Appeal: International Criminal Courts and Tribunals

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A. Introduction

1 Appeal constitutes a challenge to a previous judicial decision. In the context of criminal trials, appeal is nowadays an internationally recognized human right (→ *Right of Appeal*). This is as true in international criminal tribunals as it is in domestic courts (→ *International Courts and Tribunals, Appeals*). In this regard, the → *International Criminal Tribunal for the Former Yugoslavia (ICTY)* determined that '[t]he right of appeal is a component of the fair trial requirement, [which] is, of course, a requirement of customary international law' (*Prosecutor v Aleksovski*, 2000, para 104).

2 The present entry explores the dynamics in the current stage of appellate jurisdiction in international criminal courts. It offers a comparative study focused on ten → *International Criminal Courts and Tribunals*: the → *International Criminal Court (ICC)*, ICTY, → *International Criminal Tribunal for Rwanda (ICTR)*, → *International Residual Mechanism for Criminal Tribunals (IRMCT)*, → *Special Court for Sierra Leone (SCSL)*, → *Residual Special Court for Sierra Leone* ('RSCSL'), → *Special Tribunal for Lebanon (STL)*, → *Extraordinary Chambers in the Courts of Cambodia (ECCC)*, → *Special Panels for Serious Crimes in the Dili District Court: United Nations Transitional Mission in East Timor* ('SPSC'), and the → *Kosovo Specialist Chambers* ('KSC').

3 For the analytical and referential purposes of this entry, the expression '*ad hoc* tribunals', used throughout this entry, refers to the ICTY, ICTR, and the IRMCT. In addition, the abbreviation 'ICTY/R' refers to the ICTY and the ICTR. By turn, 'R/SCSL' refers to the SCSL and the RSCSL. This entry attempts to provide information on the statutory framework and case-law of all assessed tribunals, and is aimed at offering a comparative bird's-eye view on appeal in international criminal procedure. At times, however, the entry refers mainly to the jurisprudence of the ICC due to its relevance and the permanent nature of this tribunal.

4 The entry addresses four issues: (sec B below) appealable decisions and standing to appeal; (sec C) grounds of appeal and standards of appellate review; (sec D) available remedies in appeal; and (sec E) appeal proceedings.

B. Appealable Decisions and Standing to Appeal

5 This section covers two types of appealable decisions and the respective *locus standi* to appeal: (sec B.1 below) interlocutory decisions; and (sec B.2) the final trial judgment on verdict and sentence. Lastly, (sec B.3) the section discusses the victims' standing to bring appeals.

1. Interlocutory Decisions

6 Different from the right to appeal final judgments, 'the right of interlocutory appeal cannot be regarded as a fundamental component of international criminal law' (Boas and others, 2011, 435). In this regard, the ICC has indicated that 'only final decisions of a criminal court determinative of its verdict or decisions pertaining to the punishment meted out to the convict are assured as an indispensable right of man' (*Situation in the Democratic Republic of the Congo*, 2006, para 38). Even though → *Interlocutory appeal* are generally not treated as a matter of right, all assessed courts allow, with varying degrees, the parties to challenge procedural decisions.

7 Apart from the ECCC (see below sec B.1.(d)) and despite some particularities that will be addressed below, the assessed tribunals normally adopt a two-tier system for most interlocutory appeals: their statutory framework expressly grants the right to directly appeal a *numerus clausus* and limited list of decisions. Appeal against any other interlocutory ruling that falls outside the scope of this list is conditional on an authorization by the chamber that issued the impugned decision or, in the case of the SPSC, by the

appellate body (see below sec B.1.(b)). This authorization is called ‘leave to appeal’ or ‘certification’ depending on the tribunal. This entry uses these two terms interchangeably, as synonyms.

8 Accordingly, interlocutory appeals are permitted as a right only in some very restricted cases. Generally, leave or certification is necessary as a condition for the processing of an interlocutory appeal. Three main reasons justify the requirement of leave or certification in most cases: (i) in general, interlocutory appeal is not a recognized right of the parties; (ii) the need for leave allows the certifying chamber to curb irrelevant appeals that would unnecessarily protract or overburden the proceedings; and (iii) issues raised in an uncertified appeal can be brought in the subsequent appeal against the final trial judgment.

9 The legal regime for interlocutory appeals in the *ad hoc* tribunals, ICC, STL, and KSC is sufficiently similar to allow their assessment as a group. On the other hand, these appeals have very distinct criteria and proceedings in the SPSC, SCSL, and ECCC. Therefore, these three tribunals will be evaluated separately.

(a) Ad Hoc Tribunals, International Criminal Court, Special Tribunal for Lebanon, and Kosovo Specialist Chambers

10 In the *ad hoc* tribunals, ICC, STL, and KSC, interlocutory appeals are allowed exceptionally, meaning that only a limited number of decisions can be appealed immediately. A decision can be considered appealable if it is expressly classified as such in the statutory framework of the tribunal or if it passes a ‘certification test’.

(i) Decisions Statutorily Listed as Appealable

11 The statutory framework of the tribunals assessed in this sub-section expressly pinpoints some appealable interlocutory decisions. The list varies from court to court, especially considering the specificities in the procedure of each of them. Despite these differences, all of them allow interlocutory appeal against decisions with respect to jurisdiction and the → *interim release* of an accused (Rules 65 (D), 72 (B) (i) ICTY Rules of Procedure and Evidence (2015) (‘ICTY Rules’); Rules 65 (D), 72 (B) (i) ICTR Rules of Procedure and Evidence (2015) (‘ICTR Rules’); Rules 68 (D), 79 (B) (i) IRMCT Rules of Procedure and Evidence (2020) (‘IRMCT Rules’); Rules 17 (B), 102 (C), 90 (B) (i) STL Rules of Procedure and Evidence (2020) (‘STL Rules’); Art 45 (2) Law on Specialist Chambers and Specialist Prosecutor’s Office (2015) (‘KSC Law’); Rule 58 KSC Rules of Procedure and Evidence (2020) (‘KSC Rules’); Art 82 (1) (a), (b) Rome Statute of the ICC (1998) (‘Rome Statute’); → *Pre-Trial Detention*). Appeals concerning jurisdiction and detention on remand are statutorily granted as a right, entailing that leave to appeal is unnecessary (Boas and others, 2011, 435).

12 The ICC Appeals Chamber has imposed a restrictive approach concerning appeals on jurisdiction or admissibility and interim release of the accused (Nerlich, 2021, 2373; Guariglia and others, 2018, 490–92). Regarding jurisdiction or admissibility (Art 82 (1) (a) Rome Statute), the ICC established that the right to appeal ‘is intended to be limited only to those instances in which a Pre-Trial or Trial Chamber issues a ruling *specifically* on the jurisdiction of the Court or the admissibility of the case’ (*Prosecutor v Ntaganda*, 2016, para 15 [emphasis added]; → *Challenges to Jurisdiction and Admissibility: International Criminal Court (ICC)*). For this standard to be fulfilled, the disposition or operative part of the impugned decision must directly address a question concerning the jurisdiction of the ICC or the admissibility of a case. A mere ‘indirect or tangential link between the underlying

decision and questions of jurisdiction or admissibility' would not be enough (*Prosecutor v Abd-Al-Rahman*, Decision on the Admissibility of the Appeal, 2020, para 7).

13 In addition, the fact that a decision ultimately affected the jurisdiction of the ICC or the admissibility of a case does not necessarily mean that an appeal against this ruling is allowed under Article 82 (1) (a) Rome Statute. The ICC Appeals Chamber explained that '[i]t is the nature, and not the ultimate effect or implication of a decision, that determines whether an appeal falls under article 82(1)(a) of the Statute' (*Situation in the Republic of Kenya*, 2011, para 17).

14 As for decisions granting or denying release of the accused (Art 82 (1) (b) Rome Statute), the ICC Appeals Chamber also espoused a narrow interpretation, stating that Article 82 (1) (b) 'confers exclusively a right to appeal a decision that deals with the detention or release of a person subject to a warrant of arrest' (*Prosecutor v Lubanga*, 2007, para 16; → *Arrest: International Criminal Courts and Tribunals*). Although other decisions might affect or have implications for maintaining an accused person in custody, if the nature of the decision in question is not to specifically grant or deny release, such a decision cannot be appealed under Article 82 (1) (b) (Guariglia and others, 2018, 492–93). As a result of this strict approach, Nerlich noted that only decisions issued under Article 60 (2)–(4) Rome Statute seem to be appealable under Article 82 (1) (b) (2021, at 2376).

15 In the specific context of the ICC, Article 82 (1) (c) Rome Statute authorizes appeals against '[a] decision of the Pre-Trial Chamber to act on its own initiative' in response to a unique investigative opportunity under Article 56 (3) Rome Statute. Article 82 (1) (c) Rome Statute does not allow appeals against all decisions of the Pre-Trial Chamber regarding a unique investigative opportunity under Article 56, but only those under Article 56 (3) in which the Chamber acted *proprio motu*, without a request from the prosecution. All decisions issued under Article 56 Rome Statute following a request from the prosecution fall outside the scope of Article 82 (1) (c). As for standing, only the prosecution is authorized to bring appeals under this provision (Art 56 (3) (b) Rome Statute). This is a reasonable limitation, since Article 56 Rome Statute deals mainly, if not exclusively, with the relationship between the prosecution and the Pre-Trial Chamber in the context of an ongoing investigation (Nerlich, 2021, 2377).

(ii) The 'Certification Test'

16 Instances in which appealable decisions are specifically identified as such are rare. In general, the tribunals did not introduce an all-encompassing list of appealable interlocutory decisions or motions whose decisions could lead to appeals. They instead established a certification test for non-listed decisions, in which certain requirements need to be fulfilled for certification or leave to appeal by the challenged chamber, permitting the appellant to challenge the decision in question before the Appeals Chamber. Despite some minor linguistic changes, the certification test in the *ad hoc* tribunals, STL, and KSC reflect the requirements of the Rome Statute: the impugned decision shall involve:

> an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings (Art 82 (1) (d) Rome Statute; see also Rules 72 (B) (ii), 73 (B) ICTY Rules; Rules 72 (B) (ii), 73 (B) ICTR Rules; Rules 79 (B) (ii), 80 (B) IRMCT Rules; Rule 126 (C) STL Rules; Art 45 (2) KSC Law; Rule 77 (2) KSC Rules).

17 The purpose of this certification test is to allow appellate intervention to correct significant errors early in the proceedings. Not addressing these errors immediately, but at the appeal against the final trial judgment, 'would mean to risk that large parts or the entire proceedings may be invalidated' (*Prosecutor v Barasa*, 2015, para 7). The certification test constitutes a residual and 'catch all' avenue for appellate review: when appeal is not specifically provided for a certain decision in the founding law of the tribunal, appeal against this decision could be sought as long as the criteria of the certification test are met (*Prosecutor v Bemba*, 2020, para 10).

18 Interlocutory appeals are not aimed at seeking an advisory opinion or abstract judicial guidance from the Appeals Chamber. These appeals must refer to concrete questions or issues emanating from the impugned ruling. The raised questions or issues may be legal, factual, or have a mixed nature, ie, legal and factual combined. Appeals based on abstract discussions, hypothetical concerns, or general challenges to the impugned decision's reasoning as a whole will probably not be certified. Likewise, a question over which there is a mere abstract disagreement or conflicting opinion between the parties, whose resolution would not concretely impact the continuation of the proceedings, will also not be granted leave. Accordingly, the appellant has the burden to indicate precise and limited aspects of the impugned decision for resolution by the appellate body (*Situation in the Democratic Republic of the Congo*, para 9; *Prosecutor v Al Hassan*, 2020, para 13; *Prosecutor v Ayyash*, Decision on Defence Request for Certification for Appeal of Trial Chamber II's Decision, 2020, paras 7–9; *Prosecutor v Gucati and Haradinaj*, Decision on SPO Requests for Leave to Appeal, 2021, para 16).

19 As a feature unique to the STL, its Appeals Chamber has jurisdiction to issue decisions offering abstract legal advice on the applicable law to the STL Pre-Trial Judge. Yet, these decisions are not interlocutory appeals, as they are issued under the original competence of the STL Appeals Chamber (Rule 68 (G) STL Rules; Jacobs, 2014, 126–31).

20 Leave to bring interlocutory appeals is conditional on meeting a high threshold, and the requirements under the certification test are considered cumulative. Overall, interlocutory appeals are treated as the exception rather than the rule (Boas and others, 2013, 980). In addition, leave to appeal is not concerned with whether the impugned decision is correct or not, but solely with whether the certification test is satisfied (*Prosecutor v Ayyash and ors*, Decision Dismissing Application for Certification to Appeal, 2016, para 7; *Gucati and Haradinaj*, Decision on SPO Requests for Leave to Appeal, para 21; *Prosecutor v Milutinović and ors*, 2006, para 4).

21 In the two sub-sections below, the entry will address (sec B.1.(a)(iii) below) the requirements for leave to appeal under the certification test; and (sec B.1.(a)(iv)) two additional divisive issues regarding the certification test.

(iii) The Requirements under the 'Certification Test'

22 The certification test is composed of two central prongs. The first one requires that the issue brought in the interlocutory appeal 'would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial' (Art 82 (1) (d) Rome Statute; see above para 16). This criterion aims at determining whether the issue in question should be appealed immediately or whether it could be challenged at a later moment as part of an appeal against the final trial judgment. In this sense, a party can bring an interlocutory appeal only if the certifying chamber 'is of the opinion that the impugned decision must

receive the immediate attention of the Appeals Chamber' (*Prosecutor v Lubanga*, 2019, para 20; *Gucati and Haradinaj*, Decision on SPO Requests for Leave to Appeal, para 20).

23 To be impugned in an interlocutory appeal, the issue must 'significantly affect' either 'the fair and expeditious conduct of the proceedings' *or* 'the outcome of the trial'. The issue must impact, in a material way, at least one of these two elements. It is not necessary to demonstrate significant impact on both of them. The term 'proceedings' in Article 82 (1) (d) Rome Statute has been interpreted broadly, encompassing the proceedings at hand and prior and subsequent proceedings. The element 'outcome of the trial' requires from the certifying chamber an evaluation of the possible implications if the issue raised in appeal was, in fact, wrongly decided, particularly if it may invalidate the future verdict. This evaluation involves an informed prediction of the consequences of the alleged error. However, abstract or speculative questions are usually not granted leave to appeal, such as allegations pertaining to general interests or to unqualified points that could arise in future proceedings (*Situation in the Democratic Republic of the Congo*, paras 10–13; *Gucati and Haradinaj*, Decision on SPO Requests for Leave to Appeal, paras 16–19).

24 As for the second prong of the certification test, the challenged chamber must determine whether, in its opinion, the issue brought in the appeal is one whose 'immediate resolution by the Appeals Chamber may materially advance the proceedings' (Art 82 (1) (d) Rome Statute). The interlocutory appeal must refer to an issue whose settlement through an authoritative determination by the Appeals Chamber is capable of ridding 'the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial' (*Situation in the Democratic Republic of the Congo*, para 14). The 'materially advance' requirement entails that the Appeals Chamber, by deciding the appeal, would ensure 'that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of the proceedings' (*Situation in the Democratic Republic of the Congo*, para 15).

25 Lastly, some decisions treated the identification of a concrete issue to be resolved by the Appeals Chamber, as discussed above in paragraph 18, as a separate and distinct requirement of the certification test (eg, *Prosecutor v Al Hassan*, 2020, para 12; *Prosecutor v Shala*, 2021, para 12). Other decisions rejected this approach (eg, *Gucati and Haradinaj*, Decision on SPO Requests for Leave to Appeal, paras 15–16). Given the conflicting jurisprudence, the present entry did not present the identification of a concrete issue as a separate and distinct criterion, but as a general element of the interlocutory appeals.

(iv) Two Divisive Questions regarding the 'Certification Test'

26 Two additional questions that gave rise to conflicting jurisprudence are: (1) whether leave to appeal could be granted if the two cumulative prongs of the certification test are not present, but the appeal deals with a relevant question of law; and (2) whether the lower chamber can still deny leave to appeal when the two requirements of the certification test are present.

27 As for the first question, the *ad hoc* tribunals and the KSC maintained that, no matter the importance of the point of law, an interlocutory appeal may not be allowed to proceed if the criteria of the certification test are not met (*Prosecutor v Stanišić and Župljanin*, 2010, para 1; *Gucati and Haradinaj*, Decision on SPO Requests for Leave to Appeal, paras 11–21). The ICC has a more ambiguous jurisprudence. In general, the ICC Appeals Chamber has followed the strict position of the *ad hoc* tribunals and the KSC, determining that, notwithstanding the significance, complexity, and urgency of the issues raised in the appeal, certification cannot be granted unless the requirements under Article 82 (1) (d) Rome

Statute are fulfilled (*Situation in the Democratic Republic of the Congo*, paras 35–41; *Prosecutor v Lubanga*, 2011, paras 7–8; Roth and Henzelin, 2002, 1549).

28 In *Prosecutor v Bemba and ors*, however, the ICC Appeals Chamber showed more flexibility, recognizing that, when necessary to protect human rights, 'it is for [the lower chamber] to exercise its discretion to broadly interpret the two prongs of article 82 (1) (d) of the Statute' (2015, at para 16). In *Prosecutor v Bemba*, the ICC Pre-Trial Chamber appears to have returned to a more stringent approach, by qualifying the role of human rights in a certification decision. The Pre-Trial Chamber stated that:

> while human rights considerations may well be taken into account to expand the restrictive material scope of the remedy enshrined in article 82 (1) (d) of the Statute, leave to appeal under this provision cannot be granted solely on the basis of human rights considerations (*Prosecutor v Bemba*, 2020, para 14).

29 Future case-law may further clarify the position of the ICC, especially when human rights are concerned.

30 The second question that triggered conflicting jurisprudence is whether the lower chamber can still deny leave to appeal when the requirements of the certification test are present. The *ad hoc* tribunals allowed this possibility under the discretionary nature of the decision to certify interlocutory appeals (*Prosecutor v Prlić and ors*, Decision on Prlić Defence Request for Certification to Appeal, 2010, 6; *Prosecutor v Karemera and ors*, 2009, para 2; → *Judicial Discretion*). The ICC appears to share this view, as its Appeals Chamber stated that Article 82 (1) (d) Rome Statute does not enshrine a right to interlocutory appeal and the lower chamber may certify the appeals 'on its own accord' (*Situation in the Democratic Republic of the Congo*, para 20).

31 On the other hand, the STL ruled that, when the statutory conditions are met, the Trial Chamber has no discretion to deny certification (*Prosecutor v Ayyash and ors*, 2018, para 8). The KSC lacks case-law in this regard, but its statutory framework uses the expressions: '[t]he Panel shall grant certification' and leave to appeal 'must be granted' (Rule 77 (2) KSC Rules; Art 45 (2) KSC Law). Thus, analogous to the STL and different from the *ad hoc* tribunals and the ICC, certification in the KSC does not seem to be discretionary, but mandatory once the criteria are met (*Prosecutor v Thaçi and ors*, 2022, para 12).

(b) Special Panels for Serious Crimes in East Timor

32 The SPSC expressly allowed interlocutory appeals against decisions of the Investigating Judge and the District Court (sec 23 UNTAET Regulation No 2000/30 on Transitional Rules of Criminal Procedure (2000) ('UNTAET Regulation No 2000/30')). Yet, the SPSC had a unique legal regime for such appeals. According to the narrow definition of 'interlocutory appeal' in section 1 (m) UNTAET Regulation No 2000/30, interlocutory appeals can be brought only with regards to the provisional detention or release of an accused and substitute restrictive measures (Boas and others, 2013, 977). These appeals could be brought as a right, with no leave or certification by the Investigating Judge or the District Court.

33 The processing of interlocutory appeals differed depending on the issuing authority. Appeals challenging decisions on provisional detention, release, or substitute restrictive measures issued by the Investigating Judge were decided by a panel of judges of the District Court. There was no possibility of an additional challenge before the Court of Appeal, but the issues brought in these immediate appeals could be raised once again in the appeal against the final trial judgment (sec 23.1 UNTAET Regulation No 2000/30). On the other hand, appeals challenging decisions on pretrial detention, release, or substitute

restrictive measures issued by the District Court were impugned at the Court of Appeal (sec 23.2 UNTAET Regulation No 2000/30).

34 Notwithstanding the strict definition of interlocutory appeals in the SPSC, the latter allowed appeals against procedural decisions issued prior to the final judgment referring to motions, whether preliminary or not, lodged by either party (sec 27.1, 2 UNTAET Regulation No 2000/30). As a general rule, decisions on motions were not subject to a separate appeal, to the effect that any objection by a party should be normally raised in the appeal of the final judgment (sec 27.3 UNTAET Regulation No 2000/30). Exceptionally, the Court of Appeal may grant leave to appeal decisions on motions if one of the following conditions was present:

> (a) the decision from which appeal is sought would cause such prejudice to the case of the party seeking leave to appeal as could not be cured by the final decision of the trial; (b) the issue on which appeal is sought is of general importance to proceedings before the courts of East Timor; or, (c) upon other good cause being shown by the party seeking leave to appeal (sec 27.4 UNTAET Regulation No 2000/30).

35 Similar to other tribunals, appeals against decisions dealing with motions were generally not enshrined as a right in the SPSC: they were mostly subject to leave to appeal. However, unlike all other assessed courts, the decision on such a leave was not delivered by the same authority that issued the impugned decision but by the Court of Appeal. In addition, the use of the verb 'may' in section 27.4 UNTAET Regulation No 2000/30 could indicate that, analogous to the *ad hoc* tribunals and the ICC, the granting of leave was a discretionary decision, even when one of the requirements under section 27.4 was present.

36 Lastly, regarding the requirements for the certification test applied in the SPSC, the latter had a more flexible framework. The requirements themselves were broader compared to the criteria from other courts. For instance, while other tribunals determined that the general importance of the appealed issue is not enough to allow the appeal to proceed (see above paras 27–29), section 27.4 UNTAET Regulation No 2000/30 determined the opposite. Moreover, while in other tribunals the applicable conditions are cumulative (see above para 20), the word 'or' in section 27.4 UNTAET Regulation No 2000/30 indicated that the presence of only one the three listed requirements would suffice to allow the Court of Appeal to grant leave to appeal.

(c) Special Court for Sierra Leone and the Residual Special Court for Sierra Leone

37 The R/SCSL do not allow interlocutory appeals as a right, but only in a discretionary manner, including regarding decisions that are appealed as a right in other tribunals (Rules 65 (E), 73 (B) SCSL Rules of Procedure and Evidence (2012) ('SCSL Rules'); Rules 65 (E), 73 (B) RSCSL Rules of Procedure and Evidence (2021) ('RSCSL Rules'); Boas and others, 2011, 436). Yet, the R/SCSL have a unique legal regime for preliminary motions made prior to the prosecutor's opening statement 'which raise a serious issue relating to jurisdiction' or 'an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of a trial' (Rule 72 (E), (F) SCSL Rules; Rule 72 (E), (F) RSCSL Rules). To ensure expeditious proceedings, the merits of these motions would not be ruled upon by the Trial Chamber. The latter would forward the motion to a bench of at least three judges of the Appeals Chamber for adjudication (Rule 72 (E), (F) SCSL Rules; Rule 72 (E),

(F) RSCSL Rules). Instead of appellate jurisdiction, the Appeals Chamber has original competence to decide those motions (Boas and others, 2011, 436).

38 The R/SCSL Appeals Chamber stressed that Rule 72 (E) and (F) did 'not turn the Trial Chamber into a [mere] post box' for the processing of these motions (*Prosecutor v Norman and ors*, 2003, para 14). This is because the referral of the motion to the bench of appellate judges is not automatic. Prior to this referral, the Trial Chamber will decide whether the motion raised 'a serious issue relating to jurisdiction' or whether it 'would significantly affect the fair and expeditious conduct of the proceedings or the outcome of a trial'. If yes, the motion will be forwarded to the panel of appellate judges. If not, the motion will be dismissed by the Trial Chamber without a determination on the merits (*Prosecutor v Norman and ors*, 2003, para 14).

39 Interlocutory appeals can be brought against decisions on provisional release, which is called 'bail' at the SCSL. These appeals are conditional on leave granted 'by a Single Judge of the Appeals Chamber, upon good cause being shown' (Rule 65 (E) SCSL Rules; Rule 65 (E) RSCSL Rules).

40 The parties can also appeal decisions issued by the President, Designated Judge, or a Trial Chamber on motions brought by either party during the trial (Rule 73 (B) SCSL Rules; Rule 73 (B) RSCSL Rules). The R/SCSL did not list the motions that could trigger appeals, giving significant room for the lower judges to decide when to grant leave. The R/SCSL did not replicate the same requirements of the certification test applied in some other tribunals (see above sec B.1.(a)(iii)). Rule 73 (B) R/SCSL Rules instead determined that leave may be given 'in exceptional circumstances and to avoid irreparable prejudice to a party'. The SCSL interpreted this certification test in a strict manner, stating that interlocutory appeals are subject to a high threshold and that they are the exception rather than the rule. The two requirements under Rule 73 (B) R/SCSL Rules—the existence of 'exceptional circumstances' and 'irreparable prejudice to a party'—are cumulative: the appellant must demonstrate both of them (*Prosecutor v Brima and ors*, 2006, 3; *Prosecutor v Sesay and ors*, 2008, paras 10–15).

41 Exceptional circumstances for the purpose of certifying an interlocutory appeal existed depending on each case. These circumstances may include: (i) an issue 'of general principle to be decided for the first time'; (ii) 'a question of public international law importance upon which further argument or decision at the appellate level would be conclusive to the interests of justice'; (iii) 'the cause of justice might be interfered with'; (iv) an issue 'that raises serious issues of fundamental legal importance to the Special Court for Sierra Leone in particular, or international criminal law, in general'; and (v) a question that refers to 'some novel and substantial aspect of international criminal law for which no guidance can be derived from national criminal law systems' (*Prosecutor v Sesay and ors*, 2007, para 5). On the other hand, 'irreparable prejudice' means 'prejudice that may not be remediable by appropriate means within the final disposition of trial' (*Prosecutor v Norman and ors*, Decisions on Motion by the First and Second Accused for Leave to Appeal, 2006, para 13).

42 The SCSL concluded that, in light of the different requirements, its certification test was more restrictive than most tribunals' tests. This higher threshold was due to the need for expeditiousness and the particular circumstances of the SCSL's limited mandate (*Prosecutor v Sesay and ors*, 2004, para 39).

(d) Extraordinary Chambers in the Courts of Cambodia

43 The ECCC has a twofold appeal structure, in which interlocutory appeals can be brought before the Pre-Trial Chamber (called ‘pre-trial appeals’, Rule 74 ECCC Internal Rules (2015)) and before the Supreme Court Chamber (‘SCC’) (called ‘immediate appeals’, Rule 104 (4) ECCC Internal Rules). These two types of interlocutory appeals will be analysed below separately.

(i) Pre-Trial Appeals at the Pre-Trial Chamber

44 The term ‘pre-trial appeals’ refers to appeals submitted to the Pre-Trial Chamber against decisions issued by the co-investigating judges. The range of decisions subject to pre-trial appeals varies depending on the appellant, that is, the co-prosecutors, the accused, or the civil parties (→ *Civil Party: Extraordinary Chambers in the Courts of Cambodia (ECCC)*). The co-prosecutors are entitled to appeal all decisions by the co-investigating judges (Rule 74 (2) ECCC Internal Rules).

45 On the other hand, the accused person and the civil parties may appeal a closed list of decisions. Both of them have standing to appeal decisions of the co-investigating judges: (1) ‘refusing requests for investigative action allowed under [the ECCC Internal Rules]’; (2) ‘refusing requests for the restitution of seised items’; (3) ‘refusing requests for expert reports allowed under [the Internal Rules]’; (4) ‘refusing requests for additional expert investigation allowed under [the Internal Rules]’; (5) ‘refusing an application to seise the [Pre-Trial] Chamber for annulment of investigative action’; (6) ‘relating to protective measures’; and (7) ‘reducing the scope of judicial investigation under Rule 66*bis*’ (Rule 74 (3)–(4) ECCC Internal Rules).

46 Only the accused, besides the co-prosecutors, can appeal the following three additional types of decisions of the co-investigating judges: (1) ‘confirming the jurisdiction of the ECCC’; (2) ‘relating to provisional detention or bail’; and (3) ‘declaring a Civil Party application admissible’. Only the civil parties, besides the co-prosecutors, can appeal these two additional types of decisions of the co-investigating judges: (1) ‘declaring a Civil Party application inadmissible’; and (2) ‘a Dismissal Order where the Co-Prosecutors have appealed’ (Rule 74 (3)–(4) ECCC Internal Rules).

47 Accordingly, the ECCC’s framework for pre-trial appeals is unique in comparison to other tribunals. Such a framework is not based on the application of general requirements under a certification test but rather on an all-encompassing permission to appeal for the co-prosecutors, or on a closed list of appealable decisions for the accused and the civil parties. In addition, all those statutorily allowed pre-trial appeals can be lodged as a matter of right, with no need for leave to appeal or certification from the co-investigating judges.

48 However, the ECCC Pre-Trial Chamber has not confined itself to this restrictive arrangement, in which only the specific pre-trial appeals statutorily foreseen are be permitted. The Pre-Trial Chamber has adopted, through its case-law, a broader scope of pre-trial appeals, especially regarding appeals brought by the accused. The Chamber has determined that, in light of the fundamental principles of fairness imposed by Rule 21 ECCC Internal Rules (entitled ‘Fundamental Rights’), it may adopt a ‘“liberal interpretation of the right to appeal to ensure that the proceedings are fair and adversarial” by admitting appeals under Internal Rule 21 or broadly construing the specific provisions of the Internal Rules which grant it jurisdiction’ (*Prosecutor v Yim*, 2018, para 11). Therefore, the Pre-Trial Chamber may rule on appeals referring to issues or decisions not explicitly listed in Rule 74

ECCC Internal Rules. The Chamber labelled them ‘appeals under Rule 21’ (*Prosecutor v Yim*, 2018, para 11).

49 The Pre-Trial Chamber stressed that appeals under Rule 21 ECCC Internal Rules are exceptional and should not be considered an automatic avenue to litigate any fair trial issue (*Prosecutor v Yim*, 2018, para 11). The Chamber indicated that these appeals are conditional on meeting a high threshold and two cumulative requirements: (1) ‘the appellant must demonstrate that the situation at issue does not fall within the [scope of any other statutorily permitted pre-trial appeal]’; and (2) ‘the particular circumstances of the case require the Chamber intervention to avoid irremediable damage to the fairness of the investigation or proceedings or to the appellant fundamental rights’ (*Prosecutor v Yim*, 2018, para 11).

(ii) Immediate Appeals at the Supreme Court Chamber

50 ‘Immediate appeals’ are appeals brought at the SCC against interlocutory decisions issued by the Trial Chamber. Only four types of decisions are appealable, as exhaustively listed in Rule 104 (4) ECCC Internal Rules: (1) ‘decisions which have the effect of terminating the proceedings’; (2) ‘decisions on detention and bail’; (3) ‘decisions on protective measures under Rule 29 (4) (c)’; and (4) ‘decisions on interference with the administration of justice under Rule 35 (6)’. Any other decision of the Trial Chamber can only be challenged as part of the appeal against the final trial judgment. As a result, ‘the scope of immediate appeals before the ECCC is considerably more circumscribed than that in any other international or special criminal jurisdiction’ (Vasiliev, 2020, 729). This feature of the ECCC’s appeal framework could be explained by a factor that influenced other aspects of their structure: the United Nations Secretary-General’s (‘UNSG’) demand for swift proceedings during the negotiations leading to the creation of the ECCC (Vasiliev, 2020, 730).

51 The narrow door for interlocutory appeals in the ECCC could have negative consequences, such as the overloading of the appeal against the final judgments and the fact that important issues that could impact the verdict would remain unsettled throughout the trial. Ultimately, one of the main concerns regarding the restrictive scope of interlocutory appeals in the ECCC is an unwarranted burden on the rights of the accused, especially if they are detained during the trial (Vasiliev, 2020, 730–33).

52 The SCC attempted to tackle this deficiency via legislative reform. In 2011, 2014, and 2015, the SCC seized the Plenary of ECCC judges with proposals to amend Rule 104 (4) ECCC Internal Rules towards enlarging the list of interlocutory decisions subject to appeal. Nevertheless, all attempts were unsuccessful due to opposition from the trial judges, who feared that the expansion of immediate appeals could slow down and disrupt the proceedings. The trial judges were also confident that the rights of the accused were sufficiently protected due to the pre-trial appeals and the appeal against the final judgment (Vasiliev, 2020, 730–31).

53 Some SCC judges attempted to depart from the strict regime of Rule 104 (4) ECCC Internal Rules via case-law. In 2012, the international judges Agnieszka Klonowiecka-Milart and Chandra Nihal Jayasinghe penned a joint dissenting opinion arguing that the SCC should start using the certification test under Article 82 (1) (d) Rome Statute, which is applied by most tribunals (see above sec B.1.(a)(ii)). They based their proposal on ‘the jurisprudence of the ECCC, the practice of all existing international criminal tribunals, the needs of a fair and expeditious trial and the rights of the accused’ (*Prosecutor v Ieng* (Dissenting Opinion of Judges Klonowiecka-Milart and Jayasinghe), 2012, para 1). Their

suggestion fell on deaf ears in the SCC, which refused to depart from Rule 104 (4) ECCC Internal Rules and expand its jurisdiction to hear unlisted interlocutory appeals.

54 The SCC applied its strict approach to Rule 104 (4) ECCC Internal Rules even when the Chamber was forced into a corner in the cases of Meas Muth (Case 003), Yim Tith (Case 004), and Ao An (Case 004/2). Given that the co-investigating judges issued separate and opposing closing orders in all three cases, the international co-prosecutor seized the SCC to resolve this stalemate. Without the SCC's intervention, there was no other way to resolve the uncertainty in these cases, potentially resulting in a judicial limbo and endless litigation.

55 Even in this extreme scenario, the SCC refused to adopt a more flexible or expansive approach to Rule 104 (4) ECCC Internal Rules. The SCC ruled that the applications brought by the international co-prosecutor were inadmissible as interlocutory appeals under Rule 104 (4) ECCC Internal Rules. Nevertheless, given the extraordinariness of the situation, the SCC felt compelled to admit the applications anyhow, but instead of Rule 104 (4) ECCC Internal Rules, it used interests of justice and fairness as the legal basis for the admissibility (*Prosecutor v Yim*, 2021, paras 19–24; *Prosecutor v Meas*, 2021, paras 27–33; *Prosecutor v Ao*, 2020, paras 46–65). The SCC was very cautious in indicating that its decision was not a precedent to be often used and, in no way, could it be seen as a new ground for appeals, similar to what the Pre-Trial Chamber has done with its 'appeals under Rule 21'. The SCC's intervention in the case was rather an extraordinary remedy to deal with a stalemate that could not be resolved in any other way (*Prosecutor v Meas*, paras 32–33).

2. Final Judgment on Verdict and Sentence

56 Although the statutory language of the assessed tribunals varies on the definition of the appealable final judgments of the Trial Chambers, all tribunals grant the right to appeal the verdict—whether a conviction or acquittal—and the sentence to both the defence and the prosecution (Art 81 Rome Statute; Art 25 ICTY Statute (1993); Art 24 ICTR Statute (1994); Art 23 IRMCT Statute (2010); Arts 17new, 36new Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (2004) ('ECCC Law'); Rule 105 (1) ECCC Internal Rules; Arts 45 (1), 46 (1) KSC Law; Art 20 SCSL Statute (2002); Art 21 RSCSL Statute (2020); sec 40.1 UNTAET Regulation No 2000/30; Art 26 (1) STL Statute (2007)).

57 Given that appeal against the verdict and sentence is brought as a right, there is no need for certification or leave to appeal from the first instance chamber, which is a requirement for most interlocutory appeals. The full acquittal of a defendant following a successful → *no case to answer* motion can also be appealed as a final judgment. Contrarywise, a decision dismissing a no case to answer motion can be challenged as an interlocutory appeal if the applicable criteria are met (*Prosecutor v Gbagbo and Blé Goudé*, 2021, paras 109–24; *Prosecutor v Karadžić*, 2013, para 9).

58 Appeals by the prosecution are generally on equal footing with those by the defence. They have no specific limitations, entailing that the prosecutor can bring appeals aimed to worsen the situation of the defendant and challenge acquittals in full (*Prosecutor v Halilović*, 2007, para 16; Djukić, 2019, 122). The prosecution can also appeal on behalf of the accused, but in this scenario *reformatio in peius* is generally not permitted (see below sec D).

59 The ECCC constitute an exception to the general rule that the prosecution can fully challenge acquittals. This feature is a result of the negotiation process to create the ECCC. Cambodian domestic jurisdiction has a two-tier system for appeals: a Court of Appeal, with jurisdiction to decide a case *de novo*, and a Supreme Court, which reviews the Court of Appeal's judgments through a request for cassation (Jørgensen, 2018, 86–87). Cambodia intended to replicate the same two-tier appellate system in the ECCC, but the UNSG objected to this proposal, fearing that the proceedings would become excessively long.

60 A compromise was reached between the UNSG and Cambodia to ensure speediness and safeguard the defendants' rights. On the one hand, the ECCC do not follow the Cambodian two-tier system of appeals, having only the SCC serving 'as both appellate chamber and final instance' (Art 9new ECCC Law). On the other hand, the SCC has limited powers to review acquittals (Vasiliev, 2020, 727–29). Rule 110 (4) ECCC Internal Rules determines that if the co-prosecutors appeal an acquittal, the SCC may modify the Trial Chamber's erroneous findings, 'but [it] cannot modify the disposition of the Trial Chamber judgment'. Thus, the SCC cannot reverse an acquittal, even when it finds errors of law and fact in the reasoning of the Trial Chamber. Yet, the co-prosecutors are free to appeal a conviction to worsen the situation of the convicted person (*Prosecutor v Kaing*, 2012, 320).

3. Victims' Standing to Appeal

61 The assessed courts had two different approaches for the role of victims in appellate proceedings: (1) complete absence of a right to participate and to appeal; or (2) right to participate and different degrees of a right to appeal (→ *Victim Participation in International Criminal Proceedings*; → *Victim Participation*). The first approach existed in the *ad hoc* tribunals, SCSL, and SPSC, in which victims were not entitled to participate in the proceedings or bring appeals against any decision. In essence, their participation was limited to being witnesses.

62 In the remaining tribunals, namely, the ICC, ECCC, STL, and KSC, victims can participate in the proceedings upon fulfilling certain criteria (Art 68 (3) Rome Statute; Rule 23 ECCC Internal Rules; Rules 86–87 STL Rules; Rules 113–114 KSC Rules). In addition, they are entitled, to varying degrees, to bring appeals. The strongest standing to appeal exists in the ECCC, where victims participate in the proceedings not as mere participants but as 'civil parties' (Jørgensen, 2018, 94–95, 129–32). In addition to the right to challenge several decisions of the co-investigating judges before the Pre-Trial Chamber (see above sec B.1.(d)(i)), Article 36new ECCC Law established in general terms that victims can bring appeals before the SCC against decisions of the Trial Chamber.

63 As for appeals against final judgments, Rule 105 (1) (c) ECCC Internal Rules established: '[t]he Civil Parties may appeal the decision on reparations. Where the Co-Prosecutors have appealed, the Civil Parties may appeal the verdict. They may not appeal the sentence.' Accordingly, while the civil parties have a full and autonomous right to appeal a decision on reparations, they may question the verdict before the SCC only when the co-prosecutors have appealed. Thus, the victims have a right to appeal an acquittal or conviction at the ECCC, but such a right is not autonomous: its exercise is conditional on the co-prosecutors also bringing an appeal. If the co-prosecutors decide not to appeal the verdict, the victims are prevented from doing so. The limitation on the appeals by the co-prosecutors against acquittals in Rule 110 (4) ECCC Internal Rules also applies to appeals brought by civil parties. In addition, the victims are barred from appealing the sentence in any situation (Rule 105 (1) (c) ECCC Internal Rules).

64 The ECCC stand as the only assessed court in which victims can participate as ‘civils parties’ and can appeal a verdict, even though this right is restricted. Similar to the ECCC, victims in the ICC and KSC can appeal a reparation order (Art 82 (4) Rome Statute; Art 46 (9) KSC Law). The STL does not have jurisdiction to grant compensation to victims (Art 25 STL Statute).

65 Regarding interlocutory appeals, the victims’ *locus standi* is very limited in the ICC, STL, and KSC. In the STL and the KSC, per statutory provision victims can appeal a decision in which their application for admission as participating victims was rejected. Denied applicants may appeal as of right, with no need for certification (Rule 86 (C) (i) STL Rules; Art 46 (9) KSC Law; Rule 113 (6) KSC Rules; *Prosecutor v Ayyash*, Public Redacted Version of the Decision on Appeal by Victim Applicant V1001, 2020, para 17; *Prosecutor v Thaçi and ors*, 2021, para 5). The STL decided to go further in 2013. Through an expansive interpretation of its Statute, the STL determined that victims are entitled, conditional on certification, to appeal decisions in which their ‘interests as participants in the proceedings are fundamentally concerned’, such as decisions on the modalities of victim participation and decisions on protective measures for participating victims (*Prosecutor v Ayyash and ors*, 2013, paras 12–15; *Prosecutor v Ayyash and ors*, 2021, para 33).

66 The ICC does not grant any appellate standing to participating victims during the main criminal prosecution (Perez-Leon-Acevedo, 2021, 1605–10). The victims cannot even appeal an ICC decision denying them the right to participate in the proceedings, in contrast with the STL and KSC, where such an appeal is permitted as a right. However, the victims’ status changes dramatically during the post-conviction → *reparation proceedings*, in which the victims become full procedural parties (→ *Office of Public Counsel for Victims: International Criminal Court (ICC)*). Despite their status as parties, Article 82 (4) Rome Statute only expressly recognized the victims’ *locus standi* to challenge the final reparations order. Hence, it remains unsettled if victims can appeal a decision of the Trial Chamber not to issue a reparations order as well as decisions other than the reparations order. As for the former, some scholars have reasonably argued that, despite Article 82 (4) Rome Statute’s silence, victims can appeal a decision of the Trial Chamber declining to issue a reparations order, as a means to permit the full realization of their right to reparations (Perez-Leon-Acevedo, 2021, 1612; Nerlich, 2021, 2383).

67 Article 82 (4) Rome Statute is also silent on the victims’ standing to bring appeals against decisions other than the reparations order issued during the reparations proceedings. Perez-Leon-Acevedo noted that the ICC’s practice has been inconsistent in this matter (2021, at 1613). One should bear in mind that, as clarified by the ICC Appeals Chamber, the evaluation of who should qualify as a ‘party’ to bring appeals depends on the type of decision subject to appeal and the procedural context (*Situation in the Islamic Republic of Afghanistan*, 2020, para 14). As victims are parties in the reparations proceedings, they should have *locus standi* to bring interlocutory appeals under Article 82 (1) (d) Rome Statute as any other party (Perez-Leon-Acevedo, 2021, 1616). This is particularly important as it seems that the defence can appeal under Article 82 (1) (d) Rome Statute in the reparations stage if the criteria therein are fulfilled (*Prosecutor v Bemba*, 2017, paras 2, 10, 15, 20; *Prosecutor v Ntaganda*, Decision on the Application on Behalf of Mr Bosco Ntaganda Seeking Leave to Appeal, 2021, para 15). Denying *locus standi* to victims could, thus, create serious fair trial implications under the equality of arms principle.

C. Grounds of Appeal and Standards of Appellate Review

68 A common element throughout almost all assessed tribunals is the fact that their statutes contain a very broad regulation on the grounds of appeal and often were silent on the respective standard of appellate review (Summers, 2014, 386–87; as an exception to this trend, cf Art 46 KSC Law; → *Standard of Review in Appeal Proceedings*). This gave a wide margin for the appellate judges to decide on these important issues. In general, the statutory framework and case-law of the *ad hoc* tribunals informed the scope of grounds of appeal and standards of review in international criminal procedure.

69 This section of the entry addresses three different grounds of appeal and their respective standards of review: (sec C.1 below) errors of law; (sec C.2) errors of fact; and (sec C.3) procedural errors. It also evaluates the standard of appellate review applicable to (sec C.4) discretionary decisions, and (sec C.5) interlocutory decisions.

1. Errors of Law

(a) The Appealable Errors of Law

70 Despite some minor linguistic distinctions and except for the ICC and the SPSC, the statutes of all assessed tribunals defined errors of law mirroring the ICTY/R Statute: 'an error on a question of law invalidating the decision' (Art 25 (1) (a) ICTY Statute; Art 24 (1) (a) ICTR Statute; Art 23 (1) (a) IRMCT Statute; Art 20 (1) (b) SCSL Statute; Art 21 (1) (b) RSCSL Statute; Rule 104 (1) (a) ECCC Internal Rules; Art 46 (1) (a) KSC Law; Art 26 (1) (a) STL Statute; Rule 176 (A) (i) STL Rules). The Rome Statute adopted a simpler approach, using the unqualified expression: '[e]rror of law' (Art 81 (1) (a) (iii), (b) (iii) Rome Statute). The SPSC used 'material error of law or fact' (sec 40.1 (d) UNTAET Regulation No 2000/30).

71 Laurent Trigeaud identified three different types of legal errors that lower chambers may commit: (i) errors in identifying the rule applicable to the case; (ii) errors in interpreting the applicable rules; and (iii) errors in applying the rules to the concrete facts of the case (2019, at 2079–81). The ICTY/R Appeals Chamber clarified that not every error of law is appealable, but only those that invalidate the decision. Hence, '[a]n allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground' (*Prosecutor v Mladić*, 2021, para 16).

72 The ICTY/R Appeals Chamber also determined that, 'in exceptional circumstances', it had discretion to hear appeals dealing with 'a legal issue that is of general significance to the Tribunal's jurisprudence', even when this issue would not render the appealed decision invalid (*Prosecutor v Boškoski and Tarčulovski*, 2010, para 9; *Kanyarukiga v Prosecutor*, 2012, para 267). Other tribunals also allowed this possibility (*Prosecutor v Gucati and Haradinaj*, 2020, para 12; *Prosecutor v Taylor*, Judgment, 2013, para 25; *Prosecutor v Merhi and Oneissi*, 2022, para 29; *Prosecutor v Khieu and Nuon*, 2016, para 86). The ICTY/R Appeals Chamber was careful to avoid transforming its appellate jurisdiction into an abstract advisory function, by insisting that the legal question of 'general significance' 'must be of interest to the legal practice of the Tribunal and must have a nexus with the case at hand' (*Prosecutor v Akayesu*, 2001, paras 23–24).

73 At the ICC, the unqualified expression 'error of law' in Article 81 Rome Statute does not provide much guidance on the types of legal errors that would trigger appellate review. The ICC Appeals Chamber narrowed the scope of the provision by indicating that it 'will only intervene if the error materially affected the Impugned Decision' (*Prosecutor v Ntaganda*, Judgment on the Appeals of Mr Bosco Ntaganda and the Prosecutor Against the Decision of Trial Chamber VI of 8 July 2019 Entitled 'Judgment', 2021 ('*Ntaganda Appeals Against 8 July 2019 Judgment*'), para 36). The 'materially affected' threshold is fulfilled 'if the Trial

Chamber "would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error"' (*Ntaganda Appeals Against 8 July 2019 Judgment*, para 36).

(b) The Standard of Review

74 As for the standard of review for legal errors, the ICTY/R Appeals Chamber determined that, in light of its leading role in ensuring the correct and uniform interpretation and application of the law across the ICTY/R, it should review anew the application of the law by the Trial Chamber, applying little to no deference to the decisions in the first instance. With regards to law, there is only one correct answer, and it is the role of the Appeals Chamber to enforce such answer Tribunal-wide. In this sense:

> Errors of law do not raise a question as to the standard of review as directly as errors of fact. Where a party contends that a Trial Chamber made an error, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether there was such a mistake (*Prosecutor v Furundžija*, 2000, para 35).

75 The ICTY/R Appeals Chamber determined that review of errors of law was subject to a 'standard of correctness': 'the Appeals Chamber does not cross-check the findings of the Trial Chamber on matters of law merely to determine whether they are reasonable, but indeed to determine whether they are correct' (*Rutaganda v Prosecutor*, 2003, para 20). When the Appeals Chamber concludes that the impugned decision has legal errors, it will state the correct legal standard and apply it to the facts of the case, reviewing the affected factual findings of the lower chamber under the correct legal standard (*Prosecutor v Mladić*, 2021, para 17).

76 The 'standard of correctness' and the absence of deference to the legal findings in the first instance established by the ICTY/R has been steadily replicated by the other assessed courts, becoming the standard for the entire international criminal justice structure (*Prosecutor v Khieu and Nuon*, 2016, paras 85–86; *Prosecutor v Merhi and Oneissi*, 2022, para 29; *Prosecutor v Gucati and Haradinaj*, 2020, para 12; *Prosecutor v Taylor*, Judgment, 2013, para 25). The ICC Appeals Chamber has consistently established that '[it] 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' (*Ntaganda Appeals Against 8 July 2019 Judgment*, para 36).

2. Errors of Fact

(a) The Appealable Errors of Fact

77 Despite some minor linguistic distinctions and except for the ICC and the SPSC, the statutes of all assessed tribunals defined errors of fact mirroring the ICTY/R Statute: 'an error of fact which has occasioned a miscarriage of justice' (Art 25 (1) (b) ICTY Statute; Art 24 (1) (b) ICTR Statute; Art 23 (1) (b) IRMCT Statute; Art 20 (1) (c) SCSL Statute; Art 21 (1) (c) RSCSL Statute; Rule 104 (1) (b) ECCC Internal Rules; Art 46 (1) (b) KSC Law; Art 26 (1) (b) STL Statute; Rule 176 (A) (ii) STL Rules). The Rome Statute adopted a simpler approach, using the unqualified expression '[e]rror of fact' (Art 81 Rome Statute). The SPSC used: 'material error of law or fact' (sec 40.1 (d) UNTAET Regulation No 2000/30).

78 Following Article 25 (1) (b) ICTY Statute and Article 24 (1) (b) ICTR Statute, the ICTY/R Appeals Chamber indicated that not every error of fact shall trigger the amending or overturning of the impugned decision, but only those that have caused 'a miscarriage of justice'. Under this threshold, the appellant must demonstrate that the error of fact was 'critical to the verdict', entailing 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' (*Prosecutor v Mladić*, 2021, para 18). Put differently, the lower chamber's factual error must be serious enough to reverse the verdict in a certain charge, in whole or in part.

79 The 'miscarriage of justice' threshold has been applied in the other tribunals' case-law as well (*Prosecutor v Taylor*, Judgment, 2013, para 27; *Prosecutor v Gucati and Haradinaj*, 2020, para 13; *Prosecutor v Khieu and Nuon*, 2016, para 91; *Prosecutor v Merhi and Oneissi*, 2022, para 31). Differently, the ICC has replicated to errors of fact its threshold for errors of law, ie, the 'materially affected' standard (see above para 73). The ICC Appeals Chamber explained that '[a] trial chamber's decision is materially affected by a factual error if the Appeals Chamber is persuaded that the trial chamber, had it not so erred, would have convicted rather than acquitted the person or vice versa in whole or in part' (*Ntaganda Appeals Against 8 July 2019 Judgment*, para 43). Despite the different wording of 'materially affected' and 'miscarriage of justice', these two thresholds seem to ultimately entail the same test: the factual error would create or eliminate a reasonable doubt regarding the defendant's conviction or acquittal, respectively.

(b) The Standard of Review

80 While the standard of appellate review for errors of law is fairly straightforward, the standard for factual errors is more complex and controversial. As a starting point, and similar to the scope of appellate review for legal errors, the *ad hoc* tribunals defined the standard of appellate review for errors of fact that all evaluated criminal tribunals generally apply. To assess the existence of such an error, the ICTY/R Appeals Chamber established the 'standard of reasonableness', meaning that 'the Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding' (*Prosecutor v Mladić*, 2021, para 18).

81 The standard of reasonableness applies to both the prosecution appealing an acquittal and the defence appealing a conviction. However, the standard's application differs if the appeal challenges an acquittal or a conviction:

> considering that, at trial, it is the Prosecution that bears the burden of proving the guilt of an accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction. Whereas a convicted person must show that the trial chamber's factual errors create reasonable doubt as to his or her guilt, the Prosecution must show that, when account is taken of the errors of fact committed by the trial chamber, all reasonable doubt of guilt has been eliminated (*Prosecutor v Mladić*, 2021, para 19; see also *Prosecutor v Nyiramasuhuko and ors*, 2015, para 32; *Prosecutor v AI Jadeed and Al Khayat*, 2016, para 16; *Prosecutor v Kaing*, para 18; *Prosecutor v Ngudjolo*, 2015, paras 25–26; *Prosecutor v Sesay and ors*, 2009, para 33).

82 Connected to the standard of reasonableness, the ICTY/R Appeals Chamber consolidated a rule of deference to the Trial Chamber's factual findings, entailing that these findings will not be overturned lightly (*Prosecutor v Mladić*, 2021, para 18). The Appeals Chamber was comfortable admitting that 'two judges, both acting reasonably, can come to different conclusions based on the same evidence' (*Prosecutor v Tadić*, 1999, para 64). It also determined that the primary responsibility for evaluating the evidence and making findings of fact lies with the Trial Chamber due to its best position to assess and weigh the totality of the evidential record that were presented and discussed before it first-hand. Ultimately, the rule of deference implied that the Appeals Chamber should not simply substitute its own appraisal for that of the Trial Chamber. The ICTY/R also maintained that

an appeal was not a trial *de novo* aimed at the re-examination of the entire case (*Prosecutor v Prlić and ors*, 2017, paras 21–22; *Musema v Prosecutor*, 2001, paras 17–18).

83 The other assessed tribunals have applied the standard of reasonableness and the rule of deference in the vast majority of their cases (eg, *Prosecutor v Merhi and Oneissi*, 2022, para 31; *Prosecutor v Kaing*, para 17; Art 46 (5) KSC Law; *Prosecutor v Gucati and Haradinaj*, Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, 2021, para 13; *Prosecutor v Fofana and Kondewa*, 2008, paras 33–34; *Prosecutor v Bemba and ors*, 2018, paras 91–98).

84 However, at times, some courts deviated from this lasting jurisprudence (Boas and others, 2011, 445–46). The *Gotovina and ors* and *Perišić* cases before the ICTY/R Appeals Chamber were notorious examples. In these cases, the Appeals Chamber did not defer to the factual findings of the Trial Chambers nor assessed whether a reasonable trier could have arrived at that conclusion from the available evidence. Instead, the ICTY/R Appeals Chamber embarked on an unusual *de novo* review of the evidence (*Prosecutor v Gotovina and ors*, 2012, paras 64–67; *Prosecutor v Perišić*, 2013, paras 25–74; for a deeper assessment of these two cases: Milanovic, 2013; Summers, 2014, 391–408; Solis, 2013, 100–7).

85 The ECCC also departed from the traditional standard of reasonableness and rule of deference, espousing a less stringent threshold for appellate intervention and greater margin to review the factual findings of the Trial Chambers (Vasiliev, 2020, 734). In *Khieu and Nuon* (Case 002/01), the SCC explained that to measure the reasonableness of a factual finding, the appellate judge should assess whether the evidence at trial was strong enough and whether the reasoning of the lower chamber was appropriate (*Prosecutor v Khieu and Nuon*, 2016, para 90). This qualified deference may entail a wider appellate review, as:

> The SCC will determine whether the [Trial Chamber] made a factual finding that was reasonable considering the evidence before it and whether an alleged factual error gives rise to a reasonable doubt as to the guilt inconsistent with conviction, as opposed to merely answering a more abstract and speculative question whether 'no reasonable trier of fact could convict' on the basis of the evidence (Vasiliev, 2020, 734–35).

86 In the *Bemba* case, in a controversial three-two decision, the ICC Appeals Chamber also diverged from the general deference standard. Pursuant to the goal of protecting defendants against wrongful convictions, the majority significantly enlarged the review powers of the Appeals Chamber. The majority innovated in two ways. First, it narrowed the scope of the rule of deference, indicating that it must be applied 'with extreme caution' (*Prosecutor v Bemba*, 2018, para 38). The Appeals Chamber should intervene not only when faced with wholly unreasonable errors but 'whenever the failure to interfere may occasion a miscarriage of justice' (*Prosecutor v Bemba*, 2018, para 40). The Appeals Chamber shall not 'constrain the exercise of its appellate discretion in such a way that it ties its own hands against the interest of justice', especially considering that the Rome Statute and the Rules of Procedure and Evidence (2002) ('ICC Rules') do not bind the Appeals Chamber to a deferential approach (*Prosecutor v Bemba*, 2018, para 40).

87 Second, the majority of the ICC Appeals Chamber also limited the scope of the standard of reasonableness. It concluded that 'when the Appeals Chamber is able to identify findings

that can reasonably be called into doubt, it must overturn them' (*Prosecutor v Bemba*, 2018, para 43). In other words:

> the Appeals Chamber must be satisfied that factual findings that are made beyond reasonable doubt are clear and unassailable, both in terms of evidence and rationale. Mere preferences or personal impressions of the appellate judges are insufficient to upset the findings of a trial chamber. However, when a reasonable and objective person can articulate serious doubts about the accuracy of a given finding, and is able to support this view with specific arguments, this is a strong indication that the trial chamber may not have respected the standard of proof and, accordingly, that an error of fact may have been made (*Prosecutor v Bemba*, 2018, para 45).

88 The majority stressed that this reasoning would not imply a *de novo* assessment of evidence, but a simple determination 'whether a reasonable trial chamber … could have been satisfied beyond reasonable doubt as to the finding in question, based on the evidence that was before it' (*Prosecutor v Bemba*, 2018, para 42).

89 Judges Sanji Mmasenono Monageng and Piotr Hofmanski wrote a strong joint dissenting opinion refuting the majority's reasoning. They claimed that the Appeals Chamber should not intervene simply because it has 'serious doubts' as to the correctness of the Trial Chamber's factual findings. Given the Appeals Chamber's limited level of familiarity with the evidentiary record of the case, this course of action would likely lead to decisions at the appellate level based on erroneous factual findings (*Prosecutor v Bemba* (Dissenting Opinion of Judges Monageng and Hofmanski), 2018, para 15).

90 In light of its capacity to disrupt the merely corrective and restrained nature of the appellate process, the resignification of the standard of review for errors of fact in the *Bemba* case was very divisive among commentators (in favour: Eckelmans, 2021a, 2350; Heinze, 2018; Mbokani, 2018. Against: SáCouto and Sellers, 2019, 610–20; Sadat, 2018; Powderly, 2018, 1032).

3. Procedural Errors

91 Procedural errors refer to mistakes relating to procedural law that 'may occur in the proceedings leading up to an impugned decision', whether during the pre-trial or trial phases (*Prosecutor v Lubanga*, Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against his Conviction, 2014, para 20). These errors are rarely recognized as a separate ground of appeal. Only four of the assessed tribunals incorporated procedural errors as such in their statutory framework: ICC, SCSL, RSCSL, and the SPSC (Art 81 Rome Statute; Art 20 (1) (a) SCSL Statute; Art 21 (1) (a) RSCSL Statute; sec 40.1 UNTAET Regulation No 2000/30). While the first three tribunals used the unqualified expression 'procedural error', the SPSC inserted a list of grounds: '(a) a violation of the rules of the criminal procedure; (b) a violation of the procedural or substantive rights of the accused; (c) inconsistency within grounds of the decision' (sec 40.1 UNTAET Regulation No 2000/30). The remaining assessed tribunals have treated procedural errors as errors of law (Eckelmans, 2021a, 2337).

92 The ICC and the SCSL adopted different approaches to deal with procedural errors. On the one hand, the ICC determined that only procedural errors that 'materially affected' the decision are appealable, the same threshold for errors of law (*Ntaganda Appeals Against 8 July 2019 Judgment,* , para 44). On the other hand, the SCSL applied its threshold for errors of fact, that is, 'procedural errors which occasioned a miscarriage of justice vitiating the

proceedings and affecting the fairness of the trial' (*Prosecutor v Taylor*, Judgment, 2013, para 28).

93 The ICC also explained that, as procedural errors often relate to an alleged abusive exercise of the challenged chamber's discretion, the standard of review for discretionary decisions applies here (*Ntaganda Appeals Against 8 July 2019 Judgment*, paras 44–46; see below sec C.4). The ICC has also indicated that lack of appropriate reasoning in the impugned decision constitutes an appealable procedural error (*Prosecutor v Bemba*, 2018, paras 49–56). Other tribunals also allowed appeals based on lack of adequate reasoning as errors of law, following a similar standard (*Prosecutor v Taylor*, Judgment, 2013, para 25; *Prosecutor v Mladić*, 2021, para 16; *Simba v Prosecutor*, 2007, para 143).

4. Grounds of Appeal and Appellate Review of Discretionary Decisions

94 In general, the appellate review of a lower chamber's exercise of discretion is very limited. The appellate judge is not allowed to quash the impugned decision simply because they do not agree with the ruling.

95 The assessed tribunals have replicated the standard of review for discretionary decisions established by the *ad hoc* tribunals. The appellant must demonstrate that the lower chamber committed 'a discernible error' detrimental to a party. To determine whether such an error exists, the Appeals Chamber shall evaluate if the impugned decision: (1) 'was based on an incorrect interpretation of the law'; (2) was based on 'a patently incorrect conclusion of fact'; or (3) constituted an abuse of discretion. There would be an abuse of discretion when the decision is 'so unfair or unreasonable' to the point of forcing the Appeals Chamber to conclude that the lower chamber did not exercise its discretion judiciously. The Appeals Chamber can also consider whether the lower chamber 'has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision' (*Prosecutor v Mladić*, 2021, para 63; see also *Prosecutor v Taylor*, Judgment, 2013, para 29; *Ntaganda Appeals Against 8 July 2019 Judgment*, paras 45–46; *Prosecutor v Gucati and Haradinaj*, 2020, para 14; Rules 104 (1), 105 (2) (b) ECCC Internal Rules).

96 The standard of review for discretionary decisions also applies to appeals against sentences, due to the Trial Chamber's significant discretion during sentence determination (*Prosecutor v Mladić*, 2021, para 539; *Prosecutor v Taylor*, Judgment, 2013, para 30; *Prosecutor v Ntaganda*, Judgment on the Appeal of Mr Bosco Ntaganda Against the Decision of Trial Chamber VI of 7 November 2019 Entitled 'Sentencing Judgment', 2021, paras 19–24; *Prosecutor v Khieu and Nuon*, 2016, paras 1107–1108; → *Sentencing*).

5. Grounds of Appeal and Appellate Review of Interlocutory Decisions

97 Except for the ECCC (Rules 104 (1), 105 (2) ECCC Internal Rules), all assessed tribunals lack explicit statutory elaboration on the grounds of appeal and standards of review for interlocutory appeals. Their case-law filled this gap. Considering that matters of practice, procedure, and the general management of the proceedings are ordinarily within the Pre-Trial and Trial Chambers' discretion, most interlocutory appeals are ruled upon by the Appeals Chamber according to the grounds of appeal and standard of review applicable to discretionary decisions (*Prosecutor v Mladić*, 2013, paras 21–22; *Prosecutor v Mladić*, 2021, para 63; see above sec C.4).

98 For non-discretionary matters, it has been established that, analogous to appeals against final judgments, interlocutory appeals can be brought based on an error of law or fact (and, if applicable, procedural errors) under the respective standards of review (*Prosecutor v Norman and ors*, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, 2006, paras 4–7; *Prosecutor v Gucati and Haradinaj*, 2020, paras 9–14; *Prosecutor v Abd-Al-Rahman*, Judgment on the Appeal Against the Decision of Pre-Trial Chamber II, 2020, paras 13-15; *Prosecutor v Ayyash and ors*, Decision on Badreddine Defence Interlocutory Appeal, 2016, paras 26–27; *Prosecutor v Khieu and Nuon*, 2017, para 17).

D. Available Remedies in Appeal

99 The parties can request the Appeals Chamber to affirm, reverse, or revise the decisions taken by the lower chambers, including a verdict and sentence. The tribunals have determined that if the appeal is only brought by or on behalf of the convicted person, the Appeals Chamber is prevented from altering the conviction or sentence to their detriment, entailing a prohibition of *reformatio in peius* (Art 83 (2)–(3) Rome Statute; Art 25 (2) ICTY Statute; Art 23 (2) IRMCT Statute; Art 24 (2) ICTR Statute; Art 26 (2) STL Statute; Rule 188 STL Rules; Art 46 (3) KSC Law; Rule 182 (4) KSC Rules; Art 20 (2) SCSL Statute; Art 21 (2) RSCSL Statute; Rule 106 (B) SCSL Rules; Rule 106 (B) RSCSL Rules; Rule 104 (2) ECCC Internal Rules).

100 Depending on the nature and scale of the errors found as well as the circumstances of the case, the Appeals Chamber may, in some limited instances, remand the matter to the original chamber or order a retrial (Art 83 (2) Rome Statute; Rule 117 (C) ICTY Rules; Rule 144 (C) IRMCT Rules; Art 118 (C) ICTR Rules; Rule 188 (C) STL Rules; Art 46 (4) and (6) KSC Law; Rule 118 (C) SCSL Rules; Rule 118 (C) RSCSL Rules; *Prosecutor v Bemba*, 2018, para 56; Schabas, 2016, 1244; Eckelmans, 2021b, 2392–94). For instance, a new trial may be ordered when the lack of reasoning in the impugned decision is extensive or, to correct an error, it would be necessary to analyse the entirety or a large portion of the trial record (*Prosecutor v Bemba and ors*, 2018, para 108; *Prosecutor v Stanišić and Simatović*, 2015, paras 124–27; *Muvunyi v Prosecutor*, 2008, paras 147–48, 171).

101 In terms of available remedies in appeal, the ECCC stand as an exception in two aspects. First, as indicated in paragraph 60 above, if the co-prosecutors appeal an acquittal, the SCC ‘may only modify the findings of the Trial Chamber’s decision if it considers the judgment erroneous, but cannot modify the disposition of the Trial Chamber judgment’ (Rule 110 (4) ECCC Internal Rules).

102 Second, to ensure swift proceedings, the SCC is barred from remanding the case back to the Trial Chamber. Instead, the SCC has broad fact-finding competence, including the power to appoint delegate judges to engage in additional investigations (Art 36new ECCC Law; Rules 104 (1), (3), 104*bis*, 108 (7) ECCC Internal Rules; *Prosecutor v Khieu and Nuon*, 2015, paras 25–26; → *Fact-Finding Powers of International Courts and Tribunals*; → *Collection of Evidence*). Furthermore, if the SCC finds that the trial judgment is void for procedural defects, it will not necessarily order a retrial; it ‘may hear the case as if it were the Trial Chamber and decide it on the merits’ (Rule 111 (3) ECCC Internal Rules).

E. Procedure on Appeal

103 This section of the entry will address the procedure for (sec E.1 below) interlocutory appeals; and (sec E.2.) final appeals against the trial judgment.

1. Procedure for Interlocutory Appeals

104 If the appellant intends to impugn an interlocutory decision in which appeal is not granted as a right, they must first seek leave or certification, via written request, at the challenged chamber or, in the case of the SPSC, at the Court of Appeal (see above sec B.1). When leave or certification is granted or in cases in which it was not necessary in the first place, the proceedings can start in the appellate body.

105 The interlocutory appeals are generally processed in an accelerated procedure as a means to swiftly eradicate any doubt on the validity or appropriateness of the ongoing proceedings in the lower chamber. The *ad hoc* tribunals, the STL, and the R/SCSL formally established the 'Expedited Appeals Procedure' in their Rules, in which interlocutory appeals can be ruled upon based on a simple range of written briefs. In the R/SCSL, such appeals are not even decided by the full Appeals Chamber but by a bench of at least three appellate judges (Rule 117 ICTR Rules; Rule 116*bis* ICTY Rules; Rule 143 IRMCT Rules; Rule 117 SCSL Rules; Rule 117 RSCSL Rules; Rule 187 STL Rules; Boas and others, 2013, 965–66). The ICC, ECCC, and the KSC also determined that the procedure for interlocutory appeals is ordinarily conducted in writing, even though the Appeals Chamber still has discretion to decide otherwise and hold a hearing if the circumstances so require (Rule 156 (3) ICC Rules; Reg 64 (6) (b) ICC Regulations of the Court (2018); Rules 108 (3), 109 (1) ECCC Internal Rules; Rule 170 (3) KSC Rules).

106 Despite some distinctions in the different tribunals, the procedure for interlocutory appeals overall involves a simplified exchange of written submissions: (1) the appellant's brief, in which they indicate the impugned decision and present the grounds of appeal and related errors, the legal and/or factual arguments, and the relief sought; (2) the opposing party's response; and (3) the appellant's reply (the ICC Rules and Regulations of the Court do not foresee an appellant's reply). Although the appellate chamber is required to produce a reasoned decision, the chamber is not obliged to pronounce its decision in public session (Rules 154, 155 ICC Rules; Regs 64, 65 ICC Regulations of the Court; Rule 116*bis* ICTY Rules; Rule 117 ICTR Rules; Rule 143 IRMCT Rules; Rule 117 SCSL Rules; Rule 117 RSCSL Rules; Rule 187 STL Rules; Rule 170 KSC Rules; Rules 108 (3), 109 (1) ECCC Internal Rules; Boas and others, 2013, 965–66, 974–80; Hartwig, 2012, 551–53).

2. Procedure for Final Appeals

107 The procedure for appeals against the verdict and sentence follows three stages: (sec E.2.(a) below) the written phase; (sec E.2.(b)) the appeal hearing; and (sec E.2.(c)) the appeal judgment.

(a) Written Phase

108 Appeals against the verdict and sentence are recognized as a right. Thus, they do not require certification or leave from the Trial Chamber (see above sec B.2).

109 The written phase of appeals against the verdict and sentence usually consists of four stages: (1) the notice of appeal by the appellant, indicating, *inter alia*, the challenged decision, the grounds of appeal, the alleged errors, how the errors affected the impugned decision, and the relief sought; (2) the appellate brief by the appellant, setting out all the legal and/or factual arguments and authorities in support of each ground of appeal; (3) the response by the respondent, in which they refute the grounds and arguments raised by the appellant; and (4) the appellant may file a brief in reply to the respondent's allegations. The filling of each of these four stages have different deadlines and maximum page numbers,

but the judges may extend these limits if good cause is shown. Table 1 below describes the deadlines:

Tribunal	Deadline	Legal source
Notice of Appeal		
Ad hoc Tribunals	'not more than thirty days from the date on which the judgement was pronounced'	Rule 108 ICTY/R Rules; Rule 133 IRMCT Rules
ICC	'not later than 30 days from the date on which the party filing the appeal is notified of the decision'	Rule 150 (1) ICC Rules
STL	'within thirty days from the pronouncement of the' judgment	Rule 177 STL Rules
KSC	'within thirty (30) days of the written' judgment	Rule 176 (1) KSC Rules
R/SCSL	'not more than 14 days from the receipt of the full judgement and sentence'	Rule 108 (A) R/SCSL Rules
ECCC	'within 30 (thirty) days of the date of pronouncement of the judgment or its notification, as appropriate'	Rule 107 (4) ECCC Internal Rules
SPSC	'no more than ten (10) days after the appealed decision is released'	sec 40.2 UNTAET Regulation No 2000/30
Appellant's Brief		
Ad hoc Tribunals	'within seventy-five days of filing of the notice of appeal … Where limited to sentencing, an Appellant's brief shall be filed within thirty days of filing of the notice of appeal'	Rule 111 (A) ICTY/R Rules; Rule 138 (A) IRMCT Rules
ICC	'within 90 days of notification of the relevant [impugned] decision'	Reg 58 (1) ICC Regulations of the Court
STL	'within seventy-five days of filing of the notice of appeal … Where limited to sentencing, an Appellant's brief shall be filed within thirty days of filing of the notice of appeal'	Rule 182 (A) STL Rules
KSC	'within sixty (60) days or, where the appeal is limited to sentencing, within thirty (30) days of the notice of appeal'	Rule 179 (1) KSC Rules
R/SCSL	'within twenty one days of the notice of appeal'	Rule 111 R/SCSL Rules
ECCC	'within 60 (sixty) days of the date of filing the notice of appeal'	Rule 107 (4) ECCC Internal Rules
SPSC	'within thirty (30) days after the filing of its Notice of Appeal'	sec 40.3 UNTAET Regulation No 2000/30

Tribunal	Deadline	Legal source
Respondent's Brief		
Ad hoc Tribunals	'within forty days of filing of the Appellant's brief. Where limited to sentencing, a Respondent's brief shall be filed within thirty days of filing of the Appellant's brief'	Rule 112 (A) ICTY/R Rules; Rule 139 IRMCT Rules
ICC	'within 60 days of notification of the appeal brief'	Reg 59 (1) ICC Regulations of the Court
STL	'within sixty days of filing of the Appellant's brief. Where limited to sentencing, a Respondent's brief shall be filed within twenty-one days of filing of the Appellant's brief'	Rule 183 (A) STL Rules
KSC	'within thirty (30) days, or where the appeal is limited to sentencing, within fifteen (15) days of the Appeal Brief'	Rule 179 (2) KSC Rules
R/SCSL	'within fourteen days of the filing of the Appellant's submissions'	Rule 112 R/SCSL Rules
ECCC	'Where a party appeals, other parties have an additional 15 (fifteen) days to file their notice of appeal. The additional time begins from the expiration of the initial time limit for filing the notice of appeal'	Rule 107 (4) ECCC Internal Rules
SPSC	'thirty (30) days from the receipt of the notification to file a response to the appeal'	sec 40.4 UNTAET Regulation No 2000/30
Appellant's Reply		
Ad hoc Tribunals	'within fifteen days of filing of the Respondent's brief. Where limited to sentencing, a brief in reply shall be filed within ten days of filing of the Respondent's brief'	Rule 113 ICTY/R Rules; Rule 140 IRMCT Rules
ICC	'Whenever the Appeals Chamber considers it necessary in the interests of justice, it may order the appellant to file a reply within such time as it may specify in its order'	Reg 60 (1) ICC Regulations of the Court
STL	'within fifteen days of filing of the Respondent's brief. Where limited to sentencing, a brief in reply shall be filed within ten days of filing of the Respondent's brief'	Rule 184 STL Rules
KSC	'within fifteen (15) days or, where the appeal is limited to sentencing, within ten (10) days of the Brief in Response' / 'Where the Specialist Prosecutor appeals an acquittal, the acquitted person may, with leave of the Appeals Court Panel, file a Brief in Rejoinder within ten (10) days or, where the appeal is limited to sentencing, within five (5) days of the decision granting leave'	Rule 179 (3), (4) KSC Rules
R/SCSL	'within five days after the filing of the Respondent's submissions' / 'No further submissions may be filed except with leave of the Appeals Chamber'	Rule 113 R/SCSL Rules

Tribunal	Deadline	Legal source
ECCC	-	
SPSC	'If the response [the Respondent's Brief] includes a cross-appeal, the Registrar shall notify the appellant, who shall have fifteen (15) days to file a response to the cross-appeal'	sec 40.4 UNTAET Regulation No 2000/30

Source: Table created by the author.

110 In the ICTR, IRMCT, R/SCSL, and the KSC, the president of the appellate body can designate one of its members to spearhead the pre-hearing proceedings of the appeal in question. They are called 'Pre-Appeal Judge' in the ICTR and IRMCT, 'Pre-Hearing Judge' in the R/SCSL, and 'Judge Rapporteur' in the KSC. They are appointed after the filling of the notice of appeal and their main function is to ensure that the written proceedings are carried out without undue delays and to prepare the case for a fair and expeditious hearing. For these purposes, they can issue decisions, orders, and directions (Rule 108*bis* ICTR Rules; Rule 135 IRMCT Rules; Rule 109 SCSL Rules; Rule 109 RSCSL Rules; Rule 177 KSC Rules). The statutory framework of other assessed tribunals, including the ICTY, does not foresee such appointments.

111 The appellant has the burden to present and substantiate their grounds of appeal clearly, logically, exhaustively, and according to the applicable criteria (see above sec C). It is generally understood that the appellant is required to set out the alleged error explicitly and how it materially affected the impugned decision, leading to the need for its revision or quashing. The Appeals Chamber can summarily dismiss submissions without analysing their merits when they are not properly substantiated. The different tribunals developed, via their case-law, significant guidance on substantiation requirements and which deficient submissions will be dismissed *in limine* (Reg 58 (2) ICC Regulations of the Court; *Ntaganda Appeals Against 8 July 2019 Judgment*, paras 47–49; *Prosecutor v Tolimir*, 2015, paras 13–14; Eckelmans, 2021a, 2336).

(b) Appeal Hearing

112 The assessed tribunals can hold an oral hearing for the parties to further develop their arguments orally before the Appeals Chamber and to answer eventual questions from the bench. However, the language of the different Rules of Procedure varies on whether the appeal hearing is mandatory or if it rests on the Appeals Chamber's discretion. Rule 114 ICTY/R Rules, Rule 141 IRMCT Rules, Rule 185 STL Rules, and section 41.1 UNTAET Regulation No 2000/30 state that 'the Appeals Chamber *shall* set a date for the hearing' [emphasis added], indicating that appellate proceedings cannot be in writing only (*Prosecutor v Ngudjolo*, 2014, para 12; *Prosecutor v Merhi and Oneissi*, 2021, para 2). The ECCC Internal Rules are even more unequivocal, expressly determining that a hearing is mandatory for an appeal against the final judgment (Rules 108 (3), 109 (1)). On the other hand, at the KSC and R/SCSL, the respective appellate body has the discretion to decide not to convene a hearing and rule on the appeal based on the written submissions only (Rule 180 KSC Rules; Rules 109 (B) (ii) (b), 114 SCSL Rules; Rules 109 (C) (ii), 114 RSCSL Rules).

113 The ICC's statutory framework, especially Rule 151 ICC Rules, is silent in this regard. Thus, the ICC Appeals Chamber determined that, similar to the KSC and R/SCSL, the decision to hold an oral hearing in final appeals is discretionary (*Prosecutor v Ngudjolo*, 2014, para 12). The ICC noted that, in assessing whether a hearing should be scheduled, the Appeals Chamber 'should be based primarily on the potential utility of an oral hearing, namely whether it would assist the Appeals Chamber in clarifying and resolving the issues

raised in the appeal' (*Prosecutor v Ngudjolo*, 2014, para 13). This entails a low threshold, to the point that a simple finding that the hearing 'would be useful in assisting the Appeals Chamber in its decision-making process' could be enough to justify the scheduling of such a hearing (*Prosecutor v Ngudjolo*, 2014, para 13; Djukić, 2019, 160).

(c) The Appeal Judgment

114 The appellate body shall pronounce a reasoned written judgment on the final appeal, reached by majority vote among its members. Differently, a supermajority rule applies in the ECCC, ie, five out of seven judges (Rule 111 (6) ECCC Internal Rules; Jørgensen, 2018, 87–88). Judges may append separate or dissenting opinions. The *ad hoc* tribunals established that the Appeals Chamber has discretion to select which submissions should be addressed in detail in its written reasoning as well as which submissions should be dismissed without a thorough reasoning for being evidently unmeritorious (*Prosecutor v Mladić*, 2021, para 21; *Prosecutor v Karadžić*, 2019, para 20). Before discussing the merits, the Appeals Chamber can address the admissibility of the appeal according to the applicable criteria (Hartwig, 2012, 553-54). Lastly, the judgment, or a summary thereof, shall be delivered in public session (Art 83 (4) Rome Statute; Rule 117 ICTY Rules; Rule 118 ICTR Rules; Rule 144 IRMCT Rules; Rule 188 STL Rules; Rule 111 (6) Internal Rules ECCC; sec 41.5 UNTAET Regulation No 2000/30; Rule 183 KSC Rules; Rule 118 SCSL Rules; Rule 118 RSCSL Rules).

3. Additional Procedural Issues

115 This section will briefly address three additional procedural issues during appeal: (sec E.3.(a) below) suspensive effect; (sec E.3.(b)) variation of grounds of appeal; and (sec E.3.(c)) additional evidence on appeal (for an assessment of the status of defendants during appeal, an issue not dealt in this entry, cf → *Detention Pending Appeal*; Roth and Henzelin, 2002, 1547–48; Eckelmans, 2021a, 2357–62).

(a) Suspensive Effect

116 The suspensive effect of an appeal means that the enforceability and effects of the impugned decision remain suspended until the appeal is judged. In all assessed tribunals, interlocutory appeals do not suspend the challenged decision automatically; suspensive effect is rather exceptional. Suspension may be granted by the court depending on the specific circumstances of each case (Rule 108*bis* (C) ICTY Rules; Rule 134 (C) IRMCT Rules; Art 82 (3) Rome Statute; Rule 126 (F) STL Rules; Rules 58 (4), 171 KSC Rules; Rule 73 (B) SCSL Rules; Rule 104 (4) ECCC Internal Rules; sec 23.11 UNTAET Regulation No 2000/30; → *Stay of Enforcement*).

117 The criteria to guide the court's assessment of whether suspensive effect could be granted vary. Replicating the case-law of the *ad hoc* tribunals (*Prosecutor v Prlić and ors*, Decision on Slobodan Praljak's Appeal of the Trial Chamber's Refusal to Decide upon Evidence Tendered pursuant to Rule 92*bis*, 2010, para 47), the STL established the following three requirements: (1) 'there is a good cause for the requested suspension', including to preserve the object of the appeal; (2) 'the duration of the requested suspension is reasonable'; and (3) 'the appeal itself has reasonable prospects of success on its merits' (*In the Matter of El Sayed*, 2011, paras 8–12).

118 Rule 171 KSC Rules determined that the KSC must assess whether 'the implementation of the decision under appeal could potentially defeat the purpose of the appeal or would lead to consequences which may be irreversible'. The ICC Appeals Chamber highlighted that the determination of whether suspensive effect should be ordered

is left to its discretion, which may be exercised if one or more of these three circumstances are present:

> the implementation of the decision under appeal (i) 'would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant', (ii) would lead to consequences that 'would be very difficult to correct and may be irreversible', or (iii) 'could potentially defeat the purpose of the appeal' (*Prosecutor v Ntaganda*, Decision on the Defence Request for Suspensive Effect, 2021, paras 20–21; see also *Prosecutor v Al Hassan*, 2021, para 6; Guariglia and others, 2018, 513–15, 583–96; Nerlich, 2021, 2381–82).

119 The ICC and the STL emphasized that → *stay of proceedings*—ie, bringing the process to a halt—is not an available relief in the context of interlocutory appeals. The only interim remedy during these appeals is the non-enforcement of the specific decision subject to appeal. Given that stay of proceedings is an exceptional and drastic measure to deal with serious fair trial breaches, the decision to suspend the proceedings is separate and unrelated to the ordinary course of the appellate process (*Prosecutor v Ntaganda*, 2017, para 8; *Prosecutor v Banda and Jerbo*, 2012, paras 74–95; *Prosecutor v Ayyash and ors*, 2018, para 27; → *Due Process*; → *Mistrial: International Criminal Courts and Tribunals*; → *Fair Trial, Right To, International Protection*).

(b) Variation of Grounds of Appeal

120 Variation of grounds of appeal refers to the procedure in which the appellant requests the Appeals Chamber to add a new ground of appeal after they have filed the document in support of the appeal or to amend a ground of appeal already indicated (*Prosecutor v Lubanga*, Decision and Order in Relation to the Request of 23 December 2013, 2014, para 7; → *Variation of Grounds of Appeal: International Criminal Courts and Tribunals*). The statutory framework of some assessed tribunals allows variation, provided that the application is filed as soon as the reasons warranting it become known (Reg 61 ICC Regulations of the Court; Rule 177 (B) STL Rules; Rule 176 (3) KSC Rules; Rule 108 ICTY/R Rules; Rule 133 IRMCT Rules).

121 The case-law requires that the appellant presents 'good cause' for the inclusion of the new or amended ground of appeal as well as for why this ground was not timely included in the original submissions (*Prosecutor v Lubanga*, Decision and Order in Relation to the Request of 23 December 2013, 2014, para 7; *Prosecutor v Tolimir*, 2013, paras 5–6; Boas and others, 2013, 949–50, 958). The *ad hoc* tribunals also established that amendments in the grounds of appeal could be permitted, even in the absence of good cause, when necessary to prevent a miscarriage of justice (*Prosecutor v Blagojević and Jokić*, 2005, para 8; Boas and others, 2013, 950). Ultimately, granting the request for variation is a discretionary decision of the appellate body (Eckelmans, 2021b, 2410–11).

(c) Additional Evidence on Appeal

122 Since appellate proceedings are not *de novo* trials, all assessed tribunals allow additional evidence on appeal exceptionally, only if certain limited criteria are fulfilled (Rule 115 ICTY Rules; Rule 115 ICTR Rules; Rule 142 IRMCT Rules; Reg 62 ICC Regulations of the Court; Rule 115 SCSL Rules; Rule 115 RSCSL Rules; Rule 181 KSC Rules; Rule 186 STL Rules; Rule 108 (7) ECCC Internal Rules; sec 41.2 UNTAET Regulation No 2000/30; Guariglia and others, 2018, 509–13; Boas and others, 2011, 450–51; → *Additional Evidence on Appeal*; → *Admissibility of Evidence*).

123 Similar to other aspects of appeals in international criminal procedure, the statutory framework and case-law of the *ad hoc* tribunals laid the basis for admitting additional evidence on appeal in all other assessed tribunals (Guariglia and others, 2018, 511). As a result, the two admissibility requirements established by the *ad hoc* tribunals have been applied across different courts. The first criterion requires a finding that the evidence in question was unknown to the requesting party during the original proceedings and could not have been discovered through due diligence. The Appeals Chamber must determine whether the requesting party appropriately sought to use all available procedural mechanisms to timely bring the relevant evidence before the lower chamber as well as all the difficulties they faced in collecting such evidence. As the second criterion, the party proposing the additional evidence on appeal has the burden to demonstrate that this evidence is credible and can have a decisive impact in reaching the impugned decision. The Appeals Chamber must evaluate whether the challenged decision, especially a verdict, could have been different in whole or in part if the lower chamber had access to the evidence in question (*Nahimana and ors v Prosecutor*, 2006, paras 5–7; *Prosecutor v Popović and ors*, 2011, paras 7–12; *Prosecutor v Khieu and Nuon*, 2016, paras 23–30; *Prosecutor v Lubanga*, Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against his Conviction, 2014, paras 53-64; *Prosecutor v Taylor*, Decision on Defence Motion to Present Additional Evidence pursuant to Rule 115, 2013, paras 7–9; Rule 181 (3) KSC Rules; sec 41.2 UNTAET Regulation No 2000/30; Bianchi and Onsea, 2010, 726–34).

F. Final Remarks

124 All assessed tribunals recognize the right to appeal a conviction and sentence. This is an outstanding finding, given that such a right did not exist in the Nuremberg and Tokyo Tribunals and was deemed undesirable in the negotiations at the United Nations in the late-1940s to create a permanent international criminal jurisdiction (Boas and others, 2011, 426). Remarkably, in these early discussions some states ‘felt that a possibility for appeal would undermine the authority and prestige of decisions of the court’ (Report of the Committee on International Criminal Jurisdiction on its session held from 1 to 31 August 1951, 1952, para 159). This ‘evolution’ in international criminal law is due to the consolidation of the right to appeal in international human rights law, reinforcing that the line between these two legal fields is very much porous.

125 A different affair, however, is interlocutory appeals. Although all assessed tribunals allow the parties to challenge certain intermediate rulings, their practice is not uniform, especially with regard to which decisions can be appealed. For instance, while the SCSL and the ECCC have a very narrow door for interlocutory appeals, other tribunals are more liberal in permitting them. Despite its comparatively more ‘generous’ statutory framework, the ICC has developed a strict interpretation of Article 82 Rome Statute, restricting the scope of the permitted interlocutory appeals.

126 Therefore, no universal right to interlocutory appeal exists in international criminal law (Boas and others, 2013, 1003). In this framework, the key to ensuring a successful system for interlocutory appeals could be finding an adequate balance: opening the floodgates too wide for such appeals could hinder expediency, but a too strict approach could also harm the rights of the accused, as they would be prevented from challenging relevant wrongful decisions up until the end of the trial.

127 The standards of appellate review also deserve consideration. The assessed tribunals have applied fairly similar principles: while a standard of correctness applies to errors of law, a standard of reasonableness and rule of deference apply to errors of fact. Still, these limits to appellate intervention are fruits of case-law, not statutory determination. The KSC is the only court that has these standards of review enshrined in its founding law (Art 46

KSC Law). As a result, some appeal benches found themselves at liberty to deviate from the traditional standard of review for errors of fact. These ‘deviant’ cases and the divided reaction from commentators indicate that standards of appellate review, particularly for factual findings, remain far from settled in international criminal procedure.

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