APPEALS ON ERRORS OF FACT – ASSESSING THE REPUTATIONAL CONSEQUENCES OF THE ICTY APPEALS CHAMBER'S INTERVENTIONIST APPROACH

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ABSTRACT

ICTY trial judgements were subject to appeal on questions of law and of fact. For appeals on questions of fact, the ICTY Appeals Chamber would defer to the trial chamber's findings unless no reasonable trier of fact could have reached the original decision. In such cases, the Appeals Chamber would overturn a decision that was predicated on the erroneous finding only if the error had occasioned a miscarriage of justice. This standard of review *prima facie* appears appropriate and reflects standards of appellate review in domestic legal systems as well as being mirrored in other international courts and tribunals. However, in practice the Appeals Chamber appeared to show little deference to the trial chambers; in a majority of ICTY trials, first instance factual findings were found on appeal to have been ones that no reasonable trier of fact could have reached. By implicitly identifying the judges responsible for those judgements as lacking the capability to perform the basic function of reasonably assessing the evidence presented at trial, the Appeals Chamber unnecessarily raised doubts about the judicial professionalism of the institution. Greater adherence to the principle of deference coupled with a reframing of the standard of review could have helped in avoiding this outcome.

I. INTRODUCTION

Trial judgements of the International Criminal Tribunal for the former Yugoslavia (ICTY) could be appealed both on matters of law and of fact. As a consequence of the scope, scale and complexity of the cases tried before the ICTY and absent any requirement for parties to obtain leave to appeal a trial judgement, almost all judgements were appealed by either or both parties.[1] This opportunity for extensive appellate consideration of fundamental matters of law produced a large body of jurisprudence that propelled the development of the new discipline of international criminal law (just one notable example being the Tadić Appeal Judgement's confirmation that Joint Criminal Enterprise serves as a mode of liability for international crimes). This paper, however, focuses on the less-studied matter of how the Appeals Chamber dealt with appeals on points of fact. Though this subject is of less significance to the development of substantive law, the Appeals Chamber's approach to appeals against the factual findings made by trial chambers is of considerable importance to the reputational legacy of the institution.

A survey of the ICTY's appellate jurisprudence reveals that more than half of all appeals against judgements resulted in the Appeals Chamber identifying errors in the respective trial chambers' findings of fact. Based on the standard of review applied by the Appeals Chamber, the identification of any error made by a trial chamber in reaching its factual findings implied that the trial chamber had failed to perform the most basic judicial function of arriving at reasonable findings based on

[1] As well as Defence appeals against conviction, the ICTY Office of the Prosecutor was able to appeal against acquittals.

the evidence presented at trial. This undesirable consequence arises directly from the way in which the standard of review generally was framed by the Appeals Chamber; however, no corrective wording was ever adopted (for example, the problem could have been addressed by framing the threshold in terms of the reasonableness of the impugned finding rather than the reasonableness of the trier of fact). The implication therefore remained that a large number of the tribunal's judges were considered by their peers sitting as appeals judges to have demonstrated their inability to make reasonable findings of fact.

II. STANDARD OF FACTUAL REVIEW

The ICTY Appeals Chamber in its Appeal Judgements regularly recited the applicable standard of review for factual findings made in a trial judgement. The following exposition, taken from the Popović et al. Appeal Judgement, helpfully illustrates the application of the standard:[2]

> *19. When considering alleged errors of fact, the Appeals Chamber will determine whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt. In reviewing the findings of the trial chamber, the Appeals Chamber will only substitute its own finding for that of the trial chamber when no reasonable trier of fact could have reached the original decision… It is not any error of fact that will cause the Appeals Chamber to overturn a decision by a trial chamber, but only one that has occasioned a miscarriage of justice.*
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> *20. In determining whether or not a trial chamber's finding was reasonable, the Appeals Chamber will not lightly disturb findings of fact by a trial chamber. The Appeals Chamber recalls, as a general principle, the approach adopted by the Appeals Chamber in Kupreškić et al., wherein it was stated that:*
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> > *Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.*

The Appeals Chamber further explained that the same standard applied whether in respect of a Prosecution appeal against acquittal or a Defense appeal against conviction, taking into account

[2] Popović et al. Appeal Judgement, paras. 19-20. Note that internal footnotes have been omitted from this and other quotations used in this paper. For other examples, *see*, *e.g.*, Tolimir Appeal Judgement, para. 11 *et seq*.; Đorđević Appeal Judgement, para. 16 *et seq*.; Sainović et al. Appeal Judgement, para. 22 *et seq*.

the burden of proof when determining the significance of the impugned finding (*i.e.*, whether the correction of the error would eliminate reasonable doubt vs. whether it would create reasonable doubt).[3]

Reasonableness. There is some minor variation in the language that was used to express the appellate standard of review for factual findings. Thus, on different occasions the Appeals Chamber in formulating the standard referred to "*any reasonable person*";[4] a "*reasonable tribunal of fact*";[5] and most commonly, a "*reasonable trier of fact*".[6] These alternative formulations do not, however, reveal any evolution of, or divergence in, the relevant standard for reasonableness.

It is noticeable that other than in the context of a handful of dissents and other minority opinions, the concept of the reasonable trier of fact (or the semantic equivalent thereof) has not been explained or examined in detail in the ICTY's appellate jurisprudence.[7] The same is true of the relevant academic literature; although the standard of factual review has been set out in various publications, these descriptions have not been accompanied by any detailed analysis as to the way in which the Appeals Chamber actually applied itself to the task of considering appeals on questions of fact.[8]

Absent any contrary judicial precedent, it is appropriate to apply a natural reading of the term "reasonable trier of fact." Accordingly, it must be understood that the reasonable trier of fact is not endowed with any qualities or skills above and beyond those possessed by any fair-minded person. For example, it must be right, as the Appeals Chamber noted in the Tadić Appeal Judgement, that, "…*two judges, both acting reasonably, can come to different conclusions on the*

[3] *Op. Cit.*, para. 21.
[4] Tadić Appeal Judgement, para. 64.
[5] Mucić (Čelebići) Appeal Judgement, para. 204. As an interesting aside (at least in terms of its semantic logic), according to the phrasing of this paragraph the specific standard being applied was whether a finding of fact could "…*reasonably been made by a reasonable tribunal of fact*," implying a dual requirement of reasonableness (*i.e.*, not only that the tribunal of fact should be reasonable, but that the impugned finding of fact should itself be reasonable).
[6] *See*, *e.g.*, Furundžija Appeal Judgement, para. 38.
[7] It is unsurprising that the clearest views on the matter appear in minority opinions, given the tendency of the authors of such opinions to set out in unambiguous terms the reasoning that has led them to diverge from the position of the majority.
[8] For more thorough accounts concerning appeals on findings of fact before the ICTY, *see* Appellate Review in the International Criminal Tribunals, Fleming, 37 Texas International Law Journal 2002, and Appeal and Sentence in International Criminal Law, Jan Philipp Book, 2011, at p. 182 *et seq*. (the latter, containing a discussion of the nature of the ICTY Appeals Chamber's reasonableness test and a proposed categorisation of errors of fact but not going on to analyse the extent to which the Appeals Chamber developed an interventionist approach in the face of appeals on questions of fact). *See also*, *inter alia*, Treatise on International Criminal Law, Volume III: International Criminal Procedure, Ambos, 2016, at p. 554 *et seq*.; International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems, Carter and Pocar, 2013, at pp. 204 *et seq*.; International Criminal Procedure: Principles and Rules, Sluiter, Friman, Linton, Vasiliev and Zappalà (eds), 2013, Ch. 6: "Appeals, Reviews and Reconsideration"; Mark A. Drumbl and Kenneth S. Gallant, Appeals in the *Ad Hoc* International Criminal Tribunals: Structure, Procedure, and Recent Cases, 3 J. App. Prac. & Process 589 (2001).

basis of the same evidence."[9] In the same case, Judge Shahabuddeen in a separate opinion elaborated on this principle:

> …[W]*here there is a difference in assessment of facts, the Appeals Chamber will not simply substitute its assessment for that of the Trial Chamber. As it was said by Brierly, "different minds, equally competent, may and often do arrive at different and equally reasonable results". Similarly, it has been remarked that "[t]wo reasonable [persons] can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable"…*[10]

Deference to the Trial Chamber. Having established this reasonableness standard, the Appeals Chamber explained in clear terms why there should be deference to the trial chamber as primary trier of fact:

> *The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer…*[11]

Indeed, as Judge Shahabuddeen noted in his dissent to the Vasiljević Appeal Judgement, "*It is good law that the Appeals Chamber has to presume that all relevant evidence was taken into consideration by the Trial Chamber even if not expressly referred to by it*."[12]

This principle of deference came under particular scrutiny in cases in which new evidence was sought to be introduced on appeal. In such cases, there was an inherent tension between the principle of deference and the position that, when presented with admissible new evidence, the Appeals Chamber had to assess whether to replace any of the trial chamber's findings of fact with its own findings, the latter necessarily being informed by evidence that had not been available to the trial chamber.

Judge Weinberg De Roca in the Blaškić Appeal Judgement addressed this problem in her dissent. She contended that the majority had disregarded the deference that should have been accorded to the Blaškić trial chamber, which had based its judgement on the extensive body of evidence that had been received during a two-year trial:

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[9] Tadić Appeal Judgement, para. 64.
[10] *Id.*, Separate Opinion of Judge Shahabuddeen, para. 30.
[11] Kupreškić et al. Appeal Judgement, para. 32. *See also* Mucić Appeal Judgement, para. 330: "*The Trial Chamber, as the trier of facts, is in the best position to assess and weigh the evidence before it, and the Appeals Chamber gives a margin of deference to a Trial Chamber's evaluation of the evidence and findings of fact*." *See also* Popović et al. Appeal Judgement, Separate and Dissenting Opinions of Judge Niang, para. 9.
[12] Vasiljević Appeal Judgement, Separate and Dissenting Opinion of Judge Shahabuddeen, para. 15.

> *2.* [In disregarding the deference due to the trial chamber,] *the Appeals Chamber announces a new standard of review. This new standard empowers the Appeals Chamber to independently assess whether "it is itself convinced beyond reasonable doubt as to the finding of guilt." In making this assessment, the Appeals Chamber limits its examination of the trial record to those portions of the record cited in the Trial Judgement or mentioned in the parties' submissions. As a consequence, in evaluating the additional evidence admitted on appeal the Appeals Chamber neglects to consider the totality of the evidence...*[13]

She went on to recite the "reasonableness" standard applicable to the review of findings of fact, noting that in all previous appeals this standard had been applied "*regardless of whether additional evidence was adduced on appeal*."[14] She contended that the majority of the Blaškić Appeals Chamber had diverged from this consistent line of jurisprudence:

> *5. It is well established that the Appeals Chamber should not lightly overturn a Trial Chamber's findings of fact… Even where additional evidence is admitted on appeal, the Appeals Chamber hears only a very a small percentage of the total witnesses. In this case, the Appeals Chamber heard six witnesses over four days and admitted 108 pieces of evidence, compared to the Trial Chamber's 158 witnesses and 1300 pieces of evidence.*
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> *6. I accept that in cases involving additional evidence, the Appeals Chamber is less deferential because it becomes the primary trier of fact in relation to the new evidence. It should nevertheless still defer, to the extent possible, to the Trial Chamber's evaluation of the evidence in relation to matters unaffected by the additional evidence… The primary question remains whether no reasonable trier of fact could have reached the finding of fact in the trial judgement. In cases involving additional evidence this analysis is undertaken in light of the new evidence, the probative value of which the Appeals Chamber is free to assess without deference to the Trial Chamber. But this evaluation of additional evidence must be undertaken together with a consideration of the evidence in the trial record, with deference observed where possible.*
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> *7. …The Appeals Chamber's explanation is that its new standard is necessary because "if it were to apply a lower standard, then the outcome would be that neither in the first instance, nor on appeal, would a conclusion of guilt based on the totality of evidence relied upon in the case... be reached by either Chamber, beyond reasonable doubt." This argument seems to suggest that a single chamber should evaluate the totality of the evidence available before reaching a conclusion of guilt beyond a reasonable doubt. However, it is apparent that the Appeals Chamber does not consider the totality of the*

[13] Blaškić Appeal Judgement, Partial Dissenting Opinion of Judge Weinberg de Roca.
[14] *Id.*, para. 3.

available evidence, but rather only those elements of the record which are referred to in the Trial Judgement or by the parties. Thus, the only reason advanced to support the new standard of review is undermined by the Appeals Chamber's own application of the standard to the facts of this case.[15]

Judge Shahabuddeen gave his support to this position in his dissent to the Stakić Appeal Judgement. His dissent concerned how to treat first instance factual findings when the Appeals Chamber considered that the trial chamber had applied an incorrect legal test. In order to determine an accused's liability according to the corrected legal standard, the majority considered that the trial chamber's factual findings required new analysis in order to take the appropriate legal standard properly into account. Against this background, Judge Shahabuddeen expressed his views as follows:[16]

4. The Appeals Chamber's approach to the Trial Chamber's factual findings remains deferential even in the event that the Appeals Chamber finds legal error. The mere circumstance that the Appeals Chamber corrects the legal standard applied by the Trial Chamber to its factual finding does not suffice to vacate the Trial Chamber's factual finding (for example, that the accused held a gun). The Trial Chamber's factual finding remains, unless it is set aside in the manner aforesaid; the correct legal standard must be applied to the Trial Chamber's factual finding. If it is contended that there should be a different factual finding, it has to be shown that no reasonable tribunal of fact could have failed to make that factual finding.

5. …If the Appeals Chamber comes to a factual finding which differs from that of the Trial Chamber, it has to be borne in mind that, as often noted in the jurisprudence of the Tribunal, two reasonable people can come to equally reasonable but opposed meanings of the same set of facts. Where the meaning of facts is concerned, I would doubt that the corrective authority of the Appeals Chamber implies that its assessment must necessarily prevail.

6. The point has also been made by Judge Weinberg de Roca that the Appeals Chamber cannot truly determine "whether it is itself convinced beyond reasonable doubt as to the factual finding" of the Trial Chamber unless it actually examines the entire trial record in the way that a Trial Chamber would. That task is as physically impossible for the Appeals Chamber as it is legally misconceived. But that does not mean that the Appeals Chamber only has a duty to examine particular parts of the record to which the parties attract its attention before "it is itself convinced beyond reasonable doubt as to the factual finding of the Trial Chamber". What the impossibility points to is that the Appeals Chamber does not

[15] *Id*.
[16] Stakić Appeal Judgement, Partially Dissenting Opinion of Judge Shahabuddeen.

have to undertake the task which gives rise to the impossibility: instead, it should act on a principle which avoids that task.

Shortly after the Stakić Appeal Judgement was handed down (on 22 March 2006) the Appeals Chamber in the Galić Appeal Judgement (30 November 2006) reverted to the pre-Blaškić line of jurisprudence, confirming that trial chambers should indeed be afforded the deference due to them as the primary triers of fact:[17]

> *The Appeals Chamber wishes to emphasise that it is not conducting a new trial. The Appeals Chamber does not hear as many witnesses or consider as many exhibits as a Trial Chamber; indeed, it may consult very few. Therefore, it lacks the Trial Chamber's competence to decide most matters of fact. The difference is especially acute in a case like this, where evidence in the form of exhibits, pictures, video, scientific tables and technical expertise have been so important. Therefore, the Appeals Chamber will only overturn factual findings of the Trial Chamber if the Appeals Chamber is convinced that no reasonable trier of fact, having regard to all the evidence that was presented to it and that it should have considered, could have come to the same conclusion*.

Whether the Appeals Chamber actually adhered to its reaffirmed position that it would not lightly disturb trial chambers' findings of fact will be seen in the review of the appellate record that is described at Section III of this paper.

Miscarriage of justice. For the Appeals Chamber to disturb a trial chamber's factual findings, not only must the trial chamber have made a finding that no reasonable trier of fact have reached, but that error must have resulted in a miscarriage of justice.[18] Not every factual error has this result. Thus, for example, a trial chamber could make a finding of fact in relation to an accused's conduct that simply had no foundation in any evidence admitted at trial. Such a finding of fact should properly be described as one that no reasonable trier of fact could have made; however, it could also be the case that, based on other sufficient evidence in the trial record, all elements necessary for the accused's criminal conviction were established, meaning that ultimately, the factual error did not result in a miscarriage of justice. The ICTY's appellate record reveals many instances whereby the Appeals Chamber identified such inconsequential factual errors.[19]

[17] Galić Appeal Judgement, para. 252.
[18] *See*, *e.g.*, Kupreškić et al. Appeal Judgement, para. 29.
[19] *See, e.g.,* Đorđević Appeal Judgement, para. 501 ("The Appeals Chamber finds, however, that despite this error of fact it was reasonable for the Trial Chamber to conclude that Đorđević had knowledge of the crimes" – referring to other factors than the erroneous factual finding that the Appeals Chamber evidently found sufficient to support the particular conclusion); Naletilić and Martinović Appeal Judgement, para. 140; Popović et al. Appeal Judgement, para. 1328.

While factual errors of this kind do not affect the safety of a conviction (or the correctness of an acquittal), they nevertheless involve the Appeals Chamber marking the trial chamber as having acted in a way that no reasonable trier of fact could have acted. As such, they cast the same degree of doubt upon the capabilities of the trial chamber as in the situation in which a trial chamber is held on appeal to have made an erroneous factual finding that *did* occasion a miscarriage of justice.

By contrast, it may be that there were occasions when a trial chamber had committed no error of fact but nevertheless there had been a miscarriage of justice, revealed through fresh evidence available to the Appeals Chamber:

> *A miscarriage of justice may equally be occasioned where the evidence before a Trial Chamber appears to be reliable but, in the light of additional evidence presented upon appeal, is exposed as unreliable. It is possible that the Trial Chamber may reach a conclusion of guilt based on the evidence presented at trial that is reasonable at the time… but, in reality, is incorrect. As a result of a perfectly reasonable decision based upon seemingly reliable evidence before it, the Trial Chamber may have convicted an innocent person*.[20]

Thus, the correct, though somewhat perverse, outcome is that the credibility of a trial chamber may have remained untarnished even when it had brought about a miscarriage of justice, while another trial chamber that had not brought about any miscarriage of justice may have had its credibility called into question because of an erroneous but inconsequential factual finding.

III. QUANTIFYING THE EXTENT OF THE APPEALS CHAMBER'S INTERVENTION IN RESPECT OF FINDINGS OF FACT

In view of the clear and regularly proclaimed deference to trial chambers as the primary triers of fact (the "*appellate duty of deference*" in the words of Judge Shahabuddeen[21]) and the seemingly high bar set by the 'reasonableness' standard (perhaps better described as an 'unreasonableness' standard), the Appeals Chamber might have been expected only rarely to have established that trial chambers made errors in their findings of fact. As described in this section, however, a review encompassing the full range of the ICTY's appellate jurisprudence shows otherwise.

All ICTY Appeal Judgements[22] were reviewed to identify each instance in which a trial chamber was found to have made a factual finding that in the Appeals Chamber's view, no reasonable trier

[20] *Id*., para. 44.
[21] Stakić Appeal Judgement, Partly Dissenting Opinion of Judge Shahabuddeen, para. 3.
[22] Available at http://www.icty.org/en/cases/judgement-list.

of fact could have reached.[23] Specifically, the intention was to capture all occasions on which the Appeals Chamber found a trial chamber's finding of fact to have fallen below the "reasonable trier of fact" standard, including those occasions when the error did not result in a miscarriage of justice (that further step not being a necessary predicate to the conclusion that a trial chamber had acted unreasonably in its fact-finding). Sentencing appeals, subject to a different standard of review (according to which the Appeals Chamber does not assert that the trial chamber made findings that no reasonable trier of fact could have been reached, thus: "*[a]s a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a "discernable error" in exercising its discretion*"[24]), have been excluded. Equally, as judgements at trial and appellate level concerning offences against the administration of justice are not included in the above-referenced list of the ICTY's judgements, these also have been excluded from this review.

The results are set out in the simplified table below, broken down into five-year blocks to cover the entire lifespan of the tribunal (1993-1997, 1998-2002, 2003-2007, 2008-2012, 2013-2017). The table shows the number of cases in which the Appeals Chamber found the trial chamber to have made one or more erroneous factual findings, and shows as a percentage what proportion of all appealed cases those represented during each relevant period. A more comprehensive table is attached as an appendix to this paper. That table gives details on a case-by-case basis, providing references to the relevant paragraphs of the Appeal Judgements; the membership of each trial panel; the membership of the Appeals Chamber in cases in which it established one or more finding of fact to be erroneous; and which, if any, members of the trial panel dissented from the erroneous factual finding(s).

[23] In order to facilitate this review process, a non-case-sensitive search for the word "fact" and any expansions thereof (*e.g.*, "facts," "factual," *etc*.) was performed in each judgement that was reviewed.
[24] Dragan Nikolic Sentencing Appeal Judgement, para. 9.

Table: Numbers of ICTY Appeals Cases in which erroneous findings of fact were identified

Period	Number of Appeals cases (appeals against trial judgements)	Number of Appeals cases in which erroneous findings of fact were identified	Percentage of all Appeals cases in which erroneous findings of fact were identified
1993-1997[25]	0	0	-
1998-2002	7	1	14%
2003-2007	14	9	64%
2008-2012	11	5	45%
2013-2017	8	6	75%
Total	40	21	53%

As can be seen from this table, in 21 out of the 40 cases in which ICTY trial judgements were appealed,[26] the Appeals Chamber found the trial chamber to have made factual findings that no reasonable trier of fact could have made. The general trend over time appears to reflect an increasingly interventionist approach to the review of factual findings.

Excluding those instances whereby individual trial judges expressed dissent from the majority's factual findings, the more detailed table provided as an Appendix reveals that 47 of the judges who sat on those trial panels accordingly were held by their peers sitting on the appeals bench to have made factual findings that no reasonable trier of fact could have made. 13 judges were found by the Appeals Chamber to have made erroneous findings of fact in two or more trials (11 in two trials,[27] 2 in three trials[28]). To give an idea of how commonplace it was for ICTY judges to be marked by the Appeals Chamber as having acted unreasonably, those 47 judges represent around three-quarters of the 65 individual ICTY judges[29] who served on one or more occasion as trial judges in cases that subsequently were subject to substantive appeals, *i.e.*, those 40 cases reviewed in this paper and listed in the Appendix.[30]

[25] The only appeal against judgement during the first five years of the ICTY's existence – that of Dražen Erdemović – concerned sentencing matters and so is not considered for purposes of this review.
[26] Not including appeals against sentence or appeals in cases concerning offences against the administration of justice (nor including any case in which appeals proceedings were terminated prior to any Appeal Judgement being handed down).
[27] Judges Agius, Antonetti, Flügge, Harhoff, Hunt, Janu, Liu, Mindua, Riad, Taya and Wald.
[28] Judges Robinson and Rodrigues.
[29] Reserve judges who did not participate in the final trial judgment are not included in this count.
[30] As noted above, cases concerning offences against the administration of justice are excluded.

IV. CONSEQUENCES OF REGULAR APPELLATE INTERFERENCE IN FINDINGS OF FACT

Not only actual bias on the part of a judge, but equally, the appearance of bias, calls into question the legitimacy of the judicial process.[31] Analogous to this concern, it must be considered that the labelling of a judge as a '*person who has made factual findings that no reasonable trier of fact could make*' would be expected to have a similar impact on perceptions of that process. In other words, the extent of appellate intervention in respect of first instance findings of fact made by the ICTY's trial chambers is relevant not only to the parties to the affected proceedings; more widely, it has the potential to undermine the reputational legacy of the institution. Customs of judicial decorum may have inhibited the Appeals Chamber from saying so in more explicit terms, however each time a trial chamber's finding of fact was overturned ultimately was predicated on a determination by (at least a majority of) the Appeals Chamber that the judges responsible for the impugned finding had demonstrated themselves to have acted unreasonably in the conduct of their duties as triers of fact.

This concern has not gone entirely unnoticed. Judge Schomburg, in his dissent to the Limaj et al. Appeal Judgement,[32] took issue with the expression "*no reasonable trier of fact*" (the phrase that, as noted at Section II of this paper, was used most commonly used by the Appeals Chamber to frame its reasonableness standard in relation to alleged errors of fact). His concern was that the application of the standard as worded in this way called into question the reasonableness of the judges rather than the reasonableness of the impugned factual finding:

> *I dislike the settled expression "no reasonable trier of fact" as the question is not whether a judge is reasonable but whether his or her conclusion is reasonable in concreto… I would prefer that… the standard be rephrased to read that "no trier of fact could reasonably come to this conclusion.*[33]

Judge Schomburg's preferred formulation unfortunately never was adopted and the common formulation remained operative through to the ICTY's closure. Indeed, it is to be expected that the United Nations Mechanism for International Criminal Tribunals (MICT), the ICTY's – and the International Criminal Tribunal for Rwanda (ICTR)'s – successor institution, is most likely to adopt the common formulation in any appeals that it hears.[34]

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[31] As a notable example of an appellate court setting aside a judgement on the basis of apparent bias in order to preserve the integrity of the judicial process — an extension of the concept that no-one should be a judge in their own cause ('*nemo judex in sua causa*') — *see* the English House of Lords case of R v. Bow Street Metropolitan Stipendary Magistrate, *ex parte* Pinochet Ugarte (No. 2), HL 15 JAN 1999.
[32] Limaj et al. Appeal Judgement, Partially Dissenting and Separate Opinion and Declaration of Judge Schomburg.
[33] *Id.*, fn. 3 to para. 3.
[34] As of March 2018, the MICT Appeals Chamber has heard oral arguments in a prosecution appeal against the acquittal of Vojislav Šešelj, however as yet it has not handed down any Appeal Judgements in respect of proceedings emanating from ICTY legacy cases.

V. CONCLUSION

There is at least a colorable argument that in combination, the absence of barriers to appeal and the particular legal and factual complexity of ICTY trial judgements created conditions wherein appeals alleging errors of fact were commonplace. Either party could lodge an appeal against judgement without having to pass any hurdle of certification or other requirement to be granted leave. Meanwhile, in terms of their length as well as their legal and factual complexity, there were simply far more points of possible contention arising from a typical ICTY trial judgement that could be challenged. Thus, for example, many more factual elements necessarily are required in order to prove a charge of murder as a war crime as compared with a charge of simple murder. Similarly, far more factual elements are required in order to prove an accused's liability for a crime by means of their participation in a Joint Criminal Enterprise — frequently charged in the indictments issued by the ICTY's Office of the Prosecutor — as compared with proving a direct perpetrator's liability for the same crime.

Arguably, therefore, the Appeals Chamber's apparently interventionist approach in respect of trial chambers' findings of fact may be understood to have been a natural consequence of there being so many alleged errors brought to its attention by appellants. It is consistent with this argument that ICTY Appeal Judgements often contain findings in relation to factual errors even when those errors were judged to have had no impact on the outcome of the trial (*i.e.*, did not occasion a miscarriage of justice).[35] This reflects that, once presented with such an issue, the Appeals Chamber had to dispose of it in one way or another. Thus, it might be said that the record of the Appeals Chamber in terms of the number of cases in which it found a trial chamber to have made erroneous factual findings does not show it to have been excessively interventionist and insufficiently deferential to the primary triers of fact. Rather, the record reflects the huge number of alleged errors to which the Appeals Chamber had to give due consideration, of which only a small proportion actually were confirmed.

The problem with this viewpoint, however — as with any attempt to justify the Appeals Chamber taking on the role of finder of fact — is that it provides no satisfactory account as to why the interests of justice would be better-served by replacing the trial chamber's case-specific fact finding expertise, gained during the course of trial, with the Appeals Chamber's necessarily more circumscribed capabilities. In this regard, Judge Pocar's concern, as expressed in his dissent to the Gotovina Appeal Judgement, is apt:

[35] For examples, *see* footnote 19 above.

> *I do not believe that justice is done when findings of guilt not lightly entered by the Trial Chamber in more than 1300 pages of analysis are sweepingly reversed in just a few paragraphs, without careful consideration of the trial record and a proper explanation*…[36]

This statement perfectly captures the enormity — perhaps even, the impossibility — of the task that the Appeals Chamber would undertake when it set itself to determining whether an impugned factual finding could have been made by a reasonable trier of fact. Without giving consideration to the full trial record and without the opportunity to assess the nuances of the evidence as it was received live in the courtroom, the Appeals Chamber could not be expected to achieve as rich an assessment of the facts of a case as was possible for the trial chamber.

As described at section III of this paper, the ICTY Appeals Chamber found fault with factual findings in more than half of all appeals against judgement. In the process, it implicated the great majority of trial judges — around three-quarters of those who sat on trials that subsequently were appealed. There is a certain irony to this since, amongst the judges who were marked by the Appeals Chamber as having reached unreasonable findings, there are several who themselves went on to sit as appellate judges and who in turn made the same finding with respect to others amongst their colleagues. As Judge Shahabuddeen noted in his Separate Opinion attached to the Kvočka Appeal Judgement:

> *A Trial Chamber is not a subordinate court of the Appeals Chamber. A Trial Chamber consists of three judges of the same standing as the judges of the Appeals Chamber. Judges of the Chambers rotate; in fact, judges are elected by the General Assembly to the Tribunal (or sometimes appointed to it by the Secretary General) but are only assigned by the President to a Chamber of the Tribunal, whether to a Trial Chamber or to the Appeals Chamber*.[37]

Of course, there is nothing inherently wrong in the judicial branch of a tribunal such as the ICTY being structured in such a way. However, when many of the same judges found to have made unreasonable findings also are revealed as appeals judges who held that their peers have made similar faulty findings, there is a clear foundation for the perception that appellate intervention offered no more assurance of good justice than if trial chambers' findings had been shown more deference. This, coupled with the inflexible language used to frame the 'reasonableness'/'unreasonableness' standard, unnecessarily cast a shadow on the legacy of the institution.

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[36] Gotovina Appeal Judgement, Dissenting Opinion of Judge Fausto Pocar, para. 14. While Judge Pocar's dissent related to the majority's finding that the Gotovina trial chamber had failed to provide a reasoned opinion for certain key factual conclusions, the sentiment expressed is equally applicable to appellate intervention in respect of findings of fact *per se*.

[37] Kvočka Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 53.

APPENDIX

Appeal	Appeals Chamber found Trial Chamber to have made finding(s) of fact that no reasonable trier of fact could have made (Y/N)	References to relevant paragraph(s) of Appeals Judgement	Trial Chamber composition	Appeals Chamber composition (in cases where factual errors were identified)	Notes / information that any trial judge dissented from factual findings subsequently declared erroneous
1999					
Duško Tadić - "Prijedor"	N	-	Kirk McDonald J (Presiding), Stephen J, Vohrah J	-	-
2000					
Zlatko Aleksovski - "Lašva Valley"	N	-	Rodrigues J (Presiding), Vohrah J, Nieto-Navia J	-	-
Anto Furundžija - "Lašva Valley"	N	-	Mumba J (Presiding), Cassese J, May J	-	-
2001					
Mucić *et al.* - *"Čelebići Camp"*	Y	Paras.438-460	Karibi-Whyte J (Presiding); Odio Benito J; Jan J	Hunt J (Presiding), Riad J, Nieto-Navia J, Bennouna J, Pocar J	-
Goran Jelisić - "Brcko"	N	-	Jorda J (Presiding), Riad J, Rodrigues J	-	-
Kupreškić *et al.,* "Lašva Valley"	N	-	Cassese J (Presiding), May J, Mumba J	-	-

2002					
Kunarac *et al.* - “Foča”	N	-	Mumba J (Presiding), Hunt J, Pocar J	-	-
2003					
Milorad Krnojelac - “Foča”	Y	Paras. 171, 172, 178, 179, 186, 187, 194, 196, 202, 206, 237	Hunt J (Presiding), Mumba J, Liu J	Jorda J (Presiding), Schomburg J, Shahabuddeen J, Güney J, Agius J	-
2004					
Mitar Vasiljević - “Višegrad”	Y	Paras. 53, 57, 126, 131, 141	Hunt J (Presiding), Janu J, Taya J	Meron J (Presiding), Shahabuddeen J, Güney J, Schomburg J, Weinberg de Roca J	-
Radislav Krstić - “Srebrenica-Drina Corps"	Y	Paras. 77, 104, 106, 115, 126	Rodrigues J (Presiding), Riad J, Wald J	Meron J (Presiding), Pocar J, Shahabuddeen J, Güney J, Schomburg J	-
Tihomir Blaškić - “Lašva Valley"	Y	Paras. 443, 465, 504, 509, 511, 523, 524, 557, 571, 582	Jorda J (Presiding), Rodrigues J, Shahabuddeen J	Pocar J (Presiding), Mumba J, Güney J, Schomburg J, Weinberg de Roca J	-
Kordić & Čerkez - "Lašva Valley”	Y	Paras. 355, 360, 429, 448, 456, 457, 459, 460, 461, 468, 469, 482, 489, 493, 495, 497, 501, 503, 516, 517, 518, 520, 524, 531, 541, 547, 551, 552, 556, 582, 597, 599, 602, 603, 604,	May J (Presiding), Bennouna J, Robinson J	Schomburg J (Presiding), Pocar J, Mumba J, Güney J, Weinberg de Roca J	-

		607, 613-619, 621, 622, 628-630, 632, 635, 786, 787, 854, 857, 859, 897, 898, 913, 920, 925, 930, 931, 938, 957			
2005					
Kvočka *et al.* - “Omarska, Keraterm & Trnopolje Camps"	Y	Paras. 170, 599	Rodrigues J (Presiding), Riad J, Wald J	Shahabuddeen J (Presiding), Pocar J, Mumba J, Güney J, Weinberg de Roca J	-
2006					
Milomir Stakić - “Prijedor"	N	-	Schomburg J (Presiding), Vassylenko J, Argibay J	-	-
Naletilić & Martinović - "Tuta and Štela"	Y	Paras. 139, 140, 167, 170, 171, 211, 305, 474, 477	Liu J (Presiding), Clark J, Diarra J	Pocar J (Presiding), Shahabuddeen J, Güney J, Vaz J, Schomburg J	-
Simić *et al*. - “Bosanski Šamac"	Y	Paras. 130, 131, 138, 190	Mumba J (Presiding), Williams J, Lindholm J	Güney J (Presiding), Shahabuddeen J, Liu J, Vaz J, Schomburg J	-
Stanislav Galić	N	-	Orie J (Presiding), El Mahdi J, Nieto-Navia J	-	-
2007					
Radoslav Brđanin - “Krajina"	Y	Paras. 276, 286, 289, 483	Agius J (Presiding), Janu J, Taya J	Meron J (Presiding), Shahabuddeen J, Güney J, Vaz J, Van Den Wyngaert J	-
Blagojević & Jokić	N	-	Liu J (Presiding),	-	-

			Vassylenko J, Argibay J		
Limaj *et al.*	N	-	Parker J (Presiding), Thelin J, Van Den Wyngaert J	-	-
Sefer Halilović - “Grabovica-Uzdol”	N	-	Liu J (Presiding), Mumba J, El Mahdi J	-	-
2008					
Hadžihasanović & Kubura - “Central Bosnia"	Y	Paras. 148, 155, 163, 164, 231	Antonetti J (Presiding), Rasoazanany J, Swart J	Pocar J (Presiding), Shahabuddeen J, Güney J, Liu J, Meron J	-
Naser Orić	N	-	Agius J (Presiding), Brydensholt J, Eser J	-	-
Pavle Strugar - “Dubrovnik"	N	-	Parker J (Presiding), Thelin J, Van Den Wyngaert J	-	-
Milan Martić - “RSK”	Y	Paras. 192, 200, 201	Moloto J (Presiding), Nosworthy J, Höpfel J	Pocar J (Presiding), Shahabuddeen J, Güney J, Vaz J, Schomburg J	-
2009					
Momčilo Krajišnik	N	-	Orie J (Presiding), Canivell J, Hanoteau J	-	-
Mrkšić *et al.* - “Vukovar Hospital”	N	-	Parker J (Presiding), Van Den Wyngaert J, Thelin J	-	-
Dragomir Milošević - “Sarajevo”	Y	Para. 87	Robinson J (Presiding),	Pocar J (Presiding),	-

			Mindua J, Harhoff J	Güney J, Liu J, Vaz J, Meron J	
2010					
Boškoski & Tarčulovski	N	-	Parker J (Presiding), Van Den Wyngaert J, Thelin J	-	-
Haradinaj *et al.*	N	-	Orie J (Presiding), Höpfel J, Støle J	-	-
2011					
2012					
Gotovina and Markač	Y	Paras. 83, 84	Orie J (Presiding), Kinis J, Gwaunza J	Meron J (Presiding), Agius J, Robinsion J, Güney J, Pocar J	-
Milan Lukić & Sredoje Lukić	Y	Paras. 321, 322, 328, 329, 331, 589, 590, 609, 616, 618, 619, 623-625, 634	Robinson J (Presiding), Van den Wyngaert J, David J	Güney J (Presiding), Agius J, Pocar J, Liu J, Morrison J	
2013					
Momčilo Perišić	N	-	Moloto J (Presiding), David J, Picard J	-	-
2014					
Šainović *et al.* (formerly Milutinović *et al.*)	Y	Paras. 452, 453, 504, 1461, 1534, 1536, 1682, 1709, 1710, 1736, 1766	Bonomy J (Presiding), Chowhan J, Kamenova J, *Nosworthy J (Reserve Judge)*	Liu J (Presiding), Güney J, Pocar J, Ramaroson J, Tuzmukhamedov J	-
Vlastimir Đorđević	Y	Paras. 500, 501, 859	Parker J (Presiding), Flügge J, Baird J	-	-
2015					
Popović *et al*.	Y	Paras. 520, 521, 774, 822, 1048,	Agius J (Presiding),	Robinson J (Presiding),	-

		1068, 1069, 1118, 1119, 1328, 1377, 1378, 1678, 1684, 1717, 1789, 1874	Kwon J, Prost J, *Støle J (Reserve Judge)*	Sekule J, Pocar J, Ramaroson J, Niang J	
Zdravko Tolimir	Y	Paras. 150, 383, 412, 434, 481	Flügge J (Presiding), Mindua J, Nyambe J	Meron J (Presiding), Sekule J, Robinson J, Güney J, Antonetti J	Nyambe J's dissent did not specify specific points of fact corresponding to those found erroneous by the Appeals Chamber. However, she dissented from the broad reasoning of the majority and may be considered not to have agreed with any of the factual findings subsequently held to be erroneous
Stanišić & Simatović	N		Orie J (Presiding), Picard J, Gwaunza J	Pocar J (Presiding), Agius J, Liu J, Ramaroson J, Afanđe J	-
2016					
Stanišić & Župljanin	Y	Paras. 407, 418, 447, 584, 661, 895, 1061	Hall J (Presiding), Delvoie J, Harhoff J	Agius J (Presiding), Liu J, Flügge J, Pocar J, Afanđe J	-
2017					

Prlić *et al.*	Y	Paras. 131, 423, 434, 435, 451, 452, 614, 880, 882, 1036, 1037, 1555, 1557-1559, 2002, 2047, 2054, 2059, 2061, 2155, 2280, 2454, 2454, 2712, 2722, 2732, 2792, 2846, 3048, 3053, 3054, 3067, 3073, 3075, 3076	Antonetti J (Presiding), Prandler J, Trechsel J, *Mindua J (Reserve Judge)*	Agius J (Presiding), Liu J, Pocar J, Meron J, Moloto J	[Trechsel J's minority opinion did not implicate findings of fact; Antonetti J appended a 500-page minority opinion, the review of which is beyond the scope of this paper]
Total = 40	**Total "Y" = 22**				