
International criminal law

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1 ICTY delivers its final judgment and presents final report to the UN Security Council

1.1 The ICTY in historical, institutional and legal context

The International Criminal Tribunal for the Former Yugoslavia (ICTY), with its seat at The Hague, the Netherlands, was established in 1993 by virtue of United Nations Security Council Resolution 827. The ICTY Appeals Chamber delivered this tribunal's final decision on 29 November 2017, in the case of *Prosecutor v Jadranko Prlic, Bruno Stojic, Slobodan Praljak, Milivoj Petkovic, Valentin Coric & Berislav Pusic* ICTY IT-04-74-A, (29 November 2017) ('*Prlic et al*'). The historical moment was somewhat overshadowed by the dramatic suicide of one of the accused – Slobodan Praljak – who managed to smuggle poison into the courtroom, which he then drank in front of an international television audience while the appeal decision was read out by the President of the ICTY. The courtroom itself was declared a crime scene by the Dutch authorities, who investigated the incident in order to determine the nature of the lethal substance, and whether Praljak had any outside help in obtaining the suspected poison (for a report on the incident, see 'Dutch probe under way into war criminal's court suicide' *Radio Free Europe Radio Liberty*, 30 November 2017, available at <https://www.rferl.org/a/un-war-crimes-court-yugoslavia-final-verdict/28885760.html>).

The lengthy appeal decision, published in three volumes and totalling more than 2000 pages, epitomises the work of a tribunal that was at once a criminal court, tasked, on the one hand, with the mandate to determine the individual criminal liability of those responsible for the atrocity crimes (crimes against humanity, war crimes, and genocide) committed in the former Yugoslavia and, on the other hand, doubling as a forum for the recording of an historical account of the conflict in the Balkans.

On the same day that the Appeals Chamber delivered the decision in *Prlic et al*, the President of the ICTY, Carmel Agius, sent the final progress report and assessment of the work of the ICTY to the President of the United Nations Security Council, the UN organ which created

the ICTY ('Letter dated 29 November 2017 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council': UN Doc. S/2017/1001, 29 November 2017).

The aim of this note is not to assess the legacy of the ICTY in any detail. That legacy will be debated for many years to come. Suffice to note that while the ICTY was primarily a criminal court, it was also more than that. The ICTY was the first international criminal tribunal created since the post-Second World War Nuremberg and Tokyo tribunals. The indictment for war crimes and crimes against humanity in 1999 of a sitting president – Slobodan Milošević of Serbia – cemented the ICTY's status as Nuremberg's heir and precursor to the permanent International Criminal Court (ICC). The indictment of Milošević confirmed the premise upon which the quest to end impunity for the most serious crimes under international law rests, namely the possibility to charge the most senior military and political leaders, including heads of state and government, with atrocity crimes. There is some support in political science research for the thesis that prosecutions of atrocity crimes are affecting the behaviour of political leaders; and trials may even have a deterrent effect (K Sikkink and HJ Kim 'The justice cascade: The origins and effectiveness of prosecutions of human rights violations' (2013) 9 *Ann Rev Law & Soc Sci* 9 269-285). A cursory review of current international affairs may suggest otherwise. Be that as it may, what we can say is that, from an international criminal law point of view, the jurisprudence of the ICTY certainly marked many milestones and helped to determine the legal contours of responsibility for the atrocity crimes committed in the states of the former Yugoslavia. The ICTY, then, had a normative impact in terms of the development of substantive and procedural international criminal law. And the jurisprudence of the ICTY also had secondary effects, notably in terms of institutional reforms in the states of the former Yugoslavia and in terms of public perceptions about the international criminal justice project in the Balkans (for detailed analysis, see K Bachmann, G Kemp and I Ristic *International Criminal Tribunals and Domestic Change* (2018)).

The domestic impact of an international tribunal such as the ICTY should not be overstated or mischaracterised. One should be aware of the institutional and political conditions under which the tribunal came into existence. In addition, it is also necessary to take into account the broader international political context in which both the ICTY and the various domestic courts in the former Yugoslavia operated. Indeed, there is a clear nexus between the perceived domestic impact

of the ICTY in the Balkans and pressure applied by the international community (notably the United States and the European Union), especially in the context of war crimes trials by hybrid courts in Bosnia and Herzegovina. Domestic approaches to atrocity crime prosecutions can therefore to a significant degree be attributed to external political pressure and, to a lesser degree, as a result of the normative trickle-down from the ICTY (Y Ronen 'The impact of the ICTY on atrocity-related prosecutions in the courts of Bosnia and Herzegovina' (2014) 3 *Penn State J Law & Internat'l Aff* 113-160).

Questions about the historical, normative, institutional and domestic impact of the ICTY will not be explored in detail here. Suffice to note a number of significant challenges, developments and contributions, as noted in the ICTY Final Progress Report presented to the UN Security Council.

- The ICTY had to start trials without codified rules of evidence and procedure. Judges of the tribunal had to develop these rules. This unfortunate situation was avoided when the Rome Statute of the International Criminal Court was adopted in 1998. Unlike the ICTY, the ICC benefit from a detailed set of codified rules of evidence and procedure (Progress Report at para [60]).
- The jurisprudence of the ICTY extended the scope of international humanitarian law. Legal protections which apply in international armed conflict was thus extended to non-international armed conflicts. This has been an important development in substantive international criminal law (Progress Report at para [58]).
- Rather surprisingly, the ICTY was the first international tribunal ever to define the key concept of 'armed conflict'. This concept is important for the criminalisation of the violations of international humanitarian law in the form of war crimes. The ICTY decision in *Prosecutor v Tadic*, IT-94-1-T, 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (2 October 1995)', thus contributed to the development of international criminal law in order to bring it in line with the modern nature of armed conflict (Progress Report at para [58]).
- Although it was the ICTY's African counterpart, the International Criminal Tribunal for Rwanda (ICTR) which delivered the first ground-breaking decision on the crime of genocide in *Prosecutor v Akayesu*, ICTR-96-4-T, judgment, (2 September 1998), it should be noted that the ICTY also contributed substantially to the development of the crime of genocide, notably the element of 'protected and targeted groups'. The decision in *Prosecutor v Krstic*, IT-98-33-A, judgment, (19 April 2004) deserves special mention (Progress Report at para [58]).

- The ICTY found in two important decisions, namely *Prosecutor v Kunarac et al*, IT-96-23-T, judgment, (22 February 2001), and *Prosecutor v Krnojelac*, IT-97-25-T, judgment, (15 March 2002), that enslavement is a crime against humanity. The tribunal furthermore confirmed in these decisions that the prohibition against slavery is customary in nature (Progress Report at para [58]).
- In *Prosecutor v Furundzija*, IT-95-17/1-T, judgment, (10 December 1998), the ICTY held that the crime of rape, when committed in the context of an armed conflict, may be prosecuted as a grave breach of the Geneva Conventions and as a violation of the laws and customs of war (Progress Report at para [58]).
- In *Prosecutor v Mucic et al*, IT-96-21-T, judgment, (16 November 1998) the ICTY held that the crime of rape may constitute torture (Progress Report at para [58]).
- In addition to the ICTY's jurisprudence on the crime of rape as a crime under international law, the tribunal also held in *Prosecutor v Kunarac et al*, IT-96-23-T, judgment, (22 February 2001) that sexual enslavement can constitute a crime against humanity (Progress Report at para [58]).

In terms of the ICTY's more general role as fact-finder and recorder of the history of the conflict and atrocities in the Balkans, it is noted in the Progress Report (at para [62]) that,

'Ultimately, while the Tribunal has not been able to provide justice to victims as fast as the international community, or indeed the Tribunal itself, would have wished, it has forged a new era of accountability, demonstrating that the concept of impunity no longer prevails and that even the most senior military and political leaders may be held to account. This is perhaps the Tribunal's greatest achievement of all and thus its most fundamental legacy'.

It is against this background, then, that this article turns to the ICTY's last decision. The focus will be on one aspect only, namely the ICTY Appeals Chamber's contribution to the development of the general part of international criminal law, in particular the doctrine of joint criminal enterprise.

1.2 ICTY Appeals Chamber decision in *Prlic et al*, and the doctrine of joint criminal enterprise

It was noted above that the ICTY has made significant contributions to the development of both procedural and substantive international criminal law. One of the ICTY's more controversial contributions concerns the doctrine of joint criminal enterprise. This doctrine also featured in *Prlic et al*. The aim, for present purposes, is to focus on this one aspect of the Appeal Chamber's decision, and to contextualise

it with reference to the ICTY's contribution to the development of the general part of international criminal law. By way of conclusion this aspect of the ICTY's decision will briefly be compared to the application of joint criminal enterprise before other international tribunals.

1.2.1 *The doctrine of joint criminal enterprise: A judicial innovation*

Joint criminal enterprise, a distinct form of criminal liability, is a judicial innovation; a creation of the ICTY judges. See, for instance, *Prosecutor v Tadic*, appeals judgment, IT-94-1-A, (15 July 1999) at paras [185]-[234]. In essence, the basic form of joint criminal enterprise corresponds with what South African criminal lawyers will recognise as the doctrine of common purpose. The Appeals Chamber in *Tadic* held that participation in a common plan should be viewed as a form of 'committing' under the ICTY Statute (*Tadic* at para [186]). The Appeals Chamber went further and formulated joint criminal enterprise (JCE) as three distinct modes of liability:

- *JCE I*: This form is based on a common purpose, where 'all co-defendants, acting pursuant to a common design, possess the same criminal intention...even if each co-perpetrator carries out a different role within it' (*Tadic* at para [196]).
- *JCE II*: The systemic form of joint criminal enterprise is where 'the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e. by groups of persons acting pursuant to a concerted plan' (*Tadic* at para [202]).
- *JCE III*: The final form of joint criminal enterprise ascribes individual criminal liability where there is 'a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common plan, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose' (*Tadic* at para [204]).

The establishment of joint criminal enterprise as a mode of liability was not welcomed by all. Criticisms were raised about the absence of a proper statutory or customary international law basis for this notion. Some commentators went so far as to label the creation of joint criminal enterprise by the ICTY as a 'tremendous stain on the legacy of the Tribunal' (MG Karnavas 'The ICTY legacy: A defence counsel's perspective' (2011) 3 *Goettingen J Internat'l L* 1053, at 1074).

1.2.2 *Joint criminal enterprise before the Appeals Chamber: Revision, reform, or reaffirmation?*

Did the Appeals Chamber in *Prlic et al* use the opportunity of the Tribunal's last judgment to revisit the criticism of joint criminal enterprise as a mode of liability, and depart from the apparently settled ICTY jurisprudence, or was the *Tadic* decision and subsequent jurisprudence with respect to joint criminal enterprise simply applied and confirmed?

First, it is necessary to briefly note the findings of the Trial Chamber in *Prlic et al*. The salient facts were as follows: Between 1992 and 1994 a number of crimes were committed in the territory of Bosnia and Herzegovina. The areas where the crimes were committed were first claimed to be part of the Croatian community in Bosnia and Herzegovina. Later the areas were claimed by an entity known as the Croatian Republic of Herceg-Bosna. The appellants served in various senior leadership positions in this entity. In January 1993 the situation escalated and a joint criminal enterprise was formed. The political aim underlying the enterprise was to create an ethnic Croatian entity in Bosnia and Herzegovina. This entity would ultimately facilitate the reunification of the Croatian people. There was one obstacle, though: the local Muslim population. A key objective of the joint criminal enterprise was therefore the domination by the Croats of the Republic of Herceg-Bosna through the ethnic cleansing of the local Muslim population. Criminal acts, including unlawful deportation, murder, sexual crimes, and destruction of property, were aimed at the Muslim population. The ICTY Trial Chamber held *Prlic et al* criminally responsible on the basis of the joint criminal enterprise for committing grave breaches of the Geneva Conventions of 1949, violations of the laws and customs of war, and crimes against humanity. They were accordingly convicted pursuant to s 7(1) of the ICTY Statute.

The Trial Chamber also found that, although certain of the established crimes did not form part of the initial common criminal plan, the appellants were nevertheless responsible for a number of these crimes, pursuant to JCE III (i.e. the extended form of joint criminal enterprise).

The appellants challenged the Trial Chamber's findings concerning their individual criminal responsibility based on JCE I and III. The lengthy and detailed factual and legal analysis as set out in the Appeal Chamber's decision will not be addressed in full here. Suffice to note the Appeal Chamber's observations regarding the status of joint criminal enterprise (including the extended form thereof) as a mode of liability under international criminal law. The Appeals Chamber in *Prlic et al* stated as follows (at para [587]):

[It] is the settled jurisprudence of the Tribunal that the three forms of JCE, as forms of commission of a crime, have been established in customary international law since at least 1992. The Appeals Chamber has repeatedly

affirmed the relevant analysis in *Tadic*, which examined post-World War II war crimes cases extensively in concluding that joint criminal enterprise as a mode of criminal responsibility is firmly established in customary international law, and has recognised three forms of this mode of liability – JCE I, JCE II, and JCE III. The Appeals Chamber has also held that “the long and consistent stream of judicial decisions, international instruments, and domestic legislation in force at the time” provided “reasonable notice that committing an international crime on the basis of participating in a JCE incurs individual criminal liability”.

The question before the Appeals Chamber was whether the Tribunal could revisit and possibly depart from its earlier exposition of the meaning, scope and applicability of joint criminal enterprise as a mode of liability. The Appeals Chamber noted that it was possible to depart from previous decisions on matters of law. However, the Tribunal has formulated a strict test for such departures. A departure from a previous decision by the Appeals Chamber would only be justified if there were ‘cogent reasons’ to do so, and this entails the satisfactory presentation of ‘clear and compelling reasons’ (at para [588]). This would include a situation where a previous decision was made ‘on the basis of a wrong legal principle’, or where a decision was ‘wrongly decided, usually because the judge or judges were ill informed about the applicable law’ (at para [588]).

In *Prlic et al* the Appeals Chamber found that the appellants have failed to provide the required ‘cogent reasons’ for the Appeals Chamber to depart from its previous decision on the meaning and scope of joint criminal enterprise (at para [589]). The Appeals Chamber thus concluded that joint criminal enterprise, including JCE III, ‘was firmly established under customary international law at the time of the relevant events’ (at para [591]).

1.3 Do other international, internationalised and hybrid tribunals follow the ICTY’s approach regarding joint criminal enterprise as a mode of criminal liability?

It has been noted that the Appeals Chamber of the ICTY, in its very latest decision, has confirmed that joint criminal enterprise, including the extended form (JCE III), was established under customary international law, at least since 1992. This confirmation by the ICTY Appeals Chamber cemented one of this tribunal’s most important (and most controversial) contributions to the development of the general part of international criminal law. A survey of the law and practice of other international, internationalised and hybrid tribunals reveal that the meaning, scope and application of joint criminal enterprise is still far from settled, despite the legacy of its creator, the ICTY. For instance, the Special Court for Sierra Leone (SCSL), in *Prosecutor v*

Sesay, Kallon and Gbao, appeal judgment, SCSL-04-15-A (26 October 2009), held that the jurisprudence of the ICTY and ICTR correctly reflect customary international law, and joint criminal enterprise can therefore serve as a basis for criminal liability (at paras [400]-[402]; [475] and [485]). Diametrically opposed to that is the Pre-Trial Chamber decision by the Extraordinary Chambers in the Courts of Cambodia (ECCC), which held, in ‘Public Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)’, Case No 002/19-09-2007-ECCC/OCIJ, (20 May 2010), that JCE III was not recognised as a mode of criminal responsibility applicable to violations of international humanitarian law. This mode of liability can therefore not find application before the ECCC in regard to international crimes (at para [77]). And, finally, the Rome Statute of the International Criminal Court (ICC) provides in art 25(3)(d) for liability based on contribution to a crime by a group acting with a common purpose. This, on the face of it, corresponds with joint criminal enterprise as developed by the ICTY. However, it is doubtful that art 25(3)(d) covers the full spectrum of joint criminal enterprise (I, II, and III). Indeed, ICC decisions thus far seem to regard art 25(3)(d) as constituting only a residual form of accessorial liability, and not joint criminal enterprise, and certainly not in its extended form (JCE III). See, for instance, *The Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06), ‘Decision on the Confirmation of Charges, Pre-Trial Chamber I, (29 January 2007)’ (at paras [336] and [337]).

In *Prlic et al* the Appeals Chamber of the ICTY essentially upheld its previous exposition and application of the doctrine of joint criminal enterprise. The ICTY has made an enormous contribution to the development of international criminal law. This is not to say that subsequent international criminal courts and tribunals, including the ICC, will uncritically apply the law as interpreted by the ICTY, as we have seen with reference to joint criminal enterprise. But it is certain that the ICTY’s considerable jurisprudence will not easily be ignored.

2 ICC Appeals Chamber: Jean-Pierre Bemba Gombo acquitted on appeal

On 8 June 2018 the Appeals Chamber of the International Criminal Court (ICC) delivered an important, consequential and also instantly controversial decision. Indeed, the fact that it was a divided Appeals Chamber which delivered the decision in *The Prosecutor v Jean-Pierre Bemba Gombo*, ‘Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “judgment pursuant to Article 74 of the Statute”’, Case No ICC-01/05-01/08 A, (8 June 2018), (*Bemba*) is in itself significant and indicative of divergent views on not only

the merits of the appeal itself, but also about the role of the Appeals Chamber as a court of review and appeal.

2.1 Procedural history of the *Bemba* case before the ICC

Jean-Pierre Bemba Gombo ('Bemba'/'the appellant') was the leader of a political movement called the Mouvement de Libération du Congo (MLC), which was based in the north-western region of the Democratic Republic of the Congo (DRC). Bemba also served as the commander of the MLC's military wing, the Armée de Libération du Congo (ALC). The MLC was not only active in the DRC, but also in the neighbouring Central African Republic (CAR) where the MLC intervened to support the incumbent President of CAR against a rebellion. The events relevant to the criminal charges against Bemba before the ICC occurred in the territory of the CAR between October 2002 and March 2003.

On 21 March 2016 Bemba was convicted by the ICC Trial Chamber of crimes against humanity (murder and rape) and war crimes (murder, rape and pillaging) committed by the troops of the MLC in CAR.

Bemba appealed against these convictions, and raised six grounds of appeal, namely:

- (i) There was a mistrial
- (ii) The conviction exceeded the charges
- (iii) The appellant is not liable as a superior
- (iv) The necessary contextual elements of the relevant crimes were not established
- (v) The Trial Chamber erred in its approach to identification evidence
- (vi) Other procedural errors invalidated the conviction

The third ground – concerning command responsibility – formed a key part of Bemba's strategy on appeal. In particular, Bemba submitted that he had not exercised effective control over the MLC troops in the CAR (where the alleged crimes were committed). He also submitted that the Trial Chamber was wrong to find that he had actual knowledge of the crimes committed by the MLC troops. Also, Bemba argued that the Trial Chamber wrongly held that he failed to take all necessary and reasonable measures to prevent the MLC crimes from being committed.

The majority of the Appeals Chamber (Van den Wyngaert, Eboe-Osuji, and Morrison JJ) focussed on appeal grounds (ii) (the scope of the charges) and part of (iii) (the Trial Chamber's finding that Bemba failed to prevent or suppress the MLC crimes) and held these aspects to be determinative of the outcome of the appeal (judgment at para [32]). The majority thus decided not to address the other grounds of appeal in the main judgment. Aspects of the remaining grounds of

appeal were, however, addressed in the separate opinion by judges Van den Wyngaert and Morrison, the separate concurring opinion by judge Eboe-Osuji, and the dissenting opinion by judges Monageng and Hofmanski.

For present purposes the focus will be on the second and third grounds of appeal, since these aspects were determinative of the outcome of the appeal. By way of conclusion some of the other issues raised in the main judgment as well as in the separate opinions will be noted, albeit briefly.

2.2 The grounds of appeal

2.2.1 *Ground of appeal (ii): 'The conviction exceeded the charges'*

A key part of Bemba's argument on appeal was that the Trial Chamber, in its findings regarding the criminal acts constituting the convictions of crimes against humanity and war crimes (the 'underlying criminal acts') went beyond the parameters that were set when the charges against him were confirmed by the Pre-Trial Chamber. Bemba argued that, if a criminal act was not confirmed by the Pre-Trial Chamber, and absent a successful application to amend the charges, such an additional criminal act could not form part of the charges against him and could not be used as a basis for a conviction. It should be noted that it was not Bemba's argument on appeal that he had not received sufficient notice of the allegations against him; only that the Trial Chamber's decision went beyond the scope of the charges against him.

In order to decide this ground of appeal, the Appeals Chamber addressed two issues (at para [100]), namely (1) the scope of the conviction decision; and (2) whether the conviction decision exceeded the scope of the charges.

The Appeals Chamber noted that Bemba was convicted of the crimes as set out in the disposition of the Conviction Decision, namely (at para [101]):

'Guilty, under Article 28(a) of the Statute, as a person effectively acting as a military commander, of the crimes of: –

- (a) Murder as a crime against humanity under Article 7(1)(a) of the Statute;
- (b) Murder as a war crime under Article 8(2)(c)(i) of the Statute;
- (c) Rape as a crime against humanity under Article 7(1)(g) of the Statute;
- (d) Rape as a war crime under Article 8(2)(e)(vi) of the Statute; and
- (e) Pillaging as a war crime under Article 8(2)(e)(v) of the Statute.'

The Appeals Chamber noted that the disposition of the Trial Chamber's Conviction Decision was supplemented by further findings in order to provide more context. These findings referred to examples of crimes (murder, rape, and pillaging) committed in the entire region of the

CAR where the MLC soldiers were operating during October 2002 to March 2003. Crucially, the Appeals Chamber noted that, while these findings ‘provide more detail than the disposition, namely by defining, in broad terms, the time period and area of the crimes, as well as the affiliation of the direct perpetrators, important information is still missing’ (at para [103]). For instance, the Trial Chamber’s Conviction Decision failed to refer ‘to even an approximate number of the individual criminal acts of murder, rape and pillage found established’ (at para [103]). The majority of the Appeals Chamber also found that the Trial Chamber failed to demarcate the scope of the conviction in clear terms. The majority of the Appeals Chamber therefore concluded that the Trial Chamber’s broad disposition in the Conviction Decision did not reflect what Bemba was convicted of. The Trial Chamber’s disposition should therefore be seen as *summaries* of the findings in relation to the ‘criminal acts of murder, rape and pillage that... [had been established] beyond reasonable doubt’ (at para [104]). Of course, Bemba’s conviction was entered in relation to the specific criminal acts, and the disconnect between the scope of the findings and the convictions therefore led the majority of the Appeals Chamber to conclude that the prosecutor was wrong when she submitted, at the time of the appeal hearing, that Bemba ‘was charged with, and convicted of, generally crimes of murder, rape and pillaging committed by MLC soldiers in the territory of the CAR from 26 October 2002 to 15 March 2003, which constituted the “facts and circumstances” in the present case, and that the criminal acts were merely “subsidiary facts” or “evidence”, “used in this case to establish the material fact”’ (at para [104]).

It is important to remember the central question raised by Bemba on appeal, namely, whether his conviction exceeded the charges against him. The relevant legal provision is art 74(2) of the Rome Statute of the ICC, which provides that, ‘The decision [of the Trial Chamber at the end of the trial] shall not exceed the facts and circumstances described in the charges and any amendments to the charges’. After a review of all relevant materials and decisions (including the Confirmation of Charges Decision) and the Trial Chamber’s final decision, the majority of the Appeal Chamber concluded that the Trial Chamber held Bemba criminally responsible for one murder, the rape of 20 persons and five acts of pillaging. These were the only criminal acts which were found to be within the scope of the charges (at para [118]).

2.2.2 *Ground of appeal (iii): ‘Command responsibility’*

Ever since the post-Second World War trial of General Tomoyuki Yamashita by a US Military Commission in Manila in the Philippines,

the doctrine of command responsibility, which was established in the Yamashita prosecution, remained a controversial, yet crucial part of international criminal law and the effort to end impunity for the worst crimes under international law (G Mettraux *The Law of Command Responsibility* (2009) 5-12; C Meloni *Command Responsibility in International Criminal Law* (2010) 42-48).

Regarding command responsibility as a basis for criminal liability under art 28(a) of the Rome Statute, the Trial Chamber in *Bemba* held that a commander should take 'all necessary and reasonable measures' to prevent subordinates from committing atrocity crimes. According to the Trial Chamber, 'all necessary and reasonable' measures is a measure to be established on a 'case-by-case' basis, focussing on the 'material power' of the commander (at para [121]). Considering all the evidence, the Trial Chamber held that Bemba had failed to take 'all necessary and reasonable measures within his power to prevent or repress the commission of crimes by his subordinates during the 2002-2003 CAR Operation, or to submit the matter to the competent authorities' (at para [136]). Regarding this finding by the Trial Chamber, it was noted by the Appeals Chamber that the Trial Chamber did not link Bemba's 'putative failure to take adequate measures to any of the specific criminal acts... which he was ultimately convicted of' (at para [136]).

The commander's duty should not be analysed in the abstract; it should be done with reference to the concrete situation on the ground and with reference to the real powers and capabilities of the commander in question. It is not about what the commander 'might theoretically have done' (at para [170]). Indeed, the majority in the *Bemba* appeals judgment noted that the commander's duty to take 'all necessary and reasonable measures', is 'intrinsically connected to the extent of a commander's material ability to prevent or repress the commission of crimes or to submit the matter to the competent authorities for investigation and prosecution' (at para [167]). This legal standard is also reflected in art 28 of the Rome Statute, which requires commanders to 'do what is necessary and *reasonable* under the circumstances' (at para [169]; emphasis as it appears in the judgment).

It was noted above that Bemba was held responsible for only a limited number of crimes committed by his subordinates in CAR during 2002-2003. The Trial Chamber, however, apparently expected Bemba to have taken preventive and suppressive measures with respect to the much broader finding of widespread MLC criminality in the CAR. Furthermore, the Appeals Chamber noted that Bemba was not sufficiently notified of all the preventive or suppressive measures which the Trial Chamber ultimately legally expected of him. For instance, the 'Corrected Revised Second Amended Document Containing the

Charges’ ‘did not specifically identify the redeployment of troops as a necessary and reasonable measure’ that Bemba should have taken. And yet, the Trial Chamber erroneously relied on this measure when finding that Bemba ‘had failed to take all necessary and reasonable measures’ (at para [188]). The Appeals Chamber thus found that there were ‘serious errors in the Trial Chamber’s assessment of whether Bemba took all necessary and reasonable measures to prevent or repress the commission of crimes by his subordinates or to submit the matter to the competent authorities for investigation and prosecution’ (at para [189]). In light of these serious errors by the Trial Chamber, the majority of the Appeals Chamber found that one of the elements of command responsibility under art 28(a) of the Rome Statute was not properly established. The majority of the Appeals Chamber thus concluded that Bemba could not be held criminally liable on the basis of command responsibility for the crimes committed by MLC troops during the 2002-2003 CAR Operation (at para [194]). As for the ‘underlying crimes’ for which Bemba was convicted (i.e. the one murder, the rape of 20 persons and five acts of pillaging) it was held by the majority of the Appeals Chamber that ‘the error identified in the Trial Chamber’s finding on necessary and reasonable measures’ extinguishes in full Bemba’s criminal liability for those crimes (at para [198]).

2.3 The Appeals Chamber’s decision

The Appeals Chamber of the ICC reversed Bemba’s conviction and entered an acquittal with respect to all the charges. Article 81(3)(c) of the Rome Statute determines that in case of an acquittal, the acquitted person should be released from detention immediately. Since Bemba was also convicted of offences against the administration of justice by another Trial Chamber of the ICC, it was left to that chamber (Trial Chamber VII) to determine Bemba’s continued detention. On 12 June 2018, Trial Chamber VII ordered his interim release under specific conditions. See, ‘Decision on Mr Bemba’s Application for Release’, ICC-01/05-01/13, (12 June 2018). He subsequently joined his family in Belgium, awaiting a final decision on his release.

2.4 The *Bemba* appeal decision in critical perspective

2.4.1 *A unanimous Appeals Chamber judgment is desirable, but not an absolute aim*

The ICC has thus far rendered a relatively small number of judgments, and, excluding *Bemba*, only three full appeal judgments on the merits (i.e. not interlocutory matters). It is therefore tempting to label almost

every judgment by this Court as a ‘milestone’, or ‘pivotal’, or ‘historic’. It is perhaps better to avoid overenthusiastic characterisations of ICC decisions and to rather leave some room to identify the real historic or ground-breaking judgments when they come to pass. This author would submit that the *Bemba* appeals judgment is such a judgment, and worthy of recognition as a pivotal judgment, with even more pivotal separate opinions (at least as far as the future development of international criminal law is concerned). I also don’t share the dismay expressed by some commentators about the Appeals Chamber’s inability to achieve consensus in this case (see critical remarks by L Sadat ‘Fiddling while Rome burns? The Appeals Chamber’s curious decision in Prosecutor v Jean-Pierre Bemba Gombo’ *EJILTALK: Blog of the European Journal of International Law*, 12 June 2018, available at <https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo/> accessed on 11 July 2018). Sadat argues that the legal issues which featured in the *Bemba* appeal were unresolved, and it was therefore desirable that a unanimous Appeals Chamber pronounced on these matters in order to bring more clarity, order and authority. This point of critique is not very persuasive. The Rome Statute in art 83(4) provides for the possibility of a divided bench in appeal matters. International practice is also varied, and many domestic appeal courts as well as other international criminal tribunals provide for instances where consensus cannot be reached between the judges. Indeed, judges Van den Wyngaert and Morrison have probably anticipated this critique, and have noted in their joint separate opinion, as follows:

‘Although we regret that despite our best efforts, the judges in this Appeal have not been able to reach unanimity, we accept that it is a fact of judicial life that judges do not always agree. This is true for national courts and tribunals, and perhaps even more for international courts, where the panels consist of judges from different legal backgrounds who must interpret and apply a body of the law that is relatively new and often open to diverging approaches and views. The ICC statute is full of “constructive ambiguities” that have displaced the discussion from the political level (the drafters of the Rome Statute) to the judicial level (the judges of the ICC). Unsurprisingly, some of these discussions remain alive and explain why it is sometimes difficult to reach unanimity. The ICC is far from unique in this respect.’

(‘Separate opinion, Judge Christine Van den Wyngaert and Judge Howard Morrison, ICC-01/05-01/08-3636-Anx2-08-06-2018 1/34 EC A, at para [2]).

2.4.2 *The standard of review: Is the majority's approach in Bemba an outlier, or a new standard for future appeal cases?*

A crucial point of difference between the majority and the minority was the standard of review. It is clear from the minority's 'Dissenting Opinion of Judge Sanji Monageng and Judge Piotr Hofmanski', ICC-01/05-01/08-3636-Anx1-Red 08-06-2018 1/269 EC A) that they have opted for the established standard of review adopted before *ad hoc* tribunals (ICTY and ICTR) as well as the ICC, namely that there should only be interference with a trial chamber's factual findings where the Appeals Chamber 'cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it' (Dissenting Opinion at para [9]). The majority, however, departed from the minority's apparent margin of deference to the Trial Chamber's factual findings, and opted for a more comprehensive approach regarding interference in factual findings. The majority established the standard of review as a *miscarriage of justice test*; that is, an appeal chamber is allowed to interfere with a trial chamber's factual findings if a failure to interfere would cause a miscarriage of justice in the broad sense of the word (*Bemba* judgement at para [38]; 'Concurring Separate Opinion, Judge Eboe-Osuji' ICC-01/05-01/08-3636-Anx3 14-06-2018 1/117 EC A, at para [72]).

The appropriate standard of review is an important legal and institutional matter for the ICC. It is generally true that a trial court is normally in the best position to make factual findings. However, the Appeals Chamber of the ICC is more than just a court of appeal or review. Heinze has, correctly, pointed out that the *Bemba* majority's broad approach to the standard of review should also be seen in light of the fact that the ICC Appeals Chamber is 'the end of the road' for any accused person before the ICC. There is no other court of review (for instance, a regional human rights court or a constitutional court) available for the convicted person (A Heinze, 'Some reflections on the Bemba Appeals Chamber Judgment' *Opinio Juris*, 18 June 2018, accessed at <http://opiniojuris.org/2018/06/18/some-reflections-on-the-bemba-appeals-chamber-judgment/> (11 Jul 2018)). The Appeals Chamber of the ICC must therefore function as an ordinary court of appeal, in addition to a kind of constitutional court, aimed at the advancement and protection of the ICC's fair trial and due process guarantees. The standard of review adopted by the majority in *Bemba* is a departure from international practice but should not be seen as an unacceptable outlier, to be 'corrected' by future appeal decisions. Indeed, I would suggest that the majority's approach may quite defensibly become the new norm.

2.4.3 *Other important issues*

The *Bemba* Appeal Chamber judgment, together with the majority separate opinion (Van den Wyngaert and Morrison JJ), the concurring separate opinion (Eboe-Osuji J) and the dissenting opinion (Monageng and Hofmanski JJ) provide ample material for further debate and analysis. An in-depth discussion of any or all of the many procedural and substantive issues in *Bemba* falls outside the scope of this contribution. On the evidentiary and procedural front there is, for instance, the issue of the quality and sufficiency of the evidence that was admitted and used by the Trial Chamber to convict Bemba of the various crimes. Again, there appears to have been a sharp divergence of opinion between the majority and the minority. While the majority raised several concerns about evidentiary issues (including the admissibility and weight of hearsay and anonymous hearsay, the weight of unsworn statements, and the cumulative effect of circumstantial evidence) the minority were far less concerned about these issues ('Separate opinion of Judge Van den Wyngaert and Judge Morrison', at paras [3]-[18]).

Bemba's acquittal by the Appeals Chamber does not mean that atrocity crimes were not committed in the CAR. The victims of the situation in the CAR can attest to that. Both the majority and minority opinions dealt with various issues surrounding the elements of crimes against humanity, notably the requirements of a widespread attack and of multiple commission, as well as the policy element. As with so many of the other legal and factual issues, the majority and the minority diverged in their findings as to whether the crimes committed in the CAR qualify as crimes against humanity, with the majority stating that the evidence did not support a finding of 'widespread attack' and of 'multiple commission'. They also found that the policy requirement for crimes against humanity was lacking (majority separate opinion at para [58]). The minority disagreed with this finding and stated in detail why they would characterise the crimes committed in the CAR as crimes against humanity (minority separate opinion at paras [489]-[552]).

2.4.4 *And what about the victims?*

Bemba's successful appeal means that victims of the atrocity crimes that were committed in the CAR during 2002-2003 are left without formal recourse in the form of victim reparations. However, on 13 June 2018 the Board of Directors of the Trust Fund for Victims at the ICC informed the President of the Assembly of States Parties to the Rome Statute of the ICC that the Trust Fund will accelerate an assistance programme for the victims of the situation in the CAR.

The assistance will take the form of material and psychological support and rehabilitation for the benefit of the victims and their families (ICC media statement: 'Following Mr Bemba's acquittal, Trust Fund for Victims at the ICC decides to accelerate programmes in Central African Republic' 13 June 2018, available at <https://www.icc-cpi.int/Pages/item.aspx?name=180613-TFVPR> accessed on 11 Jul 2018).