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SPECIAL COURT FOR SIERRA LEONE
APPEALS CHAMBER

Before: Justice Renate Winter, Presiding Judge
Justice Jon Kamanda
Justice George Gelaga King
Justice Emmanuel Ayoola
Justiee Shireen Avis Fisher

Acting Registrar: Ms Binta Mansaray

Date filed: 25 June 2009

THE PROSECUTOR against ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL-2004-15-A

PUBLIC

GBAO - RESPONSE TO PROSECUTION APPELLANT BRIEF

Offiee of the Prosecutor

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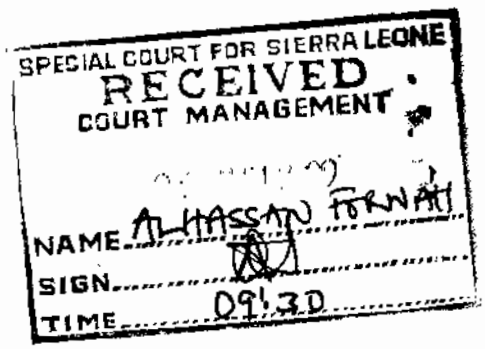

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Table of Contents

I. Introduction

1. The RUF Judgement was rendered by Trial Chamber I on 25 February 2009.[1] On 8 April 2009 the Trial Chamber issued its Sentencing Judgement.[2] Both the Prosecution and the Defence appealed the Judgement in accordance with Rule 111.[3] The Gbao Defence filed its Appeal Brief on 1 June 2009.[4]

2. The Proseeution filed its Appeal on the same date.[5] It argued that the Trial Chamber:

   i. Erred in fact and/or law in finding that the Joint Criminal Enterprise ended in April 1998;

   ii. Erred in fact and in law in acquitting Augustine Gbao of Count 12; and

   iii. Erred in fact and in law in acquitting the three Accused of Count 18.

3. In accordance with Rule 112, the Gbao Defence is hereby filing its Response to the Prosecution's Appeal. Each ground of appeal is addressed below.

II. Standard of Review for Prosecution Appeals

4. The Dcfence acknowledges that the Rules of Procedure for the Special Court for Sierra Leonc permit the Prosecution an unequivocal right to appeal procedural errors, errors of fact and errors of law.[6] We suggest, however, that the Prosecution's right of appeal should be more strictly eonstrued than the corresponding Defence right becausc:

   i. The Prosecution must remove all reasonable doubt from each alleged errant factual finding made by the Trial Chamber; and

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[1] *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-1234, Judgement (TC), 25 February 2009 ("Trial Judgement").

[2] *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-1251, Sentencing Judgement (TC), 8 April 2009 ("Sentencing Judgement").

[3] Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended 27 May 2008 ("Rules of Procedure and Evidence").

[4] *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-A-279, Confidential Appeal Brief for Augustine Gbao, 1 June 2009. ("Gbao Appellant Brief"); *also see Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-A-1253, Confidential Notice of Appeal for Augustine Gbao, 28 April 2009.

[5] *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-A-1278, Confidential Prosecution Appeal Brief, 1 June 2009 ("Prosecution Appellant Brief"); *also see Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-A-1252, Prosecution's Notice of Appeal, 28 April 2009.

[6] Article 20 of the Statute of the Special Court for Sierra Leone annexed to the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, United Nations and Sierra Leone, 16 January 2002 ('Statute'); *also see* Rules of Procedure and Evidence of the Special Court for Sierra Leone as amended at the eleventh Plenary on 27 May 2008, Rule 106.

ii. A limited prosecutorial appeal protects the right of the Accused not to be tried twice for the same criminal allegations for which he was acquitted at the trial level.

A. The Prosecution's Higher Standard of Review Emanates from its Heightened Evidentiary Burden During Trial

5. The three grounds of appeal cited by the Proseeution should be subject to a higher standard for reversal on appeal than the grounds of appeal made by thc Gbao Defence in its filing as the Prosecution faccs a stricter burden or standard of proof than the Defence at the trial level. Therefore, in the same manner in which it must prove guilt beyond reasonable doubt during trial, it should be required to disprove beyond reasonable doubt each factual finding that led to Gbao's acquittal. While the extent of this eorresponding restriction is not entirely clear, the Prosecution appeared to accept a stricter standard in paragraph 1.10 of its brief, where it stated that:

> "The same standard of reasonableness and the same dcferenee to factual findings of the Trial Chamber apply when the Prosecution appeals against an acquittal. Thc Appeals Chamber will only hold that an error of law has been committed when it determines that no reasonable trier of fact could have made the impugned finding. However, considering that it is the Prosecution that bears the burden at trial of proving the guilt of the accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against an aequittal than for a defence appeal against conviction. *A convicted person must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the convicted person's guilt has been eliminated*".[7]

6. The higher standard for the Prosecution relative to the Defence was recognised in Justice King's Partially Dissenting Opinion in the CDF Appeal Judgement. In his dissent, the Honourable Justice noted that:

> "It is important for me to observe at this juncture that when the Prosecution is appealing against an acquittal, as in this case, *it has a more onerous duty* and more difficult task than an Accused who is appealing against a conviction. Where the Prosecution alleges that errors of fact have been committed by the Trial Chamber, the Prosecution must show that all reasonable doubt as to the Accused's guilt has been eliminated".[8]

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[7] Prosecution Appellant Brief, para. 1.10 (emphasis added).
[8] *Prosecutor v. Fofana and Kondewa*, Doc. No. SCSL-04-14-T-829, Judgment (AC), 28 May 2008, Partially Dissenting Opinion of Honourable Justice George Gelaga King, para. 45 (page 14).

7. ICTR and ICTY case law support Justice King's position:

> "Under Article 24(1) (b) of the Statute, the Prosecution, like the accused, must demonstrate 'an error of fact that occasioned a miscarriage of justice'. For the error to be one that occasioned a miscarriage of justice, it must have been 'critical to the verdict reached'. Because the Prosecution bears the burden at trial of proving the guilt of the accused beyond a reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction. An accused must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. *The Prosecution faces a more difficult task.* It must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated".[9]

8. Further:

> "[s]ince the Prosecution must establish the guilt of the accused at trial, the significance of an error of fact occasioning a miscarriage of justice takes on a specific character when alleged by the Prosecution. This is because it has the *more difficult task* of showing that there is no reasonable doubt about the appellant's guilt when account is taken of the Trial Chamber's errors of fact".[10]

B. A Broad Appeal Right on the Same Basis as the Accused May not Fully Protect Fundamental Principles and Rights of the Accused

9. Other fundamental principles underlie a more restrictive interpretation of the Prosecution's appeal right. A liberal construction of prosecutorial appeal against acquittals of an Accused could be perceived as antithetical to many legal systems throughout the world, as it could unduly impinge upon the principle of double jeopardy, or *non bis in idem*. It is notable that, although in relation to subsequent prosecution by a national court, the Statute for the Special Court also recognises the principle of *non bis in idem*.[11]

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[9] *Prosecutor v. Bagilishema,* Case No. ICTR-95-1A-A, Judgement (Reasons) (AC), 3 July 2002, para. 14. ("*Bagilishema* Appeal Judgement") (emphasis added); *also see Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003, para. 24 ("*Rutaganda* Appeal Judgement"); *Prosecutor v. Seromba,* Case No. ICTR-2001-66-A, Judgement (AC), 12 March 2008, para. 11 ("*Seromba* Appeal Judgement"); *Prosecutor v. Strugar,* Case No. IT-01-42-A, Judgement (AC), 17 July 2008, para. 14 ("*Strugar* Appeal Judgement"); *Prosecutor v. Mrksic and Sljivancanin,* Case No. IT-IT-95-13/1-A, Judgement (AC), 5 May 2009, paras. 15, 49 ("*Mrskic and Sljivancanin* Appeal Judgement"); *Prosecutor v. Oric,* Case No. IT-03-68-T, Judgement (AC), 3 July 2008, para. 12 ("*Oric* Appeal Judgement"); *Prosecutor v. Limaj, Bala and Musliu,* Case No. IT-03-66-A, Judgement (AC), 27 December 2007, para. 13 ("*Limaj et al* Appeal Judgement"); *Prosecutor v. Hadzihasanovic and Kubura*, Case No. IT-01-47-A, Judgement (AC), 22 April 2008, para. 12 ("*Hadzihasanovic and Kubura* Appeal Judgement"); *Prosecutor v. Halilovic*, Case No. IT-01-48-A, Judgement (AC), 16 October 2007, paras.11, 16 fn 44 ("*Halilovic* Appeal Judgement").

[10] *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement (AC), 17 September 2003, para. 14 ("*Krnojelac* Appeal Judgement").

[11] *See* Statute of the Special Court, Article 9.

10. We acknowledge the Prosecution's right to appeal convictions within the jurisdictions of international criminal tribunals in general and the Special Court in particular. We have no desire to gainsay such a right embedded as it is within the Statute. However, we do respectfully submit that the right of prosecutorial appeal against acquittals demands and deserves the gravest scrutiny. We suggest that in accordance with the doctrine of fundamental fairness the test to be applied by the Appeals Chamber to prosecutorial appeals should therefore be an onerous one. We submit that appeals against acquittals should accordingly be upheld only in the most compelling cases where the Trial Chamber has demonstrably and blatantly erred in fact and/or in law to the extent that to leave such errors without redress would be both irrational and an affront to justice.

C. *If the Prosecution is Successful on Appeal and the Appeals Chamber Considers Increasing the Sentence Against Gbao, We Suggest that the Sentence Reflect that the Conviction was Entered on Appeal*

11. This Response vigorously disputes the contentions within the Prosecution's three grounds of appeal. However, should the Appeals Chamber uphold any such ground(s) we respectfully recall that Gbao had been previously acquitted by the Trial Chamber. This, we submit, should be reflected by the imposition of a lower sentence, if at all. The Appeal Chamber in *Aleksovski* stated that:

> "[i]n imposing a revised sentence the Appeals Chamber bears in mind the element of double jeopardy in this process in that the Appellant has had to appear for sentence twice for the same conduct, suffering the consequent anxiety and distress…[h]ad it not been for these factors the sentence would have been considerably longer".[12]

[12] *Prosecutor v. Aleksovski*, Case No. IT-95-14/I-A, Judgement (AC), 24 March 2000, para. 190 ("*Aleksovski* Appeal Judgement").

III. Response to Prosecution's First Ground of Appeal

12. In its first Ground of Appeal, the Prosecution asserted that the Trial Chamber erred in law and/or fact in finding "that the common plan, design or purpose/joint criminal enterprise between leading members of the AFRC and RUF ceased to exist some time [at] the end of April 1998".[13] Based upon its review of the Trial Chamber's factual findings the Prosecution claimed that the joint criminal enterprise ('JCE') had actually "continued to exist at least until the end of February 1999 [] and that the three Accused in this case remained participants in that common plan, purpose or purpose/joint criminal enterprise throughout that period".[14]

13. The foundation of the Prosecution's argument was that "no reasonable trier of fact could have concluded that a particular quarrel in April 1998 spelt the end of that common criminal purpose" between the AFRC and RUF.[15] The Prosecution instead argued that the AFRC and RUF were still acting interdependently after April 1998 with a common purpose to take over Sierra Leone. They concluded by asserting that the three Accused should be held responsible for crimes "found by the Trial Chamber to have been committed after the end of April 1998"[16] in Freetown and Western Area, Kono and Kailahun Districts.[17]

14. In relation to Augustine Gbao's continued contribution to the JCE, the Prosecution argued:

i. By virtue of his role as RUF Ideologist or ideology instructor, Gbao "dictated the spirit in which the crimes alleged in the Indictment were committed"[18] between April 1998 and February 1999 and he made a "sufficient" contribution to the JCE in Kailahun District;[19] and

ii. Gbao contributed "substantially" to the JCE after the end of April 1998 by the means described in relation to Count 12.[20]

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[13] Prosecution Appellant Brief, para. 2.7.
[14] *Id.* at para. 2.9.
[15] *Id.* at para. 2.34.
[16] *Id.* at para. 2.10.
[17] *Id.* at paras. 2.173-2.179.
[18] *Id.* at para. 2.168.
[19] *Id.*
[20] *Id.* at para. 2.169.

A. Preliminary Comments

i. The Prosecution Arguments on Appeal are Alleged Errors of Fact, not Law

15. The Prosecution asserted that the Trial Chamber "erred in law and/or in fact" in finding that the JCE ceased to exist after April 1998.[21] However, their arguments clearly related to alleged factual errors alone. Indeed, the Prosecution acknowledged this in paragraph 2.26, where they assert "[t]he Prosecution does not take issue with the legal framework as set out by the Trial Chamber" in paragraphs 248 – 266 of the Trial Chamber Judgement. Instead, they argue that the Trial Chamber incorrectly applied law to the facts.[22]

16. Similarly, in paragraph 2.41 the Prosecution characterises the alleged error (the finding that the AFRC and RUF were not acting in concert after April 1998) as an error of law. However, it stated "the Trial Chamber did not [correctly] apply the test for determining whether the participants in the JCE continued to act in concert in contributing to the common purpose".[23] At the Special Court, the incorrect application of legal principles constitutes an error of fact.[24]

ii. Prosecution does not Always Acknowledge Justice Boutet's Dissent as to Gbao

17. The Prosecution noted in paragraph 2.151 that "the Trial Chamber found that all three of the Accused were participants in the JCE in the period from its inception soon after the 25 May 1997 coup". They continued: "[t]he Trial Chamber found that all three Accused continued to be participants in the JCE throughout the Junta period, and following the 14 February 1998 ECOMOG intervention until the end of April 1998".[25]

18. In making these assertions, the Prosecution failed to recognise that Justice Boutet dissented to all convictions against Gbao in relation to the JCE found by the Majority in the

[21] *Id.* at para. 2.7.
[22] *Id.* at paras. 2.41, 2.142-2.148.
[23] *Id.* at para. 2.41.
[24] *See* CDF Appeal Judgement, para. 70.
[25] Prosecution Appellant Brief, para. 2.151.

Trial Chamber.[26] Additionally, Justice Boutet found that by virtue of the Majority's findings in relation to JCE, Gbao was denied his right to a fair trial.[27]

B. Gbao was not a JCE Member at Any Time During the Junta Period or After

19. We submit that Gbao was never a member of the JCE that was found by the Trial Chamber to exist in Bo from 1-30 June 1997, Kenema from 1-30 June 1997, Kono from February - April 1998 and Kailahun Districts from 25 May 1997 - 14 February 1998. These arguments are detailed extensively in the Gbao Appeal Brief and supported by Justice Boutet's Dissent.[28]

20. The Gbao Defence similarly objects to the Prosecution's argument that Gbao was a JCE member after April 1998 in Freetown and Western Area, Kono District, and Kailahun District. These arguments are detailed below.

i. Alleged JCE in Freetown and Western Area

21. There is no evidence at any point relevant to the Prosecution's argument that Gbao participated in the commission of crimes in Freetown and Western Area save for by way of the Trial Chamber's finding that Gbao was the RUF's Ideologist or the ideology instructor and in relation to his alleged contribution under Count 12. In relation to his role as RUF Ideologist, the Gbao Defence reiterates its arguments within the Gbao Appeal Brief (particularly Sub-Grounds 8(a) and 8(b)) as our response to the Prosecution's argument that Gbao significantly contributed to the furtherance of the JCE in his role as Ideologist or "ideology instructor". Gbao's alleged contribution in relation to crimes found under Count 12 is detailed in response to Ground two of the Prosecution's Appeal in the paragraphs below.

[26] *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-1234, Judgement, Dissenting Opinion of Justice Pierre G. Boutet, pp. 688-96 ("Justice Boutet Dissenting Opinion to Trial Judgement").
[27] *Id.* at para. 6.
[28] *See* Gbao Appellant Brief, paras. 27-288; *also see* Jnstice Bontet, Dissenting Opinion to Trial Judgement, pp. 688-96.

a. The Prosecution Position vis-à-vis Gbao does not Comport with its Role as an Organ of International Criminal Justice

22. Until the filing of its Appeal, the Gbao Defence could not be certain whether the Prosecution would choose to align itself with the Majority's findings that Gbao significantly contributed to the JCE as RUF Ideologist or ideology instructor.[29] By adopting the Majority's findings on Gbao's role as RUF Ideologist, or as an ideology instructor teaching a criminal ideology, the Prosecution now appears to be supporting findings that it never itself sought during the entire case. Indeed, as Justice Boutet stated: "[o]ver the course of this four-year trial, it was never the Prosecution's case that the revolutionary ideology of the RUF advocated the commission of crimes…nor did the Prosecution argue that Gbao played a vital role in putting this criminal ideology into practice".[30]

23. Not only does the Prosecution now endorse the Majority's findings on this issue (as well as concomitant convictions and sentence), it seeks further convictions based upon Gbao's imputed ideological role: a finding based on the falsehood that he trained *all* RUF recruits during the Junta period.[31] We are surprised by this decision. By first sanctioning the Majority's findings and then to seek to further them within their appellate brief it is unclear how the Prosecution may properly claim to be acting in accordance with their superseding responsibility that: "[c]ounsel has an overriding duty to the Special Court to act with independence and in the interests of justice and must assist the Court in the administration of justice".[32]

24. Additionally, the Prosecution should need no reminder of its duty to impartiality and the presumption of innocence.[33] In international criminal tribunals, this responsibility is of paramount importance. Antonio Cassese, on behalf of the Trial Chamber in *Kupreskic*, noted:

> "the Prosecutor of the Tribunal is not, or not only, a Party to adversarial proceedings, but is…an organ of international criminal justice whose object is not

[29] The only previous filing where the Prosecution took a position was in its Sentencing Brief, where it stated that "the Majority in the Trial Chamber placed emphasis on his role as the RUF ideology instructor and the fact that he singled himself out as a knowledgeable and competent Commander in the RUF ideology". *See Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-1239, Prosecution Sentencing Brief (public version), 10 March 2009 ("Prosecution Sentencing Brief"), para. 70.
[30] Justice Boutet Dissenting Opinion to Trial Judgement, pp. 688-96, para. 5.
[31] *See* Trial Judgement, para. 2170.
[32] Code of Professional Conduct with the Right of Audience Before the Special Court for Sierra Leone, amended on 13 May 2006, Article 8(A). ("Code of Conduct").
[33] *See* Code of Conduct, Article 24.

simply to secure a conviction but to present the case for the Prosecution…in order to assist the Chamber to discover the truth in a judicial setting".[34]

25. Judge Shahabuddeen also promoted this role for the Prosecutor, stating that:

"The Prosecutor of the ICTR is not required to be neutral in every case; she is a party. But she is not of eourse a partisan. … The implications of that requirement suggest that, while a prosecution must be conducted vigourously, there is room for the injunction that prosecuting counsel 'ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice'".[35]

26. The United States Supreme Court similarly set out the standard for prosecutors in the US federal judicial system long ago in *Berger v. United States*.[36] It stated that the standard for federal prosecutors as follows: "[t]he US Attorney is not the representative of an ordinary party to a controversy, but of a sovereignty whose obligations to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal proseeution is not that it shall win a case, but that justice shall be done".[37]

27. The Code for Crown Prosecutors for England and Wales notes that "[i]t is the duty of Crown Prosecutors to make sure that the right person is prosecuted for the right offence. In doing so, Crown Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a convietion".[38]

28. By adopting findings based upon arguments it never made (which led to a 25 year custodial sentence) and then to seek *further* convictions on a similar basis leaves the appearance of an arbitrary Prosecutor seeking convictions at all costs rather than impartially implementing its role in the international criminal justice system.

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[34] *Prosecutor v. Z. Kupreskic, M. Kupreskic, V. Kupreskic, Josipovic and Santic*, Case No. tT-95-16-A, Decision on Communications between the Parties and their Witnesses, 21 September 1998, p.2. Judge Antonio Cassese, writing for the Trial Chamber, was writing in response to improper contact between the Prosecution and a witness who had already taken an oath in the case.

[35] *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision (Prosecution's Request for Review or Reconsideration) (AC), 31 March 2000, Separate Opinion of Judge Shahabuddeen, para 68.

[36] 295 U.S. 78 (1935).

[37] *Id.* at p. 295.

[38] Code for Crown Prosecutors of England and Wales, Article 2.3.

1) Instead of Seeking Further Convictions, the Prosecution Could Have Sought the Dismissal of Convictions Against Gbao Pursuant to His Role as RUF Ideologist or Ideology Instructor

29. As an organ of international criminal justice, instead of seeking further convictions the Prosecution eould have sought the dismissal of the Majority's findings that Gbao significantly contributed to the JCE as the RUF Ideologist or RUF ideology instructor in furtherance of its overriding duty to administer justice.

30. We presume the Prosecution is cognisant:

i. They never averred within the Indictment, its Pre-Trial Brief or Final Brief that Gbao was the RUF Ideologist;

ii. They never argued that Gbao's role as Ideologist eonstituted his significant contribution to the JCE;

iii. Gbao did not train all RUF recruits during the Junta period; and

iv. No evidenee was led suggesting that the RUF ideology was inherently criminal.

31. While the Speeial Court statute does not explicitly state that the Prosecutor has the right to seek dismissal of convictions or otherwise object on behalf of the Accused, it does not seek to prohibit such a measure. That the Prosecutor's overriding responsibility is to administer justice from a position of impartiality cannot be in dispute. An apparent determination to arbitrarily seek further convictions based on allegations lacking evidential foundation ill befits a Proseeution wishing to retain a dignified and impartial status as an organ of international justice.

a) Support for this Position at the International Criminal Court

32. The International Criminal Court promotes the right to appeal by the Prosecution *in the interest* of the Accused. Article 81 of the ICC Statute "Appeal Against Decision of Acquittal or Conviction or Against Sentence" states:

> "The convicted person, *or the Prosecutor on that person's behalf*, may make an appeal on any of the following grounds:
>
> i. Procedural error;
> ii. Error of fact;

iii. Error of law; or
iv. Any other ground that affects the fairness or reliability of the proceedings or decision".[39]

33. There are no cases on appeal at the ICC that give clarification to the Prosecutor's rights or duties to appeal in practice. While it is not necessarily incumbent upon the Prosecutor to appeal on behalf of the Accused in this case it is clear that Article 81 ensures the Prosecutor act pursuant to their 'overriding duty' to assist in the 'administration of justice'. To do otherwise tends to serve the opposite purpose.

34. Commentary on the ICC article underscores the impartial nature that the Prosecutor must take to its responsibilities in international criminal tribunals. Article 81 "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".[40]

b) Support from Other Legal Systems

35. It may be noted that "the possibility of the prosecution appealing on behalf of a convicted person is one which is well established in some legal systems, reflecting the prosecution's non-partisan duty to truth and justice".[41]

36. Even in the more 'accusatory' tradition of the United States, in the recent case of *US v. Theodore F. Stevens*[42] the Attorney General[43] under the current Obama Administration successfully sought to dismiss the convictions against the Defendant because the Prosecution

[39] ICC Statute, Article 81(1)(b).
[40] The Appeal Procedure of the ICC, R. Roth and M. Henzelin, p. 1543, In the Rome Statute of the International Criminal Court: A Commentary, Volume II, Edited by A. Cassese, P. Gaeta and J.R.W.W. Jones, pp. 1541 – 1558.
[41] Commentary on Article 81 of the ICC Statute, Christopher Staker, page 1453,para. 8, *citing* the German Code of Criminal Procedure, §296 para 2; Model Code of Criminal Procedure for Latin America, Article 332 (1989). In Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article-, Otto Triffterer (ed.), pp. 1451-1485 (other citations omitted).
[42] *United States v. Stevens*, 593 F. Supp. 2d 177 (D.D.C. 2009).
[43] The Attorney General of the United States is the head of the Department of Justice in the US. In this role, he oversees all prosecutors acting on behalf of the United States.

failed to impartially administer its responsibilities due to its belated disclosure of exculpatory information.[44]

ii. Alleged JCE in Kono District after April 1998

37. There appears to be no evidence cited within the Prosecution's argument that Gbao participated in the alleged commission of crimes in Kono District except by way of the Trial Chamber's finding that Gbao was the RUF's Ideologist and in relation to Count 12, as discussed in Ground 2 of the Prosecution's appeal below. The arguments made in Sub-Grounds 8(a) and 8(b) of the Gbao Appellate Brief are hereby reiterated in order to respond to the finding that Gbao significantly contributed to the furtherance of the JCE by virtue of the ideological role imputed to him. Gbao's alleged contribution in relation to crimes under Count 12 is detailed in response to Ground two of the Prosecution's Appeal in the paragraphs below.

38. The Gbao Defence recalls the duties incumbent upon a Proseeutor in the international justice system, as detailed above.[45]

iii. Alleged JCE in Kailahun District after April 1998

39. The Proseeution argued that Gbao should be held individually criminally responsible as a member of the JCE for crimes that took place in Kailahun District after April 1998, thereby adding "to the criminality of the convictions of the Accused on Counts 1, 7, 9 and 13".[46] In support of this position, however, it offered only general assertions that the crimes extended beyond February 1998[47] and failed to adequately explain how these crimes served to further the interests of the JCE of taking over the country of Sierra Leone.

a. Preliminary Comments

40. Again, the Defence relies upon its arguments in sub-grounds 8(a) and 8(b) in its Appellate Brief *vis-à-vis* thc Majority's findings rcgarding Gbao as the RUF Idcologist or

[44] *United States v. Stevens*, 2009 US Dist. LEXIS 39046, 7 April 2009, p.1.
[45] *See supra*, paras. 22-36.
[46] Prosecution Appellant Brief, para. 2.179.
[47] Para 2.22 stated that the JCE took place between the AFRC and RUF in Kailahun District until April 1998. However, the Majority in the Trial Chamber found that Gbao was responsible as a member of the JCE only until 19 February 1998 for Kailahun District.

ideology instructor. In Kailahun District (like in Bo, Kenema and Kono Districts) the Majority in the Trial Chamber emphasised (and the Prosecution endorsed) Gbao's role as the RUF ideology instructor in relation to his individual criminal responsibility under the JCE. It stated that "the ruthless killing of civilians, including the execution of 64 suspected Kamajors in Kailahun Town on 19 February 1998...enslavement, 'forced marriages', forced labour...were a logical consequence to the pursuance of the goals prescribed in [RUF] ideology, the instruction on which, the Chamber recalls, was imparted particularly by Gbao".[48] It also stated "the Chamber is strengthened in drawing this conclusion [in finding Gbao as a member of the JCE] by the knowledge that Gbao was a strict adherent to the RUF ideology and gave instruction on its principles to all new recruits to the RUF".[49] Finally, it stated that these RUF recruits "in maintaining their fidelity to their ideology, either knew or had reason to know that such crimes would be committed against innocent civilians...in support of their 'broad-based' struggle that the RUF ideology purported".[50]

41. It was thereby clear within the Majority's findings that Gbao was held principally responsible as a JCE member in his role as the RUF Ideologist or ideology instructor. Justice Boutet, in his Dissent, appeared to concur with this position when he stated that "in the opinion of the majority, Gbao's significant contribution to the JCE is *founded* on his role as an RUF ideology instructor and his commitment to spreading and implementing that ideology".[51]

b. Prosecution Relied upon an Insufficient Factual Basis to Extend the JCE to February 1999

42. In seeking to attribute individual criminal responsibility to Gbao as a member of the JCE beyond February 1998, the Prosecution cited only generally mentioned crimes in Kailahun District.[52] It stated in paragraph 2.30 that:

i. The widespread commission of brutal rapes was well documented;

ii. The mass execution of suspected Kamajors took place in Kailahun District; and

[48] Trial Judgement, para. 2168.
[49] *Id.* at para. 2170.
[50] *Id.* at para. 2171.
[51] Justice Boutet Dissenting Opinion to Trial Judgement, para. 1 (emphasis added).
[52] The Majority in the Trial Chamber did not convict Gbao for membership in a JCE until April 1998 in Kailahun District, as stated by the Prosecution in paragraph 2.30, but until 19 February 1998. *See* Trial Judgement, para. 2172.

iii. The ongoing forced labour in Kenema and Kailahun District continued after February 1998.

43. In the second paragraph to mention Kailahun District, it stated that the enslavement and forced marriages took place in Kailahun District after April 1998 as before.[53]

44. Regarding the finding that 'brutal rapes were well-documented', it should be noted that the Prosecution did not plead these crimes occurred in relation to Kailahun District.[54] If never pled, such crimes cannot properly be said to have been part of a JCE at any time, before or after the Junta period.

45. Furthermore, the killing of the 64 alleged Kamajors cannot be considered as a factor in support of extending the JCE, since the event was found by the Trial Chamber to have occurred *during* the Junta period. It is unclear why the Prosecution now seeks to bolster their case that the JCE continued in Kailahun District by referring to the killings, as findings have already been made elsewhere that they occurred during the JCE as found by the Trial Chamber.[55] While the Defence objects in any event to imputing Gbao with individual criminal responsibility for the killings,[56] they nonetheless cannot be used in support of the notion that the JCE extended beyond February 1998.

46. The ongoing forced labour after February 1998 was not sufficiently substantiated by the Prosecution. It is therefore unclear as to what the Prosecution seeks to rely on in order to persuade the Appeals Chamber of the notion that crimes were committed in Kailahun District that furthered the JCE beyond February 1998. The Prosecution likely relies upon the factual findings in the Trial Judgement. If this is the case, we refer the Appeals Chamber to Ground 8(s) and 11 of the Gbao Appellant Brief in response to the findings made by the Trial Chamber in relation to forced labour.

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[53] Prosecution Appellant Brief, para. 2.131.
[54] *See* Indictment, para. 58; *also see* the Disposition to the Trial Chamber Judgement, p. 685, which demonstrates that Gbao was not convicted under Count 6.
[55] *See* Trial Judgement, paras. 1387-1397, 1447-1454.
[56] *See* Gbao Appellant Brief, Sub-Grounds 8(o), 8(q).

c. The Prosecution did not Sufficiently Explain how the Alleged Crimes in Kailahun District Furthered the Alleged JCE

47. The Prosecution failed to adequately explain how the crimes listed above were committed in furtherance of the extended JCE as it related to Gbao. It appeared to simply rely upon the reasoning of the Trial Chamber.[57]

48. The Gbao Defence responded to the findings that the crimes in Kailahun District were not adequately linked to the JCE in paragraphs 132-36, Grounds 8(r), 8(s), 10, 11, and 12 of its Appellant's Brief.

49. Finally, if the Appeals Chamber finds that the Prosecution did sufficiently argue that these crimes were committed in furtherance of the RUF taking over the country, one must not forget that the Indictment alleged that the JCE involved the joint action of the RUF and the AFRC.[58] According to the Trial Chamber, "the JCE pleaded by the Prosecution requires the joint action of the RUF and AFRC".[59] The crimes alleged under Counts 1, 7, 9 and 13 in Kailahun District do not seem to involve the AFRC. Thus, even if such crimes were found as such, they remain unconnected to a JCE between the AFRC and RUF.

IV. Response to Prosecution's Second Ground of Appeal

50. The Prosecution alleged in its Appeal that the Trial Chamber erred in law and/or fact in finding that Gbao was not individually criminally responsible for the conscription and/or use of persons under the age of 15 to participate actively in hostilities as charged in Count 12 of the Indictment.

A. Findings by the Trial Chamber

51. The Trial Chamber acquitted Gbao on Count 12.[60] It made just one finding in relation to the question of Gbao's liability under this Count.[61] Otherwise "there [was] no other evidence that Gbao participated in the design of these crimes".[62]

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[57] Prosecution Appellant Brief, para. 2.178.
[58] The Prosecution never pled that a JCE existed between RUF members. *See* Trial Judgement, para. 368.
[59] *Id.*
[60] Trial Judgement, paras. 2235-37.
[61] *Id.* at para. 2235.

52. The Chamber also found that "the Prosecution has failed to establish that Gbao was in a superior-subordinate relationship with the perpetrators of these crimes [under Count 12]" and therefore "Gbao is not liable under Article 6(3) of the Statute for the conscription of persons under the age of 15 into the RUF or the use of children under the age of 15 by the RUF to actively participate in hostilities".[63]

53. For the reasons explained below, the one factual finding made by the Trial Chamber – that Gbao loaded former child soldiers onto a truck in Makeni – was an error of fact.

B. Prosecution Appeal Against Gbao's Acquittal under Count 12

54. The Prosecution requested that the Appeals Chamber reverse the Trial Chamber's acquittal of Gbao on Count 12 of the Indictment and find that Gbao was responsible for committing, as a member of the JCE, the acts of conscription and use of child combatants referred to in paragraphs 1708 – 1748 of the Trial Judgement, for crimes committed up to April 1998.[64] If the Prosecution's first ground of appeal is allowed (the extension of the JCE) then it suggested that Gbao should additionally be convicted as a JCE member for this extended time period.[65]

55. In the alternative, the Prosecution requested that the Appeals Chamber find Gbao individually criminally responsible for the conscription and/or use of child soldiers referred to in paragraphs 1707 - 1748 on the basis that he planned such crimes committed outside Kailahun District, or alternatively, that he aided and abetted such crimes.[66] It also sought an increase in Gbao's sentence to reflect his additional criminal liability.[67]

56. The Gbao Defence will first consider the Prosecution's arguments that Gbao planned and/or aided and abetted crimes committed under Count 12. Second, it will respond to the question of whether Gbao, as an alleged JCE member, 'committed' the crimes under Count 12 before and after April 1998 in turn.

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[62] *Id.*
[63] *Id.* at para. 2237.
[64] Prosecution Appellant Brief, para. 3.97(i).
[65] *Id.* at para. 3.97(ii).
[66] *Id.* at para. 3.97(iii).
[67] *Id.* at para. 3.98.

C. Gbao did Not Plan the Crime of Conscripting or Using Child Soldiers

57. The Prosecution argued that the Trial Chamber erred in finding that Gbao did not plan the conscription of child soldiers. It stated "the only reasonable conclusion open to any reasonable trier of fact is that Gbao is criminally responsible for his participation in the planning of the conscription system found to have been put in place in Kailahun District from 1996 to December 1998".[68]

58. To satisfy the elements of planning, an Accused must be found to have contributed substantially to the design of an operation during which it is intended that crimes will be committed.[69] The Prosecution relied upon specific and general arguments in support of its argument that the Trial Chamber erred in not finding the *actus reus* of the crime of planning the conscription of child soldiers under Count 12:

i. The Trial Chamber erred by failing to consider Gbao's role and conduct in planning forced labour in Kailahun District;[70] and

ii. The Chamber erred in failing to find that, by virtue of Gbao's position of authority in Kailahun District, he contributed to the commission of the crime under Count 12.[71]

59. The Prosecution concluded, therefore, that "[t]hrough his position, role and functions, the only conclusion open to any reasonable trier of fact is that Gbao participated in the execution, administration and running of a plan designed to use civilians as forced labour in Kailahun, which included the military training of both adults and children under the age of 15 in order to increase the RUF armed manpower".[72]

60. In terms of *mens rea* for the planning of a crime, the Trial Chamber held that "the *mens rea* requirement for planning an act or omission is satisfied if the Prosecution proves that the accused acted with an intent that a crime provided for in the Statute be committed or with the awareness of the substantial likelihood that the crime would be committed in the

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[68] *Id.* at para. 3.54.
[69] Trial Judgement, para. 268, *citing Prosecutor v. Kordic and Cerkez*, Case No. tT-95-14/2-T, Judgement (TC), 26 February 2001, para. 26.
[70] Prosecution Appellant Brief, para. 3.70.
[71] *Id.*
[72] *Id.*

execution of that plan".[73] The Prosecution argued that "[b]ased on the totality of the evidence and, particularly, given Gbao's eentral role in Kailahun District as Overall Security Commander ('OSC'), as well as his oversight and supervisory functions there, the only conclusion open to any reasonablc trier of fact is that he was aware of thc substantial likelihood that children under the age of 15 were being screened at the G5 office and subsequently sent for training for military purposes or other tasks within RUF ranks".[74]

i. The Prosecution Should not be Permitted to Link the Trial Chamber's Findings under Count 13 to the System of Forced Military Training under Count 12

61. The Trial Chamber found that "in relation to those crimes in Kailahun District Gbao was directly involved in the planning and maintaining of a system of enslavement".[75] Since forced military training was one of the methods found by the Trial Chamber to constitute enslavement by the RUF under Count 13, the Prosecution relied upon this finding to suggest that Gbao should be found responsible under Count 12.

62. However, their position was dependent upon the patently false premise that Gbao was mentioned in the Count 13 findings related to forced military training. He was not. As stated above, just one finding mentioned Gbao as being involved in the use or conscription of child soldiers: that he loaded former child soldiers onto trucks and removed them from the ICC.[76] This finding was wholly erroneous, as described below. Besides this finding in relation to Bombali District, no other findings under Count 13 (or Count 12) indicate that Gbao was involved in planning a system of enslavement related to forced military training.

63. The Prosecution principally relied upon the contention that Count 12 was corollary to Count 13 in order to demonstrate their claim that the Trial Chamber erred in fact by acquitting Gbao of Count 12. While we objected to the Trial Chamber's reasoning in our Appellant Brief to the effect that Gbao had any role to play under Count 13, we note that Gbao had no role (and there were no factual findings to suggest otherwise) in relation to forced military training. The findings pursuant to Count 13 that led to the Trial Chamber's eonclusion that

[73] Trial Judgement, para. 268.
[74] Prosecution Appellant Brief, para. 3.71.
[75] Trial Judgement, para. 2167.
[76] *Id.* at para. 2237.

Gbao "planned and maintained a system of enslavement" eould only have been based upon findings against Gbao in relation to forced farming.

ii. The Prosecution Incorrectly Argued that Gbao's Role and Conduct in Kailahun Town Substantially Contributed to the Commission of Crimes under Count 12

a. Specific Allegation

64. The Prosecution referred to testimonial evidencc that was not relied upon by the Trial Chamber in order to contend that Gbao played a role in conscripting persons under the age of 15 for forced military training. It presented testimony from TF1-141 in an attempt to establish that the screening of civilians in Kailahun Distriet was sometimes done in Gbao's presence. [77] This was clearly an attempt to link him to the conscription of civilians to military training at one of the RUF camps.

65. We submit that testimony to the effect that Gbao was present during a single G5 screening cannot properly constitute individual criminal responsibility for the planning of the conscription of children for military training. At any rate, even if he were present, Gbao had no effective control over any security unit, including the G5[78] or any other perpetrators of the crimes found to have been committed under Count 12.[79]

66. As importantly, TF1-141 was not an entirely honest witness. In contrast to the Proseeution's attempt to characterise TF1-141 as credible,[80] he was found to have testified fancifully and implausibly at times.[81] As a consequence, the Trial Chamber held that where TF1-141 "has testified about the aets and conduet of the Aeeused, the Chamber has required corroboration of his testimony".[82] If Gbao's activities are found to be criminal during the screening recalled by TF1-141, such evidence should neverthcless be dismissed for its laek of corroboration.

[77] Prosecution Appellant Brief, para. 3.64.
[78] Trial Judgement, para. 2034.
[79] *Id.* at para. 2237.
[80] Prosecution Appellant Brief, para. 3.60.
[81] Trial Judgement, para. 582.
[82] *Id.* at para. 583.

b. General Allegations

67. The Prosecution's remaining arguments that the Trial Chamber erred in failing to find that Gbao planned the crimes under Count 12 were of a more general nature. In its Appeal Brief, the Prosecution sought to link Gbao to foreed military training by virtue of his:

i. Role and position in Kailahun District;

ii. Supervision of the Internal Defence Unit, Intelligence unit, the MP and the G5 (and that hc received a copy of all reports from these units); and

iii. Role in relation to discipline in the RUF.

68. The Prosecution stressed Gbao's close relationship with the G5, citing the fact that Gbao passed two orders to this unit, thereby illustrating a substantial authority.[83]

69. For thc reasons explained below, these general argumcnts nevertheless fail to demonstrate that Gbao played any role in planning the conscription of or otherwisc using persons under the age of 15 to participate actively in hostilities for in the RUF.

1) Gbao was not a Highly Respected RUF Officer in Kailahun Distriet

70. Before discussing the Prosecution's specific arguments, it is important to note the respect that other RUF had for Gbao, and membcrs of the security units in general, as it properly contextualises his role in Kailahun District. The Trial Chamber found that "there is evidence that certain fighters did not respect the unit commandcrs, and Gbao personally, sincc they were not fighters".[84] The Chamber acknowledged and adopted the testimony that both *junior and senior commanders* harassed Gbao for being a coward and a 'civilian commander' (one who did not fight).[85] The Chamber also adopted the following: "[s]ecurities were regarded as not fighters, but people with books and pens, and so they were very much overlooked".[86] The relationship between members of thc security units and the RUF fighters was challcnging, as "[t]herc [was] no respect for them".[87]

[83] Prosecution Appellant Brief, para. 3.66.
[84] Trial Judgement, para. 697, fn. 1308.
[85] *Id.*, *citing* Transcript, DAG-080, 6 June 2008, pp.14-15.
[86] *Id.*, *citing* Transcript DAG-048, 3 June 2008, p.47.
[87] *Id.*

71. The Trial Chamber also found that Gbao could do nothing when Sam Bockarie or other leaders were in Kailahun District: "[t]he Chamber considers that Gbao's ability to exercise his powers effectively in areas where Bockarie ordered the commission of crimes is doubtful".[88] Also, it found that Gbao "did not have the ability to contradict or *influence the orders of men* such as Sam Bockarie".[89] Bockarie resided either in Giema or Buedu in Kailahun District most of the time (outside the Junta period);[90] other senior leaders also lived in Kailahun District throughout the Indictment period. Finally it is worth noting that besides his usual propensity to be dictatorial Bockarie did not like Gbao and routinely harassed him.[91]

72. It is hard to imagine that Gbao could have played any active role in conscripting children to fight on behalf of the RUF when some RUF fighters did not respect him and he otherwise played no role in military action, whether in high-level meetings, issuing orders to RUF fighters,[92] military planning,[93] visiting the frontlines[94] or otherwise. In fact, within the RUF hierarchy, Gbao was not superior in his guise as Overall IDU Commander even to battalion commanders (those in the military hierarchy ranked below area/brigade commanders).[95] The Chamber succinctly characterised the relationship between the military command and security units when it stated "the staff units, and in particular the IDU, IO, G5 and MP, were not an integral part of the operational military command structure and did not interfere with it".[96]

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[88] Trial Judgement, para. 2041.
[89] Sentencing Judgement, para. 268 (emphasis added).
[90] The Trial Chamber found that Bockarie was located at the following locations during the following times: October 1996 to May 1997: Buedu, para. 740; May-August/September 1997: Freetown, paras. 24, 753, 1986, 1989; August/September 1997-February 1998: Kenema, paras. 24, 764, 770, 773; February 1998 to April 1998, Kenema District, para. 2077; February/March 1998 to May/June 1998: Buedu, para. 779, 797, 821, 1387, 1399; December 1998: Buedu, para. 861; January 1999: Western Area, para. 1514: Buedu, para. 919; From December 1999: Liberia, paras. 660, 913, 2126.
[91] This was not discussed by the Trial Chamber in its findings, bur Gbao was constantly harassed by RUF leadership, in particular Bockarie. *See Gbao Final Brief*, paras. 24-44. It is unclear whether the Trial Chamber accepted this evidence or not, but they relied upon several of the witnesses cited in this section of the Gbao Final Brief (DAG-080, DAG-101 in particular) in their Judgement.
[92] Trial Judgement, para. 697.
[93] *Id.* at para. 844.
[94] *Id.*
[95] *Id.* at para. 680; *also see* Justice Boutet Dissenting Opinion to Trial Judgement, para. 21, where he stated that "Gbao was not part of the *de jure* operational chain of command, was not part of the 'High Command' and was outranked by Brigade and Area Commanders in the RUF organisation".
[96] Trial Judgement, para. 680.

2) Gbao had No Control over the G5

73. The Prosecution argued at length in its Appellant Brief about Gbao's general power in relation to the G5. They noted the Chamber's findings that he had influence, and had in fact issued two orders to the G5 during the Indictment period.[97] These are discussed separately below, but we wish to emphasise the Prosecution is mistaken to suggest that general prestige and practical authority may connote control over the G5. It clearly cannot, as the Trial Chamber demonstrated repeatedly within its Judgement.

74. The Trial Chamber found that while he may have had some influence, Gbao had no effective control over the G5 (nor any other RUF security unit).[98] Additionally, "the Prosecution [] failed to establish that Gbao was in a superior-subordinate relationship with the perpetrators of" crimes under Count 12.[99] Also, Gbao had no formal power to issue orders to the overall unit commander of the G5 and was not otherwise superior to them.[100] He also had no ability to initiate investigations against any G5 member in his role as Overall Security Commander or Overall IDU commander.[101]

75. Rather than Gbao, the local military commander did have power over the G5 units. The Trial Chamber found that "[a]ll RUF members within an area fell under the authority of the local Area Commander".[102] It is significant, we suggest, that the Chamber did not state 'all fighters', referring instead to 'all RUF members'. This would necessarily include the G5. Before the coup, Vandi Kosia was Area Commander in Kailahun District.[103] During the Junta period, Dennis Lansana held that position.[104]

76. The Trial Chamber also found that neither the G5 nor any other security unit took orders from Gbao. It stated that "G5s attached to a battalion or a company reported to and

[97] Prosecution Appellant Brief, para. 3.66.
[98] Trial Judgement, para. 2034; *Also see* paras. 2034, 2041, 2153, 2034, 2155, 2178, 2181, 2217, 2219, 2237, 2294, 2298, 2299.
[99] *Id.* at para. 2237.
[100] *Id.* at para. 698.
[101] *Id.* at para. 684.
[102] *Id.* at para. 664.
[103] [redacted]
[104] Trial Judgement, para. 765. The Chamber described the role of the Area Commander in paragraph 664: "Prior to 1998, the RUF forces were organised into brigades of fighters for particular geographical areas who reported to the battleground commander. The Area Commanders were also responsible for passing orders to battalion commanders".

took orders from the Battalion or Company Commander, not the G5 commander".[105] Generally speaking the area or brigade commanders who controlled all RUF members within an area contained up to four battalion commanders. There were four companies in each fighting battalion.[106] According to the Trial Chamber's findings, the members of these fighting units were capable of issuing orders to the G5.

77. This notion was supported by TF1-041, a G5 member, who testified that "the efficiency of the G5 [] depended upon the extent to which it was supported by the local commander".[107] Further anecdotal support for this came in relation to Sesay, in that the Trial Chamber found that "[t]he RUF security units reported to Sesay" when he was operating in Kailahun Distriet.[108]

78. Taking the above analysis into account it is hard to understand how the Prosecution feels able to reverse a finding to a point beyond all doubt when so many findings point to the opposite conclusion.

3) Gbao did not Issue Orders to the G5

79. The Trial Chamber found that on two separate oceasions "Gbao, as OSC, did in fact give orders to...the G5".[109] It cited two sourees.[110] Both related to foreed labour rather than military training: the eonstruction of an airfield in Buedu and farming in Kailahun District. Only one of those events occurred during the Indictment period.[111] Most importantly, neither of them demonstrates that Gbao had the power to issue orders. DAG-048 testified to the airstrip order; he was subsequently found to be "inconsistent, unreliable and untrustworthy" when not corroborated by other reliable testimony.[112] Whilst DAG-048 recalled Bockarie's order to Gbao to require the G5 to provide civilians to assist in the airstrip's construction, it is

[105] Trial Judgement, para. 696.
[106] This generally accords with conventional military structure. There is no explicit support for this construction, but the Chamber described the hierarchical command structure in Kono District: "[a] brigade consists of four battalions; a Battalion consisted of four companies..." *See* Trial Judgement, para. 809.
[107] Trial Judgement, para. 696, fn 1304.
[108] *Id.* at para. 832.
[109] *Id.* at para. 699.
[110] *Id.*
[111] *See* Trial Judgement, paras. 1443, 1489. The Trial Chamber noted in relation to the construction of the airfield in Buedu that "it was not shown beyond reasonable doubt that the construction of this airstrip did in fact occur to completion and that, if so, it happened within the temporal jurisdiction of the Court".
[112] Trial Judgement, para. 572.

noteworthy that nobody was produeed to do the work, whieh suggested that Gbao's message may not have been respeeted. Moreover, as stated above, Gbao "did not have the ability to contradiet or *influence the orders of men* such as Sam Boekarie".[113]

80. The seeond order emanated from the testimony of TF1-330, a witness we suggest was inherently unreliable.[114] In any event nothing TF1-330 said demonstrated that Gbao issued an order to the G5. The testimony refereneed by the Trial Chamber, and supported by the Prosecution in its motion, noted that "[w]hatever *they* asked us civilians to do, [Gbao] would tell Morie Fekai and Morie Fekai would tell us in our own area where we were, and we would do the work".[115]

81. TF1-330 was clear in his testimony that orders came from Prinee Taylor (the overall G5 Commander) and perhaps the High Command rather than Gbao. He stated:

> "A. Where I was living there [in Talia, Kailahun District], it was Morie Fekai who was over us. He told us to cultivate that farm, the government farm. When there was an information, he was the one who would tell us – they would tell him to tell his people. It was Morie Fekai who was over us and he was the one who told us.
> Q. Who did he tell?
> A. Morie Fekai, he had his own boss. He was ealled Prince Taylor. In faet, it was in stages. *He was the one who told us.* He was working with the civilians. Whatever he tells us to do, that's what we would do. He, Morie Fekai, where I was living. This is what you should do for the government.[116]

82. Thus, the Trial Chamber erred by finding Gbao issued orders to the G5. Even viewed in the most favourable light to the Proseeution, this testimony cannot properly show that Gbao issued orders to the G5.

83. More broadly, it is significant that the Trial Chamber was able only to point to two orders over a period of over four years; neither bear any relevance to the issuing of orders regarding military matters such as conscripting childrcn to the RUF training camps, and, we would suggest, neither actually demonstrated that Gbao issued an order.

84. This position is supported by Judge Boutet in his dissent. He found that Gbao "did not have *de jure* command or control over the agents in the security units other than the IDU, of

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[113] Sentencing Judgement, para. 268 (emphasis added).
[114] *See* Gbao Appellant Brief, paras. 1254-80.
[115] Transcript, TF1-330, 14 March 2006, pp. 41-42 (emphasis added).
[116] *Id.*, 15 March 2006, p.21.

which he was the Overall Commander".[117] He continued: "[h]e would supervise these units, receive their reports, but he did not exercise control over these persons or units".[118]

4) Gbao did Not Receive Copies of All Reports from Security Units

85. The Prosecution cited the Trial Chamber's finding that Gbao "received a copy of all of the reports sent by security units, even if there was no obligation to report to him".[119] This finding was an error of fact.

86. While making the finding above, the Trial Chamber simultaneously found there was insufficient evidence to demonstrate that Gbao received reports from Bo, Kenema or Kono Districts from any of the security units.[120] There were no findings (besides the general statement that he received reports from other security units including the G5) to the effect that Gbao actually received any reports from the G5 in Kailahun District. Most importantly, there was no evidence that he received any reports on the forced conscription of persons under 15 for military training.

87. However, even if such reports were produced, Gbao could not have taken any formal action pursuant to their contents. As stated, he had no control over the G5 (or any other security unit). Additionally, "the Overall Commanders of the G5, MP, IDU and IO units reported directly to the RUF High Command. The Leader, Battlefield Commander, Battlegroup Commander, and Battlefield Inspector could exercise command and control over the special units".[121] This at no time included Gbao.

88. Additionally, regardless of the reports' content, Gbao could not in any event initiate investigations for misconduct.[122] There are no findings to the effect that Gbao could act in his capacity as Overall Security Commander or Overall IDU Commander besides recommend action.

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[117] Justice Boutet Dissenting Opinion to Trial Judgement, para. 21.
[118] *Id.*
[119] Prosecution Appellant Brief, para. 3.63.
[120] Trial Judgement, paras. 2041, 2057 (applying *mutatis mutandis* the Court's findings on Gbao's participation and significant contribution in Kenema) and 2105 (applying *mutatis mutandis* the Court's findings on Gbao's participation and significant contribution in Kono).
[121] *Id.* at para. 681.
[122] *Id.* at para. 684.

5) The Trial Chamber Never Found that Gbao Worked Closely with the G5 Pursuant to Count 12

89. The Prosecution noted in paragraph 3.63 that "Gbao was found to be working closely with the G5". This is a misleading statement presumably intended to create the perception that Gbao worked closely with the G5 pursuant to the Trial Chamber's findings under Count 12. The actual finding was: "Gbao also worked closely with the G5 in Kailahun Town to manage the large-scale, forced civilian farming that existed in Kailahun".[123]

90. The Gbao Defence opposed this complete finding in its Appeal Brief in relation to Count 13.[124]

6) Gbao's Role in Enforcing Discipline was Strictly Limited

91. The Prosecution argued that Gbao's role was essential to the accomplishment of RUF operations. According to the Prosecution, since his role was to maintain and enforce discipline, Gbao was responsible for the implementation of forced civilian labour including the recruitment of child soldiers.[125]

92. We wish to emphasise this alleged error of fact had no foundation upon testimonial evidence: findings made were merely of a generalised *de jure* nature owing to Gbao's title as Overall Security Commander. It is difficult to understand how such general statements can properly counter the Trial Chamber's specific findings as to Gbao's actual disciplinary powers.

93. Firstly, Gbao could not initiate an investigation. In his role as IDU Commander, the Trial Chamber stated that "[t]he IDU generally only commence an investigation at the order of the Battlefield Commander, Battlegroup Commander, or a Brigade or Area Commander. However, investigations were also instigated upon the filing of complaints by civilians".[126] In his role as OSC, Gbao could not commence Joint Seeurity Board investigations,[127] as "[t]he

[123] *Id.* at para. 2037.
[124] *See* Gbao Appellant Brief, Grounds 8(s) and 11.
[125] Prosecution Appellant Brief, para. 3.68.
[126] Trial Judgement, para. 684.
[127] *See generally* Trial Judgement, paras. 701-703 for a description of Joint Security Boards of Investigation.

High Command had the exclusive power to initiate a Joint Security Board investigation".[128] One might rhetorically ask how Gbao could reasonably be held responsible for disciplining the RUF whilst he could not initiate an investigation.

94. Secondly, following the opening of an investigation, Gbao's role as IDU Commander or OSC may have permitted him to investigate a particular alleged offence. However, most investigations were handled at local level, without any known input from Gbao.[129] When he was actually involved in an investigation, the Trial Chamber found that he had no right to take independent action to discipline: that was the exclusive province of the High Command.[130] He could only recommend the implementation of eertain punishments. Additionally, the Trial Chamber found that Gbao could not issue orders to fighters or other security units.[131]

95. Without the authority to initiate investigations, issue punishments or otherwise pass orders to RUF fighters or security units, we suggest that the Proseeution has asked the Appeals Chamber to reverse the factual findings on Gbao's acquittal based on flawed reasoning. Not only does this involve a three-level extrapolation (that Gbao was responsible for disciplinc; discipline includcd forced labour as described in thc Indictment; and such forced labour included the recruitment of child soldiers), even if the Appeal Chamber were to accept this line of reasoning in order for the Prosecution's appeal to be upheld it would also havc to conclude that all disciplinary failures were ultimately Gbao's responsibility and that it amounted to a substantial contribution to the planning of the crime of eonscription and use of child soldiers.

D. Gbao did Not Aid and Abet the Crimes of Conscripting or Using Child Soldiers

96. The Prosecution alternatively argued that Gbao's conduct in Kailahun District amounted to aiding and abetting all crimes charged in Count 12 of the Indictment found by the Trial Chamber to have been committed both inside and outside Kailahun District.[132] It divided its argument into aiding and abetting from 1996-1999 in Kailahun District and in 2000 in Bombali District.

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[128] Trial Judgement, para. 702.
[129] *Id.* at para. 685.
[130] *Id.* at paras. 686, 687, 701-703.
[131] *Id.* at paras. 697, 698.
[132] Prosecution Appellant Brief, para. 3.77.

i. Gbao did not Aid and Abet the Conscription of Child Soldiers in Kailahun District

97. In attempting to establish that Gbao aided and abetted the crimes eommitted within Count 12, the Proseeution relied upon its argument that Gbao planned the crime of conscripting persons under the age of 15 for forced military training.[133] As such, the Gbao Defence relies largely upon the responses above.[134]

98. Additionally, the Prosecution asserted that based upon his position and authority, Gbao must have aided and abetted the crimes committed by virtue of his physical presence at the scene where they were committed.[135] In other words, the Prosecution appear to argue that Gbao's presence in Kailahun Distriet was alone enough to form a safe conclusion that he approved of the acts of other RUF under Count 12.

99. We submit that the Prosecution's assertion that Gbao's superior position and authority in Kailahun District "cannot be disputed" [136] was, in fact, controversial. As a eonsequence, the Prosecution went on to argue that Gbao's non-interference with crimes committed within Count 12 may be seen as his taeit approval of the conduct of others in Kailahun District.[137]

100. In contrast to the 'undisputed' authority adopted by the Prosecution, the Trial Chamber's factual findings appear to be in contradiction. Gbao's lack of authority has been thoroughly discussed above.[138] Considering that Gbao had little authority when Bockarie and other RUF commanders were in Kailahun District, that he lacked effective control over security units (including the G5), that he was subordinate to the High Command, brigade/area commanders and battalion commanders, that he held a role equal to other Overall Unit Commanders and faced harassment from RUF fighters for 'fighting with a book and a pen', it is hard to reasonably eonclude that Gbao's physieal presence was capable of demonstrating tacit approval.

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[133] *Id.* at paras. 3.79, 3.80.
[134] *See supra* paras. 70-95.
[135] Prosecution Appellant Brief, para. 3.81.
[136] *Id.* at para. 3.81.
[137] *Id.*.
[138] *See supra* paras. 70-95.

ii. Gbao did not Aid and Abet the Crimes under Count 12 in Bombali District

101. The Prosecution also appealed the consequences of the Trial Chamber's finding that Gbao loaded former child soldiers onto a truck, thereby removing them from the ICC Centre in Bombali District. It argued this "clearly facilitated and assisted in the commission of the crime of use of child soldiers".[139] Accordingly, the Prosecution argued Gbao should be held individually criminally responsible for aiding and abetting under Count 12 in Bombali District.

102. We submit that this finding effectively endorsed a scenario that was factually impossible and had been reported by a witness who intentionally and materially lied during cross-examination. The finding accordingly amounted to a wholly erroneous error that should be disregarded by the Appeal Chamber. Even if the Appeals Chamber were to accept the Trial Chamber's finding, Gbao's actions cannot properly be said to amount to aiding and abetting.

a. The Single Finding Made Against Gbao is Factually Impossible

103. As stated above, the Trial Chamber made just one factual finding in relation to Gbao's involvement in relation to Count 12. It stated that "[t]he Chamber has found that Gbao loaded former child fighters onto a truck and removed them from the Interim Care Centre in Makeni in May 2000".[140] It found that this finding alone was "insufficient to constitute a substantial contribution to the widespread system of child conscription or the consistent pattern of using children to actively participate in hostilities".[141]

104. The Proseeution has accepted this factual finding but has suggested that the Appeal Chamber additionally find "the only reasonable conclusion open to the Trial Chamber was that the children that Gbao had taken from the ICC in Makeni were subsequently used in combat for the RUF".[142] The combat referenced is the fighting that took place between the RUF and UNAMSIL personnel on the road between Lunsar and Makeni on 3 May 2000 and the fighting in Lunsar on 4 May 2000.[143] Given that Gbao was found to have loaded the

[139] Prosecution Appellant Brief, para. 3.96.
[140] Trial Judgement, para. 2235.
[141] *Id.*
[142] Prosecution Appellant Brief, para. 3.91.
[143] *Id.* at paras. 3.93, 3.94.

children onto trucks, and because fighting took place between the RUF and UNAMSIL in Lunsar, the Prosecution asked the Appeals Chamber to find that "the RUF fighters deployed in that area" (to fight against UNAMSIL) were those taken by Gbao from the ICC.[144] The Prosecution has argued that the Trial Chamber failed to give proper consideration to whether this aet constituted aiding and abetting a crime under Count 12. While rejecting the arguments made by the Proseeution in their entirety, this factual finding was nevertheless an error of fact since it was based upon an impossible chronological scenario, as well as being testified to by a witness who was unsure of his own personal experience. For these reasons, the Prosecution's case that Gbao aided and abetted the attacks on UNAMSIL personnel through the use of child combatants is unfounded, as the foundation upon which it was built was wholly erroneous. This will be discussed further below.

1) The Factual Finding Could Not Have Happened in the Manner Described by TF1-174

105. The Prosecution is seeking to establish that Gbao was involved in pushing child soldiers onto a truck and that they were later used in combat between RUF and UNAMSIL personnel on 3 and 4 May 2000. However, the evidence used to seek to prove this fails by the force of logic and chronological impossibility.

106. The Prosecution relied upon testimony from TF1-174 to substantiate their claim. He testified that "on 6 May 2000, I [TF1-174] had left Makeni for Freetown".[145] When he returned *on 14 May* the fighting had extended to Lunsar.[146] Upon his return he noticed that 170 children were missing from the centre in Makeni.

107. The Prosecution argued in its Appeal Brief that they were removed in order to fight UNAMSIL personnel along the Lunsar to Makeni highway on 3 May and in Lunsar on 4 May. This is impossible in reality, *as the children had yet to be removed from the centre.* As noted, TF1-174 testified that he left Makeni on 6 May. Until 6 May, all 320 children, including the 170 found to have been removed by Gbao, were still at the ICC. It was only upon his return that he noticed the children were missing.

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[144] *Id.* at para. 3.94.
[145] *Id.* at para. 3.92.
[146] *Id.*; *also see* Transcript, TF1-174, 21 March 2006, p. 66.

108. Sinee it was only upon his return on 14 May that he noticed that half the ehildren were missing, it is impossible to suggest that the alleged fighters were removed to fight either along the Lunsar to Makeni highway or in Lunsar on 3 or 4 May.

2) TF1-174 was Not Testifying in a Forthright Manner with the Trial Chamber

109. More generally, while the Trial Chamber eventually refused to find Gbao individually criminally responsible under Count 12, the factual finding derived from TF1-174's testimony concerning loading children onto trucks must be seen as an error, as TF1-174 was not forthright in his testimony on this issue.

110. As stated, the Trial Chamber found that Gbao "loaded [] children onto a truck and removed them" from the ICC.[147] This finding was derived from TF1-174 alone. In his testimony, however, he testified to the same event in two different ways. His second account explicitly contradieted his first.

111. In evidence in chief, TF1-174 said he left Makeni on 6 May and returned on 14 May 2000.[148] It was between thesc two dates that Gbao allegedly loaded the former child soldiers onto trueks and removed them from the ICC.[149] In chief, TF1-174 testified he only became awarc about these events (and that Gbao was involved) *when he received a report* on the matter.[150] When ehallenged in cross-examination the witness dramatically changed his testimony, *then claiming to have been present* when Gbao was pushing the ICC boys onto the trucks.[151]

112. More importantly, in his direet testimony he said the incident took place while he was away from Makeni. In cross-examination, he testified that it was while he was present in Makeni.[152]

113. Additionally, if TF1-174 had witnessed Gbao's removal of former child soldiers at the ICC upon his return to Makeni, it could only have happened on 14 May 2000 at the earliest,

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[147] Trial Judgement, para. 1690.
[148] *See generally* Transcript, TF1-174, 21 March 2006, pp. 66-67.
[149] Transcript, TF1-174, 21 March 2006, pp. 65-66.
[150] *Id.*
[151] Transcript, TF1-174, 28 March 2006, p. 95-96.
[152] *Id.* at p.95.

when he returned from Freetown. By that date, fighting between the RUF and UNAMSIL had ceased.

b. Gbao was Accosted by RUF Leadership for Re-Opening the ICC

114. The Prosecution also argued that Gbao "granted permission on behalf of the RUF High Command for the re-opening of the ICC in Makeni".[153] It is not entirely clear why they recalled this piece of TF1-174's evidence. What is clear is that only half of the evidence was presented. The Prosecution failed to mention that after signing the letter to authorise the re-opening of the ICC, Gbao was accosted and embarrassed by RUF Leadership.[154] This was not because the RUF Leadership was necessarily opposed to the ICC, but because Gbao had no authority to grant such permission. Jeopardising one's position by covertly consenting to re-open the ICC (which promoted the rehabilitation of former child soldiers) without the RUF commander's consent would, we submit, tend to emphasise Gbao's desire to rehabilitate former child soldiers rather than to send them into combat.

115. This anecdote provided a clear example of Gbao's authority in Makeni in 2000. While his role was enhanced after the Lomé Peace Accord, he still lacked the authority to make basic decisions on his own.

c. Gbao was Not a Member of the RUF High Command

116. The Prosecution argued in paragraph 3.87 that "Gbao was clearly part of the RUF High Command at that time and possessed influential decision-making power" in Makeni in 2000. This is patently untrue, and was clearly demonstrated by his humiliating failed attempt to re-open the ICC.

117. The Trial Chamber found also repeatedly that Gbao lacked effective control[155] and that the RUF High Command only included the Leader, Battle Field Commander, Battle Group Commander.[156]

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[153] Prosecution Appellant Brief, para. 3.89
[154] Transcript, TF1-174, 28 March 2006, pp.71-72.
[155] Trial Judgement, paras. 2298, 2299.
[156] *Id.* at para. 657.

iii. Conclusion

118. For these reasons, the Appeals Chamber should dismiss the Prosecution arguments that Gbao planned or aided and abetted the crimes found to have been committed under Count 12.

E. The Trial Chamber Correctly Held that Gbao was not Involved under Count 12 as a Member of the JCE Between May 1997 and April 1998

119. In addition to asserting that Gbao planned or aided and abetted the crimes committed under Count 12, the Prosecution additionally argued that "the Trial Chamber erred in law/and or erred in fact in finding that Gbao is not individually responsible for the conscription and/or use of child soldiers as charged in Count 12 of the Indictment".[157] The only reasonable conclusion open to any reasonable trier of fact, according to the Prosecution's argument, is that Gbao was individually criminally responsible under Article 6(1) for committing the crimes charged in Count 12 as a participant in the JCE between May 1997 and April 1998.[158]

120. The Prosecution's arguments in seeking to reverse the Trial Chamber's acquittal of Gbao under Count 12 largely mirror those it made in seeking to conviet Gbao for planning the conscription and/or use of child soldiers in paragraphs 3.54 – 3.98. The arguments in paragraphs 57 - 118 of this brief, therefore, are incorporated herein.

i. Gbao did not Make a Significant Contribution to the JCE

121. For the reasons explained in Ground 8 of the Gbao Appeal Brief (and its 19 sub-grounds), we submit that Gbao was not a member of the JCE found by the Trial Chamber to exist between the AFRC and RUF, and therefore could not have made a significant contribution. However, should the Appeal Chamber choose to uphold the Majority's JCE findings against Gbao, the Gbao Defence aceepts that he need not make a significant contribution to the specific crimes found to have been committed under Count 12 to satisfy the *actus reus* requirements under this Count.

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[157] Prosecution Appellant Brief, para. 3.4.
[158] *Id.* at para. 3.6.

ii. Gbao did not Share the Intent of the other JCE Members or Principal Perpetrators of the Crimes under Count 12

122. In their attempt to reverse his acquittal under Count 12, the Prosecution argued Gbao shared the intent with other participants in the JCE to commit the crimes as charged in Count 12. They argued that because Gbao was physically present in Kailahun Town and held a position of power and authority with a supervisory role over the IDU, MP, IO and G5, then he must have shared the intent of the other participants in the JCE and that accordingly the Trial Chamber erred in faet in acquitting him.[159] Additionally, the Prosecution argued that sinee Gbao was found to have shared the intent under Count 13 for enslavement, he should also have been found to have shared the intent under Count 12.[160]

a. Gbao's Ostensible Position of Power and Authority does not Demonstrate his Intent under Count 12

123. Attempting to demonstrate Gbao's intent as an alleged JCE member under Count 12 by relying upon findings as to his position and role mirrors the Prosecution's arguments that Gbao should be held individually criminally responsible for planning the conscription of persons under the age of 15 for forced military training.[161] Accordingly, the Gbao Defence largely relies upon its previous arguments listed in paragraphs 57-118 in this Response.

124. As stated, Gbao was not a highly respected RUF officer in Kailahun District. He played no role regarding military matters. Area and even battalion commanders in Kailahun District were superior to Gbao.[162] Additionally, he had no control over the G5.[163] Area, battalion and company commanders issued orders to members of the G5, while Gbao could not.[164] The Trial Chamber did note two orders ostensibly issued by Gbao. While this hardly

[159] *See* Prosecution Appellant Brief, paras. 3.36, 3.37.
[160] *Id.* at para. 3.42.
[161] *Id.* at paras. 3.62-3.68, which discuss the Prosecution's argument that Gbao planned the crimes under Count 12.
[162] *See supra*, para. 72.
[163] *See supra*, paras. 73-95.
[164] *See supra*, paras. 73-84.

demonstrated an entrenched routine or practice, neither of these examples actually showed he had the power to issue orders.[165]

125. The Prosecution has detailed the various findings demonstrating, at best, Gbao's *de jure* status in the RUF. What they have failed to acknowledge was that Gbao had no command and control over RUF fighters or security units, of which there are a wealth of findings.[166] These include that "the Prosecution has failed to establish that Gbao was in a superior-subordinate relationship with the perpetrators of" Count 12.[167] Combined with the dearth of credible allegations made against Gbao under Count 12 it is difficult to understand the assurance with which the Prosecution appeared to argue that Gbao possessed the requisite intent.

b. Prosecution Should Not be Permitted to Demonstrate Intent Based upon Findings Under Count 13

126. The Gbao Defence relies upon its arguments in paragraphs 61-63 above to respond to the Prosecution's argument in paragraph 3.42 of its Appellant Brief that because Gbao shared the intent of the other JCE members under Count 13, he must have shared the intent under Count 12. Based on the absence of factual findings that Gbao played any role in the forced military training under Count 13, the Majority's finding that Gbao planned and maintained a system of enslavement centred entirely on their finding that he forced civilians to farm on behalf of the RUF.

c. Gbao was Opposed to the Use of Child Soldiers

127. It was admitted during the Gbao Defence case that some RUF soldiers used child soldiers during the war. We submitted that at that time Gbao, however, was opposed to the use of children for this purpose.

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[165] *See supra*, paras. 79-84.
[166] *See eg.* paras. 2034, 2041, 2153, 2034, 2155, 2178, 2181, 2217, 2219, 2237, 2294, 2298, 2299.
[167] Trial Judgement, para. 2237.

128. The Trial Chamber relied on DAG-080 throughout the Judgement. According to him "it was wrong to use child combatants, and in Makeni in fact he [Gbao] colleeted them, carried them to the St. Francis Secondary School, where they were given some sort of education".[168]

129. Prosecution witnesses were similarly supportive of Gbao's disapproval of the use of child combatants. Ngondi (TF1-165) confirmed that the CARITAS operation had been authorised by Gbao.[169] While he did not possess the authority to authorise such a venture,[170] Gbao's assent to CARITAS operations runs counter to the Prosecution suggestion that he supported the enlistment of child soldiers. TF1-174 (a witness who the Gbao Defence submit lied to thc Trial Chamber in an effort to impugn Gbao) even acknowlcdged that just bcfore the confrontation between the RUF and UNAMSIL Gbao had facilitated the repatriation of almost 100 ICC boys with their families.[171]

iii. The Prosecution Improperly Sought to Convict Gbao under Form III Liability

130. Should the Appeal Chamber not accept the Prosecution's argument that Gbao intended the crimes committed under Count 12, the Prosecution still maintain that "on the basis of the findings of the Trial Chamber...it was foreseeable to any participant in the JCE that the crime of conscription and/or use of child soldiers"[172] would be committed and that, thereforc, Gbao should be found responsible under Form III liability for the conscription or use of child combatants.[173]

131. If the Prosecution seeks to reverse Gbao's acquittal under Count 12 and substitute a conviction of Gbao as a JCE member under Form III liability, it should first request the Appeal Chamber to reverse the Trial Chamber's finding that Count 12 was 'within' the common purpose of the JCE.[174] Count 12 cannot be 'within' the common purpose for some JCE participants and 'outside' the common purpose for others.

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[168] Transcript, DAG-080, 6 June 2008, p.90.
[169] Transcript, TF1-165, 31 March 2006, p.17.
[170] *See supra*, paras. 114-115.
[171] Transcript, TF1-174, 28 March 2006, p.91.
[172] Prosecution Appellant Brief, para. 3.43.
[173] *Id.*
[174] *See eg.* Trial Judgement, para. 1985.

132. Specifically, the Prosecution cannot be at liberty to argue that JCE members other than Gbao intended to use child combatants to further their intention to take or maintain control over the country of Sierra Leone while arguing at the same time that Gbao did not intend it but that it was foreseeable. If Gbao did not intend it, he cannot be said to have been part of the JCE since there is only one JCE in the RUF case and it is a Form 1 JCE.

iv. Conclusion

133. In conelusion, we therefore submit the Appeal Chamber should uphold the Trial Chamber's findings under Count 12 and dismiss the Prosecution's submissions.

F. The Appeals Chamber Should Not Extend the JCE in Regards to Count 12 Past April 1998

134. The Prosecution argued that, should the Appeal Chamber reverse the Trial Chamber's finding that the JCE between the RUF and AFRC terminated in April 1998, Gbao should additionally be held individually criminally responsible as a participant in the JCE for crimes within Count 12 that were found to have been committed after the end of April 1998.

135. To support its position, the Proseeution again cited Gbao's role as the RUF Ideologist, or ideology instructor, arguing that he "dictated the spirit in which the crimes alleged in the Indictment were committed".[175] It also relied upon the same arguments advanced to support their ground of appeal that Gbao should be found to have committed, as a JCE member, crimes under Count 12 between May 1997 and April 1998.

136. If the Appeal Chamber were to dismiss the Prosecution's first ground of appeal, it should equally dismiss this part of its second ground. However, if the Appeal Chamber were to accept that the JCE can be extended beyond the termination date found by the Trial Chamber, we submit it should not find that Gbao intended the crimes by virtuc of his role as ideology instructor or his position in Kailahun District for the reasons advanced in Grounds 8(a) and 8(b) of the Gbao Appellant Brief (in relation to his role as ideology instructor), as well as paragraphs 19-21 and 39-49 under Ground 1 above.

[175] *See* Prosecution Appellant Brief, para. 3.52, where it statcd that "tlie Prosecution relies on paragraphs 2.168 and 2.169 and 3.10 – 3.44 in their Appeal Brief".

V. Response to Prosecution's Third Ground of Appeal

137. The Prosecution alleged in its Appeal that the Trial Chamber erred in law and in fact by acquitting Gbao of abducting and holding as hostage UNAMSIL personnel under Count 18 of the Indictment. They argued Gbao was guilty of aiding and abetting the abduction and taking of hostage Major Salahuedin and Lt Colonel Jaganathan Ganase on 1 May 2000.

A. Findings by the Trial Chamber

138. In its deeision on Count 18, the Trial Chamber held that "[t]he offence of hostage taking requires [a] threat to be communieated to a third party, with the intent of compelling the third party to act or refrain from acting as a condition for the safety or release of the eaptives".[176] It further found that "[t]here is no evidence that the RUF stated to the Government of Sierra Leone, the UN or any other organisation, individual or group of individuals that the safety or release of the peacekeepers was contingent on a particular action or abstention".[177]

139. It found additionally that "the RUF did not...abduct the peacekeepers in order to utilise their detention as leverage for Sankoh's release [Sankoh being arrested 5 days after the first abductions took place] as the peacekeepers were already being detained at the time of his arrest".[178]

140. It concluded that "the Prosecution failed to prove what the Trial Chamber considered to be an essential element of the crime of hostage-taking, namely, the use of a threat against the detainees so as to obtain a concession or gain an advantage"[179] and therefore acquitted Gbao of Count 18.

[176] Trial Judgement, para. 1964.
[177] *Id.* at para. 1965.
[178] *Id.* at para. 1966.
[179] *Id.* at para. 1969.

B. Prosecution's Appeal Against the Chamber's Findings

141. The Prosecution appealed these findings, arguing that the communication of a threat to a third party is not a legal element of hostage-taking and that the Trial Chamber thereby erred in law. The relevant question according to the Prosecution is whether the RUF held the requisite intent to hold the UN personnel hostage, not whether that intent was ever communicated to a third party.[180]

142. The Prosecution asserted that the Trial Chamber erred in fact in finding that there was no evidence that the RUF detained the peacekeepers with the intention to compel the Sierra Leone Government and/or UN to stop the disarmament process.[181]

143. It also argued that the Trial Chamber erred in fact in finding that the RUF did not abduct the peacekeepers in order to utilise their detention as leverage for the release of Foday Sankoh, who was arrested 5 days after the first abductions on 1 May 2000.[182] It instead argued that the fact that Sankoh was arrested after the initial abductions at Makump DDR camp was irrelevant.[183]

144. It eoncluded this alternative argument with "Gbao was aware of the intention of the RUF to capture and detain the UNAMSIL personnel with the intent to compel a third party to act or abstain from acting... [therefore] Gbao is responsible under Article 6(1) of the Statute for aiding and abetting the taking of hostages, as charged under Count 18 of the Indictment".[184] Specifically, it requested that Gbao be held responsible for aiding and abetting the hostage taking of Major Salahuedin and Lt Colonel Ganese Jaganathan, the same individuals in respect of whom he was convicted of aiding and abetting Kallon regarding 'attacks' under Count 15.[185]

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[180] Prosecution Appellant Brief, para. 4.21.
[181] *Id.* at paras. 4.56, 4.57.
[182] *Id.*
[183] *Id.* at para. 4.71.
[184] *Id.* at para. 4.112.
[185] *Id.* at para. 4.105.

C. *Preliminary Comments*

i. *The Prosecution Continued to Rely Upon Findings it Knows are Questionable*

145. The Prosecution surprisingly persisted in their reliance upon evidence of Major Maroa's abduction whilst aware this version of events is in stark contrast to the account in a statement given [redacted] in 2004. The Prosecution stated in paragraph 4.111 that "[i]t was further found that Gbao later escorted the abducted peaeekeepers arriving in a Land Rover to Makeni. He took three rifles out of the boot of his ear. Maroa was bleeding from the mouth and the other three peacekeepers were limping".[186]

146. The Gbao Defence argued in Ground 14 of its Appeal that the Proseeution abused the process of this Tribunal by failing to disclose what turned out to be a highly exculpatory statement given [redacted] before this trial started in July 2004.[187] Instead, the document was disclosed to the Defence over two years later, after the Prosecution case closed. The nature of the abuse elaimed was discussed in paragraphs 290 – 311 of the Gbao Appellant Brief.

147. Continuing to aver that Gbao facilitated Maroa's abduction demonstrated the Proseeution's cynical determination to suppress what [redacted] five years ago and to persist with a case that stands in stark contrast [redacted] what happened. The Defence finds this offensive to the legitimacy of these proceedings.

148. Aceordingly we reiterate our argument in Ground 14 of our Appeal Brief that Count 15 (and Count 18 if the Appeals Chamber upholds the Prosecution's ground of appeal) should be dismissed as against Gbao on the basis of abuse of process.

149. The Prosecution may be well advised to observe the following *salutary dicta* in *Kupreskic*:

> "the Prosecutor of the Tribunal is not, or not only, a Party to adversarial proeeedings, but is...an organ of international criminal justice whose object is not

[186] Prosecution Appellant Brief, para. 4.111.
[187] The Ground of appeal was founded upon the Trial Chamber's refusal to consider the Defence argument that this action constituted an abuse of process; however, a clear indication of the Prosecution's abuse can be found in this ground.

simply to secure a conviction but to present the case for the Prosecution...in order to assist the Chamber to discover the truth in a judicial setting".[188]

150. We submit that by continuing in their determination to implicate Gbao for facilitating Major Maroa's abduction, the Prosecution has failed in its role and duty as an organ of international criminal justice.

ii. Gbao Cannot be Found Responsible for the Abduction and Hostage-Taking under Count 18 for the Physical Assault on Major Salahuedin, as He was Never Abducted

151. Reealling Gbao's conviction of Count 15 by way of aiding and abetting the physical assault on Major Salahuedin, the Proseeution stated that "on the basis of the Trial Chamber's findings and the evidence in the case as a whole, the only conclusion open to any reasonable trier of faet is that Gbao is additionally guilty under Article 6(1) on the basis of these facts for the crime of hostage-taking".[189]

152. The failure of the Prosecution's logic is pitifully simple: Major Salahuedin was not abducted. Whilst the Trial Chamber did find that Salahuedin was punched in the face, "[e]eventually, the peaeekeepers managed to take and hide Salahuedin".[190] After his concealment Salahuedin's name was not mentioned again.

153. We urge the Prosecution to acknowledge this in order to save the Appeal Chamber valuable time.

iii. The Prosecution is Correct in Noting that, had Gbao Been the Interlocutor, Perhaps the UNAMSIL Conflict Would have been Resolved

154. In seeking to attribute Gbao with individual criminal responsibility the Prosecution noted that "[t]he Trial Chamber found that after thc first abductions, Mendy and Gjellesdad went first" to speak with Gbao because, as Ngondi testified, their discussions had been

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[188] *Prosecutor v. Z. Kupreskic, M. Kupreskic, V. Kupreskic, Josipovic and Santic*, Case No. IT-95-16-A, Decision on Communications between tlie Parties and their Witnesses, 21 September 1998, p.3. Judge Antonio Cassese, writing for the Trial Chamber, was writing in response to improper contact between the Prosecution and a witness who had already taken an oath in the case.
[189] Prosecution Appellant Brief, para. 4.105.
[190] Trial Judgement, paras. 1791, 1890(i), 2261, 2263.

successful in the past. They were unable to meet with him. The Prosecution concluded this paragraph by noting that Gbao had been an important interlocutor.

155. The Gbao Defence potentially agrees with this assertion and, had the UN staff been successful in reaching Gbao, one can only speculate as to whether further escalation of the conflict could have been avoided. As the Trial Chamber held, Gbao had attempted to interfere with the first set of attacks at the Makump DDR camp on 1 May.[191] But after that, he was absent from the scene.

156. It would be wholly unfounded and wrong to infer that simply because the UN personnel were unsuccessful in reaching him, Gbao supported the hostage-taking. Instead we submit this demonstrated that Gbao was irrelevant when military offieers beeame involved in the RUF/UNAMSIL eonfliet. We suggest it was far more likely that the UN personnel were instructed to speak to someone other than Gbao since Gbao had no power to control military officers or decisions during these events.[192]

D. The Prosecution is Incorrect In Asserting that the Trial Chamber Erred in Law

157. As stated above, the Prosecution appealed the Trial Chamber's finding that they had failed to prove an essential element of the erime of hostage-taking. The Prosecution appealed on the basis that the eommunication of a threat to a third party is not a legal element of hostage-taking and that, therefore, the Trial Chamber erred in law. The rclevant question, according to the Prosecution, is whether the RUF had the intent to hold the UN personnel hostage, not whether that intent was ever eommunicated to a third party.[193]

158. The third element of the crime of hostage-taking, that the Prosecution should demonstrate "the Accused intended to compel a State [or other actor] to act or refrain from acting as an explicit or implicit eondition for the safety or the release of such person" is a central issue in their appeal.[194] It is in relation to this third element that the Prosecution submitted there is no requirement of such communication to a third party.

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[191] Trial Judgement, para. 1790.
[192] *Id.* at paras. 2298, 2299.
[193] Prosecution Appellant Brief, para. 4.21.
[194] Trial Judgement, para. 240.

159. The Prosecution's submission was, according to them, supported by a wealth of sources including the Geneva Convention Additional Protocol II, the ICTY, ICTR and ICC Statutes, legal commentary, the domestic law of countries throughout the world, and the *Blaskic* and *Kordic and Cerkez* cases at the ICTY. Based upon these sources the Prosecution concluded that most of these authorities provide no requirement that a threat be communicated to a third party.

160. The Defence submit in response that there is no legal element that requires a threat be communicated to a third party because such communication is inherent in the taking of hostages.

161. Based on this reasoning one might suppose that the reason why *Blaskic* and *Kordic and Cerkez* cases did not discuss the issue of whether specific threats were made was because the making of such threats was inherent within the finding that the individuals in those cases were in fact hostages. Additionally, the Lambert Commentary relied upon by the Prosecution to support their argument actually supports the Trial Chamber's perspective on this issue.[195] After citing a long paragraph ostensibly in support of their position that it is intent, and not communication, that is relevant to a finding of hostage-taking, the Prosecution noted "the compulsion must be directed towards a third party".[196] This, in fact, directly supports the Trial Chamber's findings that the threat must be communicated to a third party.

E. The Prosecution is Incorrect in Asserting that the Trial Chamber Erred in Fact

162. The Prosecution additionally argued in its Appeal that the Appeal Chamber should reverse the Trial Chamber's finding that the RUF did not detain the peacekeepers with the intention to compel the Sierra Leonean Government and/or UN to stop the disarmament process.[197] It also suggested that the Trial Chamber erred in finding that the RUF did not abduct the UN personnel in order to utilise their detention as leverage for the release of Foday Sankoh, who was arrested on 6 May 2000.[198]

[195] Prosecution Appellant Brief, paras. 4.31, 4.32.
[196] *Id.* at para. 4.32 (other citations omitted).
[197] *Id.* at paras. 4.58-4.70.
[198] *Id.* at paras. 4.71-4.75.

i. The Prosecution did not Sufficiently Demonstrate that Gbao Possessed the Actus Reus Necessary under Count 18

163. The Gbao Defence recalls the arguments in made in Ground 15 of its Appellant Brief and incorporates these arguments by reference that Gbao demonstrated the necessary *actus reus* to be found individually criminally responsible under Count 18.[199]

ii. The Prosecution did not Sufficiently Demonstrate that Gbao Possessed the Mens Rea Necessary under Count 18

a. Intent related to the Course of the Disarmament

164. The Prosecution argued that the Trial Chamber erred in finding that it was not the RUF's intention to compel the Government of Sierra Leone and/or the UN to refrain from continuing the DDR process as an explicit or implicit condition for the safety or the release of the UNAMSIL personnel. As a consequence, it erred in fact, in the Prosecution's estimation, by failing to find that the third element under Count 18 was satisfied.

165. In this respect, the Prosecution presented factual findings that sought to demonstrate how Gbao and other RUF opposed disarmament, leading to the conclusion that the abductions were committed by the RUF in order to compel the Sierra Leone Government and/or the UN to stop the disarmament process for the continued safety and/or release of UN personnel.

166. This set of findings is incorrect for the reasons listed below.

1) Inappropriate Standard and Use of Evidence by the Prosecution

167. Many of the findings relied upon by the Prosecution in its argument do not meet the standard required to reverse factual findings on prosecutorial appeals. These included the following assertions in the following paragraphs:

i. 4.63: The Prosecution asserted that "[t]he Prosecution submits that a reasonable trier of fact *could infer* from this wilful misinformation…"

[199] Gbao Appellant Brief, paras. 313 – 354.

ii. 4.67: They argued: "[t]he fact that the RUF abducted high-ranking UNAMSIL staff also *gives rise to an inference* that they intended..."

iii. 4.68: They stated that "[t]he fact that the RUF abducted high-ranking UNAMSIL staff also *gives rise to an inference*..."

iv. 4.70: They stated that "[t]he Prosecution submits that the fact that the RUF leadership was called to Monrovia to negotiate the release of the UNAMSIL peacekeepers *is a strong indication* that..."; and

v. 4.70: They further stated that "it is *reasonable to infer* that the RUF did seek certain concessions in exchange for the release of the peacekeepers".

168. The Prosecution is aware of the standard required to reverse factual findings made by the Trial Chamber. As stated in paragraph 1.10 of its Appeal Brief, they stated that "considering that it is the Prosecution that bears the burden at trial of proving guilt of the accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against an acquittal than for a defence appeal against conviction...[t]he Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the convicted person's guilt has been eliminated".[200]

169. Arguing in this section that a reasonable trier of fact 'could infer' something, that the facts 'give rise to an inference', or that a particular factual finding gives 'a strong indication' does not satisfy this striet standard of proof that the Prosecution faces in reversing findings of fact on appeal. In fact, it would not satisfy the evidentiary burden at the trial level, as facts must be proven beyond reasonable doubt and cannot just be a reasonable inference.

170. Given the onerous time pressures facing both Prosecution and Defence teams in preparation of their arguments, such mistakes may be understandable. However, the Prosecution should now reeonsider whether they will be able to sustain the above assertions aecording to the proper standard of proof on appeal of acquittals. Unless all reasonable doubt as to guilt ean properly be said to have been eliminated, the Appeals Chamber should not be burdened with such assertions. By use of its language, the Prosecution appears already to have implicitly conceded that they are unable to satisfy the appropriate standard of review required

[200] Prosecution Appellant Brief, para. 1.10.

to overturn the Trial Chamber's factual findings. Urging the Appeals Chamber merely to draw inferenees, or observe strong indieations does not go nearly far enough in discharging the evidentiary standard of proof that is absolutely neeessary.

2) The Proseeution Cannot Rely upon Exhibit 190

171. The Proseeution relied upon Exhibit 190 in paragraphs 4.62 and 4.66 in order to make further allegations against the Accused. This is impermissible and infringes upon the rights of the Accused. As counsel in this case are aware, Exhibit 190 was a highly contentious document. While the Gbao Defence does not object to its inclusion, its admission into evidence was consistently opposed by the Kallon Defence.[201] It was originally introduced into the trial record for the sole reason of providing context to the cross-examination of Jaganathan Ganase by counsel for the Third Accused and nothing morc.[202]

172. The Proseeution seeks to use this document to demonstrate that Gbao and others held the requisite intent "to compel the Government of Sierra Leonc as well as the UN to refrain from continuing thc DDR process".[203] Such a document may only be employed to provide context during one particular cross-examination.

173. Beyond that, it is uncontroversial that documentary evidence – which is incapable of being tested by the Defence – may not be used to substantiate the acts and conduct of the Accused. The Trial Chamber confirmed this when stating "[t]he Chamber will not make use of the evidence admitted under this rule, where it goes to prove the acts and conduct charged against thc Aecused if there is no opportunity for cross-examination". [204]

174. The Proseeution sought to use Exhibit 190 to show that Gbao was opposed to disarmament, thereby demonstrating his *mens rea* under Count 18. Since their attempt to use

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[201] *See eg.* Transcript, Morris Kallon, 17 April 2008, pp. 60, 90; Transcripts, DMK-444, 5 June 2008, pp. 66-69; *also see Prosecutor v. Sesay et al.*, SCSL-2004-15-T-1135, Kallon Response to Gbao Request for Leave to Add Two Documents to its Exhibit List and to Admit Them as Evidence, 21 May 2008, in response *Prosecutor v. Sesay et al.*, SCSL-2004-15-T-1126, Gbao-Request for Leave to Add Two Documents to its Exhibit List and to Admit Them as Evidence with Confidential Annexes, 16 May 2008.
[202] *Prosecutor v. Sesay, Kallon, Gbao,* Doc. No. SCSL-04-15-T-620, Decision on Prosecution Motion to Admit into Evidenee a Document Referred to in Cross Examination, 2 August 2006, p. 4.
[203] Prosecution Appellant Brief, para. 4.58.
[204] Trial Judgement, para. 513; *also see* para. 513, fn. 964.

documentary evidence goes to Gbao's aets and conduct, we submit it should not be considered by the Appeals Chamber.

3) Gbao was not Opposed to RUF Disarmament

a) Gbao's Aetions on 17 April 2000

175. The Prosecution asserted that Gbao's behaviour at the Makeni Reception Centre on 17 April 2000 demonstrated his hostility to the DDR programme.[205] They noted that he threatened to burn down the UN tents (set up for purposes of disarmament at the Makump DDR camp) if the UN personnel did not dismantle them.[206] After this event, the Prosecution stated that Ngondi, the UNAMSIL commander on the ground, met Gbao to discuss matters.[207]

176. The Prosecution failed to mention the critically important conversation that Gbao and Ngondi had which illustrated Gbao's true attitude towards disarmament. When Gbao and Ngondi spokc, it was clear that Gbao was not opposed to it. Ngondi stated that Gbao "couldn't give me the reason why they're not going to do that [disarm]. And as usual, we had a lot of understanding and respect for one another with Augustine Gbao...*he said that our reception centre should remain and since the disarmament is for long term*, we should - each party should report, give a report to their headquarters on what is going on in the crowd, that there was no need of having combatants demonstrating in town [there were other protests in town]".[208] This clearly demonstrated that Gbao's intention was to promote disarmament in co-operation with Ngondi and UNAMSIL.

177. It appears that as well as disarmament in general, Gbao and Ngondi went on to discuss the other protests going on in the Makeni area at that time. In conclusion, Defence counsel asked him: "[w]ould you agree it was Augustine Gbao, on the RUF side, who was instrumcntal in urging those people to disperse peacefully on the 17th?"[209] He answered: "*Yes, yes yes, Gbao. I commend him for that*".[210]

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[205] Prosecution Appellant Brief, para. 4.108.
[206] *Id.* at para. 4.69(i).
[207] *Id.*
[208] Transcript, Leonard Ngondi, 31 March 2006, pp. 16-17.
[209] *Id.* at pp. 17-18.
[210] *Id.*

178. We submit it is difficult to eonclude that Gbao opposed disarmament given his personal interaction and co-operation with Ngondi on 17 April 2000 in order to disperse protests against disarmament throughout Makeni town.

b) TF1-071's Tcstimony about Gbao Threatening Execution for Premature Disarmament

179. The Proseeution also argued that in the second half of April 2000 Gbao warned that any RUF fighter found disarming secretly would faee execution.[211] This statement eame from TF1-071 and was used by the Prosecution to argue that that Gbao opposed disarmament.

180. The Trial Chamber erred in faet by relying upon this testimony,[212] as TF1-071 was not a reliable witness in relation to his testimony regarding UNAMSIL. Firstly, he claimed that he only became aware of Gbao in 2000 or 2001.[213] It seems unlikely that he would have been aware of Gbao's attitude to disarmament in early 2000 if he may not even have known who he was. Additionally, TF1-071 elsewhere shamelessly lied about the UNAMSIL ineident, giving a hearsay account that on 1 May, Gbao "ordered the securities to open arms at the peacekeepers" at the *Lunsar* DDR camp at the same time as the fighting raged in *Magburaka*.[214] There are no Trial Chamber findings that Gbao ordered any security to open arms against anyone during the entirety of the Indictment period, much less on 1 May, when no armed battles took place. Additionally, TF1-071 testified about events that actually took place at the Makump DDR camp, not Lunsar as hc testified. His testimony went against the weight of all other relevant testimony in the case, was plainly false and demonstrated a patent disregard for the truth. One assumes that the Prosecution is aware that TF1-071's evidence bears no relation to testimony provided by other Proseeution witnesses that led to convictions under Count 15.

181. It is also worth noting that TF1-071 gave detailed statements to thc Prosecution on 17 November 2002, 12 February 2003 and 13 September 2004. Each contained great detail on the UNAMSIL events. Remarkably, none of them mentioned Gbao in any capacity.[215]

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[211] Prosecution Appellant Brief, para. 4.108.
[212] *See* Trial Judgement, para. 1780.
[213] Transcript, TF1-071, 26 January 2005, p.62.
[214] Transcript, TF1-071, 24 January 2005, pp.10-14.
[215] Transcript, TF1-071, 27 January 2005, pp.40-42.

b. Intent Related to Sankoh's Arrest

182. The Prosecution additionally/alternatively argued that the Trial Chamber erred in their finding that "the RUF did not abduct the peacekeepers in order to utilise their detention as leverage for Sankoh's release" since Sankoh had not been arrested at the time of the abductions.[216] The Prosecution advanced two separate arguments:

i. It made no difference whether the *mens rea* element for hostage-taking existed at the time of the initial detention of the victim, or whether the *mens rea* came into existence at a later point in time;[217] and

ii. In the alternative, the only reasonable conclusion is that this intention must have been formed when Sankoh was arrested.[218] If the intent were formed later, the situation would then transform into one of hostage-taking at the time that the intent is formed.[219]

183. The first argument fails by reason of common sense - how could the *mens rea* element be satisfied at the moment Kallon arrested Jaganathan (the only relevant arrest related to Gbao's individual criminal responsibility) if the ostensible purpose for the abduction did not take place until five days later? In other words, how could Kallon have been possessed of the requisite general and specific intent on 1 May to take Jaganathan hostage in order to compel Sankoh's release when he had not yet even been arrested? The argument is fatuous and cannot possibly constitute an error by the Trial Chamber. It is imaginative but sadly mistaken for the Prosecution to argue that the issue as to when the *mens rea* arose is irrelevant to their case against Gbao on Count 18.

184. Should the Appeals Chamber find that the *mens rea* did arise later, Gbao cannot be seen to be criminally responsible for the simple reason that he was absent from any findings after Kallon abducted Jaganathan. Gbao played no role in the abductions that followed. Thus, even if the *mens rea* were said to have arisen sometime after Sankoh's arrest on 6 May, it cannot be imputed to Gbao in relation to Jaganathan's abduction as he did not have

[216] Trial Judgement, para. 1966.
[217] Prosecution Appellant Brief, para. 4.71.
[218] *Id.* at para. 4.71.
[219] *Id.* at paras. 4.55, 4.71, 4.73, 4.74, 4.75.

knowledge of the principal offender's general or specific intent to take the hostages, which is necessary for a finding of aiding and abetting under this Count.[220]

V. Comments on Kallon Appellant Brief

185. The Second Accused's Appeal Brief took positions adverse to the Third Accused's interests. It sought, largely through discredited or otherwise non-credible Prosecution testimony and errors of fact within the Trial Chamber Judgement, to cast doubt upon Gbao's desire for disarmament and to exaggerate his role in the conflict. It is unfortunately incumbent upon the Gbao Defence to issue a response to these arguments.

A. Kallon Brief and UNAMSIL Conflict

186. In their Brief, Counsel for Morris Kallon posited arguments directed to Gbao's individual criminal responsibility. Four separate arguments against Gbao's interest were made. Firstly the Kallon Defence adopted, *inter alia*, that "RUF combatants were scared to disarm because Gbao (not Kallon) threatened to execute any combatant found disarming clandestinely".[221] Additionally, they appeared to suggest that because Kallon "was not in command of the operations that took place at the DDR Camp Makump from the 17 April 2000 to May 2000" it was Gbao who was in charge.

187. The Kallon team also appeared to adopt discredited Prosecution testimony by claiming that Gbao "secured" Jaganathan and took him to Teko Barracks.[222] They further noted the Trial Chamber finding that Gbao loaded former child soldiers onto trucks and took them away in the first month of May 2000.[223]

188. The Kallon Team's act of seeking to implicate Gbao in an effort to dilute Kallon's culpability is deeply ironic. During the entirety of both Kallon and Gbao's defence cases, the Kallon Defence repeatedly obstructed Gbao's defence team's attempts to put its case,

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[220] Prosecution Appellant Brief, para. 4.106, *citing* Trial Judgement, para. 280; *CDF* Appeal Judgement, para. 367; *Prosecutor v. Ntakirutimana,* tCTR-96-10-A and ICTR-96-17-A, Appeals Chamber, 13 December 2004, para. 501; *Prosecutor v. Ndindabahizi*, lCTR-2001-71-T, Judgement and Sentence, Trial Chamber, 15 July 2004, para. 457; *Krstić* Appeal Judgement, para. 140; *Vasiljević* Appeal Judgement, para. 142.
[221] Kallon Appellant Brief, para. 273.
[222] *Id.* at para. 283.
[223] *Id.* at para. 273, fn. 610.

objecting on the basis that co-accused should not be permitted to implicate one another.[224] Such a position went against the weight of the jurisprudence[225] and, coupled with repeated interventions by the Trial Chamber severely handicapped the Gbao Defence's ability to properly present its case.[226]

189. As was repeatedly insisted during the trial the Gbao Defence's motive was never to implicate Kallon. We were duty-bound to present witnesses to fully explain the events of 1 May 2000.

190. Gbao was convicted pursuant to Kallon's acts and conduct at the Makump DDR camp on 1 May 2000. As the Trial Chamber found, Gbao did attempt to stop, or "cool down" Kallon at the scene.[227] The critical fact that Gbao tried to prevent the principal criminal perpetrator (as found by the Trial Chamber) from going further was a matter of equally critical importance not only to the Gbao Defence but also, in our view, to the Trial Chamber in order that they might have access to the full facts prior to their assessment of culpability for what occurred. This could only be demonstrated through evidence from the witness box,

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[224] In fact, the Kallon Defence even went so far as to suggest that the Gbao Defence, in seeking to demonstrate that Kallon was at the Makump DDR camp on 1 May 2000, was acting in a manner that was "vexatious, superfluous and abus[ing] the court's process". *See Prosecutor v. Sesay, Kallon and Gbao*, Kallou Response to Gbao Request for Leave to Add Two Documents to its Exhibit List to Admit them as Evidence, Doc No. SCSL-04-15-1135, 21 May 2008, para. 14; *also see* Transcript, 17 June 2008, p.121, where Kallon Counsel stated that "[i]t really seems that his instructions proper are not to inculpate this defendant unnecessarily, yet he persists in doing so and really compromises the fairness of the trial in that conduct". Counsel for Kallon then suggested that Counsel for Gbao was violating his Code of Conduct (p.121); Transcript 17 April 2008, p.36, where Counsel for Kallon stated "sincerely, it cannot be his duty, and he knows, to try to impeach the testimony of this witness. It will bring about a conflict and he should be reminded, you've done so many times, about the necessity to respect Rule 82 in the joint trial". Rule 82 of the Rules of Procedure relate to the nature of joint, but separate, trials.

[225] *See Prosecutor* v. *Brdjanin and Talic*, Case No. IT-99-36-T, Decision on Motions by Momir Talic for a Separate Trial Leave to File a Reply, 9 March 2000, which stated that "[a] joint trial does not require a joint defence, and neeessarily envisages the case where each accused may seek to blame the other. The Trial Chamber will be very alive to the 'personal interest' which each accused has in such a case. Any prejudice which may flow to either accused from the loss of the 'right' asserted by Talic here to be tried without incriminating evidence being given against him by his co-aecused is not ordinarily the type of serious prejudice to which Rule 82(C) is directed. The Trial Chamber recognises that there could possibly exist a case in which the circumstances of the conflict between the two accused are such as to render unfair a joint trial against one of them, but the circumstances would have to be extraordinary".

[226] *See eg.* Transcript, 16 June 2008, pp.60-65, where it was stated that identifying Kallon as being present at the Makump DDR camp was "prohibited territory" and the Chamber thereby instructed Counsel to "guide" the witness to refrain from testifying to events of which he had personal knowledge; *also see* Transcript, 17 June 2008, p.104, where Counsel for Gbao stated that "I've been prevented from putting Mr Gbao's side of the story beeause it offends Mr Kallon. *I'm simply asking the Court to consider what might be offending Mr Gbao.* Now, Mr Gbao's defence, and I think it's clear to everybody, is that he attempted to prevent a crime taking place. What kind of proceedings prevent that defence from being aired?" (emphasis added).

[227] Trial Judgement, para. 1790.

adduced either through cross-examination or through the evidence of Gbao Defence witnesses in chief.

191. At the Appeal stage the Kallon Defence is now seeking to implicate Gbao in an attempt to exonerate Kallon. While there is nothing wrong with this approach, it is an ironic contradiction to the previous position they maintained so vociferously at the trial.

B. The Evidence

192. While we do not suggest it is necessarily impermissible to do so, the Kallon Defence mistakenly relied upon evidence that was both unreliable and discredited. The Trial Chamber's finding that Gbao threatened RUF members with execution if they disarmed was, as we stated in our Appellate Brief[228] and in our Response,[229] a clear error of fact by the Trial Chamber given TF1-071's demonstrable disregard for the truth particularly during his evidence concerning events surrounding the UNAMSIL incident(s). We submit that TF1-071's determination to mislead the Trial Chamber demands that any allegation he made in relation to the UNAMSIL events requires, at the least, corroboration.

193. The Kallon team also suggested that, since Gbao was at the Makump DDR camp on 17 April to protest against disarmament, Kallon could not have been in charge of operations.[230] Thereby they again attempted to create the appearance that Gbao was opposed to disarmament and, perhaps, in charge of operations. It is notable however that the events of 17 April ended amicably between Gbao and UNAMSIL. Brigadier Ngondi and Gbao met and agreed that disarmament was indeed in the RUF's long-term interests. Following the meeting both Gbao and Ngondi were able to disperse similar protests taking place that day throughout Makeni town. It is significant that no erimes were committed on 17 April and that Ngondi specifically "commended" Gbao for his assistance in faeilitating disarmament that day.[231]

194. Additionally, not only did Gbao render assistance to UNAMSIL on 17 April it was found by the Trial Chamber that Gbao had no effective control over RUF during the

[228] Gbao Appellant Brief, para. 316.
[229] *See supra*, paras. 178-180.
[230] Kallon Appellant Brief, paras. 272, 273.
[231] Transcript, Leonard Ngondi, 31 March 2006, pp. 17-18.

Indictment period, which of course includes the period of the UNAMSIL conflict.[232] Thus, he could not have been "in charge" of operations.

195. In relation to Gbao's role at the camp on 1 May, it should be recalled that whilst he was clearly upset, he did nothing more than threatening not to move from the road outside the camp.[233] He was unarmed and issued no orders to anyone while he was present at the camp.[234] There were no armed confrontations and no fighting took place until other RUF arrived.

196. The Kallon Defence also referenced testimony that Gbao 'secured' Jaganathan at Teko Barracks. This is untrue and contrary to what Jaganathan himself testified.[235] It also went against the weight of the evidence. According to the findings, Gbao's role in the UNAMSIL conflict ended when, according to the Trial Chamber's findings, Kallon arrested and abducted Jaganathan.

197. Finally, the Kallon Brief made reference to Gbao allegedly loading former child soldiers from the ICC into trucks and removing them.[236] This errant finding has been conclusively addressed in paragraphs 103-113 above.

VI. Conclusion

198. For the various reasons listed throughout this Brief, the Appeals Chamber should refuse to reverse the acquittals against Gbao and reject all three of the Prosecution Grounds of Appeal.

Filed in Freetown, 25 June 2009

John Cammegh Scott Martin

[232] *See* Trial Judgement, paras. 2298, 2299.
[233] *Id.* at para. 1786.
[234] Transcript, Ganese Jaganathan, 21 June 2006, pp. 13-14.
[235] Trial Judgement, para. 1798.
[236] Kallon Appellant Brief, para. 273, fn. 610.

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Exhibit 20.

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4403

IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding
Judge Florence Ndepele Mwachaude Mumba
Judge Fausto Pocar

Registrar:
Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of:
9 March 2000

PROSECUTOR

v

Radoslav BRDANIN & Momir TALIC

DECISION ON MOTIONS BY MOMIR TALIC FOR A SEPARATE TRIAL AND FOR LEAVE TO FILE A REPLY

The Office of the Prosecutor:

Ms Joanna Korner
Mr Michael Keegan
Ms Ann Sutherland

Counsel for Accused:

Mr John Ackerman for Radoslav Brdanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talic

I Introduction

1. The accused – Radoslav Brdanin ("Brdanin") and Momir Talic ("Talic") – are jointly charged in the amended indictment with a number of crimes alleged to have been committed in the area of Bosnia and Herzegovina now known as *Republika Srpska*. Those crimes may be grouped as follows:

(i) genocide[1] and complicity in genocide;[2]

(ii) persecutions,[3] extermination,[4] deportation[5] and forcible transfer[6] (amounting to inhumane acts), as crimes against humanity;

(iii) torture, as both a crime against humanity[7] and a grave breach of the Geneva Conventions;[8]

(iv) wilful killing[9] and unlawful and wanton extensive destruction and appropriation of property not justified by military necessity,[10] as grave breaches of the Geneva Conventions; and

4404

(v) wanton destruction of cities, towns or villages or devastation not justified by military necessity[11] and destruetion or wilful damage done to institutions dedicated to religion,[12] as violations of the laws or customs of war.

Each count alleges that each of the accused is responsible both individually pursuant to Article 7(1) of the Tribunal's Statute and as a superior pursuant to Article 7(3). The indictment defines individual responsibility as including the commission of a crime by the accused both personally and by way of aiding and abetting the commission of a crime by others.[13]

II The application

2. Talic has filed a motion seekiug a separate trial in relation to the amended indictment ("Motion").[14] The application is made by way of a preliminary motion pursuant to Rule 72 of the Tribuual's Rules of Procedurc and Evidence, and within the pcriod pcrmitted by Rule 50(C). He relics upon Rule 82(B), which provides:

> The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might eause serious prejudice to an accused, or to protect the interests of justice.

Rule 48 permits persons accused of thc same or different crimes committed in the course of the same transaction to be jointly charged and tried.

3. It is argued on behalf of Talic that a joint trial is not justified because neither the witnesses nor the documents will be the same in relation to the prosceution case against each of the accused,[15] that separate trials are required in order to avoid any eonfliet of interest likely to cause serious prejudiee, and that only separate trials would ensure a proper administration of justice.[16] Before referring to the detail of that argument, and in order more fully to understand the nature of the conflict of interest and of the likely prejudice asserted, it is necessary first to ideutify, as succinctly as possible, the case now pleaded by the prosecution against the two accused jointly.

III The plcaded case

4. The amended iudictment alleges that:

> (i) In 1992, the Assembly of the Serbian People in Bosnia and Herzegovina adopted a declaration on the Proclamation of the Scrbian Republic of Bosnia and Herzegovina, an entity which eventually became known as *Republika Srpska*.[17]
>
> (ii) The signifieant Bosnian Muslim and Bosnian Croat populations in the areas claimed for the new Serbian territory were seen as a major problem in the creation of sueh a territory in those areas, and the removal of nearly all of those populations (or "ethnic cleansing") was part of the overall plan to ereate the new Serbian territory.[18]
>
> (iii) To achieve this goal, the Bosnian Serb authorities initiated and implemented a course of conduct which ineluded:
>
> > (a) the creation of impossible conditions (involving pressure and terror taetics, including summary executions) which would have the effect of encouraging the non-Serbs to leave the area;

4405

(b) the deportation and banishment of those non-Serbs who were reluctant to leave; and

(c) the liquidation of those non-Serbs who remained and who did not fit into the concept of the Serbian state.[19]

(iv) Between April and December 1992, forces under the control of the Bosnian Serb authorities seized possession of those areas deemed to be a risk to the accomplishment of the overall plan to create a Serbian state within Bosnia and Herzegovina. By the end of 1992, the events which took place in these take-overs had resulted in the death of hundreds, and the forced departure of thousands. from the Bosnian Muslim and Bosnian Croat populations from those areas.[20] Those events constitute the crimes with which the two aceused are charged jointly to have both individual responsibility and responsibility as a superior.

(v) The forces *immediately* responsible for those events (which are referred to in the indictment collectively as the "Serb forces") comprised the army, the paramilitary, and territorial defence and police units.[21] The Bosnian Serb authorities under whose control the Serb forces acted are not identified in the indictment beyond including the two aecused.[22] These authorities had authority and control over:

(a) attacks on non-Serb villages and areas in the Autonomous Region of Krajina ("ARK");

(b) destruction of villages and institutions dedicated to religion;

(c) the seizure and detention of the Bosnian Muslims and Bosnian Croats;

(d) the establishment and operation of detention camps;

(e) the killing and maltreatment of Bosnian Muslims and Bosnian Croats; and

(f) the deportation or forcible transfer of the Bosnian Muslims and Bosnian Croats from the area of the ARK.

The Bosnian Serb authorities also had power to direct a body identified only as "the regional CSB" – which appears to be the Regional Centre for Public Seeurity – and the Publie Prosecutor to investigate, arrest and prosecute any persons believed to have eommitted crimes within the ARK.[23]

(vi) Brdanin was the President of the ARK Crisis Staff. one of the bodies responsible for the co-ordination and execution of most of the operational phase of the plan.[24] As such, he had executive authority in the ARK and was responsible for managing the work of the Crisis Staff and the implementation and co-ordination of Crisis Staff decisions.[25]

(vii) Talie was the Commander of the 5th Corps/1st Krajina Corps, whieh was deployed in the ARK into, or near, areas predominantly inhabited by Bosnian Muslims and Bosnian Croats.[26] He had authority to direct and control the actions of all forces assigned to the 5th Corps/1st Krajina Corps or within his area of control, and all plans for military engagement and attack plans had to be approved by him in advance. Troops under his command took part in the events which constitute the crimes with which the two accused are charged with responsibility.[27] His approval or consent was required for any significant aetivity or action by forces under the command or control of the 5th Corps/1st Krajina Corps, all units under his command were required to report their activities to him, and he had power to punish members

4406

of those units for any crimes they may have committed.[28] In addition (in municipalities such as Prijedor and Sanski Most within the ARK), he had power to direct and control the actions of the territorial defence units, the police and paramilitary forces,[29] which were immediately responsible for the events which occurred there.[30]

(viii) Talic was also a member of the ARK Crisis Staff,[31] and he and Brdanin, as such members, participated individually or in concert in the operations relating to the conduct of the hostilities and the destruction of the Bosnian Muslim and Bosnian Croat communities in the ARK area. The ARK Crisis Staff worked as a collective body to co-ordinate and implement the overall plan to seize control of and "ethnically cleanse" the area of the ARK. After the dissolution of the ARK Crisis Staff, Brdanin and Talic continued with the implementation of this overall plan.[32]

IV The submissions

5. In support of his argument that a joint trial is not justified, Talic has submitted that, whereas Brdanin is presented as a civilian and politician with broad powers in both these roles who did not exercise any command or "subordinate" functions in respect of Talic, Talic is presented only as a military man and, as such, subject to the military hierarchy. The only link alleged between them, it is said, is their membership of the Crisis Staff. It is submitted that neither the indictment nor the supporting material demonstrates any participation by Talic in the Crisis Staff, and even less any joint action by him with Brdanin. The supporting material for the indictment, it is said, demonstrates that the action of the civilian and military bodies was not co-ordinated (as alleged in the indictment) because, "for many reasons", communication between the two bodies was almost non-existent.[33]

6. In its response to the Motion ("Response"), the prosecution concedes that Brdanin and Talic each played a different role in the execution of the overall plan to create the new Serbian territory, but points out that proof of the particular events for which each of them is jointly charged with criminal responsibility is the same so far as the case against each of them is concerned, that each of them is charged with the same crimes and that all of the crimes were committed in the course of the same transaction. It also says that the supporting material does show a link in authority between the Crisis Staff and the military, quoting from a Crisis Staff minute (but not of the ARK Crisis Staff) which provides:

> The relationship of the military authorities to the civilian authorities should be such that the military will execute the orders of the civilian authorities while the civilian authorities will not interfere with the way these orders are carried out.

The prosecution says that the supporting material includes proof of meetings between the two accused on at least ten occasions.[34]

7. After an unexplained delay, Talic sought leave to file a Reply to the prosecution's Response.[35] Although some of the matters which he wished to raise in Reply were not, strictly, matters in reply and should have been raised in the Motion, the Trial Chamber has granted leave for the Reply to be filed. It proposes, however, to refer only to those matters in the Reply which relate to the issues raised in the prosecution's Response referred to in this Decision. The Reply does not call for any further response from the prosecution.

8. Talic points out that all Serbian persons charged with crimes before this Tribunal are accused of having participated in the creation of the greater Serbia but not all of them are accused of the same offences.[36] He further points out that, of the supporting material upon which the prosecution relies to show a link in authority between the Crisis Staff and the military, the Crisis Staff whose minute has been quoted was not within his zone of command, and the document establishing the meeting between Brdanin and himself has

4407

been provided only in a redacted form and accordingly, it is said, cannot serve as any kind of proof.[37]

9. In support of his argument that separate trials are required in order to avoid any conflict of interest which may cause serions prejudice and that only separate trials will ensure a proper administration of justice, Talic has submitted that there is a risk that a joint trial would deprive him of rights which would be his if he were tried separately.

10. It is said that, as the deadlines for filing motions, responding to motions and seeking leave to appeal differ for each of the accused,[38] and as a consequence Brdanin always files his documents before Talie does, the Trial Chamber makes its determinations relating to both accused without Talic having "the opportunity to exercise his right to respond".[39] That is the only right to which express reference is made in the present Motion, although it does refer to "rights" in the plural, and the right said to have been denied by the different deadlines is introduced by the phrase "*inter alia*" and it is concluded by the qualifying description "in particular."

11. However, in support of an earlier motion by Talic, which sought separate trials in relation to the original indictment, it was said that the defences of each accused would be "totally different", and that each of the accused "has a fundamentally differing approaeh in the conduct of his defence".[40] Attention was drawn to statements made on behalf of Brdanin in a motion to dismiss the original indictment which, it was suggested, demonstrated that Brdanin placed the sole responsibility for certain events upon Talic, and the submission was made on behalf of Talic that in a joint trial with Brdanin he could be incriminated by "a person having a personal interest in the matter", contrary to the interests of justice within the meaning of Rule 82(B).[41]

12. The Trial Chamber has therefore considered the submissions made by Talic in his present Motion as asserting as well that a joint trial would deprive him of both a right to be tried without incriminating evidenee being given against him by his co-accused and also (it may be) a right Talic has, without fear of contradiction, to blame Brdanin and others for the orders which the prosecution may establish that he followed – not in order to escape criminal responsibility but in order to mitigate punishment, pursuant to Article 7(4) of the Tribunal's Statute.

13. In its Response, the prosecution submits there is no merit in the assertion by Talic that a joint trial will deprive him of rights which would be his if he were tried separately. In relation to his claim that, because of the differing deadlines for filing documents, he is denied his right to respond, the prosecution points out that on one occasion Talic filed an application for leave to appeal without waiting for a French translation of the decision dispnted, and on another occasion he filed a response to a prosecution motion without waiting for a French translation of the motion. In any event, the proseeution says, Talic has no automatic right to respond to a motion by Brdanin, and where he wishes to respond to something in a response by Brdanin to a prosecution motion he may always seek leave to do so.[42]

14. In reply, Talic has given as an example of the prejudiee he says that he has suffered in this way an order made in relation to the proscution's motion for protective measures which had been made before he had filed his response to the motion and whicb is said to be binding on both Brdanin and himself.[43]

15. The prosecution says that the interests of justice would nor be served by separating the trials beeause of the possibility that eaeh of Brdanin and Talic would at a joint trial blame each other.[44] The importance of a joint trial, the prosecution says, is not merely the saving of time and money, it also affects the public interest that there should be no inconsistencies in verdicts, and tbe desirability that the same verdiet should be returned and the same treatment afforded to those found to have been coneerned in the same offence.[45]

16. Talic replies that this last submission illustrates his fear that the possible guilt of one of the accused may automatically be ascribed to the other, and that the responsibility of each accused must be evaluated

4408

individually upon the basis of his own acts and not in the light of the acts of the other accused.[46]

17. The prosecution also says that, if separate trials are ordered, the trial of one of the two accused will be delayed, jeopardising that accused's right to a fair and expeditious trial.[47] Talic replies that the fairness of his trial takes precedence over its expedition.[48]

V Discussion and findings

18. The first challenge, although not expressly so identified, is to the propriety of the two accused being jointly charged in accordance with Rule 48. That Rule provides:

> Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.

Each of the two accused are charged with exactly the same crimes. The prosecution asserts, moreover, that the crimes were committed in the course of the same transaction.

19. The word "transaction" is also used in Rule 49, which permits two or more crimes to be joined in the one indictment if the series of acts committed together form the same transaction, and the crimes are committed by the same accused. A transaction is defined by Rule 2 as a number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan.

20. A joinder of counts under Rule 49 has been approved in the Appeals Chamber upon the basis that they "relate in substance to the same campaign of destruction, the same people, the same period of time, the same area [...]. It is not necessary for all the facts to be identical".[49] In another case concerning the equivalent of Rule 49 in the Rules of Procedure and Evidence of the Rwanda Tribunal, that statement was identified in the Appeals Chamber as an example of the jurisprudence of this Tribunal which justifies a joinder of counts, and the further statement was made that "[w]here possible public interest and the concern for judicial economy would require joint offences to be tried together".[50] The Trial Chamber adopts all these statements as relevant also to the issue raised under this Tribunal's Rule 48. In a third case, one which concerned Rule 48, a Trial Chamber said:

> To justify joinder [under Rule 48] what has to be proved is that (a) there was a common scheme or plan, and (b) that the accused committed crimes during the course of it. It does not matter what part the particular accused played provided that he participated in a common plan. It is not necessary to prove a conspiracy between the accused in the sense of direct coordination or agreement. The transaction referred to in Rule 48 does not reflect the law of conspiracy found in some national jurisdictions. [...] The fact that evidence will be brought relating to one accused (and not to another) is a common feature of joint trials. On the basis of the submissions and the allegations in the indictment the Trial Chamber is of the view that this in itself will not cause serious prejudice to [the applicant for a separate trial]. [...] [The Trial Chamber considers that it is in the interests of justice, of which judicial economy in the administration of justice under the Statute of the Tribunal is an element, that these accused, charged as they are with offences arising from the same course of conduct, should be tried together.[51]

In a fourth case, one which concerned this Tribunal's Rules 48 and 82, a Trial Chamber was not satisfied that the fact that one accused was a member of the military forces whereas his co-accused were members of the civilian authorities gave rise to a conflict of interests within the meaning of Rule 82(B).[52]

21. The case pleaded against these two accused clearly asserts the existence of the one campaign (for the execution of which both accused are charged with criminal responsibility), carried out by the same people, against the same people, during the one period of time and in the same area. The Trial Chamber is satisfied that, in accordance with Rule 48, it was proper to have charged the two accused jointly. The issue nevertheless remains as to whether, in the circumstances of this case, it is appropriate for them to be tried jointly. The Trial Chamber turns, therefore, to the matters raised by Talic supporting his allegation that separate trials are required in order to avoid any conflict of interest which may cause serious prejudice

4409

and that only separate trials will ensure a proper administration of justice.

22. The challenge by Talic to various allegations in the indictment concerning his participation in the Crisis Staff and his association with Brdanin, based upon what is said to be the absence of any evidence in the supporting material, is not one which is relevant to the present application. Subject to the accused being informed of the nature of the case he is to meet, and to the obligations of the prosecution to provide disclosure pursuant to Rules 66-68, it (the prosecution) is limited in the evidence which can be given at the trial by the allegations made in the indictment, not by those made in the supporting material. What must be looked at in this application are the allegations made in the indictment, and the Trial Chamber sees no need to resolve the dispute between the parties as to what the supporting material establishes.

23. The fact that the two accused played different roles in the hierarchy of command (or even in different hierarchies of command) does not matter, as the jurisprudence of the Tribunal makes clear.

24. The objection by Talic that neither the witnesses nor the documents will be the same in relation to the prosecution case against each of the accused is borne out only to a slight extent. The bulk of the evidence in the trial will be to establish the particular events – or the actions of the army, the paramilitary, and the territorial defence and police units – for which the two accused are charged with criminal responsibility. There is no suggestion made that these events will not be greatly in dispute. Although there may well be different witnesses and different documents required to establish the differing roles alleged to have been played by each of the accused, the evidence relevant solely to each of the accused has not, in the circumstances of the case as put forward in this application, been shown to be likely to cause serious prejudice to the other accused.

25. The Trial Chamber sees no realistic possibility of prejudice resulting from the differing deadlines for filing responses to motions. At the request of Talic,[53] the Order for Filing Motions was varied so that the time for filing a response to a motion commences to run from the receipt of the translation of the motion into the working language in which the receiving party has been filing its documents in these proceedings.[54] Hence, when the prosecution files a motion in the English language, the time for filing a response by Brdanin – who has been filing his documents in English – commences to run from the date the motion was filed (it is faxed to his counsel the same day), and the time for filing a response by Talic – who has been filing his documents in French – commences to run from when the French translation is faxed to him, which is usually two or three days after the English original was filed.

26. Although it may be assumed that, generally, Brdanin will file his response before Talic, that does not mean that Talic is denied the opportunity to respond to the prosecution's motion. Although so far it has not been necessary in the present case to determine a motion by the prosecution which relates to *both* accused,[55] it is both normal and necessary procedure in relation to *any* motion to wait before a decision is reached until the opportunity has been given for all the respondents to the motion to file their responses. There is therefore no possibility that the Trial Chamber will issue a decision relating to both Brdanin and Talic without Talic having the opportunity to exercise his right to respond.

27. The example given by Talic of where this is alleged to have happened already is misconceived. The order in question was a scheduling order.[56] It did not determine the prosecution's motion; it merely ordered the prosecution to elaborate upon the need for certain of the measures sought before any determination was made. The only effect of that order upon either of the accused was to assist them to file a proper response to the motion. It did not bind either of the accused in any way.

28. Should the situation arise that Talic does not receive the French translation of a response by Brdanin before he files his own response, and he discovers upon receipt of the French translation that a submission made by Brdanin is prejudicial to him, it is always open to Talic to seek leave to file a further response. He would need to file the proposed further response with the application for leave.[57] If he is concerned that a decision may be given in the meantime, he need only contact the Senior Legal Officer of the Trial Chamber to inform him that such an application is to be filed. This would be a very rare situation, and is

not caused by the differing deadlines; it is a situation which could arise whenever there are two accused. 4410 There is no possibility of the serious prejudice which Rule 82(B) envisages.

29. Nor does the Trial Chamber see any possibility of serious prejudice resulting from the prospect that Brdanin may give evidence which incriminates Talic or that Talic will be unable, without fear of contradiction, to blame Brdanin and others for the orders which the prosecution may establish that he followed. A joint trial does not require a joint defence, and necessarily envisages the case where each accused may seek to blame the other. The Trial Chamber will be very alive to the "personal interest" which each accused has in such a case. Any prejudice which may flow to either accused from the loss of the "right" asserted by Talic here to be tried without incriminating evidence being given against him by his co-accused is not ordinarily the type of serious prejudice to which Rule 82(C) is directed. The Trial Chamber recognises that there could possibly exist a case in which the circumstances of the conflict between the two accused are such as to render unfair a joint trial against one of them, but the circumstances would have to be extraordinary. It is not satisfied that the present is such a case.

30. The Trial Chamber considers that it would be contrary to the interests of justice were only half of the whole picture to be exposed in each trial if separate trials are ordered. Should, for example, Brdanin attempt to blame Talic (and we are by no means persuaded that was what was being attempted in Brdanin's motion to dismiss the original indictment), it is in the interests of justice that Talic should be able to give evidence refuting that attempt. Similarly, it is in the interests of justice that Brdanin should be able to give evidence refuting any attempt by Talic to place the blame on Brdanin. Again, the Trial Chamber will be very alive to the "personal interest" which each of the accused has in the matter.

31. There is, moreover, a fundamental and essential public interest in ensuring consistency in verdicts. Nothing could be more destructive of the pursuit of justice than to have inconsistent results in separate trials based upon the same facts. The only sure way of achieving such consistency is to have both accused tried before the same Trial Chamber and on the same evidence – unless (as Rule 82(B) requires) there is a conflict of interests which might cause serious prejudice to an accused, or separate trials are otherwise necessary to protect the interests of justice. Neither matter has been established by Talic in this case.

32. Both the suggestion by Talic that he may automatically be found guilty if Brdanin is found guilty and his assertion that the responsibility of each of them must be evaluated individually overlook the fact that trials in this Tribunal are conducted by professional judges who are necessarily capable of determining the guilt of each accused individually and in accordance with their obligations under the Statute of the Tribunal to ensure that the rights of each accused are respected. It is surprising that such a suggestion should be made or that it was thought necessary to make such an assertion.

33. The Trial Chamber accepts the argument of Talic that the prospect that his may be the trial which is delayed if separate trials are ordered should not be taken into account against his application for a separate trial if he is prepared to accept that delay in order to achieve a fair trial. The Trial Chamber does not, however, accept that a joint trial will be unfair to him.

34. The application by Talic for a separate trial of each accused in the amended indictment must accordingly be dismissed.

VI The earlier motion for separate trials

35. The Earlier Motion by Talic, for separate trials of the original indictment, has not been disposed of. In the present Motion, Talic says that it is "no longer applicable"[58] It is, however, unsatisfactory to leave a motion on the file without a determination.[59] If pursued, the Earlier Motion would have been dismissed, for the reasons given in this decision. It, too, must therefore be dismissed.

4411

VII Disposition

36. For the foregoing reasons, the Trial Chamber:

(i) dismisses the Motion to Separate Trials, filed 14 October 1999; and

(ii) dismisses the Motion for Separation of Trials, filed 9 February 2000.

Done in English and French, the English text being authoritative.

Dated this 9th day of March 2000,
At The Hague,
The Netherlands.

Judge David Hunt
Presiding Judge

[Seal of the Tribunal]

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1. Count 1, Article 4(3)(a) of the Tribunal's Statute.
2. Count 2, Article 4(3)(e).
3. Count 3, Article 5(h).
4. Count 4, Article 5(b).
5. Count 8, Article 5(d).
6. Count 9, Article 5(i).
7. Count 6, Article 5(f).
8. Count 7, Article 2(b).
9. Count 5, Article 2(a).
10. Count 10, Article 2(d).
11. Count 11, Article 3(b).
12. Count 12, Article 3(d).
13. Amended Indictment, par 25. Compare *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000, pars 18. 59-60.
14. Motion for Separation of Trials, 9 Feb 2000 ("Motion").
15. Motion (English translation), p 4.
16. *Ibid*, p 3.
17. Amended Indictment, par 6.
18. *Ibid*, par 7.
19. *Ibid*, par 8.
20. *Ibid*, par 16.
21. *Ibid*, par 16.
22. *Ibid*, par 8.
23. *Ibid*, par 22.
24. *Ibid*, pars 14, 19. The various Crisis Staffs were re-designated as War Presidencies and later as War Commissions, but were still commonly referred to as Crisis Staffs: *ibid*, par 15.
25. *Ibid*, par 19.
26. *Ibid*, pars 11, 20.
27. *Ibid*, par 20.
28. *Ibid*, pars 20-21.
29. *Ibid*, par 21.
30. *Ibid*, par 16.
31. *Ibid*, par 18.
32. *Ibid*, par 23.
33. Motion (English Translation), p 4.
34. Prosecution's Response to "Motion for Separation of Trials" filed by Counsel for the Accused Momir Talic, 22 Feb 2000 ("Response"), pars 4-8.
35. Application for Leave to Reply and the Reply to the Prosecutor's Response of 22 February 2000, 6 Mar 2000 ("Reply").
36. Reply, par 1.
37. *Ibid*, par 2.

4412

38. This submission appears to be based upon the Order for Filing Motions, 31 Aug 1999 (as amended by the Decision on Motion to Translate Procedural Documents into French, 16 Dec 1999), which provides that the time for filing a response to a motion commences to run from the receipt of the translation of the motion into the working language in which the receiving party has been filing its documents in these proceedings. That Order does not, however, extend any time for filing motions or applications for leave to appeal.
39. Motion (English Translation), p 4.
40. Motion to Separate Trials, 14 Oct 1999 ("Earlier Motion"), par 5.
41. *Ibid*, par 6, referring to the Motion to Dismiss Indictment (filed on behalf of Brdanin), 31 Aug 1999, and apparently to pars 11-15 thereof.
42. Response, pars 19-20.
43. Reply, par 6.
44. Response, par 13.
45. *Ibid*, par 12.
46. Reply, par 4.
47. Response, par 9.
48. Reply, par 3.
49. *Prosecutor v Kovacevic*, Case IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 28 May 1998, 2 July 1998, Separate Opinion of Judge Shahabuddeen, p 3. The Decision itself did not discuss the meaning of "transaction" (dealing only with the effects of the delay in adding further charges), but its reasoning is not inconsistent with that of Judge Shahabuddeen.
50. *Anatole Nsengiyumva v The Prosecutor*, Case ICTR-96-12-A, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, p 12.
51. *Prosecutor v Kordic & Cerkez*, Case IT-95-14/2-PT, Decision on Accused Mario Cerkez's Application for Separate Trial, 7 Dec 1998, pars 10-11. In that case, Kordic was charged as a high-ranking political and military leader, whereas Cerkez was charged merely as an HVO Brigade commander in a single municipality involved in small-scale and local operational decisions (par 4).
52. *Prosecutor v Simic*, Case IT-95-9-PT, Decision on Motion for Separate Trial for Simo Zaric, pp 2, 4.
53. Motion to Translate Procedural Documents into French, 29 Oct 1999.
54. See footnote 35, *supra*.
55. The one prosecution motion which does relate to both accused, the Motion for Protective Measures, will not be determined until after oral submissions have been heard.
56. Scheduling Order on the Confidential Prosecution Motion for Protective Measures of 10 January 2000, 27 Jan 2000.
57. Talic has already correctly followed such a procedure when seeking leave to file a Reply. Decision on Motions by Momir Talic (1) to Dismiss the Indictment, (2) for Release, and (3) for Leave to Reply to Response of Prosecution to Motion for Release, 1 Feb 2000, par 17.
58. Motion, par 2.
59. Decision on Motions by Momir Talic (1) to Dismiss the Indictment, (2) for Release, and (3) for Leave to Reply to Response of Prosecution to Motion for Release, 1 Feb 2000, par 10.

UNITED
NATIONS

21 SEPTEMBER 1998
02730 - 02796

2790

4413

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No. IT-95-16-T

Date: 21 September 1998

Original: ENGLISH

IN THE TRIAL CHAMBER

Before: **Judge Antonio Cassese, Presiding**
Judge Richard May
Judge Florence Ndepele Mwachande Mumba

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Decision of: **21 September 1998**

PROSECUTOR

v.

Zoran KUPREŠKIĆ, Mirjan KUPREŠKIĆ, Vlatko KUPREŠKIĆ, Drago JOSIPOVIĆ, Dragan PAPIĆ, Vladimir ŠANTIĆ, also known as "VLADO"

DECISION ON COMMUNICATION BETWEEN THE PARTIES AND THEIR WITNESSES

The Office of the Prosecutor:

Mr. Franck Terrier
Mr. Albert Moskowitz

Counsel for the Accused:

Mr. Ranko Radović, for Zoran Kupreškić
Ms. Jadranka Glumać, for Mirjan Kupreškić
Mr. Borislav Krajina, for Vlatko Kupreškić
Mr. Luko Šušak, for Drago Josipović
Mr. Petar Pušelić, for Dragan Papić
Mr. Petar Pavković, for Vladimir Santić

TRIAL CHAMBER II of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal");

NOTING the objections raised by Defence Counsel at the hearings of 16 and 17 September 1998 to evidence being adduced in court as a result of out-of-court communication between the Prosecutor and its witnesses during breaks in the witnesses' testimony;

CONSIDERING that Defence Counsel has raised a genuine issue since the aforementioned instances have posed a problem for Defence counsel in that it has led to their being confronted during the trial with evidence which had not previously been disclosed to them;

NOTING that this is not to imply in any way that the Prosecutor has on any occasion acted with impropriety or exerted any influence on the witnesses in question and that the Chamber fully accepts the Prosecutor's explanation that on each occasion the witness in question has volunteered the information, during the break, which was later the subject of a tender of evidence,

CONSIDERING that the importance of the issue raised by the Defence transcends the specific question to which the Defence has drawn attention, and that it appears crucial to the proper administration of international criminal justice that the Chamber rule on the whole matter of contacts between witnesses and the Party which called him or her to testify,

HAVING HEARD the submissions of both the Prosecutor and Defence counsel on this subject;

CONSIDERING that:

(i) There is nothing in the Statute or Rules of Procedure and Evidence which expressly addresses this subject;

(ii) However it should be noted that the Prosecutor of the Tribunal is not, or not only, a Party to adversarial proceedings but is an organ of the Tribunal and an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting;

(iii) a witness, either for the Prosecution or Defence, once he or she has taken the Solemn Declaration pursuant to Rule 90(B) of the Rules of Procedure and Evidence, is a witness of truth before the Tribunal and, inasmuch as he or she is expected to contribute to the establishment of the truth, not strictly a witness for either party;

(iv) permitting either Party to communicate with a witness after he or she has commenced his or her testimony may lead both witness and Party, albeit unwittingly, to discuss the content of the testimony already given and thereby to influence or affect the witness's further testimony in ways which are not consonant with the spirit of the Statute and Rules of the Tribunal,

(v) the Victims and Witnesses Unit, established pursuant to Article 22 of the Statute and Rule 34 of the Rules of Procedure and Evidence, is mandated to treat all witnesses equally and to assist and accompany all witnesses during their stay in The Hague and to manage the practical aspects of their appearance before the Tribunal, and this in turn obviates the need for the Prosecution or the Defence to be in communication with a witness during his or her testimony in order, among other things, to provide him or her with psychological or moral support.

CONSIDERING Rule 89(B) which provides, "In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law".

CONSIDERING Rule 90(G) which provides, "The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time".

CONSIDERING that, while undoubtedly it would be more coherent and judicious that any practice regarding communication between the Parties and their witnesses be consistently applied in all the cases brought before the various Chambers; nevertheless, pursuant to the aforementioned Rules, this Trial Chamber is warranted in ruling on this matter in the instant trial.

CONSIDERING, on the one hand, the need to avoid the above-mentioned problem while, on the other hand, the need to allow for the situation in which a witness wishes *proprio motu* to communicate certain information to the Prosecution – or Defence as the case may be – once the witness in question has begun testifying;

CONSIDERING, finally, that this Decision will take effect after the Prosecution has conducted the examination-in-chief of several of its witnesses – and has been permitted with respect to those witnesses, there being no Decision to the contrary in force until the present Decision, to communicate with them during breaks in their testimony – and that the Chamber will therefore apply this Decision with due regard and consideration for the rights of the Defence;

PURSUANT to Rules 54, 89(B) and 90(G) of the Rules of Procedure and Evidence;

HEREBY ORDERS that

(1) The Prosecution and Defence henceforth must not communicate with a witness, once he or she has made the Solemn Declaration provided for in Rule 90(B) and commenced testifying, on the subject of the content of the witness's testimony except with the leave of the Chamber.

(2) If a witness wishes to contact the Party which called him or her, he or she shall inform the competent staff of the Victims and Witnesses Unit who will then report the matter to the relevant Party. This Party may then decide whether or not to request, orally or in writing, the leave of the Chamber and will to this effect provide reasons for the request. The

Chambers, when granting leave, may, whenever it deems it appropriate, decide that the contact between the requesting Party and the witness must take place in the presence of an official of the Victims and Witnesses Unit.

(3) The Chamber may further direct that a member of the Victims and Witnesses Unit be present in court during the testimony of a given witness to provide the necessary moral and psychological support to compensate the withdrawal of this support from the Prosecution or Defence during the period that the witness testifies, as required by this Order.

Done in English and French, the English text being authoritative.

Antonio Cassese
Presiding Judge

Dated this twenty-first day of September 1998
At The Hague
The Netherlands

[Seal of the Tribunal]

4418

**DECLARATION OF JUDGE RAFAEL NIETO-NAVIA,
SEPARATE OPINION OF JUDGE SHAHABUDDEEN,
DECLARATION OF JUDGE LAL CHAND VOHRAH**

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

IN THE APPEALS CHAMBER

Before:
Judge Claude JORDA, Presiding
Judge Lal Chand VOHRAH
Judge Mohamed SHAHABUDDEEN
Judge Rafael NIETO-NAVIA
Judge Fausto POCAR

Registrar: Mr Agwu U OKALI

Order of: 31 March 2000

Jean Bosco BARAYAGWIZA
v
THE PROSECUTOR

Case No: ICTR-97-19-AR72

DECISION

(PROSECUTOR'S REQUEST FOR REVIEW OR RECONSIDERATION)

Counsel for Jean Bosco Barayagwiza
Ms Carmelle Marchessault
Mr David Danielson

Counsel for the Prosecutor
Ms Carla Del Ponte
Mr Bernard Muna
Mr Mohamed Othman
Mr Upawansa Yapa
Mr Sankara Menon
Mr Norman Farrell
Mr Mathias Marcusse

I. INTRODUCTION

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law

Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January and 31 December 1994 ("the Appeals Chamber" and "the Tribunal" respectively) is seised of the "Prosecutor's Motion for Review or Reconsideration of the Appeals Chamber's Decision Rendered on 3 November 1999. in Jean-Bosco Barayagwiza v. the Prosecutor and Request for Stay of Execution" filed by the Prosecutor on 1 Deeember 1999 ("the Motion for Review").

2. The deeision sought to be reviewed was issued by the Appeals Chamber on 3 November 1999 ("the Decision"). In the Decision, the Appeals Chamber allowed the appeal of Jean-Boseo Barayagwiza ("the Appellant") against the decision of Trial Chamber II whieh had rejected his preliminary motion challenging the legality of his arrest and detention. In allowing the appeal, the Appeals Chamber dismissed the indictment against the Appellant with prejudice to the Prosecutor and directed the Appellant's immediate release. Furthermore, a majority of the Appeals Chamber (Judge Shahabuddeen dissenting) directed the Registrar to make the neeessary arrangements for the delivery of the Appellant to the authoritics of Cameroon, from whence he had been originally transferred to the Tribunal's Detention Centre.
3. The Decision was stayed by Order of the Appeals Chamber in light of the Motion for Review. The Appellant is therefore still in the eustody of the Tribunal.

II. PROCEDURAL HISTORY

4. The Appellant himself was the first to file an application for review of the Decision. On 5 November 1999 he requested the Appeals Chamber to review item 4 of the disposition in the Deeision, which directed the Registrar to make the neeessary arrangements for his delivery to the Cameroonian authorities. The Prosecutor responded to the application, asking to be heard on the same point, and in response to this the Appellant withdrew his request.
5. Following this series of pleadings, the Government of Rwanda filed a request for leave to appear as *amicus curiae* before the Chamber in order to be heard on the issue of the Appellant's delivery to the authorities of Cameroon. This request was made pursuant to Rule 74 of the Rules of Procedure and Evidence of the Tribunal ("the Rules").
6. On 19 November 1999 the Prosecutor filed a "Notiee of Intention to File Request for Review of Decision of the Appeals Chamber of 3 November 1999" ("the Prosecutor's Notice of Intention"), informing the Chamber of her intention to file her own request for review of the Decision pursuant to Artiele 25 of the Statute of the Tribunal, and in the alternative, a "motion for reeonsideration". On 25 November, the Appeals Chamber issued an Order staying execution of the Decision for 7 days pending the filing of the Prosecutor's Motion for Review. The Appeals Chamber also ordered that that the direction in the Decision that the Appellant be immediately released was to be read subject to the direction to the Registrar to arrange his delivery to the authorities of Cameroon. On the same day, the Chamber received the Appellant's objections to the Proseeutor's Notiee of Intention.
7. The Prosecutor's Motion for Review was filed within the 7 day time limit, on 1 Deeember 1999. Annexes to that Motion were filed the following day. On 8 December 1999 the Appeals Chamber issued an Order continuing the stay ordered on 25 November 1999 and setting a schedule for the filing of further submissions by the parties. The Prosecutor was given 7 days to file copies of any statements relating to new facts which she had not yet filed. This deadline was not complied with, but additional statements were filed on 16 February 2000, along with an applieation for the extension of the time-limit. The Appellant objected to this applieation.
8. The Order of 8 December 1999 further provided that that the Chamber would hear oral argument on the Prosecutor's Motion for Review, and that the Government of Rwanda might appear at the hearing as *amicus curiae* with respect to the modalities of the release of the Appellant, if that question were reached. The Government of Rwanda filed a memorial on this point on 15 February 2000.
9. On 10 Deeember 1999 the Appellant filed four motions: challenging the jurisdiction of the Appeals Chamber to entertain the review proceedings; opposing the request of the Government of Rwanda to appear as *amicus curiae*; asking for elarification of the Order of 8 December and requesting leave to make oral submissions during the hearing on the Prosecutor's Motion for Review. The

4420

Prosecutor filed her response to these motions on 3 February 2000.

10. On 17 December 1999, the Appeals Chamber issued a Scheduling Order clarifying the time-limits set in its previous Order of 8 December 1999 and on 6 January 2000 the Appellant filed his response to the Prosecutor's Motion for Review.
11. Meanwhile, the Appellant had requested the withdrawal of his assigned counsel, Mr. J.P.L. Nyaberi, by letter of 16 December 1999. The Registrar denied his request on 5 January 2000, and this decision was confirmed by the President of the Tribunal on 19 January 2000. The Appellant then filed a motion before the Appeals Chamber insisting on the withdrawal of assigned counsel, and the assignment of new counsel and co-counsel to represent him with regard to the Prosecutor's Motion for Review. The Appeals Chamber granted his request by Order of 31 January 2000. In view of the change of counsel, the Appellant was given until 17 February 2000 to file a new response to the Prosecutor's Motion for Review, such response to replace the earlier response of 6 January 2000. The Prosecutor was given four further days to reply to any new response submitted. Both these documents were duly filed.
12. The oral hearing on the Prosecutor's Motion for Review took place in Arusha on 22 February 2000.

III. APPLICABLE PROVISIONS

A. The Statute

Article 25: Review Proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

B. The Rules

Rule 120: Request for Review

Where a new fact has been discovered which was not known to the moving party at the tine of the proceedings before a Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber, if it can be reconstituted or, failing that, to the appropriate Chamber of the Tribunal for review of the judgement.

Rule 121: Preliminary Examination

If the Chamber which ruled on the matter decides that the new fact, if it had been proven, could have been a decisive factor in reaching a decision, the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties.

IV. SUBMISSIONS OF THE PARTIES

A. The Prosecution Case

13. The Prosecutor relies on Article 25 of the Statute and Rules 120 and 121 of the Rules as the legal basis for the Motion for Review. The Prosecutor bases the Motion for Review primarily on its claimed discovery of new facts. She states that by virtue of Article 25, there are two basic conditions for an Appeals Chamber to reopen and review its decision, namely the discovery of new facts which were unknown at the time of the original proceedings and which could have been a decisive factor in reaching the original decision. The Prosecutor states that the new facts she relies upon affect the totality of the Decision and open it up for review and reconsideration in its entirety.
14. The Prosecutor opposes the submission by the Defence (paragraph 27 below), that Article 25 can only be invoked following a conviction. The Prosecutor submits that the wording "persons

convicted... or from the Prosecutor" provides that both parties can bring a request for review under Article 25, and not that such a right only arises on conviction. The Prosecutor submits that there is no requirement that a motion for review can only be brought after final judgement.

15. The "new facts" which the Prosecutor seeks to introduce and rely on in the Motion for Review fall, according to her, into two categories: new facts which were not known or could not have been known to the Prosecutor at the time of the argument before the Appeals Chamber; and facts which although they "may have possibly been discovered by the Prosecutor" at the time, are, she submits, new, as they could not have been known to be part of the factual dispute or relevant to the issues subsequently determined by the Appeals Chamber. The Prosecutor in this submission relies on Rules 121, 107, 115, 117, and 5 of the Rules and Article 14 of the Statute. The Prosecutor submits that the determination of whether something is a new fact, is a mixed question of both fact and law that requires the Appeals Chamber to apply the law as it exists to the facts to determine whether the standard has been met. It does not mean that a fact which occurred prior to the trial cannot be a new fact, or a "fact not discoverable through due diligence."
16. The Prosecutor alleges that numerous factual issues were raised for the first time on appeal by the Appeals Chamber, *proprio motu*, without a full hearing or adjudication of the facts by the Trial Chamber, and contends that the Prosecutor cannot be faulted for failing to comprehend the full nature of the facts required by the Appeals Chamber. Indeed, the Prosecutor alleges that the questions raised did not correspond in full to the subsequent factual determinations by the Appeals Chamber and that at no time was the Prosecutor asked to address the factual basis of the application of the abuse of process doctrine relied upon by the Appeals Chamber in the Decision. The Prosecutor further submits that application of this doctrine involved consideration of the public interest in proceeding to trial and therefore facts relevant to the interests of international justice are new facts on the review. The Prosecutor alleges that she was not provided with the opportunity to present such facts before the Appeals Chamber.
17. In application of the doctrine of abuse of process, the Prosecutor submits that the remedy of dismissal with prejudice was unjustified, as the delay alleged was, contrary to the findings in the Decision, not fully attributable to the Prosecutor. New facts relate to the application of this doctrine and the remedy, which was granted in the Decision.
18. The Prosecutor submits that the Appeals Chamber can also reconsider the Decision, pursuant to its inherent power as a judicial body, to vary or rescind its previous orders, maintaining that such a power is vital to the ability of a court to function properly. She asserts that this inherent power has been acknowledged by both Tribunals and cites several decisions in support. The Prosecutor maintains that a judicial body can vary or rescind a previous order because of a change in circumstances and also because a reconsideration of the matter has led it to conclude that a different order would be appropriate. In the view of the Prosecutor, although the jurisprudence of the Tribunal indicates that a Chamber will not reconsider its decision if there are no new facts or if the facts adduced could have been relied on previously, where there are facts or arguments of which the Chamber was not aware at the time of the original decision and which the moving party was not in a position to inform the Chamber of at the time of the original decision, a Chamber has the inherent authority to entertain a motion for reconsideration. The Prosecutor asks the Appeals Chamber to exercise its inherent power where an extremely important judicial decision is made without the full benefit of legal argument on the relevant issues and on the basis of incomplete facts.
19. The Prosecutor submits that although a final judgement becomes *res judicata* and subject to the principle of *non bis in idem*, the Decision was not a final judgement on the merits of the case.
20. The Prosecutor submits that she could not have been reasonably expected to anticipate all the facts and arguments which turned out to be relevant and decisive to the Appeals Chamber's Decision.
21. The Prosecutor submits that the new facts offered could have been decisive factors in reaching the Decision, in that had they been available in the record on appeal, they may have altered the findings of the Appeals Chamber that: (a) the period of provisional detention was impermissibly lengthy; (b) there was a violation of Rule 40*bis* through failure to charge promptly; (c) there was a violation of Rule 62 and the right to an initial appearance without delay; and (d) there was failure by the Prosecutor in her obligations to prosecute the case with due diligence. In addition, they could have altered the findings in the Conclusion and could have been decisive factors in determination of the

Appeals Chamber's remedies.

22. The Prosecutor submits that the extreme measure of dismissal of the indictment with prejudice to the Prosecutor is not proportionate to the alleged violations of the Appellant's rights and is contrary to the mandate of the Tribunal to promote national reconciliation in Rwanda by conducting public trial on the merits. She states that the Tribunal must take into account rules of law, the rights of the aceused and particularly the interests of justiee required by the victims and the international community as a whole.
23. The Prosecutor alleges a violation of Rule 5, in that the Appeals Chamber exceeded its role and obtained facts which the Prosecutor alleges were outside the original trial record. The Prosecutor submits that in so doing the Appeals Chamber acted *ultra vires* the provisions of Rules 98, 115 and 117(A) with the result that the Prosecutor suffered material prejudice, the remedy for which is an order of the Appeals Chamber for review of the Decision, together with the accompanying Dispositive Orders.
24. The Prosecutor submits that her ability to continue with prosecutions and investigations depends on the government of Rwanda and that, unless the Appellant is tried, the Rwandan government will no longer be "involved in any manner".
25. Finally, the Prosecutor submits that review is justified on the basis of the new facts, which establish that the Prosecutor made significant efforts to transfer the Appellant, that the Prosecutor acted with due diligence and that any delays did not fundamentally compromise the rights of the Appellant and would not justify the dismissal of the indictment with prejudiee to the Prosecutor.
26. In terms of substantive relief. the Proseeutor requests that the Appeals Chamber either review the Decision or reconsider it in the exereise of its inherent powers, that it vacate the Decision and that it reinstate the Indietment. In the alternative, if these requests are not granted, the Prosecutor requests that the Deeision dismissing the indietment is ordered to be without prejudiee to the Prosecutor.

The Defence Case

27. The Appellant submits that Article 25 is only available to the parties after an accused has become a "eonvicted person". The Appeals Chamber does not have jurisdiction to eonsider the Prosecutor's Motion as the Appellant has not become a "convicted person" The Appellant submits that Rules 120 and 121 should be interpreted in accordance with this principle and maintains that both rules apply to review after trial and are therefore consistent with Article 25 whieh also applies to the right of review of a "eonvieted person".
28. The Appellant submits that the Appeals Chamber does not have "inherent power" to revise a final decision. He submits that the Prosecutor is effectively asking the Appeals Chamber to amend the Statute by asking it to use its inherent power only if it concludes that Article 25 and Rule 120 do not apply. The Appellant states that the Appeals Chamber cannot on its own create law.
29. The Appellant submits that the Decision was final and unappealable and that he should be released as there is no statutory authority to revise the Decision.
30. The Appellant maintains that the Prosecutor has ignored the legal requirements for the introduction of new facts and has adduced no new facts to justify a review of the Decision. Despite the attachments provided by the Prosecutor and held out to be new faets, the Appellant submits that the Prosecutor has failed to produce any evidence to support the two-fold requirement in the Rules that the new fact should not have been known to the moving party and eould not have been discovered through the exereise of due diligence.
31. The Appellant submits that the Appeals Chamber should reject the request of the Prosecutor to classify the "old facts" as "new facts" as an attempt to invent a new definition limited to the facts of this case. The Appellant maintains that the Deeision was correet in its findings and is fully supported by the Record.
32. The Appellant maintains that the Proseeutor's contention that the applicability of the abuse of process doctrine was not communicated to it before the Decision is groundless. The Appellant alleges that this issue was fully set out in his motion filed on 24 February 1998 and that when an issue has been properly raised by a party in criminal proceedings, the party who chooses to ignore the points raised by the other does so at its own peril.
33. In relation to the submissions by the Prosecutor that the Decision of the Appeals Chamber was

wrong in light of UN Resolution 955's goal of achieving national reconciliation for Rwanda, the Appellant urges the Appeals Chamber "to forcefully reject the notion that the human rights of a person accused of a serious crime, under the rubric of achieving national reconciliation, should be less than those available to an accused charged with a less serious one".

V. THE MOTION BEFORE THE CHAMBER

34. Before proceeding to consider the Motion for Review, the Chamber notes that during the hearing on 22 February 2000 in Arusha, Prosecutor Ms Carla Del Ponte, made a statement regarding the reaction of the government of Rwanda to the Decision. She stated that: "The government of Rwanda reacted very seriously in a tough manner to the decision of 3 November 1999." Later, the Attorney General of Rwanda appearing as representative of the Rwandan Government, in his submissions as "amicus curiae" to the Appeals Chamber, openly threatened the non co-operation of the peoples of Rwanda with the Tribunal if faced with an unfavourable Decision by the Appeals Chamber on the Motion for Review. The Appeals Chamber wishes to stress that the Tribunal is an independent body, whose decisions are based solely on justice and law. If its decision in any case should be followed by non-cooperation, that consequence would be a matter for the Security Council.
35. The Chamber notes also that, during the hearing on her Motion for Review, the Prosecutor based her arguments on the alleged guilt of the Appellant, and stated she was prepared to demonstrate this before the Chamber. The forcefulness with which she expressed her position compels us to reaffirm that it is for the Trial Chamber to adjudicate on the guilt of an accused, in accordance with the fundamental principle of the presumption of innocence, as incorporated in Article 3 of the Statute of the Tribunal.
36. The Motion for Review provides the Chamber with two alternative courses. First, it seeks a review of the Decision pursuant to Article 25 of said Statute. Further, failing this, it seeks that the Chamber reconsider the Decision by virtue of the power vested in it as a judicial body. We shall begin with the sought review.

REVIEW

General considerations

37. The mechanism provided in the Statute and Rules for application to a Chamber for review of a previous decision is not a novel concept invented specifically for the purposes of this Tribunal. In fact, it is a facility available both on an international level and indeed in many national jurisdictions, although often with differences in the criteria for a review to take place.
38. Article 61 of the Statute of the International Court of Justice is such a provision and provides the Court with the power to revise judgements on the discovery of a fact, of a decisive nature which was unknown to the court and party claiming revision when the judgement was given, provided this was not due to negligence . Similarly Article 4 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) provides for the reopening of cases if there is *inter alia*, "evidence of new or newly discovered facts". Finally, on this subject, the International Law Commission has stated that such a provision was a "necessary guarantee against the possibility of factual error relating to material not available to the accused and therefore not brought to the attention of the Court at the time of the initial trial or of any appeal. "
39. In national jurisdictions, the facility for review exists in different forms, either specifically as a right to review a decision of a court, or by virtue of an alternative route which achieves the same result. Legislation providing a specific right to review is most prevalent in civil law jurisdictions, although again, the exact criteria to be fulfilled before a court will undertake a review can differ from that provided in the legislation for this Tribunal.
40. These provisions are pointed out simply as being illustrative of the fact that, although the precise terms may differ, review of decisions is not a unique idea and the mechanism which has brought this matter once more before the Appeals Chamber is, in its origins, drawn from a variety of sources.
41. Returning to the procedure in hand, it is clear from the Statute and the Rules that, in order for a

Chamber to carry out a review, it must be satisfied that four criteria have been met. There must be a new fact; this new fact must not have been known by the moving party at the time of the original proceedings; the lack of discovery of the new fact must not have been through the lack of due diligence on the part of the moving party; and it must be shown that the new fact could have been a decisive factor in reaching the original decision.

42. The Appeals Chamber of the International Tribunal for the former Yugoslavia has highlighted the distinction, which should be made between genuinely new facts which may justify review and additional evidence of a fact . In considering the application of Rule 119 of the Rules of the International Tribunal for the former Yugoslavia (which mirrors Rule 120 of the Rules), the Appeals Chamber held that:

> Where an applicant seeks to present a new fact which becomes known only after trial, despite the exercise of due diligence during the trial in discovering it, Rule 119 is the governing provision. In such a case, the Appellant is not seeking to admit additional evidence of a fact that was considered at trial but rather a new fact...It is for the Trial Chamber to review the Judgement and determine whether the new fact, if proved, could have been a decisive factor in reaching a decision".
>
> Further, the Appeals Chamber stated that-
>
> a distinction exists between a fact and evidence of that fact. The mere subsequent discovery of evidence of a fact which was known at trial is not itself a new fact within the meaning of Rule 119 of the Rules.

43. The Appeals Chamber would also point out at this stage, that although the substantive issue differed in *Prosecutor v. Dražen Erdemovic,* the Appeals Chamber undertook to warn both parties that "[t]he appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing". The Appeals Chamber confirms that it notes and adopts both this observation and the test established in *Prosecutor v. Duško Tadic* in consideration of the matter before it now.
44. The Appeals Chamber notes the submissions made by both parties on the criteria, and the differences which emerge. In particular it notes the fact that the Prosecutor places the new facts she submits into two categories (paragraph 15 above), the Appellant in turn asking the Appeals Chamber to reject this submission as an attempt by the Prosecutor to classify "old facts" as "new facts" (paragraph 31 above). In considering the "new facts" submitted by the Prosecutor, the Appeals Chamber applies the test outlined above and confirms that it considers, as was submitted by the Prosecutor, that a "new fact" cannot be considered as failing to satisfy the criteria simply because it occurred before the trial. What is crucial is satisfaction of the criteria which the Appeals Chamber has established will apply. If a "new" fact satisfies these criteria, and could have been a decisive factor in reaching the decision, the Appeals Chamber can review the Decision.

2. Admissibility

45. The Appellant pleads that the Prosecutor's Motion for Review is inadmissible, because by virtue of Article 25 of the Statute only the Prosecutor or a convicted person may seise the Tribunal with a motion for review of the sentence. In the Appellant's view, the reference to a convicted person means that this article applies only after a conviction has been delivered. According to the counsel of the Appellant:

> Rule 120 of the Rules of Procedure and Evidence is not intended for revision or review before conviction, but after ... a proper trial.
>
> As there was no trial in this case, there is no basis for seeking a review.

46. The Prosecutor responds that the reference to "the convicted person or the Prosecutor" in the said article serves solely to spell out that either of the two parties may seek review, not that there must have been a conviction before the article could apply. If a decision could be reviewed only

4425

following a conviction, no injustice stemming from an unwarranted acquittal could ever be redressed. In support of her interpretation, the Prosecutor compares Article 25 with Article 24, which also refers to persons convicted and to the Prosecutor being entitled to lodge appeals. She argued that it was eommon ground that the Prosecutor could appeal against a decision of acquittal, whieh would not be the case if the interpretation submitted by the Appellant was accepted.

47. Both Article 24 (which relates to appellate proeeedings) and Article 25 of the Statute, expressly refer to a convicted person. However, Rule 72D and consistent decisions of both Tribunals demonstrate that a right of appeal is also available in *inter alia* the ease of dismissal of preliminary motions brought before a Trial Chamber, whieh raised an objection based on lack of jurisdietion. Such appeals are on interlocutory matters and therefore by definition do not involve a remedy available only following convietion. Aceordingly, it is the Appeals Chamber's view that the intention was not to interpret the Rules restrictively in the sense suggested by the Appellant, such that availability of the right to apply for review is only triggered on conviction of the aecused; the Appeals Chamber will not accept the narrow interpretation of the Rules submitted by the Appellant. If the Appellant were correet that there could be no review unless there has been a conviction, it would follow that there could be no appeal from aequittal for the same reason. Appeals from acquittals have been allowed before the Appeals Chamber of the ICTY. The Appellant's logie is not therefore correct. Furthermore, in this case, the Appellant himself had reeourse to the mechanism of interlocutory appeals which would not have been successful had the Chamber aceepted the arguments he is now putting forward.
48. The Appeals Chamber aeeordingly subseribes to the Proseeutor's reasoning. Inelusion of the reference to the "Prosecutor" and the " eonvicted person" in the wording of the article indieates that each of the parties may seek review of a decision, not that the provision is to apply only after a convietion has been delivered.
49. The Chamber eonsiders it important to note that only a final judgement may be reviewed pursuant to Artiele 25 of the Statute and to Rule 120. The parties submitted pleadings on the final or non-final nature of the Decision in eonnection with the request for reeonsideration. The Chamber would point out that a final judgement in the sense of the above-mentioned articles is one which terminates the proeeedings; only such a deeision may be subject to review. Clearly, the Deeision of 3 November 1999 belongs to that eategory, since it dismissed the indietment against the Appellant and terminated the proceedings.
50. The Appeals Chamber therefore bas jurisdietion to review its Decision pursuant to Artiele 25 of the Statute and to Rule 120.

3. Merits

51. With respeet to this Motion for Review, the Appeals Chamber begins by eonfirming its Deeision of 3 November 1999 on the basis of the facts it was founded on. As a judgement by the Appeals Chamber, the Decision may be altered only if new facts are discovered whieh were not known at the time of the trial or appeal proeeedings and which could have been a decisive factor in the deeision. Pursuant to Artiele 25 of the Statute, in sueh an event the parties may submit to the Tribunal an application for review of the judgement, as in the instant ease before the Chamber.
52. The Appeals Chamber eonfirms that in eonsidering the facts submitted to it by the Prosecutor as "new facts", it applies the criteria drawn from the relevant provisions of the Statute and Rules as laid down above. The Chamber considers first whether the Prosecutor submitted new faets which were not known at the time of the proceedings before the Chamber, and which could have been a deeisive factor in the decision, pursuant to Article 25 of the Statute. It then eonsiders the eondition introduced by Rule 120, that the new facts not be known to the party eoncerned or not be discoverable due diligence notwithstanding. If the Chamber is satisfied, it aecordingly reviews its decision in the light of such new facts.
53. In considering these issues, the Appellant's detention may be divided into three periods. The first, namely the period where the Appellant was subject to the extradition procedure, starts with his arrest by the Cameroonian authorities on 15 April 1996 and ends on 21 February 1997 with the decision of the Court of Appeal of the Centre of Cameroon rejecting the request for extradition from the Rwandan government. The second, the period relating to the transfer decision, runs from

4426

the Rule 40 request for the Appellant's provisional detention, through his transfer to the Tribunal's detention unit on 19 November 1997. The third period begins with the arrival of the Appellant at the detention unit on 19 November 1997 and ends with his initial appearance on 23 February 1998.

(a) First period (15.4.1996 – 21.2.1997)

54. The Appeals Chamber considers that several elements submitted by the Prosecutor in support of her Motion for Review are evidence rather than facts. The elements presented in relation to the first period consist of transcripts of proceedings before the Cameroonian courts: on 28 March 1996 ; 29 March 1996 ; 17 April 1996 and 3 May 1996. It is manifest from the transcript of 3 May 1996 that the Tribunal's request was discussed at that hearing. The Appellant addressed the court and opposed Rwanda's request for extradition. stating that, « c'est le tribunal international qui est compétent ». The Appeals Chamber considers that it may accordingly be presumed that the Appellant was informed of the nature of the crimes he was wanted for by the Prosecutor. This was a new fact for the Appeals Chamber. The Decision is based on the fact that:

l'Appelant a été détenu pendant une durée totale de 11 mois avant d'être informé de la nature générale des chefs d'accusation que le Procureur avait retenus contre lui.

The information now before the Chamber demonstrates that, on the contrary, the Appellant knew the general nature of the charges against him by 3 May 1996 at the latest. He thus spent at most 18 days in detention without being informed of the reasons therefor.

55. The Appeals Chamber considers that such a time period violates the Appellant's right to be informed without delay of the charges against him. However, this violation is patently of a different order than the one identified in the Decision whereby the Appellant was without any information for 11 months.

(b) Second period (21.2.1997 – 19.11.1997)

56. With respect to the second period, the one relative to the transfer decision, several elements are submitted to the Chamber's scrutiny as new facts. They consist of Annexes 1 to 7, 10 and 12 to the Motion for Review. The Chamber considers the following to be material:

1. The report by Judge Mballe of the Supreme Court of Cameroon. In his report, Justice Mballe explains that the request by the Prosecutor pursuant to Article 40 *bis* was transmitted immediately to the President of the Republic for him to sign a legislative decree authorising the accused's transfer. As he sees it, if the legislative decree could be signed only on 21 October 1997 that was due to the pressure exerted by the Rwandan authorities on Cameroon for the extradition of detainees to Kigali. He adds that in any event this semi-political semi-judicial extradition procedure was not the one that should have been followed.

2. A statement by David Scheffer, ambassador-at-large for war crimes issues, of the United States. Mr. Scheffer described his involvement in the Appellant's case between September and November 1997. In his statement, Mr. Scheffer explains that the signing of the Presidential legislative decree was delayed owing to the elections scheduled for October 1997, and that Mr. Bernard Muna of the Prosecutor's Office asked Mr. Scheffer to intervene to speed up the transfer. He went on to say that, subsequent to that request, the United States Embassy made several representations to the Government of Cameroon in this regard between September and November 1997. Mr. Scheffer says he also wrote to the Government on 13 September 1997 and that around 24 October 1997 the Cameroonian authorities notified the United States Embassy of their willingness to effect the transfer.

57. In the Appeals Chamber's view a relevant new fact emerges from this information. In its Decision, the Chamber determined on the basis of the evidence adduced at the time that "Cameroon was willing to transfer the Appellant", as there was no proof to the contrary. The above information

4427

however goes to show that Cameroon had not been prepared to effect its transfer before 24 October 1997. This fact is new. The request pursuant to Article 40 bis had been wrongly subject to an extradition process, when under Article 28 of the Statute all States had an obligation to co-operate with the Tribunal. The President of Cameroon had elections forthcoming, which could not prompt him to accede to such a request. And it was the involvement of the United States, in the person of Mr. Scheffer, which in the end led to the transfer.

58. The new fact, that Cameroon was not prepared to transfer the Appellant prior to the date on which he was actually delivered to the Tribunal's detention unit, would have had a significant impact on the Decision had it been known at the time, given that, in the Decision, the Appeals Chamber drew its conclusions with regard to the Prosecutor's negligence in part from the fact that nothing prevented the transfer of the Appellant save the Prosecutor's failure to act:

> It is also clear from the record that the Prosecutor made no efforts to have the Appellant transferred to the Tribunal's detention unit until after he filed the *writ of habeas corpus*. **Similarly, the Prosecutor has made no showing that such efforts would have been futile. There is nothing in the record that indicates that Cameroon was not willing to transfer the Appellant.** Rather it appears that the Appellant was simply forgotten about.

The Appeals Chamber considered that the human rights of the Appellant were violated by the Prosecutor during his detention in Cameroon. However, the new facts show that, during this second period, the violations were not attributable to the Prosecutor.

(c) Third period (19.11.1997 – 23.2.1998)

59. In her Motion for Review, the Prosecutor submitted few elements relating to the third period, that is the detention in Arusha. However, on 16 February 2000 she lodged additional material in this regard, along with a motion for deferring the time-limits imposed for her to submit new facts. Having examined the Prosecutor's request and the Registrar's memorandum relative thereto as well as the Appellant's written response lodged on 28 February 2000, the Appeals Chamber decides to accept this additional information.
60. The material submitted by the Prosecutor consists of a letter to the Registrar dated 11 February 2000, and annexes thereto. A relevant fact emerges from it. The letter and its annexes indicate that Mr. Nyaberi, counsel for the defence, entered into talks with the Registrar in order to set a date for the initial appearance. Several provisional dates were discussed. Problems arose with regard to the availability of judges and of defence counsel. Annex C to the Registrar's letter indicates that Mr. Nyaberi assented to the initial appearance taking place on 3 February 1997. This was not challenged by the defence at the hearing.
61. The assent of the defence counsel to deferring the initial appearance until 3 February 1997 is a new fact for the Appeals Chamber. During the proceedings before the Chamber, only the judicial recess was offered by way of explanation for the 96-day period which elapsed between the Appellant's transfer and his initial appearance, and this was rejected by the Chamber. There was no suggestion whatsoever that the Appellant had assented to any part of that schedule.

    There is no evidence that the Appellant was afforded an opportunity to appear before an independent Judge during the period of the provisional detention and the Appellant contends that he was denied this opportunity.

62. The decision by the Appeals Chamber in respect of the period of detention in Arusha is based on a 96-day lapse between the Appellant's transfer and his initial appearance. The new fact relative hereto, the defence counsel's agreeing to a hearing being held on 3 February 1997, reduces that lapse to 20 days - from 3 to 23 February. The Chamber considers that this is still a substantial delay and that the Appellant's rights have still been violated. However, the Appeals Chamber finds that the period during which these violations took place is less extensive than it appeared at the time of the Decision.

(d) Were the new facts known to the Prosecutor?

4428

63. Rule 120 introduces a condition which is not stated in Article 25 of the Statute which addresses motions for review. According to Rule 120 a party may submit a motion for review to the Chamber only if the new fact "was not known **to the moving party** at the time of the proceedings before a Chamber, **and could not have been discovered through the exercise of due diligence**" (emphasis added).
64. The new facts identified in the first two periods were not known to the Chamber at the time of its Decision but they may have been known to the Prosecutor or at least they could have been discovered. With respect to the second period, the Prosecutor was not unaware that Cameroon was unwilling to transfer the Appellant, especially as it was her deputy, Mr. Muna, who sought Mr. Scheffer's intervention to facilitate the process. But evidently it was not known to the Chamber at the time of the Appeal proceedings. On the contrary, the elements before the Chamber led it to the opposite finding, which was an important factor in its conclusion that "the Prosecutor has failed with respect to her obligation to prosecute the case with due diligence."
65. In the wholly exceptional circumstances of this case, and in the face of a possible miscarriage of justice, the Chamber construes the condition laid down in Rule 120, that the fact be unknown to the moving party at the time of the proceedings before a Chamber, and not discoverable through the exercise of due diligence, as directory in nature. In adopting such a position, the Chamber has regard to the circumstance that the Statute itself does not speak to this issue.
66. There is precedent for taking such an approach. Other reviewing courts, presented with facts which would clearly have altered an earlier decision, have felt bound by the interests of justice to take these into account, even when the usual requirements of due diligence and unavailability were not strictly satisfied. While it is not in the interests of justice that parties be encouraged to proceed in a less than diligent manner, "courts cannot close their eyes to injustice on account of the facility of abuse".
67. The Court of Appeal of England and Wales had to consider a situation not unlike that currently before the Appeals Chamber in the matter of *Hunt and Another v Atkin*. In that case, a punitive order was made against a firm of solicitors for having taken a certain course of action. It emerged that the solicitors were in possession of information that justified their actions to a certain extent, and which they had failed to produce on an earlier occasion, despite enquiries from the court. As in the current matter, the moving party (the solicitors) claimed that the court's enquiries had been unclear, and that they had not fully understood the nature of the evidence to be presented. The Judge approached the question as follows:

> I hope I can be forgiven for taking a very simplistic view of this situation. What I think I have to ask myself is this: if these solicitors ... had produced a proper affidavit on the last occasion containing the information which is now given to me ...would I have made the order in relation to costs that I did make? It is a very simplistic approach, but I think it is probably necessary in this situation.

He concluded that he would not have made the same order, and so allowed the fresh evidence and ordered a retrial. The Court of Appeal upheld his decision.

68. Faced with a similar problem, the Supreme Court of Canada has held that the requirements of due diligence and unavailability are to be applied less strictly in criminal than in civil cases. In the leading case of *McMartin v The Queen*, the court held, *per* Ritchie J, that:

> In all the circumstance, if the evidence is considered to be of sufficient strength that it might reasonably affect the verdict of the jury, I do not think it should be excluded on the ground that reasonable diligence was not exercised to obtain it at or before the trial.

69. The Appeals Chamber does not cite these examples as authority for its actions in the strict sense. The International Tribunal is a unique institution, governed by its own Statute and by the provisions of customary international law, where these can be discerned. However, the Chamber notes that the problems posed by the Request for Review have been considered by other jurisdictions, and that the approach adopted by the Appeals Chamber here is not unfamiliar to those separate and independent

systems. To reject the facts presented by the Prosecutor, in the light of their impaet on the Decision, would indeed be to close ones eyes to reality.

70. With regard to the third period, the Appeals Chamber remarks that, although a set of the elements submitted by the Proseeutor on 16 February 2000 were available to her prior to that date, aecording to the Registrar's memorandum, Annex C was not one of them. It must be deduced that the faet that the defence counsel had given his consent was known to the Prosecutor at the time of the proceedings before the Appeals Chamber.

4. Conclusion

71. The Chamber notes that the remedy it ordered for the violations the Appellant was subject to is based on a eumulation of elements:

> ... the fundamental rights of the Appellant were repeatedly violated. What may be worse, it appears that the Prosecutor's failure to proseeute this case was tantamount to negligenee. We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the eharges against him.

The new faets diminish the role played by the failings of the Prosecutor as well as the intensity of the violation of the rights of the Appellant. The cumulative effeet of these elements being thus reduced, the reparation ordered by the Appeals Chamber now appears disproportionate in relation to the events. The new faets being therefore facts which could have been decisive in the Decision, in particular as regards the remedy it orders, that remedy must be modified.

72. The Prosecutor has submitted that it has suffered "material prejudice" from the non compliance by the Appeals Chamber with the Rules and that eonsequently it is entitled to relief as provided in Rule 5. As the Appeals Chamber believes that this issue is not relevant to the Motion for Review and as the Appeals Chamber has in any event decided to review its Decision, it will not consider this issue further.

B. RECONSIDERATION

73. The essential basis on which the Prosecutor sought a reconsideration of the previous Decision, as distinguished from a review, was that she was not given a proper hearing on the issues passed on in that Decision. The Appeals Chamber finds no merit in the contention and accordingly rejeets the request for reconsideration.

VI. CONCLUSION

74. The Appeals Chamber reviews its Decision in the light of the new facts presented by the Prosecutor. It confirms that the Appellant's rights were violated, and that all violations demand a remedy. However, the violations suffered by the Appellant and the omissions of the Prosecutor are not the same as those which emerged from the facts on whieh the Decision is founded. Accordingly, the remedy ordered by the Chamber in the Decision, whieh eonsisted in the dismissal of the indietment and the release of the Appellant, must be altered.

VII. DISPOSITION

75. For these reasons, the APPEALS CHAMBER reviews its Decision of 3 November 1999 and replaces its Disposition with the following:

1) ALLOWS the Appeal having regard to the violation of the rights of the Appellant to the extent indicated above;

2) REJECTS the application by the Appellant to be released;

3) DECIDES that for the violation of his rights the Appellant is entitled to a remedy, to be fixed at the time of judgement at first instance, as follows:

a) If the Appellant is found not guilty, he shall receive financial compensation;

b) If the Appellant is found guilty, his sentence shall be reduced to take account of the violation of his rights.

Judge Vohrah and Judge Nieto-Navia append Declarations to this Decision.

Judge Shahabuddeen appends a Separate Opinion to this Decision.

Done in both English and French, the French text being authoritative.

_____s/._____	_____s/._____	_____s/._____
Claude Jorda, Presiding	Lal Chand Vohrah	Mohamed Shahabuddeen

_____s/._____	_____s/._____
Rafael Nieto-Navia	Fausto Pocar

Dated this thirty-first day of March 2000
At The Hague,
The Netherlands

[Seal of the Tribunal]

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. This is an important case: it is not every day that a court overturns its previous decision to liberate an indicted person. This is what happens now. New facts justify and require that result. But possible implications for the working of the infant criminal justice system of the international community need to be borne in mind. Because of this, and also because I agreed with the previous decision, I believe that I should explain why I support the present deeision to cancel out the principal effect of the former.

(i) The limits of the present hearing

2. Except on one point, I was not able to agree with the grounds on which the previous decision rested. However, the points on which I differed are not now open for discussion. This is because the present motion of the Proseeutor has to be dealt with by way of review and not by way of reconsideration. Under review, the motion has to be approached on the footing that the earlier findings of the Appeals Chamber stand, save to the extent to whieh it can be seen that those findings would themselves have been different had certain new facts been available to the Appeals Chamber when the original deeision was made; under that procedure, it is not therefore possible to ehallenge the previous holdings of the Appeals Chamber as incorreet on the basis on which they were made. By contrast, under reconsideration, the appeal would have been reopened, with the result that that kind of challenge would have been possible, as I apprehend is desired by the prosecution. To cover all the requests made by the prosecution, it is thus necessary to say a word on its motion for reconsideration. I agree that the motion should not be granted. These are my reasons:

3. Deeisions rendered within the International Criminal Tribunal for the former Yugoslavia ("ICTY") on the competence of a Chamber to reconsider a decided point vary from the exercise of a relatively free power of reconsideration to a denial of any such power based on the statement, made in *Kordic,* "that motions to reconsider are not provided for in the Rules and do not form part of the procedures of the International Tribunal". Where the deeisions suggest a relatively free power of reconsideration, they concern something in the nature of an operationally passing position taken in the course of continuing proceedings; in such situations the Chamber remains seised of the matter and competent, not acting capriciously but observing due caution, to revise its position on the way to rendering the ultimate decision. In situations of more lasting consequence, it appears to me that the absence of rules does not conclude the issue as to how a judieial body should behave where complaint is made that its previous decision was fundamentally flawed, and more particularly where that body is a court of last resort, as is the Appeals Chamber. Not surprisingly, in *^elebici* the Appeals Chamber of the ICTY introduced a qualification in stating that "in the absence of particular circumstances justifying a Trial Chamber or the Appeals Chamber to reconsider one of its decisions, motions for reconsideration do not form part of the procedure of the International Tribunal". The first branch of that statement is important, including its non-reproduction of the *Kordic* words "that motions to reconsider are not provided for in the Rules": the implication of the omission seems to be that the fact that the Rules do not so provide is not by itself determinative of the issue whether or not the power of reconsideration exists in "particular circumstances". Alternatively, the omitted words were not intended to deny the inherent jurisdiction of a judicial body to reconsider its decision in "particular eireumstances".

4. Circumscribed as they evidently are, it is hard, and perhaps not in the interest of the policy of the law, to attempt exhaustively to define "particular circumstances" which might justify

reconsideration. It is clear, however, that such circumstances include a case in which the decision, though apparently *res judicata,* is void, and therefore non-existent in law, for the reason that a procedural irregularity has caused a failure of natural justice. An aspect of that position was put this way by the presiding member of the Appellate Committee of the British House of Lords:

> In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Cassell & Co Ltd v. Broome (No.2) [* 1972] 2 All ER 849, [1972] AC 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.
>
> However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.

5. I understand this to mean that, certainly in the case of a court of last resort, there is inherent jurisdiction to reopen an appeal if a party had been "subjected to an unfair procedure". I see no reason why the principle involved does not apply to criminal matters if a useful purpose can be served, particularly where, as here, the decision in question has not been acted upon.

6. I have referred to unfairness in procedure because it appears to me that this is the criterion which is attracted by the posture of the Prosecutor's case. Was there such unfairness?

7. Whether a party was or was not "subjected to an unfair procedure" is a matter of substance, not technicality. If the party did not understand that an issue would be considered (which is the Prosecutor's contention), that could found a claim that it was disadvantaged. But, provided that that was understood and that there was opportunity to respond, I do not see that the procedure was unfair merely because a Chamber considered an issue not raised by the parties. The interests involved are not merely those of the parties; certainly, they are not interests submitted by them to adjudication on a consensual jurisdictional basis; they include the interests of the international community and are intended to be considered by a court exercising compulsory jurisdiction. In *Erdemovic* the Appeals Chamber raised, considered and decided issues not presented by the parties, observing that there was "nothing in the Statute or the Rules, nor in practices of international institutions or national judicial systems, which would confine its consideration of the appeal to the issues raised formally by the parties".

8. Further, a Chamber need not echo arguments addressed to it: its reasoning may be its own. When the present matter is examined, all that appears is that the Appeals Chamber in some cases used arguments other than those presented to it. The basic issue was one on which the parties had an opportunity to present their positions, namely, whether the rights of the appellant had been violated by undue delay so as to lead to lack of jurisdiction. For the reasons given below, I am satisfied that there is not any substance in the contention of the prosecution that it had no notice that certain questions would be determined. It is more to the point to say that the prosecution did not avail itself of opportunities to present its position on certain matters; in particular, it did not assist either the Trial Chamber or the Appeals Chamber with relevant material at the time when that assistance should have been given.

9. In short, there was no unfairness in procedure in this case. Accordingly, the previous decision of the Appeals Chamber cannot be set aside and the appeal reopened. It is thus not

possible to accede to the Prosecutor's proposition, among others, that that decision was wrong when made and should for that reason be now changed.

10. For the reasons given in today's judgment, the procedure of review is nevertheless available. As mentioned above, the possibility of revision which this opens up is however limited to consideration of the questiou whether the same decision would have been rendered if certain new facts had been at the disposal of the Appeals Chamber, and, if not, what is the decision which would then have been given.

(ii) The Prosecutor's complaint that she had no notice of the intention of the Appeals Chamber to deal with the question of the legality of the detention between transfer and initial appearance

11. Before moving on, I shall pause over tbe question, alluded to above, as to whether the prosecution availed itself of opportunities to present its position on certain points. The question may be considered illustratively in relation to the issue of detention between the appellant's transfer from Cameroon to the Tribunal's detention unit in Arusha and his initial appearance before a Trial Chamber, extending from 19 November 1997 to 23 February 1998. The prosecution takes the position, which it stresses, that it had no opportunity to address this issue because it did not know tbat thc Appeals Chamber would be dealing with it. That, if correct, is a sufficiently weighty matter to justify reconsideration, as it would show that the prosecution was subjected to an unfair procedure in the Appeals Chamber. So it should be examined.

12. The prosecution submitted that the issue of delay between transfer and initial appearance was not argued by the appellant in the course of the oral proceedings in the Trial Chamber aud was not iucluded in his grounds of appeal. Although, as will be seen, the appellant did include a claim on the point in his motion, I had earlier made a similar observation, noting that, in the Trial Chamber, "no issue was presented as to delay between transfer and initial appearance", that the "Trial Chamber was not given any reason to believe that there was such an issue", and, in respect of the appeal proceedings, that it "does not appear that the Prosecutor thought that she was being called upon to meet an argument about delay between transfer and initial appearance". But it seems to tue that, apart from the action of the appellant, account has to be taken of the action of the Appeals Chamber and that the position changed with the issuing by the latter of its scheduling order of 3 June 1999; that order, referred to below, clearly raised the matter. After the order was made, the appellant went back to the claim which he had originally raised; equally, the prosecution gave its reaction. Thus, in the event, the Appeals Chamber did not pass on the matter without affording an opportunity to the Prosecutor to address the point.

13. To fill out this brief picture, it is right to consider the factual basis of the proposition that the appellant did include a claim on the point in his motion. As I noted at page 1 of a separate opinion appended to the decision of the Appeals Chamber of 3 November 1999, in paragraphs 2 and 9 of the motion the appellant complained of "continued provisional detention". Viewing the time when that complaint was made (three months after the transfer), he was thus also complaining of the detention following on his transfer, inclusive of delay between transfer and initial appearance. In fact, as I also pointed out, annexure DM2 to his motion spoke of "**98 days** of detention after transfer and before initial appearance" (original emphasis, but actually 96 days). Further, in paragraph 11 of his brief in support of that motion he referred to Articles 7, 8, 9 and 10 of the Universal Declaration of Human Rights, relating *inter alia* to protection

of the law and to freedom from arbitrary arrest and detention. More particularly, he also referred to Article 9 of the International Covenant on Civil and Political Rights ("ICCPR"), stating that this required that "the accused should be brought before the court without delay". That was obviously a reference to paragraph 3 of Article 9 of the ICCPR which stipulates that "[a] nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release". It follows that, in his motion, the appellant did make a complaint on the matter to the Trial Chamber.

14. Now, how did the prosecution react to the appellant's complaint? The complaint having been made in the motion, and the motion being heard seven months after it was brought, it seems to me that, by the time when the motion was heard, the prosecution should have been in possession of all material relevant to the issue whether there was undue delay between transfer and initial appearance; it also had an opportunity at that stage to present all of that material together with supporting arguments. The record shows that it did not do so.

15. In the Trial Chamber, the prosecution did not file a response to the appellant's motion in which the appellant complained of delay between transfer and initial appearanee. Indeed, some part of the oral hearing before the Trial Chamber on 11 September 1998 was taken up with this very fact - that the prosecution had not submitted a reply, with the consequential difficulty, about which the appellant remonstrated, that he did not know exactly what issues the prosecution intended to challenge at the hearing before the Trial Chamber. In the words then used by his counsel. "... in an adversarial system we should not leave leeway for ambush". In his reply, counsel for the prosecution simply said, "We didn't do it in this case and I have no explanation for that. ... we don't have an explanation for why we haven't followed our *usual practice*". In turn, the Presiding Judge, though not sanctioning the prosecution, noted that what was done was eontrary to the established procedure. At the oral hearing before the Appeals Chamber on 22 February 2000, counsel for the prosecution took the position that there was no rule requiring the prosecution to file a response. Counsel for the prosecution before the Trial Chamber had earlier made the same point. They were both right. But that circumstance was not determinative. As the Presiding Judge of the Trial Chamber had made clear, it was the practice to file a response; and, as counsel for the prosecution later conceded at the oral hearing before the Appeals Chamber on 22 February 2000, the Presiding Judge "did draw the conclusion that [what was done] was contrary ... to the practice of the Tribunal". Indeed, at the hearing before the Trial Chamber on 11 September 1998, counsel for the prosecution accepted, as has been seen, that the failure of the prosecution to submit a written reply was contrary to the "usual practice" of the prosecution itself.

16. The failure of the prosecution to respond to the appellant's complaint of undue delay between transfer and initial appearance did not of course remove the complaint. The dismissal of the appellant's motion included dismissal of that complaint. The complaint and its dismissal formed part of the record before the Appeals Chamber. This being so, it appears to me that at this stage the question of substance is whether the Prosecutor knew that the Appeals Chamber intended to deal with the complaint, and, if so, whether the Prosecutor had an opportunity to address it. The answer to both questions is in the affirmative. This results from the Appeals Chamber's scheduling order of 3 June 1999, referred to above.

17. That order required the parties "to address the following questions and provide the Appeals Chamber with all relevant documentation: ...4). The reason for any delay between the transfer of the Appellant to the Tribunal and his initial appearance". The requisition was made

on the stated basis that the Appeals Chamber needed "additional information to decide the appeal". At the oral hearing in the Appeals Chamber on 22 February 2000, a question from the bench to counsel for the Prosecutor was this: "Did the prosecution understand from that, that the Appeals Chamber was proposing to consider reasons for any delay between transfer of the Appellant and his initial appearance?" Counsel for the Prosecutor correctly answered in the affirmative. He also agreed that the prosecution did not object to the competence of the Appeals Chamber to consider the matter and did not ask for more time to respond to the request by the Appeals Chamber for additional information. In fact, in paragraphs 17-20 of its response of 21 June 1999, the prosecution sought to explain the delay in so far as it then said that it could, stating that it had no influence over the scheduling of the initial appearance of accused persons, that these matters lay with the Trial Chambers and the Registrar, that assignment of defence counsel was made only on 5 December 1997, and that there was a judicial holiday from 15 December 1997 to 15 January 1998. In stating these things (how adequate they were being a different matter), the prosecution fell to be understood as having accepted that the Appeals Chamber would be dealing one way or another with the question to which those things were a response.

18. Focusing on the issues as she saw them, the Prosecutor, as I understood her, submitted that the Appeals Chamber was confined to the issues presented by the parties. As indicated above, that is not entirely correct. The cases show that the leading principle is that the overriding task of the Tribunal is to discover the truth. Since this has to be done judicially, limits obviously exist as to permissible methods of search; and those limits have to be respected, for the Appeals Chamber is not an overseer. It cannot gratuitously intervene whenever it feels that something wrong was done: beyond the proper appellate boundaries, the decisions of the Trial Chamber are unquestionable. However, as is shown by *Erdemovic*, the Appeals Chamber can raise issues whether or not presented by a party, provided, I consider, that they lie within the prescribed grounds of appeal, that they arise from the record, and that the parties are afforded an opportunity to respond. I think that this was the position in this case.

19. As has been demonstrated above, the record before the Appeals Chamber included both a claim by the appellant that there was impermissible delay between transfer and initial appearance and dismissal by the Trial Chamber of the motion which included that claim. Where an issue lying within the prescribed grounds of appeal is raised on the record, the Appeals Chamber can properly require the parties to submit additional information on the point; there is not any basis for suggesting, as the Prosecutor has done, that in this case the Appeals Chamber went outside of the appropriate limits in search of evidence.

20. In conclusion, it appears to me that the substance of the matter is that the Prosecutor had notice of the intention of the Appeals Chamber to deal with the point, had an opportunity to address the point both before the Trial Chamber and the Appeals Chamber, and did address the point in her written response to the Appeals Chamber. In particular, the Prosecutor knew that the Appeals Chamber would be passing on the point and did not object to the competence of the Appeals Chamber to do so. Her approach fell to be understood as acquiescence in such competence. I accordingly return to my previous position that it is not possible to set aside the previous decision and to reopen the appeal, and that the only way of revisiting the matter is through the more limited method of review on the basis of discovery of new facts.

(iii) The Prosecutor's argument that the Appeals Chamber did not apply the proper test for determining whether there was a breach of the appellant's rights

21. In dealing with this argument by the Prosecutor, it would be useful to distinguish between the breach of a right and the remedy for a breach. The former will be dealt with in this section; the latter in the next.

22. An opinion which I appended to the decision given on 2 July 1998 by the Appeals Chamber of the ICTY in *Prosecutor v. Kovacevic* included an observation to the effect that, because of the preparatory problems involved, the jurisprudence recognises that there is "need for judicial flexibility" in applying to the prosecution of war crimes the principle that criminal proceedings should be completed within a reasonable time. The prosecution correctly submits that, in determining whether there has been a breach of that principle, a court must weigh competing interests. As it was said in one case, the court "must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in" the territory concerned. To do this, the court "should assess such factors as the length of and reason for the delay, the defendant's assertion of his right, and prejudice to the defendant". The reason for the delay could of course include the complexity of the ease and the conduct of the prosecuting authorities as well as that of the court as a whole.

23. These criteria are correct; but I do not follow why it is thought that they were not applied by the Appeals Chamber. Their substance was considered in paragraphs 103-106 of the previous decision of the Appeals Chamber, footnote 268 whereof specifically referred to the leading cases of *Barker v. Wingo* and *R. v. Smith*, among others. Applying that jurisprudence in this case, it is difficult to see how the balance came out against the appellant. On the facts as they appeared to the Appeals Chamber, the delay was long; it was due to the Tribunal; no adequate reasons were given for it; the appellant repeatedly complained of it; and, there being nothing to rebut a reasonable presumption that it prejudiced his position, a fair inference could be drawn that it did.

24. The breach of the appellant's rights appears even more clearly when it is considered that the jurisprudence which produced principles about balancing competing interests developed largely, if not wholly, out of cases in which the accused was in fact brought before a judicial officer shortly after being charged, but in which, for one reason or another, the subsequent trial took a long time to approach completion. By contrast, the problem here is not that the proceedings had taken too long to complete, but that they had taken too long to begin. It is not suggested that those principles are irrelevant to the resolution of the present problem; what is suggested is that, in applying them to the present problem, the difference referred to has to be taken into aceount. To find a solution it is necessary to establish what is the proper judicial approach to detention in the early stages of a criminal case, and especially in the pre-arraignment phase.

25. The matter turns, it appears to me, on a distinction between the right of a person to a trial within a reasonable time and the right of a person to freedom from arbitrary interference with his liberty. The right to a trial within a reasonable time can be violated even if there has never been any arrest or detention; by contrast, a complaint of arbitrary interference with liberty can only be made where a person has been arrested or detained. I am not certain that the distinetion was recognised by the prosecution. In the view of its counsel, which he said was based on the decision of the Appeals Chamber and on other cases, the object of the Rule 62 requirement for the accused to be brought "without delay" before the Trial Chamber was to allow him "to know the formal charges against him" and to enable him "to mount a defence".

The submission was that, in this case, both of these purposes had been served before the initial appearance, the indictment having been given to the appellant while he was still in Cameroon. But it seems to me that, as counsel later accepted, there was yet another purpose, and that that purpose could only be served if there was an initial appearance. That purpose – a fundamentally important one – was to secure to the detained person a right to be placed "without delay" within the protection of the judicial power and consequently to ensure that there was no arbitrary curtailment of his right to liberty. That purpose is a major one in the work of an institution of this kind; it is worthy of being marked.

26. For present purposes, the law seems straightforward. It is not in dispute that the controlling instruments of the Tribunal reflect the internationally recognised requirement that a detained person shall be brought "without delay" to the judiciary as required by Rule 40*bis*(J) and Rule 62 of the Tribunal's Rules of Procedure and Evidence, or "promptly" as it is said in Article 5(3) of the European Convention on Human Rights and Article 9(3) of the ICCPR, the latter being alluded to by the appellant in paragraph 11 of the brief in support of his motion of 19 February 1998, as mentioned above. It will be convenient to refer to one of these provisions, namely, Article 5(3) of the European Convention on Human Rights. This provides that "[e] veryone arrested or detained in accordance with the provisions of paragraph 1.*c* of this article [relating to arrests for reasonable suspicion of having committed an offence] shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ...".

27. So first, as to the purpose of these provisions. Apart from the general entitlement to a trial within a reasonable time, it is judicially recognised that the purpose is to guarantee to the arrested person a right to be brought promptly within the protection of the judiciary and to ensure that he is not arbitrarily deprived of his right to liberty. The European Court of Human Rights, whose case law on the subject is persuasive, put the point by observing that the requirement of promptness "enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty.... Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5§3 [of the European Convention on Human Rights] , which is intended to minimise the risk of arbitrariness. Judicial control is implied by the rule of law, 'one of the fundamental principles of a democratic society ...'".

28. Second, as to the tolerable period of delay, the decision of the Appeals Chamber of 3 November 1999 correctly recognised that this is short. The work of the United Nations Human Rights Committee shows that it is about four days. In *Portorreal v. Dominican Republic*, a period of 50 hours was held to be too short to constitute delay. But a period of 35 days was considered too much in *Kelly v. Jamaica*. In *Jijón v. Ecuador* a five-day delay was judged to be violative of the rule.

29. The same tendency in the direction of brevity is evident in the case law of the European Court of Human Rights. In *McGoff*, on his extradition from the Netherlands to Sweden, the applicant was kept in custody for 15 days before he was brought to the court. That was held to be in violation of the rule. *De Jong, Baljet and van den Brink* concerned judicial proceedings in the army. "[E] ven taking due account of the exigencies of military life and military justice", the European Court of Human Rights considered that a delay of seven days was too long.

30. In *Koster,* which also concerned judicial proceedings in the army, a five-day delay was held to be in breach of the rule. The fact that the period included a weekend and two-yearly military manoeuvres, in which members of the court - a military court - had been participating was disregarded; in the view of the European Court of Human Rights, the rights of the accused took precedence over matters which were "foreseeable". The military manoeuvres "in no way prevented the military authorities from ensuring that the Military Court was able to sit soon enough to comply with the requirements of [Article 5(3) of the European Convention on Human Rights] , *if necessary on Saturday or Sunday*".

31. No doubt, as it was said in *de Jong, Baljet and van den Brink,* "The issue of promptness must always be assessed in each case according to its special features". The same thing was said in *Brogan.* But this does not markedly enlarge the normal period. *Brogan* was a case of terrorism; the European Court of Human Rights was not altogether unresponsive to the implications of that fact, to which the state concerned indeed appealed. Yet the Court took the view that a period of six days and sixteen and a half hours was too long; indeed, it considered that even a shorter period of four days and six hours was outside the constraints of the relevant provision. The Court began its reasoning by saying:

> No violation of Article 5§3 [of the European Convention on Human Rights] can arise if the arrested person is released 'promptly' before any judicial control of his detention would have been feasible ... If the arrested person is not released promptly, he is entitled to a prompt appearance before a judge or judicial officer.

32. Thus, in measuring permissible delay, the Court started out by having regard to the time within which it would have been "feasible" to establish judicial control of the detention in the circumstances of the case. The idea of feasibility obviously introduced a margin of flexibility in the otherwise strict requirement of promptness. But how to fix the limits of this flexibility? The Court looked at the "object and purpose of Article 5", or, as it said, at the "aim and ... object" of the Convention", and stated that –

> the degree of flexibility attaching to the notion of 'promptness' is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3. Whereas promptness is to be assessed in each case according to its special features ..., the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5§3 [of the European Convention on Human Rights] , that is to the point of effectively negativing the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority.

33. In paragraph 62 of its judgment in *Brogan,* the European Court of Human Rights again mentioned that the "scope for flexibility in interpreting and applying the notion of 'promptness' is very limited". Thus, although the Court appreciated the special circumstances which terrorism represented, it said that "[t] he undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5§3".

34. To refer again to *McGoff,* in that case the European Commission of Human Rights recalled that, in an earlier matter, it had expressed the view that a period of four days was acceptable; "it also accepted five days, but that was in exceptional circumstances".

35. In the case at bar, counting from the time of transfer to the Tribunal's detention unit in Arusha (19 November 1997) to the date of initial appearance before a Trial Chamber (23 February 1998), the period - the Arusha period - was 96 days, or *nearly 20 times the maximum acceptable period of delay.*

36. As a matter of juristic logic, any flexibility in applying the requirements concerning time to the case of war crimes has to find its justification not in the nature of the crimes themselves, but in the difficulties of investigating, preparing and presenting cases relating to them. Consequently, that flexibility is not licence for disregarding the requirements where they can be complied with. It is only "the austerity of tabulated legalism", an idea not much favoured where, as here, a generous interpretation is called for, which could lead to the view that, once a crime is categorised as a war crime, that suffices to justify the conclusion that the requirements concerning time may be safely put aside.

37. In this case, it is not easy to see what difficulty beset the authorities in bringing the appellant from the Tribunal's detention unit to the Trial Chamber. That scarcely inter-galactic passage involved no more than a fifteen minute drive by motor car on a macadamised road. To plead the character of the crimes in justification of the manifest breach of an applicable requirement which was both of overriding importance and capable of being respected with the same ease as in the ordinary case is to transform an important legal principle into a statement of affectionate aspiration.

38. On the facts as they earlier appeared to it, the Appeals Chamber could not come to any conclusion other than that the rights of the appellant in respect of the period between transfer and initial appearance had been breached, and very badly so. As today's decision finds, the new facts do not show that they were not breached. I agree, however, that the new facts show that the breach was not as serious as it at first appeared, it being now clear that defence counsel, although having opportunities, did not object and could be treated as having acquiesced in the passage of time during most of the relevant period.

(iv) Whether a breach could be remedied otherwise than by release

39. Now for the question of remedy, assuming the existence of a breach. In this respect, the prosecution argues that, if there was a breach of the appellant's rights, it was open to the Appeals Chamber to grant some form of compensatory relief short of release and that it should have done so. In support, notice may be taken of a view that, particularly though not exclusively in the case of war crimes, the remedy for a breach of the principle that a trial is to be held within a reasonable time may take the form of payment of monetary compensation or of adjustment of any sentence ultimately imposed, custody being meanwhile continued.

40. That view is useful, although not altogether free from difficulty; it is certainly not an open-ended one. If the concern of the law with the liberty of the person, as demonstrated by the above-mentioned attitude of the courts, means anything, it is necessary to contemplate a point of time at which the accused indisputably becomes entitled to release and dismissal of the indictment. In this respect, it is to be observed that, according to the European Commission of Human Rights, contrary to an opinion of the German Federal Court, in 1983 a committee of three judges of the German Constitutional Court held that "unreasonable delays of criminal proceedings might under certain circumstances only be remedied by discontinuing such proceedings". As is shown by the last paragraph of the report of *Bell's* case, *supra*, the only reason why a formal order prohibiting further proceedings was not made in that case by the Privy Council was because it was understood that the practice in Jamaica was that there would be no further proceedings. Paragraph 108 of the decision of the Appeals Chamber of 3 November 1999 cites cases from other territories in which further proceedings were in fact prohibited. I find no fault with the position taken in those cases; true, those cases concerned

delay in holding and completing the trial, but I do not accept that the principle on which they rest is necessarily inapplicable to extended pre-arraignment delay.

41. More importantly, the view that relief short of release is possible is subject to any statutory obligation to effect a release. In this respect, in its previous decision the Appeals Chamber held that Rule 40*bis* of the Tribunal's Rules of Procedure and Evidence applied to the Cameroon period of detention. I respectfully disagreed with that view and still do, but it is the decision of the Appeals Chamber which matters; and so I proceed on the basis that the Rule applied. Now, Sub-Rule (H) of that Rule provided as follows:

> The total period of provisional detention shall in no case exceed 90 days, at the end of which, in the event that the indictment has not been confirmed and an arrest warrant signed, the suspect *shall be released* ... (emphasis added).

42. Consistently with the judicial approach to detention in the early phases of a criminal case, the object of the cited provision is to control arbitrary interference with the liberty of the person by guaranteeing him a right to be released if he is not charged within the stated time. In keeping with that object, the Rule, which has the force of law, provides its own sanction. Where that sanction comes into operation through breach of the 90-day limit set by the Rule, release is both automatic and compulsory: a court order may be made but is not necessary. The detained person has to be mandatorily released in obedience to the command of the Rule: no consideration can be given to the possibility of keeping him in custody and granting him a remedy in the form of a reduction of sentence (if any) or of payment of compensation; any discretion as to alternative forms of remedy is excluded, however serious were the allegations.

43. In effect, the premise of the conclusion reached by the Appeals Chamber that the appellant had to be released was the Chamber's interpretation, on the facts then before it, that the Rule applied to the Cameroon period of detention. These being review proceedings and not appeal proceedings, the premise would continue to apply, and so would the conclusion, unless displaced by new facts.

(v) Whether there are new facts

44. So now for the question whether there are new facts. The temptation to use national decisions in this area may be rightly restrained by the usual warnings of the dangers involved in facile transposition of municipal law concepts to the plane of international law. Such borrowings were more frequent in the early or formative stages of the general subject; now that autonomy has been achieved, there is less reason for such recourse. It is possible to argue that the current state of criminal doctrine in international law approximates to that of the larger subject at an earlier phase and that accordingly a measure of liberality in using domestic law ideas is both natural and permissible in the field of criminal law. But it is not necessary to pursue the argument further. The reason is that, altogether apart from the question whether a particular line of municipal decisions is part of the law of the Tribunal, no statutory authority needs to be cited to enable a court to benefit from the scientific value of the thinking of other jurists, provided that the court remains master of its own house. Thus, nothing prevents a judge from consulting the reasoning of judges in other jurisdictions in order to work out his own solution to an issue before him; the navigation lights offered by the reflections of the former can be welcome without being obtrusive. This is how I propose to proceed.

45. The books are full of statements, and rightly so, concerning the caution which has to be observed, as a general matter, in admitting fresh evidence. Latham CJ noted that "[t] hese are general principles which should be applied to both civil and criminal trials". Accordingly, there is to be borne in mind the principle familiar in civil cases, somewhat quaintly expressed in one of them, that it is the "duty of [a party] to bring forward his whole case at once, and not to bring it forward piecemeal as he found out the objections in his way".

46. The prosecution advanced a claim to several new facts. Agreeably to the caution referred to, the Appeals Chamber has not placed reliance on all of them. I shall deal with two which were accepted, beginning with the statement of Ambassador Scheffer as to United States intervention with the government of Cameroon. Five questions arise in respect of that statement.

47. The first question is whether the Ambassador's statement concerns a "new fact" within the meaning of Article 25 of the Statute. It has to be recognised that there can be difficulty in drawing a clear line of separation between a new fact within the meaning of that Article of the Statute and additional evidence within the meaning of Rule 115 of the Tribunal's Rules of Procedure and Evidence. A new fact is generically in the nature of additional evidence. The differentiating specificity is this: additional evidence, though not being merely cumulative, goes to the proof of facts which were in issue at the hearing; by contrast, evidence of a new fact is evidence of a distinctly new feature which was not in issue at the trial. In this case, there has not been an issue of fact in the previous proceedings as to whether the government of the United States had intervened. True, the intervention happened before the hearing, but that does not make the fact of the intervention any the less new. As is implicitly recognised by the wording of Article 25 of the Statute and Rule 120 of the Rules of Procedure and Evidence of the Tribunal, the circumstance that a fact was in existence at the time of trial does not automatically disqualify it from being regarded as new; the newness has to be in relation to the facts previously before the court. In my opinion, Ambassador Scheffer's statement is evidence of a new fact.

48. The second question is whether the new fact "could not have been discovered [at the time of the proceedings before the original Chamber] through the exercise of due diligence" within the meaning of Rule 120 of the Rules. The position of the prosecution is that it did ask Ambassador Scheffer to intervene with the government of Cameroon. This being so, it is reasonable to hold that the prosecution knew that the requested intervention was needed to end a delay caused by Cameroon, and that it was also in a position to know that the intervention had in fact taken place and that it involved the activities in question. It is therefore difficult to find that the material in question could not have been discovered with due diligence. In this respect, I agree with the appellant.

49. But, for the reasons given in today's judgment, that does not end the matter. Certainly the general rule is that " the interests of justice" will not suffice to authorise the admission of material which was available at trial, diligence being a factor in determining availability. The principle of finality supports that view. But, as has been recognised by the Appeals Chamber of the ICTY, "the principle [of finality] would not operate to prevent the admission of evidence that would assist in determining whether there could have been a miscarriage of justice". As was also observed by that Chamber, "the principle of finality must be balanced against the need to avoid a miscarriage of justice". I see no reason why the necessity to make that balance does not apply to a review.

50. Thus, there has to be recognition of the possibility of there being a case in which, notwithstanding the absence of diligence, the material in question is so decisive in demonstrating mistake that the court in its discretion is obliged to admit it in the upper interests of justice. This was done in one case in which an appeal court observed, "All the evidence tendered to us could have been adduced at the trial: indeed, three of the witnesses, whom we have heard... did give evidence at the trial. Nevertheless we have thought it necessary, exercising our discretion in the interests of justice, to receive" their evidence. It is not the detailed underlying legislation which is important, but the principle to be discerned.

51. The principle was more recently affirmed by the Supreme Court of Canada in the case of *R v. Warsing*. There the leading opinion recalled an earlier view that "the criterion of due diligence... is not applied strictly in criminal cases" and said: "It is desirable that due diligence remain only one factor and its absence, particularly in criminal cases, should be assessed in light of other circumstances. If the evidence is compelling and the interests of justice require that it be admitted then the failure to meet the test should yield to permit its admission". In the same opinion, it was later affirmed that "a failure to meet the due diligence requirement should not 'override accomplishing a just result'".

52. It may be thought that an analogous principle can be collected from *Aleksovski,* in which the Appeals Chamber of the ICTY held "that, in general, accused before this Tribunal have to raise all possible defences, where necessary in the alternative, during trial ..." , but stated that it "will nevertheless consider" a new defence. Clearly, if the new defence was sound in law and convincing in fact, it would have been entertained in the higher interests of justice notwithstanding the general rule.

53. Thus, having regard to the superior demands of justice, I would read the reference in Rule 120 to a new fact which "could not have been discovered through the exercise of due diligence" as directory, and not mandatory or peremptory. In this respect, it is said that the "language of a statute, however mandatory in form, may be deemed directory whenever legislative purpose can best be carried out by [adopting a directory] construction". Here, the overriding purpose of the provision is to achieve justice. Justice is denied by adopting a mandatory interpretation of the text; a directory approach achieves it. This approach, it is believed, is consonant with the broad view that, as it has been said, "the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case". That remark was made about rules of civil procedure, but, with proper caution, the idea inspiring it applies generally to all rules of procedure to temper any tendency to rely too confidently, or too simplistically, on the maxim *dura lex, sed lex.* I do not consider that this approach necessarily collides with the general principle regulating the interpretation of penal provisions and believe that it represents the view broadly taken in all jurisdictions.

54. The question then is whether, even if there was an absence of diligence, the material in this case so compellingly demonstrates mistake as to justify its admission. Ambassador Scheffer's statement makes it clear that the delay in Cameroon was due to the workings of the decision-making process in that country, that that process was expedited only after and as a result of his and his government's intervention with the highest authorities in Cameroon, that Cameroon was otherwise not ready to effect a transfer, and that accordingly the Tribunal was not to blame for any delay, as the Appeals Chamber thought it was. Has the Appeals Chamber

to close its eyes to Ambassador Scheffer's statement, showing, as it does, the existence of palpable mistake hearing on the correctness of the previous conclusion? I think not.

55. The third question is which Chamber should process the significance of the new fact: Is it the Appeals Chamber? Or, is it the Trial Chamber? In the *Tadic* Rule 115 application, the ICTY Appeals Chamber took the position, in paragraph 30 of its Deeision of 15 October 1998, that the "proper venue for a review application is the Chamber that rendered the final judgement". Well, this is a review and it is being eonducted by the Chamber whieh gave the final judgement - namely, the Appeals Chamber. So the case falls within the *Tadic* proposition.

56. I would, however, add this: On the basis of the statement in question, there could be argument that the Appeals Chamber cannot itself assess a new faet where the Appeals Chamber is sitting on appeal. However, it appears to me that the statement need not be construed as intended to neutralise the implication of Rule 123 of the Rules of Procedure and Evidence of the Trihunal that the Appeals Chamber may itself determine the effect of a new faet in an appeal pending before it. That Rule states: "If the judgement to be reviewed is under appeal at the time the motion for review is filed, the Appeals Chamber may return the case to the Trial Chamber for disposition of the motion". The word "may" shows that the Appeals Chamber need not send the matter to the Trial Chamber but may deal with it itself. The admissibility of this course is supported by the known jurisprudence, whieh shows that matter in the nature of a new fact may he considered on appeal. Thus, in *R. v. Ditch* (1969) 53 Cr. App. R. 627, at p. 632, a post-trial confession by a co-aecused was admitted on appeal as fresh or additional evidence, having heen first heard *de bene esse* before being formally admitted. Structures differ; it is the principle involved which matters. The jurisprudence referred to ahove in relation to mandatory and directory provisions also works to the same end. In my view, that end means this: where the new fact is in its nature conclusive, it may be finally dealt with by the Appeals Chamher itself; a reference back to the Trial Chamber is required only where, without being conclusive, the new fact is of such strength that it might reasonably affect the verdict, whether the verdict would in fact be affeeted being left to the evaluation of the Trial Chamber.

57. The fourth question is whether the new fact brought forward in Ambassador Scheffer's statement "could have been a decisive factor in reaching the decision", within the meaning of Article 25 of the Statute. The simple answer is "yes". As mentioned above, the decision of the Appeals Chamber proceeded on the basis that the Tribunal was responsible for the delay in Cameroon and that the latter was always ready to make a transfer. The Ambassador's statement shows that these things were not so.

58. The fifth and last question relates to a submission by the appellant that the Appeals Chamber should disregard Ambassador Scheffer's activities because he was merely prosecuting the foreign policy of his government and had no role to play in proceedings before the Trihunal. As has been noticed repeatedly, the Tribunal has no coercive machinery of its own. The Security Council sought to fill the gap by introducing a legal requirement for states to co-operate with the Tribunal. That obligation should not be construed so broadly as to constitute an unacceptable encroachment on the sovereignty of states; but it should certainly be interpreted in a manner which gives effect to the purposes of the Statute. I cannot think that anything in the purposes of the Statute prevents a state from using its good offices with another state to ensure that the needed cooperation of the latter with the Tribunal is forthcoming; on the contrary, those purposes would be eonsistent with that kind of *démarche*.

Thus, accepting that Ambassador Scheffer was prosecuting the foreign policy of his government. I cannot see that he was acting contrary to the principles of the Statute. Even if he was, I do not see that there was anything so inadmissibly incorrect in his activities as to outweigh the obvious relevance for this case of what he in fact did.

59. The statement of Judge Mballe of Cameroon is equally admissible as a new fact. It corroborates the substance of Ambassador Scheffer's statement in that it shows that, whatever was the reason, the delay was attributable to the decision-making process of the government of Cameroon; it was not the responsibility of the Tribunal or of any arm of the Tribunal.

(vi) The effect of the new facts

60. The appellant, along with others, was detained by Cameroon on an extradition request from Rwanda from 15 April 1996 to 21 February 1997. During that period of detention, he was also held by Cameroon at the request of the Prosecutor of the Tribunal for one month, from 17 April 1996 to 16 May 1996. In the words of the Appeals Chamber, on the latter day "the Prosecutor informed Cameroon that she only intended to pursue prosecutions against four of the detainees, *excluding* the Appellant". Later, on "15 October 1996, responding to a letter from the Appellant complaining about his detention in Cameroon, the Prosecutor informed the Appellant that Cameroon was not holding him at her behest". Today's judgment also shows that the appellant knew, at least by 3 May 1996, of the reasons for which he was held at the instance of the Prosecutor. These things being so, it appears to me that, from the point of view of proportionality, the Appeals Chamber focused on the subsequent period of detention at the request of the Tribunal, from 21 February 1997 to 19 November 1997, on which latter date the appellant was transferred from Cameroon to the Tribunal's detention unit in Arusha. How would the Appeals Chamber have viewed the appellant's detention during this period had it had the benefit of the new facts now available?

61. Regard being had to the jurisprudence, considered above, on the general judicial attitude to delay in the early phases of a criminal case, it is reasonable to hold that Rule 40*bis* contemplated a speedy transfer. If the transfer was effected speedily, no occasion would arise for considering whether the provision applied to extended detention in the place from which the transfer was to be made. In this case, the transfer was not effected speedily and the Appeals Chamber thought that the Tribunal (through the Prosecutor) was responsible for the delay, for which it accordingly looked for a remedy. In searching for this remedy, it is clear, from its decision read as a whole, that the central reason why it was moved to hold that the protection of that provision applied was because of its view that there was that responsibility. In this respect, I note that the appellant states that it "is the Prosecutor's failure to comply with the mandates of Rule 40 and Rule 40*bis* that compelled the Appeals Chamber to order the Appellant's release". I consider that this implies that the appellant himself recognises that the real reason for the decision to release him was the finding by the Appeals Chamber that the Prosecutor (and, through her, the Tribunal) was responsible for the delay in Cameroon. It follows that if, as is shown by the statements of Ambassador Scheffer and Judge Mballe, the Tribunal was not responsible, the Appeals Chamber would not have had occasion to consider whether the provisions applied and whether the appellant should be released in accordance with Rule 40*bis*(H).

62. Thus, without disturbing the previous holding, made on the facts then known to the Appeals Chamber, that Rule 40*bis* was applicable to the Cameroon period (with which I do not agree), the conclusion is reached that, on the facts now known, the Appeals Chamber

would not have held that the Rule applied to that period, with the consequence that the Rule would not have been regarded as yielding the results which the Appeals Chamber thought it did.

63. Argument may be made on the basis of the previous holding (with which I disagreed) that Cameroon was the constructive agent of the Tribunal. On that basis, the contention could be raised that, even if the delay was caused by Cameroon and not by the Tribunal, the Tribunal was nonetheless responsible for the acts of Cameroon. However, assuming that there was constructive agency, such agency was for the limited purposes of custody pending speedy transfer. Cameroon could not be the Tribunal's constructive agent in respect of delay caused, as the new facts show, by Cameroon's acts over which the Tribunal had no control, which were not necessary for the purposes of the agency, and which in fact breached the purposes of the agency. Hence, even granted the argument of constructive agency, the new facts show that the Tribunal was not responsible for the delay as the Appeals Chamber thought it was on the basis of the facts earlier known to it.

64. There are other elements in the case, but that is the main one. Other new facts, mentioned in today's judgment, show that the violation of the appellant's rights in respect of delay between transfer and initial appearance was not as extensive as earlier thought; in any case, it did not involve the operation of a mandatory provision requiring release. The new facts also show that defence counsel acquiesced in the non-hearing of the habeas corpus motion on the ground that it had been overtaken by events. Moreover, as is also pointed out in the judgment, the matter has to be regulated by the approach taken by the Appeals Chamber in its decision of 3 November 1999. Paragraphs 106-109 of that decision made it clear that the conclusion reached was based not on a violation of any single right of the appellant but on an accumulation of violations of different rights. As has now been found, there are new facts which show that important rights which were thought to have been violated were not, and that accordingly there was not an accumulation of breaches. Consequently, the basis on which the Appeals Chamber ordered the appellant's release is displaced and the order for release vacated.

(vii) Conclusion

65. There are two closing reflections. One concerns the functions of the Prosecutor; the other concerns those of the Chambers.

66. As to her functions, the Prosecutor appeared to be of a mind that the independence of her office was invaded by a judicial decision that an indictment was dismissed and should not be brought back. She stated that she had "never seen" an instance of a prosecutor being prohibited by a court "from further prosecution ...". In her submission, such a prohibition was at variance with her "completely independent" position and was "contrary to [her] duty as a prosecutor". Different legal cultures are involved in the work of the Tribunal and it is right to try to understand those statements. It does appear to me, however, that the framework provided by the Statute of the Tribunal can be interpreted to accommodate the view of some legal systems that the independence of a prosecutor does not go so far as to preclude a court from determining that, in proper circumstances, an indicted person may be released and may not be prosecuted again for the same crime. The independence with which a function is to be exercised can be separated from the question whether the function is itself exercisable in a particular situation. A judicial determination as to whether the function may be exercised in a given situation is part of the relief that the court orders for a breach of the person's rights

committed in the course of a previous exercise of those functions. This power of the courts has to be sparingly used: but it exists.

67. Also, the Prosecutor stated, in open court, that she had personally seen "5000 skulls" in Rwanda. She said that the appellant was "responsible for the death of over ... 800,000 people in Rwanda, and the evidence is there. Irrefutable, incontrovertible, he is guilty. Give us the opportunity to bring him to justice." Objecting on the basis of the presumption of innocence, counsel for the appellant submitted that the Prosecutor had expressed herself in "a more aggressive manner than she should ..." and had "talked as if she was a depository of justice before" the Appeals Chamber. I do not have the impression that the latter remark was entirely correct, but the differing postures did appear to throw up a question concerning the role of a prosecutor in an international criminal tribunal founded on the adversarial model. What is that role?

68. The Prosecutor of the ICTR is not required to be neutral in a case; she is a party. But she is not of course a partisan. This is why, for example, the Rules of the Tribunal require the Prosecutor to disclose to the defence all exculpatory material. The implications of that requirement suggest that, while a prosecution must be conducted vigorously, there is room for the injunction that prosecuting counsel "ought to bear themselves rather in the character of *ministers of justice assisting in the administration of justice*". The prosecution takes the position that it would not prosecute without itself believing in guilt. The point of importance is that an assertion by the prosecution of its belief in guilt is not relevant to the proof. Judicial traditions vary and the Tribunal must seek to benefit from all of them. Taking due account of that circumstance, I nevertheless consider that the system of the Statute under which the Tribunal is functioning will support a distinction between an affirmation of guilt and an affirmation of preparedness to prove guilt. In this case, I would interpret what was said as intended to convey the latter meaning, but the strength with which the statements were made comes so close to the former that I consider it right to say that the framework of the Statute is sufficiently balanced and sufficiently stable not to be upset by the spirit of the injunction referred to concerning the role of a prosecutor. I believe that it is that spirit which underlies the remarks now made by the Appeals Chamber on the point.

69. As to the functions of the Chambers, whichever way it went, the decision in this case would call to mind that, on the second occasion on which *Pinochet's* case went to the British House of Lords, the presiding member of the Appellate Committee of the House noted that -

> [t]he hearing of this case ... produced an unprecedented degree of public interest not only in this country but worldwide. ... The conduct of Senator Pinochet and his regime have been highly contentious and emotive matters. ... This wide public interest was reflected in the very large number attending the hearings before the Appellate Committee including representatives of the world press. The Palace of Westminster was picketed throughout. The announcement of the final result gave rise to worldwide reactions.

Naturally, however, (and as in this case), "the members of the Appellate Committee were in no doubt as to their function ...".

70. Here too there has been interest worldwide, including a well-publicised suspension by Rwanda of cooperation between it and the Tribunal. On the one hand, the appellant has asked the Appeals Chamber to "disregard ... the sharp political and media reaction to the decision, particularly emanating from the Government of Rwanda". On the other hand, the Prosecutor

has laid stress on the necessity for securing the cooperation of Rwanda, on the seriousness of the alleged crimes and on the interest of the international community in prosecuting them.

71. These positions have to be reconciled. How? This way: the sense of the international community has to be respectfully considered by an international court which does not dwell in the clouds; but that sense has to be collected in the whole. The interest of the international community in organising prosecutions is only half of its interest. The other half is this: such prosecutions are regarded by the international community as also designed to promote reconciliation and the restoration and maintenance of peace, but this is possible only if the proceedings are seen as transparently conforming to internationally recognised tenets of justice. The Tribunal is penal; it is not simply punitive.

72. It is believed that it was for this reason that the Security Council chose a judicial method in preference to other possible methods. The choice recalls the General Assembly's support for the 1985 Milan Resolution on Basic Principles on the Independence of the Judiciary, paragraph 2 of which reads: "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason". That text, to which counsel for the appellant appealed, is a distant but clear echo of the claim that the law of Rome was "of a sort that cannot be bent by influence, or broken by power, or spoilt by money". The timeless constancy of that ancient remark, cited for its substance rather than for its details, has in turn to be carried forward by a system of international humanitarian justice which was designed to function in the midst of powerful cross-currents of world opinion. Nor need this be as daunting a task as it sounds: it is easy enough if one holds on to the view that what the international community intended to institute was a system by which justice would be dispensed, not dispensed with.

73. But this view works both ways. In this case, there are new facts. These new facts both enable and require me to agree that justice itself has to regard the effect of the previous decision as now displaced; to adhere blindly to the earlier position in the light of what is now known would not be correct.

Done in both English and French, the English text being authoritative.

s/.

_____

Mohamed Shahabuddeen

Dated this 31st day of March 2000
At The Hague
The Netherlands

1 of 2 DOCUMENTS

UNITED STATES OF AMERICA, v. THEODORE F. STEVENS, Defendant.

No. 08-cr-231 (EGS)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

2009 U.S. Dist. LEXIS 39046

April 7, 2009, Decided
April 7, 2009, Filed

PRIOR HISTORY: *United States v. Stevens, 593 F. Supp. 2d 177, 2009 U.S. Dist. LEXIS 3138 (D.D.C., 2009)*

COUNSEL: [*1] For CH2M HILL COMPANIES, LTD., Non-Party Petitioner: Brian Christopher Baldrate, Francis Joseph Warin, LEAD ATTORNEYS, GIBSON DUNN AND CRUTCHER LLP, Washington, DC; David Penn Burns, LEAD ATTORNEY, GIBSON DUNN & CRUTCHER, Washington, DC.

For THEODORE F. STEVENS, Defendant: Brendan V. Sullivan, Jr., Craig D. Singer, LEAD ATTORNEYS, Alex Giscard Romain, Beth A. Stewart, Joseph Marshall Terry, Jr., Robert Madison Cary, WILLIAMS & CONNOLLY LLP, Washington, DC.

For USA, Plaintiff: Edward P. Sullivan, Nicholas A. Marsh, Patty Merkamp Stemler, Paul M O'Brien, William J. Stuckwisch, LEAD ATTORNEYS, Brenda K. Morris, David L. Jaffe, U.S. DEPARTMENT OF JUSTICE, Washington, DC; James A. Goeke, Joseph W. Bottini, LEAD ATTORNEYS, U.S. ATTORNEYS OFFICE, District of Alaska, Anchorage, AK.

JUDGES: Emmet G. Sullivan, United States District Judge.

OPINION BY: Emmet G. Sullivan

OPINION

ORDER

At the direction of the Attorney General, on April 1, 2009, a newly-appointed team of prosecutors filed a Motion to Set Aside the Verdict and Dismiss the Indictment, citing the failure to produce notes taken by prosecutors in an April 15, 2008 interview of Bill Allen. At a hearing on April 7, 2009, the government conceded that these notes contained [*2] information that the government was constitutionally required to provide to the defense for use at trial. Despite repeated defense requests and the Court's repeated admonitions to provide exculpatory information, the notes were not produced to the defense until March 25-26, 2009, nearly five months after trial. The Court will grant the Motion.

There was never a judgment of conviction in this case. The jury's verdict is being set aside and has no legal effect.

The government's Motion is GRANTED. The verdict is hereby set aside and the indictment is hereby dismissed with prejudice. See *Fed. R. Crim. P. 48(a)*.

IT IS SO ORDERED.

April 7, 2009

/s/ Emmet G. Sullivan

Emmet G. Sullivan

United States District Judge

LEXSEE 593 F. SUPP. 2D 177

UNITED STATES OF AMERICA, v. THEODORE F. STEVENS, Defendant.

Criminal No. 08-231 (EGS)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

593 F. Supp. 2d 177; 2009 U.S. Dist. LEXIS 3138

January 16, 2009, Decided
January 16, 2009, Filed

SUBSEQUENT HISTORY: Motion granted by *United States v. Stevens, 2009 U.S. Dist. LEXIS 39046 (D.D.C., Apr. 7, 2009)*

COUNSEL: [**1] For CH2M HILL COMPANIES, LTD., Non-Party Petitioner: Brian Christopher Baldrate, LEAD ATTORNEY, GIBSON DUNN AND CRUTCHER LLP, Washington, DC; David Penn Burns, LEAD ATTORNEY, GIBSON DUNN & CRUTCHER, Washington, DC; Francis Joseph Warin, LEAD ATTORNEY, GIBSON, DUNN & CRUTCHER, L.L.P., Washington, DC.

For THEODORE F. STEVENS, Defendant: Brendan V. Sullivan, Jr., Craig D. Singer, LEAD ATTORNEYS, Alex Giscard Romain, Beth A. Stewart, WILLIAMS & CONNOLLY LLP, Washington, DC; Joseph Marshall Terry, Jr., Robert Madison Cary, WILLIAMS & CONNOLLY, Washington, DC.

For USA, Plaintiff: Edward P. Sullivan, Nicholas A. Marsh, Patty Merkamp Stemler, LEAD ATTORNEYS, Brenda K. Morris, U.S. DEPARTMENT OF JUSTICE, Washington, DC; James A. Goeke, Joseph W. Bottini, LEAD ATTORNEYS, U.S. ATTORNEYS OFFICE, Anchorage, AK.

JUDGES: Emmet G. Sullivan, United States District Judge.

OPINION BY: Emmet G. Sullivan

OPINION

[*178] **OPINION & ORDER**

Pending before the Court is the government's motion for reconsideration, requesting this Court to vacate its January 14, 2009 Order directing the Attorney General to personally sign a declaration detailing precisely (1) who within every office of the Department of Justice knew about the complaint filed by Agent [**2] Chad Joy, (2) what those individuals and offices knew, and (3) when those individuals and offices received the relevant information. At issue is whether the government misled the Court and/or knowingly failed to meet its affirmative obligation to inform the Court that the government had determined that Agent Joy was not eligible for whistleblower protection. This Court is very sensitive to the extremely important, numerous, and competing demands made on high-level government officials such as the Attorney General, and therefore the Court does not ordinarily burden officials at that level with matters that can be addressed by others. However, based on the record in this case and the appearance that several attorneys in this matter - in multiple departments within the Department of Justice - may have intentionally withheld important information from the Court, it is the Court's view that a declaration from an official at the highest levels of the Department of Justice is appropriate and warranted in this instance. Accordingly, for the reasons stated briefly herein, the motion for reconsideration is **DENIED IN PART AND GRANTED IN PART.**

[*179] **BACKGROUND**

On the afternoon of December 11, 2008, the [**3] government filed a "Sealed Memorandum" accompanied by a motion to seal and a protective order. The government's pleading notified the Court that the government's attorneys in this case had received a copy of a "self-styled whistleblower complaint" on December

2, 2008. The complaint, authored by a Special Agent with the Federal Bureau of Investigation ("FBI") with extensive knowledge of the investigation and trial in this case, raised allegations of misconduct by certain government employees involved with the investigation and proseeution of the defendant.

In its motion to file ex parte and its motion to seal, the government represented to this Court that it had reeeived the complaint on December 2, 2008 and over the eourse of the following days "reeeived additional information, guidance and advice *to satisfy itself that any possible statutory and regulatory confidentiality concerns surrounding a request for whistleblower protection had been fuly [sic] explored ond addressed*, and would not prohibit a disclosure to the Court at a minimum." (emphasis added). Neither the complaint nor the substance of the eomplaint was filed or revealed to the Court until nine days after its receipt by [**4] attomeys in the Office of Public Integrity.

The defendant objected to any sealing of the complaint. In addition to *First* and *Sixth Amendment* arguments, the defense argued that any redactions would make it more difficult for the defendant to adequately address and argue the allegations made in the eomplaint. The government and eounsel for the complainant strenuously argued that the complaint should not be made public based on whistleblower and privacy coneerns. The government also maintained that publication of the complaint would interfere with an ongoing investigation into the allegations being conducted by the Department of Justiee's Office of Professional Responsibility ("OPR"). The Court ordered briefing on the government's motions to file ex parte and to file under seal aud, following a hearing on December 19, 2008, the Court issued a 29-page Opinion and Order later that day, ordering that the complaint be filed on the public docket, with identifying information about the complainant and the individuals named in the complaint redacted. Pursuant to that Opinion and Order, the redaeted complaint was made public on December 22, 2008. Also on Deeember 22, 2008, the defendant filed [**5] a Motion to Dismiss the Indietment, or, in the Alternative, Motion for a New Trial, Discovery, and an Evidentiary Hearing, based on the allegations made in the complaint.

On January 14, 2009, the government initiated a call to ehambers, with defense counsel on the line, to request that it be permitted to file on the public docket a version of the complaint with fewer redactions. The Court scheduled a hearing for 2:00 p.m. on January 14, 2009 to hear arguments related to that request. At the hearing, held in open court, the government explained that it had found it difficult to respond to the defendant's Motion to Dismiss the Indictment, or, in the Alternative, Motion for a New Trial, Discovery, and an Evidentiary Hearing, without revealing the government employees' identities. Moreover, the government explained, it had contacted the government employees and they did not object to having their identities revealed. Finally, in response to a question from the Court, the government acknowledged that the author of the complaint, Agent Joy, had not been granted whistleblower proteetion by the Office of Inspector General ("OIG"). In response to a follow-up question [*180] by the Court as to when [**6] the government learned this information, the government revealed to the Court - *for the first time* - that Agent Joy had been notified as early as December 4, 2008 that he had not been afforded whistleblower proteetion. That notification came at least seven days before the government filed its motions to file ex parte and to seal the complaint - seven days when, according to the prosecution, it was receiving "additional information, guidance and adviee to satisfy itself that any possible statutory and regulatory confidentiality concerns surrounding a request for whistleblower protection had been fully explored and addressed" - and fifteen days before the hearing and the Court's Opinion and Order.

Based on the government's repeated representations, this Court and the defendant proceeded on the understanding that Agent Joy had whistleblower protection or that his status as a whistleblower was as yet undecided due to the ongoing investigation by OIG and/or OPR. Had the Court known that the government had already legally determined that Agent Joy was not entitled to whistleblower protection *by the time it first filed the complaint under seal*, the Court would have proceeded differently. Accordingly, [**7] the Court sought an explanation from the government as to what and when various individuals and offices at the Department of Justice learned and communicated regarding Agent Joy's whistleblower-protection status. In view of what has become a pattern of belated revelations followed by unsatisfactory, and possibly false, explanations from the government in this case, the Court directed that the Attorney General provide a declaration with the requested information.

THE MOTION FOR RECONSIDERATION

Unfortunately for the government, its motion for reconsideration only serves to further cloud the issue and raises more questions than it answers. For example, the government now maintains that Attorney Brenda Morris "misstated" that Agent Joy had been denied whistleblower status and that she "misconstrued" a December 4, 2008 letter from ORP to Agent Joy. There are at least three problems with the government's argument. First, the government overlooks the faet that it was Attorney William Welch who informed the Court on

January 14, 2009, several times and with seeming certainty, that Agent Joy had been denied whistleblower protection.

> THE COURT: There's one thing the Government omitted, and in fairness, [**8] I don't think it was intentional. Mr. Welch, I believe was - you didn't participate in that phone conversation. You did. There was some mention made of the status of the complainant and -
>
> MR. WELCH: That's right. I'm more than happy to put that on the record if the Court desires.
>
> MR. WELCH: One other thing I did want to note. With respect to the complaining individual status, that individual does not qualify for whistleblower status.
>
> THE COURT: That's right.
>
> MR. WELCH: I wanted to make sure that that was clear, and I'm certainly not obviously identifying that person because the order still remains in effect.
>
> *See* January 14, 2009 Transcript at 8.

Moreover, Mr. Welch was the first attorney at the hearing to reference the letter, not Ms. Morris.

> THE COURT: Let me ask you this question, though. When did your office learn that he was denied - that the person [*181] was denied whistleblower protection?
>
> MS. MORRIS: It was sometime after our sealed hearing here, Judge. Or is that correct? Did we learn - no, I think it was.
>
> THE COURT: I need to know that.
>
> MR. WELCH: It remained unclear. I think at one point he got a letter but he was afforded the right to re-amend. The letter that he had issued -
>
> *See* January [**9] 14, 2009 Transcript at 15.

Mr. Welch raised the lack of whistleblower status as further support for the government's request to unseal the identities of the individuals named in the Joy complaint. Thus, while the government now seeks to explain this as a "misstatement" by Ms. Morris, that simply is not the case. [1]

> 1 The Court notes that the government's motion for reconsideration was not accompanied by an affidavit from Mr. Welch or Ms. Morris or from anyone else at the Department of Justice.

Second, the government now asserts that "the prosecutors had misconstrued" the OPR letter as having denied Agent Joy whistleblower status. The Court finds this explanation wholly incredible. The government has repeatedly informed this Court, including in its most recent motion, that it spent nine to ten days "attemp[ing] to determine" what they could reveal regarding the Joy complaint, in view of his request for whistleblower status. [2] Having finally been provided with a copy of this December 4, 2008 letter to Agent Joy, it simply strains credulity to think that an entire team of very successful attorneys could - as part of their nine-to-ten day effort to satisfy themselves of their legal obligations [**10] - "misconstrue" that letter as having denied Agent Joy whistleblower protection. In fact, even a quick reading of the letter makes clear that OPR was simply informing Agent Joy that it lacked jurisdiction to investigate whether he qualified for whistleblower protection because he had not raised allegations of reprisal. *See* Attached Letter to Agent Joy dated Deeember 4, 2008. Moreover, while the government would like the discussion to now focus exclusively on the December 4, 2008 letter in an attempt to explain the basis for its belief that Agent Joy had been denied whistleblower protection, there was clearly an extensive dialogue between OPR and attorneys in the Office of Public Integrity during the relevant time frame regarding this very issue. It is this information and these communications that are now relevant to the inquiry of when the government knew of the lack of whistleblower status and it is this information and these communications that are the subject of the Court's January 14, 2009 Order.

> 2 The government's initial filing informed the Court that the prosecution team received the complaint on December 2, 2008. The most recent filing states that the Criminal Division received [**11] the complaint on December 1, 2008. The complaint was not filed with the Court until December 11, 2008.

Finally, the government's effort to write this off as Ms. Morris's misstatements and misunderstandings fall short because other high level attorneys were present at the hearing on December 19, 2009 during the entire argument regarding whether the Joy complaint should be

unsealed. Not only was Mr. Weleh, the Chief of the Public Integrity Section, present, Mark Levin, also from that section, was present, and Patty Stemler, Chief of the Appellate Seetion, was present. Those attorneys, presumably, were involved in what the government has repeatedly represented as a comprehensive effort to understaud and determine the legal issues and obligations raised by the Joy complaint in the nine to ten days proceeding the filing of the Joy [*182] complaint in this Court. Moreover, it is telling that neither the government's attorneys nor Mr. Joy's attorney, who was also present at the hearing, cited any authority for sealing the Joy complaint on the grounds that it was protected under any whistleblower statute. That raises at least an inference that the reason they did not raise any such authority is that [**12] they already knew that he was not entitled to such protection. [3] While the Court, under considerable time constraints, was understandably focused on the complicated legal issues raised by this complaint and whether the *First* and *Sixth Amendment* rights at issue in a criminal case compel disclosure of a complaint that might otherwise be shielded to protect a whistleblower, the government, which had taken nine or ten days to "fully" explore the legal issues and was in sole possession of the relevant information, had an affirmative obligation to inform the Court that Agent Joy did not enjoy such status.

> 3 The government now says that no "formal" or "final" determination has been made as to whether Agent Joy is entitled to whistleblower protection. However, based on the government's motion for reconsideration, it appears that the government had determined at the time of the hearing that Agent Joy did not *presently* qualify for whistleblower protection. That determination - final or not - was highly relevant to the motions before the Court on December 19, 2008, and the government had an obligation to provide the Court with that information.

It is for these reasons, and because this incident [**13] is not the first one in this case where the government represents to the Court that it made a "mistake" and that there was no "bad faith" or intent to "mislead" the Court or defense counsel in the face of serious allegations of government misconduct, that the Court has directed that a declaration be provided by the Attorney General. As the defendant points out in his objection to the motion for reconsideration,

> The pattern is unmistakable. Over and over again the government has been caught in false representations and otherwise failing to perform its duties under the Constitution and the Rules. And over and over again, when caught, the government has claimed that it has simply made good faith mistakes. When the government failed to produce Roeky Williams's exculpatory grand jury testimony, the government claimed that this testimony was immaterial. Dkt. 105. When the government sent Mr. Williams back to Alaska without advising the defense or the Court, the government asserted that it was acting in "good faith." Dkt. 105-4. When the government affirmatively redacted exculpatory statements from FBI Form 302s, it claimed that "it was just a mistake." Tr. (Oct. 2, 2008, a.m.), at 19; see [**14] also Tr. (Oct. 2, 2008, p.m.), at 27, 29. When government counsel told the Court that Allen had not been re-interviewed the day before a hearing on its Brady disclosures, this was a mistaken understanding." Dkt. 134 at 15. When the government failed to turn over exculpatory statements from Dave Anderson, it claimed that they were immaterial. Tr. (Oct. 8, 2008, p.m.), at 58, 62, 64, 67. When the government failed to turn over a critical grand jury transcript containing exculpatory information, it claimed that it was "inadvertent." Tr. (Oct. 6, 2008, p.m.), at 95. When the government used "business records" that the government undeniably knew were false, it said that it was unintentional. Tr. (Oct. 8, 2008, p.m.), at 76. When the government failed to produce the bank records of Bill Allen and then sprang them on the defense, it claimed this check was immaterial [*183] to the defense. Tr. (Oct. 8, 2008, a.m.), at 3.

Def. Opp. at 2-3.

This case, and this most recent incident, involves numerous attorneys and offices throughout the Department of Justice. Those attorneys have not been able to provide a cohesive or credible answer to this Court's questions regarding the determination of whistleblower [**15] status. Therefore, the Court believes it appropriate and necessary to get an answer from someone with direct oversight over all of the various offices, individuals and divisions involved. Nevertheless, the Court is sensitive to the many demands placed on the Attorney General at this time and, therefore, the Court will modify its January 14, 2009

Order to require that the Attorney General or his designee(s) provide the required declaration(s) and supporting documentation. [4] However, if the Attorney General is to designate another official(s) to file the declaration(s), they must be personnel with sufficient responsibility and stature within the Department of Justice that (a) they can speak on behalf of the agency and (b) they have oversight responsibility for the OIG, OPR, OPI and the FBI. The Court will also extend the time for filing the declaration(s) to 5:00 p.m. on January 17, 2009.

> 4 In its motion for reconsideration, the government cites extensive authority from this Circuit and others in support of its argument that "high Executive Branch officials" should not be compelled to provide testimony absent exceptional circumstances. However, in most or all of the cases cited, the official [**16] was directed to testify in court and/or be subject to subpoena, depositions and/or interrogatories. The Court's order to provide a declaration is much less intrusive or burdensome than the circumstances in the cases cited by the government. Moreover, in many or all of those cases, the officials were being compelled to provide testimony about their reasons for taking certain official acts. Again, that is not the case here; the Court merely seeks an explanation from someone with oversight for the various offices and individuals involved as to when and what the government knew regarding Agent Joy's whistleblower status at the time it represented to the Court that the Court should not unseal his complaint based on whistleblower and privacy concerns. Therefore, considering the circumstances, and particularly in view of the significant record and history of "misstatements" and allegations of misconduct, the Court finds that the required declaration is reasonable.

The government was ordered to file the declaration at a hearing on January 14, 2009 that concluded at approximately 3:00 p.m. The declaration was to be filed by 12:00 p.m. on January 16, 2009. Nevertheless, the government did not [**17] file its motion for reconsideration until approximately 6:30 p.m. on January 15, 2009. The defendant filed an opposition at 11:00 a.m. on January 16, 2009. The government has once again left this Court under significant time constraints and, therefore, under the circumstances this modest extension of time to file the declaration(s) is more than reasonable.

CONCLUSION

For the foregoing reasons, the motion for reconsideration and to vacate the January 14, 2009 Order is **GRANTED IN PART AND DENIED IN PART.**

SO ORDERED.

Signed: Emmet G. Sullivan

United States District Judge

January 16, 2009

ATTACHMENT A

VIA PDF E-MAIL

Special Agent Chad Joy

Federal Bureau of Investigation

[*184] FBI Anchorage Division

101 East Sixth Avenue

Anchorage, AK 99501

Dear Special Agent Joy:

This Office was referred for handling your undated document (Document) containing complaints about the conduct of a Federal Bureau of Investigation (FBI) Special Agent identified as your co-case agent in the FBI's POLAR PEN investigation.

As you may be aware, the primary jurisdiction of the Office of Professional Responsibility (OPR) is to investigate allegations of misconduct involving Department of Justice (DOJ) attorneys that relate to their authority [**18] to investigate, litigate or provide legal advice, as well as allegations of misconduct by DOJ law enforcement personnel when they are related to allegations of attorney misconduct within OPR's jurisdiction. Your Document appears to raise such allegations against the FBI Special Agent and several Department of Justice prosecutors identified in your letter as being involved in the prosecution of *United States v. Theodore Stevens*, No. 08-231 (D.D.C). We therefore intend to investigate the matters raised in your letter pursuant to this primary jurisdictional authority.

As you may also be aware, pursuant to *28 C.F.R. §27.3*, OPR also has jurisdiction to act as an "Investigating Office" regarding allegations of "reprisals" against FBI employees disclosing violations of laws, rules or regulations. Since, however, this secondary jurisdictional authority is limited to instances of alleged reprisal taken against the disclosing employee, and since your Document did not allege any such reprisal, please be advised that we lack jurisdiction to initiate an investigation pursuant to *28 C.F.R. §27.3* into

whether you are entitled to relief as an aggrieved whistleblower. Should you come to believe that [**19] you have been subjected to or threatened with any such reprisal, please contact either this or any other office identified as a "Receiving Office" in *28 C.F.R. §27.1* for reconsideration of the matter.

The matters alleged in your Document bear heavily on the *Stevens* case which, as you are undoubtedly aware, is the subject of ongoing litigation. Please be further advised, therefore, that attorneys responsible for the litigation of that case or investigating agents acting at their direction may seek to interview you regarding those matters pursuant to their obligation to conduct the *Stevens* litigation.

If you have any questions, please contact this Office at 202-514-3365.

Sincerely,

/s/ H. Marshall Jarrett

H. Marshall Jarrett

Counsel

4455

BERGER V. UNITED STATES, 295 U. S. 78 (1935)

U.S. Supreme Court

Berger v. United States, 295 U.S. 78 (1935)

Berger v. United States

No. 544

Argued March 7, 1935

Decided April 15, 1935

295 U.S. 78

CERTIORARI TO THE CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

Syllabus

1. Where an indictment charges a conspiracy of several persons and the conspiracy proved involves only some of them, the variance is not fatal. P. 295 U. S. 81.

2. Where the proof shows two conspiracies, each fitting the single charge in the indictment, and each participated in by some but

Page 295 U. S. 79

not all of the convicted defendants, one of them who was connected by the evidence with one only of the conspiracies revealed by it has no ground to complain of the variance if it did not affect his substantial rights. Jud.Code § 269. P. 295 U. S. 82.

3. The objects of the rule that allegations and proof must correspond are (1) to inform the accused, so that he may not be taken by surprise, and (2) to protect him against another prosecution for the same offense. P. 295 U. S. 82.

4. The purpose of Jud.Code § 269, as amended, was to end the too rigid application of the rule that, error being shown, prejudice must be presumed, and to establish the more reasonable rule that if, upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless. P. 295 U. S. 82.

5. *Misconduct of a United States Attorney in his cross-examination of witnesses and address to the jury, in a criminal case, may be so* gross and persistent as to call for stern rebuke and repression -- even for the granting of a mistrial -- by the trial judge; and, when no so counteracted, it may required the reversal of a conviction, particularly when weakness of the case accentuates the probability of prejudice to the accused. P. 295 U. S. 84.

6. It is as much the duty of the United States Attorney to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. P. 295 U. S. 88.

73 F.2d 278, reversed.

4456

Certiorari, 293 U.S. 552, to review the affirmance of a conviction and sentence for conspiracy.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Petitioner was indicted in a federal district court charged with having conspired with seven other persons named in the indictment to utter counterfeit notes purporting

Page 295 U. S. 80

to be issued by designated federal reserve banks with knowledge that they had been counterfeited. The indictment contained eight additional counts alleging substantive offenses. Among the persons named in the indictment were Katz, Rice, and Jones. Rice and Jones were convicted by the jury upon two of the substantive counts and the conspiracy count. Petitioner was convicted upon the conspiracy count only. Katz pleaded guilty to the conspiracy count, and testified for the government upon an arrangement that a *nolle prosequi* as to the substantive counts would be entered. It is not necessary now to refer to the evidence further than to say that it tended to establish not a single conspiracy as charged, but two conspiracies -- one between Rice and Katz and another between Berger, Jones and Katz. The only connecting link between the two was that Katz was in both conspiracies, and the same counterfeit money had to do with both. There was no evidence that Berger was a party to the conspiracy between Rice and Katz. During the trial, the United States attorney who prosecuted the case for the government was guilty of misconduct, both in connection with his cross-examination of witnesses and in his argument to the jury, the particulars of which we consider at a later point in this opinion. At the conclusion of the evidence, Berger moved to dismiss the indictment as to the conspiracy count on the ground that the evidence was insufficient to support the charge. That motion was denied. Petitioner, Rice, Katz, and Jones were sentenced to terms of imprisonment.

The Circuit Court of Appeals, affirming the judgment, 73 F.2d 278, held that there was a variance between the allegations of the conspiracy count and the proof, but that it was not prejudicial, and that the conduct of the prosecuting attorney, although to be condemned, was not sufficiently grave to affect the fairness of the trial. We brought the case here on certiorari because of a conflict

Page 295 U. S. 81

with other Circuit Courts of Appeals in respect of the effect of the alleged variance. 293 U.S. 552.

1 It is settled by the great weight of authority that although an indictment charges a conspiracy involving several persons and the proof establishes the conspiracy against some of them only, the variance is not material. But several circuit courts of appeals have held that if the indictment charges a single conspiracy, and the effect of the proof is to split the conspiracy into two, the variance is fatal. Thus, it is said in *Telman v. United States* 67 F.2d 716, 718: "Where one large conspiracy is charged, proof of different and disconnected smaller ones will not sustain a conviction." In support of that statement, the various decisions upon which petitioner here relies are cited. This view, however, ignores the question of materiality, and should be so qualified as to make the result of the variance depend upon whether it has substantially injured the defendant.

In the present case, the objection is not that the allegations of the indictment do not describe the conspiracy of which petitioner was convicted, but, in effect, it is that the proof includes more. If the proof had been confined to that conspiracy, the variance, as we have seen, would not have been fatal. Does it become so because, in addition to proof of the conspiracy with which petitioner was connected, proof of a conspiracy with which he was not connected was also furnished and made the basis of a verdict against others?

Section 269 of the Judicial Code, as amended (28 U.S.C. § 391) provides:

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

Page 295 U. S. 82

The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to "affect the substantial rights" of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. *Bennett v. United States*, 227 U. S. 333, 227 U. S. 338; *Harrison v. United States*, 200 F.2d 2, 673; *United States v. Wills*, 36 F.2d 855, 856, 857. *Cf. Hagner v. United States*, 285 U. S. 427, 285 U. S. 431-433.

Evidently Congress intended by the amendment to section 269 to put an end to the too rigid application, sometimes made, of the rule that, error being shown, prejudice must be presumed, and to establish the more reasonable rule that if, upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless. *See Haywood v. United States*, 268 F.2d 5, 798; *Rich v. United States*, 271 F.2d 6, 569, 570.

The count in question here charges a conspiracy to utter false notes of one federal reserve bank each calling for $20, and those of another each calling for $100. The object of the utterance thus concerted is not stated, but the proof as to the conspiracies is that the one between Katz and Rice was with the purpose of uttering the false notes to buy rings from persons advertising them for sale, and the object of the other, between Katz, Jones, and Berger, was to pass the notes to tradesmen. Suppose the indictment had charged these two conspiracies in separate counts in identical terms, except that, in addition, it had specifically set forth the contemplated object

Page 295 U. S. 83

4457

of passing the notes, naming Berger, Katz, Rice, and Jones as the conspirators in each count. Suppose, further, that the proof had established both counts, connecting Berger with one but failing to connect him with the other, and thereupon he had been convicted of the former and acquitted of the latter. Plainly enough his substantial rights would not have been affected. The situation supposed and that under consideration differ greatly in form, but do they differ in real substance? The proof here in respect of the conspiracy with which Berger was not connected may, as to him, be regarded as incompetent, but we are unable to find anything in the facts -- which are fairly stated by the court below -- or in the record from which it reasonably can be said that the proof operated to prejudice his case, or that it came as a surprise; and certainly the fact that the proof disclosed two conspiracies instead of one, each within the words of the indictment, cannot prejudice his defense of former acquittal of the one or former conviction of the other, if he should again be prosecuted.

In *Washington & Georgetown R. Co. v. Hickey*, 166 U. S. 521, 166 U. S. 531, this court said that

"no variance ought ever to be regarded as material where the allegation and proof substantially correspond, or where the variance was not of a character which could have misled the defendant at the trial."

This was said in a civil case, it is true, but it applies equally to a criminal case if there be added the further requisite that the variance be not such as to deprive the accused of his right to be protected against another prosecution for the same offense. *See Meyers v. United States*, 3 F.2d 379, 380; *Mansolilli v. United States*, 2 F.2d 42, 43.

We do not mean to say that a variance such as that here dealt with might not be material in a different case. We simply hold, following the view of the court below,

Page 295 U. S. 84

that, applying section 269 of the Judicial Code, as amended, to the circumstances of this case, the variance was not prejudicial, and hence not fatal.

2. That the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record. He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said, and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and, in general, of conducting himself in a thoroughly indecorous and improper manner. We reproduce in the margin * a few excerpts

Page 295 U. S. 85

from the record illustrating some of the various points of the foregoing summary. It is impossible, however, without reading the testimony at some length, and thereby obtaining a knowledge of the setting in which the objectionable matter occurred, to appreciate fully the extent of the misconduct. The trial judge, it is true, sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them. But the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken.

The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury. A reading of the entire argument is necessary to an appreciation of these objectionable features. The following is an illustration: a witness by the name of Goldie Goldstein

Page 295 U. S. 86

had been called by the prosecution to identify the petitioner. She apparently had difficulty in doing so. The prosecuting attorney, in the course of his argument, said (italics added),

"Mrs. Goldie Goldstein takes the stand. She says she knows Jones, *and you can bet your bottom dollar she knew Berger*. She stood right where I am now and looked at him and was afraid to go over there, and when I waved my arm everybody started to holler, 'Don't point at him.'

Page 295 U. S. 87

You know the rules of law. Well, it is the most complicated game in the world. I was examining *a woman that I knew knew Berger and could identify him*, she was standing right here looking at him, and I couldn't say, 'Isn't that the man?' Now, imagine that! But that is the rules of the game, and I have to play within those rules."

Page 295 U. S. 88

The jury was thus invited to conclude that the witness Goldstein knew Berger well, but pretended otherwise, and that this was within the personal knowledge of the prosecuting attorney.

Again, at another point in his argument, after suggesting that defendants' counsel had the advantage of being able to charge the district attorney with being unfair, "of trying to twist a witness," he said:

"But, oh, they can twist the questions, . . . *they can sit up in their offices and devise ways to pass counterfeit money*;' 'but don't let the

4458

Government touch me, that is unfair; please leave my client alone '"

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused, when they should properly carry none. The court below said that the case against Berger was not strong, and, from a careful examination of the record, we agree. Indeed, the case against Berger, who was convicted only of conspiracy and not of any substantive offense, as were

Page 295 U. S. 89

the other defendants, we think may properly be characterized as weak -- depending, as it did, upon the testimony of Katz, an accomplice with a long criminal record.

In these circumstances, prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence. If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt "overwhelming," a different conclusion might be reached. *Compare Fitter v. United States*, 258 F. 5d 7, 573, *Johnson* v. *United States*, 215 F.6d 9, 685; *People v. Malkin*, 250 N.Y. 185, 201, 202, 164 N.E. 900; *Iowa v. Roscum*, 119 Iowa, 330, 333, 93 N.W. 295. Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded. *Compare N.Y. Central R. Co. v. Johnson*, 279 U. S. 310, 279 U. S. 316-318.

The views we have expressed find support in many decisions, among which the following are good examples: *People v. Malkin, supra; People v. Esposito*, 224 N.Y. 370, 375-377, 121 N.E. 344; *Johnson v. United States, supra; Cook v. Commonwealth*, 86 Ky. 663, 665-667, 7 S.W. 155; *Gale v. People*, 26 Mich. 157; *People v. Wells*, 100 Cal. 459, 34 P. 1078. The case last cited is especially apposite.

Judgment reversed.

* [The defendant (petitioner) was on the stand; cross-examination by the United States attorney]:

"Q. The man who didn't have his pants on and was running around the apartment, he wasn't there?"

"A. No, Mr. Singer. Mr. Godby told me about this; he told me, as long as you ask me about it, if you want it, I will tell you, he told me 'If you give this man's name out, I will give you the works.'"

"Q. Give me the works?"

"A. No, Mr. Godby told me that."

"Q. You are going to give me the works?"

"A. Mr. Singer, you are a gentleman, I have got nothing against you. You are doing your duty."

"Mr. Wegman: you are not going to give Mr. Singer the works. Apparently Mr. Singer misunderstood you. Who made that statement?"

"The Witness: Mr. Godby says that."

"Q. Wait a minute. Are you going to give me the works?"

"A. Mr. Singer, you are absolutely a gentleman, in my opinion, you are doing your duty here."

"Q. Thank you very much. But I am only asking you are you going to give me the works?"

"A. I do not give anybody such things, I never said it."

"Q. All right. Then do not make the statement."

"Mr. Wegman: the witness said that Mr. Godby said that."

"The Court: the jury heard what was said. It is not for you or me to interpret the testimony."

"Q. I asked you whether the man who was running around this apartment . . . , was he there in the Secret Service office on the morning that you were arrested?"

"A. I didn't see him."

4459

"Q. I wasn't in that apartment, was I?"

"A. No, Mr. Singer."

"Q. I didn't pull the gun on you and stick you up against the wall?"

"A. No."

"Q. I wasn't up in this apartment at any time, as far as you know, was I?"

"A. As far as I know, you weren't."

"You might have an idea that I may have been there?"

"A. No, I should say not."

"Q. I just want to get that part of it straight."

"* * * *"

"Q. Was I in that apartment that night?"

"A. No, but Mr. Godby —"

"Q. Was Mr. Godby in that apartment?"

"A. No, but he has been there. . "

"* * * *"

"Q. Do you include as those who may have been there the Court and all the jurymen and your own counsel?"

"A. Mr. Singer, you ask me a question. May I answer it?"

"Mr. Wegman: I object to the question."

"The Witness: are you serious about that?"

"The Court. I am not going to stop him because the question includes the Court. I will let him answer it."

"Mr. Singer: I would like to have an answer to it."

"The Witness. Mr. Singer, you asked me the question before —"

"The Court: You answer this question."

(Question repeated by the reporter.)

"A. I should say not; that is ridiculous."

"* * * *"

"Q. Now Mr. Berger, do you remember yesterday when the court recessed for a few minutes and you saw me out in the hall; do you remember that?"

"A. I do, Mr. Singer."

"Q. You talked to me out in the hall?"

"A. I talked to you?"

"Q. Yes. A. No."

"You say you didn't say to me out in the hall yesterday, 'You wait until I take the stand and I will take care of you'? You didn't say that yesterday?"

"A. No; I didn't, Mr. Singer, you are lying."

"Q. I am lying, you are right. You didn't say that at all?"

"A. No."

"Q. You didn't speak to me out in the hall?"

"A. I never did speak to you outside since this case started, except the day I was in your office, when you questioned me."

4460

"Q. I said yesterday."

"A. No, Mr. Singer."

"Q. Do you mean that seriously?"

"A. I said no."

"Q. That never happened?"

"A. No, Mr. Singer, it did not."

"Q. You did not say that to me?"

"A. I did not."

"Q. Of course, I have just made that up?"

"A. What do you want me to answer you?"

"Q. I want you to tell me I am lying, is that so? . . "

[No effort wes later made to prove that any such statement had ever been made]

"* * * "

"Q. Did she say she was going to meet me for anything except business purposes?"

"A. No."

"Q. If she was to meet me?"

"A. Just told me that you gave her your home telephone number and told her to call you up after nine o'clock in the evening if she found out anything about the case that you could help me with, that is what she told me "

"Q. Even if that is so, what is wrong about that that you have been squawking about all morning."

[redacted]

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Commentary on the Rome Statute of the International Criminal Court

- Observers' Notes, Article by Article -

Second Edition

Edited by

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Contents: margin No.

A. Introduction/General Remarks

1 Provisions for judgements of a court to be appealed to a higher instance are found in national legal systems generally, in both criminal and civil cases. In international courts and tribunals, they have been less common. For instance, article 60 of the Statute of the ICJ states expressly that judgements of that Court are "final and without appeal"[1]. Even in the case of the criminal trials conducted before the Nuremberg and Tokyo Tribunals, there was no appeal from the Tribunal's judgement to a higher judicial authority[2].

1 See also, *e.g.*, Statute of the Permanent Court of International Justice, article 60. In the case of the European Court of Justice, no provision was made for appeals against decisions of that Court in its original jurisdiction, but appeals can be taken to it from the Court of First Instance: see P.J.G. Kapteyn/P. VerLoren van Themaat, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 14 (1998); A. Arnull, THE EUROPEAN UNION AND ITS COURT OF JUSTICE 267–268 (3rd ed. 1999). Since the entry into force on 1 Nov. 1998 of Protocol No. 11 to the ECHR, articles 43 and 44 of that Convention provide a mechanism under which a case before the European Court of Human Rights may, following the judgement of a Chamber, be referred to the Grand Chamber for a further judgement.

2 Article 26 of the Charter of the International Military Tribunal (*Nuremberg Tribunal*) provided that "The judgment of the Tribunal as to the guilt or the innocence of any defendant ... shall be final and not subject to review". Article 17 of the Charter of the International Military Tribunal for the Far East (*Tokyo Tribunal*) provided that the record of the trial was to be transmitted directly to the Supreme Commander for the Allied Powers, who could reduce or otherwise alter the sentence, except to increase its severity.

However, appeals are provided for in the Statutes of both the ICTY and the ICTR[3], as well as in the Statute of the Special Court for Sierra Leone[4]. In proposing the Statute of the ICTY to the Security Council, the Secretary-General of the United Nations observed that a right of appeal "is a fundamental element of individual civil and political rights and has, *inter alia*, been incorporated in the International Covenant on Civil and Political Rights"[5, 6]. In the commentary to its original Draft Statute, which also included a provision for appeals, the ILC referred both to article 14 para. 5 of the ICCPR and to article 25 of the ICTY Statute[7].

The ICCPR refers only to a right of appeal by a convicted person. As in the case of the ICTY and the ICTR, and the original ILC Draft Statute[8], the Rome Statute also allows appeals by the Prosecutor against acquittals, a possibility recognised in some national legal systems, particularly civil law systems[9], but not others[10].

Articles 81–83 of the Statute are the principal provisions on appellate proceedings before the Court. Article 81 is the primary provision, dealing with appeals against a final judgement or sentence of a Trial Chamber[11]. Article 82 allows in addition for appeals to be brought against various interlocutory and other decisions of a Pre-Trial Chamber or Trial Chamber[12]. Article 83 deals with the powers and procedures of the Appeals Chamber. 2

These three articles must be read together with other provisions in the Statute relating to appeals. Article 34 (b) provides that one of the organs of the Court is an "Appeals Division". Under article 39 para. 1, the Appeals Division is composed of the President and four other judges. Article 39 para. 2 (b) (i) further provides that the "Appeals Chamber" is composed of all the judges of the Appeals Division. It seems necessarily implicit from article 82 paras. 1 (d) and 3 and article 83 para. 1, that all appeals under articles 81–83 are heard and determined by the Appeals Chamber[13]. 3

In addition to articles 81–83, other provisions of the Statute allow for appeals against certain decisions. Article 18 para. 4 provides for an appeal by the State concerned or the Prosecutor 4

3 Statute of the ICTY, article 25; Statute of the ICTR, article 24.

4 Statute of the Special Court for Sierra Leone, U.N. Doc. S/2000/915, 4 Oct. 2000, Annex, article 20. Article 20 para. 3 of this Statute states that "The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda, in the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone".

5 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) (presented 3 May 1993) (S/25704), para. 116.

6 Article 14 para. 5 of the ICCPR provides: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". See also article 2 para. 1 of Protocol No. 7 to the ECHR, which provides that subject to the exceptions article 2 para. 2 of that Protocol, "Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised shall be governed by law".

7 1994 ILC Draft Statute, p. 125.

8 See *ibid.*, article 48, and *supra* note 3.

9 See, *e.g.*, R. Vogler, *Criminal Procedure in France*, in: J. Hatchard/B. Huber/R. Vogler (eds.), COMPARATIVE CRIMINAL PROCEDURE 54, 56 (1996).

10 For instance, in England and Wales, the prosecution cannot appeal against an acquittal, but can appeal against sentence. A procedure also exists under which the Attorney-General may refer a point of law that has arisen during the trial to the Court of Appeal for its opinion (Criminal Justice Act 1972, section 36). The opinion of the Court of Appeal does not affect the acquittal in that case, but clarifies the law for the future. (See, *e.g.*, J. Hatchard, *Criminal Procedure in England and Wales*, in: J. Hatchard/B. Huber/R. Vogler (eds.), *supra* note 9, 204) A similar provision for the Rome Statute was proposed in the 1998 Preparatory Committee Report, but was not adopted by the Rome Conference: see Preparatory Committee Draft, p. 149. In England and Wales, certain reforms of the law have been proposed in this respect: see The Law Commission, *Double Jeopardy and Prosecution Appeals* (LawCom No. 267), Cm 5048, 6 Mar. 2001.

11 See margin No. 7.

12 See Ch. Staker, *article 82*, margin No. 2.

13 It is, however, curious that article 81 in fact makes no mention of the Appeals Chamber, referring instead to appeal proceedings being heard by "the Court" (see article 81 para. 2 (b) and (c)), "in accordance with the Rules of Procedure and Evidence" (chapeau to article 81 para. 1).

against a ruling of the Pre-Trial Chamber under article 18 para. 2. Under article 19 para. 6, appeals may be brought against decisions of a Pre-Trial Chamber or Trial Chamber with respect to jurisdiction or admissibility. Both of these provisions indicate that the relevant appeals are subject to article 82[14].

Additionally, article 42 para. 8 (which provides that any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber) appears to confer a form of "original" jurisdiction on the Appeals Chamber[15].

5 Consideration is given below to whether other types of appellate proceedings, that are neither provided for nor envisaged by the Statute, might nonetheless be possible[16].

6 Article 81 paras. 1, 2 (a) and 3 (c) (ii), and article 82 paras. 1, 3 and 4 indicate that appeals under these provisions are to be in accordance with the Rules. However, the extent of the matters which may be prescribed by the Rules is not made clear. Article 51 provides merely that the Rules shall be consistent with the Statute[17] and that "[in] the event of conflict ..., the Statute shall prevail"[18]. It is uncontroversial that the Rules should deal with matters such as the time limits for an appeal[19], and the manner of instituting appeals. It is less clear whether the Rules potentially could, for instance, impose limitations on the right to have appeals considered by the Appeals Chamber[20], or conversely, expand the rights of appeal beyond those provided for in the Statute[21]. The question is at present moot, since the relevant provisions of the Rules dealing with appellate proceedings (rules 149 to 158) do not appear to expand or restrict the scope of appeals provided for in the Statute. The procedure for appeals is further regulated by regulations 57 to 65 of the Regulations.

B. Analysis and interpretation of elements

1. Paragraph 1

7 This paragraph provides for appeals against a "decision under article 74". The wording of article 74 itself does not state unambiguously whether that article relates only to the final judgement of the Trial Chamber, pronouncing the verdict[22], or whether references in article 74 to "the decision" of the Trial Chamber could extend also to its interlocutory decisions and rulings. However, it seems clear that paragraph 1 of article 81 is in fact intended to apply only to a final judgement of a Trial Chamber, convicting or acquitting the accused. This is apparent from the

14 See also Ch. Staker, *article 82*, margin Nos. 4, 5 and 12

15 See also rule 34 para. 3.

16 See margin Nos. 48–52

17 Article 51 para. 4.

18 Article 51 para. 5.

19 *Supra* note 7, 1994 ILC Draft Statute.

20 By way of comparison, it is noted that the Rules of Procedure and Evidence of the ICTY and ICTR establish a filter mechanism for certain types of interlocutory appeals, under which an appeal can be brought only in cases where the Trial Chamber has granted certification that "the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings" (rules 72 *lit.* B (ii) and 73 *lit.* B ICTY; rules 72 *lit.* B (ii) and 73 *lit.* B ICTR). Another provision of the Rules of the ICTR provides for a different filter mechanism, under which certain interlocutory appeals are permitted only when leave is granted by a bench of three judges of the Appeals Chamber, "upon good cause being shown" (rule 65 *lit.* D ICTR). This latter type of filter mechanism was used for a period in a variety of provisions in earlier versions of the Rules of the ICTY. On the other hand, in the case of the ICC, rule 155 requires leave to appeal only in the case of appeals under article 82 para. 1 (d) or article 82 para. 2, where the Statute itself contains a leave requirement

21 See margin Nos. 48–49.

22 It would include an appeal against conviction following a plea of guilty: *see* Ch. J. M. Safferling, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 332 (2001), and *c. f. Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Judgement, Appeals Chamber, 7 Oct. 1997 ("*Erdemović* Appeal Judgement")

title to article 81, which refers, in addition to appeals against "sentence" (which are governed by paragraph 2 of this article), only to appeals against "conviction or acquittal". Also, the requirement in article 74 para. 2 that "[t]he Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings" would confirm that the references in article 74 to "the Trial Chamber's decision" are confined to the Trial Chamber's final judgement[23].

It is unclear from the wording of the Statute whether a "decision under article 74" would include a final decision in proceedings under article 70 ("Offences against the administration of justice") or article 71 ("Sanctions for misconduct before the Court")[24].

This paragraph provides three grounds on which the Prosecutor can appeal, and four grounds 8
on which an appeal can be brought by the convicted person or the Prosecutor on that person's behalf. It may be noted that the possibility of the prosecution appealing on behalf of a convicted person is one which is well-established in some legal systems[25], reflecting the prosecution's non-partisan duty to truth and justice[26].

The ILC was of the view that the right to appeal should exist equally for the Prosecutor and the convicted person[27]. At the Preparatory Committee in 1996, there appeared to be a divergence of views on this issue, one view being to keep equality, another being to limit appeals by the Prosecutor to errors of law, and another being to allow the convicted person to appeal on any substantive grounds[28]. The Zutphen Report included only the first three grounds (in square brackets) for both the Prosecutor and the convicted person, with an alternative square-bracketed proposal that would have allowed appeals by either "without any specified grounds"[29]. The fourth ground of appeal, available only to the convicted person or the Prosecutor appealing on that person's behalf, was included in the 1998 Preparatory Committee Report[30]. It is however questionable whether this fourth ground adds significantly to the first three[31].

The definition of each of the specified grounds of appeal under this paragraph, and the 9
corresponding standards of appeal on review, are considered at margin Nos. 23–38.

23 The addition of article 82 also supports this conclusion. However, even if article 81 were interpreted as applying to all decisions of a Trial Chamber, this would not make article 82 redundant, since the latter would provide for appeals against decisions of a Pre-Trial Chamber.

24 For the view that it does, see H. Brady, *Appeal*, in: Roy S. Lee (ed.), THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 576 fn. 2 (2001).

25 *E.g.*, Germany. Code of Criminal Procedure (Strafprozeßordnung), § 296 para. 2; see also Instituto Iberoamericano de Derecho Procesal, *Código Procesal Penal modelo para Iberoamérica* (Model Code of Criminal Procedure for Latin America) article 332 (1989)

26 *Cf.* C. Roxin, STRAFVERFAHRENSRECHT 52, 421 (25th ed. 1998); also *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-T, Decision on Communication Between the Parties and their Witnesses, Trial Chamber, 21 Sep. 1998 ("... the Prosecutor of the Tribunal is not, or not only, a Party to adversarial proceedings but is an organ of the Tribunal and an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting"); *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), Appeals Chamber, 31 Mar. 2000 ("*Barayagwiza* Review Decision"), Separate Opinion of Judge Shahabuddeen, para. 68 ("The Prosecutor of the ICTR is not required to be neutral in every case; she is a party. But she is not of course a partisan. ... The implications of that requirement suggest that, while a prosecution must be conducted vigorously, there is room for the injunction that prosecuting counsel 'ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice'") See also Ch. Staker, *article 84*, margin No. 5.

27 *Supra* note 7, 1994 ILC Draft Statute.

28 1996 Preparatory Committee Report I, para. 295.

29 Zutphen Draft, p. 134.

30 Preparatory Committee (Consilidated) Draft, p. 149.

31 See margin Nos. 37–38.

II. Paragraph 2

10 *Subparagraph (a)* provides for appeals against sentence either by the Prosecutor or the convicted person. In contrast to paragraph 1, there is no express provision for the Prosecutor to bring an appeal on behalf of the convicted person[32], although nothing in the wording of paragraph 2 would prevent it.

11 Only one ground of appeal against sentence is provided for, namely that of "*disproportion between the crime and the sentence*". The definition of this ground of appeal, and the corresponding standard of review on appeal, is considered at margin Nos. 39–41.

12 It seems surprising that no other grounds of appeal were included in this paragraph. In the course of the sentencing process other errors of the kind referred to in paragraph 1 could clearly arise, in particular procedural errors (*e.g.*, failure to hold a hearing under article 76 para. 2 despite a request by the Prosecutor or the defence), errors of fact (*e.g.*, where the Trial Chamber, in determining the sentence, has regard to matters which are factually incorrect) or errors of law (*e.g.*, where the Trial Chamber, in determining sentence, misconstrues a provision of the Statute or the Rules). In fact, article 83 para. 2 expressly acknowledges this, empowering the Appeals Chamber to grant an appellate remedy where the "sentence appealed from was materially affected by error of fact or law or procedural error". It may therefore be that any appeal seeking to have the sentence itself reduced or increased on appeal, on any of these grounds, would be an appeal alleging "disproportionality" of sentence within the meaning of article 81 para. 2 (a).

13 Under *subparagraph (b)*, where there is an *appeal against sentence only*, the Appeals Chamber can of its own motion raise the question whether there may be grounds to set aside the conviction itself. *Subparagraph (c)* makes similar provision in cases where there is an *appeal against conviction only*. These provisions, enabling the Appeals Chamber to raise certain issues of its own motion, are expressed to operate only to the benefit of the convicted person. It may be that they merely give expression to what would in any event fall within the inherent powers of the Appeals Chamber[33]. No similar provision is contained in the Statute or Rules of the ICTY; yet a similar power was exercised by the Appeals Chamber of that Tribunal in one case[34].

III. Paragraphs 3 and 4

14 The general principle that execution of a judgement is suspended during appeal (subject to possible exceptions), which is familiar particularly to civil law systems[35], is given effect subject to the exceptions contained in paragraph 3.

15 *Paragraph 3* establishes a general rule that a person who is convicted will remain in custody notwithstanding that he or she may have appealed. Conversely, a person who has been acquitted is to be released immediately, even if the Prosecutor has appealed against the acquittal. These general principles are subject to a contrary order of the Trial Chamber, but in case of acquittal, such an order can be made only in "exceptional circumstances", and is itself subject to appeal by the person affected.

16 *Subparagraph (a)* does not give any indication of the types of orders for release that may be made by the Trial Chamber. Such orders could be made subject to conditions, such as bail, or periodic reporting[36]. Presumably, under *subparagraph (c) (i)* the Trial Chamber could also, as an

32 See margin No. 8.

33 See margin No. 43.

34 *Supra* note 22, *Erdemovic* Appeal Judgement, (in which the accused, who had pleaded guilty, appealed against his sentence, and the Appeals Chamber, *proprio motu*, raised issues concerning the validity of the plea of guilty).

35 France: Code de Procédure Pénale, articles 506, 569, Germany: Strafprozeßordnung, §§ 316, 343

36 See article 83 para. 1 in conjunction with article 60 paras. 2–5 and rules 118–119 But *cf.* R. Roth/M. Henzelin, *The Appeal Procedure of the ICC*, in: A. Cassese/P. Gaeta/J. R.W.D. Jones (eds.), THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1547 (2002)

alternative to actual detention, order detention with conditional release subject to bail or reporting requirements.

Apart from the fact that a convicted person will thus normally remain in custody pending an appeal, under *paragraph 4* the effects of the conviction or sentence are suspended during the period allowed for appeal and for the duration of any appeal proceedings. The consequences are, for instance, that during this period the convicted person will not be transferred to the State of enforcement designated under article 103, and that no order can be made against the convicted person under article 75 para. 2. There will also be a suspension of any fine imposed under article 77 para. 2 (a) and of any order for forfeiture of assets under article 77 para. 2 (b). 17

C. Special Remarks

1. Nature of an "appeal"

a) Introduction

Although the Statute includes various provisions for appellate proceedings[37], it does not define the concept of an "appeal". In national legal systems, different forms of appellate proceedings may exist. In particular, in civil law systems generally there is a distinction between what in French is called "*appel*" on the one hand[38], and "*cassation*" on the other[39]. In the case of an *appel*, reconsideration of both questions of fact and questions of law are possible, and the merits of the case generally may be redetermined. This is usually the form of appeal from the court of first instance to an intermediate court of appeal[40]. *Cassation* on the other hand is a form of appeal confined essentially to issues of law or procedural errors, and is normally the form of appeal to the court of highest instance in such systems[41]. 18

The ILC observed, in relation to the position under the ILC Draft Statute, that the Appeals Chamber "combines some of the functions of *appel* in civil law systems with some of the functions of *cassation*" and that this was "thought to be desirable, having regard to the existence of only a single appeal from decisions at trial"[42]. The ILC was also of the view that "[i]t is not intended that the appeal should amount to a retrial. The Court would have power if necessary to allow new evidence to be called, but it would normally rely on the transcript of the proceedings at the trial"[43]. At the Preparatory Committee in 1996, one view was that the Appeals Chamber should be able to re-examine the case in its entirety and that the right of appeal should be as broad as possible[44]. The ultimate inclusion in article 81 para. 1 of specified grounds on which an appeal may be brought suggests that this view did not prevail. 19

The following discussion outlines the principles governing appeals as developed in the case law of the ICTY and ICTR. Although it cannot be certain that the ICC will adopt the same approach, it does appear to be consistent with the wording of the Statute of the ICC[45].

37 See margin Nos. 2–5.

38 Proceedings of this type in other civil law systems include "*Berufung*" in Germany, "*appello*" in Italy, "*hoger beroep*" in the Netherlands.

39 Proceedings of this type include "*Revision*" in Germany, "*ricorso per cassazione*" in Italy, "*Cassatieberoep*" in the Netherlands.

40 See Ch. Van den Wyngaert (ed.), CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY 46 (Belgium), 134 (France), 160 (Germany), 256 (Italy), 314–315 (Netherlands) (1993); *supra* note 9, J. Hatchard/B. Huber/R. Vogler (eds.), 54–55 (France), 132–133 (Germany).

41 See *supra* note 40, Ch. Van den Wyngaert (ed.), 47 (Belgium), 134–135 (France), 160 (Germany), 256–257 (Italy), 314–315 (Netherlands), 398 (Spain); *supra* note 9, J. Hatchard/B. Huber/R. Vogler (eds.), 55–56 (France), 133 (Germany).

42 1994 ILC Draft Statute, p. 127

43 *Ibid.*

44 1996 Preparatory Committee I, para. 295.

45 But *cf. supra* note 36, R. Roth/M. Henzelin, *The Appeal Procedure* 1554–1555.

b) "Corrective" nature of an appeal

20 As in the case of the ICC, the Statutes and Rules of Procedure and Evidence of the ICTY and ICTR do not indicate the nature of an appeal in those jurisdictions. However, this has been clarified in their case law. The Appeals Chamber of the ICTY has said that:

> "The appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing"[46].

The Appeals Chamber of those Tribunals has made clear that it therefore does not operate as a second Trial Chamber, and that an appeal does not involve a trial *de novo*[47]. An appellant must demonstrate how the Trial Chamber erred, and it is not sufficient for an appellant simply to duplicate the submissions already raised before the Trial Chamber without seeking to clarify *how* these arguments support a legal error allegedly committed by the Trial Chamber[48]. The Appeals Chamber of the ICTY has said that it cannot be expected to consider the parties' claims in detail if they are obscure, contradictory or vague, or if they are vitiated by other blatant formal defects, and that the party appealing must therefore set out the sub-grounds and submissions of its appeal clearly and provide the Appeals Chamber with specific references to the sections of the appeal case it is putting forward in support of its claims[49]. The Appeals Chamber of the ICTY has added that it does not have to provide a detailed written explanation of its position with regard to arguments which are clearly without foundation, and that it will reject without detailed reasoning arguments raised by appellants in their briefs or at the appeal hearing if they are obviously ill-founded[50]. An appellant who makes no submission to the effect that the Trial Chamber's findings were unreasonable but who merely challenges the Trial Chamber's findings and suggests an alternative assessment of the evidence, fails to discharge the burden of proof incumbent on it when alleging errors of fact[51]. The Appeals Chamber of the ICTY and ICTR has sometimes been quite strict, and has said that it may dismiss without detailed reasoning submissions that do not meet the formal requirements of the applicable rules and practice directions[52].

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46 *Supra* note 22, *Erdemovic* Appeal Judgement, para. 15; *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-A, Appeal Judgement, Appeals Chamber, 23 Oct. 2001 ("*Kupreskic* Appeal Judgement"), para. 408.

47 *Prosecutor v. Tadic*, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, Appeals Chamber, 15 Oct. 1998 ("*Tadic* Additional Evidence Decision"), paras. 41–42; *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, Judgement, Appeals Chamber, 21 July 2000 ("*Furundzija* Appeal Judgement"), para. 40; *Prosecutor v. Delalic et al. (Celebici case)*, Case No. IT-96-21-A, Judgement, Appeals Chamber, 20 Feb. 2001 ("*Celebici* Appeal Judgement"), paras. 203, 724; *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgement, Appeals Chamber, 25 Feb. 2004 ("*Vasiljevic* Appeal Judgement"), para. 5; *Prosecutor v. Kvocka et al.*, Case No. IT-98-30/1-A, Judgement, Appeals Chamber, 28 Feb. 2005 ("*Kvocka* Appeal Judgement"), paras. 424–425.

48 *Supra* note 47, *Celebici* Appeal Judgement, para. 371; *supra* note 46, *Kupreskic* Appeal Judgement, paras. 26–27 (indicating that there is a possible exception "where the Trial Chamber has made a glaring mistake"); *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Judgement, Appeals Chamber, 9 July 2004, para. 9 ("A party cannot merely repeat on appeal arguments that did not succeed at trial, unless that party can demonstrate that rejecting them constituted such error as to warrant the intervention of the Appeals Chamber").

49 *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement, Appeals Chamber, 17 Sep. 2003 ("*Krnojelac* Appeal Judgement"), para. 16; *supra* note 47, *Vasiljevic* Appeal Judgement, paras. 10–11.

50 *Ibid.*

51 *Supra* note 49, *Krnojelac* Appeal Judgement, para. 20 (and see also at paras. 21–27); *supra* note 47, *Vasiljevic* Appeal Judgement, paras. 13–21.

52 *Supra* note 47, *Vasiljevic Appeal Judgement*, para. 10; *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Judgement, Appeals Chamber, 20 May 2005 ("*Semanza* Appeal Judgement"), paras 9–11. See also, *e.g.*, *Prosecutor v. Kajelyeli*, Case No. ICTR-98-44A-A, Decision on Prosecution Urgent Motion for Acceptance of Prosecution Notice of Appeal Out of Time, Appeals Chamber, 23 Jan. 2004 (rejection of notice of appeal filed out of time); *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), Appeals Chamber, 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement"), paras. 15–49 (Prosecution appeal held to be inadmissible in its entirety, and Prosecution's respondent's briefs to be inadmissible, due to failure to file appeal brief and respondent's briefs in time), but *cf. Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Judgement (Reasons), Appeals Chamber, 13 Dec. 2002 (3 July 2002) ("*Bagilishema* Appeal Judgement"), paras. 15–22.

c) The "waiver" principle

Because of the "corrective" nature of an appeal, parties are in general under an obligation to raise all relevant issues before the Trial Chamber. The Appeals Chamber of the ICTY has held that: 21

> "The Appeals Chamber accepts that, as a general principle, a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial and to raise it only in the event of an adverse finding against that party"[53].

The same principle has been recognised by the Appeals Chamber of the ICTR[54].

Thus, if a party fails to raise any objection to a particular issue before the Trial Chamber, in the absence of any special circumstances, the party is to be taken as having waived its right to adduce the issue as a valid ground of appeal. A concomitant of this principle is that the accused cannot raise a defence for the first time on appeal[55]. The principle is based in part on judicial economy: if an issue is raised and dealt with at trial, an unnecessary appeal, with the ensuing possibility of a subsequent retrial, may be avoided. The Appeals Chamber has also indicated that it may be difficult for it to determine precisely what prejudice has been caused to a party if the objection was not raised before the Trial Chamber[56].

Nevertheless, it appears that the Appeals Chamber will not apply the waiver principle in exceptional cases[57]. 22

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53 *Supra* note 47, *Celebici* Appeal Judgement, para. 640 (referring to earlier case law) (and see at para. 351). Also *Prosecutor v. Kunarac et al.*, Case Nos. IT-96-23 and IT-96-23/1-A, Judgement, Appeals Chamber, 12 June 2002 ("*Kunarac* Appeal Judgement"), para. 61; *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-A, Judgement, Appeals Chamber, 3 May 2006 ("*Naletilic and Martinovic* Appeal Judgement"), paras. 21-22. The waiver principle applies also to appeals against sentence: *Prosecutor v. Delalic et al. (Celebici case)*, Case No. IT-96-21-*Abis*, Judgement on Sentence Appeal, Appeals Chamber, 8 Apr. 2003 ("*Celebici* Sentencing Appeal Judgement"), para. 13.

54 *Kambanda v. Prosecutor*, Case No. ICTR-97-23-A, Judgement, Appeals Chamber, 19 Oct. 2000 ("*Kambanda* Appeal Judgement"), paras. 25–28, 55; *supra* note 52, *Kayishema and Ruzindana* Appeal Judgement, para. 91; *Musema v. Prosecutor*, Case No. ICTR-96-13-A, Judgement, Appeals Chamber, 6 Nov. 2001 ("*Musema* Appeal Judgement"), paras. 127, 341; *supra* note 52, *Bagilishema* Appeal Judgement, para. 71.

55 *Prosecutor v Aleksovski*, Case No. IT-95-14/1-A, Judgement, Appeals Chamber, 24 Mar. 2000 ("*Aleksovski* Appeal Judgement"), para. 51.

56 *Supra* note 47, *Celebici* Appeal Judgement, para. 641.

57 In the *supra* note 55, *Aleksovski* Appeal Judgement, paras. 51–56, the Appeals Chamber considered a defence raised by a convicted person for the first time on appeal, but very quickly concluded that the new defence had no merit. In the supra note 54, *Kambanda* Appeal Judgement, para. 55, the Appeals Chamber considered that it was important for it to consider certain issues raised for the first time on appeal "as this is the Chamber of last resort for the Appellant facing life imprisonment ..., and as the issues raised in this case are of general importance to the work of the Tribunal". See also *Kamuhanda v. Prosecutor*, Case No. ICTR-99-54A-A, Judgement, Appeals Chamber, 19 Sep. 2005, paras. 21-23; *supra* note 26, *Barayagwiza* Review Decision, Separate Opinion of Judge Shahabuddeen, para. 52 ("Clearly, if the new defence was sound in law and convincing in fact, it would have to be entertained in the higher interests of justice notwithstanding the general rule"). See also *Prosecutor v Simic*, Case No. IT-95-9-A, Judgement, Appeals Chamber, 28 Nov. 2006, para. 25 (accepting the general principle, but adding "... that the importance of the right of an accused to be informed of the charges against him and the possibility that he will incur serious prejudice if material facts crucial to the Prosecution are communicated for the first time at trial suggest that the waiver doctrine should not entirely foreclose an accused from raising an indictment defect for the first time on appeal", that where "an appellant raises a defect in the indictment for the first time on appeal, he bears the burden of proving that his ability to prepare his defence was materially impaired" and that when an accused has previously raised the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecution to prove on appeal that the ability of the accused to prepare a defence was not materially impaired. See further *id.*, paras 56-74, but see the dissenting opinion of Judge Shahabuddeen. On this point, see also *Prosecutor v Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, Appeals Chamber, 18 Sep. 2006, para. 42. Furthermore, even where the waiver principle applies to an issue, the Appeals Chamber still has the power to raise the issue *proprio motu*: see margin No. 43.

2. Grounds of appeal and standards of review on appeal

a) Procedural error

23 There are two principal types of procedural error within the meaning of this article.

24 The first type includes any non-compliance with mandatory procedural requirements of the Statute and the Rules. Failure to respect the rights of the accused under article 67 would be an obvious example. Failure of the Trial Chamber's judgement to contain a "full and reasoned statement of the Trial Chamber's findings", as required by article 74 para. 5, may be another[58]. Failures by the prosecution, or by the Registry, to comply with mandatory procedural requirements might also fall within this category, such as a failure by the prosecution to comply with its disclosure obligations under article 67 para. 2.

Errors of this type will not necessarily invalidate the Trial Chamber's decision, if no prejudice to the appellant is established[59]. In the case of a successful prosecution appeal against an acquittal on grounds of a procedural error, the Appeals Chamber may also decline to order a new trial if it finds that it is not in the interests of justice to do so[60]. However, it is an open question whether there are certain procedural requirements, non-observance of which will automatically entitle the affected party to a remedy on appeal[61].

25 The second type of procedural error relates to exercises of a discretion by a Trial Chamber (such as decisions to admit or exclude certain evidence, or to grant or refuse a request by a party for an adjournment). In relation to an alleged erroneous exercise of a discretion by a Trial Chamber, it has been said that the issue on appeal is not whether the decision is correct, in the sense that the Appeals Chamber agrees with that decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision. Provided that the Trial Chamber has properly exercised its discretion, its decision will not be disturbed on appeal, even though the Appeals Chamber itself may have exercised the discretion differently[62]. The test for determining whether an exercise of a discretion by the Trial Chamber does or does not constitute an appealable error has been variously formulated, such as whether the Trial Chamber has "abused its discretion"[63], or has "erred and exceeded its discretion"[64], or whether the Trial

58 *Supra* note 46, *Kupreskic* Appeal Judgement, paras. 32–40, *supra* note 53, *Kvocka* Appeal Judgement, paras. 41–42 (but see *supra* note 47, *Kvocka* Appeal Judgement, paras. 21–25; *Prosecutor v. Brdjanin*, Case No. IT-99-36-A, Judgement, Appeals Chamber, 3 Apr. 2007 ("*Brdjanin* Appeal Judgement"), para. 39). See also, *e.g.*, *Prosecutor v. Jelisic*, Case No. IT-95-10-A, Judgement, Appeals Chamber, 5 July 2001 ("*Jelisic* Appeal Judgement"), paras. 22–29 (failure of the Trial Chamber to give the Prosecution an opportunity to be heard before deciding *proprio motu* to enter a judgement of acquittal at the end of the Prosecution case).

59 See, *e.g.*, *supra* note 47, *Celebici* Appeal Judgement, paras. 620–639. See also *Prosecutor v. Krstic*, Case No. IT-98-33-A, Judgement, Appeals Chamber, 19 Apr. 2004, paras. 187–188 (holding that the prosecution's failure to comply with its disclosure obligations did not warrant a retrial where no prejudice to the accused was established).

60 See, *e.g.*, *supra* note 58, *Jelisic* Appeal Judgement, paras. 22–29, 73–77 (finding that the Trial Chamber erred in acquitting the accused at the end of the prosecution case without affording the prosecution the right to be heard, but declining to order a retrial in all the circumstances, including the fact that the accused had pleaded guilty and been sentenced on other counts based on the same conduct).

61 See, *e.g.*, *supra* note 22, *Erdemovic* Appeal Judgement, (conviction overturned on appeal, and case remitted to a new Trial Chamber, on the ground that the requirements of a valid plea of guilty had not been met).

62 See, *e.g.*, *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73, Reasons for Refusal of Leave to Appeal from Decision on Impose Time Limit, Bench of the Appeals Chamber, 16 May 2000, para. 14; *Bagosora et al. v. Prosecutor*, Case No. ICTR-98-41-A, Decision: Interlocutory Appeal from Refusal to Reconsider Decisions Relating to Protective Measures and Application for a Declaration of "Lack of Jurisdiction", Bench of the Appeals Chamber, 2 May 2002, para. 10.

63 *Supra* note 47, *Celebici* Appeal Judgement, para. 513 ("... the Appeals Chamber recalls that it also has the authority to intervene to exclude evidence, in circumstances where it finds that the Trial Chamber abused its discretion in admitting it"), and see also at para. 564 (finding that there was no abuse of discretion by the Trial Chamber in refusing to admit certain evidence, and in refusing to issue a subpoena that had been requested by a party at trial).

64 *Ibid.*

Chamber's discretion "miscarried"[65], or whether the Trial Chamber has committed a "discernible error"[66], or whether the exercise of the discretion was "reasonably open" to the Trial Chamber[67]. It has been said by the Appeals Chamber of the ICTY that a party alleging an error in the exercise of a discretion must demonstrate that the Trial Chamber "has misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion"[68], or that it its decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly[69].

There may be considerable overlap between this ground of appeal and that of an "error of law", since the latter could also apply where it is alleged that a Trial Chamber took an erroneous view of the procedural requirements of the Statute and Rules, or of the requirements for the exercise of its judicial discretion. Indeed, although "procedural error" is not a specified basis for an appeal under the Statute or Rules of the ICTY or ICTR, as the examples cited above indicate, appeals have been allowed by those Tribunals on grounds of procedural errors, presumably because they were considered to be errors of law[70]. 26

Normally, the question whether or not there has been a procedural error by the Trial Chamber can be determined by the Appeals Chamber from an examination of the trial record. However, in some cases a party may seek to introduce additional evidence on appeal to establish that a procedural error occurred at trial[71]. 27

b) Error of fact

aa) Introduction

There are two main types of errors of fact. The first is where it is alleged that the Trial Chamber erred in reaching the conclusions of fact that it did on the basis of the evidence that was before it (see *margin* Nos. 29–30). The second is where the Trial Chamber was justified in reaching the factual conclusions it did on the evidence presented at trial, but where additional evidence presented on appeal casts doubt on those findings (see margin Nos. 31–34). 28

bb) Error of fact based on the unreasonableness of the Trial Chamber's decision

In cases where an appellant claims that the Trial Chamber reached erroneous conclusions of fact on the evidence before it, the Appeals Chamber of the ICTY and ICTR has held that it will not conduct an independent assessment of the evidence admitted at trial, or undertake a *de novo* 29

65 *Ibid.*, para. 577.

66 *Supra* note 53, *Naletilic and Martinovic* Appeal Judgement, paras. 257-259; *Prosecutor v. Mejakic et al.*, Case No. IT-02-65-AR11bis.1, Decision on Joint Defence Appeal Against Decision on Referral Under Rule 11bis, Appeals Chamber, 7 Apr. 2006 ("*Mejakic* Rule 11bis Appeal Decision"), para. 10.

67 *Supra* note 47, *Celebici* Appeal Judgement, paras. 274–275 (see also para. 292, finding that the decision of the Trial Chamber not to exercise its discretion to grant an application was "open" to the Trial Chamber).

68 *Prosecutor v. Milosevic*, Case No. IT-99-37-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, Appeals Chamber, 18 Apr. 2002, para. 5. See also *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the Amici Curiae Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, Appeals Chamber, 20 Jan. 2004, para. 7; *Prosecutor v. Bizimungu*, Case No. ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 Oct. 2003 Denying Leave to File Amended Indictment, Appeals Chamber, 12 Feb. 2004, para. 11; *Prosecutor v. Karemera*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 Oct. 2003 Denying Leave to File Amended Indictment, Appeals Chamber, 19 Dec. 2003, para. 9.

69 *C.f. supra* note 66, *Mejakic* Rule 11bis Appeal Decision, para. 10.

70 See further margin No. 37.

71 *C.f. supra* note 47, *Celebici* Appeal Judgement, paras. 620–621.

review of the evidence[72]. The standard of review on appeal for an error of fact of this type has been articulated by the Appeals Chamber of the ICTY as follows:

> "Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is 'wholly erroneous' may the Appeals Chamber substitute its own finding for that of the Trial Chamber. It must be borne in mind that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.
>
> ... it is initially the Trial Chamber's task to assess and weigh the evidence presented at trial. In that exercise, it has the discretion to 'admit any relevant evidence which it deems to have probative value', as well as to exclude evidence *'if its probative value is substantially outweighed by the need to ensure a fair trial'*. As the primary trier of fact, it is the Trial Chamber that has the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses' testimonies. It is certainly within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the 'fundamental features' of the evidence. The presence of inconsistencies in the evidence does not, per se, require a reasonable Trial Chamber to reject it as being unreliable. Similarly, factors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the Trial Chamber from relying on the evidence. However, the Trial Chamber should consider such factors as it assesses and weighs the evidence.
>
> ... *The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is* well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points. This discretion is, however, tempered by the Trial Chamber's duty to provide a reasoned opinion, following from Article 23(2) of the Statute"[73].

In other words, in an appeal against conviction, the Appeals Chamber does not determine whether it is *itself* satisfied beyond a reasonable doubt of the guilt of the accused. Rather, it applies a "deferential standard" of review, under which it must decide whether a reasonable Trial Chamber *could* have been satisfied beyond reasonable doubt as to the finding in question[74].

This same standard of unreasonableness, and the same deference to factual findings of the Trial Chamber, applies also when the Prosecution appeals against an acquittal[75]. However, the Appeals Chamber of the ICTY has said that:

> "since the Prosecution must establish the guilt of the accused at trial, *the significance of an error of fact* occasioning a miscarriage of justice takes on a specific character when alleged by the Prosecution. This is because it has the more difficult task of showing that there is no reasonable doubt about the appellant's guilt when account is taken of the Trial Chamber's errors of fact"[76].

72 *E.g.*, *supra* note 47, *Čelebići* Appeal Judgement, paras. 203–204.

73 *Supra* note 46, *Kupreškić* Appeal Judgement, paras. 30–32 (footnotes omitted), referring to earlier case law of the ICTY. See also *supra* note 53, *Kunarac* Appeal Judgement, paras. 39–42; *supra* note 53, *Čelebići* Sentencing Appeal Judgement, paras. 54–60; *supra* note 52, *Bagilishema* Appeal Judgement, paras. 11–14; *Prosecutor v. Ndindabumwe Rutaganda*, Case No. ICTR-96-3-A, Judgement, Appeals Chamber, 26 May 2003 ("*Rutaganda* Appeal Judgement"), paras. 22–23; *supra* note 49, *Krnojelac* Appeal Judgement, paras. 11–12; *supra* note 47, *Vasiljević* Appeal Judgement, para. 7.

74 *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 22 (but see margin No. 34). In making this determination, "The Appeals Chamber does not review the entire trial record *de novo*; in principle, it only takes into account evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and additional evidence admitted on appeal, if any": *supra* note 58, *Brđanin* Appeal Judgement, para. 15.

75 *Supra* note 52, *Bagilishema* Appeal Judgement, paras. 8–10, 13, 14; *supra* note 58, *Brđanin* Appeal Judgement, para. 14.

76 *Supra* note 49, *Krnojelac* Appeal Judgement, para. 14, also *supra* note 73, *Rutaganda* Appeal Judgement, para. 24.

The Appeals Chamber has for instance consistently held that a Trial Chamber is entitled to 30
rely, in relation to a crucial fact, on the uncorroborated testimony of a single witness[77]. However, a reasonable Trial Chamber must take into account the difficulties associated with identification evidence in a particular case and must carefully evaluate any such evidence, before accepting it as the sole basis for sustaining a conviction[78].

This "deferential standard" of review applies in relation to grounds of appeal alleging pure errors of fact and when no additional evidence has been admitted on appeal[79]. Consideration is given below to the standard of review to be applied in cases where factual errors are alleged on the basis of additional evidence presented during the appellate proceedings[80].

In cases where there is both an error in the legal standard applied in relation to a factual finding as well as an error of fact in relation to that finding, the Appeals Chamber of the ICTY has said that it will apply the correct legal standard to the evidence contained in the trial record, and will determine whether it is itself convinced beyond reasonable doubt as to the finding of guilt[81].

cc) Error of fact based on additional evidence presented on appeal

The second type of error of fact arises where the decision of the Trial Chamber based on the 31
evidence presented at trial is perfectly reasonable, but is subsequently shown to be incorrect as a result of additional evidence presented on appeal[82].

Article 83 para. 1 provides that for the purposes of proceedings under article 81, "the 32
Appeals Chamber shall have all the powers of the Trial Chamber"[83]. This would include the power of the Trial Chamber to receive and request evidence under article 69. However, although the Appeals Chamber has the same *power* to receive evidence as a Trial Chamber, the circumstances in which the Appeals Chamber will *authorise* the presentation of evidence are much more limited, if the approach of the ICTY and ICTR is to be followed.

The Rules of Procedure and Evidence of the ICTY and ICTR contain similar provisions to the effect that "The rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber"[84]. Nevertheless, there is an express limitation in relation to additional evidence on appeal: rule 115 *lit.* B ICTY and ICTR enables *the Appeals Chamber to consider additional evidence on appeal if* the Appeals Chamber finds that the additional evidence "was not available at trial", that it is "relevant and credible", and that it "could have been a decisive factor in reaching the decision at trial"[85]. In determining whether these criteria are met, the significance of the additional evidence

77 *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgement, Appeals Chamber, 15 July 1999 ("*Tadić* Appeal Judgement"), para. 65; *supra* note 47, *Čelebići* Appeal Judgement, paras. 492, 506; *supra* note 46, *Kupreškić* Appeal Judgement, para. 33; *supra* note 73, *Rutaganda* Appeal Judgement, paras. 27–29.

78 *Supra* note 46, *Kupreškić* Appeal Judgement, paras. 34–40; *supra* note 52, *Bagilishema* Appeal Judgement, paras. 13–41.

79 See, for instance, *supra* note 74, *Blaškić* Appeal Judgement, paras. 18–19.

80 See margin Nos. 31–34.

81 *Supra* note 74, *Blaškić* Appeal Judgement, para. 24(b); *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgement, Appeals Chamber, 17 Dec. 2004 ("*Kordić and Čerkez* Appeal Judgement"), para. 24(b). But see *supra* note 47, *Kvočka* Appeal Judgement, paras. 18–20 (a more recent pronouncement by the Appeals Chamber of the standards of review on appeal, which does not include this formulation).

82 See the discussion in the *supra* note 46, *Kupreškić* Appeal Judgement, paras. 42–47.

83 See also rule 149: "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". Unlike article 83 para. 1, this rule applies to all proceedings before the Appeals Chamber, not just those under articles 81 and 83.

84 Rule 107 ICTY; rule 107 ICTR.

85 Rule 115 ICTY has also been held to govern the presentation of additional evidence in an appeal against a decision on provisional release: *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Request to Present Additional Evidence Under Rule 115, Appeals Chamber, 3 Mar. 2006, paras

must be considered in the context of the evidence which was given at trial and of that which was admitted on appeal, and not in isolation[86].

Although no corresponding restriction on the presentation of evidence on appeal appears in the *Statute or Rules of the ICC, such a limitation is a natural corollary of* the "corrective" nature of an appeal[87] and of the "waiver" principle[88]. The Appeals Chamber has, however, indicated that this limitation applies only to evidence upon matters relating to a fact or issue that was litigated at the trial (in particular, but not exclusively, a fact or issue relating to the guilt or innocence of the accused), and that when the Appeals Chamber is hearing evidence which *relates to matters other than the issues litigated in the Trial Chamber* (such as evidence seeking to establish that one of the judges of the Trial Chamber was disqualified from being a judge or was not impartial), the Appeals Chamber is in the same position as a Trial Chamber[89].

33 In order to meet the requirement that the evidence was "not available at trial", the Appeals Chamber of the ICTY has held that the party seeking to present the additional evidence must

9–11. Its application may extend to interlocutory appeals in general: *cf. Prosecutor v. Mejakic et al.*, Case No. IT-02-65-AR11bis.1, Decision on Joint Defence Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115, Appeals Chamber, 16 Nov. 2005 ("*Mejakic* Additional Evidence Decision"), para. 6. The current wording of rule 115 *lit.* F ICTY is the result of an amendment made to the rule in July 2002 (see IT/32/Rev.24), and the wording of rule 115 *lit.* B ICTR is the result of an amendment made in May 2003. Earlier versions of rule 115 ICTY and ICTR provided for the presentation on appeal by a party of "additional evidence which was not available to it at the trial" if the Appeals Chamber "considers that the *interests of justice so require*". The *Appeals Chamber* interpreted the "interests of justice" requirement to incorporate three conditions, namely (1) that the evidence is relevant to a material issue, (2) the evidence is credible, and (3) the evidence is such that it would probably show that the conviction or sentence was unsafe (*Tadic* Additional Evidence Decision, *supra* note 47, para. 71, *Kupreskic* Appeal Judgement *supra note* 46, paras. 52–54, 61–69 (observing, at para. 63, that the second of these requirements "is linked to the danger that appellate proceedings can be abused by a party presenting evidence to the appeal body that appears to be relevant to a material issue, but that has not been tested in the crucible of a trial")).

86 *Prosecutor v. Krstic*, Case No. IT-98-33 A, Decision on Applications for Admission of Additional Evidence on Appeal, Appeals Chamber, 5 Aug. 2003, para. 3; *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Decision on Evidence, Appeals Chamber, 31 Oct. 2003; *Prosecutor v. Kvocka et al.*, Case No. IT-98-30/1-A, Decision on Appellants' Motions to Admit Additional Evidence Pursuant to Rule 115, Appeals Chamber, 16 Feb. 2004; *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-A, Decision on Naletilic's Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence, Appeals Chamber, 7 July 2005, paras. 11–15; *supra* note 85, *Mejakic* Additional Evidence Decision, paras. 9–12.

87 See margin No. 20. For statements explaining the restriction on this basis, *see, e.g.*, *supra* note 47, *Tadic* Additional Evidence Decision, 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"); *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Decision (Appellants' Motions for Admission of Additional Evidence on Appeal), Appeals Chamber, 26 Dec. 2000 ("*Kayishema and Ruzindana* Decision") ("NOTING that ... additional evidence should not be lightly admitted on appeal such that it would effectively constitute a fresh trial").

88 See margin Nos. 21–22.

89 *Prosecutor v. Delalic et al. (Celebici* case), Case No. IT-96-21-A, Order on Motion of Appellant, Esad Landzo, to Admit Evidence on Appeal, and for Taking of Judicial Notice, Appeals Chamber, 31 May 2000; *Prosecutor v. Delalic et al.* (Celebici case), Case No. IT-96-21-A, Order in Relation to Witnesses on Appeal, Appeals Chamber, 19 May 2000; *supra note 46, Kupreskic Appeal Judgement, paras. 55–57. See also Prosecutor v Kambanda*, Case No. ICTR-97-23-A, Decision on the Appellant's Motion for Admission of New Evidence, Appeals Chamber, 13 June 2000 (in which the additional evidence on appeal consisted of oral evidence by the convicted person relevant to the question whether his plea of guilty was voluntary, informed, unequivocal and based on sufficient facts for the crime and his participation in it). The raising of facts or issues before the Appeals Chamber that were not litigated at trial would, however, be subject to the "waiver" principle: see margin Nos. 21–22. Furthermore, in the ICTY and ICTR, the possibility of raising totally new facts on appeal may be limited to facts pertaining to the fairness and correctness of the trial proceedings. In relation to facts bearing on the guilt or innocence of the accused, the Appeals Chamber of the ICTY has indicated that where an applicant seeks to present a totally new fact that was not litigated at trial (as opposed to additional evidence of a fact that was in issue at trial), *the appropriate procedure is to seek review* (revision) of the trial judgement, rather than to present additional evidence on appeal (*supra* note 47, *Tadic* Additional Evidence Decision, paras. 30, 32; *supra* note 46, *Kupreskic* Appeal Judgement, paras. 48–49). It is suggested that in the ICC, no such distinction may be made, and that under article 81, additional evidence on appeal may relate either to facts that were litigated at trial or facts that were not, subject to the other requirements for the presentation of additional evidence on appeal: see article 84, margin No. 14.

demonstrate that his or her counsel exercised *due diligence in seeking to obtain* and present *all* relevant evidence at trial. This is an aspect of the "duty to be reasonably diligent" imposed upon trial counsel under the Statute and Rules. The duty to act with reasonable diligence has been held to include making "appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber"[90]. *This means, for example, that if* a party experiences difficulty in calling a witness to testify at trial, due diligence will not have been exercised unless that party brought the matter before the Trial Chamber so that the Trial Chamber could consider imposing coercive or protective measures[91]. The burden of proof is on the party seeking to present the additional evidence to show that it should be admitted, who must provide a reasonable explanation as to *why it was not available at trial* and as to any efforts he or she may have made to try to adduce it[92]. However, the Appeals Chamber has also recognised an exception to the requirement that the new evidence "was not available" in cases where "gross negligence is shown to exist" on the part of counsel at trial[93].

Furthermore, the Appeals Chamber of the ICTY has held that it "maintains an inherent power *to admit such evidence* even if it was available at trial, in cases in which its exclusion would lead to a miscarriage of justice"[94]. However, if the additional evidence *was* available at trial or *could* have been discovered through the exercise of due *diligence*, the Appeals Chamber has held that the moving party will be required to undertake the additional burden of establishing that the exclusion of the additional evidence on appeal *would* lead to a miscarriage of justice – that is, it *would* have affected the verdict[95].

Where a party is permitted to present additional evidence on appeal, the other party may seek to present further evidence in rebuttal. *There is no need for* a party seeking to present rebuttal material to show that the material was unavailable at trial or that it could have affected the verdict of the Trial Chamber. It is sufficient to show that the rebuttal material "directly affects the substance of the additional evidence admitted by the Appeals Chamber"[96].

The Appeals Chamber of the ICTY has indicated that where additional evidence is admitted 34
on appeal, in some cases *it may be so powerful that its* capacity to demonstrate a miscarriage of

90 *Tadic* Additional Evidence Decision, *supra* note 47, para. 47.

91 See generally *ibid.*, paras. 36–45, 47, 62, *Kupreskic* Appeal Judgement, *supra* note 46, para. 50.

92 *Tadic* Additional Evidence Decision, *supra* note 47, paras. 52–53, *Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Decision, Appeals Chamber, 31 May 2000 ("*Semanza* Decision"), para. 37, *Prosecutor v. Kayishema and Ruzindana* Decision, *supra* note 87. The Appeals Chamber of the ICTY has said that counsel have an obligation to report any difficulties in relation to obtaining evidence to the Trial Chamber as a first *step in exercising due diligence*, and also as a means of self-protection by creating a contemporaneous record of the difficulty: *Prosecutor v. Krstic*, Case No. IT-98-33-A, Decision on Applications for Admission of Additional Evidence on Appeal, Appeals Chamber, 5 Aug. 2003 ("*Krstic* Additional Evidence Decision"). See also *Prosecutor v. Krstic*, Case No. IT-98-33-A, Decision on Applications for Subpoenas, Appeals Chamber, 1 July 2003, paras. 12–17.

93 *Tadic* Additional Evidence Decision, *supra* note 47, paras. 48–50 (pointing out that counsel may have chosen not to present the evidence at trial because of the litigation strategy or because of the view taken of the probative value of the evidence, and that where counsel decides not to call certain evidence at trial, unless gross negligence is shown due diligence will be presumed), 65, 66 ("Barring exceptional circumstances, which are not made out in this case, it is difficult to think of circumstances which would show that expert witnesses were not available to be called at trial despite the exercise of reasonable diligence"); *supra* note 46, *Kupreskic* Appeal Judgement, para. 51; *Nikolic v. Prosecutor*, Case No. IT-02-60/1-A, Decision on Motion to Admit Additional Evidence, Appeals Chamber, 9 Dec. 2004 ("*Nikolic* Additional Evidence Decision"), paras. 29–41.

94 *Prosecutor v Jelitic*, Case No. IT-95-10-A, Decision on Request to Admit Additional Evidence, Appeals Chamber, 15 Nov. 2000; *Kupreskic* Appeal Judgement, *supra* note 196, para. 58. See also *Tadic* Additional Evidence Decision, *supra* note 197, para. 72; *Semanza* Decision, *supra* note 92, para 41.

95 *Prosecutor v Blaskic*, Case No. IT-95-14-A, Decision on Evidence, Appeals Chamber, 31 Oct. 2003 (citing *Krstic* Additional Evidence Decision, *supra* note 92); *Nikolic* Additional Evidence Decision, *supra* note 93, paras. 42–48.

96 *Prosecutor v Kvocka et al.*, Case No. IT-98-30/1-A, Decision on Prosecution's Motion to Adduce Rebuttal Material, Appeals Chamber, 12 Mar. 2004.

justice is beyond question[97]. However, it has added that in many cases, an application to admit additional evidence on appeal will be dealt with in a two-stage process. In the first stage, the Appeals Chamber will determine, in the light of the reasoning of the Trial Chamber and the submissions of the parties, whether the new evidence *could* have had an impact on the Trial Chamber's decision. If not, the Appeals Chamber may reject the additional evidence without detailed consideration[98]. If, on the other hand, the additional evidence is accepted for consideration, in the second stage this evidence must be tested for its veracity (unless there is no dispute between the parties as to this issue); for this purpose, the Appeals Chamber can either test the evidence itself to determine veracity, or order the case to be remitted to a Trial Chamber (either the Trial Chamber at first instance, or a differently constituted Trial Chamber) to hear the new evidence[99]. Finally, the Appeals Chamber is then required to determine whether the additional evidence actually reveals an error of fact of such magnitude as to occasion a miscarriage of justice. For this purpose, there have been different formulations of the test to be applied by the Appeals Chamber in deciding whether or not to uphold a decision of the Trial Chamber where additional evidence has been admitted on appeal. Earlier case law indicated that the relevant test is: has the appellant established that no reasonable tribunal of fact could have reached the conclusion it did based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings[100]. Later case law has articulated the test differently. In the *Blaskic* Appeal Judgement, the Appeals Chamber observed that if it applied the normal "deferential standard" of review in cases where additional evidence has been presented on appeal, the outcome would be that neither the Trial Chamber, nor the Appeals Chamber, would reach a conclusion of guilt beyond reasonable doubt based on the totality of evidence in the case, assessed in light of the correct legal standard. It has indicated that in such cases, in the interests of justice, the Appeals Chamber should itself be convinced, beyond reasonable doubt, of the guilt of the accused[101]. However, more recently there may have been a return to the earlier "deferential" test[102].

In the *Blaskic* Appeal Judgement, the Appeals Chamber said in that case that in cases of alleged error of fact in an appeal against conviction, where additional evidence has been admitted on appeal and there is no error in the legal standard applied by the Trial Chamber in relation to the factual finding, the standard of review is as follows. First, the Appeals Chamber will determine, on the basis of the trial record alone, whether no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt. If that is the case, then no further examination of the matter is necessary as a matter of law. If, however, the Appeals Chamber determines that a reasonable trier of fact *could* have reached a conclusion of guilt beyond reasonable doubt, then the Appeals Chamber will determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt[103].

97 *Kupreskic* Appeal Judgement, *supra* note 196, para. 65.

98 *Ibid.*, paras. 66–69.

99 *Ibid.*, paras. 70–71 (indicating further that if the Appeals Chamber adopts the former course, it may test the veracity of the additional evidence either at the main hearing on appeal or may do so at a preliminary hearing). In the case of the ICC, article 83 para. 2, expressly provides that the Appeals Chamber may remand a factual issue that arises on appeal to the original Trial Chamber for it to determine, or may itself call evidence to determine the issue.

100 *Ibid.*, paras. 72–75.

101 *Supra* note 74, *Blaskic* Appeal Judgement, paras. 20–24.

102 *Supra* note 53, *Naletilic and Martinovic* Appeal Judgement, paras. 11–12.

103 *Ibid.*, para. 24(c) (but see the partial dissenting opinion of Judge Weinberg de Roca in that case); see also *Kordic and Cerkez* Appeal Judgement, *supra* note 81, para. 24(a) (but see the separate opinion of Judge Weinberg de Roca in that case). But see *supra* note 47, *Krocka* Appeal Judgement, Separate Opinion of Judge Weinberg de Roca and Separate Opinion of Judge Shahabuddeen.

The Appeals Chamber added that in cases of this type where there is an error in the legal standard applied in relation to the factual finding, the standard of review is as follows. First, the Appeals Chamber will apply the correct legal standard to the evidence contained in the trial record, and will determine whether it is itself convinced beyond reasonable doubt as to the finding of guilt, on the basis of the trial record. If it is not convinced, then no further examination of the matter is necessary as a matter of law. If, however, the Appeals Chamber, applying the correct legal standard to the evidence contained in the trial record, is itself convinced beyond reasonable doubt as to the finding of guilt, it will then proceed to determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself still convinced beyond reasonable doubt as to the finding of guilt[104].

It remains to be seen whether the Court adopts the approach of the ICTY and ICTR to the issue of the admission of additional evidence on appeal. Regulation 62 para. 1 ICC states that a participant seeking to present additional evidence before the Appeals Chamber shall file an application setting out, *inter alia*, "the reasons, if relevant, why the evidence was not adduced before the Trial Chamber". Regulation 62 para. 2 then provides for the Appeals Chamber to rule on the admissibility of the additional evidence. This provision is consistent with the approach of the ICTY and ICTR, although it would arguably also be consistent with a more liberal approach to the admission of additional evidence.

c) Error of law

The concept of an "*error of law*" in subparagraphs (a) (iii) and (b) (iii) of paragraph 1 appears self-evident. Any determination made by a Trial Chamber on a question of the substantive or procedural law of the Court, or on any issue of international law generally that arises in the case, would fall within this ground. To the extent that a Trial Chamber is able to make findings with respect to the national law of a State[105], such findings would probably need to be appealed as "errors of fact" rather than "errors of law"[106]. 35

The Appeals Chamber of the ICTY has said: 36

> "Errors of law do not raise a question as to the standard of review as directly as errors of fact. Where a party contends that a Trial Chamber made an error of law, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether there was such a mistake. A party alleging that there was an error of law must be prepared to advance arguments in support of the contention; but, if the arguments do not support the contention, that party has not failed to discharge a burden in the sense that a person who fails to discharge a burden automatically loses his point. The Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law"[107].

Thus, the Appeals Chamber accords no particular deference to findings of law made by the Trial Chamber, since the Appeals Chamber is as capable as the Trial Chamber of determining what is the law. However, in accordance with the general principle that it is for a party asserting a right or seeking relief to establish the existence of that right or the entitlement to that relief, an appellant may be said to bear a burden of persuasion[108]. Thus, it has been said that:

> "[A] party who submits that the Trial Chamber erred in law must at least identify the alleged error and advance some arguments in support of its contention. An appeal cannot be allowed to deteriorate into a

104 *Supra* note 74, *Blaskic* Appeal Judgement, para. 24(d) (but see the partial dissenting opinion of Judge Weinberg de Roca in that case); see also *supra* note 81, *Kordic and Cerkez* Appeal Judgement, para. 24(b) (but see the separate opinion of Judge Weinberg de Roca in that case). But see *supra* note 47, *Krocka* Appeal Judgement, Separate Opinion of Judge Weinberg de Roca and Separate Opinion of Judge Shahabuddeen.

105 See *e.g.*, article 21 para. 1 (c); and cf. article 69 para. 8.

106 Cf. I. Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 39–41 (5th ed. 1998). See, however, *supra* note 197, *Celebici* Appeal Judgement, paras. 655–676 (in which the Appeals Chamber did not appear to treat the interpretation of provisions of the Constitution of Costa Rica as a pure question of fact).

107 *Supra* note 197, *Furundzija* Appeal Judgement, para. 35. See also, e.g., *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, Judgement, Appeals Chamber, 23 May 2005 (*"Kajelijeli Appeal Judgement"*), para. 5; *supra* note 197, *Tasiljevic* Appeal Judgement, para. 6.

108 See, *e.g.*, *supra* note 197, *Tadic* Additional Evidence Decision, para. 52.

guessing game for the Appeals Chamber. Without guidance from the appellant, the Appeals Chamber will only address legal errors where the Trial Chamber has made a glaring mistake. If the party is unable to at least identify the alleged legal error, he or she should not raise the argument on appeal. It is not sufficient to simply duplicate the submissions already raised before the Trial Chamber without seeking to clarify how these arguments support a legal error allegedly committed by the Trial Chamber"[109].

The Appeals Chamber of the ICTY has further said that:

Where the Appeals Chamber finds that there is an error of law in the Trial Judgement arising from the application of the wrong legal standard by the Trial Chamber, it is open to the Appeals Chamber to articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly. In doing so, the Appeals Chamber not only corrects a legal error, but applies the correct legal standard to the evidence contained in the trial record in the absence of additional evidence, and it must determine whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the Defence before that finding is confirmed on appeal[110].

The standard of review to be applied in case where there is both an error of law and an alleged error of fact is dealt with in margin No. 34.

d) Any other ground that affects the fairness or reliability of the proceedings or decision

37 The phrase in subparagraph *(b) (iv)*, "*any other ground that affects the fairness or reliability of the proceedings or decision*", may add little to the other specified grounds of appeal. The apparent intention was to include a "catch-all" provision in the case of appeals by or on behalf of the convicted person, to ensure that any miscarriage of justice would be capable of correction on appeal. The addition may have been out of an abundance of caution, since it is likely that any valid grounds of appeal would fall within one of the other categories. Indeed, the Statutes of the ICTY and ICTR provide for only two grounds of appeal, "an error on a question of law invalidating the decision" and "an error of fact which has occasioned a miscarriage of justice"[111], yet these appear to be sufficiently broad to include appeals against exercises of a discretion by a Trial Chamber[112], and would seem to extend, for instance, to an appeal on grounds of ineffective assistance of counsel[113], as well as other procedural errors[114]. *In particular*, anything occurring within the context of the trial itself that affects the fairness or reliability of the proceedings could be regarded as a procedural error on the basis that a fair trial is a procedural requirement under article 67 para. 1.

38 Because this ground of appeal is somewhat amorphous, there is probably no one standard of review that governs. The standards of review of one of the other grounds of appeal is likely to be applied by analogy, depending on the particular circumstances of the case.

109 *Supra* note 196, *Kupreskic* Appeal Judgement, para. 27. See also *supra* note 203, *Kunarac* Appeal Judgement, paras 43–48; *supra* note 196, *Krnojelac* Appeal Judgement, para. 10.

110 *Supra* note 47, *Kvocka* Appeal Judgement, para. 17; see also *supra* note 74, *Blaskic* Appeal Judgement, para. 15, *supra* note 81, *Kordic and Cerkez* Appeal Judgement, para. 17; *Prosecutor v. Stakic*, Case No. IT-97-24-A, Judgement, Appeals Chamber, 22 Mar. 2006 ("*Stakic* Appeal Judgement"), paras. 9, 312 (but see the Partly Dissenting Opinion of Judge Shahabuddeen, paras. 2-7).

111 Statute of the ICTY, article 25; Statute of the ICTR, article 24.

112 *E.g.*, *Prosecutor v. Kovacevic*, Case No IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, Appeals Chamber, 2 July 1998 (an appeal against the decision of a Trial Chamber not to grant leave to amend an indictment).

113 See *Tadic* Additional Evidence Decision, *supra* note 197, paras. 48–50, 65; *Prosecutor v. Akeyesu*, Case No. ICTR-96-4-A, Judgement, Appeals Chamber, 1 June 2001 ("*Akeyesu* Appeal Judgement"), paras. 78–84.

114 See, *e.g.*, *Kupreskic* Appeal Judgement, *supra* note 196, para. 124, holding that the Trial Chamber "erred in law" in convicting the accused on the basis of material facts which were not pleaded with the requisite detail in the indictment, thereby rendering the trial unfair. In the ICC, such an error would presumably be characterised as a "procedural error". See further the examples in margin Nos. 23–27 above.

e) Appeals against sentence

As in the case of an appeal against conviction, an appeal against sentence is an appeal *stricto* 39
sensu, *i.e.*, a procedure of a "corrective nature" and not a sentencing proceeding *de novo*[115]. Therefore, an appellant against sentence cannot simply resubmit arguments presented at trial, but must demonstrate, upon the trial record, that the Trial Chamber made an appealable error[116]. In relation to an appeal against sentence, it has been said that:

"[A]s a general rule, the Appeals Chamber will not substitute its sentence for that of a Trial Chamber unless 'it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law'. The Appeals Chamber will only intervene if it finds that the error was 'discernible'. As long as a Trial Chamber does not venture outside its 'discretionary framework' in imposing sentence, the Appeals Chamber will not intervene. It therefore falls on each appellant . . . to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing the sentence it did"[117].

The Appeals Chamber has also made clear that:

"Trial Chambers exercise a considerable amount of discretion (although it is not unlimited) in determining an appropriate sentencing. This is largely because of the over-riding obligation to individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime"[118].

An appellant therefore cannot merely assert that a sentence was wrong, without demonstrating how the Trial Chamber either failed to follow the applicable law, or how it ventured outside its discretionary framework in imposing the sentence *it did*[119]. For instance, a Trial Chamber's decision may be disturbed on appeal if an appellant shows that the Trial Chamber either took into account what it ought not to have, or failed to take into account what it ought to have taken into account, in the weighing process involved in this exercise of the *discretion*[120].

It would follow from the "corrective" nature of an appeal[121], and from the "waiver" 40
principle[122], that an appellant cannot raise factors relevant to sentencing for the first time on appeal[123], other, perhaps, than in exceptional circumstances where a miscarriage of justice would otherwise result[124].

115 *Supra* note 196, *Kupreskic* Appeal Judgement, para. 408; *supra* note 203, *Celebici Sentencing Appeal* Judgement, para. 11; *supra* note 47, *Kvocka* Appeal Judgement, para. 669.

116 *Supra* note 197, *Celebici* Appeal Judgement, para. 724; *supra* note 203, *Celebici* Sentencing Appeal Judgement, para. 11. Thus, evidence of post-sentence behaviour is irrelevant to whether the Trial Chamber erred in the exercise of its sentencing discretion. It is only where it is established that the Trial Chamber made an appealable error in sentencing that there can be any issue of introducing further evidence relating to the appropriate sentence. The admission of further evidence in those circumstances is within the discretion of the Appeals Chamber, and the exercise of that discretion is dependent mainly upon the nature of the error. See *ibid.*, paras. 11–14.

117 *Supra* note 196, *Kupreskic* Appeal Judgement, para. 408. See also *supra* note 197, *Celebici* Appeal Judgement, paras. 724-725, *supra* note 204, *Kambanda* Appeal Judgement, para. 115; *supra* note 197, *Furundzija* Appeal Judgement, para. 239; *Serushago v. Prosecutor*, Case No. ICTR-98-39-A, Reasons for Judgement, Appeals Chamber, 6 Apr. 2000, para. 32, *supra* note 205, *Aleksovski* Appeal Judgement, paras. 186–187; *Prosecutor v. Tadic*, Case Nos. IT-94-1-A and IT-94-1-Abis, Judgement in Sentencing Appeals, Appeals Chamber, 26 Jan. 2000, paras 20–22. For recent examples of appeal judgements finding that the Trial Chamber committed discernible errors in sentencing, see *Prosecutor v. Nikolic*, Case No IT-02-60/1-A, Judgement in Sentencing Appeals, Appeals Chamber, 8 Mar. 2006, paras. 6-8, 59-63, 98-103, 104-107, 108-111, 112-113; *supra* note 110, *Stakic* Appeal Judgement, paras. 388-393, 414-416, 421-423.

118 *Supra* note 197, *Celebici* Appeal Judgement, para. 717. See also *supra* note 47, *Vasiljevic* Appeal Judgement, paras. 9, 21–22.

119 *Supra* note 197, *Celebici* Appeal Judgement, para. 725.

120 *Ibid.*, para. 780. See also *supra* note 196, *Kupreskic* Appeal Judgement, para. 457 ("The burden rests on an accused to demonstrate that the Trial Chamber abused this discretion in failing to take a certain factor or circumstance into account"), *supra* note 52, *Semanza* Appeal Judgement, paras. 312, 374. It has been held to be insufficient to show that a different sentence was imposed in another case in which the circumstances were very similar: *supra* note 197, *Vasiljevic* Appeal Judgement, para. 152.

121 See margin No. 20.

122 See margin Nos. 21–22.

123 See *supra* note 46, *Kupreskic Appeal Judgement*, paras *410–414* (in which the Appeals Chamber concluded that "in these circumstances, the Appeals Chamber considers that no reason has been presented for it to

41 In cases where the accused stands convicted following the appeal proceedings, but the Appeals Chamber has reversed the Trial Chamber's verdict in relation to one or some of several crimes, this may affect the sentence that was imposed by the Trial Chamber. Although the Statute is not clear on this point, article 83 para. 2 (a) suggests that in such cases the Appeals Chamber should itself amend the sentence[125].

f) Remedies on appeal

42 Not every error of the kind referred to in paragraph 1, even if established by an appellant, will entitle the appellant to a remedy on appeal. Article 83 para. 2, requires either that the error rendered the proceedings "unfair in a way that affected the reliability of the decision or sentence", or that the error "materially" affected the decision or sentence, and the burden is on an appellant to demonstrate that this requirement is met[126]. On the remedies that can be ordered by the Appeals Chamber in the event of a successful appeal under this article, see article 83 paras. 2 and 3.

3. Other aspects of the appeals process

a) The raising of new issues by the Appeals Chamber *proprio motu*

43 The Appeals Chamber of the ICTY has *affirmed in one case 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"[127]. In this case, involving an appeal against sentence, the Appeals Chamber *proprio motu* raised the question of the validity of the plea of guilty that had been entered by the appellant before the Trial Chamber[128]. The Appeals Chamber of the ICTR has similarly affirmed its power to consider issues *proprio motu*, subject to the requirement that it do so "within the framework predefined by the Statute"[129]. The meaning of this qualification has not been the subject of further definition by the Appeals Chamber, although one of its members has said:

> "The cases show that the leading principle is that the overriding task of the Tribunal is to discover the truth. Since this has to be done judicially, limits obviously exist as to permissible methods of search; and those limits have to be respected, for the Appeals Chamber is not an overseer. It cannot gratuitously intervene whenever it feels that something wrong was done, beyond the proper appellate boundaries, the decisions of the Trial Chamber are unquestionable. However, ... the Appeals Chamber can raise issues whether or not presented by a party, provided, I consider, that they lie within the prescribed grounds of appeal, that they arise from the record, and that the parties are afforded an opportunity to respond"[130].

b) Issues which it is not necessary to decide

44 Despite the "corrective" nature of an appeal[131], the Appeals Chamber of the ICTY and ICTR has on occasion been willing to entertain appeals against findings of law by a Trial Chamber, even where this is not necessary for the purposes of disposing of the appeal (for instance,

consider and take into account any mitigating factors that, although available at the time, were not raised before the Trial Chamber"). See also *Prosecutor v. Nikolić*, Case No. IT-94-2-A, Judgement on Sentencing Appeal, Appeals Chamber, 4 Feb 2005, para. 107, for confirmation that the "waiver" rule applies also to sentencing appeals.

124 See margin No. 22 (and *cf. supra* notes 94-95 and accompanying text).

125 *See Ch. Staker, article 83*, margin No. 9.

126 *Supra* note 113, *Akayesu* Appeal Judgement, para. 35. See further Ch. Staker, *article 83*, margin Nos. 4–5.

127 *Supra* note 22, *Prosecutor v. Erdemović*, Judgement, para. 16.

128 See further margin No. 13.

129 *Supra* note 113, *Akayesu* Appeal Judgement, para. 17.

130 *Supra* note 176, *Barayagwiza* Review Decision, Separate Opinion of Judge Shahabuddeen, para. 18.

131 See margin No. 20

because the finding of law by the Trial Chamber had no bearing on its verdict). The Appeals Chamber has done so on the ground that the issues in question are of general importance to the proceedings before the Tribunal[132]. Although the Tribunals have no advisory jurisdiction[133], the Appeals Chamber has justified its willingness to decide such questions in part on the basis that the ICTY and ICTR are *ad hoc* and temporary tribunals, and that pronouncements on the law by the Appeals Chamber on such issues at an early stage of the Tribunals' development would "ensure an effective and equal administration of justice" and be consistent with the role of the Appeals Chamber of unifying the law[134]. The Appeals Chamber has however indicated that it will only exercise this power where the legal issue in question is of interest to the legal practice of the Tribunal and has a nexus with the case in question; *furthermore, even where these* requirements are satisfied, the exercise of this power is within the discretion of the Appeals Chamber[135]. It also appears that the Appeals Chamber will only exercise this power where the *legal question concerned* has been raised in accordance with the Rules of Procedure and Evidence (normally by being formally raised by a party as a ground of appeal), and that it is not open to appellants simply to point out errors in the trial judgement as and when they believe they have been identified[136].

c) Principles of precedent

The Statute of the ICC does not state whether decisions of the Appeals Chamber are binding 45
on Trial Chambers, or indeed, whether the Appeals Chamber is bound to follow its own previous decisions on question of law. Article 21 para. 2 of the Statute states only that Court *may* apply "principles and rules of law as interpreted in its previous decisions".

In the ICTY and ICTR, whose Statutes and Rules also make no provision in relation to this question, the Appeals Chamber has concluded that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice. Circumstances justifying *such a departure* from precedent would include cases where the previous decision has been decided on the basis of a wrong legal principle or where a previous decision has been given *per incuriam*. The *Appeals Chamber has further* emphasised that departure from a previous decision will be the exception, and only after the most careful consideration has been given to it by the Appeals Chamber[137]. It has also been said that the duty to follow previous decisions is not a reason for taking leave of the fundamental mission of the Tribunal to apply customary international law[138]. The Appeals Chamber has added that:

> "What is followed in previous decisions is the legal principle (*ratio decidendi*), and the obligation to follow that principle only applies in similar cases, or substantially similar cases. This means less that the *facts are similar or substantially similar*, than that the question raised by the facts in the subsequent case is

132 See *supra* note 7, *Tadić* Appeal Judgement, paras. 241, 247, 281, *supra* note 197, *Celebici* Appeal Judgement, para. 221, *supra* note 196, *Kupreškić* Appeal Judgement, para. 22, *Akayesu* Appeal Judgement, *supra* note113, paras. 16–27; *supra* note 199, *Krnojelac* Appeal Judgement, paras. 6–9.

133 *Supra* note 113, *Akayesu* Appeal Judgement, para. 23.

134 *Ibid.*, paras. 21–22.

135 *Ibid.*, paras. 23–24.

136 *Supra* note 196, *Kupreškić* Appeal Judgement, para. 470.

137 *Supra* note 205, *Aleksovski* Appeal Judgement, paras. 107–109 (and see the discussion at paras. 89–111 generally). See also *supra* note 197, *Furundžija* Appeal Judgement, para. 249; *supra* note 197, *Celebici* Appeal Judgement, paras. 8, 26, 54–55, 84, 117, 121, 129, 136, 150, 174; *supra* note 196, *Kupreškić* Appeal Judgement, paras. 418, 426; *supra* note 113, *Akayesu* Appeal Judgement, fn. 805; *supra* note 204, *Musema* Appeal Judgement, para. 15. See also *supra* note 73, *Rutaganda* Appeal Judgement, para. 26. For an example of a case in which the Appeals Chamber did depart from its own previous case law, see *supra* note 242, *Semanza* Decision, para. 92. For the view that it "should not happen that due to shifting majorities the Appeals Chamber changes its jurisprudence from case to case", see *supra* note 197, *Kvočka* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 107.

138 *Supra* note 242, *Semanza* Decision, Separate Opinion of Judge Shahabuddeen para. 31

the same as the question decided by the legal principle in the previous decision. There is no obligation to follow previous decisions which may be distinguished for one reason or another from the case before the court"[139].

Where previous decisions of the Appeals Chamber are conflicting, the Appeals Chamber has said that it is obliged to determine which decision it will follow, or whether to depart from both decisions for cogent reasons in the interests of justice[140].

46 For this purpose, the Appeals Chamber has also said that there is no reason why interlocutory decisions of the Appeals Chamber should be considered, as a matter of principle, as having any lesser status than a final decision on appeal, since the purpose of an appeal, whether on an interlocutory or on a final basis, is to determine the issues raised with finality[141].

47 The Appeals Chamber of the ICTY has further held that the *ratio decidendi* of the Appeals Chamber's decisions is binding on Trial Chambers[142], and that decisions of Trial Chambers, which are bodies with coordinate jurisdiction, have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive[143]. However, at least one Pre-Trial Chamber of the ICC has shown an inclination to follow a previous decision of a different Pre-Trial Chamber[144].

d) Whether other types of appellate proceedings are possible

48 Article 81, and certain other provisions, provide for appeals only against specified types of decisions[145]. The question arises whether it is possible to appeal against other types of decisions, where no appeal is provided for in the Statute.

49 If the practice of the ICTY and ICTR is a guide, the range of possible appeal proceedings might be expanded by the Rules[146]. The Statutes of each of these Tribunals provide only for appeals by the "Prosecutor" and by "persons convicted by the Trial Chambers". Although the Statutes of these Tribunals do not expressly envisage interlocutory appeals, certain interlocutory appeals are provided for in the Rules of Procedure and Evidence of those Tribunals[147], and the validity of these provisions has always been accepted[148]. The Rules of the Special Court for

139 *Supra* note 205, *Aleksovski* Appeal Judgement, para. 110.

140 *Ibid.*, para. 111; *supra* note 197, *Furundzija* Appeal Judgement, paras. 240–243.

141 *Supra* note 197, *Celebici* Appeal Judgement, para. 122. Compare *supra* note 105, *Kajelijeli* Appeal Judgement, paras. 202-207.

142 *Supra* note 205, *Aleksovski* Appeal Judgement, paras. 112–113. For an example where a decision of a Trial Chamber was overturned on appeal on the ground that the Trial Chamber erred in law in failing to follow an earlier decision of the Appeals Chamber, see *Prosecutor v. Blagojevic et al.*, Case Nos. IT-02-60-AR65 and IT-02-60-AR65.2, Decision on Provisional Release of Vidoje Blagojevic and Dragan Obrenovic, Appeals Chamber, 3 Oct. 2002, paras. 6–8.

143 *Supra* note 205, *Aleksovski* Appeal Judgement, para. 114.

144 *Situation in the Democratic Republic of the Congo*, No. ICC-01/04-135, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-Trial Chamber, 31 Mar. 2006, paras. 17-18.

145 See margin Nos. 2–5.

146 Pursuant to article 15 of the Statute of the ICTY and article 14 of the Statute of the ICTR, the Rules of those Tribunals are made by the judges. Rule 6 of the Rules of each Tribunal further regulates the procedure for adoption of amendments to the Rules by the judges.

147 Rule 54*bis lit.* C ICTY (appeals against interlocutory decisions of a Trial Chamber relating to requests for orders that a State produce documents or information); rule 65 *lit.* D ICTY (appeals against decisions of a Trial Chamber concerning requests for provisional release); rule 72 *lit.* B and C ICTY (interlocutory appeals against decisions of a Trial Chamber on preliminary motions); rule 73 *lit.* B and C ICTY (interlocutory appeals against decisions of a Trial Chamber on other motions). Rule 65 *lit.* D ICTR (appeals against decisions of the Trial Chamber concerning requests for provisional release); rule 72 *lit.* B, C and E ICTR (interlocutory appeals against decisions of a Trial Chamber dismissing an objection based on lack of jurisdiction); Rule 73 *lit.* B and C ICTR (interlocutory appeals against decisions of a Trial Chamber on other motions).

148 *Cf. Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 Oct. 1995 ("*Tadic* Jurisdiction Appeal Decision"), para. 6, in which the

Sierra Leone have gone further, and provide for a Trial Chamber to refer certain preliminary motions to the Appeals Chamber for decision at the pre-trial stage, without any decision on the matter first being given by the Trial Chamber[149]. Furthermore, although the wording of the Statutes of these Tribunals suggests that only appeals by the *parties* are contemplated (*i.e.*, the "Prosecutor" and by "persons convicted by the Trial Chambers"[150]), the Rules of these Tribunals also allow for appeals by certain third parties[151]. Additionally, the Rules and subordinate legislation of those Tribunals enable certain other kinds of appeal or review to be requested by a forum other than the Appeals Chamber[152]. However, as the Rules of the ICC do not provide for any appeals not envisaged by the Statute, the question whether the Rules could expand the types of appellate proceedings available is at this stage moot.

A further question is whether there is any possibility of a decision being appealed, where no such appeal is provided for either in the Statute or the Rules. One judge of the ICTY has expressed the view that: 50

"The law relating to appeals in most national jurisdictions is that no appeal lies unless conferred by statute. The right to appeal a decision is part of substantive law and can only be granted by the law-making body by specific enactment. Where the provision for an appeal or some form of review by a higher forum is not regulated by the statute under which an order is passed, there is usually some omnibus statute providing for appeals in such cases. The courts have no inherent powers to create appellate provisions or acquire jurisdiction where none is granted. Where the law provides for an appeal, the court may, by the adoption of reasonable and proper rules, supply deficiencies in the statutory provisions as to practice. Appellate courts have no jurisdiction over incompetent appeals other than dismiss them. It is thus clear that a tribunal or court cannot assume appellate powers under any concept of inherent jurisdiction or by expanding its jurisdiction through any amendment to its rules"[153]

In another case, a Bench of the Appeals Chamber of the ICTY rejected an application by a detained witness for leave to appeal against a ruling of the Trial Chamber that he be remanded to the authorities of the State which had transferred him to the Tribunal. The Bench of the Appeals Chamber observed that the ICTY had "a limited appellate jurisdiction" which could not be

Appeals Chamber suggested that the higher interest of justice would *not* be served by delaying an appeal against the Trial Chamber's rejection of a challenge to jurisdiction until after the accused had undergone what might then have to be branded an unwarranted trial.

149 Rules of the Special Court for Sierra Leone, Rule 72 *lit.* E and F (as amended in Aug. 2002). The validity of these provisions was upheld by the Appeals Chamber in *Prosecutor v. Norman, Prosecutor v. Kallon* and *Prosecutor v. Gbao*, Case Nos. SCSL-2003-08-PT, SCSL-2003-07-PT, SCSL-2003-09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, Appeals Chamber, 4 Nov. 2003. In that decision, the Appeals Chamber said that Article 20 of the Statute of the Special Court for Sierra Leone "does not purport to be an exhausting or limiting definition of the powers of the Appeals Chamber, which may function in many other respects that are important to the working of the Special Court" (para. 4), and rejected an argument that these provisions violated Article 14.5 of the ICCPR (paras. 18–25).

150 The expression "persons convicted by the Trial Chambers" should not be read as excluding interlocutory appeals by an accused prior to a final judgement of conviction or acquittal: see *Barayagwiza* Review Decision, *supra* note 176, para. 48.

151 Rule 77 *lit.* I and K ICTY (appeals by persons held to be in contempt of the Tribunal); rule 77*bis lit.* G ICTY (appeals by persons held to be in contempt of the Tribunal for failure to pay a fine imposed by the Tribunal); rule 91 *lit.* I ICTY (appeals by persons found to have given false testimony under solemn declaration); rule 108*bis* ICTY (allowing a "State directly affected by an interlocutory decision of a Trial Chamber" to request "review" of the decision by the Appeals Chamber if that decision "concerns issues of general importance relating to the powers of the Tribunal"). Rule 77 *lit.* I and K ICTR (appeals by persons held to be in contempt of the Tribunal); rule 91 *lit.* I ICTR (appeals by persons found to have given false testimony under solemn declaration).

152 Rule 44 *lit.* B ICTY provides for a review by the President of the Tribunal of a decision of the Registrar relating to the admission of a counsel who does not speak either of the two working languages of the Tribunal but who speaks the native language of the suspect or accused. Furthermore, under, for instance, the ICTY's Directive on Assignment of Defence Counsel (IT/73/Rev.10), article 13, a suspect whose request for assignment of counsel has been denied by the Registrar may seek the President's review of the Registrar's decision, and an accused whose request for assignment of counsel has been denied by the Registrar may make a motion to the Chamber before which he or she is due to appear for immediate review of the Registrar's decision. See also, e.g., the ICTR's Directive on Assignment of Defence Counsel, article 12.

153 *Tadic* Jurisdiction Appeal Decision, *supra* note 148, Separate Opinion of Judge Sidhwa, para. 6. See also A.G. Karibi-Whyte, *Appeal Procedures* 640–641 for the view that a right of appeal requires unambiguous legislative authority.

invoked in this case by a non-party, since the relevant provision of the Rules provided only for appeals by parties[154]. Another decision of the Appeals Chamber of the ICTY appears to assume also that prior to the adoption of rule 108*bis* ICTY[155], "a State whose interests were intimately affected by a Decision of a Trial Chamber could not request that Decision to be submitted to appellate review"[156]. In a subsequent case, the Appeals Chamber rejected an application for interlocutory appeal and application for review brought by a State against the decision of a judge to confirm an indictment and issue an arrest warrant, on the ground that such applications by a State did not fall within any of the provisions of the Statute or Rules of the Tribunal[157].

The Appeals Chamber of the Special Court for Sierra Leone has also held that where the rules provide that a party can bring an interlocutory appeal if the Trial Chamber gives leave to do so, the Appeals Chamber has no inherent power to entertain such an interlocutory appeal if the Trial Chamber has refused leave to appeal[158]. In that decision, the Appeals Chamber noted that it could have recourse to the inherent power of the court "when the Rules are silent and such recourse is necessary in order to do justice", but that the inherent jurisdiction "cannot be invoked to circumvent an express Rule"[159].

51 However, on more than one occasion the Appeals Chamber of the ICTY has allowed an appeal in the absence of any statutory provision.

In one case, a defence counsel had been found guilty of contempt of the Tribunal, by the Appeals Chamber ruling in the first instance. Although the Rules at that time made no provision for an appeal against such a decision of the Appeals Chamber, such an appeal was in fact entertained by a differently constituted Appeals Chamber[160]. In its decision on the appeal, the differently constituted Appeals Chamber observed that the "preferred course in this case would have been for the contempt trial to have been initially referred to a Trial Chamber, thereby providing for the possibility of appeal, rather than being heard by the Appeals Chamber, ruling in the first instance"[161]. Nevertheless, it considered that the provisions of the Rules dealing with contempt of the Tribunal were penal in nature, given that contempt was punishable by imprisonment of up to seven years, that article 14 para. 5 of the ICCPR therefore required that a person convicted of contempt have a right of appeal, and that due to the special circumstances of this case, it was therefore appropriate for the Appeals Chamber to consider the merits of the appellant's complaints[162]. However, in a dissenting opinion, one member of the Appeals Chamber said that to allow such an appeal "goes against the plain language of the Statute and Rules", and that the goal of providing an appeal from all convictions for criminal contempt "must be accomplished without wrenching all meaning from the constraints on the jurisdiction of the Appeals Chamber as set out in the Statute and Rules"[163].

154 In the case of *Dragan Opacic*, Case No. IT-95-7-Misc.1, Decision on Application for Leave to Appeal, Bench of the Appeals Chamber, 3 June 1997.

155 See *supra* note 149.

156 *Prosecutor v. Blaskic*, Case No. IT-95-14-AR108bis, Decision on the Admissibility of the Request for Review by the Republic of Croatia of an Interlocutory Decision of a Trial Chamber (Issuance of *Subpoena Duces Tecum*) and Scheduling Order, Appeals Chamber, 29 July 1997, para. 8.

157 *Prosecutor v. Bobetko*, Case Nos. IT-01-62-AR54*bis* and IT-02-62-AR108*bis*, Decision on Challenge by Croatia to Decision and Orders of Confirming Judge, Appeals Chamber, 29 Nov. 2002.

158 *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, Decision on Prosecution Appeal Against the Trial Chamber's Decision on 2 August 2004 Refusing Leave to File an Interlocutory Appeal, Appeals Chamber, 17 Jan. 2005.

159 *Ibid.*, para. 32.

160 *Prosecutor v. Tadic*, Case No. IT-94-1-A-AR77, Appeal Judgement on Allegations of Contempt by Prior Counsel, Appeals Chamber, 27 Feb. 2001.

161 *Ibid.*

162 *Ibid.*

163 *Ibid.*, Separate Opinion of Judge Wald. The Rules of the ICTY and the ICTR were subsequently amended to provide expressly that where a decision on contempt of the Tribunal is given by the Appeals Chamber sitting as a Chamber of first instance, an appeal shall be decided by five different Judges as assigned by the President: see present rule 77 *lit.* K.

In another case, a Trial Chamber had issued a subpoena against a journalist. The journalist filed a motion before the Trial Chamber seeking to have the subpoena set aside, asserting a testimonial privilege for journalists. This motion was rejected by the Trial Chamber. Although there was no provision in the Statute or Rules which allowed the journalist to bring an appeal, the Appeals Chamber permitted the journalist to appeal against the decision, and ultimately allowed the appeal[164].

Two decisions of the ICTR are also of some relevance to this question. In one of these cases, 52
the defence sought to appeal against a decision of the Trial Chamber, requiring the Registrar of the Tribunal to have regard to certain criteria when assigning co-counsel to the accused. The defence sought to rely on the interlocutory appeal provision in rule 72 ICTR, and in the alternative, advanced the theory "that higher courts are vested with an inherent power to review *ultra vires* acts of lower courts". The Appeals Chamber found that the requirements of rule 72 were not satisfied, and added that "the Appellant has not shown good cause to merit consideration by the Appeals Chamber of the question of whether it may entertain the present appeal under the doctrine of inherent powers"[165]. This question thus appears to have been expressly left undecided.

In the other case, the Prosecutor of the ICTR sought to appeal against a decision of a judge, dismissing an indictment that had been presented by the Prosecutor for confirmation[166]. No such appeal was expressly provided for in the Statute or Rules. The Appeals Chamber held that the Statute of the Tribunal did not confer an unlimited and unqualified right of appeal on the Prosecutor, and rejected each of the Prosecutor's arguments why the appeal should be permitted in the circumstances of that case. However, the decision of the Appeals Chamber contained no categorical statement that the only possible appeals are those specifically provided for in the Statute and Rules. The Appeals Chamber did consider that in circumstances where a matter affects the rights of the accused, it would be inconsistent with the principle of "equality of arms" for the Prosecutor to have a greater right of appeal than the defence[167]. The Appeals Chamber also rejected an argument by the Prosecutor that a decision of a confirming judge to dismiss an indictment was analogous to a decision finally disposing of a matter, since in the circumstances of this case, there were other avenues available to the Prosecutor to deal with the adverse effects of the decision[168]. In circumstances where a party has no other possible remedy against a decision of a judge or Trial Chamber, and where the appeal would be consistent with the principle of equality of arms, the argument that an appeal should be permitted even though not provided for in the Statute and Rules may thus not be entirely foreclosed by this decision[169].

164 *Prosecutor v. Brdanin and Talic*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, Appeals Chamber, 11 Dec. 2002. *See also, e.g., Prosecutor v. Milosevic*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, Appeals Chamber, 20 Jan. 2004, paras. 4–5, in which, on an exceptional basis, the Appeals Chamber entertained an interlocutory appeal brought by *amici curiae*, notwithstanding that the Appeals Chamber recognized that "Not being a party to the proceedings, the *amici* are not entitled to use Rule 73 [ICTY] to bring an interlocutory appeal".

165 *Prosecutor v. Nyiramasuhuko and Ntahobali*, Case No. ICTR-97-21-A, Order Dismissing Appeal, Appeals Chamber, 28 Oct. 1998. But see *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-T, Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, Appeals Chamber, 17 Jan. 2005 (finding that in circumstances where the RPE require the Trial Chamber to give leave for the bringing of an interlocutory appeal, the Appeals Chamber has no inherent jurisdiction to hear an interlocutory appeal in the absence of the grant of such leave by the Trial Chamber).

166 *Prosecutor v. Bagosora and 28 Others*, Case No. ICTR 98-37-A, Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment against Théoneste Bagosora and 28 Others, Appeals Chamber, 8 June 1998.

167 *Ibid.*, paras. 34–35.

168 *Ibid.*, paras. 37, 41.

169 See also Ch. Staker, *article 84*, margin No. 12.

c) Reconsideration by the Appeals Chamber of its own final judgements

53 The Appeals Chamber of the ICTY has held that it has an inherent power to reconsider any decision that it has given, whether an interlocutory decision, or a final judgement. This power may be exercised where the Appeals Chamber is persuaded that a clear error of reasoning in the previous judgement has been demonstrated by, for example, a subseqnent decision of the Appeals Chamber itself, the International Court of Justice, the European Court of Human Rights or a senior appellate court within a domestic jurisdiction, or where the previous decision was given *per incuriam*. Whether or not the Appeals Chamber exercises this power is a discretionary matter, and the Appeals Chamber must be persuaded that the judgement sought to be reconsidered has led to an injustice[170]. The Appeals Chamber has said that this power is an aspect of its inherent jurisdiction, deriving from its judicial function, to ensnre that its exercise of the jurisdiction which is expressly given tc it hy the Statute is not frustrated and that its basic judicial functions are safeguarded. The power to reconsider has been held to he necessary to address the prospect of any injustice resulting from the fact that the ICTY has only one level of appeal which is not a *de novo* hearing[171]. However, the Appeals Chamber of the ICTY has warned against "Over-enthusiastic counsel who file frivolous applications for reconsideration"[172]. Additionally, the Appeals Chamber of the ICTY has indicated that it has a power to grant a motion for "clarification" of a decision, but only in exceptional circumstances, for example, where the operative part of the decision is involved, and where the motion does not request a reconsideration of the decision'[173].

170 *Celebici* Sentencing Appeal Judgement, *supra* note 203, para. 49; and also the Separate Opinion of Judge Shahabuddeen, paras. 10–15 (specifying that a "clear error" justifying an exercise of this power would he "something which the court manifestly or obviously overlooked in its reasoning and which is material to the achievement of substantial justice") (but see the Separate Opinion of Judges Meron and Pocar, who considered that it was unnecessary ta decide this question in this case). In relation to the ICC, there is also some doctrinal support for the view that other remedies of "reconsideration" or "review" could be fashioned in the exercise of the Appeals Chamber's inherent jurisdiction: W.A. Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 135 (2001).

171 *Supra* note 202, *Celebici Sentencing Appeal Judgement*, paras. 50–52. See *also supra note 100, Kupreškić* Appeal Judgement, paras 202-207.

172 *Supra* note 203, *Celebici* Sentencing Appeal Judgement, para. 53.

173 *Prosecutor v. Nikolic*, Case No. IT-94-2-AR73, Decision on Motion Requesting Clarification, Appeals Chamber, 6 Aug 2003. But see, *e.g., Prosecutor v. Ljubicic*, Case No IT-95-14-A, Decision on Prosecution's Motion for Clarification of the Appeals Chamber's Decision Dated 4 December 2002, Appeals Chamber, 8 Mar 2004

Article 82
Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:
- **(a) A decision with respect to jurisdiction or admissibility;**
- **(b) A decision granting or denying release of the person being investigated or prosecuted;**
- **(c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;**
- **(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.**

2. A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

Literature:
See article 81.

Contents: margin No.

A. Introduction/General Remarks

The relationship of this article to other provisions of the Statute is considered above[1]. 1

The original ILC Draft Statute provided only for appeals against final judgements of conviction or acquittal and against sentence. Proposals for an additional *provision* dealing with interlocutory appeals had emerged by the 1996 Preparatory Committee[2]. In the 1997 Preparatory Committee Report and in the Zutphen Repon, no such provision was included, and interlocutory appeals were addressed in the proposed article dealing with the functions and powers of the Trial Chamber (which was ultimately adopted as article 64)[3]. In the 1998 Report of the Preparatory Committee, a proposal for this provision was included in the part on "Appeal and Review", with the title "Appeal Against Interlocutory Decisions"[4]. The ultimate deletion of the word "interlocutory" from the title reflects the fact that while most appeals under this article will be 2

1 See Ch. Staker, article 81, margin Nos. 2–6.

2 1996 Preparatory Committee Report II, pp. 239 - 240

3 Preparatory Committee Decisions Aug 1997, p. 31, Zutphen Draft, pp. 111 - 112 (which stated that the Trial Chamber had the power to "rule on any preliminary motions, and such ruling shall not be subject to interlocutory appeal except as provided for in the Rules")

4 Preparatory Committee (Consolidated) Draft, p. 151

taken at an interlocutory stage, some may be taken after final judgement has been given by the Trial Chamber[5].

3 Article 83 para. 1, which *deals with* the powers and procedures of the Appeals Chamber, is expressed to apply to proceedings under article 81, but not to proceedings under article 82[6]. The other provisions of article 83 are not expressed to exclude proceedings under article 82. The provision in article 83 para. 1 that "the Appeals Chamber shall have all the powers of the Trial Chamber"[7] would therefore not apply to interlocutory and other appeals under article 82, leaving the powers of the Appeals Chamber under this article to be governed solely by the Rules[8].

4 In addition to the decisions listed in this article, appeals can be brought under this provision against decisions of the Pre-Trial Chamber *under article 18 para. 2*[9]. Article 19 para. 6 further provides that appeals may be brought in accordance with article 82 against decisions of a Pre-Trial Chamber or Trial Chamber with respect to jurisdiction or admissibility[10].

B. Analysis and interpretation of elements

1. Paragraph 1

5 Unlike article 81, which provides for appeals by a "convicted person" or the Prosecutor, article 82 para. 1 provides for appeals by "*either party*". The expression "party" is not defined in the Statute. In rule 2 *lit.* A ICTY, the term "parties" is defined as "The Prosecutor and the Defence"[11]. Thus it has been held by the ICTY that a provision in the Statute conferring a right of appeal on a "party" cannot be invoked by a witness[12], and the expression "party" would similarly appear to exclude, for instance, a State[13] or *amicus curiae*[14]. On one view, in the ICC

5 *E.g.*, an appeal under article 82 para. 4.

6 See article 83 para. 1.

7 Article 83 para. 1.

8 See rules 149, 154–158, which apply to appeals under this article. Rule 158 para. 1 provides that "An Appeals Chamber which considers an appeal referred to in this section may confirm, reverse or amend the decision appealed". *See*, for instance, *Prosecutor v Lubanga*, Case No. ICC-01/04-01/06-774, 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", Appeals Chamber, 14 Dec 2006, paras. 64-66, in which the Appeals Chamber reversed an interlocutory decision and directed the Pre-Trial Chamber to decide the matter anew. The Appeals Chamber of the ICTY has said that "*in matters of* provisional release as in all other matters, where the Appeals Chamber finds an error in a Trial Chamber decision, and where it is sufficiently apprised of the issues in the case, the Appeals Chamber is free to substitute its own decision for that of the Trial Chamber": *Prosecutor v Sainovic and Ojdanic*, Case No. IT-99-37-AR65, Decision on Motion for Modification of Decision on Provisional Release and Motion to Admit Additional Evidence, Appeals Chamber, 12 Dec. 2002.

9 See article 18 para. 4. See further Ch. Staker, article 81, margin No. 4.

10 See further margin No. 8.

11 The present version of the Rules of the ICTY is IT/32/Rev.37 (6 Apr. 2006). Prior to November 1999, its rule 2 *lit.* A defined a "party" as "The Prosecutor or the accused" (*see IT/32/Rev.16, 2 July 1999*), as does the present rule 2 *lit.* A ICTR.

12 In the case of *Dragan Opacic*, Case No. IT-95-7-Misc.1, Decision on Application for Leave to Appeal, Bench of the Appeals Chamber, 3 June 1997.

13 *Prosecutor v. Blaskic*, Case No. IT-95-14-AR108*bis*, Decision on the Admissibility of the Request for Review by the Republic of Croatia *of an Interlocutory* Decision of a Trial Chamber (Issuance of *Subpoenae Duces Tecum*) and Scheduling Order, Appeals Chamber, 29 July 1997, para. 6; *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-AR108*bis*, Decision on the Request of the Republic of Croatia for Review of a Binding Order, Appeals Chamber, 9 Sept. 1999, para. 17.

14 But see *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73.6, Decision on the *Interlocutory Appeal* by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, Appeals Chamber, 20 Jan. 2004, in which the Appeals Chamber noted (para. 4) that "Not being a party to the proceedings, the *amici* are not entitled to use Rule 73 to bring an interlocutory appeal", but in which an interlocutory appeal brought by *amici curiae* was allowed in the particular circumstances of that case.

Statute this expression would be similarly confined to the Prosecutor and the defence[15]. This would explain the need for the separate provisions in *article* 18 para. 4 and article 19 para. 6, which also enable a *State* to appeal certain decisions, and the need for article 82 para. 4, allowing for certain appeals by third parties.

The chapeau of this article, in referring to "*decisions*", presumably contemplates only 6 decisions of the Court itself (whether by a single judge, a Pre-Trial Chamber or a Trial Chamber). Decisions by other authorities provided for in the Statute (such as a decision of a "competent authority" of a custodial State under article 59) would thus not be subject to appeal to the Appeals Chamber under this provision.

The decisions appealable under *subparagraph (a)* would be primarily those under Part 2 of 7 the Statute (articles 5–21). Appeals are expressly provided for in articles 18 para. 4 and 19 para. 6. Other decisions in that Part appealable under this provision may include those under article 15 para. 4 and article 20, and, for instance, decisions on whether a particular investigation or prosecution falls within the terms of a Security Council resolution under article 13 (b) or article 16[16].

However, subparagraph (a) is not necessarily confined to decisions taken under specific 8 provisions of Part 2. The ICTY has held that a provision in its Rules allowing appeals on the ground of lack of jurisdiction extends to an appeal alleging that the very establishment of the Tribunal was illegal. The Appeals Chamber said that such a challenge "result[s], in final analysis, in an assessment of the legal capability of the International Tribunal to try ... [the] case" and asked "[w]hat is this, if not in the end a question of jurisdiction?"[17].

Similarly, the concept of "admissibility" would probably also extend to broader doctrines of "political questions" or "non-justiciable disputes", should any of the parties seek to raise them, although the Appeals Chamber of the ICTY in this decision appeared to consider it unlikely that such doctrines would prevent examination of an issue by that Tribunal[18].

The decisions appealable under *subparagraph (b)* would be primarily those under article 60. 9 In respect of decisions under article 81 para. 3 (c), that provision independently provides for a

15 However, this is certainly not clear: *cf.* H. Brady, *Appeal*, in: Roy S. Lee (ed.), THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 593–596 (2001); R. Roth/M. Henzelin, *The Appeal Procedure of the ICC*, in: Antonio Cassese/Paola Gaeta/John R.W.D. Jones (eds.), THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1550–1551 (2002); G. Hafner, *The Status of Third States before the International Criminal Court*, in: M. Politi/G. Nesi (eds.), THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 239 at 251 (2001). Article 50 para. 3 and article 72 para. 4 make provision for States to intervene in proceedings, without specifying whether they thereby become "parties" for the purposes of article 82.

16 But see *supra* note 15, H. Brady, *Appeal* 578–579, indicating that it is uncertain whether this provision extends to decisions under article 53 para. 3 (a) and article 15 para. 4, and *c.f. Prosecutor v. Kvocic*, Case No. IT-95-14-R77.4-AR72.1, Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal, Appeals Chamber, 2 Mar. 2006 (holding that a challenge to jurisdiction in contempt of court proceedings is not a challenge to "jurisdiction" for the purposes of Rule 72 of the ICTY Rules).

17 *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 Oct. 1995 ("*Tadic* Jurisdiction Appeal Decision"), para. 6 (see also para. 12). To similar effect, see *Prosecutor v. Kallon, Prosecutor v. Norman and Prosecutor v. Kamara*, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-14-AR72(E), SCSL-2004-16-AR72(E), Decision on Constitutionality and Lack of Jurisdiction, Appeals Chamber, 13 Mar. 2004. See also *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence), Appeals Chamber, 13 Mar. 2004, para. 5, in which the Appeals Chamber of the Special Court for Sierra Leone said that "[n]otwithstanding that doubt may legitimately be entertained whether an allegation of real likelihood of bias is a challenge to the jurisdiction of the Court, the ground of the objection raised by the applicant's motion that the Court lacks judicial independence is sufficiently fundamental to make it imprudent to deny a hearing of the Preliminary Motion on the merits and not to determine the issues raised by the Preliminary Motion".

18 *Supra* note 17, *Tadic* Jurisdiction Appeal Decision, paras. 23–25 (holding that the Tribunal could examine the validity of a resolution of the Security Council, at least for the purpose of determining whether the Tribunal had jurisdiction in a case). See also Separate Opinion of Judge Sidhwa, para. 34. However, Judge Li, dissenting, considered that the Tribunal was never given the power to review the legality of decisions of the Security Council.

means of appeal. It is more questionable whether decisions under article 110 would be included under subparagraph (b), since these are not strictly speaking decisions "granting or denying release", nor are they decisions taken in respect of a person "being investigated or prosecuted". However, the Statute would provide no other possibility of appeal against such decisions if they were excluded from this provision[19].

10 It is clear enough to which decisions *subparagraph (c)* relates. Curiously, article 56 para. 3 contains its own provision for an appeal, under which a right of appeal is given only to the Prosecutor, whereas under article 82 para. 1 (c), an appeal may be brought by "either party". There is thus both duplication and ambiguity[20].

11 *Subparagraph (d)* confers a power on a Pre-Trial Chamber or Trial Chamber to allow an interlocutory appeal to be taken to the Appeals Chamber on any type of interlocutory decision if certain criteria are met[21]. Unlike the case of an appeal under subparagraphs (a)-(c), an interlocutory appeal under subparagraph (d) can be brought only with the leave of the Chamber which rendered the interlocutory decision against which it is sought to appeal[22]. The existing case law of the Pre-Trial Chambers of the Court indicates that an application to appeal under this provision must be examined in the light of three principles, namely: "the restrictive character of the remedy provided for in article 82 (1) (d) of the Statute; the need for the applicant to satisfy the Chamber as to the existence of specific requirements stipulated by this provision; [and] the irrelevance of or non-necessity at this stage for the Chamber to address arguments relating to the merit or substance of the appeal"[23]. In particular, this case law has emphasized that interlocutory appeals are meant to be admissible only under limited and very specific circumstances, and that it is insufficient for leave to appeal that the proposed appeal raises an issue of general interest or importance[24]. Under subparagraph (d), an applicant for leave to appeal must meet *both* of two concurrent criteria. The first criterion is that the decision sought to be appealed involves an issue that would significantly affect *either* (1) the fair and expeditious conduct of the proceedings (in the sense that the issue significantly affects the proceedings both in terms of fairness *and* in terms of expeditiousness) *or* (2) the outcome of the trial. The second criterion is that an immediate resolution of such issue by the Appeals Chamber may materially advance the proceedings. If the conditions of the first criterion are not met, a Chamber considering an application for leave to appeal under this subparagraph need not examine the second criterion[25].

19 But see Ch. Staker, article 81, margin Nos 48–52.

20 *Supra* note 15, H. Brady, *Appeal* 579–580, considers it clear that only the Prosecutor may appeal under this sub-paragraph.

21 In the ICTY and ICTR, the general provisions dealing with interlocutory appeals against decisions of the Trial Chambers on motions of the parties is Rule 73 *bis* B of the ICTY and ICTR Rules. In April 2001, Rule 73 of the ICTY Rules was changed, to make the criteria for interlocutory appeals under this provision similar to those articulated in article 82 para. 1 (d) of the ICC Statute. A similar amendment was made to Rule 73 of the ICTR Rules in May 2003. The case law of the ICTY and ICTR on these provisions, as amended, may be of some relevance in the interpretation and application of article 82 para. 1 (d).

22 The Appeals Chamber has held that the leave of the Trial Chamber "constitutes the definitive element for the genesis of the right to appeal": *Situation in the Democratic Republic of the Congo*, Case No. ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, Appeals Chamber, 13 July 2006 ("Judgment Case No. ICC-01/04-168"), para. 20. See also rules 154 and 155 of the Rules.

23 *Situation in the Democratic Republic of the Congo*, No. ICC-01/04-135, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 Jan. 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-Trial Chamber, 31 Mar. 2006 ("Decision No. ICC-01/04-135"), para. 19 (and see also paras. 25, 29-31); *Situation in Uganda*, No. ICC-02/04-01/05-20-US-Exp, Decision on Prosecutor's Application for Leave to Appeal in Part Pre- Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, Pre-Trial Chamber, 20 Oct. 2005 ("Decision No. ICC-02/04-01/05-20-US-Exp"), para. 15 (and see also paras. 22-23).

24 *Supra* note 23, Decision No. ICC-01/04-135, paras. 21-24; *supra* note 23, Decision No. ICC-02/04-01/05-20-US-Exp, paras. 16-18, 55.

25 *Supra* note 22, Judgment No. ICC-01/04-168, *supra* note 23, paras. 6-19;Decision No. ICC-01/04-135, paras. 25-28; *supra* note 23, Decition No. ICC-02/04-01/05-20-US-Exp, paras. 20-21 (and see also *Situation in the*

In many cases, interlocutory appeals will be disruptive of the proceedings, particularly if there are many issues on which parties are seeking such appeals, and particularly once trial has actually commenced (although this problem is mitigated to a degree by paragraph 3 of this article). In many national jurisdictions, interlocutory appeals may be unknown or rare, and parties may be required to defer any appellate proceedings until after final judgement at first instance, by which time, depending on the course that the proceedings have taken, many issues may have become moot or irrelevant. However, in some cases, early resolution of a point of law may render unnecessary a lengthy and costly trial on certain allegations of fact. It may also avoid a situation in which a complex case needs to be retried as a result of the original conviction being overturned in a post-judgement appeal on an issue that might have been dealt with in an interlocutory appeal during the trial[26]. In the practice of the ICTY and ICTR, interlocutory appeals have frequently been entertained, although the criteria for determining whether interlocutory appeals will be allowed have been reformulated over time in a variety of amendments to the relevant provisions of the Rules of these Tribunals. The tone of the existing case law of the Court suggests that interlocutory appeals will be very much the exception[27], although the case law so far is limited.

II. Paragraph 2

12 This paragraph (like articles 18 para. 4 and 56 para. 3 (b)) provides for the relevant appeals to be heard "on an expedited basis". The procedure for "expedited" appeals is not spelled out in the Statute, leaving this to be governed by the Rules[28].

Democratic Republic of the Congo, No. ICC-01/04-14, Decision on the Prosecutor's Application for Leave to Appeal, Pre-Trial Chamber, 14 Mar. 2005). Under subparagraph (d), only an "issue" may form the subject-matter of an appealable decision. "Issue" being defined for this purpose as "an identifiable subject or topic requiring a decision for resolution, not merely a question over which there is disagreement or conflicting opinion", or a "subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination" (*supra* note 22, Judgment No. ICC-01/04-168, para. 9). As to whether a decision affects the *fairness* of the proceedings, it has been said that fairness includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims; and that, at the investigation phase of a situation, fairness to the Prosecutor means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in article 54 (*supra* note 23, Decision No. ICC-01/04-135, paras. 38-39, 43, see also *supra* note 23, Decision No. ICC-02/04-01/05-20-US-Exp, para. 31). It appears that the burden is on the applicant for leave to appeal to produce any necessary evidence to establish that the fairness of the proceedings would be significantly affected by the decision (*supra* note 23, Decision No. ICC-01/04-135, paras. 44, 51), and that it is insufficient to cite merely hypothetical examples of how the fairness of the proceedings may be affected (*ibid.*, para. 48, 55). See also generally *supra* note 22, Judgment No. ICC-01/04-168, para. 11. As to whether a decision affects the *expeditious conduct* of the proceedings, it has been suggested that this will be the case if failure to provide for an immediate resolution of the issue at stake by the Appeals Chamber would entail the risk that lengthy and costly trial activities are nullified at a later stage (*supra* note 23, Decision No. ICC-02/04-01/05-20-US-Exp, para. 36 (see also para. 41)). As to whether an issues is one that may affect the *outcome of the trial*, it has been said that this expression does not encompass every issue that may influence the course of the proceedings in general terms, and that only those issues having a bearing on the Trial Chamber's decision to convict or to acquit are of relevance in this context (*ibid.*, para. 48). As to whether an issue is one for which an immediate resolution by the Appeals Chamber may *materially advance the proceedings*, it has been said that there must be a specific link between the immediate resolution of the issue at stake and the impact on the *current* proceedings, as opposed to merely a potential impact on future proceedings (*ibid.*, paras. 52-55). See also generally *supra* note 22, Judgment No. ICC-01/04-168, paras. 14-19.

26 See, *e.g.*, *Prosecutor v. Popović et al.*, Case Nos. IT-02-57-PT, IT-02-58-PT, IT-02-63-PT, IT-02-64-PT, IT-04-80-PT, IT-05-86-PT, Decision on Motion for Certification of Joinder Decision for Interlocutory Appeal, Trial Chamber, 6 Oct. 2005.

27 Supra note 23, Decision No. ICC-02/04-01/05-20-US-Exp, paras. 16-18.

28 Short time limits are imposed for such appeals under rules 154 and 155. Rule 156 provides that such appeals shall be in writing unless the Appeals Chamber decides to convene a hearing, and that the appeal shall be heard "as expeditiously as possible".

III. Paragraph 3

13 Unlike an appeal against final judgement or sentence[29], the general rule is that an interlocutory appeal (or other appeal under article 82) does not have suspensive effect. Thus, unless the Appeals Chamber otherwise orders, proceedings before the Pre-Trial Chamber or Trial Chamber may continue uninterrupted while an interlocutory appeal is pending on an issue in that case. While under this paragraph it is for the Appeals Chamber to determine whether to suspend the proceedings below, it would presumably also be possible for the Pre-Trial Chamber or Trial Chamber to adjourn the proceedings before it, to await the outcome of the appeal, if it considered this convenient.

IV. Paragraph 4

14 Although this provision only refers to an appeal against an "order for reparations", presumably it would also be possible for a legal representative of the victims to appeal against a decision refusing to make an order for reparations. This provision confers no right of appeal on the prosecution in relation to such orders.

C. Special Remarks

15 Article 82 is expressed to empower the Appeals Chamber to entertain appeals against certain decision of the Pre-Trial Chambers and Appeal Chambers. Article 82 is not expressed to give the Appeals Chamber any general power to supervise or intervene in ongoing proceedings before a Pre-Trial Chamber or Trial Chamber. The Appeals Chamber has for instance held that it does not have the power to entertain an application to stay all proceedings pending before another Chamber of the Court to enable the assignment of new counsel[30].

[29] See Ch. Staker, article 81, margin Nos. 14–17.

[30] *Prosecutor v Lubanga*, Case No. ICC-01/04-01/06-844, Reasons for "Decision of the Appeals Chamber on the Défence application 'Demande de suspension de toute action ou procédure afin de permettre la désignation d'un nouveau Conseil de la Défense' filed on 20 February 2007" issued on 23 February 2007, Appeals Chamber, 9 May 2007.

Article 83
Proceedings on appeal

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 judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement 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 judgement in the absence of the person acquitted or convicted.

Literature:
See article 81.

Contents: margin No.

A. Introduction/General Remarks

The relationship of this article to other provisions of the Statute is considered above[1]. 1

B. Analysis and interpretation of elements

I. Paragraph 1

This provision is expressed not to apply to proceedings under article 82[2] 2

The main provision of the Statute dealing with the powers of the Trial Chamber is article 64. 3 However, numerous other provisions confer additional powers, as do the Rules. The Appeals Chamber thus has, for instance, all the same powers as the Trial Chamber to hear witnesses and

[1] See Ch. Staker, *article 81*, margin Nos. 2–6.

[2] See Ch. Staker, *article 81*, margin No. 3.

receive other evidence[3]. This does not mean, though, that the Appeals Chamber would conduct proceedings in the nature of a retrial[4]. The Appeals Chamber of the ICTY has held that in addition to the powers conferred on it by the Statute and the Rules of Procedure and Evidence, it also has an inherent power, deriving from its judicial function, to control its proceedings in such a way as to ensure that justice is done[5].

II. Paragraph 2

4 The ILC envisaged that a remedy on appeal would not be granted in relation to every error at the trial, but rather, would be confined to cases where the error was "a significant element in the decision taken"[6]. The ILC added that "[t]he Court will – like national appellate courts – necessarily have to exercise a certain discretion in these matters, with any doubt being resolved in favour of the convicted person"[7]. The provision as finally adopted permits the Appeals Chamber to allow an appeal in either of two circumstances, namely where the proceedings appealed from were "unfair in a way that affected the reliability" of the decision or sentence, or where the decision or sentence was "materially affected" by a relevant error. The content of these formulations will be a matter to be developed more precisely in the jurisprudence of the Court. The Appeals Chamber of the ICTY has for instance held that in the case of an error of fact, the appellant must establish that the error was critical to the verdict reached by the Trial Chamber, thereby resulting in a "grossly unfair outcome", or a "flagrant injustice", for instance, where an accused is convicted despite a lack of evidence on an essential element of the crime[8]. Similarly, in the case of an error of law, it has said that the party alleging an error of law must identify the alleged error and explain how the error invalidates the decision, and that an allegation of an error of law which has no chance of resulting in an impugned decision being quashed or revised may be rejected on that ground[9]. However, even if an appellant's arguments are insufficient to support the contention of an error, the Appeals Chamber may conclude for other reasons that there has been an error of law[10].

5 Although the wording of the chapeau of this paragraph may on one view be broader than that of article 81 paras. 1 and 2, it should not be read as expanding the possible grounds of appeal[11]. It will normally only be after an appeal has been brought under article 81 paras. 1 and 2, and has been heard by the Appeals Chamber, that there will be any need for the Appeals Chamber to

3 See also rule 149, which supplements this paragraph by providing that Parts 5 and 6 of the Statute, and rules governing proceedings and admission of evidence in the Pre-Trial and Trial Chambers, shall apply *mutatis mutandis* to proceedings in the Appeals Chamber.

4 See Ch. Staker, *article 81*, margin Nos. 20–22.

5 *Prosecutor v. Delalic et al. (Celebici case)*, Case No. IT-96-21-Abis, Judgement on Sentence Appeal, Appeals Chamber, 8 Apr. 2003 ("*Celebici* Sentencing Appeal Judgement"), paras. 16–19, 50, noting that this inherent power should not be exercised where any of the parties is thereby prejudiced.

6 1994 ILC Draft Statute, p. 127.

7 *Ibid.*

8 See, *e.g.*, *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-A, Appeal Judgement, Appeals Chamber, 23 Oct. 2001, para. 29. See also *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, Judgement, Appeals Chamber, 21 July 2000, para. 37; *Prosecutor v. Kunarac et al.*, Case Nos. IT-96-23 and IT-96-23/1-A, Judgement, Appeals Chamber, 12 June 2002, para. 39; *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement, Appeals Chamber, 17 Sep. 2003 ("*Krnojelac* Appeal Judgement"), para. 13; *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgement, Appeals Chamber, 25 Feb. 2004, para. 8; *Prosecutor v. Kvocka et al.*, Case No. IT-98-30/1-A, Judgement, Appeals Chamber, 28 Feb. 2005 ("*Kvocka* Appeal Judgement"), para. 18.

9 See, for instance, *supra* note 8, *Krnojelac* Appeal Judgement, para. 10; *supra* note 8, *Kvocka* Appeal Judgement, para. 16.

10 *Prosecutor v. Stakic*, Case No. IT-97-24-A, Judgement, Appeals Chamber, 22 Mar. 2006, para. 8.

11 But see Ch. Staker, *article 81*, margin No. 12. *Cf.* H. Brady, *Appeal*, in: R. S. Lee (ed.), THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 576 fn. 5 and 577 fn. 11 (2001), for the view that article 83 para. 2 broadens the grounds of appeal, in relation to an appeal against sentence under article 81 para. 2 at least.

consider whether a remedy can be granted under article 82 para. 2[12]. Thus, the granting of a remedy on appeal will normally depend on the requirements of both articles being satisfied.

This provision allows the Appeals Chamber not merely to reverse the decision or sentence of 6
the Trial Chamber, but also to amend it. Thus, if a conviction or acquittal is overturned on appeal, the Appeals Chamber has the option of substituting its own findings and verdict for those of the Trial Chamber. Alternatively, it may order a new trial under subparagraph 2 (b). In the ILC Draft Statute, the Appeals Chamber was not empowered to reverse or amend an acquittal by the Trial Chamber, but could only annul the decision of acquittal as a prelude to a new trial[13]. Under the provision as finally adopted, the Appeals Chamber can itself substitute a guilty verdict for an acquittal, but only where an appeal for that purpose is brought by the Prosecutor. Presumably, the Appeals Chamber could in certain circumstances also amend a conviction pronounced by a Trial Chamber by substituting a conviction for a different crime[14].

This paragraph does not spell out the principles for determining which of the possible 7
courses of action under this paragraph should be adopted by the Appeals Chamber in the event of a successful appeal. If, following the decision on appeal, there is no need to determine additional facts in order to reach a final verdict, it may be appropriate for the Appeals Chamber itself to amend the Trial Chamber's judgement[15]. Similarly, if as a result of the appeal, the final verdict depends only on one or more narrow issues of fact, it may be appropriate for the Appeals Chamber to use the mechanism available under the second last sentence of this paragraph to remand those issues of fact back to the Trial Chamber[16]. If wide-ranging new fact-finding is necessary, a new trial may be more appropriate. If the Appeals Chamber reverses a conviction of a person who pleaded guilty on the ground that the guilty plea was not valid, the remedy would be to remit the case to a different Trial Chamber to give the appellant the opportunity to replead[17].

Although this provision enables the Appeals Chamber itself to determine issues of fact, it may in practice be cautious in exercising this power. The Statute envisages that trial proceedings will be held before the Trial Chambers, not the Appeals Chamber[18]. Furthermore, for the

12 However, the Appeals Chamber of the ICTY has suggested that in cases where, during the appellate proceedings, a party presents substantial amounts of new evidence which could have been a decisive factor in reaching the decision at trial, the Appeals Chamber might order a new trial without first conducting any hearing or giving any judgement on the merits of the appeal: see *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Scheduling Order, Appeals Chamber, 31 Oct. 2002; *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Decision on Evidence, Appeals Chamber, 31 Oct. 2003, in which the Appeals Chamber said that "... Rule 117(C) of the Rules [of the ICTY] provides that 'in appropriate circumstances the Appeals Chamber may order that the accused be retried according to law'; ... the decision whether to retain a case or to send it back for a re-trial lies within the discretion of the Appeals Chamber, in light of the circumstances of the case; and ... the interests of justice must be considered in such a decision".

13 *Supra* note 6, p. 126.

14 For instance, where a Trial Chamber convicts an accused of a lesser crime than the one with which he or she was charged (as to which, see *Prosecutor v. Delalic et al. (Celebici case)*, Case No. IT-96-21-T, Judgement, Trial Chamber, 16 Nov. 1998, para. 866), the Appeals Chamber might in the event of a successful prosecution appeal substitute a conviction for the original charge in the indictment. Conversely, where the accused was convicted by the Trial Chamber of the crime charged, the Appeals Chamber might in the event of a defence appeal substitute a conviction for a lesser-included offence.

15 An example would be where the Appeals Chamber determines that on the facts as found by the Trial Chamber, all of the elements of the crime charged were satisfied, and that the Trial Chamber therefore erred in law in acquitting the accused. In such a case, the Appeals Chamber could simply substitute a conviction for the acquittal.

16 Where limited issues are remanded to the Trial Chamber, the Trial Chamber has no power to go beyond determining those limited issues, and cannot conduct a new trial: *supra* note 5, *Celebici* Sentencing Appeal Judgement, para. 17.

17 *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Judgement, Appeals Chamber, 7 Oct. 1997.

18 For instance, suggestions made by the United States of America in 1998 for the Rules of Procedure and Evidence of the ICTY observed that: "In most cases where further fact findings need to be made, it will be appropriate to permit the Trial Chamber which originally considered the case (and which has seen the demeanor of the witnesses) to carry out the fact-finding process. However, the Appeals Chamber has been given the power to hear evidence itself for the rare cases in which this would be more efficient". [T/14, 17

Appeals Chamber itself to make findings of fact at first instance would deprive the defence of any possibility of appeal against those findings, which could be regarded as contrary to article 14 para. 5 of the ICCPR, to which the Statute is intended to give effect[19].

8 *The Appeals Chamber of the ICTY has indicated that where it is in the interests of justice to* do so, it can find that the Trial Chamber erred in acquitting the accused on the ground that it did, but without either substituting a conviction or ordering a new trial[20].

9 Article 78 para. 3 provides that where a person is convicted of more than one crime, the Trial Chamber shall pronounce a separate sentence for each crime, as well as a joint sentence specifying the total period of imprisonment. In such cases, where one or more convictions are overturned on appeal, but other convictions stand, it may be necessary to determine whether this has any impact on the joint sentence. Conversely, where the Appeals Chamber reverses acquittals pronounced by the Trial Chamber for one or more crimes, it will be necessary to determine the sentence for each of those crimes, as well as to consider whether these additional convictions have any impact on the joint sentence. Neither article 81, nor article 83 makes clear whether in such situations the Appeals Chamber may itself amend the sentence, or whether it should remit that matter to a Trial Chamber for further sentencing proceedings. In the ICTY and ICTR, there are precedents for both courses of action[21]. The wording of sub-paragraph (a) suggests that in this situation, the Appeals Chamber should itself revise the sentence, rather than to remit the question of sentencing to a Trial Chamber, although this is not entirely clear. The Appeals Chamber may also decide that its amendments to the Trial Chamber's verdict would have no effect on the sentence imposed[22].

III. Paragraph 3

10 See above, article 81, margin Nos. 33–41.

IV. Paragraph 4

11 The ILC Draft Statute did not provide for dissenting or separate opinions in the Appeals Chamber[23]. While some members of the ILC considered the possibility of dissenting or separate opinions "essential with respect to appellate decisions which deal with important questions of substantive and procedural law"[24], the majority did not agree, apparently partly out of concern that they could undermine the authority of the Court and its judgements[25]. Differences of

Nov. 1993, reproduced in: V. Morris/M.P. Scharf, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 509, 556, Vol. II (1995)). See, however, Ch. Staker, *article 81*, margin Nos. 30, 34 and 36.

19 See Ch. Staker, *article 81*, margin No. 1. See also the observations of Judge Sidhwa in *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Separate Opinion of Judge Sidhwa, Appeals Chamber, 2 Oct. 1995, paras. 121–123 and 124 (4).

20 *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, Appeals Chamber, 24 Mar. 2000 ("*Aleksovski* Appeal Judgement"), paras. 153–154; *Prosecutor v. Jelisic*, Case No. IT-95-10-A, Judgement, Appeals Chamber, 5 July 2001, paras. 73–77.

21 Sentencing was remitted to a Trial Chamber in *Prosecutor v. Delalic et al. (Celebici case)*, Case No. IT-96-21-A, Judgment, Appeals Chamber, 20 Feb. 2001, paras. 710–713 and disposition, paras. 2–4; *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgement, Appeals Chamber, 15 July 1999, paras. 27–28, 327 (3) and (6), and see also *supra* note 5, *Celebici* Sentencing Appeal Judgement, para. 3. Examples of where the Appeals Chamber itself revised the sentence include *Prosecutor v. Krstic*, Case No. IT-98-33-A, Judgement, Appeals Chamber, 19 Apr. 2004, para. 266; *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004, para. 680.

22 See, for example, *supra* note 20, *Aleksovski* Appeal Judgement, paras. 172–173; *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34-A, Judgement, Appeals Chamber, 3 May 2006, para. 632.

23 *Supra* note 6.

24 *Ibid.*

25 *Ibid.*, pp. 122, 127.

opinion were also reflected in the 1996 Preparatory Committee Report[26]. The principle of majority decisions was subsequently accepted, although the 1998 Preparatory Commission Report included an additional requirement in square brackets that the judges "shall attempt to achieve unanimity", failing which a majority vote would be taken[27]. This requirement was ultimately retained for Trial Chambers (article 74 para. 3), but in cases where there is no unanimity the Trial Chamber must still issue only one decision which contains the views of both the majority and the minority (article 74 para. 5). Article 83 para. 4 imposes a similar requirement on the Appeals Chamber, but adds that a judge of the Appeals Chamber may deliver a separate or dissenting opinion on a *question of law* (as opposed to questions of fact)[28].

V. Paragraph 5

This paragraph can be contrasted with article 76 para. 4, which provides that the sentence of 12
the Trial Chamber shall be pronounced "wherever possible, in the presence of the accused". There is thus no impediment to either a sentence of a Trial Chamber or a judgement on appeal being pronounced in the absence of an accused who, for instance, has escaped from the Court's custody. On the other hand, in a case where the accused is temporarily prevented from attending proceedings, for instance through illness, *article 76 para. 4 would envisage an adjournment until* the accused is able to be present. Under article 83 para. 5, there would be no requirement for any delay in the giving of judgement on appeal in such circumstances.

26 1996 Preparatory Committee Report I, para. 297.

27 Preparatory Committee (Consolidated) Draft, p. 132.

28 See H. Brady/M. Jennings, *Appeal and Revision*, in: R.S. Lee (ed.), THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 294 at 301 (2001).

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36

THE APPEAL PROCEDURE OF THE ICC

Robert Roth and Marc Henzelin*

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.[1] 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

* Translated by Rosemary Williams.

[1] 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.

states that 'the International Military Tribunal . . . [was established] for the just *and prompt* trial and punishment of the major war criminals'.[2]

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.[3] However, in the same year the Committee also decided that it should be possible to review cases if fresh evidence came to light.[4]

In 1953 the Committee of the General Assembly reiterated its opinion that no appeals should be allowed.[5]

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.[6]

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:

> ICTY Article 25, ICTR Article 24 Appellate proceedings.
> 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.

[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) 53 *et seq.*

[3] Report of the 1951 Committee on International Criminal Jurisdiction, Off. Doc., 7th Sess., Supp. No. 11 (A/2136), No. 159.

[4] Report of the 1951 Committee on International Criminal Jurisdiction, Off. Doc., 7th Sess., Supp. No. 11 (A/2136), No. 164.

[5] Report of the 1953 Committee on International Criminal Jurisdiction, Off. Doc., 9th Sess., Supp. No. 12 (A/2645), No. 159.

[6] Report of the International Law Commission on the work of its forty-sixth session, A/CN.4/SER.A/1994/Add.1, Vols. I and II.

> 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.[7] 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 *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.'[8]

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.[9] 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).

[7] 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 on 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.

[8] Report of the International Law Commission to the General Assembly on the work of its forty-sixth session, A/CN.4/SER.A/1994/Add.1, Vol. II, p. 61.

[9] PCNICC/1999/DP.1 and 2.

4483

II. The Content of Articles 81 *et seq.*: General Remarks

Appeals procedures are currently undergoing revision in a number of countries.[10] 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.[11]

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 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).

[10] Cf. A. Eser, 'Entwicklung des Strafverfahrensrechts in Europa', 108 *Zs. für die Strafrechtswissenschaft* (1996) at 126, and a comparative study by H. Becker and J. Kinzig, 'Rechtsmittel im Strafrecht', 112 *Zs für Strafrechtswissenschaft* (2000) 614.

[11] For an overview, see J. Pradel, *Droit pénal comparé* (1995), No. 436.

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).[12] The ACHR states the matter most succinctly:[13] 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.[14] This seems logical enough, albeit debatable in certain cases'[15]—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

[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 *Delcourt v. Belgium*, ECHR (1970), Series A, No. 11, 25; *Monnell 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.

[15] Cf. S. Trechsel, 'Das verflixte Siebente. Bemerkungen zum 7. Zusatzprotokoll zur EMRK' in M. Nowak, D. Steurer, and H. Tretter (eds.), *Progress in the Spirit of Human Rights: Festschrift für Felix Ermacora* (1988) at 202–203.

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,[16] 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'.[17] 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',[18] 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,[19] 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.[20] 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

[16] Cf. UN-HRC *Salgar de Montejo*, of 14 March 1982, in 13 *HRLJ* (1982) 166; M. Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary* (1993) Art. 14, No. 67.

[17] UN-HRC *Salgar de Montejo*, *supra* note 16, No. 10.4.

[18] *Sunday Times v. United Kingdom*, ECHR (1979) Series A, No. 30, 30; *Kruslin v. France*, ECHR (1990) Series A, No. 176-A, 21.

[19] PCNICC/2000/1/Add.1. See also the statements made in connection with the adoption of the Rules (PCNICC/2000/INF/4).

[20] Cf. ECHR No. 39038/97, *Hadjen v. Denmark*, DR 73, 230; 18066/91, *Nala v. Sweden*, DR 77-A, 37. For an opposing view, some members of the UN-HRC, quoted after Stavros, *supra* note 14, notes 269 and 842.

notion, 'which does not depend on the special features of the proceedings involved'.[21]

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.[22] 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)).[23] 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.[24] 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.[25] 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[26] limits appeals to a 'decision of conviction or acquittal under article 74, a sentence under article 76 or a reparation order under article 75'. This leaves little scope for

[21] Judgments *Ekbatani v. Sweden*, ECHR (1988), Series A, No. 134, 27; *Andersson v. Sweden*, ECHR (1991), Series A, No. 212-B, 29, and *Belziuk v. Poland*, ECHR (1998) Rep. 1998 II 558, 37–38.

[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) at 587 *et seq.* esp. 593–594.

[23] Cf. *Ekbatani* judgment, *supra* note 21, at 32.

[24] Cf. *Belziuk* judgment, *supra* note 21, at 7.

[25] Cf. *Andersson* judgment, *supra* note 21, at 29.

[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 *representatives*[28] 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 75[29] (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 countries.[34] One thing the latter have in common, however, is a reluctance to allow appeals against verdicts handed down by juries.[35] 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[36] and Article 81(1)(a) of the Statute, the impression is that such appeals are admissible.[37]

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.[38]

[27] Principle under which 'the exercise of appellate judicial powers by the court or tribunal, as distinct from the regulation of such rights, requires legislative authority' and 'a right of appeal does not arise from mere inference' (A. G. Karibi-Whyte, 'Appeal Procedures and Practices', in G. Kirk McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law* (2000) 641–642). For a study of the ICTY and ICTR case law on this topic, see C. Staker, 'Art. 81', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1999) at 1024–1027.

[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 195.

[31] M. C. Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions', 3 *Duke J. Comp. and Int. L.* (1993) 235, at 288.

[32] M. C. Bassiouni and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996) at 979.

[33] Art. 8(4) ACHR very explicitly forbids a 'new trial' after a '*non-appealable* judgment'.

[34] English law, for instance, admits ordinary appeals, including appeals from the Prosecutor, against a judgment given in a magistrates' court. In some cases the Prosecutor may also seek to have a Crown Court judgment either reviewed or quashed (R. Card, R. Cross, and P. A. Jones, *Criminal Law* (1992) §§ 5.25–5.36). Both the UK and the Republic of Ireland are, of course, signatories of the ECHR. On the question whether the Prosecutor can appeal against an acquittal, see the dissenting opinion of Judge Nieto-Navia appended to the decision of the ICTY Appeals Chamber, Sentencing Judgment of 15 July 1999, *Tadić*, IT-94-1. Cf. in general C. van den Wyngaert and G. Stessens, 'The International *non bis in idem* Principle: Resolving Some of the Unanswered Questions', 48 *ICLQ* (1999) at 79; K. Kittichaisaree, *International Criminal Law* (2001) at 290; C. Safferling, *Towards an International Criminal Procedure* (2001) at 332–333; ICTY Ap. Ch. Judgment of 24 March 2000, *Aleksovski*, para. 190 and note 363.

[35] Cf. J. Hatchard, B. Huber, and R. Vogler (eds.), *Comparative Criminal Procedure* (1996) at 237.

[36] *Supra* note 19.

[37] See also Report of the International Law Commission, *supra* note 6, Vol. II, p. 61, at Art. 48. In the same direction, Staker, *supra* note 27, at 1016–1017 and 1034; R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results* (1999) at 298–299.

[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 'Zutphen' 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.

On the Prosecutor's role as an 'impartial party' in a European accusatorial system, *see* R. Roth, 'Nouvelle procédure pénale italienne. L'Esprit de système et l'esprit du système', in C. N. Robert and B. Stråhli (eds.), *Études en l'honneur de D. Poncet* (1997) at 121–124.

[39] See also the discussion as regards Art. 83, *infra*, V.A.

[40] Staker, *supra* note 27, at 1020.

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.[41] There may be important evidence for the defence which was not seen by the Trial Chamber because it was located in an uncooperative country; or there may be circumstances personal to the accused or his legal representative, e.g. the accused's mental or physical condition; or there may have been problems with the defence, e.g. if counsel has been unavailable, or has wrongly instructed or defended his client, or a conflict of interests arises between the two of them.[42] 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.[43] 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,[44] leaving a very wide degree of latitude to the Trial Chamber.[45] Hence a

[41] These rights are drawn mainly from the practice of the European Court of Human Rights under ECHR Art. 6. See Stavros, *supra* note 14; D. J. Harris, M. O'Boyle, and C. Warbrick, *Law of the European Convention on Human Rights* (1995) 202 *et seq.*

[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.

[43] Lee, *supra* note 37, at 299

[44] Art. 77 of the Statute establishes only two degrees of penalty: imprisonment up to thirty years and life imprisonment.

[45] 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'.[46] Yet, that Chamber's records show that it usually confined itself to examining the arguments in the appellants' submissions.[47]

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 appelatum* maxim).[48]

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.[49] 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.[50] 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*

[46] Ap. Ch., Judgment of 7 October 1997, *Erdemović*, IT-96-22, No. 16.

[47] See in particular Ap. Ch., Judgment on jurisdiction of 2 October 1995, *Tadić*, IT-94-1-AR72, No. 7-8.

[48] See R. Merle and A. Vitu, *Traité de droit criminel*, Vol. II, *Procédure pénale* (4th edn., 1979) at 822–823. For the German correspondent notion, called *Rügeprinzip*, see N. Schmid, *Strafprozessrecht* (3rd edn., 1997) at 325.

[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.

dubio pro libertate).[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 *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.[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.[53] In particular, case law will show how to assess types of alternative custody practised by certain States (e.g. house arrest).

[51] See also Staker, *supra* note 27, at 1021.

[52] Ibid., at 1021, No. 19.

[53] See Ap. Ch., Sentencing Judgment of 26 January 2000, *Tadić*, IT-94-1, No. 34-40.

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).[54] 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.[55]

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.[56] 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.

[54] Unless the appeal only concerns one or a part of the charge(s).
[55] In the same direction, Saland, *supra* note 27, at 1022, No. 20.
[56] Lee, *supra* note 37, at 299.

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,[57] 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[58] 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.[59] 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.

contest the inadmissibility of evidence in the proceedings on merit, before either the Trial Chamber or the Appeals Chamber.[60] 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)(h) 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 400.
[61] Ibid.

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

cursorily treated in the Statute. The Rules of Procedure and Evidence[62] (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 *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.*

[62] *Supra* note 19.

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 summonsed;[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', Kambi-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 the rehearing'. Equally restrictive is the English system, see Hatchard, Huber, and Vogler, *supra* note 35, at 204.

[66] Cf. in particular judgments *Ekbatani*, *supra* note 21 and *Helmers v. Sweden*, EC HR (1991), Series A, No. 212.

[67] Judgments *Ekbatani*, *supra* note 21, at 32 and *Helmers*, *supra* note 56, 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]

[68] Judgment *Andersson*, *supra* note 21, at 27.

[69] In the *Andersson* 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.

[71] Ap. Ch., Judgment on jurisdiction of 2 October 1995, *Tadić*, IT-94-1-AR72, No. 55.

[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 24 October 2001, *Kupreškić 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).

[74] Ap. Ch., Judgment of 7 October 1997, *Erdemović*, IT-96-22-A, No. 15.

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,[75] 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.[76] 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

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

[76] On the notion of 'miscarriage of justice' under Art. 25 of the ICTY Statute, see Kanbi-Whyte, *supra* note 27, at 652.

4492

Chamber will need to publish a detailed justification for admitting or rejecting each appeal.

If the Appeals Chamber admits an appeal, it can either issue a new judgment or remand the case to the original Trial Chamber. The Rules of Procedure and Evidence give no guidance on choosing between these two alternatives. Procedural economy and expedition urge a quick decision; on the other hand, the accused has a (two-tier) *right to appeal* (i.e. to a new judgment by the Trial Chamber, followed if necessary by a new appeal).[77] The general tendency, in Western European countries at least, is to give preference to procedural economy: thus it is more common to *reverse* the judgment and issue a *new decision*; only a relatively small number of cases are remanded to the original court.[78] There is a logical connection between this question and the *power of the Appeals Chamber to re-examine the evidence* (see *supra*, V.A). It is hard to justify the issuing of a new decision without any such re-examination.

According to Article 83(2) a decision or sentence cannot be amended to the detriment of the convicted person if it is the latter who has appealed, and not the Prosecutor. On the other hand, the Appeals Chamber may reduce a sentence on appeal by the Prosecutor alone, *a fortiori* he is appealing on behalf of the convicted person (Article 81(1)(b)).

Some further clarification is necessary on the idea that a sentence cannot be amended to the detriment of the convicted person, and on the rule in Article 81(2)(b) and (c). Did the signatory States really mean that a sentence cannot be amended to the detriment of a convicted person if he is appealing, either in person or through the Prosecutor? Or did they mean that the Court cannot amend the decision of the lower court to the detriment of an appellant without first consulting the Prosecutor? The aim of this rule is clearly that the appellant should not be indirectly discouraged from appealing; therefore the former solution should be preferred and the prohibition on amendments to his detriment ought to be *total*.

The rule that a convicted person's sentence cannot be amended to his detriment on appeal is not confined to appeals against conviction and sentence: it applies *wherever the condition of the convicted appellant is changed to his detriment*.[79] Therefore the Appeals Chamber cannot harden the conditions of a suspended sentence (by ordering e.g. new rules of conduct); and it cannot reduce, or refuse to take account of, the amount of time spent on remand and offset against sentence. On the other hand, this rule would not prevent a higher court from dismissing 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.[80]

[77] Very (perhaps *too*, cf. *supra*, V.A.) strict under this respect, Staker, *supra* note 27, at 1034–1035.

[78] e.g. the Italian (Arts. 604–605 CPC) and German (para. 328 CPC) systems.

[79] Cf. Merle and Vitu, *supra* note 48, at 825–835; G. Piquerez, *Procédure pénale suisse* (2000) at 721.

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

[80] Piquerez, *supra* note 79, at 721–724.

[81] Lee, *supra* note 37, at 301–302.

4493

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.[92] 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).

[92] See the ECHR judgments in the *Ekbatani* and *Andersson* cases, *supra* V A.

37

REVISION PROCEDURE UNDER THE ICC STATUTE

Anne-Marie La Rosa

I. Introduction

To ensure the stability of legal proceedings and their completion within a reasonable time frame, court decisions need to be final and conclusive. A judgment having the value of *res judicata* because of the absence of a right of appeal, the expiry of time-limits for motions in appeal, or the exhaustion of all possible remedies, by definition reflects the truth and as such must be respected—or if need be, enforced. In other words, the parties will be precluded from raising the same issue before a court of law.[1] Though they may not be satisfied with the result, parties cannot interminably put into question a court's decision. In criminal law, the

The views expressed herein are those of the author in her personal capacities and do not necessarily represent those of any organization with which she is or was associated. The author would like to express her sincere thanks to Ms Sarah Heathcote for her very careful reading of and helpful comments on earlier versions of the text.

[1] ICTR, Ap. Ch., Decision of 31 March 2000, *Barayagwiza*, ICTR-97-19-AR72 (hereinafter 'Barayagwiza Revision Decision'), Declaration of Judge Nieto-Navia, at 2. On this issue, Judge Nieto-Navia makes reference to the *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, ICJ Reports (1954) 47.

4494

The Code

The Code for Crown Prosecutors

CPS

Crown
Prosecution
Service

The Crown Prosecution Service is the principal public prosecuting authority for England and Wales and is headed by the Director of Public Prosecutions. The Attorney General is accountable to Parliament for the Service.

The Crown Prosecution Service is a national organisation consisting of 42 Areas. Each Area is headed by a Chief Crown Prosecutor and corresponds to a single police force area, with one for London. It was set up in 1986 to prosecute cases investigated by the police.

Although the Crown Prosecution Service works closely with the police, it is independent of them. The independence of Crown Prosecutors is of fundamental constitutional importance. Casework decisions taken with fairness, impartiality and integrity help deliver justice for victims, witnesses, defendants and the public.

The Crown Prosecution Service co-operates with the investigating and prosecuting agencies of other jurisdictions.

The Director of Public Prosecutions is responsible for issuing a Code for Crown Prosecutors under section 10 of the Prosecution of Offences Act 1985, giving guidance on the general principles to be applied when making decisions about prosecutions. This is the fifth edition of the Code and replaces all earlier versions. For the purpose of this Code, 'Crown Prosecutor' includes members of staff in the Crown Prosecution Service who are designated by the Director of Public Prosecutions under section 7A of the Act and are exercising powers under that section.

1 INTRODUCTION

1.1 The decision to prosecute an individual is a serious step. Fair and effective prosecution is essential to the maintenance of law and order. Even in a small case a prosecution has serious implications for all involved — victims, witnesses and defendants. The Crown Prosecution Service applies the Code for Crown Prosecutors so that it can make fair and consistent decisions about prosecutions.

1.2 The Code helps the Crown Prosecution Service to play its part in making sure that justice is done. It contains information that is important to police officers and others who work in the criminal justice system and to the general public. Police officers should apply the provisions of this Code whenever they are responsible for deciding whether to charge a person with an offence.

1.3 The Code is also designed to make sure that everyone knows the principles that the Crown Prosecution Service applies when carrying out its work. By applying the same principles, everyone involved in the system is helping to treat victims, witnesses and defendants fairly, while prosecuting cases effectively.

2 GENERAL PRINCIPLES

2.1 Each case is unique and must be considered on its own facts and merits. However, there are general principles that apply to the way in which Crown Prosecutors must approach every case.

2.2 Crown Prosecutors must be fair, independent and objective. They must not let any personal views about ethnic or national origin, disability, sex, religious beliefs, political views or the sexual orientation of the suspect, victim or witness influence their decisions. They must not be affected by improper or undue pressure from any source.

2.3 It is the duty of Crown Prosecutors to make sure that the right person is prosecuted for the right offence. In doing so, Crown Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction.

2.4 Crown Prosecutors should provide guidance and advice to investigators throughout the investigative and prosecuting process. This may include lines of inquiry, evidential requirements and assistance in any pre-charge procedures. Crown Prosecutors will be proactive in identifying and, where possible, rectifying evidential deficiencies and in bringing to an early conclusion those cases that cannot be strengthened by further investigation.

2.5 It is the duty of Crown Prosecutors to review, advise on and prosecute cases, ensuring that the law is properly applied, that all relevant evidence is put before the court and that obligations of disclosure are complied with, in accordance with the principles set out in this Code.

2.6 The Crown Prosecution Service is a public authority for the purposes of the Human Rights Act 1998. Crown Prosecutors must apply the principles of the European Convention on Human Rights in accordance with the Act.

3 THE DECISION TO PROSECUTE

3.1 In most cases, Crown Prosecutors are responsible for deciding whether a person should be charged with a criminal offence, and if so, what that offence should be. Crown Prosecutors make these decisions in accordance with this Code and the Director's Guidance on Charging. In those cases where the police determine the charge, which are usually more minor and routine cases, they apply the same provisions.

3.2 Crown Prosecutors make charging decisions in accordance with the Full Code Test (see section 5 below), other than in those limited circumstances where the Threshold Test applies (see section 6 below).

3.3 The Threshold Test applies where the case is one in which it is proposed to keep the suspect in custody after charge, but the evidence required to apply the Full Code Test is not yet available.

3.4 Where a Crown Prosecutor makes a charging decision in accordance with the Threshold Test, the case must be reviewed in accordance with the Full Code Test as soon as reasonably practicable, taking into account the progress of the investigation.

4 REVIEW

4.1 Each case the Crown Prosecution Service receives from the police is reviewed to make sure that it is right to proceed with a prosecution. Unless the Threshold Test applies, the Crown Prosecution Service will only start or continue with a prosecution when the case has passed both stages of the Full Code Test.

4.2 Review is a continuing process and Crown Prosecutors must take account of any change in circumstances. Wherever possible, they should talk to the police first if they are thinking about changing the charges or stopping the case. Crown Prosecutors should also tell the police if they believe that some additional evidence may strengthen the case. This gives the police the chance to provide more information that may affect the decision.

4.3 The Crown Prosecution Service and the police work closely together, but the final responsibility for the decision whether or not a charge or a case should go ahead rests with the Crown Prosecution Service.

5 THE FULL CODE TEST

5.1 The Full Code Test has two stages. The first stage is consideration of the evidence. If the case does not pass the evidential stage it must not go ahead no matter how important or serious it may be. If the case does pass the evidential stage, Crown Prosecutors must proceed to the second stage and decide if a prosecution is needed in the public interest. The evidential and public interest stages are explained below.

THE EVIDENTIAL STAGE

5.2 Crown Prosecutors must be satisfied that there is enough evidence to provide a 'realistic prospect of conviction' against each defendant on each charge. They must consider what the defence case may be, and how that is likely to affect the prosecution case.

5.3 A realistic prospect of conviction is an objective test. It means that a jury or bench of magistrates or judge hearing a case alone, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a separate test from the one that the criminal courts themselves must apply. A court should only convict if satisfied so that it is sure of a defendant's guilt.

5.4 When deciding whether there is enough evidence to prosecute, Crown Prosecutors must consider whether the evidence can be used and is reliable. There will be many cases in which the evidence does not give any cause for concern. But there will also be cases in which the evidence

may not be as strong as it first appears. Crown Prosecutors must ask themselves the following questions:

Can the evidence be used in court?

a Is it likely that the evidence will be excluded by the court? There are certain legal rules which might mean that evidence which seems relevant cannot be given at a trial. For example, is it likely that the evidence will be excluded because of the way in which it was gathered? If so, is there enough other evidence for a realistic prospect of conviction?

Is the evidence reliable?

b Is there evidence which might support or detract from the reliability of a confession? Is the reliability affected by factors such as the defendant's age, intelligence or level of understanding?

c What explanation has the defendant given? Is a court likely to find it credible in the light of the evidence as a whole? Does it support an innocent explanation?

d If the identity of the defendant is likely to be questioned, is the evidence about this strong enough?

e Is the witness's background likely to weaken the prosecution case? For example, does the witness have any motive that may affect his or her attitude to the case, or a relevant previous conviction?

f Are there concerns over the accuracy or credibility of a

witness? Are these concerns based on evidence or simply information with nothing to support it? Is there further evidence which the police should be asked to seek out which may support or detract from the account of the witness?

5.5 Crown Prosecutors should not ignore evidence because they are not sure that it can be used or is reliable. But they should look closely at it when deciding if there is a realistic prospect of conviction.

THE PUBLIC INTEREST STAGE

5.6 In 1951, Lord Shawcross, who was Attorney General, made the classic statement on public interest, which has been supported by Attorneys General ever since: "It has never been the rule in this country — I hope it never will be — that suspected criminal offences must automatically be the subject of prosecution". (House of Commons Debates, volume 483, column 681, 29 January 1951.)

5.7 The public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed. A prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour, or it appears more appropriate in all the circumstances of the case to divert the person from prosecution (see section 8 below).

5.8 Crown Prosecutors must balance factors for and against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the suspect. Some factors may increase the need to prosecute but others may suggest that another course of action would be better.

The following lists of some common public interest factors, both for and against prosecution, are not exhaustive. The factors that apply will depend on the facts in each case.

Some common public interest factors in favour of prosecution

5.9 The more serious the offence, the more likely it is that a prosecution will be needed in the public interest. A prosecution is likely to be needed if:

a a conviction is likely to result in a significant sentence;

b a conviction is likely to result in a confiscation or any other order;

c a weapon was used or violence was threatened during the commission of the offence;

d the offence was committed against a person serving the public (for example, a police or prison officer, or a nurse);

e the defendant was in a position of authority or trust;

f the evidence shows that the defendant was a ringleader or an organiser of the offence;

g there is evidence that the offence was premeditated;

h there is evidence that the offence was carried out by a group;

i the victim of the offence was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance;

j the offence was committed in the presence of, or in close proximity to, a child;

k the offence was motivated by any form of discrimination against the victim's ethnic or national origin, disability, sex, religious beliefs, political views or sexual orientation, or the suspect demonstrated hostility towards the victim based on any of those characteristics;

l there is a marked difference between the actual or mental ages of the defendant and the victim, or if there is any element of corruption;

m the defendant's previous convictions or cautions are relevant to the present offence;

n the defendant is alleged to have committed the offence while under an order of the court;

o there are grounds for believing that the offence is likely to be continued or repeated , for example, by a history of recurring conduct;

p the offence, although not serious in itself, is widespread in the area where it was committed; or

q a prosecution would have a significant positive impact on maintaining community confidence.

Some common public interest factors against prosecution

5.10 A prosecution is less likely to be needed if:

a the court is likely to impose a nominal penalty;

b the defendant has already been made the subject of a sentence and any further conviction would be unlikely to result in the imposition of an additional sentence or order, unless the nature of the particular offence requires a prosecution or the defendant withdraws consent to have an offence taken into consideration during sentencing;

c the offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence);

d the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgement;

e there has been a long delay between the offence taking place and the date of the trial, unless:

- the offence is serious;
- the delay has been caused in part by the defendant;
- the offence has only recently come to light; or

- the complexity of the offence has meant that there has been a long investigation;

f a prosecution is likely to have a bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence;

g the defendant is elderly or is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is real possibility that it may be repeated. The Crown Prosecution Service, where necessary, applies Home Office guidelines about how to deal with mentally disordered offenders. Crown Prosecutors must balance the desirability of diverting a defendant who is suffering from significant mental or physical ill health with the need to safeguard the general public;

h the defendant has put right the loss or harm that was caused (but defendants must not avoid prosecution or diversion solely because they pay compensation); or

i details may be made public that could harm sources of information, international relations or national security.

5.11 Deciding on the public interest is not simply a matter of adding up the number of factors on each side. Crown Prosecutors must decide how important each factor is in the circumstances of each case and go on to make an overall assessment.

The relationship between the victim and the public interest

5.12 The Crown Prosecution Service does not act for victims or the families of victims in the same way as solicitors act for their clients. Crown Prosecutors act on behalf of the public and not just in the interests of any particular individual. However, when considering the public interest, Crown Prosecutors should always take into account the consequences for the victim of whether or not to prosecute, and any views expressed by the victim or the victim's family.

5.13 It is important that a victim is told about a decision which makes a significant difference to the case in which they are involved. Crown Prosecutors should ensure that they follow any agreed procedures.

6 THE THRESHOLD TEST

6.1 The Threshold Test requires Crown Prosecutors to decide whether there is at least a reasonable suspicion that the suspect has committed an offence, and if there is, whether it is in the public interest to charge that suspect.

6.2 The Threshold Test is applied to those cases in which it would not be appropriate to release a suspect on bail after charge, but the evidence to apply the Full Code Test is not yet available.

6.3 There are statutory limits that restrict the time a suspect may remain in police custody before a decision has to be made whether to charge or release the suspect. There will be cases

where the suspect in custody presents a substantial bail risk if released, but much of the evidence may not be available at the time the charging decision has to be made. Crown Prosecutors will apply the Threshold Test to such cases for a limited period.

6.4 The evidential decision in each case will require consideration of a number of factors including:

- the evidence available at the time;
- the likelihood and nature of further evidence being obtained;
- the reasonableness for believing that evidence will become available;
- the time it will take to gather that evidence and the steps being taken to do so;
- the impact the expected evidence will have on the case;
- the charges that the evidence will support.

6.5 The public interest means the same as under the Full Code Test, but will be based on the information available at the time of charge which will often be limited.

6.6 A decision to charge and withhold bail must be kept under review. The evidence gathered must be regularly assessed to ensure the charge is still appropriate and that continued objection to bail is justified. The Full Code Test must be applied as soon as reasonably practicable.

7 SELECTION OF CHARGES

7.1 Crown Prosecutors should select charges which:

a reflect the seriousness and extent of the offending;

b give the court adequate powers to sentence and impose appropriate post-conviction orders; and

c enable the case to be presented in a clear and simple way.

This means that Crown Prosecutors may not always choose or continue with the most serious charge where there is a choice.

7.2 Crown Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one.

7.3 Crown Prosecutors should not change the charge simply because of the decision made by the court or the defendant about where the case will be heard.

8 DIVERSION FROM PROSECUTION

ADULTS

8.1 When deciding whether a case should be prosecuted in the courts, Crown Prosecutors should consider the alternatives to prosecution. Where appropriate, the availability of suitable rehabilitative, reparative or restorative justice processes can be considered.

8.2 Alternatives to prosecution for adult suspects include a simple caution and a conditional caution.

Simple caution

8.3 A simple caution should only be given if the public interest justifies it and in accordance with Home Office guidelines. Where it is felt that such a caution is appropriate, Crown Prosecutors must inform the police so they can caution the suspect. If the caution is not administered, because the suspect refuses to accept it, a Crown Prosecutor may review the case again.

Conditional caution

8.4 A conditional caution may be appropriate where a Crown Prosecutor considers that while the public interest justifies a prosecution, the interests of the suspect, victim and community may be better served by the suspect complying with suitable conditions aimed at rehabilitation or reparation. These may include restorative processes.

8.5 Crown Prosecutors must be satisfied that there is sufficient evidence for a realistic prospect of conviction and that the public interest would justify a prosecution should the offer of a conditional caution be refused or the offender fail to comply with the agreed conditions of the caution.

8.6 In reaching their decision, Crown Prosecutors should follow the Conditional Cautions Code of Practice and any guidance on conditional cautioning issued or approved by the Director of Public Prosecutions.

8.7 Where Crown Prosecutors consider a conditional caution to be appropriate, they must inform the police, or other authority responsible for administering the conditional caution, as well as providing an indication of the appropriate conditions so that the conditional caution can be administered.

YOUTHS

8.8 Crown Prosecutors must consider the interests of a youth when deciding whether it is in the public interest to prosecute. However Crown Prosecutors should not avoid prosecuting simply because of the defendant's age. The seriousness of the offence or the youth's past behaviour is very important.

8.9 Cases involving youths are usually only referred to the Crown Prosecution Service for prosecution if the youth has already received a reprimand and final warning, unless the offence is so serious that neither of these were appropriate or the youth does not admit committing the offence. Reprimands and final warnings are intended to prevent re-offending and the fact

that a further offence has occurred indicates that attempts to divert the youth from the court system have not been effective. So the public interest will usually require a prosecution in such cases, unless there are clear public interest factors against prosecution.

9 MODE OF TRIAL

9.1 The Crown Prosecution Service applies the current guidelines for magistrates who have to decide whether cases should be tried in the Crown Court when the offence gives the option and the defendant does not indicate a guilty plea. Crown Prosecutors should recommend Crown Court trial when they are satisfied that the guidelines require them to do so.

9.2 Speed must never be the only reason for asking for a case to stay in the magistrates' courts. But Crown Prosecutors should consider the effect of any likely delay if they send a case to the Crown Court, and any possible stress on victims and witnesses if the case is delayed.

10 ACCEPTING GUILTY PLEAS

10.1 Defendants may want to plead guilty to some, but not all, of the charges. Alternatively, they may want to plead guilty to a different, possibly less serious, charge because they are admitting only part of the crime. Crown Prosecutors should only accept the defendant's plea if they think the court is able to pass a sentence that matches the seriousness of the offending, particularly where there are aggravating features. Crown Prosecutors must never accept a guilty plea just because it is convenient.

10.2 In considering whether the pleas offered are acceptable, Crown Prosecutors should ensure that the interests of the victim and, where possible, any views expressed by the victim or victim's family, are taken into account when deciding whether it is in the public interest to accept the plea. However, the decision rests with the Crown Prosecutor.

10.3 It must be made clear to the court on what basis any plea is advanced and accepted. In cases where a defendant pleads guilty to the charges but on the basis of facts that are different from the prosecution case, and where this may significantly affect sentence, the court should be invited to hear evidence to determine what happened, and then sentence on that basis.

10.4 Where a defendant has previously indicated that he or she will ask the court to take an offence into consideration when sentencing, but then declines to admit that offence at court, Crown Prosecutors will consider whether a prosecution is required for that offence. Crown Prosecutors should explain to the defence advocate and the court that the prosecution of that offence may be subject to further review.

10.5 Particular care must be taken when considering pleas which would enable the defendant to avoid the imposition of a mandatory minimum sentence. When pleas are offered, Crown Prosecutors must bear in mind the fact that ancillary orders can be made with some offences but not with others.

11 PROSECUTORS' ROLE IN SENTENCING

11.1 Crown Prosecutors should draw the court's attention to:

- any aggravating or mitigating factors disclosed by the prosecution case;
- any victim personal statement;
- where appropriate, evidence of the impact of the offending on a community;
- any statutory provisions or sentencing guidelines which may assist;
- any relevant statutory provisions relating to ancillary orders (such as anti-social behaviour orders).

11.2 The Crown Prosecutor should challenge any assertion made by the defence in mitigation that is inaccurate, misleading or derogatory. If the defence persist in the assertion, and it appears relevant to the sentence, the court should be invited to hear evidence to determine the facts and sentence accordingly.

12 RE-STARTING A PROSECUTION

12.1 People should be able to rely on decisions taken by the Crown Prosecution Service. Normally, if the Crown Prosecution Service tells a suspect or defendant that there will not be a prosecution, or that the prosecution has been stopped, that is the end of the matter and the case will not start again. But occasionally there are special reasons why the Crown Prosecution Service will re-start the prosecution, particularly if the case is serious.

12.2 These reasons include:

a rare cases where a new look at the original decision shows that it was clearly wrong and should not be allowed to stand;

b cases which are stopped so that more evidence which is likely to become available in the fairly near future can be collected and prepared. In these cases, the Crown Prosecutor will tell the defendant that the prosecution may well start again; and

c cases which are stopped because of a lack of evidence but where more significant evidence is discovered later.

12.3 There may also be exceptional cases in which, following an acquittal of a serious offence, the Crown Prosecutor may, with the written consent of the Director of Public Prosecutions, apply to the Court of Appeal for an order quashing the acquittal and requiring the defendant to be retried, in accordance with Part 10 of the Criminal Justice Act 2003.

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Mae'r cyhoeddiad hwn ar gael yn y Gymraeg

The Code for Crown Prosecutors

The Code is a public document. It is available on the CPS website:
www.cps.gov.uk

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