Appeals on errors of fact

Assessing the reputational consequences of the ICTY Appeals Chamber's interventionist approach

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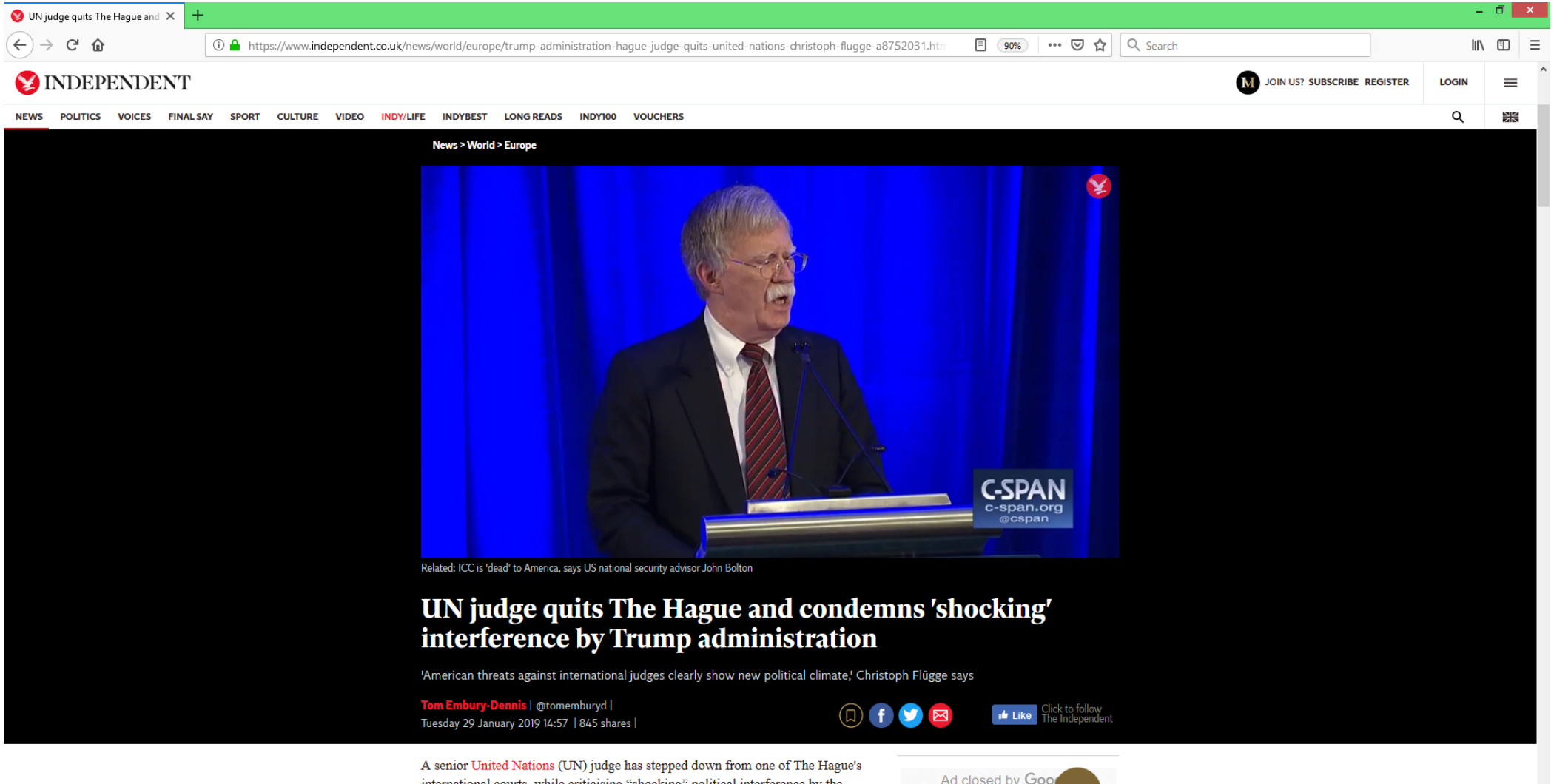
27 February 2019

I. Reputation

Perceptions of international criminal justice

The International Criminal Court in The Hague

Perceptions of international criminal justice (cont'd)



UN judge quits The Hague and

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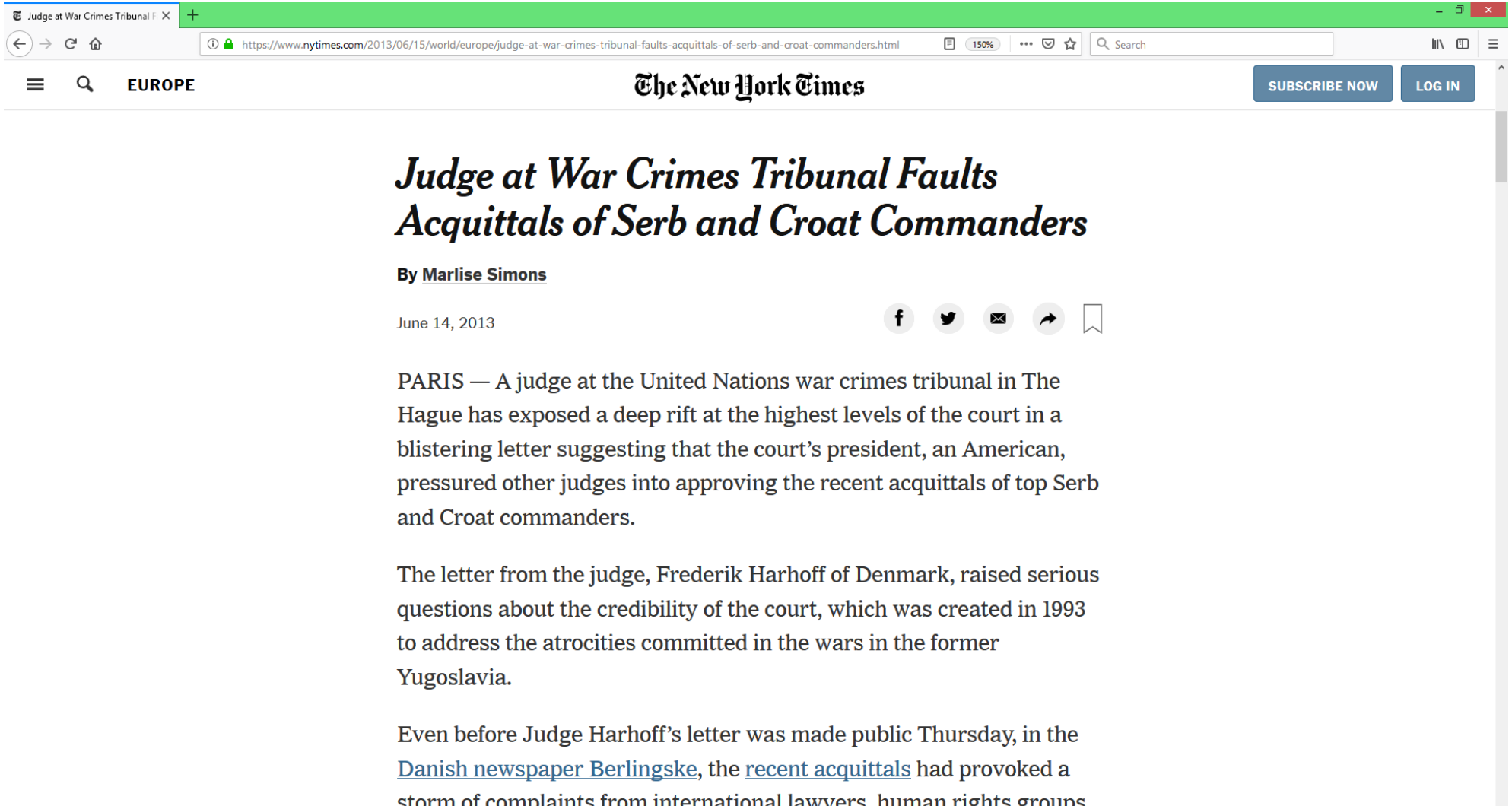

Judge at War Crimes Tribunal F

https://www.nytimes.com/2013/06/15/world/europe/judge-at-war-crimes-tribunal-faults-acquittals-of-serb-and-croat-commanders.html

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Judge at War Crimes Tribunal Faults Acquittals of Serb and Croat Commanders

By Marlise Simons

June 14, 2013

PARIS — A judge at the United Nations war crimes tribunal in The Hague has exposed a deep rift at the highest levels of the court in a blistering letter suggesting that the court's president, an American, pressured other judges into approving the recent acquittals of top Serb and Croat commanders.

The letter from the judge, Frederik Harhoff of Denmark, raised serious questions about the credibility of the court, which was created in 1993 to address the atrocities committed in the wars in the former Yugoslavia.

Even before Judge Harhoff's letter was made public Thursday, in the Danish newspaper Berlingske, the recent acquittals had provoked a storm of complaints from international lawyers, human rights groups

II. Context

How things work #1
The basics - what a criminal trial entails

- Consideration of actions and intentions of accused person(s) to determine if the accused is/are criminally responsible for the commission of a crime as defined by the applicable law
- Facts established on the basis of:
    - Witness evidence (live / partially live / prior statement(s) or testimony)
    - Real evidence
    - Documentary evidence
    - Imported into the case
        - Common knowledge
        - Previously adjudicated

How things work #2
- Findings of fact

- Key factual findings necessary to sustain criminal convictions cannot always be established on the basis of direct evidence

    - Principal example: *mens rea* / mental element. Other than in cases where the accused has confessed to the charged crimes, establishing *mens rea* *always* requires assumptions about typical human behavior

    - *Simple example:* direct perpetrator of a mass killing of civilians from a minority ethnic group is charged with persecution as a crime against humanity

        - Possible evidence for *mens rea* – evidence that only members of the minority group were targeted; evidence of accused's discriminatory comments regarding the ethnic group; pattern evidence

    - *Complex example: Prosecutor v. Gotovina et al.*

How things work #3
Reality - what an ICTY trial entailed…

- Often years-long
- Complex law and fact patterns
- Large numbers of witnesses
- Large numbers of exhibits

(IT-09-92)

RATKO MLADIĆ

RATKO MLADIĆ	
	Colonel General, Commander of the Main Staff of the Army of Republika Srpska, Bosnia and Herzegovina.
Indictment	Initial: 25 July 1995; amended on: 14 November 1995, 10 October 2002, 1 June 2011 and 16 December 2011
Arrested	26 May 2011
Transferred to ICTY	31 May 2011
Initial appearance	4 July 2011, no plea entered. Not guilty plea entered on his behalf by the Trial Chamber
Commencement of Trial	16 May 2012
Closing arguments	Held from 5 until 15 December 2016
Judgement	22 November 2017

STATISTICS

Trial days	530
Prosecution witnesses appearing in Court	169
Defence witnesses appearing in Court	208
Number of witnesses in the case	591
Number of witnesses appearing in Court	377
Number of exhibits admitted	9914

III. Standard of review

Standard of appellate review for factual errors

- "When considering alleged errors of fact, the Appeals Chamber will determine whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt. **In reviewing the findings of the trial chamber, the Appeals Chamber will only substitute its own finding for that of the trial chamber when no reasonable trier of fact could have reached the original decision**… It is not any error of fact that will cause the Appeals Chamber to overturn a decision by a trial chamber, but **only one that has occasioned a miscarriage of justice**."

Popovic et al. AJ, para.19

A note of caution

- *"…two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence."*

  Tadic AJ, para.64

- Thus, it should not be valid to reason in the following way:

  > Based on the evidence admitted at trial, the Appeals Chamber finds fact X to have been established. However, the Trial Chamber found fact X not to have been established. Therefore, the Appeals Chamber concludes that the Trial Chamber reached a factual finding that no reasonable trier of fact could have reached.

IV. Appellate intervention – examples

The basics – simple example of a factual finding that (i) no reasonable trier of fact could have reached and that (ii) occasioned a miscarriage of justice

- **Trial judgement**. A is found guilty of intentional wounding on the sole basis of the evidence of two credible eyewitnesses who knew X saw X stab Y in the chest with a kitchen knife, in broad daylight, unprovoked
- **X appeals his conviction**. Argues that nowhere in the trial record do the eyewitnesses say that X stabbed Y – both say that they saw X push Y, but no weapon is mentioned and no other evidence was admitted of any injury to Y following this event
- **Appeals judgement**. "No reasonable trier of fact could have found that X stabbed Y. This erroneous finding resulted in a miscarriage of justice."

Prosecutor v. Vlastimir Đorđević (AJ)

“499. The Prosecution responds that in establishing Đorđević’s mens rea, the Trial Chamber relied on extensive evidence obtained from a variety of sources, including […] Human Rights Watch reports. Further, it responds that the Trial Chamber’s reliance on Human Rights Watch reports as a source of Đorđević’s notice of crimes was reasonable. It argues that regardless of whether Đorđević was the addressee, in light of the evidence that Human Rights Watch sent these reports to the MUP offices where Đorđević was based, the Trial Chamber reasonably rejected his assertion that he knew nothing of the accusations against the MUP by Human Rights Watch.

“500. The Appeals Chamber notes that, as Đorđević correctly argues, there is no confirmation of delivery of Human Rights Watch reports to the MUP and there is no evidence, or Trial Chamber findings, that he personally received or read such reports. **The Appeals Chamber considers that no reasonable trier of fact could have inferred from the simple fact that reports were sent by Human Rights Watch to the MUP that Đorđević had personal knowledge of them, since reports from international human rights groups were not part of the established internal reporting system within the MUP. In addition, the Appeals Chamber takes into account Đorđević’s arguments that the Internet was not widely available in 1999 and that he does not understand any English.** The Appeals Chamber therefore finds that the Trial Chamber committed an error in inferring Đorđević’s knowledge of the crimes from reports issued by Human Rights Watch.

“501. The Appeals Chamber finds, however, that despite this error of fact it was reasonable for the Trial Chamber to conclude that Đorđević had knowledge of the crimes. As outlined above, the Trial Chamber’s conclusion was based on several factors, including Đorđević’s: position within the MUP; role in negotiations with international bodies; participation at Joint Command and MUP Collegium meetings; presence on the ground while certain operations were carried out; personal contact with Lukić; involvement in the deployment of paramilitary units and in operations to conceal crimes; and the reporting system within the MUP.

“502. **Further, the Trial Chamber considered the media as an additional source of Đorđević’s knowledge of the crimes. In light of the Trial Chamber’s findings on Đorđević’s role in the events in Kosovo, the fact that he was reading about accusations of crimes in Kosovo, in the local Serb media was relevant for the Trial Chamber to consider as an indicator of his knowledge of the crimes. The Appeals Chamber finds that the Trial Chamber reasonably relied on this evidence.**

“503. Đorđević’s submissions in relation to the media and international reports are therefore dismissed.”

Prosecutor v. Gotovina et al. (AJ)

"64. …**the Appeals Chamber, Judge Agius and Judge Pocar dissenting, finds that the distance between a given impact site and one of the artillery targets identified by the Trial Chamber was the cornerstone and the organising principle of the Trial Chamber's Impact Analysis.** In each of the Four Towns, the Trial Chamber found at least one target which the HV could have believed possessed military advantage. With no exceptions, it concluded that impact sites within 200 metres of such targets were evidence of a lawful attack, and **impact sites beyond 200 metres from such targets were evidence of an indiscriminate attack. The Appeals Chamber recalls that it has found that the Trial Chamber failed to provide a reasoned opinion in deriving the 200 Metre Standard, a core component of its Impact Analysis. In view of this legal error, the Appeals Chamber will consider de novo the remaining evidence on the record to determine whether the conclusions of the Impact Analysis are still valid.**

"65. **Absent an established range of error, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, cannot exclude the possibility that all of the impact sites considered in the Trial Judgement were the result of shelling aimed at targets that the Trial Chamber considered to be legitimate. The fact that a relatively large number of shells fell more than 200 metres from fixed artillery targets could be consistent with a much broader range of error. The spread of shelling across Knin is also plausibly explained by the scattered locations of fixed artillery targets, along with the possibility of a higher margin of error…**

“66. The Trial Judgement suggests that in Knin, a few impacts occurred particularly far from identified legitimate artillery targets, and could not be justified by any plausible range of error. In view of its finding that the Trial Chamber erred in deriving the 200 Metre Standard, however, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, does not consider that this conclusion is adequately supported. In any event, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, has found that in Knin, the Trial Chamber erred in excluding the possibility of mobile targets of opportunity such as military trucks and tanks. The possibility of shelling such mobile targets, combined with the lack of any dependable range of error estimation, raises reasonable doubt about whether even artillery impact sites particularly distant from fixed artillery targets considered legitimate by the Trial Chamber demonstrate that unlawful shelling took place.

“67. **Accordingly, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, holds that after reviewing relevant evidence, the Trial Chamber’s errors with respect to the 200 Metre Standard and targets of opportunity are sufficiently serious that the conclusions of the Impact Analysis cannot be sustained.** The consequences of this holding will be considered later in this section.

…

“83. **In these circumstances, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, finds that the reversal of the Impact Analysis undermines the Trial Chamber’s conclusion that artillery attacks on the Four Towns were unlawful. The Trial Chamber’s reliance on the Impact Analysis was so significant that even considered in its totality, the remaining evidence does not definitively demonstrate that artillery attacks against the Four Towns were unlawful. In view of the foregoing, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, considers that no reasonable trier of fact could conclude beyond reasonable doubt that the Four Towns were subject to unlawful artillery attacks.** The Appeals Chamber thus need not consider the Appellants’ remaining arguments challenging the Trial Chamber’s findings on the unlawful nature of artillery attacks against the Four Towns.”

V. Quantifying the extent of appellate intervention

Numbers of ICTY Appeals Cases in which erroneous findings of fact were identified

Period	Number of Appeals cases (appeals against trial judgements)	Number of Appeals cases in which erroneous findings of fact were identified	Percentage of all Appeals cases in which erroneous findings of fact were identified
1993-1997	0	0	-
1998-2002	7	1	14%
2003-2007	14	9	64%
2008-2012	11	5	45%
2013-2017	8	6	75%
Total	40	21	53%

Numbers of ICTY Trial Judges found to have made findings no reasonable trier of fact could have made

- 47 of 65 judges – three-quarters – who sat on these 40 trials were found to have made erroneous findings of fact in at least one trial
- 13 judges were found to have made erroneous findings of fact in at least two trials
- 2 judges were found to have made erroneous findings of fact in three trials

* Reserve judges who did not participate in the final trial judgment are not included

VI. Conclusions

Viewpoints

- “I do not believe that justice is done when findings of guilt not lightly entered by the Trial Chamber in more than 1300 pages of analysis are sweepingly reversed in just a few paragraphs, without careful consideration of the trial record and a proper explanation.”

  Gotovina et al. AJ, Dissenting Opinion of Judge Pocar, para.14

- “A Trial Chamber is not a subordinate court of the Appeals Chamber. A Trial Chamber consists of three judges of the same standing as the judges of the Appeals Chamber. Judges of the Chambers rotate; in fact, judges are elected by the General Assembly to the Tribunal (or sometimes appointed to it by the Secretary General) but are only assigned by the President to a Chamber of the Tribunal, whether to a Trial Chamber or to the Appeals Chamber.”

  Kvočka AJ, Separate Opinion of Judge Shahabuddeen, para.53

A simple solution

- “I dislike the settled expression “no reasonable trier of fact” as the question is not whether a judge is reasonable but whether his or her conclusion is reasonable in concreto… I would prefer that… the standard be rephrased to read that “no trier of fact could reasonably come to this conclusion.”

Limaj et al. AJ, Partially Dissenting and Separate Opinion and Declaration of Judge Schomburg, para.3, fn.3

Other possible solutions?

- Greater use by Appeals Chamber of power to remit particular issues to the Trial Chamber for elaboration / reconsideration?
- Consultation by Appeals Chamber with relevant Trial Chamber to establish full evidentiary basis for disputed factual findings?

or

- Greater adherence to the principle of deference to the Trial Chamber

Final thoughts

- What is expected of the international judicial system?
  - Fairness
  - Impartiality
  - Efficiency / allocation of resources
    - How realistic is it to expect Appeals Chambers to achieve the same richness of understanding regarding the evidence of any given trial as compared with the understanding of the Trial Chamber?
    - Appropriate to leave it to the parties to draw Appeals Chamber's attention to the evidentiary basis (or alleged lack thereof) for particular factual findings made by the Trial Chamber?