis, with regard to the precise crime committed.

(v) Finally, any personal qualities which might be required by the statutory definition of the crime, as well as the absence of any justifications or excuses on his part, have to be present with regard to the indirect perpetrator as well.

Id.

172. *Stakic*, Case No. IT-97-24-A ¶ 58. In lieu of Joint Criminal Enterprise, the Trial Chamber expressly stated that the concept of co-perpetration better defines the type of commission employed by *Stakic*, even though the Prosecutor did not argue this mode of liability.

Id.

173. Jessberger & Geneuss, *supra* note 2, at 857.

174. *Stakic*, Case No. IT-97-24-A ¶ 59.

175. *Id.* ¶ 62.

176. Jessberger & Geneuss, *supra* note 2, at 857. These authors discussed the significance of using this theory of liability in the Lubanga case and its comparison to the indictment of Bashir. *Id.* at 857-59.

interest in, using article 25(3)(a) of the Rome Statute.¹⁷⁷ The first initiative to use this Article was in 2006, when Thomas Lubanga, former leader in the Democratic Republic of Congo, was charged with the “co-perpetration” of war crimes for enlisting children and causing them to participate in armed conflict in violation of the Rome Statute.¹⁷⁸ Moreno-Ocampo relied on the Chamber opinions in this case in his application for Bashir’s arrest warrant.

In *Lubanga*, the Pre-Trial Chamber indicated that it agrees that article 25(3)(a) is a viable method of determining liability, particularly with respect to the commission of a crime through another person.¹⁷⁹ The Chamber further noted that indirect perpetration was a potential means of determining Lubanga’s liability.¹⁸⁰ This language signifies the Chamber’s interest in taking the indirect perpetration method of commission seriously.¹⁸¹ Here, they also noted that because of the purported hierarchical relationship between Lubanga and other members, indirect perpetration was an applicable concept.¹⁸²

The ICC is also in the process of trying both a former commander and another former leader from the Democratic Republic of Congo. In 2007, an arrest warrant was issued for Katanga and Chui for their alleged joint commission “through other persons” within the meaning of article 25(3)(a) of the Statute.¹⁸³ As with Bashir, Katanga and Chui were charged with rape under article 8(2)(b)(xxii) of the statute, as a war crime, and as a crime against humanity pursuant to 7(1)(g).¹⁸⁴ With respect to the charges for rape, Pre-Trial Chamber I alleged that

[C]ivilians were inhumanly treated “in the hands of” FNI/FRPI combatants. Civilians were allegedly arrested and imprisoned by FNI/FRPI combatants who locked them up in a room which was filled with the corpses of men, women and children. During the attack against the village of Bogoro, FNI/FRPI combatants allegedly raped civilians and reduced them to sexual slavery by force, threat of

177. *Id.* at 857.

178. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Warrant of Arrest, (Feb. 10, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc191959.pdf>.

179. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, (Jan. 29, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF> at 109-124.

180. *Id.*

181. Jessberger & Geneuss, *supra* note 2, at 857.

182. *Id.* at 857-58.

183. Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07, Warrant of Arrest, (July 2, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc349648.pdf>.

184. *Id.* at 4-5; *see also* Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07, Case Information Sheet, (July 2, 2007), http://www.haguejusticeportal.net/Docs/Fact%20Sheets/Katanga_Chui_EN.pdf. Pre-Trial Chamber I is of the opinion that there is substantial evidence to believe that “[i]n the summer of 1999, tensions rose over disagreements related to natural resources in the district of Ituri. During the second half of 2002, renewed violence flared up in several parts of Ituri. An armed conflict took place in Ituri between August 2002 and May 2003, with the intervention of many local armed groups and neighbouring [sic] states. The alleged crimes were committed in relation to this armed conflict which began on Djuju territory and in the town of Mongbwalu.” *Katanga & Chui*, Case No. ICC-01/04-01/07, Warrant of Arrest, at 4-5.

violence or death and/or detention. Civilian women were allegedly abducted from the village of Bogoro after the attack, imprisoned and forced into becoming the “wives” of FNI/FRPI combatants, which also required them to cook for and obey the orders of FNI or FRPI combatants.¹⁸⁵

In its Decision on the Confirmation of Charges, Pre-Trial Chamber I¹⁸⁶ responded to the arguments made by the defense counsel for Katanga.¹⁸⁷ Specifically, the defense argued that the mode of criminal liability described by the Prosecutor was not recognized in international law or in the Rome Statute.¹⁸⁸ In response, the Chamber discussed the roots of indirect perpetration of a crime and explained its application to Katanga and Chui.¹⁸⁹ First and most importantly, the Chamber stated that it will not look to the ad hoc tribunals to affirm its own decisions of liability, stating that the ICTY’s rejection of indirect perpetration in *Stakic* is “a good example of the need not to transfer the ad hoc tribunals’ case law mechanically to the system of the Court.”¹⁹⁰ In declaring that the concept of indirect perpetration is accepted as a legitimate mode of liability, the Chamber stressed the importance of the perpetrator’s control over the organization.¹⁹¹ This theory, the Chamber reasoned, is expressly codified in 25(3)(a) and permits prosecution of senior members of an organization as principals, not as accessories, for their role in the crime, even if they may not have had any direct involvement.¹⁹² The Chamber explained that the presence of organization and hierarchy is the backbone for an indirect perpetration doctrine.¹⁹³

The Chamber further reasoned that in order to convict under a theory of indirect perpetration, the “organization must be based on hierarchal relations between superiors and subordinates.”¹⁹⁴ Moreover, it emphasized that it is “critical that the chief, or the leader[,] exercise(s) authority and control over the apparatus and that his authority and control are manifest in subordinates compliance with his orders.”¹⁹⁵ “His means for exercising control may include his capacity to hire,

185. *Id.*

186. On October 30, 2009, the defense attorney for Katanga appealed the Pre-Trial Chamber decision under the same theory that indirect perpetration is an illegitimate theory of liability under the Rome Statute and in customary international law. Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07, Defense for Germain Katanga’s Pre-Trial Brief on the Interpretation of 25(3)(a) of the Rome Statute, (Oct. 30, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc773241.pdf>. As of the time this article was written, the Appeals Chamber had not rendered a decision.

187. Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, (Sept. 30, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf>.

188. *Id.* ¶ 509.

189. *Id.* ¶ 510.

190. *Id.* ¶ 508.

191. *Id.* ¶ 510.

192. *Katanga & Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges ¶¶ 508-09.

193. *Id.* ¶¶ 511-12.

194. *Id.* ¶ 512.

195. *Id.* ¶ 513.

train, impose discipline, and provide resources to his subordinates.”¹⁹⁶ Not only must the leader exercise control over the apparatus to commit a crime; it must also be shown that the leader “as the perpetrator behind the perpetrator, mobilizes his authority and power within the organization to secure compliance with his orders.”¹⁹⁷

In *Katanga & Chui*, Pre-Trial Chamber I described Article 25(3)(a) at length and endorsed the perpetrator behind the perpetrator theory of liability.¹⁹⁸ More importantly, the Chamber explicitly made clear that it is not bound by the decisions of ad hoc tribunals as it seeks to interpret and create its own precedent under the Rome Statute.¹⁹⁹

Some believe that this ICC jurisprudence demonstrates how the Court will interpret Article 25(3)(a) in subsequent decisions, particularly Bashir’s case.²⁰⁰ Indeed, previous ICC opinions seem favorable to use of this theory of liability, despite the hostility it has received in other ad-hoc tribunals.²⁰¹ However, several concerns arise in connection with the Prosecutor’s choice to use this theory of liability as the sole theory of liability.

First, even though the ICC may accept the general validity and use of this theory, it has never been applied to a civilian leader such as a sitting head of state. For this reason, Bashir’s case is not strictly analogous to *Lubanga* or *Katanga & Chui*.²⁰² Second, even though the ICC need not look to any other international tribunal when interpreting and applying its own statute, diverging from well-established international customary law may undermine the legitimacy of the court, even more so if the Prosecutor is not successful in prosecuting Bashir. Lastly, the Prosecutor may face significant evidentiary hurdles when attempting to demonstrate that Bashir, as the sitting head of state, exerted the requisite control over the entire military apparatus that the perpetrator behind the perpetrator theory requires. This article’s main concern is that, with respect to the crime of rape, such control might be too difficult to prove. Therefore, as a matter of caution, the Prosecutor should have included another theory of liability.

B. Problems with Indirect Perpetration as a Mode of Liability

There is no question that Article 25(3)(a) permits prosecution under perpetration-by-means; this theory of liability is expressly codified in the Rome Statute. The issue the Prosecutor will face with this charge lies in both the interpretation of this statute and the application of this infrequently used theory to

196. *Id.*

197. *Katanga & Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges ¶ 514.

198. *Id.* ¶ 509.

199. *Id.* ¶ 514.

200. *Id.*

201. *Id.*

202. See generally *Katanga & Chui*, Case No. ICC-01/04-01/07, Warrant of Arrest; *Lubanga*, Case No. ICC-01/04-01/06, Warrant of Arrest.

a unique set of facts. Relying on the guidelines set forth in *Lubanga*, the Prosecutor's application for the arrest warrant of Bashir requires three elements:

(a)[F]irst, the Prosecution must establish the existence of a relationship such that the indirect perpetrator may impose his dominant will over the direct perpetrator to ensure that the crime is committed. Where, as in this Application, the indirect perpetrator is alleged to have committed the crime through an organization or group, that institution must be "hierarchically organized." (b) Second, the indirect perpetrator must have sufficient authority within the organization such that he has "the final say about the adoption and implementation" of the policies and practices at issue. (c)Third, the indirect perpetrator must be "aware of his unique role within the [organization] and actively use it" in furtherance of the crimes charged.²⁰³

The Prosecutor argues that Bashir had absolute control of the groups that actually committed these atrocities, and therefore, he stands as the perpetrator behind the perpetrator.²⁰⁴ To assess the likelihood of success under this theory, one must evaluate the use of indirect perpetration as a theory of liability.²⁰⁵ Upon reviewing the *Lubanga* and *Katanga & Chui* cases, it is apparent that the ICC has shown an enthusiastic acceptance for a form of indirect perpetration, as codified in Article 25(3)(a).²⁰⁶ However, the factual circumstances in both cases are very different from Bashir's case.²⁰⁷ These differences are compounded by the fact that the theory is not well grounded in customary international law or ICC jurisprudence. In addition, the Prosecutor may have difficulty establishing the requisite control over the apparatus that committed the crime because Bashir is a civilian leader.

1. Concerns for making use of the Perpetration-by-Means Theory

It is apparent that the Chamber might be willing to accept a version of indirect perpetration based on precedent set forth in *Lubanga* and *Katanga & Chui*. However, it must be noted that both cases are not parallel to Bashir's case and, as such, may not serve as solid precedent for application of the perpetration-by-means theory on the facts of Bashir's case. First, Bashir's indictment is the first time the ICC indicted a sitting head of state. None of the defendants in *Lubanga* or *Katanga and Chui* were sitting heads of state at the time of their indictment.²⁰⁸

203. Jessberger & Geneuss, *supra* note 2, at 862-63; *Lubanga*, Case No. ICC-01/04-01/06, Warrant of Arrest.

204. *Omar Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest at 7.

205. *See supra* Part (C).

206. *See generally Katanga & Chui*, Case No. ICC-01/04-01/07, Warrant of Arrest; *Lubanga*, Case No. ICC-01/04-01/06, Warrant of Arrest.

207. Heikelien Verijn Stuart, *Serious Concerns Surrounding Bashir's Charges*, RADIO NETHERLAND WERELDOMROEP (July 22, 2008), <http://static.rnw.nl/migratie/www.rnw.nl/internationaljustice/specials/commentary/080722-VerijnStuartCommentary-redirected> (expressing concern about use of perpetration-by-means in reliance on *Lubanga* and suggesting a theory of co-perpetration or joint perpetration).

208. *Katanga & Chui*, Case No. ICC-01/04-01/07, Warrant of Arrest; *Lubanga*, Case No. ICC-01/04-01/06, Warrant of Arrest.

Additionally, all three perpetrators in the prior cases had a more active and direct role in the military than did Bashir.²⁰⁹ Thus, Bashir's case presents a unique situation for the Prosecutor. Morano-Ocampo must put forth convincing evidence that, as head of state, Bashir had control over the state apparatus that committed these crimes.²¹⁰

As the Sudanese President, Bashir is the civilian leader in Darfur. As such, it is not clear how the Prosecutor will prove that he had control over the militia (Janjaweed). Establishing control is necessary because it is essentially the Janjaweed's actions that the Prosecutor is seeking to punish. Two other individuals in addition to Bashir were indicted for crimes in Sudan. The first person, Ahmad Harun, was formerly in charge of recruiting and training members of the Janjaweed.²¹¹ The second, Ali Kashayb, was the former leader of the Janjaweed militia. Both perpetrators were charged under Article 25(3)(d) of the statute for their involvement in the atrocities.²¹² Article 25(3)(d) punishes those who contribute to the commission of the crime and act with a common purpose.²¹³ This theory of liability is close to the theory co-perpetration.²¹⁴

It is not completely clear how the Prosecutor intends to incorporate Bashir's charges for sole indirect perpetration of the crimes into the prosecutorial scheme for the other individuals, which are essentially predicated on a theory of joint commission. Given that the favorable case law under Article 25(3)(a) for *Lubanga* was under a theory of indirect "co-perpetration" and *Katanga & Chui* was under a theory of joint perpetration through another, it is not clear that ICC jurisprudence is directly on point.²¹⁵ The Prosecutor is urging the Chamber to find that Bashir acted through others as the commissioner (perpetrator behind the perpetrator) of the crime.²¹⁶

The fact that Bashir is the sitting head of state may not, by itself, prove that he is in control of the groups that committed the crimes. Pre-Trial Chamber I in *Katanga & Chui* stated that in order to successfully bring a theory of indirect perpetration under 25(3)(a), there must be proof of an established hierarchy or organization over which the perpetrator had complete control.²¹⁷ This requirement might be problematic for Bashir's case. An ill-defined governing structure may make it more difficult to prove the rigid hierarchy that would impute liability to Bashir for the acts perpetrated by the Janjaweed militia, particularly since they

209. *Ahmad Harun & Ali Kushayb*, Case No. ICC-02/05-01/07, Warrant of Arrest.

210. *Omar Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest at 7.

211. *Ahmad Harun & Ali Kushayb*, Case No. ICC-02/05-01/07, Warrant of Arrest.

212. *Id.*

213. Rome Statute of the ICC, *supra* note 4, art. 25(3)(d).

214. *See supra* Part (C).

215. *Katanga & Chui*, Case No. ICC-01/04-01/07, Warrant of Arrest; *Lubanga*, Case No. ICC-01/04-01/06, Warrant of Arrest.

216. *Omar Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest at 5.

217. *Katanga & Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges.

often employed guerilla-style warfare.²¹⁸ The difficulties that Moreno-Ocampo might face with respect to demonstrating actual control over the organization and the presence of a hierarchy²¹⁹ is another reason why he should consider adding another theory of liability. Other authors have hinted at the problem of establishing tightness of control over the organization.²²⁰ They have discussed the fact that while *Lubanga* set forth the framework for analyzing a crime under Article 25(3)(a), it did not provide definite elements that must be proved.²²¹ It is unclear whether the Chamber will look to German law to better flesh out these concepts.²²²

2. Problems with Prosecution for Rape

In essence, the indirect perpetration strategy is an attempt to hold Bashir liable as a principal for the sexual violence perpetrated by members of the Janjaweed militia. Although it need not be shown that Bashir ordered these crimes, it must be shown that he had sufficient control over the apparatus or organization that directly committed the crimes.²²³ The unique challenge brought on by sexual violence committed by subordinates is whether their actions are considered sufficiently within Bashir's ambit of control.²²⁴ While the numerous accounts given by victimized women suggest that this is the case,²²⁵ the problem with this part of the prosecution may very well lie in the proof.²²⁶

It does not seem difficult for Moreno-Ocampo to amass testimonial evidence from victims and witnesses that sexual violence occurred in the Sudan against the marginalized groups by the Janjaweed.²²⁷ Still, he must link this evidence to proof that Bashir had control over the organization with respect to these crimes. One possible defense that can be raised in this context is that while sexual violence was rampant, it was perpetrated by the members of the militia of their own volition.²²⁸ Thus, a theory of liability that is premised on control over the apparatus in order to demonstrate responsibility, like perpetration-by-means, may fall apart in cases where the governing body is loosely organized.²²⁹ If Moreno-Ocampo were to use a theory of command responsibility under Article 28,²³⁰ he could successfully argue that even if Bashir did not know these crimes were taking place, given the

218. Stuart, *supra* note 208.

219. Jessberger & Geneuss, *supra* note 2, at 867.

220. *Id.* ("One element to consider could, however, be a certain tightness of control directly over the intermediary or over the organization, exercised by the indirect perpetrator.")

221. *Id.*

222. *Id.*

223. *Lubanga*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges at 14-15.

224. Jessberger & Geneuss, *supra* note 2, at 867.

225. HUMAN RIGHTS WATCH, *supra* note 5, at 10-15.

226. Van Schaak, *supra* note 10, at 390-93.

227. *Omar Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest at 5-7.

228. Van Schaak, *supra* note 10, at 393.

229. *Id.*

230. Rome Statute of the ICC, *supra* note 4, art. 28.

prevalence of the accounts regarding this conduct, he should have known they were taking place.²³¹

3. Argument in Favor of the Command Theory of Liability

The Prosecutor may have a greater chance of demonstrating Bashir's guilt with respect to these crimes under a command responsibility theory. As set forth in Article 28(b), a non-military superior will be criminally responsible:

for crimes. . . 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 indicates, 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 (iii) the superior failed to take all necessary and reasonable measure within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.²³²

Under this theory of liability, the Prosecutor need only demonstrate Bashir's guilt through omission, by asserting Bashir's "effective authority and control over the organization."²³³ This will be easy to prove: as the sitting head of state, Bashir is in the position to have effective control over the military. In addition, Bashir had publically maintained his disbelief that rape was taking place in Darfur,²³⁴ which may be proof that he failed to take "necessary and reasonable" actions to investigate and repress this crime.²³⁵

It would be much easier for the Prosecutor to demonstrate Bashir's guilt under command responsibility rather than under perpetration-by-means. Perpetration-by-means requires proof of "actual" control and complete authority over an organization that is so strong and pervasive that it is justifiable to treat Bashir as though he committed the rapes himself.²³⁶ In theory, holding Bashir liable as an individual for the commission of these crimes should send a strong message to civilian leaders. However, the obstacles the Prosecutor will face when attempting to prove his individual guilt may result in an outcome that would cast a negative light on the ICC and bring further injustice to victims.

Although the Prosecutor has not publically stated why he prefers perpetration-by-means over any other theory of liability, some likely reasons can be inferred. First, Bashir will receive a higher penalty if he is convicted of perpetrating the crimes as an individual than he would as a superior.²³⁷ Second, the ICC would gain

231. *Id.*

232. *Id.* art. 28(b).

233. *Id.*

234. *See generally* Bear, *supra* note 27.

235. Rome Statute of the ICC, *supra* note 4, art. 28(b).

236. Jessberger & Geneuss, *supra* note 2, at 867.

237. Ambos, *supra* note 142, at 752.

recognition for successfully employing an infrequently used theory of liability against a well-known leader. Third, it would bring a strong sense of justice to powerless victims because it would hold Bashir personally liable for his direct involvement in the crimes, not merely by virtue of his presidency.²³⁸

While the above reasons are certainly important, they also highlight why it is equally important for the Prosecutor to successfully prove Bashir's guilt. This Comment attempts to illustrate that the Prosecutor's strategy is a dangerous one, as utilizing this theory of prosecution may lead to the worst case scenario; namely, that Bashir is found innocent for the atrocities that took place in Darfur. This result could actually decrease the legitimacy of the ICC in the eyes of the international community, undermining its ability to achieve justice for victims of international crimes. Thus, this Comment cautions against resting the entire prosecution on a theory of liability that is not well-established in ICC jurisprudence or customary international law, regardless of how strong of a message it will send. The Prosecutor should have included the command responsibility theory of liability to increase the likelihood of a successful prosecution.

VI. CONCLUSION

Because the ICC is still a relatively new international tribunal, the precedent it sets in its early years will define both its role in the international community and its legitimacy as an organization capable of bringing international criminals to justice. Perhaps this is precisely why the Prosecutor chose to prosecute the sitting head of state. As one commentator notes, this indictment may have a far-reaching impact on the Sudanese people and "[t]he stakes are high for the ICC at this juncture in its life."²³⁹ "How it handles the various challenges it now faces as a result of the choice to proceed on only one theory of liability will have ramifications beyond the institution itself, and will reflect on the international criminal law project more generally."²⁴⁰

The ICC must demonstrate that it can deliver on its promises to prosecute war crimes and crimes against humanity. To do so, it must show that it is equipped to handle the task by "prosecuting all who fall within the ambit of the statute."²⁴¹ In addition, as noted above,²⁴² the crime of rape in the context of war is often perpetrated as a symbol of the dominion that one group has over its victims.²⁴³ It is used to humiliate and degrade women.²⁴⁴ In choosing the theory of liability, the Prosecutor must be mindful of all the factors that may complicate his prosecutorial strategy, and if necessary, cast a wide enough net to maximize the chance of

238. *Omar Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest at 5-7.

239. Tom Ginsburg, *Article Symposium: International Judges: The Clash of Commitments at the International Criminal Court*, 9 CHI. J. INT'L L. 499, 503 (2009).

240. *Id.* at 503.

241. *Id.* at 510.

242. *See supra* Part A.

243. Van Schaak, *supra* note 10, at 393.

244. *Id.*

conviction.²⁴⁵ Given the obstacles the Prosecutor might face by using perpetration-by-means as the sole theory of liability, the Prosecutor should have proceeded with caution and included a command responsibility theory of liability to best ensure that Bashir is convicted. At such a fragile period in its life, the ICC cannot afford to risk the negative effects to its international status that the failure to convict Bashir would engender. While no conviction is ever guaranteed, the rhetorical benefits of a conviction under a perpetration-by-means theory do not outweigh the concrete benefits to both the victims of Bashir's heinous crimes and the legitimacy of the court that are more likely to occur as a result of utilizing a command responsibility theory.

245. Stuart, *supra* note 208.