

PUBLIC
ANNEX L

G. M. Pikis, *The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments* (Martinus Nijhoff 2010)

467. What must be underlined is that the rules of a fair trial are designed to safeguard the rights of every litigant, not only those of the accused, such as the right to confront witnesses of the adversary, equality of arms and the right to have justice bearing fruition within a reasonable time, and most importantly, adjudication by an independent and impartial tribunal.

(ii). *Error of Fact*

468. Facts, in the context we are examining, denote events emerging from the evidence adduced at trial. A factual error may arise in a variety of circumstances. In the first place, by the court ignoring or overlooking evidence relevant to a finding of the court. Misapprehension or misappreciation of a given fact may likewise found an error of fact. Taking into consideration facts extraneous or irrelevant to an issue may also give rise to an error of fact. An error of fact, as can be said, is the offspring of a misconception, misappreciation or disregard of a fact relevant to the decision of the court.

469. The process of ponderation of evidence, if faulty, that is, not attuned to or not in conformity with a proper process of reasoning, may also lead to erroneous findings, that is to say findings that cannot stand to reason. The duty to reason a judgment requires that reasons be given for the acceptance or rejection of a fact or state of affairs, and generally for coming to a finding.

(iii). *Error of Law*

470. An error of law must be contrasted to a procedural error. The rules of procedure are rules of law of a distinct kind, often referred to as adjectival law. Rules of law, *stricto sensu*, are those conferring rights, imposing obligations or defining relationships between persons, or between persons and the state, also known as rules of substantive law. The definition of crimes and the ingredients of the offence form part of substantive law. The presumption of innocence and the burden of proof, fundamental norms of justice, have the attributes of both procedural and substantive law.

471. Misdirection of the court with respect to the meaning, ambit and effect of a legislative provision amounts to an error of law. Disregard of an aspect of substantive law in the determination of an issue posing for resolution also defines an error of law. Misinterpretation or misapplication of the law provides a classic instance of a legal error. An error affecting the jurisdiction and competence of the Court to take cognizance of, or deal with, a case are self-evidently errors of law that may ground an appeal.

c. *Article 81.1(b)*

472. Article 81.1(b) lays down that the convicted person may bring an appeal on the same grounds as the Prosecutor may do and, in addition thereto, on "[a]ny other ground that affects the fairness or reliability of the proceedings or decision".

473. The conferment upon the Prosecutor of the right to appeal a decision on behalf of the convicted person is an unusual provision, blunting to an extent the adversarial character of the appellate process. The bestowal of such a power may find justification only where fundamental principles of justice have been breached, in which case, the Prosecutor as an officer or functionary of justice, may take the matter up to set aright the course of justice. But, it is not an unnatural one in the context of the Statute considering the Prosecutor's investigatory and prosecutorial duties, binding him to recover and bring before the Court every piece of evidence bearing not only on the guilt, but also on the innocence of the accused.

474. Before exploring the field further in this respect, we must quote the introductory provisions of article 81.1(b):

The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:

The crucial question in interpreting this provision of the law is whether the Prosecutor may raise an appeal on behalf of a person without his/her prior agreement or request. The word "behalf" bears a number of meanings, such as the agent or representative of another person; in the name of; on the part of, or proceeding from; in the interests or for the benefit of another person.⁴⁴⁰ The meaning befitting the expression "on that person's behalf" in this context is representing a person, a concept importing agency, making authorisation by the convicted person to the Prosecutor to represent him a pre-requisite to the mounting of an appeal on his behalf. The attachment of this meaning to the relevant provisions of article 81.1(b) is reinforced by the provisions of rule 152.2, requiring the Prosecutor to communicate an intention to discontinue an appeal filed on behalf of a convicted person to the latter in order to give him or her the opportunity to continue the proceedings himself or herself. If the meaning of "on that person's behalf" adopted herein is incorrect, this might land the Appeals Chamber with more than one appeal against conviction; one

⁴⁴⁰ See Shorter Oxford English Dictionary, (8th ed.).

by the Prosecutor and one by the convicted person, which, we may validly presume, could not have been in the contemplation of the makers of the Statute.

475. The accused may challenge by way of appeal a final decision of a Trial Chamber on grounds additional to those on which the Prosecutor may contest the decision. Article 81.1(c) provides as follows:

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

Any other ground is a ground of appeal other than one founded on procedural error, error of fact or error of law. Fairness imports the standards of a fair trial. As earlier indicated, the norms of a fair trial establish the framework within and rules according to which the trial should be conducted as directly mandated by the provisions of article 64.2. Fairness in the context of article 81.1(c) has a broader meaning, encompassing the process in its entirety from investigation up to and including the verdict of the Court.

476. In the judgment of the Appeals Chamber of 14 December 2006,⁴⁴¹ it is acknowledged that the notion of a fair trial embraces “the judicial process in its entirety”,⁴⁴² allowing the court to stay the proceedings if, in face of unfairness in the treatment of the accused, its elements are ruptured to the extent of making impossible the holding of a fair trial.⁴⁴³ The notion that a fair trial extends to the process preceding the trial, indeed to every aspect of the proceedings, is reaffirmed by the judgment of the Appeals Chamber of 21 October 2008.⁴⁴⁴ Article 81.1(b)(iv) is designed to guard against unfairness at every stage of the proceedings creeping in to pollute the process.

477. Reliability of the proceedings is, in many respects, a notion coincident with that of a fair trial, but not exhaustively so. It entails an overview of the case in its entirety, with a view to determining whether the outcome of the case leaves a lurking doubt as to the guilt of the accused. It is a residual power entitling the Court to put under the microscope the conviction of the accused with a

⁴⁴¹ *Prosecutor v. Lubanga Dyilo*, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006 (ICC-01/04-01/06-772).

⁴⁴² *Ibid.*, para. 37.

⁴⁴³ *Ibid.*, para. 39.

⁴⁴⁴ *Prosecutor v. Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008 (ICC-01/04-01/06-1486).

view to determining whether reasonable doubts can be entertained about its validity. The notion of fairness and reliability to the extent to which they refer to the final decision of the Trial Chamber bring to the fore the burden and standard of proof and their discharge by the evidence submitted, its relevance, admissibility and creditworthiness.

478. Article 81.2(a) provides that the sentence imposed on a convicted person may be appealed in the manner envisaged by the Rules of Procedure and Evidence. A right to appeal a sentence vests in both the Prosecutor and the convicted person “on the ground of disproportion between the crime and the sentence”. The ground of appeal envisaged in this provision of article 81 is confined to the proportionality of sentence vis-à-vis the crime. Here, the word “crime” denotes the gravity of the offence, not its definition or description as such. Does this provision exclude the personal circumstances of the convicted person as a consideration relevant to the assessment of the propriety of the sentence imposed? If that were the case it would be odd, because it would introduce a standard for the evaluation of the acceptability of punishment different from the one governing the exercise of the power to impose sentence by the trial court. Article 78.1 expressly provides that in passing sentence, the Trial Chamber “shall take into account such factors as the gravity of the crime and the personal circumstances of the convicted person”. Is the court of appeal required to assess the sentence imposed independently of the individual circumstances of the convicted person? This could not be the case. One may easily reason that the personal circumstances of the accused in themselves constitute a component of the gravity of the offence. As earlier explained, the principles governing determination of sentence require that it should fit both the offence and the offender.

479. On appeal against sentence, if the court considers that there are grounds on which the conviction “might be set aside, wholly or in part”, it may invite the Prosecutor and the convicted person to submit grounds of appeal under article 81.1(a) in the case of the Prosecutor, or 81.1(b) in the case of the convicted person. An appeal raised at the invitation of the court, pursuant to the provisions of article 81.2(b) or (c), shall be determined by reference to the same criteria as those governing the disposal of appeals envisaged by article 83.

480. Do the provisions of article 81.2(b) oblige the Appeals Chamber to inquire, in the case of an appeal against sentence, into the validity of the conviction and in the event of an appeal against conviction into the appropriateness of the punishment imposed (article 81.2(c))? That would involve the Appeals Chamber in an inquisitorial exercise overriding the basic adversarial character

of the appellate process that cannot be readily reconciled with the adversarial system of justice. Moreover, it would, to an extent, preempt the outcome of an appeal against a final decision of the Trial Chamber without hearing the parties. It is submitted that the provisions of article 81.2(b) and (c) can be justifiably invoked only in the event of an apparent or manifest error, flawing the decision, prompting the court to bring it to the fore. The power of the court under article 81.2(b) and (c) extends to inviting the parties to take an appeal. Is the invited party under an obligation to take up the invitation? The answer depends on the meaning to be ascribed to the word "invite" in the context of the relevant provisions of the Statute. The foremost meaning of the term is to make a courteous request in contrast to a directive. An invitation may normally be taken up or declined. It does not involve any element of compulsion leaving it to the invitee to accept the invitation or refuse it.

481. Article 81.4 provides:

Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

Suspension entails the non-enforcement of a decision or the sentence imposed by the trial court. Rule 150.4 provides that, unless an appeal is taken against conviction or acquittal, in accordance with paragraphs 1 to 3 of the same rule, the decision on conviction, the sentence or a reparation order of the Trial Chamber shall become final. It can be validly argued that the finality of judgment will be extended to a date subsequent to the one prescribed by rule 150 when the time for filing an appeal is extended for good cause, as provided in rule 150.3. Regulation 35.1 prescribes the procedure for recourse to the Court to extend the time limit for filing an appeal by application made before the lapse of the time limit set by the Rules. What may found a good cause is debated in the decision of the Appeals Chamber of 21 February 2007.⁴⁴⁵ The following passage from this judgment is indicative:

"Good cause" in this context imports the existence of valid reasons for non-compliance with the procedural obligations of a party to the litigation. What amounts to a good cause was debated, albeit not exhaustively, in a number of previous decisions of the Appeals Chamber. Such reasons as may found a good cause are necessarily associated with a party's duties and obligations in the judicial process. A cause is good, if founded upon reasons associated with

⁴⁴⁵ *Prosecutor v. Lubanga Dyilo*, Reasons for the "Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007" issued on 16 February 2007, 21 February 2007 (ICC-01/04-01/06-834).

a person's capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations.⁴⁴⁶

482. Regulation 35.2 provides that the time for raising an appeal may, in the circumstances specified therein be extended after the expiration of the time limit set for the purpose. Rule 150.2 does not specify the time within which an application for the extension of time may be made. Rule 150.4, on the other hand, provides "If an appeal is not filed as set out in sub-rules 1 to 3, the decision, the sentence or the reparation order of the Trial Chamber shall become final". The very notion of extension implies the existence of something amenable to extension. Therefore, if the time limited by rule 150.1 for taking an appeal expires nothing is left to extend. Regulation 35.2 makes, as earlier noted, provision for extending the time limit after a judgment becomes final, limiting the opportunity to the specific circumstances identified therein providing that "an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control". The Statute as well as the Rules must be interpreted and applied in accordance with internationally recognised human rights as stated in article 21.3. Access to the court for the exercise of a right is an internationally recognised human right, in the absence of which the right would be denuded of substance. In the case of a person being disabled by forces beyond his/her power to exercise a right within the prescribed period, denying him/her the opportunity to have access to the court would be tantamount to a denial of the right. Therefore, it can be persuasively argued that the provisions of regulation 35.2 can find legitimation in the inalienability of the right of man to have access to the court for the assertion of his/her rights. Outside the limitations of the relevant provisions of regulation 35.2, no justification can be found for non-adherence to the time limits within which rights should be exercised and justice be administered.

483. As indicated in the last mentioned decision of the Appeals Chamber, exceptional circumstances may justify the invocation of rule 35.2 after the expiration of the period set for exercising the right of appeal. In that case, the Appeals Chamber found that illness preventing a party from taking a step in litigation within the time envisaged by the Rules and Regulations, for reasons outside his/her control, provided due justification for extension of time after the expiration of the time limited for the purpose. The gap left was occasioned

⁴⁴⁶ *Ibid.*, para. 7.