

Public Annex B7: Electronic copy of academic authority

Appellant's submissions of the list of authorities for the oral hearing, pursuant
to the Appeals Chamber's order ICC-01/05-01/08-3579

Schabbas, W., *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed., OUP 2016, pp. 1212-1213

the *Statute* of the unique role of the Prosecutor who, in the words of a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, is ‘not, or not only, a Party to adversarial proceedings but is an organ of the Tribunal and an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting’.³² When the provision was being drafted, appeal by the Prosecutor was a controversial proposition, especially when it concerned a verdict of acquittal. In some national justice systems, appeal of an acquittal is not allowed and may even be viewed as a violation of the *non bis in idem* principle.³³

The options available to the Appeals Chamber where it grants an appeal, in whole or in part, are dealt with in article 83.

Grounds for Appeal (Art. 81(1))

Article 81(1) authorizes both the Prosecutor and the convicted person to appeal on grounds of procedural error, error of fact, or error of law. The accused person—or the Prosecutor, acting on the accused person’s behalf—may invoke an additional ground: ‘Any other ground that affects the fairness or reliability of the proceedings or decision.’ The scope of the appeal is also addressed in article 83(2), which declares that for an appeal to be upheld, it must be shown that the decision ‘was materially affected by error of fact or law or procedural error’, or that ‘the proceedings appealed from were unfair in a way that affected the reliability of the decision’. The first decisions of the Court in application of article 81, only issued in 2014 and 2015, relied heavily on case law developed by the Appeals Chamber with respect to interlocutory appeals pursuant to article 82. Moreover, they also placed great reliance on the approach taken by the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda, ‘[h]aving regard to the similarity between the Court’s legal framework and those under which the ad hoc tribunals operate’.³⁴

Procedural error may result from a failure to comply with a mandatory requirement of the *Rome Statute*, the Rules of Procedure and Evidence, or another provision of the applicable law. It may also be a consequence of exercise of discretion in a procedural context by the Trial Chamber, such as setting a time delay for a particular act that is not reasonable under the circumstances. According to the Appeals Chamber, ‘it must be possible to raise procedural errors on appeal pursuant to article 81(1)(a)(i) of the Statute in relation to decisions rendered during trial, and such errors may lead to the reversal of a decision under article 74 of the Statute, provided that it is materially affected by such errors’. The Appeals Chamber said that ‘to decide otherwise would deprive the parties of the ability to raise procedural errors on appeal’. It added that this is the case regardless of whether the Trial Chamber proceedings were on an *ex parte* basis.³⁵ The Prosecutor, as well as the

References [International Criminal Court Rules of Procedure and Evidence \(International Criminal Court \[ICC\]\) ICC-ASP/1/3 \(Part II-A\), UN Doc PCNICC/2000/1/Add.1](#) Lašva Valley, Prosecutor v

Kupreškić (Zoran) and ors, Trial judgment, Case No IT-95-16-T, ICL 98 (ICTY 2000), 14th January 2000, United Nations Security Council [UNSC]; International Criminal Tribunal for the former Yugoslavia [ICTY]; Trial Chamber II [ICTY] ICL Rome Statute of the International Criminal Court (International Criminal Court [ICC]) 2187 UNTS 3, UN Reg No I-38544, UN Doc A/CONF.183/9Part 6 The Trial, Art.74Part 8 Appeal and Revision, Art.81, (1)Situation in the Democratic Republic of the Congo, Prosecutor (on the application of Victims) v Lubanga Dyilo (Thomas), Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Case No ICC-01/04–01/06 A 5, ICC-01/04-01/06-3121-Red, ICL 1653 (ICC 2014), 1st December 2014, International Criminal Court [ICC]; Appeals Chamber [ICC] ICL

(p. 1213) defence, may invoke procedural errors on appeal, '[g]iven the Trial Chamber's duty to contribute to the establishment of the truth'.³⁶

It has been held that 'not all procedural errors vitiate the proceedings. Only errors that occasion a miscarriage of justice would vitiate the proceedings.'³⁷ These include 'procedural errors that would affect the fairness of the trial', but not 'procedural errors that could be corrected or waived or ignored (as immaterial or inconsequential) without injustice to the parties'.³⁸ As Judge Eboe-Osuji has noted, 'a decision does not become unreliable on account of a procedural impurity that did not resonate in its outcome'.³⁹ The Appeals Chamber said this requirement is explained 'by the fact that a Trial Chamber's decision, at the end of what will often have been a lengthy trial, should not be disturbed lightly'. Especially in a case of an appeal from an acquittal, 'it is not justifiable to put the person through the ordeal of a new trial or even to reverse the acquittal and enter a conviction, unless it is shown that the error indeed materially affected the decision under review'.⁴⁰

Allegations of procedural error may involve pre-trial proceedings before the Pre-Trial Chamber or the Trial Chamber as well as the trial itself. Because the test is whether the decision was materially affected by the procedural error, the appellant must show that without the error the decision 'would have substantially differed from the one rendered'.⁴¹ But there is considerable deference to the Pre-Trial Chamber. The Appeals Chamber will not interfere with the exercise of discretion by a Pre-Trial Chamber 'merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the Pre-Trial Chamber'.⁴² Insisting that this is consistent with the practice of other international tribunals as well as domestic courts, the Appeals Chamber has said it will only interfere with the exercise of discretion by the Pre-Trial Chamber '(i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion'.⁴³

Error of law is treated differently. There, the Appeals Chamber shows no deference to the Trial Chamber, but reaches its own conclusions about the interpretation and application of the law by the Trial Chamber. Nevertheless, when it identifies an error of law it will only intervene if this materially affected the impugned decision.⁴⁴ By 'materially affected', the

Appeals Chamber means that had the error not been made, the Trial Chamber would have reached a ‘substantially different’ result.⁴⁵ The statutes of the ad hoc

References CDF Trial, *Prosecutor v Fofana (Moinina) and Kondewa (Allieu)*, Appeals Chamber judgment, Case No SCSL-04-14-A, 28th May 2008, Special Court for Sierra Leone [SCSL]; Appeals Chamber [SCSL] *Situation in Darfur, Sudan, Prosecutor v Banda (Abdallah Banda Abakaer Nourain) and Jerbo (Saleh Mohammed Jerbo Jamus)*, Decision on the defence request for a temporary stay of proceedings (and Concurring Separate Opinion of Judge Eboe-Osuji), Case No ICC-02/05-03/09, ICC-02/05-03/09-410, 26th October 2012, International Criminal Court [ICC]; Trial Chamber IV [ICC]

³² *Kupreškić et al.* (IT-95-16-T), Decision on Communication between the Parties and their Witnesses, 21 September 1998.

³³ Robert Roth and Marc Henzelin, ‘The Appeal Procedure of the ICC’, in Cassese, *Rome Statute*, pp. 1535–58, at pp. 1542–3; Helen Brady and Mark Jennings, ‘Appeal and Revision’, in Lee, *The Making of the Rome Statute*, pp. 294–304, at p. 297.

³⁴ *Lubanga* (ICC-01/04-01/06 A 5), Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, para. 27.

³⁵ *Ngudjolo* (ICC-01/04-02/12 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. 3.

³⁶ *Ibid.*, para. 257. Also: *Ngudjolo* (ICC-01/04-02/12), Joint Dissenting Opinion of Judge Ekaterina Trendafilova and Judge Cuno Tarfusser, 27 February 2015, para. 5.

³⁷ *Fofana et al.* (SCSL-04-14-A), Judgment, 28 May 2008, para. 35.

³⁸ *Ibid.*

³⁹ *Banda et al.* (ICC-02/05-03/09), Concurring Separate Opinion of Judge Eboe-Osuji, 26 October 2012, para. 49, fn. 104.

⁴⁰ *Ngudjolo* (ICC-01/04-02/12 A), Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’, 27 February 2015, para. 284.

⁴¹ *Lubanga* (ICC-01/04-01/06 A 5), Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, para. 19; *Ngudjolo* (ICC-01/04-02/12 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. 21; also para. 247.

⁴² *Lubanga* (ICC-01/04-01/06 A 5), Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, para. 20; *Ngudjolo* (ICC-01/04-02/12 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. 21.

⁴³ *Lubanga* (ICC-01/04-01/06 A 5), Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, para. 20.

⁴⁴ Ibid.

⁴⁵ Ibid.