

Retrial in International Criminal Procedural Law: Remedy or Recourse for Conviction?

Bath-Shéba van den Berg*

The topic of retrials at the international criminal tribunals has received little attention from academic scholarship and practitioners alike. This is rather disconcerting as there have been recent developments at the International Criminal Tribunals that reveal a misapplication of the retrial remedy. For the first time in the history of legal proceedings at the ICTY, the Prosecution has requested for a retrial on acquittal. More importantly, the Appeals Chamber at the ICTR, ordered a retrial for the first time in the history of international criminal law. At its roots, the retrial remedy is to safeguard the rights of the accused and thus guarantee a certain standard of human rights protection. So, where there was a miscarriage of justice at the trial stage, the accused could appeal for a retrial. Unfortunately, in the history of the international criminal jurisprudence, no such remedy has been granted, and instead there appears to be a dangerous shift towards allowing the Prosecution to a sort of “second” chance when at the trial stage it had failed to establish guilt beyond a reasonable doubt.

1. Introduction

This paper will briefly overview the statutory provisions, including the statutes and rules of the International Criminal Court and *ad hoc* Tribunals and contiguous jurisprudential developments in order to provide the legal backdrop against which the case studies will be analyzed. The case studies that have been selected reflect a developing trend in international criminal procedural law that is contrary to the origins and philosophy of the appeals process. The remedy for retrial has been corrupted by the judiciary averting clarification. This paper is a working paper and aims to explore the nature of retrial in international criminal procedural legal context.

2. The Appeals Process Post-Judgment

The appellate process of the international criminal courts and tribunals contains three essential procedural ingredients; grounds for appeal, the evidence to be presented and the remedy sought.

Article 81 of the ICC Statute and Articles 25 and 24 of the ICTY and ICTR Statutes respectively contain the statutory provisions for appellate proceedings. Therein, two chief bases are prefaced for appeal post-judgment; errors of law and errors of fact.¹

* Bath-Shéba van den Berg is an Associate Member of the Association of Defence Counsel practising before the International Criminal Tribunal for the Former Yugoslavia [ADC-ICTY]. As a jurist on international law, she has worked on the defence of Mr. Ramush Haradinaj in *The Prosecutor v. Haradinaj et al.*, Case No.: IT-04-84-T and General Milivoj Petković in *The Prosecutor v. Prlić et al.*, Case No. : IT-04-74-T. The views expressed in this paper are solely the author's. As this is a working paper, comments are most welcome: bathshebav@gmail.com © 2010.

A. Grounds for Appeal

i) Error of Law

A party alleging that there was an error of law must be prepared to advance arguments in support of the contention. If the party is unable to identify the alleged legal error, he or she should not raise the argument on appeal. Otherwise, the appellant risks duplicating submissions already raised before the Trial Chamber.²

Where the Appeals Chamber finds that there is an error of law in the Trial Judgement arising from the application of the wrong legal standard by the Trial Chamber, it is open to the Appeals Chamber to apply the correct legal standard to the evidence contained in the trial record in the absence of additional evidence. The Appeals Chamber must determine whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the party.³

ii) Error of Fact

In arguing an alleged error of fact, the Appellant must discharge two burdens. The appealing party must first show that the Trial Chamber committed the error, and, if so, the party must then show that the error resulted in a miscarriage of justice.⁴

The 'Reasonableness' Test

When considering an alleged error of fact with respect to a particular ground where no additional evidence has been admitted on appeal, the standard applied by the Appeals Chamber is that of 'reasonableness'. The Appeals Chamber tests whether the conclusion of guilt beyond reasonable doubt is one which no reasonable trier of fact could have reached.⁵ The reasonableness test secures a higher standard and avoids a re-discussion on evidence.

¹ This paper will not discuss a third ground put forth by ICC (article 81) and SCSL (article 20, rule 106), on procedural errors.

² *The Prosecutor versus Kupreškić et al.*, Appeals Chamber Judgement, 23 October 2001, para. 27; *See also Anto Furundžija*, Appeal Judgement, 21 July 2000, para. 35; *Krnjelac* Appeal Judgement, para. 10.

³ *The Prosecutor versus Kvočka et al.*, Appeals Chamber Judgement, 28 February 2005, paragraph 17. *See also Blaski*} Appeal Judgement, para. 15; *Kordi*} and *Čerkez* Appeal Judgement, para. 17.

⁴ *Omar Serushagov. The Prosecutor*, Case No. ICTR-98-39-A, Reasons for Judgment, 6 Apr. 2000, para. 22.

⁵ *Simić* Appeal Judgement, para. 10; *The Prosecutor versus Kordic and Cerkez*, Appeals Chamber Judgement, 19 September 2005, paragraph 18; *See also Tihomir Blaškić* Appeal Judgement, para. 16; *Duško Tadić* Appeal Judgement, para. 64; *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63; *Mucić et al.* Appeal Judgement, paras. 434-435; *Zlatko Akayesu* Appeal Judgement, para. 178; *Musema* Appeal Judgement, para. 17.

Miscarriage of Justice

Only errors of fact which have “occasioned a miscarriage of justice” will result in the Appeals Chamber overturning the Trial Chamber’s decision.⁶ A miscarriage of justice has been defined as “a grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime.”⁷

Margin of Deference

As the Trial Chamber has the advantage of observing the testimony of witnesses first-hand and is in a better position to assess the reliability and credibility of witnesses, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber.⁸

B. Relief Sought and Legal Remedies

According to the statutory provisions of the *ad hoc* Tribunals, the Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.⁹ Relief measures sought by a convicted person usually include a reversal of the conviction or in the alternative, a reduction of the sentence. The prosecution normally requests for an acquittal to be reversed. Further to these types of relief, the remedy of retrial may be inferred. Although the term ‘retrial’ is not mentioned, the ICTY and ICTR Rules provide that “in appropriate circumstances the Appeals Chamber may order that the accused be *retried* according to law.”¹⁰

i) The meaning of “retried”

The remedy for retrial was first developed by the Appeals Chamber in *Jelisić*. The Appeals Chamber recognized the Prosecution’s right to request a retrial as a remedy on appeal,¹¹ but chose not to remit the matter to a new trial chamber on the grounds of ‘interests of justice’ and ‘judicial economy’. Not only did the Appeals Chamber confer itself with the power to order a retrial and did not follow through, but it was also reluctant

⁶ *The Prosecutor versus Kordic and Cerkez*, Appeals Chamber Judgement, 19 September 2005, paragraph 19; *See also Tihomir Blaškić* Appeal Judgement, para. 19; *Kupreškić et al.* Appeal Judgement, para. 29.

⁷ *Furundžija* Appeal Judgement, para. 37, quoting Black’s Law Dictionary (7th ed., St. Paul, Minn. 1999) upheld in *The Prosecutor versus Kvočka*, The Appeals Chamber Judgement, 28 February 2005, paragraphs 18.

⁸ *The Prosecutor versus Tadic*, Appeals Chamber Judgement, 15 July 1999, paragraph 64; *The Prosecutor versus Furundžija*, Appeals Chamber Judgement, paragraph 37; *The Prosecutor versus Kupreskic*, Appeals Chamber Judgement, 23 October 2001, paragraph 30; *The Prosecutor versus Kordic and Cerkez*, Appeals Chamber Judgement, 17 December 2004, paragraph 19.

⁹ Article 24 and 25 of the ICTR and ICTR Statutes respectively, paragraph 2.

¹⁰ Rule 117 and 118 of the ICTY and ICTR Rules of Evidence and Procedure, respectively, *emphasis added*.

¹¹ *The Prosecutor versus Goran Jelisić*, IT-95-10-A, Appeals Chamber Judgement, 5 July 2001, paragraph 73. The prosecution submitted that “the appropriate remedy is to remit the matter to a differently constituted Trial Chamber for a new trial.” Para. 12.

to provide any substantial explanation as to the reasons supporting its decision. As a result, no discussion was generated as to a possible misapplication of the remedy of retrial to the prosecution.

In fact, the Appeals Chamber fails to provide an explanation as to how it recognizes the right for the prosecution to request a retrial as a remedy on appeal. It simply moves from outlining Rule 117 to asserting the right without any elucidations offered in between. In a final act of stupefaction, the Appeals Chamber, biasing itself on hand-picked national case-law,¹² decides that it is not obliged, even after having identified an error, to remit the matter for retrial.

Two dissenting opinions heavily criticize the majority ruling. While Judge Wald's preference for securing a conviction on the crime of genocide is obvious, she is equally vigorous in her contention against the loose interpretation by the majority ruling because it highlights the problems that a convicted person faces when seeking the remedy of retrial. She argues that the use of national law to interpret ICTY statutory provisions merely provides for "the garden-variety situation where the Appeals Chamber reverses the Trial Chamber and the choice of remedy is between vacating the conviction altogether or requiring a new trial."¹³

Judge Wald urges the Appeals Chamber to recall that the Rules cannot confer power on the Chamber greater than that provided by the Statute.¹⁴ She equates the use of 'judicial economy' and 'interests of justice' as "extra-legal grounds" and "extra-record considerations" that ultimately challenge the impartiality of Judges as exclusively definers and interpreters of the law. What more, it invites views as to which cases are worthy and which are not.¹⁵

In a completely different tone, Judge Pocar, partially dissenting, contends that the remedy of retrial is futile. As judges are the final arbiters of the evidence and as there is no jury, there is no point in leaving open the possibility that another trier of fact could come to a different conclusion if the Trial Chamber itself is convinced of its own assessment of the case.¹⁶ Most importantly, he adds that by *not ordering* a retrial on the prosecution's appeal, the fundamental rights of the accused are preserved. Without naming the principle of *non bis in idem*, Judge Pocar analogously highlights that the accused is "entitled not only to be presumed innocent during the trial, but also not to undergo a trial when his innocence has already been established."¹⁷

¹² Cf. *Rigby v. Woodward*; 1957; 1 WLR 250.

¹³ Partial Dissenting Opinion of Judge Wald, paragraph 5.

¹⁴ Judge Wald dissenting, paragraph 7.

¹⁵ Judge Wald, dissenting, paragraph 14. On more about the interpretation of powers, See William A. Schabas, *An Introduction to the International Criminal Court* 75 (Cambridge U. Press 2001)

¹⁶ Partial Dissenting Opinion of Judge Pocar, paragraph 6.

¹⁷ *Ibid.*

3. The Right of Appeal: Philosophy and Origins

At its core, the right of appeal was originally intended for the protection of the rights of the accused. Looking at the development of international criminal procedural law from Nuremberg to *ad hoc* Tribunals and the International Criminal Court, one observes that the right of appeal has morphed from the guarantee of procedural fairness for the benefit of the accused to a prosecutorial recourse for conviction.

A. Origins

No right of appeal was instituted for the 1945 trials of leading German officials indicted with crimes against peace, war crimes and crimes against humanity before the International Military Tribunal. The Nuremberg Charter reflected the international community's intent on securing convictions and failed to provide remedy on the occasion of a miscarriage of justice. Instead, the Nuremberg Charter provided that the decisions of the Nuremberg Tribunal were final.¹⁸

Ten years later, the world community, under the wing of the United Nations General Assembly adopted a different approach to the rights of the convicted person. In the 1966 International Covenant on Civil and Political Rights, Article 14(5) reads that "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

Arguably, the right of appeal was borne from the philosophy that a person convicted of a crime should have the right to request review. The 1993 Report of the Secretary-General pursuant to Security Council Resolution 808 establishing the International Criminal Tribunal for the former Yugoslavia endorsed Article 14 of the International Covenant on Civil and Political Rights.¹⁹ Moreover, it highlighted that the reason for why the right of appeal should be provided under the Statute is because "such a right is a fundamental element" of individual rights.²⁰

Although the right of appeal is recognized with respect to both the defence and the prosecution on the grounds referred to in the ICTY Statute, relevant international instruments remain silent on the Prosecution's right to appeal on acquittal. The Statute's recognition of this right raises the question of the relief that may be granted by the Appeals Chamber in such a case. According to the Statute, the Appeals Chamber may

¹⁸ Article 26 of the Nuremberg Charter states that "The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review."

¹⁹ See paragraph 106: "It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights."

²⁰ Secretary General's Report on Aspects of Establishing an 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, U.N. Doc. S/25704, 3 May 1993, para. 116.

affirm, reverse or revise the judgment of the Trial Chamber. However, the Statute was not intended to authorize the Appeals Chamber to reverse an acquittal by the court of first instance and enter a conviction at the appellate level.²¹

These underpinnings reflect concerns regarding the appellate process whereby granting the Prosecutor the right of appeal potentially leads to double jeopardy.²² To the extent retrial was discussed in the official sources guiding the establishment of the ICTY, it was strictly in the context of an option after *reversing a conviction*.²³

B. *Non bis in idem* versus Double Jeopardy

i) ICTY and ICTR Statutory Provisions

Under their respective Statutes, the ICTY and ICTR have primacy over national courts. In this context, the principle *non bis in idem* would preclude further prosecution in a national court when there has been a prosecution before the International Tribunal. Returning to the Secretary-General's Report which inadvertently serves as a *travaux préparatoires*, the meaning of *non bis in idem* is limited to the context of retrying a defendant tried in a national court if "effective means of adjudication were not guaranteed."²⁴ Although both *ad hoc* Tribunals are not statutorily barred from prosecuting the accused again,²⁵ the Secretary-General Report's silence on the matter leaves one wondering whether the *ad hoc* Tribunals are authorized to do so.

In the ICTY Decision on the Defence Motion on the Principle of *non bis in idem* in the *Tadic* case, the Trial Chamber took the view that although the principle of *non bis in idem* normally protects a person from being tried twice and is enshrined in the ICCPR²⁶

²¹ See further Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* vol. 1, 296 (Transnational Publishers 1998), page 295.

²² M. Cherif Bassiouni with the collaboration of Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* 983, at 979-980.

²³ "In all cases it will be for the appeal court to determine the appropriate remedy, whether to acquit the convicted person or to return the case for retrial according to law or to substitute another judgment for the lower court judgment or to alter the sentence." Memo. from Amnesty International to the United Nations, *Memorandum to the United Nations: The Question of Justice and Fairness in the International War Crimes Tribunal for the Former Yugoslavia* (April 1993) (reprinted in Morris & Scharf, *Insider's Guide* vol. 2, 409, 433).

²⁴ Secretary General's Report on Aspects of Establishing an 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, U.N. Doc. S/25704, 3 May 1993, paragraphs 64-66.

²⁵ See Article 10 and 9 of the ICTY and ICTR Statute respectively and Rule 13 of the ICTY and ICTR Rules of Procedure and Evidence and Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia since 1991, UN Doc IT/68 First Annual Report (1994); See also the *Tadic* case, Trial Chamber, *Prosecutor v. Tadic*, Decision on the Defence Motion on the Principle of *Non-bis-in-idem*, 14 November 1995, para. 13.

²⁶ See Article 14(7) of the International Covenant on Civil and Political Rights holds "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in

as a standard of a fair trial, the principle is applied to cover only a double prosecution within the same State.²⁷ In other words, because the ICTY operates in an international vacuum, the principle of *non bis in idem* is de-contextualized and subsequently binding only to the extent that it appears in the Statute.

ii) *Double Jeopardy*

In common law jurisdictions, the maxim *non bis in idem* is referred to as double jeopardy, albeit the *non bis in idem* principle is not necessarily coextensive with the prohibition against double jeopardy.²⁸

Under constitutional law in the United States of America, a prosecutor cannot appeal an acquittal entered after the court has received evidence as doing so would violate the principle of double jeopardy which prevents a person from being tried twice for different crimes based on the same facts.²⁹

As in the United States, Guyana interprets the right against double jeopardy to prohibit retrial after an acquittal on the merits, therefore the Prosecutor is barred from appealing an acquittal.³⁰

iii) *Non bis in idem*

Three rationales support the *non bis in idem* principle in the civil domestic context: 1) the protection of the individual (freedom) 2) the importance of social peace 3) the respect for judicial decisions that have been rendered in the past. No one should have to face more than one prosecution for the same offence.³¹

In the Belgian Code of Criminal Procedure, Article 360 delineates the general rule on *non bis in idem* which reads: “The accused who has been acquitted by a court of assize cannot be prosecuted again for the same facts, regardless of their legal description.”³² If new evidence is found after a person is acquitted, Belgian law does not allow for new

accordance with the law and penal procedure of each country.” See also Article 4 of the Seventh Protocol to the European Convention on Human Rights.

²⁷ Decision on the Defence Motion on the Principle of *Non-Bis-In-Idem*, *The Prosecutor v. Dusko Tadic*, Case No.: IT-94-1-T, 14 November 1995, paragraph 9.

²⁸ Footnote 338, page 133 of Virginia Morris & Michael P. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* vol. 1, 296 (Transnational Publishers 1998).

²⁹ 18 U.S.C.S. § 3731 (2001).

³⁰ W. James & H. A. Lutchman, *Law and the Political Environment in Guyana* 149, 159 (University of Guyana 1984).

³¹ Latin Maxim *nemo debet bis vexari pro una et eadem causa* cited in T. Vander Beken, G. Vermeulen & T. Ongena, “Concurrent National and International Criminal Jurisdiction and the Principle ‘*Ne Bis in Idem*’”, *International Review of Penal Law* (Vol.73), 811.

³² See C. Van den Wyngaert and G. Stessens, “The international *non bis in idem* principle: resolving some of the unanswered questions.” *The International comparative law quarterly*, 1999, Vol. 48, 789.

prosecutions.³³ For Belgian convictions, however, there are exceptions to the *non bis in idem* principle where the convicted person may apply for retrial if a miscarriage of justice has occurred.³⁴

iv) *Conclusion*

It is noteworthy that despite the competing interpretations between common law jurisdictions and civil law jurisdictions, what remains prevalent is the deeply-rooted importance to protect the rights of the accused. The international criminal legal system which mixes elements from both common and civil law processes has largely ignored these domestic legal principles under the weight of political pressure to prosecute and secure convictions.

C. Defence versus Prosecution

There is a distinction to be made between a conviction and an acquittal with regards to the right to appeal.

i) *The Draft Statute for the ICC*

In 1992, the United Nations General Assembly agreed for the International Law Commission to draft a statute for the establishment of an international criminal court.³⁵ It took two years to draft the statute which was submitted to the GA with commentaries and later became the skeletal framework for the Rome Statute.³⁶

Interestingly, the ILC's considerations on requests for a 'new trial' were wholly excluded from the Rome Statute. What was originally proposed was the possibility of the prosecution requesting a retrial on acquittal.³⁷ The Draft Statute outlined a clear distinction between an appeal brought by the convicted person and the Prosecutor against an acquittal. The ILC argued that the only relief the court can grant in an appeal by the Prosecutor from an acquittal on a particular charge is an order for a retrial. The Appeals Chamber may order a retrial, however it is precluded from reversing a decision of acquittal by the Trial Chamber.³⁸

³³ T. Vander Beken, G. Vermeulen & T. Ongena, "Concurrent National and International Criminal Jurisdiction and the Principle '*Ne Bis in Idem*'", *International Review of Penal Law (Vol.73)*, 813.

³⁴ *Ibid* at 814.

³⁵ Report of the International Law Commission on the work of its forty-fourth session, G.A. res. 47/33, 47 U.N. GAOR Supp. (No. 49) at 287, U.N. Doc. A/47/49 (1992), § 6.

³⁶ Establishment of an international criminal court, G.A. res. 49/53, 49 U.N. GAOR Supp. (No. 49) at 293, U.N. Doc. A/49/49 (1994).

³⁷ See Article 49(2) If the Appeals Chamber finds that the proceedings appealed from were unfair or that the decision is vitiated by error of fact or law, it may:

(a) If the appeal is brought by the convicted person, reverse or amend the decision, or, if necessary, order a new trial.

(b) if the appeal is brought by the Prosecutor against an acquittal, order a new trial.

³⁸ "It is not open to the Appeals Chamber to reverse or amend a decision of a Trial Chamber acquitting an accused on a given charge as distinct from annulling that decision as a prelude to a new trial."; 46th Session

ii) *Burden of Proof*

Another important distinction raised on appeal is that between the burden on the Prosecution and the burden on the accused. Considering that it is the Prosecution that bears the burden at trial of proving the guilt of the accused beyond a reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction. Where the convicted person is appealing, the Appeals Chamber will reverse only if it finds that no reasonable trier of fact could have made the particular finding of fact beyond reasonable doubt and the conviction relied on this finding. Where the Prosecution is appealing, the Appeals Chamber will reverse only if it finds that no reasonable trier of fact could have failed to make the particular finding of fact beyond reasonable doubt and the acquittal relied on the absence of this finding.³⁹

iii) *Conclusion*

The law on appeal has been unclear as far as the remedy for retrial is concerned. However, after an overview of the development of principles in international criminal law that protect the rights of accused persons and of the statutory omissions of retrial, one appreciates that when interpreted correctly, remedies at the appellate level lean more in towards safeguarding the interests of the defence rather than offering a recourse for conviction by the prosecution.

4. Case Studies: Developing trends that are contrary to core principles

Despite the underpinning philosophy against allowing retrials, the Appeal Chambers has ruled that it can order a retrial albeit reserved as an exceptional measure to which resort must necessarily be limited.⁴⁰ However, according to the 1993 American Bar Association proposal⁴¹ for the ICTY Rules of Procedure and Evidence, the Appeals Chamber is not authorized to order a new trial before another Trial Chamber. In its proposal, the ABA submitted that the respect given by the international community to the proceedings of the ICTY may be undermined if the principle of finality is ambivalent. If a defendant, once acquitted, may be brought back for a second trial critics will claim that the ICTY values convictions more highly than it values justice.⁴²

of the International Law Commission, “Draft Statute for an International Criminal Court with commentaries”, *Yearbook of the International Law Commission*, 1994, vol. II, Part Two, page 61.

³⁹ *Blagovević and Jokić* Appeal Judgement, para. 9; *Bagilishema* Appeal Judgement, paras 13-14; *See Brđanin* Appeal Judgement, paras. 12-14; *Rutaganda* Appeal Judgement, para. 24; *Bagilishema* Appeal Judgement, paras 13-14; upheld in *The Prosecutor v. Limaj et al*, para. 13 .

⁴⁰ *Krajsnik* Appeals Judgemnet, paragraph 799; *Jelisić* Appeal Judgement, para. 77 upheld in *Muvunyi* Appeal Judgement, para. 148.

⁴¹ Suggestions made by the Government of the United States of America Rules of Procedure and Evidence for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, U.N. Doc.: IT/14, 17 November 1993.

⁴² ABA Report on the Rules, at 23.

This restrictive approach to new trials is consistent with the need to safeguard against the risk of an erroneous conviction that may occur when the prosecution, with its superior resources, is allowed to retry an individual until it finally obtains a conviction.⁴³

The fact that the Rome Statute omitted the Draft Statute's proposed article relating to the Appeals Chambers power to order a retrial, is demonstrative that either retrial is a contentious issue or that retrial in practice would lead to an outright infringement of the core rights of the accused insofar as international courts and tribunals are subject to political pressure to secure convictions.

A. Muvunyi Case

In 2009, for the first time in the history of international criminal legal proceedings, the international community witnessed a retrial.

The ICTR Appeals Chamber ordered a retrial in the case against Tharcisse Muvunyi. The retrial started on 17 June 2009 and ended three months later. On 11 February 2010, the Trial Chamber found Mr. Muvunyi guilty of direct and public incitement to commit genocide and sentenced him to 15 years of imprisonment.⁴⁴

Muvunyi was initially convicted by the Trial Chamber on 12 September 2006 for several acts of genocide, direct and public incitement to commit genocide, and other inhumane acts and was subsequently sentenced to 25 years of imprisonment.⁴⁵

Muvunyi presented fourteen grounds of appeal challenging his convictions and his sentence and requested that the Appeals Chamber overturn his convictions or, in the alternative, to reduce his sentence. The Prosecution responded that all grounds of Muvunyi's appeal should be dismissed.⁴⁶

On 29 August 2008, the Appeals Chamber 'set aside' all convictions and the sentence and ordered a retrial of the allegation of direct and public incitement to commit genocide.⁴⁷

⁴³ Legal Scholars are in agreement that the Appeals Chamber is not expressly authorize to grant a new trial. See M. Cherif Bassiouni with the collaboration of Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* 983 (Transnational Publishers 1996); Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* vol. 1, 296.

⁴⁴ As Muvunyi has been in physical custody since his arrest in February 2000, Muvunyi is entitled to credit for his time served since then.

⁴⁵ *The Prosecutor versus Muvunyi*, Trial Chamber Judgement, 12 September 2006, para. 531.

⁴⁶ *Muvunyi Appeals Judgemnet*, para. 5

⁴⁷ *The Prosecutor versus Muvunyi*, Appeals Chamber Judgement, 29 August 2008, para. 171; the indictment alleges that Muvunyi spoke at a meeting at the Gikore in Nyaruhengeri *commune*, Butare *prefecture*, in early May 1994 and incited the killings of Tutsi. Noted under Count 3 of the Indictment pursuant to Article 2(3)(c) of the ICTR Statute.

There are two core problems in the Appeals Chamber decision-making. The first touches upon the reasons justifying an order for retrial while the second concerns its decision to widened the scope of evidence to be adduced at the retrial proceeding.

i) Justification for Retrial

An overview of the Appeals Chamber's decisions on Muvunyi's grounds of appeal and its subsequent order for retrial reveals some confusion as the inherent right to apply this remedy when most convictions were reversed.⁴⁸

A retrial was ordered as a result of the inconsistent testimony of Witnesses YAI, CCP⁴⁹, and MO78⁵⁰ which prevented the Appeals Chamber from determining whether the Trial Chamber assessed the entire evidence with regards to Count 3 exhaustively and properly.⁵¹

The Appeals Chamber felt forced to conclude that Muvunyi's conviction was not *safe* and therefore quashed it.

Although the Appeals Chamber stressed that an order for retrial was "an exceptional measure to which resort must necessarily be limited" no justification was provided as to the inherent powers of the Appeals Chamber to order a retrial, it was simply assumed in the interests of justice.⁵²

The reasons which motivated the Appeals Chamber to order a retrial are at odds with scope of Article 24 of the ICTR Statute. As developed by earlier jurisprudence the presence of inconsistencies in the evidence does not in itself require a Trial Chamber to reject the evidence as unreliable.⁵³ Moreover, the Appeals Chamber is obliged to give a margin of deference to a finding of fact reached by a Trial Chamber.⁵⁴

⁴⁸ The Appeal Chamber granted Muvunyi's Ground of Appeal 1-6, 7, in part 8, 9-11, 13, and reversed the convictions. Further, it dismissed all remaining ground of appeal including those of the Prosecution. On Muvunyi's 8 Ground of Appeal, the Appeals Chamber quashed his conviction for direct and public incitement to commit genocide under Count 3 and ordered a retrial pursuant to Rule 118(C) of the Rules. *Muvunyi Appeals Judgemnet*, para. 171.

⁴⁹ Prosecution Witnesses.

⁵⁰ Defence Witness, the Trial Chamber rejected this evidence and instead found that it corroborated the evidence provided by Prosecution witnesses YAI and CCP; *See Muvunyi Appeals Judgement*, para. 142 and 145 and *Muvunyi Trial Chamber Judgemnet*, paragraph 210.

⁵¹ Appeals Chamber found that the trial Chamber had not provided sufficient reasons in its assessment of the evidence.

⁵² *Muvunyi Appeals Judgemnet*, para. 148.

⁵³ *The Prosecutor versus Delalic et al.*, Appeals Chamber Judgement, 20 February 2001, paragraph 485 and paragraphs 295-498.

⁵⁴ *See* section 2(a)(ii) of this working paper.

ii) *Scope of Evidence at Retrial*

Although Rule 118 authorizes the Appeals Chamber to order that the accused be retried before the Trial Chamber, it falls short of specifying the scope of retrial.⁵⁵

At the first trial, the Prosecution relied on the evidence of two factual witnesses. In the retrial, the Prosecution again called these witnesses, YAI and CCP, and also called FBX, AMJ and CCS. FBX, AMJ and CCS are accomplices.⁵⁶ The trial chamber found at retrial that the testimony of these witnesses was reliable and contained general consistency and corroboration contrary to the findings of the Appeals Chamber.⁵⁷

The admission of additional evidence by Prosecution at retrial led to Muvunyi's eventual conviction. The Prosecution dropped one of the two witnesses whose inconsistent testimony was identified by the Appeals Chamber as a major concern, and added the testimony of three additional witnesses. As warned in the adjoining dissenting opinion, the Prosecution's proposed strategy to admit new evidence in order to remedy inconsistencies, underscores the problematic nature of retrial, "where the Prosecution is effectively given a second chance to make its case".⁵⁸

On 14 January 2009, the Trial Chamber held a status conference where it issued oral orders establishing the scope of the Prosecution evidence to be adduced at retrial as limited to the evidence from the original trial.⁵⁹ On 24 March 2009, the Appeals Chamber overturned this restriction and allowed the Prosecution to call additional witnesses whom did not testify in the original trial.⁶⁰

The Appeals Chamber essentially agreed with the Prosecution that the Trial Chamber had erred in law by equating retrial, as provided for in Rule 118 of the ICTR Rules with a remittance to consider a narrow issue.⁶¹ Relying on national legislation, the Prosecution advanced the argument that a retrial is to be conducted *as if there had been no trial in the first instance*.⁶² The Appeals Chamber found support in this argument and finally

⁵⁵ Paragraph 12 of the *Muvunyi Decision on Scope of Evidence*

⁵⁶ Whereas FBX was released from prison in October 2007, AMJ and CCS are still in prison having been sentenced to 30 years and life imprisonment; *The Prosecutor versus Muvunyi*, Trial Chamber Judgement, 11 February 2010, paragraphs 41-42.

⁵⁷ *Muvunyi Retrial Judgement*, paragraph 93.

⁵⁸ Joint Dissenting Opinion of Judges Shahabuddeen and Meron, paragraph 6.

⁵⁹ Judge Byron decided that the retrial was limited to correcting the Trial Chamber's failure and that the Prosecution could therefore not call new witnesses, Decision on the Prosecutor's Appeal concerning the scope of evidence to be adduced in the retrial, *The Prosecutor versus Tharcisse Muvunyi, Case No. ICTR-00-55A-AR7*, 24 March 2009, para 5.

⁶⁰ Decision on the Prosecutor's Appeal concerning the scope of evidence to be adduced in the retrial, *The Prosecutor versus Tharcisse Muvunyi, Case No. ICTR-00-55A-AR7*, 24 March 2009, para 4

⁶¹ Appeal, paras. 2-10, 23-36; Reply, para. 6. The Prosecution also refers to paragraph 15 of the partial dissenting opinion of Judge Wald in *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Judgement, 5 July 2001 in which she distinguishes between retrial and remittance.

⁶² Appeal, para. 33, citing Black's Law Dictionary (7th Edition 1990), p. 1317; Criminal Procedure Code (Act 593)(revised – 1999) §316 (reprinted in the Annotated Statutes of Malaysia, Volume 5, Part (2)1, (Malayan L. J. Sdn.Bhd. 2001)); Appeal, paras. 6-8; Reply, paras. 5, 7-14.

concluded that in the absence of an express prohibition in ICTR statutory provisions and in the jurisprudence on whether new evidence should be allowed at the retrial, such a determination should be left with the Trial Chamber's discretion which is guided by the same criteria governing the admission of evidence at trial.⁶³

Not only did the Appeals Chamber in *Muvunyi* overstep its power in ordering a retrial insofar as assuming that it has the inherent powers to do so without further consideration, it also interpreted its statutory provisions *ultra vires*.⁶⁴

Non bis in idem

In arguing against the admission of additional evidence and new witnesses by the Prosecution at the retrial, Muvunyi attempted to infer the principle of *non bis in idem* as a procedural estoppel. The argument that was advanced was that trying an accused on the same charges “constitutes a violation of the *non bis in idem* principle and that allowing the Prosecution to present new evidence would place him in double jeopardy.”⁶⁵

Unfortunately, the Appeals Chamber ignored the raised contention on the ground that as his conviction at the appellate level as ‘quashed’ it cannot be considered a final judgment.⁶⁶

iii) *Conclusion*

Judges Shahabuddeen and Meron join in their dissenting opinion that they are deeply troubled by the remedy of retrial as it lends the Prosecution the offer to try the accused at a second chance.

B. Haradinaj Case

Although ICTR decisions are not technically binding in ICTY cases, they are persuasive authority. As the two Tribunals share a common Appeals Chamber, some of the same judges whom have decided on *Muvunyi* may adopt a similar position in a case prefaced on resembling matters at the ICTY, namely in the *Haradinaj* case whereby the

⁶³ Paragraph 13 of the *Muvunyi Decision on Scope of Evidence citing national law: See, e.g., Patterson v. Haskins*, 470 F.3d 645, 669 (6th Cir. 2006) (“[A]n appellate court's reversal of a conviction for trial error, unless specifically stated, does not oblige the government on remand to present a virtually identical version of the evidence and arguments that led to the initial reversal. In light of this court's statement in *Davis*, and because the type of limitation sought by Patterson is not ordinarily imposed, we conclude that our prior opinion did not intend to impose restrictions on the amount or type of evidence that the state could present during his retrial.”).

⁶⁴ See Section 2(B)(i) of this working paper.

⁶⁵ Response, para 15. “The *non bis in idem* principle aims to protect a person who has been finally convicted or acquitted from being tried for the same offence again.”

⁶⁶ Decision on the Prosecutor's Appeal concerning the scope of evidence to be adduced in the retrial, *The Prosecutor versus Tharcisse Muvunyi*, Case No. ICTR-00-55A-AR7, 24 March 2009, paragraph 16.

Prosecution has explicitly requested for retrial.⁶⁷ This is the first time that the prosecution seeks retrial as a remedy on acquittal of all counts. In its appeal, the Prosecution argued that in a case replete with witness intimidation, that Trial Chamber should have put more effort into securing the testimony of two key witnesses instead of closing its case.

On 3 April 2008, Trial Chamber I acquitted Ramush Haradinaj and Idriz Balaj on all charges of alleged war crimes and crimes against humanity committed in Kosovo between March and September 1998. Following the judgment they were released from custody. The third accused, Lahi Brahimaj, was also acquitted of crimes against humanity but convicted for war crimes and sentenced to six years of imprisonment.

The Prosecution claims that it was denied its right to a fair trial when the Trial Chamber, fully aware of the intimidation of witnesses, failed to take reasonable steps to secure the testimony of two crucial witnesses whom were reluctant to testify “because of intimidation and fear.” The Prosecution contends that had it received the evidence of the two crucial witnesses, it would have presented an incriminating case against the three accused leading to their conviction principally for their participation in a Joint Criminal Enterprise. The Prosecution therefore, conceives that the only remedy to cure the Trial Chamber’s error is to remit the matter to a new Trial Chamber for a retrial on the relevant counts only. The retrial would permit a reasonable possibility for the evidence of the two key witnesses to be heard.

The Prosecution is convinced that re-trying the accused will secure a conviction. Should the Prosecution be granted such a possibility, it would appear that the Prosecution is given a second chance, which raises fundamental concerns as to the role of the *ad hoc* Tribunals as arbiters of justice or simply puppets serving the international community’s will to secure convictions.

5. Perspective on the Future

A. Kouwenhoven

Procedural errors and the misapplication of legal principles at the international criminal tribunals and courts can potentially misguide countries in their implementation and application of international criminal law.

As the host of the International Criminal Court, the ICTY and STL, and in part the SCSL, The Netherlands’ political policy is centered on prosecuting international crimes.

On 20 April 2010, the Dutch Supreme Court, on appeal in cassation, reversed the acquittal of Mr. Guus Kouwenhoven and remitted the case to the District Court.

⁶⁷ Applying the same rationale in analyzing the *Jelisić* case; Gregory P. Lombardi, “Memorandum for the Office of the Prosecutor International Criminal Tribunal for Rwanda: Issue 8: The decision by the Appeals Chamber in *Jelisić* not to remit the case for trial after reversing a mid-trial acquittal”, *New England School of Law International War Crimes Prosecution Project*, November 2001, page 2.

Although the Supreme Court Decision appears, *prima facie*, within the scope of remittal, after scrutinizing the procedural history of the case, one is led to extrapolate that the District Court will, in practice, be rehearing a key component of the prosecution's case. In other words, the possibility that this may be in fact a retrial is proximate and in theory contrary to the rights of the accused, namely the principle of *non bis in idem*.⁶⁸

i) *A Brief Examination of Dutch Law*

It is competent to review a decision (cassation) in cases where the law has been improperly applied, or the rules of due process and fairness of the procedure have been violated.⁶⁹ Both the defendant and the prosecution have the right to appeal in cassation to the Supreme Court, even against an acquittal.⁷⁰

In cases of a procedural error, such as with the *Kouwenhoven* case, the Supreme Court remits the case to a lower court.⁷¹

Furthermore, the Supreme Court is empowered to decide on the request of a convicted person that his case, in which a final judgment already exists, has to be retried. This review is *an extraordinary remedy against miscarriages of justice* and can only be authorized on the grounds of the existence of contradictory judgments or of a previously unknown fact that *casts doubt on* the validity of the final judgment.⁷²

ii) *Procedural History*

On 18 March 2005, Guus Kouwenhoven, a Dutch businessman was arrested in the Netherlands. The trial against Kouwenhoven started at the District Court of The Hague on 24 April 2006. The accusations were broken down into five charges relating to two crimes, 1) war crimes in Liberia and Guinea, and 2) a violation of the Dutch arms embargo that was instituted pursuant to Security Council Resolutions. In view of the object of this paper, only the first crime will be examined.

On 7 June 2006, the District Court sentenced Kouwenhoven to eight years imprisonment for violating prohibitions on the supply of arms to Liberia in 2001, 2002 and 2003. The court acquitted Kouwenhoven of charges involving his participation in war crimes allegedly committed by Liberian troops and militias from 2000 to 2002. Both

⁶⁸ Article 68 of The Dutch Criminal Code contains a general *ne bis in idem* provision that is applicable to both domestic and foreign judgements. For a further interest on the application of this principle in The Netherlands, see P. Baauw, 'Ne bis in idem', in B. Swart et al. (eds.), *International Criminal Law in the Netherlands*, 1997, pp. 75-84.

⁶⁹ Sect. 79 of the Dutch 1827 Judicial Organization Act. Only matters of law or procedural error are discussed, and not the facts.

⁷⁰ Since 2002 the ban on cassation against an acquittal has been deleted.

⁷¹ The court of remittance is bound by the decision of the Supreme Court.

⁷² The retrial is done by a court of appeal to which the case is referred, See sections 457-481 of the Dutch Criminal Code of Procedure.

Kouwenhoven and the public prosecutor appealed this sentence. In the appeal, the prosecutor requested to hear two witnesses who had previously appeared before the SCSL.⁷³ The court of appeal turned down the prosecution's request and on 10 March 2008 acquitted Kouwenhoven of all charges.

Following the acquittal of all charges, the public prosecution lodged an appeal in cassation in the Dutch Supreme Court arguing that the Appeal Court's decision to turn down the request to hear two witnesses was not sufficiently justified.⁷⁴

On 20 April 2010, The Supreme Court upheld the appeal by the public prosecutor, quashing the Court of Appeal's decision and ordered the case to be remitted to the District Court for a new examination and to issue a new judgment. The Supreme Court agreed that the prosecutor should have had the opportunity to hear two anonymous witnesses from the Special Court for Sierra Leone. The date for a fresh appeals hearing is yet to be set.

iii) *Modes of Liability*

In relation to war crimes, Kouwenhoven was charged as a “superior in a subsidiary charge for acts committed by his employees or other subordinates.”⁷⁵ under Article 9 of the Dutch Criminal Law in Wartime Act and with “Accomplice Liability” under Article 48 of the Dutch Criminal Code.

The Criminal Law in Wartime Act of 1952⁷⁶ provides a framework for the investigation, prosecution and adjudication of crimes committed in wartime or during other armed conflicts. The most serious war crimes are listed in Sections 8 and 9 and are described as ‘violations of the laws and customs of war’ or the *deliberate toleration of the commission of such acts by a subordinate*.

Section 3 of the 1952 Act provides that Dutch criminal law applies to any person who commits one of the crimes listed in Sections 8 and 9 outside the Kingdom of the Netherlands, thus establishing a form of universal jurisdiction.⁷⁷

⁷³ On 15 November 2007, the Prosecutor brought a claim to hear the threatened witnesses within the meaning of Article 226a Sv. *Afwijzing* (dealing with anonymous witness. At the hearing of the appeal on 10 December 2007, the Court reject the Prosecution's application. See The Dutch Supreme Court, 20 April 2010, Case Number BK8132, paras 6-9.

⁷⁴ The witnesses are referred to as A03 and A04.

⁷⁵ Van den Herik, Larissa, “The difficulties of Exercising Extraterritorial Criminal Jurisdiction: The Acquittal of a Dutch Businessman for Crimes Committed in Liberia”, *International Criminal Law Review* 9 (2009), page 212.

⁷⁶ As of 1 October 2003, the provision has been replaced by Article 9 of the International Crimes Act. This act implements the Rome Statute for the International Criminal Court. By requiring intent (“opzer”), Article 9 of Criminal Law in Wartime Act was more restrictive than prevailing international jurisprudence of the *ad hoc* Tribunals.

⁷⁷ P.C. Tange, “Netherlands State Practice for the Parliamentary Year 2000-2001”, *Netherlands Yearbook of International Law, Volume XXXIII -2002*, page 193. However, the powers conferred by the 1952 Act are also understood as the “active nationality principle” where A State of nationality retains the right to extend the application of its laws over its national abroad when it considers it has a direct interest to do so. See V.

iv) *Evidence at Trial: Anonymous Witnesses*

According to the Code of Criminal Procedure, immediacy is the leading principle.⁷⁸ As a rule, evidence presented at trial must be produced on the basis of this principle. There are exceptions, namely the use of anonymous witnesses as admissible evidence, provided there is circumstantial evidence. Written statements may also be used as evidence, provided that they have been discussed in court.

The Prosecution in the *Kouwenhoven* case relies heavily on the interpretation of international jurisprudence from the ICTY, SCSL, and ICC, in order to advance the argument for the use of protective measures in securing the testimony of intimidated witnesses. The Defence argued under Dutch criminal law which sustains the principle of immediacy and trumps any argument advanced in favour of anonymous witnesses whereby the rights of the accused may be prejudiced.

v) *Conclusion*

The *Kouwenhouven* case illustrates that prosecuting international crimes in domestic jurisdictions leads to disparaging results whereby the application of international criminal legal principles is skewed when national criminal law provisions are at odds with the plethora of available international criminal jurisprudence. In a heavily prosecutorial atmosphere, what remains essential to safeguard in both the international and national criminal legal processes, is the right of the accused to access certain legal remedies such as the appeal on conviction and for the protection of the principle *non bis in idem*.

Lowe, Jurisdiction, in M.D. Evans, International Law, Oxford University Press, 2nd ed., 2006, page 345 and 347.

⁷⁸ The immediacy principle obliges witnesses to be questioned in court. This principle, although centered on the inquisitorial system of searching for the truth, also hinges on the right to confrontation as preserved in adversarial legal systems.