

Public Annex B13: 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

Triffterer, O. and Ambos, K., eds., *The Rome Statute of the International Criminal Court:
A Commentary*, 3rd ed., Beck et al. 2016

Article 81: pp. 1920, 1924, 1930, 1933, 1937-1941

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the investigation and prosecution of conduct under article 70 adheres to the legal framework for the investigation and prosecution of article 5 crimes²⁵. The deviations from the regular procedural framework specifically foreseen in those provisions do not apply to the appeals scheme of article 81 to 83. Nevertheless, they clarify that its application is subject to a *mutatis mutandis* assessment²⁶.

- 8 Paragraph 1 provides three grounds on which the Prosecutor can appeal and four grounds on which an appeal can be brought by the convicted person or the Prosecutor on that person's behalf. It may be noted that the possibility of the prosecution appealing on behalf of a convicted person is one that is well-established in some legal systems²⁷, reflecting the prosecution's non-partisan duty to truth and justice²⁸.

The ILC was of the view that the right to appeal should exist equally for the Prosecutor and the convicted person²⁹. At the Preparatory Committee in 1996, there appeared to be a divergence of views on this issue, one view being to keep equality, another being to limit appeals by the Prosecutor to errors of law, and another being to allow the convicted person to appeal on any substantive grounds³⁰. The Zutphen Report included only the first three grounds (in square brackets) for both the Prosecutor and the convicted person, with an alternative square-bracketed proposal that would have allowed appeals by either 'without any specified grounds'³¹. The fourth ground of appeal, available only to the convicted person or the Prosecutor appealing on that person's behalf, was included in the 1998 Preparatory Committee Report³². It is however questionable whether this fourth ground adds significantly to the first three³³.

- 9 The definition of each of the specified grounds of appeal under this paragraph, and the corresponding standards of review on appeal, are considered at mn 34-63.

²⁵ See *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, ICC-01/05-01/13-558 OA2, Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled 'Decision on the 'Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba'', Appeals Chamber, 11 July 2014, para. 14 (specifically for article 58 and 60); see also H. Brady, in: Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) 576 note 2.

²⁶ Rule 163(1) RPE.

²⁷ E.g., Germany: Code of Criminal Procedure (Strafprozeßordnung), § 296 para. 2 (available under <https://www.legal-tools.org/doc/ef2d9d/>); see also Instituto Iberoamericano de Derecho Procesal, *Código Procesal Penal modelo para Iberoamérica* (Model Code of Criminal Procedure for Latin America) article 332 (1989).

²⁸ See *Prosecutor v. Kupreskić et al.*, IT-95-16-T, Decision on Communication Between the Parties and their Witnesses, Trial Chamber, 21 Sep. 1998 (available under <https://www.legal-tools.org/doc/6e80ec/>) ('... the Prosecutor of the Tribunal 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'); *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), Appeals Chamber, 31 March 2000, Separate Opinion of Judge Shahabuddeen, para. 68 (available under <https://www.legal-tools.org/doc/1c0fe7/>) ('The Prosecutor of the ICTR is not required to be neutral in every case; she is a party. But she is not of course a partisan. ... The implications of that requirement suggest that, while a prosecution must be conducted vigorously, there is room for the injunction that prosecuting counsel ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice'). See also Staker and Nerlich, *article 84*, mn 6.

²⁹ 1994 ILC Draft Statute with commentaries, 125.

³⁰ Report of the Preparatory Committee on the establishment of an International Criminal Court, i, A/51/22 ('1996 Preparatory Committee Report I'), para. 295 (available under <http://www.legal-tools.org/doc/e75432/>).

³¹ Report on the inter-sessional meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, A/AC.249/1998/L.13, 4 February 1998, ('Zutphen Draft') (available under http://www.legal-tools.org/uploads/tx_ltpdb/doc21423.pdf), 134.

³² Report of the Preparatory Committee on the establishment of an International Criminal Court, A/CONF.183/2/Add.1, 14 April 1998, ('1998 Preparatory Committee Draft'), (available under http://www.legal-tools.org/uploads/tx_ltpdb/doc21486.pdf), 125.

³³ See mn 62.

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within its powers, how to proceed with an 'incorrect' decision. In that respect, the Appeals Chamber's powers are arguably more akin to those of a Trial Chamber⁵³.

- 23 Grounds of appeal are the basis for the Appeals Chamber's review. The Statute reinforces this by providing in article 83, para. 2(b) and (c) that, where the Appeals Chamber decides to extend the review of the Trial Chamber's decisions to either the conviction or the sentencing decision, it is required to seek grounds of appeal in relation to that decision from the parties. Accordingly, only those grounds establish the basis for the Appeals Chamber's review of that decision⁵⁴.
- 24 In the practice of the ICC and international(ised) tribunals, the Appeals Chambers *dismiss* grounds of appeal if they a) do not meet the requirements of substantiation, or, in the language of the *ad hoc* tribunals, are subject to summary dismissal, see below mn 28–30 or b) fall under the 'waiver' principle; see below mn 31–32. When dismissing a ground of appeal, the Appeals Chambers do not consider the merits of the alleged error. The Appeals Chambers use a different terminology when considering the merits of a ground of appeal but finding it to be unfounded. In this case, it is their practice to reject a ground of appeal. If a ground of appeal is rejected, it is found not to meet the standard of review applicable to the alleged error.
- 25 The Rome Statute introduces grounds of appeal and the standard of review differently from the statutes of the *ad hoc* tribunals. Article 81, paras 1 and 2, list the grounds of appeal that appellants may raise against decisions pursuant to articles 74 and 76. The standard of review, however, is implicitly dealt with in article 83, para. 2, a provision addressing foremost the powers of the Appeals Chamber⁵⁵. It determines that the Appeals Chamber's exercise of the powers described therein finds only application if 'the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of law or procedural error'. On this basis, the ICC Appeals Chamber has described its scope of review for appeals under article 81, paras 1 and 2, in the following terms:

'Pursuant to article 81 (1) (b) of the Statute, in an appeal against a conviction decision, the convicted person may raise (i) procedural errors, (ii) errors of fact, or (iii) errors of law, as well as (iv) '[a]ny other ground that affects the fairness or reliability of the proceedings or decision'. Article 83 (2) of the Statute also establishes that the Appeals Chamber may only interfere with a conviction decision if the error of fact or law or a procedural error 'materially affected' that decision, and, in respect of unfairness allegations, that the unfairness 'affected the reliability of the decision'.⁵⁶

It is noteworthy that the ICC Appeals Chamber has applied a similar standard of review with respect to article 82 appeals, without, however, making explicit reference to article 83, para. 2. The Appeals Chamber has held from the issuance of the first article 82(1) judgment that the alleged (legal) error must 'materially affect' the impugned decision⁵⁷. In the first article 81 appeal judgment, the Appeals Chamber has acknowledged that the standards of review for appeals under article 81 and for those under article 82 are – with respect to the requirement that the alleged error must materially affect the impugned decision – the same⁵⁸.

- 26 The ICTY/ICTR Statutes address the grounds of appeal and the standard of review in one single provision requiring 'an error on a question of law' to invalidate the decision and 'an error on fact' to occasion 'a miscarriage of justice'⁵⁹. The SCSL Statute adds to this list a 'procedural error' but without indicating the applicable standard of review⁶⁰. According to its

⁵³ See mn 36–39; see also Staker and Eckelmans, *article 83*, mn 5–13.

⁵⁴ See mn 71.

⁵⁵ See Staker and Eckelmans, *article 83*, mn 5.

⁵⁶ *Lubanga Appeal Judgment*, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 16.

⁵⁷ *Democratic Republic of the Congo*, ICC-01/04-169 OA, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', 13 July 2006, para. 84.

⁵⁸ See *Lubanga Appeal Judgment*, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 17.

⁵⁹ Article 25 ICTY Statute, article 24 ICTR Statute; see also rule 104 ECCC Internal Rules.

⁶⁰ Article 20 SCSL Statute.

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Having this in mind, both categories of errors may relate to violations of the rights of the accused or of fair trial requirements. In addition, both errors need to also 'materially affect' the impugned decision as clarified by article 83, para. 2 and the ICC Appeals Chamber⁹⁶. The main distinction lies, as in the practice of the ICTY/ICTR Appeals Chambers, in the higher substantiation requirements for procedural errors and the concomitant scope of review that is more limited. As indicated above⁹⁷, the appellant needs to refer to the record of the proceedings in order to substantiate the alleged error and to explain why the alleged error in the proceedings materially affected the impugned decision by showing that, 'in the absence of the procedural error, the judgment would have substantially differed from the one rendered'⁹⁸. Furthermore, the 'waiver' principle is more relevant to procedural errors than to legal errors in the impugned decision itself.

- 35 An alternative way of addressing this matter is that proposed in the previous editions of this commentary on article 81, suggesting that procedural errors fall into two categories – those relevant to the non-compliance with mandatory procedural requirements of the Statute and the Rules including the rights of the accused on the one hand and those relevant to the exercise of discretion on the other.⁹⁹ Accordingly, while not clearly stipulated in those editions, errors of law alleged in decisions under article 74 would only be those relevant to the substantive law of the Court (the crimes and the individual criminal responsibility), while other errors would be defined as procedural errors; a distinction that would allow for a better categorisation of the different errors. However, different from the distinguishing criterion discussed under mn 34, such distinction would not be applicable to article 82 appeals as they usually address errors relevant to the ICC's procedural law, to the ICC's jurisdictional limits and interim release provisions. In addition, legal errors in sentencing may e.g. be those relevant to the Trial Chamber's application of rule 145(1)(c) RPE.¹⁰⁰ Accordingly, such distinction would solely provide assistance in distinguishing between procedural and legal errors for the purposes of appeals against a conviction or an acquittal.

Below, errors relevant to the exercise of the Trial Chamber's discretion are discussed under the heading 'procedural errors', even though such errors might – depending on the distinguishing criterion that is applied – fall within the category of 'errors of law'¹⁰¹. In addition, having a good perception of errors arising in exercising discretion is also essential to 'errors of fact'. Errors relevant to the rights of the accused and a fair trial are discussed separately, as they establish arguably a separate (sub-)category of errors. See mn 59 to 63.

- 36 b) **Error of law.** The error of law, as an error distinct from a procedural error, endows the Appeals Chamber with a broad scope of review. As discussed above, the Appeals Chamber in determining whether the Trial Chamber erred in its legal analysis is not bound by the arguments of the parties or the considerations of the Trial Chamber but will arrive at its own conclusions as to the appropriate law¹⁰². When the Appeals Chamber finds that the Trial Chamber committed such an error, the Appeals Chamber needs to decide whether this error had repercussions on the Trial Chamber's overall conclusions (material effect). As to the material effect, the ICC Appeals Chamber held:

the jurisdiction of the Court pursuant to article 19 (2) of the Statute, they can be raised as errors in an appeal pursuant to articles 19 (6) and 82 (1) (a) of the Statute.').

⁹⁶ *Lubanga Appeal Judgment*, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 20.

⁹⁷ See mn 28.

⁹⁸ *Lubanga Appeal Judgment*, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 20.

⁹⁹ Staker, *article 18*, in: O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court*, (2nd edition), paras. 23–27.

¹⁰⁰ See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3122 A4 A6, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the 'Decision on Sentence pursuant to Article 76 of the Statute, 1 December 2014, para. 50.

¹⁰¹ In particular in respect of appeals under article 82 that often relate to discretionary decisions of the Pre-Trial or Trial Chamber.

¹⁰² See mn 29.

the Appeals Chamber may, rely legally reassess the factual Appeals Chamber's review. ber may – to a degree – step t of the evidence as well as the primary competence of a ose findings¹⁰⁷. Arguably, the ave not yet found a common r the appellant challenges the i of fact in that respect. The ence in e.g. interpreting the en this power is not applied

ed different paths in dealing gal error although it perhaps er's interpretation of the law. agned decisions¹¹⁰. On other ber when it determined that decision¹¹¹. The first-instance ie case before them, to apply e occasions, the ICC Appeals ling the matter¹¹². In the first

als Chamber, paras. 161, 162, 163, gs of the Trial Chamber, taken as a 09 and 118(A) of the Rules, to the ional Criminal Law (2011), p. 248; it, Appeals Chamber, 16 November ting Opinion of Judge Pocar, paras. le 81, para. 7.

3, Judgment on the appeal of Mr er 2012 entitled 'Decision on the ng the charges against the accused al-tools.org/fr/doc/9d87d9/'), paras. gment on the appeal of Mr Laurent tion and stay of the proceedings, 2C-01/04-01/06-1432 OA9 OA10, Chamber I's Decision on Victim

ummed Jerbo Jamus, ICC-02/05-03/ in and Mr Saleh Mohammed Jerbo Decision on the Defence's Request , 28 August 2013, para. 46; ICC-02/ decision of Trial Chamber IV of statements (ICC-02/05-03/09-199) 'utor v. Francis Kirimi Muthaura, OA3, Judgment on the appeal of the titled 'Decision with Respect to the 10 November 2011, paras 71-72; ie appeal of Mr Germain Katanga e Request Concerning Languages',

A6, Judgment on the appeals of Mr amber III entitled 'Decision on the 'evidence', 3 May 2011, para. 82; Judgment on the appeals of Mr of 14 July 2009 entitled 'Decision e facts may be subject to change in er 2009, para. 112; see also Staker

reparation proceedings in the *Lubanga* case, the ICC Appeals Chamber amended the Trial Chamber's reparation order upon finding several errors¹¹³.

In relation to the standard of review to be applied in case where there is both an error of law and an alleged error of fact ('mixed errors of fact and law'), the ICTY Appeals Chamber has said that it will first examine the applicable law and then determine whether the factual conclusion of the Trial Chamber was one which no reasonable trier of fact could have reached¹¹⁴.

The proper substantiation of such combined errors is of particular difficulty. Not only should the appellant explain – to the high substantiation standards – where the factual error lies and how such an error affected the Trial Chamber's overall conclusion based on the Trial Chamber's – allegedly wrong – legal standard. But the appellant should also substantiate how the – allegedly correct – legal standard with and without the allegedly erroneous factual findings affected the overall conclusions. Problematic in respect of the latter is that the Appeals Chamber may possibly perceive the law in a slightly different way than the Trial Chamber on the one hand and the party or parties on the other.

c) **Procedural error.** As addressed above¹¹⁵, procedural errors pertain to the conduct of the trial proceedings. The management of the trial proceedings, however, is, except where mandatory legal requirements apply, within the discretion of the Trial Chamber that needs to take its decisions within the confines of the requirements of a fair and expeditious trial (article 64 (2)), respecting thereby the rights of the accused (article 67). The Trial Chamber's procedural decisions may also be based on its assessment of certain materials, e.g. in relation to disclosure, that may also lead to alleging errors of fact within a procedural error.

The ICC Appeals Chamber has held that the applicable standard of review with respect to discretionary decisions – be it in article 82 or article 81 (1) or (2) appeals – is:

'79. The Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion [...] 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.

80. [...] [T]he Appeals Chamber's functions extend to reviewing the exercise of discretion by the Pre-Trial Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion [...], save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions. The jurisprudence of other international tribunals as well as that of domestic courts endorses this position. They identify the conditions justifying appellate interference to be: (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.¹¹⁶

and Eckelmans, article 83, mn 13; *Situation in Darfur*, ICC-01/05-177 OA OA2 OA3, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007, 2 February 2009, para. 8.

¹¹³ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3129 A A2 A3, Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012, 3 March 2015, see e.g. para. 76.

¹¹⁴ *Prosecutor v. Pavle Strugar*, IT-01-42-A, Judgement, ICTY Appeals Chamber, 17 July 2008, paras. 252, 269.

¹¹⁵ See mn 34-35.

¹¹⁶ *Prosecutor v. Joseph Kony et al.*, ICC-02/04-01/05-408 OA3, Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009, ICC Appeals Chamber, 16 September 2009, paras. 79-80; see *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-307 OA, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', 30 August 2011, paras. 89-90; see also *Lubanga* Sentencing Judgment, ICC-01/04-01/06-3122 A4 A6, 1 December 2014, paras. 41-42, making this standard applicable to sentencing appeals.

'since the Prosecution must establish the guilt of the accused at trial, the significance of an error of fact occasioning a miscarriage of justice takes on a specific character when alleged by the Prosecution. This is because it has the more difficult task of showing that there is no reasonable doubt about the appellant's guilt when account is taken of the Trial Chamber's errors of fact.'¹³⁵

Hence, considering that the Prosecutor bears the burden of proof in a trial, it held that the Prosecutor need to show that all reasonable doubt of the accused's guilt has been eliminated.¹³⁶ Accordingly, the ICTY Appeals Chamber held with respect to acquittal appeals that 'it will reverse only if it finds that no reasonable trier of fact could have failed to make the particular finding of fact beyond reasonable doubt and the acquittal relied on the absence of this finding'¹³⁷.

The ICC Appeals Chamber has adopted the ICTY/ICTR Appeals Chambers' jurisprudence 48 on the review of errors of fact in its first final appeal judgments, holding:

'when a factual error is alleged, the Appeals Chamber will determine whether a reasonable Trial Chamber could have been satisfied beyond reasonable doubt as to the finding in question. The Appeals Chamber will not assess the evidence *de novo* with a view to determining whether it would have reached the same factual conclusion as the Trial Chamber.'¹³⁸

According to the Appeals Chamber's jurisprudence on article 82 appeals, factual errors have to meet the following standard of review:

'Regarding factual errors, the Appeals Chamber has held that it will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts. As to the 'misappreciation of facts', the Appeals Chamber has also stated that it 'will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.'¹³⁹

While the Statute does not spell out that a factual error should occasion a 'miscarriage of 49 justice', as the ICTY/ICTR Statutes do, article 83, para. 2 clarifies that it needs to materially affect the impugned decision. This sounds on the face of it like a lesser standard than that of a 'miscarriage of justice', but this remains to be seen on the basis of future case law.

The ICTY/ICTR jurisprudence stipulates in the following terms that the alleged factual 50 error can relate to any finding relevant to the case:

'... a trier of fact is called upon to make findings beyond reasonable doubt based on all of the evidence on the trial record – direct or circumstantial – not only on facts which are essential to proving the elements of the crimes and the forms of responsibility. There might be other facts that need to be proven beyond reasonable doubt due to the way in which the case was pleaded in the indictment and presented during trial to the Defence and to the Trial Chamber. All facts underlying

¹³⁵ *Prosecutor v. Milorad Krnojelac*, IT-07-25-A, Judgement, ICTY Appeals Chamber, 17 September 2003, para. 14; also *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, ICTR-96-3-A, Judgement, ICTR Appeals Chamber, 6 May 2003, para. 24.

¹³⁶ *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, ICTR-96-3-A, Judgement, ICTR Appeals Chamber, 6 May 2003, para. 24; *Prosecutor v. Fatmir Limaj et al.*, IT-03-66-A, Judgement, ICTY Appeals Chamber, 27 September 2007, para. 13.

¹³⁷ *Prosecutor v. Vidjoje Blagojević and Dragan Jokić*, IT-02-60-A, Judgement, ICTY Appeals Chamber, 9 May 2007, para. 9; see also with respect to rule 98bis(B) RPE appeals: *Prosecutor v. Jelisić*, IT-95-10-A, Judgement, ICTY Appeals Chamber, 5 July 2001, stating 'thus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence ... but whether it could'; this standard has been accepted by the ICC Appeals Chamber, 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. 26.

¹³⁸ *Lubanga Appeal Judgment*, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 27.

¹³⁹ *Lubanga Appeal Judgment*, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 21; making reference *inter alia* to *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-307 OA, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', 30 August 2011, para. 56.

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the elements of the crime or the form of responsibility alleged as well as all those, which are indispensable for entering a conviction, must be proven beyond reasonable doubt.¹⁴⁰

- 51 This conveys that every fact that is necessary to establishing the elements of the crime and the individual criminal responsibility of the accused needs to be proved beyond reasonable doubt, even if a certain fact only leads indirectly to the conclusion that a certain other fact (e.g. the death of a person, a certain state of mind) existed. In respect of such circumstantial evidence, the ICTY Appeals Chamber has held:

'The Appeals Chamber also recalls that, in order to successfully challenge the trial chamber's assessment of circumstantial evidence on appeal, an appellant must show that no reasonable trier of fact could have found that the conclusion reached by the trial chamber was the only reasonable inference.'¹⁴¹

- 52 The ICTY/ICTR Appeals Chambers have also consistently said that a Trial Chamber is entitled to rely, in relation to a crucial fact, on the uncorroborated testimony of a single witness¹⁴². However, a reasonable Trial Chamber must take into account the difficulties associated with identification evidence in a particular case and must carefully evaluate any such evidence, before accepting it as the sole basis for sustaining a conviction¹⁴³.

- 53 Substantiating a factual error requires the appellant to show that the Trial Chamber's finding was unreasonable and that this had a material effect on the impugned decision. The Appeals Chambers have taken these requirements very seriously and have dismissed allegations that do not adhere to these requirements without considering, even partly, their merits¹⁴⁴. In that context, it is of the essence for the appellant to demonstrate that the overall conclusion of the Trial Chamber is based, at least to an essential part, on the allegedly erroneous factual finding. Where a plurality of factual errors is alleged that may only as a whole have a material effect on the impugned decision, an appellant may best allege one ground of appeal with different sub-sets of errors, setting out precisely their interrelation and the effect on the overall conclusions of the Trial Chamber.

- 54 Arguably, it is difficult to substantiate a ground of appeal if the Trial Chamber's factual findings and conclusions are not properly reasoned. The Appeals Chamber's task to review such findings is also harder in such a situation. According to the jurisprudence of the *ad hoc* tribunals, lack of reasoning should be alleged as a separate error, be it a procedural error or an error of law.¹⁴⁵ In this context, it is noted that article 74 establishes as a compulsory requirement that the decision on guilt or innocence shall 'contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions'. The ICTY Appeals Chamber has held that proper reasoning is part of the fair trial requirements¹⁴⁶. In particular with respect to the requirements of a Trial Chamber's decision on guilt or innocence, it held:

¹⁴⁰ *Prosecutor v. Sefar Halilović*, IT-01-48-A, Judgement, ICTY Appeals Chamber, 16 October 2007, para. 129; see also *Prosecutor v. Vasiljević*, IT-98-32-A, Judgement, ICTY Appeals Chamber, 25 February 2004, para. 131.

¹⁴¹ *Prosecutor v. Milan Lukić and Sredoje Lukić*, IT-98-32/1-A, Judgement, ICTY Appeals Chamber, 4 December 2012, para. 149.

¹⁴² *Prosecutor v. Tadić*, IT-94-1-A, Judgement, Appeals Chamber, 15 July 1999, para. 65 (available under <http://www.legal-tools.org/doc/8efc3a/>); *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, Judgement, ICTY Appeals Chamber, 20 February 2001, paras. 492, 506; *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, para. 33; *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, ICTR-96-3-A, Judgement, ICTR Appeals Chamber, 6 May 2003, paras. 27-29; see also *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 218.

¹⁴³ *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, paras. 34-40; see also *Prosecutor v. Milan Lukić and Sredoje Lukić*, IT-98-32/1-A, Judgement, ICTY Appeals Chamber, 4 December 2012, paras. 118-119 on the difference between identification and recognition witnesses and the requirements of a reasoned opinion.

¹⁴⁴ See mn 31.

¹⁴⁵ See mn 34, 35.

¹⁴⁶ *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, IT-01-47-A, Judgement, ICTY Appeals Chamber, 22 April 2008, para. 13; *Prosecutor v. Anto Furundžija*, IT-95-17/1-A, Judgement, ICTY Appeals Chamber, 21 July 2000, para. 69.

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6 October 2007, para. 129;
February 2004, para. 131.
Appeals Chamber, 4 Decem-

para. 65 (available under
16-21-A, Judgement, ICTY
et al., IT-95-16-A, Judge-
dubumwe Rutaganda v. The
27-29; see also Lubanga

chamber, 23 October 2001,
Judgement, ICTY Appeals
and recognition witnesses

, ICTY Appeals Chamber,
ICTY Appeals Chamber,

'With regard to legal findings, this obligation does not require a trial chamber to discuss at length all of the case-law of the International Tribunal on a given legal issue but only to identify the precedents upon which its findings are based. With regard to factual findings, a Trial Chamber is required only to make findings on those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record. In short, a Trial Chamber should limit itself to indicating in a clear and articulate yet concise manner, which, among the wealth of jurisprudence available on a given issue and the myriad of facts that emerged at trial, are the legal and factual findings on the basis of which it reached the decision either to convict or acquit an individual. A reasoned opinion consistent with the guidelines provided here allows for a useful exercise of the right of appeal by the Parties and enables the Appeals Chamber to understand and review the Trial Chamber's findings as well as its evaluation of the evidence.'¹⁴⁷

The ICTY/ICTR Appeals Chambers have said that if a judgment is too vague, they will 55
have to determine themselves whether they are satisfied beyond reasonable doubt in regard
to the disputed finding¹⁴⁸. If an appellant omits to allege lack of reasoning as a separate error,
the Appeals Chamber may wish to consider whether to nevertheless address it, be it
implicitly when considering a related factual error.

cc) Error of fact based on additional evidence presented on appeal. The second type of 56
error of fact arises where the decision of the Trial Chamber based on the evidence presented
at trial is perfectly reasonable, but is subsequently shown to be incorrect as a result of
additional evidence presented on appeal¹⁴⁹. Strictly speaking, this is not an error of fact by
the Trial Chamber, but the Appeals Chamber adjusts the Trial Chamber's factual assessment
within the limits of the admissibility of such evidence¹⁵⁰. The criteria for the admissibility of
additional evidence are discussed below in Staker and Eckelmans, *article 83*, mn 45 to 58. The
ICC Appeals Chamber did not yet express itself on its scope of review of the impugned
decision on the basis of admitted additional evidence, because it did not admit additional
evidence in its first final appeals¹⁵¹. However, the ICTY/ICTR Appeals Chambers have
developed the following case law:

'Where additional evidence has been admitted, the Appeals Chamber is then required to determine
whether the additional evidence actually reveals an error of fact of such magnitude as to occasion a
miscarriage of justice.'¹⁵²

'... miscarriage of justice may ... be occasioned where the evidence before a Trial Chamber
appears to be reliable but, in the light of additional evidence presented upon appeal, is exposed as
unreliable. It is possible that the Trial Chamber may reach a conclusion of guilt based on the
evidence presented at trial that is reasonable at the time... but, in reality, is incorrect.'¹⁵³

'... The test to be applied by the Appeals Chamber in deciding whether or not to uphold a
conviction where additional evidence has been admitted before the Chamber is: has the appellant

¹⁴⁷ *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, IT-01-47-A, Judgement, ICTY Appeals Chamber, 22 April 2008, para. 13; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, ICTY Appeals Chamber, 28 February 2005, para. 23; *Prosecutor v. Dario Kordić and Mario Cerkez*, IT-05-14/2-A, Judgement, ICTY Appeals Chamber, 17 December 2004, para. 382; *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, para. 39; *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, Judgement, ICTY Appeals Chamber, 20 February 2001, para. 498; *Prosecutor v. Kunarac et al.*, IT-96-23 and IT-96-23/1-A, Judgement, Appeals Chamber, 12 June 2002, para. 41.

¹⁴⁸ *Ferdinand Nahimana et al v. The Prosecutor*, ICTR-99-52-A, Judgement, ICTR Appeals Chamber, 28 November 2007, para. 736; *Naletilić and Martinović Appeal Judgement*, para. 603; *Prosecutor v. Fatmir Limaj et al.*, IT-03-66-A, Judgement, ICTY Appeals Chamber, 27 September 2007, para. 81.

¹⁴⁹ See the discussion in *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, paras. 42-47.

¹⁵⁰ The purpose arguably being an alignment with the real events, i.e. the truth.

¹⁵¹ See *Lubanga Appeal Judgment*, ICC-01/04-01/06-3121-Red A5, 1 December 2014, paras. 65-113; on the admissibility of additional evidence, see Staker and Eckelmans, *article 83*, mn 45-58.

¹⁵² *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, para. 72.

¹⁵³ *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Judgement, ICTY Appeals Chamber, 23 October 2001, para. 44.

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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 OA2, 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.

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Appeal against decision or sentence

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Appeals Chamber, 23 October 2001,
1-96-13-A, Judgement, ICTR Appeals
the ICTR.

ber, 29 July 2004, para. 23.

Chamber, 29 July 2004, paras. 23,
Appeals Chamber, 28 February 2005,

Chamber, 28 February 2005, para. 428.

ber 2014, para. 28.

gment on the appeal of Mr Laurent
iction and stay of proceedings, ICC

Chamber, 30 November 2006, para. 21.
CTY Appeals Chamber, 17 December

Judgement, ICTY Appeals Chamber,

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.