Leiden Journal of International Law, 17 (2004), pp. 67–102
 Printed in the United Kingdom DOI: 10.1017/S092215650400161X

HAGUE INTERNATIONAL TRIBUNALS

The Precedent of Appeals Chambers Decisions in the International Criminal Tribunals

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Abstract

The principle of judicial precedent set out by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia raises the five following issues. (i) Is the Appeals Chamber bound by its previous decisions? (ii) Are the trial chambers bound by Appeals Chamber decisions on both legal and factual issues? (iii) Are the trial chambers bound by the decisions of other trial chambers? (iv) Is the Appeals Chamber of the ICTY bound by the decisions of the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) and vice versa? (v) Are the trial chambers of the ICTR bound by the decisions of the ICTY Appeals Chamber and vice versa? The author of this article aims to show that the Appeals Chambers, most trial chambers and individual judges of the International Criminal Tribunals comply with the principle of judicial precedent. However, the principle of judicial precedent is arguably weak, because it was established by case law only. The author also intends to demonstrate that the trial chambers and an individual trial judge of the ICTY have recently departed from the practice of judicial precedent in sensitive legal areas, that is (i) the test to be applied to a motion for a judgement of acquittal; (ii) the issue of evidence; (iii) the standard to be applied to a motion for cross-access to confidential documents in other cases; and (iv) the issue of provisional release.

Key words

Appeals Chambers; International Criminal Tribunals; non-compliance; principle of judicial precedent (*stare decisis*); trial chambers

The Appeals Chamber of the International Tribunal for the former Yugoslavia (ICTY) formulated the principle of judicial precedent in its Judgement of 24 March 2000 in *Prosecutor* v. *Žlatko Aleksovski*,[1] that is, three-and-a-half years ago. This principle raises at least five different issues. (i) Is the Appeals Chamber bound by its previous

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1. *Prosecutor v. Žlatko Aleksovski* (*Lašva River Valley*), Case No. IT-95-14/1-A, Appeals Chamber, Judgement, 24 March 2000 (hereafter the '*Aleksovski* Appeals Judgement').

decisions? (ii) Are the trial chambers bound by Appeals Chamber decisions on both legal and factual issues? (iii) Are the trial chambers bound by the decisions of other trial chambers? (iv) Is the Appeals Chamber of the ICTY bound by the decisions of the Appeals Chamber of the International Criminal Tribunal for Rwanda (hereinafter the 'ICTR')[2] and vice versa? (v) Are the trial chambers of the ICTR bound by the decisions of the ICTY Appeals Chamber and vice versa? This article tries to deal with the principle of judicial precedent, so-called *stare decisis*, and tries to provide answers to the five questions mentioned. The principle of judicial precedent is arguably weak, because it was established by case law only. I shall also show that the trial chambers and an individual trial judge of the ICTY have recently departed from the practice of judicial precedent in sensitive legal areas.

Case law is traditionally deprived of any precedential value in international law: Article 38(1)(d) of the Statute of the International Court of Justice provides that judicial decisions are only 'subsidiary means for the determination of rules of law'. However, the two International Criminal Tribunals in general and their Appeals Chambers in particular represent a broader trend to change this tradition and point to an evolution on judicial precedent. As two commentators have noted, '[t]he Appeals Chambers of the ICTY and ICTR are helping to remake the role of precedent in international law.'[3] Article 21(2) of the Rome Statute establishing the International Criminal Court (ICC) of 17 July 1998 also provides that '[t]he Court may apply principles and rules of law as interpreted in its previous decisions.'

In the *Aleksovski* Judgement, the Appeals Chamber of the ICTY considered the issue of judicial precedent for the first time. It held that it may overturn a trial chamber's finding of fact where the evidence relied on could not have been accepted by any reasonable tribunal or where the evaluation of the evidence is wholly erroneous. Further, the Appeals Chamber held that 'a proper construction of the Statute, taking due account of its text and purpose, yields the conclusion that in the interests of certainty and predictability', it 'should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice'.[4] Circumstances justifying such a departure from its judicial precedent 'include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*',[5] that is, a judicial decision which has been 'wrongly decided, usually because the judge or judges were ill-informed about the applicable law'.[6] Therefore the Appeals Chamber emphasized that departure from its previous decisions shall remain the exception and only after the most careful consideration.

As for the scope of judicial precedent, the Appeals Chamber stated that '[w]hat is followed in previous decisions is the legal principle [*ratio decidendi*]' and that

2. There is no joint Appeals Chamber. The members of the two distinct Appeals Chambers of the International Criminal Tribunals are by law the same, pursuant to Art. 13(4) of the ICTR Statute. However, each Appeals Chamber is legally distinct from the other.
3. See M. A. Drumbl and K. S. Gallant, 'Appeals in the Ad Hoc International Criminal Tribunals: Structure, Procedure and Recent Cases', (2001) 3 *Journal of Appellate Practice and Process* 634.
4. *Aleksovski* Appeals Judgement, para. 107.
5. Through lack of care or inadvertence. It refers to a decision of a court which fails to apply a relevant provision.
6. Para. 108.

> the obligation to follow that principle applies in similar cases, or substantially similar cases. This means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision.[7]

Moreover, '[t]here is no obligation to follow previous decisions which may be distinguished for one reason or another from the case before the court.'[8] Where previous decisions of the Appeals Chamber are conflicting, the Appeals Chamber held that it 'is obliged to determine which decision it will follow, or whether to depart from both decisions for cogent reasons in the interests of justice'.[9]

In addition, the Appeals Chamber considered that 'a proper construction of the Statute requires that the *ratio decidendi* of its previous decisions is binding on Trial Chambers'[10] in order to comply 'with the intention of the Security Council' that the Tribunal apply 'a single, unified, coherent and rational corpus of law'.[11] The Appeals Chamber explained that

> 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.[12]

The Appeals Chamber of the ICTY did not define the *ratio decidendi* of a previous decision. Judge Mohamed Shahabuddeen appended a Separate Opinion[13] to the Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction which was rendered by the ICTY Appeals Chamber on 21 May 2003.[14] Judge Shahabuddeen drew a distinction between the *ratio decidendi* of a decision and 'the authority it exerts over the way other cases are decided'.[15] The judge considered that there is an exception to the authority normally exerted by a *ratio decidendi* where the ruling in question was 'merely assumed by the court to be correct in the absence of argument or because of the making of a concession and was not the result of the court's own deliberate inquiry and considered finding'.[16] Further, Judge Shahabuddeen considered that

7. Para. 110.
8. *Ibid.*
9. Para. 111.
10. See also *Prosecutor v. Zejnil Delalić et al. (Čelebići prison camp)*, Case No. IT-96-21-A, Appeals Chamber, Judgement, 20 Feb. 2001 (hereinafter '*Delalić et al.* Appeals Judgement'), para. 8.
11. Para. 113.
12. *Ibid.*
13. The Secretary-General has admitted the principle of allowing judges to append separate or dissenting opinions (Report of the Secretary-General pursuant to Paragraph 2 of Security Council Res. 808 [1993], S/25704, 3 May 1993, 29, para. 118).

    The judges of the ICTY expressly authorized separate or dissenting opinions, by initially adopting Rule 88(C) at the 2nd Plenary Session, held on 11 Feb. 1994 (IT/32) and amending Sub-rule (B) to Rule 117 at the 5th Plenary Session held on 16 Jan.–3 Feb. 1995 (IT/32/Rev.3). The judges of the ICTY subsequently deleted Rule 88 at the 18th Plenary Session, held on 9 and 10 July 1998 (IT/32/Rev.13). ICTR Rules 88(C) and 118(B) also provide that 'separate or dissenting opinions may be appended'. Art. 83(4) of the Rome Statute, which applies to the proceedings on appeal only, states that 'a judge may deliver a separate or dissenting opinion on a question of law'.
14. *Prosecutor v. Milan Milutinović et al.* (*Kosovo*), Case No. IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003.
15. Para. 18.
16. Para. 19.

where such a finding is relevant to a manifestly important point bearing on the court's jurisdiction, it 'cannot be relegated to the ranks of *obiter dicta* on the mere ground that the proposition was conceded by the party concerned; it is *ratio decidendi* and exerts the force normally flowing from this'.[17] Judge Shahabuddeen drew attention to the fact that 'the Tribunal is not in the position of a domestic court operating with a largely settled corpus of law', so that 'its juristic mission is more exploratory than is that of a normal domestic court'.[18]

Judge David Hunt also appended a Separate Opinion to the same Decision. The judge considered both this 'rather fluid concept' of *ratio decidendi* and *obiter dictum*, as well as the stated justification for being 'more exploratory', to be inconsistent with the *Aleksovski* Appeals Judgement.[19] Further, Judge Hunt stated that 'both overlook what *must* be regarded as the binding nature of every *ratio decidendi* and what *may* be regarded as the persuasive nature of some *obiter dicta*'.[20] Judge Hunt maintained his

> understanding that the *ratio decidendi* of a decision is the statement of legal principle (express or implied) which was necessary for the disposal of the case, whereas an *obiter dictum* is such a statement of legal principle which goes beyond what was necessary for the disposal of the case.[21]

Thus the judge concluded that the distinction drawn by Judge Shahabuddeen is contrary to the *Aleksovski* Appeals Judgement and, if accepted, that such a distinction would destroy the cohesion which this Judgement sought to impose.[22]

In the *Aleksovski* Judgement, the ICTY Appeals Chamber also held that

> decisions of Trial Chambers, which are bodies with co-ordinate jurisdiction, have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive.[23]

The Appeals Chamber did not, however, define the notion of 'interest of justice' to which it referred in paragraphs 107 and 111.

Judge Hunt appended a Declaration in which he added:

> The need for certainty in the criminal law means that the Appeals Chamber should never disregard a previous decision simply because the members of the Appeals Chamber at that particular time do not personally agree with it. The Appeals Chamber should depart from its previous decision only with caution. . . . The appropriate test . . . is that a departure from a previous decision is justified only when the interests of justice require it.[24]

The judge subsequently gave examples, illustrating the application of that test and thus, implicitly, revealing his personal understanding of what 'the interests of justice' should mean.[25]

17. Para. 24.
18. Para. 26.
19. Para. 39.
20. *Ibid.*
21. Para. 43.
22. *Ibid.*
23. Para. 114.
24. Para. 8.
25. *Ibid.*

https://doi.org/10.1017/S092215650400161X Published online by Cambridge University Press

On 18 May 2000, Judge Hunt, sitting as single judge, rendered a Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge in *Prosecutor* v. *Radoslav Brđanin and Momir Talić*.[26] With reference to the *Aleksovski* Appeals Judgement, Judge Hunt found that the discussion of that proposition made clear that it is restricted to issues of law. He conceded that the Judgement's statement that the decisions of the Appeals Chamber on questions of both law and fact are final may be equivocal, but did not understand that Judgement as asserting that trial chambers *in one case* are bound by decisions of fact made by the Appeals Chamber *in another case*. Judge Hunt consequently held that trial chambers are bound by Appeals Chamber decisions rendered in other cases on issues of law (*ratio decidendi*) but not on issues of fact.

On 31 May 2000, the Appeals Chamber of the ICTR rendered a Decision in *Prosecutor* v. *Laurent Semanza*[27] in which it stated that 'the Appeals Chamber should follow its previous Decisions, but should be free to depart from them for cogent reasons in the interests of justice'.[28] Judge Shahabuddeen appended a Separate Opinion to the Decision in which he questioned the legal status of the statement contained in the *Aleksovski* Appeals Judgement. The judge reiterated that the Statute does not expressly mention the duty of the Appeals Chamber to follow its previous decisions. Judge Shahabuddeen added that a decision of the Appeals Chamber interpreted the Statute as meaning that

> the Chamber is legally obliged to follow its previous Decisions subject to a limited power of departure. The interpretation of the Statute so made is meaningless unless the decision by which it is made has itself – and in its entirety – to be followed as a matter of law. But whether it has to be followed as a matter of law depends on the very interpretation of the Statute which it makes.[29]

Judge Shahabuddeen concluded that it was not apparent to him that 'a decision of the Appeals Chamber can of its own authority do that' and that 'the decision is drawing on itself for its authority'.[30] Consequently,

> a decision of the Appeals Chamber interpreting the Statute to mean that it is obliged in law to follow its previous decisions subject to a limited power of departure does not, because it cannot, deprive that Chamber of competence to reverse the interpretation given in that decision itself. If the Appeals Chamber can do that in a later decision, it is difficult to see what the earlier decision achieves. There is no basis for saying that, unless the departure falls within the exceptions visualized by the earlier decision, the interpretation given in that earlier decision cannot be reversed. The limitations imposed by the earlier decision cannot prevent the Appeals Chamber from later setting aside the very holding which fixed the limitations.[31]

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26. *Prosecutor v. Radoslav Brđanin and Momir Talić (Krajina)*, Case No. IT-99-36-PT, Judge David Hunt, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, 18 May 2000 (hereinafter '*Brđanin and Talić* Decision of 18 May 2000').
27. *Laurent Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Appeals Chamber, Decision, 31 May 2000 (hereinafter '*Semanza* Appeals Decision').
28. *Ibid.*, para. 92.
29. Para. 11.
30. *Ibid.*
31. Para. 12.

https://doi.org/10.1017/S092215650400161X Published online by Cambridge University Press

Judge Shahabuddeen submitted that 'nothing in the Statute can be interpreted as creating an obligation in law to follow previous decisions subject to a limited power of departure'.[32] For this reason,

> the limits of permissible implication are reached by an argument that the statutory provisions in question evidence the existence of such an obligation. No doubt, the provisions of the Statute may be interpreted as enabling the Appeals Chamber, if it sees fit, to adopt a practice of following its previous decisions subject to a limited power of departure; they do not go far enough to be interpreted as requiring it to act in that way as a matter of existing statutory compulsion.[33]

The judge interpreted the pronouncement

> not as asserting that the Statute itself lays down a requirement for the Appeals Chamber to follow its previous decisions subject to a limited power of departure, but as asserting that the Statute empowers the Appeals Chamber to adopt a practice to that end and that such a practice has now been adopted.[34]

Judge Shahabuddeen asserted that 'the stability of the law should not be jeopardized by the mere circumstance that a recomposed bench of the Appeals Chamber happens to consist of members who personally disagree with the previous decision'.[35]

In sum, the Appeals Chamber of the ICTY provided answers to questions (i), (ii), and (iii) above in the *Aleksovski* Judgement, as follows.

1. Is the Appeals Chamber bound by its previous decisions?

The Appeals Chamber of each ad hoc tribunal is not legally bound by its previous decisions including the decision in which it ruled that its prior decisions are binding. However, in practice it will follow its previous decisions unless there is good cause for a departure.[36] Thus, the *Aleksovski* Appeals Judgement resolved the issue as to the binding nature of its previous decisions on its discretion. Judge Shahabuddeen appended a Partial Dissenting Opinion to the Decision on Admissibility of Prosecution Investigator's Evidence rendered by the ICTY Appeals Chamber on 30 September 2002 in *Prosecutor* v. *Slobodan Milošević*.[37] The judge stated therein that, in his 'understanding – if not also the general understanding – a decision of the Appeals Chamber is in strict law not a binding authority on that Chamber; but of course it is highly persuasive on that Chamber and should only be departed from sparingly'.[38]

Up to the time this article was written, the ICTR Appeals Chamber never directly contradicted its previous decisions. The ICTY Appeals Chamber directly contradicted its previous decisions only twice. In the Judgement rendered by the ICTY Appeals

32. Para. 13.
33. *Ibid.*
34. Para. 17.
35. Para. 37.
36. Para. 107.
37. *Prosecutor v. Slobodan Milošević ('Kosovo', 'Croatia' and 'Bosnia & Herzegovina')*, Case No. IT-02-54-AR73.2, Appeals Chamber, Decision on Admissibility of Prosecution Investigator's Evidence, 30 Sept. 2002.
38. Para. 38.

https://doi.org/10.1017/S092215650400161X Published online by Cambridge University Press

Chamber on 7 October 1997 in *Prosecutor* v. *Dražen Erdemović*,[39] the majority[40] held that a prohibited act committed as part of a crime against humanity, that is with an awareness that the act formed part of a widespread or systematic attack on a civilian population, is – all else being equal – a more serious offence than an ordinary crime and 'should ordinarily entail a heavier penalty than if it were proceeded upon on the basis that it were a war crime'. However, the majority[41] of the same Appeals Chamber later held[42] that no distinction could be made between the relative seriousness of crimes against humanity and war crimes,[43] and that all things being equal, the authorized penalties should be the same.[44] Thus, the ICTY Appeals Chamber directly contradicted itself in the *Erdemović* Judgement and *Tadić* Judgement in Sentencing Appeals as to whether there is a hierarchy between these two types of crimes.

The ICTY Appeals Chamber directly contradicted its previous decisions for the second time in the following circumstances. On 10 December 1998, Trial Chamber II of the ICTY rendered its Judgement in *Prosecutor* v. *Anto Furundžija*,[45] holding that the offence of torture in an armed conflict requires that 'at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity'.[46] In the *Furundžija* Appeals Judgement, the ICTY Appeals Chamber endorsed this finding of the trial chamber.[47] On 22 February 2001, Trial Chamber II of the ICTY rendered its Judgement in *Prosecutor* v. *Dragoljub Kunarac et al.*,[48] in which it considered that the presence of a state 'official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international customary law'.[49] Thus, the trial chamber abandoned the element that the perpetrator of torture must be a public official. It departed from the definition given in the *Furundžija* Trial Judgement since it rejects the requirement of official involvement. Therefore the trial chamber expressly rejected the need for proof of official involvement. It cited the *Furundžija* Trial Judgement even though the Appeals Chamber had endorsed this requirement as well. The ICTY Appeals Chamber subsequently held in the *Kunarac et al.* case[50] that 'the public official

39. *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, Appeals Chamber, Judgement, 7 Oct. 1997 (hereinafter '*Erdemović* Appeals Judgement'). See also Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 20.
40. See *ibid.*, the Separate and Dissenting Opinion of Judge Li.
41. See *ibid.*, the Separate Opinion of Judge Cassese.
42. *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A and IT-94-1-A*bis*, Appeals Chamber, Judgement in Sentencing Appeals, 26 Jan. 2000 (hereinafter '*Tadić* Judgement in Sentencing Appeals').
43. Para. 69. See also *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Appeals Chamber, Judgement, 21 July 2000 (hereinafter '*Furundžija* Appeals Judgement'), paras. 243 and 246–50; Declaration of Judge Vohrah, paras. 88 and 89.
44. *Ibid.*
45. *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Trial Chamber II, Judgement, 10 Dec. 1998 (hereinafter '*Furundžija* Trial Judgement').
46. *Ibid.*, para. 162.
47. Para. 111.
48. *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Trial Chamber II, Judgement, 22 Feb. 2001 (hereinafter '*Kunarac et al.* Trial Judgement').
49. *Ibid.*, para. 496.
50. *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber, Judgement, 12 June 2002.

requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture'.[51] The Appeals Chamber affirmed the position of Trial Chamber II in excluding the public official requirement when considering criminal responsibility of an individual for torture.[52] Thus the Appeals Chamber of the ICTY contradicted its previous decision by departing from the *Furundžija* Judgement. As of the time this article was written, this has been the only time that one of the two Appeals Chambers has departed from the *ratio decidendi* of one of its previous decisions.[53] However, it failed to provide cogent reasons for such a departure.

Nevertheless, a particular difficulty regarding the application of judicial precedent may arise from the following situation. On 27 February 2001, the Appeals Chamber of the ICTY rendered its Appeal Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, in *Prosecutor* v. *Duško Tadić*.[54] Therein, it considered that a person found guilty of contempt of the Tribunal by the Appeals Chamber ruling in the first instance shall have the right to appeal the conviction; thus it admitted the appeal.[55] In a different case, Judge Shahabuddeen appended a Separate Opinion to the Judgement of the ICTR Appeals Chamber in *Georges Anderson Nderubumwe Rutaganda* v. *Prosecutor*[56] in which he considered that,

> With respect to the juridical force of the decision of the second panel of the Appeals Chamber, nothing in the Statute or in the [International Covenant on Civil and Political Rights] authorises the strangeness of an arrangement whereby one panel of the same judicial body can overturn a decision of, or remit to, or otherwise direct, another panel of the same judicial body.[57]

The judge added that '[i]t is difficult to see that the Statute gives more juridical force to decisions of one panel of the Appeals Chamber than to those of another'.[58] Judge

51. *Ibid.*, para. 148.
52. See *Prosecutor v. Mladen Naletilić and Vinko Martinović (Tuta and Štela)*, Case No. IT-98-34-T, Trial Chamber I Section A, Judgement, 31 March 2003, para. 338.
    On 30 Nov. 2000, the UN Security Council adopted Res. 1329 in which it decided to establish a pool of *ad litem* judges in the ICTY. Art. 12(2) of the ICTY Statute, as amended by Annex I to Security Council Res. 1329 of 30 Nov. 2000 provides *inter alia* that '[e]ach Trial Chamber to which *ad litem* judges are assigned may be divided into sections of three judges each, composed of both permanent and ad litem judges'.
53. See *Prosecutor v. Radislav Krstić (Srebrenica-Drina Corps)*, Case No. IT-98-33-A, Appeals Chamber, Decision on Application for Subpoenas, 1 July 2003, Dissenting Opinion of Judge Shahabuddeen (hereinafter 'Dissenting Opinion of Judge Shahabuddeen from the Appeals Decision of 1 July 2003'). The Judge considered that the decision represents a departure from the Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 rendered by the ICTY Appeals Chamber on 29 Oct. 1997 in *Prosecutor v. Tihomir Blaškić* (Case No. IT-95-14-AR108*bis*) and that such a departure is not supported by cogent reasons (para. 17).
54. *Prosecutor v. Duško Tadić (Prijedor)*, Case No. IT-94-1-AR77, Appeals Chamber, Appeal Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 27 Feb. 2001.
55. See *ibid.*, the Separate Opinion of Judge Wald dissenting from the Finding of Jurisdiction (hereinafter 'Separate Opinion of Judge Wald dissenting from the Finding of Jurisdiction') in which the Judge emphasised that the Appeals Chamber should not be transformed 'into a two-level entity for contempt only'.
56. *Georges Anderson Nderubumwe Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Appeals Chamber, Judgement, 26 May 2003 (hereinafter '*Rutaganda* Appeals Judgement').
57. *Ibid.*, para. 34.
58. *Ibid.*

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Shahabuddeen concluded that 'two decisions of equal juridical force and on the same matter would be left on record'.[59]

In the *Aleksovski* Judgement, the ICTY Appeals Chamber also provided answers to the two following questions.

2. Are the trial chambers bound by Appeals Chamber Decisions on both legal and factual issues?

Trial chambers are bound by the *ratio decidendi* of Appeals Chamber Decisions.[60] In practice, the trial chambers of both International Criminal Tribunals generally comply with the principle of judicial precedent.[61] However, both the trial chambers and an individual judge of the ICTY recently rendered decisions which depart from this principle. I will discuss examples regarding the test to be applied to a motion for judgement of acquittal (A); the distinction between admissibility and reliability of evidence (B); the requirements for access to confidential material in another case (C); and provisional release and the definition of a state (D).

2.1. The test to be applied to a motion for judgement of acquittal

In respect of the test to be applied under Rule 98*bis* of the ICTY Rules of Procedure and Evidence (Rules), Trial Chamber III of the ICTY rendered a Decision in the *Kordić and Čerkez* case[62] in which the judges ruled that the true test to determine whether there is sufficient evidence for a reasonable trial chamber to base a conviction in respect of a motion for acquittal under ICTY Rule 98*bis* is applied on the basis that the chamber is not generally required to consider questions of credibility and reliability in dealing with a motion under ICTY Rule 98*bis* – those matters being left to the end of the case, except in very limited circumstances.[63] In the *Kunarac et al.* case,[64] Trial Chamber II of the ICTY held that the test to be applied is whether there is evidence (if accepted) on which a reasonable tribunal of fact *could* convict – that is to say, evidence (if accepted) on which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge

59. *Ibid.*
60. Para. 113.
61. See for instance *Prosecutor v. Radoslav Brđanin (Krajina)*, Case No. IT-99-36-T, Trial Chamber II Section A, Decision on Prosecution's Second Request for a Subpoena of Jonathan Randal, 30 June 2003, para. 29.
Regarding the ICTY Appeals Decision in the *Randal* case, see X. Tracol, 'The Status of War Correspondents and Their Obligation to Testify', *Légipresse*, 198 (Jan./Feb. 2003), 7–11.
62. *Prosecutor v. Dario Kordić and Mario Čerkez (Lašva River Valley)*, Case No. IT-95-14/2-T, Trial Chamber III, Decision on Defence Motions for Judgement of Acquittal, 6 April 2000 (hereinafter '*Kordić and Čerkez* Decision of 6 April 2000').
63. Para. 28. See also *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-T, Trial Chamber II, Decision on *Kamuhanda*'s Motion for Partial Acquittal Pursuant to Rule 98*bis* of the Rules of Procedure and Evidence, 20 Aug. 2002 (hereinafter '*Kamuhanda* Decision of 20 Aug. 2002'), para. 19; *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, Trial Chamber II, Decision on Kajelijeli's Motion for Partial Acquittal Pursuant to Rule 98*bis*, 13 Sept. 2002, para. 15; *Prosecutor v. Stanislav Galić (Sarajevo)*, Case No. IT-98-29-T, Trial Chamber I Section B, Decision on the Motion for the Entry of the Acquittal of the Accused Stanislav *Galić*, 3 Oct. 2002 (hereinafter '*Galić* Decision of 3 Oct. 2002'), para. 11.
64. *Prosecutor v. Dragoljub Kunarac et al. (Foča)*, Case No. IT-96-23-T, Trial Chamber II, Decision on Motion for Acquittal, 3 July 2000 (hereinafter '*Kunarac et al.* Trial Chamber Decision of 3 July 2000').

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in question,[65] and that a distinction has to be drawn between the credibility of a witness and the reliability of that witness's evidence. In the *Kvočka et al.* case,[66] Trial Chamber I of the ICTY ruled that the applicable objective standard of proof under ICTY Rule 98*bis* is whether a reasonable trier of fact could, on the evidence presented by the prosecutor, taken together with all the reasonable inferences and applicable legal presumptions and theories that might be applied to it, convict the accused.

In the *Delalić et al.* Judgement, the Appeals Chamber held that '[t]he test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question.'[67] Thus it conclusively resolved the issue of the appropriate standard to be applied on a motion under ICTY Rule 98*bis*. On 5 July 2001, the same Appeals Chamber rendered its Judgement in *Prosecutor* v. *Goran Jelisić*,[68] reiterating that Trial Chamber II had correctly stated the test in the *Kunarac et al.* trial chamber Decision of 3 July 2000 in ruling that the correct test is whether there is evidence (if accepted) on which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question.[69]

Nevertheless, Trial Chamber III of the ICTY, composed of Judges Patrick Robinson (presiding), Richard May, and Mohamed Fassi Fihri, subsequently[70] adopted the same test that it had enunciated in the *Kordić and Čerkez* Decision of 6 April 2000. The trial chamber expressed the opinion that the 'test does not differ in substance' from that which was applied in the *Jelisić* Appeals Judgement. Still, the question remains why Trial Chamber III of the ICTY insisted on applying it, thereby unnecessarily departing from the principle of judicial precedent. Presumably the trial chamber preferred departing from such a principle than from the test enunciated in its earlier decision. However, this decision represents a departure from judicial precedent, since the test – arguably not different in substance – is not that set out by the Appeals Chamber of the ICTY in the *Delalić et al.* and *Jelisić* Judgements.

The judges of the ICTR added Rule 98*bis*, entitled 'Motion for Judgement of Acquittal', to the ICTR Rules of Procedure and Evidence at the 5th Plenary Session held from 1 to 8 June 1998. However, the rule was not applied until 27 September 2001.[71] The trial chamber subscribed to the interpretation contained in the *Jelisić* Appeals Judgement regarding the test to be applied on a Motion for Judgement of Acquittal under Rule 98*bis*.[72] The judges of the ICTR amended ICTR Rule 98*bis* at the 12th Plenary Session held on 5 and 6 July 2002. On 25 September 2002, Trial Chamber I of the ICTR rendered a decision on Motions for Acquittal in *Prosecutor* v.

65. *Ibid.*, para. 3.
66. *Prosecutor v. Miroslav Kvočka et al. (Omarska, Keraterm & Trnopolje Camps)*, Case No. IT-98-30/1-PT, Trial Chamber I, Decision on Defence Motions for Acquittal, 15 Dec. 2000.
67. Para. 434.
68. *Prosecutor v. Goran Jelisić (Brčko)*, Case No. IT-95-10-A, Appeals Chamber, Judgement, 5 July 2001 (hereinafter '*Jelisić* Appeals Judgement').
69. *Ibid.*, paras. 36 and 37.
70. *Prosecutor v. Duško Sikirica et al. (Keraterm Camp)*, Case No. IT-95-8-T, Trial Chamber III, Judgement on Defence Motions to Acquit, 3 Sept. 2001.
71. *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Trial Chamber III, Decision, 27 Sept. 2001.
72. *Ibid.*, paras. 14 and 15. See also the *Kamuhanda* Decision of 20 Aug. 2002, para. 18.

Ferdinand Nahimana et al.,[73] in which it found that in both ICTR and ICTY Rules 98 *bis* 'the operative words, namely that "the evidence is insufficient to sustain a conviction", are the same'.[74] Consequently, the trial chamber accepted that 'the Appeals Chamber's formulation of the law of Rule 98*bis* of the ICTY binds the present Chamber in its interpretation and application of the corresponding ICTR rule'.[75] Accordingly, it held that the interpretation of an ICTY Rule by the Appeals Chamber of the ICTY binds a trial chamber of the ICTR in its interpretation of an ICTR Rule when two rules are substantially the same. However, there is no legal basis for this finding because the two International Criminal Tribunals are legally independent. However, it would seem odd for the two Tribunals to reach divergent conclusions and set out different tests with respect to similar provisions of their Statutes and Rules. Although the interpretation by the ICTY Appeals Chamber of ICTY Rule 98*bis* does not technically bind an ICTR trial chamber in its interpretation of ICTR Rule 98*bis*, it is sound policy for trial chambers to apply tests set out by the Appeals Chamber of the other Tribunal, thus ensuring a consistent, even-handed and uniform case law in both ad hoc Tribunals which develop a new system of law.

In the *Galić* Decision of 3 October 2002, Trial Chamber I Section B of the ICTY also applied the standard of proof emanating from the case law of the ICTY 'as laid out in the *Jelisić* Appeals Chamber Judgement' (para. 10). On 11 October 2002, Trial Chamber II of the ICTY rendered its Written Reasons for Decision on Motions for Acquittal in *Prosecutor* v. *Blagoje Simić et al.*,[76] in which it adopted 'the standard enunciated by the *Jelisić* Appeal Judgement'.[77] On 31 October 2002, Trial Chamber II of the ICTY rendered a Decision on Rule 98*bis* Motion for Judgement of Acquittal in *Prosecutor* v. *Milomir Stakić*,[78] in which it also adopted the test developed in the *Jelisić* Appeals Judgement.[79]

In conclusion, only Trial Chamber III of the ICTY refuses to apply the test set out by the Appeals Chamber of the ICTY in the *Delalić et al.* and *Jelisić* Judgements.

2.2. The distinction between admissibility and reliability of evidence

On 19 January 1998, Trial Chamber II of the ICTY rendered two Decisions in *Prosecutor* v. *Zejnil Delalić et al.* In the first decision,[80] Trial Chamber II rejected the submission of the defence that the trial chamber in determining admissibility should first assess the reliability of the evidence and then rule on admissibility, with the result that unreliable evidence would be excluded. It stated, *inter alia*, that

73. *Prosecutor v. Ferdinand Nahimana et al. (The Media trial)*, Case No. ICTR-99-52-T, Trial Chamber I, Reasons for Oral Decision of 17 Sept. 2002 on the Motions for Acquittal, 25 Sept. 2002.
74. *Ibid.*, para. 16.
75. *Ibid.*
76. *Prosecutor v. Blagoje Simić et al. (Bosanski Šamac)*, Case No. IT-95-9-T, Trial Chamber II, Written Reasons for Decision on Motions for Acquittal, 11 Oct. 2002.
77. *Ibid.*, para. 8.
78. *Prosecutor v. Milomir Stakić (Prijedor)*, Case No. IT-97-24-T, Trial Chamber II, Decision on Rule 98*bis* Motion for Judgement of Acquittal, 31 Oct. 2002.
79. *Ibid.*, para. 12.
80. Decision on Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucić, to Provide a Handwriting Sample (hereinafter '*Mucić* Handwriting Decision').

> reliability is the invisible golden thread which runs through all the components of admissibility. Yet, it is a cardinal rule of construction of legislation, that where the words of a provision are clear and unambiguous, the task of interpretation does not arise. So it is with Sub-rule 89(C). Thus, *it is neither necessary nor desirable to add to the provisions of Sub-rule 89(C) a condition of admissibility which is not expressly prescribed by that provision.*[81]

In the second decision,[82] Trial Chamber II reiterated that '[t]his view of reliability as a separate requirement, independent of those provided for by Sub-rule 89(C), has been rejected by the trial chamber in the *Mucić* Handwriting Decision'.[83] It stated that there was 'no mention of reliability in the Rules',[84] but that 'it is an implicit requirement of the Rules that the Trial Chamber give due consideration to indicia of reliability when assessing the relevance and probative value of evidence at the stage of admissibility'.[85] Trial Chamber II of the ICTY thus ruled that, while evidence

81. *Ibid.*, para. 32 (emphasis added).
82. *Ibid.*, Decision on the Motion of the Prosecution for the Admissibility of Evidence.
83. *Ibid.*, para. 19.
84. However, the judges of the ICTY had already adopted ICTY Rule 95 at the 5th Plenary Session held on 16 Jan.–3 Feb. 1995 (IT/32/Rev.3). ICTY Rule 95 provides that '[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its *reliability* or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings' (emphasis added). The judges of the ICTR adopted the same provision on 29 June 1995.

    At their 23rd Plenary Session held on 29 Nov.–1 Dec. and 13 Dec. 2000, the judges of the ICTY deleted ICTY Rule 94*ter* and initially adopted ICTY Rule 92*bis*. ICTY Rule 92*bis* (C) reads as follows:

    > A written statement not in the form prescribed by paragraph (B) may nevertheless be admissible if made by a person who has subsequently died, or by a person who can no longer with reasonable diligence be traced, or by a person who is by reason of bodily or mental condition unable to testify orally, if the Trial Chamber:
    > (i) is so satisfied on a balance of probabilities; and
    > (ii) finds from the circumstances in which the statement was made and recorded that there are satisfactory indicia of its *reliability*. (emphasis added)

    The judges of the ICTR adopted the same provision at the 12th Plenary Session held on 5 and 6 July 2002.

    Regarding the interpretation of ICTY Rule 92*bis* (C), see also *Prosecutor v. Mladen Naletilić and Vinko Martinović (Tuta and Štela)*, Case No. IT-98-34-T, Trial Chamber I Section A, Decision on the Prosecutor's Request for Public Version of Trial Chamber's 'Decision on the Motion to Admit Statement of Deceased Witnesses [. . .] ' of 22 Jan. 2002, 27 Feb. 2002.
85. Para. 20. See *Prosecutor v. Zejnil Delalić et al. (Čelebići prison camp)*, Case No. IT-96-21-AR.2, Bench of the Appeals Chamber, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal Against the Decision of the Trial Chamber of 19 Jan. 1998 for the Admissibility of Evidence, 4 March 1998, in which the judges quoted this observation with apparent approval (paras. 19–21). The judges of the ICTY amended the Rules of Procedure and Evidence, introducing jurisdiction for an interlocutory appeal during the pre-trial and trial proceedings and establishing a 'filter mechanism' for certain types of appeal, under which either party can lodge an appeal against Decisions of the Trial Chamber only where a screening bench of three appointed judges of the Appeals Chamber grants leave 'upon good cause being shown', or upon other relevant criteria being satisfied. See *Prosecutor v. Zejnil Delalić et al. (Čelebići prison camp)*, Case No. IT-96-21-AR72.1, Bench of the Appeals Chamber, Decision on Application for Leave to Appeal (Separate Trials), 14 Oct. 1996, in which the judges stated that '[c]learly, the purpose of this "sifting" device is to prevent the Appeals Chamber from being flooded with unimportant or unnecessary appeals which unduly prolong pre-trial proceedings.' The bench added that '[t]he "filter" was not considered necessary for questions of jurisdiction, because of intrinsic importance and preliminary nature of such questions: therefore, they must be decided upon prior to any consideration of the merits' (*ibid.*, para. 16); see also the Separate Opinion of Judge Wald dissenting from the Finding of Jurisdiction, in which the judge pointed out that 'this provides merely a gate-keeping provision for early appeal of what can later be appealed as a matter of right at the time of final judgement and is not a decision on the merits' (2).

may be excluded because it is unreliable, that evidence must be shown to be reliable before being admissible.[86]

On 21 July 2000, the Appeals Chamber of the ICTY rendered its Decision on Appeal Regarding Statement of a Deceased Witness in *Prosecutor* v. *Dario Kordić and Mario Čerkez*[87] in which it referred to the *Aleksovski* Appeals Judgement and concluded that it supports the proposition that the reliability of a statement is relevant to its admissibility,[88] not only to its weight.[89] In the view of the judges, the two issues are, therefore, closely related. The Appeals Chamber stated that a piece of evidence may be so lacking in terms of the indicia of reliability that it is not 'probative' and therefore inadmissible.[90]

However, on 15 February 2002, Trial Chamber II Section A of the ICTY, composed of Judges Carmel Agius (Presiding), Ivana Janu, and Chikako Taya, rendered its Order on the Standards Governing the Admission of Evidence in *Prosecutor* v. *Radoslav Brđanin and Momir Talić*[91] in which, in respect of documentary evidence other than hearsay, it did 'not agree that the determination of the issue of reliability, when it arises, should be seen as a separate, first step in assessing a piece of evidence offered for admission'.[92] It considered that 'the notion of establishing indicia of reliability ought not to be confused with having admissibility predicated on proof of reliability'.[93]

The trial chamber thus reverted to the analysis provided by Trial Chamber II of the ICTY two years before the Appeals Chamber of the ICTY settled the issue. Although the three Orders of Trial Chamber II are obviously inconsistent with the Appeals Decision of 21 July 2000, none of the parties appealed against these rulings. Therefore, the three Orders still stand.

2.3. Requirements to be met by a party seeking access to confidential material in another case

On 26 September 2000, the Appeals Chamber of the ICTY rendered its Decision on the Appellant's Motions for the Production of Material, Suspension or Extension

86. Regarding the distinction between the notions of admissibility and reliability of a witness's evidence, see the text-box compiled by the author, Judicial Supplement 18, at 2.
87. *Prosecutor v. Dario Kordić and Mario Čerkez (Lašva River Valley)*, Case No. IT-95-14/2-AR73.5, Appeals Chamber, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000 (hereinafter 'Appeals Decision of 21 July 2000').
88. Regarding the definition of the reliability of a witness's evidence and the distinction to be drawn between that reliability and that witness's credibility, see the *Kunarac et al.* Trial Chamber Decision of 3 July 2000.
89. Para. 24. See also *Akayesu* Appeals Judgement, paras. 286 and 287.
90. See, however, *Rutaganda* Appeals Judgement, stating that 'il ne convient toutefois pas d'interpréter ce principe comme signifiant qu'une preuve certaine de la fiabilité doit nécessairement être rapportée afin qu'un élément de preuve soit admis' (*ibid.*, para. 33). The Appeals Chamber also considered that 'au stade de l'examen de la recevabilité d'un élément de preuve, un commencement de preuve de sa fiabilité, autrement dit l'établissement d'indices de fiabilité suffisants, est tout à fait acceptable' (para. 266).
91. *Prosecutor v. Radoslav Brđanin and Momir Talić (Krajina)*, Case No. IT-99-36-PT, Trial Chamber II Section A, Order on the Standards Governing the Admission of Evidence, 15 Feb. 2002.
92. See also *Prosecutor v. Milomir Stakić (Prijedor)*, Case No. IT-97-24-T, Trial Chamber II (Judges Wolfgang Schomburg [Presiding], Mohamed Fassi Fihri, and Volodymyr Vassylenko), Order on the Standards Governing the Admission of Evidence, 16 April 2002, in which the Trial Chamber made exactly the same finding (para. 9).
93. Guideline no. 9.

of the Briefing Schedule and Additional Filings in *Prosecutor* v. *Tihomir Blaškić*.[94] Therein, it examined the extremely sensitive issue of cross-access by the appellants and accused to non-public documents filed in other cases.[95] The Appeals Chamber held that the requesting party bears the onus of identifying 'exactly what material it seeks and the purpose the material would be used for'.[96]

On 10 October 2001, ICTY Trial Chamber II, presided over by Judge David Hunt, rendered its Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material,[97] in which it ruled that '[t]he *obiter* remark by the Appeals Chamber . . . relating to the requirements to be satisfied for a request under Rule 75(D)' was inapplicable to an application for access.[98] The trial chamber found that 'such a standard is too high for such a purpose'.[99] It added that '[a]n applicant seeking access who is able to show a legitimate forensic purpose for that access cannot be expected to identify exactly what material he needs if he does not know (due to the confidential orders) what form the material is in or what its exact nature is'.[100] The trial chamber explained that '[t]he underlying reason for requiring an identification of the documents or of the nature of the documents sought is to prevent an accused or applicant from conducting a "fishing expedition" – that is, seeking access to material in order to discover whether he has any case at all to make.'[101] It concluded that '[i]t is a sufficient onus to require the party to identify as clearly as possible the documents or the nature of the documents to which he seeks access.'[102]

On 20 February 2002, Judge Florence Mumba rendered the Decision Granting Access to Non-public Materials in *Prosecutor* v. *Tihomir Blaškić*,[103] considering the comment in the earlier *Blaškić* Decision that the material supporting requests presented under Rule 75(D) must be exactly identified – *obiter dictum* in any event – 'as setting too strict and too high a standard'.[104] The judge refused to follow the decision, opting for a less strenuous standard instead.

94. *Prosecutor v. Tihomir Blaškić (Lašva River Valley)*, Case No. IT-95-14/2-A, Appeals Chamber, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule and Additional Filings, 26 Sept. 2000 (hereinafter '*Blaškić* Decision').
95. See *Prosecutor v. Dario Kordić and Mario Čerkez (Lašva River Valley)*, Case No. IT-95-14/2-A, Appeals Chamber, Order on Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić and Čerkez* case, 19 July 2002; see also Prosecutor's Request for Reconsideration of the Appeals Chamber's 19 July 2002 'Order on Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić and Čerkez* Case' and Request for an Extension of Time (Public Redacted Version), 12 Aug. 2002; and Response to Prosecutor's Request for Reconsideration of the Appeals Chamber's 19 July 2002 'Order on Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić and Čerkez* Case' and Request for an Extension of Time (Confidential), 26 Aug. 2002.
96. Para. 55.
97. *Prosecutor v. Enver Hadžihasanović et al. (Central Bosnia)*, Case No. IT-01-47-PT, Trial Chamber II, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, 10 Oct. 2001.
98. *Ibid.*, para. 11.
99. *Ibid.*
100. *Ibid.*
101. *Ibid.*
102. *Ibid.* See also *Prosecutor v. Zejnil Delalić et al. (Čelebići prison camp)*, Case No. IT-96-21-A, Appeals Chamber, Decision on Motion to Preserve and Provide Evidence, 22 April 1999, Separate Opinion of Judge Hunt, para. 4.
103. *Prosecutor v. Tihomir Blaškić (Lašva River Valley)*, Case No. IT-95-14-A, Judge Florence Mumba, Decision Granting Access to non-Public Materials, 20 Feb. 2002.
104. *Ibid.*, para. 7.

On 8 March 2002, the Appeals Chamber of the ICTY rendered its Decision on Appellant's Motion Requesting Assistance of the Appeals Chamber in Gaining Access to Non-public Transcripts and Exhibits from the *Aleksovski* case in the same case.[105] It held that a party seeking access to material must (i) describe the general nature of the documents as clearly as possible; and (ii) show that such access is likely materially to assist its appeal. On 23 April 2002, the same Appeals Chamber rendered its Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case in *Prosecutor* v. *Enver Hadžihasanović et al.*,[106] in which it reiterated this twofold test.[107] Thus the Appeals Chamber of the ICTY departed from the *Blaškić* Decision and implicitly endorsed the more liberal position adopted by Trial Chamber II and the individual judge of the ICTY in the *Hadžihasanović et al.* and *Blaškić* cases.

2.4. Provisional release and the definition of a state

On 21 January 2002, defence counsel for Dragan Jokić filed a 'Proposal for Provisional Release'[108] which Trial Chamber II of the ICTY denied on 28 March 2002[109] pursuant

105. *Prosecutor v. Tihomir Blaškić (Lašva River Valley)*, Case No. IT-95-14-A, Appeals Chamber, Decision on Appellant's Motion Requesting Assistance of the Appeals Chamber in Gaining Access to Non-public Transcripts and Exhibits from the *Aleksovski* case, 8 March 2002.

106. *Prosecutor v. Enver Hadžihasanović et al. (Central Bosnia)*, Case No. IT-01-47-AR73, Appeals Chamber, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002.

107. See also *Prosecutor v. Radoslav Brđanin and Momir Talić (Krajina)*, Case No. IT-99-36-PT, Trial Chamber II Section A, Decision on Joint Motion by Momčilo Krajišnik and Biljana Plavšić for Access to Trial Transcripts of Both Open and Closed Sessions and Documents and Things Filed Under Seal, 13 March 2002; *Prosecutor v. Tihomir Blaškić (Lašva River Valley)*, Case No. IT-95-14-A, Appeals Chamber, Decision on Appellant's Mario Dario Kordić and Mario Čerkez Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-public Post Trial Pleadings and Hearing Transcripts, 16 May 2002, para. 14; Decision on Paško Ljubičić's Motion for Access to Confidential Material, Transcripts and Exhibits, 4 Dec. 2002, paras. 13 and 17; *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-PT, Trial Chamber I, 27 Nov. 2002, Decision on Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in *Prosecutor v. Žlatko Aleksovski*, 3; Decision on Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in *Prosecutor v. Anto Furundžija*, 3; Order Concerning Motion Filed by Paško Ljubičić for Access to Confidential Supporting Material, Transcripts and Exhibits in *Prosecutor v. Kupreškić et al.*, 3; *Prosecutor v. Kvočka et al. (Omarska, Keraterm and Trnopolje Camps)*, Case No. IT-98-30/1-A, Appeals Chamber, Decision on Momčilo Gruban's Motion for Access to Material, 13 Jan. 2003, para. 5; *Prosecutor v. Tihomir Blaškić (Lašva River Valley)*, Case No. IT-95-14-A, Appeals Chamber, Decision on Joint Motion of Enver Hadžihasanović, Mehmed Alagić and Amir Kubura for Access to All Confidential Material, Transcripts and Exhibits in the Case *Prosecutor v. Tihomir Blaškić*, 24 Jan. 2003, 4.

108. Regarding the extremely controversial issue of provisional release, see *Prosecutor v. Miroslav Kvočka et al. (Omarska, Keraterm and Trnopolje Camps)*, Case No. IT-98-30-PT, Trial Chamber I, Decision on Motion for Provisional Release of Miroslav Kvočka, 2 Feb. 2000; *Prosecutor v. Radoslav Brđanin and Momir Talić (Krajina)*, Case No. IT-99-36-PT, Trial Chamber II, Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000; Decision on Motion by Momir Talić for Provisional Release, 28 March 2001; *Prosecutor v. Momčilo Krajišnik and Biljana Plavšić (Bosnia and Herzegovina)*, Case No. IT-00-39 & 40-PT, Trial Chamber III, Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release, 8 Oct. 2001 (hereinafter '*Krajišnik* Decision'); *Prosecutor v. Miodrag Jokić (Dubrovnik)* and *Prosecutor v. Rahim Ademi (Medak Pocket)*, Cases No. IT-01-42-PT and IT-01-46-PT, Trial Chamber I Section A, Orders on Motions for Provisional Release, 20 Feb. 2002; *Prosecutor v. Milan Martić (Zagreb Bombing)*, Case No. IT-95-11-PT, Trial Chamber I, Decision on the Motion for Provisional Release, 10 Oct. 2002.

In the opposite sense, see the Dissenting Opinion of Judge Patrick Robinson appended to the *Krajišnik* Decision; *Prosecutor v. Enver Hadžihasanović et al. (Central Bosnia)*, Case No. IT-01-47-PT, Trial Chamber II, Decisions Granting Provisional Release to Enver Hadžihasanović, Mehmed Alagić and Amir Kubura, 19 Dec. 2001; *Prosecutor v. Mile Mrkšić (Vukovar Hospital)*, Case No. IT-95-13/1-PT, Trial Chamber II, Decision on Mile Mrkšić's Application for Provisional Release, 24 July 2002.

109. *Prosecutor v. Vidoje Blagojević et al. (Srebrenica-Zvornik Brigade)*, Case No. IT-02-53-PT, Trial Chamber II, Decision on Request for Provisional Release of Accused Jokić, 28 March 2002.

to ICTY Rule 65(B). The trial chamber examined the character of Republika Srpska as an entity within the state of Bosnia and Herzegovina, and considered that Republika Srpska cannot be regarded as a state unto itself.[110] It reasoned that 'it is not for the Trial Chamber to interfere in the intra-state matters of Bosnia and Herzegovina'.[111] Trial Chamber II emphasized that '[i]t is for the Government of Bosnia and Herzegovina to elaborate internally a *modus procedendi* which provides the International Tribunal with the necessary and reliable guarantees of a State in the sense of Rule 65.'[112] It concluded that '[o]n the basis of the above considerations, the Trial Chamber, without going into further details of other prerequisites of Rule 65, is not satisfied with the guarantees provided.'[113]

On 5 April 2002, Dragan Jokić filed an application for leave to appeal against the Decision of the trial chamber.[114] On 18 April 2002, a bench of the Appeals Chamber rendered the Decision on Application by Dragan Jokić for Leave to Appeal[115] granting leave to appeal.[116] The bench applied ICTY Rule 2, which defines the term 'state' within the meaning of the ICTY Rules. It equalled Republika Srpska as an entity of Bosnia and Herzegovina to a state, pursuant to ICTY Rule 2. The bench found, *inter alia*, that it is usual and certainly advisable for an applicant for provisional release to provide a guarantee from a governmental body, because the Tribunal has no power to execute its own arrest warrant on an applicant in the territory of the former Yugoslavia; thus, 'it needs to rely upon local authorities within that territory or upon international bodies to effect arrests on its behalf'.[117] On 28 May 2002, the Appeals Chamber endorsed this holding and concurred with the Decision of the bench.[118] It held that a guarantee provided by Republika Srpska is valid, although not necessarily sufficient in every case. The Appeals Chamber upheld the appeal and granted provisional release to the accused.[119] Thus, it regarded Republika Srpska, an entity of Bosnia and Herzegovina, as a state within the specific context of the ICTY.

On 22 July 2002, Trial Chamber II of the ICTY, composed of Judges Wolfgang Schomburg (presiding), Florence Mumba, and Carmel Agius, rendered the Decisions on Vidoje Blagojević's and Dragan Obrenović's Applications for Provisional Release[120] in which it expressly disagreed 'with the Appeals Chamber that the Tribunal can "rely upon local authorities within that territory" in so far as this refers specifically and exclusively to the Entities of Bosnia and Herzegovina'.[121] The trial chamber

110. *Ibid.*, paras. 25–7.
111. *Ibid.*, para. 29.
112. *Ibid.*
113. *Ibid.*, para. 32.
114. The possibility of interlocutory appeal is explicitly allowed where a trial chamber has exercised discretion in determining whether provisional release should be granted, pursuant to ICTY Rule 65(D).
115. *Prosecutor v. Vidoje Blagojević et al. (Srebrenica-Zvornik Brigade)*, Case No. IT-02-53-AR65, Bench of the Appeals Chamber, Decision on Application by Dragan Jokić for Leave to Appeal, 18 April 2002 (hereinafter '*Jokić* Decision').
116. *Ibid.*, para. 10.
117. *Ibid.*, para. 8.
118. *Prosecutor v. Vidoje Blagojević et al. (Srebrenica-Zvornik Brigade)*, Case No. IT-02-53-AR65, Appeals Chamber, Decision on Application by Dragan Jokić for Provisional Release, 28 May 2002, 2.
119. *Ibid.*, 2 and 3.
120. *Prosecutor v. Vidoje Blagojević et al. (Srebrenica-Zvornik Brigade)*, Case No. IT-02-60-PT, Trial Chamber II, Decisions on Vidoje Blagojević's and Dragan Obrenović's Applications for Provisional Release, 22 July 2002 (hereinafter 'first *Blagojević* Decision' and 'first *Obrenović* Decision' respectively).
121. *Ibid.*, paras. 36 and 46.

reasoned that the Rules of the Tribunal 'can only be read in accordance with fundamental norms of public international law'.[122] It referred to Article I paragraphs 1[123] and 3[124] of the Constitution of Bosnia and Herzegovina, finding that both provisions make 'a clear distinction between the State of Bosnia and Herzegovina under public international law and its two component federal units, the Entities'.[125] The trial chamber also referred to the Third Partial Decision on the Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina rendered by the Constitutional Court of Bosnia and Herzegovina on 1 July 2002,[126] and 'noted that this interpretation is in line with Article III, paragraph 2(b) of the Constitution of Bosnia and Herzegovina'.[127] It stated that 'according to the Constitution of Bosnia and Herzegovina neither the Republika Srpska nor the Federation of Bosnia and Herzegovina are to be considered States' and that 'only Bosnia and Herzegovina is the legal subject under public international law in the territory in question'.[128] Furthermore, the trial chamber underlined that it does not have the authority to interpret the Constitution of Bosnia and Herzegovina. Unlike the bench of the Appeals Chamber in the *Jokić* Decision, it considered that Article III, paragraph 2(c) of the Constitution[129] is clearly 'restricted to "their respective jurisdictions" and so does not regulate international criminal matters'.[130] The trial chamber asserted that 'it would act *ultra vires* should it base itself upon any guarantees offered by a federal unit under Rules 2 and 65(B)'.[131] Accordingly, it excluded the guarantees given by the government of Republika Srpska from its consideration of the fact at issue. The trial chamber held that the term 'state' under ICTY Rule 65(B) 'must be interpreted in such a way that the Tribunal does not refer to an Entity as being a State'.[132] Last, it noted that 'in light of the politically fragile situation in Bosnia and Herzegovina a reference by the Tribunal to one of the Entities as a State would not be in line with the Tribunal's mandate "to contribute to the restoration and maintenance of peace in the former Yugoslavia."'[133,134] Yet the trial chamber maintained that its inability to accept the Republika Srpska guarantees was not 'the decisive element' in

122. *Ibid.*, paras. 35 and 46.
123. 'The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina", shall continue its legal existence under international law as a State, with its internal structure modified as provided herein and with its present internationally recognised borders. It shall remain a Member State of the United Nations and may as Bosnia and Herzegovina maintain or apply for membership in organisations within the United Nations system and other international organisations.'
124. 'Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska (hereinafter 'the Entities').'
125. Paras. 39 of the first *Blagojević* Decision and 49 of the first *Obrenović* Decision.
126. Case No. U 5/98-III, Human Rights Law Journal 22, No. 1–4, 31 Oct. 2002, 144 to 146.
127. 'Each Entity shall provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honor the international obligations of Bosnia and Herzegovina . . . '.
128. Paras. 42 of the first *Blagojević* Decision and 52 of the first *Obrenović* Decision.
129. 'The Entities shall provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for the internationally recognized human rights and fundamental freedoms referred to in Art. II above, and by taking such other measures as appropriate.'
130. Paras. 44 of the first *Blagojević* Decision and 54 of the first *Obrenović* Decision.
131. Footnote added, paras. 50 of the first *Blagojević* Decision and 60 of the first *Obrenović* Decision.
132. *Ibid.*
133. S/RES/827 (25 May 1993), Preamble, para. 6.
134. Paras. 51 of the first *Blagojević* Decision and 61 of the first *Obrenović* Decision.

refusing the applications,[135] nor the 'final basis' for its Decisions.[136] Rather, it based its decisions on its 'reasonable doubts whether the guarantees offered can eliminate or significantly minimize the risk of flight'.[137] The trial chamber further stated that it was not satisfied that either Vidoje Blagojević or Dragan Obrenović would appear for trial, and accordingly refused provisional release to both of them.[138]

On 24 and 30 July 2002 respectively, Vidoje Blagojević and Dragan Obrenović filed applications for leave to appeal, which a bench of the Appeals Chamber granted on 27 August 2002,[139] on the basis that the trial chamber had excluded relevant evidence from its consideration of the issue.[140]

135. *Ibid.*, paras. 34 and 44 respectively.
136. *Ibid.*, paras. 52 and 62 respectively.
137. *Ibid.*, paras. 54 and 64 respectively.
138. *Ibid.*, paras. 54 and 55, and 64–6 respectively.
139. *Prosecutor v. Vidoje Blagojević et al. (Srebrenica-Zvornik Brigade)*, Case No. IT-02-60-AR65.2, Bench of the Appeals Chamber, Decisions on Applications by Blagojević and Obrenović for Leave to Appeal, 27 Aug. 2002 (hereinafter 'Decisions of 27 Aug. 2002').

The vast majority of applications for leave to appeal have been unsuccessful to date: see for instance *Prosecutor v. Dragoljub Kunarac and Radomir Kovać (Foča)*, Case No. IT-96-23-AR65, Bench of the Appeals Chamber, Order Rejecting Application for Leave to Appeal, 25 Nov. 1999; *Prosecutor v. Zoran Kupreškić et al. (Lašva River Valley)*, Case No. IT-95-16-AR65, Bench of the Appeals Chamber, Decisions on Application for Leave to Appeal of 18 Aug., 29 Sept. and 1 Dec. 1999; *Prosecutor v. Blagoje Simić et al. (Bosanski Šamac)*, Case No. IT-95-9-AR65, Bench of the Appeals Chamber, Decision on Application for Leave to Appeal, 19 April 2000; *Prosecutor v. Radoslav Brđanin and Momir Talić (Krajina)*, Case No. IT-99-36-AR65, Bench of the Appeals Chamber, Decision on Application for Leave to Appeal, 7 Sept. 2000, 3; *Prosecutor v. Momčilo Krajišnik and Biljana Plavšić (Bosnia and Herzegovina)*, Case No. IT-00-39 & 40-AR65, Bench of the Appeals Chamber, Decision on Application for Leave to Appeal, 14 Dec. 2001; *Prosecutor v. Paško Ljubičić (Lašva River Valley)*, Case No. IT-00-41-AR65, Bench of the Appeals Chamber, Decision Rejecting the Application for Leave to Appeal, 16 Sept. 2002; *Prosecutor v. Milan Martić (Zagreb Bombing)*, Case No. IT-95-11-AR65, Bench of the Appeals Chamber, Decision on Application for Leave to Appeal, 18 Nov. 2002; *Prosecutor v. Nikola Šainović and Dragoljub Ojdanić (Kosovo)*, Case No. IT-99-37-AR65.2, Bench of the Appeals Chamber, Decision Refusing Leave to Appeal, 26 June 2003 and Decision Refusing Ojdanić Leave to Appeal, 27 June 2003; *Prosecutor v. Milutinović (Kosovo)*, Case No. IT-99-37-AR65.3, Bench of the Appeals Chamber, Decision Refusing Milutinović Leave to Appeal, 3 July 2003.

Apart from the case in point, the only two examples of successful applications for leave to appeal are *Prosecutor v. Dragoljub Ojdanić and Nikola Šainović (Kosovo)*, Case No. IT-99-37-AR65, Bench of the Appeals Chamber, Decision Granting Leave to Appeal, 16 July 2002; and *Prosecutor v. Mile Mrkšić (Vukovar Hospital)*, Case No. IT-95-13/1-AR65, Bench of the Appeals Chamber, Decision on Application for Leave to Appeal, 26 Aug. 2002, in which the bench considered that 'good cause may be satisfied by showing that the Impugned Decision is inconsistent with other decisions of the International Tribunal on the same issues' (3).

Consequently, the case law of the Appeals Chamber of the ICTY on provisional release is extremely scarce. Regarding the legal finding that the burden of proof that provisional release should be ordered rests on the accused, see *Prosecutor v. Momčilo Krajišnik and Biljana Plavšić (Bosnia and Herzegovina)*, Case No. IT-00-39 & 40-AR73.2, Appeals Chamber, Decision on Interlocutory Appeal by Momčilo Krajišnik, 26 Feb. 2002, para. 22; see also *Prosecutor v. Miroslav Kvočka et al. (Omarska, Keraterm and Trnopolje Camps)*, Case No. IT-98-30/1-A, Appeals Chamber, Order of the Appeals Chamber on the Motion for Provisional Release by Miroslav Kvočka, 11 Sept. 2002. Regarding legal findings on the guarantee of State's co-operation and the determination of its reliability, see *Prosecutor v. Mile Mrkšić (Vukovar Hospital)*, Case No. IT-95-13/1-AR65, Appeals Chamber, Decision on Appeal Against Refusal to Grant Provisional Release, 8 Oct. 2002, para. 11. Regarding a detailed consideration of the operation of ICTY Rule 65(B), see also *Prosecutor v. Nikola Šainović & Dragoljub Ojdanić (Kosovo)*, Case No. IT-99-37-AR65, Appeals Chamber, Decision on Provisional Release, 30 Oct. 2002, in which the Appeals Chamber laid down a non-exhaustive list of factors which a Trial Chamber must take into account before granting provisional release. See also *Prosecutor v. Vidoje Blagojević et al. (Srebrenica-Zvornik Brigade)*, Case No. IT-02-60-AR65.4, Appeals Chamber, Decision on Provisional Release Application by Blagojević, 17 Feb. 2003, in which it considered that '[t]he proximity of the start of the trial clearly may be relevant to the determination of the provisional release application, as it has a bearing upon the weight to be placed upon the applicant's personal undertaking to appear' (*ibid.*, para. 10).
140. *Ibid.*, at 3.

On 3 October 2002, the Appeals Chamber rendered its Decision on Provisional Release of Vidoje Blagojević and Dragan Obrenović,[141] in which it held that 'the Trial Chamber was bound to accept and to apply the decision of the Appeals Chamber in Jokić'.[142] It reiterated that 'there is *nothing* in either the Tribunal's Statute or the Rules of Procedure and Evidence which limits the identity of the body giving an undertaking to a state as recognised by public international law, and therefore sees no cogent reason to depart from its previous jurisprudence'.[143] It added that 'an a priori exclusion of such undertakings on the basis that they emanate from an entity not recognised as a state by public international law amounts to an error of law . . . [which] invalidated the Trial Chamber's decision'.[144] The Appeals Chamber recognized that the trial chamber may nevertheless have reached the same conclusion that Vidoje Blagojević and Dragan Obrenović would not appear for trial even if it *had* taken the Republika Srpska guarantees into consideration.[145] Accordingly, the Appeals Chamber quashed the decisions, returned the matter to the trial chamber for reconsideration, and directed it 'to take into account the guarantees of the Republika Srpska when determining whether the accused would appear for trial if provisionally released'.[146]

Judge Shahabuddeen appended a Declaration in which he considered that the trial chamber 'may express its views as it wishes where, as here, the structure of the actual decision of the Appeals Chamber permitted examination of the issue in question'.[147] Judge David Hunt appended a Separate Opinion in which he underlined that

> It is open to a Trial Chamber to express a reasoned disagreement with such a decision of the Appeals Chamber (as indeed the trial chamber did here) and such reasoned disagreement may in the appropriate case lead to a reconsideration by the Appeals Chamber of its earlier decision.

The judge added that 'the Trial Chamber is in the meantime required to accept loyally the decision by which it is bound'.[148] Judge Hunt asserted that

> What is important in these cases is the power of arrest, which Republika Srpska does have, and the political will to effect an arrest of the particular accused in question, which may be in question so far as Republika Srpska is concerned in the particular case.[149]

On 19 November 2002, Trial Chamber II rendered its Decisions on Vidoje Blagojević's and Dragan Obrenović's Applications for Provisional Release,[150] in

141. *Prosecutor v. Vidoje Blagojević et al. (Srebrenica-Zvornik Brigade)*, Case No. IT-02-60-AR65 & IT-02-60-AR65.2, Appeals Chamber, Decision on Provisional Release of Vidoje Blagojević and Dragan Obrenović, 3 Oct. 2002 (hereinafter 'first *Blagojević* and *Obrenović* Appeals Decision').
142. *Ibid.*, para. 6.
143. *Ibid.*
144. *Ibid.*, para. 7.
145. *Ibid.*
146. *Ibid.*, para. 8.
147. Para. 8.
148. Para. 5. See *supra*, section 2.3. Requirements to be met by a party seeking access to confidential material in another case.
149. *Ibid.*
150. *Prosecutor v. Vidoje Blagojević et al. (Srebrenica-Zvornik Brigade)*, Case No. IT-02-60-PT, Trial Chamber II, Decisions on Vidoje Blagojević's and Dragan Obrenović's Applications for Provisional Release, 19 Nov. 2002 (hereinafter 'second *Blagojević* Decision' and 'second *Obrenović* Decision' respectively).

which it explained that its decisions to deny the requests were 'independent of the guarantees provided by the authorities which gave them'.[151] Further, it considered that the first *Blagojević* and *Obrenović* Decisions were based de facto solely on insufficiency of evidence that, if released, (i) the accused would appear for trial; and (ii) Dragan Obrenović 'would not pose a danger to any victim, witness or other person'.[152] Trial Chamber II also (i) found that no real facts had been put forward by the defence to cause it to reconsider its Decisions;[153] and (ii) referred to (a) the factual

151. *Ibid.*, 2 and 3.
152. *Ibid.*, 3.
153. Regarding reconsideration, see *Prosecutor v. Tihomir Blaškić (Lašva River Valley)*, Case No. IT-95-14-T, Trial Chamber I, Decision on the Defence Motion for Reconsideration of the Ruling to Exclude from Evidence Authentic and Exculpatory Documentary Evidence, 30 Jan. 1998; *Prosecutor v. Milan Kovačević (Prijedor)*, Case No. IT-97-24-PT, Trial Chamber II, Decision on Defence Motion to Reconsider, 30 June 1998; *Prosecutor v. Dario Kordić and Mario Čerkez (Lašva River Valley)*, Case No. IT-95-14/2-PT, Trial Chamber III, Decision on Prosecutor's Motion for Reconsideration, 15 Feb. 1999, in which the Trial Chamber held that Motions for reconsideration of a previous Decision are not provided for in the Rules and that they do not form part of the procedure of the Tribunal (2); *Prosecutor v. Zejnil Delalić et al. (Čelebići prison camp)*, Case No. IT-96-21-A, Appeals Chamber, Order of the Appeals Chamber on Hazim Delić's Emergency Motion to Reconsider Denial of Request for Provisional Release, 1 June 1999, in which the Appeals Chamber held that it was appropriate to reconsider its previous Decision where 'particular circumstances' justified such reconsideration (4); *Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-AR72, Appeals Chamber, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para. 73; Separate Opinion of Judge Shahabuddeen, paras. 2 to 11; *Prosecutor v. Radoslav Brđanin and Momir Talić (Krajina)*, Case No. IT-99-36-PT, President Claude Jorda, Order on the Prosecution's Motion for Reconsideration of the Order Issued by the President on 11 Sept. 2000, 11 Jan. 2001, in which the President considered an application for reconsideration of a previous Decision (4); *Kupreškić et al.* Appeals Judgement, in which the Appeals Chamber appeared to have ruled that it has 'inherent powers' to 'review' a previous decision without reference to the underlying 'reconsideration' principles (paras. 67 and 68); *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Appeals Chamber, Decision on the Appeal Against the Oral Decision of 7 Feb. 2002 Dismissing the Motion for Review of the Decision of 29 Jan. 2002 Relating to the Appearance of the French Expert Witness Dominique Lecomte and the Acceptance of his Report, 16 April 2002, 2; *Prosecutor v. Jean-Bosco Bagosora et al.*, Case No. ICTR-98-41-A, Appeals Chamber, Decision on Interlocutory Appeal from Refusal to Reconsider Decisions Relating to Protective Measures and Application for a Declaration of 'Lack of Jurisdiction', 2 May 2002, in which the Appeals Chamber held that '[w]hether or not a Trial Chamber reconsiders a prior decision is itself a discretionary decision' (*ibid.*, para. 10); *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Trial Chamber III, Decision on Defence Motion to Reconsider Decision Denying Leave to Call Rejoinder Witnesses, 9 May 2002, in which the Trial Chamber found that '[i]n deciding whether to exercise its discretion in a given case, the Chamber may consider, *inter alia*, any new facts or legal arguments brought to the attention of the Chamber, and the possibility and gravity of prejudice to a party' (para. 8); *Prosecutor v. Slobodan Milošević ('Kosovo', 'Croatia' and 'Bosnia & Herzegovina')*, Case No. IT-02-54-AR73, Bench of the Appeals Chamber, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, 16 May 2002, in which the Bench emphasised that 'a Trial Chamber may always reconsider a decision it has previously made, and not only because of unforeseen circumstances' (*ibid.*, para. 17); Case No. IT-02-55-Misc 4, Duty Judge David Hunt, Reconsideration of Order of 9 May 2002, 17 July 2002; *Prosecutor v. Nikola Šainović & Dragoljub Ojdanić (Kosovo)*, Case No. IT-99-37-AR65, Appeals Chamber, Decision on Provisional Release, 30 Oct. 2002, Dissenting Opinion of Judge David Hunt, in which he disagreed with the majority that there were no grounds for reconsideration; *Prosecutor v. Zdravko Mucić et al. (Čelebići prison camp)*, Case No. IT-96-21-A*bis*, Appeals Chamber, Judgement on Sentence Appeal, 8 April 2003 (hereinafter '*Mucić et al.* Appeals Judgement'), in which the Appeals Chamber was satisfied that it 'has an inherent power to reconsider any decision, including a judgment where it is necessary to do so in order to prevent an injustice . . . [and] where it is persuaded:

> (a) (i) that a clear error of reasoning in the previous judgment has been demonstrated by, for example, a subsequent decision of the Appeals Chamber itself, the International Court of Justice, the European Court of Human Rights or a senior appellate court within a domestic jurisdiction, or
> (ii) that the previous judgment was given *per incuriam*; and
> (b) that the judgment of the Appeals Chamber sought to be reconsidered has led to an injustice. (*ibid.*, para. 49)

The Appeals Chamber considered that '[t]he absence of any reference in the Tribunal's Statute to the existence of a power to reconsider is no answer to the prospect of injustice where the Tribunal possesses an inherent jurisdiction to prevent injustice. . . . There is nothing in the Statute which is inconsistent with the existence

material that it had already mentioned in its original Decisions which suggested that neither Vidoje Blagojević nor Dragan Obrenović would appear for trial if granted provisional release; and (b) the prospect that the trial would start in May 2003.[154] Therefore it remained not satisfied that, if released, the accused would appear for trial[155] and again denied both motions for provisional release.[156]

On 26 November 2002, Vidoje Blagojević and Dragan Obrenović each sought leave to appeal against the Decisions of the trial chamber for a second time. On 16 January 2003, a bench of three judges of the Appeals Chamber rendered its Decision on Applications by Blagojević and Obrenović for Leave to Appeal,[157] in which it noted that the trial chamber had formally acknowledged the specific direction given by the Appeals Chamber to take the Republika Srpska guarantees into account when determining that issue.[158] However, it also noted that the trial chamber 'made no express statement' nor gave any 'other clear indication that it had complied with that direction when stating that it remained of the same view as that expressed in its original decisions'.[159] The bench of the Appeals Chamber decided that it was not for it 'to determine whether, despite the absence of any express acknowledgement by the Trial Chamber that it *had* taken those guarantees into consideration, the Trial Chamber nevertheless did so *sub silentio*'.[160] The bench added that the silence of the trial chamber 'as to whether it has performed that primary function must, in the circumstances, give rise to the possibility that it erred in making' its decisions.[161] It concluded that '[o]nly the full Bench of the Appeals Chamber can determine whether such an error was made.'[162] However, the bench of three judges considered that even if such an error *were* made in the Decision refusing Dragan Obrenović provisional release,

> such an error would not have affected that particular decision . . . because the Trial Chamber has now unequivocally made it clear that it would in any event have refused him provisional release upon the basis that it was not satisfied that he would not pose a danger to any victim, witness or other person.[163]

Consequently, leave to appeal was granted by the bench to Vidoje Blagojević but refused to Dragan Obrenović.[164]

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of an inherent power of the Appeals Chamber to reconsider its judgment in the appropriate case' (*ibid.*, para. 52). It added that '[t]here is nothing in the Rules which is inconsistent with the existence of such an inherent power' (*ibid.*, para. 53).

See also *Prosecutor v. Vesselin Šljivančanin*, Case No. IT-95-13/1-PT, Judge Theodor Meron, Decision on Assignment of Defence Counsel, 20 Aug. 2003, in which the President of the ICTY quashed the Registrar's decision refusing to assign two attorneys to be his Tribunal-paid defence counsel and remanded the matter to him for reconsideration in light of his decision (para. 23).

154. *Ibid.*, at 2 and 3.
155. *Ibid.*, at 3.
156. Second *Obrenović* Decision, at 3, and second *Blagojević* Decision, at 4.
157. *Prosecutor v. Vidoje Blagojević et al. (Srebrenica-Zvornik Brigade)*, Case No. IT-02-60-AR65.3 & IT-02-60-AR65.4, Bench of the Appeals Chamber, Decision on Applications by Blagojević and Dragan Obrenović for Leave to Appeal, 16 Jan. 2003.
158. *Ibid.*, para. 10.
159. *Ibid.*
160. *Ibid.*, para. 13.
161. *Ibid.*
162. *Ibid.*
163. *Ibid.*, para. 14.
164. *Ibid.*, para. 17.

At the 27th Plenary Session, held on 12 December 2002, the judges of the ICTY amended ICTY Rule 2 by adding a Sub-Rule (ii) defining the term 'state' as 'an entity recognised by the constitution of Bosnia and Herzegovina, namely, the Federation of Bosnia and Herzegovina and the Republika Srpska'.[165]

On 17 February 2003, the Appeals Chamber rendered the Decision on Provisional Release Application by Blagojević,[166] in which it considered that '[t]he proximity of the start of the trial clearly may be relevant to the determination of the provisional release application, as it has a bearing upon the weight to be placed upon the applicant's personal undertaking to appear.'[167] The Appeals Chamber further found that

> The contrast between the Trial Chamber's express reference to the absence of 'new' facts and its silence concerning the presence of a fact which was 'new' to its consideration strongly suggests that indeed it did *not* take those guarantees into consideration as directed.[168]

Therefore it was satisfied that 'the Trial Chamber did *not* comply with the direction to take the Republika Srpska guarantee into account in its reconsideration of Blagojević's application for provisional release'.[169] The Appeals Chamber commented that 'the failure of the Trial Chamber to comply with the direction has led to an unfortunate and wholly unnecessary delay in reaching a proper conclusion in relation to the liberty of Blagojević'.[170] It held that

> The only issue which remains to be determined in the application for provisional release is that which the Trial Chamber has failed twice to consider: whether Blagojević has established that, when the valid guarantee from Republika Srpska is taken into account, he will appear for trial . . . as the Appeals Chamber is now in the same position as the Trial Chamber to determine that one remaining issue.[171]

However, it was not satisfied that the accused would appear for trial 'even when the valid guarantee from Republika Srpska is taken into account'.[172] Consequently, the Appeals Chamber dismissed the appeal.[173]

On 26 February 2003, Vidoje Blagojević filed a Motion to Disqualify the trial chamber on the grounds of actual bias and appearance of bias. The matter was referred to the Bureau, which rendered its Decision on Blagojević's Application Pursuant to Rule 15(B) on 19 March 2003.[174] As for actual bias, the Bureau expressed the view that

> the Trial Chamber's behaviour resulted from its disagreement with the Appeals Chamber on a point of law about which reasonable jurists could certainly differ – namely,

165. IT/213.
166. *Prosecutor v. Vidoje Blagojević et al. (Srebrenica-Zvornik Brigade)*, Case No. IT-02-60-AR65.4, Appeals Chamber, Decision on Provisional Release Application by Blagojević, 17 Feb. 2003.
167. *Ibid.*, para. 10.
168. *Ibid.*, para. 13.
169. *Ibid.*, para. 14.
170. *Ibid.*
171. *Ibid.*, para. 15.
172. *Ibid.*, para. 18.
173. *Ibid.*, para. 19.
174. *Prosecutor v. Vidoje Blagojević et al. (Srebrenica-Zvornik Brigade)*, Case No. IT-02-60, Bureau, Decision on Blagojević's Application Pursuant to Rule 15(B), 19 March 2003. The Bureau is a body composed of the president and vice-president of the Tribunal and the presiding judges of the three trial chambers pursuant to ICTY Rules 2(A) and 23(A).

https://doi.org/10.1017/S092215650400161X Published online by Cambridge University Press

> the status of guarantees from Republika Srpska – and its inadequate appreciation of the binding effect of Appeals Chamber decisions on Trial Chambers.[175]

The Bureau also reasoned that '[t]he Trial Chamber's refusal to take completely to heart the binding character of Appeals Chamber decisions is unfortunate', but found 'no evidence of bias against the applicant in that refusal'.[176] As for appearance of bias, the Bureau found that 'a reasonable observer, properly informed, would share its conclusion that the Trial Chamber's conduct flowed . . . from disagreement with the Appeals Chamber over a legal issue and inadequate appreciation of the principle that Appeals Chamber decisions are binding on Trial Chambers'.[177] Accordingly, the Bureau denied the application.[178]

On 21 March 2003, Vidoje Blagojević filed a Motion for Clarification which the Bureau denied in a Decision of 27 March 2003. The Bureau stated that it 'seriously considered' imposing sanctions on defence counsel pursuant to ICTY Rule 46(C) for filing the Motion, because it 'largely seeks to revive claims already rejected in the Bureau's denial of Blagojević's disqualification motion'.[179] The Bureau also observed that there is 'no provision in either the Statute or the Rules for appeals from decisions of the Bureau to the Appeals Chamber'.[180]

On 31 March 2003, Vidoje Blagojević filed a Motion before Trial Chamber II of the ICTY in which the accused requested the disqualification of the judges of Trial Chamber II assigned to his case pursuant to ICTY Rule 73(A), or, in the alternative event that Trial Chamber II deny the Motion, certification for interlocutory appeal pursuant to ICTY Rule 73(B). That same day, Trial Chamber II rendered its decision,[181] declining to address the issue of disqualification under ICTY Rule 73 because ICTY 'Rule 15 operates as *lex specialis* on the issue of disqualification of judges'.[182] Furthermore, the trial chamber found that because it could not rule on the Motion pursuant to ICTY Rule 73(A), it could not grant certification on the Motion pursuant to ICTY Rule 73(B). Consequently, the trial chamber rejected the Motion.[183]

On 1 April 2003, the President of the ICTY, Judge Theodor Meron, reassigned the case to Trial Chamber I, composed of Judges Liu (presiding), Argibay and Vassylenko.[184]

This case raises the following issues: first, the implicit application of ICTY Rule 117(C); second, the lack of an international police force depending on the Office of the Prosecutor; third, the requirement that the Rules be consistent with public international law; fourth, the interpretation of domestic law by the Appeals

175. *Ibid.*, para. 14.
176. *Ibid.*
177. *Ibid.*, para. 15.
178. *Ibid.*, para. 16.
179. Para. 1.
180. Para. 4.
181. *Prosecutor v. Vidoje Blagojević et al. (Srebrenica-Zvornik Brigade)*, Case No. IT-02-60-PT, Trial Chamber II, Decision on Vidoje Blagojević's Motion for Disqualification of the Trial Chamber and Concomitant Request for Certification to Appeal, 31 March 2003.
182. *Ibid.*, para. 4.
183. *Ibid.*
184. *Prosecutor v. Vidoje Blagojević et al. (Srebrenica-Zvornik Brigade)*, Case No. IT-02-60, Judge Theodor Meron, Order Assigning Judges to a Case before a Trial Chamber, 1 April 2003.

Chamber; fifth, the application of the Rules in the light of the Tribunal's mandate; and sixth, the codification of the Appeals Chamber case law in the amendments to the Rules. I shall now examine these six issues in turn.

2.4.1. The implicit application of ICTY Rule 117(C)

The Appeals Chamber returned the case to the trial chamber for reconsideration in the first *Blagojević and Obrenović* Appeals Decision. Thus, it applied ICTY Rule 117(C),[185] but did so without any explicit reference to this provision. In the *Erdemović* Judgement, the Appeals Chamber of the ICTY remitted the case to a trial chamber other than the one which had originally sentenced the appellant. On 15 July 1999, the same Appeals Chamber handed down its Judgement in *Prosecutor* v. *Duško Tadić*,[186] in which it remitted the matter of sentencing to a trial chamber to be designated by the President of the ICTY, without any reference to the Rule. In the *Delalić et al.* Judgement, the same Appeals Chamber remitted the examination of the case to a new trial chamber to be designated by the President of the ICTY, still without explicitly citing Rule 117(C). In the *Jelisić* Judgement, the same Appeals Chamber expressly referred to Rule 117(C) and to the catch-all phrase of 'the interests of justice',[187] but the majority did 'not consider that the facts of this case constitute appropriate circumstances' within the meaning of Rule 117(C) for remitting the case for further proceedings.[188] On 7 June 2002, the Appeals Chamber of the ICTY rendered its Decision on Interlocutory Appeal concerning Rule 92*bis* (C) in *Prosecutor* v. *Stanislav Galić*,[189] in which it held that it was 'not in a position in this case to exercise its own discretion in the place of the Trial Chamber as it ordinarily would be'.[190] In these circumstances', it was 'necessary to uphold the appeal . . . so that the matter may be returned to the Trial Chamber for it to reconsider the exercise

185. The judges of the ICTY added Sub-Rule (C) to Rule 117 at the 5th Plenary Session held on 16 Jan.–3 Feb. 1995 (IT/32/Rev.3). The Appeals Chamber of the ICTY has ever since been authorized to order that an accused be retried before a trial chamber in appropriate circumstances. See *Jelisić* Appeals Judgement, Partial Dissenting Opinion of Judge Wald, in which the judge commented that such a rule 'is a wise and necessary supplement to the Statute's laconic description of the Appeals Chamber's power to "affirm, reverse, or revise" the decisions of the Trial Chamber' (*ibid.*, para. 6). ICTR Rule 118(C) is to the same effect.

The Appeals Chamber of the ICC may also order a new trial before a different trial chamber, pursuant to Art. 83(2)(b) of the Rome Statute.

186. *Prosecutor v. Duško Tadić (Prijedor)*, Case No. IT-94-1-A, Appeals Chamber, Judgement, 15 July 1999 (hereinafter '*Tadić* Appeals Judgement').

187. Many Rules of the ICTY and ICTR refer to the 'interests of justice', even though no definition of this vague phrase is provided for in the Rules. See for instance ICTR Rule 15*bis* (A) and ICTY Rule 15*bis* (D) on the Absence of a Judge; ICTY Rule 44(B) on the Appointment, Qualifications and Duties of Counsel; ICTR Rule 45*quater*; Rules 53(C) on Non-Disclosure; Rules 71 on Depositions; ICTY Rule 73*bis* (D) and (F) and ICTR Rule 73*bis* (E) on Pre-Trial Conference; ICTY Rule 73*ter* (D) and (F) and ICTR Rule 73*ter* (E) on Pre-Defence Conference; Rules 79(A)(iii) on Closed Sessions; Rules 82(B) on Joint and Separate Trials; Rules 85(A) on the Presentation of Evidence and ICTY Rule 89(F) on General Provisions applying to Rules of Evidence.

See the Dissenting Opinion of Judge Shahabuddeen from the Appeals Decision of 1 July 2003, in which the judge emphasized: '[t]he idea of the interests of justice is a valuable one, but it needs to work on recognisable principles. Otherwise, there is mystery. As Edmund Burke said, speaking of "human laws; . . . where mystery begins, justice ends"' (*ibid.*, para. 41).

188. Para. 77.

189. *Prosecutor v. Stanislav Galić (Sarajevo)*, Case No. IT-98-29-AR73.2, Appeals Chamber, Decision on Interlocutory Appeal Concerning Rule 92*bis* (C), 7 June 2002.

190. *Ibid.*, para. 20.

of its discretion in accordance with this present Decision'.[191] Noticeably absent was any reference to ICTY Rule 117(C).[192]

2.4.2. *The lack of an international police force to implement warrants issued by the Office of the Prosecutor*

The Bench of the Appeals Chamber found in the *Jokić* Decision that the Tribunal '*needs* to' – not 'can', as erroneously stated by Trial Chamber II – 'rely upon local authorities within that territory or upon international bodies to effect arrests on its behalf'.[193] Indeed, the ICTY has no choice but to rely on the local authorities of Republika Srpska and the Stabilization Force in Bosnia and Herzegovina (SFOR), because the Office of the Prosecutor (OTP) lacks a police force to implement arrest warrants issued by the Tribunal.

2.4.3. *The requirement of the Rules' consistency with public international law*

The trial chamber held, without citing any legal authority, that the Rules of the ICTY 'can only be read in accordance with fundamental norms of public international law'.[194] However, in the *Kunarac et al.* Judgement, Trial Chamber II of the ICTY had previously stated that 'the Trial Chamber must interpret the Rules of Procedure and Evidence in the light of the relevant international law'.[195] Therefore, the authority for this proposition is based on a trial chamber judgement alone. As the bench of the Appeals Chamber stated in its Decisions of 27 August 2002, 'neither the Statute of the Tribunal nor the Rules impose any requirement that an undertaking in support of an application for provisional release must be given by a sovereign state as recognised under public international law'.[196]

When the Secretary-General proposed the Statute of the ICTY to the Security Council of the United Nations, he considered that the 'tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary

191. *Ibid.*

192. Regarding the conditions of application of ICTY Rule 117(C), see also *Prosecutor v. Nikola Šainović and Dragoljub Ojdanić (Kosovo)*, Case No. IT-99-37-AR65, Appeals Chamber, Decision on Provisional Release, 30 Oct. 2002, Dissenting Opinion of Judge David Hunt, in which he commented that '[i]n some cases where errors of fact or in the exercise of discretion have been established, it may be possible, or convenient, for the Appeals Chamber to substitute its own findings or its own exercise of discretion for that of the Trial Chamber' (*ibid.*, para. 24). The judge considered that '[t]his could be, for instance, because the Trial Chamber decision has depended upon that Chamber's own views of the credibility of a particular witness, or where the decision depends upon that Chamber's own views of the credibility of a particular witness, or where the decision depends upon many other issues in the case which are not sufficiently placed before the Appeals Chamber' (*ibid.*). Judge Hunt concluded that '[i]n such cases, it is appropriate to quash the decision of the Trial Chamber and to return the issue to the Trial Chamber for its reconsideration in the light of the decision of the Appeals Chamber' (*ibid.*). The judge added that '[w]here it remains unclear as to whether a particular issue was considered by the Trial Chamber, it is open to the Appeals Chamber to quash the decision and return the case to the Trial Chamber for clarification as to whether a particular matter had been considered by it, and for reconsideration if it had not' (*ibid.*, para. 25). Judge Hunt specified that '[i]f the Trial Chamber responds that it had in fact considered the particular issue, it need only say so and confirm its decision' (*ibid.*).

193. Emphasis added, para. 8.

194. Paras. 35 of the first *Blagojević* Decision and 46 of the first *Obrenović* Decision.

195. *Kunarac et al.* Judgement, para. 464.

196. Pages 3.

https://doi.org/10.1017/S092215650400161X Published online by Cambridge University Press

law'.[197] The Secretary-General also stated that '[i]t is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings.'[198] In addition, Article 15 of the ICTY Statute and Article 14 of the ICTR Statute define the rule-making powers of the judges by specifying that they adopt only rules that relate to 'the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters'. Consequently, the Rules of Procedure and Evidence derive solely from the Statutes.[199]

However, there is no consistency requirement in the provisions of the Statutes and the Rules. On 15 October 1998, the Appeals Chamber of the ICTY rendered its Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence in *Prosecutor* v. *Duško Tadić*, holding that, 'whilst the Rules can illustrate the meaning of the Statute under which they are made, they cannot vary the Statute'.[200] It added that the Statute prevails in case of variance.[201] On 5 October 1999, Trial Chamber II of the ICTY rendered a Decision on Motion to Dismiss Indictment in *Prosecutor* v. *Radoslav Brđanin*,[202] in which it considered that '[t]he rules cannot themselves alter what is provided by the Statute.'[203] However, both chambers failed to specify the legal basis for such findings.

Conversely, it should be noted that Article 51(4) of the Rome Statute requires that the Rules of Procedure and Evidence of the ICC, amendments thereto and provisional Rules all must be consistent with the Statute. This consistency requirement ensures the primacy of the Statute over the Rules. In addition, Article 51(5) of the Rome Statute provides that the Statute prevails over the Rules in the event of a conflict. Thus, this text provides the natural consequences flowing from a failure to provide the consistency called for by Article 51(4) of the Rome Statute.[204] If the Assembly of States Parties enacted a rule which is openly inconsistent with the Rome Statute, the judges of the ICC should declare it invalid, and if necessary, use the mechanism

197. Report of the Secretary-General pursuant to Paragraph 2 of Security Council Res. 808 [1993], S/25704, 3 May 1993, 9, para. 34.
198. *Ibid.*, 27, para. 106.
199. In the opposite sense, see D. Hunt, 'The Meaning of a "*prima facie* Case" for the Purposes of Confirmation', in R. May *et al.* (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (2001), 137–49. Judge Hunt submits that ICTY Rule 47(B) is *ultra vires* Art. 18(4) of the ICTY Statute because it provides a less onerous task for the prosecution to the detriment of the accused (146).
200. Para. 36. See Separate Opinion of Judge Shahabuddeen appended to the *Rutaganda* Appeals Judgement, in which the Judge considered that '[w]ide as the rule-making competence is, Rules made under article 14 of the Statute are intended to regulate matters which are "appropriate" to the functioning of the structure created by the Statute, not to vary it' (*ibid.*, para. 31).
201. *Ibid.* See also *Prosecutor v. Mladen Naletilić and Vinko Martinović (Tuta and Štela)*, Case No. IT-98-34-A, Pre-Appeal Judge Fausto Pocar, Decision on Motions for Extension of Time, 25 April 2003, in which the Judge considered that 'in the event of an inconsistency between a Rule and a Registry Directive, the Rule must prevail' (4); *Prosecutor v. Dario Kordić and Mario Čerkez (Lašva River Valley)*, Case No. IT-95-14/2-A, Pre-Appeal Judge David Hunt, Decision on Application by Čerkez for Leave to Reply and Other Relief, 16 May 2003, in which the Judge noted that ICTY 'Rule 19(B) requires Practice Directions to be consistent with the Tribunal's Statute and the Rules' (*ibid.*, para. 4).
202. *Prosecutor v. Radoslav Brđanin (Krajina)*, Case No. IT-99-36-PT, Trial Chamber II, Decision on Motion to Dismiss Indictment, 5 Oct. 1999.
203. *Ibid.*, para. 12.
204. See B. Broomhall, 'Rules of Procedure and Evidence', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), 690, 691.

established by Article 51(3) of the Rome Statute to create a provisional rule for filling the lacuna.

The conflict of Statute and Rules arose in the *Brđanin and Talić* case when Radoslav Brđanin[205] and Momir Talić[206] applied for a determination whether ICTY Rule 70(F) conflicts with Articles 20 and 21(4)(e) of the ICTY Statute and the equality of arms enshrined therein. In their submissions, they argued that a literal application of ICTY Rule 90(H)(ii) violates the accused's right to remain silent;[207] they also asserted an inconsistency between the French and English versions of ICTY Rule 90(H)(ii);[208] last, they contended that the English version violates Articles 21(2) and (4)(b) of the ICTY Statute.[209] In other words, the defence submitted that ICTY Rules 70 and 90(H)(ii) are illegal or void as inconsistent with Articles 20 and 21 of the ICTY Statute. It should be noted that the defence did not specify the legal basis of its submissions and neither did the prosecution,[210] nor did the trial chamber ask them to do so. Moreover, Trial Chamber II did not examine this issue *proprio motu* in its written decisions.[211] Consequently, defence counsel and Trial Chamber II implicitly considered that the latter enjoys the *ex post* judicial review authority to rule on alleged inconsistencies between the Rules and Statute, although there is no legal basis for such authority. The trial chamber may have deemed that it draws this authority from its inherent powers to control its proceedings.[212]

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205. Motion regarding Rule 70, its use and disclosure thereunder, 15 March 2002.
206. Rule 70 submissions and (redacted) Annex, 2 April 2002.
207. Motion of Radoslav Brđanin of 27 Feb. 2002.
208. It is worth noting that the French and English versions of the Rules are equally authoritative pursuant to Art. 33(1) of the Vienna Convention. In case of inconsistency between the two language versions, Art. 33(4) of the Convention requires the adoption of the 'meaning which best reconciles the texts, having regard to the object and purpose of the treaty'. Regarding an application of this principle, see *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Trial Chamber I, Judgement and Sentence, 6 Dec. 1999, paras. 67 and 68. See also *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber II, Judgement, 21 May 1999, in which the trial chamber has given preference to the meaning in the French version of one provision of the ICTR Statute on the basis that 'if in doubt, a matter of interpretation should be decided in favour of the accused' (paras. 137–139).
209. Motion of Momir Talić of 4 March 2002.
210. Prosecution's Response to Pleadings Entitled 'Motion to Declare Rule 90(H)(ii) Void to the Extent it is in Violation of Art. 21 of the Statute of the International Tribunal' Filed by the Accused Brđanin on 27 Feb. 2002, 8 March 2002; prosecution's response to [redacted] 'Amended motion regarding Rule 70, its use and disclosure thereunder' filed by the Accused Radoslav Brđanin on 19 March 2002, 28 March 2002.
211. *Prosecutor v. Radoslav Brđanin and Momir Talić (Krajina)*, Case No. IT-99-36-T, Trial Chamber II, Decision on 'Motion to Declare Rule 90(H)(ii) Void to the Extent it is in Violation of Art. 21 of the Statute of the International Tribunal' by the Accused Radoslav Brđanin and on 'Rule 90(H)(ii) Submissions' by the Accused Momir Talić, 22 March 2002; Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002, 23 May 2002.
212. Regarding the ever-expanding notion of inherent powers of the Tribunal, see *Prosecutor v. Zejnil Delalić et al. (Čelebići prison camp)*, Case No. IT-95-21-A, President Antonio Cassese, Decision of the President on the Prosecution's Motion for the Production of Notes Exchanged between Zejnil Delalić and Zdravko Mucić, 11 Nov. 1996; *Prosecutor v. Tihomir Blaškić (Lašva River Valley)*, Case No. IT-95-14-AR108*bis*, Appeals Chamber, Judgement on Request of Republic of Croatia for Review of Decision of Trial Chamber II of 18 July 1997, 29 Oct. 1997, n. 27; *Prosecutor v. Zejnil Delalić et al. (Čelebići prison camp)*, Case No. IT-96-21-A, Separate Opinion of Judge David Hunt on Motion by Esad Landžo to Preserve and Provide Evidence, 22 April 1999, para. 3; *Tadić* Appeals Judgement, para. 322; *Prosecutor v. Duško Tadić (Prijedor)*, Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, 31 Jan. 2000, para. 13; *Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze*, Case No. ICTR-97-34-I, Trial Chamber III, Decision on Ntabakuze's Motion Seeking to Have Rule 48*bis* Declared *Ultra Vires* Unlawful, Contrary to the Rules of Procedure and Evidence, and Inapplicable to the Accused, 4 May 2000 (hereafter '*Ntabakuze* Decision of 4 May 2000'), in which the Trial Chamber, in the exercise of its inherent powers directed 'the Registrar not to award any costs including

In its decisions, Trial Chamber II found that both rules are consistent with the ICTY Statute.[213] It should be emphasized that it is very difficult to demonstrate an alleged inconsistency in practice. Yet, had the trial chamber held to the contrary, it remains unclear what remedy it would have applied. Would it have declared the rules illegal or void? Would it have simply refrained from applying those rules? Would it have referred the issue to the Appeals Chamber for a determination? In any case, the legal basis and authority of a trial chamber to make such decisions remains – to say the very least – unclear.

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fees' (3); *Prosecutor v. Blagoje Simić et al. (Bosanski Šamac)*, Case No. IT-95-9-PT, Trial Chamber III, Judgement in the Matter of Contempt Allegations against an Accused and His Counsel, 30 June 2000; *Prosecutor v. Goran Jelisić (Brčko)*, Case No. IT-95-10-A, Appeals Chamber, Decision on Request to Admit Additional Evidence, 15 Nov. 2000, in which the judges considered that 'the Appeals Chamber maintains an inherent power to admit [additional] evidence even it was available at trial, in cases in which its exclusion would lead to a miscarriage of justice' (3); *Prosecutor v. Slobodan Milošević ('Kosovo', 'Croatia' & 'Bosnia and Herzegovina')*, Case No. IT-02-54-AR73, Bench of the Appeals Chamber, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, 16 May 2002; *Prosecutor v. Dragan Nikolić (Bosnia and Herzegovina)*, Case No. IT-94-2-PT, Trial Chamber II, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 Oct. 2002, in which the Trial Chamber considered that it 'has an inherent power to decide whether or not to exercise jurisdiction over an Accused' (*ibid.*, para. 74); *Prosecutor v. Janko Bobetko*, Case No. IT-02-62-AR54*bis* & IT-02-62-AR108*bis*, Appeals Chamber, Decision on Challenge by Croatia to Decision and Orders of Confirming Judge, 29 Nov. 2002, para. 15; *Prosecutor v. Vidoje Blagojević et al. (Srebrenica-Zvornik Brigade)*, Case No. IT-02-60-PT, Trial Chamber II, Decision on Oral Motion to Replace Co-Counsel, 9 Dec. 2002, in which the Trial Chamber considered that the basis for action in the matter of reviewing a Registrar's Decision on assignment of Counsel 'by a Trial Chamber rests with its inherent power and duty to guarantee a fair trial and the proper administration of justice, as set forth in Arts. 20 and 21 of the Statute' (3); *Mucić et al.* Appeals Judgement, in which the Appeals Chamber stated that it 'has an inherent power, deriving from its judicial function, to control its proceedings in such a way as to ensure that justice is done' (*ibid.*, para. 16). The Appeals Chamber was satisfied that it 'has an inherent power to reconsider any decision, including a judgment where it is necessary to do so in order to prevent an injustice' (*ibid.*, para. 49). The Appeals Chamber considered that '[t]he absence of any reference in the Tribunal's Statute to the existence of a power to reconsider is no answer to the prospect of injustice where the Tribunal possesses an inherent jurisdiction to prevent injustice. . . . There is nothing in the Statute which is inconsistent with the existence of an inherent power of the Appeals Chamber to reconsider its judgment in the appropriate case' (*ibid.*, para. 52). It added that '[t]here is nothing in the Rules which is inconsistent with the existence of such an inherent power' (*ibid.*, para. 53).

Rules 77(A) provide that '[t]he Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice . . . '

Art. 38 of the Code of Professional Conduct for Counsel Appearing before the Tribunal, as amended on 12 July 2002 (IT/125 Rev.1), provides that the Tribunal has the inherent powers 'to deal with conduct which interferes with the administration of justice under the Statute, the Rules or any other applicable law'.

See generally M. Buteau and G. Oosthuizen, 'When the Statute and Rules are Silent: The Inherent Powers of the Tribunal', in May *et al.*, *supra* note 199, at 65–81; see also M. Bohlander, 'International Criminal Tribunals and their Power to Punish Contempt and False Testimony', (2001) 12 *Criminal Law Forum* 91–188, in which the author concluded that 'the de facto creation of criminal offences under the Rules of Procedure and Evidence may be *ultra vires* with regard to the question whether they are necessary under the implied powers doctrine' (117); D. A. Mundis, 'The Legal Character and Status of the Rules of Procedure and Evidence of the *ad hoc* International Criminal Tribunals', (2001) 1 *International Criminal Law Review* 216–20.

213. See also *Prosecutor v. Radoslav Brđanin and Momir Talić (Krajina)*, Case No. IT-99-36-AR73.7, Appeals Chamber, Decision on the Interlocutory Appeal Against a Decision of the Trial Chamber, as of Right, 6 June 2002, in which the Appeals Chamber dismissed the interlocutory appeal. It considered that Rule 90(H)(ii) 'seeks to facilitate the fair and efficient presentation of evidence whilst affording the witness being cross-examined the possibility of explaining himself on those aspects of his testimony contradicted by the opposing party's evidence, so saving the witness from having to reappear needlessly in order to do so and enabling the Trial Chamber to evaluate the credibility of his testimony more acutely owing to the explanation of the witness or his Counsel' (4). The Appeals Chamber held that 'the purpose of Rule 90(H)(ii) is to control the procedure for presenting evidence' (*ibid.*).

See also *Prosecutor v. Slobodan Milošević ('Kosovo', 'Croatia' and 'Bosnia & Herzegovina')*, Case No. IT-02-54-AR108*bis* & AR73.3, Appeals Chamber, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 Oct. 2002.

Moreover, defence counsel for Momir Talić submitted that ICTY Rule 90(H)(ii) infringes ICTY Rule 97 and the confidentiality of communications between the accused and counsel.[214] Here again, the trial chamber rejected the argument. As one commentator pointed out, 'once a rule has been enacted by the judges, the possibility of effective *ex post* judicial review by the same persons that have adopted the rule (and accordingly have made at least a strong *prima facie* decision as to the consistency of that particular rule with the Statute) will ordinarily be reduced'.[215] Another commentator underlined that 'it seems highly unlikely that a Chamber would strike a Rule, even if the Judges personally felt that the Rule in question was beyond their authority to adopt'.[216] However, the three questions above arise even more acutely in the case of an alleged inconsistency between two rules of Procedure and Evidence.[217]

The judges of the ICTY amended Rule 73 at their Extraordinary Plenary Session held on 12 April 2001.[218] ICTY Rule 73(B) and (C) now provides that either party shall file requests for certification by the trial chamber in order to appeal one of its decisions to the Appeals Chamber of the ICTY. But, to date, no party has submitted that Rule 73(B) and (C) is void as inconsistent with ICTY Rule 15 on the impartiality of judges.[219] At the 13th Plenary Session, held on 26 and 27 May 2003, the judges of the ICTR amended Rule 73, which now provides for such a procedure of certification. It should also be noted that no provision of the Rome Statute addresses the issue of conflict between two rules of Procedure and Evidence. In the *Brđanin and Talić* case, the prosecution did not raise the inconsistency of ICTY Rule 2 with fundamental norms of public international law; the trial chamber addressed it *proprio motu* when examining the appearance of the accused for trial and the guarantees provided. However, it did not issue any legal finding on the validity of ICTY Rule 2 on that basis. Moreover, with regard to the remedy, the trial chamber simply considered that 'it would act *ultra vires* should it base itself upon any guarantees offered by a federal unit under Rules 2 and 65(B)'.[220] It held that the term 'state' under ICTY Rule 65(B) 'must be interpreted in such a way that the Tribunal does not refer to an Entity as being a State'.[221] As Daryl A. Mundis noted, 'there does not seem to be a mechanism for the Chambers to abolish Rules that may be *ultra vires*'.[222]

214. Transcripts, 4 March 2002, Submissions of Defence counsel for Momir Talić.
215. F. Guariglia, 'The Rules of Procedure and Evidence for the International Criminal Court', in A. Cassese, P. Gaeta, and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), II, 1122.
216. Mundis, *supra* note 212, at 224.
217. See the *Ntabakuze* Decision of 4 May 2000.
218. IT/32/Rev.20.
219. See the *Brđanin and Talić* Decision of 18 May 2000, in which Judge Hunt considered that ICTY Rule 15(A) should be interpreted as reflecting the principle recognized in common and civil law systems and by the European Convention, that a judge is disqualified not only if there is an *actual* bias but also if there is a *reasonable apprehension* by the parties that such a bias exists; see also the *Furundžija* Judgement, in which the Appeals Chamber of the ICTY found *inter alia* that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias.
220. Footnote added, paras. 50 of the first *Blagojević* Decision and 60 of the first *Obrenović* Decision.
221. *Ibid.*
222. Mundis, *supra* note 212, at 227.

2.4.4. The interpretation of domestic law by the Appeals Chamber

The trial chamber referred to the Constitution of Bosnia and Herzegovina and to a Decision of its Constitutional Court, interpreting specific provisions of both. Yet the trial chamber claimed simultaneously that it lacks authority to interpret the Constitution of Bosnia and Herzegovina.[223] However, the Appeals Chamber of the ICTY previously interpreted the Constitution of Costa Rica in the *Delalić et al.* Appeals Judgement.[224] Thus the remaining issue is whether the Constitutional Courts of Costa Rica and Bosnia and Herzegovina will recognize these rulings in their own decisions.

2.4.5. The application of the Rules in the light of the Tribunal's mandate

The trial chamber noted that 'in light of the politically fragile situation in Bosnia and Herzegovina a reference by the Tribunal to one of the Entities as a State would not be in line with the Tribunal's mandate "to contribute to the restoration and maintenance of peace in the former Yugoslavia"'.[225,226] However, the legal basis for the trial chamber to consider the purpose of the Tribunal's mandate defined by the Security Council in interpreting a rule of Procedure and Evidence remains unclear. In addition, the trial chamber did not specify how the application of a rule which equates an entity such as Republika Srpska with a state could endanger the Tribunal's contribution 'to the restoration and maintenance of peace in the former Yugoslavia'. Further, such a threat is not obvious, especially considering that the legal existence of Republika Srpska as an entity of Bosnia and Herzegovina was established internationally by the Dayton Peace Agreement signed on 14 December 1995 in Paris.

2.4.6. The codification of the Appeals Chamber case law in the amendments to the Rules

The amendment to ICTY Rule 2 adopted on 12 December 2002 made explicit the definition of a state which was previously implicit, and included Republika Srpska in it. This clarification confirms that the ICTY judges systematically incorporate the legal findings of the ICTY Appeals Decisions on procedural and substantive issues in the ICTY Rules. Another example is provided by Judge McDonald and Judge Vohrah, who appended a Joint Separate Opinion to the *Erdemović* Appeals Judgement. Therein they proposed conditions for the acceptance of the accused's guilty plea by a trial chamber. At the suggestion of the prosecution, the judges of the ICTY added Rule 62*bis* at the 14th Plenary Session, which was held on 20 October and 12 November 1997.[227] Yet another example is the Decision of 21 July 2000 in which the Appeals Chamber of the ICTY directed the trial chamber to exclude the statement at issue, but did not exclude the admission of statements of deceased witnesses as a matter

223. Paras. 44 of the first *Blagojević* Decision and 54 of the first *Obrenović* Decision.
224. Paras. 663, 667, 668 and 670.
225. S/RES/827 (25 May 1993), Preamble, para. 6.
226. Paras. 51 of the first *Blagojević* Decision and 61 of the first *Obrenović* Decision.
227. IT/32/Rev.12.

of principle. At the suggestion of the prosecution, the judges of the ICTY initially adopted Rule 92*bis* (C), which provides that '[a] written statement . . . may . . . be admissible if made by a person who has subsequently died',[228] at the 23rd Plenary Session and at the Extraordinary Plenary Session held on 13 December 2000.[229]

However, the codification of the Appeals Chamber case law is sometimes partial only. In the *Kupreškić et al.* Judgement,[230] the Appeals Chamber of the ICTY found that the appropriate threshold standard for assessing the admission of additional evidence under ICTY Rule 115 on appeal is whether the evidence 'could' have had an impact on the trial verdict rather than whether it 'would probably' have done so. It also found that the ultimate admissibility (or second stage) test to be applied by the Appeals Chamber in deciding whether or not to uphold a conviction where additional evidence was admitted before the Chamber is: whether the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based on the evidence before the trial chamber together with the additional evidence admitted during the appellate proceedings. ICTY Rule 115(B) was subsequently amended and now provides, *inter alia*, that '[i]f 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.' In other words, the amendment to ICTY Rule 115(B) relates only to the threshold test and does not reflect the second-stage test.

The bench of the Appeals Chamber simply applied one of the Rules of Procedure and Evidence in the *Jokić* Decision. What Trial Chamber II demonstrated in its Decisions is that ICTY Rule 2 is inconsistent with public international law. However, it should be noted that non-state actors such as firms, paramilitary groups, and even individuals may also be subjects of public international law and, therefore, have obligations under that law. The trial chamber did not address the fundamental issue – because it goes beyond the scope of its Decisions – of how the permanent judges of the ICTY can adopt a rule of procedure and evidence which is inconsistent with fundamental norms of public international law.[231] This question leads to the issue as to which body is competent to adopt and amend the Rules. Pursuant to ICTY[232] and ICTR Rules 6, the judges of the International Criminal Tribunals have the authority to define the Rules in their capacity as the rule-makers of the Tribunals, a system of considerable flexibility. In order to reflect the practical needs and experience of

228. IT/183.
229. IT/32/Rev.19.
230. *Prosecutor v. Zoran Kupreškić et al. (Lašva River Valley)*, Case No. IT-95-16-A, Appeals Chamber, Appeal Judgement, 23 Oct. 2001 (hereinafter '*Kupreškić et al.* Appeals Judgement').
231. The definition of a state in ICTY Rule 2 was adopted at the 5th Plenary Session of the judges of the ICTY, held on 16 Jan.–3 Feb. 1995 (IT/32/Rev.3), i.e. before the Dayton Peace Agreement of 14 Dec. 1995.
See *Prosecutor v. Radislav Krstić (Srebrenica-Drina Corps)*, Case No. IT-98-33-PT, Trial Chamber I, Binding Order to the Republika Srpska for the Production of Documents, 12 March 1999, in which the Trial Chamber emphasized that Republika Srpska does not constitute 'a State but an entity within the Republic of Bosnia and Herzegovina' and also referred to ICTY Rule 2 and Art. III(2)(b) of the Constitution of the Republic of Bosnia and Herzegovina (3 and 4).
232. Regarding the proceedings to amend the Rules of the ICTY, see the Practice Direction on Procedure for the Proposal, Consideration of and Publication of Amendments to the Rules of Procedure and Evidence of the International Tribunal, 4 May 2001, IT/143/Rev.1.

the International Criminal Tribunals, the judges of the ICTY and the ICTR have amended their Rules, since first adopting them on 11 February 1994 and 29 June 1995, 27 and 12 times respectively – an average of almost three times a year in the case of the ICTY. This frequency of amendments has arguably resulted in a loss of credibility for the Tribunals, because the judges have changed the Rules that they subsequently apply.

The absence of separation between the legislative power and the judicial authority of the International Criminal Tribunals poses a further problem of principle. The former President of the ICTY conceded that this 'extraordinary legislative power . . . is enormous and open to criticism'.[233] The Appeals Chamber of the ICTY stated in the *Delalić et al.* Judgement that '[t]he purpose of requiring a separation of judicial from other powers is to avoid any conflict of interest.'[234] In this connection, the judges have an interest in being able to adopt and amend, without any control, convenient Rules of Procedure and Evidence,[235] and the conflict between their two functions as legislator and judicial officer arises every time they apply those rules. As one commentator has emphasized,

> there is a significant risk that those in charge of adopting and applying the rules succumb, while exercising their legislative function, to the temptation of accommodating the legislation to the practical problems that they have to deal with (which in the context of international criminal jurisdictions are numerous), to an extent that a more detached legislator would not.[236]

The judges of the ICTR adopted a rule providing for definitions of terms on 29 June 1995, and have amended it twice so far, on 8 June 1998 and 26 June 2000. Unlike ICTY Rule 2, ICTR Rule 2 does not provide for a definition of a state encompassing a 'self proclaimed entity de facto exercising governmental functions, whether recognised as a State or not'. However, no such definition is needed in the ICTR Rules because there is no de facto entity in Rwanda. Thus the difference in the Rules reflects the practical problems that the judges have to deal with.

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233. Speech by Judge Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia, to the Preparatory Commission of the International Criminal Court, 19 June 2000, Press Release No. 511.
234. Para. 690.
235. For a symptomatic example, see Rules 15(C) on the disqualification of judges. These rules provided that '[t]he Judge of the Trial Chamber who reviews an indictment against an accused . . . *shall not sit* as a member of the Trial Chamber for the trial of that accused' (emphasis added). The judges of the ICTY and the ICTR amended Rules 15(C) at the 21st and 7th Plenary Sessions, held on 15–17 Nov. 1999 and 21 Feb. 2000 respectively. They now read as follows: 'The Judge of the Trial Chamber who reviews an indictment against an accused . . . *shall not be disqualified for sitting* as a member of the Trial Chamber for the trial of that accused' (emphasis added).
    See also General Assembly, Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, 22 Nov. 1999, A/54/634 (hereinafter 'Report of the Expert Group'), in which the Expert Group recommended that 'further consideration be given by the Trial and Appeals Chambers to whether confirmation of an indictment should automatically result in disqualification of the confirming judge' (para. 45).
    By contrast, see Art. 41(2)(a) of the Rome Statute, which provides that a judge 'shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted'.
236. Guariglia, *supra* note 215, at 1116.

3. Are the trial chambers bound by the decisions of other trial chambers?

Trial chambers are not bound by decisions of other trial chambers; there is no binding precedent. Nevertheless, some ICTY and ICTR trial chambers have considered these decisions to be 'persuasive' authorities.

From the aforementioned principles, it follows that the decision of a single judge acting as pre-trial or duty judge has no binding force in other cases. A decision of a pre-appeal judge – being only a single judge of the Appeals Chamber – is presumably not binding on trial chambers even though it may be rendered in the name of the Appeals Chamber.[237] There has been no treatment concerning the precedential value of decisions rendered by the President, Bureau, Registrar, or Bench of the Appeals Chamber. Yet, whether binding on trial chambers or not, such decisions are at least cited as persuasive authority.

4. Are the separate Appeals Chambers of the ICTY and the ICTR bound by each other's decisions?

Whether the ICTY Appeals Chamber is bound by the decisions of the ICTR Appeals Chamber and vice versa remains unsettled.[238] However, a review of the ICTR appeals judgements demonstrates that the ICTR Appeals Chamber often refers to, quotes, concurs with, and eventually endorses the findings of the ICTY Appeals Chamber.[239] For instance, the *Akayesu* Appeals Judgement endorsed the standards of admissibility of an allegation of partiality set out in the *Furundžija* Appeals Judgement[240] in finding that a presumption of impartiality attaches to judges and consequently that 'partiality must be established on the basis of adequate and reliable evidence'.[241] The *Akayesu* Appeals Judgement also followed the *Aleksovski* Appeals Judgement in explaining that trial chambers are primarily responsible for assessing and weighing evidence presented at a trial.[242] The *Kayishema and Ruzindana* Appeals Judgement followed the findings of the *Delalić et al.* Appeals Judgement on superior responsibility.[243] The *Musema* Appeals Judgement addressed the issue of corroboration of witness testimony and quoted the *Aleksovski* Appeals Judgement[244] for the

237. See *Prosecutor v. Dario Kordić and Mario Čerkez (Lašva River Valley)*, Case No. IT-95-14/2-A, Pre-Appeal Judge David Hunt, Decision on Motions to Extend Time for Filing Appellant's Briefs, 11 May 2001, disposition: '[t]he Appeals Chamber orders . . . ' (para. 23).
238. See M. A. Drumbl and K. S. Gallant, 'Appeals in the Ad Hoc International Criminal Tribunals: Structure, Procedure and Recent Cases', (2001) 3 *Journal of Appellate Practice and Process* 634.
239. See for instance *Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-A, Appeals Chamber, Judgement, 19 Oct. 2000; *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Appeals Chamber, Judgement, 1 June 2001 (hereinafter '*Akayesu* Appeals Judgement'); *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Appeals Chamber, Judgement (Reasons), 1 June 2001 (hereinafter '*Kayishema and Ruzindana* Appeals Judgement'); *Alfred Musema v. Prosecutor*, Case No. ICTR-96-13-A, Appeals Chamber, Judgement, 16 Nov. 2001 (hereinafter '*Musema* Appeals Judgement'); *Rutaganda* Appeals Judgement, paras. 42 and 276.
240. Paras. 196 and 197.
241. Para. 91.
242. Para. 132.
243. Paras. 294–298.
244. *Aleksovski*, Para. 63.

proposition that whether a trial chamber will rely on a single witness testimony will depend on various factors to be assessed according to the circumstances of each case.[245] The *Musema* Appeals Judgement also adopted the standard set forth by the majority[246] of the ICTY Appeals Chamber in the *Delalić et al.* Judgement, which held that cumulative convictions for ideal concurrence of crimes are permissible when they contain materially distinct contextual elements.[247] It reasoned that such a constraint was necessary to limit the permissible accumulation of convictions based on the same facts and conduct.[248] It also cited the *Kupreškić et al.* Appeals Judgement and considered that 'such principles are also applicable before ICTR when the admission of new evidence entails a review of the Trial Chamber's factual findings'.[249] On 3 July 2002, the ICTR Appeals Chamber rendered its Judgement in *Prosecutor* v. *Ignace Bagilishema*,[250] in which it developed the 'had reason to know' standard for the mens rea of superiors – that is, 'a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates'[251] – set forth by the ICTY Appeals Chamber in the *Delalić et al.* Judgement. The *Bagilishema* Appeals Chamber also applied the inquiry notice – a superior's affirmative duty to inquire further when put on notice[252] – for the first time. It will be interesting to see whether the Appeals Chamber of the ICTY also adopts the 'had reason to know' standard in future cases because it feels bound to do so. On 17 September 2003, the ICTY Appeals Chamber rendered its Judgement in *Prosecutor* v. *Milorad Krnojelac*,[253] in which it adopted the findings of the *Rutaganda* Appeals Judgement[254] as regards whether an error of fact resulted in a miscarriage of justice.[255]

5. Are trial chambers of the ICTR and the ICTY bound by the decisions of the other Appeals Chamber?

It also remains unclear whether trial chambers of the ICTR and the ICTY are bound by decisions of the other's Appeals Chamber. In practice, the trial chambers of both Tribunals often refer to the judgements of the two Appeals Chambers. For example, on 21 February 2003, Trial Chamber I of the ICTR rendered its Judgement and Sentence in *Prosecutor* v. *Élizaphan and Gérard Ntakirutimana*,[256] in which it applied

245. Para. 36.
246. See the Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna.
247. Para. 412.
248. Paras. 361 and 363.
249. Para. 186.
250. *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, Appeals Chamber, Judgement (Reasons), 3 July 2002.
251. Para. 241.
252. Paras. 24–62.
253. *Prosecutor v. Milorad Krnojelac (Foča-KP Dom Camp)*, Case No. IT-97-25-A, Appeals Chamber, Judgement, 17 Sept. 2003.
254. Para. 580.
255. Para. 172.
256. *Prosecutor v. Élizaphan and Gérard Ntakirutimana*, Case No. ICTR-96-10-T & ICTR-96-17-T, Trial Chamber I, Judgement and Sentence, 21 Feb. 2003.

the *Kupreškić et al.* Appeals Judgement on the particularity of Indictments[257] and adopted a similar approach.[258]

Therefore the issue is to determine whether there will be stable and consistent case law on judicial precedent.[259] Article 21(2) of the Rome Statute may provide guidance for the discretionary use of precedent. As Margaret McAuliffe deGuzman pointed out, this provision 'permits the judges, in their discretion, to accord precedential value to principles and rules of law identified in prior decisions' and 'contributes to the development of a consistent and predictable body of international criminal law'.[260] However, the ICC is not bound to follow the principles laid down in its previous decisions.[261]

The fact that the two legally distinct Appeals Chambers of the International Criminal Tribunals have been composed of the same seven permanent judges[262] – five of the ICTY and two of the ICTR – since 1 June 2001 contributes to the consolidation and standardization of the case law.

6. Conclusion

The Appeals Chamber of the ICTY established the principle of judicial precedent on 24 March 2000. However, the first decision, only 18 months subsequent to its initial pronouncement, failed to comply with that principle. Moreover, the number and frequency of such inconsistent decisions has recently increased: there have been one on 10 October 2001, two on 15 and 20 February 2002, one on 16 April 2002 and two on 22 July 2002. Most of these decisions emanate from Trial Chamber II of the ICTY, but this trial chamber was composed of different judges in every case, pursuant to ICTY Rule 27 regarding the rotation of judges.[263] Furthermore,

257. *Ibid.*, paras. 42, 49 and 54.
258. *Ibid.*, para. 59.
259. See X. Tracol, 'The Appeals Chambers of the International Criminal Tribunals', (2001) 12 *Criminal Law Forum* 137–65.
260. M. McAuliffe deGuzman, 'Applicable Law', in Triffterer, *supra* note 204, at 445, paras. 21 and 22.
261. See A. Pellet, 'Applicable Law', in Cassese *et al.*, *supra* note 215, at 1066.
262. The Appeals Chambers are, however, composed of five of their members for each appeal, pursuant to Arts. 12(3) and 11(b) of the ICTY and ICTR Statutes, as amended by Annexes I and II to Security Council Res. 1329 of 30 Nov. 2000 respectively.
263. (A) Permanent Judges shall rotate on a regular basis between the Trial Chambers and the Appeals Chamber. Rotation shall take into account the efficient disposal of cases.
(B) The judges shall take their places in their new Chamber as soon as the President thinks it convenient, having regard to the disposal of part-heard cases.
(C) The President may at any time temporarily assign a member of a Trial Chamber or of the Appeals Chamber to another Chamber.

ICTR Rule 27 provides for a similar rotation of judges between the three trial chambers of the ICTR. The Expert Group admitted that the controversial rotation principle, which is not provided for in the Statutes of the ICTY and ICTR, 'is by no means an ideal situation' (Report of the Expert Group, *supra* note 235, at 39, para. 105).

Arts. 14(6) and 13(3) *in fine* of the ICTY and ICTR Statutes respectively, as amended by Annexes I and II to Security Council Res. 1329 of 30 Nov. 2000, provide that '[a] judge shall serve only in the Chamber to which he or she was assigned.'

However, ICTY and ICTR Rules 27 on rotation are still in force, and ICTY Rule 27 was amended at the Extraordinary Plenary Session held on 12 April 2001 (IT/188). These rules, supposed to derive from the

these decisions all concern thorny topics: (i) the test to be applied to a Motion for a Judgement of acquittal; (ii) the issue of evidence; (iii) the standard to be applied to a Motion for cross-access to confidential documents in other cases; and (iv) the issue of provisional release. Although the Appeals Chambers, most trial chambers and individual judges of the International Criminal Tribunals comply with the principle of judicial precedent, and although the Appeals Chambers may err, the advent of departures from the judicial precedent by the trial chambers on sensitive issues may jeopardize the Appeals Chambers' role in ensuring a consistent, even-handed and uniform case law among trial chambers, with the risk of conflicting interpretation of the Rules of Procedure and Evidence and prejudice to the parties.

Statutes of the ICTY and ICTR, are definitely inconsistent with the provisions of Security Council Res. 1329 of 30 Nov. 2000.

https://doi.org/10.1017/S092215650400161X Published online by Cambridge University Press