UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991

Case: **IT-96-21-A*bis***

Date: **8 April 2003**

Original: **English**

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge David Hunt
Judge Asoka de Zoysa Gunawardana

Registrar: **Mr Hans Holthuis**

Judgment of: **8 April 2003**

PROSECUTOR

v

Zdravko MUCIĆ, Hazim DELIĆ and Esad LANDŽO

JUDGMENT ON SENTENCE APPEAL

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Mr Salih Karabdić and Mr Tom Moran for Hazim Delić
Ms Cynthia Sinatra and Mr Peter Murphy for Esad Landžo

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PROSECUTOR

v

Zdravko MUCIĆ, Hazim DELIĆ and Esad LANDŽO

Judgment on Sentence Appeal

CONTENTS

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1 The background to this appeal

1. The appellants – Zdravko Mucić, Hazim Delić and Esad Landžo (respectively "Mucić" "Delić" and "Landžo") – stood trial with Zejnil Delalić ("Delalić") on an indictment alleging serious violations of international humanitarian law in relation to persons detained in a camp, known as the Čelebići camp, within the Konjic municipality in Central Bosnia and Herzegovina.[1] The Trial Chamber found that detainees were killed, tortured, sexually assaulted, beaten and otherwise subjected to cruel and inhumane treatment, and that Mucić, Delić and Landžo were responsible for that conduct. Mucić was found to have been the commander of the Čelebići camp, Delić the deputy commander and Landžo a prison guard. Mucić was sentenced to an effective total imprisonment for seven years, Delić to an effective total imprisonment for twenty years, and Landžo to an effective total imprisonment for fifteen years. Delalić was acquitted.[2]

2. Mucić, Delić and Landžo each appealed against his conviction and sentence, on various grounds. The prosecution appealed against the acquittal of Delalić, certain findings in favour of Delić and the sentence imposed upon Mucić. Relevantly to the present proceedings, the Appeals Chamber:

(a) upheld the appeal by the appellants against the cumulative convictions imposed under both Article 2 ("Grave Breaches of the Geneva Conventions") and Article 3 ("Violations of the Laws or Customs of War") based upon the same acts of the appellants, and dismissed the Article 3 counts;

(b) upheld the appeal by Delić against his conviction on Count 1 of the indictment (the wilful killing of Šćepo Gotovac), and quashed that conviction;

(c) upheld the appeal by the prosecution against the inadequacy of the effective total sentence imposed upon Mucić; and

(d) upheld the complaint by Mucić that the Trial Chamber had erred when sentencing him in making an adverse reference to the fact that he had not given evidence at the trial.

Each of the other grounds of appeal was dismissed, including a challenge by Delić to his convictions on Count 3 (the wilful killing of Željko Milošević), Count 18 (the rape of Grozdana Ćećez, amounting to torture) and Count 21 (the repeated incidents of forcible sexual intercourse and rape of Miloja Antić, amounting to torture).[3]

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1 Amended Indictment, IT-96-21, confirmed on 21 March 1996.
2 *Prosecution v Delalić et al,* IT-96-21-T, Judgment 16 Nov 1998 ("First Trial Chamber Judgment").
3 *Prosecution v Delalić et al,* IT-96-21-A, Judgment 20 Feb 2001 ("Appeals Chamber Judgment").

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3. Each of those four determinations by the Appeals Chamber upholding grounds of appeal raised for consideration an issue as to whether the sentences imposed by the Trial Chamber should be adjusted. The parties had made no relevant submissions during the hearing of that appeal concerning the effect upon the sentences imposed by the original Trial Chamber of the dismissal of all the Article 3 counts. Because the resignation of one member of the Appeals Chamber was to take effect within a short time after the Appeals Chamber Judgment was delivered, it was not possible for such submissions to be made to the Appeals Chamber at that time. The Appeals Chamber therefore decided to remit the issues raised by all four determinations made by the Appeals Chamber to a Trial Chamber. Another reason for doing so was that an appeal from the Trial Chamber's judgment would be available to the parties, particularly in relation to the effect of the dismissal of the Article 3 counts upon the sentences imposed.[4]

4. The Appeals Chamber identified the issues remitted to the Trial Chamber, as follows:

(i) [After dismissing the Article 3 counts against each of the appellants] "It REMITS to a Trial Chamber to be nominated by the President of the Tribunal ("Reconstituted Trial Chamber") the issue of what adjustment, if any, should be made to the original sentences imposed on Hazim Delić, Zdravko Mucić, and Esad Landžo to take account of the dismissal of these counts."[5]

(ii) [After quashing the conviction of Delić on Count 1] "It would be convenient, when the matter is remitted, for the new Trial Chamber also to consider what adjustments should be made to the sentence of Delić in relation to the reversal of his conviction".[6]

(iii) [After finding that the Trial Chamber had erred in making adverse reference when imposing sentence to the fact that Mucić had not given oral evidence at the trial] "[...] it DIRECTS the Reconstituted Trial Chamber to consider the effect, if any, of that error on the sentence to be imposed on Mucić".[7]

(iv) [After upholding the prosecution appeal against the inadequacy of the sentence imposed upon Mucić] "[...] it REMITS the matter of the imposition of an appropriate revised sentence for Zdravko Mucić to the Reconstituted Trial Chamber, with the indication that, had it not been necessary to take into account a

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4 Appeals Chamber Judgment, par 711.

5 *Ibid*, Disposition, par 2.

6 *Ibid*, par 713. Delić has not submitted in the present appeal that the inadvertent omission of this issue from the formal Disposition in the Appeals Chamber Judgment invalidated the Second Trial Chamber's determination of this issue. The prosecution, although referring to the omission, has not suggested that the Trial Chamber's determination of this issue was invalid: Prosecution Consolidated Response Brief, 25 Feb 2002 ("Prosecution Respondent's Brief"), at pars 7.5, 7.8.

7 Appeals Chamber Judgment, Disposition, par 3.

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possible adjustment in sentence because of the dismissal of the [Article 3 counts], it would have imposed a sentence of around ten years".[8]

The President nominated a new Trial Chamber to determine the issues remitted.[9]

5. The new Trial Chamber ruled that the issues defined by the Appeals Chamber involved an adjustment of the sentences imposed by the original Trial Chamber and not a re-hearing, and that further evidence was unnecessary.[10] After hearing the arguments of the parties on the remitted issues, it then determined that:

(i) no adjustment should be made for the dismissal of the Article 3 convictions;

(ii) the effective total twenty year sentence imposed upon Delić should be reduced to a single sentence of eighteen years to reflect the quashing of his conviction on Count 1;

(iii) there should be "a small reduction" given to Mucić as a result of the adverse reference by the original Trial Chamber when sentencing him to the fact that he had not given evidence at the trial; and

(iv) an appropriate revised sentence for Mucić was a single sentence of imprisonment for nine years.[11]

Mucić, Delić and Landžo have all appealed against the Second Trial Chamber Judgment.

2 The issues raised by the appellants

6. There were two issues common to the case of each of the appellants:

(1) Did the Appeals Chamber, when hearing the original appeals against conviction and sentence, err when it remitted limited issues to be decided by a Trial Chamber? An alternative but related issue raised by Landžo and Mucić is: Did the Trial Chamber err when it ruled that further evidence was unnecessary?

(2) Did the Trial Chamber err in its determination that no adjustment should be made for the dismissal of the Article 3 convictions?

Mucić raised two further issues:

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[8] *Ibid*, Disposition, par 4.

[9] Order of the President Remitting the Case to a Trial Chamber, 11 Apr 2001. None of the judges of the original Trial Chamber was still a judge of the Tribunal.

[10] Decision on Motion for Clarification and Joint Motion for Extension of Time, 25 May 2001, p 2.

[11] *Prosecution v Mucić et al,* IT-96-21-T*bis*-R117, Sentencing Judgment, 9 Oct 2001 ("Second Trial Chamber Judgment").

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(3) Did the Trial Chamber err in reducing his effective total sentence by only a "small" amount as a result of the adverse reference by the original Trial Chamber when sentencing him to the fact that he had not given evidence at the trial?

(4) Did the Trial Chamber err in imposing a single sentence of imprisonment of nine years upon him?

Delić also raised two further issues:

(5) Did the Trial Chamber err in reducing his effective total sentence by only two years to reflect the quashing of his conviction on Count 1?

(6) Should the Appeals Chamber now reconsider its previous rejection of his appeal against his convictions on Counts 3, 18 and 21?[12]

3 The power of the Appeals Chamber to remit limited issues and the decision of the Trial Chamber that further evidence was unnecessary

7. Two of the appellants (Landžo and Mucić) initially argued that the Appeals Chamber had no power to remit limited issues such as the adjustment of a sentence to a Trial Chamber for its determination.[13] The third of the appellants (Delić) accepted that the Appeals Chamber had power to remit a limited issue to a Trial Chamber, but he submitted that it should not have done so in this case where none of the judges of the original Trial Chamber could be a member of the new Trial Chamber.[14]

8. Article 25 of the Tribunal's Statute provides that the Appeals Chamber may "affirm, reverse or revise" the decisions taken by Trial Chambers. Rule 117(C) of the Rules of Procedure and Evidence ("Rules") permits the Appeals Chamber, in appropriate circumstances, to order that an accused be "retried according to law". Landžo and Mucić submitted that, as the Appeals Chamber did not itself "revise" the sentences imposed, it had power pursuant to Rule 117(C) only to order a new trial according to law; it was, however, conceded that such a new trial could have been limited to what sentence should be imposed.[15] In determining the sentence to be imposed according to law in any such new trial, they said, a Trial Chamber would be required by

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[12] These counts are identified in par 2, *supra*.

[13] Appellant Zdravko Mucić's Appeal Brief, 15 June 2002 ("Mucić Appellant's Brief"), par 5; Brief of Esad Landžo on Appeal, 15 Jan 2002 ("Landžo Appellant's Brief"), par 5.

[14] Oral hearing of appeal, 18 June 2002, Transcript pp 852-853.

[15] Landžo Appellant's Brief, pars 7-8. The submissions made by Landžo upon this issue were adopted by Mucić and incorporated by reference as his own submissions: Mucić Appellant's Brief, par 5.

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Rule 101(B) to take into account "such factors as [...] the individual circumstances of the convicted person"[16] as well as "such factors as [...] any mitigating circumstances".[17] They argued that the limitations placed by the Appeals Chamber upon the issues remitted to the Trial Chamber erroneously precluded it from taking those matters into account in adjusting the sentences imposed by the original Trial Chamber. For this reason, they contended, the order of the Appeals Chamber remitting those limited issues to the Trial Chamber was invalid.[18] However, at the conclusion of the oral hearing of the appeal, Counsel for Landžo accepted that the appellants had conceded during the argument that the Appeals Chamber could remit a "discrete" (ie, limited) issue to a Trial Chamber, but asserted that the new Trial Chamber was nevertheless obliged to "hold a trial on issues relevant to the remit".[19] The qualification made to this concession has been interpreted by the Appeals Chamber to be that, notwithstanding the limited nature of the issues remitted to it, the Trial Chamber was nevertheless obliged to hear further evidence in accordance with Rule 101(B). Counsel for Mucić did not demur in relation to the concession made.

9. The argument originally put as to the power of the Appeals Chamber to remit limited issues to a new Trial Chamber would in any event have been rejected. The Appeals Chamber considered its power to do so at the time when it exercised that power in its judgment in the earlier appeal. An appeal from the Trial Chamber's determination of those limited issues does not give to the parties the opportunity to appeal against the decision of the Appeals Chamber to remit those limited issues to the Trial Chamber.

10. Nor does the Appeals Chamber consider it appropriate to reconsider its power to remit limited issues to a new Trial Chamber. Its power to remit limited issues is clear. First, it is not disputed that, if the circumstances at the time when the Appeals Chamber Judgment was given had not prevented it from exercising that power, the Appeals Chamber had the power itself to resolve each of the issues which it remitted to the Trial Chamber.[20] Secondly, in the circumstances of this case, it could have done so in the course of its judgment in the previous appeal, without necessarily having to hear the parties further or to receive further evidence in relation to those issues, as the parties had already had that opportunity during the hearing of the

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[16] Tribunal's Statute, Article 24.2.
[17] Rule 101(B)(ii).
[18] Mucić Appellant's Brief, par 5; Landžo Appellant's Brief, pars 5-15.
[19] Oral hearing of appeal, 18 June 2002, Transcript p 923.
[20] Those circumstances are briefly stated in par 3, *supra*.

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original appeal.[21] Thirdly, it had power to remit the determination of those issues to another Chamber. Finally, and again in the circumstances of this case, the Chamber to which it remitted that determination was not bound to receive further evidence in relation to those issues. As the reasons for the decision of the Appeals Chamber to adopt this procedure were not expressed in its judgment on the original appeal, they are expressed now.

11. A general matter which it is convenient to deal with at the outset is the right of the parties to a sentence appeal to adduce further evidence upon the hearing of that appeal. Sentencing appeals, as with all appeals to the Appeals Chamber from the judgment of a Trial Chamber, are appeals *stricto sensu*. They are not trials *de novo*. This is clear from the terms of Article 25 of the Statute. The appellant must demonstrate, upon the trial record, that the Trial Chamber had made an appealable error. Evidence of post-sentence behaviour is irrelevant to whether the Trial Chamber erred in the exercise of its sentencing discretion.[22] It is only where the appellant succeeds in demonstrating that the Trial Chamber made such an error in relation to the sentence imposed that any issue of further evidence relating to the appropriate sentence can arise.[23] In those circumstances, it is within the discretion of the Appeals Chamber as to whether further evidence will be admitted. The exercise of that discretion is dependent mainly upon the nature of the error which has been demonstrated in the sentence appeal. The jurisprudence of the Tribunal provides guidance as to the manner in which the Appeals Chamber approaches the exercise of that discretion.

12. Where the nature of the error demonstrated is such that the Appeals Chamber is replacing the sentence with another which, in its view, the original Trial Chamber should have imposed, further evidence will not ordinarily be admitted.[24] Such a course was followed by the Appeals Chamber in *Prosecutor v Aleksovski*,[25] in which the prosecution successfully argued that the sentence imposed by the Trial Chamber was manifestly inadequate because it gave insufficient weight to the gravity of the accused's conduct and failed to treat his position as commander as an aggravating feature in relation to his responsibility under Article 7.1 of the Statute. Without

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[21] See par 15, *infra*.

[22] *Prosecutor v Jelisić*, IT-95-10-A, Decision on Request to Admit Additional Evidence, 15 Nov 2000 ("*Jelisić* Decision"), p 4.

[23] The *Jelisić* Decision, which was concerned only with the admissibility of additional evidence under Rule 115, is silent as to this issue.

[24] No distinction need be drawn between the term "revise" in Article 25 and the concept of re-sentencing.

[25] *Prosecutor v Aleksovski*, IT-95-14/1-A, Judgment, 24 Mar 2000 ("*Aleksovski* Appeal Judgment"), pars 187, 190.

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hearing the parties further and without further evidence, the Appeals Chamber was able to revise the sentence imposed by increasing it.

13. In *Prosecutor v Kupreškić*,[26] the Appeals Chamber had admitted additional evidence in the appeal by the appellant Vladimir Šantić against his conviction. It reduced the sentence imposed upon that appellant because (i) the Trial Chamber in sentencing him had erroneously taken into account a fact which had not been established, (ii) the additional evidence on conviction demonstrated that Šantić had now, at least in part, accepted his guilt, and (iii) he had provided substantial co-operation to the prosecution *after* his conviction. The Appeals Chamber stressed the absence of any *de novo* review, and it did not suggest that the appellant's late acceptance of his guilt would have been admissible had it not become apparent from evidence otherwise admissible in the appeal. The last consideration (co-operation *after* conviction) is expressly made relevant to sentencing by Rule 101(B)(ii), despite the absence of a *de novo* review of sentence. The Appeals Chamber held that evidence of such co-operation was thereby made admissible, in appropriate cases, in a sentence appeal.[27] The Appeals Chamber also held that, as all relevant information was already before it, it was unnecessary to remit the matter to a Trial Chamber,[28] having earlier stated that it had power to remit to a Trial Chamber the hearing of additional evidence which had been tendered pursuant to Rule 115.[29] No other evidence falling within Rule 101(B) was adduced before the Appeals Chamber.

14. On the other hand, where the nature of the error is such that it may be cured only by additional sentences to be imposed (or a new single sentence to cover additional convictions), the provisions of Rule 101(B) may apply to permit further relevant evidence to be adduced where that evidence is not already before the Appeals Chamber. Such a course was followed by the Appeals Chamber in *Prosecutor v Tadić*.[30] Tadić had been tried and convicted prior to the 1998 amendment to Rule 85, which now requires evidence relating to sentence to be given in the trial

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[26] *Prosecutor v Kupreškić et al*, IT-95-16-A, Appeal Judgment, 23 Oct 2001 ("*Kupreškić* Appeal Judgment"), pars 463 465.

[27] *Ibid*, par 463. Rule 101(B) relevantly provides: "In determining the sentence, the Trial Chamber shall take into account [...] such factors as [...] any mitigating circumstances including substantial cooperation with the Prosecutor by the convicted person before or after conviction [...]." None of the appellants has suggested that he wished to tender evidence of co-operation with the Prosecutor.

[28] *Ibid*, par 462.

[29] *Ibid*, par 70.

[30] *Prosecutor v Tadić*, IT-94-1-A, Judgment, 15 July 1999 ("*Tadić* Conviction Appeal Judgment").

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itself.[31] The evidence tendered in the separate hearing on sentence was limited to the nine counts upon which he had already been convicted. Tadić appealed separately against both his convictions and the sentences imposed in relation to them. On appeal against the convictions, the Appeals Chamber upheld a prosecution appeal against his acquittal on nine further counts. Because the Trial Chamber had already made findings sufficient to justify his conviction of those further nine counts, the Appeals Chamber entered convictions upon them.[32] It was agreed between the parties that, before hearing the appeal against the sentences which had been imposed earlier, it was preferable, in the circumstances of the case, to remit to a Trial Chamber to be designated by the President of the Tribunal the sentences to be imposed in relation to the additional convictions.[33] The appeal against sentence was adjourned pending those sentences being imposed.[34] Most of the additional convictions were based upon the facts which had already been considered on sentence in relation to the original convictions. Three of the new convictions, however, involved more serious facts than had previously been considered.[35] The proceedings before the designated Trial Chamber, which included the two judges of the original Trial Chamber who were still judges of the Tribunal, proceeded in accordance with Rule 101(B), but the proceedings were limited to the sentences to be imposed upon the new convictions. There was no consideration given to re-sentencing the accused in relation to the original convictions.

15. The appellants in the present case say that they wished to adduce before the new Trial Chamber evidence of their conduct since the original sentences were imposed, and of sentences imposed upon other accused persons.[36] None of this was sought to be adduced before the

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[31] Rule 85 is concerned with the presentation of evidence at the trial. In July 1998, the Rule was amended by adding: "(vi) any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment."

[32] *Ibid*, par 327.

[33] Order Remitting Sentencing to a Trial Chamber, 10 Sept 1999, p 3. The need for the President to designate a Trial Chamber to hear the matter arose because one of the three judges in the original Trial Chamber was no longer a judge of the Tribunal.

[34] It is significant that, albeit by agreement between the parties, the Appeals Chamber did not order a new trial on sentencing.

[35] In relation to the incident pleaded in paragraph 12 of the Second Amended Indictment, involving the killing of five men from the village of Jaskici, the Trial Chamber had convicted Tadić only of wilfully causing great suffering or serious injury to body or health, cruel treatment and inhumane acts (Counts 32, 33 and 34). The Appeals Chamber concluded that the only reasonable conclusion to be drawn was that the armed group to which Tadić belonged had killed the five men from Jaskici (Counts 29, 30 and 31): *Tadić* Conviction Appeal Judgment, par 183. Tadić was therefore convicted upon these three additional counts.

[36] Mucić Appellant's Brief, pars 7 *et seq*; Hazim Delić's Appellate Brief Following Remand for Re-Sentencing, 15 Jan 2002 ("Delić Appellant's Brief"), pars 40-44; Hazim Delić's Offer of Proof to the Appeals Chamber Related to his Statement in Mitigation of Punishment, 15 Jan 2002; Landžo Appellant's Brief, pars 26-27.

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Appeals Chamber when hearing the original appeal. If that evidence had been relevant to the appeals which they had brought against sentence, it should have been adduced at that stage. The Appeals Chamber, however, is satisfied that none of that evidence sought to be adduced before the new Trial Chamber was relevant to the issues which arose out of the Appeals Chamber Judgment in relation to the adjustment of the original sentences imposed, so that the failure of the appellants to have adduced it at that earlier stage has not prejudiced them. In these circumstances, the Appeals Chamber would not have been conducting a new trial in relation to sentence if it had itself resolved the issues raised in the Appeals Chamber Judgment rather than remitting them to a new Trial Chamber. Rule 101(B) would not have required the Appeals Chamber to have regard to up-to-date evidence from the parties when determining those limited issues.

16. The powers of the Appeals Chamber in relation to an appeal are not limited to those expressly stated in Article 25 of the Tribunal's Statute or in Rule 117(C). As part of the Tribunal, it also has an inherent power, deriving from its judicial function, to control its proceedings in such a way as to ensure that justice is done.[37] The circumstances previously outlined prevented the Appeals Chamber from exercising its power to resolve those issues itself. In those circumstances, it had the inherent power to remit those issues to be determined by another Chamber to ensure that justice was done to the parties in relation to the issues raised by the Appeals Chamber Judgment.[38] The challenge to the power of the Appeals Chamber to remit limited issues is rejected.

17. Such an inherent power should not, of course, be exercised where any of the parties is thereby prejudiced. The appellants have argued that the procedure adopted in the present case denied them the right to adduce further evidence in order to bring up-to-date the material previously adduced in accordance with Rule 101(B). But, as already stated, the Appeals Chamber had the power to revise the sentences which had been imposed by resolving all of those issues itself in the course of its judgment without necessarily having to hear the parties further or to receive further evidence in relation to those issues. Once the Appeals Chamber exercised its

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[37] *Prosecutor v Tadić*, IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000 ("*Vujin* Judgment"), par 13, following *Prosecutor v Blaškić*, IT-95-14-AR108*bis*, Judgment on Request of Republic of Croatia for Review of Decision of Trial Chamber II of 18 July 1997, 29 Oct 1997 ("*Blaškić* Subpoena Decision"), footnote 27 (par 25); *Tadić* Conviction Appeal Judgment, par 322.

[38] It was no doubt this inherent power which the Appeals Chamber considered exercising in the *Kupreškić* Appeal Judgment, discussed in par 13, *supra*.

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inherent power to remit those limited issues to the Trial Chamber to be determined, the Trial Chamber had no power to go beyond determining the limited issues remitted to it. The Trial Chamber was not conducting a new trial on the issue of sentence, and – just as the situation would have been had the Appeals Chamber determined those limited issues itself – Rule 101(B) did not require the Trial Chamber to have regard to further evidence from the parties when determining those issues. The Trial Chamber's ruling, effectively that further evidence was inadmissible in the circumstances of this case, was correct. The argument that the Trial Chamber was obliged to receive further evidence in accordance with Rule 101(B) is rejected. The argument by Delić, that it was inappropriate to remit limited issues to a Trial Chamber which did not contain any judges from the original Trial Chamber (because none had been re-elected), depended upon the assertion that there had to be a new trial on sentencing. That argument, too, is rejected.

18. Where then is the prejudice to the appellants in the procedure adopted? They have lost nothing which they would have had if the Appeals Chamber had determined the issues for itself, and they were given something which they would not have had if the Appeals Chamber had determined the issues for itself – the opportunity (i) to be heard further upon those issues in the light of the judgment which was given, and (ii) to appeal if they were dissatisfied by the resolution of those issues. The procedure adopted was wholly in their favour. Their arguments that they were prejudiced by the procedure adopted are illusory.

19. Accordingly, there was no error made by the Appeals Chamber when it remitted the limited issues concerning the adjustment of the sentences imposed upon the appellants to a Trial Chamber, and there was no error made by the Trial Chamber when it considered only those limited issues which had been remitted to it and held that further evidence was unnecessary.

4 No adjustment for the dismissal of the Article 3 convictions

20. Prior to the Appeals Chamber Judgment, it had been usual within the Tribunal to convict an accused in relation to all crimes established in relation to the facts which had been proved to the satisfaction of the Trial Chamber, even though this resulted in multiple convictions based upon the same acts; potential issues of unfairness to the accused were addressed at the sentencing phase, usually by the imposition of concurrent sentences for all such multiple

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convictions.[39] The Appeals Chamber Judgment, however, determined that multiple criminal convictions entered relating to different offences but based upon the same conduct are permissible only if each such offence has a materially distinct element not contained in the other – that is, an element of each offence which requires proof of a fact not required by any element of the other offence.[40]

21. All three accused had been convicted cumulatively in relation to a number of counts under both Article 2 (Grave breaches of the Geneva Conventions of 1949) and Article 3 (Violations of the laws or customs of war) of the Statute. The conduct forming the factual basis of the charges was identical, and convictions were entered in relation to offences under both Articles in relation to that identical conduct. On appeal, the Appeals Chamber held that such convictions were impermissible, and it dismissed all cumulative Article 3 convictions.[41] As stated earlier, the Appeals Chamber remitted to the new Trial Chamber the issue of what adjustment, if any, should be made to the original sentences imposed to take account of the dismissal of the Article 3 convictions. The Appeals Chamber emphasised that the governing criterion in sentencing is that the sentence should reflect the totality of the offender's conduct (the "totality" principle), and that it should reflect the gravity of the offences and the culpability of the offender so that it is both just and appropriate.[42] The new Trial Chamber rejected the appellants' argument that, because the number of convictions had been reduced, the sentence should also be reduced,[43] and it concluded that, in relation to these three accused, "the totality of their criminal conduct has not been reduced by reason of the quashing of the cumulative convictions".[44]

22. The three appellants have submitted that their sentence should have been reduced as a result of their acquittal upon a number of charges because of impermissible cumulative convictions.[45] They claim that the only reason that the Appeals Chamber remitted their sentences to a new Trial Chamber was to have them reduced in light of those acquittals.[46] Although the Appeals Chamber had removed the prejudice which ensued from the cumulative

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[39] Appeals Chamber Judgment, pars 402-405.
[40] *Ibid*, par 412.
[41] *Ibid*, par 427.
[42] *Ibid*, par 429.
[43] Second Trial Chamber Judgment, par 42.
[44] *Ibid.*
[45] Mucić Appellant's Brief, pars 42-45; Delić Appellant's Brief, par 45; Landžo Appellant's Brief, pars 16-21.
[46] Mucić Appellant's Brief, par 46.

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convictions, it is said that it was the new Trial Chamber's duty and responsibility to remove the prejudice which ensued from the cumulative *sentencing*.[47] In case of doubt as to whether or not the cumulative conviction may have had an effect on the sentence, the appellants say, the new Trial Chamber should have assumed that it *did* have such an effect and it should therefore have reduced their respective sentence accordingly.[48]

23. In response, the prosecution has argued that the appellants have failed to establish that the new Trial Chamber erred in law or that it committed a discernible error in the exercise of its sentencing discretion by not reducing the sentences as a result of the acquittal in relation to Article 3 counts. The prosecution says that the appellants are merely repeating arguments which they had unsuccessfully made before the Trial Chamber.[49] The new Trial Chamber was not bound to reduce the sentence, but was directed by the Appeals Chamber to determine whether an adjustment should be made and, if so, to determine the extent of that adjustment.[50] The prosecution has argued that the original Trial Chamber had sentenced the appellants "on the basis of the underlying conduct rather than for how such conduct was characterised",[51] that the new Trial Chamber had correctly accepted that the original Trial Chamber had avoided double punishment for the same conduct,[52] and that the new Trial Chamber's decision demonstrates that it too was well aware that the final sentence must reflect the totality principle.[53]

24. The appellants' argument that the new Trial Chamber was obliged to reduce their sentences as a result of the cumulative convictions being quashed necessarily fails. The Appeals Chamber was prepared only to say that, if such convictions had not been entered, a different outcome in terms of the length and manner of sentencing "might" have resulted.[54] It specifically directed the new Trial Chamber to determine what adjustment "if any" should be made,[55] and the Appeals Chamber commented that the new Trial Chamber "will no doubt consider whether the remarks of the original Trial Chamber indicated that there should be no adjustment downwards

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47 *Ibid*, par 49.
48 Mucić Appellant's Brief, pars 55-56; Delić Appellant's Brief, pars 46-48, 51; Landžo Appellant's Brief, pars 22, 24.
49 Prosecution Respondent's Brief, par 4.7.
50 *Ibid*, par 4.9.
51 *Ibid*, pars 4.15-16.
52 *Ibid*, par 4.13.
53 *Ibid*, par 4.12.
54 Appeals Chamber Judgment, par 431.
55 *Ibid*, Disposition, par 2.

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in the sentences imposed".[56] A conclusion that no reduction was appropriate was thus within the contemplation of the Appeals Chamber at that time.

25. It may be accepted that the cumulative convictions of themselves involve an additional punishment – not only by reason of the social stigmatisation inherent in being convicted of that additional crime, but also the risk that, under the law of the State enforcing the sentence, the eligibility of a convicted person for early release will depend to some extent upon the number or nature of the convictions entered. The quashing of the cumulative convictions undoubtedly removed the punishment involved in the additional convictions themselves. The issue which the new Trial Chamber had to determine in the circumstances of the present case was whether, in determining the length of the concurrent sentences imposed, the original Trial Chamber had also added to the length of those concurrent sentences because of those additional convictions. As already stated, the new Trial Chamber concluded that the totality of the appellants' criminal conduct had not been reduced by reason of the quashing of the cumulative convictions, and that the original Trial Chamber had this factor specifically in mind in passing "sentences which clearly would have been the same without the cumulative convictions".[57] Accordingly, it made no adjustment to the sentences by reason of the quashing of the cumulative convictions. The issue which the Appeals Chamber now has to determine is whether this conclusion of the new Trial Chamber was open to it.

26. The original Trial Chamber made it clear that its decision to make the sentences imposed concurrent was intended to avoid any prejudice to the appellants by reason of the cumulative convictions. In its judgment,[58] it referred to a defence motion brought early in the case challenging the form of the indictment, complaining (*inter alia*) of the cumulative charging "which without any base multiplies the responsibility of the accused".[59] The Trial Chamber, in rejecting this complaint, had relied upon a passage taken from a decision in an earlier case,[60] which it adopted in the present case:

> In any event, since this is a matter that will only be at all relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged

[56] *Ibid*, par 769. See also pars 710-712.
[57] Second Trial Chamber Judgment, par 42.
[58] First Trial Chamber Judgment, par 1286.
[59] Motion Based on Defects in the Form of the Indictment, 3 July 1996, p 6.
[60] *Prosecutor v Tadić*, IT-94-1-PT, Decision on Defence Motion on Form of Indictment, 14 Nov 1995, par 17.

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> cumulatively or in the alternative. **What is to be published by penalty is proven criminal conduct and that will not depend upon the technicalities of pleading.**[61]

The Trial Chamber added in that decision that such reasoning was similarly applicable in the present case. In its judgment, having referred to that decision, the Trial Chamber went on to say:[62]

> It is in this context that the Trial Chamber here orders that each of the sentences is to be served concurrently. The sentence [*sic*] imposed shall not be consecutive.

27. In the light of this material, the conclusion by the new Trial Chamber that the sentences "clearly would have been the same without the cumulative convictions" was open to the Trial Chamber. Accordingly, the challenge by all three appellants to the new Trial Chamber's determination that no adjustment should be made for the dismissal of the Article 3 convictions is rejected. That disposes of both issues raised by Landžo, and his appeal will accordingly be dismissed.

5 Extent of reduction given to Mucić for adverse reference to the absence of evidence from him at the trial

28. When assessing the factors relevant to sentencing, the original Trial Chamber had stated:[63]

> Zdravko Mucić has declined to give any oral evidence, notwithstanding the dominant position he played in the facts giving rise to the prosecution of the accused persons.

The Appeals Chamber held that the Trial Chamber had, by that statement, erroneously regarded Mucić's failure to give evidence in an adverse light and that, although it was not clear whether the Trial Chamber had regarded this as an aggravating factor, its remark "leaves open the real possibility that it did so".[64] Accordingly, the Appeals Chamber concluded that the Trial Chamber had erred, and it remitted to the new Trial Chamber the determination of the effect, if any, of that error on the sentence originally imposed on Mucić,[65] together with its task of determining the length of an appropriately revised sentence for Mucić following the

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[61] The emphasis has been added; it does not appear in either the original Decision or the original Trial Chamber's Judgment.
[62] First Trial Chamber Judgment, par 1286.
[63] *Ibid*, par 1251.
[64] Appeals Chamber Judgment, par 785.
[65] *Ibid*, Disposition, par 3.

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determination by the Appeals Chamber that the sentence of seven years imposed by the original Trial Chamber was inadequate.[66]

29. The new Trial Chamber stated that "it is not possible [...] to ascertain the precise effect, if any, which the comment may have had on his sentencing", but that it was "not in a position to say that it had no effect".[67] "Under those circumstances", the new Trial Chamber continued:[68]

> [...] the Trial Chamber is of the view that, since it may have had an effect, the original sentence should be reduced accordingly. However, this can be given proper effect by a small reduction, and the Trial Chamber considers that a single sentence of nine years' imprisonment is appropriate.

This was one year less than the sentence of "around ten years" which the Appeals Chamber had indicated that it would have imposed in substitution for the original sentence of seven years imposed by the original Trial Chamber had it not had to take into account the dismissal of the cumulative convictions.[69] However, as will be demonstrated shortly, the new Trial Chamber did not assess any specific reduction resulting from the adverse inference.

30. Mucić complains that he was entitled to a much more substantial reduction than a "token" reduction of one year.[70] He says that the error made by the original Trial Chamber was so basic a defect, by ignoring the burden and standard of proof, that it went "to the heart of the criminal process", and that the redress to which he is entitled had to be "as fundamental as the original error may well have been".[71] Unless the adjustment for such an error was not also fundamental, he has said, there would be no confidence in the criminal justice system.[72] The prosecution responded that the new sentence of nine years was within the new Trial Chamber's sentencing discretion.[73]

31. The approach taken by Mucić is itself fundamentally defective. If an error is made by a sentencing tribunal, the appellate tribunal does not compensate the appellant for the fact that an error was made; it adjusts the sentence to remove the effect of the error which was made. The

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[66] *Ibid*, Disposition, par 4. The appeal by Mucić against this determination by the new Trial Chamber is considered in the next Section of this Judgment.
[67] Second Trial Chamber Judgment, par 27.
[68] *Ibid.*
[69] Appeals Chamber Judgment, Disposition, par 4.
[70] Mucić Appellant's Brief, pars 37-41.
[71] Oral hearing of appeal, 18 June 2002, Transcript p 51-52.
[72] *Ibid*, Transcript p 54.
[73] Prosecution Respondent's Brief, pars 5.8-12.

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fact that the error may have been a serious one from a lawyer's point of view does not alter the issue for the re-sentencing tribunal, which is to determine what the proper sentence should have been if the error had not been made. Moreover, the new Trial Chamber did *not* express the reduction which it allowed by reason of the error made as one of one year. It merely said that the reduction to be allowed should be a "small" one. It did so because it was also determining the length of an appropriately revised sentence for Mucić following the determination by the Appeals Chamber that the sentence of seven years imposed by the original Trial Chamber was inadequate. The new Trial Chamber correctly approached that issue upon the basis of an overall assessment of what was appropriate without reference to the absence of any evidence from Mucić, and it did not break that assessment up into separate compartments.

32. The issue which the Appeals Chamber has to determine is whether the new Trial Chamber's characterisation of the reduction warranted by the erroneous reference to the absence of evidence from Mucić as "small" was erroneous. The Appeals Chamber is not persuaded that the new Trial Chamber erred in doing so. The complaint is rejected.

6 Nine-year sentence imposed upon Mucić

33. The issue which had been remitted to the new Trial Chamber was the determination of an appropriately revised sentence for Mucić following the decision of the Appeals Chamber that the effective original sentence of seven years was inadequate, with the guidance from the Appeals Chamber that, had it not been necessary to take into account a possible adjustment in sentence because of the dismissal of the Article 3 counts, it would have imposed a sentence of around ten years.[74] As the new Trial Chamber determined that no adjustment should be made for the dismissal of the Article 2 convictions, the guidance given by the Appeals Chamber became more directly relevant to its decision, although (as already stated) the new Trial Chamber had to assess the whole of Mucić's criminal conduct without reference to the absence of any evidence from Mucić which the original Trial Chamber had erroneously taken into account.[75]

34. Leaving aside the impermissibly cumulative convictions for violations of the laws or customs of war, Mucić was found guilty by the original Trial Chamber of grave breaches of the

[74] See par 4(iv), *supra*.
[75] See par 31, *supra*.

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Geneva Conventions, as having been *directly* responsible, under Article 7(1) of the Tribunal's Statute, for the following crimes:

(1) **Wilfully causing great suffering or serious injury to body or health by virtue of the inhumane conditions in the camp** (Count 46). The Trial Chamber found that the detainees:[76]

> [...] were exposed to conditions in which they lived in constant anguish and fear of being subjected to physical abuse. Through the frequent cruel and violent deeds committed in the prison-camp, aggravated by the random nature of these acts and the threats made by guards, the detainees were thus subjected to an immense psychological pressure which may accurately be characterised as 'an atmosphere of terror'.

The Trial Chamber also found that the detainees were deprived of adequate food, access to water, medical care and sleeping and toilet facilities.[77] Mucić was found to have "participated in the maintenance of the inhumane conditions that prevailed" in the camp by omitting to provide these necessities.[78]

The Trial Chamber imposed a sentence of imprisonment for seven years for this offence.[79]

(2) **Unlawful confinement of civilians** (Count 48). The Trial Chamber found that "the detention of civilians in the Čelebići prison-camp was not in conformity with the relevant provisions of Geneva Convention IV", and it found that Mucić had the "primary responsibility for, and had the ability to affect, the continued detention of civilians".[80]

The Trial Chamber imposed a sentence of imprisonment for seven years for this offence.[81]

In addition, Mucić was found guilty by the original Trial Chamber of grave breaches of the Geneva Conventions, as having been responsible as a *superior*, under Article 7(3), for the following crimes (which had been committed by his subordinates):

(3) **Wilful killing of nine detainees and cruel treatment and wilfully causing great suffering or serious injury to a tenth detainee** (Count 13). Eight detainees died as a result of beatings by guards, and one was shot when he attempted to escape from a beating. The beating of one detainee was conducted with rifle butts and other wooden

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[76] First Trial Chamber Judgment, par 1091.
[77] *Ibid*, pars 1092-1111.
[78] *Ibid*, par 1123.
[79] *Ibid*, par 1285 (p 443).
[80] *Ibid*, pars 1142, 1145.
[81] *Ibid*, par 1285 (p 443).

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and metal objects and continued for a period of several hours. Another detainee was subjected to a similar beating at the same time as the first, and died the next day in his son's arms. A third detainee was already seriously injured when he arrived at the camp, and was then subjected to further beatings.[82]

The Trial Chamber imposed a sentence of imprisonment for seven years for this offence.[83]

(4) **Torture of six detainees** (Count 33). One detainee was imprisoned by another accused, Delić, in a manhole for at least a night and a day without food or water, and was then beaten with a number of objects, including shovels and electric wires.[84] A second detainee was rendered unconscious after being kicked and hit with "karate chops" by another accused, Landžo, then forced to hold a heated knife, causing serious burns, and finally cut twice on his head with the knife.[85] A third detainee had a gas mask placed over his face by Landžo and tightened to block his air supply, then burnt on the hand, leg and thighs with a heated knife, then forced to eat grass and to drink water with his mouth full of clover while being kicked and hit.[86] A fourth detainee had his mouth forced open by Landžo in order to insert a pair of heated pincers on his tongue, causing burns to his mouth lips and tongue, and he was then burnt in the ear with the pincers.[87] A fifth detainee, a woman, was raped twice by Delić in the presence of other guards.[88] A sixth detainee, also a woman, was raped after being ordered to lie on the bed, with a rifle being pointed at her.[89]

The Trial Chamber imposed a sentence of imprisonment for seven years for this offence.[90]

(5) **Wilfully causing great suffering or serious injury to three detainees** (Count 38). One detainee was forced by Landžo to do push-ups whilst being kicked and hit with a baseball bat. Another detainee had a burning fuse cord placed against his genitals by Landžo. A third detainee was so seriously injured from beatings received before he arrived at the

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[82] *Ibid*, pars 876-877, 889, 891, 893, 901-902, 907.
[83] *Ibid*, par 1285 (p 441).
[84] *Ibid*, pars 1005-1007.
[85] *Ibid*, par 918.
[86] *Ibid*, par 971.
[87] *Ibid*, par 995.
[88] *Ibid*, par 937.
[89] *Ibid*, par 958.
[90] *Ibid*, par 1285 (p 442).

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camp that he was unable to stand with his hands against a wall as ordered, and he was hit several times before being pulled away.[91]

The Trial Chamber imposed a sentence of imprisonment for seven years for this offence.[92]

(6) **Inhuman treatment of six detainees** (Count 44). A device similar to a cattle prod which emitted electric shocks was used by Delić on the neck of one detainee and on the bare chest of another detainee, causing the second detainee pain, burns, convulsions, twitching and scarring, despite his plea for mercy.[93] Two detainees, who were brothers, were forced by Landžo to commit fellatio upon each other in full view of a large number of other detainees.[94] Another two detainees, who were father and son, were forced by Landžo to beat each other over a period of ten minutes, being ordered to hit each other harder.[95]

The Trial Chamber imposed a sentence of imprisonment for seven years for this offence.[96]

(7) **Wilfully causing great suffering or serious injury to body or health by virtue of the inhumane conditions in the camp** (Count 46). The conviction under this count related to both Mucić's superior responsibility for the actions of his subordinates (described in par (1), *supra*) and to his own direct responsibility for his participation in the maintenance of the inhumane conditions which prevailed.

The Trial Chamber appears to have intended to include the superior responsibility of Mucić for this offence in the sentence of imprisonment for seven years imposed for his direct responsibility under the same count.[97]

Each of the sentences was ordered to be served concurrently,[98] thus producing for Mucić an effective total sentence of imprisonment for seven years for these convictions. There are twenty-four individual victims named in these convictions for superior responsibility.

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[91] *Ibid*, pars 1025-1026, 1030-1034, 1037-1040, 1047. There is an apparent inconsistency between the findings in pars 1026 and 1047, but no point has been taken in relation to that inconsistency.
[92] *Ibid*, par 1285 (p 442).
[93] *Ibid*, pars 1053-1059.
[94] *Ibid*, pars 1064-1065.
[95] *Ibid*, par 1069.
[96] *Ibid*, par 1285 (p 443).
[97] *Ibid*, pars 1239-1240. The Appeals Chamber criticised the Trial Chamber for having failed to consider the sentence to be imposed as if two separate offences were encompassed in the one count: Appeals Chamber Judgment, par 745.
[98] *Ibid*, par 1286.

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35. The Appeals Chamber held that the effective sentence of seven years imposed by the original Trial Chamber failed adequately to take into account:

(a) the influential effect of encouraging or promoting crimes and an atmosphere of lawlessness within the camp created by the ongoing failure of Mucić to exercise his duties of supervision;[99]

(b) the gravity of Mucić's offences, and specifically of the underlying crimes;[100] and

(c) the fact that both direct and superior responsibility was involved in the wilful causing of great suffering or serious injury to body or health by virtue of the inhumane conditions in the camp (Count 46) required it either to treat Count 46 as charging two offences or to treat each responsibility as aggravating the seriousness of the other.[101]

36. It was in this context that the Appeals Chamber expressed the view that it would have imposed a sentence of "around ten years".[102] The Appeals Chamber added that the new Trial Chamber was entitled to pay regard to that indication in its own determination of the new sentence.[103] The new Trial Chamber stated that, although it was not bound by that indication, it was "plainly appropriate" that it should take it into account, treating the word "around" as leaving the sentence to be imposed to the discretion of the Trial Chamber.[104] As already stated, the Trial Chamber imposed a single sentence of imprisonment for nine years.[105]

37. Many of the arguments put by Mucić in support of his appeal against the length of the sentence imposed by the new Trial Chamber were put by him in his appeal against the original sentence of seven years and were rejected by the Appeals Chamber in its previous judgment. It is not proposed to revisit those issues in this present judgment. Other arguments were directed to the refusal of the new Trial Chamber to permit further evidence to be given before it. These have already been rejected in Section 3 of the present judgment. Yet further arguments should have been raised in the earlier appeal if they were to be relied on but were not raised, and it is too

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[99] Appeals Chamber Judgment, par 740.
[100] *Ibid*, par 741.
[101] *Ibid*, pars 745-746.
[102] *Ibid*, par 853.
[103] *Ibid*, par 854.
[104] Second Trial Chamber Judgment, par 26. See also Sentencing hearing, 21 Sept 2001, Transcript p 28.
[105] Second Trial Chamber Judgment, par 27. At the time the original Trial Chamber sentenced the three appellants, Rule 87(C) limited the inherent power of any court to impose a single sentence reflecting the totality of the criminal conduct of the accused, and required a Trial Chamber to impose separate sentences in relation to each finding of guilt. That restriction was removed in December 2000 (IT/32/Revision 19), and the power to impose such a single sentence is now unrestricted.

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late now to attempt to reargue that appeal. They were beyond the scope of the remit to the new Trial Chamber, and therefore beyond the scope of this present appeal, which relates solely to the decision of the new Trial Chamber. Otherwise, no specific arguments were directed to the length of the nine year sentence which the new Trial Chamber imposed.

38. It is nevertheless perhaps appropriate to mention one of the issues now raised which is outside the scope of the present appeal, if only for the purpose of expressly refuting it. Mucić has complained that the "ceiling" of "around ten years" suggested by the Appeals Chamber unacceptably prejudged the sentence to be imposed by the new Trial Chamber.[106] This complaint is manifestly unfounded. The Appeals Chamber made it clear that this was no more than an indication to which the new Trial Chamber could pay regard if it wished to. The Appeals Chamber, possessing the power to impose its own sentence for that imposed by the original Trial Chamber, was entitled to express that view for the guidance of the new Trial Chamber as its own assessment of the cumulative effect of the errors which it had identified as having been made by the original Trial Chamber. The new Trial Chamber accepted what the Appeals Chamber said as no more than an indication, and with the full understanding that the Appeals Chamber had left the length of the new sentence to the discretion of the Trial Chamber. Once alleged errors of law are put to one side, this present appeal, like any sentence appeal, is concerned only with whether the Trial Chamber erred in the exercise of its discretion as to the length of the sentence it imposed. There would have been no error in the exercise of its discretion if the Trial Chamber had declined to pay regard to the indication which the Appeals Chamber had previously given, or if, having paid regard to it, the Trial Chamber had imposed a sentence which, although significantly different to the "around ten years" indicated, remained within its discretionary power. To suggest otherwise betrays a fundamental misunderstanding of the nature of sentence appeals.

39. The sentence which is appropriate must reflect the inherent gravity of the criminal conduct of Mucić, and it requires a consideration of the particular circumstances of this case, as well as the form and degree of the participation of Mucić in the crimes for which he was convicted.[107] That criminal conduct was serious, as the brief description of that conduct already

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[106] Mucić Appellant's Brief, par 28. The use of the word "ceiling" was inappropriate; the Appeals Chamber has interpreted the complaint as asserting that the Appeals Chamber had identified ten years as the *minimum* which could be imposed.

[107] *Aleksovski* Appeal Judgment, par 182; Appeals Chamber Judgment, par 731.

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given vividly illustrates. Despite all of the matters which he has urged in mitigation at all stages, Mucić has failed to persuade the Appeals Chamber that the new Trial Chamber made any errors of law, or that it erred in the exercise of its discretion, in imposing a sentence of nine years in the present case. That disposes of all issues raised by Mucić, and his appeal will accordingly be dismissed.

7 Reduction of sentence for Delić following quashing of one wilful killing conviction

40. Again leaving aside the impermissibly cumulative convictions for violations of the laws or customs of war, Delić was found guilty by the original Trial Chamber of grave breaches of the Geneva Conventions, as having been *directly* responsible, under Article 7(1) of the Tribunal's Statute, for the following crimes:

(1) **Wilful killings of Šćepo Gotovac and of Željko Milošević** (Counts 1 & 3). The Trial Chamber found that Gotovac was twice severely beaten by Delić and Landžo within a short period of time, that on the second occasion a metal badge was pinned to his forehead, and that a consequence of the second beating Gotovac died sometime later.[108] This is the conviction which the Appeals Chamber quashed, upon the basis that no reasonable tribunal of fact could be satisfied beyond reasonable doubt that Delić had participated in the second beating.[109]

The Trial Chamber imposed a sentence of imprisonment for twenty years for this offence.[110]

The Trial Chamber also found that Delić had inflicted numerous beatings on Milošević whilst he was detained in the camp, that, following the refusal of Milošević to comply with the requirement of Delić that he make certain confessions to journalists visiting the camp, Delić had later beaten Milošević severely for a period of at least an hour, and that Milošević later died as a consequence of that beating.[111]

The Trial Chamber imposed a sentence of imprisonment for twenty years for this offence.[112]

(2) **Wilfully causing great suffering or serious injury to body or health of Slavko Šušić** (Count 11). The indictment charged Delić and Landžo with, *inter alia*, the wilful killing

[108] First Trial Chamber Judgment, pars 817-818.
[109] Appeals Chamber Judgment, par 459.
[110] First Trial Chamber Judgment, par 1285 (p 443).
[111] *Ibid*, pars 832-833.
[112] *Ibid*, par 1285 (p 444).

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of Šušić. The Trial Chamber found that Delić and Landžo had mistreated Šušić over a continuous period in order to persuade him to reveal the location of a radio transmitter which he was suspected of using to guide Serb gun fire into his village, that when he did not respond they subjected him to serious mistreatment, including a beating with a heavy implement, that when a search of his house failed to recover the transmitter he was again subjected to a further severe beating, and that he later died. The Trial Chamber was not satisfied beyond reasonable doubt that his death was the direct consequence of the beatings and mistreatment by Delić and Landžo, and accordingly entered a conviction for the lesser offence of wilfully causing Šušić great suffering or serious injury to his body or health.[113]

The Trial Chamber imposed a sentence of imprisonment for seven years for this offence.[114]

(3) **Tortures by way of rape of Grozdana Ćećez and of Witness A** (Counts 18 & 21). The Trial Chamber found that Ćećez was interrogated by Delić upon her arrival at the camp, that he slapped her during the course of that interrogation, that she was subsequently raped by him in the presence of other guards, and that he had done so in order to obtain information about her husband who was considered to be an armed rebel, to coerce and to intimidate her into giving that information, to punish her for her inability to give that information, to punish her for her husband's acts and to intimidate other detainees by creating an atmosphere of fear and powerlessness. The rape caused Ćećez to live in a state of constant fear and depression, suicidal tendencies and exhaustion.[115]

The Trial Chamber imposed a sentence of imprisonment for fifteen years for this offence.[116]

The Trial Chamber found that Witness A was also raped by Delić, on three occasions: the first upon her arrival at the camp, after Delić had interrogated her and threatened to shoot her and to have her transferred to another camp if she did not comply with his orders; the second at the same place, where he was seated in uniform with a pistol and a rifle, when he had anal intercourse with her, causing her to bleed, and then he had vaginal intercourse with her; and the third at a time when Delić, armed with hand grenades, a pistol and a rifle, had vaginal intercourse with her. The Trial Chamber found

[113] *Ibid*, pars 861-866.
[114] *Ibid*, par 1285 (p 444).
[115] *Ibid*, pars 937-941.
[116] *Ibid*, par 1285 (pp 444-445).

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that each of the rapes was committed in order to intimidate, coerce and punish Witness A, that the first was also to obtain information from her, and that each of the rapes caused Witness A severe mental and physical pain and suffering.[117]

The Trial Chamber imposed a sentence of imprisonment for fifteen years for this offence.[118]

(4) **Inhuman treatment of detainees** (Count 42). The facts supporting this count have already been briefly described when discussing the superior responsibility of Mucić for the conduct of Delić.[119] The Trial Chamber found that Delić had used a device similar to a cattle prod which emitted electric shocks on the chest of one detainee, just below his neck. On another occasion, Delić made another detainee to remove his shirt and then used the device on his bare chest, causing him to fall over. Delić then applied the device to his chest again for a prolonged period. The Trial Chamber found that Delić had used this device on numerous detainees in the camp, causing pain, burns, convulsions, twitching and scarring, despite their pleas for mercy, and that that Delić derived sadistic pleasure from the use of this device and from the suffering and humiliation he caused.[120]

The Trial Chamber imposed a sentence of imprisonment for ten years for this offence.[121]

(5) **Wilfully causing great suffering or serious injury to body and health by virtue of the inhumane conditions in the camp** (Count 46). In support of his conviction upon this count, the Trial Chamber took into account the facts supporting the other counts upon which Delić had been convicted.[122] The Appeals Chamber noted in its earlier judgment that, notwithstanding the quashing of the conviction for the wilful killing of Šćepo Gotovac, it would nevertheless have been appropriate for the Trial Chamber to take into account under this count the fact that Delić had participated in the first of the beatings of Gotovac.[123] The Trial Chamber also found that Delić had participated in the beating of a number of groups of detainees, as indicative of the degree of influence Delić had within the Čelebići camp "on some occasions" in the criminal mistreatment of detainees.[124] It accepted evidence that there were severe restrictions upon the water which could be

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[117] *Ibid*, pars 958-964.
[118] *Ibid*, par 1285 (p 445).
[119] Paragraph 34(6), *supra*.
[120] First Trial Chamber Judgment, pars 1054-1058.
[121] *Ibid*, par 1285 (p 446).
[122] *Ibid*, par 1121.
[123] Appeals Chamber Judgment, par 510.
[124] First Trial Chamber Judgment, pars 804, 806.

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drunk by detainees, particularly during hot Summer days, despite there being no shortage of water available,[125] and that, under the threat of heavy beatings and even death, not a drop of water could be brought into the camp without the knowledge and permission of Delić,[126] that Delić told detainees who had requested medical care that they would die anyway, with or without medical assistance,[127] and that Delić severely restricted access to toilet facilities.[128] Although the Trial Chamber was not satisfied that Delić was responsible generally for the living conditions within the camp, it found that, by virtue of his direct participation in those specific acts of violence found against him, he had directly participated in the creation and maintenance of an atmosphere of terror in the Čelebići camp.[129] The Trial Chamber described Delić has having shown a "total disregard for the sanctity of human life and dignity" and as having acted with a "general sadistic motivation".[130]

The Trial Chamber imposed a sentence of imprisonment for seven years for this offence.[131]

Each of the sentences was ordered to be served concurrently,[132] thus producing for Delić an effective total sentence of imprisonment for twenty years for these convictions. An appeal by Delić against that effective total sentence was dismissed by the Appeals Chamber,[133] subject to the adjustment to the length of the sentence resulting from the quashing of the conviction for the wilful killing of Šćepo Gotovac.[134]

41. The new Trial Chamber correctly proceeded upon an acceptance of these findings (other than those relating to the wilful killing of Šćepo Gotovac) in order to determine the appropriate sentence to be imposed upon Delić as a result of the quashing of that conviction. At the hearing before the new Trial Chamber, Delić submitted that the consequential reduction in his overall criminality should result in a reduction which was not "slight" (as the prosecution had argued), but one which reflected the fact that a conviction of murder has been quashed.[135] He suggested

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[125] *Ibid*, pars 1097-1100.
[126] *Ibid*, par 1097, referring to the Trial Transcript, pp 7706-7707, and par 1098.
[127] *Ibid*, par 1104.
[128] *Ibid*, par 1109.
[129] *Ibid*, par 1121.
[130] *Ibid*, pars 1268-1269.
[131] *Ibid*, par 1285 (p 446).
[132] *Ibid*, par 1286.
[133] Appeals Chamber Judgment, par 825.
[134] *Ibid*, par 713.
[135] Hazim Delić's Brief on Re-Sentencing, 22 June 2001, pars 58-63.

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that an appropriate sentence would be one of approximately fifteen years.[136] During the hearing before the Trial Chamber, it was submitted on his behalf:[137]

> It's hard to determine, from reading the original Trial Chamber's judgment, how much of the total global sentence assessed against Mr Delić was based on the facts of the murder of Šćepo Gotovac, counts 1 and 2 in the indictment.

42. As already stated, the new Trial Chamber imposed a single sentence of imprisonment for eighteen years.[138] It said:[139]

> Having considered all these factors, the Trial Chamber finds that, following his appeal, there has been some reduction in the totality of criminality of the accused. Nonetheless, that reduction is slight given the very serious offences for which the accused remains convicted. Accordingly, the Trial Chamber considers that a reduction of two years in the sentence would correctly reflect the total criminality of the accused, and that a single sentence of 18 years is therefore appropriate.

43. On appeal, Delić complains, first, that the Trial Chamber abused its discretion by changing the issue which had been remitted to it by the Appeals Chamber.[140] The Trial Chamber stated in its judgment that the issue which had been remitted was:[141]

> What adjustment, if any, should be made to the sentence imposed on Delić as a result of the quashing of his convictions on counts 1 and 2;

The Appeals Chamber had not used the words "if any" when remitting that issue.[142] However, this complaint by Delić gives every appearance of being an afterthought. The Trial Chamber, from the beginning of the proceedings before it, had identified the issue remitted to it in these terms,[143] Delić himself used the same terms in his appellant's brief before the Trial Chamber,[144] and he raised no objection at the hearing before the Trial Chamber when the Presiding Judge

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[136] *Ibid.*
[137] Sentencing hearing, 21 Sept 2001, Transcript pp 34-35.
[138] Second Trial Chamber Judgment, par 33.
[139] *Ibid.*
[140] Delić Appellant's Brief, pars 53-55.
[141] Second Trial Chamber Judgment, par 6(i).
[142] The Appeals Chamber said: "It would be convenient, when the matter is remitted, for the new Trial Chamber also to consider what adjustments should be made to the sentence of Delić in relation to the reversal of his conviction" (par 713).
[143] Decision on Motion for Clarification and Joint Motion for Extension of Time, 25 May 2001, p 3: "1. What adjustment, if any, should be made to the sentence of Hazim Delić after the Appeals Chamber quashed his convictions on Counts 1 and 2 of the Indictment".
[144] Hazim Delić's Brief on Re-Sentencing, 22 June 2001, par 1.

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used those terms again early in the hearing.[145] In any event, Delić goes too far in his argument that the Trial Chamber had, by the inclusion of the words "if any", "changed" the issue remitted to it. Even if the inclusion of those words had the effect of impermissibly *adding* to the issue remitted a further issue as to whether any adjustment should be made at all, no prejudice could be demonstrated by such an addition because, in the event, the Trial Chamber determined that the original sentence should be adjusted by reducing it. The complaint is rejected.

44. Delić complains, secondly, that the sentence imposed by the new Trial Chamber was an "unappropriate" adjustment to his sentence. He submits that the killing of Šćepo Gotovac, "an old and sick man", was the "worst" of all the crimes for which he had been convicted by the original Trial Chamber.[146] He claims that all the Trial Chamber's conclusions concerning his "bad behaviour" and the gravity of his crimes, "were mostly based on that crime", and that such conclusions could not remain after this particular conviction was quashed.[147] He also claims that his total criminality has been "considerably" lowered, and submits that the original sentence should be reduced by at least five years.[148] In response, the prosecution submits that it has not been demonstrated that the Trial Chamber made any error of law or that it erred in the exercise of its sentencing discretion, and that, in view of the overall gravity of his acts and the principle of totality, the sentence imposed upon Delić was not outside the Trial Chamber's discretionary framework provided by the Statute and the Rules.[149]

45. The approach taken by Delić both before the new Trial Chamber and in the present appeal appears to proceed upon the basis that the reduction of his sentence should have been assessed by subtracting from the effective total of twenty years a period which could be identified as relating to the wilful killing of Šćepo Gotovac. Such an approach would be erroneous. The original Trial Chamber, by ordering that all of its sentences imposed upon Delić were to be served concurrently, had assessed a total term of twenty years to be appropriate to the totality of his criminal conduct for all of the convictions which it had entered, a term which the Appeals Chamber held was not disproportionate.[150] The task of the new Trial Chamber was to

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[145] Sentencing hearing, 21 Sept 2001, Transcript pp 7-8: "Three matters arise for consideration by the Trial Chamber as remitted to it by the Appeals Chamber: First, to consider what adjustments, if any, should be made to the sentence imposed on Hazim Delić as a result of the quashing of his convictions on Counts 1 and 2".
[146] Delić Appellant's Brief, par 59.
[147] *Ibid*, par 59.
[148] *Ibid*, pars 59-60.
[149] Prosecution Respondent's Brief, pars 7.16-7.20, 7.24-7.28.
[150] Appeals Chamber Judgment, par 825.

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assess the term which was appropriate to the totality of Delić's criminal conduct for all of the convictions which remained.

46. The principle of totality in sentencing where an offender is being sentenced in relation to more than one offence has been recognised and accepted by the Tribunal in a number of cases. In the earlier appeal in the present case, the Appeals Chamber stated that the "final" sentence (that is, the effective total sentence):[151]

> [...] should reflect the totality of the culpable conduct (the 'totality' principle), or generally, that it should reflect the gravity of the offences and the culpability of the offender so that it is both just and appropriate.

The Appeals Chamber went on to describe the goal in such cases as being:[152]

> [...] to ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender. This can be achieved through either the imposition of one sentence in respect of all sentences, or several sentences ordered to run concurrently, consecutively or both. The decision as to how this should be achieved lies within the discretion of the Trial Chamber.

In other words, sentencing in relation to more than one offence involves more than just an assessment of the appropriate period of imprisonment for each offence and the addition of all such periods so assessed as a simple mathematical exercise. The total single sentence, or the effective total sentence where several sentences are imposed, must reflect the totality of the offender's criminal conduct but it must not exceed that totality. Where several sentences are imposed, the result is that the individual sentences must either be less than they would have been had they stood alone or they must be ordered to be served either concurrently or partly concurrently.

47. For these reasons, it would have been wrong for the new Trial Chamber to have attempted to assess the period which could be identified as relating to the wilful killing of Šćepo Gotovac, and then to subtract that period from the period of twenty years which had been imposed by the original Trial Chamber, as Delić has argued. The Trial Chamber did not do so. Just as in the case of Mucić, it correctly approached its task upon an overall assessment of what was appropriate without reference to the evidence supporting the count which was quashed. The statement made by the Trial Chamber has already been quoted.[153] As the Trial Chamber said, the offences for which Delić remains convicted are very serious. The Appeals Chamber is

[151] *Ibid*, par 429. The citations in the footnotes have been omitted, but they are instructive.
[152] *Ibid*, par 430.
[153] Paragraph 42, *supra*.

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satisfied that his criminal conduct deserved substantial punishment. He has failed to persuade the Appeals Chamber that the new Trial Chamber made any errors of law, or that it erred in the exercise of its discretion, in imposing a sentence of eighteen years in this case. That disposes of all the issues raised by Delić in relation to his appeal, which will accordingly be dismissed.

8 Application by Delić for reconsideration of his original appeal against conviction

48. Although this application was included in what is in form and substance an appeal against sentence, Delić made it clear that he was independently seeking to have the Appeals Chamber reconsider its decision dismissing his appeal against the convictions other than that relating to Šćepo Gotovac.[154] The prosecution argued, *inter alia*, that, since the earlier judgment of the Appeals Chamber in this case, the issue of those convictions was now *res judicata* and cannot be litigated further.[155] Delić argued that, according to the "law of the case" doctrine, a party is entitled to litigate issues which have already been decided when the strict application of the *res judicata* principle would cause "manifest injustice" to a party.[156] The prosecution responded that the "law of the case" doctrine did not apply in this Tribunal, and that in any event it could apply only "during the course of a single continuing lawsuit".[157] The Appeals Chamber observes that this application by Delić would appear to have been made during the course of a "single continuing lawsuit", but it does not find it necessary to resolve the issue which was debated.

49. The Appeals Chamber has an inherent power to reconsider any decision, including a judgment where it is necessary to do so in order to prevent an injustice. The Appeals Chamber has previously held that a Chamber may reconsider a decision, and not only when there has been a change of circumstances, where the Chamber has been persuaded that its previous decision was erroneous and has caused prejudice.[158] Whether or not a Chamber does reconsider its decision is itself a discretionary decision.[159] Those decisions were concerned only with interlocutory

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[154] Hazim Delić's Reply to the Prosecutor's Appellate Brief Following Remand for Re-Sentencing, 27 March 2002 ("Delić Reply Brief"), par 2.

[155] Prosecution Respondent's Brief, pars 6.15 *et seq.*

[156] Delić Appellant's Brief, par 3.

[157] Prosecution Respondent's Brief, pars 6.16-6.22.

[158] *Prosecutor v Galić*, IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 Dec 2001, par 13; *Prosecutor v Milošević*, IT-01-50-AR73, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, 16 May 2002, par 17. See also *Prosecutor v Kvočka et al*, IT-98-30/1-A, Decision on Further Request for Review by Zoran Žigić, 11 Mar 2003, par 6

[159] *Prosecutor v Bagosora et al*, ICTR-98-41-A, Decision on Interlocutory Appeal from Refusal to Reconsider Decisions Relating to Protective Measures and Application for a Declaration of "Lack of Jurisdiction", 2 May 2002, par 10.

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decisions, but the Appeals Chamber is satisfied that it has such a power also in relation to a judgment which it has given – where it is persuaded:

(a) (i) that a clear error of reasoning in the previous judgment has been demonstrated by, for example, a subsequent decision of the Appeals Chamber itself, the International Court of Justice, the European Court of Human Rights or a senior appellate court within a domestic jurisdiction, or

(ii) that the previous judgment was given *per incuriam*; and

(b) that the judgment of the Appeals Chamber sought to be reconsidered has led to an injustice.

50. It is now well accepted in the Tribunal's jurisprudence that it possesses an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by that Statute is not frustrated and that its basic judicial functions are safeguarded.[160] The principal purpose of the Tribunal's existence is to administer justice, and to ensure that its proceedings do not lead to injustice. The prevention of injustice arising from error is, in most systems, provided by rights of appeal. In the civil law system, the first level of appeal is usually a *de novo* rehearing, followed by two or more levels of appeal on matters of law, or on matters of both facts and law. In the common law system, there is usually no rehearing (except in relation to minor crimes tried before magistrates) but there is either one or two levels of appeal on matters of law, or on matters of mixed fact and law. Many common law systems, however, also provide for a reconsideration where a filtering authority (either the Attorney General or a government body) examines the basis for the reconsideration request and, where appropriate, refers it to a court of criminal appeal for such reconsideration.

51. This Tribunal has only one level of appeal. That is not a *de novo* rehearing but a limited form of appeal relating to errors on a question of law which invalidates the Trial Chamber's decision or an error of fact which has occasioned a miscarriage of justice.[161] The prospect of an injustice resulting from a judgment of the Appeals Chamber is not met by any further levels of

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[160] *Blaškić* Subpoena Decision, footnote 27 (par 25); *Vujin* Judgment, par 13; *Jelisić* Decision, p 3; *Prosecutor v Kupreškić et al*, IT-95-16-A, Decision on the Motions of Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić to Admit Additional Evidence, 26 Feb 2001, par 18 (this Decision was given on a confidential basis, but a redacted version was filed on 30 May 2001); *Prosecutor v Aleksovski*, IT-95-14/1-AR77, Judgment on Appeal by Anto Nobilo Against Finding of Contempt, 30 May 2001, par 30; *Prosecutor v Delić*, IT-96-21-R-R119, Decision on Motion for Review, 25 Apr 2002, par 18. See also par 16, *supra*.

[161] Tribunal's Statute, Article 25.

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appeal. Such a prospect must be met in some way to ensure that the Tribunal's proceedings do not lead to injustice. The right of review granted by Article 26 of the Tribunal's Statute is limited to the discovery of a new fact which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which could have been a decisive factor in reaching the decision. That right has been interpreted as excluding issues of law,[162] and it is therefore only a partial answer to the prospect of injustice. A partial answer still leaves outstanding a significant prospect of injustice. No court should allow that.

52. How then is the prospect of injustice to be prevented? The absence of any reference in the Tribunal's Statute to the existence of a power to reconsider is no answer to the prospect of injustice where the Tribunal possesses an inherent jurisdiction to prevent injustice. There was no reference in the Tribunal's Statute to the particular issues dealt with in the cases to which reference has already been made in which the Tribunal's inherent powers were exercised.[163] It was the very absence of any such reference which led to the exercise of those inherent powers, because it was necessary to do so in those cases in order to ensure that the Tribunal's exercise of the jurisdiction which is expressly given to it by that Statute was not frustrated and that its basic judicial functions were safeguarded. There is nothing in the Statute which is inconsistent with the existence of an inherent power of the Appeals Chamber to reconsider its judgment in the appropriate case. As was said by Lord Browne-Wilkinson, in the *Pinochet* Case in which the House of Lords agreed to reconsider its earlier judgment, given in proceedings for extradition on criminal charges.:[164]

> In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Broome v Cassell & Co Ltd (No 2)* [1972] AC 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.
>
> However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.

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[162] *Prosecutor v Jelisić*, IT-95-10-R, Decision on Motion for Review, 2 May 2002, p 3; *Prosecutor v Tadić*, IT-94-1-R, Decision on Motion for Review, 30 July 2002, par 25.

[163] See footnote 160, *supra.*

[164] *Regina v Bow Street Stipendiary Magistrate & Ors, ex parte Pinochet Ugarte (No 2)* [2001] 1 AC 119, 132.

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The decision to reconsider the earlier judgment was unanimous. The test which is now stated is not satisfied where the Appeals Chamber is satisfied "just" that its previous decision was wrong; it must also be satisfied that its previous decision has led to an injustice.[165]

53. The Rules of Procedure and Evidence do not enlarge the powers of the Tribunal – they are intended only to establish the way in which the proceedings are conducted in the Tribunal.[166] The absence of any reference to this power in the Rules is therefore no bar to the existence of the inherent power to reconsider. There is nothing in the Rules which is inconsistent with the existence of such an inherent power. Nor does the possibility that the Appeals Chamber will be flooded with applications for reconsideration constitute any such bar. Justice cannot be denied merely because it may be inconvenient to administer it. In any event, there has been no flood of applications resulting from the existing right to seek reconsideration of interlocutory decisions in limited circumstances.[167] Over-enthusiastic counsel who file frivolous applications for reconsideration will fast lose their enthusiasm when they are denied payment of their fees and costs associated with the application.[168] If any pattern of abuse appears which cannot be prevented in that way, the adoption of a Rule imposing a filter upon such applications, such as a requirement of leave to seek reconsideration of a judgment, would stop that abuse.

54. In the present case, Delić has argued that there has been a "significant" change in the law relevant to the present case since the earlier judgment of the Appeals Chamber.[169] He claims that, in the *Kupreškić* Appeal Judgment, which is described as "one of the most important procedural decisions in the Tribunal's history",[170] the Appeals Chamber laid down a "new test" of the sufficiency of the evidence to support a conviction which, if it had been applied by the Appeals Chamber in its earlier judgment, would have resulted in the quashing of his convictions in respect of Counts 3, 18 and 31 of the indictment.[171]

55. The argument that the "test" applied in the *Kupreškić* Appeal Judgment is "new" is misconceived. In that judgment, the Appeals Chamber considered "the standard that applies with respect to the reconsideration of factual findings by the Trial Chamber" on appeal as

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[165] Paragraph 49, *supra*.
[166] *Vujin* Judgment, par 24; Appeals Chamber Judgment, par 583.
[167] See par 49, *supra*.
[168] Rule 46(C) of the Rules of Procedure and Evidence.
[169] Delić Reply Brief, par 3.
[170] Delić Appellant's Brief, par 2.
[171] *Ibid*, par 3.

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permitting the Appeals Chamber to substitute its own finding for that of the Trial Chamber only "where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is 'wholly erroneous'".[172] The standard has been stated in other cases in this way:[173]

> The test to be applied in relation to the issue as to whether the evidence is *factually* sufficient to sustain a conviction is whether the conclusion of guilt beyond reasonable doubt is one which *no* reasonable tribunal of fact *could* have reached.

There is no difference in substance between the two formulations. Such a standard has been adopted in one or other of these formulations in every appeal against conviction in the Tribunal.[174] The Appeals Chamber in the *Kupreškić* Appeal Judgment declined to lay down any universal test as to what constitutes a "wholly erroneous" evaluation of the evidence by a Trial Chamber, although it is clear from its approach in that appeal that there is in reality no difference in substance between that test and the unreasonableness one usually stated.[175]

56. The "new test" said by Delić to have been laid down in the *Kupreškić* Appeal Judgment related to the reliability (or the quality) of a witness's evidence, as opposed to the credibility (or truthfulness) of that witness. It was applied in relation to the evidence of identification given by a young girl, the only witness who was able to identify the accused as having taken part in the particular event in question. The distinction is well encapsulated in the observation made by the Appeals Chamber:[176]

> Even witnesses who are very sincere, honest and convinced about their identification are very often wrong.

Delić describes the "key" to the analysis by the Appeals Chamber is that "evidence from a truthful witness may be too unreliable to serve as the basis for a conviction,[177] and he asserts that this "watershed" decision contradicts the earlier judgment of the Appeals Chamber in the present case, so that the failure to apply it would work "a manifest injustice" on Delić.[178]

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[172] *Kupreškić* Appeal Judgment, par 30.
[173] See, for example, the Appeals Chamber Judgment in the present case, par 434.
[174] *Tadić* Conviction Appeal, par 64; *Aleksovski* Appeal Judgment, par 63; *Prosecutor v Jelisić*, IT-95-10-A, Judgment, 5 July 2001 ("*Jelisić* Appeal Judgment"), par 37; *Prosecutor v Furundžija*, IT-95-17/1-A, Judgment, 21 July 2000, par 37; *Prosecutor v Kunarac et al*, IT-96-23&23/1-A, Judgment, 12 June 2002, par 39.
[175] *Kupreškić* Appeal Judgment, par 225.
[176] *Ibid*, par 138.
[177] Delić Appellant's Brief, par 10.
[178] *Ibid*, par 7.

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57. If there is indeed a contradiction between the two judgments, it did not impress itself upon the Appeals Chamber when hearing the *Kupreškić* appeal, as it cites its earlier judgment in the present case as supporting the passage just quoted. Delić had suggested that the *Kupreškić* Appeal Judgment would have been the "proverbial bombshell or blockbuster" in the United States,[179] but his counsel was obliged to concede that – as the *Kupreškić* Appeal Judgment itself makes clear – the test it applied was certainly well known elsewhere throughout the world.[180] Nor was it even "new" to the jurisprudence of the Tribunal. In *Prosecutor v Kunarac et al*,[181] a case in which the issue was the legal sufficiency of the evidence of identification to support a charge of rape, a Trial Chamber, after saying that the credit of the witness upon whom the prosecution case relied was not in issue at that stage, drew attention to the distinction which has to be drawn between the credibility of a witness and the reliability of that witness's evidence – credibility depends upon whether the witness should be believed; reliability assumes that the witness is speaking the truth, and it depends upon whether the evidence, if accepted, proves (or tends to prove) the fact to which it is directed.[182] The Trial Chamber referred to the uncertainty and the inherent frailties of identification evidence, and added:[183]

> For these reasons, special caution has been found to be necessary before accepting identification evidence because of the possibility that even completely honest witnesses may have been mistaken in their identification.

All of those propositions were taken from decisions which are cited in every worthwhile textbook on evidence.

58. What needs to be emphasised is that, in the earlier judgment in the present case, the Appeals Chamber expressly *declined* the application by Delić to consider the legal sufficiency of the evidence to support the convictions. This is an issue which usually arises at the close of the prosecution case in a trial, when the test applied by a Trial Chamber in determining whether there is a case to answer is whether there is evidence upon which (if accepted) a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused.[184] The

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[179] Delić Reply Brief, par 4.
[180] Transcript, 18 June 2002, pp 29-31.
[181] *Prosecutor v Kunarac et al*, IT-96-23-T & 96-23/1-T, Decision on Motion for Acquittal, 3 July 2000. That decision was given within a few days of the oral argument in the earlier appeal, and there was nothing to stop counsel from referring it to the Appeals Chamber if they thought that the Appeals Chamber may be in ignorance of it. In fact, two of the judges from the Trial Chamber which decided the *Kunarac* case were also members of the Appeals Chamber which heard the earlier appeal.
[182] *Ibid*, par 7.
[183] *Ibid*, par 8.
[184] Appeals Chamber Judgment, par 434; *Jelisić* Appeal Judgment, pars 36-37.

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Appeals Chamber said that it had instead applied the usual test of whether the conclusion of guilt beyond reasonable doubt reached by the original Trial Chamber in relation to the five counts challenged by Delić was one which no reasonable tribunal of fact could have reached.[185] These issues were fully discussed in the earlier judgment of the Appeals Chamber, in the introductory part of Section VII ("Delić Grounds of Appeal Alleging Errors of Fact"). The procedure followed by the Appeals Chamber required a far wider inquiry than would an inquiry into the legal sufficiency of the evidence. An inquiry into the sufficiency of the evidence requires an acceptance of the truthfulness of the witness,[186] whereas the inquiry involved in the procedure adopted by the Appeals Chamber requires a consideration as to whether no reasonable tribunal of fact could have accepted the witness's evidence as either truthful or reliable or both.

59. The use made in the *Kupreškić* Appeal Judgment of the statement "Even witnesses who are very sincere, honest and convinced about their identification are very often wrong" was directed to a "critical component" of the Trial Chamber's finding that the evidence of the young girl's identification of the accused was truthful. After acknowledging that there had been criticisms levelled at her credibility, the Trial Chamber said:[187]

> [...] these criticisms are outweighed by the impression upon the Trial Chamber while she was giving evidence. Her evidence concerning the identification of the accused was unshaken.

When determining whether no reasonable tribunal of fact could have accepted the young girl's evidence, it was appropriate for the Appeals Chamber to refer to the uncertainty and the inherent frailties of identification evidence. That is a subject which arises frequently in identification cases where an application is made at the end of the prosecution case for a ruling that there is no case to answer, and it was quite natural for the Appeals Chamber, in overturning the Trial Chamber's finding, to have referred to the well established principles applied in such cases to make the point that there is a clear distinction between the honesty of an identification witness and the reliability of that witness's evidence.

60. Delić has not persuaded the Appeals Chamber that the *Kupreškić* Appeal Judgment laid down a "new test" for the examination of the challenges by him to the evidence upon which his convictions were based, or that the test which it stated did not in any event inform the Appeals

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[185] Appeals Chamber Judgment, pars 433-436.
[186] See par 57, *supra* – the reference to "evidence [...] (if accepted)".
[187] *Prosecutor v Kupreškić et al*, IT-95-16-T, Judgment, 14 Jan 2000, par 425.

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Chamber in the course of that examination. The application for the appeal against conviction to be reconsidered is rejected.

9 Disposition

61. For the foregoing reasons –

1. The appeals against sentence are dismissed.
2. The sentences imposed by the Trial Chamber on 9 October 2001 are confirmed.
3. The time spent in custody for which each of the appellants is entitled to credit is, accordingly, as follows:

   for Zdravko Mucić, from 18 March 1996 to the date of this Judgment; and for both Hazim Delić and Esad Landžo, from 2 May 1996 to the date of this Judgment.
4. The application by Hazim Delić to have his appeal against conviction reconsidered is rejected.

Done in English and French, the English text being authoritative.

Dated this 8th day of April 2003,
At The Hague,
The Netherlands.

Judge Theodor Meron
Presiding

Judges Meron and Pocar append a Separate Opinion to this Judgment.
Judge Shahabuddeen also appends a Separate Opinion to this Judgment.

[Seal of the Tribunal]

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SEPARATE OPINION OF JUDGES MERON AND POCAR

1. We write separately to say that we think that much of the discussion in paragraphs 48 to 53 of the Judgement concerning the Appeals Chamber's authority to re-consider its judgements and the circumstances in which such authority should be exercised is unnecessary to resolve the case at hand. In this case, the Appeals Chamber's earlier judgement affirmed several of Delić's convictions, and Delić now asks the Appeals Chamber to reconsider those affirmances. He defends the propriety of reconsideration here on one basis and one basis alone: that there has been an intervening change in the standard established by the Appeals Chamber for appellate review of certain factual findings of the Trial Chambers. If there had in fact been an intervening shift in the governing law, then the Appeals Chamber would have to decide whether that sort of shift was the kind that warrants reconsideration of an earlier judgement. The Appeals Chamber might also then have to decide whether its earlier judgement in this case was final or not and whether its final or non-final character should affect the Appeals Chamber's competence to reconsider the portion of that earlier judgement now challenged by Delić. But, as the Judgement carefully explains in paragraphs 54-60, there has in fact been no change in the governing legal standard. Thus, there is simply no reason for the Appeals Chamber in this case to address the circumstances in which it may re-consider its judgements. We believe that judicial restraint requires the Appeals Chamber to address those questions only when, in some future case, it is necessary to do so. In this regard, we recall what Lord Atkin said in *The Cristina* [1938] AC 485, at 493:

> In the present case I find it unnecessary to decide many of the interesting points raised in the argument for the appellants . . . . In matters of such grave importance as those involving questions of international law, it seems to me very expedient that Courts should refrain from expressing opinions which are beside the question actually to be decided.

We therefore reserve our position on the issue.

Done in English and French, the English text being authoritative.

Judge Theodor Meron, Presiding

Judge Fausto Pocar

Dated this 8th day of April 2003,
At the Hague,
The Netherlands.

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SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. I agree with the judgment of the Appeals Chamber, but propose to offer some supporting reasons for the existence of the power of reconsideration and to note the limits within which the power may be exercised.

A. Whether it is necessary to pronounce on reconsideration

2. But, first, having had the advantage of reading in draft the joint concurring opinion of President Meron and Judge Pocar, I must attend to the important question raised by them as to the necessity for much of the discussion in paragraphs 48-53 of the judgment concerning the authority of the Appeals Chamber to reconsider its judgments and the circumstances in which such authority should be exercised, including the question whether the power extends to a final judgment.

3. In support of the view that there was no such necessity, it may be said that it was open to the Appeals Chamber to say that, even if a power of reconsideration exists and is applicable to a final judgment, it is not exercisable in favour of Delić for the reason that the ground for its exercise, as given by him, does not exist. On that approach, the matter could be disposed of without the necessity to determine whether there is a power of reconsideration and, if it exists, whether it is applicable to a final judgment. That would accord with traditional, and wise, warnings against making unnecessary judicial pronouncements.

4. And, no doubt, that was an approach open to the Appeals Chamber. But it was not the approach which it took. The Appeals Chamber can choose its approach.[1] It can take the view that it has logically first to satisfy itself that a power, which it is asked to exercise, exists, and then, if it exists, to determine whether it is exercisable in the case before it. If, as it appears to me, that is the approach taken by the Appeals Chamber, then it is within its competence to pronounce on the matter, as is proposed in paragraphs 48-53 of the judgment.

[1] See, by way of analogy, *Northern Cameroons, I.C.J.Reports 1963*, p. 15, in which the court reversed the usual procedural approach, determining admissibility before jurisdiction.

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B. The existence of the power of reconsideration

5. As to the existence of the power of reconsideration, weight has to be given to the fact that, the Tribunal being international in character, its powers might be expected to be set out in its organic instrument and not left to be spelt out in accordance with the norms applicable to a particular legal system with which all the judges of the Tribunal or counsel appearing before it may not be familiar. Still, the fact is that the Tribunal was established to do justice; if, therefore it finds that its actions create injustice of a kind which cannot be remedied in its normal appellate or review processes, it must possess the power of reconsideration, limited though this necessarily is.

6. The silence on the matter in the regulatory regime of the Tribunal was mentioned in *Kordić*, in which it was said "that motions to reconsider are not provided for in the Rules and do not form part of the procedures of the International Tribunal".[2] But, as other cases have shown, the silence is not an impediment.

7. Without passing on cases involving additional evidence, it appears to me that in some domestic jurisdictions reconsideration is effectively made by way of rehearing. In *Metropolitan Water Dist. of Southern California v. Adams* (1942) 19 Cal. 2d 463 at 469, Shenk, J., said:

> There is no express provision of the Constitution or in the statutes for a rehearing of a cause in bank. It is, however, an essential ingredient of jurisdiction. This court has inherent power to revise, modify, and correct its judgments so long as they are under its control and may, in the exercise of that power, grant rehearings on applications of the parties or on it own motion.[3]

8. In my opinion, when the Security Council established the Tribunal as a judicial entity, the body which came into being was clothed with the essential ingredients of jurisdiction referred to by Shenk, J; those ingredients included the power of reconsideration, by whatever name called. As paragraph 52 of the judgement of the Appeals Chamber correctly notices, the power was exercised in *Pinochet's* case,[4] to which I have referred elsewhere[5] in connection with this subject. It could also be exercised in other cases.[6]

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[2] IT-95-14/2-PT, 15 February 1999. See similarly *Kovačević*, IT-97-24-PT, 30 June 1998.
[3] See too *Lane v. Mathews*, (1952) 75 Ariz. 1 at 2.
[4] *R. v. Bow Sreet Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.2)* [1999] 1 All ER 577, HL, at 585-586, per Lord Browne-Wilkinson.
[5] *Barayagwiza*, ICTR 97-19-AR72, 31 March 2000, separate opinion.
[6] See *Halsbury's Laws of England*, 4th ed., vol.26, pp.279-288, referred to in footnote 3 of the separate opinion mentioned in footnote 5 above.

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9. There is a last point. In the *Adams* case, mentioned above, Shenk, J., expressed the view that the "inherent power [of a court] to revise, modify, and correct its judgments" was available "so long as they are under its control ..." In principle, the limitation was right; it is reflected in the general view that the court is *functus officio* once the decision has been announced or formalised.[7] The idea is in keeping with the principle of finality, and the guillotine which it imposes has to be respected. However, in extreme cases reconsideration is thereafter still possible if the circumstances meet the tests mentioned below.[8]

C. The limits within which the power of reconsideration may be exercised

10. Paragraph 49(b)(i) of today's judgment speaks of the power of reconsideration being exercisable by the Appeals Chamber in relation to a judgment "where it is persuaded ... that a clear error of reasoning in the previous judgment has been demonstrated by, for example, a subsequent decision of" certain senior judicial bodies, or "that the previous judgment was given *per incuriam*", and that "the judgment of the Appeals Chamber sought to be reconsidered has led to an injustice".

11. I accept that view, but would interpret it, my apprehension being that a party might seek to show that an ordinarily appealable "error" is a "clear error", that a resulting prejudice amounts to "injustice", and on that basis attempt, long after the case is closed in the normal judicial process, to bring what is effectively an appeal under the guise of reconsideration.

12. It seems to me that the proper criterion for determining what are the limits within which reconsideration is allowed is to be derived from holding a balance between the principle that a litigant has a right to a correct decision and the principle that his opponent has a right to rely on the finality of litigation. The balance would obviously be disturbed were the litigant, for example, to be given an open-ended right to relitigate the case after the Appeals Chamber has decided it; some restriction is required.

13. I consider that some guidance is to be had from the remarks made in 1947 on a petition for rehearing by the Tennessee Court of Appeals. The court observed:[9]

> The petition points out no matter of fact or law overlooked, but only reargues matters which counsel say were improperly decided. The office of a petition to rehear is to call the attention

[7] *Cross* (1973) 57 Cr. App. R. 660, and *Roberts* [1990] Crim. L.R. 122.
[8] See *Daniel*, (1977) 64 Crim. App. R. 50.
[9] *Black v. Love and Amos Coal Co.*, (1947) 206 S.W. 2d 432 at p. 437, per Felts J., Howell and Hickerson JJ. concurring, in the Tennessee Court of Appeals, Middle Section, 28 June 1947.

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> of the court to matters overlooked, not to those which counsel suppose were improperly decided after full consideration.

Similarly, in 1950 the Ohio Court of Appeals said:[10]

> At present we have no rule permitting applications for rehearing and it is only in rare instances, where there is something which, manifestly, the court has overlooked in the original opinion that such applications are entertained.

14. Even where there are rules on the subject, some restriction is in principle required. Thus, in 1998 the Supreme Court of Nevada considered that, as it had "overlooked material matters and that rehearing will promote substantial justice, ... rehearing is warranted".[11] Likewise, in 2000 the Ohio Court of Appeals in the 10th District said:

> The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered or was not fully considered by the court when it should have been ... Here, Erie contends that this court committed an obvious error and failed to consider relevant Ohio law in two respects.[12]

15. It could be argued that the principle of finality is sufficiently honoured by the requirement, not only that there should be a "clear error", but also that the clear error should be one which causes "injustice". It may be, therefore, that what is involved is a question of nuance; be that as it may, I desire to state my understanding of the reference in the judgment to "clear error" to be a reference to something which the court manifestly or obviously overlooked in its reasoning and which is material to the achievement of substantial justice.

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[10] *Wolf v. Glenn*, 99 N.E. 2d 320 at 323, 4 January 1950.
[11] *Calloway v. City of Reno*, (1998) 971 P. 2d 1250.
[12] *Erie Insurance Exchange v. Colony Development Corporation*, (2000) 736 N.E. 2d 950 at 952.

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D. Conclusion

16. For these reasons, it appears to me that the power to reconsider exists; that, as the cases show, decisions which may be reconsidered include a final judgment; and that there are obvious restrictions which apply to the exercise of the power.

Done in both English and in French, the English text being authoritative.

Mohamed Shahabuddeen

Dated 8 April 2003
At The Hague
The Netherlands

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