

**THE BEMBA ACQUITTAL:  
A BLOW TO THE ICC'S LEGITIMACY IN A TIME OF  
CRISIS**

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**ABSTRACT**

Having convicted Congolese military leader Jean-Pierre Bemba Gombo on March 21, 2016, the International Criminal Court (ICC) secured its first conviction for rape and its first conviction under the command responsibility doctrine. At the time, this decision was lauded by the international legal community as a huge step forward for the ICC. However, a split ICC Appeals Chamber overturned the *Bemba* decision in June of 2018, effectively undoing what many had seen as a sign of progress.

World leaders and human rights groups have criticized the ICC as expensive and ineffective. This critique is essentially an attack on the court's legitimacy. This Note argues that Bemba's acquittal only serves to weaken that legitimacy. Beginning with an analysis of the majority and minority opinions, it then discusses how the decision will impact the ICC's legitimacy by imposing stricter pre-trial requirements, impeding the OTP's ability to prosecute crimes of sexual violence, and weakening the command responsibility doctrine. The ICC should have instead allowed Bemba's conviction to stand. In doing so, it would have strengthened the court's legitimacy by ensuring accountability, and it would have presented an effective ICC strong enough to withstand the attacks of its critics.

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### I. INTRODUCTION

The International Criminal Court (ICC) was formed with the adoption of the Rome Statute<sup>1</sup> in 1998 after years of negotiations.<sup>2</sup> The Court arrived on the international legal scene as a result of the focus on accountability that became prevalent in the preceding decade.<sup>3</sup> The ICC was intended to serve as a permanent forum for prosecuting war crimes and other atrocities with which states could not or would not deal on their own.<sup>4</sup> The hope of its founders then and its proponents now

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1. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

2. At the July 17, 1998 United Nations Conference of Plenipotentiaries on the Establishment of an ICC, held in Rome, Italy, 120 states voted in favor of adopting the Rome Statute, 7 against, and 21 abstained. *History of ICC*, COALITION FOR THE INT'L CRIM. CT., <http://iccnw.org/?mod=icchistory> (last visited Oct. 4, 2019).

3. See Diane Amann, *In Bemba and Beyond, Crimes Adjudged to Commit Themselves*, EJIL: TALK! (June 13, 2018), <https://www.ejiltalk.org/in-bemba-and-beyond-crimes-adjudged-to-commit-themselves/> (describing the zeitgeist of the 1990s, when hopes of ending international impunity ran high following the end of the Cold War).

4. *20 Years On, ICC Urges Help to Fight War Crimes*, VOA NEWS (July 17, 2018, 10:48

was that, in doing so, the Court would be able to hold criminal actors liable, shape international norms through the deterrent effect of its prosecutions, and secure justice for victims.<sup>5</sup> However, the ICC has since gained a reputation among critics for its inefficiency; in the first twenty years since its founding, it has spent over one billion dollars<sup>6</sup> and secured just nine convictions.<sup>7</sup>

One of those nine was the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*.<sup>8</sup> On March 21, 2016, the ICC Trial Chamber III convicted Bemba—former vice president of the Democratic Republic of the Congo (DRC) and leader of the militia organization Movement for the Liberation of the Congo (MLC)<sup>9</sup>—of two counts of crimes against humanity and three counts of war crimes, committed while MLC troops were stationed in the Central African Republic (CAR).<sup>10</sup> Global organizations considered this a landmark decision, because it secured the first ICC conviction for crimes of sexual violence<sup>11</sup> and the first conviction based on the legal concept of command responsibility.<sup>12</sup>

However, on June 8, 2018, the ICC Appeals Chamber reversed the Trial Chamber and acquitted Bemba, declining to hold him responsible for the crimes committed by his soldiers in CAR.<sup>13</sup> In doing so, the Court (i) chose not to follow settled precedent regarding its appellate standard of review; (ii) imposed new requirements on prosecutors during the pre-trial stages of a case; and (iii) applied a different interpretation of the command responsibility doctrine than what had been used by the Trial Chamber.<sup>14</sup> This decision almost immediately became extremely controversial<sup>15</sup> and led the ICC Office of the Prosecutor (OTP) to release a statement

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AM), <https://www.voanews.com/a/years-on-icc-urges-help-to-fight-war-crimes/4486189.html>.

5. *Id.*

6. Jessica Hatcher-Moore, *Is the World's Highest Court Fit for Purpose?*, GUARDIAN (Apr. 5, 2017, 6:43 AM), <https://www.theguardian.com/global-development-professionals-network/2017/apr/05/international-criminal-court-fit-purpose>.

7. *About the ICC*, INT'L CRIM. CT., <https://www.icc-cpi.int/about> (last visited Oct. 3, 2019).

8. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶ 752 (Mar. 21, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_02238.pdf](https://www.icc-cpi.int/CourtRecords/CR2016_02238.pdf).

9. *Movement de Liberation Congolais (MLC)*, GLOBAL SECURITY, <https://www.globalsecurity.org/military/world/para/mlc.htm> (last visited Oct. 4, 2019) (outlining the history of the MLC and Bemba's involvement with the organization).

10. Bemba Gombo, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶ 752.

11. *Gender Report Card on the International Criminal Court 2018*, WOMEN'S INITIATIVES FOR GENDER JUST. 50 (Dec. 2018), [https://4genderjustice.org/ftp-files/publications/Gender-Report\\_design-full-WEB.pdf](https://4genderjustice.org/ftp-files/publications/Gender-Report_design-full-WEB.pdf).

12. Command responsibility is the international legal doctrine of holding commanders responsible for crimes committed by their subordinates, or by persons otherwise under their control. Eugenia Levine, *Command Responsibility: The Mens Rea Requirement*, GLOBAL POL'Y F. (Feb. 2005), <https://www.globalpolicy.org/component/content/article/163/28306.html>.

13. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08 A, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute," ¶¶ 195–98 (June 8, 2018), [https://www.icc-cpi.int/CourtRecords/CR2018\\_02984.pdf](https://www.icc-cpi.int/CourtRecords/CR2018_02984.pdf).

14. *Id.* ¶¶ 39–40, 115, 166–71.

15. Alex Whiting, *Appeals Judges Turn the ICC on Its Head with Bemba Decision*, JUST SECURITY (June 14, 2018), <https://www.justsecurity.org/57760/appeals-judges-turn-icc-head->

regarding the outcome.<sup>16</sup> Bemba's acquittal is likely to affect how the ICC operates going forward and therefore constitutes a very important development in international law.<sup>17</sup>

Part II of this Note provides the factual and procedural background behind the *Bemba* case. Part III then analyzes the reasoning the majority used to reach its conclusions, including the three main grounds for its decision: (i) changing the standard of appellate review to remove the fact-finding deference to the Trial Chamber; (ii) heightening pre-trial standards; and (iii) adopting a more stringent interpretation of the doctrine of command responsibility. Then, this Note briefly describes the dissenting judges' reasoning in rejecting the majority's arguments.

After analyzing both sides, Part IV of this Note argues that Bemba's conviction should have been allowed to stand based on a legitimacy framework.<sup>18</sup> It will first discuss the concept of legitimacy generally within international law, adopting the categories of normative and sociological legitimacy for use in its analysis. It then discusses issues of defendants' rights, touching on the ways in which international courts often rely too heavily on eyewitness testimony and make decisions based on relatively weak evidence, and explore how these sorts of issues may have influenced the majority's decision. Parts V and VI explore the relationship between legitimacy and effectiveness, and argue that the *Bemba* acquittal will negatively impact both, because the decision (i) imposes stricter pre-trial requirements on the OTP; (ii) impedes the OTP's ability to prosecute offenses under the command responsibility doctrine and crimes of sexual violence; and (iii) results from a close split between the judges, which weakens the opinion. This Note argues that instead of strengthening the ICC's legitimacy by creating further protections for defendants, the *Bemba* decision actually weakens the Court's legitimacy by rendering it ineffective, departing wildly from precedent, and portraying a divided court before an already-hostile world stage. For these reasons, the Appeals Chamber should have allowed Bemba's conviction to stand.

## II. BACKGROUND AND PROCEDURAL HISTORY

The son of a prominent Congolese businessman, Jean-Pierre Bemba formed the MLC as a rebel group in 1999.<sup>19</sup> The group eventually captured much of the northern territory of the DRC, gaining significant influence.<sup>20</sup> As part of a peace deal with the

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16. Office of the Prosecutor, *Statement of ICC Prosecutor, Fatou Bensouda, on the Recent Judgment of the ICC Appeals Chamber Acquitting Mr. Jean-Pierre Bemba Gombo* (June 13, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180613-OTP-stat> (expressing concern over the Appeals Chamber's departure from the traditional standard of review and its new requirements for the pre-trial process, and emphasizing the OTP's support of CAR victims).

17. Whiting, *supra* note 15.

18. See *infra* Part V for an explanation of a legitimacy framework.

19. The MLC was formed during the Second Congo War (1998–2003) with the backing of the Ugandan government, which utilized the group to secure its own interests in the conflict. Sadiki Koko, *From Rebels to Politicians: Explaining the Transformation of the RCD-Goma and the MLC in the Democratic Republic of the Congo*, 23 S. AFR. J. INT'L AFF. 521, 524 (2016).

20. *Profile: Jean-Pierre Bemba, DR Congo's Ex-Rebel and Vice-President*, BBC NEWS (June

sitting government, Bemba became one of four vice-presidents of the country, a position that he held from 2003 to 2006.<sup>21</sup>

In October of 2001, General Francois Bozizé was dismissed from CAR's military.<sup>22</sup> Bozizé then started an armed rebellion against the government, employing large groups of soldiers who had deserted CAR's military to support him.<sup>23</sup> The president of CAR, Ange-Felix Patassé, subsequently requested help from Bemba and the MLC in quashing the rebellion.<sup>24</sup> MLC troops were stationed inside CAR's borders from October 2002 until October 2003; during that time, the MLC soldiers committed various atrocities, including the rape, murder, and pillaging of CAR civilians.<sup>25</sup> While his troops crossed the border into CAR, Bemba remained primarily in his home in Gbadolite, a city in northern DRC.<sup>26</sup> Despite remaining in a different country, he still retained a large amount of control over his troops and was able to communicate effectively with his army in CAR.<sup>27</sup> This fact is what led the ICC to classify Bemba as a remote commander.<sup>28</sup>

In December 2004, CAR, a party to the Rome Statute since 2001, asked the ICC to investigate the atrocities committed by the MLC troops.<sup>29</sup> The OTP opened a full investigation into the matter in May of 2007 after significant public pressure from human rights organizations, CAR, and the ICC's Pre-Trial Chamber.<sup>30</sup> The Pre-Trial Chamber issued an arrest warrant for Bemba in May 2008,<sup>31</sup> and Belgian authorities arrested him near Brussels.<sup>32</sup> The Pre-Trial Chamber confirmed the charges against Bemba, which included five counts of war crimes for rape, murder, and pillaging, as well as two counts of crimes against humanity for rape and murder.<sup>33</sup>

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8, 2018), <https://www.bbc.com/news/world-africa-35845556>.

21. *Id.*

22. See Clay Anthony, *In the Case of the Prosecutor v. Jean-Pierre Bemba Gombo: Cementing Sexual Violence and Command Responsibility Within International Criminal Law*, 25 TUL. J. INT'L & COMP. L. 403, 403 (2017) (describing the factual events that led up to the Bemba case).

23. *Id.*

24. *Id.* at 403–04.

25. *Id.* at 404.

26. Thomas Nicolon & Horaci Garcia Marti, *Congolese Nostalgic for Era of Mobutu, the 'Leopard of Zaire,'* FR. 24, <https://www.france24.com/en/revisited/20181101-drcongo-gbadolite-mobutu-zaire> (last updated Feb. 11, 2018); Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶ 706 (Mar. 21, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_02238.pdf](https://www.icc-cpi.int/CourtRecords/CR2016_02238.pdf).

27. Bemba Gombo, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶¶ 706–07.

28. *Id.* ¶ 717.

29. *Jean-Pierre Bemba Gombo at the International Criminal Court: Background*, INT'L JUST. MONITOR, <https://www.ijmonitor.org/category/jean-pierre-bemba-gombo/> (click on "Background" tab) (last visited Oct. 6, 2019).

30. *Id.*

31. Anthony, *supra* note 22, at 404.

32. *Jean-Pierre Bemba Gombo at the International Criminal Court: Background*, *supra* note 29.

33. Anthony, *supra* note 22, at 404.

Bemba's trial before the ICC lasted from November 2010 until November 2014,<sup>34</sup> resulting in a 364-page unanimous opinion from the Trial Chamber.<sup>35</sup> The Court convicted him of two counts of murder, two counts of rape, and one count of pillaging,<sup>36</sup> and on June 21, 2016, sentenced him to eighteen years in prison.<sup>37</sup> In its conviction, the Trial Chamber did not find that Bemba committed any of these crimes personally but held Bemba liable under the doctrine of command responsibility as outlined in Article 28 of the Rome Statute.<sup>38</sup> The Trial Chamber interpreted command responsibility to require that the accused have effective command or control over the troops who committed the crimes and have failed to take all necessary and reasonable measures to prevent such crimes from occurring.<sup>39</sup> In Bemba's case, the Trial Chamber found that he had taken some measures to prevent crimes from occurring but that these actions were inadequate relative to the circumstances.<sup>40</sup> Furthermore, the Court found that the measures were not taken with the genuine purpose of preventing or repressing crimes but merely to positively influence the public appearance of the MLC.<sup>41</sup> This led the Trial Chamber to conclude that Bemba had failed to take all necessary measures.<sup>42</sup>

During the trial, Bemba and four of his lawyers and aides<sup>43</sup> were charged with crimes against the administration of justice, including forging evidence and witness tampering.<sup>44</sup> On October 19, 2016, Bemba was convicted of corruptly influencing fourteen witnesses involved in his main trial.<sup>45</sup> The others were also found guilty of various counts of influencing witnesses, as well as soliciting, producing, or aiding false testimony.<sup>46</sup> On March 22, 2017, Bemba was sentenced to one year in prison

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34. *Id.*

35. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute (March 21, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_02238.pdf](https://www.icc-cpi.int/CourtRecords/CR2016_02238.pdf).

36. *Id.* ¶ 752.

37. *Jean-Pierre Bemba Gombo at the International Criminal Court: Background*, *supra* note 29.

38. Bemba Gombo, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶ 741.

39. *Id.* ¶¶ 183–185.

40. *Id.* ¶ 727.

41. *Id.*

42. *Id.*

43. Those four individuals are Aimé Kilolo-Musamba, Bemba's lead counsel, Jean-Jacques Mangenda Kabongo, his case manager, Fidèle Babala Wandu, a former Bemba aide, and Narcisse Arido, a defense witness. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/13, Judgment Pursuant to Article 74 of the Statute, ¶¶ 8–12, (Oct. 19, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_18527.pdf](https://www.icc-cpi.int/CourtRecords/CR2016_18527.pdf).

44. *Id.* ¶ 13.

45. Bemba, Kilolo and Mangenda together formulated a plan to illicitly coach fourteen defense witnesses. Kilolo provided these individuals with money or other benefits or promises and gave them scripted testimonies and other instructions on what to say. Bemba organized the scheme to illegally coach of the witnesses. *Id.* ¶¶ 104–07.

46. The Appeals Chamber later overturned Bemba's conviction for false testimony. Wairagala Wakabi, *Judges Reject Bemba's Second Bid to Overturn Witness Tampering Conviction*, INT'L JUST. MONITOR (Aug. 21, 2019), <https://www.ijmonitor.org/2019/08/judges-reject-bembas-second-bid-to-overturn-witness-tampering-conviction-and-sentence/>.

and ordered to pay a €300,000 fine in connection with the witness tampering case.<sup>47</sup>

Bemba appealed both his war crimes and crimes against humanity convictions and his sentence on the grounds that the convictions exceeded the charges and that the Trial Chamber should have found that he had taken all reasonable and necessary measures to prevent and respond to allegations of crimes committed by MLC troops in CAR.<sup>48</sup> In early January of 2018, the Appeals Chamber conducted hearings regarding Bemba's appeal, focusing on the Trial Chamber's interpretation of the command responsibility doctrine.<sup>49</sup> By a three-to-two majority, the Appeals Chamber acquitted Bemba of his war crimes convictions on June 8, 2018.<sup>50</sup> On June 14, 2018, Judge Eboe-Osuji submitted a concurring separate opinion.<sup>51</sup>

### III. THE COURT'S MAJORITY AND MINORITY OPINIONS

The majority, made up of Judges Christine Van den Wyngaert, Howard Morrison, and Chile Eboe-Osuji, held that Bemba's conviction must be reversed on the basis that the crimes of which he had been convicted exceeded the charges against him.<sup>52</sup> The majority opinion focused on three major issues: (i) determining the proper standard of appellate review; (ii) deciding how much evidence prosecutors must provide at the pre-trial stage; and (iii) defining liability under the command responsibility doctrine.<sup>53</sup> The dissent addressed the three main holdings of the majority, rejecting its interpretation of the standard of review, arguing for less strenuous pre-trial evidentiary requirements, and putting forth its own interpretation of the command responsibility doctrine.<sup>54</sup>

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47. *Id.* Bemba appealed his conviction for witness tampering. On March 8, 2018, the Appeals Chamber reversed his conviction under Art. 70(1)(b) of the Rome Statute, but confirmed the other convictions. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/13, Judgment on the Appeals of Mr. Jean-Pierre Bemba Gombo, Mr. Aimé Kilolo Musamba, Mr. Jean-Jacques Mangenda Kabongo, Mr. Fidèle Babala Wandu and Mr. Narcisse Arido Against the Decision of Trial Chamber VII entitled "Judgment Pursuant to Article 74 of the Statute," ¶ 1631 (Mar. 8, 2018), [https://www.icc-cpi.int/CourtRecords/CR2018\\_01638.pdf](https://www.icc-cpi.int/CourtRecords/CR2018_01638.pdf).

48. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08 A, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute," ¶¶ 29–30 (June 8, 2018), [https://www.icc-cpi.int/CourtRecords/CR2018\\_02984.pdf](https://www.icc-cpi.int/CourtRecords/CR2018_02984.pdf).

49. *Id.* ¶¶ 27, 30.

50. *Id.* ¶¶ 194–98.

51. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08-3636-Anx3, Concurring Separate Opinion of Judge Eboe-Osuji (June 14, 2018), [https://www.icc-cpi.int/RelatedRecords/CR2018\\_03077.pdf](https://www.icc-cpi.int/RelatedRecords/CR2018_03077.pdf).

52. Bemba Gombo, Case No. ICC-01/05-01/08 A, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute," ¶¶ 196–97 (reversing the Trial Chamber's judgment by finding that crimes convicted went beyond the facts and circumstances included in charges).

53. *See id.* ¶¶ 35–70, 71–119, 120–94 (covering discussions of appellate review, pre-trial evidentiary standards, and command responsibility doctrine).

54. *See generally id.*

### A. *The Majority's Reasoning*

The opinion began by redefining the Appeals Chamber's standard of review.<sup>55</sup> As one of its key holdings, the majority stated that the findings of fact in a given case must be "clear and unassailable" such that "when the Appeals Chamber is able to identify findings that can reasonably be called into doubt, it must overturn them."<sup>56</sup> In so doing, the majority rejected the previous deference given to the Trial Chamber with regard to findings of fact, which required evidence of a "clear error."<sup>57</sup> Instead, the majority noted that the concept of deference should be approached "with extreme caution"<sup>58</sup> and held that the Appeals Chamber may interfere with the Trial Chamber's factual findings whenever it believes such findings would result in a "miscarriage of justice."<sup>59</sup> The majority did not reference any previous ICC case law or decisions from other international courts in reaching this decision, saying only that the Appeals Chamber must be careful not to "[tie] its own hands against the interest of justice," especially where the Rome Statute does not specifically require deference to the Trial Chamber's fact-finding.<sup>60</sup>

After instituting this new standard of review, the majority next addressed the pre-trial process.<sup>61</sup> It held that "[s]imply listing the categories of crimes with which a person is to be charged or stating, in broad general terms, the temporal and geographical parameters of the charge is not sufficient" to confirm the charges at the pre-trial stage.<sup>62</sup> The majority found that Bemba's conviction exceeded the charges against him because when the Pre-Trial Chamber confirmed those charges, the prosecutor listed them in a non-exhaustive manner, which allowed the prosecutor to add further instances of conduct before the trial phase began.<sup>63</sup> Referencing Regulation 52(b) of the Regulations of the Court,<sup>64</sup> the majority found that these additional charges were outside the facts and circumstances described in the original confirmation of charges, and, therefore, that Bemba's conviction on these grounds exceeded the charges against him under Article 74(2) of the Rome Statute.<sup>65</sup>

Finally, the majority found that Bemba could not be held liable under the command responsibility doctrine.<sup>66</sup> Based on its *de novo* review of the facts, the majority concluded that Bemba's status as a remote commander significantly limited

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55. *Id.* ¶¶ 35–46.

56. *Id.* ¶ 3.

57. *Id.* ¶¶ 39–40.

58. *Id.* ¶ 38.

59. *Id.* ¶¶ 39–40.

60. *Id.* ¶ 40.

61. *See id.* ¶ 71 (beginning majority's discussion of pre-trial proceedings).

62. *Id.* ¶ 4.

63. *Id.* ¶¶ 75, 77.

64. *Id.* ¶ 110; *see also* Int'l Crim. Ct. [ICC], Reg. 52(b), *Document Containing the Charges*, in Regulations of the Court, at 22, ICC-BD/01-05-16 (2018) (containing language of Regulation of the Court 52(b)).

65. Bemba Gombo, Case No. ICC-01/05-01/08 A, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute," ¶ 115.

66. *Id.* ¶ 196.



his ability to take the measures necessary to control his troops in CAR.<sup>67</sup> The majority also subtly altered the standard for command responsibility that had originally been used by the Trial Chamber.<sup>68</sup> Under the doctrine, a commander has a duty to take “all necessary and reasonable measures” to prevent war crimes from occurring within his own ranks.<sup>69</sup> The majority found that the scope of a commander’s duty varies in relation to his actual ability to do so.<sup>70</sup> Because Bemba was a remote commander, the majority concluded that his ability to monitor his troops and prevent crimes was more limited than it would have been if he had been physically present in CAR at the time the crimes were committed.<sup>71</sup> Accordingly, the majority afforded him a measure of deference.<sup>72</sup>

The majority stated that it is not necessary for commanders to take “each and every possible measure,”<sup>73</sup> finding that commanders must often engage in a cost-benefit analysis in order to determine which measures to take.<sup>74</sup> In doing so, it specifically rejected the Trial Chamber’s consideration of the list of hypothetical measures Bemba could have taken, requiring instead that the Trial Chamber evaluate whether a commander took “specific and concrete measures that were available to him or her and which a reasonably diligent commander in comparable circumstances would have taken.”<sup>75</sup> The majority thus created a reasonableness standard for evaluating command responsibility, deferring to the circumstances of the defendant; since Bemba’s circumstances classified him as a remote commander, the majority reasoned that the measures he could have taken were limited.<sup>76</sup> Based on these three main points, the majority ultimately found that Bemba’s convictions exceeded the charges against him and issued its judgment for acquittal on that basis.<sup>77</sup>

In addition to the majority opinion, Judges Van den Wyngaert and Morrison authored a joint separate opinion,<sup>78</sup> and Judge Eboe-Osuji authored a separate

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67. *See id.* ¶ 171 (explaining that in convicting Bemba the Trial Chamber had not adequately considered the limitations of commanding troops operating in a foreign country).

68. *See id.* ¶¶ 167–69 (clarifying that the commander responsibility standard considers a commander’s obligation to take reasonable measures relative to the circumstances).

69. *See id.* ¶ 166 (referring to the Trial Chamber’s finding that Bemba violated his responsibility as commander by failing to inhibit his subordinates’ crimes as unreasonable).

70. *Id.* ¶ 167.

71. *Id.* ¶ 171.

72. *Id.*

73. *Id.* ¶ 169.

74. *Id.* ¶ 170.

75. *Id.*

76. *Id.* ¶¶ 170–71.

77. *See* Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08 A, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against Trial Chamber III’s “Judgment Pursuant to Article 74 of the Statute,” ¶¶ 196–97 (June 8, 2018), [https://www.icc-cpi.int/CourtRecords/CR2018\\_02984.pdf](https://www.icc-cpi.int/CourtRecords/CR2018_02984.pdf) (finding that Bemba’s conviction accounted for crimes beyond the scope of the charges and deciding to reverse).

78. *See generally* Prosecutor v. Bemba Gombo, ICC-01/05-01/08 A, Separate Opinion of Judge Van den Wyngaert and Judge Morrison (June 8, 2018), [https://www.icc-cpi.int/RelatedRecords/CR2018\\_02989.pdf](https://www.icc-cpi.int/RelatedRecords/CR2018_02989.pdf).

concurring opinion.<sup>79</sup> These opinions address some of the grounds for appeal that Bemba raised but that the majority did not touch on.<sup>80</sup> Judge Eboe-Osuji's opinion elaborated on the appellate standard of review and discussed dereliction of duty as a facet of command responsibility under the Rome Statute,<sup>81</sup> while Judge Van den Wyngaert and Judge Morrison expressed concerns about the sufficiency of evidence in this case and about whether the crimes charged could even be considered crimes against humanity at all.<sup>82</sup> One point of disagreement between Judge Eboe-Osuji and the two other majority judges was whether Bemba's case should have been remanded to the Trial Chamber; Judge Van den Wyngaert and Judge Morrison concluded that Bemba's case had already lasted ten years and that lengthening the process further would constitute an injustice.<sup>83</sup>

### ***B. The Dissent's Reasoning***

The dissent, made up of Judges Sanji Mmasenono Monageng and Piotr Hofmański, concluded that Bemba's conviction should be upheld.<sup>84</sup> The dissent conducted a much more comprehensive substantive review of the case than did the majority.<sup>85</sup> It addressed the three main holdings of the majority, rejecting its interpretation of the standard of review, arguing for less strenuous pre-trial evidentiary requirements, and putting forth its own interpretation of the command responsibility doctrine.<sup>86</sup> After responding to the majority's major points, the opinion continued on to reject the rest of Bemba's grounds for appeal.<sup>87</sup>

The dissent first took issue with the majority's alteration of the ICC's appellate standard of review.<sup>88</sup> It stated that the previous standard of review giving deference to the Trial Chamber's findings of fact was grounded in "consistent jurisprudence"

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79. See generally Prosecutor v. Bemba Gombo, ICC-01/05-01/08 A, Concurring Separate Opinion of Judge Eboe-Osuji (June 14, 2018), [https://www.icc-cpi.int/RelatedRecords/CR2018\\_03077.pdf](https://www.icc-cpi.int/RelatedRecords/CR2018_03077.pdf).

80. Bemba Gombo, ICC-01/05-01/08 A, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute," ¶ 33.

81. Bemba Gombo, ICC-01/05-01/08 A, Concurring Separate Opinion of Judge Eboe-Osuji, ¶¶ 32–90, 188–97.

82. Bemba Gombo, ICC-01/05-01/08 A, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, ¶¶ 48–50, 57–72.

83. *Id.* at ¶ 73.

84. Prosecutor v. Bemba Gombo, ICC-01/05-01/08 A, Dissenting Opinion of Judge Monageng and Judge Hofmański, ¶ 1 (June 8, 2018), [https://www.icc-cpi.int/RelatedRecords/CR2018\\_02987.pdf](https://www.icc-cpi.int/RelatedRecords/CR2018_02987.pdf).

85. See generally *id.*

86. See generally *id.*

87. Bemba also appealed his conviction on the following grounds, arguing: (i) that the Trial Chamber should have declared a mistrial due to ex parte submissions and alleged disclosure violations by the prosecutor; (ii) that the Trial Chamber erred in its interpretation of contextual elements such as the mens rea requirement for crimes against humanity and the definition of pillage; (iii) that the Trial Chamber erred by failing to identify the perpetrators of the rape, pillage, and murder; and (iv) that other procedural errors, such as the reliance on certain witnesses and the involvement of victims, made the trial unfair. See *id.* ¶¶ 380, 489, 553, 570, 614, 647 (marking the beginning of dissent's analysis of each of the foregoing grounds for appeal).

88. *Id.* ¶ 4.

and added that no other international appellate body uses a different standard.<sup>89</sup> Because departing from its previous jurisprudence upsets the “predictability of the law and fairness of adjudication,” the dissent pointed out that the Court should not do so lightly or without very good reason.<sup>90</sup> The dissent also noted that the Appeals Chamber had previously acknowledged that the Trial Chamber is “better positioned than the Appeals Chamber to assess the reliability and credibility of evidence.”<sup>91</sup> Accordingly, the dissent found the majority’s adoption of a new standard of review to be unwarranted and would therefore have given deference to the Trial Chamber’s findings of fact in convicting Bemba.<sup>92</sup>

The dissent then addressed the majority’s finding that Bemba’s conviction exceeded the charges that were confirmed against him by the Pre-Trial Chamber.<sup>93</sup> It argued that the Rome Statute’s pre-trial requirements are “aimed at ensuring a separation between the prosecutorial function of determining the scope of a case and the judicial function of fact-finding within the scope of the case brought by the Prosecutor.”<sup>94</sup> Thus, the Statute is less concerned with the amount of detail included in the charges than it is with the Prosecutor’s ability to lay out the general scope of the cases it brings.<sup>95</sup> The judges highlighted the fact that the pre-trial confirmation of charges is meant to be a relatively low hurdle and that charges stated broadly are sufficient to overcome this hurdle.<sup>96</sup>

The dissent also challenged the majority’s interpretation of the command responsibility doctrine under the Rome Statute.<sup>97</sup> It noted that the Trial Chamber’s findings that Bemba’s few measures to prevent the MLC from committing war crimes were limited in their scope and had very little effect.<sup>98</sup> The Trial Chamber had also found that Bemba was informed of his troops’ activities and that he was fully capable of preventing many of the crimes that ultimately resulted from his operations in CAR.<sup>99</sup> The dissenters accused the majority of blindly accepting Bemba’s own interpretation of the facts and of misinterpreting the requirements for

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89. *Id.* ¶ 3.

90. *Id.* ¶ 3 (quoting Prosecutor v. Gbagbo, ICC-02/11-01/15 OA 6, Reasons for the “Decision on the ‘Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo’s detention (ICC-02/11-01/15-134-Red3),” ¶ 14 (July 31, 2015), <http://www.legal-tools.org/doc/23da6c/pdf/>).

91. *Id.* ¶ 6.

92. *See id.* ¶¶ 6–8 (discussing the merits of deferring to the factual findings of the Trial Chamber in arguing that Bemba’s conviction should stand).

93. *See id.* ¶ 19 (beginning the dissent’s analysis of whether Bemba’s convictions exceeded the charges brought against him).

94. *Id.* ¶ 20.

95. *Id.*

96. *Id.* ¶ 21.

97. *See id.* ¶ 41 (introducing the dissent’s discussion of the Trial Chamber’s finding that Bemba did not take steps necessary to prevent crime).

98. *Id.*

99. *Id.*

command responsibility under Article 28 of the Rome Statute.<sup>100</sup> Emphasizing the “all necessary and reasonable measures” language of the doctrine, the dissent argued that the majority erred when it did not consider *all* of the measures Bemba could have taken.<sup>101</sup> After countering the majority’s three major arguments, the dissent went on to analyze and discredit Bemba’s remaining grounds for appeal.<sup>102</sup>

#### IV. LEGITIMACY AS A POLICY CONSIDERATION BEHIND THE MAJORITY’S DECISION

Throughout its twenty-year history, and especially lately, the ICC has garnered criticism from a variety of groups for a variety of reasons.<sup>103</sup> In a speech given on September 10, 2018, the Trump Administration’s national security advisor, John Bolton, lashed out against the Court, accusing it of ineffectiveness.<sup>104</sup> Though Bolton’s rhetoric was undoubtedly rooted in a desire to prevent the ICC from prosecuting crimes committed by U.S. soldiers in Afghanistan,<sup>105</sup> commentators across the political spectrum have echoed his ineffectiveness argument.<sup>106</sup>

Additionally, many African states have taken issue with the Court’s focus on the African continent.<sup>107</sup> In October 2017, Burundi became the first country to

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100. *Id.* ¶ 45.

101. *Id.* ¶ 110.

102. *Id.* ¶ 21.

103. *See, e.g.*, Nicole Fritz, *The ICC: A Common Cause Between John Bolton and Africa?*, AL JAZEERA (Sept. 16, 2018), <https://www.aljazeera.com/indepth/opinion/icc-common-john-bolton-africa-180915095755954.html> (exploring criticisms of the ICC in the U.S. and among African nations); *John Bolton Says U.S. Will Not Cooperate with International Criminal Court*, CBS NEWS, <https://www.cbsnews.com/news/national-security-adviser-john-bolton-speaks-at-federalist-society-live-updates/> (last updated Sept. 10, 2018) (reporting the United States’ stance against the ICC); Evan Slavitt, *Left, Right Can Agree on International Criminal Court’s Incompetence*, BOS. HERALD, [http://www.bostonherald.com/news/columnists/2018/09/left\\_right\\_can\\_agree\\_on\\_international\\_criminal\\_court\\_s\\_incompetence](http://www.bostonherald.com/news/columnists/2018/09/left_right_can_agree_on_international_criminal_court_s_incompetence) (last updated Nov. 8, 2018, 12:00 AM) (recognizing a general consensus in U.S. political sphere that ICC is ineffective); Alexandra Zavis & Robyn Dixon, *Only Africans Have Been Tried at the Court for the Worst Crimes on Earth*, L.A. TIMES (Oct. 23, 2016, 2:18 PM), <http://www.latimes.com/world/africa/la-fg-icc-africa-snap-story.html> (commenting on rising unpopularity of the ICC among African nations).

104. *John Bolton Says U.S. Will Not Cooperate with International Criminal Court*, *supra* note 103. Bolton has since resigned as national security advisor at President Trump’s urging. Zachary Cohen et al., *Trump Fires John Bolton*, CNN, <https://www.cnn.com/2019/09/10/politics/trump-john-bolton-out/index.html> (last updated Sept. 10, 2019, 11:07 PM).

105. *See John Bolton Says U.S. Will Not Cooperate with International Criminal Court*, *supra* note 103 (responding to ICC prosecutor requesting to investigate U.S. military crimes allegedly committed in Afghanistan).

106. *See Slavitt, supra* note 103 (highlighting ICC’s high expenditures and low conviction rate); *see also Hatcher-Moore, supra* note 6 (arguing that ICC’s ineffectiveness is aggravated by opposition and lack of support from various states, including the United States).

107. *See, e.g.*, Zavis & Dixon, *supra* note 103 (highlighting African nations’ dissatisfaction with the ICC); Fritz, *supra* note 103 (noting that ten out of eleven of the ICC’s investigations have been centered in Africa); *see also Awol K. Allo, The ICC’s Problem Is Not Overt Racism, It Is Eurocentrism*, AL JAZEERA (July 28, 2018), <https://www.aljazeera.com/indepth/opinion/icc-problem-simple-racism-eurocentrism-18072511213623.html> (acknowledging the ICC’s African focus but arguing that it is the result of a Eurocentric approach to international justice rather

withdraw from the ICC.<sup>108</sup> Though Burundi's withdrawal may have been motivated by its leaders' desire to avoid accounting for the country's recent history of political violence before the Court,<sup>109</sup> it is not the only African nation pulling away from the ICC. South Africa, long considered a leader in the push for international criminal justice, also seriously considered withdrawing its membership,<sup>110</sup> though its current government recently indicated a stronger desire to effect reform from within.<sup>111</sup>

These various criticisms culminate in the creation of an international environment in which the ICC is coming under attack from within its own structure and beyond.<sup>112</sup> The ICC faces criticism from its member states as well as from populists and nationalists who simultaneously criticize its reach while decrying its ineffectiveness.<sup>113</sup> Much of this criticism calls into question the Court's legitimacy; to Bolton, it is too far-reaching, with no checks on its power;<sup>114</sup> to African states, it is a Eurocentric institution intent on prosecuting their leaders;<sup>115</sup> and to both of these groups, as well as to victims and human rights organizations, it is an ineffective body whose meager successes in holding the perpetrators of global atrocities accountable have thus far failed to justify their cost.<sup>116</sup> The true question underlying the complaints is this: does the ICC, given all its problems, really deserve to exist? Answering in the affirmative will require the Court to justify its authority moving forward. That will mean making efforts to shore up its legitimacy.

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than overt racism).

108. Jina Moore, *Burundi Quits International Criminal Court*, N.Y. TIMES (Oct. 27, 2017), <https://www.nytimes.com/2017/10/27/world/africa/burundi-international-criminal-court.html>.

109. Zavis & Dixon, *supra* note 103.

110. *See id.* ([T]he withdrawal of South Africa, a leader on the continent and a strong proponent of international justice, could be . . . damaging [to the ICC]); *see also* Eduard Jordaan, *South Africa, Multilateralism and the Global Politics of Development*, 24 EUR. J. DEV. RES. 283, 284 (2012) (exploring the history and growth of South Africa's approach to international foreign policy).

111. Carien Du Plessis, *South Africa and the ICC: Signs of an ANC Shift on Withdrawal from ICC*, DAILY MAVERICK (Sept. 3, 2018), <https://www.dailymaverick.co.za/article/2018-09-03-signs-of-an-anc-shift-on-withdrawal-from-icc>. The North Gauteng High Court in Pretoria ruled against South Africa's formal withdrawal from the ICC, declaring it "unconstitutional and invalid." *See* Merrit Kennedy, *Court Blocks South Africa's Withdrawal from International Criminal Court*, NPR (Feb. 22, 2017, 11:35 AM), <https://www.npr.org/sections/thetwo-way/2017/02/22/516620190/court-blocks-south-africas-withdrawal-from-international-criminal-court>. The court held that withdrawal required parliamentary approval, but it did not decide the policy issue of whether South Africa should withdraw. *Id.*

112. *See* Layan Charara, *Burundi's Challenge to the ICC's "Africa Bias,"* MICH. J. INT'L L. ONLINE, <http://www.mjilonline.org/burundis-challenge-to-the-iccs-africa-bias/> (last visited Oct. 6, 2019) (describing the Africa Union's criticisms of the ICC as well as multiple member states' threats to withdraw from the ICC).

113. *See* Allo, *supra* note 107 (discussing how populists' and nationalists' criticisms require the ICC to defend its legacy).

114. *John Bolton Says U.S. Will Not Cooperate with International Criminal Court*, *supra* note 103.

115. *See* Allo, *supra* note 107 (discussing how ten of the eleven situations being investigated by the ICC concern African countries).

116. Slavitt, *supra* note 103.

### A. *Defining Legitimacy*

The term “legitimate,” in the common sense, means to be in accordance with the law.<sup>117</sup> In the context of international criminal law, defining legitimacy becomes a bit more complicated. Scholars recognize many different types of legitimacy, but one accepted definition divides the term into two broad categories: normative legitimacy and sociological legitimacy.<sup>118</sup> Normative legitimacy concerns the intrinsic bases for an institution’s authority, encompassing both the moral and legal norms that justify its existence.<sup>119</sup> Sociological legitimacy, also called descriptive legitimacy, instead focuses on the public perception of an institution.<sup>120</sup> This Note will analyze the normative legitimacy of the ICC and how the *Bemba* acquittal may have affected it.

The normative legitimacy of any given institution is deeply linked to that institution’s effectiveness.<sup>121</sup> One way to measure an institution’s effectiveness is by evaluating its goals and its success in meeting those goals.<sup>122</sup> Normative legitimacy constitutes the legal and moral norms that form the basis for an institution’s existence, and is therefore tied to the goals of the community that created it.<sup>123</sup> For the ICC to have strong normative legitimacy, it must be able to make some sort of substantial progress towards meeting its goals.<sup>124</sup> One way to measure this would be to examine how the ICC is faring in its quest to end impunity and to ensure accountability for perpetrators.<sup>125</sup> Of the ICC’s many ambitions, this is one that it

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117. *Legitimate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/legitimate> (last visited Oct. 3, 2019).

118. See Christopher A. Thomas, *The Uses and Abuses of Legitimacy in International Law*, 34 OXFORD J. LEGAL STUD. 729, 734 (2014) (describing different ways to understand the concept of legitimacy).

119. See Janine Natalya Clark, *International Criminal Courts and Normative Legitimacy: An Achievable Goal?*, 15 INT’L CRIM. L. REV. 763, 765 (2015) (quoting Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. & REV. 571, 574 (1995)) (providing Mark Suchman’s proffered definition of “legitimacy,” which includes normative terminology).

120. See Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J. L. & POL. 239, 242–43 (2011) (discussing the public’s trust in an institution, which then contributes to its loyalty to that institution).

121. See BRUCE CRONIN & IAN HURD, *THE UN SECURITY COUNCIL AND THE POLITICS OF INTERNATIONAL AUTHORITY* 6–7 (Bruce Cronin & Ian Hurd eds., 2008) (explaining how legitimacy may be based on the accomplishment of an organization’s goals).

122. See *id.* at 7 (noting how performance legitimation is based on positive results and the accomplishment of goals).

123. See *id.* (explaining how international institutions gain more legitimacy when they serve purposes and goals that are reflective of the wider cultural norms and morals of the societies that created them).

124. See Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT’L L. 225, 230 (2012) (describing how effectiveness of international courts may be assessed by evaluating goal achievement within a reasonable time).

125. *Id.*; See *Origin and Purpose of the International Criminal Court*, INVISIBLE CHILDREN, <https://invisiblechildren.com/blog/2012/04/05/origin-and-purpose-of-the-international-criminal-court/> (last visited Oct. 3, 2019) (identifying that the ICC’s purpose is to ensure that those who carry out crimes against humanity and mass atrocities are not exempt from punishment).

appears fond of flaunting; the phrases appear frequently in ICC press releases and are at the top of the “About” section of the Court’s website.<sup>126</sup> Indeed, the ICC was founded out of a spirit of accountability,<sup>127</sup> so this particular goal may come closest to being the normative ideal to which the Court owes its existence and upon which its legitimacy depends. The ICC’s effectiveness is linked to its achievement of its goals,<sup>128</sup> and therefore to its normative legitimacy; when its effectiveness suffers, it loses the ability to justify its existence.

Another important goal of the ICC is to establish an international rule of criminal law;<sup>129</sup> this goal requires ensuring fairness.<sup>130</sup> How well a criminal justice system protects and ensures defendants’ rights affects its normative legitimacy.<sup>131</sup> Normative legitimacy suffers when an institution cannot achieve its goals, and failure to protect defendants’ rights means failing to adhere to the high standards of international law that the ICC aspires to set.<sup>132</sup> It is this need to ensure fairness and protect defendants’ rights, felt perhaps more strongly in light of increasing criticisms of the Court, that may have influenced the majority to acquit in *Bemba*.

### ***B. Protecting Legitimacy by Respecting Defendants’ Rights***

The *Bemba* decision may be viewed as the majority’s response to mounting criticism against the ICC as a way to reaffirm the Court’s normative legitimacy. There are signs that the ICC is beginning to alter its behavior in response to its loudest and harshest critics.<sup>133</sup> It recently began taking definitive steps away from its highly controversial African focus by reaching out to victims of war crimes in Palestine<sup>134</sup> and initiating a preliminary probe into alleged crimes committed by

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126. See *About*, INT’L CRIM. CT., <https://www.icc-cpi.int/about> (last visited Oct. 3, 2019) (“The Court is participating in a global fight to end impunity, and through international criminal justice, the Court aims to hold those responsible accountable for their crimes and to help prevent these crimes from happening again.”).

127. See *supra* Part I for a discussion of the ICC’s history.

128. Shany, *supra* note 124.

129. See Sang-Hyun Song, *The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law*, UN CHRON. (Dec. 2012), <https://unchronicle.un.org/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law> (explaining the ICC’s role in establishing an international rule of criminal law).

130. See Hatcher-Moore, *supra* note 6 (arguing that when the ICC relies on weak evidence or does not prosecute the most culpable parties, it cannot achieve its goals).

131. See Wayne Jordash & Tim Parker, *Trials in Absentia at the Special Tribunal for Lebanon: Incompatibility with International Human Rights Law*, 8 J. INT’L CRIM. JUST. 487, 508 (2010) (explaining that if defendants’ rights erode, the goals of the ICC will be threatened).

132. See *id.* (arguing that unwillingness of international criminal courts to protect defendants’ rights will eventually cause such tribunals to be unable to uphold the high legal standards to which they aspire).

133. See Zavis & Dixon, *supra* note 103 (criticizing the ICC for its unfair focus on Africa and examining African states’ responses to same).

134. See Nada Kiswanson, *The ICC is Reaching Out to Victims of War Crimes in Palestine*, AL JAZEERA (July 20, 2018), <https://www.aljazeera.com/indepth/opinion/icc-reaching-victims-war-crimes-palestine-180720083114607.html> (describing the ICC’s outreach efforts as a positive development in the Court’s relationship with victims).

Nicolas Maduro's government in Venezuela.<sup>135</sup> It is therefore not unreasonable to suspect that issues of legitimacy may have an increasingly large part to play in the Court's decisions going forward as it struggles to justify its role on the world stage.

Viewed through the lens of the legitimacy debate, the majority's holding in *Bemba* can be interpreted as an attempt to bolster the ICC's normative legitimacy by shoring up protections for defendants. The need for such protections arises from the problematic state of defendants' rights in international tribunals in general, which are often plagued by evidentiary issues and an overreliance on eyewitness testimony.<sup>136</sup> It is also evidenced by the OTP's missteps in the *Bemba* case, which were characterized by a relative lack of evidence and criticisms of the selection of defendants.<sup>137</sup>

### 1. Defendants' Rights Issues in International Courts

As discussed, ensuring defendants' rights can have a strong positive effect on an institution's normative legitimacy.<sup>138</sup> Ironically, however, the issue of defendants' rights in international courts seems to receive relatively little academic or public attention.<sup>139</sup> This is perhaps due, in part, to the fact that the types of organizations one would usually expect to see involved in this sort of issue (i.e., human rights groups) tend to push for victims' rights and greater accountability inside the international criminal sphere.<sup>140</sup> Perhaps because of this heightened focus on holding perpetrators accountable, it is easy to forget that international criminal courts are often plagued by extreme difficulties in reaching accurate factual judgments.<sup>141</sup>

In her book, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*, Nancy Combs points to several such issues faced by international criminal courts, including an overreliance on eyewitness testimony, the inability of witnesses to provide concrete factual details,

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135. See *Venezuela: ICC Asked to Probe Crimes Against Humanity*, DEUTSCHE WELLE (Sept. 26, 2018), <https://www.dw.com/en/venezuela-icc-asked-to-probe-crimes-against-humanity/a-45652251> (reporting that several UN member countries submitted a request for the ICC to widen the scope of its ongoing preliminary investigation).

136. See *infra* Part IV.B.1 for a discussion of these issues, including overreliance on eyewitness testimony.

137. See *infra* Part IV.B.2 for a discussion of the weaknesses in *Bemba*.

138. See *supra* Part IV.A for a discussion of the link between protections for defendants and legitimacy.

139. See NANCY AMOURY COMBS, *FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS* 3–4 (2010) (describing how academic scholarship often does not address the evidentiary problems faced by international courts).

140. See, e.g., *Central African Republic/ICC: New Chance for Justice*, HUM. RTS. WATCH (Nov. 19, 2018, 1:00 AM), <https://www.hrw.org/news/2018/11/19/central-african-republic/icc-new-chance-justice> (describing arrest of alleged war criminal Alfred Yékatom as a victory for victims and criticizing the ICC's failure to charge more individuals during its first investigation into the conflict in CAR).

141. See COMBS, *supra* note 139 (arguing that international criminal courts lack the ability to accurately fact-find).



educational and cultural barriers to accurate testimony, and the courts' own lax attitude towards these problems.<sup>142</sup> Because most perpetrators of international crimes do not keep written records of their actions, international courts are forced to rely almost entirely on witness testimony, with prosecutors presenting mostly fact witnesses and very few experts.<sup>143</sup>

Such heavy reliance on eyewitness testimony can be extremely problematic, as it has a tendency to be unreliable; witnesses' memories can fade or be altered by factors such as stress.<sup>144</sup> This problem is compounded when dealing with international incidents, as differences in education and culture can also affect witness testimony.<sup>145</sup> For instance, a subsistence farmer needs to know when the seasons change but may not be as concerned with precise dates, information that the Western trial system requires from its witnesses in order to ensure accurate fact-finding.<sup>146</sup>

On the whole, international courts have not treated these issues as seriously as one would hope.<sup>147</sup> Combs theorizes that international criminal courts are eager to explain away evidentiary deficiencies because of the enormous cost of acquittals, and because international judges who believe in achieving justice tend to have subconscious biases towards conviction.<sup>148</sup> As previously discussed, inaccurate factual findings and failure to ensure defendants' rights can have a negative effect on an international institution's normative legitimacy.

## 2. Weaknesses in the *Bemba* Case

Issues relating to evidentiary standards and protections for defendants are particularly relevant to *Bemba*, as some commentators have argued that the acquittal may be due to certain failures of the OTP in proving its case.<sup>149</sup> CAR first referred the crimes that had occurred on its soil to the ICC on December 21, 2004, making

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142. *Id.* at 11, 22, 63, 190.

143. *Id.* at 12.

144. *Id.* at 14–15; see also Jennifer L. Devenport et al., *Effectiveness of Traditional Safeguards Against Erroneous Conviction Arising from Mistaken Eyewitness Identification*, in EXPERT TESTIMONY OF THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 51, 51 (Brian L. Cutler ed., 2009) (citing eyewitness identifications as the leading cause of false convictions in the United States).

145. See COMBS, *supra* note 139, at 64 (“It is certain reasonable to assume that illiteracy and lack of education substantially impair the ability of many international witnesses to answer the questions posed to them.”).

146. See *id.* at 66, 84, 89 (providing examples of how cultural differences can affect eyewitness testimony); see also Allo, *supra* note 107 (criticizing the ICC's Eurocentric structure).

147. See *supra* notes 139–44 and accompanying text for a discussion of the failure of the ICC to adequately protect the rights of defendants.

148. COMBS, *supra* note 139, at 230–34.

149. See, e.g., Leila Sadat, *Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in Prosecutor v. Jean-Pierre Bemba Gombo*, EJIL: TALK! (June 12, 2018), <https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo/#more-16264> (asserting that the OTP's case was weak and based on insufficient evidence).

the ICC's CAR investigation one of its earliest.<sup>150</sup> Bemba himself was the first person to come under the focus of this investigation when the ICC issued a warrant for his arrest in 2008.<sup>151</sup> This means that a significant portion of the early investigation into the case occurred during the tenure of Chief Prosecutor Luis Moreno Ocampo, who was the first to hold the position and whose term lasted from 2003 until 2012.<sup>152</sup> Ocampo has been the subject of controversy due to his financial dealings with a prominent Libyan billionaire and former supporter of Muammar Gaddafi.<sup>153</sup> Aside from his personal controversies, he has also been criticized for the policies implemented by the OTP while under his leadership.<sup>154</sup>

Many of these policies implicate the same concerns for fairness and protections for defendants as discussed above.<sup>155</sup> For example, during the prosecution of Thomas Lubanga Dyilo, a Congolese militia leader, Ocampo's OTP encountered issues with non-disclosure of exculpatory information and reliance on anonymous local intermediaries in interacting with witnesses, both of which nearly led to the collapse of the case.<sup>156</sup> Commentators pointed out that the OTP had utilized a strategy involving limited field investigation and heavy reliance on the cooperation of the state itself rather than interviewing victim witnesses directly or utilizing information already collected by NGOs with considerable local experience, a strategy that would ultimately become the OTP's default while headed by Ocampo.<sup>157</sup> Additionally, the OTP's choice of defendants in *The Prosecutor vs. Thomas Lubanga Dyilo* prompted criticism, with many believing that Lubanga was

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150. *Jean-Pierre Bemba Gombo Trial Timeline*, INT'L JUST. MONITOR, <https://www.jimonitor.org/jean-pierre-bemba-gombo-timeline/> (last visited Oct. 4, 2019).

151. *Id.*

152. *Luis Moreno-Ocampo*, YALE JACKSON INST. FOR GLOBAL AFF., <http://jackson.yale.edu/person/luis-moreno-ocampo/> (last visited Oct. 4, 2019).

153. See Barney Thompson, *Former ICC Prosecutor in Row Over Lucrative Consultancy Work*, FIN. TIMES (Oct. 6, 2017), <https://www.ft.com/content/313526a8-a9d8-11e7-ab55-27219df83c97> (describing Ocampo's dealings with Hassan Tatanaki—man associated with a Libyan militia group—and legally-questionable dealings with multiple ICC employees after he entered private practice).

154. See, e.g., Pascal Kalume Kambale, *A Story of Missed Opportunities: The Role of the International Criminal Court in the Democratic Republic of Congo*, in CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS 171, 171–97 (Christian De Vos ed., 2015) (criticizing Ocampo's methods specifically in the context of the ICC's investigation into the DRC); Janet Anderson, *Ocampo's Shadow Still Hangs Over the ICC*, INT'L JUST. TRIBUNAL (June 18, 2018), <https://www.justicetribune.com/blog/ocampos-shadow-still-hangs-over-icc> (analyzing Ocampo's policies and theorizing that they may have led to the relative evidentiary weakness of the OTP's case against Bemba).

155. See *supra* Part V.B.1 for a discussion of defendants' rights issues in international criminal tribunals.

156. *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Filing of Incriminating Evidence and Potentially Exculpatory Evidence, ¶ 3 (April 21, 2006), [https://www.icc-cpi.int/CourtRecords/CR2006\\_02295.pdf](https://www.icc-cpi.int/CourtRecords/CR2006_02295.pdf); see Christodoulos Kaoutzakis, *A Turbulent Adolescence Ahead: The ICC's Insistence on Disclosure in the Lubanga Trial*, 12 WASH. U. GLOBAL STUD. L. REV. 263, 267–77 (2013) (discussing the exculpatory issues associated with the OTP's investigation methods).

157. Anderson, *supra* note 154; Kambale, *supra* note 154, at 189–92.

not the correct or most culpable target.<sup>158</sup>

The *Bemba* case has attracted many of these same criticisms, with commentators asserting that the OTP based its case on insufficient evidence that lacked a proper linkage between witnesses and the orders Bemba issued to his troops in CAR.<sup>159</sup> Critics argue that the OTP should not have prosecuted Bemba without also charging individuals such as Francois Bozizé.<sup>160</sup> Just as in *Lubanga*, the OTP's lackluster investigation may have led the majority to feel that it needed to decide between accountability and fairness to the defendant.<sup>161</sup>

### 3. The Majority's Solution

Many of the ideas expressed by the majority in *Bemba* can be interpreted as intending to increase protections for defendants. One of these ideas was the need for a higher standard for the ICC's pre-trial process.<sup>162</sup> Before a case can proceed to trial, the OTP must submit the charges to a confirmation hearing by the Pre-Trial Chamber.<sup>163</sup> Designed as a low hurdle meant to eliminate only cases that have no basis to proceed to trial, the pre-*Bemba* standard merely required that pre-trial judges find "substantial grounds to believe" that a defendant committed the alleged crimes and that evidence of the crimes be provided to the defendant in advance of the trial.<sup>164</sup> Following the case, however, the Appeals Chamber modified the rules to require a detailed confirmation of every individual underlying crime committed by Bemba's soldiers.<sup>165</sup> This higher pre-trial standard set a precedent that will undoubtedly protect future defendants.<sup>166</sup>

In the *Bemba* case, the Pre-Trial Chamber, following the original standard, found it sufficient that Bemba be charged under Article 28(a) of the Rome Statute with the crimes against humanity and war crimes committed by his soldiers while operating in CAR and within the specified timeframe.<sup>167</sup> Under this standard, the ICC allowed for specific instances of conduct to later be added to the charges, as long as the defendant was properly notified before trial.<sup>168</sup> This opportunity was

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158. Kambale, *supra* note 154, at 179–85.

159. Anderson, *supra* note 154.

160. *See id.* (quoting Sylvie Panika, editor-in-chief for a radio station in Bangui) ("Bemba didn't come to CAR on his own. Without these people [President Patassé and Former President Bozizé], I don't see how the Bemba trial can be held.").

161. *See* Kaoutzani, *supra* note 156, at 296–305 (discussing how the ICC's insistency on disclosure in the *Lubanga* case forced it to choose between ensuring fairness and furthering its goal of ending impunity).

162. *See* Susana SáCouto, *The Impact of the Appeals Chamber Decision in Bemba: Impunity for Sexual and Gender-Based Crimes?*, INT'L JUST. MONITOR (June 22, 2018), <https://www.ijmonitor.org/2018/06/the-impact-of-the-appeals-chamber-decision-in-bemba-impunity-for-sexual-and-gender-based-crimes/> (explaining the new ICC standard for pre-trial processes).

163. *See id.* (describing the requirement that the Pre-Trial Chamber confirm the acts upon which the charges are based).

164. Whiting, *supra* note 15.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

invaluable to prosecutions such as Bemba's where victims could not come forward or evidence was not found until late in the pre-trial process.<sup>169</sup>

In its opinion acquitting Bemba, the Appeals Chamber majority added new requirements to the ICC's pre-trial procedure.<sup>170</sup> One of the majority's main bases for acquittal was that the crimes of which Bemba was ultimately convicted had exceeded the charges brought against him during the pre-trial.<sup>171</sup> The holding created a requirement that the Pre-Trial Chamber confirm all of the individual acts that make up the charges, effectively barring the OTP from adding related charges before trial, even if the defendant is properly notified.<sup>172</sup>

The majority also heightened the standard for a conviction based on command responsibility under Article 28(a), requiring only that a commander do what is "necessary and *reasonable* under the circumstances," rather than the previous standard, which required a commander to take "every single conceivable measure" to prevent crimes.<sup>173</sup>

Finally, the majority disregarded precedent in instituting a new standard of appellate review for the ICC.<sup>174</sup> In doing so, it declined to give deference to the Trial Chamber's assessment of the facts, stating that the Appeals Chamber may conduct its own review of the facts when failure to do so would constitute a miscarriage of justice.<sup>175</sup>

All three of these changes appear to have been intended to serve as protections for defendants.<sup>176</sup> They may well have come simply as a direct response to the OTP's less-than-stellar handling of the Bemba investigation.<sup>177</sup> However, these changes also seem to correspond with some of the more generalized criticisms leveled against the ICC. The majority's decision to acquit may be read as an attempt to reach the proper balance between defendants' rights and the ICC's effectiveness. Because both are important aspects of an institution's normative legitimacy, it is vital to strike

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169. SáCouto, *supra* note 162.

170. Whiting, *supra* note 15.

171. Prosecutor v. Bemba Gombo, ICC-01/05-01/08 A, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute," ¶ 2 (June 8, 2018), [https://www.icc-cpi.int/CourtRecords/CR2018\\_02984.pdf](https://www.icc-cpi.int/CourtRecords/CR2018_02984.pdf).

172. SáCouto, *supra* note 162.

173. Bemba Gombo, ICC-01/05-01/08 A, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute," ¶ 8 (emphasis added).

174. See Sadat, *supra* note 149 (pointing out that the majority does not cite any legal authority for this departure and theorizing that the judges may have relied on Article 83(2) of the Rome Statute, which may allow the Appeals Chamber to make its own findings of fact).

175. *Id.*

176. See *id.* (asserting that the majority's main reason for acquitting Bemba was to create protections for both the rule of law and the rights of defendants); see also Alexander Heinze, *Some Reflections on the Bemba Appeals Chamber Judgment*, OPINIO JURIS (June 18, 2018), <http://opiniojuris.org/2018/06/18/some-reflections-on-the-bemba-appeals-chamber-judgment/> (arguing that the majority's broad approach to appellate review was warranted as a protection for defendants because of the extreme finality of ICC judgments and the lack of external review).

177. See Anderson, *supra* note 154 (arguing that the relative weakness of the case against Bemba likely had a hand in the acquittal).

the right balance; however, the inherent tension between assuring fairness and holding perpetrators accountable makes it very easy for courts to end up coming down too strongly on either end of this spectrum.<sup>178</sup> The majority, in acquitting Bemba, was unable to strike this balance and sacrificed the ICC's effectiveness in the process.

### V. PROTECTIONS AT THE COST OF EFFECTIVENESS

However well-intentioned the majority may have been in creating these new protections, it is clear that they will significantly undermine the ICC's effectiveness in several respects.<sup>179</sup> To begin with, it is already very difficult for the ICC to obtain convictions or to bring defendants before the Court in the first place.<sup>180</sup> This latter situation tends to occur, because, as an international court, the ICC has no enforcement powers of its own<sup>181</sup> and therefore must rely on the cooperation of various states.<sup>182</sup> Besides this external hurdle,<sup>183</sup> ICC prosecutions also face significant challenges caused by the Court's own procedural processes.<sup>184</sup> These procedural complications have only been worsened by the *Bemba* majority's opinion.

This section argues that the majority's decision will have a negative impact on the ICC's effectiveness by creating burdensome pre-trial requirements, rendering Article 28 command responsibility all but completely impracticable as a mode of

178. See, e.g., COMBS, *supra* note 139, at 2–3 (showing how international criminal tribunals are frequently inclined to prioritize accountability to the detriment of protections for defendants).

179. See Bruce Konviser, *Congo: Jean-Pierre Bemba's ICC Acquittal May Bode Ill for Court's Future*, DEUTSCHE WELLE (June 9, 2018), <https://www.dw.com/en/congo-jean-pierre-bembas-icc-acquittal-may-bode-ill-for-courts-future/a-44141323> (describing statements by the OTP and various human rights organizations critical of the ruling, which emphasize that acquittal will make it harder to prosecute military commanders under command responsibility theory).

180. See *A Handcuffed International Criminal Court*, L.A. TIMES (June 18, 2015, 5:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-icc-sudan-south-africa-20150618-story.html> (using the ICC's inability to arrest Sudan President Omar Hassan Ahmed Bashir to highlight the Court's lack of enforcement ability, as well as the fact that sometimes even its own member states ignore its warrants).

181. See Mirjan Damaška, *The International Criminal Court Between Aspiration and Achievement*, 14 UCLA J. INT'L L. & FOREIGN AFF. 19, 21 (2009) (discussing the paradox of the ICC's ambitious goal of prosecuting the world's worst atrocities while having no inherent enforcement powers of its own, as well as the ways in which the ICC's normative framework tends to undermine its ambitions).

182. See Courtney Hillebrecht & Scott Straus, *Who Pursues the Perpetrators? State Cooperation with the ICC*, 39 HUM. RTS. Q. 162, 162 (2017) (describing how states' level of cooperation with the ICC is often affected by their domestic politics and the interests of their partner states).

183. The Court's reliance on other states also serves as the beginning of its procedural difficulties. As a complementary court, the ICC may only have jurisdiction where the states that would normally prosecute the issue agree to allow the ICC to take the case. Conflict between the OTP and states may lead to a long, drawn-out process merely to determine whether the Court has jurisdiction. Damaška, *supra* note 181, at 23–28.

184. See Mark A. Drumbl, *Epilogue: From Too Tall to Trim and Small*, 27 WM. & MARY BILL OF RTS. J. 765, 768 (2019) (discussing how the ICC can disregard due process, rights of accused, and principled development of law in making decisions such as acquittals).

liability and dramatically increasing the difficulties the OTP already faces in prosecuting crimes of gender and sexual violence. It then argues that, because the decision decreases the ICC's effectiveness and makes it more difficult for the Court to achieve its goals, it will have a negative impact on the Court's legitimacy that far outweighs the gains the majority may have achieved in its emphasis on defendants' rights.

#### **A. *The Bemba Majority's New Pre-Trial Barriers***

The majority's new requirements for the pre-trial process will significantly impact the prosecutor's ability to bring cases before the Court.<sup>185</sup> Because of the complexity and unique nature of ICC cases, it would be almost impossible for the OTP to go to trial with exactly the same evidence it had during the pre-trial confirmation hearing.<sup>186</sup> The generally extensive period of time between the confirmation of the charges and the beginning of trial creates innumerable opportunities for witnesses to disappear or for new evidence to be discovered.<sup>187</sup> This is particularly true for cases involving crimes of sexual violence, which are often considered ancillary to the most serious offenses and thus are not prioritized by investigators.<sup>188</sup> The majority's approach, in failing to take this into consideration, unnecessarily complicates an already inconsistent and inefficient pre-trial process,<sup>189</sup> while blunting the OTP's power to make the best case it can before the Trial Chamber.<sup>190</sup>

#### **B. *Impact on Prosecutions for Command Responsibility***

The majority's decision in *Bemba* will also have a massively negative impact on the ICC's ability to hold commanders responsible under Article 28(a) of the Rome Statute.<sup>191</sup> In its interpretation of the command responsibility doctrine, the majority accorded a great deal of deference to the military commander to conduct a cost/benefit analysis when deciding what measures should be taken to combat and prevent crimes committed by those under their command.<sup>192</sup> Because *Bemba* was a remote commander, the majority reasoned, there were limitations to his ability to

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185. See Whiting, *supra* note 15 (discussing the increased fact-finding prosecutors must engage in to comply with the new standard).

186. See *id.* (noting how the Trial court must limit its findings despite the fact that evidence added after the pre-trial phase would help establish truth or would not be prejudicial to the accused).

187. See *id.* (discussing the inevitability of witnesses dropping out and new evidence coming to light in the seventeen months between the confirmation decision and the beginning of trial).

188. See SáCouto, *supra* note 162 (asserting that evidence of crimes of sexual violence often is not uncovered until late in the investigation, or even during trial).

189. Sadat, *supra* note 149.

190. See Whiting, *supra* note 15 (predicting that the new pre-trial requirements will be overly beneficial to defendants, as the lengthening periods between confirmation and trial will allow evidence against defendants to weaken, while the prosecution will not have any opportunity to enhance it).

191. Konviser, *supra* note 179.

192. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶ 170 (March 21, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_02238.pdf](https://www.icc-cpi.int/CourtRecords/CR2016_02238.pdf); Amann, *supra* note 3.

conduct such an analysis.<sup>193</sup> Not only does this aspect of the holding make it more difficult to hold commanders responsible for crimes committed by their troops, but it also comes dangerously close to giving a free pass to any military group whose members operate across borders.<sup>194</sup>

The ICC is meant to judge atrocities committed on a global scale, so the low-level soldiers who actually commit the crimes in question are not and will never be the targets of its efforts.<sup>195</sup> Therefore, eroding the notion of command responsibility will make it much harder for the ICC to hold anyone at all responsible for these crimes going forward.<sup>196</sup> Holding no one accountable for crimes that undoubtedly occurred flies in the face of the spirit of accountability under which the ICC was founded and can only have a negative impact on its efficacy.<sup>197</sup>

### ***C. Impact on Prosecuting Crimes of Sexual Violence***

The majority's opinion will have a particularly devastating impact on the ICC's ability to prosecute crimes of sexual violence. Bemba's original conviction had been seen by many as a major step forward in the ICC's attitude towards such crimes and as an important victory for international gender justice.<sup>198</sup> Historically, crimes of sexual violence had been overlooked when dealing with crimes committed during times of conflict.<sup>199</sup> Prosecutions for these crimes on the national level are almost nonexistent, and prosecutions in international tribunals, including the ICC, had been sparse.<sup>200</sup>

However, the topic has garnered significantly more attention in recent years.<sup>201</sup> In 2008, Germain Katanga was charged with rape as a war crime before the ICC, though he was ultimately acquitted of those charges.<sup>202</sup> In 2014, the OTP published a Policy Paper on Sexual and Gender-Based Crimes, signaling its intent to create

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193. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, A Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute," ¶ 191 (June 8, 2018), [https://www.icc-cpi.int/CourtRecords/CR2018\\_02984.pdf](https://www.icc-cpi.int/CourtRecords/CR2018_02984.pdf); Sadat, *supra* note 149.

194. See Sadat, *supra* note 149 (arguing that, since troops now travel between states more frequently than ever, the Court should in fact hold these sorts of commanders to a *higher* standard of responsibility than commanders who operate only within their respective states, owing to both the increased risks of such ventures and the advancement of technology, such as cell phones, which makes it easier for a commander to remotely monitor his forces).

195. Rome Statute, *supra* note 1, art. 5.

196. Amann, *supra* note 3.

197. *Id.*

198. *Gender Report Card on the International Criminal Court 2018*, *supra* note 11.

199. See Anne-Marie de Brouwer, *The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes*, 48 CORNELL INT'L L. J. 639, 639 (2015) (examining how sexual violence in conflict is investigated and prosecuted around the world).

200. *Id.*

201. *Id.*

202. Prosecutor v. Katanga, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 27 (Sept. 30, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf>; see Olga Jurasz, *Gender-Based Crimes at the ICC: Where is the Future?*, 108 AM. SOC'Y INT'L L. PROC. 429, 430 (2014) (discussing the Katanga charges and acquittal).

more of a focus on prosecuting instances of sexual violence.<sup>203</sup> When the ICC's Trial Chamber convicted Bemba in 2016, it secured its first conviction for crimes of sexual violence, treating them as war crimes and crimes against humanity.<sup>204</sup> Bemba's conviction seemed to serve as a sign that prosecutions of sexual violence were now being taken seriously on the world stage and that more of the perpetrators of these crimes would be held accountable.<sup>205</sup>

Not only does the majority's acquittal of Bemba effectively undo this symbol of progress for international gender justice, but the procedural hurdles it creates are also likely to have an extremely negative impact on the OTP's ability to prosecute crimes of sexual violence. As previously mentioned, the pre-trial requirements forbidding the OTP from bringing in new evidence after the confirmation of charges, but before trial will make it much more difficult to prosecute crimes of sexual violence, the evidence of which often emerges late in investigations.<sup>206</sup>

The new appellate standard of review will most likely also make it more difficult to secure final convictions for cases involving sexual violence.<sup>207</sup> In substituting its own review of the facts for that of the Trial Chamber, the Appeals Chamber will not have access to the context in which evidence appears.<sup>208</sup> Access to full factual context is particularly important in cases involving crimes of sexual violence, because such crimes may seem less clear-cut than others.<sup>209</sup> Commanders do not often order their subordinates to commit rape; it is much more common for its perpetration to be encouraged or merely allowed, explicitly or implicitly.<sup>210</sup> This can make it difficult for a court that does not review all of the facts of a given situation to grasp the context in which these crimes were committed.<sup>211</sup>

But perhaps the aspect of the majority's opinion that will have the most adverse impact on efforts to prosecute crimes of sexual violence is its interpretation of the command responsibility doctrine under Article 28(a). It is, and always has been, very difficult to link crimes of sexual violence to high-level officials, especially remote

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203. See Valerie Oosterveld, *The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law*, 24 WM. & MARY J. WOMEN & L. 443, 443–44 (2018) (describing how the Policy Paper adopted an innovative understanding of gender and provided a new framework for the prosecution and investigation of crimes of sexual violence).

204. See Anthony, *supra* note 22, at 421 (analyzing Bemba's conviction and making contemporaneous predictions of its effects on future prosecutions of crimes of sexual violence at the ICC).

205. *Id.* at 424.

206. See SáCouto, *supra* note 162 (describing how crimes of sexual violence are often either intentionally or mistakenly not recognized or not prioritized from the outset of investigations).

207. *Id.*

208. *Id.*

209. *Id.*

210. See Kelly Dawn Askin, *Holding Leaders Accountable in the International Criminal Court (ICC) for Gender Crimes Committed in Darfur*, 1 GENOCIDE STUD. & PREVENTION: INT'L J. 13, 15 (2006) (explaining how, when rape is not expressly forbidden by commanders, its frequency increases dramatically as compared to situations where commanders punish offenders).

211. See SáCouto, *supra* note 162 (explaining that factual context is often necessary in order to link crimes of sexual violence that might otherwise go unnoticed to the other crimes committed within a situation).



commanders such as Bemba.<sup>212</sup> Again, because crimes of sexual violence are frequently tolerated rather than explicitly ordered,<sup>213</sup> it will be very difficult for prosecutors to prove that such high-level commanders had the level of control over the acts that the majority seems to require.<sup>214</sup>

Furthermore, it is much more difficult to obtain a sexual violence conviction for high-level offenders under other modes of liability besides Article 28.<sup>215</sup> For example, in *Katanga*, one of only two other ICC cases addressing charges of sexual violence, Katanga was convicted of all of the charges against him except for those regarding sexual violence.<sup>216</sup> He was acquitted despite the fact that the evidence presented at trial proved that the assaults in question had certainly occurred.<sup>217</sup> Katanga had been charged under Article 25(3)(a) as an accessory;<sup>218</sup> one commentator postulated in the wake of the decision that Katanga might have been convicted of the sexual violence crimes if he had instead been charged under Article 28.<sup>219</sup>

The legal requirements of command responsibility form a lower threshold than those of other modes of liability such as co-perpetration, making the doctrine an important tool in charging high-level offenders.<sup>220</sup> Because these high-level offenders are ultimately most responsible for ensuring that their subordinates do not commit these crimes, they are the offenders against whom the deterrent effect of ensuring accountability would prove most useful.<sup>221</sup> However, the majority's decision in *Bemba* will make the requirements of Article 28 stricter, thus making it even more difficult to hold high-level offenders accountable. Because low-level offenders are not typically brought before the ICC, this results, as in *Katanga*, in a

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212. See de Brouwer, *supra* note 199, at 662–63 (describing how higher officials who did not directly commit the crimes may only be convicted under respondeat superior, and arguing that showing the official had reason to know that his troops were committing crimes of sexual violence specifically adds yet another layer of difficulty).

213. Askin, *supra* note 210.

214. See SáCouto, *supra* note 162 (arguing that the majority's assessment of necessary and reasonable measures did not take into account how effective those measures were in preventing specific crimes; for instance, the facts showed that the measures Bemba took to investigate crimes either ignored or gave very little attention to allegations of rape as opposed to other crimes such as pillaging).

215. See de Brouwer, *supra* note 199, at 663–64 (noting that prosecutions under the liability theories of command responsibility and joint criminal enterprise have been significantly rare).

216. Prosecutor v. Katanga, Case No. ICC-01/04-01/07-3436, Judgment Pursuant to Article 74 of the Statute ¶¶ 1691–93 (Mar. 7, 2014), [https://www.icc-cpi.int/CourtRecords/CR2015\\_04025.pdf](https://www.icc-cpi.int/CourtRecords/CR2015_04025.pdf).

217. Prosecutor v. Katanga, Case No. ICC-01/04-01/07-3436, ¶ 516 Decision on the Confirmation of Charges, (Sept. 30, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf> (stating that the evidence clearly showed incidence of sexual violence done in the district of Ituri from 2002-2003).

218. See *id.* ¶¶ 7–8 (detailing Katanga's charges, which include those under Article 25(3)(a)).

219. See generally Linnea Kortfält, *Sexual Violence and the Relevance of the Doctrine of Superior Responsibility in the Light of the Katanga Judgment at the International Criminal Court*, 84 NORDIC J. INT'L L. 533 (2015).

220. *Id.* at 569.

221. *Id.* at 552–54.

situation where crimes occurred, but no one is held accountable for them.<sup>222</sup> Thus, the inability to prosecute crimes of sexual violence decreases the ICC's overall effectiveness, which negatively impacts its normative legitimacy.<sup>223</sup>

## VI. IMPACT ON LEGITIMACY

The *Bemba* majority's new protections for defendants have come at a cost to the ICC's effectiveness. That decision, while perhaps meant to bolster the Court's legitimacy, may just as likely have the opposite effect, making the court seem ineffective, frequently split, and unpredictable.

### A. *Decreased Effectiveness*

The ICC's legitimacy will likely be most adversely affected by the way in which the *Bemba* decision decreases its effectiveness in prosecuting certain crimes. Because the ICC is a complementary court that was created by agreement among numerous states to serve a specific purpose—namely to prosecute the worst atrocities committed at the international level—its legitimacy is inextricably linked to its effectiveness in doing so.<sup>224</sup> One of the main goals of the ICC is to shape international norms and deter the conduct that it prosecutes.<sup>225</sup> It is already very difficult for the ICC to deter conduct, simply because it has no inherent enforcement powers of its own.<sup>226</sup> Many of the Court's critics argue that its long, drawn-out procedures and infrequent prosecutions make it even more unlikely that the Court's actions will have a significant deterrent effect.<sup>227</sup> The majority's decision in *Bemba* seems destined only to worsen these problems. Additionally, because the majority's decision declines to hold *Bemba* responsible for the crimes that were undeniably committed in CAR, the Court essentially moves away from its mission of accountability and towards a jurisprudence wherein crimes occur, but no one will ultimately be held responsible.<sup>228</sup> This attitude can only serve to weaken the ICC's already precarious deterrent effect<sup>229</sup> and will therefore severely impact the Court's

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222. Amann, *supra* note 3.

223. See *infra* Part VI.A for a discussion of how decreased effectiveness may impact the ICC's legitimacy.

224. See C. Cora True-Frost, *Weapons of the Weak: The Prosecutor of the ICC's Power to Engage the UN Security Council*, 44 FLA. ST. U. L. REV. 261, 314 (2016) (discussing the relative fragility of the ICC's sought-after legitimacy, and how it can be affected by the many criticisms levelled against the Court).

225. See *20 Years On, ICC Urges Help to Fight War Crimes*, *supra* note 4.

226. See Nada Ali, *Bringing the Guilty to Justice: Can the ICC Be Self-Enforcing?*, 14 CHI. J. INT'L L. 408, 411 (2014) (highlighting the large number of subjects of ICC arrest warrants who are still at large, and arguing that the ICC's inability to enforce its mandate to prosecute crimes weakens its credibility).

227. Yvonne M. Dutton & Tessa Alleblas, *Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya*, 91 ST. JOHN'S L. REV. 105, 107 (2017) (explaining that some critics of the ICC believe that it is impossible to deter people from committing the kinds of crimes punished by the Court, as persons who commit such crimes are irrational, and the concept of deterrence assumes that the subject to be deterred is a rational actor).

228. Amann, *supra* note 3.

229. *Id.*

legitimacy in the eyes of both its critics and its supporters.

### ***B. Unpredictable and Split***

The majority's decision in *Bemba* also impacts the ICC's legitimacy by depicting the Court as unpredictable and unstable. In adopting its new standard of appellate review and changing the Court's pre-trial requirements, the majority essentially disregarded ICC precedent<sup>230</sup> without citing any legal authorities in support of the change.<sup>231</sup> This means that not only has the majority made a huge departure from previous jurisprudence, it has done so seemingly out of nowhere, offering no explanation for its actions.<sup>232</sup> While Article 21 of the Rome Statute provides that the ICC is not bound by *stare decisis*,<sup>233</sup> the ICC in fact frequently applies principles from its past decisions, as well as past decisions of the *ad hoc* tribunals.<sup>234</sup> Consistency is vital to any legal institution, serving as a necessary protection for all parties involved.<sup>235</sup> An inconsistent ICC only feeds into the criticisms of nationalist figures and institutions, like John Bolton and the Trump Administration, fond of arguing that the Court is overreaching and unaccountable.<sup>236</sup> Thus, when the majority departs from established precedent without bothering to justify its holding, it negatively impacts the legitimacy of the ICC itself.

This problem is compounded by the fact that the decision to acquit Bemba was essentially split.<sup>237</sup> While the Trial Chamber originally convicted Bemba unanimously, his conviction was overturned by an Appeals Chamber that was split three-to-two.<sup>238</sup> Because the ICC was so bitterly divided on multiple fundamental

230. *See id.* (arguing that the *Bemba* decision suggests that the ICC is retreating from its focus on assigning responsibility for war crimes to high-level officials).

231. *See* Sadat, *supra* note 149 (noting the fact that the majority did not provide any case law or evidence of international custom to indicate the source of its reasoning).

232. *See* Jennifer Trahan, *Bemba Acquittal Rests on Erroneous Application of Appellate Review Standard*, OPINIO JURIS (June 25, 2018), <http://opiniojuris.org/2018/06/25/bemba-acquittal-rests-on-erroneous-application-of-appellate-review-standard/> (arguing that the majority's new standard of review is unprecedented, makes prosecutions nearly impossible, and is offered by the majority with no argument for its adoption).

233. *See* Rome Statute, *supra* note 1, art. 21(2) (stating that the ICC *may* apply principles derived from its previous decisions, not that it *must* do so).

234. *See* Gudrun Hochmayr, *Applicable Law in Practice and Theory: Interpreting Article 21 of the ICC Statute*, 12 J. INT'L CRIM. JUST. 655, 672–73 (2014) (discussing how, while the usage of the term “may” in the Statute makes the Court's precedent non-binding, the Court frequently relies on its own past decisions, which is desirable in order to create a consistent jurisprudence).

235. *Id.*

236. Fritz, *supra* note 103 (outlining some of Bolton's criticisms in his position as National Security Advisor).

237. *See* Joseph Powderly & Niamh Hayes, *The Bemba Appeal: A Fragmented Appeals Chamber Destabilises the Law and Practice of the ICC*, PHD STUD. HUM. RTS. (June 26, 2018), <http://humanrightsdoctorate.blogspot.com/2018/06/the-bemba-appeal-fragmented-appeals.html> (adding that the majority essentially comprises three separate opinions, indicating a divide even among the members of the narrow three-to-two majority).

238. *See* Jacques B. Mbokani, *The Bemba Appeals Judgment: The ICC Facing the Tower of Babel?*, INT'L JUST. MONITOR (June 26, 2018), <https://www.ijmonitor.org/2018/06/the-bemba-appeals-judgment-the-icc-facing-the-tower-of-babel/> (emphasizing how harshly divided the two

issues, this case ultimately does not provide any sort of clarity or definitive instruction on how judges should handle or respond to these issues in future cases.<sup>239</sup> The split between the judges and the fact that the majority opinion rests on such a thin margin shows a court trapped in confusion and disarray.<sup>240</sup> Commentators have called the Court's inability to agree on the most basic of issues underlying the *Bemba* case a failure of the ICC's judicial process;<sup>241</sup> indeed, having such a split on a decision in which the majority makes radical and sweeping changes to the ICC's processes further damages the Court's credibility and legitimacy.<sup>242</sup>

If the ICC cannot agree on important and far-reaching issues such as those at play in *Bemba*, then it cannot be expected to take a truly clear stand on anything.<sup>243</sup> If the Court does not respect its own precedent, or at least overturn that precedent only when it has a good reason to do so, then it cannot be trusted to remain consistent.<sup>244</sup> And if it cannot fulfill its mission of holding perpetrators accountable, deterring further criminal conduct, and providing justice for victims, then how, in the face of its high costs and drawn-out, inefficient processes, can the ICC continue to justify its own existence?<sup>245</sup> Though the majority may have intended to secure protections for defendants and the rule of law through its decision, those protections have come at the cost of the Court's legitimacy as an international institution.

## VII. ALTERNATIVE SOLUTIONS

How could the Appeals Chamber have avoided these problems? As with most troublesome topics in the law, there is no perfect solution. In *Bemba*, the Appeals Chamber judges had only two options: to overturn or uphold Bemba's conviction. Each came with its own set of complications and troubling baggage. For instance, even commentators critical of the majority's decision to acquit have admitted that the evidence against Bemba may have been relatively weak, the charges imperfect, and the OTP's case theory disjointed.<sup>246</sup> These circumstances imbue the case with

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sides, majority and minority, really were, each blaming the other for serious errors in judgment).

239. See Powderly & Hayes, *supra* note 237 (arguing that the multiple opinions serve to muddle the issues and make it impossible to discern a clear rule of law from the case).

240. See Mbokani, *supra* note 238 (adding that the vagueness of the charges confirmed by the Pre-Trial Chamber may have been a factor in causing the confusion).

241. See Sadat, *supra* note 149 (laying out the different legal issues and standards the judges disagreed upon).

242. See Powderly & Hayes, *supra* note 237 (noting that the split is particularly injurious in this case because of the importance of the legal issues involved, for which the Court ultimately provided little clarity).

243. *Id.*

244. *Id.*

245. See, e.g., Slavitt, *supra* note 103 (arguing that the ICC is a failed institution in part because it has largely failed to accomplish its mission of bringing war criminals to justice).

246. See Sadat, *supra* note 149 (relaying this criticism held by other commentators, before rejecting it and noting that Judges Van der Wyngaert and Morrison held this belief, having stated as much in their joint separate opinion); see also Kevin Jon Heller, *Why Bemba's Conviction Was Not a "Very Good Day" for the OTP*, OPINIO JURIS (Mar. 22, 2016), <http://opiniojuris.org/2016/03/22/a-few-thoughts-on-bembas-conviction/> (criticizing the OTP's reliance on the ICC's judges in formulating its cases, and pointing out how the OTP would not have charged Bemba

the distinctive whiff of prosecutorial bungling, which is hardly surprising, given the fact that the *Bemba* investigation and trial lasted through an OTP regime change that brought along an entirely new set of investigatory strategies.<sup>247</sup>

On the other hand, the circumstances of the acquittal come with their own problems, as well. The *Bemba* majority did not seem to have taken Bemba's witness tampering into account when it issued its own review of the facts.<sup>248</sup> In fact, as the dissent points out, the majority's limited factual review relied on witnesses whom the Trial Chamber had found, based on various factors including evasive courtroom demeanor, to be untrustworthy.<sup>249</sup> These factors, combined with the narrow split among the Appeals Chamber judges, sap the majority opinion's strength.<sup>250</sup>

#### A. *Other Alternatives*

The ideal outcome in this situation would have been for the Appeals Chamber to uphold Bemba's conviction. Despite its choice not to do so, the majority could have greatly improved the clarity of its opinion and prevented the damage done to the ICC's legitimacy in several smaller ways.

As previously discussed, the majority should have articulated its reasoning for adopting its new standard of appellate review.<sup>251</sup> In addition, one of the most glaring criticisms of the majority's opinion in *Bemba* is that, after changing the Court's standard of appellate review to strip the previous layer of deference from the Trial Chamber's factual findings, the majority did not conduct anything close to a thorough review of the facts in its own opinion.<sup>252</sup> Nor did the majority take into account or even address the witness tampering that took place during the trial.<sup>253</sup> Conducting a more thorough review of the facts would have given the majority's

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under the command responsibility doctrine at all if that charge had not been suggested to it by the Pre-Trial Chamber).

247. The Bemba investigation began under former prosecutor Louis Ocampo and ended under Fatou Bensouda, whose new strategies have included a larger focus on crimes of sexual violence and stronger presence of ICC in the field. The investigation was hampered by the vestigial influence of Ocampo and ultimately resulted in missing evidence, including links between witnesses and orders issued to Bemba's troops in CAR. See Anderson, *supra* note 154.

248. See SáCouto, *supra* note 162 (pointing out the majority's failure to consider the witness tampering evidence regarding corrupt witness D54).

249. See Prosecutor v. Bemba Gombo, ICC-01/05-01/08 A, Dissenting Opinion of Judge Monageng and Judge Hofmański, ¶ 63 (June 8, 2018), [https://www.icc-cpi.int/RelatedRecords/CR2018\\_02987.pdf](https://www.icc-cpi.int/RelatedRecords/CR2018_02987.pdf) (criticizing the majority's limited factual review, especially in the case of witness P36, whose testimony the Trial Chamber argued should be treated with particular caution); see also SáCouto, *supra* note 162 (noting that the majority did not reference P36's contradictory courtroom demeanor).

250. See Sadat, *supra* note 149 ("The inability of the Appeals Chamber to achieve consensus means that the judgment actually decided very little, and the two points it did decide remain hotly contested.").

251. See *supra* Part VI.B for a discussion of how the majority's failure to cite to precedent or international law negatively impacts the Court's normative legitimacy.

252. See SáCouto, *supra* note 162 (describing how the majority opinion declined to review the evidence *de novo*, but instead relied on limited amounts of the evidence presented at trial).

253. See *id.* (indicating that the majority did not consider that one defense witness was determined to be corrupt).

decision much more weight and would have deflected criticism that the majority had simply accepted Bemba's interpretation of the facts at face value.<sup>254</sup>

The Appeals Chamber could also have remanded the case to the Trial Chamber instead of acquitting Bemba outright. In fact, Judge Eboe-Osuji stated in his separate opinion that he would have done so, but the rest of the majority ultimately outvoted him.<sup>255</sup> Those two judges, Van den Wyngaert and Morrison, both stated that part of the reason why they did not remand the case was to avoid giving the OTP a second crack at it.<sup>256</sup> While this argument is in line with the majority's goal of adding protections for defendants, it seems somewhat weak in light of the fact that the prosecution could not have anticipated that the Appeals Chamber was going to reinterpret and depart from established precedent in the way in which it did.

### ***B. Bemba's Conviction Should Have Been Upheld***

In short, there are many different ways the Appeals Chamber could have decided the *Bemba* appeal. But if it wanted to strengthen the legitimacy of the ICC, it should have upheld the Trial Chamber's conviction.

Even if the OTP's investigation into Bemba was troubled at its outset, it was not nearly so weak or insubstantial as to require acquittal—at least not under the previous standard of review.<sup>257</sup> In fact, the majority most likely<sup>258</sup> would not have been able to acquit Bemba at all if it had not made its multiple unsupported changes to previous ICC jurisprudence.<sup>259</sup> This Note does not attempt to argue that Bemba should not have been acquitted under any circumstances, but rather that the Appeals Chamber should not have done so by sacrificing the effectiveness, and thus the legitimacy, of the ICC.

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254. See Bemba Gombo, Case No. ICC-01/05-01/08 A, Dissenting Opinion of Judge Monageng and Judge Hofmański, ¶ 54, 60–61 (criticizing the *Bemba* majority for uncritically accepting assertions made by the defendant and failing to conduct a thorough review of the evidence in the case on its own).

255. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08 A, Concurring Separate Opinion of Judge Eboe-Osuji, ¶ 22 (June 14, 2018), [https://www.icc-cpi.int/RelatedRecords/CR2018\\_03077.pdf](https://www.icc-cpi.int/RelatedRecords/CR2018_03077.pdf).

256. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08 A, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, ¶ 73 (June 8, 2018), [https://www.icc-cpi.int/RelatedRecords/CR2018\\_02989.pdf](https://www.icc-cpi.int/RelatedRecords/CR2018_02989.pdf); see Sadat, *supra* note 149 (noting that, while this was most likely not meant to punish the OTP for not anticipating the Court's departure from precedent, it still results in a generally dissatisfactory decision which cannot be counted as a victory for either the prosecutor or the Court itself).

257. The Appeals Chamber majority concluded that the Trial Chamber's factual findings presented some doubt only after conducting its own review of the facts based on incomplete and selectively chosen pieces of evidence, rather than considering the totality of the evidence presented in the case. Historically, deference was afforded to the factual determinations of the Trial Chamber. See Trahan, *supra* note 232.

258. Due to the brevity of the majority opinion, it is difficult to speculate whether the majority might have found other bases for acquittal among the remaining three grounds of Bemba's appeal, which it did not address.

259. See Trahan, *supra* note 232 (indicating that the majority never evaluated whether a reasonable trier of fact could have convicted based on the evidence before the Trial Chamber, instead relying solely on its own newly-invented standard of appellate review).

This Note has discussed the negative practical consequences of the sweeping changes outlined in the majority's opinion,<sup>260</sup> but there would have also been many positive effects on both the ICC's legitimacy and the broader sphere of international law if the Appeals Chamber had upheld Bemba's conviction.

Bemba's original conviction was a landmark case for international gender justice and for prosecuting crimes of sexual violence.<sup>261</sup> The international legal community saw it as a remarkable step forward in accountability for crimes that historically had been glossed over or treated as a detour from war crimes investigations.<sup>262</sup> Given that the Rome Statute was drafted with such crimes in mind,<sup>263</sup> the ICC finally catching up to its founding document and treating sexual violence as a war crime would have been a sign that Prosecutor Bensouda's focus on the issue was beginning to pay off.<sup>264</sup>

Upholding Bemba's conviction would also have positively impacted accountability for war crimes under international law in general. Bemba's conviction was not merely the first ICC conviction for rape as a war crime but was also the first such conviction under the doctrine of command responsibility.<sup>265</sup> Because the ICC was meant to prosecute the world's worst atrocities,<sup>266</sup> it does not have the resources to charge all of the low-level soldiers who actually commit the offenses that the Court is designed to punish.<sup>267</sup> Command responsibility is therefore an extremely important aspect of the Court's operations, a fact of which the drafters of the Rome Statute were certainly conscious.<sup>268</sup> Bemba's conviction under the doctrine would have served as an important precedent and further cemented command responsibility's place in international law.

By establishing both command responsibility and accountability for crimes of sexual violence, Bemba's conviction could have helped to influence international

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260. See *supra* Parts V–VI for the referenced discussion.

261. See Anthony, *supra* note 22, at 420 (stating that the Trial Chamber's decision was notable for being the first case in which rape was charged as a war crime and the doctrine of command responsibility was utilized to find individual liability).

262. See *supra* Part V.C for a more in-depth discussion of the treatment of crimes of sexual violence under international criminal law.

263. See Susana SáCouto & Katherine Cleary, *The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court*, 17 AM. U. J. GENDER SOC. POL'Y & L. 337, 338–40 (2009) (discussing how, though the ICC's record of prosecutions in this area was spotty in its first years of operation, the Rome Statute's drafters recognized the serious nature of crimes of sexual violence, and embedded provisions in the Statute designed to address the issue).

264. See Oosterveld, *supra* note 203, at 443 (noting how Bensouda's 2014 Policy Paper on Sexual and Gender-Based Crimes signaled the OTP's new focus, grounded in the sexual and gender-based language included in the Rome Statute).

265. Owen Bowcott, *Jean-Pierre Bemba's War Crimes Conviction Overturned*, GUARDIAN (June 8, 2018, 12:03 PM), <https://www.theguardian.com/global-development/2018/jun/08/former-congo-leader-jean-pierre-bemba-wins-war-crimes-appeal-international-criminal-court>.

266. Rome Statute, *supra* note 1, art. 5.

267. See Amann, *supra* note 3 (adding that the Rome Statute itself seems designed to push the ICC towards prosecuting high-level offenders by focusing on the most serious of crimes).

268. Rome Statute, *supra* note 1, art. 28.

norms. Deterring criminal conduct by positively affecting international norms is one of the main goals of the ICC and is crucial to ensuring its effectiveness.<sup>269</sup> A conviction under the doctrine of command responsibility would have served as a warning to commanders to exercise firmer control over their troops in order to prevent crimes from occurring in the first place.<sup>270</sup> And a conviction for crimes of sexual violence, categorized as war crimes, would have gone a long way towards dispelling the notion that such crimes exist merely as background noise or “acceptable consequence[s] of war.”<sup>271</sup>

Crimes of sexual violence proliferate during times of conflict because commanders tolerate their commission.<sup>272</sup> While it is certainly a good thing that international institutions such as the ICC have begun to increase their focus on such crimes,<sup>273</sup> scholarly articles and policy papers full of promise and progressive thinking cannot hope to match the practical deterrent effects that result from convictions.<sup>274</sup>

Although international legal scholars hotly contest the practical deterrent effect of the ICC,<sup>275</sup> there is concrete evidence that ICC prosecutions of individuals have created positive effects in countries such as Uganda, Kenya, and Côte d’Ivoire, and have even led to domestic reforms.<sup>276</sup> A conviction for crimes of sexual violence under the command responsibility doctrine would have had the effect of deterring commanders from engaging in the lax supervision of their troops and failing to correct the criminal behavior of those soldiers, which invariably results in most instances of sexual violence that occur in wartime.<sup>277</sup> Thus, Bemba’s conviction

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269. See Sara Anoushirvani, *The Future of the International Criminal Court: The Long Road to Legitimacy Begins with the Trial of Thomas Lubanga Dyilo*, 22 PACE INT’L L. REV. 213, 214, 237–38 (2010) (describing how the ICC’s costly trials are justified not by the sheer number of defendants convicted, but by the ability of the ICC to create and influence international jurisprudence and change the conduct of combatants in instances of armed conflict).

270. See Houston John Goodell, *The Greatest Measure of Deterrence: A Conviction for Jean-Pierre Bemba Gombo*, 18 U.C. DAVIS J. INT’L L. & POL’Y 191, 197 (2011) (positing that a conviction of Bemba under the command responsibility doctrine would act as a powerful deterrent against rape as a war crime, because it would clearly demonstrate to military commanders that they will be held responsible for the commission of that crime by their troops).

271. *Id.* at 196.

272. See SáCouto, *supra* note 162 (describing how sexual violence typically occurs with greater frequency and severity when it becomes clear to soldiers that their superiors do not disapprove of such actions).

273. See Oosterveld, *supra* note 203, at 443 (discussing the positive impact of Prosecutor Bensouda’s focus on sexual and gender-based crimes).

274. See Hyeran Jo & Beth Simmons, *Can the International Criminal Court Deter Atrocity?* 70 INT’L ORG. 443, 444, 469–70 (2016) (defining deterrence as having both prosecutorial and social dimensions, with prosecutorial deterrence arising from the direct fear of legal consequences such as prosecution and conviction).

275. See Dutton & Alleblas, *supra* note 227, at 106.

276. See Jo & Simmons, *supra* note 274, at 444 (describing how the ICC’s deterrence effect, though conditional upon a number of factors, has resulted in notable positive effects); see generally Dutton & Alleblas, *supra* note 227.

277. See Goodell, *supra* note 270, at 203 (arguing that Bemba’s conviction would have had a deterrent effect on military commanders by signaling that they would be held accountable for



would have been an important step forward in shaping international norms regarding crimes of sexual violence.<sup>278</sup> It also would have stood as a testament to the ICC's effectiveness and its ability to hold offenders accountable, thus greatly strengthening its normative legitimacy.

### VIII. CONCLUSION

The ICC is in a precarious position.<sup>279</sup> It faces criticism from its enemies and allies alike, and states are withdrawing or planning to withdraw their memberships.<sup>280</sup> Perhaps even worse, due to its failure to secure cooperation from member states, the OTP was forced to drop its case against Kenyan President Uhuru Kenyatta and halt its investigation into war crimes allegedly committed in the Darfur region of Sudan.<sup>281</sup> The international community is calling the ICC's value as an international institution into serious question, and the Court should be doing what it can to strengthen its own normative legitimacy. Normative legitimacy requires a court both to ensure its own effectiveness *and* protect the rights of defendants; therefore, it is vitally important for courts to strike the proper balance between the two. In the *Bemba* case, the majority came down too hard on one side, which resulted in a decision that will likely be a major blow to the ICC's legitimacy. The ICC needs improvement, but Jean-Pierre Bemba's acquittal is not a step in the right direction.

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crimes of sexual violence).

278. *Id.*

279. See Alexandre Skander Galand, *A Global Public Goods Perspective on the Legitimacy of the International Criminal Court*, 41 LOY. L.A. INT'L & COMP. L. REV. 125, 126 (2018) (pointing out that the ICC has been criticized as illegitimate and that some states have left or are now are considering leaving the Court as a result, and calling on the Court to bolster its legitimacy).

280. *Id.*

281. *Id.*