Leiden Journal of International Law, 21 (2008), pp. 131–150
 Printed in the United Kingdom doi:10.1017/S0922156507004761

'New Facts' in ICTY and ICTR Review Proceedings

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Abstract
The Statutes of the ICTY and ICTR provide for the review of final judgments upon the discovery of a 'new fact' that could have affected the judgments. The Appeals Chambers of the two Tribunals interpret the term 'new fact' to mean new information related to a matter that was not at issue during the original trial, as opposed to simply meaning new information of a factual nature. The article argues that this interpretation of 'new fact' creates a risk that review will be denied on formalistic grounds even in situations where principles of justice would make review plainly warranted. The article proposes several ways in which the Appeals Chambers could alter their case law to ensure against such injustice. Finally, the article considers the implications of this issue for other international criminal tribunals.

Key words
additional evidence; Article 26; International Criminal Tribunal for the former Yugoslavia; International Criminal Tribunal for Rwanda; new fact; review proceedings

1. Introduction

Most jurisdictions permit review of criminal judgments where new information suggests that there has been a miscarriage of justice.[1] The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are no exceptions. Article 26 of the ICTY Statute and Article 25 of the ICTR Statute provide for review proceedings where a 'new fact has been discovered' that was not known earlier and which 'could have been a decisive factor' in the earlier judgment. Parties invoking these provisions, however, have had little success. The Appeals Chambers have granted review only once, whereas they have issued at least 14 decisions denying motions for review on the merits.[2] The rate of decisions on motions for review has increased over time. Of the 15 decisions just mentioned, seven were issued in 2006 and 2007.

In light of the increasing number of motions for review, it is important to consider whether the Appeals Chambers' framework for evaluating these motions ensures

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1. See A. Carcano, 'Requests for Review in the Practice of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', (2004) 17 LJIL 103, at 105–8.
2. See sections 2 and 3, *infra*. While the two Tribunals have different Appeals Chambers, these chambers share the same judges, and, at least with regard to decisions on motions for review, their jurisprudence is essentially the same.

that substantive justice is done. At first glance, the elements of this framework seem well suited to this task and in keeping with the language of Article 26; the Appeals Chambers will grant review where (i) there is a new fact; (ii) this fact was not known to the moving party during the original proceedings; (iii) the moving party exercised due diligence with regard to this fact; and (iv) this fact could have been a decisive factor in the original decision.[3]

A closer look at the first element of the Appeals Chambers' test, however, gives rise to some concern. The Appeals Chambers define 'new fact' as 'new information of an evidentiary nature of a fact that was not at issue during' the earlier proceedings.[4] This definition requires *two* types of newness: first, there must be new information and second, the new information must not relate to facts that were 'at issue' in the original proceedings. Under this reading, new evidence related to an alibi that was rejected at trial would not constitute a 'new fact'. While such evidence would indeed be 'new information', it would relate to a fact at issue in the original proceedings rather than to a fact not at issue. Thus such new evidence could not trigger review proceedings – even if it conclusively showed that the alibi was ironclad and that the verdict was therefore wrong.

In the author's view, this interpretation of the term 'new fact' is too restrictive and could bar meritorious claims for review. This risk is particularly pertinent in the light of the Appeals Chambers' recent tendency to deny motions for review simply because the new information presented relates to a fact that was at issue at the trial – and thus does not constitute a 'new fact' under their definition of this term – without further considering whether this new evidence could nonetheless have affected the judgment.[5]

This article addresses how the Appeals Chambers developed their interpretation of 'new facts', how they have applied this interpretation, and how they might modify their approach to eliminate the risk of substantive injustice. Section 2 first discusses the provisions for review set out in the Statutes and Rules of Procedure and Evidence (Rules) of both Tribunals. It then shows how the restrictive interpretation of the term 'new fact' originated in a 1998 decision made during the course of the *Tadić* appeal.[6] In that decision the ICTY Appeals Chamber drew a distinction between 'new facts' for purposes of review proceedings and 'additional evidence' for purposes of Rule 115 of the Rules, which provides for the introduction of evidence which satisfies certain criteria during an appeal from a trial judgment.[7] Section 3 provides a close analysis of

3. *Rutaganda v. Prosecutor*, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification, Case No. ICTR-96-03-R, A. Ch., 8 December 2006 (hereinafter *Rutaganda* Review Decision), para. 8; *Prosecutor v. Blaškić*, Decision on Prosecutor's Request for Review or Reconsideration (Public Redacted Version), Case No. IT-95–14-R, A. Ch., 23 November 2006, para. 7 (hereinafter *Blaškić* Review Decision). As discussed later, the Appeals Chambers have permitted waiver of the second and third requirements in certain circumstances. See notes 32–3, *infra*, and accompanying text.
4. *Niyitegeka v. Prosecutor*, Decision on Request for Review, Case No. ICTR-96-14-R, A. Ch., 30 June 2006, para. 6 (hereinafter First *Niyitegeka* Review Decision) (internal quotation marks omitted); *Blaškić* Review Decision, *supra* note 3, para. 14 (internal quotation marks omitted).
5. See section 3.2, *infra*.
6. *Prosecutor v. Tadić*, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, Case No. IT-94–1-A, A. Ch., 15 October 1998 (hereinafter First *Tadić* Review Decision).
7. Ibid., at para. 32. Rule 115 is discussed in more detail in section 2.1, *infra*.

case law on this issue since the *Tadić* decision and shows how the Appeals Chambers have dismissed many motions for review on the ground that these motions do not raise 'new facts' under the *Tadić* standard. Section 4 calls for the abandonment of this restrictive interpretation. Rather than focusing on whether new information does or does not relate to a fact that was at issue in the original trial, the Appeals Chambers should focus instead on whether this information was brought forward with diligence and could have affected the outcome of the case. Section 4 also briefly considers the implications of the Appeals Chambers' approach for other international criminal tribunals.

2. THE DISTINCTION CREATED BETWEEN 'NEW FACTS' AND 'ADDITIONAL EVIDENCE'

As mentioned above, the Statutes of the ICTY and ICTR each have a provision devoted explicitly to review proceedings. Each Tribunal also has four rules aimed at review proceedings. Neither the drafting history of the Statute nor the language of the Rules, however, explains what the term 'new fact' should encompass. It was left to the ICTY Appeals Chamber to interpret the term for the first time during the course of the *Tadić* appeal.

2.1. The Statutes and the Rules

Article 26 of the ICTY Statute states in full:

> Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement.[8]

The drafting history provides little guidance as to why the Statute uses the term 'new fact' in Article 26 as opposed to another term such as 'new evidence' or 'new information'. During the drafting of the Statute, states and other bodies submitting suggestions proposed a variety of formulations for a provision enabling review. Some suggestions used the term 'fact', while others spoke of 'evidence' or 'circumstances'.[9]

8. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/25704, Art. 26, UN Doc. S/Res/827.Add.1 (1993) (hereinafter ICTY Statute). Art. 25 of the ICTR Statute is essentially equivalent. Given this equivalence, and given that the ICTY Statute pre-dates the ICTR Statute, I focus here only on the origins of the ICTY Statute.

9. See V. Morris and M. P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (1995), Vol. I, at 445–7 (identifying the Conference on Security and Co-operation in Europe as proposing a 'decisive fact'; France as proposing a 'new fact . . . that is likely to have a decisive influence on the judgement'; Italy as proposing 'evidence unknown at the time of the judgement' that is found to 'justif[y] an acquittal or exclude[] the crime from [the Court's] jurisdiction'; the Organization of the Islamic Conference as proposing 'newly discovered evidence [that] would probably alter the judgement'; Amnesty International as proposing 'decisive new evidence'; the Russian Federation as proposing 'circumstances [that] come to light after the judgement which could have a decisive influence on it'; the United States as proposing a 'decisive fact unknown . . . when the judgement was given'; and the Netherlands as proposing 'new facts or circumstances'). It is unclear whether these bodies put much thought into the difference between the terms 'fact' and 'evidence'. For example, while the United States proposed the word 'fact' for the Statute, it later suggested that Art. 26 be implemented via a Rule of Procedure and Evidence that would provide for review upon '*evidence* [that]

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The Secretary-General selected the term 'new fact' in his draft of the Statute without explaining in his accompanying Report why he chose this particular term or what he meant by it.[10]

In addition to the Statutes, the Rules of Procedure and Evidence of both Tribunals have provisions regarding review proceedings. For the ICTY, these are Rules 119 to 122, which were adopted in 1994 and have remained unchanged since, save for one minor procedural amendment.[11] Rule 119 provides in relevant part that

> Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecution, may make a motion to that Chamber for review of the judgement.[12]

Rule 120 states that '[i]f a majority of Judges of the Chamber . . . agree that the new fact, if proved, could have been a decisive factor in reaching a decision, the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties.'[13] Rule 121 provides a right of appeal where a trial chamber has conducted a review proceeding. Finally, Rule 122 states that '[i]f the judgement to be reviewed is under appeal at the time the motion for review is filed, the Appeals Chamber may return the case to the Trial Chamber for disposition of the motion.'[14]

These Rules track Article 26 in using the phrase 'new fact' and in requiring that these facts 'could have been a decisive factor' in the earlier judgment. In other respects, however, they modify or expand on Article 26. For one thing, Article 26 draws no distinction between requests by the prosecution and by the convicted person for review, but Rule 119 sets a time limit on prosecution requests for review. For another, Article 26 states only that the 'new fact' not be 'known at the time of the proceedings before the Trial Chambers or the Appeals Chamber',[15] but Rule 119 further requires that this fact 'could not have been discovered through the exercise of due diligence' at the time of the proceedings.[16] Finally, Rules 121 and 122 have

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has come to light . . .that [is] credible and would probably have caused a different result on some or all of the charges or in the imposition of a substantially different sentence'. Ibid., Vol. II, at 556 (emphasis added).

10. See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704 (1993), para. 119. Perhaps the term was chosen to mirror that used in the Statute of the International Court of Justice (ICJ), which provides for review of judgments based upon the discovery of some 'new fact'. Statute of the International Court of Justice, Art. 61, s. 2; see also s. 1 (speaking of 'the discovery of some fact of such a nature as to be a decisive factor'). The ICJ has not addressed whether, in order to constitute a 'new fact', new decisive evidence must not relate to matters in issue in the original proceeding. See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras)*, Application for Revision of the Judgment of 11 September 1992, 18 December 2003, [2003] ICJ Rep. 392, paras. 27, 31, 36, 59 (where the ICJ declined to address this issue although it was raised by the parties).
11. See Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/32 (1994) (hereinafter ICTY, Rules of Procedure and Evidence) and Rev. 39 (2006). Rules 120 to 123 of the ICTR are essentially identical to Rules 119 to 122 of the ICTY and thus will not be discussed separately. For the same reason, Rule 115 of the ICTR Rules will not be discussed separately from Rule 115 of the ICTY Rules.
12. ICTY, Rules of Procedure and Evidence, *supra* note 11, Rule 119.
13. Ibid., Rule 120.
14. Ibid., Rule 122.
15. ICTY Statute, *supra* note 8, Art. 26.
16. ICTY, Rules of Procedure and Evidence, *supra* note 11, Rule 119.

no direct origins in Article 26; rather, they fill in gaps regarding the mechanics of applying it. Rule 122 is particularly significant because it appears to assume that a motion for review can be filed while appeal of judgment is pending.

Before turning to the Appeals Chamber's first application of these Rules, it is important to discuss another provision of the Rules: Rule 115. When adopted in 1994, Rule 115 stated that '[a] party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial. . . . The Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require'.[17] Unlike Rules 119 to 120, this rule did not stem from a specific provision of the ICTY Statute; rather, the judges appear to have included it purely of their own accord.

2.2. The 1998 *Tadić* decision

As with so much ICTY Appeals Chamber case law, the first case that considered the applicability of Article 26 and Rules 119 to 122 was *Tadić*. While the case was pending appeal, Tadić moved to introduce a vast amount of new material – including documentary evidence and the testimony of 80 witnesses[18] – for the Appeals Chamber to consider pursuant to Rule 115. In the alternative or in addition, he invoked Rules 119 to 122 and asked the Appeals Chamber to send the case back to the trial chamber for review proceedings.[19] In response, the prosecution argued that if additional evidence were to be admitted on appeal, the Appeals Chamber should apply the same substantive standard for admission as it would apply in review proceedings. The prosecution further urged that the Appeals Chamber not permit the admission of new evidence pursuant to *both* Rule 115 and Rules 119 to 122, as this could lead to duplication of proceedings.[20]

The Appeals Chamber thus had to confront the relationship between Rules 119 to 122 and Rule 115. This was a far from straightforward issue. The prosecution had correctly pointed out that it would be cumbersome to permit the invocation of both review proceedings and additional evidence on appeal with regard to the same material. Although the Rules could have been written to permit the invocation of the review process only if there was no appeal pending, this had not been done. Instead, Rule 122 plainly suggests that review can be sought while an appeal is pending. The Appeals Chamber thus had the option of (i) permitting duplicative proceedings; (ii) drawing a distinction between the type of new material that could be presented pursuant to Rule 115 and the type of new material that could be presented pursuant to Rules 119 to 122; or (iii) accepting that the same new material could be presented pursuant either to Rule 115 or to Rules 119 to 122, but reserving for the Appeals Chamber the discretion to determine which process was more appropriate in the light of the particular circumstances.

17. Ibid., Rule 115. As discussed in section 3.1, *infra*, this language was amended in 2002.
18. First *Tadić* Review Decision, *supra* note 6, para. 51.
19. Ibid., at para. 38.
20. Ibid., at para. 24.

https://doi.org/10.1017/S0922156507004761 Published online by Cambridge University Press

The Appeals Chamber chose the second option by drawing a distinction between Rules 119 to 122 and Rule 115 that had not been suggested by the parties. Specifically, the Appeals Chamber observed that Rule 115 speaks of 'additional evidence', while Rule 119 speaks of a 'new fact'. The Appeals Chamber then stated that 'a distinction exists between a fact and evidence of that fact. The mere subsequent discovery of evidence of a fact which was known at trial is not itself a new fact within the meaning of Rule 119 of the Rules.'[21] Rather, 'it is additional evidence of facts put in issue at the trial'.[22] The Appeals Chamber considered that such 'additional evidence' could properly be considered during an appeal pursuant to Rule 115, but not during review proceedings pursuant to Rules 119 to 122. By contrast, where 'the Appellant is not seeking to admit additional evidence of a fact that was considered at trial, but rather a new fact', then the 'proper venue for a review application is to the Chamber that rendered the final judgement; it is to that Chamber that the motion for review should be made'.[23] Without going into details, the Appeals Chamber announced that the evidence at issue in this motion did not constitute 'new facts' but rather amounted to 'additional evidence' of facts at issue at trial.[24]

The Appeals Chamber's distinction can be questioned. On its face, it has just two advantages: first, it respects the textual difference in the Rules between the phrase 'additional evidence' and the phrase 'new fact', and, second, it avoids duplicative proceedings by drawing a distinction between material that should be introduced pursuant to Rule 115 and material that should be introduced pursuant to Rules 119 to 122. On closer examination, however, both of these advantages are not real. As to the textual issue, there is no particular reason why the Appeals Chamber should have given much weight to the difference between 'new fact' and 'additional evidence'. For one thing, the terms have separate origins. The phrase 'additional evidence' was chosen by the judges in adopting Rule 115, while the phrase 'new fact' in Rule 119 was lifted from the text of the Statute itself. Indeed, even where the judges have themselves chosen to use different phrases in the Rules, they have not been hesitant to equate these phrases where appropriate. In this very same decision the Appeals Chamber held that the phrase 'not available to [the party] at the trial' in Rule 115 means the same thing as the phrase 'not known to the moving party at the time of [trial] and could not have been discovered through the exercise of due diligence' in Rule 119 – despite the rather obvious textual differences.[25] As to the value of avoiding duplicative proceedings, the Appeals Chamber's approach actually does not do a particularly good job on this front. While it ensures that there will not be two separate proceedings going on as to the same evidence, it does nothing to bar

21. Ibid., at para. 32.
22. Ibid.
23. Ibid., at para. 30. Although this language (and, indeed, the language of Rule 119) would suggest that a party seeking review while appeal of the trial judgment is pending should bring the motion for review to the trial chamber rather than to the Appeals Chamber, the Appeals Chamber has subsequently held that a party seeking review while an appeal is pending should lodge the request with the Appeals Chamber. That Chamber will then determine 'whether it can deal with the motion for review itself or whether it is necessary to refer the case back to' a trial chamber. *Prosecutor v. Tadić*, Decision on Motion for Review, Case No. IT-94–1-R, A. Ch., 30 July 2002, para. 22 (hereinafter Second *Tadić* Review Decision).
24. First *Tadić* Review Decision, *supra* note 6, para. 32.
25. Ibid., at para. 36.

https://doi.org/10.1017/S0922156507004761 Published online by Cambridge University Press

the possibility that there will be two separate proceedings going on as to different evidence (with the Appeals Chamber dealing with 'additional evidence' and the trial chamber dealing with 'new facts').[26]

Moreover, the Appeals Chamber's distinction raises a difficult question: where does the boundary lie between a 'new fact' and 'evidence of a fact which was known at trial'? Let us suppose, for example, that Witnesses A and B testified at trial that they saw the accused kill the victim, but Witness C testified at trial that she saw someone else kill the victim. The accused is convicted, and thereafter seeks review based on evidence that another person, Witness D, also saw someone else kill the victim. Is this a 'new fact' or 'additional evidence' of an existing fact? The fact that Witness D believes he saw someone else kill the victim is new, but the fact of the identity of the killer was a fact that was put in issue at trial. *Tadić* never spells out how it defines 'fact'. Its cursory conclusion that the proposed additional 80 witnesses were all merely offering 'additional evidence' suggests, however, that it took a restrictive view of what is a 'fact' and would probably treat the testimony of Witness D in the hypothetical posed above as 'additional evidence' rather than as a 'new fact'.

Most significantly, the Appeals Chamber's distinction creates a risk of substantive injustice. Only parties with pending appeals can invoke Rule 115; thus parties who have not appealed or who have final judgments on appeal must use review proceedings pursuant to Rules 119 to 122. Under the reasoning in *Tadić*, they can only raise new evidence related to matters that were not at issue earlier – even if new evidence of facts that were at issue in the original proceedings could obviously have affected the outcome of those proceedings. To pose an extreme example building on the hypothetical example given earlier, suppose that in addition to Witness D, newly discovered Witnesses E, F, G, H, I, and J come forward to say that they also saw someone else kill the victim. Pursuant to *Tadić*, this request for review would presumably be denied on the formalistic ground that it does not raise a 'new fact', even though review would obviously be merited from the perspective of substantive justice. It seems unlikely, however, that the Security Council would have intended the Statute's term 'new facts' to be interpreted to bar review in such an instance. Instead, from a perspective of substantive justice, it seems wiser to focus on whether the evidence was newly discovered and whether it could have materially affected the judgment, rather than on whether to classify it as related to matters that were or were not at issue in the trial.[27] Under such an approach, one could define 'new facts'

26. There is also no apparent reason why the original trial chamber would do a better job dealing with 'new facts' while the Appeals Chamber would be better qualified to consider 'additional evidence'. To the contrary, since the trial chamber already has knowledge of the facts that were at issue before it, it might be better equipped than the Appeals Chamber to consider how 'additional evidence' as to these facts could have affected its ultimate findings.

27. See, e.g., *House v. Bell*, 126 S.Ct. 2064, 2076 (2006) (stating that the US standard for reviewing otherwise defaulted claims is whether 'in light of new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt' (internal quotation marks omitted)). This formulation goes to the material effect of the new evidence and not to whether this evidence does or does not relate to facts at issue in the original trial. See also Criminal Appeal Act 1995, § 13 (authorizing the Criminal Case Review Commission in the United Kingdom to refer closed criminal cases for review if there is a 'real possibility' of a different result 'because of an argument, or evidence, not raised in the [original] proceedings'); German Code of Criminal Procedure, § 359 (providing for reopening of criminal cases where,

as 'new evidence of a factual nature' rather than as 'new information related to facts that were not at issue in the original trial'.[28]

3. Subsequent decisions on motions for review

Since *Tadić*, there have been at least 14 ICTY and ICTR Appeals Chambers decisions reaching the merits of requests for reviews.[29] Virtually all of these decisions have applied *Tadić*'s problematic distinction between 'additional evidence' and 'new fact', although there has been variation among these decisions in where they draw the line between the two concepts. For ease of discussion, the case law here can be divided roughly into two periods. In the first period – from 2000 to 2005 – the Appeals Chambers' assessment of what constituted a 'new fact' differed significantly from case to case, with two decisions taking a broad view of 'new facts', two decisions taking a narrow view of 'new facts', and three other decisions proving too brief to categorize decisively. In the second period, beginning in June 2006, the Appeals Chambers have consistently taken a narrow view of 'new facts' while simultaneously rejecting the possibility of reconsideration of final judgments through any means other than Article 26 and its implementing rules.

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among other possible reasons, 'new facts or evidence were produced, which, independently or in connection with the evidence previously taken, tend to support the defendant's acquittal').

28. Such an approach would enable a Chamber to consider whether new evidence suggests that factual findings made with regard to contested facts in the earlier proceeding were erroneous. As discussed in section 4, *infra*, this approach would be consistent with the approach taken in the Rome Statute. It would also provide what the International Law Commission recognized as the 'necessary guarantee against the possibility of factual error relating to material not available to the accused and therefore not brought to the attention of the Court at the time of the initial trial or any appeal'. International Law Commission, Report of the Working Group on a Draft Statute for an International Criminal Court, A/CN.4/L.491/Rev.2/Add.3, 18 July 1994, Draft Commentary to Article 50.

29. In chronological order, these are *Barayagwiza v. Prosecutor*, Decision (Prosecutor's Request for Review or Reconsideration), Case No. ICTR-97–19-AR72, A. Ch., 31 March 2000 (hereinafter *Barayagwiza* Review Decision); *Akayesu v. Prosecutor*, Arrêt (Requête aux fins de Renvoi de l'Affaire devant la Chambre de Première Instance I), Case No. ICTR-96–4-A, A. Ch., 16 May 2001 (hereinafter *Akayesu* Review Decision); *Prosecutor v. Delić* ('*Čelebići*'), Decision on Motion for Review, Case No. IT-96–21-R-R119, A. Ch., 25 April 2002 (hereinafter *Čelebići* Review Decision); *Prosecutor v. Jelisić*, Decision on Motion for Review, Case No. IT-95–10-R, A. Ch., 2 May 2002 (hereinafter *Jelisić* Review Decision); Second *Tadić* Review Decision, *supra* note 23; *Prosecutor v. Josipović*, Decision on Motion for Review, Case No. IT-95–16-R2, A. Ch., 7 March 2003 (hereinafter First *Josipović* Review Decision); *Prosecutor v. Josipović*, Decision on Motion for Review, Case No. IT-95–16-R.3, A. Ch., 2 April 2004 (hereinafter Second *Josipović* Review Decision); First *Niyitegeka* Review Decision, *supra* note 4; *Prosecutor v. Žigić*, Decision on Zoran Žigić's Request for Review under Rule 119, Case No. IT-98–30/1-R.2, A. Ch., 25 August 2006 (hereinafter *Žigić* Review Decision); *Prosecutor v. Radić*, Decision on Defence Request for Review (Public Redacted Version), Case No. IT-98–30/1-R.1, A. Ch., 31 October 2006 (hereinafter *Radić* Review Decision); *Blaškić* Review Decision, *supra* note 3; *Rutaganda* Review Decision, *supra* note 3; *Prosecutor v. Simba*, Decision on Aloys Simba's Requests for Suspension of Appeal Proceedings and Review, Case No. ICTR-01–76-A, A. Ch., 9 January 2007 (hereinafter *Simba* Review Decision); *Niyitegeka v. Prosecutor*, Decision on Request for Review, Case No. ICTR-96–14-R, A. Ch., 6 March 2007 (hereinafter Second *Niyitegeka* Review Decision). There have also been several Appeals Chambers decisions that dismiss motions for review for other reasons, such as the absence of a final judgment, which this article does not further address. See, e.g., *Barayagwiza v. Prosecutor*, Decision on Review and/or Reconsideration, Case No. ICTR-97–19-AR72, A. Ch., 14 September 2000. For a discussion of two of these cases, see Carcano, *supra* note 1, at 116–17.

3.1. Case law from 2000 to 2005

The first decision since *Tadić* on a motion for review is also the only decision thus far to grant review. In its March 2000 decision in *Barayagwiza*, the ICTR Appeals Chamber granted a request for review made by the Prosecution in response to an Appeals Chamber decision that had found illegalities with regard to Barayagwiza's pre-trial detention and had dismissed all charges against him in consequence.[30] This decision is noteworthy in several respects. To begin with, it is the first decision to distil Rules 119 to 120 into four criteria for granting motions for review:

> There must be a new fact; this fact must not have been known by the moving party at the time of the original proceedings; the lack of discovery of the new fact must not have been through the lack of due diligence on the part of the moving party; and it must be shown that the new fact could have been a decisive factor in reaching the original decision.[31]

Significantly, the Appeals Chamber also held that in 'wholly exceptional circumstances' a party need not show the second and third of these criteria.[32] Specifically, the Appeals Chamber found that these criteria might not need to be shown where the relevant material '*would* clearly have altered [the] earlier decision'.[33] Somewhat questionably, the Appeals Chamber claimed that the 'Statute itself does not speak to' these two criteria and accordingly that the Appeals Chamber was particularly free to carve out this exception.[34] The Appeals Chamber did not suggest that the 'new fact' requirement could be similarly waived in the interests of justice.

As to the specific distinction between 'additional evidence' and 'new facts', *Barayagwiza* reiterated the difference drawn in *Tadić*,[35] but did not apply this difference in a rigorous manner. To the contrary, it found that all the new information proffered by the prosecution amounted to 'new facts' rather than 'additional evidence' of existing facts.[36] For example, in the Appeals Chamber's initial decision, it considered the fact that Barayagwiza had been kept in Cameroonian custody for many months before he was transferred to ICTR custody. The Appeals Chamber had observed the prosecution's claim that this delay was not the prosecution's fault, but had rejected this argument as lacking evidentiary support. The Appeals Chamber found instead

30. The Appeals Chamber found that this earlier decision constituted a 'final judgement' for purposes of Art. 25 of the ICTR Statute and Rule 120, since it had terminated all proceedings in the case. *Barayagwiza* Review Decision, *supra* note 29, paras. 49–50.
31. Ibid., at para. 41.
32. Ibid., at para. 65.
33. Ibid., at para. 66. A standard of 'would' have altered the earlier decision is clearly much harder to satisfy than a standard of 'could' have altered the earlier decision.
34. Ibid. The Statute requires that the new fact 'was not known at the time of the proceedings', while Rule 119 requires that the new fact 'was not known *to the moving party* at the time of the proceedings' (emphasis added). In finding that Rule 119 was the sole source of the requirement that the moving party not know of the new fact at the time of the original proceedings, the Appeals Chamber must have read the Statute as permitting the fact to be known to the moving party but not known to some other entity (such as the chamber) at the time of the original proceedings. This is certainly not the only plausible reading of the Statute. See also W. A. Schabas, 'International Decisions: Barayagwiza v. Prosecutor', (2000) 94 AJIL 563, at 567–8 (observing that the *Barayagwiza* Review Decision overlooked the Statute's requirement of a 'discovery' of a new fact).
35. *Barayagwiza* Review Decision, *supra* note 29, para. 42. *Barayagwiza* thus officially imported the *Tadić* standard into the ICTR.
36. See ibid., at paras. 54, 57, 61.

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that the evidence suggested a willingness on the part of Cameroon to transfer Barayagwiza in a timely fashion.[37] Even though the question of Cameroon's willingness to transfer Barayagwiza was thus plainly 'at issue' during this initial decision, the Appeals Chamber treated as a 'new fact' the further evidence offered on this issue by the prosecution in its decision on the prosecution's motion for review.[38] This evidence supported the prosecution's original argument that Cameroon had in fact not been willing to transfer Barayagwiza in a timely fashion. While it thus would seem that, under the *Tadić* distinction, this evidence was merely 'additional evidence' of a fact at issue at the time of the initial decision, the Appeals Chamber nonetheless accepted it as a 'new fact' with little explanation – and, upon finding that exceptional circumstances justified waiver of the knowledge and due diligence requirements, also found it decisive.

Perhaps recognizing that whether this new evidence was 'additional evidence' or a 'new fact' under the *Tadić* distinction was a difficult question, Judge Shahabuddeen wrote separately to address this issue. He reiterated the *Tadić* distinction but acknowledged that 'there can be difficulty in drawing a line of separation' between the two concepts.[39] In his view, the 'differentiating specificity is this: additional evidence, though not merely cumulative, goes to the proof of facts which were at issue at the hearing; by contrast, evidence of a new fact is evidence of a distinctly new feature which was not at issue at the trial'.[40] In this case he concluded that the evidence at issue was a 'new fact' because it gave specifics about Cameroon's unwillingness to transfer Barayagwiza that the Appeals Chamber had not known about previously – namely, the fact that the ICTR Prosecution had asked the United States to intervene to help it effect the transfer.[41]

Commentators have suggested that the *Barayagwiza* decision came about as the result of political pressure.[42] Whatever the merits of that view, it is true that this decision took a broad approach in practice to what constitutes a 'new fact'. It treated new information about an already contested issue as a 'new fact' – an approach that stands in sharp tension with the *Tadić* distinction.

The next several decisions from the Appeals Chambers on motions for review, however, proved less willing to find 'new facts'. In May 2001 the ICTR Appeals Chamber dismissed a motion for review filed while the *Akayesu* case was pending appeal, on the grounds that no 'new facts' were presented in a claim that certain witnesses had testified falsely at trial.[43] Next, and more significantly, in April 2002 the ICTY Appeals Chamber dismissed a motion for review in the *Čelebići* case on the grounds that no 'new facts' were presented. The conviction of the accused Delić for

37. *Barayagwiza v. Prosecutor*, Decision, Case No. ICTR-97–19-AR72, A.Ch., 3 November 1999, paras. 24, 59.
38. *Barayagwiza* Review Decision, *supra* note 29, paras. 58–59.
39. Ibid., at para. 47 (Judge Shahabuddeen, Separate Opinion).
40. Ibid.
41. Ibid.
42. See, e.g., A. Sridhar, 'The International Criminal Tribunal for the Former Yugoslavia's Response to the Problem of Transnational Abduction', (2006) 42 *Stanford Journal of International Law* 343, at 362–3; Schabas, *supra* note 34, at 568, 571.
43. *Akayesu* Review Decision, *supra* note 29. It is unclear from this brief decision whether Akayesu offered specific evidence to support his claim or simply made a generalized assertion.

beating to death a particular victim at a concentration camp had rested in part on the fact that two witnesses had identified him as the person who had pulled this victim out of a line and taken the victim away. In his motion for review, Delić claimed that he had found another witness who would testify that someone else had pulled the victim out of the line and taken the victim away. Although acknowledging that 'there may be difficulty in some cases in making the distinction between a new fact and additional evidence of a fact', the Appeals Chamber found that in this case there was no 'new fact', since

> whether it was the Applicant who called [the victim] out to be beaten . . . [was] in issue at the trial and in the appeal. Evidence to establish it was given by two witnesses, and that evidence was strongly contested by the Applicant at the trial. The statement of [proposed] Witness W is additional evidence of that material fact, but is not of itself a new fact.[44]

While in *Barayagwiza* the Appeals Chamber treated new evidence related to the contested issue of Cameroon's willingness to transfer Barayagwiza as a 'new fact', here the Appeals Chamber viewed new evidence related to the contested identity of the individual who called the victim out of line as merely 'additional evidence' of a fact at issue in trial. It thus denied the motion for review on the grounds that the motion lacked a 'new fact'.

The next decision from the ICTY Appeals Chamber on a motion for review – a May 2002 ruling in the *Jelisić* case – did not directly address the difference between 'additional evidence' and 'new fact'. Instead, it briefly dismissed a motion for review on the grounds that a change in the governing legal standard for sentencing does not constitute a new fact. This decision also defined 'new fact' as 'new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings'.[45] This formulation, while first introduced here, follows logically from the Appeals Chamber's discussion of 'new facts' in *Tadić*. Moreover, this formulation illustrates that the Appeals Chamber incorporates two separate newness requirements into its interpretation of 'new fact': first, there must be 'new information' and, second, it must relate to a 'fact that was not at issue' earlier.

In the light of the difficulty acknowledged by the Appeals Chamber in drawing the line between 'additional evidence' and 'new facts', one might have expected an amendment to the Rules clarifying this asserted distinction. Yet while ICTY Rule 115 underwent substantial amendment in July 2002, this change did nothing to clarify the difference between 'additional evidence' and 'new facts'. Instead, the language of Rule 115 was changed to the following:

> A party may apply by motion to present additional evidence before the Appeals Chamber. . . . If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence . . . [in] arriv[ing] at a final judgement.[46]

44. *Čelebići* Review Decision, *supra* note 29, para. 13.
45. *Jelisić* Review Decision, *supra* note 29, at 3.
46. Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. IT/32/Rev.24 (2002), Rule 115. Rule 115 of the ICTR Rules was similarly amended in May 2003.

This change made Rule 115 more like Rules 119 to 120. Where before Rule 115 had contemplated the consideration of 'additional evidence' where the 'interests of justice so require', Rule 115 now uses the phrase 'could have been a decisive factor' in reaching the decision below – exactly the same language used in Article 26 and in Rule 120. Thus, aside from the fact that Rule 115 deals with the appeal stage and Rules 119 to 120 deal with proceedings for review of judgments, the only difference of significance remaining between these rules is that one deals with 'additional evidence' and the others with 'new facts'.[47] Moreover, this formalistic distinction seems important to the Appeals Chambers only in the context of review proceedings. While the Appeals Chambers make great efforts in review proceedings to distinguish between 'new facts' and 'additional evidence', they do not expend similar effort – or indeed any effort – in considering whether new evidence brought pursuant to Rule 115 constitutes 'new facts' or 'additional evidence'.[48] Instead, the Appeals Chambers seem to assume that all such new evidence is simply additional evidence.[49]

In the same month as the amendment of Rule 115, the ICTY Appeals Chamber issued another decision on a motion for review – this one again in the *Tadić* case. After the final judgment had been issued in Tadić's appeal, the Appeals Chamber held one of his attorneys in contempt for multiple acts of witness manipulation, some of which may have been adverse to Tadić's interests.[50] Tadić sought review, claiming that the Appeals Chamber's findings against his attorney constituted 'new facts'. For example, Tadić pointed to the Appeals Chamber's finding in the contempt proceeding that counsel had acted against Tadić's own interests in certain ways. The Appeals Chamber agreed that this was a 'new fact' – even though it does not seem like a particularly 'evidentiary' point.[51] As another 'new fact', Tadić pointed to the finding that his counsel had manipulated two defence witnesses to keep them from giving the name of another person – a man called Daničić who looked like Tadić – whom they believed responsible for the crimes with which Tadić was charged. Surprisingly, the Appeals Chamber agreed that this was a 'new fact' even though it acknowledged

47. As noted earlier, the Appeals Chamber had already found that the unavailability requirement of Rule 115 was equivalent to the unknown-and-undiscoverable-through-due-diligence requirement of Rule 119. See note 25, *supra*, and accompanying text.

48. This might be because, in practice, the Appeals Chambers consider that 'additional evidence' is a broad category encompassing both 'new facts' and other evidence. If that is the case, however, then it is contrary to *Tadić*, which appeared to treat 'new facts' and 'additional evidence' as separate, non-overlapping categories. See note 23, *supra*, and accompanying text.

49. See, e.g., *Prosecutor v. Naletilić & Martinović*, Decision on Naletilić's Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence, Case No. IT-98–34-A, A. Ch., 7 July 2005, paras. 11–15 (failing to discuss the meaning of 'additional evidence' or how it compares with 'new facts' in setting out the legal standard); *Prosecutor v. Nikolić*, Decision on Motion to Admit Additional Evidence (Public Redacted Version), Case No. IT-02–60/1-A, A. Ch., 9 December 2004, paras. 19–25 (same); *Prosecutor v. Kvočka et al.*, Decision on Appellants' Motions to Admit Additional Evidence Pursuant to Rule 115, Case No. IT-98–30/1-A, A. Ch., 16 February 2004. p. 4 (same).

50. See *Prosecutor v. Tadić*, Appeal Judgement on Allegations of Contempt against Prior Counsel Milan Vujin, Case No. IT-94–1-A-AR77, A. Ch., 27 February 2001.

51. Carcano has expressed concern that the *Jelisić* Review Decision's requirement that 'new facts' be of an 'evidentiary' nature might prevent review proceedings brought based upon subsequent evidence of bias or misconduct by a judge. Carcano, *supra* note 1, at 110. The broad approach taken in the Second *Tadić* Review Decision to what is 'evidentiary' material suggests a partial answer to this concern. If attorney misconduct can be deemed a new fact of an evidentiary nature, then surely judicial misconduct could be also.

that 'the issue of a Tadić look-alike and therefore the possibility that Daničić could have committed some of the crimes of which Tadić was convicted, was squarely before the Appeals Chamber' during the earlier appeal.[52] The Appeals Chamber went on, however, to find that this new information could not have changed the verdict.[53]

Given that the issue of the look-alike was 'squarely' before the Appeals Chamber in earlier proceedings – and, indeed, that the Appeals Chamber had treated information related to this look-alike as 'additional evidence' in these earlier proceedings[54] – the Appeals Chamber's finding of a 'new fact' in this circumstance seems inconsistent with its emphasis elsewhere on the difference between 'new facts' and 'additional evidence'. The approach is nonetheless a sensible one. As in *Barayagwiza*, this second *Tadić* decision focused on whether this new information would have changed the original verdict rather than on the formalistic question of whether to categorize this new information as 'additional evidence' or 'new facts'.

In its next decision on a motion for review, the ICTY Appeals Chamber took a more restrictive approach to what constitutes a 'new fact'. In this March 2003 decision in *Josipović*, the Appeals Chamber found that the testimony of two new witnesses who would have supported Josipović's alibi was merely 'additional evidence' of this alibi.[55] The Appeals Chamber found, however, that evidence of a Josipović look-alike could be considered as a 'new fact', although not one that could have affected the verdict.[56] In a decision a year later on another motion for review brought by Josipović, the Appeals Chamber dismissed his claims in a short opinion of little note.[57]

In summary, none of the seven decisions discussed in this section challenged the problematic distinction drawn in *Tadić* between 'additional evidence' and 'new facts'. Instead, they applied this difficult distinction – but did so in varying ways. The *Čelebići* decision and the first *Josipović* decision construed 'new facts' in a narrow manner. By contrast, *Barayagwiza* and the second *Tadić* decision paid lip service to the distinction but then accepted basically all the new information as 'new facts', regardless of whether this new information related to facts that had been at issue in the earlier proceedings.

3.2. Case law from 2006 to spring 2007

While the period discussed in the prior section contains conflicting applications of the concept of 'new facts', the Appeals Chambers have since taken a more consistent – and restrictive – understanding of 'new facts'. Importantly, they have also ruled out the possibility of reconsideration of earlier judgments in the absence of what they consider 'new facts'.

52. Second *Tadić* Review Decision, *supra* note 23, para. 47.
53. Ibid.
54. See ibid.
55. First *Josipović* Review Decision, *supra* note 29, paras. 19–20.
56. See ibid., at paras. 30, 38.
57. See Second *Josipović* Review Decision, *supra* note 29.

https://doi.org/10.1017/S0922156507004761 Published online by Cambridge University Press

The decision on reconsideration occurred in June 2006 in *Žigić*. Prior to this decision, a majority of the ICTY Appeals Chamber had held in the *Čelebići* sentencing judgment of 2003 that the Appeals Chamber has the inherent power to reconsider final judgments even where the requirements of Article 26 are not met.[58] In *Žigić*, however, the Appeals Chamber switched its position and held that 'the existing appeal and review proceedings established under the Statute provide sufficient guarantees to persons convicted before this Tribunal that they have been tried fairly and in accordance with the norms of due process', and that accordingly there is no inherent power to reconsider final judgments.[59] In explaining why review proceedings pursuant to Article 26 are sufficient to ensure fairness, the Appeals Chamber asserted that 'the requirement of the existence of a "new fact" has been interpreted broadly'.[60] The Appeals Chamber did not elaborate on this statement, which seems dubious in the light of the *Tadić* distinction between 'new facts' and 'additional evidence' (particularly as followed in the *Čelebići* review decision and the first *Josipović* decision).

Judge Shahabuddeen wrote separately to express disagreement with the Appeals Chamber's approach. He saw no reason to depart from the approach taken in the *Čelebići* sentencing judgment. Moreover, he expressed concern that the new approach could potentially bar the Appeals Chamber from correcting a clear miscarriage of justice where the technical requirements for review were not met.[61]

Just four days after the *Žigić* decision, the ICTR Appeals Chamber issued a decision denying review in *Niyitegeka*. Niyitegeka, the Minister of Information during the interim Rwandan government that formed after 6 April 1994, had proffered new information to support his alibi at trial that on the days of certain alleged crimes he had been doing government work many kilometres away. For example, based on the testimony of one eyewitness, the trial chamber had found that on 22 June 1994 Niyitegeka had been among a group that killed, decapitated, and castrated a prominent Tutsi at Karziranimwe Hill. It rejected Niyitegeka's alibi that he had been at a cabinet meeting that day in Muramba, which was several hundred kilometres away, on the grounds that the witness who testified to this alibi offered vague hearsay testimony and could not even verify the date.[62] In seeking review, Niyitegeka offered the testimony of additional witnesses and the agenda from a 22 June 1994 cabinet meeting in Muramba that referenced 'MINIFOR' (which he claimed stood for his title, Minister of Information). The Appeals Chamber rejected his submissions as merely 'additional evidence' rather than 'new facts', since Niyitegeka had asserted during trial that he had been at a cabinet meeting that day in Muramba, albeit without

58. *Prosecutor v. Mucić et al. ('Čelebići')*, Judgement on Sentence Appeal, Case No. IT-96–21-A *bis*, A. Ch., 8 April 2003, paras. 49–53.
59. *Prosecutor v. Žigić*, Decision on Zoran Žigić's 'Motion for Reconsideration of Appeals Chamber Judgement IT-98–30/1-A Delivered on 28 February 2005, Case No. IT-98–30/1-A', A. Ch., 26 June 2006, para. 9 (hereinafter *Žigić* Reconsideration Decision). The ICTR Appeals Chamber has reached the same conclusion. *Rutaganda* Review Decision, *supra* note 3, para. 6.
60. Ibid., at para. 7.
61. Ibid., at para. 8 (Declaration of Judge Shahabuddeen).
62. *Prosecutor v. Niyitegeka*, Judgement and Sentence, Case No. ICTR-96–14-T, T. Ch. I, 16 May 2003, paras. 214, 311.

much evidence at that time.[63] This strict approach to 'new facts' is in keeping with the *Čelebići* review decision and the first *Josipović* decision, but not with *Barayagwiza* and the second *Tadić* decision.

Judge Shahabuddeen wrote separately to reiterate his view that the Appeals Chambers have inherent power to reconsider judgments even if the technical requirements for review are not met. Observing that in *Žigić* the ICTY Appeals Chamber had suggested that the 'broad' interpretation of 'new facts' adequately satisfied the due process concerns associated with cutting off any alternative mechanism of reconsideration, he noted that

> Today's decision, however, neither invokes nor illustrates a 'broad' interpretation of that requirement, which is instead rather strictly enforced. I do not object to strict enforcement that is consistent with Article 25. What I do object to is the notion that, where the determination is that Article 25 is inapplicable, that ends the Appeals Chamber's obligation to ensure that justice is done.[64]

Judge Shahabuddeen observed that in this case, however, none of the new evidence could have had a decisive effect on the earlier judgment.[65]

In August and October 2006, the ICTY Appeals Chamber issued two more decisions on motions for review. The first of these, another decision in the *Žigić* case, was relatively brief,[66] but the second decision, in *Radić*, showed a continuation of the strict approach to 'new facts' taken in *Niyitegeka*. Among other crimes, Radić had been convicted of raping a woman in a particular room in a concentration camp. He had argued unsuccessfully at trial that he could not have committed this rape because he did not have access to the room. In the motion for review, he sought to introduce statements from previously unavailable individuals confirming that he did not have access to this room. The Appeals Chamber held that it was 'not persuaded that the accessibility of the room in which Witness K was found to have been raped was not in issue before the Trial Chamber' and thus that the new evidence only constituted 'additional evidence' rather than 'new facts'.[67] Significantly, the Appeals Chamber did not go on to consider whether this new evidence could have affected the verdict – instead, it simply ended its analysis on finding that Radić failed to fulfil the 'new facts' requirement of the four-part test.[68] Judge Shahabuddeen wrote separately to suggest that at least part of this new evidence constituted 'new facts' and that 'it would be more logical, and more helpful to the case law of the Tribunal' to dismiss the motion

63. First *Niyitegeka* Review Decision, *supra* note 4, para. 34.
64. Ibid., at para. 4 (Declaration of Judge Shahabuddeen).
65. Ibid.
66. See *Žigić* Review Decision, *supra* note 29.
67. *Radić* Review Decision, *supra* note 29, paras. 20, 22.
68. By contrast, in many of the earlier decisions where the Appeals Chambers had held that new information did not amount to 'new facts', the Chambers nonetheless went out of their way to conclude that in any event the new information could not have affected the judgments. See, e.g., First *Josipović* Review Decision, *supra* note 29, paras. 23–25 (finding that the new information related to Josipović's alibi could not have affected the judgment in any event); First *Niyitegeka* Review Decision, *supra* note 4, paras. 13–14 (finding that the new information related to Niyitegeka's alibi for 22 June 1994 could not have affected the original judgment in any event).

on the grounds of lack of due diligence and on a finding that no miscarriage of justice would result from waiving the due diligence requirement.[69]

The four Appeals Chamber decisions since *Radić* as of June 2007 have continued this strict understanding of 'new facts'. In a November 2006 decision in *Blaškić*, the ICTY Appeals Chamber held that five of the six pieces of new evidence that the prosecution sought to introduce did not constitute 'new facts' but were rather 'additional evidence' of facts considered at trial.[70] For example, the prosecution sought to offer new information that Blaškić had given an oral order to attack a Bosnian Muslim town. The Appeals Chamber found that since the issue of whether Blaškić had ordered attacks on the town had generally been at issue in the earlier proceedings, this new information was merely 'additional evidence' on that point – even though the Appeals Chamber acknowledged that there had been no evidence at trial as to this specific oral order.[71] As in *Radić*, the Appeals Chamber stopped its inquiry here rather than going on to consider whether in any event this new information could have affected the judgment. Similarly, in a December 2006 decision in *Rutaganda*, the ICTR Appeals Chamber rejected most of Rutaganda's new information simply on the ground that it did not amount to 'new facts'.[72] Then, in January 2007, the ICTR Appeals Chamber rejected a motion for review brought in *Simba* as the case was pending appeal. It did so on the ground that the new information proffered – which had to do with the distance between two locations at which Simba had allegedly committed nearly contemporaneous crimes – amounted to 'additional evidence' of the issue of travel time that had been litigated at trial rather than to a 'new fact'.[73] Finally, in March 2007, the ICTR Appeals Chamber denied another motion for review in *Niyitegeka*. Niyitegeka sought to introduce more alibi evidence of his presence at cabinet meetings on days when he had been found to have committed crimes hundreds of kilometres away, but the Appeals Chamber rejected all this evidence on the sole grounds that it did not go to 'new facts'.[74] Judge Shahabuddeen wrote separately to reiterate his separate statement in *Žigić*,[75] and Judge Meron, who had not been on the bench in *Žigić*, also wrote separately to express a view similar to that of Judge Shahabuddeen.[76]

In short, since June 2006 the Appeals Chamber has both set a high threshold for finding 'new facts' and has eliminated the possibility of reconsideration of a final judgment in the absence of 'new facts'. Although the high threshold for finding 'new facts' is consistent with the distinction set out in *Tadić* between 'new facts' and 'additional evidence', it raises troubling issues from a perspective of substantive

69. *Radić* Review Decision, *supra* note 29, para. 6 (Judge Shahabuddeen, Separate Opinion).
70. See generally *Blaškić* Review Decision, *supra* note 29. With regard to the sixth piece of evidence, the Appeals Chamber held that it was simply not relevant to the prosecution's argument and thus did not address whether it constituted a 'new fact'. Ibid., at para. 32.
71. Ibid., at paras. 41–42.
72. *Rutaganda* Review Decision, *supra* note 3.
73. *Simba* Review Decision, *supra* note 29, paras. 17–18. Once again, the Appeals Chamber did not consider whether this new information might have affected the original verdict.
74. Second *Niyitegeka* Review Decision, *supra* note 29.
75. Ibid. (Declaration of Judge Shahabuddeen).
76. Ibid. (Judge Meron, Separate Opinion).

justice, especially in the light of the absence of other mechanisms for reconsideration – a point that Judge Shahabuddeen, who presided over the *Tadić* decision, now acknowledges. Indeed, it seems likely that most new information that could affect a verdict will amount to 'additional evidence' rather than 'new facts' for purposes of the Appeals Chamber's distinction, since a competent lawyer is likely to try to put many material facts at issue during the original trial, even if, at the time, the lawyer lacks much evidence to support his or her contentions. Under the Appeals Chamber's case law, however, later discovered information related to material facts put at issue in trial cannot trigger review proceedings. If Niyitegeka in seeking review had offered iron-clad proof that he was in Muramba for every minute of 22 June 1994, then, under its given logic, the Appeals Chamber would nonetheless have denied review on the grounds that this was not a 'new fact' because he argued this alibi at trial (albeit without credible evidence of it at that time). While the Appeals Chamber's high threshold for 'new facts' may enable the speedy dismissal of motions for review, it does so in a way that risks substantive injustice.

4. Possible alternatives

This article has criticized the restrictive interpretation that the Appeals Chambers have given to 'new facts'. It has attempted to show that this interpretation stems from the ICTY Appeals Chamber's decision in *Tadić* to distinguish between 'additional evidence' and 'new facts'. Had the Appeals Chamber chosen not to draw this distinction, it could simply have treated all new evidence relating to factual matters as 'new facts'. Such an interpretation of the term would prevent the potential for substantive injustice that could arise from rejection of obviously material new evidence on the formalistic grounds that it is not a 'new fact'.

There are several ways in which the Appeals Chambers could eliminate the risk of substantive injustice that their jurisprudence has created. In the author's view, the best way would be to get rid of the *Tadić* distinction between 'new facts' and 'additional evidence'. Instead, the terms could both be read to cover all new evidence of a factual nature. Should a party submit new evidence after a trial judgment but before an appeal judgment that satisfied the other elements of diligence and materiality, then the Appeals Chamber in that case could choose whether to accept this material pursuant to Rule 115 (and deal with the material itself) or instead to send it back to the trial chamber for review pursuant to Rules 119 to 122. Such a change in the jurisprudence would of course be dramatic, and the Appeals Chambers are unlikely to make it. Nonetheless, this approach would have significant advantages. Besides eliminating the risk of substantive injustice, it would create a coherent and straightforward jurisprudence. It would also complete the process of harmonization between Rule 115 and Rules 119 to 120, which now share every other element in common – namely, the requirement that the new evidence was not previously known to the moving party, the requirement of due diligence on the part of the

moving party, and the requirement that this new evidence could have decisively affected the earlier decision if known at that time.[77]

Should the Appeals Chambers prefer to depart less radically from the *Tadić* distinction, they could pursue one of two other alternatives. First, they could nominally retain the *Tadić* distinction, but in practice treat virtually all new evidence as 'new facts'. In doing so, they could rely on precedents like *Barayagwiza* and the second *Tadić* decision. This approach would enable the Appeals Chambers to avoid substantive injustice, but it would probably prove confusing. It seems better to abandon a principle entirely than to abandon it in practice while paying it lip service. This is especially true since this approach would also require a departure from recent precedent; in returning to *Barayagwiza* and the second *Tadić* decision, the Appeals Chambers would have to ignore the strict approach to 'new facts' taken in their last seven cases.

Alternatively, the Appeals Chambers could continue to stick to their restrictive approach to 'new facts' but leave the door open for reconsideration of final judgments based on their inherent power to prevent miscarriages of justice. This is the approach supported by Judges Shahabuddeen and Meron. It would require only a modest departure from precedent: while the Appeals Chambers would have to reverse the holding in the *Žigić* reconsideration decision and the cases that followed this decision, in doing so they would be returning to the original approach to reconsideration set out in the *Čelebići* sentencing judgment. Nonetheless, this approach has several disadvantages. As the majority pointed out in *Žigić*, it seems likely that the drafters of the Statute of the ICTY intended for Article 26 to be the only basis for reopening cases.[78] By allowing reconsideration, the Tribunals may overstep their jurisdiction. Moreover, it seems unnecessary to create a parallel process for reopening judgments where a reinterpretation of the term 'new fact' would achieve the same result.[79]

In short, while all the alternative approaches mentioned above require departure from precedent, they would remove the risk of substantive injustice created by the

77. Although in theory this harmonization would make motions for review as easy to bring as motions for additional evidence, in practice the effect would likely be different. The further away a party is from the time of trial, the less likely it is that the party will satisfy the due diligence requirement (since more time will have passed during which the party could have acted). If the due diligence requirement is not satisfied, then the party must succeed under the stricter standard of showing that the new evidence 'would' have affected the verdict (as opposed to 'could' have affected the verdict). See note 33, *supra*, and accompanying text. Thus motions for review, which generally are brought after more time has passed from the trial than motions for the admission of additional evidence, are more likely in practice to trigger this stricter standard. This practical difference is a positive one in the light of the social value placed upon the finality of judgments. If most motions for review of judgments will only be granted where the new information 'would' have affected the verdict, then only powerful new information will trigger this standard (and thus judgments will rarely if ever be reopened).

78. *Žigić* Reconsideration Decision, *supra* note 59, para. 9. In particular, a separate reconsideration power might allow the Tribunal to revisit questions of law. However, given the quite conscious distinction between 'facts' and 'law' drawn in the Statute, it seems likely that the drafters did not intend such a power. See Arts. 25–26. A similar point would apply with regard to the ICTR and Arts. 24–25.

79. Another possible fix – one available to the Security Council rather than to the Appeals Chamber – would be amendment of the Statutes of the Tribunals. Such amendment could bring Art. 26 of the ICTY Statute and Art. 25 of the ICTR Statute into conformity with the review provision in the Rome Statute, discussed *infra*, an approach that would make clear that the focus is on 'new evidence' and would also tighten the materiality standard from 'could' have affected the verdict to 'would . . . likely' have affected the verdict). The likelihood of such an amendment, however, seems far too remote to make it a practically feasible suggestion.

Appeals Chambers' current approach to 'new facts'. It may be, of course, that this risk never materializes, and that no party ever seeks to reopen a case with evidence that does not amount to a 'new fact' under the current approach but which nonetheless shows the verdict to be wrong.[80] Yet it would be better if the jurisprudence were prepared to address such a situation. This is particularly true with respect to the issue of review. The ICTY and ICTR are due to wind down in other respects within the next few years, but the number of requests for review is only increasing. From the founding of the Tribunals until 2006, the Appeals Chamber had only issued eight decisions on the merits of motions for review. By contrast, in 2006 and the first quarter of 2007, they issued seven such decisions. It seems quite likely that there will continue to be a high number of motions for review, at least until the Tribunals close their doors. It is unclear what will happen after that, but, as one commentator has suggested, it would raise fairness concerns if the possibility of review ends entirely once all trials and appeals have been completed.[81]

In closing, it is important to consider the possible impact of the Appeals Chambers' approach on other international criminal tribunals. The Special Court for Sierra Leone has provisions similar to those of the ICTY and ICTR: Article 21(1) of the Special Court's statute is equivalent to Article 26 of the ICTY Statute and to Article 25 of the ICTR Statute, and Rule 120 of the Special Court closely resembles Rules 119 to 120 of the ICTY Rules and Rules 120 to 121 of the ICTR Rules. The Special Court has not yet decided any motions for review. Although the Special Court's statute further provides in Article 20 that its Appeals Chamber judges should look to decisions of the ICTY and ICTR Appeals Chamber for guidance, the Special Court is not definitively bound by such decisions. It thus might choose to take a more liberal approach to 'new facts' than the ICTY and ICTR Appeals Chambers have done to date.

Finally, the International Criminal Court (ICC) has a straightforward justification for not following the approach currently taken by the ICTY and ICTR Appeals Chambers. The Rome Statute, which was adopted shortly before the first *Tadić* decision, provides for review of judgments in Article 84. This article authorized review where

> new evidence has been discovered that: (i) [w]as not available at the time of trial and such unavailability was not wholly or partially attributable to the party making application; and (ii) [i]s sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict.[82]

The use of the term 'new evidence' rather than 'new facts' makes it highly unlikely that the ICC will draw the *Tadić* distinction between 'additional evidence' and 'new

80. There is also the possibility that pardons could be given pursuant to Art. 28 of the ICTY Statute and Art. 27 of the ICTR Statute in cases where evidence that does not amount to a 'new fact' under the current jurisprudence nonetheless decisively undermines the convictions. The existence of this possibility, however, does not undermine the need to revisit the existing jurisprudence. Not only do pardons fall short of the exonerations due if convictions were truly entered in error, but they are also acts of discretion and their availability under the Statutes depends on the convicted persons' eligibility for pardons according to the applicable law of the states in which they are serving their sentences.

81. Carcano, *supra* note 1, at 118.

82. 1998 Rome Statute of the International Criminal Court, (1998) 37 ILM 1002, at 1050.

https://doi.org/10.1017/S0922156507004761 Published online by Cambridge University Press

facts', as the text gives the ICC no arguable justification for doing so. Rather, the ICC is likely to focus on the more important question, from a substantive justice perspective, of whether the new factual information would likely have affected the verdict.

In conclusion, this article has tried to show that ICTY and ICTR jurisprudence interprets the term 'new facts' in an unduly narrow way, thus creating the risk that meritorious applications for review will be denied. This article has also tried set forth ways in which the Appeals Chambers could reshape their jurisprudence to remove this risk. The Appeals Chambers will undoubtedly face many more requests for review before they close their doors. It remains to be seen whether they will use these opportunities to refine their jurisprudence.