Admitting and Evaluating Evidence in the International Criminal Tribunal for the Former Yugoslavia Appeals Chamber Proceedings. A Few Remarks

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Abstract. This article analyses the requirements when the ICTY Appeals Chamber may overturn factual findings made by a Trial Chamber and may admit fresh evidence. The conclusion is that the Appeals Chamber should overturn factual findings only when strong reasons so indicate, since trial transcripts cannot provide the same information as did live impressions from the proceedings when the Trial Chamber reached its findings. Fresh evidence should be admitted exceptionally; otherwise the control (corrective) function of the ICTY Appeals Chamber could be weakened, endangering the division of tasks in the court organisation, the effective administration of justice and a final hearing within a reasonable time.

1. INTRODUCTION

Neither the Statute of the International Criminal Tribunal for the former Yugoslavia ('ICTY Statute')[1] nor the Statute of the International Criminal Tribunal for Rwanda ('ICTR Statute')[2] provide the parties with an absolute right to appeal against a judgement from a Trial Chamber. On the contrary, Article 25 of the ICTY Statute and Article 24 of the ICTR Statute both clearly state that an appeal shall be heard from persons convicted by the Trial Chambers or from the Prosecutor only when there has been an error of law invalidating the decision in the Trial Chamber or an error of fact, which has occasioned a miscarriage of justice. Exceptionally, the Appeals

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1. The ICTY Statute is available at http://www.un.org.icty/basic/statut/statute.htm.
2. The ICTR Statute is available at http://www.ictr.org/ENGLISH/basicdocs/statute.html.

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Chamber may, however, depart from these grounds and hear arguments about issues of general significance to the Tribunal's jurisprudence.[3]

Apparently, this articulates that the proceedings before the Appeals Chamber should not automatically be considered being *de novo*. Once the Appeals Chamber has agreed to hear the appeal, the Chamber may at its discretion affirm, reverse or revise the decisions taken by the Trial Chamber.

Well established case law further suggests that the Appeals Chamber will overturn a conviction only where the Trial Chamber has reached its findings of criminal responsibility on the basis of evidence that could not have been accepted by any reasonable tribunal, or where the evaluation of evidence was 'wholly erroneous.'[4]

The underlying argument for this test is that under such circumstances no reasonable tribunal of fact could be satisfied beyond a reasonable doubt that the accused participated in the crime.[5] In cases where the appeal is related to the sentence imposed by the Trial Chamber, the Appeals Chamber has developed a similar test being that of a 'discernable error.'[6]

In reality, however, a test or prognosis of such a kind may very well be most difficult for the court to do, since it includes a complex task of assessing and weighing evidence and applying the facts to the relevant standard of proof. Moreover, there is the functional and hierarchical relationship between the Trial Chambers and the Appeals Chamber to consider,

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3. Prosecutor *v.* Duško Tadić, Case No. IT-94-1-A, A.Ch., 15 July 1999, at para. 247 (hereinafter 'Tadić Appeals Chamber Judgement'); Prosecutor *v.* Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Šantić, Case No. IT-95-16-A, A.Ch., 23 October 2001, at para. 22 (hereinafter 'Kupreškić Appeals Chamber Judgement'). The adversarial character of the appellate proceedings is expressed in the fact that the party, who is appealing on a matter such as an alleged error in law shall at a minimum identify the error and address the issue with legal arguments. Otherwise the ICTY Appeals Chamber will only adjudicate legal errors where the Trial Chamber has made a notorious mistake, *see* Kupreškić Appeals Chamber Judgement, *supra*, at para. 27. In this sense the principle of *iura novit curia* (the court knows the law and may take various steps on its own motion to seek clarification of the issue concerned) is effective only to a lesser degree. *See also* Prosecutor *v.* Dragoljub Kunarač, Radomir Kovač and Zoran Vuković, Case No. IT-96-23&IT-96-23-A, 12 June 2002, at paras. 43–48.
4. Tadić Appeals Chamber Judgement, *id.*, at para. 64; Prosecutor *v.* Zlatko Aleksovski, Case No. IT-95-14/1-A, A.Ch., 24 March 2000, at para. 63 (hereinafter 'Aleksovski Appeals Chamber Judgement'); Prosecutor *v.* Zejnil Delalić, Zdravko Mucić (aka 'PAVO'), Hazim Delić and Esad Landžo (aka 'Zenga'), Case No. IT-96-21-A, A.Ch., 20 February 2001, at para. 491 (hereinafter 'Čelebići Appeals Chamber Judgement'); Kupreškić Appeals Chamber Judgement, *supra* note 3, at para. 41.
5. Tadić Appeals Chamber Judgement, *supra* note 3, at para. 64; Aleksovski Appeals Chamber Judgement, *supra* note 4, at para. 63; Čelebići Appeals Chamber Judgement, *supra* note 4, at para. 491; Kupreškić Appeals Chamber Judgement, *supra* note 3, at para. 41.
6. Čelebići Appeals Chamber Judgement, *supra* note 4, at para. 725, citing Prosecutor *v.* Duško Tadić, Case No. IT-94-1-A*bis*, A.Ch., 26 January 2000, at para. 22 ('Tadić Appeals Chamber Sentencing Judgement'), and Aleksovski Appeals Chamber Judgement, *supra* note 4, at para. 187.

which is reflected in the rather strict rules about receiving fresh evidence on appeal[7] and reassessing the whole body of evidence.

From the perspective of the prosecution and the defence a restricted possibility to effectively foresee the outcome of such a test creates a certain amount of uncertainty when planning and preparing their cases for the proceedings before a Trial Chamber. Such practical considerations are often related and merged with highly justified concerns about the efficient administration of justice, judicial economy, a fair and final hearing within a reasonable time and the interests of justice.

Having these very brief remarks in mind, the scope of this article may conveniently be sharpened in relation to the following issues:

1. What is the role and functions of the Appeals Chamber?
2. How should evidence be evaluated?
3. When may the Appeals Chamber reconsider and overturn the factual findings made by the Trial Chamber?
4. When may fresh evidence be admitted on appeal?
5. When should a case on appeal be ordered a re-trial?

2. What Is the Role and Functions of the Appeals Chamber?

The mandate for the ICTY and the ICTR[8] is to prosecute persons responsible for serious violations of international humanitarian law. In this mandate three different, and to some extent competing, objectives are encompassed:

> The purposes of the Tribunal have been laid down in Security Council resolution 808 (1993) and, in even more detailed form, in Security Council resolution 827 (1993). They are threefold: to do justice, to deter further crimes and to contribute to the restoration and maintenance of peace.[9]

These three objectives – to do justice, to deter future crime and to restore and maintain peace – are achieved through the procedures laid down in the Statute and Rules of Procedure and Evidence for the Tribunal. The appellate proceedings should moreover be seen in the light of the fact that the Appeals Chamber is the second and last instance in the court hier-

7. Rule 115 of the ICTY Rules of Procedure and Evidence ('ICTY RPE') and Rule 115 of the ICTR Rules of Procedure and Evidence ('ICTR RPE'). The ICTY RPE are available at http://www.un.org/icty/basic/rpe/IT32_rev22con.htm. The ICTR RPE are available at http://www.ictr.org/ENGLISH/Rules/310501/index.htm.
8. *Supra* notes 1 and 2.
9. Report 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, at para. 11; and *see* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), at para. 26 and UN Res. 955 (1994), UN Doc. S/RES/955 (8 November 1994) (the ICTR).

archy, leaving the appellant without any further possibility to appeal against the judgement. This allows a certain control (corrective) function to be referred to the Appeals Chamber:

> The Statute establishes a hierarchical structure in which the Appeals Chamber is given the function of settling definitively certain questions of law and fact arising from decisions of the Trial Chambers. Under Article 25, the Appeals Chamber hears an appeal on the ground of an error on a question of law invalidating a Trial Chamber's decision or on the ground of an error of fact which has occasioned a miscarriage of justice, and its decisions are final.[10]

An appeal against a Trial Chamber judgement under Article 25 of the ICTY Statute and Article 24 of the ICTR Statute is not a complete re-hearing of the case, which is reasonable in the perspective of the court organisation designed upon a concept of hierarchy. This may perhaps be seen as limiting the scope and strength of the control function of the Appeals Chamber, where the findings of the Trial Chamber are to be screened and either affirmed, reversed or revised. Such a corrective nature of the appellate proceedings therefore alone suggests certain restrictions for admitting fresh evidence on appeal.[11] Indeed, it is abundantly clear that when appealing against a Trial Chamber judgement the parties are not provided with an opportunity to reargue their cases.[12]

For these and other reasons the prosecution case must be trial ready before the trial commences and the defence should not be allowed to abuse rules of disclosure to turn the main hearing into a 'fishing expedition.' Trial proceedings and especially proceedings before the ICTY Appeals Chamber are not forums for 'practice' arguments – legal theories, facts and evidence should be crystallised before trial.

The function of screening or controlling the activities of the Trial Chamber concerned also proposes that overturning and changing the factual findings made by the Trial Chamber should be done with great care. This suggestion is supported by the fact that the appellate proceedings are not designed to take evidence with cross-examination as a vital ingredient, as is the case before the Trial Chamber. Trial transcripts are used instead, which plainly cannot provide the Appeals Chamber with exactly the same information, especially when determining credibility and evidentiary value of a live witness testimony.

If new evidence and facts were admitted on appeal without any restriction, the consequence would be that the importance of the proceedings in the first instance would diminish and the appellate proceedings increase.

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10. Aleksovski Appeals Chamber Judgement, *supra* note 4, at para. 113(i).
11. Prosecutor *v.* Duško 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, at para. 42 (hereinafter 'Tadić Decision').
12. Kupreškić Appeals Chamber Judgement, *supra* note 3, at para. 22.

Doubtless, this would be questionable from a viewpoint of court organisation and court administration. A complete re-hearing would also be of some concern for the parties involved, who are entitled to a hearing and a final decision within a reasonable time. Judicial economy must be considered as well. Also, in light of the two-tier court system, such an approach effectively deprives the parties of the right to an appeal.

However, it might be difficult for the parties to know beforehand what facts should be advanced and what evidence presented in order to have a successful case. It is often impossible to predict what a witness actually will say during examination. Another argument for a trial *de novo* is that a complicated matter of law sometimes is clarified only after having heard all the evidence.

A function to protect and maintain legal certainty and predictability for the parties is recognised in the ICTY case law:

> The fundamental mandate of the Tribunal to prosecute persons responsible for serious violations of international humanitarian law cannot be achieved if the *accused and the Prosecution* do not have the assurance of certainty and predictability in the application of the applicable law.[13]

This is the Rule of Law taken seriously. The parties need to know the conditions for the proceedings, since it is crucial for the design, planning and construction of cases and the proceedings in the Trial Chamber. The functional relationship in the court hierarchy between the Trial Chambers and the Appeals Chamber stresses the importance of being able to foresee what is going to happen when on trial, especially when being confronted with the control function of the Appeals Chamber as already outlined. However, a distinction should be made between Trial Chambers and the ICTY Appeals Chamber. Trial Chambers are bound by *ratio decidendi* in decisions made by the Appeals Chamber for reasons of predictability, court hierarchy and the right of the accused to have similar cases treated alike.[14] But for the Appeals Chamber, the requirement of protecting and maintaining the Rule of Law and the interest of avoiding a miscarriage of justice need to be seen together with a competing function to develop international law and providing guidance:

> […] The need for coherence is particularly acute in *the context in which the Tribunal operates, where the norms of international humanitarian law and international criminal law are developing*, and where, therefore, the need for those appearing before the Tribunal, the accused and the Prosecution, to be certain of the regime in which cases are tried is even more pronounced.[15]

13. Aleksovski Appeals Chamber Judgement, *supra* note 4, at para. 113(ii) (emphasis added).
14. *Id.*, at para. 113(iii).
15. *Id.*, at para. 113(iii) (emphasis added).

It therefore appears reasonable to conclude that the Appeals Chamber actually is sitting on several chairs at the same time. The balance to be struck between the control (corrective) function, including the function to protect and implement the Rule of Law, and the function to develop international law for guidance, is a complicated matter: should the legitimate right of the parties to predict the outcome of the proceedings and avoiding a miscarriage of justice be sacrificed on the altar of the common good being advancing international law, or vice versa? Such an uncomfortable situation would at least in some instances benefit from the ICTY Appeals Chamber having a possibility to choose between a re-hearing of the case (in whole or in part) itself and alternatively ordering the case (in whole or in part) back for a re-trial before a Trial Chamber.

Most importantly, the powers and functions vested with the ICTY Appeals Chamber are related and tied to the Statute and the Rules of Procedure and Evidence for the ICTY and the ICTR respectively. These legal instruments establish a clear division of tasks and functions between the actors in the proceedings. Although there is a tendency where a more orthodox common law oriented system is moving in the direction of civil law type proceedings,[16] the adversarial accent still is clear and loud: the Prosecutor alone decides whether or not to launch an investigation, to file an indictment against an alleged perpetrator and what crimes should be tried by the chambers – there is no investigating judge.[17] On the other hand, a Trial Chamber may ask for and even order more evidence upon its own motion, but this rarely happens in practice reflecting the point of departure that obtaining and presenting evidence mainly is the responsibility of the parties and not a task of the court. Moreover, the existence of an accepted practice of plea agreements clearly emanates more from a common law system of proceedings than a civil law structure, not least since this practice to some extent weakens the fact finding argument being a typical feature of a pure civil law jurisdiction.

Therefore the role and functions of the Appeals Chamber should be defined in relation to this legal context.[18] But since the legal framework is changing one might ask what the effects are on the scope and contents of the role and functions of the Appeals Chamber? It is not an easy

16. D.A. Mundis, *From 'Common Law' Towards 'Civil Law': The Evolution of the ICTY Rules of Procedure and Evidence*, 14 LJIL 367-382 (2001).
17. It should be noted that judges confirm the indictment before a trial can commence.
18. For an interesting discussion on the powers of the judges to delete or amend the Rules of Procedure and Evidence, *see* D.A. Mundis, *The Legal Character and Status of the Rules of Procedure and Evidence of the ad hoc International Criminal Tribunals*, 1 International Criminal Law Review 191–239 (2001).

question.[19] When there is a shift from a system based more upon discretion to proceedings designed and constructed with the principle of legality as an overriding policy, doubtless fundamental values and interests are concerned. Discretion can – but not always – promote a cost efficient administration of justice where the parties decide when to use the judicial machinery and for what crimes. Moving in a direction towards a more legalistic approach may provide the parties with a higher degree of foreseeability about the legal consequences of certain actions taken in the proceedings and would vest the courts with more powers to exercise effective control over them. There is – and should be – an ongoing interplay between what is considered to be the role and functions of the Appeals Chamber (and Trial Chambers) and the Statute and RPE for the ICTY and the ICTR, which together set the tone for both the proceedings as such and its actors.

That being said it cannot be denied that the legal structure originally adopted by the judges to accommodate the mandate from the Security Council drew heavily on common law legal traditions and still does. From a comparative law perspective this inevitably means that when analysing issues such as admitting fresh evidence on appeal it is more likely to find relevant arguments in common law systems than in civil law systems.[20] This is not a matter of policy, but of fact. Inserting into this context legal arguments deeply rooted in civil law traditions would expose the discussion to justified criticism of arguing *lex ferenda* and create uncertainty and confusion about the legal basis for and the credibility of the analysis and its results, which would be unwise. The comparative arguments introduced *infra* are indicators (flags), which serve the purpose of providing the reader with a preliminary understanding of the legal arguments underpinning the ICTY jurisprudence.

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19. In the Vujin Appeals Chamber Appeal Decision (Prosecutor *v.* Duško Tadić, Appeal Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, Case No. IT-94-1-A-AR77, A.Ch., 27 February 2001 (hereinafter 'Vujin Contempt Decision')) the Appeals Chamber was sitting in another configuration than it had as first instance when finding Defence Counsel Vujin in contempt when representing Duško Tadić. Although the ICTY Statute does not contain a provision to the effect that one Appeals Chamber may hear an appeal from another Appeals Chamber, referring to internationally recognised standards regarding the rights of the accused the new Appeals Chamber held that the decision could be appealed. Judge Wald, dissenting, held that there was no legal basis for a procedure where the decision of one Appeals Chamber could be heard by another bench. Considering "the laudable aim" of allowing a review this could "only be accomplished by an amendment to the Statute, or perhaps to the Rules," Judge Wald further held (Separate Opinion of Judge Wald, at 1). Note that Rule 94(B) provides the Trial Chamber with discretion to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal – which suggests that the ICTY Appeals Chamber is included – relating to matters at issue in the current proceedings.
20. It is not appropriate to make a broad and general distinction between common and civil law legal systems. There are mixed and other legal systems as well and legal families do have examples of systems with a difference of degree in between but still considered belonging to the same legal family.

3. How Should Evidence Be Evaluated?

For obvious reasons, the evaluation of evidence by the court should be done in the same fashion whether or not the case is before a Trial Chamber or the Appeals Chamber. The standards and arguments relevant for the Trial Chamber should therefore be considered as binding upon the Appeals Chamber, not least given its control function and function of protecting and maintaining the Rule of Law. There are several requirements to consider when evaluating or weighing evidence in court. Since the evaluation of evidence is related to a certain body of information, this relationship needs to be addressed.

When deciding the case the Trial Chamber considers various facts and evidence presented and admitted during the trial. This information depends on a variety of procedural and evidentiary rules and the theories of the parties.

Since the trial is designed upon a concept of an oral hearing immediately before the judges and where the cross-examination of witnesses is a typical feature of the proceedings, at least in theory there are very good conditions for evaluating the evidence presented by the parties. The reason is that the judges during the trial will themselves see and hear what the witness says and how the witness responds and reacts to questions put by the parties. Having the observations in fresh memory and having heard closing arguments from the parties, the judges then deliberate in private and decide the case. Therefore it makes sense that the ICTY case law rejects a statutory theory of evidence. Such a theory is defined in law and provides in general that one witness statement would mean having established criminal liability to half of what is required, and two corroborating statements would result in a conviction since the standard of proof would automatically be met.

One could argue that such a mechanical, statutory theory of evidence could be used to control a judge and the proceedings. The law would proscribe that where two witnesses are concurring the judge would *have to* convict the defendant, even when the judges do not believe what the witnesses testified. But such a system of evidence could also force the judge to acquit someone he or she very much believes is guilty where a confession is lacking. This would of course be of a great danger for the parties, who could suffer from miscarriage of justice through abusive and excessive use of archaic formalism – which is sometimes a sword, and other times a shield.

But leaving the judges completely without any restrictions how to determine the value of the evidence could lead to arbitrariness and 'straying' from the Rule of Law. To cure this, the ICTY case law imposes certain requirements to be observed when evaluating evidence. One of them is that the judge must act reasonably in this exercise:

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber.

> Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. […] It must be borne in mind that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.[21]

Observing that the Appeals Chamber should give a margin of deference to a finding of fact reached by a Trial Chamber, the requirement of a certain degree of common sense when evaluating the evidence clearly establishes an intellectual activity based upon a concept of discretion. This is further supported by the fact that different conclusions about the value of the evidence – not necessarily if the standard of proof has been met – are accepted, even though they are related to exactly the same body of information.

Moreover, there is a requirement of analysing the evidence thoroughly:

> As stated above, it is initially the Trial Chamber's task to assess and weigh the evidence presented at trial. In that exercise, it has the discretion to 'admit any relevant evidence which it deems to have probative value', as well as to exclude evidence 'if its probative value is substantially outweighed by the need to ensure a fair trial'. As the primary trier of fact, it is the Trial Chamber that has the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses' testimonies. It is certainly within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the 'fundamental features' of the evidence. The presence of inconsistencies in the evidence does not, *per se*, require a reasonable Trial Chamber to reject it as being unreliable. Similarly, factors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the Trial Chamber from relying on the evidence. However, the Trial Chamber should consider such factors as it assesses and weighs the evidence.[22]

This clearly suggests that in cases where witnesses are heard, there are certain surrounding facts to be used as guiding factors when determining the evidentiary value of the statement. Such factors include, but are not limited to, circumstances affecting the conditions making safe the observation of the actual event forming the substance of the statement. Normally, the analysis has to go deeper than that. The specific pieces of information contained in a statement need be analysed and confronted with facts contained elsewhere in the package of information that constitutes the evidentiary bulk put before the court for its consideration. Sometimes these appear to be conflicting in relation to a certain legal fact to be established and must therefore be addressed and explained. To promote foreseeability, all this ought to be done in an objective fashion meaning the judge should in the first place apply standards that a reasonable judge would use.

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21. Kupreškić Appeals Chamber Judgement, *supra* note 3, at para. 30.
22. *Id.*, at para. 31.

Further, it should be noted that when having thoroughly analysed the evidence, the Trial Chamber should take another step before reaching its final conclusion and consider whether the evidence *taken as a whole* is reliable and credible and to accept or reject the fundamental features of the evidence. In other words, there seems to be a requirement of an overall assessment at the end of the weighing process.[23]

This combined atomistic/holistic method to evaluate the evidence has been affirmed by the Appeals Chamber on several occasions. Citing the *Vujin Contempt Decision*[24] the Appeals Chamber stated in the *Kupreškić Appeals Chamber Judgement*:

> A tribunal of fact must never look at the evidence of each witness separately, as if it existed in a hermetically sealed compartment; it is the accumulation of *all* the evidence in the case which must be considered. The evidence of one witness, when considered by itself, may appear at first to be of poor quality, but it may gain strength from other evidence in the case.[25]

The ICTY case law also stresses a requirement of a reasoned opinion operating as a safe guard against arbitrary convictions:

> The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so it is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points. This discretion is, however, tempered by the Trial Chamber's duty to provide a reasoned opinion, following from Article 23(2) of the Statute. In the Furundžija Appeal Judgement, the Appeals Chamber considered the right of an accused under Article 23 of the Statute to a reasoned opinion to be an aspect of the fair trial requirement embodied in Articles 20 and 21 of the Statute.[26]

There is a clear distinction between failing to give a proper explanation how the court arrived at the conclusion of criminal responsibility and erring in weighing the evidence or implementing a standard of proof that is not beyond a reasonable doubt. In reality, however, there are good grounds to believe that a conviction poorly supported by written arguments would have a small chance of survival on appeal. Typically this would be the case where there are circumstances affecting the credibility of the witness. Occasionally, it is rather difficult to explain why we tend to believe or

23. *Id.*, at paras. 135, 202, 218 and 334.
24. *Supra* note 19, at para. 92.
25. Kupreškić Appeals Chamber Judgement, *supra* note 3, at para. 334 (emphasis in original). In para. 202, the Appeals Chamber further stated: "It is a fundamental principle, affirmed in the jurisprudence of this Tribunal, that the credit of a witness can never be finally determined until all of the evidence has been given" (reference omitted).
26. *Id.*, at para. 32.

not believe what the witness has said, but this is no excuse for not providing the parties with a reasoned opinion.

But the crucial point is perhaps not the evaluation of evidence as such, but making effective the safeguards the accused has been afforded in the proceedings. At the end of the day one of the more fundamental guarantees is the presumption of innocence. It is about risk management in the proceedings or who should bear the risk of an incorrect conviction – the prosecution or the accused?

The burden of proof never shifts to the defence. If the defendant presents evidence, other information or arguments that leads the Trial Chamber to conclude that the probative value of all the evidence received in the case no longer meets the standard of proof, he or she will be acquitted. But this is not the same as to say that the burden of proof rests upon the defendant. There is a distinction between a case where the analysed and weighed body of information at least reaches the standard of proof (beyond reasonable doubt) and cases where it does not (on the balance of probabilities, probable, likely, etc.).

Arguably, there is a difference between the value of the evidence or its weight and its robustness, meaning how safe the conclusion about the weight is. Although one witness may establish the case beyond a reasonable doubt, adding another such witness does not make any major difference in evidentiary value given the standard of proof. However, the adding of another witness (or other information or evidence) to the body of evidence normally means the court may conclude more safely that criminal responsibility has been established beyond a reasonable doubt.

4. When May the Appeals Chamber Reconsider and Overturn the Factual Findings Made by the Trial Chamber?

The role and functions of the Appeals Chamber impose certain restrictions as to the scope of the appellate proceedings. The legal framework clearly is designed to make the proceedings before the Trial Chamber a main attraction from an evidentiary viewpoint – the conditions to evaluate (oral) evidence are not as good on appeal as they normally are when a Trial Chamber hears the evidence. One important reason is that the proceedings before the Appeals Chamber normally consists of trial transcripts leaving the Chamber without access to the immediate impression of the witness that the Trial Chamber had when determining the evidentiary value of the evidence. The Appeals Chamber has, so to say, to rely on second hand information.

Observing the exception that a re-hearing of the case may be an option to consider when a party has raised a legal issue of general significance to the jurisprudence of the Tribunal,[27] the general rule still prevailing is

27. *Id.*, at para. 22.

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that the appellate proceedings are not *de novo*. But when would the Appeals Chamber find an error of fact occasioning a miscarriage of justice and overturn the factual findings made by the Trial Chamber?

This may be the case when the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or the evaluation of the evidence is 'wholly erroneous.'[28] It could perhaps be argued that a lack of evidence is something related to the standard of proof and therefore a matter of law rather than a matter of fact resulting in two different tests being designed to apply. But the distinction between facts and law is sometimes artificial, since these two components tend to merge with each other when analysed. When deciding a case normally the value of the evidence is constantly related to the standard of proof, piece by piece and at the final overall assessment. It is an ongoing process.

Since this test was set in a case where a conviction was overturned,[29] it may be argued that the element of double jeopardy or the principle of *ne-bis-in-idem* should make it even more difficult to change the factual findings when the prosecution is appealing against an acquittal.

But what do these requirements for overturning factual findings on appeal actually mean? They seem to be about a decisive factual mistake on behalf of the Trial Chamber when analysing the evidence in the case and reaching the conclusion. Whether or not this would include a situation where the parties have not been provided with sufficient reasons for the conclusion can be left open for now. Perhaps it should be viewed as a formal error when drafting the judgement rather than a factual error. This may be of some importance when determining whether or not to order a re-trial.

It should also be noted that a similar test has been adopted in cases related to sentencing issues. The sentence may be revised if the Trial Chamber erred in exercising its discretion or erred to follow applicable law, where the test applied is whether or not there is a 'discernable error.'[30] This indicates a sort of common standard to be applied on appeal reflecting the role and functions of the Appeals Chamber.

Re-evaluating evidence on appeal appears in national jurisdictions mainly to be an issue when oral evidence is involved. A brief survey over some national jurisdictions shows that there are certain limits imposed upon an appeals court when analysing and changing factual findings made by a trial court based upon live witness testimony, especially when the appeal attacks the credibility of the witness, the meaning of inconsistent statements and other such intricate factors mainly depending upon direct observation of the witness when being questioned.

In the United States, an appellate court will not consider reversing the judgement of a lower court if the error occurred only is a 'harmless error.'[31]

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28. *Id.*, at para. 30.
29. *Id.*, at para. 41.
30. *Supra* note 6.

The 'harmless error' doctrine means that an appellate court may hold that the error is so insignificant that the trial court judgement should stand. The underlying reason is to promote the effective administration of justice and to protect the interests of the parties and the integrity of the witnesses involved.[32]

The case law reveals that the courts have applied the doctrine of 'harmless error' in different ways, where the 'correct ruling' test is the most generous.[33] The 'correct ruling' test is met when the appellate court believes that the appealed judgement is correct having assessed all the evidence. This test has been subject to criticism for putting the appellate court in a position of second-guessing the trial fact finder, which is considered not to be its function. In *Kotteakos* v. *United States*[34] the Supreme Court analysed the 'harmless error' test to be applied in the federal courts to non-constitutional errors. Rejecting the test of a 'correct ruling' the Supreme Court held that it was not the function of the appellate court to determine guilt or innocence, nor to speculate upon a probable reconviction. Emphasising the importance of the jury trial, the Supreme Court further stated that although the appellate judges cannot escape such impressions, they should not be the sole criteria for reversal or affirmance. The error was considered harmless only when it did not influence the jury, or had very slight effect. It therefore seems that the Supreme Court looked at all of the 'remaining' evidence to determine whether it is so overwhelmingly supportive of the verdict, and the relative significance of the error so small, that the fact finder could not have been affected by the error. The standard of proof for whether or not the test is met appears to be 'fair assurance.'[35]

Clearly, the role and functions of the appellate court are decisive factors to consider when deciding whether or not to allow an appeal. The same goes for England and Wales, where all relevant evidence should be put before the jury so that they can make a final determination on the issues of fact.[36] Expressing a control function and a principle of finality as in the case of the ICTY Appeals Chamber, the hearing in the Court of Appeal normally is based upon transcripts of the summing-up and the evidence and any other documents or exhibits which are before the court.[37] Exceptionally, the evidence may be taken before the Court of Appeal, such

31. This 'harmless error' test is similar to the 'discernable error' test, adopted in the Čelebići case, *supra* note 4.
32. C.H. Whitebread, Criminal Procedure. An Analysis of Cases and Concepts, 3rd Ed., at 771 *et seq.* with references (1993).
33. There are other tests developed in the case law (the 'cumulative evidence' test, the 'overwhelming evidence' test and the 'effect of the error' test), which view the error in relation to remaining evidence or focuses on whether the error could have had any effect on the fact finder, *see id.*, at 772 with references.
34. Kotteakos *v.* United States, 328 U.S. 750, 66 S.Ct. 1239 (1946).
35. Whitebread, *supra* note 32, at 771–773.
36. J. Sprack, Emmins on Criminal Procedure, 8th Ed., at 431 (2000).
37. P. Murphy, *et al.*, Blackstone's Criminal Practice, at para. 23:15 (2001).

as when a prosecution witness has made a statement after trial, which is alleged to be inconsistent with his testimony at trial. The witness would then likely be called before the Court of Appeal and the statement put to the witness for an explanation.[38]

A successful appeal under Canadian law depends on whether or not the verdict is unreasonable or cannot be supported by the evidence,[39] including the credibility of the witness.[40] The whole body of evidence must therefore be re-examined and reassessed, but this must not go too far.[41] In *Regina* v. *R.W.* the accused was convicted for several sexual offences on the testimony of three children. His appeal was allowed, but the Supreme Court restored the conviction and cautioned that the Court of Appeal went too far in finding *lacunae* in the evidence, which did not exist and in applying too critical an approach to the evidence, an approach that placed insufficient weight on the trial judge's findings of credibility.[42] In *R.* v. *François* the Supreme Court continued along this avenue pointing out that the Court of Appeal should act very carefully when drawing inferences from inconsistencies in witness testimonies. It was stressed that the appellate court's function on review is not to substitute itself for the jury, but to decide whether the verdict is one that a properly instructed jury acting judicially could reasonably have rendered.[43]

Under the law of New South Wales,[44] not every error of the trial or risk of miscarriage of justice will result in a successful appeal. The appeal will normally be allowed when there was a real risk that an innocent person was wrongly convicted or the appellant has 'lost a real chance of acquittal.'[45] When this test is focusing on the outcome of the proceedings from a factual perspective, the 'fundamental flaw' test relates to a miscarriage of justice from a viewpoint whether or not the accused has had a fair trial.[46] Arguably, both tests apply when illegally obtained evidence incorrectly has been admitted and incorporated in the bulk of evidence leading to a conviction. It is not clear which test then should be applied (or both). The point is, however, an appeals court should normally not assume the role as a fact finder. A control (corrective) function may easily be reconciled with such a role of an appellate court, which reflects an unwillingness to allow an appeal in the absence of error during the trial or new evidence.[47]

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38. Conway, 70 Cr. App. R. 4 [1979].
39. Art. 686(1)(a)(i) of the Criminal Code, and *see* R. *v.* Biniaris, 1 S.C.R. (2000)
40. Regina *v.* R.W., 74 C.C.C. (3d) 134 (1992).
41. Yebes *v.* The Queen, 36 C.C.C. (3d) 417 (1987).
42. Regina *v.* R.W., *supra* note 40, at 134 *in fine*.
43. R. *v.* François, 91 C.C.C. (3d) 289 (1994).
44. Criminal Appeal Act 1912, Sec. 6.
45. Dietrich *v.* The Queen, 109 ALR 385, at 396 (1992).
46. Wilde *v.* The Queen, 164 CLR 365, at 373 (1988).
47. Chamberlain *v.* The Queen, 153 CLR 521, at 534 (1984), *but see* M *v.* The Queen, 181 CLR 487 (1994) and Jones *v.* The Queen, 72 ALJR 78 (1997).

Although the arguments in national jurisdictions against re-evaluating evidence on appeal appear in legal systems where the jury acts as the fact finder, they are valid also in the context of the ICTY Appeals Chamber where professional judges only (as in the Trial Chambers) decide both matters of fact and matters of law. One reason why the arguments are relevant is that the role and functions of the national appellate courts are similar to those of the ICTY Appeals Chamber. Another related reason is that the underlying policy expresses the same concerns about a fair hearing with a final decision within a reasonable time saving time and resources without violating the rights of the accused.

5. When May Fresh Evidence Be Admitted on Appeal?

Whether or not to admit fresh[48] evidence on appeal is a complicated matter that in broad terms revolves around an intertwined core of three significant issues:

1. The test to be applied;
2. At what time in the appellate proceedings the admissibility should be decided;
3. When a re-trial should be ordered.[49]

It may generally be said that admission of fresh evidence goes to the role and function of the ICTY Appeals Chamber and the flexibility of the legal framework in which the Tribunal operates. Expanding the body of evidence limits the possibilities for the Appeals Chamber to exercise effective control over the fact-finding process in the Trial Chamber, may be time consuming and expensive, and even be a surprise for the parties who are left alone without further means to appeal the judgement. As a result, the case may be sent back to a Trial Chamber for a re-trial, further delaying a final decision. But sometimes it is justified and wise to admit fresh evidence, such as when there are reasons to fear that otherwise a miscarriage of justice would occur or perhaps when the Appeals Chamber considers setting a new landmark in the area of international law. It is about striking a balance between competing functions of the ICTY Appeals

48. It is still to some extent unclear what is meant by additional evidence. Would it suffice that the Appeals Chamber looks upon the statement of an expert witness differently than the Trial Chamber did? If the information in a report is structured in another way, through which the focus changes to emphasise another material fact than before? Normally, it is difficult to make a clear dividing line between facts related to material elements of the crime (legal facts), such as 'I saw the victim be killed' and circumstances other than evidence providing arguments for believing in this, where distance, light and weather conditions, emotional state, etc. are decisive factors to consider.
49. This issue will be dealt with in the following section.

Chamber including the policies underlying the relevant rules and the Statute as such.[50]

Technically, the test for admitting fresh evidence on appeal is defined in Rule 115 of the RPE for both ICTY and ICTR. Rule 115 provides the following requirements to admit new evidence:

> 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.[51]

The ICTY jurisprudence analysing Rule 115 shows that there is an interesting development starting with the *Tadić Decision*[52] on the admission of new evidence followed by the *Jelisić Appeals Chamber Decision*[53] and where the strand of arguments appears to take a somewhat different direction in the *Kupreškić Appeals Chamber Judgement*. When the two former decisions focus more on the parties influence over the criminal process honouring the adversarial principle, the latter tends to draw the attention towards continental civil law legal systems.

Starting with the *Tadić Decision*, the ICTY Appeals Chamber held that the burden of proof rests upon the moving party to provide an explanation why the new evidence was not available at the time of the trial. This may be the case when the evidence did not exist at that time, the party was unaware of the evidence or was not able to produce the evidence since the witness was unable or unwilling to come forward.[54] Due diligence is

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50. Admission of new evidence should not be mixed with the right of the accused to have a fresh trial when a new legal fact has been discovered, *see* Art. 26 of the ICTY Statute with Rules 119 and 122 of the ICTY RPE and Art. 25 of the ICTR Statute with Rules 120 and 123 of the ICTR RPE.
51. Rule 115 has recently been amended. It reads:

> Additional Evidence
>
> A. A party may apply by motion to present additional evidence before the Appeals Chamber. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not later than 75 days from the date of the judgement, unless good cause is shown for further delay. Rebuttal material may be presented by any party affected by the motion.
>
> B. 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 and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 117.
>
> C. The Appeals Chamber may decide the motion prior to the appeal, or at the time of the hearing on appeal. It may decide the motion with or without an oral hearing.
>
> D. If several defendants are parties to the appeal, the additional evidence admitted on behalf of any one of them will be considered with respect to all of them, where relevant.

52. Tadić Decision, *supra* note 11, at para. 30.
53. Prosecutor *v.* Goran Jelisić, Decision on Request to Admit Additional Evidence, Case No. IT-95-10-A, A.Ch., 15 November 2000 (hereinafter 'Jelisić Appeals Chamber Decision').
54. Tadić Decision, *supra* note 11, at paras. 54–63.

assumed, unless there is gross negligence in the conduct of the prosecution or defence counsel.[55]

The Appeals Chamber also stated that in applying these criteria, any doubt should be resolved in favour of the appellant (defendant) according to the principle *in dubio pro reo*.[56] When the principle of *in dubio pro reo* indicates that there may be reasons to treat a motion from the defence more generously (non-availability) than from the prosecution, the element of double jeopardy or the principle of *non-bis-in-idem* may in a similar way restrict the possibilities for the prosecution to have new evidence admitted. The issue is present through the wording of Article 25 of the ICTY Statute and Article 24 of the ICTR Statute, both of which provide the Prosecutor with a right to appeal an acquittal.[57] If no attention is paid to the element of double jeopardy the consequence could be that the accused was in effect tried a second time for the same criminal conduct if the prosecution acted without due diligence.[58] It should be noted that for sentencing purposes, the element of double jeopardy has been treated as a mitigating factor in the ICTY jurisprudence when a case has been sent back to a Trial Chamber for a re-hearing on a sentencing matter.[59] Arguably, depending on the circumstances there may be few valid and persuasive legal arguments not to consider treating admission of new evidence offered by the prosecution in a similar fashion when a re-trial is ordered.

Concerning the requirement 'in the interests of justice' the Appeals Chamber noted the finality principle as important and made the admission dependent on three conditions:

1. If the evidence is relevant to a material issue;
2. If the evidence is credible; and
3. If the evidence is such that it would probably show that the conviction was unsafe.[60]

After the *Tadić Decision* the ICTY case law continued along this avenue and added in the *Jelisić Appeals Chamber Decision* the Appeals Chamber exercised its inherent power to admit new evidence that was available at trial, if the exclusion of it would lead to a miscarriage of justice.[61] The

55. *Id.*, at para. 48.
56. *Id.*, at para. 73. The principle of *in dubio pro reo* applies in criminal cases and means that when a fact or issue has not been clarified the choice and decision of the court on the matter shall be in favour to the accused. This expresses the fact that the burden of proof rests upon the prosecution.
57. The element of double jeopardy has been addressed in the context of proceedings before the ICTY by R. Nieto-Navia & B. Roche, *The Ambit of the Powers under Article 25 of the ICTY Statute: Three Issues of Recent Interest*, *in* R. May, *et al.* (Eds.), Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald, at 473–493 (Kluwer, 2001).
58. Tadić Decision, *supra* note 11, at para. 43.
59. As for an example, *see* Aleksovski Appeals Chamber Judgement, *supra* note 4, at para. 190.
60. Tadić Decision, *supra* note 11, at para. 71.
61. Jelisić Appeals Chamber Decision, *supra* note 53, at 3. This reflects an application of the *in dubio pro reo* principle, as defined in the Tadić Decision, *supra* note 11.

Appeals Chamber also advanced the third limb of 'in the interests of justice' and held that the evidence would probably show that the conviction *or* the sentence was unsafe.[62]

However, the consolidation of this careful attitude towards admitting fresh evidence was challenged in the *Kupreškić Appeals Chamber Judgement* in several aspects. First, it is unclear whether the Appeals Chamber acknowledged the application of *in dubio pro reo* and the element of double jeopardy (*non-bis-in-idem*) in relation to the condition of non-availability, which have a potential of risk related to a miscarriage of justice if that would be the case. Secondly, the condition that the evidence be credible was a low threshold. The court asked itself if the evidence appeared to be reasonably capable of belief or reliance.[63]

Moreover, where the third limb (in the interests of justice) still contains both conviction and sentence the test changed from *would probably show* to *could have* an effect on the judgement.[64] It would be tempting to assume that the first test is about the actual effect of the fresh evidence in relation to the whole body of evidence (completed reassessment), and the other a sort of hypothetical test (preliminary or uncompleted reassessment). But 'probably' can either mean that the conclusion meets a high standard of proof or expresses a lower degree of probability than that. In the latter case the difference compared to the 'could have' test should not be exaggerated, not least since the standard for credible evidence is low and affects in either way the practical importance of the third limb (would or could have) and considering that opposing party may challenge the veracity of the evidence perhaps leading to an evidentiary hearing where the issue likely will be dealt with rather thoroughly anyway.[65] In clear cases where the evidentiary value of the evidence is very high the application of the test should normally not create any problems.[66]

Arguably, there are good reasons to uphold the distinction between 'non-availability' and 'in the interests of justice' since it reflects that the parties are responsible for taking and submitting evidence and the Tribunal is to see to the interests of justice when the parties are presenting their cases. Making thin the requirement of non-availability including due diligence and emphasising a 'could have' criterion could undermine the role and functions of the Appeals Chamber in relation to the legal framework defining them.

But at what time in the appellate proceedings should the test be applied?

62. Jelisić Appeals Chamber Decision, *supra* note 53, at 3.
63. Kupreškić Appeals Chamber Judgement, *supra* note 3, at para. 63.
64. *Id.*, at para. 66.
65. The relationship with the condition of relevance is unclear in this respect. It seems to encompass both matters of law (legal facts as elements of the crime) and evidentiary value or weight (*able* to prove miscarriage of justice). If the new evidence does not relate to findings material to the conviction or sentence – meaning those findings were crucial or instrumental to either (or both) of them – the suggested new evidence is inadmissible, since it will not be able to prove that a miscarriage of justice has been occasioned, *id.*, at para. 62.
66. *Id.*, at para. 65.

To do it in the pre-appellate stage may unduly delay the proceedings if they are analysed and tried too thoroughly, since the credibility of the evidence depends on a variety of circumstances.[67] Making the decision at the end of the trial would have the advantage of including all evidence and make the 'could have' test meaningful. But the parties would have great difficulties in knowing whether they can rely on the fresh evidence and may also prolong the hearing considerably through evidentiary hearings on the issue of credibility, especially if the case is sent back for a re-trial where the final judgement may be seriously delayed and the proceedings highly resource ineffective. Finally, as already mentioned, the role and functions of the Appeals Chamber is affected in relation to existing legal framework.

Leaving international law for a while and turning to the law of the United States, the appellant may file a motion for a new trial when fresh evidence has been discovered. According to Article 33 of the Federal Rules of Criminal Procedure the court may grant the motion if required in the interests of justice. One of the conditions for ordering a re-trial is that the evidence was unknown or unavailable to the defendant at the time of the trial and that the failure to discover the evidence was not due to lack of diligence on the part of the defendant. The new evidence must be material in the sense of being not merely cumulative or impeaching, but material to the issues involved. Moreover, the value of the fresh evidence should be such that it would probably produce an acquittal upon re-trial of the defendant.[68]

In England and Wales, the admission of new evidence on appeal depends on requirements, such as the fresh evidence is necessary or expedient in the interests of justice.[69] The evidence must also appear to be capable of belief and afford grounds for affirming the appeal. Leaving aside the due diligence requirement, it is important to consider whether the fresh evidence would have been admissible in the proceedings from which the appeal lies on an issue. It should be noted that the Court of Appeals has certain powers to obtain evidence on its own motion, such as ordering a witness to attend or that his or her evidence be taken in the form of a deposition.[70] Sometimes the statement will be sufficient and no questioning before the court takes place.[71] These powers also include a right to inspect and read any material as provided for in Section 23(1) of the Criminal

67. *Id.*, at para. 63.
68. United States *v.* Joselyn *et al.*, 206 F.3d 144 (1st Cir. 2000); United States *v.* Ortiz, 23 F.3d 21 (1st Cir. 1994); United States *v.* Marachowsky, 213 F.2d 235 (7th Cir. 1954); United States *v.* Johnson, 32 F.2d 127 (8th Cir. 1929).
69. Criminal Appeal Act 1968, Sec. 23(1).
70. The initiative to receive new evidence may be taken by the appellant as stated in Criminal Appeals Rules 1968, Rule 3(1) or by the Court of Appeal on its own motion following Criminal Appeal Act 1968, Sec. 23(4).
71. Murphy, *et al.*, *supra* note 37, at para. D 23:18.

Appeal Act 1968.[72] These powers should, however, be exercised with great care. The court must not appear to be the adversary of the defence from a point of view of any neutral bystander, since it would undermine the adversarial proceedings.[73]

The Canadian case law[74] suggests as decisive factors for admitting fresh evidence that the evidence was not available at the trial and could not have been obtained with due diligence. Due diligence is about balancing the interests of the accused and the integrity of the criminal proceedings, which is closely linked to the role and functions of the Appeals Chamber in the sense of providing the parties with the opportunity to challenge the correctness of what happened at the trial. That function should be expanded only exceptionally in order not to disturb the finality of the trial process.[75] The fresh evidence must be relevant and credible. The Court of Appeal will further consider whether or not there might have been a reasonable doubt in the minds of the jury as to guilt of the appellant had the evidence been given together with the other evidence at trial.

In Australia, an appellate court may receive fresh evidence under certain conditions. Section 574 of the Victorian Crimes Act provides that new evidence may be admitted when the court think it is necessary or expedient in the interests of justice. Contrary to the other jurisdictions discussed, there is no requirement of due diligence meaning that evidence known at the time of the trial before court of first instance may be accepted. When such evidence shows that the appellant is innocent or raises doubt about guilt that the verdict should not be allowed to stand, the appeal will succeed. Assuming the evidence being fresh in the proper sense, the test is whether or not the evidence is capable of being accepted by a jury and would be likely to produce an acquittal if the jury believed it.[76] This is considered to be the case even where the evidence only goes to the credibility of a prosecution witness.[77]

Using these national jurisdictions as flags it may be concluded that Rule 115 strongly draws upon common law considerations related to the role and function of an appellate court. Normally, due diligence is required before considering the value and importance of the suggested evidence.

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72. Callaghan, 86 Cr. App. R. 181 [1988]. In very rare circumstances the Court of Appeal may be prepared to hear all prosecution and defence evidence to determine an appeal against conviction. *In* Lee, 82 Cr. App. R. 108 (1984), the Court of Appeal accepted to hear the whole case and receive new evidence not previously received due to the defendant's plea of guilty, since the defendant's confession and plea of guilty for various reasons appeared to be incorrect.
73. Grafton, 96 Cr. App. R. 156 (1993). For an interesting discussion of the Court of Appeal's role, *see* McIlkenny, 93 Cr. App. R. 287, at 310–313 (1991).
74. McMartin, 1 C.C.C. 142 (1965); Young and three others, 5 C.C.C. 142 (1970); Stewart, 8 C.C.C (2d) 137 (1972); Palmer and Palmer, 50 C.C.C. (2d) 193 (1979); Stolar, 40 C.C.C. (3d) 1 (1988); and *see* R.E. Salhany, Canadian Criminal Procedure, 6th Ed., at 9–35 (2001).
75. Doherty J.A. *in* M (P.S.), 77 C.C.C. (3d) 402 (1992).
76. Ratten *v.* The Queen, 131 CLR 510 (1974).
77. M. Findlay, S. Odgers & S. Yeo (Eds.), Australian Criminal Justice, 2nd Ed., at 282 (Oxford, 1999).

The tendency indicated is that fresh evidence will be admitted on a rather restricted basis.

6. When should a Case on Appeal Be Ordered a Re-trial?

When the appeal is successful it must be decided whether or not the judgement should be reversed or the case sent back to a Trial Chamber for a re-hearing. Concerns about the increasing workload of the Appeals Chamber and the right of the parties to have their case tried before courts in two hierarchically different instances are arguments for a re-trial, where the risk of not having a final judgement within a reasonable time, judicial economy and the element of double jeopardy or the principle of *ne-bis-in-idem* supports the judgement being reversed.

The ICTY jurisprudence clearly establishes that a re-trial may be ordered in the case of errors of law, such as sentencing issues. In *Čelebići Appeals Chamber Judgement*, the Trial Chamber had entered multiple convictions based on the same acts under Article 2 and Article 3 of the ICTY Statute, which was wrong as a matter of law. All convictions under Article 3 were therefore quashed. The Appeals Chamber referred the issue of sentencing back to a Trial Chamber since this was "a matter that lies within the discretion of the Trial Chamber."[78] Four arguments supported that finding:[79]

1. The Appeals Chamber had not had any submissions from the parties on this issue;
2. Important matters of principle may be involved;
3. The Appeals Chamber could not be reconstituted in its then former composition;
4. A new matter of such significance should be determined by a Chamber, from which an appeal is possible.

It should be noted that the Appeals Chamber applied a test within the test. In relation to the remaining convictions the Chamber stressed that the appeals proceedings are of a "corrective nature" and not designed for and having the purpose of being a trial *de novo*.[80] The sentence may be revised if the Trial Chamber erred in exercising its discretion or erred to follow applicable law meaning a 'discernable error.'[81]

Aside from sentencing issues, the vagueness of the indictment may be sufficient for ordering a re-trial when there is strong evidence of criminal responsibility.[82] Although perhaps challenging the element of double

78. Čelebići Appeals Chamber Judgement, *supra* note 4, at para. 431. Judge Hunt and Judge Bennouna dissenting.
79. *Id.*, at para. 711.
80. *Id.*, at para. 724.
81. *Supra* note 6.
82. Kupreškić Appeals Chamber Judgement, *supra* note 3, at para. 125.

jeopardy, a re-trial under these circumstances would be reasonable in the interests of justice. Referring the case back could be seen as protecting the functions of the Appeals Chamber and confirming the legal framework of the criminal proceedings rather than disciplining the lower court.

Concerning factual errors resulting in a miscarriage of justice, the situation is a little bit different given the design and structure of the appellate proceedings. As discussed, the Trial Chamber has better conditions than the Appeals Chamber to evaluate oral evidence, perhaps indicating that there should be more space for the Appeals Chamber to reconsider errors of law than errors of fact. This hypothesis gains support in the *Kupreškić Appeals Chamber Judgement*. When *Čelebići* establishes an 'elevator' down in the court organisation, *Kupreškić* says that the 'elevator' can move in the opposite direction as well:

> It may also be noted that [the ICC Statute], like the Statute of the Tribunal, provides, that, when it revisits a first instance judgement in light of new evidence showing that such a judgement is erroneous, the Appeals Chamber may remand a 'factual issue' to the original Trial Chamber for it to determine a new factual issue that arises on appeal, or may itself call evidence to determine the issue.[83]

There are, however, still some remaining doubts whether or not it was appropriate to overturn the factual findings made by the Trial Chamber through what seems to be a reassessment of the decisive oral evidence, an eye identification witness. The Appeals Chamber held that the Trial Chamber erred in relying so heavily on the witness' confident demeanour and held that there were "several strong indications on the trial record that her absolute conviction in her identification evidence was very much a reflection of her personality and not necessarily an indicator of her reliability."[84] But even the most accurate trial transcripts with the most detailed reasons for the findings cannot provide the judges sitting on appeal with the same information and with the same quality than had the Trial Chamber when hearing the witness live before them.

Turning to national jurisdictions, the position of the United States has already been analysed when discussing admission of fresh evidence. When fresh evidence is admitted, Article 33 of the Federal Rules of Criminal Procedure provides that the court may grant the motion if required in the interests of justice and then order a re-trial.

Like in the United States, the tendency in England and Wales seems to be that the courts are quite reluctant to order new trials. As stated in Section 7(1) of the Criminal Appeal Act 1968 a new trial may be ordered when it appears to the Court of Appeal that the interests of justice so

83. *Id.*, at para. 47.
84. *Id.*, at para. 154.

require.[85] An analysis of some of the leading cases[86] establishes certain factors as important when considering ordering a new trial, such as the period elapsed from the time when the offence was committed and whether or not the defendant has been in custody for that period – the longer time period the less probable a re-trial would be. The strength of the new evidence in relation to the 'old' evidence should be carefully looked into together with the nature of the crime. Strong evidence and a serious crime should indicate a new trial. Whether or not the prosecution had a proper opportunity to consider the fresh evidence and obtain its own advice and evidence on the relevant issue is also a factor to be aware of. If the prosecution has not had such opportunities this is an argument for having a re-trial.

The value of the evidence is decisive also in Canadian law. When fresh evidence is conclusive in its nature, the Court of Appeal may at its discretion deal finally with the case. But when the evidence is less decisive, although of sufficient strength that there might have been a reasonable doubt in the minds of the jury, a re-trial may be ordered.[87] This is clearly stated in *R.* v. *Milligan*, where the fresh evidence consisted of a defence witness.[88] Therefore, the court has to do a hypothetical test, which may be done in various ways. Other factors to consider concerning a re-trial are the length of time the defendant has spent in custody[89] or of the sentence imposed[90] and if the crucial witness is available for another hearing.[91] The court may order a limited new trial on a specific issue.[92]

In Australia, when the appeal is allowed it is at the appellate court's discretion to determine whether or not to acquit the accused or to order a re-trial before a court of first instance. In *Fowler*, the High Court held that the interests of justice may require a new trial and when deciding if that is the case it is important to consider whether the admissible evidence given at the original trial was sufficiently cogent to justify a conviction. If it was not it would be wrong to order a new trial to give the prosecution an opportunity to supplement a defective case. The court must also take into account any circumstances that might render it unjust to the accused to make him stand trial again where, however, the public interest

85. Sprack, *supra* note 36, at 419 with references.
86. Hobson, 1 Cr. App. R. 31 (1998); Ahluwalia, Cr. App. R. 133 (1993); Grafton, *supra* note 73; McIlkenny, *supra* note 73; Saunders, Cr. App. R. 248 (1973); Flower, Cr. App. R. 22 (1965).
87. Martin, 82 C.C.C. 311 (1944); R. *v.* Milligan, 110 C.C.C. 225 (1954); Lakatos, 129 C.C.C. 387 (1961); McDonald, 3 C.C.C. 426 (1970); and *see* Salhany, *supra* note 74, at 9–38.
88. R. *v.* Milligan, *id.* Other relevant cases are Martin, *id.*; Lakatos, *id.*; McDonald, *id.*; and *see* Salhany, *supra* note 74, at 9–38.
89. R. *v.* Dunlop, 47 C.C.C. (2d) 93 (1979).
90. R *v.* Dillabough, 28 C.C.C. (2d) 482 (1975).
91. R. *v.* Tom, 79 C.C.C. (3d) 84 (1992).
92. R *v.* Pearson, 3 S.C.R. 620 (1998); and *see* R. *v.* Thomas, 3 S.C.R. 535 (1998).

in the proper administration of justice must be considered as well as the interests of the individual accused.[93]

Returning to the ICTY jurisprudence and errors of facts, two options have been addressed so far, either ordering a re-trial or dealing with the matter on appeal. A rather special situation would be when the Appeals Chamber hears the case as a court of first instance. This happened in the *Vujin Contempt Decision* where Tadić's former defence counsel Vujin was convicted of contempt before the Appeals Chamber. Although Rule 77 of the ICTY RPE does not expressly provide for the right to appeal a contempt decision, a new bench of the Appeals Chamber applied Rule 77 since the provision should be interpreted in conformity with the Statute including the rights of the accused. Having acknowledged the special circumstances of the case, the new bench used the 'wholly erroneous' test.[94]

There are good reasons to be cautious when having serious thoughts about opening a Pandora's Box. Neither a super Appeals Chamber nor a semi Supreme Court fits into the functional and legal framework in which the ICTY Appeals Chamber is designed and established to be operating. It should be noted that Article 25 of the ICTY Statute and Article 24 of the ICTR Statute does not address any other situation than an appeal from a Trial Chamber to the Appeals Chamber and the latter cannot be said to have inherent powers to create such a process on its own.[95] Although being true that the right to an appeal is a fundamental safeguard in criminal proceedings and therefore an honourable objective, it has been stated that the failure to provide a right of appeal for convictions that originate in the highest tribunal is not a fundamental violation of this right.[96]

7. Concluding Remarks

Admitting and evaluating evidence in proceedings before the ICTY Appeals Chamber is a complicated matter not the least because the legal landscape is constantly changing. Torn between competing objectives to do justice, deter crime and to restore and maintain peace, the Appeals Chamber performs three main functions: a control (corrective) function over the proceedings before the Trial Chambers, a function to maintain the Rule of Law and, finally, to develop international law. Having these considerations in mind and confronted with these issues of evidence on appeal, the situation is unfortunately getting more complicated through concerns about the importance of the court hierarchy, a fair and final hearing within a reasonable time, judicial economy and the division of roles and tasks between the actors in the proceedings.

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93. Director of Public Prosecutions (Nauru) *v.* Fowler, 154 CLR 627, at 630 (1984).
94. Vujin Contempt Decision, *supra* note 19, at 6.
95. Dissenting Opinion of Judge Wald, at 1 *et seq*., *in* Vujin Contempt Decision, *id.*
96. *Id.*, at 3.

Accepting this as a point of departure for the application of Rule 115, a certain test shall be done to examine whether the fresh evidence may be admitted. The first requirement is that the evidence was not available at the time of the trial, which could be applied more generously when the defendant is the moving party than if the prosecution seeks admission of new evidence. The reason is that the condition of due diligence may be applied differently with reference to the principle of *in dubio pro reo* and the element of double jeopardy (*non-bis-in-idem*).

Secondly, there is a requirement that the admission of the fresh evidence is in the interests of justice. According to the ICTY jurisprudence this may be the case when the evidence is relevant, credible and would probably show that the conviction or sentence was unsafe. Although some cases formulate the last condition in a different way (could have) and set a rather low standard on the second condition (credible evidence) it allocates the execution of the test to the pre-appellate stage. This may strike back on the practical meaning of the test, since the opposing party may challenge the veracity of the evidence in a special hearing that might end up with a re-trial. Another complication is that trial transcripts are used on appeal, leaving the judges without first hand impressions of live witness testimony that was used by the Trial Chamber in its findings.

The test designed in the *Čelebići Appeals Chamber Judgement* may provide guidance when to order a re-trial assuming the appeal was successful and noting that factual issues should normally be treated more strictly than matters of law. A factual issue may be referred to a Trial Chamber and the Appeals Chamber may order a witness to appear for a re-hearing in the appellate proceedings. This 'elevator' may be an effective tool to strike and maintain an appropriate balance of powers and functions between the actors in the criminal process.