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The decision by the Appeals Chamber in Jelisić not to remit the case for trial after reversing a mid-trial acquittal

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Memorandum for the
Office of the Prosecutor
International Criminal Tribunal for Rwanda

Issue 8: The decision by the Appeals Chamber in *Jelisić* not to remit the case for trial after reversing a mid-trial acquittal

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Table of Contents

Index of Sources

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> "It has been said that the two dominant feelings in our age are fear and indifference. The Tribunal is a symbol to show that the United Nations cannot be accused of indifference *vis-à-vis* the fear and suffering prevailing in the former Yugoslavia."

Antonio Cassese, President of the International Criminal Tribunal for the Former Yugosaliva, *Address to the General Assembly of the United Nations* (New York, N.Y., 7 Nov. 1995)

> The Appeals Chamber "is not obliged, having identified an error, to remit for retrial."

Prosecutor v. Jelisić, IT-95-10-A, Judgment, 5 July 2001, para. 77 (acknowledging that the Trial Chamber had erroneously acquitted Jelisić of genocide but declining to reverse).

Discussion

I. Introduction and summary of conclusions.

In July this year, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) issued a judgment in the matter of *Prosecutor v. Jelisić*.[1] The central issues on appeal were of no small importance: on its own motion and without hearing argument from the Prosecutor, the Trial Chamber had acquitted Jelisić mid-trial by applying what the Prosecutor charged was the wrong legal standard. But overshadowing these important legal issues is what the Appeals Chamber did when it announced that the Trial Chamber had indeed blundered: absolutely nothing.

Although it agreed that the Trial Chamber had improperly acquitted Jelisić, the Appeals Chamber refused to remit the case for further proceedings. "The Appeals Chamber is not obliged, having identified an error, to remit for retrial."[2] Jelisić had been on trial for genocide. If the trial had resumed, would he have been convicted? We will never know. Citing the burdens of its case load, the fact Jelisić was already sentenced to 40 years in prison for other offenses, and Jelisić's poor mental health, the Appeals Chamber decided it wasn't worth the effort to find out.

This decision is unsettling on a number of levels. Most immediately, there is the possibility that a man guilty of genocide has escaped justice on a technicality. In the larger picture, the Appeals Chamber passed up an opportunity to establish that genocide occurred in the former Yugoslavia, something it had never done. But the most troubling question is this: Why was the Appeals Chamber making this decision at all? In effect, it

[1] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, 5 July 2001. [Reproduced in the accompanying notebook at Tab 40.]

[2] *Id.*, para. 77.

decided that although further prosecution was legally permissible, it did not think it was warranted. Judges are supposed to decide cases based on the law and leave prosecutorial discretion to the Prosecutor. The decision to cross that line has serious consequences for the ICTY.

The *Jelisić* decision has implications for the International Criminal Tribunal for Rwanda (ICTR) as well. The two Tribunals have similar Statutes and Rules of Procedure and Evidence. Although ICTY decisions are not technically binding in ICTR cases, they are persuasive authority. And because the two Tribunals share a common Appeals Chamber, many of the same judges who decided *Jelisić* would likely decide a case raising similar issues in the ICTR.

A. Issues.

The Appeals Chamber based its decision on three main points: it concluded that the Statute of the Tribunal[3] and the Rules of Procedure and Evidence[4] were broad enough to confer a power not to remit; it claimed case law from England and the United States condoned the practice; and it found exceptional circumstances sufficient to warrant exercise of the power.

This memo will examine each of these bases to determine if they indeed support the Chamber's judgment. Using the interpretative standards of the Vienna Convention on the Law of Treaties,[5] it will analyze both the plain language and the drafting histories of

[3] Statute of the International Tribunal (annexed to S/RES/827 (1993) and as amended by S/RES/1166 (1998) and S/RES/1329 (2000)). [Reproduced in the accompanying notebook at Tab 17.]

[4] Rules of Procedure and Evidence, U.N. Doc. IT/32 Rev.20, 12 April 2001. [Reproduced in the accompanying notebook at Tab 14.]

[5] Vienna Convention on the Law of Treaties (May 23, 1969), U.N. Doc. A/CONF.39/27 (reprinted in 8 I.L.M. 679). [Reproduced in the accompanying notebook at Tab 1.]

the Statute and the Rules of Procedure and Evidence to see if the Chambers' interpretation is warranted. In this connection, it will question how the result can be squared with the structure and purpose of the Tribunal and the Judges' obligation to remain impartial. It will then examine the cited cases and look for support in law of other national jurisdictions. Finally, the memo will examine the factors the Chamber considered exceptional and determine whether they hold up to close scrutiny.

B. Conclusions.

The Tribunal's Statute and Rules of Procedure do not grant the Appeals Chamber a discretionary power not to remit

Article 25 describes the Appeals Chamber's power on appeal. The article is ambiguous with respect to the Chamber's power to remit after reversing. The drafting history does not confirm that the Appeals Chamber has the discretion it claims. More significantly, finding power not to remit is inconsistent with the object and purpose of the Tribunal, with the separation of powers set forth in the Statute, and with the Judges' obligation to remain impartial and decide each case according to the law.

National jurisprudence does not reveal a discretionary power not to remit.

It is not clear that the Appeals Chamber is justified in relying on national law. The Tribunal should only apply a national norm as last resort when a plain reading of the Statute and international law do not speak to an issue. Even if it is justified, the cases cited do not support the Chambers' decision and a survey of other national case law reinforces this conclusion.

The facts the Appeals Chamber relies upon to exercise its discretionary power are not exceptional.

The factors the majority relies upon to halt Jelisić's genocide trial are poorly conceived. Fairness to the accused does not require the Chamber to acquit him when the Trial Chamber makes a mistake. If the Appeals Chamber accepts the prosecutor's right to appeal, it must live with the consequences when an acquittal is reversed. If it is concerned about delay, the defendant has other protections and remedies. If it is concerned about Jelisić's mental problems, it can take them into account during sentencing.

II. Factual background.

A. The trial.

On 21 July 1995, Goran Jelisić was indicted for crimes allegedly committed in May 1992 in Brčko, Bosnia-Herzegovina.[6] The indictment alleged 59 counts against him of genocide, grave breaches of the Geneva Convention of 1949, violations of the laws or customs of war, and crimes against humanity.[7] He was arrested by SFOR on 22 January 1998 and made his initial appearance before the Tribunal four days later.[8] Jelisić allegedly suffered from personality disorders with borderline, narcissistic and anti-social characteristics, but after examination, psychiatrists declared him fit to stand trial.[9] The Prosecutor amended the indictment twice, first to withdraw certain allegations, and later

[6] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, para. 1. [Reproduced in the accompanying notebook at Tab 40.]

[7] *Prosecutor v. Jelisić*, Case No.: IT-95-10-T, Initial Indictment, 21 July 1995. The indictment pled 18 additional counts against another man, Ranko Česić.

[8] *Prosecutor v. Jelisić*, Case No.: IT-95-10-T, Judgment, 14 December 1999, paras. 5, 6. [Reproduced in the accompanying notebook at Tab 36.]

[9] *Id.*, para. 7.

to reflect Jelisić's intention to plead guilty to 31 of the counts against him.[10] Based on an agreed factual basis, Jelisić then pled guilty to sixteen counts of violating the laws or customs of war and fifteen counts of committing crimes against humanity.[11]

On 30 November 1998, the case proceeded to trial on one count of genocide, the sole remaining count in the indictment.[12] Three days later, the trial was suspended when a judge became ill.[13] After an eight-month delay, the trial resumed in August 1999 and the Prosecution completed its case on 22 September 1999.[14] During a break before the start of the defendant's case, the defense indicated that it would not move for acquittal.[15] The Trial Chamber, however, acted anyway. On its own initiative and without affording the Prosecutor the opportunity to argue, the Trial Chamber announced that it would acquit Jelisić under Rule 98 *bis*.[16]

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[10] *Id.*, para. 8. The first amended indictment withdrew the counts alleging grave breaches of the Geneva Convention of 1949. *Prosecutor v. Jelisić*, IT-95-10-T, First Amended Indictment, 13 May 1998. The second amended indictment withdrew eight counts relating to the killings of Kemal Sulejmanović and Amir Novalić, the torture of Naza Bukvić, and the general conditions at Luka Camp. *Prosecutor v. Jelisić*, IT-95-10-T, Second Amended Indictment, 19 October 1998.

[11] *Prosecutor v. Jelisić*, Case No.: IT-95-10-T, Judgment, paras. 11, 24. [Reproduced in the accompanying notebook at Tab 36.]

[12] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, para. 3. [Reproduced in the accompanying notebook at Tab 40.]

[13] *Id.*

[14] *Id.*, para 4. There is nothing in either Judgment that explains why the trial was delayed so long.

[15] *Id.*

[16] *Id.* Rule 98 *bis* (B) provides "The Trial Chamber shall order entry of judgment of acquittal on motion of an accused or *proprio motu* if it finds that the evidence is insufficient to sustain a conviction on that or those charges." Rules of Procedure and Evidence, U.N. Doc. IT/32 Rev.20. [Reproduced in the accompanying notebook at Tab 14.]

The Prosecution moved to postpone the Chamber's decision until it could present argument against acquittal but the Trial Chamber denied this request.[17] On 19 October 1999, the Trial Chamber convicted Jelisić of the counts to which he had pled guilty and acquitted him of genocide. After two weeks of sentencing hearings in November, the Trial Chamber issued its written judgment on 14 December 1999, and sentenced Jelisić to forty years in prison.[18] The Prosecutor timely appealed.[19]

B. The appeal—defeat from the jaws of victory.

The Prosecution raised three arguments on appeal. It contended the Trial Chamber had erred by 1) not giving the Prosecution on opportunity to be heard on the Rule 98 *bis* motion; 2) actually assessing whether the evidence did establish the crime of genocide instead of merely determining whether it could establish the crime, and; 3) not concluding that the evidence established beyond a reasonable doubt that Jelisić had committed genocide.[20] Significantly, the Prosecution asked the Appeals Chamber to reverse and "remit the matter to a differently constituted Trial Chamber for a new trial."[21]

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[17] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, para. 5. [Reproduced in the accompanying notebook at Tab 40.] The Trial Chamber also rejected the Prosecutor's request for oral argument on the motion to postpone.

[18] *Prosecutor v. Jelisić*, Case No.: IT-95-10-T, Judgment, para. 139. [Reproduced in the accompanying notebook at Tab 36.]

[19] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, para. 6. [Reproduced in the accompanying notebook at Tab 40.] Jelisić cross-appealed, raising a number of arguments concerning the length of his sentence, but his appeal is not relevant here.

[20] *Id.*, para 11. The third ground actually has two parts but the details are not relevant to this memo.

[21] *Id.*, para. 12.

On 5 July 2001[22], a divided Appeals Chamber rendered its judgment.[23] The Chamber—composed of Judges Shahabuddeen (Presiding), Vohrah, Nieto-Navia, Wald, and Pocar—unanimously allowed the first ground of appeal.[24] With Judge Pocar dissenting, the Chamber also allowed the second ground.[25] Finally, again with Judge Pocar dissenting, the Chamber allowed the third ground of appeal in part.[26]

Although these three decisions led inexorably to the conclusion that Jelisić had been improperly acquitted, the Appeals Chamber snatched defeat from the jaws of the Prosecutor's victory: it did not remit the case to the Trial Chamber. "[T]he Appeals Chamber by majority (Judge Shahabuddeen and Judge Wald dissenting) considers that, in the circumstances of this case, it is not appropriate to order that the case be remitted for

[22] The appeal took almost two years due in large part to Jelisić's four requests for additional time to file his briefs. *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Scheduling Order, 7 March 2000 [Reproduced in the accompanying notebook at Tab 37]; Order for Extension of Time, 11 May 2000 [Reproduced in the accompanying notebook at Tab 38]; Decision on Motion Requesting Extension of Time, 15 September 2000 [Reproduced in the accompanying notebook at Tab 39].

[23] Despite majority support for the Judgment, four of the five judges wrote separate opinions. Judge Nieto-Navia concurred in the Disposition but wrote separately to explain his reasons, while Judge Shahabuddeen, Judge Wald, and Judge Pocar each partially dissented.

[24] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, at Disposition, para. (1). [Reproduced in the accompanying notebook at Tab 40.] "In the view of the Appeals Chamber, the fact that a Trial Chamber has a right to decide *proprio motu* entitles it to make a decision whether or not invited to do so by a party; but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made." *Id.*, para. 27. Jelisić conceded this point. *Id.*, para. 28.

[25] *Id.* at Disposition, para. (2). "The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier of fact would in fact arrive at a conviction beyond a reasonable doubt on the prosecution evidence (if accepted) but whether it could." *Id.*, para. 37. Jelisić conceded this point as well. *Id.*, para. 38.

[26] *Id.* at Disposition, para. (3). "The Appeals Chamber considers that this evidence and much more of a similar genre in the record could have provided the basis for a reasonable Chamber to find beyond a reasonable doubt that the respondent had the intent to destroy the Muslim group in Brčko." *Id.*, para. 68. The Appeals Chamber unanimously disallowed the Prosecution's claim that the Trial Chamber had not applied the proper mental state.

further proceedings, and declines to reverse the acquittal."[27] Instead, it affirmed the forty-year sentence and ordered Jelisić to remain in custody until his prison transfer.[28]

The majority built its decision not to remit on three pillars. It reasoned that Article 25 of the Statute of the Tribunal "is wide enough to confer such a faculty" and that Rule 117(C) of the Rules of Procedure recognized this discretion.[29] Citing English and American cases,[30] it observed that "national case law gives discretion to a court to rule that there should be no retrial."[31] And although it recognized that this discretion must be "exercised on proper judicial grounds," it found those grounds existed:

- Jelisić had been convicted of 31 counts and sentenced to 40 years in prison.
- The genocide count was based on the same killings as these 31 counts.
- It was not Jelisić's fault that the Trial Chamber erred.
- "Considerable time will have elapsed" from the date the killings occurred and any retrial.
- The Tribunal has limited resources.
- A new trial would mean Jelisić remained in detention but he needs psychiatric help and "a prison would generally be in a better position to provide long-term consistent treatment."

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[27] *Id.* at Disposition, para. (4).

[28] *Id.* at Disposition, paras. (7), (8).

[29] *Id.*, para. 73.

[30] *Director of Public Prosecution v. Cosier*, CO/4180/99, Q.B.D. (Crown Office List) 5 April 2000 [Reproduced in the accompanying notebook at Tab 27]; *R. v. Barking and Dagenham Justices*, [1995] Crim. L.R. 953, Q.B.D. (Crown Office List) 1994 [Reproduced in the accompanying notebook at Tab 45]; *United States v. Hooper*, 432 F.2d 604 (D.C. Cir. 1970) [Reproduced in the accompanying notebook at Tab 51]; *United States v. Lindsey*, 47 F.3d 440 (D.C. Cir. 1995) [Reproduced in the accompanying notebook at Tab 53].

[31] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, para. 73. [Reproduced in the accompanying notebook at Tab 40.]

In these "exceptional" circumstances, the majority declined to reverse the acquittal.[32]

Judge Wald dissented. Although she "empathise[d]" with the majority's motives, she declared that the Appeals Chamber lacked the power to act as it did:

> I cannot discern any authority in the Tribunal's Statute or the Rules of Procedure and Evidence for the Appeals Chamber, on its own, to declare that the genocide count should be rejected, even though there is sufficient evidence to support it.[33]

She debunked the notion that the English and American cases support the majority's decision.[34] Most significantly, she warned that the majority's decision takes the Tribunal into "strange and uncharted terrain."[35] The Statute gives the Prosecutor the power to decide whether to prosecute or not. "To recognise a parallel power in judges to accept or reject cases on extra-judicial grounds invites challenges to their impartiality as exclusively definers and interpreters of the law."[36]

Judge Shahabuddeen also criticized the majority's decision but on different grounds. He accepted that the Appeals Chamber had the power not to remit, agreeing with the majority's analysis and citing additional cases to buttress this view.[37] But he did

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[32] *Id.*, paras. 74-76.

[33] *Id.*, Partial Dissenting Opinion of Judge Wald, para. 1.

[34] "I do not find that national jurisprudence reveals any generally recognised inherent power in appellate bodies to prevent the prosecution of a crime in the interests of judicial economy or that such a power is essential to a court of law's functioning. *Id.*, para. 11.

[35] *Id.*, para. 14.

[36] *Id.*

[37] *Id.*, Partial Dissenting Opinion of Judge Shahabuddeen, para. 20. In addition to *Barking* and *Cosier*, he cited *Botton v. Secretary of State for the Environment*, [1992] 1 P.L.R. 1, Q.B.D. 1991 [Reproduced in the accompanying notebook at Tab 26] and *Griffith v. Jenkins*, [1991] Crim LR 616, Q.B.D. 1991 [Reproduced in the accompanying notebook at Tab 28]. He also found support in the Tribunal's decision in *Prosecutor v. Aleksovski*, Case No.: IT-95-14/1-A, Judgment, 24 March 2000 [Reproduced in the accompanying notebook at Tab 32], although he acknowledged that case did not involve a mid-trial acquittal.

agree that the power had been "correctly exercised in this case."[38] After rejecting the majority's justifications point-by-point,[39] Judge Shahabuddeen attacked the decision at its core. While the majority says its decision is "in the interests of justice,"

> there is nothing in the considerations advanced which enables me to discern how the interest of the international community . . . is served by finding that, although the proceedings on as grave a charge as one of genocide were erroneously terminated by the Trial Chamber, they should nevertheless not continue.[40]

Jelisić now awaits transfer to prison.

III. Legal analysis.

A. The Tribunal's Statute and Rules of Procedure do not grant the Appeals Chamber a discretionary power not to remit.

To accurately interpret Article 25 and Rule 117(C), it is necessary to first determine what interpretative rules apply. National criminal laws are often interpreted to resolve all doubts in favor of the defendant. But the Tribunal has not followed this approach. Instead, it has applied the Vienna Convention on the Law of Treaties.[41]

As its name implies, the Vienna Convention normatively applies to treaties.[42] Under its provisions, treaties are interpreted according to a hierarchical set of rules.

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[38] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, Partial Dissenting Opinion of Judge Shahabuddeen, para. 23. [Reproduced in the accompanying notebook at Tab 40.]

[39] *Id.*, paras. 24-27. He argued there is nothing unfair about continuing a case after "normal recourse to the appellate process"; that since Jelisić was fit for trial, his need for psychiatric treatment should not influence the decision to remit; that if convicted of genocide, his 40 year sentence could well be increased; and that a judicial-economy excuse should be used sparingly.

[40] *Id.*, para. 29.

[41] Vienna Convention, *supra* n. 5. [Reproduced in the accompanying notebook at Tab 1.] This is significant since "when problems of interpretation arise, the 'contextual rule' of the Vienna Convention and the principle of strict construction drawn from national legal practice . . . may lead to very different results." William A. Schabas, *An Introduction to the International Criminal Court* 75 (Cambridge U. Press 2001). [Reproduced in the accompanying notebook at Tab 74.]

[42] "The present Convention applies to treaties between States." Vienna Convention, *supra* n. 5, Art. 1. [Reproduced in the accompanying notebook at Tab 1.]

At first, the language must be interpreted in "good faith" in accordance with its "ordinary meaning" in light of the treaty's "object and purpose."[43] If this analysis leaves the meaning ambiguous or leads to an absurd result, "supplementary means of interpretation" can be used.[44] Generally, this means a review of the *travaux préparatoires* (the preparatory work) to determine the intent of the drafters. In all cases, the treaty must be interpreted to give each term a useful effect, and to make all provisions internally consistent.[45]

The ICTY Appeals Chamber applies the same rules when it interprets the Statute of the Tribunal.

> Although the Statute of the International Tribunal is a *sui generis* legal instrument and not a treaty, in interpreting its provisions and the drafters' conception of the applicability of the jurisprudence of other courts, the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties appear relevant.[46]

Thus, the Chamber looks at the ordinary meaning of the language in light of the Statute's object and purpose,[47] and may also examine the Statute's drafting history.[48] It gives each

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[43] "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." *Id.* at Art. 31(1).

[44] "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstance of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable." *Id.* at Art. 32.

[45] These principles are commonly referred to as good faith, textuality, contextuality, and teleology. *See e.g. Prosecutor v. Aleksovski*, Case No.: IT-95-14/1-A, Judgment, para. 98. [Reproduced in the accompanying notebook at Tab 32.] This approach is not revolutionary. Statutory interpretation in national jurisdictions follows similar rules.

[46] *Prosecutor v. Tadić*, Case No.: IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 18. [Reproduced in the accompanying notebook at Tab 44.]

[47] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, para. 35. [Reproduced in the accompanying notebook at Tab 40.]

term a useful effect,[49] but it does not use this principle to ascribe a meaning which is contrary to the "letter and spirit" of the Statute.[50] In the same vein, it considers international law, but does not give "credence . . . to such international authorities if they are inconsistent with the spirit, object and purpose of the Statute and the Rules . . . ."[51] The Rules of Procedure and Evidence are interpreted in a similar manner with one caveat. As the power to create Rules is derived from the Statute, a Rule generally "cannot confer power on the Chambers greater than that provided by the Statute . . . ."[52]

The majority's decision in *Jelisić* is notable for its complete failure to perform any analysis along these lines. Instead, the majority summarily declares "Article 25 is wide enough to confer" a power not to remit and that the text of Rule 117(C) reinforces

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[48] *Prosecutor v. Erdemović*, Case No.: IT-96-22-A, Judgment, 7 October 1997, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 3. [Reproduced in the accompanying notebook at Tab 35.]

[49] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, Separate Opinion of Judge Nieto-Navia, para. 12 ("It is a general rule of interpretation that the law must be interpreted in such a way that it has useful effect (the principle of effectiveness, or *ut res magis valeat quam pereat*.") [Reproduced in the accompanying notebook at Tab 40]; *Prosecutor v. Kordić*, Case No.: IT-95-14/2-A, Decision on Appeal Regarding the Admission of Evidence of Seven Affidavits and One Formal Statement, 18 September 2000, para. 27 ("It is an elementary rule of interpretation that one should not construe a provision or part of a provision as if it were superfluous and hence pointless: the presumption is warranted that law-makers enact or agree upon rules that are well thought out and meaningful in all their elements." (footnote omitted)) [Reproduced in the accompanying notebook at Tab 42].

[50] *Prosecutor v. Kordić*, Case No.: IT-95-14/2-A, Decision on Appeal Regarding the Admission of Evidence of Seven Affidavits and One Formal Statement, para. 23. [Reproduced in the accompanying notebook at Tab 42.]

[51] *Prosecutor v. Erdemović*, Case No.: IT-96-22-A, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 4 [Reproduced in the accompanying notebook at Tab 35]; *Prosecutor v. Tadić*, Case No.: IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, para. 30 ("While the jurisprudence of other international judicial bodies is relevant," the Tribunal "must interpret its provisions within its own context . . . .") [Reproduced in the accompanying notebook at Tab 44]; *Prosecutor v. Aleksovski*, Case No.: IT-95-14/1-A, Judgment, para. 98 ("References to the law and practice in various countries and in international institutions are not necessarily determinative of the question as to the applicable law in this matter.") [Reproduced in the accompanying notebook at Tab 32].

[52] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, Partial Dissenting Opinion of Judge Wald, para. 7. [Reproduced in the accompanying notebook at Tab 40.]

this interpretation. In fact, neither a plain reading of Article 25 and Rule 117(C) nor review of their drafting histories supports this result. More significantly, the majority's decision is inconsistent with the object and purpose of the Tribunal, with the separation of powers set forth in the Statute, and with the Judges' obligation to remain impartial and decide each case according to the law.

1. Article 25 is ambiguous—it neither expressly grants nor prohibits the power not to remit.

The Statute does not expressly confer power not to remit after reversing acquittal. Article 25, which details the Chamber's power on appeal, provides:

> 1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
>
> (a) An error on a question of law invalidating the decision; or
>
> (b) An error of fact which has occasioned a miscarriage of justice.
>
> 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.[53]

By no stretch, can the ordinary meaning of "affirm, reverse, or revise" be interpreted to include "decline to reverse." The majority apparently concedes this point. Its claim that the Article is "wide enough" to grant a power not to remit implies that it is looking beyond the literal language of the statute. Is this justified?

There can be no real argument that requiring the Appeals Chamber to remit after reversing an acquittal is "manifestly absurd or unreasonable." The majority concedes that it would remit in this situation in appropriate circumstances.[54] Thus, under the

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[53] Statute of the International Tribunal, Art. 25. [Reproduced in the accompanying notebook at Tab 17.]

[54] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, para. 77. [Reproduced in the accompanying notebook at Tab 40.]

Vienna Convention, there will be no basis to look beyond the plain language of Article 25 unless it is ambiguous or obscure.[55]

On its face, Article 25 is not ambiguous: the Chamber "may affirm, reverse or revise." In her dissent, Judge Wald observed that there is no language empowering the Chamber to "veto a prosecution in the interests of justice, judicial economy or otherwise."[56] This is true but it proves too much. There is also no language authorizing a retrial in the first place.[57] While it is certainly arguable that the drafters intended to foreclose any retrials, this would be a significant deviation from the norm.

> [V]irtually every appellate tribunal has, in both common law and civil law countries, [the power] to decide whether to reverse a conviction outright and let the prisoner go free (in cases where the evidence is not sufficient to convict) or to retry the prisoner (in cases where a procedural or other error has tainted the original proceedings but the evidence is sufficient to sustain a conviction).[58]

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[55] *Prosecutor v. Bagosora*, Case No.: ICTR-98-37-A, Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora and 28 others, 8 June 1998, para. 28 (interpreting Article 24 of the ICTR Statute according to its plain meaning and finding it unnecessary to look at the object and purpose of the Statute). [Reproduced in the accompanying notebook at Tab 33.]

[56] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, Partial Dissenting Opinion of Judge Wald, para. 5. [Reproduced in the accompanying notebook at Tab 40.]

[57] Both Bassiouni and Morris & Scharf observed this point. "The Appeals Chamber apparently does not have the authority to grant a new trial." M. Cherif Bassiouni with the collaboration of Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* 983 (Transnational Publishers 1996). [Reproduced in the accompanying notebook at Tab 62.] "The Appeals Chamber is not expressly authorized to order the Trial Chamber that heard the case to reconsider the matter . . . ." Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* vol. 1, 296 (Transnational Publishers 1998). [Reproduced in the accompanying notebook at Tab 70.] An early ILC draft statute did expressly authorize a retrial. *Id.* at 295 n. 759. The U.S. government's proposal also explicitly authorized a retrial. Suggestions Made by the Government of the United States of America Rules of Procedure and Evidence for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, U.N. Doc.: IT/14, 17 November 1993 (reprinted in Morris & Scharf, *Insider's Guide* vol. 2, 509-563). [Reproduced in the accompanying notebook at Tab 85.]

[58] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, Partial Dissenting Opinion of Judge Wald, para. 6. [Reproduced in the accompanying notebook at Tab 40.] See e.g. Hong Kong Code Crim. Proc. Ord. § 83E(1) "Where the court of Appeal allows an appeal against conviction and it appears to the Court of Appeal that the interest of justice so require it, it may order that the appellant be retried." [Reproduced in

Article 25 is ambiguous because the extent of this universally accepted power is unclear.

2. The drafting history does not confirm that the Appeals Chamber has the discretion it claims.

Accepting that Article 25 is ambiguous does not lead inexorably to the majority's result. The drafting history of the Article does not confirm that the Chamber has the discretion it claims. Unfortunately, evidence of the preparatory work on Article 25 is largely non-existent.[59] In its place, the Chamber must rely on the Secretary-General's report accompanying the final version submitted to the Security Council and the opinions of those governments who voted to adopt the statute.[60] These opinions are more readily

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the accompanying notebook at Tab 7.] This power in Hong Kong derived not from English common law but from a 19th century Indian Code of Criminal Procedure. [Reproduced in the accompanying notebook at Tab 9.] "A similar power, not always conferred by identical words, has subsequently been incorporated in the criminal procedure codes of many other Commonwealth jurisdictions." *Au Pui-Kuen v. Attorney General of Hong Kong*, [1979] 1 All ER 769. [Reproduced in the accompanying notebook at Tab 24.]

The Rome Statute also explicitly allows a new trial. Statute of the International Criminal Court, U.N. Doc. A/Conf.183/9, 17 July 1998, Art. 83 [Reproduced in the accompanying notebook at Tab 16]; *see generally* Christopher Staker, *Appeal and Revision* in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 1034-5 (Otto Triffterer ed., Nomos Verlagsgesellschaft 1999) [Reproduced in the accompanying notebook at Tab 75]; Schabas, *supra* n. 41, at 134 [Reproduced in the accompanying notebook at Tab 74].

[59] Bassiouni explains: By Resolution 808, the Security Council asked the Secretary-General to draft the Statute for the Tribunal for the Former Yugoslavia. In practice, this meant that the OLA under the direction of Carl-August Fleischhauer would craft the statute largely on its own although it received input from outside sources. While a Commission of Experts or the International Law Commission would have filed reports with the Security Council, documenting the stages of the process, the OLA was not obligated to do so. As a result, a typical drafting history is not available. Bassiouni, *supra* n. 57, at 221-224. [Reproduced in the accompanying notebook at Tab 62.]

[60] *Prosecutor v. Delalić*, Case No.: IT-96-21-T, Judgment, 16 November 1998, para. 169 ("It seems to the Trial Chamber that any *travaux préparatoires*, opinions expressed by members of the Security Council when voting on the relevant resolutions, and the views of the Secretary-General of the United Nations expressed in his Report, on the interpretation of the Articles of the Tribunal's Statute cannot be ignored in the interpretation of provisions which might be deemed ambiguous. The vast majority of members of the international community rely upon such sources in construing international instruments.") [Reproduced in the accompanying notebook at Tab 34.]

The Tribunal can also examine the Commission of Experts' reports. Bassiouni, *supra* n. 57, at 257. [Reproduced in the accompanying notebook at Tab 62.]

available then they might otherwise be since, in lieu of a formal amendment process, governments set out their understanding of the Statute's terms in their own reports appended to final draft of the Statute.[61]

A review of the Secretary-General's report and the government submissions suggests an appellate power not to remit after reversing an acquittal was never considered. The main concerns regarding the appellate process were allowing the Prosecutor to appeal, the double jeopardy concerns that raised, and requiring unanimity of decision.[62] To the extent retrial was discussed in these official sources, it was strictly in the context of an option after reversing a conviction.[63]

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[61] *Id.* at 225. Bassiouni questions utility of the reports since in his view, the Security Council is not legislating but merely codifying existing international law. *Id.* This may be true with regard to substantive law, but it's hard to follow this argument with regard to appellate procedure. Because the ICTY was the first international criminal tribunal to recognize a right to appeal, there was no international law in this area to codify. "We must prepare a veritable international code of criminal procedure." Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia, *Address to the Secretary-General at a Meeting of the Judges of the Tribunal* (The Hague, Netherlands, 21 Jan. 1994) (reprinted in ICTY, *Yearbook 1994*, at 144-148 [Reproduced in the accompanying notebook at Tab 79]; Cristoph M. Safferling, *Towards an International Criminal Procedure* 34 (Oxford U. Press 2000) (These two ad hoc tribunals are the first real international enterprises to prosecute international criminal law 'directly', on an international level. From a procedural point of view, this is the birth of international criminal procedure . . . .") [Reproduced in the accompanying notebook at Tab 73].

[62] Bassiouni, *supra* n. 57, at 979-980. [Reproduced in the accompanying notebook at Tab 62.] *E.g.* ABA Sec. Intl. Law & Prac., Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia (ABA 1993). [Reproduced in the accompanying notebook at Tab 61.]

The drafting of the Rome Statute raised similar concerns although by that point, the prosecutor's right to appeal was accepted and the dispute centered on the mechanics of that right. Helen Brady & Mark Jennings, *Appeal and Revision* in *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* 298, 301 (Roy S. Lee ed., Kluwer L. Intl. 1999). [Reproduced in the accompanying notebook at Tab 63.] "In the ILC Draft Statute, the Appeals Chamber was not empowered to reverse or amend an acquittal by the Trial Chamber, but could only annul the decision of acquittal as a prelude to a new trial. Under the provision as finally adopted, the Appeals Chamber can itself substitute a guilty verdict for an acquittal, **but only where an appeal for that purpose is brought by the Prosecutor.**" Staker, *supra* n. 58, at 1034 (footnote omitted, emphasis added). [Reproduced in the accompanying notebook at Tab 75.] "It would depend on the circumstances of the case whether it was more appropriate for the Appeals Chamber, having allowed an appeal, itself to substitute a different verdict rather than to order a new trial." *Id.*

[63] "In all cases it will be for the appeal court to determine the appropriate remedy, whether to acquit the convicted person or to return the case for retrial according to law or to substitute another judgment for the lower court judgment or to alter the sentence." Memo. from Amnesty International to the United Nations,

From unofficial sources, the information is slightly different. Morris and Scharf state that the drafters did consider the question of authorizing new trials after reversing acquittals but specifically decided not to do so "in view of the substantial time and expense involved in prosecuting a major criminal case once let alone twice."[64] At the same time, they did not want to prevent new trials in appropriate circumstances.

The majority contends Rule 117 supports its interpretation but this is far from obvious. Subsection C states "In appropriate circumstances the Appeals Chamber may order that the accused be retried according to law."[65] By the majority's logic, this confers discretion to order or not to order a retrial in any situation. But Judge Wald's rejoinder is equally reasonable: it makes explicit the power to retry a defendant after his conviction has been reversed but says nothing about a power not to retry him after his acquittal has been reversed.[66]

The drafting history of Rule 117 reinforces Judge Wald's conclusion. Rule 117(C) was not added until the Fifth Plenary Session in January 1995.[67] The amendment

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Memorandum to the United Nations: The Question of Justice and Fairness in the International War Crimes Tribunal for the Former Yugoslavia (April 1993) (reprinted in Morris & Scharf, *Insider's Guide* vol. 2, 409, 433). [Reproduced in the accompanying notebook at Tab 82.]

[64] Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* vol. 1, 608, n. 1989 (Transnational Publishers 1998). [Reproduced in the accompanying notebook at Tab 69.] No authority is cited for this proposition but as Virginia Morris was a member of the drafting team, there is no reason to doubt its veracity.

[65] Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.20, 12 April 2001, Rule 117(C). [Reproduced in the accompanying notebook at Tab 14.]

[66] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, Partial Dissenting Opinion of Judge Wald, para. 6. [Reproduced in the accompanying notebook at Tab 40.]

[67] Rules of Procedure and Evidence, U.N. Doc. IT/32 Rev.3/Corr.1, 6 February 1995. [Reproduced in the accompanying notebook at Tab 13.] An Inter-session Working Group created at Fourth Plenary Session proposed amendments which were then voted on by judges at the Fifth Plenary Session. Press Release, U.N. Doc. CC/P10/003-E, 1 February 1995. [Reproduced in the accompanying notebook at Tab 83.] Plenary sessions themselves are confidential but the Inter-session Working Group likely submitted a report outlining their proposals. Reports were often annexed to a list of decisions adopted during the sessions.

was not meant to make any significant changes, but "simply to improve the clarity, consistency and completeness" of the Rule.[68] It was "added, at the suggestion of the Prosecutor . . . to specify a measure which the Appeals Chamber may take by virtue of Article 25(2) of the Statute."[69] This interpretation is consistent with the intent of the Statute's drafters. Further, because the Prosecutor proposed the amendment, it makes little sense that it was intended to give the Appeals Chamber the power to deny a Prosecutor's request to remit when it was otherwise appropriate.

3. Finding power not to remit is inconsistent with the separation of powers established in the Statute.

It is not surprising that the *travaux préparatoires* does not confirm the Chambers' interpretation of Article 25—it is at odds with the object and purpose of the Statute. The Statute was written to create a chiefly accusatorial judicial system in which there is a stark separation of power between the Prosecutor and the Judges. By not remitting, the Appeals Chamber violated that separation of powers. In effect, the Appeals Chamber withdrew the indictment against Jelisić. Under the Statute, this power rests solely in the Prosecutor's hands.

Thus, the working group's report may be annexed to the List of decisions adopted during the Fifth Plenary Session of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc.: IT/91, 30 January 1995. This is a public document [see Tab 57] but I was unable to locate a copy at my local U.N. depository. John R.W.D. Jones, who was present at the Fifth Plenary Session, suggests that Morten Bergsmo in the Prosecutor's office at The Hague may have access to it.

[68] Second Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 21, n. 6., U.N. Doc. A/50/365, 23 August 1995 [Reproduced in the accompanying notebook at Tab 59]; International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Yearbook 1995*, U.N. Sales No. E.96III.P.1 (U.N. 1996) [Reproduced in the accompanying notebook at Tab 56].

[69] John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* 453 (2d ed., Transnational Publishers 2000). [Reproduced in the accompanying notebook at Tab 68.]

Prosecutorial independence is a cornerstone of the Tribunal. As the first truly international criminal court, the Tribunal is a unique institution. "Its only predecessors in living memory, the international military Tribunals at Nürnberg and Tokyo, were created in very different circumstances and were based on moral and juridical principles of a fundamentally different nature."[70] The Tribunal's Statute is a "fusion and synthesis" of common-law and civil-law traditions.[71] But the Statute adopts the largely adversarial approach of the common law. The Secretary-General emphasized that an independent Prosecutor was critical.[72] Article 16 implements this concept: "The Prosecutor shall act independently as a separate organ of the International Tribunal."[73]

Unlike the prosecutor in a civil-law jurisdiction, the Tribunal's Prosecutor alone is responsible for investigating crimes and for determining whether to proceed with an

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[70] First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, para. 3, U.N. Doc. A/49/342, 29 September 1994 (reprinted in International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Yearbook 1994*, at 81-133, U.N. Sales No. E.95.III.P.2 (ICTY 1995)). [Reproduced in the accompanying notebook at Tab 55.]

[71] *Prosecutor v. Delalić*, Case No.: IT-96-21-T, Judgment, 16 November 1998, para. 159. [Reproduced in the accompanying notebook at Tab 34.]

[72] "The Prosecutor should act independently as a separate organ of the International Tribunal." Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704, 3 May 1993 (reprinted in 32 I.L.M. 1159 (1993)). [Reproduced in the accompanying notebook at Tab 60.]

The Rome Statute establishes a similar system. Statute of the International Criminal Court, art. 42. [Reproduced in the accompanying notebook at Tab 16.] "An effective international court requires not only a Prosecutor who is independent and able to access necessary information, but an institutional framework which ensures that he or she is able to make vital decisions without undue pressure or restraint. In many ways the credibility of the Court depends on whether the Prosecutor is able to act independently and in an atmosphere which does not create perceptions of bias or partiality." Medard R. Rwelamira, *Composition and Administration of the Court* in *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* 294-304 (Roy S. Lee ed., Kluwer L. Intl. 1999). [Reproduced in the accompanying notebook at Tab 72.]

[73] Statute of the International Tribunal, art. 16. [Reproduced in the accompanying notebook at Tab 17.]

indictment.[74] "Whether the International Tribunal should exercise jurisdiction is, in the first instance, a question for the Prosecutor to consider."[75] The Prosecutor's decision is of course based on the results of its investigation—whether there is sufficient evidence to make a case—but it considers other factors too:

> The Prosecutor will have to pick and choose appropriate cases to investigate and prosecute. In a domestic context, there is an assumption that all crimes that go beyond the trivial or *de minimis* range are to be prosecuted. But before an international tribunal . . . 'the discretion to prosecute is considerably larger, and the criteria upon which such Prosecutorial discretion is to be exercised are ill-defined, and complex.'[76]

The criteria include whether a case may "have significant implications in other terms of investigation, prosecution or adjudication or other cases," or "involve important questions of law."[77] "The Prosecutor enjoys sole discretion in the execution of her mandate."[78]

In contrast, the Tribunal's judges do not get to "pick and choose" the cases they will hear. The ICTY Statute "adopts one of the principal features of the accusatorial system of criminal procedure . . . namely that a formal indictment, detailing the material facts alleged and the legal character of the offenses charged is an essential foundation of

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[74] Antonio Cassese, *Statement by the President Made at a Briefing to Members of Diplomatic Missions*, U.N. Doc. IT/29, 11 February 1994 (reprinted in Morris & Scharf, *Insider's Guide* vol. 2, 650). [Reproduced in the accompanying notebook at Tab 80.]

[75] Morris & Scharf, *Insider's Guide*, vol. 1, *supra* n. 57, 128. [Reproduced in the accompanying notebook at Tab 70.] "It remains entirely . . . proceed." ICTY First Annual Report, *supra* n. 70, para. 74. [Reproduced in the accompanying notebook at Tab 55.]

[76] Schabas, *supra* n. 41, at 99 (quoting *Statement by Justice Louise Arbour to the Preparatory Committee on the Establishment of an International Criminal Court*, December 8, 1997, 7-8). [Reproduced in the accompanying notebook at Tab 74.]

[77] Morris & Scharf, *Insider's Guide*, vol. 1, *supra* n. 57, 129. [Reproduced in the accompanying notebook at Tab 70.]

[78] *Prosecutor v. Bagosora*, Case No.: ICTR-98-37-A, Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora and 28 others, 8 June 1998, para. 31. [Reproduced in the accompanying notebook at Tab 33.]

a criminal trial."[79] Under Article 19, the judge's role is limited to reviewing the indictment to determine if the Prosecutor has presented sufficient evidence to make out a *prima facie* case. If so, the judge "shall confirm the indictment."[80]

When testing the sufficiency of an indictment, judges do not assess the Prosecution's ability to eventually prove its case beyond a reasonable doubt. They have no discretion to withhold confirmation on extra-judicial grounds such as whether the prosecution is in public interest. "The trial Judges are not given power to reject the indictment because they do not think it is a wise use of the Tribunal's resources or for any other reason than the lack of a *prima facie* case."[81]

The Prosecutor's control over the indictment process is reflected in the rules regarding amendment and withdrawal. The Prosecutor initiates both procedures.[82] The Trial Chamber is not empowered to act *proprio motu*. "'It is the prerogative of the

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[79] John O'Dowd, *Commentary* in *Annotated Leading Cases of International Criminal Tribunals, Volume II: The International Criminal Tribunal for Rwanda 1994-1999* at 79 (André Klip & Göran Sluiter eds., Intersentia 2001. [Reproduced in the accompanying notebook at Tab 71.]

[80] Statute of the International Tribunal, Art. 19. [Reproduced in the accompanying notebook at Tab 17.] This is a safeguard against "unreasonable or unwarranted action" by the Prosecutor. Morris & Scharf, *Insider's Guide*, vol. 1, *supra* n. 57, 204. [Reproduced in the accompanying notebook at Tab 70.]

[81] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, Partial Dissenting Opinion of Judge Wald, para. 4. [Reproduced in the accompanying notebook at Tab 40.]

[82] Jones, *supra* n. 69, at 271-272, 277-278, 583. [Reproduced in the accompanying notebook at Tab 68.] It is true that if an indictment has already been confirmed, the Prosecutor must obtain leave of court to withdraw or amend it, but the Prosecutor still initiates the procedure. Morris & Scharf, *Insider's Guide*, vol. 1, *supra* n. 57, 204. [Reproduced in the accompanying notebook at Tab 70.] This is another example of the separation of powers at work. If the Prosecutor seeks to amend or withdraw after a judicial determination that there is sufficient evidence to proceed, the Prosecutor's motives are called into question.

> Any suggestion that the prosecution has not proceeded with a case for reasons of international politics or the wishes of one or more states, would seriously damage the authority of the Tribunal. There should therefore be some method for seeking review of a decision not to proceed with a prosecution.

Amnesty Memorandum, *supra* n. 63 (reprinted in Morris & Scharf, *Insider's Guide* vol. 2, 425). [Reproduced in the accompanying notebook at Tab 82.] The Trial Chamber steps in to ensure the Prosecutor's actions are proper.

Prosecutor, not the Chamber, to amend the indictment (Rule 50).' The Chamber can only 'express its belief and invite the Prosecutor to amend the indictment accordingly, should he share that belief.'"[83] The Prosecutor's control is also reflected in the ability to enter into plea bargains with certain defendants in exchange for testimony against others.[84]

The decision in *Jelisić* not to remit violates the independence of the Prosecutor. In effect, the Appeals Chamber withdrew the indictment against Jelisić because it does not think the case worthy of retrial. It had no power to do so. "An international court must apply *lex lara*, that is to say, the existing rules of international law as they are created through the sources of the international legal system. If it has instead recourse to policy considerations or moral principles, it acts *ultra vires*."[85] "Nowhere in the Statute is any Chamber of the ICTY given authority to dismiss an indictment of any count therein because it disagrees with the wisdom of the Prosecutor's decision to bring the case."[86]

In his partial dissent, Judge Shahabuddeen acknowledges that the "Prosecutor is of course independent" and concedes that "consideration has to be given to the question whether her functions are unlawfully compromised" by the decision not to remit.[87] But

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[83] Jones, *supra* n. 69, at 272 [Reproduced in the accompanying notebook at Tab 68] citing *Prosecutor v. Nikolić*, Case No.: IT-94-2-R61, Rule 61 Decision, 20 October 1995, para. 32. This decision is apparently not publicly available.

[84] *Prosecutor's Regulation No. 1 of 1994 (as amended 17 May 1995)* (reprinted in International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Basic Documents 1995*, U.N Sales No. E/F.95.III.P.1, 133-137 (U.N. 1995)). [Reproduced in the accompanying notebook at Tab 84.]

[85] *Prosecutor v. Erdemović*, Case No.: IT-96-22-A, Judgment, Separate and Dissenting Opinion of Judge Cassese, para. 49. [Reproduced in the accompanying notebook at Tab 35.]

[86] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, Partial Dissenting Opinion of Judge Wald, para. 4.

[87] *Id.*, Partial Dissenting Opinion of Judge Shahabuddeen, para. 20.

he argues the force of that argument is "diminished by the circumstance that the Prosecutor's entitlement to continue with the case depends on whether it is remitted" which depends on how the Appeals Chamber exercises its power under Article 25.[88] This is circular reasoning at its finest.

Contrary to Judge Shahabuddeen, *Aleksovski*[89] does not provide any "assistance." It is true that the Appeals Chamber declined to reverse the acquittal on Counts 8 and 9 even though the Trial Chamber had applied the wrong legal standard when it ruled on them. But it cannot "equally be said that a failure to remit the case interfered with the functions of the prosecutor,"[90] because the Prosecutor did not seek a retrial in that case.

The Appeals Chamber cannot do what the Trial Chamber cannot. "The rules of procedure and evidence that govern the proceedings in the Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber."[91]

> The majority has not suggested that the Trial Chamber could have simply said "enough" because it did not think the genocide trial was worthy in terms of the allocation of Tribunal resources.
>
> Now solely because of the fortuitous circumstance of an erroneous use of Rule 98 *bis* by which the Trial Chamber stopped the trial in mid-course, the Appeals Chamber asserts such a power.[92]

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[88] *Id*.

[89] *Prosecutor v. Aleksovski*, Case No.: IT-95-14/1-A, Judgment. [Reproduced in the accompanying notebook at Tab 32.]

[90] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, Partial Dissenting Opinion of Judge Shahabuddeen, para. 12. [Reproduced in the accompanying notebook at Tab 40.] *Aleksovski* is actually an example of the concurrent-sentence doctrine at work, discussed *infra* pp. 33-35. Aleksovski had already been convicted of count 10, which was based on the same underlying acts as counts 8 and 9. "Thus, even if the verdict of acquittal were to be reversed by a finding of guilt on these counts, it would not be appropriate to increase the Appellant's sentence. Moreover any sentence imposed in respect of Counts 8 and 9 would have to run concurrently with the sentence on count 10." *Prosecutor v. Aleksovski*, Case No.: IT-95-14/1-A, Judgment, para. 153. [Reproduced in the accompanying notebook at Tab 32.]

[91] Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.20, 12 April 2001, Rule 107. [Reproduced in the accompanying notebook at Tab 14.]

By doing so, it violated the separation of powers established by the Statute.

4. Finding power not to remit is inconsistent with the Judges' obligation to remain impartial and to decide appeals on law only.

The majority's decision has serious consequences. Prosecutorial independence is critical to maintain public confidence in the Tribunal's work. "The independence, competence, and integrity of the Prosecutor's office is essential to ensure the credibility of the prosecutions it undertakes."[93] "The Tribunal must be fair and seen as fair. It must therefore respect basic norms of due process, including: an impartial and independent trial court; [and] a prosecutorial authority independent from the trial court . . . ."[94] The Judges recognized this when they created the Rules of Evidence and Procedure:

> Based on the limited precedent of the Nuremberg and Tokyo Trials, and in order for us, as judges, to remain as impartial as possible, we have adopted a largely adversarial approach to our procedures, rather than the inquisitorial approach found in Continental Europe and elsewhere.[95]

But they seem to have forgotten it now.

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[92] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, Partial Dissenting Opinion of Judge Wald, paras. 12-13. [Reproduced in the accompanying notebook at Tab 40.]

[93] Bassiouni, *supra* n. 57, at 833. [Reproduced in the accompanying notebook at Tab 62.]

[94] *Letter* from Madeleine K. Albright, Permanent Representative of the United States of America to the United Nations, to the Secretary-General of the United Nations, U.N. Doc. S/25575, 12 April 1993 (reprinted in Morris & Scharf, *Insider's Guide* vol. 2, 451). [Reproduced in the accompanying notebook at Tab 81.]

[95] Antonio Cassese, *Statement by the President Made*, U.N. Doc. IT/29, (reprinted in Morris & Scharf, *Insider's Guide* vol. 2, 650.) [Reproduced in the accompanying notebook at Tab 80.] "The Statute clearly contemplates that the Prosecutor will have an independent adversarial role, typical of the role of a prosecutor in a common- law system, as opposed to the less partial role of a civil law prosecutor (or standing judge)." Report of the American Bar Association Task Force on War Crimes in the Former Yugoslavia, Commenting on the United States' Draft Rules of Procedure and Evidence for the International Tribunal, U.N. Doc. IT/INF.6/Rev.2, 18 January 1994 (reprinted in Morris & Scharf, *Insider's Guide* vol. 2, 608). [Reproduced in the accompanying notebook at Tab 58.]

It is axiomatic that judges owe an obligation to be impartial. "The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law . . . ."[96] "Impartiality is characterized by objectivity in balancing the legitimate interests at play."[97] This is a particular concern in an ad-hoc Tribunal.[98] Tribunal Judges have sworn to uphold this principle. "Our sole ambition will be to administer justice and do so in an objective, neutral and equitable manner."[99]

It is also axiomatic that judges must avoid even the appearance of impropriety. Otherwise, credibility will be lost.

> The Chambers of the International Tribunal must act independently and impartially in the exercise of their judicial function, and . . . this independence and impartiality must not only be done, it must be seen to be done. Even an appearance of partiality or bias on the part of the Chambers would dangerously undermine the authority of the Tribunal, and render ineffective their efforts to fulfil the mandate of the Tribunal to dispense justice in accordance with the Statutes and the Rules.[100]

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[96] Basic Principles on the Independence of the Judiciary, no. 2 (endorsed A/RES/40/32, 29 November 1985). [Reproduced in the accompanying notebook at Tab 3.]

[97] *Prosecutor v. Kanyabashi*, Case No.: ICTR-96-15-A, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, 3 June 1999, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, para. 35. [Reproduced in the accompanying notebook at Tab 41.]

[98] Morris & Scharf, *The International Criminal Tribunal for Rwanda*, *supra* n. 64, 76, n. 370. [Reproduced in the accompanying notebook at Tab 69.]

[99] Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia, *Address to the Secretary-General at a Meeting of the Judges of the Tribunal* (The Hague, Netherlands, 21 Jan. 1994) (reprinted in ICTY, *Yearbook 1994*, at 144-148). [Reproduced in the accompanying notebook at Tab 79.]

[100] *Prosecutor v. Kanyabashi*, Case No.: ICTR-96-15-A, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, 3 June 1999, Joint Separate and Concurring Opinion of Judge Wang Tieya and Judge Rafael Nieto-Navia, para. 26. [Reproduced in the accompanying notebook at Tab 41.]; "It is generally recognised that, if there is an appearance of lack of independence and impartiality, the appellate court will not inquire into whether there was any actual prejudice." *Id.*, Dissenting Opinion of Judge Shahabuddeen, p. 24.

As Judge Shahabuddeen observed in *Kanyabashi*, "The issue is one of public confidence in the system of administering justice."[101] The test is not whether there has actually been any prejudice but whether "the events in question give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the judge was not impartial."[102]

The *Jelisić* decision fails this test. On appeal, the Appeals Chamber is required to pronounce judgment "on the basis of the record on appeal."[103] But the Appeals Chamber in *Jelisić* has overstepped this power. Although it determined that, "on the basis of the record on appeal," Jelisić was improperly acquitted, it pronounced judgment on other grounds, namely its subjective view that the case should not continue. To any fair-minded person, this action must call into question the motives of the Appeals Chamber. "To recognise a parallel power in judges to accept or reject cases on extra-judicial grounds invites challenges to their impartiality as exclusively definers and interpreters of the law."[104]

5. Finding power not to remit is inconsistent with the "letter and spirit" of the Statute.

Beyond the ramifications to the Tribunal's power structure and public confidence in its work, the *Jelisić* decision is contrary to the "letter and spirit" of the Statute. The

[101] *Prosecutor v. Kanyabashi*, Case No.: ICTR-96-15-A, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, 3 June 1999, Dissenting Opinion of Judge Shahabuddeen, p. 24. [Reproduced in the accompanying notebook at Tab 41.]

[102] *Id.*

[103] Rules of Procedure and Evidence, U.N. Doc. IT/32 Rev.20, Rule 117(A). [Reproduced in the accompanying notebook at Tab 14.]

[104] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, Partial Dissenting Opinion of Judge Wald, para. 14. [Reproduced in the accompanying notebook at Tab 40.]

Tribunal's object and purpose is "to do justice, to deter further crimes, and to contribute to the restoration and maintenance of peace."[105] It accomplishes these objectives by indicting, trying, and convicting "those persons responsible for serious violations of international humanitarian law."[106] It has primary jurisdiction to accomplish these goals, and can even retry a defendant tried in a national court if "effective means of adjudication were not guaranteed" there.[107] Stopping Jelisić's genocide trial is antithetical to this spirit of justice.

The decision in *Jelisić* does not do justice. The creation of the Tribunal was a statement that the world would not remain indifferent to horrific crimes committed in far away places.

> To be sure, tragedies such as the old unfolding before our eyes in the former Yugoslavia leave nature indifferent; nature proceeds along its eternal course, unconcerned with human events. But it is obvious that we, human beings, neither can nor should remain idle or indifferent.[108]

Yet the Appeals Chamber justifies its decision largely on the grounds that because it has limited resources and Jelisić has already pled guilty to other crimes, it can remain indifferent to genocide, despite its determination that there was sufficient evidence to

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[105] ICTY First Annual Report, *supra* n. 70, para. 11. [Reproduced in the accompanying notebook at Tab 55.]

[106] *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgment, para. 101. [Reproduced in the accompanying notebook at Tab 32]; "This Tribunal is charged with the sole responsibility for judging the perpetrators of some of the most heinous crimes known to man . . . ." Antonio Cassese, *Statement by the President*, *supra* n. 95 (reprinted in Morris & Scharf, *Insider's Guide* vol. 2, 651). [Reproduced in the accompanying notebook at Tab 80.]

[107] Secretary-General's Report, *supra* n. 72, paras. 64-66.

[108] Antonio Cassese, *Address to the Secretary-General at a Meeting of the Judges of the Tribunal*, *supra* n. 99. [Reproduced in the accompanying notebook at Tab 79.]

convict him.[109] This does not reflect the Appeals Chamber's view of justice; it reflects its opinion "as to which cases are 'worthy' and which are not."[110]

The decision also does little to deter future crime or contribute to peace. It is likely the ICTY and any future Tribunal will always operate under financial constraints. Under the *Jelisić* rationale, a defendant need only plead guilty to lesser crimes and he will potentially escape prosecution for greater acts. Escaping individual responsibility will not bring reconciliation. As Judge Cassese observed, "How can we prevent someone from instinctively hating a whole ethnic group, and thus leaving a spark of hatred to reignite the whole conflict, if the particular member of that group who has allegedly wrought havoc upon him or her is not brought to book?"[111]

Finally, the decision defeats the purpose of primacy. The Tribunal's goals supercede national ambitions. Even where an individual state is willing to try a person accused of these crimes, the Tribunal has primary jurisdiction.[112] The purpose of primacy is to remove cases from national jurisdictions where they can be subverted by extra-judicial concerns such as a state's concern for its judicial resources or its determination that a particular case is not worthy of prosecution after all. The decision in *Jelisić* allows these same concerns to infiltrate the Tribunal. "The fundamental purpose of the Tribunal is the prosecution of persons responsible for serious violations of

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[109] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, paras. 74-75. [Reproduced in the accompanying notebook at Tab 40.]

[110] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, Partial Dissenting Opinion of Judge Wald, para. 14. [Reproduced in the accompanying notebook at Tab 40.]

[111] Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia, *Address to the General Assembly of the United Nations* (New York, N.Y., 14 Nov. 1994) (reprinted in ICTY, *Yearbook 1994*, at 134-143). [Reproduced in the accompanying notebook at Tab 77.]

[112] Statute of the International Tribunal, Art. 9. [Reproduced in the accompanying notebook at Tab 17.]

international humanitarian law."[113] The Appeals Chamber should treat each case before it equally.

It is arguable that the Tribunal should only prosecute high status individuals and that Jelisić did not meet that criterion.[114] But the Prosecutor decides whom to prosecute, not the Appeals Chambers.[115] Moreover, the time to declare the Tribunal will not proceed with a case is at the indictment stage, before trial. A national jurisdiction would then be free to try the accused if it wanted to. Under Article 10, the majority's decision prevents any national jurisdiction from prosecuting Jelisić for genocide.

In his address to the General Assembly at the presentation of the Tribunal's First Annual Report, Judge Cassese acknowledged the steep obstacles in the Tribunal's path but he trumpeted its higher purpose:

> We, the members of the International Criminal Tribunal for the former Yugoslavia, are fully aware that the sentences we will pass will not exhaust the poisoned wells of racial, national or religious hatred. We also know, however, that the setting up of our Tribunal is intended to signal that the world community will not stand idly by, impassive or resigned, and watch while barbarous acts are perpetrated, unconcerned and unaffected by them only because they are committed in what is, for most of us, a far away land, the former Yugoslavia.[116]

The *Jelisić* decision signals an entirely different message to the world community: from time to time, the Tribunal will "stand idly by"—whenever the Appeals Chamber decides. For that reason alone, it is contrary to the letter and spirit of the Statute.

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[113] *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgment, para. 101. [Reproduced in the accompanying notebook at Tab 32.]

[114] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, Partial Dissenting Opinion of Judge Wald, para. 2.

[115] Jones, *supra* n. 69, at 548. [Reproduced in the accompanying notebook at Tab 68.]

[116] Antonio Cassese, *Address to the General Assembly of the United Nations*, *supra* n. 111. [Reproduced in the accompanying notebook at Tab 77.]

B. National jurisprudence does not reveal a discretionary power not to remit.

1. It is questionable whether national case law should be considered at all.

The *Jelisić* majority claims "national case law gives discretion to a court to rule that there should be no retrial."[117] At the outset, it is questionable whether the majority is justified in relying on national case law. As a general rule, the Tribunal should not blindly apply national norms in an international context for three fundamental reasons:[118]

1) "Reliance on legal notions or concepts as laid down in a national legal system can only be justified if international rules make explicit reference to national law or if such reference is necessarily implied by the very content and nature of the concept."[119]

2) The origins of international criminal procedure justify caution. As an amalgam of common-law and civil-law traditions, it is "unique and begets a legal logic that is qualitatively different from that of each of the two national criminal systems . . . ."[120]

3) National laws are designed to function in a specific setting with a particular interplay between one State's lawmaking, adjudication, and enforcement mechanisms. The Tribunal operates inter-State—a different setting entirely.[121]

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[117] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, para. 73. [Reproduced in the accompanying notebook at Tab 40.]

[118] *Prosecutor v. Erdemović*, Case No.: IT-96-22-A, Judgment, Separate and Dissenting Opinion of Judge Cassese, para. 2. [Reproduced in the accompanying notebook at Tab 35.]

[119] *Id.*, para. 3.

[120] *Id.*, para. 4.

[121] *Id.*, para. 5.

These considerations dictate that the Tribunal should only apply a national norm as last resort when a plain reading of the Statute and international law do not speak to an issue.[122]

In the *Jelisić* context, analyzing each of these considerations leads to a strong argument that the Appeals Chamber should not rely on national law. First, the Statute and the Rules of Procedure regulating the Chamber's power on appeal neither explicitly nor impliedly incorporate national law. Second, the tribunal Statute is an amalgam of common law and civil law traditions and is unique even in international law. Third, the major justification behind the English and American cases cited in support of the power is judicial economy but is questionable whether a national notion of judicial economy is appropriate in an international context.[123] The Tribunal has a higher calling.

2. Even if it is considered, the cases cited to support the Appeals Chamber's decision are either distinguishable or lack any strong rationale.

Even if we accept that national law can influence the analysis, the question is whether it should. A review of the cases cited to support the Chamber's exercise of discretion suggests that it should not. While Judge Shahabuddeen suggests that the "particularities are not . . . relevant to the general thinking,"[124] the opposite is true. The cases are either distinguishable or rest on weak foundations. In *Cosier*, the sole reason

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[122] *Id.*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 5. The Rome Statute codifies this hierarchy in Article 21. At the top are the Rome Statute and the Court's Rules of Procedure and Evidence. International law principles occupy the second tier, along with "established principles of the international law of armed conflict." Finally, if an issue cannot be resolved by applying the first two levels, the ICC may consider domestic law, including the law of the state which would "normally exercise jurisdiction over the crime." Schabas, *supra* n. 41, at 71-73. [Reproduced in the accompanying notebook at Tab 74.]

[123] *Supra* pt. A(5) (discussing why judicial economy concerns are different at the international level).

[124] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, Partial Dissenting Opinion of Judge Shahabuddeen, para. 20, n. 11. [Reproduced in the accompanying notebook at Tab 40.]

for disallowing a retrial was the passage of time—two years had elapsed from the time of the alleged crime to the appellate decision.[125] In *Barking*, the passage of time was again the sole consideration militating against a retrial but *Barking* is even less persuasive since the court was not even asked to decide the issue and the "significant lapse of time" was less than one year.[126] In *Griffith v. Jenkins*, the court did not remit the case because more than three years had passed since the alleged crime—the defendant's theft of three trout.[127]

Cosier, *Barking*, and *Griffith* hardly offer a powerful justification for canceling a genocide trial.[128] At most, they stand for the proposition that a court should not remit if the charged offense is trivial and a significant period of time has elapsed since the offense was committed. This amounts to dismissing a case for undue delay. The Chamber should hesitate to adopt the English notion of undue delay in trivial cases as its standard. None of the cases before the Tribunal involve "trivial" offenses and proper analysis of undue-delay concerns requires much more than the observation that a lot of time has passed.

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[125] "If a retrial were to be ordered by this court, it is likely to be some months ahead before the magistrates could find time to hear this case again with a reconstituted bench. In my view, considering all the circumstances of this case, the time passed is too long and a retrial should not now take place." *Director of Public Prosecution v. Cosier*, CO/4180/99, Q.B.D. (Crown Office List) 5 April 2000. [Reproduced in the accompanying notebook at Tab 27.]

[126] "Since, however, we are not asked by the prosecution to remit this case for further hearing (indeed it would be, in my judgment, wholly unjust to do so because of the very significant lapse of time that has occurred since the commencement of the original trial), it is unnecessary for any ruling to be made on that aspect of the case." *R. v. Barking and Dagenham Justices*, [1995] Crim. L.R. 953, Q.B.D. (Crown Office List) 1994. [Reproduced in the accompanying notebook at Tab 45.]

[127] *Griffith v. Jenkins*, [1991] Crim LR 616, Q.B.D. 1991. [Reproduced in the accompanying notebook at Tab 28.]

[128] It is charitable to characterize the cases as standing for a common proposition. Neither *Cosier*, *Barking*, nor *Griffith* cites any authority for the decision not to remit.

A fourth English case, *Botton v. Secretary of State*,[129] is distinguishable on its facts. In Botton, the court declined to remit an administrative matter even though a court rule said it must, because the relevant statute expressly gave the court discretion to prescribe its remit power. Since Article 25 does not give the Appeals Chamber this type of discretion, this decision is inapposite.

The American cases, *Hooper* and *Lindsey*,[130] do not lead to a better result. Both cases apply what is known as the concurrent-sentence doctrine. As Judge Wald established in her dissent, this doctrine has no applicability to the situation in *Jelisić*.[131] This is true primarily because that situation could never occur in U.S. courts. Under U.S. law, a prosecutor cannot appeal an acquittal entered after the court has received evidence. To do so would violate double jeopardy.[132] But even if the doctrine were extended to cover an appeal from an acquittal,[133] it would not apply on the facts in *Jelisić*.

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[129] *Botton v. Secretary of State for the Environment*, [1992] 1 P.L.R. 1, Q.B.D. 1991. [Reproduced in the accompanying notebook at Tab 26.]

[130] *United States v. Hooper*, 432 F.2d 604 (D.C. Cir. 1970) [Reproduced in the accompanying notebook at Tab 51]; *United States v. Lindsey*, 47 F.3d 440 (D.C. Cir. 1995) [Reproduced in the accompanying notebook at Tab 53].

[131] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, Partial Dissenting Opinion of Judge Wald, paras. 7-9. [Reproduced in the accompanying notebook at Tab 40.] Judge Wald should know—she wrote the *Lindsey* opinion.

[132] 18 U.S.C.S. § 3731 (2001) [Reproduced in the accompanying notebook at Tab 2]; Fed. R. Crim. P. 29 (2001) [Reproduced in the accompanying notebook at Tab 20]. This is true because under the American interpretation of the doctrine, jeopardy attaches when court first receives evidence, not after all appeals have been exhausted. *United States v. Jorn*, 400 U.S. 470 (1971) (plurality). [Reproduced in the accompanying notebook at Tab 52.] It is the mere act of making a factual determination that is critical. "The fact that the acquittal may result from erroneous interpretations of governing legal principles affects the accuracy of that determination, but it does not alter its essential character." *United States v. Lynch* 162 F.3d 732, 735 (2d Cir. 1998) (citation and internal quotations omitted). [Reproduced in the accompanying notebook at Tab 54.]

[133] *Attorney General v. Van Sou Leng*, [1989] 1 H.K.C. 27 [Reproduced in the accompanying notebook at Tab 23] suggests that the rationale supporting the power not to remit after a conviction is reversed equally supports the power not to remit after an acquittal is reversed. But this point is far from clear. An appeal from a conviction and an appeal from an acquittal do not implicate the same concerns. See e.g. *Griffith* [1991] Crim LR 616, Q.B.D. 1991 (where prosecutor successfully appeals against an acquittal and "where

The doctrine is a "rule of judicial convenience."[134] It can be invoked it only under certain conditions:

1) The defendant has been convicted on more than one count and the sentences on each run concurrently.

2) He appeals and the appellate court finds no error in at least one of the convictions.

3) The appeal presents a difficult legal issue with no controlling precedent.

4) No public interest is served by resolving the issue.

5) Declining to review the issue will not "impair any need of the government."[135]

If these conditions are met, the court can decline to reach the merits of the issue.[136] Significantly, however, the appeals court does not decline to reverse the conviction. Instead, it remands to the trial court with instructions to vacate the concurrent conviction and sentence. "If it later develops that the interest of justice so requires, the sentence can be reimposed on a concurrent basis."[137]

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the circumstances of the case are such that a rehearing is the only way in which the matter can be put right" court will normally order retrial. But "very different considerations may apply to the exercise of discretion to order a rehearing following a successful appeal against conviction by the defendant . . . ." [Reproduced in the accompanying notebook at Tab 28.]

[134] *Benton v. Maryland*, 395 U.S. 784, 791 (1969). [Reproduced in the accompanying notebook at Tab 25.] The D.C. Circuit Court of Appeals explains the rationale behind it: "We see no reason to devote our time and energies to the research, and opinion-writing, incident to appropriate determination of an issue not governed by controlling precedent when no public interest or need is furthered thereby. It better serves the general interest in the administration of justice if the court limits its resources to the determination of those questions and cases that must be decided." *United States v. Hooper*, 432 F.2d 604, 606 (D.C. Cir. 1970). [Reproduced in the accompanying notebook at Tab 51.]

[135] *Id.*

[136] *E.g. United States v. Cadona*, 650 F.2d 54 (5th Cir. Unit A 1981) [Reproduced in the accompanying notebook at Tab 49]; *United States v. Dorsey*, 865 F.2d 1275 (D.C. Cir. 1989) [Reproduced in the accompanying notebook at Tab 50].

[137] *United States v. Butera*, 677 F.2d 1376, 1386 (11th Cir. 1982) (citations omitted). [Reproduced in the accompanying notebook at Tab 48.]

In light of these conditions, the concurrent-sentence doctrine does not support the majority's decision for three obvious reasons: 1) Jelisić was not sentenced concurrently for the genocide count,[138] 2) there is a great public interest in prosecuting all war crimes,[139] and 3) the decision impairs the Prosecutor who specifically requested a new trial.[140]

If the U.S. cases are inapplicable and the English cases lack a strong rationale, it can hardly be said on the strength of them that "national case law gives discretion to a court to rule that there should be no retrial."

3. Other national law does not support the Appeals Chamber's decision either.

It is not surprising that when the time came to demonstrate that national law gives discretion, the Appeals Chamber could not cite to better support. In civil law jurisdictions, if there is sufficient evidence to prosecute an accused, judges are generally obligated to do so. A survey of common-law and mixed jurisdictions suggests the result there is no different, at least with respect to judges.[141] There is not a large body of national law supporting a power not to remit.[142]

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[138] Nor is it clear that the decision not to remit did not affect the length of Jelisić's sentence. Although the 40 years he did receive was substantial, "it might have been even more substantial had the accused also been convicted of genocide." *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, Partial Dissenting Opinion of Judge Wald, para. 9. [Reproduced in the accompanying notebook at Tab 40.]

[139] This was particularly true in *Jelisić* since, at that time, the Tribunal had yet to convict anyone of committing genocide in the former Yugoslavia.

[140] *Id.*

[141] Although the survey is admittedly small, it includes Turkey, Malaysia, Sri Lanka, and Guyana, the home states for Judges Güney, Vohrah, Gunawardana, and Shahabuddeen, respectively.

[142] The concurrent-sentence doctrine has not been universally accepted in U.S. courts either. *Dorsey*, 865 F.2d at 1280, n.2. [Reproduced in the accompanying notebook at Tab 50.]

a. Turkey.

Turkish criminal procedure has a mixed heritage, incorporating elements of the common-law accusatorial model and the civil-law inquisitorial system.[143] Judicial independence and impartiality are secured through constitutional provisions accepting the "principles of separation of the offices of prosecution (public prosecutor), and trial (court)."[144]

Appeals against trial court judgements in Turkey are governed by "The Ordinary Way of Cassation" (*temyiz*) and can be based only on a violation of the law.[145] If the Court of Cassation determines that law was violated, it reverses judgment,[146] and either remits the case to the originating court or enters judgment in place of the originating court.[147] The Court of Cassation is empowered to enter its own judgment in only four circumstances:

1) If a decision for acquittal or for the cessation of the investigation is necessary without further clarification of the fact.

2) If the Court of Appeal concurs with the assertion of the Chief Public Prosecutor for the application of the minimum degree of punishment prescribed by law.

3) If the law has been erroneously applied.

4) If the provisions of law regarding court fees and expenses are violated.[148]

[143] Yüksel Ersoy, *Criminal Procedure* in *Introduction to Turkish Law* 196 (Tugrul Ansay & Don Wallace, Jr. eds., Kluwer L. Intl. 1996). [Reproduced in the accompanying notebook at Tab 65.]

[144] *Id.* at 197.

[145] Feridun Yenisey, *Turkey (Fundamentals of Turkish Criminal Law and Criminal Procedure Law)* 136 in *Criminal Law* (Lieven Dupont & Cyrille Fijnaut eds., Kluwer L. & Taxn. Publishers Supp. 1995). [Reproduced in the accompanying notebook at Tab 76.]

[146] Turkish Code Crim. Proc. § 321 (trans., Fred B. Rothman & Co. 1962). [Reproduced in the accompanying notebook at Tab 19.]

[147] *Id.* at § 322.

[148] *Id.*

These circumstances are "exceptional."[149] Thus, under Turkish law, the appeals court has no discretion to decline to reverse if the law was violated and it remits to the trial court in all but four limited situations, none of which would apply in *Jelisić*.

b. Hong Kong

The result is similar in Hong Kong, although the appellate court there has broader discretion not to remit if it concludes the defendant is guilty. "An appeal by way of case stated lies against a verdict or order of acquittal made by a District Court Judge."[150] Under Section 84 (c) of the District Court Ordinance (Cap 336) which prescribes the power of the appellate court in Hong Kong, the Court of Appeal shall:

> (i) if it is satisfied that there is no sufficient ground for interfering, dismiss the appeal; or
>
> (ii) reverse the verdict or order and direct that the trial be resumed or that the accused be retried as the case may be, or find him guilty, record a conviction and pass such sentence on him as might have been passed on him by a judge;
>
> (iii) give all such necessary and consequential directions as it shall think fit.[151]

A plain reading of section 84(c) indicates that the legislature's intent "was to give the court power, having reversed the verdict, to direct either that the trial be resumed or that the accused be retried or, if there was plainly no point in sending the matter back to the

[149] Ersoy, *supra* n. 143, at 207. [Reproduced in the accompanying notebook at Tab 65.]

[150] Andrew Bruce, *Criminal Procedure: Trial on Indictment* vol. 1 (Butterworths Asia 1997). [Reproduced in the accompanying notebook at Tab 64.]

[151] Hong Kong District Court Ord. (Cap 336) § 84(c). [Reproduced in the accompanying notebook at Tab 8.]

lower court, to find him guilty and pass sentence."[152] This construction is buoyed by section 83E which provides that "where the Court of Appeal allows an appeal against conviction and it appears . . . that the interests of justice so require, it may order the appellant to be retried."[153]

Despite the plain language of the statute, the court in *Attorney General v. Van Sou Leng* declined to remit even though the defendant had been wrongfully acquitted.[154] Normally, it would have ordered the trial to resume, but the trial judge had retired and left Hong Kong. As the alleged offense occurred six years before, it was unclear if retrial would result in a conviction, and it was not the defendant's fault that the trial judge had retired, the court did not consider retrial appropriate. "The issue then becomes: do we have a power to, by making no order, take none of the steps set out in § 84(c)(i) and (ii)?"[155]

The Court acknowledged that since the acquittal was "founded on a plainly wrong basis in law," it could not find that there was "no sufficient grounds to interfere."[156] But

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[152] *Secretary for Justice v. Wong Sau Fong*, [1998] 3 H.K.C. 544, 17 (remitting case for trial after lower court had erroneously acquitted defendant for crimes allegedly committed three years before). [Reproduced in the accompanying notebook at Tab 46.] *Secretary for Justice* distinguished two earlier cases that had interpreted section 84 more narrowly. *Attorney General v. Yeung Sun Shun & Anor*, [1987] 2 H.K.C. 92 [Reproduced in the accompanying notebook at Tab 21] had reversed an acquittal and recorded a conviction. It wanted to remit for sentencing but interpreted section 84 to not allow that course. *Attorney General v. Ling Kar Fai (No. 2)*, [1997] 2 H.K.C. 651 [Reproduced in the accompanying notebook at Tab 22] had held that if the defendant was acquitted after he presented his case, the appeals court had no power to order trial to be resumed if it reversed the acquittal.

[153] Hong Kong Crim. Proc. Ord. (Cap 221) § 83E (1997). [Reproduced in the accompanying notebook at Tab 7.]

[154] *Attorney General v. Van Sou Leng*, [1989] 1 H.K.C. 27. [Reproduced in the accompanying notebook at Tab 23.]

[155] *Id.*

[156] *Id.* at 12. In the United States, this doctrine is known as the harmless-error rule. If the trial court's error would not affect the outcome of the case, the appellate court may dismiss the appeal despite the error.

it declined to interfere anyway. "The circumstances here are such that we thought the fairest way of disposing of this matter was to take the course we did."[157] The Court's concession that it had no power not to remit under a plain reading of the statute strongly suggests that the opinion was wrongly decided. The Court's acknowledgement that the only reason it did not order a retrial was because the judge had retired suggests that, in any event, the case is limited to its unusual facts. To date, it remains the sole Hong Kong case to take this action.

These cases reinforce the view that Article 25 and Rule 117(C) empower the Appeals Chamber to order a retrial in appropriate cases after reversing a conviction but do not empower it to decline to remit after reversing an acquittal. The initial options under section 84 mirror those under Article 25: the appeals court can affirm (dismiss appeal) or reverse. Unlike Article 25, section 84 details the court's options if it reverses: order trial to resume, order retrial, or find defendant guilty itself. Rule 117(C) can be read to fill in this gap somewhat: it authorizes Tribunal to order retrial. Under a plain reading of section 84, it is inappropriate to dismiss an appeal where acquittal is "founded on a plainly wrong basis in law." By the same logic, it is inappropriate to reverse the acquittal in *Jelisić* where it too was founded on a plainly wrong basis in law.

c. Malaysia

Malaysia has yet to address the existence of an appellate court's power not to remit, but the statute governing the High Court's power is similar to Hong Kong's, so one would expect a similar result.

> At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may—

[157] *Id.* at 14.

> (a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law; . . .[158]

In an appeal from the High Court to the Court of Appeal, the higher appellate court has similar powers:

> (1) At the hearing on appeal, the Court of Appeal . . . may thereupon confirm, reverse, or vary the decision of the High Court, or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised:
>
> Provided that the Court of Appeal may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.[159]

As in Hong Kong, the power to dismiss an appeal if there is no sufficient ground to interfere does not encompass the situation in *Jelisić*. Applying the wrong standard to determine if there was a case to answer at the close of the Prosecution's evidence is a "substantial miscarriage of justice."[160] In the same vein, on an appeal from conviction, a Malayan High Court judge observed:

> My decision ordering a rehearing therefore is way within the ambit of s 316 of the Criminal procedure Code. It would have been a travesty of

[158] Crim. Proc. Code (Act 593) (Revised-1999) § 316 (reprinted in *The Annotated Statutes of Malaysia*, vol. 5, part (2)1, (Malayan L. J. Sdn. Bhd. 2001)). [Reproduced in the accompanying notebook at Tab 6.]

[159] Courts of Judicature Act 1964 (Act 91) (Revised-1972) § 60 (reprinted in *The Annotated Statutes of Malaysia*, vol. 4A, part 10, (Malayan L. J. Sdn. Bhd. 2000)). [Reproduced in the accompanying notebook at Tab 4.]

[160] *Harun bin Abdullah v. Pendakwa Raya*, [1998] 3 M.L.J. 1. [Reproduced in the accompanying notebook at Tab 29.]

> justice if I had not meted out that order when the evidence adduced by the prosecution deserved a serious consideration by a court of justice.[161]

Thus, the appellate court in Malaysia must either reverse the order and remit for trial or find the defendant guilty.

d. Sri Lanka

Except for the omission of a few commas, the Code of Criminal Procedure in Sri Lanka is identical to the Criminal Procedure Code in Malaysia:

> At the hearing of the appeal the court may if it considers that there is no sufficient ground for interfering dismiss the appeal or may—
>
> (a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made or that the accused be re-tried or committed for trial as the case may be or find him guilty and pass sentence on him according to law; . . .[162]

The interpretation of the proviso is also similar.[163]

e. Guyana

In Guyana, the Prosecutor cannot appeal an acquittal.[164] Like the United States, Guyana interprets the right against double jeopardy to prohibit retrial after an acquittal on the merits.[165] Even on an appeal from a conviction, however, the appellate court in

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[161] *Hamid's Criminal Procedure* 802 (Hamid Ibrahim & Maimoonah Hamid eds., Sweet & Maxwell Asia 1998) citing *Rozi b Ramli v. Pendakwa Raya* [1998] 1 J Cr 107, 116. [Reproduced in the accompanying notebook at Tab 66.]

[162] Sri Lanka Code Crim. Proc. (Cap. 26) §§ 328, 337 (1980). [Reproduced in the accompanying notebook at Tab 15.]

[163] *Mannan v. Republic of Sri Lanka*, [1990] 1 Sri L.R. 280 [Reproduced in the accompanying notebook at Tab 30]; *Surasena v. Republic of Sri Lanka*, [1994] 3 Sri L.R. 400 [Reproduced in the accompanying notebook at Tab 47].

[164] The term "'appeal' means an appeal by a person convicted upon indictment . . . ." Guyana Court of Appeals Act (Cap. 3:01) § 11 (1972). [Reproduced in the accompanying notebook at Tab 5.]

[165] W. James & H. A. Lutchman, *Law and the Political Environment in Guyana* 149, 159 (University of Guyana 1984). [Reproduced in the accompanying notebook at Tab 67.]

Guyana does not have discretion to allow an appeal but not grant relief. The Court of Appeal "shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered, or if the interests of justice so require, order a new trial."[166]

C. The facts the Appeals Chamber relies upon to exercise its discretionary power are not exceptional.

Perhaps aware of its shaky legal foundation, the Appeals Chamber stresses that the power not to remit should be invoked only "on proper judicial grounds."[167] It identifies five factors to consider: 1) fairness to the accused, 2) the interests of justice, 3) the nature of the offences, 4) the circumstances of the case in hand, and 5) considerations of public interest. Based on these factors, it found five facts significant:

1. Jelisić had already been convicted for the same acts on which genocide count was based, and the Chamber had resolved the legal issues surrounding that count for future cases.

2. It was not Jelisić's fault the Trial Chamber erred.

3. Considerable time will have elapsed between date offenses committed and any retrial.

4. The Tribunal has limited resources.

5. Jelisić needs psychiatric help.

Neither *Cosier*, *Barking*, nor *Botton*[168] addressed these concerns and the Chamber does not explain how it developed its five-factored test.[169] Whatever its source, the majority's

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[166] Guyana Court of Appeals Act (Cap. 3:01) § 13. [Reproduced in the accompanying notebook at Tab 5.]

[167] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, para. 73. [Reproduced in the accompanying notebook at Tab 40.]

[168] *Cosier*, CO/4180/99, Q.B.D. 2000 [Reproduced in the accompanying notebook at Tab 27]; *Barking and Dagenham Justices*, [1995] Crim. L.R. 953 [Reproduced in the accompanying notebook at Tab 45]. *Botton*, [1992] 1 P.L.R. 1, Q.B.D. 1991. [Reproduced in the accompanying notebook at Tab 26.]

conclusion that applying it in *Jelisić* results in "exceptional" circumstances stretches the meaning of that word.

In the first place, none of the facts seems particularly unusual. Defendants before the Tribunal are often charged with multiple crimes based on the same conduct and may be convicted of each if the necessary elements are proven. Because it took time to establish the Tribunal and more time to convince certain national authorities to cooperate with it, considerable time has elapsed between the date most defendants allegedly committed offenses and the date they were brought to trial. The Tribunal's limited resources affects every case.

More importantly, even if they were unusual, the facts do not provide a strong justification for ending Jelisić's trial. The first fact—a circumstances-of-the-case consideration—is perhaps the most troubling. In essence, the Appeals Chamber makes a value judgment that because Jelisić had already pled guilty to some crimes, there was no point in attempting to convict him of genocide. As Judge Shahabuddeen properly rebuked: this was not some academic exercise. Moreover, "the proceedings of the Trial

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[169] They bear some resemblance to factors considered when a court considers whether to retry a defendant after reversing his conviction. See e.g. *Molapisi v. State* [1985] B.L.R. 538 (reprinted in D.D. Ntanda Nsereko, *Criminal Procedure in Botswana: Cases and Materials* 503-505 (Pula Press 1998)) (an appellate court will order a retrial if 1) there has been a miscarriage of justice, 2) there is a substantial case against the defendant, 3) no special circumstance makes it oppressive to retry him, 4) the alleged offense is not trivial, and 5) it would be an even greater injustice to not retry him). [Reproduced in the accompanying notebook at Tab 31.]

To the extent they are drawn from national case law, it is questionable whether they should be adopted wholesale into Tribunal jurisprudence. Judge Cassese has observed that if the Tribunal relies on a national norm, it will most often need to adapt it to the international context rather than directly adopt it. *Prosecutor v. Erdemović*, Case No.: IT-96-22-A, Judgment, Separate and Dissenting Opinion of Judge Cassese, para. 6. [Reproduced in the accompanying notebook at Tab 35.] Judge Pocar acknowledges this point in his concurring opinion in *Jelisić*. "It is my view that the issue should be approached prudently, avoiding the application, in a mechanical fashion, of national solutions without assessing whether they may require adaptations to the needs of procedure before this Tribunal . . . ." *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, Partial Dissenting Opinion of Judge Pocar, para. 5, n. 2. [Reproduced in the accompanying notebook at Tab 40.] In fact, the Appeals Chamber used this approach in *Jelisić* to interpret Rule 98 *bis*. *Id.*, Judgment, para. 33.

Chamber on the particular charge were not an unimportant incident in contested proceedings relating to other matters as well; they were the only contested proceedings in the whole case."[170] Important aspect of Tribunal's mission is to document the full extent of the crimes in the former Yugoslavia. The fact that Jelisić was convicted of lesser crimes should not be justification for abdicating that responsibility.

The fact Jelisić was not at fault for the Trial Chamber's error—another circumstances-of-the-case consideration—can hardly be deemed decisive. While it makes sense as a species of the unclean-hands or invited-error doctrine, there is no evidence the Prosecutor was responsible for the Trial Chamber's error either so why should this fact favor Jelisić?

As suggested above, the length of time that has passed from the date Jelisić committed his crimes is not particularly unusual. Considering the potential of any specific unfairness to Jelisić changes nothing. While nine years may have passed since Jelisić committed the crimes at issue, only three years have passed since his initial appearance at the Tribunal. The appeals process covered about half of that time and Jelisić was largely responsible for this delay by requesting four separate extensions of time to file various briefs. The majority balks at remitting because it will take even more time to conduct the retrial, but retrials will always take time so this is hardly a distinguishing factor in Jelisić's case.[171] If the Appeals Chamber is balking at the unfairness of subjecting Jelisić to retrial after being acquitted, this is not persuasive.

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[170] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, Partial Dissenting Opinion of Judge Shahabuddeen, para. 25. [Reproduced in the accompanying notebook at Tab 40.]

[171] Article 25 anticipates new trial so must expect delay. *Id.*, Partial Dissenting Opinion of Judge Wald, para. 10.

Allowing the prosecutor to appeal an acquittal is already "unfair" by this logic but the Statute allows it.

As previously discussed,[172] it is doubtful that a concern for the Tribunal's resources should determine the outcome of an appeal at all. The Appeals Chamber should apply the law and not make policy choices. If it considers the public's interest in resource use, however, it should take its cue from the Prosecutor, the public's representative. If, as in *Jelisić*, the Prosecutor asks the Chamber to remit, it should be inferred that it is in the public interest to do so, despite the drain on resources. In any case, it is a fact that should be considered sparingly.[173]

The last fact, Jelisic's need for psychiatric treatment, is an appeal to fairness but it is hard to see how the Appeals Chamber can rely upon it. The Trial Chamber has already decided that Jelisić is fit to stand trial.[174] There was no evidence suggesting that assessment had changed. Ill health is not even a good reason to withdraw an indictment. "No matter how critical the medical reasons cited may be, nothing in the Statute or Rules authorises the withdrawal for those reasons on an indictment for major crimes which the International Criminal Tribunal must judge . . . ."[175]

Significantly, the majority fails to consider the nature of the offenses and the interests of justice. These factors of course will always weigh heavily in favor in

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[172] *Supra* pt. III A(5).

[173] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, Partial Dissenting Opinion of Judge Shahabuddeen, para. 27. [Reproduced in the accompanying notebook at Tab 40.]

[174] *Id.*, Partial Dissenting Opinion of Judge Shahabuddeen, para. 24.

[175] Jones, *supra* n. 69, at 277-278 [Reproduced in the accompanying notebook at Tab 68] citing *Prosecutor v. Dukić*, Case No.: IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 April 1996. This decision is apparently not publicly available.

remitting. The crimes subject to the Tribunal's jurisdiction are not trivial. Crimes against humanity, war crimes, and genocide are the most horrific crimes one human can inflict on another. Properly considering the interests of justice requires more than a concern for the accused. "The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice mean only the interests of prisoners."[176] The interests of justice are also not limited to the interests of the Prosecution although its view is certainly a factor.

> They include the interests of the public . . . that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of a technical blunder by the judge . . . .[177]

The interests of the public in the former Yugoslavia and in the world at large to prosecute suspected war criminals are high enough that Jelisić and others like him should not escape justice merely because of a "technical blunder" by the Trial Chamber.

An additional factor may come into play in a future case: the fact that a case would have to be remitted to a newly constituted Trial Chamber. Judge Wald mentions this factor in passing[178] and national cases frequently grapple with it.[179] Tribunal judges serve limited terms so it is likely that even if an appeal is resolved in a short period of time, a particular judge may not be available to rehear the case. A proper analysis of this issue is beyond the scope of this memorandum, but it does not appear that it will be

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[176] *Hamid's Criminal Procedure*, *supra* n. 161, 800 [Reproduced in the accompanying notebook at Tab 66] quoting *Rex v. Grondkowski* [1946] 1 KB 369, 372.

[177] *Id.*, para. 28 quoting *Au Pui-Kuen v. Attorney General of Hong Kong*, [1979] 1 All ER 769. [Reproduced in the accompanying notebook at Tab 24.]

[178] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, Partial Dissenting Opinion of Judge Wald, para. 2. [Reproduced in the accompanying notebook at Tab 40.]

[179] *See e.g. Griffith v. Jenkins*, [1991] Crim LR 616, Q.B.D. 1991 [Reproduced in the accompanying notebook at Tab 28].

decisive. At the twenty-fourth plenary session, held two weeks after *Jelisić* was decided, the Judges amended the Rule 119 to address a similar situation.[180] The Rome Statute authorizes the Appeals Chamber to remand to a different trial chamber.[181]

In sum, the factors the majority relies upon to halt Jelisić's genocide trial are poorly conceived. Fairness to the accused does not require the Chamber to acquit him when the Trial Chamber makes a mistake. If the Appeals Chamber accepts the prosecutor's right to appeal, it must live with the consequences when an acquittal is reversed. If it is concerned about delay, the defendant has other protections and remedies. If it is concerned about Jelisić's mental problems, it can take them into account during sentencing.[182]

D. *Jelisić's* impact on the Rwanda Tribunal.

The ICTY's decision in *Jelisić* has implications for the ICTR. The two Tribunals share a common Appeals Chamber.[183] The Rwanda Statute and Rules of Procedure and Evidence include language identical to Article 25 and Rule 117(C),[184] and the ICTR

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[180] ICTY Amendments to the Rules of Procedure and Evidence, IT/193. [Reproduced in the accompanying notebook at Tab 10.] The last sentence of Rule 119 now reads: "If, at the time of the request for review, any of the Judges who constituted the original Chamber are no longer Judges of the Tribunal, the President shall appoint a Judge or Judges in their place."

[181] Schabas, *supra* n. 41, at 134. [Reproduced in the accompanying notebook at Tab 74.]

[182] *Prosecutor v. Jelisić*, Case No.: IT-95-10-A, Judgment, Partial Dissenting Opinion of Judge Shahabuddeen, para. 25. [Reproduced in the accompanying notebook at Tab 40.]

[183] Statute of the International Tribunal for Rwanda (annexed to S/RES/955 (1994)), Art. 12(2). [Reproduced in the accompanying notebook at Tab 18.]

[184] *Compare* Rules of Procedure and Evidence, U.N. Doc. ICTR/3/Rev., 31 May 2001,Rule 118(C) ("In appropriate circumstances the appeals Chamber may order that the accused be retried before the Trial Chamber") [Reproduced in the accompanying notebook at Tab 12] *with* Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.20, 12 April 2001, Rule 117(C) ("In appropriate circumstances the Appeals Chamber may order that the accused be retried according to law") [Reproduced in the accompanying notebook at Tab 14]; *compare* Statute of the International Tribunal for Rwanda, Art. 24 [Reproduced in the accompanying notebook at Tab 18] *with* Statute of the International Tribunal, Art. 25 [Reproduced in the accompanying notebook at Tab 17].

employs the same interpretative rules.[185] Although international courts are historically not bound by precedent, the *ad hoc* Tribunals are unique, borrowing from common-law and civil-law systems which do rely on precedent.[186] The extent to which *Jelisić* is binding on the ICTR is therefore an important question.

The Statutes and the Rules do not specify how the Tribunals should use precedent, if at all.[187] In theory, there are three possible results: prior decisions have no impact, they are binding precedent, or they are persuasive authority. In *Aleksovski*, the ICTY Appeals Chamber held that it was bound it "follow its previous decisions" and would only depart from them in exceptional cases where there were "cogent reasons in the interests of justice" to do so.[188] Dicta in *Aleksovski* also suggested that ICTY Appeals Chamber decisions are binding on ICTY Trial Chambers.[189]

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[185] "The Appeals Chamber agrees with the Prosecutor on the applicability *mutatis mutandis*, of the Vienna Convention on the Law of Treaties to the Statute." *Prosecutor v. Bagosora*, Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming judge dismissing an indictment against Théoneste Bagosora and 28 others, Case No.: ICTR-98-37-A, 8 June 1998, para. 28 [Reproduced in the accompanying notebook at Tab 33]; see also *Prosecutor v. Kanyabashi*, Case No.: ICTR-96-15-A, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, 3 June 1999, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, para. 15 and Joint Separate and Concurring Opinion of Judge Wang and Judge Nieto-Navia, paras. 10-13. [Reproduced in the accompanying notebook at Tab 41.]

[186] *Prosecutor v. Aleksovski*, Case No.: IT-95-14/1-A, Judgment, paras. 92-93. [Reproduced in the accompanying notebook at Tab 32.]

[187] Morris & Scharf, *The International Criminal Tribunal for Rwanda*, *supra* n. 64, 91, n. 428. [Reproduced in the accompanying notebook at Tab 69.]

[188] *Prosecutor v. Aleksovski*, Case No.: IT-95-14/1-A, Judgment, paras. 107, 109. [Reproduced in the accompanying notebook at Tab 32.] This is not a novel concept. Civil-law jurisdictions are not bound by prior decisions although they endeavor to follow them, and the *stare decisis* doctrine in common–law jurisdictions still allows a court to depart from precedent when appropriate. Judge Hunt emphasizes the nature of this obligation: the Appeals Chamber cannot depart from precedent just because it does not agree with it. *Id.*, Declaration of Judge David Hunt, para. 8.

[189] *Id.*, Judgment, para 113; *Id.*, Declaration of Judge David Hunt, para. 10 (clarifying that it is dicta). [Reproduced in the accompanying notebook at Tab 32.]

Aleksovski raises two questions: 1) does the mandate to follow "its previous decisions" apply with equal force when the Chamber is sitting as the Appeals Chamber for the ICTR; and 2) are ICTY Appeals Chamber decisions binding on ICTR Trial Chambers. The answers are not obvious. While the purpose of the common Appeals Chamber is to ensure uniformity in the decisions of the two Tribunals,[190] the separate nature of the Tribunals' Trial Chambers could lead to anomalous results. The ICTR Trial Chamber in *Kanyabashi* has already indicated that ICTY Appeals Chamber decisions are merely persuasive authority.[191] If those same decisions were binding on the ICTR Appeals Chamber, it would invert the hierarchical structure of the Tribunals. The Appeals Chamber will have to resolve this conflict in a future case.

Assuming *Jelisić* would be binding on the ICTR Appeals Chamber, there are cogent reasons to depart from it. *Jelisić* was decided on a wrong legal principle. The majority did not interpret Article 25 as required by the Vienna Convention and reached a resolution that is contrary to the letter and spirit of the Tribunal's Statute. Even if *Jelisić* is not binding, the Prosecutor may face an uphill battle on appeal from an ICTR case since many of the same judges who decided *Jelisić* would likely decide the ICTR case. Moreover, the Prosecutor could not count on Judge Wald—she is no longer in the Appeals Chamber.[192]

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[190] Jones, *supra* n. 69, at 49. [Reproduced in the accompanying notebook at Tab 68.]

[191] *Id.* ICTR Trial Chambers have treated ICTY Trial Chamber decisions the same way. See e.g. *Prosecutor v. Rutaganda*, Case No.: ICTR-96-3-T, Decision on the Preliminary Motion Submitted by the Prosecutor for Protective Measures for Witnesses, 26 September 1996. [Reproduced in the accompanying notebook at Tab 43.]

[192] The current Appeals Chamber judges: Judge Claude Jorda (France), President; Judge Mohamed Shahabuddeen (Guyana); Judge Lal Chand Vohrah (Malaysia); Judge Rafael Nieto-Navia (Colombia); Judge Fausto Pocar (Italy); Judge Mehmet Güney (Turkey); Judge Asoka de Zoysa Gunawardana (Sri Lanka).