Public Annex B3: 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

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A COMMENTARY

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cursorily treated in the Statute. The Rules of Procedure and Evidence[62] (Part 8, Section III) give a few details, starting with the time allowed, which is five days from when the party filing the appeal is notified of the decision (Rules 154–155). Rule 156 sweepingly requires 'all parties who participated in the proceedings' to be notified of an intended appeal. However, there is no mention of their right to be actively involved in the hearing of the case by the Appeals Chamber. This involvement may be subsumed in the entitlement to make written submissions (cf. Rule 156(3)).

An appeal against an interim decision does not in itself have suspensive effect (Article 82(3)). However, it may do so if, and only if, the Appeals Chamber so orders at the appellant's request. It goes without saying that the only decision suspended is the one being appealed; in all other ways the proceedings will continue.

An appeal against investigative measures ordered by the Pre-Trial Chamber under Article 57(3)(d) cannot be admitted without the prior consent of that Chamber, which has the authority to grant leave to appeal.

An appeal against a decision under Article 57(3)(b) must be treated *expeditiously*. However, the Rules of Procedure and Evidence do not prescribe any particular approach except that the appeal should be heard 'as expeditiously as possible', which applies to all appeals against interim decisions (Rule 156(4); cf *supra*, II). The case law of the Appeals Chamber will doubtless establish (if necessary) how this 'expeditious' procedure is to be conducted.

V. Article 83: Proceedings on 'ordinary' Appeal

Article 83(1) of the Statute, dealing with proceedings on appeal, refers only to appeals against conviction or sentence (Article 81), not to appeals against other (interim) decisions (Article 82).

A. Preparation of an Appeal

Article 83(1) states that the Appeals Chamber has all the powers of the Trial Chamber. This effectively refers to Article 64 of the Statute which deals with the functions and powers of the Trial Chamber: it may or must confer with the parties, determine the language to be used at trial, provide for disclosure of documents, refer preliminary issues to the Pre-Trial Chamber, direct a joinder or severance of charges, prepare the case, etc. Thus Article 83 gives the Appeals Chamber *wide powers to investigate and examine or re-examine the facts of the case.*

[62] *Supra* note 19.

Hence, while the Appeals Chamber is not required to reopen the whole of the proceedings in the Trial Chamber, it nonetheless has *all necessary procedural powers to form its own opinion* on the verdict and sentence handed down by the Trial Chamber. In particular, the Appeals Chamber may call additional evidence over and above that brought before the Trial Chamber and may allow the parties to present such new evidence if it considers that this is in the interests of justice; or it may seek new evidence from a State, or from the parties or Prosecutor. It may also remand the case back to the original Trial Chamber for further investigation or ask that Chamber to determine a factual issue (Article 83(2)). The *powers* of the Appeals Chamber are thus very extensive, which (apparently or potentially, at least) contradicts the universal principle that the most competent body in the finding of facts is the Court which passed the (original) judgment.[63]

Another problem is the Appeals Chamber's *obligation* to determine or re-determine factual issues. National practice differs fairly widely on this point. The majority of criminal jurisdictions require a re-examination of factual issues if a party so requests.[64] But others, more restrictive and more convinced of the competence of the original court (cf. *supra*), give the Court of Appeal discretion to re-examine the evidence.[65]

The European Court of Human Rights has considered this question in connection with the accused's right to a trial *in open court*. Its case law has established that the first and second appeals do not need to be heard in open court and that the evidence may be re-examined, in certain circumstances which are treated jointly in the case law:[66]

(1) first, the original trial must have been in open court;
(2) secondly, the object of the appeal is a decisive factor. If an Appeals Chamber is asked to consider points of both fact and law, and the circumstances of the case require that the defence witnesses be heard (in particular where witnesses do not agree), then those witnesses must be summonsed;[67]
(3) thirdly, if the case is a minor one, there may be a curb on fresh investigations;

[63] 'It is a well-settled principle that the trial chamber is the most competent body in the finding of facts', Karibi-Whyte, *supra* note 27, at 658.

[64] e.g. Art. 603 Italian Crim. Proc. Code (hereinafter CPC). In the same direction, para. 325 German CPC.

[65] Cf. Art. 513(2) French CPC: the witnesses are re-heard only when and if 'the court has ordered their hearing'. Equally restrictive is the English system, see Hatchard, Huber, and Vogler, *supra* note 35, at 204.

[66] Cf. in particular judgments *Ekbatani, supra* note 21 and *Helmers v. Sweden*, ECHR (1991), Series A, No. 212.

[67] Judgments *Ekbatani, supra* note 21, at 32 and *Helmers, supra* note 66, at 38.

(4) finally, the need for an expeditious hearing and a reasonably prompt decision must be borne in mind, which means that cases coming before the Appeals Chamber must be treated with dispatch.[68]

There is room for doubt as to whether the need for dispatch applies *in principle* to the ICC. The European Court of Human Rights seems to be applying those criteria mainly to the minor cases—such as traffic offences—which so often clog the lower courts.[69] In view of the nature—and notoriety—of the cases that are likely to come before the ICC, their importance to the States involved, and the penalties faced by defendants, it would have been unthinkable to exclude, in advance, the possibility of re-examining factual issues on appeal.

The question of when the Appeals Chamber must re-examine the issues—and what issues—remains entirely open. The trend of ECHR case law indicates that a mere *error of law*, as per Article 81(1)(a)(iii) and (b)(iii), does not justify reopening the entire case. Similarly, the impact of a *procedural error* as per Article 81(1)(a)(i) and (b)(ii) may be purely judicial, and so not justify reopening the case. It must be left more or less to the discretion of the Appeals Chamber to determine whether factual issues need to be examined in order to decide whether a procedural error has occurred, or whether the fairness or reliability of the proceedings or decision are in doubt.

The question of how far the Appeals Chamber is called upon to re-examine *errors of fact* alleged by one of the parties is more difficult, since it sets the requirements of justice against the requirements of speediness in the *concrete case*.[70] The 'right to a total defence' established by the *Tadić* decision (relating to the jurisdiction of the ICTY)[71] must be set against the ICC's inevitable problems with the nature of evidence, the question of proportionality and, at times, the total impossibility of examining or re-examining certain factual issues.[72]

Here the case law of the ICTY and ICTR seems rather restrictive with regard to admitting at the appeal evidence that was not brought at the original trial.[73] In the *Erdemović* case the Appeals Chamber of the ICTY remarked that 'the appeal process of the International Tribunal is not designed for the purpose of allowing the parties to remedy their own failings or oversights during trial or sentencing.'[74]

[68] Judgment *Andersson*, *supra* note 21, at 27.

[69] In the *Andersson* case, the appellant had been condemned to a 400 Swedish Crowns (*Kronor*) fine because he had driven his tractor on a main road.

[70] As opposed to the *abstract* standard of due diligence.

[71] Ap. Ch., Judgment on jurisdiction of 2 October 1995, *Tadić*, IT-94-1-AR72, No. 55.

[72] Esp. those which took place in countries which do not—or poorly—cooperate with the ICC.

[73] See Staker, *supra* note 27, at 1022–1024; the last (to date) state of the case law is to be read in Ap. Ch. Judgment of 23 October 2001, *Kupreskić et al.*, esp. paras. 68–69: 'the more appropriate standard for the admission of additional evidence . . . is whether that evidence "could" have had an impact, rather than whether it "would probably" have done so' (para. 68).

[74] Ap. Ch., Judgment of 7 October 1997, *Erdemović*, IT-96-22-A, No. 15.