CHAPTER 1

THE NEED FOR EFFECTIVE RETRIAL PROCEDURES IN INTERNATIONAL CRIMINAL CASES

A. WRONGFUL CONVICTIONS AND THEIR INTER-RELATIONSHIP WITH THE NATURE OF THE CRIMINAL JUSTICE SYSTEM

The judicial process in criminal cases does not require a mathematical exercise. In civil law or inquisitorial systems, it depends largely on the compilation of a file, the "dossier," while within common law or adversarial systems it depends largely on the outcome of examination and cross-examination of witnesses at trial. To put it differently, the common law system may be seen as "party-driven," as the parties themselves drive the case forward and the judge is merely an umpire. When the trial starts, there is no evidence before the judge; the parties themselves are responsible for the submission of evidence. The civil law system, however, may be seen as "judge-driven"; the trial judge plays the leading role at trial, which extends to the examination of witnesses. The trial judge does so on the basis of the "dossier," which is prepared by the investigating judge or prosecutor. As a consequence, there may be instances in which the judiciary lacks complete insight into all the relevant facts that are determinative for achieving justice. In both the civil law "dossier" approach and the common law adversarial approach, it may happen that not all facts are adduced to the criminal law judge.

Moreover, and perhaps inevitably, new facts may come up after a criminal trial has been concluded and become irreversible. Such situations may result in criminal convictions that are unsafe or even qualify as miscarriages of justice. Here, a distinction should be drawn between

See RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 17 (2002).
a wrongful conviction and a miscarriage of justice. Whereas wrongful convictions do not necessarily imply that, objectively speaking, the wrongfully convicted is innocent, the term "miscarriage of justice" is associated with an innocent convicted person. Yet the term "miscarriage of justice" is sometimes also canvassed in a broader sense, namely as encompassing cases that resulted in retrial without factual innocence being proven. Miscarriages of justice, understood in this broad sense, may thus encompass several categories of cases. Gudjonsson identifies four of these:

(1) A miscarriage may occur because the defendant did not receive a fair trial, even though he may have committed the offense in question. Therefore, the defendant may be legally innocent, but factually guilty. For example, a defendant who is convicted on the basis of fabricated evidence, even though he committed the offense, is innocent in law, as he was convicted by unfair means and in violation of due legal process.

(2) A defendant who was only marginally involved in the case may be convicted of a more serious charge.

(3) The wrong person may be convicted for the offense committed.

(4) The alleged crime for which the defendant was convicted may in fact never have been committed. In other words, the actus reus of the alleged offense has not been correctly established?

When one regards this subject from the viewpoint of the doctrine of error facti-meaning that one mistakenly believes the absence or presence of a particular fact that is causative for a certain criminal law judgment—the term "miscarriage of justice" would embrace such a broad interpretation. The doctrine of error facti features within the system of criminal law defenses and could, by way of analogy, be of assistance in the clarification of the analysis of miscarriages of justice.

---