"Elusive Abominations":

Standards of Appellate Review in the *ad hoc* International Criminal Tribunals

Krissa Lanham[*]

April 20, 2007

International Law Research and Writing

Professor Hathaway

[*] J.D. Candidate, Yale Law School, 2007. B.A., Yale College, 2002. The author thanks Philippa Webb, Ben Batros, Oona Hathaway, Allison Marston Danner, Matiangai Sirleaf, and Mickey Martinez for their advice and support during the development and editing of this paper.

"Elusive Abominations":

Standards of Appellate Review in the *ad hoc* International Criminal Tribunals

Prior to 1993, appellate review in international criminal tribunals was an exercise of the imagination. The International Military Tribunals in Nuremberg and Tokyo after World War II, generally recognized as the birthplaces of international criminal law, provided no mechanism for post-conviction judicial review.[1] Appellate review in international criminal law only became a reality with the creation of second-generation international criminal tribunals in 1993. The statutes of the *ad hoc* tribunals—the

[1] Mark C. Fleming, Appellate Review in the International Criminal Tribunals, 37 TEXAS INTERNATIONAL LAW JOURNAL 111, 111 (2002); Mark A. Drumbl and Kenneth S. Gallant, Appeals in the *Ad Hoc* International Criminal Tribunals: Structure, Procedure, and Recent Cases, 3 JOURNAL OF APPELLATE PRACTICE AND PROCESS 589, 590 (2001); William A. Schabas, THE U.N. INTERNATIONAL CRIMINAL TRIBUNALS 439 (2006). However, Executive review in these cases was possible, for example, in the form of petitions for clemency to the Control Council for Germany. *See, e.g.,* Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38, 38 (1947).

International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)—each contain articles providing for appeals.[2] However, the relative novelty of international criminal appellate review belies its import. As of 2002, nearly all of the ICTY and ICTR judgments had been appealed, giving the Appeals Chambers "a central role in the functioning of the tribunals."[3]

The *ad hoc* tribunals are currently experiencing an enormous shift from trial-level cases to appeals. The United Nations Security Council issued a completion strategy for both tribunals in 2003.[4] The strategy calls for the ICTY and the ICTR to complete all trials of first instance by 2008 and all appeals by 2010. As of October 2006, eleven cases were being heard on appeal before the ICTY, compared to five cases—albeit of multiple individuals—at the trial level.[5] The ICTR is currently hearing five group cases and six individual cases at the trial level, and seven cases on appeal.[6] As the work of the *ad hoc* tribunals nears completion, even more trials will end and the Appellate Chambers will receive proportionately more cases. As the ICTR noted in its 2005 periodic report on the progress of the completion strategy,

> It is anticipated that the Appeals Chamber's already heavy workload will, in all likelihood, continue to increase. It has been observed from past experiences, that appeals are normally lodged by both (in multi-accused cases all) parties. . . . As the work load of the Trial Chambers decreases, the focus will shift to the Appeal Chamber where a drastic increase in work is anticipated.[7]

---

[2] Statute of the International Tribunal art. 25, May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda art. 24, Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute].
[3] Drumbl & Gallant, *supra* note 1, at 591.
[4] S.C. Res. 1503, U.N. Doc. S/Res/1503 (Aug. 28, 2003).
[5] International Criminal Tribunal for the Former Yugoslavia, Key Facts and Figures, http://www.un.org/icty/glance-e/index.htm (last visited Apr. 17, 2007).
[6] International Criminal Tribunal for Rwanda, Status of Cases, http://69.94.11.53/default.htm (follow "Cases" hyperlink, then follow "Status of Cases" hyperlink) (last visited Apr. 17, 2007).
[7] Letter from the President of the ICTR to the President of the Security Council (Dec. 5, 2005), ¶ 8, U.N. Doc. S/2005/782 (Dec. 14, 2005), *available at* http://69.94.11.53/ENGLISH/completionstrat/s-2005-782e.pdf.

The International Criminal Court (ICC) has also experienced an upswing in the number of appellate decisions as the Court begins interpreting the provisions of the Rome Statute in actual cases.[8] However, all ICC appeals decisions thus far have been interlocutory, as no trials have yet reached the judgment stage.

Despite the rapid rise in the number of appellate cases in the international criminal tribunals, international criminal appellate law has received relatively little scholarly attention. Only a few articles and books have thus far examined the dynamics of appellate review at the *ad hoc* tribunals.[9] Two early articles analyzed statutory and regulatory provisions for appellate review, using a few select appeals judgments to ground their analysis of the law.[10] Other early studies primarily relied on the tribunals' statutes and national case law to suggest how the *ad hoc* Appeals Chambers should answer specific questions.[11] More recent materials have incorporated information from a wider variety of cases; however, their analysis also tends to center on the interpretation of specific statutory provisions.[12] With one exception—the extent to which the *ad hoc* tribunals, in both trials and appeals, follow their own appellate precedent—scholars have yet to use cases to examine specific questions about the nature of appellate review in

[8] The ICC Appeals Division issued twenty-three decisions and orders (excluding scheduling orders and directions) in the *Thomas Lubanga Dyilo* case (Democratic Republic of Congo) after Lubanga was transferred in March, 2006. International Criminal Court, Public Court Records – Appeals Chamber, http://www.icc-cpi.int/cases/RDC/c0106/c0106_docAppeal.html (last visited Apr. 17, 2007). Lubanga will probably be the Court's first trial, and as other ICC cases rise to that activity level, the Appeals Division will likely handle a greater number of appeals.

[9] One author noted in 2002, "although much discussion has arisen regarding the jurisdiction of the ICTY or ICTR as a whole, very little discussion has centered specifically on their appellate jurisdiction." Fleming, *supra* note 1, at 112.

[10] Fleming, *supra* note 1; Drumbl & Gallant, *supra* note 1.

[11] *See, e.g.*, Ulf S. Lundqvist, *Admitting and Evaluating Evidence in the International Criminal Tribunal for the Former Yugoslavia Appeals Chamber Proceedings*, 15 LEIDEN J. INT'L L. 641 (2002).

[12] *See, e.g.*, Schabas, *supra* note 1, at 439-451; KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW (2001); JOHN R.W.D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA (2d ed., 2000); Xavier Tracol, *The Appeals Chambers of the International Criminal Tribunals*, 12 CRIMINAL LAW FORUM 137 (2001) [hereinafter Tracol, *Appeals Chambers*].

international criminal law.[13] Which parties seek and receive appellate review? What type of review do they seek? When do they seek it, and with what outcomes? What standards guide the Appellate Chambers in their decisions? Only by systematically studying the appellate decisions of the international tribunals can we address these issues.

In a paper of this scope, I can only examine one of these crucial questions: the standards of review by which international criminal appellate bodies evaluate the decisions of the trial chambers below them. Standards of review are the criteria by which appellate courts assess the propriety of orders, findings, and judgments entered by trial courts.[14] They are the legal principles that make tiered systems of courts, like the *ad hoc* tribunals, effective.[15] Appellate judges must enunciate these standards clearly; when standards of review are confusing or vague to the trial chamber, the appeals chamber's ability to fulfill the goals of review may be threatened. Further, if standards are unclear to the public or defendants, the entire tribunal's legitimacy may be called into question. While multiple review standards will necessarily exist since numerous categories of appeals come before appellate bodies, using inconsistent standards for similarly-situated appellants may raise claims of bias and discrimination.

Up until the mid-1980s, standards of review generally received little attention in the legal literature. In actual cases, standards of review appeared "frequently . . . in the

---

[13] Xavier Tracol's article on the use of precedent in international criminal appeals surveyed most of the appellate cases before 2004. Xavier Tracol, *The Precedent of Appeals Chambers Decisions in the International Criminal Tribunals*, 17 LEIDEN J. INT'L L 67 (2004).

[14] BLACK'S LAW DICTIONARY 1441 (8th ed. 2004).

[15] Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 JOURNAL OF APPELLATE PRACTICE AND PROCESS 101, 105 (2005). Standards of review make tiered court systems effective by dividing tasks between the decision-makers best situated to handle them. Trial judges see evidence first-hand, making them better placed to make decisions of fact, so they are reviewed deferentially on appeal. Appeals Judges are more expert in the law, have a broader perspective through reviewing a wider range of cases, and have greater opportunities to research, analyze, discuss and debate important legal issues, making them better-situated to decide questions of law *de novo*. *Id*. at 105.

nature of boilerplate expressions which had the appearance of being used not to confine the boundaries of appellate review prior to deciding particular issues in the case, but rather as mechanistic incantations inserted to justify a predetermined result."[16] With the publication of a major treatise on standards of review in U.S. law in 1986, the scholarship began to change.[17] American authors began to believe that standards of review raise crucial questions about how power is allocated between decision-makers in the legal system.[18] They posited that these standards can tell an appellant whether an appeal is likely to succeed, and guide his decision-making accordingly.[19] With these considerations in mind, many articles investigated standards of review in a variety of legal fields.[20] Scholars in other domestic jurisdictions—particularly Australia and Canada—also began to study standards of review.[21] As yet, however, no article has specifically examined the standards of review used in international criminal law.

---

[16] Timothy P. O'Neill, *Standards of Review in Illinois Criminal Cases: The Need for Major Reform*, 17 S. ILL. U. L.J. 51, 52 (1992), citing Robert L. Byer, *Judge Aldisert's Contribution to Appellate Methodology: Emphasizing and Defining Standards of Review*, 48 U. PITT. L. REV. xvi, xvi (1987).

[17] MARTHA S. DAVIS & STEVEN A. CHILDRESS, STANDARDS OF REVIEW (1986). U.S. scholarship on standards of review may be particularly instructive in the international criminal context, since many of the American delegation's proposals for procedural rules were ultimately adopted as part of the ICTY Rules of Procedure and Evidence. *See infra* note 151 and accompanying text.

[18] *Id*. at 464.

[19] Michael R. Bosse, *Standards of Review: the Meaning of Words*, 49 ME. L. REV. 367, 369 (1997); Warner, *supra* note 15, at 109.

[20] *See, e.g.,* Christopher A. Considine, *Rule 11: Conflicting Appellate Standards of Review and a Proposed Uniform Approach*, 75 CORNELL L.REV. 727 (1990); Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437 (1993); Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193 (1996); Peter B. Rutledge, *The Standard of Review for the Voluntariness of a Confession on Direct Appeal*, 63 U. CHI. L. REV. 1311 (1996); Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47 (2000); John K. Chapman, *Reforming Federal Habeas Review of Military Convictions: Why AEDPA Would Improve the Scope and Standard of Review*, 57 VAND. L. REV. 1387 (2004); Rebecca Silver, *Standard of Review in FOIA Appeals and the Misuse of Summary Judgment*, 73 U. CHI. L. REV 731 (2006).

[21] *See, e.g.,* Adrienne Stone, *The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication*, 23 MELB. U. L. REV. 668 (1999); Mark Aronson, *Unreasonableness and Error of Law*, 24 UNIV. NEW SOUTH WALES L. REV. 26 (2001); M. Ann Chaplin, *Who is Best Suited to Decide? The Recent Trend in Standards of Judicial Review*, 26 OTTAWA L. REV. 321 (1994); The Honourable Mr. Justice Frank Iacobucci, *Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis*, 27 QUEENS L. J. 859 (2001-2002); Mark Elliott, *The Human Rights Act 1998 and the*

The goals of appellate review in international criminal law, just as in national jurisdictions, may be undermined by inconsistent standards of review.[22] First, appellate review is necessary for ensuring the consistency of trial court verdicts; in essence, that "similar cases receive similar treatment."[23] When an appellate body applies different standards of review to similar cases, it not only makes the task of regularizing case treatment more difficult—it is less likely that the appellate court will mandate similar treatment for similar cases when examining them through a different lens—but it also fails to apply the maxim to its own jurisprudence, undermining its credibility.

The "orderly development of law," that is, that "novel questions of law receive uniform answers from a single authoritative body," is an important interest supporting appellate review in international criminal law.[24] This goal is similarly widely recognized in common law national jurisdictions.[25] Inconsistent standards of review undermine the orderly development of law also; appellate courts will be less equipped to give uniform answers to novel questions of law when they apply different standards to similar cases.

As in domestic law, appellate review in international criminal law is also important in ensuring justice in individual cases. "The public aversion to convicting the

---

Standard of Substantive Review, 60 CAMBRIDGE L. J. 301 (2001); Hubert Legal, *Standards of Proof and Standards of Judicial Review in EU Competition Law*, *in* INT'L ANTITRUST L. AND POL'Y (Barry Hawk, ed., 2005).

[22] Several goals of international appellate review—particularly those that differentiate it from national appeals practice—may not be impacted by inconsistent standards of review. For example, international peace and reconciliation is a goal for appellate review at the *ad hoc* tribunals. Fleming, *supra* note 1, at 116. While review standards could hypothetically impact this goal also, inconsistent review seems to have direr and more direct consequences for the other goals I discuss.

[23] Fleming, *supra* note 1, at 114. *See also* Lundqvist, *supra* note 11, at 644 (describing the "corrective function" of the ICTY Appeals Chamber). These "process values" are also recognized in U.S. law. Harlon Dalton noted that, apart from arriving at correct decisions, "we are committed to arriving at decisions correctly, in a manner that ensures that litigants are, and feel they are, treated fairly." Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L. J. 62, 66 (1985).

[24] Fleming, *supra* note 1, at 114.

[25] *See, e.g.*, Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 S.M.U. L. REV. 469, 469-470 (1998).

innocent supports a level of review adequate to ensure that procedures are properly followed and the law correctly applied."[26] For defendants, the right to appeal "is a protection against error, prejudice, and human failings in general."[27] Inconsistent standards of review fail to give appellants the guidance necessary to clearly plead their grounds of appeal.[28] Trial-level courts are also harmed by inconsistent standards: they, too, rely on clear appellate directives in preparing their judgments, which are undermined when appellate courts apply erratic standards.

The *ad hoc* tribunals also face a goal that is generally absent from national jurisdictions. Since the ICTY and ICTR are not permanent, the international community, financing the tribunals, has a temporal interest in seeing them finish their work "speedily and effectively."[29] This goal is negatively impacted by inconsistent standards of review, which force trial courts to spend time guessing at the type of review that will be applied in order to justify their decisions. Further, it may lead the Appeals Chambers to spend more time closely reviewing certain types of appeals than they should: with time as a precious commodity in the *ad hoc* tribunals, waste of this sort must be avoided.

Assessing the impact of review standards on some identified goals for appellate review at the *ad hoc* tribunals thus shows that inconsistent standards will have a detrimental effect. This effect, in turn, could go far beyond the work of the *ad hoc* tribunals themselves. The ICTY and ICTR were a "crucial catalyst" for the establishment

[26] Fleming, *supra* note 1, at 114.
[27] Dalton, *supra* note 23, at 66.
[28] Appellants in the *ad hoc* tribunals are required to clearly plead a ground of appeal; otherwise, the Appeals Chambers may dismiss the argument. Prosecutor v. Kupreskic, Case No. IT-95-16, Judgment, ¶¶ 28-41 (Oct. 23, 2001) [hereinafter Kupreskic Judgment]. *See infra* note 83 and accompanying text.
[29] Fleming, *supra* note 1, at 115.

of the International Criminal Court (ICC),[30] a permanent tribunal whose influence will continue into the foreseeable future. Hybrid and international tribunals have proliferated after the creation of the *ad hoc* tribunals, and the statutes of each of these institutions include articles providing for an appeals chamber; often, the provisions giving rise to standards of review are nearly identical to those of the ICTY and ICTR.[31] The legacy of ICTY and ICTR standards of review will continue to impact international criminal law long after the *ad hoc* Appeals Chambers close their doors.

In this paper, I examine the standards of review used at the *ad hoc* international criminal tribunals through the lens of their appellate case law. My methodology differs from prior studies of international criminal appeals: rather than examining the substance of the ICTY and ICTR statutes through select cases, as early articles did, or providing a general analysis of the Appeals Chamber supported by numerous cases, as more recent literature has, I systematically considered the specific procedural question of the standards review used on each argument of the entire universe of appellate judgments issued by the ICTY and ICTR.

---

[30] Zoe Pearson, *Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Criminal Law*, 39 CORNELL INT'L L. J. 243, at FN 24 (2006). *See infra* note 201 and accompanying text.

[31] *See* Statute of the Special Court for Sierra Leone arts. 11, 20, S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000) (creating an Appeals Chamber and giving it jurisdiction over appeals alleging "(a) A procedural error; (b) An error on a question of law invalidating a decision; (c) An error of fact which has occasioned a miscarriage of justice."); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Law NS/RKM/0801/12, arts. 2, 37 (July 23, 2001), *available at* http://www.derechos.org/human-rights/seasia/doc/krlaw.html (last visited Apr. 17, 2007) (creating extraordinary chambers of the Cambodian trial courts, courts of appeal, and supreme court, and giving the extraordinary chambers of the supreme court to make final decisions on "issues of law and fact"); United Nations Transitional Administration in East Timor, Regulation No. 2000/11 On the Organization of Courts in East Timor, § 4, U.N. Doc. UNTAET/REG/2000/11 (Mar. 6, 2000) (creating one Court of Appeal). The jurisdiction provisions of the Court of Appeal in East Timor are the only ones that significantly differ from the provisions giving rise to standards of review in the ICTY and ICTR.

In Part I, I introduce the structure of the Appeals Chambers and describe my methodology, providing a general overview of the nature of grounds of appeal I considered and broad conclusions that may be drawn. In Part II, I frame the law on standards of review as *stated* in the ICTY and ICTR appellate decisions. Part III examines whether the Appeals Chambers' practice actually matches the standards of review they enunciated. Part IV considers reasons why standards of review may be inconsistent, and Part V assesses the consequences of inconsistent standards for defendants, prosecutors, and the *ad hoc* tribunals themselves. Finally, Part VI draws the comparison between standards of review at the *ad hoc* tribunals and the ICC, providing recommendations for future practice in international criminal law generally.

Part I. Overview and Methodology

To frame the methodology I used in examining the standards of review, it is necessary to provide a brief overview of the structure of the Appeals Chambers at the Yugoslavia and Rwanda tribunals. When the United Nations Security Council created the ICTY in 1993, it incorporated a chamber "constituted to hear appeals from the decisions of the Trial Chambers."[32] Article 11 of the ICTY Statute provides for an appeals chamber, and Article 12 allocates seven of the permanent judges of the tribunal to serve on the Appeals Chamber, which shall, "for each appeal, be composed of five of its members."[33] The Security Council created the ICTR in 1994, and provided by statute that the judges of

[32] Fleming, *supra* note 1, at 112.
[33] ICTY Statute, *supra* note 2, arts. 11, 12. Initially, in both the ICTY and ICTR, judges "rotate[d] on a regular basis between the Trial Chambers and the Appeals Chamber." Fleming, *supra* note 1, at 115. However, in 2000, the number of judges in the ICTY and the ICTR were increased and the Appeals Chamber "now consists of the same seven members, five of whom sit on the panel for any appeal." Drumbl & Gallant, *supra* note 1, at 608. The President of the ICTR assigns two judges to the Appeals Chamber, the President of the ICTY assigns four judges to the Appeals Chamber, and the President of the ICTY presides over the Appeals Chamber as its seventh member. Drumbl & Gallant, *supra* note 1, at 608.

the ICTY Appeals Chamber would also serve as the members of the ICTR Appeals Chamber.[34] The similarity in provisions of the ICTY and ICTR statutes and identity of the judges allows for their appeals to be considered as a cohesive unit when examining standards of review: essentially, the same judges use the same legal standards based on the same statutory provisions when considering appeals from both tribunals.[35]

The Appeals Chambers hear appeals from final judgments and interlocutory decisions. Article 24 of the ICTR Statute and Article 25 of the ICTY statute provide the jurisdiction of the Appeals Chambers to consider final judgment appeals.[36] The statutes do not provide for interlocutory appeals but the Rules of Procedure and Evidence at both tribunals have allowed for certain limited categories of such appeals from the beginning,[37] and as of 2002, the Appeals Chambers were spending much of their time considering interlocutory appeals.[38] In this study, I chose to focus on appeals of final judgments rather than interlocutory appeals. A high proportion of the voluminous

[34] Article 10 of the ICTR Statute provides for a Trial Chamber and an Appeals Chamber; Article 11 provides for five judges to serve each appeal, and Article 12 mandates that the members of the ICTY Appeals Chamber would also serve as the members of the ICTR Appeals Chamber. ICTR Statute, *supra* note 2, arts. 10-12.
[35] Drumbl & Gallant, *supra* note 1, at 607.
[36] ICTY Statute, *supra* note 2, art. 25; ICTR Statute, *supra* note 2, art. 24.
[37] Drumbl & Gallant, *supra* note 1, at 613. According to Drumbl and Gallant, the principal interlocutory appeals of right are appeals from the denial of a motion to dismiss for lack of jurisdiction, governed by Rule 72(B)(i) of the ICTY and ICTR Rules of Procedure and Evidence. *Id*. Rule 72(B)(ii) also provides for discretionary interlocutory appeals in other cases involving "an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings." ICTY Rules of Procedure and Evidence, Rule 72(B)(ii), U.N. Doc. IT/32/Rev.39 (2006) [hereinafter ICTY Rules of Procedure and Evidence]. Appealing parties must show "good cause" in order to merit consideration of an interlocutory appeal of a preliminary motion under Rule 72(B)(ii). John Hocking, *Interlocutory Appeals before the ICTY*, *in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE 459, 462 (Richard May et al. eds., 2001). Interlocutory appeals of non-preliminary motions may also be considered on matters that require resolution early in the proceedings such that they 'would cause . . . prejudice' to the party seeking leave to appeal that could not be cured by final appeal, and matters of "general importance to proceedings." *Id*. at 462-463. *See also* Drumbl & Gallant, *supra* note 1, at 615-616.
[38] Drumbl & Gallant, *supra* note 1, at 595.

requests for interlocutory appeal are denied fairly summarily,[39] so final judgment appeals provide more fertile ground for initially analyzing the standards applied.

The ICTY and ICTR statutes outline the basics of appellate jurisdiction at the tribunals. The Appeals Chambers are permitted to hear appeals based on "(a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice."[40] Separating out errors of fact and errors of law is not unique to the *ad hoc* tribunals: federal courts in the U.S., which had a major impact on drafting the statutes, also consider appellate arguments under these categories.[41] In their pure forms, a question of law is one where a court "determines an abstract principle of general application that is independent of the facts under consideration,"[42] and a question of fact "is an inference that a certain event did or did not occur in a certain way."[43] The Appeals Chambers, like U.S. federal courts, apply different standards of review for questions of law and questions of fact. I therefore first examined each argument raised on appeal in the entire universe of judgments of the Appeals Chambers, and classified each as an error

[39] The ICTY and ICTR websites list more than 669 interlocutory Appeals Chamber decisions, not including decisions that are repeated across cases (for example, in cases where multiple co-defendants lodge a unitary interlocutory appeal and it is listed under each co-defendant's file). Many of the interlocutory decisions issued are denials of leave to appeal, and do not discuss specifically how the appellant failed to satisfy the requirements for leave to appeal. *See, e.g.*, Prosecutor v. Naletilic, Case No. IT-38-94, Decision on Application for Leave to Appeal by the Accused Mladen Naletilic and Notice of Joinder in that Application by the Accused Vinko Martinovic Against the Decision of Trial Chamber I of 10 November 2000 (Jan. 31, 2001). Other types of interlocutory decisions also do not explicitly consider standards of review. *See, e.g.* Prosecutor v. Kupreskic, Case No. IT-95-16, Decision on the Petition of the Counsels of Zoran Kupreskic, Mirjan Kupreskic, Drago Josipovic and Vladimir Santic (May 16, 2000).

[40] ICTY Statute, *supra* note 2, art. 25(1); ICTR Statute, *supra* note 2, art. 24(1). The Appeals Chambers have also developed another category of cases over which they have jurisdiction: issues of "general significance" to the tribunals' jurisprudence. *See* Schabas, *supra* note 1, at 441. *See also* Drumbl & Gallant, *supra* note 1, at 618-619.

[41] For more discussion, *see infra* notes 154-157 and accompanying text.

[42] Fleming, *supra* note 1, at 124. *See also* O'Neill, *supra* note 16, at 56, citing Hart and Sacks's definition of errors of law: "fact-free general principles that are applicable to all, or at least many, disputes and not simply to the one *sub judice*." Henry Hart & Albert Sacks, THE LEGAL PROCESS 374 (ed. 1958).

[43] Fleming, *supra* note 1, at 124. Henry P. Monaghan describes questions of fact as "generally respond[ing] to inquiries about who, when, what, and where." Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985).

of fact, an error of law, or both an error of fact and an error of law.[44] Since each Appeals Chamber judgment addresses numerous grounds of appeal—for instance, forty-five in the first *Celebici (Delalic)* judgment—and each ground of appeal in turn contains numerous subgrounds of appeal and separate arguments raising multiple questions of fact and law,[45] the thirty-five Appeals Chamber judgments issued between October 7, 1997 and July 7, 2006 gave rise to 659 arguments that I classified.[46] Classifying the arguments both according to the category of question they raised and as an error of fact or error of law allowed me to see whether the Appeals Chamber was treating the same kind of argument as an "error of fact" in one appeal and an "error of law" in another.

The problem of treating the same argument variously as an error of fact and an error of law could arise far more often than the definitions above would suggest. Classifying grounds of appeal as questions of fact and questions of law is difficult since such questions rarely arise in their purest form: appellants often contest the way that a

---

[44] There are many—often confusing—examples of arguments that allege both errors of fact and errors of law. One clear example is an argument raised by Juvenal Kajelijeli in the ICTR:

> The Appellant submits that the Trial Chamber erred in law and fact in accepting the uncorroborated testimony of Witness GDD . . . . The Appellant argues that Witness GDD's veracity "was called into question by virtue of the fact of his criminal records, his reputation in the community for dishonesty and the inconsistencies between his statements given to the ICTR investigators and his trial testimony." In consideration of this, the Appellant contends, the Trial Chamber's failure to view Witness GDD's testimony with "great caution" and not requiring corroboration was erroneous.

Prosecutor v. Kajelijeli, Case No. ICTR-98-44A, Judgment, ¶ 168 (May 23, 2005) [hereinafter Kajelijeli Judgment]. Here, Kajelijeli's allegations regarding Witness GDD's veracity could be considered a question of fact, and the Trial Chamber's failure to view potentially-incredulous testimony with "great caution" and not requiring corroboration suggests that the Trial Chamber applied an incorrect standard—an error of law.

[45] For example, the Appeals Chamber in *Kunarac* listed six separate "complaints" as "aspect[s] of the Appellants' ground of appeal in respect of Article 5 of the statute." Prosecutor v. Kunarac, Case No. IT-96-23, Judgment ¶¶ 73, 71-75. These included, among others, the contention that their acts were not sufficiently connected to the armed conflict to qualify as having been "committed in armed conflict," error in finding there was an attack against the non-Serb population of Foca, and that the consequences for civilians were the unfortunate results of a legitimate military operation. Because each of these "complaints" raised an entirely separate issue, I considered each one separately.

[46] This time period represents the entire universe of ICTY and ICTR appeals judgments from the time the first judgment was issued up to the last judgment available in January 2007 as I completed my data analysis. For a table breaking down the judgments issued between October 7, 1997 and July 7, 2006, and the number of arguments that arose in each, *see* Appendix I. The entire data set can also be emailed upon request.

trial court has applied the law to the facts of their case.[47] Some domestic appellate courts therefore refer to 'mixed questions of law and fact' in certain situations.[48] The ICTY and ICTR statutes make no provisions for 'mixed questions,' and the Appeals Chambers generally do not refer to 'mixed questions' as such.[49] However, since the Chambers do apply different standards of review for errors of fact and errors of law, the problem of how to classify questions intertwining both types of error is crucial to the consistency of their jurisprudence.

Inauspiciously, the legal scholars who first provided in-depth analyses of the *ad hoc* Appeals Chambers appeared to arrive at different conclusions about the classification for mixed questions. Mark Fleming stated that what domestic jurisdictions called 'mixed questions' are "questions of applied law," under the "question of law" standard, noting, "[i]n deciding a question of applied law, the court is not concerned with issues such as the credibility or relative persuasiveness of witnesses or documents; the underlying facts have been established, and the question of applied law is what legal consequences follow from these facts."[50] However, Drumbl and Gallant later found that in the *ad hoc* tribunals, "[i]f a standard of law is correct, the alleged misapplication of that standard to the facts of a specific case appears to be treated as an error of fact."[51] That these applied questions of fact or 'mixed questions' cause confusion is no surprise: domestic jurisdictions also struggle with them, and the U.S. Court of Claims went as far as to call them "elusive

[47] Further, the distinction between a question of fact and a question of law may itself be difficult to maintain. Ulf Lundqvist observes, "the distinction between facts and law is sometimes artificial, since these two components tend to merge with each other when analyzed." Lundqvist, *supra* note 11, at 652.
[48] Drumbl & Gallant, *supra* note 1, at 620.
[49] *Id*.
[50] Fleming, *supra* note 1, at 124.
[51] Drumbl & Gallant, *supra* note 1, at 620.

abominations."[52] In my analysis, I classified "applied questions," including how much weight to give a circumstance in sentencing once the facts have been established, as errors of fact since the Appeals Chambers generally focus on factual sufficiency when addressing them.[53] However, I attempted to preserve the distinction between "pure questions of fact" and "applied questions of fact" by noting which type of factual question the appellant appeared to allege.[54]

In addition to coding grounds of appeal as questions of fact and questions of law in final appeals judgments, I also noted other information about the argument. For each ground, I noted the party appealing (in contrast with many national jurisdictions, prosecutors at international criminal tribunals are permitted to appeal both questions of law and questions of fact),[55] the relief they requested, and whether or not the appeal was successful. When factual appeals are "successful" in the *ad hoc* tribunals, similar to civil law countries, the Appeals Chamber may itself reconsider factual issues rather than remanding.[56] I then recorded information from the paragraphs of the judgment where the Appeals Chamber made its decision and applied the standard of review. Since Appeals Chambers sometimes failed to describe the standard they were using for each argument (a

[52] S&E Contractors, Inc. v. U.S., 433 F.2d 1373, 1378 (Ct. Cl. 1970).
[53] *See, e.g.,* Prosecutor v. Kayishema, Case No. ICTR-95-1, Judgment, ¶¶ 137-149 (June 1, 2001).
[54] Although I examined each ground of appeal in each final judgment, I chose not to code certain types of arguments in which the Appeals Chamber was not asked to directly examine the Trial Chamber holding on grounds of fact or law. These included: procedural grounds of appeal, e.g. grounds alleging that the Trial Chamber had failed to ensure the defendant was represented by his counsel of choice; grounds that the Trial Chamber could not address in its judgment, e.g. alleging the defendant had been unlawfully detained prior to trial, grounds alleging errors in transcription, and grounds alleging the bias or incapacity of Trial Chamber judges; grounds based on the actions of the prosecution rather than actions of the Trial Chamber, e.g. failure to plead charges in the indictment, failure to turn over evidence, and claims of selective prosecution; grounds utilizing new factual evidence admitted before the Appeals Chamber under Rule 115; and grounds that the Appeals Chamber dismissed under its "inherent jurisdiction" without a reasoned opinion as being irrelevant. *See* Kunarac Judgment, *supra* note 45, at ¶¶ 35-48.
[55] Prosecutors are even permitted to appeal questions of fact leading to an acquittal, a controversial power. Fleming, *supra* note 1, at 140. This issue will be revisited, *infra* note 186 and accompanying text.
[56] For more discussion on the difficulties the Appeals Chambers' tendency not to remand provides for standards of review, *see infra* notes 173-179 and accompanying text.

problematic tendency that I will discuss more in Part III), I noted both the standards of review they stated and they *appeared* to use (the 'implicit standard of review') in order to obtain a more realistic picture of the review the Appeals Chamber was actually conducting for each argument.[57] I coded the implicit standard of review from 1 to 5, 1 being most deferential to the Trial Chamber's decision and 5 being least deferential (essentially, *de novo* review). The coding looked at the types of sources the Appeals Chamber considered in its opinion,[58] the amount the Appeals Chamber cited to the Trial Judgment and underlying sources, and the extent to which the Appeals Chamber emphasized the deference it was using. I analyzed this data to see whether the Appeals Chambers were applying consistent standards of review to similar questions, considering separately the stated standards (Part II) and the underlying methodology (Part III).

The breadth of data I collected allows me to paint a more thorough picture of appellate review than prior studies. Because I collected data on the entire universe of appellate judgments issued up until July 7, 2006, and not merely a sample of the judgments, the statistics I present are not sample statistics, but actual population parameters. This obviates the need to calculate the significance of the statistics I set out.[59] The nature of the data I collected means that I can report with certainty that the variations

[57] I looked only at the relevant paragraphs of the Appeals Chamber judgment setting out the sources it considered for each argument when coding this implicit standard of review to avoid knowing *a priori* whether the Appeals Chamber claimed to be reviewing an error of fact or error of law, and the standard of review the Appeals Chamber claimed to be using.

[58] The ICTY *Blaskic* Appeals judgment gave a general idea of the sources the Appeals Chambers use in making their decisions about the factual record: "the Appeals Chamber will in principle only take into account the following factual evidence: evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote; evidence contained in the trial record and referred to by the parties; and additional evidence admitted on appeal." Prosecutor v. Blaskic, Case No. IT-95-14, Judgment, ¶¶ 8-24 (July 29, 2004) [hereinafter Blaskic Judgment]. *See also* Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2, Judgment, ¶¶ 13-24 (Dec. 17, 2004) [hereinafter Kordic & Cerkez Judgment]; Prosecutor v. Stakic, Case No. IT-97-24, Judgment, ¶¶ 7-13 (Mar. 22, 2006) [hereinafter Stakic Judgment].

[59] Statistical significance calculates the likelihood that variations in sample statistics are due to actual differences in the population and not the choice of samples themselves.

I describe exist in the actual population of cases, because I have measured the characteristics of the entire population.

A preliminary analysis of the results I obtained illuminates the general character of appellate review in the *ad hoc* tribunals. Focusing only on challenges to the Trial Chamber Judgment that raised questions of law and fact, I examined 659 arguments raised on appeal in the judgments issued between October 7, 1997 and July 7, 2006.[60] The vast majority of these (570) were arguments raised by defendants. Of the remaining arguments I considered, eighty-seven were raised by the prosecution, and two were raised by the Appeals Chamber itself in the course of considering party appeals.[61] Defendants were successful on their grounds of appeal 9.6% of the time, wholly unsuccessful on 87.5% of their arguments, and partially successful on 2.8% of their arguments. The prosecution generally had a higher success rate: the Appeals Chamber granted its ground of appeal on 46% of arguments, rejected its ground on 49.4% of arguments, and partially granted the appeal on 4.6% of arguments.

Both questions of law and questions of fact arise frequently in appeals. Overall, 332 arguments (50%) were questions of fact (including applied questions of fact), 158 arguments (24%) raised questions of law, and 169 arguments (26%) raised questions of both fact and law. The most common type of argument raised was that the Trial Chamber erroneously found that facts either did or did not meet a legal standard—an applied question of fact.[62]

---

[60] For a table of the judgments I considered, *see* Appendix I.

[61] As Schabas explains, the Appeals Chambers of the *ad hoc* Tribunals "have reserved the right to raise questions *proprio motu*, as well as to examine alleged errors which will not affect the verdict but which raise an issue of general importance for the case law or functioning of the Tribunal." Schabas, *supra* note 1, at 447.

[62] This allegation of facts failing to meet the standard applied arose often in arguments involving alibi evidence, witness identification of the defendant, mens rea, and superior responsibility. Allegations

Breaking down the data further, the numbers become far more interesting. Comparing the types of arguments raised by the prosecution and the defense, defendants were far more likely to raise errors of fact. Of 570 grounds of appeal raised by defendants, 302 (53%) comprised pure and applied questions of fact, 128 (23%) raised questions of law, and 150 (25%) raised questions of both fact and law. Defendants' appeals were thus heavily focused on questions of pure and applied fact. In contrast, the prosecution raised roughly equal proportions of each type of argument: 35% questions of fact, 32% questions of law, and 33% arguments involving questions of fact and of law.[63] Defendants are less successful on factual and legal appeals than the prosecution: they had a 8.3% success rate on appeals of fact compared to the prosecution's 36.7% success rate on appeals of fact, and defendants successfully appealed issues of law 20.5% of the time compared to 57.1% by the prosecution.

The differences in the types and success rates of appeals raised make some intuitive sense. As repeat players, prosecutors are more likely to be concerned with 'getting the law right' for future cases by appealing issues of law, while defendants are more likely to focus on the law as applied to their unique facts, raising every factual claim possible in order to contest their own convictions. Prosecutors, knowing they must continue to apply to the Appeals Chambers in future appeals, may also be more hesitant to raise issues that the judges may see as frivolous, explaining the lower number of appeals and higher success rates. In repeated interactions with the Appeals Chamber, the

---

regarding witness credibility (generally, questions of fact) and assertions that the Trial Chamber had applied an incorrect standard (generally, questions of law) also arose very commonly.

[63] These differences become even more apparent when factoring out reviews of sentencing appeals, which aim not to overturn convictions and acquittals, but rather simply to reduce or increase the sentence. Without sentencing appeals, defendants' appeals comprised 55.8% questions of fact, 18.6% questions of law, and 25.6% questions involving errors of fact and law. In contrast, the prosecution's non-sentence appeals raised 21.2% questions of fact, 37.9% questions of law, and 40.9% questions involving both errors of fact and law.

prosecution may develop a better understanding of the types of arguments that are likely to succeed, and choose their issues accordingly. Repeat players are also exposed more often to the standards of review the Appeals Chamber uses, potentially leading them to tailor their arguments accordingly.

Unfortunately, the imbalance in the types of arguments raised also means that the standards of review used will have differential impacts on the parties. Inconsistent standards of review of errors of law would have a greater impact on the prosecution, which raises proportionately more questions of law, than on the defense. Conversely, as a party who primarily appeals factual questions, inconsistent standards of review of factual errors—or mere changes in the standard of review for factual questions—would impact defendants far more than they would affect the prosecution. These base inequalities become important through differential pleading requirements for errors of fact and errors of law: the Appeals Chambers will review errors of law, even if incorrectly pleaded, if the Trial Chamber "has made a glaring mistake."[64] No such exception exists for errors of fact.[65] When standards of review are inconsistent, they fail to give appellants the guidance necessary to efficiently frame their argument to meet pleading requirements.[66] As a possible result, parties for whom the standard of review is inconsistent may raise more appeals to cover all possible standards of review that a court might actually apply.

---

[64] Kupreskic Judgment, *supra* note 28, ¶ 27. For more information, see *infra* note 111 and accompanying text.

[65] The Appeals Chamber acknowledged in *Kupreskic*, "[a]dmittedly, alleged errors of law do not require that the appellant make as specific a showing of an error by the Trial Chamber as do alleged errors of fact." Kupreskic Judgment, *supra* note 28, ¶ 26.

[66] Specifically, one of the pleading requirements of the *ad hoc* Tribunals is to "explain how the error invalidates the decision." Prosecutor v. Rutaganda, Case. No. ICTR-96-3, Judgment, ¶ 20 (May 26, 2003) [hereinafter Rutaganda Judgment]. The types of argument necessary to show that an error invalidates a decision will depend greatly on the standards of review. *See infra* note 110 and accompanying text.

Inconsistent standards of review might therefore partially explain why defendants raise many more arguments on appeal and are comparatively less successful in doing so.

The following two sections will examine the standards of review stated and used in practice at the *ad hoc* international criminal tribunals. Significantly, my analysis will show that both the stated standards and the standards the Appeals Chambers actually apply are far less predictable for errors of fact than for errors of law. Taken together with the above statistical analysis showing that defendants appeal issues of fact far more than the prosecution, and that defendants are comparatively less successful on their factual appeals, the overall picture is one of a system in need of reform.

Part II. The Stated Standards of Appellate Review

The ICTY and ICTR Appeals Chambers have developed standards of review from the statutory mandate that they review errors "on a question of law invalidating the decision" and errors of fact which have "occasioned a miscarriage of justice."[67] Consistent with the goal of appellate review of ensuring that "novel questions of law receive uniform answers from a single authoritative body,"[68] the Appeals Chambers do not claim to be deferential when assessing errors of law. When assessing errors of fact, the Appeals Chambers state that they will be deferential to the Trial Chambers, reasoning that the Trial Chambers are the primary finders of fact.[69] The Appeals Chamber often encapsulates the standard of review at the beginning of an appellate judgment, noting that

[67] ICTY Statute, *supra* note 2, art. 25; ICTR Statute, *supra* note 2, art. 24.
[68] Fleming, *supra* note 1, at 114.
[69] The exact standards used, and the number of cases in which each stated standard is cited, will be presented *infra*.

the appeals procedure at the *ad hoc* tribunals is only corrective (not a *de novo* review of the case), [70] and then sets out the separate standards for errors of fact and errors of law.[71]

In this section, I draw on the universe of judgments to examine the standards that the Appeals Chambers have enunciated in the case law. My analysis of these 'stated standards' ultimately will show that the Appeals Chambers apply a greater range of standards for errors of fact and that these standards are more likely to change significantly over time. Statements of the Appeals Chambers indicate that certain errors of fact are reviewed on a case-by-case basis, giving little guidance to appellants. In contrast, standards of review for errors of law have been relatively stable over time, giving appellants a greater ability to judge how they should raise legal issues on appeal.

A. Errors of Fact

The Appeals Chambers purport to show "a high degree of deference . . . to the factual findings of the Trial Chamber."[72] They generally find such deference to be warranted because "[t]he task of hearing, assessing and weighing the evidence presented at trial is

[70] Prosecutor v. Krnojelac, Case No. IT-97-25, Judgment, ¶ 5 (Sept. 17, 2003) [hereinafter Krnojelac Judgment]. *See also* Prosecutor v. Furundzija, IT-95-17/1, Judgment, ¶ 40 (July 21, 2000) [hereinafter Furundzija Judgment]; Kunarac Judgment, *supra* note 45, at ¶¶ 35-48; Kordic & Cerkez Judgment, *supra* note 58, at ¶¶ 13-24; Kupreskic Judgment, *supra* note 28, ¶¶ 405-409; Prosecutor v. Vasiljevic, IT-98-32, Judgment, ¶¶ 4-12 (Feb. 25, 2004) [hereinafter Vasiljevic Judgment]; Blaskic Judgment, *supra* note 58, at ¶¶ 8-24; Prosecutor v. Semanza, ICTR-97-20, Judgment, ¶ 9 [hereinafter Semanza Judgment]; Schabas, *supra* note 1, at 444.

[71] This practice of setting out the standard of review at the beginning of a judgment, and only sometimes referring to the standard in the actual context of the arguments the Appeals Chamber is examining, may be a contributing factor to the confusion in evaluating "errors of applied fact" and errors that include both questions of fact and questions of law. When the Appeals Chamber fails to state the standard being applied to such questions (presumably instead relying on the statement of standards at the beginning of the judgment), it is sometimes unclear whether the judges are actually applying an error of fact or error of law standard to that individual argument. *See* Part III, *infra.*

[72] Rutaganda Judgment, *supra* note 66, at ¶ 21.

left to the judges sitting in a Trial Chamber."[73] In addition to acknowledging the Trial Chambers' role as primary fact-finders, Appeals Chambers recognize their own practical limitations in assessing evidence from a written record:

> the Trial Chamber has the advantage of observing witnesses in person and hearing them when they are testifying, and so are [*sic*] better placed to choose between divergent accounts of one and the same event. Trial Judges are better placed than the Appeals Chamber to assess witness reliability and credibility, and to determine the probative value to ascribe to the evidence presented at trial.[74]

Thus, not only is it the Trial Chambers' role to find facts, but they are better placed to do so by virtue of the nature of evidence before them, compared to the paper record available to the Appeals Chamber.[75] The respect which Appeals Chambers accord the Trial Chambers' factual findings is variously expressed as a "margin of deference,"[76] and "not lightly disturb[ing] findings of fact," [77] but the principles described as underlying such deference do not vary.

---

[73] Furundzija Judgment, *supra* note 70, at ¶ 37. *See also* Kupreskic Judgment, *supra* note 28, ¶¶ 28-41; Prosecutor v. Kvocka, Case No. IT-98-30/1, Judgment, ¶¶ 13-20 (Feb. 28, 2005) [hereinafter Kvocka Judgment].

[74] Rutaganda Judgment, *supra* note 66, at ¶ 21. *See also* Kupreskic Judgment, *supra* note 28, ¶¶ 28-41; Furundzija Judgment, *supra* note 70, at ¶ 37; Prosecutor v. Bagilishema, Case. No. ICTR-95-1, ¶ 12 (Dec. 13, 2002) [hereinafter Bagilishema Judgment]; Krnojelac Judgment, *supra* note 70, at ¶¶ 18-20; Blaskic Judgment, *supra* note 58, at ¶¶ 8-24; Prosecutor v. Ntakirutimana, Case No. ICTR-96-10&17, Judgment, ¶ 11 (Dec. 13, 2004) [hereinafter Ntakirutimana Judgment].

[75] Indeed, one commentator noted, "even the most accurate trial transcripts with the most detailed reasons for the findings cannot provide the judges sitting on appeal with the same information and with the same quality than had the Trial Chamber when hearing the live witnesses before them." Lundqvist, *supra* note 11, at 662. The written record is made available to the Appeals Chamber under ICTY Rule 109, stating that "[t]he record on appeal shall consist of the trial record, as certified by the Registrar." ICTY Rules of Procedure and Evidence, *supra* note 37, at Rule 109. However, Rule 107, which states that "[t]he rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chambers," may "at least suggest the possibility that the Appeals Chamber could choose to hear the entire trial again." Fleming, *supra* note 1, at note 128.

[76] Furundzija Judgment, *supra* note 70, at ¶ 37; Kupreskic Judgment, *supra* note 28, ¶¶ 28-41.

[77] Furundzija Judgment, *supra* note 70, at ¶ 37; Kupreskic Judgment, *supra* note 28, ¶¶ 28-41. *See also* Rutaganda Judgment, *supra* note 66, at ¶ 21; Krnojelac Judgment, *supra* note 70, at ¶¶ 18-20; Prosecutor v. Niyitegeka, Case No. ICTR-96-14, Judgment, ¶ 8 (July 9, 2004) [hereinafter Niyitegeka Judgment]; Blaskic Judgment, *supra* note 58, at ¶¶ 8-24; Ntakirutimana Judgment, *supra* note 74, at ¶ 11; Kvocka Judgment, *supra* note 73, at ¶¶ 13-20; Semanza Judgment, *supra* note 70, at ¶ 8; Prosecutor v. Kamuhanda, Case No. ICTR-99-54, Judgment, ¶ 7 (Sept. 19, 2005) [hereinafter Kamuhanda Judgment]; Prosecutor v. Naletilic & Martinovic, Case No. IT-98-34, Judgment, ¶¶ 8-14 (May 3, 2006) [hereinafter Naletilic &

The deference that the Appeals Chambers feel they owe to Trial Chambers' fact-finding manifests itself in the standard of review they purport to apply to errors of fact. They ostensibly apply a "reasonableness" test, examining whether "the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person."[78] The ICTY Appeals Chamber's *Aleksovski* decision enunciated a slightly more expansive standard that has been cited in many subsequent judgments: "The Appeals Chamber may overturn the Trial Chamber's finding of fact only where the evidence relied on could not have been accepted by any reasonable tribunal or where the evaluation of the evidence is wholly erroneous."[79] The relevant articles of the ICTY and ICTR statutes also require that errors of fact occasion "a miscarriage of justice,"[80] which has been interpreted as entailing a "grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the

---

Martinovic Judgment]; Prosecutor v. Gacumbitsi, Case No. ICTR-01-64, Judgment, ¶ 8 (July 7, 2006) [hereinafter Gacumbitsi Judgment].

[78] Furundzija Judgment, *supra* note 70, at ¶ 99. *See also* Prosecutor v. Tadic, Case No. IT-94-1, Judgment, ¶ 64 (July 15, 1999); Bagilishema Judgment, *supra* note 74, at ¶ 11; Prosecutor v. Delalic et al., Case No. IT-96-21, Judgment, ¶ 202 (Feb. 20, 2001) [hereinafter Delalic I Judgment]; Prosecutor v. Musema, Case No. ICTR-96-13, Judgment, ¶ 99 (Nov. 16, 2001) [hereinafter Musema Judgment]; Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgment, ¶ 232 (June 1, 2000) [hereinafter Akayesu Judgment]. The *Rutaganda* and *Musema* judgments also formulate the standard slightly differently, as "the evidence relied on by the Trial Chamber could not have been accepted by any reasonable person." Rutaganda Judgment, *supra* note 66, at ¶ 22; Musema Judgment, *id*. at ¶ 92. Other judgments have stated the standard as, "the Appeals Chamber will only substitute the Trial Chamber's finding for its own when no reasonable trier of fact could have made the original finding," or reached "the conclusion of guilt beyond a reasonable doubt." Vasiljevic Judgment, *supra* note 70, at ¶ 7; Kordic & Cerkez Judgment, *supra* note 58, at ¶ 18; Stakic Judgment, *supra* note 58, at ¶¶ 7-13; Blaskic Judgment, *supra* note 58, at ¶ 16; Kvocka Judgment, *supra* note 73, at ¶ 426.

[79] Prosecutor v. Aleksovski, Case No. IT-95-14/1, Judgment, ¶ 63 (Mar. 24, 2000) [hereinafter Aleksovski Judgment]. Although this standard was first cited in the *Aleksovski* decision, it is usually associated with the *Kupreskic* judgment, and the type of analysis the Chamber conducted there, as I will describe in the following paragraphs. *See* Kupreskic Judgment, *supra* note 28, ¶¶ 28-41; Kunarac Judgment, *supra* note 45, at ¶¶ 35-48; Rutaganda Judgment, *supra* note 66, at ¶ 22; Niyitegeka Judgment, *supra* note 77, at ¶ 8; Blaskic Judgment, *supra* note 58, at ¶¶ 8-24; Ntakirutimana Judgment, *supra* note 74, at ¶ 11; Kvocka Judgment, *supra* note 73, at ¶¶ 13-20; Stakic Judgment, *supra* note 58, at ¶¶ 7-13. *See also* Drumbl & Gallant, *supra* note 1, at 625. Although my analysis did not address errors of fact based on new evidence admitted on appeal, it is important to note that the Appeals Chambers use a different standard when new evidence is admitted. *See* Rutaganda Judgment, *supra* note 66, at ¶ 463; Blaskic Judgment, *supra* note 58, at ¶¶ 8-24. *See also* Lundqvist, *supra* note 11, at 655-661.

[80] ICTY Statute, *supra* note 2, art. 25; ICTR Statute, *supra* note 2, art. 24.

crime."[81] The Appeals Chambers also apply a "reasonableness" standard when the prosecution appeals an acquittal, however, since the 'proof beyond a reasonable doubt' standard applies in the tribunals, the standard necessary to show a "miscarriage of justice" in an acquittal requires that "when account is taken of the errors of fact . . ., all reasonable doubt of the accused's guilt has been eliminated."[82] Thus, the Appeals Chamber will not overturn the trial judgment based on "each and every error of fact"; rather, it requires a level of error sufficient to occasion a miscarriage of justice. The Appeals Chambers also impose procedural requirements on appellants,[83] and will dismiss, without providing detailed reasons, submissions that are "evidently unfounded."[84]

In October 2001, the ICTY Appeals Chamber's *Kupreskic* judgment applied the reasonableness standard in a new way. Although *Kupreskic* cited the "margin of deference" due to the Trial Chamber and the *Aleksovski* standard, it overturned several of the facts found at trial under review that seemed to employ a less deferential component. After making the usual observations about the fact-finding advantages of the Trial Chamber, the *Kupreskic* Appeals Chamber noted that the Trial Chamber's discretion to

---

[81] Kupreskic Judgment, *supra* note 28, ¶¶ 28-41. *See also* Furundzija Judgment, *supra* note 70, at ¶ 37; Kunarac Judgment, *supra* note 45, at ¶¶ 35-48; Rutaganda Judgment, *supra* note 66, at ¶ 23; Krnojelac Judgment, *supra* note 70, at ¶¶ 18-20; Vasiljevic Judgment, *supra* note 70, at ¶¶ 4-12; Kordic & Cerkez Judgment, *supra* note 58, at ¶¶ 13-24; Kvocka Judgment, *supra* note 73, at ¶¶ 13-20.

[82] Rutaganda Judgment, *supra* note 66, at ¶ 24; Bagilishema Judgment, *supra* note 74, at ¶¶ 10-14; Krnojelac Judgment, *supra* note 70, at ¶¶ 18-20. More recently, the *Kordic and Cerkez* judgment described the Appeals Chamber's standard as determining "whether no reasonable trier of fact could have come to the conclusion of acquittal." Kordic & Cerkez Judgment, *supra* note 58, at ¶¶ 13-24.

[83] The *Kunarac* judgment stated,

> An appellant must . . . clearly set out his grounds of appeal as well as the arguments in support of each ground. Furthermore, depending on the finding challenged, he must set out the arguments supporting the contention that the alleged error has invalidated the decision or occasioned a miscarriage of justice.

Kunarac Judgment, *supra* note 45, at ¶ 44. *See also* Niyitegeka Judgment, *supra* note 77, at ¶ 10; Blaskic Judgment, *supra* note 58, at ¶¶ 8-24; Ntakirutimana Judgment, *supra* note 74, at ¶ 11; Semanza Judgment, *supra* note 70, at ¶ 9; Kajelijeli Judgment, *supra* note 44, at ¶ 6; Kamuhanda Judgment, *supra* note 77, at ¶ 9; Stakic Judgment, *supra* note 58, at ¶¶ 7-13; Gacumbitsi Judgment, *supra* note 77, at ¶ 10. Similar requirements are imposed on respondents. Rutaganda Judgment, *supra* note 66, at ¶ 19.

[84] Rutaganda Judgment, *supra* note 66, at ¶ 19. *See also* Krnojelac Judgment, *supra* note 70, at ¶¶ 18-20; Blaskic Judgment, *supra* note 58, at ¶¶ 8-24; Kordic & Cerkez Judgment, *supra* note 58, at ¶¶ 13-24.

"determine whether a witness is credible" and "decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points," is "tempered by the Trial Chamber's duty to provide a reasoned opinion . . . ."[85] The Appeals Chamber discussed the skepticism that many national jurisdictions have shown towards identification evidence, finding that

> a reasonable Trial Chamber must take into account the difficulties associated with identification evidence in a particular case and must carefully evaluate any such evidence, before accepting it as the sole basis for sustaining a conviction. . . . While a Trial Chamber is not obliged to refer to every piece of evidence on the trial record in its judgement, where a finding of guilt is made on the basis of identification evidence given by a witness under difficult circumstances, the Trial Chamber must rigorously implement its duty to provide a "reasoned opinion". . . . As stated by the Canadian Court of Appeal in R. v Harper: 'Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede.'[86]

Thus, at least in the context of witness identifications, the Appeals Chamber seemed to apply a standard of review that allows the Appeals Chamber to intercede not only when "no reasonable tribunal of fact" would have relied on certain evidence, but also when the Appeals Chamber infers from the record that the Trial Chamber completely disregarded relevant evidence. The *Kupreskic* Chamber found that under such circumstances, "no reasonable tribunal of fact could be satisfied beyond reasonable doubt that the accused had participated in the criminal conduct."[87] The *Kupreskic* Chamber went on to re-examine the evidence presented at trial, showing no deference to the trial findings. As one commentator noted, "[t]his reasoning evinces a willingness to review a Trial Court's evaluation of evidence that goes well beyond what might be expected from the bare

[85] Kupreskic Judgment, *supra* note 28, ¶¶ 28-41.
[86] *Id*.
[87] *Id.*, ¶ 41.

language that a finding of fact must be 'wholly erroneous' or 'could not reasonable have been accepted by any reasonable person' in order to be reversed." [88]

The Appeals Chamber subsequently took pains to point out that the *Kupreskic* approach was not a "new standard." The *Delalic* case initially came before the ICTY Appeals Chamber before *Kupreskic*. The Appeals Chamber then revised the convictions in ways that could have affected the sentence, so in an unusual move, reconstituted a Trial Chamber to reconsider sentencing. After the second sentencing—and incidentally, after the *Kupreskic* judgment—defendants again appealed the new sentence imposed. In the second appeal, Hazim Delic requested that the Appeals Chamber reconsider issues dismissed in the first appeal in light of what he called *Kupreskic*'s "new test" of the sufficiency of evidence to support a conviction.[89] After finding that it had the "inherent jurisdiction to prevent injustice" by reconsidering an earlier judgment, the Appeals Chamber found "no difference" between the "wholly erroneous" standard applied in *Kupreskic* and the "no reasonable tribunal of fact" standard applied in previous judgments.[90] Further, the Appeals Chamber rejected Delic's contention that finding that "evidence from a truthful witness may be too unreliable to serve as the basis for a conviction," was a "watershed," stating that the test was "well known elsewhere throughout the world" and not "even 'new' to the jurisprudence of the Tribunal."[91]

The *Delalic* judgment did not, however, address the new strength the *Kupreskic* judgment gave to the "reasoned opinion" requirement as part of the standard of review. This was a way in which *Kupreskic* truly may have created "new opportunities for

[88] Drumbl & Gallant, *supra* note 1, at 625-627.
[89] Prosecutor v. Delalic et al., Case No. IT-96-21, Judgment, ¶¶ 48, 54 (Apr. 8, 2003) [hereinafter Delalic II Judgment].
[90] *Id*., ¶¶ 52-55.
[91] *Id*., ¶¶ 56-57.

counsel to argue issues of fact before the Appeals Chambers," as some scholars initially thought.[92] However, neither the *Kupreskic* judgment nor subsequent judgments provided the Trial Chamber or appellants with concrete standards as to which other types of "relevant evidence"—like identification evidence—necessitated that the Trial Chamber set aside its discretion to avoid "articulating every step of the reasoning in reaching a decision," and instead "rigorously implement its duty to provide a 'reasoned opinion.'"[93] The ICTR Appeals Chamber's *Musema* judgment stated,

> There is no guiding principle on this point and, to a large extent, testimony must be considered on a case by case basis. . . . [T]he Appeals Chamber of ICTY has stated that although the evidence produced may not have been referred to by a Trial Chamber, based on the particular circumstances of a given case, it may nevertheless be reasonable to assume that the Trial Chamber had taken it into account.[94]

Thus, in some circumstances where the Trial Chamber does not set out reasons for its decisions, the Appeals Chamber will assume the Trial Chamber has taken relevant evidence into account. In other contexts, the Appeals Chamber will instead re-review the facts presented at trial and come to its own conclusions, like the Appeals Chamber in *Kupreskic*. And, since the way that the Appeals Chamber will review the Trial Chamber's decision "must be considered on a case-by-case basis," neither Trial Chambers nor appellants can know which type of review will take place in untested factual scenarios.

---

[92] Drumbl & Gallant, *supra* note 1, at 624. Drumbl and Gallant also believed, similar to the defense counsel in *Delalic*, that *Kupreskic* "restated, and to some extent, reshaped, the law concerning standards of review on appeal . . . ." They warned counsel that "the law may remain in flux for some time and that new developments are ongoing in this area of the law," and noted that "[t]he extent to which *Kupreskic*'s treatment of credibility determinations will influence appellate jurisprudence in the Tribunals, or in international criminal law more generally, remains to be seen." *Id*. at 620, 627.

[93] Kupreskic Judgment, *supra* note 28, ¶¶ 28-41.

[94] Musema Judgment, *supra* note 78, at ¶¶ 17-19. Drumbl cites *Kupreskic* itself as saying 'what constitutes a wholly erroneous' evaluation of the evidence must be determined on a case-by-case basis. Drumbl & Gallant, *supra* note 1, at 625.

One further issue may complicate standards of review for factual errors at the international tribunals. Recent decisions have described the "reasonableness" standard in terms of the "reasonable doubt" standard rather than simply addressing acceptance of the evidence. Thus, early judgments like *Furundzija* enunciated the standard as "*the evidence relied on by the Trial Chamber* could not reasonably have been accepted by any reasonable person,"[95] but more recent judgments have stated, "the Appeals Chamber will determine whether no reasonable trier of fact *could have reached the verdict of guilt beyond reasonable doubt*."[96] These differences may only be semantic—and likely are, since *Musema* and subsequent judgments cite the "evidence relied on by the Trial Chamber" standard without apparently recognizing a change[97]—but using an outcome-based rather than evidence-based approach may provide the Appeals Chamber with another different way of reviewing factual findings of the Trial Chamber.

In sentencing appeals, challenges to whether the Trial Chamber gave enough weight to mitigating or aggravating circumstances are taken as questions of fact.[98] As

---

[95] Furundzija Judgment, *supra* note 70, at ¶ 37. *See also* Rutaganda Judgment, *supra* note 66, at ¶ 22; Krnojelac Judgment, *supra* note 70, at ¶¶ 18-20; Bagilishema Judgment, *supra* note 74, at ¶ 11. *See supra* note 78 and accompanying text.

[96] Kordic & Cerkez Judgment, *supra* note 58, at ¶ 18; Kvocka Judgment, *supra* note 73, at ¶¶ 18; Stakic Judgment, *supra* note 58, at ¶ 10. Earlier judgments had stated this test in the context of whether evidence was "factually sufficient to sustain a conviction," but the ICTR's *Musema* Appeals Chamber described this test as "the test to be applied" for errors of fact without noting the "sufficient to sustain a conviction" distinction. *Cf.* Delalic I Judgment, *supra* note 78, at ¶¶ 434-435; Akayesu Judgment, *supra* note 78, at 178; Musema Judgment, *supra* note 78, at ¶ 17. The *Musema* judgment stated, "As to errors of fact, the test to be applied is whether the conclusion of guilt beyond reasonable doubt is one which no reasonable tribunal of fact could have reached."

[97] The "wholly erroneous" standard has also been variously described in evidentiary and outcome-based terms. Some judgments describe the standard as outlined above, i.e., "where the evidence relied on could not have been accepted by any reasonable tribunal or where the evaluation of the evidence is wholly erroneous," and others state it as, "where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous." *Cf.* Prosecutor v. Krstic, Case No. IT-93-33, Judgment, ¶ 40 (Apr. 19, 2004) [hereinafter Krstic Judgment]; *see also* Kajelijeli Judgment, *supra* note 44, at ¶ 5; Kamuhanda Judgment, *supra* note 77, at ¶ 7; Gacumbitsi Judgment, *supra* note 77, at ¶ 8. The Appeals Chamber also has not explained a difference between these standards.

[98] Furundzija Judgment, *supra* note 70, at ¶ 37. *See also* Drumbl & Gallant, *supra* note 1, at 620-621.

with other types of appeals, the Appeals Chambers stress that these factual challenges to sentencing are a corrective process, and not an opportunity for a trial *de novo*.[99] Rather,

> as a general rule, the Appeals Chamber will not substitute its sentence for that of a Trial Chamber unless "it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law." The Appeals Chamber will only intervene if it finds that the error was "discernible." As long as a Trial Chamber does not venture outside its "discretionary framework" in imposing sentence, the Appeals Chamber will not intervene.[100]

The "discernible error"/"discretionary framework" standards are used for both prosecution and defense sentencing appeals.[101]

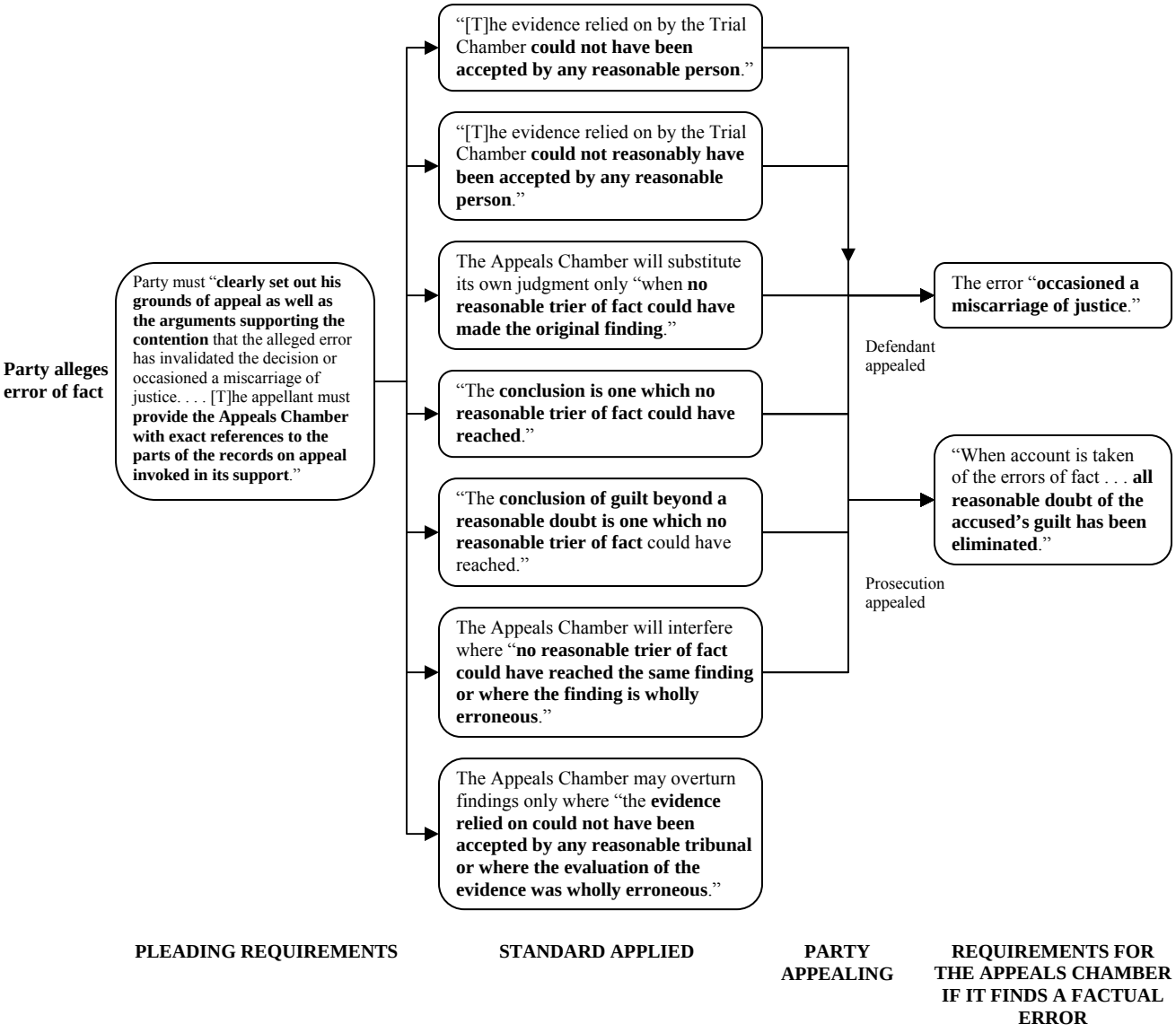
Overall, the Appeals Chambers have stated multiple standards in reviewing errors of fact. These standards have changed over time, particularly with new opportunities created by the *Kupreskic* opinion, and appellants are not provided guidance on which standard will be used. As the following section will illustrate, stated standards of review for errors of law are remarkably stable in contrast.

Chart 1. Standards of Appellate Review for Errors of Fact

[99] Delalic I Judgment, *supra* note 78, at ¶¶ 723-725. *See also* Prosecutor v. Nikolic, Case No. IT-94-2-A, Judgment, ¶¶ 6-9 (Feb. 4, 2005) [hereinafter Dragan Nikolic Judgment]; Kvocka Judgment, *supra* note 73, at ¶¶ 13-20; Kajelijeli Judgment, *supra* note 44, at ¶ 291; Prosecutor v. Milan Babic, Case No. IT-03-72, Judgment, ¶¶ 5-7 (July 18, 2005) [hereinafter Babic Judgment]; Prosecutor v. Jokic, Case No. IT-01-42/1, Judgment, ¶¶ 6-8 (Aug. 30, 2005) [hereinafter Jokic Judgment]; Prosecutor v. Nikolic, Case No. IT-02-60/1, Judgment, ¶¶ 6-8 (Mar. 8, 2006) [hereinafter Momir Nikolic Judgment].

[100] Delalic I Judgment, *supra* note 78, at ¶¶ 723-725. *See also* Kupreskic Judgment, *supra* note 28, ¶¶ 405-409; Vasiljevic Judgment, *supra* note 70, at ¶¶ 4-12; Kajelijeli Judgment, *supra* note 44, at ¶ 291; Babic Judgment, *supra* note 99, ¶¶ 5-7; Jokic Judgment, *supra* note 99, ¶¶ 6-8; Momir Nikolic Judgment, *supra* note 99, at ¶¶ 6-8; Naletilic & Martinovic Judgment, *supra* note 77, at ¶¶ 8-14. Thus, according to the *Dragan Nikolic* judgment, the Appeals Chamber may overturn a sentence on appeal if "the Appellant shows that the Trial Chamber either erred in the weighing process involved in the exercise of its discretion by taking into account what it ought not to have, or erred by failing to take into account what it ought to have taken into account." Dragan Nikolic Judgment, *supra* note 99, at ¶¶ 6-9. This standard is "particularly" applied "to determine whether the sentence was consistent with sentences handed out in similar cases in the Tribunals . . . ." Drumbl & Gallant, *supra* note 1, at 621.

[101] The Appeals Chamber in *Delalic* stated, "It therefore falls on each appellant, including the Prosecution . . . to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing the sentence it did." Delalic I Judgment, *supra* note 78, at ¶¶ 723-725. *See also* Kupreskic Judgment, *supra* note 28, ¶¶ 405-409.



B. Errors of Law

The Trial Chambers' role as primary fact-finder limits the character of the Appeals Chambers' analysis of errors of fact. For questions of law, this limitation does not exist. One of the Appeals Chambers' most important functions is to ensure that the law is uniform across the Trial Chambers.[102] Thus, one Appeals Chamber noted,

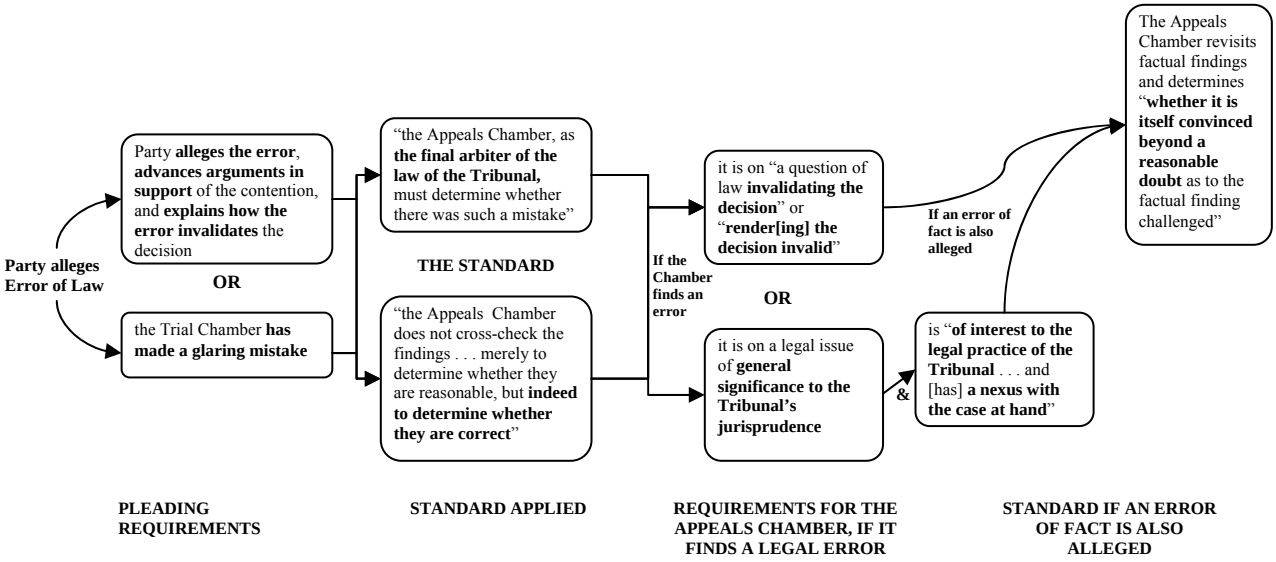
> Errors of law do not raise a question as to the standard of review as directly as errors of fact. Where a party contends that a Trial Chamber made an error of law,

[102] Fleming, *supra* note 1, at 114. *See also supra* note 23 and accompanying text.

> the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether there was such a mistake.[103]

That the Appeals Chambers "must determine whether there was such a mistake" is as close as most appeals judgments come to stating the standard of review for errors of law.[104] The *Krnojelac* judgment went slightly further in elucidating what the standard entails: "In fact, the Appeals Chamber does not cross-check the findings of the Trial Chamber on matters of law merely to determine whether they are reasonable, but indeed to determine whether they are correct."[105] Sentencing appeals of questions of law seem to follow the same standard. Thus, overall, the Appeals Chambers employ little or no deference in reviewing legal errors of the Trial Chambers.

Chart 2. Standards of Appellate Review for Errors of Law



[103] Furundzija Judgment, *supra* note 70, at ¶ 35; Krnojelac Judgment, *supra* note 70, at ¶ 20. The Appeals Chamber's role as the "final arbiter of law" is cited in many subsequent decisions. *See* Kunarac Judgment, *supra* note 45, at ¶¶ 35-48; Rutaganda Judgment, *supra* note 66, at ¶ 20; Kordic & Cerkez Judgment, *supra* note 58, at ¶¶ 13-24.
[104] Kunarac Judgment, *supra* note 45, at ¶¶ 35-48.
[105] Krnojelac Judgment, *supra* note 70, at ¶¶ 18, 20. *See also* Rutaganda Judgment, *supra* note 66, at ¶ 20; Blaskic Judgment, *supra* note 58, at ¶¶ 8-24; Stakic Judgment, *supra* note 58, at ¶¶ 7-13.

Nevertheless, the ICTY and ICTR statutes do restrict the types of legal errors the Appeals Chambers may review. The relevant articles provide for appeal only for "a question of law invalidating the decision"[106] Thus, "[I]t is not any error of law that leads to a reversal or revision of the Trial Chamber's decision," but rather an error that "renders the decision invalid."[107] The Appeals Chamber does make an exception to this requirement in cases where the appellant alleges "a legal issue that is of general significance to the Tribunal's jurisprudence."[108] However, these questions of general significance "must be of interest to the legal practice of the Tribunal and must have a nexus with the case at hand."[109] For errors of law, Chambers will also make an exception to the requirement that appellants must identify the alleged error, advance arguments in support of the contention, and explain how the error invalidates the decision.[110] Even without guidance from the appellant, the Appeals Chamber will address questions of law *sua sponte* "where the Trial Chamber has made a glaring mistake."[111] The "general

---

[106] ICTY Statute, *supra* note 2, art. 25; ICTR Statute, *supra* note 2, art. 24.
[107] Furundzija Judgment, *supra* note 70, at ¶ 36. See also Kunarac Judgment, *supra* note 45, at ¶¶ 35-48; Rutaganda Judgment, *supra* note 66, at ¶ 20; Krnojelac Judgment, *supra* note 70, at ¶ 20; Kordic & Cerkez Judgment, *supra* note 58, at ¶¶ 13-24. An error of law invalidates a decision "if it is an established error of law that 'has an impact on the verdict of guilt.'" Drumbl & Gallant, *supra* note 1, at 623. The *Bagilishema* Appeals Judgment held that this requirement applies equally to the prosecution and the defendant. Bagilishema Judgment, *supra* note 74, at ¶¶ 8-9.
[108] Kupreskic Judgment, *supra* note 28, ¶ 22. *See also* Musema Judgment, *supra* note 78, at ¶ 16; Krnojelac Judgment, *supra* note 70, at ¶¶ 6-9. *Krnojelac* discussed the Appeals Chambers' ability to consider these types of errors without arguments from the parties in some detail. The judgment explained that Appeals Chambers have the ability to do so because "the Appeals Chamber must give the Trial Chambers guidance in their interpretation of the law. This role of final arbiter of the law applied by the Tribunal should be seen in the light of the Tribunal's specific character and, in particular, of its ad hoc, temporary nature." Krnojelac Judgment, *supra* note 70, at ¶¶ 6-9. The Appeals Chambers may also have developed this ability because their time constraints make it inadvisable to wait until an issue is squarely presented in another case. Fleming, *supra* note 1, at 131-132. *See also* Schabas, *supra* note 1, at 447.
[109] Krnojelac Judgment, *supra* note 70, at ¶¶ 6-9.
[110] Rutaganda Judgment, *supra* note 66, at ¶ 20. *See also* Krnojelac Judgment, *supra* note 70, at ¶ 18; Kupreskic Judgment, *supra* note 28, at ¶ 27; Blaskic Judgment, *supra* note 58, at ¶¶ 8-24; Kvocka Judgment, *supra* note 73, at ¶¶ 13-20; Stakic Judgment, *supra* note 58, at ¶¶ 7-13.
[111] Kupreskic Judgment, *supra* note 28, at ¶ 27. The ICTR's *Niyitegeka* judgment explained, "if the arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law."

significance" and "glaring error" standards thus give the Appeals Chambers even more discretion to reverse Trial Chambers' decisions on legal grounds.[112]

* * *

Summarizing the stated standards of review in the *ad hoc* tribunals, we may draw a few conclusions. First, the standard of review for errors of fact is complex.[113] The Appeals Chamber reviews Trial Chamber judgments differently depending on the party appealing, whether new evidence has been admitted on appeal, whether the appeal involves sentencing, and, in certain unidentified situations, whether the Trial Chamber provided a "reasoned opinion." Standards are stated differently over time—for example, looking at whether "*the evidence relied on by the Trial Chamber* could not have been accepted by any reasonable person," versus determining whether "no reasonable trier of fact *could have reached the verdict of guilt beyond reasonable doubt*"—and the Appeals Chamber does not address whether only the language, or the standards themselves, have changed. The Appeals Chamber reviews Trial Chambers' factual findings without deference when the Trial Chamber failed to meet its obligation to "to set out its reasons

---

Niyitegeka Judgment, *supra* note 77, at ¶ 7. *See also* Blaskic Judgment, *supra* note 58, at ¶¶ 8-24; Ntakirutimana Judgment, *supra* note 74, at ¶ 11; Kordic & Cerkez Judgment, *supra* note 58, at ¶¶ 13-24; Kvocka Judgment, *supra* note 73, at ¶¶ 13-20; Semanza Judgment, *supra* note 70, at ¶ 7; Kajelijeli Judgment, *supra* note 44, at ¶ 5; Kamuhanda Judgment, *supra* note 77, at ¶ 6; Naletilic & Martinovic Judgment, *supra* note 77, at ¶¶ 8-14; Gacumbitsi Judgment, *supra* note 77, at ¶ 7.

[112] In cases where the Appeals Chamber does find a legal error, and an error of fact is also alleged in relation to that finding—which would be coded as "questions of both law and fact" in my analysis—it may revisit factual findings of the Trial Chamber. In these situations, "it is open to the Appeals Chamber to articulate the correct legal standard and to review the relevant findings of the Trial Chamber accordingly." Blaskic Judgment, *supra* note 58, at ¶¶ 8-24. When the Appeals Chamber applies the correct standard to facts in the trial record, it "must determine whether *it is itself convinced beyond reasonable doubt* as to the factual finding challenged by the Defense, before that finding is confirmed on appeal." *Id*., emphasis added. Thus, the Appeals Chamber's role expands here in the same way it does when the Trial Chamber fails to give a reasoned opinion on certain kinds of questions (the *Kupreskic* situation), and the Appeals Chamber will find facts for itself. Subsequent decisions have not stated when the Appeals Chamber will use its discretion to re-review factual findings this way.

[113] *See also* Drumbl & Gallant, *supra* note 1, at 624.

for accepting or rejecting a particular testimony," but provides no "guiding principle" for when this standard applies and instead evaluates situations on a "case-by-case basis."

Table 1. **Standards of Review Cited for Errors of Fact and Errors of Law**

	Standard of Review	**Judgments Citing the Standard Clearly**[114]
Errors of Fact	"[T]he evidence relied on by the Trial Chamber **could not have been accepted by any reasonable person**."	*Rutaganda, Musema*
	The Appeals Chamber will reverse "only when the evidence relied on by the Trial Chamber **could not reasonably have been accepted by any reasonable person**."	*Bagilishema, Furundzija, Tadic, Delalic, Musema, Akayesu*
	"[T]he Appeals Chamber will only substitute the Trial Chamber's finding for its own when **no reasonable trier of fact could have made the original finding**."	*Vasiljevic*, *Krnojelac, Kvocka*
	"[T]he **conclusion is one which no reasonable trier of fact could have reached**."	*Naletilic*
	"[T]he **conclusion of guilt beyond a reasonable doubt is one which no reasonable trier of fact** could have reached."	*Blaskic, Kordic & Cerkez, Stakic, Musema, Kvocka, Krnojelac, Akayesu*
	"[I]t will only interfere in those findings where **no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous**."	*Krstic, Kajelijeli (5), Semanza (8), Ntakirutimana, Niyitegeka (8)*
	"The Appeals Chamber may overturn the Trial Chamber's finding of fact only where the evidence relied on **could not have been accepted by any reasonable tribunal or where the evaluation of the evidence was wholly erroneous**."	*Aleksovski, Kupreskic, Kunarac, Rutaganda (353), Blaskic, Kvocka, Stakic, Kordic & Cerkez, Mucic II*
Errors of Law	"Where a party contends that a Trial Chamber made an error of law, the Appeals Chamber, as the **final arbiter of the law of the Tribunal**, **must determine whether there was such a mistake**."	*Furundzija*, *Krnojelac*, *Kunarac*, *Rutaganda*, *Kordic & Cerkez*
	"[T]he Appeals Chamber does not cross-check the findings of the Trial Chamber on matters of law merely to determine whether they are reasonable, but indeed **to determine whether they are correct**."	*Krnojelac*, *Rutaganda, Blaskic, Stakic*

Compared to this complexity, standards of review for errors of law look remarkably simple, as the table above illustrates. As "the final arbiter of law" for the tribunals, the Appeals Chambers do not "defer to statements of law made by the Trial Chambers"[115] and instead evaluate legal questions themselves.

In the following section, I examine the standards of review that the Appeals Chambers actually use to assess factual and legal arguments. I first address whether the

[114] The judgments cited here represent only those that clearly stated a standard of review before considering factual or legal claims. Several other judgments did not clearly cite any of these standards, instead drawing on stated standards only in the context of a specific factual or legal claim. Appendix I contains a full list of the judgments I considered.
[115] Drumbl & Gallant, *supra* note 1, at 622.

complexity and uncertainty of factual review correlates with actual differences in the standards applied in cases raising similar legal issues. I then evaluate the outcomes of actual arguments on appeal, comparing stated standards of review to 'implicit standards of review'—the standards of review that Appeals Chambers actually use, which can be determined through a close examination of the language of their judgments—as a tool for predicting the outcomes of appeals. I find that, although stated standards of review do correlate with very different outcomes on appeal, they are not nearly as reliable at predicting outcomes as implicit standards of review.

Part III. Standards of review, as applied by the Appeals Chambers

Complex and unclear standards of review may lead to inconsistencies in jurisprudence in two ways. First, the standards may be formulated in such a way as to cause confusion in the abstract, regardless of the facts to which they are applied. In the course of the previous part, I have described some of the ways in which standards of review for errors of fact may be confusing this way, based solely on how they are stated—for example, in recognizing that the *Kupreskic* standard allows the Appeals Chamber to show less deference to the Trial Chamber's findings of fact, yet in stating that the standard will be applied on a case-by-case basis without any guiding principles. However, an analysis of the ways in which the Appeals Chambers' stated standards of review impact the actual outcome of cases suggests that a second kind of inconsistency may be at play. This type of inconsistency arises in practice, when the Appeals Chamber states that it is using a certain standard, but actually applies the standard differently in

some situations. Drumbl and Gallant pointed out that the Appeals Chamber did this in the *Kupreskic* judgment:

> This [*Kupreskic* judgment] reasoning *evinces a willingness to review a Trial Court's evaluation of evidence that goes well beyond what might be expected from the bare language that a finding of fact must be 'wholly erroneous' or 'could not reasonably have been accepted by any reasonable person'* in order to be reversed.[116]

In order to understand whether this type of issue arise frequently in the *ad hoc* tribunals, it is necessary to study the arguments actually raised on appeal and the Appeals Chambers' disposition of them. In this part, I first set out the general impressions gleaned from a review of the appeals data. To illustrate my claims, I provide examples from representative Appeals Chamber judgments in footnotes. I then examine the outcomes of stated and implicit standards of review—which can be assessed by looking closely at the language of judgments and the sources they cite—in ICTY and ICTR case law. Part IV in part aims to explain the data, addressing causes for inconsistent standards of review.

A. General impressions of standards of review applied

The 650 appeals arguments that I examined led me to several general conclusions. First, the standards of review that the Appeals Chambers apply are often unclear, both because of the structure of ICTY and ICTR judgments and because of the Appeals Chambers' discretion to decide not to provide a reasoned consideration of certain arguments raised. Structurally, many judgments—at least twenty of the thirty-five I examined—set out the standards of review in introductory materials at the beginning of the judgment, and state or imply that the standards "shall be applied where appropriate in

[116] Drumbl & Gallant, *supra* note 1, at 626-627 (emphasis added).

the present Judgement."[117] Having stated the standards at the beginning, most Appeals Chamber judgments do not then express how they are applying the standards to the individual arguments. When considering a ground of appeal, the Appeals Chambers seldom state whether the appellant has alleged an error of law or an error of fact: the judgments sometimes do state how an appellant characterizes the argument, but more often simply state the appellant's argument that the Trial Chamber "erred" without noting whether the appellant believed it to be an error of fact or error of law.[118] It is even rarer for the Appeals Chamber to state whether *it* believes the argument raises a question of fact or question of law, although it certainly does say so on occasion.[119]

Although the Appeals Chamber does more frequently state the actual standard (i.e., "reasonableness") it purports to be applying, even this language is not dependably present as the Chamber evaluates arguments. It is generally clear when the Appeals Chamber uses "reasonableness" language that it is examining an error of fact; however, the Appeals Chamber is sometimes silent, and in these cases it may be evaluating errors of law[120] or errors of fact,[121] making it impossible to tell how the Appeals Chamber has

---

[117] Blaskic Judgment, *supra* note 58, at ¶¶ 8-24. *See also* Kordic & Cerkez Judgment, *supra* note 58, at ¶¶ 13-24; Kvocka Judgment, *supra* note 73, at ¶¶ 13-20.

[118] The *Kajelijeli* judgment provides an example: "The Appellant submits that the Trial Chamber erred by failing to make findings in respect of the testimony of Witness JK27 . . . . The Appellant argues that the Trial Chamber's failure to make any specific finding . . . undermines the findings and verdict of the Trial Chamber." Kajelijeli Judgment, *supra* note 44, at ¶ 56.

[119] The Appeals Chamber does sometimes highlight when it classifies an argument differently from the appellant. For example, in *Kamuhanda*, it appears that the defense counsel alleged an error of law in the Trial Chamber's treatment of the constituent elements of crimes against humanity at the Gikomero Parish Compound. The Appeals Chamber essentially stated that it was instead considering the argument as a question of fact. Kamuhanda Judgment, *supra* note 77, at ¶ 85.

[120] A representative example may be found in *Blaskic*:

> In relation to the mens rea of an aider and abettor, the Trial Chamber held that 'in addition to knowledge that his acts assist the commission of the crime, the aider and abettor needs to have intended to provide assistance . . . .' However, as previously stated in the Vasiljevic Appeal Judgement, knowledge on the part of the aider and abettor that his acts assist in the commission of the principal perpetrator's crime suffices for the mens rea requirement of this mode of participation. In this respect, the Trial Chamber erred.

evaluated the evidence in these cases. The failure to state standards becomes particularly confusing in situations where the appellant has alleged an error that could be either legal or factual, and the Appeals Chamber gives no indication of how it is treating the issue.[122]

Putting aside the failure to reliably state classifications and standards, does the Appeals Chamber consistently evaluate similar errors the same way? Overall, although the Appeals Chamber rarely states the standard it is applying for a question of law, legal errors are treated fairly consistently. The Appeals Chamber does not hesitate to set answer legal questions itself, examining sources of law such as the ICTY/ICTR statutes and rules, case law, and domestic law, to arrive at the "correct" formulation.[123] That the Appeals Chamber examines Trial Chamber holdings not to see whether they are "reasonable," but to see whether they are "correct,"[124] is evident in the treatment of most arguments alleging an error of law.[125] Ultimately, it is logical that the Appeals Chamber

---

Blaskic Judgment, *supra* note 58, at ¶ 49. In this way, the Appeals Chamber showed no deference to the Trial Chamber's evaluation of the law without actually stating the standard of review it was applying.

[121] For example, defense counsel in *Kordic & Cerkez* alleged that the Trial Chamber erred in finding a defendant had the *mens rea* to commit certain crimes based on its factual assessments (thus raising a question of fact). The Appeals Chamber, without discussing the reasonableness standard, held:

> The Appeals Chamber considers that this general plan included the whole of the Lasva Valley and that the crimes explicitly discussed were to kill military aged men, expel civilians, and destroy houses. . . . Kordic approved the general plan knowing that these crimes would be committed, and with the awareness of the substantial likelihood that other crimes such as killings of civilians, unlawful detention of civilians, and plunder would be committed in the execution of this general plan. Planning with such awareness has to be regarded as accepting these crimes.

Kordic & Cerkez Judgment, *supra* note 58, at ¶ 976.

[122] For one example, see Kvocka Judgment, *supra* note 73, at ¶¶ 138-139, 144.

[123] The recent *Gacumbitsi* judgment provides an example:

> [The Trial Chamber's] approach is consistent with the Appeals Chamber's previous holdings. For instance, the Rutaganda Appeal Judgement states: 'The Appeals Chamber concurs with the Appellant that in order to find a person guilty of genocide, it must be established that such a person was personally possessed of the specific intent to commit the crime at the time he did so.' Nonetheless, as stated by the Appeals Chamber in Kayishema/Ruzindana, 'explicit manifestations of criminal intent are [...] often rare in the context of criminal trials'. In the absence of explicit, direct proof, the dolus specialis may therefore be inferred from relevant facts and circumstances. Such an approach prevents perpetrators from escaping convictions simply because such manifestations are absent.

Gacumbitsi Judgment, *supra* note 77, at ¶ 41.

[124] Krnojelac Judgment, *supra* note 70, at ¶¶ 18, 20.

[125] *See, e.g., id*.

reviews questions of law more consistently. The Appeals Chamber takes its job as the "final arbiter of law" seriously, and it is far easier to be consistent when providing no deference to the Trial Chamber than when affording varying degrees of deference that depend on complex circumstances.

Contrasting the treatment of errors of law, standards for errors of fact were muddled. The Appeals Chamber frequently states that it is applying a "reasonableness" standard, but the level of review that "reasonableness" entails varies from seemingly not looking at all at evidence presented to the Trial Chamber[126] to entirely re-evaluating factual findings using trial transcripts and exhibits,[127] and a spectrum in between. In some cases where the Trial Chamber did not state its reasoning, the Appeals Chamber seems to *try* to find inferences that would make the Trial Chamber's holding reasonable[128]; for other arguments, the Appeals Chamber seems to search for a reason why the Trial Chamber's holding could not be reasonable.[129] Of seventeen categories of argument involving seemingly inconsistent standards of review, sixteen concerned errors of fact.[130]

---

[126] For example, the Appeals Chamber in the *Kunarac* case stated,

> As to the effect of age and the degree of suffering upon the credibility of the witnesses, the Appeals Chamber notes that the Trial Chamber has clearly indicated that it was aware of this aspect of the case. . . . The Appellant has failed to demonstrate that the Trial Chamber committed an error of fact in admitting evidence from traumatised young victims.

Kunarac Judgment, *supra* note 45, at ¶ 279.

[127] E.g., *Krnojelac*:

> According to his own testimony, Krnojelac knew that the detainees were being removed from the KP Dom. Furthermore, the Trial Chamber established that, by virtue of his position as prison warden, Krnojelac knew that non-Serb detainees were unlawfully detained as a result of their ethnicity. . . . The Appeals Chamber is satisfied that Krnojelac shared the intent of the principal perpetrators in the joint criminal enterprise aimed at removing the non-Serb detainees from the KP Dom. The Appeals Chamber finds that Krnojelac is responsible, as a co-perpetrator, of persecution by way of forcible displacement . . . .

Krnojelac Judgment, *supra* note 70, at ¶¶ 246-247. It should be noted that, as here, when the Appeals Chamber does this kind of factual re-evaluation, it rarely states that it is applying the "reasonableness" standard, though it is clear that the appellant has presented a question of fact.

[128] For example, the *Musema* judgment stated, "[h]owever, the Trial Chamber *may have decided* not to take into consideration the testimony of Gillian Higgins, *because it found the said testimony less credible*." Musema Judgment, *supra* note 78, at ¶¶ 118-119 (emphasis added).

[129] For example, the Appeals Chamber in *Blaskic* held,

Inconsistent standards arose more frequently for some categories of argument than for others.[131] I found the greatest inconsistencies when the appellant alleged that the Trial Chamber incorrectly applied a legal standard to the facts of the case. The most common categories of this type of claim were arguments that the facts did not merit a finding that the appellant could be held responsible as a superior using command responsibility,[132] and arguments alleging the facts did not support the finding that he possessed the necessary *mens rea*.[133] As the post-*Kupreskic* "case-by-case" language would suggest, the Appeals Chamber also seemed to apply inconsistent standards to

---

> [T]he Trial Chamber's further finding that the Appellant can accordingly be held accountable for the crime of hostage-taking is problematic for two reasons. First, the Appeals Chamber disagrees that the Appellant's order to defend Vitez necessarily resulted in his subordinate's illegal threat. It does not follow, by virtue of his legitimate order to defend an installation of military value, that the Appellant incurred criminal responsibility for his subordinate's unlawful choice of how to execute the order.

Blaskic Judgment, *supra* note 58, at ¶ 644.

[130] The one type of argument where the Appeals Chamber seemed to evaluate questions of law differently were the sentencing practices of national jurisdictions, specifically, when defense counsel argued that the Trial Chamber had applied the wrong type of law in its evaluation. *Cf* Krstic Judgment, *supra* note 97, at ¶ 26; Dragan Nikolic Judgment, *supra* note 99, at 76.

[131] Aside from the categories that I discuss here, the Appeals Chamber seemed to apply inconsistent standards to arguments alleging that the Trial Chamber: applied the wrong standard to determine *mens rea*, and the facts did not prove (or did prove, in prosecution appeals) the appellant had the necessary *mens rea*; gave inadequate weight to mitigating circumstances; erred in law by considering (or not considering) mitigating circumstances outside of the scope of the guilty plea and that facts meet the correct standard for mitigation; considered incorrect sources of law in referring to national practices; more generally applied an erroneous standard to a set of facts and the facts met the correct standard; applied an incorrect standard to determining mitigating circumstances *and* gave inadequate weight to those circumstances that the sentence was disproportionate in light of other defendants' sentences.

[132] *Cf. Aleksovski* (where the Appeals Chamber simply stated that there was no good reason to believe the Trial Chamber had drawn unreasonable conclusions, without recourse to other evidence), *Blaskic* and *Kamuhanda* (where the Appeals Chamber seemed to consider a similar argument to be an error of law), and *Kordic & Cerkez*, and *Kvocka* (where the Appeals Chamber compares paragraphs of the Trial Judgment and carefully assesses evidence itself in applying the "reasonable trier" standard). Aleksovski Judgment, *supra* note 78, at ¶ 74; Blaskic Judgment, *supra* note 58, at ¶ 65; Kamuhanda Judgment, *supra* note 77, at ¶ 76; Kordic & Cerkez Judgment, *supra* note 58, at ¶¶ 846-854, 857; Kvocka Judgment, *supra* note 73, at ¶¶ 155-159.

[133] *Cf.* Kordic & Cerkez Judgment, *supra* note 58, at ¶ 888; Vasiljevic Judgment, *supra* note 70, at ¶¶ 52-53; Delalic I Judgment, *supra* note 78, at ¶¶ 328, 330.

arguments alleging the Trial Chamber had incorrectly evaluated testimony, particularly when credibility claims hinged on contradictory witnesses[134] and identification issues.[135]

My analysis of the standards used in practice at the *ad hoc* tribunals shows that the inconsistencies in the standards applied track the inconsistencies in stated standards. The standards stated for errors of fact are complex, vague, and sometimes confusing. The standards applied are likewise inconsistent on many types of factual questions: a number of similar types of questions are evaluated differently, even when the Appeals Chamber states it is applying "reasonableness" analysis to each. In contrast, the stated standard for errors of law, based on the premise that the Appeals Chamber has a duty to act as the "final arbiter of law" and set out legal standards for itself, changes little from judgment to judgment. This standard is applied consistently across most appeals on errors of law, even though the Appeals Chamber rarely states the standard it is applying.

B. Outcomes in the case law of stated standards of review

Examining the actual outcomes of arguments on appeal in the *ad hoc* tribunals, the impact of standards of review, as stated and applied, becomes clear. First, the actual outcomes of appellate decisions do vary with stated standards of review. However, the ways in which the outcomes will vary is erratic; the *stated* standard of review is seemingly not predictive of the ways in which outcomes will change. In contrast, implicit standards of review appear to vary with outcomes in more predictable ways. Implicit standards of review pose a different problem for predictability, however. Primarily

---

[134] *Cf.* Kupreskic Judgment, *supra* note 28, at ¶¶ 130, 135, 138, 154, 179, 201-202, 223-225, 335; Musema Judgment, *supra* note 78, at ¶¶ 134-135; Rutaganda Judgment, *supra* note 66, at ¶¶ 319, 321, 419, 427-428, 433; Ntakirutimana Judgment, *supra* note 74, at ¶¶ 181-190, 242-244, 254-255, 269, 275-276, 278, 280, 316-322; Kordic & Cerkez Judgment, *supra* note 58, at ¶¶ 261, 267; Kamuhanda Judgment, *supra* note 77, at ¶¶ 135-150.

[135] *Cf.* Kunarac Judgment, *supra* note 45, at ¶¶ 225, 324; Kvocka Judgment, *supra* note 73, at ¶¶ 472-474; Niyitegeka Judgment, *supra* note 77, at ¶¶ 112-117, 123-131, 136-138, 170-171, 182.

because they are implicit rather than stated, they provide appellants with only limited guidance as to how an Appeals Chamber will consider an argument.

Overall, outcomes do seem to vary with stated standards of review. After the Appeals Chamber provided new opportunities for factual review in *Kupreskic*, the rate of rejecting defendants' factual appeals went from 96.6% to 87.5%.[136] Taking Table 1's standards a step further by examining the outcomes in the decisions cited there, success rates on factual appeals vary widely between 1.9% and 27.5%, and success rates on legal appeals vary between 18.5% and 35.5% (*see* Table 2, below).[137] However, these standards do not seem to predictably affect outcomes. There should theoretically be little difference in success rates between Appeals Chambers that will overturn Trial Chamber findings "where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous" versus Appeals Chambers that will interfere "only where the evidence relied on could not have been accepted by any reasonable tribunal or where the evaluation of the evidence was wholly erroneous," yet the percentage of successful outcomes in judgments stating these standards are 1.9% and 23.2%, respectively.[138] Looking at Table 2, the stated standards of review do seem to make a difference for the outcome, but it is almost impossible to predict what kind of difference they will make.

---

[136] This comparison is somewhat limited because there were relatively few factual arguments on appeal before *Kupreskic* (only 29 in my analysis), which may mean that the figures are not completely comparable.
[137] Because my study is descriptive rather than experimental, it cannot show that variations in standards of review *cause* differential outcomes. However, statistical analysis of the data can suggest that there may be *correlations* between standards of review and outcomes. Assuming that similar types of arguments are raised in decisions citing different standards, differential outcomes may be one way of measuring the standard of review the Chamber has actually applied. Greater deference to the Trial Chamber would theoretically result in lower success rates than *de novo*-type review. Other factors may certainly contribute to differential success rates, but they are useful here in examining the standard of review.
[138] Conversely, the difference in successful factual appeals between Appeals Chambers that "will only substitute the Trial Chamber's finding for its own when no reasonable trier of fact could have made the original finding" and that will overturn Trial Chamber's findings "only where the evidence relied on could not have been accepted by any reasonable tribunal or where the evaluation of the evidence was wholly erroneous," is relatively minor (27.1% and 23.2%, respectively).

Table 2. Stated Standards of Review and Appellate Outcomes

	Standard of Review	Judgments Citing the Standard	Success Rate in Judgments Citing the Standard
Error of Fact	"[T]he evidence relied on by the Trial Chamber **could not have been accepted by any reasonable person**."	*Rutaganda, Musema*	Error of fact: **14.3%** (3/21)
	The Appeals Chamber will reverse "only when the evidence relied on by the Trial Chamber **could not reasonably have been accepted by any reasonable person**."	*Bagilishema, Furundzija, Tadic, Delalic, Musema, Akayesu*	Error of fact: **9.5%** (2/21)
	"[T]he Appeals Chamber will only substitute the Trial Chamber's finding for its own when **no reasonable trier of fact could have made the original finding**."	*Vasiljevic*, *Krnojelac, Kvocka*	Error of fact: **27.1%** (13/48)
	"[T]he **conclusion is one which no reasonable trier of fact could have reached**."	*Naletilic*	Error of fact: **8.7%** (2/23)
	"[T]he **conclusion of guilt beyond a reasonable doubt is one which no reasonable trier of fact** could have reached."	*Blaskic, Kordic & Cerkez*, *Stakic, Musema, Kvocka, Krnojelac, Akayesu*	Error of fact: **27.5%** (22/80)
	"[I]t will only interfere in those findings where **no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous**."	*Krstic, Kajelijeli (5), Semanza (8), Ntakirutimana, Niyitegeka (8)*	Error of fact: **1.9%** (1/53)
	"The Appeals Chamber may overturn the Trial Chamber's finding of fact only where the evidence relied on **could not have been accepted by any reasonable tribunal or where the evaluation of the evidence was wholly erroneous**."	*Aleksovski, Kupreskic, Kunarac, Rutaganda (353), Blaskic, Kvocka, Stakic, Kordic & Cerkez, Mucic II*	Error of fact: **23.2%** (46/198)
Errors of Law	"Where a party contends that a Trial Chamber made an error of law, the Appeals Chamber, as the **final arbiter of the law of the Tribunal**, **must determine whether there was such a mistake**."	*Furundzija*, *Krnojelac*, *Kunarac*, *Rutaganda*, *Kordic & Cerkez*	Error in Law: **18.5%** (10/54)
	"[T]he Appeals Chamber does not cross-check the findings of the Trial Chamber on matters of law merely to determine whether they are reasonable, but indeed **to determine whether they are correct**."	*Krnojelac*, *Rutaganda, Blaskic, Stakic*	Error in Law: **35.5%** (11/31)

C. Outcomes in the case law of implicit standards of review

Setting aside the *stated* standards of review and focusing instead on the kinds of arguments the Appeals Chamber is considering and the standard of review the Appeals Chamber *appears* to be applying, the outcomes of appeals are somewhat more predictable. Two of the variables I coded are useful for assessing the standards of review actually applied. First are issue-based categories that describe the type of question the Appeals Chamber is addressing. Second are true 'implicit standards of review': the standard of review that the Chamber appears to be applying, evaluated by looking closely at the language and sources the Appeals Chamber uses.

Evaluating data in issue-based categories can be useful in showing that, although an Appeals Chamber may claim to be applying a unitary standard of review, it actually reviews different types of issues very differently. In a recent article, Mark Warner suggests that U.S. courts should use a category-based approach rather than attempting to pigeonhole arguments as questions of fact, questions of law and mixed questions, which he argues leads to inconsistencies in standards of review for mixed questions.[140] Warner proposes that courts instead evaluate questions using "issue-types," categories that better reflect the analysis the court should actually apply. He identifies pure questions of law (questions which involve the "establishment, disestablishment, modification, or interpretation of legal rules,") which should be reviewed *de novo* on appeal,[141] pure questions of fact (questions involving "predicate facts upon which every legal decision is ultimately based,") which should be reviewed deferentially,[142] evaluative determinations

[140] Warner, *supra* note 15, at 102.
[141] *Id*. at 112-113.
[142] *Id*. at 115-116.

(questions that require "the decision-maker to exercise judgment and evaluate a person's conduct or set of circumstances," often "according to a community standard") whose standards should be governed on an issue-by-issue rather than case-by-case basis,[143] definition application (questions that "require the decision-maker to determine whether a particular set of facts falls within a legal definition,") which should generally be viewed deferentially,[144] and prescriptive determinations (questions that require the "decision-maker to prescribe some future result" that arise "[a]nytime the court is being asked to do something rather than to find something,") which should be reviewed for abuse of discretion.[145]

In addition to the issue-types that Warner outlines, my data suggests that the Appeals Chambers in the *ad hoc* tribunals frequently confront an additional type of issue. Appellants often allege that the Trial Chamber has 'incorrectly weighed' some factual issue—for example, that the Trial Chamber has privileged the testimony of certain witnesses above other witnesses based on incorrect reasoning, or has given more weight to certain aggravating circumstances rather than mitigating circumstances in determining

[143] *Id*. at 116. Warner gives the example of fact-finders being asked to evaluate the defendant's conduct under the tort law "duty of reasonable care," but such evaluative determinations also arise commonly in international criminal law, for example when asking whether information provided to a defendant "would have put him on notice of offenses committed by subordinates" in order to find superior responsibility. *See, e.g.*, Delalic I Judgment, *supra* note 78, at ¶¶ 223.

[144] Warner, *supra* note 15, at 122-135.Warner explains that appeals courts must first ask themselves whether the argument raises a "true question of definition application" that requires applying facts to a known legal standard, or whether the appellant raises a question of law concerning the interpretation of that standard. The second type of question, which raises issues applicable to other defendants, may be reviewed *de novo* as a question of law. The first type of question, which is only applicable in this specific factual situation, should be reviewed deferentially. Further, like evaluative determinations, these questions should be addressed on an issue-by-issue rather than case-by-case basis. Warner's example of this type of true question of definition application is whether a suspect was "in custody" so as to be entitled to Miranda warnings, but an example frequently arising in ICTY jurisprudence is whether victims were "protected persons" under the Geneva Conventions in order to give rise to liability for 'grave breaches' of the Conventions. *See* Kordic & Cerkez Judgment, *supra* note 58, at ¶¶ 324-325, 375; Blaskic Judgment, *supra* note 58, at ¶ 167; Delalic I Judgment, *supra* note 78, at ¶¶ 152; Aleksovski Judgment, *supra* note 78, at ¶ 9.

[145] Warner, *supra* note 15, at 124-125.

a sentence. Allegations of 'incorrect weight' tap directly into the Trial Chamber's advantage of being "better placed to choose between divergent accounts of one and the same event,"[146] and Appeals Chambers should consequently employ a great deal of deference to the Trial Chamber in evaluating these arguments.

As part of my analysis, I coded each of the 659 appellate arguments according to the issue-types that Warner provides, and the additional 'incorrect weight of facts' issue-type I formulated. Since some appellate arguments raised more than one issue type, I coded both a primary and secondary issue-type where the appellant raised more than one issue in an argument. The Appeals Chambers' stated standards, which are not very predictive of outcomes, would purport to apply similar "reasonableness" standards to all errors of fact and "final arbiter of the law" standards to all errors of law, rather than varying the standards based on issues. Focusing on these issue-types, however, a different picture emerges (*see* Table 3, below). Despite claiming to use the "reasonableness" and "final arbiter of the law" standards consistently for all issue-types, the actual outcome of claims varies significantly by issue. Arguments claiming that the Trial Chamber incorrectly weighed a set of facts and prescriptive determinations are very rarely successful (only 6.28% and 7.69% of the time, respectively), while arguments raising primarily pure questions of fact, pure questions of law and evaluative determinations are moderately successful (25%, 22.37% and 20.7%, respectively), and arguments raising evaluative determinations are quite successful (with a 46.94% success rate). Table 3 suggests that the Appeals Chambers may actually applying more deferential standards of review to certain types of questions, despite claiming to apply the same standards of review across the board.

[146] Rutaganda Judgment, *supra* note 66, at ¶ 21. *See supra* note 74 and accompanying text.

Table 3. Success Rate by Warner Category

Warner Category	Number of Arguments	Success Rate
Definition Application & Evaluative Determination	10	10% (1/10)
Definition Application & Incorrect Weight	1	0% (0/1)
Definition Application & Pure question of fact	2	0% (0/2)
Definition Application & Pure question of law	8	0% (0/8)
Definition Application	37	29.7% (11/37)
Definition Application as Primary Category, Overall	**58**	**20.7%**
Evaluative Determination & Definition Application	4	0% (0/4)
Evaluative Determination & Incorrect Weight of Evidence	16	18.75% (3/16)
Evaluative Determination & Pure question of fact	9	22.2% (2/9)
Evaluative Determination & Pure question of law	16	18.75% (3/16)
Evaluative Determination	49	30.61% (15/49)
Evaluative Determination as Primary Category, Overall	**49**	**46.94%**
Incorrect Weight of facts & Evaluative Determination	12	0% (0/12)
Incorrect Weight of facts & Prescriptive Determination	6	0% (0/6)
Incorrect Weight of facts & Pure question of fact	17	11.76% (2/17)
Incorrect Weight of facts & Pure question of law	33	12.12% (4/33)
Incorrect Weight of facts	139	5.04% (7/139)
Incorrect Weight of Facts as Primary Category, Overall	**207**	**6.28%**
Prescriptive Determination & Evaluative Determination	1	0% (0/1)
Prescriptive Determination & Incorrect weight of facts	4	0% (0/4)
Prescriptive Determination & Pure Question of Law	3	0% (0/3)
Prescriptive Determination	5	20% (1/5)
Prescriptive Determination as Primary Category, Overall	**13**	**7.69%**
Pure question of fact & Definition Application	2	0% (0/2)
Pure question of fact & Evaluative Determination	16	31.25% (5/16)
Pure question of fact & Incorrect weight of facts	22	9.09% (2/22)
Pure question of fact & Pure question of law	5	40% (2/5)
Pure question of fact	23	34.78% (8/23)
Pure question of fact as Primary Category, Overall	**68**	**25%**
Pure question of law & Definition Application	5	60% (3/5)
Pure question of law & Evaluative Determination	24	29.16% (7/24)
Pure question of law & Incorrect Weight of Facts	45	2.22% (1/45)
Pure question of law & Prescriptive Determination	7	14.29% (1/7)
Pure question of law & Pure question of fact	6	16.67% (1/6)
Pure question of law	132	27.27% (36/132)
Pure Question of Law as Primary Category, Overall	**219**	**22.37%**

Another way of getting behind the stated standards of review to assess the standard that Appeals Chambers actually apply is by examining 'implicit standards of review.' As described in Part I, *supra*, I coded these implicit standards from 1 to 5 by looking at the sources the Appeals Chamber considered, the amount the Appeals Chamber cited to the Trial Judgment, and the extent to which the Appeals Chamber

emphasized deference in its holding. Examining the data, it is clear that these 'implicit' standards do seem to have a differential impact on the outcome of decisions. Charts 2 and 3, below, represent my findings.[147]

Chart 3. Success Rates of Appeals by Implicit Level of Review

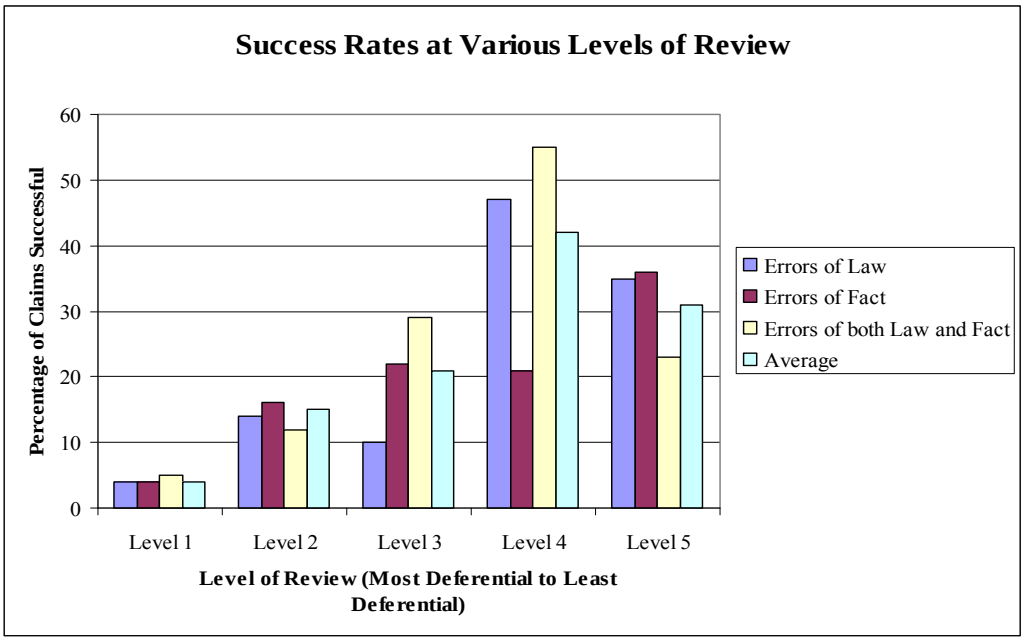
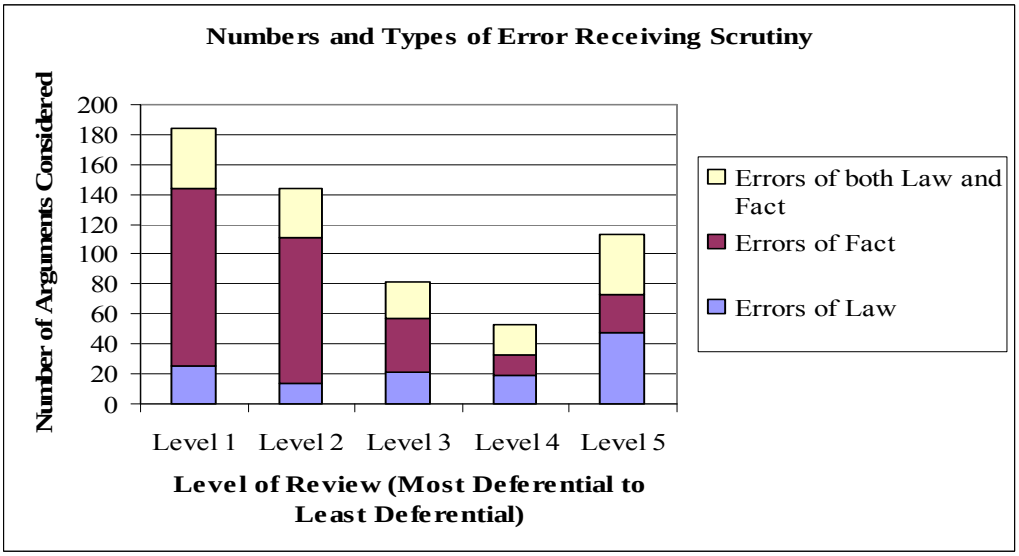


Chart 4. Types of questions considered in implicit levels of review



[147] A table in Appendix 2 gives a rubric for each of the five levels of implicit review, along with examples of each, the number and types of arguments falling under each, and the success rate by argument type.

Overall, it was clear that the chance of a successful outcome to an appeal did vary greatly with the implicit standard of review the Appeals Chamber was using. Arguments in which the Trial Chamber was reviewed very deferentially (Level 1) were far less successful than arguments in which the Appeals Chamber applied a standard of review more nearly approaching *de novo* review (4% successful versus 31% successful). With one exception—Level 4 review—the success rates varied predictably along the spectrum from most deferential to least deferential review. Predictably, and appropriately, questions of fact tended to be reviewed more deferentially while questions of law tended to be reviewed less deferentially. This analysis suggests that the implicit standard of review is a good predictor for the potential success of an argument; the drawback of this prediction lies in its very nature as an "implicit" standard. Unless the Appeals Chambers make their implicit standards open and available, they are no more helpful to appellants than the stated standards of review.

In the following sections, I will examine the some of the reasons why the stated standards of review may be inconsistently applied in the *ad hoc* tribunals. Revisiting and expanding upon some of the reasons why consistent standards of review are important, I will then note potential difficulties for standards of review at the ICC and make suggestions for the future.

Part IV. Accounting for inconsistencies in standards of review

Difficulties in applying standards of review are by no means limited to international criminal law; domestic jurisdictions also struggle with some of these questions. In particular, national systems have grappled with the appropriate standard of

review to apply to 'mixed questions' of fact and law.[148] "Reasonableness" standards like those employed by the Appeals Chambers have also proven difficult to apply in domestic law.[149] While the *ad hoc* Appeals Chambers share these problems with national systems, their "mixed" procedural character (borrowing aspects from both common law and civil law systems) occasions an added layer of structural complexity that domestic jurisdictions do not face. In mixing common law and civil law principles in appellate review, international criminal law has restricted the checks on inconsistent standards that exist in national systems. Thus, issues that already raise problems for national jurisdictions are magnified by the structure of the *ad hoc* tribunals.

It is no surprise that the ICTY and ICTR share standard of review problems present in national systems, and particularly in American law. During the time that the ICTY statute was drafted, the American delegation submitted "by far the most comprehensive set of proposed rules with commentary,"[150] which led many of the U.S. proposals to ultimately be adopted as part of the Rules of Procedure and Evidence.[151] The American proposal suggested giving the Appeals Chamber jurisdiction over appeals alleging the Trial Chamber committed "an error of law invalidating the decision, or an error of fact that caused a manifest miscarriage of justice,"[152] language that was

[148] For a general discussion, *see* Warner, *supra* note 15; Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235 (1991).
[149] *See, e.g.*, Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676 (2007). Gersen and Vermeule discuss the difficulties of applying the unreasonableness standard embodied in *Chevron* deference in U.S. administrative law.
[150] Vladimir Tochilovsky, *Trial in International Jurisdictions: Battle or Scrutiny?* 6/1 EUR. J. CRIME, CRIM. L. & CRIM. JUSTICE 55 (1998).
[151] *Id*.
[152] Letter dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General (Apr. 5, 1993), art. 24(a), U.N. Doc. S/25575 (Apr. 12, 1993).

substantially replicated in the final Article 25.[153] Difficulties in domestic systems—particularly the United States and other common law systems—were logically carried over to the ICTR and ICTR when states proposed rules modeled on their national law.

Like the *ad hoc* tribunals, common law domestic systems recognize a distinction between errors of fact and errors of law. *And* like the *ad hoc* tribunals, common law judges have difficulty distinguishing between errors of fact and errors of law—however, they are sometimes more open about the problems. In one decision, U.S. Supreme Court Justice Sandra Day O'Connor once wrote, "[t]he Court has long noted the difficulty of distinguishing between legal and factual issues."[154] As far back as the 1920's, American legal scholars noted,

> [m]atters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law . . . . It would seem that when the courts are unwilling to review, they are tempted to explain by the easy device of calling the question one of 'fact'; and when otherwise disposed, they say that it is a question of 'law'.[155]

---

[153] Other proposals formulated the right to appeal in quite different terms. For example, a proposal came from the representatives of Egypt, Iran, Malaysia, Pakistan, Saudi Arabia, Senegal, and Turkey:

> The prosecution and the defense may appeal a judgment where it is shown that:
> (a) There is newly-discovered evidence which would probably alter the judgment and which by due diligence could not have been discovered at the time the judgement was entered;
> (b) A fraud upon the Tribunal was committed which substantially affected the judgement; or
> (c) The facts proved do not constitute a crime within the jurisdiction of the Tribunal;
> (d) The judgement is in error as to the law or facts.

Letter dated 31 March 1993 from the Representatives of Egypt, the Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia, Senegal, and Turkey to the United Nations addressed to the Secretary-General (Mar. 31, 1993), art. VI.4, U.N. Doc. S/25512, A/47/920 (Apr. 5, 1993).

[154] Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 395 (1990). The Supreme Court has also described the "vexing distinction between questions of fact and questions of law," and noted "[w]e yet know of . . . [no] rule or principle that will unerringly distinguish a factual finding from a legal conclusion." Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) (citing Baumgartner v. United States, 322 U.S. 665, 671 (1944)).

[155] JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 55 (1927). One scholar in the 1930's stated, "['law' and 'fact' are] equally expansible and collapsible terms . . . . It is readily acknowledged that the term 'law' is indefinable. No less difficult to bound is the orbit of that companionate phantom 'fact'." Monaghan, *supra* note 43, at 235 (internal citations omitted). *See also* O'Neill, *supra* note 16, at 56.

The difficulty in separating law and fact in American law still arises today, with two scholars recently calling the law/fact distinction a "myth."[156] However, unlike the *ad hoc* tribunals, U.S. federal courts recognize a third category: so-called 'mixed questions' of law and fact.[157] Recognition alone does not solve the problem of inconsistent standards for mixed questions.[158] In fact, Randall Warner describes the mixed question category as a "catch-all, an amorphous box into which courts place any issue or combination of issues that cannot neatly be labeled law or fact."[159]

According to Warner, "[t]he mix-up about mixed questions exists because courts try to apply a single 'mixed question' standard of review to a variety of issues that are analytically quite different from one another."[160] Warner suggests that the tendency of American courts and commentators to see questions of fact and questions of law as a continuum, with mixed questions somewhere in the middle, fails to acknowledge questions that do not fit neatly into either category, gives no principled method for determining which questions are "mostly fact" or "mostly law," and "permits the standard of review to change from case to case."[161]

---

[156] Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW U. L. REV. 1769, 1790-1806 (2003).

[157] The U.S. Supreme Court defines 'mixed questions' as "[q]uestions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." Pullman-Standard v. Swint, 456 U.S. at 289 n. 19.

[158] Evan Tsen Lee discusses a circuit split among the federal circuits on the correct standard of review to be applied to mixed questions:

> One group of circuits generally reviews findings on such questions on a non-deferential, de novo basis; another group generally reviews them on a highly-deferential, "clearly erroneous" basis; a third group varies the standard of review depending on the "mix" of the question; and a fourth group has yet to establish a clear pattern.

Evan Tsen Lee, *supra* note 148, at 235. *See also* O'Neill, *supra* note 16, at 59. The Supreme Court itself noted that there was "'substantial authority in the Circuits on both sides of [the] question' of whether a mixed question should be reviewed as a legal or factual question." Pullman-Standard v. Swint, 456 U.S. at 290 n. 19.

[159] Warner, *supra* note 15, at 102.

[160] *Id*.

[161] *Id.* at 108-109.

Warner's analysis is equally applicable to questions of fact at the *ad hoc* tribunals. Many of these factual questions are "applied questions of fact," which would be classified as 'mixed questions' in national jurisdictions. The Appeals Chambers apply the same standard to analytically different factual questions—to take just a few examples, the error of fact "reasonableness" standard is purportedly applied when determining whether the Trial Chamber incorrectly assessed witness credibility,[162] whether the Trial Chamber erred in finding that crimes actually occurred in particular towns,[163] whether the Trial Chamber drew incorrect inferences from facts presented,[164] and whether the facts actually supported a "less culpable" form of liability (e.g. aiding and abetting) than the Trial Chamber found.[165] Undoubtedly, each of these questions asks whether the Trial Chamber erred. But they also each involve distinct types of analysis, some requiring the Appeals Chamber to examine the way the Trial Chamber assessed witness testimony, others assessing which inferences are permissible from certain facts, and others still finding which legal principle (mode of liability) should be applied in a given factual situation. The Appeals Chambers do not attempt to distinguish between these types of questions, and as a result, purport to universally apply a "reasonableness" standard but actually assess these questions in very different ways.

Part of the difficulty in reviewing mixed questions, or applied questions of fact, may stem from the purposes of appellate review. Evan Tsen Lee states that mixed questions seem to "sit precisely at the midpoint between the Scylla of allowing errors to

---

[162] *See, e.g.*, Rutaganda Judgment, *supra* note 66, at ¶¶ 316-321; Ntakirutimana Judgment, *supra* note 74, at ¶¶ 253-255.
[163] *See, e.g.*, Kordic & Cerkez Judgment, *supra* note 58, at ¶¶ 533-546.
[164] *See, e.g.*, Blaskic Judgment, *supra* note 58, at ¶¶ 616-633.
[165] *See, e.g.*, Kvocka Judgment, *supra* note 73, at ¶¶ 568-571.

go uncorrected and the Charybdis of judicial inefficiency."[166] He explains, "[t]oo much deference and the court fails to fulfill its duty to ensure that justice is done; not enough deference and it will be sucked into a whirlpool of unending review of fact patterns too peculiar to recur."[167] Like the federal courts Lee describes, the Appeals Chambers of the *ad hoc* tribunals face a conflicting role. They share the function of ensuring justice in individual cases,[168] yet simultaneously run the risk of being "sucked into a whirlpool of unending review" if they review all factual questions closely. The "whirlpool" carries far greater risks for the *ad hoc* Appeals Chambers than U.S. federal courts: as temporary institutions set to close their doors in 2010, the ICTY and ICTR simply cannot afford to spend time closely re-reviewing all of the factual determinations of the Trial Chamber. This role-based conflict may lead the Appeals Chambers to review certain errors of fact far more closely than others, despite claiming to apply the "reasonableness" standard across the board.

"Reasonableness" standards may themselves create inconsistencies in standards of review. One recent article evaluated a reasonableness standard applied in U.S. administrative law: *Chevron* deference. In *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc*., the U.S. Supreme Court held that federal courts should defer to agency interpretations of law unless the relevant statute is clear or *the agency interpretation is unreasonable*.[169] Jacob Gersen and Adrian Vermeule note that this doctrine has come under increasing strain, in part because of the difficulties in applying reasonableness standards. When applying "reasonableness," "judges must develop and

---

[166] Evan Tsen Lee, *supra* note 148, at 236.
[167] *Id*.
[168] *See* Fleming, *supra* note 1, at 114. *See also supra* note 26 and accompanying text.
[169] Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-844 (1984) (emphasis added).

internalize a legal distinction between the best interpretation of the statute and a reasonable interpretation of the statute. For conceptual, psychological, and motivational reasons, this distinction is tenuous, even unstable."[170]

This critique is equally applicable to the "reasonableness" standard of review applied to errors of fact at the *ad hoc* tribunals. Judges are asked to distinguish between their own thoughts on the "best" or "right" conclusion to be inferred from evidence, and a "reasonable" interpretation. Similar to *Chevron* deference, "[p]sychologically, it may be difficult for judges . . . to avoid collapsing their conception of a *reasonable* legal answer into their conception of the *best* legal answer, thereby defining all second-best answers as unreasonable."[171] The psychological tension between appeals judges wanting to give the "right" answer but settling for a "reasonable" answer may contribute to unstable jurisprudence in international criminal law just as Gersen and Vermeule posit in administrative law.

Though the U.S. was a significant contributor to the *ad hoc* tribunals' Rules of Procedure and Evidence, the structure and character of the Appeals Chambers were also influenced by other common law and civil law traditions, leading to a procedural hybrid in many respects.[172] As a result, structures that alleviate some of the problems caused by inconsistent standards of review in national systems do not exist, or are not used, in the

---

[170] Gersen & Vermeule, *supra* note 149, at 679-680.
[171] *Id*. at 685.
[172] *See generally* Nancy Amoury Combs, *Copping a Plea to Genocide*, 151 U. PA. L. REV. 1 (2002); Vladimir Tochilovsky, *supra* note 150, at 56-59; Adolphus G. Karibi-Whyte, *Appeal Procedures and Practices*, in SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW 623, 641 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman, eds., 2000); Patricia M. Wald, *ICTY Judicial Proceedings: An Appraisal from Within*, 2 JOURNAL OF INT'L CRIM. JUSTICE 466, 467 (2004). Judge Wald noted, "devising a procedural regime that combines facets of the common-law adversarial system with the civil-law inquisitorial mode of criminal trial is not easy. The ICTY mix appears to be, to some degree, in a constant state of flux."

ad hoc tribunals. Common law and civil law systems differ in the ability to reconsider factual issues presented at trial. John Henry Merryman broadly painted the differences:

> "Appeal" has a special meaning [in the civil law tradition] that is unfamiliar in the United States, where it is thought of as primarily a method of correcting mistakes of law made by the trial court. In the civil law tradition, the right of appeal includes the right to reconsideration of factual, as well as legal, issues. . . . The appellate bench is expected to consider all of the evidence itself and to arrive at an independent determination of what the facts are and what their significance is.[173]

Remands for new trials are relatively rare in most countries.[174] Instead, in many civil law countries, Appeals Courts consider facts *de novo*. France, for example, allows appeals from the Correctional Court and the Police Court (handling the majority of felony cases) that is "in principle, a trial de novo on all issues of fact, law, or sentencing raised by the appeal."[175] In Germany, three-judge appeals panels hold "a new trial as to guilt as well as sentence," substituting "its own judgment for that of the trial court" if it finds the trial court has erred.[176]

The nature of ICTY and ICTR appellate review—as with many of their rules—is a procedural mix between the common law and civil law systems. When the Appeals Chambers decide that the Trial Chamber has evaluated facts unreasonably, they substitute their own decisions for those of the Trial Chamber based on their reading of the written record available to them under Rule 109.[177] They do not remand for factual

---

[173] JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 120 (2d ed., 1985).
[174] George C. Thomas III, *Improving American Justice by Looking at the World: A Review of* Criminal Procedure: a Worldwide Study *edited by Craig M. Bradley*, 91 J. CRIM. L. & CRIMINOLOGY 791, 820 (2001).
[175] Richard S. Frase, *France*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 143, 179 (Craig M. Bradley, ed., 1999).
[176] Thomas Weigend, *Germany*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 187, 212 (Craig M. Bradley, ed., 1999). Italy employs a similar procedure. Rachel VanCleave, *Italy*, in in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 245, 280-281 (Craig M. Bradley, ed., 1999). China permits the appellate court to "rehear the case or 'simply to review the case by reading the file, interrogating the defendant and interviewing the defense counsel if the facts of the case are unclear." Liling Yue, *China*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 81, 89 (Craig M. Bradley, ed., 1999).
[177] *See, e.g.*, the method used in Kupreskic Judgment, *supra* note 28, at ¶ 223.

determinations even when doing so may be desirable for legal or policy reasons.[178] Thus, they combine the civil law ability to substitute the appeals court's own factual findings (which is in civil law jurisdictions tempered by those courts' entire rehearing of the evidence) with the common law's reliance on the written record (which is usually countered by a willingness to remand to trial courts for factual re-determinations).[179] The result is factual decisions by an Appeals Chamber that has not heard the witnesses speak; it makes its credibility and reliability determinations in the absence of the kind of evidence that the majority of domestic fact-finders—whether at the trial or the appellate level—have. The results of this process may appear more inconsistent than standards of review in domestic systems, since the Appeals Chambers must make an additional set of their own inferences because they are one step further removed from the actual evidence.

Part V. Consequences of inconsistent standards of review

It is widely recognized in human rights instruments and domestic criminal law systems that defendants have a right to appeal their convictions. Defendants' rights to appeal their convictions and sentences are enshrined in the International Covenant on

[178] Judge Wald's partial dissenting opinion in *Jelisic* highlights the potential negative implications of a failure to remand. In *Jelisic*, the Appeals Chamber determined that the Trial Chamber's *sua sponte* mid-trial ruling that there was insufficient evidence to sustain a conviction for genocide was legally incorrect. Nevertheless, the Appeals Chamber refused to remand for a new factual determination. Judge Wald dissented from this decision, stating that she could not see "that the Appeals Chamber has any choice but to remand the case to a Trial Chamber," since the Appeals Chamber effectively went beyond its powers by preventing the prosecutor from re-prosecuting this charge "in the interests of justice, judicial economy, or otherwise." Judge Wald argued that, contrary to the Appeals Chamber's finding, such a power to effectively halt prosecutions was not consistent with the appellate function in national jurisdictions. Prosecutor v. Jelisic, Case No. IT-95-10/A, Judgment, Partial Dissenting Opinion of Judge Wald, ¶¶ 1, 5, 7-8 (July 5, 2001).

[179] The Appeals Chambers do have the ability to remand for retrial under ICTY Rule 117(C) and ICTR Rule 118(C). ICTY Rules of Procedure and Evidence, *supra* note 37, at Rule 117(C); ICTR Rules of Procedure and Evidence, Rule 118(C), as amended Nov. 10, 2006, U.N. Doc. ITR/3/Rev.1 (2006). However, this power has rarely been used. RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 313 (2002).

Civil and Political Rights and numerous other human rights conventions.[180] At least forty-five national constitutions also contain guarantees that essentially guarantee the right to appeal a criminal conviction to a higher court.[181] It was because the right to appeal was a "fundamental element" of human rights that the U.N. Secretary-General proposed there should be an Appeals Chamber at the ICTY.[182]

Defendants have no specific right to know with certainty the standards of review that will be applied to their cases, but inconsistent standards may impact the right to appeal in several ways. Standards of review are a "fertile ground for advocacy," "[b]ecause they define the framework for an appeal and an appellate court's approach to certain issues."[183] When a court inconsistently applies a standard of review, it curtails this type of advocacy, making appeals less effective. At the *ad hoc* tribunals, counsel will be less capable of meeting the Appeals Chamber requirement to "clearly set out [their] grounds of appeal as well as the arguments in support of each ground" and "set out the arguments supporting the contention that the alleged error has invalidated the decision or occasioned a miscarriage of justice,"[184] when they do not know the type of information necessary to meet the standard of review. "[A] restricted possibility to effectively foresee the outcome of [a standard of review] creates a certain amount of uncertainty when

---

[180] International Covenant on Civil and Political Rights, art. 14(5), Dec. 16, 1966, art. 23, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976). Numerous other human rights instruments also contain the right to appeal. *See, e.g.* American Convention on Human Rights, art. 8(2)(h), O.A.S.T.S. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978; European Convention on the Protection of Human Rights and Fundamental Freedoms, Protocol No. 7, art. 2, Nov. 4, 1950, 213 U.N.T.S. 222; African [Banjul] Charter on Human and Peoples' Rights, art. 7(1)(a), adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986).

[181] M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 287-288(1993).

[182] The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 116, *delivered to the President of the Security Council*, UN Doc. S/25703 (Apr. 30, 1993).

[183] Bosse, *supra* note 19, at 369.

[184] Kupreskic Judgment, *supra* note 28, at ¶¶ 28-41. *See supra* note 83 and accompanying text.

planning and preparing their cases for the proceedings before a Trial Chamber."[185] Case law giving the Appeals Chamber the ability to circumvent these pleading requirements for *errors of law only* further compounds the problem.[186]

The diminished ability to meet these pleading requirements for errors of fact may have differential—and grave—consequences for defendants, who rely most heavily on factual appeals. 53% of arguments made by defendants concern only questions of fact, compared to 35% of arguments by the prosecution. In contrast, defendants raise questions of law in only 23% of their appeals compared to 32% of appeals by prosecutors. Thus, inconsistent standards of review for errors of fact differentially impact defendants not only because they bring more factual appeals than the prosecution and are therefore given less guidance for the majority of their pleadings, but also because the Appeals Chambers cannot mitigate pleading errors for errors of fact by circumventing pleading requirements "where the Trial Chamber has made a glaring mistake."[187] Defense counsel, who as non-repeat players may be less intuitively familiar with the standards of review applied, may attempt to compensate for inconsistent standards for errors of fact by arguing every

---

[185] Lundqvist, *supra* note 11, at 643.

[186] Unlike for errors of fact, for legal errors the Appeals Chambers have held they can make an exception to the requirement that appellants identify the alleged error. *See supra* note 110 and accompanying text. The differential impact of standards of review for errors of fact highlights a contentious issue in international criminal law: the ability of prosecutors to appeal acquittals based on issues of fact. Mark Fleming examines this issue in the context of the *ad hoc* tribunals in some detail, and finds that such appeals are arguably inconsistent with many of the goals of appellate review:

> [T]he possibility of a prosecutorial appeal on a question of fact is disquieting. On a question of law, the appellate court is arguably in a position to reach a better decision, since it has the benefit not only of the trial court's conclusions, but also of the arguments of counsel in response. On questions of the factual inferences to be drawn from an evidentiary record, however, neither court has any particular advantage, except to the extent that the trial court can observe the demeanor of witnesses. Absent a reason to believe that the Appeals Chamber's appraisal of the facts is apt to be more accurate more often than the Trial Chamber's, the presumption that the 'margin of error' should be resolved in favor of the accused should prevail in factual disagreements between the two chambers. This militates against appellate review of findings of fact when the trial court has acquitted the defendant.

Fleming, *supra* note 1, at 114-117, 139.

[187] Kupreskic Judgment, *supra* note 28, at ¶ 27. *See supra* note 111 and accompanying text.

possible factual question on appeal—a propensity that would lead to significant waste of defense resources. Such a tendency would explain my data showing that defendants appeal more than six times as much as prosecutors, but are significantly less successful.

Inconsistent standards of review may also impact the internationally-guaranteed right to appeal more directly. Commentary on the Rome Statute of the ICC noted that when the Appeals Chamber itself makes findings of fact, it deprives defendants "of any possibility of appeal against those findings, which could be regarded as contrary to article 14 para. 5 of the International Covenant on Civil and Political Rights . . . ."[188] Depriving defendants of appeal rights is all the more problematic when prosecutors can appeal, turning acquittals into un-reviewable convictions. When the Appeals Chambers of the *ad hoc* Tribunals decide issues of fact themselves as part of inconsistently-applied heightened standards of review, the right to appeal is just as surely curtailed. When the tribunals inconsistently apply heightened factual review on a "case by case basis,"[189] defendants cannot even predict when their appeal rights will actually be constrained.

The need for certainty and predictability in substantive criminal law is widely recognized.[190] The *ad hoc* tribunals are not bound to follow precedent, but they have nevertheless recognized that "[t]he fundamental mandate of the Tribunal . . . cannot be achieved if the accused and the Prosecution do not have the assurance of certainty and

---

[188] Christopher Staker, *Appeal and Revision*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1015, 1035 (Otto Triffterer, ed., 1999).
[189] Musema Judgment, *supra* note 78, at ¶¶ 17-19. *See supra* note 94 and accompanying text.
[190] The need for certainty and predictability are expressed in the legality doctrine, which prohibits retroactive offenses (*nullum crimen sine lege*) and retroactive penalties (*nulla poena sine lege*) William A. Schabas, *Perverse Effects of the* Nulla Poena *Principle: National Practice and the ad hoc Tribunals*, 11 EUR. J. INT'L L. 521, 522 (2000). The legality principle is part of customary international law. GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 32 (2005).

predictability in the application of the applicable law."[191] Some scholars have recognized predictability, transparency, and rationality as important in providing "procedural due process" in domestic criminal systems.[192] Due process values should be equally important in international criminal law.[193] International due process also requires "equality in knowing what reasonably bears relevance to deciding the criminal case."[194] Taken together, these due process components may require that appellants have a measure of certainty and predictability in knowing the factors that will be relevant in deciding their cases, whether at the trial level or on appeal.

Uncertainty in standards of review would logically have an effect on appellants. Previous articles have suggested the importance of standards of review for the outcome of appeals,[195] and my analysis of implicit standards of review, above, confirmed the strong correlation between implicit standards of review and success rates.[196] Even *Kupreskic*'s change to the stated standard of review appears to have impacted the success rate of factual appeals.[197] Insofar as the outcome for a specific appellant may depend on the standard of review, these standards are one of the "procedural due process" components that should be applied with "a fair amount of consistency and predictability."[198] Moreover, the ICTY Appeals Chamber did not distinguish between

---

[191] Aleksovski Judgment, *supra* note 78, at ¶ 113(ii). For more detailed discussion on the use of precedent in the *ad hoc* tribunals, *see* Tracol, Appeals Chambers, *supra* note 12 at 137.
[192] *See* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 485 (1986).
[193] Very few people have studied procedural due process in international criminal law, though several excellent early treatments of the topic exist. *See* Cristian Defrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381 (2001); Rupa Bhattacharyya, *Establishing a Rule-of-Law International Criminal Justice System*, 31 TEX. INT'L L. J. 57, 76 *et seq.* (1996); GEERT-JAN G.J. KNOOPS, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW, 263-268 (2001).
[194] KNOOPS, *supra* note 193, at 267.
[195] For a general discussion, *see* Warner, *supra* note 15, at 109.
[196] *See* Chart 3, Chart 4, and Appendix II.
[197] *See supra* note 136 and accompanying text.
[198] Bhattacharyya, *supra* note 193, at 79.

substantive and procedural provisions in stating that it should follow its decisions "in the interests of certainty and predictability."[199] Presumably, certainty and predictability are similarly implicated when the Appeals Chamber applies the "reasonableness" standard to factual errors in two different ways and when it is unpredictable in questions of substantive law.

Finally, inconsistent standards of review may be harmful for the Appeals Chamber itself. As discussed earlier, one of the goals of appellate review is to ensure the consistency of trial court verdicts, guaranteeing that "similar cases receive similar treatment."[200] The Appeals Chambers will be less able to do so when they view similar cases through a different lens. That similar cases should receive similar treatment is a fundamental maxim that does not only apply to Trial Chamber decisions: preserving the credibility of the Appeals Chambers equally requires recognizing occasions when different standards are being applied to the same questions, asking why, and taking steps to remedy the problem.

Part VI. Suggestions for the future

With the ICTY and ICTR set to close their doors in 2010, do the standards of review they use even matter, long-term? Undoubtedly, insofar as the jurisprudence of the *ad hoc* tribunals will affect case law at the permanent International Criminal Court and other present and future international criminal law institutions. The ICC is in part the

[199] Aleksovski Judgment, *supra* note 78, at ¶ 107.
[200] Fleming, *supra* note 1, at 114. *See supra* note 23 and accompanying text.

legacy of the *ad hoc* tribunals,[201] and as such, cannot help but be influenced by their jurisprudence. William Schabas explains:

> There can be no doubt that the case law of the international criminal tribunals will provide immense guidance to the International Criminal Court, as it begins its work. . . . Where judges at the ICC depart from the precedents set by the *ad hoc* tribunals, they will feel compelled to explain this, and make the relevant distinctions, just as the judges at the *ad hoc* tribunals have done when they identified principles of customary law that are at variance with the Rome Statute.[202]

There is an unusual level of agreement among international criminal law scholars that the ICC should learn from the lessons of the ICTY and ICTR.[203] As the first international criminal tribunals providing for an appeals procedure, problems experienced by the ICTY and ICTR Appeals Chambers should be particularly instructive for the Court. The evidence I found suggesting that standards of review as applied in international criminal law may have a differential, and more harmful, impact for the defense should particularly compel the ICC to learn from the lessons of the *ad hoc* tribunals, in order to preserve its own legitimacy and the human rights norms it aspires to protect.

---

[201] The ICTY and ICTR have been described as a "crucial catalyst" in the establishment of the ICC. Pearson, *supra* note 30, at FN 24. *See also* M. Cherif Bassiouni, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT 19 (1998); Roy S. Lee, *Introduction*, in THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 1, 6 (Roy S. Lee, ed., 1999); Alison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 3 (2006); Knut Dörmann, *Contributions by the* Ad Hoc *Tribunals for the former Yugoslavia and Rwanda to the Ongoing Work on Elements of Crimes in the Context of the ICC*, 94 AM. SOC'Y INT'L L. PROC. 284, 284-285 (2000); Susan W. Tiefenbrun, *The Paradox of International Adjudication: Developments in the International Criminal Tribunals for the former Yugoslavia and Rwanda, the World Court, and the International Criminal Court*, 25 N.C. J. INT'L & COM. REG. 551, 592 (2000).

[202] Schabas, *supra* note 1, at 44. *See also* GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 12 (2005).

[203] *See, e.g.,* The Editors in Chief, *Developments in International Criminal Law*, 93 AM. J. INT'L L. 1, 1 (1999); Schabas, *supra* note 1, at ix; Minna Schrag, *Lessons Learned from ICTY Experience*, 2 J. INT'L CRIM. JUSTICE 427 (2004); Claude Jorda, *The Major Hurdles and Accomplishments of the ICTY: What the ICC can Learn from them*, 2 J. INT'L CRIM. JUSTICE 572 (2004); Dörmann, *supra* note 201, at 286; Hans Holthuis, *Operational Aspects of Setting up the International Criminal Court: Building on the Experience of the International Criminal Tribunal for the former Yugoslavia*, 25 FORDHAM INT'L L.J. 708, 709 (2002).

There are undoubtedly differences between the ICC Appeals Chamber and those in the *ad hoc* tribunals. The ICC is permanent, making the Appeals Chamber less subject to the time pressure of the ICTY and ICTR. ICC Appeals Division judges are permanently assigned to hear appeals rather than rotating to the Pre-Trial or Trial Divisions,[204] a model the *ad hoc* Appeals Chambers only adopted after 2000.[205] The five judges of the ICC Appeals Division will hear every appeal, unlike at the *ad hoc* tribunals where only five of the seven Appeals Chamber members hear any one appeal.[206] The ICC Statute contains an explicit provision for the consideration of interlocutory appeals, which the ICTY and ICTR statutes lack.[207] The ICC Appeals Chamber may be less able than the *ad hoc* Appeals Chambers to voluntarily restrict its own powers to examine the grounds for an appeal,[208] and may review questions of law *and* fact not raised by the parties.[209] Perhaps most importantly for standards of review, the ICC Appeals Chamber

[204] Rome Statute of the International Criminal Court, July 17, 1998, art. 39(4), 2187 U.N.T.S. 90 [hereinafter Rome Statute].
[205] *See supra* note 33 and accompanying text.
[206] Rome Statute, *supra* note 204, art. 39(2)(b)(i). For more information on the composition of Appeals Chambers at the *ad hoc* tribunals, *see supra* note 33 and accompanying text.
[207] Rome Statute, *supra* note 204, art. 82. The ICTY and ICTR subsequently provided for interlocutory appeals in Rule 72(B), *see supra* note 37 and accompanying text.
[208] Robert Roth & Marc Henzelin, *The Appeal Procedure of the ICC*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1535, 1545 (Antonio Cassese, Paola Gaeta, & John R.W.D. Jones, eds., 2002). Roth and Henzelin state, "it seems doubtful . . . that the ICC Appeals Chamber can voluntarily and in general restrict its own powers to examine the grounds for an appeal. Rather, it seems that the Appeals Chamber *must* examine the grounds for any appeal . . . against a conviction or sentence handed down by a Trial Chamber, before deciding whether or not that appeal is admissible." This presumably runs contrary to the "inherent jurisdiction" of the *ad hoc* Appeals Chambers to dismiss certain arguments without a reasoned opinion. *See supra* note 54 and accompanying text.
[209] Rome Statute, *supra* note 204, arts. 81(2)(b), (c). *See also* Roth & Henzelin, *supra* note 208, at 1546.

has "wide powers to investigate and examine or re-examine the facts of the case,"[210] in addition to the power to remand.[211]

However, the Rome Statute makes the ICC similar to the ICTY and the ICTR in the provision that may most closely to relate to standards of review. Article 81(1) of the Rome Statute, setting out the basics of ICC appellate jurisdiction, states:

> (a) The Prosecutor may make an appeal on any of the following grounds:
> (i) Procedural error,
> (ii) Error of fact, or
> (iii) Error of law;
> (b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:
> (i) Procedural error,
> (ii) Error of fact,
> (iii) Error of law, or
> (iv) Any other ground that affects the fairness or reliability of the proceedings or decision.[212]

While the Rome Statute provides a slightly different requirement for overturning judgments of the Trial Chamber—the ICC Appeals Chamber may reverse or amend the decision if it finds the proceedings were "unfair in a way that affected the reliability of the decision or sentence" or if it finds the decision was "materially affected" by the error,[213] compared to the *ad hoc* tribunals' "miscarriage of justice"/"invalidating the decision" requirements[214]—it preserves the basic structural division into errors of fact and errors of law. The distinction of errors of fact and errors of law is not surprising, since many national systems (including the United States) also recognize these grounds,

---

[210] Roth & Henzelin, *supra* note 208, at 1552. Roth and Henzelin emphasize, "[t]he *powers* of the Appeals Chamber are thus very extensive, which (apparently or potentially, at least) contradicts the universal principle that the most competent body in the finding of facts is the Court which passed the (original) judgment. *Id*. at 1553.

[211] Rome Statute, *supra* note 204, art. 83(2). For more discussion of the structure of the ICC Appeals Chamber, *see generally* Roth & Henzelin, *supra* note 208, at 1535-1558; Helen Brady, *Appeal*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 575, 575-582 (Roy S. Lee, ed., 2001).

[212] Rome Statute, *supra* note 204, art. 81(1).

[213] Rome Statute, *supra* note 204, art. 83(2).

[214] ICTY Statute, *supra* note 2, art. 25; ICTR Statute, *supra* note 2, art. 24. *See supra* note 67 and accompanying text.

but it once again leaves the development of basic standards of review, including standards to be applied to 'mixed questions' open to the Appeals Chamber. Thus, the ICC Statute leaves room for the Appeals Division to create the same inconsistencies as the *ad hoc* tribunals that preceded it—inconsistencies that are all the more salient for their differential impact on the defense.

The ICC Appeals Division, having not yet faced an appeal from a final judgment, can avoid applying standards of review in inconsistent ways if it is cognizant from the outset of the danger that it might do so. Like the ICTY and ICTR themselves, and other more recent institutions, the ICC can benefit from the following suggestions for improving the application of standards of review in international criminal law.

A. Recommendation 1: The ad hoc *tribunals and the ICC should use their existing powers more fully in order to harmonize standards of review*

First, and most simply, the Appeals Chamber should state for each argument whether it considers it to be an error of law, error of fact, or an appeal raising both types of questions. It is not enough to simply state at the beginning of the judgment the standards to be applied, without actually analyzing whether the individual argument presents a question of fact or question of law. When issues of fact and law are intermingled, "they must be distinguished and analyzed separately."[215] When Appeals Chambers force themselves to recognize the type of question presented by each argument, they will be more constrained from implicitly analyzing similar types of issues differently. Although the standards of review that the Appeals Chambers state at the beginning of their judgments currently do not prevent them from analyzing certain arguments with more or less scrutiny, adopting a practice whereby they state the type of question each

[215] Warner, *supra* note 15, at 103.

individual argument presents will force the Appeals Chambers to consider each argument more carefully at the outset, draw their attention to the potential inconsistencies in their analysis, and in turn make these inconsistencies less likely.

Just as the *ad hoc* tribunals have expanded upon the bare statutory requirements for errors of fact and errors of law in order to develop standards of review,[216] they should develop jurisprudential tools for analyzing "applied questions of fact." The case law of international tribunals should recognize the difference between pure questions of fact and "applied questions of fact," or "mixed questions," in order to consistently apply a more deferential standard to pure questions of fact. When the Appeals Chambers begin recognizing that 'mixed questions' do occur, they can judge which categories of arguments raise these questions, and pay close attention in those situations.[217] Further, the tribunals should think carefully about the deference due to the trial chamber when analyzing different types of "applied questions of fact." For example, appeals alleging that the Trial Chamber incorrectly assessed witness testimony may be treated more deferentially than allegations that the Trial Chamber drew incorrect inferences from documentary evidence, since the Appeals Chamber is in more secure position when re-evaluating documentary evidence than written records of live testimony. The Appeals Chamber has recognized that written transcripts place it at a comparative disadvantage when assessing witness reliability and credibility, and it could consequently tailor its standards of review to minimize the effects of this disadvantage while giving greater emphasis to the factual evidence it is equally well-positioned to assess—written exhibits.

---

[216] *See supra* note 67 and accompanying text.
[217] I noted mixed questions commonly occurring in arguments about *mens rea*, superior responsibility, identification evidence, certain types of witness credibility questions, and the weight given to mitigating circumstances in sentencing.

The ICC Appeals Chamber has a luxury that the *ad hoc* tribunals do not have: time. In *any* case where the ICC Appeals Chamber is considering overturning a Trial Chamber that was based on live testimony rather than documentary evidence, it should take the opportunity provided in Article 83(2) of the Rome Statute to "remand . . . to the original Trial Chamber" or itself "call evidence . . . to determine the issue."[218] Trial Chamber decisions based on live evidence should not be overturned without hearing that same testimony, unless the Appeals Chamber remands to the Trial Chamber that initially heard all the testimony. Although it could be argued that remand may make ICC proceedings more costly, Rome Statute negotiations explored the possibility of allowing the Appeals Chamber to reexamine a case in its entirety and state parties ultimately appear to have decided that remand was a preferable alternative.[219] With the knowledge that the States Parties responsible for the finances of the court agreed to the remand provisions in full awareness of alternative possibilities, the ICC Appeals Division should not hesitate to use the powers the State Parties knowingly conferred on it.

The Appeals Chambers of the *ad hoc* tribunals should also exercise their as-yet-unused ability to remand under ICTY Rule 117(C) and ICTR Rule 118(C).[220] My analysis shows that situations in which an Appeals Chamber is tempted to overturn the Trial Chamber on factual issues based on testimonial evidence arise comparatively rarely.[221] In these few situations, the rights of the defendant, and the resources of the prosecutor, will be better protected through standards of review that consistently recognize the Appeals Chamber's inability to re-evaluate facts from a written record

[218] Rome Statute, *supra* note 204, art. 83(2).
[219] Staker, *supra* note 188, at 1022-1023.
[220] MAY & WIERDA, *supra* note 179, at 313. In at least one situation, a an Appeals Judge has criticized the Appeals Chamber for not using these powers. *See supra* note 179 and accompanying text.
[221] Overall, only 10.8% of appeals of fact were successful.

alone. As the Trial judges finish hearing the initial trials, they should be able to devote more time to this effort.

B. Recommendation 2: The ad hoc *tribunals and the ICC should consider novel solutions to standard of review problems*

Recent literature in other legal fields suggests several novel ways to combat standard-of-review problems. While it may be too late for the *ad hoc* tribunals to adopt these changes wholesale, the International Criminal Court has a blank slate, giving it the ability to set up a rational review scheme from the very beginning.

In the context of U.S. federal law, Randall Warner suggests that by correctly parsing the issues on appeal, ambiguous 'mixed questions' may become less elusive. As discussed above, Warner recognizes numerous "issue-types" in his article that are relevant to international criminal law, and suggests different standards of review for each issue-type.[222] My analysis suggested that the *ad hoc* Appeals Chambers also confront a sixth type of issue that Warner did not identify: claims that the Trial Chamber incorrectly weighed certain facts, which should be reviewed very deferentially. As a new court, the ICC could develop standards of review using issue-types from the start. To do so would give the judges a better roadmap for applying standards of review consistently than the ICTY and ICTR categories, which are based on the fallacy that issues can be neatly pigeonholed as errors of fact and errors of law.

Judge-developed issue-type standards of review would not violate the Rome Statute's provisions giving the Appeals Division jurisdiction over procedural errors, errors of fact, errors of law, and other grounds that affect the fairness or reliability of the proceedings. An issue-type analysis simply realistically recognizes the gradations

[222] For further explanation, *see* Part III, *supra*.

between errors of fact and errors of law rather than eliminating references to errors of fact and errors of law altogether. Essentially, issue-type analysis would not eliminate review for errors of fact and errors of law, but use a preferable method to guide the Appeals Division towards the standard of review it should apply on questions that may fall into either category.

If the ICC Appeals Division decides to formulate standards of review on issue-based lines, it should be aware of potential pitfalls based on the ICTY and ICTR experience. Although my analysis shows that the *ad hoc* Appeals Chambers do evaluate different issue types differently, in failing to overtly apply issue-type analysis, the Appeals Chambers make several mistakes. Assuming that the success rates of appeals are at least partially indicative of the type of review the Appeals Chamber is applying (as my "implicit levels of review" analysis suggests), the Appeals Chambers appear to be reviewing pure questions of fact and evaluative determinations less deferentially than they should be.[223] Moreover, the Appeals Chambers are considering evaluative determinations and definition applications on a case-by-case basis rather than an issue-by-issue basis. If the *ad hoc* Appeals Chambers identified the certain categories of questions for which their standards of review are applied inconsistently[224] and developed issue-based standards accordingly, their own standards would become far more consistent. The ICC Appeals Division should be wary of these categories of questions from the outset, particularly if it decides to apply standards of review using an issue-type analysis.

---

[223] *See* Table 3, *supra*.

[224] My analysis suggested that standards of review were most inconsistent where the appellant alleged that the facts did not merit a finding he could be held responsible as a superior using command responsibility, arguments alleging that the appellant did not possess the necessary *mens rea* for a crime, arguments alleging the Trial Chamber incorrectly evaluated the credibility of witnesses, and arguments alleging the Trial Chamber incorrectly evaluated witnesses' identification of the defendant. *See* Part III, *supra*.

Evaluating appellate arguments according to the "issue-type" analysis Warner suggests would not require any changes in procedural structure: the ICC or the *ad hoc* tribunals could evaluate these issues and still make decisions according to the usual procedure used in international criminal law, where appellate judges arrive at a majority decision.[225] In the context of U.S. administrative law, one more radical option was recently suggested. Federal courts defer to agency interpretations of law under *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc*., unless the underlying statute is clear or the agency's determination is "unreasonable."[226] As discussed above, reasonableness determinations lead judges to have to make difficult internal distinctions between the "best" interpretation of a statute and a "reasonable" interpretation of a statute.[227] Gersen and Vermeule propose a novel solution to requiring these internal distinctions, instead "institutionalizing deference" based on a voting rule. To illustrate, they give a sample voting rule:

> when a litigant challenges agency action as inconsistent with an organic statute, the agency will prevail unless the judges, asking simply what the best interpretation of the statute is, vote to overturn the agency by supermajority vote—say, by a 6-3 vote on the Supreme Court, or by a 3-0 vote on a court of appeals panel.[228]

Although using a voting rule to arrive at appellate decisions in international criminal law would be as much of a break with prior procedure as in U.S. administrative law, a voting rule could work equally well in that context. Under such a voting rule,

---

[225] Although Brady and Jennings note there was disagreement in the drafting of the Rome Statute as to whether dissenting opinions would be permitted, the drafters arrived at a structure whereby "on factual issues the judgment shall reflect the views of both the majority and the minority, but on a question of law a judge may deliver a separate or dissenting opinion." Helen Brady & Mark Jennings, *Appeal and Revision*, in THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 294, 301 (Roy S. Lee, ed., 1999).
[226] Gersen & Vermeule, *supra* note 149, at 676.
[227] *Id*. at 679.
[228] *Id*.

judges could be asked what conclusion should "rightfully" be drawn from the factual evidence presented. Then, if a supermajority (say, a 4-1 split) of Appeals Chamber judges agreed on the "right" conclusion, and it was different from the Trial Chamber's conclusion, the Appeals Chamber could overturn the decision. "Institutionalizing deference" in this way would give appellants a better sense of the standard of review to be applied to Trial Chamber decisions—the Appeals Chamber would be applying this standard for every factual question—and would capture many of the same benefits as Gersen and Vermeule identify for the voting rule in the *Chevron* context:

> the [current standard] requires judges to internalize a legal norm of deference, but it is accompanied by none of the traditional mechanisms that law uses to force decision-makers to internalize the consequences of their choices. Conversely, the principal advantage of institutionalizing *Chevron* as a voting rule is that it makes agency deference an aggregate property that arises from the whole set of votes, rather than an internal component of the decision rules used by individual judges. . . . A voting-rule version of *Chevron* would allow more precise calibration of the level of judicial deference over time, and . . . would produce less variance in deference across courts and over time, yielding a lower level of legal uncertainty than does the doctrinal version of *Chevron*.[229]

Clearly, using a voting rule rather than traditional standards of review in the appeals context in international criminal law would require far more careful study than I can give it here, but at first glance, it would seem to provide an answer to the inconsistency and uncertainty that I saw arising in my analysis of factual appeals.

Part VII. Conclusion

Standards of review, which can be "the single most important factor in determining whether an appeal will succeed,"[230] are currently receiving intense scrutiny by legal scholars in many areas of the law. My analysis of standards of review in final

[229] *Id. at* 680.
[230] Warner, *supra* note 15, at 109.

appellate judgments of the *ad hoc* international criminal tribunals, based on an empirical study of every appellate decision they issued between October 7, 1997 and July 7, 2006, shows that this scrutiny is not misplaced. Although many appellate judgments claim to be applying a "reasonableness" standard to errors of fact, they also acknowledge that they will examine trial judgments more closely when the Trial Chamber failed to give a "reasoned explanation," but give no guidance as to when this heightened scrutiny will be triggered except on a "case-by-case basis."[231] Looking past the stated standards at the standards actually used in reviewing Trial Chamber judgments for errors of fact, based on the sources they consult and inferences they make, Appeals Chambers do not always give the same amount of deference to similar questions. In applying the "reasonableness" standard, the Appeals Chamber sometimes brushes aside a claim without discussing any evidence presented to the Trial Chamber; in other cases, the Appeals Chamber fully re-evaluates factual findings using trial transcripts and exhibits, and because these differences are not overtly stated, appellants cannot predict which treatment their claim will receive in advance. Inconsistencies arise most frequently in challenges to *mens rea* determinations, challenges to factual findings related to mitigating circumstances in sentencing, challenges to the weight the Trial Chamber gave to such mitigating circumstances, and general challenges alleging that the Trial Chamber applied an erroneous standard to a set of facts, and the facts meet the correct standard.

Inconsistencies in standards of review undermine the certainty and predictability that is so important for defendants, and may place their right to appeal—recognized in multiple human rights instruments—in jeopardy. Inconsistencies in factual review in international criminal tribunals place defendants at a particular disadvantage since they

[231] *See supra* note 94 and accompanying text.

make many more factual appeals than the prosecution, and are generally far less successful at those appeals. Further, parties making factual appeals—usually defendants—are held to a higher pleading standard than parties alleging errors of law, compounding the ill effects of inconsistent standards for errors of fact. Inconsistent standards may themselves contribute to the disproportionately high number of factual appeals that defendants bring, and may implicate defense resources and strategy. Undoubtedly, defendants in international criminal tribunals are accused of horrific crimes, but violating their fair trial rights undermines the legitimacy of these tribunals as a whole.

The picture is not entirely gloomy, however. The Appeals Chambers do consistently evaluate errors of law, and for certain categories of factual questions, review is quite consistent.[232] The work for international criminal law in the coming years—in not only the *ad hoc* tribunals, but in also the hybrid tribunals and the ICC which are their legacy—will therefore to be to make the standards of review for *all* types of factual questions as consistent as those for legal questions.

There is also much work for future international criminal law scholars in the fields of standards of review. I have not examined the standards applied to interlocutory decisions here. Since interlocutory decisions may take many more forms and arise far more frequently, standards of review may be even less consistent for these. Similarly, standards of evidentiary review as applied at the trial level would be a fruitful area for future analysis. Further development of procedural innovations to assist international criminal appellate bodies, such as "voting rules" structures discussed in other contexts, may also assist in the development of international criminal law more generally.

[232] For example, arguments about the failure to account for defense evidence, internal inconsistencies in witness testimony (as opposed to inconsistencies in testimony between witnesses unrelated to credibility determinations), and comparisons to other defendants for purposes of sentencing.

The ICC has yet to hear a final judgment appeal, and it therefore has an unparalleled opportunity to develop consistent and coherent standards of review from the very start. Problems that have arisen in the *ad hoc* tribunals should be a guide to the Court. Standards of review for *any* type of question—factual or legal—need not be an "elusive abomination." Rather, if tribunals develop issue-based standards that pay heed to the purposes of appellate review, judgment appeals will on the whole be clearer, more logical, and fairer for defendants and prosecutors alike.

Appendix

I. Table of Cases

I examined arguments from the following cases in my analysis:

Case Name	**Tribunal**	**Date of Appeal Judgment**	**Number of Arguments Considered**
Prosecutor v. Jean-Paul Akayesu	ICTR	1 June 2000	6
Prosecutor v. Zlatko Aleksovski	ICTY	24 Mar. 2000	7
Prosecutor v. Milan Babic	ICTY	18 July 2005	9
Prosecutor v. Ignace Bagilishema	ICTR	13 Dec. 2002	10
Prosecutor v. Tihomir Blaskic	ICTY	29 July 2004	39
Prosecutor v. Drazen Erdemovic	ICTY	7 Oct. 1997	1
Prosecutor v. Anto Furundzija	ICTY	21 July 2000	2
Prosecutor v. Sylvestre Gacumbitsi	ICTR	7 July 2006	18
Prosecutor v. Joran Jelisic	ICTY	5 July 2001	9
Prosecutor v. Miodrag Jokic	ICTY	30 Aug. 2005	5
Prosecutor v. Juvenal Kajelijeli	ICTR	23 May 2005	21
Prosecutor v. Jean Kambanda	ICTR	19 Oct. 2000	4
Prosecutor v. Jean de Dieu Kamuhanda	ICTR	19 Sept. 2005	42
Prosecutor v. Clement Kayishema	ICTR	1 June 2001	20
Prosecutor v. Dario Kordic & Mario Cerkez	ICTY	17 Dec. 2004	32
Prosecutor v. Milorad Krnojelac	ICTY	17 Sept. 2003	22
Prosecutor v. Radislav Krstic	ICTY	19 Apr. 2004	13
Prosecutor v. Dragoljub Kunarac, Radomir Kovac & Zoran Vukovic	ICTY	12 June 2002	37
Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic & Vladimir Santic	ICTY	23 Oct. 2001	17
Prosecutor v. Miroslav Kvocka, Mlado Radic, Zoran Zigic & Dragoljub Prcac	ICTY	28 Feb. 2005	51
Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic & Esad Landzo	ICTY	20 Feb. 2001	35
Prosecutor v. Zdravko Mucic, Hazim Delic & Esad Landzo (Mucic II)	ICTY	8 Apr. 2003	3

Prosecutor v. Alfred Musema	ICTR	16 Nov. 2001	21
Prosecutor v. Mladen Naletilic & Vinko Martinovic	ICTY	3 May 2006	42
Prosecutor v. Dragan Nikolic	ICTY	4 Feb. 2005	12
Prosecutor v. Momir Nikolic	ICTY	8 Mar. 2006	8
Prosecutor v. Eliezer Niyitegeka	ICTR	9 July 2004	20
Proseuctor v. Elizaphan Ntakirutimana & Gerard Ntakirutimana	ICTR	13 Dec. 2004	39
Prosecutor v. George Anderson Nderubumwe Rutaganda	ICTR	26 May 2003	25
Prosecutor v. Laurent Semanza	ICTR	20 May 2005	26
Prosecutor v. Omar Serushago	ICTR	6 Apr. 2000	2
Prosecutor v. Milomir Stakic	ICTY	22 Mar. 2006	26
Prosecutor v. Dusko Tadic	ICTY	15 July 1999	5
Prosecutor v. Dusko Tadic (Tadic II)	ICTY	26 Jan. 2000	8
Prosecutor v. Mitar Vasiljevic	ICTY	25 Feb. 2004	22

II. Success rates for implicit levels of review

Level of Review	Description of Review	Example	Number and Type of Arguments	Success Rate by Argument Type
1	Extremely deferential. Appeals Chamber looks only to Trial Judgment, and considers underlying sources very briefly, if at all. Very cursorily addresses claims of appellant's argument.	"The Appeals Chamber finds that the Appellant has not demonstrated how the Trial Chamber's rejection of his assertion that he had attempted to dissuade Milan Lukic from carrying out the killings was unreasonable. The Appellant has also failed to demonstrate how the fact that none of the persons present could have influenced Milan Lukic would be relevant to the assessment as to whether or not the Appellant attempted to dissuade Milan Lukic. The Appeals Chamber finds that the Appellant has failed to show that no reasonable tribunal could have made this finding. This sub-ground of appeal therefore fails." (*Vasiljevic*, para. 60)	Error of Law: 25 Error of Fact: 119 Both Errors: 40 Total: **184**	Error of Law: 4% Error of Fact: 4% Both Errors: 5% Total: **4%**
2	Fairly deferential. Appeals Chamber looks to transcripts, appellate briefs, exhibits, and underlying materials, but fairly cursorily.	"On the basis of the testimonies of Witnesses AF and Y, the Trial Chamber also found that Martinovic was involved in the burial of the body. Martinovic challenges this finding on the ground that these witnesses did not give any evidence that he was involved in the burial. While neither Witness AF nor Witness Y gave evidence that Martinovic was present and participated in the burial at Liska Park, Witness AF stated that Martinovic gave instructions to Ernest Takac to clean up the spot first chosen as the gravesite. Witness AF also gave evidence that Ernest Takac supervised the burial of Nenad Harmandzics body. Witness Y gave evidence that Stela directed the prisoners to go and pick up the body. The Appeals Chamber finds that it was open to a reasonable trier of fact to find that Martinovic was involved in the burial of Nenad Harmandzicon the basis of this evidence." (*Naletilic*, para. 523)	Error of Law: 14 Error of Fact: 97 Both Errors: 33 Total: **144**	Error of Law: 14% Error of Fact: 16% Both Errors: 12% Total: **15%**
3	Moderate level of review. Appeals Chamber looks closely at transcripts, appellate briefs, exhibits and underlying materials; Appelas Chamber may consider legal precedents from other cases in making its determination; alternatively, Appeals Chamber seems to combine more searching review and less searching review for different parts of the argument.	"The Appeals Chamber has considered the transcripts of 26 and 27 September 2001 and it is not convinced that the witness attempted to change his answer to avoid being "pinned down." Witness HH first testified that he went into the building sometime between 11 a.m. and 2 p.m. and that he hid into the ceiling about an hour later. Witness HH's cross-examination continued the next day. When asked at what time he went into the ceiling, Witness HH replied: "You are asking me questions on time, but I've already told you that I didn't have a watch. And I think this question was put to me yesterday actually, and I gave you an estimate. I think that I left – that I went into the ceiling between 1100 and 1400 hours." Moments later, the witness corrected himself, saying that he went into the building between 11 a.m. and 2 p.m., and that it was only an hour or two later that he went into the ceiling, concluding "[s]o I would say that I went into the ceiling at about 4 p.m." This was in conformity with his testimony the previous day. Therefore, the Appeals Chamber is not persuaded that the above shows that Witness HH lacked credibility and that the Trial Chamber should have rejected his testimony. . . . In the Appeals Chamber's view, the fact that the witness did not concentrate on the number of shots fired bears little relation to his ability (or inability) to observe the shooters. As the Trial Chamber found, the observational conditions for Witness HH were good, and it was therefore reasonable for the Trial Chamber to conclude, given the overall evidence before it, that Witness HH could observe the events well enough	Error of Law: 21 Error of Fact: 36 Both Errors: 24 Total: **81**	Error of Law: 10% Error of Fact: 22% Both Errors: 29% Total: **21%**

		to describe them in detail, even if he could not recall the number of shots fired at Ukobizaba." (*Ntakirutimana,* para. 232)		
4	Not very deferential. Court looks to new materials and sources of law itself, does not emphasize deference to Trial Chamber or ascribe interpretive weight to the Trial Chamber's conclusions.	"The Appeals Chamber considers that the Trial Chamber interpreted the instructions contained in D269 in a manner contrary to the meaning of the order. Even though the order was presented as a combat command to prevent an attack, the Trial Chamber concluded that it was part of an offensive strategy because "no military objective justified the attack" and in any event it was an "order to attack." The order defines the type of military activity as a blockade in the territory of Kruscica, Vranjska, and D. Vecerska (Ahmici and the neighbouring villages are not specifically mentioned), and it addresses the Viteska Brigade and the Tvrtko special unit, but not the Jokers or the Military Police which are only mentioned in item 3 of the order in the following terms: [i]n front of you are the forces of the IV Battalion VP, behind you are your forces , to the right of you are the forces of the unit N.S. Zrinski, and to the left of you are the forces of the civilian police. As noted above, the Trial Chamber had concluded that since the Ahmici area had no strategic importance, no military objective justified the attack, and determined that it was unnecessary to analyze the reasons given by the Appellant for issuing D269. The Trial Chamber concluded that nothing had been adduced to support the claim that an imminent attack justified the issuing of D269. The Appeals Chamber notes that the Trial Chamber gave no weight to the argument that the road linking Busovaca and Travnik had a strategic significance, and with respect to the fact that ABiH soldiers were reported travelling towards Vitez, it concluded that "the fact that these soldiers were drinking highlighted the fact that the soldiers were on leave and were not preparing to fight in the municipality of Vitez." The Appeals Chamber considers that the Trial Chamber's assessment of D269, as reflected in the Trial Judgement, diverges significantly from that of the Appeals Chamber following its review." (*Blaskic,* paras. 330-332)	Error of Law: 19 Error of Fact: 14 Both Errors: 20 Total: **53**	Error of Law: 47% Error of Fact: 21% Both Errors: 55% Total: **42%**
5	De novo review. Court gives no deference to Trial Chamber judgment; assesses materials and arguments without reference to Trial Chamber, or without any deference to the Trial Chamber's conclusion.	""The Appeals Chamber considers that the same is true where the conviction is for torture under Article 5(f) of the Statute and persecutions under Article 5(h) of the Statute where torture constitutes an underlying act of persecutions. The underlying act is not the determining factor. The Appeals Chamber finds that the definition of persecutions contains materially distinct elements not present in the definition of torture under Article 5 of the Statute: the requirements of proof that an act or omission discriminates in fact and proof that the act or omission was committed with specific intent to discriminate. Torture, by contrast, requires proof that the accused caused the severe pain or suffering of an individual, regardless of whether the act or omission causing the harm discriminates in fact or was specifically intended as discriminatory. Thus, cumulative convictions on the basis of the same acts are permissible in relation to these crimes under Article 5 of the Statute." (*Naletilic*, para. 590)	Error of Law: 48 Error of Fact: 25 Both Errors: 40 Total: **113**	Error of Law: 35% Error of Fact: 36% Both Errors: 23% Total: **31%**
Unrated	References provided in the Appellate Judgment and my own notes on sources are not sufficient to categorize the analysis.	"The Appeals Chamber considers that a question of interpretation of the Trial Chamber's Judgement is involved. Read in context, the question with which the Judgement was concerned in referring to dolus specialis was whether destruction of a group was intended. The Appeals Chamber finds that the Trial Chamber only used the Latin phrase to express specific intent as defined above." (*Jelisic*, para. 51).	Error of Law: 29 Error of Fact: 41 Both Errors: 14 Total: **84**	Error of Law: 17% Error of Fact: 15% Both Errors: 7% Total: **14%**