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Fabricio Guariglia, Ben Batros, Reinhold Gallmetzer, George Mugwanya
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THE APPEALS CHAMBER OF THE INTERNATIONAL CRIMINAL COURT

This volume is a comprehensive source of the most authoritative statements of the International Criminal Court's appellate jurisprudence. Its clear format includes commentaries followed by excerpts of the decisions and judgments, carefully selected by lawyers based on their relevance and grouped by topic. It provides a practical background to the International Criminal Court's appellate jurisprudence from experienced current and former Appeals Counsel of the Office of the Prosecutor of the Court, highlighting pertinent issues. In doing so, readers are given the tools to discern the meaning of the case law themselves, while attention is drawn to the most important developments in the jurisprudence. This text presents an authoritative and comprehensive digest of the Appeals Chamber's jurisprudence, bringing the relevant case extracts together for the first time with clear and informative commentary.

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Commentary and Digest of Jurisprudence

FABRICIO GUARIGLIA
BEN BATROS
REINHOLD GALLMETZER
GEORGE MUGWANYA



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To Håkan Friman, John R. W. D. Jones and Lorenzo Pugliatti
In Memoriam

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that are associated with the emission of significant amounts of greenhouse gases. He holds a law degree from the University of Innsbruck and Padova, and an honours degree from Glasgow University.

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FOREWORD

As we celebrate the fifteenth anniversary of the establishment of the International Criminal Court (“ICC” or “the Court”), the Office of the Prosecutor is pleased to publish *The Appeals Chamber of the International Criminal Court: Commentary and Digest of Jurisprudence*, a compilation of legal developments arising from the Appeals Chamber of the Court, prepared with the insight of my learned and indefatigable colleagues from the Prosecution Division, namely its Appeals Section. This tool has been conceived with a view to taking stock of the important contributions the ICC has made to date to the evolution of international criminal law, as well as to serve as a guide to my Office and other interested end-users in advancing international criminal justice through the force of the law and overcoming the complex legal and operational challenges facing us.

Mandated to be the first permanent court for trying atrocity crimes, the ICC plays an integral role in shaping the development of international criminal law. Indeed, the last fifteen years have witnessed significant legal developments in a number of areas. As the ICC breaks new ground, appellate decisions help to delineate the contours of the emerging jurisprudence under the distinct regime established by the Rome Statute, solidify key legal concepts and inform the way future cases should proceed.

The Appeals Chamber has elaborated, in greater detail, on the ICC’s approach towards a wide range of issues. In entrenching the general principles of interpreting the Rome Statute and other seminal legal documents of the Court, the Chamber has provided guidance on the applicability of secondary sources of law, specifically, the supplementary role of the *travaux préparatoires* and the precedential value of decisions from other international criminal tribunals. In addition, it has shed light on the proper exercise of judicial functions and the role of the Registrar, which not only assists global justice partners in understanding the ICC’s mechanisms and legal processes, but also strengthens inter-organ cooperation by providing the requisite certainty and clarity respecting each organ’s functions and independence.

Victims' participation, a feature unique to the ICC in the international criminal law arena, was also the subject of extensive reflection and legal pondering by the Appeals Chamber, as for the first time in the history of international criminal law, individuals who have suffered from the commission of crimes within the jurisdiction of the Court are afforded the right to participate in proceedings through legal representation. Yet the procedural modalities and practical complexities of such participation raise important questions for both the efficiency of the judicial proceedings and the rights of suspects and accused persons, requiring the right balancing act. A series of important appellate decisions have hence helped to determine the scope of this right and the manner in which it could be exercised at pre-trial and trial stages, a crucial step forward in recognising the victims' rights and experiences, and increasing their faith in the international criminal justice system.

Importantly for the Office, appellate decisions further outlined the Prosecutor's authority in the realm of investigations as well as the nature and scope of prosecutorial discretion. Additionally, various procedural and evidentiary issues, central to the Office's work, were given judicial clarity. For instance, the nature, grounds, standard and procedure of appellate review were among the first issues on which the Appeals Chamber was asked to deliberate. The Appeals Chamber also solidified rules relating to, *inter alia*, admissibility, disclosure and confidentiality. The standards, thresholds and tests established by the generated jurisprudence have proved to be useful guidelines for the Office, including colleagues in the field, who look to them to carry out their daily work objectively and impartially. In this regard, the appellate jurisprudence is an invaluable reference for the Office to use to strengthen its institutional capacity to conduct effective preliminary examinations, investigations and prosecutions. The Office will continue to incorporate and be guided by this jurisprudence, including, where applicable, in Office policies, strategies and best practices, as part of our effort to achieve greater efficiency and transparency.

Most notably, the recent *Ntaganda* decision unanimously affirmed the ICC's jurisdiction over war crimes of rape and sexual slavery committed by members of an armed group against other members of the same armed group, a landmark development in international humanitarian and criminal law. In so doing, the Appeals Chamber reinforced the normative framework of the Rome Statute for the accountability of sexual and gender-based crimes and made a significant contribution to the protection of vulnerable persons in armed conflict. The *Ntaganda* decision is particularly encouraging for this Office as we have elevated the

prosecution of sexual and gender-based crimes and crimes against and affecting children, and their prevention, as chief priorities. The comprehensive policies we have adopted in these areas are a testament to our resolve to address these heinous crimes through the vector of the law.

The efficient and fair prosecution of crimes under the Rome Statute is facilitated on the strength of a clearly established legal framework. Legal developments at the appellate level, by adding to and strengthening the emerging body of jurisprudence, thus represent significant steps forward towards the aim of closing the impunity gap. Here, I also want to acknowledge the commendable contributions of the Office towards settling the law through its many well-reflected submissions before the Court's Chambers.

In accordance with the principle of complementarity, the Office will continue to encourage and support national efforts to hold persons accountable for atrocity crimes. I trust that this *Digest* will not only aid national jurisdictions and other actors in developing national legislation and best practices that address genocide, war crimes and crimes against humanity, but also add to academic discussions and promote meaningful cooperation with States, international and local organisations, and relevant entities.

This *Digest* is a compilation of the ICC's appellate jurisprudence – it is by no means the final word. As the ICC continues to clarify existing jurisprudence and adjudicate on novel issues in international criminal law, the *Digest* will be updated accordingly. I wish to express my earnest gratitude to my colleagues who have contributed to its development in one form or another. Without their expertise, dedication and hard work the *Digest* would not have been possible.

It is my hope that this *Digest* will serve as a useful reference guide for all committed to the fight against impunity for the world's most heinous crimes, and will provide a solid foundation upon which the ICC will build in the years ahead to advance its important mandate. It is an important and timely contribution, which through the depth and thoroughly reflected quality of its content offers real value. This impressive work will leave neither the academic nor the practitioner indifferent to its considerable insights.

Dr Fatou Bensouda
Prosecutor of the International Criminal Court

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Fabricio Guariglia , Ben Batros , Reinhold Gallmetzer , George Mugwanya
Frontmatter
[More Information](#)

FOREWORD

The Appeals Chamber of the International Criminal Court: Commentary and Digest of Jurisprudence is a gift to the practitioners, scholars, judges and others who require an understanding of the appellate decisions and judgments of the Court. Its authors, themselves experienced practitioner-scholars of international criminal law, have designed the *Digest* to serve as a reference tool summarising decisions on issues, respecting which the Appeals Chamber has authoritatively spoken. They have also identified key passages in those decisions.

As the Appeals Chamber interprets the provisions of the Rome Statute, it breathes life into its text. It clarifies and develops the law on the Court's operations, powers and responsibilities, even while doing justice in the individual case. Thus, a digest of the Court's appellate jurisprudence is crucial to understanding the evolution of the Court's practice and procedure, and how the law should apply in any particular situation.

The experience of the *Digest's* authors accords them a practitioner's eye to utility and clarity. As seasoned appellate litigators, with experience before the ICC Appeals Chamber, they all know the true value of the reference tool they have created. Within a logical and progressive framework, elegant and thoughtful commentaries precede key extracts of decisions and judgments, providing a simple, user-friendly guide to the Court's appellate jurisprudence.

The Commentary appearing at the start of each chapter in the *Digest* presents a helpful overview and analysis of the legal issues discussed in the chapter, allowing the reader to gain a quick grasp of the legal concepts being treated and how the Appeals Chamber has interpreted and applied them. The reader is thus able to locate what is relevant for his or her research, and get on a fast track to the pertinent decisions and judgments. The extracts that follow the commentaries enhance the ability to identify decisions on point. The authors offer readers the sensible advice to consult the full decision or judgment before citing it, but the extracts

they provide also whet one's appetite to read the whole decision or judgment, to enhance one's knowledge and feel for the law.

Thus, the *Digest*, with its thoughtful analyses and helpful extracts, will equip practitioners, scholars, judges and all those many others who study the ICC and the development of international criminal law with a reference tool of inestimable value. It will deepen understanding, both scholarly and practical, of the Court's appellate jurisprudence, enhancing the study of modern international criminal law. It should also reinforce our appreciation of the significance of the role the Court plays in delivering justice to victims of the crimes the ICC was created to address.

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PREFACE

On 2 October 1995, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) Appeals Chamber issued a seminal decision in an interlocutory appeal challenging the jurisdiction of the Tribunal brought by its first defendant, Duško Tadić.¹ The decision was revolutionary in many ways, including its assertion of the ICTY’s authority to scrutinise its own competence (*Kompetenz-Kompetenz*), its definition of armed conflict (which became an “instant classic” and continues to guide international courts today), and its conclusions on the applicability of international customary law to situations of internal conflict. The ruling also triggered an era of international appellate practice and case law – the first of its kind, since appellate review was virtually non-existent in both the Nuremberg and Tokyo tribunals.

Almost eleven years later, the ICC Appeals Chamber issued its first ruling. It was a much more modest decision, focused on a single question, namely, whether a Pre-Trial Chamber had erred in concluding that a case against a military commander from the Democratic Republic of the Congo was not grave enough to be admissible before the ICC, because the commander was not, in that Chamber’s view, one of the “most senior leaders” in the region.² A number of distinctive features of the Appeals Chamber’s case law, as it emerged during the ICC’s first decade, are already present in this decision: in a concise document (25 pages), the Appeals Chamber carefully examined the issues before it, adopted a surgical approach to the remedial action required, and refused to go beyond the strict limits of its jurisdiction when analysing the appropriate

¹ *Prosecutor v. Tadić*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

² *Situation in the DRC*, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, ICC-01/04-169, 13 July 2006.

relief in the circumstances.³ This “cautious exercise of the Appeals Chamber’s powers”, as one veteran legal adviser to the Appeals Chamber describes it,⁴ or judicial restraint in the discharge of appellate functions,⁵ has been a trademark of the Appeals Chamber’s practice and case law to date.

The contrast between these appellate bodies may be explained by multiple factors, starting with the obvious fact that the ICTY was the first international criminal tribunal since Nuremberg and Tokyo, and at the time of its inception, international criminal law was effectively *terra incognita*. In such a context, the ICTY Appeals Chamber may have properly concluded that, in addition to deciding on the legal and factual issues brought before it, it also had to perform an educational function and provide extensive guidance on the law, leading to an “almost textbook-like approach”⁶ in its early judgments.⁷ The ICC Appeals Chamber started its operations in very different circumstances: it had received from States Parties a lengthy and detailed Statute, supplemented by the Elements of Crimes and the Rules of Procedure and Evidence, and by the time it commenced its work, it had the benefit of more than ten years of ICTY and International Criminal Tribunal for Rwanda (“ICTR”) practice and jurisprudence, which continued to evolve and grow. In addition, the ICC Appeals Chamber seems to have preferred a “bottom-up”, as opposed to “top-down”, approach for the development of ICC practice and law, favouring a gradual process⁸ and confining its role to solving those specific matters which were squarely before it.

³ The Appeals Chamber reversed the impugned decision for legal error, but refused to (a) identify the correct legal principle in the interpretation of article 17(1) of the Statute, and (b) determine that the case against Ntaganda was admissible (*see ibid.*, paras. 86 et seq.). Judge Pikis dissented.

⁴ Nehrlich, V., “The Role of the Appeals Chamber”, in Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press: Oxford, 2015), p. 978.

⁵ Batros, B., “The Judgment on the Katanga Admissibility Appeal: Judicial Restraint at the ICC”, *Leiden Journal of International Law*, Vol. 23, Issue 2 (2010), p. 343.

⁶ Expression taken from Nehrlich, V., “The Role of the Appeals Chamber”, in Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press: Oxford, 2015), p. 979.

⁷ The fact that the first president of the ICTY (and its Appeals Chamber) was a renowned academic, Antonio Cassese, may have also played a role.

⁸ Nehrlich refers to the Appeals Chamber giving “room for growth and for a step-by-step development of the law”, in “The Role of the Appeals Chamber”, in Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford University Press: Oxford, 2015), p. 980.

Considering this cautious approach, and also the fact that for a significant part of its initial phase the Appeals Chamber had to deal primarily with interlocutory appeals emanating from a few cases, it should not be surprising that it took eleven years for the Chamber to issue a decision capable of producing a transformative effect in international law comparable to that of the ICTY *Tadić* appeal ruling on jurisdiction – and, curiously, also in the context of an appeal on jurisdiction. The decision, providing new protections to members of armed forces against certain international humanitarian law (IHL) violations, such as the crimes of rape and sexual slavery under article 8(2)(b)(xxii) and (2)(e)(vi) of the Statute, was nonetheless written in the Appeals Chamber’s customary concise and economical style, without delving into considerations that were not strictly necessary for the *thema decidendi*.⁹

But the fact that the ICC Appeals Chamber may have been more conservative in its judicial approach than its ICTY or ICTR sisters does not mean that the Chamber has performed a lesser role in developing the Court’s practice to date. On the contrary, and as highlighted by Fatou Bensouda in her foreword, the Appeals Chamber, through an exercise of patient craftsmanship, has made critical contributions to shaping the Court’s case law and practice during its first fifteen years; providing clarity *vis-à-vis* obscure areas of the Statute and the Rules; delimiting the division of functions between different organs of the Court; and correcting practices from first instance Chambers that it considered incompatible with a proper and faithful reading of the Statute.

In this sense, the Appeals Chamber provided essential guidance on matters as diverse and important as the proper ambit of jurisdictional challenges under the Statute, the test for admissibility of a case under article 17, the breadth and scope of victims’ participatory rights under article 68(3), the nature of the confirmation of charges process, the proper limits of a Trial Chamber’s authority to amend the legal characterisation of the charges, and the compatibility of the theory of indirect

⁹ I refer to the appeal brought by Ntaganda against a decision on jurisdiction, claiming that the Trial Chamber had erred in law when it held that victims of the war crimes of rape and sexual slavery listed in article 8(2)(b) and (e) do not have to be “protected persons” in the sense of the Geneva Conventions of 1949 (“Geneva Conventions”) or “[p]ersons taking no active part in the hostilities” in the sense of Common Article 3 to the Geneva Conventions. See *Prosecutor v. Ntaganda*, Judgment on Ntaganda’s Appeal on the Second Decision on the Jurisdiction of the Court in respect of Counts 6 and 9, ICC-01/04-02/06-1962 OA5, 15 June 2017. The decision is commented on in the commentary of Chapter N, Substantive Law, below.

perpetration within article 25 of the Statute, to name only a few. It did this while embracing a narrow, corrective reading of its own jurisdiction, declining to follow a *de novo* review model.¹⁰ Obviously, the Appeals Chamber case law has focused initially on procedural matters arising from pre-confirmation, confirmation and trial procedures, as well as threshold issues of jurisdiction and admissibility, and not so much on matters of substantive law. This trend, however, is likely to change as the Court's procedural regime becomes more settled (not only through case law, but also through the issuance of judicial manuals),¹¹ and the number of final appeals grows.

The Appeals Chamber has been somewhat less active in developing its own practice and procedures, in particular in relation to final appeals. To date, there remains a certain level of uncertainty as to how final appeals are managed, starting with the holding of hearings – which the Appeals Chamber in its first composition did not seem particularly enthusiastic about – but also in more routine matters such as scheduling, the monitoring of disclosure on appeal, the use of email communications in lieu of filings, and the holding of status conferences – all areas where the Appeals Chamber's practice is arguably less developed than that of the Pre-Trial and Trial Chambers of the ICC. Recent amendments to the Regulations of the Court, introducing a new regime for appeals on detention or release,¹² indicate a more enthusiastic approach to oral hearings and a more decisive approach to case management functions. It will be interesting to see whether this incipient trend is continued and developed by the next Appeals Chamber.¹³

¹⁰ The discussion on the scope of appellate review is discussed below in Chapter O on Conduct of Appeals. See also Klamberg, M., "Article 81: Appeal Against Decision of Acquittal or Conviction or Against Sentence", in Klamberg (ed.), *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic EPublisher: Brussels, 2017), p. 606, fn. 652.

¹¹ In September 2015, the ICC judges delivered the *Pre-Trial Practice Manual*, which was later replaced by the more general *Chambers Practice Manual* in February 2016 and updated in May 2017, available at: www.icc-cpi.int/legalAidConsultations?name=pr1302, last accessed 15 October 2017.

¹² See regulation 64 of the RoC amended 12 July 2017. See also International Criminal Court, "ICC Judges amend the Regulations of the Court", ICC-CPI-20170720-PR1326, available at: www.icc-cpi.int/legalAidConsultations?name=pr1326, last accessed 15 October 2017.

¹³ In March 2018, three Judges of the Appeals Division finish their mandate. See International Criminal Court, "Who's Who", available at: www.icc-cpi.int/about/judicial-divisions/biographies/Pages/default.aspx#, last accessed 15 October 2017.

All issues highlighted above, as well as quite a few others, are discussed and illustrated in the following chapters of this book, which documents the work of the Appeals Chamber during the ICC's first fifteen years of practical existence and seeks to offer a comprehensive description of the issues with which the Chamber had to grapple, and how the Appeals Chamber has contributed to the development and clarification of ICC law. Its genesis was an internal digest that we put in place in the Appeals Section of the Office of the Prosecutor ("OTP") when we could no longer remember all the decisions of the Appeals Chamber by heart and realised that we needed a more structured system. One day a legal representative of a group of victims, with whom we had shared a few summarised decisions out of courtesy, asked whether there was any manner in which we could make the digest available to a wider audience, starting with those practising before the ICC. That day, the project of putting together this book was born. It would take many years and a lot of effort, however, for that idea to bear fruit. We are indebted to Cambridge University Press, in particular to Finola O'Sullivan, for their support for this project from its very inception and their incredible patience throughout the long and tortuous process of its completion.

The book is dedicated to the memory of Judge Håkan Friman, barrister John R. W. D. Jones and OTP trial lawyer Lorenzo Pugliatti, bright and committed international lawyers who left us too soon. Apart from being dear friends and colleagues of the authors of this book, as well as of many other international criminal law scholars and practitioners, all three were passionate believers in international criminal justice, to which they made outstanding contributions. Each of them embodied the qualities of professionalism, integrity and collegiality. But there is another, perhaps deeper, aspect of these lawyers' lives and achievements: as one of the authors of this book put it, they epitomised the fact that it takes many people working together and in good faith – judges, prosecution and defence, senior and junior – to make international criminal justice work. This book is for them, and for all who wish to embrace their message.

Fabricio Guariglia

ACKNOWLEDGEMENTS

This book is the culmination of many years of work. It would not have been possible without the efforts of many individuals, who as staff members, visiting professionals or interns of the Appeals Section of the Office of the Prosecutor of the International Criminal Court, contributed to digesting the Appeals Chamber's jurisprudence. The authors would like to express their particular gratitude to Whitney Kapa and Claire McGeorge for editing both the digest and the commentaries.

Any proceeds from the sales of this book will be donated to the Trust Fund for Victims of the International Criminal Court.

DISCLAIMER

The Appeals Chamber of the International Criminal Court: Commentary and Digest of Jurisprudence is provided as a reference tool summarising the issues on which the Appeals Chamber has provided an authoritative statement of the law, and to assist in identifying the relevant passages of the decisions and judgments. Unless text is in quotation marks, it represents a summary of the decision. In any event, users should consult the original decision before citing.

Further, the opinions, conclusions and recommendations contained in the present publication are expressed by the authors exclusively in their private capacity. They do not necessarily reflect the views of the Office of the Prosecutor or the International Criminal Court, nor can they be attributed to the Office or the Court.

ABBREVIATIONS

article	Unless specified otherwise, “article” shall be used for an article of the Rome Statute of the International Criminal Court
ASP	Assembly of States Parties
CAR	Central African Republic
Court	International Criminal Court
DCC	Document Containing the Charges
Diss. Op.	Dissenting Opinion
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECtHR	European Court of Human Rights
FPLC	<i>Forces Patriotiques pour la libération du Congo</i> or Patriotic Forces for the Liberation of the Congo
ICC	International Criminal Court
ICCPR	International Convention on Civil and Political Rights
ICJ	International Court of Justice
ICL	international criminal law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	international humanitarian law
ILC	International Law Committee
JCE	Joint Criminal Enterprise
NCTA	no case to answer
Office	Office of the Prosecutor
OPCD	Office of Public Counsel for Defence
OPCV	Office of Public Counsel for Victims
OSCE	Organization for Security and Co-operation in Europe
OTP	Office of the Prosecutor
RFA	Request for Assistance
RoC	International Criminal Court’s Regulations of the Court (as amended on 12 July 2017), adopted by the judges of the Court on 26 May 2004, ICC-BD/01-05-16

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rule	Unless specified otherwise, “rule” shall be used for a rule of the Rules of Procedure and Evidence of the International Criminal Court
Rules	International Criminal Court’s Rules of Procedure and Evidence, in force 9 September 2002, ICC-ASP/1/3 (part IIA), UN Doc. PCNICC/2000/1/Add.1 (2000)
SCSL	Special Court for Sierra Leone
Sep. Op.	Separate Opinion
Statute	Rome Statute of the International Criminal Court, Rome, 17 July 1998, in force 1 July 2002, 2187 UNTS 90
TFV	Trust Fund for Victims
UN	United Nations
UNSC	United Nations Security Council
UPC	<i>Union des Patriotes Congolais</i> or Union of Congolese Patriots
VCLT	Vienna Convention on the Law of Treaties
VPRS	Victims Participation and Reparations Section
VWU	Victims and Witnesses Unit

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