



An International Bar Association International Criminal Court & International Criminal Law Programme report

**Remedying international injustice:
appeals, retrials and revisions of
judgments in international criminal law**

About the Programme

The International Bar Association (IBA) commenced International Criminal Court and International Criminal Law Programme (ICC & ICL Programme) in 2005.

The ICC & ICL Programme monitors issues related to fairness and equality of arms at the International Criminal Court (ICC) and other war crimes tribunals based in The Hague and encourages the legal community to engage with the work of these courts. The IBA's work includes thematic legal analysis of proceedings, and ad hoc evaluations of legal, administrative and institutional issues which could potentially affect the rights of defendants, the impartiality of proceedings and the development of international justice.

The Programme also acts as the interface between the courts and the global legal community. As such, special focus is placed on monitoring emerging issues of particular relevance to lawyers and collaborating with key partners on specific activities to increase engagement of the legal community on ICC and international criminal law issues.

Programme information is disseminated through regular reports, expert discussions, workshops and other events and expert legal analysis on issues relevant to our mandate.

The ICC and ICL Programme consults and interacts with courts' officials, civil society organisations, academics and international lawyers.

Methodology

The IBA's monitoring work and research are complemented by consultations with key legal professionals, including court officials, academics and legal researchers, non-governmental organisations, individual counsel and diplomatic representatives. This report forms part of the Programme's thematic publication series 'IBA ICL Perspectives' and presents the Programme's views on key developments in ICL that have a particular impact on fair trial standards. It reflects the IBA's monitoring and analysis of developments and jurisprudence to 1 September 2022.

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Acronyms

ECCC	Extraordinary Chambers in the Courts of Cambodia
ECtHR	European Court of Human Rights
HRC	United Nations Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court (or the ‘Court’)
ICCPR	International Covenant on Civil and Political Rights
ICL	International criminal law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IRMCT	International Residual Mechanism for Criminal Tribunals
KSC-SPO	Kosovo Specialist Chambers and Specialist Prosecutor’s Office
OTP	Office of the Prosecutor
RPE	Rules of Procedure and Evidence
RSCSL	Residual Special Court for Sierra Leone
SCC-CAR	Special Criminal Court Central African Republic
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon

International criminal cases and decisions

The following decisions on appeals, retrials, review/revision and compensation for miscarriage of justice are addressed in this report.

Chapter 1 – Appeals

ICTY

Prosecutor v *Furundžija*, Appeal Judgment (IT-95-17/1-A), 21 July 2000.

Prosecutor v *Jelisić*, Appeal Judgment (IT-95-10-A), 5 July 2001.

Prosecutor v *Kupreškić et al*, Appeal Judgment (IT-95-16-A), 23 October 2001.

Prosecutor v *Blaškić*, Appeal Judgment (IT-95-14-A), 29 July 2004.

Prosecutor v *Hadžihasanović & Kubura*, Appeal Judgment (IT-01-47-A), 22 April 2008.

Prosecutor v *Haradinaj et al*, Appeal Judgment (IT-04-84-A), 19 July 2010.

Prosecutor v *Gotovina and Markač*, Appeal Judgment, (IT-06-90-A), 16 November 2012.

Prosecutor v *Stanišić and Simatović*, Appeal Judgment (IT-03-69), 9 December 2015.

ICTR

Prosecutor v *Rutaganda*, Appeal Judgment (ICTR-96-3-A), 26 May 2003.

Prosecutor v *Muvunyi*, Appeal Judgment (ICTR-2000-55A-A), 29 August 2008.

ICC

Prosecutor v *Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, 1 December 2014.

Prosecutor v *Ngudjolo*, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute', ICC-01/04-02/12-271-Corr, 7 April 2015.

Prosecutor v *Ruto and Sang*, Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11-2027-Red-Corr, 16 June 2016.

Prosecutor v *Bemba et al*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute', ICC-01/05-01/13-2275-Red, 8 March 2018.

Prosecutor v *Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', ICC-01/05-01/08-3636-Red, 8 June 2018.

Prosecutor v *Ntaganda*, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, ICC-01/04-02/06-2666-Red, 30 March 2021.

Prosecutor v *Gbagbo and Blé Goudé*, Judgment in the appeal of the Prosecutor against Trial Chamber I’s decision on the no case to answer motions, ICC-02/11-01/15-1400, 31 March 2021.

STL

Prosecutor v *Merhi and Oneissi*, Appeal Judgment, 10 March 2022.

Chapter 2 – Retrials

ICTY

Prosecutor v *Haradinaj et al*, Retrial Judgment (IT-04-84bis-T), 29 November 2012.

ICTR

Prosecutor v *Muvunyi*, Retrial Judgment (ICTR-00-55A-AR73), 11 February 2011.

IRMCT

Prosecutor v *Stanišić and Simatović*, Retrial Judgment (MICT-15-96-T), 30 June 2021.

Chapter 3 – Review/revision of judgments

ICTY

Prosecutor v *Šljivančanin*, Review Judgment (IT-95-13/1-R), 18 December 2010.

ICTR

Prosecutor v *Barayagwiza*, Decision (Prosecutor’s request for Review or Reconsideration), (ICTR-97-19-AR72), 31 March 2000.

IRMCT

Prosecutor v *Ngirabatware*, Review Judgment (MICT-12-29-R), 27 September 2019.

Chapter 4 – Compensation for miscarriage of justice

ICC

Prosecutor v *Ngudjolo*, Decision on the ‘Requête en indemnisation en application des dispositions de l’article 85(1) et (3) du Statut de Rome’ ICC-01/04-02/12-301-t-ENG, 16 December 2015.

Prosecutor v *Gbagbo and Blé Goudé*, Decision on Mr Blé Goudé’s request for compensation, ICC-02/11-01/15-1472, 10 February 2022.

Prosecutor v *Bemba*, Decision on Mr Bemba’s claim for compensation and damages, ICC-01/05-01/08-3694, 18 May 2022.

Introduction

Criminal justice systems are imperfect. While criminal courts generally endeavour to achieve justice through the fair and impartial examination of evidence to determine the guilt or innocence of an accused person, it is not an exact science and judgments are not absolute. This is confirmed by the ‘beyond a *reasonable* doubt’ standard of proof applied by international criminal courts and tribunals.

Errors of fact, law or procedure or professional misconduct can result in unfair trials, wrongful convictions, or victims being denied justice if the person who perpetrated crimes against them is acquitted.

There are many factors, within and beyond the control of a criminal court, which may lead to wrongful convictions, wrongful acquittals or unfair trials (which regardless of the innocence or guilt of the accused are a form of injustice). There may be evidentiary errors, including mistaken forensic evidence or eye-witness testimony. Witnesses may commit perjury for a range of reasons, including due to threats, intimidation or bribery. Suspects may receive inadequate or flawed legal advice from defence counsel. Investigators, prosecutors and judges may make errors regarding the interpretation or application of the law or commit misconduct. Critical inculpatory or exculpatory evidence may not be discovered until after the trial.

Most criminal justice systems, including international criminal courts and tribunals seek to mitigate these risks through safeguards, including fair trial guarantees, rules of procedure and evidence, witness protection systems, legal aid and professional standards. However, the risk of injustice remains.

International criminal courts and tribunals are not immune from delivering injustice.¹ Indeed, a number of factors heighten the risk of international criminal injustice:

- International criminal courts and tribunals rely heavily on state cooperation to gather evidence, which is often not forthcoming. The International Criminal Court (ICC) reported in 2020 that over a one-year period only 32 per cent of OTP cooperation requests and 19 per cent of defence cooperation requests had been executed.²
- International courts and tribunals face significant challenges in protecting victims and witnesses.³
- International criminal law jurisprudence is still in development and the application of many ambiguously defined and complex legal provisions and concepts (including crimes, defences,

1 In some instances, injustices are labelled ‘miscarriages of justice’, especially when a person’s final conviction is overturned. The term is used in many international criminal law instruments defining grounds for appeal and in the ICC Statute and international human rights treaties and standards as a basis for compensation for wrongful conviction. However, its definition is not clear and disputed in some commentaries, judicial decisions, national laws and academic literature. For this reason, the term will be only used in this report when examining its use in specific provisions.

2 Report of the Court on Cooperation, ICC-ASP/19/25, 28 October 2020, 3-4.

3 The ICC Office of the Prosecutor’s Strategic Plan 2016-2018 reports at para 27: ‘Almost all cases in the confirmation of charges and trial phases have been or are confronted with incidents of obstruction of justice –in particular witness tampering.’ See also: Open Society Justice Initiative, ‘Witness Interference in cases before the International Criminal Court’ (2016), <https://www.justiceinitiative.org/publications/witness-interference-cases-international-criminal-court>.

principles of criminal responsibility) and procedures (including best practices relating to the adjudication of evidence by international criminal courts and tribunals and victim participation) are unsettled or evolving.

- All international criminal courts and tribunals have faced significant resource challenges as a result of insufficient state support. States' reluctance to support effective legal aid is a particular concern. A review of the ICC's legal aid policy has been in progress since 2012 without any resolution, despite concerns that legal aid for the defence is insufficient.⁴

Considering the political attacks that international criminal courts and tribunals face in advancing the fight against impunity and the potential for injustice to damage the integrity and legitimacy of international criminal justice,⁵ these challenges demand attention. International criminal courts and tribunals must, to the best of their ability, apply their mandates justly, fairly and effectively, ensuring that the rights of the accused and victims are respected. States must, in accordance with their international legal obligations, provide the courts (including the defence) with full, prompt and effective cooperation and allocate adequate resources to guarantee the effective administration of justice (including legal aid for the defence and victims).⁶ Civil society organisations that have supported the creation and work of international criminal courts and tribunals can play a vital role in monitoring international criminal proceedings to ensure that they are fair and advocating best practices.⁷

Moreover, it is essential that international criminal courts and tribunals put in place coherent, fair and effective mechanisms to remedy any injustice when it occurs or is discovered. Fairness requires that convicted persons must be able to challenge their conviction, including when evidence of wrongful conviction emerges after their appeals have been exhausted. In some circumstances, the prosecution should also be able to seek remedies for significant errors that led to an acquittal. However, safeguards must be applied to ensure that the rights of an acquitted person and fundamental principles of justice, including *ne bis in idem* (the prohibition against double jeopardy), are fully respected.

Victims also have the right to an effective remedy for the crimes they have suffered. Their interests will be directly affected in proceedings that review the outcome of case, especially if reparations are being determined or have been ordered. It is important that they are informed about and able to participate in such proceedings, providing their views and concerns at stages determined to be appropriate.

4 In 2020, an Independent Expert Review of the ICC commissioned by the Assembly of States Parties identified legal aid as a priority issue and noted that 'further matters need to be urgently addressed before it can truly be said that the Defence is accorded the respect and fair treatment that its important role in the Court merits'. Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report (IER Final Report), 30 September 2020, para 821. See also, IBA, *Priorities and Recommendations to the 19th Session of the International Criminal Court Assembly of States Parties* (December 2020), <https://www.ibanet.org/MediaHandler?id=35647a75-e765-4d19-bc4d-37399224178a>.

5 Geert-Jan Alexander Knoops, *Redressing Miscarriages of Justice: Practice and Procedure in National and International Criminal Law Cases*, (Transnational Publishers 2006), p 18: 'The integrity and legitimacy of a criminal justice system is largely based on fairness and effectiveness.'

6 For further information on measures that states should take to support the effective functioning of the ICC, see IBA, *Strengthening the International Criminal Court and the Rome Statute system: A guide for States Parties* (2021), <https://www.ibanet.org/document?id=ICC-Report-Rome-Statute-October-2021>.

7 For further details of the IBA's work to promote the fairness and equality of arms at the ICC and other Hague-based war crimes tribunals, see <https://www.ibanet.org/ICC-ICL-Programme>.

This report examines the legal frameworks and practices of international criminal courts and tribunals to remedy international injustice through appeals, retrials, reviews or revisions of judgments and compensation for miscarriage of justice. It also refers to the frameworks and practices of internationalised criminal courts, where appropriate.

Chapter 1 – Appeals

Chapter 1 acknowledges that the right to appeal is the vital first line of response to injustice. It examines how international criminal courts and tribunals give effect to the right of convicted persons to have their conviction reviewed by a higher tribunal, as well as the ability of the prosecution to appeal acquittals, including the human rights safeguards that should apply.⁸

The Chapter considers the different grounds for appeal that are permitted, including errors of law, errors of fact, errors of procedure and other grounds that affect the fairness and reliability of a trial judgment. For each ground, it analyses the different standards of review applied, including issues raised by the ICC's Appeal Judgment in the *Bemba* case regarding the level of deference that should be afforded to a trial chamber's findings of fact.

It reviews the appeals procedures that have been established, including rules for admitting new evidence on appeal, safeguards for the rights of the accused and procedures for victims to participate in the appeals process. It considers an appeals chamber's ability to remand issues to the original chamber for clarification or adjudication and explores potential solutions if judges of the original chamber are not available.

The Chapter concludes by reviewing the remedies available to appeals chambers, including the power to confirm, reverse or amend a trial judgment or to order a retrial (a new trial before a different chamber). It pays particular attention to the fairness challenges associated with a retrial and considers criteria for when it may be appropriate for the Appeals Chamber to order this exceptional remedy. It also considers the ICC Prosecutor's request for the Appeals Chamber to declare a mistrial in the *Gbagbo and Blé Goudé* case and whether mistrial should be a possible appeal remedy.

Chapter 2 – Retrials

Chapter 2 considers the fair trial issues and challenges that inevitably arise from a decision to order a new trial before a different chamber, as an exceptional appeal remedy, and how to address them. It draws from the experiences of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Residual Mechanism for Criminal Tribunals (IRMCT) in conducting three retrials.

Recognising the corrective nature of the remedy of retrial, the Chapter starts by examining the critical role of the appeals chamber ordering a retrial to define the scope of the new trial so that the errors in the original trial are addressed without prejudice to rights of the accused, in contrast to ordering a completely new trial as though a first trial had never taken place.

⁸ Appeals can also be made against sentences, reparations orders and other decisions. Such appeals are beyond the scope of this report.

The Chapter explores measures available to the new trial chamber to admit evidence from the original trial to expedite the proceedings and protect witnesses from the potential trauma or other security risks that may be associated with retestifying. However, it also emphasises that such measures must be consistent with the rights of the accused and a fair trial.

It considers when new evidence should be admitted in a retrial. It acknowledges that in some instances it may be appropriate to allow new evidence in light of errors identified by the appeals chamber in the original trial and to allow the accused to present new exculpatory evidence. However, it also highlights fair trial concerns that would arise if the prosecution were allowed to introduce new evidence to address weaknesses in its original case or to take advantage of having heard the presentation of the defence's case in the original trial.

Finally, Chapter 2 considers how retrials affect the rights of victims. It recognises that a decision to order a retrial is likely to cause confusion and that outreach will be essential to explain the decision and its consequences to victims and affected communities. In addition, it considers measures to support legal representatives engage with their clients and to enable victims to participate in the retrial. It also considers the impact of a retrial on reparations proceedings if the appeals chamber orders a partial retrial in relation to some charges while it delivers final convictions on others.

Chapter 3 – Review/revision of judgments

Chapter 3 examines the powers of international criminal courts and tribunals to review or revise final judgments following the discovery of certain kinds of important new evidence or information. It identifies lessons that can be learned from review processes conducted to date, in particular by the ICTY, ICTR and IRMCT, recognising the differences between 'reviews' conducted by these tribunals and 'revision' proceedings yet to be conducted by the ICC and some other internationalised criminal courts.

The Chapter compares and examines the different potential applicants and grounds for review and revision. It considers restrictions on the availability of legal aid following final conviction and whether it fairly limits access to vital remedies.

Chapter 3 also compares and reviews the two stage procedures applied for both review and revision, including whether there is a need for some flexibility in the initial examination phase to ensure that applications that may have merit are fully considered. It considers the remedies available following review and revision proceedings, including whether an order for a retrial would be consistent with the principle of *ne bis in idem*.

Finally, the Chapter considers the lack of clear appeal procedures for review or revision judgments. In light of the importance of the process and its outcomes, it examines whether appeals may be possible, as well as whether convicted persons can make multiple applications for review or revision.

Chapter 4 – Compensation for miscarriage of justice

Chapter 4 reviews the unique provisions in the ICC Statute to provide compensation to persons who have been determined to have been subjected to miscarriages of justice before the Court, examining how the Court has dealt with applications filed to date by three acquitted persons.

The Chapter considers the Statute's recognition of a *right to compensation* for a miscarriage of justice overturned following a revision process, compared to the Court's *discretion to award compensation* for a grave and manifest miscarriage of justice when a person is acquitted, or the proceedings are otherwise terminated. It examines the definitions of 'miscarriage of justice' and 'grave and manifest miscarriage of justice', including whether they require findings of actual innocence.

The Chapter considers the unique nature of the compensation process (compared to the criminal process), as well as the need for applicants to be provided with legal aid and for fair procedures. It concludes by examining the standard of proof that should be applied and how compensation should be determined.

Throughout the report, the IBA makes detailed recommendations for the ICC to strengthen and implement coherent, fair and effective systems to implement these remedies consistent with international human rights law and standards and best practice. Although recommendations for all active international and internationalised criminal courts are beyond the scope of this report, many of the recommendations to the ICC will be relevant to other courts and tribunals.

Chapter 1: Appeals

Appeal processes provide the most immediate post-trial judgment opportunity to pursue remedies in the event of a wrongful conviction, wrongful acquittal or an unfair trial. Although appeals were not permitted before the post-Second World War Nuremberg and Tokyo International Military Tribunals,⁹ they are now considered a fundamental requirement of international criminal procedure.

1.1 The right to appeal a conviction

The right to appeal is an essential safeguard against wrongful conviction, ensuring that a defendant has at least one review of their conviction and sentence.¹⁰ The appeals process may also provide remedies for human rights violations, including fair trial violations, which occurred in earlier proceedings.¹¹

International human rights law and standards require that everyone convicted of a criminal offence has the right to have their conviction and sentence reviewed by a higher tribunal.¹² As the representative of Israel stated when proposing the inclusion of the right of appeal in the ICCPR, it is:

‘a basic guarantee of the proper administration of justice, for it was the only way to deal with miscarriages of justice before it was too late. [...] If there was to be some guarantee that persons would be wrongly condemned to years of suffering, there must be some provision for the review of every case by a higher court.’¹³

The Inter-American Court of Human Rights has emphasised that the aim of the right to appeal a judgment is ‘to protect the right of defence by creating a remedy to prevent a flawed ruling, containing errors unduly prejudicial to a person’s interests, from becoming final.’¹⁴

9 Nuremberg Charter, Art 26 provided: ‘The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review.’ Although Art 17 of the Tokyo Tribunal does not specifically address the finality of the judgment, Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press, 2008), at 101 noted the lack of an appeals process: ‘Article 17 gave SCAP [the Supreme Commander for the Allied Powers] the power to reduce or alter the sentence, a process common in military commissions. However, Article 17 provided no opportunity to challenge the prejudicial nature of the evidence admitted or of the process adopted.’

10 Amal Ramzi Alamuddin Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (OUP 2020), 656.

11 Clooney and Webb, n 10, 656-657.

12 See eg: Art 14(5) of the International Covenant on Civil and Political Rights; Art 7(1)(a) of the African Charter on Human and Peoples’ Rights; Art 8(2)(h) of the American Convention on Human Rights; Art 16(7) of the Arab Charter on Human Rights; Art 2(1) of Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms; Art 40(2)(b)(v) of the Convention on the Rights of the Child; Art 17(2)(c) (iv) of the African Charter on Rights of the Child; Art 18(5) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; Principle 30(2) of the UN Principles on Detention and Imprisonment; sN(10)(a) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

13 UN General Assembly, Official records of the 14th session, Third Committee 964th meeting, 23 November 1959, UN Doc A/C.3/SR.964, para 31.

14 IACtHR, *Herrera-Ulloa v Costa Rica* (series C, no 107), 2 July 2004, para 158.

In presenting the draft ICTY Statute to the UN Security Council in 1993, the UN Secretary-General proposed that the ICTY Statute should provide for appeals, stating ‘[s]uch a right is a fundamental element of individual civil and political rights’.¹⁵

Provisions providing for appeals by convicted persons have subsequently been incorporated in the statutes of international criminal courts and tribunals, including the ICTY,¹⁶ the ICTR,¹⁷ the ICC,¹⁸ the IRMCT,¹⁹ the Special Tribunal for Lebanon (STL),²⁰ the Malabo Protocol (extending the jurisdiction of the African Court of Justice and Human Rights to try international crimes),²¹ and the laws and statutes of internationalised criminal courts.²²

1.2 Prosecution appeals

International human rights law and standards refer only to the right of a convicted person to appeal their conviction. Indeed, many common law jurisdictions do not allow prosecution appeals on the basis that they are inconsistent with the principle of *ne bis in idem* or double jeopardy.²³ However, prosecution appeals are common in civil law jurisdictions.²⁴

Human rights courts and bodies have not found prosecution appeals to be incompatible with international human rights law.²⁵ In some cases, they have found that a prosecution appeal against a first instance acquittal is a continuation of the criminal proceedings and is not a retrial.²⁶ In other words, a prosecution appeal against a first instance acquittal does not violate the principle of *ne bis in idem* because the acquittal was not a *final* judgment.

Nevertheless, as discussed later in this chapter, it is important that where prosecution appeals are permitted, safeguards are in place to ensure that the rights of the acquitted person are respected. In particular, acquitted persons should not be detained while appeals are conducted, unless there are truly

15 Report of the Secretary-General pursuant to para 2 of Security Council Resolution 808 (1993), UN Doc S/25704, 3 May 1993, para 116.

16 ICTY Statute, Art 25.

17 ICTR Statute, Art 24.

18 ICC Statute, Art 81(1)(b).

19 IRMCT Statute, Art 23.

20 STL Statute, Art 26.

21 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Art 8(2).

22 See eg, the Special Court for Sierra Leone (SCSL) Statute, Art 20(1); the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC), Art 26 and Internal Rules, r 104; Law on Specialist Chambers and Specialist Prosecutor’s Office of the Kosovo Specialist Chambers and Special Prosecutor’s Office (KSC-SPO), Arts 46-47; Loi no 18-010 *portant règlement de procédure et de preuve devant la Cour Pénale Spéciale de la république centrafricaine* (SCC-CAR Loi no 18-010), 2 July 2018, s 132.

23 See eg, Drazen Djukić, ‘The right to a fair appeal in international criminal law’ (2017), https://pure.uvt.nl/ws/portalfiles/portal/19560105/Djukic_The_right_06_12_2017.pdf, 58: ‘In Common Law jurisdictions, appellate rights are markedly asymmetrical in favour of defendants, while Civil Law jurisdictions do not draw such a distinction. The double jeopardy doctrine bars prosecutorial appeals from first instance acquittals on questions of fact in Common Law jurisdictions.’

24 Djukić, n 23, 58: ‘On the other hand, Civil Law systems have placed the appellate rights of the prosecution on par with those of the accused, including in respect of first instance acquittals.’

25 Clooney and Webb, n 10, 656.

26 See eg, IACtHR, *Mohamed v Argentina* (series C, no 255), 23 November 2012, paras 121–126.

exceptional circumstances. If the acquittal is reversed, the newly convicted person should be able to appeal the conviction to a higher tribunal (see s1.8.3).

The legal frameworks of most international criminal courts and tribunals permit prosecution appeals, including the ICTY,²⁷ ICTR,²⁸ ICC,²⁹ IRMCT,³⁰ the STL,³¹ as well as the Malabo Protocol³² and the laws and statutes of internationalised criminal courts.³³

1.3 Grounds for appeal

Human rights courts and bodies have interpreted that the right to appeal entails permitting a convicted person to seek a review of both alleged errors of laws and facts.³⁴ The Inter-American Court of Human Rights has held that appeal courts are required to:

‘analyze questions of fact, evidence, and law upon which the contested judgment is based, since in judicial activity there is interdependence between the factual determinations and the application of law in such a way that an erroneous finding implies a wrong or improper application of law.’³⁵

International criminal courts and tribunals expressly provide for appeals on grounds of both error of law and fact.³⁶ The Malabo Protocol and the laws and statutes of internationalised courts also recognise these grounds of appeal.³⁷ The ICC Statute went further in providing specifically for appeals on grounds of an error of procedure.³⁸ Moreover, it is the only instrument to include the catch-all ‘any other ground that affects the fairness or reliability of the proceedings or decision’, which can only be raised in an appeal by or on behalf of the convicted person.³⁹ According to one commentary this was apparently intended ‘to ensure that any miscarriage of justice would be capable of correction on appeal’.⁴⁰ Although procedural errors and

27 ICTY Statute, Art 25.

28 ICTR Statute, Art 24.

29 ICC Statute, Art 81(1)(a).

30 IRMCT Statute, Art 23.

31 STL Statute, Art 26.

32 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Art 8(2) and 8(3).

33 See eg: SCSL Statute, Art 20(1); ECCC Law, Arts 17 and 26, Internal Rules, r 104; KSC-SPO Law, Art 46; SCC-CAR Loi no 18-010, s 132.

34 See eg, Human Rights Committee, General Comment 32, CCPR/C/GC/32, 23 August 2007, states: ‘The right to have one’s conviction and sentence reviewed by a higher tribunal established under article 14, paragraph 5, imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case. A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant.’

35 IACtHR, *Mohamed v Argentina*, Judgment, n 26, para 101.’

36 ICTY Statute, Art 25; ICTR Statute, Art 24; ICC Statute, Art 81(1)(a) and (b); IRMCT Statute, Art 23; STL Statute, Art 26.

37 Malabo Protocol, Art 8(2); SCSL Statute, Art 20(1); ECCC Internal Rules, r 104; KSC-SPO Law, Art 46(1); SCC-CAR Loi no 18-010, s 29(a).

38 This ground was subsequently adopted in Malabo Protocol, Art 8(2); and SCSL Statute, Art 20(1).

39 ICC Statute, Art 81(1)(b)(iv).

40 Christopher Staker and Franziska Eckelmans, ‘Article 81’ in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court* (3rd edn, CH Beck Hart Nomos 2015), 1941.

unfairness are not expressly listed as grounds for appeal of other international and internationalised criminal courts and tribunals, in practice, the ICTY and ICTR have addressed such allegations as errors of law.⁴¹

1.4 Appeal procedures

1.4.1 The Appeals Chamber

International criminal courts and tribunals contain appeals chambers dedicated to handling appeals. For example, judges assigned to the Appeals Division of the ICC must only serve in that division.⁴² The ICC Appeals Chamber is composed of five judges: the President of the Court and four other judges.⁴³

1.4.2 Rules of procedure and evidence during appeal

Despite the significance of the appeal phase and its corrective role, the legal frameworks of international criminal courts and tribunals vary significantly in defining the appeals process.

The IRMCT Rules of Procedure and Evidence (IRMCT RPE) provides 14 rules relating to appellate proceedings. These rules cover a range of procedural issues, including notice of appeal,⁴⁴ filing of briefs by the parties⁴⁵ and submission of additional evidence.⁴⁶ However, the ICC Rules of Procedure and Evidence (ICC RPE) contains only three rules relating to appeal against judgments, sentences and reparation orders addressing timelines for lodging appeals (no more than 30 days after notification of the decision), notifications and discontinuance.⁴⁷ The gap is partly addressed by Rule 149, which contains a general clause that states rules relating to the pre-trial and trial phase apply *mutatis mutandis* to appeal proceedings, even though those phases of a case are of a different nature and serve other purposes.⁴⁸ Some procedural elements are reflected in the ICC's Regulations of the Court⁴⁹ and deadlines regarding the delivery of judgments of the Appeals Chamber are addressed in the ICC Chambers Practice Manual.⁵⁰ Other procedural matters have been addressed in each case by the Appeals Chamber. Having completed

41 Staker and Eckelmans, 'Article 81', n 40, 1925: 'In the practice of the ICTY/ICTR Appeals Chambers, procedural errors and errors relevant to the rights of the accused and a fair trial have been treated as "errors of law".'

42 Rome Statute, Art 39(4).

43 Rome Statute, Art 39(1). IER Final Report, n 4, R218 recommended, in the long term, the ICC Statute should be amended to increase the number of Appeal Chamber judges to seven in order to address such important issues. In response to the IER Final Report's recommendation, the Court stated that, in addition to the challenges of amending the Statute, considerable practical challenges could arise, not least because the additional two judges would have to be ones that have not sat on the case in question in the pre-trial or trial phase, see: Overall Response of the International Criminal Court to the 'Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report', (ICC's Response to IER) 14 April 2021, para 390,

44 IRMCT Rules of Procedure and Evidence, r 133.

45 IRMCT Rules of Procedure and Evidence, rr 138-140.

46 IRMCT Rules of Procedure and Evidence, r 142.

47 ICC Rules of Procedure and Evidence, rr 150-152.

48 ICC Rules of Procedure and Evidence, r 149. ICC, Prosecutor v *Thomas Lubanga Dyilo*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, para 56 stated: 'The Appeals Chamber considers that appellate proceedings significantly differ in their nature and purpose from pre-trial and trial proceedings.'

49 ICC Regulations of the Court, regs 57-65.

50 ICC Chamber's Practice Manual, 5th edn 2021, 24.

appeals against trial judgments in six cases, it may be an opportune moment for the Court to develop more detailed and precise Rules and Regulations, as well as guidance in the Manual (eg, on the conduct of hearings), which can contribute to greater predictability, consistency and best practice.

The Independent Expert Review of the ICC has specifically recommended that, before the ICC Appeals Chamber departs from practice or jurisprudence approved by the Appeals Chamber, a special procedure should be conducted which involves notifying the parties and hearing their arguments before deciding the point either as a preliminary issue or in the context of the appeal.⁵¹ The Court has however raised concerns that the special procedure might conflict with the principle of the secrecy of deliberation, noting that judges already have the possibility to seek submissions from the parties in such circumstances.⁵²

1.4.3 Remanding issues to the original trial chamber

Appeals are conducted by appeals chambers. However, in some instances, an appeals chamber can decide to remand an issue to the original trial chamber to determine a matter. For example, Article 83(2) of the ICC Statute states: ‘the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly.’

An appeals chamber may decide to exercise this power where it determines that the original trial chamber, having heard the evidence in the case, is best placed to determine a factual issue. It may even decide to quash the conviction or acquittal and remand factual errors back to the original trial chamber to deliver a new judgment. As explained in section 1.8.3, this has the specific advantage of ensuring that a decision to overturn an acquittal taken by a trial chamber on appeal can be appealed to a higher tribunal. This is a remedy which would not be available in most international criminal courts and tribunals if the appeals chamber, as the highest chamber, decides to reverse an acquittal on appeal.

Appeals chambers may also remand a factual issue to the original trial chamber if it determines that the trial judgment has not provided a full and reasoned statement of findings on the evidence and conclusions reached. The appeals chamber could order the original trial chamber to clarify its reasoning and report back to the appeals chamber so that it can determine the ground of appeal.⁵³ It could also instruct the trial chamber to consider the factual issue raised on appeal and to issue a new fully reasoned judgment that addresses it.

In order for appeals chambers to exercise this important power, it should be possible to reconstitute the original trial chamber, recognising that the trial judges will have heard the evidence, be most familiar with the complexities of the case and be able to make a timely determination. However, recognising that many international criminal judges complete their terms of office following the completion of a trial or move on to other cases, this can pose significant challenges.

51 IER Final Report, n 4, r218.

52 ICC’s Response to the IER, n 43, para 390.

53 In at least one decision on an interlocutory appeal, the ICC Appeals Chamber reversed a decision by the Pre-Trial Chamber and remanded the issue to the Pre-Trial Chamber to provide further reasons for its decision, see ICC, Prosecutor v *Mokom Gawaka*, Judgment on the appeal of Maxime Jeffroy Eli Mokom Gawaka against the decision of Pre-Trial Chamber II of 25 March 2022 entitled ‘Order to the Registry concerning the appointment of Mr Nicholas Kaufman as counsel for Mr Maxime Jeffroy Eli Mokom Gawaka’, ICC-01/14-01/22-70-Red, 19 July 2022.

Where judges are still at the court at the time of the appeal, it should be possible to address workload challenges through judicial management and to extend the term of office of any judges, if necessary. Article 36(10) of the ICC Statute provides ‘a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.’

However, when a judge has left the court, the challenges are far greater. Should a judge be available (eg, because they have retired and have not taken on a potentially conflicting role) consideration should be given by the Presidency and the Assembly of States Parties as to whether it may be possible, in accordance with the ICC Statute, to reappoint the judge solely for the purposes of addressing the issues remanded by the Appeals Chamber.

At the same time, recognising that in some instances a judge who has left the ICC may not be available, the Court and the Assembly should prioritise implementing the recommendations of the Independent Expert Review of the ICC to amend the legal framework providing for the assignment of a substitute Judge who has familiarised themselves with the record of the proceedings.⁵⁴

1.5 Rights of the convicted or acquitted person during appeals

Provisions setting out the rights of the accused in the statutes of international criminal courts and tribunals generally apply to the ‘determination of a charge’,⁵⁵ which should be interpreted to include the appeal phase. Respect for the rights of the accused is equally important during this stage of a case when an appeals chamber reviews a trial chamber’s judgment determining those charges.

The European Court of Human Rights has held that states are required to ensure that persons enjoy fundamental fair trial rights before appeals courts.⁵⁶ Although certain fair trial rights may be varied, relaxed or even dispensed with on appeal – including the right to a public hearing, the right to be present, and the right to examine witnesses⁵⁷ – many other fair trial rights, such as the right to adequate time and facilities (including legal aid), remain essential for convicted persons to prepare appeals and for appeals to be fair.

In particular, a full and reasoned judgment is recognised as fundamental to enjoying the right to appeal. The Human Rights Committee has stated:

‘The right to have one’s conviction reviewed can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written Judgment of the trial court [...]’.⁵⁸

54 IER Final Report, n 4, R214-215. ICC’s Response to IER, n 43, para 386, the ICC urged the Assembly to address these recommendations as a matter of priority.

55 See eg, ICTY Statute, Art 21; ICTR Statute, Art 20; ICC Statute, Art 67.

56 See eg: ECtHR, *Lalmahomed v Netherlands* (Application no 26036/08), 25 May 2011, para 36; ECtHR, *Belziuk v Poland*, (Application no 45/1997/829/1035), 25 March 1998, para 37(i).

57 Clooney and Webb, n 10, 699-700, contains a detailed analysis of these issues.

58 HRC, General Comment 32, n 34, para 49.

The ICTY Appeals Chamber has similarly held that the right of the accused to a reasoned opinion is an aspect of the fair trial requirement embodied in Articles 20 and 21 of the ICTY Statute.⁵⁹ As one commentator notes, there are also important policy reasons for this rule:

‘International criminal trials are complex, lengthy, and feature numerous witnesses, thousands of exhibits, and decisions often measured in the hundreds if not thousands of pages. Appeals Chambers would face an arduous task if there was not a clear roadmap available to it.’⁶⁰

Most international and internationalised criminal courts and tribunals are expressly required to provide a written judgment containing reasons.⁶¹ Article 74(5) of the ICC Statute requires that the judgment must be in writing and shall contain a full and reasoned statement of the trial chamber’s findings on evidence and conclusions. The ICC Appeals Chamber has held that the purpose of the requirement is to ‘ensure [...] that each party and participant to the case is fully apprised of the outcome in a predictable manner, which must be public and reasoned, and to guarantee the right to appeal.’⁶² It has found that a failure to provide sufficient reasoning for findings of fact may amount to a procedural error and therefore a ground for appeal by itself.⁶³ Considering the requirements of a full and reasoned decision, the ICC Appeals Chamber has explained:

‘To fulfil its obligation to provide a reasoned opinion, a trial chamber is not required to address all the arguments raised by the parties, or every item of evidence relevant to a particular factual finding, provided that it indicates with sufficient clarity the basis for its decision. [...] The Appeals Chamber notes that a trial chamber thus has a degree of discretion as to what to address and what not to address in its reasoning. Not every actual or perceived shortcoming in the reasoning will amount to a breach of article 74(5) of the Statute.’⁶⁴

59 ICTY, *Prosecutor v Furundžija*, Appeal Judgment, (IT-95-17/1-A), 21 July 2000, para 69.

60 Kevin W Gray, ‘Is there even a standard of review at the ICC?’, *International Criminal Law Review* (2020), 945-982 at 958.

61 ICTY Statute, Art 23(2); ICTR Statute, Art 22(2); IRMCT Statute, Art 21(2); SCSL Statute, Art 18; RSCSL Statute, Art 19(2); ECCC Internal Rules, r 101(1); KSC-SPO Law, Art 43(2); SCC-CAR Rules, Art 130; ICC Statute, Art 74(5).

62 ICC, *Prosecutor v Gbagbo and Blé Goudé*, Judgment in the appeal of the Prosecutor against Trial Chamber I’s decision on the no case to answer motions, ICC-02/11-01/15-1400, 31 March 2021, para 161. In that case, the Appeals Chamber decided that, having definitively decided to acquit the accused persons, the Trial Chamber could announce the verdict and provide its full and detailed reasoned written decision as soon as possible thereafter.

63 ICC, *Prosecutor v Bemba et al*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Judgment pursuant to Article 74 of the Statute’, ICC-01/05-01/13-2275-Red, 8 March 2018, para 107.

64 *Prosecutor v Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’, ICC-01/04-01/06-773, para 20; See also: ICC, *Prosecutor v Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s ‘Judgment pursuant to Article 74 of the Statute’, ICC-01/05-01/08-3636-Red, 8 June 2018, para 53.

Although there is clearly a need for such discretion, there have been some decisions where the Appeals Chamber has held that the reasoning provided by a trial chamber was inadequate,⁶⁵ indicating that further guidance to trial chambers may be required.

When the prosecution appeals an acquittal, it is important that the rights of the acquitted person are fully respected. As a general rule, they must be released from detention immediately following the trial judgment. Article 81(3)(c)(i) of the ICC Statute provides for continued detention of an acquitted person in ‘exceptional circumstances’ based on ‘*inter alia* the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal’. However, the IBA has expressed concern about the potential length of continued detention while an appeal is being conducted and called on the Court to clarify further this vague and potentially broad criteria.⁶⁶ The organisation has also highlighted the significant challenges faced by the Court in obtaining state cooperation with the release of acquitted persons and called on more States Parties to enter into cooperation agreements with the Court to assist with release.⁶⁷ Following the acquittals of Laurent Gbagbo and Charles Blé Goudé in January 2019, the Appeals Chamber overturned a decision releasing the two men and imposed conditions on their release.⁶⁸ However, because no state was willing to accept Charles Blé Goudé, he remained under the supervision of the ICC in the Netherlands in what one judge described as ‘a situation of house arrest comparable, if not virtually equivalent to remaining in detention.’⁶⁹

1.6 Rights of victims during appeals

Except for the ECCC (which allowed civil parties to appeal a verdict if the Co-Prosecutors had appealed) victims cannot appeal a trial judgment issued by international criminal courts and tribunals.⁷⁰ The ICC Statute, however, provides that the Court shall permit their views and concerns to be presented and

65 See eg: in relation to the trial chamber’s judgment in the *Bemba* case, concerns were raised regarding the opacity of the judgment in ICC, Prosecutor v *Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s ‘Judgment pursuant to Article 74 of the Statute’, Separate Opinion, Judge Christine Van den Wyngaert and Judge Howard Morrison, ICC-01/05-01/08-3636 Anx2, 8 June 2018, para 6; in relation to decisions on redactions, see: Prosecutor v *Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’, ICC-01/04-01/06-773, 14 December 2006, paras 20–23; in relation to a reparations order, see: Prosecutor v *Ntaganda*, Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled ‘Reparations Order’, ICC-01/04-02/06-2782, 12 September 2022.

66 IBA, Provisional Release, Release at Advanced Stages of Proceedings, and Final Release at International Criminal Courts and Tribunals (2019), p. 82: ‘The appeals chamber should consider clarifying the criteria set out under Article 81(3)(c)(i). From the limited jurisprudence of the ICC thus far, it is unclear whether a “concrete” risk of flight implies a higher standard of proof than that required at the pre-trial and trial phases. Further, the appeals chamber should consider addressing whether there exists a hierarchy of seriousness of offences under the Statute as a general matter. Lastly, the appeals chamber should consider addressing the criteria on which to base a “probability of success on appeal” to increase the clarity and consistency of interpretation of this provision.’

67 IBA, Provisional Release, Release at Advanced Stages of Proceedings, and Final Release at International Criminal Courts and Tribunals (2019).

68 ICC, Prosecutor v *Gbagbo and Blé Goudé*, Judgment on the Prosecutor’s appeal against the oral decision of Trial Chamber I pursuant to Art 81(3)(c)(i) of the Statute, ICC-02/11-01/15-1251-Red, 1 February 2019.

69 ICC, Prosecutor v *Gbagbo and Blé Goudé*, Reasons for oral decision of 15 January 2019 on the *Requête de la Défense de Laurent Gbagbo afin qu’un jugement d’acquiescement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée* Opinion of Judge Cuno Tarfusser, ICC-02/11-01/15-1263-AnxA, para 117.

70 The ICC and ECCC permit victims to appeal reparation orders, which is beyond the scope of this report.

considered at appropriate stages of the proceedings, where their interests are affected.⁷¹ In practice, this means that the Court has allowed victims to participate in appeals, in most cases through legal representatives for victims who have been able to file submissions on issues under consideration and participate in appeal hearings. Significantly, the Appeals Chamber in the *Ongwen* case removed a requirement applied in other cases that a decision must be issued permitting victims to participate in appeals.⁷² Therefore victims that participated at trial in the *Ongwen* case were able to participate during the appeal against judgment without authorisation.⁷³

When a decision is taken on appeal to reverse or amend a trial conviction as a whole or in significant part, it is particularly important that outreach is conducted to explain the decision to victims and affected communities. As demonstrated by victims' reactions to the reversal of the conviction in the *Bemba* case,⁷⁴ such decisions can be difficult to understand, cause victims distress and may terminate their claims for reparations before the Court. At a minimum, significant efforts should be made to explain the reasons for the decision and its consequences to them, as well as to inform them of any separate efforts to assist them, such as projects of the ICC Trust Fund for Victims.

1.7 Standard of review

Appeal processes conducted by international criminal courts and tribunals generally avoid retrying cases and instead perform the role of correcting any errors made by the trial chamber. The ICC Appeal Chamber has held:

‘The Appeals Chamber considers that appellate proceedings significantly differ in their nature and purpose from pre-trial and trial proceedings. Importantly, appellate proceedings at the Court are of a corrective nature, which finds expression in, inter alia, the standard of review on appeal [...]’.⁷⁵

This approach is consistent with international human rights law. The Human Rights Committee has stated that a review of facts does not require a full retrial or hearing as long as the tribunal carrying out the review can look at the factual dimensions of the case.⁷⁶

71 Rome Statute, Art 68(3).

72 ICC, Prosecutor v *Ongwen*, Decision on the Modalities of Victims Participation, ICC-02/04-01/15-1859, 11 June 2021, paras 3–4.

73 ICC, *Ongwen*, Decision on the Modalities of Victims Participation, n 72, paras 3–4.

74 ICC, Prosecutor v *Bemba*, Legal Representatives of Victims' joint submissions on the consequences of the Appeals Chamber's Judgment dated 8 June 2018 on the reparation proceedings, ICC-01/05-01/08-3649, 12 July 2018, para 2: ‘the Judgment has had a distinguished impact on victims who report their deep disappointment and hopelessness for not receiving justice.’

75 ICC, *Lubanga* Appeal Judgment, n 48, para 56.

76 HRC, General Comment 32, n 34. See also: HRC, *Rolando v Philippines* (Comm no 1110/2002), 3 November 2004, para 4.5; HRC, *A.W.K. v New Zealand* (Comm no 1998/2010), 28 October 2014, para 9.3; HRC, *Sevostyanov v Russia* (Comm no 1856/2008), 1 November 2013, para 7.3; HRC, *Kharkhal v Belarus* (Comm no 1161/2003), 31 October 2007, para 6.5; HRC, *González Roche v Spain* (Comm no 1370/2005), 24 July 2007, para 6.5; HRC, *Van Hulst v Netherlands* (Comm no 903/2000), 1 November 2004, para 6.4; HRC, *Rayos v Philippines* (Comm no 1167/2003), 27 July 2004, 6.7; HRC, *Juma v Australia* (Comm no 984/2001), 28 July 2003, para 7.5; HRC, *Perera v Australia* (Comm no 536/1993), 28 March 1995, para 5.5.

The standard of review applied by most international and internationalised criminal courts and tribunals in reviewing grounds of appeal requires that errors of law must ‘invalidate the decision’ and errors of fact must ‘occasion a miscarriage of justice’ in order to trigger appeal remedies.⁷⁷

Article 83(2) of the ICC Statute appears to apply a lower standard. It provides that the Appeals Chamber can take remedial measures if it ‘finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error.’ The ICC Appeals Chamber has held that, in the event of an acquittal, ‘it is not justifiable to put the person through the ordeal of a new trial or even to reverse the acquittal and enter a conviction, unless it is shown that the error indeed materially affected the decision under review.’⁷⁸

1.7.1 Error of law

In considering alleged errors of law, the ICTR recognised that the Appeals Chamber was the final arbiter of the law of the tribunal.⁷⁹ As such, the role of Appeals Chamber was not to cross-check the findings of the trial chamber on matters of alleged errors of law merely to determine whether they were reasonable, but indeed to determine whether they were correct.⁸⁰ The ICC Appeals Chamber has similarly held that it will not defer to a trial chamber’s interpretation of the law, but will reach its own conclusion and then determine whether or not the trial chamber misinterpreted the law.⁸¹ As explained by one commentator:

‘If they [the ICC Appeals Chamber] find an error of law arising from the application of the wrong legal standard, they will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly. Thus, the Appeals Chamber may not only correct the legal error, but also, where appropriate, apply the correct legal standard to the evidence.’⁸²

This ‘correctness’ standard is uncontroversial given that it is applied by courts in both common law and civil law jurisdictions.⁸³ Another commentator notes:

‘There are important policy reasons for this approach, including the need for consistency so that there may be a sphere of behaviour which individuals know will bring criminal sanction, the importance of consistency in the application of the law, thought necessary to ensure public confidence in the administration of justice, and the recognised authority of appellate courts to make and determine law.’⁸⁴

77 ICTY Statute, Art 25(1); ICTR Statute, Art 24(1); IRMCT Statute, Art 23(1); SCSL Statute, Art 20(1); ECCC Internal Rules, r 104(1); KSC-SPO Law, Art 46(1); Loi no 18-010 SCC-CAR, s 29(A).

78 ICC, Prosecutor v *Ngudjolo*, Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’, ICC-01/04-02/12-271-Corr, 7 April 2015, para 284.

79 ICTR, Prosecutor v *Rutaganda*, Appeal Judgment (ICTR-96-3-A), 26 May 2003, para 20.

80 ICTR, *Rutaganda* Appeal Judgment, n 79, para 20.

81 ICC, *Lubanga* Appeal Judgment, n 48, paras 18–19; ICC, *Ngudjolo* Appeal Judgment, n 78, para 20; ICC, *Bemba* Appeal Judgment n 64, paras 36–37; ICC, Prosecutor v *Ntaganda*, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, ICC-01/04-02/06-2666-Red, 30 March 2021, para 36; ICC, *Gbagbo and Blé Goudé* Appeal Judgment, n 62, para 62.

82 William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2016), 1214.

83 Gray, n 60, 953.

84 Gray, n 60, 948-949.

Applying its Statute, the ICTY held that ‘it is not any error of law that leads to a reversal or revision of the Trial Chamber’s decision; rather, as required by its Statute, the appealing party alleging an error of law must also demonstrate that the error renders the decision invalid.’⁸⁵

Applying the Rome Statute’s standard, the ICC Appeals Chamber has concluded that a judgment is ‘materially affected’ by an error of law if the trial chamber ‘would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error’.⁸⁶

1.7.2 Error of fact

In most cases, appeals chambers of international criminal courts and tribunals have applied a deferential standard of review to alleged errors of fact by trial chambers, recognising that it is the trial chamber’s task to hear, assess and weigh the evidence presented at trial and that, having heard testimony directly, they are best placed to assess its reliability and credibility.⁸⁷ The ICTY Appeals Chamber held:

‘Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is “wholly erroneous” may the Appeals Chamber substitute its own finding for that of the Trial Chamber. It must be borne in mind that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.’⁸⁸

The ICC initially took a similar deferential approach, finding in its first appeal judgments:

‘[I]t will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts. As to the “misappreciation of facts”, the Appeals Chamber has also stated that it “will not disturb a Pre-Trial or Trial Chamber’s evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it”’.⁸⁹

In other words, since the appeals chambers of international criminal courts and tribunals do not rehear all the evidence heard by the trial chamber, their review of factual matters focuses on assessing the *reasonableness* of the trial chamber’s findings, taking into account the standard of proof (duty to be satisfied of essential findings beyond reasonable doubt) and the nature and degree of reasoning provided. While some national jurisdictions (more generally from civil law traditions) take a different approach and afford

85 ICTY, *Furundžija* Appeal Judgment, n 59, para 37.

86 Prosecutor v *Banda and Jerbo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled ‘Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation’, ICC-02/05-03/09-295 OA2, 17 February 2012, para 20, referred to in *Lubanga* Appeal Judgment, n 48, para 18; see also ICC, Democratic Republic of the Congo, Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, ICC-01/04-169 OA, 13 July 2006.

87 See eg, ICTR, *Rutaganda* Appeal Judgment, n 79, para 21; ICTY, Prosecutor v *Aleksovski* Appeal Judgment, 24 March 2000.

88 ICTY, Prosecutor v *Kupreškić et al*, Appeal Judgment (IT-95-16-A), 23 October 2001, paras 30–32.

89 ICC, *Lubanga* Appeal Judgment, n 48, para 21; *Ngudjolo* Appeal Judgment, n 78, para 22.

much less deference to initial triers of fact, this is generally because the appellate procedure permits the appeals court to rehear all of the evidence.

Tensions in the standard of review to be applied at the ICC for factual matters seemed to emerge from the *Bemba* Appeal Judgment, which reversed all the convictions entered at trial. This was apparently based – at least in part – on a less deferential approach. The majority held that ‘the idea of a margin of deference to the factual findings of the trial chamber must be approached with extreme caution’,⁹⁰ to avoid constraining the exercise of its appellate discretion in such a way that it ties its own hands against the interest of justice.⁹¹ While the Appeals Chamber accepted that it should not assess the evidence *de novo* with a view to determining whether it would have reached the same factual conclusion as the trial chamber, it stated that it would determine whether a reasonable trial chamber properly directing itself could have been satisfied beyond reasonable doubt as to the finding in question, based on the evidence that was before it.⁹² In doing so, it attached ‘great significance’ to the Trial Chamber’s reasoning.⁹³ It stated that ultimately, the Appeals Chamber must be satisfied that factual findings made beyond reasonable doubt are clear and unassailable, both in terms of evidence and rationale.⁹⁴ Accordingly, when the Appeals Chamber is able to identify findings that can reasonably be called into doubt, it must overturn them.⁹⁵

This apparent move away from deference to trial chambers’ factual findings in international criminal appeals was heavily criticised by the two dissenting Appeals Chamber judges,⁹⁶ the ICC Prosecutor,⁹⁷ the Independent Expert Review of the ICC conducted in 2020,⁹⁸ and a number of commentators.⁹⁹ Criticisms focussed in particular on the unexplained departure from the Court’s previous jurisprudence,¹⁰⁰ and its ‘replacement with new, uncertain and untested standards.’¹⁰¹ The procedure applied by the Appeals Chamber, which reviewed factual findings without a *de novo* examination of the evidence (including allowing submissions from the parties and additional evidence) has also been criticised as bringing together the worst of the common law and civil law systems.¹⁰²

90 ICC, *Bemba* Appeal Judgment, n 64, para 38.

91 ICC, *Bemba* Appeal Judgment, n 64, para 40.

92 ICC, *Bemba* Appeal Judgment, n 64, para 42.

93 ICC, *Bemba* Appeal Judgment, n 64, paras 43–44.

94 ICC, *Bemba* Appeal Judgment, n 64, para 45.

95 ICC, *Bemba* Appeal Judgment, n 64, para 46.

96 ICC, *Bemba* Appeal Judgment, n 64, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, ICC-01/05-01/08-3636-Anx1-Red, 8 June 2018.

97 Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo, 13 June 2018.

98 IER Final Report, n 4, paras 609–614.

99 See eg: Alex Whiting, ‘Appeals Judges Turn the ICC on its Head with Bemba Decision’, Just Security, 14 June 2018, <https://www.justsecurity.org/57760/appeals-judges-turn-icc-head-bemba-decision>; Leila N Sadat, ‘Fiddling While Rome Burns? The Appeals Chamber’s Curious Decision in Prosecutor v Jean-Pierre Bemba Gombo’, EJIL Talk, 12 June 2018, <https://www.ejiltalk.org/fiddling-while-rome-burns-the-appeals-chambers-curious-decision-in-prosecutor-v-jean-pierre-bemba-gombo>.

100 ICC, *Bemba* Appeal Judgment, n 64, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, 8 June 2018, para 5.

101 Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo, 13 June 2018.

102 Gray, n 60, 980.

In two subsequent appeal Judgments, the ICC Appeals Chamber has sought to define a clearer balance between deferring to the findings of the trial chamber and assessing alleged errors of fact. In identical statements of the standard of review for errors of fact, the Appeals Chamber in the *Ntaganda* and *Gbagbo/Blé Goudé* appeal judgments stated that it will continue to apply the standard of reasonableness.¹⁰³ However, it was more explicit that in conducting its assessment of alleged errors of fact:

‘the Appeals Chamber will consider whether the trial chamber’s evaluation was consistent with logic, common sense, scientific knowledge and experience, and whether the trial chamber took into account all relevant and connected evidence, and was mindful of the pertinent principles of law (including, as applicable, the standard of proof beyond reasonable doubt). Beyond the foregoing considerations, the Appeals Chamber will not disturb a trial chamber’s factual finding only because it would have come to a different conclusion.’¹⁰⁴

The Appeals Chamber held that it ‘will allow the deference considered necessary and appropriate to the factual findings of the trial chamber.’¹⁰⁵ Nevertheless, it held that the Appeals Chamber’s deference to the factual findings of the trial chamber is ‘not without qualification’.¹⁰⁶

‘The Appeals Chamber may interfere with a trial chamber’s factual finding if it is shown to be attended by errors including the following: insufficient support by evidence; reliance on irrelevant evidence; failure to take into account relevant evidentiary considerations and facts; failure properly to appreciate the significance of the evidence on record; or failure to evaluate and weigh properly the relevant evidence and facts. The Appeals Chamber may interfere where it is unable to discern objectively how the trial chamber’s conclusion could have reasonably been reached from the evidence on the record.’¹⁰⁷

As in the *Bemba* Appeal Judgment, the Appeals Chamber reiterated the ‘great significance’ of the trial chamber’s reasoning in assessing a factual finding.

‘In particular, if the supporting evidence appears weak, or if there are significant contradictions in the evidence, deficiencies in the trial chamber’s reasoning as to why it found that evidence persuasive may lead the Appeals Chamber to conclude that the finding in question was unreasonable.’¹⁰⁸

If the aim of a criminal appeal is to remedy any injustice, then the Appeals Chamber’s efforts to clarify the standard of review, including its qualifications on deferring to a trial chamber’s findings of fact and clarifications on when it will interfere with those findings, should be commended for seeking to maintain the highest standards of fairness and equality of arms.

Of course, not every error of fact will cause an appeals chamber to amend or overturn a decision.¹⁰⁹ Most international and internationalised criminal courts and tribunals require a showing that the error had

103 ICC, *Ntaganda* Appeal Judgment, n 81, para 37; ICC, *Gbagbo and Blé Goudé* Appeal Judgment, n 62, para 66.

104 ICC, *Ntaganda* Appeal Judgment, n 81, para 39; ICC, *Gbagbo and Blé Goudé* Appeal Judgment, n 62, para 68.

105 ICC, *Ntaganda* Appeal Judgment, n 81, para 40; ICC, *Gbagbo and Blé Goudé* Appeal Judgment, n 62, para 69.

106 ICC, *Ntaganda* Appeal Judgment, n 81, para 41; ICC, *Gbagbo and Blé Goudé* Appeal Judgment, n 62, para 70.

107 *Ibid.*

108 ICC, *Ntaganda* Appeal Judgment, n 81, para 42; ICC, *Gbagbo and Blé Goudé* Appeal Judgment, n 62, para 71.

109 ICTY, *Furundžija* Appeal Judgment, n 59, para 37.

a sufficient impact on the judgment to trigger appeal remedies. This is usually framed as requiring a showing that the error occasioned a miscarriage of justice. To demonstrate that a miscarriage of justice has occurred as a result of an error of fact, the ICTY/ICTR Appeals Chamber specified that the appellant must show that it was critical to the verdict reached by the Trial Chamber or that the assessment of the evidence was totally erroneous, and that, therefore, flagrant injustice resulted therefrom.¹¹⁰

The ICC Statute does not require that the error of fact resulted in a miscarriage of justice, but that it materially affected the conviction decision. Although this appears to be a lesser standard, the ICC Appeals Chamber held in its first judgments (citing ICTY and ICTR jurisprudence) that its ‘intervention is required when “an unreasonable assessment of the facts of the case” carried out by the Trial Chamber “may have occasioned a miscarriage of justice”, which constitutes a factual error.’¹¹¹ Although the most recent appeal decisions do not mention a miscarriage of justice threshold, they essentially require a finding that the verdict was wrong:

‘Importantly, an error and its materiality must not be assessed in isolation; rather the Appeals Chamber must consider the impact of the error in light of the other relevant factual findings relied upon by the trial chamber for its decision on conviction or acquittal. A trial chamber’s decision is materially affected by a factual error if the Appeals Chamber is persuaded that the trial chamber, had it not so erred, would have convicted rather than acquitted the person or *vice versa* in whole or in part.’¹¹²

1.7.3 Error of fact – additional evidence

In addition to errors of fact that originate from a trial chamber’s assessment of evidence presented during trial (covered in 1.7.2 above), new evidence may be discovered after the trial that shows errors of fact. The ability of appellants to raise such evidence and for it to be considered during appeals may be essential in obtaining remedies for a wrongful conviction or acquittal or to support grounds of appeal alleging unfairness.

Rules governing the admission of evidence at the appeals phase applied by international and internationalised criminal courts and tribunals are generally restrictive requiring: (1) that the additional evidence was not available at trial; (2) it is relevant and credible; and (3) it could have been a decisive factor in reaching the decision at trial.¹¹³ Although there is not a comparable rule in the ICC Rules of Procedure and Evidence or the Regulations of the Court,¹¹⁴ the Appeals Chamber in the *Lubanga* case held similarly:

‘Additional evidence on an appeal pursuant to article 81(1) of the Statute is admissible if: (i) the Appeals Chamber is convinced of the reasons why such evidence was not presented at trial, including whether it could have been presented with the exercise of due diligence; and (ii) it is

110 ICTR, *Rutaganda* Appeals Judgment, n 79, para 512.

111 ICC, *Lubanga* Appeal Judgment, n 48, para 25; *Ngudjolo* Appeal Judgment, n 78, para 24. See also *Bemba* Appeal Judgment, n 64, para 40: ‘The Appeals Chamber is of the opinion that it may interfere with the factual findings of the first-instance chamber whenever the failure to interfere may occasion a miscarriage of justice.’

112 ICC, *Ntaganda* Appeal Judgment, n 81, para 43; ICC, *Gbagbo and Blé Goudé* Appeal Judgment, n 62, para 72.

113 ICTY r 115; ICTR r 115; IRMCT r 142; SCSL r 115; RSCSL r 115; ECCC Internal r 108(7); KSC-SPO r 181; SCC-CAR rr, s 137.

114 ICC Regulations of the Court, reg 62 set out some procedural requirements.

demonstrated that the additional evidence, if it had been presented before the Trial Chamber, could have led the Trial Chamber to enter a different verdict, in whole or in part.¹¹⁵

The Appeals Chamber held that additional evidence may include evidence not only related to guilt or innocence but also to the fairness of the proceedings.¹¹⁶ It also confirmed that ‘the criteria of relevance, probative value and potential prejudicial effect also apply to the admission of evidence at the appellate stage of proceedings’.¹¹⁷

Admission of new evidence on appeal is therefore an exceptional measure. The ICC Appeals Chamber has reasoned ‘allowing the admission of additional evidence on appeal, without further restriction, entails a real risk of litigation strategies that contemplate the presentation of evidence for the first time on appeal, even if such evidence was available at trial or, with due diligence, could have been produced’.¹¹⁸

Nonetheless, the need for some flexibility has also been recognised. The IRMCT’s Rules provide, following the case law of the ICTY and ICTR,¹¹⁹ that ‘[w]here the Appeals Chamber finds that the evidence was available at trial, it may still allow it to be admitted provided that the moving Party can establish that the exclusion of it would amount to a miscarriage of justice’.¹²⁰

The ICC Appeals Chamber has similarly held that ‘[i]t is within the Appeals Chamber’s discretion [on a case-by-case basis] to admit additional evidence on appeal despite a negative finding on one or more of these criteria, if there are compelling reasons for doing so.’¹²¹ In particular, it has recognised that the rules for admission of evidence by a convicted person on appeal must align with the ability of new evidence to trigger revision proceedings (see Chapter 3):

‘With respect to the interaction between the rules governing the admissibility of additional evidence on appeal and revision proceedings, the Appeals Chamber considers that additional evidence brought by a convicted person on appeal that would be considered in revision proceedings should, as a general matter, be admissible on appeal. In this respect, it would be contrary to the interests of justice and the proper and expeditious administration of judicial proceedings to establish a more stringent standard for the admission of evidence on appeal than that which can be considered in revision proceedings. This is because to do so could lead to a person’s conviction first being confirmed on appeal because the evidence could not be considered, only then to be overturned in revision proceedings.’¹²²

115 ICC, *Lubanga* Appeal Judgment, n 48, para 1.

116 ICC, *Lubanga* Appeal Judgment, n 48, para 60.

117 ICC, *Lubanga* Appeal Judgment, n 48, para 54.

118 ICC, *Lubanga* Appeal Judgment, n 48, para 57.

119 IRMCT Criminal Law Database, Notions List, Additional evidence on appeal, see <https://cld.irmct.org/notions/show/29/additional-evidence-on-appeal#> accessed 19 October 2022.

120 IRMCT, r 142(c).

121 ICC, *Lubanga* Appeal Judgment, n 48, para 1.

122 ICC, *Lubanga* Appeal Judgment, n 48, para 61.

When an application is made to introduce additional evidence during appeal proceedings, international and internationalised criminal courts and tribunals provide other parties an opportunity to make submissions on admissibility and to adduce evidence in response if the additional evidence is admissible.¹²³

The ICTY/ICTR Appeals Chamber recognised that it may either determine admissibility following the application and responses, or delay its entire decision on admissibility and weight of new evidence until the appeal judgment, suggesting that there are pros and cons to both approaches.¹²⁴ On the one hand, ruling on admissibility first provides the parties with clarity about whether the evidence is being considered when they make their submissions on the appeal.¹²⁵ This is arguably very important when the veracity of the additional evidence has been challenged by other parties and/or rebuttal evidence has been submitted to the Appeals Chamber.¹²⁶ On the other, the ICTY Appeals Chamber argued that by waiting to rule until the appeal Judgment, the Appeals Chamber can consider all other evidence in the case having completed its study of the trial record.¹²⁷

Although the ICC Appeals Chamber has so far preferred to rule on admissibility during the appeal judgment,¹²⁸ there are compelling reasons for it to reconsider its approach in future appeals. In performing its corrective role, it is essential that the Appeals Chamber conducts a process that is logical, transparent and that the parties are able to make informed submissions on matters that will determine the final verdict in the case. Requiring parties to make their final submissions in a case without knowing whether or not additional evidence has been admitted or having to rebut evidence that may never be admitted is not conducive to a fair and transparent final determination on guilt or innocence. While ruling on admissibility during the appeal process may take additional time, an appeals chamber should be sufficiently familiar with the trial record in the early stages of an appeal to determine whether evidence *could* have led to a different verdict for the purposes of determining admissibility. The ICTY Appeals Chamber suggested that, even if the decision to admit the evidence is made at the same time as the main appeal, a two-step process is nonetheless envisaged in which new evidence, once admitted, will then be assessed as to its effect on the appeal as a whole.¹²⁹

When additional evidence is admitted, an appeals chamber will need to consider the additional evidence and any rebuttal evidence against the evidence on the trial record to determine whether there has been an error of fact warranting a remedy. In light of all the evidence, the appeals chamber will need to decide whether an error of fact could have been a decisive factor in reaching the decision at trial, or in relation to the ICC, could have led the trial chamber to enter a different verdict, in whole or in part. Although the ICC has yet to articulate the test that it will apply, the ICTY applied the following test to an appeal against conviction:

123 ICC Regulation of the Court, Regulation 62(2); ICTY r 115; ICTR r 115; IRMCT r 142; SCSL r 115; RSCSL r 115; ECCC Internal Rules, r 108(7); KSC-SPO r 181; SCC-CAR Rules, s 137.

124 ICTY, *Kupreškić et al.* Appeal Judgment, n 88, para 71.

125 *Ibid.*

126 *Ibid.*

127 *Ibid.*

128 Fabricio Guariglia, 'Conduct of Appeals' in Guariglia, Batros, Gallmetzer, & Mugwanya, (eds), *The Appeals Chamber of the International Criminal Court: Commentary and Digest of Jurisprudence* (CUP 2018) 487-596 at p 510.

129 See n 124, above.

‘has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings[?].’¹³⁰

The ICTY Appeals Chamber went on to confirm:

‘when the Appeals Chamber is itself seized of the task of evaluating trial evidence and additional evidence together, and in some instances in light of a newly articulated legal standard, it should, in the interests of justice, be convinced itself, beyond reasonable doubt, as to the guilt of the accused, before confirming a conviction on appeal.’¹³¹

1.7.4 Error of procedure

In relation to the ICC, one commentary notes that procedural error may result from a failure to comply with a mandatory requirement of the ICC Statute, the Rules of Procedure and Evidence, or another provision of the applicable law¹³² that may amount to errors of law. In these circumstances, the same standard of review for errors of law applies – it must be demonstrated that, had the Trial Chamber not erred, the decision under Article 74 of the Statute would (as opposed to ‘could’ or ‘might’) have been substantially different.¹³³

Procedural errors may also arise from international criminal courts and tribunals exercising discretion in relation to trial management.¹³⁴ For example, the ICC has interpreted the obligations of trial chambers in Article 64(2) to ensure that trials are fair and expeditious as providing the judges with a ‘significant degree of discretion’ concerning the procedures they adopt in managing the trial, ‘as long as the rights of the accused are respected, and due regard is given to the protection of witnesses and victims.’¹³⁵

The ICC Appeals Chamber has held that it will only interfere with the exercise of discretion under limited conditions. For example, it has held that it will not interfere with the exercise of discretion of the Pre-Trial Chamber ‘merely because the Appeals Chamber, if it had the power, might have made a different ruling. To do so would be to usurp powers not conferred on it and to render nugatory powers specifically vested in the Pre-Trial Chamber.’¹³⁶ Citing the jurisprudence of other international tribunals as well as domestic courts, it found that the conditions justifying appellate interference to be: (1) where the exercise of discretion is based on an erroneous interpretation of the law [error of law]; (2) where it is exercised on

130 ICTY, *Kupreškić et al* Appeal Judgment, n 88, para 75.

131 ICTY, *Prosecutor v Blaškić*, Appeal Judgment (IT-95-14-A) 29 July 2004, para 23.

132 Schabas, n 82, 1212.

133 ICC, *Ngudjolo* Appeal Judgment, n 78, para 285; ICC, *Lubanga* Appeal Judgment, n 48, paras 19–20; *Bemba et al* Appeal Judgment, n 63, para 90; *Gbagbo and Blé Goudé* Appeal Judgment, n 62, para 258.

134 See eg, in relation to the ICTY, *Prosecutor v Prlić et al*, Decision on prosecution appeal concerning the Trial Chamber ruling reducing time for the prosecution case (IT-04-74-AR73.4), 6 February 2007, para 8: ‘It is well established in the jurisprudence of the International Tribunal that Trial Chambers exercise discretion in relation to trial management.’

135 See eg: ICC, *Prosecutor v Ruto and Sang*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial’, ICC-01/09-01/11-1066, 25 October 2013, para 50.

136 ICC, *Lubanga* Appeal Judgment, n 48, para 20; *Ngudjolo* Appeal Judgment, n 78, para 21.

patently incorrect conclusion of fact [error of fact]; or (3) where the decision is so unfair and unreasonable as to constitute an abuse of discretion.¹³⁷

With respect to an exercise of discretion based on an alleged erroneous interpretation of the law or an alleged incorrect conclusion of fact, the ICC Appeals Chamber has held that it will apply the standard of review with respect to errors of law and errors of fact (see ss 1.6.1 and 1.6.2 above). Where an exercise of discretion is alleged to amount to an abuse of discretion, the Appeals Chamber has held:

‘an abuse of discretion will occur when the decision is so unfair or unreasonable as to “force the conclusion that the Chamber failed to exercise its discretion judiciously”. The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion. The degree of discretion afforded to a Chamber may depend upon the nature of the decision in question.’¹³⁸

As with errors of law, the ICC Appeals Chamber held that it will only reverse a conviction decision if it is materially affected by the procedural error. In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the judgment would have substantially differed from the one rendered.¹³⁹

1.7.5 Any other ground that affects the fairness or reliability of proceedings or decision

This ground is unique to the ICC Statute and can only be raised by a convicted person or by the Prosecutor on their behalf. According to one commentary, it was intended as a catch-all provision to ensure that any miscarriage of justice could be remedied on appeal.¹⁴⁰ Other international criminal courts have considered alleged violations of fair trial rights as errors of law.¹⁴¹

Although it has been suggested that it adds little to the other grounds of appeal,¹⁴² it is noteworthy that some common law jurisdictions include ‘a failure of due process at trial’ as a ground of appeal, which allows judges to find convictions ‘unsafe’ or ‘unsatisfactory’ regardless of the guilt or innocence of the convicted person.¹⁴³ The fact that Article 83(2) requires that the Appeals Chamber intervene where it is found that the proceedings appealed from were ‘unfair in a way that affected the reliability of the decision

137 ICC, Prosecutor v *Kony et al*, Judgment on the appeal of the Defence against the ‘Decision on the admissibility of the case under article 19(1) of the Statute’ of 10 March 2009, ICC-02/04-01/05-408 OA3, ICC Appeals Chamber, 16 September 2009, paras 79–80; ICC, Prosecutor v *Ruto, Kosgey and Sang*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, ICC-01/09-01/11-307 OA, 30 August 2011, paras 89–90.

138 ICC, Prosecutor v *Kenyatta*, Judgment on the Prosecutor’s appeal against Trial Chamber V(B)’s ‘Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute’, ICC-01/09-02/11-1032, 19 August 2015, para 25; see also: ICC, *Bemba et al* Appeal Judgment, n 63, para 101; ICC, *Ntaganda* Appeal Judgment, n 81, para 46; ICC, *Gbagbo and Blé Goudé* Appeal Judgment, n 62, para 65.

139 ICC, *Lubanga* Appeal Judgment, n 48, para 20.

140 Staker and Eckelmans, ‘Article 81’, n 40, 1941.

141 ICTY, Prosecutor v *Hadžihasanović & Kubura*, Appeal Judgment (IT-01-47-A), 22 April 2008, para 130, ‘[w]here a party alleges on appeal that the right to a fair trial has been infringed, it must prove that the violation caused such prejudice to it as to amount to an error of law invalidating the judgement’.

142 See n 140, above.

143 Gray, n 60, 952.

or the sentence' (as distinct from the 'materially affected the decision' standard applied to other grounds of appeal) indicates that it may be significant in addressing fair trial violations.

The ICC Appeals Chamber has established a two-limb enquiry into allegations of unfairness on this ground: (1) whether the convicted person's rights have been violated; and, if so, (2) whether the violations affected the reliability of the Conviction Decision.¹⁴⁴ It has also held that:

'Whether any unfairness that is established affects the reliability of the decision is not a question that can be decided *in abstracto*; it is dependent on the nature of the particular case that is before the Appeals Chamber and must be determined as such.'¹⁴⁵

One commentary points out that, while the ground raised must affect the fairness or reliability of the proceedings or decision, the standard of review requires that those grounds must not only be accepted by the Appeals Chamber, but the Chamber must conclude that the proceedings or the decision were actually unfair in a way that affected the reliability of the decision or the sentence.¹⁴⁶

1.8 Appeal remedies

Having reviewed the alleged errors in the trial chamber judgment, most international and internationalised criminal courts and tribunals can, based on their findings, either confirm, reverse or amend the judgment,¹⁴⁷ or order a retrial.¹⁴⁸

1.8.1 Confirming a decision

If an appeals chamber finds that the error(s) alleged by the appellant(s) did not occur, it will reject the appeal and confirm the trial chamber's verdict and any sentence or penalty. Similarly, if the appeals chamber finds that an error occurred but it did not invalidate the decision or occasion a miscarriage of justice, or, in the case of the ICC, it did not materially affect the decision or affect the reliability of the decision, it will confirm the trial chamber's decision.¹⁴⁹

144 *Lubanga* Appeal Judgment, n 48, para 28.

145 *Bemba* Appeal Judgment, n 64, para 62.

146 Schabas, n 82, 1216 'This standard is articulated slightly differently in article 83(2) of the *Statute*, which speaks of proceedings that "were unfair in a way that affected the reliability of the decision or sentence". The implication is that the proceedings must be "unfair", perhaps a test that is somewhat stricter than "grounds that affect the fairness".'

147 ICTY Statute, Art 25(2); ICTR Statute, Art 24(2); ICC Statute, Art 83(2); IRMCT Statute, Art 23(2); SCSL Statute, Art 20(2); ECCC Internal Rules, r 104(2); Malabo Protocol, Art 18(4); KSC-SPO Law, Art 46(3); Loi no 18-010 SCC-CAR, s 138(c).

148 ICTY r 117(c); ICTR r 118(c); ICC Statute, Art 83(2)(b); SCSL r 118(c); IRMCT r 144(c); KSC-SPO r 182(3); Loi no 18-010 SCC-CAR, s 138(c).

149 Christopher Staker and Franziska Eckelmans, 'Article 83' in Triffterer at 1969 notes 'Article 83, para. 2 does not spell out the Appeals Chamber's power for the scenario that the appeal does not meet the standard of review. However, while not specified, the Appeals Chamber also has the power to reject the appeal and confirm the appealed decision where the appeal was not successful, rendering the impugned decision final.' The ICC Appeals Chamber has confirmed the trial chamber's judgment in numerous instances. See eg: ICC, *Lubanga* Appeal Judgment, n 48, para 529; ICC, *Ngudjolo* Appeal Judgment, n 78, para 296; ICC, *Ntaganda* Appeal Judgment n 81, para 1170; ICC, *Gbagbo and Blé Goudé* Appeal Judgment, n 62, para 380.

It is only when the appeals chamber finds an error(s) that meets the standard of the review that it can reverse or amend a decision or order a new trial.

1.8.2 Reversing or amending a conviction decision

The power of an appeals chamber to reverse a conviction by a trial chamber and order an acquittal or to amend the conviction decision are the most direct measures that it can take to remedy errors of law, procedure, or fact or unfairness in the trial.

A reversal of a conviction essentially recognises that the conviction was wrong or that the trial was so unfair that an acquittal is warranted and completely overturns it.

Amending a conviction decision involves entering new findings, including overturning convictions relating to specific charges. Significantly, Article 83(2) of the ICC Statute provides that when the decision or sentence has been appealed only by the convicted person or the Prosecutor on their behalf, it cannot be amended to their detriment. In these circumstances, the Appeals Chamber cannot substitute the conviction for a higher offence or sentence.

Although it has been questioned whether the ICC Appeals Chamber may apply Regulation 55 of the Regulations of the Court to change the legal characterisation of the fact to accord with other crimes or forms of participation, without exceeding the facts and circumstances described in the charges and any amendments to the charges,¹⁵⁰ Regulation 55 expressly applies only ‘during the trial’. Article 83(1) recognises that ‘the Appeal Chamber shall have all the powers of Trial Chamber’. However, Regulation 55 expressly limits its application to the trial and there is nothing in the Regulations to suggest that Regulation 55 should be applied *mutatis mutandis* during appeals. In line with criticisms of the use of Regulation 55 at the very late stages of the *Katanga* case, after the defence had presented its case,¹⁵¹ the IBA has previously urged caution regarding its use even during the trial. The IBA has argued that whether the use of Regulation 55 is consistent with a fair trial depends in part on the stage of the proceedings at which it is applied and has recommended that consideration should be given to limiting its use at some stages of the trial.¹⁵² Applying Regulation 55 during the appeal phase would go beyond the limitations expressly included in the Regulation and raise significant fair trial concerns.

When errors of law or procedural errors are established, the ICC Appeals Chamber has held that it will *only reverse a conviction* if the appellant has demonstrated that, in the absence of the error, ‘the decision would have substantially differed from the one rendered’.¹⁵³ Of course, findings of errors of law may require a review of the facts against a corrected legal standard (especially in relation to the elements of crimes and

150 Staker and Eckelmans, ‘Article 83’, n 149, 1967.

151 See in particular ICC, Prosecutor v *Germain Katanga*, ICC-01/04-01/07-3436-AnxI, Minority Opinion of Judge Christine Van den Wyngaert, 10 March 2014 opined that the Majority’s recharacterisation of facts at the end of the trial both exceeded the facts and circumstances of the case and violated Mr Katanga’s right to a fair trial, including (as he had already given evidence during the trial) the right to remain silent, the right to be informed of the charges, to have adequate time and facilities to prepare the defence, and to be tried without undue delay.

152 Recommendations of the IBA ICC and ICL Programme to the Independent Expert Review of the International Criminal Court, April 2020, see <https://www.ibanet.org/document?id=2020-IBA-submission-IER> accessed 19 October 2022.

153 ICC, *Lubanga* Appeal Judgment, n 48, para 20.

principles of criminal responsibility)¹⁵⁴ to determine whether the error materially affected the decision and whether a reversal or amendment or other remedy is appropriate.¹⁵⁵

When errors of fact are established, the ICC Appeals Chamber has ruled that a conviction decision is materially affected by a factual error if it is persuaded that the trial chamber, had it not so erred, would have acquitted the person in whole or in part.¹⁵⁶ It follows that, in considering ‘the impact of the error in light of the other relevant factual findings relied upon by the trial chamber for its decision on conviction or acquittal’,¹⁵⁷ the ICC Appeals Chamber will need to determine whether it was reasonable for the trial chamber to conclude that the standard of beyond reasonable doubt has been met.¹⁵⁸ If it was not reasonable, the Chamber may decide to reverse or amend the trial judgment.

As explained in 1.7.3, the ICC Appeals Chamber has yet to define a specific test in relation to errors of fact established through additional evidence. However, the ICTY’s test focused on 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.¹⁵⁹ In a subsequent decision the ICTY Appeals Chamber confirmed that following an assessment of all the evidence, the Appeals Chamber must ‘be convinced itself, beyond reasonable doubt, as to the guilt of the accused, before confirming a conviction on appeal.’¹⁶⁰ It follows logically that, if the ICC Appeals Chamber adopts this approach, it will need to consider the reasonableness of the guilty verdict based on the evidence that was before the trial chamber together with the additional evidence admitted during the appellate proceedings. If it is not satisfied, it may reverse or amend the trial judgment.

In relation to other grounds that have affected the fairness or reliability of the proceedings, the ICC Appeals Chamber has held that depending on the nature of a case, in some instances a breach of fairness ‘might be decisive and lead to a reversal of a conviction’.¹⁶¹ Although the nature of the case is no doubt relevant and a case-by-case determination will be essential, there is significant scope for the Court to

154 ICC, *Lubanga* Appeal Judgment, n 48, para 22 states:

‘a clear distinction must be made between facts constituting the elements of the crime and mode of liability falling under the subject matter of the case, and any other set of facts introduced by the different types of evidence. Only those facts falling under the subject matter of the case must be proven beyond reasonable doubt, as dictated by article 66(3) of the Statute. In the view of the Appeals Chamber, when determining whether this standard has been met, the Trial Chamber is required to carry out a holistic evaluation and weighing of *all the evidence taken together* in relation to the fact at issue. Indeed, it would be incorrect for a finder of fact to do otherwise.’

155 Staker and Eckelmans, ‘Article 81’, n 40, 1931 opine:

‘If the Trial Chamber’s factual findings (as they stand after the Appeals Chamber’s consideration of the related factual errors) did not meet the correct(ed) legal standard, the error would usually materially affect the impugned decision. In that case, the Appeals Chamber needs to consider on the basis of the charges and the case as a whole whether to reverse and acquit on this charge, whether to reverse and order the hearing of evidence (or hear evidence itself), whether to reverse and order a new trial, or whether it falls within its scope of review to substitute its own factual conclusions for those of the Trial Chamber on the basis of a (limited) re-assessment of the evidence that had been presented before the Trial Chamber.’

156 ICC, *Ntaganda* Appeal Judgment, n 81, para 43; ICC, *Gbagbo and Blé Goudé* Appeal Judgment, n 62, para 72.

157 ICC, *Ntaganda* Appeal Judgment, n 81, para 43; ICC, *Gbagbo and Blé Goudé* Appeal Judgment, n 62, para 72.

158 ICC, *Bemba* Appeal Judgment, n 81, para 198, in reversing the conviction and entering an acquittal the Appeals Chamber held ‘the error identified in the Trial Chamber’s findings on necessary and reasonable measures extinguishes in full his criminal liability for these crimes.’

159 ICTY, *Kupreškić et al* Appeal Judgment, n 88, para 75.

160 ICTY, *Blaškić* Appeal Judgment, n 131, para 23.

161 ICC, *Bemba* Appeal Judgment, n 64, para 62.

further define what ‘might be decisive’, drawing potentially from the Court’s jurisprudence on ordering stays of proceedings as a remedy for unfairness.¹⁶²

It is foreseeable that, in some cases, the ICC Appeals Chamber may be able to apply these tests with confidence to determine that the errors resulted in a wrongful conviction that must be reversed or amended. Having not heard all of the evidence at trial, the Appeals Chamber may use its discretion under Article 83(3) to remand a factual issue to the original Trial Chamber (if it still exists) for it to determine the issue and report back accordingly. The ICC Appeals Chamber has also indicated that it may remand factual findings to the original Trial Chamber if it identifies shortcomings in its reasoning, with the instruction to properly set out its reasoning in support of it and report back to the Appeals Chamber.¹⁶³

1.8.3 Reversing or amending an acquittal decision

Adopting the test applied by the ICTY, the ICC Appeals Chamber has acknowledged that, as the onus is on the Prosecutor to prove guilt beyond a reasonable doubt, it will only reverse an acquittal decision ‘if it finds that no reasonable trier of fact could have failed to make the particular finding of fact beyond reasonable doubt and the acquittal relied on the absence of this finding.’¹⁶⁴

While the ICTY, ICTR, the STL and the IRMCT have reversed and amended acquittals on appeal,¹⁶⁵ and a plain reading of Article 81(1) and 83(2) of the ICC Statute indicates that the ICC Appeals Chamber has the power to do the same, the practice potentially raises fair trial issues. In particular, as the Appeals Chamber is the highest chamber of the ICC – and other international and internationalised criminal courts (with the exception of the KSC-SPO)¹⁶⁶ adopt a similar single-level appeal process – the person whose acquittal is reversed or amended and replaced with a conviction by an appeals chamber would have no avenue to seek a review of the conviction by a higher tribunal.

There are conflicting standards and interpretations on whether the unavailability of an appeal as a result of reversing an acquittal on appeal would be consistent with human rights. The Human Rights Committee has stated that the right to appeal in Article 14, paragraph 5 of the ICCPR is violated when a conviction is imposed by an appeal court or a court of final instance, following acquittal by a lower court, which

162 See eg, Prosecutor v *Ntaganda*, Decision on Defence request for stay of proceedings with prejudice to the Prosecution, ICC-01/04-02/06-1883, 28 April 2017 para 20, noting that various chambers of the ICC have confirmed the remedy of a permanent stay of proceedings where it would be ‘repugnant or odious to the administration of justice to allow the case to continue, or where the rights of the accused have been breached to such an extent that a fair trial has been rendered impossible.’

163 ICC, *Bemba et al* Appeal Judgment, n 63, para 108; *Bemba* Appeal Judgment, n 64, para 56.

164 ICC, *Ngudjolo* Appeal Judgment, n 78, para 26, citing ICTY, Prosecutor v *Blagojević and Jokić*, Appeal Judgment, (IT-02-60-A), 9 May 2007, para 9; ICTY, Prosecutor v *Brdanin*, Appeal Judgment (IT-99-36-A), 3 April 2007, paras 12–14.

165 For an overview of the ICTY and ICTR practice see: Clooney and Webb, n 10, 667-668. STL, Prosecutor v *Merhi and Oneissi*, Appeal Judgment, 10 March 2022, the Appeals Chamber overturned an acquittal following a trial *in absentia*. The Appeals Chamber noted at para 653 that an accused who appears after having been convicted *in absentia* by the Appeals Chamber has a right to: ‘(i) accept in writing the conviction or sentence; (ii) request a retrial; (iii) accept in writing the conviction and request a new hearing in respect of his sentence; or (iv) accept the Trial Chamber’s judgment of acquittal and request a new hearing on appeal’. IRMCT, Prosecutor v *Fatuma et al*, Appeal Judgment (MICT-18-116-A), 29 June 2022.

166 KSC-SPO Law, Art 47 provides for a third instance appellate proceedings conducted by a Supreme Court Panel of the Specialist Chambers to ‘hear appeals against judgment of a Court of Appeals Panel if the Court of Appeals Panel has modified an acquittal and has instead entered a conviction or when the criminal sanction of life-long imprisonment has been imposed by either the Trial Panel or the Court of Appeal Panel.’

cannot be reviewed by a higher court.¹⁶⁷ The Inter-American Court of Human Rights has similarly held that the right to appeal must be guaranteed to someone who is convicted in a judgment that overturns an acquittal.¹⁶⁸ However, contrary to the findings of these human rights courts and bodies, a provision in Protocol 7 to the European Convention states that the right to appeal to a higher tribunal ‘may be subject to exceptions [...] in cases in which the person concerned [...] was convicted following an appeal against acquittal.’¹⁶⁹

Strong arguments can be made that, despite the practice of the other international criminal courts and tribunals reversing or amending acquittals without the opportunity of appeal¹⁷⁰ and the provision of Protocol 7, other international human rights law and standards are sufficient for the ICC to conclude that such practice is inconsistent with internationally recognised human rights and therefore prohibited by Article 21(3) of the ICC Statute. However, faced with a choice between ruling that the conviction delivered by the Appeals Chamber is final and cannot be appealed, which raises significant fairness concerns, or deciding that an acquittal cannot be reversed by the Appeals Chamber, the ICC Appeals Chamber should explore other options available to it.

In particular, as explained in 1.4.3 above, Article 83(2) allows the Appeals Chamber discretion to remand a factual issue to the original Trial Chamber for it to determine the issue and report back accordingly. In light of this provision and considering the Appeal Chamber’s practice of remanding issues to trial chambers following appeals against other decisions in Article 82¹⁷¹ and appeals against sentence,¹⁷² an Appeals Chamber may instead decide to quash an acquittal and remand a case back to the original trial chamber to deliver a new decision on guilt or innocence pursuant to Article 74. If the trial chamber enters a new conviction, then the convicted person can appeal to the Appeals Chamber. If the trial chamber again acquits (albeit on the basis of new reasoning), then the Office of the Prosecutor can review its reasons and decide whether to appeal the decision again.

1.8.4 Ordering a new trial before a different trial chamber (retrial)

A decision by an appeals chamber to order a retrial should be distinguished from remanding errors it has identified back to the original trial chamber to deliver a new or revised decision, as it involves a new trial before a different trial chamber which has not heard the evidence in the original case.

167 HRC, General Comment 32, n 34, para 47. See also the following jurisprudence: HRC, *Hens Serena v Spain* (Communications 1351/2005 & 1352/2005), 25 March 2008, para 9.2; HRC, *Gomariz Valera v Spain* (Communications 1095/2002), 22 July 2005, para 7; HRC, *Larrañaga v Philippines* (Communication 1421/2005), 24 July 2006, para 7.8.

168 IACtHR, *Mohamed v Argentina* n 26, para 93.

169 Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art 2(2).

170 For an overview of the ICTY and ICTR’s practice, see Clooney and Webb, n 10, 667-668.

171 For an overview of the ICC’s initial practice to 2010, see for example Prince Neto D C B Waite, ‘An Inquiry into the ICC Appeals Chamber’s Exercise of the Power of Remand’, *The Law & Practice of International Courts and Tribunals* (2010), 313-325.

172 ICC, *Prosecutor v Bemba et al*, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Decision on Sentence pursuant to Article 76 of the Statute’, ICC-01/05-01/13-2276-Red, 8 March 2018, paras 361–362: the Appeals Chamber upheld the Prosecutor’s allegations that a series of errors were committed by the Trial Chamber in its sentencing decision. The Appeals Chamber reversed the sentence and remanded the matter to the original trial chamber to determine a new sentence.

Human rights law and standards allow criminal courts to order retrials after quashing a first instance conviction. The Human Rights Committee has stated that *ne bis in idem* is not at issue when a higher court quashes a conviction and orders a retrial.¹⁷³ Indeed, the jurisprudence of many human rights bodies and courts regularly find that states should provide retrials as remedies for fair trial violations.¹⁷⁴ In quashing the conviction and ordering a retrial in the *Muvunyi* case, the Trial Chamber explained that *non bis in idem*: ‘aims to protect a person who has been finally convicted or acquitted from being tried for the same offence again’ and that in the present case, in relation to the quashed conviction and order for a retrial, there had been no final judgment with respect to that allegation.¹⁷⁵

Human rights law and standards also appear to permit a retrial to be ordered following a decision to quash an acquittal on appeal. Article 14(7) of the ICCPR on *ne bis in idem* limits the prohibition of trying and punishing a person again for an offence ‘for which he has already been *finally* convicted or acquitted.’ The European Court of Human Rights has held that a decision is final when ‘it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them.’¹⁷⁶ This indicates that ordering a retrial as an appeal remedy against both a first instance conviction and acquittal is permitted. In the ICTY’s appeal judgments in the *Haradinaj et al* and *Stanišić and Simatović* cases, the Appeals Chamber ordered a retrial after quashing acquittals, but did not address the issue of *non bis in idem*. Addressing a subsequent request by the defence in the *Stanišić and Simatović* case to stay the proceedings, the new Trial Chamber noted that:

‘the *non bis in idem* principle aims to protect a person who has been finally convicted or acquitted from being tried again for the same offence [...]. In the present circumstances, there has neither been a final conviction or acquittal of the Accused nor has there been a final judgment on the merits on any of the counts that has an impact on the current retrial.’¹⁷⁷

Article 20(1) of the ICC Statute specifically provides that the principle of *ne bis in idem* applies to proceedings before the Court. It states: ‘[e]xcept as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.’ However, the opening phrase – ‘except as provided in this Statute’ – means that it does not affect the power of the Appeals Chamber to order a new trial before a different chamber, which is expressly set out in Article 83(2).¹⁷⁸

173 Human Rights Committee, General Comment 32, n 34, para 56.

174 See Clooney and Webb, n 10, 867-873.

175 ICTR, Prosecutor v *Muvunyi*, Decision on the Prosecutor’s Appeal Concerning the Scope of Evidence to be Adduced in the Retrial (ICTR-00-55A-AR73), 24 March 2009, para 16.

176 ECtHR, *Zolotukhin v Russia*, Application no 14939/03, 10 February 2009, para 107.

177 IRMCT, Prosecutor v *Stanišić and Simatović*, Decision on Stanišić’s Request for Stay of Proceedings (MICT-15-96-PT), 2 February 2017, para 13.

178 ICC, Prosecutor v *Gbagbo and Blé Goudé*, Prosecution’s submissions in response to the Chamber’s questions on the Appeal, ICC-02/11-01/15-1349, 22 May 2020, para 61, the OTP argued: ‘the *ne bis in idem* principle in article 20 will only bar a second trial at the Court (for the same criminal conduct) when an acquittal is final in the sense of *res judicata*. As such, article 20(1) does not preclude holding a retrial following a successful Prosecution appeal against an acquittal. Article 20 recognises this in its opening words, “[e]xcept as provided in this Statute,” and article 83(2)(b) provides that the Appeals Chamber, upon finding appealable error, has the power to order a new trial before a new Trial Chamber. This latter provision applies both when an accused appeals a conviction (which is overturned on appeal) and when the Prosecution appeals an acquittal (which is overturned on appeal).’

Even if the principle of *ne bis in idem* does not preclude retrials before international criminal courts and tribunals, pursuant to their own appeal process, Chapter 2 of this report explains that an order for a new trial does not mean that a new trial should be conducted as though there had never been a first trial. The appeals chamber ordering the retrial and the new trial chamber have a duty to ensure that the retrial is fair and expeditious, which includes navigating complex fair trial challenges associated with conducting a new trial before a different chamber.¹⁷⁹ In particular, they must respect the rights of the accused, witnesses and victims, as well as ensure equality of arms between the prosecution and the defence.¹⁸⁰

The ICC Appeals Chamber has acknowledged that retrials may be an ‘ordeal’ for the accused.¹⁸¹ Following a long pre-trial and trial process (often in detention) they will be forced to repeat the trial process, in many cases due to errors that are no fault of their own. That is not to mention the potential impact of a retrial on victims and witnesses, who may be required to testify again and experience additional security issues and trauma as a result. Retrials involve huge costs and inevitably use resources that could be devoted to delivering justice in other international criminal cases.¹⁸² They can be fraught with fair trial challenges, including complex questions regarding the scope of the retrial and whether new evidence should be admitted. In particular, it would be unfair and contrary to the principle of the equality of arms¹⁸³ if a retrial allowed the prosecution a second chance to correct flaws in its original case and to benefit unfairly from its advanced knowledge of the defence’s case.

Significantly, the ICTR Appeals Chamber held that a retrial is an exceptional measure to which resort must necessarily be limited.¹⁸⁴ The ICTY Appeals Chamber held that its discretion to order a retrial must be ‘exercised on proper judicial grounds, balancing factors such as fairness to the accused, the interests of justice, the nature of the offences, the circumstances of the case in hand and considerations of public interest’.¹⁸⁵ In practice, the ICTY and ICTR ordered retrials in only three cases, supporting the view that it is an extraordinary appeal remedy. However, a closer examination of the decisions illustrates a lack of coherency and consistency in the Appeals Chamber’s decisions.

In the *Muvunyi* case, the ICTR Appeals Chamber reversed the conviction of all charges on appeal except public incitement to commit genocide, which the Appeals Chamber quashed and, on its own motion, ordered a retrial limited to that allegation. The Appeals Chamber explained that the Trial Chamber had failed to provide a reasoned opinion explaining why it relied on the testimony of two witnesses in reaching its conviction, despite inconsistencies in their accounts of a meeting during which the alleged incitement occurred, and despite contradictory evidence by another witness.¹⁸⁶ As a result, the Appeals Chamber found it was prevented from determining whether the Trial Chamber assessed the entire evidence on

179 See in particular, Rome Statute, Art 64(2).

180 Rome Statute, Art 64(2).

181 ICC, *Ngudjolo* Appeal Judgment, n 78, para 284.

182 See eg, Wayne Jordash QC (Defence Counsel in the *Stanišić and Simatović* case), Merry-Go-Round Justice – The Retrial of Stanišić and Simatović, Opinion Juris, <http://opiniojuris.org/2016/01/04/guest-post-merry-go-round-justice-the-retrial-of-stanistic-and-simatovic>

183 As the OTP bears the burden of proof and would have presented its case before the defence in the original trial, in a retrial the Prosecution would gain some advantage having heard the presentation of the defence’s case in the original trial if it is allowed to substantively adapt its case.

184 ICTR, *Prosecutor v Muvunyi*, Appeal Judgment (ICTR-2000-55A-A), 29 August 2008, para 148.

185 ICTY, *Prosecutor v Jelisić*, Appeal Judgment (IT-95-10-A), 5 July 2001, para 73.

186 ICTR, *Muvunyi* Appeal Judgment, n 184, paras 142–147.

this point exhaustively and properly, forcing it to conclude that the conviction was not safe.¹⁸⁷ Although the Appeal Chamber stated that a retrial is an exceptional measure,¹⁸⁸ its judgment did not consider other appeal remedies. In particular, it did not explain why the Chamber had decided not to remand the matter to the original Trial Chamber to provide a fully reasoned opinion for its conviction. Two judges of the original Trial Chamber (Judge Arrey and Judge Da Silva) were still serving at the ICTR at the time of the Appeal Judgment and another (Judge Lattanzi) had become a judge at the ICTY. Instead, while recognising that the accused had already spent eight years in custody, the Appeals Chamber explained:

‘At the same time, the alleged offence is of the utmost gravity and interests of justice would not be served well if retrial were not ordered to allow the trier of fact the opportunity to fully assess the entirety of the relevant evidence and provide a reasoned opinion.’¹⁸⁹

In the *Haradinaj et al* case, the ICTY Appeals Chamber quashed the Trial Chamber’s acquittals on various counts and ordered that the three co-accused persons be retried in relation to those charges.¹⁹⁰ The Appeals Chamber found that the Trial Chamber had failed to take sufficient steps to counter witness intimidation that permeated the trial and, in particular to facilitate the Prosecution’s requests to secure the testimony of two witnesses.¹⁹¹ Given the potential importance of these witnesses to the Prosecution’s case, the Appeals Chamber found that the error undermined the fairness of the proceedings as guaranteed by the Statute and Rules and resulted in a miscarriage of justice.¹⁹² The Appeals Chamber did not explain its choice of remedy further, including why it had decided not to remand the errors back to the original trial chamber. Two judges of the original Trial Chamber (Judge Höpfel and Judge Støle) were no longer serving as judges of the ICTY at the time of the appeal judgment.

In the *Stanišić and Simatović* case, the ICTY Appeals Chamber quashed the Trial Chamber’s acquittal and, on its own motion, ordered a retrial having identified two errors. The Appeals Chamber found that the Trial Chamber had: (1) failed to adjudicate, and provide a reasoned opinion on, essential elements of Joint Criminal Enterprise liability,¹⁹³ and (2) erred in applying the mode of liability of aiding and abetting by requiring that the acts of the aider and abettor be specifically directed to assist the commission of a crime.¹⁹⁴ Significantly, the prosecution argued that a retrial was not the most appropriate remedy in this case¹⁹⁵ and requested the Appeals Chamber to exercise its discretion to remand the case to a bench of the Tribunal to apply the correct legal standards to the trial record, and to determine the liability of the accused as alleged in the indictment.¹⁹⁶

187 ICTR, *Muvunyi* Appeal Judgment, n 184, para 148.

188 ICTR, *Muvunyi* Appeal Judgment, n 184, para 148.

189 *Ibid.*

190 ICTY, *Prosecutor v Haradinaj et al*, Appeal Judgment (IT-04-84-A), 19 July 2010, para 50.

191 ICTY, *Haradinaj et al*, Appeal Judgment, n 190, paras 34–49.

192 ICTY, *Haradinaj et al*, Appeal Judgment, n 190, para 49. Judge Robinson dissented disputing whether an error occurred in light of three extensions granted by the Trial Chamber and arguing that the Appeals Chamber had misinterpreted the Statute by prioritising the Prosecution’s right to present its case through its witnesses over the right of the accused to an expeditious trial, see partially dissenting opinion, paras 16–32.

193 ICTY, *Prosecutor v Stanišić and Simatović*, Appeal Judgment (IT-03-69), 9 December 2015, para 90.

194 ICTY, *Stanišić and Simatović* Appeal Judgment, n 193, para 108.

195 ICTY, *Stanišić and Simatović* Appeal Judgment, n 193, para 114, ‘as the problem is one of a failure to properly adjudicate the evidence already on the record, not a problem with the existing evidentiary record, the interests of justice militate away from a time and resource intensive retrial’.

196 ICTY, *Stanišić and Simatović* Appeal Judgment, n 193, para 114.

In a detailed consideration of the remedies available to it, the Appeals Chamber, noting the scale and complexity of the case, rejected the possibility of reviewing the decision itself, as it would have to analyse the entire trial record.¹⁹⁷ According to the Appeals Chamber, without having directly heard the witnesses, it would not be able to determine Mr Stanišić and Mr Simatović's criminal responsibility fairly and accurately.¹⁹⁸

Although the Appeals Chamber acknowledged that the three original trial judges who directly heard the evidence at trial would have been best placed to make the necessary findings on the basis of the original trial record, it decided that remanding the case to them was impractical as two of the judges (Judge Picard and Judge Gwaunza) no longer held office at the Tribunal.¹⁹⁹ It also ruled out remitting the case to a newly composed trial chamber to do this exercise, on the basis that the original trial record would encounter the same difficulties that would be encountered by the Appeals Chamber as a result of not having directly heard the witnesses.

Accordingly, the majority of the Appeals Chamber decided that it was appropriate to order a retrial. Recognising that Stanišić and Simatović had both spent approximately five years in detention, the Appeal Chamber held that the alleged offences are of the utmost gravity and that in the circumstances of the case 'the interests of justice would not be well served if a retrial were not ordered'.²⁰⁰

To date, the ICC has yet to order a retrial. In reversing the conviction against Jean-Pierre Bemba, Judge Eboe-Osuji stated in a separate opinion that he had initially favoured ordering a new trial instead.²⁰¹ However, he was persuaded by the other two judges in the majority, Judge Van den Wyngaert and Judge Morrison, that the interests of justice impelled a judgment of acquittal.²⁰² In a separate opinion, Judge Van den Wyngaert and Judge Morrison explained:

'For us, this [a retrial] is not an option, given the fact that Mr Bemba, who now benefits from the presumption of innocence again, has already been in the Court's detention for over ten years. Ordering a retrial at this stage would inevitably prolong the proceedings by several more months, if not years. In light of the scope and nature of the charges, this would be excessive in our view. We are also concerned that ordering a retrial after such a long time would create a perverse incentive for the Trial Chamber to arrive at a conviction in order to "justify" the extended detention. In addition, we would not find it fair to give the Prosecutor a "second chance" to prosecute this case, given the serious problems we have detected in the Prosecution case.'²⁰³

197 *Ibid.*

198 *Ibid.*

199 ICTY, *Stanišić and Simatović* Appeal Judgment, n 193, para 126.

200 ICTY, *Stanišić and Simatović* Appeal Judgment, n 193, para 127.

201 ICC, *Prosecutor v Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute', Concurring Separate Opinion of Judge Eboe-Osuji, ICC-01/05-01/08-3636 Anx3, 14 June 2018, para 263.

202 ICC, *Bemba* Appeal Judgment, Concurring Separate Opinion of Judge Eboe-Osuji, n 201, para 263.

203 ICC, *Bemba* Appeal Judgment, Separate Opinion, Judge Christine Van den Wyngaert and Judge Howard Morrison, n 65, para 73.

In footnotes to this text, the two judges also took into account the potential complexity of the retrial²⁰⁴ and the likelihood that Mr Bemba would not have been released pending retrial.²⁰⁵

The reasoning provided in these decisions is informative of the dilemmas that appeals chambers of international criminal courts and tribunals will face in deciding appropriate appeal remedies and the factors they may consider in exercising their discretion on whether to order a retrial.

First, in cases where an appeals chamber concludes that it does not wish to address errors itself, it will need to decide between remanding matters to the original chamber or ordering a retrial. In most cases, it will be most efficient and effective to remand the issues to the original chamber, which is already familiar with the trial record and has heard the evidence, to review the errors and deliver a new verdict. However, appeals chambers may not be in a position to remand matters to the original chamber. As judges of international criminal courts and tribunals often complete their term of office at the conclusion of a trial, the original bench may not be available. This hurdle should be acknowledged and addressed if orders for retrial are to remain exceptional. As recommended in section 1.4.3 above, although it may not be an option in every case, consideration should be given by the ICC and the Assembly of States Parties as to whether judges that have left the Court could be reappointed on a temporary basis (subject to their availability and no conflicts of interest) specifically for the purpose of participating in a case remanded to the original trial chamber by the Appeals Chamber. In the event that only one judge of the original trial chamber is not available, consideration could be given to appointing a substitute judge. After familiarising themselves with the evidence and deliberating with the other two judges of the original trial chamber, the substitute judge should be in a position to make an informed determination on the remanded matter. However, to implement this approach, amendments to the legal framework (as recommended by the 2020 Independent Expert Review) would need to be adopted to allow for substitute judges. Even though these measures to allow the ICC Appeals Chamber to remand matters to the original trial chamber may entail some additional costs, the expense is likely to be significantly less than a retrial.

Second, it is striking that, in two of the decisions in which the ICTR/ICTY Appeals Chamber attempted to balance of the rights of the accused and the interests of justice (*Muvunyi* and *Stanišić and Simatović*), consideration focused exclusively on the time the accused had spent in detention versus the gravity of the crime. Given that all crimes under international law are particularly grave, a more detailed analysis of the consequences of ordering a retrial for an accused is arguably required – including the anticipated length of proceedings as a whole if a retrial is ordered and consideration of other fairness factors that are relevant to the case. The more sophisticated analysis provided by Judge Van den Wyngaert and Judge Morrison explaining why they opposed a retrial in the *Bemba* case illustrates that other considerations can be relevant to reaching an informed and convincing decision. ICTY Judge Robinson, in his separate opinion in the *Gotovina* Appeals Judgment, noted the lack of guidelines on when it is appropriate for a retrial to take

204 ICC, *Bemba* Appeal Judgment, Separate Opinion, Judge Christine Van den Wyngaert and Judge Howard Morrison, n 65, footnote 56 states:

‘Given the likelihood that the new Trial Chamber may wish to use Regulation 55 of the Regulations of the Court in order to change for the knowledge to ‘should have known’ standard, the new trial would involve a lot more than simply a new panel of judges reviewing the existing case record.’

205 ICC, *Bemba* Appeal Judgment, Separate Opinion, Judge Christine Van den Wyngaert and Judge Howard Morrison, n 65, footnote 57 states: ‘Given that Mr Bemba was convicted under article 70 of the Statute, it may be unrealistic to expect that the Trial Chamber would release him pending retrial.’

place and referred to a list of 11 non-exhaustive considerations identified by McClellan CJ in the Australian case of *Gilham v R*,²⁰⁶ in explaining his decision not to order a retrial because:

‘(i) it would be unduly oppressive to put the Appellants to the burden of a re-trial; (ii) a fair part of the sentences imposed upon convictions have already been served – in Gotovina’s case, approximately one-third (7 years), and in Markač’s case, approximately one-half (8 and ½ years); (iii) a re-trial would be lengthy and expensive; and (iv) an unduly long time would have elapsed between the date of the alleged offence (1995) and the new trial.’²⁰⁷

Third, in determining the interests of justice, no consideration has been given to the potential impact of a retrial on witnesses, who may experience security threats and trauma from the possibility of having to give testimony twice. The willingness of witnesses to give testimony again is not only a question of the best interests of those witnesses (including victims), but also of whether a retrial is even possible if they refuse to participate, despite the powers of compulsion available to the tribunal. It has also been noted that witness’s memories may fade over time, and so neither party should be placed in a less privileged position than it was in before as a result of the retrial order.²⁰⁸ Appeals chambers should seek submissions from the prosecution, defence, legal representatives for victims and the victims and witnesses unit on these matters to inform their interests of justice analysis.

To ensure that retrials are ordered only in exceptional circumstances, further consideration should be given to developing criteria for ordering retrials in full recognition of the practical, logistical and fairness challenges they present.

1.8.5 *Mistrial as an appeal remedy?*

The legal frameworks of international criminal courts and tribunals do not list ‘declaring a mistrial’ as an appeal remedy. This is unsurprising as it is a remedy used almost exclusively in common law jurisdictions to halt a jury trial on the basis of irreparable procedural errors before a decision is reached on the merits.²⁰⁹

206 *Gilham v R* [2010] NSWCCA 131, 25 June 2012, para 649. The factors identified were: (1) the public interest in the due prosecution and conviction of offenders; (2) the seriousness of the alleged crimes; (3) the strength of the Crown case; (4) the desirability, if possible, of having the guilt or innocence of the accused finally determined by a jury, which, is the appropriate body to make such a decision; (5) the length of time between the alleged offence and the new trial, and in particular whether the delay will occasion prejudice to the accused; (6) whether the grant of a new trial would impermissibly give the prosecution an opportunity to supplement or ‘patch up’ a defective case or to present a case significantly different to that presented to the jury in the previous trial; (7) the interests of the individual accused, and in particular whether it would be unduly oppressive to put the accused to the expense and worry of a further trial; (8) whether a significant part of the sentence imposed upon conviction has already been served; (9) the expense and length of a further trial; (10) whether a successful appellant to the Court of Criminal Appeal has been released from custody; and (11) whether an acquittal would usurp the functions of the properly constituted prosecutorial authorities, which are entrusted with responsibilities and discretions to act in the public interest in the initiation and conduct of criminal prosecutions.

207 ICTY, Prosecutor v *Gotovina and Markac*, Appeal Judgment, IT-06-90-A, 16 November 2012, Separate Opinion by Judge Patrick Robinson, para 19.

208 Yvonne McDermott, ‘Double Speak and Double Standards: Does the Jurisprudence on Retrial following Acquittal under International Criminal Law Spell the End of the Double Jeopardy Rule?’ in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (Cheltenham, Edward Elgar 2012) 180.

209 Kevin Jon Heller and John Heieck, ‘Mistrial: International Courts and Tribunals’, *Oxford Public International Law*, para 1.

Nonetheless, the ICC Office of the Prosecutor’s appeal against the acquittal of Laurent Gbagbo and Charles Blé Goudé – after the Trial Chamber granted the defence’s no case to answer motion – requested the Appeals Chamber to reverse the acquittal based on procedural errors and to declare a mistrial.²¹⁰ This, the Office of the Prosecutor submitted, was the most appropriate remedy over ordering the continuation of the original trial or ordering a new trial.²¹¹ In particular, the OTP argued that ‘[t]his will leave the case in the hands of the Prosecutor to decide on its future course and how justice may best be served in this case’.²¹² The Defence opposed this request arguing that the prosecution was ‘creating ways to evade an acquittal so it can get a second chance, at some unknown point in time, to do its case again’ and ‘a mistrial would be a mere tool to render article 20 of the Statute inapplicable, to pursue prosecutions *ad infinitum* against Mr Blé Goudé’.²¹³

In support of its request, the OTP cited the decision by a majority of the Trial Chamber in the *Ruto and Sang* case, which effectively declared a mistrial.²¹⁴ In that case, following a successful no case to answer application by the defence, the Trial Chamber decided on its own motion to vacate the charges and discharge the two defendants ‘without prejudice to their prosecution afresh in the future’, instead of acquitting them.²¹⁵ As explained in the separate reasons issued by Judge Eboe-Osuji, who expressly called for a mistrial, a decision to acquit in the circumstances of direct and indirect intimidation of prosecution witnesses in the case would have made ‘a perfect mockery of any sense of the idea that justice has been seen to be done in this case’.²¹⁶ The defence decided not to appeal the decision and questions of whether or in which circumstances a Trial Chamber can order a mistrial were not considered by the Appeals Chamber in this case.

There are, however, compelling criticisms of the decision taken in the *Ruto and Sang* case and the fairness of the outcome.²¹⁷ It has been argued that:

- a mistrial without prejudice, reserving ‘the right of the Prosecutor to start again’, finds no basis in the legal framework of the ICC;²¹⁸
- it is difficult to argue that there is a customary rule permitting international criminal courts and tribunals to declare mistrials, as none has ever granted a mistrial, much less one without prejudice;²¹⁹

210 ICC, Prosecutor v *Gbagbo and Blé Goudé*, Further public redacted version of ‘Prosecution Document in Support of Appeal’, ICC-02/11-01/15-1277-Conf, 15 October 2019, 30 April 2021, paras 264–267.

211 ICC, *Gbagbo and Blé Goudé*, Prosecution Document in Support of Appeal, n 210, para 266.

212 *Ibid.*

213 ICC, Prosecutor v *Gbagbo and Blé Goudé*, ICC-02/11-01/15-1348, Blé Goudé Defence Submissions answering the Appeals Chamber’s questions in ‘Decision rescheduling, and directions on, the hearing before the Appeals Chamber’, ICC-02/11-01/15-1338, 22 May 2020, para 51.

214 Heller and Heieck, n 209, para 20.

215 ICC, Prosecutor v *Ruto and Sang*, Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11-2027-Red-Corr, 16 June 2016.

216 ICC, *Ruto and Sang* Decision on Defence Applications for Judgments of Acquittal, n 215, Reasons of Judge Eboe-Osuji, para 81.

217 See in particular, Heller and Heieck, n 209.

218 William Schabas, ‘The Mistrial, An Innovation in International Criminal Law’ (*Human Rights Doctorate*, 8 April 2016), see <http://humanrightsdoctorate.blogspot.com/2016/04/the-mistrial-innovation-in.html> accessed 27 August 2020; Heller and Heieck, n 209, para 21.

219 Heller and Heieck, n 209, para 21.

- there is no general principle of law that would allow the ICC to declare a mistrial, because they are almost exclusively a creature of the common law.²²⁰
- a mistrial without prejudice is inconsistent with Article 84 of the ICC Statute which precludes the reopening of acquittals based on new evidence.²²¹ This precludes the Appeals Chamber from finding that it has an implied power to order a mistrial without prejudice; and
- there exists ‘a serious obstacle’ to this remedy in the Rome Statute under Article 20(1) on *ne bis in idem*.²²²

Having analysed the *Ruto and Sang* decision previously, the IBA emphasised that:

‘The outcome of an acquittal, with respect to any counts for which the prosecution has not presented evidence such that a reasonable Trial Chamber could convict, is integral to, and the object of, such proceedings in other international criminal jurisdictions. The outcome of an acquittal also supports a fair trial, in that it provides finality for the accused, and is in keeping with the principle of *ne bis in idem*, which is included in the ICC’s legal regime in Article 20 of the Rome Statute. The ICC’s legal regime does not provide for a mistrial, and had this been the official result, it would have been the first mistrial declared in ICL. In vacating the charges, and in the theoretical alternative of a mistrial, the prosecution is being invited to try again, and indeed this is made explicit in the decision. The IBA notes that the lack of clarity and finality of this outcome is antithetical to the purpose of “no case to answer” proceedings, and to the precedents of ICL, and therefore recommends that this precedent not be carried further by other cases at the ICC.’²²³

Regrettably, having dismissed the grounds of appeal raised by the OTP in the *Gbagbo and Blé Goudé* case, the Appeals Chamber did not address the OTP’s request for a remedy of declaring a mistrial, including the OTP’s argument that, even though it is not listed as an appeal remedy in the Statute, the Appeals Chamber could declare a mistrial by analogy.²²⁴ It therefore remains an open question whether international criminal courts and tribunals have implied powers to declare a mistrial (which may arguably be appropriate if the rights of the accused have been irreparably damaged during the trial),²²⁵ let alone whether it is a remedy available on appeal.

220 *Ibid.*

221 Heller and Heieck, n 209, para 23.

222 Schabas, ‘The Mistrial, An Innovation in International Criminal Law’ n 217. Heller and Heieck, n 209, para 24: ‘Judge Fémr made no attempt to explain why the Trial Chamber has the authority to introduce a remedy that is specifically designed to avoid the plain text and clear drafting of Article 20 of the Rome Statute’.

223 IBA, Evidence Matters in ICC Trials (2016), see <https://www.ibanet.org/document?id=Evidence-matters-in-icc-trials>, 60.

224 ICC, *Gbagbo and Blé Goudé*, Prosecution Document in Support of Appeal, n 210, fn 555 at 128, the OTP based its argument on Rule 149, which provides that the rules governing proceedings before Pre-Trial and Trial chambers also apply *mutatis mutandis* to proceedings in the Appeals Chamber.

225 Heller and Heieck, n 209, para 30, following an analysis of mistrial requests by the defence at the ICTY concluded: ‘ICTY Trial Chambers acknowledged that a mistrial might be appropriate in response to prosecutorial misconduct or judicial bias, but have never found facts sufficient to warrant imposing such a drastic remedy.’

Recommendations for the ICC – appeals

In its first two decades, the ICC has developed a robust appeal process to review grounds of appeal raised by parties in relation to trial judgments. The Appeals Chamber has interpreted and applied the Rome Statute’s unique appeal framework completing six appeals against trial judgments, drawing on the jurisprudence and best practice of other international criminal courts and tribunals, where appropriate. It has adopted clear tests for applying the standards of review to the different types of errors, including clarifying the proper assessment of alleged errors of fact. The following recommendations seek to further clarify the scope, procedures and outcomes of ICC Appeals.

Review and development of appeal procedures

- 1) In light of the Court’s experience in its first two decades, the Court should consider a detailed review of its Rules, Regulations and Chambers Practice Manual for conducting appeals, with a view to codifying best practices and addressing any gaps in the framework to ensure predictability and consistency.
- 2) Recognising the need for predictability and consistency in the practice and jurisprudence of the Appeals Chamber, the Court is encouraged to make a final determination on whether it will implement the Independent Experts Review’s recommendation for a special procedure to be conducted before the Appeals Chamber departs from previous practice or jurisprudence. If the Court decides against establishing a special procedure, it should consider alternative measures to address the Independent Experts’ concerns.
- 3) Given the challenges that the Appeals Chamber may face in exercising its discretion to remand issues to the original trial chamber if the judges of the Chamber are not available, the Court should work with the Assembly of States Parties to:
 - a. Determine whether procedures can be established to reappoint judges temporarily who have completed their terms of office (where no conflict of interests exist) specifically in order to reconstitute an original trial chamber to determine the remanded issue.
 - b. Implement the Independent Expert Review’s recommendation to amend the legal framework providing for the assignment of a substitute judge. Any amendment should allow for the assignment of a substitute judge to the original chamber, who has familiarised themselves with the record of the proceedings, in the event of one judge of the original chamber not being available.

Ensuring the rights of convicted or acquitted persons during appeals

- 4) Recognising that a fully reasoned judgment is essential to the right of appeal, and that concerns have been raised by judges of the Appeals Chamber regarding the reasoning provided in some decisions, the Court should review the requirements of a full and reasoned judgment, including the guidance already provided in the Appeals Chamber’s case law. If necessary, the Court should propose or adopt additional guidelines, Rules and Regulations to assist trial chambers in meeting this obligation.
- 5) In the event of an appeal by the prosecution against acquittal, the Court should release the acquitted person while the appeal is being conducted, unless there are truly exceptional circumstances

for continuing detention. The Court should further develop criteria in Article 81(3)(c)(i) for determining whether to continue detention that are clear, fair and consistent with the exceptional nature of the measure.

- 6) More States Parties should enter into cooperation agreements with the Court to accept acquitted persons, including conditional release pending appeals against acquittal.

Ensuring the rights of victims during appeals

- 7) The Appeals Chamber should continue to review and, where appropriate, strengthen victim participation during the appeal process.
- 8) The Registry should conduct outreach to victims and affected communities to explain the appeal process and its outcomes, especially in the event that the Appeals Chamber decides to reverse or amend a trial conviction as a whole or in significant part, or it orders a new trial.

Applying the appeal standard of review

- 9) The Court is encouraged to review its jurisprudence and Regulation 62 of the Regulations of the Court to determine whether additional Rules of Procedure and Evidence or amendments to Rule 62 are required on the admission of additional evidence during the appeal phase.
- 10) At a relevant opportunity, the Appeals Chamber should adopt a test for assessing new evidence, when it is admitted, together with the evidence before the trial chamber, for the purposes of determining whether findings of fact were reasonable and whether the Appeals Chamber is itself convinced, beyond a reasonable doubt, as to the guilt of the accused before confirming a conviction.

Applying appeal remedies

- 11) Where necessary and appropriate to address errors, in particular to ensure that a person can appeal a decision to overturn an acquittal on some or all of the charges, the Appeals Chamber should quash the verdict and remand the errors identified in the judgment to the original trial chamber to deliver a new verdict.
- 12) In appropriate proceedings, when it finds that there are other grounds which have affected the fairness or reliability of the proceedings, the Appeals Chamber is encouraged to further consider when a breach of fairness ‘might be decisive and lead to a reversal of a conviction’, drawing, as appropriate, from the Court’s jurisprudence in relation to ordering stays of proceedings on fairness grounds.
- 13) To ensure that a new trial before a different chamber is only ordered in truly exceptional circumstances with no other way of achieving justice, the Appeals Chamber should develop further conditions and criteria that considers whether:
 - a. The Appeals Chamber is unable to address the errors itself.

- b. The Appeals Chamber is unable to remand the issues to the original trial chamber, including because the trial judges are not available and cannot be reappointed, or there has been a finding of judicial misconduct.
 - c. The Appeals Chamber has determined (after hearing the views of all the parties and participants) that the retrial, as ordered, will not cause undue prejudice to the accused and their rights will not be violated (including the right to be tried without undue delay).
 - d. The Appeals Chamber has conducted a thorough analysis and determined that a retrial is in the interests of justice, including considering whether witnesses are available and willing to participate in a new trial without serious risk to their security or psychological wellbeing (based on submissions of the parties, participants and the Victims and Witnesses Section).
- 14) To ensure certainty regarding appeals remedies, at the next appropriate opportunity, the Appeals Chamber is encouraged to clarify whether and in which circumstances a trial chamber can order a mistrial and whether the Appeals Chamber may order a mistrial as an appeal remedy.

Chapter 2: Retrials

As explained in section 1.8.4 above, in light of the fair trial challenges presented by conducting a retrial following appeal, it should only be ordered as an appeal remedy in exceptional circumstances, subject to clear criteria and fairness safeguards.

When a retrial is ordered as an appeal remedy, it is essential that it is defined and conducted in a manner that addresses the fairness challenges. Although it has been argued that a retrial is a completely new trial, a retrial that ignores the length of the overall proceedings, refuses to take into account the impact of a retrial on the rights of accused persons, victims and witnesses or fails to address equality of arms concerns arising in the second trial²²⁶ would violate the obligations of international criminal courts and tribunals to ensure that trials are fair and expeditious.

In this regard, a retrial following appeal as a corrective measure to address errors in a trial judgment is distinct from a retrial following a trial *in absentia* conducted by some courts, including the STL.²²⁷ The latter is a procedural right of the accused to be tried in their presence following appearance at the court and arguably requires that a completely new and fair trial be held.²²⁸

Despite the challenges that retrials present, there is very little guidance to appeals chambers in deciding the scope of the retrial. The legal frameworks of international criminal courts or tribunals are also silent on how they should be conducted beyond applying the same rules that apply to trials in first instance. This chapter examines the three retrials conducted by the ICTY, ICTR and IRMCT and considers safeguards that could be implemented by the ICC to ensure that any retrials it conducts are fair.

2.1 Defining the scope of a retrial

The scope of retrials has been disputed by the prosecution and the defence in each of the cases retried at the ICTR, ICTY and IRMCT. In general, the prosecution has sought an expansive scope of a retrial to re-prosecute their case: ‘a *de novo* hearing which proceeds as though there had never been a first trial’.²²⁹ In contrast, especially during the two retrials of acquitted persons, the defence has argued that retrials should focus specifically on addressing the errors identified by the appeals chamber.²³⁰

226 See equality of arms concerns relating to retrials in n 183, above.

227 STL Statute, Art 22(3); STL r 109.

228 See eg, Amnesty International, *Fair Trials Manual*, 2nd edn (2014), 158: ‘If a person is apprehended following a trial in which they were convicted *in absentia*, Amnesty International calls for the verdict rendered *in absentia* to be quashed and for a completely new and fair trial to be held before an independent and impartial court.’

229 ICTY, Prosecutor v *Haradinaj et al*, Decision on Haradinaj’s Appeal on Scope of Partial Retrial (IT-04-84bis-Ar73.1) 31 May 2011, para 16.

230 ICTY, *Haradinaj et al*, Decision on Haradinaj’s Appeal on Scope of Partial Retrial, n 229, para 28: ‘Haradinaj contends that the fact that the Prosecution would be given a second chance to convict him with knowledge of the weaknesses in its case and the case of the defence in a retrial following acquittal means that the Appeals Chamber should limit the scope of the retrial to correcting the error made by Trial Chamber I.’
IRMCT, Prosecutor v *Stanišić and Simatović*, Decision on Stanišić’s Request for Stay of Proceedings (MICT-15-96-PT), 2 February 2017, para 9:
‘[...] Stanišić argues that the retrial should be limited to applying the correct legal standard to the ICTY Trial Chamber’s factual findings on his contribution to the crimes committed in Bosanski Samac, Dobojo, and SAO Krajina.’

Indeed, there is an inherent tension in conducting a retrial between, on the one hand, the need for the new trial chamber to hear all the relevant evidence so that it can reach an informed and convincing determination on guilt or innocence and, on the other, the corrective nature of a retrial that demands the errors identified are addressed without prejudicing the defence.

In resolving the disputes between the prosecution and the defence, new trial chambers appointed by the ICTY and ICTR have deferred to the order for the retrial, noting that the appeals chamber is responsible for defining the scope of the retrial in each case.²³¹ They have found that any restrictions on the scope of a retrial must be made ‘explicit’ by the Appeals Chamber,²³² indicating that the default setting of a retrial is a completely new trial.

However, a completely new trial may be inconsistent with the remedial focus of a retrial and could prejudice the defence by allowing the prosecution an opportunity to correct errors it made in presenting its original case, or to benefit unduly from its knowledge of the defence’s case strategies in the original trial. Given the length of international criminal trials, an undefined full retrial could take several years (or in some cases even longer) to complete in potential violation of the rights of the accused to be tried without undue delay and expending the limited resources of international criminal courts and tribunals.

It is therefore crucial that appeals chambers carefully define the scope of the retrial in each case. As the Appeals Chamber in the *Haradinaj et al* case underscored:

‘the context of each retrial is unique, and the impact of a previous conviction or acquittal can only be addressed by taking into account this individual context. Any potential for undue prejudice to a defendant in a retrial following an acquittal should be addressed through both the Appeals Chamber’s careful delineation of a retrial’s parameters and the Trial Chamber’s continuing duty to apply fair trial principles.’²³³

In the retrials ordered by the ICTY/ICTR, the Appeals Chamber took various approaches to defining the scope of each retrial and provided only limited instructions to the new trial chambers to address the errors it had identified.

- In the *Muvunyi* case, the Appeals Chamber ordered a retrial limited to the allegations of direct and public incitement to commit genocide, having reversed the conviction and acquitted the accused of other charges in the case. The order did not include any further instructions to the trial chamber in relation to how it should address the errors it had identified – inadequate reasoning provided by the trial chamber for its conviction on this charge. In its reasons for ordering the retrial, it

231 ICTR, *Muvunyi*, Decision on the Prosecutor’s Appeal Concerning the Scope of Evidence to Be Adduced in the Retrial n 175, para 12 ‘the scope is given by the Appeals Chamber in a particular instance.’ ICTY, *Haradinaj et al*, Decision on Haradinaj’s Appeal on Scope of Partial Retrial, n 229, para 24: ‘the Appeals Chamber is able to set out the appropriate parameters of a retrial, taking into account the specific context of each case, including whether the retrial follows conviction or acquittal, as well as relevant principles of law.’ IRMCT, *Stanišić and Simatović*, Decision on Stanišić’s Request for Stay of Proceedings, n 177, para 11: r 117(c) ‘does not specify the scope of a retrial – it is for the Appeals Chamber to specify the scope in a particular instance.’

232 ICTR, *Muvunyi*, Decision on the Prosecutor’s Appeal Concerning the Scope of Evidence to Be Adduced in the Retrial, n 175, para 13; IRMCT, *Stanišić and Simatović*, Decision on Stanišić’s Request for Stay of Proceedings, n 177, para 11.

233 ICTY, *Haradinaj et al*, Decision on Haradinaj’s Appeal on Scope of Partial Retrial, n 229, para 26.

indicated that the purpose of the retrial was ‘to allow the trier of fact the opportunity to fully assess the entirety of the relevant evidence and provide a reasoned opinion.’²³⁴

- In the *Haradinaj et al* case, the Appeals Chamber ordered a retrial limited to six counts without explaining why they were specifically affected by the errors identified or providing instructions to the new Trial Chamber to address the original trial chamber’s failures to ensure testimony by prosecution witnesses.
- In the *Stanišić and Simatović* case, the Appeals Chamber ordered that the two accused persons should be retried on all counts, even though errors had only been identified regarding the original Trial Chamber’s application of two modes of liability charged in the case. In relation to an error of law, it ordered the new trial chamber ‘should it consider aiding and abetting liability, to apply the correct law on aiding and abetting as affirmed herein [the Appeal Judgment], which does not require that the act of the aider and abettor be specifically directed to the commission of a crime.’²³⁵

Given that the role of appeals chambers of international criminal courts and tribunals is corrective, there is arguably significant capacity for appeals chambers to provide more detail on the scope of retrials to address errors they identified in the original trial judgment, as well as instructions to ensure that the proceedings are fair and expeditious.

First, appeals chambers should limit the scope of the new trial by reducing the charges specifically to address the errors identified. For example, in the *Stanišić and Simatović* case, the ICTY Appeals Chamber ordered a retrial of acquittals ‘on all counts’ without limiting the modes of liability, even though it identified only two errors related to the trial chamber’s application of the joint criminal responsibility and aiding and abetting in the judgment acquitting the two men.²³⁶ During the retrial, the defence questioned the prosecution’s efforts to prosecute other modes of liability, including ordering and planning.²³⁷ The trial chamber responded that, in the absence of explicit restrictions in the Appeals Chamber’s order, it was not convinced that the Appeals Chamber intended to limit the charges.²³⁸

In defining the scope of a retrial, the ICC Appeals Chamber should prohibit any amendments or additions to the charges in accordance with Article 61(9) and changes to the legal characterisation of facts in accordance with Regulation 55 of the Regulations of the Court. In addition to the concerns previously expressed by the IBA that Regulation 55 should be used as a last resort and that notice be provided as promptly as possible to the accused person during the trial,²³⁹ expanding the retrial to cover different

234 ICTY, *Haradinaj et al*, Decision on Haradinaj’s Appeal on Scope of Partial Retrial, n 229, para 26.

235 ICTY, *Stanišić and Simatović* Appeal Judgment, n 193, para 131.

236 See s 1.8.4.

237 IRMCT, *Prosecutor v Stanišić and Simatović*, Stanišić Defence Request to Stay the Proceedings until the Prosecution Respects the Principle of Finality and the Appeal Chamber’s Order for Retrial (MICT-15-96-PT), 27 October 2016, para 24.

238 IRMCT, *Stanišić and Simatović*, Decision on Stanišić’s Request for Stay of Proceedings, n 175, para 12.

239 IBA, Evidence Matters in ICC Trials, n 223, at 67-68.

charges or modes of liability could not only prolong the retrial,²⁴⁰ but it may cross the line between a retrial to correct the errors identified by the Appeals Chamber and a completely new second trial in which the OTP is given a fresh opportunity to prosecute an amended case, drawing from the experience of the first trial.

Second, when an appeals chamber decides to limit the charges to be prosecuted at retrial, it should confirm that the verdict of the original trial chamber in relation to other charges that are not to be retried is final and should not be relitigated in the new trial. The retrial in the *Haradinaj* case was limited to six counts. Nonetheless, the Appeals Chamber ruled by a majority that the prosecution could introduce evidence relating to other crimes for which the accused had been acquitted to support its allegations of Joint Criminal Enterprise. It concluded that as the retrial was limited to the six counts, the accused could not be convicted of the other crimes and therefore the partial retrial did not place Mr Haradinaj in potential double jeopardy or otherwise affect his fundamental rights and interests.²⁴¹ In a partially dissenting opinion, Judge Robinson argued that some paragraphs in the Statement of Facts concerned crimes for which Mr Haradinaj had been acquitted, and thus their inclusion in the indictment violated ‘the principles of *non bis in idem* or *res judicata* or would amount to an abuse of process.’²⁴² He explained that ‘pursuant to the principle of *non bis in idem*, a person who has been tried by the Tribunal must not be placed at the risk of being thought guilty of an offence of which he has been acquitted, or of being treated as guilty in any sense’.²⁴³ The doctrine of *res judicata* requires that matters decided having passed into judgment must be accepted as true in the sense of the judgment, and cannot be re-litigated by the same parties in a subsequent proceeding.²⁴⁴

Third, although the ICTY Appeals Chamber in the *Stanišić and Simatović* case provided clear instructions for the new trial chamber to address the error of law it identified, there is arguably room for appeals chambers to provide more detailed instructions to the new trial chamber to address other errors it has identified. In particular:

- where an appeals chamber finds an error of fact based on inadequate reasoning, the appeals chamber should, where appropriate, identify specific questions or legal requirements that the new trial chamber should address in its judgment;
- where an appeals chamber identifies an error of fact or procedure caused by the admission of evidence that should have been excluded (eg, because it was obtained in violation of internationally recognised human rights), the appeals chamber should instruct the new trial chamber to exclude the evidence in the retrial; and

240 ICC, *Bemba Appeal Judgment*, Separate Opinion, Judge Christine Van den Wyngaert and Judge Howard Morrison, n 65, para 73 states that ordering a retrial would inevitably prolong the proceedings by several more months, if not years, acknowledging the ‘likelihood that the new Trial Chamber may wish to use Regulation 55 of the Regulations of the Court in order to change for the knowledge to “should have known” standard, the new trial would involve a lot more than simply a new panel of judges reviewing the existing case record.’

241 ICTY, *Haradinaj et al*, Decision on Haradinaj’s Appeal on Scope of Partial Retrial, n 229, para 32.

242 ICTY, *Haradinaj et al*, Decision on Haradinaj’s Appeal on Scope of Partial Retrial, n 229, Partially Dissenting opinion of Judge Robinson, para 8.

243 ICTY, *Haradinaj et al*, Decision on Haradinaj’s Appeal on Scope of Partial Retrial, n 229, Partially Dissenting opinion of Judge Robinson, para 3.

244 *Ibid.*

- where an appeals chamber finds an error of procedure, it should specify the correct procedure to be followed in the new trial. For example, in the *Haradinaj et al* case, the ICTY Appeals Chamber could have included instructions of reasonable measures that the new trial chamber should have taken to ensure the testimony of uncooperative witnesses.

Fourth, where the appeals chamber orders a retrial after quashing a conviction, the appeals chamber should specify in its order that the new trial chamber must not order a longer sentence if it decides to convict the accused. This is consistent with the principle in Article 83(2) of the ICC Statute that when the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment. In the *Muvunyi* trial, the Appeals Chamber considered that the 'principle of fairness demands that in the event that a new Trial Chamber was to enter a conviction for the respective charge, any sentence could not exceed the twenty-five years of imprisonment imposed by the first Trial Chamber'.²⁴⁵

Finally, in the event an appeals chamber orders a retrial, it should address all grounds of appeal raised by the prosecution and the defence in its appeal judgment. The Appeals Chamber should not leave any allegations of errors in the original trial unresolved in case they pollute the trial record on which the new Trial Chamber relies, the new Trial Chamber repeats these errors or the issues are re-raised in appeals against the retrial judgment.²⁴⁶

2.2 Admission of evidence from the original trial

Neither the statute nor the rules of the ICTY, the ICTR, the IRMCT, the ICC or other international and internationalised courts and tribunals address the scope of evidence to be adduced in a retrial. Although the ICTR and ICTY accepted that the Appeals Chamber in making an order for a retrial could impose restrictions on the admission of evidence,²⁴⁷ no restrictions were imposed in the three retrials conducted. As a result, the new trial chamber relied on the rules of evidence applied in trials of first instance. Nonetheless, unique evidentiary issues arose in those retrials that go directly to the fairness and expeditiousness of the proceedings.

A retrial will inevitably rely on much of the evidence admitted in the original trial unless it has been specifically excluded in the appeals chamber's order or it is no longer relevant to the limited charges. The new trial chamber, which has not heard the evidence from the trial, will need to consider this evidence again in order to make an informed determination on guilt or innocence. However, the process of calling evidence again, in particular the testimony of witnesses, is time consuming and witnesses can experience trauma or security risks from having to testify a second time.

Of course, there may be instances where the new trial chamber decides that it needs to rehear evidence given in the first trial. However, there are also a number of tools in existing rules of evidence that the new trial chamber can use to manage the process of reviewing evidence adduced in the previous trial. These

²⁴⁵ ICTR, *Muvunyi* Appeal Judgment, n 184, para 170.

²⁴⁶ ICTY, *Stanišić and Simatović* Appeal Judgment, n 193, para 130, having upheld two grounds of the prosecutions appeal, the Appeals Chamber dismissed a third ground of appeal and a number of sub-grounds as moot.

²⁴⁷ ICTR, *Muvunyi*, Decision on the Prosecutor's Appeal Concerning the Scope of Evidence to Be Adduced in the Retrial, n 175, para 13; ICTY, *Haradinaj et al*, Decision on Haradinaj's Appeal on Scope of Partial Retrial, n 229, para 24.

tools have the potential to expedite the process but must be balanced against ensuring respect for the rights of the accused and take into account the duties of the prosecution to present its strongest evidence.

In the *Muvunyi* case, which focused specifically on allegations of public incitement to commit genocide, large amounts of evidence from the original trial were not an issue. The Prosecution presented its case, including testimony by six witnesses and 21 exhibits, over four trial days.²⁴⁸ The Defence conducted its case, including testimony by seven witnesses and 11 exhibits over five trial days.²⁴⁹ However, retrials in the *Haradinaj et al* and the *Stanišić and Simatović* cases were much broader in scope and involved significant amounts of evidence adduced in the original trials.

In the *Haradinaj et al* retrial, a large amount of evidence was admitted in written form, as well as audio or video recordings of the witnesses' prior testimony before the Tribunal.²⁵⁰ Of the 56 prosecution witnesses that were called, including the two witnesses with respect to whom the retrial was ordered:

- six witnesses testified entirely *viva voce*,
- the evidence of 25 witnesses was admitted in written form by agreement of the parties;
- the evidence of five witnesses was presented pursuant to Rule 92ter;²⁵¹
- eleven witnesses gave evidence pursuant to Rule 92bis without cross-examination;²⁵²
- one witness gave evidence pursuant to Rule 92bis with cross-examination;²⁵³ and
- eight gave evidence in accordance with Rule 89(F).²⁵⁴

No defence witnesses were called.²⁵⁵ Protective measures were granted to 21 of the 56 witnesses who gave evidence.²⁵⁶ For 15 of the witnesses subject to protective measures, the relevant measures were those imposed in the original trial.²⁵⁷

248 ICTR, Prosecutor v *Muvunyi*, Retrial Judgment (ICTR-00-55A-AR73), 11 February 2011, para 183.

249 ICTR, *Muvunyi*, Retrial Judgment, n 248, para 189.

250 ICTY, Prosecutor v *Haradinaj et al*, Retrial Judgment (IT-04-84bis-T) 29 November 2012, para 11.

251 Rule 92 *ter* provides that a Trial Chamber 'may admit, in whole or in part, the evidence of a witness [including evidence that goes to proof of the acts and conduct of the accused as charged] in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions: (i) the witness is present in court; (ii) the witness is available for cross-examination and any questioning by the Judges; and (iii) the witness attests that the written statement or transcript accurately reflects that witness' declaration and what the witness would say if examined'.

252 Rule 92 *bis* provides that a Trial Chamber 'may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.'

253 Rule 92 *bis* (c) provides that 'The Trial Chamber shall decide, after hearing the parties, whether to require the witness to appear for cross-examination'.

254 Rule 89(F) provides that a 'Chamber may receive the evidence of a witness orally, or where the interests of justice allow, in written form'.

255 ICTY, *Haradinaj et al* Retrial Judgment, n 250, para 701.

256 ICTY, *Haradinaj et al* Retrial Judgment, n 250, para 702.

257 *Ibid.*

In the *Stanišić and Simatović* retrial, the new Trial Chamber received testimonial evidence from 145 witnesses, including live testimony from 80 witnesses,²⁵⁸ and admitted 6,311 exhibits into evidence either through witnesses or from the bar table.²⁵⁹ One-hundred-and-three witnesses were called by the prosecution and 3,860 of its exhibits were admitted into evidence.²⁶⁰ The defence called 42 witnesses (20 by the Stanišić defence and 22 by the Simatović defence) and the Trial Chamber admitted 1,451 exhibits for the Stanišić defence and 1,000 exhibits for the Simatović defence.²⁶¹ The Trial Chamber encouraged the parties to reach agreements on the admission in written form of evidence given by witnesses in the original trial.²⁶² Evidence of 25 witnesses was admitted this way, and the Trial Chamber treated such witness evidence as if it were provided in the retrial pursuant to the same mode as in the original trial.²⁶³ Written testimony was also admitted pursuant to Rule 110 (admission of written statements or transcripts in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged); Rule 111 (other admission of written statements or transcripts); and Rule 112 (unavailable persons). A breakdown of the amount of evidence given under each rule was not provided in the Judgment. Where a witness, whose testimony was tendered in the retrial pursuant to Rule 112 of the Rules because they had died, could not be traced or were unavailable due to a bodily or mental condition, the Trial Chamber decided to rely on such evidence, even in the absence of corroboration, as if they testified in the original trial and his or her evidence was tested by the defence through cross-examination.²⁶⁴

A comprehensive analysis of decisions relating to the admission of evidence and prior recorded testimony in each of these three cases is beyond the scope of this report. Nevertheless, it is encouraging to see that new trial chambers have made efforts to expedite the retrial proceedings through a number of evidentiary mechanisms. Efforts by the parties to reach agreements on the admission in written form of evidence given by witnesses in the original trial can benefit all parties and should be encouraged. The application of rules that allow prior recorded testimony should also be considered, where appropriate, during retrials. As the IBA has commented on the general application of these rules:

‘there are two rationales to admit prior recorded testimony: the first is to increase the efficiency of proceedings by reducing the length of trials and the second is to overcome obstacles to witnesses appearing in person to give evidence.’²⁶⁵

Overall, there are sound policy reasons and ample precedent for admitting prior recorded testimony as a regular part of retrials. Especially where audio visual recordings are available of witness testimony given at the original trial, the new trial chamber can hear evidence expeditiously with fewer risks to witnesses. Prior recorded testimony should particularly be considered for evidence going to prove matters other than the acts and conduct of the accused.²⁶⁶

258 IRMCT, *Prosecutor v Stanišić and Simatović*, Retrial Judgment (MICT-15-96-T) 30 June 2021, para 11.

259 IRMCT, *Stanišić and Simatović* Retrial Judgment, n 256, para 19.

260 IRMCT, *Stanišić and Simatović* Retrial Judgment, n 256, paras 19 and 646.

261 IRMCT, *Stanišić and Simatović* Retrial Judgment, n 256, paras 19 and 648.

262 IRMCT, *Stanišić and Simatović* Retrial Judgment, n 256, para 12.

263 *Ibid.*

264 IRMCT, *Stanišić and Simatović* Retrial Judgment, n 256, para 12. The IRMCT Rules cited are largely drawn from the ICTY Rules applied in the *Haradinaj* retrial.

265 IBA, *Evidence Matters in ICC Trials*, n 223, 48.

266 *Ibid.*

However, the new trial chamber must be vigilant to ensure that efforts to expedite the retrial through the admission of prior recorded testimony do not prejudice the rights of the accused to a fair trial. Where possible, when evidence relates to the acts and conduct of the accused, international criminal courts and tribunals should apply rules that ensure that the witness is still available for cross-examination or questioning by the judges, if required.²⁶⁷ As the IBA has previously urged, a cautious approach should be applied to the introduction of prior recorded testimony where it relates to unavailable and interfered-with witnesses.²⁶⁸ The ability to introduce prior recorded testimony as evidence should not be a substitute for the continued development of strong witness protection practices at the ICC.²⁶⁹

2.3 Rules of new evidence in retrials

Neither the statute nor the rules of the ICTY, the ICTR, the IRMCT, the ICC or other international and internationalised criminal courts and tribunals specifically address whether new evidence can be adduced in a retrial. The ICTR/ICTY Appeals Chamber has held that:

‘Whether new evidence should be allowed at the retrial is a determination to be made within the Trial Chamber’s discretion which is guided by the same criteria governing the admission of evidence at trial.’²⁷⁰

Given the very broad discretion of the ad hoc tribunals and other international criminal courts to admit evidence, this places few limits on new evidence that can potentially be admitted during retrials.

Whether a new trial chamber should admit new evidence has proved a contentious issue in the three ICTR/ICTY retrials.

In the *Muvunyi* case, the prosecution sought to drop one of the two witnesses whose testimony the Appeals Chamber found was inconsistent and called three new witnesses who had not testified in the original trial, but whose statements had been disclosed to the Defence.²⁷¹ Initially, the new Trial Chamber rejected the testimony, on the basis that the scope of the retrial was to correct the lack of reasoning provided by the original trial chamber in the assessment of the evidence.²⁷² It limited the retrial to reviewing the evidence adduced in the original proceedings.²⁷³ However, on appeal, the Appeals Chamber by a majority held that a retrial inherently includes the possibility of hearing evidence that was not presented during the initial proceedings.²⁷⁴ It noted that neither the Rules nor the Tribunal’s jurisprudence prohibit a Trial Chamber from hearing the testimony of new witnesses when a retrial is ordered and that the same criteria governing the admission of evidence at trial applied.²⁷⁵ Judge Shahabuddeen and Judge Meron dissented,

267 See in particular, ICTY rr 92 Ter; IRMCT r 111; ICC rr 68(3).

268 IBA, Evidence Matters in ICC Trials, n 223, 49.

269 *Ibid.*

270 ICTR, *Muvunyi*, Decision on the Prosecutor’s Appeal Concerning the Scope of Evidence to Be Adduced in the Retrial, n 175, para 13.

271 ICTR, *Muvunyi*, Decision on the Prosecutor’s Appeal Concerning the Scope of Evidence to Be Adduced in the Retrial, n 175, para 4.

272 ICTR, Prosecutor v *Muvunyi*, Oral Decision, (ICTR-2000-55A-PT), 14 January 2009, p 3.

273 ICTR, *Muvunyi* Oral Decision, n 272, p 3.

274 ICTR, *Muvunyi*, Decision on the Prosecutor’s Appeal Concerning the Scope of Evidence to Be Adduced in the Retrial, n 175, para 13.

275 *Ibid.*

explaining that they found the admission of new witnesses ‘troubling’.²⁷⁶ In their view, it underscored ‘the problematic nature of retrial, where the Prosecution is effectively given a second chance to make its case’.²⁷⁷ They stressed the importance of safeguarding defendants’ rights in a retrial ‘through means such as limitations on which evidence the Prosecution may adduce’.²⁷⁸

In the *Haradinaj et al* case, although the retrial was ordered largely because the original trial chamber had failed to take sufficient steps to ensure the testimony of two witnesses, the prosecution sought to add six new prosecution witnesses who had not been disclosed to the defence at trial; an expert witness who, although disclosed at trial, had not been called to testify; as well as other witnesses who had been heard at the first trial but from whom new statements had been taken.²⁷⁹ The Trial Chamber dismissed the defence’s objections to the admission of this new evidence on the basis that the Appeals Chamber’s order for partial retrial did not set limits on the evidence that the prosecution might adduce,²⁸⁰ which was upheld by the Appeals Chamber.²⁸¹

In the *Stanišić and Simatović* case, the Trial Chamber repeated the findings in *Muvunyi* and *Haradinaj et al* that a retrial inherently includes the possibility of hearing evidence that was not presented during the original proceedings.²⁸² However, acknowledging that the proceedings had begun 14 years before, it also recognised that it had an obligation to ensure that the proceedings were fair and expeditious.²⁸³ To this end, the Trial Chamber held that it had the discretion to limit evidence and allegations to ensure the proper conduct of the case.²⁸⁴ The Trial Chamber held that, since the prosecution’s appeal did not dispute the facts, but rather the application of the correct legal standards, it would restrict the scope of evidence to that adduced in the original trial save for exceptional circumstances in which the original evidence might have become unavailable or the new evidence it presented was not discoverable through the exercise of due diligence.²⁸⁵ In rejecting the Prosecution’s request for certification to appeal this decision, the Trial Chamber further noted:

‘A retrial only envisions “the possibility of hearing evidence that was not presented during the initial proceedings”. Accordingly, the admission of new evidence is neither a starting point nor a matter of right in a retrial, and the Trial Chamber’s decision to limit the Prosecution’s presentation of evidence primarily to that presented during the original trial falls squarely within its discretion. Such decisions are routine matters for a Trial Chamber and may be revisited in the interests of justice during the trial.’²⁸⁶

276 ICTR, *Muvunyi*, Decision on the Prosecutor’s Appeal Concerning the Scope of Evidence to Be Adduced in the Retrial, n 175, Joint Dissenting Opinion of Judges Shahabuddeen and Meron, 24 March 2009, para 6.

277 *Ibid.*

278 *Ibid.*

279 ICTY, *Haradinaj et al*, Decision on Haradinaj’s Appeal on Scope of Partial Retrial, n 229, para 14.

280 ICTY, *Prosecutor v Haradinaj et al*, Decision on Shortened Form of the Fourth Amended Indictment (IT-04-84bis-Ar73.1) 14 January 2022, para 41.

281 See n 279, above.

282 IRMCT, *Stanišić and Simatović*, Decision on Stanišić’s Request for Stay of Proceedings, n 177, para 14.

283 *Ibid.*

284 *Ibid.*

285 IRMCT, *Stanišić and Simatović*, Decision on Stanišić’s Request for Stay of Proceedings, n 177, paras 19–24.

286 IRMCT, *Stanišić and Simatović*, Decision on Stanišić’s Request for Stay of Proceedings, n 177, para 10.

Despite the Trial Chamber deciding to restrict evidence to be adduced at the retrial, the prosecution attempted to introduce new evidence on a number of occasions. These requests were at times successful. Thirty-five per cent of the evidence admitted in the retrial was not admitted in the original proceedings.²⁸⁷ However, other requests were denied by the Trial Chamber, which was of the view that the prosecution had failed to justify its admission within the limits ruled upon.²⁸⁸ Ultimately, the Trial Chamber allowed the testimony of 18 Prosecution witnesses who did not testify in the original trial, permitted new or updated evidence to be elicited from witnesses who testified in the original trial, and admitted numerous new Prosecution exhibits into evidence.²⁸⁹

The ability of a trial chamber to admit new evidence during a retrial can serve important purposes. Additional evidence may be required to address errors identified by the appeals chamber. For example, if the appeals chamber finds an error of law and instructs the new trial chamber to apply a different legal standard, it may be appropriate to allow the parties to present evidence relating to that standard that had not been presented at the original trial. Where an appeals chamber identifies an error of fact because of a mistake by the original trial chamber to exclude evidence, the new trial chamber may require new evidence to establish the correct facts. If a witness has died, it may be appropriate to call a new witness to the same crime. Moreover, the defence should be able to present newly discovered exculpatory evidence at retrial, rather than having to wait until a final judgment has been delivered to apply for a revision of the judgment.

Nonetheless, as the admission of evidence in the three retrials conducted by the ICTY, ICTR and IRMCT demonstrates, providing new trial chambers with a very broad discretion in the absence of any guidance risks inconsistent approaches and may raise fairness concerns. In particular, the prosecution should not be allowed to adduce new evidence simply to address weaknesses in the case it presented in the first trial that have been highlighted in the previous proceedings. The ICTY Appeals Chamber rightly directed the Trial Chamber in the *Haradinaj* case ‘to be particularly mindful of any potential prejudice that the admission of new evidence may cause to the fair trial rights of the accused.’²⁹⁰ Such caution merits the development of rules for the admission of new evidence during all retrials.

2.4 Victim participation, outreach and reparations

In the event that an appeals chamber orders a retrial, especially on technical errors of law, procedure or fact, it is likely to cause significant confusion to victims and affected communities. Outreach efforts will need to be prioritised following the retrial order to explain the decision and its consequences. Outreach

287 IRMCT, *Prosecutor v Stanišić and Simatović*, *Stanišić Defence Response to Prosecution Request for Certification to Appeal Decision on Prosecution Motions for Admission of Evidence Pursuant to Rule 112 (MICT-15-96-T)*, 19 March 2018, para 27(b); IRMCT, *Stanišić and Simatović Retrial Judgment*, n 256, para 9:

‘it allowed the Prosecution to present new evidence in certain limited circumstances, such as where the tendered evidence (i) may be necessary, as evidence presented during the original trial has become subsequently unavailable due to circumstances outside the Prosecution’s control; or (ii) was unavailable during the original proceedings, could not have been discovered through the exercise of due diligence, and its admission was in the interests of justice.’

288 See eg, IRMCT, *Prosecutor v Stanišić and Simatović*, Corrigendum to ‘Decision on Prosecution Motion for Admission of Documents from the Bar Table (Bosnia)’ Issued On 11 February 2019, (MICT-15-96-PT), 15 February 2019, 1-3.

289 IRMCT, *Stanišić and Simatović Retrial Judgment*, n 256, para 10.

290 ICTY, *Haradinaj et al*, *Decision on Haradinaj’s Appeal on Scope of Partial Retrial*, n 229, para 26.

will need to be maintained throughout the retrial to ensure the process and its relationship with the original trial can be understood.

International criminal courts and tribunals that provide for victim participation will need to provide support and resources to the legal representatives of victims so that they can communicate and explain the decision to their clients. If a partial retrial is conducted, the legal representatives will need to inform some of the victims that their crimes will be included in the scope of the retrial. Those victims should be able to participate in the retrial without having to apply to participate again. Other eligible victims who want to participate in the retrial should apply in accordance with procedures for participation followed in the original trial. Where the accused has been convicted of crimes that do not form part of the retrial and the conviction is final, the process of determining reparations for victims of those crimes should be started without delay, ensuring sufficient legal aid for the defence to cover both the retrial and the reparations process.

Recommendations for the ICC – retrials

The ICC Appeals Chamber has yet to order the remedy of a new trial before a different chamber. However, the experience of the ICTR, ICTY and IRMCT reveals a number of challenges that the ICC may face in conducting a new trial. It is recommended that the Court considers and takes a number of measures to safeguard the rights of the accused in preparation for the likely event that it orders a new trial in the future.

Defining the scope of a new trial

- 15) The ICC Appeals Chamber should, on a case-by-case basis, define the scope of the new trial, having due regard for:
 - a. the errors that resulted in the decision to order a retrial;
 - b. the rights of the accused and the fairness of the new trial, including addressing any prejudice to the defendant arising from the length of the proceedings to date, the conduct of the original proceedings and fair trial concerns relating to the new trial, including the amount of time it is estimated to take; and
 - c. the proceedings required for the new trial chamber to address the errors identified by the Appeals Chamber and reach a fully informed determination on guilt or innocence.
- 16) The order of a retrial should:
 - a. Limit the charges and modes of liability to be prosecuted in the new trial to those necessary to address the errors identified in the original trial.
 - b. Confirm that the original trial chamber's verdict in relation to charges not addressed in the new trial is final and should be treated as *res judicata* by the new trial chamber and therefore cannot be re-litigated.
 - c. Address all grounds raised on appeal by the prosecution and the defence and, in the event that it finds other errors, provide instructions to the new trial chamber on how to address them.

- d. Confirm that the rights of the accused in the Statute, including the presumption of innocence, must apply.
 - e. Where appropriate, provide specific instructions to the trial chamber to ensure that the errors it has identified are addressed effectively in the new trial, including:
 - in the case of errors of law, setting out the correct legal standard to be applied;
 - in the case of errors of procedure, setting out the correct procedures that should be conducted;
 - excluding evidence that should not have been admitted during trial (eg, because it was obtained in violation of internationally recognised human rights);
 - in relation to lack of reasoning for factual findings, setting out questions or legal requirements that should be addressed.
 - f. In the event that a conviction is quashed and a new trial is ordered following an appeal by the accused, the Appeals Chamber should instruct the new trial chamber not to order a sentence higher than that imposed by the original trial chamber if it decides to convict the accused.
- 17) To ensure that the new trial focuses on addressing the errors identified by the Appeals Chamber and does not stray into a completely new trial in which the Office of the Prosecutor is given a second chance to correct errors in the first trial and take unfair advantage of having heard the defence's case, the Appeals Chamber should prohibit amendments to the charges pursuant to Article 61(9) or the application of Regulation 55 to change the legal characterisation of the facts. Amendments to the Rules and/or the Regulations should be considered to codify these restrictions in all cases of a new trial.

Admitting evidence from the original trial

- 18) The new trial chamber should encourage the parties to reach agreements on the admission in written form of evidence given by witnesses in the original trial.
- 19) The Court should ensure that a secure database of audio-visual recordings of witness testimony given in trials is maintained so that they are available for future retrials, if required.
- 20) Trial Chambers are encouraged to admit prior recorded testimony in retrials for evidence going to prove matters other than the acts and conduct of the accused pursuant to Rule 68(2)(b), subject to consideration of objections by the parties. Where evidence goes to the acts and conduct of the accused, trial chambers should, where possible, apply Rule 68(3) ensuring that the witness can be cross-examined or questioned by the chamber, if necessary.
- 21) Trial Chambers should apply Rules 68(2)(c) to admit the prior recorded testimony of unavailable witnesses and 68(2)(d) to admit the prior recorded testimony of interfered-with witnesses on an exceptional basis and only as a last resort without prejudice to the rights of the accused.
- 22) The ICC should continue to strengthen its witness protection practices and monitor the use of Rule 68 vigilantly to ensure that it is not used as a substitute for victim and witness protection mechanisms.

Admitting new evidence in the new trial

- 23) In light of the unique issues that may arise in presenting new evidence during retrials, including fairness considerations, the ICC should consider developing Rules of Procedure and Evidence and/or Regulations of the Court specifically addressing the admission of evidence if a new trial is ordered. In particular, new rules should safeguard the rights of accused by:
- a. Imposing appropriate limitations on the admission of new inculpatory evidence by the prosecution, taking into account the approach of the IRMCT in the *Stanišić and Simatović* case to restrict new evidence to circumstances where the evidence presented at trial is no longer available or exceptional circumstances where evidence was not available at the original trial and could not have been discovered through the exercise of due diligence. In the latter scenario, the Chamber should exercise particular caution in ensuring that the new evidence is specifically relevant and probative to addressing an error identified by the Appeals Chamber and the trial chamber is satisfied that it does not prejudice the rights of the accused.
 - b. Providing that the trial chamber, in exercising its discretion to admit new evidence, should consider whether new witnesses called by the prosecution had been or should have been disclosed to the defence at the original trial.
 - c. Providing that (as held in the *Haradinaj et al* case),²⁹¹ where the prosecution seeks to introduce evidence that was excluded in prior proceedings, the trial chamber should explicitly consider whether re-litigation of the same issue in the retrial would be unduly prejudicial. If so, the evidence should be excluded.
 - d. Allowing the defence to present new exculpatory evidence during the retrial that was not available at the time of trial, provided that such unavailability was not wholly or partially attributable to the defence and is sufficiently important that, if it is proved, may result in an acquittal.

Victim participation, outreach and reparations

- 24) Following a decision to order a retrial, the Court should intensify outreach to victims and affected communities to explain the decision and its consequences.²⁹¹ Outreach should continue throughout the retrial to explain the process.
- 25) Legal representatives of victims should be provided with support and sufficient resources to explain the decision to their clients and to represent them throughout the retrial.
- 26) Victims of crimes in the scope of the retrial that participated in the original trial should be permitted to participate in the retrial without a new application process.
- 27) In the event of a partial retrial, processes should be commenced without delay to determine reparations for victims of crimes finally convicted by the Court. In such situations, the Court should ensure that defence teams are given increased legal aid resources to enable them to participate in both the retrial and reparations process simultaneously.

²⁹¹ ICTY, *Haradinaj et al*, Decision on Haradinaj's Appeal on Scope of Partial Retrial, n 229, para 26.

Chapter 3: Review/revision of judgments

The legal frameworks of international and internationalised criminal courts and tribunals provide that, in certain circumstances, when new evidence or facts are discovered, a review or revision of a judgment can be conducted to remedy potential injustice. However, the scope and procedures vary significantly between different courts and tribunals.

Review of a judgment was expressly prohibited by the Nuremberg International Military Tribunal,²⁹² which only anticipated that fresh evidence might be discovered after the trial which could lead to fresh charges against a convicted person.²⁹³ Both the Nuremberg and Tokyo International Military Tribunals provided the possibility that the Control Council for Germany and the Supreme Commander of the Allied Powers (for the Tokyo Tribunal) ‘may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof’.²⁹⁴ However, this was not a judicial process.

The ICTY Statute established a system to review a judgment, independent of the appeal process. Article 26 states:

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

This provision was largely adopted by the ICTR,²⁹⁵ the IRMCT,²⁹⁶ the SCSL,²⁹⁷ the RSCSL²⁹⁸ and the STL.²⁹⁹ While review ‘is normally regarded as an extraordinary remedy that is seldom successfully invoked’³⁰⁰,

292 Art 26 of the Nuremberg IMT Charter states: ‘The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review.’

293 Art 29 of the Nuremberg IMT Charter states: ‘If the Control Council for Germany, after any Defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion, would found a fresh charge against him, the Council shall report accordingly to the Committee under Article 14 hereof of such action as they may consider proper, having regard to the interests of justice.’

294 Nuremberg IMT Charter, Art 29; Tokyo IMT Charter, Art 17.

295 ICTR Statute, Art 25.

296 IRMCT Statute, Art 24.

297 SCSL Statute, Art 21.

298 RSCSL Statute, Art 22.

299 STL Statute, Art 27.

300 Christopher Staker and Volker Nerlich, ‘Article 84: Revision of conviction or sentence’ in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court* (3rd edn, CH Beck Hart Nomos 2015) 1987.

applications have been made in a number of cases at the ICTY,³⁰¹ ICTR,³⁰² IRMCT³⁰³ and the SCSL,³⁰⁴ but only three cases – one each at the ICTY,³⁰⁵ ICTR³⁰⁶ and IRMCT³⁰⁷ – have made it past the initial examination stage. In dealing with these applications, a significant amount of jurisprudence focused on clarifying the distinction between an appeal and a review (when applications for review were submitted while appeals were still in process), as well as attempting to define a ‘new fact’.

Article 84 of the ICC Statute adopted an arguably more straightforward system of ‘revision’, which has yet to be applied. Revision can only be sought for a *final* judgment, which means that all rights of appeal must have been exhausted. Revision can only be sought for a conviction or sentence, not an acquittal. The grounds for seeking revision involve three clear grounds. Similar provisions for revision have been adopted by some internationalised criminal courts.³⁰⁸

Chapter 3 examines the differences in the legal frameworks, the limited practice to date, and provides recommendations to ensure that the ICC deals with revision applications fairly and effectively.

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- 301 See eg: ICTY, Prosecutor v *Delić*, Decision on Motion for Review (IT-96-21-R-R119), 25 April 2002; ICTY, Prosecutor v *Tadić*, Decision on Motion for Review (IT-94-1-R), 30 July 2002; ICTY, Prosecutor v *Žigić*, Decision on Zoran Žigić’s Request for Review under Rule 119 (IT-98-30/1-R.2), 25 August 2006; ICTY, Prosecutor v *Radic*, Decision on Defence Request for Review, 31 October 2006; ICTY, Prosecutor v *Blaškić*, Decision on Prosecutor’s request for review or reconsideration (IT-95-14-R), 23 November 2006; ICTY, Prosecutor v *Naletilić*, Decision on Mladen Naletilić’s Request for Review (IT-98-34-R) 19 March 2009; ICTY, Prosecutor v *Šljivančanin*, Decision with Respect to Veselin Šljivančanin’s Application for Review, 14 July 2010; ICTY, Prosecutor v *Delić*, Decision on Motion for Review (IT-04-83-R.1), 17 December 2013.
- 302 See eg: ICTR, Prosecutor v *Barayagwiza*, Decision (Prosecutor’s request for Review or Reconsideration), (ICTR-97-19-AR72), 31 March 2000; ICTR, Prosecutor v *Niyitegeka*, Decision on Request for Review (ICTR-16-44-R), 30 June 2006; ICTR, Prosecutor v *Rutaganda*, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure and Clarification (ICTR-96-03-R), 8 December 2006; ICTR, Prosecutor v *Niyitegeka*, Decision on Request for Review (ICTR-16-44-R), 6 March 2007; ICTR, Prosecutor v *Niyitegeka*, Decision on Third Request for Review (ICTR-16-44-R), 23 January 2008; ICTR, Prosecutor v *Niyitegeka*, Decision on Fourth Request for Review (ICTR-16-44-R), 12 March 2009; ICTR, Prosecutor v *Niyitegeka*, Decision on Fifth Request for Review (ICTR-16-44-R), 27 January 2010; ICTR, Prosecutor v *Karera*, Decision on Request for Review and Assignment of Counsel (ICTR-01-74-R), 28 February 2011; ICTR, Prosecutor v *Kajelijeli*, Decision on Request for Review (ICTR-98-44-A-R), 29 May 2013.
- 303 See eg: IRMCT, Prosecutor v *Lukić*, Decision on Milan Lukić’s Application for Review (MICT-13-52-R.1) 7 July 2015; IRMCT, Prosecutor v *Lukić*, Decision on Sreten Lukić’s Application for Review (MICT-13-52-R.1) 8 July 2015; IRMCT, Prosecutor v *Ngirabatware*, Decision on Ngirabatware’s Motion for Review (MICT-12-29-R), 19 June 2017; IRMCT, Prosecutor v *Semanza*, Decision on a Request for Access and Review (MICT-13-36-R) 9 April 2018; IRMCT, Prosecutor v *Niyitegeka*, Decision dismissing a request (MICT-12-16-R)), 13 April 2018.
- 304 SCSL, Prosecutor v *Senessie*, Decision on Defence Motion for Review (SCSL 11-01-Rev), 4 September 2012.
- 305 ICTY, *Šljivančanin* Decision with Respect to Veselin Šljivančanin’s Application for Review, n 301.
- 306 ICTR, *Barayagwiza* Decision (Prosecutor’s request for Review or Reconsideration), n 302.
- 307 IRMCT, *Ngirabatware* Decision on Ngirabatware’s Motion for Review, n 303.
- 308 ECCC Internal Rules, r 112 contains largely the same provision as Art 84 of the Rome Statute. KSC-SPO Law, Art 48; and SCC-CAR Loi no 18-010, ss 141-142 mostly follow the ICC’s approach to revision, with some differences.

3.1 Applicants for review/revision

Reviews provided for in the Statutes of the ICTY, the ICTR, the IRMCT and the STL state that an application may be submitted by the convicted person or the prosecutor.³⁰⁹ This has been interpreted by the ICTR/ICTY Appeals Chamber to include applications by the prosecution for a review of an acquittal.³¹⁰ However, applications for review by the prosecution must be made ‘within one year from the day that the final judgment was pronounced.’³¹¹ In all but one completed case before the IRMCT – *Stanišić and Simatović* – that deadline has now passed.

In contrast, the ICC Statute makes clear that an application for revision can only be made in relation to a final judgment of conviction or sentence, and not an acquittal.³¹² This is consistent with the International Law Commission’s approach in its original draft of the ICC Statute, which considered that review proceedings in the case of an acquittal would be a violation of the principle of *ne bis in idem*.³¹³

Significantly, the ability to make an application for revision before the ICC is not limited to the convicted person. If the convicted person has died, their ‘spouses, children, parents or a person alive at the time of the accused’s death who has been given express written instructions from the accused to bring such a claim’ can apply for revision.³¹⁴ This is in contrast to the practice of the ICTY, which dismissed at least one motion by a next of kin and Counsel of a deceased person due to their lack of standing.³¹⁵

Moreover, while the ICC Prosecutor cannot apply for a revision of an acquittal, the Prosecutor can apply for revision of a conviction on the convicted person’s behalf.³¹⁶ The International Law Commission, which initially proposed this provision, emphasised that the Prosecutor has an ‘equal interest with the defence in securing a just and reliable outcome in proceedings brought under the Statute’.³¹⁷ Regulation 70 of the ICC Regulations of the Office of the Prosecutor, requires that the Prosecutor ‘shall seek to consult with the convicted person, or with his or her legal representative where applicable’ prior to filing an appeal on behalf of the convicted person.

309 ICTY Statute, Art 26; ICTR Statute, Art 25; IRMCT Statute, Art 24; STL Statute, Art 27. The SCSL and the RSCSL contain the same requirement, see: SCSL Statute, Art 21; RSCSL, Art 22.

310 ICTR, *Barayagwiza* Decision (Prosecutor’s request for Review or Reconsideration), n 302, para 48: the Appeals Chamber ruled that the inclusion of the terms ‘prosecutor’ and ‘convicted person’ ‘indicates that each of the parties may seek review of a decision, not that the provision is to apply only after a conviction has been delivered’.

311 ICTY r 119(a); ICTR r 120(a); IRMCT Art 24; SCSL r 120; STL r 190A. The Statute and Rules of the RSCSL does not contain this time limit, although it was included in the Rules of the SCSL.

312 ICC Statute, Art 84(1). See also: Staker and Nerlich, ‘Article 84: Revision of conviction or sentence’ n 300, 1988. The ECCC and SCC-CAR contain similar rules, see: ECCC Internal Rules, r 112(1); SCC-CAR Loi no 18-010, s 141. The KSC-SPO allows prosecution applications for reopening criminal proceedings against an accused on some grounds but not others, see: KSC-SPO Law, Art 48(3).

313 International Law Commission, Draft Statute for an International Criminal Court with commentaries (1994), 62: ‘once a prosecution has been duly launched and conducted it would be a violation of the *non bis in idem* principle to allow revision of an acquittal on grounds of the discovery of new evidence’; Staker and Nerlich, ‘Article 84: Revision of conviction or sentence’ n 300, 1988.

314 ICC Statute, Art 84(1). The ECCC and SCC-CAR contain the same provision, see: ECCC Internal Rules, r 112(1); SCC-CAR Loi no 18-010, s 141.

315 ICTY, *Delić* Decision on Motion for Review, n 301.

316 ICC Statute, Art 84(1). The ECCC and SCC-CAR contain the same provision, see: ECCC Internal Rules, r 112(1); SCC-CAR Loi no 18-010, s 141(B).

317 International Law Commission, Draft Statute for an International Criminal Court with commentaries (1994), 62; Staker and Nerlich, ‘Article 84: Revision of conviction or sentence’ n 300, 1989.

The possibility for different actors to bring applications for revision is an important safeguard to ensure that the ICC can respond to wrongful convictions in a broad range of situations, including when the convicted person is not in a position to seek revision. However, the fact that the ICC Prosecutor is not required to apply for revision in lieu of an application by the convicted person or others when it discovers new exonerating evidence, leaves a potential gap which should be addressed. Indeed, in practice, it should be expected that in many instances, especially where the convicted person or their family or supporters lack significant resources to continue investigations following final judgment, new evidence is more likely to be discovered by the prosecution in investigating and prosecuting other cases in the same conflict situation or events.

In circumstances where the prosecution of an international criminal court or tribunal discovers new exculpatory evidence or other information that may trigger an application for review or revision, it should, at a minimum, disclose the evidence or information to the convicted person or their representatives, so that they can decide how to proceed. Although Article 67(2) of the Rome Statute is included in Part 6 on ‘The Trial’, it can and should be read as imposing a duty on the ICC Prosecutor to disclose new exculpatory evidence to the convicted person when it is discovered following the trial, so that it can be used in appeal and revision processes to ensure that miscarriages of justice do not go unremedied. It states:

‘In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.’

If the convicted person or their representatives are not in a position to apply for revision or they decide not to do so, but the ICC Prosecutor determines that the evidence may still warrant a revision process to determine whether a wrongful conviction has occurred, the Prosecutor has a duty to apply for revision on behalf of the convicted person, consistent with their obligations to act independently, impartially and objectively.

3.2 Grounds for review/revision

The grounds for review of a judgment at the ICTY, the ICTR, the IRMCT and the STL vary significantly from the grounds for revision of a judgment at the ICC.

3.2.1 *Grounds for review*

The statutes and rules of procedure and evidence of the ICTY, the ICTR, the IRMCT and the STL require that a motion for review pass a four-part test, for a review of judgment to be conducted:

- a new fact has been discovered;
- the fact was not known at the time of the proceedings;
- the fact could not have been discovered through the exercise of due diligence; and

- the fact could have been a decisive factor in reaching the decision.³¹⁸

In practice, the ICTY and ICTR have struggled with determining what constitutes a new fact.³¹⁹ The Tribunals have sought to make a ‘clear distinction’ between a new fact – ‘that is, a fact which was *not* in issue or considered in the original proceedings’ and additional evidence ‘relating to a fact which was in issue or considered in the original proceedings but which evidence was not available to be given in those proceedings [...]’.³²⁰ A number of applications have been dismissed because the newly discovered evidence related to facts considered at the original trial or appeal, not to new facts.³²¹

However, in some decisions, chambers have found that new facts have been discovered, even though the evidence clearly points to an issue that was considered in the trial or appeal proceedings. For example, in the *Barayagwiza* case, the accused had been released and the charges were dismissed because of violations resulting from delays in transferring him to the ICTR and charging him, which had been attributed to failures of the prosecution. The prosecution sought a review based on evidence that showed Cameroonian authorities were responsible for the delay in the transfer. Even though the reasons for the delay had been considered in the decision dismissing the charges, the Appeals Chamber determined that evidence presented by the Prosecution constituted a new fact that would have had a significant impact on the decision to acquit, had it been known at the time.³²²

Similarly, in the *Šljivančanin* case, the Appeals Chamber decided to review its appeal judgment, which had convicted the accused of aiding and abetting the murder of 194 prisoners. The Appeals Chamber originally found the accused must have been told by his co-accused of the withdrawal of troops protecting the prisoners and therefore ‘must have been aware that his failure to take action to save the prisoners would assist in their killing’.³²³ A review was ordered after the accused filed a motion presenting evidence that a witness had been found who could testify that the co-accused had not informed him of the withdrawal of the troops.³²⁴ Even though the evidence clearly contradicted facts that had been considered

318 ICTY Statute, Art 26, and rr 119 and 120; ICTR Statute, Art 25, and rr 120 and 121; IRMCT Statute, Art 24, and rr 146 and 147; STL Statute, Art 27, and r 190. The SCSL and RSCSL apply the same grounds, see: SCSL, Art 21 and rr 120 and 121; RSCSL, Art 22, and r 120.

319 ICTY, *Delić* Decision on Motion for Review, n 301, para 13: ‘It is obvious that there may be difficulty in some cases in making the distinction between a new fact and additional evidence of a fact which is not new[...].’

320 ICTY, *Prosecutor v Tadić*, Decision on Appellant’s Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, para 32: ‘The mere subsequent discovery of evidence of a fact which was known at trial is not itself a new fact within the meaning of Rule 119 of the Rules.’; See also: ICTY, *Prosecutor v Delić*, Decision on Motion for Review, n 301, para 13.

321 See eg: ICTY, *Tadić* Decision on Appellant’s Motion for the Extension of the Time-Limit and Admission of Additional Evidence, n 320; ICTR, *Niyitegeka*, Decision on Request for Review, n 302, 30 June 2006, paras 12 and 34: The Appeals Chamber dismissed the motion for review because the additional evidence that he has been on government business elsewhere on the days of certain alleged crimes went to issues that ‘had been raised during the original proceedings and on appeal’; ICTY, *Radić* Decision on Defence Request for Review, n 301, para 21: The Appeals Chamber dismissed a motion for review based on the introduction of evidence going to show that Mlado Radić did not have access to a room in which a witness had been raped because the defence did not establish whether accessibility to this room was ‘not in issue or not considered’ by the Trial Chamber in its verdict.

322 ICTR, *Barayagwiza*, Decision (Prosecutor’s request for Review or Reconsideration), n 302, para 58.

323 ICTY, *Prosecutor v Šljivančanin*, Review Judgment (IT-95-13/1-R), 18 December 2010, para 4.

324 ICTY, *Šljivančanin*, Review Judgment, n 323, para 6.

in reaching the conviction, the Appeals Chamber held that the ‘new information’ provided by Mr Šljivančanin constituted a new fact that could ‘fundamentally alter the balance of evidence’ in the case.³²⁵

The ICTY and ICTR’s inconsistent application of the ‘new fact’ requirement demonstrates that the test itself is problematic. Making a strict distinction between new facts and new evidence in some cases but not others, indicates that in some instances, chambers are unwilling to ignore the injustice that could arise from dismissing evidence that contradicts key facts upon which the original decision rested. While this refusal to accept injustice is commendable, it is concerning that the Tribunals failed to develop a more coherent and convincing legal basis to justify reviews in such circumstances.

Significantly, both Tribunals have issued decisions concluding that a review can be conducted even if the second and third requirements are not met, finding that these conditions are advisory in nature, not mandatory.³²⁶ In the *Barayagwiza* case, the Appeals Chamber accepted that, contrary to the statutory requirements, the evidence brought by the prosecution ‘may have been known to the Prosecutor or at least they could have been discovered’ and that the ‘Prosecutor was not unaware that Cameroon was unwilling to transfer the Appellant’.³²⁷ Nevertheless, it held that:

‘[i]n the wholly exceptional circumstances of this case, and in the face of a possible miscarriage of justice, the Chamber construes the condition laid down in Rule 120, that the fact be unknown to the moving party at the time of the proceedings before a Chamber, and not discoverable through the exercise of due diligence, as directory in nature.’³²⁸

According to Judge Shahabuddeen a balance was necessary between the ‘principle of finality’ and the need to avoid a miscarriage of justice.³²⁹ Therefore, ‘notwithstanding the absence of diligence, the material in question is so decisive in demonstrating mistake that the court in its discretion is obliged to admit it in the upper interests of justice’.³³⁰

Similarly, in the *Tadić* case, after finding that the conviction of Mr Tadić’s counsel for contempt was a new fact, the Appeals Chamber found that co-counsel had been informed of the misconduct, and therefore the second criterion of Rule 119 had not been met, as the fact was known at the time of proceedings. However, the Appeals Chamber held that ‘fairness requires the adoption of a flexible interpretation with regard to the second and third criteria under Rule 119’.³³¹

In both the *Barayagwiza* and *Tadić* cases, the ICTR/ICTY Appeals Chamber found it necessary to waive the statutory criteria for a review in order to address a possible miscarriage of justice. In both cases, the approach taken required facts which *would clearly* have altered an earlier decision, rather than merely, *could have*.³³² Although it involves a departure from the specific provisions of the ICTY and ICTR Statutes

325 ICTY, *Šljivančanin* Decision with Respect to Veselin Šljivančanin’s Application for Review, n 301, 3.

326 ICTR, *Barayagwiza*, Decision (Prosecutor’s request for Review or Reconsideration), n 302, para 65.

327 ICTR, *Barayagwiza*, Decision (Prosecutor’s request for Review or Reconsideration), n 302, para 64.

328 ICTR, *Barayagwiza*, Decision (Prosecutor’s request for Review or Reconsideration), n 302, para 65.

329 ICTR, *Barayagwiza*, Decision (Prosecutor’s request for Review or Reconsideration), n 302, Separate Opinion of Judge Shahabuddeen, para 49.

330 ICTR, *Barayagwiza*, Decision (Prosecutor’s request for Review or Reconsideration), n 302, Separate Opinion of Judge Shahabuddeen, para 50.

331 ICTY, *Tadić*, Decision on Motion for Review, n 301, para 44.

332 ICTR, *Barayagwiza*, Decision (Prosecutor’s request for Review or Reconsideration), n 302, Separate Opinion of Judge Shahabuddeen, para 66; ICTY, *Tadić*, Decision on Motion for Review, n 301, para 27.

and Rules, the justification to give priority to addressing miscarriages of justice is compelling.³³³ It is not a significant leap to suggest that new evidence that does not amount to a new fact could therefore also result in a review, if the chamber is satisfied that it shows a miscarriage of justice had occurred.

3.2.2 Grounds for revision

In contrast to the ‘new fact’ ground for review applied by the ICTY, the ICTR, the IRMCT, the SCSL, the RSCSL and the STL, a revision of a judgment at the ICC can be conducted on three grounds.

- New evidence has been discovered that: (1) was not available at the time of trial, and such availability was not wholly or partially attributable to the party making the application; and (2) is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict.
- It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified.
- One or more of the judges who participated in conviction or confirmation of the charges have committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office.³³⁴

3.2.2.1 NEW EVIDENCE

The ICC’s first ground for conducting a revision requires that:

- new evidence has been discovered;
- the evidence was not available at the time of trial;
- such unavailability was not wholly or partially attributable to the party making application; and
- the evidence is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict.

The most immediate difference between this ground and the ground for review applied by other international criminal courts and tribunals is that the test for revision requires the discovery of ‘new evidence’ as opposed to new facts.³³⁵ Therefore, the problems that the Tribunals faced in distinguishing between new evidence and a new fact do not apply. Evidence of both new facts and facts previously considered in the trial or appeal can trigger the revision process.³³⁶ In this regard, the ICC’s revision process provides clearer protection against injustice.

333 Although Schabas, n 82, at 1252 has remarked that ‘[t]his is a bad precedent, of dubious authority’, Staker and Nerlich, ‘Article 84: Revision of conviction or sentence’ n 293, 1994 argue that it would be undesirable not to ‘correct a judgment that is clearly wrong’.

334 ICC Statute, Art 84(1). The ECCC contains the same grounds in Internal Rule 112(1). The grounds applied by the KSC-SPO and the SCC-CAR are similar to the ICC, but with some differences, see: KSC-SPO Law, Art 48(2); SCC-CAR Loi no 18-010, s 141.

335 The ECCC also lists ‘new evidence’ as a ground for revision, see: ECCC Internal Rules r 112(1). The KSC-SPO lists both new fact or new evidence, see: KSC-SPO Law, Art 48(2). The SCC-CAR covers new facts or an ‘unknown element’ [unofficial translation] which may cover new evidence, see: SCC-CAR Loi no 18-010, s 142.

336 Staker and Nerlich, ‘Article 84: Revision of conviction or sentence’, n 300, 1992.

As the ICC has yet to conduct a revision process, it is not clear whether it will strictly apply the second and third requirements. The fact that the ICTY and ICTR have both applied similar requirements in their frameworks flexibly in some circumstances (see 3.2.1 above), indicates that in practice the ICC is likely to be faced with situations of either finding flexibility in the requirements or rejecting a motion despite evidence that a miscarriage of justice has occurred. One commentary of the ICC Statute has opined that the text of Article 84(1)(a) does not appear to leave room for a similar exception to that adopted by the ICTY/ICTR, but states: '[n]evertheless, it would be undesirable if the ICC could not correct a judgment that is clearly wrong'.³³⁷

In addition to the approach taken by the ICTY and ICTR to interpret the second and third requirements as advisory rather than mandatory, there are a number of interpretative options available to the ICC to find flexibility when required to remedy injustice. First, the ICC has the potential to interpret whether evidence was 'not available at the time of trial' broadly, taking into account the facts of each case and the reasons presented by the party making the application as to why it was not presented at trial or appeal. Second, in determining whether to attribute the unavailability of the evidence during the trial to the party applying for the review, the ICC should apply the same due diligence standard applied by other tribunals,³³⁸ which takes into account the facts of each application and has due regard to the presumption of due diligence, 'unless gross negligence is shown to exist in the conduct of either Prosecution or Defence counsel'.³³⁹

Finally, Article 84 of the ICC Statute appears to depart from the requirements for grounds for review before other courts and tribunals that a new fact 'could have been a decisive factor in reaching the decision', requiring instead that the new evidence be 'sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict'.³⁴⁰ It remains to be seen if this provision will be applied as a higher test.³⁴¹

On first reading it appears that the ICC test is higher, as it focuses on whether the new evidence *would have been likely to change* the verdict, as opposed to whether it *could have been a decisive factor* in reaching the original verdict. An argument could be made that a higher test is required because the revision process at the ICC can be triggered by new evidence as opposed to the narrower requirement of new facts. However, the need for such a narrow interpretation of the threshold is arguably not necessary, when weighed against the possibility that it might leave the ICC unable to remedy an injustice.

As the test merely determines whether an application proceeds past the initial examination of the application, it is important that the 'likely' requirement is interpreted and applied broadly enough to allow a full revision process when required to determine whether a wrongful conviction has occurred. Given the relatively small caseload of the ICC, the Appeals Chamber is unlikely to be flooded with applications and,

337 Staker and Nerlich, 'Article 84: Revision of conviction or sentence', n 300, 1994.

338 ICTY, *Tadić* Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, n 320, para 47: the Appeals Chamber held that 'the requirement of due diligence includes the appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber'.

339 ICTY, *Tadić* Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, n 320, para 48.

340 ICC Statute, Art 84(1)(a)(ii). This test is also applied by the ECCC, see: ECCC Internal Rules, r 112(1). The KSC-SPO and SCC-CAR provide similar tests, see: KSC-SPO Law, Art 48(2)(c); SCC-CAR Loi no 18-010, s 142 (A).

341 See discussion in Staker and Nerlich, 'Article 84: Revision of conviction or sentence', n 300, 1994.

if the aim of the revision process is to address wrongful conviction, its test should be interpreted to focus first and foremost on ensuring consideration of applications that may have merit.

Moreover, as Article 84(1) of the ICC Statute expressly permits applications to revise ‘the final judgment of *conviction or sentence*’, it is important that the requirement that new evidence would have been likely to have resulted in a ‘different verdict’ is interpreted to cover situations where it may have resulted in a different sentence, even if the determination of guilt or evidence would not change. One commentary notes that ‘it would be illogical if new evidence that, had it been presented at trial, would have been likely to have resulted in a more lenient sentence could not lead to revision proceedings.’³⁴²

3.2.2.2 FALSE, FORGED OR FALSIFIED EVIDENCE

The second ground in the ICC Statute deals expressly with the scenario where ‘[i]t has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified.’³⁴³ It has been observed that this ground overlaps with the first ground for revision based on new evidence ‘because presumably, in order to establish that evidence was “false, forged or falsified”, evidence of this fact will have to be presented.’³⁴⁴ In practice, the IRMCT has, in at least one decision, ordered a review after witnesses recanted their testimony after trial, which it determined amounted to a new fact.³⁴⁵

Nonetheless, there are important reasons for the ICC to address this ground separately. The wording of Article 84(1)(b) provides a different test than Article 84(1)(a). This ground does not require that the false, forged or falsified evidence was ‘sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict’ but that it was ‘decisive’, and the conviction depended on it. According to one commentary:

‘This is explained by the fact that the perspective differs: for the determination under sub-paragraph (a), a prediction has to be made as to what might have happened, had the original Chamber been aware of the new evidence; in contrast, for sub-paragraph (b), the actual importance of the false, forged or falsified evidence for the verdict has to be determined; arguably, this will be done primarily on the basis of the reasoning of the decision in question.’³⁴⁶

342 Staker and Nerlich, ‘Article 84: Revision of conviction or sentence’, n 300, 1994.

343 ICC Statute, Art 84(1)(b). The ECCC contains the same ground, see: ECCC Internal Rules, r 112(1)(b). The KSC-SPO Law, Art 48(2)(a) requires that ‘it is proven that the judgment rests on a forged document or a false statement of a witness, expert witness or interpreter’. SCC-CAR Loi no 18-010, 2 July 2018, s 142(c) list ‘when a witness who has been heard is prosecuted and convicted for perjury against an accused after the conviction of the latter’ as a ground for revision [unofficial translation].

344 Staker and Nerlich, ‘Article 84: Revision of conviction or sentence’, n 300, 1994.

345 IRMCT, *Ngirabatware*, Decision on Ngirabatware’s Motion for Review, n 303. See also: Ephrem Rugiririza, ‘First ICTR review trial for former Rwandan minister Ngirabatware’ (Justice Info, 16 September 2019) <https://www.justiceinfo.net/en/tribunals/ictr/42364-first-icttr-re-trial-for-former-rwandan-minister-ngirabatware.html>, accessed 7 July 2020.

346 Staker and Nerlich, ‘Article 84: Revision of conviction or sentence’, n 300, 1995.

3.2.2.3 JUDICIAL MISCONDUCT OR BREACH OF DUTY

The third ground for revision in the ICC Statute covers a situation where ‘one or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.’³⁴⁷

When violations of judicial integrity occur in a case, it is important that a judgment can be reviewed to ensure that a miscarriage of justice has not occurred. Indeed, by extending the grounds to cover not only misconduct by judges who participated in the final judgment, but also trial judges and pre-trial judges that participated in the confirmation of charges decision, the ICC Statute has the potential to consider breaches of judicial integrity at most stages of the proceedings of a case.³⁴⁸

As a motion for revision under this ground has yet to be filed at the ICC, it remains to be determined how it will be applied in relation to the process of removing a judge from office. The wording ‘to justify the removal of that judge or those judges from office’ means that a revision process could potentially be commenced even if the plenary of judges vote against referring a complaint to the Assembly³⁴⁹ or the Assembly fails to act on the complaint or votes against removal from office.³⁵⁰ A determination will need to be made by the Appeals Chamber taking into account the circumstances in each instance.

The ability of a convicted person to raise a legitimate complaint regarding the conduct of a judge in their application for revision is an important judicial safeguard against injustice, which should exist independently from the process conducted to determine whether to remove a judge from office. However, it raises questions of due process for the judge involved, who is neither a party nor a participant in the revision process, as well as the confidentiality of the complaints process for removal of office, including when complaints are set aside by the Presidency because they were anonymous or manifestly unfounded.³⁵¹ Nonetheless, justice demands that the interests of the convicted person to seek revision in the circumstances provided for in Article 84(1)(c) are given priority in this situation.

Article 84(1)(c) is silent on what test should be applied by the Appeals Chamber in conducting a revision under this ground. This is a significant gap that requires careful consideration. If the aim of the revision process is to address any wrongful conviction, then (as with the first two grounds) the Appeals Chamber arguably needs to consider whether the misconduct or breach of duty affected the guilty verdict. However, as has been noted, this would often be impossible to prove, in view of the requirement in Article 74 paragraph 4 that ‘[t]he deliberations of the Trial Chamber shall remain secret’.³⁵² In these circumstances, the Appeals Chamber may need to resort to another test based on whether, in light of any findings of misconduct or breach of duty, the conviction is safe or unsafe.

347 ICC Statute, Art 84(1)(c). The ECCC applies essentially the same ground, see: ECCC Internal Rule 112(1)(c). The KSC-SPO required that a criminal offence is committed by a judge or a person who undertook investigative actions, see: KSC-SPO Law, Art 48(2)(b). There is no similar ground at the SCC-CAR.

348 Schabas, n 82, 1252.

349 ICC r 29(1).

350 ICC Statute, Art 46(2). See also: Staker and Nerlich, ‘Article 84: Revision of conviction or sentence’, n 300, 1995.

351 ICC r 26.

352 Staker and Nerlich, ‘Article 84: Revision of conviction or sentence’, n 300, 1995.

3.3 Review/revision process

Both systems of review and revision apply a two-stage process. An initial examination must be completed before a full review or revision process is conducted. However, the procedures and standards applied by international criminal courts and tribunals differ.

3.3.1 Application process and legal aid

Applications for review to the ICTY and ICTR were made to the chamber that pronounced the original judgment.³⁵³ No time limit was applied for the convicted person to file an application. If any of the judges who constituted the original ICTY or ICTR chamber were no longer judges of the court or tribunal, the President appointed a judge or judges in their place.³⁵⁴ Applications to the IRMCT are made to the President of the Tribunal instead.³⁵⁵ The STL requires that applications are made to the Appeals Chamber.³⁵⁶ There are no rules that address the content of applications for review before these courts and tribunals.

Applications for revision at the ICC are made to the ICC Appeals Chamber.³⁵⁷ There is no time limit for making an application. Revision can only be sought after final judgment. Applications must be in writing and set out the grounds on which the revision is sought and as far as possible be accompanied by supporting material.³⁵⁸ Regulation 66(1) of the Regulations of the ICC requires:

‘An application under article 84, paragraph 1 (a), shall set out the new facts or evidence, unknown or unavailable at the time of trial, and shall indicate the effect that the production of such facts or evidence at the trial might have had upon the decision of the Court. Other applications shall set out the reasons in accordance with article 84, paragraph 1 (b) or (c). The facts relied upon in any application for revision shall, as far as possible, be supported by a solemn affirmation by a person having knowledge of the facts. The application shall not exceed 100 pages.’

In order to make an application addressing the complex grounds for review or revision, it should be expected that, in most cases, a convicted person will require legal representation, including legal aid for indigent convicted persons or those making an application on their behalf. In determining requests for assignment of counsel for the purpose of review, the ICTR had held:

‘As a matter of principle, it is not for the Tribunal to assist a convicted person whose case has reached finality with any new investigation he would like to conduct or any new motion he may wish to bring by assigning him legal assistance at the Tribunal’s expense. It is only

353 ICTY r 119(a); ICTR r 120(a).

354 ICTY r 119(a); ICTR r 120(a); IRMCT Art 24, SCSL r 120.

355 IRMCT r 146(a). Applications to the RSCSL are also made to the President, see RSCSL r 120(b).

356 STL Statute, Art 27(2). However, r 190(a) also states that a motion can be made ‘to the Chamber that rendered the judgment for review of the conviction, acquittal, or sentence.’ Applications to the SCSL were made to the Appeals Chamber, see: SCSL r 121.

357 ICC Statute, Art 84(1). Applications for revision at the ECCC are made to the Supreme Court Chamber, see: ECCC r 112(2). Applications at the KSC-SPO are made to the Specialist Chambers Supreme Court, see: KSC-SPO Law, Art 48(1). Applications to the SCC-CAR are made to the President, see: SCC-CAR Loi no 18-010, s 143.

358 ICC r 159(1). ECCC r 112(2) requires that the application clearly set out the factual and legal basis for the request.

in exceptional circumstances that a convicted person will be granted legal assistance by the Tribunal after a final judgment has been rendered against him. At the preliminary examination stage of a request for review, such assistance will be granted only if the Appeals Chamber deems it “necessary to ensure the fairness of the proceedings”. This necessity is, to a great extent, assessed in light of the grounds for review put forward by the applicant.³⁵⁹

In practice, the IRMCT has applied this approach in at least two cases. In one case, it decided that the grounds for review raised by the convicted person were ‘not per se particularly complex’ and therefore dismissed the request for assignment of an investigator and counsel.³⁶⁰ In the other, the Appeals Chamber held that it could not exclude that the grounds had a chance of success and underscored the complexity of the matter.³⁶¹ It decided to appoint counsel under the IRMCT legal aid programme on the basis that the convicted person ‘would benefit from the assistance of counsel to better evaluate the viability of his potential grounds for review and to provide a new and more focused submission supporting his request for review.’³⁶²

Although there is logic in those aspects of the IRMCT’s decisions that focus on the complexity of applications, the adoption of an ‘only in exceptional circumstances’ requirement to access legal aid to seek an ‘extraordinary’ remedy is arguably too restrictive and may make it impossible in some cases to address miscarriages of justice. Indeed, it should be expected that most situations will involve a level of complexity and the need for professional legal advice in assessing whether new evidence or information merit an application. While legal aid may entail some costs, they would likely be offset by costs saved by chambers not having to conduct an initial examination of unfounded or incomplete applications. Furthermore, if chambers follow the example of the IRMCT and consider the chances of success in determining whether exceptional circumstances exist to grant legal aid applications, it risks pre-empting the chamber’s initial examination of the application.

The ICC’s current Legal Aid Policy does not address legal aid following the closure of a case.³⁶³ A draft of a new Legal Aid Policy submitted to the Assembly’s Committee on Budget and Finance in 2022 omits specific reference to legal aid for revision proceedings.³⁶⁴ However, it provides generally that defence counsel may make a request for a reduced team to the Registrar for legal aid relating to proceedings after the closing of the main case.³⁶⁵ The Registrar may grant ‘on an exceptional and justified basis, limited legal aid resources.’³⁶⁶ As with the IRMCT’s approach, the requirement of an ‘exceptional’ basis is arguably too restrictive and may serve as a barrier to efforts seeking remedies for miscarriages of justice. The lack of

359 ICTR, *Karera*, Decision on Request for Review and Assignment of Counsel, n 302, para 38.

360 IRMCT, Prosecutor v *Ntabakuze*, Decision on Ntabakuze’s *pro se* Motion for Assignment of an Investigator and Counsel in Anticipation for his Request for review, 19 January 2015, para 13.

361 IRMCT, Prosecutor v *Niyitegeka*, MICT-12-16-R, Decision on Niyitegeka’s Request for Review and Assignment of Counsel, 13 July 2015, para 12.

362 IRMCT, *Niyitegeka*, Decision on Niyitegeka’s Request for Review and Assignment of Counsel, n 361, para 12.

363 Registry’s single policy document on the Court’s legal aid system, ICC-ASP/12/3, 4 June 2013.

364 Submissions to the Committee on Budget and Finance on the Full Reform of the Registry’s Single Policy Document on the Court’s Legal Aid System (ICC-ASP/12/3).

365 Submissions to the Committee on Budget and Finance on the Full Reform of the Registry’s Single Policy Document on the Court’s Legal Aid System, p 21.

366 *Ibid.*

detail regarding legal aid that would be provided and emphasis that any resources will be limited also raises concerns as to whether the amount of legal aid provided by the Court will be sufficient.

3.3.2. Initial examination of the application

When an application for review or revision is filed, the parties are notified and provided with an opportunity to submit a brief in response.³⁶⁷ Most international and internationalised criminal courts and tribunals then conduct an initial examination to determine whether to proceed with the review or revision.³⁶⁸

Where possible, initial examinations of review applications were conducted by the original trial chamber or the Appeals Chamber at the ICTY and the ICTR³⁶⁹ – an approach that has also been adopted by the STL³⁷⁰ – at the IRMCT, the President composes a bench with the same number of judges as the original bench to conduct the initial examination.³⁷¹ In the *Ngirabatware* case, the President appears to have interpreted this requirement to mean that, when an appeal judgment is the subject of the application, an Appeals Chamber made up of five judges must be appointed.³⁷² The chamber conducting the initial examination must determine whether there is a new fact and, whether, if it is proved, it could have been a decisive factor in reaching the verdict.³⁷³ If a majority of the chamber agree that these criteria are met, the review will proceed.³⁷⁴

Initial examinations of revision applications at the ICC are conducted by the Appeals Chamber.³⁷⁵ The initial examination focuses on whether the application is ‘unfounded’ (in which case it is rejected) or ‘meritorious’ (in which case a review will be conducted).³⁷⁶ Unfortunately, the ICC legal framework does not further define the scope of examination to determine whether an application is ‘unfounded’ or ‘meritorious’, which it has been observed is ‘rather cumbersome’ language:

367 ICTY r 119(b); ICTR r 120(b); ICC reg 66(2); IRMCT r 146(C); STL r 190(b); SCSL r 120(c) and (d); RSCSL, r 120(C); KSC-SPO r 187(3); SCC-CAR Loi no 18-010, s 144. ECCC Internal Rules, r 112(2) provides that ‘the procedure for appeals before the Chamber as set out in these Internal Rules will apply’, which includes notifying the parties (r 106(1)).

368 ICTY r 120; ICTR r 121; ICC Statute, Art 84(2); IRMCT r 147; STL r 191; SCSL r 121; RSCSL r 121; KSC-SPO r 188; ECCC Internal Rules, r 112(3).

369 ICTY r 119(a). ICTR rr 120(a).

370 STL r 190(a).

371 IRMCT rr 146(B) and 147. At the RSCSL, the preliminary examination is conducted by the President, see RSCSL Statute, Art 22(2).

372 IRMCT, Prosecutor v *Ngirabatware*, Review Judgment (MICT-12-29-R), 27 September 2019, paras 19–22.

373 ICTY r 120; ICTR r 121; IRMCT r 147; STL r 191.

374 *Ibid.*

375 ICC Statute, Art 84(2). Initial examinations at the ECCC are conducted by the Supreme Court Chamber of the ECCC, see: ECCC Internal r 112; and by the Specialist Chambers Supreme Court at the KSC-SPO, see: KSC-SPO Law, Art 48(1).

376 ICC Statute, Art 84(2), and ICC r 159. ECCC Internal Rules, r 112(3) contains the same test. KSC-SPO Rule 188 requires the Supreme Court Panel ‘to verify that the application is not frivolous or an abuse of the process, to determine whether the request has been filed by a person with legal standing, and whether the facts and evidentiary material presented in support of the request have not already been considered in the prior proceedings before the Specialist Chambers.’

‘if a provision is not “unfounded”, it seems then to be “meritorious”, and the use of two different terms to describe what is apparently one judicial standard cannot be helpful.’³⁷⁷

One commentary on the ICC Statute argues:

‘The use of the terms “unfounded” and “meritorious” indicates that the first step involves an assessment of whether the criteria set out in paragraph 1, sub-paragraphs (a) to (c) are actually met. This is more than a *prima facie* evaluation.’³⁷⁸

However, the process would be arguably unfair if anything more than a *prima facie* determination on the merits of the application is required at this initial stage of the Revision process. At this point, the ICC Appeals Chamber will only have the application and any responses filed; the convicted person will not be present for the initial examination; no hearings will have been conducted and any new evidence will not have been tested.³⁷⁹ An initial examination at the IRMCT clearly involves a *prima facie* determination of whether ‘a new fact, *if proved, could have been* a decisive factor in reaching a decision’³⁸⁰ (emphasis added), without making any final determination on the review, which will be considered in detail at the second stage of the process. The same approach should be applied by other international criminal courts and tribunals conducting reviews or revisions.

Although most rules relating to initial examinations do not expressly require a written decision, this has been the practice of the ICTY, ICTR and IRMCT. Rule 159 of the ICC Rules of Procedure and Evidence requires that the decision must be supported by reasons in writing. Given the importance of review and revision processes, this practice should be followed by other international criminal courts and tribunals.

3.3.3 Assignment of review/revision

When an initial examination conducted at the IRMCT and the STL concludes that a full review should be conducted, the chamber that conducted the initial examination is also responsible for conducting the review.³⁸¹ In contrast, the ICC Appeals Chamber has much broader discretion to choose one of three options to conduct the revision as it determines is appropriate:

- to reconvene the original Trial Chamber;
- to constitute a new Trial Chamber; or

377 Schabas, n 82, 1252.

378 Staker and Nerlich, ‘Article 84: Revision of conviction or sentence’, n 300, 1996.

379 Although in *Prosecutor v Šljivančanin*, Scheduling Order for Hearing Regarding Veselin Šljivančanin’s Application for Review (IT-95-13/1-R.1) 20 April 2010, p 1, the ICTY Appeals Chamber ordered a ‘pre-review hearing’, such hearings were not conducted in other cases at the initial examination stage at the ICTY. There are no provisions requiring hearings at this stage in the ICC revision process.

380 IRMCT r 147.

381 IRMCT r 147; STL r 191. These rules follow ICTY r 120 and ICTR r 121. After the RSCSL President conducts a preliminary examination, they ‘may, as appropriate, reconvene the original trial chamber or, if that is not possible, constitute a new trial chamber’ to conduct a review, see: RSCSL Statute, Art 22(2).

- to retain jurisdiction over the matter.³⁸²

Despite the absence of further guidance for assigning the revision, there are strong reasons for the ICC Appeals Chamber to favour reconvening the original trial chamber whenever possible. As the ICTY recognised in conducting reviews, it is preferable to appoint judges that originally heard the case.³⁸³ Especially in the case of new evidence or the discovery of false, forged or falsified evidence, the judges of the original trial chamber will be best placed to assess the new evidence and determine whether the judgment should be revised. In some instances, in particular, where an acquittal was overturned and replaced by a conviction on appeal, it may be more appropriate for the Appeals Chamber to retain jurisdiction, where it considers it is best placed to consider the new evidence and whether it affects the conviction. However, as discussed in 3.6 below, if the Appeals Chamber retains jurisdiction, this may preclude an appeal against the Review Judgment.

Where possible, all judges that composed the original trial or appeal chamber that delivered the final judgment should be assigned to conduct the review. If not all the original judges are available, the next best option will be to constitute a new trial chamber to conduct the review or for the Appeals Chamber to retain jurisdiction, including one or more of the judges of the original trial or appeals chamber if possible. Constituting a completely new trial chamber should be the last option when all of the original judges are unavailable or when a review is sought for alleged misconduct by one or more of the original judges.

3.3.4 Review/revision proceedings

The procedures for conducting review or revision proceedings are vaguely defined in the legal frameworks of international criminal courts and tribunals.

The ICTY, ICTR, IRMCT and STL rules simply provide that the Chamber ‘shall review the judgment, and pronounce a further judgment after hearing the Parties.’³⁸⁴ The ICC Statute provides that ‘after hearing the parties in the manner set forth in the Rules of Procedure and Evidence’ the relevant chamber will arrive at a determination on whether the judgment should be revised.³⁸⁵ However, the ICC Rules only state that the relevant Chamber shall exercise, *mutatis mutandis*, all the powers of the Trial Chamber pursuant to Part 6 and the rules governing proceedings.³⁸⁶

382 ICC Statute, Art 84(2). At the ECCC, a revision is conducted by the Supreme Court Chamber, see: ECCC Internal r 112(3). At the KSC-SPO, the Supreme Court Panel may, following initial examination, either reconvene the trial panel, if available or if appropriate determine the matter itself, see: KSC-SPO Law, Art 48(4). The SCC-CAR President constitutes a Revision Chamber made up of three judges who have not heard the case, see: SCC-CAR Loi no 18-010, s 143.

383 ICTY, *Tadić* Decision on Motion for Review, n 301, para 23.

384 ICTY r 120; ICTR r 121; IRMCT r 147; STL r 191. The SCSL and RSCSL statutes and rules are silent on how a review should be conducted.

385 ICC Statute, Art 84(2). ECCC Internal r 112(2) provides that the Supreme Court Chamber will follow ‘the procedure set out for appeals from the Trial Chamber in these [Internal Rules]’, with a view to arriving at a determination on whether the judgment should be revised. The SCC-CAR provides rules relating to the conduct of revision hearings, see: SCC-CAR Loi no 18-010, s 145.

386 ICC r 161(2).

The conduct of hearings is a central aspect of most review and revision processes. Given the public interest in the proceedings and the potential for the process to amend the judgment, all hearings should be public, subject to measures required to protect victims and witnesses.³⁸⁷

The ICC Rules are alone in expressly providing for the presence of the convicted person during revision hearings. Rule 160 provides that the chamber shall issue a hearing order sufficiently in advance to enable the transfer of the sentenced person to the seat of the Court, as appropriate. Rule 161(2) requires the chamber to exercise the rules governing proceedings in Part 6 of the ICC Statute on the trial, which requires the presence of the accused, subject to very limited exceptions.³⁸⁸ Given the interests of the convicted person in the revision process and the potential benefits of their presence to support the presentation of their application and to examine witnesses, the convicted persons should be present at all revision and review hearings where possible.

The ICC Statute and the Rules are silent on the participation of victims in a revision process. However, as a decision to revise a judgment may affect the personal interests of victims, including the implementation of any reparation orders, it is important that they are informed about the process and able to participate, including through legal representatives, to present their views and concerns at appropriate stages of the process.

In light of the evidentiary focus of most grounds of review and revision, the applicant should be able to call witnesses during the hearings in support of their application and those witnesses should be available for cross-examination by the other parties and questioning by the Chamber. The right of the applicant or their representatives to examine witnesses during an ICC revision process is also found in Rule 161(2), which provides that powers in Part 6 of the Statute on the trial and the rules governing the proceedings and the submission of evidence in the Pre-Trial and Trial Chamber apply. The legal frameworks of other international and internationalised courts and tribunals are silent on calling witnesses during reviews,³⁸⁹ however, this clearly falls within the realms of the chamber's discretionary powers. For example, the IRMCT permitted witnesses, including expert witnesses, in the *Ngirabatware* review hearings.³⁹⁰

As demonstrated in the IRMCT's review of the *Ngirabatware* judgment, while it should be expected that in some cases, applications for review will overlap with separate proceedings for offences against the administration of justice, these proceedings should not delay the review or revision process. In that case, during the review process, five individuals were indicted for contempt and incitement to commit

387 See eg: IRMCT, *Ngirabatware* Review Judgment, n 372, para 18, at the early stages of the review proceedings, the Appeals Chamber decided, out of an abundance of caution, to treat the basis of the new fact, provisionally as confidential, given the limited number of witnesses whose testimonies critically underpin *Ngirabatware*'s convictions as well as *Ngirabatware*'s submission that the witnesses had expressed concerns if it were known to the Rwandan authorities that they had recanted their testimonies. After receiving a report from the Witness Support and Protection Unit and other submissions, the Chamber decided to lift confidentiality at the commencement of the review hearing, the Chamber having determined it was not required to ensure the security of the witnesses or to uphold the integrity of the review proceedings.

388 ICC Statute, Art 63 and 67(1)(d).

389 Similarly, the ECCC which follows appeal procedures in conducting revisions, appears to permit calling witnesses in limited circumstances; ECCC Internal r 108(7) provides: 'the parties may submit a request to the Chamber for additional evidence provided it was unavailable at trial and could have been a decisive factor in reaching the decision at trial'.

390 IRMCT, *Ngirabatware* Review Judgment, n 372, paras 14–15.

contempt by interfering with protected witnesses in the case.³⁹¹ Nonetheless, the Appeals Chamber rejected applications by the prosecution to postpone the review, finding that, although proof of alleged witness interference may be relevant to the issues in the review, the contempt case was not decisive in determining the review and was a separate matter.³⁹² Furthermore, postponing the review hearing until the completion of the contempt case risked delaying the case for one to two years and ‘consequently implicates Ngirabatware’s right to expeditious proceedings’.³⁹³

Finally, while most international criminal courts and tribunals are silent on the requirements of the review judgment itself,³⁹⁴ the ICC Statute and Rules apply the same requirements of an appeal judgment that it ‘shall be taken by a majority of the judges and shall be delivered in open court. The judgment shall state the reasons on which it is based. When there is no unanimity, the judgment [...] shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.’³⁹⁵

These important measures of transparency have largely been applied in review judgments issued by other international criminal courts and tribunals to date. In addition, outreach to victims and affected communities will be required, especially when a judgment is revised, to explain the decision and its consequences, including for reparations.

3.4 Standard of review/revision

Despite the critical nature of the process of review and revision and its potential to revise a final judgment, surprisingly most legal frameworks do not address the standard of review to be applied in determining whether the new fact, evidence or information require revision of the judgment. The SCC-CAR is an exception. Its governing law provides: ‘when it considers that a new fact or that an unknown element is likely to establish the innocence of the condemned person or to give rise to a doubt as to his guilt, the Chamber ruling in revision revises the judgment and pronounces a new one.’ [unofficial translation]³⁹⁶

In the revision judgments that have been issued by the ICTR, ICTY and IRMCT, this issue has not been addressed directly. In the *Barayagwiza* decision, the ICTR Appeals Chamber decided that the new facts – regarding the violations of the rights of the accused – were different to those on which the original decision was founded and therefore the remedy ordered had to be altered.³⁹⁷ In the *Šljivančanin* Review Judgment, the Appeals Chamber found that the new fact rendered inferences in the appeal judgment relating to the accused *mens rea* for one charge ‘untenable’ and accordingly it had to vacate the conviction on that charge.³⁹⁸ In the *Ngirabatware* Review Judgment, the Appeals Chamber decided not to revise the judgment because the convicted person had not proved the new fact that witnesses had truthfully recanted their

391 IRMCT, *Ngirabatware* Review Judgment, n 372, para 9.

392 IRMCT, *Prosecutor v Ngirabatware*, Decision on Prosecution Request to Postpone the Review Hearing (MICT-12-29-R), 20 August 2019, p 2.

393 IRMCT, *Ngirabatware*, Decision on Prosecution Request to Postpone the Review Hearing, n 392, p 2.

394 Except for SCC-CAR Loi no 18-010, 2 July 2018, s 147, which requires that the review judgment is delivered in open court; a copy is given to the applicant; and the judgment is published.

395 ICC Statute, Art 83(4), and r 161(3).

396 SCC-CAR Loi no 18-010, s 148(a),

397 ICTR, *Barayagwiza*, Decision (Prosecutor’s request for Review or Reconsideration), n 302, para 74.

398 ICTY, *Šljivančanin*, Review Judgment, n 323, para 32.

testimony at trial.³⁹⁹ The Appeals Chamber held: ‘an applicant bears a heavy burden in showing that the conduct of a witness, occurring significantly post trial testimony, taints their original testimony.’⁴⁰⁰

Notably, when new evidence demonstrated errors of fact in the judgment in the *Barayagwiza* and *Šljivančanin* reviews, the chambers’ reasoning did not appear to consider the test established by the ICTY when considering new evidence presented during an appeal:

‘has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted during the appellate proceedings.’⁴⁰¹

The ICC has yet to consider its test for assessing new evidence on appeal or revision. However, the ICTY’s test would appear to provide a clear and logical standard upon which to also base any revisions of a judgment based on new evidence. Further consideration is required on whether this should also apply to revision processes conducted on the basis of misconduct or breach of duty by a judge, considering the different ways in which such findings can impact the reliability of a judgment and the need to ensure that ‘justice must not only be done, but must be seen to be done’.

3.5 Review/revision remedies

The ICC Statute provides that a chamber which conducts a revision should determine whether the judgment should be revised.⁴⁰² The ICTY, ICTR, IRMCT, and STL Rules state that the chamber should ‘pronounce a further judgment’.⁴⁰³ Pronouncing a further judgment in the *Šljivančanin* case, the ICTY Appeals Chamber issued a ‘review judgment’ that essentially vacated a conviction on one of the charges, indicating that pronouncing a further judgment is essentially the same as revising the judgment.⁴⁰⁴

No legal framework sets out the exact remedies that can be ordered following a review or revision. Remedies clearly include the power to confirm the original judgment. For example, in the *Ngirabatware* case, the IRMCT Appeals Chamber decided that the Appeal Judgment should remain in force, because, following hearings, it concluded that it had not been proved that five witnesses who gave evidence at trial had truthfully recanted their trial testimonies.⁴⁰⁵

Revision and review processes, as their titles demonstrate, include the power to amend a judgment, including the sentence. For example, in the *Šljivančanin* case, the ICTY vacated the conviction on one charge, which had been added in the appeal judgment, based on new exculpatory evidence.⁴⁰⁶ However, controversially in that case, the review judgment reversed the appeal judgment’s conviction on this

399 IRMCT, *Ngirabatware* Review Judgment, n 372, para 62.

400 IRMCT, *Ngirabatware* Review Judgment, n 372, para 63.

401 ICTY, *Kupreškić et al* Appeal Judgment, n 88, para 75.

402 ICC Statute, Art 84(2). ECCC Internal r 112(3) contains the same provision.

403 ICTY r 120; ICTR r 121; IRMCT r147; STL r 191. SCC-CAR Loi no 18-010, s 148(a) provides for both revising the judgment and pronouncing a new one. The legal frameworks of the SCSL, RSCSL and KSC-SPO are silent on the outcome of a review.

404 ICTY, *Šljivančanin*, Review Judgment, n 323.

405 IRMCT, *Ngirabatware* Review Judgment, n 372, paras 62–63.

406 ICTY, *Šljivančanin*, Review Judgment, n 323, paras 31–32.

additional charge but did not reinstate the sentence of five years' imprisonment imposed by the original trial chamber. It reduced the 17-year sentence imposed by the appeal judgment, but only to ten years.⁴⁰⁷

Although it is not expressly stated in any of the legal frameworks on review or revision, strong arguments can be made that, where an application is made by or on behalf of a convicted person, the conviction must not be revised to the accused's detriment. If a purpose of review and revision proceedings is to remedy wrongful conviction, a risk of further conviction or harsher punishment might deter convicted persons from bringing an application in the first place,⁴⁰⁸ especially if they are close to completing their sentence. This is consistent with the principle in Article 83(2) – prohibiting the amendment of a judgment or sentence to the detriment of a convicted person, when an appeal has been brought by the convicted person or the Prosecutor on the convicted person's behalf.⁴⁰⁹

To date a case has yet to be completely overturned by an international criminal court or tribunal on review or revision (in the sense of reversing *all* the convictions originally entered). However, it is clearly possible, and a basis for compensation pursuant to Article 85(2) (see section 4.1 below).

There have been no applications by the prosecution to overturn acquittals on review before those international criminal courts and tribunals that permit such applications to be brought within a year of final judgment. However, in the *Barayagwiza* case, the Appeals Chamber effectively overturned a decision it had taken pre-trial to dismiss the indictment and release the accused, based on its findings that the rights of the accused had been violated.⁴¹⁰ The review decision confirmed that violations had occurred but held that new facts established during the review diminished the role played by the failings of the Prosecutor as well as the intensity of the violation.⁴¹¹ It ruled that, instead of dismissing the case, the accused's right to a remedy should be addressed at the time of judgment at first instance through an order for financial compensation in the event of an acquittal, or a reduction of sentence in the event of a conviction.⁴¹²

Although it has been suggested that in certain cases a retrial may be necessary, 'for instance, where serious misconduct by one of the judges vitiates the entire trial proceeding',⁴¹³ there is no basis for ordering this exceptional remedy following a review or revision process in any of the legal frameworks. More importantly, where reviews or revisions are sought against *final* judgments, whether acquittal or conviction, a retrial would violate the principle of *ne bis in idem*.⁴¹⁴ Another option has been proposed that in such circumstances 'the revision proceedings would themselves need to be in effect a new trial'.⁴¹⁵ However, there is also no legal basis for the review or revision process to conduct a new trial, which would also be inconsistent with *ne bis in idem*.

407 ICTY, *Šljivančanin*, Review Judgment, n 323, para 36. Judge Pocar dissented on the basis that Šljivančanin was not able to appeal the new sentence.

408 Staker and Nerlich, 'Article 84: Revision of conviction or sentence', n 300, 1989.

409 *Ibid.*

410 ICTR, *Prosecutor v Barayagwiza*, Decision, 3 November 1999.

411 ICTR, *Barayagwiza*, Decision (Prosecutor's request for Review or Reconsideration), n 302, para 71.

412 ICTR, *Barayagwiza*, Decision (Prosecutor's request for Review or Reconsideration), n 302, para 75.

413 Staker and Nerlich, 'Article 84: Revision of conviction or sentence', n 300, 1997.

414 See eg, ICCPR, Art 14(7): 'No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.'

415 Staker and Nerlich, 'Article 84: Revision of conviction or sentence', n 300, 1997.

3.6 Appeal of a review/revision decision

Given the importance of review and revision processes, strong arguments can be made that revision judgments should be appealable, especially by convicted persons alleging miscarriage of justice. However, the opportunities to appeal a review judgment before international criminal courts and tribunals are limited.

Despite rules providing for an appeal of a review judgment before the ICTY, the ICTR, the IRMCT, and the STL, these are limited to decisions taken by a trial chamber or in some cases by a single judge.⁴¹⁶ In some instances, the initial review process will be conducted and a review judgment will be delivered by the appeals chamber because the decision being reviewed is the final appeal judgment (not the original trial judgment). This occurred in the IRMCT's review of the *Ngirabatware* appeal judgment. A decision by the President of the IRMCT found that the Review Judgment rendered by the Appeals Chamber terminated the review proceedings in the case and therefore constituted a final judgment.⁴¹⁷

The ICC Statute or Rules do not expressly provide for an appeal of a revision decision.⁴¹⁸ However, it may be possible in some circumstances. Although the Appeal Chamber carries out the initial examination of revision applications at the ICC, it has the power to reconvene the original trial chamber or constitute a new trial chamber to conduct the actual revision. When revisions are conducted by the original or a new trial chamber, the convicted person, or their representatives, or the Prosecutor, may be able to appeal the trial chamber's revision judgment pursuant to Article 81(1). Since Article 81(1) relates to appeals of trial judgments under Article 74, this would require interpreting a revision judgment to be analogous to a decision under Article 74 and covered by Article 81(1). Alternatively, an appeal may be possible under Article 82(1)(d), which would require leave of the trial chamber based on a determination that the revision judgment 'involves an issue that would significantly affect [...] the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.' Neither of these avenues of appeal are certain and will need to be addressed in future proceedings.

When the ICC Appeals Chamber retains jurisdiction and conducts the revision itself, which is likely to occur in some cases if the revision is sought against a final appeal judgment, then the opportunity to appeal a revision judgment appears to be barred by the lack of a higher chamber. The inability to appeal a revision judgment delivered by the Appeals Chamber should be taken into account by the Appeals Chamber in its decision on assigning the revision proceedings following the initial examination, and in conducting initial examinations of any subsequent applications for revision (see s 3.7 below).

3.7 Subsequent applications for review/revision

There is nothing in the legal frameworks of international criminal courts and tribunals to prevent convicted persons or their representatives from applying more than once for review or revision. In the

416 ICTY r 121; ICTR r 122; IRMCT r 148; STL r 192. SCSL r 122 and RSCSL r 122 contain the same limitations.

417 IRMCT, Prosecutor v *Ngirabatware*, Decision on Augustin Ngirabatware's Motion for Reconsideration of Review Judgment and Motion for Extension of Word Limit (MICT-12-29-R), 10 January 2020, 4.

418 The Internal Rules of the ECCC also do not provide for an appeal of a revision decision. SCC-CAR Loi no 18-010, s 148(b) provides for appeals for revision judgments taken by the review chamber established by the President.

Niyitegeka case at the ICTR, multiple applications for review were filed by the convicted person.⁴¹⁹ Indeed, the nature of the process to remedy miscarriages of justice when new evidence, facts or information is discovered means that it would be inappropriate to limit the number of times that an application for review or revision can be made. This interpretation is further supported by the need to support avenues of remedy in light of the limitations on the ability of a convicted person to appeal review judgments in some cases.

Recommendations for the ICC – revision

The ICC Statute contains strong safeguards to address injustice post-conviction through its revision process. Although applications for revision have yet to be made, it is only a matter of time before the system is tested. The following recommendations are aimed at ensuring the effectiveness of the revision process to fully consider and fairly determine applications claiming wrongful conviction.

Applications for revision

- 28) The ICC Office of the Prosecutor should update the Regulations of the Office of the Prosecutor and put in place procedures to ensure that all new exculpatory evidence discovered after final judgment is identified and disclosed to the convicted person or their representatives and their appointed counsel without delay.
- 29) The ICC Office of the Prosecutor should update the Regulations of the Office of the Prosecutor and other operational procedures and manuals to ensure that the Prosecutor will apply for revision either on their own motion or together with the convicted person or their representatives when they determine that the discovery of new evidence or other information indicates that a wrongful conviction may have occurred.

Applying grounds for revision

- 30) In conducting an initial examination of applications for revision on the grounds of new evidence, the Appeals Chamber should interpret and apply the four-part test in Article 84(1)(a) with appropriate flexibility to ensure that a full revision process is conducted whenever the risk of a miscarriage of justice is identified.
- 31) In considering motions for revision on grounds of serious judicial misconduct or breach of duty, the Appeals Chamber should consider each application on its merits, giving appropriate consideration to the status or outcome of any proceedings to remove the judge from office pursuant to Article 46 of the ICC Statute. In light of the difficulties in assessing whether such misconduct or breach of duty, if proved, affected the verdict, the Appeals Chamber is encouraged to consider a test focused on whether any findings of misconduct or breach of duty would render the conviction unsafe.

419 See n 302, above.

Implementing the revision process

- 32) The ICC's Legal Aid Policy should be further developed to ensure that, where required, sufficient legal aid should be provided to indigent convicted persons or those seeking to apply for revision on their behalf, so that they can obtain legal advice on whether to make an application, obtain assistance in preparing the application, and have legal assistance throughout the relevant stages of the revision process.
- 33) At the initial examination phase of a revision application, the Appeals Chamber should make a *prima facie* determination on whether the application for revision is 'unfounded' or 'meritorious', recognising that a more in-depth examination of the application will be conducted at the second phase of the process.
- 34) If, following the initial examination, the Appeals Chamber finds that the application has merit, it should assign the original trial chamber, a new trial chamber, or retain jurisdiction itself taking into account which chamber is best placed to conduct the revision, the grounds of revision and limitations on the ability of the parties to appeal the revision judgment in the event that the Appeals Chamber conducts the revision. If some, but not all, of the original judges are available to reconvene the original chamber, they should be assigned to the chamber conducting the revision, unless the review involves a ground of judicial misconduct or breach of duty.
- 35) The Court should consider developing Rules and Regulations governing the conduct of full revision proceedings, including providing that:
 - a. revision hearings should be public, subject to measures to protect victims and witnesses;
 - b. the convicted person, if possible, and their counsel shall be present during revision hearings;
 - c. victims can participate in the revision process, including through legal representatives, to present their views and concerns at appropriate stages of the proceedings;
 - d. parties and the chamber on its own motion can call witnesses;
 - e. revision proceedings should be conducted concurrently with any proceedings relating to offences against the administration of justice; and
 - f. the decision will be made public, and outreach will be conducted to explain the decision to victims and affected communities.

The standard of review for revision proceedings

- 36) The same standard of review for appeals on error of fact based on new evidence should be applied in determining requests for revision based on grounds of new evidence or false, forged or falsified evidence. Further consideration should be given to the appropriate standard to be applied to determine allegations of serious judicial misconduct or breach of duty.

Revision remedies

- 37) Revision proceedings should include the powers to confirm, reverse or amend the final judgment. It should not include the power to order a retrial, which would be inconsistent with the principle of *ne bis in idem*.
- 38) The conviction or sentence should not be revised to the convicted person's detriment.

Revision appeals

- 39) Given the importance of the Revision process and its impact on the outcome of a case, where possible, the ICC should ensure, either through interpretation and/or proposing amendments to the legal framework, that convicted persons and their representatives, or the Prosecutor are able to appeal the revision judgment.

Subsequent applications for revision

- 40) Restrictions should not be placed on the number of applications for revision that can be made by a convicted person or their representatives, leaving determinations on the merits of multiple applications to the initial examination process.

Chapter 4: Compensation for miscarriage of justice

The ICC Statute is the only international criminal law statute that provides compensation for miscarriage of justice.

Article 85(2), which largely follows the text of Article 14(6) of the ICCPR, requires that compensation is provided to a person following the reversal of their conviction in a revision judgment, where they have suffered punishment and a new or newly discovered fact ‘shows conclusively that there has been a *miscarriage of justice* [...] unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her’. Article 85(3) provides the Court with a discretion to award compensation to a person who has otherwise been released from detention following a final decision of acquittal or a termination of the proceedings, where it finds conclusive facts showing that there has been a *grave and manifest miscarriage of justice*.

Article 85(2) has yet to be applied. Applications for compensation pursuant to Article 85(3) have been considered in three cases.

Following the adoption of the ICC Statute, in 2000, the Presidents of the ICTY and the ICTR proposed that the ICTY and ICTR Statutes should be amended to add similar provisions.⁴²⁰ However, the UN Security Council did not act on the proposals.⁴²¹ In the absence of statutory provisions for compensation, in some cases, the ICTY and ICTR went on to order compensation for unlawful arrest and detention,⁴²² as provided for in Article 9(5) of the ICCPR and Article 85(1) of the Rome Statute. The tribunals or the IRMCT have yet to order compensation for miscarriage of justice following review, as provided in Article 14(6) of the ICCPR and Article 85(2) of the ICC Statute. In at least one case, a person acquitted by the ICTR following trial argued that they were entitled to compensation on the basis of customary international law, relying on Article 85(3) of the ICC Statute as authority, but the application was rejected.⁴²³

4.1 Right to compensation following revision

Article 85(2) of the ICC Rome Statute recognises that, in limited circumstances, a convicted person has a right to compensation when a conviction is reversed following a revision process. It provides:

420 Letter dated 26 September 2000 from the Secretary-General addressed to the President of the Security Council, UN Doc S/2000/904, 26 September 2000; Letter dated 28 September 2000 from the Secretary-General addressed to the President of the Security Council, UN Doc S/2000/925, 6 October 2000.

421 Christopher Staker and Volker Nerlich, ‘Article 85: Compensation to arrested or convicted person’ in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court* (3rd edn, CH Beck Hart Nomos 2015) 1998.

422 ICTR, *Barayagwiza*, Decision (Prosecutor’s request for Review or Reconsideration), n 302; Prosecutor v *Kajelijeli*, Judgment (ICTR-98-44A-A), 23 May 2005, para 324; and Prosecutor v *Rwamakuba*, Decision on Appeal against Decision on Appropriate Remedy (ICTR-98-44C-A), 13 September 2007, para 31.

423 ICTR, Prosecutor v *Rwamakuba*, Decision on Appropriate Remedy, (ICTR-98-44C-T), 31 January 2007, para 28: ‘even if Article 85(3) of the ICC Statute had achieved customary status, the Chamber observes that it remains a narrowly drafted provision. It firstly does not as such provide a right to compensation, but rather provides that the Court *may in its discretion* make an award for financial compensation. It secondly provides that such an award will be appropriate in *exceptional circumstances* where *conclusive facts* establish that there has been a grave and manifest miscarriage of justice.’ See also Schabas, n 82, 1261.

‘When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.’

This provision largely mirrors Article 14(6) of the ICCPR.⁴²⁴ The Human Rights Committee has observed that there are three conditions for an application under Article 14(6):

- a final conviction for a criminal offence;
- suffering of punishment as a consequence of such conviction; and
- a subsequent reversal or pardon on the ground of a new or newly discovered fact showing conclusively that there had been a miscarriage of justice.⁴²⁵

Although it is commendable that the drafters of the ICC were committed to provide for compensation in the event of a miscarriage of justice in line with international human rights law and standards, Article 85(2) raises some complex issues that will need to be resolved when the Court applies the rule.

4.1.1 Compensation following revision of final conviction

Even though revision of judgment is not expressly referred to in Article 85(2) of the ICC Statute, the text clearly states that compensation can only be provided when a conviction is reversed following a final conviction. Indeed, revision is the only avenue provided in the Rome Statute for a person convicted by a ‘final decision’ to seek a reversal of the conviction. The need for new or newly discovered fact aligns, albeit awkwardly, with the grounds for revision in Article 84(1) (see s 4.1.2 below). The text of Article 85(2) and the findings of human rights courts and bodies interpreting and applying Article 14(6) confirms that the right to compensation under these provisions does not extend to convictions that are overturned on appeal.⁴²⁶ As discussed in section 4.2 below, Article 85(3) provides the ICC with discretion to award compensation in other circumstances.

424 The only substantive difference between Art 14(6) and Art 85(2) is that Art 14(6) also provides for compensation in the event of a pardon on grounds of miscarriage of justice, which is not relevant to the ICC. Clooney and Webb, n 10, 832-833 ‘The American and European [human rights] systems also mirror the right in the ICCPR to compensation for miscarriages of justice [...]. Although the African Charter on Human and Peoples’ Rights does not refer to an effective remedy or compensation for miscarriage of justice these rights have been recognized by the African Commission,’ citing Protocol 7 ECHR, Art 3; American Convention on Human Rights, Art 10; Arab Charter, Art 19(2). For a detailed analysis of the right to compensation for miscarriage of justice in human rights law, see Jamil Ddamulira Mujuzi, ‘The Right to Compensation for Wrongful Conviction/Miscarriage of Justice in International Law’, *International Human Rights Law Review*, 8 (2019) 215-244.

425 Human Rights Committee, *WJH v The Netherlands*, Communication No 408/90, 31 July 1992, para 6.3.

426 See eg: Human Rights Committee, General Comment 32, n 34, para 52; Council of Europe, Explanatory Report to Protocol 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (1984), paras 22-25; Inter-American Commission on Human Rights, *Grande v Argentina* (Petition 11.498), 27 February 2022, para 43.

4.1.2 *New or newly discovered fact*

By importing the text of Article 14(6) of the ICCPR, the right to compensation in Article 85(2) aligns awkwardly with the grounds for revision in Article 84(1). Article 85(2) requires that a decision is reversed on the ground of a new or newly discovered ‘fact’. However, new or newly discovered fact is not expressly included in the three grounds for revision in Article 84(1) (see s 3.2 above).

One reading of these differences is that the drafters intended that a separate determination must be made on whether the revision decision was based on ‘grounds of new or newly discovered facts’ for a right to compensation to arise. However, as demonstrated by the manner in which the ICTY, ICTR and IRMCT struggled to distinguish between a ‘new fact’ and ‘new evidence’ in considering applications for review on the grounds of new fact (see s 3.2.1), there is a real risk that a strict application of a new or newly discovered fact requirement to the grounds set out in Article 84 may lead to inconsistent and questionable outcomes.

Therefore, in determining applications for compensation under Article 85(2), the ICC should apply a flexible approach to determining whether convictions reversed on all three grounds in Article 84(1), meet the requirement of ‘on grounds of new or newly discovered fact’. Indeed:

- where a conviction is reversed pursuant to Article 84(1)(a) because *new evidence* demonstrated errors of fact upon which the conviction rested, the discovery of the errors, or new facts established by the new evidence should fulfil the ‘grounds of new or newly discovered fact’ requirement;
- the discovery that evidence taken into account at trial and upon which the conviction depends, was false, forged or falsified leading to the reversal of a conviction pursuant to Article 84(1)(b) should also be considered a new or newly discovered fact.⁴²⁷ The IRMCT has, in at least one decision, ordered a review after witnesses recanted their testimony after trial, which it determined amounted to a new fact⁴²⁸; and
- a decision to reverse a conviction based on an act of serious misconduct or serious breach of duty by a judge or judges in the case pursuant to Article 84(1)(c), is based on the new facts regarding their conduct.

4.1.3 *Meaning of miscarriage of justice*

Article 85(2) requires that the new or newly discovered fact ‘shows conclusively that there has been a miscarriage of justice’. However, ‘miscarriage of justice’ is not defined in the Statute or human rights law. The interpretation of miscarriage of justice by national authorities in considering domestic applications for compensation in accordance with their human rights obligations is disputed.

A principled argument can be made that a miscarriage of justice has occurred and compensation should be awarded in every case in which a final judgment of conviction is reversed and the person has suffered punishment for crimes it is ultimately determined they should not have been convicted of committing.⁴²⁹

427 Staker and Nerlich, ‘Article 84: Revision of conviction or sentence’, n 300, 1994.

428 IRMCT, *Ngirabatware* Decision on Ngirabatware’s Motion for Review, n 303.

429 Staker and Nerlich, ‘Article 85: Compensation to an arrested or convicted person’ n 421, 2000.

This interpretation is supported by the requirement in Article 85(2) that compensation can only be provided if the error that led to conviction was not wholly or partially attributed to the accused.

However, some human rights commentaries have questioned whether a ‘miscarriage of justice’ can occur ‘in the absence of some form of State malfeasance, such as police or prosecutorial misbehaviour during relevant investigations or proceedings’.⁴³⁰ There is some support for the ICC taking a similar approach in the drafting history of Article 85, which shows that some delegations were of the opinion that the Statute provides enough ‘checks and balances’ and thus the Court should only award compensation when it is determined that prosecution was undertaken in ‘*malafides* or for malicious purposes’.⁴³¹

In the absence of a clear definition of miscarriage of justice in international human rights law, states have taken a variety of approaches to implementing Article 14(6) of the ICCPR.⁴³² Some states have taken the extremely narrow view that the convicted person must be completely exonerated of the offences in order to qualify for compensation. This is despite evidence in the drafting history of Article 14(6) that a requirement to establish the innocence of the applicant was rejected.⁴³³

The definition of miscarriage of justice has been particularly contested in the UK. In the 2004 House of Lords Judgment in *R (Mullen) v Secretary of State for the Home Department*, the law lords disagreed on the meaning of miscarriage of justice contained in s 133 of the Criminal Justice Act 1988, which largely restates Article 14(6) of the ICCPR. Lord Steyn found that term should extend only to ‘clear cases of miscarriage, in the sense that there would be acknowledgment that the person concerned was clearly innocent’, whereas Lord Bingham gave a wider scope to the words and would have allowed them to cover ‘failures of the trial process’.⁴³⁴ The issue was revisited by the UK Supreme Court in 2011 in *R (Adams) v Secretary of State for Justice*, which ruled by a five to four majority that compensation should be paid not only where the new fact showed the person to be ‘clearly innocent’, but also where the new fact ‘so undermines the evidence against the defendant that no conviction could possibly be based upon it’.⁴³⁵ This interpretation of miscarriage of justice led to the UK government legislating in 2014 a new definition of miscarriage of justice based on a proof of innocence standard:

‘there has been a miscarriage of justice in relation to a person convicted of a criminal offence [...] if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence.’⁴³⁶

The problem with this definition is that it essentially requires the person seeking compensation to prove their innocence. The Human Rights Committee has expressed concern ‘that the new test for miscarriage

430 Sarah Joseph, Jenny Schultz, and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (OUP 2000), Art 14(6), 515.

431 Helen Brady and Mark Jennings, ‘Appeal and Revision’ in Roy S Lee (ed) *The International Criminal Court: The Making of the Rome Statute* (1999), 303-304.

432 See Jamil Ddamulira Mujuzi, ‘The Right to Compensation for Wrongful Conviction/Miscarriage of Justice in International Law’, *International Human Rights Law Review*, 8 (2019) 215-244 at 237-244.

433 See Mujuzi, n 432, 220-221.

434 *Regina v Secretary of State for the Home Department (Appellant) ex parte Mullen (Respondent)* [2004] UKHL 18, 29 April 2004.

435 *R (Adams) v Secretary of State for Justice* [2011] UKSC 18.

436 UK Criminal Justice Act, s 133(1ZA).

of justice “may not be in compliance with article 14 (6) of the Covenant.”⁴³⁷ Regrettably, it did not explain why.⁴³⁸ In 2020, a complaint was filed at the European Court of Human Rights that the test violates the presumption of innocence.⁴³⁹ A decision has yet to be delivered.

At the heart of the debate about the definition of miscarriage of justice in the UK appears to be a concern that compensation should not be provided to persons who in fact committed the crime. Lord Phillips stated in *R (Adams) v Secretary of State for Justice*:

‘I think that the primary object of section 133, as of Article 14(6), is clear. It is to provide entitlement to compensation to a person who has been convicted and punished for a crime that he did not commit. But there is a subsidiary object of the section. This is that compensation should not be paid to a person who has been convicted and punished for a crime that he did commit. The problem with achieving both objects is that the quashing of a conviction does not of itself prove that the person whose conviction has been quashed did not commit the crime for which he was convicted. Thus it is not satisfactory to make the mere quashing of a conviction the trigger for the payment of compensation [...] It is necessary to consider whether the wording of the section permits a balance to be struck between the two objectives and, if so, how and where the balance should be struck.’⁴⁴⁰

As the ICC will deal with serious allegations of war crimes, crimes against humanity, genocide and aggression that attract global attention, it is foreseeable that the Court will feel similar pressure not to award compensation in high-profile cases where innocence has not been fully established, especially after taking a decision to reverse a conviction. Nonetheless, once a conviction is reversed, that person has a right to be presumed innocent, which must be respected when determining applications for compensation. Although an argument might be made for the requirement in Article 85(2) to show ‘conclusively’ that there has been a miscarriage of justice requires proof of actual innocence, it would be a very narrow interpretation of the text. Moreover, requiring a person whose conviction has been overturned to prove their actual innocence, would be inconsistent with Article 66 of the ICC Statute and internationally recognised human rights.

Instead of requiring that the applicant prove their innocence to establish that a miscarriage of justice has occurred, the ICC should consider more objective criteria that focuses on the extent of the failures in the justice process conducted.

As explained in section 4.2.1 below, the ICC’s definition of ‘grave and manifest miscarriage of justice’ for the purpose of applying Article 85(3) already takes this approach. It focuses on whether the fundamental

437 Human Rights Committee, *Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland*, CCPR/C/GBR/CO/7, 17 August 2015.

438 To date, the Human Rights Committee has not commented in detail on this issue. However, in *Dumont v Canada*, Communication No 1467/2006, 16 March 2010, Committee member Fabián Omar Salvioli, wrote a partially dissenting opinion in which he stated that ‘[c]learly, article 14, paragraph 6, does not require the convicted person to prove his or her innocence.’

439 ECtHR, *Nealon and Hallam v The United Kingdom*, Application Nos 32483/19 and 35049/19, communicated on 14 May 2020. For further details regarding this case, see: Hannah Quirk, ‘Compensation for Miscarriages of Justice: Degrees of Innocence’, *The Cambridge Law Journal*, 79(1), 4-7.

440 *R (Adams) v Secretary of State for Justice*, n 435, para 37.

rights or the right to a fair trial were violated to the extent that the proper administration of justice was compromised. As ‘grave and manifest miscarriage of justice’ is a particularly serious form of ‘miscarriage of justice’, the Court should adopt a similar definition of miscarriage of justice based on whether violations have compromised the proper administration of justice but recognising that a lower threshold of gravity applies.

4.1.4 Non-disclosure of unknown fact attributable to the applicant

Although there is clearly logic to the final phrase of Article 85(2) to exclude the right to compensation if ‘it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable’ to the applicant, it is important that this exception is applied fairly taking into account the specific facts of each case.

The New Zealand Law Commission has commented:

‘First, it may almost always be argued that a person who was wrongly convicted or prosecuted could have done more, while still a suspect or defendant, to prevent the misfortune from occurring. Secondly, there is concern that this requirement could be used to punish the naive, the youthful, or the powerless [...] Thirdly, and importantly, what if the reason for the fact being suppressed is that the claimant, while a suspect or defendant: (i) accepted a lawyer’s advice to say nothing and therefore lost the chance to rebut the accusations made; or (ii) failed to adduce forensic evidence that might have been exculpatory; or (iii) engaged incompetent counsel who failed to conduct a proper cross examination of one or more of the prosecution witnesses? In the second and third cases non-disclosure of a fact is arguably not attributable to the claimant. Nevertheless these cases illustrate the potential unfairness in excluding compensation whenever part of the reason for the non-disclosure of a fact is attributable to the claimant.’⁴⁴¹

Similarly, Lord Phillips, in the UK Supreme Court decision in *R (Adams) v Secretary of State for Justice* noted that ‘many who are brought before the criminal courts are illiterate, ill-educated, suffering from one or another form of mental illness or of limited intellectual ability’.⁴⁴² Lord Phillips foresaw situations where the accused might not deliberately conceal the fact but did not draw it to the attention of their lawyers ‘because the significance of the fact was not reasonably apparent or because it was not apparent to him.’⁴⁴³ According to Lord Phillips, a person who has been wrongly convicted should not be penalised should this be attributable to any of these matters.⁴⁴⁴

These scenarios highlight the need for some flexibility in how the ICC applies the exception on a case-by-case basis. Even if the fact was known to the applicant, it may not be fair or appropriate to attribute responsibility for non-disclosure to them and deny them compensation. This would certainly be the case where the accused received legal advice that the fact was not relevant or should not be disclosed. It would also include a situation where the Court is satisfied that the accused did not appreciate the significance

441 New Zealand Law Commission, *Compensating the Wrongly Convicted* (1998), paras 157-158.

442 *R (Adams) v Secretary of State for Justice*, n 435, para 63.

443 *Ibid.*

444 *R (Adams) v Secretary of State for Justice*, n 435, para 63.

of the fact at the time of trial or appeal. The ICC can achieve such flexibility through its interpretation of ‘new or newly discovered fact’⁴⁴⁵ and its application of ‘attributable’.

4.2 Compensation for other grave and manifest miscarriages of justice

While Article 85(2) focuses specifically on the right to compensation for miscarriage of justice when final convictions are reversed following revision of a judgment pursuant to Article 84, Article 85(3) provides for the possibility of compensation for ‘gross and manifest miscarriages of justice’ if an acquittal is ordered or the proceedings are terminated at other stages of the process. It states:

‘In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.’

Article 85(3) is distinct from Article 85(2), as it only provides a discretion for the Court to provide compensation in exceptional circumstances⁴⁴⁶ and only for ‘grave and manifest miscarriage of justice’. The Court has held that it does not establish a right to compensation for acquittals.⁴⁴⁷ The difference in approach is likely explained by the fact that international human rights law and standards only provide for a right to compensation for miscarriages of justice following final conviction. The appeals process is considered an appropriate remedy to any miscarriage of justice before final conviction.⁴⁴⁸

To date, the ICC has considered three applications for compensation brought by Mathieu Ngudjolo, Jean Pierre Bemba and Charles Blé Goudé. In considering all three applications, the chambers decided to follow a ‘two-fold approach’:

445 See eg, s 9(6) of the Republic of Ireland’s *Criminal Procedure Act 1993* states; ‘newly-discovered fact’ means – (a) [...] “a fact which was discovered by him or came to his notice after the relevant appeal proceedings had been finally determined or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings [...]”.

446 Salvatore Zappalà, ‘Compensation to an Arrested or Convicted Person’, in Antonio Cassese, Paola Gaeta and John R W D Jones (eds) *The Rome Statute of the International Criminal Court, A Commentary* (OUP 2002) 1583 argues that the phrase ‘exceptional circumstances’ was used ‘more as a wish than as a limitation of the scope of the rule’.

447 ICC, Prosecutor v Bemba, Decision on Mr Bemba’s claim for compensation and damages, ICC-01/05-01/08-3694, 18 May 2022, paras 44–47 ‘the drafters of the Statute never meant to go so far as to vest an acquitted person with a right to benefit from compensation by mere virtue of the fact that the acquittal was preceded by time spent in custody, or of the mere duration of the proceedings, however lengthy either might have been [...] a right to compensation for an acquitted person has not yet emerged as a general principle of international human rights law, be it either in treaty, international customary law or in the jurisprudence of regional and international human rights bodies.’ ICC, Prosecutor v Gbagbo and Blé Goudé, Decision on Mr Blé Goudé’s request for compensation, ICC-02/11-01/15-1472, 10 February 2022, paras 24–25 ‘Article 85(3) should not be interpreted as providing a *right* to compensation in all cases resulting in an acquittal.’

448 See eg, Inter-American Commission on Human Rights, *Mendoza v Argentina*, Report no 172/10, case 12.561, 2 November 2010, para 184: the purpose of the right of appeal in criminal matters ‘is to avoid a miscarriage of justice from becoming *res judicata*.’

‘First it will determine whether a grave and manifest miscarriage of justice occurred. If this is found to be the case, the Chamber will, as a second step, consider whether it will exercise its discretion to award compensation.’⁴⁴⁹

4.2.1 Grave and manifest miscarriage of justice

Although the ICC has yet to define ‘miscarriage of justice’ for the purposes of Article 85(2), a definition of ‘grave and manifest miscarriage of justice’ has been developed in the three decisions on applications for compensation under Article 85(3).

In the *Ngudjolo* decision, the Chamber held that a grave and manifest miscarriage of justice:

‘is a certain and undeniable miscarriage of justice following, for example, an erroneous decision by a trial chamber or wrongful prosecution. The miscarriage of justice must have given rise to a clear violation of the applicant’s fundamental rights and must have caused serious harm to the applicant.’⁴⁵⁰

Noting that Article 85(3) of the Statute sets a high threshold in this regard, and it therefore follows that not every error committed in the course of the proceedings is automatically considered a ‘grave and manifest miscarriage of justice’,⁴⁵¹ the Chamber held:

‘it is up to the applicant’s Counsel to demonstrate that a decision was made that violated Mr Ngudjolo’s fundamental rights or his right to a fair trial to the extent that the proper administration of justice was compromised.’⁴⁵²

The Chamber deciding Jean Pierre Bemba’s application agreed that for this threshold to be met, the violation must be so serious and exceptional as to indicate that ‘the proper administration of justice was compromised’.⁴⁵³ It identified the following additional scenarios that may be sufficiently grave so as to reach the threshold:

- the conviction of an innocent person;⁴⁵⁴
- wrong decisions on the admissibility of evidence;⁴⁵⁵

449 ICC, *Gbagbo and Blé Goudé* Decision on Mr Blé Goudé’s request for compensation, n 447, para 23; ICC, *Bemba* Decision on Mr Bemba’s claim for compensation and damages, n 447, para 22; ICC, *Prosecutor v Ngudjolo*, Decision on the ‘Requête en indemnisation en application des dispositions de l’article 85(1) et (3) du Statut de Rome’ ICC-01/04-02/12-301-tENG, 16 December 2015, para 16.

450 ICC, *Ngudjolo* Decision on the ‘Requête en indemnisation en application des dispositions de l’article 85(1) et (3) du Statut de Rome’ n 449, para 45.

451 *Ibid.*

452 *Ibid.*, para 53.

453 ICC, *Bemba* Decision on Mr Bemba’s claim for compensation and damages, n 447, para 42.

454 ICC, *Bemba* Decision on Mr Bemba’s claim for compensation and damages, n 447, para 42, drawing from the definition of miscarriage of justice in the Oxford Dictionary cited in the *Ngudjolo* decision.

455 ICC, *Bemba* Decision on Mr Bemba’s claim for compensation and damages, n 447, para 42, drawing from the ECtHR’s definition of ‘miscarriage of justice’ in *Granger v The United Kingdom*, Application No.11932/86, 28 March 1990, para 26 cited in the *Ngudjolo* decision.

- demonstrated or substantiated suspicion of corruption and lack of impartiality on the part of the bench;⁴⁵⁶ or
- other examples of gross negligence in the administration of justice to the detriment of the suspect or the accused.⁴⁵⁷

The decision on Charles Blé Goudé's application, which addressed allegations of wrongful prosecution, held that for the threshold of Article 85(3) to be met, it must be shown by the Applicant that the alleged wrongful prosecution amounted to a violation so serious and exceptional as to indicate that the proper administration of justice was compromised.⁴⁵⁸

Without taking a position on how the definition of 'grave and manifest miscarriage of justice' was applied in each of the three cases, which resulted in the rejection of each claim, the focus on violations of fundamental rights or the right to a fair trial to the extent that the proper administration of justice was compromised appears to strike an appropriate balance between maintaining the threshold in Article 85(3), while allowing the Court to award compensation in a range of scenarios that could amount to grave and manifest miscarriage of justice.

However, the Pre-Trial Chamber's decision in the *Bemba* compensation decision illustrates the potential limitations of this approach in practice. The Chamber stated that it was receptive to Mr Bemba's submission that the length of the proceedings was not reasonable.⁴⁵⁹ It acknowledged that 'ten years is a significant amount of time to spend in custody, likely to result in personal suffering, which would trigger compensation in many national systems for violation of the fundamental right to be tried expeditiously'.⁴⁶⁰ It noted that expeditiousness of the proceedings are 'a fundamental tenet of the right to a fair trial'.⁴⁶¹ However, it went on to conclude that a finding of a grave and manifest miscarriage of justice 'cannot be entered on those grounds alone',⁴⁶² without explaining how the facts fell short of the definition or consideration of whether its interpretation and application of Article 85(3) was consistent with internationally recognised human rights, as required by Article 21(3). Instead, it held:

'If the Court's aim is to serve as a beacon at the forefront of all matters pertaining to individual human rights, the case for legislative reform could indeed be made and a review of article 85(3) aiming at aligning the Statute to the most progressive systems in this area might be warranted.'

Indeed, if in practice, the Court applies the definition of grave and manifest miscarriages of justice very narrowly, legislative reform should be considered.

456 ICC, *Bemba* Decision on Mr Bemba's claim for compensation and damages, n 447, para 42.

457 *Ibid.*

458 ICC, *Gbagbo and Blé Goudé* Decision on Mr Blé Goudé's request for compensation, n 447, para 31.

459 ICC, *Bemba* Decision on Mr Bemba's claim for compensation and damages, n 447, para 65.

460 ICC, *Bemba* Decision on Mr Bemba's claim for compensation and damages, n 447, para 69.

461 *Ibid.*

462 ICC, *Bemba* Decision on Mr Bemba's claim for compensation and damages, n 447, para 65.

4.2.2 Discretion to award compensation

As the three applications decided to date were rejected on the basis that a grave and manifest miscarriage of justice had not been established, the ICC has yet to make a determination on whether to exercise its discretion to award compensation under Article 85(3).

Chambers have however emphasised that Article 85(3) does not provide for the right to compensation even when a grave and manifest miscarriage of justice has occurred.⁴⁶³ Instead, they have emphasised that the Court may award compensation at its discretion,⁴⁶⁴ –an *ex-gratia* payment, awarded by the Court as a concession rather than due.⁴⁶⁵

Nonetheless, having established that a ‘grave and manifest miscarriage of justice’ occurred, it would be concerning if the Court refused to award compensation to persons who had suffered harm, unless it can show compelling reasons for not doing so.

4.3 Compensation process

As noted by the Chamber in the decision on Charles Blé Goudé’s Article 85(3) application, proceedings under Article 85(2) and (3) are not criminal proceedings.⁴⁶⁶ They are neither part of the criminal trial, nor a continuation thereof.⁴⁶⁷ Instead they are akin to a civil suit or administrative complaint.⁴⁶⁸ Procedures applicable to applications for compensation under both Article 85(2) and (3) are set out in Rules 173 to 175 of the ICC Rules of Procedure and Evidence.

4.3.1 Access to legal aid for compensation claims

Although Rule 173(4) provides that the ‘person requesting compensation shall be entitled to legal assistance’, the ICC’s current Legal Aid Policy is silent on the provision of legal aid for the purposes of applying for compensation under Article 85.⁴⁶⁹ It is not clear whether legal aid was granted to the applicants in the three cases filed under Article 85(3). According to the draft of a new Legal Aid Policy submitted to the Assembly’s Committee on Budget and Finance in 2022, defence counsel may make a reasoned request for a reduced team to the Registrar for proceedings arising after the closing of the main case, ‘such as proceedings under Article 85’.⁴⁷⁰ However, according to draft Policy, the Registrar may grant the request ‘on an exceptional and justified basis, limited legal aid resources.’⁴⁷¹ This approach is inconsistent with Rule 73(4) as it severely restricts access to legal aid to which the applicant is entitled and

463 ICC, *Ngudjolo* Decision on the ‘Requête en indemnisation en application des dispositions de l’article 85(1) et (3) du Statut de Rome’ n 449, para 46.

464 *Ibid.*

465 ICC, *Bemba* Decision on Mr Bemba’s claim for compensation and damages, n 447, para 40.

466 ICC, *Gbagbo and Blé Goudé* Decision on Mr Blé Goudé’s request for compensation, n 447, para 18.

467 *Ibid.*

468 *Ibid.*

469 Registry’s single policy document on the Court’s legal aid system, ICC-ASP/12/3, 4 June 2013.

470 Submissions to the Committee on Budget and Finance on the Full Reform of the Registry’s Single Policy Document on the Court’s Legal Aid System (ICC-ASP/12/3).

471 Submissions to the Committee on Budget and Finance on the Full Reform of the Registry’s Single Policy Document on the Court’s Legal Aid System, p 21.

may serve as a barrier to efforts seeking remedies for miscarriages of justice. The lack of detail about the legal aid that will be provided and the draft Policy's emphasis that any resources will be 'limited' also raises concerns as to whether the amount of legal aid provided by the Court will be sufficient.

4.3.2 Applications for compensation

Rule 173 requires that applications for compensation under Article 85 must be submitted in writing to the President not later than six months from the date of the decision of the Court concerning the reversal of the conviction (for applications under Article 85(2)) or the existence of a grave and manifest miscarriage of justice (for applications under Article 85(3)). The request must contain the grounds and the amount of compensation requested.⁴⁷² The applicant is entitled to legal assistance.⁴⁷³

In practice, each of the three chambers that considered applications under Article 85(3) proceeded to determine applications in the absence of a decision to the effect that a grave and manifest miscarriage of justice had taken place. They decided that a prior decision issued by another Chamber is not a prerequisite to entertaining a request for compensation under Article 85(3) of the Statute.⁴⁷⁴ An extension of the time limit was also granted to Jean Pierre Bemba to prepare an application.⁴⁷⁵ Such flexibility is warranted for applications under Article 85(3), considering that the decision acquitting the person or terminating the proceedings may not address the issue of whether a grave and manifest miscarriage of justice occurred. Indeed, an independent assessment of this question is arguably required by a separate chamber. In some instances, information which supports a finding of grave and manifest miscarriage of justice may not come to light until after the acquittal judgment or decision to terminate the proceedings. Moreover, the process of developing an application can be complex and may take some time. The Chamber considering the application by Mathieu Ngudjolo emphasised:

'the applicant must supply specific references to the content of hearings and to any relevant decisions and must also show proof that the conditions set out above are satisfied. The above-mentioned conditions will not be satisfied by a simple claim, without any reference to transcripts, that an error was committed by the Pre-Trial Chamber or the Trial Chamber, or by the repetition of arguments which have already been brought before the Chambers and settled by them.'⁴⁷⁶

4.3.3 Procedure for determining applications

Upon receipt of an application for compensation, the ICC Presidency shall designate a chamber of three judges who did not participate in any earlier judgment to consider the request. So far, the Presidency

472 ICC r 173(3).

473 ICC r 173(4).

474 ICC, *Gbagbo and Blé Goudé* Decision on Mr Blé Goudé's request for compensation, n 447, paras 22–23; ICC, *Bemba* Decision on Mr Bemba's claim for compensation and damages, n 447, para 21; ICC, *Ngudjolo* Decision on the 'Requête en indemnisation en application des dispositions de l'article 85(1) et (3) du Statut de Rome' n 449, para 13.

475 ICC, *Bemba* Decision on Mr Bemba's claim for compensation and damages, n 447, para 6.

476 ICC, *Ngudjolo* Decision on the 'Requête en indemnisation en application des dispositions de l'article 85(1) et (3) du Statut de Rome' n 449, para 48.

has appointed a trial chamber, a pre-trial chamber and an ‘Article 85 chamber’ to consider the first three applications.

The request is transmitted to the Prosecutor for the opportunity to make observations.⁴⁷⁷ The chamber may then either hold a hearing (which is required if the prosecution or the applicant requests a hearing) or determine the matter based on written observations.⁴⁷⁸ This process should be transparent, and outreach should be conducted to victims and affected communities to explain the process and its outcomes.

There are no provisions on whether the applicant or the chamber can call witnesses. However, this may be required, for example, to establish whether the new fact was known to the applicant at the time of trial or appeal and, if so, whether the failure to disclose it should be attributed to them.

4.4 Decisions on compensation

The ICC Rules provide that, following the submissions and any hearings, a decision is taken by a majority of the three judges.⁴⁷⁹

4.4.1 Standard of proof

Although it has been acknowledged that a claim for compensation under Article 85 is not part of the criminal proceedings,⁴⁸⁰ neither the Statute nor the Rules provide any guidance on the standard of proof that should be applied.

The Article 85 Chamber considering Charles Blé Goudé’s application under Article 85(3) held that the applicant:

‘need not prove the claim to the standard of beyond reasonable doubt but there must be concrete evidence on the basis of which the Chamber is satisfied that a grave and manifest miscarriage of justice took place, that is, evidence of a violation so serious and exceptional resulting in the proper administration of justice being compromised.’⁴⁸¹

However, although this clarifies that the beyond reasonable doubt standard does not apply, it is not clear which alternative standard of proof should be applied to satisfy the chamber. The requirement of ‘concrete evidence’ might be an indication that the Chamber in this case favoured a standard similar to the ‘clear and convincing evidence’ standard used in some jurisdictions. Greater clarity is required on which standard will be applied and why it might be preferred to other standards commonly used in civil proceedings before national courts, including balance of probabilities or preponderance of the evidence.

In deciding which standard of proof is appropriate, the ICC should consider that high thresholds have already been set in Article 85(2) and (3) for accessing compensation; and a decision reversing a conviction, acquitting a person or terminating the proceedings must have been taken.

477 ICC r 174(1).

478 ICC r 174(2).

479 ICC r 174(3).

480 ICC, *Gbagbo and Blé Goudé* Decision on Mr Blé Goudé’s request for compensation, n 447, para 34.

481 ICC, *Gbagbo and Blé Goudé* Decision on Mr Blé Goudé’s request for compensation, n 447, para 34.

4.4.2 Determination of compensation award

If the Court decides to order compensation pursuant to Article 85(3), Article 175 requires that, in establishing the amount to be paid, the Court shall take into consideration the consequences of the grave and manifest miscarriage of justice on the personal, family, social and professional situation of the person filing the request.

In accordance with Article 21(3), the ICC should also consider the findings of the European Court of Human Rights on this matter, which has held that:

‘the purpose of Article 3 of Protocol No. 7 is not merely to recover any pecuniary loss caused by a wrongful conviction but also to provide a person convicted as a result of a miscarriage of justice with compensation for any non-pecuniary damage such as distress, anxiety, inconvenience and loss of enjoyment of life.’⁴⁸²

In this regard, compensation should seek to address the full extent of the harms caused by the miscarriage of justice, not simply provide compensation for terms of imprisonment served. Compensation should also be extended to periods of detention or restrictions of liberty following reversal of a conviction, where the person cannot be released due to non-cooperation by states.

4.4.3 Contents of the decision

The ICC Statute, Rules and Regulations are silent on the contents of decisions on compensation applications. However, it is important for the transparency of these potentially controversial decisions that the Court provides a written decision providing full reasons in each instance. This should include explaining:

- the determination of whether a miscarriage of justice or grave and manifest miscarriage of justice occurred;
- reasons for deciding whether or not to exercise its discretion to award compensation under Article 85(3); and
- how it calculated the amount of any compensation awarded.

Recommendations for the ICC – compensation

In the event of a miscarriage of justice, the ICC Statute contains ground-breaking provisions in international criminal law for compensation to address the harm caused. The Court has yet to receive applications under Article 85(2) for miscarriages of justice discovered following final conviction. However, the Court has considered three applications for compensation under Article 85(3) alleging grave and manifest miscarriages of justice, which it has defined as violations of fundamental rights or the right to a fair trial to the extent that the proper administration of justice was compromised. The following recommendations encourage the ICC to prepare for applications pursuant to Article 85(2); to build on its

⁴⁸² ECtHR, *Poghosyan and Baghdasaryan v Armenia*, Application no 22999/06, 12 June 2012, para 51.

limited practice to date of applying Article 85(3); and to put in place effective procedures and principles to determine applications, recognising the unique nature of the proceedings.

Considering applications for compensation for miscarriage of justice (Art 85(2))

- 41) Adopt a flexible interpretation of the requirement in Article 85(2) that a conviction is reversed on grounds of new or newly discovered facts to allow for the possibility of compensation for convictions reversed on any of the three grounds in Article 84(1).
- 42) Adopt a clear definition of ‘miscarriage of justice’ and develop an objective test based on whether the rights of the applicant were violated to the extent that the proper administration of justice was compromised. Ensure that the test fully respects the presumption of innocence of the applicant, who should not be required to prove their actual innocence to qualify for compensation.
- 43) Apply the exception – ‘unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable’ to the applicant – on a case-by-case basis, with sufficient flexibility to ensure that the applicant is not denied compensation because they received poor legal advice or because they failed to appreciate the significance of the fact.

Considering applications for compensation for grave and manifest miscarriages of justice (Art 85(3))

- 44) The Court and the Assembly of States Parties should consider the finding of the Pre-Trial Chamber’s decision on Jean-Pierre Bemba’s application that ‘the case for legislative reform could indeed be made and a review of Article 85(3) aiming at aligning the Statute to the most progressive systems in this area might be warranted.’ If necessary, the Court and States Parties should develop and promote amendments to the legal framework.
- 45) When the ICC Appeals Chamber establishes that a grave and manifest miscarriage of justice has occurred, it should exercise its discretion to award compensation, unless there are compelling reasons for not doing so.
- 46) Chambers should continue to proceed with the determination of applications under Article 85(3) in the absence a prior decision on the existence of a grave and manifest miscarriage of justice and to show flexibility with timelines for applications, when appropriate.

Procedures for compensation

- 47) The ICC’s Legal Aid Policy should be further developed to ensure that sufficient legal aid will be allocated to indigent persons to file an application seeking compensation for miscarriages of justice and to be represented in the proceedings, as required by Rule 73(4).
- 48) Chambers should ensure that the process for determining whether to order compensation is transparent. The ICC should conduct outreach to inform affected communities about the process and to explain the Court’s decision.
- 49) The applicant and the chamber on its own motion should be able to call witnesses, if necessary.

Determinations of compensation

- 50) The ICC should clarify, through its jurisprudence, the appropriate standard of proof to be applied in determining compensation claims under Article 85(2) and (3).
- 51) The ICC should develop principles to guide the consistent determination of just and effective compensation awards, with a view to addressing the full extent of the harms suffered by the convicted person.
- 52) The ICC should provide written decisions, including full reasons, for its decisions on compensation applications.

Conclusions

Effective mechanisms to prevent injustice and provide remedies for miscarriages of justice are vital to ensuring the effective functioning and legitimacy of international criminal courts and tribunals.

As documented in this report, modern international criminal courts and tribunals provide for appeals by the prosecution and the defence. This has resulted in more than two decades of practice and jurisprudence reviewing alleged errors in trial judgments. Nonetheless, the IBA's recommendations to the ICC highlight further measures that should be taken to clarify some aspects of the appeals process, standards of review and decision making on appropriate remedies, as well as to ensure respect for the rights of the accused and victims at the appeals phase.

Although only three retrials have been ordered by the ICTY, ICTR and IRMCT, valuable lessons can be drawn from these cases. The IBA recommends measures that the ICC can take both in the lead up to its first decision to order a new trial before a different chamber and in subsequent proceedings to ensure that retrials are only ordered in exceptional circumstances and conducted without undue prejudice to the accused and with due regard for the rights of victims.

The ability of international criminal courts and tribunals to review and revise convictions where new evidence and facts emerge following final judgment is essential to identify and remedy miscarriages of justice. The report examines the practice of the ICTY, ICTR, IRMCT and SCSL in adjudicating applications for review. Drawing lessons from those review processes and considering the significant differences in the revision process adopted by the ICC, the IBA recommends a number of steps that the ICC should take to ensure that its revision process is accessible and fair, as well as to address procedural and substantive issues that are likely to arise in the first revision processes.

Significantly, the ICC goes further than other international criminal courts and tribunals in providing the possibility of compensation for miscarriages of justice. Having reviewed the ICC's limited practice to date in considering three applications, the report provides recommendations to ensure that the Court gives effect to the groundbreaking yet complex provisions in a fair, coherent and consistent manner.

The recommendations contained in this report aim to assist the ICC in preventing and remedying any injustice in its cases and avoid the devastating effect it could have on wrongfully convicted persons, victims and public confidence in international justice. Although the recommendations are targeted at the ICC, many may also be relevant to other active international criminal courts and tribunals.