

Chapter 12: Appeals and Extraordinary Legal Remedy

General Commentary

Chapter 12 deals with both appeals and an extraordinary legal remedy. For a discussion of appeals, reference should be made to the general commentary to Chapter 12, Part 1. For a discussion of extraordinary legal remedy, reference should be made to the general commentary to Chapter 12, Part 2.

Part 1: Appeals against Acquittal or Conviction or against a Penalty

General Commentary

The right to an appeal is recognized as a human right and is almost universally implemented in a domestic context. The right to an appeal is recognized in Article 14(5) of the International Covenant on Civil and Political Rights, Article 8(2)(h) of the American Convention on Human Rights, Article 7(1)(a) of the African Charter on Human and Peoples' Rights, and Article 2 of Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to an appeal, according to the United Nations Human Rights Committee, "provides that everyone convicted of a crime shall have the right to have his conviction and sentence be reviewed by a higher tribunal according to law" (General Comment no. 13, paragraph 17). In addition, the right to a fair and public hearing must be observed throughout the appeals proceedings (General Comment no. 13, paragraph 17).

The way in which the right to appeal is implemented varies greatly from state to state. In some states, only a convicted person may make an appeal. The preclusion of a prosecutorial appeal is justified by some on the basis that a prosecutorial appeal violates the principle of *ne bis in idem*, or double jeopardy. Many other experts, however, believe that a prosecutorial appeal is not a violation of the double jeopardy principle because the appeal is the continuation of the same proceedings rather than a new proceeding (in which case, the principle of double jeopardy may preclude the redetermination of the criminal responsibility of the person). Conversely, in many states, a prosecutorial appeal is permissible. In some states that allow a prosecutorial appeal, the prosecutor may appeal only to the detriment of an accused or convicted person (e.g., to appeal against a finding of "not criminally responsible" by the lower court or to appeal

the leniency of a sentence). However, in other legal systems, the prosecutor may appeal either to the detriment or to the benefit of the accused or convicted person.

It is not only who may appeal that varies between states but also (a) what may be appealed, (b) how the appeal may be filed and heard, and (c) what powers the appeals court has to amend or revise the verdict or sentence of the lower court. Some jurisdictions allow appeals both before and during the trial—called *interlocutory appeals*—under which judicial determinations may be appealed to a higher court. The issues that can be appealed by way of interlocutory appeal vary immensely from state to state. With regard to appeals that occur at the conclusion of the trial, in most legal systems, an appeal can be made on the basis of alleged errors of law and errors of fact made by the trial court in rendering its verdict. Whether the sentence or penalty handed down by the lower court can be appealed differs from state to state. Some states allow the sentence to be appealed and, as will be discussed later, allow the appeals court to revise the sentence. Another sort of appeal that is permissible in some legal systems is an appeal on the basis of a procedural irregularity. The laws of a particular state may permit any variation of these forms of appeal.

As for the question of how the appeal is filed and heard, in some jurisdictions, the appellant requires the permission of the lower court to make an appeal. This is known as *leave to appeal*, and the potential appellant will not be able to have his or her appeal heard unless leave to appeal is granted. In other jurisdictions, there is no requirement to obtain leave to appeal and the appeal can be made directly to the appellate court. Once the appeal is before the appellate court, the court is responsible for determining the substance of the appeal. How the appeal is determined will depend on the nature of the appeal and sometimes which court the appeal derives from. In some states where interlocutory appeals are permissible, the appeal may be done on the basis of a *paper review*, meaning a review of the issues based on the case file and relevant materials only. This is not universal practice, however, and many states require that interlocutory appeals be heard in oral proceedings before the appeals court. Other forms of appeal aside from interlocutory appeal are commonly heard in oral proceedings with the parties present. Some legal systems provide for a trial *de novo*, which means that the appeals court assesses all the evidence assessed by the lower court. In other legal systems, the appeals court will review only the relevant points of law or fact or issues relating to the sentence that are in dispute. Once the court has heard the appeal, the next question that arises is what are the powers of the appeals court? Can it amend or revise the judgment of the lower court? Or does it simply have the power of *cassation*, which means to either set aside or confirm the judgment of the lower court? Practice regarding the powers of the appeals court varies significantly from state to state.

Because of the immense diversity in the law and practice surrounding appeals, the drafters of the M CCP had a wide range of options to choose from. In drafting the appeals section of the M CCP, the drafters carried out extensive research to determine the options available, which were then discussed at great length. The range of options provided for in the M CCP are quite broad and are significantly influenced by both state practice and the law and practice of the international tribunals (the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda) and the International Criminal Court.

In summary, the MCCC provides that both the prosecutor and the convicted person may make an appeal on a number of different grounds both pretrial and post trial. Pretrial and during trial, the prosecutor or the suspect or the accused may make an interlocutory appeal under Article 295. Once the trial has been completed and the verdict and penalties have been rendered, the prosecutor and the convicted person may appeal on the following grounds: (a) on an error of law or error of fact, and (b) on a penalty imposed by the lower court. With regard to interlocutory appeals, the appeal is a paper appeal only, with the judges determining the appeal without an oral hearing. All the other appeals are conducted by way of oral proceedings with all parties present. Under the MCCC, the appeals court may hear new evidence but must not conduct a trial *de novo*, or from the beginning (and therefore hear all the evidence once again). The appeals court, upon hearing an appeal (other than an interlocutory appeal), has the power to confirm, overrule (and thus reverse), or modify the judgment of the trial court. The appeals court is also empowered to require that a new trial be conducted by a newly constituted trial court.

It is important to note that the existence of a written judgment of the trial court, as required under Article 269, and transcripts or records of the trial, as required under Article 37 and Article 217, are vital to the appeals process.

Reference should be made to Chapter 2, Part 3 on the constitution and powers of the appeals court.

Article 274: Grounds of Appeal

1. The prosecutor, the convicted person, or the prosecutor on behalf of the convicted person may appeal the decision of the trial court on grounds of:
 - (a) an error of fact; or
 - (b) an error of law; or
 - (c) the penalty or order imposed by the trial court.
2. Where the competent panel of the appeals court, in considering an appeal under Paragraph 1(a) or 1(b), considers that grounds exist to reduce the penalty or order under Paragraph 1(c), the court may invite the prosecutor or the convicted person to submit grounds under Paragraph 1(c).
3. Where the competent panel of the appeals court, in considering an appeal under Paragraph 1(c), considers that grounds exist upon which the conviction may be set aside, wholly or in part under Paragraph 1(a) or 1(b), it may invite the prosecutor and the convicted person to submit grounds under Paragraph 1(a) or 1(b).

Commentary

As discussed in the general commentary to Chapter 12, under the MCCC, both the prosecutor and the convicted person may appeal on the basis of an error of fact or law without leave to appeal and also appeal on the basis of the penalty or order imposed upon the convicted person. The meaning of error of law is dealt with in greater detail in Article 275 and Article 276 (which deals with an error of law as it relates to an error of the criminal procedure law rather than substantive criminal law).

Article 275: Error of Law

1. An appeal on an error of law may refer to violations of both substantive and procedural law.
2. An error of substantive law exists where the provisions of the MCC have been wrongly applied, including a violation of the determination of penalties under Section 12 of the General Part of the MCC.
3. An error of procedural law exists when a substantial violation of the MCCC exists, as provided for in Article 276.

Article 276: Substantial Violation of the MCCC

1. A substantial violation of the MCCC exists where:
 - (a) the trial court was not properly constituted in the manner required in Article 6 or an appeals court is not properly constituted in the manner required in Article 12;
 - (b) the trial court did not have jurisdiction under Articles 4, 5, or 6 of the MCC to hear the case;
 - (c) a judge who should have been disqualified under Article 19 participated in the proceedings;
 - (d) a judge, whose presence was required at trial under Article 215, was not present at all sessions;

- (e) a hearing or trial was conducted otherwise than in public, in violation of Article 62;
 - (f) a suspect or accused had no legal assistance or interpreter as required by Articles 59, 67, and 68;
 - (g) a party that was obliged to be present during a hearing or at trial was excluded from the proceedings in violation of the MCCP;
 - (h) the judgment was based on evidence that should have been excluded in accordance with Article 230;
 - (i) the court based its judgment, in violation of Article 263(7), solely, or in the absence of corroborating evidence, to a decisive extent upon the evidence of a sole anonymous witness, a sole cooperative witness, a child who testified without making a solemn declaration, or a statement or confession given to the police or the prosecutor;
 - (j) the judgment of the trial court was not reasoned as required by Article 269; or
 - (k) the judgment of the trial court determined matters beyond the scope of the indictment.
2. A violation of the procedural law also exists where, in the course of the criminal proceedings, the court, the prosecutor, or the police:
- (a) omitted to apply a provision of the MCCP or applied it incorrectly; or
 - (b) violated the rights of the suspect or the accused and this violation influenced, or might have influenced, the rendering of a lawful or proper judgment.

Commentary

A substantial violation of the MCCP is an error of law under Article 275. Two types of substantial violations are provided for in the MCCP. The first, contained in Paragraph 1, is a substantial violation on the basis of absolute grounds. This means that in any case where the appeals court finds the grounds set out in Paragraph 1(a)–(k) exist, the court must find a substantial violation has occurred without further inquiry. The second type of substantial violation, contained in Paragraph 2, is a violation on the basis of relative grounds. No particular violations of the MCCP are laid out, which means that an applicant could claim a violation of any aspect of it. However, in order to find a substantial violation under Paragraph 2, the particular violation of the MCCP alleged must have affected the legality of the judgment; a relationship must exist between the violation and the judgment, in that the violation may have influenced the rendering of a lawful and proper judgment. The type of appeal under Article 276 is not found in all states, and thus may not be familiar to some. Another element that might be equally

unfamiliar is the obligation of the appeals court to look into a substantial violation of the MCCP, even if neither of the parties has raised this issue (see Article 282), and the obligation to order a full retrial where a substantial violation is found. The drafters of the MCCP were of the view that such an obligation is an important measure to protect the rights of the accused person and to protect the integrity and fairness of the proceedings. The grounds chosen under Paragraph 1, a breach of which automatically leads to a finding of a substantial violation, were arrived at after comparative research on legislation on this sort of appeal in many countries and research on what grounds were typically found in this legislation. All the grounds chosen, in the view of the drafters of the MCCP, represent major violations of the MCCP such that their existence significantly jeopardizes the integrity and fairness of the proceedings or the rights of the accused. For all other violations of the MCCP, according to Paragraph 2, the court must assess whether the violation negatively impacted, or may have negatively impacted, the judgment.

Paragraph 1(b): Where the court does not have jurisdiction to hear the case, either because it lacks territorial, extraterritorial, or universal jurisdiction over the criminal offense or because it lacks personal jurisdiction over the suspect or the accused, the case cannot proceed. Where the appeals court finds that the trial court had no jurisdiction to proceed in the case, the appeals court must dismiss the case. Unlike in other instances of substantial violations of the MCCP, no retrial can take place because the court does not have jurisdiction to hear the case.

Article 277: Procedure upon Filing an Appeal Statement

1. The prosecutor or the defense must make an appeal no later than thirty working days from the receipt of the written judgment of the trial court.
2. Where the prosecutor and the defense have been invited to submit an appeal pursuant to Article 274(2) or 274(3), the relevant party must make an appeal no later than thirty working days after the competent panel of the appeals court has invited it to submit an appeal.
3. In order to file an appeal, the prosecutor or the defense must file a written appeal statement with the registry of the competent trial court.
4. The appeal statement must include the following:
 - (a) the name of the prosecutor and the defense;
 - (b) the name of the competent trial court that issued the appealed judgment;
 - (c) the specific grounds of the appeal;

- (d) a summary of the case;
 - (e) the evidence sought to be presented at the hearing of the appeal, if any;
and
 - (f) the remedy sought.
5. A copy of the appealed judgment must also be filed with the registry of the competent appeals court at the same time the appeal statement is filed.
 6. Where an appeal is filed by a convicted person acting without the assistance of counsel, the appeal statement must not be rejected solely on the basis that it does not comply with the requirements of Paragraph 4.
 7. Where no written appeal statement is filed by the prosecutor or the defense within thirty days of receipt of the written judgment of the trial court, both parties are deemed to have waived their right to appeal and the judgment of the trial court is final. Where a stay of execution of the applicable penalties or orders has been ordered under Article 271, the stay of execution must be cancelled and the applicable penalties and orders must be executed immediately.

Commentary

Paragraph 6: The drafters of the MCC included this provision to ensure that an appeal made by the defense will not be automatically rejected by the court on the basis that it does not fully comply with the procedural and technical requirements of Article 277. Where the defense has submitted an appeal without the assistance of counsel (which may be the case in a post-conflict state experiencing a shortage of lawyers), the court must accept correspondence from the defense that, while not presented in the form of an appeal statement, nonetheless resembles it in substance.

Article 278: Notification of the Respondent of an Appeal, Response to the Appeal Statement, and Cross-Appeal

1. After a written appeal statement is filed with the registry of the competent trial court by the appellant, the registry must notify the respondent of the appeal in accordance with Article 27. A copy of the appeal statement must also be delivered to the respondent.

2. The respondent has thirty working days from receipt of the notification of the appeal statement to file a response to the appeal with the registry of the trial court.
3. The response to the appeal statement may include a cross-appeal and must be filed with the registry of the competent trial court.
4. The cross-appeal, if any, must include the information set out in Article 277(4).
5. If the response includes a cross-appeal, the registry must notify the appellant about the cross-appeal in accordance with Article 27. A copy of the cross-appeal must also be delivered to the appellant.
6. The appellant has fifteen working days to file a response to the cross-appeal.

Commentary

The *appellant* is the party that files the appeal statement with the registry of the appeals court; the *respondent* is the other party in the proceedings. If the defense appeals the judgment of the trial court, the prosecutor is the respondent, and vice versa. A *cross-appeal* is the name given to an appeal made by the respondent.

Article 279: Transmission of the Trial Records to the Appeals Court and the Parties

1. After receipt of the response to the appeal and cross-appeal, if any, or after the periods allowed for such responses have expired, the registry of the trial court must forward the records of the trial and the case file to the registry of the appeals court.
2. The registry must make copies of the records of the trial and distribute the records to the prosecutor and the convicted person.

Commentary

As discussed in the general commentary to this part, it is imperative that both parties have access to the trial records in order to participate in the appeal proceedings.

Article 280: Discontinuation of an Appeal

1. The prosecutor and the defense may at any stage discontinue an appeal by filing a written notice of discontinuation of the appeal.
2. The prosecutor may withdraw an appeal statement by presenting a written statement of discontinuation of the appeal to the appeals court.
3. The defense must not discontinue an appeal without the written consent of the convicted person. In cases where a convicted person was tried jointly with another accused under Article 193, the discontinuation of the appeal of one appellant does not affect other appellants.
4. The registrar must notify the other party of the discontinuation of the appeal in accordance with Article 27.

Article 281: Competence Regarding Detention of the Convicted Person

Upon receipt of the case file and records of the trial from the trial court, the competent panel of the appeals court is responsible for all matters concerning the detention of the convicted person until the judgment on appeal is pronounced.

Article 282: Appeal Hearing

1. Upon receipt of the court file and trial record, the competent panel of the appeals court must set a date and time for a hearing of the appeal.
2. The registry must notify the prosecutor and the defense of the date and time of the hearing in accordance with Article 27.
3. During any appeal hearing, the court must, of its own motion, inquire into whether there were any substantial violations of the MCCP during the trial in accordance with Article 276(1).

4. If there is no complaint by either side in relation to evidence presented during the trial, the appeal may proceed on the record of evidence produced before the trial court.
5. The prosecutor or the defense may file a motion to introduce new evidence during the hearing of the appeal.
6. The appeals court must permit the introduction of the new evidence, if the evidence was not known to the party seeking to introduce it at the time of the trial and could not have been discovered through the exercise of due diligence.
7. The rules of procedure and evidence that govern proceedings of the trial court apply, with the necessary modifications, to a hearing of an appeal in the appeals court.
8. If witness testimony is allowed by the appeals court, witnesses offered by the appellant must be examined first, followed by the examination of witnesses offered by the respondent.
9. Witnesses must be questioned first by the party calling the witness, followed by the other party, and then by the appeals court.
10. The hearing of an appeal must be recorded in accordance with Article 37.

Commentary

The MCCP requires that an appeal on the basis of a conviction, acquittal, or a penalty or order requires an oral hearing held in public. This is in keeping with the requirement that an appeal respect the right to a public hearing, as discussed in the general commentary to Chapter 12, Part 1. The purpose of the oral hearing of the appeal is not to revisit all the issues that were discussed at trial but rather to adjudicate the issues of contention arising out of the grounds listed in Article 274. Unlike in some legal systems, the appeals court is not conducting a fresh trial, nor may the appeals court, as is the case in some legal systems, enquire into other aspects of the trial court, save with the exception of its consideration of substantial violations of the MCCP under Paragraph 3. On the basis of judicial economy, the drafters decided not to include in the MCCP an appeal that was akin to a full retrial or an appeal in which any matters relating to the trial may be raised by either party or the court.

A novel feature of the oral hearing in the MCCP, which is a feature of some legal systems and of the Rules of Procedure and Evidence for the International Criminal Court, is the permissibility of fresh evidence before the appeals court where the evidence was not known at the time of the trial (and could not have been found with the exercise of due diligence). The appeals court would thus work from the record of the trial and the new evidence (which may include witness testimony) in determining the validity of the appeal.

Article 283: Deliberations of the Competent Panel of the Appeals Court

1. After the hearing of an appeal, the panel of judges must deliberate in private.
2. The judgment must be decided on the basis of the appeal file. The appeal file consists of the record of the trial and the record of the appeal.
3. The judgment of the competent panel of the appeals court must be rendered by a majority vote.
4. The competent panel of the appeals court may, in its judgment, confirm, reverse, or amend the judgment of the trial court.
5. Where the appeals court finds that there was an error of law or fact as set out in Articles 274–276, it may:
 - (a) reverse or amend the judgment, including the penalty or order; or
 - (b) order a new trial before a different judge or panel of judges of the competent trial court.
6. Where the appeals court finds that a substantial violation exists, the court must order a retrial under Paragraph 5(b), except in the case of a substantial violation under Article 276(b).
7. Where an appeal in favor of the convicted person has been filed, the judgment may not be modified to the detriment of the accused.
8. If the competent panel of the appeals court, in an appeal against a penalty or order under Article 274(1)(c), finds that the penalty or order is disproportionate to the seriousness of the criminal offense, it may vary the penalty or order in accordance with the procedure set out in Sections 12–14 of the General Part of the MCC.
9. If a convicted person is successful in the appeal and the appeals court finds that the reasons for its decision in favor of the accused, excluding reasons of a purely personal nature, are also to the advantage of a co-accused who has not filed an appeal or has not filed an appeal along the same lines, the court must proceed on its own motion as if such appeal were also filed by the co-accused.

Commentary

There are several levels of appeals in some legal systems. A panel of an appeals court may hear an appeal initially. An appeal from a panel may be heard by the appeals court sitting *en banc* (meaning with all its judges). In other systems, an appeal may go to a supreme court or to a constitutional court. Under the M CCP, in light of the simple court structure developed in Chapter 2, there is only one level of appeal. Where a post-conflict state is reforming the provisions of the applicable law on appeals, the state must consider the court system in place and may consider providing for other levels of appeal beyond the sort of one-tiered panel hearing provided for in the M CCP.

Once the appeals court has held a hearing under Article 282, it must begin its private deliberations on the substance of the appeal. A number of options are available to the appeals court depending on the type of appeal lodged. If the appeal relates to an error of law or fact, the appeals court may confirm the judgment (and therefore the original judgment stands and must be executed under Article 271), reverse the judgment, amend the judgment, or refer the case back to a newly composed trial court for retrial. Where the appeal relates to the severity of any penalty or order imposed by the trial court, the court may simply confirm the penalty or order; in this case, the penalty or order must be executed immediately. Where the appeals court finds that the penalty or order imposed was disproportionate to the seriousness of the criminal offense, it must modify the original trial court judgment by changing the penalty or order.

Paragraph 6: Because a substantial violation of the M CCP affects the legality and integrity of a judgment, Paragraph 6 provides that the judgment is automatically nullified and that a retrial must be ordered. Where the substantial violation is based on a lack of jurisdiction, no retrial can be ordered because the trial court did not have jurisdiction over the accused in the first place. Reference should be made to the commentary to Article 276(1)(b) for further discussion.

Paragraph 7: Where the appeal is filed by the convicted person and where the appeal is not successful, Paragraph 7 requires that the court not augment the penalty or order imposed by the trial court so as to make it more severe, nor alter the legal qualification of the criminal offense to the detriment of the convicted person. The latter restriction means that, for example, a conviction for theft (which is the “lesser-included offense” of robbery) may not subsequently be altered by the appeals court to become a conviction for robbery. This principle—which is known as the principle of “prohibition of *reformatio in peius*”—is standard in many states around the world.

Paragraph 9: Paragraph 9 concerns a scenario where there were two or more co-accused in a particular case. When one of the co-accused files an appeal and wins the appeal, another co-accused who has not filed an appeal (or does not file an appeal on the same grounds) may benefit from the appeal filed by his or her co-accused. The principle is known as *beneficium cohesionis* in many states, and it requires that the court act as if the co-accused who has not filed an appeal (or who has filed on different grounds to his or her co-accused) actually filed the appeal. The only exception to this rule is where the co-accused who filed the appeal was successful on grounds personal to him or her that do not apply to a co-accused person.

Article 284: Pronouncement of the Judgment on Appeal

1. The judge or panel of judges must set a date and time for the pronouncement of the judgment of the appeal.
2. The prosecutor and defense must be notified of the date and time of the hearing in accordance with Article 27.
3. The judgment must be pronounced in public, except where the interests of a juvenile require otherwise, as provided for in Article 62(3).
4. The judgment must be pronounced in the presence of the convicted person, subject to Article 214.
5. The presiding judge must declare whether the competent panel of the appeals court will confirm, overrule, or modify the judgment of the trial court.
6. Where the judgment of the trial court is confirmed, the presiding judge must order that the penalties and orders of the trial court be executed immediately.
7. Where the judgment is reversed or modified, the presiding judge must declare whether it orders that:
 - (a) the original judgment, penalty, or order is reversed or modified; or
 - (b) a newly constituted panel of the competent trial court must hear the case from the beginning.
8. Where the judgment, penalty, or order of the trial court is reversed or modified, the presiding judge of the competent panel of the appeals court must declare how the judgment, penalty, or order of the trial court will be altered or amended.
9. Where a judgment is confirmed or modified and where the convicted person is required to serve a penalty of imprisonment, any time spent in detention before the trial and between the end of the trial and the pronouncement of the judgment on appeal must be deducted from the total term of imprisonment.
10. Where a penalty or order is pronounced by the appeals court, the penalty or order must be executed immediately.

Commentary

Reference should be made to Article 62 on public trials, regarding the exclusion of the public from the delivery of the judgment, and to Article 215, regarding the exclusion of the convicted person from the delivery of the judgment.

Article 285: Preparation and Release of a Written Appeal Judgment

1. A written and reasoned judgment must be prepared by the competent panel of the appeals court.
2. The written judgment must contain, at a minimum, the following elements:
 - (a) the name of the appellant and the respondent in the case;
 - (b) the name of the appeals court, the judges on the competent panel of the appeals court, the prosecutor, and the defense;
 - (c) the date of the judgment;
 - (d) a decision on each of the grounds of appeal raised by the appellant;
 - (e) a decision on each of the grounds raised by the respondent in cross-appeal;
 - (f) an order to confirm, reverse, or modify the original judgment, penalty, or order of the competent trial court;
 - (g) in the case of a confirmation of the original judgment, penalty, or order, an order that the original penalty or order must be executed immediately;
 - (h) in the case of a reversal or modification of the original judgment, penalty, or order, an order on how the judgment, penalty, or order must be amended or altered or an order that the case must be heard by a newly constituted panel of the competent trial court; and
 - (i) the signature of the judge, or of all the judges of a panel of judges.
3. Separate or dissenting opinions may be appended to the main judgment.
4. The competent panel of the appeals court may release its written judgment at the time the judgment is pronounced under Article 284.
5. The written judgment must be released within a maximum of thirty working days from the date on which the judgment of the competent panel of the appeals court was pronounced under Article 284.

6. The prosecutor and the defense must be served with a copy of the written judgment in accordance with Article 27.
7. The judgment must be entered into the appeal file.

Commentary

Paragraph 3: In contrast to the judgment of the trial court, separate or dissenting opinions may be drafted by individual judges and published with the main appeals court judgment.

Part 2: Extraordinary Legal Remedy to Reopen Criminal Proceedings Terminated by a Final Judgment

General Commentary

An extraordinary legal remedy differs from an appeal. The difference relates to whether or not the judgment that the appeals court is reviewing is final or not. An appeal under Chapter 12, Part 1 involves the appeals court examining a judgment that is not yet final (under Article 266 the judgment of the trial court is not final until after the time limit for both parties filing an appeal has passed and neither have filed an appeal). An extraordinary legal remedy, on the other hand, involves the reopening of final proceedings, whether those proceedings became final after trial (where no appeal was filed by the parties) or after appeal. As is apparent from the name of this remedy—an extraordinary legal remedy—this sort of reopening of a final judgment occurs only rarely. Even more rare is the reopening of the final judgment by a person other than the accused (as provided for in Article 288[2][c]).

Article 286: General Provision on Reopening of Criminal Proceedings

1. Criminal proceedings terminated by a final judgment may be reopened only through the extraordinary legal remedy set out in Part 2.
2. An application for reopening of criminal proceedings must not stay the execution of a final judgment. The appeals court may, however, in determination of an extraordinary legal remedy and pending its final decision, order an interruption of the execution of a final judgment.
3. Criminal proceedings terminated by a final judgment may be reopened to the detriment of the accused person, where:
 - (a) it is discovered that decisive evidence, taken into account at trial and upon which the judgment or penalty was based, was false, forged, or falsified; and
 - (b) the false, forged, or falsified evidence was the result of a criminal offense committed by the accused person or his or her agent against a witness, an expert witness, an interpreter, a prosecutor, a police officer involved in the investigation, a judge, or someone close to such persons.

4. Criminal proceedings terminated by a final judgment may be reopened to the detriment of the accused person within five years of the time the final judgment was rendered.

Commentary

Paragraph 3: The general rule under the MCCP is that an extraordinary legal remedy to reopen proceedings should be allowed only to benefit the accused person. This prohibition is based on the principle of “prohibition of *reformatio in peius*” discussed in the commentary to Article 283(7). The accused person or the accused person’s representative (e.g., if the accused is deceased) will normally bring such proceedings, although the prosecutor could also petition the court to reopen the proceedings in general if he or she were acting for the benefit of the accused person. The only situation where an application may be made to reopen a final judgment to the detriment of the accused is provided for in Paragraph 3.

Article 287: Grounds for Reopening of Criminal Proceedings

1. Criminal proceedings that have been terminated by a final judgment may be reopened on the grounds that:
 - (a) new evidence has been discovered that:
 - (i) was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making the application; and
 - (ii) is sufficiently important that had it been proved at trial, the trial would have likely resulted in a different outcome; or
 - (b) it has been discovered that decisive evidence, taken into account at trial and upon which the judgment or penalty depends, was false, forged, or falsified; or
 - (c) new facts were discovered that prove that a substantial violation of the MCCP under Article 276(1) exists.
2. An application for the reopening of criminal proceedings may be brought only where the new fact was not known to the party bringing the appeal at the time of the proceedings and that fact could not have been discovered through the exercise of due diligence.

Article 288: Procedure on Filing an Application to Reopen Criminal Proceedings

1. An application to reopen criminal proceedings must be in writing and must be filed with the registry of the competent appeals court.
2. An application to reopen criminal proceedings may be filed:
 - (a) by the prosecutor acting for the benefit of a convicted person or to the detriment of the convicted person under Article 286(3);
 - (b) by a convicted person; or
 - (c) where a convicted person has died, by his or her spouse, children, parents, or any person alive at the time of the convicted person's death who was given express written instructions from the convicted person to bring such a claim.
3. The application to reopen criminal proceedings must set out the grounds on which the reopening of proceedings is sought.
4. The application to reopen criminal proceedings must, as much as possible, be accompanied by supporting materials.

Article 289: Initial Determination of an Application to Reopen Criminal Proceedings

1. A panel of the appeals court must be assigned to make an initial determination of whether the application to reopen criminal proceedings is of merit. The determination must be made on the basis of the written application.
2. The panel of the appeals court considering the application must deliver a written and reasoned decision on whether the application is of merit or not.
3. The panel of the appeals court must reject the application if the majority of the panel considers that the application is unfounded.

4. If the competent panel of the appeals court determines that the application is of merit, it may, as appropriate, order that:
 - (a) the competent judge or panel of judges of the trial court reconvene to determine whether the judgment or penalty must be revised;
 - (b) a new judge or panel of judges of the competent trial court be convened to determine whether the judgment or penalty must be revised; or
 - (c) the competent panel of the appeals court retain jurisdiction over the matter with a view to determining whether the judgment or penalty must be revised.
5. The written determination of the application to reopen criminal proceedings must be served upon the convicted person and the prosecutor in accordance with Article 27.

Commentary

The first stage in dealing with an application to reopen criminal proceedings is for the competent panel of the appeals court to review the application to determine if it raises sufficient issues to merit holding an oral proceeding. The decision on whether the application is of merit must be in writing. If the application is rejected at this initial stage, no further steps need to be taken. If the application is found to be of merit, the written decision on the application must specify the next steps in the appeals process. The appeals court has three options: it can order the reconvening of the original trial court to rule on the application to reopen criminal proceedings; it can convene a different trial court; or it can determine the matter itself. In either case, under Article 290 (relating to the determination of the application by a trial court) and Article 291 (relating to the determination of the application by the appeals court), a hearing must be convened.

Article 290: Determination of an Application to Reopen Criminal Proceedings by a Trial Court

1. A date and time for the hearing on the application to reopen criminal proceedings must be set by the competent panel of judges of the trial court.
2. The registry must notify the prosecutor and the defense of the date and time of the hearing in accordance with Article 27.

3. At the hearing, the competent judge or panel of judges must rule upon the application to reopen criminal proceedings on the basis of the grounds set out in Article 287.
4. The trial court must permit the introduction of the new evidence, if the evidence was not known to the party seeking to introduce it at the time of the trial and the evidence could not have been discovered through the exercise of due diligence.
5. The rules of procedure and evidence that govern the proceedings of the trial court apply, with the necessary modifications, to a hearing of an application to reopen criminal proceedings.
6. If witness testimony is ordered by the trial court, witnesses offered by the applicant must be examined first, followed by the examination of witnesses offered by the respondent.
7. Witnesses must be questioned first by the party calling the witness, followed by the other party, and then by the trial court.
8. The hearing must be recorded in accordance with Article 37.

Article 291: Determination of an Application to Reopen Criminal Proceedings by the Appeals Court

1. Where the competent panel of the appeals court retains jurisdiction over the application to reopen criminal proceedings, it must set a date and time for a hearing.
2. The registry must notify the prosecutor and the defense of the date and time of the hearing in accordance with Article 27.
3. At the hearing, the panel of judges must rule upon the application to reopen criminal proceedings on the basis of the grounds set out in Article 287.
4. The rules governing the hearing before the competent panel of the appeals court are the same as those governing the hearing before the trial court as specified in Article 290(3)–(8).

Article 292: Deliberations of the Competent Panel of the Appeals Court or the Trial Court

1. After the hearing of the application under Article 290 or Article 291, the panel of judges must deliberate in private.
2. The judgment of the competent panel of the appeals court or the trial court must be rendered by a majority vote.
3. The competent panel of the trial court or the appeals court may, in its judgment, confirm, reverse, or amend the judgment of the trial court.
4. Where the application is submitted by the convicted person, the judgment may not be modified to the detriment of the convicted person.

Article 293: Pronouncement of the Judgment

1. The competent panel of judges of the trial court or the appeals court must set a date and time for the pronouncement of the judgment.
2. The prosecutor and the defense must be notified of the date and time of the hearing in accordance with Article 27.
3. The judgment must be pronounced in public, except where the interests of a child require otherwise as provided for in Article 62(3).
4. The judgment must be pronounced in the presence of the convicted person, subject to Article 214.
5. The presiding judge must declare whether the competent panel of the appeals court will confirm, overrule, or modify the judgment of the trial court.
6. Where the judgment is reversed or modified, the presiding judge must declare how the original judgment or penalty will be reversed or modified.
7. Where the judgment or penalty of the trial court is reversed or modified, the presiding judge of the competent panel of the trial court or appeals court must declare how the judgment or penalty of the original trial court will be altered or amended.

Commentary

Reference should be made to Article 62 on public trials, regarding the exclusion of the public from the delivery of the judgment, and to Article 214, regarding the exclusion of the convicted person from the delivery of the judgment.

Article 294: Preparation and Release of a Written Judgment

1. A written and reasoned judgment must be prepared by the competent panel of the trial court or appeals court.
2. The written judgment must contain, at a minimum, the following elements:
 - (a) the name of the applicant in the case;
 - (b) the name of the appeals court or the trial court, the judges on the competent panel of the appeals court or the trial court, the prosecutor, and the defense;
 - (c) the date of the judgment;
 - (d) a decision on the issues raised by the applicant in his or her application to reopen the proceedings;
 - (e) an order to confirm, reverse, or modify the original judgment or penalty of the competent trial court;
 - (f) in the case of a confirmation of the original judgment or penalty, an order that the original penalty be executed immediately;
 - (g) in the case of a reversal or modification of the original judgment or penalty, an order on how the judgment or penalty must be amended or altered; and
 - (h) the signature of the members of the panel of judges of the trial court or the appeals court.
3. Separate or dissenting opinions or the application to reopen the criminal proceedings may be appended to the main judgment.
4. The competent panel of the trial court or the appeals court may release its written judgment at the time the judgment is pronounced under Article 293.
5. The written judgment must be released within a maximum of thirty working days from the date on which the judgment of the competent panel of the trial court or appeals court was pronounced under Article 293.

6. The prosecutor and the defense must be served with a copy of the written judgment in accordance with Article 27.
7. The judgment must be entered into the appeal file.

Commentary

Paragraph 3: In contrast to the judgment of the trial court, separate or dissenting opinions may be drafted by individual judges and published with the main appeals court judgment.

Part 3: Interlocutory Appeals

General Commentary

An *interlocutory appeal* is an appeal that is heard before the trial court has delivered its verdict.

Article 295: Interlocutory Appeals

An interlocutory appeal may be filed against the following decisions or orders of the court:

- (a) an order that a person pay a fine for misconduct before the court under Article 40;
- (b) an order that a person pay a fine for noncompliance with a court order under Article 41;
- (c) the seizure of a person's property in the course of a criminal investigation;
- (d) an order for noncompliance with an order of the prosecutor for the expedited preservation of computer data and telecommunications traffic data under Article 128(6);
- (e) an order for noncompliance with an order of the prosecutor to identify a subscriber, owner, or user of a telecommunications system or point of access to a computer system under Article 129(6);
- (f) an order for the temporary seizure of proceeds of crime and property, equipment, or other instrumentalities used in or destined for use in a criminal offense under Article 133;
- (g) an order for confiscation of property, equipment, or other instrumentalities used in or destined for use in a criminal offense under Article 298, where the applicant is a person other than an accused person;
- (h) an order for confiscation of proceeds of crime or of property of corresponding value under Article 299;
- (i) an order for protective measures under Article 150 or Article 151, or an order for anonymity under Article 159;
- (j) a decision on detention, continued detention, bail, or restrictive measures other than detention under Chapter 9, Part 3;
- (k) a decision on a preliminary motion pursuant to Article 212;

- (l) a decision on the exclusion of evidence under Article 230; or
- (m) a decision on extradition under Article 315.

Commentary

After agreeing on the fact that the MCCP should provide an interlocutory appeal mechanism, the drafters of the MCCP discussed what matters could be appealed to the appeals court. The drafters were concerned that creating too many grounds for interlocutory appeal would overburden an already overworked and under-resourced post-conflict criminal justice system and would work against the principle of judicial economy. In order to draft the provisions on interlocutory appeals, research was conducted on the types of interlocutory appeals provided for around the world. In finalizing the list of orders and decisions included in Article 295, the drafters considered the sorts of decisions that could be made by judges or panels of judges under the MCCP during the pretrial or trial phase and that were particularly sensitive or that restricted the rights of the suspect, the accused, or another person significantly so as to merit review by a higher court. For example, an order for anonymity greatly impedes upon the suspect or the accused person's right to examine a witness under Article 64. An order for temporary seizure of property impinges upon the property rights of a suspect or an accused, and orders for detention or restrictive measures impinge upon the person's right to liberty. In addition to allowing for interlocutory appeals on orders that potentially infringe upon the rights of the suspect or accused, the drafters of the MCCP also considered an appeal mechanism on the basis of preliminary motions to be necessary.

In some instances, an interlocutory appeal will be made by a party other than the prosecutor or the defense. For example, a third party may appeal an order for temporary seizure under Article 133 where the person has a property or other interest in the items seized (reference should be made to the commentary to Article 133 for a discussion of this). Where a person has been ordered to pay a fine under Article 41 for non-compliance with a court order for misconduct before the court, he or she may appeal the decision by way of interlocutory appeal. A third party may also want to appeal an order for noncompliance with an order of the prosecutor for the expedited preservation of computer data and telecommunications traffic data or for the identification of a subscriber, owner, or user of a telecommunications system or point of access to a computer system under Article 128(6) and 129(6), respectively.

Paragraph c: As required by Article 114(9), where a person's property has been seized by the police in the course of a criminal investigation, the person is entitled to appeal by way of interlocutory appeal. For example, a person may appeal the seizure of property that was carried out pursuant to a warrant, such as a warrant to search premises or dwellings or a warrant to search a person. A person may also appeal where the police had a warrant but where they exceeded the scope of the warrant and took property not referenced in the warrant (this is the equivalent of not having a warrant in the first place). Moreover, an interlocutory appeal may be brought where a person's prop-

erty has been seized by the police without a warrant where a warrant is required under the MCCP.

Article 296: Procedure for Seeking an Interlocutory Appeal

1. An appellant must commence an interlocutory appeal by filing a written statement with the registry of the competent trial court within five working days of the date the party was notified of the order that is being challenged.
2. After a written statement is filed, the registry must notify the respondent in accordance with Article 27.
3. The respondent may file a written response with the registry of the competent trial court within five working days of notification of the appeal statement.
4. An interlocutory appeal does not suspend proceedings, except where an appeal under Article 295(a), 295(h), or 295(i) is filed.

Commentary

In drafting Article 296, the drafters discussed whether the filing of an interlocutory appeal should halt proceedings completely. In some jurisdictions, the filing of an interlocutory appeal suspends proceedings until its determination, whereas in other jurisdictions, the proceedings continue on in parallel with the appeal. The MCCP drafters decided that only some kinds of interlocutory appeals should suspend proceedings. Part of the drafters' rationale was the danger of interlocutory appeals being used as a mechanism to delay proceedings by a party filing multiple unfounded appeals.

Article 297: Determination of an Interlocutory Appeal

1. The registry of the trial court must forward a copy of the case file, the written appeal statement, and the written response to the appeal statement, if any, to the registry of the appeals court within two working days from the filing of a written response with the registry or upon the expiration of five days after notification of the respondent about the appeal statement.

2. The registry of the competent trial court must also forward the sealed record of a witness anonymity hearing, where an appeal under Article 295(a) is filed.
3. The competent panel of the appeals court may at its discretion request any other relevant material from the competent trial court.
4. The competent panel of the appeals court must make a decision on the interlocutory appeal within two working days of receiving the case file and the other materials set out in Paragraph 1.
5. The appeal must be decided by the appeals court on the basis of the appeal statement, the written response, if any, and the case file.
6. A written and reasoned decision of the competent panel of the appeals court must be prepared.
7. The decision of the competent panel of the appeals court must be served as soon as possible, and no later than two working days in accordance with Article 27, on the prosecutor, the defense, and on other appellants if the appeal was not made by the prosecutor or the defense.

Commentary

As discussed in the general commentary to Chapter 12, an interlocutory appeal, in contrast to appeals against acquittal, conviction, or a penalty, is determined wholly through examination of written submissions and evidence rather than by way of oral proceedings. This form of paper review is common in many states and serves the principle of judicial economy by not requiring the court to conduct a full hearing. Because an interlocutory appeal is not an appeal based on a conviction or sentence, the requirements detailed in the general commentary to Chapter 12 (i.e., that the appeal must respect the requirements of a fair and public trial) do not apply and there is no obligation that the appeal be determined in public.