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**ANNEX B**

THE ROME STATUTE OF  
THE INTERNATIONAL  
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A COMMENTARY

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## THE APPEAL PROCEDURE OF THE ICC

Robert Roth and Marc Henzlin\*

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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.<sup>1</sup> 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

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\* Translated by Rosemary Williams.

<sup>1</sup> Art. 26 of the Nuremberg Statute reads as follows: 'The Judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review.' The criticism is all the more relevant as most of the accused were sentenced to death and executed.

## *The Appeal Procedure of the ICC*

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,<sup>75</sup> 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.<sup>76</sup> 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

<sup>75</sup> For the determination of the procedural stage at which new evidence material has to be tested, see ICTY Ap. Ch. Judgment in *Kupreskić et al.*, *supra* note 73, paras 70–71.

<sup>76</sup> On the notion of 'miscarriage of justice' under Art. 25 of the ICTY Statute, see Karibi-Whyte, *supra* note 27, at 652.