



UDC 341.645.5:343.13/.15  
Manuscript received: 10.02.2016.  
Accepted for publishing: 05.04.2015.  
Original scientific paper

Serbian Political Thought  
No. 1/2016,  
Year VIII, Vol. 13  
pp. 93-137

Aleksandar V. Gajić<sup>1</sup>  
University of Belgrade, Faculty of Law

## Standards of Appellate Review in the International Administration of Criminal Justice

### Abstract

Proceedings before contemporary international courts and tribunals are truly international, without counterpart in national legal systems, and that is also a characteristic of the proceedings on appeal. The author discusses standards of appellate review, namely standards of review applied by appeals chambers of various international courts and tribunals (the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the Mechanism for International Criminal Tribunals and International Criminal Court). The issues discussed in this article are whether standards of appellate review applied by international courts and tribunals safeguards the appellant's right to a fair trial and whether they are appropriate for international criminal proceedings.

Key words: Appeal, Standard of appellate review, International Criminal Courts and Tribunals, International Criminal Tribunal for the Former Yugoslavia, Error of fact, Error of law, Standard of reasonableness, *de novo*, discernible error.

### Introduction

Understanding standards of appellate review in international administration of criminal justice is of crucial importance for

1 Assistant Professor, [gajic@ius.bg.ac.rs](mailto:gajic@ius.bg.ac.rs)  
The author was a Defence Counsel before the UN Mechanism for International Criminal Tribunals and legal advisor for self-represented accused before the International Criminal Tribunal for the Former Yugoslavia with a right of audience before the Trial Chamber and the Appeals Chamber.

understanding the nature and reasons of the decisions of the appeals chambers of international criminal courts and tribunals. Despite an impressive body of jurisprudence the international criminal law literature remains sparse on this issue. Today, it seems desirable to consider whether the standards of appellate review, as developed in the jurisprudence of various courts and tribunals, safeguard the appellant's right to a fair trial and whether they are appropriate for international criminal proceedings.

In international criminal administration of justice, like in some national jurisdictions, particularly common law jurisdictions, "[s]tandards of review are complex, often difficult to understand, and frequently confusing even to experienced attorneys" (Calkins and Kicks 2003:1). Page limits do not allow comprehensive discussion on appellate review in international criminal proceedings and on all issues that are related to the standards of appellate review. In this article, only fundamental issues of appeal against conviction, acquittal and sentence that are necessary for understanding standards of appellate review are discussed.<sup>2</sup> The issue how those standards were or are actually applied in the international criminal jurisprudence remain outside the scope of this article, and require detailed case-by-case analysis.

Courts and tribunals encompassed by this study are the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR)<sup>3</sup>, the Mechanism for International Criminal Tribunals (MICT), and the International Criminal Court (ICC).

Standards of review on appeal are developed in the jurisprudence of the ICTY and ICTR.<sup>4</sup> The MICT will certainly follow the jurisprudence of the ICTY and the ICTR<sup>5</sup>, and the ICC jurisprudence follows the path established by those *ad hoc* tribunals. The ICC Appeals Chamber pronounced a dozen of judgments on interlocutory matters. However, only one case (*Lumbaga case*) it had an

---

2 Outside the scope of this article remains, for example, significant procedural issues, production of new evidence during appeals proceedings, the right of victims on appeal, appeals against interlocutory decisions.

3 The same standard will probably be applied by the Special Tribunal for Lebanon (STL) whose rules of procedure and evidence are substantially the same as those of the ICTY and the ICTR.

4 The ICTY and the ICTR Appeals Chambers have common members. The purpose for this solution was to obtain "consistency in interpretation and development of international criminal law and procedure" (Drumbl 2001:607)

5 On this topic see: McIntyre 2011:923-983.

opportunity to pronounce appeals judgments on convictions and sentence.<sup>6</sup>

Standard of appellate review in international criminal law is an innovation (Fleming 2002:202), a judge-made law. International criminal courts and tribunals are not bound by the rules of any one national legal system.<sup>7</sup> Statutes of various international criminal courts and tribunals are skeletal on the issue and open possibility for variety of solutions, however, grounds of appeal and corresponding standards of appellate review are unique or almost unique, described in common law terminology and with prevalence of common law influence.<sup>8</sup>

In international criminal law we are sometimes confronted with a need of *post factum* rationalization of existing jurisprudence on particular issue or its critique. It seems that prior to formulation of standards of appellate review there was no solid theoretical basis in international law. While the jurisprudence is, for the time being, conservative, scholarly attention on appropriateness of the standards of appellate review may have an impact on further development of the jurisprudence of the ICC and possibly some further international criminal tribunals.

- 6 *Lumbaga Conviction AJ*; No. ICC-01/04-01/06 A 4 A 6, *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lumbaga Dyilo, Judgment on appeals of the Prosecutor and Mr. Thomas Lumbaga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute, 1 December 2014 (Lumbaga Sentencing AJ)*
- 7 See., for example, Pocar, F. 2006: 92, "The International Tribunal is, in fact, a *sui generis* institution with its own rules of procedure which do not merely constitute a transposition of national legal systems. " neither the rules issuing from the common law tradition in respect of the admissibility of hearsay evidence nor the general principle prevailing in the civil law systems, according to which, barring exceptions, all relevant evidence is admissible, including hearsay evidence, because it is the judge who finally takes a decision on the weight to ascribe to it, are directly applicable before this Tribunal. The International Tribunal is, in fact, a *sui generis* institution with its own rules of procedure which does not merely constitute a transposition of national legal systems. The same holds for the conduct of the trial which, contrary to the Defence arguments, is not similar to an adversarial trial, but is moving towards a more hybrid system." Murphy, S. D. 1999:57-96 quoting Case No.: IT-95-14-T Prosecutor v. Blaškić, Decision on the standing objection of the Defence to the admission of hearsay with no inquiry as to its reliability, 21 January 1998.
- 8 Compare with: Cassese 2003, §§20.2.10-20.3.3. K. Ambos observed that „While the generous scope of the right to appeal resembles the civil law, the appeals procedure is based on the common law since it does not allow a trial de novo but only a review of the decision on clearly identified points of fact and law with limited opportunities for new evidence.“ Ambos 2011:33.

## The right to appeal, permissible grounds of appeal and standards of appellate review

The right to appeal in contemporary law is a human right that consists of the right of an accused, the prosecutor or some other participants in the criminal proceedings to request the higher court or the chamber (court of appeal, court of cassation, appeals chamber) to review the decision of the lower court or the chamber. The scope of the right to appeal is “determined by the law”, and in various jurisdictions it varies (significantly) depending on permissible grounds of appeal and standard(s) of appellate review.

Grounds of appeal concerns the issue what decisions of a trial chamber and for what reasons can be appealed (for example conviction on the basis of error of law, error of fact, procedural error, discretionary decision), and they significantly vary in different systems.

Standard of appellate review is an institute of common law origin that consist of rules that guide analytical process in reviewing trial (or pre-trial) chamber decisions, particularly the degree of deference that is to give to the the actions and decisions under review (Calkins and Kicks 2003:1, Davis 2000:47, Davis 1988:469) In other words, standard of appellate review determines of parameters of appellate review,<sup>9</sup> Each standard of appellate review has “a name or phrase intended to denote the level of deference” (Davis, 1988:470.), whether on the appeal the standard will be *de novo*, standard of reasonableness, standard of clear error, discernible error or some other standard.<sup>10</sup> It defines, as M. Davis observed, “the relationship and power shared by decisionmakers.” (*Ibid.*, 469.) The very notion of standards of appellate review is unknown to the legal systems of continental Europe (civil law).

## The right to appeal, grounds of appeal and standard of appellate review in international law and national legal standards

The right to appeal in international criminal proceedings is of recent origin

---

9 As noted by A. Peters, the standard of review guides an appellate court or chamber “in determining how wrong the lower court has to be before it will be reversed” (Peters 2009:235)

10 In the United States it could be identifies six standards of appellate review – *de novo* review, clearly erroneous review, reasonableness review, arbitrary and capricious review (for agency decisions), the clear error of judgement test, abuse of discretion for discretionary decisions, and no review. *Ibid.*, 471

The right to appeal in international criminal law is of recent origin first appearing in the Statute of the ICTY. In the interwar period, the idea of appellate jurisdiction of an international criminal tribunal was fluid, and certainly the right to appeal had not been established as a component of the fair trial.<sup>11</sup>

Nuremberg and Tokyo trials did not recognize a right to appeal. Statutes of those tribunals were explicit that the judgment of the Tribunal is final and not subject of review.<sup>12</sup> However, while there was no possibility to review convictions,<sup>13</sup> review of sentences was treated as a political issue, since convicted persons “could only

---

11 The International Law Association in the period between the I and II World Wars provided in Article 15 of the Draft Statute of the International Penal Court that “[w]here sentence of death or imprisonment for life, or for a term of not less than five years, has been passed by a Sectional Court, there shall be a right of appeal to a Full Court consisting of not less than seven Judges, of whom no more than two may be Deputy Judges. A defendant State charged with an offence shall be entitled in any case to appeal to the Full Court from the decision of a Sectional Court.” (International Law Association, 34th Report (Vienna) 1927, pp. 113-125 (see. Historical Survey of the Question of International Criminal Jurisdiction – Memorandum submitted by the Secretary-General, Topic: Question of international criminal jurisdiction, UN. Doc. A/CN.4/7/Rev.1, pp.61etc) However, other proposals, for example Voeu of the International Congress of Penal Law concerning an international criminal court (Brussels, 1926) provided in paragraph 8 that “No appeal against decisions of the Court should be admissible other than review under the terms of the present Statute of the Court”. It was proposed that “The Council of the League of Nations should have the right to suspend or commute sentences” (para. 10). Similar proposition was contained in the Draft Statute for the Creation of a Criminal Chamber of the International Court of Justice prepared by Professor V. V. Pella and adopted by the International Association for Penal Law (Paris, 16 January 1928, and revisited in 1946) (*Ibid.*, pp.75etc.)

12 For example Article 24 of the Statute of the International Military Tribunal provided that „The Judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review”. See also. Roth and Henzelin 2002:1535-15578.

13 There was no judicial reexamination of the facts or law underlying the conviction” For details see: Fleming 2002:111-112. Estimating the legacy of the International Military Tribunal Heller concluded that “because of the liberal good-conduct and parole programs created by the United States after the tribunals shut down, very few of the convicted defendants ever served even a fraction of their modified sentences. To take only the most obvious example, seven defendants were facing life sentences after McCloy’s clemency decisions in January 1951: List and Kuntze from the Hostage case; Biberstein, Klingelhofer, Ott, Sandberger from Einsatzgruppen; and Reinecke from High Command. List was released from prison in late 1952; Kuntze was released in early 1953; Klingelhofer was released in late 1956; and the others were all released in early 1958. In practice, therefore, a life sentence meant as few as three and no more than 10 years—a result that is impossible to reconcile with retributive principles.” Haller 2011:371

request clemency from political body.”(Haller 2011:331-367) Cassese observed that: “[t]he Nuremberg and Tokyo tribunals belong to era that preceded codified human rights under international law the rights guaranteed to the defendants were rudimentary and, in practice, were not always fully respected.”(Cassese 1997:331)<sup>14</sup>

Soon after the World War II, under auspices of the United Nations, there were some efforts in order to examine a possibility of creation of an international criminal court and to draft a parameters of its jurisdiction. The Committee on International Criminal Jurisdiction of the UN General Assembly examining possibility of creation of an ICC discussed the issue of the appeal in the context of the question whether the proposed ICC should have more than one chamber. In 1951 the Committee decided that there should be no separate chambers and consequently no right to appeal, particularly not by any of the authority outside the proposed international criminal court. It took position that it should be possible to review cases on the basis of fresh evidence.<sup>15</sup>

In the work of the International Law Commission (ILC) on the Draft Code of Crimes against Peace and Security of Mankind, the right to appeal appears for the first time in 1994 when it has already become a human right and provided as a right in the Statutes of the ICTY. The ILC in the context of proposal for an International Criminal Court proposed the right to appeal against conviction and sentence in international criminal proceedings in accordance with Article 14 (5) of the International Covenant on Civil and Political Rights (ICCPR) and Article 25 of the Statute of the ICTY.<sup>16</sup>

The ILC proposed that “the standard to be applied by the appeals chamber, and its power to alter a decision or order a new trial, are

---

14 See also: Case No. IT-94-1-T, Prosecutor v. Tadić, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, paras. 20-21. “As a body unique in international law, the International Tribunal has little precedent to guide it. The international criminal tribunals at Nuremberg and Tokyo both had only rudimentary rules of procedure.” It seems that Klamberg is of different opinion. He argued: “Even though the statutes of the International Military Tribunal in Nuremberg ... and the International Military Tribunal for the Far East... preceded the ICCPR, they both contain fair trial guarantees falling shorts but still similar to present day norms.”(Klamberg 2010:287)

15 For a summary of the work of this Committee see: Roth and Henzelin 2002:1536.

16 Report of the International Law Commission on the work of its forty-six session, 2 May-22 July 1994, Official records of the General Assembly, Forty-ninth session, Supplement No. 10. , UNN Doc. A/49/10, Yearbook of the ILC 1994, vol. II (2), Draft Code of Crimes Against Peace and Security of Mankind, p. 61(*ILC Commentary*)

dealt in Article 49<sup>17</sup> which provides that “The Appeals Chamber has all to powers of the Trial Chamber”. Very brief commentary of the ILC opens a number of questions about proposed standard of appellate review. In the commentary of Article 49 it is stated that:

“The appeals chamber combines some of the functions of appeal in civil law systems with some of the functions of cassation. This was thought to be desirable having regard to the existence of only a single appeal from the decision at trial.”

The Commentary made clear that only “the error that had to be a significant element in the decision taken” might lead to reversal or annulment, and added that proposed court, “like national appellate courts-necessarily have to exercise a certain discretion in these matters, with any doubt being resolved in favor of the convicted person”.<sup>18</sup>

In the Commentary it was further stated that:

“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.”<sup>19</sup>

From this explanation it seems that the ILC did not deal with particular measure of deference as to the trial chamber decisions. A proposed solution seem to be a compromise between common law and civil law understanding of the role of appellate courts and in final resolution of the issue is delegated to the discretion of an international criminal court. However, from the ILC Commentary it cannot be concluded with certainty that it allows a great margin of deference to the trial chamber either legal or factual findings or discretionary decisions (as in the common law systems). This

17 Article 49. (Proceedings on appeal) reads as follows:

1. The Appeals Chamber has all the powers of the Trial Chamber.
2. If the Appeals Chamber finds that the proceedings appealed from were unfair or that the decision is vitiated by error of fact or law, it may: (a) If the appeal is brought by the convicted person, reverse or amend the decision, or, if necessary, order a new trial; (b) If the appeal is brought by the Prosecutor against an acquittal, order a new trial.
3. If in an appeal against sentence the Chamber finds that the sentence is manifestly disproportionate to the crime, it may vary the sentence in accordance with article 47.

18 *ILC Commentary*, para. 3.

19 *Ibid.*, para. 6. It is interesting to note that the ILC took a position that no dissenting or separate opinion should be allowed.

conclusion follows from at least two considerations, the first one is that “the Appeals Chamber has all the powers of the Trial Chamber” (this is now a part of the Rome Statute of the ICC) and the second, that “any doubt should be resolved in favor of the convicted person”.

The ILC draft was made in absence of any Appeals Chamber jurisprudence that would be under the scrutiny and a very basis for discussion,<sup>20</sup> and, on the other side, in the jurisprudence of the ICTY and the ICTR there is no a single reference to the work of the ILC on the issue.

The Preparatory Commission for the International Criminal Court and the Working Group for the Rules of Procedure and evidence discussed the issues of appeal. (Brady and Jennings 1999:294) As observed by H. Brady and M. Jennings, although the Rome Statute “... only contains a small number of articles compared to other parts of the Statute, its negotiation proved difficult and time-consuming. This was in large part due to the need to achieve a blending of the approaches taken in the major legal systems”.(Roth and Henzlin 2002:1537)

At the outcome of the Rome Conference there was no clear indication about relevant standard of appellate review, and whether there should be any departure from standards (already) crystallized in the ICTY and the ICTR jurisprudence.

*International Covenant on Civil and Political Rights (ICCPR) and European Convention on Human Rights and Fundamental Freedoms (ECHR)*

Human rights treaties are of little help in determination of the appropriate standard of appellate review in international criminal administration of justice.

The ICPR in Article 14 (5) provides:

“Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. “

---

20 The first Judgment of the Trial Chamber was pronounced in 1996, and the first Judgment of the Appeals Chamber in 1997, both in the *Case No. IT-96-22, Prosecutor v. Dražen Erdemović*, Judgement of 7 October 1997, and Sentencing Judgment, 29 November 1996.

Peter D. Marshall observed that when proposed “relatively late in the gestation of the ICCRP ... did not envisage a particular standard.” (Marshall 2011:17)

The UN Human Rights Committee described in robust terms essential features of the right to appeal (*Ibid*:18) and repeatedly emphasized that in order for there to be compliance with article 14(5), the conviction and sentence must be “review[ed] substantively, both on the basis of sufficiency of the evidence and of the law, . . . such that the procedure allows for due consideration of the nature of the case.” (*Ibid*.)

The right to appeal, surprisingly, was not envisaged in the original text of the ECHR, but in Protocol 7 (1984) (Article 2 Right of appeal in criminal matters) which reads as follows:

“Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.”<sup>21</sup>

In the Commentary contained in the Explanatory Report it is stated that:

„Different rules govern review by a higher tribunal in the various member States of the Council of Europe. In some countries, such review is in certain cases limited to questions of law, such as the *recours en cassation*. In others, there is a right to appeal against findings of facts as well as on the questions of law. The article leaves the modalities for the exercise of the right and the grounds on which it may be exercised to be determined by domestic law.”<sup>22</sup>

Jurisprudence of the European Court on Human Rights shows how many differences exist between various legal systems concerning the scope of the right to appeal. In the ECHR’s jurisprudence it is commonly observed that:

“The Court reiterates that the Contracting States may limit the scope of the review by a higher tribunal by virtue of the re-

---

21 The 2<sup>nd</sup> paragraph reads as follows: “This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.”

22 Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *European Treaty Series - No. 117*, Strasbourg, 22 November 1984, para.18.

ference in paragraph 1 of this Article to national law. In several Member States of the Council of Europe such a review is limited to questions of law or may require the person wishing to appeal to apply for leave to do so.<sup>23</sup>

In the *case of Krobmbach v. France* the ECHR reiterated that:

“However, any restrictions contained in domestic legislation on the right to a review mentioned in that provision must, by analogy with the right of access to a court embodied in Article 6 § 1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right”<sup>24</sup>

From the practice of the both the European Court on Human Rights and the UN Commission on Human rights it follows that the scope of the right to appeal remains undefined. However, the right to appeal must be effective. As stated by the European Court on Human Rights, „[t]he right to the fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience“.<sup>25</sup>

In determination of the appropriate standard of review, which differs significantly among various legal systems, as argued by P. Marshall, “all appeals must afford a convicted person the ability to access and adequate and effective review of conviction and sentence...Beyond these minimum requirements, the right to appeal does not mandate a particular standard of review.” (Marshall 2011:45)

## Origins of the Right to Appeal and Standard of Appellate Review in Contemporary International Criminal Law

Today the right to appeal conviction and sentence is recognized as “an indispensable guarantee of a fair trial”, and there was no doubt that this right should be provided in the statutes of international courts and tribunals. (Book 2011:47)<sup>26</sup>

---

23 See, for example, *Case of Pesti and Frodl v. Austria*, Applications no(s) 27618/95 and 27619/95, ECHR Reports of Judgments and Decisions 2000-I, para. 4.

24 *Case of Haser v. Switzerland*, Application no. 33050/96, Judgment of 27 April 2000, para. 96.; *Case of Krobmbach v. France*, Application no. 29731/96, Judgment of 13 February 2001, para. 96.

25 *Case of Lalmahomed v. the Netherlands*, App. no. 26036/08, Judgment of 22 February 2011, para. 36.

26 See also: Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808(1993), UN. Doc. S/25704, (Report of the SG) para. 10.; Karibi-Whyte 2000: 644-653. He was of the opinion that „the genesis of vesting of

In the *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808(1993)*<sup>27</sup> it is stated that:

“It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary General, such internationally recognized standards are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights”<sup>28</sup>

Concerning the right of appeal, in the Report it was stated as follows:

“Secretary-General is of the view that the right of appeal should be provided for under the Statute. Such a right is a fundamental element of individual civil and political rights and has, *inter alia*, been incorporated in the International Covenant on Civil and Political Rights. For this reason, the Secretary General has proposed that there should be an Appeals Chamber.”<sup>29</sup>

Except for enumeration of grounds of appeal and that the prosecution may also appeal against acquittal, and the power of the Appeals Chamber to affirm, reverse or revise the judgment of the Trial Chamber, there was no indication of the appropriate standard of appellate review.

Various states and organizations provided various proposals as to the appeal, almost always in terms of its limitations.<sup>30</sup> It might be identified two approaches, board light to appeal reserved to defence, and limited right to appeal (on allegations of error of law) for both

---

appellate jurisdiction in an international criminal court would seem to be current provision of Article 25 of the Statute of the ICTY and Article 24 of the Statute of the ICTR. This followed from the recommendation of the Secretary General...“ (*Ibid.*, 631.)

27 This Report was a basis for the establishment of the ICTY.

28 *Report of the SG*, para.106. About protection of human rights of the accused at international courts and tribunals see, Gajić 2005.

29 *Report of the SG*, para.106

30 Just for example, the Russian Federation, The Netherlands and the France, proposed that all appeals need to be limited on questions of law, and the France proposal was in opposition for the creation of an appeals chamber, “but recommended that appeal procedure be available in the nature of cassation”, Much boarder right of appeal was proposed by the USA, and the most comprehensive right of appeal was proposed by the Organization of Islamic Conference. See: Fleming 2002: 118-119.

parties. The Secretary General proposed board light to appeal for both parties that reflects proposal of the United States of America.<sup>31</sup>

Constitutive instruments of international courts and tribunals remain silent on the issue of standards of appellate review and provide a huge space for variety of solutions. In final outcome this issue was transferred to the discretion of the Appeals Chamber.<sup>32</sup>

### A Few observations on standard of appellate review in national legal systems

The scope of the right to appeal in terms of permissible grounds of appeal and standards of appellate review differ significantly even between national legal systems that belong to the same family, and between civil law and common law countries.

P. Marshall observed that comparative studies of the standards of appellate review “are virtually non-existent.” (Marshall 2011:2) A. Peters, discussing standard of review in common law system noted that “finding a general history on standards of review is virtually impossible.”<sup>33</sup> In common law jurisdictions standard of appellate review also vary from jurisdiction to jurisdiction.(Sward 1991:1-43, O’Hear 2010:2123-2167) In civil law countries the situation is different and those systems do not recognize a particular standard of review understood in terms of a margin of deference to a finding of a lower court.<sup>34</sup>

---

31 *Ibid.*, 119.

32 It should be noted that Secretary General Proposals are quite different from the proposal of the ILC discussed above.

33 “One can find the earliest formulations of modern-day standards of review beginning in the late 1950s and 1960s. The first commentators on standards of review began to discuss them in the 1970s and 1980s. However, it was not until the late 1980s and early 1990s that appellate courts routinely began to include a discussion on the applicable standard of review in most opinions. As Martha Davis, professor and coauthor of the treatise *Federal Standards of Review* stated, “[t]he idea of using standards to guide appellate review of decisions of tribunals below has existed from the beginning of American jurisprudence, but the articulation of those standards is a fairly recent and still not always clear development.” Having established that standards of review, as we know them today, are relatively modern creatures, it is important to examine why they were created and what purposes they serve.” (Peters 2009: 238)

34 For short summary of the „exercise of right of appeal in national courts“ see: Karibi-Whyte 2000:644-653

The law on criminal appeals has different historical foundations in the common law and in the legal systems of continental Europe, and different parameters. (Damaška 1974:482-490)

From the perspective of common law layers, unlike in common law countries, in civil law jurisdictions appeals proceeding are consider “as a continuation of the /trial/ proceedings.”<sup>35</sup> However systems differ significantly. For example in Germany and France the scope of appeal (defined by permissible grounds of appeal) differs depending on the court from which the appeal is taken. (Marshall 2011:23) In various systems appeals may be on different grounds, however, no deference will be given to the trial court’s rulings.

The nature of appeal might be dependent on various factors such as, who is a fact finder (a jury, professional judge or a chamber composed of both professional judges and lay persons), the rules of admissibility of evidence, hierarchical structure of the judicial system, whether there is a reasoned judgment as to the factual issues (in a jury trial decision on factual issues remains unexplained.)

In common law jurisdictions certain common standards are established. It should be noted that, as one common law judge said, they are not always “black and white... standard of review will be the determinative issue on appeal.” (Chartier 2011)

In common law systems, it is tradition that judges decisions “are divided into three categories: questions of law (reviewable *de novo*), questions of fact (reviewable for clear error or standard of reasonableness), and discretionary matters (reviewable for abuse of discretion).” However, there is a mixed error of fact and law that consist in application of the law to the facts in issue. It is usually observed that:

“In practice, the lines between these categories can blur, leading to the application of several layers of review on a single issue or a case where it is unclear whether the appellate court is reviewing a question of law or a question of fact. This fluidity requires the practitioner to make strategic decisions about how to frame the standard of review.”<sup>36</sup>

---

35 Because reconsideration of first instance decisions is standard, appeal in hierarchical systems are regarded as a continuation of the trial process. (Marshall 2011:15).

36 *Kansas Appellate Practice Handbook* 2013:§ 8.5. See also, for example, Peters 2009: 243-247. One particular problem is in differentiation of the error of law and error of fact. It is commonly observed that “Although there are situations where it is difficult to determine whether a given question is properly one of law or one of

If a lay jury is a trier of fact, crystallization of a particular standard of appellate review required a great measure of deference as to factual findings. However, lay jury is also a judge of the law because they make decision “on the manner and extent to which the law expounded by the judges fits the facts brought out into the evidence” (Davis 1988:473). Division of tasks between professional judges and a lay jury has its reflection on the scope of the jurisdiction and powers of appellate courts. If there is no deference as to the findings by the jury, the very existence and the role of the lay jury would be put in question.<sup>37</sup> However, as observed by A. Peters, “[t]heoretically, standards of review are one thing; in practice, they are often another” (Peters 2009:247).

In common law system, lay jury is a fact finder (a trier of fact), and the role of the judge is to filtrate evidence on the basis of which a lay jury would take decision. There is no reasoned opinion as to factual findings. If a court of appeals would have an unlimited right to reverse factual findings of a lay jury, fundamental division of tasks between a judges and a jury would be practically annulled and the very purpose for a very existence of a jury will be put in question. On the other side, in civil law system professional judges (with or without lay persons sitting at the bench) are triers of both, fact and law. There is a complete trial record (recorded or summarized witness statements and documents produced, record of all procedural decisions etc.) and more importantly reasoned opinion on both, legal and factual issues. The judges of the appellate court in civil law systems, (we are trying to express our opinion in common law terminology) review factual findings with caution, but are free to reverse or revise them if they found that there are not correct (not only in the case when they are unreasonable like in common

---

fact, the statement that there is “no fixed distinction” between the two types of question must, unless taken in a very limited sense, be regarded largely as hyperbole.” Brown1943:900

37 In the USA, as well as in other common law jurisdictions, the right to a jury trial is the constitutional right. For example, in the USA, the Seventh Amendment of the Constitution provides that “In suits at common law no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law.” This provision has been construed to mean that if there was any substantial evidence which supported the verdict it must stand.” “Substantial evidence” has been best defined by Chief Justice Hughes: “It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Rives 1959:72.

law jurisdictions). If the conviction, sentence and reasoning are of such a nature that they persuade the appeal judges that they are correct, they would be confirmed on the appeal. Because there is a reasoned opinion, there is no need to show significant margin of deference to the trial court's findings. Court of appeals in civil law system cannot base its decision on argument commonly expressed in common law systems - we are of different opinion, however, the trial court rendered reasonable decision or did not commit a clear error, and the judgment is confirmed.

No general standard of appellate review in national jurisdictions

The state of "the law of criminal appeals" is such that it is impossible to find a general agreement or a general principle of law recognized by civilized nations<sup>38</sup> that would guide the Appeals Chamber of an international criminal tribunal in determination of standards of appellate review. In other words, a common standard or appellate review is impossible to find, e. g. sharp distinction between common law standards and absence of those standards in civil law systems makes that it is almost impossible to formulate some generally accepted principle defined at the level of abstraction that can be applied in concrete cases.

### **Grounds and nature of appeal in the international criminal administration of justice**

Statutes of the ICTY, the ICTR and the MICT provide that the Prosecution or convicted persons may appeal on two grounds: "error on a question of law that invalidates the decision" and "error of fact which has occasioned a miscarriage of justice."<sup>39</sup>

Acquitted person has no right to appeal against the trial judgment even if it belief that the judgment contain some error in law or in

---

38 Understood as a source of international law in accordance with the Statute of the International Court of Justice.

39 Article 25 (1) of the ICTY Statute, Article 24 (1) of the ICTR Statute. Article 26 (Appellate proceedings) of the Statute of the Special Tribunal for Lebanon. M.A. Drumbl -K.S.Gallant observed that those statutes "generally do not refer to mixed questions of law and fact, a classification often used in common law appellate courts to discuss issues such as negligence" (Drumbl and Gallant 2001:620)

fact, and even when the Prosecution appeal against a judgment of acquittal. In that case, the acquitted person, because it has no right to appeal, is deprived of the possibility to challenge factual findings of the Appeals Chamber in appropriate way.<sup>40</sup>

In accordance with Article 81 of the Rome Statute (Appeal against decision of acquittal or conviction or against sentence), a judgment of the Trial Chamber may be appealed on the ground of “procedural error”, “error of fact” or “error in law”, and convicted person, “or the Prosecutor on that person’s behalf, may make an appeal on any of the following grounds: “procedural error”, “error of fact” “error of law” or “any other ground that affects the fairness or reliability of the proceedings or decision”. In accordance with paragraph 2 of that Article: “A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence”. Article 83(s) provides that “the Appeals Chamber may also interfere with a conviction decision if the error of fact or law or a procedural error “materially affected” the decision, and in respect of unfairness allegations, that unfairness “affected the reliability of the decision”.<sup>41</sup>

Like ICTY and ICTR statutes, the Rome Statute on appeals proceedings is skeletal and provides for a (high) degree of discretion to the Appeals Chamber in determination of standards of appellate review. As a matter of principle, the ICC is not obliged to follow jurisprudence of other international tribunals and the text of the Rome Statute provides a basis for different interpretations as to the standards of appellate review. On closer examination it can be concluded that the Rome Statute and statutes of ad hoc tribunals provides opportunity for the same grounds of appeal. For example, procedural error is by its nature en error in law.<sup>42</sup>

---

40 That happened, for example, *Stanišić and Simatović case* before the ICTY. In that case, the Defence argued that response to the Prosecution appeal “is not the appropriate instrument to argue against” findings challenged by the Defence. (Case No. IT-03-69-A, Prosecutor v. Jovica Stanišić and Franko Simatović, Judgement, 9 December 2015, para. 13)

41 *Lumbaga Conviction AJ*, para. 16. Some authors as M. Škulić provide that the ICC Appeals Chamber has board powers without consideration of standard of appellate review, and without consideration of the jurisprudence of ad hoc tribunals and positions of various states in the course of drafting the Rome Statute. See: Škulić 2005: 522.

42 Appeals Chamber of the ICTY has argued that „With regard to the alleged errors of law, the Appeals Chamber recalls that, as arbiter of the law applicable before

The ICC jurisprudence, even it use somewhat different terminology, is substantially the same as the jurisprudence of the ICTY and the ICTR, and the ICC frequently relied on that jurisprudence in determination of permissible grounds of appeal and standard of appellate review. However, that does not mean, *per se*, that the appellate law of the ICC is or will be the same as the appellate law of the ICTR and the ICTY. Interpretation of statutory provisions may lead to some difference, and States parties to the Rome Statute may, by way of revision of the Rome Statute or more conveniently the Rules of the Procedure and Evidence, introduce a new standard of appellate review. However, that possibility seems to be very distant and dependent on scholarly attention on the issue.

Statute of the ICTY (and subsequently the ICTR, the MICT and the STL) contains limited guidance expressed in common-law terminology. An error of law must be of such a nature that “invalidates the decision” and a factual error must be of such a nature that “occasioned a miscarriage of justice”.<sup>43</sup> Those terms are missing from the Rome Statute. Reliance on national laws can be of little help. In civil law jurisdictions the terms “miscarriage of justice” and “invalidation of decision” could be easily translated (understood) as relevant legal and factual findings that (significantly) affected the outcome of the case. However, this is not a simple issue, and using common law terminology might be understood in terms of particular standard of review and a measure of deference to the findings of a trial chamber.

It seems undisputable that the powers of the Appeals Chamber are designed to be of corrective nature. However, common law layers may have different opinion in determination of the standard commonly named “*de novo*”. It seems that it should be noted that in any legal system (common law or civil law) appeal proceedings is not concerned with new presentation of evidence already on the record, however differences exists in the scope and standards of review, particularly whether an appellate body is obliged to defer

---

the International Tribunal, when a party raises such an allegation, it is bound in principle to determine whether an error was in fact committed on a substantive or procedural issue. (Case no. IT-97-25-A, Prosecutor v. Milorad Krnojelac, Judgment, 17 September 2003 (*Krnojelac AJ*), para. 10) However, it seems that the sentence may be appealed on the basis of an error of law or error of fact, or procedural error. Klamberg argues that it follows from Article 83(2) of the Rome Statute. Klamberg Commentary, p. 652.

43 Article 25 of the ICTY Statute, Article 24 of the ICTR Statute.

or not to defer as to the particular legal or factual finding and discretionary decisions of the trial chamber. For layers of civil law background understanding of common law notion of the standard *de novo* may be strange. Trial record is preserved, and no evidence will be presented at the appeal which has already been presented during the trial and there is a limited right or no right to present fresh evidence on appeal. There is no rehiring in the sense of fresh presentation of evidence already on the record. Those (mis)understandings had been reflected in the work of the ILC that concluded that “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.”<sup>44</sup>

Deference as to the factual findings and discretionary decisions of the lower court is another topic and concerns applicable standard of appellate review. It is not the issue of whether the proceedings on appeal are considered as a “trial *de novo*” or a continuation of a “trial”. The key point is – what conditions need to be satisfied in order for the appeals chamber to exercise its power to substitute its decision or factual finding of that of the trial chamber. Those parameters are defined in the terms of deference to a finding of the trial chamber.

The authors differ, basing its observation on the *travaux préparatoires* and the text of the Rome Statute, on the nature of the appeal. While some argues that the appeal is of corrective nature, others open a possibility for a *de novo* review.<sup>45</sup> Others argues that “The nature of the appeals review at the ICC is less clear and the Statute leaves the appeals chamber with board discretion; the Chamber has all the powers of the Trial Chamber and evidence may be presented in the appeals proceedings.”<sup>46</sup> However, those observations were made at the time when there was no the ICC Appeals Chamber jurisprudence.

44 *Ibid.*, para. 6. It is interesting to note that the ILC took a position that no dissenting or separate opinion should be allowed.

45 *Klamberg Commentary*, p.651. See also: Klamberg 2013:415-416.

46 The authors differ, basing its observation on the *travaux préparatoires* and the text of the Rome Statute, about the nature of the procedure. While some argues that the appeal is of corrective nature, others open a possibility for a *de novo* standard of appellate review. “The nature of the appeals review at the ICC is less clear and the Statute leaves the appeals chamber with board discretion; the Chamber has all the powers of the Trial Chamber and evidence may be presented in the appeals proceedings.” (Crayner et al. 2008:389)

Corrective nature of the appeals proceedings are frequently emphasized by the Appeals Chambers. The Appeals Chamber, in the words frequently employed by the Appeal Chamber, “does not operate as a second Trial Chamber” providing that its “role of the Appeals Chamber is limited, pursuant to Article 25 of the Statute, to correcting errors of law invalidating a decision, and errors of fact which have occasioned a miscarriage of justice”.<sup>47</sup> However, this consideration does not resolve the issue of applicable standard of review that could be discussed in terms of difference between common law and civil law approach as discussed above.

One element in estimation of the nature of appellate review is the division of tasks of trial and appeals chamber. Unlike in common law jurisdictions, there is no statutory base of “division of tasks” between trial and appeals chamber as understood in common law jurisdictions. The Statute of the ICC is explicit that “the Appeals Chamber has all the powers of the trial chamber”. Division of tasks is a matter of consecutiveness, before the trial chamber all evidence is produced, and the Appeals Chamber has before itself a complete trial record and there is no need to call all evidence for its presentation again. However, fresh evidence could be presented on the Appeal if they satisfy strict criteria.<sup>48</sup>

### **Limits of the right to appeal and determination of the scope of appellate review**

In international criminal proceedings, as in common and civil law jurisdictions, not every legal, factual or other error deserve intervention of the Appeals Chamber, but only those that have an impact on the outcome of the case.<sup>49</sup> Starting point in determination of the limits of the right to appeal (including standards of appellate review) are that an appeal is not a trial *de novo*<sup>50</sup> and corrective na-

---

47 See, for example, *Kupreškić AJ*, para. 23

48 See, e.g. Case No. IT-05-88-A, Prosecutor v. Popović et al., Public Redacted Version of 2 May 2014 Decision on Vujdić Popović’s Third and Fifts Motions for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 23 May 2014, paras. 6-12

49 No. ICC-01/04-01/06 A 5, Appeals Chamber, Situation in the Democratic Republic of the Congo in he case of the Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction, 1 December 2014.

50 This sentence is common to all appeals judgments.

ture of the Appeals Chamber's jurisdiction.<sup>51</sup> The Appeals Chamber exercise only limited scrutiny over the Trial Chamber's decisions.<sup>52</sup>

The ICTY Appeals Chamber observed that:

“This appeal system affects the nature of the submissions that a party may legitimately present on appeal as well as the general burden of proof that the party must discharge before the Appeals Chamber acts.”<sup>53</sup>

Appeal is an opportunity right, and the parties to the proceedings need to satisfy demanding formal requirements, and to express their arguments in a limited page numbers against judgments that has a few hundred pages and based of thousands of pages of transcripts and on thousands of exhibits.<sup>54</sup> Frequently, Counsels find that that page numbers does not satisfy their needs to properly argue issues on appeal, particularly in very complex cases of circumstantial nature.<sup>55</sup>

In all, or almost all, Appeals Chamber judgments the Appeals Chamber observed that:

“The Appeals Chamber reiterates that it does not review the entire trial record *de novo*; in principle, it takes into account

---

51 Appeals Chamber of the ICC held that „The Appeals Chamber repeatedly held that its review is corrective in nature and not *de novo*.“ *Lumbaga Conviction AJ*, para. 18; No. ICC-01/04-01/10-283 (OA), Prosecutor v. Callixte Mbarushimana, “Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled ‘Decision on the “Defence Request for Interim Release”’, 14 July 2011, para. 15; No. ICC-01/05-01/08-631-Red (OA 2) Prosecutor v. Jean-Pierre Bemba Gombo, “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber 11’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’”, 2 December 2009, para. 62.

52 Case No. IT-95-14-A, Prosecutor v. Tihomir Blaškić, Judgment, 29 July 2004, para. 8-24.

53 Case No. IT-97-25-A, Prosecutor v. Milorad Krnojelac, Judgment, 17 September 2003, para. 5.

54 See: Practice Direction on Formal Requirements for Appeals from Judgment, IT/201,7 March 2001.

55 Case no. IT-05-88/2-A, Prosecutor v. Zdravko Tolimir, Decision on Motion for Setting a Time Limit for Filing and Appellant’s Brief and for an Extension of Word Limit, 17 May 2013. (Considering that the lengths of the trial judgement, the number of exhibits admitted at trial, and the number of grounds and subgrounds of appeal does not per se provide sufficient reason to enlarge the word limits prescribed by the Practice Direction”)

only evidence referred to by the Trial Chamber in the body of the judgment or in a related footnote, evidence contained in the trial record and referred to by the parties, and additional evidence admitted on appeal, if any”<sup>5657</sup>

One of the basic principles in determination of the scope of appellate review is expressed in following terms:

“The Appeals Chamber recalls that it has an inherent discretion to determine which of the parties’ submissions merit a reasoned opinion in writing and that it may dismiss arguments which are evidently unfounded without providing detailed reasoning in writing. Indeed, the Appeals Chamber’s mandate cannot be effectively and efficiently carried out without focused contributions by the parties. In order for the Appeals Chamber to assess a party’s arguments on appeal, the party is expected to present its case clearly, logically and exhaustively. A party may not merely repeat on appeal arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber’s rejection of them constituted an error warranting the intervention of the Appeals Chamber. Additionally, the Appeals Chamber may dismiss submissions as unfounded without providing detailed reasoning if a party’s submissions are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies. It is not for the Appeals Chamber to guess what the consequence of an alleged error is. It must be explained in terms that it occasioned a miscarriage of justice.”<sup>58</sup>

56 See, for example, Case No. IT-95-11-A, Prosecutor v. Milan Martić, Judgment, 8 October 2008, para. 13, Case no. IT-05-87-A, Prosecutor v. Nikola Šainović, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić, Judgment, 23 January 2014.

57 Appeals Chamber of the ICC held that „The Appeals Chamber repeatedly held that its review is corrective in nature and not *de novo*.“ *Lumbaga Conviction AJ* 18.; No. ICC-01/04-01/10-283 (OA), Prosecutor v. Callixte Mbarushimana, “Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled ‘Decision on the “Defence Request for Interim Release””, 14 July 2011, para. 15; No. ICC-01/05-01/08-631-Red (OA 2) Prosecutor v. Jean-Pierre Bemba Gombo, “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber 11’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”, 2 December 2009, para. 62.

58 Case No. IT-98-32-A, Prosecutor v. Mitar Vasiljević, Judgment, 25 February 2004, para. 20.

It is commonly observed that “On appeal, parties must limit their arguments to errors of law that invalidate the decision of the trial chamber and to factual errors that result in a miscarriage of justice”.<sup>59</sup>

The exception is that “in exceptional circumstances, the Appeals Chamber will ... hear appeals in which a party has raised a legal issue that would not lead to the invalidation of the trial judgment but that is nevertheless of general significance of the Tribunal’s jurisprudence”.<sup>60</sup> Also, the Appeals Chamber in the exercise of its discretion may raise some issues *proprio motu* if it is “of general significance to the jurisprudence of the Tribunal.”<sup>61</sup>

However, before the ICTY and the ICTR there are more restrictions imposed on the parties in the proceedings or, looked from different angle, formal requirements in order the appeal be considered. It seems that they are all based on proposition that parties to a proceedings are represented by qualified and experienced counsels acting with due diligence and that the trial chambers are composed of professional judges. At the ICTY and ICTR (and probably before the MICT and STL) in general, the parties’ mistakes cannot be remedied on the appeal. Generally, a party cannot raise an issue on appeal if the issue was not raised at trial. The appeal is not an opportunity for the parties to remedy their own failings or oversights during trial (Drumbl and Gallant 2001: 631).<sup>62</sup> If the issue is of importance for outcome of the case, failure to file a motion for grant to appeal on particular decision of the trial chamber can also be considered. In other words, from the parties it is expected to act

---

59 *Stanišić and Simatović AJ*, para. 15.

60 *Ibid.*, para. 15.

61 Case No. *IT-05-88/2-A, Prosecutor v. Zdravko Tolimir*, Judgment, 8 April 2015, fn. 662 at 96. However, in this particular case concrete issue was raised by the Defence. Compare, para. 230 of the Appeals Chamber Judgement and Public Redacted Version of the Consolidated Appeal Brief, 28 February 2014, paras. 160-166 „The Appeals Chamber has raised preliminary issues *proprio motu* pursuant to its inherent powers as an appellate body once seized of an appeal lodged by either party pursuant to Article 25 of the Statute. The Appeals Chamber finds nothing in the Statute or the Rules, nor in practices of international institutions or national judicial systems, which would confine its consideration of the appeal to the issues raised formally by the parties. The preliminary issues revolve around the question of the validity of the plea of guilty entered by the Appellant. This is a question to be decided *in limine*. Case no. *IT-96-22-A, Prosecutor v. Dražen Erdemović*, Judgement, 7 October 1997, para. 16.

62 Drumbl and Gallant, 631. relying on *Delalić AJ*, 790 and *Furundžija AJ*, 174.

with a due diligence and during the pre-trial and trial proceedings take every step possible to preserve an issue for an appeal.<sup>63</sup>

That follows from the corrective nature of the role of the Appeals Chamber. For example, concerning examination of the grounds of appeal that relate to sentence the Appeals Chamber was clear that „The accused, generally, cannot raise a defence for the first time on appeal.“<sup>64</sup> The Appeals Chamber observed that “appeal proceedings are not appropriate forum” to raise issues concerning mitigating or aggravating circumstances for the first time. „Rule 85(A)(vi) of the Rules provides that a trial chamber will consider any relevant information that may assist it in determining an appropriate sentence Appeal proceedings are not the appropriate forum to raise such matters for the first time.“<sup>65</sup>

The other example is that “the Prosecution cannot seek to have a more severe sentence imposed on appeal where, as here, the Trial Chamber, by exercising its discretion, imposed a sentence within the Prosecution’s requested range.”<sup>66</sup>

From the parties, represented by qualified counsels, are expected to properly raise any issue at the trial. Failure to properly raise an issue at trial sometimes is referred as “waiver” of an issue on appeal or “failure to preserve” an issue for appeal.<sup>67</sup> However, this role is not absolute<sup>68</sup>, and the party must provide reasons that are sufficient to persuade the Appeals Chamber to consider the issue.

---

63 “The rationale for this rule is simple: a trial court cannot wrongly decide an issue that was never before it... There are several exceptions to the rule that a new legal theory cannot be raised for the first time on appeal. The appellate courts may consider an issue that was not properly preserved when: (1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the district court is right for the wrong reason.” *Kansas Appellate Practice Handbook* 2013, § 8.4

64 Case No. IT-95-14/1-A, Prosecutor v. Zlatko Aleksovski, Judgement, 24 March 2000, para. 51. However, in Aleksovski case, the Appeals Chamber „In this Appeal, the Appeals Chamber will nevertheless consider the defence of necessity, as pleaded.“ However, the Appeals Chamber dismissed this ground of appeal as misplaced.

65 *Tolimir AJ*, para. 644 (footnoted omitted). However, this consideration is in sharp contradiction with the right of the accused to remain silent.

66 *Šainović et al. AJ*, para. 1834.

67 Drumbl and Gallant , 631

68 *Ibid.*

The Appeals Chamber routinely states that it can summarily dismiss a ground of appeal that contains “mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the trial chamber constituted an error warranting the intervention of the Appeals Chamber”.<sup>69</sup> This is of particular importance for appeal against factual findings and discretionary decisions.

As noted by M. A. Drumbl and K. S. Gallant, “there is no clear rule concerning when either Appeals Chamber will permit either party to raise issues on appeal that were not preserved below”. (Drumbl and Gallant 2001: 631) However, there is “no clear rule” also in the Statute or Rules of the ICTY and other ad hoc tribunals. In *Lumbaga case*, the Appeals Chamber argued that

“In respect of Mr. Lubanga’s arguments which challenge findings in the Conviction Decision that are raised for the first time in the present appeals, the Appeals Chamber will consider these arguments on an individual basis and declines, as requested by the Prosecutor, to decide in the abstract whether they can be considered in the context of the present appeals.”<sup>70</sup>

### An error of law that invalidates the decision

There are many types of legal errors. They may consist in wrong understanding of particular legal standard or in its application.<sup>71</sup> They may be errors of substantive law or of procedural law (procedural error).

At the international criminal tribunals, as in many national jurisdictions, the main purpose of the appellate jurisdiction is to serve as “the final arbiter of the law of the Tribunal”.<sup>72</sup> The Trial Cham-

---

69 *Tolimir AJ*, para. 14, Case No. IT-05-88-A, Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić and Radivoje Miletić, Judgment, 30 January 2015, para. 22-23; Case No. IT-05-87/1-A, Prosecutor v. Vlastimir Djordjević, Judgment, 27 January 2014, para. 19-20; *Šainović et al. AJ*, 26-27, Case no. IT-00-39-A, Prosecutor v. Momčilo Krajišnik, Judgment, 17 March 2009, paras. 17-27.

70 *Lumbaga Sentencing AJ*, para. 50.

71 Application of a legal standard is sometimes qualified, in national jurisdictions, as mixed issue of law and fact.

72 Case No. IT-95-17/1-A, Prosecutor v. Anto Furundžija, Judgment, 21 July 2000, para. 35

bers are, generally, obliged to follow legal position of the Appeals Chamber.<sup>73</sup>

The requirement on appeal is that: “A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision”.<sup>74</sup>

In the case of an alleged error in law on the basis of the lack of a reasoned opinion, it is necessary for an appellant “to identify the specific issues, factual findings, or arguments that an appellant submits the trial chamber omitted to address and to explain why this omission invalidated the decision”<sup>75</sup>

Only legal error that invalidates decision may be reversed on the appeal. It is unique jurisprudence of all international criminal tribunals that “an allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground”.<sup>76</sup> In other words, “A judgment is “materially affected by an error of law” if the Trial Chamber “would have rendered a judgment that is *substantially different* from the decision was affected by the error, if it had not made the error”.<sup>77</sup>

The Appeals Chamber is not tied with the arguments of parties concerning alleged legal errors. If the arguments of the party is “insufficient to support the contention of an error, the Appeals

---

73 “Important use is being made of the appellate jurisprudence of the Tribunals. Judgements are being used as precedents within the Appeals Chamber and by the Trial Chambers. “ One author observed that “Although this may not seem newsworthy to a common law layer, the emergence of *stare decisis* within the Tribunals is an important development in international law” Drumbl. M. A. and Gallant, K. S. 2001:592 However, various appeals chambers of the same tribunal may render a conflicting decisions concerning articulation of some legal standard. That appears, for example in the case of determination whether “a specific direction” is necessary to establish in order to enter a conviction on the basis of aiding and abetting as a mode of liability under international law. Compare: Case no. IT-06-90-A, Prosecutor v. Ante Gotovina and Mladen Markač, Judgment, 16 November 2012; Case No. IT-04-81-A, Prosecutor v. Momčilo Perišić, Judgment, 28 February 2013, paras. 25-36.; *Stanišić and Simatović* AJ, paras. 103-108

74 *Stanišić and Simatović* AJ, para. 16.

75 *Ibid.* As stated by the Appeals Chamber “Insufficient analysis of evidence on the record can amount to a failure to provide a reasoned opinion. Such failure in the reasoning “constitutes an error in law requiring de novo review of evidence by the Appeals Chamber.” *Separate and Partly Dissenting Opinion of Judge Antonetti, Tolimir* AJ para. 58.

76 *Stanišić and Simatović* AJ, para. 16.

77 *Lumbaga Conviction* AJ, para. 19.

Chamber may still conclude for other reasons that there is an error of law”.<sup>78</sup>

In sharp contrast as to the alleged factual errors, the Appeals Chamber needs not to defer to the Trial Chamber’s interpretation of the law. As stated by the ICC Appeals Chamber:

“[T]he Appeals Chamber will not defer to the Trial Chamber’s interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision”.<sup>79</sup>

In the ICC jurisprudence it is clarified that

“the appellant has to substantiate that the Trial Chamber’s interpretation as of the law was incorrect; contrary to the Argument of the Prosecutor... this may done including by raising arguments that were previously put before the Pre-Trial and/or Trial Chamber. In addition, the appellant must substantiate that the decision under review would have been substantially different, had it not been for the error”.<sup>80</sup>

If the Appeals Chamber find that the Trial Chamber applied the wrong legal standard, “the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly”<sup>81</sup>“In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, applies the correct legal standard and the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by a appellant before the finding is confirmed on appeal”.<sup>82</sup>

However, even if the Appeals Chamber found that the trial chamber committed a legal error, it “will not review the entire trial record *de novo*. Rather, it will in principle only take into account evidence referred by the trial chamber in the body of the trial judgment or in a related footnote, evidence contained in the trial record and referred to by the parties, and, where applicable, addi-

---

78 *Stanišić and Simatović AJ*, para. 16.

79 *Lumbaga Conviction AJ*, para. 18.

80 *Lumbaga Conviction AJ*, para. 31

81 See, for example, *Stanišić and Simatović AJ*, para. 17., *Popović et al. AJ*, para. 18, Šainović et al., para. 21.

82 See, for example, *Stanišić and Simatović AJ*, para. 21.

tional evidence admitted on appeal.”<sup>83</sup> In other word, the Appeals Chamber will review only factual findings of the Trial Chamber taking into consideration arguments of the parties in which they refer to evidence contained in the trial record as well as evidence produced for the first time before the Appeals Chamber.

## Procedural error

In the ICTY and the ICTR jurisprudence procedural errors are considered as errors of law. The Appeals Chamber stated that “With regard to the alleged errors of law, the Appeals Chamber recalls that, as arbiter of the law applicable before the International Tribunal, when a party raises such an allegation, it is bound in principle to determine whether an error was in fact committed on a substantive or procedural issue.”<sup>84</sup> The Rome Statute provides that a procedural error is a distinct ground of appeal. Providing a procedural error as a type of error distant from factual and legal errors is highly desirable, because it often requests considerations that, by its very nature, differ of these concerning allegations of an error of law or error of fact.

As stated by the ICC Appeals Chamber:

“the Appeals Chamber will only reverse a conviction decision if it is materially affected by the procedural error. In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the judgment would have substantially different from the one rendered.”<sup>85</sup>

There are many possible types of procedural errors, and “the substantiation required will also depend on the precise type of error alleged”<sup>86</sup> Qualification of a procedural error as a separate ground of appeal emphasis the need for a clarification of particular standard of review. It differ significantly from the errors in law or errors in fact, “and may be based on events occurred during the trial or pre-trial proceedings.”<sup>87</sup>

---

83 See, for example, *Stanišić and Simatović AJ*, prara. 17.

84 *ICTY, Case No. IT-97-25-A, Prpsecutor v. Milorad Krnojelac*, Judgment, 17 September 2003, para. 10

85 *Lumbaga Conviction AJ*, prara. 20.

86 *Lumbaga Conviction AJ*, para. 32.

87 *Lumbaga Conviction AJ* prara. 20.

As stated by the ICC Appeals Chamber: „To the extent that the appellant is arguing that a mandatory procedural provision was violated, this has to be sufficiently substantiated both in fact and in law. To the extent that a discretionary decision of the Trial Chamber is at issue, the arguments of the appellant must be tailored to the specific standard of review for such decisions. Further, when alleging such an error, the appellant must substantiate specifically how the error materially affected the impugned decision.“<sup>88</sup>

### **Discretionary decisions (standard of discernable error)**

Standard of review of discretionary decisions of the Trial Chamber, such as, for example, the issue of admissibility of evidence, credibility of witnessed, reliability of evidence adduced, is standard of “discernible error”.

The Appeals Chamber will not lightly disturb discretionary decisions. With regard to discretionary decisions the Appeals Chambers usually observe

”that a trial chamber is best placed to assess the credibility of a witness and reliability of the evidence adduced, and therefore has broad discretion in assessing the appropriate weight and credibility to be accorded to the testimony of a witness. Indeed, the ICTR Appeals Chamber has previously noted that it “is loathe to disturb such credibility assessments”. As with other discretionary decisions, the question before the Appeals Chamber is not whether it “agrees with that decision” but “whether the trial chamber has correctly exercised its discretion in reaching that decision”. The party challenging a discretionary decision by the trial chamber must demonstrate that the trial chamber has committed a discernible error. The Appeals Chamber will only overturn a trial chamber’s discretionary decision where it is found to be: (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of discretion. In such cases the Appeals Chamber will deem that the witness evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or that the evaluation of the

---

88 *Lumbaga Conviction AJ*, para. 32.

evidence was “wholly erroneous”, and proceed to substitute its own finding for that of the Trial Chamber.”<sup>89</sup>

The Appeals Chamber in assessing discretionary decisions will provide a great margin of deference without requiring the Trial Chamber to provide detailed explanation. It is commonly observed by the Appeals Chamber that:

“The Appeals Chamber recalls that a trial chamber is not required to set out in detail why it accepted or rejected a particular testimony, and that an accused’s right to a reasoned opinion does not ordinarily demand a detailed analysis of the credibility of particular witnesses. However, a trial chamber must provide reasons for accepting testimony despite alleged or material inconsistencies when it is the principal evidence relied upon to convict an accused.”<sup>90</sup>

### **Erroneous factual findings and error of fact that occasioned a miscarriage of justice**

Erroneous factual finding that are basis for conviction, acquittal or sentence may be a consequence of an error of law, procedural error, error in exercise of discretion or error of fact. For example, erroneous understanding or application of the requisite standard of proof<sup>91</sup>, abuse of discretion in estimation of credibility of witnesses

89 *Popović AJ*, 131.

90 *Popović AJ*, para. 133.

91 Wrong understanding or applicability of required standard of proof is very hard to raise before international tribunals. Namely, in introductory part of the judgment they frequently refer to applicable standard of proof quoting previous jurisprudence. That does not mean that they actually applied that standard. In one case that issue was of particular importance. For example in *Martić* case the Appeals Chamber established that: “The Appeals Chamber finds that the Trial Chamber’s reference to a “high degree of probability” in one of the footnotes to the section on standard of proof is confusing and not in accordance with the standard of proof of a criminal trial. However, the Appeals Chamber is not satisfied that *Martić* has shown that the Trial Chamber’s application of the standard of proof as requiring the trier of fact to be satisfied of guilt beyond reasonable doubt was in error.” *Martić AJ*, para.57. However, this ground of appeal challenging applicable standard of proof was denied, inter alia, because” The Appeals Chamber finds that, despite making reference to a probability standard once in a footnote, the Trial Chamber’s other statements regarding the standard of proof establish that it properly understood the requisite standard.” *Martić AJ*, para. 58- 59. Moreover, with respect to

or reliability of evidence, denial of some fair trial right are considered as errors of law. A lack of reasoned opinion or insufficient analysis of evidence on the record<sup>92</sup> is also an error of law. If the Appeals Chamber finds that a legal error occurred it might correct the error and substitute its finding as to those of the trial chamber or to order partial or complete re-trial<sup>93</sup>.

As noted above, difference between legal and factual error is sometimes hard to explain in clear terms, and pleadings need to be composed on the basis of a well developed appeal strategy. In the absence of well developed strategy the appellant runs the risk of summary dismissal.

Standard of appellate review as of the facts is a complex matter, and generally the Appeals Chamber considerations disfavors appe-

---

the application of the standard, the Trial Chamber adopted the proper standard in its consideration of the evidence by consistently holding that a conviction could not be entered when there was a reasonable conclusion other than the guilt of the accused. Following this approach, the Trial Chamber only made findings leading to a conviction when stating that it was satisfied “beyond reasonable doubt” that they were correct. In various instances, the Trial Chamber refrained from making a finding of guilt, when a reasonable doubt remained.” *Martic AJ*, para. 59.

92 *Kupreškić et al. AJ*, para. 32. *Krnojelac AJ*, para. 11. As regards errors of fact, the party alleging this type of error in support of an appeal against a conviction must provide evidence both that the error was committed and that this occasioned a miscarriage of justice. The Appeals Chamber has regularly pointed out that it does not lightly overturn findings of fact reached by a Trial Chamber. This approach is explained principally by the fact that only the Trial Chamber is in a position to observe and hear the witnesses testifying and is thus best able to choose between two diverging accounts of the same event. First instance courts are in a better position than the Appeals Chamber to assess witnesses’ reliability and credibility and determine the probative value of the evidence presented at trial. *Krnojelac AJ*, para. 12. Thus, when considering this type of error the Appeals Chamber applies the “reasonable nature” criterion to the impugned finding. Only in cases where it is clear that no reasonable person would have accepted the evidence on which the Trial Chamber based its finding or when the assessment of the evidence is absolutely wrong can the Appeals Chamber intervene and substitute its own finding for that of the Trial Chamber. Thus, the Appeals Chamber will not call the findings of fact into question where there is reliable evidence on which the Trial Chamber might reasonably have based its findings. It is accepted moreover that two reasonable triers of fact might reach different but equally reasonable findings. A party suggesting only a variation of the findings which the Trial Chamber might have reached therefore has little chance of a successful appeal, unless it establishes beyond any reasonable doubt that no reasonable trier of fact could have reached a guilty finding.

93 See: ICTY, Case No. IT-04-84-A, Prosecutor v. Ramuš Haradinaj, Idriz Balaj and Lahi Brahimaj, Judgment, 19 July 2010. and *Stanišić and Simatović AJ*.

late review on factual issues (Drumbl and Gallant 2001: 624)<sup>94</sup> The starting position of the ICTY Appeals Chamber is that

“The Appeals Chamber has regularly pointed out that it does not lightly overturn findings of fact reached by a Trial Chamber“.<sup>95</sup>

In order to revise particular factual finding is a two step analysis. The Appeals Chamber need to be satisfied that an error occurred and that it occasioned a miscarriage of justice. Examining allegations of an error of fact the ICTY and the ICTR Appeals Chamber applies standard of “reasonableness” or “wholly erroneous”, while the ICC named the same standard as a standard of “clear error”. In another word, in the case of an allegation of an error of law, the Appeals Chamber examines whether the decision is correct, in the case of an allegation of an error of fact, the Appeals Chamber examines whether challenged factual findings are reasonable or whether there exist a clear error.

In the ICTY Appeals Chamber wording:

“In reviewing the findings of the trial chamber, the Appeals Chamber will only substitute its own finding of that of the trial chamber *when no reasonable trier of fact could have reached the original decision*. The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence. Further, only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the trial chamber”.<sup>96</sup>

In other words:

“... It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber. It is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence”<sup>97</sup>

---

94 As noted by those authors „The ICTY Appeals Chamber has used language disfavoring appellate review of factual issues”

95 *Krnjelac AJ*, para. 11., *Stanišić and Simatović AJ*, para. 19., *Popović et al.*, para. 20.

96 *Stanišić and Simatović AJ*, para. 18, *Popović et al. AJ*, para. 19, *Šainović et al. AJ*, para.24.

97 *Tadić AJ*, para. 64.

The ICC applies the standard of a “clear error”. In the words of the ICC Appeals Chamber:

“Regarding factual errors, the Appeals Chamber has held that it will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely misappreciated the facts, took into account irrelevant evidence, or failed to take into account relevant facts. As to the “misappreciation of facts”, the Appeals Chamber has also stated that it “will not disturb a Pre-Trial or Trial Chamber evaluation of the facts just because the Appeals Chamber might have come to a different conclusion, It will interfere only in the case when it cannot discern how the Chamber’s conclusion could have reasonably been reached from evidence before it”<sup>98</sup>

J. P. Book observed that

“defining the notion of reasonableness is a complex exercise... the question of reasonableness is to be answered in relation to a specific finding in its specific context. ... What may reasonably be inferred from certain evidence is not predominantly a matter of logic, but of probabilities. What exactly separates and unreasonable conclusion from a reasonable one is the respective degree of probability attached to them. However there is no abstract measure to determine the necessary degree of probability required for a conclusion to be regarded as reasonable.” (Book, J. P. 2011:61)

The standard of reasonableness or of a clear error seems to be too high. It might have justification in the system where the trial record does not contain all elements of the trial and/or pre trial proceedings, or where the functions in criminal proceedings are divided between professional judges and lay jury. However, in the system where professional judges are triers of both facts and law, where every second of the trial is recorded in the transcript and where official audio and video recording of every session are part of the trial record, it seems that this standard does not have proper justification.

Factual findings might be based on direct evidence or on circumstantial evidence (inferences). In criminal proceedings against high ranking political and military leaders, where there is no direct evidence as of their guilt, which involve a complex matrix of

---

98 *Lumbaga Conviction AJ*, para. 21, quoting other ICC appeals judgments.

facts that might produce different outcomes, this standard of proof seems to be too strict and allow outcome that might have serious consequences beyond the trial.

It is not enough that a party succeeds in establishing an error of fact, in the wording of the ICTY Appeals Chamber:

“the Appeals Chamber still has to accept that the error occasioned a miscarriage of justice such that the impugned finding should be revoked or revised. 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.”<sup>99</sup>In other words, it must be established “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.”<sup>100</sup>

### Sentencing appeal (standard of discernable error)

Statute of the ICTY, the ICTR, and the MICT does not specifically regulate sentencing appeal. The Rome Statute provides boarder normative framework. However, the jurisprudence of all international criminal tribunals, despite differences in normative framework established by statutes and rules of procedure and evidence, are the same.

The ICTY Appeals Chamber determined that:

“The trial chamber is vested with board discretion in determining an appropriate sentence reflecting circumstances the particular accused and the gravity of the crime”.<sup>101</sup>

„Similar to an appeal against conviction, an appeal from sentencing is a procedure of a corrective nature rather than a *de*

---

99 *Krnojelac AJ*, para. 13.

100 *Kupreškić et al.*, para. 29, *Furundžija AJ*, para. 37 quoting Black’s Law Dictionary. A miscarriage of justice is defined in Black’s Law Dictionary as “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.” *Black’s Law Dictionary* (7th ed., St. Paul, Minn. 1999).

101 See, for example, *Tolimir AJ*, para. 626, *Lumbaga Sentencing AJ*, para. 40, *Popović et al. AJ*, para. 1961, *Šainović et al. AJ*, 1797.

*novo* sentencing proceeding. A Trial Chamber has considerable though not unlimited discretion when determining a sentence. As a general rule, the Appeals Chamber will not substitute its sentence for that of a Trial Chamber unless “it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law.” The test that has to be applied for appeals from sentencing is whether there has been a discernible error in the exercise of the Trial Chamber’s discretion. As long as the Trial Chamber keeps within the proper limits, the Appeals Chamber will not intervene.”<sup>102</sup>

The ICC Appeals Chamber also pronounced the same:

“Thus, the Appeals Chamber’s review of a Trial Chamber’s exercise of its discretion in determining the sentence must be deferential and it will only intervene if: (i) the Trial Chamber’s exercise of discretion is based on an erroneous interpretation of the law; (ii) the discretion was exercised based on an incorrect conclusion of fact; or (iii) as a result of the Trial Chamber’s weighing and balancing of the relevant factors, the imposed sentence is so unreasonable as to constitute an abuse of discretion.”<sup>103</sup>

As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a “discernible error” in exercising its discretion. It is for the Appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing a sentence as it did. A Trial Chamber’s decision may therefore be disturbed on appeal if the Appellant shows that the Trial Chamber either erred in the weighing process involved in the exercise of its discretion by taking into account what it ought not to have, or erred by failing to take into account what it ought to have taken into account.<sup>104</sup>

The Appeals Chamber will also estimate an impact of its own findings on the sentence. It is on the discretion of the Appeals Chamber to affirm the sentence, or to reverse it in the light of reversed convictions or acquittals. Article 83 (2) and (3) of the Rome Statute is in line with the ICTY jurisprudence and provides that:

---

102 Case No. IT-98-32-A, Prosecutor v. Mitar Vasiljević, Judgement, 25 February 2004, para. 9. (footnotes omitted). See also, Case No. IT-94-2-A, Prosecutor v. Dragan Nikolić, Judgement on Sentencing Appeal, 4 February 2005, para.8.,

103 *Lumbaga Sentencing AJ*, para. 44.

104 Case No. IT-94-2-A, Prosecutor v. Dragan Nikolić, Judgement on Sentencing Appeal, 4 February 2005, para.8.

“If the Appeals Chamber finds 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, it may ...Reverse or amend the decision or sentence...”.

It seems that the ICC articulation of the standard of the review of sentence on the appeal is not in conformity with the Rome Statute. The standard of “discernible error” seems to be more in line with requirements of “manifest” disproportion between the crime and the sentence. Proposals by some stated that the sentence might be amended on the appeal only in if it is “significantly” or “manifestly disproportionate” did not find its place in the Statute.<sup>105</sup> That consideration seems to be without any impact on the formulation of the requisite standard of appellate review.

It seems that standard of “discernible error” is too strict, leaving a little opportunity for control of the Trial Chamber’s sentencing considerations, or to establish a consistent sentencing practice.<sup>106</sup>

## Concluding remarks

In international criminal jurisprudence there have not been comprehensive discussions either on standards of appellate review, or on the question whether contemporary standards fit the needs of international administration of criminal justice. However, it seems that the standard of appellate review, as articulated in contemporary jurisprudence, has become a part of the “common law of inter-

---

105 *Lumbaga Sentencing AJ*, para. 40. quoting Roth and Henzelin 2002:545.

106 Standards applied by the Appeals Chambers of international criminal tribunal are the same as, or very similar to the standard applied in the USA (however not in all common law jurisdictions). Briana Lynn Roesnbaum, in recent article, discussing the scope of appellate review in various common law jurisdictions argued that: “The appellate function in sentencing is not limited to either enforcement or lawmaking; it can include aspects of both. Nor does the standard of review have to be either de novo or full deference; it can include a mix of both. And appellate review does not automatically inhibit individualized sentences; appellate review can expand to guide sentencing discretion in a way that retains the kind of discretion necessary to sentence each individual as appropriate in a particular case. Blind acceptance of deference as an institutional model based on assumptions like these is not only inaccurate, but may lead to the rejection of reforms at the appellate level that could further the goals of uniformity and fairness in sentencing.” Roesnbaum:157

national administration of criminal justice”<sup>107</sup>. It eluded scholarly attention and developed exclusively in the jurisprudence of appeals chambers. However, there is room for argument that standards of appellate review may further developed in the jurisprudence of the ICC or of some existing or future international criminal tribunals, .

It should be noted that the strength of a precedent and consistent jurisprudence is great even in civil law systems.<sup>108</sup> In the first appellate proceedings following full trial (*Tadić case*), the parties

“agree[d] that the standard to be used when determining whether the Trial Chamber’s factual findings should stand is that of unreasonableness, that is, a conclusion which no reasonable person could have reached. ... It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber, It is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence”<sup>109</sup>

The Prosecution was keen to apply common law standards, whereby Defence Counsel<sup>110</sup> were of common law (U.K.) background, to which standard of appellate review as formulated by the Appeals Chamber was quite natural. One may ask only a speculative question: what if the Defence Counsel were of civil law background and if they opposed, in theoretical and practical terms, proposed standards of appellate review. Would the outcome have been different? It seems that due to lack of disagreement on this fundamental issue the Appeals Chamber was relaxed in applying this particular standard.

In one of the subsequent cases, *Kupreškić at all*, in which most of the Defence Counsel were of civil law background, the Defence challenged the standard of appellate review; the Appeals Chamber simply stated that:

“The Appeals Chamber finds no merit in the Appellant’s submission which it understands to mean that the scope of the

---

107 The term “common law of international adjudication” has been used by Chester Brown to describe a common principles of international adjudication of various (non-criminal) international courts and tribunals. Brown, C. 2007.

108 See, for example, Fon and Parisi 2006:519-535.; Pejović 2001: 821

109 *Tadić AJ*, para. 64.

110 W. Clkeag and J. Livingston

appellate function should be expanded to include de novo review. This Chamber does not operate as a second Trial Chamber. The role of the Appeals Chamber is limited, pursuant to Article 25 of the Statute, to correcting errors of law invalidating a decision, and errors of fact which have occasioned a miscarriage of justice”<sup>111</sup>

An error that occasioned a miscarriage of justice could be found even if no deference or a little deference is shown to the Trial Chamber’s findings. Reconsideration of evidence on the basis of complete and detailed record of the trial proceedings in the light of the Trial Chamber’s findings and arguments of the both, the Defence and the Prosecution, seems to be, at least, an equally acceptable solution, and more in favor of the accused<sup>112</sup> and standard of proof applicable in international criminal proceedings “proof beyond reasonable doubt”.

Standard of appellate review should not be confused with standard of proof.<sup>113</sup> If the applicable standard of proof is proof beyond reasonable doubt, frequently defined as “the only conclusion on the evidence on the record”, how the Appeals Chamber may control application of that standard? Reasoning might be reasonable, but still not the only one available, so that another reasoning may be reasonable as well. If one keeps in mind that, as frequently observed by the ICTY Appeals 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”, why opinion of 2 or 3 judges of the trial chamber (majority or unanimity requirement) should be prevalent over *intime conviction* (firm conviction) of 3, 4 or 5 judges of the Appeals Chamber? The standard of appellate review, as currently formulated, (standard of reasonableness or standard of clear error) has the following consequence – the Appeals Chamber might be of different opinion (it may have doubts or completely different opinion), however if the opinion of the trial chamber is reasonable, the Appeals Chamber will affirm the trial chamber’s finding as the finding that satisfies the standard of proof beyond reasonable doubt. In another words, standards of appellate review may not be in line

---

111 *Kupreskic et al AJ*, para. 40.

112 As noted above, the ILC took position that “like national appellate courts-necessarily have to exercise a certain discretion in these matters, with any doubt being resolved in favor of the convicted person”. *ILC Commentary*, para. 3.

113 Davis 1998:469-480.

with the applicable standard of proof.<sup>114</sup> If the “conviction could not be entered when there was a reasonable conclusion other than the guilt of the accused”<sup>115</sup> why that conclusion could not be under full scrutiny of the Appeals Chamber?

Besides that, factual findings confirmed by the Appeals Chamber in the jurisprudence of the ICTY and ICTR were frequently used for the purpose of other trials (for example, facts confirmed by the Appeals Chamber may be judicially noticed in another cases).<sup>116</sup> Control is exercised by the five members Chamber, the opinion of which could not be limited of reasonableness, but must include control of application of applicable standard of proof.

These considerations should not be understood as a call to the Appeals Chamber to completely disregard the Trial Chamber arguments. That is also not the case in civil law countries. The appeal remains corrective in nature regardless of the level of deference to the Trial Chamber’s factual findings. In common law systems the jury trial is a constitutional right, and a measure of deference to the jury findings seems to be the matter of a legal necessity. In international criminal proceedings there is no lay jury and there is no reason for a high level of deference to the trial chamber’s discretionary decisions, factual findings and findings that are result of an application of relevant legal standard (rule). On the contrary, since an appeals chamber has all the powers of a trial chamber, it should reach its decision with little deference to the trial chamber findings. That does not mean that the Appeals Chamber should disregard the Trial Chamber’s arguments. That is also not the case in civil law jurisdictions. The appeal remains corrective in nature regardless of the level of deference to the Trial Chamber’s findings.

---

114 C. M. Rohan, discussion standard of appellate review concerning factual findings provided an opinion that “having obtained the benefit of the reasonable doubt standard during the course of trial, an accused faces and extremely high appellate standard of review when seeking to overturn Trial Chamber factual findings on appeal” (Rohan 2010:688) However, standard of proof and distribution of standard of proof remain unchanged during the whole proceedings. One of the main issues is whether the Trial Chamber applied that standard regardless of the words employed in order to explain challenged finding. If standard of reasonable doubt as to the guilt of the accused does not have its prominent place in appeals proceedings, than it could be considered as a serious defect of the appeals procedure and minimization of its correcting powers.

115 See, for example, *Martić AJ*, paras. 55-63.

116 See: Gajić 2012: 292-326

One of the main issues is whether standards of appellate review as have been formulated in the jurisprudence of international courts and tribunals fit the needs of international administration of criminal justice. The answer to that question is highly dependent on the understanding of the goals of a particular international criminal tribunal. If an international tribunal tends to establish a reliable historical record, the Appeals Chamber should have much less deference to the rulings of the trial chambers.

## Bibliography

- Ambos, K. (2003) "International Criminal Procedure: "adversarial", "inquisitorial" or mixed?", *International Criminal Law Review*, 3:1-37.
- Antonio Cassese, Opinion: The ICTY and Human Rights, *European Human Rights Law Review*, vol. II, *European Human Rights Law Review* 2/1997
- Book, J. P. (2011) *Appeal and Sentence in International Criminal Law*. Berlin: Berliner Wissenschafts – Verlag
- Brady, H. and Jennings M. (1999) "Appeal and Revision". In Lee., R. L (ed.) *The International Criminal Court, The Making of the Rome Statute*. The Hague, London, Boston: Kluwer Law International
- Brown, C. (2007) *A Common Law of International Adjudication*, New York: Oxford University Press
- Brown, R. A. (1943), "Fact and Law in Judicial Review", *Harvard Law Review*, 899-928.
- Calkins, M. and Kicks, M., (2003) *Identifying and Understanding Standards of Review*, Georgetown: The Writing Centre Georgetown University Law Centre, <https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/Standards-of-Review.pdf> [Accessed: 10 March 2016]
- Cassese, A. (2003) *International Criminal Law*, Oxford: Oxford University Press
- Chartier, R. (April 2011) "Standards of Review on Criminal Appeals: Your Sword or Your Shield", *Montiba Bar Association Criminal Justice Subsection Meeting*.
- Crayer, R., Friman, H., Robinson D. and Wilmshurst, E. (2008) *An Introduction to International Criminal Law and Procedure*, Cambridge: Cambridge University Press

- Damaška, M. (1974) "Structures of Authority and Comparative Criminal Procedure", *Yale Law Journal*, pp.480-490
- Davis, M. M. (2000) "Standards of Review: Judicial Review of Discretionary Decisionmaking", *The Journal of Appellate Practice and Process*, 2: 47-84.
- Davis, M. S. (1988) "A Basic Guide to Standards of Judicial Review", *South Dakota Law Review*, 3: 469-483.
- Drumbl, M. A. and Gallant, K. S. (2001) "Appeals in the Ad Hoc International Criminal Tribunals: Structure Procedure and Recent Cases", *The Journal of Appellate Practice and Process*, 2:2001: 589-659.
- Fleming, M. C. (2002) "Appellate Review in the International Criminal Tribunals", *Texas International Law Journal*, 1: 111-156
- Fon, V. and Parisi, P. (2006) "Judicial precedents in civil law systems: A dynamic analysis", *International Review of Law and Economics*, pp. 519-535.,
- Gajić, A. V. (2010) "The International Criminal Tribunal for the Former Yugoslavia – Human Rights Perspective". In: Jovanović, M. and Krstić, I. (eds.) *Human Rights Today- 60 Years of the Universal Declaration*, Utrecht: Eleven International Publishing, pp. 127-142.
- Gajić, A. V. (2012) „Formalni prijem na znanje presuđenih činjenica u međunarodnom krivičnom pravosuđu“, *Anali Pravnog fakulteta u Beogradu* 2:292-326.
- Kansas Appellate Practice Handbook*, 5<sup>th</sup> ed. (2013) Kansas: Kansas Judicial Council
- Karibi-Whyte, A. G. (2000) "Appeal Procedures and Practices". In: McDonald G. K. and Swaak-Goldman O. (eds.) *Substantive and Procedural Aspects of International Criminal Law – The Experience of International and National Courts Vol 1 – Commentary*, (eds.), The Hague:Kluwer Law International, pp. 644-653.
- Kevin John Haller, K. J. (2011) *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford – New York: Oxford University Press
- Klamberg, M. Klamberg Commentary, "Appeal against decision of acquittal or conviction or against sentence, Commentary on the Law of the International Criminal Court", Case Marix Network, <https://www.casematrixnetwork.org/cmnn-knowledge-hub/icc->

[commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-8/](#), [Accessed 01 February 2016]

- Klamberg, M. (2010) "What are the Objectives of International Criminal Procedure? – Reflections on the Fragmentation of a Legal Regime", *Nordic Journal of International Law*, 79:279-302.
- Klamberg, M. (2013) *Evidence in International Criminal Trials: Confronting Gaps and the Reconstruction of Disputed Events*, Leiden-Boston:Martinus Nijhoff Publishers
- Marshall, P. D. (2011), "A Comparative Analysis of the Right to Appeal", *Duke Journal of Comparative & International Law*, 1:1-45.
- McIntyre, G. (2011) "The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda", *Goettingen Journal of International Law*, 3: 923-983.
- Murphy, S. D. (1999) "Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia", *American Journal of International Law*, 57-96.
- O'Hear, M. M. (2010) "Appellate Review of Sentences: Reconsidering Deference", *William and Mary Law Review*, 6: 2123-2167
- Pejović, Č. (2001) "Civil Law and Common Law: Two Different Paths Leading to the Same Goal", *Victoria University of Wellington Law Review*, 32:817-842.
- Peters, A. (2009) "The Meaning, Measure, and Misuse of Standards of Review", *Lewis & Clark Law Review*, 1:233-278
- Pocar, F. (2006) "Criminal Proceedings Before the International Criminal Tribunals for the Former Yugoslavia and Rwanda", *Law and Practice of International Courts and Tribunals*, 1: 89-102.
- Rives, R. T. (1959) "The Source of Review of Fact by United States Courts of Appeal", pp. 70-78.
- Roesnbaum, B. L. (2013) "Sentence Appeals in England: Promoting Consistent Sentencing Through Robust Appellate Review", *The Journal of Appellate Practice and Process*, 14:81-157
- Rohan, C. M. (2010) "Reasonable Doubt Standard of Proof in International Criminal Trials". In: Khan, K. A. A., Buisman, C. and Gosnell C. (eds.), *Principles of Evidence in International Criminal Justice*, New York-Oxford: Oxford University Press
- Roth R. and Henzelin, M. (2002) "The Appeal Procedure of the ICC". In: Cassese, A., Gaeta P. and Jones J. R. W. D (eds.) *The Rome Statute*

*of the International Criminal Court: A Commentary, Vol. II.* New York: University Press. pp. 1535-15578

Schomburg, W. (2005) "The Protection of human Rights of the Accused before the International Criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR)". In: Bard K. and Soyer R. (eds.) *Internationale Strafgerichtsbarkeit – Status quo and Perspektiven*, Wien-Gratz-Berlin: BWB Berliner

Škulić, M. (2005) *Međunarodni krivični sud, nadležnost i postupak*, Beograd: Dosije

Sward, E. E. (1991) "Appellate Review of Judicial Fact-Finding", *The University of Kansas Law Review*, 1-43.

### Reports

Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, European Treaty Series - No. 117, Strasbourg, 22 November 1984

Historical Survey of the Question of International Criminal Jurisdiction – Memorandum submitted by the Secretary-General, Topic: Question of international criminal jurisdiction, UN. Doc. A/CN.4/7/Rev.1

Practice Direction on Formal Requirements for Appeals from Judgement, IT/201,7 March 2001

Report of the International Law Commission on the work of its forty-six session, 2 May-22 July 1994, Official records of the General Assembly, Forty-ninth session, Supplement No. 10. , UNN Doc. A/49/10, Yearbook of the ILC 1994, vol. II (2), Draft Code of Crimes Against Peace and Security of Mankind

Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808(1993), UN. Doc. S/25704

### Judgments and decisions of the ICC and the ICTY

Case No. IT-94-1-T, Prosecutor v. Tadić, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995.

Case No. IT-94-2-A, Prosecutor v. Dragan Nikolić, Judgement on Sentencing Appeal, 4 February 2005

Case No. IT-95-17/1-A, Prosecutor v. Anto Furundžija, Judgment, 21 July 2000.

- Case no. IT-00-39-A, Prosecutor v. Momčilo Krajišnik, Judgment, 17 March 2009.
- Case No. IT-03-69-A, Prosecutor v. Jovica Stanišić and Franko Simatović, Judgement, 9 December 2015
- Case No. IT-04-81-A, Prosecutor v. Momčilo Perišić, Judgment, 28 February 2013.
- Case No. IT-04-84-A, Prosecutor v. Ramuš Haradinaj, Idriz Balaj and Lahi Brahimaj, Judgment, 19 July 2010.
- Case No. IT-05-87/1-A, Prosecutor v. Vlastimir Djordjević, Judgment, 27 January 2014.
- Case no. IT-05-87-A, Prosecuor v. Nikola Šainović, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić, Judgement, 23 January 2014.
- Case No. IT-05-88/2-A, Prosecutor v. Zdravko Tolimir, Decision on Motion for Setting a Time Limit for Filing and Appellant's Brief and for an Extension of Word Limit, 17 May 2013.
- Case No. IT-05-88/2-A, Prosecutor v. Zdravko Tolimir, Judgment, 8 April 2015
- Case No. IT-05-88/2-A, Prosecutor v. Zdravko Tolimir, Public Redacted Version of the Consolidated Appeal Brief, 28 February 2014
- Case No. IT-05-88-A, Prosecutor v. Popović et all, Public Redacted Version of 2 May 2014 Decision on Vujdic Popović's Third and Fifts Motions for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 23 May 2014
- Case No. IT-06-90-A, Prosecutor v. Ante Gotovina and Mladen Markač, Judgment, 16 Novemer 2012.
- Case No. IT-95-11-A, Procecutor v. Milan Martić, Judgment, 8 October 2008
- Case No. IT-95-11-A, Prosecutor v. Milan Martić, Judgment, 8 October 2008
- Case No. IT-95-14/1-A, Prosecutor v. Zlatko Aleksovski, Judgement, 24 March 2000.
- Case No. IT-95-14-A, Prosecutor v. Tihomir Blaškić, Judgement, 29 July 2004
- Case No. IT-95-16-A, Prosecutor v. Zoran Kupreškić, Mirjnan Kupreškić, Vlatko Kupreškić, Drago Josipović, Vladimir Šantić, Appeal Judgement, 26 October 2001

- Case No. IT-96-22, Prosecutor v. Dražen Erdemović, Judgement, 7 October 1997
- Case No. IT-96-22, Prosecutor v. Dražen Erdemović, Sentencing Judgment, 29 November 1996.
- Case No. IT-96-22-A, Appeals Chamber, Prosecutor v. Dražen Erdemović, Judgement, 7 October 1997
- Case No. IT-97-25-A, Prosecutor v. Milorad Krnojelac, Judgment, 17 September 2003
- Case No. IT-98-32-A, Prosecutor v. Mitar Vasiljević, Judgement, 25 February 2004,
- Case No. IT-98-32-A, Prosecutor v. Mitar Vasiljević, Judgement, 25 February 2004,
- Case No.: IT-95-14-T, Prosecutor v. Blaskic, Trial Chamber, Decision on the standing objection of the Defence to the admission of hearsay with no inquiry as to its reliability, 21 January 1998.
- ICTY, IT-05-88-A, Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić and Radivoje Miletić, Judgment, 30 January 2015.
- No. ICC-01/05-01/08-631-Red (OA 2) Prosecutor v. Jean-Pierre Bemba Gombo, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber 11's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa', 2 December 2009
- No. ICC-01/04-01/06 A 4 A 6, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, Judgment on appeals of the Prosecutor and Mr. Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute, 1 December 2014 (Lubanga Sentencing AJ)
- No. ICC-01/04-01/06 A 5, Appeals Chamber, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction, 1 December 2014 (Lubanga Conviction AJ)
- No. ICC-01/04-01/06 A 5, Appeals Chamber, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction, 1 December 2014.

- No. ICC-01/04-01/10-283 (OA), Prosecutor v. Callixte Mbarushimana, Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled ‘Decision on the “Defence Request for Interim Release”’, 14 July 2011.
- No. ICC-01/04-01/10-283 (OA), Prosecutor v. Callixte Mbarushimana, Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled ‘Decision on the “Defence Request for Interim Release”’, 14 July 2011.
- No. ICC-01/05-01/08-631-Red (OA 2) Prosecutor v. Jean-Pierre Bemba Gombo, “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber 11’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’”, 2 December 2009.

### **Judgments of the European Court on Human Rights**

- Case of Krombach v. France, Application no. 29731/96, Judgment of 13 February 2001.
- Case of Haser v. Switzerland, Application no. 33050/96, Judgment of 27 April 2000.
- Case of Lalmahomed v. the Netherlands, App. no. 26036/08, Judgment of 22 February 2011.
- Case of Pesti and Frodl v. Austria, Applications no(s) 27618/95 and 27619/95, ECHR Reports of Judgments and Decisions 2000-I