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## Punishment, Legality, and other Challenges of International Criminal Law

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From its first articulation at the Nuremberg Tribunal that followed WWII, international criminal law has proudly proclaimed its utopian goals. At Nuremberg, trials simultaneously “stayed the hand of vengeance,”<sup>1</sup> and replaced bloodthirsty revenge killing with methodical justice, as well as establishing a legal and moral baseline regarding how people can be treated regardless of their community of citizenship. If Hitler once reputedly stated, “who remembers the Armenians?” as a precursor for his genocide of European Jewry (Simpson 2019), following the Nuremberg Tribunal and its establishment of international criminal law, atrocity crimes such as genocide and crimes against humanity are now universally recognized as illegal, i.e. impermissible. Continuing in this vein, the plaque at the entrance to the permanent International Criminal Court (ICC), founded in 2002, reads: “Towards a more just world.” Between Nuremberg and the ICC, the utopian goals of the international criminal law project have not been muted.

Yet simultaneous with these utopian goals and claims, critics of international law have from its inception – though often *sotto voce* – challenged its practices as extra-legal and thereby unjust. The crimes tried at Nuremberg, for example, were largely unestablished prior to the trial. “Crimes against humanity,” the Nuremberg Tribunal’s most significant and enduring addition to the international criminal law cannon, proved more effective at convicting defendants than charges of war crimes, although the latter enjoyed a stronger precedential foundation (Douglas 2005). Retroactive application of law violates the legality principle, a fundament of justice, however. The legality problems associated with the Nuremberg Tribunal as an institution were augmented by procedural anomalies. Domestic criminal law suffers from an “inequality of arms,” because the powerful state concentrates its might on an individual defendant. Criminal procedure has developed to mitigate this imbalance. At Nuremberg, however, the inequality of arms was only exacerbated by its adopted procedure, as the tribunal Charter refused constraint via “technical rules of evidence,”<sup>2</sup> while simultaneously describing vastly inclusive crimes and procedurally circumscribed defenses.<sup>3</sup> Taken together, the anomalies of Nuremberg Tribunal place it somewhere between Lyotard’s *différend* paradox, paraphrased by legal theorist Koskeniemi (2002:17) as where “to accept a method or criterion of settlement is already to have accepted the position of one’s adversary,” and a show trial, i.e. “a spectacle with prearranged results” (Arendt 2006, 266).

Although international criminal law has developed significantly in the 75 years following the Nuremberg Tribunals, the challenge to the legality principle at the heart of its practice remains unaddressed, and international criminal law remains trapped between

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<sup>1</sup> This famous claim was made by U.S. Prosecutor, also a Justice on the U.S. Supreme Court, [ ] Jackson in his opening statement at the trial. Opening statement, US Prosecutor Justice Jackson, Nuremberg Trial Proceedings, vol. 3, December 4, 1945 (<http://avalon.law.yale.edu/imt/12-04-45.asp>).

<sup>2</sup> Article 19, IMT Charter.

[https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2\\_Charter%20of%20IMT%201945.pdf](https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf)

<sup>3</sup> Articles 7 & 8, IMT Charter.

*différend* and show trial. This article discusses the structural challenges to international criminal law's legitimacy that I have identified in earlier research (Carlson 2016; 2017; 2018; 2019; 2022), beginning by deconstructing the progress paradox that simultaneously legitimizes and undermines international criminal law. Because these challenges are situated in questions of how actions are legally characterized at international criminal law, the article moves on to consider two recent ICC cases that demonstrate two aspects of this fundamental challenge to international criminal law practice at work. These cases, the article argues, demonstrate the doctrinal problems that arise from a legal form that bases its legitimacy on its promise of progress.

## I. International Criminal Law's "Progress" Paradox

Reordering the world to prioritize justice over might is a generalized rendition of international criminal law's stated goal and purpose. This requires rewriting rules, norms and practices. The central reordering concerns justice, which has for centuries been the prerogative of the sovereign (Schmitt 2020)(Agamben and Attell 2005). Under the standard, long-standing sovereign ordering, "justice" entailed the rules the sovereign deemed necessary and fruitful for organizing the state. This justice originated from, and stopped at, the sovereign, who was, per his position, decider and not subject. Beyond the bounds of who was subjected to sovereign decision, the content of such decisions themselves fell outside of a modern fairness framework. Consider how Henry VIII disposed of his wives, beginning with modifying the church's control over divorce and moving on to beheading. Michel Foucault graphically investigated the bounds and content of sovereign power in *Discipline and Punish* (1979), which opens with a description of the public drawing and quartering, with further deprivations applied to the eventual corpse, of a defendant charged with attempted regicide.

"Justice" has made two significant shifts in modern times. First, the punishment associated with justice has been "rationalized." Beginning with Beccaria (1764), ideologies regarding measured, commensurate punishment have accompanied statecraft. Liberal constitutionalism imagines punishment that should be predicated on humaneness, fairness, and dignity (Duff 2001). Following Immanuel Kant (1781; 2020), just laws are those which anyone, regardless of their position in relation to the law, would accept. Two centuries later, John Rawls (1972) updated this formulation with his "veil of ignorance" thought experiment, where "just" laws are those that we would construct to apply to ourselves, so long as we are without knowledge of where we would find ourselves in society.

The second significant shift to justice was the way in which the sovereign was reimagined, from person to position to institution. This opened up the possibility of making law itself the sovereign. The constraint by which the head of state (sovereign) is subject to states' laws is known as rule of law (Hart 1961); (Lacey 2019); (Krygier 2016). Making the law sovereign does not resolve the issue of how justice and power interact, however. This is because the sovereign is foundational in determining either the law's content or its application, or both (Sa'adah 2006); (Teitel 2000). Moreover, legal institutions and actors enjoy legitimacy based on a system headed by a sovereign, and are thus structurally disinterested in challenging that system, since it would challenge their own status and legitimacy (Shapiro 1986); (Bourdieu 1993). Legal philosophers have spent great energies over the past century extolling law's neutrality and fixing a place for law as science (Hart

1961)(Ross 2019)(Kelsen 2009). Critical legal studies have demonstrated how, nevertheless, law's sovereignty exerts its own forms of violence, by reordering narrative (Cover 1995), erasing complexity (Scott 1999), and reifying power imbalances (Bell and Alexander 2018)(Anghie 2006).

The flaws in law's service to power named above are mitigated by constraints related to liberal constitutionalism. First, there is the democracy element: law serves the sovereign but sovereignty is based in popular rule and transparent processes, with an active, free media bringing information from state institutions to the citizenry to whom they answer. Second, established procedure seeks to balance the power inequities between a well-equipped state and private citizens. From habeas corpus, which requires that the state articulate a charge shortly after arrest in order to continue to hold an individual, to the specificities of criminal procedure and the rules of evidence governing how courts acquire, share, and test evidence, state power as expressed by law is mitigated by pre-determined processes. Here, the legality principle is a central component to rights-based governance; the sovereign can enforce the law, but the law must be clearly formulated prior to enforcement, and this law includes the procedural rules related to its practice. This is a cornerstone of modern justice, meeting Becarrian expectations regarding measured, commensurate judgment and serving the communicative function imagined for the law as theorized by (Durkheim 1972), (Duff 2001), (Lacey 2016).

International criminal law challenges ideas of political sovereignty by expanding rule of law principles outside and beyond the state. International criminal law thus becomes "Humanity's law" (Teitel 2011)(Graf 2021), recognizing a sovereign authority beyond the state for certain impermissible crimes, which include at least the "core crimes" of genocide and crimes against humanity.<sup>4</sup> Given the modern rule of law principles that structure law itself as sovereign, this development is perhaps not surprising. What is surprising is rather the practices surrounding the law that claims sovereign authority, specifically the ways that "progress" and not "legality" legitimizes international criminal law. Specifically, the legality principle that constrains domestic criminal law is relaxed in order to allow international criminal law to meet its progress mandate; the mitigating constraints effected on law in liberal constitutional democracies are entirely missing in international criminal law. First, the feedback loop between sovereign (when imagined as an individual leader and/or an institution such as law) and those under sovereign command that constrains domestic law is missing in international criminal law (Klabbers 2018).<sup>5</sup> The experts crafting international criminal law's content are not subject to democratic election, and the individuals applying international criminal law are rarely subject to its dictates. These problems are explored below.<sup>6</sup>

#### **a. Progress as a Legitimizing Force**

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<sup>4</sup> War crimes and the recently recognized "crime of aggression" might also reasonably be added to this list, though their moral and judicial reach has proven somewhat more limited, as discussed further below.

<sup>5</sup> Klabbers (2015) argues that this problem is generalizable across all international organizations, and is particularly problematic for legal organizations, as legitimacy is linked to representation.

<sup>6</sup> These arguments were originally developed in (Carlson 2017).

Let us begin by considering what international criminal law identifies as actionable violations. These were first articulated at and immediately after the Nuremberg trial. The Nuremberg prosecutors faced two central problems. The first was that many of the barbarous acts perpetrated by the Nazi regime were not per se illegal. As noted, war crimes against other nations' soldiers could be construed as illegal under international law at the time of the Second World War; this comprised a central element of the Allied prosecution case at Nuremberg. But Germany's crimes against its own citizens were very specifically not illegal in Nazi Germany, which rather notoriously enacted its state violence under a carefully articulated regime of laws and rules. State violence in Nazi Germany owed not to lawlessness, but rather a terrible *lawfulness*. And given that criminal legality was a determination made by individual states in an international law system of mutual recognition, since the atrocity acts committed by Nazi Germany against its own citizens system were not illegal in Germany, it was not clear how or where they could be illegal.

Had the Nuremberg tribunal constrained itself to the prevailing law at the time, it would not have been able to address the brutal atrocity at the heart of the Nazi criminal state: the murder of individuals in an effort to eradicate whole groups of people, i.e. the crime later defined as genocide. Prevailing law recognized war crimes committed by the enemy, but there was no legal category, and no legal procedure, to redefine action taken as a part of state policy towards its own citizens as criminally illegal; there was no pre-existing law to which the Nuremberg prosecutors could turn to assert that the Nazis' internal murderous policies were illegal. Given that the positive law in force in Nazi Germany at the time made the policies legal, it was further challenging to determine how individuals could be legitimately criminally charged with those policies' commission i.e., how to bring a charge without violating a central tenet of legal legitimacy, the legality principle, which forbids retroactive articulation of law.<sup>7</sup>

The Nuremberg prosecutors turned this weakness into a strength. Faced with an insurmountable positive law challenge, the Nuremberg prosecutors abandoned the legitimacy of positive law and its legality principle, and built their doctrine, and with it their case, on the moral certainty of natural law. The prosecutor proposed to prosecute "acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code."<sup>8</sup> The Tribunal accepted this reasoning: in its judgment, the Tribunal argued that in "circumstances [where the defendant] must know that he is doing wrong, . . . so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished".<sup>9</sup> The IMT drew on natural law arguments regarding a universally recognizable "human good" (Finnis 1980/2006; Sohn 1982; Donnelly 2003) to legitimize its practice (Citron 2006). Günther Teubner (2015, 10) calls this "sociological natural law" because it "uses societal constitutions to reconstruct the rationalities of diverse subsystems

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<sup>7</sup> This principle is often expressed via the Latin *nullem crimen sine lege*.

<sup>8</sup> US Supreme Court Justice Robert H. Jackson, Prosecutor at the IMT at Nuremberg, in "Report to the President on Atrocities and War Crimes," June 7, 1945; [http://avalon.law.yale.edu/imt/imt\\_jack01.asp](http://avalon.law.yale.edu/imt/imt_jack01.asp))

<sup>9</sup> September 30, 1946; <http://avalon.law.yale.edu/imt/judlawch.asp>).

within the legal system and transform them into binding principles.” This “sociological natural law” became the universal set of legal principles that legitimize, and are recognized by, international criminal law, reified as criminal categories of genocide; crimes against humanity; war crimes; and aggression.<sup>10</sup> The legitimacy and applicability of these principles is rooted not in the past – via precedent or positive law – but rather in the future, via the progressive articulations of human rights they recognize and affirm. This is the “more just world” towards which international criminal law inclines.

“Progress” thus does double duty in international criminal law because it is at once the legitimizing force permitting international legal practice as well as the articulated end goal. By rooting its legitimacy primarily in forward-looking rights recognition rather than backward-looking positive law or precedent, international criminal law incorporates the iteration of progressive law as central to its enterprise. This application of natural (nonpositive) law (Shklar 1964/1986) is understood as a means to ensure against the totalitarian excesses that led to the war (Primus 1996), and it framed the debates that defined legal science in the decades following the Second World War (Hart 1961)(Fuller 1969).

#### **b. The Problem of Non-Derogation**

One element of the “communication” function that criminal law theorists identify as necessary in “tolerably just” (Duff 2013, 175) criminal justice systems concerns their capacity to adjust or align the conduct to be criminalized. This feedback loop is an essential element of how domestic criminal justice systems serve to represent and create community and permits a certain flexibility, mobility, and responsiveness to criminal justice. Law protects rights, but when rights conflict, one right will necessarily be derogated when confronted with another right that takes precedence (Berlin 1969). This contestation is in fact one of the ways that regimes negotiate conflicts of interest (Shapiro 1986; Kymlicka 1989), and it is a space where law and politics are deliberately in conversation with each other.

By contrast, international criminal law is legitimized by progress, and this progress focuses on legal recognition of “core” rights. These core rights are not only non-derogable, i.e. inalienable, universal, and absolute, permitting no contingency or context, but they are necessarily so, because the legitimacy of international criminal law is based in this nonderogable construction. Following its progress narrative, the nonderogable nature of the core rights international criminal law recognizes provides the legitimizing animus for international criminal law. International criminal law offers no resolution for the resulting confrontation between the nonderogation standard of human rights and the justice and fairness compromises present at domestic criminal law. The reason is that such resolution is necessarily political, not doctrinal, and international criminal law rejects political compromise as a source of legitimacy.

This is the “justice” paradox of international criminal law, and it emerges from conflating human rights, which “should be read expansively to realize their object and purpose” (Roth 2010, 286) with criminal law, which gains its legitimating authority through

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<sup>10</sup> See for example Rome Statute of the ICC Articles 5 -8.

rule of law practices based on predictability and accountability, i.e. justice and fairness. This justice paradox is further amplified by the absence, at international criminal law, of accommodation, acknowledgement, or theory regarding what Roth (2010) has termed “ruthless” behavior on the part of states. Ruthless behavior consists of acts that, though “presumptively wrongful in both moral and legal terms,” nevertheless are “substantially related to cognizable governmental (or insurgent) objectives” (239). Roth’s “ruthless” category highlights how justice itself is, at least in practical terms, largely a political formulation; as discussed above, for most citizens in most situations, “justice” is what the state so defines (Sa’adah 2006). International criminal law’s foundational impetus necessarily rejects subjective constructions of justice, however.

Criminal law practice in Duff’s “tolerably just” states represents liberalism in action, where law is a necessary and effective space to address (if not fully redress) social injustice or imbalance. International criminal law, constructed in the shadow of this liberal outcome, has thus far neglected to engage in liberalism’s practices. Rather, international criminal legal practice has engaged in subjective imbalances that violate the rule of law tenets that liberal practices are designed to effect. Because ICL so often violates the legality principle, it must be progressive, operating “towards a more just world” (the ICC’s words) in order to legitimize itself. This has encouraged a rejection of context – what the European Court of Human Rights labels “margin of appreciation” in a different judicial context – in order to safeguard its legitimacy. In practice, this means that international criminal law is inflexible regarding motive, and considers only consequence. This turns it into a form of strict liability where it is applied, which in turn triggers legitimacy problems from a criminal law and fairness standpoint. In the following section, the article examines two examples that underscore international criminal law’s structural challenges.

## **II. Challenging the Progress Paradox at the ICC: Bemba & Ongwen**

There are two recent examples from ICC practice that illustrate the paradoxes of international criminal law discussed above. The first concerns the Appeals Chamber’s acquittal of Jean-Pierre Bemba in 2018. The second concerns the recent Trial Chamber conviction of Dominic Ongwen, a child soldier turned military leader. Both cases demonstrate the ongoing, unresolved structural challenges at the heart of a legal practice constructed around natural law principles and eschewing positive law constraints. In the *Bemba* (2018) judgment, the question at issue regards imprecision in international criminal law doctrine. In that decision, a majority of judges took issue with insufficient protection of the defendant’s rights due to charges not made with sufficient specificity. This is an anticipatable challenge given that international criminal law as a field prioritizes the righteousness of natural law over the plodding bureaucracy of positive law, as discussed above. Problematically, however, greater specificity of criminal content may indeed curtail the reach and power, and thus the significance, of international criminal law. Given the myriad other challenges international criminal law faces, foremost the necessity that states cooperate, with few resources at the ICC’s disposal when and if they don’t, the reasonable and important demands made by the *Bemba* judges arguably threaten the entire international criminal law enterprise.

In reviewing the *Ongwen* (2021) judgment, the article turns its focus from how international criminal law tribunals convict to whom they convict. As with the *Bemba* judgment, the focus is doctrinal, examining the case for what it can reveal about the limitations of a legal form based in sociological natural law. In previous work I have focused on “sympathetic” defendants, individuals acting without malice or sadism who violate international criminal law because they are caught up in the machinery of state violence over which they have no control (Carlson 2017; 2018; 2019). The *Ongwen* case evinces a different problem as it is the first ICC prosecution where the crimes committed by the perpetrator have their genesis in his own victimhood. A child soldier abducted at age 9 and raised in the Lords Resistance Army paramilitary group, Ongwen the criminal is the result of the 9-year-old victim who survived, and eventually thrived, in a brutal social setting. This case thus raises questions related to the context in which international criminal law operates, specifically its relatedness to domestic criminal law expectations of rationality and reasonable social control.

#### a. How does ICL Convict? The Appeals Chamber and Jean-Pierre Bemba (2018)

On June 9, 2018, in a 3-2 ruling, the ICC appeals chamber acquitted Jean-Pierre Bemba.<sup>11</sup> The decision astounded observers.<sup>12</sup> In 2016, Bemba was sentenced by the ICC Trial Chamber to 18 years’ for his role in atrocities committed in Central African Republic (CAR). Bemba was the president of the rebel Mouvement de Libération du Congo (MLC), “a rebel group turned political party” (Ba 2018), and commander in chief of its military wing, the

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<sup>11</sup> [https://www.icc-cpi.int/CourtRecords/CR2018\\_02984.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF)

<sup>12</sup> See, for example, <https://www.ejiltalk.org/in-bemba-and-beyond-crimes-adjudged-to-commit-themselves/>; L N Sadat, “Fiddling While Rome Burns? The Appeals Chamber’s Curious Decision in *Prosecutor v Jean-Pierre Bemba Gombo*” (12 June 2018) EJIL Talk (blog); D M Amann, “In *Bemba* and beyond, Crimes Adjudged to Commit Themselves” (13 June 2018) EJIL Talk (blog); J Trahan, “Bemba Acquittal Rests on an Erroneous Application of Appellate Review Standard” (25 June 2018) *Opinio Juris* (blog); J Powderly & N Hayes, “The *Bemba* Appeal: A Fragmented Appeals Chamber Destabilises the Law and Practice of the ICC” (26 June 2018) *Human Rights Doctorate* (blog); A Whiting, “Appeal Judges Turn the ICC on Its Head with *Bemba* Decision” (14 June 2008) *Just Security* (blog). Darryl Robinson considers the Appeals Chamber’s decision in Bemba the kind of “overcorrection” that is currently developing at ICL. (Robinson 2020) says of the Bemba decision:

Now that judges and scholars are more attentive to fundamental principles, the danger of overcorrection is more present. In my view, there is arguably a tendency, observable in a few decisions at the ICC, for judges to announce new and stringent requirements, based only on their impressions and without providing any authority for the claims. The absence of authority is somewhat understandable: the judges are simply expounding on what they perceive to be the obvious and incontrovertible implications of time-honoured principles of criminal law. However, the danger in these unadorned declarations is that one might, without realizing, be advancing idealized, exaggerated, or rarefied conceptions that are both contrary to past practice and normatively unsound.

(Robinson 2020, 272 (references omitted)).



Armée de Libération du Congo (ALC). Bemba was one of four vice presidents of Congo from 2003- 2006. In 2006, Bemba and his MLC came in second in the presidential election in the DRC, gaining 41% of the vote (Prunier 2009).

The ICC's 2016 conviction of Bemba's was significant because it assigned criminal responsibility to a senior military official physically removed from the violence, and because it made sexual violence a centerpiece of the charges (Chappell 2017). Sexual violence, a staple of war, has long been absent from international criminal law's charge sheets. By assigning Bemba responsibility for the rapes committed by fighters under his command, the 2016 trial court judgment was seen as an important doctrinal advance for international criminal law.

Because the 2016 had been celebrated and significant, the acquittal the Court produced in 2018, narrowly decided and unexpected, brought scads of criticism.<sup>13</sup> The acquittal judgment defined two significant procedural ideas, both of which triggered criticism. First, the acquittal concerned itself with how the ICC prosecution managed its case against Bemba. Second, the acquittal considered which facts, gleaned in which way, it might consider. We address these issues in turn.

*i. Specifying the Charges*

Battlegrounds in distant locations are not conducive to easy criminal evidence collection. Actors both local and international, including international courts, can have difficulty accessing those locations. Determining that crimes have occurred can already be a difficult task involving searching for mass graves, or comparing satellite imagery. Connecting those crimes to individual responsible culprits, i.e. assigning criminal responsibility through the demonstration of commission, is all the more difficult in these circumstances. Often, it is the guilty actors themselves who have contributed to the difficulty in assessing their guilty actions, by selecting remote locations or deliberately hiding their acts. Bosnian Serb soldiers buried, disinterred, and reburied corpses in the massacre of more than 7000 Bosnian Muslim men and boys at and around Srebrenica in July 1995. The provision of earth movers, trucks, etc that it took to effectuate this required a massive organization.<sup>14</sup> Even today, after many of the mass graves have been located, and more than two decades expended taking DNA samples of the living in order to try to identify the dead, there are still bodies and body parts that are not identified. In other parts of Bosnia, there are still thousands of missing persons feared lost in graves not yet discovered. When even identifying the victim proves so challenging, connecting the living perpetrator to the crime is even harder.

Therefore, in order to meet their progressive aims, international criminal courts have traditionally employed relatively lenient standards of precision in pre-trial indictments and charge sheets. They have further permitted the prosecutor relatively wide latitude in amending the charges, including during trial. This answers the real-world problems faced by international courts in collective evidence and connecting the evidence to the indicted. At

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<sup>13</sup> See, for example: <https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo/>; <https://www.amnesty.org/en/latest/news/2018/06/car-acquittal-of-bemba-a-blow-to-victims/>

<sup>14</sup> The ICTY has found several Bosnian Serb military and civilian leaders responsible for the Srebrenica massacre, including president Radovan Karadžić and general Ratko Mladić. See Carlson 2018; see also icty.org.

the same time, this can pose a clear challenge to liberal criminal law protections of the accused, principally the accused's right to be informed of the charges against them. At the most extreme, international criminal law practices threaten to dismiss the presumption of innocence, by requiring the accused to demonstrate that they were not where the prosecutor says they were, engaged in the activities the prosecutor alleges.

In the *Bemba* case, the prosecution charged the defendant with murders, rapes, and pillaging by MLC soldiers against civilians in CAR from 26 October 2002 – 15 March 2003. Following confirmation of the charges by the Pre-Trial Chamber, the prosecution specified some additional criminal acts, including new instances of pillaging<sup>15</sup> and 35 rapes. The question for the appeals chamber was, was this a (permissible) clarification or an (impermissible) amendment to the charges?<sup>16</sup>

ICC procedure dictates that cases brought independently by the ICC prosecutor must be confirmed by a majority of three-judge pre-trial ICC chamber.<sup>17</sup> Following confirmation by the pre-trial chamber, alterations to the charges can be procedurally amended, but these amendments also require confirmation by a majority of the pre-trial chamber.<sup>18</sup> Before the *Bemba* appeals chamber, the prosecution argued that the “murders, rapes, and pillaging by MLC soldiers against civilians in CAR from 26 October 2002 – 15 March 2003” constituted “the facts and circumstances” of the case.<sup>19</sup> The prosecution specified that these were “not material facts, but subsidiary facts or evidence.”<sup>20</sup> The victims (who can also officially participate as parties before the ICC) concurred, arguing the prosecution could not “be expected to prove every crime committed by LMC troops in the CAR during the 2002-2003 operation.”<sup>21</sup> For his part, in his briefing to the appeals chamber Bemba argued that “[n]early two thirds of the underlying acts for which [he] was convicted were not included or improperly included... and fall outside the scope of the charges.”<sup>22</sup> Bemba characterized the charges as impossibly broad, arguing “[w]ithout the inclusion of any other factual details, it would be a rape chabe with [a] 141-day time frame covering a geographic area of approximately 623,000 square [kilometers].”<sup>23</sup> Bemba argued that by violating procedure by making amendments without having them confirmed by the pre-trial chamber, the fairness of the procedure was jeopardized.<sup>24</sup>

The *Bemba* Appeals Chamber found for the defendant. It found that alerting Bemba to the categories of charges he faced (rape, murder, pillage) was not sufficient to later bring precise instances not named prior to trial.<sup>25</sup> It determined, three votes to two, that based on the way the prosecution had framed its case, additions of the kind the prosecution made

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<sup>15</sup> AC para 78.

<sup>16</sup> See discussion in AC para 115 regarding the way that the prosecution pleaded the charges in this specific case as amounting to amendment and not a permissible addition. Not also that this was closely decided, with two of five judges dissenting.

<sup>17</sup> Rome Statute Article 15(3-5).

<sup>18</sup> Rome Statute Article 61(9).

<sup>19</sup> AC para 93.

<sup>20</sup> Id.

<sup>21</sup> Id para 96.

<sup>22</sup> AC para 74.

<sup>23</sup> AC para 90.

<sup>24</sup> AC para 86.

<sup>25</sup> AC para 110.

were effectively amendments, and it retracted 18 counts on which the Trial Chamber convicted on this basis.<sup>26</sup>

Finally, the appellate majority also reconsidered Bemba's conviction under command responsibility, i.e. the mode of commission by which the crimes established by the trial chamber took place. The Appeals Chamber found that the Trial Chamber improperly weighed Bemba's responses to his troops' crimes. Specifically, the majority took issue with what it found were unsubstantiated interpretations regarding Bemba's intent, as well as the Trial Chamber's use of a standard that amounted to what Bemba *should have done*, together with the fact that Bemba was never informed of this standard.<sup>27</sup>

The *Bemba* Appeals Chambers' discussion on this topic is particularly interesting and instructive. The discussion concerns Bemba's response, as commander, to his troops' crimes. The legal standard is that the commander should take "all necessary and reasonable" actions.<sup>28</sup> This is not the same as taking "each and every possible measure at his or her disposal," the Appeals Chamber clarified.<sup>29</sup> The latter standard would transform international criminal law into a form of strict liability, or shift the burden from the prosecution to the defense, the Appeals Chamber found.<sup>30</sup> The Appeals Chamber moreover determined that post-facto assessments of what "a commander might theoretically have done are unhelpful and problematic, not least because they are very difficult to disprove."<sup>31</sup>

Perhaps the most interesting and potentially legally significant concerns how the *Bemba* Appeals Chamber takes aim at the inferences the Trial Chamber made regarding the defendant's motivation for his actions, finding these not well taken. The discussion here concerns Bemba's calls for a commission of inquiry regarding crimes committed in CAR. The Trial Chamber found that these were "primarily motivated by Mr. Bemba's desire to counter public allegations and rehabilitate the public image of the MLC."<sup>32</sup> In the words of the Appeals Chamber, "the Trial Chamber's preoccupation with Mr. Bemba's motivations appears to have coloured its entire assessment of the measures that he took."<sup>33</sup> The Appeals Chamber challenges what it characterizes as the Trial Chamber's treatment of "the motives as determinative" as an unreasonable and ultimately unlawful standard. This discussion is so significant because it addresses long-unresolved legal issues in international criminal law regarding how knowledge and intent interact (Carlson 2016; 2017; 2018). Where previous jurisprudence has erected a "I know it when I see it" standard that is difficult to defend against precisely because it is so abstract,<sup>34</sup> the *Bemba* Appeals Chambers call for assessment "*in concreto*."<sup>35</sup>

ii. *Collecting and Interpreting the Facts*

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<sup>26</sup> AC para 116.

<sup>27</sup> AC paras 166-179.

<sup>28</sup> Rome Statute Article 28; AC paras 167-169.

<sup>29</sup> AC para 169.

<sup>30</sup> AC para 170.

<sup>31</sup> AC para 170.

<sup>32</sup> AC para 177.

<sup>33</sup> AC para 178.

<sup>34</sup> See discussion in Carlson (2018) Chapters 3 and 6; see also (Carlson 2016)

<sup>35</sup> AC para 179.

In the common law tradition (Merryman and Pérez-Perdomo 2007), trial courts determine facts and appellate courts rule on questions of how the law is interpreted and applied. Appellate courts turn to questions of fact only when such facts cannot, as a matter of law, stand as interpreted by the trial court. Even in the civil law tradition, which gives appellate courts greater flexibility regarding reconsideration of facts, including in some systems a practice of re-examining witnesses and calling new fact witnesses, the move between trial and appellate hearings is designed to streamline and simplify factual questions (Damaska 2009). Thus, as regards findings of fact, the typical appellate standard is one of deference to the trial court.

At the ICC, while the appeals chamber has the same powers as the trial chamber,<sup>36</sup> it is also imagined that challenges to factual questions will be remanded to a trial chamber.<sup>37</sup> The *Bemba* appeals decision importantly challenged this standard, however. Three of the five judges found that “when the Appeals Chamber is able to identify findings [of fact] that can reasonably be called into doubt, it must overturn them.”<sup>38</sup> This would seem to invite ICC appeals chambers to re-litigate facts heard by trial chambers. Anticipating this objection, the Appellate Chamber emphasized, “This is not a matter of the Appeals Chamber substituting its own factual findings for those of the trial chamber. It is merely an application of the standard of proof [beyond a reasonable doubt.]”<sup>39</sup> This line of argument has not, so far, convinced many observers. Writing at the time, international law scholar Leila Sadat argued it is inappropriate for the appeals court to substitute its judgment for a court which worked four-and-a-half years, hearing the testimony of 77 witnesses and producing a nearly 400-page decision.<sup>40</sup>

There is another issue regarding how facts should be treated in the *Bemba* case, and that concerns witness tampering. *Bemba* and several co-defendants were convicted by the ICC for witness tampering in a separate procedure. And given that the witness tampering for which *Bemba* and was convicted have arguably had a direct impact on some of the testimony that the Appeals Chamber found to be “in doubt,” it could be argued that the Appeals Chamber decision directly rewards *Bemba*’s witness interference.<sup>41</sup> The Appeals Chamber judgment made no mention of how *Bemba*’s conviction for obstruction of justice might have altered the evidence it was assessing, however.

The ambiguity left by the *Bemba* Appeals Chamber regarding the problem of witness tampering and how it should be construed to impact evidence has implications beyond the individual judgment. Witnesses and their testimony constitute huge, unresolved problems for ICTs . Small and mobile, ICC operatives and investigators can never hope to attain local expertise, and are thus eternally at the mercy of local operators and their interests. This makes the information they collect particularly subjective. On the other side, the ICC has had trouble protecting witnesses, either from coaching or threat or both. In response to these challenges, the ICC appears to be “getting tougher” through, for example, its

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<sup>36</sup> Rome Statute para 83(1).

<sup>37</sup> Rome Statute para 83(2).

<sup>38</sup> AC para 3.

<sup>39</sup> AC para 46.

<sup>40</sup> <https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo/>

<sup>41</sup> [https://www.icc-cpi.int/CourtRecords/CR2018\\_03430.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_03430.PDF)

prosecution of Bemba and several others for obstruction of justice in his case. On the other hand, Bemba's acquittal, on evidentiary grounds that do not themselves reference or consider the problem of witness coaching and tampering, works against any tough line on witness tampering.

*iii. ICL After Bemba*

*Bemba* arguably signals a change in direction for the ICC. Other cases have recognized evidentiary ambiguities and inconsistencies. The *Kenyatta & Ruto* cases were dismissed when evidence dissolved (witnesses changed their stories, disappeared, or died, some by murder).<sup>42</sup> In the ICC's first judgment, *Lubanga*, all witness testimony was ultimately found to have been tainted and was thrown out by the Trial Chamber (Lubanga was still convicted, but given a relatively light sentence). Yet *Bemba* is the first case where, after years of effort, evidentiary inconsistencies resulted in complete acquittal, i.e. the whole ballgame. More significantly, the *Bemba* majority's language, arguing against international criminal law as a form of "strict liability,"<sup>43</sup> signals the possibility of a changing direction in terms of how legal doctrine is applied and interpreted.

Prior to the *Bemba* acquittal, international criminal law had evolved into a field where the strongest defense is "rupture" of the proceedings themselves. This is where the defendant takes aim at the institution and seeks to delegitimize the proceedings. This strategy is best epitomized by the obstreperous bane of the ICTY, Serbian paramilitary leader and far right politician Vojislav Šešelj.<sup>44</sup> Šešelj effectively bullied the ICTY into letting him leave the Hague, after spending more than a decade in its prison and court rooms. Šešelj, representing himself, harangued the court with long soliloquies and multiple, million-euro countersuits. He disclosed the names of protected witnesses, went on hunger strike, and was repeatedly penalized for disrespecting the court. He was acquitted at trial but convicted on appeal, which conviction occurred after he had been released on health grounds and returned to Serbia. While his case was on appeal, he gained a seat in the Serbian Parliament. The ten-year sentence he received from the Appeals Chamber was deemed fulfilled by time served. Although Šešelj gave more than ten years of his life to do it, he appeared to emerge victorious from his entanglement with the ICTY.

The introduction of a stronger procedural protections promises to make international criminal law more like domestic criminal law. This has significant potential, even though rights advocates and victims lament that substantive justice is not served when defendants are acquitted on procedural grounds. Here the language of Van den Wyngaert and Morrison's concurrence in the judgment, that such is "regrettable" but in fact constitutes "the price that must be paid in order to uphold fundamental principles of fairness and the integrity of the judicial process,"<sup>45</sup> is instructive and correct. With its narrow majority and its bombshell reception, however, it is not clear this new focus on procedural legitimacy will hold.

Because the acquittal focused on procedural issues, it's also not clear what significance it will have for the recognition and prosecution of sexual violence crimes.

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<sup>42</sup> Discussed in Carlson 2022.

<sup>43</sup> AC para 170.

<sup>44</sup> See <http://michaelgkarnavas.net/blog/2018/05/03/seselj-appeal-judgement/>

<sup>45</sup> AC para 5.

Sexual violence, although pervasive in war, has faced slow doctrinal development under international criminal law. The 2016 *Bemba* trial court judgment's focus on sex crimes, and its doctrinal findings regarding how sexual violence is articulated through international humanitarian law, were significant. These doctrinal connections stand, unimpacted by the acquittal since it did not address them. On the other hand, heightened scrutiny for evidentiary matters and procedural rules is arguably a challenge to future prosecutions for sexual violence. Victims of sexual violence are often slow to come forward, or slow to report sex crimes as part of the litany of what they have suffered. In addition to being very personal (and thus inappropriate to discuss with strangers taking a witness statement), in many communities, sexual violence carries deep and pervasive stigma against victims. The 2016 Bemba judgment was seen as an important victory for substantive justice as regards sexual violence in war, an important step in carrying us towards the "more just world" the ICC celebrates. Unfortunately, a focus on procedure may detrimentally impact these advances.

#### **b. Who does ICL Convict? The Trial Chamber Judgment against Dominic Ongwen (2021)**

On 4 February 2021, Dominic Ongwen, was found guilty of crimes against humanity and war crimes in northern Uganda by an ICC Trial Chamber.<sup>46</sup> He was subsequently sentenced to 25 years' jail.<sup>47</sup> Ongwen was a child soldier abducted by the Lords Resistance Army (LRA) who went on to become an LRA commander. Formed in 1987, the LRA preyed on communities in northern Uganda and its surroundings for decades. It is particularly infamous for its practice of abducting children; it is estimated that the LRA has abducted more than 30,000 children.<sup>48</sup> These children, like Dominic Ongwen, were made to fight, kill, and perform sexual services for LRA soldiers.

The Ongwen case was a massive undertaking, spanning several years, with more than 4000 recognized victims and nearly 200 witnesses. The case against Ongwen focused on atrocity crimes committed at four refugee camps in northern Uganda between 2002 and 2005. And the suffering of the victims was at the center of the ICC judgment's organization and presentation. The 1077-page judgment spends hundreds of pages detailing the attacks in the camps and their consequences.<sup>49</sup> In the chamber's oral statement, Judge Schmitt read aloud the names of known victims; observers reported that relatives of the victims listening to the judgment on the radio clapped and shed tears as the names were spoken.<sup>50</sup> Ongwen's suffering, on the other hand, did not play a determinative factor. In its decision, the ICC did not allow Ongwen's background to impact its legal determination of his criminal liability. Instead of considering the 9-year boy who survived abduction by flourishing in his brutal environment, the court adjudicated an adult Ongwen acting with full volition and

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<sup>46</sup> ICC <https://www.icc-cpi.int/Pages/item.aspx?name=pr1564>; see also <https://www.asil.org/insights/volume/25/issue/7> Tonny Kirabira

<sup>47</sup> <https://www.icc-cpi.int/itemsDocuments/210506-ongwen-sentence-summary-eng.pdf>

<sup>48</sup> <https://enoughproject.org/conflicts/lra>

<sup>49</sup> [https://www.icc-cpi.int/CourtRecords/CR2021\\_01026.PDF](https://www.icc-cpi.int/CourtRecords/CR2021_01026.PDF)

<sup>50</sup> <https://www.ictj.org/news/ongwen-verdict-step-closer-acknowledgment-and-justice-victims-northern-uganda>

independence. There are therefore two central take-aways from the ICC judgment: its focus on recording the horror of what victims experienced, and its insistence on an inflexible, uncontextualized liability standard for the defendant.

Volumes have been written about the thorny problem of assessing the actions of someone who is both victim and perpetrator.<sup>51</sup> International criminal law considers duress and mental incapacity as affirmative defenses, i.e. arguments which can potentially overcome the liability attached to guilt for a crime. The judgment, however, dismissed defense arguments regarding how Ongwen's experiences as a child soldier impacted his moral development and agency.

The ICC concluded that Ongwen was not acting under "duress" because he sometimes acted independently of LRA leader Joseph Kony. In the words of the ICC, Ongwen was not "a puppet on a string."<sup>52</sup> Likewise, the court concluded that Ongwen was not "mentally diseased or incapacitated." The court explained:

"The overwhelming evidence paints a picture of Dominic Ongwen as a person in full possession of his mental abilities. He is described by his subordinates as an extremely capable fighter and commander whom they loved to follow. He planned his attacks carefully and assessed the risks together with his officers. He was repeatedly lauded by other commanders, including Joseph Kony, for his 'good work'."<sup>53</sup>

Yet Ongwen's defense attorneys were actually making a more subtle and meaningful argument. They sought to argue that Ongwen's adult actions were indelibly shaped by his childhood, i.e. his experiences as an LRA victim. This is not an argument about mental deficiency but rather a recognition of social expectation, or moral norms. In this telling, the question of Ongwen's agency is less about whether he is a "puppet" and more about his capacity to recognize the norms that we, as represented by the ICC, recognize.

In refusing to let Ongwen's background alter its understanding of charges, the ICC demonstrated the limitations of using criminal law to address a problem much larger than individual criminal acts. In its content and presentation, the judgment showcases the investigative and moral potential of the ICC. In this way, we can read the *Ongwen* judgment as the court making its best case for itself: that even in the face of scandal, inefficiency, and favoritism, it is not obsolete. The paradoxes of the Ongwen case still beg the question, however, of whether international criminal law can rise to meet the challenges before it.

## **CONCLUSION: Between *différend* and show trial**

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<sup>51</sup> See <https://justiceinconflict.org/2016/04/19/we-need-to-talk-about-ongwen-the-plight-of-victim-perpetrators-at-the-icc/>. See also new research on excluding former child soldiers from international criminal prosecution: <http://transnationaljusticeproject.com/the-exclusion-of-criminal-responsibility-of-combatants-who-were-illegally-recruited-as-children/>; Fagan et al 2016.

<sup>52</sup> <https://www.icc-cpi.int/itemsDocuments/ongwen-verdict/2021.02.03-Ongwen-judgment-Summary.pdf>

<sup>53</sup> <https://www.icc-cpi.int/itemsDocuments/ongwen-verdict/2021.02.03-Ongwen-judgment-Summary.pdf>

The *Bemba* and *Ongwen* judgments highlight unresolved conceptual challenges faced by international criminal law. As I have argued before (Carlson 2016; 2017; 2018; 2019; 2022), these challenges are intrinsic to the practice of international criminal law, structurally challenging its legality and therefore legitimacy. International criminal law is driven by a progressive mandate to increase justice by prosecuting perpetrators of atrocities. Yet charging individuals with culpability for atrocities frequently overlooks the factors that contribute to those atrocities that are outside the individual defendant's control. The doctor who is guilty for visiting dying children in a Nazi orphanage and also guilty for not visiting them;<sup>54</sup> the policeman who has increased responsibility for the atrocities committed in an internment camp because conditions improved during the hour he was on watch;<sup>55</sup> the general convicted for making a corridor for civilians to exit territory while his peers were murdering the civilians who stayed;<sup>56</sup> for victims of these and other atrocity crimes, there may be some comfort to be had in the formulation that the person who harmed you is punished. But by dismissing context – in what circumstances the harm occurred, and in what circumstances the perpetrator found themselves – as anathema to justice, international criminal law risks performing injustice. This paradox is at the heart of the *Ongwen* case, for all that ICC trial chamber determined to ignore it. Attempting to address the problem, as the *Bemba* Appeals Chamber did, feels no less satisfying, as one of the leaders and beneficiaries of human misery goes free (and on to run for office once again).

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<sup>54</sup> Velpke Children's Home (1946), discussed in Carlson 2018 Chapter 2.

<sup>55</sup> Kvočka (2002; 2006), discussed in Carlson 2017; Carlson 2018 Chapter 4; Carlson 2019.

<sup>56</sup> Krstic...



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