

Public Annex B14: 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 83: pp. 1967-1968

Proceedings on appeal

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to certain differences in the applicable law, there is legally little difference between the law applicable to the Appeals Chamber in appeals under article 81 and that under article 82, despite the prominent position of article 83, para. 1. Hence in practice, it may not be necessary to clarify certain minor points, such as whether a) the reference in article 83, para. 1 to article 81 of the Statute includes appeal proceedings pursuant to article 81, para. 3(c)(ii) of the Statute, and b) whether the legal provisions referenced by rule 149 RPE do or may exceed the scope of the powers conferred upon the Appeals Chamber pursuant to article 83, para. 1.

The Appeals Chamber has not interpreted these provisions as requiring it to hold an **appeals hearing**⁹. Nevertheless, in appeals raised pursuant to article 81, the Appeals Chamber has thus far called a hearing¹⁰.

II. Paragraph 2

Paragraph 2 has **three distinct elements**. First, it establishes the standard of review by 5 which the Appeal Chamber is guided during the appeal proceedings and in its decision-making process. Second, it specifies the powers of the Appeals Chamber if the appeal is successful based on this standard of review. Third, it delimits the Appeals Chamber's powers in appeal proceedings raised solely pursuant to article 81, para. 1(b), i.e. by the convicted person or on his/her behalf.

The applicable **standard of review** is discussed in Staker/Eckelmans, *article 81*, mn 34–68.

As just set out, paragraph 2 also establishes the Appeals Chamber's **powers** upon reviewing 6 the Trial Chamber's decision or sentence and allows the Appeals Chamber not merely to reverse such a decision, but also to amend it or to order a new trial before a different Trial Chamber. These powers apply when the Appeals Chamber establishes that one or several errors meet the relevant standard of review.

The *ad hoc* tribunals' Appeals Chambers have on many occasions *amended* a conviction 7 by e.g. substituting a lesser crime or a different form of individual criminal responsibility for those found to exist by the Trial Chamber¹¹. Usually, any such amendment presupposes that the substituted crime or form of responsibility was part of the charges¹². It is an open question whether the ICC Appeals Chamber may change the legal characterisation of the facts pursuant to regulation 55 of the Regulations of the Court, e.g. in respect of the mode of liability or of a 'lesser' crime and which procedure it would need to adopt¹³. Regarding the additional fact-finding that may be required for an amendment, see below margin number 9.

⁹ *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-01/12-199 A, Scheduling Order for a hearing before the Appeals Chamber, Appeals Chamber, 18 September 2014, (available under <https://www.legal-tools.org/fr/doc/203990/>), paras. 12,13.

¹⁰ See below mn 41.

¹¹ See e.g. *Prosecutor v. Radislav Krstić*, IT-98-33-A, Judgement, Appeals Chamber, 19 April 2004, paras. 135–144 (convicted on appeal for aiding and abetting genocide instead of committing genocide); for a full reference to the ICTY/ICTR jurisprudence, see *Prosecutor v. Ante Gotovina and Mladen Markač*, IT-06-90-A, Judgement, Appeals Chamber, 16 November 2012, paras. 106–108; see also Staker/Eckelmans, *article 81*, mn 36–39.

¹² However, with respect to a 'lesser' crime, it was argued in *Prosecutor v. Delalic et al.* (*Čelebići* case), IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para. 866, that 'it is a principle of law' that a grave offence includes a lesser offence of the same nature'. Accordingly, where the accused was convicted by the Trial Chamber of the crime charged, the Appeals Chamber might in the event of a defence appeal be able to substitute a conviction for a lesser-included offence.

¹³ As to the scope of a change in the legal characterisation of facts pursuant to regulation 55 of the Regulations of the Court, see *Prosecutor v. Germain Katanga*, ICC-01/04-01/07-3363 OA13, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons', Appeals Chamber, 27 March 2013 (available under <https://www.legal-tools.org/fr/doc/9d87d9/>), paras. 48–58; and Dissenting Opinion of Judge Tarfusser.

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Part 8. Appeal and Revision

The Appeals Chamber may also fully or partly reverse a conviction and consequently fully or partly **acquit** the accused, e.g. if it finds that amending the conviction would violate the rights of the accused¹⁴.

The ILC Draft Statute did not empower the Appeals Chamber to reverse or amend an *acquittal* by the Trial Chamber, but only to annul the decision of acquittal as a prelude to a new trial¹⁵. Under the provision as finally adopted, the Appeals Chamber can itself enter a guilty verdict instead of an acquittal, but only where an appeal for that purpose is brought by the Prosecutor pursuant to article 81 para. 1(a). The ICTY/ICTR Prosecutors usually appealed partial or full acquittals, but often without success.¹⁶ Noteworthy are two cases, where the ICTY Appeals Chamber found that, although the standard of review was met, it was not appropriate to reverse partial acquittals and enter convictions or order re-trial¹⁷. In others, it substituted partial acquittals by full convictions¹⁸.

- 8 The Appeals Chamber may order a **new trial** under subparagraph 2(b). The new trial needs to be conducted by a newly composed Trial Chamber. The statutory framework of other international tribunals does not specifically provide for the remedy of ordering a new trial, but limits the applicable remedies to affirming, reversing or revising the impugned decisions¹⁹. Nevertheless, the ICTY Appeals Chamber held since its early jurisprudence, in deciding to confirm an acquittal instead of ordering a new trial, that taking this decision lies within its discretion to be “exercised on proper judicial grounds, balancing factors such as fairness to the accused, the interests of justice, the nature of the offences, the circumstances of the case in hand and considerations of public interest”²⁰. The remedy of ordering a new trial, an ‘exceptional measure’²¹, has **rarely been imposed**. On one occasion, the ICTY Appeals Chamber ordered a new trial without even conducting full appeal proceedings²². On another, it remitted a case to a different Trial Chamber when it found the guilty-plea that was the basis for the conviction invalid²³. The **scope of re-trials** was discussed in the case *Prosecutor v. Haradinaj et al*²⁴. Finally, it is noteworthy that the ICTY/ICTR Appeals Chambers, in recent judgments, did not consider on their own motion (i.e. without a relief request of a

¹⁴ See *Gotovina and Markač* Appeal Judgement, IT-06-90-A, 16 November 2012, paras. 154–155; see also generally *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Judgement, Appeals Chamber, 23 October 2001.

¹⁵ 1994 ILC Draft Statute with commentaries, 126 (available under <https://www.legal-tools.org/doc/390052/>).

¹⁶ For a statistical overview in this regard, see Re in: Reydam et al (eds.), *International Prosecutors* (2012), 797, 814–816 for statistics about ICTY appeals, 843–844 for statistics about ICTR appeals, 856 for statistics about SCSL appeals.

¹⁷ See *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Judgement, Appeals Chamber, 24 March 2000, paras. 153–154; *Prosecutor v. Goran Jelisić*, IT-95-10-A, Judgement, Appeals Chamber, 5 July 2001, paras. 73–77.

¹⁸ See *Prosecutor v. Duško Tadić*, IT-94-1-A, Appeals Chamber, 15 July 1999.

¹⁹ Article 25, para. 2, ICTY Statute; article 24 ICTR Statute; article 20, para. 2, SCSL Statute; rule 104(2) ECCC Internal Rules.

²⁰ *Jelisić* Appeal Judgment, IT-95-10-A, 5 July 2001, para. 73, see Partially Dissenting Opinion of Judge Wald, paras. 3, 14.

²¹ See *Tharicse Muvunyi v. Prosecutor*, ICTR-2000-55A-A, Judgement, Appeals Chamber, 29 August 2008, para. 148, where the Appeals Chamber ordered a re-trial on its own motion; see also Re in: Reydam et al (eds.) *International Prosecutors* (2012), 797, 810.

²² The ICTY Appeals Chamber has suggested that in cases where, during the appellate proceedings, a party presents substantial amounts of new evidence which could have been a decisive factor in reaching the decision at trial, the Appeals Chamber might order a new trial without first conducting any hearing or giving any judgement on the merits of the appeal: see *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Scheduling Order, Appeals Chamber, 31 October 2002; *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Decision on Evidence, Appeals Chamber, 31 October 2003, in which the Appeals Chamber said that ‘... Rule 117(C) of the Rules [of the ICTY] provides that ‘in appropriate circumstances the Appeals Chamber may order that the accused be retried according to law’; ... the decision whether to retain a case or to send it back for a re-trial lies within the discretion of the Appeals Chamber, in light of the circumstances of the case; and ... the interests of justice must be considered in such a decision’.

²³ *Prosecutor v. Drazen Erdemović*, IT-96-22-A, Judgement, Appeals Chamber, 7 October 1997; note the different legal framework re guilty plea at the ICC (article 65 of the Statute).

²⁴ *Prosecutor v. Ramush Haradinaj et al.*, IT-04-84bis-AR73.1, Decision on Haradinaj’s appeal on scope of partial retrial, Appeals Chamber, 31 May 2011, paras. 21–27.