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Annex A

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The Rome Statute of the International Criminal Court

A Commentary

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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.

'has misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion'¹²⁴, or that its decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly¹²⁵.

Normally, the question whether the first-instance Chamber committed a procedural error can be determined by the Appeals Chamber from an examination of the pre-trial and trial record. However, a party may seek to introduce additional evidence on appeal to establish that a procedural error occurred at trial¹²⁶.

The 'waiver' principle is of particular importance to this category of errors,¹²⁷ insofar as the parties need to raise any issues – of which they are aware – during trial. The Rules provide certain opportunities for the parties to raise objections or observations relevant to the proceedings and require the Trial Chamber to address them.¹²⁸ They also preclude parties from raising matters relevant to the proceedings leading to the confirmation hearing after the start of the confirmation hearing or during trial.¹²⁹ Accordingly, it is doubtful whether such **Pre-Trial Chamber decision** may be the subject of a procedural error in a final appeal. Similarly, objections against the conduct of the trial preparation phase before the Trial Chamber need to be raised at the commencement of the trial, although the Trial Chamber may, and this is also within its discretion, decide to address such issues later.¹³⁰

The ICC Appeals Chamber has not yet resolved whether a party is required to seek leave to appeal against procedural decisions pursuant to article 82, para. 1(d) in order to be able to raise an error in this decision later on appeal. It is noted in this context that the legal texts do not require the parties to seek leave to appeal and that such a requirement would most likely raise the workload of the Trial Chamber in dealing with requests for leave to appeal and may therefore distort the expeditiousness of the proceedings. Where leave to appeal has been granted and the Appeals Chamber decided the appeal on the merits, this matter should be considered *res judicata* and preclude the parties from raising it again in a final appeal.

d) Error of fact. aa) Introduction. There are two main types of errors of fact. The first is where it is alleged that the Trial Chamber erred in reaching the conclusions of fact that it did on the basis of the evidence that was before it (see mn 47–58). The second is where the Trial Chamber was justified in reaching the factual conclusions it did on the evidence presented at trial, but where additional evidence presented on appeal casts doubt on those findings (see mn 59–63).

bb) Error of fact based on the unreasonableness of the Trial Chamber's decision. In cases where an appellant claims that the Trial Chamber reached erroneous conclusions of

¹²⁴ *Prosecutor v. Milošević*, IT-99-37-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, Appeals Chamber, 18 April 2002, para. 5 (also available under <http://www.legal-tools.org/doc/201a8d/>). See also *Prosecutor v. Milošević*, IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, Appeals Chamber, 20 January 2004, para. 7 (available under <http://www.legal-tools.org/doc/8220bc/>); *Prosecutor v. Bizimungu*, ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, Appeals Chamber, 12 February 2004, para. 11 (available under <http://www.legal-tools.org/doc/f25a2c/>); *Prosecutor v. Karemera*, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File Amended Indictment, Appeals Chamber, 19 December 2003, para. 9 (available under <https://www.legal-tools.org/doc/381737/>).

¹²⁵ Cf. *Prosecutor v. Međaković et al.*, IT-02-65-AR11Bis, Decision on joint defence appeal against decision on referral under rule 11bis, 7 April 2006, para. 10.

¹²⁶ Cf. *Prosecutor v. Delalić et al.* (*Čelebići case*), IT-96-21-A, Judgement, ICTY Appeals Chamber, 20 February 2001, paras. 620–623; *Lubanga* Appeal Judgment, ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 60.

¹²⁷ See, mn 32–33.

¹²⁸ See rules 134(2), (3) RPE.

¹²⁹ Rule 122(4) RPE.

¹³⁰ See rule 134(2) RPE.

emphasized that leave to appeal is to be granted only under **limited and very specific circumstances**, and that it is insufficient that the proposed appeal raises an issue of general interest or importance.³⁹ Under subparagraph (d), an applicant for leave to appeal must meet both of two cumulative criteria. The first criterion is that the decision sought to be appealed involves an issue that would significantly affect *either* (1) the fair and expeditious conduct of the proceedings (in the sense that the issue significantly affects the proceedings both in terms of fairness *and* in terms of expeditiousness) *or* (2) the outcome of the trial. The **merits of the eventual appeal** are not a consideration when deciding whether or not to grant leave to appeal.⁴⁰ The second criterion is that an immediate resolution of such issue by the Appeals Chamber may materially advance the proceedings. If the conditions of the first criterion are not met, a Chamber considering an application for leave to appeal under this subparagraph need not examine the second criterion.⁴¹

The Appeals Chamber has defined ‘issue’ in terms of subparagraph (d) as ‘an identifiable subject or topic requiring a decision for its resolution [...] An issue is constituted by a subject the resolution of which is essential for the resolution of a matter arising in the judicial cause under examination. The issue may be legal or factual or a mixed one’.⁴² The issue must arise from the decision that is to be appealed and ‘cannot represent a hypothetical concern or an abstract legal question.’⁴³ In the practice of the Court, the ‘issue’ is not only relevant for the question of whether leave to appeal should be granted, but also for the subsequent appeals proceedings. The Appeals Chamber has refused to consider arguments on appeal that fall outside the ‘issue’ in relation to which leave to appeal was granted, in particular, if the first-instance Chamber has rejected leave to appeal in respect of the argument now raised on appeal.⁴⁴ Nevertheless, while the ‘issue’ therefore limits – at least

³⁹ Decision ICC-01/04-135, see note 38, paras. 21–24; Decision ICC-02/04-01/05, see note 38, paras. 16–18, 55.

⁴⁰ *Situation in Uganda*, ICC-02/04-01/05-20, Decision on Prosecutor’s Application for Leave to Appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, Pre-Trial Chamber II, 19 August 2005, para. 22 (available under <http://www.legal-tools.org/en/doc/cae449/>).

⁴¹ Judgment ICC-01/04-168, see note 37, paras. 6–19; Decision ICC-01/04-135, see note 38, paras. 25–28; Decision ICC-02/04-01/05-20-US-Exp, see note 38, paras. 20–21 (and see also *Situation in the Democratic Republic of the Congo*, ICC-01/04-14, Decision on the Prosecutor’s Application for Leave to Appeal, Pre-Trial Chamber, 14 March 2005 (available under <http://www.legal-tools.org/en/doc/799eaf/>). As to whether a decision affects the *fairness* of the proceedings, it has been said that fairness includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims; and that, at the investigation phase of a situation, fairness to the Prosecutor means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in article 54 (Decision ICC-01/04-135, see note 38, paras. 38–39, 43; see also Decision ICC-02/04-01/05-20-US-Exp, see note 38, para. 31). It appears that the burden is on the applicant for leave to appeal to produce any necessary evidence to establish that the fairness of the proceedings would be significantly affected by the decision (see note 23, Decision ICC-01/04-135, see note 38, paras. 44, 51), and that it is insufficient to cite merely hypothetical examples of how the fairness of the proceedings may be affected (*ibid.*, para. 48, 55). See also generally Judgment ICC-01/04-168, see note 37, para. 11. As to whether a decision affects the *expeditious conduct* of the proceedings, it has been suggested that this will be the case if failure to provide for an immediate resolution of the issue at stake by the Appeals Chamber would entail the risk that lengthy and costly trial activities are nullified at a later stage (Decision ICC-02/04-01/05-20-US-Exp, see note 38, para. 36 (see also para. 43)). As to whether an issue is one that may affect the *outcome of the trial*, it has been said that this expression does not encompass every issue that may influence the course of the proceedings in general terms, and that only those issues having a bearing on the Trial Chamber’s decision to convict or to acquit are of relevance in this context (*ibid.*, para. 48). As to whether an issue is one for which an immediate resolution by the Appeals Chamber may *materially advance the proceedings*, it has been said that there must be a specific link between the immediate resolution of the issue at stake and the impact on the *current* proceedings, as opposed to merely a potential impact on future proceedings (*ibid.*, paras. 52–55). See also generally Judgment ICC-01/04-168, see note 37, paras. 14–19.

⁴² Decision ICC-01/04-168, see note 37, para. 9.

⁴³ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-464, Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges, Pre-Trial Chamber I, 31 July 2013, para. 8 (www.legal-tools.org/en/doc/799eaf <http://www.legal-tools.org/en/doc/56ca30/>).

⁴⁴ See the references cited in *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11-572 (OA5), Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled ‘Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute’, Appeals Chamber, 16 December 2013, footnote 142 (available under <http://www.legal-tools.org/en/doc/1bffd/>). This practice has led parties to discontinue appeals: in the *Banda and Jerbo* case, the Defence, having been granted leave to appeal

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in practice – the Appeals Chamber’s consideration, it determines in appeals under subparagraph (d) whether the decision under appeal – in particular, its operative part – can stand, and does not merely decide the ‘issue’ in the abstract.

- 20 Although the decision as to whether to grant leave to appeal lies with the first-instance Chamber, the Appeals Chamber exercises a degree of **control** as to whether **leave was properly granted**. In the *Lubanga* case, the Appeals Chamber rejected an appeal as inadmissible, noting that the Trial Chamber had granted leave to appeal ‘on an exceptional basis’, even though the conditions under subparagraph (d) had not been fulfilled.⁴⁵ Also in the *Lubanga* case, the Appeals Chamber rejected an appeal as inadmissible even though the Trial Chamber had granted leave to appeal under subparagraph (d): it found that, contrary to the Trial Chamber’s own characterization of the decision, the ‘Decision establishing the principles and procedures to be applied to reparations’⁴⁶ was appealable under article 83 para. 4 because it was deemed to be a reparations order, and that, therefore, the appeal brought under article 82 para. 1 (d) was inadmissible.⁴⁷ The Appeals Chamber found that ‘[w]here necessary, the Appeals Chamber itself has to establish the true nature of an impugned decision, in order to ensure that the decision in question is appropriately before it, and that the appeal is determined pursuant to the correct legal basis.’⁴⁸ In contrast, decisions of the Pre-Trial or Trial Chamber rejecting requests for leave to appeal cannot be reviewed by the Appeals Chamber.⁴⁹

II. Paragraph 2

- 21 Under paragraph 2, a Pre-Trial Chamber’s decision under article 57 para. 3 (d) to ‘[a]uthorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9’ may be appealed. Neither the Statute nor the Rules stipulate the **criteria for the granting of leave to appeal**. The procedure and time limits for the application for leave to appeal and the ensuing appeal are the same as for appeals under article 82 para. 1 (d). This paragraph (like articles 18 para. 4 and 56 para. 3 (b)) provides for the relevant appeals to be heard ‘on an expedited basis’. The procedure for ‘expedited’ appeals is not spelled out in the Statute, leaving this to be governed by the Rules.⁵⁰

in relation only to one of two issues in relation to which leave to appeal had been sought, decided not to pursue the appeal, stating that, given that leave to appeal the second issues had been denied, ‘it is prevented from proceeding to explore the adequacy of the Trial Chamber’s decision to proceed to trial and keep the Defence complaints in mind’; *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-435 (OA3), Defence Notice to the Registrar of the Discontinuance of the Defence appeal against the Decision on the defence request for a temporary stay of proceedings (ICC-02/05-03/09-410), 21 December 2012, para. 11 (available under <http://www.legal-tools.org/en/doc/9e4e1e/>).

⁴⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2799 (OA19), Decision on the ‘Urgent Request for Directions’ of the Kingdom of the Netherlands of 17 August 2011, Appeals Chamber, 26 August 2011 (available under <http://www.legal-tools.org/doc/88d2f4/>).

⁴⁶ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2904, Decision establishing the principles and procedures to be applied to reparations, Trial Chamber I, 7 August 2012 (available under <http://www.legal-tools.org/en/doc/a05830/>).

⁴⁷ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2953 (A1, A2, A3, OA21), Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings, Appeals Chamber, 14 December 2012, paras. 51 *et seq.* (available under <http://www.legal-tools.org/en/doc/2e59a0/>).

⁴⁸ Decision ICC-01/04-01/06-2953, see note 47, para. 50.

⁴⁹ See Decision ICC-01/04-168, see note 37.

⁵⁰ Rules 154 and 155 impose short time limits for such appeals. Rule 156 provides that such appeals shall be in writing unless the Appeals Chamber decides to convene a hearing, and that the appeal shall be heard ‘as expeditiously as possible’.