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# JUDICIAL DECISION-MAKING IN INTERNATIONAL CRIMINAL COURTS: “EFFECTIVE” JUSTICE?<sup>1</sup>

STEVEN FREELAND\*

*The past two decades have witnessed the re-emergence of a system of international justice mechanisms, and the “institutionalisation” and “judicialisation” of international criminal justice, principally through the operation of formalised international and hybrid courts and tribunals. This followed a long period of impunity, during which there was virtually no legal accountability for the commission of atrocities and international crimes. After a slow beginning, several of these mechanisms then became active in the implementation of criminal justice against those accused of the most egregious crimes. All of a sudden, judges were required to adjudicate on complex and emotional factual and legal issues, largely without the benefit of significant practical experience. Over time, and particularly more recently, questions have been publically raised — even by judges themselves — as to the validity of several significant decisions. Highly visible controversies have emerged that have highlighted the difficulties in the judicial decision-making processes within these mechanisms of international justice. These challenge perceptions as to the “efficiency” of the justice being handed down. This article will discuss the applicable law used to determine and interpret legal rules in the international criminal arena, and then explore how these are increasingly challenged by both internal and external factors associated with the overarching context of the specific conflicts, and their political and social consequences.*

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<sup>1</sup> This article, completed in June 2014, is based upon a presentation by the author at the University of Antwerp, Belgium in May 2014. The author, at the time a ‘Marie Curie’ Fellow, acknowledges the generous financial assistance provided by the European Commission.

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## I IS SOMETHING “ROTTEN” WITH THE CURRENT STATE OF INTERNATIONAL CRIMINAL JUSTICE?

In June 2013, the then-judge of the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’), Frederik Harhoff of Denmark, wrote a confidential letter to 56 of his friends in which he suggested that the jurisprudence of that tribunal had recently deviated from ‘more or less set practice’,<sup>2</sup> with the effect that it had become significantly more difficult to convict senior military commanders for crimes committed by their subordinates. This followed the decision of the ICTY Appeals Chamber in the case of *Perišić* in February 2013,<sup>3</sup> in which a former (Serbian) Chief of the General Staff of the Yugoslav army, having been convicted by the Trial Chamber of war crimes and crimes against humanity and sentenced to 27 years imprisonment, was acquitted of all charges on appeal, a decision described by one news agency as ‘a rare victory for Serbs’.<sup>4</sup>

Judge Harhoff found himself in a ‘deep professional and moral dilemma’ and alleged that this ‘back-tracking’ in the application of the law relating to aiding and abetting was, in part, due to ‘tenacious pressure’ on other judges by the President of the ICTY, American Theodor Meron — who presided in the *Perišić* Appeals Chamber decision — in response to pressure supposedly imposed by various (named) countries.<sup>5</sup> Three months prior to

<sup>2</sup> An English version of this letter can be found at; Email from Judge Frederik Harhoff to 56 Contacts, 6 June 2013, <<http://www.bt.dk/sites/default/files-dk/node-files/511/6/6511917-letter-english.pdf>>.

<sup>3</sup> *Prosecutor v Perišić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-04-81-A, 28 February 2013) (*‘Perišić’*).

<sup>4</sup> See Guy De Launey, ‘Momcilo Perisic Hague acquittal leaves little sense of justice’, *BBC News* (online), 28 February 2013 <<http://www.bbc.com/news/world-europe-21621695>>.

<sup>5</sup> Harhoff, above n 2.

the acquittal of Momčilo Perišić, the Appeals Chamber (again presided by Judge Meron), in a decision that caused outrage in Serbia, had acquitted two Croat Generals, Ante Gotovina and Mladen Markač, who had been convicted and sentenced to 24 years and 18 years respectively by the Trial Chamber.<sup>6</sup> Both of these Appeals Chamber Judgements were notable for strident dissenting opinions on the question of acquittal and the application of relevant legal principles.

Following the subsequent publication of his letter, Judge Harhoff was himself found *not* to be impartial by a majority of a panel of other ICTY judges. He was held to have ‘demonstrated a bias in favour of conviction such that a reasonable observer properly informed would reasonably apprehend bias’.<sup>7</sup> He was therefore removed from the *Šešelj* case, in which the accused had already spent over 11 years in detention without a final verdict.<sup>8</sup> Judge Harhoff was replaced in that case by Judge Mandiaye Niang on 31 October 2013 and then effectively forced to leave the ICTY. He has returned to the University of Southern Denmark as a Professor of Law.

A subsequent ICTY Appeals Chamber Judgement in early 2014 — in which Judge Meron was not a member of the bench — disagreed with the *Perišić* reasoning in unusually strong language. In *Šainović*,<sup>9</sup> the majority ‘unequivocally reject[ed] the approach adopted in [*Perišić*] as it is in direct and material conflict with the prevailing jurisprudence ... and with customary international law’.<sup>10</sup> *Perišić* was also rejected by the Appeals Chamber of the Special Court for Sierra Leone (‘SCSL’) in its decision in *Taylor* in September 2013.<sup>11</sup> In light of the *Šainović* Appeals Chamber decision, the ICTY Prosecutor, in what he admitted would be an ‘extraordinary measure’ — as well as being legally and procedurally unsupportable — filed a motion requesting that the ICTY

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<sup>6</sup> *Prosecutor v Gotovina (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-06-90-A, 16 November 2012).

<sup>7</sup> *Harhoff Disqualification Decision* (International Criminal Tribunal for the Former Yugoslavia, Chamber Convened by Order of the Vice-President, Case No IT-03-67-T, 28 August 2013).

<sup>8</sup> The judgement in the *Šešelj* case had been scheduled for 30 October 2013; however, the departure of Judge Harhoff and the necessity for the replacement judge to familiarise himself with the voluminous brief so that he could actively participate in the deliberations for, and drafting of, the final decision have meant that the judgement has been indefinitely postponed.

<sup>9</sup> *Prosecutor v Šainović (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-87-A, 23 January 2014) (‘*Šainović*’).

<sup>10</sup> *Ibid* [1650].

<sup>11</sup> *Prosecutor v Taylor (Judgement)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-03-01-A, 26 September 2013)[471–486] (‘*Taylor Appeals Chamber Judgement*’).

reconsider the Appeals Chamber acquittal in *Perišić*. This motion has since been rejected by an Appeals Chamber bench (presided by Judge Meron), which held that:

... the Appeals Chamber has underscored the importance of “certainty and finality of legal judgements” for both victims and individuals who have been convicted or acquitted by the Tribunal ... [and that] victims’ interest in the success of the Motion does not constitute a legal basis which would justify granting the Motion.<sup>12</sup>

Whilst this sequence of events is unusual for its public nature, it is not an isolated incident in terms of the important questions that it highlights. These relate particularly to the impartiality and independence of judges in the international criminal arena, the effects of external pressures (or perceptions thereof) on their judicial decision-making, and the overall role of judges in speaking out in instances where they perceive that the judicial decision-making process has been compromised. Thus, in another extraordinary statement by an international criminal judge in April 2012, the Senegalese jurist El Hadji Malik Sow — who was the alternate (reserve) judge in the SCSL Trial Chamber hearing the *Taylor* case — made the following claims in the court room after the guilty verdict had been pronounced, the microphones switched off, and the three other Trial Chamber Judges had left the room:

... there were no deliberations ... and I disagree with the findings and conclusions of the other Judges, standard of proof the guilt of the accused from the evidence provided in this trial is not proved beyond reasonable doubt by the prosecution. And my only worry is that the whole system is not consistent with all the principles we know and love, and the system is not consistent with the values of international criminal justice, and I’m afraid the whole system is under grave danger of just losing all credibility, and I’m afraid this whole thing is heading for failure.<sup>13</sup>

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<sup>12</sup> *Prosecutor v Perišić (Decision on Motion for Reconsideration)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-04-81-A, 20 March 2014) 2–3.

<sup>13</sup> These comments by Judge Sow were transcribed by a court stenographer at the time, but were subsequently expunged from the official court records. However, they were widely circulated on the internet. See, eg, Charles Jalloh, “The Verdict in the Charles Taylor Case and the Alternate Judge’s “Dissenting Opinion”” on *Blog of the European Journal of International Law* (11 May 2012) <<http://www.ejiltalk.org/the-verdict-in-the-charles-taylor-case-and-the-alternate-judges-dissenting-opinion/>>.

Judge Sow was shortly thereafter dismissed as a judge of the SCSL for misconduct.<sup>14</sup>

Irrespective of the accuracy of each of the claims made by Judges Harhoff and Sow, they indicate that disagreements among judges sometimes occur in the decision-making processes in the international criminal courts and tribunals, which have led these judges to, in effect, become “whistle-blowers”. This does not necessarily seem coincidental, given that there are many complex external factors at play for each of these mechanisms of criminal justice. This article briefly reflects on a number of those factors that characterise judicial decision-making in the area of international criminal justice, and their possible impact on the “effectiveness” of these courts and tribunals.

## II THE IMPERATIVE TO DEVELOP (QUICKLY) A “PRACTICE” OF INTERNATIONAL CRIMINAL JUSTICE

Much has been written about the proliferation of international (and hybrid “internationalised”) criminal tribunals and courts over the past two decades. At the end of the Second World War, the Nuremberg Military Tribunal in particular had made generally positive steps regarding the formulation of principles of international criminal law and the development of an international-level process of judicial accountability. However, there then followed a long period of impunity, particularly due to factors of an international and national political nature. It has been estimated that as many as 170 million people were killed during the period 1945 to 1990, with little accountability before national or international courts.<sup>15</sup> It was not until the shackles of the Cold War were loosened in the early 1990s, and the United Nations Security Council was then able to play a more active role in addressing international crimes, albeit after the fact, that the world finally saw a renewed and much more concerted effort to create a system of international criminal justice.

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<sup>14</sup> See Hironelle News Agency, ‘SCSL/Taylor’s defence wants to call dissenting Judge to the stand’, *Hironelle News Agency* (online), 22 August 2012 <<http://www.hirondellenews.com/other-courts/325-scs/33630-082212-scsltaylors-defence-wants-to-call-dissenting-judge-to-the-stand>>. See also the Concurring Opinion on Aiding and Abetting Liability in *Taylor* at [717] of Justice Shireen Avis Fisher, who ‘absolutely repudiated’ any suggestion of political influence on the decisions of international criminal judges stating that ‘to suggest otherwise wrongfully casts a cloud on the integrity of judges in international criminal courts generally and the rule of law which we are sworn to uphold, and encourages unfounded speculation and loss of confidence in the decision-making process as well as in the decisions themselves’.

<sup>15</sup> M Cherif Bassiouni, ‘Introduction to the Symposium: The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities’ (1998) 8(1) *Transnational Law and Contemporary Problems* 199, 203.



Faced with genocides in both Rwanda and in the former Yugoslavia, the United Nations Security Council eventually agreed to establish two *ad hoc* tribunals to prosecute the perpetrators of serious crimes committed during those conflicts. These institutions have been followed by a series of other *sui generis* courts and tribunals dealing with specific conflicts and situations in various places including Sierra Leone, East Timor, Cambodia, and Lebanon. More significantly, in 1998, a treaty to establish a permanent International Criminal Court ('ICC') was agreed, and that court began its operations in 2002.

Thus, over a short time frame, it became necessary to shift from a 45-year-period in which there was no "practice" of international criminal law, to a vibrant era of significant jurisprudential evolution. This called for the development and elaboration of even the most basic notions of what constitutes an international crime, and how international criminal accountability should operate to counter such acts. What had largely been considered merely interesting and somewhat academic questions (albeit important) became "real" — they were being raised and challenged in a formalised and highly visible international legal process. This required adjudication by competent judges.

For example, although the definition of genocide, the so-called "crime of crimes", was concluded in 1948, it was not until 1998 (50 years later) that judges were first required to interpret and apply the core elements of the crime. Even what had been assumed to be a fundamental and perhaps obvious issue — the characterisation of the relevant groups within the crime of genocide — gave rise to difficulties and controversy in this initial period of (renewed) international criminal justice.<sup>16</sup>

The judges in the embryonic stages of this new era of international criminal justice evidently had no "hard" practical experience in this field. Yet, the rapid evolution of this "internationalisation" of criminal justice called for the appointment of a significant number of judges over a relatively short space of time. They were thrust into a position where many interested parties, as well as the relevant stakeholders, were watching them adjudicate a series of high-profile trials with inflated expectations that the

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<sup>16</sup> See *Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-96-4-T, 2 September 1998) [511] ('*Akayesu*'), where the Trial Chamber extended the scope of genocide beyond the four specified groups to apply to any 'stable and permanent' group. This was subsequently rejected in a series of later decisions at the ICTR.

establishment of these various mechanisms would ultimately deal effectively with the complex issues that they would inevitably raise.

Not surprisingly, despite the fact that the first of these tribunals to be established in this new era of accountability, the ICTY, was to ‘apply rules of international humanitarian law which are beyond any doubt part of customary law’,<sup>17</sup> the initial phases of judicial decision-making were characterised by what could be termed “law-creation on the run”. This involved a departure from well-established principles of national criminal law, due to the unique aspects of this (re)new(ed) area of international legal practice. This is, in part, a reflection of the fact that this regulatory regime for international crimes was initially developed in reaction to, rather than in anticipation of, horrendous events, including those that could not have possibly been foreseen.

As a practical matter, the generally reactive nature of this system will sometimes necessitate the “adaptation” of existing and well-established principles to meet particular situations. Judge Cassese has suggested that international criminal courts can still work within the legal principle of *nullum crimen sine lege* (“no crime without law”), a fundamental human rights principle that underpins the operation of criminal law in many national legal systems, whilst, at the same time, refining and elaborating upon ‘by way of legal construction, *existing* rules’.<sup>18</sup> Other commentators have, however, taken a different view and have not been as generous in their assessment of the international judicial processes. Schabas has argued that international criminal judges at the ICTY have adopted a ‘relaxed attitude’ to the *nullum crimen* principle from quite early on in their decision-making activities,<sup>19</sup> while Bassiouni and Manikas have suggested that, in the context of international criminal law, the principle itself should be moulded to instead become *nullum crimen sine iure* (“no crime without *some* law”).<sup>20</sup>

While this may be a necessary *modus operandi* of the judicial mechanisms of international criminal justice, particularly given the very complex and unique factual

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<sup>17</sup> See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, UN Doc S/25704 (3 May 1993) [34] <[http://www.un.org/ga/search/view\\_doc.asp?symbol=S/25704](http://www.un.org/ga/search/view_doc.asp?symbol=S/25704)>.

<sup>18</sup> Antonio Cassese, *International Criminal Law* (Oxford University Press, 3<sup>rd</sup> ed, 2003) 149.

<sup>19</sup> William Schabas, ‘Commentary on Judgement, *Prosecutor v Furundžija*’, in André Klip and Göran Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals, Volume III, The International Criminal Tribunal for the Former Yugoslavia, 1997–1999* (Intersentia, 2001) 753, 757.

<sup>20</sup> M Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers, 1996) 290.

situations with which they often deal, it does have its risks, particularly where judges may perceive there to exist an underpinning “pressure to convict”. This has presented not inconsiderable challenges for judges seeking to demonstrate unconditional objectivity and to present considered deductive reasoning in their judgments. Despite the increasing body of jurisprudence, international criminal law still remains a developing field, and there may be no “precedent” to rely upon in particular circumstances. As such, a judge may be forced into a position where he/she must elaborate on the boundaries (or, seen from another perspective, the “potential”) of a codified crime, often with the result that the crime is interpreted to encompass situations to the maximum extent possible — and thus cover the specific factual matrix before the court. This, however, also brings with it the attendant concerns that the application of the *nullum crimen* principle may invariably be compromised.

One example may be illustrative in this regard. In *Furundzija*,<sup>21</sup> a Trial Chamber of the ICTY, having concluded that there existed no definition of “rape” in international law, formulated its own definition, after a consideration of various national laws. This was necessary because an element of the relevant crime with which the accused was charged was the commission of an act of rape (rather than any other form of sexual assault). The definition that the Trial Chamber arrived at made reference to body parts and included forced oral penetration, which encompassed the acts of the accused, and he was thus ultimately found guilty of the crime. In 2001, another ICTY Trial Chamber,<sup>22</sup> while accepting that the *Furundzija* definitional elements, if proved, constituted the *actus reus* of rape, proceeded to expand the scope of the crime even further by not limiting it to situations of “coercion”, as had been stipulated in *Furundzija*. Once again, this led to the conviction of the accused in that case.

At the International Criminal Tribunal for Rwanda (‘ICTR’), only three months before the *Furundzija* decision, a Trial Chamber, having been required also to define rape (once again, it constituted an element of one of the crimes with which the accused was charged), came up with a completely different definition, not based on reference to body parts, but

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<sup>21</sup> *Prosecutor v Furundzija (Judgement)* (International Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1, 10 December 1998) [174–185].

<sup>22</sup> *Prosecutor v Kunarac (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-23-T, 22 February 2001) [453–460].

rather emphasising ‘physical invasion’.<sup>23</sup> This, therefore, covered violent acts perpetrated with foreign implements and/or sticks. This was typically a feature of the horrors in Rwanda. Once again, the accused was ultimately found guilty of the relevant crime.

As such, the question arises as to whether, in their judicial decision-making, the judges strayed beyond what was legally defensible into a realm of “doing what it takes” to convict? This divergence of opinion as to the nature of the act of rape — an essential element of a crime that must be proven by the Prosecution beyond a reasonable doubt — gives rise to more than concerns about the “fragmentation” of international law. These examples leave a distinct impression that definitions were formulated by the respective Chambers to fit the circumstances before them in each case. Indeed, and bearing in mind the then current state of national law in the relevant regions, there are strong arguments to suggest that the accused could not have been in a position to know that such acts constituted rape, as opposed to sexual assault.<sup>24</sup>

Arguably, the reasoning of these judges was seemingly driven by the intended result such that the “ends justified the means” of judicial decision-making. This may be both morally acceptable and defensible. Perhaps this even contributes towards the attainment of some of the “macro” goals of international criminal justice in circumstances including deterrence, closure, reconciliation, and the provision of a voice for victims. However, one must always keep in mind that the practical consequence of a conviction in an international criminal trial is, at its “micro” level, the deprivation of an accused person’s liberty, sometimes for a significant period of time.

As such, it is an essential element of the trial process that even those accused of grave crimes must be accorded their full rights. Indeed, one of the primary justifications of the system of internationalised criminal justice is that it ensures a fair trial for all accused. The credibility of the process itself should reinforce the importance of the decision of the relevant court or tribunal, as well as the historical record that arises from the evidence presented. Obviously, these are principles that should not be discarded. Prosecutorial burdens of proof and certainty, and legality protections for an accused, exist for important reasons.

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<sup>23</sup> *Prosecutor v Akayesu* (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-96-40T, 2 September 1998) [598].

<sup>24</sup> Mia Swart, *Judges and Lawmaking at the International Criminal Tribunals for the former Yugoslavia and Rwanda* (PhD Thesis, University of Leiden, 2006) <<https://openaccess.leidenuniv.nl/handle/1887/5434>>.

In this regard, it is perhaps interesting to note that the *nullum crimen sine lege* principle, which was not expressly mentioned in the ICTY or ICTR Statutes, has been specifically included in the *Rome Statute of the International Criminal Court*.<sup>25</sup>

### III “CONSTRUCTIONIST” DECISION-MAKING TO CREATE “NEW” MODES OF CRIMINAL LIABILITY?

The significance of judge-made law within the modern regime of international criminal justice goes further than isolated cases such as those referred to above. Although there is no formalised system of precedent throughout the system, it is clear that several of the early decisions have since established or confirmed important benchmarks and legal tools. Those decisions, delivered in the context of developing the practice of international criminal law, have particularly shaped subsequent jurisprudence, even to the present time.

The overall jurisprudential methodology adopted in particular by the ICTY and ICTR has undoubtedly broadened the possibilities that senior leaders may be implicated in the perpetration of crimes, even where they are located at all relevant times at a (geographical) distance from the actual acts committed. This approach, almost by definition, brings with it elements of subjectivity and policy as to how far one extends the linkages that would result in the individual criminal responsibility of, for example, senior military personnel. Recall the words of Judge Harhoff: this is ‘more or less set practice’.<sup>26</sup>

These considerations are particularly heightened in the context of an international criminal trial, where the complexities associated with the trial of those “most responsible” for the commission of international crimes — typically senior military or political leaders who themselves are not involved in “pulling the trigger” — have widespread implications for the future of judicial decision-making, including at the ICC, as well as the aforementioned “macro” goals of international criminal justice.

A striking example of this, and one that has had profound implications for subsequent judicial decision-making in this area, is the 1999 ICTY Appeals Chamber decision in

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<sup>25</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90, art 22 (entered into force 1 July 2002) (*‘Rome Statute’*).

<sup>26</sup> Harhoff, above n 2.

*Tadić*.<sup>27</sup> One of the members of this bench was the first President of the ICTY, the highly esteemed legal jurist-cum-international criminal judge, Antonio Cassese, who is remembered by many 'for having taken international criminal law out of the classroom and into the courtroom'.<sup>28</sup> In its decision, the Chamber, in what was in certain respects a judge-made construct, concluded that, in its opinion, there existed under customary international law a mode of liability stemming from the notion of 'common criminal purpose', comprising three categories of cases giving rise to collective criminality.<sup>29</sup>

Ultimately, this construct came to be formally referred to as a Joint Criminal Enterprise ('JCE'), the effect of which is to connect those in some way involved in the commission of an international crime through a common plan or design. This is despite the fact that they may not have been active in all aspects, or even necessarily aware, of the commission of the crime to every degree.

Many subsequent decisions, particularly at the ICTY, have centred on the application of this legal tool of accountability, although it has also given rise to considerable confusion and controversy.<sup>30</sup> Indeed, the interpretation of dicta of the *Tadić* Appeals Chamber, particularly where it compared the elements of the common criminal purpose with the *actus reus* of aiding and abetting liability, lie at the heart of the legal controversies that surround the *Perišić* decision referred to earlier.<sup>31</sup>

Equally striking, in *Stakić*, a decision rendered some several years after the concept had first been introduced into the jurisprudence of the ICTY, a Trial Chamber rejected the application of the JCE as a mode of liability, even though it had been specifically pleaded by the Prosecution in that case, on the grounds that its application could 'constitute a new crime not foreseen under the [ICTY] Statute and therefore amount to a flagrant infringement of the principle *nullum crimen sine lege*'.<sup>32</sup> Instead, the Trial Chamber itself

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<sup>27</sup> *Prosecutor v Tadić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Cases No IT-94-1, 15 July 1999) ('*Tadić*').

<sup>28</sup> *Antonio Cassese* (28 October 2014) Antonio Cassese Initiative for Justice, Peace and Humanity <<http://www.cassese-initiative.org/antonio-cassese.html>>.

<sup>29</sup> *Tadić* (ICTY, Appeals Chamber, Case No IT-94-1, 15 July 1999) [195].

<sup>30</sup> Some sceptics have rather cynically suggested that the JCE acronym in reality stands for "Just Convict Everyone".

<sup>31</sup> See *Tadić* (ICTY, Appeals Chamber, Case No IT-94-1, 15 July 1999) [229].

<sup>32</sup> *Prosecutor v Stakić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-97-24-T, 31 July 2003) [433] ('*Stakić*') (emphasis added).

applied a new mode of liability, which it labelled as ‘co-perpetration’,<sup>33</sup> or as the Appeals Chamber referred to it, ‘co-perpetratorship’.<sup>34</sup>

The case went to appeal and, in its judgement, the Appeals Chamber considered this question *proprio motu* (“on its own impulse”) given its general importance. In the end, the Appeals Chamber rejected the new mode of liability suggested by the Trial Chamber, stating pointedly that it ‘does not have support in customary international law or in the settled jurisprudence of this Tribunal, which is binding on the Trial Chambers’.<sup>35</sup> The Appeals Chamber concluded that, in fact, the Trial Chamber’s findings did support the conclusion that the accused in that case had participated in a JCE.

Even today, the JCE construct, although now undoubtedly regarded by the ICTY as a form of commission under customary international law, still gives rise to confusion and unnecessary judicial complexity. This was evident in the January 2014 Appeals Chamber decision in *Dordević*, where the Chamber, having found that the Trial Chamber had convicted the accused on the basis of two modes of liability — JCE and aiding and abetting — found that this represented an error of law, as the Trial Chamber had failed to articulate why both modes were necessary to reflect the ‘totality of Mr Dordević’s criminal conduct’.<sup>36</sup> The Appeals Chamber then, without any detailed explanation, stated that such conduct was ‘fully reflected in a conviction based solely on his participation in the JCE’.<sup>37</sup> The Chamber, by so holding, was able to avoid further discussion of the elements of aiding and abetting, which also lies at the core of the *Perišić* controversy.

As such, the extent to which confusion, not to mention lack of consistency and certainty in relation to the JCE concept, continues within the ICTY, serves to indicate that judicial creativity may not necessarily be appropriate in all circumstances. This is particularly given the importance attached to the use of “collective” modes of liability in the overall judicial decision-making of the ICTY and ICTR. It is perhaps not surprising that the

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<sup>33</sup> *Ibid* [440–41].

<sup>34</sup> Both terms were referred to by the Appeals Chamber in *Tadić* (ICTY, Appeals Chamber, Case No IT-94-1, 15 July 1999) [198], [201], [220].

<sup>35</sup> *Prosecutor v Milomir (Judgement)* (International Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-97-24-A, 22 March 2006) [62].

<sup>36</sup> *Prosecutor v Dordević (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-87/1-A, 27 January 2014) [832].

<sup>37</sup> *Ibid* [833].

drafters of the *Rome Statute* chose not to incorporate all aspects of the JCE into the ICC's judicial framework.<sup>38</sup>

#### IV JUDICIAL INDEPENDENCE AND IMPARTIALITY

Another relevant consideration in relation to judicial decision-making within the context of international criminal justice relates to the general requirement that a judge act with unfettered independence and complete impartiality. It is a fundamental precept of international human rights law that an accused person is entitled to a hearing before an independent and impartial court.<sup>39</sup> Independence and impartiality are two different concepts but are linked — it would be difficult, for example, to envisage a situation where a judge is not free from political or other interference but at the same time would still be able to operate completely impartially. Whilst these are fundamental requirements for any judge, either in a national or international legal regime, there are some factors inherent in the operation of the mechanisms of international criminal justice that add to their complexity.

Dealing first with the issue of independence, it is generally considered that independent judges are more likely to act in accordance with existing law and thus deliver decisions that 'have a certain predictability', which itself contributes to 'the political stability and economic prosperity of a society'.<sup>40</sup> The scholarship tends to differentiate between two forms of judicial independence: i) internal independence, which relates to a judge's activities within the Court environment *vis-à-vis* actors present in that same system such as other judges, the Registrar, Prosecutor, or Defence; and ii) external independence, which reflects the degree to which a judge is independent of and free from any political interference by any government, intergovernmental organisation, or other external stakeholder.

Whilst there is an implicit assumption that the "professional" judges hearing international criminal cases will automatically display the appropriate level of independence, the issue is never quite so straightforward. Given that international

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<sup>38</sup> See Kai Ambos, 'Joint Criminal Enterprise and Command Responsibility' [2007] *Journal of International Criminal Justice* 159, 172-4.

<sup>39</sup> See *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810, art 10 (10 December 1948).

<sup>40</sup> Theodor Meron, 'Judicial Independence and Impartiality in International Criminal Tribunals' (2005) 99(2) *The American Journal of International Law* 359, 359.



criminal justice has become a significant growth industry over the past two decades, more and more judges have been engaged to deal with the increasing workload generated by the proliferation of courts and tribunals. Some of these judges, even today, are relatively inexperienced and not necessarily adequately equipped to deal with the myriad of issues involved. A number of those thrust into this role will never even have acted as judges previously — diplomats, academics, legal advisers yes, but not judges. This continues to be the case.<sup>41</sup> As Judge Meron has himself noted:

... for an international judge to conduct himself in an impartial and independent way may require adaptation and discipline. The synergy between the personal perception and the court's culture of judicial independence is critical in helping the newcomer adapt to a whole new universe of judicial thinking and action.<sup>42</sup>

Moreover, it has been generally observed that the process of nominating and appointing judges to these international criminal tribunals is very much a politicised process, raising suggestions of “horse trading” among States eligible to vote in these elections. One study of the nomination and election of judges to the ICC and International Court of Justice (ICJ), has concluded that:

[E]vidence of politicisation is apparent at both the nomination and election stages. For both courts, nomination practices are fragmented, lacking in transparency, and highly varied. At one end of the spectrum, a few candidates emerge following a transparent and formal consultative process that focuses on merit; at the other end, it is not unusual for individuals to be selected as a result of overtly political considerations or even nepotism. Whatever form of nomination process is adopted, all nominated candidates must work their way through a highly politicised election process.<sup>43</sup>

Whilst it is impossible to be too specific on this point, what becomes apparent is that it is certainly not the case that the best candidate is always nominated by their government,

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<sup>41</sup> Note, for example, the different types of competencies specified for judges of the ICC in the *Rome Statute*, art 36(3)(b).

<sup>42</sup> Meron, above n 40, 360.

<sup>43</sup> Ruth Mackenzie et al, *Selecting International Judges: Principle, Process, and Politics* (Oxford University Press, 2010) 173.

or indeed is elected to take up an appointment at the relevant court. Of course, it is a truism that '[c]ourts are only as good as the people sitting on the bench'.<sup>44</sup> The incorporation of extraneous factors into the nomination or election process compromises the scope for true judicial independence, as well as the legitimacy and effectiveness of these mechanisms.<sup>45</sup>

As to internal independence, this may in fact represent an unattainable "holy grail", at least for many of the less experienced judges. The possibility that they might be in a position to actively influence a decision, and the application of the relevant legal principles, is at times limited, particularly given that many judgments are drafted by in-house legal officers, who may take instructions from the registry of a particular court, or be overseen only by a small number of senior judges. This threat to judicial independence is quite insidious and hidden, perhaps only rising to the surface on those rare occasions when a "whistle-blower" judge decides to make such allegations public. Naturally, it is always open to a judge to register a dissenting or separate opinion on a particular issue and, as noted above, this is sometimes the case. However, to do so is not necessarily an easy undertaking for a new judge, particularly when finding his or her way in the particular Court. It may also be made even more difficult where there is some implicit or express pressure being brought to bear for unanimity by the other members of the relevant chamber.

With respect to external independence, the subject matter of, and overall political environment within which international mechanisms of criminal justice operate, give rise to added pressure, even perhaps greater than other international judicial bodies. International criminal judges, whilst exercising a judicial function, deal with issues that are highly sensitive from a social, political, and historical perspective.<sup>46</sup>

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<sup>44</sup> Kai Ambos, Book Review of Ruth Mackenzie et al, *Selecting International Judges: Principle, Process, and Politics* (2012) 23 *Criminal Law Forum* 223, 223.

<sup>45</sup> *Ibid* 228.

<sup>46</sup> Consider, for example, that international criminal proceedings are often held within the context of an ongoing conflict situation (ICC — Democratic Republic of the Congo, Central African Republic), or with the active "encouragement" of the United Nations Security Council (ICC — Sudan, Libya), or coincidentally with peace negotiations (ICC — Uganda) or attempts at reconciliation (ICTR), or may involve former or incumbent Heads of State (ICC — Bashir, SCSL — Taylor, ICTY — Milosevic), or deal with issues that are of extreme sensitivity to the then current Government (Extraordinary Chambers in the Courts of Cambodia ('ECCC') — prosecution of former Khmer Rouge officials).

In such circumstances, one would imagine there to be an extraordinarily high degree of public scrutiny of the relevant judges. It would also be naïve to consider that these issues are not within the consciousness of the judges themselves, or even that there have been no external attempts made (whether or not successful) to influence the judicial decision-making process in some way. The risks are magnified when members of the judiciary in a mechanism of international criminal justice are also nationals of the country within which the alleged crimes were perpetrated — “local” judges (for example, ECCC).

There have, for example, been public statements by the Governments of Rwanda and Cambodia directly critical of various aspects of the proceedings at the ICTR and ECCC respectively. Extremely serious allegations have been made as to the integrity and independence of some judges and judicial officials at those institutions. The SCSL, the first international(ised) criminal tribunal to be financed entirely from voluntary contributions by states, operates under a Management Committee comprised of representatives of donor states, which is responsible for the payment of the judges’ salaries. One accused, Sam Hinga Norman, unsuccessfully challenged the independence of the judges trying his case for this very reason.<sup>47</sup>

The ICC faces a seemingly endless barrage of criticism from, for example, the African Union, governments, and commentators, for being too slow, too costly, too selective, too politicised, too removed from the actual victims of atrocities, and even racist.<sup>48</sup> In 2009, the Assembly of the African Union decided that AU member states should not cooperate with respect to certain aspects of ‘the arrest and prosecution of President Omar El Bashir of The Sudan’, as the UN Security Council had failed to act upon previous

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<sup>47</sup> See *Prosecutor v Norman (Decision on Preliminary Motion based on Lack of Jurisdiction (Judicial Independence))* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-13-AR72(E), 13 March 2004).

<sup>48</sup> See, eg, Mark Kersten, ‘Is the ICC Racist?’, *Justice in Conflict* (22 February 2012) <<http://justiceinconflict.org/2012/02/22/is-the-icc-racist/>>.

requests.<sup>49</sup> Furthermore, ample legal scholarship raises criticisms towards the ICC from multiple perspectives,<sup>50</sup> and in the public media domain.<sup>51</sup>

In such circumstances, the question arises as to whether international criminal judges should be held to the same standard of external independence as national judges or, instead, the unique factors encompassed by an international criminal trial necessitate that a 'different (lesser) standard' should be applicable.<sup>52</sup>

Turning now to the question of impartiality, it is of course vital that a judge exercise his or her judicial decision-making duties without bias or the appearance of bias. The overarching principle that '[j]ustice must not only be done, but should manifestly and undoubtedly be seen to be done' should also be rigorously applied at the international level.<sup>53</sup> This is perhaps even more necessary in (international) criminal proceedings, where the liberty of the accused is at stake. The situation is, however, complicated in the international field by the 'relatively small world of international law',<sup>54</sup> and the even smaller subset of international criminal law. There is simply not the luxury of an overwhelming number of potential international criminal law judges available (although this is changing); thus the possibility of disqualification should be managed sensibly. Indeed, there is a strong presumption of impartiality that attaches to a judge at the international criminal courts, and this has long been borne out in the jurisprudence.<sup>55</sup>

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<sup>49</sup> *Decision of the Assembly of the African Union (AU Assembly)*, 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)', Assembly/AU/Dec.245(XIII) Rev.1, 3 July 2009 [10].

<sup>50</sup> See Sarah M H Nouwen and Wouter G Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21(4) *European Journal of International Law* 941; Mirjan R Damaska, 'What is the Point of International Criminal Justice' (2008) 83 *Chicago-Kent Law Review* 329; James Meernik, 'Victor's Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia' (2003) 47(2) *Journal of Conflict Resolution* 140.

<sup>51</sup> See Tony Cadman, 'The International Criminal Court's many flaws can't simply be glossed over', *The Guardian* (online), 28 June 2012 <<http://www.guardian.co.uk/commentisfree/2012/jun/28/international-criminal-courts-flaws-overlooked>>; Ian Paisley, 'Peace Must Not be the Victim of International Justice', *The International Herald Tribune* (online), 16 March 2012 <[http://www.nytimes.com/2012/03/17/opinion/peace-must-not-be-the-victim-of-international-justice.html?\\_r=1](http://www.nytimes.com/2012/03/17/opinion/peace-must-not-be-the-victim-of-international-justice.html?_r=1)>.

<sup>52</sup> Ruth Mackenzie and Philippe Sands, 'International Courts and Tribunals and the Independence of the International Judge' (2003) 44(1) *Harvard International Law Journal* 271, 275-6. The authors were referring to international judges in general, but it is submitted that this question is particularly pertinent with respect to the international criminal law judge.

<sup>53</sup> *R v Sussex Justices, ex parte McCarthy* [1923] 1 KB 256, 259 (Lord Hewart CJ).

<sup>54</sup> *Ibid* 280.

<sup>55</sup> See the footnoted references in *Prosecutor v Karadžić (Decision on Motion to Disqualify Judge Picard and Report to the Vice-President Pursuant to Rule 15(B)(ii))* (International Criminal Tribunal for the Former

However, given the diverse background of the international criminal law judge, it is quite possible that, prior to having been appointed to the relevant court or tribunal, they will have had (as counsel, advisor, or diplomat) some connection with, or (as an academic) made comments relating to, a party to proceedings over which they are now required to adjudicate. Difficult issues arise as to whether, and in what circumstances, judges should recuse themselves from such proceedings. In the international criminal law arena, there have been a number of challenges to the impartiality of a judge, and anecdotal evidence suggests a general reluctance of judges to voluntarily recuse themselves, thus requiring a judicial hearing by that judge's peers to determine the issue.

The ICTY Appeals Chamber has set out general principles that assist in determining the impartiality requirement at that tribunal. They establish a framework within which a judge should be able to decide whether to recuse him/herself from specific proceedings; although in practice, it has typically been left to that judge's colleagues to make that determination. In *Furundžija*, the Appeals Chamber rejected the accused's allegation of bias on the part of Judge Mumba based on her previous involvement with the United Nations Commission on the Status of Women, which had dealt with issues of mass and systematic rape in the former Yugoslavia. The principles enunciated in that decision were as follows:

- A. A judge is not impartial if it is shown that actual bias exists.
- B. There is an unacceptable appearance of bias if:
  - i) a judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a judge's disqualification from the case is automatic; or
  - ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.<sup>56</sup>

One well-known instance of disqualification occurred at the SCSL. Prior to having been appointed to the Court (where he acted as its President at the time of the decision) the highly regarded scholar and legal counsel, Geoffrey Robertson QC, had discussed the

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Yugoslavia, Chamber Convened by Order of the Vice-President, Case No IT-95-05/18-PT, 22 July 2009) [17].

<sup>56</sup> *Prosecutor v Furundžija (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-17/1-A, 21 July 2000) [189].

events in Sierra Leone, and come to various conclusions about the warring groups and some of the defendants. In his book *Crimes Against Humanity: the Struggle for Global Justice* published in 2002,<sup>57</sup> he characterised the acts of several of the accused as international crimes, and labelled one particular accused, Foday Sankoh, as the 'nation's butcher'.<sup>58</sup> The defence, supported on this issue by the prosecution, sought the judge's immediate withdrawal from the case on the grounds of bias.

Judge Robertson declined to voluntarily withdraw, arguing that:

... [t]o permit such a challenge would be contrary to the principle of judicial independence, under which a judge must be secure in the office itself, notwithstanding the right of parties to seek his removal from the bench in a particular case, a judge would most sensibly resign his office, but that decision must, if judicial independence is to be maintained, be his decision alone.<sup>59</sup>

Ultimately, applying the *Furundžija* test, the SCSL Appeals Chamber concluded that Judge Robertson should be disqualified from any case relating to the Revolutionary United Front ('RUF'), of which the particular accused had been members.<sup>60</sup> The decision of the Appeals Chamber was important in terms of maintaining the integrity of the SCSL and its activities; the decision by Judge Robertson not to voluntarily withdraw from the case was perhaps regrettable.

More recently, as noted above, Judge Harhoff was disqualified from the *Šešelj* case, a decision that he himself did not agree with. The majority of a special Chamber established to consider this issue (and the motion of an accused) concluded that:

... in the Letter Judge Harhoff has demonstrated a bias in favour of conviction such that a reasonable observer properly informed would reasonably apprehend bias. As such an unacceptable appearance of bias exists. Therefore, the Majority ... finds that the presumption of

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<sup>57</sup> Geoffrey Robertson, *Crimes against Humanity: the Struggle for Global Justice* (New Press, Rev ed, 2002).

<sup>58</sup> *Prosecutor v Sesay (Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-2004-15-AR15, 13 March 2004) [2] ('*Robertson Disqualification Decision*').

<sup>59</sup> *Robertson Disqualification Decision* (SCSL, Appeals Chamber, Case No SCSL-2004-15-AR15, 13 March 2004) [11].

<sup>60</sup> *Ibid.*

impartiality has been rebutted. Accordingly, the Majority finds that the allegation of bias against Judge Harhoff is founded.<sup>61</sup>

The majority conclusion in the *Harhoff Disqualification Decision* seemingly ignored the views of Judge Antonetti, the presiding judge in the *Šešelj* case who, after having noted that Judge Harhoff had sworn an oath and should be 'presumed unbiased', argued that the claim against the judge should be rejected, adding that:

... without violating the secrecy of deliberations ... Judge Harhoff has always demonstrated the utmost professionalism and I never observed in him any bias for or against the accused since the proceedings commenced.<sup>62</sup>

The *Harhoff Disqualification Decision* was marked by a dissent from Judge Liu — who had also dissented in *Perišić* and subsequently presided in the *Šainović* decision that so unequivocally rejected the *Perišić* interpretation of the applicable law. Judge Liu was not persuaded that the June 2013 letter 'would lead a reasonable observer, properly informed, to reasonably apprehend bias' on the part of Judge Harhoff.<sup>63</sup> Yet, even so, Judge Liu was highly critical of Harhoff's actions in writing the letter, stating that:

... I consider a letter of this kind to be undoubtedly improper in various respects for a judge in his position. In the letter, Judge Harhoff sets forth an inarticulate critique of the recent jurisprudence of the tribunal based on unsubstantiated speculations and insinuations of improper conduct by other colleagues in a fashion that is unbecoming of a judge. I believe that Judge Harhoff should have used the proper channels available to him and present any criticism of the recent jurisprudence in this manner.<sup>64</sup>

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<sup>61</sup> *Harhoff Disqualification Decision*, (ICTY, Chamber Convened by Order of the Vice-President, Case No IT-03-67-T, 28 August 2013) [14].

<sup>62</sup> *Prosecutor v Šešelj (Decision to Unseal the Report of the Presiding Judge to the President of the Tribunal or Alternatively the Judge Designated by Him Regarding the Motion for Disqualification of Judge Harhoff)* (International Criminal Tribunal for the Former Yugoslavia, Chamber of the President, Case No IT-03-67-T, 4 September 2013) annex 7.

<sup>63</sup> *Harhoff Disqualification Decision* (ICTY, Chamber Convened by Order of the Vice-President, Case No IT-03-67-T, 28 August 2013) [5].

<sup>64</sup> *Ibid* [2].

Significantly, Judge Liu did not believe that what he regarded as Judge Harhoff's 'improper' actions, 'unsubstantiated speculations and insinuations', and conduct 'unbefitting of a judge' were determinative in relation to the question of his impartiality.<sup>65</sup> Clearly, and despite the relatively straightforward and often-quoted test set out in *Furundžija*, the assessment in practice of a judge's impartiality in specific circumstances may give rise to substantial disagreement. It is therefore of crucial importance that the judges themselves are sensitive to public perception about the possibility of bias, although it appears that, in practice, this is perhaps not always the case.

#### V CONCLUDING REMARKS: "EFFECTIVE" JUSTICE?

The aim of this article is to raise a number of issues that highlight the complex matrix of factors that may be relevant in assessing the objectivity of the judicial decision-making process within the system of international criminal justice. The cases and situations referred to demonstrate that basic requirements for proper judicial functioning may potentially become "clouded" by various non-legal issues. Judges are required to administer justice in accordance with the prevailing law properly applied to the facts as proven. This may be easier said than done.

The controversies and uncertainties explored in this article demonstrate the difficulties in the process of adjudicating international criminal cases. These international trials are very complex, very difficult, unique (in the sense that each one will be different), and very costly. Despite the fact that a considerable degree of jurisprudence has developed, coupled with the now one-generation of expertise in the area of international criminal law, everyone concerned is still learning as they go. The vast majority of current judges acting within the arena of international criminal law possess, of course, great expertise and extensive qualifications. However, there may (rightly or wrongly) be changes in legal direction along the way.

Although international criminal law decisions and judgments will continue to be expressed in the language of legal deductive reasoning based on the interpretation of the relevant rules, there remains the underlying risk that these non-legal factors also play an increasingly significant role in the fashioning of international criminal legal

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<sup>65</sup> Ibid.



decision-making by judges. As such, it is contended that we are just at the “end of the beginning” along the path in trying to work out precisely (if we ever will be able to) how best to progress towards more effective international criminal justice by way of process and law.

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