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ICTR POST-JUDGMENT REMEDIES: CHALLENGES AND HOPES

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Introduction

This paper briefly discusses landmark ICTR and ICTY Appeals Chambers decisions that have all but eliminated the chances of successful post-judgment legal remedies for convicted persons. It is hoped that it will provoke discussion on changing the *status quo*. In addition, I will say a word about legal assistance to indigent ICTR convicts, and the relative inaccessibility of the ICTR Legal Aid Programme for these persons.

ICTR Jurisprudence

In societies governed by the rule of law, legislatures and the courts normally do what they can to ensure there are adequate safeguards against miscarriages of justice i.e. post-judgment remedies. In the famous Canadian case of David Milgaard, the primary question posed by the Supreme Court of Canada on a referral by the Minister of Justice was: *does the fresh information constitute credible evidence that could reasonably be expected to have affected the verdict?*¹

At the ICTR, rather than asking whether fresh evidence could have been a decisive factor in reaching a decision, the ICTR Appeals Chambers instead asks whether that same fresh

¹ Reference re Milgaard (Can), [1992] 1 S.C.R. 866, at p. 8 (<http://csc.lexum.umontreal.ca/en/1992/1992scr1-866/1992scr1-866.pdf>). The Criminal Code of Canada provides for Applications for Ministerial Review in situations where there has been a miscarriage of justice (Article 696.1; Article 696.4 provides that the Minister of Justice shall take into account that which is deemed relevant including, (a) whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister in an application in relation to the same conviction or finding under Part XXIV; (b) the relevance and reliability of information that is presented in connection with the application; and (c) the fact that an application under this Part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.

evidence constitutes a ‘new fact’. In so doing, the ICTR Appeals Chamber shifts from a substantive to a purely technical inquiry. Because a ‘new fact’ is the key that will open the door to review proceedings, its absence constitutes a bar to due process. No ‘new fact’, no review.

Until 2008, there were 15 review decisions rendered by the ICTR and the ICTY Appeals Chambers. Eight were rendered during the first five years, and seven in 2006 and 2007 alone. Among the most important are *Tadić*,² *Barayagwiza*,³ *Čelebići*,⁴ *Rutaganda*,⁵ *Niyitegeka*,⁶ and *Žigić*.⁷

When *Tadić* appealed his judgment, he also moved to introduce copious amounts of evidence for the Appeals Chamber to consider pursuant to Rule 115.⁸ Alternatively, he invoked Rules 119 to 122⁹ and asked for the case to be returned to the Trial Chamber for review. Thus, the Chamber was required to establish the relationship, and differences, between both recourses, and did so, on the basis of the purported nature of the information required for each remedy. ‘Additional evidence’ related to a fact that was raised during trial, whereas ‘new facts’ were related to an issue that was not raised at trial.

Barayagwiza was the first decision to set out the four criteria from ICTR Rules 120 to 123: i) a ‘new fact’, ii) that is unknown to the party at proceedings, ii) due diligence would not have uncovered the ‘new fact’, and iv) it “could have been a decisive factor in reaching a decision”.¹⁰ It was also the first and only time the Prosecutor brought such a motion before the Appeals Chamber, and the first and only time the Appeals Chamber granted a motion for

² *Prosecutor v. Tadić*, Decision on Appellant’s Motion for the Extension of the Time-Limit and Admission of Additional Evidence, Case No. IT-94-I-A, A. Ch., 15 October 1998 (hereinafter *Tadić* Review Decision)

³ *Barayagwiza v. Prosecutor*, Decision (Prosecutor’s Request for Review or Reconsideration), Case No. ICTR-97-19-AR72, A. CH., 31 March 2000 (*Barayagwiza* Review Decision).

⁴ *Prosecutor v. Delic* (‘*Čelebići*’), Decision on Motion for Review, Case No. IT-96-21-R-R119, A.Ch., 25 April 2002 (*Čelebići* Review Decision). *Čelebići*, Case No. IT-96-21-Abis Judgment on Sentence Appeal, 8 April 2003 (*Čelebići* Judgment).

⁵ *Rutaganda v. Prosecutor*, Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure and Clarification, Case No. ICTR-96-03-R, A. Ch., 8 December 2006 (*Rutaganda* Review Decision).

⁶ *Niyitegeka v. Prosecutor*, Decision on Request for Review, Case No. ICTR-96-14-R, A. Ch., 30 June 2006 (First *Niyitegeka* Review Decision); *Niyitegeka v. Prosecutor*, Decision on Request for Review, Case No. ICTR-96-14-R, A. Ch., 6 March 2007 (Second *Niyitegeka* Review Decision) .

⁷ *Prosecutor v. Zoran Žigić a/k/a “Ziga”*, Decision on Zoran Žigić’s “Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005”, Case No. IT-98-30/1-A, 26 June 2006 (*Žigić* Reconsideration Decision).

⁸ Rule 115, ICTY R.P.E.

⁹ Rules 119-122, ICTY R.P.E., the equivalent of Rules 120-123 ICTR R.P.E.

¹⁰ *Barayagwiza* Review Decision, para. 41.

review. It did so, on the grounds that it considered that so-called fresh prosecution evidence relating to the non-cooperation of Cameroon in transferring Mr Barayagwiza was a ‘new fact’. The issue of non-cooperation, however, was fully debated during the appeal. Moreover, the Appeals Chamber held: “in wholly exceptional circumstances”, where the impact of a **new fact is of such strength that it would affect the verdict such that to ignore it would lead to a miscarriage of justice**, review might be possible *even though the ‘new fact’ was known to the moving party, or was discoverable by it through the exercise of due diligence*.¹¹ The Appeals Chamber at once observed the distinction between “additional evidence” and “new fact” and, accepted that the prosecutor’s evidence constituted new facts for reasons not entirely clear.

In contrast, the Appeals Chamber in *Čelebići* and other decisions denied defence motions for review simply on the basis that there was no “new fact”.¹² *Jelisić*,¹³ defined ‘new fact’ as ‘*new information of an evidentiary nature of a fact that was not in issue during the [proceedings]*’. Since all other motions for review, and brought by convicted persons, have been denied, it may be said that the distinction between “additional evidence” and “new facts” was applied with less rigour in *Barayagwiza*.

That said, the Appeals Chamber, Judge Shahabuddeen presiding, nevertheless confirmed the need for a safety net to avoid miscarriages of justice. In the absence of a review mechanism for lack of a ‘new fact’, due process required an alternative remedy. Thus, in the Judgment on Sentence Appeal in *Čelebići*, the Appeals Chamber, recognized its inherent jurisdiction to *reconsider* judgments when the criteria for review were not met, thus ensuring its basic judicial functions are safeguarded through one remedy or the other.¹⁴

The right of review granted by Article 26 of the Tribunal’s Statute is limited to the discovery of a new fact which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which could have been a decisive factor in reaching the decision. That right has been interpreted as excluding issues of law, and it is therefore only a partial answer to the prospect of injustice. A partial answer still leaves outstanding a significant prospect of injustice. No court should allow that.

[...]

¹¹ *Barayagwiza* Review Decision, at para. 65-66.

¹² *Čelebići* Review Decision, para 13.

¹³ *Prosecutor v. Jelisić*, Decision on Motion for Review, Case No. IT-95-10-R, A. Ch., 2 May 2002 (*Jelisić* Review Decision).

¹⁴ *Čelebići* Judgment, paras. 49 to 53.

The Rules of Procedure and Evidence do not enlarge the powers of the Tribunal – they are intended only to establish the way in which the proceedings are conducted in the Tribunal. The absence of any reference to this power in the Rules is therefore no bar to the existence of the inherent power to reconsider.¹⁵

In 2006 the Appeals Chamber reversed its holding in *Čelebići* and found that it **did not have an inherent right to reconsider judgments**,¹⁶ on the basis that existing appeal and review proceedings ‘sufficiently guaranteed’ the rights of accused before the Tribunal. In *Žigić*, the Appellant moved the Appeals Chamber to *reconsider* its judgment. The Appeals Chamber held that the “new fact” criteria in review proceedings was already being interpreted *broadly*, and that *Žigić* used the “purported right to reconsideration” to file a frivolous motion.¹⁷

In light of these considerations, the Appeals Chamber has come to the view that **cogent reasons in the interests of justice demand its departure from the majority opinion in the Čelebići Judgement on Sentence Appeal**. Accordingly, this Appeals Chamber holds that there is no power to reconsider a final judgement.¹⁸

Judge Shahabuddeen wrote a separate opinion which, although supporting the dismissal of the motion on the merits, expressed serious doubt of the Appeals Chamber’s holding that “there is no power to reconsider a final judgement”; he did not favour the departure from *Čelebići*.¹⁹ At paragraph 5 of his Declaration, he suggested alternatives to the motion for reconsideration:

The alternative is that a motion for reconsideration of a final judgment must be packaged as an article 26 motion for review even in cases which do not involve a “new fact” as reasonably understood. This approach is artificial. A better alternative is that, in such cases recourse must be had to the Tribunal’s inherent jurisdiction as a judicial body. It will not be the first time that recourse is had to that jurisdiction. Nor need it be thought that, because the jurisdiction is described as “inherent”, it comes from nowhere; it is impliedly given by the Statute itself being an understood accompaniment of the jurisdiction which it expressly grants.

¹⁵ *Čelebići* Judgment, paras. 51 and 53.

¹⁶ *Žigić* Reconsideration Decision.

¹⁷ *Žigić* Reconsideration Decision, para. 8.

¹⁸ *Žigić* Reconsideration Decision, para. 9. Emphasis added.

¹⁹ *Žigić* Reconsideration Decision, Declaration of Judge Shahabuddeen, para. 1.

In sum, if a Rule 120 review application can only be successful upon the discovery of evidence related to a matter that was not raised during the proceedings, it follows that, in its present form, the law rewards professional negligence because competent counsel are expected to address all relevant facts during the proceedings. If all reasonably relevant factual issues have been raised during proceedings, evidence related to these issues is excluded under the narrow ‘new fact’ interpretation. If not all reasonably relevant factual issues have been addressed, then the chances are greater that new evidence will speak to one of them.

The line drawn by the Appeals Chamber between “additional evidence” and “new facts” further renders *the timing of the discovery* of new evidence of greatest importance. If the information is discovered post-judgment while the judgment is pending appeal, the new evidence has a very good chance of being heard because it will constitute ‘additional evidence’. If, on the other hand, the information is discovered after final judgment (i.e. after first instance or appeal), there is virtually no chance it will see the light of day. It is suggested that applying two standards to fresh evidence on the basis of the time it was discovered, is unfair.

Proposals to Diminish the Risk of Miscarriages of Justice at the ICTR

Judge Shahabuddeen suggests packaging a reconsideration motion under the terms of a motion for review, or better, appealing to the inherent jurisdiction of the Tribunal as a judicial body.²⁰

In the second *Niyitegeka* decision²¹ on review, Judge Meron and Judge Shahabuddeen expressed separate opinions urging a departure from *Žigić*. Judge Meron’s ALO, Jean Galbraith, published an important article on the development of the law of review and reconsideration at the *ad hoc* Tribunals. Ms Galbraith put forth a series of alternatives that the Appeals Chamber might follow to eliminate or dramatically reduce the risk of substantive injustice, in order of her suggested preference:

- 1) Eliminate the *Tadić* distinction between ‘new facts’ and ‘additional evidence’; both terms can be read to cover all new evidence of a factual nature;

²⁰ *Žigić* Reconsideration Decision, Declaration of Judge Shahabuddeen, para. 1.

²¹ *Niyitegeka v. Prosecutor*, Decision on Request for Review, Case No. ICTR-96-14-R, A. Ch., 6 March 2007 (Second *Niyitegeka* Review Decision).

- 2) Nominally retain the *Tadić* distinction, but in practice treat all new evidence as ‘new facts’. In doing so, they could rely on precedents like *Barayagwiza* and the Second *Tadić* decision;
- 3) Continue the restrictive approach to ‘new facts’ and leave the door open for reconsideration of final judgments based on the inherent power to prevent miscarriage of justice (as supported by Judges Meron and Shahabuddeen).²²

In March 2008 our good friend and colleague Peter Robinson proposed to the ICTR Plenary that the ICTR Rule be modified to reduce the risk of miscarriages of justice. He proposed the addition of a single sentence at the end of Rule 120

(D) A Chamber retains the discretion to review a judgement in the absence of a new fact in a case of actual innocence.

How this sentence would be interpreted by the Trial Chamber or the Appeals Chamber we may never know. It has been nearly two years and Peter Robinson has yet to hear back from the Plenary on his proposal.

In addition to the foregoing, another way to encourage a departure from the current anti-*Čelebići* case law would be to choose a model case for review and file with the application for review and in the alternative, reconsideration, accompanied by a strong *amicus curiae* brief from one of the Defence organizations.

Legal Aid Assistance for Review Proceedings

For indigent and innocent prisoners who discover exculpatory evidence following final judgment legal assistance in the form of *assigned counsel* is their lifeline to the real world and the only true hope they stand to see that justice is applied in their specific cases.

²² J Galbraith, ‘New Facts’ in ICTY and ICTR Review Proceedings, LJIL, 21 (2008) 131-150, at 147-148.

In January 2009, the Registrar visited the ICTR prisoners who are currently detained in Koulikoro, Mali and discussed the matter of legal aid.

La révision du procès n'est pas une voie de recours ordinaire. Elle est une procédure extraordinaire qui doit arriver presque accidentellement, pour ainsi dire. Je comprends bien que vous avez envie de vous battre jusqu'au bout, de saisir toute possibilité de contester le jugement qui consacre votre culpabilité, mais ne me demander pas de financer une telle entreprise : je n'ai pas les moyens juridiques de le faire, et c'est une question que la Chambre d'Appel a définitivement tranché.²³

Pascal Besnier, Officer-in-charge of the Judicial and Legal Services Division of the ICTR and Deputy Registrar, also spoke to the detainees at the UNDF, and apparently informed them about the existence of associations of lawyers and professional organizations of counsels *which would be willing to handle cases for convicts who may be in need to initiate the procedure for review*. Georges Rutaganda followed up this suggestion with a letter to Mr Besnier. In response, the latter referred to the Appeals Chamber jurisprudence on the matter and then made the following suggestion:

Comme vous pouvez constater, la question du financement de l'assistance judiciaire dépend exclusivement, dans votre cas, d'une Décision de la Chambre d'Appel et ne relève pas du pouvoir discrétionnaire du Greffier. Cependant, il vous est toujours loisible de retenir les services d'un Conseil *pro bono*, dont le travail sera facilité par le Greffe, dans toute la mesure du possible, et avec qui vous pourrez librement communiquer.

Le Greffe ne peut, de sa propre initiative, vous assigner un Conseil *pro bono* ou vous communiquer une liste à cet effet. Nous pensons qu'il s'agit là d'une démarche personnelle et, j'y insiste, exceptionnelle, que le Greffe ne doit ni entraver, ni encourager. Nous croyons également que les associations d'avocats ou les organismes professionnels des Conseils sont suffisamment nombreux et notoires pour que le Greffe n'ait pas à intervenir à cet égard. Je pourrais toutefois vous communiquer les adresses de quelques-uns d'entre eux si vous m'en faites la demande, à titre de simple renseignement.²⁴

²³ Letter from Pascal Besnier dated 14 May 2009.

²⁴ Letter from Pascal Besnier dated 14 May 2009. « As you are aware, the question of financing via legal aid depends exclusively, in your case, on an Appeals Chamber decision and does not depend on the Registrar's discretionary powers. However, it is always preferable for you to retain a lawyer *pro bono*, for whom the work will be facilitated by the Registrar in every way possible, and with whom you will be able to communicate freely. The Registrar cannot take the initiative to assign you counsel *pro bono* or to provide you with such a list (of *pro bono* lawyers). We believe that this is a personal step and I insist, an exceptional one, that the Registrar should neither interfere with, nor encourage. We also believe that the lawyers' associations or lawyers professional organisations are sufficiently numerous and popular that the Registrar need not interfere at this stage. I can, however, provide you with the addresses of some of them if you so request, simply for your information." (my translation)

In *Musema*,²⁵ the ICTR Appeals Chamber confirmed the two circumstances in which an accused is entitled to assigned counsel under the ICTR Legal Aid Programme.

RECALLING that review of a final judgment is an exceptional remedy and that an indigent applicant is only entitled to assigned counsel, at the Tribunal's expense, **if the Appeals Chamber authorizes the review or if it deems it necessary in order to ensure the fairness of the proceedings at the preliminary examination stage.**²⁶

Under Article 1²⁷ the *ICTR Directive on the Assignment of Defence Counsel, 14 March 2008*, defines 'Stage of Procedure' as follows: '*Means the following stages of procedure: Pre-Trial, Trial, Sentencing Hearing, Appeal and Review.*' Article 15 of the *Directive* provides,

(A) A suspect or accused shall only be entitled to have one Counsel assigned to him and that Counsel shall deal with *all stages of procedure and all matters arising out of the representation of the suspect or accused or of the conduct of his Defence.*²⁸

Article 22(C) of the *Directive* further provides,

(C) The Registrar, with the concurrence of the President, may establish an alternative scheme of payment based on a fixed fee ("lump sum") system consisting of a maximum allotment of moneys for each Defence Team in respect of each stage of the procedure taking into account the Registrar's estimate of the duration of the stage and the apparent complexity of the case.
[...]

There are a number of difficulties with the Registry's suggestion that prisoners retain the services of counsel *pro bono*. First, there exists no *pro bono system* as such at the ICTR. Second, once counsel begins to act *pro bono*, it may be difficult for counsel to start getting paid, even with a decision to that effect. Third, if counsel is acting *pro bono*, no work

²⁵ *Musema v. Prosecutor*, Case no: ICTR-96-13-R, Decision on the Assignment of Counsel, 27 February 2009. Emphasis added.

²⁶ *Musema v. Prosecutor*, citing *Emmanuel Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-R, Decision on Emmanuel Ndindabahizi's Motion for Assignment of Counsel and the Prosecution's Request to Place the Motion Under Seal, 24 September 2008, p.2; *Jean-Bosco Barayagwiza v. Prosecutor*, Case No. ICTR-9952A-R, Decision on Jean-Bosco Barayagwiza's Motion of 6 March 2008, 11 April 2008, p. 3; *Hassan Ngeze v. Prosecutor*, Case No. ICTR-99-52-R, Decision on Hassan Ngeze's Motion To Obtain Assistance from Counsel, 28 February 2008, p.2; *Eliézer Niyitegeka v. Prosecutor*, Decision on Third Request for Review, 23 January 2008, para. 12.

²⁷ Use of Terms

²⁸ Emphasis added

programmes will be authorized. In the absence of an official work programme, Counsel is neither guaranteed reimbursement of expenses, nor enjoyment of United Nations functional immunity for work performed during this period.

It is suggested, therefore, that if anyone wishes to act on a *pro bono* basis, that this is conditional upon a) communicating freely with the client, and b) authorized work programmes. Additionally, a motion should be filed at the very earliest opportunity for an Appeals Chamber order that the Registrar meet the expenses of legal representation on the basis that it '*is necessary in order to ensure the fairness of the proceedings at the preliminary examination stage*' of the review process, as per *Musema*.

Conclusion

While the chances of successful motions for review may appear to be *nil*, I am hopeful. I am hopeful because I am encouraged when I see the ALO of Judge Meron publishing an article to comment on questionable jurisprudential developments that increase the risk of miscarriages of justice. I am encouraged to see colleagues proposing amendments to the Rules, though they may fall on deaf ears. I am encouraged to know NGO's such as the AIAD and Human Rights Watch come up to bat for the Defence when the going really gets tough (the Rule 11*bis* transfer cases are but one example). For these reasons I believe a change in the *status quo* for review cases is achievable, but only with a lot of work. If the evidence is there, can we not all do what we can to ensure that a miscarriage of justice does not occur?

The Law

ICTR R.P.E., Rule 115

- (A) A party may apply by motion to present additional evidence before the Appeals Chamber. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed; and must be served on the other party and filed with the Registrar not later than thirty days from the date for filing of the brief in reply, unless good cause or, after the appeal hearing, cogent reasons are shown for a delay. Rebuttal material may be presented by any party affected by the motion. Parties are permitted to file supplemental briefs on the impact of the additional evidence within fifteen days of the expiry of the time limit set for the filing of rebuttal material, if no such material is filed, or if rebuttal material is filed, within fifteen days of the decision on the admissibility of that material.
- (B) If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 118.
- (C) The Appeals Chamber may decide the motion prior to the appeal, or at the time of the hearing on appeal. It may decide the motion with or without an oral hearing.
- (D) If several defendants are parties to the appeal, the additional evidence admitted on behalf of any one of them will be considered with respect to all of them, where relevant.

ICTR Statute, Article 25

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

ICTR R.P.E., Rule 120 Request for Review

(A) Where a new fact has been discovered which was not known to the moving part at the time of the proceedings before a Trial Chamber or the Appeals Chamber and could not have been discovered through the exercise of due diligence, the Defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement. 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

(B) [...]

Rule 121: Preliminary Examination

If the Chamber constituted pursuant to Rule 120 agrees that the new fact, if it had been proven, could have been a decisive factor in reaching a decision, the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties'

Rule 122: Appeals

The judgement of a Trial Chamber on review may be appealed in accordance with the provisions of Part Seven' (*APPEALS*)

Rule 123: Return of the Case to the Trial Chamber

If the judgement to be reviewed is under appeal at the time the motion for review is filed, the Appeals Chamber may return the case to the Trial Chamber for disposition of the motion'.