THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT:
A COMMENTARY

VOLUME II

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THE APPEAL PROCEDURE OF THE ICC

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I. History of Appeals at International Courts and Tribunals

A. Precedents

The procedure at the Nuremberg Trials could be—and has been—strongly criticized on the grounds that there was no provision for any appeal against the judgments. The winners appear to have been as anxious to expedite the trials as to fully respect the rights of the accused; Article 1 of the Nuremberg Statute clearly...
states that 'the International Military Tribunal . . . [was established] for the just
and prompt trial and punishment of the major war criminals'.

After the war, the Committee of the General Assembly set up to examine the
feasibility of creating an International Criminal Court originally subsumed
the question of appeals in the larger question of whether the Court should have more
than one chamber, which would allow for an appeal to the full Court against a
decision made by any one chamber. In 1951, the Committee decided that there
should be no separate chambers, and that there should be no appeal to any authority
outside the Court itself. However, in the same year the Committee also
decided that it should be possible to review cases if fresh evidence came to light.

In 1953 the Committee of the General Assembly reiterated its opinion that no
appeals should be allowed.

There was then no further discussion of appeals until the 1994 report of the
International Law Commission to the General Assembly: Article 39 of the Draft
suggested that there might be a possibility of appeal (the word used in the French
version was recours, 'review') against the decisions of any Trial Chamber to an
Appeals Chamber.

In the meantime, the absolute need for an appeals procedure in criminal cases had
been recognized in a number of international conventions: the UN Covenant on
Civil and Political Rights of 1966 (CCPR); the American Convention on Human
Rights of 1969 (the 'Pact of San José', hereinafter 'ACHR'); and Protocol No. 7 to
the European Convention on Human Rights of 1984 (ECHR). The right of appeal was also recognized in the Statutes of the ICTY and the ICTR (Article 25,
resp. 24).

The relevant Article in the Statutes of the ICTY and ICTR reads as follows:

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial
Chambers or from the Prosecutor on the following grounds:
(a) an error on a question of law invalidating the decision; or
(b) an error of fact which has occasioned a miscarriage of justice.

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2 The Rules of Evidence established by Art. 18 et seq. of the Statute clearly show the intention of
enforcing an 'expeditious' justice. Nevertheless, for an affirmation of the fairness of the procedure, see
Q. Wright, 'The Law of the Nuremberg Trial', 41 AJIL (1947) 51 et seq.
Supp. No. 11 (A/2136), No. 159.
Supp. No. 11 (A/2136), No. 164.
Supp. No. 12 (A/2645), No. 139.
6 Report of the International Law Commission on the work of its forty-sixth session,
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2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

B. Draft Proposals Prior to the Rome Conference

The first more or less complete text was that submitted by the ILC in 1994. It was still rather unclear how an appeals procedure was to be integrated into a permanent international criminal court, as is clearly shown by the fact that the French version of the ILC Draft diverged from the ICC Statute by using the word *recours* instead of *appel*. This *recours* would have been unique and would have combined some of the functions of *appeal* in civil law systems with some of the functions of *casation*. This was thought to be desirable, having regard to the existence of only a single appeal from decisions at trial.¹⁸

Neither the 1996 nor the 1998 ('Zutphen') report of the Steering Committee for the establishment of an International Criminal Court made any changes to this procedure, which admitted appeals only against the verdicts or sentences pronounced in Trial Chambers.

On the other hand, the Preparatory Commission for the International Criminal Court, and particularly the Working Group for the Rules of Procedure and Evidence, discussed appeals at some length; in particular France and Australia made a number of suggestions for modifications to the Rules.² It was not until the Rome Conference that the decision was made to allow appeals against interim decisions and against refusal to grant release from custody (*infra*, IV.A).

¹ Article 48. Appeal against judgment or sentence.
The Prosecutor and the convicted person may, in accordance with the Rules, appeal against a decision under articles 45 or 47 on grounds of procedural error, error of fact or of law, or disproportion between the crime and the sentence.

Unless the Trial Chamber otherwise orders, a convicted person shall remain in custody pending an appeal.

Article 49. Proceedings on appeal
1. The Appeals Chamber has all the powers of the Trial Chamber.
2. If the Appeals Chamber finds that the proceedings appealed from were unfair or that the decision is vitiated by error of fact or law, it may:
   - If the appeal is brought by the convicted person, reverse or amend the decision, or, if necessary, order a new trial;
   - If the appeal is brought by the prosecutor against an acquittal, order a new trial.
3. If an appeal against the sentence the Chamber finds that the sentence is manifestly disproportionate to the crime, it may vary the sentence in accordance with article 47.
4. The decision of the Chamber shall be taken by a majority of the judges, and shall be delivered in open court. Six judges constitute a quorum.
5. Subject to article 50, the decision of the Chamber shall be final.


¹⁸ PCNIICC/1999/DP.1 and 2.
II. The Content of Articles 81 et seq.: General Remarks

Appeals procedures are currently undergoing revision in a number of countries. Proposed reforms are generally aimed at improving the effective administration of justice, in particular its expeditiousness in accordance with the principle laid down in ICCPR, Article 14(3)(c), ACHR, Article 8(4) and ECHR, Article 6(1). This to some extent conflicts with the need to maintain or extend the protection afforded to an accused person by his right to have the charge against him examined successively by (at least) two independent tribunals. Articles 81 et seq. of the Statute favour the second requirement over the first.

The language and terminology of appeals procedures vary considerably between the common-law and the civil-law countries, and also within these two groups.

Nonetheless, one may discern some criteria for classifying appeals procedures:

(a) Can the Appeals Chamber consider only points of law, or also factual issues? If the latter, should the Court review all the facts of the case or only certain aspects (the ‘arbitrary decision’ of continental law)?

(b) Should the appeal be against the verdict (conviction or acquittal), or the sentence, or both?

(c) Does the appeal transfer all issues of fact and law to the Appeals Chamber, i.e. can that Court amend the original judgment? Or are the powers of the Appeals Chamber limited to cassation, i.e. it can set aside or confirm the appealed judgment, but cannot amend it?

(d) Is there a ‘leave to appeal’ procedure?

If we apply the above criteria to the procedure laid down in Articles 81 et seq. of the Statute, we shall see that it is actually very extensive:

(a) Appeals can be made on both factual issues and points of law.

(b) An appeal can be against either the verdict or the sentence. Article 81(2)(b) allows the Appeals Chamber to re-examine the conviction even if the appeal was only against the sentence; Article 81(2)(c) permits the reverse.

(c) The Appeals Chamber may not only reverse an appealed decision but also amend it. The power to reduce the sentence, which might seem implicit in the general clause allowing amendment of the decision, is spelt out in Article 83(3).

(d) No general ‘leave to appeal’ procedure is envisaged for appeals against either a verdict or a sentence. However, an appeal against investigative


11 For an overview, see J. Pradel, Droit pénal comparé (1995), No. 436.
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measures ordered by the Pre-Trial Chamber is inadmissible unless authorized by that chamber (Article 82(1)(d) (2); Article 57(3)(d); cf. infra, IV.A).

Together with its openness, therefore, the essential quality of the appeals procedure as detailed in the Statute is its extreme flexibility.

Although international instruments for safeguarding human rights do not always apply directly, it is relevant, and not without interest, to ask whether the appeals procedure in the Statute is compatible with those safeguards—some of which seem to have become international legal currency, or at least reflect general principles of international law.

These safeguards reside essentially in three texts with broadly similar content: ICPR, Article 14(5); ECHR, Article 2 Protocol No. 7; ACHR, Article 8(h). The ACHR states the matter most succinctly; ICCPR, Article 14(5)(a) and Article 2 Protocol No. 7(b) are more detailed. They grant any person convicted of a criminal offence the right to 'have his conviction and sentence' (a) or 'his conviction or sentence' (b) reviewed by a higher tribunal. The implications of the difference in conjunctions ('and' v. 'or') are not clear. The Explanatory Memorandum to Protocol No. 7 seems to exclude a review of the verdict if the accused pleaded guilty. This seems logical enough, albeit debatable in certain cases—so logical, indeed, that the precision of the wording seems somewhat superfluous.

There is another clause, present in both Protocol No. 7, Article 2, and ICCPR, Article 14(5), that is so unclear that one wonders if it can really be transposed into an international instrument such as the Statute. This is the reference to 'law', which is much more extensive in the Protocol than in the Covenant. The latter

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12 We shall not discuss ECHR Art. 13, which establishes a generic right to an 'effective appeal' to a national court against any violation of the rights or liberties covered by the Convention. For one thing, it is difficult to transpose this safeguard to the international dimension. For another, case law from bodies charged with implementing the Convention (the European Commission for Human Rights, abolished in 1998, and the European Court of Human Rights) does not draw heavily on the criminal aspect of this rule. Until Protocol No. 7 came into force on 18 August 1988, these bodies looked to ECHR Art. 6 (right to a fair trial) as a basis for any comments on the circumstances of criminal appeals (cf. judgments: Deltours v. Belgium, ECHR (1978), Series A, No. 11, 25; Mannell and Morris v. United Kingdom, ECHR (1987), Series A, No. 115, 54–56). The safeguard in Art. 13 might have a part to play, but this would mean transposing into the international domain a rule which was originally aimed at ensuring that national jurisdictions conformed to the substantive principles of the Convention with regard to interim applications, which are not covered by CCPR Art. 14(5) or by Art. 2 Prot. No. 7.

13 'Every person accused of a criminal offense has the right to appeal the judgment to a higher court.'

14 In the same direction, S. Stavros, The Guarantees for Accused Persons under Article 6 of the ECHR (1993) at 269.

merely insists that the convicted person must have a right to appeal 'according to law'. The former has a complete sentence: 'The exercise of this right, including the grounds on which it may be exercised [sic], shall be governed by law.' What does this mean? Clearly the intention is not to countenance restrictions on the right of appeal in national law, but rather to leave it to national law to determine the modalities by which the review by a higher tribunal is to be carried out'. The French text of Protocol No. 7 ('régis par la loi') seems to see the requirement as a purely statutory one; this is an error, because 'law' must be taken to cover not only statute but also unwritten law, in both common-law and civil-law countries.

This clause in Protocol No. 7, Article 2 and ICCPR, Article 14(5), is to be, one must determine its regulatory force. The Statute must dictate, if not the detailed modalities, at least the broad lines on which the right of appeal is to be exercised. It is not clear that the Rome text—which contains omissions to be examined below—wholly fulfils this requirement. The deficit could be made good by adopting the Rules of Procedure and Evidence; this (Statute, Article 51(1)) would require a two-thirds majority in the Assembly of participating States and would engender a brand-new international treaty. However, the finalized Rules, adopted in June 2000, do not fit the bill: the text prepared by the Preparatory Commission is substantively very weak. This will throw far more weight on the case law and practice of the Court itself.

Apart from this 'legislative' question, the Statute broadly accords with international instruments. As a matter of fact, these instruments do not actually guarantee a 'full' appeal, if by this we mean a complete review of the Trial Chamber's decision by the Appeals Chamber. The requirements of the Statute would be met if the review was confined to the legal grounds for the original decision. A convicted person may ask a higher tribunal to review his conviction (Article 81(1) and/or sentence (Article 82(2)(a)).

The protection afforded by ICCPR, Article 14(5) and Article 2, Protocol No. 7, focuses on the fairness of the appeal itself. This 'fair trial' is not the same as the 'fair trial' of ICCPR, Article 14(1) and ECHR, Article 6(1), which were originally intended to apply to the merits of the case in the (original) trial: it is a separate

17. UN-HRC, Salgar de Montejo, supra note 16, No. 10.4.
20. Cf. ECHR No. 19028/91 Nielsen v. Denmark, DR 73, 239; 18066/91, Nätì v. Sweden, DR 77-A, 37. For an opposing view, some members of the UN HRC, supra note 14, notes 269 and 342.
notion, 'which does not depend on the special features of the proceedings involved'.

As for the scope of the protection offered by this 'fair trial', it depends on how far the Appeals Chamber is entitled to review the merits of the case: it is a 'functional' safeguard. For example, if the Appeals Chamber has the power to review all the facts of the case, the convicted person has the right to demand a re-examination of the prosecution witnesses (cf. ICCPR, Article 14(3); ECHR, Article 6(3)). Broadly the same approach must be taken when the credibility of the witnesses, or even of the convicted person, is in doubt; if the latter, he must appear in person. But the guarantee of a double scrutiny does not apply—or not altogether—if the evidence being sought is of a purely objective nature, such as documents, or an expert testimony by a criminologist. Still less does it apply if the Appeals Chamber is only reviewing points of law, or examining the facts from a narrowly 'arbitrary' viewpoint (see infra, III.D).

III. Article 81: Appeal against Conviction or Sentence

A. Appealable Decisions

Though it is not mentioned directly in either the headings or the text of Articles 74 and 81 of the Statute, this latter provision entrenches the principle that it is possible to appeal under Article 74 against a conviction or acquittal handed down by a Trial Chamber. Indeed, in order to differentiate between appeals against conviction and appeals against sentence, States have tended to talk in terms of 'decisions' rather than 'judgments'.

Owing to the vagueness of the terminology in Articles 74 and 81 of the Statute, it is not clear whether the right to appeal under Article 81 is general, or limited to certain kinds of decision. Article 150 of the Rules of Procedure and Evidence limits appeals to a 'decision of conviction or acquittal under article 74', a sentence under article 76 or a separation order under article 75'. This leaves little scope for

22 Cf. the comprehensive study by A. Saccucci, 'L'art. 6 della Convenzione di Roma e l'applicazione delle garanzie del giusto processo ai giudizi d'impugnazione', 42 Riv. ital. dir. proc. pen. (1999) 587 et seq. esp. 593–594.
23 Cf. Ekhbatani judgment, supra note 21, at 32.
24 Cf. Belziuk judgment, supra note 21, at 7.
26 Supra note 19.
appeals against other decisions, e.g. a decision under Articles 108 or 110 of the Statute.27

B. The Right of Appeal

A convicted person may appeal against his conviction.

Victims of crime and their representatives28 are not entitled to appeal against such decisions—a reminder that proceedings before the ICC are essentially in defence of public rights. However, victims and their representatives, and bona fide third persons adversely affected by a civil reparation order, may appeal against such an order made under Article 7529 (Article 82(4)).

The Prosecutor’s right to appeal against an acquittal has been much debated.30 The procedure for the taking of evidence is generally more restrictive in appeals proceedings. This will cause problems if an Appeals Chamber substitutes its own understanding of the facts for the version which elicited an acquittal from the Trial Chamber, since that will be to the detriment of the accused.

While civil-law countries generally accept this possibility, common-law countries are more inclined to reject it as contrary to the principle of res judicata.31 Some authors, mostly American, have even argued that an appeal against an acquittal violates international human rights standards, in particular the ne bis in idem principle.32 This divergence between civil-law and common-law countries is more apparent than real, however. Although ICCPR, Article 14(7), Article 4, Protocol No. 7 to the ECHR, and ACHR, Article 8(4), all insist (in slightly different words) that no one can be tried twice for the same offence (ne bis in idem), they do not exclude an appeal by the Prosecutor against an ‘appealable’ judgment.33 Moreover, legal systems vary widely across both civil-law and common-law coun-

28 See infra IV.B.3.
29 The French version of Art. 82(4) incorrectly refers to Art. 73 instead of Art. 75.
30 Wrongly according to some commentators, the ICTY Statute does not allow for a Prosecutor’s appeal against an acquittal, see V. Morris and M. P. Scharf, An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia (1995) at 295.
33 Art. 8(4) ACHR very explicitly forbids a ‘new trial’ after a ‘non-appealable judgment’.
tries. One thing the latter have in common, however, is a reluctance to allow appeals against verdicts handed down by juries. This does not apply to the ICC. Article 81 of the Statute does not explicitly sanction appeals by the Prosecutor against an acquittal. However, if one reads Article 74, to which Article 81 refers, in conjunction with Rule 150 of the Rules of Procedure and Evidence and Article 81(1)(a) of the Statute, the impression is that such appeals are admissible. Notwithstanding, Article 82(4), States cannot appeal against a conviction or acquittal. Though they may have an ‘interest’ in the verdict, this is thought insufficient to entitle them to appeal against the judgment, let alone against the sentence. Thus the Statute clearly espouses the principle that if a case goes to the International Criminal Court, that Court has sole jurisdiction in the domain of international criminal justice, although the Prosecutor may lodge an appeal if it is (in his or her opinion) in the interest of the international community.

The Prosecutor may appeal on behalf of the convicted person. It is hard to see why the Prosecutor would want to do this, unless the convicted person has no counsel of his own, or—in exceptional and alarming cases—his counsel has failed to represent him adequately, forcing the Prosecutor to assume the task.

Nonetheless this provision relativizes the ‘accusatory’ role of the Prosecutor and requires him to serve the interests of abstract justice. To put it another way, the Prosecutor’s role in the trial ceases to be purely dialectic, in the ‘accusatory’ tradition of UK and American courts: he must help to guarantee the proper administration of justice.


36 Supra note 19.


38 ‘The Prosecutor is not simply, or not only, an instrument of executive justice, a party to the proceedings whose exclusive interest is to present the facts and evidence as seen by him or her in order to accuse and to secure the indictee’s conviction. The Prosecutor is rather conceived of as both a party to the proceedings and also an impartial truth-seeker or organ of justice’; A. Cassese, ‘The Statute of the International Criminal Court: Some Preliminary Reflections’, 10 EJIL (1999) 168.
Clearly, the Prosecutor cannot appeal on behalf of the convicted person except to seek an acquittal (if e.g. the convicted person does not himself appeal), or at least a favourable amendment to the Trial Chamber’s decision. This could scarcely be done without prior consultation with the convicted person.

C. Grounds for the Appeal

An appeal on the grounds of procedural error must be heard in accordance not only with the Statute’s Rules of Procedure, but also with the procedural standards generally recognized by the international community.

An appeal on the grounds of an error of fact may issue not only when the Trial Chamber misinterpreted the evidence, but also when the relevant facts were not properly established. Therefore the Appeal Chamber ought to be entitled to consider fresh evidence not heard by the Trial Chamber, assuming that such evidence is relevant.39

One may argue in an appeal on the grounds of an error of law that the evidence has been misinterpreted, or may invoke the relevant criminal law. It is less clear whether an ‘error of law’ can relate to generally accepted procedural principles, or whether that would constitute procedural error.

Appeals on any other ground that affects the fairness or reliability of the procedure or decision (Article 81(1)(b)(iv) ) were added to the Preparatory Committee’s 1998 ‘Zuutpen’ draft. The addition is unclear and controversial; the wording was apparently left deliberately vague in order to avoid limiting the grounds for an appeal, whether by the convicted person or the Prosecutor, to those detailed above.

Some commentators think that this clause adds very little to the grounds previously mentioned.40 However, it is important to know exactly how Article 81(1)(b)(iv) relates to ‘procedural error’ and ‘errors of fact or law’, because the Prosecutor is debarred from appealing on this fourth ground, as these two issues are very close in their substance.

In principle, ‘procedural errors’ ought to include any formal violations of the Statute or the Rules of Procedure and Evidence, whereas ‘grounds that affect the fairness or reliability of the proceedings or decision’ should be substantive, especially if they relate to State practice or supranational tribunals such as the European Court of Human Rights or the Inter-American Court.

39 See also the discussion as regards Art. 83, infra, V.A.
40 Staker, supra note 27, at 1020.
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These 'grounds' may relate to the trial in open court, equality of arms, or self-incrimination; to the accused's right to be legally represented and to cross-examine prosecution witnesses; or to the publication of, and grounds for, the judgment. The conduct of the trial itself may also be affected by grounds originally unconnected with it, e.g. an armed conflict or uprising in the city where the Court is located, or a threat to the safety of the audience or participants.

In theory, then, it seems doubtful, in the light of Article 81 (1) (b) (iv), that the ICC Appeals Chamber can voluntarily and in general restrict its own powers to examine the grounds for an appeal. Rather, it seems that the Appeals Chamber must examine the grounds for any appeal that is brought to it against a conviction or sentence handed down by a Trial Chamber, before deciding whether or not that appeal is admissible.

As well as appealing against conviction, the Prosecutor or the convicted person may also enter a separate appeal against sentence (Article 81 (2) ). In this case the appellant is not disputing the evidence or the court's judgment thereof (this is covered by Article 81 (1) ), but only the nature and severity of the sentence.

D. The Jurisdiction of the Appeals Chamber

This question first arose in discussions on whether or not the Appeals Chamber should be empowered to review a sentence only if it is significantly or manifestly disproportionate to the crime, or whether it can reconsider every aspect of the judgment handed down by the Trial Chamber. The final version of the Statute gives the Chamber full jurisdiction rather than 'arbitrary' powers.

This seems justified, particularly in the light of Article 77 of the Statute, which lays down a scale of punishments only loosely related to the seriousness of the crime, leaving a very wide degree of latitude to the Trial Chamber. Hence a

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42 This could happen if e.g. the barrister is too closely identified with a former or existing regime and is more interested in 'covering up for' or informing other persons than in defending his client. See supra note 37, at 299.
43 Art. 77 of the Statute establishes only two degrees of penalty: imprisonment up to thirty years and life imprisonment.
44 Art. 78. On the idea of a scale of penalties related to the hierarchical position of the accused, see ICTY T. Ch., Sentencing Judgment of 26 January 2000, Tadić, IT-94-1, No. 51–58.
right of appeal against sentence should reduce the risk of unequal treatment between defendants and cases. On the other hand, since the Appeals Chamber is not required to reopen cases, it should be cautious in substituting its view of the case for that of the Trial Chamber.

The jurisdiction of an Appeals Chamber over submissions made by the parties is not the same in all legal systems. Some hold that the Appeals Chamber’s power to examine evidence ought not to depend on the will of the parties; others, that the Appeals Chamber should not amend the judgment of the Trial Chamber except on such matters of fact and law as have been brought before the former. In the latter case, the appeal proceedings should, in principle, be confined to relevant but disputed facts, or facts of which the interpretation is disputed.

An interesting point of comparison is the Erdemović case, in which the ICTY Appeals Chamber held that ‘there is nothing in the Statute or the Rules nor in practices of international institutions or national judicial systems, which would confine . . . [the Appeals Chamber’s] consideration of the appeal to the issues raised formally by the parties’. Yet, that Chamber’s records show that it usually confined itself to examining the arguments in the appellants’ submissions.

Article 81 of the Statute makes no attempt to define the jurisdiction of the Appeals Chamber over ex parte submissions. In particular, it does not say whether or not the Appeals Chamber is confined to the points of fact and law raised by the appellant in his statement of appeal, i.e. the grounds for the appeal (tantum devolutum quantum appelatuum maxim).

Article 81(2)(b) and (c) give the Appeals Chamber very wide powers to review, at its own discretion, both the conviction and the sentence passed by the Trial Chamber, even if the appellant has not appealed against either. Article 81(2)(b) seems to grant the Appeals Chamber the discretion, when hearing an appeal against sentence, to review the verdict itself—even if this should prove detrimental to the accused. This would constitute reformatio in pejus, which is clearly banned by Articles 81(2)(c) and 83(2)(2) of the Statute; and if it is to be admissible, this ought to be made quite clear in the Statute itself (applying the maxim in

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49 At the very least it must be admitted that the Appeals Chamber may review points of fact and law that have not been raised by the parties. We shall return to this question in connection with Art. 83 of the Statute.
50 This might happen, e.g. if the Trial Chamber has passed a separate verdict on each item of the indictment.
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dubio pro libertate).\textsuperscript{51} Therefore if the Chamber is hearing an appeal against the verdict it can also, according to the Statute, review the sentence, but only in order to \textit{reduce} it. In any case, the Appeals Chamber will not review such elements without first consulting the parties, since all parties are entitled to be heard.

E. Custody during the Appeal Proceedings

A person who has been convicted by a Trial Chamber should in principle remain in custody during the appeal proceedings, unless the Trial Chamber has itself decided otherwise (Article 81(3)(a), last sentence). This might happen, for example, if the accused became unfit to stand custody, in which case to keep him in custody would violate a generally accepted principle of human rights.

However, it is still unclear whether or not the Trial Chamber can order less severe measures to ensure that the convicted person remains within reach of justice. He could, for example, be freed on bail, required to surrender his passport or put under electronic surveillance. Some authors believe this is permissible.\textsuperscript{52} We are inclined to disagree, believing the silence of the Statute on this matter to be eloquent. Countries cooperating with the Court are of course entitled to substitute custody by one of the alternatives mentioned above. This may produce inequality of treatment, but if so it is inherent in the sharing of responsibilities between the international court and the national State. Moreover, the kinds of cases that come before an international criminal court are likely to be so severe that at least one of the conditions for continued custody laid down by ECHR, Article 5(1), which gives the most detailed rules, will apply. This is a difficult matter, and the Pre-Trial Chamber will have to build up a body of case law weighing up the conflicting interests that are in play.

The accused may not be given a custodial sentence longer than that already imposed by the Trial Chamber. If acquitted, therefore, he must be released immediately after the judgment has been pronounced. Similarly, he must be released if sentenced to a term of imprisonment shorter than the time he has already spent on remand.

The Trial Chamber must take account of time spent on remand when passing sentence. ICC case law will eventually determine how to compute the time the accused has spent on remand in his own country, before his case was referred to The Hague.\textsuperscript{53} In particular, case law will show how to assess types of alternative custody practised by certain States (e.g. house arrest).

\textsuperscript{51} See also Staker, supra note 27, at 1021.
\textsuperscript{52} Ibid., at 1021, No. 19.
Article 81(4) rules that execution of the decision shall be suspended during the period allowed for appeal, and for the duration of the appeal proceedings. This does not mean that a person in custody should be released as soon as the Trial Chamber has issued its verdict, pending the result of the appeal, but that a convicted person who appeals should be kept in protective custody, rather than remanded in the strictest sense of the word, imprisoned awaiting sentence or imprisoned in accordance with sentence. At this stage, the convicted person cannot be transferred to a particular State to serve his sentence (Articles 103 et seq. of the Statute).

If the appeal is against conviction, this will suspend the execution of any sentence or accessory penalty (e.g. fine, confiscation under Article 77(2) of the Statute). If the appeal is against the sentence, however, this ought not in principle to affect the execution of any accessory penalty not included in the appeal. However, this is problematic, since the Appeals Chamber may review the sentence even if the appeal was only against the conviction (Article 81(2)(c)). It seems that an appeal must be taken to suspend the execution of all penalties, including accessory ones.

IV. Article 82: Appeal against Other Decisions

A. Appealable Decisions

The 'appeal' in Article 82 differs from that in Article 81 in that it refers to interim decisions, not final decisions. Article 82 of the Statute, unlike Article 81, specifies the decisions which may be appealed against.

During the negotiation of the Statute, there was much discussion of which interim decisions should be appealable. The list in Article 82(1) must therefore be read as exhaustive; it is not subject to extension by decision of the Appeals Chamber.

Decisions of the Trial Chamber regarding the jurisdiction of the ICC, in accordance with Articles 5 et seq. of the Statute, or on the admissibility of a case, in accordance with Articles 17–18, may be appealed against under Article 82(1)(a).

The parties may also appeal against a decision of a Trial Chamber granting or denying release of the person being investigated or prosecuted. Though this is not spelt out in the Statute, it seems clear that the Appeals Chamber must be prompt in its decision on granting or denying release.

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54 Unless the appeal only concerns one or a part of the charge(s).
55 In the same direction, Stekei, supra note 27, at 1022, No. 20.
56 Lee, supra note 37, at 299.
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It is also possible to appeal against a decision of the Pre-Trial Chamber made under Article 56(3) (Article 82(1)(c)).

Finally, Article 82(1)(d) sanctions appeals against any interim decision by the Pre-Trial or Trial Chamber (with the specific exception of an indictment), so long as both the following conditions are fulfilled: (1) the appealed decision significantly affects the proceedings or outcome of the trial; (2) the Pre-Trial or Trial Chamber itself considers that an immediate resolution will materially advance the proceedings.

Thus the idea of Article 82(1)(d) is that an interim decision not covered by paragraph (1)(a)–(c) may be appealed against if this would ensure the expeditious conduct of the trial, i.e. when the issue is bound to arise at some time—say in the course of an appeal against the verdict or sentence—and is bound to affect the proceedings or the outcome. The relevant Rule of Procedure and Evidence, No. 155, does not elaborate further.

It is the Appeals Chamber that decides whether a particular judgment is appealable per se, but it is up to the Pre-Trial or Trial Chamber to decide whether the immediate resolution of an issue by the Appeals Chamber would advance the proceedings. Hence an appeal under Article 82(1)(d) will not be admissible unless leave to appeal has been granted by both the Pre-Trial or Trial Chamber and the Appeals Chamber.

Article 82(4) of the Statute allows an appeal against an order under Article 75 relating to the civil aspects of a dispute. It is not clear whether or not the appeal envisaged by the Statute is against an interim order to safeguard the interests of victims as part of the compensation procedure.

Article 75 seems to relate to a final decision on the merits, and not an interim order: that would prevent a person who has been charged, but not convicted, from appealing against an interim order for reparations, e.g. an order blocking a bank account. Moreover, Article 82(4), which allows an appeal by a convicted person, does not seem to envisage any appeal against a protective interim decision, as otherwise the right to appeal would have been extended to accused persons. In fact, interim protective measures can be very damaging to the persons concerned. This may constitute an omission from the Statute which will some day be made good by a broader interpretation of Article 82(1)(d).

The question whether to include an appeal against the admissibility of certain types of evidence was vigorously debated in the preparatory stages. The negotiators finally decided against it, mainly because the parties always have a chance to

57 Cf. supra note 19.
58 And not Art. 73, as incorrectly stated in the French version of the Statute.
59 Lee, supra note 37, at 299–300.
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contest the inadmissibility of evidence in the proceedings on merit, before either the Trial Chamber or the Appeals Chamber. It remains an open question whether it is possible to appeal against the admissibility of evidence under Article 82(1)(d).

Similarly, the negotiators decided not to include express permission for the defence to appeal against an indictment. They decided that decisions on the indictment were really the business of the Prosecution, and that to give the defence a right to appeal against such decisions would encourage the entering of appeals purely to gain time.61

B. Persons Entitled to Appeal

1. The Parties to the Trial

Decisions under Article 82(1)(a–d) can be appealed against by ‘either party’, i.e. the Prosecutor or the accused/convicted person.

This is complicated, however, by the fact that Article 56(3)(b), referred to in Article 82(1)(c), allows the Prosecutor to appeal against such decisions but does not mention the defence, in apparent contradiction to Article 82(1).

Yet the contradiction is more apparent than real if, at this stage in the proceedings, the person directly affected by the investigative proceedings has not yet been indicted. In that case, the question arises whether the Prosecutor alone has the right to appeal (i.e. we are dealing with a lex specialis), or whether the defence can still appeal the decision despite the fact that Article 56(3)(b) mentions only the Prosecutor. The principle of ‘equality of arms’ between prosecution and defence, which regularly applies in accusatory proceedings such as those of the ICC, clearly militates in favour of the second interpretation.

2. States

Notwithstanding Article 82(1), a State may, as a party, appeal under Article 57(3)(b) against a decision by the Pre-Trial Chamber permitting the Prosecutor to take specific investigative steps within the territory of a State Party, so long as that State is concerned (Article 82(2)). But what State can be considered to be ‘concerned’ by such measures?

Obviously, the State on whose territory the investigation is being conducted is directly concerned, in that the investigation affects its presumed sovereignty over police and legal matters in its own territory. Complications arise if a country is under military occupation or under the administration of the UN or a State with

60 Lee, supra note 37, at 300.
61 Ibid.
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a UN mandate. This question might well arise, particularly since Article 57(d) raises the possibility that the State may be 'clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request'. There is no reason, a priori, why the occupying or mandated State should not appeal decisions under Article 82(2)/Article 57(3)(d), since such a State will be exercising judicial and police powers in the occupied country.

A State is not entitled to appeal against interim decisions except insofar as this is permitted for decisions under Article 57(3)(b). This is striking, especially since a State may, under Article 19(2)(b) and (c) contest the admissibility of the case in the Trial Chamber.

3. Victims, Civil Parties, and Third Parties Affected by the Decision

Victims, civil parties, and third parties affected by a decision cannot normally be considered as parties, in the strictest sense of the word, to an appeal against an interim decision under Article 82, unless such decisions affect their civil rights as envisaged by Article 82(4)/Article 75.

The expression 'legal representative of the victims' is confusing, since it normally refers to the person(s) considered in law to represent another person, e.g. parents representing children who are minors. Article 84(4) probably envisages a broader definition, viz. any person or organization duly admitted to represent a victim before the ICC.

On the other hand, it appears that a bank, or a credit-taking institution acting on a purely contractual basis, could not appeal against a decision taken under Article 75.

Article 82(4) does not specifically answer the question whether a State could present itself as the legal representative of victims—or as itself the victim—of genocide, war crimes, or crimes against humanity. There is no a priori reason why not, however.

C. Grounds for the Appeal

Unlike Article 81 of the Statute, Article 82 does not specify what grounds may—or must—be given for an appeal against an interim decision. It must therefore be assumed that any question of fact or law can be invoked as a ground for an appeal under Article 82.

D. The Effect of an Appeal against an Interim Decision; Procedure

Unlike the procedure for appealing a final judgment under Article 81, which is detailed in Article 83, the procedure for appealing an interim decision is only
curtly treated in the Statute. The Rules of Procedure and Evidence\textsuperscript{42} (Part 8, Section III) give a few details, starting with the time allowed, which is five days from when the party filing the appeal is notified of the decision (Rules 154–155). Rule 156 sweepingly requires 'all parties who participated in the proceedings' to be notified of an intended appeal. However, there is no mention of their right to be actively involved in the hearing of the case by the Appeals Chamber. This involvement may be subsumed in the entitlement to make written submissions (cf. Rule 156(3)).

An appeal against an interim decision does not in itself have suspensive effect (Article 82(3)). However, it may do so if, and only if, the Appeals Chamber so orders at the appellant's request. It goes without saying that the only decision suspended is the one being appealed; in all other ways the proceedings will continue.

An appeal against investigative measures ordered by the Pre-Trial Chamber under Article 57(3)(d) cannot be admitted without the prior consent of that Chamber, which has the authority to grant leave to appeal.

An appeal against a decision under Article 57(3)(b) must be treated expeditiously. However, the Rules of Procedure and Evidence do not prescribe any particular approach except that the appeal should be heard 'as expeditiously as possible', which applies to all appeals against interim decisions (Rule 156(4); cf. \textit{supra}, II). The case law of the Appeals Chamber will doubtless establish (if necessary) how this 'expeditious' procedure is to be conducted.

V. Article 83: Proceedings on 'ordinary' Appeal

Article 83(1) of the Statute, dealing with proceedings on appeal, refers only to appeals against conviction or sentence (Article 81), not to appeals against other (interim) decisions (Article 82).

A. Preparation of an Appeal

Article 83(1) states that the Appeals Chamber has all the powers of the Trial Chamber. This effectively refers to Article 64 of the Statute which deals with the functions and powers of the Trial Chamber: it may or must confer with the parties, determine the language to be used at trial, provide for disclosure of documents, refer preliminary issues to the Pre-Trial Chamber, direct a joinder or severance of charges, prepare the case, etc. Thus Article 83 gives the Appeals Chamber wide powers to investigate and examine or re-examine the facts of the case.

\textsuperscript{42} Supra note 19.
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Hence, while the Appeals Chamber is not required to reopen the whole of the proceedings in the Trial Chamber, it nonetheless has all necessary procedural powers to form its own opinion on the verdict and sentence handed down by the Trial Chamber. In particular, the Appeals Chamber may call additional evidence over and above that brought before the Trial Chamber and may allow the parties to present such new evidence if it considers that this is in the interests of justice; or it may seek new evidence from a State, or from the parties or Prosecutor. It may also remand the case back to the original Trial Chamber for further investigation or ask that Chamber to determine a factual issue (Article 83(2)). The powers of the Appeals Chamber are thus very extensive, which (apparently or potentially, at least) contradicts the universal principle that the most competent body in the finding of facts is the Court which passed the (original) judgment.63

Another problem is the Appeals Chamber’s obligation to determine or re-determine factual issues. National practice differs fairly widely on this point. The majority of criminal jurisdictions require a re-examination of factual issues if a party so requests.64 But others, more restrictive and more convinced of the competence of the original court (cf. supra), give the Court of Appeal discretion to re-examine the evidence.65

The European Court of Human Rights has considered this question in connection with the accused’s right to a trial in open court. Its case law has established that the first and second appeals do not need to be heard in open court and that the evidence may be re-examined, in certain circumstances which are treated jointly in the case law:66

1) first, the original trial must have been in open court;
2) secondly, the object of the appeal is a decisive factor. If an Appeals Chamber is asked to consider points of both fact and law, and the circumstances of the case require that the defence witnesses be heard (in particular where witnesses do not agree), then those witnesses must be summoned;67
3) thirdly, if the case is a minor one, there may be a curb on fresh investigations;

63 “It is a well-settled principle that the trial chamber is the most competent body in the finding of facts”, Karibi-Whyte, supra note 27, at 658.
64 E.g. Art. 603 Italian Crim. Proc. Code (hereinafter CPC). In the same direction, para. 325 German CPC.
65 Cf. Art. 513(2) French CPC: the witnesses are re-heard only when and if ‘the court has ordered their hearing’. Equally restrictive is the English system, see Hutchard, Huber, and Vogler, supra note 35, at 204.
67 Judgments Ekbhatani, supra note 21, at 32 and Helmers, supra note 66, at 38.
(4) finally, the need for an expeditious hearing and a reasonably prompt decision must be borne in mind, which means that cases coming before the Appeals Chamber must be treated with dispatch.68

There is room for doubt as to whether the need for dispatch applies in principle to the ICC. The European Court of Human Rights seems to be applying those criteria mainly to the minor cases—such as traffic offences—which so often clog the lower courts.69 In view of the nature—and notoriety—of the cases that are likely to come before the ICC, their importance to the States involved, and the penalties faced by defendants, it would have been unthinkable to exclude, in advance, the possibility of re-examining factual issues on appeal.

The question of when the Appeals Chamber must re-examine the issues—and what issues—remains entirely open. The trend of ECHR case law indicates that a mere "error of law," as per Article 81(1)(a)(iii) and (b)(iii), does not justify reopening the entire case. Similarly, the impact of a "procedural error" as per Article 81(1)(a)(i) and (b)(ii) may be purely judicial, and so not justify reopening the case. It must be left more or less to the discretion of the Appeals Chamber to determine whether factual issues need to be examined in order to decide whether a procedural error has occurred, or whether the fairness or reliability of the proceedings or decision are in doubt.

The question of how far the Appeals Chamber is called upon to re-examine "errors of fact" alleged by one of the parties is more difficult, since it sets the requirements of justice against the requirements of speediness in the concrete case.70 The 'right to a total defence' established by the Tadić decision (relating to the jurisdiction of the ICTY)71 must be set against the ICC's inevitable problems with the nature of evidence, the question of proportionality and, at times, the total impossibility of examining or re-examining certain factual issues.72

Here the case law of the ICTY and ICTR seems rather restrictive with regard to admitting at the appeal evidence that was not brought at the original trial.73 In the Erdemović case the Appeals Chamber of the ICTY remarked that 'the appeal process of the International Tribunal is not designed for the purpose of allowing the parties to remedy their own failings or oversights during trial or sentencing.'74

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68 Judgment Anderson, supra note 21, at 27.
69 In the Anderson case, the appellant had been condemned to a 400 Swedish Crowns (Kronor) fine because he had driven his tractor on a main road.
70 As opposed to the abstract standard of due diligence.
72 Esp. those which took place in countries which do not—or poorly—cooperate with the ICC.
73 See Staker, supra note 27, at 1022–1024; the last (to date) state of the case law is to be read in Ap. Ch. Judgment of 23 October 2001, Kupreskic et al., esp. paras. 68–69: "the more appropriate standard for the admission of additional evidence... is whether that evidence "could" have had an impact, rather than whether it "would probably" have done so" (para. 68).
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One may nevertheless wonder whether this curb on the appeals procedure might encourage the parties to the original trial to trot out every conceivable witnesses and item of evidence, purely in order to ensure that they are not excluded at the appeal; and these witnesses and items of evidence may not be the most helpful in establishing the truth. This would vitiate the procedural economy which is the aim of all criminal justice systems.

Since there are no precise instructions in the Rules of Procedure and Evidence, the problem of the re-examination of evidence will need to be determined flexibly by the case law of the Appeals Chamber, leading to a sensible procedure suited to the very exceptional kinds of cases that come before the International Criminal Court.

B. The Impact of Appeals Chamber Decisions

When an appeal is admitted by the Appeals Chamber, the latter may reverse or amend the decision or sentence, or order a new trial before a different Trial Chamber (Article 83(2)(b)). This, obviously, applies not only to decisions by the Trial Chamber under Article 81, but also to decisions that have been appealed against under Article 82.

Article 83(2) seems to indicate that the Appeals Chamber's power to reverse or amend the original decision, or order a retrial, is not discretionary but depends on its impact on the result of the trial ("affect... the reliability of the decision or the sentence"), or on the degree of error ("materially affected by error"). The second hypothesis is expressed more restrictively in the French text of the Statute ("décision sérieusement entachée d'une erreur") than in the English.

Not every procedural error, or error of fact or law, in a conviction or sentence automatically obliges the Appeals Chamber to admit the appeal. The procedural error must have been sufficient to make the whole trial unfair; or else the assessment of the evidence, or the severity of the sentence, must be such as to constitute a miscarriage of justice. Thus, an appeal against merely formal, or insignificant, errors which do not affect the operative part of the judgment will not be admitted. In other words, the appeal will not be admitted unless the intervention of the higher court will have a definite impact on the accused; purely theoretical questions, on points of detail, are insufficient.

It goes without saying that the ICC's decisions will not only impact on the accused or convicted person but are also likely to be important and influential in the domains of criminal law and procedure, and international law. Hence the Appeals

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75. For the determination of the procedural stage at which new evidence material has to be tested, see ICTY Ap. Ch. Judgment in Kupreski et al., supra note 73, paras 70–71.
76. On the notion of 'miscarriage of justice' under Art. 25 of the ICTY Statute, see Karibi-Whyte, supra note 27, at 652.
missing the appellant’s arguments and confirming the original judgment (whether civil or criminal); or reducing the criminal or civil penalties imposed by the Trial Chamber; or changing the legal classification adopted by that Chamber—so long as these changes were not detrimental to the appellant—or from confirming the original sentence, even if the Appeals Chamber were to deliver a partial acquittal.89

The Statute does not mention whether or not an Appeals Chamber decision can be to the detriment of a victim or bona fide owner of property affected by an order, if such persons appeal under Article 82(4). This will need to be settled by case law.

The Appeals Chamber is empowered to amend a conviction; it can also vary a sentence on the basis of Article 81(2)(c). In that case it will determine the new sentence according to the criteria in Part VII.

The reference to Part VII in Article 83(3) raises the question whether the Appeals Chamber has full discretion when applying those criteria, i.e. should it review the entire sentence, or whether its power of examination is limited by Article 83(2). The first alternative certainly has (once again) the advantage of promoting uniformity in an area where the range of possible punishments is very great. However, it must not be forgotten that the Appeals Chamber may not be as familiar as the Trial Chamber with the facts of the case and the personality of the accused, unless the Appeals Chamber has reviewed the entire case. Hence it will have to exercise restraint in contemplating the sentence already imposed.

C. The Internal Decision-making Procedure of the Appeals Chamber

Much ink was spilled, at the preparatory stage, over the question of what majority among the judges is needed to pass a judgment in either the Trial Chamber or the Appeals Chamber.81 Many delegates demanded unanimity, to avoid giving the defendant, or the public, the impression of a divided court. But the argument that dissenting views might further the progress of legal thinking and enactment finally carried the day and it was decided that minority views should be partly permitted, in the sense that a judge could advance a separate or dissenting view on a question of law, but no judge should advance a separate or dissenting view on a factual issue. It follows that a separate or dissenting view on the sentence could scarcely be countenanced.

The Appeals Chamber may deliver its judgment in the absence of the person acquitted or convicted (Article 83(5); cf. Article 76(4), which is more restrictive). Could one go a step further and say that the convicted person might be absent

81 Piquez, supra note 79, at 721–724.
82 Lee, supra note 37, at 301–302.

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from the *whole* of the appeal proceedings? In our opinion the answer must be positive if, but only if, the Appeals Chamber has not instituted any *investigative measures* before delivering its judgment. In this the appeals procedure differs from the procedure in the Trial Chamber, where the accused cannot in principle be tried *in absentia* (Article 63).

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82 See the ECHR judgments in the *Ekbatani* and *Anderson* cases, *supra* V.A.