A

Interpretation and Structural Issues

Commentary

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I Applicable Law, Interpretation of the Statute and Other Governing Texts

The Appeals Chamber has had the opportunity to provide guidance on a series of fundamental questions, including the interpretation and application of the law, the requirements of a judicial decision, the binding nature of court orders, and the authority of the Prosecution in the realm of investigations. While these decisions should be seen as the Chamber's first steps in the process of establishing the fundamentals of the Court's effective functioning, their importance is considerable and they have already produced a significant impact in the Court's practice.

a General Principles of Interpretation

The Appeals Chamber has clarified that the interpretation of the Statute, like any other treaty, is governed by the Vienna Convention on the Law of Treaties ("VCLT"),[1] and in particular, articles 31 and 32.[2]

Interestingly, the Appeals Chamber has also affirmed the applicability of the principles of interpretation under the VCLT to the Rules, without providing any reasons for extending its application.[3] In an earlier

[1] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331.
[2] *See, inter alia, Situation in the DRC*, Judgment on Extraordinary Review, ICC-01/04-168 OA3, 13 July 2006, para. 33.
[3] *Prosecutor* v. *Lubanga*, Judgment on Victims' Participation, ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, para. 55.

Dissenting Opinion, Judge Pikis reasoned that the interpretation of the Rules was governed by the principles of interpretation derived from the VCLT, since the Rules supplement the Statute and are the product of an agreement between the States Parties to that particular treaty.[4]

The Statute must first be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" as per article 31(1) of the VCLT.[5] By affirming the applicability of article 31, the Appeals Chamber has implicitly continued the jurisprudential path of the ICTY.[6]

In *Katanga & Ngudjolo*, the "object and purpose" of the Statute was held to encompass the aim "to put an end to impunity" and to ensure that "the most serious crimes of concern to the international community as a whole must not go unpunished", quoting verbatim from the Statute's preambular language.[7] The important consequences of this finding were reaffirmed when the Appeals Chamber upheld the legality of the enactment of regulation 55 of the Regulations of the Court (RoC) by the plenary of ICC judges.[8] Regulation 55 of the RoC empowers Trial Chambers of the Court to adopt a legal characterisation of the facts charged different to that chosen by the Prosecution in its judgment, under specific conditions. In *Lubanga*, the Appeals Chamber noted the detrimental consequences of the interpretation put forward by the Defence: if this provision was ultra vires the Statute, and consequently null and void, a Trial Chamber would be forced to acquit if it concluded that based on the evidence presented at trial, the legal qualification confirmed in the pre-trial phase turned out to be incorrect, and this would be detrimental to the Statute's objective of putting an end to impunity.[9]

[4] *Prosecutor* v. *Katanga & Ngudjolo*, Dissenting Opinion of Judge Pikis in the Judgment on Ngudjolo's Appeal against the Redaction of Statements of Witnesses 4 and 9, ICC-01/04-01/07-521 OA5, 27 May 2008, para. 16. Diss. Op.

[5] For a discussion on the use of the principle in international law, see Shaw, M., *International Law*, 5th edn (Cambridge University Press: Cambridge, 2003), p. 838.

[6] *See, inter alia, Prosecutor* v. *Tadić*, IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 18; *Prosecutor* v. *Delalić et al.*, IT-96-21-T, Judgment, 16 November 1998, para. 1161: it is "well settled that an interpretation of the articles of the Statute and the provisions of the Rules should begin with resort to the general principles of interpretation as codified in Article 31 of the Vienna Convention on the Law of Treaties".

[7] *Prosecutor* v. *Katanga & Ngudjolo*, Judgment on Katanga's Appeal on the Admissibility of the Case, ICC-01/04-01/07-1497 OA8, 25 September 2009, para. 79.

[8] *Prosecutor* v. *Lubanga*, Judgment on the Regulation 55 Appeals, ICC-01/04-01/06-2205 OA15 OA16, 8 December 2009.

[9] *Ibid.*, para. 77.

However, ending impunity is not the only value covered by the object of the Statute. In an earlier ruling, the Appeals Chamber considered that the Statute also sought to guarantee "the assurance of the efficacy of the criminal process, and promotes its purpose that proceedings should be held expeditiously. Proceedings should be held without delay, a course consistent with the rights of the accused."[10]

While the rules of interpretation under article 31 of the VCLT remain the starting point for interpreting the Statute[11] (the role of article 32 of the VCLT will be addressed in greater detail below under subsection (c), Role of the *travaux préparatoires*), when there is variation between the texts of the Statute, article 33 of the VCLT will apply.[12] The Appeals Chamber has concluded that while there is a presumption that every text shares the same meaning, if an attempt to find a common meaning fails, the supplementary means of interpretation under article 32 must then be utilised.[13] If such recourse fails, then "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty" should be considered.[14]

b Applicable Law in Order of Applicability

The applicable law is set out in its order of application by article 21(1)(a)–(c). When a matter is exhaustively dealt with by the text of the Statute or that of the Rules (article 21(1)(a)), "no room is left for recourse to the second or third source of law to determine the presence or absence of a rule governing a given subject" (articles 21(1)(b) and 21(1)(c)).[15]

Under this strict reading of the Statute, the Appeals Chamber rejected the possibility of using the "general principles of law derived [. . .] from national laws of legal systems of the world [. . .]" contemplated in article 21(1)(c) in order to trigger the Chamber's jurisdiction to review a decision from a lower Chamber rejecting an application for leave to appeal.[16] In that ruling, the Prosecution argued that there was a lacuna in the Statute pertaining to the ability of the Appeals Chamber to examine

[10] *Prosecutor* v. *Katanga & Ngudjolo*, Judgment on Ngudjolo's Joinder Appeal, ICC-01/04-01/07-573 OA6, 9 June 2008, para. 8.
[11] *Prosecutor* v. *[REDACTED]*, Judgment on the Prosecutor's Appeal on the Freezing of Assets, ICC-ACRed-01/16, 15 February 2016, para. 56.
[12] *Ibid.*, para. 57. [13] *Ibid.*, para. 57. [14] *Ibid.*, para. 57.
[15] *Prosecutor* v. *Lubanga*, Judgment on Lubanga's Jurisdiction Appeal, ICC-01/04-01/06-772 OA4, 14 December 2006, para. 34; referring to *Situation in the DRC*, Judgment on Extraordinary Review, ICC-01/04-168 OA3, 13 July 2006, paras. 22–24, 33–42.
[16] *Situation in the DRC*, Judgment on Extraordinary Review, ICC-01/04-168 OA3, 13 July 2006.

a first instance Chamber's decision denying a party the possibility to bring a matter before the Appeals Chamber.[17]

The Appeals Chamber rejected the application in its totality; first, the Chamber considered that the Prosecution had failed to establish the existence of the general principle of law advanced, since the Prosecution could not show that there was a uniform and universally accepted standard applicable to the review of decisions by lower courts denying access to an appellate court.[18] Second, the Appeals Chamber considered that the plain terms of the Statute and the Rules did not vest the Appeals Chamber with any authority to review decisions from lower Chambers denying leave to appeal. Accordingly, there was no such lacuna as invoked by the Prosecution; rather, the system was a deliberate choice of the legislator.[19]

Two salient aspects of this decision can be identified: first, it is curious that the Appeals Chamber decided to discuss the applicability of the third source of law under article 21(1) first, and then analyse whether there was in fact any gap or lacuna in the Statute and the Rules that had to be filled through resort to the general principles of law.[20] However, subsequent jurisprudence from the Appeals Chamber has clarified the subsidiary nature of the general principles of national laws under the Statute.[21] The second aspect relates to what appears to

[17] The Prosecution offered examples from fourteen national legal systems from the Civil Law tradition, five from the Common Law and three from jurisdictions applying Islamic law; see *Situation in the DRC*, Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-141, 24 April 2006, paras. 22–29.

[18] *Situation in the DRC*, Judgment on Extraordinary Review, ICC-01/04-168 OA3, 13 July 2006, para. 32: "[i]t emerges from the above that nothing in the nature of a general principle of law exists or is universally adopted entailing the review of decisions of hierarchically subordinate courts disallowing or not permitting an appeal".

[19] *Ibid.*, para. 35.

[20] One commentator considers that the Appeals Chamber's discussion of the Prosecution's arguments on the applicability of article 21(1)(c), and the ensuing findings, was unnecessary, since "declaring that no remedy lies unless conferred by statute would have been a sufficient explanation for dismissing the Prosecution's submission". *See* Raimondo, F., *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff: Leiden/Boston, 2008), p. 155.

[21] In a decision issued only a few months later, the Appeals Chamber was categorical: when a matter is exhaustively dealt with by the text of the Statute or that of the Rules, then "no room is left for recourse to the second or third source of law to determine the presence or absence of a rule governing a given subject": *Prosecutor v. Lubanga*, Judgment on Lubanga's Jurisdiction Appeal, ICC-01/04-01/06-772 OA4, 14 December 2006, para. 34. This approach is consistent with the traditional conception of the general principles of international law, whereby the expression of a source of law functions as a tool to close

be a restrictive approach to the concept of general principles of national laws. The Appeals Chamber's ruling would appear to require the existence of a uniform rule in the main legal systems of the world, hence placing a heavy burden on the party seeking to demonstrate the existence of the principle.[22]

However, when a Chamber is satisfied that the absence of a specific procedural device is not the product of a lacuna but of a legislative choice, it may still import that device into the context of the Statute if interpreting the law in a manner consistent with internationally recognised human rights would require.[23] This is precisely what the Appeals Chamber did in *Lubanga* in relation to the extra-statutory remedy of stay of proceedings due to an abuse of process: after concluding that "the Statute does not provide for stay of proceedings for abuse of process as such",[24] the Appeals Chamber examined the relevance of article 21(3) for the exercise of jurisdiction by the Court, and noted that, under the provision, such exercise of jurisdiction must be "in accordance with internationally recognized human rights norms".[25] It further stated that human rights "underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court".[26] As a result, where a fair trial "becomes impossible because of breaches of the fundamental rights of the suspect or the Accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped."[27]

gaps and prevent a situation of *non liquet*. *See* Shaw, M., *International Law*, 5th edn (Cambridge University Press: Cambridge, 2003), p. 93.

[22] This aspect of the decision has also been criticised as being overly restrictive. *See* Raimondo, F., *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff: Leiden, 2008), p. 155.

[23] *Situation in the DRC*, Judgment on Extraordinary Review, ICC-01/04-168 OA3, 13 July 2006, para. 38.

[24] *Prosecutor* v. *Lubanga*, Judgment on Lubanga's Jurisdiction Appeal, ICC-01/04-01/06-772 OA4, 14 December 2006, para. 35.

[25] *Ibid.*, para. 36.

[26] *Ibid.*, para. 37. This is a much-quoted finding from the Appeals Chamber. See, for instance, Sluiter, G., "Human Rights Protection in the ICC Pre-trial Phase", in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff: Leiden/Boston, 2009), p. 464, and El Zeidy, M. M., *The Principle of Complementarity in the International Criminal Law: Origin, Development, and Practice* (Martinus Nijhoff: Leiden/Boston, 2008), p. 169.

[27] *Prosecutor* v. *Lubanga*, Judgment on Lubanga's Jurisdiction Appeal, ICC-01/04-01/06-772 OA4, 14 December 2006, para. 37.

On this basis, the Appeals Chamber, in what has been characterised as a "rather dramatic consequence of article 21(3)",[28] effectively incorporated into the panoply of procedural tools at the disposal of the ICC judges the possibility of staying proceedings if they consider that an abuse of the Court's process has taken place.

c Role of the *Travaux Préparatoires*

In applying article 32 of the VCLT, the Appeals Chamber has stated that the *travaux préparatoires* constitute the "supplementary means of interpretation designed to provide a) confirmation of the meaning of a statutory provision resulting from the application of article 31 of the [VCLT] and b) the clarification of ambiguous or obscure provisions and c) the avoidance of manifestly absurd or unreasonable results".[29]

The practical importance of the *travaux préparatoires* is reflected in an Appeals Chamber's judgment concerning the standard to be applied in order to determine the level of language proficiency of an accused for the purposes of article 67(1)(a) and (f).[30] In reversing the Pre-Trial Chamber's determination that the Accused's knowledge of French was sufficient for the purposes of following the proceedings, the Appeals Chamber noted that the former Chamber had erred as it "did not comprehensively consider the importance of the fact that the word 'fully' is included in the text and the article's full legislative history".[31] "The fact that this standard is high", the Appeals Chamber continued, "is confirmed and further clarified by the preparatory work of the Statute, to which the Appeals Chamber turns under article 32 of the Vienna Convention on the Law of Treaties."[32] The Appeals Chamber then embarked on a detailed analysis of the different texts discussed during the negotiations of the Statute, and, basing itself, *inter alia*, on a footnote attached to the draft version of article 67(1)(a), concluded that the Statute had effectively adopted a high standard, "higher, for example, than that applicable under the European Convention on Human Rights and the ICCPR. To give effect to this higher standard must mean that an accused's request for interpretation into a language other than the Court's

[28] Schabas, W. A., *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press: Oxford, 2010), p. 399.
[29] *Situation in the DRC*, Judgment on Extraordinary Review, ICC-01/04-168 OA3, 13 July 2006, para. 40.
[30] *Prosecutor* v. *Katanga & Ngudjolo*, Judgment on Katanga's Language Appeal, ICC-01/04-01/07-522 OA3, 27 May 2008.
[31] *Ibid.*, para. 37. [32] *Ibid.*, para. 50.

language must be granted as long as he or she is not abusing his or her rights under article 67 of the Statute."[33]

d Role of the Jurisprudence of Other International Criminal Tribunals

The approach to the jurisprudence of other international criminal tribunals is less straightforward, and will probably be the object of further developments. In an early decision, the Appeals Chamber approached the precedential value of decisions stemming from other international criminal tribunals with caution, stating that "the International Criminal Court is not in the same position [as the ICTY and ICTR] in that it is beginning, rather than ending, its activities. In addition, being a permanent institution, it may face a variety of different and unpredictable situations."[34] However, this statement must be read in light of the facts of that particular case, where a Pre-Trial Chamber had *ex officio* determined that a case against a Congolese military commander was inadmissible under article 17 of the Statute due to an alleged lack of sufficient seniority of the Accused, basing its decision on a resolution by the United Nations Security Council calling on each Tribunal to, within the framework of the so-called "completion strategy", ensure that any new indictments concentrated "on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal",[35] which, in turn, led to an amendment of the ICTY Rules of Procedure and Evidence.[36] In reversing the decision appealed, the Appeals Chamber considered that this reliance had been misplaced and that it was inappropriate to import a standard developed primarily for the purposes of ensuring the timely completion of the work of a different institution into the context of the ICC.[37]

[33] *Ibid.*, para. 62.
[34] *Situation in the DRC*, Judgment on the Ntaganda Arrest Warrant Appeal, ICC-01/04-169, 13 July 2006, para. 80.
[35] United Nations Security Council Resolution 1534, S/RES/1534 (2004), para. 5.
[36] See added language to rule 28 (Reviewing and Duty Judges), ICTY, Rules of Procedure and Evidence of the ICTY (as amended 6 April 2004), in force 14 March 1994, IT/32/Rev. 30.
[37] *Situation in the DRC*, Judgment on the Ntaganda Arrest Warrant Appeal, ICC-01/04-169, 13 July 2006, para. 80. The Chamber also noted that prior to the UNSC Resolution and the ensuing amendment to the Rules of Procedure and Evidence of the ICTY, the ICTY had conducted proceedings "against individuals of various ranks over a number of years without being restricted to the most senior leaders": *ibid.*

However, in a different appeal involving the scope of the regime created by the Rules for the Defence's inspection of material in possession or control of the Prosecution, the Appeals Chamber itself resorted to the case law of the ICTY. According to the Chamber, "[g]iven that the wording of rule 77 of the Rules of Procedure and Evidence is based on the wording of rule 66(B) of the Rules of Procedure and Evidence of the ICTY, it is useful to consider the relevant jurisprudence of the ICTY and the ICTR on the corresponding provisions in the ICTY and ICTR Rules of Procedure and Evidence".[38] A review of two decisions on point from both ad hoc tribunals confirmed the Appeals Chamber's conclusion that the ICC Trial Chamber had adopted an overly restrictive interpretation of rule 77.[39]

On the basis of these decisions a trend can be identified whereby the jurisprudence from other international criminal tribunals (chiefly the ICTY and the ICTR) is neither rejected nor accepted wholesale as an auxiliary means of interpretation. Notably, when rejecting the importation of ICTY standards into the Court's legal context, the Appeals Chamber did so on the basis of clear and identifiable differences between both institutions, including their situation and their legal framework, which in the Chamber's view rendered such importation inadequate, and not on the basis of a generic rejection of those standards or a blanket assertion that the institutions were "different". Conversely, the Appeals Chamber had no difficulties in examining, and relying on ICTY and ICTR case law where it concluded that, in the light of the connections between the ICC legal provisions under analysis and certain ICTY and ICTR equivalents, such case law could be helpful for a proper determination of the issues.

It will be interesting to follow further developments in this field, especially when the Appeals Chamber is faced with substantive legal issues concerning the elements of international crimes and modes of liability, and to see what weight, if any, the Chamber will give to the extensive existing jurisprudence on these topics. For instance, will the ICC Appeals Chamber endorse the "overall control" test developed by its ICTY counterpart in *Tadić* for the purposes of determining whether

[38] *Prosecutor* v. *Lubanga*, Judgment on Appeal against Oral Disclosure, ICC-01/04-01/06-1433 OA11, 11 July 2008, para. 78.

[39] *Ibid.*; *see also* paras. 77 and 79–82. *See also* the commentary in Chapter O, Conduct of Appeals, (VII) Additional Evidence on Appeal (Regulation 62), below, where the Appeals Chamber has also sought guidance from the case law of the ad hoc tribunals which also resulted in a restrictive standard in that context.

a national armed conflict has become internationalised,[40] thereby fostering the stability of international criminal law? Or will it decide, if it considers the *Tadić* test not to be suitable for the particular context of the ICC, to develop its own test or, going full circle, return to the ICJ's "effective control" test in *Nicaragua*?[41] Whereas, on the one hand, it is to be expected that the Appeals Chamber, and the Court as a whole, will take into account the risk of "fragmentation" of international criminal law posed by a drastic departure from existing, pre-ICC case law, on the other hand, it must be noted that with time the Court will constitute the main source of international criminal jurisprudence, a factor which, to the extent that the Court is capable of developing a coherent body of jurisprudence, could be seen to compensate any initial instability stemming from such departure.

e Scope and Interpretation of the Regulations of the Court

Under article 52, ICC judges are vested with a limited legislative authority, and are mandated to "adopt, by absolute majority, the Regulations of the Court necessary for its routine functioning". Regulations are subsidiary provisions that are intended to address matters related to the Court's daily business, and as such are distinguishable from the more substantive Rules.[42] However, the first set of RoC adopted by the ICC judges in plenary session included a number of provisions that could be characterised as substantive in nature. A particular example is regulation

[40] As expressly done by the Trial Chamber delivering the Court's first trial judgment in the *Lubanga* case: *see Prosecutor* v. *Lubanga*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012, para. 541. This issue was not addressed by the Appeals Chamber when the case went to appeal: *see Prosecutor* v. *Lubanga*, Judgment on Lubanga's Appeal against Conviction, ICC-01/04-01/06-3121-Red A5, 1 December 2014.

[41] *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Merits, Judgment, 27 June 1986, ICJ Reports 1986, p. 14, paras. 75–125.

[42] See Behrens, H. and Staker, C., "Article 52: Regulations of the Court", in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edn (C. H. Beck/Hart/Nomos: Munich/Oxford/Baden-Baden, 2008), pp. 1053–1056; on the limited legislative functions of the ICC judges under the Statute, see Guariglia, F., "The Rules of Procedure and Evidence for the International Criminal Court: A New Development in International Adjudication of Individual Criminal Responsibility", in Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (Oxford University Press: Oxford, 2002), pp. 1115–1123; *see also* Broomhall, B., "Article 51: Rules of Procedure and Evidence", in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edn (C. H. Beck/Hart/Nomos: Munich/Oxford/Baden-Baden, 2008), p. 1049.

55 of the RoC, a provision enabling Trial Chambers to depart from the legal characterisation of the conduct charged chosen by the Prosecution, albeit under certain conditions.

In *Lubanga*, the majority of Trial Chamber I entered a controversial decision, concluding that regulation 55 of the RoC contained two distinct procedures, one applicable at the deliberations and delivery of the judgment stage (para. (1) of the provision) and another one applicable during trial (para. (2)). The "facts and circumstances described in the charges", within the terms of article 74(2), would limit the first procedure, but not the second one. Consequently, in the second procedure, the Chamber would be allowed to modify the *nomen iuris* "based on facts and circumstances that, although not contained in the charges and any amendments thereto, build a procedural unity with the latter and are established by the evidence at trial".[43] On appeal, the Defence raised fundamental objections to the very existence of the provision, arguing, *inter alia*, that the enactment of the regulation was in contravention of article 52, which only vests the ICC judges with the authority to adopt regulations which are necessary "for the routine functioning of the Court".[44] The Defence also considered that the provision failed to find any support in any general principle of international law and was inconsistent with the case law emanating from the ICTY.

The Appeals Chamber was thus faced with a constitutional question: had the ICC judges gone beyond the proper scope of their legislative functions under article 52 when enacting regulation 55 of the RoC? Notably, this was the first time that the Appeals Chamber was asked to

[43] *Prosecutor* v. *Lubanga*, Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2049, 14 July 2009, para. 27; *Prosecutor* v. *Lubanga*, Decision on the Prosecution and the Defence Applications for Leave to Appeal the "Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court", ICC-01/04-01/06-2107, 3 September 2009, para. 41. Judge Fulford, dissenting, considered that the provision "created an indivisible or singular process". He further concluded that "a modification to the legal characterisation of the facts under Regulation 55 must not constitute an amendment to the charges, an additional charge, a substitute charge or a withdrawal of a charge, because these are each governed by Article 61(9)" (*Prosecutor* v. *Lubanga*, Minority Opinion on the "Decision Giving Notice to the Parties and Participants that the Legal Characterisation of Facts may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court", ICC-01/04-01/06-2054, 17 July 2009, paras. 4 and 17).

[44] Article 52(1).