2014

The Surprising Acquittals in the Gotovina and Perisic Cases: Is the ICTY Appeals Chamber a Trial Chamber Is Sheep's Clothing

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THE SURPRISING ACQUITTALS IN THE *GOTOVINA* AND *PERIŠIĆ* CASES: IS THE ICTY APPEALS CHAMBER A TRIAL CHAMBER IN SHEEP'S CLOTHING?

*Mark A. Summers**

INTRODUCTION

Over a decade ago, not long after the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY")[1] had begun its work, one commentator opined that because of the three trial judge/five appellate judge structure of the tribunal, a three-judge majority of an Appeals Chamber could overturn a unanimous judgment by a Trial Chamber. Thus, there is "a risk . . . that three voices may prevail over five, where all the judges who have actually viewed the evidence are on the defeated side."[2]

That happened in November 2012, when a three-judge majority ICTY Appeals Chamber overturned a unanimous Trial Chamber judgment.[3] The lead defendant in the case was Ante Gotovina, a Croatian General and war hero, who led Operation Storm, which finally drove the Serbians out of Croatia after three years of occupation.[4] This was the beginning of the end of the Yugoslav war.[5] In Croatia, Gotovina's conviction by the Trial Chamber in 2011 was met with scorn and cynicism. The wags commented that Gotovina, the Croatian word for "cash," was the price of Croatia's admission to the European Union.[6]

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[1] U.N. Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827 (1993).

[2] Mark C. Fleming, *Appellate Review in the International Criminal Tribunals*, 37 TEX. INT'L L.J. 111, 115 (2002).

[3] Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012). Trial Chamber Judge Ínis partially dissented from some of the majority's findings but not from its judgment. Prosecutor v. Gotovina, Čermak & Markač, Case No. IT-06-90-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011).

[4] *See infra* Part IV.

[5] *See* RICHARD HOLBROOKE, TO END A WAR 72–73 (1998).

[6] As a Fulbright Scholar at the University of Zagreb in the spring of 2011, I have first-hand knowledge of these events. *See* Nick Carey, *Croatia Finds EU's Entry*

Gotovina's surprise acquittal by the Appeals Chamber was celebrated in Croatia and decried in Serbia.[7] It was praised by some commentators and panned by others.[8] It is no surprise that some were shocked when, only three months later, another ICTY Appeals Chamber overturned the conviction of Momčilo Perišić, who had been the top general in the Serbian army during the war.[9]

One crucial similarity between the two cases is the focus of this article. In each case, the Appeals Chamber found that the Trial Chamber had insufficiently explained why it had come to a factual conclusion.[10] This failure to provide a reasoned opinion was an error of law, which, both Appeals Chambers asserted, gave them the right to undertake a *de novo* review of the record without giving any deference to the findings of the Trial Chamber.[11] This maneuver permitted the Appeals Chambers to substitute their findings for those of the Trial Chambers without applying the standard of review normally applicable to errors of fact. A Trial Chamber's judgment is overturned only if no reasonable trier of fact could have come to same conclusion.[12] The Appeals Chambers' novel use of *de novo* review in cases where the error is the failure to provide a reasoned opinion based on a Trial Chamber's factual mistake is unsupported by the case law of either the ICTY or the International Criminal Tribunal for Rwanda ("ICTR"),[13] and could have

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Price Steep, WALL ST. J., Mar. 7, 2005, http://online.wsj.com/news/articles/SB111015177847171707.

[7] Jens David Ohlin, *Why the Gotovina Appeals Judgment Matters*, EJIL: TALK! (Dec. 21, 2012), http://www.ejiltalk.org/why-the-gotovina-appeals-judgment-matters/.

[8] *Compare* Gary D. Solis, *The Gotovina Acquittal: A Sound Appellate Course Correction*, 215 MIL. L. REV. 78 (2013), *with* Marko Milanovic, *The Gotovina Omnishambles*, EJIL: TALK! (Nov. 18, 2012), http://www.ejiltalk.org/the-gotovina-omnishambles/.

[9] Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment (Int'l Crim. Trib. for the former Yugoslavia Feb. 28, 2013). Perišić's acquittal was celebrated in Serbia. Christopher Jenks, *Prosecutor v. Perišić, Case No. IT-04-81-A*, 107 Am. J. Int'l L. 622, 626 (2013). It was a bit less controversial, however, because the *Perišić* Trial Chamber had split 2-1 and the Appeals Chamber reversed 4-1, the majority including one of the dissenting judges in *Gotovina*. Marko Milanovic, *The Limits of Aiding and Abetting Liability: The ICTY Appeals Chamber Acquits Mom-Čilo Perišić*, EJIL: TALK! (Mar. 11, 2013), http://www.ejiltalk.org/the-limits-of-aiding-and-abetting-liability-the-icty-appeals-chamber-acquits-momcilo-perisic/#more-7749.

[10] *See infra* Part VI.

[11] *See id.*

[12] Milanovic, *supra* note 8.

[13] U.N. Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994).

future negative repercussions if the International Criminal Court ("ICC") follows these cases.[14]

This article argues that the decisions in *Gotovina* and *Perišić* are wrong because *de novo* review is not the appropriate standard to apply when there is a failure to provide a reasoned opinion. First, Part II examines the origins of reasoned opinions in international criminal trials. Part III explains why reasoned opinions are necessary in international criminal trials. Part IV will identify the necessary elements of a reasoned opinion. Part V analyzes the ICTY and ICTR case law to ascertain the standards of review used in international criminal trials. Part VI dissects the portions of the *Gotovina* and *Perišić* Appeals Judgments dealing with the failure to provide reasoned opinions and the use of *de novo* review. Finally, Part VII offers my conclusions.

I. The Origins of Reasoned Opinions in International Criminal Trials: The Adversarial and Inquisitorial Models of Criminal Procedure

Most of the world's national criminal justice systems can be classified as either adversarial or inquisitorial. And while none of these national systems are entirely "pure," there are certain salient features that characterize each of the models.[15]

A. *The Adversarial Model*

The adversarial systems are predicated upon opposing parties, equally armed, who are responsible for investigating the case and presenting it in court.[16] The jury is composed of laypersons.[17] The parties elicit facts in open court from witnesses who testify under oath and from documents and other physical evidence.[18] The jury and, most of the time, the judge learn what they know about the case only when the evidence is presented in court.[19] The judge plays the role of a "neutral" referee, administering complex rules of evidence, which determine what the jury may hear, instructing the jury as to the law applicable to the facts, and imposing the sentence following a guilty verdict.[20] The accused may or may not testify.[21] If he chooses to tes-

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[14] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 83.

[15] Antonio Cassese, International Criminal Law 366 (2008). *See* Sean Doran et al., *Rethinking Aversariness in Nonjury Criminal Trials,* 23 Am. J. Crim. L. 1, 13–14, 16 (1995).

[16] Cassese, *supra* note 15, at 356.

[17] *Id.* at 357.

[18] Doran et al., *supra* note 15, at 17–18.

[19] Cassese, *supra* note 15, at 361–62.

[20] *Id.* at 361, 363. *See* Doran et al., *supra* note 15, at 15–16.

tify, he is put under oath and treated as any other witness.[22] If he chooses not to testify, the jury is instructed that it may not draw any adverse inferences from his failure to do so.[23] The verdict is tersely "enigmatic"—guilty or not guilty—unaccompanied by any statement of the reasons for or against.[24] Only the defendant may appeal a guilty verdict and an appellate court must assume that, in order for it to find guilt beyond a reasonable doubt, the jury found the facts most favorable to the prosecution's case.[25] Appellate courts almost never hear additional evidence, and appellate review is ordinarily limited to correcting mistakes of law, except in those rare instances when no reasonable jury could have reached the same conclusion as the trial jury.[26]

B. The Inquisitorial Model

In the inquisitorial systems, there is an investigating judge who is responsible for gathering the evidence. The judge investigates both sides of the case and can terminate weak cases prior to trial.[27] If the investigating judge determines that there is sufficient evidence of guilt, she sends the factual record (*dossier de la cause*) to the trial court.[28] The dossier itself is the evidence and the oral testimony in court is often merely an affirmation of the accuracy of the information contained in the dossier.[29] In some countries, the jury panel is a mixture of laypersons and professional judges.[30] The presiding judge is the dominant figure in the trial, aggressively questioning the witnesses who testify, including the defendant, who is not under oath.[31] Because the judges are professionals, there are few rules of evidence.[32] Consequently, the panel normally considers all the evidence (*liberté des preuves*)[33] and specifies that on which it relied in a written judgment, which is called a "reasoned opinion."[34] The reasoned opinion explains why the court reached its conclusions both as to the facts and as to the

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[21] CASSESE, *supra* note 15, at 360.
[22] *Id.*
[23] LAFAVE ET AL., Criminal Procedure § 24.5(b) (4th ed. 2004).
[24] Doran et al., *supra* note 15, at 18, 21.
[25] LAFAVE ET AL., *supra* note 23, §27.5(d).
[26] *See infra* note 88 discussing Jackson v. Virginia.
[27] CASSESE, *supra* note 15, at 356.
[28] *Id.*
[29] *Id.* at 358.
[30] *Id.*
[31] *Id.* at 361–62.
[32] Doran et al., *supra* note 15, at 19–20.
[33] CASSESE, *supra* note 15, at 363.
[34] *Id.* at 358.

law.[35] Appeals are trials *de novo*, with the appellate court conducting a thorough review of the record, substituting its judgment for that of the trial court, both as to the law and as to the facts.[36]

C. *International Criminal Trials: A Blended Procedure*

When the first international criminal tribunal was established following Germany's defeat in World War II, the victorious allies represented both criminal procedure models. The United States and the United Kingdom followed the adversarial model while the French epitomized the inquisitorial model; this is because one of its most important features, the investigating judge, was instituted in the 1808 Napoleonic Code.[37] The Soviet Union, supported by France, wanted speedy trials followed by speedier executions, which would have had none of the features of a fair trial and would have provided no protection for the rights of the accused.[38]

In the end, the adversarial system of oral evidence presented in open court by the parties largely prevailed.[39] The fact-finder, however, was a panel of professional judges whose judgment was rendered in a reasoned opinion.[40] The International Criminal Court has adopted, as have all the post-war *ad hoc* international criminal tribunals, that basic model.[41] Consequently, the courtroom part of an international criminal trial would be familiar to any common law lawyer. Live witnesses, whom the parties call, are placed under oath and are subjected to both direct and cross-examination. Likewise, the parties present the documentary and physical evidence, which become part of the trial record when admitted by the court.

On the other hand, the decision-making process would not be so familiar. Once all the evidence is presented, the trial court retires to consider its verdict. Unlike a lay jury, which usually announces its verdict after hours or, at most, days of deliberation, the international jury renders its verdict months later in the form of a written opinion,

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[35] CRYE, et al., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 387 (2008).

[36] CASSESE, *supra* note 15, at 364. Some countries limit the right of appeal to questions of law when the lower court decisions are reached by panels of professional judges because the "risk of erroneous conviction is lower." Fleming, *supra* note 2, at 114.

[37] CASSESE, *supra* note 15, at 357.

[38] *See* WHITNEY R. HARRIS, TYRANNY ON TRIAL: THE TRIAL OF THE MAJOR GERMAN WAR CRIMINALS AT THE END OF WORLD WAR II AT NUREMBURG, GERMANY, 1945-1946, at 16–17 (Southern Methodist Press ed., 1999).

[39] *Id.* at 11.

[40] Charter of the International Military Tribunal arts. 2, 26, Aug. 8, 1945, 82 U.N.T.S. 280.

[41] CASSESE, *supra* note 15, at 369–70.

which is often hundreds, if not more than a thousand, pages long.[42] This reasoned opinion resolves issues of fact and law and imposes a sentence.[43]

The requirement for a reasoned judgment was included in the statute of the International Military Tribunal at Nuremberg, although there was no necessity for a written judgment because there was no appeal.[44] The Tribunal's judgment was more than 150 pages long and, while it did resolve the difficult legal questions the Tribunal faced, the bulk of it was devoted to the Tribunal's findings of fact and the bases upon which it had concluded that the defendants were either guilty or innocent.[45]

The statutes of the post-war *ad hoc* international criminal tribunals and the ICC all contain provisions requiring a verdict in the form of a "reasoned opinion,"[46] and they all provide for appellate review.[47] A reasoned opinion is considered an essential element of a fair trial.[48]

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[42] For example, in the *Gotovina* case, final arguments concluded on September 1, 2010, and the Trial Chamber Judgment was issued April 15, 2011. *Case Information Sheet: The Prosecutor v. Ante Gotovina, Ivan Čermak, & Mladen Markač*, INT'L TRIBUNAL FOR THE FORMER YUGOSLAVIA, *available at* http://www.icty.org/x/cases/gotovina/cis/en/cis_gotovina_al_en.pdf [hereinafter Gotovina Information Sheet]. The Trial Chamber's Judgment in *Gotovina* was nearly 1400 pages. Prosecutor v. Gotovina, Čermak & Markač, Case No. IT-06-90-T, Judgment (Int'l Crim. Trib. for the former Yugoslavia Apr. 15, 2011).

[43] *See, e.g.*, Prosecutor v. Gotovina, Čermak & Markač, Case No. IT-06-90-T, Judgment.

[44] Charter of the International Military Tribunal, *supra* note 40, art. 26. The Charter does not mandate that the judgment be in writing, although, practically speaking, there was no other way to announce the verdict of the court and give the reasons for it. The lack of an appeal was one of the criticisms of both the Nuremberg and Tokyo Tribunals. *See* Fleming, *supra* note 2, at 111.

[45] International Military Tribunal (Nuremberg), Judgment (October 1, 1946), *available at* http://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf.

[46] U.N. Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 23(2), U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; U.N. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 22(2), U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; Rome Statute of the International Criminal Court, art. 74(5), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter ICC Statute].

[47] ICTY Statute, *supra* note 46, art. 25; ICTR Statute, *supra* note 46, art. 24; ICC Statute, *supra* note 46, art. 81.

[48] *See, e.g.*, Torija v. Spain, 303 Eur. Ct. H.R. (ser. A) ¶¶ 18-19 (1994).

II. THE NECESSITY FOR REASONED OPINIONS IN INTERNATIONAL CRIMINAL TRIALS

It is a fair question why a reasoned opinion is required when judges are fact-finders, but not when laypersons are the fact-finders. Intuitively, it would seem that it should be the other way around. But, as one appeals chamber of the ICTR observed:

> When considering this case in the context of the Tribunal, it has to be borne in mind that here the trier of fact is not a jury, but a panel of professional judges. In the case of the jury, the one question that has to be answered is the question of guilty or not guilty, and the factual findings supporting this conclusion are neither spelled out nor can they be challenged by one of the parties. The instruction given to the jury concentrates on this 'ultimate issue' of the case. In this Tribunal, on the other hand, Trial Chambers cannot restrict themselves to the ultimate issue of guilty or not guilty; they have an obligation pursuant to Article 22(2) of the Statute, translated into Rule 88 (C) of the Rules, to give a reasoned opinion.[49]

Aside from this legal obligation to render a reasoned opinion, there are a number of cogent reasons supporting the reasoned opinion requirement.

First, since appellate courts in the inquisitorial model have greater latitude to overturn the factual findings of a trial court, a reasoned judgment is necessary so that the defendant can exercise his right to appeal.[50] This is so because, unlike in the adversarial model where the jury may only consider the evidence the judge admits, in the inquisitorial model all or almost all of the evidence in the dossier is considered.[51] Without a reasoned opinion, it would be impossible for an appellate court to tell what influenced the verdict and what did not.[52]

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[49] Prosecutor v. Ntagerura, Case No. ICTR-99-46-A, Judgment, ¶ 169 (Int'l. Crim. Trib. for Rwanda July 7, 2006).

[50] Nchamihigo v. Prosecutor, Case No. ICTR-2001-63-A, Judgment, ¶ 165 (Int'l Crim. Trib. for Rwanda Mar. 18, 2010).

[51] Bernard H. Oxman, *International Criminal Procedure – Scope of ICTY Appellate Review – Eyewitness Credibility – Reasoned Opinion by Trial Judges – Adequacy of Factual Allegations in Indictment*, 96 AM. J. INT'L L. 439, 444 (2002) (observing that "international criminal tribunals employ a hybrid procedure: they allow cross-examination, as at common law, yet also admit evidence more freely, as at civil law").

[52] *Cf. id.* at 444 ("[The] reasoned opinion . . . invites more rigorous appellate review."); *see also* Doran et al., *supra* note 15, at 49.

Second, scholars have studied the "Diplock" courts, which were instituted in Northern Ireland to deal with terrorist cases.[53] These courts follow common law procedures, except that the judge is both the fact-finder and the decision-maker.[54] In the cases that were studied, the researchers found that the Diplock judges tended to be more interventionist than their counterparts who presided over jury trials.[55] Unlike lay jurors, who are "passive" fact-finders, judges charged with making the ultimate determination in a case "often react to their duty by trying to bring the hearing into some order and coherence by following their own partial lines of inquiry, which may prevent the parties from having a sufficient opportunity to present their cases."[56] To safeguard against this "adversarial deficit," Diplock judges are required to issue reasoned opinions.[57]

Finally, international criminal trials are extremely complex with the evidentiary phase of the trial lasting months and sometimes years.[58] In many of them, hundreds of witnesses testify, and thousands of exhibits are admitted into evidence.[59] The reasoned opinions are hundreds, and sometimes thousands, of pages long.[60] In such circumstances, appellate review of the trial record without a reasoned opinion would be a daunting task to say the least.

III. THE ELEMENTS OF A REASONED OPINION

There is extensive case law in both the ICTY and the ICTR regarding the essential elements that a reasoned opinion must contain.[61] Trial chambers are required to make findings of fact for each essential element of a charged crime.[62] But they are not required to

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[53] Doran et al., *supra* note 15, at 11–13.

[54] *Id.* at 12.

[55] *See id.* at 28–29.

[56] *Id.*

[57] Oxman, *supra* note 51, at 444.

[58] For example, in the Gotovina trial, there were 303 trial days spanning the period from March 11, 2008 until September 1, 2010. Gotovina Information Sheet, *supra* note 42.

[59] *See id.*

[60] The *Gotovina* trial chamber judgment was nearly 1400 pages in length. *See supra* note 42 and accompanying text.

[61] The ICTY and the ICTR share an appeals chamber and the chambers frequently cite each other's opinions. *See* Gabrielle McIntyre, *The International Residual Mechanism and the Legacy of the International Criminal Tribunals of the Former Yugoslavia and Rwanda*, 3 GO. J. INT'L L. 3, 923, 928–29 n.8 (2011).

[62] Renzaho v. Prosecutor, Case No. ITCR-97-31-A, Judgment, ¶ 320 (Int'l Crim. Trib. for Rwanda Apr. 1, 2011). But, even where no explicit factual findings are made, an appeals chamber may infer that "by finding that the crimes were established, the Trial Chamber implicitly found all the relevant factual findings re-

refer to every "witness testimony or every piece of evidence," and "although certain evidence may not have been referred to . . . it may be reasonable to assume that the Trial Chamber took it into account."[63] A trial chamber may not, however, disregard a piece of evidence that is "clearly relevant" to findings made by the trial chamber.[64] The failure to provide a reasoned opinion that meets this standard is treated as an error of law, even when that failure relates to a finding of fact.[65]

Although there is a presumption that a trial chamber has "evaluated all the evidence presented to it,"[66] there are situations where an appeals chamber holds the trial chamber to a higher standard to provide a reasoned opinion.[67] One such circumstance is where the guilty verdict depends upon "identification evidence given by a witness under difficult circumstances."[68] In that case, "the Trial Chamber must rigorously implement its duty to provide a 'reasoned opinion.'"[69]

Another situation where a trial chamber is required to make reasoned findings is when the evidence relating to one of the essential elements of the crime is circumstantial. In that instance the trial

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quired to cover the elements of the crimes." Prosecutor v. Kordič & Čerkez, Case No. IT-95-14/2-A, Judgment, ¶ 384 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

[63] Nchamihigo v. Prosecutor, Case No. ICTR-2001-63-A, Judgment, ¶ 166 (Int'l Crim. Trib. for Rwanda Mar. 18, 2010).

[64] *Id.*; Zigiranyirazo v. Prosecutor, Case No. ICTR-01-73-A, Judgment, ¶ 45 (Int'l Crim. Trib. for Rwanda Nov. 16, 2009).

[65] Zigiranyirazo v. Prosecutor, Case No. ICTR-01-73-A, Judgment, ¶ 46 (holding *inter alia* that the Trial Chamber's failure to address the feasibility of defendant's traveling between two locations in the amount of time alleged by the prosecution was an error of law); *see also* Muvunyi v. Prosecutor, Case No. ICTR-2000-55A-A, Judgment, ¶¶ 144, 147–48 (Int'l Crim. Trib. for Rwanda Aug. 29, 2008) (finding that the Trial Chamber's failure to address inconsistencies in witness testimony was an error of law).

[66] Prosecutor v. Kvočka, *et. al.*, Case No. IT-98-30/1-A, Judgment, ¶ 23 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005).

[67] *Id.* ¶ 24.

[68] Prosecutor v. Kupreškič, Case No. IT-95-16-A, Judgment, ¶ 39 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001). In assessing identification testimony, "'little or no credence' is given to the witness's in-court identification." Kalimanzira v. Prosecutor, Case No. ICTR-05-88-A, Judgment, ¶ 96 (Int'l Crim. Trib. for Rwanda Oct. 20, 2010) (quoting Kamuhanda v. Prosecutor, Case No. ICTR-95-54A-A, Judgment, ¶ 243 (Int'l Crim. Trib. for Rwanda Sept. 19, 2005)).

[69] Prosecutor v. Kupreškič, Case No. IT-95-16-A, Judgment, ¶ 39; *see also* Oxman, *supra* note 51, at 444 (opining that under the "difficult-circumstances doctrine" the trial chamber has an "enhanced duty" to "articulate adequate reasoning").

chamber must explain how the findings it made were the "only reasonable inference that could be drawn from the evidence."[70]

A third instance when findings must be explicit is when there is conflicting testimony about a fact that is relevant to a finding of guilt. Then, the trial chamber must "provide sufficient reasons" for crediting the testimony of the witnesses it relied upon over that of the conflicting witnesses.[71] Otherwise, the appeals chamber cannot "determin[e] whether the Trial Chamber assessed the entire evidence on this point exhaustively and properly."[72]

IV. STANDARDS OF REVIEW

Because additional evidence may be admitted on appeal[73] and the prosecutor may appeal from a judgment of acquittal,[74] there are additional standards of review in the *ad hoc* international criminal tribunals to deal with situations not confronted by common law courts. Because this article deals with appellate acquittals in cases where no additional evidence was admitted on appeal, it will limit itself to the standards of review applicable to errors of law, errors of fact, mixed errors of law and fact, and instances where the trial chamber has made no findings.

The ICTY and ICTR statutes contain identical provisions regarding appellate review of a trial chamber's judgment.[75] Both provide that the appeals chamber can reverse the trial chamber when there is either a) "an error on a question of law invalidating the decision;" or b) "an error of fact which has occasioned a miscarriage of justice."[76] Neither statute elaborates upon either "invalidating the decision" or "miscarriage of justice," leaving these as matters for judicial interpre-

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[70] Renzaho v. Prosecutor, Case No. ICTR-97-31-A, Judgment, ¶ 319 (Int'l Crim. Trib. for Rwanda Apr. 1, 2011).

[71] Muvunyi v. Prosecutor, Case No. ICTR-2000-55A-A, Judgment, ¶ 147.

[72] *Id.* ¶ 148.

[73] *See, e.g.*, Prosecutor v. Blaškič, Case No. IT-95-14-A, Judgment, ¶ 24 (Int'l. Crim. Trib. for the Former Yugoslavia July 29, 2004) (defining additional standards of review in cases where there is an alleged error of fact and additional evidence has been admitted on appeal and cases where there is an alleged error in the legal standard plus an alleged error of fact and additional evidence has been admitted on appeal).

[74] *See, e.g.*, Prosecutor v. Blagojevič & Jokič, Case No. IT-02-60-A, Judgment, ¶ 9 (Int'l. Crim. Trib. for the Former Yugoslavia May 9, 2007) (setting the standard of review for prosecution appeals).

[75] U.N. Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 25. U.N. Doc. S/RES/827 (1993); U.N. Statute of the International Criminal Tribunal for Rwanda, art. 24, U.N. Doc. S/RES /955 (1994).

[76] *Id.*

tation. Similarly, the statutes do not define the applicable standards of review.[77]

A. *Errors of Law*[78]

Where the appeals chamber identifies an error of law, for example if the trial chamber has applied an incorrect legal standard, "the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly."[79] In doing so, not only is the legal error corrected, but also the appeals chamber satisfies itself whether, given the application of the correct legal standard, it is convinced beyond a reasonable doubt of the defendant's guilt.[80]

Indeed, with regard to pure errors of law, it may be a misnomer even to say that there is a standard of review because:

> 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, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether there was such a mistake.[81]

Logically then, the presence or absence of a reasoned opinion is irrelevant when the question is whether there was a pure error of law be-

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[77] The tribunals' rules of procedure and evidence are likewise silent on these questions. ICTY Rules of Procedure and Evidence, *available at* http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev49_en.pdf. ICTR Rules of Procedure and Evidence, *available at* http://www.unictr.org/Portals/0/English/Legal/Evidance/English/130410amended%206_26.pdf.

[78] Fleming, *supra* note 2, at 124:

> A question of law, on the other hand, is a determination of the legal effect of the facts as found. The determination of a question of law involves two steps that are not distinguished in Article 25 [of the ICTY Statute], but are often identified in domestic jurisprudence. The first, which could be called a question of 'pure law,' is one where the court determines an abstract principle of general application that is independent of the facts of the case under consideration.

[79] Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgment, ¶ 14 (Int'l. Crim. Trib. for the Former Yugoslavia Nov. 12, 2009). *See, e.g.*, Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 41 (Int'l Crim. Trib. for the former Yugoslavia Feb. 28, 2013) (holding that the trial chamber's ruling that "specific direction is not an element of the *actus reus* of aiding and abetting was an error of law").

[80] Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgment, ¶ 14. These basic principles are repeated in every ICTY and ICTR appeals judgment in a section of the opinion entitled, "Standard of Review."

[81] Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgment, ¶ 35 (Int'l. Crim. Trib. for the Former Yugoslavia July 21, 2000).

cause the appeals chamber will identify and correct the error no matter how much reasoning was supplied by the trial chamber making it.[82] For example, in *Perišić*, the Appeals Chamber corrected the Trial Chamber's definition of the legal standard for aiding and abetting. In so doing, it stated:

> The Appeals Chamber emphasises [sic] that the Trial Chamber's legal error was understandable given the particular phrasing of the *Mrkšić* and *Šljivančanin* Appeal Judgement. However, the Appeals Chamber's duty to correct legal errors remains unchanged. Accordingly, the Appeals Chamber will proceed to assess the evidence relating to Perišić's convictions for aiding and abetting *de novo* under the correct legal standard.[83]

B. Errors of Fact[84]

Errors of fact are less straightforward. The ICTY Appeals Chamber addressed this issue in its very first case when it stated that the standard of review for an error of fact is "unreasonableness, that is a conclusion which no reasonable person could have reached."[85] Since that decision, appeals chambers of both the ICTY and ICTR have consistently echoed this same standard.[86] In applying this standard, appeals chambers have stressed that "two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence."[87]

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[82] *See* Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶¶ 25–44.

[83] *Id.* ¶ 43.

[84] There is no reason for appellate courts to review questions of fact to achieve their purposes of assuring the "consistency of verdicts and the orderly development of law" because "[t]he decision that a certain body of evidence warrants or does not warrant a certain factual finding beyond a reasonable doubt cannot be of relevance to any other case." Fleming, *supra* note 2, at 135. Instead, appellate review of factual issues serves another purpose—"justice in the individual case." *Id.* at 136.

[85] Prosecutor v. Tadič, Case No. IT-94-1-A, Judgment, ¶ 64 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999). *See* Fleming, *supra* note 2 at 138 (noting that the Appeals Chamber in *Tadič* adopted the "common law standard").

[86] *See, e.g.*, Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment, ¶ 34 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012); Kalimanzira v. Prosecutor, Case No. ICTR-05-88-A, Judgment, ¶ 9 (Int'l Crim. Trib. for Rwanda Oct. 20, 2010). An alternative formulation of the standard of review is that the trial chamber's finding must be "wholly erroneous." Prosecutor v. Galič, Case No. IT-98-29-A, Judgment, ¶ 9 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006) (quoting Prosecutor v. Kupreškič, Case No. IT-95-16-A, Judgment, ¶ 30 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001)).

[87] Prosecutor v. Kupreškič, Case No. IT-95-16-A, Judgment, ¶ 30.

ICTY and ICTR appeals chambers apply a rule of deference to the factual findings of the trial chambers. Thus, an appeals chamber "will not lightly disturb findings of fact by a Trial Chamber . . . [because] the Trial Chamber has the advantage of observing the witness testimony first-hand, and is, therefore, better positioned than this Chamber to assess the reliability and credibility of the evidence."[88] Moreover, the appeals chambers have repeatedly explained that, unlike in the inquisitorial systems,[89] an appeal is not a trial *de novo*.[90] Finally, where a trial chamber has not made a finding of fact, "the party seeking to have the Appeals Chamber make that finding for itself must demonstrate that such a finding is the only reasonable conclusion available."[91]

C. *Mixed Questions of Law and Fact*

Neither the ICTY nor the ICTR statute address mixed questions of law and fact—that is, where a court applies "an objective legal

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[88] Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgment, ¶ 37 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000). This is almost identical to the approach taken in U.S. courts:

> Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Johnson v. Louisiana, 406 U.S., at 362, 92 S.Ct., at 1624–1625. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

Jackson v. Virginia, 443 U.S. 307, 319 (1979).

[89] CASSESE, *supra* note 15, at 364.

[90] *See, e.g.*, Prosecutor v. Furundžija, Judgment, ¶ 40 ("This Chamber does not operate as a second Trial Chamber"); Musema v. Prosecutor, Case No. ICTR-96-13-A, Judgment, ¶ 17 (Int'l. Crim. Trib. for Rwanda Nov. 16, 2001) ("The Appeals Chamber stresses, as it has done in the past, that an appeal is *not* an opportunity for a party to have a *de novo* review of their case."); Prosecutor v. Kordič & Čerkez, Case No. IT-95-14/2-A, Judgment, ¶ 21 n.15 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004) ("Furthermore, it is settled jurisprudence of the International Tribunal that it is the trier of fact who is best placed to assess the evidence in its entirety as well as the demeanour of a witness. The Appeals Chamber would act *ultra vires* when reviewing *proprio motu* the entire trial record."). *Accord* Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgment, ¶ 14 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 12, 2009).

[91] Prosecutor v. Aleksovski, Case No. IT-95-14/1-AR77, Judgment on Appeal by Anto Nobilo Against Finding of Contempt, ¶ 48 (Int'l Crim. Trib. for the Former Yugoslavia May 30, 2001).

standard to the facts"[92]—and there is scant case law addressing the issue. In *Prosecutor v. Strugar*, the defendant challenged the Trial Chamber's finding that he should be held liable for crimes committed by those under his command because it had erroneously concluded that the facts established a superior-subordinate relationship.[93] Despite the defendant's characterization of the issue as a question of law, the Appeals Chamber thought it was "a mixed error of law and fact" and, therefore, applied the deference standard applicable to errors of fact—"whether the conclusion reached by the Trial Chamber was one which no reasonable trier of fact could have reached."[94] *Strugar* appears to be the only case squarely addressing this issue,[95] so it is fair to say that the Tribunals' jurisprudence is underdeveloped.[96]

Strugar also illustrates the point that a party's characterization of the issue is not controlling.[97] In *Prosecutor v. Blagojević and*

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[92] Ornelas v. United States, 517 U.S. 690, 701 (1996) (Scalia, J. dissenting). One commentator has described this as "a question of 'applied law,' [which] is the concrete determination of the consequences of a specific set of facts under a specific principle of pure law." Fleming, *supra* note 2, at 124.

[93] Prosecutor v. Strugar, Case No. IT-01-42-A, Judgment, ¶ 246 (Int'l Crim. Trib. for the Former Yugoslavia July 17, 2008).

[94] *Id.* ¶ 252.

[95] A search of the ICTR/ICTY Case Law Database using the search term "mixed errors (law and fact)" disclosed only the Strugar case as dealing squarely with that issue. As we shall see, however, the *Perišić* Appeals Chamber took the position that whether a superior-subordinate relationship had been established was a question of law because the Trial Chamber had failed to provide a reasoned opinion. Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 95 (Int'l Crim. Trib. for the former Yugoslavia Feb. 28, 2013).

[96] This becomes apparent when one looks at the approach of the U.S. Supreme Court described by Justice Scalia in his dissenting opinion in *Ornelas:*

> Merely labeling the issues 'mixed questions,' however, does not establish that they receive de novo review. While it is well settled that appellate courts 'accep[t] findings of fact that are not 'clearly erroneous' but decid[e] questions of law de novo,' there is no rigid rule with respect to mixed questions. We have said that 'deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine.'

Ornelas v. United States, 517 U.S. at 701 (citations omitted).

[97] *See* Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgment, ¶ 18 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 12, 2009) (citing Prosecutor v. Strugar, Case No. IT-01-42-A, Judgment, ¶¶ 252, 269):

> [W]here the Appeals Chamber finds that a ground of appeal, presented as relating to an alleged error of law, formulates no clear legal challenge but essentially challenges the Trial Cham-

Jokič, Jokič, who did not contest the legal standard utilized by the Trial Chamber, argued that the Chamber's conclusion that he had the *mens rea* required for aiding and abetting was a legal error because the facts were not sufficient to prove his knowledge beyond a reasonable doubt.[98] Rejecting Jokič's argument, the Appeals Chamber stated:

> [A]lthough a Trial Chamber's factual findings are governed by the legal rule that facts essential to establishing the guilt of an accused have to be proven beyond reasonable doubt, this does not affect their nature as factual conclusions. A party arguing that a Trial Chamber based its factual conclusions on insufficient evidence therefore submits that the Trial Chamber committed an error in fact, not an error in law.[99]

Based on *Strugar* and *Blagojevič and Jokič*, it is not easy to differentiate between a "pure" error of fact and a "mixed" error of law and fact. In both of these cases, the court applied the correct legal standard. In both cases, the appellants argued that the trial chamber's findings were not based upon sufficient evidence, and yet the appeals chambers characterized the issue differently. In the end perhaps it doesn't much matter, because the standard of review is the same—deference.

V. The Decisions in the Gotovina and Perišić Cases

A. *Gotovina*

1. Background and Charges

Croatia declared its independence from Yugoslavia on June 25, 1991.[100] By the end of that year, the Yugoslav People's Army ("JNA")[101] and "various Serb forces" occupied about one-third of Croatia.[102] This occupation was concentrated in the Krajina region between Croatia and Bosnia-Herzegovina.[103] In December of 1991, the occupied

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> ber's factual findings in terms of its assessment of evidence, it will either analyse these allegations to determine the reasonableness of the impugned conclusions or refer to the relevant analysis under other grounds of appeal.

[98] Prosecutor v. Blagojevič & Jokič, Case No. IT-02-60-A, Judgment, ¶ 144 (Int'l Crim. Trib. for the Former Yugoslavia May 9, 2007).

[99] *Id.* ¶ 145.

[100] Prosecutor v. Gotovina, Čermak, & Markač, Case No. IT-06-90-T, Judgment, ¶ 2 (Int'l Crim. Trib. for the former Yugoslavia Apr. 15, 2011).

[101] *Id.* ¶¶ 2, 7.

[102] *Id.* ¶ 2.

[103] Historically, the Krajina was the military border between Croatia and Bosnia Herzegovina. Noel Malcolm, Bosnia: A Short History 77 (1994). Ethnic Serbs

territory was declared the Republic of the Serbian Krajina ("RSK") and it established its own government.[104] From then until 1995, Croatia engaged in a series of military operations with the goal of retaking the Krajina.[105] The culmination of this effort was Operation Storm, which began on August 2, 1995 and ended on August 5, 1995 with a Croatian declaration of victory.[106]

According to the best estimate, in the wake of Operation Storm, 180,000 Croatian Serbs fled Croatia, going mostly to Bosnia-Herzegovina and the Federal Republic of Yugoslavia ("FRY").[107] Elisabeth Rhen, the Special Rapporteur of the UN Commission on Human Rights, testified: "In the three years before the military operations of 1995, the proportion of Serbs in the Krajina had significantly increased,"[108] while after Operation Storm, "only 3,500 Serbs remain[ed] in the former Sector North and 2,000 Serbs remain[ed] in the former Sector South, representing a small percentage of the former Krajina Serb population."[109]

Ante Gotovina was the commander of the Split Military District ("MD") of the Croatian Army ("HV")[110] and overall operational commander of Operation Storm in the southern Krajina region.[111] He was charged, along with Ivan Černak, the commander of the Knin Garrison,[112] and Mladen Markač, the Assistant Minister of the Interior,[113] with being a member of a Joint Criminal Enterprise ("JCE") whose purpose was to bring about the "permanent removal of the Serb population from the Krajina region by force, fear or threat of force, persecution, forced displacement, transfer and deportation, appropria-

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had lived there peacefully with their non-Serb neighbors since World War II. MICHAEL P. SCHARF, BALKAN JUSTICE 129 (1997).

[104] Prosecutor v. Gotovina, Čermak, & Markač, Case No. IT-06-90-T, Judgment, ¶ 2.

[105] Prosecutor v. Gotovina, Čermak, & Markač, Case No. IT-06-90-T, Amended Joinder Indictment ¶ 25–27 (May 17, 2007), *available at* http://www.icty.org/x/cases/gotovina/ind/en/got-amdjoind070517e.pdf.

[106] *Id.* ¶ 27.

[107] Prosecutor v. Gotovina, Čermak, & Markač, Case No. IT-06-90-T, Judgment, ¶ 1712.

[108] *Id.* ¶¶ 1711-12.

[109] *Id.* ¶ 1712.

[110] *Id.* ¶ 7.

[111] *Id.* ¶ 4.

[112] *Id.* ¶ 5.

[113] Prosecutor v. Gotovina, Čermak, & Markač, Case No. IT-06-90-T, Judgment, ¶ 6. By virtue of his position, Markač was also the commander of the Special Police, who also participated in Operation Storm.

tion and destruction of property or other means."[114] The membership of the JCE also included some of the highest-ranking officials in the Croatian government, including its then president, Franjo Tuđman.[115] According to the Appeals Chamber, the Trial Chamber found that Gotovina had significantly contributed to, and shared the objective of, the JCE by virtue of "ordering unlawful attacks against civilians and civilian objects in Knin, Benkovac, and Obrovac and by failing to make a serious effort to prevent or investigate crimes committed against Serb civilians in the Split MD."[116]

Membership in a JCE is not itself a crime.[117] It is a way of attributing liability to those who do not directly participate in the commission of a substantive offense.[118] In this sense, it performs some of the same functions as conspiracy in U.S. law.[119] There are three forms of JCE, only two of which (JCE I and JCE III) are relevant to this analysis.[120] JCE I imputes liability for substantive crimes based on the shared intent of the JCE members to achieve its common purpose.[121] JCE III makes the members of a JCE liable for crimes outside its common purpose (deviant crimes) if those crimes are "'a natural and foreseeable consequence of the implementation of the common

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[114] Prosecutor v. Gotovina, Čermak, & Markač, Case No. IT-06-90-T, Amended Joinder Indictment ¶¶ 10, 12 (May 17, 2007), *available at* http://www.icty.org/x/cases/gotovina/ind/en/got-amdjoind070517e.pdf.

[115] *Id.* ¶ 15. Tuđman was deceased at the time of the indictment. The alleged other members of the JCE, all of whom were deceased at the time of trial, were Gojko Šušak, the Minister of Defense, Janko Bobetka, the Chief of the Main Staff of the HV, and Zvonimir Červenko, who succeeded Bobetka. *Id.*

[116] Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012.

[117] Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 118 (2005). Although there is substantial case law and academic debate about JCE, a brief overview of the doctrine is all that is necessary here. For a more thorough analysis, *see* Mark A. Summers, *The Problem of Risk in International Criminal Law*, WASH. U. GLOBAL STUD. L. REV. 2014).

[118] Prosecutor v. Tadič, Case No. IT-94-1-A, Judgment, ¶¶ 226-28 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

[119] Danner & Martinez, *supra* note 117, at 140–41.

[120] Prosecutor v. Tadič, Case No. IT-94-1-A, Judgment, ¶¶ 226-28; Gunel Guliyeva, *The Concept of Joint Criminal Enterprise and ICC Jurisdiction*, 5 EYES ON THE ICC 49, 53 (2008), *available at* http://www.americanstudents.us/Pages%20from%20Guliyeva.pdf (noting that JCE II involves the liability for crimes committed within the framework of an "'organized criminal system' such as concentration or detention camps").

[121] Guliyeva, *supra* note 120, at 52–53.

purpose."[122] Via JCE I, the Trial Chamber convicted Gotovina of the crimes which were within the common purpose of the JCE.[123] He was also found guilty of deviant crimes under JCE III.[124]

2. The 200-Meter Standard

The Appeals Chamber made it crystal clear that the ultimate validity of the Trial Chamber Judgment rested on its conclusion that Gotovina had ordered "unlawful" artillery attacks against civilian targets during Operation Storm.[125] Moreover, the Appeals Chamber found that the Trial Chamber's conclusion that the attacks were unlawful was ineluctably linked to its "impact analysis" of the artillery strikes, which, in turn, was predicated on its finding that "with no exceptions . . . impact sites within 200 metres of such targets were evidence of a lawful attack, and impact sites beyond 200 metres from such targets were evidence of an indiscriminate attack."[126] Indeed, the Trial Chamber's reliance on the 200-Meter Standard was so pivotal that other evidence suggesting that there had been indiscriminate shelling of civilian objects "was indicative of an unlawful attack only in the context of the Trial Chamber's application of the 200-Meter Standard."[127] Thus, as it was portrayed by the Majority, the 200-Meter

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[122] *Id.* at 53 (*citing* Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 258 (Int'l Crim. Trib. for the Former Yugoslavia Sep. 1, 2004)).

[123] Prosecutor v. Gotovina, Čermak, & Markač, Case No. IT-06-90-T, Judgment, ¶ 2619 (Int'l Crim. Trib. for the former Yugoslavia Apr. 15, 2011) (Crimes against humanity – Persecution (Count 1), Deportation (Count 2), and War crimes (wanton destruction)).

[124] *Id.* (Crimes against humanity, murder, inhumane acts (Counts 6 and 8, respectively); War Crimes, wanton destruction, murder, and cruel treatment (Counts 5, 7 and 9, respectively)).

[125] *See, e.g.*, Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment, ¶ 24 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (stating that unlawful attacks were the "touchstone" of the Trial Chamber's analysis concerning the existence of a JCE); *id.* ¶ 77 (observing that unlawful attacks were the "core indicator that the crime of deportation had taken place"); *id.* ¶ 92 (finding that unlawful attacks were "the primary means by which the forced departure of Serb civilians from the Krajina region was effected); *id.* ¶ 96 (concluding that the unlawful attacks "constituted the core basis for finding that Serb civilians were *forcibly* displaced").

[126] *Id.* ¶ 64. *See also id.* ¶ 25 ("Using the 200 Metre Standard as a yardstick, the Trial Chamber found that all impact sites located more than 200 metres from a target it deemed legitimate served as evidence of an unlawful artillery attack."); *id.* ¶ 51 ("The Trial Chamber heavily relied on the 200 Metre Standard to underpin its Impact Analysis."); and *id.* at ¶ 57 ("The Trial Chamber's Impact Analysis never deviated from the 200 Metre Standard.").

[127] *Id.* ¶ 65. *See also id.* ¶ 82 ("[T]he Trial Chamber assessed much of the other evidence on the record to be ambiguous and considered it indicative of unlawful

Standard was the lynchpin of the Trial Chamber's Judgment, so that if the 200-Meter Standard fell, then surely, so would Gotovina's conviction.

Yet, despite the fact that all five of the Appeals Chamber judges agreed that the Trial Chamber erred in adopting the 200-Meter Standard,[128] only three concluded that Gotovina's conviction should be reversed.[129] The Majority found that the Trial Chamber's mistake regarding the 200-Meter Standard was due to the lack of evidence in the record to support it and because the Trial Chamber failed adequately to explain its reasoning, *i.e.,* failed to provide a reasoned opinion.[130] Based on this, the Appeals Chamber undertook *de novo* review of the Trial Chamber judgment.[131] In so doing, it swept aside not only the Trial Chamber's findings based on the 200-Meter Standard, but also all the other evidence of Gotovina's guilt.[132]

3. Error of Fact, Error of Law or Something Else?

While the Appeals Chamber was quite clear that the Trial Chamber's error regarding the 200-Meter Standard was the fatal flaw in its judgment, it was much less clear regarding the nature of this error. At first it appeared that the Appeals Chamber regarded it as an error of fact when it said that when a Trial Chamber's approach leads to an "unreasonable assessment of the facts," an appeals chamber must consider "carefully whether the Trial Chamber did not commit an error of fact in its choice of the method of assessment or in its application thereof."[133] This seemed to perfectly describe the situation in

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artillery attacks only when viewed through the prism of the Impact Analysis."); and *id.* ¶ 83 ("The Trial Chamber's reliance on the Impact Analysis was so significant that even considered in its totality, the remaining evidence does not definitively demonstrate that artillery attacks against the Four Towns were unlawful.").

[128] Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Separate Opinion of Judge Theodor Meron, ¶ 2. (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

[129] Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment, ¶ 158. Judges Meron, Robinson, and Güney concurred in the decision; Judges Agius and Pocar dissented.

[130] *Id.* ¶ 61.

[131] *Id.* ¶ 64.

[132] *See* Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Dissenting Opinion of Judge Carmel Agius, ¶ 13 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (criticizing that the Majority's reliance on the Trial Chamber's error regarding the 200-meter standard because it then proceeded to "discard *all evidence on the record* with respect to the impact sites").

[133] Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment, ¶ 50 (quoting Prosecutor v. Kayishema & Ruzidana, Case No. ICTR-95-1-A, Judgment, ¶ 119 (Int'l Crim. Trib. for Rwanda June 1, 2001)). The *Kayishema* and *Ruzidana* Ap-

Gotovina; *i.e.*, the trial court erred both in its choice of the 200-Meter Standard as its "method of assessment," and it also erred in its application of that standard to the facts.[134] After identifying a factual error, the Appeals Chamber should have applied the "no reasonable trier of fact" standard of review to determine whether any reasonable trial chamber could have reached the same result[135] and, if not, whether the mistake caused a miscarriage of justice.[136]

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peals Chamber stated that if the Trial Chamber's "approach in assessment of evidence . . . is reasonable, the [Appeals] Chamber is bound to respect it"; Prosecutor v. Kayishema & Ruzidana, Case No. ICTR-95-1-A, Judgment,¶ 121. The *Gotovina* Appeals Chamber also cited Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment, ¶ 63 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000). In *Aleksovski*, the Trial Chamber found that witnesses had suffered without requiring any medical or scientific evidence to substantiate their testimony. The Appeals Chamber observed that it "has to give a margin of deference to the Trial Chamber's evaluation of the evidence presented at trial" and that it may overturn that determination "only where the evidence could not have been accepted by any reasonable tribunal or where the evaluation of the evidence is wholly erroneous."

[134] Though he called it an error of law, dissenting Judge Pocar described the Trial Chamber's use of the 200-meter standard as an assessment tool:

> Thus, in its assessment of the evidence, the Trial Chamber used the 200 Metre Standard as a presumption of legality–which was generous and to the benefit of Gotovina–to analyse in part the evidence of the shelling attacks and the artillery impacts. In my view, there is therefore no doubt that, while the error was allegedly founded on a factual basis, the establishment of the 200 Metre Standard and its use ultimately constitutes an error of law. The 200 Metre Standard was, as its name indicates, a standard or a legal tool that the Trial Chamber used in order to determine that Rajčič was not credible when he claimed that Gotovina's attack order was understood as directing his subordinates only to target designated military objectives.

Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Dissenting Opinion of Judge Fausto Pocar, ¶ 10 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2011). In fact, as I will argue, the best classification is a mixed error of law and fact as to which deference to the trial court's findings is the appropriate standard of review. *See infra* Part VI.

[135] *See* Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Dissenting Opinion of Judge Carmel Agius, ¶ 19 (reasoning that there was other evidence, apart from the 200-meter standard upon which a reasonable trier of fact could have relied to find that the artillery attacks were unlawful).

[136] Prosecutor v. Furundžija, Case No. IT-95-/7/1-A, Judgment, ¶ 37 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000) ("In putting forward this question [of fact] as a ground of appeal, the Appellant must discharge two burdens. He must show that the Trial Chamber did indeed commit the error, and, if it did, he must go on to show that the error resulted in a miscarriage of justice."). (quoting Ser-

Thereafter, the Appeals Chamber proceeded to analyze the evidence that the Trial Chamber heard regarding the 200-Meter Standard,[137] concluding that "[t]he Trial Judgment contains no indication that any evidence considered by the Trial Chamber suggested a 200 metre margin of error."[138] It also rejected the prosecution's argument that the 200-Meter Standard was "a maximum possible range of error," not because this was not a reasonable interpretation of the evidence, but rather because "the Trial Chamber did not justify the 200 Metre Standard on this basis."[139] Even if that were so, given the Appeals Chamber's approach to errors of fact discussed above, it should not have summarily dismissed the prosecution's argument, since a Trial Chamber's findings should stand if they are reasonable.[140]

Instead, and although the Appeals Chamber had stated that there was "no indication of any evidence" supporting the 200-Meter Standard, the Appeals Chamber then described the problem as a failure by the Trial Chamber to "explain the specific basis on which it arrived at a 200 metre margin of error as a reasonable interpretation of the evidence on the record."[141] In the next paragraph, the Majority observed that "absent any specific reasoning as to the derivation of this margin of error, there is no obvious relationship between the evidence received and the 200 Metre Standard."[142] The Majority thus changed course from its original approach to the issue as one of factual error, making it explicit that there were in two errors in the Trial Chamber's judgment:

> [T]he Trial Chamber adopted a margin of error that was not linked to any evidence it received; this constituted an error on the part of the Trial Chamber. The Trial Chamber also provided no explanation as to the basis for the margin of error it adopted; this amounted to a failure to provide a reasoned opinion, another error.[143]

Was the real issue that the 200-Meter Standard was not supported by the evidence, or that the Trial Chamber failed to explain why? And, if there really was no evidence that any reasonable trier of fact could have relied upon, how could such an explanation have been possible?

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suhago v. Prosecutor, Case No. ICTR 98-39-A, Reasons for Judgment, ¶ 22 (Int'l Crim. Trib. for Rwanda Apr. 6, 2000)).

[137] Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment ¶¶ 52–57 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

[138] *Id.* ¶ 58.

[139] *Id.* ¶ 59.

[140] *See supra* note 85 and accompanying text.

[141] Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment, ¶ 58.

[142] *Id.* ¶ 59.

[143] *Id.* ¶ 61.

Notwithstanding these ambiguities,[144] the Majority confidently concluded that, given the error of law in failing to provide a reasoned opinion, it would "consider *de novo* the remaining evidence on the record to determine whether the conclusions of the Impact Analysis are still valid."[145]

4. *De Novo* Review

Gotovina appears to be the first case in which an ICTY Appeals Chamber has held that a *de novo* review of the record is appropriate when the legal error was a failure to provide a reasoned opinion.[146] Indeed, the ICTY cases are replete with assertions that an appeals chamber will not conduct a trial *de novo*.[147] One appeals chamber went so far as to say that "[t]he Appeals Chamber would act *ultra vires* when reviewing *proprio motu* the entire trial record."[148] When it identifies an error of law because the Trial Chamber applied an incorrect legal standard:

> The Appeals Chamber . . . will in principle only take into account evidence referred to by the Trial Chamber in the body of the judgment or in a related footnote, evidence contained in the trial record and referred to by the parties, and, where applicable, additional evidence admitted on appeal.[149]

Some cases refer to this standard of review as *de novo* review, though it is clearly a less extensive review than trial *de novo* as it is limited to

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[144] *See* Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Dissenting Opinion of Judge Carmel Agius, ¶ 10 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012) (observing that the Majority should have "clearly explained" why the Trial Chamber's error in "adopting a margin of error that was not linked to any evidence in the record" constituted the application of an incorrect legal standard (which would then permit it to proceed with a *de novo* review)).

[145] Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment, ¶ 64.

[146] Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Dissenting Opinion of Judge Carmel Agius, ¶ 9. As Judge Agius observed, the failure to provide a reasoned opinion is "clearly not an error of law arising from the application of an incorrect legal standard."

[147] *See supra* note 90.

[148] Prosecutor v. Kordič & Čerkez, Case No. IT-95-14/2-A, Judgment, ¶ 21 n.15 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

[149] Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgment, ¶ 14 (Int'l. Crim. Trib. for the Former Yugoslavia Nov. 12, 2009). Based on my research, *Gotovina* is the first ICTY case to omit the language cited in the text from the "Standard of Review" section of its opinion. *Perišić*, decided a few months later, was the other. Interestingly, the case decided in between those two cases contained the language. *See* Prosecutor v. Lukič & Lukič, Case No. IT-98-321/1-A, Judgment, ¶ 12 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 4, 2012).

the evidence in the trial chamber judgment and in the record, only if the parties bring the latter to the appeals chamber's attention.[150] Nonetheless, an error in failing to provide a reasoned opinion does not justify even this more restricted form of *de novo* review.

The ICTR case cited by the majority provides, at best, ambiguous support for its holding that *de novo* review of the record is appropriate when there is a failure to provide a reasoned opinion.[151] *Kalimanzira* involved the reliability of identifications made by two different witnesses. Regarding the first witness, BWK, the Appeals Chamber found that the Trial Chamber had not "explicitly explained why it had accepted BWK's identification evidence" and that its failure to do so was an error of law.[152] It then "consider[ed] the relevant evidence," concluding that BWK's uncorroborated identification was "unsafe."[153] Ultimately, however, the Appeals Chamber did not reverse the appellant's conviction on this ground because the Trial Chamber's error "did not result in a miscarriage of justice."[154] Thus, despite its statement that the error was one of law, and because the miscarriage of justice standard applies only to errors of fact,[155] it is apparent that the *Kalimanzira* Appeals Chamber treated the failure to provide a reasoned opinion as a factual problem.

The *Kalimanzira* Appeals Chamber reached a similar conclusion with regard to the second identification witness, BDK, but, for reasons that are not apparent, applied a different standard of review when it concluded that it was not "convinced beyond a reasonable doubt" by the identification evidence and, therefore, that appellant's conviction was "unsafe."[156] While this more closely resembles the standard of review for errors of law,[157] it is important to note that there is heightened scrutiny of the obligation to provide a reasoned opinion in uncorroborated identification cases.[158] Moreover, the review undertaken in *Kalimanzira* must also be assessed in light of the oft-repeated position of the ICTY Appeals Chamber—that it will not engage in *de novo* review.[159] Thus, the case cited by the majority does not support

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[150] *See, e.g.,* Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Dissenting Opinion of Judge Carmel Agius, ¶¶ 10-14.

[151] Kalimanzira v. Prosecutor, Case No. ICTR-05-88-A, Judgment, ¶¶ 99-100, 199-200 (Int'l. Crim. Trib. for Rwanda Oct. 20, 2010).

[152] *Id.* ¶ 99.

[153] *Id.* ¶ 100.

[154] *Id.* ¶ 126.

[155] *See supra* text accompanying note 76.

[156] *Id.* ¶ 201.

[157] *See supra* text accompanying note 80.

[158] *See supra* text accompanying note 69.

[159] *See supra* note 90.

its sweeping application of *de novo* review when the error of law is the failure to provide a reasoned opinion.

Moreover, if the failure to provide a reasoned opinion is an error of law, why did the majority neglect to use the standard of review applicable to such errors? As dissenting Judge Agius pointed out earlier in its judgment, the *Gotovina* majority parroted the correct standard of review when a Trial Chamber applies an incorrect legal standard:[160]

> [T]he Appeals Chamber will articulate the correct legal standard and review the relevant findings of the trial chamber accordingly. In so doing, the Appeals Chamber not only corrects the legal error, but, when necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond a reasonable doubt as to the factual finding challenged by the appellant before that finding is confirmed on appeal.[161]

Several observations are apparent. First, the majority never even attempted to articulate a correct legal standard.[162] Second, it is impossible to articulate a correct legal standard when dealing with an insufficiently reasoned opinion grounded on a factual error because the error is essentially one of fact, not law.[163] Finally, the majority's purported *de novo* review was a thinly disguised ruse for substituting its judgment for that of the Trial Chamber without following its own rules. By its own standards, the majority had only two choices: 1) substitute its findings of fact for those of a trial chamber only if no reasonable trier of fact could have reached the same conclusion and the result would be a miscarriage of justice;[164] or 2) identify an error of law, articulate the correct standard, and apply the correct standard to the facts in order to ascertain whether guilt has been proved beyond a reasonable doubt.[165] A third option—identify an error of fact, characterize it as an error of law, and conduct a *de novo* review, substituting the

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[160] Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Dissenting Opinion of Judge Carmel Agius, ¶8 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

[161] Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment, ¶ 12 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

[162] *See* Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Dissenting Opinion of Judge Carmel Agius, ¶ 14.

[163] *See id.* ¶ 9.

[164] Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment, ¶ 13.

[165] *Id.* ¶ 12.

Appeals Chamber's findings for those of the Trial Chamber—simply does not exist in the current jurisprudence of the Tribunal.[166]

5. The House of Cards Collapses

With the 200-Meter Standard out of the way and along with it the Trial Chamber's findings regarding the unlawfulness of the attacks, the majority made swift work of the other arguments for affirming the conviction. It waved aside evidence that showed that the attacks were indiscriminate because some of the shells landed so far from any legitimate target that they could not be justified by any margin of error.[167] Likewise, it belittled other evidence of the unlawfulness of the attacks—including statements made by Gotovina during a meeting with Tuđman and others to plan Operation Storm (the Brioni Meeting) and Gotovina's order to attack the towns without specifying targets—because the evidence was ambiguous or somehow tainted by the original sin of the 200-Meter Standard.[168]

It found that, without the unlawful artillery attacks, it could not "affirm the Trial Chamber's conclusion that the only reasonable interpretation of the circumstantial evidence on the record was that a JCE, aiming to permanently remove the Serb civilian population from the Krajina by force or threat of force, existed."[169] The Appeals Chamber also rejected arguments that the artillery attacks that Gotovina had ordered proved that he had aided and abetted the deportation of the Serbs who fled the Krajina in their wake.[170] The majority's rejection of the aiding and abetting theory was principally grounded on its observation that the Trial Chamber "would not characterise civilian departures from towns and villages subject to lawful artillery attacks as deportation, nor could it find that those involved in launching lawful artillery attacks had the intent to forcibly displace civilians."[171]

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[166] Judge Agius characterized the Majority's approach as one which "fail[ed] to comport with any recognisable standard of review." Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Dissenting Opinion of Judge Agius, ¶ 14.

[167] Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment, ¶ 66.

[168] *See id.* ¶¶ 72–83.

[169] *Id.* ¶ 91.

[170] *Id.* ¶ 115.

[171] *Id.* ¶ 114. This statement by the Majority was disingenuous for two reasons. First, the Trial Chamber was referring to the shelling of locations other than the Four Towns which were the focus of the trial. *See* Prosecutor v. Gotovina, Čermak & Markač, Case No. IT-06-90-T, Judgment, ¶¶ 1754-55 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011), *available at* http://www.icty.org/x/cases/gotovina/tjug/en/110415_judgement_vol2.pdf; *see also* Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Dissenting Opinion of Judge Fausto Pocar, ¶ 23 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2011) (pointing out that "paragraph 1755 of the Trial Judgment to which the Majority refers to support this claim is not

Finally, the majority dismissed the Trial Chamber's conclusion that Gotovina had made a substantial contribution to the JCE by failing to make a "'serious effort' to ensure that reports of crimes against Serb civilians in the Krajina were followed up and future crimes were prevented."[172] Without identifying any legal standard misapplied to the facts by the Trial Chamber, the Appeals Chamber reached the conclusion that evidence of the measures taken by Gotovina, coupled with the Trial Chamber's failure to address the testimony of a defense witness,[173] created a "reasonable doubt" as to Gotovina's guilt under this theory.[174]

B. Perišić

Momčilo Perišic was the Chief of the Yugoslav Army ("VJ") General Staff from August 1993 until November 1995.[175] As such, he was the VJ's highest-ranking officer.[176] He was charged with various crimes[177] that had occurred in Sarajevo and Srebrenica based on his role "in facilitating the provision of military and logistical assistance from the VJ to the Army of the Republika Srpska ("VRS")."[178] The prosecution alleged that he was responsible for these crimes under two different theories—aiding and abetting and superior responsibility.[179]

1. Aiding and Abetting

As to the former, the Appeals Chamber held that the Trial Chamber applied an incorrect legal standard for aiding and abetting.

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linked to the Trial Chamber's findings on the departure of persons from the Four Towns on 4 and 5 August 1995 but rather concerns the departure of persons from other locations"). Second, the Trial Chamber did not conclude that the attacks on those other towns were "lawful." Rather, it found that "an unlawful attack on civilians or civilian objects in these towns was not the only reasonable interpretation of the evidence." Prosecutor v. Gotovina, Čermak & Markač, Case No. IT-06-90-T, Judgment, ¶ 1755.

[172] Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment, ¶118.

[173] The witness, Anthony R. Jones, a retired U.S. Lieutenant General, "opined that Gotovina's actions were appropriate and sufficient." *Id.* ¶ 121.

[174] *Id.* ¶ 134.

[175] Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶ 2 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013), *available at* http://www.icty.org/x/cases/perisic/acjug/en/130228_judgement.pdf.

[176] *Id.*

[177] The crimes included "murder, extermination, inhumane acts, attacks on civilians, and persecution as crimes against humanity and/or violations of the laws or customs of war." *Id.* ¶ 3.

[178] *Id.*

[179] *Id.*; U.N. Statute of the International Criminal Tribunal for the Former Yugoslavia, arts. 7(1), 7(3), U.N. Doc. S/RES/827 (1993).

Specifically, it found that the Trial Chamber had erred as a matter of law by "holding that specific direction is not an element of the *actus reus* of aiding and abetting."[180] And, while this error was "understandable" because of the confusing language in some of the Tribunal's cases, "the Appeals Chamber's duty to correct legal errors remain[ed] unchanged."[181] Applying the correct legal standard, it then reviewed and assessed "*de novo* relevant evidence, taking into account, where appropriate, the Trial Chamber's findings."[182] The result of this review and assessment was the Appeals Chamber's conclusion that the evidence did not establish beyond a reasonable doubt that Perišić's acts were specifically directed at aiding and abetting crimes committed by the VRS.[183] The first part of the *Perišić* Appeals Chamber judgment was thus a straightforward application of the standard of review for errors of law.

2. Superior Responsibility

The Appeals Chamber then turned to the second theory of individual responsibility—superior responsibility. There are three necessary elements for a conviction based on the theory of superior responsibility: "(i) the existence of superior-subordinate relationship; (ii) the superior's failure to take the necessary and reasonable measures to prevent the criminal acts of his subordinates or punish them for those actions; (iii) . . . the superior knew or had reason to know that a criminal act was about to be committed or had been committed."[184] The superior-subordinate relationship is established by proof that the superior had "the actual ability to exercise sufficient *control* over the subordinates so as to prevent them from committing crimes."[185] Appellant challenged the Trial Chamber's finding that Perišić exercised effective control over both the soldiers in the SVK and those in the VJ, who had been seconded to the SVK.[186] The Appeals Chamber determined that the Trial Chamber had insufficiently analyzed the evidence, which "can amount to a failure to provide a reasoned opinion . . . [and which] constitutes an error of law requiring *de novo* review of evidence by the Appeals Chamber."[187]

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[180] Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment,¶ 41.
[181] *Id.* ¶ 43.
[182] *Id.* ¶ 45.
[183] *Id.* ¶ 73.
[184] Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT'L. CRIM. JUST. 159, 161 (2007).
[185] *Id.* at 162.
[186] Prosecutor v. Perišić, Case No. IT-04-81-A, Judgment, ¶¶ 80-82.
[187] *Id.* ¶ 92. It is interesting that Judge Agius, who so vociferously criticized the Majority's use of *de novo* review in *Gotovina*, joined in the *Perišić* judgment, even though the *Perišić* Appeals Chamber followed the same approach.

3. *De Novo* Review

As it did in *Gotovina*, the Appeals Chamber cited *Kalimanzira* as support for its conclusion that *de novo* review was warranted. Additionally, it cited three other ICTR cases and one ICTY case but, curiously, it did not cite *Gotovina*. The three other ICTR cases cited by the *Perišić* Appeals Chamber do not strengthen the case for *de novo* review. Instead, they strongly suggest that the appropriate standard of review should be similar to that for errors of fact.

In *Zigiranyirazo,*[188] the Appeals Chamber found that the Trial Chamber failed to consider clearly relevant evidence suggesting that the defendant could not have been in two locations within the timeframe argued for by the prosecution.[189] Although the Trial Chamber erred in failing to provide a reasoned opinion and the Appeals Chamber categorized it as a error of law, it did not purport to conduct *de novo* review on that basis, nor did it identify the correct applicable legal standard, as it had done a few paragraphs earlier when it found that the Trial Chamber had reversed the burden of proof applicable to an alibi defense.[190] Instead, it accepted appellant's estimate of the travel time as "reasonable" based on the evidence on the record that the Trial Chamber had failed to consider.[191]

In *Muvunyi,*[192] the Appeals Chamber found that the Trial Chamber erred in failing to explain why it relied on the testimony of witnesses YAI and CCP to convict appellant, even though their evidence was contradicted by the testimony of another witness.[193] In reaching its conclusion that there had been a failure to provide a reasoned opinion, the Appeals Chamber observed that it could not "conclude whether a reasonable trier of fact could have relied on the testimony of witnesses YAI and CCP to convict Muvunyi for this event."[194] This strongly suggests that the appropriate standard of review when there is a failure to provide a reasoned opinion based on a factual error is the same as that applicable to errors of fact. This conclusion is bolstered by the fact that the *Muvunyi* Appeals Chamber did not substitute its own factual findings for those of the Trial Chamber.

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[188] Zigiranyirazo v. Prosecutor, Case No. ICTR-01-73-A, Judgment, (Int'l Crim. Trib. for Rwanda Nov. 16, 2009).

[189] *Id.* ¶¶ 44-46.

[190] *Id.* ¶ 43.

[191] *Id.* ¶ 44. The Appeals Chamber noted that at the hearing the prosecution had essentially conceded the point. *Id.* ¶ 44 n.118.

[192] Muvunyi v. Prosecutor, Case No. ICTR-2000-55 A-A, Judgment (Int'l Crim. Trib. for Rwanda Aug. 29, 2008).

[193] *Id.* ¶ 147.

[194] *Id.*

Rather, it took the exceptional step of remanding the case for a retrial on this issue.[195]

In the *Simba* judgment,[196] also cited by the *Perišić* Appeals Chamber, the issue was essentially the same as in *Munvunyi*—the failure to provide a reasoned opinion explaining why the Trial Chamber had credited the testimony of a witness regarding the time the defendant arrived at a particular location.[197] Rather than stating that it intended to conduct a *de novo* review, the *Simba* Appeals Chamber said that it would "consider . . . whether and, if necessary, to what extent the Trial Chamber's error affects its findings relating to the Appellant's participation in the attacks at the Murambi Technical School and Kaduha Parish on 21 April 1994 within the time frame emerging from the relevant testimonies."[198] After reviewing the evidence, the Appeals Chamber concluded that "a reasonable trier of fact could have found beyond a reasonable doubt" that appellant had been in the two locations on the relevant date, thus applying the standard of review applicable to errors of fact.[199]

The final cited case, the ICTY's appeals judgment in *Limaj*,[200] likewise seems to weaken the support for *de novo* review and strengthen the case for applying the deference standard when there is no reasoned opinion based on an error of fact. The *Limaj* Appeals Chamber found no error based on the claim that the Trial Chamber had failed to cite in its judgment relevant evidence claimed to undercut the credibility of two prosecution witnesses because "the Trial Chamber reasonably accepted the honesty of their testimony."[201] Therefore, "a reasonable trier of fact" could have found the witnesses credible.[202]

Limaj well illustrates the point that failing to provide a reasoned opinion does not genuinely convert an error of fact into one of law that alters the appropriate standard of review. While it did not do so, the Appeals Chamber could have characterized the Trial Cham-

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[195] *Id.* ¶ 148. Because of the length and complexity of international criminal trials and the long periods of time defendants spend in jail prior to trial (Muvunyi had been in jail for eight years), the *ad hoc* tribunals are reluctant to order retrials. *Id.*

[196] Simba v. Prosecutor, Case No. ICTR-01-76-A, Judgment. (Int'l Crim. Trib. for Rwanda Nov. 27, 2007).

[197] *Id.* ¶ 142.

[198] *Id.* ¶ 143.

[199] It should be noted that the failure to provide a reasoned opinion was intertwined with other alleged errors of fact. *Id.* ¶ 144. But, the Appeals Chamber did not separate them when it made the statement quoted in the text.

[200] Prosecutor v. Limaj, *et. al.*, Case No. IT-03-66-A, Judgment. (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2007).

[201] *Id.* ¶ 88.

[202] *Id.*

ber's failure to address "clear and identical" discrepancies in the witnesses' stories[203] as the failure to provide a reasoned opinion. But that does not change the fact that the essential nature of the appellate review is the same in both cases; that is, whether the trial chamber acted reasonably in reaching its conclusions.

In addition to the fact that its cited precedents do not support the *Perišić* Appeals Chamber's conclusion that *de novo* review was appropriate, its approach contradicts that taken by another ICTY Appeals Chamber that had faced the identical question. In *Strugar,*[204] the appellant argued that the Trial Chamber erred when it found that a superior-subordinate relationship existed because he had the ability to prevent or punish the crimes that were committed and, therefore, that he had "effective control."[205] The *Strugar* Appeals Chamber rejected the appellant's characterization of the issue as an alleged error of law, finding that "it is more accurately characterized as a mixed error of law and fact" to which it would apply the "no reasonable trier of fact" standard of review,[206] the same standard applicable to pure questions of fact.[207]

Strugar is clearly the better-reasoned case. In neither *Strugar* nor *Perišić* did the Trial Chamber misapprehend the correct legal standard. Instead, in both cases the issue was whether the Trial Chamber had correctly applied the legal standard to the facts. While merely labeling the issue as a mixed question is not dispositive, a court should not treat the issue as one of law if the trial court is in a better position to decide the question and the result would not bring greater clarity to the law.[208] That rationale clearly applies to both *Strugar* and *Perišić.* In neither case did the Appeals Chamber add to, or subtract from, the interpretation of the effective control necessary to establish the existence of a superior-subordinate relationship. On the other hand, both did involve ascertaining whether the trial chamber had correctly applied the well-established legal standard to the facts, an issue which should be decided by giving the trial chamber's findings due deference and reversing it only if no reasonable trier of fact could have reached the same conclusion.

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[203] *Id.* ¶ 87.

[204] Prosecutor v. Strugar, Case No. IT-01-42-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 17, 2008).

[205] *Id.* ¶¶ 247–48, 251.

[206] *Id.* ¶ 252.

[207] *See* Milanovic, *supra* note 8.

[208] *See supra* note 96.

CONCLUSION

The reasoned opinion requirement originating in the civil law systems sits somewhat uncomfortably next to the deference standard for the review of a trial chamber's factual findings imported from the common law model.[209] There is a strong argument, however, that both are necessary. The reasoned opinion is an essential element of a fair trial because complex international criminal cases take years to try and the verdicts are based on voluminous evidence. Without reasoned opinions, appellate review would simply be impossible. On the other hand, because the international criminal tribunals largely follow the common law procedure of presenting the trial evidence in open court, it is unarguably true that the trial judges are in a better position when it comes to determining the credibility of witnesses and the weight and persuasiveness of the evidence. Thus, deference seems to be the appropriate standard of review.

The vexing question is what standard of review is applicable when there is a failure to provide a reasoned opinion. It is unassailable that the failure to provide such an opinion is an error of law because all of the tribunals' statutes impose that obligation on trial chambers.[210] But, it is equally true that this error of law does not stem from the failure to apply the correct legal standard, which triggers a limited form of *de novo* review requiring articulation of the correct legal standard and application of it to the facts of the case. The failure to provide a reasoned opinion cannot result in this form of review because it is impossible to articulate a correct legal standard if there has been no mistake in that regard.

Moreover, *de novo* review of these errors does not serve the main purposes of appellate review, which are to insure consistency and develop the law:

> The decision that a certain body of evidence warrants or does not warrant a certain factual finding beyond a reasonable doubt cannot be of relevance to any other case, where the quantity and type of evidence, as well as the demeanor and credibility of witnesses, will necessarily be different.[211]

In the *Gotovina* and *Perišić* decisions, the Appeals Chambers employed a *trompe l'oeil* to transform what was essentially an error of fact into an error of law, which freed them to substitute their findings for that of the Trial Chambers'. Consequently, these decisions have "lessen[ed] the ICTY historical record of the conflict in the former Yu-

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[209] *See* Fleming, *supra* note 2, at 138.

[210] *See supra* note 46.

[211] Fleming, *supra* note 2, at 135.

goslavia" and "might result in a lack of predictability and confidence in the tribunal writ large."[212]

The most obvious way to correct the deficiencies in the reasoned opinions in these cases would have been to remand the cases to the trial chambers. Fearing additional delays in cases when defendants may have already been in jail for years and because of the finite existence of the *ad hoc* tribunals, appeals chambers have been reluctant to remand.[213] Such fears are overblown when the remand is to correct a reasoned opinion because there would be no need for additional evidence, and the specific areas requiring clarification would be identified.

Unlike the statutes of the *ad hoc* tribunals, the ICC Statute authorizes its Appeals Chamber to "remand a factual issue to the original Trial Chamber for it to report back accordingly."[214] This method of curing deficiencies in a reasoned opinion would be rendered nugatory if the ICC follows the ICTY cases which characterize such errors as errors of law. Hopefully the ICC Appeals Chamber will see such errors for what they really are—errors of fact that have been insufficiently explained in the reasoned opinion—and use the power of remand rather than making its own findings of fact from its inferior position to assess the evidence based only on the cold record.

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[212] Jenks, *supra* note 9, at 626–27.

[213] Theodor Meron, *Hudson Lecture: Anatomy of an International Criminal Tribunal*, 100 AM. SOC'Y INT'L L. PROC. 279, 285 (March 29-April 1, 2006) (observing that the "the length of proceedings, combined with the tribunals' need to complete their work, largely prevents their Appeals Chambers from using remand as a means of curing errors").

[214] Rome Statute of the International Criminal Court, art. 83(2)(b), July 17, 1998, 2187 U.N.T.S. 3.