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February 21, 2014

The Honorable Reena Raggi, Chair
Advisory Committee on the Criminal Rules
704S United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201-1818

Dear Judge Raggi:

Recommended is an amendment to Rule 29 of the Federal Rules of Criminal Procedure to clarify and include the procedure by which a motion for a judgment of acquittal is made in a non-jury trial. At present, there is no such rule governing the motion.

This recommendation is made in my individual capacity as a member of the bar of the Eastern District of New York, as a Trial Attorney with Brooklyn Defender Services, as an adjunct professor of law at Fordham University School of Law, and as defense counsel to a detainee at the United States Naval Station, Guantánamo Bay, Cuba.

There Is No Rule Governing A Motion For A Judgment of Acquittal In A Bench Trial

Although district court judges in almost all of the reported decisions assume Rule 29 ("Motion for a Judgment of Acquittal [in a Jury Trial]") governs, there are several cases in which district court judges have turned to Rule 23 ("Jury or Nonjury Trial") as the governing statute.

Further, even among the authors of treatises on the Federal Rules of Criminal Procedure, there is disagreement as to what Rule governs. Wright's *Federal Practice and Procedure* discusses a motion for a judgment of acquittal in a bench trial under Rule 29. Yet *Moore's Federal Practice* states, "Rule 29 has no real application when a case is tried by the court since the plea of not guilty asks the court for a judgment of acquittal."

Description Of The Proposed Rule

The proposed amendment to Rule 29, Rule 29(e) ("Nonjury Trial") of the Federal Rules of Criminal Procedure includes two subdivisions. The first subdivision, similar to a motion for a judgment of acquittal in a jury trial (Rule 29(a) ("Before Submission to the Jury")), allows for the defendant to move the court for a judgment of acquittal of any offense for which the evidence is legally insufficient to sustain a conviction. The court may also, on its own, consider whether the evidence is legally insufficient to sustain a conviction.

The second subdivision allows for the defendant to move the court for a judgment of acquittal of any offense on the ground that the government did not prove that the defendant is guilty of such offense beyond a reasonable doubt. The court may also, on its own, consider

whether the government did not prove that the defendant is guilty of such offense beyond a reasonable doubt.

Background & Basis For The Proposed Rule

In practice, courts – in both jury and non-jury trials – entertain a motion for a judgment of acquittal on the mere legal sufficiency standard. This is Rule 29(a) for jury trials. No such rule exists in a non-jury trial. This is the proposed Rule 29(e)(1).

In a criminal jury trial, the Rule 29(a) motion for a judgment of acquittal is made to the court and granted by the court only when "the evidence is insufficient to sustain a conviction."[1] Of course, no provision is made for a motion for a judgment of acquittal on the beyond a reasonable doubt standard in a jury trial because the bench – as the arbiter of law – cannot usurp a defendant's Sixth Amendment protection to be tried on the facts by a jury of his peers.

For better or worse, it is through the lens of the Sixth Amendment that the motion for a judgment of acquittal – in both jury and non-jury trials – is viewed.

However, a historical analysis of our modern motion for a judgment of acquittal bears out that the modern motion is improperly based on mid-nineteenth century motions in civil suits for a judgment as a matter of law. The mere importation of the standards employed in a civil jury trial into a criminal non-jury trial fail to take into appropriate consideration the defendant's exposure to a deprivation of his liberty, his right to remain silent, the government's burden of proving the defendant guilty beyond a reasonable doubt rather than by a preponderance, and the presumption of the defendant's innocence.

In contrast to jury trials, the court in a non-jury trial is both the arbiter of law and fact-finder[2] and there is no Sixth Amendment protection at issue. In the absence of the Sixth Amendment preclusion, there is nothing to prevent – other than an improper interpretation of the law – a court from determining a motion for a judgment of acquittal on the facts and the beyond a reasonable doubt standard.

Presently, when a motion for a judgment of acquittal is made to the court in a non-jury trial, and the motion is denied, the defendant is still left to speculate and guess whether the government satisfied its burden – on the government's evidence – of proving the defendant guilty beyond a reasonable doubt. Of course, if the government does not introduce evidence to prove the defendant guilty beyond a reasonable doubt, then the defendant is not guilty. The government (not the defendant) must introduce evidence sufficient to persuade the fact-finder, beyond a reasonable doubt, of the defendant's guilt. Thus, not knowing whether the government has discharged its burden leaves the presumption of innocence and the defendant's right to remain silent in competition with the government's obligation to discharge its burden when, in fact, these three aims should be cooperating with one another.

Effectively, "inviting" the defendant to call a defense case – despite the uncertainty of whether the government has proved its case beyond a reasonable doubt at the close of its case and whether the judge would have acquitted the defendant of an offense charged – reduces the

[1] Rule 29(a). "BEFORE SUBMISSION TO THE JURY."
[2] Rule 23(c). "NONJURY TRIAL."

government's burden at that stage. This "invitation" to the defendant to call defense witnesses or for the defendant to testify on his own behalf militates against the government's obligation to prove its case. Such an invitation should be correctly considered as not only a reduction of the government's burden (and therefore impermissible burden shifting) but also a violation of due process.[3] The defendant should not be called upon to supply the gaps missing in the government's proof that will ultimately lead to his conviction.

The Proposed Rule – based on research included in the appended article[4] – better coordinates the government's obligation to discharge its burden with the presumption of innocence and the defendant's right to remain silent. This research includes a comparative study of motions for judgment of acquittal in the courts of the United States, the courts of several foreign common-law nations, and international war crimes tribunals.

Generally speaking, reported decisions from the courts of the United States, treatises on the Federal Rules of Criminal Procedure, and reported decisions from the international war crimes tribunals, improperly cite – for the standard in a non-jury trial – the standard of *appellate* review of the sufficiency of evidence after trial, or the standard for determining a motion for a judgment of acquittal in a *jury* trial.[5] Of note, in Australia[6] and in England and Wales,[7] the court in a non-jury trial may acquit the defendant after the prosecution's case-in-chief.

Language Of The Proposed Rule

Rule 29. Motion for a Judgment of Acquittal

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(e) NONJURY TRIAL.

(1) *Legal Sufficiency.* After the government closes its evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction.

(2) *Beyond a Reasonable Doubt.* After the government closes its evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the

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[3] "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

> Both doctrinally and practically, criminal procedure, as presently constituted, does not give the accused [as stated by Judge Learned Hand] "every advantage" but, instead, gives overwhelming advantage to the prosecution. The real effect of the "modern" approach has been to aggravate this condition by loosening [the] standards of pleading and proof without introducing compensatory safeguards earlier in the process. Underlying this development has been an inarticulate, albeit clearly operative, rejection of the presumption of innocence in favor of a presumption of guilt.

Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1152 (1960).

[4] Jared Kneitel, *The Forgotten Dinner Guest: The "Beyond a Reasonable Doubt" Standard in a Motion for a Judgment of Acquittal in a Federal Bench Trial*, 36 Am. Jur. Trial Advocacy 35 (2012).

[5] *Id.*, at 43-58.

[6] *Id.*, at note 101.

[7] *Id.*, at note 26.

government did not prove the defendant guilty beyond a reasonable doubt. The court may on its own consider whether the government did not prove the defendant guilty beyond a reasonable doubt.

How The Rule Would Work In Practice

If the proposed Rule 29(e) were implemented, no drastic change to the manner in which bench trials are conducted is envisaged.

In the course of any ordinary prosecution, a defendant would naturally move for a judgment of acquittal on the grounds that the evidence is insufficient to sustain a conviction. Proposed Rule 29(e)(1). In some instances, some defendants – without any present statutory authority (albeit with the strength of the presumption of innocence, the defendant's right to remain silent, and the government's obligation to discharge its burden in favor of the defendant) – move for a judgment of acquittal on the grounds that the defendant has not been proven beyond a reasonable doubt. Proposed Rule 29(e)(2).

The Proposed Rule 29(e)(1) motion is being made in any event with the corresponding opposition, reply, and decision from the court. No judicial economy is lost by introduction of Proposed Rule 29(e)(1).

Of note, the defendant is not required to make a motion pursuant to the Proposed Rule 29(e)(2) (nor (1)). If the defendant makes a motion pursuant to Proposed Rule 29(e)(2), the motion will likely include many, if not all, of the features and elements of the defendant's prospective closing argument and the government's closing argument. The introduction of these arguments – in whole or in part – at the close of the prosecution's case, will have little effect on the proceedings.

If a motion on Proposed Rule 29(e)(2) is granted as to all counts, the defendant would be acquitted, double-jeopardy would attach, and the trial would conclude, thus saving judicial resources by stopping a trial that is heading towards an acquittal. The defendant's right to remain silent and his presumption of innocence are held intact in coordinated fashion with the government having made every effort to discharge its burden. There would be no further need for additional closing arguments.

On the other hand, if a defendant's motion on the Proposed Rule 29(e)(2) is denied in part or in its entirety, double-jeopardy would attach on any count or counts for which the defendant was acquitted, and the government would have been found to have discharged its burden in part (or as to all counts). At this juncture, the defendant – no longer presumed innocent as to the counts on which the motion was denied – may call a defense case including making a fully knowing and intelligent waiver of his right to remain silent and choose to testify. Any closing arguments would presumably rely upon the arguments made at the Proposed Rule 29(e)(2) stage and would not create a diseconomy of judicial resources.

The Proposed Rule 29(e) should logically exist in our jurisprudence. The standard for determining the motion in a bench trial should include a determination as to both legal sufficiency and beyond a reasonable doubt. The motion is being made to the arbiter of law and the fact-finder. Only because of the perception that the Sixth Amendment precludes a judge from

making findings of fact – thus usurping the fact-finding function of a non-extant jury – has the standard remained (in practice at least) as solely legal sufficiency.

The lack of a standard in the Federal Rules appears to be a legislative oversight based on the mere importation of the standard in a civil jury trial into a criminal non-jury trial leading to our present tradition. Further, treatises on the standard to be employed suggest that the proper standard is only legal sufficiency. However, this is based on a misunderstanding of the law. For example, Wright's *Federal Practice and Procedure* improperly cites the standard for a *pre-trial* dismissal of an indictment, the test to be applied in *appellate review* of the sufficiency of evidence after trial, or the standard for a judgment of acquittal *after* a conviction.[8] Perhaps because of the tradition borne out of civil jury trials, the treatises, and the lack of acknowledgment of the history of the motion, neither the Supreme Court nor any Circuit Court has had an opportunity to properly determine what the standard should be.

The Proposed Rule ensures that the defendant's right to remain silent and his presumption of innocence work in coordination – instead of the present antagonism – with the government's discharge of its burden of proving the defendant guilty, if it can, beyond a reasonable doubt. The Proposed Rule, which has demonstrated support in other common-law jurisdictions, can add to judicial economy or otherwise have little effect on the proceedings other than strengthening the presumption of innocence, the right to remain silent, and the discharge of the government's obligations.

I very much appreciate the Committee's consideration of this proposal and would be glad to provide the Committee with any further information it might request.

Sincerely,

Jared Kneitel

cc: Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter

[8] *Id.*, at 43-45.

AMERICAN JOURNAL OF TRIAL ADVOCACY

SUMMER 2012
VOLUME 36, NUMBER 1

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The Forgotten Dinner Guest: The "Beyond a Reasonable Doubt" Standard in a Motion for a Judgment of Acquittal in a Federal Bench Trial

Jared Kneitel[†]

Abstract

In comparison to civil trials, criminal trials are decided on more stringent standards of proof. However, motions for judgment of acquittal in criminal non-jury trials are currently decided on a mere legal sufficiency standard as opposed to the "beyond a reasonable doubt" standard. This Article examines the lack of reasoning and uniformity in deciding these motions as well as the potential dangers and injustices posed to a defendant by applying a lower standard. Through an examination of both domestic and foreign law, the author argues for the application of the "beyond a reasonable doubt" standard when determining motions for judgment of acquittal in criminal non-jury trials.

Welcome to the Dinner Party: Introduction

The standard for judging a civil trial is lower than the standard for judging guilt in a criminal trial, and there is no jury in a non-jury trial. Somehow—despite these two very obvious conclusions—the nineteenth century standard for determining a motion for a directed verdict in a civil jury trial is still applied to our modern motion for a judgment of acquittal in a criminal non-jury trial.

In a criminal trial, at the close of the government's case-in-chief, the defense may make a motion for a judgment of acquittal on one or more offenses charged.[1] If the motion is unsuccessful and the defense calls

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All opinions expressed herein belong solely to the author.

[1] Federal Rule of Criminal Procedure 29(a) describes a motion for a judgment of acquittal:

a case, the defense may make another motion for a judgment of acquittal at the close of its case.[2] This Article concerns only the motion at the end of the government's case. At present, the motion will succeed only if the government has not presented legally sufficient[3] evidence of all the elements of the particular offense or offenses.

This Article discusses why, in a non-jury trial, the "beyond a reasonable doubt" standard should be applied—instead of merely the legal sufficiency standard—when the bench considers a motion for a judgment of acquittal. Not knowing whether the government has proven—in the judge's mind—the defendant's guilt before inviting the defendant to call a case actually militates against the presumption of innocence, the assurance that the government discharges its burden, and the defendant's right to remain silent.

This Article shows that the jurisprudence in the United States improperly cites, for the standard for determining whether to grant or deny a motion for a judgment of acquittal in a non-jury trial, either the standard in a jury trial or the standard for appellate review. This Article examines the historical (lack of) development of the motion for a judgment of acquittal and the perceived constitutional preclusion against the "beyond a reasonable doubt" standard. Namely, the bench—as the arbiter of law—cannot usurp a defendant's Sixth Amendment protection to be tried on the facts by a jury of his peers.[4] Of course, in a non-jury

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> After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

FED. R. CRIM P. 29(a).

[2] FED. R. CRIM. P. 29(a).

[3] In *Tibbs v. Florida*, the United States Supreme Court explained that evidence "'legally insufficient'" to support a conviction "'means that the government's case was so lacking that it should not have even been *submitted* to the jury.'" 457 U.S. 31, 40-41 (1982) (quoting Burks v. United States, 437 U.S. 1, 16 (1978)). Note, as discussed in more detail below, *Tibbs* and *Burks v. United States* concern the standard of appellate review on a motion for a judgment of acquittal; however, they correctly enunciate the standard for legal sufficiency. *Tibbs*, 457 U.S. at 40-41; *Burks*, 437 U.S. at 16-17.

[4] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

trial, the bench is both the arbiter of law and fact-finder;[5] hence, there is no Sixth Amendment preclusion.

At present, there is no rule in the Federal Rules of Criminal Procedure explicitly governing a motion for a judgment of acquittal in a bench trial. Is it Rule 23[6] ("Jury or Nonjury Trial") or Rule 29[7] ("Motion for a Judgment of Acquittal [in a Jury Trial]") that governs the motion? Although district court judges in almost all of the reported decisions assume Rule 29 governs, there are several cases in which district court judges have turned to Rule 23 as the governing statute.[8] Further, even among the authors of treatises on the Federal Rules of Criminal Procedure, there is disagreement as to what Rule governs.[9] Wright's *Federal Practice and Procedure* discusses a motion for a judgment of acquittal in a bench trial under Rule 29.[10] Yet *Moore's Federal Practice* states, "Rule 29 has no real application when a case is tried by the court since the plea of not guilty asks the court for a judgment of acquittal."[11]

This Article concludes by proposing a new Rule 29(e) to resolve this ambiguity and to make clear that the "beyond a reasonable doubt" standard is the standard that should be employed in determining a motion for a judgment of acquittal in a bench trial.

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[5] FED. R. CRIM. P. 23(c) ("In a case tried without a jury, the court must find the defendant guilty or not guilty.").

[6] FED. R. CRIM. P. 23(c).

[7] FED. R. CRIM. P. 29(a).

[8] *See, e.g.*, United States v. Wasson, No. 06-CR-20055, 2009 WL 4758604, at *1 (C.D. Ill. Dec. 4, 2009); United States v. Kalb, 86 F. Supp. 2d 509, 510 (W.D. Pa. 2000).

[9] *See, e.g.*, 26 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 629.02[3] (3d ed. 2012) (stating Rule 29 does not apply to a nonjury trial); 2A CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF CRIMINAL PROCEDURE § 467, at 375-76 (4th ed. 2009) (stating Rule 29's sufficiency standard should be applied by a judge determining whether or not to grant a motion for a judgment of acquittal).

[10] WRIGHT & HENNING, *supra* note 9.

[11] MOORE ET AL., *supra* note 9. Notably, however, Moore's *Federal Practice* on Rule 23 does not address the motion for a judgment of acquittal in a bench trial. 25 MOORE ET AL., *supra* note 9, §§ 623.00–623.05. Nor does Wright's *Federal Practice and Procedure* discuss the motion under Rule 23. 2 WRIGHT & HENNING, *supra* note 9, §§ 371-376, at 476-547.

I. By Invitation Only: Respondez S'il Vous Plaît

A criminal defendant is not guilty unless proven guilty;[12] the government bears the burden of proving the criminal defendant guilty beyond a reasonable doubt;[13] and the government (not the defendant) must introduce evidence sufficient to persuade the fact-finder, beyond a reasonable doubt, of the defendant's guilt.[14] Thus, if the government does not introduce evidence to prove the defendant guilty beyond a reasonable doubt, then the defendant is not guilty.

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[12] *In re* Winship, 397 U.S. 358, 364 (1970) ("Lest there remain[ed] any doubt about the constitutional stature of the reasonable-doubt standard, [the Supreme Court] explicitly h[eld] that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

[13] *Id.* at 363-64 ("The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest[s] of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As [the Supreme Court] said in *Speiser v. Randall*: 'There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt.'" (alteration in original) (citation omitted) (quoting Speiser v. Randall, 357 U.S. 513, 525-26 (1958))).

[14] "All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." Miranda v. Arizona, 384 U.S. 436, 460 (1966) (citation omitted) (quoting 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE: EVIDENCE IN TRIALS AT COMMON LAW § 2251(12), at 317 (McNaughton rev. 1961)). "In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.'" *Miranda*, 384 U.S. at 460 (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)).

At the conclusion of the government's case, the government's case will presumably—and in almost all circumstances—be at its highest. If the government has not proven its case beyond a reasonable doubt after the presentation of its evidence, when will it ever be able to prove its case beyond a reasonable doubt? This begs the very simple question: If the defendant is not guilty at the conclusion of the government's case-in-chief, why should the defendant be "invited" to call a defense?

Although the government may have presented legally sufficient evidence of the offenses charged, the judge still may not find at the close of the government's case that the government proved its case beyond a reasonable doubt. For example, the judge may find the accounts of the government witnesses to be unworthy of belief (either alone or in combination) or circumstantial evidence presented to be too circumspect to sustain a conviction. As always, the government must prove its case beyond a reasonable doubt. This burden is without the assistance of any defense evidence (including the defendant's testimony).[15]

Effectively, "inviting" the defendant to call a defense case—despite the uncertainty of whether the government has proved its case beyond a reasonable doubt at the close of its case and whether the judge would have acquitted the defendant of an offense charged—reduces the government's burden at that stage. This "invitation" to the defendant to call defense witnesses or for the defendant to testify on his own behalf militates against the government's obligation to prove its case. Such an invitation should be correctly considered as not only a reduction of the government's burden (and therefore impermissible burden shifting) but also a violation of due process.[16]

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[15] If the government has not proven its case, the defendant—by poor representation, ineffective counsel, or otherwise—should not be called upon to supply the missing gaps in the government's proof, resolving doubt in favor of the government.

[16] "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. at 364; *see also infra* text accompanying note 27.

> Both doctrinally and practically, criminal procedure, as presently constituted, does not give the accused [as stated by Judge Learned Hand] "every advantage" but, instead, gives overwhelming advantage to the prosecution. The real effect of the "modern" approach has been to aggravate this condition by loosening [the] standards of pleading and proof without introducing compensatory safeguards earlier in the process. Underlying this development has been an inarticulate, albeit clearly

Elevating the government's burden at the motion for a judgment of acquittal stage to beyond a reasonable doubt actually strengthens the presumption that the defendant is not guilty and properly holds the government to its burden. This strengthens the requirement that the government prove its case based solely on its own evidence and without the assistance of the introduction of a defense case.

II. The Forgotten Dinner Guest: Historical Development of the Motion for a Judgment of Acquittal

The motion for a judgment of acquittal in criminal suits evolved from its counterpart in civil procedure. Federally, in the late 1700s, civil judges could withdraw a civil case from a jury and decide the case; then, the common law motion for non-suit came; and finally, in the mid-nineteenth century, the civil motion for a directed verdict emerged.[17] "The motion for judgment of acquittal in criminal cases came still later and was probably influenced by these earlier developments in the civil trial."[18] "The early cases directing acquittal did so without citing any authority but apparently assumed such power was inherent in the judge's role as presiding officer."[19]

Indeed, *Moore's Federal Practice* states that Rule 29 ("Motion for a Judgment of Acquittal" in a jury trial) of the Federal Rules of Criminal Procedure was modeled on Rule 50 of the Federal Rules of Civil Procedure.[20] "Thus, a motion for acquittal [in a jury trial] is equivalent to a motion for a directed verdict (now called 'judgment as a matter of

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operative, rejection of the presumption of innocence in favor of a presumption of guilt.

Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1152 (1960).

[17] Theodore W. Phillips, Comment, *The Motion for Acquittal: A Neglected Safeguard*, 70 YALE L.J. 1151, 1151-52 (1961).

[18] *Id.* at 1152.

[19] *Id.* at 1152 n.8; *see also* Richard Sauber & Michael Waldman, *Unlimited Power: Rule 29(a) and the Unreviewability of Directed Judgments of Acquittal*, 44 AM. U. L. REV. 433, 439-41 (1994).

[20] MOORE ET AL., *supra* note 9, § 629.02[2].

law' under Civil Rule 50), or judgment notwithstanding the verdict (judgment n.o.v.) under pre-Rules practice."[21]

However, there still remains no legislation specifically directed towards a motion for a judgment of acquittal in a criminal bench trial. This is due to legislative oversight based, seemingly, on the mere importation of the standards employed in a civil jury trial into a criminal non-jury trial without appropriate consideration for the defendant's exposure to a deprivation of his liberty, his right to remain silent, the government's burden of proving the defendant guilty beyond a reasonable doubt rather than by a preponderance, and the presumption of the defendant's innocence.

III. The Head of the Table: The Prevailing Legal Sufficiency Standard

The standard for judging a motion for a judgment of acquittal—in a jury trial at least—is based on *Burks v. United States*.[22] "The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt."[23] "Even the trial court, which has heard the testimony of witnesses first hand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal."[24] This view is accepted on the Sixth Amendment right that a defendant be tried by a jury of his peers. In jury trials, the court cannot substitute its

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[21] *Id.*

[22] 437 U.S. 1, 16 (1978); *see also* Tibbs v. Florida, 457 U.S. 31, 37 (1982) ("[A] conviction rests upon insufficient evidence when, even after viewing the evidence in the light most favorable to the prosecution, no rational factfinder could have found the defendant guilty beyond a reasonable doubt.").

[23] *Burks*, 437 U.S. at 16; *see also* Jackson v. Virginia, 443 U.S. 307, 318 n.11 (1979) ("If 'reasonable' jurors 'must necessarily have . . . a reasonable doubt' as to guilt, the judge 'must require acquittal, because no other result is permissible within the fixed bounds of jury consideration.' . . . This is now the prevailing criterion for judging motions for acquittal in federal criminal trials." (quoting Curley v. United States, 160 F.2d 229, 232 (D.C. Cir. 1947))). The reference in both *Burks* and *Jackson* to the "jury" demonstrates that the "prevailing rule" or "prevailing criterion" is the rule or criterion in jury trials. The Supreme Court has made no ruling on what the rule or criterion is in bench trials.

[24] *Burks*, 437 U.S. at 16.

judgment for that of the jury.[25] To do so would usurp the power of the jury and violate the Sixth Amendment guarantee to be tried by one's peers[26] as well as the Fifth and Fourteenth Amendments' due process protections.[27]

To date, however, the Supreme Court has not considered the standard on a motion for a judgment of acquittal in a non-jury trial.[28] This might

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[25] *Jackson*, 443 U.S. at 318-19.

[26] *See* U.S. CONST. amend. VI. "It is quite clear that a court may not direct a verdict of guilty, either in whole or in part. To permit this would invade [the] defendant's constitutionally protected right to trial by jury." WRIGHT & HENNING, *supra* note 9, § 461, at 324-25 (footnote omitted). Also, consider if a judge were to not acquit a defendant of one or more charges at the close of the government's case. The failure to acquit would effectively be an endorsement of the government's case and a signal (however slight) to the jury that it should consider convicting the defendant. The danger for an improper conviction (resting upon the judge instead of the jury as an *ipso facto* fact-finder) would be ever more present because lay jurors might inherently follow an experienced and professional judge's view of the evidence.

By contrast, consider that in England and Wales—where there is no Sixth Amendment preclusion—"[t]he right of the jury to acquit an accused at any time after the close of the case for the Crown, either upon the whole indictment or upon one or more counts, is well established at common law." ARCHBOLD: CRIMINAL PLEADING, EVIDENCE, AND PRACTICE 2011 Ch. 4, § XII, § G, 4-303 (James Richardson ed., 59th ed. 2010). Similarly, in a bench trial, "magistrates are judges both of facts and law. It is therefore submitted that . . . they . . . have the same right as a jury to acquit if they do not accept the evidence, whether because it is conflicting, or has been contradicted or for any other reason." *Id.* § D, 4-296.

[27] "In [*In re*] *Winship*, the Court held for the first time that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Jackson*, 443 U.S. at 315 (quoting *In re* Winship, 397 U.S. 358, 364 (1970)). The Supreme Court in *In re Winship* saw it vital to the due process protection of the Fourteenth Amendment "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Id.* at 316; *see also* Thompson v. Louisville, 362 U.S. 199, 206 (1960) ("Just as '[c]onviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt." (footnote omitted) (quoting De Jonge v. Oregon, 299 U.S. 353, 362 (1937))).

[28] Although *Jackson* is often cited for the appellate and trial standard on determining a motion for a judgment of acquittal, *Jackson* actually concerns what "sufficiency" of evidence means and whether a conviction on less than sufficient evidence would be a violation of due process:

> Our inquiry in this case is narrow. The petitioner has not seriously questioned any aspect of Virginia law governing the allocation of the burden of production or persuasion in a murder trial. . . . His sole constitutional claim, based squarely upon

be because esteemed and erudite practitioners have effectively written off considering the "beyond a reasonable doubt" standard in bench trials and, as such, the issue has not reached the Supreme Court. For example, Section 467 of Wright's *Federal Practice and Procedure* states, "A motion for judgment of acquittal at the close of the prosecution's evidence in a case tried to the court is considered by the same standard as in a jury case."[29] However, none of the cases Wright relies on for this proposition in Section 467 are on point.

IV. The Unwelcome Guest: When Wright Is Wrong

For support, Wright cites *United States v. Salman*,[30] *United States v. Pierce*,[31] *United States v. Magallon-Jimenez*,[32] *United States v. Carter*,[33] and *United States v. Stubler*[34]—none of which were decided by the United States Supreme Court. *Salman* involved a *pre-trial* dismissal of an indictment.[35] *Pierce* involved the test to be applied in *appellate review*[36]

> [*In re*] *Winship*, is that the District Court [for the Eastern District of Virginia in which the petitioner brought his habeas corpus proceeding] and the [Fourth Circuit] Court of Appeals were in error in not recognizing that the question to be decided in this case is whether any rational factfinder could have concluded beyond a reasonable doubt that the killing for which the petitioner was convicted was premeditated. The question thus raised goes to the basic nature of the constitutional right recognized in the [*In re*] *Winship* opinion.

Jackson, 443 U.S. at 313 (citations omitted).

[29] WRIGHT & HENNING, *supra* note 9.

[30] 378 F.3d 1266, 1267 n.3 (11th Cir. 2004) (per curiam); WRIGHT & HENNING, *supra* note 9, at 376 n.33.

[31] 224 F.3d 158, 164 (2d Cir. 2000); WRIGHT & HENNING, *supra* note 9, at 376 n.33.

[32] 219 F.3d 1109, 1112 (9th Cir. 2000); WRIGHT & HENNING, *supra* note 9, at 376 n.33.

[33] 311 F.2d 934, 940 (6th Cir. 1963); WRIGHT & HENNING, *supra* note 9, at 376 n.33.

[34] No. 4:06-CR-00225, 2006 WL 3043073, at *2 (M.D. Pa. Oct. 24, 2006) (order denying motion for judgment of acquittal); WRIGHT & HENNING, *supra* note 9, at 362 n.1.

[35] *Salman*, 378 F.3d at 1267.

[36] The standard for appellate review is clear error, and the clear error standard is significantly deferential, requiring a "'definite and firm conviction that a mistake has

of the sufficiency of evidence *after* a trial, jury or bench, and quoted *Jackson v. Virginia* for the appellate standard.[37] Thus, *Pierce* did not concern a determination by the trial court on a motion for acquittal.[38]

Both *Magallon-Jimenez* and *Carter* held that, in both jury and bench trials, "there is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the [government], any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[39] As with *Pierce*, *Magallon-Jimenez* and *Carter* concerned the *appellate review* of the sufficiency of the evidence and did not relate to a determination of a motion for acquittal at trial level.[40]

Out of those five cases, *Stubler* was the only one that happened to be a bench trial.[41] In *Stubler*, the defendant moved for a judgment of acquittal *after* he was convicted.[42] The district court held that "Rule 29 of the Federal Rules of Criminal Procedure allows for a motion for judgment of acquittal[, and] [t]he standard the court must apply is whether 'the evidence is insufficient to sustain a conviction.'"[43] Further, the district court held "this standard remains the same [even in] a non-jury trial."[44] In a surprise demonstration of a lack of understanding of the

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been committed.'" Easley v. Cromartie, 532 U.S. 234, 242 (2001) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)). Special deference is paid to a trial court's credibility findings. Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574-75 (1985). Consequently, on appeal, the reviewing court determines whether the evidence was sufficient to sustain a conviction. Jackson v. Virginia, 443 U.S. 307, 318-19 (1979). If the evidence was insufficient, then a violation of due process has occurred. *Id.* at 315 (quoting *In re* Winship, 397 U.S. 358, 364 (1970)).

[37] United States v. Pierce, 224 F.3d 158, 164 (2d Cir. 2000) (quoting *Jackson*, 443 U.S. at 319).

[38] *See id.*

[39] United States v. Magallon-Jimenez, 219 F.3d 1109, 1112 (9th Cir. 2000) (citing *Jackson*, 445 U.S. at 319); *Carter*, 311 F.2d 934, 940 (6th Cir. 1963).

[40] *See Pierce*, 224 F.3d at 164; *Magallon-Jimenez*, 219 F.3d at 1112; *Carter*, 311 F.2d at 940.

[41] United States v. Stubler, No. 4:06-CR-00225, 2006 WL 3043073, at *1 (M.D. Pa. Oct. 24, 2006) (order denying motion for judgment of acquittal).

[42] *Id.*

[43] *Id.* at *2 (quoting WRIGHT & HENNING, *supra* note 9, § 467, at 362).

[44] *Id.* (citing McCarthy v. N.Y.C. Technical Coll. of City Univ. of N.Y., 202 F.3d 161, 166 (2d Cir. 2000)).

standard—*Stubler* cited *civil case law* regarding the Age Discrimination in Employment Act to support that holding.[45]

Wright's *Federal Practice and Procedure* demonstrates—by its citation to these inapposite cases—that it has not appropriately analyzed the jurisprudence in making its assertion that the standard in a bench trial is the same as in a jury trial. None of these cases concern a trial-level determination of a motion for a judgment of acquittal in a bench trial at the conclusion of the government's evidence. Thus, Wright has propounded a baseless proposition on a mere cursory examination, preventing a proper analysis of the standard. A more thorough examination is warranted.

V. A Nostalgic Affair: Let Us Go Back to *Camp*

In the United States, there are only three cases found to date in which the "beyond a reasonable doubt" standard was discussed in a bench trial: *United States v. Camp*,[46] *United States v. Laikin*,[47] and *United States v. Cascade Linen Supply Corp. of New Jersey*.[48]

In *Camp*, a two-defendant case tried before a district judge, a motion for a judgment of acquittal was made after the close of the government's evidence and before either defendant put on a case.[49] The court expressly considered whether the standard on the motion should be "whether the evidence was insufficient to sustain a conviction" and held, "*logically*," that standard meant whether the government's evidence proved the defendant guilty beyond a reasonable doubt.[50] According to the court,

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[45] *Id.* (citing *McCarthy*, 202 F.3d at 163 (where the plaintiff brought a civil claim under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2006))).

[46] 140 F. Supp. 98, 99 (D. Haw. 1956).

[47] 439 F. Supp. 257, 257-58 (E.D. Wis. 1977) (order denying defendant's motion for a judgment of acquittal).

[48] 160 F. Supp. 565, 566-67 (S.D.N.Y. 1958).

[49] *Camp*, 140 F. Supp. at 99, 101 ("The question to be determined . . . is whether the government has proved beyond a reasonable doubt that [the] defendants are guilty as charged, absent some defense which they may or may not be prepared to make.").

[50] *Id.* at 99 (emphasis added) ("This case, however, is a criminal case tried to the court without a jury, jury trial having been waived by both parties. The motion for

if the government did not prove the defendant guilty and the case were to proceed, continuing with the case

> would put upon the defendant the risk that by his own evidence, as by testimony produced on cross-examination, he might supply the evidence which convinces the trier of fact of his guilt, where absent such evidence the trier of fact would not be so convinced. To subject the defendant in a criminal case to such a risk would be contrary to the principles by which the criminal law has developed in [the United States]. It would in effect require the defendant to assist in providing a vital element of the evidence which convicts him.[51]

Thus, *Camp* allowed for a coordinated effort of (1) the presumption of innocence, (2) the government's evidentiary burden of proving the defendant guilty (if it can), and (3) the defendant's right to remain silent to protect the defendant from conviction.[52]

While *Camp*'s reasoning appears sensible, some courts have expressly rejected the *Camp* logic. In *Laikin*, the defendant in a bench trial requested the court to consider whether, on his motion for a judgment of acquittal, the government's evidence proved him guilty beyond a reasonable doubt.[53] The *Laikin* court, citing the Seventh Circuit case of *United States v. Feinberg*,[54] held that the correct standard is taking the government's evidence in the light or aspect most favorable to the government.[55] The *Feinberg*[56] court, in making its holding, cited *Glasser*

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judgment of acquittal, therefore, logically goes beyond the test of whether the evidence is sufficient to *sustain* a conviction by the trier of fact. Where the court is the trier of fact, the test to be applied to the evidence produced by the government is not whether it *could* sustain a conviction, but whether the government has so far substantiated its case, that absent a defense the court *would* find the defendant guilty as to any of the counts of the indictment." (emphasis added)).

[51] *Id.*

[52] *See id.*

[53] United States v. Laikin, 439 F. Supp. 257, 257-58 (E.D. Wis. 1977) (order denying defendant's motion for a judgment of acquittal).

[54] 535 F.2d 1004, 1008 (7th Cir. 1976).

[55] *Laikin*, 439 F. Supp. at 258 (citing Glasser v. United States, 315 U.S. 60, 80 (1942), *superseded by rule on other grounds*, FED. R. EVID. 104(a), *as recognized in* Bourjaily v. United States, 483 U.S. 171, 181 (1987)).

[56] 535 F.2d at 1008.

v. United States,[57] *United States v. Velasco*,[58] and *United States v. DeNiro*.[59] However, *Glasser*, *Velasco*, and *DeNiro* each refer to the standard of *appellate review*.[60]

United States v. Cascade Linen Supply Corp. of New Jersey[61] similarly declined to follow *Camp*.[62] The defendants in a bench trial moved for judgments of acquittal after the close of the government's evidence.[63] *Camp* was not followed in *Cascade Linen* because the district judge held—without citing any authority—that determining whether the government proved its case beyond a reasonable doubt at the close of the government's case would "severely impair the orderly disposition of the issues."[64] The judge also held, again without citing any authority, that determining the motion using the "beyond a reasonable doubt" standard "would be tantamount to submitting the evidence to the trier of the facts twice. To this defendants are not entitled."[65]

The judge further indicated, without discussion, that "[he was] unable to understand [the] defendants' contentions that the presumption of their innocence and their right to remain silent and offer no proof [were] in some way diminished or impaired by [his] ruling."[66] From the language

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[57] 315 U.S. 60, 80 (1942).

[58] 471 F.2d 112, 115 (7th Cir. 1972).

[59] 392 F.2d 753, 756 (6th Cir. 1968).

[60] *Glasser*, 315 U.S. at 80 ("It is not for [the Supreme Court] to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." (citing United States v. Manton, 107 F.2d 834, 839 (2d Cir. 1939))); *Velasco*, 471 F.2d at 115 ("In deciding whether the trial court erred in denying the appellant's motions for acquittal [the reviewing court] must take the evidence in the aspect most favorable to the government." (citing *Glasser*, 315 U.S. at 80)); *DeNiro*, 392 F.2d at 756 ("'In determining whether the evidence was sufficient to withstand a motion for acquittal, the evidence must be viewed in the light most favorable to the prosecution. This rule applies to a case tried to a District Judge as well as to a case tried to a jury.'" (quoting United States v. Carter, 311 F.2d 934, 940 (6th Cir. 1963))).

[61] 160 F. Supp. 565, 566-68 (S.D.N.Y. 1958).

[62] *Cascade Linen*, 160 F. Supp. at 568.

[63] *Id.* at 566-67.

[64] *Id.* at 567.

[65] *Id.* at 568.

[66] *Id.* ("The obligation to measure the evidence against the rule of reasonable doubt arises only when both sides have rested, and this is as true in a case tried to a jury as it is in one in which a jury is waived. This obligation cannot arise from a resting of the Government's case alone and a motion for acquittal. In this posture, the moving

and tone in *Cascade Linen*, it appears the judge was eager to convict the defendants. Indeed, after the defendants' respective motions for judgment of acquittal were denied, the defendants rested.[67] They were then convicted.[68]

Herein lies the problem. The court can readily deny a motion for a judgment of acquittal. Upon this denial, the defendant is still left to speculate and guess whether the government satisfied its burden—on the government's evidence—of proving the defendant guilty beyond a reasonable doubt. Thus, not knowing whether the government has discharged its burden leaves the presumption of innocence and the defendant's right to remain silent in competition with the government's obligation to discharge its burden when, in fact, these three aims should be cooperating with one another.

VI. Pass the Salt: The International Tribunals—An Exercise in Impermissible Burden Shifting

As a comparative study, consider that the proceedings before international war crimes tribunals are bench trials.[69] Although in a number of

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defendants are entitled to invoke the Court's power to enter a judgment of acquittal as a matter of law, but not to impose the duty of rendering findings on the facts. The latter occurs only upon the final termination of the proof and is the final conclusion of the trier of the facts on the totality of the evidence. Short of the resting of both sides there can be no totality of evidence, no obligation to render findings, and necessarily, no occasion for applying the rule of reasonable doubt.").

[67] United States v. Consol. Laundries Corp., 291 F.2d 563, 567 (2d Cir. 1961).

[68] *Id.* ("After pleading not guilty, the sixteen defendants waived trial by jury. Trial began before Judge Palmieri on January 20, 1958 and the government rested on March 12. . . . Their motions [for acquittal] being denied, they rested without introducing any evidence. On June 16, 1958 the trial judge filed findings of fact and conclusions of law which denied the motions for acquittal and found all the defendants guilty.").

[69] *See, e.g.*, Rule 87 of the RULES OF PROCEDURE AND EVIDENCE, The 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 ("When both parties have completed their presentation of the case, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private. A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt."); Rule 87 of the RULES OF PROCEDURE AND EVIDENCE, The Special Court for Sierra Leone ("After presentation of closing arguments, the Presiding Judge shall declare the hearing

instances the "beyond a reasonable doubt" standard was argued by defense counsel on a motion for a judgment of acquittal at the close of the government's case,[70] the use of the legal sufficiency standard became settled law. Unfortunately, this was without the benefit of any real analysis.

The Appeals Chamber Judgement in *Prosecutor v. Jelisić*[71] is the

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closed, and the Trial Chamber shall deliberate in private. A finding of guilty may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.").

[70] *See, e.g.*, Andrew T. Cayley & Alexis Orenstein, *Motion for Judgement of Acquittal in the Ad Hoc and Hybrid Tribunals: What Purpose If Any Does It Serve?*, 8 J. INT'L CRIM. JUST. 575, 584 & n.60, 587 & n.82 (2010) (citing Prosecutor v. Kordić, Case No. IT-95-14/2, Decision on Defence Motions for Judgement of Acquittal, ¶¶ 2, 4 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 6, 2000) (defendants contending that the standard was beyond a reasonable doubt); Prosecutor v. Norman, Case No. SCSL-04-14-T, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, ¶ 23 (Special Ct. for Sierra Leone Oct. 21, 2005) (defense counsel arguing the standard was beyond a reasonable doubt)). Note Cayley and Orenstein incorrectly stated that "[t]he *Jelisić* Trial Chamber concluded that the standard of review [on a motion for a judgment of acquittal] was the familiar common law requirement of guilt 'beyond a reasonable doubt.'" *See* Cayley & Orenstein, *supra*, at 584. This statement is incorrect. First, at common law, the "beyond a reasonable doubt" standard is nowhere near familiar on a motion for a judgment of acquittal. Second, Cayley and Orenstein refer to the standard of *review*. *Id.* As an appellate court reviews a trial decision or verdict, this has misleading insinuations. Third, and perhaps most importantly, Cayley and Orenstein refer to the *Jelisić* Trial Chamber *Judgement* and not the Trial Chamber's decision on the motion for judgment of acquittal. *See id.* at 584 n.59.

[71] Case No. IT-95-10-A, Appeals Chamber Judgement, ¶ 37 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001) ("The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but whether it could. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt." (footnote omitted)). In *Jelisić*, the Appeals Chamber followed its holding in *Prosecutor v. Delalić* "where it said: '[t]he test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question.'" *Jelisić*, Case No. IT-95-10-A ¶ 37 & n.66 (quoting Prosecutor v. Delalić, Case No. IT-96-21-A, Appeals Chamber Judgement, ¶ 434 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001)). The Appeals Chamber in *Jelisić* also cited the Canadian case of *R. v. Syms* and expressly referred to the fact that *Syms* was a jury trial. *Id.* ¶ 37 n.67 ("[A] trial judge should withdraw a case from the jury only where 'the evidence was so slight or tenuous that it would be incapable of supporting a verdict of guilty.'" (quoting R. v. Syms (1979), 47 C.C.C. (2d) 114, para.

leading case among the international tribunals[72] for use of the legal sufficiency standard in determining a motion for a judgment of acquittal—known as Rule 98 *bis*[73]—at the close of the prosecution's evidence.

The Appeals Chamber in *Jelisić* followed[74] its prior Appeals Chamber Judgement in *Prosecutor v. Delalić*,[75] which in turn cited the Appeals Chamber Judgement in *Prosecutor v. Tadić*,[76] the Appeals Chamber Judgement in *Prosecutor v. Aleksovski*,[77] and the Trial Chamber's "Decision on Motion for Acquittal" in *Prosecutor v. Kunarać*[78] for support.

However, those portions of *Aleksovski* and *Tadić* referred to by the *Delalić* Appeals Chamber Judgement concern the standard of *appellate review* in determining whether a trial chamber's factual finding can

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6 (Can. Ont. C.A.))). Of course—as expressed in *R. v. Monteleone*, the other Canadian case cited in *Jelisić*—if the court were to decide issues of fact, the court would be usurping the function of the jury. *Id.* ¶ 37 n.65 (citing R. v. Monteleone, [1987] 2 S.C.R. 154, paras. 5, 9 (Can.) ("'The function of the trial Judge on the motion is only to decide if there is any evidence to go to the jury. To hold otherwise would be to permit the Judge to usurp the function of the jury.'" (quoting R. v. Kavanagh, [1972] 3 O.R. 546, para. 15 (Can. Ont. C.A.))). All things considered, this pair of Canadian cases does not support *Jelisić*'s holding as applied to a bench trial.

[72] ARCHBOLD: INTERNATIONAL CRIMINAL COURTS PRACTICE, PROCEDURE & EVIDENCE § 8-88, at 380 (Karim A.A. Khan et al. eds., 2d ed. 2005); *see also* Cayley & Orenstein, *supra* note 70, at 586 & n.74 (noting the standard of review under Rule 98 *bis* was settled by *Jelisić* and "other international tribunals cite [it] as authoritative").

[73] Rule 98 *bis* of the RULES OF PROCEDURE AND EVIDENCE, The 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; *see also* Rule 98 of the RULES OF PROCEDURE AND EVIDENCE, The Special Court for Sierra Leone (requiring the trial court to "enter a judgment of acquittal" if the prosecution provides "no evidence capable of supporting a conviction").

[74] *Jelisić*, Case No. IT-95-10-A ¶ 37 (stating the court was "follow[ing] its recent holding in . . . *Delalić*").

[75] Case No. IT-96-21-A, Appeals Chamber Judgement, ¶ 434 & nn.665, 667 (Int'l Crim. Trib. for the Former Yugoslovia Feb. 20, 2001).

[76] Case No. IT-94-1-A, Appeals Chamber Judgement, ¶ 64 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

[77] Case No. IT-95-14/1-A, Appeals Chamber Judgement, ¶ 63 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000).

[78] Case No. IT-96-23-T, Decision on Motion for Acquittal, ¶¶ 2-10 (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2000).

withstand appellate scrutiny—that is, legal sufficiency.[79] As such, *Tadić* and *Aleksovski* are incorrectly cited by *Delalić* for the proposition that the standard a *trial court* sitting without a jury should use to determine a motion for a judgment of acquittal is also legal sufficiency.[80]

The Trial Chamber's "Decision on Motion for Acquittal" in *Prosecutor v. Kunarać* held—citing the Trial Chamber's "Decision on Defence Motions for Judgement of Acquittal" in *Prosecutor v. Kordić*[81]—that the appropriate test to be applied on a motion for a judgment of acquittal "was not whether there was evidence which satisfied the Trial Chamber beyond reasonable doubt of the guilt of the accused (as the defence in that case had argued), but rather it was whether there was evidence on which a reasonable Trial Chamber *could* convict."[82]

All things considered, the Trial Chamber in *Kunarać* did its best not to impugn the prior jurisprudence on the issue. Thus, *Kunarać*, shifting the burden of proof off the shoulders of the prosecution, noted—*without citing any authority*—that

> [i]f the Trial Chamber *were* entitled to weigh questions of credit generally when determining whether a judgment of acquittal should be entered, and if it found that such a judgment was not warranted, the perception would

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[79] *See Tadić*, Case No. IT-94-1-A ¶ 64 (The defense's third ground of appeal was regarding an error of fact. As such, the Appeals Chamber had no contention with the parties agreement that "the standard to be used when determining whether the Trial Chamber's factual finding should stand is that of unreasonableness, that is, a conclusion which no reasonable person could have reached."); *Aleksovski*, Case No. IT-95-14/1-A ¶ 63 ("[I]t is for a Trial Chamber to consider whether a witness is reliable and whether evidence presented is credible. The Appeals Chamber, therefore, has to give a margin of deference to the Trial Chamber's evaluation of the evidence presented at trial. The Appeals Chamber may overturn the Trial Chamber's finding of fact only where the evidence relied on could not have been accepted by any reasonable tribunal or where the evaluation of the evidence is wholly erroneous." (footnote omitted)).

[80] Prosecutor v. Delalić, Case No. IT-96-21-A, Appeals Chamber Judgement, ¶ 434 & n.667 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (citing *Tadić*, Case No. IT-94-1-A ¶ 64; *Aleksovski*, Case No. IT-95-14/1-A ¶ 63).

[81] Case No. IT-95-14/2, Decision on Defence Motions for Judgement of Acquittal, ¶ 26 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 6, 2000).

[82] *Kunarać*, Case No. IT-96-23-T ¶ 9 (citing *Kordić*, Case No. IT-95-14/2 ¶ 26). *Kunarać* also cites to both an English and an Australian opinion—both of which concern a trial court's power to withdraw a case from a jury (that is, the cases are not bench trials). *Id.* ¶ 7 n.19 (citing *Alexander v The Queen* [1981] 145 CLR 395, 402-03, 417, 430, 433, 435 (Austl.); R. v. Galbraith, [1981] 1 W.L.R. 1039 (H.L.) 1042 (Eng.)).

> necessarily be created (whether or not it is accurate) that the Trial Chamber had accepted the evidence of the prosecution's witnesses as credible. Such a consequence would then lead to two further perceptions: (1) that the accused will bear at least an evidentiary onus to persuade the Trial Chamber to alter its acceptance of the credibility of the prosecution's witnesses, and (2) that the accused will be convicted if he does not give evidence himself. He would virtually be required to waive the right given to him by the Tribunal's Statute to remain silent.[83]

An analysis of *Kordić*—the case spawning the seminal misunderstanding of the proper application of a motion for a judgment of acquittal at the international tribunals—is thus warranted.

First, the Trial Chamber in *Kordić* seemed satisfied that because other trial chambers at the International Criminal Tribunal for the former Yugoslavia were using a standard lower than beyond a reasonable doubt, using a lower standard was the appropriate thing to do.[84] Without any analysis, the Trial Chamber indicated that "[i]mplicit in Rule 98 *bis* proceedings is the distinction between the determination made at the halfway stage of the trial, and the ultimate decision on the guilt of the accused to be made at the end of the case, on the basis of proof beyond a reasonable doubt."[85] The Trial Chamber failed to provide any basis or reasoning for that distinction.

Next, the *Kordić* Trial Chamber looked to the Trial Chamber's "Decision on Defence Motion to Dismiss Charges" in *Prosecutor v. Tadić*,[86] the Trial Chamber's "Order on the Motions to Dismiss the Indictment at the Close of the Prosecutor's Case" in *Prosecutor v. Delalić*,[87] the Trial Chamber's "Decision of Trial Chamber I on the

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[83] *Kunarać*, Case No. IT-96-23-T ¶ 5.

[84] *Kordić*, Case No. IT-95-14/2 ¶ 11. ("An analysis of the International Tribunal's jurisprudence shows a consistent pattern in determining motions for acquittal at the close of the Prosecution's case, not on the basis of a Trial Chamber being satisfied beyond a reasonable doubt of the guilt of the accused on the basis of the Prosecution's case, but on a different and lower standard.")

[85] *Id.*

[86] *Id.* ¶ 12 (citing *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on Defence Motion to Dismiss Charges, at 2 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 13, 1996)).

[87] *Id.* ¶ 13 (citing in *Prosecutor v. Delalić*, Case No. IT-96-21-T, Order on the Motions to Dismiss the Indictment at the Close of the Prosecutor's Case, at 4 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 18, 1998)).

Defence Motion to Dismiss" in *Prosecutor v. Blaškić*,[88] and the Trial Chamber's "Decision on Motion for Withdrawal of the Indictment against the accused Vlatko Kupreškić" in *Prosecutor v. Kupreškić*.[89]

The Trial Chamber in *Tadić* merely held—without citing any authority—that, because it would ultimately determine whether each count was proven beyond a reasonable doubt at the conclusion of the entire case, it would only determine whether the evidence presented was legally sufficient.[90]

In *Delalić*, the Trial Chamber held that a motion for judgment of acquittal will be denied if, "as a matter of law, there is evidence before it relating to each of the offences in question for the accused persons to be invited to make their defence."[91] There was no analysis as to the foundations for this principle nor did this decision cite any jurisprudence.

After citing *Tadić* and *Delalić*, the Trial Chamber in *Blaškić* held:

> CONSIDERING that, on these legal foundations, based on a strict application of the spirit and letter of the Rules, the Trial Chamber limits the review of the Motion:
>
> [1] in fact: to the mere hypothesis that the Prosecutor omitted to provide the proof for one of its counts;
>
> [2] in law: to the mere hypothesis that the Prosecution failed to show a serious *prima facie* case in support of its claims.[92]

That decision was made without any legal analysis as to the foundations for this principle nor did the decision cite any jurisprudence for that holding.

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[88] *Id.* ¶ 14 (citing *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Decision of Trial Chamber I on the Defence Motion to Dismiss, at 5 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 3, 1998)).

[89] *Id.* ¶ 15 (citing *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Decision on Motion for Withdrawal of the Indictment Against the Accused Vlatko Kupreškić, at 3, 5 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 18, 1998)).

[90] *See Tadić*, Case No. IT-94-1-T, at 2 ("[T]he test to be applied in determining this motion is whether as a matter of law there is evidence, were it to be accepted by the Trial Chamber, as to each count charged in the indictment which could lawfully support a conviction of the accused; . . . this is in contradistinction to what will remain for ultimate determination at the conclusion of this trial, namely, the question of fact whether, as to each count and on the whole of the evidence relating to that count, the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt . . . .").

[91] *Delalić*, Case No. IT-96-21-T, at 4.

[92] *Blaškić*, Case No. IT-95-14-T, at 5.

Lastly, the Trial Chamber in *Kupreškić* merely referred to the test enunciated in *Tadić* and dismissed the motion to withdraw the indictment because the Trial Chamber was of the opinion that there was "evidence as to each count charged in the indictment, which were it to be accepted by [the] Trial Chamber, could [have] lawfully support[ed] [the] conviction."[93] Other than referring to *Tadić*, the *Kupreškić* Trial Chamber did not provide any legal support for that standard.

Kordić then examined the practice in five domestic jurisdictions—England and Wales,[94] Canada,[95] Australia,[96] the United States,[97] and Spain[98]—and found "the test that is applied on motions for acquittal at the end of the Prosecution's case is not the high standard of proof beyond [a] reasonable doubt."[99] However, the practice referred to in England and Wales, the United States, and Spain is in relation to *jury trials*, not bench trials.[100] As explained above, the low legal sufficiency standard is used

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[93] Kupreškić, Case No. IT-95-16-T, at 3.

[94] Prosecutor v. Kordić, Case No. IT-95-14/2-T, Decision on Defence Motions for Judgement of Acquittal, ¶ 19 & n.11 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 6, 2000) (citing R. v. Galbraith, [1981] 1 W.L.R 1039 (H.L.) 1040-42 (Eng.) (involving a jury trial rather than a bench trial where the test was not beyond a reasonable doubt)). *Compare Galbraith*, [1981] 1 W.L.R. at 1040-42, *with* ARCHBOLD, *supra* note 26 (where the jury has the common law power to stop a trial after the Crown's evidence has been presented). Also consider that, in a bench trial, magistrate judges can acquit the defendant after the Crown's evidence. ARCHBOLD, *supra* note 26, § D, 4-296.

[95] *Kordić*, Case No. IT-95-14/2-T ¶ 20 (quoting 2 ROGER E. SALHANY, CRIMINAL TRIAL HANDBOOK § 11.2(b) (2d Release 2004)).

[96] *Id.* ¶ 21 (quoting RAY WATSON ET AL., CRIMINAL LAW (NSW) § 2.35740 (1996)).

[97] *Id.* ¶ 22 (citing FED. R. CRIM. P. 29). As explained above, the United States' Rule 29 explicitly concerns jury trials, and "Rule 29 has no real application when a case is tried by the court since the plea of not guilty asks the court for a judgment of acquittal." MOORE ET AL., *supra* note 9. *Kordić* also cites *United States v. Mariani*, a jury trial, but the cited portion of *Mariani* concerns the standard of *appellate review* of a motion for a judgment of acquittal. *Kordić*, Case No. IT-95-14/2-T ¶ 23 (citing United States v. Mariani, 725 F.2d 862, 865 (2d Cir. 1984)). This is further evidence of the international tribunals' misunderstanding of the proper standard for determining a motion for a judgment of acquittal at the trial level.

[98] *Id.* ¶ 24 ("Civil law jurisdictions do not generally have a procedure equivalent to Rule 98 *bis*, except for Spanish legislation, *which allows the judge to dismiss the jury* after the Prosecution's case, where there is no evidence that could support a conviction of the accused." (emphasis added) (citing S. ANDRÉS DE LA OLIVA SANTOS ET AL., DERECHO PROCESAL PENAL 905-06 (3d ed. 1997))).

[99] *Id.* ¶ 18.

[100] *See* R. v. Galbraith, [1981] 1 W.L.R. 1039 (H.L.) 1040-42 (Eng.); *see also Alexander v The Queen* [1981] 145 CLR 395, 403 (Austl.). Similarly, with the excepf-

in jury trials because the judge is precluded from usurping the fact-finder's role. As such, the jury trial practice in these jurisdictions provides *Kordić* no support. Next, Australian practice allows for a judge to acquit a defendant after the close of the prosecution's case[101] and is

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tion of *Jackson v. Virginia* and Salhany's *Criminal Trial Handbook*, each of the authorities to which Cayley and Orenstein refer for the "Origins of the Rule" for a motion for a judgment of acquittal at the international tribunals concern jury trials. Cayley & Orenstein, *supra* note 70, at 577-80 nn.5, 12, 14-22, 24 & 27-34 (citing FED. R. CRIM. P. 29; Jackson v. Virginia, 443 U.S. 307, 309 (1979) (involving a bench trial conviction); Holland v. United States, 348 U.S. 121, 130, 139-40 (1954); United States v. Sax, 39 F.3d 1380, 1384-85 (7th Cir. 1994); United States v. Taylor, 464 F.2d 240, 242 (2d Cir. 1972); United States v. Masiello, 235 F.2d 279, 284-85 (2d Cir. 1956); Curley v. United States, 160 F.2d 229, 230, 232-33 (D.C. Cir. 1947); *Doney v The Queen* [1990] 171 CLR 207, 214-15 (Austl.); United States v. Shephard, [1977] 2 S.C.R. 1067, paras. 1, 8 (Can.) (concerning a determination made by a magistrate judge, prior to extradition, on whether the evidence was legally sufficient for a jury to convict); R. v. Galbraith, [1981] 1 W.L.R. 1039 (H.L.) 1040 (Eng.); *Kordić*, Case No. IT-95-14/2-T ¶ 24 (citing S. ANDRÉS DE LA OLIVA SANTOS ET AL., *supra* note 98) (noting the Spanish procedure for a "judge to dismiss the jury after the [p]rosecution's case"); SALHANY, *supra* note 95; WRIGHT & HENNING, *supra* note 9 (stating the sufficiency of the evidence standard for judgment of acquittal is the same for a bench trial as in a jury trial)).

[101] *See* RAY WATSON ET AL., CRIMINAL LAW (NSW) § 18.1830, *available at* Thomson Reuters (Professional) Australia, http://legalonline.thomson.com.au (last visited Oct. 19, 2011) (purchase required) (on file with the American Journal of Trial Advocacy). Section 18.1830 of Watson's *Criminal Law* titled, "Where there is a case to answer—Prasad direction," states that "[a]t the close of the prosecution['s] case the accused may make an application that the court give itself a 'Prasad direction' and enter a verdict of not guilty if the prosecution evidence is conflicting or unsatisfactory." *Id.* (citing *R v Prasad* (1979) 23 SASR 161, 163 (Austl.); *May v O'Sullivan* (1955) 92 CLR 654, 656-67 (Austl.)).

Section 18.1830 distinguishes, citing *Prasad*, between a non-jury trial and a jury trial. Concerning jury trials, the *Prasad* court holds that

> [i]t is, of course, *open to the jury at any time after the close of the case for the prosecution to inform the judge that the evidence which they have heard is insufficient to justify a conviction and to bring in a verdict of not guilty without hearing more.* It is within the discretion of the judge to inform the jury of this right, and if he decides to do so he usually tells them at the close of the case for the prosecution that they may do so then or at any later stage of the proceedings. *He may undoubtedly, if he sees fit, advise them to stop the case and bring in a verdict of not guilty.* But a verdict by direction is quite another matter. Where there is evidence which, if accepted, is capable in law of proving the charge, a direction to bring in a verdict of not guilty would be . . . a usurpation of the rights and the function of the jury.

Prasad, 23 SASR at 163 (emphasis added) (citation omitted). Chief Justice King writing for the court in *Prasad* continued the holding with respect to a non-jury trial:

> [T]here is a clear distinction for this purpose between a trial before a magistrate or other court which is the judge of both law and facts and a trial by judge and jury.

in direct contradistinction to *Kordić*.

Finally, Canadian practice is the lone exception that does provide some support for *Kordić*'s proposition. However, in Canada—per statutory requirement—the fact-finder can only render a verdict after the defendant declares, after the prosecution's evidence, whether the defendant intends to call a defense case (and upon such an affirmative declaration, after hearing the defense evidence).[102] Notably, there is no such requirement

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> I have no doubt that a tribunal which is the judge of both law and fact may dismiss a charge at any time after the close of the case for the prosecution, notwithstanding that there is evidence upon which the defendant could lawfully be convicted, if that tribunal considers that the evidence is so lacking in weight and reliability that no reasonable tribunal could safely convict on it. This power is *analogous to the power of the jury, as judges of the facts, to bring in a verdict of not guilty at any time after the close of the prosecution's case.* It is part of the tribunal's function as judge of the facts. It cannot, consistently with principle, exist in a judge whose function does not include adjudication upon the facts.

Id. (emphasis added). Consequently, *Kordić*'s reference to Australian law for support of the proposition that the test to be applied "on motions for acquittal at the end of the Prosecution's case is not the high standard of proof beyond reasonable doubt" refers, at best, to the standard in a jury trial. *Kordić*, Case No. IT-95-14/2-T ¶ 18. Watson's *Criminal Law*, citing *Prasad*, actually supports a holding opposite to *Kordić*. *See* WATSON, *supra* (quoting *Prasad*, 23 SASR at 163). In particular, *Prasad* holds that the judge or tribunal in a non-jury trial may find the defendant not guilty at the end of the prosecution's case despite evidence having been presented on "'which the defendant could lawfully be convicted.'" WATSON, *supra* (quoting *Prasad*, 23 SASR at 163).

As a caveat, "if a Prasad application is not successful, the accused may not be permitted to call evidence in reply." WATSON, *supra*.

[102] SALHANY, *supra* note 95. The only non-jury decision discussed in Section 11.2(b) of Salhany's *Criminal Trial Handbook* is the 1949 case of *R v. Morabito*. *See id.* (citing [1949] S.C.R. 172, para. 6 (Can.)). *Morabito* turned on the interpretation of what is now Section 651(1) of the Canadian Criminal Code, which states:

> Where an accused, or any one of several accused being tried together, is defended by counsel, the counsel shall, at the end of the case for the prosecution, declare whether or not he intends to adduce evidence on behalf of the accused for whom he appears and if he does not announce his intention to adduce evidence, the prosecutor may address the jury by way of summing up.

CANADA CRIMINAL CODE, R.S.C. 1985, c. C-46, s. 651(1); *see Morabito*, [1949] S.C.R. 172 at para. 13. The Supreme Court of Canada held that this statute requires—by the word "shall"—that defense counsel, at the close of the prosecution's case, must declare whether he intends to adduce evidence; thus, it was inappropriate for the trial judge to consider the defendant's motion to dismiss for lack of "sufficient evidence which *could* legally and properly support a conviction . . . . [N]o other application could have been made at that stage in the absence of an election on the part of the defence to call or not

in the Rules of Procedure and Evidence at the international tribunals nor in the Federal Rules of Criminal Procedure in the United States. Consequently, *Kordić*'s citation to Canadian procedure does not support *Kordić*'s proposition.

Ultimately, what happened at the international level was that a meager legal analysis emanating from the domestic practice in *jury trials* was applied to the motion for a judgment of acquittal in non-jury trials. Of course, the jurisprudence demonstrates worry that the court would usurp the jury's function and, as such, would allow only for a court's determination as to legal sufficiency on a motion for a judgment of acquittal. This led to a fundamental misunderstanding of how such a motion should be decided in *non-jury trials* and a failure to recognize that it is impossible for trial judges to usurp the fact-finder's function because the trial judges themselves are the fact-finders.

Further propounding this misunderstanding was (1) the misapplication of the standard of appellate *review* (as in *Tadić* and *Aleksovski*) as the standard for a trial court's determination, (2) reliance on a "consistent pattern" in the jurisprudence of solely a legal sufficiency standard (although this pattern developed without any forethought),[103] and (3) a demurrer to the trial chambers' ultimate responsibility of determining guilt beyond a reasonable doubt at the close of the trial. What remains is a very low hurdle for the prosecution to meet for a motion for a judgment of acquittal to be denied. Thus, "since the denial of such a motion is, in no sense, an indication of the view of the Chamber as to the

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to call evidence." *Morabito*, [1949] S.C.R. 172 at para. 6-7 (internal quotation marks omitted).

[103] Prosecutor v. Kordić, Case No. IT-95-14/2, Decision on Defence Motions for Judgement of Acquittal, ¶ 11 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 6, 2000).

> An analysis of the International Tribunal's jurisprudence shows a consistent pattern in determining motions for acquittal at the close of the Prosecution's case, not on the basis of a Trial Chamber being satisfied beyond a reasonable doubt of the guilt of the accused on the basis of the Prosecution's case, but on a different and lower standard.

Id. That "consistent pattern" was based on *Tadić*, *Delalić*, *Blaškić*, and *Kupreškić*. *Id.* ¶¶ 12-15. As discussed above, those cases—other than *Kupreškić*'s reference to *Tadić*—did not cite any jurisprudence.

guilt of the accused on any charge, little meaningful guidance is provided to the accused in connection with his defence case."[104]

As highlighted in *Kunarać*, the jurisprudence implicitly prefers—in attempts to avoid the twin perceptions that the accused has to persuade the trial chamber "to alter its acceptance of the credibility of the prosecution's witnesses" and that "the accused will be convicted if he does not give evidence himself"—the defense to call a case instead of holding the prosecution to its evidentiary burden of proving the defendant guilty.[105]

It should be the opposite. The government should be held to its burden. If, and only if, the government has satisfied its burden of proving the defendant guilty beyond a reasonable doubt, the defendant may then *choose* to waive his right to silence. Indeed, if the trial chamber finds that the defendant is guilty beyond a reasonable doubt, the government has discharged its burden.

VII. The Invitee: The Proposed Rule 29(e)—"Motion for a Judgment of Acquittal, Nonjury Trial"

To remedy the problems previously discussed, the author proposes the following addition to Rule 29:

> (e) Nonjury Trial. After the government closes its evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense on the ground that the government did not prove that the defendant is guilty of such offense beyond a reasonable doubt.

Note, with this proposed rule, the defendant may—but is not required to—make a motion for a judgment of acquittal. Further note that the

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[104] Cayley & Orenstein, *supra* note 70, at 583. Thus, Cayley and Orenstein propose that defendants at the international and ad hoc tribunals should be stripped of their opportunity to make a motion for a judgment of acquittal. *See id.* at 576. This is despite acknowledging that "some defendants [have] certainly succeed[ed] in obtaining a reduction of some of the charges against them." *Id.* at 588.

[105] Prosecutor v. Kunarać, Case No. IT-96-23-T, Decision on Motion for Acquittal, ¶ 5 (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2000).

language in the proposed Rule 29(e) would require the court, upon such a motion, to make a decision—without reservation—on the motion.

Of course, if acquitted on one or more counts, double jeopardy attaches. If the bench indicates, upon decision of the motion, there will be a conviction on one or more counts, the defendant may elect to call a case and may elect to testify. The proposed rule does not include the prospect for a defendant to make a motion at the conclusion of the evidence.[106]

Just Desserts: Conclusion

"[I]t may fairly be said, that, so soon as a man is arrested on a charge of crime, the law takes the prisoner under its protection, and goes about to see how his conviction may be prevented."[107] Elevating the standard in determining a motion for a judgment of acquittal from prima facie to beyond a reasonable doubt is the "forgotten" protection that a criminal defendant deserves. Odd would be the prosecutor who would fuss about elevating the standard. After all, the government bears the burden of proving the defendant guilty beyond a reasonable doubt, and if the government cannot do so on its own evidence, the defendant must be not guilty.

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[106] *See* United States v. Houston, 159 F.R.D. 33, 34 (N.D. Ohio 1994) (order denying motion for judgment of acquittal) ("The logic is simple: the rules do not provide any express discussion of post-verdict motions for judgment of acquittal in nonjury criminal cases. Absent such provision, such motions, it can be argued, are not allowed. This argument makes some sense in view of the requirement of Rule 23(c) that the judge in a bench trial is, on request, to make special findings of fact—i.e., to provide an explanation for his or her verdict. No such demand can, of course, be made of a jury. By granting the opportunity to defendants to call on the judge to develop special factual findings in the course of returning a bench-trial verdict, the drafters of the rules may have acknowledged the protection that such request gives against haphazard or conclusory findings. By asking for special findings, the defendant has a way of protecting himself from oversight on the judge's part. Alternatively, the drafters of Rule 29 may have concluded that it would make little sense to require a trial judge to revisit the evidence under the guise of deciding a post-verdict motion for acquittal, in view of the review that the judge would necessarily have undertaken in the course of concluding that the defendant had been proven guilty beyond a reasonable doubt." (citation omitted)).

[107] John W. May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642, 661 (1876).