

INDEX

Abbreviations used in the index

ACHPR (African Charter on Human and Peoples' Rights (1981) (Banjul Charter))

ACHR (American Convention on Human Rights (1969))

AP I (Geneva Conventions (1949), First Additional Protocol (international armed conflicts) (1977))

CAR (Central African Republic)

CERD (UN Committee/Convention on the Elimination of Racial Discrimination (1965))

DCC (Document Containing the Charges)

ECCC (Extraordinary Chambers in the Courts of Cambodia)

ECHR (European Convention on Human Rights (1950))

ECtHR (European Court of Human Rights)

EOC (Elements of Crimes)

FIDH (International Federation for Human Rights)

FTT (First-tier Tribunal)

GC IV (Geneva Convention relating to the Protection of Civilian Persons in Time of War (1949))

HR (Hague Regulations (1907))

IA (Immigration Act)

ICC (International Criminal Court/ICC Statute)

ICCPR (International Covenant on Civil and Political Rights (1966))

ICRC (International Committee of the Red Cross)

ICTR (International Criminal Tribunal for Rwanda/ICTR Statute)

ICTY (International Criminal Tribunal for the former Yugoslavia/ICTY Statute)

IHL (international humanitarian law)

IHRL (international human rights law)

ILR (indefinite leave to remain)

MLC (Mouvement de libération du Congo)

NIAA (Nationality, Immigration and Asylum Act)

QD (Qualification Directive (Council Directive 2004/83/EC))

RC (Refugee Convention (1951))

RLR (Restricted Leave to Remain/RLR policy)

SIA (State Immunity Act)

SIAC (UK Special Immigration Appeals Commission)

SoS (Secretary of State)

TFV (Trust Fund for Victims)

UDHR (Universal Declaration of Human Rights (1948))

UT (Special Administrative Upper Tribunal)

VCCR (Vienna Convention on Consular Relations (1963))

VCLT (Vienna Convention on the Law of Treaties (1969))

Babar

background (facts and procedural history in order of occurrence)

i. respondent's claim for asylum (29 January 2001) 636

ii. rejection of asylum claim on RC 1F grounds 636

confirmation on appeal but removal impossible as a breach of ECHR 3 (risk of detention/inhuman and degrading treatment) 636

grant of exceptional leave to remain 636



676 INDEX

Babar (cont.) iii. ILR application (October 2005)/rejection on RC 1F(a) grounds (October 2008) 636-7 classification of Babar's behaviour as constituting a pattern of widespread and systematic crimes against the civilian population/crime against humanity 637 grant of six months' discretionary leave followed by six months' restricted leave 637 impossibility of removal under ECHR 3 637 iv. ILR application pursuant to Immigration Rule 276B (17 September 2012) grounds for application 638 reasons for removal (public interest not outweighed by other considerations/ rejection of ECHR 3 claim) 638 respondent's admission of visits to Pakistan without any difficulty 637 v. refusal of application/decision to remove respondent to Pakistan (18 July 2014) 638 background (previous hearings) FTT 643-4 UT 644-5 background (relevant law) (Immigration Rule 276B (ILR)) 639-43 assessing ILR/public interest balance (Long Residence policy statement) 639 r 276D (cumulative nature of r 276B requirements) 639 text 638 "there are no reasons why" (r 276B(ii)), confusing nature 639 adoption of the more lenient version (Pokhriyal) 639 sensible approach to interpretation (Mahad) 639 background (relevant law) (RLR (2015 Asylum Policy Instruction)) 1.2.3 (applicability to persons with ECHR barrier to removal) 640 1.2.4 (ECHR 3 considerations outweighing public interest/exceptional circumstances test) (qualified ECHR rights) 640 4.12 (applications for indefinite leave to remain) 640-2 4.12.3 (possibility of reliance on *N*) 641, 643 "in exceptional circumstances" likely to be "very rare" (s 1.2.5) vs "usually" be refused (s 4.12.1) (MS and MBT) 641-2 "exceptional circumstances", focus on 641-2 appeal (Court's analysis) (UT judge's failings) insufficiency of weight given to the justification for denying settlement to those guilty of crimes against humanity 647 avoidance of UK becoming a safe haven, importance 647 dependence on N as contributory factor 647 insufficient attention to respondent's dishonesty/failure to include it in his assessment of public interest 648 purpose of RF 1F (protection of the integrity of the asylum process) 647 stringency of RC 1F test 647 underestimation of what constitutes "exceptional circumstances" 647 appeal (Court's decision) confirmation of SoS's claim that the respondent has no entitlement to ILR 649 remittance to the UT of ECHR 8-based claim to non-removal 649 appeal (grounds) (UT errors of law) i. improper resort to ECHR 8 balancing exercise 646 ii. failure to recognize need for compelling circumstances to override a powerful public interest 646 iii. perverse underestimate of "exceptional circumstances" test 640 iv. failure to take into account respondent's dishonesty in claiming that he was in fear

of returning to Pakistan 646



INDEX 677

Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (background) 2, 21*-3*9 1. key findings 21-2 Appeals Chamber's task (determination that factual findings that are made beyond reasonable doubt are clear and unassailable) 22 duty to take "all necessary and reasonable measures" (ICC 28(a)) 23-4 motivation, relevance 23 standard of proof (ICC Regulation 52(b)) ("beyond reasonable doubt") 22, 54 2. grounds of appeal (ICC 81(1)(b)) as presented by appellant 1 (mistrial) 27 2 ("conviction exceeded the charges") 27, 40-59 3 (non-liability as a superior for crimes committed by others) 27, 59-91 dismissal/ignoring of evidence relevant to the establishment of effective control 27 finding of actual knowledge of MLC crimes 27 finding of causation 27 finding of effective control 27 finding of failure to take all necessary and reasonable measures 27-8 4 (failure to establish the contextual elements of crimes against humanity) 27 5 (error in approach to identification evidence) 27 6 (other procedural errors) 27 3. procedural history in date order appellant's arrest (24 May 2008) 528 Amended DCC/Confirmation Decision (31 March 2009) 40-1 Pre-Trial Chamber's Charges Decision (15 June 2009) 528 filing of Prosecutor's Summary Presentation of Evidence/Updated Summary (4 November 2009/15 January 2010) 42 Second Amended DCC (4 November 2009) 41 appellant's challenge to (12 February 2010) 41 Decision on Appellant's Challenge to (20 July 2010) 41-2 corrected revised version of the Second Amended DCC (14 October 2010) 42 conviction under ICC 28(a) of crimes against humanity/war crimes (21 March 2016) (Conviction Decision) 23, 528 notice of appeal (4 April 2016) 24 sentence to 18 years' imprisonment (21 June 2016) 528 filing of Appeal Brief/Additional Evidence Application (19 September 2016) 24, 39 Prosecutor's responses to the Appeal Brief and to the Additional Evidence Application (21 November 2016) 24 appellant's reply to Prosecutor's Response to the Additional Evidence Application (9 December 2016) 24 appellant's reply to the Response to the Appeal Brief (20 December 2016) 24 victims' observations on the Additional Evidence Application (21 December 2016) 24 victims' observations on the Appeal Brief (9 January 2017) 24 appellant's reply to the Victims' Observations 24 Appeals Chamber's order for Contextual Elements Submissions (30 October 2017) scheduling order for an appeal hearing (7 November 2017) 24 appellant's Contextual Elements Submissions (13 November 2017)/Prosecutor's response (27 November 2017) 25 Order on the Conduct of the Hearing (27 November 2017) 25 victims' Representatives' Observations on the Contextual Elements Submissions (4 December 2017) 26 appellant's response (11 December 2017) 26



678 INDEX

```
Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (background)
(cont.)
    Appeals Hearing (9-11 January 2018) 26, 27
    parties' and participants' further written submissions (19 January 2018) 26
    Bemba et al. Appeal Judgment of 8 March 2018 30-1, 34, 92, 94-5, 117, 172, 201-2,
           271, 276, 329, 331, 355
    Prosecutor's request to present an additional authority (13 April 2018)/appellant's
           response (20 April 2018) 27, 39
    Appeals Chamber's reversal of Conviction Decision (8 June 2018) 529
    notification of intention to file an Article 85 claim (22 October 2018) 529
      Pre-Trial Chamber II's decision (30 October 2018) 529
    appellant files Article 8 claim (8 March 2019) 529
    Registry's Request for Guidance Regarding Some Procedural Aspects (22 March 2019)
      Chamber's clarification (11 April 2019) 530
    Prosecutor's response (6 May 2019) 530
      Prosecutor and Registry's responses to the appellant's responses (13 May 2019) 531
    Registry's Observations on the Defence Compensation Claim (6 May 2019) 531
    appellant's request to file a reply to the Prosecutor and the Registry's submissions
           (8 May 2019)
      appellant's Reply (3 June 2019) 531
         Prosecutor and Registry's responses to appellant's reply 532
Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (background)
           (standard of review (ICC 83(2)))/grounds of appeal (ICC 81(1))
  Appeals Chamber's right to intervene, factors justifying/not justifying 28, 29-32
    Appeals Chamber's right to reverse or amend the impugned decision, or order a new
           trial in case of non-compliance
      with ICC 83(2) 35-6
    clear and unassailable findings, need for 32
    jurisprudence 35
      Lubanga 35-6
      RUF 35
    material effect on the decision or sentence 28-9, 32-3
    reasonableness test 30-2
    risk of miscarriage of justice 30, 35 n. 58
    Trial Chamber's reasoning, importance 31-2
    unfairness affecting the reliability of the decision or sentence (ICC 81(1)(b)(iv)) 28-9
    unfairness of proceedings/reliability of the conviction decision, interrelationship 36
  error of fact (ICC 81(1)(b)(ii))
    Appeals Chamber's task (determination of Trial Chamber's compliance with "beyond
           reasonable doubt" standard)
      obligation to overturn Trial Chamber's findings in case of reasonable doubt/
           substitution of own factual findings distinguished 22, 32, 38
    clear and unassailable findings, need for 32
    margin of deference, cautious approach to 29-32, 38-9
    reasonableness test 30-1
  error of law (ICC 81(1)(b)(iii))
    Appeals Chamber's independence of assessment/non-deference to Trial Chamber 29-30
    Bemba et al. 30-1
    material effect of error on the decision or sentence, need for 29
  procedural error (ICC 81(1)(b)(i)) 27, 28-9, 32-5
    jurisprudence
```



INDEX 679

ECtHR jurisprudence, importance 33 Gotovina and Markač 35 Hadjianastassiou 33 Kenyatta OA5 Judgment 32-3 Lubanga OA5 Judgment 33 Lubanga Sentencing Appeal Judgment 32-3 Ruto et al. OA Judgment 32-3 material effect of error on the decision or sentence, need for 32-3 procedural error (ICC 81(1)(b)(i)) (failure to provide "a full and reasoned statement of [its] findings on the evidence and conclusions" (ICC 74(5))) importance of Trial Chamber's reasoning to an understanding of the legal and factual basis for decision 33 need to address all arguments/every item of evidence relevant to a particular factual finding, whether 34 new trial before a different trial chamber 34 remand of factual finding to the original trial chamber 34-5 Tribunal's determination of the factual question de novo 35 remedies in case of a finding of non-compliance, alternatives 34-5 substantiation of the arguments (ICC Regulation 58(2)) (appeal brief), requirements 36-7 Lubanga 36-7 Ngudjolo 37 Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (Merits) (ground 2 ("conviction exceeded the charges")) procedural background in date order Amended DCC (non-exhaustive list of criminal acts)/Confirmation Decision (31 March 2009) 40-4 filing of Prosecutor's Summary Presentation of Evidence/Updated Summary (4 November 2009/15 January 2010) 42 Second Amended DCC (4 November 2009) 41 appellant's challenge to (12 February 2010) 41 Decision on Appellant's Challenge to (20 July 2010) 41-2 corrected revised version of the Second Amended DCC (14 October 2010) 42 conviction under ICC 28(a) of crimes against humanity/war crimes (21 March 2016) (Conviction Decision) 23, 24 Appeals Chamber's analysis Conviction Decision, scope broadness of terms/absence of important information 51-2 scope of charges and sufficiency of notice, relationship 50 summary of Trial Chamber's findings 51-2 Conviction Decision, whether amounting to excess (ICC 74(2)) 52-7 "facts and circumstances", role 52-4 review of criminal acts claimed to be outside the charges 54-7 parameters of ground 2 (scope of the charges (ICC 74(2))) 58 parties' misrepresentation of Trial Chamber's findings 50 n. 156 Appeals Chamber's Conclusion 57-9 acts found beyond reasonable doubt to be within the scope of the charges 58-9 acts not falling within the facts and circumstances described in the charges 57-8 Appeals Chamber's determination parameters of ground 2 (scope of the charges (ICC 74(2))): see Trial Chamber III's

findings below



680 INDEX

Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (Merits) (ground 2 ("conviction exceeded the charges")) (cont.) parties'/participants' arguments (appellant) 40, 44-50 i. conviction partly based on unconfirmed criminal acts/inadequacy of notice 44-5, ii. unacceptability of V1/V2's evidence as the basis of a conviction 44, 45, 49, 50-1 iii. conviction based on charges improperly included in the Corrected Revised Second Amended DCC 44, 45-7 classification as "facts" (ICC 74(2)) 46 specificity requirement (Regulation 52(b)/Rule 121(3)) 146-7 parties'/participants' arguments (Prosecutor) i. conviction partly based on unconfirmed criminal acts/inadequacy of notice 47-8 ii. unacceptability of V1/V2's evidence as the basis of a conviction 48 iii. conviction based on charges improperly included in the Corrected Revised Second Amended DCC classification as "facts" (ICC 74(2)) 46 specificity requirement (Regulation 52(b)/Rule 121(3)) 48-9 parties'/participants' arguments (victims) i. conviction partly based on unconfirmed criminal acts/inadequacy of notice 49 ii. unacceptability of V1/V2's evidence as the basis of a conviction 49 Trial Chamber III's findings adequacy of notice to appellant 43-4 Confirmation Decision as authoritative definition 40-3 Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (Merits) (ground 3 (command responsibility) (failure to take reasonable and necessary measures (ICC 28(a)))) (Appeals Chamber's analysis and determination) Appeals Chamber's opening remarks appellant's contention/Appeals Chamber's endorsement of 79 commander's duty to take "all necessary and reasonable measures" (ICC 28(a)(ii)) cost-benefit analysis, acceptability 80 intrinsic connection with the extent of a commander's material ability to do so 79 limitation of duty to necessary and reasonable measures/strict liability distinguished proportionality/feasibility 80 reasonableness" 80 Trial Chamber III's tasks assessment of "reasonableness"/demonstration of commander's failure to take specific and concrete measures that were available 80 identification of what crimes the commander knew or should have known about at the time 80 scope 27-8, 59 issues addressed by the Appeals Chamber i. alleged misappreciation of the limitations of the MLC's jurisdiction and competence to investigate 81, 89

iii. wrongful inclusion of motivation 84-5, 89, 90-1 iv. attribution to appellant of limitations in the mandate and results of measures taken 89, 90-1

ii. failure to acknowledge that the appellant had asked the CAR Prime Minister to

v. finding that appellant had failed to empower other MLC officials to fully and adequately investigate and prosecute crimes 89

alleged failure to consider evidence relating to 81

investigate the allegations 83-4

Trial Chamber's finding 81



INDEX 681

vi. failure to indicate approximate number of crimes committed and to assess the impact on finding a breach of ICC $28\,$ $89-90\,$ vii. improper inclusion of redeployment of MLC troops as a measure appellant should have taken 88-9 viii. adequacy of Trial Chamber's denunciation of the measures taken 85-8 Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (Merits) (ground 3 (command responsibility) (failure to take reasonable and necessary measures (ICC 28(a)))) (preliminary matters including jurisprudence, parties' arguments and Trial Chamber III's findings) jurisprudence AFRC 81 Aleksovski 79 Blaškić 79 Boškoski and Tarčulovski 68, 74-5, 84 Čelebići 79 Đorđević 84 Halilović 79, 80, 84 Kaing Guek Eav 84 Karadžić 79, 80 Lubanga Appeal 88 Orić 84 Renzaho 80 RUF 84 Strugar 64, 80, 84 parties'/participants' arguments (appellant) i. failure to apply the correct legal standard 64 ii. misappreciation of the limitations of the MLC's jurisdiction and competence to investigate 64-5 notification of possible/required measures requirements 64-5, 67-8 iii. failure to acknowledge that the appellant had asked the CAR Prime Minister to investigate the allegations 64, 71-2 iv. adoption of irrelevant considerations/relevance of motivation 64, 72-5 v. unreasonable findings on measures taken, misstatement of the evidence and failure to take relevant evidence into account 64 alleged failure to take concrete measures 77 alleged limitation of scope and duration of Mondonga Inquiry and Zongo Commission 76-7, 79 distortion of Sibut Mission evidence 77-8 measures taken (Chad-CAR international commission of inquiry) 76 parties'/participants' arguments (Prosecutor) appellant's repetition of old arguments 78 distortion of Sibut Mission evidence 78-9 reasonableness of the weight given by Chamber III to the evidence 78 parties'/participants' arguments (victims) (importance of motivation) 75 Trial Chamber III's findings 59-63 motivation 61-2 Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (Merits) (ground 3 (command responsibility) (failure to take reasonable and necessary measures (ICC 28(a)))) (relief (ICC 83(2))) acquittal, right to 92

pending decision on detention in respect of conviction by another Chamber 92 options (confirmation, reversal or amendment of the decision appealed or order of a new

trial) 35-6, 91



682 INDEX

```
Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (Merits)
(ground 3 (command responsibility) (failure to take reasonable and necessary
measures (ICC 28(a))) (relief (ICC 83(2))) (cont.)
    impugned decision on grounds of error of fact 91
    reversal of decision/discontinuation of proceedings in case of
       acts not falling within the facts and circumstances described in the charges 91
Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate
           opinions) (Eboe-Osuji J (concurring)) 379-520
  I. the crux 382-90
    conclusion 492
    difficulties of the case
       appellant's status as commander as opposed to perpetrator/remoteness 382-3,
       as enforced restriction of charges to the taking of "all necessary and reasonable
           measures" 385-8
    majority/minority divide, features of 383-5
    margin of deference 383-5
  II. accountability 390-1
  III. scope of separate opinion 400-1
  IV. standard of review 392-417
    A. margin of deference in relation to findings bearing on guilt or innocence 394-7
    B. margin of deference in relation to factual findings 397-401 must be convinced "beyond reasonable doubt" (ICC 63(3)) 401
    C. reasonableness of factual findings ("reasonableness test") 401-3
    D. appellate disadvantage in relation to factual findings 403-13
       margin of deference and 403-13
       reasonableness test 410-11
       restating the principle 411-13
       risk of letting appellate courts off the hook 412-13
    E. material effect on the decision or sentence 413-17
  V. failure to provide "a full and reasoned statement of [its] findings on the evidence and conclusions" (ICC 74(5)) 417-19
  VI. amendment of the indictment by the Trial Chamber at any stage of the proceedings
           420-39
    introduction 421-5
       admissible powers of the Trial Chamber 420-1
       consistency with contemporary practice 423-5
       general principles of international criminal justice law, trend to allow amendment in
           certain circumstances 421
    A. purposive interpretation/interpretation principles 425-9
       treaty as a whole in context 428-9
    B. ICC 61(9) (confirmation of charges) 429-39
       dealing with lacuna 436-9
  VII. causation (ICC 28) 440-55
    A. as a complex legal concept 441-2
    B. pragmatic approach to 442-6
    C. omission as a cause 446-54
    D. "as a result of" applicability in Bemba case 455
  VIII. theories of responsibility under ICC 28 455-72
    A. dereliction of duty 455-60
```

ICC 28 and AP I: 86(2) distinguished 456

review of the arguments 455-8



> **INDEX** 683

A.1. dereliction of duty

awkwardness of dereliction of duty theory in Bemba 458-61

B. complicity as a theory of command responsibility under ICC 28 461-72

1. accomplice liability 462-6

- 2. aiding and abetting under ICC 25(3)(c) 466-8
- 3. complicity under ICC 25(3)(c)/ICC 28 (Grotius) 469-72

IX. endangerment liability 472-86

definition 473-4

A. ICC 28 and 474-7

B. strict liability and 477-8

C. dichotomy between jus in bello and jus ad bellum 478-9

D. fault element (ICC 28) 479-83

E. control as a legal factor of liability 483-5

F. "necessary and reasonable measures" 485-6

X. withdrawal of troops in abatement of criminality 486-9

XI. organizational policy requirement (ICC 7(2)(a)) 489-91

"organization" as essential element 490

possibility of prosecuting gang members for crimes against humanity (*Ruto*) 489-90 XII. "reasonable measures" (ICC 28(b)(iii)) 491-2

Appendix I: rulings on admissibility of evidence 492-504

A. Appeals Chamber's 2011 decision: obligation of evidential ruling on admissibility

summary of the decision 493-4

Trial Chamber "may rule on the relevance or admissibility of any evidence" (ICC 69(4))/"will have to" 493-4

B. Appeals Chamber's 2018 decision: no obligation of evidential ruling 495

C. ICC Rule 64 496-7

- D. evidential rulings as a matter of fairness of trial proceedings 497-500
- E. customary international criminal procedural law and 500-1
- F. efficiencies of evidential rulings during trial 501-3 G. alternative approaches 503-4

Appendix II: military necessity 504-20: see also necessity/duress as defence/ justification (including war-related situations, war crimes or crimes against humanity)

A. "military objective" and "military necessity" distinguished 504-10

B. pacific settlement of international disputes and the defence of military necessity

consistency between war and international law, changes in approach to 511-16 ex iniuria ius non oritur 516-18

C. IHRL and 518-20

Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Monageng and Hofmański JJ (dissenting)), ground 1 ("mistrial") (ICC 70 (administration of justice))

introduction (parties' arguments) 245

- A. dismissal of appellant's arguments *in limine* 246-51 1. relevance of the ICC 70 investigation 246 2. approach to the determinations by the Trial Chamber appellant's obligation to set out how the proceedings were unfair/how this affected

the reliability of the decision 247 exclusion of a de novo review 247

parties' arguments (appellant) 246-7

parties' arguments (Prosecutor) 246



684 INDEX

Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Monageng and Hofmański JJ (dissenting)), ground 1 ("mistrial") (ICC 70 (administration of justice)) (cont.)

- 2.a. ex parte communications before the Trial Chamber regarding suspected witness interference 247-9
- 2.b. failure to disclose within a reasonable time a suspected scheme of witness interference 249
- 2.c. transmission of privileged and confidential defence information to the Prosecutor 250-1
- B. appellant's additional evidence request 251-6
 - 1. appellant's submissions before the Appeals Chamber 251-2
 - 2. Prosecutor's submissions before the Appeals Chamber 252
 - 3. appellant's response 252-3
 - 4. observations of the victims' representative 253
 - 5. analysis

Lubanga 254-5

relevant rules and regulations 253-4

- C. Prosecutor's *ex parte* submissions and alleged disclosure violations, whether compromising appellant's right to a fair trial 256-68 overview 258
 - 1. relevant procedural background 256-8
 - 2. submissions before the Appeals Chamber 257-8
 - 3. analysis 258-68
 - 3.a. alleged irregularities in the proceedings 259-63
 - 3.b. alleged unfairness of the proceedings due to the *ex parte* submissions and alleged disclosure violations 263-8
 - 3.c. conclusion 268
- D. sharing of Defence's privileged/confidential information with the Prosecutor 268-79
 - 1. relevant procedural background 268-9
 - 2. submissions before the Appeals Chamber 269
 - 3. analysis 269-79
 - 3.a. relevant legal framework 269-70
 - 3.b. ICC 70 Case review process, whether resulting in a violation of privilege in the main case 270-4
 - i. 14 September 2013 Conversation 274-7
 - ii. intercepted communications containing defence strategies 276-7
 - iii. allegedly confidential intercepted communications 277-8
 - iv. intercepted communications allegedly wrongly disclosed in their entirety 278
 - v. conclusion 278
 - 3.c. failure to segregate ICC 70 investigation team from prosecution team 279 3.d. conclusion 279

Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Monageng and Hofmański JJ (dissenting)), ground 2 ("conviction exceeded the charges") 102-245

accused's rights

absence of objection by appellant on grounds of breach of 108-9

adequate time for the preparation of the defence (ICC 67(1)(b)) 108

applicability to pre-trial phase of proceedings 108

as limitation on Prosecutor's right to rely on more detailed factual allegations 108 prompt receipt of detailed information of the charges (ICC 67(1)(a)) 108-9 confirmation of charges (ICC 61)

Pre-Trial Chamber's task, parameters (ICC 61(7)) 107

purpose (separation out of cases and charges which should go to trial) 106-7



INDEX 685

determination of charges, responsibility of Prosecutor for (ICC 58/ICC 61/ICC 74(2)) dissenting conclusion (compliance of conviction with the charges) 109 "facts and circumstances" (ICC 74(2)), level of detail required 102-3 holistic approach to interpretation of 104 principle of congruence and 104 Prosecutor's discretion in formulation of charges/possible approaches to 104-6 right to rely on individual acts not relied on for the purposes of the confirmation proceedings 107-8 right to adequate time for the preparation of the defence (ICC 67(1)(b)) applicability to pre-trial phase of proceedings 108 travaux préparatoires 104 Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Monageng and Hofmański JJ (dissenting)), ground 3 (command responsibility) 92-348 dissenting conclusions failure to identify any error in the Trial Chamber's findings or any unreasonableness in the overall conclusions 110, 245 introduction (points of dissent from the majority) 94, 109-38 failure to submit the matter to the competent authorities 110 A. "appellant took all necessary and reasonable measures" (ICC 28(b)(iii)) dissenting conclusion, summary of grounds for 138 errors in majority's findings (overview) continued commission of crimes throughout 2002-3 CAR Operation/appellant's knowledge of 110 failure to engage in any meaningful way with the Trial Chamber's factual findings or demonstrate awareness of the evidence 112 failure to suggest resolutions based on its own examination of the evidence in relation to a number of issues on which it expressed doubt 111-12 finding that measures taken "were limited in mandate, execution, and/or results" implementation of modified standard of review as demonstration of its incompatibility with achievement of justice 112 misconstruction of the nature of criminal liability under ICC 28 111 patent failure of measures to match appellant's extensive material ability to prevent the crimes 110 "reasonable"/"necessary", as a matter of evidence to be determined on a case-by-case basis 114 subjective view of Trial Chamber's reasoning not justified by the Conviction Decision 111 uncritical acceptance of appellant's unsubstantiated arguments 111 errors in majority's findings (assessment of the material impact on the decision of errors it had identified) adoption of appellant's narrow focus 137 failure to assess the findings and evidence supporting the Trial Chamber's decision 137 failure to reach a conclusion in areas of doubt 137 limitation of position to expression of "certain doubts" 137 misapplication of the standard of review 137 errors in majority's findings (failure to empower other MLC officials) absence of challenge from the appellant 127 majority's misreading of Conviction Decision 127 errors in majority's findings (lack of adequate notice)

appellant's authority and control over MLC troop deployment 133-4



686 INDEX

Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Monageng and Hofmański JJ (dissenting)), ground 3 (command responsibility) (cont.)

need to address every item of evidence relevant to a particular factual finding, whether 133-5

sharing of information with the CAR authorities 134-5

errors in majority's findings (letter to the CAR Prime Minister) 119-21

failure to refer to a specific witness testimony, relevance 120

majority's failure to assess truth of unchallenged claim that the letter had been sent 120-1

need to address every item of evidence relevant to a particular factual finding, whether 120

errors in majority's findings (motivation) 121-5

majority's determination that the Trial Chamber erred in not taking appellant's motivation into account, counter evidence 123-5

majority's speculative language imputing a reasoning not apparent from the plain wording of the decision 121-3

errors in majority's findings (number of crimes committed) 128-33

errors in majority's findings (purported limitations on appellant's ability to order investigations) 115-19

absence of any effort by appellant to substantiate his argument 118 erroneous application of the accepted standard of appellate review 115 need to address every item of evidence relevant to a particular factual finding, whether 118-19

scant regard to the findings and analysis of the Trial Chamber 115, 119 test for addressing evidence ("significant" vs "of such importance") 118-19 uncritical acceptance of appellant's submissions on the facts 115-18

errors in majority's findings (scope of assessment) 113-15

apparent adoption of "serious doubts" approach 115 approval of elements of majority's approach 113-15

unfounded criticism of Trial Chamber for not specifically identifying what a commander should have done 114-15

errors in majority's findings (shortcomings in measures taken by the appellant) misreading of Trial Chamber's finding/misunderstanding of ICC 28 criminal liability 125-6

majority's failure to provide its own list of what a commander should have done 155 B. "lack of effective control"

- 1. overview of the Trial Chamber's findings 138-42
- conflation of the concepts of "effective control" and "overall command" (error of law) appellant's attempt to distinguish "effective control" and "overall command" 142-3 appellant's objection to Trial Chamber's application of a "'checklist' of traditional criteria" to cross-border operations 144-5

dissenting conclusion (absence of error in Trial Chamber's finding/rejection of appellant's arguments) 145

transfer of operational control to the CAR authorities, appellant's challenge to Trial Chamber's view 143

Trial Chamber's definition of "effective control"/appellant's acceptance of 142

3. appellant's "operational control" over MLC troops in the CAR

- a. assistance by the MLC General Staff 145-8
- b. MLC forces' independent operation 148-50
- c. appellant's issuance of orders, significance 150-3
- d. conclusion 153-4



> **INDEX** 687

remaining indicia of control

a. responsibility for MLC's deployment to the CAR 154-6

b. appellant's contact with commanders/receipt of operations and intelligence reports 156-60

c. provision of logistical support 160-2

- d. appellant's retention of primary disciplinary authority 162-3
- e. appellant's representation of MLC forces in external matters 163-5

f. appellant's order to MLC troops to withdraw 165-8

5. conclusion ("not unreasonable" for Trial Chamber to conclude) 168 C. "evidence dismissed or ignored" 168-96

- 1. 2001 intervention 168-71
- 2. contested items

a. relevant part of the Conviction Decision 171-2

b.i. manner of questioning of CHM1 172-4

b.ii. General Gambi's rank 174-6

b.iii. Document EVD-T-D04-00066/CAR-D04-0003-0137 176-8

b.iv. Document EVD-T-D04-00069/CAR-D04-0003-0140 176-9

b.v. Document EVD-T-D04-00065/CAR-D04-0003-0136 179-80

b.vi. Document EVD-T-D04-00063/CAR-D04-0003-0133 180-1

b.vii. Document EVD-T-D04-00058/CAR-D04-0003-0128 181-2

b.viii. Document EVD-T-D04-00059/CAR-D04-0003-0129 182-3

b.ix. eight Documents dated January or February 2003 183-4 b.x. Documents EVD-T-D04-00075/CAR-D04-0003-0141 and EVD-T-D04-00064/CAR-D04-0003-0134 184-5

b.xi. overall conclusion in relation to the contested items ("not unreasonable" for Trial Chamber to conclude) 185

- 3. expert witness General Jacques Seara 185-6
- 4. CHM1's evidence on command 186-92
- 5. evidence of Witness P36 192-6
- 6. conclusion ("not unreasonable" for Trial Chamber to conclude) 196
- D. "appellant did not have actual knowledge of the alleged crimes" (ICC 22(a)(i))

1. introduction (arguments on the required mental element) 196

- 2.a. as legal error 196-211
- 2.a.i relevant part of the impugned decision 197-8
- 2.a.ii analysis 198-201

direct or circumstantial knowledge, acceptability of either 200

"knew"/"should have known", distinguishability 198-201

modification of the legal characterization of facts (Regulation 55), consequences

proximity of commander, relevance 200-1

requirement ("knew, or owing to the circumstances at the time, should have known" (ICC 28(a)(i))) 198-201

2.b. evidence erroneously ignored 201-6

summary of appellant's arguments 201

denials of the commission of crimes allegedly reaching the appellant, relevance of Trial Chamber's failure to address directly 202

"full and reasoned statement of ... findings on the evidence and conclusion"/ procedural error (ICC 74(5) requirement) 201-2

need for clarity on facts found to have been established beyond reasonable doubt and on assessment of relevant evidence 200-1

need to establish significance of any omitted reasons 201-2

reasons for treatment of President Patassé's evidence 203-4



ore imormation

688 INDEX

Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Monageng and Hofmański JJ (dissenting)), ground 3 (command responsibility) (cont.)

Trial Chamber's treatment of D19's evidence, reasons for 202-3

Trial Chamber's treatment of the Mondonga Inquiry and "Bomengo case file" 204 Trial Chamber's treatment of Sibut Mission's findings/P15 and D21's evidence on 205

Trial Chamber's treatment of the Zongo Commission's report 204-5

 alleged failure of facts as found by the Trial Chamber to support finding of knowledge 206-20

summary of Trial Chamber's findings/appellant's challenge 206

3.a.i. relevant part of the impugned decision 206-7

3.a.ii. analysis 207-11

appellant's claim (Trial Chamber's alleged dependence on RFI syndicated reports)

alleged disregard of Sibut Mission's evidence on RFI's false reporting 210-11 alleged false reporting by RFI 208-9

MLC Communication Logs, sufficiency to corroborate claim that RFI allegations were generally viewed with suspicion 210

range of international media sources relied on by the Trial Chamber 207-8 rejection of appellant's claims 211

relevance of the "ignored testimony" of D49, D21 and P33 209-10

3.b. Trial Chamber's reliance on the Mongoumba attack as misstatement of the evidence 211-15

3.b.i. relevant part of the impugned decision 211-12

3.b.ii. analysis 212-15

appellant's principal allegation (impossibility of any reasonable trial chamber concluding that this finding was the only reasonable conclusion) 212-13 basis for the Trial Chamber's decision 213-14

Trial Chamber's inferences, whether reasonable 214-15

3.c.i. relevant part of the impugned decision 215-16

3.c.ii. analysis 216-20

appellant's argument (Trial Chamber's treatment of murder, rape and pillage together/failure to consider information contradicting reports of MLC crimes) 216 appellant's selective approach to the evidence 217

conclusion ("not unreasonable" for Trial Chamber to conclude) 220

credibility of RFI's reporting 218-19

required detail of knowledge (ICC 28/ICTY jurisprudence) 216-17

Trial Chamber's alleged failure to consider evidence casting doubt on appellant's knowledge of murders 219-20

Trial Chamber's reliance on intelligence reports/presumption that appellant had received them 219

Trial Chamber's reliance on report of appellant's response to the FIDH report on war crimes in the CAR 219

E. "finding on causation is invalid" 220-45

1. relevant part of the Conviction Decision 221-2

failure to define the applicable standard 222-4
 absence of a definition of "result of" (ICC 28(a)), relevance 223-4
 applicability of "full and reasoned statement" obligation to factual and legal findings

effects 222-4

jurisprudence (ECHR 6 (fair trial)) 223



INDEX 689

jurisprudence (international criminal courts and tribunals) 223 obligation to provide "a full and reasoned statement of the Trial Chamber's findings" (ICC 74(5)) 222-3

3. conflation of legal elements and "causation" 224-30 causation in case of an omission 229-30

3.a. overall construction of ICC 28(a) 224-30 "result of"/causation interrelationship 224-30

- 3.b. conflation of causation and "necessary and reasonable measures" (ICC 28(a)) 230-1
- 4. Trial Chamber's alleged misstatement of the evidence and its findings 231-45
- 4.a. findings related to compensation of MLC troops 232-3
- 4.b. findings related to training regime of MLC soldiers 233-5
- 4.c. findings related to the MLC Code of Conduct 235-7
- 4.d. findings related to the supervision of MLC soldiers 237-8
- 4.e. findings related to the punishment of MLC troops 238-42
- 4.f. findings related to the withdrawal of MLC troops 242-5

Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Monageng and Hofmański JJ (dissenting)), ground 4 ("contextual elements were not established") 279-305

- A. Trial Chamber's alleged error in relation to the *mens rea* requirement for crimes against humanity 279-91
 - 1. parties' submission 279-80
 - 2. analysis

EOC (ICC 7 material elements) 280

EOC (knowledge of widespread or systematic attack directed against a civilian population requirement) 280

ICC 28 (mens rea requirements specific to commanders) 281

"knew, should have known or consciously disregarded information that their subordinates were committing crimes" (ICC 28(b)(i)) 281

"with knowledge of the attack" (ICC 7(1)) 280

- B. Trial Chamber's alleged error in finding that there was an organizational policy 281-99
 - 1.a. link between any policy and the MLC 281-4
 - 1.b.i. failure to substantiate findings on deliberate failure to prevent 284-5
 - 1.b.ii. failure to properly address contradictory evidence 285-6
 - 2. modus operandi 286-90
 - 3. reliance on general motives 290-2
 - 4. reliance on pillaging to prove a policy to commit an ICC 7(1) attack 292-5
 - 5. significance of orders to exercise vigilance and use force against civilians 295-7
 - 6. reliance on factors not available on the evidence 297-9
 - 7. conclusion 299
- C. Trial Chamber's alleged error in its consideration of pillage 299-305
 - 1. error in its legal interpretation of the war crime of pillage
 - definition of the law 299-303: *see also* looting/pillage, prohibition (ICC 8(2)(b)(xvi)/ICC 8(2)(e)(v))

parties' arguments 299-300

2. application of the concept of "private or personal use" 304-5

conclusion (appellant's failure to demonstrate that Trial Chamber III's decision did not meet the no reasonable Trial Chamber test) 304-5

parties' arguments (appellant) 303, 304-5 parties' arguments (Prosecutor) 304-5

Trial Chamber III's findings "beyond reasonable doubt" 303-4



> 690 **INDEX**

Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Monageng and Hofmański JJ (dissenting)), ground 5 (Trial Chamber "erred in its approach to identification evidence") 305-21

A. Trial Chamber's alleged failure to deliver a reasoned judgment as to the identities of the perpetrators of rape and pillage 305-21

1. cumulative assessment of identification criteria 305-13 conclusion (appellant's misrepresentation of the facts) 306-7 parties' arguments (appellant) 305-6 parties' arguments (Prosecutor/victims) 305

2. rape of P22 and uniforms of attackers (appellant's failure to justify his claim) 307-8

3. treatment of evidence of the attackers' language analysis and conclusion (appellant's failure to justify his claims) 308-11 parties' arguments 308

4. reliability of other identification criteria, analysis and conclusions alleged insufficiency of reliance on witnesses' identification 312 "exclusive presence" of MLC troops in a given area 312 modus operandi and general motive 313 uniforms 311-12

5. reliability of other identification criteria, parties' arguments 11

B. Trial Chamber's alleged failure to deliver reasoned judgment on identities of the perpetrators of murder 313-15

1. murder of P87's "brother" 313-15 2. murder of P69's "sister" 315

C. alleged alteration of dates to fit the MLC's movements 315-21

1. rape of P68 and P68's sister-in-law analysis and conclusion (appellant's failure to demonstrate any error in the Trial Chamber's overall conclusion) 317 parties' arguments 315

Trial Chamber's findings 315-17

2. two unidentified girls aged 12 or 13 in Bangui

analysis and conclusion (appellant's failure to demonstrate any error in the Trial Chamber's overall conclusion) 319

parties' arguments 318

Trial Chamber's findings 318-19

3. woman in the bush outside PK22

analysis and conclusion (appellant's failure to demonstrate any error in the Trial Chamber's overall conclusion) 321

parties' arguments 319

Trial Chamber's findings 320

Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Monageng and Hofmański JJ (dissenting)), ground 6 ("other procedural errors invalidate the conviction"), A. reliance on the evidence of P169, P178 and the 19 CAR Witnesses

1. issue on appeal

margin of deference, applicability 322

parties' arguments (appellant) 321-2

2. reliance on testimony of P169 and P178

appellant's allegations, failure to substantiate 322-7

2.a. lack of sufficient information

appellant's unfounded assertion that the Trial Chamber had failed to order proper investigations 322-3

2.b. superficial credibility analysis (appellant's failure to substantiate) 328-9



INDEX 691

2.c. failure to address (appellant's failure to substantiate) 329-30

2.d. conclusion (appellant's failure to demonstrate abuse of discretion) 321-3, 348

2.e. other reasons to reject the testimony of P169 and P178 (appellant's failure to substantiate) 330-2

3. reliance on testimony of 19 CAR Witnesses (appellant's failure to substantiate) 332-3

Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Monageng and Hofmański JJ (dissenting)), ground 6 ("other procedural errors invalidate the conviction"), B. legal representative of victims' involvement 333-48

1. procedural background and submissions 333-5

2.a. allegedly unconstrained questioning by the victims' representatives 335-40 appropriateness of questions 339-40

authorization of questions (Rule 91(3)(a)/ICC 68(3)) 337-9

conclusion (rejection of appellant's arguments) 340

modalities of victims' participation (Rule 91(3)) 334-7 "personal interests" 336-7

victims' right to present their views and concerns where their personal interests are affected (ICC 68(3)) 335-40

2.b. cross-examination of the defence witnesses 340-8

2.b.i. leading questions 341-2

failure to make contemporaneous objections, effect 341-2

2.b.ii. use of lengthy extracts from testimony 342-3

2.b.iii. repetitive questions 343-5

2.b.iv. uneven approach of the victims' representatives 345-6

2.b.v. conclusion (rejection of appellant's arguments) 346

2.c. prejudice caused to appellant 346-8

2.c.i. expeditiousness of the proceedings 346-7

2.c.ii. reliance on evidence led by the victims' representatives 347-8

2.d. conclusion 347-8

Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Monageng and Hofmański JJ (dissenting)), standard of review (factual errors) (margin of deference) ("conventional standard") 95-102

acceptance by all international criminal law courts/tribunals 94-5 advantages of 96

applicability of principles and rules of international law as interpreted in its previous decisions (ICC 21(2)) 93-6

inappropriateness of any different standard of review 95

Lubanga as model 94-5

predictability of the law considerations 95

roles of Trial Chamber and Appeals Chamber compared 95-7

Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Monageng and Hofmański JJ (dissenting)), standard of review (factual errors) (margin of deference) ("conventional standard"), criticism of majority's departure from

failure to give required margin of deference 96-7

obligation to overturn Trial Chamber's findings in case of reasonable doubt, conflict with "material effect" requirement 98

removal of substantiation of errors requirement/confusion with pre-conviction burden of proof 100-1

risk of miscarriage of justice test, need for explanation of 97

"serious doubts" test, incompatibility with



> 692 **INDEX**

Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Monageng and Hofmański JJ (dissenting)), standard of review (factual errors) (margin of deference) ("conventional standard"), criticism of majority's departure from (cont.)

margin of deference 98

material effect on the decision requirement 101-2

Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Van den Wyngaert and Morrison JJ (separate opinion)) 348-79

I. introduction (difficulties attaching to ICC interpretation)

"constructive ambiguities" 349

unresolved issues from the drafting stage 349

II. concerns about the evidence and opacity of the reasoning of the Conviction Decision 349-56

opacity of Conviction Decision/multiplicity of cross-references 351

1. hearsay and anonymous hearsay 351-2

judicial role (protection of the rule of law), Appeals Chamber members' differences of view 350-1

2. large amount of circumstantial evidence/disregard for the "beyond reasonable doubt" standard 353-5

absence of ruling on admissibility 355-6

III. concerns about the definition of the scope of the charges

"decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges" (ICC 74(2)) 356-61 IV. definition of "command responsibility" (ICC 28) 361-70

general approach 361

2. concept of command responsibility 361-3

limitation of duty to necessary and reasonable measures/strict liability distinguished 362, 363

3. mens realknowledge/recharacterization of the charges 363-70

3.a. "knew, should have known or consciously disregarded information that their subordinates were committing crimes" (ICC 28(b)(i)), distinguishability 364-5

recharacterization of the charges 364-5

3.b. concept of knowledge (ICC 28)

knowledge ex ante and knowledge ex post facto distinguished 366-7 "unconvinced knowledge" 365-6

3.c. imprecision/insufficient evidentiary base for charges and findings in relation to appellant's knowledge 367-9

4. causation ("as a result of") 369-70

V. acts as crimes against humanity 370-7

1. requirements of a widespread attack and of multiple commission 370-7

2. failure to establish policy requirement 375-7

VI. conclusion 377-9

Bemba (compensation and damages (ICC 85)) 532-62

I. background and procedural history 528-32: see also Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (background), 3. procedural history in date order

II. general remarks

arrested or convicted person's enforceable right to compensation (ICC 85) 533-4 criticism of language and tone of appellant's Counsel (Code of Professional Conduct for Counsel) 532-3, 535-6

two-pronged nature of claim 533



INDEX 693

III. component 1 (compensation for a grave and manifest miscarriage of justice (ICC 85(3))) (background/procedural matters/preliminary considerations) introduction Chamber as appeal court, exclusion 539 "compensated according to law" (ICC 85(2)) vs "compensation, according to the criteria ... in the Rules" 534-5 request for compensation (Rule 173(2)), time limit 535 responsibility for determining the existence of 533 time limit for submission of request (Rule 173(2)) 535 appellant's criticisms of the Appeal Judgment grievances dismissed as matters already discussed 542-3 grievances submitted for the first time, limitation of eligibility to matters pertaining to ICC 85(3)/excluded matters 543-4 appellant's criticisms of the Appeal Judgment/Chamber's responses conformity of Appeals Chamber's approach with normal appeals procedure 539-41 minority judges' criticism of Appeals Chamber's judgment, effect 540-1 as a revisiting of issues already dealt with 539-40 parties' arguments (appellant) i. Prosecutor's alleged violation of the duty to act impartially following the decision on the confirmation of the charges 535 ii. Trial Chamber's alleged "negligent mismanagement" of the case 536-7 iii. alleged excessive scope of the legal representatives of victims' (the "LRVs") involvement 537 iv. alleged "industrial falsification" of victims' applications 538 v. alleged "sub-standard and unacceptable quality" of the Trial Judgment 538 vi. alleged excessive duration of the proceedings in the Main Case 538 parties' arguments (Prosecutor) 538-9 III. component 1 (compensation for a grave and manifest miscarriage of justice (ICC 85(3))) (Chamber's analysis and determination) ("grave and manifest miscarriage of justice") Chamber's decision (rejection of claim) 555 definitions/qualification as admissible/excluded matters 543-5 definitions 549 qualification as/high threshold/"exceptional" 549-50 determination violation of right to an expeditious trial as sole grievance meeting exceptional scenario standard 550 interpretation principles/aids ACHR 551 "applicable treaties and ... principles and rules of international law" 550-5 "consisten[cy] with internationally recognised human rights" 550-5 general principles of law derived from national law of legal systems of the world 550, 555 Ngudjolo 535, 539, 541, 543-4, 546, 547-50 as novelty/sole example 544 opposition to provision/adoption of restrictions as compromise 547-9 compensated according to law" (ICC 85(2)) vs "shall be awarded" (ICC 85(2)) vs "compensation, according to the criteria ... in the Rules" 547-9 purpose (provision of full range of guarantees against serious violations of fundamental

right to a fair trial) 544



694 INDEX

Bemba (compensation and damages (ICC 85)) (cont.) sources international human rights treaties 544-6 national legislation 546 travaux préparatoires 543-4, 547-8, 549 IV. component 2 (compensation for damage caused to assets frozen and seized/failure to manage them properly) parties' arguments (appellant) allegations 555-6 Chamber's inherent power/UNCITRAL arbitration as alternatives 556 parties' arguments (Prosecutor) incompatibility of claim with Statute 556 parties' arguments (Registry) Court's dependence on States to execute requests concerning assets 556 obligation limited to follow-up with States on their execution in accordance with the applicable legal framework 556 IV. component 2 (compensation for damage caused to assets frozen and seized/failure to manage them properly), Chamber's determination appellant's claim as a "private law claim alleging tortious behaviour by the ICC" not dependent on ICC 85(3) 558 absence of jurisdiction 558-9 excessive length of proceedings/fundamental right to a fair trial 560-2 absence of provision in the Statute making compensation for breach possible 561-2 Chamber's recommendation for amendment to the Statute 562 ICCPR 14(3)(c)/ECHR 6(1)/ACHR 8(1)/ACHPR 7(1)(d) compared 560 n. 142 right to be tried without undue delay (ICC 67(1)(c)) 560-2 execution of requests Pre-Trial Chamber's powers and responsibilities (ICC 57(3)(e)/ICC 93(1)(k)) 557 Registry as the channel of communication between the Chamber issuing requests for cooperation and the requested States (Rule 176(2)) 557 State's primary responsibility for 556, 557-8 "inherent powers definition 559 purpose (Nuclear Tests Case) 559-60 rejection of proposal 559-60 rejection of proposal that States freezing appellant's assets should become 'participants" in the proceedings 560 Bemba (Final Decision on reparations) (ICC 75) (3 August 2018) 520-7 acknowledgement of victims 522-4 appreciation of efforts of all parties and participants 524-6 limitation of reparations order to convicted persons (ICC 75(1))/justification for a Final Decision on 521 principles on reparations (ICC 75(1)), decision not to issue 527

Canada

consular immunity from jurisdiction (VCCR 43) commercial activity exception (SIA 5), exclusion 571-3 Federal Courts Act 1985 by section 26 (general original jurisdiction) 565 Labour Code 1985 by section

TFV's assistance mandate 526-7



INDEX 695

244 (enforcement of orders) 566-7, 573 service of process on foreign State or State agency [out of the jurisdiction] (including State immunity issues) waiver, requirements explicit, unequivocal and certain terms 570-1 waiver by the State/authorized representative 570-1 *Zakhar*y 569-71 State immunity: see State Immunity Act 1980 (Canada) by section command responsibility (war crimes/crimes against humanity) concept commander's place in the hierarchy, relevance 362 dependence on circumstances 361-3 cross-border operations and 144-5 ICC Statute (ICC 28) 59-91, 105, 106, 109-245, 361-9: see also Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Eboe-Osuji J (concurring)); Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Monageng and Hofmański JJ (dissenting)), ground 3 (command responsibility); Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Monageng and Hofmański JJ (dissenting)), ground 6 ("other procedural errors invalidate the conviction"); Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Van den Wyngaert and Morrison JJ (separate opinion)) causation/"as a result of" (ICC 28(a)) 220-31, 369-70, 440-55 duty to take "all necessary and reasonable measures" (ICC 28(a)) 23-4, 485-6 limitation of duty to necessary and reasonable measures/strict liability distinguished 80, 362, 363, 457, 476-8 mens rea 196-220, 279-91: see also Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Monageng and Hofmański JJ (dissenting)), ground 3 (command responsibility), D. "appellant did not have actual knowledge of the alleged crimes" (ICC 28(2)(i)) EOC (knowledge of widespread or systematic attack directed against a civilian population requirement) 280 ICC 28 (mens rea requirements specific to commanders) 281 "knew, should have known or consciously disregarded information that their subordinates were committing crimes" (ICC 28(b)(i)), distinguishability 281, 364-5 knowledge ex ante and knowledge ex post facto distinguished 366-7 recharacterization of the charges 364-5 'unconvinced knowledge" 365-6 "with knowledge of the attack" (ICC 7(1)) 280 required detail of knowledge 216-17 command responsibility (war crimes/crimes against humanity), jurisprudence AFRC 81, 144, 150, 157 n. 338, 163 Aleksovski 79, 200 Bagosora and Nsengiyumva 161, 164 Bemba 59-91, 105, 106, 109-245, 361-70: see also Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (Merits) (ground 3 (command responsibility)); Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Monageng and Hofmański JJ (dissenting)), ground 3 (command responsibility) Bemba et al. 120, 145, 171, 172, 201-2

Blaškić 79, 163, 228



696 INDEX

```
command responsibility (war crimes/crimes against humanity), jurisprudence (cont.)
  Boškoski and Tarčulovski 68, 74-5, 84
  Čelibići 79, 161, 163, 164, 200, 201
  Đorđević 84
  DRC 225
  Furundžija 223
  Galić 200
  Gbagbo 68
  Hadžihasanović and Kubura 68, 157 n. 338, 161, 223, 228
  Halilović 68, 79, 84, 163, 228
  Kaing Guek Eav 84
  Karadžić 79, 80
  Kordić and Cerkez 164, 228
  Krnojelac 157 n. 338, 163, 164, 201, 216
  Lubanga 88, 200, 227-8
  Mladić 68
  Mpambara 227
  Ndindiliyimana 150, 164
  Nikola Šainović 223
  Nikolić 223
  Nizeyimana 150
  Ntabakuze 201
  Ntaganda 68
  Nuon Chea and Khieu Samphân 84, 223
  Orić 84, 164, 228
  Pagett 229
  Perišić 120, 150, 163
  Popović 228
  Prlić 133
  Renzaho 80
  RUF 84
  Strugar 73-4, 80, 84, 157 n. 338, 163, 237, 244
  Tadić 227
  Taxquet v. Belgium 223
consular immunity from jurisdiction (VCCR 43)
  "commercial activity exception", exclusion 571-3
crimes against humanity, definition/classification as/requirements
  motivation of alleged perpetrator, relevance 84-5, 89, 90-1, 121-5
  multiple commission of [impugned] acts ... against any civilian population
    pursuant to or in furtherance of a State or organizational policy (ICC 7(2)(a)) 375-7,
          491-2
  widespread or systematic policy, Bemba 371-5
```

Elements of Crimes (EOC): *see* ICC (jurisdiction, admissibility and applicable law) (ICC Part 2), Elements of Crimes (ICC 9) (EOC)

fair trial (international criminal tribunals)

evidential rulings, importance to 497-500

family/private life, respect for, justified restrictions/interference by public authority, grounds/requirements (ACHR 11(2)/ACHR 17/ECHR 8(2)/ICCPR 17)

"in accordance with the law"/"prescribed by law" 612-14

"proportionate to the legitimate aim" 615-17



INDEX 697

family/private life, respect for, justified restrictions/interference by public authority (ACHR 11(2)/ACHR 17, ECHR 8(2), ICCPR 17), jurisprudence

Al Nashif 613, 614
Gillan and Quinton 612-14
Kardi 612, 615-17
Lupsa 612-14
Malone 612-14
Mayaya 615
MS and MBT 612-18
N 615

ICC (appeal and revision (ICC 81-5))

```
compensation, arrested or convicted person's enforceable right to (ICC 85) 532-62
  "compensated according to law" (ICC 85(2)) vs "compensation, according to the criteria . . . in the Rules" 534-5
  designated Chamber as appeal court, exclusion 539
  grave and manifest miscarriage of justice as ground (ICC 85(3)) 533-62
    admissible/excluded matters 543-5
    classification as/high threshold/"exceptional" 549-50
    definitions 549
    interpretation "consistent with internationally recognised human rights" 550-5
    responsibility for determining the existence of 535
    time limit for submission of request (Rule 173(2)) 535
    travaux préparatoires 543-4
  jurisprudence
    Bemba 532-55
    Ngudjolo 535, 539, 541, 543, 546, 547-50
  jurisprudence (ICTR)
    Rwamakuba 548
    Zigiranyirazo 548
  as novelty/sole example 544
  purpose (provision of full range of guarantees against serious violations of fundamental
         right to a fair trial) 544
    international human rights treaties 544-6
    national legislation 546
  text 533-4
  travaux préparatoires (opposition to compensation proposal) 547-8, 549
    adoption of restrictions as compromise 547-9
     'compensated according to law" (ICC 85(2)) vs "shall be awarded" (ICC 85(2)) vs
         'compensation, according to the criteria ... in the Rules" 547-9
grounds of appeal (ICC 81(1)(b))/standard of review: see also ICC (trial (ICC 62-76)),
         standard of proof ("beyond reasonable doubt" (ICC 66(3)))
  "any other ground that affects the fairness or reliability of the proceedings or decision"
         (ICC 81(1)(b)(iv)) 35-6, 333-48
    appellant's obligation to set out how the proceedings were unfair/how this affected
         the reliability of the decision 247
    Bemba 35-6, 333-48: see also Bemba (Appeal against Trial Chamber III's judgment
         of 8 June 2018) (separate opinions) (Monageng and Hofmański JJ
         (dissenting)), ground 6 ("other procedural errors invalidate the conviction")
    exclusion of a de novo review 247
    Lubanga 247
    modalities of victims' participation (Rule 91(3)) 334-7
```



698 INDEX

```
ICC (appeal and revision (ICC 81-5)) (cont.)
        personal interests" 336-7
       victims' right to present their views and concerns where their personal interests are
           affected (ICC 68(3)) 335-40
    Appeals Chamber's right to reverse or amend the impugned decision, or order a new
    trial in case of non-compliance with ICC 83(2) 35-6 error of fact (determination of compliance with "beyond reasonable doubt" standard)
      Appeals Chamber's margin of deference to Trial Chamber 29-30, 38-9, 95-102,
           322, 394-401, 403-13
      Appeals Chamber's right of intervention, factors justifying/not justifying 29-30
       clear and unassailable findings, need for 32
       obligation to overturn Trial Chamber's findings in case of reasonable doubt/
           substitution of Appeals Chamber's own factual findings distinguished 22, 32,
           38, 98
       reasonableness test 30-1, 401-3
    error of law (ICC 81(1)(b)(iii)) 28-9
      Appeals Chamber's independence of assessment 29
       "conviction exceeded the charges" 39-59
       importance of Trial Chamber's reasoning to an understanding of the legal and
           factual basis for decision 33
    error of law (ICC 81(1)(b)(iii)), failure to provide "a full and reasoned statement of
           [its] findings on the evidence and conclusions" (ICC 74(5)) 33-5, 417-19
       importance of Trial Chamber's reasoning to an understanding of the legal and
           factual basis for decision 33
      need to address all arguments, whether 34, 208-311
      remedies in case of a finding of non-compliance 34-5
    error of law (ICC 81(1)(b)(iii)), jurisprudence
       Delalić 309
       ECtHR jurisprudence, importance 33
       Hadjianastassiou 33
       Halilović 309
       Kalimanzira 309
       Kenyatta OA5 Judgment 32-3
       Kvočka 309, 394-5
       Lubanga 32-3, 309
       Nuon Chea and Khieu Samphân 309
       Perišić 35
      Ruto et al. OA Judgment 32-3
Simba 309
    procedural error 28-9, 32-5
       material effect of error on the decision or sentence, need for
         ECtHR jurisprudence, importance 33
    substantiation of errors requirement at appeal stage and pre-conviction burden of
           proof distinguished 100-1
  standard of review, Appeals Chamber's right to intervene (ICC 83(2)), limitation to
           finding of
    material effect on the decision or sentence 28-9, 98, 194, 413-17
    "materially affected", definition 29, 32
    miscarriage of justice 30, 35 n. 58, 97
    unfairness affecting the reliability of the decision or sentence 28-9
  standard of review, jurisprudence
    Bemba 28-39, 94-102, 392-417: see also Bemba
```



INDEX 699

Bemba et al. 30-1, 394, 395, 397 Fox v. Percy 400-1 Lubanga 28-30, 33, 94-5, 96, 97, 99-100, 395, 397-8 Ngudjolo 28-9 Nuon Chea and Khieu Samphân (ECCC) 31 Pendleton 399-400 Stafford 399-400 ICC (Code of Professional Conduct for Counsel) 532-3 ICC (general) 500-1 interpretation consistency with contemporary practice 423-5 difficulties attaching to "constructive ambiguities" 349 unresolved issues from the drafting stage 349 ordinary meaning of terms of treaty in their context and in the light of its object and purpose (VCLT 31(1)), Bemba 427-8 purposive approach (VCLT 31(1)) 425-9 treaty as a whole in context 428-9 purpose of ICC ("to guarantee lasting respect for and the enforcement of international justice") (Preamble) 429 ICC (international cooperation and judicial assistance (ICC Part 9)) execution of requests jurisprudence: see also Bemba (compensation and damages (ICC 85)) Al Bashir 557 Bemba 555-62 Pre-Trial Chamber's powers and responsibilities (ICC 57(3)(e)/ICC 93(1)(k)) 557 Registry as the channel of communication between the Chamber issuing requests for cooperation and the requested States (Rule 176(2)) 557 State's primary responsibility for 556, 557-8 ICC (investigation and prosecution (ICC 53-61)) confirmation of charges (ICC 61) Pre-Trial Chamber's task, parameters (ICC 61(7)) 107 purpose (separation out of cases and charges which should go to trial) 106-7 Mbarushimana 106-7 determination of charges, responsibility of Prosecutor for (ICC 58/ICC 61/ICC 74(2)) 104-5 initiation and conduct of investigation (ICC 70)/Prosecutor's responsibility for (ROC 161(5)) 323-4 Prosecutor's discretion in formulation of charges/possible approaches to (ICC 61(9)) 104-6, 429-39 dealing with lacuna in ICC 61(9) 436-9 need for confirmation of Prosecutor's request involving upgrading of a charge/adding a new one or for withdrawal of charges (ICC 61(11)) 432-4 relationship with ICC 74(2) ("shall not exceed the facts and circumstances") 430 right to adequate time for the preparation of the defence (ICC 67(1)(b)) 108 applicability to pre-trial phase of proceedings 108 as limitation on Prosecutor's right to rely on more detailed factual allegations 108 right to receive detailed information of the charges promptly (ICC 67(1)(a)) 108-9 Trial Chamber's right to exercise any function of the Pre-Trial Chamber that is relevant (ICC 61(11)) 439 ICC (jurisdiction, admissibility and applicable law) (ICC Part 2)

applicable law (ICC 21)



700 INDEX

```
ICC (jurisdiction, admissibility and applicable law) (ICC Part 2) (cont.)
    jurisprudence
       Bemba 95-6, 492-504
       Gbagbo OA 6 95
       Lubanga 95
    predictability of the law considerations 95
    principles and rules of international law as interpreted in its previous decisions (ICC
       cautious approach to departure from precedent 93-6
  Elements of Crimes (ICC 9) (EOC): see also under individual headings
    interpretation "within the established framework of the international law of armed
           conflict" 300
    purpose ("assist the Court in the interpretation and application of articles 6, 7 and 8")
           300 n. 1213
  pillaging: see looting/pillage, prohibition (ICC 8(2)(b)(xvi)/ICC 8(2)(e)(v))
ICC (penalties (ICC 77-80))
  Bemba 92
ICC Regulations of the Court (ROC)
  52(b) (DCC, requirements: statement of facts/standard of review) 22-3, 25 n. 19, 46,
           54, 102-3, 108, 356-7
  53 (decision of Pre-Trial Chamber: 60-day deadline) 107 n. 44
  55 (authority of the Chamber to modify the legal characterization of facts) 199
  58(2) (appeal brief: requirements) 36-8
  62(1) (additional evidence presented to the Appeals Chamber) 254
  97 (communication with defence counsel) 270
  101(2) restrictions on access to news and contact: Prosecutor's right to request
           restrictions 270
  101(3) restrictions on access to news and contact: detained person's right to notification
           of Prosecutor's request/right to challenge 270
ICC (reparations (ICC 75))
  Bemba 520-7
  Rutol/Sang 521
ICC (reparations order, requirements) (Lubanga model)
  limitation to convicted persons (ICC 75(1))/justification for a Final Decision on 521
ICC Rules of Procedure and Evidence (2019)
  63(5) (non-applicability of national laws) 501
  64 (procedure relating to the relevance or admissibility of evidence) 496-7
  77 (inspection of material in possession or control of the Prosecutor) 257, 261-3
  81(1) (restrictions on disclosure) 270
  81(2) (authorization of non-disclosure of otherwise disclosable material on an ex parte
           basis) 259, 262-3, 267
  121(3) (pre-confirmation hearing proceedings: provision of detailed description of
           charges and list of evidence to be presented at the hearing) 46, 107 n. 44
  149 (applicability of the rules governing proceedings and the submission of evidence in
           the Pre-Trial and Trial Chambers to the Appeals Chamber) 253-4
  165 (investigation, prosecution and trial) 257, 323
  173(2) (request for compensation: time limit in case of notification of a grave and
           manifest miscarriage of justice) 535
ICC (trial (ICC 62-76))
  "decision shall not exceed the facts and circumstances described in the charges and any
```

amendments to the charges" (ICC 74(2)) 21, 25 n. 19, 42-59, 99, 102-9, 356-61, 421-39, 463, 480, 533: see also Bemba (Appeal against Trial Chamber III's



> **INDEX** 701

judgment of 8 June 2018) (Merits) (ground 2 ("conviction exceeded the charges")); Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Eboe-Osuji J (concurring)); Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Monageng and Hofmański JJ (dissenting)) amendment of the indictment by the Trial Chamber/at any stage of the proceedings 420-39 admissible powers of the Trial Chamber 420-1 general principles of international criminal justice law, trend to allow amendment in certain circumstances 421 State practice 421-3 ICTY (Akayesu) 421 principle of congruence and 104 Prosecutor's discretion in formulation of charges/possible approaches to, right to rely on individual acts not relied on for the purposes of the confirmation proceedings 107-8 travaux préparatoires 103-4 standard of proof ("beyond reasonable doubt" (ICC 66(3))) 30-2, 401 circumstantial evidence, role 30-1 "must be convinced" 401 substitution of Appeals Chamber's own views distinguished 32 Trial Chamber's reasoning, importance 31-2 victims, Court's right to permit their views and concerns to be presented (ICC 68(3)) 521

IHRL (international human rights law)

military necessity and 518-20

international criminal law principles

amendments to indictments at any stage of the proceedings, trend towards 421

judicial role/function of the courts

Bemba 350-1 protection of the rule of law 350-1

looting/pillage, prohibition (HR 47/GC IV:33): see also Bemba (Appeal against Trial Chamber III's judgment of 8 June 2018) (separate opinions) (Monageng and Hofmański JJ (dissenting)), ground 4 ("contextual elements were not established"), C. Trial Chamber's alleged error in its consideration of pillage; looting/pillage, prohibition (ICC 8(2)(b)(xvi)/ICC 8(2)(e)(v))

customary IHL/ICRC Rule 52 301-3

GC IV:33 provisions

absolute terms without exception or justification 301

ICRC Commentary on 301-2

HR 28/HR 47, absolute nature of prohibition 302

looting/pillage, prohibition (ICC 8(2)(b)(xvi)/ICC 8(2)(e)(v)) 299-305

as a crime against humanity (ICC 8(2)(e)(v)) 300 as a war crime (ICC 8(2)(b)(xvi))/elements of

appropriation of property without the consent of the owner 300-1

customary international law 301

"[intention] to deprive the owner of the property and to appropriate it for private or personal use" 300-5



> 702 **INDEX**

looting/pillage, prohibition (ICC 8(2)(b)(xvi)/ICC 8(2)(e)(v)) (cont.)

EOC travaux préparatoires 302-3

international armed conflict requirement/exclusion of action justified by military necessity 300-1

"private or personal use" as distinguishing factor between pillaging and lawful appropriations 302-3

"within the established framework of international law" 300

MS and MBT

introduction

appeals

Administrative Court decision of 9 December 2016 (MS2 proceedings) 578

RLR policy (Restricted Leave Policy) 578

UT proceedings (decision of 4 September 2015) 578

claimants

anonymity 579

profiles 579

requests (ILR) (indefinite leave to remain) 579

Court's disposal (dismissal of appeals) 632

background (facts and procedural history in order of occurrence) (MBT)

i. MBT's conviction in France of terrorism-related offences (19 January 1998) 599

ii. MBT's arrival in the UK/request for asylum (13 May 1999) 500

iii. refusal of claim for asylum on RC 1F grounds (22 July 2004) 599-600 grant of six months' discretionary leave, twice repeated 600

iv. application for further leave (30 July 2009) 600 SoS's loss of/supply of copy (March 2011) 600

v. marriage of MBT, establishment of family with ILR and British citizenship 600

vi. application for ILR (6 November 2012)/issue of judicial review proceedings complaining of delay 600

vii. rejection of ILR application/grant of six months' restricted leave with conditions (21 August 2013) 600

viii. SoS's refusal to relax conditions (1 October 2013) 600

ix. issue of judicial proceedings challenging 21 August 2013 decision (20 November

x. further extension of leave with conditions (20 March 2015) 600

background (facts and procedural history in order of occurrence) (MS)

i. basis of application for asylum (risk of persecution in India as a Sikh) 597 rejection by SoS on grounds of support for terrorism pending determination of application 597

ii. SIAC proceedings (claim that MS was excluded from RC on terrorism grounds) 597-8

iii. SIAC determination (31 July 2000)

RC 1F exclusion 198

real risk of torture if returned to India/breach of ECHR 3 consequent on 598

iv. grant of one year's "exceptional leave to remain" 598

v. grant of discretionary leave on a rolling six-month basis until 8 June 2005 598

vi. marriage to British citizen and establishment of a family 598

vii. application (7 June 2005) for ILR following 10 years' lawful presence in the UK

viii. application for judicial review of continuing absence of a response to request for ILR (March 2014) 599



INDEX 703

```
ix. SoS's refusal of ILR application on Rule 322(5) grounds/grant of six months'
         restricted leave with conditions (2 May 2014) 599
  x. application for further leave to remain (30 October 2014) 599
  xi. grant of a further six months' restricted leave (15 January 2015) 599
  xii. evidence presented to the Court 599
background (facts and procedural history in order of occurrence) (MS2 proceedings)
  application for further leave to remain/ILR 602
    refusal of request for ILR/grant of two years' RLR with conditions 602
  proceedings
    judgment (9 December 2016) (Collins J) upholding claim 603
    MS's issue of judicial review proceedings (17 May 2016) 603
    Order giving effect to judgment 603-4
    parties' arguments 603
background (facts and procedural history in order of occurrence) (UT proceedings)
  findings (Part IV) (rejection of claim of unlawfulness of RLR) 601
  findings (Part V) (MS1) (lawfulness of RLR)
    finding for (1) (SoS's failure to consider length of time in the country) 601
    finding for (2) (SoS's failure to consider request for permission to take a course of
         study) 601
    refusal to quash the decision and order it to be retaken 600-1
    rejection of challenge on most grounds 601
  findings (Part VI) (MBT) (lawfulness of RLR), rejection of all the submissions 602
  issues 600-1
background (relevant domestic law: DL (discretionary leave) (2003))
  applicability
    period of discretionary leave 582
    persons excluded but irremovable 582
    persons irremovable for reasons other than ECHR 3 582
    persons not entitled to humanitarian protection 582
  features
    eligibility for ILR 582
    period of discretionary leave 582
     road blocks to settlement and to the further building up of private life" (Kardi)
         596, 619
  jurisprudence
    Mayaya 585
    N 583-4
background (relevant domestic law: RLR (2015 Asylum Policy Instruction))
  early versions
    2011 policy statement 585-7
2012 "interim" Asylum Casework Instruction 587
  jurisprudence
    Gedi 603
    George 596-7
    Kardi 594-6
background (relevant domestic law: RLR (2015 Asylum Policy Instruction by section))
  1.1-1.4 (purpose of instruction) 587-9
    1.1 (circumstances for considering granting RLR) 587
    1.1.2 provision of specific guidance on eligible persons, duration and conditions of
         leave, and an active review 587
    1.2 (background) 58
```



704 INDEX

MS and MBT (cont.)
1.2.1 (background: Exclusion under Article 1F of the Refugee Convention) 589
1.2.2 (background: policy towards persons excluded but irremovable for ECHR
reasons) 588
1.2.3 (applicability to persons with ECHR barrier to removal) 588
1.2.4 (ECHR 3 considerations outweighing public interest/exceptional
circumstances test (qualified ECHR rights)) 588
1.2.5 (regular review with a view to removal as soon as possible/eligibility for settlement or citizenship as very exceptional) 588
1.3 (policy intention behind restricted leave) 588-9
4 (administration of the policy) 589-92
4.2.1 (duration: reasons for limitation to six months) 589
4.2.2 (duration: individual assessment) 588
4.3 (recourse to public funds/NHS) 589
4.4 (employment restriction) 589-90
4.5.1 (residence restrictions: rationale for) 590
4.5.2 (residence restrictions: standard conditions) 590
4.6.1 (reporting restrictions: frequency) 590
4.6.2 (reporting restrictions: presumption of regular reporting) 590 4.7.1 (restrictions on studies: general prevention from undertaking a course) 590
4.7.2 (restrictions on studies: rationale) 590
4.10 (active review: scope) 590-1
4.10.3 (active review: applicability to persons who enjoyed discretionary leave prior
to the introduction of the policy) (text) 591
4.12.1 (ILR application by persons excluded from the RC/Humanitarian
Protection: requirements/case-by-case approach) 591
4.12.2 (ILR application: grounds for refusal/consideration of a criminal conviction)
591
4.12.3 (ILR application: right to rely on N) 591-2 4.12.4 (ILR application: decision-makers' obligation to consider carefully whether
the facts of individual cases are analogous to the specific facts in N and
applicability of the principles in N) 592
4.12.5 (ILR application: action in case of refusal) 592
background (relevant domestic law: RLR (2015 Asylum Policy Instruction: RLR/ILR
relationship (s 1.2.5/s 4.12.1))) 592-4
"in exceptional circumstances" likely to be "very rare" (s 1.2.5) vs "usually" be refused
(s 4.12.1) 592-4
applicability of principles set out in N (s 4.12.4)/whether "exceptional" or "rare"
592 text of principles 592
interpretation of published policies, responsibility (Court vs relevant Minister)
592-3
Gangadeen 593
Mandalia 593
0 593
Raissi 593
background (relevant domestic law: statutory background/the rules)
IA 3(1)(b) (non-patrial: leave to enter or remain in the UK for limited or indefinite period) 581
IA 3(1)(c) (non-patrial: conditions attach to leave to enter or remain) 581
IA 3(2) (regulations and control: Secretary of State's right to lay rules before
Parliament) 581



INDEX 705

Immigration Rules (qualification as a rule) 581 Immigration Rules 2017 r 322(5) (undesirability of permitting a person to remain: conduct including convictions, character or associations, threat to national security) 581-2 background (relevant international law) RC 1F (non-applicability of the Convention) 579-80 QD (EU Qualification Directive) 580 RC 33(2) (reasonable grounds for regarding as danger to national security) 580 ECHR 3 (expulsion to country where risk of breach of human rights including torture/inhuman treatment) 580-1 issues on the appeals Collins J's permission to SoS to appeal on ten grounds 604 MBT 604 MS 604 issues on the appeals (A), challenge to RLR policy 604, 605-18
1. *ultra vires* ground ("subject to" (IA 3(1)(c)), alleged effect (to make any breach of conditions necessarily lead to removal)) 605 consequential non-applicability to irremovable persons 605-6 Court's decision 605-6 UT rejection of claimed construction of IA 3(1)(c) 605 2. Alvi ground (failure to lay January 2015 Instruction before Parliament as allegedly required by IA 3(2)) 606-11 Court's decision 612 dependence on distinction between "rules" and other instructions or statements of policy/case-by-case approach 606-11 extracts (Alvi) 606-7 extracts (Fakih) 611 extracts (Munir) 607-8 extracts (UT) 609 summary of the arguments (UT) 608 3. fettering decision (dismissal as involving essentially the same considerations as the Alvi ground) 612 4. ECHR 8 ground (respect for private and family life, home and correspondence) 612-18 4.i. ECHR rights: common ground (liability/intention of RLR to interfere with ECHR 8 rights) 612 Mayaya|Kardi 612 4.ii. ECHR 8 rights: "within the law" 613-14 Al Nashif 613, 614 Gillan and Quinton (extract) 613 Malonel Lupsal Gillan and Quinton 612-14 4.iii. ECHR 8 rights: compatibility of RLR policy with "legitimate aim" requirement Court's decision (rejection of submission) 615 Kardi (binding effect) 615 UT rejection of submission (extracts) 614-15 4.iv. ECHR 8 rights: proportionality and Court's decision (confirmation of UT's finding/rejection of submission) 616-17

4.v. ECHR 8 in conjunction with ECHR 14 (detention without trial of non-nationals

absence of challenge in either MS's or MBT's grounds of appeal 618

Kardi (extracts) 615, 616-17 UT (extracts) 615-16

as unlawful discrimination)

UT's rejection of submissions 618



706 INDEX

```
MS and MBT (cont.)
  issues on the appeals (B), challenges to the decisions, introduction (standard of review)
    balancing ordinary rationality review, ECHR 8 proportionality requirement and the
           public interest 622-3
    determination of existence of exceptional standards
       cases where there are clearly no special circumstances 619-20
       the extent to which the migrant has changed since the offence 621
      gravity of the conduct leading to migrant's exclusion from humanitarian protection
           621
      individual circumstances 621
      length of time in the UK/Kardi 620-1
       respondent's position (existence of exceptional circumstances as matter for SoS's
           judgement) 619-20
       reviewability of SoS's decision 620
       scope of review 604-5
    determination of existence of exceptional standards, relevant considerations
      strength of the case leading to migrant's original conviction 621 n. 6
  issues on the appeals (B), challenges to the decisions, MBT
    i. UT decision
       exceptional circumstances 629-30
       family life (Appendix FM of the Immigration Rules) 629
       restricted leave 629
    ii. UT proceedings
       issue 1 (lawfulness of refusal to grant ILR/grant RLR) 630-1
      issue 2 (possibility of rational application of the RLR policy to MBT) 631
    iii. Court's analysis and decision
      legitimate expectation that SoS will not change policy, absence 631-2
       length of stay, effect on "exceptional circumstances" 632
       UT's alleged failure, by not applying 2004 policy, to deal fairly and lawfully with the
           applicant 631
  issues on the appeals (B), challenges to the decisions, MS

 i. decision letter

       ECHR 8 625
      exceptional circumstances 625
      restricted leave 623-4
    ii. reasoning of Collins J 625-7
    iii. Court's analysis and decision
       appeal allowed 629
       Collins J's treatment of the reference to N as importing a norm that ILR would be
           granted after 10 years as an error 628
       ECHR 8 proportionality of SoS's decision 628
      rationality of SoS's decision 628
```

necessity/duress as defence/justification (including war-related situations, war crimes or crimes against humanity)

war crimes/crimes against humanity IHRL and 518-20 jurisprudence Bemba 300-1, 504-10 Galić 507-8 Göring 511



INDEX 707

Hostages Case (List) 505-6, 508
Kordić 509
Prlić 508
Strugar 507-8
The Caroline 511
Lieber Code 509, 510
"military objective" and "military necessity" distinguished 504-10
pacific settlement of international disputes and the defence of military necessity 511-18
consistency between war and international law, changes in approach to 511-16
ex iniuria ius non oritur 516-18
non-refoulement (RC 33)
asylum distinguished 580 n. 1

Refugee Convention (1951) (RC), non-application on grounds of crime against peace, war crime or crime against humanity (RC 1F(a))

jurisprudence Babar 636-40 Ruhumuliza 653-74 purpose of provision protection of the integrity of the asylum process 647 upholding the international rule of law 647, 665-6, 670 Ruhumuliza 650-74 background (facts relating to the respondent and procedural history in date order) Anglican Bishop Co-Adjutor (Kigali) (1994) 653 in Canada (1997) 653 Missionary Bishop and Representative of the Archbishop of West Africa in Cameroon (1998) 653 arrival in UK on a student visa (January 2004) 653 leave to remain as a minister of religion until 31 January 2007 653 refusal of application to extend leave to remain (June 2008) 653 rejection on grounds of conduct (June 2008) 653 withdrawal of rejection 653 application for asylum (March 2009) 653 rejection of asylum application on RC 1F(a) grounds (10 March 2011) 653 concerns that a return to Rwanda might involve a breach of ECHR 6 654 exclusion of right of appeal (NIAA 83) 654 grant of six months' discretionary leave to remain 654 application for further leave to remain (25 August 2011) 654 refusal on suitability grounds (Appendix FM to the Immigration Rules/RF 1F(c)) (20 March 2014) 654 appeal to FTT/claim to ILR (r 276B) 654-5 hearing on ILR application (3 June 2015) 655

issue (ILR entitlement/disqualifying conduct (r 276B(ii)(c) and (iii))) 655
FTT decision allowing appeal in relation to SoS's failure to consider long residence ground 655
SoS's appeal, dismissal (19 May 2016) 656
appeal (overview) (procedural history/jurisprudence)

cross-examination about respondent's alleged conduct in connection with Rwanda

i. 2014 decision letter 656-7 ii. FTT's reasons 657-61

genocide 655



708 INDEX

Ruhumuliza (cont.) iii. UT's reasons 662 iv. MS 662-4 v. Babar 664-5 appeal (Court's analysis and decision) (Underhill LJ) appellant's arguments/the issue insufficiency of weight given by FTT to the justification for denying settlement to those guilty of crimes against humanity 665-6 piecemeal nature of evidence/arguments presented to the FTT 666 decision (dismissal of the appeal) 668-9 evaluation of r 276B(ii)(c) in relation to respondent 666-7 avoidance of UK becoming a safe haven, importance 664-7 Babar/MS and MBT distinguished 667 FTT's failure to consider decision letter's reference to distribution of weapons, relevance 667-8 FTT's use of "redemption", relevance 668 rationality of FTT's decision 666-7 purpose of RC 1F (upholding the international rule of law) 665-6 separate opinions Irwin LJ (concurring) absence of evidence that the respondent participated in the impugned events 673-4 improper deference to the SoS/failure to examine the facts 673 RC 1F(a)-based exclusion (crimes against humanity), stringency of test 173 Singh LJ (dissenting) FTT/UT's failure to apply the public interest/compelling circumstances legal test correctly 669-71 improper deference to the SoS/failure to examine the facts 671-3 RC 1F(a)-based exclusion (crimes against humanity), stringency of test 169-71

service of process on foreign State or State agency

applicable law

law of State where process to be served 567-70

waiver, requirements

explicit, unequivocal and certain terms 570-1

waiver by the State/authorized representative 570-1

Zakhary 565-73

State Immunity Act 1980 (Canada) by section

5 (commercial activity exception) 567-8, 571-3

9(2) (service of document: means of service) 565, 567, 569-70

10(4) (default judgment: application to set aside or revoke) 565

11 (no injunction, specific performance, etc., without consent) 573

travaux préparatoires as supplementary means of interpretation (VCLT 32)

EOC 8(2)(b)(xvi) 302-3

ICC 74(2) 103-4

ICC 85(3) 543-4, 547-8, 549

treaty interpretation (VCLT 31(2)) (context)

treaty as a whole/holistic approach (relevant materials) 104



INDEX 709

United Kingdom Immigration Act 1971 by section 3(1)(b) (non-patrial: leave to enter or remain in the UK for limited or indefinite period) 581 3(1)(c) (non-patrial: conditions attach to leave to enter or remain) 581 "subject to" 605-6 3(2) (regulations and control: Secretary of State's right to lay rules before Parliament) immigration policy: see Babar; MS and MBT; Ruhumuliza policies relating to excluded but irremovable persons: see MS and MBT Immigration Rules interpretation adoption of the more lenient version (Pokhriyal) 639 sensible approach (Mahad) 639 qualification as a rule Alvi 581, 606-11, 656 MS and MBT 581, 606-11 Immigration Rules 2014 r 332(5) (registration with the police) 590 Immigration Rules 2017 r 322(2)-(12) ("grounds on which leave to remain and variation of leave to enter or remain ... should normally be refused") 581-2 r 322(5) (undesirability of permitting a person to remain: conduct including convictions, character or associations, threat to national security) 581-2 Immigration Rules 2018 r 276B (ILR) 637, 638-48, 654-74: see also Babar; Ruhumuliza r 276B(ii)(c) (ILR) (long residence: public interest considerations: personal history) 654-5, 666-7, 669-73 Nationality, Immigration and Asylum Act 2002 by section

war crimes/crimes against humanity, procedural aspects

83 (appeal: asylum claim) 654

burden/standard of proof
"beyond reasonable doubt"
ICC 62-76 22, 29-32, 34, 39, 51-2, 57-9, 87-8, 94-102, 128-38, 145-68, 171220, 401: see also Bemba

Zakhary 563-73

I. the matter 565
II. background (facts in date order)

respondent's status (cashier at US consulate in Toronto) 565
respondent's Complaint alleging unjust dismissal (6 October 2010) 565
transmission of Complaint to US consulate by registered mail (9 November 2010) 565
acknowledgement by Embassy human resources officer 566
Federal Ministry of Labour's invitation to respondent and Consul General to
participate in a voluntary Alternative Dispute Resolution process 566
hearing in absence of the US/finding of unjust dismissal/order to reinstate 566
Canadian Statement of Claim issued by the respondent (31 August 2012)/US filing of
Statement of Defence (30 October 2012) 567



710 INDEX

Zakhary (cont.) filing of Adjudicator's Order for enforcement (Labour Code 244) (20 February 2013) service of Certificate on US through diplomatic channels (26 April 2013) 566 Attorney General's letter setting out Canada's position of applicability of SIA to Labour Code complaints 566-7 III. Adjudicator's decision (26 March 2012) 567-8 finding 1: consulate letter of 9 November 2010 as waiver of US's right to object to failure of service to comply with SIA 9 567 finding 2: consulate's activities as a "commercial activity" (SIA 5) 567-8 finding 3: applicability of Labour Code to the respondent's employment relationship with the US 568 finding 4: unjust dismissal 568 IV. issues parties' arguments 568 order of consideration 568 V. Court's analysis 569-73 V.A. Court's analysis (improper service) applicable law (SIA 9(2)) (service through the Deputy Minister of Foreign Affairs) 569-70 compliance as mandatory, jurisdictional precondition to the commencement of proceedings against a foreign State 570 failure to comply as breach of VCLT 22 (inviolability of the premises of the mission) 570 policy objectives (Circular on Service of Originating Documents in Judicial and Administrative Proceedings Against the Government of Canada in other States (28 March 2014)) 570 responsibility for proper service 570 jurisprudence Softrade 569 Tritt 569 V.B. absence of US waiver of any defect in service 570-80 treatment of waiver in domestic context distinguished 570-80 waiver requirements explicit, unequivocal and certain terms 570-1 waiver by the State/authorized representative 571 V.C. non-applicability of the commercial exception (SIA 5) 571-3 Amaratunga v. Northwest Atlantic Fisheries Organization 572-3 Employment Appeals Tribunal 571-2 Re Canada Labour Code 571 VI. reinstatement order as violation of SIA 11 573 VII. Court's decision (revocation of reinstatement order) 573