

# Mystery Lane: A Note on Independence and Impartiality in International Criminal Trials

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## 1. Introduction

The unconditional impartiality of judges in civil as well as criminal trials is an indispensable feature of the judiciary in every mature jurisdiction. It is a *sine qua non* condition of modern justice.

In practice, to be “impartial” means that the judge must not entertain any prejudice or bias against a party to the trial or have any association that might affect impartiality. Nor can he or she hold or promote any interest in a particular outcome of the trial other than a fair and just determination of the problem at hand. Were this not the cornerstone of a country’s judicial system, public faith in the law and the entire legal system would soon fade. This is true for trials in domestic and international jurisdictions. Judges are required to be persons of high moral character, independence, impartiality and integrity. There is therefore a presumption of their impartiality which cannot lightly be discarded.

As we are unable to look into the minds of judges, their impartiality needs to be assessed and determined by their demeanour and appearance both in public and private. Short of any proof of an interest or association which might affect the impartiality of the judge in question, the commonly applied test for otherwise assessing his or her independence is that there would be an unacceptable appearance of bias *if, under the circumstances, a reasonable observer, properly informed, would reasonably apprehend bias* by considering the judge’s actions. In light of the presumption of impartiality, the “reasonable apprehension of bias” must be established.

## 2. The Background

Sitting as a judge *ad litem* in 2013 in the trial against Vojislav Šešelj before the ICTY, I found myself in the wrong end of an allegation of bias when the accused filed a motion for my disqualification from the Bench after a private and personal e-mail which I had written to a

number of friends in Denmark had been leaked to the press.<sup>1</sup> In my communication, I had primarily criticised the ICTY Appeals Chamber’s recent acquittals of persons on grounds which I found to be surprising.

First, the Croats Ante Gotovina and Mladen Markač were acquitted by the majority of the Appeals Chamber on a technical detail relating to the Trial Chamber’s finding that Croatian artillery shells falling more than 200 meters away from the designated military targets in the Serbian held city of Knin and three surrounding towns were a result of indiscriminate shelling.<sup>2</sup> In the Appeals Chamber’s opinion, the Trial Chamber had erred by not explaining why and how it had chosen the 200-meter radius as the maximum distance for lawful shelling, thus crushing the alleged participation in a joint criminal enterprise (‘JCE’). However, the Appeals Chamber did not itself provide guidance on how far away from the designated targets a shell could fall in order to still be considered lawful. While the Appeals Chamber was right in pointing out that the 200-meter radius may have lacked basis, we might ask whether the extensive and heavy shelling of Knin and surrounding areas was disproportionate in relation to the limited presence of military targets in the area, or otherwise in violation of the Statute? The Appeals Chamber’s handling of the matter continues to make this question relevant for affected individuals and communities.

1 Vojislav Šešelj, leader of a radical nationalist political party in Serbia, was accused of war crimes and crimes against humanity against civilian Croats and Bosnian Muslims for having held inflammatory speeches and sending his armed Serbian volunteers to assist the Serbian forces at the frontlines in Bosnia-Herzegovina and Croatia. He was acquitted at trial on 31 March 2016, see *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Judgment, 31 March 2016 (<http://www.legal-tools.org/doc/7e3191/>). My letter was dated 6 June 2013 and Šešelj’s motion was filed on 9 July 2013.

2 *Prosecutor v. Gotovina and Markač*, Case No. IT-06-90-A, Judgment, 16 November 2012 (<http://www.legal-tools.org/doc/03b685/>).

Secondly, the Serbian general Momčilo Perišić had been convicted at trial for aiding and abetting the crimes committed by the Army of Republika Srpska ('VRS') against civilian Bosnian Muslims in Bosnia, by providing logistic and personnel assistance, including, *inter alia*, the supply of weapons, ammunition, fuel, training and technical assistance, from Serbia to the Bosnian Serb forces that used that assistance to commit crimes.<sup>3</sup> He was convicted because his actions had a substantial effect on the commission of the crimes, he knew that the VRS's operation encompassed grave crimes against civilians or of the likelihood that the VRS would perpetrate crimes and was aware that his actions assisted in the commission of these crimes. The Trial Chamber's judgment was rendered by majority, with a dissenting opinion by a judge who had argued in favour of acquittal based on the Prosecution's lack of proof of "specific direction". Surprisingly, the Appeals Chamber majority agreed with this dissenting trial judge and included the extra condition of "specific direction" which "establishes a culpable link between assistance provided by an accused individual and the crimes of principal perpetrators".<sup>4</sup> Since the Prosecution had not brought any proof at trial of such "specific direction", the general was acquitted. However, the Appeals Chamber majority failed to provide clear guidance on what "specific direction" would entail more precisely.

Both acquittals sparked a hefty debate within the Tribunal and outside among scholars and professionals. The appellate judgments were even challenged in the international press.<sup>5</sup> I too was taken aback by what I saw as a departure from the Tribunal's jurisprudence. I could not figure out why the Appeals Chamber would change its practice so significantly at such a late stage of the Tribunal's lifetime. The only holder of interest in such a change, in my view, would have been the military establishments in countries involved in armed conflicts in other parts of the world, such as the United States and Israel – and, I should have added, Russia, France, the UK and others. From a military point of view, there could have been an interest in making sure, for posterity, that the Tribunal would leave a legacy according to which superior military officers could only be held liable for crimes committed by others if they were somehow more directly involved in the commission of the crimes, for instance by meeting the new requirement of "specific direction", or by having had clear and well-established guidelines for just how far artillery shells could fall from

the designated (lawful) target without being characterised as unlawful indiscriminate shelling.

Any such interest of military establishments would perhaps be understandable as an attempt to reduce the risk of international prosecution of senior commanders, but in my view hardly justifiable. Commanders are supposed to be vigilant in trying to prevent perpetration of crimes by their subordinates or in turning perpetrators over for criminal investigation as soon as information of crimes reaches them. And if indeed "specific direction" was a condition for criminal liability by aiding and abetting, the assumption in my personal e-mail communication was that it would henceforth be difficult to ever convict generals under this mode of liability.

### 3. My Concerns

To the extent that the ICTY's President at the time – Judge Theodor Meron, now President of the International Residual Mechanism for Criminal Tribunals ('MICT') – had pushed for the acquittals by the Appeals Chamber over which he presided, the question was whether he had perhaps been influenced one way or another by military establishments. I raised this concern in my personal communication because it raised a moral dilemma for me: if that were indeed true, I would have had difficulty continuing in my position as a judge in a Tribunal that exposed itself in this way to external influence, however slight. This was the frustrating dilemma which prompted my concerns in the communication to my friends at home. I do not believe that an informed observer could have missed that by reading my text.<sup>6</sup>

Having lived abroad for a number of years, in Canada and in Africa and subsequently in The Hague, I had taken the habit of writing a letter, once or twice a year, to my family and trusted friends at home with whom I would share my experiences and some of my inner thoughts. The leaked e-mail was such a communication. By its very nature, it was clearly private and confidential.

To this day, I still do not know how or by whom my communication was leaked to a Danish tabloid newspaper shortly after I had e-mailed it. It did not occur to me, naively, that any of my friends would disclose the letter to the press as they would all immediately appreciate its confidential nature. In retrospect, I am even shocked that any of my friends would have such lack of decency as to send it to a tabloid paper that would predictably run with whatever scandal it could construct – which it did – rather than raising the more important discussion about possible external influence on the Tribunal.

3 *Prosecutor v. Perišić*, Case No. IT-04-81-T, Judgement, 6 September 2011 (<http://www.legal-tools.org/doc/f3b23d/>).

4 *Prosecutor v. Perišić*, Case No. IT-04-81-A, Judgement, 28 February 2013, para. 37, see para. 73 (<http://www.legal-tools.org/doc/f006ba/>).

5 *The Economist* and the *New York Times* on 1 and 2 June 2013, respectively.

6 In fact, I did consider resigning from the case after my letter had been leaked, but not because of any sense of being legally compelled to do so. I decided to stay on and finish the job in order to avoid causing any further delays in the trial against Šešelj.

I readily admit that it was unwise of me as a judge to air my concerns so openly in a private letter addressed by e-mail to 56 family members and friends, but my conscience was torn at the time. Naively, I did not realise the risk of a leak or an interception, and my communication was not intended to become public. Nevertheless, the Panel's Decision to disqualify me was, in my opinion, wrong.

#### 4. The Procedure

According to the ICTY Rules of Procedure and Evidence, the presiding judge of a trial chamber of which the incumbent judge is a member, is required to confer with that judge and then file a report to the president who, upon the presiding judge's report, will appoint a Panel of three Judges.<sup>7</sup>

President Meron immediately recused himself and handed the matter over to the Vice President who then constituted a Panel of three Judges to review the matter.

I did submit a memorandum with my explanation and interpretation of the contents of my personal communication to the presiding judge in the Šešelj trial who, in turn, filed his own report along with my memorandum to the Vice President. Both documents were then forwarded to the Panel<sup>8</sup> which rendered its Decision on the Defence Motion for Disqualification on 28 August 2013: it decided, by majority, to disqualify me from the trial proceedings.

#### 5. The Decision

In its Decision, the Panel majority decided not to admit and consider the presiding judge's report and my own memorandum, arguing that the Panel was not obliged to take our views into consideration since neither of us was a party to the trial. Thus, the Decision was made exclusively on the basis of the Defence Motion, the Prosecution's response, and an unofficial translation of my personal communication, without taking my views into account. Even if I was not a party to the trial against Šešelj, the Decision to disqualify me from that case clearly concerned the trial and manifestly affected my function as a judge therein. By any standard of fairness, I should have been entitled to have my views considered and taken into account by the Panel.

Secondly, the presiding judge of the Panel to consider my disqualification was the very judge who had originally dissented at trial against the conviction of General Perišić and on whose dissenting arguments the Appeals Chamber had largely based its acquittal. In other words,

<sup>7</sup> See Rule 15 of the ICTY Rules of Procedure and Evidence.

<sup>8</sup> My memorandum to the presiding judge was submitted on 8 July 2013 and his report to President Meron (with my memorandum attached) was filed on that same day.

that judge would appear to have held a clear personal interest in disproving my criticism of the Appeals Chamber's acquittal of Perišić because he was himself the author of the arguments by which the general was finally exonerated by the Appeals Chamber – and which I had criticised in the letter. It is ironic that the judge presiding over the Panel established to assess my impartiality might himself appear to have been just as biased as he claimed me to be.

Thirdly, the Panel's majority did not seem to have applied the test of determining whether, "in the circumstances, a reasonable observer, properly informed, would reasonably have apprehended bias". After having challenged the allegations made in my letter, the majority concluded that my letter, "when read as a whole, rebuts the presumption of impartiality". However, I did not even mention Šešelj's name or make any reference to his person or his trial in my letter because my concern was not about Šešelj or other politicians, but about *generals* and the military establishments' possible interest in raising the legal requirements for the conviction of generals. The Panel did raise this issue in its Decision by referring to the fact that Šešelj was charged, *inter alia*, with having "directed paramilitary forces", but his role was not comparable to the authority of a regular military commander during combat. He was a politician who occasionally visited his paramilitary volunteers at the front-line to boost their morale, but to the best of my knowledge, he never engaged in tactical manoeuvres or combat control on the battlefield. My letter had nothing to do with Šešelj, nor was it particularly concerned with *Serbs* as such (as claimed by Šešelj in his Motion); indeed, Gotovina, whose acquittal I had also challenged in my letter, was a Croat.

Finally, the Decision implied that I was of the view that generals or Serbs should be convicted, irrespective of the evidence. This was clearly a misperception. The Panel's implication was based on a remark in my letter that I had always found it right to convict superior commanders for crimes committed by others with their knowledge and support, but then added that the new practice of "specific direction" would require proof at trial of a *much stronger degree of intent and participation* in the future, thereby expressing a preference for preserving the law as it stood before the *Perišić* Appeal Judgment. This does not imply a total abdication from all the normal *mens rea* and *actus reus* requirements.

#### 6. The Merits

Disqualification of a judge from a particular trial must be based on evidence of the judge's prejudice against the accused in that trial – not just an alleged prejudice against an abstract category of persons with little or no resemblance to the accused. My personal understanding

of the Decision is that I was really disqualified *not* for having shown prejudice against the accused, but for having criticised the Appeals Chamber's acquittals and President Meron's role therein, in a manner considered disloyal because I had not raised my concerns directly with him. If anything, I might have been reproved for having entertained in my letter a bias against President Meron (which I did not), but that is no argument for disqualifying me from the trial against Šešelj.

The issue of the Trial Chamber's failure in the *Gotovina et al.* trial to justify its choice of the maximum impact range of 200 meters for lawful shelling of legitimate targets during an artillery attack remains unresolved in the sense that the Appeals Chamber failed to provide any alternative guidance. The Trial Chamber's choice of the wider 200-meter range was arguably made in the interest of the accused and it may appear to be somewhat awkward – for lack of a better word – that the Trial Chamber's likely intention to ensure fairness was used instead against it to completely thwart the judgment, let alone the Appeals Chamber's omission to provide further guidance on the matter. The massive shelling of Knin and the surrounding area caused 15-20,000 civilian Serbs to flee the targeted areas. The accused were not held accountable for this.

In contrast, the second problem about the application of “specific direction” as a requirement for conviction under the mode of liability of aiding and abetting – created by the *Perišić* Appeal Judgment – has been adjudicated and corrected by the ICTY Appeal Chamber in subsequent judgments.<sup>9</sup> In the *Šainović et al.* Appeal Judgment delivered in January 2014,<sup>10</sup> the Appeals Chamber rejected the approach adopted in the *Perišić* Appeal Judgment that “specific direction” is an element of the *actus reus* of aiding and abetting. A year later, in January 2015, the Chamber confirmed this position in the *Popović et al.* case,<sup>11</sup> as was further reiterated in the *Stanišić and Simatović* Appeal Judgment of 9 December 2015.<sup>12</sup>

<sup>9</sup> See also *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Judgment, 26 September 2013, para. 481 (<http://www.legal-tools.org/doc/3e7be5/>).

<sup>10</sup> *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Judgment, 23 January 2014 (<http://www.legal-tools.org/doc/81ac8c/>).

<sup>11</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Judgment, 30 January 2015 (<http://www.legal-tools.org/doc/4c28fb/>).

<sup>12</sup> *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-A, Judgment, 9 December 2015 (<http://www.legal-tools.org/doc/198c16/>).

## 7. Conclusion

I waited until after the rendering of the Šešelj Trial Judgment on 31 March 2016 to publish these thoughts. A possible appeal may still reverse the Trial Chamber's acquittal. I regret the Decision to disqualify me from the Šešelj trial, not only because I still believe that the Decision – for the reasons I have explained above – was ill-founded, but also because my disqualification and replacement by another Judge caused a further and substantial delay of the trial against the accused who had already been held in custody in The Hague for more than ten years. Indeed, the Bench on which I sat in the Šešelj case was just a couple of months away from rendering its judgment. The episode remains a mystery to me.

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See also *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgment, 14 December 2015 (<http://www.legal-tools.org/doc/b3584e/>), and *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Public Redacted Version of Judgement Issued on 24 March 2016, 24 March 2016, para. 576 (<http://www.legal-tools.org/doc/173e23/>).