

ICTY Shifts Have Made Its Credibility Quake

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1. Changing Direction at the Expense of Victims and Accountability

For many victims of core international crimes in the 1990s in the former Yugoslavia, the International Criminal Tribunal for the Former Yugoslavia ('ICTY') served as the hope for justice. Victims and civil society actors sought accountability from the ICTY for those bearing the greatest responsibility for the crimes. Acquittals in 2012–2013 of high-ranking Croat and Serb officials – Ante Gotovina, Mladen Markač, Momčilo Perišić, Jovica Stanišić, and Franko Simatović – shook this aspiration and generated concerns about the quality of the legacy of the ICTY.

Carl Bildt, former Swedish foreign minister, expressed a feeling shared by many: "It is becoming increasingly difficult to see the consistency or logic in the different judgments".¹ Some went further, claiming that the acquittals "might eventually emasculate the capacity of the institutions of international justice to bring to justice the highest-ranking persons responsible for heinous war crimes. Only the actual killers will be punished, not the mass murderers".²

Criticism of the acquittals was supplemented by irrefutable evidence of deep disunity among ICTY judges. Frederik Harhoff, then ICTY Judge, sent an e-mail on 6 June 2013 to 56 friends, questioning the Tribunal's credibility, in an expression of grave personal concern. International media reported extensively.³ Much of the subsequent criticism fo-

cused on the role of the then ICTY President Theodor Meron (now President of the International Residual Mechanism for Criminal Tribunals ('MICT')), alleging that he sought to unduly influence other Tribunal judges. The criticism extended to the International Criminal Tribunal for Rwanda ('ICTR') which shares its Appeals Chamber with the ICTY.⁴

Changes in judicial interpretation at a late stage in the life of the ICTY affecting the ability of the Tribunal to hold leaders accountable, combined with an apparent power struggle between an American Tribunal President and a Danish judge, leading to the exclusion of the latter, has not only revealed serious disunity, but has reduced trust in the Tribunal in ways which disorients victims, their families, and the wider struggle against impunity. The situation far exceeds normal doctrinal controversy. Regrettably, there remains a strong, unanswered need for MICT President Meron to take responsibility for this unfortunate situation. My organisation, the Norwegian Helsinki Committee, has recently presented this view in a letter to President Meron.

2. ICTY Judges Pioneered Joint Criminal Enterprise in Contemporary International Criminal Law

Finding suitable modes of liability for persons in senior positions was one of the ICTY's challenges from the start of its substantive work in July 1994. Such persons are rarely involved in the actual physical commission of crimes, but may bear responsibility through their leadership role. According to the ICTY Statute, military commanders and political leaders can be responsible for crimes committed by their subordinates on the grounds of, *inter alia*, "aiding and abetting"⁵ and "superior responsibility".⁶ In addition, the ICTY has applied the so-called joint criminal enterprise

¹ "War crimes in the former Yugoslavia: Two puzzling judgments in The Hague", *The Economist*, 1 June 2013 (<http://www.legal-tools.org/doc/04d6c8/>).

² Comment by Chuck Sudetic, quoted from *op. cit.* Sudetic is a respected war crimes journalist and co-author with Carla Del Ponte of *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity. A Memoir*, The Other Press, 2009 (<http://www.legal-tools.org/doc/a33e23/>).

³ See, *inter alia*, The New York Times, 30 May 2013, "U.N. Court Acquits 2 Serbs of War Crimes", and 14 June 2013, "Hague Judge Faults Acquittals of Serb and Croat Commanders". An English translation of Judge Harhoff's letter is available at <http://www.legal-tools.org/doc/e3d89c/>.

⁴ Among contested judgments, the Appeals Chamber acquitted Justin Mugenzi (Minister of Trade during the 1994 genocide) and Prosper Mugiraneza (Minister of Public Service) on 4 February 2013. They had been convicted at trial to 30 years of imprisonment.

⁵ ICTY Statute Article 7(1).

⁶ *Ibid.*, Article 7(3).

(‘JCE’) doctrine, which has its origin in trials before national courts and international tribunals in the aftermath of the Second World War.⁷ It considers a participant in an organised criminal group with a common plan or purpose liable for crimes committed by the group, provided the requisite *actus reus* and *mens rea* are satisfied.

The ICTY Statute does not explicitly refer to JCE, but ICTY jurisprudence introduced it in the *Tadić* case in 1999. Duško Tadić, a former local leader of the Serbian Democratic Party (‘SDS’) and a member of Bosnian Serb paramilitary forces, was found guilty by the Appeals Chamber because of his active participation in a group that killed five men. He shared a common plan, design or purpose with the group.⁸ When formulating the JCE doctrine, the Appeals Chamber held that it is part of customary international law.⁹ It also said that it is dictated by the object and purpose of the Statute,¹⁰ and that it is in line with the collective nature of many international crimes.¹¹ Over the years, although sometimes criticised, JCE has been an important concept of attributing criminal responsibility for crimes to persons in leading positions.

3. ICTY Judges Started to Acquit

The criticism of the acquittals points to a resulting failure to hold political or military leaders accountable and lack of judicial consistency.¹² Such consistency is important to determine the content of law and establish predictability, as the ICTY has itself emphasised.¹³ Three of the acquittals stand out.

Case 1: The ICTY Prosecutor had charged Ante Gotovina, Mladen Markač, and Ivan Čermak with war crimes and crimes against humanity committed during ‘Operation Storm’. According to the indictment, they ordered unlawful artillery attacks and created a climate of impunity through a failure to prevent, investigate, or punish crimes committed by members of the Special Police against Serb civilians.¹⁴

⁷ See *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999, paras. 189, 191 and 195 (<http://www.legal-tools.org/doc/8efc3a/>).

⁸ *Ibid.*, para. 231.

⁹ *Ibid.*, para. 220.

¹⁰ Cf. Article 18 of the Vienna Convention on the Law of Treaties of 23 May 1969 (<http://www.legal-tools.org/doc/6bfcd4/>).

¹¹ On JCE, see *Tadić* Appeal Judgement, *supra* note 7, paras. 189–204.

¹² See, for instance, Janine Natalya Clark: ‘Courting Controversy: The ICTY’s Acquittal of Croatian Generals Gotovina and Markač’, *Journal of International Criminal Justice* (2013) 11 (2) (<http://www.legal-tools.org/doc/8cd3a3/>) and Bridget Conley: ‘Acquittals at the ICTY and the Limitations of a Legal Approach to Conflict’, 14 June 2013 (<http://www.legal-tools.org/doc/1b4b22/>).

¹³ See, for example, *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment, 22 March 2006 (<http://www.legal-tools.org/doc/09f75f/>), where *consistency* is given as reason for employing the JCE doctrine rather than a different mode of co-perpetration that the Trial Chamber had applied.

¹⁴ *Prosecutor v. Gotovina et al.*, Case No. IT-06-90. ‘Operation

The Trial Chamber found Gotovina and Markač guilty for their participation in a JCE, with the common plan to expel the Serb civilian population from the Krajina.¹⁵ Gotovina was sentenced to 24 years of imprisonment, Markač to 18 years, while Čermak was acquitted. The Appeals Chamber contested the evidence of the existence of a JCE. The Trial Chamber had based its conclusion on an overall assessment of several “mutually-reinforcing findings”, but primarily on the unlawfulness of artillery attacks against four cities. The Appeals Chamber found, however, that the artillery attacks were lawful.¹⁶ It therefore acquitted Gotovina and Markač on 16 November 2012 (in a 3–2 decision).

Case 2: Momčilo Perišić, former Chief of the Yugoslav Army General Staff, was charged with murder, extermination, inhumane acts, attacks on civilians, and persecution as crimes against humanity and/or violations of the laws or customs of war. The crimes took place in the territory of Bosnia-Herzegovina and Croatia between August 1993 and November 1995.¹⁷ Perišić was charged, *inter alia*, with *aiding and abetting* crimes against Bosnian Muslims and Bosnian Croats in the Bosnian towns of Sarajevo and Srebrenica due to his role in facilitating military and logistical assistance to the Army of ‘Republika Srpska’.¹⁸ The Trial Chamber found Perišić guilty and sentenced him to 27 years of imprisonment. The Appeals Chamber, however, stated that aiding and abetting requires a close link between the assistance provided and the particular criminal activities. The assistance must be “specifically” – rather than “in some way” – directed towards the crimes.¹⁹ The 28 February 2013 *Perišić* Appeal Judgment held that the evidence in the case was not enough to establish the specific direction of the assistance towards the crimes, and acquitted him. In a further development, the ICTY Prosecutor on 3 February 2014 filed a motion for reconsideration of the *Perišić* Appeal Judgment. The Judgment based itself on flawed requirements and could not stand, the Prosecutor argued.²⁰ On 20 March 2014, the Appeals Chamber denied the motion.²¹

Case 3: The Prosecutor charged Serbian General and former chief of the Serbian Intelligence Service Jovica

Storm’ was a Croat military action conducted in July–September 1995 in order to take control of territory in Krajina in Croatia, an area traditionally populated by Serbs.

¹⁵ *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Judgment (Volume II), 15 April 2011, paras. 2314, 2368–2375, 2578–2587 (<http://www.legal-tools.org/doc/86922c/>).

¹⁶ *Prosecutor v. Gotovina and Markač*, Case No. IT-06-90-A, Judgment, 16 November 2012, paras. 91–96 (<http://www.legal-tools.org/doc/03b685/>).

¹⁷ *Prosecutor v. Perišić*, Case No. IT-04-81-A, Judgment, 28 February 2013 (<http://www.legal-tools.org/doc/f006ba/>).

¹⁸ *Ibid.*, para. 3.

¹⁹ *Ibid.*, paras. 25–36.

²⁰ Press release available at <http://www.legal-tools.org/doc/195e1f/>.

²¹ *Prosecutor v. Perišić*, Case No. IT-04-81-A, Decision on Motion for Reconsideration, 20 March 2014 (<http://www.legal-tools.org/doc/6cdbd5/>).

Stanišić and his subordinate Franko Simatović with persecution, murder, deportation, and forcible transfer from 1 April 1991 to 31 December 1995 against Croats, Bosnian Muslims, Bosnian Croats, and other non-Serb civilians in large areas of Croatia and Bosnia-Herzegovina. The primary mode of liability was participation in a JCE. The 13 May 2013 Trial Judgment found both men not guilty for lack of conclusive evidence of participation in the JCE. It further applied the specific direction requirement to clear them of aiding and abetting the crimes.²²

The contested judgments in the *Perišić* case, and partly in the *Stanišić and Simatović* case, concern legal doctrine; namely, whether specific direction is a requisite element of aiding and abetting. On 23 January 2014, the *Šainović et al.* Appeal Judgment unequivocally overturned the *Perišić* view. According to the ruling, aiding and abetting “consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime”.²³ Specific direction of crimes is *not* a requirement, it held.²⁴ This view has been upheld in subsequent appeals.²⁵

The conclusion of the *Gotovina and Markač* Appeal Judgment is far-reaching. War crimes were extensively discussed after ‘Operation Storm’, and there have been a number of cases before Croatian courts. However, according to the ICTY’s conclusion there is not enough evidence to say that the Croat leadership at the time had a plan to empty the Krajina of Serbs.

The outcome of these cases is consequential for the wider understanding of the 1992–1995 wars in Bosnia-Herzegovina. It means that the ICTY to date has not convicted any officials of the Serbian government for involvement in atrocities in Bosnia-Herzegovina. There is a prevailing and very well-documented view that Bosnian Serb military and paramilitary units attacking the civilian population in Bosnia were heavily dependent on support from Belgrade.²⁶

Such an outcome of the lengthy processes in The Hague will certainly remain contested.

4. Perceived Impartiality as a Binding Legal Requirement

A major point of contention in Judge Harhoff’s well-known e-mail was the suggestion that the Tribunal’s doctrinal shift came about as a result of pressure exerted by President Meron on colleagues. Such a suspicion would be serious for any court, in particular the ICTY which from its inception has been accused of bias by actors in the territorial States under its jurisdiction. Judge Harhoff contended that President Meron put “tenacious pressure on his colleagues” in the *Gotovina and Markač* and *Perišić* cases to achieve acquittals, and raised the question whether the President himself had been under pressure from American and Israeli military circles.

Further to a motion filed by Vojislav Šešelj, a special Chamber appointed by the then ICTY Vice President Carmel Agius – now ICTY President – decided that, as a consequence of his e-mail, Judge Harhoff was disqualified to be a judge in the *Šešelj* case. According to the decision, the letter showed bias in favour of conviction of Serb military commanders without evidentiary basis.²⁷ Interestingly, dissenting Judge LIU Daqun concluded that the letter seen in its context did not indicate such bias. On 7 October 2013, the special Chamber – by majority, Judge LIU dissenting – rejected a request filed by the Prosecution to reconsider its previous decision.²⁸

There has been considerable academic discussion whether the disqualification of Judge Harhoff was justified or not. There still exists a pervasive view that he was forced to leave the ICTY, not because his criticism of the acquittals was unfounded, but rather because he breached unwritten rules of collegial loyalty.

Given the precarious situation at the ICTY, the question of bias on the part of President Meron has also been raised. Indeed, if the test applied so swiftly to Judge Harhoff – whether a reasonable, informed outside observer, with knowledge of all the relevant circumstances would apprehend bias – is applied to President Meron in cases where the mode of liability is JCE or aiding and abetting,

armed forces of the Republika Srpska were to be regarded as acting under the overall control of and on behalf of the FRY [the Federal Republic of Yugoslavia (Serbia and Montenegro)]”.

²⁷ *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President, 28 August 2013, para. 13 (<http://www.legal-tools.org/doc/5b4aa1/>).

²⁸ *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on Prosecution Motion for Reconsideration of Decision on Disqualification, Requests for Clarification, and Motion on Behalf of Stanišić and Župljanin, 7 October 2013 (<http://www.legal-tools.org/doc/20a960/>).

²² *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Judgment, 30 May 2013 (<http://www.legal-tools.org/doc/066e67/> and <http://www.legal-tools.org/doc/698c43/>).

²³ *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Judgment, 23 January 2014 (<http://www.legal-tools.org/doc/81ac8c/>). The “specific direction” requirement is discussed at pp. 1643 *et seq.* The quotation is from para. 1649.

²⁴ On this point, the *Šainović et al.* Appeal Judgment is also in line with the *Taylor* Appeal Judgment of the UN Special Court for Sierra Leone, see *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Judgment, 26 September 2013, paras. 471–481 (<http://www.legal-tools.org/doc/3e7be5/>).

²⁵ See *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Judgment, 30 January 2015 (<http://www.legal-tools.org/doc/4c28fb/>), *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-A, Judgment, 9 December 2015 (<http://www.legal-tools.org/doc/198c16/>), and *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgment, 14 December 2015 (<http://www.legal-tools.org/doc/b3584e/>).

²⁶ *Cf. Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999, paras. 83–162. (<http://www.legal-tools.org/doc/8efc3a/>). In a far-reaching conclusion, the Appeals Chamber found that “the

it is regrettably not clear that he would pass.²⁹ There exists a troublesome picture of a President who has gone beyond his powers and role.³⁰

5. Institutional Responsibility and External Expectations

We may well argue that wrongful convictions are a far greater scandal than incorrect acquittals. *In dubio pro reo* is the right approach of any criminal court. However, the problem we are facing at the ICTY differs: it concerns a shift in the evaluation of evidence and the quality of legal analysis. In fact, it represents ways of undermining trust in the independence of judges that President Meron has described well, stating that when “judges are independent and act in accordance with the law, their decisions have a certain predictability, because they are based on existing law, judicial precedent, and the unbiased application of that law to the facts at issue”.³¹

Victims and human rights organisations have looked to The Hague for justice and for a reliable historic record after the extremely abusive armed conflicts of the 1990s in the former Yugoslavia. No other institution represented such a degree of quality of documentation, evidence and legal argument, they believed.

The 2012–2013 acquittals and the split among the judges on key points of legal analysis have put the ICTY’s ability to fulfil its mandate at risk. Even though the latest Appeals Chamber decisions seem to have ‘corrected’ some

mistakes, concerns remain whether President Meron enjoys the perception of independence and impartiality required by both the Tribunal and MICT to properly fulfil their mandates.

My organisation – as well as many other actors who we have consulted – has come to the painful conclusion that there is persistent reason to doubt the impartiality of President Meron. Regrettably, this doubt has a cancerous staying power. We are so-called ‘informed observers’, a part of the community of actors that has helped make and protect the ICTY for more than 20 years. If such ‘informed observers’ perceive bias on the part of an ICTY Judge and MICT President, and have the courage to say so publicly, that has immediate relevancy under the ICTY’s law. Losing trust among the informed part of the public is detrimental for a judge of an institution whose authority depends on being – and being perceived as – impartial.

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²⁹ This bias test is based on Rule 15 of the ICTY Rules of Procedure and Evidence, as applied in *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgment, 21 July 2000, para. 189 (<http://www.legal-tools.org/doc/660d3f/>). The Appeals Chamber held that there is an unacceptable appearance of bias if “(ii) the circumstances would lead a reasonable observer, properly informed, to reasonable apprehend bias”.

³⁰ See the thorough report by the Danish newspaper *Information*, “Fellow judges support ousted colleague’s criticism of Hague tribunal”, 5 December 2013 (<http://www.information.dk/481114>). The report concludes that new information “reinforce doubts as to whether the procedure against the Danish judge was truly impartial and based on factual evidence. Or whether political and disciplinary considerations were really behind his removal from office. Furthermore, *Information* learned that there is growing dissatisfaction among the 22 judges at the ICTY with President Theodor Meron’s brusque management style and controversial handling of appeals cases” (p. 2).

³¹ Theodor Meron, “Judicial Independence and Impartiality in International Criminal Tribunals”, in *American Journal of International Law*, Vol. 99 (2005), p. 359.