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A Commentary on the Rome Statute

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The International Criminal Court: A Commentary on the Rome Statute

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Article 83. Proceedings on appeal / Procédure d'appel

1. For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

- (a) Reverse or amend the decision or sentence; or
- (b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.

4. The judgment of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgment shall state the reasons on which it is based. When there is no unanimity, the judgment of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

5. The Appeals Chamber may deliver its judgment in the absence of the person acquitted or convicted.

1. Aux fins des procédures visées à l'article 81 et au présent article, la Chambre d'appel a tous les pouvoirs de la Chambre de première instance.

2. Si la Chambre d'appel conclut que la procédure faisant l'objet de l'appel est viciée au point de porter atteinte à la régularité de la décision ou de la condamnation, ou que la décision ou la condamnation faisant l'objet de l'appel est sérieusement entachée d'une erreur de fait ou de droit, elle peut:

- (a) Annuler ou modifier la décision ou la condamnation; ou
- (b) Ordonner un nouveau procès devant une chambre de première instance différente.

À ces fins, la Chambre d'appel peut renvoyer une question de fait devant la Chambre de première instance initialement saisie afin que celle-ci tranche la question et lui fasse rapport, ou elle peut elle-même demander des éléments de preuve afin de trancher. Lorsque seule la personne condamnée, ou le Procureur en son nom, a interjeté appel de la décision ou de la condamnation, celle-ci ne peut être modifiée à son détriment.

3. Si, dans le cadre de l'appel d'une condamnation, la Chambre d'appel constate que la peine est disproportionnée par rapport au crime, elle peut la modifier conformément au chapitre VII.

4. L'arrêt de la Chambre d'appel est adopté à la majorité des juges et rendu en audience publique. Il est motivé. Lorsqu'il n'y a pas d'unanimité, il contient les vues de la majorité et de la minorité, mais un juge peut présenter une opinion individuelle ou une opinion dissidente sur une question de droit.

5. La Chambre d'appel peut prononcer son arrêt en l'absence de la personne acquittée ou condamnée.

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Introductory comments

There are distinct provisions of the *Rome Statute* entitled 'Functions and Powers of the Pre-Trial Chamber'¹ and 'Functions and Powers of the Trial Chamber',² but nothing equivalent for the Appeals Chamber. In fact, article 83 performs much the same role for the Appeals Chamber within the general architecture of the *Statute*. Indeed, in stating that 'for the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber', article 83(1) in effect incorporates much of article 64, which governs the powers of the Trial Chamber. More detailed norms on the procedure on appeal are set out in the Rules of Procedure and Evidence.³

Drafting of the provision

The draft prepared by the Working Group of the International Law Commission contained a provision entitled 'proceedings on appeal' that governed the creation of a seven-judge Appeals Chamber, the designation of its president, a general formulation of its powers ('all the powers of the [trial] Chamber, and may affirm, reverse or amend the decision which is the subject of the appeal'), and a rule that decisions would be taken by unanimity.⁴ In the final draft, the provision labelled 'proceedings on appeal' was modified somewhat from the earlier version. It set out the powers of the Appeals Chamber, distinguishing between an appeal filed by the Prosecutor and one by the defence, as well as sentencing appeal. The commentary explained that 'the appeals chamber combines some of the functions of *appel* in civil law systems with some of the functions of *cassation*'. This was thought to be desirable, having regard to the existence of only a single appeal from decisions at trial.⁵ It also noted that the proceedings on appeal would not consist of a retrial; although the Court would be empowered to allow new evidence, it was expected that it would generally rely upon the transcript of the trial proceedings.⁵

Obviously there was no serious discussion of the provision in the *Ad Hoc* Committee, because the report confines itself to a single sentence: 'A number of delegations thought it necessary to introduce a time-limit for the lodging of an appeal.'⁶ Given that virtually all legal systems impose time limits for appeals and similar proceedings, the observation seems rather trite. In the Preparatory Committee, there was again discussion about the time limit for filing an appeal.⁷ Different views were expressed as to whether or not judges of the Appeals Chamber should be entitled to express dissenting opinions.⁸ A clear separation between trial and appeal judges was proposed.⁹ Complex procedural texts were submitted, although most of them were more appropriately dealt with in the Rules of Procedure and Evidence.¹⁰ By the penultimate session of the Preparatory

¹ *Rome Statute*, art. 57. ² *Ibid.*, art. 64.

³ Rules of Procedure and Evidence, Rules 156–158.

⁴ ILC 1993 Working Group Report, p. 126.

⁵ ILC 1994 Final Report, p. 61.

⁶ *Ad Hoc* Committee Report, para. 49.

⁷ Preparatory Committee 1996 Report, Vol. I, para. 296.

⁸ *Ibid.*, para. 297. ⁹ *Ibid.*, para. 298.

¹⁰ Preparatory Committee 1996 Report, Vol. II, paras. 237–242. See the second note on p. 38 of 'Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997', UN Doc. A/AC.249/1997/L.9/Rev.1.

Committee, the provision began to assume its final form.¹¹ The draft adopted by the Preparatory Committee corresponds quite closely to article 83 of the *Rome Statute*. All of the major issues had been resolved, with the exception of a few details, such as the quorum of the Appeals Chamber, dissenting opinions, and whether to prohibit the introduction of defences that had not been raised during trial.¹²

At the *Rome Conference*, the provision was considered in detail by the Working Group on Procedural Matters. Proposals were submitted concerning the required majority in the Chamber, the permissibility of dissenting opinions, and conditions for production of new evidence.¹³ The Working Group's final report contained several footnotes, which may be of relevance to interpretation of article 83. To the title was appended the following note: 'The Working Group notes that the term "decision" or "sentence", as appropriate, should be used consistently throughout part 8 rather than the term "judgment". The Working Group notes that the term "sentence" should be translated as *pena* in Spanish and the corresponding term in Arabic.'¹⁴ The Committee of the Whole transmitted the note to the Drafting Committee as an 'understanding'.¹⁵ Paragraph 2 was accompanied by this footnote: 'The Working Group notes that the submission of new evidence to the Appeals Chamber should be addressed in the Rules of Procedure and Evidence.' Similarly, paragraph 4 had a footnote specifying that details on the quorum 'could be addressed in the Rules of Procedure and Evidence'.¹⁶

Analysis and interpretation

Functions and powers of the Appeals Chamber (art. 83(1))

Article 83(1) states that the Appeals Chamber may reverse or amend the decision or sentence, or it may order a new trial before a different Trial Chamber. In the case of appeal of a reparation order made pursuant to article 75, the Appeals Chamber may confirm, reverse or amend the order.¹⁷ When a decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment. Thus, an appeal of sentence by the convicted person cannot result in an increase in the sentence, for example.

Clearly, article 83(1) does not apply to interlocutory appeals. This is confirmed elsewhere in article 83, such as the references to ordering a new trial, appeal against sentence,

¹¹ 'Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997', UN Doc. A/AC.249/1997/L.9/Rev.1, pp. 37–38.

¹² Preparatory Committee Draft Statute, pp. 127–128. See also: Zutphen Report, pp. 136–137; 'Proposal submitted by the United States of America, Article 74 [49]. Proceedings on appeal', UN Doc. A/AC.249/1998/WG.4/DP.21; 'Preliminary draft consolidated text, Article 74 [49]. Proceedings on appeal', UN Doc. A/AC.249/1998/WG.4/CRP.9.

¹³ 'Syrian Arab Republic: proposal regarding article 82', UN Doc. A/CONF.183/C.1/WGPM/L.53; 'Israel: proposal regarding article 82', UN Doc. A/CONF.183/C.1/WGPM/L.54; 'Philippines: proposal regarding article 82', UN Doc. A/CONF.183/C.1/WGPM/L.60; 'Canada: proposal regarding article 82', UN Doc. A/CONF.183/C.1/WGPM/L.73.

¹⁴ 'Report of the Working Group on Procedural Matters', UN Doc. A/CONF.183/C.1/WGPM/L.2.

¹⁵ 'Note regarding part 8 and articles 82 and 83 contained in the transmittal letter from the Chairman of the Committee of the Whole to the Chairman of the Drafting Committee dated 8 July 1998', in UN Doc. A/CONF.183/13(Vol. III), at p. 321.

¹⁶ 'Report of the Working Group on Procedural Matters', UN Doc. A/CONF.183/C.1/WGPM/L.2.

¹⁷ Rules of Procedure and Evidence, Rule 153.

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and acquitted persons.¹⁸ However, the Rules of Procedure and Evidence establish that in an appeal of 'other decisions' pursuant to article 82, the Appeals Chamber may 'confirm, reverse or amend the decision appealed'.¹⁹ According to the Appeals Chamber, '[t]he adoption of rule 158 would not have been necessary if article 83 (2) had been intended to apply to appeals brought under article 82(1)(d) of the Statute'.²⁰ But, according to Judge Pikis, '[u]ltimately, the grounds upon which a decision on admissibility can be impugned are no different from those enumerated in article 81(1)(a) of the Statute. To these grounds one must necessarily add those affecting a fair trial that should pervade the judicial process as mandated by article 21(3) of the Statute'.²¹ Although Rule 158(1) of the Rules of Procedure and Evidence does not expressly provide for remand of a matter to the Pre-Trial or Trial Chamber, when the Appeals Chamber granted the Prosecutor's appeal from a decision denying issuance of an arrest warrant, it sent the application back to Pre-Trial Chamber I so that it could reconsider the question in light of the principles set out in the appeal decision.²²

It seems that the Appeals Chamber may only grant the appeal if it finds that 'the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error'. The language echoes article 81(1), but at the same time narrows things slightly. Whereas article 81(1)(b)(iv) authorizes appeal by or on behalf of the convicted person for any ground 'that affects the fairness or reliability of the proceedings or decision', article 83(2) makes the initial issue one of fairness alone. If the proceedings or decision are found to be unfair, this must be 'in a way that affected the reliability'. This may not be a very meaningful distinction, because where a decision is 'unreliable' a court will have little difficulty concluding it is also 'unfair'. The second nuance that article 83(2) brings to article 81(1) is the requirement that an error of fact or law or procedure have a 'material affect' on the impugned decision or sentence.

¹⁸ *Lubanga* (ICC-01/04-01/06), Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence', 13 October 2006, para. 16.

¹⁹ Rules of Procedure and Evidence, Rule 158. See: *Bemba* (ICC-01/05-01/08 OA), Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on Application for Interim Release', 16 December 2008, para. 70; *Lubanga* (ICC-01/04-01/06 (OA 6)), Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81', 14 December 2006, para. 64; *Katanga et al.* (ICC-01/04-01/07 OA 7), Judgment on the appeal of the Prosecutor against the 'Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules' of Pre-Trial Chamber I, 26 November 2008, para. 105.

²⁰ *Lubanga* (ICC-01/04-01/06), Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence' 13 October 2006, para. 18. In an earlier decision, it declined to take a position on the point: *Situation in the Democratic Republic of the Congo* (ICC-01/04), Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para. 83.

²¹ *Situation in the Democratic Republic of the Congo* (ICC-01/04), Separate and partly dissenting opinion of Judge Georgios M. Pikis, 13 July 2006, para. 23.

²² *Situation in the Democratic Republic of the Congo* (ICC-01/04), 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', 13 July 2006, para. 90.