

Public Annex B4: Electronic copy of academic authority

Appellant's submissions of the list of authorities for the oral hearing, pursuant
to the Appeals Chamber's order ICC-01/05-01/08-3579

Lee, R., S., eds., *The International Criminal Court—Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers 2001, pp. 582-585

Further debate was held on these rules during Working Group meetings at the fifth session. Their final form was adopted by consensus at the fifth session of the Preparatory Commission.²⁹ In turn, they became part of the finalized draft text of the Rules.

C. Structure of the Rules on the Appeal

The basic structure of the rules on the appeal emanated in the joint Australian-French proposal and was, with some minor changes to the order of rules and section headings, maintained in the final text. One fundamental feature of this structure is that all issues relating to appeals are contained in Chapter 8, rather than scattered in other chapters of the Rules. The primary reason for this approach was so as not to deviate from the appellate regime of the Statute by creating “new” grounds for appeal.

The rules on the appeal are contained in three sections—general provisions; rules to govern appeals against the “main” or “fundamental” decisions of the Court, namely appeals against acquittals, convictions, sentence or reparations orders; and rules to govern appeals against “other” appellable decisions of the Court. Notwithstanding the inclusion in article 82 of reparations orders as “other decisions” of the Court that may be appealed, there was a strong view that a reparations order should be classed as a “fundamental” decision, and consequently treated in a similar manner to a decision of conviction, acquittal or sentence.

For both “classes” of appeal, the rules follow the same basic order: a procedure for bringing the appeal, including time limits; a procedure for the appeal itself; a procedure for discontinuing the appeal; and a rule regarding judgement on the appeal.

When considering rules required in the Rules, delegations observed that some of the appeal provisions in the Statute explicitly refer to the fact that further elaboration is required in the Rules.³⁰ Generally speaking, delegations thought that a relatively “minimalist approach” to elaborating rules on the appeal was appropriate, in view of the coverage given to appeals in the Rome Statute.

D. General Provisions

Rule 149: Rules governing proceedings in the Appeals Chamber

Parts 5 and 6 and rules governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber.

In order to perform its functions as a court of appeal, the Appeals Chamber needs to have the same powers as the Pre-Trial and Trial Chambers, whose decisions it will review. Rule 149 (“rules governing proceedings in the Appeals Chamber”), a rule of general applicability, provides that Parts 5 and 6 of the Rome Statute—concerning

29. Report of the Working Group on Appeal and Revision, PCNICC/2000/WGRPE/L.12 (22 June 2000), and Corrigendum, PCNICC/2000/WGRPE/L.12/Corr.1 (28 June 2000).

30. Specifically, art. 81, paras. 1, 2(a), and 3 (c); and art. 82, paras. 1, 3, and 4.

the functions and powers of the Pre-Trial and Trial Chambers and the conduct of proceedings before them—and the rules governing proceedings and submission of evidence in the Pre-Trial and Trial Chambers, shall apply *mutatis mutandis* to proceedings in the Appeals Chamber.

While article 83, paragraph 1 is clear that for the purposes of article 81 proceedings the Appeals Chamber has all the powers of the Trial Chamber, it does not address the powers of the Appeals Chamber in respect of article 82 appeals. Nor does it explicitly empower the Appeals Chamber with any of the powers of the Pre-Trial Chamber, although this may be implied since, through article 64, paragraph 6(a) and article 61, paragraph 11, the Trial Chamber may exercise any function of the Pre-Trial Chamber that is “relevant and capable of application” in proceedings subsequent to the confirmation of charges.

Rule 149 clarifies these points, in addition to providing that all rules on proceedings and the submission of evidence in the two lower Chambers also apply to the Appeals Chamber. This means that the Appeals Chamber has the same powers as the Trial Chamber to hear witnesses and receive other evidence. However, this does not mean that its proceedings will necessarily be a “re-trial.” Indeed, the Court should guard against its appellate proceedings being turned into a “re-trial.” This issue is further discussed in this chapter in relation to Rule 151.

E. Rules Governing Appeals Against Convictions, Acquittals, Sentences, and Reparations Orders

1. Procedure for Bringing an Appeal

Rule 150: Appeal

1. Subject to sub-rule 2, an appeal against a decision of conviction or acquittal under article 74, a sentence under article 76 or a reparation order under article 75 may be filed not later than 30 days from the date on which the party filing the appeal is notified of the decision, the sentence or the reparation order.

2. The Appeals Chamber may extend the time limit set out in sub-rule 1, for good cause, upon the application of the party seeking to file the appeal.

3. The appeal shall be filed with the Registrar.

4. If an appeal is not filed as set out in sub-rules 1 to 3, the decision, the sentence or the reparation order of the Trial Chamber shall become final.

Section II of Chapter 8 sets out the rules governing appeals against the “main” or “fundamental” decisions of the Trial Chamber—that is, appeals against a decision of acquittal or conviction under article 74, a sentence under article 76, or an order for reparations under article 75.³¹

Rule 150 (“appeal”) sets out a simple procedure for bringing such an appeal. The appeal must be filed with the Registrar within 30 days of the date that the party

31. The term “a reparations order under article 75” also clearly embraces a Trial Chamber’s order *not* to grant reparations.

filing the appeal is notified of the decision, sentence or reparations order. This period can be extended for good cause upon the application of the party filing the appeal.

The Australian-French text, and the Coordinator's Discussion Paper arising from the second session, adopted 15 days as the time limit for filing such an appeal. However, during the fourth session many delegations favoured a longer time period of 30 days, given the kinds of cases likely to come before the Court, and the likelihood that the Trial Chamber's judgements will be lengthy and complex.

In acknowledging the need for flexibility on the question of time limits, delegations agreed that the Appeals Chamber might extend this time limit for good cause.

The Australian-French text³² and Coordinator's Discussion Paper arising from the second session³³ provided that an appeal could be brought by filing a "notice of appeal." In the fourth session some delegations observed that this could be interpreted to mean merely a "notice" or intention to file an appeal, and not the appeal itself. To avoid confusion, and to ensure that the substance of the appeal is filed during the relevant time period, "appeal" was substituted for "notice of appeal" throughout the rules.

This means that parties must file their grounds for appeal within the time limit. However, because of the likely complexity and length of judgements, the Court may develop a practice allowing parties to file further or more detailed briefs in support of those grounds at a later date.

If an appeal is not filed within the time period, or any extended period, the decision of the Trial Chamber becomes final. This is automatic and requires no further order. This is a corollary of article 81, paragraph 4, which suspends execution of the decision or sentence during the period allowed for appeal and the duration of any appeal proceedings. Having a concrete date from which a decision, sentence or order can be considered "final" is necessary in order to enforce a sentence or transfer a person to another country for imprisonment, to execute a fine or a forfeiture order, or to enforce an order for reparations.

2. Appeal Proceedings

Rule 151: Procedure for the appeal

1. Upon the filing of an appeal under rule 150, the Registrar shall transmit the trial record to the Appeals Chamber.
2. The Registrar shall notify all parties who participated in the proceedings before the Trial Chamber that an appeal has been filed.

Rule 151 ("procedure for the appeal") governs how an appeal is to proceed. Upon an appeal being filed, the trial record is transmitted to the Appeals Chamber. This would include the transcript and any evidence which forms part of the record.

32. See *supra* note 23.

33. PCNICC/1999/WGRPE/RT.7, *supra* note 24.

The Registrar is to notify “all parties who participated in the proceedings before the Trial Chamber that an appeal has been filed.”

The rule does not provide a specific reference that the other party (or possibly parties, in the case of a reparations order) are able to respond to the appeal. However, basic procedural fairness and equality of arms would give rise to this fundamental right.

In terms of a procedure for the conduct of the appeal itself, the rule provides little direction. However, article 83 already sets out some fundamental matters—including that, for the purposes of proceedings under article 81, the Appeals Chamber has all the powers of the Trial Chamber. In addition, through Rule 149, proceedings before the Appeals Chamber are to take place in accordance with Parts 5 and 6 and any rules governing proceedings and the submission of evidence before the Pre-Trial and Trial Chambers. This gives the Appeals Chamber a broad discretion as to the conduct of its own proceedings.

The manner in which the Appeals Chamber exercises this discretion will largely depend upon the view it takes as to the “nature” of an appeal before the Court. Is the appeal intended to be a “hearing *de novo*” or is it more in the nature of a corrective procedure? The Statute is not entirely clear on this point, although the specified grounds for appeal would suggest it is more in the nature of the latter.

The ICTY’s jurisprudence indicates that their appeal proceedings are more in the nature of a corrective procedure and that the appellant bears the onus to “identify and persuade the Appeals Chamber of an error in the proceedings below which he or she is entitled to have corrected on appeal, and that the appellate process is not an opportunity simply to relitigate matters that have already been decided by the Trial Chamber or to advance arguments or present evidence that the appellant failed to advance before the Trial Chamber.”³⁴

If the ICC takes a similar approach, then on what basis, if any, could the Appeals Chamber hear witnesses and take evidence during the course of the appeal proceedings? There is no specific rule, such as Rule 115 of the ICTY Rules, which would allow additional evidence that was not available at trial to be admitted at the appeal stage. Theoretically, article 83, paragraph 2, which envisages that for article 81 appeals the Appeals Chamber may remand a factual issue back to the original Trial Chamber to determine or “may itself call evidence to determine the issue,” in combination with

34. Staker, *supra* note 1, at 1023. See Tadić, Appeals Chamber’s Decision on appellant’s motion for the extension of the time-limit and admission of additional evidence, 15 October 1998, paras. 41–42: “so far as the Statute is concerned, an appeal does not involve a trial *de novo*. . . . The corrective nature of that [appeal] procedure alone suggests that there is some limitation to any evidentiary material sought to be presented to the Appeals Chamber; otherwise, the unrestricted admission of such material would amount to a fresh trial.” See also Aleksovski, Decision on Prosecutor’s appeal on admissibility of evidence, 16 February 1999, para. 17: “the decision was well within the exercise of the Trial Chamber’s discretion and should not be disturbed on appeal unless that discretion has been shown to have miscarried.”