

International Judges and Government Interests: The Case of President Meron

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What would happen if a president of the International Court of Justice or the International Criminal Court was shown to be close to a government and characterized by diplomatic personnel as a preeminent supporter of specific government interests? In precisely such a case involving the former President of the International Criminal Tribunal for the Former Yugoslavia ('ICTY') – Judge Theodor Meron – nothing happened. He was re-elected by a large majority of his fellow judges after documents revealing the nature of his relationship with the United States ('US') government came to public light. He was also appointed President of the International Residual Mechanism for Criminal Tribunals ('MICT') by the United Nations ('UN') Secretary-General on 1 March 2012 and re-appointed as of 1 March 2016.

That suggests that it is acceptable and compatible with the function for international judges to seek and endorse government positions and act accordingly on critical issues of their mandate. How does that relate to judicial ethics and the principles of independence and impartiality of judges? If similar documentary evidence surfaces for another judge or president of an international court, will that also be ignored? Who will be responsible for the consequences for the credibility of international criminal courts, the administration of justice, and for efforts to establish the rule of law universally?

1. The First Presidency: WikiLeaks Cables

Elected ICTY judge in March 2001 as a nominee of the first George W. Bush Administration, Judge Theodor Meron has served in different capacities for the US government, including in the contexts of ICC negotiations and the International Court of Justice.¹ Prior to immigrating to the US in the late 1970s, he was a member of the Israeli Foreign Service where his duties included that of Legal Adviser to the Foreign Ministry and Ambassador

to Canada and the UN in Geneva.² In the Appeals Chamber from the outset, Judge Meron served as ICTY President for several periods.

At the end of 2010, the public was provided with a direct insight into Judge Meron's first presidency when WikiLeaks published many US diplomatic cables, also from the US Embassy in The Hague. The cables came into focus during his second presidency three years later when Judge Meron's Appeals Chamber acquitted by majority three senior military and police officers initially sentenced to long-term imprisonment (Ante Gotovina, Mladen Markač and Momčilo Perišić). The release, in a short space of time,³ of three major war criminals in two of the most important ICTY cases caused a veritable earthquake in the former Yugoslavia and significant legal controversy. In the various attempts to comprehend the reversals, the WikiLeaks cables came under the spotlight.

The cables⁴ revealed that, as ICTY President, Judge Meron actively participated in political manoeuvres to remove Chief Prosecutor Carla Del Ponte. He argued in favour of splitting the unified ICTY-ICTR prosecutorial function,⁵ shared with the US government internal ICTY

² See http://www.law.nyu.edu/news/MERON_THEODOR_ELECTED_PRESIDENT ICTY.

³ *Prosecutor v. Gotovina and Markač*, Case No. IT-06-90-A, Judgment, 16 November 2012 (<http://www.legal-tools.org/doc/03b685/>); and *Prosecutor v. Perišić*, Case No. IT-04-81-A, Judgment, 28 February 2013 (<http://www.legal-tools.org/doc/f006ba/>).

⁴ See <https://cablegatesearch.wikileaks.org/search.php?q=Meron&qo=87&qc=0&qto=2004-12-31>.

⁵ Cable dated 17 July 2003. Del Ponte's fight against these manoeuvres and for the independence of the Prosecutor is reflected in the cables. Her mandate at the ICTY was renewed on 4 September 2003, but her Office was split. A veteran ICTY journalist Marliese Simons wrote in the New York Times on 28 July 2003: "With the quiet support of the United States, the Rwandan government has been campaigning to have Carla Del Ponte replaced as chief prosecutor for the tribunal dealing with the mass killing in Rwanda in 1994, Western diplomats and tribunal officials have said in recent days" (<http://www.nytimes.com/2003/07/28/world/rwanda-is->

¹ See <http://www.unmict.org/en/about/principals/president> (URLs in this text were last accessed on 21 March 2016).

memoranda, accepted US views, rejected the Chief Prosecutor's request to publicly oppose interference by US officials and staunchly supported "the completion strategy" through hasty transfer of cases to local courts, the then main priority of a US government intent on closing down the Tribunal. Judge Meron is described in the cables as "a vigorous and strong proponent of the completion strategy" (21 August 2003) and "the Tribunal's pre-eminent supporter of USG efforts" (7 November 2003); his "initiatives, priorities and concerns track closely with USG thinking" (25 June 2004).

Based on a cable of 7 November 2003, partially quoted here, US Ambassador-at-Large for War Crimes, Pierre-Richard Prosper, met with the President and Registrar of the ICTY separately on 30 October 2003 in The Hague:

2.(C) President Theodor Meron, joined by chief of staff Larry Johnson (American), initiated the discussion with Ambassador Prosper by noting that Chief Prosecutor Carla Del Ponte had placed him under considerable pressure by formally requesting in writing that he condemn publicly U.S. officials' statements concerning the possibility of Serb courts trying cases such as those involving recently unsealed indictees Lukic, Lazarevic, Pavkovic and Djordjevic. (Note: In an October 22 internal memo, Del Ponte told the President that "the statements made by US officials in the past days are an interference in the work of the prosecution that not only create confusion and uncertainties, but also constitute de facto encouragement for Serbia and Montenegro not to fulfill their international obligation." She characterized the statements as "a direct interference in the work of the Tribunal and unacceptable." End note.) See also ref b. Meron said that Del Ponte is "adamant that the next indictees (i.e., those to be indicted before the close of investigations by the end of 2004) will be too senior for transfer," adding that "she may be right." Prosper, joined by Embassy legal officers and S/WCI intern Shah, responded that the full context of his comments demonstrated that the USG was not trying, in Del Ponte's words, to "interfere" with the work of the Tribunal. Quite the contrary, he said, the USG principal interest at this stage is the apprehension of Ratko Mladic and Radovan Karadzic. The unsealing of the indictments of the above-named indictees was, in the U.S. view, a huge mistake, undermining the political environment in Belgrade and putting at risk efforts to apprehend Mladic. The arrest and transfer of Mladic would "change the environment" in the region. As a result, once Belgrade has the capacity and credibility to handle such cases, "any or all cases can go back to Belgrade if the ICTY agrees." He noted further that, even in a situation of transfer to Belgrade, the ICTY retains primacy and "can take back cases if Belgrade doesn't prove credible."

3.(C) Meron responded positively to Prosper's detailed explanation of U.S. policy [...] He concluded that, with Prosper's explanation in hand, he found no need to accede to Del Ponte's request for a statement. [...]

7.(C) Comment: Ambassador Prosper's meetings, particularly with President Meron, provided an excellent opportunity to advance USG equities with respect to the completion strategy and to convey our support for the consistent efforts of the President and Registrar in this respect. Meron, the Tribunal's pre-eminent supporter of USG efforts, welcomed Prosper's articulation of U.S. policy with respect to the transfer of cases for local prosecution and benefited from a detailed understanding of the circumstances that prompted the USG's reaction to the unsealing of the recent indictments. [...] End comment.

2. The Second Presidency: Gotovina, Perišić

Judge Meron was re-elected ICTY President on 19 October 2011, a year after the WikiLeaks cables became public, and again on 1 October 2013. His second presidency will be remembered for the Gotovina and Perišić final judgments with their transparent intent to acquit in disregard of the established facts and the law. They raised serious credibility issues and questions about subordination to outside interests. The second term will also be remembered for the concerns expressed by Judge Frederik Harhoff, which saw him disqualified from a case for bias and ended his judgeship at the ICTY.

An intimation of where things were heading came in March 2011 at the Perišić closing arguments when the presiding judge asked the prosecutor:

A war began in Afghanistan in 2001 and it is generally known that there are allegations of crimes having been committed at least since 2002 to date. Does that make the commanders of the various NATO armies that are jointly participating in that war guilty of the crimes that are alleged to have been committed and are still being committed like detentions in Guantanamo, in Bagram, in Kabul and all these places?⁶

The prosecutor remarked: "Your Honour, you are asking me obviously an explosive political question".⁷ He had already stated: "General Perišić provided assistance knowing that that assistance was going to assist the VRS (the Bosnian Serb army) and it was likely that that assistance would be used in the commission of crimes".⁸

The Gotovina appeal judgment followed, with Judge Fausto Pocar indirectly pointing to extra-legal considerations: "Finally, even if the Majority wished to acquit Gotovina and Markač entirely, one might wonder what

⁶ *Prosecutor v. Perišić*, Case No. IT-04-81-T, Trial Transcript, 28 March 2011, p. 14657

⁷ *Ibid.*

⁸ *Ibid.*, p. 14656

the Majority wanted to achieve by quashing the mere existence of the JCE rather than concentrating on Gotovina's and Markač's significant contributions to the JCE. I leave it as an open question".⁹ He concluded: "I fundamentally dissent from the entire Appeal Judgment, which contradicts any sense of justice".¹⁰

Then came Perišić. Initially convicted by majority as an aider and abettor of crimes committed by officers of ostensibly separate Serb armies in Bosnia and Croatia, he was absolved because it was not proved that the massive, critical assistance he for years provided to forces committing grave crimes was not "specifically directed" at the commission of the crimes.

At the first opportunity, the Prosecution asked the Appeals Chamber to depart from the Perišić appeal judgment because "it is wrong in customary international law, it wrongly interprets the Appeals Chamber case law, creates uncertainty and problems, and, maybe worst of all, it undermines the adherence to international humanitarian law contrary to the interests of international justice".¹¹ The Prosecution argued that "it ignores and misrepresents the Appeals Chamber's previous judgments which have explicitly rejected the specific direction element", and "undermines the respect for international humanitarian law" since "allowing persons to engage in conduct they know will substantially contribute to a crime because it is not their specific aim to do so risks undermining international humanitarian law".¹² The judgment, according to the Prosecution, gives rise to two fundamental implications: that the aider and abettor must specifically direct his acts towards a crime or crimes, and that a remote aider and abettor who knows of the substantial likelihood that his acts will assist crimes and whose conduct does, in fact, substantially assist in those crimes will not be considered to have met the elements of aiding and abetting – that is, the element of specific direction:

What is the outcome of this? It means that a remote aider and abettor who both knowingly and substantially contributes to widespread and systematic crimes will escape liability for aiding and abetting. Your Honours, this impunity gap cannot be accepted. And worse, the Perišić appeals judgement appears to require assistance to a purely criminal organisation in order for a remote aider and abettor to attract criminal responsibility. [...] - but governments, armies, security forces, insurgency and rebel movements will hardly ever be purely criminal. By introducing a requirement that contributions must be to purely

criminal organisations, the impunity gap becomes so huge that little is actually left of aiding and abetting responsibility for remote perpetrators in practice. The customary international law standard of aiding and abetting promotes the respect for international humanitarian law. The Perišić appeal judgement undermines it. The two elements of the customary international law standard of aiding and abetting ensure that there is no risk that anyone will be unreasonably convicted.¹³

Three subsequent ICTY appeal judgments as well as the last appeal judgments of the ICTR and the Special Court for Sierra Leone reaffirmed that specific direction is not an element of aiding and abetting.¹⁴

3. The Harhoff Alarm Bell

Following first instance acquittals under the "specific direction" standard of Slobodan Milošević's two most senior secret service officials (Jovica Stanišić and Franko Simatović), instrumental in the commission of crimes in Croatia and Bosnia-Herzegovina, ICTY judge Frederik Harhoff shared with friends that he was wrestling with "a deep professional and moral dilemma".¹⁵ The reason: repercussions of the three judgments and a suspicion of political pressure "so that American (and Israeli) military leaders can breathe a sigh of relief".¹⁶ His e-mail of 6 June 2013 somehow landed in a Danish tabloid and from there in the world media. Judge Harhoff wrote that with the Gotovina and Perišić judgments the Tribunal had stepped back and changed direction, voicing "an uncomfortable feeling" that it may have been "under pressure from the military establishment of certain dominant countries". He wondered if any American or Israeli officials had exerted pressure on the American presiding judge, concluding "we will probably never know". He referred to "reports of the presiding judge's tenacious pressure on

¹³ *Ibid.*, pp. 457-458.

¹⁴ "Consequently, the Appeals Chamber, Judge Tuzmukhamedov dissenting, unequivocally rejects the approach adopted in the *Perišić* Appeal Judgement as it is in direct and material conflict with the prevailing jurisprudence on the *actus reus* of aiding and abetting liability and with customary international law in this regard", *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Judgment, 23 January 2014, para. 1650 (<http://www.legal-tools.org/doc/81ac8c/>); *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Judgment, 30 January 2015, para. 1758 (<http://www.legal-tools.org/doc/4c28fb/>); *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-A, Judgment, 9 December 2015, paras. 106, 108, 128, 131 (<http://www.legal-tools.org/en/doc/198c16/>); *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Judgment, 26 September 2013, paras. 471-481 (<http://www.legal-tools.org/doc/3e7be5/>); see also *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgment, 14 December 2015, paras. 1955, 3332, 3343, with fins. (<http://www.legal-tools.org/doc/b3584e/>).

¹⁵ An English translation of the letter is available at <http://www.legal-tools.org/doc/e3d89c/>.

¹⁶ *Ibid.* The subsequent quotations in this paragraph are from the same letter.

⁹ *Prosecutor v. Gotovina and Markač*, Case No. IT-06-90-A, Judgment, 16 November 2012, Dissenting Opinion of Judge Fausto Počar, para. 30.

¹⁰ *Ibid.*, para. 39. For context, see para. 29; see also paras. 25-28.

¹¹ *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Appeals Hearing Transcript, 13 March 2013, p. 460; the whole argument, pp. 440-461.

¹² *Ibid.*, pp. 447, 441 and 457.

his colleagues in Gotovina-Perišić cases which makes you think he was determined to achieve an acquittal". Judge Harhoff also mentioned rumours "from the corridors", that the presiding judge in the Stanišić and Simatović case was under pressure from the President, resulting in a "rush job".

In reactions to the 'Harhoff Letter' the WikiLeaks cables came under public scrutiny. A former legal adviser to the ICTY reportedly said: "The perception among my colleagues is that Meron takes instructions from the US government and that this reigning in of the legal standards – as we have seen with the acquittals – would have implications for the US and probably Israel. And WikiLeaks does not help him".¹⁷ Most members of the legal profession, however, directed their criticism at Judge Harhoff, not Judge Meron. But there was a rare, differing note at the time that went to the heart of the matter:

Prof. David Crane, an international law expert from Syracuse University College of Law and former prosecutor of the Special Court for Sierra Leone, said the tribunal has to publicly establish the truth or risk an indelible stain on its reputation. "If this type of alleged – and I underscore alleged – manipulation is going on this is really quite problematic; it brings the whole system into question," said Crane.¹⁸

4. Meron: We Will Just Laugh it Off

In April 2013 in Washington, D.C. Judge Meron "reminded" everyone "that acquittals, just as convictions, show the health of the system",¹⁹ and asserted that "my fellow judges and I [...] are not and cannot be influenced by any broader agenda nor political concerns".²⁰ What worried him was the assumption that anyone charged before the ICTY must be guilty simply because of being charged. He added in a later interview: "accountability does not mean that every trial should end in a conviction. If that were true – if the whole purpose of international criminal justice were simply to convict – then we would be living in a world where every person who stands accused is necessarily and auto-

matically guilty".²¹

Upon returning from the UN where he learned of Judge Harhoff's e-mail message, Judge Meron brushed it aside: "We will just laugh it off", he told a fellow judge, according to a person who was present. The Tribunal did nothing. The judges, by a wide margin, re-elected Judge Meron as ICTY President for a third time.

Fifteen victim organizations from Bosnia-Herzegovina asked Judge Meron to resign. More than 25 organizations and over 110 individuals from the former Yugoslavia urged the UN Secretary-General "to order a prompt and thorough inquiry" and publicly present its findings to dispel doubts about the fairness of ICTY judgments.²²

The executive director of Human Rights Watch, Kenneth Roth, criticized attacks on Judge Meron. He told the media he disagreed with the aiding and abetting ruling, but: "My guess is that the tribunal was trying to narrow the concept of aiding and abetting", Roth said, "to avoid far right fears in the United States that U.S. military aid would lead to criminal liability if the recipients unexpectedly committed war crimes".²³

5. In Conclusion

As a result, five major war criminals are free, truth has been distorted, justice abandoned, and the Tribunal's authority and significance greatly diminished. Gotovina is a prominent businessman with a highly publicized personal friendship with the highest Croatian political leaders. He and Markač were appointed members of the National Security Council by the President of Croatia. Upon release from UN detention, Perišić went on national television in Serbia to say he would do it again in the same circumstances. He lamented the injustice done to his family.

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¹⁷ Philip Weiss, *Judge Who Acquitted War Criminals at Hague Had "Close and Confidential Relations" with US Gov't*, 18 June 2013 (<http://mondoweiss.net/2013/06/criminals-confidential-relations/>).

¹⁸ Mike Corder, *UN court prosecutor to appeal recent acquittal*, AP, 24 June 2013 (available at <http://news.yahoo.com/un-court-prosecutor-appeal-recent-acquittal-130923115.html>).

¹⁹ See http://www.brookings.edu/~media/events/2013/4/04-hague/20130404_hague_human_rights_tribunals_transcript.pdf, p. 14 of the transcripts, Anderson Court Reporting, 4 April 2013.

²⁰ *Ibid.*, pp. 13-14.

²¹ See <http://www.balkaninsight.com/en/article/hague-tribunal-president-convictions-shouldn-t-be-automatic/1437/4>.

²² For the text of the letter dated 25 June 2013, see <http://www.hlc-rdc.org/wp-content/uploads/2013/06/Letter-to-His-Excellency-Secretary-General-of-the-United-Nations-25-June-2013.pdf>.

²³ David Rhode, "Gutting International Justice" (<http://blogs.reuters.com/david-rohde/2013/07/12/gutting-international-justice/>).

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