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Some thoughts on the nature and limits of the right to appeal in front of the ICC*

Abstract

This article deals with the right to appeal as established in the Rome Statute and guaranteed in proceedings in front of the ICC. The Rome Statute acknowledges the right to appeal as a right to challenge both convictions and other decisions. Due to statutory limitations and a clearly restrictive interpretation by the ICC, this safeguard appears however less effectively protected than a first reading of the relevant dispositions might suggest. In fact, Article 83 (2) ICCSt imposes a specific standard of review for appeals against final decisions, which ICC case-law has questionably extended also to appeals against other decisions. Furthermore, according to the Rules of Evidence and Procedure, appeals against some interim *decisions require the leave of the first instance Chamber. These limitations of the right to appeal in the ICC system seem to put the respect of the minimum protection standard, established under international human rights law, in doubt.*

Résumé

La présente contribution porte sur le droit au recours garanti par le Statut de Rome dans le cadre des poursuites engagées devant la Cour Pénale Internationale. Le Statut de Rome confère cette garantie en tant que droit d'appel contre les arrêts de condamnation ainsi que d'autres décisions judiciaires. En raison des règles restrictives régissant les recours et leur interprétation d'autant plus restrictive par la CPI, cette garantie s'avère finalement bien moins effective que ne le laisse supposer la lecture des dispositions applicables. En effet, l'article 83 (2) du Statut de Rome impose des standards spécifiques de contrôle juridictionnel en matière d'appel contre un arrêt de condamnation, standard, que la jurisprudence a étendu de façon discutable aux recours dirigés contre d'autres décisions. De plus, conformément au Règlement de procédure et de la preuve, un recours contre certaines décisions présuppose l'obtention d'une autorisation d'interjeter appel auprès de la Chambre de première instance. Ces limites au droit d'appel devant la CPI soulèvent de doutes quant au respect des standards a minima de protection de droits fondamentaux.

Zusammenfassung

Der vorliegende Beitrag befasst sich mit dem durch das Römische Statut gewährleisteten Recht auf Berufung in Verfahren vor dem IGH. Das Römische Statut gewährt

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dieses Berufungsrecht als Anfechtungsrecht gegen Schuldsprüche und andere Entscheidungen. Aufgrund statuarisch festgelegter Einschränkungen und einer eindeutig restriktiven Auslegung des IStGH stellt sich diese Verfahrensgarantie allerdings als weniger effektiv dar, als eine erste Lektüre der einschlägigen Vorschriften annehmen lässt. So schreibt Artikel 83 (2) IGHSt-Statut einen spezifischen Prüfungsmaßstab für Berufungen gegen Endurteile vor, welcher durch das Fallrecht des IStGH in bedenklicher Weise auf Berufungen gegen andere Entscheidungen ausgedehnt wurde. Darüber hinaus ist nach der Verfahrens- und Beweisordnung des IStGH für die Berufung gegen einige Zwischenentscheidungen die Zustimmung jener Kammer erforderlich, die die anzufechtende Entscheidung erlassen hat. Diese Beschränkungen des Berufungsrechts im IStGH-System scheinen den Respekt der Mindestschutzstandards wie sie durch die internationalen Menschenrechte aufgestellt wurden in Zweifel zu ziehen.

Introductory remarks

"*Even a final court of appeal makes errors, as witness cases in which it overrules its own previous decisions. The reason, if one were needed, is that it is 'common knowledge that courts of law and other tribunals, however praiseworthy their intentions may be, are not infallible*"[1].

Judicial errors, such as wrongful convictions or violations of trial fairness, always can occur – what is important is that specific instruments for the protection of their rights are made available to the parties, especially to the defendant.[2] The possibility to challenge the conviction, to seek to redress damages and to re-establish the fragile balance of trial fairness constitutes a fundamental defence right, recognized by most international human rights conventions.[3] Even though human rights conventions rule in the first place on the conduct of State Parties towards individuals, their dispositions, especially the ones of the International Covenant on Civil and Political Rights[4] (ICCPR) and the European Convention on Human Rights[5] (ECHR), are taken into consideration, respected and applied also in front of international criminal institutions.[6]

1 ICTR, *Prosecutor v. Barayagwiza*, Case N° ICTR- 97-19-A, Appeals Chamber, Decision, Separate Opinion of Judge Shahabuddeen, 3 November 1999.

2 P.D. Marshall, *A comparative analysis of the right to appeal*, in *Duke Journal of Comparative and International Law*, 2011, 3.

3 K.N. Calvo-Goller, *The Trial Proceedings of the International Criminal Court. ICTY and ICTR Precedents*, Martinus Nijhoff Publishers, 2005, 303; L. Baig, *Appeals and Enforcement*, in A. Cassese, P. Gaeta, L. Baig, M. Fan, C. Gosnell, A. Whiting (revised by), *Cassese's International Criminal Law*, Oxford University Press, 2013, 389.

4 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

5 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

6 Indeed, the ECHR and the ICCPR appear to be the most influential international human rights conventions in contemporary criminal law. The constant referral to their dispositions by defence attorneys, prosecutors and judges indicates their recognition as common minimum standards of human rights protection. See, in this regard, *inter alia*, ICC, *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga*

In the field of international criminal law the explicit recognition of the right to appeal is relatively recent. Unlike the post-war Military Tribunals of Nuremberg[7] and Tokyo,[8] which did not foresee any appellate procedure, the Statutes of the International Criminal Tribunals for the former Yugoslavia[9] (ICTY) and Rwanda[10] (ICTR), as well as the one of the International Criminal Court[11] (ICC) have, under the influence of human rights law, established a right to appeal.[12]

The present article will discuss the normative contours of the right to appeal in front of the ICC, as established by the Rome Statute.[13] It will be argued that, despite the broad and explicit recognition of the right in the Statute (I), there are normative limitations and restrictions deriving from case-law that might obstruct the effectiveness of its protection (II).

Dyilo, Case N° ICC-01/04-01/06 (OA4), Appeals Chamber, Judgement on the Appeal of *Mr. Thomas Lubanga Dyilo* against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, par. 37-38.

7 International Military Tribunal for the trial and punishment of the major war criminals of the European Axis, established by the London Agreement, which entered into force together with the Charter of the International Military Tribunal, 82 U.N.T.S. 280 on 8 August 1945.

8 International Military Tribunal for the Far East, established by an executive decree of the Supreme Commander for the Allied Powers in Japan, American General *Douglas MacArthur* of 19 January 1946. The same day, also the Charter of the International Military Tribunal for the Far East was approved. It was amended on 26 April 1946.

9 International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia since 1991, established 25 May 1993 by resolution Sc/RES/827 of the Security Council, acting under Chapter VII of the Charter of the United Nations.

10 International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed on the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed on the Territory of Neighbouring States, between 1 January and 31 December 1994, established on 8 November 1994 by resolution Sc/RES/955 of the Security Council, acting under Chapter VII of the Charter of the United Nations.

11 Established on 17 July 1998 through the "Rome Statute of the International Criminal Court" by a majority of the Member States of the United Nations during the "UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court", held in Rome from 15 June to 17 July 1998.

12 J. Doria, *Standards of Appeals and Standards of Revision*, in J. Doria, H.P. Gasser, M.C. Bassiouni (eds.), *The Legal Regime of the International Criminal Court. Essays in Honour of Professor Igor Blishchenko*, Martinus Nijhoff Publishers, 2009, 946-947; M. Maystre, *Right to appeal*, in L. Carter, F. Pocar (eds.), *International Criminal Procedure. The Interface of Civil Law and Common Law Legal Systems*, Edward Elgar Publishing, 2013, 199: "*The procedure of post-WWII international military tribunals has been strongly criticized on this ground, especially because most of the accused were sentenced to death and executed*".

13 UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998.

I. The broad recognition of the right to appeal in the Rome Statute

The protection of human rights under the Rome Statute follows the standards posed by previous legal instruments, such as the International Covenant on Civil and Political Rights[14] (ICCPR) and the European Convention on Human Rights[15] (ECHR).[16] The regulation of the right to appeal and the extent, to which it is guaranteed, are an indicator of this influence. Under this approach, the right to appeal is related to the fundamental right to a fair trial in a twofold manner. While, on the one hand, it embodies the fair trial principle, on the other hand, it is an essential instrument for the accused to defend this right to a fair trial (A). However, there are specificities of the ICC system that distinguish it from other international or national jurisdictions and, thus, may affect the understanding of the rights in question (B).

A. The right of appeal ensured by (and ensuring) the principle of fair trial

From a textual point of view, the protection of the right to appeal under the Rome Statute is broader than under the ECHR or the ICCPR. While both conventions refer to the right to appeal only as to the right to challenge a conviction or sentence, the Rome Statute foresees also a right to appeal other decisions.

As it has already been mentioned, most human rights conventions recognise the right to appeal as a fundamental right of the defence, an expression of the right to a fair trial. It is in that sense that the right to appeal is laid down in Article 14 (5) ICCPR and Article 2 of Protocol 7[17] to the ECHR. Both instruments define the right in question as the right of "everyone convicted of a criminal offence" "to have his conviction or sentence reviewed by a higher tribunal". This understanding of the right in question is reflected in the provision of Article 81 ICCSt. In addition, Article 82 ICCSt rules on the right to appeal "other decisions". This aspect offers the accused a concrete means, among others, to react to possible violations of other defence rights and of his right to a fair trial in general. In this sense, the right to appeal reveals itself as an instrument for the concretisation and enforcement of other procedural safeguards or rights. This feature does not appear to have its legal basis in the provisions

14 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

15 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

16 J.K. Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, in *The Yale Journal of International Law*, 2002, 117; *contra* T. Margueritte, *International criminal law and human rights*, in W.A. Schabas (ed.), *Routledge Handbook of International Criminal Law*, Routledge, 2011, 441: "*it remains difficult to assert that the international tribunals afford the highest standard of protection for the accused. Because the tribunals are free to pick and choose what provisions of human rights law they must apply, the protection of criminal defendants is said to be lagging behind*"; G. Boas, *The Case for a New Appellate Jurisdiction for International Criminal Law*, in G. Sluiter, S. Vasiliev (eds.), *International Criminal Procedure: Towards a coherent body of law*, CMP Publishing, 2009, 418.

17 Council of Europe, *Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 22 November 1984, ETS 117.

on the right to appeal *stricto sensu* as established in international human rights conventions. Rather, it seems possible, under certain conditions, to trace it back to a combination of the provision affirming the specific defence right, to the protection of which it is invoked, and the one granting a more general right to an effective remedy. In the ECHR this right is established in Article 13, while the ICCPR provides under Article 2 (3) (a) on the matter. The right to appeal "other" decisions might be considered a fundamental right, whenever its exercise aims at protecting another fundamental right, that requires an immediate and autonomous remedy in order to preserve its effectiveness.[18]

In both meanings, the right to appeal has an essential relationship to the fair trial principle. On the one hand, the first is a manifestation of the latter. The definition and protection of the right to appeal depend on the recognition and concretisation of the fair trial principle in a given system. On the other hand, the right to appeal, aiming at protecting other defence rights, not only derives from but ensures and protects itself the right to a fair trial.

B. The understanding and protection of trial fairness in light of the specificities of the ICC with regard to other criminal or human rights jurisdictions

Along the path set by the *ad hoc* Tribunals, especially the ICTY,[19] the ICC acknowledged the right to a fair trial as a fundamental right.[20] The interpretation of this fundamental right in accordance with the dispositions of international human rights conventions, such as the ECHR and the ICCPR, is possible by virtue of Article 21 (3) ICCSt, which imposes the application and interpretation of law in consistency with

18 L. Baig, *Appeals and Enforcement*, cit. 390, on the fact that in international criminal law interlocutory appeals are often crucial for the parties, since they allow them "*to challenge a trial chamber on important issues during the proceedings, rather than waiting to raise them after the completion of the proceedings, thus risking a retrial*".

19 The ICTY referred to some fair trial standards, such as defence rights, as norms of *ius cogens*: ICTY, *Prosecutor v. Tadić*, Case N° IT-94-1-A-AR-77, Appeals Chamber, Appeal Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, 27 February 2001, at 3: "*considering moreover that Article 14 of the International Covenant reflects an imperative norm of international law to which the Tribunal must adhere*"; N.A.J. Croquet, *The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?*, in *Human Rights Law Review*, 2011, 101.

20 ICC, *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/06, Trial Chamber, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, par. 77; N.A.J. Croquet, *The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?*, cit., 99.

internationally recognized human rights. The ICC has repeatedly relied upon this "*human rights enabling clause*"[21] to invoke the ECHR and the relevant case-law.[22]

That being said, an analysis of the actual understanding of trial fairness in the ICC system must take into account the specific, hybrid nature of this system.

Firstly, international criminal law is shaped by a combination of principles stemming from both national criminal law and international humanitarian law. The contrast between the two branches, with regard to the established hierarchy of values,[23] is reflected in the dilemma between fairness and efficiency of justice, that has appeared frequently in international criminal law.[24] Full protection of due process principles is time and money-consuming and it often requires compromises relating to the efficiency of the procedure.[25] This might even endanger the possibility of carrying out a trial against the "*most serious crimes of concern to the international community as a whole*"[26] and at the same time nullify the ICC's vocation of ending impunity.[27] Practice seems to indicate that, when balancing the importance of "smooth prosecutions" and

21 N.A.J. Croquet, *The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?*, cit., 97.

22 ICC, *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/06, Trial Chamber, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, par. 57; *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/06 (OA4), Appeals Chamber, Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, par. 37; *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/06, Appeals Chamber, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, par. 38; *Situation in Uganda in the case of the Prosecutor v. Joseph Kony and others*, Case N° ICC-02/04-01/05, Pre-Trial Chamber II, Decision on the Prosecutor's position on the Decision of the Pre-Trial Chamber II to redact factual descriptions of crimes from the Warrants of Arrest, motion for reconsideration and motion for clarification, 28 October 2005, par. 19.

23 M. Sassòli, *Humanitarian Law and International Criminal Law*, in A. Cassese (ed.)*, International Criminal Justice*, Oxford University Press, 2009, 119; R. Haveman, *The Context of the Law*, in R. Haveman, O. Kavran, J. Nicholl (eds.), *Supranational Criminal Law: a System Sui Generis*, Intersentia, 2003, 32.

24 C. Safferling, *The Development of International Criminal Procedure*, in C. Safferling (ed.), *International Criminal Procedure*, Oxford University Press, 2012, 63, according to whom requiring from a justice system to be both fair and efficient is not necessarily a contradiction. To this end, "efficiency" of criminal justice is not to be equalled to the concept of a quick and easy trial. Rather, efficiency is to be understood as the ability to solve the conflict in a sustainable way.

25 C. Buisman, *Defence and Fair Trial*, in R. Haveman, O. Kavran, J. Nicholl (eds.), *Supranational Criminal Law: a System Sui Generis*, Intersentia, 2003, 182.

26 See Preamble of the Rome Statute.

27 See Preamble of the Rome Statute, according to which the State Parties have "*[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes*".

against a thorough application of fair trial principles, the ICC, just as the *ad hoc* tribunals, tends to prefer the first option.[28]

Secondly, the international criminal law system is the result of a particular combination of civil law and common law tradition, which roughly corresponds to the amalgamation of, respectively, accusatorial (adversarial) and inquisitorial elements.[29] The cohabitation of elements from different systems and philosophies results in the intersection of differently nuanced understandings of "fairness" and a different emphasis on protection of this principle in the course of the proceeding. While systems of adversarial inspiration allocate judicial safeguards primarily in the trial stage, systems of a mainly inquisitorial tradition show a higher sensibility for defence rights protection also at the investigative stage. The ICC can be defined as a balanced combination of both traditions. When it comes to procedural safeguards, it focuses on and includes elements from both systems, providing on a detailed set of rules on the rights of the suspect in addition to the one conceived for the accused.[30] Nonetheless, what must be considered is that also the most inclusive combination of elements from different systems bares the risk of an insufficient guarantee of trial fairness and defence right protection. In fact, although every system is, in principle, consistent, fair in itself, this consistency might be lost when single elements from different systems are melted into a new legal order.[31]

Thirdly, the ICC and international human rights jurisdictions, first of all the European Court of Human Rights[32] (ECtHR), show parallels regarding their international nature, the integration of elements from both major legal traditions and their role as guardians of human rights.[33] The differences are, however, substantial. The *modus*

28 C. Buisman, *Defence and Fair Trial*, cit., 234; in this sense, see ICTR, *Prosecutor v. Barayagwiza*, Case N° ICTR- 97-19-AR72, Appeals Chamber, Decision on Prosecutor's Request for Review or Reconsideration, 31 March 2000; ICC, *Situation in Uganda*, Case N° ICC-02/04-01/05-20-US-Exp, Pre-Trial Chamber, Decision on the Prosecutor's Application for Leave to Appeal in the Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 19 August 2005, par. 19.

29 G.P. Fletcher, *The Influence of the Common Law and Civil Law Traditions on International Criminal Law*, in A. Cassese (ed.), *International Criminal Justice*, Oxford University Press, 2009, 104-107, who concludes by asserting "*the general part of the Rome Statute reveals a greater debt to common law modes of thinking and drafting, but there is room within the Statute for incorporating civilian doctrines and achieving a greater balance between the two systems*"; K. Ambos, *International criminal procedure: "adversarial", "inquisitorial" or mixed?*, in *International Criminal Law Review*, 2003, 3, 5; along these lines see also ICTY, *Prosecutor v. Blaškić*, Case N° IT-95-14-PT, Trial Chamber, Decision on the Objection of the Republic of Croatia to the issuance of *Subpoenae Duces Tecum,* 18 July 1997, par. 60.

30 C. Buisman, *Defence and Fair Trial*, cit., 170.

31 R. Haveman, *The Context of the Law*, cit., 36; C. Deprez, *Extent of Applicability of Human Rights Standards to Proceedings before the International Criminal Court: On Possible Reductive Factors*, in *International Criminal Law Review*, 2012, 725.

32 Established in 1959 by the European Convention on Human Rights.

33 H.P. Gasser, *The Changing Relationship between International Criminal Law, Human Rights Law and Humanitarian Law*, in J. Doria, H.P. Gasser, M.C. Bassiouni (eds.), *The Legal Regime of the International Criminal Court. Essays in Honour of Professor Igor Blishchenko*, Martinus Nijhoff Publishers, 2009, 1115-1116.

operandi of the two kinds of institutions differs in that institutions, such as the ECtHR, do not have direct jurisdiction over the case, in which an alleged violation of fundamental rights has occurred; the case is referred to Strasbourg only after all internal remedies have been exhausted. The ECtHR does not operate within a rule-base normative system and has therefore to adopt an empirical approach in the examination of the cases. A violation of the ECHR is proclaimed only where a serious infringement of rights and freedoms protected by the Convention affects the proceeding as a whole in the concrete case under analysis. Hence, the Strasbourg Court does not deal with every error of law or fact allegedly committed by a national court.[34] Its role consists in the reasoning through general principles that can be then applied, as a guideline, within the respective domestic order. The ICC, conversely, is the trial judge of the proceedings, in which the potential violation of a fundamental right has arisen. The ICC does not reason in terms of principles: it faces concrete questions in the context of a criminal proceeding, that need to be solved, in light of specific and detailed procedural provisions, and their outcome and consequences must be integrated in the sequence of the proceeding. In this regard, the position and nature of the ICC is closer to the one of a national criminal court than to the one of a supranational human rights court. However, despite these fundamental differences, the approach of the ICC in the protection of fundamental rights resembles largely the anti-formalistic and empirical review of the ECtHR. This alignment can be found also in the regulation of the right to appeal. As will be addressed in the next section, it is arguable that a more formalistic approach, according to which a procedural sanction is generally foreseen in case of breach of a rule, regardless of having it or not materially affected the vitiated act, might better guarantee effective defence rights protection.[35] This assumes particular importance, especially since the ICC is fully autonomous and no separate appeal body exists nor any international human rights review has been provided for its decisions.[36] The control is exercised only from within, via the Appeals Chamber.[37]

II. Normative scope and limitations of the right to appeal under the ICC Statute

Appellate proceedings in front of the ICC reflect the hybrid nature of the system they are embedded in. They constitute a combination of appeals conceived as re-trial, as in

34 ECtHR, *Schenk v. Switzerland*, appl. n. 10862/84, 12 July 1988, par. 45; *Teixeira de Castro v. Portugal*, appl. n. 44/1997/828/1034, 9 June 1998, par. 34; *Jalloh v. Germany*, appl. n. 54810/00, 11 July 2006, par. 94-97; *Lee Davis v. Belgium*, appl. n. 18704/05, 28 July 2009, par. 40 et seq.

35 ECtHR, *Airey v. Ireland*, appl. n. 6289/73, 9 October 1979, par. 24; *Artico v. Italy*, appl. n. 6694/74, 13 May 1980, par. 33; C. Deprez, *Extent of Applicability of Human Rights Standards to Proceedings before the International Criminal Court*, cit., 731.

36 K.N. Calvo-Goller, *The Trial Proceedings of the International Criminal Court*, cit., 305.

37 This feature clearly derives from the common law tradition, where courts operate in a system of coordinate authority; see also G.P. Fletcher, *The Influence of the Common Law and Civil Law Traditions on International Criminal Law*, cit., 110; see also C. Safferling, *The Rights and Interests of the Defence in the Pre-Trial Phase*, in *Journal of International Criminal Justice*, 2011, 666.

most civil law systems, and corrective appellate proceedings carried out on the basis of trial records, as generally foreseen in common law systems.[38]

A. Right to appeal final decisions

Final decisions of the Trial Chamber may be appealed on the grounds listed in Article 81 ICCSt. The appellate proceeding as envisaged by the Rome Statute combines elements and functions of appeal and cassation. As affirmed by the International Law Commission (ILC) in the Draft Statute for an International Criminal Court, the merger of these two profiles "*was thought to be desirable, having regard to the existence of only a single appeal from decisions at trial*".[39] In this sense, appellate proceedings in the ICC system are structured similarly to cassation proceedings, since first instance proceedings and decisions are checked for specific errors.[40] However, appeals in front of the ICC are not confined to issues of law or procedural errors, but entail also the possibility to challenge the impugned decision on the ground of an error of fact or a more general unfairness or unreliability of the proceeding or decision.[41] Nonetheless, as the ILC stressed, it is "*not intended that the appeal should amount to a retrial. The court would have power if necessary to allow new evidence to be called, but it would normally rely on the transcript of the proceedings at the trial*".[42] This broad recognition of the right of appeal is complemented by the acknowledgement of the prohibition of *reformatio in peius*. As the last period of Art. 83 (2) ICCSt states, "*[w]hen the decision or sentence has been appealed only be the person convicted or by the prosecutor on that person's behalf, it cannot be amended to his or her detriment*".[43] In this respect, the Rome Statute offers a more exhaustive protection than international human rights conventions, such as the ECHR and the ICCPR.

This comprehensive protection must however be read in light of the standard of review, as established in the Rome Statute. By virtue of Article 83 (2) ICCSt, in order to uphold an appeal, the Appeal Chamber must come to the conclusion that 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 fact or law or procedural error. Indeed, according to the ILC Draft Statute for an International Criminal Court, "*[n]ot every error at the trial need[s to] lead to re-*

38 L. Baig, *Appeals and Enforcement*, cit., 389-390.

39 ILC, *Draft Statute for an International Criminal Court with commentaries*, 1994, 61.

40 B. Elberling, *Art. 81. Appeal against decision of acquittal or conviction or against sentence*, in P. De Hert et al. (eds.), *Code of International Criminal Law and Procedure, Annoted*, Larcier, 2013, 411.

41 J. Doria, *Standards of Appeals and Standards of Revision*, cit., 948.

42 ILC, *Draft Statute for an International Criminal Court with commentaries*, 1994, 61; C. Staker, *Appeal and Revision*, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Beck-Hart-Nomos, 2008, 1455.

43 According to H. Friman, *International criminal procedures*, in W.A. Schabas (ed.), *Routledge Handbook of International Criminal Law*, Routledge, 2011, 279 "*the principle is easy to apply to penalties but more difficult concerning convictions, since no formal hierarchical order has been established between the different crimes and thus there is no clear indication concerning which crime shall be considered more or less serious than another crime*".

versal or annulment: the error had to be a significant element in the decision taken. This is expressed in paragraph 2 by the requirement that the proceedings must have been, overall, procedurally unfair or the decision must be vitiated by the error".[44] It is the appellant's burden to demonstrate both that the vice exists and that this specific requirement is met.[45] In terms of defence rights protection, this provision implies that only those breaches of defence rights matter, that are found to have essentially affected the appealed decision. In this regard, according to ICC case-law, an error materially affected the impugned decision, if the decision would have been "substantially different", if the error had not occurred.[46]

1. Appeal against decisions of conviction

Under Article 81 (1) (b) ICCSt, a convicted person, or the Prosecutor on that person's behalf, may lodge an appeal against a conviction on the grounds of (i) a procedural error, (ii) an error of fact, (iii) an error of law or on (iv) any other ground that affects the fairness or reliability of the proceedings or decision.

The right laid down in Article 81 ICCSt matches first of all the main interpretation of the right to appeal: as the fundamental right for the defence to counteract an allegedly wrongful conviction or sentence.

As to the second connotation, depending on the details of the concrete case, grounds (i), (iii) and (iv) seem to constitute suitable vehicles also to except the violation of defence rights.

a. Procedural error

Appealing a decision on the ground of a procedural error, under Article 81 (1) (b) (i) ICCSt, refers to two possible scenarios.[47] Firstly, to the case, in which a Chamber does not comply with a mandatory procedural requirement of the Statute and Rules of Procedure and Evidence. Given the provision of Article 64 ICCSt on functions and powers of the Trial Chamber and the explicit mention, in paragraph 2, of its duty to "*ensure that a trail is fair and expeditious and is conducted with full respect of the*

44 One cannot but notice the assonance of this explanation with the affirmation, by the ECtHR, on the task of the Strasbourg Court of only ascertaining "*whether the proceedings as a whole […] were fair*": see ECtHR, *Schenk v. Switzerland*, cit., par. 45; *Teixeira de Castro v. Portugal*, cit., par. 34; *Jalloh v. Germany*, cit., par. 94-97; *Lee Davis v. Belgium*, cit., par. 40 et seq.; ILC, *Draft Statute for an International Criminal Court with commentaries*, 1994, 61; A. Hartwig, *Appeal and Revision*, in C. Safferling (ed.), *International Criminal Procedure*, Oxford University Press, 2012, 540; C. Staker, *Appeal and Revision*, cit., 1482; K.N. Calvo-Goller, *The Trial Proceedings of the International Criminal Court*, cit., 317.

45 ICTR, *Prosecutor v. Akayesu*, Case N° ICTR-96-4-A, Appeals Chamber, Judgement, 1 June 2001, par. 35; C. Staker, *Appeal and Revision*, cit., 1468.

46 ICC, *Situation in the Democratic Republic of the Congo*, Case N° ICC-01/04-169 OA, Appeals Chamber, 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, par. 84.

47 K.N. Calvo-Goller, *The Trial Proceedings of the International Criminal Court*, cit., 308.

rights of the accused", the failure to grant one or more of the rights enshrined under Article 67 ICCSt constitutes a procedural error in the meaning of Article 81 (1) (b) (i) ICCSt. The second situation, in which such a procedural error can occur, is when a Chamber erroneously exercises its discretion. This might affect decisions to admit or to exclude evidence, or to grant or refuse a request by a party for an adjournment. The review of the Appeals Chamber concerns the manner, in which the Trial Chamber exercised its discretion. If the Trial Chamber has correctly exercised its discretion, its decision will not be disturbed on appeal, even though the Appeals Chamber itself may have exercised the discretion differently.[48] In order for an appeal on the ground of the erroneous exercise of discretion to be upheld, the appellant must demonstrate that the exercise of the discretion is based on an erroneous interpretation of law, an erroneous application of a principle of law, on a patently incorrect conclusion of fact[49] or that the decision is so unfair and unreasonable to constitute an abuse of discretion.[50]

Pursuant to the standard of appeal laid down in Article 83 (2) ICCSt, a procedural error is only relevant if it "*materially affected*" the final decision. This provision reflects the case-law deriving from the Special Court for Sierra Leone[51] (SCSL), whose Statute was the first to mention also this category of error as ground for appeal. Ac-

48 ICTY, *Prosecutor v. Milošević*, Case N° IT-02-54-AR73, Bench of the Appeals Chamber, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, 16 May 2002, par. 14.

49 C. Staker, *Appeal and Revision*, cit., 1459, where it is explained that the appellant alleging an error in the exercise of the discretion must demonstrate that the first instance Chamber "*has miscredited 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 made an error as to the facts upon which it has exercised its discretion*"; see ICTY, *Prosecutor v. Milošević*, Case N° IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Appeals Chamber, Reasons for decision on prosecution interlocutory appeal from refusal to order joinder, 18 April 2002, par. 5; *Prosecutor v. Milošević*, Case N° IT-02-54-AR73.6, Appeals Chamber, Decision on the interlocutory appeal by the *Amici Curiae* against the Trial Chamber order concerning the presentation and preparation of the defence case, 20 January 2004, par. 7; ICTR, *Proseuctor v. Bizimungu, Mugenzi, Bicamumpaka, Mugiraneza*, Case N° ICTR-99-50-AR50, Appeals Chamber, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 denying leave to file amend indictment, 12 February 2004, par. 11; *Prosecutor v. Karemera, Ngirumpatse, Nzirorera, Rwamakuba*, Case N° ICTR-98-44-AR73, Appeals Chamber, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III Decision of 8 October 2003 denying leave to file an amended indictment, 19 December 2003, par. 9.

50 ICC, *Situation in Uganda in the case of the Prosecutor v. Joseph Kony and others*, Case N° ICC-02/04-01/05-408, Appeals Chamber, Judgement on the Appeal of the Defence against the "Decision on the Admissibility of the Case under Article 19 (1) of the Statute", 10 March 2008, par. 80; A. Hartwig, *Appeal and Revision*, cit., 536.

51 The Special Court for Sierra Leone was established on 16 January 2002 by an agreement between the Government of Sierra Leone and the United Nations, in order to "*prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law*" committed in Sierra Leone after 30 November 1996 and during the Sierra Leone Civil War. After its closure in 2013, the Residual Court for Sierra Leone was established by an agreement between the United Nations and the Government of Sierra Leone to oversee the continuing legal obligations of the Special Court for Sierra Leone.

cording to the SCSL, "*not all procedural errors vitiate the proceedings. Only errors that occasion a miscarriage of justice would vitiate the proceedings. Such are procedural errors that would affect the fairness of the trial. By the same token, procedural errors that could be corrected or waived or ignored (as immaterial or inconsequential) without injustice to the parties would not be regarded as procedural errors occasioning a miscarriage of justice*".[52]

b. Error of fact

An error of fact appears, when a chamber errs in the factual findings in relation to the evidence presented in front of it. It is the task of the Appeals Chamber to evaluate whether the first instance Chamber failed in appreciating the facts, on which the appealed decision is founded, disregarded relevant facts or took facts into account that were not related to the issues under decision.[53] Further, judicial review on the ground of a possible error of fact is available also for situations, in which the first instance Chamber wrongfully read the evidence presented to it or drew unreasonable conclusions from such evidence or came to factual conclusions from evidence that should not have been accepted. The criterion of review for the Appeals Chamber is the "reasonableness" of the decision. Hence, the Appeals Chamber will find an error of fact, where the challenged decision is unreasonable in relation to the conclusion or the evidence presented before it.[54] In principle, the task of hearing, assessing and weighing the evidence presented at trial is mainly left to the Trial Chamber. Considering that the Appeals Chamber normally has only indirect access to evidence formed during the first instance, it tends to give a margin of deference to a finding of fact reached by a Trial Chamber. The standard of review can thereby be defined as follows: "*Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is 'wholly erroneous' may the Appeals Chamber substitute its own finding for that of the Trial Chamber. It must be borne in mind that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence*".[55] Referring the standard

52 SCSL, *CDF Case*, Case N° SCSL-04-14-A, Appeals Chamber, Judgement, 28 May 2008, par. 35; see also A. Hartwig, *Appeal and Revision*, cit., 535.

53 ICC, *Prosecutor v. Bemba*, Case N° ICC-01/05-01/08-962 OA3, Appeals Chamber, Judgement on the Appeal of *Mr. Jean-Pierre Bemba Gombo* against the Decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", 19 October 2010, par. 63.

54 A. Hartwig, *Appeal and Revision*, cit., 536. The same standard applies also in cases of the *ad hoc* Tribunals: ICTY, *Prosecutor v. Blaškić*, Case N° IT-95-14-PT, Appeals Chamber, Judgement, 29 July 2004, par. 16: "*As to errors of fact, the standard applied by the Appeals Chamber has been that of reasonableness, namely, whether the conclusion of guilt beyond reasonable doubt is one which no reasonable trier of fact could have reached*".

55 ICTY, *Prosecutor v. Kupreškić et al.*, Case N° IT-95-16-A, Appeals Chamber, Judgement, 23 October 2001, par. 30; *Prosecutor v. Tadić*, Case N° IT-94-1-A, Appeals Chamber, Judgement, 15 July 1999, par. 64; ICTY, *Prosecutor v. Aleksovski*, Case N° IT-95-14/1-A, Appeals Chamber, Judgement, 24 March 2000, par. 63; *Prosecutor v. Delalić, Mucić, Delić and Landžo ("Čelebici Case")*, Case N° IT-96-21-A, Appeals Chamber, Judgement, 20 February 2001, par. 491; *Prosecutor v. Tadić*, Case N° IT-94-1-A, Appeals Chamber, Judge-

under Article 83 (2) ICCSt to this ground for appeal, the "*appellant must establish that the error of fact was critical to the verdict reached by the Trial Chamber, thereby resulting in a 'grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime'*.[56] *Consequently, it is not each and every error of fact that will cause the Appeals Chamber to overturn a decision of the Trial Chamber, but only one that has occasioned a miscarriage of justice*".[57]

c. Error of law

An error of law occurs when a Chamber's decision is based on an incorrect interpretation of the governing law. In general, any determination made by a Trial Chamber on a question of the substantive or the procedural law of the Court, or on any issue of international law related to the case would fall within this ground.[58] It arises from this description that the concepts of procedural error and error of law are quite similar and could be confused.[59] An error of law could indeed derive from a wrong interpretation of procedural law, such as a misconception regarding the scope of the rights of the accused. In order to differentiate the two categories, the error of law may only be applied as long as no formal violations of the Statute or the Rules of Procedure and Evidence are concerned.[60]

Further, this ground of appeal includes also the application of the wrong legal standard. An example can be found in the *Al Bashir* case. The Pre-Trial Chamber denied the prosecution's application for a warrant of arrest against Omar Hassan Ahmad Al Bashir for his alleged responsibility for the crime of genocide.[61] For the issuance of an arrest warrant, Article 58 (1) (a) ICCSt requires the establishment of "*reasonable*

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ment, Separate Opinion of Judge Shahabuddeen, 15 July 1999, par. 30; K.N. Calvo-Goller, *The Trial Proceedings of the International Criminal Court*, cit., 308-309.

56 *Prosecutor v Furundžija*, Case N° IT-95-17/1-A, Appeals Chamber, Judgement, 21 July 2000, para. 37 (quoting Black's Law Dictionary (7th ed., 1999)).

57 ICTY, *Prosecutor v. Kupreškić et al.*, Case N° IT-95-16-A, Appeals Chamber, Judgement, 23 October 2001, par. 29; *Prosecutor v Furundžija*, Case N° IT-95-17/1-A, Appeals Chamber, Judgement, 21 July 2000, para. 37; *Prosecutor v. Kunarac*, Case N° IT-96-23 and IT-96-23/1-A, Appeals Chamber, Judgement, 12 June 2002, par. 39; *Prosecutor v. Krnojelac*, Case N° IT-97-25-A, Appeals Chamber, Judgement, 17 September 2003, par. 13: "*The party alleging a miscarriage of justice must, in particular, establish that the error strongly influenced the Trial Chamber's decision and resulted in a flagrant injustice, such as where an accused is convicted despite lack of evidence pertaining to an essential element of the crime*"; *Prosecutor v. Vasiljevic*, Case N° IT-98-32-A, Appeals Chamber, Judgement, 25 February 2004, par. 8; *Prosecutor v. Kvočka*, Case N° IT-98-30/1-A, Appeals Chamber, Judgement, 28 February 2005, par. 18; C. Staker, *Appeal and Revision*, cit., 1482.

58 C. Staker, *Appeal and Revision*, cit., 1465.

59 K.N. Calvo-Goller, *The Trial Proceedings of the International Criminal Court*, cit., 306.

60 A. Hartwig, *Appeal and Revision*, cit., 537.

61 The present example refers to an error of law established in a decision on an interlocutory appeal. The applicability of the grounds of appeal listed in Article 81 ICCSt equally to appeals against final decisions and appeals against other decisions seems to allow to draw on examples originating from one category to clarify concepts in relation to the other.

grounds to believe that the person has committed a crime within the jurisdiction of the Court". In evaluating the existence of this condition in relation to the existence of genocidal intent by way of proof by inference, the Pre-Trial Chamber stated that "*such a standard would be met only if the materials provided by the Prosecution in support of the Prosecution Application show that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe in the existence of a GoS's* dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups*".[62] In this interpretation, the standard of proof imposed by Article 58 (1) (a) ICCSt would have resembled rather the considerably higher threshold of "beyond reasonable doubt" than the one implied in the requirement of "reasonable grounds to believe". According to the Appeals Chamber, this reading led to the application of an erroneous standard of proof that resulted in an error of law that materially affected the decision not to issue a warrant of arrest in respect of the crime of genocide.[63]

As can be seen from the above cited case-law, also with respect to this ground for appeal, a material incidence on the decision, required by Article 83 (2) ICCSt, is necessary in order for the appeal to succeed. In this sense, it is upon the appellant to identify the alleged error and to explain how the error invalidates the decision. However, the burden of proof on appeal is not absolute with regard to errors of law: [64] "*if the arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and for other reasons find in favour of the contention that there is an error of law*".[65] The Appeals Chamber, as final arbiter of the law, has the power, according to the principle *iura novit curia*, to inquire the "correctness" of the interpretation of the law. Furthermore, the Appeals Chamber is in the position to consider the ground of appeal regarding an error of law, also in case of lack of proof of a result, if it deems it useful to clarify important points of law.[66]

62 ICC, *Situation in Darfur, Sudan in the case of the Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case N° ICC-02/05-01/09, Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against *Omar Hassan Ahmad Al Bashir*, 4 March 2009, par. 158.

63 ICC, *Situation in Darfur, Sudan in the case of the Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case N° ICC-02/05-01/09-73, Appeals Chamber, Judgement on the Appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 3 February 2010, par. 33, 39 and 41.

64 ICTY, *Prosecutor v. Krnojelac*, Case N° IT-97-25-A, Appeals Chamber, Judgement, 17 September 2003, par. 10; *Prosecutor v. Kvočka*, Case N° IT-98-30/1-A, Appeals Chamber, Judgement, 28 February 2005, par. 16; C. Staker, *Appeal and Revision*, cit., 1482.

65 ICTY, *Prosecutor v. Kvočka*, Case N° IT-98-30/1-A, Appeals Chamber, Judgement, 28 February 2005, par. 16; *Prosecutor v. Vasiljevic*, Case N° IT-98-32-A, Appeals Chamber, Judgement, 25 February 2004, par. 6; See also ICTR, *Kambanda v. Prosecutor*, Case N° ICTR-97-23-A, Appeals Chamber, Judgement, 19 October 2000, par. 98: "*[I]n the case of errors of law, the arguments of the parties do not exhaust the subject. It is open to the Appeals Chamber, as the final arbiter of the law of the Tribunal, to find in favour of an Appellant on grounds other than those advanced:* jura novit curia"; see also H. Friman, *International criminal procedures*, cit., 286.

66 J. Doria, *Standards of Appeals and Standards of Revision*, cit., 951.

d. Any other ground that affects the fairness or reliability of the proceedings or the decision

Article 81 (1) (b) (iv) ICCSt contains a "catch-all" provision. The vague and unspecified formulation, relating to "*any other ground that affects the fairness or reliability of the proceedings or decision*", should allow the convicted person to exercise his right to appeal in an exhaustive manner.

However, the addition of this ground of appeal may be superfluous since it is likely that any valid ground would fall within one of the other categories. Indeed, the concepts of "error of law invalidating the decision" and "error of fact which has occasioned a miscarriage of justice" seem to be already sufficiently broad to absorb possible questions of fairness or reliability of the proceedings. Moreover, issues relating to trial fairness and reliability might be qualified as a procedural error.[67] Indeed, it does not seem easy to distinguish the ground for appeal at issue from the procedural error under Article 81 (1) (b) (i) ICCSt. In this regard, it could be stated that procedural errors should refer to formal violations, while the residual ground for appeal under Article 81 (1) (b) (iv) ICCSt includes violations of a substantive nature.[68]

Because of the rather vague formulation of this ground of appeal, there hardly seems to be a single standard of review. It is likely that the standards of review of other grounds are applied by analogy on a case-by-case basis.[69]

2. Appeals against sentences

According to Article 81 (2) (a) ICCSt, the convicted person can appeal a sentence on the ground of disproportion between the crime and the sentence. Although disproportion constitutes an autonomous ground for appeal, a combined reading of Article 81 (2) (a) and Article 83 (2) ICCSt suggests the necessity to link this ground to one of the grounds indicated in Article 81 ICCSt. Article 83 (2) ICCSt requires also for the appeal according to Article 81 (2) (a) ICCSt that the proceedings appealed from were unfair in a way that they affected the reliability of the sentence or that the sentence appealed from was materially affected by the error of fact or law or procedural error.[70] It is upon the convicted person to show that the Trial Chamber made an appealable error in exercising its discretion or has failed to follow applicable law.[71] The Appeals Chamber will intervene only if the appellant demonstrates that the error of the Trial

67 C. Staker, *Appeal and Revision*, cit., 1466.
68 A. Hartwig, *Appeal and Revision*, cit., 537.
69 C. Staker, *Appeal and Revision*, cit., 1466.
70 C. Staker, *Appeal and Revision*, cit., 1454; B. Elberling, *Art. 81*, cit., 411.
71 C. Staker, *Appeal and Revision*, cit., 1467; ICTY, *Prosecutor v. Kupreškić et al.*, Case N° IT-95-16-A, Appeals Chamber, Judgement, 23 October 2001, par. 408; *Prosecutor v. Delalić, Mucić, Delić and Landžo ("Čelebici Case")*, Case N° IT-96-21-A, Appeals Chamber, Judgement, 20 February 2001, par. 724-725; *Prosecutor v. Tadić*, Case N° IT-94-1-A and IT-94-1-A*bis*, Appeals Chamber, Judgement in Sentencing Appeals, 26 January 2000, par. 20; ICTR, *Omar Serushago v. The Prosecutor*, Case N° ICTR-98-39-A, Appeals Chamber, Reasons for Judgement, 6 April 2000, par. 32.

Chamber was "*discernible*" and that it manifestly ventured outside of its discretionary framework.[72]

It should be noted, that the Court has *proprio motu* the possibility to reconsider the assessment of criminal responsibility, also when the appeal concerns only the sentence (Article 81 (2) (b) ICCSt). Conversely, the Court has the "*inherent power*"[73] to reduce the sentence, even if only the convictions has been appealed (Article 81 (2) (c) ICCSt). However, the Appeals Chamber seems to be able to exercise this discretion only in favour of the defendant. When there is no request from the parties, it can only reduce a sentence or a charge on appeal. This is in line with the other provision of Article 83 (2) ICCSt, that prohibits to amend the decision or sentence to the detriment of the person convicted, whenever that person is the only appellant.[74]

B. Right to appeal other decisions

Pursuant to Article 82 ICCSt, the defendant may file an appeal against decisions that do not fall under the scope of Article 81 ICCSt. In this sense, the defendant is entitled to challenge decisions of an *interim* nature of the Pre-Trial or the Trial Chamber, exhaustively listed in Article 82 (1) ICCSt, with respect to jurisdiction and admissibility; granting or denying release of the person being investigated or prosecuted and decisions that involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.[75] Although most appeals under Article 82 ICCSt are taken at an interlocutory stage, some may be taken after the final judge-

72 ICTY, *Prosecutor v. Aleksovski*, Case N° IT-95-14/1-A, Appeals Chamber, Judgement, 24 March 2000, par. 187; *Prosecutor v. Tadić*, Case N° IT-94-1-A and IT-94-1-A*bis*, Appeals Chamber, Judgement in Sentencing Appeals, 26 January 2000, par. 22. However, according to B. Elberling, *Art. 81*, cit., 405, the referral to the "*disproportion*" in Article 81 (2) ICCSt could be interpreted so as to allow the Appeals Chamber a more thorough review of the sentencing process than the "*discernible error*" standard employed by the *ad hoc* Tribunals.

73 ICTY, *Prosecutor v. Erdemović*, Case N° IT-96-22-A, Appeals Chamber, Judgement, 10 October 1997, par. 16.

74 K.N. Calvo-Goller, *The Trial Proceedings of the International Criminal Court*, cit., 310-311.

75 Article 82 (1) (c) ICCSt further refers to decisions of the Pre-Trial Chamber to act on its own initiative under Article 56 (3) ICCSt. Although Article 82 (1) (c) ICCSt mentions this category of decisions among the decisions "*either party*" may appeal, in light of the provisions of Article 56 (3) ICCSt, the restriction to the Prosecutor as the party entitled to appeal seems likely: Article 56 (3) (a) ICCSt rules on measures for the preservation of evidence essential for the defence at trial, taken by the Pre-Trial Chamber on its own initiative in cases, in which the failure by the Prosecutor to request such measures is deemed unjustified. With respect to these measures in favour of the defendant, Article 56 (3) (b) ICCSt rules that "*[a] decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor*". Therefore, the present analysis will not deal with the (apparently only formal) right of the defendant to appeal this kind of decisions.

ment: under to Article 82 (4) ICCSt, the convicted person has the right to appeal against the order for reparations issued according to Article 75 ICCSt.[76]

As to the errors, on which the impugned decision may be appealed, Article 82 ICCSt remains silent. In this regard, the ICC Appeals Chamber found that parties are "*at liberty to raise any relevant grounds*", including the grounds established under Article 81 (1) ICCSt.[77] It does not seem, however, that it would concretely be possible to lodge an appeal, as established by Article 82 ICCSt, for grounds other than the ones laid down in Article 81 ICCSt: both categories of appeal may be lodged on the basis of the same catalogue of grounds. In this regard, interlocutory appeals that require leave to appeal represent an exception in that, according to the Appeals Chamber of the Court, only procedural errors or errors of law or of fact may be relied upon as grounds.[78]

Another extension of the scope of dispositions concerning appeals of final decisions to appeals under Article 82 ICCSt, regards the standard of appeal under Article 83 (2) ICCSt.[79] In fact, in *Katanga and Ngudjolo Chui*, the Appeals Chamber held that also in case of an interlocutory appeal, as a prerequisite, the error raised by the appellant must have materially affected the decision.[80] In introducing this restrictive condition, the Appeals Chamber reversed a previous case-law, according to which the application of the standard in question was excluded for appeals pursuant to Article 82 ICCSt.[81] What has been observed in relation to appeals against final decisions appears

76 C. Staker, *Appeal and Revision*, cit., 1476.

77 B. Elberling, *Art. 81*, cit., 407; see also A. Hartwig, *Appeal and Revision*, cit., 542; ICC, *Situation in the Democratic Republic of the Congo*, Case N° ICC-01/04-169 OA, Appeals Chamber, 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, par. 32-34.

78 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/06-568 OA3, Appeals Chamber, Judgement on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, par. 19; however, see dissenting opinion of *Judge Pikis*, par. 14: "*Ultimately, the grounds upon which a decision can be impugned are no different from those enumerated in article 81 (1) (a) of the Statute. To these grounds one must necessarily add those affecting a fair trial that should pervade the judicial process as evident from the provisions of article 21 (3) of the Statute*"; *Prosecutor v. Bemba*, Case N° ICC-01/05-01/08-962 OA3, Appeals Chamber, Judgement on the Appeal of *Mr. Jean-Pierre Bemba Gombo* against the Decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges", 19 October 2010, par. 63; see also H. Friman, *International criminal procedures*, cit., 281.

79 A. Hartwig, *Appeal and Revision*, cit., 545.

80 ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, Case N° ICC-01/04-01/07-1497 OA8, Appeals Chamber, Judgement on the Appeal of *Mr Germain Katanga* against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, par. 37; *Prosecutor v. Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/06-1487 OA-12, Appeals Chamber, Judgement on the Appeal of the Prosecutor against the Decision of the Trial Chamber I entitled "Decision on the Release of Thomas Lubanga Dyilo", 21 October 2008, par. 44.

81 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/06-568 OA3, Appeals Chamber, Judgement on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber

to be even more true with regard to appeals against *interim* decisions. The addition by interpretation of a substantive threshold such as the extension of the requirement under Article 83 (2) ICCSt, might result in an excessive restriction of the right to appeal and other, underlying, defence rights. Not only is such an interpretation questionable with regard to the principle of the *ubi lex voluit dixit, ubi noluit tacuit*. Even from a teleological perspective, this extension by analogy of the provisions of Article 83 (2) ICCSt appears to only aggravate the position of the defendant, who is held to demonstrate not only that a specific ground of appeal occurred, but also that the proceeding was unfair in a way that it affected the reliability of the decision or that the decision was materially affected by error of fact or law or procedural error. The consequences of restricting the possibilities of an appeal to be upheld hardly seem to have effects *in bonam partem*.

While this substantive limitation concerns every appeal under Article 82 ICCSt, the drafters of the Statute provided for a procedural limitation of the right of the accused to lodge an appeal only for a specific category. In fact, a distinction must be made between decisions that can be appealed as of right (1) and decisions that can only be appealed with leave of the Chamber of first instance (2).

1. Appeals not requiring leave of the Court

a. Interlocutory appeal, as of right, of a decision with respect to jurisdiction or admissibility

According to Article 82 (1) (a) ICCSt, the defence is entitled to appeal as of right any decision with respect to jurisdiction or admissibility. This reference encompasses decisions the Pre-Trial or Trial Chamber issued on the basis of a challenge to jurisdiction or admissibility under Article 19 (6) ICCSt. This rule provides explicitly that the decisions at issue "*may be appealed to the Appeals Chamber in accordance with Article 82*". However, the scope of Article 82 (1) (a) ICCSt is not necessarily limited to decisions taken under Part 2 of the Rome Statute. An example can be found in the case-law of the ICTY, where an appeal on the ground of jurisdiction allowed the party to challenge the legality of the very establishment of the Tribunal. Likewise, the concept of "admissibility" could also encompass broader doctrines of "political questi-

I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, par. 12 et seq.; see also ICC, *Situation in the Democratic Republic of the Congo*, Case N° ICC-01/04-169 OA, Appeals Chamber, 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, par. 83, where the Appeals Chamber declined to determine whether the standard of review established in article 83 (2) of the Statute applies to appeals under article 82 (1) (a) of the Statute, as "*in any event, the appealed decision was materially affected by the error of law identified in the preceding section of the judgment*".

ons" and "non-justiciable disputes" in case any of the parties raises them.[82] Further, it is presumed that the reference to jurisdiction and admissibility encompasses also decisions issued in accordance with Part 2 of the Statute as a whole, including matters relating to Article 21. In this sense, in light of Article 21 (3) ICCSt, a violation of defence rights, the right to a fair trial and, more in general, human rights, could constitute a ground for appeal under Article 82 (1) (a) ICCSt.[83] This is what occurred in the *Lubanga* case, where the defence disputed the jurisdiction of the Court by reference to the "*doctrine of abuse of process*" and on the basis of the violation of the fundamental rights of the accused. The Appeals Chamber stated that the doctrine of abuse of process "*had* ab initio *a human rights dimension in that the causes for which the power of the Court to stay or discontinue proceedings were largely associated with breaches of the rights of the litigant, the accused in the criminal process, such as delay, illegal or deceitful conduct on the part of the prosecution and violations of the rights of the accused in the process of bringing him to justice […] More importantly, Article 21 (3) of the Statute makes the interpretation as well as the application of the law applicable under the Statute subject to internationally recognized human rights*".[84] The ICC Appeals Chamber affirmed that the deprivation of fundamental fair trial guarantees may outweigh the interest of the world community in the conduct of the trial and thus may proceed to discontinue the proceedings: "*[w]here the breaches of the rights of the accused are such as to make it impossible for him to make his defence within the framework of his rights, no fair trial can take place and the proceedings can be stopped*".[85]

b. Interlocutory appeal, as of right, of a decision granting or denying release

Article 82 (1) (b) ICCSt establishes the right to appeal a decision granting or denying release of the suspect or accused. The "*decision*" referred to in Article 82 (1) (b) ICCSt relates to the decision issued in accordance with Article 60 ICCSt. The sensitivity of the fundamental freedom at stake in proceedings under Article 60 ICCSt makes the importance of the respect of the rights of the accused even more evident. It is not a coincidence that precisely with regard to *interim* release the Appeals Chamber

82 C. Staker, *Appeal and Revision*, cit., 1477; ICTY, *Prosecutor v. Tadić*, Case N° IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 6, 23-25. *Contra* see ICTY, *Prosecutor v. Tadić*, Case N° IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Separate Opinion of *Judge Li*, 2 October 1995.

83 A. Hartwig, *Appeal and Revision*, cit., 543-544.

84 ICC, *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/06 (OA4), Appeals Chamber, Judgement on the Appeal of *Mr. Thomas Lubanga Dyilo* against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, par. 36.

85 ICC, *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/06 (OA4), Appeals Chamber, Judgement on the Appeal of *Mr. Thomas Lubanga Dyilo* against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, par. 39.

of the ICC has developed an extensive case-law and has elaborated on important material and procedural issues.[86] In this context, even if under a slightly different prospective, it might also convene to recall the *Lubanga* case, where the question of *interim* release was posed as a possible consequence of a conditional stay of proceedings, resulted from a gross violation of defence rights.[87]

c. Appeal, as of right, of the order for reparations

Pursuant to Article 75 (2) ICCSt, the Court may issue an order directly against the convicted person for reparations to, or in respect of, victims. The convicted person is entitled to exercise his right to appeal from the moment the Court issued the order.[88]

2. Appeals requiring leave of the Court

a. Appeal under Article 82 (1) (d) ICCSt

The last sub-paragraph of Article 82 contains another "catch-all" provision for issues not included in the foregoing paragraphs. Article 82 (1) (d) ICCSt states the right of the defendant to appeal a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. As can be derived from the letter of the law, this provision is intended to apply to any type of interlocutory decision.

The wide scope attributed by the Rome Statute to this provision is, however, significantly restricted by a procedural prerequisite: the leave of the chamber that delivered the to be impugned decision.

The existing case-law indicates three principles that the party applying for leave to appeal must respect: the restrictive character of the remedy provided for in Article 82 (1) (d) ICCSt, the need to satisfy the Chamber as to the existence of the specific requirements stipulated by this provision and the irrelevance of or non-necessity at this stage for the Chamber to address arguments relating to the merit or substance of the appeal.[89] In particular, it must be considered that the specific requirements under Article 82 (1) (d) ICCSt must be fulfilled cumulatively. The first criterion is that the decision of the first instance judge must entail an issue that would significantly affect either the fair and expeditious conduct of the proceedings or the outcome of the trial.

86 A. Hartwig, *Appeal and Revision*, cit., 545-546.

87 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case N° ICC-01/04-01/06-1487 OA12, Appeals Chamber, Judgement on the Appeal of the Prosecutor against the Decision of the Trial Chamber I entitled "Decision on the Release of *Thomas Lubanga Dyilo*", 21 October 2008.

88 K.N. Calvo-Goller, *The Trial Proceedings of the International Criminal Court*, cit., 317.

89 ICC, *Situation in Uganda*, Case N° ICC-02/04-01/05-20-US-Exp, Pre-Trial Chamber, Decision on the Prosecutor's Application for Leave to Appeal in the Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 19 August 2005, par. 15.

According to the ICC Appeals Chamber in its ruling in the *Situation in the Democratic Republic of the Congo*, the core of Article 82 (1) (d) ICCSt lies in the immediate tackling of procedural errors that otherwise might put the integrity of the proceedings at risk.[90] The second criterion must be read in the same light. Article 82 (1) (d) ICCSt requires that an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings. The *ratio* is to avoid, the earliest possible, through an "*immediate resolution*", potential errors so as to allow the proceedings to "*move forward*", ensuring that the right course is followed.[91] Only if both these requirements are fulfilled, the Chamber of first instance will grant the leave to appeal. This indicates that Article 82 (1) (d) ICCSt is accessible only under "*limited and very specific circumstances*".[92]

b. Problematic aspects linked to the provisions on the leave to appeal

Subjecting the right to appeal to a procedural limitation, such as the leave to appeal, is to be considered *per se* compatible with international human rights provisions, as long as the very essence of the right to appeal is not infringed. This has been assessed by the ECtHR with regard to the right to appeal a conviction or sentence.[93] It makes sense to refer this reasoning also to limitations of the right to appeal *interim* decisions. However, the specific regulation on the leave to appeal under the Rome Statute seems, at least in certain situations, to violate the defendant's right to a fair trial. The basis for this assumption can be summarized in three points.

Firstly, the green light to lodge an appeal must be given by the very institution that issued the decision to be impugned. This entails the risk for an inherent bias in the examination of the existence of the requirements laid down in Article 82 (1) (d) ICCSt. It might have been more sensitive to allow parallel routes, as it is the case in some domestic orders, such as England and Wales. There, the assessment in question is operated by the lower court as well as directly by the higher court. Taking again inspiration from a national system, this time Sweden, another solution could have be-

90 ICC, *Situation in the Democratic Republic of the Congo*, Case N° ICC-01/04-168 OA3, Appeals Chamber, Judgement on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, par. 11.

91 ICC, *Situation in the Democratic Republic of the Congo*, Case N° ICC-01/04-168 OA3, Appeals Chamber, Judgement on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, par. 14, 15 and 19; A. Hartwig, *Appeal and Revision*, cit., 549; C. Staker, *Appeal and Revision*, cit., 1478.

92 ICC, *Situation in Uganda*, Case N° ICC-02/04-01/05-20-US-Exp, Pre-Trial Chamber, Decision on the Prosecutor's Application for Leave to Appeal in the Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 19 August 2005, par. 16.

93 ECtHR, *Gurepka v. Ukraine,* appl. n. 61406/00, 6 September 2005, par. 59.

en providing for the decision on the application for leave to appeal to be only a matter for the higher court: the Appeals Chamber in the case of the ICC.[94]

Secondly, practice shows that interlocutory appeals are generally disfavoured by the Court itself. They are regarded as inefficient, because "*they disrupt the momentum of the case; rob the trial court of the power to conduct the trial as it sees as fit; and risk exposing the appellate court to appeals alleging numerous errors during the course of the case, many of which might be corrected by the trial court or become moot if the trial is allowed to proceed*".[95] The ICC Pre-Trial Chamber expressed this position as follows: "*in striking the balance between the convenience of deciding certain issues at an early stage of the proceedings, and the need to avoid possible delays and disruptions caused by recourse to interlocutory appeals, the provisions enshrined […] in the ICC Statute, favour as a principle the deferral of appellate proceedings until final judgement, and limit interlocutory appeals to a few, strictly defined, exceptions*".[96]

Thirdly, the decision as to whether or not concede the leave to appeal is not appealable. Attention must be drawn to the fact that, in the past, the Office of the Prosecutor has submitted an application for extraordinary review of the decision of the Pre-Trial Chamber denying leave to appeal. Such request was based on the argumentation, that the absence of provisions on the reviewability of decisions of a hierarchically lower court disallowing an appeal to a higher court constitutes a *lacuna* in the law. This *lacuna* should be remedied through resort to "*general principles of law derived by the Court from national laws of legal systems of the world*" within the terms of Article 21 (1) (c) ICCSt.[97] In this regard, the Prosecutor argued on the existence of a uniform pattern of reviewability of decisions of this kind across many countries of different legal traditions[98] and broadened his submission to include a general right to appeal any decision of first instance.[99] However, the Appeals Chamber dismissed the application arguing that "*nothing in the nature of a general principle of law exists or is universally adopted entailing the review of decisions of hierarchically subordinate courts disallowing or not permitting an appeal*". Further, the Appeals Chamber affirmed that Article 21 (1) (c) ICCSt does not find any application to the case at issue,

94 H. Friman, *Interlocutory appeals in the early practice of the International Criminal Court*, in C. Stahn, G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, 2009, 556.

95 M.C. Fleming, *Appellate Review in the International Criminal Tribunals*, in *Texas International Law Journal*, 2002, 144.

96 ICC, *Situation in Uganda*, Case N° ICC-02/04-01/05-20-US-Exp, Pre-Trial Chamber, Decision on the Prosecutor's Application for Leave to Appeal in the Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 19 August 2005, par. 19; see also H. Friman, *International criminal procedures*, cit. 280.

97 ICC, *Situation in the Democratic Republic of the Congo*, Case N° ICC-01/04, Office of the Prosecutor, Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 24 April 2006, par. 13.

98 ICC, *Situation in the Democratic Republic of the Congo*, Case N° ICC-01/04, Office of the Prosecutor, Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 24 April 2006, par. 30-32.

99 ICC, *Situation in the Democratic Republic of the Congo*, Case N° ICC-01/04, Office of the Prosecutor, Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 24 April 2006, par. 24 sub f).

since no *lacuna* can be identified in the law of the Statute.[100] This reasoning is based on three assumptions. First, an interpretation in accordance with the ordinary meaning to be given to the terms[101] demonstrates that Article 82 (1) (d) ICCSt does not in itself "*confer power or competence on the Appeals Chamber to review a decision not stating a subject for appeal*".[102] Second, a systematic interpretation of this provision in its context and in the light of the object and purpose[103] of the Rome Statute reveals that such power or competence is equally excluded since there "*is nothing in Part 8 to suggest that a right to appeal arises except as provided thereunder*".[104] Third, even an interpretation in accordance with internationally recognized human rights, pursuant to Article 21 (3) ICCSt, does not introduce such a possibility. According to the ICC Appeals Chamber, the right to appeal every decision of a hierarchically subordinate court to a court of appeal is not acknowledged by universally recognized human rights norms: only the appeal of final decisions, *i.e.* convictions and sentences, is assured as an indispensable right of man. This is reflected in Article 14 (5) ICCPR and many regional conventions and treaties giving effect to universally recognized human rights norms (Article 2 of Protocol 7 to the ECHR, for instance). This right is already granted under Article 81 ICCSt.[105]

Put in a nutshell, no extraordinary review is available for decisions on whether or not to grant the leave to appeal. Nevertheless, the last point in the argumentation of the Court requires specific attention. One can agree that the right to appeal every decision of first instance is not covered as such by internationally recognized human rights norms. However, whenever the first instance decision consists in the denial of access to a remedy against a decision that affects fundamental rights, such as the right to a fair trial, the above-mentioned conclusion must be revised. As has been elucidated in the first part of this article, the right to appeal is not only anchored to the fundamental right to appeal in criminal matters in relation to convictions and sentences, as laid down in Article 14 (5) ICCPR or Article 2 of Protocol 7 to the ECHR. In its broader understanding, the right to challenge a decision that violated a fundamental right

100 ICC, *Situation in the Democratic Republic of the Congo*, Case N° ICC-01/04-168 OA3, Appeals Chamber, Judgement on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, par. 32, 39.

101 United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Art. 31 (1) (VCLT).

102 ICC, *Situation in the Democratic Republic of the Congo*, Case N° ICC-01/04-168 OA3, Appeals Chamber, Judgement on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, par. 34.

103 Art. 31 (1) VCLT.

104 ICC, *Situation in the Democratic Republic of the Congo*, Case N° ICC-01/04-168 OA3, Appeals Chamber, Judgement on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, par. 35.

105 ICC, *Situation in the Democratic Republic of the Congo*, Case N° ICC-01/04-168 OA3, Appeals Chamber, Judgement on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, par. 38.

is protected by a combination of fundamental rights: the fundamental right violated in the specific case and the more general right to effective remedy (Article 2 (3) ICCPR or Article 13 ECHR). In so far as the decision under Article 82 (1) (d) ICCSt involves an issue that would significantly affect the fair and expeditious conduct of the proceedings, the decision on the leave to appeal, has repercussions on the right to a fair trial of the accused. Disallowing to appeal a decision allegedly affecting fundamental rights could be in contrast with Article 21 (3) ICCSt. It has already been stated that decisions violating Article 21 can be challenged by virtue of Article 82 (1) (a) ICCSt. This latter rule would provide the legal basis for the review, at least of those decisions on the leave to appeal, which have decisions potentially affecting the right to a fair trial as a subject matter. For the moment, however, in absence of an affirmation to the contrary by the ICC, a denial of the leave to appeal seems to be definitive.

In view of the above, it must be affirmed that, as much as the intent to avoid unreasonable delays of the proceedings must be appreciated, such a restrictive approach might undermine the core function of interlocutory appeals. As has already been mentioned, interlocutory appeals are of great importance to the proceedings and the development of law, especially the interpretation of the Rome Statute and the provisions in the Rules of Procedure and Evidence. Moreover, it must be considered, that an early review of the Appeals Chamber on certain questions might even contribute to avoid lengthy trials, and that the Appeals Chamber might help to ensure certainty and consistency in the application of the law.[106] The conservative attitude of first instance Chambers towards the possibility of granting leave to appeal makes the right under Article 82 (1) (d) ICCSt and, at the same time, also those defence rights, whose protection is pursued through the interlocutory appeal, more theoretical and illusory than practical and effective.[107]

Concluding remarks

The Rome Statute contains a comprehensive recognition of the right to appeal, establishing a protection standard that exceeds the one required by international human rights conventions. This reflects the gradual integration of human rights law into international criminal justice. The roots of this conjunction can be found already in the immediate aftermath of the experience of the Nuremberg Tribunal, which underlined the importance of the guarantee of trial fairness as the main yardstick against which the legitimacy of the whole exercise will be measured.[108]

In the present article, it has been however argued that the fair trial guarantees, and specifically the right to appeal, are less effectively protected in the ICC system than a first glance at the Rome Statute might suggest. Two main reasons have been pointed out in this regard.

106 A. Hartwig, *Appeal and Revision*, cit., 549-550; C. Staker, *Appeal and Revision*, cit., 1479.

107 ECtHR, *Airey v. Ireland*, cit., par. 24; *Artico v. Italy*, cit., par. 33.

108 S. Zappalà, *Human Rights in International Criminal Proceedings*, Oxford University Press, 2003, 164.

The first one can be identified in the statutory imposition of a specific standard of review for appeals against final decisions and the extension of this limitation by the Court also to other types of appeal. Pursuant to this standard, an appeal is upheld, only when the appellant establishes that the proceeding as a whole was unfair or that the alleged error has materially affected the decision or sentence. This approach resembles the review modality of international human rights courts; however, it seems less justified in view of the ICC's nature of criminal justice authority.

The second reason concerns particular features of the leave to appeal such as the provision that it has to be granted by the same authority that issued the first instance decision; the generally restrictive approach of *a quo* judges towards the concession of the leave; and the apparent impossibility to appeal the decision on the grant of the leave.

In front of these problems, in order to enhance the protection of the right to a fair trial, it has been suggested that a decision denying leave to appeal could be impugned by subsuming it under the provision allowing the interlocutory appeal of a decision with respect to jurisdiction and admissibility. This systematic interpretation of the dispositions of the Statute could provide a remedy for infringements of fundamental rights, that otherwise might become final. It remains to be seen, however, if the Court will take a similar reading of the Statute into consideration. What can be argued, is that the system, as it is, is not fully in line with international human rights law.