**NOTES**

# FRACTURED FOR GOOD? USING THE ACQUITTAL IN THE PROSECUTOR V. JEAN-PIERRE BEMBA GOMBO AS AN IMPETUS TO CLARIFY AND STRENGTHEN THE DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW

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ABSTRACT

*This Note examines the ways in which the International Criminal Court (ICC)'s fragmented 3-2 acquittal of Jean-Pierre Bemba Gombo (Bemba) demonstrates the ineffectiveness of a lack of legal standards guiding the ICC. It analyzes the doctrine of command responsibility as applied in the Bemba acquittal, exploring the Appeals Chamber judges' divergent views on three legal issues pertinent to a finding of that particular mode of liability. The Note then argues that the fractured decision should serve as an opportunity for proactively updating the rules.*

*Following Bemba's 2018 acquittal, much of the response from affected communities and scholars has focused on how this decision reflects the efficacy of the ICC, or even international justice writ large. However, as judicial dissents and fragmented judgments frequently serve not only as an influence on legitimacy but also to impact future jurisprudence and institutional reforms, an additional discussion is critical: how can interested parties learn from the fractured manner in which the acquittal was accomplished to further the goals of international criminal law?*

*In order to ensure that the Bemba decision is constructive, this Note proposes that the Assembly of States Parties (ASP) develop an Elements of Liability guiding document, modelled after the Elements of Crimes. As explored in the Note, this guidance would establish uniform standards in determining modes of liability, providing the Prosecution, Defence, and Judges' Chambers—as well as victims, scholars, national court systems, and others—clear and consistent principles on which to base their advocacy and decisions. Creating an Elements of Liability document would thus transform a divisive judgment into a strengthening of international criminal law.*

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> " . . . *[H]e who knows of a crime, and is able and bound to prevent it but fails to do so, himself commits a crime.*"[1]
>
> Hugo Grotius

## I. Introduction

Pending before the International Criminal Court (ICC or "the Court") as of early 2020 is the case of *The Prosecutor v. Dominic Ongwen*, a former commander of the Lord's Resistance Army.[2] Ongwen is indicted on multiple charges, in part on the grounds of command responsibility under Article 28(a) of the Rome Statute.[3] Just as in any trial, the prosecutor, defense team, and judges alike—not to mention the accused and his victims—deserve the chance to ensure that their ongoing work at the trial phase is consistent with the lens through which the Appeals Chamber will review any appeal of the case. However, this case, and others like it in the future, are made much more challenging by the fractured judicial decision in the high-profile acquittal of Jean-Pierre Bemba on June 8, 2018.[4] To ensure that future prosecutions—such as the immediate *Ongwen* case—are pursued effectively and efficiently, many challenges brought to light in the *Bemba* acquittal's rationale must be addressed.

The judges in *The Prosecutor v. Jean-Pierre Bemba Gombo* ("*Bemba*") Appeals Chamber issued a 3-2 ruling that was both fractured and unclear. It left the Court vulnerable to criticism, and advocates at a loss for how to approach similar proceedings in the future. Acquittals, and fragmented decisions more generally, while heavily criticized, are not inherently negative results for international criminal justice. In order to ensure that the *Bemba* results are constructive, the Assembly of States Parties (ASP)—the body intended to regulate the functioning of the Court[5]—should pick up the mantle and issue an Elements of Liability guiding document. Doing so will bolster the legitimacy of the court because prosecutions will become more efficient and effective, and the

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1. Hugo Grotius, On The Law Of War And Peace: Student Edition 292 (Stephen C. Neff ed., 2012).

2. Prosecutor v. Ongwen, Case No. ICC-02/04-01/15.

3. The Prosecutor v. Ongwen, ICC-02/04-01/15, Decision on the Confirmation of Charges against Dominic Ongwen, ¶¶ 146–56 (Mar. 23, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02331.PDF.

4. Prosecutor v. 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" (June 8, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF.

5. *See generally ICC-Assembly of States Parties*, Int'l Criminal Court, https://asp.icc-cpi.int/en_menus/asp/assembly/Pages/assembly.aspx (last visited May 3, 2019).

states parties as a body (not simply five Appeals Chamber judges) will establish specific legal frameworks to be followed by future practitioners of international criminal law.

This Note examines the ways in which the *Bemba* acquittal decision demonstrates the ineffectiveness of the standards guiding the ICC as currently applied and argues that the fractured decision should serve as impetus for updating the rules. Part II provides a brief overview of the *Bemba* case for context: the basic facts of the situation, procedural history, and the core legal elements of his conviction and subsequent acquittal. Part III analyzes the *negative* impacts of the fractured judicial decision by the Appeals Chamber, discussing how it led to questions of the Court's legitimacy among both affected communities and the international community and a lack of clarity in the law for future proceedings. Part IV discusses the potentially *positive* consequences of fragmented judgments and dissents in international criminal law proceedings, looking at their role in legitimizing both courts and international criminal justice, and also in establishing necessary institutional reforms. This section ends with a brief comparison to an acquittal in a different international court featuring many of the same characteristics as *Bemba*, suggesting further that the problems of which people complain are not with an acquittal itself, but rather external elements that can be addressed. Part V argues that based on the aforementioned challenges, critical updates and amendments such as that to the means of finding liability for command responsibility should not be left to the personalities of individual practitioners at the Court. Rather, needed clarifications stemming from the *Bemba* decision should be codified by the ASP into the legal frameworks utilized by the ICC, including via an Elements of Liability guiding document. The doctrine of command responsibility—a form of liability attaching to a military commander for the crimes of his or her subordinates—serves throughout the piece as an illustrative example of one particular legal issue that could be addressed in this proposed manner. The Note concludes by asserting that such changes will not diminish the legitimacy of the Court, but rather strengthen the global effectiveness of international criminal law.

## II. The *Bemba* Decision: A Very Brief Overview

### A. *2016 Trial Chamber Conviction*

Jean-Pierre Bemba Gombo, known as Bemba, was the first individual convicted by the ICC on a theory of command responsibility under Article 28(a) of the Rome Statute. Bemba was a political and military leader in the Democratic Republic of Congo (DRC), under whose

control troops of the military wing of the Mouvement de libération du Congo (MLC), the Armée de Libération du Congo, committed widespread atrocities in the nearby Central African Republic (CAR). For about five months from the end of 2002 into early 2003, the MLC wreaked havoc on communities.

In March 2016, an ICC Trial Chamber convicted Bemba on two counts of crimes against humanity, including murder and rape, and three counts of war crimes, including murder, rape, and pillage. He was sentenced to eighteen years in prison in June of that same year.[6] Bemba's conviction was historical not only for the theory of liability used, but also marked the first conviction at the ICC for sexual and gender-based crimes, recognizing rape as a war crime and crime against humanity.[7]

### B. *2018 Appeals Chamber Acquittal*

On June 8, 2018, the Appeals Chamber overturned the Trial Chamber's decision and acquitted Bemba of war crimes and crimes against humanity by a 3-2 decision. He was given an interim release four days later, on June 12. The three majority judges issued a short majority opinion. Two of the majority judges issued a joint separate opinion. The third majority judge issued a third opinion for himself, and the two dissenting judges issued a joint dissenting opinion.

The judges each raised a multitude of issues in the written decisions, including the standard of factual review the Appeals Chamber gives to decisions of the Trial Chamber, the standards by which command responsibility is established, and the standard by which charges are confirmed at the confirmation hearing phase.[8] Many respected scholars have already conducted a broader analysis of each of the three. Most important for the purposes of this Note, however, is the way the

6. *Case Information Sheet: The Prosecutor v. Jean-Pierre Bemba Gombo*, INT'L CRIMINAL COURT, https://www.icc-cpi.int/CaseInformationSheets/BembaEng.pdf (last updated Mar. 2019).

7. Laura Wagner, *Ex-Congolese Vice President Convicted Of Rape, Murder And Pillage*, NATIONAL PUB. RADIO, (Mar. 21, 2016 ),https://www.npr.org/sections/thetwo-way/2016/03/21/471088818/ex-congolese-vice-president-convicted-of-rape-murder-and-pillage.

8. Core to the controversy surrounding the *Bemba* decision are not only some of the key elements of this particular decision as described in this section, but also Bemba's distinct September 2018 conviction of offenses against the administration of justice (witness tampering). A full analysis of the impact of this concurrent case is outside the scope of the paper, but the author notes here its relevance to the decision to acquit given the appellate judges' decision to conduct a factual review of the case. This paper does not make a conclusion on the merits of the acquittal, but any such discussion would necessarily require a thorough consideration of the impact of witness tampering on the relevant evidence.

majority approached the doctrine of command liability, which was much more narrowly interpreted at the Appeals stage than by the Trial Chamber judges.

## III. Criticisms: Was the Fragmented Acquittal a Failure?

The divided manner in which the particular judgment was released resulted in—or at least, compounded—two twin problems: it left the court open to further claims of illegitimacy and obfuscated the law itself.

### A. *The Court is Vulnerable to Claims of Illegitimacy*

The ICC's "legitimacy"[9] is a current topic of wide discussion, spearheaded from different directions by both supporters of the Court and its opponents.[10] For those who believe in the promise and imperative of international justice, it can be challenging when the Court takes actions that appear to undermine its key goals. As discussed in the following two subsections, international scholars and communities affected by *Bemba* and his troops alike have viewed the decision in both positive and negative ways, though the discourse largely skews negative.

#### 1. International Scholars and Practitioners

International justice scholars have widely derided the acquittal, for many valid reasons. Some interpreted this acquittal as a wholesale failure of the ICC—not necessarily the project of international justice, but certainly the function of the Court as it stands today. Some derided its practical implications, noting that it may serve as "encouragement to warlords" directing remote military operations.[11]

Many are outraged at the process and the lack of legal precision with which the judgment was written. Claiming that the judgment results in the evasion of responsibility for crimes such that they become

9. While a full discussion is outside the scope of this Note, the term legitimacy has multiple conceptions, and there are numerous lenses through which one can view legitimacy. *See, e.g.*, Antonio Cassese, *The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice*, 25 Leiden J. Int'l L. 491, 491–501 (2012).

10. *See, e.g.*, John Bolton, National Security Adviser, Protecting American Constitutionalism and Sovereignty from International Threats, Remarks at The Federalist Society (Sept. 10, 2018) (transcript available at https://www.lawfareblog.com/national-security-adviser-john-bolton-remarks-federalist-society).

11. Bruno Hyacinthe Gbiegba, *Deputy Coordinator of the Central African Republic National Coalition for the ICC, quoted in Jean-Pierre Bemba Gombo acquitted by ICC Appeals Chamber*, Coal. for the Int'l Criminal Court, (Jun. 13, 2018), http://www.coalitionfortheicc.org/news/20180613/jeanpierre-bemba-gombo-acquitted-icc-appeals-chamber.

"adjudged to commit themselves," Diane Marie Amann explores how this is the latest decision in a trend away from accountability on notions of indirect liability, undermining the whole project of international criminal justice.[12] Regarding the undetermined question of which charges were actually confirmed and formed the basis of Bemba's conviction, Leila Sadat notes that "the fact that [eight] judges of the Court, representing both common and civil law jurisdictions, could not agree upon this fundamental and simple point represents a complete failure of the Court's judicial process."[13] Alex Whiting has noted that the acquittal "turn[ed] the Court's procedures upside down, with extremely negative consequences for the institution" when it departed from what he considers settled jurisprudence regarding both the role of the Pre-Trial Chamber in confirming the charges, and the standard of review employed by the Appeals Chamber.[14]

At the same time, others believe that this decision is logical—or at least unsurprising—and they warn against overstating the problems with the acquittal. Alexander Heinze recognizes that even if it would be "inappropriate to applaud this decision," in fact "[n]ot sacrificing the rights of the accused on an altar of grand gestures by the world community [such as platitudes about the need to send a signal of punishment and accountability for crimes] is certainly a decision that should find—despite its controversy—support."[15] Fritz Streiff wrote about how the case against Bemba had a "shadow looming over it from the very beginning," largely because the charges brought against him were caused by a poor prosecutorial strategy back in 2008.[16] Strieff cites Sadat[17] and states that the early investigations lacked substance, the evidence was insufficient, the case theory was weak, and the Office of the Prosecutor

12. Diane Marie Amann, *In Bemba and Beyond, Crimes Adjudged to Commit Themselves*, EJIL: TALK! (Jun. 13, 2018), https://www.ejiltalk.org/in-bemba-and-beyond-crimes-adjudged-to-commit-themselves/.

13. Leila N. Sadat, *Fiddling While Rome Burns? The Appeals Chamber's Curious Decision in Prosecutor v. Jean-Pierre Bemba Gombo*, EJIL: TALK! (Jun. 12, 2018), https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo/.

14. Alex Whiting, *Appeals Judges Turn the ICC on its Head with Bemba Decision*, JUST SECURITY (Jun. 14, 2018), https://www.justsecurity.org/57760/appeals-judges-turn-icc-head-bemba-decision/.

15. 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/.

16. Fritz Streiff, *The Bemba Acquittal: Checks and Balances at the International Criminal Court*, INT'L JUSTICE MONITOR (July 18, 2018), https://www.ijmonitor.org/2018/07/the-bemba-acquittal-checks-and-balances-at-the-international-criminal-court/.

17. It is worth noting that Strieff appears to take Sadat's words out of context, and thus the citation to her commentary as support for his argument might be seen as odd.

(OTP) had the wrong mode of liability.[18] Streiff goes on to note that the spectrum of commentaries to the *Bemba* decision "draws attention to the idea that the majority, at least partially, disciplined the OTP for its early-years strategy."[19] Another commentator, Miles Jackson, urges scholars to remember that "to have a criminal court is to have acquittals," remarking that if Bemba's acquittal is evidence of a crisis for the ICC, then it "is not the acquittal itself that is responsible, but rather a perception that a criminal court cannot acquit a defendant without doubts being raised about its future."[20]

Despite lengthy writings by some of the judges, international criminal law scholars posit that very little was actually decided in this acquittals process.[21] Sadat, for one, believes that with regards to the law moving forward, "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."[22] All told, one takeaway from the variety of views is that if the international criminal justice community wants the OTP to walk away with a better understanding of when and how to employ particular modes of liability (which it did not have back in the early 2000s, leading in part to this acquittal), a clear direction needs to be set to establish the appropriateness of a particular mode of liability as applied to the case at bar. The decision as it stands now, while perhaps chastising the OTP, does not offer a clear course-correct.

### 2. Affected Communities

Judicial decisions are generally most important for the impact they have on affected communities. Perhaps unsurprisingly, while no community is a monolith in their opinions, Bemba's acquittal was met with widespread approval in his native DRC. Bemba had been seen by many as a political champion in the early 2000s, resulting in many approving his release from prison. One study found that 83% of those polled

18. Streiff, *supra* note 16.

19. *Id.*

20. Miles Jackson, *Commanders' Motivations in Bemba*, EJIL: Talk! (June 15, 2018), https://www.ejiltalk.org/commanders-motivations-in-bemba/.

21. *See, e.g.*, Sadat, *supra* note 13; James A. Goldston, *Don't Give Up on the ICC*, FOREIGN POLICY (Aug. 8, 2019), https://foreignpolicy.com/2019/08/08/dont-give-up-on-the-icc-hague-war-crimes/ ("[T]he court's failure to marshal consensus on such a range of fundamental questions . . . offered little practical guidance for future prosecutions.").

22. Sadat, *supra* note 13.

thought that his acquittal was positive.[23] The same study found 68% of Congolese polled had a good opinion overall of the ICC.[24] The acquittal was welcome for those who disagreed with his indictment and conviction in the first place, with at least one Congolese lawyer finding the decision "well-reasoned."[25]

At the same time, it is important to recognize that many who likely do not want to perceive the ICC with legitimacy can see any decision, cohesive or not, as fodder for such a campaign. While some "advocates see the reversal as evidence of impartiality," other Congolese believe that the acquittal "merely highlights what in their minds is the injustice of the original decision. . . . [One activist notes] '[t]he court risks losing its credibility following this decision for the sole reason that it is recognizing its mistakes and thereby reinforcing the impression or sentiment that it was out to get Bemba.'"[26]

Some reactions in CAR have been, understandably, notably different. Civil society group leaders Nadia Carine Fornel Poutou and Lucie Boalo Hayali wrote in Just Security that the *Bemba* decision left victims and survivors of mass atrocities "confused, discouraged, and disillusioned."[27] Any belief that they could place their hope and trust in the international criminal justice system to vindicate grave crimes has been "shattered."[28] Poutou, the Executive President of the Association of Women Lawyers of Central African Republic, has also remarked on how the "victims of Bemba's crimes were sacrificed due to the negligence of the judges. These victims were not prepared to receive news about Jean-Pierre Bemba's acquittal by the ICC."[29]

Given the disparities in the ways in which the acquittals have been received by affected communities, and notably because both DRC and

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23. *New CRG/BERCI Poll: Congolese Expect a Flawed, Contentious Election*, CONGO RESEARCH GRP. (July 31, 2018), http://congoresearchgroup.org/new-crgberci-poll-congolese-expect-a-flawed-contentious-election/ (compared with 66 percent who thought his sentence was unfair in the poll conducted in October 2016).

24. *Id.*

25. Olivia Bueno, *Impact of the Bemba Acquittal Already Seen in the Democratic Republic of Congo*, INT'L JUSTICE MONITOR (Aug. 2, 2018), https://www.ijmonitor.org/2018/08/impact-of-the-bemba-acquittal-already-seen-in-the-democratic-republic-of-congo/.

26. *Id.*

27. Nadia Carine Fornel Poutou and Lucie Boalo Hayali, *A Belief Shattered: The Internatioanl Criminal Court's Bemba Acquittal*, JUST SECURITY, (Jun. 25, 2018), https://www.justsecurity.org/58386/belief-shattered-international-criminal-courts-bemba-acquittal/.

28. *Id.*

29. Nadia Carine Fornel Poutou, *What does the Bemba Appeal Judgment Say about High Responsibility under Article 28 of the Rome Statute?*, ICC FORUM (May 27, 2019), *https://iccforum.com/responsibility#Poutou.*

CAR communities are on a continent that has long been the subject of discussions regarding the legitimacy of the ICC (though that is outside the scope of this Note), the ASP must take care not to frame the creation of an Elements of Liability document (as proposed in Part V) as a political development relevant to Bemba himself.

### B. *Lack of Clarity on the Law*

In addition to acquittals themselves raising questions of legitimacy, the technical legal questions raised by this decision are currently without resolution. As one observer noted, the "fragmented reasoning" in four separate opinions of the five judges "confused many."[30] Each of the three main legal questions (mentioned briefly in Part II) presents a significant problem for the efficient functioning of the court moving forward given that any legal framework set forth in the opinions is unclear. As an illustrative example of this problem, this section will explore the divergent views on command responsibility presented in the *Bemba* opinions.[31] It is a key legal issue that, as developed in Part IV, the ASP can work to address.

#### 1. Brief History and Comparison of Different Definitions

The doctrine of command responsibility—a form of asserting liability onto a military commander for the crimes of his or her subordinates—has a long history in military and international humanitarian law. Modern prosecutions under the command responsibility theory of liability have taken place in numerous criminal tribunals since the International Military Tribunal following World War II. As Michael Sherman notes, "there is no single accepted definition of what it encompasses, or what standards should be applied in cases against commanders."[32] In fact, disagreements and dissents in criminal tribunals often arise from applying this very doctrine. The ad hoc International Criminal Tribunal for Rwanda (ICTR) and International

30. Goldston, *supra* note 21.

31. This issue was chosen in part because of its novelty and centrality to the decision. As Amnesty International remarked, "Command responsibility as defined in Article 28 of the Statute was the most novel issue in this case and ultimately proved to be the key issue in overturning the conviction." *Bemba Judgment warrants better investigations and fair trials – not efforts to discredit the decision*, AMNESTY INTERNATIONAL (Jun. 19, 2018), https://hrij.amnesty.nl/bemba-verdict-warrants-better-investigations-and-fair-trials/.

32. Michael J. Sherman, *Standards In Command Responsibility Prosecutions: How Strict, And Why?*, 38-2 N. ILL. U. L. REV. 298, 299 (2018), https://commons.lib.niu.edu/bitstream/handle/10843/19210/38-2-298-Sherman-pdfA.pdf?sequence=1&isAllowed=y.

Criminal Tribunal for the former Yugoslavia (ICTY) identified command responsibility to be present when they found:

> (i) a superior–subordinate relationship;
> (ii) the superior knew or had reason to know that a subordinate was about to commit crimes or had done so; and
> (iii) the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[33]

The Rome Statute language is largely the same. Article 28(a) of the Rome Statute establishes command responsibility for military commanders (with a similar form of liability for non-military commanders, superior responsibility, established in Article 28(b)).[34] Article 28(a) stipulates the following regarding command responsibility liability:

> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
>
> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[35]

33. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 7(3), May 25, 1993, S.C. Res. 827; Statute of the International Criminal Tribunal for Rwanda art. 6(3), Nov. 8, 1994, S.C. Res. 955.

34. Rome Statute of the International Criminal Court art. 28, July 17, 1998, U.N. Doc. A/CONF.183/9 [hereinafter "Rome Statute"].

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

While similar, a few key differences emerged. For one, the ICC language requires an element of *causation* with the framing of the crimes being "as a result of" the commander's acts or omissions.[36] Further, it changes the mens rea such that instead of *having reason* to know, the commander only "should have known," a lower standard.[37] Finally, while perhaps semantic, it changes the requirement to take "all" necessary and reasonable measures, as opposed to just "the" necessary and reasonable measures, which might suggest an intentional widening of the possible measures needed to take, or alternatively the lack of a need for those measures to be pre-ordained.[38] While the language has developed meaningfully from the ad hoc tribunals in a detailed and thoughtful manner,[39] it still leaves open many questions for interpretation by judges—many of which were in dispute in the *Bemba* case. As little jurisprudence exists exploring what the changed definition means practically, the *Bemba* case has heightened importance as an early application.

### 2. Application of Command Responsibility Doctrine in *Bemba*

Multiple elements were in dispute among the Appeals Chamber judges with regard to legal interpretation of Article 28(a) on command responsibility, specifically the question of whether Bemba had "knowledge," that the troops responsible for crimes were under his "effective control," and the question of whether Bemba took "all necessary and reasonable measures" to prevent or repress crimes.[40] Additionally, regarding the burden of proof, the three-judge majority found that "it is for the trial chamber to demonstrate in its reasoning that the commander did not take specific and concrete measures that were available to him or her and which a reasonably diligent commander in comparable circumstances would have taken. It is not the responsibility of the accused to show that the measures he or she did take were sufficient."[41]

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36. *Id.*

37. *Id.* art. 28(a)(i).

38. *Id.* art. 28(a)(ii).

39. For a further discussion of some of these differences, *see, e.g.*, Amy H. McCarthy, *Erosion of the Rule of Law as a Basis for Command Responsibility under International Humanitarian Law*, 18 CHI. J. INT'L L. 553, 571-74 (2018); Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Amicus Curiae Observations on Superior Responsibility Submitted Pursuant to Rule 103 of the Rules of Procedure and Evidence, ¶ 7-17 (Apr. 20, 2009), https://perma.cc/828G-U8ZD.

40. Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute" (June 8, 2018).

41. *Id.* ¶ 170.

This burden of proof as laid out by the Appeals Chamber sets forth a confusing (at best) framework for trial lawyers to follow. Three of the critical disagreements among the Appeals Chamber judges concerned (a) causation, (b) the proximate nature of subordinates, and (c) motivation.

### *a. Causation*

Article 28(a) describes individual criminal responsibility for commanders when certain crimes are committed "*as a result of* his or her failure to exercise control" over troops.[42] In the *Bemba* decision, the correct approach to causation as an element of command responsibility was split among the judges 2–2–1, with two (in the majority) believing direct causation ("but-for") is required, the two dissenters believing that rather only a "close link" is needed, and the separate majority opinion supporting a "significant contribution" standard defined as "more than negligible" and not de minimis.[43]

The dissenting judges rejected the idea that causation is an important factor in establishing effective control. They noted that "[a]pplying a strict 'but-for'-test to establish causation would disregard the specificities of liability under Article 28 (a) of the Statute, if not of causation in the context of omissions more generally."[44] Instead, they argued, the subordinates' crimes are the result of the commander's failure to exercise control properly if there is a "close link" between the commander's omission and the crimes. They agreed with Trial Chamber Judge Steiner, who concluded that the "result" element would be established if "there is a high probability that, had the commander discharged his duties, the crime would have been prevented or it would not have been committed by the forces in the manner it was committed."[45]

Judge Eboe-Osuji in his separate opinion asserted:

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42. Rome Statute, *supra* note 34 (emphasis added).

43. *See* Prosecutor v. Gombo, Case No. ICC-01/05-01/08 A, Dissenting Opinion of Judge Monageng and Judge Hofmański, ¶¶ 328–39 (June 8, 2018), https://www.icc-cpi.int/RelatedRecords/CR2018_02987.PDF; Prosecutor v. Gombo, Case No. ICC-01/05-01/08-3636-Anx2, Separate Opinion of Judge Wyngaert and Judge Morrison, ¶¶ 51–56 (June 8, 2018), https://www.icc-cpi.int/RelatedRecords/CR2018_02989.PDF; Prosecutor v. Gombo, Case No. ICC-01/05-01/08-3636-Anx3, Concurring Separate Opinion of Judge Eboe-Osuji, ¶ 166 (June 14, 2018), https://www.icc-cpi.int/RelatedRecords/CR2018_03077.PDF.

44. Prosecutor v. Gombo, Case No. ICC-01/05-01/08 A, Dissenting Opinion of Judge Monageng and Judge Hofmański, ¶ 338 (June 8, 2018).

45. *Id.* ¶ 339 (emphasis removed).

> It is thus possible for there to be multiple legal causes that contributed to a given harm. In those circumstances, the test becomes 'whether the defendant's contribution was, by the time the consequence came about, still a "significant and operating cause." If so, then, it is irrelevant whether that same consequence can also be attributed to other defendants.' . . . What is required is merely that *the defendant's 'contribution must be more than negligible* or not to be so minute that it will be ignored under the "de minimis" principle.'[46]

Thus, only two of the Appeals Chamber judges take a direct causation or but-for approach, while the dissenters take a "close link" approach, and Judge Eboe-Osuji takes a "more than negligible" approach. Because the situations in which this might be applied are typically muddied and unclear, the extent to which the underlying act or crime needs to be tied to a failure to act by a commander is critically important in fact-finding, and in making decisions about whether such a link exists such that it is worth pursuing a prosecution at all.[47] As it stands now, it is unclear how a prosecutor in a future case could use this decision to determine whether to bring command responsibility charges and if so, how to properly argue them such that the Appeals Chamber, following precedent, would recognize its validity if so proven.

*b. Proximate Nature of Subordinates: Impact of Remote Control*

The correct approach to remote control as a factor in determining command responsibility was also split among the judges 2–2–1. Two, writing for the majority, believed the primary duty of higher-level commanders is to hold accountable those immediately under them, not one at the bottom of the chain; the two dissenters believed that

46. Prosecutor v. Gombo, Case No. ICC-01/05-01/08-3636-Anx3, Concurring Separate Opinion of Judge Eboe-Osuji, ¶¶ 165–66 (June 14, 2018), https://www.icc-cpi.int/RelatedRecords/CR2018_03077.PDF (emphasis added) (footnotes omitted).

47. *See, e.g.*, *Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo*, INT'L CRIM. COURT (June 13, 2018), https://www.icc-cpi.int/Pages/item.aspx?name=180613-OTP-stat ("Additionally, the Majority seems to have departed from the Appeals Chamber's previous jurisprudence, as well as international practice, in relation to the manner in which the Prosecution ought to charge cases involving mass criminality. The level of detail that the Prosecution *may* now be required to include in the charges *may* render it difficult to prosecute future cases entailing extensive campaigns of victimisation, especially where the accused is not a direct perpetrator, but a commander remote from the scene of the alleged crimes but who may bear criminal responsibility as the superior having effective control over the perpetrators, his subordinates.") (emphasis added).

geography is no bar to effective control; and the separate majority opinion outlined how remote control is not a controlling factor in a judicial decision, but a "complicat[ing]" one to be considered.[48]

The three judges in the majority opinion held that "the Trial Chamber paid insufficient attention to the fact that the MLC troops were operating in a foreign country with the attendant difficulties on Mr. Bemba's ability, as a remote commander, to take measures."[49] This statement emphasizes the role that remoteness and physical separation from one's troops can have in making a determination regarding whether or not the measures taken to repress or prevent crimes were adequate, and makes it thus more likely that physically remote commanders will have a lower standard by which to abide.

Judges Van den Wynagaert and Morrison of the majority write separately to explain their theory of why Bemba's position did not render him in "effective control" of the subordinates.[50] They cite to the International Committee of the Red Cross (ICRC) Commentary of 1987 on Article 86(2) Additional Protocol I to the Geneva Conventions, which states, *inter alia*, "it should not be concluded from this that this provision only concerns the commander under whose direct orders the subordinate is placed . . . [T]he concept of the superior is broader and should be seen in terms of a hierarchy encompassing the concept of control."[51] Despite this clear language, they go on to argue (without citations), that the primary duty of higher-level commanders to hold accountable those immediately under them, not one at the bottom of the chain.[52]

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48. Prosecutor v. Gombo, Case No. ICC-01/05-01/08-3636-Anx3, Concurring Separate Opinion of Judge Eboe-Osuji, ¶ 3 (June 14, 2018), https://www.icc-cpi.int/RelatedRecords/CR2018_03077.PDF.

49. Prosecutor v. 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" ¶ 171 (June 8, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF.

50. Prosecutor v. Gombo, Case No. ICC-01/05-01/08-3636-Anx2, Separate Opinion of Judge Wyngaert and Judge Morrison, ¶¶ 33–37 (June 8, 2018).

51. *Id.* n.34.

52. *Id.* ¶ 34 ("The main responsibility of the higher-level commander is to make sure that the unit commanders are up to the task of controlling their troops. It is not the task of the higher-level commander to micro-manage all lower level commanders or to do their jobs for them. The duty of higher-level commanders is to ensure that those immediately under them comply with their obligations . . . [s]trictly speaking, therefore, if a senior commander is held responsible for a crime committed by a soldier at the bottom of the chain of command, he or she is not blamed for not having supervised the individual soldier properly, but for not having monitored the superior(s) of the soldier adequately.").

In a separate concurring opinion, under a section titled "The Crux of It," Judge Eboe-Osuji notes repeatedly that Bemba "was at all material times remotely located in another country" from his troops.[53] While recognizing that "remoteness of location is not a controlling factor of innocence, it can complicate the question of guilt (as it does in this appeal) depending on the particular circumstances of a given case."[54] Judge Eboe-Osuji disagrees with any indication the two majority judges give regarding geography as a controlling factor, but states that here, the evidence did not point to "effective control," even though he had enough effective control when he "deployed his troops into the CAR and withdrew them eventually[.]"[55] The dissenting judges, Sanji Mmasenono Monageng and Piotr Hofmański, do not view geography as a bar to effective control.[56]

Leila Sadat explored the radical nature of this majority opinion (which Judge Eboe-Osuji somewhat neutralizes in his writing):

> It asserted he was owed a certain deference due to the "limitations that Mr. Bemba would have faced in investigating and prosecuting crimes as a remote commander sending troops to a foreign country." (para. 191) This extraordinary statement [—] uttered without a single case, treaty or treatise to support it—appears not only to shelter Mr. Bemba but serves the interests of any state, regional organization or even rebel group whose forces cross borders, an increasingly frequent occurrence in today's world. It could be argued that a commander in those circumstances should be required to exercise an even higher level of due diligence and supervision exactly because of the risks involved and the fact that most modern commanders have almost immediate access to their forces through cell and satellite phones and other modern communications methods.[57]

53. Prosecutor v. Gombo, Case No. ICC-01/05-01/08-3636-Anx3, Concurring Separate Opinion of Judge Eboe-Osuji, ¶ 3 (June 14, 2018), https://www.icc-cpi.int/RelatedRecords/CR2018_03077.PDF.

54. *Id.*

55. *Id.* ¶ 259.

56. Prosecutor v. Gombo, Case No. ICC-01/05-01/08 A, Dissenting Opinion of Judge Monageng and Judge Hofmański (June 8, 2018), https://www.icc-cpi.int/RelatedRecords/CR2018_02987.PDF.

57. Sadat, *supra* note 13.

Given this shift in approach, it will be difficult for future prosecutors and defense teams alike to understand in what ways it is possible to bring and prove charges against remote commanders—if it even can be done at all, as it might be inferred by the two non-concurring judges that it typically cannot.

### *c. Motivation*

In looking to whether or not Bemba took "all necessary and reasonable measures" to "prevent or repress" the commission of crimes, the Trial Chamber concluded that while he did undertake some measures, his primary motivation in doing so was to create a good public image, not to actually effect real change.[58] This decision begs the question: to what extent, if any, should a commander's motivation for undertaking measures to prevent or repress crimes *matter* in determining his or her liability? At the appellate level, the judges once again split in how they answered that question and understood motivation to be a relevant part of the decision.[59] The majority believed that the motivation never matters,[60] the two dissenters believed that it often matters,[61] and the separate majority opinion discussed how it sometimes can matter.[62] With no prevailing standard on the importance of motivation, it is now unclear for future practitioners the extent to which this is a question that must be addressed, and in what manner.

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58. Prosecutor v. Gombo, ICC-01/05-01/08, Trial Chamber Judgment, ¶ 728 (Mar. 21, 2016) ("the above measures were primarily motivated by Mr Bemba's desire to counter public allegations and rehabilitate the public image of the MLC").

59. However, for further analysis of the motivation prong and whether its discussion among the judges actually has any impact on future proceedings, *see* Jackson Miles, *What Does the Decision of the ICC Appeals Chamber in Bemba Say About the Motivations and Geographical Remoteness of Commanders in Determining Superior Responsibility Under Article 28 of the Rome Statute?*, ICC FORUM (May 27, 2019), https://iccforum.com/responsibility#Jackson.

60. Prosecutor v. 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", ¶ 179 (June 8, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_02984.PDF. ("[I]n considering Mr Bemba's motivation to protect the image of the MLC, the Trial Chamber erred because it took into consideration an irrelevant factor").

61. Prosecutor v. Gombo, Case No. ICC-01/05-01/08 A, Dissenting Opinion of Judge Monageng and Judge Hofmański, ¶¶ 70–78 (June 8, 2018), https://www.icc-cpi.int/RelatedRecords/CR2018_02987.PDF.

62. Prosecutor v. Gombo, Case No. ICC-01/05-01/08-3636-Anx3, Concurring Separate Opinion of Judge Eboe-Osuji, ¶¶ 14–16 (June 14, 2018), https://www.icc-cpi.int/RelatedRecords/CR2018_03077.PDF (in this case, the motive was "imputed" by the Trial Chamber and witnesses, as opposed to concrete evidence).

### 3. Role of ICC Decisions in Clarity of Law

Split decisions are not inherently unclear, in either an international tribunal such as the ICC or a domestic court. However, decisions by various chambers are beneficial when, among other things, they offer guidance on how to interpret the law.[63] In its early days, the ICC's rulings in the *Lubanga* case prompted commenters such as Human Rights Watch to note that "by providing one interpretation of the boundaries of the ICC's jurisdiction, this decision has shaped perceptions of what cases ought to be investigated by the prosecutor and to be heard by the court."[64] The Head of Office for the Institute for International Criminal Investigations (IICI) noted that if the

> Appeals Chamber [in the *Bemba* judgment] wanted to make such dramatic changes to the applicable law and procedure of the Court, with such profound implications for all ongoing investigations and trials, it would have been preferable to do so in a more unanimous and less fragmented way in order to provide the necessary clarity and certainty for not only the parties but also their fellow judges at the pre-trial and trial phase.[65]

Multiple interpretations might cut against the ability of the court to shape perceptions, especially of the prosecutor or others working in this space. Case law, while not binding,[66] is critically important at the

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63. *Courting History: The Landmark International Criminal Court's First Year*s, HUMAN RIGHTS WATCH (July 11, 2008), https://www.hrw.org/report/2008/07/11/courting-history/landmark-international-criminal-courts-first-years (". . . [E]arly decisions by the pre-trial chambers have created a foundation for interpretation of the Rome Statute.").

64. *Id.*

65. Joseph Powderly & Niamh Hayes, *The Bemba Appeal: A Fragmented Appeals Chamber Destablises the Law and Practice of the ICC*, PHD STUDIES IN HUMAN RIGHTS BLOG (June 26, 2018, 7:38 PM), https://humanrightsdoctorate.blogspot.com/2018/06/the-bemba-appeal-fragmented-appeals.html [hereinafter Powderly & Hayes].

66. The ICC "may," but does not have to, "apply principles and rules of law as interpreted in its previous decisions." Rome Statute, supra note 34, art. 21(2). For further discussion, see Luigi Prosperi, The ICC Appeals Chamber Was Not Wrong (But Could Have Been More Right) in Ntaganda , Opinio Juris[.] (June 27, 2017), http://opiniojuris.org/2017/06/27/33178/ ("ICC judges are not bound by a principle of precedent "); Stewart Manley, Referencing Patterns at the International Criminal Court , 27 Eur. J. Int'l L. 191, 194 (2016) ("Generally, international courts and tribunals do not use stare decisis, the doctrine requiring judges to follow previous similar decisions. Rather, a particular decision binds only the parties before the court. As a result, prior decisions are of diminished importance at the international level, in contrast to the national level where precedent is binding on lower courts in common law countries such as the USA and England.") (footnotes omitted).

ICC. A 2016 study of referencing patterns at the ICC underscores that case law "dominates" the types of legal sources used by the ICC; at that time a full 92% of sources of law cited by the Appeals Chamber were "persuasive cases."[67] With the knowledge that this Chamber (and pre-trial and trial chambers as well) will so heavily rely on past precedent, including their own,[68] the prosecutorial and defense teams, along with investigators and documenters outside the court, would rationally focus on the precedents set by the Chamber in understanding the type of cases most possible to initiate. In fact, Judge Eboe-Osuji stated specifically that a "key motivation" for writing a separate opinion was "to assist in the understanding in those aspects of the law that are applicable in this Court."[69] Yet, as some scholars point out, by virtue of these opinions being excluded from the majority opinion, it is clear that the Chamber as a whole does not share his views.[70]

### 4. Importance of *Bemba's* Legal Standards

*Bemba* is a landmark case. With the conviction, the Trial Chamber set many precedential standards, including not only on command responsibility but also on sexual and gender-based violence. The *Bemba* case was only the third substantive appeal judgment in the ICC's history. Thus, for the Appeals Chamber to overturn the *Bemba* conviction without providing any precedent is, at best, a missed opportunity—and potentially an abdication of responsibility. One commenter noted that while the *Bemba* acquittal, a 3-2 split among Appeals Chamber judges, is "not unusual or unprecedented," it is "particularly unfortunate" because it "appears to indicate a significant lack of agreement between the five judges on important issues of law, and therefore makes it more difficult for parties in future cases and even other judges at the pre-trial and trial phase to assess how best to comply with its findings."[71] Another remarked on how even though dissenting and concurring opinions are "not unusual and can be beneficial, the [C]ourt's failure to marshal consensus on such a range of fundamental questions . . .

67. Manley, supra note 66, at 193.

68. Id. (explaining that judges frequently cite to themselves in past decisions).

69. Prosecutor v. Gombo, Case No. ICC-01/05-01/08-3636-Anx3, Concurring Separate Opinion of Judge Eboe-Osuji, ¶ 31 (June 14, 2018), https://www.icc-cpi.int/RelatedRecords/CR2018_03077.PDF

70. Powderly & Hayes, supra note 65.

71. *Id.*

[including] the doctrine of command responsibility . . . offered little practical guidance for future prosecutions."[72]

Furthermore, as certainty and predictability of the law are core tenets of its fair application—indeed some have gone as far as to assert they are a "fundamental right"[73]—it is critical that judgments do their best to provide a pathway for future parties engaged before the court. Two of the judges involved in the *Bemba* acquittal have since left the bench (van den Wynagaert and Monageng), meaning that the Appeals Chamber is now made up of two judges from the majority (one of whom issued the separate opinion), one from the minority, and two newly-appointed judges, who are new to these issues in the context of the ICC—thus leaving practitioners without clear guidance as to what standards they may choose to apply.[74] The outcome of a case is necessarily fact-dependent, and it is never possible to predict with certainty the final judgment. Nevertheless, in this landscape, it would be nearly impossible to have any clear understanding among parties regarding the factors that will likely go into an Appeals Chamber decision. With this new makeup of the Chamber, combined with the ambiguity in the legal precedent, there are simply no applicable rules, standards, or even clear dicta regarding the court's preferences.

## IV. Positive Consequences of Fragmented Judgments

Despite the aforementioned negative ramifications of Bemba's fragmented acquittal, the emergence of adverse results is not inevitable. On the contrary, fragmented decisions and dissents can play a helpful role in both the legitimacy of courts and the development and clarity of legal standards. The following discussion will outline some of the potential positive impacts, which builds the case for using the *Bemba* decision as a constructive tool.

### A. *Role of Fragmented Decisions and Dissent in Legitimacy*

Dissents and acquittals work in both negative and positive ways to shape the collective memory of a particular situation. On the one hand, a dissent can actually help to curb the legitimacy deficiencies that are inherent to an international criminal tribunal. As Neha Jain explains, dissents can open up a "public space that allows evaluations of the

72. Goldston, *supra* note 21.
73. *Id.*
74. *Id.*

broader political and historical context to be contested."[75] She recognizes that this is inherently risky, but notably her discussion is largely different from the case at hand because it generally concerns dissents to a finding of guilt, whereas this Note discusses a fragmented decision delivering an acquittal.[76] In her commentary, a dissenting opinion to a conviction

> allows for contestation as to the occurrence of these crimes and their scale and scope, as to the motivations and intentions of the individuals and collectivises that allegedly perpetrated these crimes and as to the possibility of these crimes being justified or excused because of the circumstances in which they took place.[77]

Perhaps then, to flip the analysis, a dissent for an acquittal in fact can do the opposite—it *creates space to ensure that the existence of the crimes is not in dispute*. It further creates the space so that the dominant narrative is not solely predicated on Bemba's lack of responsibility. By ensuring the decision is made based on the law and facts, but allowing the decision to be so narrow, it might both prop up the court as a legitimate institution driven by rule of law, while simultaneously not denying (via the dissent) the reality of the atrocities that were committed.

The existence of dissents themselves can also serve to legitimize a court. While distinct from the issue of fragmented judgments, as a dissent was one of three opinions written distinct from the official majority holding decision, the dissent is important in recognizing the power of the decision as a whole. Hemi Mistry argues that judicial dissents are a "mechanism of ownership" enhancing claims of the court to universal values by indicating that the one (or ones) aggrieved by the outcome are not alone—the publication of a dissent proves the independence of individual judges and provides insight into views of minority judges.[78] A dissent thus "empowers minority defendants and other actors whom distrust the exercise of official authority by chambers of international criminal bodies."[79] Mistry goes on to explain how this empowerment

75. Neha Jain, *Radical Dissents in International Criminal Trials*, 28 EUR. J. INT'L L. 1163, 1181 (2017).

76. *Id.* at 1172–86.

77. *Id.* at 1183–84.

78. Hemi Mistry, *The Paradox of Dissent: Judicial Dissent and the Projects of International Criminal Justice*, J. INT'L CRIM. JUST., Vol. 13-3, (Jul. 2015), 449-474, https://academic.oup.com/jicj/article/13/3/449/890724.

79. *Id.*

strengthens claims to "consent legitimacy," and "enhances the effectiveness of the judicial process in ensuring accountability and projecting norms as well as validating and strengthening the project's claims to universality."[80]

### B. *Role of Fragmented Decisions and Dissent in Institutional Reform*

Appeals Chamber Judges Morrison and van den Wyngaert asserted in their written separate opinion that the Chamber's failure to achieve unanimity is "not just a matter of difference of opinion, but appears to be a fundamental difference in the way [they] look at our mandates as international judges."[81] However, dissents and fragmented decisions are not atypical, either at national or international levels—and can in fact lead to significant reforms and improvements in the state of the law. The dissenting opinion can serve the purpose of "stimulating debates within the wider international lawmaking community" regarding the importance of those dissenting views, and whether those views should be acted on in any possible appeals or in future cases.[82]

Under U.S. jurisprudence, this experience is widely recognized. Legal scholar Cass Sunstein has examined the ways in which dissents can lead to constructive lawmaking. He first recognizes that dissents, depending on their power, have the ability to influence future Court decisions.[83] Moving beyond that—and more relevant to our inquiry—he adds that "[e]ven if a dissent is not likely to move a future Court, it might influence Congress. If a Justice signals that the Court has erred and that the stakes are high, she might trigger legislative attention."[84] In the international system, Hemi Mistry reaffirms this same principle in noting how "while [sic] dissents could be appeals to future courts—whether chambers of the ICC or national or hybrid courts—they could equally be appeals to other participants in the process of international lawmaking and law interpretation."[85]

Relevant to the *Bemba* case, disagreement among judges has appeared "most frequently—and often, most forcefully—in the context

80. *Id.*

81. Prosecutor v. Gombo, Case No. ICC-01/05-01/08-3636-Anx2, Separate Opinion of Judge Wyngaert and Judge Morrison, ¶ 4 (June 8, 2018), https://www.icc-cpi.int/RelatedRecords/CR2018_02989.PDF.

82. Mistry, *supra* note 78.

83. *See* Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 802–03 (2015).

84. *Id.* at 803.

85. Mistry, *supra* note 78.

of ascertaining and applying the law regarding modes of liability."[86] Mistry continues in asserting that "[a]s the norm of international justice and accountability strengthens with the regularization of investigations and prosecutions of individuals for international crimes, these prominent dissents have played an important role in bringing to a wider audience the fundamental debate on who should be held criminally responsible and on what basis."[87] However, this perspective includes a trade-off. Especially when the decision is divided but the ruling is an acquittal of the defendant, additional considerations such as the impact the verdict has on victims must be taken into account. Such academic pursuits regarding a wide debate over criminal responsibility might come off as too theoretical when dealing with actual cases, with real lives affected. In order to, therefore, make the most of the discussion that these divergent views have opened up, it is the responsibility of anyone in a position of power to act to make more clear determinations of "who should be held criminally responsible and on what basis."[88] As applied to the case at bar, that would mean an elaboration on the elements of command responsibility as dissected in the *Bemba* acquittal.

### C. *Is It Even About the Acquittal? An ICTY Case Study*

A 2012 ICTY decision bears remarkable structural similarity to the current Bemba acquittal. In *Prosecutor v. Gotovina et al*, a five-judge Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia issued a 3-2 acquittal of Gotovina and Markač.[89] The *Gotovina* Appeals Chamber reversed the Trial Chamber's finding that the shelling of four Serbian towns in August 1995 during the course of 'Operation Storm' by Croatian forces constituted indiscriminate attacks—resulting in the acquittal of two Croatian commanders.[90] Like the Appeals Chamber in *Bemba*, one of the majority judges wrote a separate opinion, and two disagreeing judges issued an "unusually harsh" dissent, stating that certain elements of the judgment were "confusing, inconsistent, unclear, artificial, and defective."[91] The critique of the

86. *Id.*

87. *Id.*

88. *Id.*

89. Prosecutor v. Gotovina, Case No. IT-06-90-A, Appeals Chamber Judgement (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012), http://www.icty.org/x/cases/gotovina/acjug/en/121116_judgement.pdf.

90. Mistry, *supra* note 78.

91. Radmila Nakarada, *Acquittal of Gotovina and Markač: A Blow to the Serbian and Croatian Reconciliation Process*, 29/76 MERKOURIOS – UTRECHT J. OF INT'L AND EUR. L. 102, 103 (2013).

majority decision included that the majority did "not respect the unanimous evaluation of the facts by the Trial Chamber," and also did not consider the "totality of the evidence" in re-evaluating the facts in their own views.[92] Reminiscent of a key divergence in *Bemba*, the dissent in *Gotovina* went so far as to declare that the Appeals Chamber "overstepped its boundaries" in reviewing the Trial Chamber's findings *de novo*.[93]

Just as in *Bemba*, this controversial decision led to disparate views regarding the legitimacy of the decision in affected communities. In Croatia, it was "widely seen as a victory for the nation as a whole," whereas in Serbia, "the acquittal was met with outrage . . . it reinforced subsequent Serbian victimhood by the ICTY and the wider international community backing it."[94] Some asserted that this divisiveness "gives reason to doubt whether the law in the concerned area is fit for purpose."[95] In fact, "by highlighting the unsatisfactory nature of the application of international criminal law" to the specific military decisions in question, the judgment and dissenting opinions actually "defined the parameters within which the legal and policy debates necessary to clarify this disputed area of law are being conducted."[96] So too could be the case for *Bemba*.

The fact that the *Bemba* acquittal so closely mirrors that of this ICTY case—a court often viewed as illegitimate by Serbians, but not called into question on the basis of the acquittal in much of the surrounding commentary[97]—could indicate that the questions the decision has raised regarding legitimacy of the court are not actually about the acquittal *qua* acquittal. Rather, the critiques are better understood as geopolitical arguments challenging the project of international criminal justice as carried out by the tribunal in question. Despite the fact, then, that the *Bemba* acquittal is being used as a scapegoat towards entrenching perceived problems of the Court, international criminal law

92. *Id.* at 104.

93. *Id.*

94. Mistry, *supra* note 78.

95. *Id.*

96. *Id.*

97. *See e.g.*, Mark Kersten, *The aftermath of the ICTY's Gotovina Trial: Due process and Historical truth*, JUSTICE IN CONFLICT, (Nov. 19, 2012), https://justiceinconflict.org/2012/11/19/the-aftermath-of-the-ictys-gotovina-trial-due-process-and-historical-truth/; Marko Milanovic, The Gotovina Omnishambles, EJIL: *TALK!*, (Nov. 18, 2012), https://www.ejiltalk.org/the-gotovina-omnishambles/; Bogdan Ivanisevic, *Hague Failed to Justify Gotovina Acquittal*, BALKAN TRANSITIONAL JUSTICE, (Nov. 19, 2012), https://balkaninsight.com/2012/11/19/hague-failed-to-justify-gotovina-acquittal/.

practitioners and advocates have the ability to instead use the decision's high-profile stature to advance legitimate needed reforms to the ICC. The challenge, therefore, is not the acquittal *per se*, but rather the corresponding lack of convictions at the ICC. The lack of convictions might be corrected in part if all actors involved—the OTP, Pre-Trial and Trial Chambers, and Defence teams—better understand the standards by which judgments will be determined, and the specific elements that will need to be proved. This will help the OTP make determinations regarding priorities and case selection, and ensure that Chambers are making decisions that, based in law, can be (and likely will be) upheld. Thus, the focus of negativity on acquittals is misplaced; the energy should be focused on ensuring the rules of the game are clear to all.

## V. Opportunities Following the Appeals Chamber Judgment

Lack of clarity regarding the means by which one can demonstrate command responsibility moving forward after *Bemba* is an illustrative example of the problems of efficiency and legitimacy connected to fractured judgments of political, personality-driven judges. One way to constructively react to the development of this challenge is for the ASP, the Court's management oversight and legislative body,[98] to step in, just as Congress or a legislature does in certain domestic settings. As applied here, this would mean the adoption of an Elements of Liability guiding document of further rules to clarify the uncertainty following the *Bemba* decision, including regarding the means by which command responsibility is established.

Part V of this Note will thus: (A) examine the rationale for using the *Bemba* decision as an impetus to create legal certainty; (B) explore the mechanics of adopting an Elements of Liability guiding document; (C) discuss the main benefits to this effort; and (D) address the core counterarguments to this effort.

### A. *Rationale for Using* Bemba *as an Impetus to Create Legal Certainty*

#### 1. Re-Envisioning the Perception of the Fragmented Opinion as a Call to Action

The majority of reactions to the *Bemba* judgment, as illustrated above, have so far centered on one, or a combination, of three reactions:

98. The Assembly of States Parties is the Court's management oversight and legislative body and is composed of representatives of the States which have ratified or acceded to the Rome Statute. *Assembly of States Parties*, Int'l Crim. Court, https://www.icc-cpi.int/asp (last visited May 3, 2019).

(1) analysis of one or more of the majority's technical legal decisions, either agreeing or disagreeing with the outcome; (2) commentary on the fractured nature of the Chamber, either expressing dismay or tempering the negative reactions; or (3) positive or negative reactions from affected communities, largely predictable based on the affiliation of the interested party (*i.e.*, generally speaking, civil society from the DRC report higher levels of satisfaction, and survivor communities from the CAR see the judgment as a major setback for justice). However, the existence of such a fragmented and split decision can also be seen as a call to action. Mistry employs such a lens when discussing certain dissents of the ICTY:

> By *creating* uncertainty regarding the correctness of statements of the law within a decision of a court, such dissents encourage actors to seek out *with certainty* whether in fact the decision is a correct reflection of the law. If it is not correct, then actors know not to conduct their behaviour according to it, but if it is, then they can do so with greater confidence. Even when it is concluded that the law articulated by the majority *is* accurate, dissents . . . are appeals 'to the brooding spirit of the law, to the intelligence of a future day' in order to change or reform the law. Judicial dissent does not merely give representation to the plurality of understanding of those laws, values and interests that are held by the diversity of actors subject to a universal project of international justice. *Rather, the real potential lies in the ability of judicial dissent to contribute to the process of making the [international criminal justice] project's professed universality real.* Judicial dissent within international criminal courts and tribunals forms a platform on which a more diverse range of actors are engaged and empowered in the process of evaluating the weight and contribution of a judgment to the identification of international criminal law.[99]

The *Bemba* decision turned, in part, on questions of substantive law. Following the Mistry approach, three out of five judges (who wrote a dissent and a separate opinion) can be seen as actors intentionally creating uncertainty regarding the "correctness of statements of the law," thereby encouraging various actors within and outside of the court to "seek out" the right answer; or, in its absence, to "change or reform the

99. Mistry, *supra* note 78 (emphasis added to fifth sentence).

law."[100] The community of international criminal law practitioners and scholars should take up this charge.[101]

### 2. The Judges Need Not Practice Law-Making Alone

As ICC jurisprudence develops, judges—especially the five appellate judges—need not be the only individuals involved in decision making and defining the law. The actions of the Appeals Chamber judges in the *Bemba* case were widely seen as unusual. Even Prosecutor Bensouda herself thought that their decision to overturn years of precedent regarding the Court's procedures, such as the standard of factual appellate review at the ICC, other U.N. ad hoc tribunals, and other international criminal tribunals, was "significant and unexplained."[102] It is unusual for the Prosecutor to issue a statement after a final judgment has been issued such as this. Doing so further underscored the gravity of the judges' choices in how they approached the acquittal.

That much of the decision was an uncited departure from precedent suggests that it would not be responsible for the international community to leave it up to the judges to act in future instances to clarify the law through their future decisions. In discussing the Court's stated approach to remoteness in command responsibility, Leila Sadat recognizes that "[g]iven [the new standard's] profound potential implications, more analysis and elaboration of the judges' meaning would have been useful."[103] As the judges did not provide that analysis and elaboration in the instant case, it would be prudent to look elsewhere in the creation of standards for the future. If the ASP agrees that the Appeals Chamber judgment inappropriately turns command responsibility from a well-established tool to ensure criminal culpability for atrocity crimes into "a legal burden too easily shirked,"[104] as Diane Amann asserts, it would befit the ASP to craft law through which this standard can revert to—one that is more aligned with the commonly adopted understanding of command responsibility. Amann concludes

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100. *Id.*

101. *See, e.g.*, Amnesty International, *supra* note 31 ("Of course it is perfectly legitimate for the OTP, other parties and participants to a case and observers including academics, and even Amnesty International, to disagree with a chamber's analysis of the law. On complex and novel issues, such as command responsibility, such debates may enrich and even advance the development of the law.").

102. *Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo*, INTERNATIONAL CRIM. COURT (June 13, 2018), https://www.icc-cpi.int/Pages/item.aspx?name=180613-OTP-stat. (quoting the dissenting judges).

103. Sadat, *supra* note 13.

104. Amann, *supra* note 12.

her analysis of the *Bemba* decision with an overt recognition that "it is high time to confront, and combat, an apparent drift away from the assignment of responsibility for international crimes."[105]

Concerns regarding the politicization of judges is another reason why it might be useful to widen the scope of decision making. Nominations for ICC judges are viewed by many as a political process, in which individual voting decisions of states may be subject to the "influence" of political factors such as mutual support arrangements.[106] While this certainly does not lead to the nullification of their decisions, it can serve as a specific recognition that a variety of qualifications, temperaments, and interests exist among the judges in any particular Chamber. This should not be over-emphasized; to do so would both diminish the important work of each individual judge, and provide more fodder for those critical of international criminal justice. If there are indeed challenges concerning the politicization of judges, that is a distinct issue (and outside the scope of this Note). However, relevant to this discussion is the understanding that one of the reasons to urge the ASP to get involved at this stage is to ensure that any *perception* of politicization of five individuals is removed, and each state party has a voice in the matter. Judges are, therefore, not inherently the most appropriate vehicle through which to undertake law-making.

### B. *Proposal: Create and Adopt an Elements of Liability Guiding Document*

Judges in the *Bemba* appeals decision issued a ruling that was fractured and unclear, and left the Court vulnerable to criticism and advocates unable to discern how to approach similar situations in the future. The Assembly of States Parties should take action to ensure that the fragmented opinion is used as an impetus for positive development of international criminal law, instead of left to undermine the legitimacy of the Court in the eyes of numerous constituencies. To provide clarity on the points of law currently undetermined and bolster its presence as a global legislative body, the ASP should adopt an Elements of Liability guidance document.

ASP is an appropriate venue in itself through which significant changes can be made,[107] including to the law itself, as the body

105. *Id.*

106. Ruth Mackenzie, Kate Malleson, Penny Martin, *Selecting International Judges: Principle, Process, and Politics. Reprinted in* 106-3 AM. J. INT'L L. 704–708, 706 (July 2012), https://www.jstor.org/stable/10.5305/amerjintelaw.106.3.0704.

107. See, for example, the website of the International Criminal Court and the structures within the Assembly of States Parties, including a Working Group on Amendments and a Working

intended to regulate the functioning of the Court.[108] Numerous resolutions are considered, and it has a structure that enables deliberation over particular topics before drafts are circulated and voted on at a yearly meeting. The ASP's involvement in the course of its proceedings, in responding to the changing understanding of the realities of international criminal law prosecutions, is an appropriate way to ensure individual states and not just a handful of judges are a part of lawmaking in this new field.

The proposed Elements of Liability document would aim to mirror the Elements of Crimes,[109] adopted concurrently with the implementation of the Rome Statute in 2002. Just as the Elements of Crimes are to be used in conjunction with the definition of crimes in Articles 6, 7, 8, and 8*bis*, the Elements of Liability would be utilized in conjunction with the definition of modes of liability in Articles 25, 28, and 30.[110] As with the Elements of Crimes, the Elements of Liability would clarify in more detail than the Rome Statute currently does what specific actions are required in order for liability to be established under a particular theory. For example, with respect to Article 28(a) command responsibility, it should utilize the areas over which there have so far been disparity in the way judges approach the standard to elucidate the proper one moving forward. It should include at a minimum the standards under which to adjudicate (1) causation, (2) the impact of remote control, and (3) motivation for actions taken to prevent or punish. Based on the decision in *Bemba*, it should likely also include (4) a non-exhaustive list against which future defendants charged with command responsibility will be judged pertinent to actions they could have taken to prevent or repress atrocities.[111]

The goal of this Note is not to outline *which* specific standards are the appropriate ones, but rather to make the case that the *clarity* that could ensue among Chambers, the Office of the Prosecutor, and Defence

Group on Lessons Learnt (part of the Study Group on Governance): Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/15/Res.5 (Nov. 24, 2016), https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP15/ICC-ASP-15-Res5-ENG.pdf#page=20.

108. *See generally* ICC-Assembly of States Parties, *supra* note 5.

109. The Elements of Crimes, INT'L CRIM. COURT (2011), https://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf.

110. Rome Statute, *supra* note 34, arts. 6–8*bis*, 25, 28, 30.

111. One of the main challenges involved whether proper *notice* was provided to Bemba regarding all of the possible measures the prosecution believed he could have taken to prevent or punish the crimes. Including these measures in the Elements of Liability could address the Court's emphasis on this notice requirement. In this theoretical example, prosecutors could, with notice, add to this list, but it is a minimum for which possible defendants should be prepared.

alike is a meaningful and necessary change, regardless of the exact definition and standards adopted.[112] Understanding *which*, if any, of the three different standards use in the *Bemba* case for each of the three legal issues described is best placed in the hands of those with significant experience, as there does not appear to be a universally understood "right" answer.

To that end, the core drafting of the Elements of Liability as proposed here should be undertaken in much the same manner as the Elements of Crimes—by bringing together a diverse array of international experts and distinguished practitioners, such as former international criminal tribunal judges, past presidents of the Court, renowned academics, and more. Such a group should also involve civil society and NGOs, either formally or informally, as was the case with the Elements of Crimes. The ASP recently undertook a similarly structured project at its 2019 session, in which it appointed an Independent Expert Review to prepare recommendations for strengthening the performance, efficiency, and effectiveness of the Court.[113] Given that the ASP is already to some extent engaged in a "rethink" regarding critical topics to the functioning of the Court, now is an opportune moment to ensure that legal standards, such as those guiding various modes of liability, are incorporated into their work.[114]

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112. While this topic is better suited to further discussion in a separate piece, it is worth noting that if an Elements of Liability document were successful, it may help the ASP recognize that legal issues relevant to the functioning and legitimacy of the Court will continue to arise in perpetuity, and a more permanent body within the Court's structure could help to address these challenges as they develop in real time. The lack of clarity regarding standards by which an offender may be convicted under a command responsibility liability theory is just one of many such issues that necessarily becomes clearer as the Court continues to function. To best address these challenges, the ASP should consider the creation of an Advisory Committee on Legal Issues. This Advisory Committee would work closely with the Working Group on Amendments, and based upon recommendations from the Bureau, undertake research on particular areas of the law for ASP to clarify. The Legal Issues Group would be tasked with reviewing contentious points of law for possible resolution through a vote of the entire ASP. For instance, and pursuant to the *Bemba* decision, initial tasks could the standard of review used by the Appeals Chamber and the Pre-Trial Chamber's role in confirming the charges against a defendant.

113. Resolution ICC-ASP/18/Res.7, Review of the International Criminal Court and Rome Statute system, ¶ A.6 (Dec. 6, 2019).

114. Yassir Al-Khudayri & Christian De Vos, *Excellence, not Politics, should Choose the Judges at the ICC*, Open Society Justice Initiative (Oct. 28, 2019), https://www.justiceinitiative.org/voices/excellence-not-politics-should-choose-the-judges-at-the-icc ("The court's members, represented by the Assembly of States Parties, are now engaged in what amounts to a major rethink that provides an opportunity to address the issues that its members can control–such as flawed investigations, and shortcomings in governance, including in the way the court selects its judges.").

Working together in a diplomatic fashion, a committee made up of these individuals as appointed by the ICC Bureau would create a draft document, to be discussed and voted on by the ASP. The Elements of Liability should take into account the historical development of the issues,[115] precedent from national and international criminal tribunals, and current perspectives on the topics to create recommendations. Thus, it would be based on technical expertise while reflecting the will of the states regarding the extent of various modes of liability.[116]

In order to ensure that the Elements of Liability is given equal weight and authority as the Elements of Crimes by the Court, small amendments to the legally binding Rome Statute should be made. Just as it is debatable exactly how much legal deference to the Elements of Crimes is required, here too judges would, in theory, still have the ability to deviate if the proper case were to arise.[117] However, incorporating the Elements of Liability, once adopted, into the Rome Statute provides a firm foundation on which all organs of the Court can rely when crafting legal theories and issuing rulings with an eye towards consistent and credible jurisprudence. At present, the Rome Statute refers to the Elements of Crime in two main places. Article 9 states that the Elements of Crimes are designed to "assist the Court in the interpretation and application of articles 6, 7, 8, and 8*bis*."[118] Article 21(a) states that "the Court shall apply . . . in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence."[119] These references in the Rome Statute separate the Elements of Crimes and Rules of Procedure and Evidence from other guiding documents, such as the Judicial Code of Conduct, by giving them a higher legal status. Therefore, both Articles 9 and 21 should justly be amended upon adoption of the Elements of Liability to read as follows:

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115. *See, e.g.*, Michael A. Newton, *Charging War Crimes: Policy & Prognosis from a Military Perspective*, VAND. PUB. L. & LEGAL THEORY WORKING PAPER NO. 14-6, § 4.3.2 (Feb. 18, 2014) ("Given the historical context and vitally important role of command authority explained above, military practitioners would almost certainly be in strong concurrence that the phrase 'knew or should have known' is an essential and non-transferrable tenet of command.").

116. This document could utilize, and reflect in many ways, the Command Responsibility toolkit produced by Case Matrix Network in November 2016, https://www.legal-tools.org/doc/367a2d/pdf.

117. *See* Joshua H. Joseph, *Gender and Internatinoal Law: How the International Criminal Court Can Bring Justice to Victims of Sexual Violence*, 18 TEX. J. WOMEN & L. 61, 71 (2008) ("the exact authoritative force of the EOC Annex is debatable").

118. Rome Statute, *supra* note 34, art. 9.

119. Rome Statute, *supra* note 34, art. 21.

Article 9
Elements of Crimes and Elements of Liability

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8*bis*. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
2. Elements of Liability shall assist the Court in the interpretation and application of articles 25, 28, and 30. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
3. Amendments to the Elements of Crimes and the Elements of Liability may be proposed by:
   (a) Any State Party;
   (b) The judges acting by an absolute majority;
   (c) The Prosecutor. Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
4. The Elements of Crimes, Elements of Liability, and amendments thereto shall be consistent with this Statute.

Article 21
Applicable Law

1. The Court shall apply:
   (a) In the first place, this Statute, Elements of Crimes, Elements of Liability, and its Rules of Procedure and Evidence

### C. *Benefits of the Elements of Liability Approach*

Taking action through the ASP will bolster the legitimacy of the Court because prosecutions will likely become more efficient and effective, decisions will likely become less fractured, and while it will still exist, there will likely be *less* discrepancy among individual judicial opinions. The OTP and the Registry can also take these new guidance documents into account when developing their bi-annual strategic plans such that their pursuit of individuals or crimes reflect the likely realities of the Court's evaluations. The effectiveness of counsel on both the

Defence and Prosecution teams would increase. In turn, this could lead to an uptick in convictions, which often build credibility among court constituencies, while ensuring those convictions are based wholly on a known standard of law.

Furthermore, having an Elements of Liability document codified by the ICC will help to harmonize the practice of international criminal law in a variety of jurisdictions around the globe. As national courts increase their prosecution of not just low-level soldiers, but also high- or mid-senior level officials as well, adoption of new guidelines through the ASP will support those jurisdictions as they craft their own rules. Guidance from the Rome Statute is influential for many state parties; at least sixteen states have implemented all or many of the legal requirements of command responsibility, described in Article 28(a) of the ICC Statute, and at least fifty other states include various provisions which punish commanders or those in positions of responsibility for the failure to act or of acts of omission.[120] The more centralized and developed these standards can be, the easier they will be for domestic courts to apply, thus contributing to consistency and predictability.

Finally, the creation of an Elements of Liability would provide a clear advocacy opportunity for state parties and practitioners alike. All those who, like Amann, believe that any one decision or activity make it time to "confront, and combat" a particular problem would have a direct avenue through which changes can be proposed, debated, made, or rejected.[121]

### D. *Overcoming Key Challenges to these Reforms*

Two key challenges arise from this proposed guidance document. The first is that the ASP is too political of a body to conduct what amounts to lawmaking, and that it is not within their purview to counteract the work of the judges. The second is that such a document arising from the *Bemba* decision would be discredited as it would appear to be an attempt to change the rules of the Court simply based on an outcome many disliked—regardless of its legality. Counterarguments continue by noting that many acquittals are wholly legitimate, and to update the standard every time a person evades a conviction would contradict the very goals of this endeavor and undermine the rule of law. Furthermore, the nature of courts is that jurisprudence develops over

120. *International Criminal Law Guidelines: Command Responsibility*, CASE MATRIX NETWORK, (Jan. 2016), https://www.legal-tools.org/doc/7441a2/pdf/.

121. Amann, *supra* note 12.

the course of time. Some may say that the ICC, at only twenty years old, is taking an understandably slow and gradual approach to creating a body of case law that can provide future practitioners necessary guidance.

Notwithstanding these rebukes, an Elements of Liability as proposed would be a strong step forward in international criminal justice. For one, this proposal might bring the jurisprudence of the ICC more in line with civil law jurisdictions, which depend much more on written law than case law to understand the legality of any particular action. That does not mean, of course, that the outcome in any case will be pre-determined; quite the contrary. Yet, by moving in the direction of establishing more detailed written law, Defence, the OTP, and the Court alike will have a better understanding of the rules.

Secondly, the counterargument to the question of the ASP's political nature is recognizing that the judges themselves are also often seen as too political, and too fractured, to be making such decisions alone. In fact, adoption of standards via the ASP would *counteract* this political challenge by bringing the legal questions to a body explicitly intended to be political. The practice of turning to a legislative body when a court is unable to create a satisfactory outcome is a common one. While it can be challenging to get large bodies such as the ASP to come to agreement on critical issues—especially concerning how high-level officials might one day be convicted of atrocity crimes—it would likely be in their interests to clarify this law because of the equity it provides to all organs of the court, including the Defence. If the Assembly of State Parties takes on the role of adopting an Elements of Liability, the ICC's application of laws would more closely reflect the will of state parties, rather than relying solely on a handful of individuals' varied judgments.

Naturally, the answer to an acquittal in any credible judicial system is not simply to change the rules of the game. However, in this instance such an effort would be part of broader constructive reforms for which many respected scholars and practitioners are calling, including four former presidents of the ASP, who specifically noted in April 2019 that among other changes, the ICC must "clarify the legal standards it applies to its criminal proceedings."[122]

122. Prince Zeid Raad Al Hussein, Bruno Stagno Ugarte, Christian Wenaweser, & Tiina Intelman, *The International Criminal Court Needs Fixing*, ATLANTIC COUNCIL (Apr. 24, 2019), https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing.

## VI. Conclusion

Approximately twenty years after the establishment of a permanent international criminal court, the time is ripe to use the lessons gleaned in practice so far to further clarity and consistency moving forward in prosecuting those who order the commission of, or do not take steps to address the commission of, the most heinous international crimes. The Assembly of States Parties should adopt an Elements of Liability document. Doing so as a response to the *Bemba* acquittal would mean that the decision has a positive impact on the future of international criminal law, rather than be most remembered for fracturing both the international community and communities directly affected by the commission of crimes. For the ICC to be practical, its guiding principles must reflect reality and pragmatic considerations about which the international community much better understands now, following nearly two decades of practice, than it did during the drafting of the Rome Statute.

The frustration and sadness many felt following Bemba's acquittal do not have to result in a lasting despair. Instead, this can be the moment to change a long-evolving regret of the international community—the legal fiction that some crimes can be committed without perpetrators.[123] One scholar forewarned that the *Bemba* Appeal Judgment "may come to be seen in retrospect as a watershed moment for the law and practice of the Court, or it may prove to be merely an idiosyncratic, opportunistic and ultimately unsuccessful attempt at judicial lawmaking."[124] By picking up the mantle from the Appeals Chamber, the Assembly of States Parties can ensure that the *Bemba* decision is not only a "watershed" moment, but a positive one.

123. *See* Amann, *supra* note 12.

124. Powderly & Hayes, *supra* note 65.