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A Commentary

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established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings.¹⁵⁴

- 57 This test has been further developed in appeals where the ICTY Appeals Chamber found that in light of the trial evidence and the additional evidence ‘a reasonable trier of fact could reach a conclusion of guilt beyond a reasonable doubt’¹⁵⁵. According to the case law, the Appeals Chamber must in such cases in ‘the interests of justice be convinced itself, beyond reasonable doubt, as to the guilt of the accused, before confirming a conviction on appeal’¹⁵⁶. Only then can it uphold the guilty verdict.

Accordingly, the guilty verdict can only be upheld ‘on the basis that a reasonable trier of fact could have arrived at a conviction on the evidence on the trial record in two cases: (i) if there is no additional evidence admitted; (ii) if additional evidence is admitted, but upon further review, is found to be not credible or irrelevant, so that it could not have been a decisive factor in reaching the decision at trial’¹⁵⁷.

- 58 The ICC Appeals Chamber might address the standard of review applicable to facts based on additional evidence in similar terms as the ICTY/ICTR Appeals Chambers, because the standard of review for factual errors appears to be essentially the same.

- 59 e) **Violation of the rights to a fair trial.** The Trial Chamber’s violations of the rights of the accused and any fair trial violations usually fall within the category of procedural errors or errors of law, as the case may be.¹⁵⁸ Article 83, para. 2 establishes a specific standard of review for such errors, in that it stipulates that the proceedings appealed from must have been unfair ‘in a way that affected the reliability of the decision or sentence’¹⁵⁹. Arguably, the standard is lower than the requirement that a procedural error or an error of law must have materially affected the impugned decision. Such a material effect may be difficult to establish because the trial proceedings are usually lengthy and effects of procedural decisions on the impugned decision cannot easily be detected, as many other factors may also come into the equation¹⁶⁰. The ‘reliability’ test, on the other hand, requires an assessment by the Appeals Chamber as to whether due to the unfairness that occurred in the proceedings, the impugned decision can still be relied upon. Such an assessment might require taking into account also the after-effects of the fair trial violation.

- 60 Establishing a violation of the right to a fair trial is, according to the jurisprudence of the ICTY/ICTR a two-step process. First, the right of the accused must have been infringed and second the violation must have ‘caused such prejudice to it as to amount to an error of law invalidating the judgement’¹⁶¹. ‘Thus, the element of prejudice forms an essential aspect of proof required of an appellant in relation to the appeal alleging a violation of his fair trial rights’¹⁶². In terms of the ICC Statute, it would arguably not be necessary to show that the

¹⁵⁴ *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, para. 75, see also para. 76; see also *Alfred Musema v. the Prosecutor*, ICTR-96-13-A, Judgement, ICTR Appeals Chamber, 16 November 2001, paras. 185–186, adopting this standard for the ICTR.

¹⁵⁵ *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004, para. 23.

¹⁵⁶ *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004, paras. 23, confirmed by *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, ICTY Appeals Chamber, 28 February 2005, para. 426.

¹⁵⁷ *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, ICTY Appeals Chamber, 28 February 2005, para. 428.

¹⁵⁸ See mn 34–35.

¹⁵⁹ *Lubanga Appeal Judgment*, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 28.

¹⁶⁰ See e.g. *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-321 OAA, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of proceedings, ICC Appeals Chamber, 12 December 2012, para. 45.

¹⁶¹ *Prosecutor v. Stanislas Galić*, IT-98-29-A, Judgement, ICTY Appeals Chamber, 30 November 2006, para. 21. *Prosecutor v. Dario Kordić and Mario Čerkez*, IT-05-14/2-A, Judgement, ICTY Appeals Chamber, 17 December 2004, para. 119.

¹⁶² *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, IT-01-47-A, Judgement, ICTY Appeals Chamber, 22 April 2008, para. 130.

prejudice led to an error of law that ‘invalidates’ the impugned decision. Essential is that the violation led to prejudice and that the unfairness as such (the prejudice suffered arguably being one aspect of it) makes the impugned decision unreliable, as required by article 83, para. 2.

If the rights of the accused were violated only by the impugned decision, the reliability standard would most likely not find application due to the formulation in article 83, para. 2 that ‘the proceedings appealed from’ needed to be unfair. Nevertheless in respect of such a violation, the formula applied by the *ad hoc* tribunals referred to in the previous margin number would most likely apply in ICC appeal proceedings too.

Arguably, the reliability standard in article 83, para. 1 is not applicable to the Prosecutor appealing an acquittal or sentence, because unfairness allegations could arguably only be raised in favour of the accused, as also indicated by article 81, para. 1(b)(iv)¹⁶³.

On the basis of the preceding paragraphs, the phrase in article 81, para. 1(b)(iv), ‘any other ground that affects the fairness or reliability of the proceedings or decision’, may add little to the other specified grounds of appeal. The apparent intention was to include a ‘catch-all’ provision in the case of appeals by or on behalf of the convicted person, to ensure that any miscarriage of justice would be capable of correction on appeal. Arguably, the addition may have been out of an abundance of caution, since it is likely that any valid grounds of appeal would fall within one of the other categories. Room for applying this provision might be only where it was not the (Pre-) Trial Chamber that ‘erred’, an implicit precondition for the other ‘errors’ listed in article 81, para. 1, but were the unfairness was caused e.g. by others, such as the Prosecutor as a party to the proceedings. Usually, the ‘waiver’ principle would require the accused to raise any such issues during the trial and would thereby trigger a decision of the relevant Chamber. As a consequence, this decision of the first-instance Chamber would then become the focus of the unfairness violations and transform the alleged unfairness violation into an alleged error by that Chamber. Arguably, unfairness allegations that may still fall within this catch-all provision are those that only came to light after the closure of the trial proceedings. Hence, it can be expected that additional evidence be produced in relation thereto.

Finally, unfairness allegations under subparagraph (b)(iv) must be distinguished from requests for a stay of proceedings because of breaches of the fundamental rights of the accused.¹⁶⁴

f) **Appeals against sentence.** As set out above,¹⁶⁵ article 81, para. 2 only mentions one ground of appeal, that of ‘disproportion between the crime and the sentence’, while article 83, para. 2 clarifies that also errors of law and fact as well as procedural errors may be raised against a sentencing decision. The ICC Appeals Chamber did not even further address this discrepancy but found in the first sentencing judgment that it reviews ‘any errors’ of the Trial Chamber and incorporated in its review errors of law and of fact as well as procedural errors. It held:

‘At the outset, the Appeals Chamber notes that article 83 (2) and (3) of the Statute clarifies that, with respect to appeals against sentencing decisions, the Appeals Chamber’s primary task is to review whether the Trial Chamber made any errors in sentencing the convicted person. The Appeals Chamber’s role is not to determine, on its own, which sentence is appropriate, unless – as stipulated in article 83 (3) of the Statute – it has found that the sentence imposed by the Trial Chamber is ‘disproportionate’ to the crime. Only then can the Appeals Chamber ‘amend’ the sentence and enter a new, appropriate sentence.’¹⁶⁶

¹⁶³ It is noteworthy in this context that the ICC Appeals Chamber in the Prosecutor’s appeal against an acquittal did omit reference to the ‘reliability’-standard in article 83, para. 2; see *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12-271-Corr A, Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’, 7 April 2015, para. 18.

¹⁶⁴ *Lubanga Appeal Judgment*, ICC-01/04-01/06-3121-Red A5, 1 December 2014, paras. 147–149.

¹⁶⁵ See mn 12.

¹⁶⁶ *Lubanga Sentencing Judgment*, ICC-01/04-01/06-3122 A4 A6, 1 December 2014, para. 39.