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APPEALS IN THE *AD HOC* INTERNATIONAL
CRIMINAL TRIBUNALS: STRUCTURE, PROCEDURE,
AND RECENT CASES

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INTRODUCTION

Two international criminal tribunals are developing and re-making much of international humanitarian law—the law of genocide, crimes against humanity, and war crimes. These are the International Criminal Tribunal for the Former Yugoslavia

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("ICTY")¹ and the International Criminal Tribunal for Rwanda ("ICTR").²

For the first time, appellate practice and procedure have become vital to the development of international humanitarian law. These two *ad hoc* Tribunals have substantial appellate as well as trial jurisdiction. In this, they are quite different from their historic predecessors, the International Military Tribunals at Nuremberg and Tokyo following World War II, which had no appellate jurisdiction or appellate courts. The appellate jurisprudence of these new Tribunals is contributing to the growth of international law, both in international fora and in the domestic courts of many nations.³

The Tribunals are unusual in that they have common judges in their Appeals Chambers and have a single Prosecutor, based in The Hague, Netherlands. The current Prosecutor is Carla Del Ponte of Switzerland. Each of the Tribunals operates separate Trial Chambers and a separate Registry (the ICTY in The Hague, Netherlands; the ICTR in Arusha, Tanzania), and the Deputy Prosecutors are different in each. They also have separate subject matter mandates, in that they have jurisdiction over crimes committed in different places and at different times, and, to some extent, the crimes within the jurisdiction of each Tribunal are different.

Both the ICTY and the ICTR have issued important judgments. In so doing, they have clarified the statutory and general law governing military behavior, human rights, crimes

1. Formally, 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. See S.C. Res. 827, U.N. SCOR, 48th Year, 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993) (approving and adopting *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)* [hereinafter Secretary-General's Rep.], U.N. Doc. S/25704 & Add. 1 (1993) (setting out, as an Annex to the Report, the Statute of the ICTY [hereinafter ICTY Statute]), as amended).

2. Formally, 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 1994 and 31 December 1994. See S.C. Res. 955, U.N. SCOR, 49th Year, 3453d mtg. at 1, U.N. Doc. S/RES/955 (1994) (setting out as an Annex to the Resolution the Statute of the ICTR [hereinafter ICTR Statute]), as amended.

3. See *infra* nn. 9-13, 353-56, and accompanying text.

against humanity, and genocide (as well as defenses to these charges), thereby establishing a strong foundation for the eventual permanent International Criminal Court contemplated by the Rome Statute of the International Criminal Court.⁴ Looking more at the short term, though, successes with this *ad hoc* approach to promoting accountability for mass violence have prompted calls for the establishment of similar tribunals for Cambodia, Sierra Leone, and East Timor. These *ad hoc* tribunals will remain necessary at least until the International Criminal Court (which will have only prospective jurisdiction⁵) comes into existence. There also have been suggestions that *ad hoc* tribunals be established to adjudge some or all of those responsible for the September 11, 2001 attack on the United States.⁶

Part I of this Article introduces the Tribunals and addresses their unusual appellate structure, discussing both appellate jurisdiction and procedures and including changes the Security Council made to the appellate structure in 2000.⁷ Part II summarizes the work of the Appeals Chambers in its review of some important trial decisions of both Tribunals from January 2000 to Fall 2001.⁸ Given that nearly all ICTY and ICTR trial

4. U.N. Doc. A/CONF. 183/9, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on July 17, 1998, as corrected by the *procès-verbaux* of November 10, 1998 and July 12, 1999 [hereinafter ICC Statute]. As of April 30, 2001, thirty nations had ratified the ICC Statute, out of sixty required for the International Criminal Court to come into existence. Well over one hundred nations have signed the Statute. The United States signed the ICC Statute on December 31, 2000. The ICC Statute has not yet been submitted to the Senate for ratification, and the current administration has no plans to do so. See H.R. Subcomm. on Com., J., State & Jud. of the Comm. on Appropriations, *Hearings on Fiscal Year 2002 State Department Appropriations*, 107th Cong. (Apr. 26, 2001) (testimony of Secretary of State Colin Powell).

5. ICC Stat. art. 11.

6. If this proves to be the case, the ICTY and ICTR will serve as crucial precedents.

7. S.C. Res. 1329, 4240th mtg., S/RES/1329 (Nov. 30, 2000) and Annexes, amending ICTY Stat. arts. 12-14, and ICTR Stat. arts. 11-13.

8. Our choice here is temporal and not hierarchical. Many Appeals Chambers decisions issued prior to 2000 are particularly germane to the development of international humanitarian law. These groundbreaking early decisions are amply discussed in the academic literature (for example, the ICTY *Tadic* interlocutory appeal on jurisdiction and the *Tadic* decision itself, which resolved the question of whether the Bosnian conflict was internal or international). See *infra* n. 258 and accompanying text.

judgments have been appealed, the Appeals Chambers play a central role in the functioning of the Tribunals.

Important use is being made of the appellate jurisprudence of the Tribunals. Judgments are being used as precedent within the Appeals Chambers and by the Trial Chambers.⁹ The jurisprudential effect of Appeals Chamber decisions (and the Statutes creating the Tribunals) also is being felt in national courts.¹⁰ Within the United States, however, the national use of

9. See *infra* Part I(D)(4), discussing *Prosecutor v. Aleksovski*, IT-95-14 (ICTY App. Chamber 2000). Although this may not seem newsworthy to a common law lawyer, the emergence of *stare decisis* within the Tribunals is an important development in international law. Compare *e.g.* ICC Stat. art. 21 (created after several years of operation of the *ad hoc* Tribunals, permitting the use of precedent) with *e.g.* Statute of the International Court of Justice, art. 59 (entered into force Oct. 24, 1945) [hereinafter ICJ Statute] (stating that a decision is not binding except between the parties and in respect of the particular controversy). Unlike its use in common law countries, use of judicial precedent is not at the core of the civil law legal tradition. The Tribunals represent an admixture of civil law legal systems and common law systems. The civil law approach, which dominates Western and Eastern Europe, Central and South America, and other areas including the Middle East and Asia, can be distinguished from the common law in a variety of ways, including that the civil code is the principal source of law that judges are to apply to a given dispute before them. As the logical thought process in the civil law system is deductive (going from the code provision to the dispute before the judge) and not inductive (analogizing from prior and similar fact situations to resolve the dispute before the judge), the usefulness of precedent is lower. Although some areas of law in civil law countries have developed through judge-made law, express acknowledgment of the precedential value of cases by courts remains the exception rather than the rule. For greater discussion of the differences between the common law and civil law, see Peter Stein, *Roman Law, Common Law, and Civil Law*, 66 Tul. L. Rev. 1591 (1992).

10. See, for example, the judgment of the House of Lords in *Regina v. Bartle*, 38 I.L.M. 581 (H.L. 1999) (Lord Browne-Wilkinson citing ICTY judgment in *Prosecutor v. Furundzija* as supporting the point that torture is an international crime on its own, even if separated from war or hostilities, and that the prohibition of torture has evolved into a peremptory norm (or *jus cogens*) of international law; Lord Millet citing ICTY decision in *Prosecutor v. Furundzija* as supporting the point that a crime that is contrary to a peremptory norm of international law that infringes a *jus cogens* may attract universal jurisdiction under customary international law). See also *In re Former Syrian Ambassador to German Democratic Republic* (Bundesverfassungsgericht [federal constitutional court of the Federal Republic of Germany] June 10, 1997) (unreported; on file with authors) (drawing a distinction between the immunity of a diplomat and the immunity of a head of state or governmental official and relying on the Statutes of the ICTY and ICTR, both of which provide that the official position of an accused, whether as a leader of a state or as a responsible official in a government department, does not serve to free that individual from responsibility or mitigate punishment); *U.S. v. Burns*, 1 S.C.R. 283 (Sup. Ct. Canada 2001) (refusing on constitutional grounds to extradite two Canadians to the United States to face capital murder charges unless assurances were given that the death penalty would not be sought, and noting "that the United Nations Security Council excluded the death penalty

Tribunal jurisprudence is at best inchoate.¹¹ In fact, it is fair to say that the Tribunals have a lower profile in the United States than in many other nations; accordingly, an important purpose of this Article is to increase awareness for the bench and bar within the United States (as well as other jurisdictions) of the Tribunals, their work, their structure, and their purpose. After all, these appellate decisions have a significant effect on customary international law, in particular those peremptory norms of customary international law from which no derogation is possible (*jus cogens*), which form part of the federal common law¹² and for which a private right of action may be implied in the event of an alleged violation.¹³ As a result, the jurisprudence of the Appeals Chambers can be raised as persuasive authority in United States courts or offered as proof of the customary nature of an international legal rule.

Given the effects of globalization on the law, the types of claims that could invoke the areas of international law covered by ICTR and ICTY jurisprudence—genocide, crimes against

from the punishments available to the [ICTY] and [ICTR] despite the heinous nature of the crimes [involved]”).

11. For an example of the incorporation of a Tribunal judgment in domestic law, see *Tagaga v. INS*, 228 F.3d 1030, 1034-35 & n. 10 (9th Cir. 2000) (citing the ICTY Trial Chamber’s 1996 sentencing judgment in *Prosecutor v. Erdemovic* to support the “universally recognized principle that obedience to superior orders does not relieve an official from responsibility for humanitarian law or human rights violations”).

12. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (international law forms part of U.S. federal law); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (generally providing that international law is part of U.S. law and “must be ascertained and administered by the courts of justice of appropriate jurisdiction”); *Restatement (Third) of Foreign Relations Law of the United States* § 702 cmt. c (1987). For a criticism of this generally accepted position, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997) (arguing that the “modern” view that customary international law forms part of the federal common law departs from well-accepted notions of American democracy and federalism and that, absent a clear rule from a federal statute or treaty, state courts and legislatures should be free to treat as they wish or even ignore customary international law); see also Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 Fordham L. Rev. 319 (1997) (reiterating their position against the “modern” view); *contra* Harold Hongju Koh, *Is International Law Really State Law?* 111 Harv. L. Rev. 1824 (1998) (criticizing Bradley & Goldsmith’s position).

13. Federal courts may, but appear to be reluctant to, imply a private right of action for violations of *jus cogens* norms of international law in the absence of a statutorily provided right of action. See e.g. *White v. Paulsen*, 997 F. Supp. 1380, 1383 (E.D. Wash. 1998).

humanity, and war crimes—are appearing more frequently on the dockets of United States courts. These sorts of claims include, but are not limited to the following:

- Claims regarding crimes against humanity arising from the September 11, 2001 terrorist attacks (and also any civil claims arising out of that tragedy);
- Claims under the Alien Tort Claims Act (giving federal courts jurisdiction over claims brought by aliens for violations of the law of nations or a treaty of the United States);
- Claims under the Torture Victim Protection Act (giving a right of civil action for damages against an individual who, under actual or apparent authority of any foreign nation, subjects an individual to torture or extrajudicial killing);
- Restitutionary claims for slave labor and conversion (for example, arising out of World War II or other armed conflicts);
- War crimes proceedings involving United States military personnel or foreign military personnel over which the United States has “effective control”;
- Extradition claims;
- Refugee, asylum, and immigration claims; and
- Non-statutory tort claims (against foreign governments for human rights abuses and terrorism; against United States companies for environmental desecration arising out of their foreign operations; and possibly even by American citizens against United States authorities).

This jurisprudence also should be central to instructing all branches of the armed forces on appropriate protocol and conduct. Accordingly, knowledge of and familiarity with the work of the Tribunals is of growing importance for effective judging and lawyering, even in domestic settings. Reviewing this jurisprudence, particularly in the area of sentencing, also can serve an illuminating comparative function for those operating within domestic criminal law or thinking about the ability of the criminal law to address hate crime. Finally, reviewing the structures of the Appellate Chambers can be insightful for domestic law reform and judicial reorganization efforts.

The authors also hope this Article will be useful as an introductory overview of the appellate process in the ICTY and ICTR for those counsel from any nation considering taking a case on appeal in the Tribunals. Such counsel should, however, take care to consult the Tribunals for updated information, as the Rules of Procedure and Evidence for both Tribunals have been in constant evolution since they were initially promulgated.¹⁴

I. STRUCTURE, APPELLATE JURISDICTION, AND PROCEDURE IN THE *AD HOC* INTERNATIONAL CRIMINAL TRIBUNALS

The Appeals Chambers of the ICTY and ICTR decide (1) judgment (conviction or acquittal) appeals; (2) sentence appeals;¹⁵ (3) interlocutory appeals on jurisdictional matters and (in the ICTY only) procedural matters;¹⁶ and (4) some special appeals.¹⁷ By and large, they have spent much of their time on interlocutory appeals, though the scope of interlocutory appeals has recently been limited.

The Appeals Chambers are unusually structured. Formally, each Tribunal has its own Appeals Chamber, and each Appeals Chamber is administratively served by the Registry of its own Tribunal. The two Appeals Chambers have common judges, however. A judge from either Tribunal who is appointed to the Appeals Chamber will hear appeals from the Trial Chambers of both Tribunals.¹⁸ In terms of judgment appeals, the Appeals Chambers can review both findings of law and of fact, but the scope of that review is limited. There are no juries in ICTR or ICTY trials,¹⁹ so judges are finders of fact as well as law at both the trial and appellate levels. The interlocutory appeals have been very important insofar as the Tribunals are new and as many procedural formalities have to be established by

14. The research in this article ends as of October 23, 2001.

15. Judgment and sentence appeals are discussed *infra* in Part I(C)(1).

16. For the difference in interlocutory appeals between the Tribunals, see *infra* Part I(C)(2).

17. For special appeals, see *infra* Part I(C)(3). Post-appeal review proceedings are discussed briefly *infra* in Part I(E).

18. ICTY Stat. arts. 11, 12 & 17; ICTR Stat. arts. 11, 12 & 16.

19. Juries are not found in civil law countries, nor are juries much used in most common law countries, the United States excepted.

precedent. But several important judgment and sentence appeal decisions also have been issued. Because these decisions have widespread precedential and law-making influence, they shall constitute the focus of Part II of this Article.

Both the ICTY and the ICTR have jurisdiction over a similar group of particularly heinous crimes, described as widespread, flagrant, and serious violations of international humanitarian law.²⁰ These crimes are genocide, crimes against humanity, and war crimes. Readers unfamiliar with the details of international criminal law may have difficulty separating these crimes, or they may view them as somewhat indistinguishable. There are very important distinctions between the members of this triumvirate of terror. Accordingly, these distinctions merit a brief review so that the jurisdiction and jurisprudence of the Tribunals can be better understood.

Genocide means the killing of or causing serious harm to members of a national, ethnical, racial, or religious group with the intent to destroy that particular group, in whole or in part.²¹ Proof of this mental element—the intent to destroy—is one factor that distinguishes genocide from crimes against humanity and war crimes. The violence in Rwanda was genocidal in nature (and the ICTR has issued several convictions for genocide). On August 2, 2001, the ICTY Trial Chamber convicted Bosnian Serb General Radislav Krstic of genocide for his role in the massacre of 7,000 Muslims in Srebrenica, a purported United Nations “safe haven” in eastern Bosnia. This was the first finding of genocide in Europe since World War II. Krstic was sentenced to forty-six years in prison.²² Slobodan Milosevic now faces charges that include genocide.

20. G.A. Res. 827, U.N. GAOR (May 25, 1993) (creating the ICTY); G.A. Res. 955, U.N. GAOR (Nov. 8, 1994) (creating the ICTR).

21. ICTY Stat. art. 4; ICTR Stat. art. 2.

22. *Prosecutor v. Krstic*, IT-98-33, Judgement (ICTY Tr. Chamber Aug. 2, 2001). As of the time of this writing, Krstic is appealing his conviction and sentence, and this appeal will offer for the ICTY Appeals Chamber an opportunity to pronounce itself on the law of genocide. ICTY, Press Release JL/P.I.S./PA021, *The International Criminal Tribunal for the Former Yugoslavia Will Resume Hearings on 27 August 2001* <http://www.un.org/icty/press_real/ADV010824.htm> (Aug. 24, 2001). It had previously affirmed the Trial Chamber's decision to acquit another indictee on genocide charges. *Prosecutor v. Jelusic*, IT-95-10-A, Appeals Judgement (ICTY App. Chamber, July 5, 2001).

Moreover, much of the violence in the former Yugoslavia has been prosecuted under the rubric of crimes against humanity or war crimes. Broadly speaking, crimes against humanity involve a series of acts—including murder, enslavement, extermination, deportation, persecution, and torture—that are committed as part of a widespread or systematic attack directed against any civilian population.²³ The ICTY has been instrumental in expanding the jurisprudence of crimes against humanity to include sex crimes. There is some difference between the definitions of crimes against humanity in the Statutes of the two Tribunals.²⁴

War crimes cover two sorts of activities: (1) crimes committed in international armed conflict, such as willful killing, torture, and inhuman treatment; and (2) violations of the laws and customs of war, a residual category that can apply to internal armed conflicts.²⁵ A broader array of conduct is prohibited in international armed conflict than in internal armed conflict; civilians and prisoners are accorded more protection during international armed conflict than internal armed conflict. As such, much of the jurisprudence of the ICTY has been concerned with determining whether the Balkan Wars were in fact international or internal armed conflicts, and, if international, the point at which they became so. The more restrictive scope of crimes within internal armed conflicts flows from states' concerns about external regulation of internal affairs, as well as their ability to deal with sedition, uprising, armed secession movements, and insurgency.

23. ICTY Stat. art. 5; ICTR Stat. art. 3.

24. For example, although the ICTY jurisdiction is not limited to widespread and systematic attacks, it is limited to crimes "committed in armed conflict, whether international or internal in character." ICTY Stat. art. 5. The jurisprudence of the ICTY has distanced itself from the requirement that crimes against humanity be committed during armed conflict. As for the ICTR, its grant of jurisdiction to prosecute crimes against humanity covers "persons responsible for . . . crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds . . ." ICTR Stat. art. 3. The most contemporary and precedential definition of crimes against humanity, found in the ICC Statute, accords jurisdiction over crimes against humanity when they arise "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." ICC Stat. art. 7.

25. ICTY Stat. arts. 2 & 3; ICTR Stat. art. 4.

Also important, by way of introduction, is the fact that neither the ICTY nor the ICTR can impose the death penalty. That the death penalty cannot be imposed for genocidal mass murderers both reflects and contributes to the disfavor with which the death penalty is perceived under international law. The law of Rwanda, however, permits the imposition of the death penalty, and persons tried in the national courts have been executed for participation in the genocide.²⁶

A. Introduction to the Tribunals: Background and Jurisdiction

1. The International Criminal Tribunal for the Former Yugoslavia (ICTY)

The ICTY was established in 1993 by United Nations Security Council Resolution 827. It is mandated to prosecute persons responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991. Serious conflict began in the early 1990s when Slovenia, Macedonia, Croatia, and Bosnia-Herzegovina (Bosnia) separated from Yugoslavia, a multi-ethnic state.²⁷ The remaining parts of Yugoslavia were Serbia and Montenegro, which collectively form what is now known as the Federal Republic of Yugoslavia (the “FRY”).²⁸ The FRY viewed these separations as secessions, leading to the Balkan Wars of 1992-1995, while the international community generally considered the actions of Slovenia, Macedonia, Croatia, and Bosnia to be state succession.²⁹

These conflicts predominantly pitted Croat against Serb and Muslim against Serb, with much of the violence taking

26. There have been twenty-two executions in Rwanda. The death penalty has yet to be abolished in the Federal Republic of Yugoslavia, although it has not been imposed since the 1980s. The death penalty has been abolished in all the other states that made up the former Yugoslavia. But this was not the case at the time the fighting began in 1991.

27. See Lori Lyman Bruun, *Beyond the 1948 Convention—Emerging Principles of Genocide in Customary International Law*, 17 Md. J. Intl. L. & Trade 193, 199 (Fall 1993).

28. Mark C. Fleming, *Appellate Review in the International Criminal Tribunals*, 37 Tex. Intl. L.J. 111, 122 (Winter 2002).

29. Bruun, *supra* n. 27, at 199-200.

place first in Croatia (primarily Croat against Serb, following the Yugoslav invasion of Croatia), and then in the deeply multi-ethnic regions of Bosnia-Herzegovina.³⁰ The war in Croatia led to massive migrations of both Serbs and Croats.³¹ To varying extents, all parties to the Bosnian conflict—Serb, Muslim, and Croat—sought to “ethnically cleanse” parts of Bosnia of members of the other ethnic groups, although the Serb campaign of ethnic cleansing against the Bosnian Muslims likely was the most determined.³²

The fighting in Croatia essentially ended in 1993, except for a brief period in 1995 when the Croatian armed forces extended their control over areas held by ethnic Serbs since 1992.³³ The Dayton Agreements stilled the fighting in Bosnia in 1995.³⁴ In 1999, new violence was triggered in Kosovo, this time between the government of the remaining Serb-led FRY and the Kosovo ethnic Albanians,³⁵ when Kosovo similarly sought to separate.³⁶ Here the FRY initiated an extensive campaign of ethnic cleansing against Albanians living in Kosovo, which

30. *Id.* There was a brief armed conflict between Yugoslavia and Slovenia at the very beginning of the wars. Additionally, there has been fighting between the Croat and Muslim communities. “Muslims” here means persons of the Muslim religion (or of Muslim religious background, given that Yugoslavia was, for about forty years, ruled by the officially atheistic Communists) who are ethnically Slavic, as are the Serbs (predominantly Orthodox Christian in religion or background) and Croats (predominantly Roman Catholic in religion or background). There are also members of many other ethnic groups who live or lived in the areas of the conflict. The three major groups and many members of the others speak what are essentially mutually intelligible dialects of the same language, Serbo-Croatian, though Serbia uses the Cyrillic alphabet, and Croatia and most Bosnian Muslims use the Roman alphabet. Especially since the beginning of the wars in 1992, nationalists of all three groups have portrayed each group as speaking a distinct language.

31. See Bruun, *supra* n. 27, at 195.

32. *Id.* at 200.

33. Paul Watson, *Anatomy of Violence in Kosovo*, L.A. Times, A1 (Dec. 22, 1999).

34. Eric Rosand, *The Kosovo Crisis: Implications of the Right to Return*, 18 Berk. J. Intl. L. 229, 239 (2000); see generally Paul C. Szasz, *Current Development: The Protection of Human Rights through the Dayton/Paris Peace Agreement on Bosnia*, 90 Am. J. Intl. L. 301 (Apr. 1996) (an in-depth look at the development of the Dayton Agreement).

35. Albanians are predominantly Muslim in religious history, with a Christian minority. (The most famous ethnic Albanian Christian of recent times was Mother Teresa.) They are not Slavs, and the Albanian language is not Slavic.

36. Rosand, *supra* n. 34, at 231.

drew to a close after sustained NATO bombing of the FRY.³⁷ The subsequent repatriation of ethnic Albanians to Kosovo triggered an exodus of Serbs.³⁸ There is continued instability in the region, which remains under the tutelage of the United Nations and NATO peacekeepers. All of these conflicts among Serbs, Croats, Muslims, and Albanians left approximately 200,000 to 250,000 people dead.³⁹ As of this writing, there is violence between the government of Macedonia and groups of ethnic Albanians.

The ICTY was initially designed to prosecute crimes committed during the wars that began in 1992 “in the territory of the former Yugoslavia.”⁴⁰ However, in its Statute, the temporal jurisdiction of the ICTY is open-ended.⁴¹ Consequently, it can prosecute offenses occurring in conflicts that arose following its creation, such as the 1999 violence against ethnic Albanians in Kosovo. The Prosecutor of the ICTY has rejected Yugoslav calls for investigation of the NATO bombings in Yugoslavia during the 1999 Kosovo crisis.⁴²

The ICTY is empowered to prosecute four clusters of offenses, which are set out in its Statute. These include grave breaches of the 1949 Geneva Conventions,⁴³ violations of the laws or customs of war⁴⁴ (which together are generally known as “war crimes”), genocide,⁴⁵ and crimes against humanity.⁴⁶ There are some important differences in crimes that can be punished by the ICTY and ICTR, as discussed below.⁴⁷ Trials in the ICTY are held before panels of three judges, a majority vote of whom

37. See Rosand, *supra* n. 34, at 229; see also Ruth Wedgwood, *NATO's Intervention: NATO's Campaign in Yugoslavia*, 93 Am. J. Intl. L. 828, 829 (Oct. 1999).

38. See Rosand, *supra* n. 34, at 230.

39. Bruun, *supra* n. 27, at 195.

40. ICTY Stat. art. 1 (on territorial jurisdiction).

41. ICTY Stat. art. 1 (power to prosecute crimes “committed . . . since 1991”). Contrast ICTR Stat. art. 1, discussed *infra* in Part I(A)(2).

42. ICTY, Press Release PR/P.I.S./510-e, *Prosecutor's Report on the NATO Bombing Campaign* <<http://www.un.org/icty/pressreal/p510-e.htm>> (June 13, 2000).

43. ICTY Stat. art. 2. Contrast ICTR Stat. art. 4, discussed *infra* in I(A)(2).

44. ICTY Stat. art. 3. There is no direct analogue to this in the ICTR Statute.

45. ICTY Stat. art. 4.

46. ICTY Stat. art. 5.

47. See *infra* Section I(A)(2) and nn. 75-80.

is necessary to a decision.⁴⁸ Originally, there were two Trial Chambers of three judges each.⁴⁹ The number of Trial Chambers was increased to three in 1998.⁵⁰ As of 2000, up to nine *ad litem* judges may be appointed, with up to six of these in any one Trial Chamber, and trials continue to be heard by panels of three.⁵¹

The ICTY has made significant progress in investigations, indictments, judgments, and appeals. At the time of this writing, the ICTY has forty-eight accused in custody and has provisionally released one accused.⁵² Thirty-one indictees, some of whom are subject to international arrest warrants, remain at large. Many of these indictees are believed to be in the FRY or Republika Srpska (the part of Bosnia-Herzegovina governed by the Bosnian Serbs). The arrest and surrender by the FRY government of accused individuals to the ICTY—along with the freezing of assets of some accused—remain contentious issues.⁵³

Of course, the most notable indictee is the former president of the FRY, Slobodan Milosevic, who was turned over to the ICTY on June 28, 2001, two years after his indictment in May 1999.⁵⁴ Milosevic is currently in pre-trial proceedings at the ICTY. Milosevic's initial 1999 indictment involved crimes against humanity (including persecution) and war crimes against

48. ICTY Stat. art. 23.

49. ICTY Stat. arts. 11, 12 (art. 12 since amended).

50. S.C. Res. 1166, U.N. SCOR, 3878th mtg., U.N. Doc. S/RES/1166 (1998).

51. S.C. Res. 1329, U.N. SCOR, 4240th mtg. at 1, U.N. Doc. S/RES/1329 (2000), with Annexes, amending ICTY Stat. arts. 12-14, and ICTR Stat. arts. 11-13.

52. ICTY, *Outstanding Public Indictments* <<http://www.un.org/icty/glance/indictlist-e.htm>> (last updated Oct. 2, 2001).

53. See ICTY, Press Release P.I.S./558-E, *Statement by Prosecutor, Carla Del Ponte, on the Occasion of Her Visit to Belgrade* <<http://www.un.org/icty/pressreal/p558-e.htm>> (Jan. 30, 2001); ICTY, Press Release SJP/P.I.S./557-e, *Milosevic and Others Case: Warrants of Arrest Re-Issued to the Federal Republic of Yugoslavia* <<http://www.un.org/icty/pressreal/p557-e.htm>> (Jan. 23, 2001).

54. BBC News Online, *Milosevic Extradited* <http://news.bbc.co.uk/1/hi/english/world/europe/newsid_1412000/1412828.htm> (June 28, 2001). "Transfer" or "surrender," rather than "extradition," is the word that in international law correctly describes the process by which a State delivers an accused to an international criminal tribunal. See Kenneth S. Gallant, *Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition*, 5 *Crim. L. Forum* 557, 558-60 & n. 6 (1994) (relying on ICTY Stat. arts. 19(2), 20(2), 29(2)(e)). "Extradition" generally describes the process by which a State transfers an accused person to another State. M. Cherif Bassiouni, *International Extradition and World Public Order* 1 (Sijthoff/Oceana 1974). An international criminal tribunal is not a State.

ethnic Albanians in Kosovo.⁵⁵ This indictment has subsequently been amended twice and now explicitly includes the deportation of 800,000 Kosovo Albanians, approximately one-third of the entire Kosovo Albanian population.⁵⁶ Milosevic also faces separate charges of genocide and crimes against humanity (including persecution and extermination) and war crimes committed in Croatia against Croats and other non-Serbs during the Balkan Wars.⁵⁷ Other notorious indictees still at large include former high-ranking officials in the Bosnian Serb government, such as Radovan Karadzic and Ratko Mladic. Assuredly, the transfer of Milosevic by the Serbian government has caused tension. The transfer was allegedly contrary to a suspension of the transfer order issued by the Constitutional Court of the FRY, and it spawned unsuccessful litigation by Milosevic in the Dutch courts.⁵⁸ All this raises difficult and complex questions regarding the role of trials, in particular international trials, in post-authoritarian political transitions, and the relationship between international criminal jurisdiction and national law.

Notwithstanding the problematic transfer of certain high-level indictees, the ICTY's workload is growing quickly. Assuming all accused are apprehended, it is estimated that their trials will not be completed before the year 2007.⁵⁹ To this must be added the time it takes for appeals to be adjudged, given that nearly all trial convictions are appealed. These estimates do not include the Prosecutor's intention to open further investigations into 150 suspects (many related to the Kosovo violence), which

55. See ICTY Prosecutor, IT-99-37, *Indictment against Milosevic et al.* (May 22, 1999).

56. See ICTY Prosecutor, IT-99-37-I, *First Amended Indictment against Milosevic et al.* (June 29, 2001); ICTY Prosecutor, IT-99-37-PT, *Second Amended Indictment against Milosevic et al.* ¶¶ 62-63, 106 (Oct. 16, 2001).

57. See ICTY Prosecutor, IT-01-50-I, *Indictment against Milosevic* ¶¶ 37, 60-62, 66 (Oct. 8, 2001); ICTY, Press Release X.T./P.I.S./638-E, *Judge Richard May Confirms Indictment Charging Slobodan Milosevic with Genocide in Bosnia and Herzegovina* (Nov. 23, 2001). Milosevic also was arrested on April 1, 2001, by FRY police on allegations of corruption and abuse of power, not war crimes.

58. See BBC News Online, *supra* n. 54.

59. ICTY President Judge Claude Jorda, *Report on the Operation of the International Criminal Tribunal for the Former Yugoslavia* (May 12, 2000) (presented to the U.N. Security Council on June 20, 2000) (available at <<http://www.un.org/icty/pressreal/RAP000620e.htm>>).

would permit the ICTY to accomplish its mission only by 2016.⁶⁰ Moreover, in November 2001, the ICTY actively began to investigate crimes allegedly committed by Macedonian soldiers against ethnic Albanian civilians and also crimes allegedly committed by ethnic Albanian militant rebels.⁶¹ Given these projections, there is a pressing need for the ICTY to contemplate institutional reform such that it can judiciously process all actual and potential cases, while respecting tenets of due process and prompt trial.

In this vein, ICTY President Judge Jorda has suggested a number of possible reforms. Although many involve expediting the pre-trial and trial phases, suggested reforms at the appellate level include the following: (1) creating two new judge positions; (2) establishing a preliminary screening mechanism to verify that appeals from judgments of the Trial Chamber satisfy the grounds for appeal; (3) permitting motions for dismissal in cases where an appeal would be frivolous; and (4) assigning judges to either the Appeals Chamber or the Trial Chamber such that subsequent disqualifications owing to intermingling could be minimized.⁶² In the most recent revision of the ICTY and ICTR Statutes by the Security Council, two judges were added to the Appeals Chambers and procedures were put in place to avoid disqualifications due to transfers of judges between Chambers.⁶³

For 2000, the ICTY's budget was \$U.S. 95,942,600.⁶⁴ Some United States judges have sat on the ICTY. In fact, one former President of the ICTY was an American, Judge Gabrielle Kirk MacDonald. When Judge MacDonald vacated her position on the ICTY as well as its Presidency, Patricia Wald (formerly of the United States Court of Appeals for the District of Columbia Circuit), replaced her as Judge. On March 14, 2001, the United Nations elected another American, Theodor Meron, as a Judge

60. *Id.*

61. See The Globe and Mail on-line edition, *War Crimes Probe Uncovers Human Remains* (Nov. 25, 2001) (available at <<http://www.globeandmail.ca>>).

62. Daryl A. Mundis, *Improving the Operation and Functioning of the International Criminal Tribunals*, 94 *Am. J. Intl. L.* 759, 768 (2000).

63. S.C. Res. 1329, *supra* n. 7.

64. ICTY, *ICTY Key Figures* <<http://www.un.org/glance/keyfig-e.htm>> (last updated Sept. 25, 2001).

on the ICTY; he took office in November 2001 upon the expiration of Judge Wald's term.⁶⁵

2. *The International Criminal Tribunal for Rwanda (ICTR)*

Rwanda's Hutus attempted to exterminate Rwanda's Tutsis in the spring and summer of 1994. Approximately 800,000 people (ten percent of the Rwandan national population) were murdered.⁶⁶ Hutu and Tutsi had lived closely intermingled in Rwanda for centuries, with Tutsi comprising about fifteen percent of the population, the Hutu about eighty-five percent.⁶⁷ Although marriage and clan structures often cut across ethnic lines, several decades of ethnic propaganda, spurred by the ethnically divisive effects of colonialism, acutely polarized Hutu-Tutsi relations.⁶⁸ Hutu and Tutsi are not limited to the territories of the Rwandan nation-state; they also live in neighboring states such as Burundi, the Democratic Republic of the Congo, and Uganda.

The Rwandan genocide was carefully planned and methodically orchestrated by an extremist Hutu government.⁶⁹ The mass killings involved very high levels of popular participation and victimization.⁷⁰ The only entity that actively sought to stop the genocide was the Rwandan Patriotic Army ("RPA"). The RPA, largely composed of Tutsi who had previously fled to Uganda, invaded Rwanda in July 1994 and eventually ousted the genocidal regime, whose poorly trained and meagerly equipped armed forces were more interested in slaughtering Tutsi civilians than fighting any war. By July 1994,

65. ICTY, Press Release CC/P.I.S./577-e, *The Fourteen Elected Judges Will Take Up Office in November* (Mar. 15, 2001).

66. Gérard Prunier, *The Rwanda Crisis: History of a Genocide* 261, 264-66 (rev. ed., Colum. U. Press 1997).

67. See Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U.L. Rev. 1221, 1223 n. 3 (2000).

68. *Id.* at 1243.

69. Philip Gourevitch, *We Wish to Inform You that Tomorrow We Will Be Killed with our Families: Stories from Rwanda* 95 (Farrar, Straus & Giroux 1998).

70. See Drumbl, *supra* n. 67, at 1245-52.

a new regime led by the Tutsi-dominated Rwandan Patriotic Front (“RPF”) took over power, where it remains to this date.⁷¹

The ICTR, established late in 1994 by Security Council Resolution 955, is mandated to prosecute those responsible for the genocide. Separately from the ICTR proceedings, the Rwandan government has initiated its own national genocide trials and has incarcerated approximately 125,000 suspects pending trial.⁷² As of August 21, 2001, there are forty-five detainees at the ICTR.⁷³ The ICTR has been much more successful than the ICTY in obtaining custody over its indictees; this is largely due to the cooperation accorded the ICTR by many African countries, as well as France and Belgium, to which many of the indictees fled shortly after the RPA takeover of Rwanda. The ICTR has definitely convicted six individuals and has acquitted one individual.⁷⁴

The Statute of the ICTR is similar to that of the ICTY, although there are some important differences in jurisdiction. The ICTR’s jurisdiction is time-limited, applying only to crimes committed during 1994.⁷⁵ It may prosecute a somewhat different set of crimes than the ICTY. The crimes that can be prosecuted in the ICTR include genocide,⁷⁶ crimes against humanity,⁷⁷ and “serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and Additional Protocol II thereto of 8 June 1977.”⁷⁸

71. *Id.* at 1224.

72. *Id.* at 1233.

73. See ICTR, *ICTR Detainees—Status of 21 August 2001* <<http://www.ictr.org/ENGLISH/factsheets.detainee.htm>> (accessed Sept. 4, 2001).

74. *See id.*

75. ICTR Stat. art. 1.

76. ICTR Stat. art. 2 (defined as in ICTY Stat. art. 4). Like the ICTY, the ICTR can prosecute conspiracy to commit genocide, attempt to commit genocide, and direct and public incitement to commit genocide. *See* ICTR Stat. arts. 2, 4; ICTY Stat. art. 4. The ICTR currently is prosecuting a series of individuals who used the public media to incite genocide. These cases raise the issue of the boundary between the prosecution of acts leading to genocide and international human rights law protecting freedom of expression.

77. ICTR Stat. art. 3 (defined to include the same acts (such as murder, enslavement, torture and rape) as in ICTY Stat. art. 5). The ICTR Statute, however, prohibits these acts “when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.” The ICTY Statute prohibits these acts “in armed conflict, whether international or internal in character.”

78. ICTR Stat. art. 4.

Of note is the inclusion of only a part of the Geneva Conventions of 1949 applying specifically to “armed conflict not of an international character,”⁷⁹ and the addition of a Protocol further protecting victims of such conflicts. This language recognized that the war in Rwanda was principally an internal matter, whereas the Balkan Wars had both internal and international characteristics. It also recognized that the acceptance of the Protocol by Rwanda before 1994 meant that its protections could be applied to its nationals and individuals committing crimes on its soil, even though all of the protections have not necessarily become customary international law, which applies to all nations.⁸⁰

The ICTR has three three-judge Trial Chambers, with decisions made by a majority vote of the members of the Chamber hearing the matter.⁸¹ Unlike the ICTY, the ICTR has not been given the authority to appoint judges *ad litem*, because it did not seek such authority until very recently—July 2001.

The General Assembly provided the ICTR with over \$U.S. 75 million for its 1999 budget.⁸²

B. *The Appeals Chambers in the Tribunals' Statutes*

As mentioned above, the two Tribunals have separate Appeals Chambers with common members. Currently, there are seven members of the Appeals Chambers, five of whom sit on each appeal. The ICTY and ICTR Statutes have always spoken of an Appeals Chamber for each Tribunal. The Rules of Procedure are somewhat different for each, as will be discussed

79. *Geneva Conventions* (Nos. I-IV) (for the Protection of War Victims) (Aug. 12, 1949) (available at <<http://www.icrc.org>>).

80. *Cf.* Secretary-General's Rep., *supra* n. 1, at ¶ 35 (not listing the Protocol as within those treaties that have “without doubt become part of international customary law”). “International customary law” (or “customary international law”) is one of the fundamental sources of international law. It is essentially that body of the general international practice of nations that is accepted as legally binding by them. *See e.g.* ICJ Stat. art. 38(1)(b).

81. *Compare* ICTR Stat. arts. 11-13 (all later amended) & 22 with ICTY Stat. arts. 12-14 (all later amended) & 23.

82. U.N., Press Release GA/9652, *Assembly Appraises Progress Made By War Crimes Tribunals; Judges Describe Obstacles* <<http://www.un.org/News/Press/docs/1999/19991108.ga9652.doc.html>> (Nov. 8, 1999).

below. When they discuss or cite cases in their opinions, the judges regularly note from which Appeals Chamber a case has come.

The identity of judges in both Tribunals' Appeals Chambers creates an important linkage between them. The purpose of this linkage is clear: consistency in the interpretation and development of international criminal law and procedure. The recent addition to the Appeals Chambers of judges originally assigned to the ICTR emphasizes the importance of the crimes within the jurisdiction of each Tribunal. This linkage of two international courts through Appeals Chambers with common members is highly unusual in international practice. Most international tribunals are independent of each other, even where they deal with similar subject matters.⁸³ The linkage was politically possible because the two tribunals were created by a single international organization, the United Nations, acting through the Security Council.

The original ICTY Statute provided for an Appeals Chamber of five members, to sit only in that Chamber.⁸⁴ The mandate of the Appeals Chamber is to hear appeals from persons convicted by the Trial Chambers or from the Prosecutor. The grounds for appeal are limited to correcting "an error on a question of law invalidating the decision" or "an error of fact which has occasioned a miscarriage of justice."⁸⁵ The ICTY Appeals Chamber may "affirm, reverse or revise" a decision of the Trial Chamber.⁸⁶ Note that this language authorizes

83. For example, the Inter-American Court of Human Rights and the European Court of Human Rights are wholly independent institutions dealing with protection of individual rights under regional treaties. The International Court of Justice, based in The Hague, is independent of the Tribunals and will also be independent of the International Criminal Court. Dispute resolution mechanisms under regional trade agreements (for example, the NAFTA) can also operate independently from dispute resolution under global trade agreements (for example, the World Trade Organization). The independence and separateness of various international tribunals in a context of potential jurisdictional overlap is a potential problem for international law. *See Prosecutor v. Delalic*, IT-96-21-A, *Appeals Judgement* ¶¶ 10-26 (ICTY App. Chamber Feb. 20, 2001).

84. ICTY Stat. arts. 12, 14 (both later amended).

85. *Id.* at art. 25. For further discussion of scope and standards of review, see *infra* Part I(D).

86. *Id.* For discussion of ordering new trials or sentencing proceedings, see *infra* Part I(D)(1).

Prosecutorial appeals of acquittals, a practice that exists in many common and civil law nations, but that is prohibited in the United States by its understanding of double jeopardy.⁸⁷ When the ICTR Statute was implemented, a similar structure was adopted, with the same grounds for appeal and authority to “affirm, reverse or revise” Trial Chamber decisions.⁸⁸ Members of the ICTY Appeals Chamber were designated to serve as “the members of the Appeals Chamber of the [ICTR].”⁸⁹ The Prosecutor for the ICTY also serves as the ICTR Prosecutor.⁹⁰

In the year 2000, the sizes of both the ICTY and ICTR were increased, and this increase extended to each Appeals Chamber. Each Appeals Chamber now consists of the same seven members, five of whom sit on the panel for any appeal.⁹¹ The President of the ICTR assigns two judges to the Appeals Chamber.⁹² The President of the ICTY assigns four members of the Appeals Chamber, and the President of the ICTY is a member of, and presides over, the Appeals Chamber.⁹³

The ICTY and ICTR Statutes leave open many questions concerning appellate practice and procedure. Among the most basic is whether the Tribunals will bind themselves by *stare decisis* and follow precedent like common law courts, or whether they will take more of a civil law approach.⁹⁴ Additionally, as will be seen, Rules adopted by the Tribunals have stretched the wording of the Statutes in allowing some

87. U.S. Const. amend. V. Although the Prosecutor is allowed to appeal acquittals, both the ICTY and ICTR Statutes protect against double punishment or double trial (i.e., by both national Courts and the International Tribunal) under the rubric of *Non-bis-in-idem*. ICTY Stat. art. 10; ICTR Stat. art. 9. *See also infra* nn. 252-54 and accompanying text, (discussing the Review process in the ICTY and ICTR Statutes, and its relationship to the principle that no one should be retried for an offense for which there has been a final acquittal). The Prosecutor has appealed from acquittals on several occasions.

88. ICTR Stat. arts. 11, 12, 13 (all later amended) & 24.

89. *Id.* at art. 12(2) (later amended).

90. *Id.* at Stat. art. 15.

91. ICTY Stat. art. 12(3), as amended; ICTR Stat. art. 11(b), as amended.

92. ICTR Stat. art. 13 (3 & 4), as amended; ICTY Stat. art. 14(4), as amended. The ICTR President is chosen by the ICTR judges and becomes a member of one of the ICTR Trial Chambers. ICTR Stat. art. 13 (1 & 2), as amended.

93. ICTY Stat. art. 14 (2 & 3), as amended. The ICTY President is chosen by the ICTY Judges from among themselves. ICTY Stat. art. 14(1), as amended.

94. *See supra* n. 9 and accompanying text and *infra* Part I(D)(4) (discussing the general acceptance of precedent in the Tribunals' decisionmaking).

interlocutory appeals and in allowing appeals by States (i.e., nation-states) in some matters.⁹⁵ One question that the ICTY and ICTR Statutes do not leave open, however, is that of the independence and impartiality of the judges, which are guaranteed.⁹⁶ This judicial independence should not obscure the fact that the work of both tribunals, as well as the implementation of indictments, is heavily contingent upon the cooperation of all nation-states, in particular Rwanda, Croatia, Bosnia, and the FRY.

C. The Appellate Process in the Rules of Procedure and Evidence

The ICTY Statute requires the ICTY to make Rules of Procedure and Evidence concerning the following: pre-trial, trial, and appellate proceedings; “admission of evidence; protection of victims and witnesses; and other appropriate matters.”⁹⁷ These Rules were promptly promulgated and have since been revised many times.⁹⁸ The ICTR Statute requires the ICTR judges to adopt the ICTY Rules “with such changes as they deem necessary.”⁹⁹ This adoption was also done promptly, and revisions have been ongoing.¹⁰⁰ The ICTR Rules authorize

95. These interlocutory appeals are covered *infra* Part I (C)(2).

96. ICTY, Press Release JD/P.I.S./540-e, *Speech by His Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, to the U.N. General Assembly* <<http://www.un.org/icty/pressreal/p540-e.htm>> (Nov. 20, 2000).

97. ICTY Stat. art. 15.

98. The most recent full version is Rules of Procedure and Evidence, IT/32/REV.21 (as amended July 12, 2001) [hereinafter ICTY R. P. & Evid.]. Additional revisions, the twenty-first set, were made by the Tribunal on July 19, 2001, effective July 26, 2001, in an order signed by Judge Richard May. (These revisions are ambiguously designated on the ICTY website as being dated July 16 or July 19, and they do not carry a U.N. document number.) The ICTY Rules of Procedure and Evidence were originally adopted February 11, 1994, IT/32. The April 2001 full version and the July amendments, as well as some prior versions, are on the ICTY web site, <<http://www.un.org/icty>>. This web site contains a great deal of the case law of the ICTY as well as the Statute, Rules, and other basic legal documents of the Tribunal. Early versions of the ICTY Rules of Procedure and Evidence are reprinted as “Appendix C” in *A Critical Study of the International Tribunal for the Former Yugoslavia*, 5 Crim. L. Forum 651 (1994).

99. ICTR Stat. art. 14.

100. ICTR Rules of Procedure and Evidence (as amended May 30-31, 2001) [hereinafter ICTR R. P. & Evid.] is the most recent version. The current version, as well as some prior

the Appeals Chamber to issue Practice Directions that are more specific than the Rules for appeals.¹⁰¹ The ICTR Registrar's Office, the administrative arm of the Tribunal, should be consulted about whether such Directives have been issued.

Concerning appeals, the two Tribunals' rules are similar, but they have many differences in the details. These differences arise partly from differing needs of the Tribunals. They may also arise simply from the promulgation of Rules for each Tribunal by its own body of judges. There is no requirement of common Rules on appeal or elsewhere in the process. The basic appellate process will be familiar to most lawyers. Interlocutory and special proceedings also exist.

1. Appeals from Final Judgments: The Basic Appellate Process

After judgment or sentence, the aggrieved party has fifteen days to file a notice of appeal in the ICTY, thirty days in the ICTR.¹⁰² Either the defense or the prosecution may appeal, unlike in the United States, where the prosecution may not appeal an acquittal.¹⁰³ In the ICTR only, the notice of appeal must set out the grounds for appeal.¹⁰⁴ The Record on Appeal consists of the entire trial record in the ICTY, but in the ICTR, it consists only of those parts of the trial record designated by the

versions, is on the ICTR web site, <<http://www.ictt.org>>. This web site also contains case law of the ICTR as well as its basic legal documents. The ICTR Rules of Procedure and Evidence were originally adopted June 29, 1995, and do not carry a UN document number.

101. ICTR R. P. & Evid. 107 *bis*.

102. ICTY R. P. & Evid. 108; ICTR R. P. & Evid. 108(A). No reason is given for the different times for appeal. The greater difficulty of communications among the relevant persons and offices involved in ICTR proceedings (especially the separation of the Trial Chambers in Arusha, Tanzania and the Appeals Chamber, operating from the ICTY seat in The Hague, Netherlands) may account for the difference. Additionally, the judges who adopted the ICTY Rules of Procedure and Evidence are different from those who adopted the ICTR Rules of Procedure and Evidence. There is little coordination between the two Tribunals when it comes to rule adoption and amendments.

103. *See supra* n. 87 and accompanying text. In other common law countries, for example, Canada, the United Kingdom, Australia, and New Zealand, the prosecution can in certain cases appeal on questions of law. *See also* Fleming, *supra* n. 28.

104. ICTR R. P. & Evid. 108(A). The reason the grounds must be stated in the notice of appeal in the ICTR is so that the parties can determine which parts of the record will need to be certified for appeal and included in the Appeal Book.

parties.¹⁰⁵ In both Tribunals, the Registrar makes a sufficient number of copies of the record on appeal for the judges of the Appeals Chamber and the parties.¹⁰⁶

Written briefing follows a schedule similar to that in many jurisdictions. In both Tribunals, the appellant has ninety days from filing the notice of appeal to file a brief with argument and authorities; in the ICTY the brief must also contain the grounds for appeal.¹⁰⁷ In both Tribunals, the respondent's brief with arguments and authorities must be filed within thirty days of the filing of the appellant's brief.¹⁰⁸ In both Tribunals, the appellant may file a reply brief within fifteen days of the filing of the respondent's brief. The Appeals Chamber may extend these time limits on a showing of good cause. This power to extend the time limits is explicit in the ICTR Rules.¹⁰⁹ In the ICTY Rules, it must be inferred from the Rules governing Trial Chamber proceedings, which apply "*mutatis mutandis* to proceedings in the Appeals Chamber."¹¹⁰ Because the Trial Chambers may extend time periods for good cause, so too can the Appeals Chamber.¹¹¹ Complying with time limits is nonetheless vital. The ICTR Appeals Chamber recently dismissed a Prosecution appeal for failure to file its brief timely.¹¹²

105. ICTY R. P. & Evid. 109; ICTR R. P. & Evid. 109. It is clearer here that the reason for the difference is the problem of transporting a voluminous record, including evidence, from Arusha to The Hague. See ICTR R. P. & Evid. 109(G). The ICTR Appeals Chamber may call for the whole record, and a party may ask the Appeals Chamber for leave to designate additional portions of the trial record that it did not originally request be made part of the record on appeal. ICTR R. P. & Evid. 109 (E) & (F).

106. ICTY R. P. & Evid. 110; ICTR R. P. & Evid. 110.

107. ICTY R. P. & Evid. 111; ICTR R. P. & Evid. 111.

108. ICTY R. P. & Evid. 112; ICTR R. P. & Evid. 112.

109. ICTR R. P. & Evid. 116.

110. ICTY R. P. & Evid. 107.

111. *Id.* at 127. For example, the ICTY has allowed time for filing a brief to run from the time of receipt by counsel of a translation of the Trial Chamber's decision into Serbo-Croatian. John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* 450 (2d ed., Transnational Pubs. 2000) (discussing *Erdemovic v. Prosecutor*, IT-96-22-A (Order of Cassese, P.J.)). (The version of the ICTY Rules of Procedure and Evidence that Jones commented upon is IT/32/REV.14 (Dec. 17, 1998 & Feb. 25, 1999); the version of the ICTR Rules of Procedure and Evidence commented upon is that of June 8, 1998. The commentary is often very useful even if there have been later changes in the text of the Rules of Procedure and Evidence, for which practitioners should always check.)

112. See *Le Procureur c/ Kayishema*, ICTR-95-1-A (ICTR App. Chamber June 1, 2001).

The ICTY Rules require that the Appeals Chamber set a date for hearing of the appeal.¹¹³ The ICTR Rules give the Appeals Chamber the option of either setting a date for hearing or deciding the appeal on the written briefs.¹¹⁴ A new ICTR Rule requires that each party present its own "Appeal Book," containing all documents and materials (or relevant excerpts) from cases cited in its briefs or referred to in oral argument. Each party must also file its own "Book of Authorities," with the text or relevant excerpts from "every reference material, including case law, statutory and regulatory provisions, from international and national sources" to which it refers in its briefs or intends to refer to in oral argument. These materials must be filed with the Registry two weeks before the hearing.¹¹⁵

The Rules of both Tribunals allow the presentation of additional evidence on appeal if the evidence was not available to the proffering party at trial and if the request for presentation is made not fewer than fifteen days before the hearing on the appeal. The Appeals Chamber has the discretion to authorize presentation of the evidence if "the interests of justice so require."¹¹⁶

The Appeals Chambers of both the ICTY and ICTR pronounce judgment based on the record on appeal and on any additional evidence that may have been presented. Judgment must be reached by a majority of the Judges, and it must be accompanied or followed by a "reasoned opinion in writing," with any concurring or dissenting opinions appended.¹¹⁷ Judgment must be pronounced in public, and the parties and counsel have the right to be present.¹¹⁸ Enforcement of the judgment is immediate.¹¹⁹ Note that the Rules of both Tribunals allow the Appeals Chamber to order a retrial, even though the

113. ICTY R. P. & Evid. 114.

114. ICTR R. P. & Evid. 114, as amended. Earlier versions of the Rule were similar to ICTY R. P. & Evid. 114. *See* Jones, *supra* n. 111, at 639. The reason for this difference is likely the expense of traveling from Arusha to The Hague.

115. ICTR R. P. & Evid. 117 *bis*. *Cf.* Jones, *supra* n. 111, at 639-40 (an early version of the Rules of Procedure and Evidence without this provision).

116. ICTY R. P. & Evid. 115; ICTR R. P. & Evid. 115. *See infra* Part I(D)(2)(b).

117. ICTY R. P. & Evid. 117(B); ICTR R. P. & Evid. 118(B).

118. ICTY R. P. & Evid. 117; ICTR R. P. & Evid. 118.

119. ICTY R. P. & Evid. 118; ICTR R. P. & Evid. 119.

Statutes on their face only authorize the Appeals Chambers to affirm, reverse, or revise judgments of the Trial Chambers.¹²⁰

The Tribunals' Statutes and Rules do not explicitly provide for reconsideration of their Appeals Chambers' final judgments. At least Judge Shahabuddeen of the ICTR Appeals Chamber believes that there is an inherent power of reconsideration in courts of last resort.¹²¹ Additionally, the Tribunals' Statutes and Rules provide for post-appellate review proceedings.¹²²

2. *Interlocutory Appeals by Parties and States*

The ICTY and ICTR Statutes do not explicitly provide for interlocutory appeals.¹²³ Nonetheless, both Tribunals' Rules of Procedure and Evidence have allowed for certain interlocutory appeals from the beginning.¹²⁴ The ICTY allows for a greater variety of interlocutory appeals than does the ICTR, where such appeals are limited to matters of jurisdiction and pretrial release.

The principal interlocutory decisions that may be appealed as a matter of right by the parties are, in both Tribunals, appeals from the denial of a motion to dismiss for want of jurisdiction.¹²⁵ These appealable decisions are defined further as claims that the indictment does not relate to the persons, places, times, or crimes defined as falling within the ambit of the Statutes.¹²⁶ A panel of three Judges of the Appeals Chamber may decide whether the claim is truly jurisdictional in this sense before the Chamber hears the appeal.¹²⁷ Essentially, these are defense

120. Compare ICTY R. P. & Evid. 117(C) and ICTR R. P. & Evid. 118(C) with ICTY Stat. art. 25 and ICTR Stat. art. 24.

121. *Barayagwiza v. Prosecutor*, ICTR 97-19-AR72, *Decision: Prosecutor's Request for Review or Reconsideration* (ICTR App. Chamber Mar. 31, 2000) (separate opinion of Shahabuddeen, J.).

122. See *infra* Part I(E) on Review Proceedings in ICTY Stat. art. 26; ICTR Stat. art. 25; ICTY R. P. & Evid. 119; & ICTR R. P. & Evid. 120.

123. ICTY Stat. art. 25; ICTR Stat. art. 24.

124. See Jones, *supra* n. 111, at 364-65 (discussing *Prosecutor v. Tadic*, IT-94-1-A, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (ICTY App. Chamber Oct. 2, 1995) (ruling on merits of interlocutory appeal on jurisdiction of the ICTY)). This was the first major decision of the Appeals Chamber).

125. ICTY R. P. & Evid. 72(B); ICTR R. P. & Evid. 72(D).

126. ICTY R. P. & Evid. 72(D); ICTR R. P. & Evid. 72(H).

127. ICTY R. P. & Evid. 72 (B, D & E) (citing ICTY Stat. arts. 1-9); ICTR R. P. & Evid. 72 (D, H & I) (citing ICTR Stat. arts. 1-8).

appeals, as the prosecution would have no reason to appeal the denial of a motion to dismiss an indictment.

The Rules of both Tribunals allow for appeal of interlocutory decisions on whether to provisionally release an accused pending appeal of the trial decision. A three-judge bench of the appropriate Appeals Chamber must grant permission for the appeal.¹²⁸ Requests for permission must be made within seven days of the impugned decision in both Tribunals, except that, in the ICTY only, the Prosecutor must file the appeal within one day if the ICTY Trial Chamber grants a provisional release.¹²⁹ The Appeals Chamber has the authority to suspend the execution of the impugned decision at any stage of the appeal.¹³⁰ The “party upon whose motion the Trial Chamber issued the impugned decision” (i.e., the prosecutor or defense, as the case may be) has a right to be heard by the Appeals Chamber; “[t]he other party may be heard if the Appeals Chamber [decides] the interests of justice so require.”¹³¹

Since mid-1997, the ICTY Rules have allowed for a State’s immediate appeal of an interlocutory decision that directly affects it “if that decision concerns issues of general importance relating to the powers of the Tribunal.”¹³² State appeals are not expressly provided for in the ICTY Statute, and the Rule does not apply to others who may be affected by an interlocutory order of a Trial Chamber.¹³³ This provision was designed to respond to States’ concerns that emerged from the ruins of the former Yugoslavia that orders of the ICTY were requiring them or their current and former officials to produce evidence that

128. ICTY R. P. & Evid. 65 (D, E & F); ICTR R. P. & Evid. 65 (D).

129. ICTY R. P. & Evid. 65 (D, E & F); ICTR R. P. & Evid. 65(D). Presumably, the reference to filing an appeal in one day in ICTY Rule 65(F) means filing an application for leave to appeal in the sense of Rule 65(D).

130. ICTY R. P. & Evid. 108 *bis* (C).

131. ICTY R. P. & Evid. 108 *bis* (B). Note that this structure allows for litigation in a criminal case pitting a State (i.e., a nation-state) directly against an individual in a tribunal established by an international organization, the United Nations. *See also* ICTY R. P. & Evid. 54 *bis* (procedure in these matters before appeal). The implications of this innovation for the role of international organizations and the international legal standing of individuals are great, but too complex to be discussed in full here.

132. ICTY R. P. & Evid. 108 *bis*, discussed in Jones, *supra* n. 111, at 448.

133. *See* ICTY Stat. art. 25 (allowing only appeals by parties—i.e., the Prosecutor and the Accused).

might endanger their national security.¹³⁴ There is no explicit authority for rejecting an interlocutory appeal from a State on the grounds that it is not directly affected by a decision or that the issues concerned are not of general importance to the powers of the Tribunal. Unlike interlocutory appeals on procedure by the parties, appeals by States are heard as a matter of right by full five-judge panels of the ICTY Appeals Chamber.¹³⁵ There is no similar provision for State interlocutory appeals in the ICTR Rules, presumably because the political and security issues among Rwanda and its neighbors are significantly different from those among the States of the former Yugoslavia.

To balance this right of appeal by States, the ICTY Rules have recently been amended to allow an interlocutory appeal by a party—either the prosecutor or the defense—where a motion to require a State to produce documents is denied.¹³⁶ It is not wholly clear whether this is an interlocutory appeal as a matter of right. It would seem so from the rule authorizing the appeal because it does not require leave to appeal, but the general rule on interlocutory appeals of motions in the Trial Chamber would require leave to appeal for this motion.¹³⁷ The canon of interpretation that specific provisions control the general would suggest that parties have such an appeal as a matter of right, but the Appeals Chamber has the authority to accept or reject this interpretation.

The ICTY Rules allow for other interlocutory appeals by permission of a three-judge bench of the Appeals Chamber. The rule for interlocutory appeal of preliminary motions on assignment of counsel, severance of counts of indictments or of trials of co-accused, or form of indictments requires “good

134. See ICTY R. P. & Evid. 54 *bis* (F) (allowing State to object in Trial Chamber to request for order to produce documents on grounds of national security); *Prosecutor v. Blaskic*, IT-95-14, *Judgement on the Request of the Republic of Croatia for Review of Decision* (ICTY App. Chamber Oct. 29, 1997).

135. See ICTY R. P. & Evid. 108 *bis* (B).

136. ICTY R. P. & Evid. 54 *bis*(C).

137. Compare ICTY R. P. & Evid. 54 *bis* (C) (stating rejection of application “shall be subject to appeal,” which appears to make it appearing to be as a matter of right) with ICTY R. P. & Evid. 73(D) (requiring leave to appeal unless motion is jurisdictional or has been certified by Trial Chamber). See also ICTY R. P. & Evid. 65(D-F) (on pre-trial release of detainees; similar language to Rule 54 *bis*(C) except leave to appeal is specifically required).

cause”; interlocutory appeals of other motions require either prejudice to a party not curable by later appeal or an issue of general importance to the Tribunal or international law more generally.¹³⁸ A person who is not a party (e.g., a witness who is not an accused) may not file such an appeal.¹³⁹ There is, perhaps surprisingly, currently no analogous rule for such appeals in the ICTR.¹⁴⁰

The ICTY Rules also provide for another avenue of interlocutory appeal by the parties. An appeal may be made on evidentiary or procedural matters during trial if the Trial Chamber certifies that such an appeal is “appropriate for the continuation of the trial.”¹⁴¹ In that case, leave of the Appeals Chamber is not necessary.¹⁴² Again, there is no similar ICTR provision.

In all cases of interlocutory appeals in both Tribunals, the process is expedited. The time for filing the notice of appeal of an interlocutory decision varies. For jurisdictional issues and State appeals in the ICTY, it is fifteen days.¹⁴³ Notices for other interlocutory appeals must be filed within seven days.¹⁴⁴ Where the ICTY states that a written decision will follow an oral ruling, time runs from the filing of the written decision, or if the party and counsel are not present when an oral decision is made, time runs from receipt of the oral decision.¹⁴⁵ In the ICTR,

138. ICTY R. P. & Evid. 72(B) (interlocutory appeals of preliminary motions require good cause be shown); ICTY R. P. & Evid. 73(D) (interlocutory appeals from other motions require prejudice to a party that could not be cured by appeal after final judgement, or general importance of an issue to Tribunal proceedings or international law generally). Decisions on whether to allow interlocutory appeals are decided by the Appeals Chamber without oral hearing. Jones, *supra* n. 111, at 366.

139. *Prosecutor v. Tadic*, IT-94-1-T, *In the Case of Dragan Opacic: Decision on Application for Leave to Appeal* (ICTY App. Chamber June 3, 1997) (three-judge bench) (Note: Dragan Opacic’s case was given its own case number, IT-95-7-Misc.1; however it can be found on the ICTY web site under the parent case of *Prosecutor v. Tadic*).

140. Interlocutory appeal of decisions on most motions is prohibited by ICTR R. P. & Evid. 72(B), 73(D).

141. ICTY R. P. & Evid. 73(C).

142. *Id.*

143. ICTY R. P. & Evid. 72 (B & C) (jurisdiction) & 108 (appeal by State). In the case of a State, the document to be filed is called a “request for review” rather than a notice of appeal.

144. *Id.* at 72(C), 73(E).

145. *Id.* at 72(C), 73(E).

interlocutory appeals must generally be filed within seven days. An extension for more than seven days from the receipt of the full decision on jurisdiction may be granted, especially if counsel is not fluent in the language in which the full decision is initially written.¹⁴⁶

After the notice of appeal, interlocutory appeals in both Tribunals are to be heard on an expedited basis. The usual time limits do not apply. The Presiding Judge of the Appeals Chamber sets the schedule. Interlocutory appeals may be decided wholly on the basis of the written briefs, without oral argument, but oral argument may be scheduled by the Appeals Chamber. Finally, the parties and counsel do not have the right to be present when judgment is pronounced on interlocutory appeals.¹⁴⁷

3. *Special Appeals: Contempt and False Testimony*

The Tribunals may punish contempt of court and false testimony, ancillary to their power to conduct trials.¹⁴⁸ Conviction and penalties for these crimes may be appealed.¹⁴⁹ The procedures to be applied in these appeals are the expedited procedures applied to interlocutory appeals.¹⁵⁰

146. ICTR R. P. & Evid. 108.

147. For all the material in this paragraph, see ICTY R. P. & Evid. 116 *bis* (and Rules cited therein) and ICTR R. P. & Evid. 117 (and Rules cited therein). Unlike the ICTR Rule, the ICTY Rule does not specifically state that it is the presiding judge who controls scheduling, but it can be inferred that the presiding judge does so in consultation with the rest of the Appeals Chamber. Compare ICTR R. P. & Evid. 117(B) (explicit authority in presiding judge) with ICTY R. P. & Evid. 116 *bis* (C) (presiding judge, in consultation with other members of Appeals Chamber, decides whether parties and counsel should have opportunity to be present when judgment is rendered on an appeal).

148. See Jones, *supra* n. 111, at 393-95 (contempt power as prerogative of the appropriate Chamber) & at 627-28 (nature of crime of false testimony). The Statutes of the Tribunals do not explicitly authorize convictions for these crimes.

149. ICTY R. P. & Evid. 77 (contempt) & 91 (false testimony under solemn declaration); ICTR R. P. & Evid. 77 & 91 (same rubrics as ICTY). See *Prosecutor v. Tadic (Appeal of Vujin)*, IT-94-1-A-AR77 (ICTY App. Chamber Feb. 27, 2001) (contempt may be appealed, even when initially found by Appeals Chamber), discussed further *infra* Part II(A)(4).

150. ICTY R. P. & Evid. 116 *bis*; ICTR R. P. & Evid. 117; see *supra* n. 147 and accompanying text.

D. Practice on Appeal: Grounds for Appeal, Standards of Review, Preservation of Issues, and Use of Precedent

1. Grounds for Appeal and Available Remedies

The general scope of the Appeals Chambers' review, at least in cases of final judgments,¹⁵¹ is set forth in their Statutes:

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 Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.¹⁵²

Where two grounds are raised, the Appeals Chamber may decide to review both of them, even though, strictly speaking, it could dispose of the entire case based on only one of them.¹⁵³

The ICTY Appeals Chamber very recently has reiterated that there is a third class of grounds for appeal:¹⁵⁴ "the exceptional situation where a party has raised a legal issue that

151. The scope of review for interlocutory appeals is defined by the limits on what may be appealed and is discussed *supra* part I(C)(2). For special matters, discussed *supra* part I(C)(3), if the Appeals Chamber is reviewing either its own action or the action of a Trial Chamber, there is no case law or other evidence that suggests it will apply different standards of review from that applied to normal final judgments. However, experience in these matters has been very limited. See *Prosecutor v. Aleksovski (Appeal of Nobilo)*, IT-95-4/1-AR77, Judgment on Appeal (ICTY App. Chamber May 30, 2001); *Prosecutor v. Tadic (Appeal of Vujin)*, IT-94-1-A-AR77 (ICTY App. Chamber Feb. 27, 2001) (both contempt of court proceedings involving unprofessional conduct of counsel).

152. ICTY Stat. art. 25; ICTR Stat. art. 24.

153. See *Prosecutor v. Kupreskic*, IT-95-16-A, *Appeal Judgement*, ¶ 125 (ICTY App. Chamber Oct. 23, 2001) (Appeals Chamber decided issue of vagueness of indictment, even though issue of sufficiency of evidence wholly disposed of case).

154. This is in addition to the two set forth in ICTY Statute, article 25(1)(a) & (b). The same considerations would appear to apply to ICTR Statute, article 24(1)(a) & (b).

is of general significance to the Tribunal's jurisprudence."¹⁵⁵ For example, in *Tadic* the Appeals Chamber determined both that a crime against humanity may be committed out of a purely personal motive and that the Trial Chamber has discretion to require the defense to disclose prior statements made by its witnesses. Yet neither party contended that the convictions would stand or fall on either of these issues.¹⁵⁶ Such an issue might be raised (as it was in *Tadic*) by the prosecution in a cross-appeal seeking review of a legal ruling by the Trial Chamber at the same time that the Appeals Chamber hears a defense appeal against conviction.

The Rules of both Tribunals allow their respective Appeals Chambers to order retrials,¹⁵⁷ as well as to "affirm, reverse or revise" Trial Chamber decisions.¹⁵⁸ The Appeals Chamber has held that this includes the authority to refer a matter back for resentencing.¹⁵⁹ There is some discretion available to the Appeals Chambers in considering whether to order a retrial. For example, the ICTY Appeals Chamber has refused to order a retrial following a successful prosecutorial appeal of an acquittal for insufficient evidence. In *Jelusic*, factors such as the accused's guilty pleas on other charges as well as his need for psychiatric treatment that was more readily available in prison than in the Tribunal's detention center led the Chamber to conclude that a retrial would not be in the interests of justice.¹⁶⁰

155. *Kupreskic*, ¶ 22 (citing *Prosecutor v. Tadic*, IT-94-1-A ¶ 247 (ICTY App. Chamber July 15, 1999)); accord *Procureur c/ Akayesu*, ICTR-96-4-A, *Arrêt [Judgement]* ¶ 18 (ICTR App. Chamber June 1, 2001).

156. *Tadic*, ¶¶ 238-72, ¶¶ 306-326 (ICTY App. Chamber July 15, 1999).

157. ICTY R. P. & Evid. 117(C) (accused may be "retried according to law"); ICTR R. P. & Evid. 118(C) (accused may be "retried before the Trial Chamber"); *Kupreskic*, ¶ 125; *Jelusic*, ¶¶ 73-77.

158. ICTY Stat. art. 25(1); ICTR Stat. art. 24(1).

159. *Prosecutor v. Delalic*, IT-96-21-A, *Appeal Judgement* ¶ 851 (ICTY App. Chamber Feb. 20, 2001).

160. *Jelusic*, ¶¶ 73-77.

2. Standards of Review

On October 23, 2001, in *Prosecutor v. Kupreskic*,¹⁶¹ the ICTY Appeals Chamber restated, and to some extent reshaped, the law concerning standards of review on appeal, especially with regard to errors of fact and admission of new evidence on appeal. Counsel in both the ICTY and ICTR should be aware that the law may remain in flux for some time and that new developments are ongoing in this area of the law.

In their major statements on standards of review,¹⁶² the Appeals Chambers have generally classified grounds for appeal into two categories: errors of law or errors of fact. They generally do not refer to mixed questions of law and fact, a classification often used in common law appellate courts to discuss issues such as negligence.¹⁶³ There appear to be two reasons for this. First, the Statutes of both Tribunals refer only to “an error on a question of law” or “an error of fact,” not to mixed questions.¹⁶⁴ The second is the requirement that a judgment of a Trial Chamber be “accompanied by a reasoned opinion in writing.”¹⁶⁵ In such an opinion, the Trial Chamber might be expected to state the standards of law it is applying as well as the facts to which it finds the standards applicable—each of which may be reviewed by the Appeals Chamber.¹⁶⁶

If a standard of law is correct, the alleged misapplication of that standard to the facts of a specific case appears to be treated as an error of fact.¹⁶⁷ An error of fact causes a miscarriage of

161. IT-95-16-A, *Appeal Judgement* (ICTY App. Chamber Oct. 23, 2001). See also *Musema c/ Le Procureur*, ICTR-96-13-A, *Arrêt*, ¶ 399 (ICTR App. Chamber Nov. 16, 2001) (holding converse of *Kupreskic*, the Appeals Chamber did not remand for re-sentencing where defense appeal upheld as to one charge, where facts of remaining case necessitated sentence given). Note: *Musema* was decided after completion of the primary research for this article. Notes to it have been added where feasible.

162. *Kupreskic*; *Prosecutor v. Furundzija*, IT-95-17-A, *Appeal Judgement* (ICTY App. Chamber July 21, 2000); *Serushago v. Prosecutor*, ICTR-98-39-A, *Reasons for Judgment* (ICTR App. Chamber Apr. 6, 2000) (discussed further *infra* part II (B)(1)); see also *Tadic*, IT-94-1-A, *Judgement* (ICTY App. Chamber July 15, 1999).

163. Fleming, *supra* n. 28, at 124.

164. ICTY Stat. art. 25; ICTR Stat. art. 24.

165. ICTY Stat. art. 23; ICTR Stat. art. 22.

166. See *Furundzija*, ¶ 37 (relying on *Serushago*, ¶ 22).

167. *Id.* at ¶ 37 (relying on *Serushago*, ¶ 22); see *Le Procureur c/ Kayishema*, ICTR-95-1-A, ¶¶ 135-47 (ICTR App. Chamber June 1, 2001) (discussed further *infra* part II (B)(5));

justice where, for example, an accused “is convicted despite a lack of evidence on an essential element of the crime.”¹⁶⁸ Similarly, the Appeals Chambers have distinguished between alleged errors of law in defining what mitigating circumstances apply in sentencing proceedings and alleged errors of fact concerning how much weight to give each circumstance.¹⁶⁹ This class of factual error is encompassed by the phrase “error of fact,” which ordinarily means a mistake as to what happened.¹⁷⁰

In sentencing appeals, however, counsel should be aware that the Appeals Chambers often use a different formulation. The inquiry is whether the Trial Chamber committed “discernable error” in exercising its discretion in sentencing.¹⁷¹ The Appeals Chamber particularly applies this standard to determine whether the sentence was consistent with sentences handed out in similar cases in the Tribunals and whether the sentence was within the “discretionary framework” available to the sentencer.¹⁷²

Fleming, *supra* n. 28 (noting that this is the sort of question often referred to in domestic systems as a mixed question of law and fact) (relying on *e.g. Dir. of Investigation & Research v. Southam Inc.*, 1 S.C.R. 748, 766-67 (S. Ct. Can. 1997); *U.S. v. Gaudin*, 515 U.S. 506, 512 (1995)).

168. *Furundzija*, ¶ 37 (quoting Black’s Law Dictionary (7th ed. 1999) (defining “miscarriage of justice”)); followed in *Kupreskic*, ¶ 29; *Kayishema*, ¶¶ 135-49 (issues of sufficiency of evidence of genocide and accused’s *mens rea* treated as factual issues). *Accord Delalic*, ¶¶ 434-37, ¶¶ 438-507 (treating issue of sufficiency on appeal as factual; distinguishing issue of “legal” sufficiency of evidence to continue with trial at the close of the Prosecution’s case).

169. *Furundzija*, ¶ 37 (relying on *Serushago*, ¶ 22).

170. *See Kupreskic*, ¶¶ 126-232 (reversing a finding that an accused participated in a particular attack); ¶ 304 (pointing out what appear to be both types of factual error: errors as to whether accused was a member of a police force and whether troops were at his house on a given day; and an error as to whether a reasonable tribunal of fact could find the accused guilty as an aider and abettor on the evidence; these errors led to a “miscarriage of justice”).

171. *Kupreskic*, ¶ 408; *Prosecutor v. Aleksovski*, IT-95-14/1, *Judgement* ¶ 187 (ICTY App. Chamber Mar. 24, 2000); *Prosecutor v. Tadic*, IT-94-1-A and IT-94-1-Abis, *Judgement in Sentencing Appeals*, ¶ 22 (ICTY App. Chamber Jan. 26, 2000).

172. *See Kupreskic*, ¶ 408; *Aleksovski*, ¶ 187; *Kayishema*, ¶ 337 (“pouvoir discrétionnaire” in the authoritative French version, translated by the ICTY Appeals Chamber in the later cases as “discretionary framework”); *Tadic, Judgement in Sentencing Appeals*, ¶ 22.

a. Errors of Law

An appellant claiming an error of law “must at least identify the alleged error and advance some arguments in support of its contention.”¹⁷³ The Appeals Chamber does not, however, limit itself to the precise arguments raised by an appellant. If the argument raised in support of a claim of error does not support the claim, the party raising the claim

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.¹⁷⁴

The Appeals Chamber thus makes a distinction between issues or grounds for appeal that must be asserted and the arguments that may be adduced in favor of those grounds, which the Appeals Chamber may shape as appropriate.

The Appeals Chambers freely review questions of law. Neither the language nor the practice in the cases discussed in this article suggests that the Appeals Chambers require themselves to defer to statements of law made by the Trial Chambers. In *Kupreskic*, the Appeals Chamber refused to consider arguments concerning the definitions of the crime of persecution, because the appellant “[did] not identify any legal error on the part of the Trial Chamber, such as, for example, a discrepancy between the elements of the crime identified by him and those identified by the Trial Chamber.”¹⁷⁵ The Appeals Chamber pointed out that an Appeal Brief must be more than a restatement of one’s argument before the Trial Chamber;¹⁷⁶ it must identify the Trial Chamber’s legal error. The Appeals Chamber does preserve for itself some right to raise legal issues on its own motion: “Without guidance from the appellant, the

173. *Kupreskic*, ¶ 27.

174. *Kupreskic*, ¶ 26 (quoting from *Furundzija*, ¶ 35). See Fleming, *supra* n. 28, for an extended discussion of standards of review on appeal in the ICTY (based principally upon *Tadic*) and ICTR (based principally on *Barayagwiza v. Prosecutor*, ICTR 97-19-AR72, *Decision (Prosecutor’s Request for Review or Reconsideration)* (ICTR App. Chamber Mar. 31, 2000) (discussed further *infra* Part II (B)(2)), and related litigation).

175. *Kupreskic*, ¶ 26 (discussing ICTY Stat. art. 5(h)).

176. *Id.* at ¶ 26.

Appeals Chamber will only address legal errors where the Trial Chamber has made a glaring mistake.”¹⁷⁷ Counsel cannot, however, rely on the Appeals Chamber to search the record for glaring error; counsel must take care to raise all issues worthy of consideration.

The ICTR Appeals Chamber set out a standard for what makes an error of law “invalidate a decision” in its *Akayesu* judgment, whose authentic version is in French:

La Chambre d’appel peut-elle examiner toutes les erreurs de droit alléguées?

De prime abord, l’article 24 1) ne mentionne que les erreurs de droit *qui invalident la décision*, c’est-à-dire les erreurs qui, si elles sont avérées, ont un impact sur le verdict de culpabilité.¹⁷⁸

Briefly, in English, an error of law invalidates a decision if it is an established error of law that “has an impact on the verdict of guilt.”

There are some examples, especially from the ICTY Appeals Chamber, of the types of errors of law that will invalidate a decision. Use of an improper definition of a crime that disadvantaged a party—whether prosecution or accused—is one ground for invalidating a decision.¹⁷⁹ Multiple convictions for crimes with materially similar elements arising out of the same conduct will invalidate all but one conviction for each act and will require resentencing.¹⁸⁰ An indictment that does not fairly inform the accused of the charges against him or her will invalidate a conviction. However, by itself it will not bar a retrial of which the accused has fair notice.¹⁸¹ Use by the court of improper evidence at sentencing (for example, considering the

177. *Id.* at ¶ 27; *see also Akayesu*, ¶ 17.

178. *Akayesu*, ¶ 18.

179. *See Kupreskic*, ¶ 26 (accused could claim improper definition applied); *Tadic*, ¶¶ 68-144 (prosecution claim that Trial Chamber applied improper definition of “control” under international law was necessary to reversal of acquittal on count charging grave breaches of Geneva Conventions).

180. *Delalic*, ¶¶ 412-32.

181. *Kupreskic*, ¶¶ 124-25.

accused's silence at trial) has invalidated a sentence and required re-sentencing.¹⁸²

On the other hand, except for matters of general importance to the jurisprudence of the Tribunals,¹⁸³ an error that had no effect on the judgment challenged will not be reviewed; it does not invalidate a decision. For example, a possible error in characterizing whether a substantive defense, *tu quoque*, was raised at trial by the accused would not be considered by the Appeals Chamber where the error had no bearing on the accused's conviction.¹⁸⁴

b. Errors of Fact (with or without newly admitted evidence on appeal)

An error of fact is grounds for appeal if it has "occasioned a miscarriage of justice."¹⁸⁵ As discussed above, the Appeals Chambers appear to recognize two sorts of errors of fact: simple errors concerning what happened and errors of application of facts to a correct standard of law.¹⁸⁶ The standard under which the Appeals Chamber will review alleged errors of fact is a complex matter.¹⁸⁷ The *Kupreskic* decision may create new opportunities for counsel to argue issues of fact before the Appeals Chambers.

182. *Delalic*, ¶¶ 781-85.

183. See *supra* Part I (D)(1), nn. 155-56 and accompanying text. The Appeals Chambers may wish to articulate an explicit standard delineating which errors will be considered prejudicial enough to require reversal or retrial and which will be considered harmless. Compare e.g. *Delalic*, ¶¶ 781-85 (error considering accused's silence requires resentencing) with e.g. *Musema*, ¶ 399 (invalidation of conviction on one count did not require resentencing, because remaining counts required life sentence).

184. *Kupreskic*, ¶ 25. The accused there claimed that the Trial Chamber had improperly construed their arguments as raising the defense of *tu quoque* (roughly, and controversially, a claim that in an armed conflict, the other side had done the same things the accused are charged with), but the Appeals Chamber held that this error "had no bearing on the conviction of the Defendants [*sic*—"accused" is the usual term in the Tribunals]." *Id.* Presumably, though the Appeals Chamber did not say so, this is because the addition of a ground of defense could not have prejudiced the accused.

185. ICTY Stat. art. 25(1)(b); ICTR Stat. art. 24(1)(b).

186. See *supra* text accompanying nn. 167-70.

187. See generally Fleming, *supra* n. 28 (extensive discussion and critique of the Appeals Chambers' review of facts, especially at request of prosecution).

The ICTY Appeals Chamber has used language disfavoring appellate review of factual issues. This language will be familiar to many lawyers, especially from common law systems:

The task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber. Therefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. *It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber.* It is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.¹⁸⁸

The italicized sentence above provides the basic standard for review of allegations of factual error in the Appeals Chambers.

Subsequently, the ICTY Appeals Chamber restated this standard and added another general situation in which it could reverse a finding of fact: “where the evaluation of the evidence is wholly erroneous.”¹⁸⁹ In *Kupreskic*, the Appeals Chamber stated that where the evidence relied on at trial could not reasonably have been accepted by any reasonable person or the evaluation of evidence at trial was wholly erroneous, the Appeals Chamber

will overturn the conviction since, under such circumstances, no reasonable tribunal of fact could be satisfied beyond reasonable doubt that the accused had participated in the criminal conduct.¹⁹⁰

The Appeals Chamber in *Kupreskic* also pointed out that “what constitutes a ‘wholly erroneous’ evaluation of the evidence must . . . be determined on a case-by-case basis.”¹⁹¹

Kupreskic demonstrates that the Appeals Chamber may engage in an in-depth reevaluation of evidence in order to make this determination. In that case, it engaged in such reevaluation because the convictions of the accused rested primarily upon the

188. *Tadic*, ¶ 64 (emphasis added).

189. *Aleksovski*, ¶ 63; followed in *Kupreskic*, ¶ 30.

190. *Kupreskic*, ¶ 41 (footnote omitted) (emphasis added).

191. *Id.* at ¶ 225; see also *Musema*, ¶ 211.

testimony of a single eyewitness. Without reversing the rule that uncorroborated eyewitness testimony may support a finding of guilt beyond a reasonable doubt, the Appeals Tribunal discussed at length cases from both civil and common law countries recognizing problems raised by eyewitness testimony.¹⁹² It then undertook an examination of factors that affected the credibility of the eyewitness, such as: the difficulty of the circumstances under which the identification was made;¹⁹³ the confidence of the witness's demeanor;¹⁹⁴ matters concerning a prior statement;¹⁹⁵ her familiarity with her neighbors;¹⁹⁶ the detail of her description of the attack and alleged attackers;¹⁹⁷ comparison of her testimony with the written statements of another witness;¹⁹⁸ the possibility of others having influenced her testimony;¹⁹⁹ inconsistencies with the remainder of the evidentiary record,²⁰⁰ including evidence admitted into the record for the first time on appeal;²⁰¹ and absence of corroboration.²⁰² Based on its own evaluation of these factors, it rejected the decision of the Trial Chamber to accept the testimony of the witness as evidence that could prove the participation of the accused beyond reasonable doubt.²⁰³

The Appeals Chamber stated that all of these factors had weight, although the Trial Chamber had not considered some of them in its judgment.²⁰⁴ Therefore, the Appeals Chamber reasoned that it was not really reweighing the evidence considered by the Trial Chamber and reaching a different conclusion. The Appeals Chamber was convinced that, had the Trial Chamber considered all the factors it should have, "it

192. *Kupreskic*, ¶¶ 33-40.

193. *Id.* at ¶¶ 132-35.

194. *Id.* at ¶¶ 136-39.

195. *Id.* at ¶¶ 140-45, 155-63.

196. *Id.* at ¶¶ 146-50.

197. *Id.* at ¶¶ 151-54.

198. *Id.* at ¶¶ 155-90.

199. *Id.* at ¶¶ 191-201.

200. *Id.* at ¶¶ 202-18.

201. *Id.* at ¶¶ 203-16; *followed in Musema*, ¶ 185.

202. *Kupreskic*, ¶¶ 219-21.

203. *Id.* at ¶¶ 222-27.

204. *Id.* at ¶¶ 223-24.

would not have accepted the identification evidence of this single witness as the basis upon which to convict the Defendants.”²⁰⁵ This reasoning evinces a willingness to review a Trial Court’s evaluation of evidence that goes well beyond what might be expected from the bare language that a finding of fact must be “wholly erroneous” or “could not reasonably have been accepted by any reasonable person” in order to be reversed. This type of review, however, will probably not apply symmetrically to prosecution and defense appeals. The Appeals Chamber was quite clear that the witness’s testimony could not be accepted beyond reasonable doubt—not that it had been proven untrue.

Where the prosecution seeks to appeal a judgment of acquittal on the basis of an error of fact, it has a much more difficult task. It must show not only that its proposed finding is likely true, but also that no reasonable finder of fact could have any reasonable doubt about that fact.²⁰⁶ Nonetheless, in *Tadic*, the Appeals Chamber appears to have upheld a prosecution appeal of an acquittal on this ground. However, in that case, there was no evidence contradicting the prosecution’s position that the accused had been involved in certain murders.²⁰⁷ It is harder to see an Appeals Chamber reweighing contradictory evidence under the “wholly erroneous” standard and concluding that the only reasonable conclusion a reasonable tribunal could reach is that an accused is guilty beyond a reasonable doubt.

The Appeals Chambers tests the credibility of the new evidence presented to them. In *Kupreskic*, the Appeals Chamber admitted new evidence, and held a hearing “with the purpose of testing the veracity of . . . three witnesses.”²⁰⁸ Although the

205. *Id.* at ¶ 225.

206. See generally Fleming, *supra* n. 28 (extended discussion of prosecutorial appeals of factual matters).

207. *Tadic*, ¶¶ 182-234. This decision is complex. The Appeals Chamber appears to do two things. First, it is treating as an error of fact the Trial Chamber’s refusal to find beyond a reasonable doubt that Tadic participated at all in certain killings. Second, it is stating that under the correct legal definitions for crimes against humanity and accomplice liability, Tadic was guilty of crimes against humanity. One commentator criticizes this case in part for appearing to shift a burden to the defense to produce some evidence to contradict the prosecution case. Fleming, *supra* n. 28.

208. *Kupreskic*, ¶ 505; see generally *id.* at ¶¶ 481-507 in Annex A: Procedural Background.

Chamber avoided the term “cross-examination” as being oriented to the common law, it did permit testing the credibility of witnesses through examination by all sides in court.²⁰⁹ Documentary and other evidence apparently were admitted without an oral evidentiary proceeding.²¹⁰ Counsel needs to be aware of these options for presentation of new evidence and to be able to justify a request to admit it with or without an oral evidentiary hearing, as desired.

The extent to which *Kupreskic*'s treatment of credibility determinations will influence appellate jurisprudence in the Tribunals, or in international criminal law more generally, remains to be seen. It apparently allows defense counsel wide latitude to argue credibility, especially of eyewitnesses, on appeal. By contrast, the prosecution will seek to limit its applicability to the special case in which uncorroborated eyewitness testimony is the only evidence of one or more elements essential to the case against the accused.

Perhaps the greatest difference the appellate practitioner from a common law system will find in the Appeals Chambers is the opportunity to offer new evidence on appeal.²¹¹ This is a regular feature of some appellate courts in many civil law systems, but the practice is often disfavored in the common law.²¹² In the Appeals Chambers, if new evidence is admitted, the entire record can then be reexamined to determine whether there has been a factual error that has occasioned a miscarriage of justice, under the standards discussed above.²¹³

The standard for admitting new evidence on appeal was developed by the Appeals Chamber in *Kupreskic*. New evidence

209. *Id.* at ¶ 505; ICTY Stat. art. 21(4)(e) (right of accused “to examine, or have examined, the witnesses against him”); ICTR Stat. 20(4)(e) (same); *but see* ICTY R. P. & Evid. 85(B); ICTR R. P. & Evid. 85(B) (both referring to cross-examination). One commentator has recently argued that appellate proceedings to admit new evidence in international criminal tribunals should be oral, because of the need to test credibility. *See* Christoph J.M. Safferling, *Towards an International Criminal Procedure* 336-37 (Oxford U. Press 2001).

210. *See Kupreskic*, ¶¶ 481-507.

211. ICTY R. P. & Evid. 115; ICTR R. P. & Evid. 115; *see supra* part I(C)(1), text accompanying n. 101.

212. *See generally Kupreskic*, ¶¶ 45-46.

213. *Id.* at ¶ 44; *see other portions of the opinion discussed supra* nn. 191-203 and accompanying text; *followed in Musema*, ¶ 185.

is admissible in appeal under Rule 115²¹⁴ when “the new evidence goes to prove an underlying fact that was at issue in the original trial.”²¹⁵ The evidence generally must have been unavailable at trial, given reasonable diligence of trial counsel. Reasonable diligence of trial counsel includes using the mechanisms to obtain evidence available under the Statute and Rules of the Tribunal, though an exception may be made for gross negligence of trial counsel.²¹⁶ Most importantly, admission of the new evidence under Rule 115 must be “in the interests of justice.” Under prior interpretations, this occurred “if [the new evidence] is relevant to a material issue, if it is credible and if it is such that it would probably show that a conviction *or sentence* was unsafe.”²¹⁷ The Appeals Chamber in *Kupreskic* admitted it was difficult to make the preliminary judgment to admit evidence on appeal in a way that did not prejudice the eventual decision on the merits. The decision of whether to admit may be made either before or at the time of the appeals judgment on the merits.²¹⁸ It therefore modified this standard so that now,

[the] standard for the admission of additional evidence under Rule 115 on appeal is whether that evidence “could” have had an impact on the verdict, rather than whether it “would probably” have done so.”²¹⁹

Ultimately, an “unsafe” conviction is one based upon an error of fact that has occasioned a miscarriage of justice; i.e., which meets the ultimate statutory standard of review for factual errors, discussed above.²²⁰

All of these cases discuss defense appeals following conviction and sentence. The Rules on their face allow the prosecution to seek admission of new evidence on appeal. In

214. ICTY R. P. & Evid. 115; ICTR R. P. & Evid. 115.

215. *Kupreskic*, ¶ 49. Matters going to facts not contested in the Trial Chamber can be admitted pursuant to ICTY R. P. & Evid. 89(C) and 107. *Kupreskic*, ¶ 55 (example of qualification of trial judge raised on appeal).

216. *Kupreskic*, ¶¶ 50-51.

217. *Id.* at ¶ 54 (quoting from *Prosecutor v. Jelusic*, IT-95-10-A, *Decision on Request to Admit Additional Evidence* (ICTY App. Chamber Nov. 15, 2000)) (emphasis added by later court).

218. *Kupreskic*, ¶ 71 (relying on ICTY R. P. & Evid. 115, 117).

219. *Id.* at ¶ 68.

220. *See id.* at ¶¶ 54, 58, 64-69.

fact, the ICTR Appeals Chamber has done so in the context of an interlocutory appeal, rather than in an appeal from a final judgment.²²¹ In this context, the definition of miscarriage of justice obviously does not depend on whether a conviction is “unsafe.”

As with the development of the general standard of review of factual errors, it remains to be seen whether this expansion of admissibility of new evidence on appeal will greatly change the jurisprudence or caseload of the tribunals. Counsel should, however, be aware that important evidence coming to their attention after trial may be admissible on appeal, and they should examine it under the developing standards of the Tribunal.

Finally, one must note that the Appeals Chambers have retained the ability to admit evidence on appeal through another route: if the matters concerned were not litigated at trial. In these cases, “*the Appeals Chamber is in the same position as a Trial Chamber, so that Rule 107 applies to permit the Appeals Chamber to admit any relevant or probative evidence pursuant to Rule 89(C).*”²²² This appears to create a peculiar situation, in which there is greater latitude to admit evidence if an issue was not properly raised than if it had been raised. However, as discussed immediately below, issues not raised in the Trial Chamber in an appropriate manner are in general waived.²²³ Counsel therefore should not wait to raise issues until appeal, because they risk waiving the issue.

221. *Id.* at ¶ 58 (discussing *Prosecutor v. Semanza*, ICTR-97-20-A, *Decision*, ¶¶ 41, 45 (ICTR App. Chamber May 31, 2000)). In *Semanza*, the accused filed a motion for release, claiming the ICTR lacked jurisdiction due to his illegal arrest and detention. His motion was denied and he filed an interlocutory appeal with the ICTR Appeals Chamber. During this interlocutory appeal, the prosecution was allowed to introduce evidence that Semanza’s arrest and detention were in fact legal, and his appeal was dismissed.

222. *Kupreskic*, ¶ 55 (quoting *Prosecutor v. Delalic*, IT-96-21-A, *Order in Relation to Witnesses on Appeal* (ICTY App. Chamber May 19, 2000)) (emphasis in original). Among the cases cited in *Kupreskic*, ¶ 55 n. 97, in support of this proposition is *Prosecutor v. Akayesu*, ICTR-96-4-A, *Decision (Concerning Motions 2, 3, 4, 6, and 8 Appellant’s Brief Relative to the Following Motions Referred to by the Order Dated 30 November 1999)* (ICTR App. Chamber May 24, 2000). ICTY R. P. & Evid. 107 allows the Appeals Chamber to apply to itself, to the extent appropriate, rules that facially apply to the Trial Chambers. ICTY R. P. & Evid. 89(C) is the general rule of admissibility of relevant evidence. *Accord* ICTR R. P. & Evid. 107, 89(C).

223. *See infra* Part I(D)(3).

3. *Preservation of Issues (Waiver)*

A party generally cannot raise an issue on appeal if the issue was not raised at trial. As in many national judicial systems, “[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.”²²⁴ Failure to properly raise an issue in the trial court is sometimes referred to as “waiver”²²⁵ of an issue on appeal or “failure to preserve” an issue for appeal. This rule, however, is not absolute. In one case, the ICTY Appeals Chamber found that the accused could have raised an issue related to the bias of a Trial Chamber judge in the Trial Chamber but did not. In another, the ICTR Appeals Chamber found that the accused could have raised an issue as to the validity of a guilty plea in the Trial Chamber but did not. The Appeals Chambers nonetheless considered the allegations on their merits and rejected them.²²⁶

There is no clear rule concerning when either Appeals Chamber will permit either party to raise issues on appeal that were not preserved below. One possibility, suggested by the examples of alleged bias of a Trial Chamber judge or the invalidity of a guilty plea, would be a “fundamental error” rule. The Appeals Chambers would consider errors so fundamental they would impugn the integrity of the entire proceeding, even if they had not been properly preserved. An advocate might also suggest adoption of something like the recent “glaring mistake” standard allowing the Appeals Chamber to raise a ground for appeal.²²⁷ Some national courts allow “plain error” to be raised on appeal, even if the issue was not properly preserved.²²⁸ Trial

224. *Delalic*, ¶ 790, n. 1339 (quoting *Erdemovic*, ¶ 15, and relying on *Furundzija*, ¶ 174, discussed *infra* at n. 226 and accompanying text).

225. See e.g. *Kupreskic*, ¶ 123.

226. *Kambanda v. Prosecutor*, ICTR 97-23-A, *Judgement*, ¶¶ 52-55 (ICTR App. Chamber Oct. 19, 2000); *Furundzija*, ¶¶ 174-215.

227. *Kupreskic*, ¶ 27, discussed *supra* n. 177 and accompanying text. In the *Kupreskic* decision, the Appeals Chamber made the point that the appellant should state its grounds for appeal, and that “without guidance from the appellant, the Appeals Chamber will only address legal errors where the Trial Chamber has made a glaring mistake.”

228. For example, the United States allows “plain error” to be raised on appeal through Fed. R. Evid. 103. Rule 103 adopted its “plain error rule” language from Rule 52(b) of the

counsel must, however, realize that the case in which the Appeals Chamber allows a new ground to be raised on appeal will be rare. Counsel must, therefore, take care that all substantial grounds for appeal are properly preserved.

One final point: Grounds for appeal can be abandoned as well as waived.²²⁹ While the Appeals Chamber does not state what constitutes abandonment on appeal, counsel would be well advised to provide briefing on any ground deemed important, rather than simply to state the ground in the appeals document. As noted above, counsel should not only identify a ground for appeal, but also provide some argument in its support.²³⁰

4. *Use of Precedent in the ICTY and ICTR*

In international law, precedent plays a much different role than it does in common law domestic courts. Traditionally, judicial decisions are “subsidiary means for the determination of rules of [international] law.”²³¹ The precedents that are often most influential in traditional international law are the acts of nation-states that make up “international custom, as evidence of a general practice accepted as law”²³²—usually acts of the political arms of government. The Appeals Chambers of the ICTY and ICTR are helping to remake the role of precedent in international law.

The ICTY Appeals Chamber considered the precedential effect of its own decisions at length in *Prosecutor v. Aleksovski*, eventually reaching the following conclusions:

107. The Appeals Chamber . . . concludes that a proper construction of the [ICTY] Statute, taking due account of its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should

Federal Rules of Criminal Procedure. See also e.g. *Jones v. U.S.*, 527 U.S. 373 (1999) (allowing a review for “plain error” of jury instructions in a death penalty case).

229. *Kupreskic*, ¶ 395.

230. *Id.* at ¶ 27, discussed *supra* nn. 173-74 and accompanying text.

231. ICJ Stat. art. 38(1)(d).

232. *Id.* at art. 38(1)(b). International custom is a complex area of the law with an immense literature.

be free to depart from them for cogent reasons in the interests of justice.

108. Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been “wrongly decided, usually because the judge or judges were ill-informed about the applicable law.”

....

109. It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception. The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts.²³³

In the discussion preceding this statement, the ICTY Appeals Chamber attempts to minimize the current difference in practice between civil law, common law, and international courts in their use of precedent.²³⁴ Thus, it does not explicitly state that it is following the common-law model of *stare decisis*. The advocate before either Tribunal would, however, be well advised to understand relevant prior cases in either Tribunal and to consider how such cases might be applied to the matter at hand.

In the Appeals Chambers, prior decisions of both Chambers are treated in a manner that resembles treatment of a single court's own prior cases within the common law system. For example, the ICTR Appeals Chamber recently determined the standards for acceptance of a guilty plea in *Kambanda v. Prosecutor*.²³⁵ In doing so, it accepted the reasoning of a guilty plea case from the ICTY Appeals Chamber.²³⁶ In the same case,

233. IT-95-14/1-T, *Judgement* (ICTY App. Chamber Mar. 24, 2000) (footnote omitted). *Accord Delalic*, ¶ 8.

234. *Aleksovski*, ¶¶ 92-107. Whether this attempt is successful as an intellectual matter will be left for another time.

235. *Kambanda*, ¶¶ 49-95 (discussed *infra* in Part II (B)(3)).

236. *Id.* (relying on *Prosecutor v. Erdemovic*, IT-96-22-A (ICTY App. Chamber Oct. 7, 1997)).

the ICTR Appeals Chamber also accepted the reasoning of the ICTY Appeals Chamber in determining what counts as waiver of an issue by failure to present it to the Trial Chamber.²³⁷ Technically, the ICTY and ICTR are separate Tribunals, and in fact, because of personnel changes, most of the judges in the *Kambanda* case were different from the judges in the prior ICTY cases. Thus, it appears that counsel may use precedent from the Appeals Chamber in either Tribunal in a manner that closely resembles the use of precedent in a single common law appellate court.²³⁸ The ICTR Appeals Chamber did not, however, specifically state that it was bound by the law or reasoning of the ICTY Appeals Chamber, and thus care should be exercised by counsel when using prior case law.

Other sources and evidence of international law²³⁹ may not be ignored. Just a few examples of the diversity of sources and evidence used by the Appeals Chamber will be mentioned here. They have taken into account generally recognized international human rights of defendants, as well as rights of victims, as a source of the law that they apply. For example, the ICTY Appeals Chamber has applied the right to appeal found in the International Covenant on Civil and Political Rights in holding that a person convicted of contempt by the ICTY has the right to appeal that conviction.²⁴⁰ It also used a regional multilateral treaty (the European Convention on Human Rights) and cases in the European Court of Human Rights (established to apply that treaty) in determining that judges must be impartial.²⁴¹ The ICTR Appeals Chamber has also relied on an administrative agency

237. *Id.* at ¶¶ 15-34 (relying on *Furundzija*, ¶ 174; *Tadic*, ¶ 55 (ICTY App. Chamber July 15, 1999); *Prosecutor v. Kovacevic*, No. IT-97-24-AR73 ¶ 33 (ICTY App. Chamber July 2, 1998)).

238. Where different substantive law applies in the two Tribunals (as in the definition of some crimes, discussed *supra* Part I(A)), or there are different procedural Rules in the Tribunals, precedent from the other Tribunal may not be that useful.

239. *E.g.* ICJ Stat. art. 38.

240. *See generally Tadic (Appeal of Vujin)* (contempt may be appealed, even when initially found by Appeals Chamber) (relying on International Covenant on Civil and Political Rights, art. 14 (Dec. 16, 1966) (available at <<http://www.sas.upenn.edu>>) [hereinafter ICCPR], as discussed in *Secretary-General's Rep.*, *supra* n. 1).

241. *Furundzija*, ¶ 181 & n. 243 (relying on *European Convention on Human Rights*, art. 6 (1); *Piersack v. Belgium*, 53 Eur. Ct. H.R. (ser. A) at ¶ 30 (1982); and many other cases from the European Court of Human Rights).

charged with interpreting human rights documents, writings of scholars, and cases of national courts.²⁴² The ICTY Appeals Chamber has looked at national statutes and cases to determine if the defense of “diminished mental capacity” was one of the “general principles of law recognized by all nations.”²⁴³ It has also looked to international customary law to define the crime of “violating the laws and customs of war.”²⁴⁴ Custom and general principles of law are both important sources of international law.

*E. Post-Appellate Review as Provided by the Statutes
and Rules: A Brief Note*

The Tribunals allow for review proceedings after (or in some cases before) the completion of appeals.²⁴⁵ The ICTR Appeals Chamber has applied its Statute and Rules to hold that a party (either the prosecutor or the accused) may seek review of a final judgment of the Appeals Chamber if “new facts are discovered which were not known at the time of the trial or appeal proceedings and which could have been a decisive factor in the decision.”²⁴⁶ Additionally, the new facts must meet the

condition introduced by [ICTR] Rule 120, that the new facts not be known to the party concerned or not be discoverable due diligence notwithstanding. If the Chamber is satisfied, it accordingly reviews its decision in the light of such new facts.²⁴⁷

New facts, not merely new evidence (or presumably, arguments), must have been discovered in order for the Appeals Chamber to review a decision.²⁴⁸

242. *Kambanda*, ¶¶ 33-34 & nn. 48-49.

243. *Delalic*, ¶¶ 583, 584-90. *Cf.* ICJ Stat. art. 38(1)(c).

244. *See Prosecutor v. Tadic*, IT-94-1, *Decision on Defence Motion for Interlocutory Appeal on Jurisdiction* ¶ 87 (ICTY App. Chamber Oct. 2, 1995); *cf.* ICJ Stat. art. 38(1)(b).

245. *Barayagwiza v. Prosecutor*, ICTR-97-19-AR72, *Decision (Prosecutor's Request for Review or Reconsideration)* (ICTR Appeals Chamber Mar. 31, 2000) (relying on ICTR Statute, art. 25; ICTR Rule 120). *See also* ICTY Statute, art. 26; ICTY Rule 119.

246. *Barayagwiza*, ¶ 51. In this case, review was granted to consider a new fact that showed the Chamber's decision to dismiss an indictment on the ground of unreasonable pre-trial delay was incorrect. The prosecutor prevailed on the motion for review.

247. *Id.* at ¶ 52.

248. *Id.* at ¶ 54. This case is discussed in more detail *infra* Part II(B)(2).

A motion for review goes to the Chamber (whether Trial Chamber or Appeals Chamber) that made the decision to be reviewed.²⁴⁹ Under the Rules, the prosecutor has only a year in which to discover new facts, a limitation which is not placed on the defense (and which does not appear in the Statutes).²⁵⁰ If new facts are discovered after the Trial Chamber's judgment but before completion of the appeal, a motion for review may still be filed with the appropriate Chamber, and the Appeals Chamber may return the case to the Trial Chamber for disposition.²⁵¹

The Tribunals must take care that the review process not impinge on the principle that "[n]o one shall be liable to be . . . tried . . . again for an offense for which he has already been finally . . . acquitted."²⁵² This provision of international human rights law is from the International Covenant on Civil and Political Rights ("ICCPR"), an international human rights treaty that on its face applies only to States. In the jurisprudence of the Tribunals, provisions of the ICCPR are applied in courts created by international organizations as well.²⁵³ The ICTY and ICTR Statutes protect persons from trial "before a national court for acts . . . for which he or she has already been tried by the International Tribunal."²⁵⁴ In light of the relevant international human rights norms, one could interpret the prohibition of a

249. ICTY R. P. & Evid. 119; ICTR R. P. & Evid. 120.

250. Compare ICTY R. P. & Evid. 119 and ICTR R. P. & Evid. 120 (limiting prosecution time to request review) with ICTY Stat. art. 26 & ICTR Stat. art. 25 (no such limit).

251. ICTY R. P. & Evid. 122; ICTR R. P. & Evid. 123.

252. ICCPR art. 14; see ICTY R. P. & Evid. 122; ICTR R. P. & Evid. 123. See also *supra* n. 87 and accompanying text.

253. See *infra* Part II(A)(4), notes 300-01 and accompanying text, discussing *Prosecutor v. Tadic (Appeal of Vujin)*, for an example of adoption of an international human rights standard in the ICCPR that is not in the text of the ICTY Statute. Note that *Barayagwiza*, as decided, does not offend the rule against being tried twice, because Barayagwiza had not been tried on the merits when the case against him was dismissed. (See *supra* nn. 246-48 and accompanying text for discussion of *Barayagwiza*).

254. ICTY Stat. art. 10; ICTR Stat. art. 9. These provisions also prevent trials by the International Tribunal for crimes tried by national tribunals, unless: (1) the national courts characterized the allegations as ordinary crimes (rather than serious violations of international humanitarian law); (2) the case was not diligently prosecuted; (3) the case was not independent and impartial; or (4) the case was designed to shield the accused from international criminal responsibility.

second trial in a national court as being based on the assumption that there would certainly not be a second international trial once proceedings were finalized.

II. RECENT JUDGMENTS OF THE ICTY AND ICTR APPEALS CHAMBERS

The best way to appreciate the work of the ICTY and ICTR Appeals Chamber is to review their case law. In this Part, some recent judgments are discussed. Counsel should be aware that a number of important appeals are pending before the ICTY and ICTR Appeals Chambers.²⁵⁵ The October 2001 *Kupreskic* appeals decision is not discussed in this Part, given its extensive incorporation in Part I (D) on Scope and Standards of Review.²⁵⁶

As discussed earlier, the emergence of precedent within the Appeals Chambers, between the two Trial Chambers, and even

255. For the ICTY: the *Blaskic* decision; the *Kunarac, Kovac and Vukovic* decisions; the *Kordic* and *Cerkez* decisions, and the *Krstic* decision. See ICTY, *Fact Sheet on ICTY Proceedings—August 2001* <<http://www.un.org/icty/glance/procfact-e.htm>> (accessed on Sept. 7, 2001). For the ICTR: In late May 2001, it heard the *Musema* appeal, which has been decided since this article was originally written. See *supra* n. 161. The *Rutaganda* appeal also is pending. Musema, director of a tea factory in western Rwanda, was convicted on January 27, 2000, of one count of genocide and two counts of crimes against humanity (extermination and rape). The three counts for which he was convicted related to his participation in anti-Tutsi attacks in April and May, 1994. In one such attack, Musema was found to have ordered that a cave in which 300 to 400 Tutsis had sought refuge be sealed and then set on fire. All but one Tutsi perished. He was also held liable for the acts carried out by his employees, over whom he was found to have *de jure* control, an important extension of the doctrine of superior responsibility outside the military context and into the context of a civilian workplace. See *Prosecutor v. Musema*, ICTR-96-13-T, *Judgement* ¶¶ 141-148 (ICTR Tr. Chamber Jan. 27, 2000). The Trial Chamber sentenced Rutaganda to life imprisonment on December 6, 1999, following conviction on one count of genocide and two counts of crimes against humanity. See *Prosecutor v. Rutaganda*, ICTR-96-3-T, *Judgement* (ICTR Tr. Chamber Dec. 6, 1999). When the genocide broke out, Rutaganda was a leading member of the governing Hutu Power political party as well as second Vice-President of the national committee of the Interahamwe militia. The Interahamwe are notorious for having been a major agent in the anti-Tutsi pogroms. The Trial Chamber held that Rutaganda incurred individual criminal responsibility for having ordered, incited, and carried out murders and for causing serious bodily or mental harm to members of the Tutsi ethnic group. *Id.* at ¶¶ 469-70. The Prosecutor is appealing the acquittal at trial of Ignace Bagilishema. See ICTR Press Release ICTR/INFO-9-2-284.EN, *Bagilishema to Reside in France pending Appeal* (Sept. 21, 2001).

256. In fact, many of the judgments discussed in this Part have been referenced in Part I. Nonetheless, reviewing the facts and key substantive legal pronouncements of these judgments provides a good flavor of the work of the *ad hoc* Tribunals.

outside of the Tribunals themselves is an important new phenomenon. This development gives a principled provenance to Tribunal judgments. To reiterate: The Appeals Chambers' judgments (as well as those of the Trial Chambers) are based on a rich variety of sources in addition to Tribunal precedent, including interpretation of the Statutes of the ICTY and ICTR, international conventions, principles of international law, general principles as evidenced by important national and regional court decisions, the writings of important legal experts, and even decisions of other international courts such as the International Court of Justice.²⁵⁷ Because there has been a great deal written about the earlier case law of the Tribunals,²⁵⁸ this Part focuses on decisions of the Appeals Chambers since the beginning of the year 2000.

A. ICTY Appeals Chamber

1. *Prosecutor v. Jelusic*

Goran Jelusic, who called himself the "Serb Adolf," held a position of authority at the Luka Camp, located in Brcko in northeastern Bosnia. From early May 1992 until early July 1992, Bosnian Serb forces confined hundreds of Muslims and Croats under inhumane conditions at this Camp. Jelusic was indicted on thirty-one charges of crimes against humanity and violations of the laws and customs of war, along with one count of genocide.²⁵⁹ Allegations were made that Jelusic murdered,

257. In this latter regard, neither the Appeals nor the Trial Chamber is bound to follow these prior decisions. In fact, in the 1999 *Tadic* decision, the ICTY declined to follow the ICJ's 1986 holding in *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 277, 278, 292(3) and (9) (June 27), that the United States was responsible for the acts of the Contra rebels in Nicaragua only to the extent that the United States could be shown to have effective control over the activities of the Contras. See *Celebici Case*, ¶¶ 10-26 (affirming the *Tadic* approach).

258. E.g. Jones, *supra* n. 111; M. Cherif Bassiouni & P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Pubs. 1996); Virginia Morris & Michael Scharf, *The International Criminal Tribunal for Rwanda* (Transnational Pubs. 1998).

259. *Prosecutor v. Jelusic*, IT-95-10-A, *Appeals Judgement* ¶ 2 (ICTY App. Chamber July 5, 2001).

tortured, and beat detainees at Luka. He pleaded guilty to the thirty-one charges, resisting only the genocide charge. On October 19, 1999, the ICTY Trial Chamber acquitted Jelusic on the genocide charge and sentenced him to forty years' imprisonment on the charges to which he had pled guilty.²⁶⁰ The lengthy sentence was based on the Trial Chamber's observation of Jelusic's "scornful attitude towards victims, his enthusiasm for committing the crimes, his dangerous nature, and also the inhumanity of the crimes."²⁶¹ The *Jelusic* trial was the first genocide proceeding undertaken by the ICTY.

The prosecutor appealed the genocide acquittal, and Jelusic appealed the sentence. On July 5, 2001, the ICTY Appeals Chamber affirmed the sentence of forty years.²⁶² The ICTY Rules provide that a convicted person may be sentenced to imprisonment for a term up to and including the remainder of that person's life.²⁶³ Accordingly, the Trial Chamber has the discretion to impose life imprisonment. The Appeals Chamber held that the ICTY Trial Chamber "has broad discretion as to which factors it may consider in sentencing and the weight to attribute to them."²⁶⁴ The Appeals Chamber found that the Trial Chamber did not exercise this discretion in an erroneous fashion.²⁶⁵

As for the Prosecutor's appeal, although the Appeals Chamber found some error in the Trial Chamber's treatment of the law, it declined to reverse the genocide acquittal. The Appeals Chamber held that the correct test for determining whether prosecution evidence is insufficient to sustain a conviction "is whether there is evidence (if accepted) upon which a reasonable [trier] of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question."²⁶⁶ As for the law on genocide, the Appeals

260. *Id.* at ¶ 5.

261. ICTY, Press Release JL/P.I.S./454-e, *Goran Jelusic Sentenced to 40 Years Imprisonment (sic) for Crimes Against Humanity and War Crimes* <<http://www.un.org/icty/pressreal/p454-e.htm>> (Dec. 14, 1999).

262. *Jelusic, Appeals Judgement*, Disposition (7).

263. ICTY Stat. art. 24; ICTY R. P. & Evid. 101(A).

264. *Jelusic*, ¶ 100.

265. *Id.* at ¶¶ 110-11.

266. *Id.* at ¶ 37.

Chamber clarified that the requisite intent is one to destroy, in whole or in part, a national, ethnical, racial or religious group by one of the acts prohibited in the Statute of the ICTY.²⁶⁷ The existence of a plan or policy is not a necessary legal ingredient of the crime of genocide, although it may certainly constitute probative evidence.²⁶⁸ Notwithstanding the need to point out errors and to make clarifications, the Appeals Chamber did not consider it appropriate to reverse the acquittal and remit the case for further proceedings.²⁶⁹

2. *Prosecutor v. Furundzija*

Anto Furundzija commanded a special unit of the military police force of the Croatian Defense Council known as the “Jokers.” He was charged with violations of the laws or customs of war (specifically, torture and outrages upon personal dignity, including rape) for his conduct at the “Jokers” headquarters, where he interrogated a female Muslim civilian and a Croatian soldier and was present while the civilian was raped and both the civilian and the soldier were beaten. Furundzija did nothing to stop or curtail these actions. The Trial Chamber sentenced Furundzija to ten years’ imprisonment following conviction on December 10, 1998, on two counts of violating the laws or customs of war.²⁷⁰ He appealed. On July 21, 2000, the Appeals Chamber unanimously dismissed each ground of Furundzija’s appeal, upheld the Trial Chamber’s ruling, and also upheld the sentence awarded by the Trial Chamber.²⁷¹ By affirming the Trial Chamber decision, the Appeals Chamber gave its imprimatur to some of the important points of law contained within that decision.

One important substantive point of law is that the prohibition of torture had attained the status of a norm of

267. *Id.* at ¶ 45.

268. *Id.* at ¶ 48.

269. *Id.* at ¶¶ 72-77.

270. *Prosecutor v. Furundzija*, IT-95-17/1-T, *Judgement* (ICTY Tr. Chamber Dec. 10, 1998).

271. *Prosecutor v. Furundzija*, IT-95-17, *Appeals Judgement* (ICTY App. Chamber July 21, 2000).

international law from which no derogation is possible.²⁷² Rape may amount to torture.²⁷³ Torture in an armed conflict is defined as:

- (i) the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition
- (ii) this act or omission must be intentional;
- (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;
- (iv) it must be linked to an armed conflict;
- (v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity.²⁷⁴

Procedurally, the Trial Chamber decision was affirmed in its conclusion that a person's testimony may be reliable notwithstanding proof that the person is suffering from post-traumatic stress disorder.²⁷⁵

3. *Prosecutor v. Delic, Landzo, Mucic, and Delalic (the "Celebici" Case)*

On February 20, 2001, the Appeals Chamber issued its judgment in the *Celebici* case.²⁷⁶ This case involved events that took place in 1992 in a prison camp near the town of Celebici, in central Bosnia. This part of central Bosnia—predominantly

272. *Id.* at ¶ 111.

273. The Trial Chamber held that the elements of the offense of rape include "the sexual penetration, however slight, [either] of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or of the mouth of the victim by the penis of the perpetrator; [where such penetration is effected] by coercion or force or threat of force against the victim or a third person." *Prosecutor v. Furundzija*, ¶ 185 (ICTY Tr. Chamber Dec. 10, 1998).

274. *Furundzija, Appeals Judgement*, ¶ 111 (quoting from the Trial Chamber decision in *Prosecutor v. Furundzija* ¶ 162 (Dec. 10, 1998)).

275. *Furundzija, Appeals Judgement*, ¶¶ 122-23.

276. *Prosecutor v. Delalic*, IT-96-21, *Appeals Judgement* (ICTY App. Chamber Feb. 20, 2001).

inhabited by Bosnian Serbs—had been taken over by Bosnian Muslim and Bosnian Croat forces. Many of the Bosnian Serb civilian inhabitants were held at the Celebici prison camp. Four individuals—Hazim Delic, Esad Landzo, Zdravko Mucic, and Zejnil Delalic—were tried. The *Celebici* defendants all were accused of actual or imputed involvement with the killings, torture, sexual assault, unlawful confinement, and cruel and inhuman treatment that occurred at the prison camp. Although Delalic was acquitted by the Trial Chamber, on October 15, 1998, the remaining three defendants were convicted of grave breaches of the Geneva Convention (Article 2 of the Statute of the ICTY) and of violating the laws or customs of war (Article 3 of the Statute of the ICTY). On November 16, 1998, they were sentenced to the following terms of imprisonment: twenty years (Delic); fifteen years (Landzo); and seven years (Mucic).²⁷⁷

The Appeals Chamber affirmed Delalic's acquittal. It also dismissed—for cumulative convictions—all counts charging Mucic, Delic, and Landzo with violations of the laws or customs of war. In light of this dismissal, the Appeals Chamber sent the case back to the Trial Chamber for possible adjustment to the original sentences. However, the Appeals Chamber also reaffirmed many of the substantive points of law made by the Trial Chamber.²⁷⁸

The ICTY has jurisdiction over offenses under Article 2 of its Statute only if the Prosecutor can prove the existence of an international armed conflict in relation to those offenses charged. The Trial Chamber found that the armed conflict in Bosnia was in fact international, as Bosnian Serb forces were fighting in Bosnia under the control of the FRY. The Appeals Chamber noted that in *Tadic* and *Aleksovski*, it had held that what must be established is that the foreign intervening party was in "overall" control of the local forces.²⁷⁹ The Appeals Chamber also explained that it would follow its previous decisions unless there were "cogent reasons in the interests of justice to depart from [them]."²⁸⁰ With regard to the conflict in

277. *Id.* at ¶¶ 1-3.

278. *Id.* at ¶¶ 1-5, *Disposition*.

279. *Id.* at ¶¶ 6, 14, & 26.

280. *Id.* at ¶ 117.

Bosnia, the Appeals Chamber found that the Trial Chamber's determination that the conflict was international should be affirmed.²⁸¹ Bosnian Serbs detained in the Celebici camp were in the hands of parties to the conflict, Bosnia and Herzegovina, of which they were not nationals, and they were thereby entitled to the protection of (in particular) Geneva Convention IV, relating to the safeguarding of civilians in times of war.²⁸² On a closely connected note, the Appeals Chamber also affirmed the Trial Chamber's finding that it had jurisdiction to prosecute violations under Article 3 of the Statute of the ICTY. These violations can give rise to individual criminal responsibility and may be prosecuted whether committed in internal or international conflicts.²⁸³

The Appeals Chamber also affirmed the Trial Chamber's rulings regarding command responsibility. The Trial Chamber had held that command responsibility encompasses not only military commanders, but also civilians holding positions of authority. It also had held that responsibility extended not only to those in *de jure* command (in other words, those who have the official titles and rankings), but also those in *de facto* command (in other words, those who may not have the official titles, but who exert authority in the field).²⁸⁴ Such individuals may be held criminally responsible if they have effective control over the persons committing the violations of international humanitarian law, in the sense of having the material ability to prevent or punish the commission of such violations.²⁸⁵ Whereas Delalic (coordinator of the Bosnian Muslim and Bosnian Croat forces) was found not to have had command and control over the prison-camp and the guards who worked there, Mucic (commander of the camp) was found to have allowed those under his authority to commit the most heinous of offenses without taking any disciplinary action, thereby creating an atmosphere of terror.²⁸⁶ Delic was found not to be a superior with

281. *Id.* at ¶ 50.

282. *Id.* at ¶ 106.

283. For discussion of this reasoning, see *id.* at ¶¶ 116-181.

284. *Id.* at ¶¶ 192-93.

285. *Id.* at ¶ 197.

286. *Id.* at ¶¶ 204-14 (Mucic), 256-67 (Delalic).

command and control despite his position as deputy commander of the camp.²⁸⁷

The linchpin of the appeal was the question of cumulative convictions. Here, the appellants argued that each conviction related to the same conduct. This challenge raised a thorny question: Can conduct simultaneously violate both Article 2 of the ICTY Statute—grave breaches of the Geneva Convention—as well as Article 3, violation of the laws or customs of war? The Appeals Chamber held

that reasons of fairness to the accused and the consideration that only distinct crimes may justify [cumulative] convictions, . . . [require that cumulative] convictions . . . are permissible only if each statutory provision involved has a materially distinct element not contained in the other.²⁸⁸

If this material distinctiveness is not established, then a judicial decision must be made regarding the offense for which a conviction will be entered. The conviction must be for the offense containing the more specific provision. In a situation such as that faced by some of the Celebici defendants, namely where the evidence establishes guilt based upon the same conduct under both Article 2 and Article 3, the conviction must be entered for the offense under Article 2. Accordingly, the Appeals Chamber dismissed the convictions of all counts on violations of the laws or customs of war (Article 3).²⁸⁹ It further held that, because the sentences of each of the three convicted accused may have been different had the Trial Chamber not imposed multiple convictions, a Trial Chamber should reconsider the remaining sentences for possible adjustment.²⁹⁰ Nevertheless, in the case of Mucic, the Appeals Chamber advised the Trial Chamber that had it not been necessary to take into account a possible adjustment in sentence due to the cumulative convictions issue, it would have imposed a heavier sentence, perhaps as much as ten years' imprisonment.²⁹¹ On

287. *Id.* at ¶¶ 299, 312.

288. *Id.* at ¶ 412.

289. *Id.* at ¶ 427.

290. *Id.* at ¶ 431.

291. *Id.* at ¶ 853.

October 9, 2001, the Trial Chamber passed adjusted sentences of eighteen years for Delic, fifteen years for Landzo, and nine years for Mucic.²⁹²

4. *Prosecutor v. Tadic (Vujin) and Prosecutor v. Aleksovski (Nobilo)*—*Contempt Appeals*

On February 27, 2001, the Appeals Chamber upheld a judgment it had initially made on January 31, 2000, in contempt proceedings brought against Milan Vujin, former counsel for Dusko Tadic, the first defendant to face trial at the ICTY.²⁹³ This judgment involved matters related to the professional responsibility of lawyers appearing before the ICTY. The power to deal with contempt lies within the inherent jurisdiction of the ICTY, deriving from its judicial function. On January 31, 2000, the ICTY (ruling in the first instance) had found Vujin in contempt of court for his conduct in representing Tadic.²⁹⁴ The contempt hearings were conducted from March 30, 1999 to November 18, 1999 (when Tadic was appealing the judgment and sentence issued against him by the Trial Chamber in 1997).²⁹⁵ Regarding the questions of professional responsibility, the Appeals Chamber found that Vujin had put forward evidence that was known by him to be false. The Appeals Chamber also found that Vujin had “manipulated” two unnamed witnesses “by seeking to avoid [their] . . . identification of persons who may have been responsible for [certain] crimes for which Tadic had been convicted.”²⁹⁶

On February 27, 2001, the Appeals Chamber dismissed Vujin’s appeal from the initial decision and ordered him to pay a fine of 15,000 Dutch guilders to the Registry within twenty-one

292. ICTY, Press Release P.I.S./628-e, *Sentencing Judgement in the “Celebici Case”* <<http://www.un.org/icty/pressreal/p628-e.htm>>.

293. *Prosecutor v. Tadic (Appeal of Vujin)*, IT-94-1-A, *Appeal Judgement* (ICTY App. Chamber Feb. 27, 2001).

294. *Prosecutor v. Tadic (Appeal of Vujin)*, IT-94-1-A, *Judgment on Allegations of Contempt* (ICTY App. Chamber Jan. 31, 2000).

295. ICTY, Case Information Sheet, *Tadic Case* (IT-94-1-A) (Sept. 24, 2001).

296. *Tadic (Vujin)*, *Judgment on Allegations of Contempt*, ¶ 160.

days.²⁹⁷ The Appeals Chamber also requested the Registrar to consider striking Vujin off or suspending him for a suitable period from the list of assigned counsel, and also to “report” Vujin’s conduct “to the professional legal body to which he belongs.”²⁹⁸ The Appeals Chamber did note that persons it found guilty of contempt while sitting in the first instance must be entitled to appeal that conviction.²⁹⁹ In the case at hand, however, there was no reason to overturn the initial decision. The Appeals Chamber’s pronouncement upon a matter of the professional responsibility of lawyers is giving rise to the emergence of a nascent corpus of legal ethics principles in international criminal law.

This decision is also significant because the Appeals Chamber recognized that the right to appeal a criminal conviction is a human right protected by international law that must be respected by the Tribunals. The Court cited the International Covenant on Civil and Political Rights (“ICCPR”)³⁰⁰ as a source of this right. The ICCPR, however, is a document that in form binds only the States that are party to it. The United Nations, and hence the ICTY, is not a State, and arguably this provision of the ICCPR could bind the Tribunals only if it has passed into customary international law.³⁰¹ Now

297. *Prosecutor v. Tadic (Appeal of Vujin)*, IT-94-1-AR-77, *Appeal Judgement* (ICTY App. Chamber Feb. 27, 2001).

298. *Id.*

299. The ICTY Rules of Procedure and Evidence do not expressly provide for the right to appeal a contempt conviction of the Appeals Chamber. *See* ICTY R. P. & Evid. 77. However, the Appeals Chamber concluded that the Rules

must respect the “internationally recognized standards regarding the rights of the accused” Article 14 of the International Covenant on Civil and Political Rights [. . .], Article 14(5) of [which] guarantees that “Everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law.”

Tadic (Appeal of Vujin), IT-94-1-AR77 (ICTY App. Chamber Feb. 27, 2001). The Appeals Chamber concluded that the contempt procedure is of a penal nature. “[T]his means that a person found guilty of contempt by the Appeals Chamber [sitting in the first instance] must have the right to appeal the conviction.” *Id.*

300. *Id.* (contempt may be appealed, even when initially found by Appeals Chamber), relying on ICCPR art. 14, as discussed in Secretary-General’s Rep., *supra* n. 1. The Appeals Chamber was not unanimous on the point of having jurisdiction to hear an appeal from its own decision. *See Tadic (Appeal of Vujin)*, IT-94-1-A, *Appeals Judgement* (Wald, J., dissenting from finding of jurisdiction).

301. *See Tadic (Appeal of Vujin)*, IT-94-1-A, *Appeals Judgement* (Wald, J., dissenting).

there is a debate within the ICTY Appeals Chamber as to whether human rights standards that have not passed into customary international law are binding. In the opinion of the majority in this contempt case, the ICTY should follow human rights provisions that are in favor of the accused, even though these provisions might not yet be considered customary.

The second contempt appeal comes out of the *Blaskic* trial. Ante Nobile was defense counsel for Tihomir Blaskic, a defendant before the ICTY.³⁰² On December 11, 1998, the Trial Chamber found that, in reexamination of a defense witness in the Blaskic trial, Nobile had disclosed information relating to the identity of another witness; such information was subject to a protective order in Aleksovski's trial.³⁰³ The Trial Chamber held this amounted to a "knowing violation" of an order that it had made prohibiting the disclosure of such information regarding the witness. It found Nobile in contempt and ordered the payment of 4,000 Dutch guilders into the court.³⁰⁴

On May 30, 2001, the Appeals Chamber allowed Nobile's appeal and directed the Registrar to repay the fine.³⁰⁵ For the Appeals Chamber, a basic question was whether Nobile's violation of the witness protection order was a "knowing" one.³⁰⁶ According to the Appeals Chamber, actual knowledge of the order was not required before it could be knowingly violated. Willful blindness could suffice.³⁰⁷ The Appeals Chamber found no evidence of willful blindness.³⁰⁸ "There can be no wilful blindness to the existence of an order unless there is

302. *Prosecutor v. Aleksovski*, IT-95-14/1-AR77, *Judgment on Appeal by Anto Nobile Against Finding of Contempt*, ¶ 2 (ICTY App. Chamber May 30, 2001).

303. *Le Procureur c/ Aleksovski*, IT-95-14/1-T (ICTY Tr. Chamber Dec. 11, 1998) (judgment available only in French).

304. *Id.* at IV. Decision.

305. *Aleksovski, Nobile Contempt Appeal*, ¶ 57.

306. *Id.* at ¶ 37.

307. *Id.* at ¶¶ 39-52. The Appeals Chamber defined willful blindness as

[p]roof of knowledge of the existence of the relevant fact is accepted in such cases where it is established that the defendant suspected that the fact existed (or was aware that its existence was highly probable) but refrained from finding out whether it did exist because he wanted to be able to deny knowledge of it (or he just did not want to find out that it did exist).

Id. at ¶ 43.

308. *Id.* at ¶ 51.

first of all shown to be a suspicion or a realization that the order exists.”³⁰⁹ On a related note, the Appeals Chamber held that it is not necessary for the prosecution to establish an intention to violate the order and that it is sufficient that the person charged “acted with reckless indifference as to whether his act was in violation of the order.”³¹⁰

5. Prosecutor v. Tadic and Prosecutor v. Aleksovski—Sentence Appeals

Sentence appeals are different than judgment appeals. Whereas a judgment appeal challenges the correctness of the finding of guilt or innocence on the respective charges, a sentence appeal challenges the choice or amount of punishment, not the question of guilt or innocence. Judgment and sentence appeals may be combined.

The sentence appeal of Dusko Tadic was partly successful. Tadic (the same accused whose case gave rise to the Vujin professional responsibility judgment) initially was convicted by the Trial Chamber on May 7, 1997, of eleven counts of violating the laws and customs of war and crimes against humanity. Tadic’s appeal of the Trial Chamber judgment resulted in an additional nine convictions: seven counts of grave breaches of the 1949 Geneva Conventions; one count of a violation of the laws or customs of war; and one count of a crime against humanity.³¹¹ On November 11, 1999, the Trial Chamber sentenced Tadic to twenty-five years’ imprisonment in light of these additional counts (Tadic had originally been sentenced to twenty years’ imprisonment). On January 26, 2000, the Appeals Chamber reduced Tadic’s sentence on all counts to a maximum of twenty years’ imprisonment.³¹² In mitigating the sentence, the Appeals Chamber was motivated by the fact that

309. *Id.*

310. *Id.* at ¶ 54.

311. *Prosecutor v. Tadic*, IT-94-1-A, *Judgement* ¶¶ 171, 235-37, 327(4) and (5) (ICTY App. Chamber July 15, 1999).

312. ICTY, *Fact Sheet on ICTY Proceedings* <<http://www.un.org/icty/glance/procfact-e.htm>> (updated Oct. 2, 2001).

although [Tadic's] conduct . . . was incontestably heinous, his level in the command structure, when compared to that of his superiors, i.e. commanders, or the very architects of the strategy of ethnic cleansing, was low.³¹³

The Appeals Chamber also overturned the Trial Chamber's finding that a crime against humanity was a more serious offense than a war crime and, all other things being equal, thereby required a stricter sentence. On this point, the Appeals Chamber held that "there is in law no distinction between the seriousness of a crime against humanity and that of a war crime."³¹⁴

The second sentence appeal involved Zlatko Aleksovski. On May 7, 1999, Aleksovski had been found guilty by the Trial Chamber of one count of violating the laws or customs of war as a result of his activities as commander of the Kaonik prison facility, in which hundreds of Bosnian Muslim civilians were detained. This conviction netted Aleksovski a sentence of two years and six months, less time served in custody. As the time served exceeded the sentence, Aleksovski was immediately released. Notwithstanding the release, the prosecution appealed both the judgment as well as the sentence. On March 24, 2000, the Appeals Chamber allowed the prosecution's appeal and issued a revised sentence of seven years' imprisonment.³¹⁵ It was held that the Trial Chamber had committed discernable error by undervaluing the gravity of Aleksovski's conduct.³¹⁶

The *Aleksovski* decision also dealt with the role of precedent within the ICTY. Discussion of this part of the judgment is found in Part I of this Article.

313. *Prosecutor v. Tadic*, IT-94-1-A, *Judgement in Sentencing Appeals*, ¶ 56 (ICTY App. Chamber Jan. 26, 2000).

314. *Id.* at ¶ 69; see also separate opinion of Judge Shahabuddeen.

315. ICTY, Press Release CC/P.I.S./481-e, *Aleksovski Case: The Appeals Chamber Increases His Sentence to Seven Years Imprisonment* <<http://www.un.org/icty/pressreal/p481-e.htm>> (Mar. 24, 2000); ICTY, *Fact Sheet on ICTY Proceedings* <<http://www.un.org/icty/glance/procfact-e.htm>> (updated Oct. 2, 2001); ICTY, Press Release CC/P.I.S./469-E, *Aleksovski Case: The Appeals Chamber Orders Aleksovski's Return to Custody* <<http://www.un.org/icty/pressreal/p469-e.htm>> (Feb. 9, 2000).

316. *Prosecutor v. Aleksovski*, IT-95-14/1-A, *Judgement* ¶ 187 (ICTY App. Chamber Mar. 24, 2000).

*B. ICTR Appeals Chamber*³¹⁷*1. Prosecutor v. Barayagwiza*

In a particularly controversial decision made on November 3, 1999, the Appeals Chamber quashed the indictment against genocide suspect Jean-Bosco Barayagwiza. As a result of this decision, Barayagwiza, a minister in the fanatical Hutu government who helped set up a radio station used to incite anti-Tutsi violence, was ordered released. Lengthy delays in bringing Barayagwiza to justice were cited as the basis for this decision. These delays were found to have violated Barayagwiza's human rights. One and a half years had elapsed from the time of his arrest to the time of his actually being charged, and additional delays had occurred at the pre-trial stage.³¹⁸

The quashing of Barayagwiza's indictment created what Prosecutor Del Ponte called a "crisis in relations between the ICTR and the Government of Rwanda."³¹⁹ The Rwandan representative advised the United Nations General Assembly that Rwanda would "register a vote of no confidence" in the ICTR.³²⁰ The Rwandan government suspended all cooperation and assistance to the ICTR.³²¹ It also refused to issue Prosecutor Del Ponte an entry visa. In response, Prosecutor Del Ponte filed

317. In addition to the cases detailed in this section, see *Serushago v. Prosecutor*, ICTR-98-39-A, *Reasons for Judgment* (ICTR App. Chamber Apr. 6, 2000); ICTR, Press Release ICTR/INFO-9-2-221En, *Appeals Chamber Confirms Serushago Sentence* <<http://www.ictr.org/ENGLISH/PRESSREL/2000/221.htm>> (Feb. 14, 2000). Serushago was originally sentenced by the ICTR Trial Chamber on February 5, 1999 to fifteen years' imprisonment following a guilty plea to one count of genocide and three counts of crimes against humanity. He filed an appeal against his sentence; this appeal was dismissed on February 14, 2000.

318. *Prosecutor v. Barayagwiza*, ICTR 97-19-A, *Decision*, ¶¶ 100-112 (ICTR App. Chamber Nov. 3, 1999).

319. ICTY, Press Release PR/P.I.S./457-e, *Statement by Madame Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia* <<http://www.un.org/icty/pressreal/p457-e.htm>> (Dec. 22, 1999).

320. U.N., Press Release GA/9652, *Assembly Appraises Progress Made By War Crimes Tribunals; Judges Describe Obstacles* <<http://www.un.org/News/Press/docs/1999/19991108.ga9652.doc.html>> (Nov. 8, 1999).

321. ICTR, Press Release ICTR/INFO-9-2-210.En, *Barayagwiza Seeks Partial Stay of Appeal Order* <<http://www.ictr.org/ENGLISH/PRESSREL/1999/210.htm>> (Nov. 8, 1999).

with the Appeals Chamber a notice to suspend the release, which was followed up on December 1, 1999, with a brief in support of a motion that the Appeals Chamber review its decision of November 3, 1999, to free Barayagwiza. The government of Rwanda relented in early December 1999, issuing Del Ponte her visa and resuming cordial relations with the ICTR.³²² This development is very important, as the effective operation of the ICTR largely depends on the cooperation of the Rwandan government.

Although authorized by ICTR Statute as well as its Rules of Procedure and Evidence, a request for review remains an unusual procedure. There were difficult questions regarding whether delays owing to (1) the length of transfer proceedings from Cameroon, (2) the assignment of defense counsel, and (3) the scheduling of initial appearances each should count as part of the “pre-trial period.” The government of Rwanda, which intervened as *amicus curiae* in this matter, argued that Barayagwiza should be tried by the ICTR, but if the ICTR did not try him, it should send Barayagwiza to a jurisdiction willing and able to prosecute him, namely Rwanda.³²³ The Appeals Chamber’s initial decision to release Barayagwiza back to the Cameroonian authorities (who had transferred him to the ICTR in the first place) was unsatisfactory to the Rwandan government, as “Cameroon has not passed legislation to punish the crime of genocide.”³²⁴ On February 22, 2000, Chief Prosecutor Del Ponte argued the case for review before the Appeals Chamber. She underscored how any delays did not prejudice Barayagwiza and that failing to prosecute him for his crime would be the true travesty of justice.³²⁵ In the end, Prosecutor Del Ponte was successful, and on March 31, 2000, the Appeals Chamber unanimously overturned its previous decision to quash Barayagwiza’s indictment.³²⁶ The Appeals

322. *Rwanda Approves Visa for U.N. Prosecutor*, 149 N.Y. Times A4 (Dec. 4, 1999).

323. ICTR, Press Briefing ICTR/INFO-9-13-007, *Prosecutor v. Jean-Bosco Barayagwiza* <<http://www.ictr.org/ENGLISH/pressbrief/brief20000222.htm>> (Feb. 22, 2000).

324. *Id.*

325. *Id.*

326. *Barayagwiza v. Prosecutor*, ICTR 97-19-AR72, *Decision (Prosecutor’s Request for Review or Reconsideration)* (ICTR App. Chamber Mar. 31, 2000).

Chamber found that Barayagwiza's rights had in fact been infringed. However, "new facts" presented for the first time during the request for review diminished the gravity of any infringement of Barayagwiza's rights.³²⁷

For example, it was found that the actual period of pre-trial delay was much shorter than previously believed; it was also found that some of the delays faced by Barayagwiza were not the responsibility of the Prosecutor.³²⁸ Because of this diminished gravity, the previous decision to release Barayagwiza was characterized as "disproportionate."³²⁹ Interestingly, although the Appeals Chamber held that this was the first time it learned of these facts, it did not find that the Prosecutor's office did not know or could not have discovered these facts at the time of the November 1999 appeal. Notwithstanding that the exercise of due diligence by the prosecution could perhaps have resulted in the availability of these facts in November 1999, the Appeals Chamber held that the Prosecutor's motion should still succeed. Basing its decision on "the wholly exceptional circumstances of [the] case," and the "possible miscarriage of justice" that would arise by releasing Barayagwiza, the Appeals Chamber found that the apparent lack of due diligence by the prosecution and potential availability of the information should not serve to defeat the request for review.³³⁰ However, the Appeals Chamber did note that, should Barayagwiza subsequently be found not guilty, he should receive financial compensation. In the event he is found guilty, then his eventual sentence is to be reduced to take into account the infringements of his rights during the pre-trial period.³³¹

The *Barayagwiza* crisis demonstrates the extent to which criminal trials may create conflict between victims and due process for the accused. It also demonstrates the extent to which international institutions must be sensitive to the effects of their decisions on the nations they were created to assist. The Appeals

327. *Id.* at ¶ 74.

328. *Id.* at ¶¶ 54-55, 62.

329. *Id.* at ¶ 71.

330. *Id.* at ¶ 65.

331. *Id.* at ¶ 75.

Chamber's principal motivation in originally quashing Barayagwiza's indictment was the "integrity of the tribunal" and the "loss of public confidence" that would arise from "allowing [Barayagwiza] to stand trial in the face of such violations of his rights."³³² What about the loss of public confidence in Rwanda occasioned by his release? When setting out the general considerations animating its decision to quash, the Appeals Chamber went out of its way to emphasize that its decisions are "based solely on justice and law" and not the product of political pressure by Rwanda, the society affected by the violence and the judicial response thereto.³³³

This gives rise to deeper questions. What is the primary purpose of the ICTR—to promote accountability for mass atrocity or to maximize its credibility in the eyes of the international community? In the event of disputes between international tribunals and post-conflict national governments, who should give way? At the time of writing, Barayagwiza's trial (together with two co-accused) is currently ongoing before the ICTR Trial Chamber.

2. *Prosecutor v. Kambanda*

On October 19, 2000, the Appeals Chamber dismissed Jean Kambanda's appeal against conviction and sentence.³³⁴ Kambanda was Prime Minister of Rwanda during the genocide. Kambanda had previously pled guilty to six counts of genocide and crimes against humanity (although he subsequently sought to challenge his own guilty plea and demanded a trial). He was sentenced to life imprisonment on September 4, 1998.³³⁵ The Appeals Chamber unanimously affirmed Kambanda's conviction and sentence. As to conviction, Kambanda had argued that his initial guilty plea should be quashed, as he allegedly had not been represented by a lawyer of his own

332. Ian Fisher, *Crisis Points Up Tough Choices for Tribunal on Rwanda*, 149 N.Y. Times, § 1, at 3 (Dec. 19, 1999).

333. *Barayagwiza*, ¶ 34.

334. ICTR, Press Release ICTR/INFO-9-2-244.En, *Kambanda Conviction and Sentence Confirmed* <<http://www.ictor.org/ENGLISH/PRESSREL/2000/244.htm>> (Oct. 19, 2000); *Kambanda v. Prosecutor*, ICTR 97-23-A, *Judgement* (ICTR App. Chamber Oct. 19, 2000).

335. *Kambanda*, ¶¶ 2-4.

choosing, he had been detained in unlawful conditions, and the Trial Chamber had failed to determine that the guilty plea was voluntary, informed and unequivocal.³³⁶ The Appeals Chamber rejected all of these arguments. In so doing, it drew heavily from its prior decisions in matters involving appeals from the ICTY Trial Chambers, thereby promoting principles of consistency, precedent, and *stare decisis*. In numerous contexts the ICTR Appeals Chamber “adopted” the law or reasoning of the ICTY Appeals Chamber, although it did not specifically state that it was bound by such law or reasoning.³³⁷

As to sentence, the Appeals Chamber dismissed Kambanda’s allegations of excessiveness. Although Kambanda’s cooperation with the Prosecutor certainly was a mitigating factor to be taken into consideration, the “intrinsic gravity” of the crimes and the position of authority Kambanda occupied in Rwanda outweighed any considerations of leniency and justified the imposition of a life sentence.³³⁸ Kambanda, detained in The Hague, awaits transfer to Mali, Benin, or Swaziland (the three countries with which the ICTR has concluded incarceration agreements). He is the first official head of government to be convicted and punished for genocide committed under his rule.

3. *Prosecutor v. Akayesu*

The appeal judgment in the matter of Jean-Paul Akayesu, a local mayor, was pronounced on June 1, 2001.³³⁹ Akayesu’s appeal was heard on November 1 and 2, 2000. The nub of the charges relate to Akayesu’s failure to prevent the killing of Tutsis or otherwise respond with assistance to quell the violence, notwithstanding that he had authority and responsibility to do so.³⁴⁰ The Trial Chamber’s groundbreaking 1998 judgment in the *Akayesu* matter provided judicial notice that the Rwandan

336. *Id.* at ¶¶ 12, 36-37, 49.

337. *Id.* at ¶¶ 25-26, 61, 75, 77, 84, 107, 110-11.

338. *Kambanda*, ¶¶ 119, 126.

339. *Le Procureur c/ Akayesu*, ICTR-96-4-A, *Arrêt (Judgement)* (ICTR App. Chamber June 1, 2001) (available only in French at time of writing).

340. *Prosecutor v. Akayesu*, ICTR-96-4-T, *Judgement* ¶¶12-23 (ICTR Tr. Chamber Sept. 2, 1998).

violence was organized, planned, ethnically motivated, and undertaken with the intent to wipe out the Tutsis (as discussed earlier, this latter element being required to constitute genocide under the definitions provided by the Genocide Convention). Akayesu was the first person convicted of genocide by an international court. In addition, the initial *Akayesu* judgment marked the first time that an international tribunal ruled that rape and other forms of systematic sexual violence could constitute genocide. It was also the first conviction of an individual for rape as a crime against humanity. Akayesu was sentenced to life in prison.³⁴¹

The Appeals Chamber rejected Akayesu's appeal against his conviction and sentence. In so doing, it dealt with a broad array of issues, some of which were not raised by counsel on appeal. Of significance is the Appeals Chamber's finding that the right of an indigent person to be represented by a lawyer free of charge did not imply the right to select the assigned lawyer.³⁴² In other words, the right to free assistance from a lawyer does not confer the right to choose one's counsel. The right to choose counsel "is only guaranteed for those who can assume the financial burden of lawyer's fees," although the indigent defendant can choose from a list of counsel kept by the ICTR Registrar who will take that choice into account when assigning counsel.³⁴³ But the Registrar "is not necessarily bound by the wishes of the indigent accused person, and has wide powers of discretion [that can be exercised] in the interests of justice."³⁴⁴ The Appeals Chamber also held that there were insufficient grounds to find that the lawyers representing Akayesu were incompetent, as alleged by Akayesu.³⁴⁵ Also rejected were Akayesu's arguments that the ICTR was pursuing selective justice, was biased, and was lacking in impartiality; and that the

341. *Id.*; ICTR, Press Release ICTR/INFO-9-2-269.EN, *Appeals Chamber Upholds Sentences in the Akayesu, Kayishema and Ruzindana Trials* <<http://www.ictor.org/ENGLISH/PRESSREL/2001/269.htm>> (June 1, 2001).

342. *Akayesu*, ¶ 61.

343. Fondation Hirondelle, *Appeals Court Says Indigent Detainees Cannot Choose Lawyer*, available at <<http://www.hirondelle.org>> (June 1, 2001) (citing Appeals Court President Claude Jorda).

344. *Id.*

345. *Akayesu*, ¶¶ 80-84.

examination of witnesses was irregular and that Akayesu's detention was illegal.³⁴⁶

The Appeals Chamber also rejected a motion by Akayesu that it reconsider an earlier decision that had rejected additional grounds for appeal. In fact, the Appeals Chamber held that this motion constituted an abuse of process as reconsideration of final decisions must remain absolutely exceptional.³⁴⁷ Akayesu's lawyers were sanctioned under the Rules of the ICTR, and the Appeals Chamber ordered the ICTR Registrar to withhold payment to these lawyers for the preparation of the impugned motion.³⁴⁸ Throughout the *Akayesu* decision, the ICTR Appeals Chamber made extensive reference to judgements by the ICTY Trial and Appeals Chambers.³⁴⁹

4. *Prosecutor v. Kayishema and Ruzindana*

On May 21, 1999, the Trial Chamber convicted Clément Kayishema, a former local governmental official, and Obed Ruzindana, a businessman, of genocide and crimes against humanity and sentenced them to life imprisonment and twenty-five years imprisonment respectively. On June 1, 2001, the Appeals Chamber dismissed their appeals, thus confirming their convictions and sentences.³⁵⁰ The appellants had unsuccessfully alleged lack of equality of arms,³⁵¹ defective indictment, and inadequate proof.

346. *Id.* at ¶¶ 92, 97, 101, 319, 326, 376.

347. Fondation Hironnelle, *Appeals Court Confirms Judgement on Former Mayor*, available at <<http://www.hironnelle.org>> (June 1, 2001).

348. *Id.*

349. *See e.g.* ¶¶ 77, 91, 96, 117, 135, 286, & 336, as well as others throughout the decision.

350. *Le Procureur c/ Kayishema*, ICTR-95-1-A, *Motifs de L'Arrêt (Reasons for Judgement)* (ICTR App. Chamber June 1, 2001). ICTR, Press Release ICTR/INFO-9-2-269.En, *Appeals Chamber Upholds Sentences in the Akayesu, Kayishema and Ruzindana Trials* <<http://www.ictor.org/ENGLISH/PRESSREL/2001/269.htm>> (June 1, 2001). At the time of writing, the actual judgment was available only in French.

351. "Egalité des armes" in French. This phrase means that the prosecutor and defense must have access to identical resources and means. The Appeals Chamber held that, although the right to a fair trial implicitly includes "equality of arms," *Kayishema*, ¶ 67, this does not mean that the prosecution and defense must have equal resources and personnel at their disposal. *Id.* at ¶ 69. Rather, there must be sufficient resources made available to allow a good defense to be put forward. *Id.* at ¶ 72.

This judgment clarifies the law regarding the mental element for genocide and the type of circumstantial evidence that could establish that mental element. It also addresses the defense of command authority by affirming the approach taken by the ICTY in the *Celebici* case.³⁵²

CONCLUSION

The ICTR and ICTY Appeals Chambers have a novel structure and are significantly contributing to the development of international criminal and humanitarian law. Receptiveness to the jurisprudence of the Tribunals has varied among nation-states; this variation reflects general attitudes toward the incorporation and harmonization of international law within domestic legal systems. There has been some movement in Canada, Australia, the United Kingdom, and European countries toward a sedimentary integration of international law; in the United States, however, a more pronounced separation between national and international law remains.³⁵³ Professor Drinan recently observed, “American jurists continue to be uneasy about utilizing norms that derive from customary international law.”³⁵⁴ However, the realities of globalization in the business and practice of law oblige courts, lawmakers, and law schools of all nation-states to improve the interface between domestic and international norms.

352. *Kayishema*, ¶¶ 293-304.

353. See José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 *European J. Intl. L.* 183, 217 n. 161 (2001). The Canadian Supreme Court is comfortable turning to international law when appropriate and does so with considerable respect. See e.g. *supra* n. 10 (regarding *U.S. v. Burns* (Supreme Court of Canada extensively relying on developments in international law regarding the death penalty to depart from its prior decisions and refuse to extradite two Canadians to the United States to face capital murder charges unless assurances were given that the death penalty would not be sought)). But see Alvarez, *supra*, at 203 (providing some skepticism at the actual level of integration of international law in Canada and Australia).

354. Robert F. Drinan, *The Mobilization of Shame* 96 (Yale U. Press 2001). This unease operates within the federal courts and particularly within state courts and covers customary as well as convention-based international law. *Id.* at 101-102 (“The challenge underlying the struggle of American courts concerning how and when they should use international law as a source of their decisions is complex and profound. Most state judges do not want to give their opponents or critics an opportunity to challenge them on the grounds that they relied on some international document as the equivalent of sound American law.”).

This new interface should strive to create a connection between international and domestic law as opposed to the current parallelism that exists in the law of nearly all nations. This parallelism is an artificial relic as in the practice of law the boundaries between international law and domestic law are eroding. Even public international law, hitherto the haughty preserve of *inter-State* relations, can no longer be limited to relations between States, as it covers (and increasingly so) the relations between individuals and States as well as individuals and international organizations.³⁵⁵ Moreover, the events of September 11, 2001, reveal the pressing need for international law to regulate non-State actors as well.

In the end, the Tribunals are contributing to an important paradigm shift in the way in which human rights and criminal accountability for human rights abusers is perceived. Although the ICTY and ICTR deal only with a small subset of human rights abuses, they have helped mainstream the involvement of national courts in promoting accountability for human rights abuses committed either at home or abroad. Some of these national trials have taken place in the United States, where they can be expected to continue and diversify.³⁵⁶ A tangible and functional body of human rights law is emerging that is weaving its way even into federal common law. This mainstreaming into

355. See generally Kenneth S. Gallant, *Individual Human Rights in a New International Organization: The Rome Statute of the International Criminal Court*, in *International Criminal Law*, vol. III, *Enforcement* 693 (M. Cherif Bassiouni ed., 2d ed., Transnational Pubs. 1999).

356. See e.g. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (victims of Bosnian conflict successfully suing Karadzic, the leader of Bosnian Serb forces, in the United States for damages); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (wrongful death action involving a Paraguayan police official); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (compensatory and punitive damages to victims who were tortured and subject to cruel, inhuman and degrading treatment in Ethiopia); *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988) (lawsuits involving the "dirty war" conducted by the Argentine military); *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460 (D. Haw. 1995) (awarding \$2 billion in damages to a class of almost 10,000 members in litigation involving the former President of the Philippines). United States courts also are hearing claims involving damages for terrorism, property restitution, and even claims by indigenous peoples abroad regarding the preservation of environmental and natural resources. See Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, 79 *For. Affairs* 102, 102 (Sept./Oct. 2000). Lawsuits are also pending regarding civil liability for the September 11, 2001, terrorist attacks on the United States.

national courts of international human rights issues will only be accentuated by the eventual—and seemingly inevitable—creation of the International Criminal Court. As the International Criminal Court is designed to be complementary to national proceedings, it creates incentive for nation-states to encourage the prosecution of human rights abuses in their own courts, so as to avoid the threat of international intervention.

ADDENDUM—NEW ICTY RULES

After the authors completed this article, the ICTY released Document IT/199 (effective December 28, 2001), significantly changing the Rules of Procedure and Evidence concerning appeals. See <<http://www.un.org/icty>>. Highlights include:

Rule 54 *bis* now states that a party's interlocutory appeal of the denial of a motion to require a State to produce documents is subject to leave of a bench of three Appeals Chamber Judges. This modifies text at note 136-37, *supra*.

Rule 73(C) now provides that requests for certification of interlocutory appeals of decisions on evidence or procedure must be made within seven days of the decision, and if certification is granted, the appeal must be taken within seven days. This modifies text at notes 141-42, *supra*.

Rule 75(D) states that, during appellate proceedings, the Appeals Chamber may vary or rescind orders to protect victims and witnesses. This is a new provision.

Rule 108 now provides that a party must file a notice of appeal against a judgment within thirty days, setting forth the grounds of appeal. The party must identify the challenged ruling by date and/or transcript page, and must indicate the substance of the alleged errors and the relief sought. Variation of the grounds of appeal requires leave of the Appeals Chamber, for good cause. This modifies text at notes 102, 104, 108, *supra*.

Rules 111 and 112 provide new briefing times in non-expedited appeals: for Appellant's brief, seventy five days after notice of appeal; for Respondent's brief, forty days after Appellant's. This modifies text at notes 107-08, *supra*.

Counsel in both the ICTY and ICTR should always check with the Tribunals for the latest changes.

