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Model(ing) Law: The ICTY, the International Criminal Justice  
Template, and Reconciliation in the Former Yugoslavia

By

Kerstin Bree Carlson

A dissertation submitted in partial satisfaction  
of the requirements for the  
degree of Doctor of Philosophy  
in  
Jurisprudence and Social Policy  
in the  
Graduate Division  
of the  
University of California, Berkeley

Committee in charge:

Professor Malcolm Feeley, Chair  
Professor Ronelle Alexander  
Professor Kristin Luker  
Professor Martin Shapiro

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Abstract

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Reconciliation in the Former Yugoslavia

By

Kerstin Bree Carlson

Doctor of Philosophy in Jurisprudence and Social Policy

University of California, Berkeley

Professor Malcolm M. Feeley, Chair

My project uses the case study of the ICTY and reconciliation in the Balkans to address the larger topic of the capacity of international criminal tribunals (ICTs) as transitional justice mechanisms. I argue that the ICTY operates under the (flawed) received wisdom of the IMT at Nuremberg, what I term the *international criminal justice template*. This template accords three transitional justice functions for ICTs beyond (and in conjunction with) their central judicial aim of adjudicating cases: as (1) articulators of progressive criminal law (2) historians and (3) reconcilers or storytellers. My examination of the ICTY through each category illustrates that obstacles to the ICTY's role as a transitional justice mechanism are structural, and relate to the absence of a discursive loop between sovereign and governed. This discursive loop, present at domestic law, accounts for the capacity of domestic courts to perform the tasks identified by law and society scholars as central to courts, namely the capacity to act as constitutive social agents as well as the capacity to exert social control. At the international level, this capacity is interrupted. The dissertation calls for new scholarship and the development of *international law and society* studies, in order to better theorize and understand the structural and theoretical constraints governing the establishment of legitimacy for international criminal courts.

*for my grandmother (Ingrid) Violet Bengston Carlson  
(1916 – 2013)*

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## Introduction

*“[At the time the Srebrenica massacre took place in July 1995] [t]he Tribunal was seen by many – including persons in the former Yugoslavia – as more of an academic or diplomatic response to the armed conflict and the violations being committed therein rather than as an operational institution where one might face criminal proceedings.... International humanitarian law and international criminal law were not seen as enforceable law, but rather aspirational, if not academic, ideas. Thus, expectations of impunity for ones [sic] crimes, no matter how egregious, were the norm. A stark example of this expectation of impunity and total disregard for the law in 1995 was provided by Momir Nikolic ... when he was asked during his cross-examination in the Blagojevic trial whether he was required to abide by the Geneva Conventions in carrying out his duties in and around Srebrenica in July 1995. Momir Nikolic replied with a mix of incredulity and exasperation:*

*“Do you really think that in an operation where 7000 people were set aside, captured, and killed that somebody was adhering to the Geneva Conventions? Do you really believe that somebody adhered to the law, rules and regulations in an operation where so many were killed? First of all, they were captured, killed, and then buried, exhumed once again, buried again. Can you conceive of that, that somebody in an operation of that kind adhered to the Geneva Conventions? Nobody ... adhered to the Geneva Conventions or the rules and regulations. Because had they, then the consequences of that particular operation would not have been a total of 7000 people dead.”*

*During the past ten years, as international criminal law has moved from “law in theory” to “law in practice,” the principles of international humanitarian law have taken hold to the extent that in the face of such widespread and massive crimes a person being called to participate in the criminal enterprise might consider the Geneva Conventions and the consequences of disregarding the principles contained therein.”*

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ICTY Trial Chamber, *Nikolić Sentencing Judgment* (December 2, 2003)<sup>1</sup>

In August of 1992, images of starving men held in Bosnian Serb detention camps raised the specter of genocide in Europe. The following year, the United Nations Security Council passed Resolution 827,<sup>2</sup> setting up the International

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<sup>1</sup> *Prosecutor v. Momir Nikolić, Sentencing Judgment*, Case No. IT-02-60/1-S (December 2, 2003) (“*Nikolić Sentencing Judgment*”); see Appendix A for a full list of all ICTY cases.

<sup>2</sup> UN Security Council Resolution 827 (1993) on the International Criminal Tribunal for the Former Yugoslavia (ICTY) May 25, 1993.

Criminal Tribunal for the Former Yugoslavia (ICTY). The *ad hoc* tribunal<sup>3</sup> carried an immediate threat of criminal sanctions for perpetrators of war crimes, and the immediate promise of justice (as well as international recognition) for victims.

The impetus to found and build the ICTY was fueled by an emerging international focus on *transitional justice*. Transitional justice is the process societies undergo in addressing past injustice as they move from war to peace or from a repressive regime to a democracy. (Quinn 2009) Rule of law initiatives, as well as criminal prosecutions, are two important transitional justice mechanisms. (Teitel 2000) The ICTY is a criminal tribunal mandated to determine the guilt and innocence of individuals it investigates and tries, and to mete out punishment.<sup>4</sup> It is also very deliberately designed<sup>5</sup> as a didactic institution which should model rule of law processes for the states and peoples of former Yugoslavia (Hayden 1999; Sacirbey 1997), and as such is the leading modern example of the development and application of international criminal law (ICL) as a transitional justice mechanism. The ICTY is the first *ad hoc* international criminal tribunal (ICT)<sup>6</sup> since those convened at Nuremberg and Tokyo following World War II, it is the longest running international criminal law institution, and it is the most celebrated of all contemporary ICTs,<sup>7</sup> which has made it a progenitor of the International Criminal Court (ICC), the permanent ICT that came into existence in 2002. Thus the ICTY lends itself better than any other body created to date to an assessment of using an ICT as a transitional justice mechanism.

## My research question

My study of the ICTY began with the desire to test the transitional justice equation that the prosecution of individuals for violations of international criminal law performs functions beyond the determination of the guilt or innocence of the person before the court. Advocates of judicial responses to broad social violence argue that public discovery and recognition of violent acts as unlawful helps set the stage for social healing, and is a necessary element of peace and reconciliation in societies scarred by government-sponsored (or government-permitted) violence. (Neier 1997; Kritz 1995; Teitel 2000) This equation – that punishment of wrongdoers (justice) will permit reconciliation and ensure peace, which is morally, theoretically, and increasingly politically powerful<sup>8</sup> – remains theoretically and empirically underexplored. (van der Merwe et al 2009)

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<sup>3</sup> *Ad hoc* tribunals are legal institutions limited in time and scope. The institutional impact of non-permanent, limited judicial institutions is further explored throughout the dissertation, with particular focus in Chapters Two and Three.

<sup>4</sup> The ICTY is comprised of three independent bodies: the Office of the Prosecutor (OTP); Chambers; and the Registry.

<sup>5</sup> Elements of this design are evident in the UN resolutions and debates surrounding its founding. See Chapter Two, Part II.

<sup>6</sup> Other *ad hoc* ICTs following the ICTY include those for Rwanda, Indonesia, Sierra Leone, Cambodia, and Lebanon.

<sup>7</sup> The ICTY is the longest running (20 years) and most productive (161 individuals indicted) of all ICTs. Moreover, other ICTs have been marred by crippling inefficiency, corruption, or both. A review of arguments and literature in support and critique of these other ICTs is beyond the scope of this dissertation, *but see*, as examples of the types of criticism leveled at other ICTs: Combs (2009), which discusses the problematic determination and use of facts at the ICT for Rwanda.

<sup>8</sup> The term “transitional justice” came into use in the 1990s. There is now an extensive literature regarding transitional justice, it is recognized by the United Nations, and several prominent NGOs

The emerging consensus regarding the value of international courts as transitional justice mechanisms follows a larger trend in jurisprudential studies to explore the connection between legal codes, judicial institutions, and the societies in which they operate, a field known as “law and society.” (Nonet & Selznik 1979) Building on interdisciplinary research between law, the humanities, and the social and experimental sciences, law and society scholars have explored myriad facets of both how law and legal institutions shape society, as well as how individuals experience the legal systems operating around them. I began this project seeking to apply the findings of U.S.-focused scholars (Tyler 1990; Scheingold 2004) to an extra-national context, studying the transitional justice initiative of the ICTY through its capacity to impact reconciliation in the Balkans. Operationalizing reconciliation as the emergence of a common narrative regarding crimes committed in the 1991-1995 wars,<sup>9</sup> I set out to document local (Croatian, Bosnian and Serbian) responses to ICTY court proceedings and decisions to understand the *capacity* of the ICTY *as a court* to impact reconciliation in Bosnia-Herzegovina (abbreviated as BiH and frequently referred to by the briefer term Bosnia), Croatia and Serbia.

My investigations encountered two obstacles. First, local responses to the ICTY were not only mostly negative but, more problematically for my research, they did not draw connections between the work of the ICTY and the historical record of the wars of 1991-1995. My visits to the region (1999, 2004-2005, 2006, 2008, 2013) confirm a steady distrust of the ICTY and its processes that is distinct from, and apparently unconnected with, the nationalized narratives present across Bosnia, Serbia and Croatia. These narratives – concerning the underlying causes for the dissolution of Yugoslavia, the source of the aggression that began the wars in Yugoslavia, or the events that are most representative of the tragedy and criminality of the conduct of the war – are distinct among “ethnic”<sup>10</sup> groups and unified across national lines *by ethnicity*. Thus there are distinct Croat, Serb, and Bosniak narratives that obtain across the nation-state boundaries of Croatia, Serbia, and Bosnia, and are distinct between ethnic groups, even ethnic groups living in the same state. These “imagined communities” (Anderson 1983) do not map onto the nation-states boundaries that have emerged from the Yugoslav dissolution, and represent a site of ongoing, unresolved, tension.<sup>11</sup> None of the narratives take as their starting place the

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engage principally in transitional justice (*see*, for example, The International Center for Transitional Justice, information available at: <http://ictj.org>).

<sup>9</sup> My use of war in the plural recognizes the variety and frequent lack of cohesion among the many instances of violence in the former Yugoslavia.

<sup>10</sup> The distinctions between those who identify as Bosniak (Bosnian Muslim, and Serb Muslims in the Sandžak region of Serbia, *see* the map in Chapter Two), Serb, and Croat, respectively, are religious, cultural, and political; the term “ethnic” is used as an imperfect shorthand, and is further discussed in Chapter Two.

<sup>11</sup> It is unclear how seriously this political tension threatens the states of the former Yugoslavia at the time of this writing, most specifically the most vulnerable of these states, still governed partially by an international representative, Bosnia. On the one hand, there seems ample cause for concern regarding Bosnia’s future. For example, American University BiH professor Goran Šimić, who advises the BiH government on transitional justice issues, predicts that there will be another war within 20 years. (Lecture, Sarajevo, March 9, 2013, notes on file with author.) The president of Republika Srpska (RS), the Bosnian Serb entity that makes up 49% of Bosnia, has been a vocal proponent of secession for the RS from Bosnia, and has based arguments for such secession in the recent recognition of Kosovo as an independent state, although his latest statements on the topic calm secession plans. B92, “Dodik: Secession not on RS agenda” (February 4, 2010) available at: [http://www.b92.net/eng/news/region.php?yyyy=2010&mm=02&dd=04&nav\\_id=64988](http://www.b92.net/eng/news/region.php?yyyy=2010&mm=02&dd=04&nav_id=64988) (accessed July 28, 2013). On the other hand, the International Crisis Group, a leading global NGO that reports on all

transitional justice ideology underlying the ICTY (the belief in the power of rule of law processes to elucidate facts and foster social reconciliation through the articulation of “what really happened” as produced by an “objective” international body) (Akhavan 1998; Forsythe 2005); the three distinct “ethnic” narratives reference ICTY findings only to the extent that such findings confirm “their side.”<sup>12</sup>

Consider as an example the massacre of up to 8,000 Muslim men and boys at Srebrenica in July 1995. For Bosniaks, it represents a definitive wartime atrocity and an act of genocide.<sup>13</sup> Yet a group of Croatian law students visiting the ICTY in 2005 professed no knowledge of the crimes committed at Srebrenica.<sup>14</sup> Serbs, on the other hand, have usually heard of Srebrenica but dismiss it as having nothing to do with them because it was perpetrated by Bosnians (Bosnian Serbs) on Bosnian soil.<sup>15</sup> Additionally, Serbs generally resist terming the massacre “genocide.”<sup>16</sup>

The absence of a unified narrative among ex-Yugoslavs surrounding Srebrenica is significant because there is no credible discord regarding the event itself. The basic facts – the take-over of the UN-protected safe area by Bosnian Serbs commanded by Ratko Mladić, the dismissal of UN troops, and the segregation of Srebrenica residents by sex, where women and children were bussed into Muslim-

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serious and potentially serious global conflicts and which was founded partially in response to the violence accompanying Yugoslavia’s dissolution, has recently closed its Balkan offices, predicting peace in Bosnia. (Interview ICG President Louise Arbour, Paris, May 2013, notes on file with author.)

<sup>12</sup> See, as an example of this phenomenon, the 2002 SMMRI poll, which found Croatian Serbs’ “trust in the ICTY” to be far higher than Croats’ trust in the ICTY (45% compared to 19%), and also much higher than other Serbs’ trust in the ICTY (1.8% in BiH, 5.6 % in Serbia). “SEE Public Agenda Survey January-February 2002: ICTY” (March 2002) pp. 46, 49 (on file with author). For Croatian Serbs, ICTY prosecutions carry the possibility of addressing wrongs against them and impacting their vulnerable status as a minority in Croatia that does not obtain for Serbs in other countries.

<sup>13</sup> See, for example, “Public Opinion Poll: Attitudes towards war crimes issues, the ICTY, and the national judiciary,” OSCE survey conducted October 2011, released February 2012, available at <http://www.osce.org/serbia/90422> (accessed May 1, 2013) (“OSCE 2011 survey”).

<sup>14</sup> ICTY Outreach presentation May 11, 2005, notes on file with author. While this small, non-representative sample does not stand in for general Croatian awareness of Srebrenica, it is interesting that a group of law students visiting the ICTY, a group with a particularized interest in the institution, were unfamiliar with the event. Certainly, even those Croats who have heard of Srebrenica do not generally reference it when asked about any “genocide” committed during the 1991-1995 wars. Instead they name as an example of genocide the massacre in Vukovar, eastern Croatia, where Serb-sponsored militia murdered hundreds of hospital patients. Author interviews, Zagreb, Croatia, 2004 – 2005, notes on file with author.

<sup>15</sup> OSCE 2011 survey. It is of course important to note that many Bosnian Serb and Serbian political elites have publicly resisted identifying Srebrenica as a genocide. The leader of the most popular Bosnian Serb political party, Milorad Dodik, publicly denied Srebrenica as genocide for years, recognizing the event as genocide only last year. Although Boris Tadić, the democratically elected leader of Serbia, recognized the Srebrenica genocide, made a public apology, and visited the site in commemoration in July 2010, his political opponent Tomislav Nikolić, who took power in 2012, vehemently resisted calls for him to recognize the events at Srebrenica. Nikolić made international news in April 2013 when, for the first time, he apologized for the Srebrenica massacre. He refused to call the massacre a genocide, however. This is further discussed in Chapter 5.

<sup>16</sup> Rationales offered include the fact that the Srebrenica massacre targeted men and boys of fighting age. There is also a static insistence on moderating the power of the “genocide” charge by asserting that “genocide happened to all three groups in Bosnia.” See UC Berkeley 1999 study, notes on file with International Human Rights Law Clinic at U.C. Berkeley, published as Human Rights Center and International Human Rights Law Clinic, “Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors,” 18 *Berkeley Journal of International Law* (2000) (hereafter “UC Berkeley 1999 study”); see also April 2013 comments of Serbian president Tomislav Nikolić, discussed further in Chapter 5.

held Bosnian territory, and men and adolescent boys were bussed to sites where they were executed, buried, disinterred, and buried again<sup>17</sup> – are well established and essentially uncontested.<sup>18</sup> The absence of a unified narrative regarding Srebrenica is not a debate over facts. Instead, it is an instance of “collective memories” diverging around national identity. (Anderson 1983; Halbwachs 1992)

In terms of assessing the ICTY’s impact as a transitional justice mechanism, the absence of a unified narrative surrounding Srebrenica is significant. The ICTY has made a major investment in prosecuting defendants connected with Srebrenica.<sup>19</sup> At an international level, Srebrenica is among the most recognized of the atrocities committed during the wars of Yugoslav dissolution. Yet, local Balkan narratives remain both 1) internally divergent between “ethnicities” and 2) distinct from the generalized “international” narrative of the wars that recognizes the Bosnian Serb massacre at Srebrenica as an exemplary instance of the horror and atrocity of the wars (as well as recognizing Bosnian Serbs as bearing the lion’s share of the guilt).

Worse still, at the present mark of 20 years after the war, ICTY involvement appears, if anything, to move community narratives farther away from the narrative it seeks to establish. In 2011, after nearly two decades on the run, Ratko Mladić, who oversaw the Srebrenica massacre, was apprehended in Serbia. A poll later that year found that more than 50% of Serbs consider Mladić “a national hero.”<sup>20</sup> This finding regarding Mladić’s popularity is particularly interesting and unexpected given that the general Serbian (Serbs within Serbia) response to Bosnian war crimes and criminals is to disavow Serbian implication in any way, demonstrated in part through a deafening national disinterest.<sup>21</sup> The 2011 survey response indicates that Mladić, a Bosnian Serb general, *has become* a known and popular personality in Serbia.<sup>22</sup>

Finally, there is a troubling stasis in Balkan narratives. In the 20 years of its existence, the ICTY has not made significant inroads as regards the *legitimacy*<sup>23</sup> it enjoys among Bosnian, Croat and Serb audiences.<sup>24</sup> This failure comes in spite of

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<sup>17</sup> Work by the intergovernmental agency International Commission for Missing Persons (ICMP), through which victims’ bodies are identified using DNA samples from relatives, confirms that the disinterment and reburial process sometimes happened a number of times, as some individuals’ body parts have been found at several different sites.

<sup>18</sup> There is, of course, a fringe element that contests the official version of Srebrenica. Even this fringe element, however, does not assert that the massacre did not take place; rather, it lowers the numbers by arguing that some of the victims must be attributed to combat deaths rather than to execution. Chivikov 2010.

<sup>19</sup> See Appendix A regarding the number of ICTY prosecutions which have focused specifically on participation in genocide at Srebrenica.

<sup>20</sup> OSCE 2011 survey. This is even more interesting given the general Serb response to Bosnian war crimes and criminals, which is to disavow Serb implication in any way. This response indicates that Mladić, a Bosnian Serb, has become a Serb hero.

<sup>21</sup> Serb narratives and Serbian responses to wartime narratives are discussed in Chapter Five.

<sup>22</sup> The ICTY’s capacity to turn war criminals into national heroes for the local population is addressed in Chapter Five.

<sup>23</sup> Legitimacy is central to court capacity and will be theorized and explored in later chapters.

<sup>24</sup> “Public perception in Serbia of the ICTY and the national courts dealing with war crimes” OSCE & Belgrade Centre for Human Rights, available at: [http://wcjp.unicri.it/proceedings/docs/OSCESrb ICTY\\_Perception\\_in\\_Serbia.pdf](http://wcjp.unicri.it/proceedings/docs/OSCESrb ICTY_Perception_in_Serbia.pdf) (accessed May 15, 2013) (“OSCE 2009 survey”). Compare to 2002 SMMRI poll locating “Awareness vs. Trust” of the ICTY at nearly 100% versus less than 10% in both Serbia and the RS (7.6% and 3.6%, respectively). “SEE Public Agenda Survey January-February 2002: ICTY” (March 2002) pp. 25, 41 (on file with author). See also Orentlicher 2008. Data on Bosnia is more difficult to parse given that Bosnia is still

considerable initiatives, from the ICTY and from myriad international and local organizations, promoting outreach and education in the region. The stasis in the ICTY's perceived (il)legitimacy has not been significantly altered by changes in local political regimes, either. For example, both Croatia and Serbia have moved from autocratic to democratic regimes (albeit with more movement back and forth in Serbia), both are pushing for European Union membership (Croatia is scheduled to have joined in July 2013; Serbia is officially on a path to candidacy), and both nations' governments have cooperated, if often tardily and unenthusiastically, with ICTY demands. Yet despite movement towards commitment to democratic systems and other human rights ideals, Croats and Serbs remain distrustful of the work of the ICTY, and fail to share its conclusions.<sup>25</sup>

The failure of the ICTY to enjoy a positive reception in the region of its mandate is not, however, considered an important factor to many of those assessing the work of the tribunal. (Alvarez 1999) For the international audience evaluating the work of the ICTY – legal technocrats, academics, politicians, international organizations – the question of the legitimacy enjoyed by the ICTY in the Balkans is understood as outside the criteria for assessing the institution's efficacy. Instead, assessments of the ICTY are made in terms of its primary mandate as an adjudicatory body. (Meron 1995; Wald 2002; Mundis 2001) For example, in interviews conducted at the ICTY (2005, 2011, 2012), several ICTY employees expressed curiosity regarding the topic of my research – broadly, the ICTY's reception in the Balkans – while simultaneously noting that such questions have nothing to do with them. Their work is simply to apply law correctly and let locals interpret it as they will. For these ICTY personnel as well as many other proponents of ICL, an assessment of the ICTY must be solely an assessment of its technical capacity, including the number of indictments handed down and cases completed, the length of time of each procedure, its application of international criminal law, and its capacity to try (and identify) those persons most responsible for the crimes committed in the territory of the Former Yugoslavia.<sup>26</sup> Even the most sophisticated assessments by this audience cite the tribunal's mere existence and years of practice, given the many ways it might have failed, as evidence of “success.” (Akhavan 1998; Arbour 1999; Bassouni 1997)

Where then to study the question of the ICTY's *capacity*? The ICTY enjoys legitimacy and recognition among its international audience without reference to the rationale for its function, which is built on an imagined engagement with a local

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governed in part by international coalition. *But see*, Nettlefield 2011 (who argues that international involvement in Bosnia has brought measurable, democratizing results).

<sup>25</sup> *See, for example*, “47% of Serbians believe Karadžić is innocent,” Gallup Balkan Monitor, [www.balkan-monitor.eu](http://www.balkan-monitor.eu) (accessed February 1, 2012). Assessments in Bosnia-Herzegovina are even harder to draw, as that country is still an international protectorate, with the United Nation's Office of the High Commissioner often intervening in domestic politics.

<sup>26</sup> This criterion, “to concentrate on the prosecution and trial of the highest-ranking political, military and paramilitary leaders who are suspected of being responsible for serious violations of international humanitarian law,” was developed with the ICTY's practice. *See* Letter dated June 17, 2002 from the Secretary General addressed to the President of the Security Council, S/2002/678; Letter dated May 12, 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the secretary General, S/2000/865; *see also* UN Security Council Resolution 1329, December 5, 2000; UN Security Council Resolution 1503, August 28, 2003. At its inception, the ICTY tried any individual (in principle; seizing such individuals proved difficult in practice) suspected of violating international humanitarian law. Prosecutor Richard Goldstone defended this strategy of indicting “small fish” as part of a pyramid strategy to eventually capture “big fish.” The particulars of this history, and the ICTY's change in focus, are discussed in Chapter Two.



Balkan audience as a mechanism of reconciliation.<sup>27</sup> Data point to a failure of the ICTY-developed narrative regarding war crimes to “take root” locally. At the same time, another ICTY narrative, that of the moral imperative and practical capacity of international criminal prosecutions to advance justice and human rights, has taken healthy root, as demonstrated by, among other things, the institution of a permanent International Criminal Court (ICC), currently ratified by 110 states worldwide. In between “local resistance” and “international commitment” is the amorphous place holder of “transitional justice”; the transitional justice function of the ICTY comprises part of the stated and ideological rationale for the modern development of ICL (and ICTs such as the ICTY formed to practice and advance it), yet there is little serious recognition of how to (or even the need to) measure this institutional output within ICTs themselves.<sup>28</sup>

## **The international criminal justice template**

This dissertation makes three arguments. First, it identifies an *international criminal justice template* that emerged from the IMT at Nuremberg and that is applied today as the basis for the contemporary use of ICTs as transitional justice mechanisms. The *international criminal justice template* is a prototype of three functions that ICTs are said to perform:

1. the articulation (and development) of progressive criminal law;
2. the construction of a credible historical archive capable of withstanding historical revisionism;
3. the construction of an “official version” of events with the power to effect reconciliation among the warring parties by providing a unified, and thus unifying, narrative.

The *international criminal justice template* recognizes these functions as distinguishable from, but still related to, the central adjudicatory job performed by ICTs of determining individual guilt or innocence through trials.

The first element of the *international criminal justice template*, the articulation (and thus necessarily the development)<sup>29</sup> of progressive international criminal law is the element most directly related to ICTs’ institutional design as tribunals (thereby tasked with finding the guilt or innocence of individuals through judicial processes). ICTs require international criminal legal content in order to adjudicate cases, and ICTs must necessarily make interpretations of ICL (which is predominantly treaty and customary international law) in order to bring it within ICT ambit. To this necessary articulation, however, the *international criminal justice template* adds that such articulation will be “progressive.” The ICTY itself calls its decisions “precedent-

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<sup>27</sup> See, for example, UN Security Council Resolution 1534, March 26, 2004 “Commending the important work of [the ICTY] in contributing to lasting peace and security and national reconciliation...” (emphasis removed).

<sup>28</sup> As discussed in the following chapters, there are several ICTY judgments that make reference to ICTY functions as extending beyond its primary adjudicatory mandate, including functions of reconciliation, deterrence, peace, and producing an objective history.

<sup>29</sup> This observation follows arguments such as Shapiro (1986) that any application of law requires interpretation, and the interpretive act is necessarily creative (and that this is true even in those codified systems in which judicial invention is not allowed).

setting.”<sup>30</sup> The injunction that ICTs produce *progressive* ICL is based on the moral theory that underwrites ICL more broadly; this is discussed in greater detail in the chapters that follow.

The second and third functions of the *international criminal justice template*, (ICTs as (2) historians (3) capable of pronouncing an “objective” “official version” of events that may assist a population in reconciliation), are not directly related to ICTs’ primary mandate (to adjudicate individual cases) but rather are argued to flow from it. (Rauxloh 2010; Wilson 2005) These second and third “indirect” functions are in fact precisely the capacities recognized for ICTs that have made them central as transitional justice mechanisms. They are also the amorphous functions that are simultaneously claimed by ICTs in defense of the value of their work<sup>31</sup> and rejected by ICTs as bars against which to assess their accomplishments.<sup>32</sup>

After demonstrating that there is an *international criminal justice template*, which provides the prototype for the use of ICTs as transitional justice mechanisms, the dissertation’s second argument is that this template is flawed, and always has been. ICTs have not performed the functions attributed to them by the *international criminal justice template*, neither at the IMT at Nuremberg, from whence the template originated, nor at the ICTY, the most developed example of an ICT since the IMT at Nuremberg. The bulk of the dissertation seeks to prove this contention through an examination of the asserted, and failed, elements of each of the functions claimed for ICTs by the *international criminal justice template* through an examination of aspects of ICTY practice against the template: 1) the ICTY’s problematic, regressive articulation and formulation of international criminal law, both procedural and substantive (Chapters Three and Four, respectively), 2) the ICTY’s limitations as a historian (Chapter Five), and 3) the ICTY’s failures in generating an “official version” with the capacity to unify Balkan narratives (Chapter Six)).

The dissertation’s final argument is that the failure of the ICTY to perform the functions imagined for it by *the international criminal justice template* is not centrally a failure of practice, but rather one of structure. Any and all institutions will fail in some ways at some things, and the ICTY, a new institution in a new field, surely faces a steeper learning curve than most. Rather, this dissertation argues that the ICTY *cannot help but fail to perform* the functions designated by the *international criminal justice template* due to its inherent structural imbalances. Theories of transitional justice borrow notions regarding the potential capacities of ICTs from arguments developed by the field of law and society.<sup>33</sup> Law and society literature accords to courts a central role as constitutive social agents. The ICTY fundamentally upends the logic of domestic courts, however, by separating the individuals prosecuted from the controlling sovereign; this disconnect, which I term the absence of a discursive loop between ruler and ruled (drawing on social contract theory at the base of political liberalism), constitutes a *structural* obstacle to the capacity of the ICTY to perform the functions outlined in the *international criminal justice template*. The ICTY claims (as do other ICTs) the *legitimacy* enjoyed by courts without being subject to the

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<sup>30</sup> “In its precedent-setting decisions on genocide, war crimes and crimes against humanity, the Tribunal has shown that an individual’s senior position can no longer protect them from prosecution.” Available at: <http://www.icty.org/sections/AbouttheICTY> (accessed July 20, 2013).

<sup>31</sup> See, for example *Nikolić* Sentencing Judgment para 145 (identifying the Tribunal’s mandate as restoring peace and promoting reconciliation).

<sup>32</sup> See, for example, author interviews May 2005, quoted throughout the dissertation.

<sup>33</sup> This borrowing is discussed in Chapter Two.

*constraints* imposed on courts. A viewpoint that situates the ICTY's legitimacy in moral theory (the universalism claimed for human rights)<sup>34</sup> rather than political theory (the social contract) has allowed the ICTY to develop, unchecked, its jurisprudence into an unapologetically *unjust* jurisprudence, a situation the dissertation labels *post rule of law*.<sup>35</sup> Ironically, it is precisely the disrespect for political theory (the social contract basis for political liberalism) in the face of the higher moral claims asserted by proponents of international criminal law that has contributed, in the eyes of its detractors, to the delegitimization of the tribunal as a "political" and not "court-like" actor.

Because the obstacles that inhibit ICTs from functioning as constitutive social agents are structural, not individual, the problems identified in this dissertation in the ICTY's practice will not abate with the ICTY's anticipated closure.<sup>36</sup> If unaddressed, the structural inequities expanding under ICTs, as evidenced by the ICTY's practice, will continue to impair the effectiveness of these institutions to fulfill the functions imagined for them by the *international criminal justice template*. Such a failure will imperil the human rights ideology paired with (although existing separately from) ICL and ICTs, endangering the project of the recognition of non-derogable human rights as a whole. Without recognition and address of these structural flaws, the dissertation argues, the worthy goals of ICL – the ideal of recognizing and protecting individual human rights regardless of individual citizenship, a goal that emerged from the horror of World War II and more specifically the Holocaust – are themselves at risk.

## Chapters & structure

International criminal law was founded for the modern era with the two tribunals convened following World War II, and this dissertation thus takes the IMT at Nuremberg (with a brief consideration of the IMT at Tokyo) as its starting point. Chapter One reviews the legacy of the IMT, from which the *international criminal justice template* emerged. Formed to punish the losing side in World War II as the actors responsible for that conflict, the IMT has come to symbolize the triumph of the rule of law over vengeance and retribution. In the wake of the well-known IMT, thousands of lesser tribunals, staffed by Allied-power appointees, passed tens of thousands of sentences; these materials, together with the work of the IMT and its related tribunals, constitute sources of "precedent" in international law which the ICTY, among others, has mined for use in its own decisions. This chapter demonstrates the emergence of the *international criminal justice template* though the received "legacy" of the IMT at Nuremberg, as well as the fallacy of the template as regards the IMT at Nuremberg's actual work and accomplishments.

Chapter Two contextualizes the dissertation's assessment of the ICTY, reviewing the theoretical foundations of transitional justice including its relation to law and society and international criminal law. The Chapter also provides a brief

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<sup>34</sup> See, for example, the seminal human rights instrument of the 20<sup>th</sup> century, the "Universal Declaration of Human Rights" (1948) available at: <http://www.un.org/en/documents/udhr/index.shtml> (accessed July 20, 2013)(emphasis added).

<sup>35</sup> These ideas are more fully developed in Chapters Two and Three.

<sup>36</sup> The ICTY is expected to "close" in July 2013. It will continue to hear the last trials currently ongoing, as well as all related and outstanding appeals, through its "Residual Mechanism." See Chapter Two.

history of the conflict in the former Yugoslavia as well as an institutional history of the ICTY.

Chapter Three begins the dissertation's critique of ICTY practice against the prototype of the *international criminal justice template*. Chapter Three examines the specifics of the ICTY's hybrid procedure, developed as a mixture of common and civil law. Evolving over its existence, the ICTY's procedure has consistently adapted more elements of civil law practice, while retaining a rationality adhering to the common law. This chapter illustrates the danger of constructing a hybrid procedure without also respecting the forces animating that procedure.

Chapter Four moves from a question of the ICTY's development of international legal procedure to the substance of international criminal law. Showcasing the clash inherent in the development of an *individual, criminal* tradition of international law against *non-derogable* ideals of human rights law, the chapter follows the development and eventual crisis of the contentious theory of liability developed by the ICTY, joint criminal enterprise (JCE). Nicknamed *just convict everybody*, formally passed over by the ICC,<sup>37</sup> JCE has risen during the ICTY's practice to a near strict liability standard. The 2012 acquittal of Croatia's highest-ranking indictee, Ante Gotovina, by an Appellate Chamber deeply divided over the application and applicability of JCE, demonstrates the apex of the crisis. The chapter argues that the flawed substance of JCE is made possible by the structural deficit obtaining at the ICTY as an international criminal law institution.

Chapter Five challenges the capacity of the ICTY to act as a historian. Beginning with an examination of the sharp distinctions between courts and historians, including questions of epistemology as well as aim, the chapter concludes with an exploration of how Balkan collective memories differ from the narrative articulated by ICTY practice.

Chapter Six further examines the ICTY's case law production of narrative, locating a disconnect between the ICTY's articulated narrative and Balkan collective memories in the structure of the applied legal categories themselves. The chapter identifies the institutional constraints that make the ICTY poorly placed to establish a unified narrative for ex-Yugoslav peoples (a necessary foundation for reconciliation), including the use of a trial medium for a civil law audience, as well as the tension between articulating individual criminal responsibility at the same time as collective social histories. The chapter explores the celebrated plea bargain of Biljana Plavšić in contrast to the truly contrite submissions of Milan Babić to explore why and how the ICTY's version of "reconciliation" does not map onto Yugoslav ideas regarding the same.

The conclusion summarizes the dissertation's findings and calls for further scholarship. The assumed capacity of ICTs to realize transitional justice aims is based in an argument regarding court capacity – that courts are constitutive social agents with the power to exert social control – that developed through law and society

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<sup>37</sup> Like the ICTY, the ICC has articulated a means of commission for co-perpetrators in a common plan. See UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), July 17, 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html> (accessed July 2, 2013) ("Rome Statute") Article 25. While this theory of liability has been characterized as "quite different" from JCE by ICC practitioners, the two may in fact prove to be quite close in practice. This is further discussed in Chapter Four.

studies of domestic courts. This dissertation argues that the structural distinctions that distinguish international courts from domestic courts – namely, the absence, at the international level, of a discursive loop between sovereign and governed – have important implications for ICT capacity. Thus the capacity expectations developed through the consideration of domestic judicial institutions cannot be exported, *mutatis mutandis*, to ICTs. This dissertation invites transitional justice, law and politics, and other social science scholars to distinguish *international law & society* findings from the studies, theories and conclusions of law and society more generally.

## Chapter 1: The IMT and the Emergence of a Tripartite Transitional Justice Template

*“And so we believe that this Tribunal, acting, as we know it will act notwithstanding its appointment by the victorious powers, with complete and judicial objectivity, will provide a contemporary touchstone and an authoritative and impartial record to which future historians may turn for truth, and future politicians for warning. From this record shall future generations know not only what our generation suffered, but also that our suffering was the result of crimes, crimes against the laws of peoples which the peoples of the world upheld and will continue in the future to uphold—to uphold by international co-operation, not based merely on military alliances, but grounded, and firmly grounded, in the rule of law.”*

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Opening Statement of Sir Hartley Shawcross, Britain’s Attorney General, November 20, 1945<sup>1</sup>

The International Military Tribunal at Nuremberg (IMT) forms a cornerstone of the western narrative of World War II. In that narrative, the victorious nations “stayed the hand of vengeance”<sup>2</sup> through the imposition of the rule of law. In place of purely political resolutions by the victorious powers, enemy actors were subjected to a public hearing before a judicial body, which decisions were subsequently adhered to by the leadership of the victorious powers. The “achievement of Nuremberg,” which was celebrated at the time as “one of the most significant tributes that Power has ever paid to Reason,”<sup>3</sup> has been characterized by Tony Judd (2000:206) as the process whereby “*German* guilt was in turn distilled into a set of indictments reserved exclusively for German *Nazis*, and then only a select few.”

While the IMT predates the field of transitional justice<sup>4</sup> by 50 years, it should nonetheless be understood as a seminal transitional justice mechanism. (Teitel 2003) When a Polish filmmaker speaks of expecting “a Nuremberg for Communism”<sup>5</sup> after

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<sup>1</sup> Nuremberg Trial Proceedings Volume 3, December 4, 1945 available at <http://avalon.law.yale.edu/imt/12-04-45.asp> (accessed November 10, 2012). Opening Statement of Sir Hartley Shawcross.

<sup>2</sup> Nuremberg Trial Proceedings Volume 3, December 4, 1945 available at <http://avalon.law.yale.edu/imt/12-04-45.asp> (accessed November 10, 2012) Opening statement U.S. Prosecutor Justice Jackson.

<sup>3</sup> Idem. The entire phrase reads: That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.”

<sup>4</sup> Transitional justice is a description for the value of addressing and redressing past social violence in order to avoid future violence emerged in academic writings in the 1990s. (Zalaquett 1990; Teitel 2000; Kritiz 1995)

<sup>5</sup> Nicolas Kulish, “Poland Leads Wave of Communist-Era Reckoning,” *New York Times*, February 29, 2012.

the fall of the Iron Curtain, or a law professor refers to a case as “the Nuremberg trial for Cambodia,”<sup>6</sup> or a retired jurist characterizes Nuremberg as “the triumph of good over evil,”<sup>7</sup> they are referencing the IMT’s transitional justice capacity, that is the ability to create a break between a past repressive regime and an emerging, rule of law democracy. The IMT was a deeply flawed court: it applied ex-post facto laws that it gerrymandered in order to include only selected acts and enemies, which would fail to satisfy any Kantian notion of a moral law or any established index of transparency.<sup>8</sup> Yet history has all but forgotten the respected legal theorists who joined the German defendants in accusing the IMT of applying “victor’s justice,” and international criminal law institutions today proudly trace their lineage back to the IMT at Nuremberg,<sup>9</sup> and use it as a foundation for their own jurisprudence.

The current “legacy” of the IMT at Nuremberg (which might more accurately be called a “myth”) credits it with several achievements beyond the adjudication of the individual cases that came before it. This dissertation theorizes that these various (alleged) achievements can be distilled into three categories that comprise the received wisdom of the functions performed by the IMT at Nuremberg, which I term the *international criminal justice template*. The international criminal justice template asserts that international criminal tribunals (ICTs) provide social value because they: (1) articulate progressive international criminal law, (2) function as historians or historical archives, and (3) generate narratives capable of producing official versions, which make reconciliation possible.

The international criminal justice template is anchored in the “myth” (or “legacy”) of the IMT at Nuremberg, and comprises the contemporary rationale offered for the creation, support, and growth of ICTs as transitional justice mechanisms. The IMT at Nuremberg’s accepted capacity in each template function underwrote the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY). When brutal, chaotic, genocidal war erupted throughout Yugoslavia in 1991 and 1992, Western powers addressed the problem by turning to the rule of law narrative they knew. (Woodward 1995) The ICTY is a court, designed to adjudicate individual cases. Its *purpose*, however, is to bring “peace, justice, and reconciliation”<sup>10</sup> to the troubled former Yugoslavia. The ICTY is a direct successor of the IMT and the first attempt to regulate wartime atrocity and peacetime narrative through an ICT since the IMT. Moreover, the ICTY’s institutional success is measured against the IMT’s achievements as they are popularly understood. For this

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<sup>6</sup> David Scheffer, Northwestern University professor and UN Special Expert on Khmer Rouge Trials, radio address WBEZ April 2013, quoted in Florent Zwiers, “The story of Khmer Rouge crimes” (unpublished), on file with author.

<sup>7</sup> Remarks of Norbert Ehrenfreund, Robert H. Jackson Center, June 13, 2005, available at <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-related-to-robert-h-jackson/reflections-on-nuremberg-trial/> (accessed April 11, 2011); *see also* Ehrenfreund 2007.

<sup>8</sup> *See* the UN definition of rule of law (“The modern conception of the rule of law has developed as a concept distinct from the “rule of man,” involving a system of governance based on non-arbitrary rules as opposed to one based on the power and whim of an absolute ruler.”) United Nations Rule of Law, available at: [http://www.unrol.org/article.aspx?article\\_id=3](http://www.unrol.org/article.aspx?article_id=3) (accessed June 26, 2013).

<sup>9</sup> Interestingly, while this lineage includes the IMT and its sister court at Tokyo, the International Military Tribunal for the Far East at Tokyo (“IMTFE” or “Tokyo Tribunal”) is much less frequently cited as a source for transitional justice ideology or international criminal law. This is discussed further below.

<sup>10</sup> These are among the stated goals of the ICTY. *See, for example*, an ICTY press release at [http://www.iwpr.net/archive/tri/tri\\_098\\_4\\_eng.txt](http://www.iwpr.net/archive/tri/tri_098_4_eng.txt) (accessed July 2, 2012).

reason, a critical exploration of the IMT through the lens of the *international criminal justice template* – as articulator of progressive international criminal law, as historian, and transitional justice mechanism capable of reconciliation – is a necessary first step in a critical examination of the work of the ICTY.

This chapter begins in Part I by providing a brief history of the IMT and the trials that followed it. Included in that brief history is an overview of other denazification efforts in postwar Germany. Following this factual introduction, the chapter turns to a critical examination of the myths attributed to the Nuremberg process. In so doing, the chapter examines the Nuremberg “myths” as generative of the *international criminal justice template*. Part II considers the international criminal law developed by the IMT at Nuremberg and afterwards in order to critique this law as either “progressive” or “international.” Irregularly generated by varied international and military tribunals, the law that constitutes the IMT at Nuremberg’s “legacy” is inconsistent and often simply vengeful. Examining in detail one Allied war crimes judgment which has been applied in contemporary jurisprudence by the ICTY, the chapter challenges the argument that law emerging from IMT-era war crimes prosecutions represents the domestic criminal law on which it reputedly rests, in order to consider the larger problem of what international criminal law, charged with universalizing morality, should look like in substance to preserve its legitimacy. Part III considers the historical distortions that emerged from the Nuremberg-narrated history, demonstrating the structural constraints that limit courts as historians. Finally, Part IV turns to the least precise and most aspirational aspect of the Nuremberg myth, the tribunal’s role in enabling transitional justice in post-war Germany. The facts on the ground in IMT-era Germany belie the transitional justice narrative that would assert that trials are showcases of information, making the truth of wartime atrocity known and undeniable for the public at large, and that this served as the foundation for a modern, democratic (reconciled) Germany. Rather, the chapter argues that the IMT’s transitional properties were most keenly felt by the Western Allied powers that eventually, based largely on the political fallout from the Cold War, came to include Germany.

## **(I) Prosecutions of war crimes after World War II**

Although popularly considered in the singular, the IMT was actually the first, and most well known, of thirteen international criminal law trials at Nuremberg following the war.<sup>11</sup> The IMT was an Allied effort, with one judge (and one alternate) drawn from each of the four victorious powers (U.S., U.K., France, and U.S.S.R.) sitting together and determining guilt through majority vote. The 12 trials that followed the IMT that were also situated in Nuremberg were by contrast entirely American affairs.

In addition to these well-known tribunals, the Nuremberg legacy must be examined in conjunction with other Allied trials that developed international criminal law in the same era. From 1946-1949, Allied powers held hundreds of war crimes trials in the sectors of vanquished Germany under their control, sentencing thousands

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<sup>11</sup> Major War Criminals (USA, France, UK, and USSR v. Hermann Goering et al. 1945-46) available at <http://avalon.law.yale.edu/imt/12-04-45.asp> (accessed November 10, 2012).



of defendants to jail and hundreds to death; the most “important”<sup>12</sup> of this jurisprudence has been preserved in reports assembled after the war by the United Nations War Crimes Commission (UNWCC) and is today a citable source of international law relied on by the ICTY and others.

Allied powers also engaged in “denazification” exercises that were themselves quasi-judicial, that is, capable of sentencing defendants to work camps or restricting their professional capacities but without the attendant due process rights afforded at military trials. While they were administrative actions and thus not sources of international law, these processes form an important aspect of the history of Allied occupation. These processes continued through the end of the Allied occupation, with diminishing Allied resolve, until 1949, when the Western Allies drew back, Adenauer was elected president of West Germany, and the Allied ‘international’ law that governed war crimes prosecutions was revoked. Legal processes against Nazis continued under Adenauer, but were markedly different in scope and aim from the Allied efforts and were governed by German law and not international law.

This commitment to the capacity of the Nuremberg process has resulted in an incomplete popular history, whereby 1) the Marshall Plan of 1948 is well known but the U.S. postwar policy JCS 1067, under which Germans were systematically and deliberately starved, is not; 2) the U.S. trial against Einsatzgruppen criminals (who shot hundreds of thousands of Jews and political prisoners in Eastern Europe) is known, but U.S. agreement to release nearly all the convicted within a few years is not; and 3) the massive postwar push to denazify Germany is known, but the quiet, successful German pushback to pardon and reinstate even very high ranking Nazis is not. The following section seeks to tell a more complete story. Its goal is to lay the necessary foundation to enable the rest of this chapter to challenge the three central myths associated with the Nuremberg process: Nuremberg as historian, Nuremberg as legal source, and Nuremberg as transitional justice mechanism.

### **Getting to Nuremberg**

The Allied powers began discussing what to do with their vanquished foes well before the end of World War II. As early as 1942, the Soviets had raised the need to try “the Hitlerite invaders and their accomplices for the crimes committed by them in the occupied countries of Europe.”<sup>13</sup> The possibility of trying Nazi leaders as war criminals enjoyed a sort of precedent: the Treaty of Versailles that concluded World War I had condemned Germany for waging aggressive war and made provisions for Allied war crimes trials. (Bass 2000) The alternative, of course, was execution; Stalin reputedly estimated that executions of between 10-50,000 Germans were on order. Though Churchill was said to be horrified by the scale of Stalin’s suggestion, the British also favored executing Nazi leaders, whose guilt was seen as “simply too obvious” for a trial. (Bloxham 2001: 9) The British maintained this opinion through the end of the war. Execution did not rule out a trial apparatus, of course: when the Russians, Americans and British met at Yalta in 1944 to discuss the coming peace, Stalin reputedly told Churchill, “In the Soviet Union, we never execute anyone without a trial” to which Churchill replied, “Of course, of course. We should give

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<sup>12</sup> Law Reports of Trials of War Criminals Selected and prepared by the United Nations War Crimes Commission 1947–1949, available at: [http://www.loc.gov/rr/frd/Military\\_Law/law-reports-trials-war-criminals.html](http://www.loc.gov/rr/frd/Military_Law/law-reports-trials-war-criminals.html) (accessed November 11, 2012).

<sup>13</sup> Stalin’s foreign minister, Molotov, published the in cable October 1941, quoted in Roberts 2006:141.

them a trial first.”<sup>14</sup> Even after agreeing to the trials suggested by the U.S., the Russians wished such trials to exist as an exceptional law against the defeated. (Jeshenk 1957: 49) It was the U.S. that championed, “an episode that would leave an enduring judicial monument, to mark a giant step in the growth of international law.” (Taylor 1970: 80)

Even for the U.S., the eventual champion of the idea, the choice of bringing enemy combatants before an actual trial exercising due process and the potential for acquittal was never self-evident. The question of whether to seek rule of law solutions to questions of how to handle the vanquished Nazi regime was hotly debated in the highest levels of U.S. government as the war drew to a close. Opinion was divided between those who favored execution and banishment, advocated by U.S. Treasury Secretary Henry Morgenthau, and those who favored judicial processes, notably Henry Stimson in the Department of War. The Morgenthau plan, which enjoyed primacy in the U.S. until just before the end of the war, endorsed a theory of collective guilt and proposed a postwar retribution that should destroy Germany as an industrial state and reduce it to a “pastoral existence.” (Kubek 1989: 287)

President Roosevelt was himself sympathetic to the Morgenthau approach. Shortly before his death, he reiterated:

Too many people here and in England hold to the view that the German people as a whole are not responsible for what has taken place – that only a few Nazi leaders are responsible. That unfortunately is not based on fact. The German people as a whole must have it driven home to them that the whole nation has been engaged in a lawless conspiracy against the decencies of modern civilization. (Maguire 2001: 87)

Secretary Stimson, however, made the argument for war crimes trials that ultimately became U.S. policy in the document known as the “Yalta memorandum” (or alternately the “Crimean proposal.”) In his January 22, 1945 memorandum, Stimson argued:

Condemnation of these criminals after a trial would command maximum public support in our own times and receive the respect of history. The use of the judicial method will, in addition, make available for all mankind to study in future years an authentic record of Nazi crimes and criminality.<sup>15</sup>

Following President Roosevelt’s death just before the end of the war, his successor Truman elected to follow the Stimson approach, and appointed Supreme Court Justice Robert Jackson as chief prosecutor of the planned tribunal. Over the summer months that followed, Jackson worked with other Allied appointees to solve a number of problems for the Tribunals. They drafted the Charter, which articulated applicable procedure – following U.S. and Anglo-Saxon common law – and established the applicable law. They chose the location, selecting Nuremberg because the Palace of Justice and a major hotel were still standing. Finally, they drew up a list of defendants.

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<sup>14</sup> See <http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/nurembergaccount.html> (accessed April 13, 2011).

<sup>15</sup> Memorandum to the President January 22, 1945 (“Yalta Memorandum”) available at <http://avalon.law.yale.edu/imt/jack01.asp> (accessed July 1, 2013); this perspective shaped the crafting of immediate U.S. postwar policy in Germany.

For months before the trials began, the question of who would be indicted – whether (and which) politicians, military leaders, prominent business people, cultural figures, and from which countries such defendants should be drawn, was debated. The British Attorney General defined the selection of defendants thus: “The test should be: Do we want the man for making a success of our trial? If yes, we must have him.” (Overy 2003: 8) Americans wanted the indicted to include “leading representatives of groups or organizations [...] deemed criminal.” (Marrus 1997: 56) The final list of entirely German indictees represented a series of political compromises between the British, American, French and Soviet powers behind the trials. It was devised as representative of German aggression and the evils of the Nazi regime, with a nod to political practicality, namely who the Allied powers had in prison. For example, Admiral Erich Rader (sentenced to life in prison by the IMT, released after nine years) and one of Goebbels’s propaganda officials, Hans Fritzsche (acquitted by the IMT), were included in the indictment because they were in Soviet custody and the Soviets wished to be sure that some of their prisoners appeared on the dock at Nuremberg. (Overy 2003: 13) These political considerations made for a motley group, where command responsibility rested very unevenly among defendants. Some defendants were critical senior members of the Nazi apparatus and were arguably directly implicated in Nazi crime. Others served mainly as representatives of Nazi evil, in the guises of symbols of German capitalism and industry.

In addition to the 24 individuals indicted by the IMT, six Nazi *organizations* were arraigned as well.<sup>16</sup> This action, novel in the extreme, opened the possibility for finding participants in “guilty associations” guilty by association, and was developed in order to facilitate later prosecutions. The issues and repercussions associated with this line of legal reasoning will be explored further below.

### **Before the IMT: charges, defenses, verdicts**

The IMT was governed by its Charter, drawn up by the victorious nations in the summer of 1945. The Charter of the IMT framed the trial, detailing the roles of the participating countries (and their prosecutors), the rules of procedure designed to grant a “fair trial” to defendants (where defendants were presumed innocent until proven guilty, and enjoyed basic due process rights such as the right to counsel and the right to have information provided in their native language), and circumscribing the defenses available to the defendants (where defenses based on obeying orders could afford at best a mitigation of sentence, with no immunity for state officials).

In considering the IMT as a rule of law exercise, the Charter represents a deeply problematic – yet often overlooked – aspect of IMT procedure. The IMT Judges were constrained by the Charter, and applied the law it set out for them “conservatively.” (Mettraux 2010: xiv) In many ways, the legal revolutions attributed to the Judgment at Nuremberg were in fact revolutions contained in the Charter of

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<sup>16</sup> Die Reichsregierung (Reich Cabinet); Das Korps der Politischen Leiter der Nationalsozialistischen Deutschen Arbeiterpartei (Leadership Corps of the Nazi Party); Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (commonly known as the “SS”) and including Der Sicherheitsdienst (commonly known as the “SD”); Die Geheime Staatspolizei (Secret State Police, commonly known as the “Gestapo”); Die Sturmabteilungen der NSDAP (commonly known as the “SA”); and the General Staff and High Command of the German Armed Forces; Minutes of the Opening Session of the Tribunal, at Berlin, 18 October 1945. The question as regards these organizations was whether they were criminal or not.

Nuremberg. That the IMT Prosecutor – U.S. Supreme Court Justice Jackson – was also a key member of the Charter drafting committee represents a serious flaw in the separation of powers.

In drafting the Charter, Jackson assured President Truman that the tribunal would “punish acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code.”<sup>17</sup> Of the four counts brought against the indictees, however, only “war crimes” existed in any defined manner prior to the Nuremberg trials; the other three – crimes against peace, crimes against humanity, and conspiracy to commit any of the above<sup>18</sup> – were all without precedent in international law.

### **The law at the IMT: charges**

Modern attempts to harmonize international law are typically said to begin with The Hague Conventions of 1899 and 1907, which sought to define the laws of combat. Known as “the Law of The Hague,” these conventions prohibited attacks on undefended towns, as well as the use of poisonous weapons, and claimed special protections for hospitals and religious and cultural sites. (Ratner & Abrams 2001) While the Charter governing the IMT “wove together all the different and separate strands of the nascent international human rights and humanitarian law” (Martin 2006 5), crimes against peace (or the waging of aggressive war), crimes against humanity, and conspiracy were all crimes for which there was little precedent. Their articulation at the IMT represented a novel application of international law.

The central charge before the IMT was the waging of aggressive war. A central concern facing the Tribunal was the allegation that it was applying *ex post facto* legal standards (making something illegal after the fact), which would open it up to criticism as a political body enforcing “victor’s justice” and therefore not a legitimate legal institution. The Prosecution found support for the illegality of aggressive war in the Kellogg-Briand Pact of 1928, which renounced “war as an instrument of national policy.”<sup>19</sup> Participants to the drafting of the Charter, however, resisted the novel charge; the French participant, for example, called the aggressive war charge “a creation of four people who are just four people.”<sup>20</sup> Even if one accepts that the Kellogg-Briand Pact made war illegal, it is still another step to find that breach of the treaty was *criminal* and prosecutable at the level of the individual.

Conspiracy, the second argument developed by the U.S. prosecution at the IMT, was particularly contentious because, as drafted, it was not recognized under civil law, and the French and Soviet representatives therefore vigorously resisted its inclusion during the drafting of the Charter. The conspiracy charge was developed as a means of bringing the German treatment of German Jews within the scrutiny of the IMT. (Douglas 2001; Bloxham 2001) Under established principles of international law, which placed state sovereignty at its center, states’ treatment of their own citizens was not a topic for international law to address. The conspiracy charge also promised to facilitate prosecutions by later courts (who would ostensibly be able to build cases against further individuals implicated based on IMT rulings). Ultimately,

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<sup>17</sup> Robert H. Jackson, Report to the President, June 7, 1945, quoted in Davis (2008:12).

<sup>18</sup> Article 6, Charter of the International Military Tribunal, available at: <http://avalon.law.yale.edu/imt/imtconst.asp> (accessed November 1, 2012).

<sup>19</sup> Judgment, p 220, available at <http://avalon.law.yale.edu/imt/12-04-45.asp> (accessed November 10, 2012).

<sup>20</sup> Quoted in Douglas 2001: 52.

the Tribunal rejected the prosecution's broad charge of conspiracy, ruling instead that the charge was applicable only as regards waging of aggressive war.

"Crimes against humanity" was in many respects the boldest invention of the IMT, although in its final application it came to serve more as an "interstitial legal category" rather than as a legal revolution. (Douglas 2001: 60) The phrase originated during World War I, when the Allied powers issued a statement decrying the Armenian genocide as a "crime against humanity." (Schabas 2000) At the end of the war, the U.S. rejected proposed trials of "violations of the laws of humanity" as legally imprecise, however. (Cryer et al 2007:188) At the IMT, the charge was meant to catch the violence visited on states by their own nationals: such violence fell outside the legal category of "war crimes," and was understood even at the time as an important part of the story of Nazi atrocity.

Much has been written about the Justice Jackson's determination to pursue defendants at the IMT for their role in waging "aggressive" war, as opposed to prosecuting the greater crimes perpetrated by the Nazi regime, particularly the annihilation of European Jewry, known as the Holocaust. The scale of Nazi criminality and the murderous focus on Jews, even to the detriment of the Nazi war machine, were facts known at the war's end. Scholars attribute different rationales to Jackson's determination to focus on "crimes against peace" (which was essentially a focus on Nazi wrongs committed against Allied troops, a focus which continued throughout Allied war crimes trials) as opposed to "crimes against humanity," which referred most centrally to the Nazi genocide. Lawrence Douglas (2001) argues that Jackson chose a safer, more conservative legal strategy by focusing his argument on the charge with the strongest basis in international law. At trial, conservative legal strategies are preferred, as the aim is conviction. The charge of aggressive war, even with its dubious legal authenticity based in the Kellogg-Briand Pact, followed the contours of international law – which before Nuremberg had nearly exclusively consisted of the law governing the relations between states – more easily than the charge of crimes against humanity followed such contours. Crimes against humanity was a charge which was both imprecise and novel – not a favorable combination for a responsible jurist.

While Douglas' legal reading is doubtless correct, others have convincingly argued that anti-Semitism, or at the very least discomfort with a focus on Jewish victims, explains the Prosecution's determination to focus the attention of the IMT on Allied losses and not the Holocaust. Both Power (2000) and Bloxham (2001), for example, argue that the prosecution team was deliberately organized to separate legal practitioners of Jewish extraction from legal questions involving Nazi murder of Jews. Moreover, in making its case the prosecution repeatedly denied the specificity of the Holocaust by lumping crimes against Jews together with other Nazi crimes. In the decades following the IMT, activists and historians have worked to correct this image, situating the destruction of European Jewry at the center of the Nazi project.

More troubling is the manner in which the Prosecution used the facts of the Holocaust to make an argument about *Allied* suffering. In his opening statement, Jackson classified the murder of six million Jews as an aspect of the Nazi conspiracy to wage war, arguing that destruction of the European Jews was akin to the Nazi attack on labor unions and Protestant groups, i.e. a strategy designed to eliminate opposition to Nazi governance. The terrible aspects of the Jewish genocide – gas chambers, the collection of personal effects of the murdered, as well as documentary

footage at the liberation of Bergen-Belsen, with the enduring horror of British bulldozers pushing piles of bodies into mass graves – were put to use at the IMT to make a legal argument about the effect that German action had on *Allied* actors. While Douglas (2001) defends this choice as the legal straightjacket Jackson was forced to wear in order to prove the aggressive war charge, Bloxham (2001) shows how Allied victimhood continued to be the focus of Allied prosecutions in the years following the war.

### **The trial**

A central benefit of using the legal process as a didactic tool is the assumed power of trials as showcases. Though many historic trials have garnered a steady and devoted audience, in this respect too the IMT was a precursor to the ICTY: the trial was by all accounts quite tedious. Though acknowledging that the trials were dealing with incredible events of relevance to the entire world, Rebecca West, covering the IMT for the *New Yorker*, called it “a citadel of boredom.”<sup>21</sup> The British alternate judge of the IMT wrote in his diary of the time, “When I consider the utter uselessness of acres of paper and thousands of words and that life is slipping away, I moan for this shocking waste of time.”<sup>22</sup>

There are several reasons why this sense of slowness obtained, even as the trial was – certainly by modern standards – remarkably concise and effective. In his excellent consideration of the trial as a didactic actor, Douglas (2001) cites two central aspects of Prosecution strategy that lead to boredom and repetition. First, the four Allied parties divided the charges between them, with the U.S. presenting the conspiracy charge, the British addressing crimes against peace (waging aggressive war), the Soviets addressing war crimes and crimes against humanity in the east, and the French addressing these two topics in the west. This resulted in frequent repetition, particularly as regards facts underlying conspiracy, since that charge rested on the factual content of the other three charges.

Second, IMT Prosecutor Jackson’s determination to “establish incredible events by credible evidence” so that finally “the case... against the defendants rests in large measure on documents of their own making, the authenticity of which has not been challenged,”<sup>23</sup> led him to privilege documentary evidence over witness testimony. This was a “safer” judicial strategy; witness testimony can be destroyed through defense cross-examination, and many Nazi atrocities challenge our human capacity to believe. Reports of certain atrocities following World War I, which had helped spur war crimes trials, turned out to be spurious or at the very least unconvincingly documented, and this played a large role in the failure of those trials. (Douglas 2001: 30 – 40)

Certainly another obstacle to the IMT as spectacle was defense counsels’ unfamiliarity with cross-examination techniques. At civil law, the trial is a space where truth is confirmed, not created.<sup>24</sup> Common law cross-examination techniques are designed to pull forth facts to help the truth emerge, which of course adds to the theatrical aspect of the proceedings. Consider the ill-fitting glove in the widely

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<sup>21</sup> Quoted in Rollyson 1995: 214-215.

<sup>22</sup> Quoted in Douglas 2001:12.

<sup>23</sup> October 7, 1946 letter from Justice Jackson to President Truman, available <http://avalon.law.yale.edu/imt/jack63.asp> (accessed November 11, 2012).

<sup>24</sup> The distinctions between civil and common law processes and ideologies are explored in detail in Chapter Three.

followed O.J. Simpson case of the 1990s, leading defense counsel to crow, “If it doesn’t fit, you must acquit!” Defense counsel at the IMT had no experience in such strategies, and with the exception of Hermann Göring, who parried with U.S. Prosecutor Jackson with such success that the British Prosecutor stepped in to complete the examination, the German defendants and their lawyers, unfamiliar with Anglo-Saxon cross-examination techniques, were unprepared to harness the potential power of the trial medium.

Finally, judicial concern with overcoming criticism that the trial represented “victor’s justice” meant that judges exerted little control over meandering defendant responses. This, too, is a pattern that has been repeated at the ICTY.

### **Defenses**

The central defense asserted at Nuremberg was “*nullem crimen sine lege*,” in which defendants argued that the charges against them, particularly the waging of aggressive war, were not considered to be crimes when the war began, and thus constituted an *ex post facto* application of the law. The IMT rejected this defense, finding that a prohibition on the waging of aggressive war was “a principle of justice” and that “the attacker must know that he is doing wrong.”<sup>25</sup> Responses to this reasoning were mixed even at the time. (Finch 1947)

The IMT Charter explicitly denied several other possible defenses as well. Defendants were not permitted to challenge “the Tribunal, its members [...] or their alternates” (Article 3); defendants did not enjoy immunity based on their official position (Article 7); and following orders was not a complete defense (though it might be considered in mitigation of punishment) (Article 8). The Tribunal also rejected attempts at using obedience to national law and *tu quoque* (“you too,” which uses the examples of similar crimes committed by the other side to defend the legitimacy of defendant’s actions) by defendants.

In domestic systems, criminal acts require a mental element of criminality, the *mens rea* (criminal consciousness) that must accompany the criminal act itself (*actus reus*). Many domestic defenses in criminal law center on the question (absence) of *mens rea*. At the IMT, however, such *mens rea* defenses were generally rejected. Thus a lack of criminal consciousness while following orders in a military hierarchy, or in carrying out national law, did not constitute a defense for those individuals on trial.

### **Verdicts**

Of the 21 defendants who stood trial, 12 were sentenced to death, 7 were sentenced to prison terms, and 3 were acquitted. Although the Prosecution’s case centered on the waging of aggressive war, the sentences imposed by the Tribunal reflected an acknowledgment of the larger horrors attending World War II. Defendants found guilty of conspiracy and crimes against peace but not crimes of war or crimes against humanity were sentenced to prison terms; those found guilty of crimes against humanity were sentenced to death.

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<sup>25</sup> 22 IMT Trials, 462 available at <http://avalon.law.yale.edu/imt/12-04-45.asp> (accessed November 10, 2012).

## After the IMT: Allied war crimes trials, denazification, and “putting the past behind us” in Germany

In the immediate aftermath of the war, there were 12 trials in addition to the IMT held at Nuremberg. These trials were conducted by the U.S. alone between 1946-1949, and were grouped by subject: there was, for example, a doctors trial, a lawyers trial (immortalized in the film “Judgment at Nuremberg”), the IG Farben trial (considering the manufacture of Zyklon B), and the Einsatzgruppen trial (trying 24 heads of military groups that murdered one million Jews in Eastern Europe before the death camps were constructed). Full records, including transcripts and exhibits, of these trials exist and are available for study, and there is at least one project underway to digitize these materials.<sup>26</sup>

In addition to these available and well-documented trial records, there were thousands of war-related trials followed the Nuremberg trials, conducted by military and civilian courts throughout Europe. Individually, the Allied powers held military trials in the sectors under their control.<sup>27</sup> Under Allied Control Council Law No. 4, enacted in December 1945, German courts were prohibited from trying any crime committed against an Allied national. Control Council Law No. 10 referenced the four charges defined by the IMT and specified that German courts could only try crimes committed by Germans against other Germans, or stateless persons.

David Cohen heads a U. C. Berkeley initiative currently collecting post-World War II trial materials and making them available online. He counts 489 U.S.-led trials against German war criminals (1,672 defendants, 1,416 convictions), 379 UK-led trials, more than 2,000 convictions in French-led trials (which lasted into the 1950s, in contrast to U.S. and U.K. efforts which concluded with the rise of the Cold War), and 14,820 German defendants before Soviet trials (of whom 13,198 were convicted, and 138 sentenced to death). (Cohen)

In addition to Allied war crimes trials, the Allies oversaw an extensive “denazification” project, consisting of the “internment of Germans, who, though not guilty of any specific crimes, are considered to be dangerous to Allied purposes.” (Cohen 7) Opinions among and within Allied governments differed as to the extent that ordinary Germans should be made to feel the weight and horror of the war. The administrative reality cautioned against an extensive purge; late in 1945, General George Patton, acting governor of the province of Bavaria, was quoted as saying, “more than half the German people were Nazis and we would be in a hell of a fix if we removed all Nazi party members from office.” (Axelrod 2009) At the same time, political sentiment – echoed in the IMT’s insistence that German guilt *towards Allied actors* be recognized for posterity – demanded a reckoning; Eisenhower removed Patten over the comment above.

In total, in the U.S. sector more than 13 million Germans were reviewed regarding their wartime affiliations, and three million were charged with a variety of offenses. (Beschloss 2002) While internment was conceptually designed as

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<sup>26</sup> See, e.g., Harvard Law School Library Nuremberg Trials Project: A Digital Document Collection, available at: [http://nuremberg.law.harvard.edu/php/docs\\_swi.php?DI=1&text=overview](http://nuremberg.law.harvard.edu/php/docs_swi.php?DI=1&text=overview) (accessed June 25, 2013).

<sup>27</sup> Following World War II, Germany was partitioned, with each of the Allied powers of the U.S., UK, Russia and France asserting control in a designated area.



administrative and not punitive, harsh camp conditions, particularly during the hard winter of 1945/46, blurred such distinctions. Moreover, Soviet work camps, for example, are estimated to have had a 33% mortality rate, making such sentences more likely to result in death than criminal sentences handed down by Allied tribunals.

Like denazification, U.S. “reconstruction” efforts in post-war Germany were overwhelmingly punitive. While Stimson’s temperate vision had obtained for the IMT, Morgenthau’s unforgiving plan was put in place to shepherd Germany’s “transition.” The Morgenthau Plan advocated the crushing of German capacity in many spheres, and guided the U.S. occupation policy in place from 1945-1947.<sup>28</sup>

Under JCS 1067, which applied only to the U.S. zone of occupation, the U.S. worked towards the “industrial dismantlement”<sup>29</sup> of Germany. The period was characterized by rampant food shortages, some of which were deliberate: American soldiers, for example, were told to destroy food rather than give it to German civilians, a policy that also applied to soldiers’ wives. (Davidson 1999:85) Care packages and other foreign sources of food were not allowed into the country throughout at least the first year following the war.<sup>30</sup> Estimates place daily caloric intake for adults at between 1,000-1,500 calories for the years 1945 - 1947. Child mortality is estimated to have skyrocketed to 65% in some areas. (Wiggers 2003: 280) Over the difficult winter of 1945-46, with Soviet influence rising, the U.S. viceroy charged with overseeing JCS 1067 remarked “There is no choice between becoming a communist on 1500 calories and a believer in democracy on 1000 calories.” (Jennings 2003:14) This policy of “slow starvation” (Fossedal 1993) finally led to riots in the winter of 1947, and an eventual change of U.S. policy, due in part to growing U.S. recognition of the need not to lose the campaign for the “hearts and minds” of the German populace to communism and the impending threat of the former U.S. ally, the Soviet Union.

The emerging Cold War led to significant changes in U.S. policy towards Germany, as the conquered enemy became a potential ally. In 1948 the punitive JCS 1067 was replaced with a more evenhanded directive, JCS 1779, which came to be known as the celebrated Marshall Plan. Under JCS 1799, more than 90% of the Germans originally purged under JCS 1067 were rehabilitated. Cold War concerns also led to the rearmament of West Germany in the three zones occupied by the Western Allies. In 1949, German self-rule under the Bundestag was established, and Konrad Adenauer was elected as Chancellor. Adenauer advocated a policy known as “putting the past behind us,” recognizing that “in order to avoid a renewal of German nationalism and Nazism, economic recovery and political democratization [needed to] take priority over a judicial confrontation with the crimes of the Nazi past.” (Herf 1997: 209) In his first speech to the Bundestag, Adenauer stated this position clearly:

The government of the Federal Republic, in the belief that many have subjectively atoned for a guilt that was not heavy, is determined where it appears acceptable to do so to put the past behind us. On the other hand, it is absolutely determined to draw the necessary lessons from the past regarding all of those who challenge the existence of our state whether

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<sup>28</sup> Joint Chiefs of Staff directive 1067 (JCS 1067).

<sup>29</sup> Quoted in Dietrich 2002: 85.

<sup>30</sup> This official U.S. policy was supported by a not insubstantial portion of the U.S. public: a 1945 poll found that one sixth of Americans polled thought that even in the case of starvation, Germans should not be given food. NORC 1945:23 quoted in Meritt 1995.

they come now from right-wing radicalism or left-wing radicalism.  
(Herf 1997: 271)

War crimes trials continued under German self-rule but were notoriously lenient. Between 1950 and 1962, 30,000 former Nazis were investigated, nearly 13,000 were indicted, approximately 5,400 were tried, and 75% of these were acquitted. Of those sentenced, only 155 were convicted of murder. Legal historian Rebecca Wittman (2005) attributes this poor conviction rate to the legal change that, in 1951, prohibited the use of Control Council Law No. 10 in German courts. The result of this was that international law was no longer available to German courts; prosecutions against war criminals proceeded under the German penal code, which under the particularities of the German murder statute made prosecutions particularly difficult. At the famous Auschwitz trial of 1963, 800 people were investigated, 20 were indicted, and seven were found guilty of murder.

Furthermore, at the beginning of the 1950s “both politicians and the public intervened sweepingly – and as if doing so were a self-evident thing – for war criminals and Nazis condemned by the Allies,” demanding their release from prison and rehabilitation. (Frei 2002: xiv) This popular push resulted in the early release from prison of nearly all those defendants who had been jailed under Allied war crimes trials by the mid to late 1950s. (Cohen)

## **(II) Articulating a “progressive” “international” criminal law?**

Following the IMT there were 12 additional trials brought at Nuremberg by the U.S. military (NMTs). Like the IMT, records of the NMTs are preserved in their entirety, including full transcripts and exhibits. Although the NMTs were U.S. military tribunals, they are preserved and utilized as sources of *international* criminal law. In addition to these well-known trials, there were literally thousands of defendants tried by Allied bodies immediately following the war. Like the NMT’s, these trials were carried out by unified national bodies (French, American, British, or Soviet) yet this “case law” also constitutes a source of *international criminal law*.

Extracts of several hundred cases, “selected... based on the major points of municipal and international law that were raised and settled during the trials as well as the potential for the greatest legal interest,” were collected in 15 volumes by the UN War Crimes Commission immediately following the war.<sup>31</sup> These UNWCC extracts and reports serve as sources of international law and are referenced by contemporary international criminal tribunals. It remains to be seen what impact new research, such as that by U.C. Berkeley’s David Cohen, will have on international criminal law, as more sources are recovered and added to available archives.

There are several issues surrounding this “base line” of international criminal law. First, there is the technicality that such law fails as “international”; where the IMT was a multinational project applying procedure it created itself, later military trials applied the legal standards of the nationalities that organized them. These decisions emerge from a particularized perspective and point in time. The prosecutors and judges who sat in judgment of these cases were representatives of the victorious, Allied nations, handling crimes committed (in large part) against Allied soldiers. Thus

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<sup>31</sup> Law Reports of Trials of War Criminals Selected and prepared by the United Nations War Crimes Commission 1947–1949, available at: [http://www.loc.gov/rr/frd/Military\\_Law/law-reports-trials-war-criminals.html](http://www.loc.gov/rr/frd/Military_Law/law-reports-trials-war-criminals.html) (accessed March 3, 2013).

these processes were frequently retributive and the jurisprudence is marked by a palpable desire for vengeance. This particularized perspective evidences a tendency towards rigorous applications of “principle,” often obfuscating or denying other considerations. In short, the “case law” emerging from this period demonstrates a bias in opposition to individuals involved in reprehensible situations without a counterbalancing recognition of the larger circumstances in which those individuals found themselves. This is poignantly demonstrated in the *Velpke Children’s Hospital* case discussed below.

*Velpke* is one of several World War II-era cases that has been re-invigorated in contemporary ICL through its use at the ICTY. This chapter presents a close reading of *Velpke* as a contribution towards a more generalized critique of the development of ICL. If ICL is to develop as “progressive” international law, then it should be a law that is recognizably “progressive.” The *Velpke* and *Tyrolt* cases considered below raise serious questions in this respect.

### ***Velpke Children’s Home***

The *Velpke Children’s Home* case was tried before a British military court in 1946.<sup>32</sup> The circumstances are particularly tragic, involving a “home” set up to keep the babies of Polish and Russian women who had been forcibly removed to Velpke, Germany, to work. The babies were taken from their mothers and kept in a “corrugated iron hut” with no running water, electricity, or telephone. They were tended by a “nurse,” formerly a schoolteacher with no experience with young babies, who was sent to run the home against her will. The home operated from May to December 1944, during which time more than 80 babies perished, with the principle causes of death recorded as weakness and dysentery.

Eight people stood accused. The two Nazi administrators who ran the home (the first had set it up, including choosing the location, on orders from a superior, and the second had been appointed to “administer” the home) were both sentenced to death. The schoolteacher charged with running the home (who reportedly “went away for her meals and to do shopping, and was never in the home at night, though the helpers stayed there”<sup>33</sup>) was sentenced to 15 years. A local doctor who “without official instructions” visited the home “to tend sick infants” and who later “only tended such of the children as [were] brought to him, and only visited the home to sign death certificates” was sentenced to 10 years’ prison.<sup>34</sup> The other accused – a leading Nazi in the village, the mayor of the village, and a farmer who had sent at least two children to the home, were all found not guilty.

Of the schoolteacher, the Prosecutor said, “Although she has said that what she did she did under order, she seems to have had very little idea of service and devotion and sacrifice to duty. If you *undertake a task of skill* then in law you are

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<sup>32</sup> Case No. 42, Trial of Heinrich Gerike and Seven Others (The Velpke Children’s Home Case) British Military Court, Brunswick, VII Law Reports of Trials of War Criminals 76 (1948) (“*Velpke Children’s Home*). The preface to Volume VII of the UNWCC extracts that contains the *Velpke* case, considered below, finds the case significant “because the children who were barbarously dealt with were actually born in Germany, their mothers having been deported contrary to international law from an Allied country, namely Poland, while that country was occupied by the Nazis.” For our purposes, *Velpke* is more significant for its commentary regarding guilt for “causing death by criminal negligence.”

<sup>33</sup> *Velpke Children’s Home* p. 80.

<sup>34</sup> *Velpke Children’s Home* p. 80

called upon to show the skill of the task that you have undertaken.”<sup>35</sup> Perhaps the most surprising is the sentence passed on the doctor who “without official instructions” visited the children in an effort to save their lives. According to the Prosecution, the doctor had, by his acts, “assumed the care of those children in place of their mothers.”<sup>36</sup> The court did not comment specifically on the doctor’s defense that, “due to his large practice, he could find no time to write any letters of protest to persons in authority, or, in the later period, to visit the babies.”<sup>37</sup> No further explanation is made of the doctor’s sentence except to note that he received 10 years’ prison.

The *Velpke Children’s Home* case makes reference to a similar trial, *Trial of Georg Tyrolt and others by a British Military Court (1946)*, which original case is not included in the UNWCC reports and is unavailable for review. That tribunal passed death sentences on a doctor “responsible for the medical care and health of the children, and on... a nurse in whose charge [the children] were placed.” A five-year prison sentence was passed on a second nurse “who also had charge of the infants for a period.”<sup>38</sup> The *Velpke Children’s Home* tribunal does not discuss the discrepancy in sentencing in the *Tyrolt* case.

There are three central questions to address to the *Velpke* case in order to determine the strength of its judicial holdings. First, was the law of the time properly applied (which speaks to the strength of the case, and has an impact on its potential to set “precedent”<sup>39</sup>)? Second, would the law be applied differently today (relevant because current law should reflect modern thinking, and these cases, unconsidered in light of modern practice, are currently referenced as precedent in ICTY case law)? Finally, what is the legal principle that can be extracted from these cases as a guideline for international humanitarian law? This final question is both the most abstract and the most pertinent, and speaks to the question of what kind of humanitarian law we are forming.

#### 1. The English law of criminal negligence in 1946

The Prosecutor brought charges under Article 46 of The Hague Convention of 1907 which provides for the respect of family honor, individual life, and private property, and made reference to English law and murder and criminal negligence as expounded in Archbold’s *Pleading, Evidence and Practice in Criminal Cases*, 31<sup>st</sup> Edition. Quoting extensively from the above, the Prosecutor elaborated on death by criminal negligence, stating that where “the probable consequence may be and eventually is death, such killing may be murder, although no stroke was struck by himself” listing the following cases as examples of such:

As was the case of the gaoler, who causes the death of a prisoner by imprisoning him in unwholesome air; of the unnatural son, who exposed his sick father to the air against his will, by reason whereof he died; of the harlot, who laid her child in an orchard, where a kite struck it and killed it; of the mother, who hid her child in a pig-sty, where it was

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<sup>35</sup> *Velpke Children’s Home* p. 80 (emphasis added).

<sup>36</sup> *Velpke Children’s Home* p. 80.

<sup>37</sup> *Velpke Children’s Home*. p. 82. Although the case references the two doctors who paid visits to the home before September 1944, they were not accused.

<sup>38</sup> *Velpke Children’s Home* p. 81.

<sup>39</sup> Precedent is persuasive, not binding, in international law.

devoured; and of the parish officers, who moved a child from parish to parish till it died from want of care and sustenance. . . . If a grown-up person chooses to undertake the charge of a human creature helpless either from infancy, simplicity, lunacy, or other infirmity, he is bound to execute that charge without wicked negligence; and if a person who has chosen to take charge of a helpless creature lets it die by gross negligence, that person is guilty of manslaughter. Mere negligence will not do; there must be negligence so great as to satisfy a jury that the prisoner was reckless and careless whether the creature died or not.<sup>40</sup>

Because this definition is quoted extensively in the judgment, we can assume that the tribunal made reference to it at arriving at its sentence.

Even at the time, however, there was criticism of Archbold's pronouncements as "out of touch." A review of Archbold's 32<sup>nd</sup> Edition criticizes Archbold's editing as:

prepared within the limits of the practitioner's tradition of editing, which is to note the latest cases and statutes at what appear to be the most appropriate places in the traditional text. If one is left dissatisfied with the result, it is largely because this method of editing performed thirty-one times since 1822 produces a volume that is out of touch with modern thinking about criminal law.<sup>41</sup>

This criticism seems to be supported by the text itself, which appears to lump several potentially distinguishable crimes together under the heading of criminal negligence. The jailor and parish officers, state administrators, seem differently positioned than the son and mothers, for example, who owe different duties of care. Without greater detail, it is impossible to know who among these administrators is guilty of "wicked negligence. . . [being] reckless and careless whether the creature died or not." Generally, the doctrine of *respondiat superior* applies to administrators carrying out their duties, relieving them of personal responsibility for acts that are reasonably foreseeable elements of their work.

Taking the son and mothers, it is not clear from the text if they sought to kill father and offspring through exposure. If so, this is homicide, not manslaughter (where the difference between the two is *mens rea*, the presence or absence of an *intent to kill*.) The critique of Archibald's 32<sup>nd</sup> edition specifically notes the problem that while *mens rea* is required for every crime, the qualification of the defense of necessity or superior orders exists and is not mentioned until much later in the Archibald text, at which point there is no "adequate discussion." These defenses significantly qualify *mens rea*, the intent of the perpetrator at the time of the commission of a crime. Thus it is not clear that the English criminal law cited and relied on at the time of the *Velpke* decision constituted an accurate representation of criminal negligence in England at the time *Velpke* was decided, and it is even less clear whether such a representation would obtain today.

## 2. Legal principles enshrined in the *Velpke* and *Tyrolt* cases

What is striking is the closed circuit of the legal reasoning offered in *Velpke Children's Home* and the *Tyrolt* case referenced therein. It seems that the doctor in the

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<sup>40</sup> *Velpke Children's Home* p. 81 (quoting Archibald).

<sup>41</sup> G.L.W. Review, 14 *The Modern Law Review* No. 2, p. 233 (April 1951).

*Velpke* case could have escaped criminal liability only by doing nothing at all. Perhaps had he limited his “participation” in the home to signing death certificates he might not have been found guilty? Likewise, it is not clear how he or the schoolteacher in charge of the home escaped the death penalty, where others seemingly similarly positioned, as explained in the *Tyrolt* case, did not. Furthermore, there is no explanation of why the “two doctors [who] paid rare visits to the home before September 1944”<sup>42</sup> were not charged in the *Velpke* case, nor as to why, of the two nurses charged in the *Tyrolt* case, one was sentenced to death and the other to five years’ prison. In short, an assessment of the *Velpke* and *Tyrolt* cases leaves a student of international criminal law in the dark as concerns applicable criminal standards or possible defenses. It also leaves open the social control question of what *non-criminal* actions in such a situation might consist of.

The central problem in the *Velpke* case and the law it purports to follow arises from the idea of “choos[ing] to undertake” an activity or responsibility. The court report of *Velpke* informs us that the schoolteacher was sent to run the home “against her will.” How then did she “choose” to undertake” her role in the home? Domestic criminal law recognizes coercion as an affirmative defense to conduct otherwise punishable as criminal. The *Velpke* standard appears to be nearly one of strict liability.<sup>43</sup>

As regards the doctor, his voluntary participation appears to be closer to “choos[ing] to undertake” a role in the care of the children. The circumstances surrounding his efforts, however, complicate an assessment of his “participation” in the criminal actions, distinguishing the doctor’s actions from those named in the English law of criminal negligence. The doctor did not forget to feed a child when he said he would, or leave a child exposed outside when he said he would care for it; the doctor faced a physical situation (dying children) caused by a political circumstance over which he had no control or influence, and sought to address the aspects of the physical situation before him.

In applying the English law of criminal negligence to the doctor’s actions, the *Velpke* tribunal assesses the doctor’s actions *as if* he had *not* been acting in the confining circumstances of the desperate days of a murderous state. The *Velpke* tribunal engages the legal fiction that the doctor enjoyed the possibility of communicating his concern regarding the conditions in the home to an administrative apparatus charged with citizens’ affairs, as if a death camp for infants set up by the state itself could somehow be compared to an unattended pothole in a state-operated motorway.

*Velpke* and *Tyrolt* demonstrate the extent to which strict liability attended the development and application of international criminal law in the period following the Second World War. How can we explain the sentences passed on individuals before these courts except by an attendant *feeling* – the horror attached to the atrocity of allowing infants to die, and the sense that those connected to such horror should pay?

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<sup>42</sup> *Velpke Children’s Home* p. 77.

<sup>43</sup> Strict liability is a legal doctrine that awards absolute legal responsibility to an individual for an injury regardless of that individual’s intent or knowledge. So long as an injury is proven, there is no defense. Black’s Law Dictionary defines it as “[w]hen a plaintiff makes a motion to prove harm has occurred without having to show how or why to collect damages.” Available at <http://thelawdictionary.org/strict-liability/#ixzz2Y0QMxCQW> (accessed June 30, 2013).

For the practitioner of international criminal law, another way to ask the question is: what articulable principles can be drawn from the *Velpke* or *Tyrolt* cases? In time of war, should concerned parties write letters of protest to authorities? Would the doctor's sentence have been reduced had he done so? What person, given the situation in Nazi-ruled Germany at the time, would have engaged in such an exercise, only slightly more useless than it would have been dangerous? Is such an expectation reasonable, or fair? And even in the case of the schoolteacher, tasked with "caring" for the babies brought to her in these conditions and under such orders – how are we to understand the criminal liability of her actions? She was sent to run the home "against her will" and was provided, at first, "with no staff, no medical equipment and no records except for a register of incoming children."<sup>44</sup> The court notes that she "made many complaints" to the home's administrator and that one witness testified that the schoolteacher "on finding that some of the children were dying because they needed mothers' milk, sent some back to their mothers, but that [the administrator], on discovering her action, forbade such a course."<sup>45</sup> At the same time, evidence showed that the sick children were not separated from the others, that infants' clothing was not kept clean, that the home was infested with flies, and that the schoolteacher "went away for her meals... and at night."

An analysis of *Velpke* leaves open the question of what sort of conduct *would not be criminal*. This question is larger than the procedural question of what the uncharged doctors, or acquitted defendants, did to escape prosecutorial notice and judicial pardon. Domestic criminal law, particularly common law, is rife with examples of massive disparities between individual defendants, based on their individual conduct, post-crime cooperation, or other unrelated circumstances, and while individual cases may often seem unjust, such injustice is rarely perceived to rise to *systemic inequality*. The unaddressed problem in *Velpke* is more a question of criminal law as a guideline for individual conduct, an outline for what the state expects of citizens' behavior. What might the schoolteacher brought in as a nurse, or the doctor who made periodic visits, have done to *not* be guilty of criminal negligence in the *Velpke* example? What conduct on their part could have fallen within societal norms (since criminal law is designed to punish the conduct that falls outside the acceptable)? This absence of guidance, together with an absence of recognition for the changed circumstances that obtain during times of social violence, is an unaddressed problem of ICL, and will be considered in greater detail in Chapter Three.

To the extent that the *Velpke* and *Tyrolt* cases pronounce a legal principle, it seems to follow Justice Jackson's famous iteration of the law applied at Nuremberg: "individuals have international duties which transcend the national obligations of obedience imposed by the individual State."<sup>46</sup> The IMT rejected the defenses of obeying superior orders and obeying national law. Thus it seems that the IMT and the trials that followed it began from the position the trials ostensibly were assembled to prove: the illegality of the Nazi state and all actions associated with it. Under this rationale, individuals subject to the dictates of the Nazi state should have resisted such dictates as, if not illegal during the time in which the Nazis were in power, then certainly illegal on a larger plane.

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<sup>44</sup> *Velpke Children's Home* p. 76.

<sup>45</sup> *Velpke Children's Home* p. 77.

<sup>46</sup> Trial of the Major War Criminals before the International Military Tribunal, vol. I, Nuremberg, 1947 p. 223.

Following *Velpke*, as the ICTY does in its important *Kvočka* decision, discussed in greater detail in Chapter Three, ICL pronounces involvement of any sort, even involvement intended to ameliorate criminal circumstances, to be participation in the criminal activity at the base of the situation. In short, the doctor seems to have tried to make the minor improvements available to him in the face of a horrible situation. The law as interpreted by *Velpke* suggests that doing *nothing* in the face of a horrible situation is less punishable than trying to ameliorate it, however futile such actions seem in the face of greater horror.<sup>47</sup>

For example, there is an important body of mob violence cases setting standards of guilt for mobs that turned violent, resulting in the deaths of Allied soldiers; this retributive case law sets the standard for modern ICL applications of conspiracy. These standards, which offer very weak protections of individual rights, exist as valid international law available for use by contemporary tribunals. The advent of new bodies practicing and applying international criminal law has energized projects to collect war crimes trials materials in their entirety, which may only further develop these problematic standards.

### **Developing international criminal law**

Several ICTY cases have referenced World War II-era case law to explain and justify rules and decisions.<sup>48</sup> This chapter has shown how this received “case law” is derived from military and civilian courts, working with different rules of precedent, in different systems, and in a very particularized social environment. In any domestic system, such distinctions would be determinative in other courts’ recognition of the persuasive or precedential character of preceding judicial decisions. In using these cases to shape and pronounce international criminal law, the ICTY has reified these cases as it has found them.

Guénaël Mettraux (2008) has criticized the ICTY for “turn[ing] the customary [international law recognition] process on its head.” Where normally customary international law is determined “by induction based on an analysis of a sufficiently extensive and convincing state practice, and not by deduction based on preconceived ideas [regarding what the law should be],” the ICTY practice has frequently stated a rule first and then explained state practice in light of the rule. (Mettraux 2008; Swart 2010)

### **(III) Re-evaluating Nuremberg: IMT & Allied war crimes trials as historians**

The Nuremberg tribunals are credited with playing a central role in producing the history of the Nazi regime. This role is largely ascribed to the trial itself, where

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<sup>47</sup> Judge Kwon made a similar point in his dissent in *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin and Radivoje Miletić, Sentencing Judgment*, Case No. IT-05-88-T (June 10, 2010) (Judge Kwon dissenting).

<sup>48</sup> See, e.g., *Prosecutor v. Duško Tadić, Trial Chamber Judgment*, Case No. IT-94-1-T (May 7, 1997) (“*Tadić* Trial Chamber”); *Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić & Dragoljub Prcać*, IT-98-30/1-T (November 2, 2001) (“*Kvočka* Trial Chamber”); *Prosecutor v. Drago Josipović, Vladimir Šantić, Zoran Kupreskić, Mirjan Kupreskić, Vlatko Kupreskić & Dragan Papić*, Case No. IT-95-16-T, (January 14, 2000) (“*Kupreskić* Trial Chamber”) para 541 (“In many instances no less value [than decisions of international courts] may be given to decisions on international crimes delivered by national courts operating pursuant to the 1948 Genocide Convention, or the 1949 Geneva Convention of the 1977 Additional Protocols or similar international treaties.”)



the indictment and judgment told a story of Nazi conspiracy to commit aggression, war crimes and crimes against humanity. Since the day-to-day work of the trial was characterized by tedium and not closely followed by either the victorious or the vanquished peoples, the IMT's narrative power was largely concentrated in the opening statements and concluding judgment. Additionally, outside the question of spectacle, the IMT's findings of guilt for 21 defendants, along with the "guilt" of three Nazi organizations, form a central piece of its received narrative.

The IMT is also credited with amassing an important archive of historical documents. More than 100,000 German documents were reviewed in preparation for the trial, of which approximately 4,000 were entered as exhibits. Millions of feet of film were examined, together with 28,000 photographs, and 1,800 were used as trial exhibits. (Douglas 2001) The organized, bureaucratic nature of the Third Reich, combined with the necessity of showing connections between orders and acts in order to support the conspiracy charge, made this rich documentation central to the Nuremberg proceedings. This documentary trove, assembled for the purposes of prosecution, has become part of the narrative of the value of the Nuremberg Tribunals; the prosecution organized documents that might otherwise have been lost or destroyed, therefore making our knowledge of the Nazi war machine possible. These valuable documents form the foundation of our understanding of the Nazi regime and Nazi criminality, and without the Nuremberg process, it follows, they would not have been preserved and would not be available for study today.

The following section critically examines these contentions. Reviewing the literature, this section details some of the historical obfuscations attending the IMT and the trials that followed, describing how Allied prosecutorial policies distorted the popular narrative attending Nazi atrocities in World War II. This obfuscation, I argue, is based on structural obstacles that inhibit courts from effectively performing as historians. While there is no such thing as a neutral narrator, stories developed for judicial consumption exhibit several particularities that separate them from other kinds of "truth" that can be presented by historians, journalists, politicians, or even novelists. The benefit incurred from court organization of prosecutorial materials is often unequal to the prejudice created by asking "judicial truths" to function as historical truths.

#### The particular history told by the IMT

The IMT is today understood as a judicial response to the unprecedented inhumanity of the Nazi regime, a regime that made the destruction of a race of people one of its central aims. In the popular understanding, the IMT is understood as a judicial response to the Holocaust. This is absolutely incorrect, however. Our modern understanding of the Holocaust, including its role as the central element of the horrors of World War Two, developed decades after the Nuremberg trials. (Power 2000; Levy & Sznajder 2006)

Legal historians offer varying theories regarding the prosecution's decision to place the Nazi genocide of the Jews as a supporting fact in a case regarding Nazi criminality, and not as the centerpiece. As noted above, one argument holds that putting Nazi persecution of the Jews on trial was too risky an application of international law; international law was being significantly stretched in its application by the IMT, and the prosecution chose the least novel argument by focusing on the crime of aggression and basing its legality in the 1928 Kellogg-Briand treaty. Crimes against humanity, by contrast, represented an even further stretch for international

law, comprising a finding of *individual criminal liability* for a category of crimes that had had been specifically rejected as too vague by the U.S. following World War I. Law is inherently a conservative discipline, and prosecutors are charged with making a successful case; thus, a responsible prosecutor brings the case he can win, and aggressive warfare was understood as the most winnable case. (Douglas 2001)

Other legal historians, however, find more nefarious intentions behind the determinations of IMT prosecution. Donald Bloxham discusses the overt discomfort with Jewish causes and Jewish actors that obtained throughout the trials, where Jewish lawyers were deliberately given matters that did not touch upon the Jewish genocide.

Perhaps modern prejudices interfere in making an objective assessment of the choice before the prosecution in 1945. Crimes against peace (the crime of “waging aggressive war”) did not take root following the IMT, whereas “crimes against humanity” has flourished as a legal category. This itself points to the success enjoyed by those seeking to tell the story of the Holocaust. The Holocaust concerns itself with the fate of Jews at the hands of Nazi oppressors, and does not include other categories of people singled out for Nazi obliteration, such as Roma, the handicapped, or political prisoners.

But the demands of proving a legal (instead of historical or popular) case go deeper than technical questions of how evidence may be produced and accepted by the tribunal. As Douglas’s and Bloxham’s analyses show, the real distortion created by legal processes, the alteration that mandates that facts presented at trial be considered as “judicial truths” instead of simply as fact, consists in the way that legal stories must be crafted to respond to the contours of existing law in light of the probability of conviction. Justice Jackson’s indictment sought to win conviction against the defendants, and with this goal in mind, he selected the prosecutorial strategy that best equipped him to realize this end. As discussed above, such a strategy precluded hitching the prosecution case to individual responsibility for crimes against humanity; the combination of making *individuals responsible under international law* (which was novel and untried except in the very specific realm of piracy) for a crime that risked failure as “too undefined” (as was the case with the charge of “crimes against humanity” following World War I) was too great a risk to take. Jackson’s contorted case of “crimes against peace” and “conspiracy” was based on the surest *judicial* option available to him at law

Thus, while “crimes against humanity” was introduced at the IMT, and defended as good, pre-existing law, the prosecution did not rest its case on this legal outsider. Ultimately, 15 of the defendants indicted at Nuremberg were indicted on the charge of crimes against humanity: two of them, Julius Streicher and Baldur von Shirach, were convicted solely on this charge, and Streicher was identified by the IMT as a key player in the Final Solution. The IMT overlooked Göring’s role in the persecution of the Jews, however, as it was focused on demonstrating his guilt for crimes against peace. (Wittman 2005: 21)

Constrained by the institutional pressure to achieve conviction, bringing a case at law means trying to tell the *easiest* story (as conscribed by existing law), not necessarily the most central or significant story. Although the extent and particular focus of Nazi criminality against European Jewry was known at the war’s end, as noted above, the recognition of the Holocaust as a central event characterizing Nazi rule did not develop for another several decades. (Marrus 1998; Levy & Sznajder

2006; Power 2000) Ian Baruma (1994) locates the turning point in German acceptance of guilt as the broadcast of the American miniseries *Holocaust* in 1979. Samantha Power (2000) identifies the beginning of a new era with the film *Judgment at Nuremberg* in 1962. Regardless of what it has come to signify, the Tribunal at Nuremberg was not convened to recognize the wrongs of Nazi atrocities against mankind, specifically the Holocaust, but rather to punish the architects of Germany's "aggressive war" against the Allied powers (also known as the United Nations, from whence the UN derives its name). The chilling facts of the Holocaust emerged from camps and offices by way of the detailed records kept by Nazi administrators, but even as these records emerged, they continued to be used to prosecute aggressive warfare and war crimes visited upon Western soldiers. (Bloxxham 2001)

In his excellent study on the impact and reception of the trials following World War II, *Genocide on Trial* (2001), historian Donald Bloxxham argues that the IMT produced neither an accurate history of Nazi war crimes nor a reconciled German people. Bloxxham demonstrates that our armchair (mis)information about the Nazi war machine owes much to the trials that followed the war. For example, Bloxxham considers the six death camps run by the Nazis in World War II. Contrast the actual list of death camps (Auschwitz, Belzec, Chelmno, Maidanek, Sobibor, Treblinka, all located in Poland<sup>49</sup>) with camps that might come to mind in considering the question, such as Bergen-Belsen, Buchenwald, or Dachau. These latter camps were Nazi work camps, and were harsh, brutal, often deadly but potentially survivable places. By contrast, the potential for survival at death camps was very low. This historical reality has been obfuscated by Allied trials that focused on crimes against humanity visited upon Allied soldiers, in events largely occurring in Western Europe in Nazi work camps. Because death camps did not become the subjects of western judicial intervention (in as much as they were located in Poland and fell under Soviet control at the end of the war), the reality of the Nazi murder system was obscured. Bloxxham shows that the judicial attention paid by the Allies to work camps, largely prosecuting crimes against humanity visited upon Allied soldiers, served to obfuscate the "true" history of the Nazi war machine, which is fundamentally a history of camps designed to permit no survivors.

Additionally, there is a second fact of historical obfuscation to consider, namely the charges *not* brought by the IMT. The Allies sought to avoid triggering *tu quoque* ("you too") defenses, which were not admissible at the tribunal and which moreover threatened to muddy the waters of the Allied narrative. Thus crimes of which the Allied nations were also guilty were deleted from consideration. The Soviet massacre of thousands of Polish officers at Katyn in 1940, the Allied bombing of Dresden in 1944 with catastrophic civilian casualties – these were acts that the Allies did not want revisited or referenced at the IMT, and those wartime atrocities with too obvious an Allied mirror image (such as German bombing raids or Nazi aggression against Poland) were strategically omitted from the indictment. (Overy 2003)

There are also the less direct but still important historical distortions. Because we tell the story of the triumph of the rule of law at the IMT, we do not tell the story of JCS 1067 and U.S. attempts to create a "pastoral" German state, or the story of one of the most significant ethnic cleansings in recorded history, the transfer of roughly 10 million ethnic Germans out of neighboring countries under the terms of the Potsdam agreement. Perhaps these historical obfuscations are merely part and parcel

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<sup>49</sup> See <http://www.jewishvirtuallibrary.org/jsource/Holocaust/cclist.html> (accessed March 4, 2012).

of the adage that history is written by the victors. We can nevertheless see structural roots of the avoidance of these subjects in the legal structure barring *tu quoque* defenses, and an unwillingness to consider Allied crimes alongside, without negating, German crimes.

The examples discussed above document factual aspects of World War II that were distorted by IMT consideration. In the case of the Holocaust, organized response has altered the story told about Nazi war crimes to prioritize the genocidal nature of the regime and the particular Nazi goal of the elimination of European Jews. In the case of work and death camps, the history written by the IMT rests as the (misleading) basis for the modern Western narrative of World War II, further developed and encouraged by movies like *Life is Beautiful* and *Schindler's List*. While these films reference the horror and death of Nazi concentration camps, they reiterate a story of possible survival. As Bloxham discusses, this is a story that obtained only in certain, Western, concentration camps. Finally, the determination not to consider *certain kinds of crimes* because they might reference Allied crimes, and the absence of Allied crimes themselves from the IMT, is a considerable distortion of actual history.

In light of the problematic obfuscations of history, the claim that Nuremberg process preserved some important documents seems hollow. Preservation and availability of documents is surely valuable and important. And given the post-war chaos and level of destruction, it is possibly even true that without the focus and effort connected to Nuremberg, these documents would have been lost or destroyed. Of course, it is also possible that the threat of a tribunal, or retribution based on documentary evidence, results in the concerted destruction of documents, as was the case in Japan. Two weeks elapsed between Japanese surrender and Allied occupation, and Japan's skies were reportedly black with smoke from the mass documentary burnings.<sup>50</sup> Regardless, even to the degree that the IMT has inarguably amassed a valuable historical archive, this is perhaps small consolation given the larger historical myths, obfuscations, and silences which emerged from the Nuremberg process.

#### **(IV) Transitional justice: reconciliation and the power of an “official version”**

Unified modern Germany, now an economic and cultural pillar of the European Union and a champion of democracy and human rights, is a transitional justice “poster child,” a stellar exemplar of the potential for rule of law processes to foster democratic structures, respect for human rights, and unified narratives of the past. The IMT and Allied postwar occupation oversaw the transformation from the horrifying totalitarianism of the Nazi regime to a model democracy. Though the term “transitional justice” was not in use at the time, the historic process of the IMT and other Allied trials has become associated with German democratic success as transitional justice mechanisms, which in turn has transformed the IMT and its related processes into models for the potential of transitional justice trial mechanisms. The problem is that this perception skips several decades of data that belie the argument that the IMT and its related processes should be held responsible for the German democratic *Rechtstat*.

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<sup>50</sup> This is noted in the fascinating “conversations” between Antonio Cassese and Bert V. Röling, the Dutch appointee to the IMT Tokyo, which Cassese later published (with Röling 1993).

Daniel Goldhagen's 1996 book *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* was a bestseller in several markets, including Germany's. Setting his argument against Christopher Browning's, *Ordinary Men: Police Battalion 101 and the Final Solution in Poland* (in which Browning explores peer pressure and the human need to belong in a group as explanations for Einsatzgruppen atrocities), Goldhagen argues that German anti-Semitism was the driving rationale behind the Holocaust, and that only Germans could have perpetrated the Holocaust. Goldhagen does not engage with other prominent Holocaust scholars, such as Raul Hilberg (who set out a structuralist explanation of the Holocaust as a product of bureaucratic inertia) or Zygmunt Bauman (who argued that the Holocaust is a prime realization of Weberian bureaucratic rationality). Instead, Goldhagen argues that Nazi actors faced neither threat of death nor promise of promotion as regards their murderous work, and that only a hatred specific to Jews (which is itself specific to Germans) explains their actions.

In addition to its problematic tautological aspects, Goldhagen's work is challenged in its own terms by scholarship such as Jan Gross's *Neighbors* (2001), which discusses the fate of Jews in a Polish village in an attempt to demonstrate the depth of Polish anti-Semitism. From a public policy perspective, Goldhagen's work is troubling: arguing that the German people, collectively, are singularly, rabidly inhuman looks too much like the ideology underlying the Nazi project itself.<sup>51</sup> For our purpose, though, what is most striking about Goldhagen's work is the popular reception it enjoyed in Germany. Is there any more striking demonstration of the totality of transitional justice than German eagerness to read how deeply evil they have been? The German public's hunger for Goldhagen's theory indicates the scale at which a unified narrative obtains in Germany. Such a reception indicates the success of German re-engagement with the West, a project that sets the model for other transitional justice projects.

The IMT and its related processes are popularly understood as laying the foundation for modern Germany. At one level, this story has become true through its own mythology: the IMT narrative consists of Allied powers asserting rule of law solutions over a vanquished Germany; indeed, modern Germany tells this same story. Yet data points along a historical axis beginning with the end of the war indicate a much more varied narrative among Germans about Germany, the war, the Occupation, and German guilt. In other words, the Western narrative – wherein the Allies/West were committed to the rule of law above vengeance or retribution – has stayed constant and the German narrative regarding Germany's place in the West has altered so as to become incorporated with this Western narrative.

This section critically considers this unified narrative, arguing that such a narrative occurred in spite of, not because of, the work done by the IMT and other Allied trials. The story of German reconciliation should be understood as the exception and not the norm, since it is too heavily tied to its particularities to serve as a model for the potential of tribunals to contribute to transitional justice. (Sa'Adah 1998) The reason that the IMT (though interestingly not other international war crimes tribunals such as the IMT at Tokyo, discussed briefly below) plays a central part of this narrative today is not because of the social work it did in Germany, but is

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<sup>51</sup> In fact, Goldhagen's work even explicitly goes this far, urging readers not to mistake Germans for "us... normal American youth." (Goldhagen 1996: 27)

rather primarily due to the Allies' own investment in the self-representations contained in the IMT and its related processes.

### **Germany immediately following World War II**

Transitional justice is built on the “desire to reconstitute a political community,” which was the precise question at issue for the Allied powers that overtook control of partitioned Germany at the end of the war. Opinions within and between Allied governments differed as to the extent to which ordinary Germans should be made to feel the weight and horror of the war, and as to what that burden should look like. If some elements of the Allied power structure favored trials because of their capacity to individualize guilt, other elements, as seen earlier in this chapter, favored strategies that recognized (and harshly punished) German collective responsibility.

As part of the “re-education” effort that was at the heart of the denazification of the Allied occupation of Germany, Germans were to be made aware of the full scope of the horrors of World War II and their collective responsibility therefor. To that end, numerous forms of re-education propaganda were created. In the immediate aftermath of the war, the US. Army’s “Psychological Warfare Branch” launched a campaign to familiarize the German people with the atrocities committed by Nazi Germany. Morris Janowitz, writing in the *American Journal of Sociology* about his work as an intelligence officer in the Psychological Warfare Branch, states that “the development of a sense of collective responsibility was considered a prerequisite to any long-term education of the German people.” (Janowitz 1946: 141) Films such as the concentration camp documentary *Die Todesmühlen* were screened throughout Germany to acquaint Germans with the truth of concentration camps. Propaganda posters were hung showing piles of human remains with large captions reading, “Diese Schandtaten: Eure Schuld!” (These Atrocities: Your Fault!) The propaganda effort was extensive, utilizing radio and German press.

Janowitz and his colleagues measured the impact on a cross-section of 100 Germans one month into the propaganda campaign, in June 1945. They concluded that before the end of the war there was “good evidence that the German people were... ignorant of the details of concentration camps in Germany,” finding that psychological repression and the desire to avoid learning the unacceptable, together with the totalitarian control of information under Nazi rule, likely shielded most Germans from learning about the systematic extermination occurring in concentration camps. (Janowitz 1946: 142) Thus the Allied campaign to acquaint Germans with the facts of German atrocities presented information that had not been known with precision or certitude by a majority of the German populace before the end of the war.

Janowitz found that while a majority of German respondents believed the Allied propaganda campaign – i.e., they believed the veracity of the facts presented by the Allies regarding German atrocities committed in the war – this did not result in admissions of guilt.<sup>52</sup> When asked who bore responsibility for atrocities, individual Germans overwhelmingly pointed to the Nazi party or Nazi leaders. Respondents

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<sup>52</sup> Interesting, while Janowitz’s respondents largely did not resist Allied propaganda, respondents still demonstrated only a passing familiarity with facts. For example, most respondents listed the number of people killed in concentration camps in the tens of thousands, only a few spoke of one hundred thousand or more, and “[o]ne or two Social Democrats were able to conjure up the phrase “millions.” (Janowitz 1946: 143)

argued that the ruthlessness of the Nazi regime prevented opposition, and that individuals were powerless against it, or that Nazi atrocities were inevitable consequences of war. Although Janowitz found one “gap in the protective wall which Germans have erected to keep out all feeling of guilt about atrocities” in the question of the treatment of Jews, a facet of Nazi rule he characterized as “a fact that even the most simple-minded of Germans could not hide from his own consciousness,” (1946: 145) even here, an awareness of Jewish persecution did not lead to a sense of individual responsibility. Janowitz cites as an example the absence of German assistance in rehabilitating concentration camp victims in the aftermath of the war; those Germans living in the vicinity of concentration camps assisted victims in the camps only after having been ordered by military commanders to do so. Ultimately, Janowitz’s survey found that exposure to the facts of German atrocity during the war did not increase political participation among the population.

Where perhaps Janowitz’s immediate postwar data can be explained by an immediate post-war numbness, an absence of information, or even the daily obstacles to survival that might have usurped attention or energy, the 1955 survey examined by Beschloss (2002) is not subject to any similar line of explication. Beschloss argues that the survey shows an absence of guilt among Germans.<sup>53</sup> In the survey, Germans reported that the prewar period was the best time in recent history. Of Hitler and the Nazi party, the survey indicated that a majority found they had good ideas that were poorly executed. (Beschloss 2002: 279) Donald Bloxham (2001: 138) similarly observed that propaganda material, such as photos from concentration camps, often caused distrust, disgust, or even angry emotion reactions, unless such materials suggested German suffering.

In fact, as discussed earlier in the chapter, “transitional justice” in Germany in the decade following the war consisted of an early, Allied effort that was devastatingly punitive, followed by a warming to Germany as a potential ally in the emerging Cold War, followed by German leadership under Adenauer that embraced a policy of “leaving the past behind.” Throughout the 1950s, Germany, left to its own devices as regards the “justice” elements of its transition, conducted a few minor trials and otherwise generally released most of the defendants that had been jailed following the war. The 1962 Frankfurter trial, hastily assembled in part in response to Israel’s capture of Adolf Eichmann in Argentina in 1960, resulted in the acquittal of most of the defendants. The Eichmann trial itself provided a shocking window into the quiet, undisturbed lives some former Nazis were living, even (and especially) in Germany. (Arendt 2010)

It was during the 1960s and 1970s that the Western narrative of German responsibility began to develop in Germany. (Power 2000; Herf 1997) Levy and Sznajder (2006: 64) argue that selective memory was necessary to construct myths that would serve the budding democracy. Germans opposed the Allied project of “postwar judicial reckoning or frank public memory” (Herf 1997) and the response to the IMT and related trials following the war was negative. Due to the political problem of “victor’s justice,” it was not possible for the Allied initiatives to be perceived as impartial. As one observer noted, “The trials were characterized by an intermingling of military, political and purely criminal events in a manner which

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<sup>53</sup> *But see* Gordon 1984 (who argues that difficult phrasing and inconsistent results between survey questions caution against drawing broad conclusions.)

rendered it virtually impossible for an unprejudiced observer to obtain the facts needed to unravel the tangle of evidence.” (Rückerl 1979)<sup>54</sup>

Anne Sa’adah (1998; 2006) cautions against using the German example as a paradigmatic in the study of transitional justice.<sup>55</sup> She considers the political and ideological circumstances of post-war Germany as distinctive and unlikely to be repeated. First, a central trope of transitional justice mechanisms is moderating the interaction between victims and perpetrators; victims may want individualized vengeance and/or justice, neither of which is necessarily directly served through the institution of rule of law state apparatuses. In the case of Germany, there was no balance to be made between perpetrators and victims because the victims were dead or gone. This freed the political climate to focus on rule of law initiatives that institutionalized democratic norms. Second, Germany’s defeat obliterated the Nazi ideology, giving the Allied victory a finality uncommon to many modern conflicts. Considering Germany next to the Former Yugoslavia, for example, where 20 years after the war Bosnian Serbs are still vocally calling for secession and defendants before the ICTY often enjoy a “hero” status among certain Balkan populations,<sup>56</sup> demonstrations the salience of this categorization. While it is certainly inaccurate to claim that postwar Germany enjoyed a political restart in 1945, it is also certain that German hostilities were far more finalized than those in other contexts, and that such finalization carried important significance for Germany’s transitional justice project, starting at the level of state ideology. Finally, even given the particularities of the German situation, the German response to World War II’s atrocities was to “put them behind us.”

### **The emergence of the modern understanding of Nuremberg**

The question of how an ambivalent and victimized populace (post-war Germany) was transformed into the modern German state, accepting full responsibility for war atrocity and seeking to downplay any historical revisionism that would also include Allied atrocities (such as the bombing of Dresden), is a complex historical tapestry involving changes in U.S. policy toward Germany (including the need to count it as an ally in the face of growing Soviet strength) as well as the success of the project of European unification.

Samantha Power (2000) effectively traces the development of the Nuremberg Tribunals’ position in contemporary understandings of World War II, noting that the genocidal aspects of the Nazi war machine, and the Holocaust itself, while illuminated during the investigations accompanying the Nuremberg tribunals, actually only entered the mainstream a full generation after World War II, in the 1960s. Power explores the discomfort, and in some cases simple anti-Semitism, surrounding

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<sup>54</sup> Quoted in Wittman 2005: 25 note 25.

<sup>55</sup> Sa’Adah (2006: 305) states: “[T]he postwar German case is both highly exceptional and importantly paradigmatic. West Germany was exceptional because a set of local circumstances promoted successful and fairly rapid institution building – the necessary condition for democratization and also the one most difficult to achieve.... The case was paradigmatic in the ambiguities that attended its efforts to establish justice and moral clarity while winning popular support for a democratic regime. Its “happy ending” notwithstanding, the West German story should be viewed as a cautionary tale, not as a demonstration that, even under what are (incorrectly) characterized as the worst possible circumstances, democracy can be produced by external intervention: German success in the institutional realm was the result of specific and probably nonreplicable circumstances.”

<sup>56</sup> Narratives in the Former Yugoslavia, including the ICTY’s work in constructing “heroes” out of those they would prosecute for war crimes, are discussed in Chapter Five.



the acceptance of particular Jewish victimhood in World War II, recounting how mounting evidence of particular Jewish suffering by Nazi perpetrators was buried, ignored and generally set aside by prosecutors unwilling to tackle the racial aspects of Nazi atrocity. As Power describes, it was only with the film *Judgment at Nuremberg* that the Holocaust became a topic safe for mainstream recognition.

The controlling narrative regarding Nuremberg is thus one in which the application of judicial processes (with their accompanying tropes of objectivity and neutrality) brought the benefit of healing nations not only by punishing (and removing) their criminal leaders, but also by setting an example of how democratic, transparent, modern, just societies approach the problem of social chasms and criminality. Douglas (2001: 41) argues:

The trial was understood as an exercise in the reconstitution of the law, an act staged not simply to punish extreme crimes but to demonstrate visibly the power of the law to submit the most horrific outrages to its sober ministrations. In this regard, the trial was to serve as a spectacle of legality, making visible both the crimes of the German and the sweeping neutral authority of the rule of law.

Thus, in modern parlance, the Nuremberg Trials are synonymous with the idea of instituting objectivity and neutrality in the place of vengeance, regardless of how deserved that vengeance may be.

In this way, Nuremberg exists as the prototype of reconciliation. This is not in the sense that that court made it possible for Jews and other victims of Nazi persecution to “forgive” their persecutors; indeed, as regards the Holocaust, the suggestion of “forgiveness” seems perverse, or at the very least, given the collective harm represented by genocide, impossible for any individual. Rather, “reconciliation” in this context constitutes German acceptance of German guilt,<sup>57</sup> and German acceptance of German guilt has been the necessary condition for German reentry into the international community and moving forward together as a community of nations.

The Allied narrative of World War II is a story of good versus evil, where Allied good can centrally be understood as commitment to rule of law. Overy (2003: 26-27) notes:

The political purpose of the trials was also evident in the efforts to use them as part of a more general program of re-education in Germany, and, by implication, in the rest of Europe.... The assumption of Western moral superiority implicit in the liberal values expressed in the Indictment was accepted as a necessary underpinning for the construction of a new moral and political order.

While the edges of this narrative have been frayed in the past few decades by critical scholarly considerations (Bloxham 2001), the story of Nuremberg as a didactic institution remains the mainstream narrative surrounding that tribunal. (Marrus 1997) Other more problematic Allied war crimes tribunals that less convincingly evince this narrative have fallen away. We now turn briefly to a consideration of one such Tribunal, the IMT at Tokyo.

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<sup>57</sup> Chapter Six considers reconciliation as a personal, versus political, act.

### **Providing a “control” case for the international criminal justice template: the IMT at Tokyo.**

Unlike the IMT at Nuremberg, which has served as a template for the development of international criminal law, the International Military Tribunal for the Far East (IMTFE or Tokyo Trial) has been largely discarded as a source of international law and as a jurisprudential model. The IMTFE’s clumsy mixture of politics and law (from the decision not to try Emperor Hirohito to the U.S. determination not to raise issues of Japanese germ warfare), the moral gray zone of a war crimes trial that would not touch the U.S. decision to use atomic bombs on a civilian population, and the several concurrent and dissenting opinions among the international panel of judges serving at the Tribunal have all added to the IMTFE’s decades-long shadow position in history. Referenced only very sparingly in international criminal law decisions and legal guidelines,<sup>58</sup> the IMTFE is an ugly stepsister in the family of international criminal law institutions.

Unlike the IMT Nuremberg, a tribunal comprised of four justices from the four victorious nations,<sup>59</sup> the IMTFE was a substantially international tribunal. Eleven justices served on the tribunal all from different nations. U.S. General Douglas MacArthur, Supreme Commander of the Allied Forces and head of the Allied administration of post-war Japan, appointed the American Judge William Webb, along with the chief prosecutor, the American Joseph Keenan.<sup>60</sup> MacArthur also issued the Declaration establishing the IMTFE as well as its rules of procedure.

The Trial began May 3, 1946 and lasted two and a half years. The IMTFE recognized “categories” of war criminals, and concerned itself only with what it called “Category A” defendants, those who stood accused of “crimes against peace” (i.e. the waging of aggressive war). Those defendants charged with crimes against peace were also eligible to stand trial for war crimes and crimes against humanity at the IMTFE. Category “B” and “C” offenders not charged with crimes against peace could not stand trial before the IMTFE. There were 80 “Category A” accused jailed by the Allies.

Of the 28 defendants appearing before the IMTFE, seven received death sentences, 16 life sentences (13 of whom were released between 1954-1956),<sup>61</sup> two served jail terms, two died during trial, and one was found unfit for trial. Unlike its sister tribunal at Nuremberg, the IMTFE did not put criminal organizations on trial. Again unlike the IMT Nuremberg, the final verdict was not unanimous. Eight justices joined the majority (with Justices Webb and Jaranilla writing separate opinions) and three contested the judgment through written dissents (Justices Pal, Bernard and Röling).

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<sup>58</sup> Totani (2008: 4) asserts that the IMTFE today provides “useful precedents” and that “[t]he very trial that has been thoroughly discredited in the eyes of the Japanese public ... is gaining international recognition as an important precursor of international prosecutorial efforts today.” The other excellent aspects of Totani’s monograph notwithstanding, I believe the meager and unenthusiastic references to the IMTFE in contemporary international criminal jurisprudence do not bear this assertion out.

<sup>59</sup> This tribunal claimed the support, as Jackson noted in his opening statement, of an additional 17 nations. This small number does not bespeak overwhelming global support. “This inquest represents the practical effort of four of the most mighty of nations, with the support of 17 more.” IMT Nuremberg Opening Statement November 21, 1945.

<sup>60</sup> Ten associate prosecutors were provided by the assisting nations as well.

<sup>61</sup> In this respect, the IMTFE followed the IMT Nuremberg successor trials.

Of the three dissents, Pal's is the most significant from a transitional justice/unified narrative point of view. Röling (1993) reports that Pal arrived at the IMTFE determined to dissent from a majority guilty verdict, and that this position made it impossible for the judges to produce a unanimous judgment. In an opinion numbering more than 1,200 pages, Pal argued for the acquittal of all defendants.<sup>62</sup> He did not entirely whitewash Japanese war crimes, but instead generally resisted Western categorizations of Japan as the evil actor. Pal, an Indian national, vehemently opposed Western colonialism, and used his dissent to advance an "Asia for Asians" narrative, arguing that pre-war Japan had only done what Western powers had typically done in Asia – which was to colonize, sometimes brutally – but that Japan, unlike Western nations, had more of a claim to moral right for such colonialization, since they were Asian, like their subjects.

It was illegal to distribute the content of Pal's dissent during the U.S. occupation, but in 1952 his dissent was brought out in publication. Pal remained a hero in Japan for the remainder of his life; there is a monument dedicated to him at the Yasakuni Shrine in Tokyo.<sup>63</sup> Moreover, the ideas he expressed continue to enjoy a place in Japanese political life. For example, there has been ongoing political strife regarding Japanese depictions – particularly in textbooks – of Japanese acts at Nanking in China (the "rape of Nanking"), and of the Japanese system of sexual slavery ("comfort women").<sup>64</sup> In 1993, in response to emerging victims' narratives and demands for a response regarding the "comfort women" system and Japan's role in these atrocities, the Japanese government issued an apology known as the "Kono" statement.<sup>65</sup>

In 2006, however, conservative Prime Minister Abe seemingly rescinded the state's apology, demanding an "objective" look at the "comfort women" issue.<sup>66</sup> In March 2007, Prime Minister Abe stated that, "The material discovered by the government contained no documentation that directly indicated the so-called coercive recruitment by the military or the authorities." These remarks drew strong international criticism, and the international response included a U.S. congressional resolution recognizing Japan's responsibility for the "comfort women" system.<sup>67</sup>

While Japan is also a successful modern democracy, it does not have the same singularity of narrative regarding World War II that Germans and other Western nations do. Disjointed narratives – surrounding both history and territory – continue to plague Sino-Japanese relations. The IMTFE was distinct from the IMT at Nuremberg in many ways, and did not produce a unanimous verdict. Yet it was nevertheless an ICT designed to shepherd a democratic transition, and its flaws, regarded through the lens of the *international criminal justice template*, are plain to see, so much so that it

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<sup>62</sup> Röling also reports that Pal stopped attending court sessions, and missed more than one-third of the courtroom proceedings (which of course would have been necessary in order to write a 1,200-page dissent in the time available.) (Cassese and Röling 1993)

<sup>63</sup> Photo available at <http://www.flickr.com/photos/dgunn/3224087403/> (accessed July 16, 2013).

<sup>64</sup> The Japanese government had a policy of "recruiting" women to provide sexual services to Japanese soldiers. This government practice was widespread and impacted populations throughout the Far East. Estimates of how many women were imprisoned in the "comfort women" system are contentious and entirely theoretical; figures ranging from 30,000 – 410,000 are cited.

<sup>65</sup> August 4, 1993, "Statement by the Chief Cabinet Secretary Yohei Kono on the Result of the Study on the Issue of "Comfort Women," available at <http://www.mofa.go.jp/policy/women/fund/state9308.html> (accessed February 2, 2013).

<sup>66</sup> "Abe urges 'objective' look at sex slave apology, draws flak" *The Japan Times*, October 27, 2006.

<sup>67</sup> H. Res. 121 July 30, 2007. In the House of Representatives, U. S., 110th Congress.

has been all but dismissed as international legal precedent, and is understood to be fatally flawed as a rule of law institution. The seminal English language monograph regarding the IMTFE is Richard Minear's *Victor's Justice: The Tokyo War Crimes Tribunal* (1971); the title demonstrates his total condemnation of the institution, and the work remains the prevailing reference point for Western considerations of the IMTFE.<sup>68</sup>

## Conclusion

This chapter has shown how the IMT at Nuremberg laid the foundation for the *international criminal justice template*, and that this template is flawed as relates to the IMT at Nuremberg's practice and achievements. The IMT at Nuremberg enjoys a legacy that stands for the value that ICTs can bring towards producing good history and good law, both of which are thought to assist the key goal of transitional justice. Transitional justice, in turn, is rooted in didactic legal and political processes, through which powerful, "knowing" countries provide aid to countries unable to satisfactorily reconstruct themselves without such aid. This perspective is underwritten by a moral universalism where "good" and "evil" are easily discernable, and where "good" draws its entitlement to act based on "goodness" itself.<sup>69</sup> All this forms part of the inheritance of ICTs following in the shadow of the IMT at Nuremberg, owing to its received *international criminal justice template*.

The IMT is received as a seminal source of international criminal law. Prior to the IMT, international law was generally understood as the law between states.<sup>70</sup> The IMT advanced the capacity for international law to vest at the level of the individual. Prior to the IMT, there were only very particularized instances of international law applying to individuals. For example, international law historically addressed piracy, permitting states to try the citizens of other sovereign states for piracy. Pirates, of course, present a very particularized problem, operating outside the territorial (sailing the high seas) and legal (as national outlaws) boundaries of any national sovereignty (leaving aside those instances where pirates operated as "brigands" and thus in the service of some sovereign power). Thus it is widely accepted that the legal construct of *individual criminal responsibility* for violations of international law came into being at Nuremberg. These ideas were further developed in the Geneva Conventions of 1949 – essentially a law of war – that sought to implicate individuals in their wartime conduct. Wars are declared by states but fought by individuals, and it is individuals that commit atrocities. By insisting that a law higher than military hierarchy obtains, the IMT generated the ideology of addressing wartime atrocity at the level of the individual. Such a law, alternately termed international criminal law, the law of war, or humanitarian law, while reputedly based on "acts which have been regarded as criminal since the time of Cain and have been so written in every civilized

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<sup>68</sup> Minear (1971: 180) condemns the IMTFE thusly: "We have found its foundation in international law to be shaky. We have seen that its process was seriously flawed. We have examined the verdict's inadequacy as history."

<sup>69</sup> See, e.g., Walzer 1977 (who argues that "there was no working, moral alternative to the IMTFE setup and that its critics were more concerned with minutiae and procedural matters than with offenses against humanity") quoted in Maga 2001: 121.

<sup>70</sup> There are some notable exceptions to this general rule, discussed in detail in Gary Bass's (2000) excellent historical consideration of war crimes trials that preceded the IMT, such as the trial of Napoleon Bonaparte, and the failed trials in Leipzig following World War I.

code,”<sup>71</sup> was first articulated with specificity at the IMT and in the trials that followed.

The highly bureaucratic nature of Nazi rule, combined with an ideological assurance of the value of the Nazi project, led to a regime that meticulously documented its actions, aims, and orders. At the end of the war, Nazi records were assembled for the purpose of Allied prosecution. These documents, organized, reviewed, and catalogued, served not only as bases for prosecutions, but also as publicly available historical materials. The prosecutions at Nuremberg and afterwards are credited both with bringing the historical facts of Nazi rule to light as well as with making those archival materials available to others for further study. The IMT is credited as an important historical archive, a primary source of knowledge regarding the Nazi state and its actions during the war.

Finally, the IMT is understood as a central element of the political apparatus that articulated the horrible facts of the Second World War so as to make them undeniable for the German populace.<sup>72</sup> The IMT, *in its example of a trial*, which then encouraged further trials and further historical examinations, is understood to be at the root of the modern German *Rechtstat*, an exemplary Western market democracy. Most fundamentally, the Western narrative of World War II is also the German narrative of World War II and without this shared narrative, the grand European project of the past 50 years, the European Union, would not have been possible.

In 1993 Istvan Deak published a review of Telford Taylor’s *The Anatomy of the Nuremberg Trials: A Personal Memoir* in the *New York Review of Books*. In his review, Deak argued that the Germany was liberated by the Allies, instead of the Germans themselves rising up to overthrow their corrupt and doomed government, largely because of Allied policies of unconditional surrender and collective guilt. Had Germany not been facing total defeat – a defeat that made the survival of the German people uncertain – the German resistance might have gained more ground and successfully liberated Germany from Hitler himself. Because these policies placed insurmountable obstacles in the way of the German resistance movement, Deak argues that the Allies themselves are partially responsible for the failure of the German resistance movement to take control of the German government.

Deak’s review produced vitriolic response. As arguments against his thesis, which was that German courts could hardly have done a much worse job than the Allies did at the IMT, readers cited *inter alia* the poor track record of postwar German war crimes trials, the saturation of the German judiciary by prior Nazis, and the “apologist” aspects of Adenauer’s “put the past behind us.” Historical fact notwithstanding, in a follow-up article responding to comments, Deak requests that we consider what Adenauer might have done, “had he come to power as a former member of the anti-Hitler movement and not as the choice of the Americans, and had his main task been to create a new Germany and not to prepare the country for the anti-Communist crusade.” (Deak 1994) This is, in fact, the historical question that we

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<sup>71</sup> Robert H. Jackson, Report to the President on Atrocities and War Crimes, June 7, 1945, available at [http://avalon.law.yale.edu/imt/imt\\_jack01.asp](http://avalon.law.yale.edu/imt/imt_jack01.asp) (accessed November 11, 2012) quoted in Davis 2008: 12.

<sup>72</sup> Whether this narrative functioned to acknowledge collective guilt (by showing the scale of atrocity and insisting that it was not possible for any individual to credibly claim that s/he did not know what was happening), or to avoid collective responsibility (by finding certain individuals criminally responsible, and further separating “Nazis” from “Germans”), is the subject of debate. (Osiel 1998)

would be wise to consider when setting contemporary policy, and precisely the question that reflexive adherence to the Nuremberg myth does not invite us to ask.

In this chapter, we have examined the substance, practice, and reception of the IMT and subsequent Allied war crimes trials, and have demonstrated deviance between the myth and the reality in three central aspects of the *international transitional justice template*. The following chapters focus on the ICTY and its capacity in each template category.

## Chapter 2: Situating the ICTY

*“The Tribunal has laid the foundations for what is now the accepted norm for conflict resolution and post-conflict development across the globe, specifically that leaders suspected of mass crimes will face justice. The Tribunal has proved that efficient and transparent international justice is possible.*

*The Tribunal has contributed to an indisputable historical record, combating denial and helping communities come to terms with their recent history. Crimes across the region can no longer be denied. For example, it has been proven beyond reasonable doubt that the mass murder at Srebrenica was genocide.”*

About the ICTY” <http://www.icty.org/sections/AbouttheICTY> (accessed June 13, 2013).



Map of Yugoslavia August 1990, National Geographic Vol. 178, No. 2, page 105 (1990).

## Introduction

At the turn of the millennium, Gary Bass (2000: 208) summarized the institutional story of the ICTY as a “largely dispiriting one.”<sup>1</sup> More than a decade later, the ICTY is understood as a paradigm-setting institution, with a legacy that includes trying former heads of state, overseeing the initiation of war crimes courts in Bosnia-Herzegovina (abbreviated BiH and also frequently referred to simply as Bosnia) and Serbia,<sup>2</sup> and shadowing Croatia’s entry into the European Union.<sup>3</sup> This represents a shift in order of magnitude for the Tribunal as an institution. In the second decade of the ICTY’s existence, recalcitrant, uncooperative Balkan powers have come to heel, participating in the arrest and extradition of the ICTY’s most-wanted. After nearly four years on the run, the Croatian “war hero” Ante Gotovina<sup>4</sup> was arrested in the Canary Islands in December 2005.<sup>5</sup> Serbia extradited not only its former president Slobodan Milošević (2001), but also wanted Bosnian Serb war criminals Radovan Karadžić (2008) and Ratko Mladić (2011), both of whom were

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<sup>1</sup>Bass (2000: 207) treats the history of war crimes prosecutions as a laudatory exploration of the liberal ideology of rule of law in place of vengeance. Nevertheless, his summary assessment of the work of the ICTY held:

[T]he establishment of The Hague tribunal was an act of tokenism by the world community, which was largely unwilling to intervene in ex-Yugoslavia but did not mind creating an institution that would give the appearance of moral concern. The world would prosecute the crimes that it would not prevent. The Tribunal was built to flounder. At first, it did not disappoint. It staggered from one crisis to another: lack of funding; lack of intelligence cooperation from the great powers; lack of staff; threats of amnesties; inability to do investigations; inability to deter war criminals as the wars raged on in Bosnia; and, after the 1995 Dayton accords brought peace and sixty thousand NATO soldiers to Bosnia, a refusal by NATO to arrest the suspects indicted by the tribunal.

<sup>2</sup> Court of Bosnia-Herzegovina, information available at <http://www.sudbih.gov.ba> (accessed June 10, 2013); Special Chambers for War Crimes and Organized Crimes, information available at [http://www.tuzilastvorz.org.rs/html\\_trz/pocetna\\_cir.htm](http://www.tuzilastvorz.org.rs/html_trz/pocetna_cir.htm) (accessed June 10, 2013). *See also* the ICTY’s website regarding outreach and the development of local judiciaries, <http://www.icty.org/sid/10462> (accessed June 10, 2013).

<sup>3</sup> Croatia is scheduled to join the European Union (EU) in July 2013. The ICTY has taken an active role in Balkan accession to the EU by issuing opinions regarding state cooperation with the ICTY. In 2005, for example, Croatian non-compliance with ICTY demands caused the EU to postpone accession processes. This is discussed further below, and in Chapter Five.

<sup>4</sup> Though Croatia maintained it had no knowledge of Gotovina’s whereabouts, when he was captured in the Canary Islands he was traveling on a Croatian-issued passport, under the pseudonym “Hristian Horvat” (“Christian Croat”). It is of course possible that the passport was forged and not issued by Croatian authorities, although the combination of the Croatian passport and the choice of such a nationalist name suggests otherwise to this author. On November 16, 2012, in a stunning jurisprudential reversal, the ICTY Appeals Chamber acquitted Gotovina and his co-defendant Markač (a third co-defendant had been earlier acquitted at trial). *Prosecutor v. Ante Gotovina & Mladen Markač, Appeals Chamber Judgment*, IT-06-90 (November 16, 2012) (“*Gotovina Appeals Chamber*”). This is discussed in greater detail in Chapter Four.

<sup>5</sup> BBC News “Croatian fugitive general seized,” December 5, 2005. <http://news.bbc.co.uk/2/hi/europe/4510122.stm> (accessed May 24, 2013).



hiding in Serbia under assumed identities.<sup>6</sup> Gone are the days when the ICTY posted flyers with pictures of its “most wanted” (Appendix B) and rented local billboards to champion its cause. Once the question of “impunity by default”<sup>7</sup> loomed over the work of the Tribunal, as the UN discussed closing the ICTY even as Karadžić, Mladić, Gotovina and other fugitives remained at large.<sup>8</sup> Now, however, the Tribunal asserts, not incorrectly, that it has “irreversibly changed the landscape of international humanitarian law.”<sup>9</sup>

The importance and centrality of the ICTY as an international institution has been cemented by the creation of the International Criminal Court (ICC). The Rome Statute, the treaty constructing the ICC, was concluded in 1998 and included a provision permitting the ICC to come into existence upon receipt of the signature and ratification of 60 countries.<sup>10</sup> This quorum was achieved in only four years, an achievement which surprised most observers.<sup>11</sup> With the ICC’s founding in 2002, and its first verdict in 2012, international criminal law (ICL) cannot be presented as any *ad hoc* fad; regardless of whether history judges it a success, the concept of individual liability for breaches of international criminal law is an idea that is here to stay. And where ICL once existed solely in Nuremberg’s<sup>12</sup> shadow, the field is now dominated by the work of the ICTY.<sup>13</sup>

This chapter is designed to provide the necessary background for the dissertation’s application of the *international criminal justice template* to the case study of the ICTY. This background is threefold. First, this chapter sets out a brief survey of the literatures and arguments with which this dissertation is in conversation. This interdisciplinary evaluation of the ICTY as a transitional justice mechanism uses the law and society question of court capacity to re-theorize the ICTY; each of these

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<sup>6</sup> These indictees were extradited as soon as they were apprehended (Karadžić in July 2008 and Mladić in May 2011); both had spent more than a decade in hiding.

<sup>7</sup> Press Release SC/8409 Security Council 5199th Meeting (AM). (ICTY President Theodore Meron addressed the Tribunal, arguing for an extension of the working mandate, saying that the ICTY “would not have fulfilled its historic mission — and it would not close its doors” without Karadžić, Mladić, and Gotovina in The Hague.)

<sup>8</sup> The UN Security Council set 2004 as the date by which all indictments should be issued and 2008 as the deadline to complete all work. (U.N. Resolution 1503, S/res/1503 (2003)) The indictment deadline was met, but the closure date was extended to July 2013, when the Residual Mechanism will replace the ICTY in order to complete the final trials and appeals. (U.N. Resolution 1534, S/res/1534 (2004) and following completion strategy reports, available at <http://www.icty.org/sid/10016> (accessed June 13, 2013)).

<sup>9</sup> “About the ICTY” <http://www.icty.org/sections/AbouttheICTY> (accessed June 13, 2013).

<sup>10</sup> See The Rome Statute, available at <http://www.un.org/law/icc/index.html> (accessed June 5, 2013).

<sup>11</sup> In addition to espousing a commitment to supra-national criminal law, member states must bring their domestic law in line with ICC dictates in order to ratify the Rome Statute.

<sup>12</sup> The International Military Tribunal (IMT) at Nuremberg and its sister tribunal for the Far East at Tokyo both applied international criminal law. As discussed in Chapter One, the IMT at Nuremberg is the model for international criminal law, whereas the IMTFE at Tokyo is not.

<sup>13</sup> This dominance is ideological; ICTY decisions do not constitute “precedent” even for the ICTY itself. Like the Nuremberg / Tokyo tribunal divide, the ICTY’s work often eclipses the work of its sister tribunal in Rwanda. The two tribunals share appellate chambers and, for the first decade of their existence, shared a prosecutor as well. Some decisions of the International Criminal Tribunal for Rwanda (ICTR) have been precedent-setting in international criminal law, such as the *Akeyesu* (1998) court’s recognition of rape as a war crime. See *Prosecutor v. Jean-Paul Akayesu* (Trial Judgment), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR) (September 2, 1998) available at: <http://www.refworld.org/docid/40278fbb4.html> (accessed June 1, 2013). In general, however, the ICTR has come under stiffer criticism than the ICTY in terms of its use of resources and its work product. See, e.g., Peskin 2008; Combs 2013.

relevant literatures will be considered in turn. Second, the chapter traces a brief historical sketch of the events leading up to the disintegration of Yugoslavia in 1991. Because the *international criminal justice template* imagines the possibility of effecting work *on the terrain* of an affected state, it is imperative to consider the fundamentals of that terrain. Finally, the chapter concludes with a brief sketch of the institutional construction of the ICTY, from its meager institutional beginnings to its amassed archive (of materials and judgments) and apparatus, background which is necessary for the dissertation's later close consideration of the ICTY's procedural and substantive law developments.

## **(I) Import of the project (review of the literature)**

This dissertation is situated at a unique confluence of three related, yet distinct literatures: transitional justice, law and society, and ICL. The dissertation offers a theoretical and empirical challenge to assumptions underlying the “judicial romanticism” (Forsythe 2005) that drives transitional justice, an assumption that holds that international courts have the capacity to shape individual citizen expectations and behavior. (Akhavan 1998) This assumption draws on law and society observations regarding court capacity to internalize social norms and behaviors (courts as constitutive social agents; courts as exerting social control) and well as liberal theorists' arguments about the universality of justice and rule of law standards.<sup>14</sup> At the center of the convergence of these three literatures are the prominent (and divergent) roles that each approach assigns to questions of consent and legitimacy.

For law and society scholars, consent is “the most fundamental device” for maintaining court efficacy. (Shapiro 1986:2) In most bureaucratic modern regimes, consent is not individually granted;<sup>15</sup> instead, office and procedure are substituted for consent to preserve the legitimacy of institutions. (Shapiro 1986; Scheingold 1976; Tyler 2006) The centrality of consent for law and society scholars studying court capacity draws on political philosophers' discussions of social contract theory. (Hobbes 1958; Locke 1958; Rousseau 1958) Modern liberal democracies are built on these ideas, which may be generalized as the argument that the legitimacy of rulers is based on the consent of the governed. “Consent” in this discussion is represented by the idea of a “contract” between ruler and ruled. (Gauthier 1986)

Along with discussions of social contract theory, Immanuel Kant developed an argument for an “exceptionless and simple rule, part of a Moral Law that governs us all equally without recourse to power.” (Williams 2010; Kant 1991) Kant's universal “cosmopolitanism” animated aspects of the development of international law in the 20<sup>th</sup> century (Koskeniemi 2007) as well as underwriting modern political philosophers' discussions of political liberalism, a theory of social contract wherein the freedom of contract should be limited by fairness principles. (Rawls 1999; Kymlicka 1996)

These “universal” fairness principles are the substitutes for consent, i.e. that which relays legitimacy, in public international law (PIL).<sup>16</sup> PIL in general, and ICL

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<sup>14</sup> Neither of these two latter fields has addressed the application of their findings to transitional justice projects, however, and transitional justice, for its part, is famously short on empirical application. See Hayner 1992.

<sup>15</sup> One exception to this is arbitration, which in principle arises only from party consent thereto.

<sup>16</sup> The category PIL as used here includes international human rights law, international criminal law, and international humanitarian law. Ratner & Abrams (2001: 10) divide international law into

in particular, presents a series of moral claims drawn from a natural law base regarding the universal nature of the rights that it recognizes. ICL does not require the “consent” of individuals because its universality constitutes its legitimacy. Put another way, ICL understands individual resistance and lack of consent as demonstrations of deviance from a universal norm which is widely recognized and valued.

Finally, transitional justice scholars understand the task of transition as one of harnessing consent to change, and building a desire for representative government through the process. Transitional justice sees transition as a formative, extra-ordinary political moment. For example, the field’s seminal work (Teitel 2000:6) claims that “in transition, the ordinary intuitions and predicates about law simply do not apply. In dynamic periods of political flux, legal responses generate a *sui generis* paradigm of transformative law.” Another way to state this would be to say that transitional justice seeks to construct government legitimacy in order to make the consent of the population meaningful. Transitional justice thus shares the Kantian qualification of the value of sovereignty *per se*, and resists a political assessment of legitimacy in consent because such an assessment might not be capable of making a distinction between unjust (former) regimes and rule-abiding (future) regimes. If “justice” has been recognized by political theorists as a political and social construct that changes with regimes (Shklar 1990; Sa’adah 2006), transitional justice still imagines justice as objective and not subjective.<sup>17</sup> In this way, transitional justice conceptions of legitimacy, for all they are grounded in assessments of political change, hew more closely to ICL’s legitimacy in universalism than law and society scholars’ recognition of legitimacy in consent (i.e. the processes that, in our modern age, are substituted for consent: office and procedure).

This dissertation undertakes a critique of transitional justice assumptions from a legal studies perspective. In so doing, it demonstrates that while transitional justice would seem to have conscripted law and society theories regarding the capacity of legal institutions to act as social agents and exert social control, in fact such arguments distinguish between domestic and international spaces precisely in the space of consent and legitimacy. Drawing on critical legal theorists (Tallgren, Koskenniemi, Kennedy, Meister), the dissertation offers a challenge to ICL from a perspective sympathetic to its aims but critical of its methods, assumptions, and oversights. This dissertation’s critique of ICL “from the left” suggests a rubric – the *international criminal justice template* – as a guide against which to measure legitimacy and consent towards international criminal law institutions.

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international human rights law (“a body of international law aimed at protecting the human dignity of the individual”), international humanitarian law (“[law] synonymous with the law governing the conduct of armed conflict”), and international criminal law, which they describe as more complex because it “involves the inculcation of individuals, but is developed and enforced by the actions of states. It must address, and reconcile, the dichotomies between its two sets of constituent parts: international law’s principal focus upon the obligations of states vs. criminal law’s concern with the obligations of individuals; and international law’s general lack of vertical prescription and enforcement processes vs. the centrality of both to criminal law.”

<sup>17</sup> *But see* Gray 2006: 2623 (who argues against viewing transitional justice approaches as ordinary justice approaches on a larger scale. In support of this argument, Gray notes that “an abusive regime is defined by social norms, a particular ontology, and a historical teleology that, operating through official state agents, construct a public face of law that sanctions and organizes violence perpetrated by institutional actors and private citizens.”)

## Transitional justice

*“The ghosts of the past, if not exorcised to the fullest extent possible, will continue to haunt the nation tomorrow.”*

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Jose Zalaquett, Commissioner on Chile’s National Truth and Reconciliation Commission

One of the legacies of the 20<sup>th</sup> century is the ascent of the idea that societies benefit from confronting their past or, put another way, that societies that do not address past injustice or violence risk a return of said violence. Transitional justice is “the process of acknowledging, prosecuting, compensating for and forgiving past crimes during a period of rebuilding after conflict.”<sup>18</sup> While the question of best practices at achieving transitional justice is still hotly debated, a debate which is discussed briefly below, it is now generally accepted that truth telling and justice rendering are central aspects of social healing and necessary for peace and reconciliation following conflict. With only a few exceptions (Elster 2004; Shaw 2010; Wilson 2001) this widely asserted theory has not been empirically examined. (Hayner 2010) In the field of international legalism (Alvarez 1999) there is furthermore a resistance to engaging meaningfully with scholars of collective memory, anthropologists, or psychologists,<sup>19</sup> all professions with much to add to any empirical consideration of transitional justice’s foundational assertion.

The term “transitional justice” emerged out of social and political rebuilding in South America (notably Argentina and Chile) following decades of repressive dictatorships. (Orentlicher 1991; Nino 1991; Zalaquett 1992; Teitel 2003) While such rebuilding can take many forms, including truth commissions (which typically offer perpetrators amnesty in exchange for their confession of wrongdoing) and lustration (which collectively removes all state representatives from office for a certain amount of time following transition), the principal mechanisms endorsed for transitional justice purposes are hybrid or international courts (ICTs).<sup>20</sup>

The focus on the value of information – and the methods most likely to induce cooperation – lies behind the push to employ truth commissions following violent periods. Truth commissions typically trade “truth” for amnesty in order to encourage facts to come to light. Truth commissions are understood to put victims and narrative at the center of their work. They are critiqued, however, for denying victims recompense in the form of criminal punishment. Nothing in the truth commission process, furthermore, guarantees that reparations will be forthcoming.

The most well-received truth commission was that held by South Africa following the end of apartheid in the 1990s, though in fact there have been hundreds

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<sup>18</sup> US Institute of Peace, “Transitional Justice: Informational Handbook,” September 2008, available at <http://www.usip.org/sites/default/files/TRANSITIONAL%20JUSTICE%20formatted.pdf> (accessed March 1, 2013).

<sup>19</sup> As considered in Chapters Five and Six, Tribunal judgments have relied on historians, anthropologists, psychologists and other “expert witnesses” in arriving at legal conclusions.

<sup>20</sup> Hybrid tribunals are those tribunals that use a combination of local and international judges, such as the Special Court for Sierra Leone. Hybrid tribunals arguably have greater potential to build local capacity than purely international tribunals, as they directly train the locals participating in them. The Special Court for Sierra Leone is the pre-eminent example and it has a mixed reception. The hybrid/international distinction is not particularly important to arguments made here, and the dissertation will refer to all non-domestic criminal tribunals as ICTs (international criminal tribunals).

of truth commission bodies convened in the past 50 years.<sup>21</sup> The South African Truth and Reconciliation Commission (TRC) granted amnesty for “political crimes” (although some of these amnesties were later successfully challenged in South African courts). This still left open the question of the “political,” and accounts of the TRC’s work detail the variegated standard that applied to “political” crimes depending upon the affiliation of the perpetrator.<sup>22</sup> (Krog 1999)

Another non-judicial method of affecting transitional justice is lustration. Lustration is a blanket condemnation of political leaders affiliated with transgressing regimes. Lustration campaigns remove all statesmen from political life for a certain period of time following transition, an across-the-board sweep designed to wipe the slate clean. Lustration was used throughout Eastern Europe in the 1990s after the fall of the Iron Curtain.

Truth commissions prioritize the discovery of facts, but trade such revelations for amnesty, a process that has left many observers critical. Lustration campaigns, on the other hand, make no distinction between individual engagement and motivation, a collective response often ill met by observers in Western liberal democracies. Criminal processes have emerged as central transitional justice mechanisms based on their dual mandate of social control and punishment. For purposes of truth telling and community building, criminal law need not be universally applied. Select criminal trials, on a public stage where victims’ stories are aired and past events are accurately retraced, can establish a “new” community. (Teitel 2000) Criminal trials, it is argued, may play a complex role that exceeds their immediate impact on punishment or retribution, “a performance that would ultimately enable the state itself to function as a moral agent.” (Borneman 1997: 23)

Courts are perceived as uniquely effective transitional justice mechanisms, for a number of reasons including their (perceived) capacity to perform the following acts: punish offenders; recognize victims; set social standards regarding what is criminal or not; and locate guilt in individuals thereby avoiding “collective guilt,” which is believed by some to encourage future violence. (Akhavan 2001) Antonio Cassese (1998: 229), leading international law scholar and a former ICTY judge, summarizes the benefits of using ICTs as follows:

[T]rials establish individual responsibility over collective assignation of guilt, i.e., they establish that not all Germans were responsible for the

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<sup>21</sup> In her seminal article, “Fifteen Truth Commissions,” Patricia Hayner (1994) describes 15 institutions convened before 1994. Her article reveals that what walks like a truth commission needn’t talk like one: the “truth commission” sponsored by Idi Amin in Uganda in 1974, for example, ended without any official publication, and cost one of the three commissioners his life, simply because he had ill-advisedly attempted to pursue a real mandate of truth regarding the atrocities of the Amin regime. Although Hayner’s article lays out categories for assessing truth commission, South Africa’s actual experience demonstrates how difficult such assessment becomes in practice. Antije Krog (1999) provides a moving, poetic account of the struggle to account for violence in South Africa. Krog’s account underlines the critical importance of a charismatic leader like Desmond Tutu.

<sup>22</sup> In one case, for example, a hit squad sent to kill a political activist also killed the activist’s wife (ultimately sparing, after some debate, the couple’s 11-year-old child). The three participating killers all testified before the TRC, all telling somewhat distinct versions of the murders (specifically as regards which of them committed the actual murder). In one version of the murders the most infamous of the killers – a nationally known figure – commented that the activist’s wife had seen his face, and would have been able to identify him, thus linking her husband’s murder to the state police. Should the otherwise “non-political” victim’s capacity to identify the killer, a recognizable police representative of the party in power, transform a murder into a political crime eligible for amnesty? *See* Krog 1999.

Holocaust, nor all Turks for the Armenian genocide, nor all Serbs, Muslims, Croats or Hutus but individual perpetrators – although, of course, there may be a great number of perpetrators; justice dissipates the call for revenge, because when the Court metes out to the perpetrator his just desserts, then the victims' calls for retribution are met; by dint of dispensation of justice, victims are prepared to be reconciled with their erstwhile tormentors, because they know that the latter have now paid for their crimes; a fully reliable record is established of atrocities so that future generations can remember and be made fully cognizant of what happened.<sup>23</sup>

International courts are seen as more effective than national courts because national courts are aligned with regimes that commissioned or permitted crimes. International institutions are thus seen as capable of making the “clean break” necessary in a post conflict situation. Moreover, some assert that the *nature* of the crimes committed argues in favor of ICTs: “International jurisdiction is clearly more effective than state jurisdiction, since genocide is commonly state-sanctioned. For this reason, primacy or even exclusive jurisdiction should be given to the UN.” (Mendlovitz & Fousek 1996) Some previous scholarship has assumed that establishing the rule of law is a necessary and sometimes even sufficient condition of social reconstruction.<sup>24</sup> While many scholars embrace the use of international courts to respond to human rights violations (Walzer 1977; Meron 1997), few have empirically examined the efficacy of these efforts and the complications inherent in them.<sup>25</sup>

International courts are understood to present ICTY as clean break from nationalism. Teitel (2000:56) argues that “Individuating wrongdoing lifts collective responsibility from the prior regime and re-legitimizes state authority.” Prosecutions “clearly separates a newly democratic government from the abuses of its predecessor.”<sup>26</sup> (Hesse and Post 1998: 15) They are also presented as a healthy antidote to collective guilt, where “to prevent lingering assignments of collective guilt, blame and punishment must be restricted to specific individuals and based on specific proof, itself tested through the adversary process.”<sup>27</sup> (Minnow 1998:40) Richard Goldstone (1996: 216-217) locates this possibility as beginning with the IMT at Nuremberg:

“[The war crimes trials] ensured that guilt was personalized—when one looks at the emotive photographs of the accused in the dock at Nuremberg one sees a group of criminals. One does not see a group representative of the German people – the people who produced Goethe

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<sup>23</sup> Cassese argued that a truth commission would be a less ideal mechanism for transitional justice in the former Yugoslavia because: “(a) they have been the scene of appalling atrocities which are beyond amnesty, (b) they are still riven by the violent nationalisms or ethnic hatred over which the wars were fought, and (c) they are not yet willing to be reconciled.” (Cassese 1998)

<sup>24</sup> See Twining 2000 for a discussion of this literature.

<sup>25</sup> See Hayner 1992 (who discusses untested nature of transitional justice mechanisms); *but see* Hathaway 2002 (who examines the effects of treaties on human rights practices in 140 countries).

<sup>26</sup> See also Huyse and Kritz 1995: 339-41 (describing need for post-transition trials).

<sup>27</sup> See also ); *Prosecutor v. Momir Nikolić* ICTY Case No. IT-02-60/1-S, Sentencing Judgment Dec. 2, 2003 para 60 “By holding *individuals* responsible for the crimes committed, it was hoped that a particular ethnic or religious group (or even political organization) would not be held responsible for such crimes by members of other ethnic or religious groups, and that the guilt of the few would not be shifted to the innocent.”

or Heine or Beethoven. The Nuremberg Trials were a meaningful instrument for avoiding the guilt of the Nazis being ascribed to the whole German people.”

#### i. Critiques of Transitional Justice from the Left

There is an emerging field of anthropological work that critiques transitional justice arguments and findings from the perspective of local, lived experience. (Hinton 2011) Anthropologist Rosalind Shaw (2010), for example, follows reconciliation processes in Sierra Leone, a country that hosted a hybrid court that tried the leadership most responsible for the conflict and the human rights atrocities committed,<sup>28</sup> as well as instituting a truth commission. Shaw found that reconciliation in villages operated not through a determination of what community members did during the war (a justice/criminology formulation), but rather the state of their heart: “warm or cool.” A “warm” heart means that the violence experienced by this person still animates them; in such a case, that person is not welcome in the village. A “cool” heart means that the past does not trouble that person in the present; such a person may join the community.

The warm/cool heart rubric challenges mainstream considerations of transitional justice, which are largely based in a victim/perpetrator dialectic, which seeks to establish right and wrong, guilty and innocent. Even those transitional justice mechanisms that do not punish the guilty through imprisonment (truth commissions, lustration campaigns) still ground their discourse in a determination of who bears fault. The warm/cool heart divide is another method of looking at reconciliation, focusing not on “what happened?” or “whose fault?” but instead on a contemporary assessment of a person’s willingness and capacity to engage peacefully with the community. Advocates of mainstream transitional justice might critique such an approach as not respecting the rights of the victim, or even as forgetting the past, anathema to transitional justice.<sup>29</sup> Sophisticated considerations of victimhood might note that the warm/cool heart approach only further institutionalizes war gains, where those who lost in the war continue to lose in the peace by living under the system actualized by violence.<sup>30</sup>

#### ii. Critiques from the Right

With its focus on normative, aspirational techniques, transitional justice aligns itself with constructivist theories of international relations. (Teitel 2000) Within international relations, the schools of functionalism and realism challenge the constructivist elements of transitional justice theory.

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<sup>28</sup> The conflict in Sierra Leone was infamous for its civilian victims, where military forces targeted civilians, particularly children, for maiming, cutting off their hands and arms.

<sup>29</sup> It bears consideration that the warm/cool heart model is distinguishable from forgetting the past ever happened. Perhaps in a country like Sierra Leone, where the scars of violence are physically worn by swaths of the population and will remain so for several generations, the query of “forgetting” (which is to say, the problem of remembering) is less relevant than in, say, a country like Serbia, where war wounds and war damage are more psychological than physical. Unlike in Bosnia or Croatia, the 1991-1995 wars left the Serbian landscape unscarred. A reminder of the 1999 NATO bombing is on prominent display in downtown Belgrade, where the wreckage of what was once the Ministry of Defense dominates an otherwise prosperous city block. This is discussed further in Chapter Five.

<sup>30</sup> See Meister 2010. A prime example of Meister’s theory is presented by Republika Srpska in Bosnia, where Bosnian Serb “ethnic cleansing” netted the Bosnian Serbs a homogenous statelet even in the face of military defeat.

Realists, rationalists, and neo-rationalists argue that international relations are a reflection of the power of sovereign states. (Morgenthau 2005; Kissinger 2001) From this perspective, international institutions themselves have little independent ability to alter political realities, as such institutions can only mirror the interests of the states that support them. Functionalists and neo-functionalists, on the other hand, see greater roles for institutions than realists and rationalists. For functionalists, institutions do not merely indicate state interests but also have the potential to affect them. Functionalists point to the role that institutions play in changing national expectations, laws, and constitutions. (Slaughter 1995; Stone-Sweet 2000) Constructivists, on the other hand, argue that norms and ideas become accepted by socialization and internationalization. (Schmitz and Sikkink 2012: 517) Within the transitional justice literature, this debate plays out in a few ways. Theorists like Sa'adah (2006) have argued against transitional justice's "individualization" of guilt, pressing instead for transitional projects that focus on institutions. Realists have challenged the normative agenda of transitional justice through, for example, challenging the alleged trade of justice for peace. Just as proponents of using truth commissions as principal transitional justice mechanism argue that the criminally accused are unlikely to cooperate and tell all they know about the crimes which they committed,<sup>31</sup> realists (and others) argue that warring parties may feel unconvinced to engage in peace talks if they feel a jail cell is awaiting them.<sup>32</sup>

### **Law & society**

As argued above, the transitional justice reliance on courts is in part constructed on the idea that courts are (1) socially constitutive (capable of decreeing what constitutes law and morality in a given society) and (2) capable of exerting social control (where state expectations, à la Foucault, are internalized and citizens police themselves). Law and society literature explores the ways that law acts as a means of social control. This exploration occurs at an institutional level, examining the way that legal institutions like courts, prosecutors, bar associations, and bureaucracies shape policy and belief through law. (Shapiro 1986; Feeley 1992) The exploration also occurs at the level of the individual, examining how individual perceptions are crafted and controlled by law. (Tyler 2006; Ewick & Silbey 1998)

In his seminal *Courts* (1986), Martin Shapiro rejects the idea that a clear boundary can be drawn between courts and other political actors. Courts enjoy multiple political functions that range from shoring up the political regime in which they operate to setting social policy. (Shapiro 1986: 63) Shapiro's work debunks the prototype of courts that consists, among other attributes, of independent judges applying pre-existing legal norms. (Shapiro 1986: 1) No judge can be said to be "independent" because while she determines individual cases, her authority to do so, and the law she applies, is generated by a sovereign. (Shapiro 1986: 67) The application of pre-existing legal norms always requires some element of interpretation, because no code comprises the whole body of legal rules. (Shapiro

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<sup>31</sup> This is summarized as the "truth vs. justice" debate, the concern that bringing criminals to justice will prolong wars. See Rotberg and Thompson 2000 (an edited volume of essays considering the "trade-off between truth and justice before truth commissions").

<sup>32</sup> This argument, frequently applied to the first years of the ICTY, has also been raised concerning the work of the ICC. As noted in Chapter One, a similar argument has been made regarding Nazi Germany, in which it is asserted that the publicized unconditional surrender only encouraged the Germans to fight to the bitter end, since they had so little to gain by coming to the negotiating table. (Deak 1993; Deak 1994)



1986: 134) Shapiro disavows a study of judicial institutions that would seek to make them “not courts” because they have identities or aims that could be deemed political.

Approaching the question of law and politics from an international law perspective, Martti Koskenniemi (2005: 562) theorizes that international law is characterized by a “simultaneous sense of rigorous formalism and substantive or political open-endedness of argument.” Perhaps more than other forms of law, international law is capable of wide and disparate interpretations, which would seem to suggest that it is entirely political or self-interested. Koskenniemi argues that in spite of such ideological flexibility, international law should be understood as a system; his work seeks to illuminate the “grammar” of international law, which he identifies as a means of problem solving that characterizes law and thereby distinguishes it from pure politics.

Koskenniemi argues that law has a grammar. If this is so, is this a grammar spoken only by lawyers? Louise Arbour, former ICTY Prosecutor, notes that the greatest cultural distinction among the ICTY staff was not between common and civil law practitioners, but rather between international law and criminal law practitioners, where the former were more likely to have institutional trust, and the latter, institutional skepticism.<sup>33</sup> Justice Arbour’s observation suggests that whatever law’s grammar may be, it comes grounded in politics even among legal professionals.

#### i. Capacity

Law and society sets the question of capacity at the heart of its discourse. Law and society scholars have extensively explored how court actions shape policy as well as legal and social consciousness. (Horowitz 1977; McCann 1994; Rosenberg 1991) One of the more interesting additions that law and society scholars have made to the consideration of court capacity is to look beyond the legal/philosophical question of the role of courts and instead examine the descriptive question of what courts are actually doing and whether they are more or less effective in these endeavors than other institutions.

#### ii. Law as constitutive agent

The founder of sociology, Emile Durkheim, identified crime as those acts that violate a society’s *conscience collective*. Examining Durkheim’s work, David Garland (1990: 23) has argued:

Penal sanctioning represented... a tangible example of the “collective conscience” at work, in a process that both expressed and regenerated society’s values. By analyzing the forms and functions of punishment, the sociologist could gain systematic insights into the otherwise ineffable core of the moral life around which community and social solidarity were formed.

The various levels of intensity and severity in response to crime in diverse societies reflect the varying nature of the *conscience collective*. (Garland 1990: 29)

Likewise, Michel Foucault has argued that trials serve an elaborate social purpose. It is not enough that wrongdoers be justly punished. They must if possible judge and condemn themselves. (Foucault 1992: 38) Payam Akhavan, a proponent of

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<sup>33</sup> Author interview, Paris, May 2013.

what Alvarez (1999) calls the “international legal paradigm” and Forsythe (2005) calls “judicial romanticism,” has argued that “the ICTY’s most significant and realistic contribution to deterrence is in the gradual internalization of expectations of individual accountability and the emergence of habitual conformity with elementary humanitarian principles, both in the former Yugoslavia and the international community.” (Akhavan 1998: 751)

Judith Shklar (1990) has written extensively on the value of “political trials” to instill the “right kind” of ideals and political goals for the targeted nations. Others have similarly argued that the type of lesson being taught (i.e. political liberalism) can justify the methods used to impart the lesson, even if those methods do not meet the neutral or impartial standards typically assigned to courts. (Osiel 1998; Bass 2000) Even those authors who agree with Shklar, however, note the myriad problems associated with relying on legal proceedings in order to tell a social story or otherwise shape the collective consciousness. (Osiel 1998)

Louise Arbour (1999: 13, 16, 17) notes that the ICTY is challenged by having to act where other social controls are absent. In her 1999 article, she argues that the absence of other social controls “leaves criminal justice to meet the sometimes unrealistic expectations about the contribution that it can make to social peace and harmony, to the eradication of hatred, and to the reconciliation of previously warring factions.” Justice Arbour further notes that criminal law and international law are radically opposed in theory and in style, yet the ICTY is asked to administer both.

i. Law & Society in an International Context

The political and sociological questions described above have been mostly applied within national systems, and largely concern the U.S., where the movement was born. (Bickel 1986; Cover 1982; Fuller 1969) In the past decade, however, law and society considerations of legal systems throughout the world have grown considerably, and the field has branched into extra-national subjects as well, producing many excellent comparative considerations of national systems (Ginsburg 2003; Halliday et al 2007) as well as the European Union. (Stone-Sweet 2000; 2003; Conant 2004)

**International criminal law (ICL)**

In the wake of World War II, many international lawyers and scholars renewed projects begun in the early 20<sup>th</sup> century to usher in legal frameworks that would structure the actions of states. The pre-World War II stripping of citizenship – and thus the rights afforded citizens – of Jews and other groups demonstrated that human rights protected only within the realm of individual sovereign states were subject to problematic lacunae. (Hart 1963; Arendt 1963) Rejecting separation of “higher principles” from positivist law, in the wake of the highly legalist Nazi regime,<sup>34</sup> these scholars pushed for conceptions of rights that existed at a level above individual governments, and to which all governments could be held accountable. (Dworkin 1978; Rawls 1993) The Geneva Conventions of 1949<sup>35</sup> offered satisfaction

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<sup>34</sup> *But see* debate between HLA Hart and Lon Fuller re whether Nazi regime was in fact “legal.” Cane (ed) 2008.

<sup>35</sup> *See* Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field (Geneva Convention No. I), Aug. 12, 1949, 6 *U.S.T.* 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), Aug. 12, 1949, 6 *U.S.T.* 3217, 75 U.N.T.S. 85; Convention Relative

to both international law idealists and realists. For idealists, the Geneva Conventions offered the premise that rights to life and liberty in times of war are based in humanity, not citizenship, and should be equally enjoyed by all peoples.<sup>36</sup> For realists, the Geneva Conventions signified a desire of the signatory states to abide by certain conditions. The *quid pro quo* of the Geneva Conventions as regards prisoners of war and civilians during wartime offered protections easily within the interest of states.

The term “genocide” was first articulated in the wake of World War II (Lemken 1949) and work began on a convention outlawing genocide. The immediate effect of these advances in international law was short-lived, due to the outbreak of the Cold War and its reconfiguration of the international scene (Power 2000), and in the 1960s and 1970’s, lawyers and activists “rediscovered” law’s humanitarian capacity. In works like *A Theory of Justice* (Rawls 1971) and in the creation of organizations like Amnesty International and Helsinki Watch, law was set at the center of the discourse of fairness and political illegitimacy. These supporters of law as insurer of human rights placed stock in law vesting at the level of the individual, (Dworkin 1986) whereas realists, rationalists, and liberals had always viewed international law and actions as a purview of the state.<sup>37</sup>

Transnational and international law scholars agree that international law should act as a constraint on nation-states; they disagree, however, as to whether that constraint provides a normative good and should be celebrated or instead functions as an obstacle to existing national legal orders and as such should be denigrated. (Berman 2008; Roth 2011) International criminal law draws on the Kantian project of “cosmopolitan justice,” seeking a universal human rights standard. (Rawls 1971; 1992; Kymlicka 1992) In this projection, international law is universal based on its underlying morality. Such morality may be based on fairness (Franck 1995) or universality. (Koh 1999)

Anne-Marie Slaughter is a central proponent of international law as a liberal project. Contesting realist and neo-realist accounts that state behavior is predicated by state interest, Slaughter (1995: 537) argues that “how States behave depends on how they are internally constituted.” Slaughter’s argument follows Moravcsik’s (1997) pro-liberal theory/observation that liberal democracies do not go to war with each other.<sup>38</sup> Opposing Slaughter, Alvarez (1999) discusses the development of “progressive” international law in terms of epistemic communities. He contrasts the international legal paradigm with “journalism,” which he substitutes as a foil for local culture, politics, and law. Alvarez’s suggested use of epistemic categories, specifically his separation of international and local communities, is useful, though his does not, ultimately, provide the same balanced consideration of “local” communities as he does international.

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to the Treatment of Prisoners of War (Geneva Convention No. III), Aug. 12, 1949, 6 *U.S.T.* 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Times of War (Geneva Convention No. IV), Aug. 12, 1949, 6 *U.S.T.* 3516, 75 U.N.T.S. 28 (hereafter collectively “The Geneva Conventions”).

<sup>36</sup> The Geneva Conventions mostly offer protections for people involved in conflicts of an international nature. Domestic conflicts are less strictly overseen by the Geneva Conventions, and domestic uprisings and riots are not covered at all.

<sup>37</sup> The seminal articulation of legal positivism is John Austin (1832).

<sup>38</sup> This argument was produced for mass consumption by Thomas Friedman through the “McDonalds” test. Thomas Friedman, “Foreign Affairs Big Mac I” *The New York Times*, December 8, 1996.

Finally, idealists like Thomas Franck (1995) and John Rawls (1999; 2003) are concerned less with the practical questions of enforcement of international relations, than with whether the rules governing relationships between and within nations are fair. Harold Koh (1995) points to this divergence of idealists' and realists' conceptions of international law as the source of the schism between international relations and international law scholars.

### **In conclusion: joining and expanding critical legal studies**

This dissertation, then, would join the small body of critiques of the ICL movement from the left (Tallgren 2002; Koskenniemi 2002; 2006; 2011; Kennedy 1999; Meister 2011; Todorov 1992). These critiques are generally located squarely in political theory. This project expands these critiques through the law and society lens of court capacity, with a specific focus on legitimacy and consent. Applying the *international criminal justice template* which emerged from the IMT at Nuremberg, a template advocated both within transitional justice literature as well as ICL, the dissertation examines the legitimacy and consent elements of what law and society scholars have located as a source for the court capacity to exert social control.

## **(II) A brief history of the “Land of the South Slavs”<sup>39</sup>**

In 1993, when Bill Clinton took office as President of the United States, war was ravaging Croatia and Bosnia. An international arms embargo was in effect, and the heavily armed Bosnian Serbs, having inherited much of Yugoslavia's war machinery through pre-war machinations, had effectively sealed off a helpless Sarajevo for almost a year. There, as the world watched, the civilian inhabitants<sup>40</sup> of this diverse and cosmopolitan city were being picked off through mortar attacks and sniper shots. To the north and west of Sarajevo, one third of Croatian territory was under the control of Croatian Serbs,<sup>41</sup> who had declared it an independent republic, and exiled Croats were massing on the coast, with some of them receiving contraband guns from expatriate contacts and family members in the U.S. and Canada.<sup>42</sup> Many of these weapons were in turn funneled to the brutal conflict that had broken out between Bosnian Croats and Bosnian Muslims in January 1993. Meanwhile, Serbian paramilitary groups, operating with the backing of Serbia's president Slobodan Milošević, were terrorizing populations in the verdant eastern lands of Croatia and Bosnia, inflicting violence that would later make the picturesque historic towns of Vukovar, Srebrenica, Zvornik, and Višegrad synonymous with crimes against humanity and even genocide. In northern Bosnia, Bosnian Serbs had been working on building a “corridor” between Serbia and the “Krajina” lands controlled by Croatian Serbs by “ethnically cleansing” this territory, destroying mosques and detaining civilians in camps. The potentially “clear” Serbian corridor was interrupted by a sizeable Muslim pocket in northwestern Bosnia led by a commander at odds,

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<sup>39</sup> In Slavic, Yugoslavia means “[land] of the South Slavs.”

<sup>40</sup> Bosnian Muslims were the main target of this offensive, though others were impacted, including Bosnian Serb enclaves at times. It is estimated that 10,000 citizens were killed in the three-year siege of Sarajevo alone.

<sup>41</sup> These are Orthodox Christians (i.e. Serbs) living in the territory of Croatia, a constituent “republic” of the former Yugoslavia and, since 1991, an independent country. The area is called “Krajina,” a word which means “Borderland.” Its history and peoples are discussed in greater detail below, as well as in Chapters Five and Six.

<sup>42</sup> See, for example, Christopher Bellamy, “Flight from Croatia: How the Croats Armed and Trained for Victory: Weapons,” *The Independent* (London), August 8, 1995.

sometimes violently, with the Muslim leadership in the rest of Bosnia. Milošević, together with Croatia's equally nationalist president Tuđman, had already brokered the reputed pact concerning the division of Bosnia between them.<sup>43</sup> Thus, in addition to their brutality and tragedy, the wars in the Former Yugoslavia were complicated.

When Clinton took office, news of Bosnian Serb concentration camps in Omarska and Prijedor had been widely reported, and genocide terminology – and its automatic triggering of the international apparatuses to prevent genocide<sup>44</sup> – was in use. An oft-repeated story holds that President Clinton read one book about the Balkans: Robert Kaplan's *Balkan Ghosts* (1992). Kaplan's thesis – that the wars that occasioned Yugoslavia's destruction were unavoidable, given the thousand year history of war and difference between Catholics (Croats) Muslims (Bosniaks) and Orthodox Christians (Serbs) – reportedly convinced Clinton that the warring peoples of the former Yugoslavia were representative of “ancient ethnic hatreds” that could neither be suppressed nor controlled. Clinton therefore opted to let them fight their differences out (while maintaining the arms embargo, which served to strengthen the position of the already armed Bosnian Serbs), forswearing immediate U.S. intervention. UN peacekeepers, deployed in farcically low numbers and without the authority to fire their weapons unless they or their equipment had been hit by fire,<sup>45</sup> served largely as convenient hostages, adding another tool to the militarily dominant Serb armies.

Kaplan's thesis has been so resoundingly refuted that it exists for area scholars as nothing more than a disastrously timed straw man.<sup>46</sup> (Donia & Fine 1994; Ramet 2005) Yet in the popular culture and discourse, including even the recent comments of leading politicians and international civil servants, the impact of Kaplan's thesis is still felt. Moreover, the “ethnic”<sup>47</sup> differences between the peoples of the former

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<sup>43</sup> Reputedly, the two leaders divided up Bosnia on a cocktail napkin. Silber & Little (1997:131). See also *Stenogrami o podjelene Bosne* (Lovrenović & Lucić, eds, 2003); testimony from the uncompleted Milošević trial, *Prosecutor v. Slobodan Milošević*, Case No IT-02-54, available at [www.icty.org](http://www.icty.org) (accessed March 1, 2013).

<sup>44</sup> The Convention on the Prevention and Punishment of the Crime of Genocide (1948), to which 142 countries, including the U.S., are signatories. The International Court of Justice has found that “Contracting Parties have a direct obligation to prevent genocide.” *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, para 165.

<sup>45</sup> See for example, Kevin Fedarko, “No Peace for the Peacekeepers” *Time Magazine*, June 12, 1995.

<sup>46</sup> Many area scholars nevertheless argue that the collapse of Yugoslavia was at least “over-determined.” (Ramet et al 2006) From divergently timed ideas of Yugoslav identity (Wachtel 1998) to the failed, decentralized 1974 Yugoslav constitution (Hayden 1999), many academics have argued that Yugoslavia's “union of south Slavs” was always a “bad marriage” (Ramet 1992) and a doomed experiment.

<sup>47</sup> For lack of better terminology, this dissertation will distinguish the peoples of the former Yugoslavia in terms of “ethnicity,” following Anderson's (2006) argument regarding the construction of community. Although there are no measurable “ethnic” differences between these groups, all of whom trace their roots to Slavic migrations in the 6<sup>th</sup> and 7<sup>th</sup> centuries AD, group identity is self-perceived as rigidly distinguishable, in which contemporary “ethnicity” is tied mainly to religious affiliation (which is inherited paternally). “Ethnicity” does not map directly onto citizenship divisions or linguistic divisions, part of the complexity of the Balkan story. For further discussions of the construction of Balkan identities see, e.g., Alexander (2013) on the role of language in the construction of identity in the Balkans since the 19<sup>th</sup> century; Fine (2006) on medieval identity construction; Bringa (1995) on the construction of Muslim identity in Bosnia on the eve of Yugoslavia's disintegration; Judah (2010) on contemporary Serbian identity; Wachtel (1998) on nationalist movements in the 19<sup>th</sup> and 20<sup>th</sup> centuries, and disjunctures in competing narratives; West (1941) a travelogue through the Balkans on the eve of

Yugoslavia that were reified by the war are sometimes enforced by the very organs charged with healing these rifts.

Emerging in the late 19<sup>th</sup> century during the decline of empires, the idea of Yugoslavia converged with and was borne aloft by European theories of nationalism, theories that highlighted the “natural” connection between a people (a group defined by shared language, culture, or religion) and a particular geographical area.

### **From the first Slav migrants through World War I**

In the 6<sup>th</sup> and 7<sup>th</sup> centuries AD, groups of Slavs who were the ancestors of today’s occupants in the Balkans began migrating to the area. By the medieval period, the groups that comprise the “ethnicities” we recognize today were all living in the geographical region that would come to be known as Yugoslavia. While coastal communities fell first under Roman, and then Venetian rule, the hilly and varied terrain of the interior of the former Yugoslavia, particularly Bosnia and the unconquerably mountainous Montenegro, made the peoples living there remote from the activities of the age, and sometimes successful at winning independence or the right of self-government. Nevertheless, with the exception of the powerful city-state of Ragusa (today’s Dubrovnik) on what is today the Croatian coast, most Balkan territory was ruled by others for over 1,000 years: Venice ruled the Croatian coast, and Hungary ruled Croatia proper in what is today the area around Zagreb.<sup>48</sup> The Serbs, as the legend says, traded their kingdom on earth for a kingdom in heaven at their 1389 defeat by the Ottomans during the battle of Kosovo,<sup>49</sup> and the Bosnians, independent the longest, fell under Ottoman rule as well by the end of the 15<sup>th</sup> century. (Anzulovic 1999; Donia & Fine 1994; Goldstein 1999)

Of the many migrations that characterize Balkan history, the resettling of a group of Orthodox herders in the Habsburg border zone beginning in the mid-16<sup>th</sup> century created one of the most important elements in the 1991-1995 wars. Ethnically “Serb” based on their Orthodox religion, this group heeded the Habsburg offer of land in exchange for military service. Known during the Habsburg period as *die Militärgrenze* (*Vojna Krajina* in the local language), the region they settled now comprises the borderland between Croatia and Bosnia and bears the name “Krajina.” Both this transplanted population and the region they called home are critical to understanding some territorial issues within Croatia and Bosnia during the war.<sup>50</sup>

In 1878, after a century of uprisings, Serbia formally achieved independence from the dissolving Ottoman Empire and saw its state officially recognized on the international scene. This event had dramatic ramifications for the neighboring peoples. In addition to signaling the coming of the end of the Ottoman Empire, it also served as a magnet for the Slavic peoples of the area who had aspirations of independence from the empires to which they belonged. (Mazower 2000) Western theories of nationalism encouraged identities built around shared language, culture, and history, as well as homogeneity (measured in these same terms) in state building.

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World War II by an esteemed journalist and public intellectual, including riveting accounts of local sentiment and perspective.

<sup>48</sup> This period of Croatia’s history is understood as the beginning of Croatian statehood because the Hungarian king was required to be crowned in Croatia as well as Hungary.

<sup>49</sup> A reference to Prince Lazar’s purported statement, on the eve of the battle of Kosovo Polje, that, “The earthly kingdom is short-lived, but the Heavenly one is forever.”

<sup>50</sup> The “Krajina” peoples remained non-integrated based on several factors. Tax breaks granted by the Austro-Hungarian empire in exchange for military service, for example, led to local resentment.

The threat from large neighboring states, the likelihood of existing only as a pawn or being folded into another state, the affinities between peoples living in the area (mutually comprehensible language first among them,<sup>51</sup> small peoples with a history of being swallowed by empire clearly also creating common sentiment) and the nationalist sentiments of the time – all of this encouraged coalition building between groups and the idea of coming together into a single large state. Yet Serbia's independence, for all it served as inspiration for other Balkan peoples, arguably sowed the seeds of the eventual failure of Yugoslavia, by creating for Serbs the idea that they were “first among equals.” (Wachtel 1998)

Dissolving empires and ally building led the western world into World War I, the tinder spark famously being the assassination of the Austro-Hungarian Duke Ferdinand by a Serbian nationalist in Sarajevo. Following World War I, the “Kingdom of Serbs, Croats, and Slovenes” was founded, building on shared linguistic, cultural, and historical elements of its founding peoples. This first iteration of Yugoslavia (which formally gained that name in 1929) was marked by political strife and failed to achieve political balance. The Serbian monarchy, of the Karađorđević dynasty, ruled the country, first under a constitution and then as a royal dictatorship. The latter change was forced by dramatic events in 1928, when the charismatic Croatian politician Stjepan Radić, founder of the Croatian peasant party who “carried the banner [of Croatian identity] to all levels of Croatian society and became the symbol of Croatian resistance to Serbian unitarism” (Alexander 2013: 373) was shot in Parliament. In 1934, King Alexander was himself assassinated by Croatian and Macedonian terrorists.

### **World War II & Tito: sowing the crop later reaped**

World War II was viciously fought in Yugoslavia, where a civil war between three competing factions – Tito's Partisans (communist), the Croatian Ustasha (fascist), and the Serbian Chetniks (royalist) – raged simultaneously with fighting the occupiers following the invasion and partition of the state by the Axis powers in 1941. Croatia achieved statehood for the first time during this period: it was governed by a fascist Nazi puppet regime that persecuted and murdered Roma and Serbs in addition to Jews.

The events of World War II, and particularly the contested numbers and narratives of that conflict, play an important role in the wars of Yugoslav disintegration. Contemporary claims to victimhood, genocide, and “holocaust” (MacDonald 2002) made by both Serbs and Croats draw nearly exclusively on World War II history. The estimates of total numbers of those killed in Yugoslavia vary fairly widely, with early Communist estimates (1.706 million)<sup>52</sup> suspect for their obvious political aims (externally, securing war reparations from Germany and

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<sup>51</sup> For a definitive history of the creation and destruction of the “Serbo-Croatian” language, see Alexander (2013) (which traces the movements of linguistic codification and unity among mutually comprehensible Balkan peoples beginning in the 19<sup>th</sup> century, and follows language and its role in the construction of identity and use in politics through Yugoslavia's creation and destruction). Alexander terms the mutually comprehensible language once called Serbo-Croatian, “Bosnian, Croatian and Serbian (BCS)” in her textbook and grammar of the language. (Alexander 2006)

<sup>52</sup> This figure was presented to the war reparations committee in 1946. Cited in MacDonald (2002: 161).

internally, equalizing losses to soothe interethnic tensions). U.S. statisticians put the number at 1.067 million,<sup>53</sup> which comports with later estimates made in the 1980s.<sup>54</sup>

By the end of the war, Tito's Partisans had triumphed and Yugoslavia had liberated itself from Axis control. Consolidating power, Tito purged enemies<sup>55</sup> and began building the second iteration of Yugoslavia. In 1948 Tito successfully outmaneuvered Stalin and exited the Soviet bloc. In addition to developing its own unique version of socialism, Yugoslavia was also a founding member of the Non-Aligned Movement (1961).

Tito's Yugoslavia was a state devised of six "constituent republics": Slovenia, Croatia, Bosnia-Herzegovina, Serbia, Montenegro, and Macedonia. The Constitution recognized six constitutive peoples/nations who enjoyed "the right to self-determination, including secession": Slovenes, Croats, Muslims (recognized as "constitutive" first in the 1960s), Serbs, Montenegrins, and Macedonians. By contrast, "nationalities" in Yugoslavia, the largest of which were the Albanians<sup>56</sup> (but which also included significant Yugoslav populations of Roma, Jews, and Hungarians), were not entitled to the constitutional right of self-determination/secession. (Trbovich 2008) Instead, two "autonomous provinces" were carved out of Serbia (Kosovo in the south, with its Albanian population, and Vojvodina in the north, with its Hungarian population). These autonomous provinces were designed to temper the proportional power of Serbia, which was twice as populous as the next largest republic, Croatia. When Yugoslavia later unraveled, new countries formed along internal republic borders.<sup>57</sup>

### **Destroying the Yugoslav identity: ethno-nationalism & war**

Robert Hayden (1999) argues that what doomed Yugoslavia was the latest version of the Yugoslav Constitution, finalized in 1974, six years before the death of Tito. Unwilling to name a successor, Tito instead instituted a collective presidency, a

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<sup>53</sup> U.S. statisticians Paul Myers and Arthur Campbell, cited in MacDonald (2002:161).

<sup>54</sup> Serb statistician Bogoljub Kočović and Croat economist Vladimir Žerjavić, working in the 1980s, estimated total deaths at around one million. This estimate is confirmed by the official Yugoslav estimate of the 1960s, kept secret and published in *Danas* in 1989. Cited in MacDonald (2002:162)

<sup>55</sup> Tito's purges included members of both Ustaša and Chetnik fighting forces, and included the slaughter of up to 25,000 former Ustaša and others at Bleiburg, Austria in May 1945. The events at Bleiburg were not acknowledged during Tito's rule. Since Croatian independence, the massacre is now commemorated with an annual on-site parade; free buses take all interested observers on the daylong trip from Zagreb. This is what MacDonald (2002) calls the "Croatian Holocaust" event, which competes with the "Serb Holocaust" event, the Ustaša-run concentration camp of Jasenovac during World War II.

<sup>56</sup> The "Autonomous Province" of Kosovo, which is now more than 90% Albanian, has faced a much harder battle for independence from the Constituent Republic of Serbia to which it belonged; even supported by the UN, the EU, and the U.S., as of this writing Serbia has refused to recognize Kosovo, which declared independence in February 2008. In April 2013, Serbia and Kosovo came to a deal regarding Kosovar governance in order that both countries could continue to move forward in EU accession talks. The question of Kosovo's independence has been destructive within Serbia internally, with Serbia's democratic party nearly losing an election over the issue to the nationalists in January 2008. Even though *both* the democrats and the nationalists oppose Kosovo's independence, the democrats are more open to cooperating with the EU in other areas, and the EU supports Kosovar independence. At the time of this writing, Kosovo is recognized by more than 100 countries. *The Economist*, "Serbia and Kosovo: A breakthrough at last," April 20, 2013.

<sup>57</sup> Indeed, this is often the case, and makes the drawing of internal boundaries particularly significant. (Walker 2003) With the peaceful succession of Montenegro from Serbia in 2006, all six 'Constituent Republics' are now independent countries.



ruling body that would lead Yugoslavia. This body was comprised of eight members, one representative of each of the six republics and the two autonomous provinces, with group leadership rotating annually. This complicated system of a rotating presidency functioned only with Tito as a magnetizing influence at its center. After his death in 1980, this federal system created a power void into which nationalists eventually inserted themselves. Meanwhile, the warming of the Cold War resulted in Yugoslavia losing its status as “Western darling”; the credit line extended throughout the 1950’s and 60’s was cut and deficits came due, all of which markedly decreased the standard of living within Yugoslavia. Yugoslavia’s decentralized government was ill prepared to deal with these crises, and the Yugoslav economy languished.

Recognizing Yugoslavia’s deep and lengthy economic and political crisis is central to understanding the success of nationalist politicians in the decade that followed. Balkan scholars are somewhat divided on the question of the origins of nationalist politics in the 1980’s and 90’s. Certain authors suggest that nationalism, and specifically the Wilsonian ideal of self-government for peoples, constituted a driving, populist force for the political successes of the Milošević and Tuđman regimes. (Hayden 1999; Tanner 2001)<sup>58</sup> More generally accepted, however, is the view that nationalism emerged *from the elite* as a political program in Yugoslavia and was promulgated “by men who had nothing to gain and everything to lose from a peaceful transition from state socialism and one-party rule to free-market democracy.” (Silber & Little 1995: 25) Both Milošević and Tuđman used fear to pave their political pathways and best their political adversaries. Nationalist parties with divisive agendas worked together, across national divides, to ensure these divisions; nowhere is this more evident than in the 1990 elections, where the universally popular Ante Marković, the Yugoslav Prime Minister who polled as the most popular politician across Yugoslavia in 1990 (Gagnon 2004; Hayden 1999), was defeated by nationalists in the various republics.

In searching for the thread that whose pulling began the unraveling of Yugoslavia, many experts point to the “Memorandum” produced by the Serbian Academy of Arts and Sciences and leaked to the press in 1986. Naturally, this event vies with others: the 1981 riots in Kosovo, where Kosovar Albanians demanded autonomous republic status for Kosovo (i.e. secession from Serbia), or Milošević’s 1987 address to Serbs in Kosovo, promising them they should never be beaten again, or his 1989 speech at Gazi Mestan on the 600<sup>th</sup> anniversary of the 1389 defeat at Kosovo Polje, where Serbs lost their earthly kingdom but gained the kingdom of heaven. Yet the openly nationalist agenda of the 1986 Serbian Academy of Arts and Sciences Memorandum, and more importantly the failure of the communist party authorities to suppress it, is today recognized as a central event signaling the beginning of the end for Yugoslavia.

Produced by a group of intellectuals and academics, the Memorandum did what was impermissible in Tito’s Yugoslavia: it openly discussed the (un)fairness of divisions made along ethnic lines. For example, the Memorandum addressed the partitioning of Serbia into three pieces, with each piece (including the autonomous

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<sup>58</sup> Indeed, this has become the mainstream narrative in Croatia; even those Croats who lived through the war as children explained to me that Croatian independence was predicated on an inability to live with Serbs any longer. One 50-year-old woman, after explaining this to me, stopped herself and noted that this was actually a sort of strange idea, because she remembered how everyone cried in the street when Tito died. (Author interview, Zagreb, Croatia, January 2005.)

provinces of Kosovo and Vojvodina) having its own parliament and governing structures. As noted above, this weakening of Serb might had been intended to equalize the power of Serbia with that of the other five constitutive republics, and to put the Serbian people on par with the other constitutive peoples of Yugoslavia. Responding to this situation, the Memorandum argued that Serbs and Serbia were being victimized within Yugoslavia, and that after winning World War II, instead of prospering, Serbs were suffering economic and political discrimination. The Memorandum further argued that within Croatia and Kosovo, Serbian existence itself was threatened, and that Serbs there were faced with genocide.

The Memorandum of the Serbian Academy of Arts and Sciences inflamed a long-simmering nationalist discourse. Under Tito, Franjo Tuđman, before he was president of Croatia, had been jailed for nationalism as a result of his role in the 1971 “Croatian Spring.” Likewise, Bosnia’s first president, Alija Izetbegović, had once been jailed for nationalist activities. Indeed the list of Yugoslavs persecuted for their political views under Tito became a veritable “Who’s Who” in the dissolution of Yugoslavia. (Silber & Little 1997: 36) What was most significant about the Serbian Memorandum was the broad participation of elites and intellectuals in its creation, and the inability of the Party to quell such expressions. The head of the communist party in Serbia, Slobodan Milošević, harnessed these ideas in his rise to power only a short time later.

In terms of its narrative, the Memorandum was significant in setting the stage for Serb discourse throughout the war, a sort of virulent victimhood where Serbs were both the silent sufferers as well as the saviors of Yugoslavia. This rationale made Serbia the protector of Yugoslavia at the same time as it was its victim, and thus entitled to make demands *in the name of Yugoslavia* as well as to enjoy concessions from the federal state (like the loss of autonomy for the governments in Kosovo and Vojvodina under Milošević).

Importantly, the Academy of Serbian Arts and Sciences Memorandum opened the floodgates of repressed national sentiment *throughout* Yugoslavia, as the Serbs were not the only national group within Yugoslavia to have gripes or concerns. As the largest of Yugoslavia’s minorities, with their republic capital Belgrade functioning simultaneously as the capital of all of Yugoslavia, Serbs had long enjoyed a kind of domination in Yugoslavia; official documents were written in the Serbian version of Serbo-Croatian, and Serbs were disproportionately represented in the Yugoslav military and political elite. The Serbian Academy’s Memorandum opened the door for Slovenian and Croatian complaints. As Yugoslavia’s economic powerhouse, Slovenia had for years produced a disproportionately large share of Yugoslavia’s non-tourism generated revenue, which was then distributed throughout Yugoslavia. Nearly homogenous Slovenia, linguistically distinct from the rest of Yugoslavia, stood up to ask why it was carrying Yugoslavia’s poorest regions, like Kosovo and Bosnia.<sup>59</sup> Croatia had long harbored dreams of independence and had always existed somewhat warily within the South-Slav alliance, afraid of losing its identity to Serbia. The

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<sup>59</sup> This argument was the basis of Slovenia’s demand for a reconstruction of the constitution that preceded Slovenia’s withdrawal from Yugoslavia. Silber & Little criticize the argument that Slovenia, with 8% of Yugoslavia’s population, produced 1/3 of its hard-currency exports, noting that this does not sufficiently calculate the value of raw materials provided by other republics. (Silber & Little 1995: 73)

Serbian Academy's Memorandum was an invitation to Croatian nationalists, proof of the Serbs' desire to dominate the other nationalities within Yugoslavia.

Slobodan Milošević, generally credited with the breakup of Yugoslavia,<sup>60</sup> used the ideas expressed in the Memorandum to rise to power in Serbia and then in Yugoslavia. Milošević's career as a nationalist began with Kosovo. Kosovo houses the center of the Serbian Orthodox church, in Peć, and hundreds of centuries-old churches; it is the historic Serbian heartland. In the 20<sup>th</sup> century, however, demographics worked against the Serbs' historical connection to Kosovo: the combination of a higher Albanian birthrate and Serb migration away from the economically depressed region had the result of making the Serbs a marked minority. By the time of Milošević's ascension to power, Serbs made up only 10% of Kosovo's population, and ethnic Albanians controlled the government and police.

In 1987, Milošević, at the time head of the Serbian communist party, was sent by the Serbian president, his old friend and mentor, Ivan Stambolić, to meet with local Kosovar leaders. A melee broke out and Milošević, seeing police trying to contain Kosovar Serbs, yelled, "No one should dare to beat you." This put Milošević on the political map as a representative of the Serb cause in Kosovo. Two years later, Milošević spoke at the anniversary of the Serb defeat at Kosovo Polje, where, in recollection of armed battles, he intoned that such further battles "should not be excluded yet." In the intervening years, through deft political moves, Milošević consolidated power, overthrowing his communist party mentor and installing operatives loyal to him in Kosovo and Vojvodina.

The rising nationalist political forces in the 1980s led to the election of nationalist politicians across Yugoslav constituent republics. Croatian nationalists fomented ideas to unite Yugoslavia's Croats in a "Greater Croatia" (which imagined unit also claimed territory in BiH); Serb nationalists likewise imagined a "Greater Serbia" (which unit also claimed territory in BiH as well as Croatia). Serbian interests in Croatia and BiH received arms and equipment from the Yugoslav National Army (JNA), an institution in which people of Serbian ethnicity were disproportionately represented, particularly in leadership positions. Serbian goals (that territory peopled by Serbs should be united in a "Greater Serbia") were couched in terms of Yugoslav goals, where the Serb cause and Yugoslav integration were conflated. In 1990, Slovenia's president Kučan led the Slovene delegation out of the meeting of the Communist congress, effectively spelling the end of Yugoslav governance.

In 1991, after a 14-day battle with limited casualties, Slovenia won its independence. Croatia, however, could not secede from Yugoslavia so easily. Having declared its independence at the same times as Slovenia, Croatia was subjected to fierce fighting. For three months in the autumn of 1991, the JNA shelled beautiful Dubrovnik, a UNESCO World Heritage cite on Croatia's southern coastal border. In

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<sup>60</sup> As with many topics regarding Yugoslavia, this is a highly charged contention. While the conventional wisdom places Milošević at the center of Yugoslavia's demise, there is a vocal group outside of Serbia that challenges the attribution of the wars in Yugoslavia to Milošević. (Hayden (1999) argues that Slovenia's President Kučan bears the lion's share of responsibility, for pushing for a non-tenable union that in turn enabled Slovenia's succession.) In his cross-examination of Slovenian's President Kučan at his trial before the ICTY, Milošević asked him, "Why did you need this war?" and, in the context of arguing that the war could have been avoided, stated, "You opted for violence, you personally played the decisive role." *Prosecutor v. Slobodan Milošević*, IT-02-54, Trial Transcript, May 23, 2003 ("Milošević Trial").

eastern Croatia, by the border with Serbia, Territorial Defense (TO) troops, paramilitaries, and the JNA participated in fighting that led to the war's first charge of genocide, the massacre of more than 200 people at the hospital in Vukovar. Ethnic Serbs living in the Krajina region of Croatia formed barricades, drove ethnic Croats out, and held Krajina (creating the Republika Srpska Krajina (RSK), discussed in greater detail in Chapters Five and Six) from 1991 through 1995, when Operations "Storm" and "Flash" recaptured the territory.

War in Bosnia-Herzegovina itself broke out in April 1992. Whereas most of Yugoslavia's six autonomous republics were comprised of solid ethnic majorities, in Bosnia, the population was very mixed, with Bosnian Muslims, Serbs, and Croats living in the same towns, or in non-mixed towns in the same regions. Military territorial gains were made through brutal and deadly campaigns of ethnic cleansing, with clashes between any and all three ethnicities. Fighting in the former Yugoslavia was intense and brutally personal. In his confession to Croatian independent weekly *Feral Tribunal*, Miro Bajramović stated:

I killed 72 people with my own hands, among them nine were women. We made no distinction, asked no questions; they were "Chetniks" [Serbs] and our enemies. The most difficult thing is to ignite a house or kill a man for the first time; but afterwards, everything becomes routine. I know the names and surnames of those I killed.<sup>61</sup>

In August of 1992, Human Rights Watch summarized the situation in Bosnia as follows:

Full-scale war, marked by appalling brutality inflicted on the civilian population and extreme violations of international humanitarian law, has been raging in Bosnia-Herzegovina since early April 1992. Mistreatment in detention, the taking of hostages and the pillaging of civilian property is widespread. The most basic safeguards intended to protect civilians and medical facilities have been flagrantly ignored. The indiscriminate use of force by Serbian troops has caused excessive collateral damage and loss of civilian life. A policy of "ethnic cleansing" has resulted in the summary execution, disappearance, arbitrary detention, deportation and forcible displacement of hundreds of thousands of people on the basis of their religion or nationality. In sum, the extent of the violence and the fact that it is targeted along ethnic/religious lines raise the question of whether genocide is taking place.<sup>62</sup>

The same month, Republika Srpska President Radovan Karadžić invited newspaper reporter Ed Vulliamy of *The Guardian* to visit the Omarska prison camp in order to counter allegations of Bosnian-Serb run concentration camps.<sup>63</sup> The ensuing pictures and reporting publicized the specter of such camps, putting the situation in Bosnia squarely in the world spotlight.

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<sup>61</sup> *Feral Tribune*, September 1, 1997, interview with Miro Bajramović (a member of Tomislav Merčep's special police force, "Autumn Rain"). Merčep was an advisor to the Croatian Interior Ministry; he has been on trial in Zagreb in connection to wartime atrocities since 2010, with no resolution to the case at the time of this writing.

<sup>62</sup> Human Rights Watch, "War Crimes in Bosnia-Herzegovina, Vol. I," August 1992.

<sup>63</sup> Ed Vulliamy, "Shame of camp Omarska," *The Guardian*, August 7, 1992.

Meanwhile, the siege of the civilian population in Sarajevo by the Bosnian Serb army, begun in April 1992, continued; in 1994, 68 civilians were killed when the crowded Markale marketplace was bombed, and in 1995 another marketplace bombing claimed 38 lives.<sup>64</sup> It is estimated that 10,500 civilians died in the three and a half year Sarajevo siege, some killed by the bombs launched from the surrounding hillsides, others murdered individually by snipers.

During the same time period, the Croat-Muslim alliance broke, and gruesome fighting began between those two groups throughout southwestern BiH. In 1995, two years after the creation of the Tribunal designed to hear crimes against humanity and thereby deter the same, the largest single occurrence of genocide since World War II took place, the massacre of more than 7,000 Bosnian men by the Bosnian Serb army after it overran the UN safe haven of Srebrenica. In 1995, planned in concert with the U.S. and NATO, the Croatian military initiatives “Flash” and “Storm” retook the Croatian territory that had been controlled by ethnic Serbs for four years; Operation Storm caused the wars’ largest single incident of ethnic cleansing, the exodus of up to 200,000 ethnic Serbs from the Croatian Krajina.

The genocide at Srebrenica increased international resolve to end the conflict, and in the months that followed, NATO air strikes, as well as advances made by the Croat, Bosnian Croat, and Bosnian Muslim forces, quickly pushed back ethnic Serbian forces in Croatia and BiH. In October, the parties came to the table and a ceasefire was agreed. The Dayton Accords, concluded in November 1995, recognized Croatian sovereignty and partitioned BiH into two nearly equal entities, installing a provisional government under the international supervision of the Office of the High Representative (OHR). This left a “Yugoslavia” comprised of the constitutive republics of Serbia (including Vojvodina and Kosovo) and Montenegro. The architects of the wars (Tudman in Croatia, Milošević in Serbia) remained in their leadership positions, essential partners in the peace process.<sup>65</sup>

### **War wounds: Yugoslavia’s legacy**

It is now nearly 20 years since the cessation of hostilities in the Former Yugoslavia. Casualties of the war include nearly 100,000 dead<sup>66</sup> and the multi-ethnic state of Yugoslavia. International reconstruction efforts in the Balkans, particularly in Bosnia, have been extensive, and cannot be overlooked when considering the work of the ICTY. Indeed, the Tribunal has in several instances directly relied on the carrot of European Union membership, and the stick of economic sanctions, to accomplish compliance with its dictates. The question that animates this consideration of the ICTY, however, concerns the exact way the ICTY has attempted, or succeeded, in

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<sup>64</sup> This is discussed further in Chapter Five.

<sup>65</sup> As discussed below, the ICTY issued indictments for Bosnian Serb president Radovan Karadžić and Bosnian Serb general Ratko Mladić, and these political and military leaders were excluded from peace negotiations, with western leaders demanding that Slobodan Milošević deliver the Bosnian Serbs.

<sup>66</sup> Responding to the need for an accurate death toll, and to combat the types of numeric historical revisionism that is particularly potent in Balkan nationalist discourse, numerous initiatives were undertaken to identify the dead. In 2013, the Research and Documentation Center (Sarajevo) and Humanitarian Law Center (Belgrade) jointly published *The Bosnian Book of the Dead*, putting the official death count at 96,000. See <http://www.zarekom.org/news/The-Bosnian-Book-of-the-Dead.en.html> (accessed June 13, 2013). The Humanitarian Law Center in Belgrade has undertaken a similar project for Kosovo, where the four-part volume will identify the 10,000 victims of the Kosovo conflict and include the circumstances of their death. See Volume One (2012) (on file with author).

addressing Balkan identities. These questions are addressed more directly in Chapter Five.

### **(III) Justice = peace: tasking a court to end a war**

#### **Imagining a war crimes tribunal**

On September 25, 1991, in response to growing tensions in Yugoslavia, the United Nations Security Council passed Resolution 713 affirming its “full support for the collective efforts for peace and dialogue in Yugoslavia.” In July and August of 1992 the Security Council passed further Resolutions condemning the conflict.<sup>67</sup> In October 1992, with Resolution 780, the Security Council established a Commission of Experts to report to the Security Council regarding possible “grave breaches” of the Geneva Conventions. The Commission comprised five “old fogeys” with some degree of expertise in international law and human rights. (Bass 2000: 211) It was chaired by Frits Kalhoven, a retired law professor. Importantly, the committee included M. Cherif Bassouni, a proponent of human rights who approached his role with an activist’s zeal.

To support the Commission’s work, the Security Council passed Resolution 787 in November 1992, calling on the Commission to “pursue actively its investigations [of] grave breaches... and other violations of international humanitarian law.” Behind the scenes, Bassouni accused the UN of obstructionism. In response to this perceived obstructionism, and working outside of UN resources, Bassouni raised \$1.4 million from private organizations, and accumulated 65,000 pages of documents and 300 hours of video tape describing 900 prison camps, 90 paramilitary groups, 1500 rapes, and 150 mass graves in the Former Yugoslavia. (Bass 2000: 211) This material substantiated the ICTY’s first indictments.

On February 9, 1993 the Commission submitted its interim report to the Security Council, finding that grave breaches of the Geneva Conventions, perhaps amounting to genocide, were taking place in the former Yugoslavia, and recommending that an *ad hoc* tribunal be constituted. (Expert Report paragraph 74) On February 22, 1993 the Security Council passed Resolution 808.<sup>68</sup> The resolution “express[ed] once again [the Security Council’s] grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, including reports of mass killings and the continuance of the practice of “ethnic cleansing” and found “that this situation constitutes a threat to international peace and security.” Thus, “convinced that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would enable [persons to be brought to justice] and would contribute to the restoration and maintenance of peace,” the Security Council recommended the establishment of “an international tribunal ... for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.” (Resolution 808 point 1) In furtherance of this goal, Resolution 808 requested that the Secretary General submit, within 60 days, “a report on all the aspects of this matter, including specific proposals and where appropriate options for the effective and expeditious implementation of the decision [above.]” (Id. Point 2) No further guidance was offered by the Resolution.

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<sup>67</sup> Security Council Resolution 764 S/Res/764 (July 13, 1992) and Security Council Resolution 771 S/Res/771 (August 13, 1993) respectively.

<sup>68</sup> Security Council Resolution 808 S/Res/808 (February 22, 1993)

i. “What *Kind* of Tribunal?”<sup>69</sup>

While the public deliberations at the UN celebrated the nascent Tribunal in ecstatic terms,<sup>70</sup> the UN Resolution calling for the ICTY left the details unconfirmed. The Secretary General’s requested report (“SG Report”) was prepared by the Office of Legal Affairs in New York.<sup>71</sup> The first question the report addressed was under what authority an international tribunal might be constituted. The SG Report considered the possibility of establishing such a tribunal based on treaty, which would have the advantage of the full participation of the states in question, but the heavy disadvantage of being debilitatingly time-consuming, with the further risk that the countries directly implicated – the emerging republics of the Former Yugoslavia – would not ratify such a treaty. The SG Report then considered the possibility of drafting or reviewing a statute for an international tribunal before the General Assembly, but again concluded that such action “would not be reconcilable with the urgency expressed by the Security Council in resolution 808.”<sup>72</sup> Finally the SG Report argued that under Article VII of the UN Charter, the Security Council *itself* had the capacity to establish mechanisms “aimed at restoring and maintaining international peace and security.”<sup>73</sup> Since the tribunal was based on the Security Council’s peacekeeping authority, “the life span of the international tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia.”<sup>74</sup>

Several Security Council members expressed reservations. Russia enjoyed a traditional affinity with Serbia, and the development of any international precedent for prosecuting war crimes posed a potential general threat to Russia, in light of Russian activities in Chechnya and elsewhere. China adopted the SG Report with the reservation that: “the International Tribunal established in the current manner can only be an ad hoc arrangement suited only to the special circumstances of the former Yugoslavia and shall not constitute any precedent.”<sup>75</sup> France and Britain both had troops on the ground in Bosnia as part of the UN Protection Force, and thus feared that an aggressive or effective tribunal might jeopardize a settlement in Bosnia, by

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<sup>69</sup> Bass 2000: 215.

<sup>70</sup> Madeleine Albright proclaimed: “There is an echo in this Chamber today. The Nuremberg Principles have been reaffirmed. We have preserved the long-neglected compact made by the community of civilized nations 48 years ago in San Francisco to create the United Nations and enforce the Nuremberg Principles. The lesson that we are all accountable to international law may have finally taken hold in our collective memory. This will be no victor’s tribunal. The only victor that will prevail in this endeavor is the truth. Unlike the world of the 1940s, international humanitarian law today is impressively codified, well understood, agreed upon and enforceable. The debates over the state of international law that so encumbered the Nuremberg Trials will not burden the Tribunal.” Madeleine Albright, Provisional Verbatim Record of the Three Thousand One Hundred and Seventy-Fifth Meeting, NYC, February 22, 1993, S/PV. 3175, February 22, 1993.

<sup>71</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) S/25704, May 3, 1993 (“SG Report”). The committee was headed by Carl-August Fleischhauer (Germany), who was assisted by Ralph Zacklin (UK), Larry Johnson (U.S.), Virginia Morris (U.S.), Daphna Shraga (Israel) and William Taubman (Libya). The names and citizenships of the OLA committee are remarkable first in terms of the strong common law tendency in the ICTY’s initial procedure and second in terms of later scholarship on the subject. Zacklin, in particular, evoked public ire from both Bassouni and ICTY Prosecutor Richard Goldstone for being “an obstructionist force.” He has since published scholarship critical of the Tribunal. (Zacklin 2005)

<sup>72</sup> SG Report, para 21.

<sup>73</sup> SG Report, para 27.

<sup>74</sup> SG Report, para 28.

<sup>75</sup> UN Security Council, May 25, 1993 9 p.m., S/PV.3217.

indicting leaders, or that their support of such a tribunal might put their troops at greater risk for retaliation on the ground. Michael Scharf, who participated in the establishment of the ICTY at the U.S. State Department, identifies several members of the SC with reservations specifically regarding the ICTY as an “impediment to a negotiated peace settlement.”<sup>76</sup> Even strong proponents of the Tribunal such as the U.S.’s UN Ambassador Madeleine Albright expressed doubt that the Tribunal would ever arrest anyone in a statement arguing that the Tribunal would be effective “whether or not suspects can be taken into custody.”<sup>77</sup> Nonetheless, on May 25, 1993 the SG Report was unanimously adopted, without modification, by the Security Council.

In detailing the obstacles posed by member states and committees within the UN to the ICTY’s creation, Gary Bass wryly notes that structural hurdles to be crossed in setting up the ICTY were sufficient “to cripple the tribunal without attracting the kind of embarrassing headlines that would come from open opposition to it.” (Bass 2000: 216) Drafting the statute, selecting judges, and appointing a prosecutor all stood between the imagined Tribunal and its prescribed functions. Physical obstacles such as the lack of functioning courtrooms and staff offices, a detention center, and adequate finances also threatened the fledgling institution. The ICTY’s budget in 1993 was U.S. \$276,000, and staffers reported difficulty collecting their pay. (Bass 2000)

The SG Report contained, as an appendix, the ICTY Statute, a tidy document of just over 10 pages, comprised of 34 Articles. The tribunal was granted competence over “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”<sup>78</sup> It proposed to apply “rules of international humanitarian law which are beyond any doubt part of customary law”<sup>79</sup> or more specifically, the Geneva Conventions of 1949, The Hague Convention Respecting the Laws and Customs of War on Land (1907), the Genocide Convention (1948), and the Charter of the International Military Tribunal (1945).<sup>80</sup> These included specifically, “Grave breaches of the Geneva Conventions of 1949,”<sup>81</sup> “Violations of the Laws and Customs of War;”<sup>82</sup> “Genocide;”<sup>83</sup> and “Crimes against Humanity.”<sup>84</sup> The crime of waging aggressive war, central at the IMT, was omitted.<sup>85</sup>

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<sup>76</sup> Michael Scharf, “Indicted for War Crimes, Then What?” *The Washington Post*, October 3, 1999.

<sup>77</sup> UN Security Council, May 25, 1993 9 p.m., S/PV.3217

<sup>78</sup> ICTY Statute, Article 1.

<sup>79</sup> ICTY Statute para 3.4

<sup>80</sup> ICTY Statute para 35.

<sup>81</sup> (Article 2) These include: willful killing; torture or inhuman treatment; biological experiments; willfully causing great suffering; causing serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or a protected civilian to serve in the armed forces of the hostile Power; willfully depriving a prisoner of war or a protected person of the rights or fair and regular trial prescribed in the Conventions; unlawful deportation or transfer; unlawful confinement of a protected person; and the taking of hostages.

<sup>82</sup> ICTY Statute Article 3.

<sup>83</sup> ICTY Statute Article 4. The central piece of the legal definition of genocide is “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”

<sup>84</sup> ICTY Statute Article 5. These include: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; other inhumane acts. See e.g. Rachel Taylor “Tribunal Law Made Simple” available at <https://www.globalpolicy.org/component/content/article/163/29333.html> (accessed June 1, 2013) (summarizing ICTY foundation documents and jurisdiction).



Where the IMT at Nuremberg had jurisdiction over natural persons that included organizations, the ICTY Statute refused to consider the criminality of organizations,<sup>86</sup> and therefore tries only natural persons.<sup>87</sup> The mechanism for charging individual criminal responsibility, located in Article 7 of the Statute, will be explored in depth in Chapter Four.

Article 12 of the Statute set forth the selection of judges; states could nominate up to two candidates, and the Security Council would select a list of between 22 and 33 names from such nominations to pass on to the General Assembly for election for a renewable period of 4 years. Judges would further elect a president from amongst themselves. The President would then select which judges should be assigned to trial and appellate chambers, and preside over appellate proceedings (in addition to being a member of the Appellate Chamber herself).<sup>88</sup> The Prosecutor, who “shall act independently as a separate organ of the International Tribunal [and] not seek or receive instructions from any Government or from any other source” was to be appointed by the Security Council on nomination by the Secretary General.<sup>89</sup> No institutional resources were set aside for the Defense.

Selection of judges was relatively quick, and by November 1993 11 judges were installed in temporary quarters in The Hague, led by the ICTY’s first president, the prominent Italian jurist and human rights proponent Antonio Cassese. Cassese began working on securing permanent headquarters for the ICTY, including setting up a courtroom and a jail.

Article 15 of the Statute called on the judges of the ICTY to “adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.” Suggestions regarding the content of such rules flowed in from many quarters.<sup>90</sup> Morris and Scharf note that, given the tight turn-around, anyone who was able to produce a finalized document got a hearing. (Morris & Scharf) The first rules of procedure and evidence were confirmed February 11, 1994. Rule 6 provides for their amendment by a plenary of 10 permanent judges.<sup>91</sup> Amendments have historically been generated by the Prosecutor’s office, Tribunal decisions, and UN expert groups. As of this writing, the ICTY Rules of Procedure and Evidence have been revised 48 times.<sup>92</sup>

The ICTY is an *ad hoc* tribunal, which means that it is limited in time, scope, and jurisdiction. While it was issuing indictments, the ICTY enjoyed juridical

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<sup>85</sup> The history of the crime of aggression, too complex to be thoroughly considered here, is an interesting one. The central change at Nuremberg, aggression has fallen into complete disuse at international law. The International Criminal Court omitted it from its Statute when negotiations on a definition broke down and threatened the entire ICC project. The question of whether “aggression” should be added to the International Criminal Court statute is perennially under consideration, with no progress to date.

<sup>86</sup> ICTY Statute para 51.

<sup>87</sup> ICTY Statute Article 6.

<sup>88</sup> ICTY Statute Article 14.

<sup>89</sup> ICTY Statute Article 16.

<sup>90</sup> Morris and Scharf have collected some central examples in their Volume 2 of *Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (Transnational Publishers USA 1995).

<sup>91</sup> With the expansion of ICTY staff, *ad litem* judges have been added to permanent staff.

<sup>92</sup> The latest draft is dated August 28, 2012.

primacy over war crimes committed on the terrain of the former Yugoslavia from 1990-1999.<sup>93</sup> In Bosnia, an international protectorate governed by the Dayton Accords, where the international community played a primary role through the Office of the High Representative, all war crimes cases were to be seconded to the Tribunal for review before being tried domestically.<sup>94</sup> Only those cases the ICTY did not want to try, but which the ICTY held to merit trial (i.e. where the ICTY found a prima facie case), could be tried domestically after being passed over by the ICTY.<sup>95</sup> Furthermore, judges and prosecutors in Bosnia were required to cooperate with the ICTY.<sup>96</sup>

In Croatia and Serbia, ICTY juridical supremacy is not assumed, and cooperation with the court is dictated by national legal mandate. Cooperation with the ICTY could not be directly compelled in either Serbia or Croatia, although pressures to cooperate, largely in the form of promised EU membership and IMF funding, were brought to bear.<sup>97</sup> Croatian cooperation with the ICTY, promised by Tuđman even as the war still raged, dwindled significantly with the first indictments against ethnic Croats in 1995. Ultimately, however, both countries passed laws regarding cooperation with the ICTY and have extradited indictees to the Tribunal. Such extraditions have often been long in coming and demonstrated a deep resistance to the Tribunal.<sup>98</sup>

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<sup>93</sup> ICTY Statute Art. 9 (2). The ICTY issued its last indictment in 2004, and will complete the last of its processes (finishing on-going trials and appeals) through the Residual Mechanism, which replaces the ICTY in July 2013.

<sup>94</sup> This procedure was known as the “Rules of the Road.” The Rules were derived from two separate agreements, the Rome Agreement (Sect. 5, 2nd paragraph) and “Procedures and Guidelines for Parties for the Submission of Cases to the International Criminal Tribunal for the Former Yugoslavia under the Agreed Measures of February 18, 1996 (“The Rules of the Road”)” The Rules of the Road held that cases involving war crimes could only be domestically prosecuted after the ICTY had determined 1) that there was a prima facie case and 2) that the ICTY itself was not interested in trying the case.

<sup>95</sup> Twelve cases have been transferred by the ICTY to Bosnia. <http://un.org/icty/cases-e/factsheets/procfact-e.htm> (accessed June 1, 2013). See Appendix A.

<sup>96</sup> ICTY Statute, Art. 29 (2)(b-c).

<sup>97</sup> Created and overseen by the UN Security Council, the ICTY exists within this ambit. Opinions differ as to the advantages and disadvantages of this situation, particularly when, as now, it is possible to compare the UN Security Council mandated ICTY with the product of international treaty making, the International Criminal Court. An attorney working at the ICTY opined that the ICTY, as a child of the Security Council, enjoys a clout that the ICC does not. For instance, when the ICTY issues a subpoena, citizens must respond; the ICC, in contrast, has yet to clarify its subpoena process. (Author interviews, The Hague, November 2012). This author is more skeptical of the idea that a charter-based institution like the ICTY possesses more “clout” than a treaty-based institution like the ICC. Ultimately, most international organizations reach citizens through domestic structures, and a strong argument can be made that the ICC, which compels state parties to write cooperation with the ICC into domestic law before ratification and membership in the ICC is possible, therefore enjoys greater “clout” than the distant Security Council.

<sup>98</sup> Moreover, both Croatia and Serbia have independently pursued war crimes domestically. In Serbia, such pursuit has come only well after the cessation of the war, spurred on by the assassination of Serbia’s President Zoran Đinđić in 2003: since then, international monies and assistance have constructed a new court to deal with war crimes and organized crime in Belgrade, and the focus is largely on organized crime. In Croatia, the only former Yugoslav country evincing interest in bringing war crimes cases in the years following the war, thousands of cases were brought and tried, all of them against Croatian Serbs, usually in absentia, often with groups of defendants numbering up to 100 at a time and disposed of within minutes; these universally criticized trials served largely to discourage departed ethnic Serbs from returning, for fear of being placed directly in jail.<sup>98</sup> Thus in both Croatia and Serbia, while there has been some movement on the front of war crimes recognition, such movement has either been predicated by external necessity or has represented a further shoring up of

Finally, the ICTY's scope is limited to crimes committed within the territory of the former Yugoslavia. This *does not* include, based on a somewhat infamous determination of the ICTY itself,<sup>99</sup> any purported war crimes committed by NATO in its 1999 campaign in Serbia and Kosovo, though it does include Serb and Albanian-Serb war crimes committed in the same conflict.

The ICTY was a product of timorous *Realpolitik*: violent conflict erupted in a remote corner of Europe, and international actors were reluctant to risk the lives of their citizens in an effort to snuff it out. A Tribunal in The Hague was in all respects the most attractive form of international action for an international community unwilling to forcefully intervene but uncomfortable doing nothing; it enjoyed the moral legitimacy of a court as well as a fashionable Dutch address several hundred miles away from Bosnian battles. If the story had ended there, it might be possible to view the ICTY only in terms of what it was not, that is to say, to see it only as an ineffectual tool against regional violence and a weak attempt by the international community to protest its own impotence. The story did not end there, however. Had the ICTY been no more than an international straw man, it should have dissolved at the cessation of the Yugoslav conflict, its purpose served. The end of the war, however, only saw a dramatic upsurge in the ICTY's activity and efficacy. Even as the international community retained a large and expensive physical presence in Bosnia, it continued to fund and support the ICTY. The international community's commitment to the costly ICTY in the company of other effective military measures indicates that a force beyond *Realpolitik* was at work in the decision to back the creation of the tribunal. Gary Bass identifies this force as the West's commitment to a "liberal idea," tracing this commitment from 19<sup>th</sup> century seeds through Nuremberg and ultimately to the ICTY and ICTR. (Bass 2000) Institutionally, it was the Office of the Prosecutor (OTP) who implemented this liberal idea through the practice of the Tribunal.

### **Shaping the ICTY: institutional legacies of central participants**

As noted above, the central question behind the formation and evolution of the ICTY is that of what "kind" of tribunal was instituted. (Bass 2000) The mere establishment of the institution did not guarantee that the Tribunal could serve as an institution "of truth *and* consequence." (Trueheart 2000) Between Bass's seminal study and John Hagan's related investigation published three years later, the ICTY had begun the trial of ousted Serbian President Slobodan Milošević, a signatory to the Dayton Accords. The story of the growing momentum of this radical decade –from ICTY indictments that were mere paper, because even NATO forces could not be induced to enforce them, to the trial of a former leader and diplomatic partner – is a story that resides largely in the work of the ICTY prosecutors. From 1994-1996 this was Richard Goldstone, the consummate politician. Following him, from 1996-1999, was Canadian jurist Louise Arbour, who indicted Milošević, among other acts.<sup>100</sup>

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what are perceived to be national (as in ethnic majority) interests. This will be discussed in greater detail in Chapters Five and Six.

<sup>99</sup> "Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia" <http://www.un.org/icty/pressreal/p510-e.htm>, June 6, 2000 (accessed November 1, 2012).

<sup>100</sup> William Schabas argues that these reasoned, professional prosecutors assisted the institutional emergence of International Criminal Court by allaying concerns of power-hungry, irrational internationally appointed prosecutors. (Schabas 2010).

From 1999-2007, the Swiss “bulldog” Carla del Ponte led the Prosecutor’s office.<sup>101</sup> Del Ponte successfully tied the work of the ICTY to larger initiatives, speaking for the Tribunal before European Union representatives; she also successfully delayed Croatia’s ascension to the European Union based on an absence of cooperation with the Tribunal. Serge Brammertz, appointed in 2007, is expected to see the Tribunal through its completion.

The selection of the first ICTY Prosecutor, without whom indictments were not possible, was a complicated affair that took 18 months. Here the varied interests of the international community in the *kind* of tribunal they were creating – an empty figurehead or an institution capable of making an impact – were most clearly on display. Cherif Bassouni, the energetic member of the Commission who had successfully pushed the project of the ICTY, lobbied hard for the post, but was ultimately rejected by Britain as too likely to be aggressive (read: to disrupt the peace process). Bassouni’s Muslim identity also posed a problem, as it was feared this might be read as less than objective among the warring Muslim, Serb and Croat factions. Ultimately, Richard Goldstone, a South-African judge of Jewish descent, was selected for the post and appointed in August 1994.

#### **Richard Goldstone brings the ICTY to life (1994-1996)**

When Goldstone arrived on the job in 1994, a deputy prosecutor, the Australian Graham Blewitt, was already in place, working on indictments developed from the information collected through Bassouni’s work on the UN Commission.<sup>102</sup> Goldstone was content to leave the running of the office to Blewitt; he turned his attention to the political problems facing the Tribunal. (Bass 2000) Insignificant funding and significant political obstacles stood in the way of the ICTY performing like a “real” court, which is to say holding trials for indicted suspects. In the summer of 1994 war raged on in Croatia and Bosnia; UN “safe havens” (like Srebrenica) were under threat, the civilian population of Sarajevo was under siege, and the thousands of blue-helmeted UN troops stationed in the region to try to prevent violence served as ready pawns through which the West could be manipulated, as they were repeatedly captured and ransomed by Bosnian Serb forces. As European powers tried to broker a peace, pressures were exerted to ensure that such a peace was not disrupted by ICTY indictments of European “peace partners.”

The OTP was originally allocated 126 positions, very few of which were filled. Blewitt brought in staff to OTP through his Anglo-American network (Hagan 2003: 63). The United States contributed 22 staffers to the OTP. This helped create what is generally recognized as a strong common law preference in the early OTP.<sup>103</sup>

The first indictments issued by the ICTY’s OTP were based on the data collected by Bassouni in his work on the Commission. (Hagan 2003) Commission researchers had gathered information regarding vast human rights abuses in Bosnian Serb-run detention centers around Prijedor, as well as a massacre posing a potential instance of genocide at the Vukovar hospital in eastern Croatia. Goldstone felt pressured to issue an indictment for many reasons, not least among them that without

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<sup>101</sup> Serge Brammertz has been Prosecutor since Del Ponte stepped down in 2007.

<sup>102</sup> A comprehensive table of ICTY cases, including brief summaries of topic and outcome, is attached as Appendix A.

<sup>103</sup> Both Bass (2000) and Hagan (2003) discuss the common law tradition imported into the Office of the Prosecutor in detail.

work product from the Tribunal, he was likely to face difficulties in securing funding from the UN, a process that had already been fraught with difficulty. (Hagan 2003) Duško Tadić, a low-level participant whose name came up frequently in Commission reports regarding atrocities in the camps in the Prijedor region, had been arrested in Munich after having been recognized by camp survivors in a government registration office. Germany was willing to extradite Tadić to the ICTY and the ICTY needed a case; thus Tadić became the first indictee to stand trial at the ICTY. (Scharf 1997; Hagan 2003; Bass 2000) Goldstone also oversaw the ICTY's first guilty plea, the voluntary confession of Dražen Erdemović.

Goldstone's strategy of starting with "small fish," either to work his way up the chain of command or simply to produce Tribunal work product in order to increase institutional credibility, was instantly controversial. Cherif Bassiouni, who traveled to The Hague to brief Goldstone on the criminal information unearthed in his Commission report, urged that Goldstone indict Serbs in the Romanija Corps (responsible for the siege of Sarajevo), or leaders responsible for the policies of ethnic cleansing. (Hagan 2003; Bass 2000)

In 1995, amidst tens of indictments for lesser participants, the OTP issued indictments for the Bosnian Serb leader Radovan Karadžić and the Bosnian Serb military chief Ratko Mladić. Karadžić and Mladić had been the subject of intense negotiations between Goldstone and Western peace negotiators such as Richard Holbrooke. Frozen out of the Dayton Peace Process in order to make indictment by the ICTY possible, Karadžić and Mladić nonetheless freely traveled throughout Bosnia and Serbia, their whereabouts known to the UN's police force, SFOR, which was "authorized" but not "required" to arrest wanted war criminals indicted by the ICTY. In order to increase pressure on these two actors, in the summer of 1996 Goldstone brought a Rule 61 "trial in absentia" process against the two. At "trial," only the prosecution presented evidence; the result was an ICTY decision to issue an international arrest warrant against the two figures.<sup>104</sup> (Hagan 2003; Scharf 1997)

The ICTY began trying its first war criminal in 1996, the Bosnian Serb Duško Tadić.<sup>105</sup> Tadić was a civilian during the Bosnian war and collaborated with the Bosnian Serb army without ever enlisting or officially serving. He was accused of killing several people and raping at least one woman at the Omarska prison camp, which he visited periodically.<sup>106</sup> Tadić came to the Tribunal's attention in Germany, where he was living after the war. (Scharf 1997) German law permits the extradition of suspected war criminals, and on this basis, Germany handed him over to the ICTY. Tadić was the opposite of a "big fish," involved in no way in planning or executing major war crimes. He was not even a member of the Bosnian Serb governing or military apparatus, or an unofficial paramilitary group. Tadić appears to have been a random citizen with a penchant for sadism who enjoyed the disorganization of early war-time Bosnia to pursue his own criminal impulses.

In addition to the question of whom to indict, and when, based on the need to negotiate with certain actors in the region, the ICTY was politically constrained by its own position outside of the Balkans, and the cooperation it required with local power structures, most of which was entirely non-forthcoming in the Tribunal's early years.

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<sup>104</sup> Karadžić and Mladić remained at large until 2008 and 2010, respectively.

<sup>105</sup> The *Tadić* case is considered in greater detail in Chapter Four.

<sup>106</sup> *Tadić* Trial Chamber

While Tuđman promised support to the Tribunal and was an early supporter of the Tribunal, this position changed rapidly in December 1995 when, after issuing several indictments against Bosnian Serbs, the ICTY in turn issued indictments against ethnic Croats. Even in Bosnia, under international guidance, the ICTY had little purchase, as local leaders refused to cooperate and the international police force stationed there had no authority to make arrests. In the years following the war, Karadžić and Mladić lived openly in Republika Srpska, protected by a sympathetic government and untouchable by international forces.

### **Louise Arbour shapes a “consequential” ICTY (1996-1999)**

When Goldstone left office in 1996, 76 indictments had been issued by the OTP. Most of these indictments targeted low or intermediate level Bosnian Serbs. Of those indicted, only eight were in custody, and only one of them was Serbian. At Goldstone’s departure, only one trial had been completed (*Tadić*) and one confession recorded (*Erdemović*).

Sociologist John Hagan (2003), in his in-depth assessment of the politics and personalities that oversaw the institutional success story of the ICTY, credits Louse Arbour with the ICTY’s institutional success. Canadian jurist Louise Arbour arrived with two main projects: to acquire custody of the indicted, and to cull the indictment list. (Trueheart 2000) The OTP lacked any form of police force, and was entirely dependent upon state cooperation. Croatia had formally pledged cooperation but had furnished little; such cooperation was evidently based on the principle that as a victim of Serb aggression, Croatia could only benefit from ICTY action.<sup>107</sup> Serbia remained uncooperative, and Bosnia was governed under international mandate, yet international troops did not make arrests, for a combination of reasons ranging from troop safety to the received inconsequence of the ICTY.<sup>108</sup>

In order to bring ICTY indictees into custody, Arbour pressured NATO to assist in making arrests. NATO had so far resisted such co-option. Under Goldstone, international troops had been implicated in a significant misstep. Bosnian authorities had arrested two Bosnian Serb military leaders, General Đorđe Đukić and Colonel Aleksa Krsmanović, who had inadvertently crossed into Bosnian territory. Although these individuals had not been indicted by the ICTY at the time, their apprehension and captivity was a mitzvah the ICTY could not pass up. Đukić was the logistician of the Bosnian Serb army, working directly under Mladić; Krsmanović was a colonel allegedly involved in crimes against prisoners of war in Sokolac. Goldstone elicited the cooperation of IFOR in “capturing” the two captives from the complicit Bosnian Muslim army; Đukić and Krsmanović were immediately transferred to The Hague. Ultimately, both men were released from ICTY custody within weeks after the ICTY failed to build a case against them. Đukić, terminally ill with cancer, died a short time later, providing General Mladić with a public relations goldmine as he attended the funeral in full military regalia. No NATO or UN troops arrested the indicted Mladić during this public spectacle. After this misstep, it was agreed that no non-indicted defendants would be arrested by NATO or UN troops.

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<sup>107</sup> In fact, at the time of his death in 1999, Tuđman was in the process of being indicted by the ICTY.

<sup>108</sup> SFOR, the international force in Bosnia, killed indicted ICTY defendant Krsto Mičić during a shootout surrounding his arrest in 1999, an incident that provoked protest and outrage throughout Republika Srpska.

Arbour also began the (controversial) practice of secret (“sealed”) indictments. The first such indictment was against Slavko Dokmanović, the Serb mayor of Vukovar who had overseen the massacre at Vukovar hospital. Dokmanović was lured from Serbia to a meeting in Vukovar, where he was captured by IFOR and transported immediately to The Hague.<sup>109</sup> Finally, Arbour rescinded indictments against at least 17 individuals (Bass 2000) in an effort to refocus the Tribunal.

#### i. Indicting Milošević

The cessation of hostilities left Milošević and Tuđman, architects of the wars in the former Yugoslavia, in power. In the winter of 1996, in response to Milošević’s party’s attempted falsification of election results that had seen an upswing in opposition parties, hundreds of thousands of demonstrators took to the streets of central Belgrade for weeks. Milošević managed the upheaval by stepping down as Serbian president and taking over as president of “rump” Yugoslavia (comprised of Serbia and Montenegro). (Collins 2001).

Throughout 1998, Serbian pressure on Kosovar Albanians mounted. In January 1999, 45 civilians, including women and children, were murdered in the Kosovar village of Račak. Louise Arbour responded by flying to Macedonia and driving to the Kosovar border, where she was refused entry. Through she recounted this incident at the time as “the bottom of the pit,” the political impact of Serbia refusing admittance to an internationally appointed official responsible for researching atrocities was significant, arguably moving international consensus towards a humanitarian operation in Kosovo – the NATO bombing in the spring of 1999 – as well as furthering political will to support an indictment. Milošević was indicted in the summer of 1999, the first international indictment against a sitting head of state. He was transferred to The Hague to stand trial in June 2001 after being ousted from power through a political uprising in Serbia.<sup>110</sup>

#### **Carla Del Ponte sharpens the ICTY’s teeth (1999-2007)**

Richard Goldstone came to the ICTY fresh from work on South Africa’s Truth and Reconciliation project, a consummate politician of Jewish extraction. Louise Arbour came as a jurist, an appellate judge from Ontario who learned English, her second language, later in her professional career. Carla Del Ponte, in contrast, arrived as a Prosecutor, the “Iron Lady” a.k.a. “Bulldog” of Switzerland, trained up in corruption scandals.<sup>111</sup> It is undisputed that Del Ponte arrived primed for battle, prepared to crack heads as needed. She is on record as criticizing the ICTY detention center in Schvenigen as “cushy.” Her sympathies, she has repeated stated, lie with the victims, and while all accused are of course innocent until proven guilty, she also advocated the use of the ICTY to try “notorious and despicable criminals” like Saddam Hussein and Osama Bin Laden.<sup>112</sup>

Del Ponte arrived to an ICTY that had indicted Milošević but had yet to detain him; infamous wanted war criminals Karadžić, Mladić, and Željko Ražnjatović, better

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<sup>109</sup> Dokmanović hanged himself in his jail cell at the conclusion of his trial in 1998, on the eve of receipt of the verdict.

<sup>110</sup> Much has been written regarding the ICTY’s trial of Slobodan Milošević. Milošević died in custody before the lengthy trial against him came to an end.

<sup>111</sup> Switzerland is a civil law jurisdiction but prosecutors there are notoriously more adversarial.

<sup>112</sup> Victor Tsilonis, “Interview with the ‘Iron Lady of The Hague,’” *Intellectum*, June 14, 2004, available at [www.intellectum.org/articles /topics/bg\\_Carla Del Ponte](http://www.intellectum.org/articles /topics/bg_Carla Del Ponte) (accessed August 24, 2012).

known as Arkan, were still very publicly at large, enjoying basically full freedom of movement in Serbia and Serb-controlled Bosnia. Del Ponte oversaw the transfer of Milošević to The Hague (a delicate process that involved pressuring Serbia's willing but politically fragile president Đinđić: Đinđić was assassinated by members of organized crime in 2003) and the beginning of his trial. Noting the difficulty of convicting under command responsibility, and charged with bringing cases directly against the "biggest fish" without benefit of any "pyramid strategy" that could use lower level perpetrations against leaders, her office exploded the controversial use of the theory of liability termed "Joint Criminal Enterprise" to win convictions.<sup>113</sup>

Beginning in the late 1990s, international concern over rising Tribunal costs and moderate Tribunal results brought a series of UN Resolutions designed to improve the efficiency of the institution, in some cases by directing the work of the OTP. A 1999 UN Expert Report made dozens of specific suggestions regarding Tribunal practices and rules of procedure.<sup>114</sup> In 2003, the UN Security Council Resolution 1503 directed the OTP to focus on the "gravest" breaches of international humanitarian law.<sup>115</sup> The Resolution specifically named three wanted actors, Karadžić, Mladić, and Gotovina (president of the Bosnian Serb republic, leader of Srebrenica, and Croatian general heading Operation Storm, respectively) who should occupy the attention of the Tribunal.<sup>116</sup> The ICTY was directed to produce bi-annual reports on its progress as part of its refunding requests.<sup>117</sup> Under pressure from the UN Security Council, the ICTY was given a deadline to issue all indictments, and required to show how it was working towards closing down.<sup>118</sup>

Del Ponte is described by colleagues as a gifted politician, and indeed she used the politics of her office to significant effect. She brought effective political pressure to bear to apprehend Croatian general Ante Gotovina, as well as, ultimately, Mladić and Karadžić. It was Del Ponte, not ICTY President Meron, who addressed the EU Ascension Committee regarding the cooperation (or lack thereof) of former Yugoslav states; on her testimony, Croatia's membership in the European Union was delayed.<sup>119</sup>

If Del Ponte was a crusading Prosecutor, it is not clear that she will ultimately be understood as an effective one. The Milošević trial, in particular, has been universally criticized in terms of its organization.<sup>120</sup> The Prosecution's staggering case was broken into several parts, separating Milošević's actions in Kosovo, Bosnia, and Croatia. There were thousands of exhibits and hundreds of witnesses; yet the Prosecutor's case seemed confused and non-directed when set against Milošević, who

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<sup>113</sup> Joint Criminal Enterprise is considered in detail in Chapter Four.

<sup>114</sup> UN Expert Report (1999) A/54/634. This Report is considered in detail in Chapter Three.

<sup>115</sup> Up until this time, the ICTY had asserted it was engaging a "Pyramid strategy" which focused on "little fish" in order to climb the hierarchy. See 2003 ICTY UN report; *see also* Hazan (2004:59).

<sup>116</sup> *See* Schabas 2010 regarding discussion of whether such direction violates the right to a fair trial by challenging a defendant's presumption of innocence. In this case, commentators have argued that the Security Council is not trying the defendants, so the presumption remains intact.

<sup>117</sup> ICTY Statute Article 34, S/25704.

<sup>118</sup> UN Resolution 1534 (March 26, 2004). At this time, both Mladić and Karadžić were still at large, and ICTY President Meron went on record to opine that without their capture, the legacy of the Court would be tarnished.

<sup>119</sup> Institutionally, the President of the ICTY represents the Tribunal, not the Prosecutor. Del Ponte's assumption of this duty complicates the idea of prosecutorial impartiality central to civil law culture and procedure. This is explored more fully in Chapter Three.

<sup>120</sup> *See, e.g.*, Boas 2007; Waters 2013.



represented himself and used the ICTY to great grandstanding advantage. That Milošević died in the midst of this trial, and thus remains un-judged, is also laid at the OTP's feet. Though this cannot be the fault of the OTP, the argument holds that a leaner, faster trial would have allowed judgment in Milošević's lifetime.

### **Closing down**

With its recent capture of Mladić, Karadžić, and finally a lesser-known figure who had nonetheless successfully been on the run for more than a decade, Goran Hadžić, the ICTY now has jurisdiction over all indicted persons. In July 2013, the ICTY was set to close its normal operation and move to the "Residual Mechanism." The Residual Mechanism will continue to hold trials and appeals until the ICTY has finished all its work, which is currently anticipated to last until 2016.<sup>121</sup> Additionally there is the question of the ICTY's archive of materials, and it is currently imagined that a small staff will be retained to supervise the archive. Part of the ICTY's "completion strategy"<sup>122</sup> imagines the ICTY as assisting in capacity building for regional Balkan courts, where the use of materials from the ICTY's archive would play a role. That these materials should be available to other courts trying related matters, as well as more generally to researchers and historians, is a central element of the ICTY's *raison d'être*. Questions of confidentiality and witness protection, which for years have followed the ICTY's transmission of cases to local courts under its *II bis* procedure, will remain live even at the ICTY's conclusion, necessitating a staff to deal with them.<sup>123</sup>

### **Conclusion**

This chapter has situated the ICTY as an institution within the literature and within the history of the conflict the Tribunal was created to address. The field of transitional justice imagines legal institutions as primary sites to uncover truths that will have social relevance. This chapter has drawn links between these transitional justice assumptions and theories developed by law and society scholars regarding court capacity. Court capacity, however, is assessed in relation to societies within which courts are institutionalized, and with an awareness of court institutional structure.

The *international criminal justice template* fixes three central tasks to ICTs: the development of progressive international criminal law; the creation of an accurate historical record; and the ephemeral task of "reconciliation," generally imagined to emerge through the facts gathered by the ICT in its creation of an official version of events. In the chapters that follow, this dissertation assesses the ICTY's achievement through the lens of each of these functions.

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<sup>121</sup> The Residual Mechanism will allow the continuation of the *Hadžić* trial and (imagined) eventual appeals in, at least, the *Mladić* [*Prosecutor v. Ratko Mladić*, Case No. IT-09-92] and *Karadžić* [*Prosecutor v. Radovan Karadžić*, Case No. IT-95-18] cases.

<sup>122</sup> See <http://www.icty.org/sid/10016> (accessed June 16, 2013).

<sup>123</sup> The problem of confidentiality of materials is addressed in Chapter Five.

## Chapter 3: Post Rule of Law: International Criminal Procedure and its Evolution before the ICTY

*“Some civil law models can doubtless deal with criminal law cases more expeditiously than the common law adversarial system. Since all the accused before the Tribunals are from civil law backgrounds, it could hardly be objectionable to them.”*

*“The rights of the accused are protected as much as they should be.”*

*“The hallmark of a good system is uniformity, courtroom to courtroom. You walk in and they all seem the same. You need certainly, predictability, uniformity. But here, the makeup of each individual trial chamber changes things, between civil law, common law, and the occasional oddball set on blazing new trails.”*

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UN Expert Report (1999) (emphasis added)

ICTY Attorney (author interview May 2005)

ICTY Defense Attorney (author interview May 2005)

This chapter begins the dissertation's specific analysis of the ICTY against the *international criminal justice template*. In order to perform its mandate to adjudicate individual cases, the ICTY must necessarily articulate and develop international criminal law (as discussed in the preceding chapters, no prosecutions at international criminal law are possible without ICL having *content*). Law consists of both procedure and substance, and this dissertation's consideration of the ICTY's articulation of ICL likewise breaks its consideration along the procedure and substance of ICL content. Chapter Four considers one element of the ICTY's substantive development of ICL, its articulation of “joint criminal enterprise” as a theory of liability. This chapter examines the development and established content of ICTY procedure.

The ICTY is a unique hybrid, and its procedural rules regulate only itself; the combination of common and civil law techniques developed by the ICTY to hear its cases may or may not be applied in the design of future courts, just as some of its substantive legal developments may or may not be adopted in other courts.<sup>1</sup> The development of ICTY procedure, however, implicates more than the ICTY, as such evolution demonstrates the direction and rationale of the development of international criminal procedure.<sup>2</sup> As the prototype of international criminal law in practice, the

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<sup>1</sup>The most significant example of substantive law developed by the ICTY and thus far refused by other international criminal bodies is the International Criminal Court's rejection of “Joint Criminal Enterprise” (the topic of Chapter Four) as a theory of liability.

<sup>2</sup>The International Criminal Court, for example, has both borrowed and diverged from procedure developed at the *ad hoc* tribunals. (Schabas 2010)

ICTY's procedural evolution, representing the Tribunal's understanding of best practices, cannot be overlooked by other institutions seeking to apply international criminal law.

International human rights law, which has developed prolifically since World War II, includes legal processes as part of its subject matter,<sup>3</sup> and the fairness expectations of ICTY proceedings are very high.<sup>4</sup> Indeed, while the ICTY's sister institution, the ICTR, has been beset by myriad fairness criticisms (*see, e.g.*, Combs 2013; Peskin 2008), the ICTY has, with a few exceptions,<sup>5</sup> been received by its international audience as a generally fair and objective institution.

This chapter challenges the fundament of the ICTY's fairness through a consideration of the *structural* flaws in the ICTY's procedure. Although the ICTY's first procedural iteration owed much to common law (Cassese 1995; Scharf 1997; Bass 2000), it was at its inception already a judicial hybrid, drawing some aspects of its procedure from civil law systems. The ICTY has continued to develop its procedure (48 iterations at the time of writing), moving generally in a direction commonly (mischaracterized) as "increasingly inquisitorial." This chapter traces the evolution of ICTY procedure and demonstrates that this hybrid procedure does not *marry* civil and common law procedural methods, but rather *cherry-picks* from between the two. Although the Tribunal states that it is seeking to take the "best" of both systems, this is a "best" that lacks balance, as it is a "best" measured in terms of the Tribunal's own institutional goals. These goals – efficiency, legitimacy, objectivity, uniformity – do not in themselves threaten defendants' rights; indeed, they would appear to mirror them. But the ICTY's adversarial institutional structure, coupled with the absence of a discursive loop between the institution and those on whom it sits in judgment, creates a structural "conflict of interests" whereby the ICTY's goals cannot and should not be equated with those of the defendants before it.

While the ICTY procedure draws on the procedures of domestic criminal law systems (Meron 1995), the structural forces animating the ICTY lack the balance of domestic systems, where the legitimacy of the ruler depends upon the consent of the ruled. There is no discursive loop between ICTY representatives (prosecutors, judges, legal technocrats at the UN or other international institutions) and the defendants who appear before the Tribunal. The hybrid procedure of the ICTY fails to find the balance realized in (non-hybrid) common or civil law systems, making the ICTY hybrid far less than the sum of its parts. This critique is not intended to fault temporary or incidental unfairness observed in ICTY practice; such anomalies should be understood as incidental, not structural, imperfections, and no institution can avoid them. Rather, this chapter's analysis considers the imbalances of ICTY procedure that

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<sup>3</sup> *See, e.g.*, International Covenant on Civil and Political Rights (ICCPR). *See also*, generally, European Convention on Human Rights and its interpretation by the European Court of Human Rights.

<sup>4</sup> The ICTY articulated its intention of applying rights protections "within the context of the 'object and purpose' and unique characteristics of the [ICTY] Statute" in its first case, (*The Prosecutor v. Duško Tadić, First Amended Indictment*, Case No. IT-94-1-T (September 1, 1995) para 19) and the ICTY's 20 years of evolving procedure demonstrate that this intention remains unchanged. *But see* Mégret 2009 (who argues that fairness expectations of international tribunals should be lower than domestic tribunals). Mégret's contention is addressed later in this chapter, and again in the Conclusion.

<sup>5</sup> Critics of the ICTY have noted that long detention periods awaiting trial and protracted trial proceedings constitute potential violations of defendants' rights; such criticisms, while valid, may be dismissed as elements of the "growing pains" that any new institution undergoes as it perfects its practice.

come, first, from the conflict of interest in articulating a “best” practice, and second, from the ICTY’s categorical refusal to apply methods used in domestic criminal law to temper such structural weaknesses. This finds example in ICTY sentencing policy. ICTY judgments and representatives have defended ICTY sentencing policy, which has always suffered from an absence of uniformity or predictability, as not needing to be uniform or predictable. This is an example of what I call the ICTY’s *post rule of law* method.

The chapter is divided into four parts. In part one, I explore civil and common law systems as typologies to demonstrate the distinct *means* each system applies to reach a common goal (a justice system that punishes the guilty and exonerates the innocent). In part two, I contrast the specifics of criminal procedure between the two systems, demonstrating how the logic of each typology maps on to specific procedural elements in domestic criminal law practice. In part three, I discuss the specifics of ICTY procedure, detailing its evolution and showing how the basic procedure drafted in 1994, usually deemed “mostly adversarial,” has evolved towards what are understood to be inquisitorial processes, and what this has meant for the function of the tribunal. This part begins by considering certain hybridities that the ICTY “was born” with, which include procedural aspects unlikely to translate across the cultural divide in either direction, such as acquittals (which function to assure the system is working at common law, and challenge the legitimacy of judicial processes at civil law), the possibility for the Prosecutor to appeal (anathema to the common law), a standard of proof which demands proof beyond a reasonable doubt as determined by a majority of judges, and the ICTY version of “plea bargaining” (which was instituted early in Tribunal practice). Next, I examine the reforms driven by the UN Expert Report, reforms which were designed to address inefficiency and other problems of Tribunal practice. I argue that, contrary to the suggestion that reform “move[s] in the direction of drawing upon and incorporating into [ICTY] jurisprudence *the most helpful aspects* of the two systems,”<sup>6</sup> the ICTY’s evolving procedure should be understood as civil law methods *harnessed* by common law methodologies, a situation that seriously threatens defendants’ rights, and therein, institutional legitimacy. Finally, part four concludes with the example of the absence not only of uniformity or predictability in sentencing, but a more fundamental rejection of the need for such, as a quintessential demonstration that the ICTY advocates *post rule of law* processes. Taken together, these arguments support the dissertation’s contention that the ICTY’s failings are structural and unresolvable so long as the singular connection between the institution and the defendants before it is the “universality” of human rights standards (moral theory) rather than a more discursive, “contractual” relationship between individuals and governing institutions such as that upon which liberal theories of sovereignty rest (political theory).

### **(I) Typologies: common law & civil law in contrast**

Legal systems around the globe fall, generally speaking, into two typologies: common law and civil law.<sup>7</sup> Common law, also referred to as “judge-made law,” developed in England and was exported to her former colonies, i.e. the U.S., Canada, Australia, and New Zealand. Common law recognizes precedent – previously decided

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<sup>6</sup> UN Expert Report (1999)(emphasis added).

<sup>7</sup> Civil law here refers to a legal system, not the private arm of law that exists next to the public arm of law, criminal law. Civil law systems comprise civil, criminal, and administrative processes.

cases – as a form of legal authority. The common law tradition prioritizes the value of a contest between parties on each side of the dispute, a contest in which truth, as the strongest element of fact, must emerge victorious. The benefits of judge-made law include a degree of flexibility that can serve the interest of justice. A central conceptual drawback is a democracy deficit where judges, serving for life, play a critical role in law-making.<sup>8</sup> Practically speaking, the system also evidences weakness because the centrality of a *contest* can severely handicap participants with unequal resources. This “inequality of arms” is particularly problematic at criminal law, where an individual defendant confronts the extensive resources of the state.

Civil law, also known as “codified law” was first developed in Rome and edited, in the modern age, by the ideas of Hans Kelsen. Civil law is based on the principle that a legal code, drafted by legislators, constitutes the law that must be applied, without creativity or approximation, by judges. The strength of the civil law typology lies in its transparent, democratic design: law should be the province of elected legislators, and its content should be accessible by all. The weaknesses of civil law are more subtle than those of common law, and largely concern questions of whether the homogeneity of the system makes it impossible to challenge state power when such may be necessary in the pursuit of justice.

It should be noted that no legal system lives entirely within either archetype: common law systems legislate through codes, and civil law judges look to materials outside the Code to adjudicate their cases. Nevertheless, the broad typologies are interesting and important because of the spirit and approach to the law that each embodies. Each typology fundamentally characterizes the pursuit of justice in distinctive ways, which will be explored more fully below.

### **Legal systems as ideologies**

Continental European law, the civil law, preserves uniformity through a strict hierarchical structure. Judges serve as “the mouthpieces of the law” and are thus conceptually not permitted to interpret, much less challenge, the laws formulated by the legislature. (Merryman 1969) Continuity of the law is assured by the central place played by law itself. The Code should change only gradually, as legal improvements are discovered and implemented. Transparency is assured by aiming to make the Code clear and complete, an open book both for the populace as well as for judges, who should not be required to create law to fill in legal lacunae nor to choose between conflicting provisions. Efficiency is assured by assigning actors fixed roles in the process, where each additional process serves as a bureaucratic review of the process that came before.

In contrast, Anglo-American law, the common law, utilizes judicial precedent to preserve uniformity and continuity in legal decision-making. At common law, judges are permitted a wide breadth in their decisions. They may review not only the facts of the case before them, but also the validity of the law in question. Common law judges are permitted powers that border on the legislative. (Ely 1980) These powers are constrained, however, by the necessity of finding a historical basis in law for any decision made by a judge; the historical basis of precedent provides the continuity and uniformity that are critical to the legitimacy of a legal structure.

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<sup>8</sup> At U.S. law, judges are elected in some jurisdictions and appointed in others. The election of judges, while it may mitigate the democratic deficit of judge-made law to some degree, is commonly understood as raising a host of other issues, in many of which political viability may trump justice.

Efficiency and fairness are achieved through a contest. The adversarial structure of the proceedings encourages alternate methods of resolution when the facts seem to be weighted heavily in favor of one side or the other. Most criminal cases are disposed of outside of trial (through plea bargaining), and most civil cases settle outside of court, although often with the assistance and participation of the court.

### **Adversarial vs. inquisitorial**

A useful method to conceptualize the differences between common law and civil law systems is “the dispute” model versus “the official investigation” model. Common law systems construct procedure around the idea of a battle between two opposing sides, staged before a passive arbitrator, the judge. Civil law systems construct procedure around an investigation carried out by impartial public officials seeking the truth of a matter. Grounding an examination of the two systems in the ideal types described above helps explain the distinctions in the roles played by the parties as well as to characterize what is permissible and what is impermissible in each of the two systems. The two typologies enjoy two distinct procedural norms: common law is characterized by “adversarial” or “accusatorial” procedure, where the process is driven by the parties and the judge functions as a passive arbitrator. Civil law by contrast is characterized by “inquisitorial” procedure, where the judge oversees the state’s search for the truth;<sup>9</sup> “only one case exists and no distinction is made between the evidence introduced by the prosecutor and that presented by the defense.” (Turone 2004: 455)

Common law criminal procedure is characterized by two sides (the prosecution and the defense), each with a stake in the outcome of the contest.<sup>10</sup> Obviously, the defendant, whose liberty is at issue, is an interested party. The victim, who has the greatest personal stake, may participate only in the role granted him by the state, which is at best as a witness called by the state to make its case. But the prosecution too, though nominally charged with pursuing “justice,” tends to view convictions as “wins” and acquittals as “losses.” (Pizzi 1993) Both the prosecution and the defense assemble their own facts, witnesses, and arguments in order to present two competing cases. The contest between the parties consists largely in the disclosure (or withholding) of information. The judge acts as a referee in this contest, assuring that rules of fairness are followed and controlling the information available

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<sup>9</sup> These definitions are intended as purely descriptive. This divide is disputed by German comparative criminal law scholar Kai Ambos, who finds both systems equally “inquisitorial” and “accusatorial”; Ambos substitutes “orality” and “immediacy” for the divide instead. (Ambos 2003: 4.)

<sup>10</sup> Ambos characterizes common law as “the two case” approach in recognition that the “search for the (procedural) truth lies, if at all, in the hand of the parties and therefore their conflict is at the center of the proceedings.” (Ambos 2003:4) This two case description also invites a consideration of the rule of truth. As Salvatore Zappalà (2003: 16) explains:

Generally speaking it may be recalled that these models historically reflect different conceptions of “judicial truth.” The inquisitorial perspective generally considers that the objective of the criminal process is ascertaining the truth; this is and should be the overriding concern of the rules of criminal procedure. These rules must enable the ‘inquisitor’ to extract the truth from the suspect. On the other hand, from an accusatorial viewpoint the process per se is what really matters. The establishment of historical truth cannot be ensured other than through respect for procedural rules, which constitute the method for reaching ‘judicial truth.’ In the end, this differentiation reflects two opposing epistemological beliefs: while for the inquisitorial paradigm there is an objective truth that the ‘inquisitor’ must ascertain, for the accusatorial approach the truth is the natural and logical result of a pre-determined process.

to the decision maker, the jury. The binary nature of the contest between prosecution and defense excludes the possible of representing a third interest, that of the victim.<sup>11</sup> (Damaška 1986: 201)

### **The hierarchical vs. coordinate ideal**

A prominent comparative scholar, Mirjan Damaška, criticizes the adversarial/inquisitorial divide typically employed to describe the two systems, because while it accurately explores characteristics of both systems it offers little framework for understanding any patterns which might emerge. There has also been a good deal of procedural overlap, borrowing, and experimentation between the two systems, further obfuscating comparison. Damaška thus considers the distinction between civil law and common law as two separate conceptions of officialdom: the hierarchical ideal and the coordinate ideal. The hierarchical ideal he associates with civil law systems. Under this schematization, information moves up a narrowing pyramid of authority. At each level, legal professionals are asked to think institutionally, not individually, and to “anesthetize” their hearts as part of their duty as professionals. Lifetime bureaucrats deal with situations prescribing a certain routine, and are seldom faced with circumstances outside their field that might call for “individualized justice.” (Damaška 1986: 19) In multi-party decisions, dissenting opinions are swallowed. (Merryman 1969: 38) In this way, the unique and individual nature of the human drama is cleansed and de-colored for appellate study. We see in Damaška’s retelling both the characteristics and the mentality behind the bureaucratic civil law ideal.

In contrast to the hierarchical ideal, where power originates at the top and where superiors are called in to resolve disputes between equals, the coordinate ideal (associated with common law systems) conceptualizes an even plane of power. Officials enjoy status, and there is minimal impetus to move further up in the ladder. Order is maintained through a fear of reciprocity. Decisions are personalized and individual. (Damaška 1986)

### **Typologies as ideals: law as culture**

For practitioners and lay people alike, the judicial systems in which they operate constitute their cultural relationship to justice, fairness, and rule of law. John Merryman urges students of the civil law tradition to “think[] of codification not as a form but as the expression of an ideology.” (Merryman 1969: 26) Common law and civil law are distinguished not merely by a difference in style – at common law, the parties direct the process, at civil law the judge does – but by fundamental distinctions regarding philosophies of justice. For common law practitioners, the neutrality and justice of the proceedings are ensured by a party-dominated fight; for civil law practitioners, the same aims are ensured by multiple layers of official-lead review. Damaška shows how the differences between those trained in common law or civil law systems are not merely skin deep; they cut to the center of identity. (Damaška 1986)

Again and again, in the literature as well as through this author’s interviews, the distrust that legal practitioners exhibit to the system outside which they were

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<sup>11</sup>Unlike in civil law systems, participation of victims in common law proceedings is limited to providing witness testimony.

trained is striking.<sup>12</sup> “To common law ears,” observes one commentator, “the strange cluster of the words ‘the Appeals Chamber convicted him’ sounds blasphemous.” (Gordon 2006: 45) Such distrust tends to be foundational; one system is “rational” where the other is not,<sup>13</sup> or one system “protects the rights of the defendant” where the other system does not. Even those practitioners positioned at legal crossroads – practitioners working in hybrid international systems, or comparativists interested in legal systems outside their own – exhibit great difficulty overcoming a bias towards their primary understanding of how justice, fairness, and rule of law are practiced.<sup>14</sup>

Moreover, as law and society scholars demonstrate, legal culture has important ramifications outside the professional circles where it is practiced. Where Tocqueville located a particularized American litigiousness 200 years ago, Robert Kagan (2000) has advanced a theory of “adversarial legalism” to explain a cultural commitment to common law ideology and practice. As practiced in the U.S., law is a space where minority rights may be protected from the “tyrannical” threat inherent in majority rule.

The foundational nature of the cultural challenge between civil and common law systems’ (universally agreed) commitment to justice, fairness and rule of law can lead to a determination that the “other” system’s practices are “not law,” where that which is “not law” becomes politics, self-interest, or other unacceptable forms of influence. *Ad hoc* institutions like the ICTY are particularly susceptible to charges of politicism that threaten their legitimacy, both because they *are* overtly political institutions to a great degree,<sup>15</sup> and also because their hybrid structure is likely to mix ideas taken from different systems, which themselves have often found different methods to mediate the necessary conflicts inherent in the law’s mixture of doctrine and politics.<sup>16</sup>

Richard Goldstone, the ICTY’s first lead Prosecutor, said of the Tribunal that success would not be based on the number of indictments or convictions, but rather on

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<sup>12</sup> See, e.g., responses to UC Berkeley 1999 survey; UN Expert Report (1999) fn 29 (discussing how Balkan lawyers find common law processes “disconcerting”).

<sup>13</sup> For Max Weber, Anglo-American law was “empirical justice,” where formal judgments are rendered not “by subsumption under rational concepts, but by drawing on ‘analogies’ and by depending upon and interpreting concrete ‘precedents.’” As Hunt notes, “[Weber’s] picture of the development of the common law is of a gradual stripping away of the irrational elements and their replacement by legal formalism which does not in itself rid the system of its irrationality.” (Hunt 1978: 123)

<sup>14</sup> Regarding the newly constituted war crimes court in Bosnia, one ICTY interviewee told me: “OHR has told the judges how to interpret texts and is helping change their mindset. Judges [in Bosnia] are not used to rationalizing by analogy. So either it’s set down in the code in front of you, or it’s not. The idea of leaving things to parties to argue is tough for them.” Author interview, The Hague, May 2005. See also Kupreskić *et al.* “We... asked the investigators to come to Vitez and not to interview only one side... It was first time that I come across the problem of ‘my witnesses and your witnesses’, because in the area in which we worked, we usually had witnesses of the court, a person who has to tell the truth regardless of whether he is speaking in favour of the Defence or the Prosecution. He conveys what he saw and what he heard.” Kupreskić Trial Transcript (August 27, 1998), available at [www.icty.org](http://www.icty.org), Defense Attorney Radovan, 1220:11- 1221:3.

<sup>15</sup> On show trials see Arendt 1963 (critiquing the Eichmann process in so far as it addresses questions outside of the accused’s liability for criminal acts); Shklar 1964; Taylor 2012; Osiel 2000; Douglas 2005 (arguing for the power of trials to shape didactic memory).

<sup>16</sup> In order to preserve the legitimacy of law given the interplay it necessarily shares with politics, different systems have adapted different measures. In some continental systems, judges are not permitted to be members of any political party, for example. Like much of the culture of legal practice, such measures rarely translate well.



whether the trials were fair. (Goldstone, 2000; Minnow 1998:26) International law theorists base international law's legitimacy on fairness. (Koh 1992; Franck 1995) Yet when processes are not mutually understandable, there can be no "fair" there.

## (II) Criminal law practice

This section describes and contrasts domestic criminal procedure within civil and common law systems, in order to draw out the internal logic present in the procedure of both systems. The typologies above demonstrate the distinct ideologies that animate both legal systems. This section examines criminal law in practice to demonstrate how "innocent until proven guilty," as well as standard rule of law protections, regulate both systems.

### Pre-trial

Pre-trial investigations begin in both systems with a crime and police investigation. When the investigation is sufficiently advanced, the Prosecutor is brought in. At common law, the Prosecutor has discretion as to whether or not to press charges against the accused, as well as to what the content of such charges should be.<sup>17</sup> In most civil law systems, such prosecutorial discretion is substantially curtailed.<sup>18</sup> In civil law systems, the "grade" of the crime determines whether there will be an administrative hearing or whether an investigating judge will be assigned to the case. For example, French criminal law divides crimes between minor infractions, "*delits*" and more serious crimes, "*crimes*." For crimes categorized as *delits*, the case is investigated by the police and then the *dossier*, the written file that has been compiled by the police, is passed to a prosecutor, who determines whether or not the evidence should lead to a charge. Cases categorized as *crimes*, by contrast, are passed to a *juge d'instruction*, an investigating judge, who conducts her own investigation. At civil law, both the prosecutor and the *juge d'instruction* are charged with investigating incriminating and exculpatory evidence. If the *juge d'instruction* determines that the party investigated by the police is the guilty party,<sup>19</sup> the *dossier* is

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<sup>17</sup> There is a vast literature on prosecutorial discretion. See, e.g., Miller 1970; Davis 1969. Kay Levine (2006: 697) identifies two "filters" of discretion, the first at the macro-level (which relies on the understood purpose of a statute to distinguish between 'real' and 'technical' crimes), and the second at the micro-level (which includes "office policy, resource allocation, and the multitude of decisions prosecutors must make in each case against the backdrop of discretion exercised by other criminal justice actors").

<sup>18</sup> There is also a significant English-language literature on prosecutorial discretion, or lack thereof, in the civil law, focusing largely on Germany and France. German civil law, for example, is said to mandate prosecution through application of the *Legalitätsprinzip*. Other authors, however, dispute this mandatory prosecution theory, citing the German law's *Opportunitätsprinzip*, a principle of expediency, which permits prosecutors not to move forward on a case based on the triviality of the offense. This is still quite distinct from U.S.-styled prosecutorial discretion, as any application of *Opportunitätsprinzip* must be justifiable on "rational" grounds and can be reviewed by higher courts on this ground. See Damaška 1981, reviewing Thomas Weigend's book; see also Langbein 1974; and the exchange between Langbein, Weinrib, Goldstein and Marcus in the *Yale Law Journal* 1977 & 1978.

<sup>19</sup> The standard of proof is *intime conviction*— "inner certainty." See Ricouer 1995. This standard is common to both criminal and civil proceedings at civil law, unlike common law, which has distinct standards in criminal versus civil proceedings. Moreover, the standard is the same across all stages of the proceedings, from pre-trial through the trial. This, too, is distinct from the common law, which uses a *prima facie* standard at pre-trial, before a Grand Jury, to determine whether or not to go forward, and a "beyond reasonable doubt" standard at the trial phase of criminal proceedings.

forwarded to the Prosecutor. In either case, the charge the prosecution will bring is based on the findings in the dossier.<sup>20</sup>

In the event that a defendant is believed to be responsible for a crime, a charge is brought against him, at which time the entirety of the dossier is made available to him. Counsel may take the dossier home or to her office. The defense is entitled to the full benefit of the information contained in the dossier. In its absence of obfuscation or dramatics, civil law hews to the theory that open investigations are the best methods of ascertaining the truth of events. Finally, at civil law, the victim of a crime may join the case, not as a witness for the state (as at common law) but as an actual party to the criminal case. Such participation begins in the pre-trial stage of the proceedings.

At common law, the prosecutor receives the police investigation, and determines whether to bring a charge and if so what charge to bring. While ostensibly an arm of the state, the common law prosecutor is an adversarial party. This plays out, in the investigation stage, in the prosecutor's requirement to *turn over* to the defense any exculpatory evidence she finds during her investigation, but not to *seek out* such exculpatory evidence. After an investigation, the Prosecutor brings a charge. Charge inflation is typical. Charge inflation is an effective technique to encourage a defendant to plead guilty to a lesser charge and thus to dispense with the necessity of a trial: as much as 95% of all criminal charges in the U.S. may be dispensed with through plea bargains.<sup>21</sup>

The central distinction between the pre-trial process in the two systems is its purpose. At civil law, pre-trial procedure is designed to determine the likely guilt of the party charged. The standard of proof is "*intime conviction*" the "inner certainty" of the trier of fact.<sup>22</sup> The resources of the system are concentrated on determining whether or not further system resources should be expended – clearly, neither the state nor the defendant benefits from prosecuting an innocent party. Thus police, investigative judges, and prosecutors are all charged with investigating incriminating and exculpatory evidence. Defendants deemed innocent are released. Those found guilty are sent on to trial, where an official determination of guilt is virtually assured.

At common law, the guilt of the party charged is determined at trial. Trials, however, consume substantial state resources. In addition to the work of the prosecutor in preparing for trial, there is the selection and employment of a jury, and the trial itself, an affair that can range from less than a day to, in the case of celebrity crimes, several years. In the event that a defendant is indigent, counsel is provided. These costs must all be born by the state. Moreover, trials carry a high likelihood of acquittal, as it is the state's burden to demonstrate guilt "beyond a reasonable doubt." Jury trials, the nearly mythic centerpieces of common law, are thus in fact comparatively very rare occurrences; only a tiny fraction of the criminal offenses committed in common law systems are ever adjudicated by a judge and jury.

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<sup>20</sup> There is some room, as well, for prosecutors to determine what charges should emerge from an event, although as above, such "discretion" is always subject to review and must meet a "rationality" standard.

<sup>21</sup> See the review of literature in Combs (2006), including Fischer 2000:1012 (which shows that 90-95% of cases were resolved through guilty pleas).

<sup>22</sup> The standard of proof at civil law is "both universal and also more subjective." Civil law judges have trouble understanding the different standards that exist at criminal and civil law in common system. (Van Caenegem 1999:85)

We should therefore understand that the purpose of the pre-trial process at common law is to seek to avoid trial. This avoidance, however, is not obtained by expending additional state resources, as in the civil law tradition, to determine the defendant's guilt during an investigative phase and therefore *to try only guilty parties*. Instead, common law systems use prosecutorial discretion and plea bargaining to cull criminal charges from proceeding to trial. Plea bargaining is a central aspect of the common law pre-trial process, where the prosecutor bargains a reduction in charge, sentence length, or both, in exchange for the defendant's plea of guilt. While this plea of guilt must be entered before a judge, it significantly reduces the cost of criminal justice by avoiding the convocation of a jury and the resources expended on a trial.

### **Trial**

As detailed above, a central facet distinguishing the *trial* in common and civil law criminal procedure begins with the *pre-trial* apparatus, which sets up what kind of truth finding (ascertaining the truth, as at common law, or confirming the truth, as at civil law) the trial is designed to produce. At common law, the trial is the proving ground, where the majority of the "action" happens.<sup>23</sup> At civil law, the action happens during the investigation preceding the trial, and the trial is the transparent element of the process that allows the public to observe the judicial branch in action. The different role played by trials in the two systems is furthermore demonstrated through the different demands on the participating parties through the roles they are required to play in both systems.

One important distinction between common and civil law trials is the common law's division of issues into legal questions (which shall be determined by a judge) and factual questions (which are the domain of the jury).<sup>24</sup> Common law proceedings are understood to represent a contest between two sides, in which prosecution and defense square off, with the judge as neutral arbitrator. In this conception of the trial, the intervention of judges should be limited to guiding the parties regarding the tools they are allowed to bring or use in the contest. Judicial participation is limited in part by the inferior familiarity of judges with the case. At trial, the case is laid out before the judge in its specifics for the first time; the parties are the experts, and the judge is a level removed. But judicial participation is also limited for reasons of neutrality and legitimacy: any further, or more direct, intervention on the part of judges – such as questioning a witness – is understood to threaten the objectivity of the proceedings by allowing the finder of law (the judge) to potentially influence the views of the finders of fact (the jury). The jury, after hearing the cases presented by the two opposing sides, and upon being instructed on the applicable law by the judge, retires to confidentially determine the guilt of the accused. This determination must be unanimous.

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<sup>23</sup> In fact, if one considers pretrial motions at common law to be arguments about how the trial will be conducted, (including discovery, which determines the information that is known and included, as well as motions regarding the inclusion and exclusion of expert testimony, evidence, and witness participation), then we can say that the trial comprises not the majority of the action but the entirety of the action at common law.

<sup>24</sup> Certainly the presence of the jury at common law is in itself a major distinction between common and civil law trial processes. Some commentators downplay this difference by noting that many civil law systems employ a three "judge" panel where two of the "judges" may be laypeople or otherwise less formally trained than the presiding judge. There are, of course, many important differences between such "lay judges" and a jury.

Civil law trials, by contrast, are generally overseen by a three-judge panel. Judges direct the process and enjoy a much more active role than their common law counterparts, questioning witnesses directly, and demanding further evidence, investigation, or witness testimony where they deem necessary. The dossier containing all relevant facts of a case is provided to the judges before trial, allowing the judge to become an “expert” in the case beforehand. At the end of the trial, the judicial panel convenes and determines the guilt of the accused, by majority vote.

The role of the defendant is also very different in the two systems. At common law, the defendant enjoys a right to silence because of the possibility of self-incrimination. This right means that no negative inference may be drawn from the defendant’s unwillingness to address the court. As a principle, the right to silence enforces the prosecution’s burden to prove its case on its own, and ensures that the defendant is treated as “innocent until proven guilty.” While defendants at common law are permitted to take the stand and speak in their defense, such statements are open to cross-examination by prosecutors, all of which may be considered by the jury in making its determination. Thus structurally, defendants are encouraged to remain silent, as their silence may not be used to make the case against them, whereas their participation may.

At civil law, defendant participation may be demanded by the judge (although it is not technically mandatory) because the defendant is not permitted, as a party with an interest in the case, to act as a witness for himself. No element of the defendant’s testimony may therefore be used as a factual component to strengthen the dossier. With judges checking facts and law, as well as pronouncing the sentence, a defendant’s participation can usually only help his case, by shedding light on his motivation or the context of his action. While technically “innocent until proven guilty,” defendants at trial in civil law in fact carry the burden of proving their innocence at the moment of trial by showing some misstep made in the investigation. The upshot is that most defendants do address the court at civil law, which serves to add legitimacy to the proceedings because when a defendant participates in the case against him this signals his consent. Consent to the proceedings increases the legitimacy of the proceedings. (Shapiro 1986)

It is also interesting to note, in considering the role of defendants, that both systems recognize a right against “self-incrimination,” which ensures justice and protects the rights of the accused, albeit in different ways. In civil law systems, the accused must address the court if requested by the judge, but this address is not a sworn statement, and thus the accused is protected from perjuring himself based on what he has previously told police or other authorities. At common law, the accused is protected against self-incrimination by retaining the right to remain silent.

Finally, the two systems differ significantly in terms of the orality of the proceedings. Civil law, moving forward on a written dossier, makes significant use of written testimony at trial, reviewing such testimony in open court. Because the defendant has full access to the dossier before trial, contestation of written testimony should also be raised, and generally resolved, at the pre-trial stage. In contrast, common law trials are defined by the orality of the process, where all information relevant to a finding of guilt must be discussed, and contested, in open court. While at common law a judge may have received written briefings alerting her to the legal arguments raised by the two sides, the fact-finding jury relies entirely on the oral presentation of evidence and argument to make its finding. This also provides the

defendant the capacity to interrogate the witness brought against her, an important element of defendants' rights recognized at international law.<sup>25</sup>

In addition to the contrasts explored above, there are two specific aspects of trial procedure that differ across systems where a clash of ideologies has been evidenced at the ICTY: plea bargains and acquittals. These are explored in turn below.

#### i. Plea Bargains

Plea bargaining is the practice in which the prosecution changes the terms of the indictment against the accused in exchange for information or cooperation offered by the accused, after which the accused accepts responsibility for the changes made by the prosecution (entering a guilty plea before the court). Plea bargaining can consist of "charge bargaining" and/or "sentence bargaining."

Proponents of plea bargaining argue that it is a win-win situation for prosecution and defense. By offering deals to defendants in exchange for testimony, prosecutors can secure crucial information against "bigger" criminals, and assure the defendant's cooperation by making it worth his while. This allows prosecutors access to information that they might never otherwise procure, and allows the criminal justice system to focus its resources efficiently (where efficiency can be understood as realized through the capture of "big fish"). In the case where pleas are offered for reduced charges or dropped charges, proponents of plea-bargaining note that this saves system resources, because it obviates the need for expensive, resource-consuming trials. Defendants accept guilt and are punished, which serves the purposed of criminal justice. While such sentences are shorter than they might otherwise have been without the plea bargain, they are nonetheless assured (which is never the case at trial, where at common law prosecutors have the hefty burden of proving the defendant's guilt "beyond a reasonable doubt"), and society as a whole is served by the assurance that criminals will be put in jail.

Opponents of plea bargaining in the common law system often note the disparity in the power of the two sides: a prosecution with the entire resources of the state behind it facing a lone individual is a highly unequal situation. In such a structural power imbalance, they argue, the idea of a "fair deal" between these two sides is impossible. Moreover, at common law, due to the high burden prosecutors face at trial, prosecutors typically inflate charges against defendants, "throwing the book" at someone in the hope that "something will stick." Thus many defendants face inflated indictments to start with; a plea bargain, some opponents argue, is no "bargain" at all; instead, it represents the actual charges that a prosecutor could successfully bring against a defendant at trial (and again, a trial setting at common law, with the prosecutor's high burden and the presence of a non-professional jury, always carries with it the significant possibility of acquittal for the defendant.) Thus, in giving up a trial for a deal that is not actually any kind of deal for a defendant, opponents see the structural power imbalance at work.

For civil law jurists, plea bargaining appears to be a miscarriage of justice. Civil law is predicated on the notion that all acts that constitute crimes shall be punished; prosecutorial discretion, inflation, or abnegation all run contrary to this

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<sup>25</sup> The right to oral confrontation of evidence has been recognized by the European Court of Human Rights as well as the ICCPR.

notion of law, which places power not in the hands of unelected officials (judges and prosecutors) but rather in those of elected representatives (who pass the laws that judicial actors are then charged with carrying out). For practitioners of civil law, plea bargaining looks like the antithesis of law: it is political, subjective, and random. Suspicion of plea bargaining is not therefore just an unfamiliarity with the practice, its processes, or its potential benefits, but rather a more deeply rooted rejection of what the practice represents.<sup>26</sup>

## ii. Acquittals

Because trials serve very different functions across systems, acquittals are likewise understood very differently. At common law, acquittals serve to demonstrate the fairness of the system – if a defendant, after all the resources of the state have been invested in finding him guilty, is found innocent, then the trial apparatus is demonstrated to be objective and capable of rendering a disinterested verdict.<sup>27</sup> At civil law, acquittals do not perform the same communicative function, which is again a function of the different roles of the trial in the two systems. Since trials at civil law exist as public, transparent means of checking the work of the prosecutor, police, investigating judges, etc. (that is the work of the state that has brought charges against an individual and plans to deprive him of his liberty), acquittals may take on an air of scandal. Something in the process must be seriously broken, at civil law, for the state to bring its significant resources to bear against an individual who is ultimately not found guilty of the charges against him. For this reason, acquittals at civil law are exceedingly rare.<sup>28</sup> The communication of an acquittal at civil law is tantamount to an acknowledgement of a massive mistake made by the state, which has usurped the resources of the state in an unnecessary prosecution, as well as the liberty of an innocent defendant.

### **Comparative efficacy of systems**

The central question animating both systems is the search for the truth. The strength of the civil law is seen as its written, multi-party investigation, where police, prosecutor, and investigating judge are all charged explicitly with finding the truth of a crime, a process which translates legally into finding *all* evidence, both incriminating and exculpatory. This means that the substantial resources of the state are (at least in theory) at the service of the defense as well as the prosecution. Some theorists, however, take issue with how this theory works in practice, arguing that it is “unrealistic” to imagine that investigators can remain impartial. (Keen 2004: 773) Certainly, as Fields and Brant (1995: 46) argue, civil law investigations “require[] an inordinate amount of faith in the integrity of the state and its capacity to pursue truth unprompted by partisan pressures.”

Fields & Bryant’s (1995) critique translates into a more subtle structural indictment of the system, an indictment which is alluded to, if not expressed directly, in the comparative work of Martin Shapiro (1986) or Bron McKillop (1997). Civil law pre-trial investigations turn on the thought processes of individuals representing the state, and these investigations do not include confrontation as at common law.

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<sup>26</sup> See, e.g., Plantz 2004; author interviews, The Hague, May 2005.

<sup>27</sup> Indeed, the acquittals rendered by the IMT at Nuremberg were celebrated in this fashion.

<sup>28</sup> A Bosnian prosecutor interviewed in June 1999 by the author’s team for the Berkeley Human Rights study said that in his entire career, he had had only one acquittal, and it had caused him an ulcer. Interview transcript on file with Berkeley Human Rights Center. (U.C. Berkeley 1999 study.)

This model presumes, for the purposes of justice, a homogeneity of ideas, cultures, and meanings. Civil law is thus arguably less able to adjudicate across heterogeneous cultures, ideas, or meanings, and less able to embody flexibility. Take, as an example, the idea of “crime of passion” as an affirmative defense for murder. Around the world, and over time, legal systems’ acceptance of the validity of “crime of passion” as a defense has not remained stable. Changing norms regarding the validity of the defense, at common law, have come from the confrontational model embodied in the adversarial system, where the meanings ascribed to actions are continually subject to scrutiny, both by judges expressly charged with interpreting law, as well as by lay fact finders applying community standards. At civil law, in contrast, meanings may remain frozen in the interpretations perceived by the arms of the state responsible for investigations. Such meanings may translate badly across race, class, or state of origin. The façade of neutrality in charging crimes at civil law obscures the rigidity with which meaning is constructed by an investigative class which may not represent the larger population either demographically, politically, or culturally.

For its part, advocates of the adversarial system cite the importance of argument in arriving at truth, where the adversarial trial process, which demands that evidence must be proven and withstand challenge, assists in the emergence of the truth. This adversarialism pervades all aspects of the trial, including the parties’ claims as well as the narratives brought by fact and even expert witnesses, all of which leaves the fact-finder the task of assessing credibility. Critics of the system note the imbalance in resources between the parties, where the State, with nearly unlimited resources, squares off again a defendant whose resources are typically much more limited.

### **(III) The ICTY’s peculiar hybrid: “an adversarial court with continental flavors”<sup>29</sup>**

Both the practice of the ICTY (the focus of its work, and its use and expansion of international criminal law) and the procedure it employs to do its work, have evolved over the nearly 20 years of the Tribunal’s existence. This section details this evolution, demonstrating how the ICTY’s practice and procedure have evolved towards *securing convictions of the accused*, resulting in an important loss both of rights of the accused as well as of institutional legitimacy. This section ends by examining the way in which the procedural conditions surrounding sentencing at the ICTY create a procedure that is “post rule of law.”

Like the IMT before it, ICTY procedure was developed by a body of jurists hailing from both civil and common law jurisdictions. As discussed above, in both theory and practice, these systems disagree about how best to achieve justice for victims and defendants. The legitimacy of plea bargains, the proper role of prosecutor and judge, the defendant’s responsibility before the court, and the function of the trial are all differently constituted, both theoretically and practically, within the two different systems. Like the IMT, the Rules of Procedure of the ICTY required a marriage of competing practice and ideologies. Unlike at Nuremberg, the 20-year practice of the ICTY, in conjunction with its 20-year political navigation under Security Council scrutiny, has occasioned myriad alterations to those Rules of Procedure (48 drafts at the time of writing). Where procedure evolves, however,

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<sup>29</sup> Interview with defense counsel before ICTY, The Hague, May 2005.

practitioners rarely do: my interviews of ICTY legal practitioners confirm what many others have noted as well – the spirit and practice of the legal system in which a practitioner is trained continues to animate her understanding of law and justice, regardless of the rules she is asked to apply. This results in a situation such as the current practice at the ICTY, where common law practitioners have, for example, exulted (or despaired, depending on the role they are playing) in the civil law’s perceived “ease of conviction” without similarly incorporating the civil law’s front-loaded investigation procedure demanding objectivity of its participants.<sup>30</sup>

### **ICTY rules of procedure & their evolution**

When the Rules of Procedure of the ICTY were drafted in 1994 by the first ICTY judges, the particular make-up of the court staff, as well as the influence over the Tribunal exerted behind the scenes by the United States, dictated that the ostensibly “hybrid” procedure of the Tribunal, intended to represent a mixture of both common and civil law, leaned decidedly toward the common law and owed a clear debt to U.S. jurisprudence in particular. (Bassouni & Manikas 1995:872) Whereas in civil law systems criminal investigations are typically handled by an investigative judge, at the ICTY they are handled by the Prosecutor, as is the case in common law systems. (Idem) While the ICTY does not permit its Prosecutor to grant immunity (thereby prohibiting U.S.-style plea bargaining), it does permit the Prosecutor discretion in determining the charges to be brought in an indictment, which has led to a version of plea-bargaining.<sup>31</sup> Where accused parties are required to speak in civil law systems, the Tribunal permits them to remain silent. (Bassiouni & Manikas 1995: 877) Also, trials in absentia, permitted in many continental systems, are prohibited under the ICTY Rules of Procedure.<sup>32</sup>

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<sup>30</sup>The ICTY is neither the first nor the only hybrid experiment. Italy, a civil law country, has implemented aspects of adversarial procedure in reforming its judiciary. The Italian experiment, however, has generated a great deal of criticism from many quarters. Elisabetta Grande (2000: 230) has challenged the efficacy of the reform, arguing that the accusatorial features transplanted into Italian criminal procedure have not effected a full-style transformation of the code into an adversarial system, but have instead created merely “another type of non-adversary model.” Moreover, Grande (2000: 232) argues that the model doesn’t work; she asserts that the Italian reform has made Italian criminal procedure less protective of the rights of the accused. *See also* Pizzi 2004 (which discusses the introduction of adversarial procedures in Italy).

<sup>31</sup>Rules of Procedure & Evidence, Rule 62 *ter*.

<sup>32</sup>Rule 61 hearings have been “characterized as the functional equivalent of trials [in absentia].” (Thieroff & Amley 1998: 243) Schabas (2005: 655) notes that “[Rule 61 proceedings] really were in absentia trials, the only meaningful distinction being they didn’t impose a sentence when it was over.” These proceedings were conducted on a fairly regular basis in the early years of the ICTY. Several ICTY defendants have been the subject of Rule 61 hearings, including Radovan Karadžić and Ratko Mladić. *See* Quintal 1998. While some authors have decried this procedure as a “pre-trial kangaroo court” (Gordon 2006: 39), it does not in fact appear as fraught with procedural unfairness as critics suggest. At common law, a trial in absentia is truly a violation of defendant’s rights. It is not as clear that such is the case at civil law, where the defendant’s interest is affirmatively protected by state institutions in the pre-trial stage of proceedings.

Moreover, for all the concern over Rule 61 proceedings as trials in absentia, the result of such proceedings is an arrest warrant and potentially the freezing of an accused’s assets. ICTY Prosecutor Goldstone said, of Nikolić’s Rule 61 Hearing, “The publication of the evidence before the Tribunal . . . will constitute a permanent judicial record for all time of the horrendous war crimes that have been committed in the former Yugoslavia. That public record will assist in attributing guilt to individuals. . . .” *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-I, Trial Transcript (Goldstone, J., opening statement) (October 9 1995) 59:5-59:10. For all intents and purposes, however, such a finding prior to Nikolić’s actual trial can hardly be seen as creating a greater prejudice against the defendant



The Prosecutor's office, while situated in The Hague in the same building as the Tribunal, was not subject to administrative control in the same way that a typical civil law prosecutor would be.<sup>33</sup> Under the 1994 ROP the OTP investigated and drew up indictments, which were confirmed by judges. This pre-trial work hews closely to the procedure of adversarial systems: the OTP is required to hand over, but not to seek out, exculpatory evidence. Indictments are vague and frequently amended, even on the eve of trial (where trial, and not pre-trial, often becomes the space where prosecutorial arguments are formulated and perfected). At the ICTY, indictments may be kept secret, following common law practice. As with a hearing before a grand jury in the U.S., suspects before the ICTY may not contest the evidence that may result in an indictment. Furthermore, during the review of the indictment itself, the reviewing judge hears not the defendant but only the Prosecutor, who may present new information to the court.<sup>34</sup> Civil law systems, in contrast, typically allow an indicted person to contest the evidence against him contained in the indictment.

Unlike in civil law systems, the ICTY prosecutor is not constrained by an "investigating judge" who assesses, among other things, the charges and evidence gathered against a defendant.<sup>35</sup> The ICTY Prosecutor, as an "independent body," may bring the charges she sees fit against a defendant. Once drafted by the ICTY Prosecutor, an indictment is reviewed by a chamber of judges at the ICTY, who apply a relaxed standard of proof like that of the Grand Jury in the U.S. The ICTY Chamber looks only at the indictment for proof that the charges brought, if true, constitute criminal offenses. Unlike in civil law systems, the ICTY Prosecutor's office is not constrained by an external body which considers the validity of the case as a whole. This means that, as at common law, the first real chance a defendant before the ICTY has to prove his innocence before an objective body is at trial.

Finally, and most importantly, the trial itself follows a strictly common law calculus. While ICTY judges are permitted a greater role than their common law counterparts in that they are permitted to question witnesses and even request additional witnesses, the ICTY Rules of Procedure ensure that the trial remains the space at which truth would be proven in a process where judicial control is limited by judges' inferior access to information. The standard of proof is "beyond a reasonable doubt." This means also that, as at common law, there is a chance for trial to result in

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than that which generally exists for defendants before the ICTY. After five years on the run, Nikolić was abducted in Serbia and handed over to SFOR in Bosnia. He challenged the ICTY's jurisdiction partly on the grounds of the circumstances of his arrest (his abduction) as well as mistreatment he received during arrest (he claimed he was handcuffed and put in the trunk of the car during his transfer to SFOR). The Tribunal rejected his motion (*Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-PT, Decision on Defense Motion Challenging the Exercise of Jurisdiction, (October 9 2002)).

<sup>33</sup> As was the case with the IMT, the institutional space-sharing raises concerns regarding objectivity, because the two bodies are not perceived as sufficiently independent. (Author interviews ICTY defense counsel, The Hague, May 2005). At common law the adversarial nature of the process requires a clear separation between judges and prosecutors. At civil law, structural distinctions are not as sharp, because both the prosecutor and the judge are working towards the same goal and thus can be understood to share interests to a certain degree.

<sup>34</sup> Statute of ICTY, Rule 47D.

<sup>35</sup> This process was slightly altered by a significant reform, which was intended to make the Tribunal more efficient by employing several civil law processes, such that there is now an "investigating judge." This has not significantly altered the logic underlying the process, however, which remains one of a Grand Jury's finding of a prima facie case against the defendant.

acquittals, as has been the case for 16 of the 161 individuals indicted by the ICTY. An acquittal rate of ten percent would be remarkable in a civil law system.<sup>36</sup>

The Rules of Procedure originally drafted by the ICTY (1994) took the fundamental elements of common law procedure as described above and made two significant, civil-law based alterations:<sup>37</sup> (1) majority determination of guilt by judicial panel (instead of unanimous determination of guilt by separate fact finder, as in the common law system) and (2) the possibility for the Prosecutor to appeal acquittals.<sup>38</sup>

In the case of guilt by finding of the majority, this follows a civil law model whereby a panel of judges sit in judgment of both law and facts. Where civil law systems generally use “lay judges” to constitute two-thirds of the judicial panel, the ICTY in contrast employs only professional judges. Thus the ICTY judicial mechanism is entirely devoid of a “community” element, the peerage that civil law systems achieve by employing lay judges and common law systems through the use of a jury.<sup>39</sup> Furthermore, as the ICTY jurisprudence has developed, there have been an increasing number of majority decisions. This means that situations obtain that one cannot find at civil law, and this structure makes it likely that most trials result in unanimous verdicts based on the logic of what kinds of cases come to trial at civil law. In the event of a majority decision at civil law, one judge has not been convinced to the level of *intime conviction*. What the presence of majority findings of guilt should be understood to mean for the standard “beyond a reasonable doubt” is an open question. It would seem that any doubt that can be held by a professional judge faced with all the evidence would be able, legally speaking, to constitute the sort of “reasonable doubt” that would give pause to her colleagues.

While much of common law procedure strikes a civil law audience as perplexing or worse, the most controversial borrowing from common law is the hybrid form of plea bargaining that the ICTY has instituted. Plea bargaining was originally rejected in the ICTY Statute as “inappropriate for crimes of this magnitude and viciousness.” (Johnson 2004) The push to permit plea bargaining followed the first guilty plea registered before the institution, that of Dražen Erdemović, a Bosnian Croat, who approached the ICTY offering to enter a plea of guilty to murders he committed at Srebrenica as a soldier in the Bosnian Serb army. In 1996, Erdemović gave an interview to a Serbian journalist in Novi Sad about the Srebrenica massacre. Fearing for his life, the ICTY brought him to The Hague, where he cooperated with the Tribunal, providing evidence not in the Tribunal’s possession regarding the particulars of the Srebrenica massacre, specifically detailing several murder locations

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<sup>36</sup> The statistics should be read with the further consideration of the intense pressure that the ICTY is under, both politically and structurally, to bring successful war crimes cases against Balkan defendants. Since there is sadly little shortage of either war crimes or war criminals, successful cases would not seem to be a difficult standard to meet.

<sup>37</sup> See Bassouni & Manikas 1995: 955 (where it is argued that ICTY procedure “selectively incorporate[d] civil law concepts into a predominantly common law framework”) quoted in Mégret 2003.

<sup>38</sup> In addition to appealing, the OTP under Rule 99(B) is permitted to request the arrest and detention of the acquitted accused pending the appeals hearing. ICTY Rules of Procedure and Evidence adopted pursuant to Art. 15 of the Statute of Tribunal, as amended Oct. 6 1995 (“ICTY Rules of Procedure). These particular traits were singled out for criticism in a 1997 law review article by Scharf.

<sup>39</sup> Indeed, some have argued for the value of introducing juries to international criminal law trials. (Powell 2004).

and greatly aiding the Tribunal's investigation of the murder. By his own estimate, Erdemović killed approximately 70 people, and a thousand or more were murdered on the site the day he was there. Erdemović recounted the motivation for his confession in simple terms: "Because of everything that happened I feel terribly sorry, but I could not do anything. When I could do something, I did it." The Trial Chamber sentenced him to 10 years' jail.<sup>40</sup>

As discussed in the previous chapter, Erdemović's cooperation and confession came at a critical time for the tribunal. In the first years of its practice, the ICTY issued dozens of indictments but held no trials, as it did not have defendants in custody. Erdemović provided the ICTY with useful facts about the crimes committed at Srebrenica; his testimony has been used frequently in later ICTY jurisprudence. More critically, however, Erdemović provided an example for the ideology underwriting the ICTY's practice, which was an ideology of the value of a trial to promote reconciliation. Erdemović arrived at the tribunal prepared to take his punishment and willing to state his remorse, two powerful elements of the promise of international criminal law as a transitional justice mechanism. Thus, while Erdemović's guilty plea is not categorized as resulting from a plea bargain, the circumstances surrounding his sentencing both in the original case and at the remand suggest the application of a "plea bargain logic." The *Erdemović* case, with its elements of cooperation and remorse, opened the doors for the adoption of plea bargaining before the ICTY, and the ICTY reformed its rules to permit plea bargaining in late 1997.<sup>41</sup>

Plea bargaining at common law can consist of "charge bargaining" and/or "sentence bargaining." At the ICTY, while both forms of plea bargaining are practiced, only "charge bargaining" follows the "bargain" principle that is central to the practice of plea bargaining at common law. Under a charge bargaining rubric, the OTP revises the indictment against the accused, dropping certain charges in exchange for the accused's plea of guilty against other charges. Amended indictments must be submitted to the Trial Chamber for approval, but thus far, no indictment has been refused amendment for the purpose of securing a guilty plea.

Sentence bargaining is more complex because ICTY sentencing policy is entirely discretionary.<sup>42</sup> In exchange for a plea of guilty, the prosecutor's office will often recommend a shortened sentence for the accused, often joining with defendant's counsel to agree on a proposed sentence length. ICTY Chambers, however, are not bound by the prosecutor's suggestion, even when it represents an agreement with the

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<sup>40</sup> *Prosecutor v. Dražen Erdemović, Sentencing Judgment*, Case No. IT-96-22 (November 29, 1996) ("*Erdemović Sentencing Judgment*"). Erdemović's initial plea of guilt included a statement of remorse, in which he testified that he had been an unwilling participant in the Srebrenica massacre and that he had feared for his life had he not complied with his superior's orders. To take illegal action in order to avoid your own death constitutes "duress," which is a recognized affirmative defense before the ICTY, unlike at the IMT, and thus the Appeals Chamber held that Erdemović's plea was "not informed" and remanded the case to the Trial Chambers for a rehearing. *Prosecutor v. Dražen Erdemović, Appeals Judgment*, Case No. IT-96-22 (October 7, 1997) ("*Erdemović Appeals Judgment*"). At his second sentencing hearing, Erdemović's sentence was reduced to five years' prison. *Prosecutor v. Dražen Erdemović, Sentencing Judgment*, Case No. IT-96-22 (March 5, 1998) ("*Erdemović Sentencing Judgment II*").

<sup>41</sup> Rule 62*bis* (1997); Rule 62*ter* (2001).

<sup>42</sup> See Part IV below.

defense, and even when it comes in conjunction with the recommendation of the defense. In the case of Milan Babić, the Trial Chamber sentenced him to 13 years instead of the less than 11 recommended by the Prosecutor.<sup>43</sup> At the same time, many sentencing determinations have referenced the defendant's guilty plea and/or statement of remorse as mitigating factors to be considered in sentencing. Moreover, a gross average demonstrates that guilty pleas reduce sentences by one-third their length.<sup>44</sup> Since the Erdemović plea, a further 20 cases have been resolved through guilty pleas.

As noted above, for a civil law jurist, plea bargaining is more likely to be perceived as a political a than legal act. Civil law jurists have difficulty accepting plea bargaining as an acceptable practice in a legitimate judicial system. Such rejection comes in part from distinct understandings in common and civil law of the role of the prosecutor (including especially the shape of prosecutorial discretion in the two systems). It is also grounded squarely in a distaste for “bargaining” or “negotiation” as a valid element of criminal law. At civil law, practioners are required to apply a law determined by the legislature. Justice is practiced and protected by professionals applying criminal laws equally and without discrimination. The rule of law consists of this constancy. Thus the idea of “trading” a charge for information, cooperation, or any institutional benefit, strikes many civil law jurists as illegitimate

Plea bargaining's impact on the indictment is especially problematic across systems. At civil law, if an individual is charged with, say, eight counts of violations of international law, this is because law enforcement, the prosecutor's office, and an investigating judge each confirmed that the facts are such that the charge is justified. At civil law, prosecutorial discretion, while it varies across systems, exists only at the margins of non-violent crime, if it exists at all. Thus, at civil law, an individual slated to stand trial for eight counts of violations of international law will come to trial on those counts, and almost universally be found guilty. The state's interest in prosecuting dangerous behavior, as well as the state's interest in locating individuals responsible for such behavior and not burdening uninvolved individuals, are all served by the process. The idea of dropping an identified crime from the indictment based on an individual's behavior or promise after the commission of the crime strikes civil law jurists as arbitrary at best, and as corrupt at worst.<sup>45</sup>

Moreover, for the civil law jurist, plea bargaining fuses two spheres that, for reasons of unavoidable conflict, are designed to be kept separate. The civil law recognizes “interest” as central to judicial processes. Criminal law recognizes the interest of the state, which stands for the interest of the society it represents. It recognizes the interest of the defendant both as a citizen who should not stand unjustly accused and then, later, as a guilty party who cannot be trusted to participate in a process except as a self-interested party. One aspect of this recognition is that defendants may address the court – indeed, may even be compelled to address the

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<sup>43</sup> *Prosecutor v. Milan Babić, Sentencing Judgment*, Case No. IT-03072, (June 29, 2004) (“*Babić Sentencing Judgment*”). This is discussed at length in Chapter Six.

<sup>44</sup> Dixon & Demirdjan (2005: 681). Due to the discretionary and highly non-uniform nature of ICTY sentences, an estimation of the impact of plea bargaining on sentence length can only be suggestive of the impact of the practice.

<sup>45</sup> See, in Chapter Six, the discussion of the *Plavšić* guilty plea, where eight counts, including genocide and aiding and abetting genocide, were dropped to one, “persecutions.”

court – but their testimony may not be considered as evidence in support of or against the indictment. Finally, civil law recognizes the interest of the victim; civil law criminal processes make space for victims to participate, whereas at common law this space is relegated strictly to witness testimony, at the discretion of the prosecutor. Plea bargaining problematically – for a civil law audience – blends the interest of the state with that of the defendant, allowing the defendant’s self-interest to impact the work of the state. Plea bargaining invites the defendant to make a decision based on a simple calculation of risk and interest – the interest of a completed process with a known outcome versus the risk of a long process and an unknown outcome. This calculation, at home in the adversarial process of common law, challenges institutional legitimacy in a civil law paradigm.

### **Adding civil law procedure “for efficiency”: the 1999 reforms**

In 1999, concerned with cost and inefficiency in the two *ad hoc* Tribunals operating under United Nations mandate, the Security Council commissioned an Expert Group<sup>46</sup> to report on the work of the ICTY and ICTR and to submit recommendations as to how this work could be strengthened. The 126-page report articulated 46 precise recommendations. In 2000, the ICTY and ICTR responded to the Expert Report’s Recommendations, agreeing with and adopting most of them.<sup>47</sup>

In terms of substance, the Expert Report specifically suggested that the ICTY should use Tribunal resources to bring senior leaders to trial, relegating less senior defendants to domestic processes within the Former Yugoslavia.<sup>48</sup> The Expert Report

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<sup>46</sup> The Expert Group was comprised of Jerome Ackerman, USA (Chair); Justice Pedro R. David, Argentina; Justice Hassan B. Jallow, The Gambia; Justice K. Jayachandra Reddy, India; and Patricio Ruedas, Spain.

<sup>47</sup> Some recommendations had already been put into effect. Others were adopted following the Expert Report’s recommendations. Still others, objected to in the ICTY Commentary, were eventually adopted. (See in this regard Recommendations regarding limiting expenses to Defense Bar.)

<sup>48</sup> UN Expert Report (1999) para 96. Outreach program discussed in paragraphs 97 – 99.

[D]espite the importance and the value of developing an international criminal jurisprudence and of victims seeing their immediate tormentors tried and punished, the major objectives of the Security Council are in large part not fulfilled if only low-level figures rather than the civilian, military and paramilitary leaders who were allegedly responsible for the atrocities are brought before the Tribunal[] for trial. It is thought that trials of low-level figures would fail to demonstrate the resolve of the international community and insufficiently draw the world’s attention to the importance of the humanitarian objectives underlying the work of the Tribunal[]. Devoting huge resources to the prosecution of “small fry” while vindicating the wholly understandable and justified emotions of individuals and families victimized by atrocities would leave major goals largely unattained. It is hoped that in time the low-level perpetrators can be tried fairly and properly for their crimes by national courts. Nevertheless, it is recognized that are the current stage that may not be possible.

In addition to addressing institutional efficiency, by trying the leaders and military personnel with the greatest authority, *ad hoc* proceedings in theory permit the populace to accept their verdicts by removing fear that their powers will be brought to bear on more anonymous persons. (Bass, *supra* 301) As we have seen with the ICTY, however, the political realities of the Tribunal forced it to look past this standard of transitional justice and indeed, as is perhaps predictable, the resistance to the Tribunal among citizens of the former Yugoslavia may be owed in part to the Tribunal’s procedural inability to reassure the average citizen that the court is not coming for him. (Supporters of indicted Croats made use of such rationalizations in their campaigns, protesting indictments of Generals Norac and Gotovina with slogans such as “we are all Mirko Norac” and “today, Gotovina, tomorrow, YOU!” See Chapters Five and Six. Similar slogans followed the arrest of Karadžić in July 2008.)

also supported the creation of an outreach office for the ICTY in order to inform the peoples of the Former Yugoslavia of its work.

The procedural suggestions made by the Expert Report mostly called for an increase in civil law methods, on the principle that “Some civil law models can doubtless deal with criminal law cases *more expeditiously* than the common law adversarial system.” (A/54/634 page 32, emphasis added) The Expert Report further justified this by observing that, “Since the accused before the Tribunals are from civil law backgrounds, it could hardly be objectionable to them.” (Idem.)

Broadly speaking, the Expert Report pushed three central reforms, each of them ostensibly drawing from civil law procedural methods. First, the ICTY created the role of a “pre-trial judge,” a case-manager designed to expedite cases. Second, the reforms permitted greater use of written witness statements at trial, a procedure designed to cut down on the lengthy, costly process of examining live witnesses. Finally, the reforms gave ICTY judges more power to limit interlocutory appeals. While each of these three amendments to ICTY procedure does, on its face, draw on civil law procedure, none of them preserves the meaningful characteristics that these processes possess at civil law, features that serve to balance the state’s interest in deterrence, punishment, and social control and the defendant’s interest in due process. The central elements and issues with each of these three reforms are considered in turn below.

i. Pre-trial judges at the ICTY versus the civil law model of *juge d’instruction*

The central proposed reform was the institution of a “pre-trial judge” à la the *juge d’instruction* at civil law. The goal was to streamline information by encouraging parties to stipulate to uncontested facts, and to create a dossier that would assist trial judges in being better informed when the case came to trial. In its Recommendation 9, the Expert Report suggested that pre-trial judges should enjoy a “more interventionist role, *inter alia*, including authority to act for the Trial Chamber ... and making a pre-trial report to the other judges with recommendations for a pre-trial order establishing a reasonable format in which the case is to proceed.” (UN Expert Report para 83) While certainly unknown at common law, the ICTY’s pre-trial judge is not in fact a counterpart to the civil law’s *juge d’instruction*, with that position’s inherent mandate to investigate exculpatory evidence.

Studying the impact of the reforms, Langer (2005) found that the addition of a pre-trial judge has made little impact on ICTY efficiency, because ICTY pre-trial judges do not have the capacity enjoyed by the *juge d’instruction* to radically alter charges or impact the case.

ii. Written witness statements

Observers agree that in civil law systems there is a wider use of written statements than at common law. (Wald 2002) Although initially stating a preference for “live testimony” in its Rules of Procedure, the ICTY reforms pushed for an increased use of written witness statements.<sup>49</sup> The ICTY currently advocates a “no preference alternative.” (Gordon 2006: 40; Farlie 2003) Rule 92 *bis* essentially

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<sup>49</sup> Written witness statements Rules 73*bis* & *ter*.

replaced Rule 94 *ter*, which had been even more permissive with respect to admission of written statements.<sup>50</sup>

The OTP, in its response to the UN Expert Group, suggested that efficiency demands would be met by permitting “rulings during trials on matters of fact proved to the satisfaction of the Chambers, or in relation to using the record of prior testimony to create rebuttable presumptions of fact that shift the evidential burden in the course of the trial.”<sup>51</sup>

At issue in the increase of the use of written witness statements in place of live testimony is fundamentally a question of the right of the defendant to challenge accusations brought against him. The ICTY procedure now permits the Trial Chamber to rule on whether or not previous witness testimony (and other facts) have been sufficiently established to be brought in as written statements, and not oral testimony. This case-by-case analysis, however, does not address structural fairness issues at stake. At civil law, these fairness issues are addressed largely by permitting the defendant access to the dossier compiled against him, and by collecting the evidence in that dossier as a neutral party, i.e. where both inculcating and exculpatory evidence is collected.<sup>52</sup>

### iii. Reducing interlocutory appeals

Finally, the UN Document encouraged the limitation of interlocutory appeals. Interlocutory appeals are a problem at the ICTY due to their high number and their capacity to delay cases (the Expert Report noted that there were more than 500 pre-trial motions in 1997 and 1998). At the same time, interlocutory appeals are part of the “game” played in the adversarial process, categorized by the UN Expert Report as follows:

[M]ore of a combat situation between two parties than the protection of international public order and its values under the control of the court.... This, coupled with the presumption of innocence and the principles relating to self-incrimination, results in accused, as is their right [under the ICTY Statute and human rights law] being uncooperative and insisting upon proof by the Prosecutor of every element of the crime alleged. From the standpoint of an accused, this represents optimum use of defense counsel. (UN Expert Report (1999) para 67.)<sup>53</sup>

The Expert Report cited as evidence of efficacy that counsel for the accused was “cooperative”<sup>54</sup> and Chambers obtained witness statements in advance of trial, and the

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<sup>50</sup> *Idem*. See *Prosecutor v. Dario Kordić and Mario Čerkez, Appeals Chamber Judgment*, Case No. IT-95-14/2-Y (Sept. 18, 2000) (Appeals Chamber decision overruling Trial Chamber’s admission of statement of deceased witness implicating accused that was not given under oath, never subject to cross-examination, uncorroborated by other evidence, and was verbally translated by an interpreter from Croatian to English before it was written down in English by an investigator whose native language was Dutch).”

<sup>51</sup> Response to UN Expert Report (1999) para 43.

<sup>52</sup> It should be noted, however, that even civil law systems are instituting increased oral procedures regarding witness testimony, in part in response to the human rights dictates of the ICCPR.

<sup>53</sup> See also para 84 regarding Defense Counsel reluctance to accept stipulations

<sup>54</sup> The characterization of defense counsel engaging in “uncooperative” methods, when exercising the practices the adversarial system requires as an element of the protection of defendants’ rights, suffers a more direct assault under the Expert Report in its consideration of Defense Counsel fees. While steering away from such blunt language in the body of its report, in its Recommendations section the

Trial Chamber “exercised considerable control over the length of courtroom testimony and the trial was completed in about three months.” (Idem fn 23) The Report does not specify the case, whether or not “cooperation” was entailed, or the outcome for the defendant.

The question of court efficacy and the problem of casting defendants’ rights against institutional efficacy raises what should be understood as a *Différend* problem. Considering the issue at international law, Koskenniemi (2002: 17) paraphrases Jean-François Lyotard’s theory of *Différend* as:

a situation in which to accept a method or criterion of settlement is already to have accepted the position of one’s adversary.... In case of *différend*, everything is at stake and the context is always a part of the dispute itself.”

This *différend* problem played out first at the IMT, where defendants sought unsuccessfully to challenge the jurisdiction of the Tribunal, primarily through the charge of *nullem crimen sine lege*. At the IMT, the charge of “aggressive war,” tailored specifically to recognize the illegality of acts committed by Nazi Germany, was controversial even with participants in the IMT prosecution.<sup>55</sup> Similarly, at the ICTY we see that one of the few resources left to the Defense is the potential to exercise obstreperousness in service of the defendants’ rights. Indeed, if the recent spate of high level acquittals is any indication, such obstreperousness is paying dividends.

#### **The verdict thus far: fairness concerns, no added efficiency**

In a 2005 article, Maximo Langer challenged the assertion that ICTY procedure was evolving towards an “inquisitorial” model, arguing instead that ICTY procedure is best described as “managerial.” “Managerial” judging was famously identified by Judith Resnik (1982) to explain reforms in U.S. civil procedure that granted judges more capacity to control certain aspects of the cases before them. In contrast to an adversarial ideal in which the judge is a passive arbitrator before a process run by the parties, “managerial justice” showcased judges intervening in civil proceedings from very early in the process in order to mediate and expedite the proceedings. Langer identifies several ICTY evolutions that fit within a managerial model.

Langer’s article remains agnostic as to whether managerial judging is good or bad for the ICTY. (Langer 2005: 908) In a later article, Langer and his co-author (2011) empirically tested recent ICTY procedures against older cases and determined that the introduction of managerial processes had not increased the ICTY’s efficiency by decreasing the length of proceedings.

Canadian academic Frederic Mégret has written extensively on the “internationalization” of procedure, analyzing the evolution of the ICTY and other international bodies. In seeking to explain the evolution of criminal procedure, Mégret rejects arguments rooted in a clash of traditions (between the civil and common law)

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UN Expert Report (1999) suggests that “In order to reduce the potential for obstructive and dilatory tactics by assigned defense counsel, the amount of legal fees allowed might properly take into account delays in pre-trial and trial proceedings deemed to have clearly been caused by such tactics.” (UN Expert Report (1999), “Recommendations” p. 90 para 5).

<sup>55</sup>See Chapter One.



or in human rights law (where criminal procedure “strive[s] for the fairest possible procedure under the guidance of human rights standards.”) (Mégret 2009: 1)<sup>56</sup> Mégret instead argues for a model he identifies as “international criminal procedure’s process of ‘becoming international.’”

Mégret begins by considering how international trials can act as a “filter” for ideas generated by domestic criminal justice systems. He considers how the particular needs of *ad hoc* criminal tribunals have caused certain aspects of common law criminal jurisprudence – the notion that common law is “defense friendly” or the right of defendants to remain free pending trial – to be reconsidered in international criminal procedure. This is based in part on the idea of exceptionalism attending international criminal law, where some have argued that “the very seriousness of the charges means that only limited analogies may be made with domestic processes at large.” (Warbrick 1998:53) This is also based on the affirmative goals attending international criminal processes, such as deterring criminal conduct to as to facilitate peace and security (which may require international trials to proceed with greater speed than that required by a domestic criminal apparatus).

Although Mégret shows how international criminal tribunals are distinct from domestic criminal tribunals, he is less convincing in his analysis of *why* the rights that adhere to domestic criminal processes should matter less at international law. Mégret’s (2009) research has challenged what he terms the “assumed benevolence” of trials in the international system. He argues that the potential cost to legitimacy by processes that fail to be perceived as fair, and the context and scrutiny under which international tribunals operate, provide the requisite pressure for institutions to adjust their processes as necessary. (Mégret & Hoffman 2003) Yet he concludes that:

The tribunals also stand as a testimony of the peculiar adaptations required internationally to ensure the emergence of a procedure that is deeply in tune with its environment. In that respect, it should be underlined that international criminal procedure is neither better nor worse than at least most Western legal procedural systems. (Mégret 2009: 43)

Ultimately, he concludes, echoing Warbrick, that the standard should be “fair enough,” not “fairest of all.”

The problem with Mégret’s subtle and considered approach is that he does not pay sufficient attention to the means in which criminal law is domestically grounded. In considering other evolving hybrids – he specifically cites China – Mégret pays scant attention to the balance struck within domestic systems between two government interests: 1) protecting the rights of the defendant and 2) punishing criminal offenders. In retrofitting inquisitorial systems with adversarial aspects, experiments currently ongoing in both China and Italy,<sup>57</sup> those domestic governments must balance interests that *at their core* include defendants’ rights, because those

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<sup>56</sup> “[O]ver time, international criminal procedure seems to exhibit certain authoritarian features or at least a tendency to distance itself from liberal archetypes.... It might be tempting to think that the two phenomena are correlated, i.e. that the adoption of more continental procedural features leads international criminal tribunals in more repressive directions, but ... that would be a gross simplification.” (Mégret 2009: 3)

<sup>57</sup> There is substantial literature regarding the difficulties in transporting law between cultures. See, e.g., Twining 1992.

defendants Chinese or Italian citizens and the legitimacy of Chinese and Italian governments resides in the social contract between the government and all citizens, even those accused of crimes. When international criminal procedure seeks to apply human rights through international criminal law, however, the balance between defendants' rights and punishment of criminals struck at domestic law is absent. Instead, ICTY balance, in the words of the UN Expert Report, is struck between "law" and "victims."<sup>58</sup> The victims of atrocities stand in for a "we" that is positioned as human rights acknowledging and respecting, whereas the accused is a deviant "them." The rehabilitation aspects of criminal law that are often present in domestic criminal law can remain absent at ICL, because there is no community being served by ICL that will seek to reintegrate that perpetrator after he has served his sentence.

#### **(IV) "Post rule of law": the problem of sentencing**

Sentencing is perhaps the most controversial aspect of ICTY practice. The "confusing, disparate, inconsistent, and erratic" sentencing policy of the ICTY has been charging with "giv[ing] rise to distributive inequalities." (Drumbl 2007: 11) ICTY sentencing has been referred to as "Russian roulette." (Olusanya 2005: 139) In addition to problems regarding uniformity and predictability, sentencing has been critiqued as too aggressive, coming as it does at the end of the liability phase, and not reserved for its own procedure. (Wald 2004) Others criticize ICTY sentences as too lenient, particularly given the gruesome nature of the crimes in question. (Ohlin 2011, 2009, 2009)

The only reference to Yugoslav procedure mentioned in the ICTY statute is a reference to the use of Yugoslav guidelines in designing sentences, although the ICTY has not given much weight to Yugoslav practice.<sup>59</sup> Even this borrowing from Yugoslav law, however, has proved problematic.<sup>60</sup> The law of the former Yugoslavia provides for either criminal sentences of up to 20 years, or the death penalty. The death penalty, however, is not utilized by international tribunals, and thus it was

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<sup>58</sup> The final paragraph of the UN Expert Report (para 265) states:

Thus far the report of the Expert Group, by definition and mandate, has dealt with the dry warp of the law. Its context has been that of adversarial combat between the prosecution and the accused... But we would be failing in our human condition if we did not recall the background of the work of the Tribunals and of our own work, the hundreds of thousands of men, women and children who have been the victims, in south-east Europe as in Central Africa, of unspeakable and unforgettable atrocities. Let not the victims, and their close ones, go unmentioned in our report. Let there be a reminder yet again that many once existed who today are no more. Let us be allowed to hope that the international community will find, at a time and place yet unknown, the strength and the resources to recall those who were and to help those who survived, maimed or raped in body or in spirit.

<sup>59</sup> See *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23 (February 22, 2001) ("Kunarac Trial Chamber") para 349, 377; *Prosecutor v. Zejnil Delalić, Hazim Delić, Zdravko Mucić, Esad Landžo*, IT-96-21 (February 20, 2001) ("Delalić Appeals Chamber") para 818; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24, (July 31, 2003), available at [www.icty.org](http://www.icty.org), ("Stakić Trial Chamber") para 887 (national sentencing "will... be considered, although in itself is not binding"); *Prosecutor v. Darko Mrđa, Sentencing Judgment*, Case No. IT-02-59, (March 31, 2004) paras 121, 122, 129 (holding that national sentencing practices are "merely indicative").

<sup>60</sup> *Babić Sentencing Judgment* para 50, without citation to Yugoslav law, held, "The Trial Chamber has found that Babić [sic] participated in a JCE whose objective – the forcible and permanent removal of non-Serb populations from the SAO Krajina – was carried out through persecutory acts of murders, deportations or forcible transfers, imprisonment, and destruction of property.... The commission of this crime would have attracted the harshest sentence in the former Yugoslavia."

suggested that life imprisonment should replace the Yugoslav death penalty tradition in sentencing before the ICTY.<sup>61</sup>

As regards sentencing guidelines, the ICTY Statute states, in full:

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners. (Article 24 Penalties)

The Rules of Procedure add little to this bare skeleton, except to note that mitigating and aggravating circumstances shall also be considered. The Rules address only one mitigating circumstance: “substantial” cooperation with the Prosecutor.<sup>62</sup> Through its case law, the ICTY has established that it has discretion to consider other potentially mitigating factors,<sup>63</sup> which it has defined as voluntary surrender,<sup>64</sup> guilty plea,<sup>65</sup> expression of remorse,<sup>66</sup> good character with no prior criminal convictions,<sup>67</sup> and the post-conflict conduct of the accused. As the International Criminal Law Services manual entitled “Sentencing” notes, “Sentencing is essentially a discretionary responsibility of the judges at the international tribunals. There are no guidelines or scales for the various crimes, as there might be in domestic jurisdictions.” (ICLS, 4) ICTY case law emphasizes this approach as well, with myriad judicial findings emphasizing the complete discretion of the Chambers in imposing the appropriate sentence.<sup>68</sup> This includes discretion in determining concurrent or cumulative sentences.<sup>69</sup>

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<sup>61</sup>Some opponents, most notably Bassiouni, argued that this violated the principle of *nullum crimen nulla poena*. See Schabas 1997.

<sup>62</sup>ICTY Rules of Procedure Rule 101(B)(ii).

<sup>63</sup>*Prosecutor v. Radislav Krstić*, Case No. IT-98-33, (August 2, 2001) (“*Krstić* Trial Chamber) para 713.

<sup>64</sup>See, e.g., *Kupreskić* Trial Chamber paras 853, 860, 863; *Prosecutor v. Drago Josipović, Vladimir Šantić, Zoran Kupreskić, Mirjan Kupreskić, Vlatko Kupreskić & Dragan Papić*, Case No. IT-95-16-A, (October 23, 2001), available at [www.icty.org](http://www.icty.org), (“*Kupreskić* Appeals Chamber”) para 430; *Kunarac* Trial Chamber para 868; *Prosecutor v. Biljana Plavšić*, IT-00-39&40/1-S, (February 27, 2003) (“*Plavšić* Sentencing Judgment”) paras 82- 84.

<sup>65</sup>See, e.g. *Kupreskić* Appeals Chamber para 464; *Prosecutor v. Goran Jelisić, Appeals Judgment*, Case No. IT-95-10, (July 5, 2001) (“*Jelisić* Appeal Judgment”) para 122; *Prosecutor v. Duško Sikirica, Damir Došen & Dragan Koludžija*, Case No. IT-95-8 (November 13, 2001) (“*Sikirica* Sentencing Judgment”) paras 148-151, 192-193, 228; *Prosecutor v. Stevan Todorović*, Case No. IT-95-9/1, (“*Todorović* Sentencing Judgment”) paras 75-82; *Erdemović* Sentencing Judgment II para 16(ii); *Plavšić* Sentencing Judgment paras 66 – 81.

<sup>66</sup>See, e.g. *Sikirica* Sentencing Judgment paras 152, 194, 230; *Todorović* Sentencing Judgment paras 89-92; *Erdemović* Sentencing Judgment II para 16(iii); *Plavšić* Sentencing Judgment paras 66 – 81.

<sup>67</sup>See, e.g. *Krnjelac* Trial Judgment para 519; *Kupreskić* Trial Chamber para 478; *Kupreskić* Appeals Chamber para 459; *Prosecutor v. Zlatko Aleksovski, Trial Chamber Judgment*, Case No. IT-95-14/1, (June 25, 1999) para 236; *Erdemović* Sentencing Judgment II, para 16(i).

<sup>68</sup>Discretion in sentencing is unquestioned in ICTY jurisprudence. See *Stakić* Trial Chamber para 884;

Uwe Ewald's 2010 article whose title terms international sentencing "Predictably Irrational" is instructive in reaching a conclusion that international sentencing has reached a "post rule of law" status. Ewald served in the Office of the Prosecutor of the ICTY for seven years, and while his views should not be considered interchangeable with the practice or opinion of the ICTY as an institution, his position and length of service make him at the very least a significant source of opinion for the Prosecutors' office.<sup>70</sup> Ewald makes the argument that there is legal significance (i.e. precedent) to the scattered World War II jurisprudence regarding sentences and their fulfillment, arguing that "the patterns of sentence at the Nuremberg and Tokyo trials as well as the so called 12 succession Trials in Germany already show that diversity in international sentencing is an obvious feature from the outset." (Ewald 373) In essence, Ewald is arguing that there is "precedent" to find unpredictability (euphemistically referred to as "diversity") in international sentencing

Academics and commentators have made various propositions regarding a hierarchy of crimes or other sentencing guidelines that would increase uniformity and predictability in international criminal law sentencing. (Danner 2001) So far, the ICTY has categorically rejected such suggestions.<sup>71</sup> Ewald argues:

[M]any articles still start from the unrelated sentencing principles in the ICTY Statute or case law to "mirror" sentencing practice against these normative standards, in particular with regard to the 'litmus test' of proportionality between the gravity of the crime and the severity of punishment – inevitably resulting in criticism that these principles are not visible in the sentencing practice and all kinds of contradictions and inconsistencies are discovered. However, it is questionable whether such a normative approach to analyze sentencing is reliable because this would imply that the rather humble legal principles provide a sufficient ground for conceptualizing and operationalizing the complexity of factors "behind" international sentencing decision-making. (Ewald 380)

As a rule of law matter, it is problematic – to say the least – to categorize predictability in sentencing as a "humble legal principle."

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*Delalić* Appeals Chamber para 758 (which states that a pattern of sentences does not exist yet). See also *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61, March 30, 2004 ("Deronjić Sentencing Judgment" (where Judge Schomburg recommended a 20-year sentence in his dissenting opinion; the Majority awarded a 10-year sentence.) See also Knoops (2003:117) (arguing that ICTY pronouncements are "not bound to impose the same sentence merely because the facts of two or more cases are comparable.")

<sup>69</sup> *Delalić* Appeals Chamber para 771; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14 (July 29, 2004) available at [www.icty.org](http://www.icty.org) ("*Blaškić* Appeals Chamber") para 721 – 722 (which describes types of convictions that are impermissibly cumulative).

<sup>70</sup> The ICTY institutionally is formally represented by the president, who is one of the ICTY judges. The Prosecutor's office, however, has spoken on behalf of the institution with regularity, representing compliance of states, for example, to EU organs in connection with the application of those states to EU membership.

<sup>71</sup> *Prosecutor v. Radislav Krstić*, Case No. IT-98-33, (April 19, 2004) ("*Krstić* Appeals Chamber) para 242 (the Appeals Chamber rejected as inappropriate the setting down of a definitive list of sentencing guidelines).

## **Conclusion**

This dissertation argues that structural balance at the ICTY is affected by an absence of a discursive loop between ruler and ruled. Borrowing legitimacy from international law's morality arguments, arguments based in morality and fairness, the ICTY would hold itself above critiques of its institutional workings at the level of politics, or political theory. Yet as this chapter has shown, relying on Franck's (1995) fairness arguments of international law abuts, rather brusquely, with real fairness problems at the level of individual criminal law institutions. The following chapter explores the other side of the ICTY as progressive articulator of international law, the ICTY's imbalanced articulations of substantive law.

## Chapter 4: When Non-derogable Principles Meet Criminal Liability: the Justice Problem of JCE

*“The Tribunals’ legacy will be measured less by their shortcomings than by the legal principles expressed in the pages of their judicial opinions.”*

*“At the Tribunal, Joint Criminal Enterprise is referred to, privately, as ‘Just Convict Everybody.’”*

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Dermot Groome, Office of the Prosecutor, *American Journal of International Law* Vol 100, No. 4 (October 2006) 993- 999

Lawyer working at ICTY (author interview, The Hague, May 2005)

This chapter continues the examination of the ICTY as progenitor of international criminal law (ICL), which is a necessary function of international criminal tribunals (ICTs). Where Chapter Three considered the question of the law of procedure, this chapter looks at one element of international criminal law substance developed by the ICTY, the theory of liability called “Joint Criminal Enterprise” (JCE). While the *international criminal law template* finds a value in allowing courts to articulate ICL based on the conviction that such articulation and development will be *progressive* (based on a moral argument for the value of ICL and ICTs), this chapter will show that, like the World War II-era case law, the ICTY’s legal pronouncements arguably fail to meet – or even to pursue – any Kantian notion of justice.

As William Schabas (2011:206) has noted, *ad hoc* tribunals are “very thin” with respect to the guidance they give in relation to general principles of criminal law.<sup>1</sup> The ICTY has developed the substance of its law based on treaty and customary international law.<sup>2</sup> Judges have frequently drawn from the Vienna Convention on the Law of Treaties to make “contextual and purposive” interpretations. (Schabas 2011: 215)

The ICTY’s JCE jurisprudence is perhaps its most (in)famous contribution to ICL. Critiqued for its possibility to “weaken” ICL (Danner & Martinez 2005) or imperil ICL’s coherence (Osiel 2005), JCE nonetheless has enjoyed great *institutional* success before the ICTY; following its first iteration in the *Tadić* appeals judgment (15 July 1999), JCE has functioned as a standard-bearing theory of liability, forming the basis of the majority of the ICTY’s post-*Tadić* indictments.<sup>3</sup> (See Appendix A<sup>4</sup>)

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<sup>1</sup> Schabas notes that the ICC, undoubtedly learning from the tribunals that came before it, has given judges far less discretion in law-making than judges in previous ICTs enjoyed.

<sup>2</sup> ICTY Statute para 3.4.

<sup>3</sup> Marston & Danner (2005: 108) estimate that 64% of indictments between 2001-2004 (when indictments ceased) relied on JCE and “[i]f all indictments that include charges that the defendant acted ‘in concert’ with others are viewed as implicitly employing a JCE theory, then thirty-four of the forty-three indictments confirmed between June 25, 2001 and January 1, 2004 (81% of the total), incorporate JCE.”

Part I of this chapter picks three points along the trajectory of the ICTY's jurisprudential development of JCE to showcase this problematic articulation of substantive ICL. These are: 1) *Tadić*, the first case to articulate the doctrine (Trial Chamber judgment 1997,<sup>5</sup> Appeals Chamber judgment 1999<sup>6</sup>); 2) *Kvočka et al.*, a case heard several years later concerning some of the same events (Trial Chamber judgment 2001,<sup>7</sup> Appeals Chamber judgment 2005<sup>8</sup>); and 3) the latest appellate consideration of JCE, as of this writing, in the *Gotovina et al.* case (Judgment on JCE applicability 2007;<sup>9</sup> Trial Chamber judgment 2011;<sup>10</sup> Appeals Chamber judgment 2012<sup>11</sup>). Bold in scope and formation when it was first articulated in *Tadić*, JCE has become a catch-all theory of liability, a jack-of-all-trades (Van der Wilt 2007:92) which provides a "useful" tool for the Prosecution. (Del Ponte 2007) JCE has developed into a seemingly indefensible charge wherein the judicial chamber and the Office of the Prosecutor (OTP) work together, part of the "ad hoc standards that enable [the Tribunal] to convict."<sup>12</sup> More problematically, the unstable standards and conceptual contradictions inherent in JCE in the *Tadić* Judgment have become only more (and not less) problematic as the jurisprudence has developed. This leads today to a protracted and problematic jurisprudence recycling, as one observer of the *Tadić* trial noted, a situation where "there are no absolute, objective, or predetermined parameters that define illegal violence external to the proceedings themselves." (Philipose 2002:170)

Part II briefly analyzes the substantive problems of JCE. It begins with common and civil laws' contradictory openness to "conspiracy" charges (conspiracy arguably provides the theoretical foundation for the ICTY's JCE jurisprudence), continues through the *nullem crimen sine lege* issue of JCE (the problem of articulating law *ex post facto*) and concludes with a comparison of JCE and the ICC's "co-perpetrator" jurisprudence. The overall purpose is to show that while the ICC has formally rejected the JCE doctrine, it will continue to face the same "commission" definition issues that have driven the rapid development and use of JCE before the ICTY.

Finally, Part III ties discussions of the substantive content of ICL to the structural problem of the absence of a discursive loop between ruler and ruled. Arguing that JCE represents the flashpoint between international human rights law's non-derogable standard (which is essentially a form of strict liability) against domestic criminal law theory (which rejects strict liability in most cases), Part III

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<sup>4</sup> Where JCE forms part of the theory of liability under which defendants are charged, this is noted in the second column "Case in a nutshell."

<sup>5</sup> *Tadić* Trial Chamber.

<sup>6</sup> *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Appeals Chamber (July 15, 1999), available at [www.un.icty.org](http://www.un.icty.org) ("*Tadić* Appeals Chamber").

<sup>7</sup> *Kvočka* Trial Chamber.

<sup>8</sup> *Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić, Dragoljub Prcać*, Case No. IT-98-30/1-A (February 28, 2005) ("*Kvočka* Appeals Chamber").

<sup>9</sup> *The Prosecutor v. Gotovina, Čermak, Markač*, Decision on Several Motions Challenging Jurisdiction, Case No. IT-06-90-PT (March 19, 2007) ("*Gotovina et al.* Decision on Motions Challenging Jurisdiction").

<sup>10</sup> *The Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-PT (April 15, 2011) ("*Gotovina* Trial Chamber").

<sup>11</sup> *Gotovina* Appeals Chamber.

<sup>12</sup> *Tadić* Trial Chamber para 535, quoting the Defense (referring to civil vs. common law evidentiary standards, not JCE).

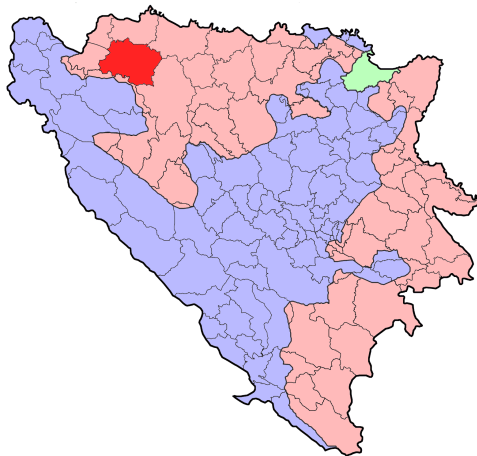
demonstrates that the developing substance of the JCE doctrine is a prime example of the imbalance that can accrue when legal content is developed outside of political balance.

## **(I) The development of joint criminal enterprise**

“Joint Criminal Enterprise” is nowhere located in the ICTY statute, nor was it, before its development at the ICTY, any meaningful criterion of ICL practice. JCE is a theory of liability based in the ICTY’s “commission” jurisdiction; it is, in other words, a theory of how the ICTY recognizes defendants “do” (commit) a crime. The first element of Article 7 (Individual Criminal Responsibility) of the ICTY statute reads: “1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”<sup>13</sup> It is from this aspect of “commission” that JCE emerged.

### **JCE’s first articulation: the *Tadić* case**

Duško Tadić was from a prominent Bosnian Serb family in the largely Muslim town of Kozarac, and owned a café in the center of that town. (Scharf 1997) As nationalist politics heated up, his café became a gathering place for supporters of Bosnian Serb nationalist power. A minor volunteer in the Bosnian Serb nationalist party, after the Bosnian Serb takeover of the region in April 1992, Tadić served as a check-point guard in a private capacity. He fled Republika Srpska for Germany when he was drafted into the army in 1993.



(Bosnia: the region in dark red is the Prijedor region.)<sup>14</sup>

Tadić was brought to the attention of German authorities by other Bosnian refugees, who identified him as a torturer, and he was arrested in February 1994 on charges of committing crimes against humanity at the Omarska prison camp outside of Prijedor, Bosnia-Herzegovina. Coming less than a year after the inception of the ICTY, the arrest of “the butcher of Omarska”<sup>15</sup> constituted an important opportunity

<sup>13</sup> ICTY Statute.

<sup>14</sup> Map of Bosnian showing the Federation (in blue), the RS (in red) and independent Brčko (in green), courtesy of Wikipedia (accessed June 24, 2013).

<sup>15</sup> For a detailed, dramatic discussion of the Tadić trial and the politics surrounding it, see Scharf 1997.



for the fledgling court<sup>16</sup> by providing it with a live body. In April 1995 Tadić was transferred from Germany to The Hague, and in May 1996 his trial commenced.

The ICTY Office of the Prosecutor (OTP) charged Tadić with killings, torture, rape, castration, starvation, beatings and other abuses at the Omarska camp, as well as attacking and killing civilians during Bosnian Serb seizures of the towns of Kozarac (May 1992) and Jaskići and Sivci (June 1992), of being a political leader in the emerging Bosnian Serb state and playing a pivotal role in the ethnic cleansing in the region.

Omarska was a prison camp constructed to house non-Serb men collected from the Prijedor region, specifically from the largely Muslim enclaves of Kozarac<sup>17</sup> and inner Prijedor, both of which had resisted the Bosnian Serb military take-over effected April 30, 1992. On the site of a mine complex, the warehouse-type buildings at Omarska were insufficient to contain the up to 3,000 prisoners eventually interned there. With inadequate food, water, or sanitary facilities, the Omarska camp was described by the *Tadić* Trial Chamber as “the most notorious of the camps, where the most horrific conditions existed.”<sup>18</sup> By all accounts, terrible violence was daily inflicted on many of the prisoners, and organized killings were “recreational and sadistic.” (Silber & Little 1997: 251) This violence was perpetuated both by guards stationed at the camp as well as by visitors arriving on site; the *Kvočka* chamber later described the problem of the porous camp borders and the threats to prisoners that came from outside. By the time of Omarska’s inception, local political and military organization had effectively disarmed all non-Serbs and redistributed the weapons to Serbs; moreover, the political situation had placed all Serb men of age into some form of military service, either as police, checkpoint guards or members of the armed forces. This situation, a disproportionately armed populace stoked by hate and fear,<sup>19</sup> was a tinder keg.

Although Tadić claimed that he had never visited Omarska, several witnesses placed him there on 18 June and during a few days in July 1992. The Trial Chamber found that while not formally involved with the administration or policing of the camp, Tadić had been present and participated in the beatings and deaths of several detainees. The Trial Chamber did not, however, find him guilty of the murder of those detainees presumed to be dead (which presumption was made on the basis of the fact that they had been removed from common holding cells, beaten, and then never seen again), even where Tadić was found to have participated in the beatings. While the Court noted that in the chaotic circumstances of war “it is inappropriate to apply rules of some national systems that require the production of a body as proof of death” it nevertheless found that “there must be evidence to link injuries received to a resulting death.”<sup>20</sup>

In addition to Tadić’s participation in crimes in prison camps, the judgment considered several deaths in villages. For those that occurred in the town of Kozarac, Tadić was indicted for the death of five Muslim men who were allegedly selected

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<sup>16</sup> See Chapter 2 regarding the difficulties faced obtaining custody over defendants.

<sup>17</sup> *Tadić* Trial Chamber para 146.

<sup>18</sup> *Tadić* Trial Chamber para 155.

<sup>19</sup> Some of the specifics of how the population was stoked by hate and fear, a reference to the extensive, aggressive nationalist propaganda in circulation, were discussed in Chapter Two and are further considered in Chapter Six

<sup>20</sup> *Tadić* Trial Chamber para 240.

from a column of civilian deportees, lined up against a kiosk on the side of the road, and shot. Based on witness evidence, the Trial Chamber found it beyond a reasonable doubt that Tadić was in Kozarac that day and that he had participated in calling people out of the moving column of civilian deportees; inconsistencies in testimony prevented the Trial Chamber, however, from finding either that Tadić participated in the shootings as alleged or in fact that such shootings took place at all.<sup>21</sup>

In Jaskići and Sivci, where many Muslim refugees from Kozarac had fled, Tadić was charged with crimes committed on June 14, 1992. On that day, armed Bosnian Serb men went through the villages door to door, issuing threats and removing all men ages 15-65. In Sivci this process was relatively calm. One witness placed Tadić in Sivci that day. In Jaskići, by contrast, the process was accompanied by beatings, the firing of shots, and death threats. By the time the armed men had left the village, the remaining villagers had discovered five dead bodies, four of whom had been shot in the head. Based on witness testimony, the Trial Chamber found Tadić was an active member of the party that beat and removed the men from the village of Jaskići. It stopped short, however, of finding that Tadić took part in the killing of the five men.<sup>22</sup>

Finally, the Trial Chamber found that Tadić participated, by assisting in the military effort, in the ethnic cleansing of Kozarac, and was present, in a more limited role, in the Keraterm and Trnopolje prison camps. Based on Tadić's political activities and nationalist statements, the Court found that Tadić was aware of a discriminatory policy and that he sought to persecute non-Serbs on religious and political grounds.<sup>23</sup> It held:

Based on the presence of the accused at the Trnopolje camp when surviving prisoners were being deported, as well as his support *both for the concept and the creation* of a Greater Serbia, necessarily entailing, as discussed in the preliminary findings, the deportation of non-Serbs from the designated territory and the establishment of the camps as a means towards this end, the Trial Chamber is satisfied beyond reasonable doubt that the accused participated in the seizure, selection, and transfer of non-Serbs to various camps and did so within the context of an armed conflict and that while doing so, he was aware that the majority of surviving prisoners would be deported from Bosnia-Herzegovina.<sup>24</sup>

This finding, particularly as regards Tadić's political leanings, is a central element in the Trial Chamber's development of a jurisprudence that would eventually be called "JCE."

### **The law of *Tadić***

Tadić's commission of crimes was adjudicated under Article 7 of the ICTY Statute. As noted above, that Article reads: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be

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<sup>21</sup> *Tadić* Trial Chamber para 341.

<sup>22</sup> *Tadić* Trial Chamber para 375.

<sup>23</sup> *Tadić* Trial Chamber para 477.

<sup>24</sup> *Tadić* Trial Chamber Para 461 (emphasis added).

individually responsible for the crime.”<sup>25</sup> By focusing on the Article’s definition of those bearing responsibility for a crime, in particular the Article’s *commission* language, the Trial Chamber found that liability under a joint commission theory was implicitly included in the Statute’s terms.

To determine liability for participation in a common criminal design, the *Tadić* Court reviewed World War II case law in the context of reviewing customary international law. The Trial Chamber’s analysis centered on *intent* and *participation*. The Court defined *intent* as “awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting,” maintaining in addition that this must be a deliberate act that directly aids the commission of the crime itself. The deliberateness and relation to the crime should be *inferred* from the circumstances. As support for this argument, the Court cited the post World War II case *Maulthausen*,<sup>26</sup> in which 61 defendants working in a concentration camp were found guilty of murder because they must have known about the gas chambers.

As noted above, in its May 1997 Judgment, the Trial Chamber found Tadić guilty of participating in an attack on the town of Kozarac, the collection and transfer of non-Serb civilians to detention camps, and atrocities at Omarska that included beating Muslim prisoners and killing two Muslim policemen. The Trial Chamber found that Tadić committed these acts of persecution in the aim of establishing a “Greater Serbia” in the area through the ethnic cleansing of all non-Serbs. As regards charges of cruel treatment and inhumane acts, the Trial Chamber found that Tadić was both a perpetrator and an assister. Concerning his assistance, the Court found he assisted “directly and substantially in the *common purpose* of inflicting physical suffering upon [his victims] and thereby aided and abetted in the commission of the crimes and is therefore individually responsible for each of them.”<sup>27</sup> The Trial Chamber found likewise with regard to the severe beating suffered by a Muslim prisoner at the Omarska prison camp. While the Court found no direct evidence that Tadić was present when the prisoner was beaten, it found Tadić individually responsible for aiding and abetting the beating. The court cited the testimony of a witness who heard Tadić say, as he was returning the prisoner Sivac to his holding place “You will remember, Sivac, that you cannot touch a Serb or say anything to a Serb.” Based on this, the Court concluded, “Even though there is no direct evidence that [Tadić] physically participated in the beating of Sivac, by these acts, [Tadić] intentionally assisted directly and substantially in the common purpose of the group to inflict severe physical suffering upon Sivac.”<sup>28</sup>

The Court acquitted Tadić of cruel treatment in the beating of a one prisoner in front of a house. In this instance, the Court found the Prosecution witness’s testimony that he had seen Tadić following the beaten prisoner insufficient to find Tadić guilty of participating in the beating within the meaning of Article 7.1<sup>29</sup> The Court also acquitted Tadić for the five deaths in the village of Jaskići, on the grounds

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<sup>25</sup> ICTY Statute. Articles 2-5 describe the criminal categories the Statute addresses: grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity.

<sup>26</sup> U.S. Military Tribunal, Volume XI *Law Reports* 15.

<sup>27</sup> *Tadić* Trial Chamber paras 726, 730 (emphasis added).

<sup>28</sup> *Tadić* Trial Chamber para 735.

<sup>29</sup> *Tadić* Trial Chamber para 747.

that while the Court found Tadić had been in the village that day, it could not connect him directly to the deaths.

While the actual JCE standard was first articulated by the Appeals Chamber,<sup>30</sup> the Trial Chamber established several significant standards in its Judgment that have framed JCE indelibly. First and most importantly, it defined a culpability standard below co-perpetration. Second, it relied on (select) World War II-era case law to assert that it was consolidating and articulating principles that constitute customary international law. Finally, the Trial Chamber articulated an undeniably aggressive standard regarding *commission*. Tadić was found guilty of aiding and abetting a beating based on an unrelated, although assuredly aggressive, statement. The *Tadić* Trial Chamber stopped short, however, of finding Tadić liable for any form of commission of murder based solely on corpses found on site. The Appeals Chamber proceeded to undo these latter limitations.

### **The *Tadić* Appeals Chamber**

The Appeals Chamber articulated the present JCE standard in considering the problem of the five murdered villagers in Jaskići. The Trial Chamber had found Tadić not guilty beyond a reasonable doubt because it reasoned that the Jaskići deaths might be attributable to members of the large Bosnian Serb force operating in Sivci on the same day. The Appeals Chamber held that the Trial Chamber had erred, and that the only reasonable factual conclusion was that those five men had been killed by the armed group that included Tadić.<sup>31</sup> The Appeals Chamber then set out to explain how “under international law, [Tadić] can be held criminally responsible for the killing of the five men from Jaskići even though there is no evidence that he personally killed any of them.”<sup>32</sup>

Based on an analysis of Article 7(1) (commission), as well as the collective nature of crimes committed in wartime situations, the Appeals Chamber found that, “whoever contributes to the commission of crimes by the group of persons of some members of the group, in execution of a *common criminal purpose*, may be held to be criminally liable, subject to certain conditions.”<sup>33</sup> The Tribunal found that in a group where some members physically perpetrate a crime, the participation or contribution of other group members can facilitate the crime, and “the moral gravity of such participation is often no less – or indeed no different—from that of those actually carrying out the acts in question.”<sup>34</sup>

The Trial Chamber concluded that the ICTY Statute permitted the notion of a transfer of culpability within members engaged in a common plan. The Statute was silent, however, regarding the objective and subjective elements (*actus reus* and *mens rea*) of this sort of collective criminal responsibility. Relying on World War II case law, international legislation, and other sources of customary law, the Appeals Chamber articulated the applicable standard in what is now the foundation of the JCE doctrine. The Appeals Chamber divided JCE into three categories distinguished by

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<sup>30</sup> The Appeals Chamber used various terms to describe JCE, including “common criminal plan,” “common criminal purpose,” “common design or purpose,” “common criminal design,” “common purpose,” “common design,” “common concerted design,” “criminal enterprise,” “common enterprise,” and “joint criminal enterprise.” Quoted in Uhovica 2012.

<sup>31</sup> *Tadić* Appeals Chamber paras 179-184.

<sup>32</sup> *Tadić* Appeals Chamber para 185.

<sup>33</sup> *Tadić* Appeals Chamber para 190 (emphasis added).

<sup>34</sup> *Tadić* Appeals Chamber para 191.

*mens rea*. The *actus reus* remains the same, requiring a group, a common plan/purpose, and the participation of the accused.<sup>35</sup> The doctrine holds:

First, in cases of co-perpetration, where all participants in the common design *possess the same criminal intent to commit a crime* (and one or more of them actually perpetrate the crimes, with intent). [JCE I]

Secondly, in the so-called “concentration camp” cases, where the requisite *mens rea* comprises *knowledge* of the nature of the system of ill-treatment and *intent* to further the common design of ill-treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused’s authority within the camp or organizational hierarchy. [JCE II]

With regard to the third category of cases, it is appropriate to apply the notion of “common purpose” only where the following requirements concerning *mens rea* are fulfilled: (i) the *intention* to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise and (ii) the *foreseeability* of the possible commission by other members of the group of offences that do not constitute the object of the criminal purpose.... It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless *willingly took that risk*.<sup>36</sup> [JCE III]

In short, JCE I concerns co-perpetration, cases where all actors, in pursuit of a common plan, possess the same criminal intention.<sup>37</sup> JCE II, termed a variant of JCE I, applies this common plan to concentration camp cases. Citing the *Belsen* case of 1945,<sup>38</sup> the Appeals Chamber noted that the elements necessary for establishing guilt in such a case are:<sup>39</sup>

[T]he existence of an organized system to ill-treat the detainees and commit the various crimes alleged; (ii) the accused’s awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system, i.e. encouraged, aided and abetted or in any case participated in the realization of the common criminal design.

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<sup>35</sup> For a good discussion, see Powles 2004: 206-10.

<sup>36</sup> *Tadić* Appeals Chamber para 220 (emphasis added).

<sup>37</sup> *Tadić* Appeals Chamber para 196. It bears noting that while the least controversial of JCE, this category is not without controversy, because there are problems with criminalizing collective guilt from a rule or law standpoint. Some commentators have noted the different approaches to collective crimes in common and civil law jurisdictions, specifically the doctrines of conspiracy versus co-perpetration, respectively. See, e.g., Hamdorf 2007. Others have disputed using terminology originating from the civil law (co-perpetration) to describe a jurisprudence that clearly borrows much from the common law. See van Sliedregt 2007 for a detailed discussion; see also Cassese 2007.

<sup>38</sup> *Trial of Josef Kramer and 44 others*, British Military Court, Luneberg, September 17 – November 17, 1945, UNWCC, Volume II, Page 1.

<sup>39</sup> While the Appeals Chamber termed JCE II a variant of JCE I, some commentators have argued that it comes closer to JCE III, as it is possible to imagine a camp setting where a defendant would not be aware of individual crimes committed. Problems associated with applying this standard are discussed in Part II below.

Finally, while there is evidence that the co-perpetration standard of JCE I finds support in varied domestic jurisdictions (although its application is still problematic, particularly as regards its second variant regarding concentration camp cases), there is less support for the final JCE category, the so-called “extended” JCE (Piacente 2004), which is the most controversial of the three. There, the Chamber found culpability for a perpetrator committing an act that, while outside of the common design, led to a crime that was a *natural and foreseeable* consequence of the common design, and where the perpetrator was either *reckless or indifferent* to the risk. Applying this category, the Appeals Chamber found Tadić criminally responsible for the deaths of the five Jaskići villagers. The Chamber reasoned (i) that Tadić had the intention to further the criminal purpose of ethnically cleansing the Prijedor region; (ii) that the deaths of non-Serbs in pursuit of this aim were foreseeable; and (iii) that although he knew that his armed group might in fact lead to killings, Tadić regardless willingly took the risk.<sup>40</sup>

### **Problems in *Tadić***

*Tadić* left open the question of how aiding and abetting might work with JCE, particularly the third and most diluted form. Commentators noted that in fact it would be impossible to *aid and abet* a third category JCE, because the third category JCE in fact claims many of the elements associated with aiding and abetting, and that moreover, the level of participation for aiding and abetting was, as a general rule, more stringent than that of JCE III. (Ambos 2007) The *Kvočka* Appeals Chamber later held that it was impossible to aid and abet a JCE at all, because the theory of JCE is a theory of liability, not a crime in itself.<sup>41</sup>

In a sense, the aiding and abetting inconsistencies of *Tadić* are instructive of the evidentiary and procedural flaws of the decision. If part of the legitimacy of law is its ability to put people on notice regarding what behaviors are legal and not, what standard can we extract from *Tadić*? While the *Tadić* court held that liability under JCE does not require physical presence on the scene of the crime, or indeed knowledge that the crime has been committed, the Court did not find Tadić culpable for crimes against humanity except those with which he had a direct physical tie (albeit as tenuous as having been present either in a place on a day where crimes were committed). In a sense, the reasoning of *Tadić* does not match the holding of *Tadić* – why shouldn’t Tadić be culpable for all the deaths in the Prijedor region resulting from the policy of ethnic cleansing that he physically and politically worked towards? Even the later *Kvočka* Judgment acknowledged these problems, finding in 2005 that the “precise threshold of participation in JCE has not been settled.”<sup>42</sup>

It took some time for JCE to make international criminal law headlines. For international law scholars, the *Tadić* decision was centrally remarkable for the ICTY’s inventive jurisdiction jurisprudence. At the time *Tadić* was decided, the international law world was occupied with the jurisdiction questions arising from the holding, which considered the nature of the conflict in the former Yugoslavia and thus the applicability of the Geneva Conventions – and thereby the legitimacy of the *ad hoc* tribunal itself.<sup>43</sup> Furthermore, Duško Tadić is the type of sadistic, violent, and

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<sup>40</sup> *Tadić* Appeals Chamber para 232.

<sup>41</sup> *Kvočka* Appeals Chamber para 91.

<sup>42</sup> *Kvočka* Appeals Chamber para 289.

<sup>43</sup> See, for example, Niemann (2004: 437) who, as a senior trial attorney at the ICTY, argued that the *Tadić* case should go ahead, as it would be a good “ ‘vehicle’ by which the jurisdiction of the Tribunal

opportunistic criminal that national criminal jurisdictions seek to remove from society, and this perhaps dulled scrutiny of the methods under which he was found culpable for barbarous and despicable acts. Future cases, in particular the singular defendant Kvočka, would challenge this jurisprudence.

### ***Kvočka* and the evolution of joint criminal enterprise**

In 2001, two years after the final *Tadić* judgment, and arising from the same Omarska prison camp where Tadić participated in violent crimes, the ICTY Trial Chamber ruled on the case of Miroslav Kvočka.<sup>44</sup> Unlike Tadić, Kvočka was a moderate Bosnian Serb, not a supporter of the nationalist party, and was married to a Bosnian Muslim, as was his sister. A professional police officer in Prijedor since 1980, Kvočka responded to a call ordering him to report to the Omarska mine complex the night of 28/29 May 1992. When Kvočka arrived, he saw two police officers in an official vehicle and ten buses parked inside the complex, some containing detainees and some empty. Kvočka was ordered to collect the reserve police force (a group of 25 basically untrained recruits) and the police station commander, and to report back to duty at the complex.<sup>45</sup> With these actions, the prison camp of Omarska, and Kvočka's participation in the JCE of the same, was set in motion.

As noted above, the conditions at the hastily assembled prison camp of Omarska were terrible. Food rations were not equal to the detainees streaming into the camp, nor were sanitary facilities adequate, and these conditions only deteriorated with the arrival of more detainees and the growing summer heat.<sup>46</sup> Borders were porous and anyone claiming a connection to an authority was admitted, and as demonstrated by the even occasional presence of thugs such as Tadić, this in itself led to many atrocities. The *Kvočka* Court noted several instances in which drunken, armed men and criminals who were "totally out of control"<sup>47</sup> randomly appeared at the camp and engaged in violence. Police recruits, undertrained and sometimes with criminal backgrounds themselves, were permitted to carry their personal weapons in the camp.<sup>48</sup> Kvočka testified that while it was the job of the military police officers at the camp's entrance to determine who might enter or not, he intervened in some instances because, as he testified, "sometimes to protect people you have to bypass the usual procedure."<sup>49</sup>

Following orders from his superiors, Kvočka helped organize the internal security of the camp.<sup>50</sup> As one of a handful of professional policemen on site, it seems

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could be tested." See also ICTY president Theodor Meron, visiting lecturer, seminar course *Law of War*, U.C. Berkeley School of Law, fall 2000, notes on file with author.

<sup>44</sup> Kvočka had four co-defendants, all with connections to the Omarska prison camp. See Appendix A. The distinctions between them impacted the rationale the Court used in sentencing them, but unimportant in terms of its application of a collective theory of liability.

<sup>45</sup> *Kvočka* Trial Chamber para 345.

<sup>46</sup> In August 1992, pictures of filthy, emaciated prisoners in Omarska made world headlines, shaming Europe into reacting, and bringing about the closure of the camp.

<sup>47</sup> *Kvočka* Trial Chamber para 377.

<sup>48</sup> *Kvočka* Trial Chamber para 376. The *Tadić* Trial Chamber detailed how Serb authorities had effectively disarmed the non-Serb population in the months preceding the Serb takeover, redistributing the weapons to Serb citizens.

<sup>49</sup> *Kvočka* Trial Chamber paras 111; 378.

<sup>50</sup> *Kvočka* Trial Chamber para 346.

that Kvočka brought a small amount of order and a suggestion of professionalism to an otherwise staggeringly random and brutal operation. Indeed, several witnesses testified that “the atmosphere in the camp was generally ‘better’ when Kvočka was present.”<sup>51</sup> On the other hand, Kvočka’s personal position was insecure; with extensive family connections to the Muslim community, living and working in a political environment where political leaders regularly espoused, on television and radio, the policy that the population of non-Serbs in the region should be brought down to no more than 2% and that this should be done by any means necessary,<sup>52</sup> Kvočka testified that his “loyalties” were constantly questioned. Pressure could only have increased when he intervened to remove his brothers-in-law, brought in on the second day of operation, from the camp. Indeed, this action led to his eventual dismissal less than one month later, and his reassignment to another police station.<sup>53</sup>

Aside from this personal intervention, Kvočka seems to have challenged authority, as recorded by the Trial Chamber, in only in a few of the “gravest” cases. On the second day of the camp’s operation, a drunk man drove up beside detainee buses and started shooting, causing several deaths and injuries. Kvočka physically deterred the shooter, saving many lives in the process.<sup>54</sup> He also intervened in the beating of one prisoner, asserting he had been wrongly detained (the actual target was the man’s sister, with a very similar name, who was a prominent local judge); Kvočka convinced the guards to release the man. Generally, however, Kvočka’s response to the brutalities of the camp was to consistently and repeatedly inform his superior, the commander of the Prijedor police station, of the criminal activities he observed. For example, Kvočka cordoned off dead bodies he found next to the first arriving buses, preserving the scene for later investigation, and informed his superior: there was no later investigation. Following standard Prijedor police procedure, Kvočka made reports to his superior of all the following: reports of beatings, wrongful arrests, porous camp borders, and the murder of detainees by other guards.<sup>55</sup>

### **Findings of the Trial Chamber**

The Trial Chamber found that Kvočka served at Omarska for 17 days over a one-month period. He was not found to have personally committed any of the extensive acts of violence that occurred at Omarska, nor was he found to have ordered such acts, or even participated in them by, for example, selecting certain detainees for “interrogation.” Instead, he was found to be a co-perpetrator of crimes against humanity, including torture, persecution, and murder, on a theory of JCE based on his work within the JCE, the prison camp of Omarska.<sup>56</sup>

The Trial Chamber applied a two-pronged test to determine Kvočka’s criminal responsibility. First, it examined the evidence before it to determine whether the time Kvočka spent at Omarska was sufficient to find that he participated the joint criminal enterprise of the camp. Second, the Court reviewed the evidence to determine whether his level of participation made him a co-perpetrator (“sharing the intent of the camp’s

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<sup>51</sup> *Kvočka* Trial Chamber para 371.

<sup>52</sup> This was detailed in the exposition in the *Tadić* judgment. *Tadić* Trial Chamber.

<sup>53</sup> Kvočka was also required, as a parting act, to bring his brothers-in-law back to the camp.

<sup>54</sup> *Kvočka* Trial Chamber para 387.

<sup>55</sup> *Kvočka* Trial Chamber paras 393-394.

<sup>56</sup> The Trial Chamber found Omarska to be a JCE because of the serious crimes committed intentionally in order to persecute and subjugate the non-Serb detainees. *Kvočka* Trial Chamber paras 319-320.



evil goals,” in the Court’s words) or an aider or abettor, characterized by the Court as performing only his discrete job, alleviating detainee suffering when he could, and committing no violations of his own.<sup>57</sup> While the Court acknowledged that such a line was finely drawn, it stated that this was the standard emerging from World War II case law, and was thus appropriate.<sup>58</sup>

Upon examining the evidence, the Trial Chamber found that Kvočka was aware of the horrible conditions for detainees in the camp, of beatings, deaths, lack of food, and miserable conditions. Kvočka’s *awareness* (knowledge) of the terrible conditions in the camp are the legal equivalent of intent, the Trial Chamber determined, based on its review of World War II case law.<sup>59</sup> While the Trial Chamber found that Kvočka himself did not physically perpetrate any of the crimes committed at Omarska, it found that he:

could have done far more to mitigate the terrible conditions in the camp... [by] tak[ing] steps within his designated authority to more actively prevent unauthorized outsiders from entering the camp and abusing detainees... ensur[ing] more detainees received medical treatment... prevent[ing] guards and other subordinates from beating or otherwise abusing detainees on arrival, in the dining room, or en route to the toilets.<sup>60</sup>

As regards Kvočka’s co-defendants, the Trial Chamber ultimately found a spectrum of *commission*, from defendants who actively participated in violence, to those who watched detainee abuse passively, to those who pretended that things were normal when evidence clearly showed otherwise, concluding, “All three attitudes deserve to be punished.”<sup>61</sup>

The Trial Chamber rejected Kvočka’s contention that he lacked the authority to prevent abuses in the camp, in part relying on Kvočka’s own testimony of intervention in “grave” circumstances to show that he did in fact have such authority. The Trial Chamber found witness testimony that Kvočka’s presence improved conditions to be additionally indicative of authority. The Trial Chamber further found that the Prijedor police department had sufficiently increased in size that it could be viewed on par with a station, putting Kvočka in a “*de facto* position of authority and influence in the Omarska police station... parallel[ing] the function of a deputy commander or assistant commander.”<sup>62</sup> Thus, according to the Trial Chamber, Kvočka occupied an authority position based on (1) the terrible conditions and violent

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<sup>57</sup> *Kvočka* Trial Chamber para 328.

<sup>58</sup> *Kvočka* Trial Chamber para 328.

<sup>59</sup> “The concentration camp cases seemingly establish a rebuttable presumption that holding an executive, administrative, or protective role in a camp constitutes general participation in the crimes committed therein. An intent to further the efforts of the joint criminal enterprise so as to rise to the level of co-perpetration may also be inferred from knowledge of the crimes being perpetrated in the camp and continued participation which enables the camp’s functioning.” *Kvočka* Trial Chamber para 278, footnote omitted.

<sup>60</sup> *Kvočka* Trial Chamber para 395.

<sup>61</sup> *Kvočka* Trial Chamber para 709.

<sup>62</sup> *Kvočka* Trial Chamber para 344.

crime that occurred within the camp, and (2) the Trial Court's finding that Kvočka was in a position to prevent crimes and alleviate suffering, and *yet did not*.<sup>63</sup>

Finally, the Trial Chamber concluded that Kvočka's participation in Omarska was not only knowing, but was also willing.<sup>64</sup> The Trial Chamber accepted Kvočka's citation of the individual detainees he saved or helped as proof that Kvočka harbored no personal animus towards Muslims. This did not impact Kvočka's liability for participation in a JCE, however, because the critical intent question the Trial Chamber addressed was not whether Kvočka *intended* to hurt Muslims, but rather whether he *knowingly* facilitated the joint criminal enterprise, which was the operation of the Omarska camp. The Trial Chamber found that Kvočka's knowing and continued participation both enabled the camp to continue its abusive practices and sent a message of approval to others in the camp – specifically guards the Trial Chamber found subordinate to him – condoning the abuses and deplorable conditions there.<sup>65</sup> For his role in the crimes at Omarska prison camp, Kvočka was sentenced to seven years, a sentence that was upheld on appeal.

### ***Kvočka Appeals Chamber***

The Appeals Chamber upheld the Trial Chamber's finding that Kvočka knowingly participated in a joint criminal enterprise, thereby becoming a co-perpetrator of the JCE. It also upheld the Trial Chamber's finding that Kvočka was only responsible for those crimes against humanity that occurred during the period he was working at Omarska, and on the basis of this, overturned two murder findings of the Trial Chamber, based on an inability to place those murders during Kvočka's term.<sup>66</sup>

Although the *Tadić* Judgment of two years before had established JCE as a theory of liability for the commission of crimes, the Prosecution in the *Kvočka* case never pled JCE as a theory of liability in its indictment. Instead, the Prosecution's reliance on collective responsibility emerged first in its pre-trial brief, submitted two weeks before the trial. In response to Kvočka's contestation in his appellate brief, the Appeals Chamber allowed that the indictment was in this area "vague and ... therefore defective."<sup>67</sup> The Appeals Chamber further noted that such failure to plead with specificity disadvantaged both the defense as well as the trial chamber. It nonetheless determined, after "a careful review of the trial record" that:

[T]he Prosecution gave timely, clear, and consistent information to [Defendants], which detailed the factual basis of the charges against them and thereby compensated for the Indictment's failure to give

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<sup>63</sup> The Appeals Chamber stressed that naturally Kvočka was not being condemned for things he did not do; given the Trial Chamber's language and rationale, however, this seems inaccurate.

<sup>64</sup> *Kvočka* Trial Chamber para 404.

<sup>65</sup> *Kvočka* Trial Chamber para 404.

<sup>66</sup> Another point raised by Defendants on appeal was the problematic lack of care taken by the Trial Chamber, where Defendants in the case were never entirely sure of whom they were accused of/found guilty of persecuting, beating, or killing and on what day. The Appeals Chamber found that the Trial Chamber erred in its information representation approach on this score, thereby violating a principle of fair trial. The Appeals Chamber nonetheless found that this error did not invalidate the Judgment.

*Kvočka Appeals Chamber* para 74.

<sup>67</sup> *Kvočka Appeals Chamber* para 41.

proper notice of the Prosecution's intent to rely on joint criminal enterprise responsibility.<sup>68</sup>

In this rationale, the Appeals Chamber echoed the Trial Chamber, which responded in its Judgment to Defendants' protests about the lack of specificity in pleading by arguing:

The charges in the Amended Indictment that the accused "instigated, committed or otherwise aided and abetted" crimes may include responsibility for participating in a joint criminal enterprise designed to accomplish such crimes.... [It is within the Trial Chamber's] discretion to characterize the form of participation of the accused, if any, according to the theory of responsibility it deems most appropriate, within the limits of the Amended Indictment and insofar as the evidence permits.<sup>69</sup>

The Chamber's position is demonstrative of the issues that can arise, particularly as regards the rights of the accused, in hybrid legal systems.

### **Problems with *Kvočka***

In addition to the irregularities noted above, there are three central thematic problems with the *Kvočka* judgment as regards defendants' rights. First, it is important to keep in mind that the ICTY statute precludes guilt by association or culpability based on membership in a criminal group.<sup>70</sup> Yet it appears that it is precisely *Kvočka*'s position in the Omarska camp that serves as the basis for his culpability; this is the Appeals Chamber's reading of World War II case law as regards JCE II.

The second issue has to do with the flawed categorization of JCE I. *Kvočka* was tried, it was initially argued, under a JCE I theory of co-perpetration (the Appeals Chamber found that he was in fact tried under JCE II, the concentration camp wing of JCE; this is described as similar in nature to JCE I). He was found to be a co-perpetrator because he shared the goals of the joint criminal enterprise (the Omarska Camp), which were the persecution and subjugation of non-Serbs; findings of his *participation* and *knowledge* regarding the Omarska camp were sufficient to demonstrate co-perpetration.

*Kvočka* submitted that he was a policeman performing his duty, which due to circumstances far outside his control became a job of providing internal security at a holding center, albeit a particularly odious and dangerous one. The Appeals Chamber dismissed this argument, noting:

Incidentally, it does not appear that maintaining a camp which seeks to subjugate and persecute detainees based on their ethnicity, nationality or political persuasion and in which living conditions are intolerable and the most serious beatings are regularly meted out can possibly be

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<sup>68</sup> *Kvočka* Appeals Chamber para 43.

<sup>69</sup> *Kvočka* Trial Chamber paras 247-248.

<sup>70</sup> Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993 (S/25704), §§ 50, 51. This was reaffirmed in *Prosecutor v. Milomir Stakić*, Case No. IT-97-24, (March 22, 2006), available at [www.icty.org](http://www.icty.org), ("*Stakić* Appeals Chamber").

considered as performing “duties in accordance with the police requirements.”<sup>71</sup>

The Appeals Chamber’s rationale is that Kvočka should have been able to recognize the criminal nature of the enterprise he was engaged in, and that once he had recognized it, any further participation suggested co-perpetration.

At issue here is the Tribunal’s finding that the Omarska prison camp (and not merely the criminal acts which took place within it) was a joint criminal enterprise. Upon determining that the camp itself is a JCE, the Tribunal employed World War II case law regarding participation in such criminal enterprises, much of which contains a very low standard for participation (and thus co-perpetration); in essence, anyone helping such a camp function becomes a co-perpetrator.

In line with this reasoning, the Tribunal should have found Kvočka liable for all crimes against humanity committed while he held his position in the Prijedor police force (particularly given the Tribunal’s focus on finding him a *de facto* deputy as well as an early constructor of the camp). The Tribunal did not so find, however, refusing to hold Kvočka liable for crimes committed in his absence from the camp (specifically for atrocities committed during the two sick leaves Kvočka took following incidents of violence he personally witnessed).<sup>72</sup>

Furthermore, many of the Tribunal’s arguments regarding Kvočka’s culpability turn precisely on the foreseeability and willing risk-taking standards that rest at the heart of JCE III. The Court found Kvočka’s presence in the camp – even in the absence of any direct participation in atrocities – to be readable as condoning the conditions of the camp, thus setting an example for the less experienced guards. Kvočka’s constant reporting of the crimes he witnessed at Omarska to his police department superior, and the absence of any change in behavior (on the part of his superior, as regards investigations, and on the other participants’ criminal activities), should have made it clear that crimes would continue; yet even after observing these patterns, Kvočka continued to report to work at the camp. While for purposes of the Tribunal’s finding this makes Kvočka a co-participant in a JCE (where the JCE *IS* the camp of Omarska), it is actually more accurate to see Kvočka’s situation as one where the work environment in which he was participating was foreseeably leading to the commission of crimes.

The third thematic problem that arises from *Kvočka* has to do with drawing the line between co-perpetration in a joint criminal enterprise and aiding and abetting (a mode of commission that was explicitly recognized in the ICTY Statute, unlike JCE). In *Kvočka* we see that Kvočka’s *intent* to persecute non-Serbs was determined based on his *knowledge* of the conditions that existed at the camp. Yet these same questions of *intent* and *knowledge* underlie the Courts’ distinctions between aiding and abetting and co-perpetration, as well as shoring up liability under JCE I, II, and III. Attempts made by the *Kvočka* judgments and others to elucidate and standardize these distinctions have tended only to muddle them.<sup>73</sup> Thus the *Kvočka* Trial Chamber found that a co-perpetrator shares the *intent* to carry out the JCE and actively furthers

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<sup>71</sup> *Kvočka* Appeals Chamber para 242.

<sup>72</sup> The Appeals Chamber characterizes this as a *factual* finding on the part of the Trial Chamber. *Kvočka* Appeals Chamber para 114. The standard for overturning a finding of fact by a lower court is more onerous than overturning an articulation of law by a lower court.

<sup>73</sup> See Ohlin 2007 for a detailed discussion.

it; whereas an aider and abettor need not share the *intent* of the participants, but rather need only be *aware* that his contribution facilitates a crime. Of course, *awareness* seems indistinguishable from *knowledge*, which is the standard the Chamber used to determine Kvočka's culpability. In other words, the combination of Kvočka's knowledge of atrocities, the horror of these acts and the length of time he "willingly"<sup>74</sup> served, creates intent. Further attempts to clarify have added little: the *Krnojelac* Appeals Chamber held, in a similarly circular manner, that "The acts of a participant in a joint criminal enterprise are more serious than those of an aider and abettor since a participant in a JCE shares the *intent* of the principal offenders whereas an aider and abettor *need only be aware of that intent*."<sup>75</sup> To this the *Vasiljević* Appeals Chamber adds "In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a JCE, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose."<sup>76</sup> The addition of *mens rea* helps little here, as it only leads back to the *intent to pursue a common purpose*, which reaches a dead end in Kvočka's holding that *knowledge* of the criminal nature of the common purpose legally constitutes *intent*. For this reason, the *Kvočka* Appeals Chamber rejects all Kvočka's arguments that he cannot have shared the common purpose of Omarska to persecute non-Serbs because, in addition to personally committing no atrocities, he harbored no personal animus towards Muslims, and that his acts to help or save individual Muslims in the Omarska camp further demonstrates this.

Defenders of the ICTY's developing JCE jurisprudence have argued that the court has aptly applied and updated principles arising from the Nuremberg tribunals, (Ohlin 2007) and note that international criminal law is a "rudimentary" tool lacking the qualifiers one finds in more "mature" legal systems, such as a distinction between murder and manslaughter. (Cassese 2007) Regardless, it remains true that in the midst of these growing pains, defendants' rights have been seriously truncated.

In short, the question *Kvočka* leaves unanswered is the question raised by one of his co-defendants, and the charge specifically articulated by General Gotovina's lawyers, which is explored below: JCE as a theory of strict liability. While the *Kvočka* Trial Chamber stressed that not everyone working in an abusive detention camp would automatically become liable as a participant in a JCE because participation must be *significant*,<sup>77</sup> the Appeals Chamber rejected this same "significance" language.<sup>78</sup> Thus we are left unable to say how we might distinguish culpability of those working in a concentration camp. This is perhaps not surprising, as it is in fact a holding gleaned from much of the World War II case law.

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<sup>74</sup> The Chamber also makes much of Kvočka's "willing" participation, noting that he would not have been punished had he simply refused to come to the camp, and thus drawing the conclusion that his participation was therefore willing. Of course, even had punishment been at issue, that would provide no defense, as the Chamber itself notes.

<sup>75</sup> *Prosecutor v. Milorad Krnojelac, Appeals Chamber Judgment*, Case No. IT-97-25 (September 17, 2003) para 75 (emphasis added).

<sup>76</sup> *Prosecutor v. Mitar Vasiljević, Appeals Judgment*, Case No. IT-98-32 (February 15 2004).

<sup>77</sup> *Kvočka* Trial Chamber para 309.

<sup>78</sup> *Kvočka* Appeals Chamber para 97.

## ***Gotovina and the future of joint criminal enterprise***

Ante Gotovina is the Croatian general who headed the southern wing of Operation “Storm,” the military operation that retook Croatian territory from Croatian Serb control in August 1995. Operation Storm, which benefited from U.S. support,<sup>79</sup> was a startlingly rapid military success, retaking in a matter of days land that had been held for four years, as Croatian troops rushed through the sparsely populated remote region that the Croatian Serbs had held. Croatian Serb defenses crumpled like a house of cards, and the ethnic Serb population made a hasty exodus by cart, tractor, and car; only those too old or frail to make the journey stayed behind. It is estimated that 20,000 people fled. Following Croatian troops came policemen and finally displaced Croats, who had been living as refugees for years on the coast. When the dust from Operation Storm settled, approximately 150 people were found dead.<sup>80</sup> Massive numbers of houses had been burned or destroyed, and many of the dead – who were mostly elderly and infirm – exhibited wounds consistent with war crimes (gun shots to the back of the head; slit throats).

For his role in the military action, Gotovina was indicted on charges of persecutions, plunder, murder, inhumane acts, and cruel treatment, all committed under the JCE theory of liability. Given a head start by Croatian authorities, Gotovina fled, and remained successfully underground for four years, which made him into somewhat of a *cause célèbre* both within Croatia (where he came to symbolize patriotism and stoicism in the face of injustice, being referred to simply as “hero”<sup>81</sup>) as well as before the ICTY, where, after the death of Tuđman, he came to symbolize the Tribunal’s balance, demanding “leaders” from Serbia and Croatia alike.<sup>82</sup> Gotovina’s continued absence from The Hague became a point of confrontation between Croatia, the ICTY, and the EU, ultimately stalling Croatian EU entry negotiations based on a negative report from the ICTY Prosecutor. Gotovina was ultimately apprehended in the Canary Islands in 2005; the arrest was made with the assistance of the Croatian authorities, which was ironic in light of the fact that

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<sup>79</sup> See, i.e. Daković “How Operation Storm Destabilized the Balkans” August 27, 2001 <http://www.antiwar.com/article.php?articleid=1483> (accessed June 25, 2013) (“According to the former head of Croatian counterintelligence, Markica Redić, “the Pentagon undertook complete supervision during the Storm action.” Moreover, Miro Tuđman, son of the late Croatian President and head of Croatia’s equivalent of the CIA, has argued that during Operation Storm “all our (electronic) intelligence in Croatia went online in real time to the National Security Agency in Washington” and “we had a de facto partnership.”)

<sup>80</sup> *The Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač, Amended Joinder Indictment* Case No. IT-06-90-PT (March 12, 2008) (“*Gotovina Joinder Indictment*”).

<sup>81</sup> During my fieldwork in Croatia in 2004-2005, which coincided with the period directly preceding Gotovina’s capture, and during the time when his absence from The Hague was delaying Croatia’s accession process with the EU, Gotovina was frequently publicly commemorated, in posters, plaques, decorative frescoes, and bumper stickers displayed in towns throughout Croatia as “heroj ne zločinac”: “hero, not criminal.”

<sup>82</sup> Gotovina was specifically named by the UN Security Council in Resolution 1503 (August 28, 2003) when the Security Council called on states to increase cooperation with the ICTY to “bring Radovan Karadžić and Ratko Mladić, as well as Ante Gotovina and all other indictees” to the ICTY. S/Res/1503 (2003) ICTY President Meron in his statement to the Security Council said “the Tribunal will not have fulfilled its historic mission – and it will not close its doors – until Karadžić, Mladić, and Gotovina have been arrested, brought to The Hague, and tried before the Tribunal in accordance with the full procedural protections recognized by our jurisprudence.” Statement by Judge Theodor Meron, President, International Criminal Tribunal for the Former Yugoslavia, to the Security Council June 13, 2005, available at <http://www.icty.org/sid/8581> (accessed June 24, 2013).

Gotovina was traveling on a Croatian-issued passport (under a pseudonym meaning “Christian Croat”).

Gotovina challenged the ICTY’s jurisdiction, specifically the JCE element of the indictment, and in March 2007 the Trial Chamber ruled against him.<sup>83</sup> The Joinder Indictment accuses Gotovina of participating in a JCE based on the foreseeability that, “murder, inhumane acts and cruel treatment were a *possible* consequence in the execution of the enterprise”<sup>84</sup> and that further, “[the] accused was aware of this *possible* consequence and, despite this awareness, joined and continued in the enterprise...”<sup>85</sup> Gotovina challenged<sup>86</sup> the “*possible* consequence” language of the Indictment, arguing that this weakened the JCE standard articulated in *Tadić* (of “*predictable* consequence”), diluted the *mens rea* requirement, and ultimately “replace[d]” the *dolus eventualis* standard articulated in *Tadić* with a standard of strict liability.<sup>87</sup>

The Tribunal rejected Gotovina’s argument, citing *Kvočka* as well as a later case that relied on *Kvočka*, the *Stakić* decision.<sup>88</sup> *Tadić* articulated the subjective standard as “predictable consequence”;<sup>89</sup> *Kvočka*, applying *Tadić*, articulated the standard as where “the accused had sufficient knowledge such that the additional crimes were a *natural and foreseeable consequence to him*”;<sup>90</sup> and the *Stakić* Appeals Chamber asserted it was applying *Tadić* and *Kvočka* and articulated the standard as one where:

Liability attaches “if under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused willing *took that risk*.” The crime must be shown to have been foreseeable to the accused in particular.<sup>91</sup>

Later in the *Stakić* opinion, however, the Appeals Chamber stated:

As noted above, for the application of third category joint criminal enterprise liability, it is necessary that ... the participant in the joint criminal enterprise was aware that the crimes were a *possible consequence* of the execution of the Common Purpose, and in that awareness, he nevertheless acted in furtherance of the Common Purpose.<sup>92</sup>

Based on this language, the Trial Chamber in Gotovina’s pre-trial motion challenging jurisdiction found that the “possible consequence” language in the Gotovina

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<sup>83</sup> Gotovina et al. Decision on Motions Challenging Jurisdiction.

<sup>84</sup> Joinder Indictment para 12 (emphasis added).

<sup>85</sup> Joinder Indictment para 43 (emphasis added).

<sup>86</sup> With regard to JCE, Gotovina and his co-defendants challenged several elements of the ICTY’s jurisdiction. Jurisdictional challenges are commonplace at the ICTY.

<sup>87</sup> Gotovina et al. Decision on Motions Challenging Jurisdiction para 5 (quoting Gotovina Defense brief).

<sup>88</sup> *Stakić* Trial Chamber.

<sup>89</sup> *Tadić* Appeals Chamber para 204.

<sup>90</sup> *Kvočka* Appeals Chamber para 86 (emphasis in original).

<sup>91</sup> *Stakić* Appeals Chamber para 65, citing *Tadić* Appeals Chamber paras 220, 228 and *Kvočka* Appeals Chamber para 83.

<sup>92</sup> *Stakić* Appeals Chamber para 87.

indictment, “can clearly be said to fall squarely within the accepted definition of JCE as set out in the *Tadić* Judgment and subsequent Judgments.”<sup>93</sup>

For the skeptical reader who might not find the argued absence of a distinction between “possible consequences” and “predictable consequences” either “clear” or “square,” there are two additional challenges to make to the *Gotovina* pre-trial Chamber’s reading of the presence of “possible consequences” language in *Stakić*, and that is that such language (1) is dicta and (2) is not controlling. “Dicta” refers to that language in court decisions that is explanatory but not central: Black’s Law Dictionary defines it as “an opinion by a court on a question ... that is not essential to the decision.” It is true that the Appellate Chamber in *Stakić* used the phrase “possible consequence” in its opinion. It did so, however, as an aside, 20 paragraphs after defining the standard in such a way as to follow both *Tadić* and *Kvočka*. At no point did the Appellate Chamber appear to challenge the standard as articulated in *Tadić*, which leads to the second observation, that this language of an aside should not be read as controlling. With an admission that it is the foreseeability of “possible consequences” that attaches a defendant to the participation of a common criminal plan, *Gotovina*’s argument that JCE had devolved to a theory of strict liability might seem persuasive,<sup>94</sup> although the Trial Chamber did not find it so.

#### ***Gotovina* Trial Chamber**

On April 15, 2011, the ICTY announced its verdict in the *Gotovina* case, sentencing *Gotovina* to 24 years in prison.<sup>95</sup> *Gotovina* was convicted for his participation in:

a JCE whose common purpose was the permanent removal of Serb civilians from the Krajina by force or threat of force, involving the crimes of deportation/forcible transfer and persecution (deportation, forcible transfer, unlawful attacks against civilians and civilian objects, and discriminatory and restrictive measures).<sup>96</sup>

In its 1,300-page judgment, the Trial Chamber articulated four categories of action that “corroborated” its finding that there was a JCE and that *Gotovina* “meaningfully participated in it.”<sup>97</sup> First, the Trial Chamber analyzed (over the course of approximately 200 pages) the transcript of a meeting on the island of Brioni (just off the Croatian coast) on July 31, 1995. Present at this meeting were many of the highest-ranking officials of the Croatian government, including President Tuđman, Minister of Defense Šušak, and Chief of the Croatian Army Main Staff Červenko. *Gotovina* was also present at this meeting, at which Tuđman articulated his design of using military force to take back the Krajina, ensuring “that not only the Serb Krajina army, but also the Serb civilian population, would leave the Krajina.”<sup>98</sup> Based

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<sup>93</sup> *Gotovina et al.* Decision on Motions Challenging Jurisdiction (March 19, 2007).

<sup>94</sup> Indeed, observers in the former Yugoslavia treated it as such; in the wake of the re-issued *Gotovina* indictment, Croatian newspapers were filled with the suggestion that based on this reasoning, at least 500 members of the current Croatian administration might face indictment. *Globus*, May 2005.

<sup>95</sup> His co-defendants Mladen Markač and Ivan Čermak received sentences of 18 years and an acquittal, respectively. See Appendix A.

<sup>96</sup> *Gotovina* Appeals Chamber para 85 (summarizing *Gotovina* Trial Chamber findings, relying on *Gotovina* Trial Chamber paras 2314, 2368-2375, 2578-2587).

<sup>97</sup> This useful analysis and structure is borrowed from Judge Pocar’s dissenting opinion in the *Gotovina* Appeals Chamber, discussed further below.

<sup>98</sup> Case information sheet, *Gotovina & Markač*, available at [www.icty.org](http://www.icty.org) (accessed March 4, 2013).



significantly on its analysis of the Brioni meeting, the Trial Chamber determined there was a JCE that included Tuđman and many of his top associates, and that Gotovina's participation amounted to a "significant contribution" to this JCE. At this meeting, responding to a statement by Tuđman, Gotovina said: "A large number of civilians are already evacuating Knin and heading towards Banja Luka and Belgrade. That means that if we continue this pressure, probably for some time to come, there won't be so many civilians, just those who have to stay, who have no possibility of leaving" and, "if there is an order to strike at Knin, we will destroy it in its entirety in a few hours."<sup>99</sup> These statements were construed by the Trial Chamber as demonstrative of Gotovina's meaningful participation in a JCE, the object of which was the permanent removal of Serbs from the Krajina region.

In making its JCE determination, the Trial Chamber considered artillery attacks against civilians on August 4 and 5 that preceded the exodus of 20,000 Serbs from the Krajina region. For example, there was an August 2, 1995 order instructing units to:

[organize] along the main attack axes, focus on providing artillery support to the main forces in the offensive operation through powerful strikes against the enemy's front line, command posts, communications centres, artillery firing positions and by putting the towns of [ ] Knin, Benkovac, Obravac and Gračac under fire.<sup>100</sup>

Additionally, the Trial Chamber analyzed shell markings to determine whether shelling was targeted or indiscriminate. It heard expert witness testimony, much of it conflicting, regarding the level of accuracy (based on conditions, equipment, and training) that could have been expected of the weaponry. In response to this testimony, the Trial Chamber developed a "200 meter" standard; shells falling within 200 meters of a legitimate military target would be considered lawful, and shells falling outside 200 meters of a legitimate military target would constitute "indiscriminate" shelling, which is a crime.

Finally, the Trial Chamber considered the crimes committed by armed units in the period directly following the military operation (the months of August and September 1995) as well as the discriminatory policy of the Croatian government towards its Serbian minority, including discriminatory property laws, in its determination that there was a JCE to illegally remove the Serbian population from Krajina.

### ***Gotovina Appellate Chamber***

In a stunning reversal of JCE policy and development, Gotovina was acquitted, together with his co-defendant Mladen Markač, on November 20, 2012 in a 3-2 Appellate Chamber judgment. The Majority found not only that Gotovina had not participated meaningfully in a JCE, but that there was no JCE at all, a finding one dissenting judge called "grotesque" and "contradict[ing] any sense of justice."<sup>101</sup> Four separate opinions were written in addition to the Majority judgment, although only two addressed JCE, in a holding that gives little guidance regarding the developing substantive law of JCE, or the institutional cohesion of the ICTY.

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<sup>99</sup> Brioni Transcript, p 10; *Gotovina* Trial Chamber.

<sup>100</sup> *Gotovina* Trial Chamber para 1893.

<sup>101</sup> Pocar dissenting opinion *Gotovina* Appeals Chamber paras 26, 39.

The heart of the Majority opinion was the problem of the 200-meter standard articulated by the Trial Chamber. The Majority contested the basis and use of this standard, and when the standard fell, the Majority held that the JCE finding fell with it, because according to the Majority's reading of the Trial Chamber's judgment, only *unlawful* artillery attacks could constitute deportation.<sup>102</sup> Once the standard to determine lawfulness was challenged, and the artillery attacks ceased to be demonstrably unlawful (as construed by the court, recollecting that the OTP has the burden of proving that something is unlawful), by this rationale, there was no crime of deportation.

The Majority characterized the Trial Chamber's judgment as "not explicitly consider[ing] evidence drawn from the Brioni Meeting to support its finding that unlawful artillery attacks took place"<sup>103</sup> but rather "consider[ing] inferences drawn from the Brioni Meeting alongside its finding that unlawful artillery attacks took place in order to establish the existence and parameters of a JCE."<sup>104</sup>

The Majority's finding removed not only Gotovina's liability via his "meaningful participation" in a JCE, but it undid the Trial Chamber's finding of a JCE to illegally remove the Serb residents of the Krajina region as well. While the Trial Chamber had arguably dangerously overreached in naming – not merely implicating but asserting the guilt of – individuals not before the Tribunal in its finding of JCE (finding Tuđman and others to be participants in the JCE),<sup>105</sup> the Appellate Chamber also overreached in undoing the entirety of the Trial Chamber's findings without articulating under what basis of review it did so.<sup>106</sup> As Pocar and Aguis each note in their acerbic dissents, for the Appellate Chamber to overrule 1,300 pages describing in careful detail, through the consideration of individual witnesses, documents, events and allegations, a far-reaching plan to permanently remove the Krajina Serbs, it should give some real consideration to the substance of the Trial Chamber's findings. The Appellate Chamber's reversal of the Trial Chamber's epic judgment was a mere 16 pages long.<sup>107</sup>

If the Trial Chamber's 2011 analysis of statements made at a meeting on Brioni Island seemed a thin basis for finding evidence of a common plan and convicting Gotovina to 24 years in prison, its judgment did at least comport with JCE jurisprudence to date: put on notice that he was working for politicians with illegal intent, Gotovina's willingness to assist them in the realization of their plan would be the sort of "risk-taking" that was criminalized in *Kvočka*. The Majority opinion in

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<sup>102</sup> "[T]he Trial Chamber held that Serb civilians' departures from settlements at the same time as or in the immediate aftermath of artillery attacks only constituted deportation where these artillery attacks were found to have been unlawful." *Gotovina Appeals Chamber* para 87, citing *Gotovina Trial Chamber* para 1755. Judge Pocar contests both this interpretation and the holding directly in his dissent, paras 23-24.

<sup>103</sup> *Gotovina Appeals Chamber* para 81, referencing *Gotovina Trial Chamber* paras 1893-1945.

<sup>104</sup> *Gotovina Appeals Chamber* para 81, referencing *Gotovina Trial Chamber* para 2310.

<sup>105</sup> This arguably constitutes a violation of Tuđman's and others' rights, as of course one must be named as a defendant to mount a defense before a court. Arguably, the prohibition on naming absent participants may be less acute in the civil law system, where trials in absentia are permissible.

<sup>106</sup> See Pocar's dissent paras 4-10, in which he critiques the absence of the appropriate rationale for rejecting the Trial Chamber's findings of fact and/or interpretations of law, both of which are subject to different standards of review.

<sup>107</sup> ICTY Judgments routinely number in the hundreds of pages: the *Gotovina Appeals Judgment* is by contrast shockingly short. The attached separate and dissenting opinions outnumber the Majority holding.

*Gotovina*, however, presents a real challenge to the JCE doctrine developed by the ICTY thus far. Following the *Gotovina* Appellate Court judgment, it seems only more clear that “JCE” is not so much a legal doctrine, functioning within Koskienniemi’s “grammar” formulation, as it is a “means to spread the net” of the Prosecution’s indictment.<sup>108</sup>

## (II) JCE jurisprudence: an analysis

The *Gotovina* Judgment left the substance of the ICTY’s JCE jurisprudence in doubt, but in fact, problems with JCE are deeper, and more intractable, than any mere absence of legal clarity, though indeed such absence represents a substantial and important charge. First, there is the problem that JCE arguably constitutes a violation of *nullem crimen sine lege* by setting legal standards (such as they can be argued to exist, particularly post *Gotovina*) ex post facto. This critique, in addition to considering the problematic World War II jurisprudence discussed above in connection to the *Kvočka* judgment as well as in Chapter One, raises the problem of what elements of “conspiracy” are recognized as criminal between common and civil law (and, in fact, the exaggerated conspiracy jurisprudence that is a particular hallmark of U.S. law), as well as the question of how distinctions should be made between legal categories (there has been a great deal of criticism, for example, that aiding and abetting, which should be a lesser crime than co-perpetration, is in fact harder to prove than JCE). (Ambos 2007) Finally, the issues arising in the articulation and development of JCE promise to arise again in ICL, as the ICC’s first judgment demonstrates. While the ICC has formally rejected JCE as a form of liability, its co-perpetration method of commission is plagued by many of the same doctrinal problems inherent in JCE. These criticisms are considered in turn, briefly, below.

### Articulating a basis for JCE

The *Tadić* Court, defending its jurisdiction in nearly every aspect of its holding, also articulated the legitimacy of what would become JCE. In a pre-trial decision, the *Tadić* Court held that to avoid *nullem crimen sine lege*, ICTY must apply either CIL or Treaty law.<sup>109</sup> In the Trial Chamber Judgment, the *Tadić* Court found liability for the joint commission of crimes implicit in the ICTY Statute’s “commission” language.<sup>110</sup> In its 2003 pre-trial Appellate ruling “Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*”<sup>111</sup>

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<sup>108</sup> Defense attorney at the ICTY, author interview, The Hague, May 2005. See also reporting regarding “rifts” between the judges at the ICTY “who claimed in private that the [recent acquittals, including *Gotovina*] had abruptly rewritten legal standards that had been applied in earlier cases.” Marlise Simons, “Judge at War Crimes Tribunal Faults Acquittals of Serb and Croat Commanders” *New York Times*, June 14, 2013. These rifts came to a head with a recent letter published by a Danish judge at the ICTY claiming that ICTY President Meron put pressure on judges to make acquittals, saying that before the ICTY today, even Hitler might not be convicted. Morten Frich, “Bekymret dansk FN-dommer: Jugoslavien-generalerne går fri” (“Worried Danish ICTY Judge: The Yugoslav Generals are Being Freed”) *Berlinske*, June 12, 2013.

<sup>109</sup> *The Prosecutor v. Duško Tadić*, Jurisdictional Decision, Case No. IT-94-1-T, (February 10, 1995) para 143.

<sup>110</sup> *Tadić* Trial Chamber paras 661-669 (finding a basis in customary international law, through an examination of Council Control Law No. 10 following the IMT at Nuremberg, for individual culpability for “participating in, in contrast to the direct commission of” a crime (para 666)).

<sup>111</sup> *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić, Motion Challenging Jurisdiction*, Case No. IT-05-87-PT (May 21, 2003) (“Ojdanić’s Motion Challenging Jurisdiction”).

the Appellate Chamber reaffirmed *Tadić*, stating that “[t]he reference to that crime or to that form of liability does not need [...] to be explicit to come within the purview of the Tribunal’s jurisdiction” finding that “the list in Article 7(1) appears to be non-exhaustive in nature as the use of the phrase ‘*or otherwise* aided and abetted’ suggests.”<sup>112</sup> The Appeals Chamber explained:

The Statute of the ICTY is not and does not purport to be, unlike the Rome Statute of the International Criminal Court, a meticulously detailed code providing for every possible scenario and every solution thereto. It sets out in somewhat general terms the jurisdictional framework within which the Tribunal has been mandated to operate.<sup>113</sup>

While the ICC Code is more detailed than the ICTY’s, that Code, as all codes, of course, still requires judicial interpretation, as will be discussed further below.

As regards conspiracy, the Appeals Chamber found “conspiracy” and JCE to be distinct, explaining:

[w]hilst conspiracy requires a showing that several individuals have agreed to commit a certain crime or set of crimes, a joint criminal enterprise requires, in addition to such a showing, that the parties to that agreement took action in furtherance of that agreement.<sup>114</sup>

It further clarified that “while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise.”<sup>115</sup>

The *Gotovina* Pre-Trial Chamber, in its Decision on Several Motions Challenging Jurisdiction, quoted at length the Appellate Chamber holding in Ojdanić’s Motion Challenging Jurisdiction. The *Gotovina* Pre-Trial Chamber defended its JCE jurisdiction thus:

In order to come within the Tribunal’s jurisdiction *ratione personae*, any form of liability must satisfy four pre-conditions: (i) it must be provided for in the Statute, explicitly or implicitly; (ii) it must have existed under customary international law at the relevant time; (iii) the law providing for that form of liability must have been sufficiently foreseeable at the relevant time to anyone who acted in such a way; and (iv) such person must have been able to foresee that he could be held criminally liable for his actions if apprehended. *Prosecutor v. Milutinović et. al*, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction [...] para. 21.

The *Gotovina* Pre-Trial Chamber then interpreted this reference directly with the following analysis:

The Trial Chamber notes that in its Decision the *Milutinović* Appeals Chamber upheld the inclusion of joint criminal enterprise in that

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<sup>112</sup> Ojdanić’s Motion Challenging Jurisdiction para 18.

<sup>113</sup> Ojdanić’s Motion Challenging Jurisdiction para 19.

<sup>114</sup> Ojdanić’s Motion Challenging Jurisdiction para 23.

<sup>115</sup> Ojdanić’s Motion Challenging Jurisdiction para 23.

indictment, thus finding that joint criminal enterprise fulfilled the above-listed pre-conditions.<sup>116</sup>

By way of legal exposition, this is problematically light.

### **JCE vs. co-perpetration: two terms for the same problem?**

As noted above, the ICC has formally rejected the application of JCE as developed through ICTY jurisprudence as a form of liability. To assert jurisdiction over crimes arising from “common plans” or distinct levels of commission, the ICC statute uses “co-perpetration.” The ICC Statute defines co-perpetration in Article 25(3)(a), which provides that a person shall be criminally responsible for an international crime if he “[c]ommits such a crime, whether as an individual, *jointly with another* or through another person, regardless of whether that other person is criminally responsible.”<sup>117</sup> In Article 25 (3)(d), the ICC further defines criminal responsibility as attaching to an individual who:

in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime.<sup>118</sup>

Whether, and to what extent, either of these Articles approximates JCE by another name is a matter of great debate in ICL circles. (Ohlin 2009) The ICC made a ruling on 25(3)(d) in a December 16, 2011 pre-trial decision,<sup>119</sup> holding that there is a threshold level of substantial, but not significant, participation to trigger Article 25(3)(d). In so doing, the pre-trial chamber rejected Cassese’s (2007) suggestion that Article 25(3)(d) applied to “outsider” instead of “insider” participants. Ohlin (2009) was critical of such an interpretation as it would thereby invite JCE, by another name, for “insider participants” (ostensibly such “insider” participants would be addressed in Article 25(3)(a)). This would have constituted a significant judicial reinterpretation of the plain language of the statute, anathema to law across systems.

In its 2012 Judgment in *Lubanga*,<sup>120</sup> the ICC Trial Chamber rejected the argument that co-perpetration under Article 25(3)(a) is the equivalent of JCE I. Instead, the Majority found:

that the commission of a crime jointly with another person involves two objective requirements: (i) the existence of an agreement or common plan between two or more persons that, if implemented, will result in the commission of a crime; and (ii) that the accused provided *an essential*

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<sup>116</sup> Gotovina et al. Decision on Motions Challenging Jurisdiction.

<sup>117</sup> Rome Statute.

<sup>118</sup> Rome Statute Article 25 (3)(d).

<sup>119</sup> *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10 (December 16, 2011) (the Pre-Trial Chamber declined to confirm the charges against Mbarushimana and he was released.)

<sup>120</sup> *Prosecutor v. Thomas Lubanga Dyilo*, (*Verdict*) ICC-01/04-01/06 (March 14, 2012)

*contribution* to the common plan that resulted in the commission of the relevant crime.<sup>121</sup>

It is the “essential contribution” language that distinguishes co-perpetration from JCE I. The “essential contribution” language is borrowed from the “control theory of co-perpetration” developed by German legal theorist Claude Roxin in the 1960s.<sup>122</sup> Commentators contest this; some argue that Article 25(3)(a) should be understood as the functional equivalent of JCE I (Ohlin 2009), while others argue that the two constructions of liability are distinct. (Cassese 2007)

### **(III) Situating the substance of ICL within a domestic criminal law context**

The ICTY has struggled with the idea of the collective versus the individual since its inception. Established with the aim of finding individual guilt that would absolve assessments of collective guilt,<sup>123</sup> the ICTY has faced the difficult task of applying traditional criminal law procedures, ideals, and mechanisms – which, while they certainly enjoy a collective character (Garland 1993), have been developed in modern times with the ideal of individual rights as paramount – to a situation characterized by issues of the collective, both on the side of victims and perpetrators. Criminal acts become war crimes or crimes against humanity precisely due to the relation between an individual victim and a persecuted group. On the other side, many perpetrators of war crimes throughout the former Yugoslavia were formerly law-abiding citizens swept up in the violent currents of a splintering country; some convicted defendants before the ICTY were following orders,<sup>124</sup> others were leading internationally devised military actions,<sup>125</sup> while still others were continuing to perform their jobs in the changed circumstances of war.<sup>126</sup>

JCE facilitates the work of ICTY prosecutors by removing the necessity of definitively tying an individual to a particular crime. Proponents of JCE argue that the chaotic and collective nature of war crimes both justifies and necessitates this deviation from a fundamental element of western criminal jurisprudence. Yet the outcry that the emergence and evolution of JCE has occasioned even within communities most sympathetic to the aims of the Court (and including ICTY judges

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<sup>121</sup> *Idem* para 1006 (emphasis added).

<sup>122</sup> Fulford dissenting Opinion in Lubanga paras 10-15; Ohlin post at *OpinioJuris* “Lubanga Decision Roundtable: Lubanga and the Control Theory” March 15, 2012 available at: <http://opiniojuris.org/2012/03/15/lubanga-and-the-control-theory-2/> (accessed June 24, 2013).

<sup>123</sup> *See, e.g.*, Del Ponte (2004: 517), former ICTY Prosecutor, who characterizes the work of the ICTY as “making the responsible leaders and other key figures accountable for their crimes; and enabling the rest of the people to face their past, accept the present and move forward.”

<sup>124</sup> *See, e.g.*, *Erdemović*, a case concerning a Bosnian Croat drafted into the Bosnian Serb army, who pled guilty to murder as a war crime in connection with the Srebrenica massacre, for following orders to kill, at the risk of being killed himself had he disobeyed.

<sup>125</sup> *See, e.g.*, the case against Ante Gotovina, charged with JCE for leading the Southern half of Operation Storm, the military putsch in August 1995 that retook Croatian territory formally held by Croatian Serbs, discussed in Part III of this chapter; Gotovina commanded an action in which foreign military commanders, including US and NATO, participated.

<sup>126</sup> Kvočka, municipal policeman who oversaw the formation of Omarska prison camp, discussed in Part II.

themselves, at times),<sup>127</sup> as well as the reticence that international courts following the ICTY have shown in adopting the JCE standard, is one indication of the deeply problematic nature of using the JCE theory of liability to address of the vexing question of how to hold individuals responsible for criminal acts committed by, and in the name of, a collective.

The basis of this law is human rights law, a law marked primarily by its non-derogable character. (Donnelly 2003) International *human rights law* derives its legitimacy from its “universality” and for this (and other reasons as well) brooks no derogation, a trait that sets it apart from domestic criminal law. This chapter’s last section briefly explores this challenging constraint to the substantive law emerging from the ICTY, demonstrating how the conflict between ICL as moral universalism (drawn from natural law) and ICL as criminal law (drawn from the social sciences and theories of criminal law’s role in retribution, deterrence, and rehabilitation) outlines the problematic absence of a discursive loop between ruler and ruled that animates this dissertation. ICL has borrowed domestic criminal law theory to address a field based (steeped) in international human rights theory. The two fields, I argue, co-exist up to a point but clash precisely at the point of the individual. This drives (valid) critiques of ICTs as “scapegoating” individuals for what are, in fact, collective (state-based) crimes, as well as (again, valid) goals of international human rights law to set universal rights standards that will benefit, and protect, all human beings regardless of the accident of their citizenship.

### **An ICL penology**

ICL seeks to “criminalize” violations of international human rights law. Lacking its own penology, ICL builds instead on the rationales used for applying criminal sanctions at the domestic level. (Bassouni 2003:588) ICTY judgments locate the rationale for their criminal jurisprudence within the confines of domestic criminal law, citing deterrence, retribution, and rehabilitation as underwriting such jurisprudence. Some proponents of ICL argue that this facilitates the transposition of domestic criminal law to the international arena. (Cassese 1998) Others argue that making any clean transposition is a mistake because:

[T]he perpetrator of mass atrocity fundamentally differs from the perpetrator of ordinary crimes. The fulcrum of this difference is that, whereas ordinary crime tends to be deviant in the times and places it is committed, the extraordinary acts of individual criminality that collectively lead to mass atrocity are not so deviant. In fact, these acts of individual criminality may support a social norm even though they transgress a *jus cogens* norm. (Drumbl 2007: 549-550)

Criticisms such as Drumbl’s echo the work of ICL theorists (Allott 1990) who critique ICL’s potential to “scapegoat” individuals for the work of states. In turn, these critiques mirror questions raised by criminal law theorists such as Paul Ricoeur (1995) who bases criminal theory in the recognition of the accused as a reasonable and responsible being.

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<sup>127</sup> See *Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić, Appeals Chamber Judgment*, IT-95-9 (November 28, 2006) (a decision which threw the JCE charges out because they were not properly pled).

Criminal law is generally understood as acting to deter criminal acts, as a legitimized<sup>128</sup> form of retribution, and as offering the possibility for the rehabilitation of the wrong-doer. ICTY jurisprudence reflects a commitment to these three central principles of domestic criminal law.<sup>129</sup> Retribution and deterrence have in turns been perceived by Chambers as “equally important,”<sup>130</sup> or deterrence “probably is the most important factor in the assessment of appropriate sentences,”<sup>131</sup> or alternately, retribution has been identified as a “primary objective,” with deterrence a “further hope.”<sup>132</sup> Finally, the rehabilitation of offenders is also noted in ICTY jurisprudence, particularly in plea bargains.<sup>133</sup>

As Foucault (1995: 38) argued, the purpose of trials is not mere punishment. Trials serve a more elaborate social role. It is not enough that wrong-doers be justly punished. They must if possible judge and condemn themselves. This internalization of state control is a central element of the social control that forms the heart of criminal court capacity in domestic systems. It traces a central tenet of transitional justice: proponents of the ICTY argue that it will function to “internalize” certain legal and moral values. Payam Akhavan (1998:737) describes the work of the tribunal in terms of “[a] gradual internalization of expectations of individual accountability and the emergence of habitual conformity with elementary humanitarian principles, both in the former Yugoslavia and the international community.” Balkan anthropologist and legal scholar Robert Hayden (1998: 45, 47) has argued that “the ICTY ... is meant to act as a moral compass and pedagogue to the ex-Yugoslavs, particularly the Serbs.” There is also an extensive literature considering the value of “political trials” to instill the “right kind” of ideals and political goals for the targeted nations. (Shklar 1964; Osiel 1998)

Humanitarian law and international human rights law are fundamentally distinguishable from domestic law. The two principal characteristics of this difference are (1) the lack of a sovereign dispensing, regulating, checking, relying on, organizing, and revising this law and (2) the place of the individual before such law, particularly the absence of defenses rooted in the individual. Unlike domestic law,

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<sup>128</sup> This reflects both Weber’s definition of statehood as a monopoly on violence as well as the legitimizing function the state plays when it removes questions of vengeance from private hands.

<sup>129</sup> See ICTY Prosecutorial statements, e.g. “The publication of the evidence before the Tribunal and the issue of the international warrant of arrest have important deterrent effects. I dare say that no sane or rational person would wish to render himself or herself subject to such proceedings. In the future, would-be violators of international humanitarian law will know that such a fate may be in store for him or her and that knowledge may well stop or at least curb [such criminal] conduct.” *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2, Trial Transcript 58:21 - 59:4 (October 9, 1995) (Goldstone Opening Statement). See also ICTY judgments: “The jurisprudence of the Tribunal emphasizes deterrence and retribution as the main general sentencing factors.” *Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić, Appeals Chamber Judgment*, Case No. IT-95-9 (October 17, 2003) para 1059. “It is universally accepted and reflected in judgments of [ICTY & ICTR] that deterrence and retribution are general factors to be taken into account when imposing sentences.” *Stakić Trial Chamber* para 900. See also *Prosecutor v. Milorad Krnojelac, Trial Chamber Judgment*, Case No. IT-97-25 (March 15, 2002) para 508; *Todorović Sentencing Judgment* para 28-29; *Prosecutor v. Anto Furundžija, Trial Chamber Judgment*, Case No. IT-95-17/1 (December 10, 1998) para 288. *Prosecutor v. Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković*, Case No. IT-96-23 & 23/1 (June 12, 2002) (“Kunarac Appeals Chamber”) (rejecting alleged trend away from retribution in international law).

<sup>130</sup> *Stakić Trial Chamber* para 900.

<sup>131</sup> *Prosecutor v. Zejnil Delalić, Hazim Delić, Zdravko Mucić, Esad Landžo*, Case No. IT-96-21 (November 16, 1998) available at [www.icty.org](http://www.icty.org) (“Delalić Trial Chamber”) para 1234.

<sup>132</sup> *Nikolić Sentencing Judgment* para 59.

<sup>133</sup> *Nikolić Sentencing Judgment* para 85, 93.



humanitarian law is defined by an inability to rationalize actions. Individual culpability can be pardoned (through insanity and in some, not often followed cases, duress)<sup>134</sup> but never legitimized. In domestic systems, criminal acts can cease to carry penal sanction based on their context, that is, after the court has considered the circumstances surrounding a case. This is not so in humanitarian law, where an act that has been criminalized as in violation of the laws of war or humanitarian law can, at best, be non-punishable for the commissioning individual based on his personal circumstances (insanity or, in some outlying cases, duress).

The “case law” created in the wake of World War II, considered in Chapter One and underwriting the development of the ICTY’s JCE jurisprudence, does not generally recognize such individual circumstance. In fact, war crimes and humanitarian law exist deliberately within an idealized, and not a mundane, sphere. Humanitarian law demands that human beings act in accordance with a moral code that proponents of humanitarian law insist is “universal” and thus above question or reproach. There are no affirmative defenses to war crimes because war crimes and crimes against humanity are acts that are inexcusable regardless of circumstance.

## Conclusion

Paul Ricouer (1995:198) has argued that for penal sentencing to have a future, it must contain the capacity to make the accused feel she is seen as a “reasonable, responsible being.” This is, in effect, exactly the crossroads illustrated by the ICTY’s problematic JCE jurisprudence. Who is reasonable and what is (il)legal under this doctrine? If no one can say, then the accused cannot feel that their punishment is designed to reach them as human beings, and the benefits that accrue to the costs of punishment are sure to be impacted.

This chapter has placed one prominent example of a substantive law articulation by the ICTY against a function identified by the *international criminal justice template*, that ICTs articulate progressive international criminal law. The ICTY’s JCE doctrine is inarguably the most publicized (and criticized) example of the ICTY’s legal “creativity” (bearing in mind that proponents of JCE would debate such a characterization to their last breath). With the November 2012 *Gotovina* judgment, however, it is unclear what the future of the doctrine is at the ICTY. At the ICC, as noted above, “JCE” has expressly not been adopted as a theory of liability.<sup>135</sup> At the same time, as discussed above, the ICC cannot escape the “JCE debate” entirely, as it too must address how to quantify “commission” in an environment where individuals may not personally, nor through an official hierarchy, engage in crimes against humanity, war crimes, or even genocide.<sup>136</sup>

With an eye to the particular challenges that exist in prosecuting war crimes, this chapter has examined the evolving uncertainty and instability of the ICTY’s JCE jurisprudence. JCE challenges a central tenet upon which legal systems build their legitimacy: predictability. Although the process of crafting JCE as a theory of liability

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<sup>134</sup> Duress was not recognized at the IMT at Nuremberg but is recognized, in limited capacity, before the ICTY.

<sup>135</sup> This statutory distinction is confirmed by legal professionals working at the ICC. (Author interview ICC personnel, The Hague, November 16, 2012.)

<sup>136</sup> As it is typically considered an act of state that cannot be formulated by any single individual, commission of genocide cannot be set on equal terms as other crimes against humanity or war crimes in terms of commission issues.

has been underway for more than a decade, defendants before the Tribunal today are ever more uncertain of what constitutes the relevant degree of participation, knowledge, or intent in order that JCE apply. As matters currently stand, there is no way for a defendant to combat the charge; JCE has become a form of strict liability because there is no way to mount a defense against it (although, as the *Gotovina* case has shown, it may from time to time be possible to surmount the charge). These procedural legal problems underline more pressing institutional issues for the ICTY, one being that of its legitimacy (and therefore its potential to impact discourse in the former Yugoslavia) and another being the heritage it leaves to other ICTs, most notably the International Criminal Court.

The development of JCE, which is an example of the development of the substance of international criminal law, illustrates a major structural deficit of the ICTY. This chapter has examined the development of JCE and explored, with *Gotovina's* 2012 acquittal, the acute crisis of the doctrine. Whereas human rights law, based on the principle of non-derogability, rejects the context of a crime in order to achieve a collective benefit, criminal law, developed in balance between individual rights and social deviance, necessarily includes context. The problematic development of the ICTY's JCE jurisprudence lays bare this conflict.

## Chapter Five: *One Truth* versus *A Truth*: History, Trials, and Collective Memory

*“What the ICTY does is to produce facts, truth. The ICTY produces facts that are proven. When societies are ready to confront their past, with an open mind, objectively, then those societies, thanks to the ICTY, will have a wealth of material to look at. There are photos, videos, forensic evidence, witness statements. The OTP has something like 4.5 million pages of documents, 12,000 hours of video and audio, hundreds of maps. However, that said, there are limits to what we, the court, can do to make them, the former Yugoslavia, face the past.”*

*“The basic thing that I need to mention is this: There’s just one truth. It’s an integral truth. It involves all the parties that were involved in the conflict, and I couldn’t talk at that time. I could only tell a fragment of the truth, and this is what I can do and didn’t want to do. And this is the reason why I didn’t come forward sooner.”*

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ICTY personnel, author interview, The Hague, May 2005.

Milan Babić, Sentencing hearing 2003, Tr 188:7-12.

Part of the ICTY’s value, and what in the eyes of many legitimizes its significant expense, is the role that it has been intended to play in writing the history of the Balkans and the bloody wars of the 1990s. Like advocates of the IMT at Nuremberg before it, advocates of the ICTY point to the investigatory, research-oriented, archival aspects of the ICTY’s work as central elements of its value. The ICTY should produce “an official version” of the wars that tore Yugoslavia apart, and the strength of the evidence presented, as well as the integrity of the institution, should overcome the nationalist narratives still pervasive throughout the former Yugoslavia.

This chapter considers the ICTY as historian and narrative constructor. Building on the critiques of courts as historians, enumerated in Chapter One, Part I of this chapter begins with a critique both of ICTY narratives as “history” and of the ICTY as an archive. Part II considers how the ICTY’s historical constructions diverge from dominant narratives among Serbs, Croats, and Bosnians. Building on a theoretical base which affirms that history and collective memory should be understood as continuous constructions of the past in the present (Halbwachs 1992; Schwartz 1982), the chapter concludes in Part III by considering the problem of divergent collective memories and reconciliation. If unified narratives hold the key to reconciliation, by unifying collective memory, then historical constructions play a key, under-examined role in the ICTY’s transitional justice project of reconciliation.

## (I) ICTs as historians

The *international criminal justice template* recognizes value in ICTs' purported capacity to generate facts and pronounce histories. This perspective is echoed in the foundational debates surrounding the ICTY,<sup>1</sup> and in ICTY judgments.<sup>2</sup> The case for using ICTs as historians can be summarized as follows:

[E]stablishing a historical record through trial does not only help to find out what happened but moreover it provides for a mechanism to validate these findings. The limits of evidential and procedural rules confer legitimacy and credibility to the outcome. An independent court establishes facts through a public trial where each element needs to be proven beyond reasonable doubt. Thus not only will the criminal investigation uncover the truth but the test of that criminal trial will also validate it. The thorough investigation of high profile offenders, the strict rules of evidence and the rule of law that allows both sides to be heard make the international criminal trial a most appropriate forum for building an accurate historical record of the atrocities. (Rauxloh 2010:744)

The “template” established by the IMT, the ICTY founding documents, and Tribunal representatives all contribute to the assertion that holding trials helps the “truth” of the Balkan wars emerge.<sup>3</sup> Such “truth” can in turn facilitate reconciliation because when history is credibly established it serves as a narrative with the power to unify through its very singularity. (Akhavan 1998) This is the received wisdom of the IMT and post-war Germany. Courts assist in establishing this unified, and thus unifying, narrative through their iteration of an official story based on officially-sanctioned proofs.

Outside the legal field, proponents of ICT capacity to work as historians and produce history are generally a bit more cautious. Richard Wilson, a legal anthropologist, advances arguments in favor of the use of ICTs as historians even while carefully noting the myriad issues involved, beginning with epistemology and moving through court procedure. In his book considering the history generated by international criminal tribunals, Wilson (2011: 7) characterizes the distinction between law and history in terms of epistemology: “[l]aw’s epistemology is positivist and realist” while “history... is more pluralistic and interpretative in both its methods and conclusions.” Wilson’s monograph traces the use of historical narratives in several ICTY cases. Noting that “a number of prosecutors and defense lawyers have come to realize [that] the complexity of history in the Balkans... is such that it can lend itself to virtually any legal argument” (2011:70), Wilson traces the emergence and use of historical argument, and historians, as “expert witnesses” before the ICTY. While Wilson recognizes the structural obstacles impeding legal mechanisms’ work as historians, he nevertheless defends the historical narratives produced by (and in pursuit of) international criminal law judgments.

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<sup>1</sup> [I]t is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process.” Madeleine Albright, May 25, 1993 UN SCORE, 48<sup>th</sup> Session, 3217<sup>th</sup> meeting UN Doc. S/PV3217.

<sup>2</sup> *Nikolic Sentencing Judgment* para 60: “such a historical record would prevent a cycle of revenge killings and future acts of aggression.”

<sup>3</sup> “Through public proceedings, the truth about the possible commission of war crimes, crimes against humanity and genocide was to be determined, thereby established an accurate, accessible record.” *Nikolic Sentencing Judgment* para 60.

The standard critique of lawyers as historians begins with an examination of the different ways of knowing in the two disciplines. Lawyers gather facts to demonstrate a story that must be told in relation to a pre-existing legal norm. In this sense, it is the pre-existing norm that is central and definitive, as it determines what facts “matter” to the story. Such essential facts are the only ones that need enter the discourse. Furthermore, because lawyers present facts in a highly stylized procedural setting, where all facts require a basis in law in order to be presented to the court, certain narratives may be easier to establish than others. This is exemplified by the well-worn example of the notoriously violent American gangster, Al Capone, indicted and imprisoned for tax fraud. Historians, on the other hand, engage in a more interpretive project, interrogating and (re)interpreting our present knowledge of the past. Such interrogations are themselves without any clear goal or watermark; there is no readily evident goalpost determining success or failure for a historian such is provided by a verdict at law. Instead, historians add value through the richness (and not the singularity) of the evidence they muster in presenting their narrative. Additionally, historians are just as often interested in what did not happen – unrealized possibilities – as what did, and historical narratives frequently weave these threads together.

Theorist Martti Koskenniemi (2002: 25) is less sanguine than Wilson in his appraisal of the capacity for courts to produce history:

[N]o matter how much judges may seek to proceed in good faith towards their judgments, the context of the trial cannot – unlike the history seminar – be presumed to manifest good faith on everybody’s part. This is not a disinterested enquiry by a group of external observers but part of the history it seeks to interpret. Much is at stake for the protagonists – that is the nature of the trial – and no truth can remain sacred within it.

Significantly, Koskenniemi locates the distinction between law and history as one of motivation. The motivation lying behind the production of historical fact and theory at law lies in each side’s<sup>4</sup> desire to win. This motivation thus creates an interest in outcome that categorically prevents objectivity. Koskenniemi (2002:11) rather cynically suggests that perhaps proponents of the ICTY have settled on the value of its history-telling elements because neither its deterrence nor community building rationales are persuasive.

Koskenniemi goes even further in his argument, however, asserting that judgments aiming at telling an official history may obstruct rather than enhance that process. He locates this problem in the individual nature of judgment, which risks “exonerating from responsibility those larger (political, economic, even legal) structures within which the conditions for individual criminality have been created – within which the social normality of a criminal society emerges.” (Koskenniemi 2002: 15) The problem of situating individual responsibility as a response to collective action and as an antidote to collective guilt is a recurring criticism in considerations of international criminal justice. (Allott 1990)

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<sup>4</sup> Civil law resists the adversarial construction of “sides” to a case, as at civil law the state, bringing the criminal case, is invested in both the charge and the defense. Regardless of this difference in balance of approach, Martin Shapiro’s work highlights the state interest served by a prosecutor in following the rules laid down by the state. In this way, even a state representative charged with accusing and defending an individual (the mandate of the civil law prosecutor) can be said to represent a “side.”

Critical considerations of history and narrative invite questions regarding ways of knowing. As discussed in Chapter One and reviewed briefly above, courts engage in particularized ways of knowing. The examination in Chapter Three of the common law/civil law divide suggests that justice *systems* in their entirety are defined by distinct ways of knowing as well, which likely impact the possibility of a court to produce an effective (unified and thereby unifying) official narrative. These two elements of court “knowing” are discussed below.

### **Courts: form & function**

There is a well-honed debate regarding the role that courts can and should play regarding history, facts, and narrative. In *Eichmann in Jerusalem*, Hannah Arendt famously articulated the problem thus:

The purpose of the trial is to render justice, and nothing else; even the noblest ulterior purposes – “the making of a record of the Hitler regime...” can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgment and to mete out due punishment. (1963: 251)

Arendt was highly critical of the prosecutorial strategy of proving facts that had little bearing on Eichmann’s own actions and crimes, a strategy that laid out the horror of the Holocaust for the illegitimate purpose, she argued, of strengthening the Israeli state.

Likewise, in an essay written nearly 50 years ago, Lon Fuller advanced the theory that courts should exist solely for the purpose of conflict resolution, because their purpose is to create a space of reasoned, rational argument for the parties to the case. (Fuller 1978) In Fuller’s view, courts should confine their activities to the space of the precise conflict at hand. Fuller did not perceive litigation as the correct space to right social wrongs or to make policy determinations.<sup>5</sup>

Even a court cast in a completely Fullerian mold, however, acts as an instrument of social control. Martin Shapiro (1986) argues that courts function in service to the government of the nation and the laws created by that government. Shapiro makes the case that even those courts perceived of as most “independent,” that is to say common law courts, are bound to the government as agents of social control when they apply the laws enacted by that government. This is of course particularly the case in criminal law, where courts, as instruments of the state, apply the law of the state to a person charged by the state. This social control is further magnified in courts in civil law jurisdictions, where the court, in its dossier, inquires into personal areas beyond the immediate scope of the crime at issue, and where the court’s determinations are often informed by considerations of the individual’s place in society.<sup>6</sup>

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<sup>5</sup> On the limits of adjudication as a policy determinant, *see* Hazard 1969.

<sup>6</sup> Indications of court consideration of individuals’ social realities can be seen both in the factors courts consider in terms of mitigation or aggravation of the factors surrounding the crime, and in court determinations themselves. For an example of the latter, *see* Bedford 1961 (who describes the trial of a German man accused of murdering a person who allegedly exposed himself to the defendant’s daughter. In what is described by witnesses as an unprovoked and unnecessary assault, the defendant shot and killed the victim as the victim was trying to “escape” from the defendant’s custody. After paying extended attention to the Defendant’s status as a doctor and a former member of the military, the court gave him a six-month suspended sentence.)

Damaška (1986:11) details the distinction between common and civil law as two “archetypes of the legal process: one devoted to conflict resolution, the other to policy implementation,” and theorizes that each shares a “kinship” with one of the two forms of judicial process, either civil or common law. As Shapiro (1986:36) notes, in civil law systems where academic writings play significant roles in judicial decision-making, there is evidence that judges make determinations based on general goals and social utility rather than simply weighing the evidence of the case before them.

### **Common versus civil law and ways of knowing**

As discussed in preceding chapters, common law and civil law systems diverge in the methods they use for determining truth. Civil law is inquisitorial law, and privileges a scientific approach to inquiry in which truth results from a paring away of all that is false or irrelevant. Such inquiry should be objectively recognizable and systematically repeatable; the fairness of the system of knowing comes from the belief that any (and all) observers correctly applying the elected scientific methods would arrive at the same result. As information travels through the system, it is simplified, clarified, and objectified. (Damaška 1986)

Adversarial law, by contrast, employs a “marketplace of ideas” way of knowing. In the marketplace of ideas, those ideas that have merit are accepted and those that do not fall away. A marketplace of ideas approach to knowing accepts that any number of variables might impact the choice of which ideas will eventually be accepted. Presentation, audience, timing, and circumstance may all impact the end result. This gives weight to James Sedgewick’s observation (2009:1231) that “the production of a disputed narrative is necessarily *inherent* to adversarial judicial proceedings.” The disputed nature of the narrative, Sedgewick further argues, detracts from the narrative’s position as “the official story.”

The center of the dispute between the systems lies their disparate relationship to facts. At common law facts are “binary.”<sup>7</sup> Facts are not absolute truth, but rather the court’s best approximation thereof. Consider, for example, the well-publicized U.S. trial of O.J. Simpson.<sup>8</sup> At common law, the composition of the jury is instrumental in determining the outcome of the case;<sup>9</sup> indeed, trial lawyers battle over which jurors must be excluded by the court, and volumes of case law have developed pertaining to the criteria that allows attorneys to legally exclude certain jurors. In the U.S., a private jury selection industry exists to help each side construct a jury sympathetic to its argument. Thus at common law a somewhat postmodern understanding obtains, where truth can be Richard Rorty’s “compliment paid to sentences that seem to be paying their way.” It is understood in the common law system that two different juries might reach two different verdicts. Juries choose

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<sup>7</sup> Shapiro 1986:11, borrowing the term “binary” from Mel Eisenberg’s 1976 discussion of litigation. As Burns notes, “Every fact has two faces.” (Burns 2001: 91) (Thus while a person accused of being drunk and fatally shooting someone might be imagined to have a lack of self-control, he might also be imagined to lack the coordination and accuracy necessary to aim a fatal shot.) Burns details the process by which a jury is presented facts, some of which it ignores, some of which it interprets in one way or another, but all of which lead to a development of facts that is contingent and performative.

<sup>8</sup> See Toobin 1996.

<sup>9</sup> Likewise, Robert Kagan (2003: 74) notes that the police officers who beat Rodney King were acquitted in their first trial, before a jury in a white, suburban community, and convicted in a subsequent trial before a largely minority jury in downtown LA.

between (at least) two versions of the “truth,” in the face of the possibility that perhaps neither of them is true.

Civil law, in contrast, places priority on uniformity. The notion that a trial might turn out differently if conducted before a different panel challenges the civil law judge’s concept of rule of law. Legal officials in civil systems are not charged with making discretionary decisions. Their standard is rather to try and make the same decision that any other legal official in their place would make. So where at common law it is widely known and accepted that two different juries or even two different judges might reach vastly different conclusions, this individualism and unpredictability constitutes an absence of law to civil law judges.<sup>10</sup>

Shapiro (1986:139) asserts that judges in civil law systems are obliged to be certain that they have discovered the true facts. While the common law is more willing to treat truth as *a* truth, civil law seems to seek the one truth that is *the* truth. My interviews with Bosnian judges and prosecutors confirmed this assertion.<sup>11</sup> Many judges spoke of the pressures they felt to be certain of the facts of a case. One judge discussed the use of judicial experts as central to her own ability to best understand and correctly apply the facts. When asked what might happen if two experts submitted reports, one for the prosecution and one for the defense, and disagreed, she frowned for a moment, perplexed. She then explained that she would send them back to their institute to deliberate more, instructing them to return only when they had a unanimous recommendation. As she explained, if the experts themselves couldn’t agree on what was right, how could she – a judge, unskilled in such areas – know?<sup>12</sup>

Courts within the civil law system are not in the business of weighing competing claims; competition is to have been ironed out by the prosecutor and investigating judge long before a case comes to court. Courts in the civil law are moments of transparency designed to check the work that the state has done in bringing a case, and this work should only be done in consideration of *one* case; courts eschew the role of deciding which side produces the more compelling story. Common law, on the other hand, celebrates the court as a place where justice emerges, usually in the form of one truth rising up to vanquish another; the adversarial system embraces the marketplace of ideas notion that stronger stories will win, and that in this way the truth will out. (Burns 2001) At the same time, the common law courtroom, by being a place where two competing truths do battle, permits the notion that “truth” is multi-faceted and contingent. Where the civil law system constructs trial and post trial structures around the idea of simplifying and perfecting one truth, the common law allows for a number of “truths,” including situational truths, victorious truths, and subjugated truths, among others.

### **Writing Balkan history through ICTY judgments**

Richard Wilson’s work considers how international criminal tribunals such as the ICTY challenge national myths to establish an “official” version of events. This focus on a singular, established version of history is evident in both the ICTY’s dicta

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<sup>10</sup> Shapiro (1986:47) theorizes that this flexibility on the part of the common law system may exist because decisions regarding truth are made by judicial amateurs – the jury – and are therefore based on which side’s evidence carries more weight.

<sup>11</sup> U.C. Berkeley 1999 study, materials on file with the University of California at Berkeley International Human Rights Law Clinic.

<sup>12</sup> U.C. Berkeley 1999 study, RS Interview #10 June 1999, on file with the University of California at Berkeley International Human Rights Law Clinic.



and in its practice. Numerous judgments have referenced the institution's work as that of establishing historical fact. Moreover, ICTY practice now permits facts determined in previous cases to enter into subsequent cases (this includes, problematically, witness testimony in those cases where it has been accepted by only a majority of the tribunal).<sup>13</sup>

The "official version" developed by the ICTY is two-fold. First, there is the structural element, common to the transitional justice ethos that underwrites continuing international support of the ICTY, which is the communication of rule of law and human rights through the example of its work. Because the ICTY would institute a culture of respect for human rights that exceeds military or political mandate, for example, relatively minor players with no demonstrated animus or particularized criminal intent, "caught in the net" of Yugoslavia's violent dissolution, have been found guilty for their participation.

Second, the ICTY has privileged certain aspects of Yugoslavia's brutal conflict for its own cases. Bosnian Serb run prison camps (considered below) and the massacre at Srebrenica, which the ICTY has labeled genocide, constitute two main areas of factual focus. Yet it is here that data suggest that the "official version" articulated by the ICTY is failing to take root among a Balkan audience. An October 2011 survey by the OSCE in Serbia reported the following responses to the statement, "In Srebrenica, in July 1995, a few thousands Muslims/Bosniaks were executed in a few days": 72% of respondents had heard of the event, 40% believed it to have happened, and 33% believed it to be a war crime.<sup>14</sup> It is instructive to contrast these responses with responses to the question "Were Bosnian Serb women raped at the Čelebići camp in Konjic, Bosnia" (this is small camp where a handful of crimes occurred: it is discussed further below). Here 56% of respondents had heard of the incident, 50% believed it to be true, and 48% believed it was a war crime.<sup>15</sup> The ICTY may be making some information available, but its unified, unifying official version of the Yugoslav wars for domestic consumption is not mirrored by the data on the ground.

From the very first ICTY cases, historians were brought before the Tribunal, and accepted as "expert witnesses" in order to create context, educate the Tribunal, and in the case of genocide charges, to add material to the special intent necessary for a finding of genocide. In the *Perišić* case of 2008, however, the Trial Chamber altered settled court practice and admitted historian testimony only following oral argument and by majority opinion; the presiding judge issued a separate opinion objecting to the "lack of objective and systematic criteria in selecting documents."<sup>16</sup> Wilson (2011:138) is perhaps unjustly generous when he calls the unsettled nature of the admissibility of historians as expert witnesses 17 years into Tribunal practice "remarkable."

Wilson's observations serve as a helpful reminder of the ways in which the still developing nature of international criminal law impacts its capacity to produce a singular official version. As discussed in Chapter Four, in November 2012 the ICTY

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<sup>13</sup> See Chapter Three.

<sup>14</sup> OSCE 2011 Survey.

<sup>15</sup> OSCE 2011 Survey. One should note that responses among Bosnians to the same query would likely have been very different.

<sup>16</sup> *Prosecutor v. Momčilo Perišić*, Case IT-04-81, "Decision on Admissibility of Expert Report of Patrick Treanor, Separate Opinion of Judge Moloto, November 27, 2008, para 1.

Appeals Chamber acquitted Ante Gotovina, striking a blow to JCE jurisprudence. The uncertainty surrounding the legal construction of JCE bleeds into the construction of narratives (as well as their acceptance). In April 2005, the ICTY expanded the joint criminal enterprise portion of the indictment against three Croatian generals (including Gotovina) to potentially include almost all members of the Croatian national and local governments between 1991 and 1995.<sup>17</sup> Did these statesmen, governing under a leader with clearly articulated ethnic cleansing goals,<sup>18</sup> participate in a “common plan” with an illegal purpose? If ethnic cleansing was not the purpose of Croatia’s “Homeland War,” was it a “reasonably foreseeable” outcome?<sup>19</sup> JCE has remained a moving standard throughout the ICTY’s practice. Gotovina’s acquittal determined him not legally responsible for the civilian murders committed during Operation Storm and the massive ethnic cleansing that was its result. What can and should such a legal finding mean regarding Gotovina’s place in history, given that the ICTY’s “official version” has acquitted him (by a 3-2 “victory”) of wrongdoing?

Similarly, on March 2013, General Momčilo Perišić, a Serbian general, was acquitted of charges of command responsibility for atrocities committed in Bosnia (discussed further below), thus delivering a serious blow to an “official version” of the wars in Yugoslavia that would view Bosnian Serb violence as the result of a Serbian “Greater Serbia” master plan. How should such an acquittal be understood in terms of historical narrative?

A central issue emerging from the recent *Gotovina* and *Perišić* Appeals Judgments is that the evolving substance of international criminal law complicates its capacity to issue unified, and thereby unifying, narratives. On the day that the *Gotovina* Appellate judgment was released, the chill gray morning in the ICTY’s quiet corner of The Hague was punctuated by chants more appropriate to a soccer stadium, as a crowd of Croatian sympathizers fêted their victory.<sup>20</sup> For a Croatian audience, Gotovina’s acquittal constituted a validation of the legitimacy of the “Homeland War” and a reification of Gotovina as a Croatian hero.

Finally, there is a central structural issue that impedes the ICTY’s capacity to communicate an official version of events to a civil law audience, which is as significant as the cultural disconnect between the way that facts, and trials, are understood at common law and civil law: this is the problem of majority decision making. Although unanimity is the norm, there are many split decisions. This rule, borrowed from the civil law (where, as we have seen, by the time a case arrives at trial, there is no need to mandate judicial unanimity, it is only in the rarest of cases it will not occur), facilitates judicial decision-making. In terms of “an official version,” however, majority decisions complicate the narrative landscape.

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<sup>17</sup> See “Joining of Gotovina Cermak Markac” (IWPR 474); *Globus* 2005.

<sup>18</sup> Tudman allegedly aimed to bring the ethnic Serb population in Croatia down to 5%, from an estimated 12%. Tihomir Loza, “Tudjman’s Dismal Legacy” *Transitions Online* December 13, 1999, available at: <http://www.tol.org/client/article/8203-tudjmans-dismal-legacy.html?print> (accessed July 20, 2013).

<sup>19</sup> This is the standard of the third variant of JCE. See Chapter Four.

<sup>20</sup> The *Gotovina* decision was long awaited and announced weeks in advance. By coincidence, I was at the ICTY on the day that the *Gotovina* judgment was released. The astonishment among ICTY staff, who refused to discuss the content of the decision itself, was palpable. The fallout from this decision includes the scandal rocking the ICTY at the time of completing this dissertation (June 2013), the charge by a Danish ICTY judge that the ICTY President Theodor Meron is pressuring judges to acquit. See the discussion in Chapter Four.

Consider the problem of the ICTY's treatment of the Markale massacre. The first Markale incident, which occurred on February 5, 1994, was a single explosion in a crowded downtown Sarajevo marketplace that resulted in 68 dead and more than a hundred wounded. While the event is generally attributed to a Bosnian Serb shell, there is some speculation that the explosion was instead caused by a bomb planted on the site. Conspiracy theories arose instantly: these theories intimated that Bosnian Muslims were themselves responsible for the explosion because they sought to turn international public opinion against Bosnian Serbs.<sup>21</sup> Such theories were fueled by observations that no characteristic whistle was heard before the explosion,<sup>22</sup> that help arrived on the scene "too quickly," that the bomb crater was not consistent with a shell, and that injuries, which were almost universally below the waistline, were inconsistent with a shell from above.<sup>23</sup>

The ICTY trial of Bosnian Serb Stanislav Galić considered this first Markale explosion, with two judges (the majority) concluding that the attack was caused by a Bosnian Serb shell.<sup>24</sup> A third judge, however, dissented, citing among other evidence a UN official's testimony that the origin of the shell could not be determined. The *Galić* Trial Chamber sentenced him to 20 years in jail, which sentence was increased to life imprisonment by the Appeals chamber.<sup>25</sup> The *Galić* Trial Chamber's majority decision regarding the source of the deadly shell, however, did not quiet speculation regarding the veracity of the "official version."

A second Markale explosion in August 1995, was at issue in the ICTY case against Bosnian Serb Dragomir Milošević, Galić's chief of staff.<sup>26</sup> Although the OTP had requested transfer of the case against Milošević to local courts, arguing that the *Galić* trial reduced the historical importance of the *Dragomir Milošević* case, the Trial Chamber rejected this position and tried Milošević in The Hague. During this trial, the question of whether Bosnian Muslims "bombed their own people" again arose,<sup>27</sup> including references to speculation regarding earlier incidents. Dragomir Milošević's case was unanimously decided, but harm to the "official version" remains.

There are serious challenges facing the ICTY as a historian in terms of its epistemology, its still developing "base-line" for what constitutes valid evidence, and even valid law. There is one final problem with the ICTY as historian that bears mention, and this is the problem of the availability of its materials. Gathered in the

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<sup>21</sup> These theories were fueled by similar claims regarding the August 1992 "Breadline massacre," in which 17 people were killed and dozens injured in an explosion: this explosion, also attributed to Bosnian Serbs, was similarly suspected to be the work of Bosnian Muslim forces. Leonard Doyle, "Muslims Slaughter Their Own People" *Independent* August 22, 1992. See also Mackenzie 1994: 293.

<sup>22</sup> Attributed to journalist Eve-Anne Prentice.

<sup>23</sup> Karadžić has addressed the Markale massacre as "staged" in his trial; see transcript from May 11, 2010, where Karadzic sought to enter two videos into evidence, the first showing a "dummy leg" at the scene before the bombing (this video was not accepted) and the second showing David Owen ascribing the Markale massacre to the Bosnian Muslims (this clip was accepted into evidence as exhibit D180).

<sup>24</sup> *Prosecutor v. Stanislav Galić, Trial Chamber Judgment*, Case No. IT-98-29 (December 2, 2003) (20 years); *Prosecutor v. Stanislav Galić, Appeals Chamber Judgment*, Case No. IT-98-29 (November 30, 2006) (life sentence).

<sup>25</sup> Life imprisonment, the most severe sentence available at the ICTY, has been awarded in only a handful of cases; see Appendix A.

<sup>26</sup> *Prosecutor v. Dragomir Milošević*, Case No IT-98-29/1, (December 12, 2007), available at [www.icty.org](http://www.icty.org).

<sup>27</sup> See Reporting from Radio Netherlands Worldwide, International Justice Tribunal, "ICTY sifts through the Markale massacre," February 7, 2007.

course of prosecutions, many ICTY materials are confidential and unavailable for scrutiny. Even the use of these materials by other courts, such as the transfer of materials from the ICTY to regional courts under the *11 bis* procedure, has been fraught with problems and protest. Materials that are unavailable to other courts, with their (hopefully) clear standards of confidentiality and protection, are unlikely to be available for any form of public scrutiny. Thus the argument that the ICTY will provide a valuable archive is, while not baseless, nevertheless seriously challenged by confidentiality issues unlikely to be resolved in the immediate future.

For the reasons explored above, the ICTY's position as "historian" is not without challenges and complications. In the sections that follow, this chapter further considers the question of the ICTY's creation of an "official version" of the wars of the former Yugoslavia, and the problem of how a judicial institution can participate in the construction of collective memory

## (II) Reconciliation & Balkan narratives

War narratives, which differ substantially across the Balkans, each follow a recognizable pattern with identifiable signposts that instantly locate the narrator in a particular ethnic<sup>28</sup> position. Croats are defensive regarding their statehood; their struggle for independence from Yugoslavia is known as "The Homeland War" ("Domovinski rat") and questions regarding the means used to fight that war are often construed as threats to the legitimacy of the war, and thereby the nation itself. Serbs see themselves in terms of a self-sacrificing victimhood, a narrative that begins with the loss of the Serbian kingdom in 1389 to the Ottoman Turks,<sup>29</sup> through World War II and including the dissolution of Yugoslavia in 1991. In this narrative, Serbia is the unrecognized hero, saving European Christianity from Islam (by creating a buffer zone), from Hitler (the morass of war in mountainous Yugoslavia used up Nazi energies and permitted Allied victory), and from destructive elements within Yugoslavia. For Croats, the 1991-1995 wars represent Croatia's "1000 year yearning for a state." For Serbs, these wars represent a contemporary example of self-sacrifice, in this instance on the altar of Yugoslav unity.<sup>30</sup>

The question of war narrative in Bosnia-Herzegovina is more complex. Structurally divided (after 1995) into two entities, culturally divided between three ethnicities (Croat, Serb, and Muslim/Bosniak) the Bosnian version of the wars varies almost entirely by ethnic group of the teller of the narrative (with some variation according to geography).<sup>31</sup> Two things are nevertheless clear. First, there is no unified (and consequently unifying) narrative across Bosnia's three ethnicities, a fact which partly explains the perennial statehood problem in Bosnia, still unresolved nearly 20 years after the cessation of hostilities. All three ethnic groups, for example, understood themselves to be fighting a defensive war. (Ford 2012: 414) Secondly,

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<sup>28</sup> Regarding the use of "ethnic" to distinguish between Balkan peoples, see Chapter Two.

<sup>29</sup> As noted earlier, the Serbs view this loss as the trading of their earthly kingdom for a kingdom in heaven.

<sup>30</sup> Another way to phrase this distinction is to say that the Croats fought an international war and the Serbs fought an internal struggle. In the *Tadić* case, the first case considered by the Tribunal, the ICTY addressed this question and determined that the 1991-1995 wars were international in nature, thus privileging the right of self-determination for the constituent republics of Yugoslavia. (*Tadić* Trial Chamber) This question came before the court because the determination is an important element in the application of international law.

<sup>31</sup> U.C. Berkeley 1999 study.

thus far the work of the ICTY has fueled, and not consolidated, the three dominant, ethnically-structured narratives present in Bosnia.

By trying and sentencing war criminals, the Tribunal asserts that it is contesting “collective guilt,” the idea that all people in the Balkans bear the responsibility for the atrocities committed throughout the 1990s, and instead individualizing guilt by locating and punishing the few responsible parties. Yet reactions to the ICTY’s judgments among local populations show an increase in collective identity in the reception of both heroes and enemies, and a use of the tribunal to strengthen certain facets of national identity. Popular responses to the ICTY within Croatia, Serbia, and Bosnia demonstrate that these populations correctly understand that it is not only the individual fortunes of those few defendants appearing before the ICTY that are at stake, but also (and more critically) the historical record of the recent Balkan wars and the ethnic groups involved in them, and the narratives that will emerge from the wars.

The following sections discuss the narratives told in Croatia and Serbia, and present some elements of emerging narratives in Bosnia. If reconciliation as a function for ICTs consists of achieving a unified and therefore unifying narrative, the ICTY has failed to pronounce or promote such a narrative for the peoples of the former Yugoslavia. In Croatia, Serbia, and within divided Bosnia, narratives diverge sharply from the facts determined, crimes articulated, and responsibility assigned by the ICTY.

### **Croatia’s “Homeland War”**

*“Croatian nationalism is hating Serbs more than what is normal.”<sup>32</sup>*

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In 1995 Croatia emerged victorious from war. Its territory (the equivalent to its administrative borders within Yugoslavia) intact after four years of partial occupation, its own nation for the second time in history, Croatia looked expectantly towards Europe and a bright future in the first world. In the reshufflings that followed the war, Croatia suffered many disappointments, including the sullyng, both domestically and abroad, of the reputation and accomplishments of its founding father, nationalist leader Franjo Tuđman, indictments of Croatian “heroes” by the ICTY, and the repeated delay of EU accession talks.<sup>33</sup>

The Croatian narrative of the war is first and foremost a narrative of statehood. Tuđman’s focus on separating Croatia from other former Yugoslav states and shoring up the indisputability of Croatian nationhood set the parameters for the nation-question in Croatia. Tuđman successfully galvanized Croatian public opinion around an ideal of “European-ness,” the idea that (1) Croatia and Croatians belong in Europe (as opposed to the Balkans), (2) experiments with Balkan-ness (such as the 20<sup>th</sup> century Croatian ideological commitment to and political participation in Yugoslavia) were the results of misconceived ideals, and (3) independent Croatia was at last realizing its “1000 year old dream” of statehood and entering Europe as a European state. This narrative dates the beginning of Croatia’s subjugation to other states and peoples to 1102 and the pact between Croatia and Hungary, which

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<sup>32</sup> Popular Croatian joke (author interviews Zagreb, Croatia 2004-2005).

<sup>33</sup> Croatia will become the 28th member state of the European Union on July 1, 2013.

subjugation continued until 1991 with Croatia's secession (or independence) from Yugoslavia. This history saw only one short break: the years 1941-1945, when the Croatian Ustaša regime, a puppet state of the Nazis, founded the Independent State of Croatia (Nezavisna Država Hrvatska, or NDH). This lamentable period of Croatian history is nonetheless popularly mythologized in contemporary Croatian discourse and politics where a focus on the legitimacy of Croatian self-determination ignores the rights abuses that characterized the NDH government. Symbols associated with the NDH government, such as its flag<sup>34</sup> and currency,<sup>35</sup> were revived in Croatia's 1991 declaration of independence. One by-product of this discourse is the continued presence (and acceptance), even in otherwise mainstream political events and demonstrations, of fascist symbols and paraphernalia.<sup>36</sup>

Tuđman built his narrative on tensions regarding Croatia's statehood and identity that preceded the Yugoslav era and were not assuaged by several decades of participation in the Yugoslav state. Whereas a "Serb nation" has flourished for centuries, with or without a state to call its own, Croatian national identity has been more fluid and fragile, given that both its territorial and linguistic identities are somewhat fluid, with Catholicism as a unifying element. As recently as 100 years ago, the average Croatian peasant, if approached and asked about identity, might have answered "Catholic." In response to the question of what language she spoke, she would have answered "ours."<sup>37</sup> It is only over the course of the 20th century, through two incarnations of Yugoslavia, that territorial understandings of Croatia have come to underlie the current Croatian state.<sup>38</sup>

Statehood requires the balance of identity against the elimination of threats to the state. (Skocpol 1979) Tuđman's nationalist discourse targeted the Serb minority as a threat to Croatian independence, and became a somewhat self-fulfilling prophecy, as Croatian Serbs responded to announced restrictions on their minority rights through the "log revolution" (noted in Chapter Two and discussed in more detail in the next chapter), setting up a separate state and carving out nearly one-third of Croatian territory for themselves.

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<sup>34</sup> The modern Croatian flag is dominated by colorful checkerboard at its center, which was also the symbol of the NDH (and was historically a Croatian pattern, seen for example on roof tiles). There is a subtle distinction between the contemporary and historic symbol; the checkerboard of the NDH began with a white square; modern Croatia's checkerboard begins with a red square.

<sup>35</sup> This is the "kuna." The word means a large rodent, similar to a ferret, indigenous to Croatia. Again, as with the checkerboard, the symbol enjoys a history predating the NDH; in medieval times, taxes to Rome were paid in valuable fur pelts.

<sup>36</sup> For example, in 2005 the author attended a parade to commemorate the anniversary of the slaughter of Ustaša forces by Tito's partisans in Bleiberg, Austria. Free buses transported spectators from the main cathedral in Zagreb to the site in Austria. The crowd, which numbered in the thousands, was a mix of ages. The buses were filled mostly with older people, who had come to commemorate the participation of a father, grandfather, or uncle in the battle itself. Groups of young people, teenagers and those in their twenties, were also on site, many of them dressed in mock Ustaša uniforms. More startling, however, was the fact that an Ustaša-dressed brigade headed the formal parade, appearing directly behind the state representative, a higher-up in the ruling party (which, while formally nationalist, is in fact moderate and democratic). I awaited the shocking image of Croatia's second-ranked politician flanked by "Ustaša" to appear in the paper the next day; it did not.

<sup>37</sup> The phrase "naš jezik" or simply "naš" ("our language" or "ours") is often used by BCS speakers seeking to avoid "politicizing" the name of the language they are speaking, particularly when in conversation with speakers of other ethnicities.

<sup>38</sup> Regarding the development and interchange between linguistic and political identity in the 19<sup>th</sup> and 20<sup>th</sup> centuries, *see* Alexander 2013 (discussed in Chapter Two).

Croatia's "Homeland War" sought to defend the territory allotted to Croatia within the state of Yugoslavia and to expand the state through acquisitions of territory in Bosnia-Herzegovina, whose southwestern portion, "Herzegovina," is predominantly Catholic and in which many identify as Croats. Dry, craggy, and relatively poor, the region was a feeding ground for the Croatian Ustaša during World War II. Just as Serbia eyed a "Greater Serbia" and included vast portions of Bosnia (in the east and north) in its territorial claim, elements within Croatia spoke of a "Greater Croatia" that would include Herzegovina. Tapes have surfaced of the "secret" meetings between Tuđman and Milošević during the war where the two discussed how they would "divide Bosnia" between their two states.<sup>39</sup> Croatian soldiers and support helped fuel the vicious battles in Herzegovina, most famously those within the divided city of Mostar. More significantly, Croatian intransigence on the question of "Greater Croatia" proved a massive obstacle to reconstruction efforts in Mostar and throughout Herzegovina following the war.<sup>40</sup>

#### i. ICTY trials and the Homeland War

Tuđman was the first Balkan leader to acknowledge the ICTY, signing a cooperation agreement and agreeing to the aims and work of the Tribunal. This early embrace quickly turned to resistance, however, when the Tribunal began to investigate crimes committed *by* Croats and not simply against them.

December 1999 saw the death, after a lengthy bout with cancer, of Franjo Tuđman, revered by Croats as the father of the nation.<sup>41</sup> Under Tuđman, Croatia had faced growing international pressure and disapproval. Non-transparent state institutions, discrimination against the decimated remaining Serb minority, and non-cooperation with an increasingly more demanding Tribunal all brought criticism against the nascent state. At the same time, compared to other former Yugoslav actors (divided Bosnia with its separate institutions and uncooperative populations, and Milošević's Serbia, fresh from invoking the ire of NATO for its actions in Kosovo), Croatia was a stable state with the outlines of democratic institutions and processes. In many cases, these institutions were more democratic in concept than in practice (as was the case with Croatia's troubled courts, particularly the Supreme Court) (Uzelac 1998) and in many cases even only falteringly democratic in concept.

In the elections following Tuđman's death, a liberal coalition was voted into power. Up through 1999, there had been very little positional difference between the HDZ and opposition parties, particularly as regards resistance to ICTY investigations of Croatian involvement in war crimes and denial of ICTY jurisdiction over the Croatian military initiatives Oluja and Blijesak ("Storm" and "Flash") of August 1995 that retook Croatian territory held by Croatian Serbs. A public opinion poll in 1999, however, listed the government as the source of bad relations with the ICTY, and this appeared to prompt the opposition parties to change their position. (Erozdan 2002) In the months following Tuđman's death, the new government concluded a status

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<sup>39</sup> The transcript has been reprinted in a two volume set, *Stijene o podjelene Bosne* (2003).

<sup>40</sup> *See Nach Saison*, (a film documenting the attempt of a German diplomat who was posted to Mostar in 1994-1996, to reunite the city). (Pepe Danquart, director.)

<sup>41</sup> Tuđman's role in Croatian politics was as long one: he was associated with the "Croatian spring" movement in the early 1970s seeking greater independence for the Republic, and briefly jailed. He was also a historian, and his academic writings articulated many of his beliefs regarding the history of the Croatian nation.

agreement with the ICTY,<sup>42</sup> extradited an ICTY indictee whom the Tuđman government had argued was too ill to be moved, and finally and most importantly, officially recognized the ICTY's jurisdiction over the Croatian military actions Storm and Flash. (Erozdan 2002) This last issue had been a particular sticking point with Tuđman, who refused to concede that war crimes could be committed in actions of national liberation because such campaigns were "police actions" to restore areas under rebel control and thus outside ICTY jurisdiction. While Tuđman categorically refused to admit that any war crime could have been committed by soldiers fighting for the restoration of Croatia's borders, there was also the idea that in the scale of wrongs done to Croatia, any small accompanying wrongs enacted in restorative/reprisal type actions did not (and could not) matter.

Following Tuđman's death, Stipe Mesić was elected president, and Ivica Račan became the Prime Minister of a liberal government coalition. A former Communist, Mesić was in fact the last president of Croatia within Yugoslavia, and had been filling the rolling presidency of Yugoslavia when the country disbanded in 1990. When Yugoslav and Montenegrin troops attacked World Heritage city Dubrovnik in 1991 (a well-covered though relatively bloodless moment of fighting in Yugoslavia, notable mostly for the threat posed to the exquisitely beautiful 700-year-old walled city), Mesić sailed into the harbor with several civilian boats seeking to stop the attack.

Where Tuđman was an unapologetic firebrand with violently expressed racist opinions on Serbs and Jews, Mesić was a calm, cosmopolitan, eminently fair and reasonable figure beloved among Croats. Where Tuđman urged the celebration of Croatia's fascist government of World War II (more as representative of an independent Croatia than for its fascist character), Mesić treaded more carefully, always condemning fascist actions and beliefs. Mesić is a figure who brought balance to the Croatian political landscape.

Unlike many other Balkan politicians, Mesić was assertedly pro-ICTY, even testifying at The Hague several times. This was not without political cost: in 2001 Mesić's confidential testimony was published, most likely by political opponents seeking to capitalize on the ICTY's unpopularity with mainstream Croats.<sup>43</sup> In another example of strong leadership, in September 2000, 12 generals joined the nationalist HDZ party leaders in signing letters saying that government was undermining the legitimacy of Homeland War and Mesić retired the seven generals who were still serving. These actions distinguish Mesić from most other leaders in the Balkans, and have helped frame Croatia as cooperative, modern, and cosmopolitan, especially as compared to Serbia and Bosnia.

#### ii. Tihomir Blaškić: Implicating the Croatian State in Bosnian Violence

Very early in its practice, in 1996, the ICTY indicted a Bosnian Croat general, Tihomir Blaškić, for crimes against humanity committed by military and paramilitary groups under his command in the Lašva valley in central Bosnia, specifically in the

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<sup>42</sup> This allowed ICTY personnel freedom of movement throughout Croatia, mandated that the government would assist in ICTY investigations, and permitted a permanent ICTY presence in the form of liaison offices in Zagreb.

<sup>43</sup> Copies of this confidential testimony surfaced again in the 2005 presidential election, outside of the opposition party's offices.



village of Ahmići.<sup>44</sup> There, British troops discovered the bodies of at least 118 civilians, most of them women, children and the elderly, some of whom had been burned alive in their houses. They accused the Croatian Defense Council (HVO), the Bosnian Croat army, of perpetrating the massacre. Blaškić was the HVO commander; his headquarters were located only four kilometers away from Ahmići.

Although Blaškić initially resisted turning himself over to the ICTY, he eventually surrendered under pressure from his military superiors, and the trial began in 1997. In neighboring Croatia, Franjo Tuđman showed his resistance to Blaškić's indictment by naming him Inspector General of the Croatian Army. Tuđman refused to assist the ICTY, arguing that the information requested constituted Croatian national security secrets, and insisting that the military operations Flash and Storm were "police actions" rather than armed conflict under the ICTY jurisdiction. For his part, Blaškić argued that he had not ordered the massacre nor had he been aware of it when it happened. He further argued that his attempts to investigate the massacre had been prevented by those above him in the command hierarchy.

In March 2000 the Trial Chamber found Blaškić guilty of ordering crimes against humanity and war crimes against Bosnian Muslim civilians (Article 7(1) of the ICTY Statute) as well as of failing, as commander, to prevent the crimes or otherwise punish the perpetrators (Article 7(3).)<sup>45</sup> He was sentenced to 45 years in prison, the longest sentence the Tribunal had awarded at that time. The sentence was particularly contentious as it was significantly longer than the 20-year maximum prescribed by Yugoslav criminal law.<sup>46</sup>

Upon assuming the presidency in 2001, Stipe Mesić and his office began producing documents related to the Ahmići massacre. Blaškić utilized this material in his appeal, submitting 8,000 new pages of documentation. Blaškić argued that an alternate chain of command via the Croatian state – and not the HVO military, which was the military of the Bosnian Croats – was in command in the Lašva valley, and that he did not have effective control over his troops.<sup>47</sup> In October 2001, a report on the Ahmići massacre originating in Tuđman's office was leaked to the press. This report, signed by Tuđman, detailed the massacre and named five men responsible for it.<sup>48</sup> Later leaks and documents, as well as a review of the transcripts of Tuđman's recorded meetings, revealed that the Ahmići massacre comprised part of a larger plan of "ethnic engineering" designed to goad Croats in central Bosnia to move to Herzegovina in order to give more weight to the idea of Greater Croatia. The massacre in Ahmići was intended to trigger Muslim retaliation that would encourage a Bosnian Croat exodus. (Modrić 2001)

The Appellate Chamber ruled in 2004, reversing most of the factual determinations of the Trial Chamber based on new evidence and new witnesses.<sup>49</sup> The

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<sup>44</sup> Blaškić indictment, Case No. IT-95-14, available at [www.icty.org](http://www.icty.org).

<sup>45</sup> *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14, (March 3, 2000) available at [www.icty.org](http://www.icty.org) ("Blaškić Trial Chamber").

<sup>46</sup> For further discussion, see Chapter Three.

<sup>47</sup> See *Blaškić Appeals Chamber*.

<sup>48</sup> In addition to revealing the Tuđman administration's awareness of and complicity in the massacre (Tuđman, his son Miroslav, and his defense minister Gojko Šušak were all implicated), the leaked records also served as a warning to the five "guilty" parties named to run; indeed, there is somewhat of a precedent for this in Croatia, where even courts have announced impending indictments for war crimes as a warning to those indicted.

<sup>49</sup> *Blaškić Appeals Chamber*.

Appellate Chamber also applied a much narrower reading of the applicable law and statutes, which strengthened Blaškić's appeal.<sup>50</sup> When the Appellate Chamber pronounced its sentence, it became clear that the Appellate Chamber was essentially acquitting Blaškić; although the defendant was still found guilty of a few counts against him (ordering crimes in detention facilities, the use of protected persons for the construction of military installations, and the use of detainees as human shields), his 45-year sentence was reduced to 9 years, of which he had already served eight years and four months. He was released immediately, with the Tribunal citing good behavior, poor health, and his young children as contributing factors.

In an article printed in the weekly Croatian news magazine *Globus*, author Brian Gallagher argued that the Blaškić appellate "acquittal" should be read as an invitation for Croatia to press the ICTY to reconsider its position vis à vis Croatia's role in the Croat-Muslim conflict in Bosnia.<sup>51</sup> Instead, however, the Blaškić decision is more striking for what it reveals about Croatian meddling in Bosnia, specifically about the possible role played by the Croatian secret service in obfuscating and withholding war crimes evidence. (Vujić 2004)

### iii. Ante Gotovina's Rebirth As Croatian Hero

Ante Gotovina may represent a case of a war hero *created* by the ICTY. Indicted by the ICTY in July 2001, Ante Gotovina fled, and successfully evaded capture for nearly five years. Gotovina was a mercenary soldier, former member of the French Foreign Legion, and was allegedly wanted for crimes committed in France in the 1980s. His 2001 indictment triggered a popular uprising against the ICTY and prompted mass protests against the criminalizing of "Croatian Heroes." In the wake of Gotovina's indictment, conservative groups threatened roadblocks, public demonstrations, and general disorder. A popular retired general, Janko Bobetko, demanded new elections. Moves of support included the publication of books, the production of a Gotovina wine (with labels bearing the Croatian checkerboard<sup>52</sup> and the line "for our own freedom and for the freedom of our homeland") (Held 2003), billboards around the country (sporting Gotovina's face and often the caption "today Gotovina, tomorrow YOU") and even an enormous poster, hung from the enclosing wall of the historic town of Zadar, with the caption "Hero, not criminal." In 2002, a petition signed by 555 people, including prominent, mainstream journalists, academics, artists, and sports figures, was delivered to the Račan government and reprinted in several papers; this petition asserted that Gotovina's indictment had no legal foundation and backed the general's freedom.

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<sup>50</sup> In relation to Article 7(1), the Appellate Chamber applied a substantial likelihood standard, replacing the negligence standard applied by the Trial Chamber. The Appeals Chamber clarified, "[t]he knowledge of any kind of risk [of violations], however low, does not suffice for the imposition of criminal responsibility [...] Under the Trial Chamber's standard, any military commander who issues an order would be criminally responsible, because there is always a possibility that violations could occur" (para 41). In response to Article 7(3), the Appeals Chamber re-examined command responsibility, setting a standard that "a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offenses committed by subordinates" (para 62). The article states that a superior is not relieved of criminal responsibility if "he knew or had reason to know that the subordinate was about to commit [criminal] acts or had done so [...]" (para 406). By leaning towards a subjective knowledge as a basis for command responsibility for those further down the chain of command, the Appellate Chamber was criticized as reading Article 7(3) too narrowly. (Drumbl 2004)

<sup>51</sup> Brian Gallagher, "Blaškićeva presude odbačena je zbog Jordinih grešaka" *Globus* October 15, 2004.

<sup>52</sup> See discussion of Croatian checkerboard, footnote 31 above.

Gotovina was finally apprehended in the Canary Islands in 2005, an arrest that was likely brought about with the assistance of the Croatian government. In the intervening years, in addition to bringing down a liberal coalition, support for Gotovina cost Croatia dearly in terms of its accession to the EU. It was clearly official Croatian assistance (for instance, Gotovina was carrying a fake, Croatia-issued passport) that helped keep the general hidden so long. Yet for all the intervening uprising, billboards supporting Gotovina, constant scrutiny in the press, there was very little public outrage over his final deportation to The Hague; the threatened roadblocks and public disorder failed to take place.<sup>53</sup>

During interviews, several ICTY personnel suggested that Gotovina was singled out by the UN in order to “right the balance” in the Balkans, and to make sure that Croatia is “pulling its weight.” One interviewee said, “Gotovina is central due to his symbolic value, like Mladić and Karadžić.”<sup>54</sup> The interviewee further explained “Croatia has a mixed record on cooperation. Thus Gotovina is about getting them to give up someone who is important to them. The true test of cooperation is giving someone you don’t want to.”<sup>55</sup> Croatian intransigence over the Gotovina issue, even under the more cooperative governing regimes following Tuđman, eventually became a sticking point in Croatia’s EU accession. With his recent acquittal, Gotovina represents a resounding blow to the ICTY. His status as Croatian hero is confirmed; ironically, this is a status he would likely never have enjoyed had not he come to the Tribunal’s attention.

## Serbia

*“Perišić is even more of a joke than Gotovina.”<sup>56</sup>*

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In today’s Belgrade, a lively, pedestrian-only area in the heart of the old city buzzes with commerce and its street cafes are full. Only a few blocks away, the Ministry of Defense offers a striking anomaly. This deserted building, lawn patchy and overgrown, is rent by a perfectly cylindrical hole driven through the center of it, and stands as a reminder of and consequent monument to the NATO bombings of 1999. A recent visit found none of the hallmarks of early 2000s mainstream culture, no postcards commemorating the NATO bombings in downtown Belgrade (one had featured the U.S. stealth bomber downed by Serbian fire with the caption, “Sorry, we didn’t know it was invisible”) or celebrations of battered Serbdom, such as a drawing of Asterix cartoon characters superimposed on a map of Europe with a magnified Serbia at its center, with the caption “In a time of empire, one small European nation stands alone.”<sup>57</sup> Yet at the same time, the destroyed Ministry of Defense remains untouched. What preserves this ruined building in the middle of a bustling city? Is it politics, finances, symbolism? Or is it something else?

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<sup>53</sup> See Vjeran Pavlakovic 2010 (arguing that 2005 and the failed EU accession talks – which failure was due to the absence of Gotovina from the ICTY docket – represented the height of public agitation in favor of Gotovina as a symbol of Croatia.)

<sup>54</sup> Author interview OTP personnel, The Hague, May 2005.

<sup>55</sup> Author interview OTP personnel, The Hague, May 2005.

<sup>56</sup> ICTY representative in Belgrade, reporting observations of Serbian law students to the most recent ICTY judgments. (Interview notes on file with author, March 2013). The *Perišić* decision is discussed below.

<sup>57</sup> Sociologists have studied the particular brand of Serb humor and its application to the 1990s. See, e.g., Greenberg 2010.

In Serbia, contradictions abound. Corruption is so bedeviling that a special court has been built, using international funds, to combat organized crime. At the same time, progressive Serbian NGOs are so effective that they generate much of the material used by the prosecutor in that court. In 2000, Serbia deposed a despot by tractor;<sup>58</sup> in 2003, a trusted democratic leader was gunned down in the street. After a decade during which fragile, democrat-led coalitions fought internally over where to stand regarding cooperation with the ICTY, recognition of Kosovo, and entry into the European Union, Serbs last year elected a “recovering nationalist”<sup>59</sup> who wants to do all three. In April 2013, that nationalist even apologized for Srebrenica. The founding member of and program director at B92 Radio, the “guerilla” voice of the opposition through the 1990s, (Collins 2001) admitted in March of this year, with chagrin, that life this past year under the nationalists has in fact been surprisingly better for B92 than life under the democrats for the previous decade.<sup>60</sup>

The Serb narrative of the war, like much else in Serbia, is a study in contradiction. For Serbs, the brutal wars of Yugoslav disintegration – wars that claimed 100,000 lives in Croatia and Bosnia – are held at a certain distance. No battles were fought on Serbian soil; the first wartime violence to threaten Serb lives was the NATO bombing campaign over the Kosovo question in 1999.<sup>61</sup> Whatever discourse might once have existed regarding a “Greater Serbia,” the arrival of tens of thousands of ethnic Serb peasants from Croatia and Bosnia in the final year of the war has cooled that dream, too; the cosmopolitan Serbs of Belgrade have little desire to share limited resources with these needy “brothers.”

One piece of the Serb narrative is a victim story of unrecognized suffering. For instance, Milošević’s war in Bosnia resulted in a military draft, resisted by evasion and even several uprisings;<sup>62</sup> wartime international sanctions and their economic repercussions resulted in crushing inflation worse than Germany’s in the years directly following World War I.<sup>63</sup> Because Bosnian Serb leaders were unreasonable, Western powers decided to negotiate with Milošević to end the war, and this ensured his position in Serbia despite the fact of his clear unpopularity with a large percentage of the Serb population. In the winter of 1996, hundreds of thousands of Serbs demonstrated for months in Belgrade against the Milošević regime, to no avail (and to little international attention). Only after Milošević started a second war, in Kosovo, and fell from international grace, were Serbian protests effective in ousting him. Both the suffering narrated by Serbs, and the fact that it has gone largely unrecognized by outsiders, are accurate: who else discusses the staggering Serbian economy of 1996 and 1997 but the Serbs who lived it, and perhaps a few sympathetic

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<sup>58</sup> Slobodan Milošević was ousted from power in October 2000 in a revolution notable, in part, for the use of farm equipment driven from the countryside into central Belgrade.

<sup>59</sup> This is Tomislav Nikolić, who was once the deputy of Vojislav Šešelj’s Serbian Radical Party. Šešelj is a paramilitary leader and politician currently on trial at the ICTY, representing himself and combatting the Tribunal even more effectively than did former President Slobodan Milošević. Nikolić broke with Šešelj a few years ago over the question of Serbia’s membership in the EU.

<sup>60</sup> Presentation to American University of Paris student group, March 2013, notes on file with author.

<sup>61</sup> The accuracy of the NATO arsenal ensured a low civilian casualty rate, and the war’s most deadly civilian incident was the air strike of a passenger train as it crossed a targeted bridge.

<sup>62</sup> These occurred, for instance, in Valjevo, Kragujevac, and Topola.

<sup>63</sup> The hyper-inflation of the Weimar government has been called “the most destructive case of inflation in history.” NPR, “The Economic Disaster that Germany can’t Forget” September 14, 2011, available at: <http://www.npr.org/blogs/money/2011/09/14/140419140/the-economic-catastrophe-that-germany-cant-forget> (accessed July 10, 2013).

academic voices? At the same time, the potential to exaggerate, or to misappropriate context, is ever pervasive. For example, in the summer of 2004 a theater piece at Belgrade's trendy Amelia 212, entitled "War and Memory," superimposed images from the NATO bombing of Belgrade onto pictures of piles of skulls typically associated with the wars of Rwanda and Cambodia. A deeply resonating self-pity pervades Serbian politics, not only in the conservative, nationalist-party voting Serbian countryside but even in its cosmopolitan capital.

The other piece of the Serbian narrative is ennui. This is communicated in various ways, the most frequent being a grunt, the shrug that says "not my problem," or both, in response to any question concerning Serb responsibility for the brutal events in Bosnia and Croatia. Facts related to these events – the participation of paramilitaries trained in Serbia, the use of weapons sent from Serbia, and the issuing of political directives from Serbia – are dismissed as unsubstantiated tales. The general attitude seems to be that since the war was not fought in Serbia, it should be seen as someone else's tragedy. This ennui response accompanies the victim narrative comfortably – since Serbs have already suffered so much, they do not need any more suffering.

It is the second aspect of the Serbian narrative that works in opposition to the ICTY narrative. Ultimately, Serbia cooperated extensively with the ICTY; Serbia delivered its ex-president,<sup>64</sup> several high-ranking generals, and recently the long-elusive Karadžić<sup>65</sup> and Mladić, the most-wanted Bosnian Serbs who evaded capture for more than a decade. Yet such cooperation has always been of the "necessary evil" variety and not that of a "true believer" or even "partner in peace." A case in point is that of the four retired Serbian generals wanted for crimes in Kosovo who were handed over to the ICTY, a transfer that occurred in direct response to a threat to hold up a needed IMF loan.<sup>66</sup> One should note that the send-off was preceded by a parade in honor of the generals, and that the defendants were accompanied to The Hague by an official delegation. Even Nikolić's recent apology regarding events at Srebrenica falls into the category of "necessary evil." In an unexpected admission, Nikolić, who had evoked ire by denying genocide in Srebrenica upon taking up the presidency in June 2012, said in an interview for Bosnian television in April 2013, "I am on my knees because of that, here I'm on my knees and begging for a pardon for Serbia because of the crime committed in Srebrenica. I apologize for all crimes committed by any individual in the name of our state and our people."<sup>67</sup> He had, however,

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<sup>64</sup> Opposition leader Zoran Đinđić, Serbian prime minister following Milošević's ouster from 2001 until his assassination in 2003 may have paid for this with his life, since the organized criminals found responsible for his assassination acted in part over the transfer of Slobodan Milošević to the ICTY to stand trial.

<sup>65</sup> Concealed in a thick, bushy beard, white-haired, and resembling an Orthodox priest, Karadžić had evidently lived in the capital for several years as a New Age healer under the identity of a man killed in Bosnia. Clearly assisted by state organs, his arrest is credited to the new governing coalition led by Boris Tadić's liberal democrats.

<sup>66</sup> Davor Konjikusić, "Lack of Co-operation Has Economic Consequences for Serbia" *Southeastern European Times*, February 21, 2005, available at: [http://setimes.com/cocoon/setimes/xhtml/en\\_GB/features/setimes/features/2005/02/21/feature-02](http://setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2005/02/21/feature-02) (accessed May 11, 2013).

<sup>67</sup> "Analysts say Nikolic's Srebrenica apology is significant," *Southeastern European Times*, April 29, 2013, available at: [http://www.setimes.com/cocoon/setimes/xhtml/en\\_GB/features/setimes/features/2013/04/29/feature-01](http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2013/04/29/feature-01) (accessed May 10, 2013).

preceded this statement by saying, “Everything that happened during the 1990s was some form of genocide.”<sup>68</sup> In a later interview, he confirmed his unwillingness to classify Srebrenica as “genocide,” saying that “genocide must be proven.”<sup>69</sup> Nikolić’s statement is of course significant: given his party affiliation and past connection to Šešelj, an unrepentant nationalist, such an admission is unexpected. Yet when seen in context, Nikolić’s statement is less a sea-change than a tact-change. One could see it as simply another element in the “victim narrative”: since Serbs have been making necessary sacrifices for nearly two decades now, Nikolić’s statement could perhaps be read as just one more in the sequence.

The Srebrenica discourse is striking and important because Srebrenica is in some ways the center of the ICTY narrative regarding the dissolution of Yugoslavia. No mainstream narrative discredits the fact that thousands of Bosnian Muslim men and boys were killed in the woods around Srebrenica in July 1995. The divergence in narratives generally concerns the numbers and the nature of the killings, and most particularly the charge of genocide. Early estimates of the numbers killed were widely exaggerated, in both directions; but work by local NGOs and international organizations applying reliable technology, specifically the International Commission for Missing Persons, has helped settle the debate. The official number now accepted is between 7,000 and 8,000. The charge of “genocide” has proved more problematic. The ICTY has found that genocide occurred at Srebrenica and has so far found several defendants guilty.<sup>70</sup> Last year the Bosnian Serb leader Milorad Dodik admitted, for the first time, that the murders at Srebrenica constituted genocide. Boris Tadić, the progressive leader of Serbia for the decade preceding Nikolić, had already made a public apology for the massacre several years ago, but stopped short of calling the massacre “genocide.”

While the ICTY is a central news topic in Serbia, the substance of ICTY indictments is not. Prosecution of these war participants is central to Serbian advancement towards economic prosperity and any potential membership in the European Union, and is mostly treated by the media as such.<sup>71</sup> Missing from these domestic conversations is the narrative of the underlying crimes that have made such prosecutions necessary. In the Serbian press, Mladić is often pictured in his wartime fatigues engaged in directorial activities, talking on the phone or with other generals

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<sup>68</sup> “Serbian President Apologises for War Crimes” April 25, 2013, BIRN, available at: <http://www.balkaninsight.com/en/article/serbia-s-nikolic-apologised-for-srebrenica-war-crime> (accessed May 10, 2013). This echoes Bosnian Serb responses recorded in the 1999 U.C. Berkeley survey of Bosnian judges and prosecutors: those Bosnian Serb respondents who were willing to answer the question about whether there was genocide in Bosnia responded that there was, but that it was against everyone. See Appendix A to U.C. Berkeley 1999 study. While Nikolić’s surprising admission was widely reported in English-language news outlets, other elements of his interview, including his assertion that there was genocide against Serbs in Kosovo, in Croatia, and in Krajina, as well as his direct criticism of the forms of justice dispensed by the ICTY, were not mentioned. See “Nikolić se izvinio zbog Srebrenice” April 25, 2013, available at: <http://www.rts.rs/page/stories/sr/story/9/Politika/1312408/Nikolić+se+izvinio+zbog+Srebrenice.html> (“Nikolić je ustvrdio da je i nad Srbima počinjen genocid na Kosovu, odakle su proterani, kao i genocid u Krajini u Hrvatskoj, odakle je, kako je naveo, proterano 300.000 ljudi. Kritikovao je rad Haškog suda, ocenivši da taj sud radi “po svojim pravilima i zakonima”) (accessed May 10, 2013).

<sup>69</sup> Daria Sito-Sucić, “Serb president seeks pardon “on my knees” for Srebrenica” April 25, 2013, available at: <http://uk.reuters.com/article/2013/04/25/uk-serbia-president-srebrenica-idUKBRE93O0SZ20130425> (accessed May 10, 2013).

<sup>70</sup> See Appendix A.

<sup>71</sup> This is confirmed by the most recent OSCE survey. (OSCE Survey 2011)

and Karadžić is pictured in a suit in governmental chambers.<sup>72</sup> The connection between these figures and the war crimes and genocide committed in Bosnia and Croatia is not part of Serbian discussions of post-war reality. Indictments of generals who were active in Kosovo preceding and following the NATO bombardment of Serbia are presented in the press as indictments for participating in Milošević's unjust regime, and not for particular actions committed in Kosovo.

In March 2013 the ICTY Appellate Chamber reversed the Trial Chamber and acquitted Serbian general Momčilo Perišić of aiding and abetting the Bosnian Serb military campaign in Bosnia and Croatia. Perišić, an officer in the (former) Yugoslav National Army (JNA), who had been charged with providing weapons to the Bosnian Serb and Croatian Serb military forces, had been found guilty of crimes against humanity and war crimes by the Trial Chamber, and sentenced to 27 years' imprisonment.<sup>73</sup> The acquittal is a blow to the ICTY's construction of Serbian responsibility for arming Bosnian and Croatian Serbs during the war,<sup>74</sup> and might have been seen as a victory for the Serb narrative holding that the wars in Bosnia and Croatia were the tragedies of other peoples, and not of the Serbs. According to researchers at Belgrade's Humanitarian Law Center, however, the *Perišić* case has not generated this response in Serbia.<sup>75</sup> Perišić is seen as "an American guy"<sup>76</sup> whose release was due to the maneuvering of Theodor Meron, the U.S.-appointed judge at the ICTY and long-time president of the Tribunal. Serbian public opinion has been following the *Karadžić* and *Mladić* cases, two of the last cases the Tribunal will try as it moves towards shutting down (implementing the Residual Mechanism) and both Karadžić and Mladić are popular figures in contemporary Serbia.<sup>77</sup>

Unlike within Croatia, there is evidence to suggest that Serbian political opposition to Western-oriented parties is more deeply rooted, and less transient or easily reoriented, than Croatian opposition to the same. Whereas in Croatia popular, pro-Western voices, such as that of Stipe Mesić, create a tie between Croatia's communist past and the integrated, EU member-state future, no such unifying figure exists in Serbia. Zoran Đinđić, who came the closest to such a stance, was assassinated in 2003, just as Serbia was moving out of the grip of Milošević's legacy (and the destructive Western sanctions that accompanied it). Under Boris Tadić, the pro-Western, pro-ICTY president who led several fragile coalitions in the past decade before losing to Tomislav Nikolić in 2012, other democratically oriented parties (such as that of Vojislav Koštunica), have been more skeptical of full cooperation with the West. Moreover, Tadić's and Koštunica's parties were always in near dead-heats with

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<sup>72</sup> The Humanitarian Law Center, a prominent human rights NGO led by Serbia's most recognized progressive intellectuals, points out that Karadžić and Mladić are the center of Serbian popular attention now, as their cases move forward at the ICTY. (Author interview, March 2013.) This focus on Bosnian actors belies the prevalent attitude of "not my country, not my problem" which has been frequently observed regarding questions of Serb responsibility for crimes inflicted upon Bosnians.

<sup>73</sup> *Perišić* Trial Chamber.

<sup>74</sup> This is historical fact: there is no doubt that the JNA did in fact arm Bosnian Serb and Croatian Serb military forces. (Silber & Little 1997)

<sup>75</sup> In the October 2011 OSCE survey regarding attitudes towards the ICTY in Serbia, 72% of respondents did not know what Perišić was on trial for. OSCE survey 2011 p. 42. Regardless, 42% stated that they did not believe he was guilty of what he was charged with, and 49% did not agree with his sentence. OSCE survey 2011 p. 43, 44.

<sup>76</sup> In other words, Perišić is perceived as a U.S. agent. Author interview ICTY Outreach Office, Belgrade, Serbia, March 2013.

<sup>77</sup> See OSCE survey 2011.

a conservative (nationalist) movement that continues to be strong and significant, even while the leader of one popular nationalist party, Vojislav Šešelj, is on trial in The Hague. Šešelj's criminal status and physical distance seem to have done little to decrease his popularity.<sup>78</sup> Thus while in Croatia the shadow of Tuđman has generally waned and with it, serious, rooted, politically-measurable opposition to the ICTY, the same cannot be said for Serbia. Whether this is based in a strong nationalist sentiment that is more deeply rooted and less opportunistic and malleable than Croatia's, or whether nationalist parties offer something in addition to the nationalist rhetoric that echoes most strongly in their statements to external audiences, is a point disputed by Balkan scholars. (Ramet 2006a; Caspersen 2010) Perhaps the resiliency of nationalism owes something to that famous bad Serbian luck: at exactly the moment when the country was challenged to adapt liberal democracy in order to move "west," the question of Kosovo, the demographically impossible and emotionally-charged Serb "heartland"<sup>79</sup> came to a head. Whatever the reason, in the years since the war, the tool of nationalism, tamed and domesticated for easier international consumption within the Croatian context, has not seen the same transformation in Serbia. This is in spite of the fact that Serbian opposition parties and organizations are strong, deeply rooted, and very active (which must also be seen in contrast to Croatia, where opposition is smaller and more-often externally based, with a few notable examples).

## **Bosnia**

*"I would say this of conflict [in Syria]; I hope there are clear winners and losers. That is what is important for reconciliation. Look at the Balkans. Croatia won, and it's fine. Serbia lost – really lost, even lost Kosovo – and it's fine, too. But Bosnia, where everyone avoided having a conversation of who won and who lost, Bosnia is really not OK."<sup>80</sup>*

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The signature of the Dayton Accords in December 1995 marked the end of nearly four years of war in Bosnia and heralded the beginning of international efforts to assist in reconstructing the country. The four-year war devastated Bosnia, leaving nearly 100,000 dead and estimates of up to 2.5 million displaced.

Dayton's compromise divided Bosnia-Herzegovina, the most ethnically diverse of the six constituent republics of the Former Yugoslavia,<sup>81</sup> into two entities:

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<sup>78</sup> Šešelj's numbers have been hurt, however, by his party's splintering into two, with the second arm led by the current President Tomislav Nikolić. Nikolić broke with Šešelj in 2008 over the question of Serbian accession to the EU: Nikolić is pro-EU while Šešelj is not.

<sup>79</sup> Kosovo is traditionally understood as the "birthplace" of the Serbian nation, the site of some of the oldest Serbian churches, and the locus of the famous 1389 battle against the Turks that resulted in 500 years of Ottoman occupation. For the past century, however, demographics have been working against the Serbs in Kosovo. In Yugoslavia, Kosovo was the poorest region, and the second half of the 20<sup>th</sup> century saw a significant Serbian "brain drain." Additionally, Serbian birth rates are lower than those of Kosovar Albanians. According to the last census before the 1999 conflict, Kosovo was 90% Kosovar Albanian; following the mass exodus of Serbs after the war, that ratio will now be even more weighted in the Albanians' favor.

<sup>80</sup> Dennis Gratz, President of "Naša Stranka," presentation at the American University of Paris, April 27, 2013, notes on file with author.

<sup>81</sup> Bosnia is made up of a mixture of Bosniaks (the current term for Muslims in Bosnia and adjacent regions of Serbia) and Christians (Bosnian Serbs, Orthodox, and Bosnian Croats, Catholic). While Bosniaks constitute a plurality, no group enjoys an absolute majority. Bosnia is scheduled to hold its



Republika Srpska (RS), comprising 49% of the territory of Bosnia and rendered fairly homogenous (Bosnian Serbs) after the successful ethnic cleansing campaigns of the war, and the Federation (Federacija), comprising 51% of Bosnia. The Federation, comprised largely of Muslim (Bosniak) and Bosnian Croat citizens, was in turn divided into 12 cantons.<sup>82</sup> While the Federation was the home of Bosniaks and Bosnian Croats, this mixture tended to be village by village, ghettoized villages side by side to form interspersed regions. Mostar, a divided Croat/Muslim city, was the most notorious example of this division: currently the city has alternate government structures, including transportation, education, and police on either side of the river that divides the town, the Neretva.<sup>83</sup>

In the mixed Bosniak/Croat Federation, programs like the OSCE-backed “Two Schools, One Roof” have made it possible for entirely different education systems – curricula, teachers, administrators – to operate in the same building, thus reifying the divide between Bosniak and Croat students. In some cases, Bosniaks attend in the morning and Croats in the afternoon; in other cases, the buildings themselves are divided, with different entrances for the different nationalities.<sup>84</sup>

Dayton has been called a successful compromise because it pleased no one. Indeed, the structures of the Dayton Accords are often precisely those which need to be overcome in order to effectively accomplish the nation-building which is the international community’s objective in Bosnia.<sup>85</sup> Formally separated from the rest of Bosnia under Dayton, the RS developed its own structures outside of cooperation with the Federation. Since the achievement of a Serb state was one of the goals propounded by Bosnian Serb nationalists, the RS government resisted (and continues to resist) efforts to encourage cooperation with its co-nationals in the Federation. For this reason, critics of Dayton have argued that the Accords legitimized, sanctioned and ultimately officiated the terrible ethnic cleansing that caused the majority of the non-Serb population to flee the RS during the war.

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first census since 1991 in the fall of 2013. Because Bosnia’s governance structure is based on quotas derived from pre-war statistics, this upcoming census has the possibility of impacting every center of power. See Amy Dean presentation at the American University of Paris April 27, 2013, paper on file with author.

<sup>82</sup> The RS does not share the Federation’s cantonal structure, only one of several asymmetric aspects across Bosnia’s two entities.

<sup>83</sup> The destruction of Mostar’s 600-year-old bridge “Stari Most” in 1993 by Bosnian Croat mortar fire symbolized for many the tragedy of Bosnia’s destruction; in the wake of the war, temporary walking bridges set up between the Croat and Muslim halves of Mostar were themselves the target of vandals and destruction, as certain members of the separated populations worked to keep the separation permanent.

<sup>84</sup> “Students share the bell,” one frustrated NGO leader who works with youth told me. Author interview Sarajevo, Bosnia, March 2013.

<sup>85</sup> As Dennis Gratz, President of the progressive, multi-ethnic party “Naša Stranka” notes, there are 180 ministries in Bosnia: simply providing cars and staff for these ministries “blows up” the Bosnian budget. (Presentation at The American University of Paris, April 26, 2013, notes on file with author.) The Dayton Accords effectively make Bosnia ungovernable. An additional problem has arisen for the Dayton Accords in the form of a successful lawsuit by Bosnian citizens including the named plaintiff, Jakob Finci, against Bosnia-Herzegovina before the European Court of Human Rights. The Dayton Accords distribute power based on membership in ethnic group, but only recognizes the three dominant groups. Finci, a member of the Bosnian Jewish community, is excluded from holding office under Dayton. The Court held that this is a violation of Article 14 of the European Convention of Human Rights. *Case of Sejdić and Finci v. Bosnia and Herzegovina* (Applications nos. 27996/06 and 34836/06) December 22, 2009.

In his seminal, oft-cited 1998 article, “Justice in The Hague, Peace in the Former Yugoslavia?” Payam Akhavan (1998: 740)<sup>86</sup> articulated a central tenet of transitional justice underwriting the work of the ICTY: working correctly, an international court can, through the establishment of facts, communicate truth and morality to a population. Akhavan predicted that the ICTY had the capacity to contribute to interethnic reconciliation through the articulation of a unified narrative.

After twenty years of ICTY practice, however, Bosnian reality belies this prediction. While day-to-day life in Bosnia is peaceful, the divisions introduced by Dayton have created a two-state structure internally with few overlaps or agreement, where even basic communication between the two entities is hard-won. For some, future violence seems probable.<sup>87</sup> Kosovo’s successful bid for independence, for example, has proved a useful precedent for leaders in Republika Srpska, who echo the language of self-determination in pushing the argument that the RS should leave Bosnia. The question of the RS’s place in Bosnia remains contested and uncertain. Milorad Dodik, president of the RS, testified in April 2013 before the ICTY *on behalf of* Radovan Karadžić. In his testimony Dodik maintained that there was no plan to create a Greater Serbia, that Karadžić never ordered any crimes, that Bosnian Muslims were responsible for the dissolution of Yugoslavia by organizing Bosnia’s secession in 1992, and that “where they were not armed, where they did not support military activities of the Muslims, Muslims were not touched, and there were no elements of conflict or crimes against them.”<sup>88</sup> Reminded by the prosecutor of previous statements he had made before the RS parliament, such as his claim that “it should be openly said that the crimes were orchestrated under the leadership of the Serbian Democratic Party” (Karadžić’s party) and that the perpetrators “must answer for them before The Hague Tribunal,” Dodik replied that he made these statements for political reasons and they were not true.<sup>89</sup> It bears recollection that Milorad Dodik was the “progressive” politician called to speak on behalf of Biljana Plavšić’s “remorse” at her sentencing hearing in 2003.<sup>90</sup>

### **1. The problem of the victim-centered narrative: an example**

The focus of ICTY cases has been on crimes committed in Bosnia. While the majority of these cases involve violence committed by ethnic Serbs (either Bosnian or Serbian) against Bosnian Muslims, the Tribunal has deliberately included within its caseload crimes by other ethnicities, including Bosnian Muslims, as a means of demonstrating its objectivity. Twenty years of ICTY practice has established certain facts regarding the dissolution of Yugoslavia and the brutal fighting in Bosnia. Few dispute that there were detention centers where prisoners were held in deplorable conditions, that acts of unspeakable brutality were committed against individual civilians (prolonged torture, rape, immolation) as well as entire populations (the siege of Sarajevo, mass deportations), and that thousands of Bosniak men were massacred

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<sup>86</sup> At the time, Akhavan was serving in the OTP. Akhavan is currently a law professor and international lawyer – he served on the Gotovina defense team, and is active before the ICC as well.

<sup>87</sup> Goran Šimić, professor and BiH government consultant on transitional justice, predicts a return to violence. Lecture at American University BiH March 10, 2013 (notes on file with author).

<sup>88</sup> Karadžić Transcript 4864:19-21 (April 10, 2013). *See also* “Karadžić Was Innocent, Dodik Tells Hague Tribunal” BIRN 10 April 2013 <http://www.balkaninsight.com/en/article/accusations-of-crimes-political-speech-claims-dodik> (accessed May 11, 2013).

<sup>89</sup> Dodik stated, “You can consider this as political discourse which need not necessarily be based on facts.” Karadžić Transcript 4904: 3-4 (April 10, 2013).

<sup>90</sup> *See* Chapter Six.

in the hills surrounding Srebrenica. Arguably, for both Srebrenica as well as prison camps, ICTY cases have brought a type of scrutiny that might exceed what journalism, civil society, or political discussion could have provided, particularly in the absence of the ICTY's having set the conversation. This surely points to a role for the ICTY in post-conflict ex-Yugoslavia, and possibly for the use of ICTs in other post conflict situations. What the Tribunal has failed to do, however, is articulate a narrative that all Bosnians tell equally. Some civil society associations have been trying to construct such a narrative, bringing victims' associations or veteran's associations together, across ethnicities, to find a common narrative of suffering, and they have experienced some success. This task is complicated, however, by a competition for dominant recognition as victim. (Todorov 2012).

The 2006 Bosnian-made documentary film *Blind Justice (Slijepa pravda)* directly engages this narrative. The film investigates two of the first cases tried to completion before the ICTY, those involving the prison camps Čelebići and Prijedor. The film-makers interviewed victims of these incidents, tracing the impact that ICTY judgments had made. The film-makers chose these cases because they were complete at the time of filming, with final appellate chamber rulings. The cases were distinct in another important way as well, however. The Čelebići case<sup>91</sup> concerns a prison camp run by Bosnian Muslim and Bosnian Croat forces, imprisoning Bosnian Serbs. The camp functioned from May-December 1992. The four defendants, Zdravko Mucić (Camp Commander from May-November 1992), Hazim Delić (Deputy Camp Commander until November and Camp Commander in November and December), Esad Landžo (camp guard), and Zejnil Delalić (coordinator of Bosnian Muslim and Croat forces), stood accused of killing eight people and raping two women. At the 1998 trial, Mucić was sentenced to seven years (later adjusted to nine), Delić 20 years (later decreased to 18), Landžo 15 years and Delalić was acquitted. In total, a few hundred local Bosnian Serb men and women may have been housed by the camp over the course of its existence. The Čelebići case was the only ICTY judgment addressing the camp.<sup>92</sup>

The Keraterm camp in Prijedor, in contrast, was a more serious and far-reaching prison camp run by Bosnian Serbs; in terms of numbers of detainees and atrocities committed, it is difficult to compare it with the Čelebići camp in Konjic. In total, 16 ICTY cases address events related to the Keraterm camp. The first case concerning the Prijedor camp, around which the documentary was built, ended in 2001 with the plea agreements of the three defendants.<sup>93</sup> The initial charges included war crimes and crimes against humanity up to and including genocide, relating to an alleged massacre of more than 120 men in one room in the camp. In exchange for their guilty pleas, charges against the three were reduced to "persecutions" as a crime against humanity.<sup>94</sup> Duško Sikirica, the commander of the camp initially charged with genocide, admitted with his plea to killing one detainee by shooting him in the head, and further admitted that there were murders, beatings, rape, sexual assault, harassment, humiliation and abuse of detainees in the camp. He denied being present during the incident where at least 120 men were murdered, however. Sikirica was

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<sup>91</sup> *Delalić* Trial Chamber.

<sup>92</sup> See Appendix A.

<sup>93</sup> *Sikirica* Sentencing Judgment. There have been several cases related to the first Prijedor case before the ICTY; 16 geographically related, and seven dealing with events in the camp specifically. See Appendix A.

<sup>94</sup> *Sikirica* Sentencing Judgment.

sentenced to 15 years and served ten before being released. Damir Došen, a shift leader at the camp and Dragan Kolundžija, a shift commander, were sentenced to five and three years respectively, and both were released early.<sup>95</sup>

As part of their plea agreements, all three defendants addressed the court, offering sincere statements of remorse.<sup>96</sup> The defendants' statements of remorse are remarkable, and may partially explain the relative leniency of their sentences. None of the defendants admitted any knowledge of, or involvement in, the massacre in Room 3, however.

In *Blind Justice* the film-makers interview victims and local civilians in Konjic and Prijedor regarding the crimes committed, what they lived through, and the

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<sup>95</sup> *Sikirica* Sentencing Judgment.

<sup>96</sup> *Sikirica*'s statement of remorse contains many of the hallmarks celebrated by proponents of transitional justice, hewing closely to the potential for courts as reconciliatory models advocated by "judicial romantics" like Akhavan (1998). *Sikirica*'s statement reads:

Before the war in Bosnia, we all lived together in good neighbourly relations regardless of who or what we were. Prijedor was a good place to live in in the former Yugoslavia and to live together. I had many friendships, many of which transcended ethnic differences.

Unfortunately, when the war broke out, we had to go where we were told to go. We didn't have much choice. We could either obey orders, refuse to obey them, or desert. I was sent to Keraterm, although I would have preferred to go somewhere else at the time, because to go and work in Keraterm was the worst thing that could have happened to me.

After the events in 1992, I personally had occasion to see the consequences suffered by Serbian refugees who arrived in Prijedor because of similar events elsewhere, and I was able to imagine what the people who had to leave Prijedor had to go through. I fully understand that these events had destructive consequences and that they still affect Muslims today, some of whom were my friends.

After I saw and I understood the consequences, I wish to tell the Trial Chamber that I deeply regret everything that happened in Keraterm while I was there. I feel only regret for all the lives that have been lost and the lives that were damaged in Prijedor, in Keraterm, and unfortunately, I contributed to the destruction of these lives.

I am especially sorry that I did not have enough moral courage and power to prevent some or all of the terrible things that happened. I would like to be able to turn back the clock and act differently. I understand that by taking responsibility for my role in these events I have to be punished, and I hope that what happened to me will be a good lesson to anyone anywhere who finds himself in similar circumstances in the future, and I truly hope that I will be forgiven, although I do understand that some will find it very difficult.

I also hope that my family will forgive me, because through my thoughtlessness, I have brought their lives into a difficult situation. I hope that what happened to me will contribute to the faster return of Muslims to their homes and to the faster and more efficient reconciliation of all peoples.

I understand that as a consequence of this, I will be absent from Prijedor for a long time, but let me assure you, Your Honours, that when I do return home one day, I will be the one to speak with the most conviction against such folly, and I hope that you will accept this – that you will accept my regret and my remorse for everything that I did and everything I did not do.

I feel no self-pity because I know that this is an experience I have to go through, but I trust that Your Honours will understand when I say that I deeply regret what has happened and that I regret that I cannot be with my family in my home. I know that it is always difficult to find enough words and the right words to express one's sorrow in such circumstances, but I hope that Your Honours will understand me and reach a just decision."

Transcript of *Sikirica* Sentencing Hearing, Case No. IT-95-8, (October 8, 2001) 5718:5-5720:2

value of ICTY trials. The film-makers carefully omit all context that would identify the ethnicity of the victims interviewed, however. This conscious editorial decision was central to the film, whose explicit goal was to create a commonality among victims. As one of the directors argued, they didn't want people to hear the story of a 60-year-old woman raped three times and say "Oh, she's a Serb, I don't care."<sup>97</sup>

The film was screened in Konjic, Bosnia (the locality of the Čelebići camp) for the first time at the 8<sup>th</sup> International Conference on Democracy in July 2005. A local crowd attended the screening and provided a lively, moderately heated discussion. Directly after *Blind Justice* was shown, a local amateur film maker showed a brief video he had taken in Konjic during the war, illustrating the destruction wrought by Bosnian Serb attacks. This film-maker noted the injustice of the Čelebići judgment, saying that the ICTY prosecution "hurts Konjic because they were the first ones shown, they came first before the ICTY, those who did lesser crimes got smaller sentences."<sup>98</sup> Many audience members insisted on the necessity of comparing the massive scale of the atrocities in Prijedor to the relatively small scale of crime committed in Konjic in terms of the film's internal comparison. Others objected to the film as historical narrative, pointing to the potential for the film to distort the scale of brutalities committed in the Bosnian war and demanding to know why the film-makers hadn't taken on Srebrenica as a subject, or if they would consider showing the "Scorpion video" in conjunction with their film.<sup>99</sup> The film-makers, Sarajevans who are themselves a mixed Serb and Bosniak team, were steadfast in their insistence that comparisons are misplaced, saying:

War crimes aren't things you compare. There is no difference between the 18 in Čelebići and the thousands in Prijedor. It is the suffering of people that matters. In Čelebići, people's legs were burned, lots of bad stuff happened. They used hot tweezers to brand tongues. They must all be punished. Crimes against victims must be seen as such.<sup>100</sup>

For these film-makers, victimhood is available to all three ethnicities, so long as it is recognized. This construction, built around a recognition of human rights, is one variant of a unifying narrative.

## 2. Legitimacy from the perspective of the perpetrator

French-language researchers Damien Scalia, Christian Staerklé, and Mina Rauschenback approach the question of ICTY legitimacy and impact from the perspective of the perpetrators, not the victims. Basing their study on the idea that acceptance of punishment as legitimate by the guilty party is a hallmark of an effective judicial system, Scalia et al. have constructed their current project (2012) around interviews they did with defendants before the ICTY with the goal of ascertaining their feelings about the Tribunal and the processes brought against them.

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<sup>97</sup> Panel presentation Konjic conference, July 2005, notes on file with author.

<sup>98</sup> Audience member comment, Democracy Conference Konjic Bosnia July 2005, notes on file with author. See Chapter Three regarding non-uniformity of ICTY sentencing.

<sup>99</sup> The "Scorpion video" shows the execution of five Bosnian men by a Serb paramilitary unit. Provided to the ICTY by Nataša Kandić of Belgrade's Humanitarian Law Center in 2005, the video proved irrefutable evidence of Serb involvement in atrocities that changed the nature of public discourse in Belgrade. Following the release of the film, Serbian leaders sought to contain the indictment by disassociating the paramilitary executioners from regular Serb forces.

<sup>100</sup> Oral statement by film director Aldin Arnautović, Konjic Bosnia July 2005, notes on file with author.

Their semi-structured interviews with 18 defendants, therefore, explore perceptions of the ICTY as a judicial institution. The defendants interviewed represent the three directions of ICTY prosecution: command responsibility, joint criminal enterprise (discussed in Chapter Four) and direct perpetration. Some interviewees had been found guilty, and others acquitted.

Their first finding was that defendants were more concerned with process than with sentencing, and this held across those found guilty and those acquitted. (Scalia et al. 2012) The issue raised most often by defendants was that “nobody heard them during the process; they couldn’t speak their mind at the time of the process.”<sup>101</sup> Defendants also complained that the ICTY was unfair, politicized, and imposed by “others.” In general, Scalia et al. (2012) found that the defendant’s position regarding procedural justice had a greater impact on the defendant’s perception of judicial legitimacy than the eventual outcome of the case. This finding comports with Tyler’s (1990; 2006) findings. Secondly, they found that the defendant’s perception of justice was linked with the different forms of responsibility under which he was charged. Specifically, they found that there was a gap between the ICTY’s definition of legal responsibility and the perception of the condemned of this same issue. In general, they found that defendants accepted the acts they were accused of committing, but did not accept criminalization of these acts. In those instances where the ICTY charged them with killings civilians, defendants countered that they killed combatants. “Ethnic cleansing” ceased to be the crime of driving people out of their homes through fear and persecution, and instead became “helping civilians escape.” Moreover, many defendants asserted that they would do the same thing tomorrow.

Scalia et al.’s research confirms what defense counsel iterated in my interviews in 2005. There, one counselor criticized ICTY processes as being “not about truth but about the logic of the trials themselves, proving the OTP indictment.”<sup>102</sup> This criticism of legal positivism unaccompanied by the acceptance of legal substance is precisely what is in play in international criminal law, and marks the gap between what ICTs *do* and what target populations *perceive* they do.

### **Conclusions regarding narrative**

Through the introduction of the rule of law in the place of lawlessness, ICTs contain a Weberian promise of order, underwritten by a Kantian argument in the universality of rights. This law-specific, rights-based narrative, centered on the universality of victimhood and the attributability of criminality, forms the centerpiece of the ICTY’s narrative for the ex-Yugoslavia. This narrative has failed to take root in Bosnia. Consider Srebrenica, and the competing narratives surrounding it. Or consider the “concentrations camps” run by Bosnian Serbs: ICTY judgments have focused on the camps in Prijedor (with 16 cases touching at least peripherally on the subject, and several focusing on crimes committed at the Keraterm camp) and yet even in March 2013 “there is still no truthful discourse.”<sup>103</sup> This observation would appear to be supported by RS Prime Minister Dodik’s April 2013 testimony in the *Karadžić* case, in which Dodik characterized violence against Muslims in Republika Srpska as based

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<sup>101</sup> Damien Scalia, presentation International Global Law and Policy conference, Harvard University, June 4, 2013, notes on file with author.

<sup>102</sup> Defense counsel ICTY (author interview The Hague May 2005).

<sup>103</sup> Alma Mašić, Youth Initiative for Human Rights (interview Sarajevo, Bosnia March 2013, notes on file with author).

on the activities of local warlords, “who tried to interpret the situation in their way and find their own responses to it.”<sup>104</sup>

Dodik’s testimony, in which he refused to “refute” his own early testimony in the *Brđanin* case, nonetheless starkly contrasted with his statements to the ICTY and may be read to show the difference a decade can make. In 2003, before the *Brđanin* court,<sup>105</sup> Dodik described a situation of fear and terror perpetuated by the Bosnian Serb war machine with Karadžić at the helm. In his 2013 *Karadžić* testimony, in contrast, Dodik attributed responsibility for crimes to the chaos and terror of war,<sup>106</sup> and used the pulpit of the ICTY to advance nationalist discourse such as the Bosniak “plan” to institute Sharia law,<sup>107</sup> a plan of “perseverance”<sup>108</sup> that is perpetually laying in wait until Bosniaks achieve a majority.

A recent OSCE survey reports a 71% negative view of the ICTY in Serbia.<sup>109</sup> The numbers are resoundingly negative: 66% say the ICTY is unnecessary;<sup>110</sup> 73 % say the ICTY have different attitude towards individuals indicted for war crimes depending on their ethnicity;<sup>111</sup> 71% find the trials have not contributed to reconciliation (this number remained constant in 2009 and 2011<sup>112</sup>); and 49% say trials before the ICTY will not contribute to finding out the truth about the events in wars on the territory of former SFRY “because [the] real truth will never reach ordinary citizens”<sup>113</sup> These negative numbers are repeated across the former Yugoslavia. Presently, the Federation numbers are even more negative than those in RS. Across the former Yugoslavia, a distrust in the judgments of the Tribunal unifies Serbs, Croats, and Bosniaks. This is not the unified narrative that was imagined.

### (III) History, collective memory, and courts

There is an emerging discourse in “collective memory” or “memory and history” studies that seeks to theorize the issue of what ideas enter the “collective memory” and why. This discipline is still coalescing into a “field” itself (Olick 2009; Olick & Robbins 1998; Golden 2005; Cattel & Climo 2002), and is thus far approached, with distinct perspectives, by scholars of different fields, namely

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<sup>104</sup> Dodik’s explanation in full reads:

Unfortunately, in Bosnia-Herzegovina, there were many local warlords who tried to interpret the situation in their way and find their own responses to it. And such – it was the same on all sides. As for your question, in my municipality, there has been a small Muslim community, and nobody bothered them. They didn't have any problems, especially not at the beginning of the war. When their crucial problem was the issue of weapons, whether those communities were armed and ready to enter into conflict with the Serbian people.[sic] However, that was not the case, the Muslim settlements were not bothered.” Karadžić Transcript 4852:11-19 April 10, 2013.

<sup>105</sup> *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36 (September 1, 2004) (“*Brđanin* Trial Chamber”)

<sup>106</sup> *Karadžić* Transcript 4852: 7-10.

<sup>107</sup> *Karadžić* Transcript 4834: 23 - 4835: 2 “Wherever the Muslims established the authorities, they had to organise an Islamic state and that as long as they were a minority, they should stay calm, be integrated in the society, but once they became the majority they should strive towards this goal without any doubt.” *See also* Id. At 4846; 4848 - 4849

<sup>108</sup> *Karadžić* Transcript 4848:14.

<sup>109</sup> OSCE 2011 survey p. 65.

<sup>110</sup> OSCE 2011 survey p. 15.

<sup>111</sup> OSCE 2011 survey p. 22.

<sup>112</sup> OSCE 2011 survey p. 58.

<sup>113</sup> OSCE 2011 survey p. 57.

anthropologists, sociologist, and political scientists. There is as of yet little interplay between collective memory studies and international criminal law, and the field is ripe for the intervention and participation of law and society scholars, who have made bridges both between law and sociology, and between law and psychology, in the U.S. domestic sphere.

“Collective memory” studies begin with Durkheim’s pupil, sociologist Maurice Halbwachs, and continue to develop his seminal contributions to the field. (Connerton 1989) Halbwachs considered memory to be a constant construction of the present, observing:

If, as we believe, collective memory is essentially a reconstruction of the past, if it adapts the image of ancient facts to the beliefs and spiritual needs of the present, then a knowledge of the origin of these facts must be secondary, if not altogether useless, for the reality of the past in no longer in the past. (1941:7)

Contemporary cultural theorists have expanded his ideas, arguing that collective memory develops into “cultural memory,” a field they have termed “mnemohistory.” (Assmann 2011) The study of mnemohistory focuses specifically on the ways in which history is remembered, separating such remembrance from the actual facts of history.

Collective histories help shape national identity. (Anderson 1983) Young nations may “recover” (Lewis 1975) memories in order to instill national identity. In a 1986 article, sociologists Schwartz, Zerubavel and Barnett considered the emergence of the battle of Masada in 73 AD in Jewish and Israeli collective memories. The battle of Masada, in which 900 Jewish defenders committed mass suicide instead of allowing themselves to be captured by Romans, was an insignificant event in ancient Jewish history, fulfilling none of the criteria generally associated with memorialization. Schwartz et al. argue that Masada’s “recovery” in contemporary Israeli society should be understood as a means of understanding the precariousness, experienced in the present, of Israel’s situation. Additionally, collective memory may be distinct between generations, as memories are more vividly instilled in young adulthood (Schuman & Scott 1989). In the case of the Masada recollection, current generations of Israeli citizens may interpret the symbolism of the Masada battle differently than their early 20<sup>th</sup> century forebears who “recovered” the recollection. (Schwartz et al 1986: 151)

ICTY judgments make use of historians as expert witnesses, and have sought to use “history” (from sweeping narratives beginning in the Middle Ages through the last days of Yugoslav communism) to provide context for legal argument. (Wilson 2005) Thus far, the ICTY’s experiments with “legitimizing” academic argument and approaches through court judgments have not reaped the “collective narrative” rewards that are – at least for some connected with the Tribunal – one of its aims.

## **Conclusion**

This chapter has considered the problem of the use of ICTs as historians: the exploration has considered the issue of epistemology, has contrasted what law “knows” and can know with what historians “know,” and has compared the values and aims of both of those typologies of “knowing.” While history and law share a commitment to facts (and each have developed scientific procedures to produce and



verify facts), law's "interested" relationship to facts, particularly at common law, shapes the way each fact is expressed before a court.

Facts alone, of course, do only one part of the work in establishing collective memory. As Tuomas Forsberg (2003:73) notes:

Even if factual truth is established, facts do not speak for themselves. In political life, it is the interpretation that the facts are given that is most important; and if the different interpretative frameworks do not converge, facts alone will not help to form a shared past.

Emerging considerations in collective memory studies bear this out, and give ample fodder to law and society scholars interested in considering ICT implications for law's capacity to shape collective memory.

Representations of history comprise part of collective memory, which itself can map onto the "official version" of events that the international criminal justice template asserts courts can assist in producing. The next chapter further explores these ideas through a consideration of "reconciliation" through ICTY case law.

## Chapter 6: Reconciliation Through a Judicial Lens

*“I came [before the ICTY] for two reasons: to confront these charges and to spare my people, for it was clear that they would pay the price of any refusal to come.”*

*“I ask from my brothers, Croats, to forgive us, their brother Serbs, and I pray for the Serb people to turn to the future and to achieve the kind of compassion that will make it possible to forgive the crimes. And lastly, I place myself at the full disposal of this Tribunal and international justice.”*

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Biljana Plavšić, Sentencing Hearing following plea of guilt (2002)

Milan Babić, Sentencing Hearing following plea of guilt (2003)

One function imagined for ICTs by the *international criminal justice template* is the role of ICTs in generating a unified and thereby unifying narrative, an “official version” of events which, by stating truths, acknowledging facts, and allaying doubts, can assist in “reconciliation.” The ICTY has produced an inconsistent discourse regarding its own proscribed role in the reconciliation of the peoples of the former Yugoslavia. On the one hand, reconciliation among the former warring peoples in the Balkans is among the central stated goals of the ICTY.<sup>1</sup> It is repeatedly noted in ICTY jurisprudence<sup>2</sup> as well as in reports made by the ICTY before the UN. At the same time, ICTY judges and personnel, both publicly in decisions as well as privately in interviews with the author, have often distanced the professional work of the Tribunal from what they deem the personal, social, or cultural work of reconciliation.<sup>3</sup> They note that the ICTY’s foundational documents, unlike those of its sister court in Rwanda, make no mention of “reconciliation.”<sup>4</sup> For these actors, any reconciliation obtained through ICTY judgments, while a decided benefit of the Tribunal’s work,

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<sup>1</sup> “Reconciliation” is not explicitly mentioned in UN SC Resolution 827 (May 25, 1993), the document that establishes the ICTY. Chief Judge Antonio Cassese mentioned the purpose of reconciliation as central to the Tribunal’s work in his 1994 report to the UN. (UN doc . IT/68 (July 28, 1994), para 16.) The OTP has repeatedly noted the ICTY’s reconciliatory role. *See, e.g.*, Carla del Ponte’s address to NATO Parliamentary Assembly October 2007, available at [www.un.icty/pressreal/2007/pr1193e.htm](http://www.un.icty/pressreal/2007/pr1193e.htm) (in which Del Ponte argued “the Tribunal was established as a measure to restore and maintain peace and promote reconciliation.”) accessed March 15, 2013.

<sup>2</sup> *See, e.g.*, *Nikolić* Sentencing Judgment para 145 (identifying the Tribunal’s mandate as restoring peace and promoting reconciliation).

<sup>3</sup> As an employee in the ICTY Registry commented, heatedly: “There is no mandate for reconciliation. Look in the Security Council documents, the court documents, it’s not there. This idea of reconciliation as been projected onto the ICTY by diplomats. But it’s ridiculous to charge the court with reconciliation.” Author interview, The Hague, May 6, 2005.

<sup>4</sup> This is clear if one contrasts the ICTY statute with the ICTR statute.

cannot and should not be used as a bar against which to examine the work of the ICTY.

In this regard, the Tribunal's robust record of guilty pleas, which comprise one third of all convictions before the Tribunal (Henham & Drumbl 2005: 53), has been cited as an important reconciliatory mechanism in the former Yugoslavia both by expert witnesses appearing before the Tribunal, and in Tribunal judgments themselves.<sup>5</sup> The ICTY has alleged that there is a connection between truth telling, evidenced remorse and acceptance of the Tribunal's authority to be found in guilty pleas before it on the one hand, and the reconciliation mission of the Tribunal on the other. Guilty pleas are argued to advance the cause of reconciliation in a variety of ways, among them access to information in the possession of the accused,<sup>6</sup> as well as increasing Tribunal legitimacy through the specter of defendant cooperation. A statement of remorse accompanies nearly all guilty pleas from the Defendant at his/her sentencing hearing before the Tribunal. These statements are highlighted by the ICTY as a major reconciliatory mechanism in the Balkans.<sup>7</sup> In this capacity, ICTY jurisprudence considers a guilty plea as a *mitigating factor* in determining a defendant's sentence, basing its action on a logic of the potential impact of reconciliation. This rationale has helped bolster the Tribunal's use of plea bargaining to obtain and prosecute these guilty pleas, a practice that is foreign to the civil law system of the former Yugoslavia as well as many ICTY justices.<sup>8</sup> The Tribunal has recorded 20 guilty pleas thus far.<sup>9</sup>

This chapter contrasts the guilty pleas (and related processes, sentences, and narratives) of two ethnic Serb leaders, Biljana Plavšić and Milan Babić. Both individuals were minor leaders<sup>10</sup> of ethnic Serb statelets. Both saw the Prosecution's charges against them mitigated by their plea of guilt. Both ultimately faced very similar sentences – 11 years for Plavšić, 13 for Babić. Both agreed in principle – in part through the specter of their guilty plea itself – to cooperate with the Tribunal. Both addressed the Tribunal, ostensibly offering statements of remorse.

And yet, despite all these parallels, a comparison both of the *Plavšić* and *Babić* processes and decisions, and of the “remorse” articulated by these two figures, affords an interesting insight, and provides a clear invitation to reconsider the ICTY's

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<sup>5</sup> See, for example, *Nikolić Sentencing Judgment*.

<sup>6</sup> “[A] guilty plea contributes directly to one of the fundamental objectives of the international tribunal: namely, its truth-finding function.” *Sikirica Sentencing Judgment* para 149; “[A] guilty plea is always important for the purpose of establishing the truth in relation to a crime” *Prosecutor v. Todorović Sentencing Judgment*, Case No. IT-95-9/1-S, 31 July 2001 [para 81]. “Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation.” *Erdemović Sentencing Judgment II* para 21.

<sup>7</sup> See *Sikirica Sentencing Judgment* para 149; see also *Plavšić Sentencing Judgment* para 80 (“The Trial Chamber accepts that acknowledgement and full disclosure of serious crimes are very important when establishing the truth in relation to such crimes. This, together with acceptance of responsibility for the committed wrongs, will promote reconciliation.”) See also Clark 2009.

<sup>8</sup> Chapter Three explored the reasons for resistance to plea bargaining in civil law systems.

<sup>9</sup> As discussed in Chapter Three, plea bargaining was originally disallowed before the ICTY. While the first guilty plea before the ICTY of Erdemović is not traditionally characterized as a “plea bargain,” Chapter 3 explored the aspects of the case that argue in favor of applying a plea bargaining logic to Erdemović.

<sup>10</sup> While both Plavšić and Babić occupied leadership positions during periods of violence in the Former Yugoslavia, neither of them served as central figures in the planning or commission of atrocities.

work and capacity as a reconciliatory mechanism. An examination of the *Plavšić* and *Babić* cases permits an examination of the ICTY's construction and application of legal categories regarding individuals' contribution to reconciliation as well as reconciliation itself. This chapter argues that the legal categories that the ICTY recognizes as significant do not easily converge with common perceptions of justice or fairness.

There are many aspects of ICTY practice that inhibit transmission of any reconciliatory message identified by the ICTY to an audience in the former Yugoslavia. For example, as discussed in Chapter Three and revisited in Chapter Five, the ICTY faces a major obstacle in the disconnect between the common law practice of plea bargaining and the civil law audience in the former Yugoslavia. This chapter focuses on the problem of the Tribunal's creation of legal categories that have little meaning to non-legal professionals, arguing that such characterization, particularly when it works at odds with a received judicial culture, impedes the possibility for the ICTY to work as a reconciliatory organ. Moreover, the Tribunal's iteration of seemingly illogical and flawed categories regarding which defendant actions constitute encouragement towards "reconciliation" and which do not arguably constitutes a failure that is at once more serious, sinister, and systemic than a failed psychological evaluation of defendants' motivations and interiority. The chapter draws on Ricoeur (1995) and Allott (1990) to consider how the ICTY's legal categorizations demonstrate a structural failure of the institution.

The chapter begins with a consideration of how observers might operationalize "reconciliation," a notoriously amorphous and abstract term, and examines claims made by the ICTY and others regarding the Tribunal's capacity to impact, or even effect, reconciliation. Part II contrasts the *Plavšić* and *Babić* cases with the goal of discovering exactly where the ICTY imagines "reconciliatory" capacity to reside. This inquiry in turn raises the question of what role "character" "forgiveness" and "extenuating circumstances" may have on international criminal law, an institution which localizes itself, as explored in Chapter Four, between the non-derogable standard of human rights law and the social construction of criminal law. Part III concludes by pointing out how a close textual analysis of the *Plavšić* and *Babić* cases demonstrates the structural deficits that impede the Tribunal's work as a reconciliatory organ.

## **(I) The ICTY & reconciliation in the Balkans**

Advocates for the ICTY as a force for reconciliation in the Balkans argue that ICTY judgments will assist in bringing the truth of the Balkan wars to light. Such truth, it is argued, will enable social and political reconciliation.<sup>11</sup> This school of

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<sup>11</sup> "Truth is the cornerstone of the rule of law, and it will point towards individuals, not people, as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process." Provisional Verbatim Record of the 3217<sup>th</sup> Meeting of the Security Council, May 25, 1993, Statement by the Representative of the United States, cited in *Nikolić* Sentencing Judgment para 60 fn 106. *See also* Akhavan 1998 (who argues that the truth of the Balkan wars is principally a truth of elite politicians fomenting nationalism to serve their own power interests and that by prosecuting those most responsible for the wars of the former Yugoslavia and individualizing their guilt, the ICTY could free citizens of the former Yugoslavia from the weight of collective responsibility and recast nationalist arguments in the light of political realism.)

thought has been labeled “judicial romanticism” (Forsythe 2006: 89) and forms part of the foundation of transitional justice theory. The truth emerging from ICTY decisions is necessarily articulated through, and constructed by, legal categories. Thus the same criminal act can trigger a count of genocide, crimes against humanity, or war crimes. The category of “persecutions,” for example, includes crimes that range from murder to the destruction of property.

Empirical considerations of the ICTY’s efficacy and influence are still in their infancy,<sup>12</sup> and there is as of yet little hard evidence to support the argument that the ICTY has generated a reconciliatory or unifying narrative in the former Yugoslavia. Indeed, in the 20 years following the creation of the ICTY, the leaders and peoples of nations of the former Yugoslavia have shown, if anything, a determined resistance to the “truths” the ICTY has sought to articulate. The Croatian general Ante Gotovina, for example, a non-entity in Croatia before the war, has emerged from his ICTY indictment, years in hiding, eventual arrest and ultimate acquittal as a *bona fide* Croatian hero.<sup>13</sup> Serving as leader in absentia of the far right Serbian Radical Party (SRS) while he awaited trial in The Hague, Vojislav Šešelj was only narrowly defeated in presidential elections in 2008.<sup>14</sup> Slobodan Milošević, deposed by his own people, saw a rebound in his popularity in the years he stood trial at the Tribunal.<sup>15</sup> Meanwhile, even established truths regarding the war – the source of mortars that killed tens of civilians on multiple occasions in Sarajevo marketplaces, for example, or the fact of the massacre (genocide) of at least 7000 men and boys at Srebrenica in 1995 – have remained contested or unacknowledged following multiple ICTY considerations. The more abstract *truths* justifying the work of the ICTY, such as the truth that ethnic nationalism and separatism were largely invented by power-hungry elites and lack any consistent foundation in larger Balkan populations,<sup>16</sup> are not presently discourses of interest in the former Yugoslavia. The ICTY itself is a deeply unpopular institution there, and even those populations most amenable to the ICTY, such as Bosnian Muslims, accept only those Tribunal decisions which are seen to be in their favor.

After nearly 20 years of work and \$3 billion in expenditures, the ICTY has indicted 161 individuals. Slated to close July 2013, the ICTY’s work (and expense) will continue with the Residual Mechanism. In addition to the ICTY, other institutions designed to consider war crimes and reconciliation have been erected, using international funds, in Bosnia and Serbia. Hundreds of billions of dollars have been spent to address the problem of violence in the Balkans, with often dispiriting

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<sup>12</sup> See Cibelli and Guberek 2000; Nettlefield 2012; UC Berkeley 1999 study.

<sup>13</sup> The *Gotovina* case is discussed in Chapter Four.

<sup>14</sup> The results of the second round of voting were: 50 percent of the vote for Tadić’s Democratic Party (DS) and 47 percent for the Serbian Radical Party (SRS), represented by Tomislav Nikolić. After breaking with the SRS, Nikolić went on to win the Serbian presidency in 2012. Nikolić has only recently apologized for the massacre at Srebrenica. He has recently denied that genocide was committed at Srebrenica, and has refused to visit the commemoration of the massacre, although his predecessor Tadić did both. “Serbian president denies Srebrenica genocide,” *The Guardian*, June 2, 2012.

<sup>15</sup> In a poll taken in 2005, Milošević was the third most popular politician in Serbia, behind Nikolić and Tadić. “Opinion Poll Shows Milošević More Popular in Serbia than Premier,” BBC Monitoring International Reports, April 22, 2005, available at: <http://www.slobodan-milošević.org/news/fonet042205.htm> (accessed February 25, 2013).

<sup>16</sup> See Akhavan 1998, who makes the exemplary argument for the potential of “judicial romanticism.”

results. Bosnia is still an international protectorate and the president of Republika Srpska, Milorad Dodik, publicly acknowledged the Srebrenica massacre as genocide only in 2012, while at the same time working doggedly to “repopulate” the region around Srebrenica with Bosnian Serbs. This is a dismal indication in the lack of ideological progress made on the ground.

Part of the difficulty involved in measuring the ICTY’s impact on reconciliation is an absence of agreement as to what exactly reconciliation consists of, what impedes it, and what impact, if any, official decisions might have on such a poorly understood process. The ICTY is difficultly situated as regards this issue. In interviews conducted in 2005, many Tribunal professionals informed me that reconciliation, while surely important, had nothing to do with the ICTY’s professional activity, which was strictly legal. At the same time, ICTY representatives have repeatedly highlighted the impact the ICTY has on this most central of goals, in part because a disconnect between reconciliation and the work of the ICTY might spell trouble for the institution before its somewhat fickle parent institution, the UN Security Council.

There is a large body of sophisticated, important work on the politics and psychology of reconciliation, as well as, to a lesser degree, consideration in the potential for judicial institutions to impact the process. Is reconciliation a state of living together relatively harmoniously, even acknowledging separate interests and histories? (Wilson 2001) Is it a process of telling one single, shared history of a time period? If we argue that reconciliation should consist of such a uniform narrative, as has emerged within Germany regarding World War II, then we must also consider the problem of transgressor and victim (Meister 2011; Sa’adah 1998) and the obvious fact that German reconciliation did not include making peace with German victims, since all such victims had been eliminated. Is reconciliation a political process, where elites guide an official discourse, or a personal process, where individuals find peace within their hearts? (Shaw 2011)

In the specific case of the ICTY, what is the “reconciliation” that its decisions might encourage? “Reconciliation” within transitional justice literature is a fluid term with a broad range of meanings. (Minnow 1998; Sa’adah 1998; Shaw 2011; Stover 2004; McGregor 2007) More often associated with truth commissions and other local efforts designed to reunite and reknit communities sundered by violence and conflict,<sup>17</sup> reconciliation should be understood along the two axes of “unification” and “forgiveness,” where unification in turn should be understood as a political form of reconciliation, as opposed to forgiveness, which should be understood as a more personal, and often religious, experience of reconciliation.

Reconciliation, in the context of Truth Commissions, is often equated with forgiveness; seen this way, is a quasi-religious act. In this understanding of the term, a wronged person accepts that his wrong will remain unpunished, and determines to forgive the wrongdoer. In this way, the argument goes, a social, collective healing can take place, where facts and forgiveness replace punishment. The benefit to the forgiver, in addition to the healed collective, is arguably a more thorough “truth”

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<sup>17</sup> Krog (1999); the author is a South African poet and journalist; her book concerns the TRC and the processes surrounding it.

about the act in question. As we have seen in the preceding chapter, judicial processes may not be particularly well adapted to produce a truth that would be so recognized by the average citizen.

The Swedish development agency (IDEA), which works with reconciliation as a political element, has produced a “Handbook” for effectuating reconciliation. Hamber (2003), one of the authors of the IDEA Handbook, defines reconciliation as having five “interwoven and related strands.” These include:

1. Developing a shared vision of an interdependent and fair society: The development of a vision of a shared future requiring the involvement of the whole society, at all levels. Although individuals may have different opinions or political beliefs, the articulation of a common vision of an interdependent, just, equitable, open and diverse society is a critical part of any reconciliation process.
2. Acknowledging and dealing with the past: Acknowledging the hurt, losses, truths and suffering of the past. Providing the mechanisms for justice, healing, restitution or reparation, and restoration (including apologies if necessary and steps aimed at redress). To build reconciliation, individuals and institutions need to acknowledge their own role in the conflicts of the past, accepting and learning from it in a constructive way so as to guarantee non-repetition.
3. Building positive relationships: Relationship building or renewal following violent conflict addressing issues of trust, prejudice, intolerance in this process, resulting in accepting commonalities and differences, and embracing and engaging with those who are different to us.
4. Significant cultural and attitudinal change: Changes in how people relate to, and their attitudes towards, one another. The culture of suspicion, fear, mistrust and violence is broken down and opportunities and space opened up in which people can hear and be heard. A culture of respect for human rights and human difference is developed creating a context where each citizen becomes an active participant in society and feels a sense of belonging.
5. Substantial social, economic and political change: The social, economic and political structures which gave rise to the conflict and estrangement are identified, reconstructed or addressed, and transformed.

ICTs concerned with reconciliation as a measure of transitional justice are engaged with reconciliation that looks like the social, political set of processes described by Hamber above.

## **(II) The Plavšić & Babić cases**

The cases against Plavšić and Babić are similar yet distinct. Both individuals were leaders of ethnic Serb statelets: Plavšić was a member of Republika Srpska’s (RS) tripartite presidency, while Babić was President of Republika Srpska Krajina (RSK), the Serb statelet within Croatian territory that was reclaimed for Croatia in the

(now) infamous operation “Storm.”<sup>18</sup> Their indictments overlap in time, with Babić’s early, voluntary cooperation with the OTP coming just after Plavšić had surrendered herself to The Hague and entered an initial plea of not guilty. Both “benefited” from their pleas through the mitigation of charges against them: Plavšić’s eight-count indictment, which had included genocide and complicity in genocide, was dropped to one, participation in a joint criminal enterprise (“JCE”) of “persecutions.” Babić had originally faced five counts, which fell to one count, co-participation in a JCE of “persecutions.”<sup>19</sup> Both expressed remorse for their wartime conduct.

Both leaders agreed in principle to cooperate with the Tribunal in further investigations, though here their destinies diverge: Plavšić cooperated with the Tribunal only once, testifying against Stakić under court order and while awaiting the Trial Chamber’s sentence against her. She steadfastly refused to testify, for example, against Slobodan Milošević. Babić, in contrast, cooperated fully and extraordinarily with the Tribunal, offering the Tribunal 1200 pages of voluntary testimony (the testimony upon which he was himself finally indicted) and testifying in three other cases.<sup>20</sup>

Plavšić’s sentencing hearing in 2003, where she publicly pleaded guilty before the ICTY Trial Chamber and was sentenced, was a three-day affair. Several world dignitaries – Madeleine Albright, Elie Wiesel, Carl Bildt, Alex Boraine – joined the witness roster and made statements, many of which situated the importance of Plavšić’s admission of guilt as a question of reconciliation in the former Yugoslavia. The Prosecution celebrated Plavšić’s “journey”<sup>21</sup> from a hard-line Serb nationalist to a supporter of the Dayton Peace Accords working towards the ICTY’s own goals in the former Yugoslavia. In exchange for her plea of guilt to the charge of “persecutions,” as well as her agreement to cooperate with the Tribunal, the OTP dropped seven counts against her, including genocide, and recommended a sentence of between 15 – 25 years.<sup>22</sup> The Tribunal sentenced her to 11 years.

Only two years into her sentence, however, Plavšić began publicly renouncing her plea of guilt and her statement of remorse. Although the ICTY prosecutor argued that such abdication should put Plavšić “in violation of her plea,” (Del Ponte 2007: 150) ICTY judges refused to permit the Prosecutor to bring charges.<sup>23</sup> In 2009, with two-thirds of her sentence served, ICTY Chambers permitted Plavšić’s early release,<sup>24</sup> with a majority of the court finding that she had demonstrated “sufficient

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<sup>18</sup> See Chapter Four.

<sup>19</sup> The OTP plea agreement initially charged Babić with aiding and abetting a joint criminal enterprise; the Trial Chamber rejected this, however, and pushed the OTP to charge co-perpetration instead, which the OTP did.

<sup>20</sup> Milošević, Krajišnik, and Martić; at the time of his death, he was scheduled to testify in further cases as well.

<sup>21</sup> Plavšić Sentencing Hearing Transcript 636:19 – 20.

<sup>22</sup> The Defense argued that given Plavšić’s age and life expectancy, any sentence above 8 years would be a “life sentence.” The Tribunal formally rejected this argument.

<sup>23</sup> Plavšić’s plea agreement dropped seven counts “without prejudice” which means, in legal terms, that a violation of the plea agreement could permit the prosecutor to bring these charges anew.

<sup>24</sup> Early release after two-thirds of a sentence is served is typical in European jurisprudence, and habitual for those sentenced by the ICTY.



reconciliation,” and making no mention of her public recants of her ICTY testimony nor of her refusal to voluntarily cooperate with the ICTY in other cases.<sup>25</sup>

Babić’s sentencing hearing in 2004 was a vastly different affair. It took only one and a half days, and only two joint witnesses for the OTP and the defense appeared, both of whom were citizens of the former Yugoslavia and neither of whom enjoyed international recognition or renown. The transcript betrays troubling professional lapses, so serious that they could perhaps be said to rise to the level of a lack of effective representation on the part of Babić’s lawyers.<sup>26</sup> The tone of Plavšić’s hearing can be described as a mixture of somber and celebratory, with accolades and respect afforded the defendant; the tone of Babić’s hearing is much more aggressive. Despite the Prosecutor’s recommendation of a sentence of less than 11 years,<sup>27</sup> the Tribunal sentenced Babić to 13 years. Babić, in witness protection and jailed at an undisclosed location, his family in witness protection as well (due to his cooperation with the Tribunal), went on to voluntarily testify for 10 days against Slobodan Milošević. For the first eight days Babić testified as a protected witness, but during the last two days of his testimony he chose to be publicly identified. He had been returned to The Hague to testify against Milan Martić in 2006 when he hanged himself in his jail cell. An investigation by ICTY authorities concluded that the death was a suicide.<sup>28</sup>

## **Plavšić before the ICTY**

On October 2, 2002, Biljana Plavšić made history by becoming the highest ranking Bosnian Serb official, as well as the first woman, to plead guilty to charges against her before the ICTY. But although Plavšić was charged with eight counts of crimes against humanity, including both genocide and complicity in genocide, she pled guilty to only one of the lesser counts against her, “persecutions.” In conjunction with her plea of guilt, the prosecution dropped the remaining seven counts. Sentenced to 11 years in prison, the 72-year-old Plavšić publicly called for other leaders to follow her example, but refused to testify against any other defendants indicted by the ICTY. After serving six years of her 11-year sentence, she was released in 2009. She now lives comfortably in Belgrade.

The indictment charges that Plavšić, “acting individually and in concert with others in a joint criminal enterprise, planned, instigated, ordered and aided and abetted persecutions of the Bosnian Muslim, Bosnian Croat and other non-Serb populations of 37 municipalities in Bosnia and Herzegovina”<sup>29</sup> during the time period between July 1, 1991 and December 30, 1992. “Persecutions” is a wide charge, and encompasses behavior that ranges across a spectrum of activities associated with

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<sup>25</sup> *Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs. Biljana Plavšić*, Case No. IT-OO-39 & 40/1-ES, September 14, 2009. The Tribunal stopped at the phrase, “sufficient reconciliation,” and did not explicate further.

<sup>26</sup> In fact, as will be discussed in more detail below, the Prosecutor made a stronger case for Babić than his own lawyers did.

<sup>27</sup> The defense concurred.

<sup>28</sup> Judge Kevin Parker, Vice President, “Report to the President: Death of Milan Babić,” June 8, 2006, The Hague.

<sup>29</sup> *Prosecutor v. Biljana Plavšić, Indictment*, Case No. IT-00-39&40/1-S (April 7, 2000; consolidated February 23, 2001; amended consolidated March 4, 2002).

violent conflict. In Plavšić's case, it included charges as varied as discrimination in hiring and property destruction to deportations, rape, and murder.<sup>30</sup>

Biljana Plavšić was a biologist on the faculty of the University of Sarajevo before she joined the Serbian Democratic Party (SDS) in July 1990. As the Serbian Representative to the joint presidency of Bosnia-Herzegovina, she participated in the politics of the Bosnian Serb separation from Bosnian politics to form "Republika Srpska" (RS) the Bosnian Serb statelet on Bosnian territory. As co-President in RS's tripartite presidency, Plavšić was in a leadership position during the most brutal episodes in Bosnia-Herzegovina's ethnic cleansing campaign, which claimed upwards of 100,000 lives.

Throughout the war, Biljana Plavšić was an unapologetic Serb nationalist who became infamous for her inflammatory rhetoric. In 1992, following a massacre by Serb paramilitaries in Bijelina, she was seen, in a widely-circulated photograph, stepping over the body of a dead civilian to kiss the notorious paramilitary leader "Arkan."<sup>31</sup> She is reported to have claimed, "There are 12 million Serbs and even if six million perish on the field of battle, there will still be six million to reap the fruits of the struggle."<sup>32</sup> She referred to Muslims as "genetically deformed material."<sup>33</sup> SRS President Vojislav Šešelj, himself a "declared Serb nationalist,"<sup>34</sup> described her as "insufferably extremist."<sup>35</sup>

Following the 1995 Bosnian Serb massacre of at least 7,000 Muslim men and boys at Srebrenica, international powers pushed through the Dayton Peace Accords. The Bosnian Serb leadership was excluded from the peace talks. At the time Dayton was signed, the OTP under Richard Goldstone had already, controversially,<sup>36</sup> indicted Radovan Karadžić, the key member of the RS tripartite presidency and a central architect of the murder and terror that characterized the war in Bosnia. Karadžić

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<sup>30</sup> The entirety of the persecutions count is laid out in the joint indictment of Plavšić and her co-president Krajišnik in paragraphs 18 and 19, attached as Appendix A to the ICTY's Judgment against Plavšić. In Plavšić's plea agreement, the elements of "persecutions" are articulated as follows:

- a. the existence of an armed conflict; b. the existence of a widespread or systematic attack directed against a civilian population; c. the accused's conduct was related to the widespread or systematic attack directed against a civilian population; d. the accused had knowledge of the wider context in which her conduct occurred; e. the accused committed acts or omissions against a victim or victim population violating a basic fundamental or human right; f. the accused intended to commit the violation; g. the accused's conduct was committed on political, racial, or religious grounds; and h. the accused's conduct was committed with an intent to discriminate. In signing the plea agreement, Plavšić acknowledged that she understood that the prosecutor was required to show these elements in order to prove the charge against her to which she was pleading guilty.

See *Prosecutor v. Biljana Plavšić, Plea Agreement of Biljana Plavšić*, Case No. IT-00-39&40/1-S, (September 30, 2002), available at: <http://www.un.org/icty/krajisnik/trialc/plea-300902e.pdf> (accessed February 20, 2013).

<sup>31</sup> See, e.g., Slavenka Drakulić, "The false repentance of Biljana Plavšić" *Eurozine*, October 23, 2009.

<sup>32</sup> "Biljana Plavšić: Serbian iron lady" *BBC News*, February 27, 2003.

<sup>33</sup> *Ibid.*

<sup>34</sup> Milošević Hearing transcript August 30, 2005 page 43373:1-2

<sup>35</sup> Milošević Hearing transcript August 30, 2005 page 43371:25 - 43373:1.

<sup>36</sup> The controversy was due to concern that "justice" would trump "peace," as there was fear that indicted RS leaders would not be incentivized to pursue peace with a potential jail sentence awaiting them.

nominated Plavšić to run for office on the SDS ticket, as he was prohibited from holding office by the Dayton Accords, and she won the 1996 election.

The Dayton Accords were universally unpopular in Bosnia. In the RS, a power struggle erupted between hardline Serb nationalists in Pale (a once sleepy village just over the hill from Sarajevo; after the war, it was re-imagined as the Serb Sarajevo that RS had lost) and those in Banja Luka (RS's principal township and Plavšić's seat of power). With the international community's assistance and even (on one occasion) police intervention, Plavšić remained in power to serve her two-year mandate. In exchange, she oversaw a program more moderate than that advocated by her former colleagues based in Pale. Although Plavšić had originally pledged not to cooperate with the ICTY, by the end of 1997 she had begun to cooperate with international actors: for example, she dismissed Ratko Mladić as Commander of Bosnian Serb forces. She also worked to implement, or at least refrained from working against, the unpopular Dayton Peace Accords and their restructuring of BiH following the war. In 1998, she lost her bid for re-election.

In 2000 the ICTY issued a sealed indictment against Plavšić and the third RS co-president (Momčilo Krajišnik), which was unsealed upon Plavšić's surrender to the ICTY on January 10, 2001.<sup>37</sup> On January 11, 2001, Plavšić appeared before the ICTY and pleaded not guilty to the charges against her. In August 2001, Plavšić was provisionally released from ICTY custody.<sup>38</sup>

On March 7, 2002, the OTP filed an amended indictment (Amended Consolidated Indictment) charging Plavšić with "commission" (in the form of joint criminal enterprise) of genocide, crimes against humanity, and violations of the laws and customs of war.<sup>39</sup> In support of these charges the Amended Consolidated Indictment lists more than 100 incidents, with more than 50,000 people killed, 830 villages destroyed, and thousands of non-Serbs expelled from their homes during this period.<sup>40</sup>

On September 30, 2002, as the OTP was gearing up to begin her trial, Plavšić concluded a plea agreement with the OTP, appearing before the Trial Chamber October 2, 2002, to enter her change of plea to "guilty" of one count, "persecutions." In the plea agreement the OTP agreed to dismiss the remaining seven counts against Plavšić.<sup>41</sup> A five page "Factual Basis for Plea of Guilt," signed by Plavšić, the OTP, and defense counsel, accompanied Plavšić's Plea Bargain Agreement:

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<sup>37</sup> Plavšić requested, and was granted, the right to celebrate Orthodox Christmas (January 6) at home before surrendering to the ICTY.

<sup>38</sup> Except for appearing before the ICTY for her sentencing hearing in December 2002, and again under order by the Trial Chamber in the *Stakić* case to give evidence in that case, Plavšić remained outside of ICTY custody until her sentence was pronounced in February 2003. Such provisional release was quite uncommon.

<sup>39</sup> *The Prosecutor of the Tribunal Against Momčilo Krajišnik and Biljana Plavšić, Amended Consolidated Indictment*, Case No. IT-00-39 & 40-PT, March 7, 2002.

<sup>40</sup> Amended Consolidated Indictment supra n 39, Schedules A, B, C, and D; see also Plavšić Sentencing Judgment paras 41-43.

<sup>41</sup> *Prosecutor v. Biljana Plavšić, Plea Agreement*, Case No. IT-00-39 & 40-PT (September 3, 2002) paras 3, 9. The Trial Chamber granted the motion to dismiss on December 20, 2002.

Mrs. Plavšić supported the objective of ethnic separation by force in various ways, including among other things, the following: she served as co-President and on the collective and expanded collective Presidencies, and thereby supported and maintained the Bosnian Serb government and military bodies at the local, municipal, regional and national levels through which the objective of ethnic separation by force was implemented; she encouraged participation in it by making public pronouncements that force was justified because certain territories within BH were Serbian by right and because Serbs should fear that Bosnian Muslims and Bosnian Croats would commit genocide against them; she invited and encouraged paramilitary forces from Serbia to assist Bosnian Serb forces in effecting the objective of ethnic separation by force; although not a representative of the Bosnian Serb republic at international peace conferences to resolve the conflict, she was delegated the responsibility of interacting with representatives of the international community on various issues on behalf of the Bosnian Serb republic.

The Bosnian Serb leadership, including Mrs. Plavšić, knew that the predominantly ethnically Serb-based armed forces fighting on the side of Bosnian Serbs... were far more powerful militarily than the non-Serbs. Radovan Karadžić publicly warned Muslims that they would be destroyed if Muslims sought a sovereign and independent BH....

Mrs. Plavšić participated in the cover up of ... crimes by making public statements of denial for which she had no support. When she subsequently had reason to know that these denials were in fact untrue, she did not recant or correct them.<sup>42</sup>

On the ICTY website, the factual basis is available only in English. The Amended Consolidated Indictment, containing eight counts against Plavšić and Schedules A-D, is by contrast easily available in Bosnian-Croatian-Serbian (BCS), as is the Judgment.<sup>43</sup> The result of the above is that, at least for a BCS-speaking audience, the materials regarding Plavšić suggest that she admitted her guilt for crimes listed in Schedules A-D of the Amended Consolidated Indictment and charged as genocide, crimes against humanity and violations of the laws and customs of war.

During the period December 16-18, 2002, the ICTY held a hearing to determine Plavšić's sentence. A sentencing hearing following a plea of guilt is designed to permit the Trial Chamber to deliberate on the appropriate sentence by considering the charges against the accused as well as any mitigating and aggravating factors. Witnesses at Plavšić's sentencing hearing spoke to these categories, and added another: the important reconciliatory potential of Plavšić's admission (and with it, the important reconciliatory role played by the ICTY itself). Problematically, the Judgment in *Plavšić* appraised its consideration of the ICTY's potential as a reconciliatory organ as an element of the content of Plavšić's mitigating conduct. The OTP proposed a sentence in the range of 15-25 years, and called four witnesses to testify to the gravity of the suffering wrought by SDS leadership policies. The defense focused on Plavšić's advanced age (she was 72 at the time of the hearing) and argued

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<sup>42</sup> *Prosecutor v. Biljana Plavšić, Factual Basis for Plea of Guilt*, Case No. IT-00-39&40/1-S (September 30, 2002) paras 17-20 ("*Plavšić Factual Basis for Plea of Guilt*").

<sup>43</sup> See <http://www.icty.org/case/plavsic/4>, choose Serbo-Croatian.

that given her life expectancy, imprisonment for more than eight years would constitute a life sentence. Defense counsel called three witnesses, demonstrating Plavšić's work towards peace following the war. Finally, Madeleine Albright and Alex Borraigne appeared as joint witnesses for the OTP and Defense.

### **Mitigating and aggravating factors: the legal categories recognized by the Court**

Because sentencing itself is only very broadly defined by the ICTY Statute, the mitigating and aggravating factors recognized by the Tribunal form an important element of sentencing. Only one mitigating factor is mentioned explicitly in the ICTY Rules of Procedure and Evidence: "substantial cooperation" with the prosecution.<sup>44</sup>

The four prosecution witnesses addressed both aggravating and mitigating circumstances. The OTP sought to demonstrate that Plavšić's leadership position, the victims' vulnerability, and the depravity of the crimes committed should all be accepted as aggravating factors. To illustrate the seriousness of the "persecutions" charge, the first witness, a representative of the Bosnia-Herzegovina State Commission on War Crimes, detailed gruesome stories of forced expulsions, the use of rape to "tarnish[] family honour"<sup>45</sup> and the fact of tens of thousands of deaths. A former camp inmate spoke to the horrific conditions in detention facilities, of which there were 408 in 37 municipalities.<sup>46</sup> A psychiatrist who works with traumatized victims testified to the impact of the war specifically on women and children.<sup>47</sup> Finally, Holocaust survivor Elie Wiesel appeared by video link, read a prepared statement to the tribunal and was not subjected to questioning.<sup>48</sup>

As mitigating circumstances, the OTP stressed Plavšić's guilty plea, remorse, voluntary surrender, post-conflict conduct, previous good character, and age; the Defense joined the OTP in these arguments. Milorad Dodik, recognized at the time as a "reformist politician" (but who has since gone on to support strikingly Serb-nationalist viewpoints), Carl Bildt (High Representative of Bosnia-Herzegovina), and Robert Frowick (OSCE) all spoke to Plavšić's postwar conduct and her support of the Dayton Accords. Additionally, as noted above, the defense stressed that any sentence longer than eight years would constitute life imprisonment based on Plavšić's age.

Finally, two individuals of world note spoke directly to a third judicial category at stake, the role of Plavšić as symbol. These two witnesses were Madeleine Albright, former U.S. Secretary of State, and Dr. Alex Borraigne, Deputy Chairperson of the Truth and Reconciliation Commission in South Africa and founding president of the International Center for Transitional Justice in New York. The Judgment also

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<sup>44</sup> ICTY Rules of Procedure, Rule 101 (B) (ii).

<sup>45</sup> Plavšić Sentencing Hearing Transcript 395:24.

<sup>46</sup> *Plavšić* Sentencing Hearing Transcript 417:11.

<sup>47</sup> The court, somewhat unconvincingly, requested that she "put aside the war trauma victims that you have been treating who were traumatized from January 1993 onwards and focus [her] testimony on those victims who were traumatized in 1992." *Ibid* [440:16].

<sup>48</sup> The Sentencing Judgment disguised the nature of Professor Wiesel's intervention, where his intervention was referred to as evidence and as a "joint witness for the parties." *Plavšić* Sentencing Judgment para 50, 69.

quoted extensively from the testimony of Dr. Borraine,<sup>49</sup> who explicated four areas of significance related to Plavšić's plea of guilt. Because the Tribunal relied on this testimony to make a judicial finding regarding reconciliation, it is worth quoting it in full:

Firstly, as the plea of guilty was offered by a Serb nationalist and former political leader, Mrs. Plavšić's confession sends out a crucial message about the true criminal nature of the enterprise in which she was involved; secondly, by surrendering and pleading guilty, Mrs. Plavšić is also sending a powerful message about the legitimacy of the International Tribunal and its functions; thirdly, Mrs. Plavšić's apology for her actions and her call on other leaders to examine their own conduct is of particular importance; and fourthly, the confession of guilt and acceptance of responsibility by Mrs. Plavšić may demonstrate to the victims of the persecutory campaign that someone has acknowledged their personal suffering.<sup>50</sup>

Based on Dr. Borraine's testimony, as well as that of another prosecution witnesses, who categorized Plavšić's admission as "an extremely courageous, brave, and important gesture,"<sup>51</sup> the Tribunal determined that "the guilty plea of Mrs. Plavšić and her acknowledgement of responsibility, particularly in the light of her former position as President of Republika Srpska, should promote reconciliation in Bosnia and Herzegovina and the region as a whole."<sup>52</sup> Based on its determination of the reconciliatory impact of Plavšić's admission, the Trial Chamber determined to give Plavšić's plea "significant weight" as a mitigating factor.

For the layman, it is perhaps the category of "cooperation" that most distinguishes Plavšić's actions from those of Milan Babić, discussed further below. Plavšić cooperated only very begrudgingly with the ICTY. Aside from her own plea, for example, she assisted the OTP on only one other occasion, and that by court order, while awaiting her sentence.<sup>53</sup> It is not surprising that such a witness, one whose willingness to serve the Tribunal in that capacity derived specifically from her knowledge that this willingness had had the potential to reduce her own sentence, might refuse to serve the Tribunal once such a reduced sentence had been passed.

Plavšić's rationale and behavior is consistent; the ICTY's interpretation is not. While noting that "'substantial' co-operation with the Prosecutor is the only mitigating circumstance that is expressly mentioned in the Rules,"<sup>54</sup> the Judgment goes on to find that since *not* cooperating is not an aggravating circumstance, "the accused's unwillingness to give evidence is not a factor to be taken into account in determining sentence."<sup>55</sup> While such categories remain legally distinct, they fly in the

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<sup>49</sup> *Plavšić Sentencing Judgment* para 75. The Judgment includes a description of the ICTJ's work, fn 131.

<sup>50</sup> *Plavšić Sentencing Judgment* para 76.

<sup>51</sup> *Plavšić Sentencing Judgment* para 78.

<sup>52</sup> *Plavšić Sentencing Judgment* para 80.

<sup>53</sup> *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, "Order Summoning Dr. Biljana Plavšić Propio Motu to Appear as a Witness of the Trial Chamber Pursuant to Rule 98," (January 9, 2003).

<sup>54</sup> *Plavšić Sentencing Judgment* para 63.

<sup>55</sup> *Plavšić Sentencing Judgment* para 64.

face of common sense understanding, particularly when paired with the central fiction advanced by the Judgment, the marriage of Plavšić's "remorse" and the ICTY's important role as a reconciliatory mechanism.

### **"Reading" Plavšić: remorseful?**

It is precisely in the area of remorse that the Trial Chamber makes the leap from individual circumstance – that of Plavšić – to the value of the ICTY as an institution. Considering the mitigating circumstances in favor of reducing Plavšić's sentence, the Trial Chamber states:

Indeed, it may be argued that by her guilty plea, Mrs. Plavšić had already demonstrated remorse.... However, there is a further and significant circumstance to be considered, namely the role of the guilty plea of the accused in establishing the truth in relation to the crimes and furthering reconciliation in the former Yugoslavia.<sup>56</sup>

With this brushstroke, the Trial Chamber connects Plavšić's modest step – a guilty plea on the eve of trial for a substantial charge reduction – with the process of social reconstruction in which the ICTY is implicated.

Despite the Prosecution's insistence that Plavšić's expression of remorse was "full[] and unconditional[],"<sup>57</sup> it is hard to read much remorse in Plavšić's address to the Tribunal. Plavšić's statement reads as only thinly veiled nationalism, including both self-pity and self-aggrandizement. Plavšić's four-minute address makes more references to "Serb victims" than to other victims and repeatedly invokes the specter of the "Serbian character." Plavšić begins by saying that she originally appeared before the Tribunal, "to spare my people."<sup>58</sup> She acknowledges a "responsibility" for suffering that is "mine and mine alone. It does not extend to other leaders who have a right to defend themselves. It certainly should not extend to our Serbian people, who have already paid a terrible price for our leadership."<sup>59</sup> While admitting she oversaw the persecutions of thousands of innocent victims, she continually refers to these acts in terms of their capacity to "soil[] the character"<sup>60</sup> of the Serbian people. She spends more than half of her time explaining the valor of this character and the harm it currently suffers. Even Plavšić's oft-cited conclusion is more accurately read as nationalist than reconciliatory. She concludes:

I will, however, make one appeal, and that is to the Tribunal itself, the Judges, Prosecutors, investigators; that you do all within your power to bring justice to all sides. In doing this, you may be able to accomplish the mission for which this Tribunal has been created.<sup>61</sup>

While it is possible to read this as a plea for objective justice, this statement is better understood as a political response to a nationalist position of Serb victimization, with

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<sup>56</sup> *Plavšić Sentencing Judgment* para 73.

<sup>57</sup> *Plavšić Sentencing Judgment* para 70.

<sup>58</sup> *Plavšić Sentencing Hearing* (December 18, 2002) Tr. 609:8.

<sup>59</sup> *Plavšić Sentencing Hearing* (December 18, 2002) Tr. 610:17 – 20.

<sup>60</sup> *Plavšić Sentencing Hearing* (December 18, 2002) Tr. 610: 21.

<sup>61</sup> *Plavšić Sentencing Hearing* (December 18, 2002) Tr. 612: 17 – 20.

a heightened sense of persecution surrounding Serb “over-representation” before the ICTY.

The Trial Chamber identifies a reconciliatory “theme” in Plavšić’s interactions with the ICTY, and cites her written statement in support of her change of plea in support of this. Plavšić’s written statement concludes: “To achieve any reconciliation or lasting peace in BH, serious violations of humanitarian law during the war must be acknowledged by those who bear responsibility – regardless of their ethnic group. This acknowledgment is an essential first step.” While such language does seem reconciliatory, it is singular in Plavšić’s discourse, and its source documentation is not publicly available.<sup>62</sup>

Plavšić’s plea is significant less for its remorse than for its admissions of fact. Such admissions are not insubstantial: given the relentless nationalist discourse within the RS at the time, it is a significant move for Plavšić to have admitted “I have now come to the belief and accept the fact that many thousands of innocent people were the victims of an organised, systematic effort to remove Muslims and Croats from the territory claimed by Serbs.”<sup>63</sup> Such admissions are powerful and important, and arguably form a basis for social healing and increased solidarity.<sup>64</sup> Yet such an admission is not *remorse*. Plavšić reserves her regret, in her address, for the war’s “innocent victims,” which in her own terms include the Serbian people, the Serbian character, as well as certain Croats and Muslims. Indeed, she herself emerges as one of the war’s innocent victims: “Although I was repeatedly informed of allegations of cruel and inhuman conduct against non-Serbs, I refused to accept them or even to investigate.... I remained secure in my belief that Serbs were not capable of such acts.”<sup>65</sup>

Two years into her sentence, Plavšić began to publicly renounce her plea of guilt and her statement of remorse. Although ICTY Prosecutor Carla Del Ponte, who oversaw Plavšić’s plea agreement, argued that such abdication should put Plavšić in violation of her plea, (Del Ponte 2007) ICTY judges refused to permit the Prosecutor to bring charges.<sup>66</sup> In 2009, with two-thirds of her sentence served, ICTY Chambers ruled on Plavšić’s early release,<sup>67</sup> with a majority of the court finding that she had demonstrated sufficient reconciliation to permit release, and making no mention of her public recants of her ICTY testimony nor of her refusal to voluntarily cooperate with the ICTY in other cases.

That Plavšić would recant the “remorse” of this statement within a few years of issuing it is much less puzzling than the ICTY’s institutional treatment of the case. In her memoirs, Prosecutor Carla Del Ponte first states that she was “taken in” by the “apologetic” Plavšić, and then nearly in the same breath recounts that upon meeting

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<sup>62</sup> This statement is quoted in the *Plavšić* Sentencing Judgment para 74, but otherwise publicly unavailable.

<sup>63</sup> *Plavšić* Sentencing Hearing Transcript (December 18, 2002) 609:11- 14.

<sup>64</sup> *Nikolić* Sentencing Judgment.

<sup>65</sup> *Plavšić* Sentencing Hearing Transcript (December 18, 2002) 610:5 – 12.

<sup>66</sup> Plavšić’s plea agreement dropped seven counts “without prejudice,” which means that a violation of the plea agreement could permit the prosecutor to bring these charges again without running afoul of “double jeopardy” provisions that do not permit multiple judicial dispositions of the same case.

<sup>67</sup> *Plavšić* Early Release Decision.



the “tweed-dressed” Plavšić in her office and she found her determined, unflinching nationalism nauseating. (Del Ponte 2007:150) At the sentencing hearing, the Prosecution maintained that Plavšić had expressed her remorse, “fully and unconditionally.”<sup>68</sup> While Plavšić’s guilty plea allowed the Trial Chamber to celebrate the importance of its own work, which might indeed serve some real political purpose for the Tribunal, this cannot explain why the Trial Chamber agreed to release Plavšić early in light of her recantation of her celebrated remorse.

The prosecution and defense attorneys, the witnesses called at Plavšić’s sentencing hearing, and the ICTY itself in its Judgment – all advanced the idea that Plavšić was remorseful and reformed, and further, that it was precisely such reform that is necessary for peace and democracy to obtain in Bosnia. The ICTY Prosecutor Carla Del Ponte went so far as to describe Plavšić’s transformation from rabid pro-Serb nationalist to the point-person for the international community in Bosnia as a “journey” and a “trajectory.” In her closing arguments before the ICTY, Del Ponte stated that Plavšić’s guilty plea did not surprise her, because it was “nothing but a further step in [Plavšić’s] development since 1995, basically starting with the Dayton Accords.”<sup>69</sup> The analogy is simple: whither the most fanatic Serb nationalist, the people, and country, will follow. In Del Ponte’s vision, the Dayton Accords’ transformative power, when combined with Plavšić’s admission of guilt and remorse, will bring both truth and reconciliation to Bosnia.

### **Sincere remorse: the lost opportunity of Milan Babić**

Like Biljana Plavšić, Milan Babić, “Župan,”<sup>70</sup> was a part-time politician rocketed to power during, and by events connected with, the dissolution of the former Yugoslavia. A dentist by training, Babić became a central figure in the SDS party in Croatia in February 1990.<sup>71</sup> Following Croatia’s declaration of secession from Yugoslavia in February 1991, Babić’s party advocated the creation of an independent Serb state in the territory known as Krajina. On April 30, 1991 Babić was elected President of the Executive Council of SAO Krajina.<sup>72</sup>

Beginning in the summer of 1991, villages and communities within SAO Krajina were attacked by Yugoslav Army (JNA) units, local Serb Territorial Defense (TO) units, TO units from Serbia and Montenegro, local police, police from Serbia and Montenegro, and paramilitary groups, all with the objective of forcing the non-Serb members of the population to flee the region. Some 200 civilians were killed in these offensives. Some of these deaths are attributed to targeted executions, in which groups of civilians were murdered and buried in mass graves. Several hundred civilians were imprisoned in makeshift facilities in terrible conditions. Homes, churches, and cultural sites were deliberately destroyed. On December 19, 1991, SAO Krajina declared itself the Republic of Serbian Krajina (RSK), with Babić as president of this entity.<sup>73</sup> Although Babić signed a decision on August 1, 1990 making him *de*

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<sup>68</sup> *Plavšić Sentencing Judgment* para 70.

<sup>69</sup> *Plavšić Sentencing Hearing Transcript* 636:19 – 20.

<sup>70</sup> The term refers to an administrative post in the Croatian state, “prefect.” It was used in Babić’s case to mean “traitor,” as explained in the discussion to follow.

<sup>71</sup> *Babić Sentencing Judgment* para 18.

<sup>72</sup> *Babić Sentencing Judgment* para 21.

<sup>73</sup> *Babić Sentencing Judgment* para 23.

*jure* commander of SAO Krajina's armed forces, it is undisputed that actual control of armed forces (some of whom went on to commit serious crimes against civilian populations) remained throughout this time with Milan Martić and others. Babić served in this position until he broke with Milošević in early 1992.<sup>74</sup> He spent the remainder of the war politically sidelined, although still officially occupying minor political positions, and fled Krajina in the path of Operation Storm in 1995 along with 200,000 others,<sup>75</sup> eventually settling in Belgrade.

Babić's story intersected with that of the ICTY in October 2001, after Babić learned that he had been named as member of a joint criminal enterprise in the Milošević indictment. From his home in Belgrade, Babić reported to representatives of the ICTY and made himself available for questioning. By the Prosecutor's own admission, Babić's availability was "extensive[]"<sup>76</sup> and he cooperated with the OTP over a period of several months. During this time the OTP amassed a documentary trove of more than 1,200 interview transcript pages containing descriptions of the events, players, and actions surrounding the Croatian Serb take-over of the Krajina territory in Croatia, as well as specific information as to the ways in which such a take-over was effectuated, included details about the support of both Milošević and the JNA. Babić made such statements while fully admitting his own role and his own guilt, and without bartering for any form of immunity.

In November 2002, Babić testified for 12 days at the *Milošević* trial. At first, he made his testimony as a protected witness, but during the last two days of his testimony he was publicly identified, despite the risk of danger this represented to himself and his family, stating that he chose to do so for the benefit that his public testimony might bring for the former Yugoslavia. In November 2003 the OTP indicted Babić on charges of aiding and abetting a joint criminal enterprise, the "goal of which was the forcible permanent removal of the majority of Croat and other non-Serb populations from approximately one-third of Croatia in order to transform that territory into a Serb-dominated state through the commission of crimes."<sup>77</sup> In response to the plea agreement submitted on January 12, 2004, the Trial Chamber suggested that the legal basis for the indictment would more accurately be "co-

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<sup>74</sup> In the relevant literature there is a mixed assessment of Babić's role in the war and his character. The so-called "log revolution" in Knin (SAO Krajina barred access to its territory by blocking all major thoroughfares with logs) represents the commencement of violence in the dissolution of Yugoslavia, and Babić played a central role in this event. Journalist Misha Glenny (1992: 17) puts Babić's "badness" on par with Milošević's. Silber and Little (1997) are more agnostic on the subject of Babić's character, and present him as manipulated, bullied, and finally discarded, by his patron Milošević. The ICTY's sentencing judgment of Babić does not shed light on how to interpret Babić's actions or character.

<sup>75</sup> The numbers are disputed. The BBC reports that 200,000 fled. (Matt Prodger, "Evicted Serbs remember Storm" *BBC News* (August 5, 2005)) Croatia has put the number at 90,000, the United Nations at between 150-200,000, and Serbian sources at 250,000. Carl Bildt, the European Union Special Envoy to the Former Yugoslavia, called it "the most efficient ethnic cleansing we've seen in the Balkans." (Quoted in Pearl 2002: 224)

<sup>76</sup> *Prosecutor v. Milan Babić, Sentencing Hearing*, Case No. IT-03-72, (April 2, 2004) Tr. 78:20 ("Babić Sentencing Hearing").

<sup>77</sup> *Prosecutor v. Milan Babić, Indictment*, Case No. IT-03-72, (November 6, 2003) para 5.

perpetrator” of a JCE, and not “aiding and abetting,”<sup>78</sup> and on January 27, 2004, Milan Babić pleaded guilty to this more severe charge, as amended.

### **Babić’s sentencing hearing**

The Trial Chamber considered the available aggravating and mitigating evidence in relation to Babić’s sentence for one and a half days in April 2004. In contrast to the list of luminaries who graced Biljana Plavšić’s sentencing hearing, the parties called only two witnesses: Mladen Lončar, a Croatian psychiatrist, and Drago Kovačević, a social worker and local Krajina politician who had lived through the events of 1990-1995 with Babić. A review of the trial transcript accompanying Babić’s hearing reveals a confused bench, inept and unprofessional defense counsel, and a somewhat conflicted Prosecutor. The upshot of the above was that Babić was sentenced, against Prosecutorial recommendation, to 13 years’ imprisonment. He committed suicide three years later while testifying for the OTP for the fourth time during the trial of Milan Martić.

The first witness, Dr. Lončar, was led by the Prosecutor and testified as an expert witness regarding the psychology of war trauma and reconciliation. A certified psychologist heading a Croatian trauma clinic, Dr. Lončar was fully qualified to give testimony on the damaging psychological impact of war. Yet in addition to his testimony concerning wartime trauma, the report he prepared for the Tribunal contained several facts related to wartime statistics – for example, increased death rates and figures for persons directly impacted by war – that were both unsupported by scientific data and outside his area of expertise. By Dr. Lončar’s own admission, some of his expressed opinions were based loosely on his own interpersonal “exchanges”<sup>79</sup> within the field since “no official statistics... official record-taking or research”<sup>80</sup> exists in those areas. In a similar vein, based on what amounted to personal impressions, Dr. Lončar testified to the fact that Babić’s testimony had had a positive impact on Croat victims because “[t]he perpetrator finally was given a first and a last name, so the guilt has been individualized.”<sup>81</sup> Even more problematically, Dr. Lončar made similar statements regarding the effect of Babić’s guilty plea on ethnic Serbs:

[T]here was a certain feeling of relief [among Serbs in Croatia]. The admission of guilt of Mr. Babić and the message that it sent was that we should focus on universal human emotions and treat it as such. This led to the fact that the Serbs do not feel a collective guilt now but, rather, this guilt has been individualized and attributed to a person.”<sup>82</sup>

This “expert opinion” was given based on what Dr. Lončar had earlier qualified as possibly 30 exchanges with non-Croat (and not necessarily Serb) users of his Center. While the bench made queries into the witness’s data – even going so far as to ask for

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<sup>78</sup> See Chapter Four regarding distinctions between these two categories.

<sup>79</sup> *Babić Sentencing Hearing* (April 1, 2004) Tr. 112:14.

<sup>80</sup> *Babić Sentencing Hearing* (April 1, 2004) Tr. 112:12-14.

<sup>81</sup> *Babić Sentencing Hearing* (April 1, 2004) Tr. 110:23-25.

<sup>82</sup> *Babić Sentencing Hearing* (April 1, 2004) Tr. 112:17-21.

a reading list at one point<sup>83</sup> – the bench seemed nonetheless satisfied with the content of Dr. Lončar’s expert testimony.<sup>84</sup>

The examination of the second witness, Drago Kovačević, was markedly different in tone and content from that of Dr. Lončar. Kovačević, a resident of Belgrade, is active in humanitarian organizations and works closely with refugees. He first met Babić in the early 1980s. Their lives intersected more closely when they both became members of the local parliament after the 1990 elections, Babić representing (the ethno-nationalist) SDS party and Kovačević representing a minority multi-ethnic party.<sup>85</sup>

The Defense strategy in calling Kovačević appears to have been designed to demonstrate that Babić was a reasonable and temperate man, who was temporarily carried away by events and was unaware of the gravest humanitarian violations in the area, and who, after initially endorsing ethno-nationalist beliefs later, in his career worked to facilitate a political solution.<sup>86</sup> The testimony faltered, however, as Kovačević attempted to provide nuanced, articulate answers to questions designed to produce facile historical recitations. It nearly broke down over testimony regarding Babić’s capacity to treat Serb propaganda with skepticism, since the testimony itself was overly focused on issues concerning Croatian television, not just its availability during the early war years but also the differences between the propaganda broadcast by the Croatian media and that by the Serbian media.<sup>87</sup> Babić’s guilty plea nearly collapsed, in fact, over the question of whether or not sufficient media information had existed to inform him of civilian murders at the hands of Krajina forces in 1991; the collapse was averted by the Prosecutor who noted that Babić’s liability under “JCE 3”<sup>88</sup> meant that the defendant need only have knowledge of the *likelihood* of violence to fix criminal liability.

In his testimony, the witness Kovačević tried repeatedly to detail the political environment of fear and propaganda under which Serbs in Croatia lived and the ways in which this made all information suspect for them; he tried to provide detailed information as to which officials (and from which entity) were present at which meetings; he began to give a description of the murder of Babić’s father-in-law (undoubtedly by forces loyal to Croatian parties; the village was burned down and Babić’s own mother narrowly escaped) in Vrlika in 1991; and he tried to recount an attempt on Babić’s life by troops loyal to ethnic Serb interests. During all these

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<sup>83</sup> *Babić* Sentencing Hearing (April 1, 2004) Tr. 118.

<sup>84</sup> There is a sharp distinction made at law between “fact” witnesses, who testify to what they personally experienced, and “expert” witnesses, who contextualize information based on their area of expertise. In Dr. Lončar’s case, the Tribunal seems not only to have blurred these categories but also to have asked the expert witness to opine on matters outside his expertise.

<sup>85</sup> *Babić* Sentencing Hearing (April 1, 2004) Tr. 132.

<sup>86</sup> This reading is reinforced by Defense counsel’s attempt to induce precisely this testimony from Dr. Lovcar, *Babić* Sentencing Hearing (April 1, 2004) Tr. 123-124.

<sup>87</sup> See Gagnon 2004 (regarding the use of local media as a political tool); Milošević 1997 (regarding content and result of media propaganda). During the examination, the Prosecution established that Croatian television was available to Babić in 1991, because the witness Kovačević had had access to it (this access was no longer possible after lines were cut and television stations were disabled beginning in 1993). *Babić* Sentencing Hearing (April 1, 2004)

<sup>88</sup> See Chapter Four regarding JCE.

explanations he was repeatedly interrupted, scolded, and redirected, either by counsel or by the presiding judge, for giving “non-responsive” answers.

An examination of Kovačević’s testimony regarding the attempt on Babić’s life is instructive in this regard. In 1992, after Babić had broken with Milošević, he was attacked in his home by Krajina police while meeting with SDS party members, and was badly beaten and hospitalized as a result.<sup>89</sup> Kovačević testified that the attackers “shouted insults at [Babić],” and made specific mention of one particular insult, a word which was initially translated as “prefect.”<sup>90</sup> Distracted by Kovačević’s “hearsay”<sup>91</sup> testimony, Judge Orić shut down this line of questioning as “really entering the realm of speculation.”<sup>92</sup> What was nearly lost in the fracas was the actual meaning of the insult shouted at Babić. The word in question was originally translated as “prefect,” which an overwhelmed translator later replaced with the original BCS word, “župan,” and which was finally paraphrased by Defense counsel, in an aside, as “traitor.” It was only the following day, however, that the witness was invited by the bench to revisit the term, at which point Kovačević insisted on explaining the significance of the term. He went on to explain that the term referred to the head of an administrative territory in Croatia.<sup>93</sup> Thus this insult, when directed at Babić, had implied that Babić was a stooge, a Croatian stand-in, and a traitor to the Serb cause. Kovačević went on to testify that this term was used in pamphlets distributed criticizing Babić, and that Kovačević had personally heard it used, both during negotiations between political factions, and by Biljana Plavšić.

The resolution of the “Župan” confusion represents a moment where judicial frustration was ultimately overcome, but such a moment was the exception and not the rule. Unfortunately, Kovačević’s testimony regarding the ways in which Babić worked towards finding a political solution with Croatia after barricades were erected in August 1990, as well as his renunciation of nationalist politics and violence, all of which could have augmented arguments in favor of mitigating his sentence, was incomplete and truncated by the bench and counsel. Likewise, Kovačević’s attempts to describe his own political experience were also shut down.

Impatience – if not worse – on the part of the judges and the defense worked to obscure an interpretation of Babić’s story that emerged in bits and blurbs from Kovačević’s testimony, recitations of Babić’s interviews with the OTP, and the Prosecution’s lengthy addresses to the Tribunal. This story, which had the capacity to give satisfactory answers to the Defense’s central question, namely what had

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<sup>89</sup> *Babić Sentencing Hearing* (April 1, 2004) Tr. 150:17; *see also* Little & Silber 1997.

<sup>90</sup> *Babić Sentencing Hearing* (April 1, 2004) Tr. 150:21-22.

<sup>91</sup> Kovačević was testifying to exchanges he had not personally witnessed. However, U.S. rules of evidence do not apply at the ICTY, and hearsay is admissible, as Judge Orić noted in the very same breath. Judge Orić stated: “[W]hat words were exactly used by the attackers if the witness has not been there, of course, is hearsay. I’m not saying hearsay is not admissible in the Tribunal.” *Babić Sentencing Hearing* (April 1, 2004) Tr. 151:5-7.

<sup>92</sup> *Babić Sentencing Hearing* (April 1, 2004) Tr. 148:11.

<sup>93</sup> “The word Zupan, [sic] under the circumstances, meant traitor, a traitor of national interest because its meaning derives from the fact that the Republic of Croatia determined its territorial organizations by establishing counties as administrative units. And a Zupan [sic] or a prefect is somebody who is the head of this administrative unit in Croatia.” *Babić Sentencing Hearing* (April 2, 2004) Tr. 181:24 – 182:4.

“change[d]” Babić “from a moderate man into a nationalist,”<sup>94</sup> depicted an amateur politician swept up in nationalist rhetoric, operating for a nationalist party during times of violent upheaval, who worked for a party advocating nationalist solutions with peripheral violence but who frequently rejected instances of such violence himself.

In this respect, the most damning testimony against Babić seems to have come from Babić himself. During the lengthy interviews in 2003 and 2004 that preceded his indictment, Babić told the OTP that he remained president of RSK, even while aware that nationalist politics was likely to have claimed civilian victims, partly because he had become an “ethno-nationalist” and partly out of vanity, because he enjoyed his position of power. Peter Galbraith’s testimony from the Milošević trial, that Babić was intimidated by Milošević and Martić, seems also to have only worked against him, allowing the Tribunal to find him an important co-perpetrator in the JCE. Galbraith’s further testimony regarding Babić’s work towards a peaceful political solution was largely overlooked. In addition, even though he had received death threats and was at odds with the Milošević machine, Babić nevertheless remained in politics in the RSK in a reduced capacity, even after being driven out of the presidency by Milošević’s proclamation that he was a traitor. The fact that he remained in politics, in this reduced capacity, also worked against him in the eyes of the ICTY Sentencing Chamber.

### **The sentence**

In its June 2004 decision, a unanimous Trial Chamber sentenced Babić to 13 years’ imprisonment. The Tribunal rejected the OTP’s and Defense’s joint submission that Babić’s participation in the JCE was limited. While the Tribunal accepted that Babić was not “the prime mover in the campaign of prosecutions,”<sup>95</sup> it did not accept that Babić was “not crucial to the functioning of the JCE.”

Sentencing policy before the ICTY, while notoriously unscientific,<sup>96</sup> permits the inclusion of aggravating and mitigating factors in determining the sentence. The Prosecution had suggested a sentence of less than 11 years, citing Babić’s extraordinary cooperation and sincere remorse. The Tribunal found that Babić’s participation, comprising financial, administrative, logistical, and political support, was significant to the JCE, and rejected as unconvincing as mitigating evidence both the suggestion that Babić was “acting out of conviction to save the Serbs in Croatia” or that “others could have played the same role.” The Tribunal did not address evidence submitted regarding the personal sacrifices Babić had made both during the war, when his life was repeatedly threatened and he was publicly deemed a traitor to the Serb nation by several politicians, including Plavšić, and after the war, when his actions required that he and his family be relocated as protected witnesses, cutting them off from their community completely. The Tribunal rejected the parties’ joint

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<sup>94</sup> *Babić* Sentencing Hearing (April 1, 2004) Tr. 136:7-8. Defense counsel asked this question twice: “There is no question but at some point Milan Babić became an extreme Serbian nationalist, and I think the question that the Trial Chamber needs to have answered was: Was he always like that...?” *Babić* Sentencing Hearing (April 1, 2004) Tr. 136:23 – 137:1

<sup>95</sup> *Babić* Sentencing Judgment para 79.

<sup>96</sup> See Chapter Three for a detailed argument that ICTY sentencing represents an aspect of Tribunal procedure that is “post rule of law.”

contention that Babić's post-conflict behavior constituted a mitigating factor, stating that it was "not satisfied that conclusive evidence was provided that Babić alleviated the suffering of victims whether immediately after the commission of the crime of persecution in SAO Krajina or after the end of the armed conflict in Croatia in 1995."<sup>97</sup>

In submitting its recommendation of a sentence of less than 11 years for Babić, the Prosecution distinguished Babić's guilty plea from most others, since most defendants plead guilty on the eve of trial, or even during trial.<sup>98</sup> The Trial Chamber noted Babić's "exceptional" testimony during the Milošević trial in 2002. In particular, the Trial Chamber found Babić's "acceptance of guilt exceptional because his admission of facts and of guilt made it likely that an indictment would be issued against him."<sup>99</sup> Despite finding that these exceptional circumstances argued for mitigation, the Trial Chamber sentenced Babić to 13 years, two years more than the sentence recommended by the Prosecutor. Although the Prosecutor had specifically referenced *Plavšić* in making its recommendation, the Trial Chamber refused to follow the *Plavšić* outcome.<sup>100</sup>

The Trial Chamber distinguished between *Babić* and *Plavšić* largely on the question of post-conflict mitigation. Referencing the Trial Chamber's finding that *Plavšić* had worked towards the success of the Dayton Agreement, the Trial Chamber determined that Babić's post-conflict activities did not have a similar reconciliatory affect. Specifically, the Trial Chamber noted that Babić engaged in activities designed to benefit Serbs rather than all groups. The Trial Chamber did not question either *Plavšić's* *motivation* in her political support for Dayton, nor did it examine Babić's *capacity* regarding his post-war conduct.

The Tribunal rejected the parties' contention that *Plavšić's* 11-year sentence should guide its judgment. The Prosecution used the *Plavšić* sentence as a guideline in making its recommendation for *less than* 11 years. The Defense drew parallels between *Babić* and *Plavšić*, noting first the distinction between Babić's early, voluntary plea (as opposed to that of *Plavšić*, which came nearly two years into the process against her, when the likelihood of her own conviction was clear) and the second distinction between Babić's extensive cooperation with the Tribunal and *Plavšić's* refusal to cooperate. Nonetheless, noting only that "the sentences imposed on other convicted persons by this Tribunal are based on premises that may differ from the circumstances of the present case," the Chamber found that "the recommendation by the Prosecution of a sentence of imprisonment of no more than 11 years would not do justice in view of the applicable sentencing principles and the gravity of Babić's crime taking account of the aggravating and mitigating circumstances."<sup>101</sup>

Babić appealed the sentencing judgment on several grounds. The Appeals Chamber dismissed all grounds except for the question of whether the Trial Chamber

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<sup>97</sup> *Babić* Sentencing Judgment para 95.

<sup>98</sup> *Babić* Sentencing Judgment para 67, quoting the Prosecution Sentencing Brief.

<sup>99</sup> *Babić* Sentencing Judgment para 70.

<sup>100</sup> *Babić* Sentencing Judgment paras 99, 100.

<sup>101</sup> *Babić* Sentencing Judgment 100.

erred in not considering his post-conflict conduct as mitigating.<sup>102</sup> The Appeals Chamber found that such conduct should have been considered a mitigating circumstance. The Appeals Chamber did not, however, (Judge Mumba dissenting) follow this finding with a mitigation in sentence. In her dissent, Judge Mumba explained that based on the Appeals Chamber's finding of mitigating post-conflict activity, the Trial Chamber should have been found to have erred in its sentence determination.<sup>103</sup>

### **Remorse**

Unlike Plavšić, Babić demonstrated real remorse even at his initial plea hearing (Plavšić, in contrast, spoke first only at her sentencing hearing). "I come before this tribunal with a deep sense of shame and remorse. I have allowed myself to take part in the worst kind of persecution of people simply because they were Croats and not Serbs," he said. He stated that his regret was "the pain I have to live the rest of my life," further adding, "I ask my brother Croats to forgive us, their brother Serbs."

On March 5, 2006, Milan Babić, who had been returned to The Hague to testify against Milan Martić, committed suicide in his jail cell in Schveningen. While suspicion surrounded his death in some parts of the Yugoslav community, an investigation made by the ICTY confirmed that he died by his own hand.<sup>104</sup> At the time of his death, Babić had testified against Milošević, Krajišnik, and Martić, and was due to testify against Simatović, Stanisić, and Šešelj. Martić's defense counsel described him as the trial's "most important prosecution witness."<sup>105</sup>

### **(III) Contrasting *Plavšić* and *Babić***

The cases of *Plavšić* and *Babić* clearly invite comparison. Both individuals were publicly recognizable, but ultimately politically sidelined, leaders of ethnic Serb statelets. Both saw the charges against them mitigated by their guilty pleas. Both ultimately faced very similar sentences – 11 years for Plavšić, 13 for Babić. Both "cooperated" with the Tribunal and expressed "remorse."

Yet it is in a comparison of the details and divergences between the two leaders that one finds the kernel of truth that might have the potential to "cleanse[] the ethnic and religious hatreds and begin[] the healing process,"<sup>106</sup> a role that the Tribunal has often imagined for itself. In closing arguments, the Babić defense counsel invited the Tribunal to contrast the two leaders. Considering Babić's public statements regarding nationalist rhetoric and "the fuel he fed to the fire," defense counsel invited comparison with Plavšić, saying, "She said horrible, horrible things, racist things, ugly things."<sup>107</sup> Counsel continued, "You ask the Prosecution to provide

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<sup>102</sup> *Prosecutor v. Milan Babić, Appeal Judgment*, Case No. IT-03072, (July 18, 2005) ("*Babić* Appeal Judgment").

<sup>103</sup> *Babić* Appeal Judgment (Judge Mumba, dissenting).

<sup>104</sup> Judge Kevin Parker, Vice President, "Report to the President: Death of Milan Babić" June 8, 2006, The Hague.

<sup>105</sup> Janet Anderson, "Babić Suicide a Blow for Prosecutors," March 10 2006 IWPR.

<sup>106</sup> *Erdemović* Sentencing Judgment.

<sup>107</sup> *Babić* Sentencing Hearing (April 2, 2004) Tr. 242:13-14.



you with the worst of what Mr. Babić said.... So that if that is a legitimate mitigating factor ... it should weigh more heavily in his favour, the nature of what was said.”<sup>108</sup> Fundamentally, Babić’s counsel tried to present a “common sense” understanding of the case. Despite floundering through the legal categories, he nevertheless tried to hold the substance of the comparison:

With respect to [Plavšić’s and Babić’s] role, various degrees of responsibility, in paragraph 1 of the Plavšić [sic] judgment, the Court found that she embraced and supported the objective of ethnic cleansing. I guess Mr. Babić [sic] did, but not in exactly the same way and under the same circumstances. *And I don’t know how to articulate that any better, but I think that the Tribunal ought to have a sense of that at this point.*<sup>109</sup>

Defense counsel’s plea for the Tribunal to “have a sense” is precisely what was lost (a loss that is clearly felt), in these judgments. The OTP in *Babić* argued that Babić’s character should serve as a mitigating factor, as he:

only became radicalized through moves of the political leaderships both in Belgrade and Zagreb and a large-scale and sophisticated Serbian media campaign to revive peoples’ old fears and insecurities, leading to separation of communities along ethnic lines and resulting in violence of the dominant ethnic group against the others.<sup>110</sup>

We see in this construction the essence of the line of argument offered by Akhavan (1998) in terms of truths the court might promote. The OTP’s arguments are clearly articulated by the Defense Witness Kovačević. Yet the Trial Chamber’s dismissal of this line of argument is complete: it does not reference Kovačević’s testimony even once in its judgment.<sup>111</sup>

By providing the ICTY an opportunity to celebrate itself, Plavšić secured a short and gentle prison sentence. The ICTY was so determined to celebrate itself through Plavšić’s plea that the Tribunal did not even allow her recanted testimony to impact her judicial fate. Instead, the ICTY decided, on multiple occasions, to ignore Plavšić’s later words.

Babić, in contrast, seems to have made the “journey” so celebrated, and so absent, in the example of Biljana Plavšić. From nationalist mouthpiece to remorseful humanitarian, Babić’s trajectory is an example of the very truths that transitional justice theory advocates as advantageous and essential. Where Plavšić’s story tells none of the abstract truths “judicial romanticism” presages for ICTs (Forsythe 2005; Akhavan 1998), Babić’s story illustrates many of them. Yet there are no legal categories to catch those illustrations, and we are left with the image of Babić’s counsel articulating the question of “what turned Milan Babić into an extreme nationalist?” in the face of a judicial silence. Babić’s own testimony, which answers

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<sup>108</sup> *Babić* Sentencing Hearing (April 2, 2004) Tr. 242:14-19.

<sup>109</sup> *Babić* Sentencing Hearing (April 2, 2004) Tr. 242: 3 – 8 (emphasis added).

<sup>110</sup> *Babić* Sentencing Judgment para 90 (quoting OTP’s Sentencing Brief para 57).

<sup>111</sup> The only reference the Judgment makes to Kovačević is descriptive, noting he testified “about Babić’s personality and positions at the time of the commission of the crimes.” *Babić* Sentencing Judgment para 15.

an even more central question with respect to reconciliation, namely “What turned the fanatical nationalist into a committed humanitarian?” falls completely between the cracks of the legal categories utilized by the Tribunal.

## **Conclusion: defendant as object, and structural problems of the ICTY**

Elie Wiesel, a witness for both the prosecution and the defense at the Plavšić sentencing hearing, celebrated the ICTY as the centerpiece of justice. He concluded his statement thus:

Your sentences will reverberate across national and ethnic borders. Through the work that you and the Court accomplish, the words uttered in this courtroom will be taken in, studied, and remembered far beyond the frontiers and far across the centuries.”<sup>112</sup>

He then positioned the ICTY as the hope of humanity, in all places where “crimes against humanity have sown bereavement or despair.”<sup>113</sup>

Wiesel’s focus on “humanity” raises precisely the question at the center of the *Plavšić* and *Babić* cases. In *Le Juste* (1995), Paul Ricoeur argues that criminal sentences must speak to the condemned “as reasonable beings.” The idea of the punishment reaching the punished is central to theories of criminal justice. (Foucault 1995; Garland 1993) It is this element of international criminal law that Allott (1990) refers to when he critiques its practice of “co-opting” and “scapegoating” individuals by holding them responsible for crimes that can only occur within circumstances made possible by, or indeed often actively encouraged by, the state.

The chapter has explored the ICTY’s problematic reconciliation jurisprudence by contrasting two judgments: the 11-year sentence of Bosnian Serb Biljana Plavšić and the 13-year sentence of Croatian Serb Milan Babić. The two cases are marked by intriguing similarities and differences. Comparison of the two cases provides a means to explore the chasm between the work and objectives of the ICTY on the one hand and its actual practice as received in the former Yugoslavia on the other.

The judgments in these two cases demonstrate a continuing disconnect between the work of the Tribunal and its stated goals, specifically as regards reconciliation. The legal categories that the ICTY recognizes as significant, and around which it structures its findings and judgments, do not easily converge with the lived experience of the peoples of the former Yugoslavia. The ICTY argues that the “truth” emerging from ICTY indictments and guilty pleas to portions of those indictments is imagined to “trickle down” to the populace of the former Yugoslavia. But this truth is couched in complicated legal categories, in which the same criminal act can trigger a count of genocide, crimes against humanity, war crimes, persecutions etc. What is a layperson to take from the fact that Plavšić, through an admission of guilt, saw an indictment that included genocide decrease to an indictment based on “persecutions”? The Prosecution stressed that the same atrocities form the basis of

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<sup>112</sup> *Plavšić* Sentencing Hearing (December 17, 2002) Tr. 461.

<sup>113</sup> *Plavšić* Sentencing Hearing (December 17, 2002) Tr. 461

both counts: indeed, the Prosecutor in the *Plavšić* case drew special attention to the fact that in pleading guilty to “persecutions” instead of facing counts including “genocide” and “complicity in genocide,” Plavšić was admitting her guilt to all the crimes listed in the appendixes to the indictment, amounting to thousands of murders.<sup>114</sup> Yet of these two categories, only “genocide” has a widely acknowledged social meaning. (Akhavan 2012) Although “persecutions” is a serious charge that can (and in the case of *Plavšić* did) include murder, ethnic cleansing, discrimination, and the destruction of private property, the word itself sounds trivial.

Ultimately, the ICTY used the *Plavšić* sentencing hearing to make a judicial finding regarding its own capacity as a reconciliatory organ. It did so using a circular argument based in part on the findings of the *Plavšić* decision itself. These findings relied on statements of “interested” parties (such as *Plavšić* herself, but also arguably Dr. Borraine, who was, not coincidentally, head of a foundation working under the same belief structure/ideology). This instrumentalization of *Plavšić* made no room for her humanity, as evidenced by the Tribunal’s use of her intervention for its own purposes.

More problematic even than the transformation of *Plavšić* from person to symbol in the Tribunal’s jurisprudence is its use of harsh punishment to erase Babić without any seeming regard at all for his humanity. It would appear that it was precisely Babić’s internalization of the exercise, his embrace of “judicial romanticism’s” promise of liberalism delivered by judicial verdict that evoked the ire of the Tribunal.

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<sup>114</sup> *Plavšić* Sentencing Hearing (December 16, 2002).

## Conclusion: Assessing the Capacity of “Cosmopolitan Justice”

*“We are subjected to the production of truth through power and we cannot exercise power except through the production of truth. If I were to characterize... its intensity and constancy, I would say that we are forced to produce the truth of power that our society demands.... In the end, we are judged, condemned, classified, determined in our undertakings, destined to a certain mode of living or dying, as a function of the true discourses which are the bearers of the specific effects of power.”*

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Michel Foucault, “Two Lectures” in *Power/Knowledge* (1980), 94.

Consider the corpses of dozens of women and children smoldering in the remains of a house which had been padlocked from the outside before being set alight,<sup>1</sup> or the bodies of men and boys, blindfolded and manacled, who had been shot cleanly through the head at close range.<sup>2</sup> These are unequivocally criminal scenes. There is no context that can justify them, and no system in the world under which they would be legal. Someone (or many someones) brought these events to pass; often, someone higher up the chain of authority authorized the events, or encouraged them, or failed to discourage them when others committed similar crimes, and this, too, seems readily identifiable as a crime. International criminal law (ICL) begins with one deceptively simple principle: punish the guilty who might otherwise, due to circumstances partly connected to their own violence and criminality, go free. The moral and political power of this principle – to expand the reach of justice and to combat impunity – has propelled several *ad hoc* international criminal tribunals (ICTs) in the 20<sup>th</sup> century, beginning with the tribunals following the devastating violence of World War II (the IMT at Nuremberg and the IMTFE at Tokyo), re-engaging after a long period dominated by the Cold War with the ICTY (1993) and its sister institution for Rwanda, the ICTR (1994), and culminating in the foundation of “the court for the 21<sup>st</sup> century” (Ellis & Goldstone 2008) the International Criminal Court (ICC) (2002).

Yet, as this dissertation has detailed, the reality is devilishly more complex, and begins with a problem in the foundation upon which domestic criminal law rests and within which ICL seeks to situate itself, the definitional problem of what constitutes *crime* at international criminal law. Take, for example, the case of Ante Gotovina, the Croatian general indicted for his role in murders, deportations, and the destruction of civilian property that were part of Croatia’s military offensive to retake the territory held by Croatian Serbs in August 1995. Gotovina was found guilty – of deportations and murder (and sentenced to 24 years in prison) – by one ICTY

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<sup>1</sup> *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1 (July 20, 2009).

<sup>2</sup> *Prosecutor v. Radislav Krstić*, Case No. IT-98-33 (August 2, 2001).

chamber, only to be acquitted by another. It would have been possible for the Appellate Chamber, in acquitting Gotovina, to contest Gotovina's level of participation, which the Trial Chamber had found to be "co-perpetration." The *Gotovina* Appellate Chamber did not do this, however. Instead, it reconsidered the Trial Chamber's findings regarding the *crimes* (more than 100 civilian execution-style deaths (murders), and the mass exodus of thousands of civilians (deportations)) that formed the basis of the *Gotovina et al.* indictment. The *Gotovina* Appellate Chamber threw out the Trial Chamber's determination that the massive civilian flight that followed Croatia's Operation Storm offensive was a "deportation," (which is a crime recognized at international criminal law); as discussed in Chapter Four, the Appellate Chamber did this based on its analysis of the standard of error of Croatian artillery.<sup>3</sup> In the wake of the *Gotovina* judgments, we read different determinations by the ICTY regarding the content of ICL. This is reminiscent of Scalia et al.'s (2012) findings in interviewing defendants before the ICTY, where such defendants, particularly those charged with JCE forms of commission, contested the illegality of the "crimes" with which they were charged; such defendants often averred that, faced with the same circumstances, they would act the same. Was Gotovina guilty of working with the Croatian leadership to expel a civilian population (a practice recognized today as "ethnic cleansing" and defined by ICL as illegal)? Or was Gotovina, in deliberately planning an operation that left open a "corridor" of escape for a civilian population while engaging in a legitimate military exercise, exhibiting the kind of humanitarian behavior of the sort that ICL should recognize and encourage?

For the skeptical reader, the *Gotovina* case may read too much like one of Dworkin's (1975) "hard cases," the sort of legal conundrum to which it is hard to find a satisfying conclusion. On the one hand, Operation Storm wreaked substantial damage on civilians, and Gotovina was in command: who should be guilty if not he? On the other hand, the rationale of the Trial Chamber, finding Gotovina guilty of "co-perpetration" of a criminal plan based in large part on his presence at a meeting where others articulated a series of (arguably) criminal designs does not seem very convincing, either – surely it is not fair to impute others' (arguably) criminal desires to a defendant simply because he shared a conference room with them? Should we understand the *Gotovina* case as a disproportionately "hard case," a rotten apple thrown into what is an otherwise healthy barrel of ICTY case law?<sup>4</sup>

It is the contention of this author that although the cases which have been examined herein, with the goal of assessing the ICTY's work against the proposed prototype of the *international criminal justice template*, are discouraging, and perhaps even shocking, they are not atypical or unrepresentative of the overall work, practice,

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<sup>3</sup> By dismissing the Trial Chamber's findings that Gotovina participated in a joint criminal plan (which criminal purpose had been found by the Trial Chamber to be deportations), the Appellate Chamber excused itself from addressing Gotovina's potential involvement in murders, because such murders were not alleged to have been directly perpetrated by Gotovina or those under his command, but rather were attributed to Gotovina as the "foreseeable" (JCE III) consequences of his co-perpetration of a criminal plan. Once that "criminal plan" finding was overturned by the Appellate Chamber, Gotovina's responsibility for murders was necessarily dismissed as well.

<sup>4</sup> Some might note that the UN Security Council, in specifically naming Gotovina as one of the leaders most responsible for crime committed in the Balkan wars, obligated the ICTY to continue its prosecution of him. On the other hand, the Security Council would have received its information regarding which individuals in the Balkans were the "most responsible" from the ICTY OTP, so it would seem difficult to make the argument that somehow the Security Council forced the ICTY's hand regarding Gotovina's indictment.

and record of the ICTY. Some of these cases – although admittedly not yet *Gotovina*, which is freshly at the center of a scandal at the time of this writing<sup>5</sup> – are even the subject of ICTY celebration. For example, the ICTY website highlights *Kvočka et al.*, the case examined in Chapter Four, as an example of the ICTY’s accomplishments.<sup>6</sup> The named defendant in *Kvočka et al.*, Miroslav Kvočka, was a Bosnian Serb police officer who received a seven year sentence from the ICTY for his role in co-perpetrating a joint criminal enterprise, which in this case was the prison camp itself. The ICTY celebrates the case for “establish[ing] that a ‘hellish orgy of persecution’ occurred in the Omarska, Keraterm and Trnopolje camps of northwestern Bosnia.”<sup>7</sup> This dissertation, in contrast, has examined *Kvočka et al.* for the problematic facts of the case and its troubling development regarding standards of criminal intent. Like the World War II-era case *Velpke Children’s Hospital* that it references, *Kvočka et al.* fails in legal and moral terms, the dissertation argues, by expounding the legal fiction that Miroslav Kvočka’s participation constitutes his intent. Can (or should) the defendant Miroslav Kvočka – a man who was married to a Muslim woman, and who on one occasion put his body between a group of Muslim prisoners and a maddened local citizen shooting at them – be said to have *shared the criminal intent* of those who organized and committed “the hellish orgy of persecution” at Omarska? Legally, this makes Miroslav Kvočka indistinguishable from those who constructed the camp and carried out atrocities. These two descriptions of what *Kvočka et al.* stands for and reveals – this dissertation’s concern regarding *Kvočka et al.* from a rule of law standpoint, and the ICTY’s assertion of the power of *Kvočka et al.* to address crimes and fight impunity – which are quite far apart, are both arguably accurate. The distance between these two interpretations is an apt example of how divergent assessments of the Tribunal can be.

Those evaluating ICTs generally view them either negatively – dismissing them as “political,” or positively – celebrating them as moral.<sup>8</sup> For international relations theorists, ICTs are often dismissed as expensive, unwieldy, and ineffective mechanisms to implement political goals. (Rabkin 2007) For ICL proponents, ICTs represent important landmarks in liberalism’s justice project, and evidence of humanity’s “progress.”<sup>9</sup> This dissertation had undertaken a critique of ICTs and the ICL movement more broadly “from the left.” It follows Koskenniemi (2002) in recognizing that law has a “grammar” that distinguishes it from other fields, and Shapiro (1986) in rejecting the idea that the presence of the political invalidates the legal.<sup>10</sup> Furthermore, it echoes Tallgren (2002) in desiring a more nuanced debate regarding “progress” and “morality.” Thus this dissertation’s critique of ICTs as transitional justice mechanisms is not intended as a critique of transitional justice’s aim to recognize and redress injustice, or a critique of the project of human rights recognition more generally. Unlike former U.S. representative to the U.N. John Bolton (2001), who has also criticized ICTs for working outside the constraints of sovereign rule (a not entirely dissimilar argument from this dissertation’s argument that the absence of a discursive loop creates a structural imbalance reflected in the

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<sup>5</sup> See discussion in Chapter Four of Danish ICTY judge who has charged ICTY president Theodor Meron of exerting pressure on ICTY judges to acquit.

<sup>6</sup> <http://www.icty.org/sections/AbouttheICTY> (accessed July 1, 2013).

<sup>7</sup> <http://www.icty.org/sections/AbouttheICTY> (accessed July 1, 2013).

<sup>8</sup> This is discussed in Chapter Two.

<sup>9</sup> Teitel (2006), for example, refers to international criminal law as “Humanity’s Law.”

<sup>10</sup> See Shapiro (1986) (in which he debunks the traditional “prototype” of courts with the goal of demonstrating the fallacy of a separation between “law” and “politics”).

ICTY's practice), this author would perfect international criminal law institutions, not dismantle them.

This concluding chapter 1) revisits the tenets of the "*international criminal justice template*," a framework which has been developed in the preceding chapters, 2) summarizes the dissertation's findings, 3) addresses possible critiques of the "*international criminal justice template*," and 4) calls for the vigorous development of international law and society studies as a means of addressing the greatest problem facing the application and development of effective theories of transitional justice, which is a problem of absent empirical data (as well as theoretical discourse about what sort of data are necessary).

### **The ICTY & the *international criminal justice template***

This dissertation has interrogated the question of ICL legitimacy not through the lens of moral philosophy, the standpoint from which ICL generally makes its legitimacy arguments, but rather through the lens of political philosophy. Ruti Teitel's seminal work, *Transitional Justice* (2000), identified transitional justice as a constructivist element of international relations theory, situating transitional justice ideology alongside other ideas in political philosophy regarding the construction of state legitimacy. Just as Teitel's work introduced a powerful frame for the field of transitional justice, this dissertation seeks to introduce a critical framework for considerations of international criminal law. This dissertation theorizes and applies the transitional justice goals of ICTs through the law and society lens of court capacity, and proposes a specific framework, the *international criminal justice template*, to evaluate the functions and output of ICTs.

The international criminal justice template distills the myriad benefits, functions, or capacities imagined for ICTs into three basic goals. Consequently, it views ICTs as designed to (1) articulate progressive international criminal law, (2) act as historians or historical archives, and (3) produce an "official version" that permits reconciliation. This template has been developed on the basis of a contemporary understanding of what the IMT at Nuremberg achieved, as well as the frequent invocation of the IMT at Nuremberg among proponents of ICL as an exemplary (albeit imperfect) ICT.<sup>11</sup> The functions identified by the *international criminal justice template* comprise the secondary functions – the functions beyond the primary adjudicatory task that constitutes ICT work – that represent the actual *raison d'être* of ICTs.

At the end of the World War II, the Allied powers formed ICTs and tasked them with public identification and punishment of those individuals "most responsible for the war." The Allied trials at Nuremberg – and as discussed in Chapter One, to a lesser degree, at Tokyo – heralded a new era both in international law and in the Kantian, political liberal project of "cosmopolitan law." When international law was retooled, via a Kantian search for total justice, from the law between states to a law capable of directly impacting individuals, the field of international criminal law was born.

This dissertation began its analysis of contemporary transitional justice with the IMT at Nuremberg because that is where the field of transitional justice itself

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<sup>11</sup> See the discussion in Chapter Two regarding proponents of ICL for a non-definitive list of the myriad international human rights and international criminal law scholars who espouse this viewpoint.

locates its own foundation. (Teitel 2003) The IMT at Nuremberg was many things in 1946: it was contested, innovative, massive, boring. As Chapter One has shown, the *actual* IMT at Nuremberg differs significantly from the *mythologized* IMT at Nuremberg. In the intervening years, much of what was problematic with the IMT at Nuremberg as a rule of law institution has disappeared from the discussion of the IMT at Nuremberg among proponents of ICL. For them, what remains is the rosy institutional fact that the Allied powers established a trial instead of (the skeptical might say simply “before”) establishing a scaffold. Of course, for ICL, the IMT at Nuremberg is but the beginning of the movement. As Chapter One has outlined, the IMT at Nuremberg founded a vigorous international humanitarian law campaign, with the Geneva Conventions of 1949 and the Convention on the Prevention of Genocide (1949) following it. The IMT at Nuremberg also gave rise to the modern ideology of transitional justice, and placed ICTs as central mechanisms for its realization.

Chapter One has established the historical anchor for the contemporary expectation of what ICTs can achieve, and has labeled this the *international criminal justice template*. Chapter Two has provided the necessary background to appreciate the sphere in which that *template* arose and in which it must operate with respect to the former Yugoslavia. By introducing the literatures and ideas on which this dissertation draws, as well as the relevant circumstances attending the ICTY as an institution, Chapter Two has also provided the background necessary to assess the ICTY against the *international criminal justice template*.

Chapters Three through Six, respectively, have examined the work of the ICTY against each of the three categories that comprise the *international criminal justice template*. Chapter Three has demonstrated that because the ICTY’s hybrid procedure sacrifices defendants’ rights to procedural efficiency and institutional demand, it has failed to articulate a progressive international criminal law standard. Relying on legal positivism – the fact that each element of procedure adopted by the Tribunal has roots in a balanced and just criminal procedure – the Tribunal has looked past the *purpose* of the domestic criminal systems from which it has borrowed such procedure. Such purpose, domestically, is always to balance the power of the state against the rights of the individual; without effective balance, the state’s legitimacy – and with it, law’s legitimacy and capacity as a social agent – is threatened. While the debate between the letter of the law and the purpose of the law is a classic one within legal studies,<sup>12</sup> the ICTY articulates a jurisprudence the dissertation labels *post rule of law* because it rejects an interest in legal purpose altogether. Chapter Three has focused on an example of the disjunction between ruler and ruled, and rejection of legal purpose, through its consideration of the specific example of ICTY sentencing. ICTY sentencing is notoriously variable, violating a central rule-of-law maxim of uniformity and predictability. Of course, the problem of sentencing at ICL is complex – what proportional punishment can be meted out towards an *individual* for crimes which are by their very definition *collective* in nature? Yet instead of addressing this complexity, the ICTY has articulated, in its judgments as well as in writings by those who work there, the principle that ICTY sentencing *need not be uniform*. By declaring that the centerpiece of the rule of law inapplicable to the ICTY, the Tribunal problematically locates itself in a *post rule of law* position.

Chapter Four has focused on the fact that progressive criminal law is made up of both procedure and substance with its examination of the problem of legal

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<sup>12</sup> This is known as the “Hart/Fuller debate”.



substance through the ICTY's controversial articulation of Joint Criminal Enterprise (JCE), a theory of liability that stretches "commission" along a common law conspiracy scale to reach, at its farthest point, crimes which are "foreseeable consequences" of individuals' projects and actions. Following the troubled, and troubling, development of the ICTY's JCE jurisprudence, this chapter has demonstrated the difficulty of articulating the content of illegality for international criminal institutions, where institutions such as the ICTY are required to translate non-derogable human rights norms into criminal law specifics which can be applied to individuals.

Both Chapters Five and Six have addressed issues surrounding the ICTY's capacity to formulate an "official version": Chapter Five considers this "official version" as history, while Chapter Six considers the problem of reconciliation, or ICTs as "reconcilers." International criminal courts function as standard-bearers of transitional justice due to their unique configuration as regards the articulation of an official version. An official version of events is a frame (Keck & Sikkink 1998) containing the facts of what occurred as well as a structure in which to understand them (i.e. questions regarding what is legal and illegal). This version of past events constitutes one shared story of what happened in the past that unifies the people who tell it in the present, and thus creates for them the possibility of a future. Courts establish facts; although such facts are "judicial facts" collected in pursuit of a particular judicial goal (Chapter Five), they are nonetheless vetted and this imbues them with a certain element of legitimacy.

A basic goal of the dissertation has been to examine structural hurdles that impede local acceptance of the narrative pronounced by international criminal courts. As discussed in Chapter Three, civil law audiences (which comprise most of the globe, and all of the Balkans) are unaccustomed to viewing trials as spaces where guilt is *determined*. The Kelsonian theoretical underpinnings of the civil law restrict court capacity regarding law making; at civil law, law is made by legislatures and implemented by courts.<sup>13</sup> Furthermore, the rights discourse prominent at common law, where courts are charged with articulating and ensuring fundamental rights, is much more muted at civil law, where courts are mostly legal implementers, not inventors.

Another basic focus of the dissertation has been the question of how to properly configure the role of ICTs. What should ICTs do/achieve? What designates an ICT "a success"? And, of course, planted within such considerations are questions of audience and aim – success for whom, and doing what? These questions impact the perceived legitimacy of ICTs, and legitimacy is a crucial axis for ICTs. On the one hand, legitimacy is structurally distinct for ICTs; where consent as represented by office and process (Shapiro 1986) at domestic law, such consent is significantly attenuated at an international level. (Scheingold 1964) On the other hand, legitimacy behind the use of ICTs to articulate an official version of events in the first place. The legitimacy of legal pronouncements is one of the imagined values added through the use of courts (as opposed to truth commissions, grass-roots organizing, etc.) as transitional justice mechanisms. As discussed in Chapter Five, both Croatia and Serbia "consented" to ICTY jurisdiction unwillingly and contingently, cooperating only as much as necessary to realize their own goals. In the case of Bosnia,

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<sup>13</sup> Shapiro's prototype correctly contests this; regardless, the theoretical prejudice against judicial "law making" remains central to the civil law.

functioning as an international protectorate and not entirely self-governing, the question of consent is even more complicated. In the absence of consent, courts will substitute procedure; in the case of the ICTY, and international criminal law institutions more generally, the perceived legitimacy of the institution will rest on the perceived integrity of its procedure. This dissertation has outlined the systemic, cultural distinctions between the common and the civil law that challenge even legal professionals operating across systems to understand procedure across the divide. The dissertation has further detailed the objective deficits in the hybrid procedure that has evolved before the ICTY. Finally, the dissertation has made the argument, based in social contract theory, that without a discursive connection between an institution, the peoples subject to its mandate, and the sovereigns (as represented by the UN Security Council) that it serves, an institution is structurally imbalanced and cannot therefore avoid growing towards an unjust jurisprudence. In the case of the ICTY, such injustice is apparent in its imbalanced procedure as well as its articulation of substantive law, such as its joint criminal enterprise jurisprudence.

## **The functions of ICTs: does the *international criminal justice template* get it right?**

### **What should we measure?**

The “Nuremberg legacy” – the belief that ICTs have the capacity to institute liberal values and respect for human rights – was originally articulated by the victorious Allied powers, most particularly the U.S. The “myth of Nuremberg” centered on the value of holding individuals accountable for designated international crimes (defined in the Charter for the IMT at Nuremberg as (i) crimes against peace, (ii) war crimes, (iii) crimes against humanity, and (iv) conspiracy to commit these three crimes) in order to address the destructive phenomenon of collective responsibility; under this framework, the most guilty individuals would be identified and punished, and the population at large could move forward, having affirmed the guilt of certain individuals and having reaffirmed their own humanity by doing so.

In the decades following World War II, the Nuremberg myth/legacy came to be professed by the vanquished themselves. This unified narrative of World War II, wherein both victorious and vanquished peoples recount the same version of events and their significance, forms the centerpiece of political reconciliation. Political reconciliation makes it possible for once-opposed states to cooperate in the international realm, regardless of the antipathies or mistrust still felt by individuals within nations towards individuals of other nations.<sup>14</sup> Political reconciliation is the centerpiece of transitional justice ideology, in so far as it such reconciliation is generally equated with peace. (Bloomfield 2006; Villa-Vicencio 2004; Crocker 2003)

It is undeniable that Germany (and Japan) experienced political reconciliation as well as profound political change following World War II, as they moved from autocratic, rights-denying regimes to democratic, rights-articulating ones. It is also true that German (and Japanese) citizens were subjected to international criminal law prosecutions by the international occupying powers. As explored in Chapter One,

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<sup>14</sup> Political reconciliation, a collective recognition, should be distinguished from the individual measure of “forgiveness,” although forgiveness and reconciliation are often conflated in transitional justice considerations. *See* Chapter Six.

however, overwhelming evidence suggests that the actual journey from autocracy to democracy, and from a rights-denying to a rights-protecting regime, owes little to the work or example of the IMT at Nuremberg (and even less to the IMT at Tokyo). In spite of volumes of compelling evidence to the contrary, however, the “myth of Nuremberg” continues to dominate mainstream discussion of the capacity of ICTs to function as transitional justice mechanisms.

This dissertation has measured ICTY practice against the prototype of the *international criminal justice template* with the goal of exposing the gaps between the expected, defined functions of ICTs and the actual practice of the ICTY. As noted above, it is this author’s contention that the examples described are defensibly standard – and in some cases, positively celebrated by the ICTY – to stand in as representative of ICTY practice. Is it, however, possible that ICTY practice is not the correct measurement for an assessment of its works against the *international criminal justice template*? And if this is the case, the next question to ask is whether this dissertation’s methods of measurement are reasonable.

Proponents of the use of the ICTY to effect reconciliation argue that the Tribunal’s narrative can function as a palliative to the nationalist politics and discourse that began the war and continue in its aftermath. (Akhavan 1998; Wilson 2011) This unified, and thereby unifying, narrative lies at the heart of a political definition of reconciliation, which Bloomfield (2006:11) defines as “something less deep, less personal, and more pragmatic, than the individual form. ... [I]t requires no such grandiose elements as forgiveness or harmonious end-states.” As this dissertation has argued, it is preferable to examine reconciliation as a social/political process than to rely upon forgiveness-based definitions that lean heavily on religious terminology. This is because 1) the political definition is located in the collective realm where transitional justice largely operates, 2) the political definition is measurable (as opposed to personal forgiveness, which is located deep within each individual heart), and 3) the political definition is morally appropriate; indeed, as regards collective crimes like genocide, it is arguably inappropriate to speak of “forgiveness.” Chapter Six has argued that both the ICTY’s development and application of legal categories regarding remorse, and its instrumentalized treatment of defendants before the Tribunal, interfere with its capacity to convincingly articulate for a Balkan audience its unifying version of events (not just facts, but also, and more importantly, a legal frame to understand and accept their criminality). But again, perhaps there should be a different set of empirics to try to make this assessment. The dissertation as a whole invites these considerations.

### **Are these the right functions?**

This dissertation has argued that the significance of ICTs lies in their use as *transitional justice* mechanisms. As such, ICTs are proposed as responses to instances of mass violence, intractable conflict, or pervasive social upheaval for the numerous secondary functions they are said to perform while in the process of (and indeed through the process of) adjudicating individual cases.<sup>15</sup> The Overview of the ICC, for example, cites the following functions as among the purposes of the court:

“Peace and Justice”  
“To achieve justice for all”

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<sup>15</sup> See, e.g., Justice Jackson’s opening statement at the IMT at Nuremberg, quoted in part in Chapter One; the debate and founding documentation surrounding the ICTY, quoted in part in Chapter Two;

“To end impunity”  
“To help end conflicts”  
“To take over when national criminal justice institutions are unwilling or unable to act”  
“To deter future war criminals”<sup>16</sup>

Many proponents of the ICTY claim a restricted role/standard for the ICTY. Some believe the ICTY’s role is simply to “work properly,” a process-based argument that locates the institution’s “success” in a consideration of the institution’s work in its own terms. The most extreme of such arguments locate “success” in terms of mere existence. (Arbour 1999; Cassese 1998; Meron 1997) This school of ICTY defenders recognizes that deterrence, distributive justice, punishment, respect for rule of law, and rehabilitation are all recognized tenets of (domestic) criminal law. They protest, however, that no one court or one court decision can necessarily achieve all these aims, but rather that courts, acting correctly, make these aims possible. Such narrow, case-by-case, process arguments relating to the ICTY’s mandate are typically raised in response to the criticism, or criticisms, that the institution has not effectuated either reconciliation, deterrence, or retribution, at least not to any significant degree.

On the face of it, of course, ICTs are charged simply with adjudicating individual cases. There is no cost-benefit analysis that could ever condone the use of ICTs simply for the purpose of adjudicating the guilt or innocence of the few individuals who have been (and who foreseeably will be) brought before them, however.<sup>17</sup> The IMT at Nuremberg worked for nearly a year to try two dozen individuals; the ICTY & ICTR are said to consume 25% of the UN’s annual budget,<sup>18</sup> and over the course of two decades have between them produced fewer than 100 convictions; the ICC has been in operation one decade and has produced only one verdict (which is itself not yet even final, since as of this writing the appeals process is still in the very early stages).

Furthermore, even if ICT function is more appropriately assessed against a simple adjudicatory standard (following Arendt (1963) and Fuller (1969) who argue that a court’s job is to hear the case before it), ICTs retain the criminal definition problems explored throughout this dissertation, and revisited at the beginning of this concluding chapter. In order to be able to adjudicate cases, ICTs will need at the very least to *articulate* international criminal law.

### **Are these critiques based in unreasonably standards or on unattainable ideals?**

Some theorists have postulated that “fair enough,” rather than “fairest of all,” is sufficient for international criminal trials. (Warbrick 1998) Frédéric Mégret

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<sup>16</sup> “Overview” to the Rome Statute (establishing the ICC), available at <http://untreaty.un.org/cod/icc/general/overview.htm> (accessed July 10, 2013).

<sup>17</sup> Augustine Brannigan is currently conducting research comparing the costs of large, multi-year domestic trials with international criminal trials: he is interested, among other things, in determining whether the cost-benefit losses he sees as constituting the surest proof of the dismantlement of the international criminal law system (Brannigan 2012) also obtain for complex domestic criminal litigation. Presentation question and answer, *Law & Society Association Annual Conference* (Hawai’i May 2012), notes on file with author.

<sup>18</sup> This figure is cited in Brannigan 2012 and has been confirmed by ICTY officials, who nonetheless contest that it is “not the whole story” because the ICTY, for example, also receives considerable funding from outside the UN. Author interviews, The Hague, November 2012. To date, the ICTY has cost more than \$3 billion.

advances a considered discourse arguing that international tribunals are “different” and should not be held to the same procedural standards as domestic criminal justice institutions. (Mégret 2009) For the reasons detailed above, however, this dissertation has argued precisely the opposite: namely, it has asserted that international criminal courts are *more sensitive to procedural anomalies than domestic courts*. This is because, in the absence of consent, legitimacy is built on office and procedure. With court legitimacy subject to them, procedural standards should be higher, not lower, than what might obtain domestically.

Other theorists argue that time is an essential healer, and that it is unreasonable to expect to see ICT achievements immediately. Sometimes these theorists point to the IMT at Nuremberg and to the time that passed before that narrative “took.” The time argument, however, seems to work both ways. First, as this dissertation has demonstrated, twenty years is a long time to see so little forward movement. Second, if time is the fundamental requirement of healing, then it remains unclear why we should employ resource-demanding institutions like ICTs at all.

### **Final thoughts: where do we go from here?**

The development of human rights law constitutes one of the revolutionary advances of the last century. With the Geneva Conventions and the establishment of prominent human rights enforcement mechanisms – not only the advisory bodies of the United Nations<sup>19</sup> but more significantly the toothy courts of supra-national (though still limited) jurisdiction such as the ICC<sup>20</sup> – a revolution in politics, law, and statecraft has been effected. Nation states, sovereign since the Peace of Westphalia, have acknowledged in theory a higher sovereignty in the rights of man, and have begun to put this concept into practice. Likewise, international law, which for centuries regulated only inter-state conduct, has begun to manifest at the level of the individual, both by circumscribing governments’ actions towards their citizens, and by holding individuals accountable for breaches of humanitarian law.

While the 20<sup>th</sup> century witnessed mass violence on a global scale unparalleled in history, it also heralded a burgeoning global awareness of standards of behavior grouped under the heading of human rights, and the potential power of this awareness should not be downplayed. Although it remains uncertain whether institutions promising to hold perpetrators of gross violations of human rights responsible for their actions have prevented, or will prevent, crimes from occurring, it is absolutely clear that reports of the 8,000 Muslim men killed in the remote wooded area of Bosnia in July 1995 have circled the globe, that those reports have identified the location of what was once an inconsequential Bosnian village with the concepts of genocide and international judicial retribution. In the wake of this public, judicial response to the massacre at Srebrenica, it has become harder to imagine that any would-be human rights violator, no matter how remotely located, could remain unaware that his actions could be construed as a gross violation of humanitarian law, and subject to punishment as such. As the Trial Chamber said in the *Nikolic*

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<sup>19</sup> See, for example the Human Rights Council enacted in 2006 by the United Nations, which evaluates situations involving breaches of human rights and makes recommendations.

<http://www2.ohchr.org/english/bodies/hrcouncil/>

<sup>20</sup> This list also includes the European Court of Justice (European Union) and European Court of Human Rights (the Council of Europe)

Sentencing Judgment (2003), quoted at the beginning of this dissertation's Introduction:

as international criminal law has moved from “law in theory” to “law in practice,” the principles of international humanitarian law have taken hold to the extent that in the face of such widespread and massive crimes a person being called to participate in the criminal enterprise *might* consider the Geneva Conventions and the consequences of disregarding the principles contained therein.

While this growth in the awareness and import attached to human rights law is impossible to measure in quantitative terms, it may perhaps be inferred from the growth in number, size, and strength of institutions charged with applying universal humanitarian norms. There is no question that the ICTY, and the global international criminal law project it has advanced, has made a considerable impact in human rights norms and awareness. The dissertation has not questioned this. Rather, the salient contemporary question posed by this dissertation concerns the *way* the ICTY, and other ICTs, impact human rights.

This dissertation has argued that the ICTY, and other ICTs more generally, suffer a legitimacy deficit because they enact the social control of criminal law outside of the political constraint of a sovereign state. Thus legal and procedural deficits in ICTY practice are not “deviations” or anomalies, but rather indications of the underlying structural, institutional failure of the ICTY. This disconnect has permitted the development of international criminal law in the flawed template of the IMT at Nuremberg, and results in substantive and procedural law that should best be understood as *post rule of law*. Post rule of law processes interrupt the imagined transitional justice goals afforded international criminal courts, foremost among them the construction of an “official history” as well as the modeling of political liberalism. If ICTs are perceived as more political than legal – if they remain, as they are at present, institutions to which more powerful countries subject less powerful countries, and refuse to subject themselves<sup>21</sup> – then the ICT movement will fail. Such a failure would imperil the human rights ideology paired with (though existing separately from) international criminal law, and would endanger the project of the recognition of non-derogable human rights as a whole.

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<sup>21</sup> One prominent example is the US refusal to join the ICC.

## Appendix A: ICTY Prosecutions as of June 2013<sup>1</sup>

Case Number	Case “In a Nutshell”	Defendants <sup>2</sup>	Procedural Outcome & Sentence
IT-94-1	“Prijedor” 7(1) <sup>3</sup> JCE: willful killing; murder; torture	Duško Tadić (BS) - president of local board of SDS	Trial (7/14/1997): 20 years Appeal (7/15/1999): 20 years Trial II (11/11/1999) (9 additional counts): 25 years Appeal (1/26/2000): 20 years - Early release 7/2008
IT-94-2	“Sušica Camp” persecutions; rape; murder	Dragan Nikolić (BS) - commander of Sušica camp	Sentencing Judgment (12/18/2003) (plea bargain): 23 years Sentencing Appeal (2/4/2005): 20 years
IT-94-3	“Prijedor”	Goran Borovnica (BS)	Proceedings terminated, accused died before transfer to ICTY
IT-94-4		Željko Mejakić Močila Gruban Dušan Knežević	Joined IT-95-8/1
IT-94-5		Radovan Karadžić Ratko Mladić	See IT-95-18 re Karadžić See IT-09-92 re Mladić
IT-95-8	“Keraterm Camp” (Prijedor, BiH) Indictment charged genocide, due to alleged massacre of over 120 men in Room 3 at the camp; reduced to “persecutions” with plea bargain	Duško Sikirica (BS) - commander of security at camp Damir Došen (BS) - shift leader at Keraterm camp June -August 1992 Dragan Kolundžija - shift commander at Keraterm camp June – July 1992 Charges withdrawn: Nikica Janjić (passed away) Dragan Kondić; Goran Lajić; Dragomir Šaponja; Neđeljko Timarac	Sentencing judgment (11/13/2001) (plea bargain all 3) - Sikirica: 15 years Early release 6/2010 - Došen: 5 years Early release 2/2003 - Kolundžija: 3 years Early release 12/2001
IT-95-8/1		Dušan Fustar Predrag Banović Dušan Knežević Nenad Banović	See IT-02-65 & IT-02-65/1
IT-95-9	“Bosanski Samac” (prison camp) 7(1) JCE: persecutions	Blagoje Simić, MD (BS) - president of Municipal Board of SDP, Serb Crisis Staff (highest ranking civilian in municipality) Miroslav Tadić (BS) - in TO Simo Zarić (BS) - in TO	Trial (10/17/2003) - Simić: 17 years - Tadić: 8 years - Zarić: 6 years Appeal (11/28/2006) - Simić: 15 years (reduced) - Tadić & Zarić: sentence unchanged
IT-95-9/1	“Bosanski Šamac”	Stevan Todorović (BS)	Sentencing Judgment (7/31/2001)

<sup>1</sup> See [www.icty.org](http://www.icty.org) for complete information on cases.

<sup>2</sup> Defendants’ ethnicities and/or side they fought for, where different, denoted as Croat (C); Serb (S); Bosnian-Croat (BC); Bosnian Serb (BS); Bosnian Muslim (Bosniak) (B); Kosovar Albanian (KA); Macedonian (M). Other abbreviations, and color-coding, are defined at the end of this appendix.

<sup>3</sup> Article 7(1) of ICTY statute regarding “commission.”

	(prison camp) persecutions	- chief of police in Bosanski Šamac	(plea bargain): 10 years - Early release 6/2005 - Died 9/2006
IT-95-9/2	“Bosanski Šamac” (prison camp) torture	Milan Simić (BS) - member of BS crisis staff	Sentencing Judgment (10/17/2002) (plea bargain): 5 years - Early release 11/2003
IT-95-10	“Brčko” (Luka camp) genocide; murder; plunder; inhumane acts	Goran Jelisić (BS) - acted under authority of Brčko police	Trial (12/14/1999) (plea bargain): 40 years [Trial went forward on genocide charge: acquitted] Appeal (7/5/2001): sentence unchanged Request for review (5/2/2002): dismissed
IT-95-10/1	“Brčko” murder (admitted to killing at least 10 people); rape; humiliating and degrading treatment	Ranko Češić (BS) - member of TO; became BS Police Reserve Corps member	Sentencing Judgment (3/11/2004) (plea bargain): 18 years
IT-95-11	“Shelling of Zagreb” “RSK” 7(1) JCE: persecutions; murder	Milan Martić - president, SAO Krajina	Trial (9/27/2007): 35 years Appeal (10/8/2008): affirmed
IT-95-12	“Stupni Do” (37 villagers killed); Vareš (looting, detaining 250 Muslim men, sexual assaults) 7(1) & 7(3) <sup>4</sup> murder; inhumane treatment; extensive destruction	Ivica Rajić (BC) - HVO commander in Central Bosnia	Sentencing Judgment (5/8/2006) (plea bargain): 12 years - Early release 8/2011
IT-95-13/1	“Vukovar Hospital” (massacre of 200 people from hospital at Ovcara) 7(1) JCE: murder; torture; cruel treatment	Mile Mrkšić (S) - colonel in JNA Veselin Šljivančanin (S) - major in JNA Miroslav Radić (S) - captain in JNA (“Serbian Generals”)	Trial (9/27/2007) -Mrkšić: 20 years -Radić: Acquired -Šljivančanin: 5 years Appeal (5/5/2009) -Mrkšić: unchanged -Šljivančanin: 17 years (increased) Review Judgment by the Appeals Chamber (12/8/2010) -Šljivančanin: 10 years (increased from TC; reduced from AC)
IT-95-13a	“Vukovar Hospital” Murder; a+a	Slavko Dokmanović (S) - JNA & Serb paramilitary soldier	Captured by IFOR 6/27/1997. Committed suicide in custody (on eve of verdict) 6/1998
IT-95-14	“Lašva Valley” 7(1) JCE 7(3) CR	Tihomir Blaškić (BC) - colonel in HVO [charges withdrawn: Ivan Santić; Pero Skopljak; Zoran Martinić]	Trial (3/3/2000): 45 years. Appeal (7/29/2004): 9 years (reduced) Request for review (11/23/2006): dismissed - Early release (time served) 8/2004
IT-95-14/1	“Lašva Valley” 7(3) CR: Outrages on	Zlatko Aleksovski (BC) - commander of prison	Trial (6/25/1999): 2.5 years; Appeal (3/24/2000): 7 years

<sup>4</sup> Article 7(3) of the ICTY Statute regarding “commission.”



	personal dignity; a+a	facility at Kaonik	(increased) - Early release 11/2001
IT-95-14/2	“Lašva Valley” Attack on Ahmići (100 civilians killed) 7(1) individual criminal responsibility for common plan	Dario Kordić (BC) - president of the HDZ- BiH (leading political figure) Mario Čerkez (BC) - commander of Vitez Brigade of HVO	Trial (2/26/2001) - Kordić: 25 years - Čerkez: 15 years Appeal (12/17/2004) - Kordić: sentence affirmed - Čerkez: reduced to 6 years, released 12/2004, sentence served
IT-95-15	“Lasva Valley” murder	Zoran Marinić - military policeman for HVO	Proceedings terminated 10/2/2002, indictment withdrawn b/c low level perpetrator
IT-95-16	”Lašva Valley” Attack on Ahmići (100 civilians killed) 7(1) JCE: murder; persecutions; inhumane acts	Zoran Kupreškić (BC) - member of HVO Vlatko Kupreškić (BC) -member of HVO Mirjan Kupreškić (BC) - member of HVO Vladimir Šantić (BC) - local commander of military police & “Jokers” Drago Josipović (BC) -member of HVO Šantići Dragan Papić - member of HVO Marinko Katava [charges withdrawn]	Trial (1/14/2000) - Josipović: 15 years - Šantić: 25 years - Z. Kupreškić: 10 years - M. Kupreškić: 8 years - V. Kupreškić: 6 years - Papić: <b>acquitted</b> Appeal (10/23/2001) - Papić: affirmed - Josipović: 12 years (reduced) Early release 1/2006 - Šantić: 18 years (reduced) Early release 2/2009 - Z. Kupreškić: <b>acquitted</b> (reduced) M. Kupreškić: <b>acquitted</b> (reduced) V. Kupreškić: <b>acquitted</b> (reduced)
<b>IT-95-17</b>	“Lašva Valley” murder; persecutions	Miroslav Bralo (BC) - member of “Jokers”	Sentencing judgment (12/7/2006) (plea bargain): 20 years Sentencing appeal (4/2/2007): confirmed sentence
IT-95-17/1	“Lašva Valley” torture; outrages upon personal dignity; rape	Anto Furundžija (BC) - local commander of “Jokers”	Trial (12/10/1998): 10 years Appeal (7/21/2000): affirmed - Early release 8/2004
<b>IT-95-18</b>	“Srebrenica” & “Sarajevo” 7(1) JCE: genocide; crimes against humanity; violations of laws of war	Radovan Karadžić (BS) - president of RS	<i>On trial</i>
<del>IT-96-20</del>	“Sarajevo” inhumane acts (firing on civilian targets)	Dorde Đukić (BS) - assistant commander of logistics VRS	- Released 4/1996 for ill health - Died 5/1996
IT-96-21	“Čelebići Camp” (Established by Bosnian Muslim and Bosnian Croat forces; Bosnian Serbs imprisoned) 7(1) JCE: willfully causing suffering and killing 7(3) CR	Zejnir Delalić (B) - coordinator of Bosnian Muslim and Croat forces; commander of First Tactical Group of Bosnian Army Hazim Delić (B) - deputy commander, then commander Bosnian Muslim forces Zdravko Mucić - commander	Trial (11/16/1998) - Mucić: 7 years - Delić: 20 years - Landžo: 15 years - Delalić: <b>Acquitted</b> Appeal (2/20/2001) Mucić, Delić, Hazim, Landžo: sentencing remitted to Trial Chamber for possible adjustment Trial sentencing (10/9/2001) sentences adjusted: Sentencing appeal (4/8/2003)

		Esad Landžo - Guard	sentences unchanged: - Mucić: 9 years (increased) Early release 7/2003 - Delić: 18 years (reduced) Early release 6/2008 - Landžo: unchanged Early release 4/2006
IT-96-22	“Pilica Farm” (“Srebrenica”) murder (he personally killed approximately 70 people)	Dražen Erdemović (BC) - soldier working with VRS	Sentencing judgment (11/29/1996) (guilty plea): 10 years Appeal (10/7/1997) ruled that guilty plea not informed and new plea should be entered; Second sentencing (3/5/1998): 5 years - Early release 8/1999
IT-96-23 & IT-96-23/1	“Foča” Torture, rape, enslavement	Dragoljub Kunarac (BS) - leader of VRS reconnaissance unit for local Foča Tactical Group Radomir Kovač (BS) - subcommander of VRS and paramilitary Zoran Vuković (BS) - subcommander of VRS and paramilitary	Trial (2/22/2001) - Kunarac: 28 years - Kovač: 20 years - Vuković: 12 years Early release 3/2008 Appeal (6/12/2002): all sentences affirmed
IT-95-23/2	“Foča” “Karaman’s house” torture; rape	Dragan Zelenović (BS) - soldier and <i>de facto</i> military policeman in Foča	Sentencing judgment (4/4/2007) (plea bargain): 15 years Sentencing appeal (10/31/2007): affirmed
IT-96-23/2	“Foča” “Karaman’s house”	Radovan Stanković Gojko Janković	Case transferred to BiH court under 11 bis; Stanković convicted in 2006 and sentenced to 16 years; served sentence in Foca and escaped in 2007, re-apprehended 1/2012
IT-97-24	“Prijedor” 7(1) JCE & 7(3) CR: genocide; extermination; murder; torture	Milan Kovačević (BS) - leading figure in Prijedor crisis staff	Died 8/1998 while trial ongoing
IT-97-24	“Prijedor” (Omarska, Keraterm & Trnopolje camps) 7(1) JCE: persecutions; extermination; murder	Milomir Stakić (BS) - leading figure in Prijedor municipal government	Trial (7/31/2003): life imprisonment; Appeal (3/22/2006): 40 years (reduced)
IT-97-25	“Foča” 266 disappearances from KP Dom	Milorad Krnojelac (BS) - commander of “KP Dom” detention camp	Trial (3/15/2002): 7.5 years Appeal (9/17/2003): 15 years (increased) - Early release 7/2009
IT-97-25/1		Savo Todorović and Mitar Rašević	Case transferred to BiH court under 11 bis; sentenced to 12.5 and 8.5 years respectively, on appeal, Rašević reduced to 7 years.
IT-97-27	“Sanski Most” murder; rape; inhumane acts	Željko Raznatović (S) - “Arkan”; leader of paramilitary group	Murdered in mafia-related violence in Belgrade in 2000

		“Serbian Volunteer Guard” [“Arkan’s Tigers”]	
IT-98-29	“Sarajevo” sniper attacks on civilians, Markale marketplace bombing 2/5/1994 (60 killed)	Stanislav Galić (BS) - commander of “Sarajevo Romanija Corps” of VRS	Trial (12/2/2003): 20 years Appeal (11/30/2006): <b>life imprisonment</b>
IT-98-29/1	“Sarajevo” Sniper attacks, use of modified air bombs, mortar attack on Markale marketplace 8/28/1995 (34 killed)	Dragomir Milošević (BS) - chief of staff to Galić	Trial (12/12/2007): 33 years Appeal (11/12/2009): 29 years (reduced)
IT-98-30/1	“Omarska, Keraterm & Trnopolje Camps” 7(1) JCE: persecutions; murder; torture	Miroslav Kvočka (BS) - police officer attached to Omarska camp Dragoljub Prcać (BS) -retired policeman mobilized as administrative aid to camp commander Milojica Kos (BS) - guard shift leader Mlađo Radić (BS) -police officer attached to camp as guard shift leader Zoran Žigić (BS) - taxi driver, Keraterm camp guard	Trial (11/2/2001) - Kvočka: 7 years Early release 3/2005 - Prcać: 5 years Released 3/2005, served sentence in full. - Kos: 6 years [final] Early release 7/2002 - Radić: 20 years - Žigić: 25 years Appeal (2/28/2005)(all but Kos) all sentences unchanged Request for review submitted by Radić & Žigić (6/6/2006): dismissed
IT-98-32	“Višegrad” 7(1) JCE; a+a: Drina river (5 dead); acquitted of Pionirska Street incident (house fire 60 dead)	Mitar Vasiljević (BS) - member of “White Eagles” paramilitary group	Trial (11/29/2002): 20 years Appeal (2/15/2004): 15 years Early release 3/2010
IT-98-32/1	“Višegrad”: Pionirska Street (house fire, 60 dead); Bikavic (house fire, 70 people dead); Drina river (5 dead)	Milan Lukić (BS) - leader of “White Eagles” paramilitary group Sredoje Lukić (BS) - member of “White Eagles”	Trial (7/20/2009) -Milan Lukić: <b>Life imprisonment</b> -Sredoje Lukić: 30 years Appeal (12/4/2012) - M. Lukić: <b>affirmed</b> - S. Lukić: 27 years (reduced)
IT-98-33	“Srebrenica-Drina Corps” a+a: genocide; murder; persecutions;	Radislav Krstić (BS) - chief of staff/deputy commander VRS	Trial (8/2/2001): 46 years; Appeal (4/19/2004): 35 years (reduced)
IT-98-34	“Tuta and Štela” torture, unlawful labor, persecutions	Mladen Naletilić (BC) - founder & commander of “Convicts Battalion” Vinko Martinović (BC) - subordinate to Naletilić	Trial 3/31/2003: - Naletilić: 20 years - Martinović: 18 years Early release 12/2011 Appeal (5/3/2006): affirmed.
IT-99-36	“Krajina” 7(1) JCE & 7(3) CR: genocide; persecutions; wanton destruction; a+a BS forces in killing 140 civilians in Kozarac 5/1992; 8 civilians in Jaskići 6/1992; 300 BC & B men in Bišćani 7/1992	Radoslav Brđanin (BS) - leading political figure in ARK	Trial (9/1/2004): 32 years Appeal (4/3/2007): 30 years
IT-99-36/4	“Krajina”	Momir Talić (BS)	Died 5/2003 while trial ongoing.

	7(1) JCE: genocide; extermination; torture; wanton destruction	- chief of staff/deputy commander JNA in Banja Luka; VRS commander	
IT-99-36/2		Stojan Župljanin	See IT-08-91
IT-99-37		Milutinović et al.	See IT-05-87
IT-00-39	“Bosnia and Herzegovina” 7(1) JCE: persecutions	Momčilo Krajišnik (BS) - member of RS presidency	Trial (9/27/2006): 27 years Appeal (3/17/2009): 20 years (reduced)
IT-00-39&40/1	“Bosnia and Herzegovina” 7(1) JCE: persecutions	Biljana Plavšić (BS) - member of RS presidency	Trial Chamber (2/27/2003) (plea bargain): 11 years - Early release 9/2009
IT-00-41	"Lašva Valley"	Ljubičić	Referred to BiH under 11 bis
IT-01-42	“Dubrovnik” attacks on civilians; wanton destruction	Pavle Strugar - JNA commander [charges withdrawn; Milan Zec]	Trial (1/31/2005): 8 years Appeal 7/17/2008): 7.5 years (reduced)
IT-01-42/1	“Dubrovnik” a+a & 7(3) CR: murder; cruel treatment; attacks on civilians; willful damage	Miodrag Jokić - commander in Yugoslav navy	Sentencing judgment (3/18/2004): 7 years Sentencing appeal (8/30/2005): affirmed -Early release 9/2008
IT-01-42/2		Vladimir Kovačević	Referred to Serbia under 11 bis; Serbian court found unfit to stand trial 12/1997
IT-01-43		Dragan Obrenović	See IT-02-60/2
IT-01-44		Dragan Jokić	See IT-02-60
IT-01-45		Ante Gotovina	See IT-06-90
IT-01-46		Rahim Ademi	See IT-04-78
IT-01-47	“Central Bosnia” cruel treatment; plunder	Enver Hadžihasanović - senior ABiH officer Amir Kubura - senior ABiH officer <del>Mehmed Alagić</del> <del>- senior ABiH officer</del> [deceased and proceedings terminated]	Trial (3/15/2006) - Hadžihasanović: 5 years - Kubura: 2.5 years Appeal (4/22/2008) - Hadžihasanović: 3.5 years (reduced) - Kubura: 2 years (reduced) Early release 4/2006
IT-01-48	“Grabovica-Uzdol” 7(3) CR: murder	Sefer Halilović - deputy commander of staff of ABiH	Trial (11/16/2005): acquitted Appeal (10/16/2007): affirmed
IT-02-53		Blagojević et al.	See IT-02-60
IT-02-54	“Kosovo; Croatia; Bosnia-Herzegovina” genocide; deportation; murder; extensive destruction	Slobodan Milošević (S) - president of FY; President of Serbia	Died while trial ongoing; proceedings terminated
IT-02-55		Macedonia	Prosecutor requested deferral of cases involving Macedonian victims to ICTY; deferred 5 cases but did not defer “all future cases” (10/4/2002)
IT-02-56		Momir Nikolić	See IT-02-60/1
IT-02-57		Vujadin Popović	See IT-05-88
IT-02-58		Ljubisa Beara	See IT-05-88
IT-02-59	“Vlašić Mountain” (massacre of 200 Muslim	Darko Mrđa (BS) - member of special BS	Sentencing judgment (3/31/2004) (plea bargain): 17 years

	military aged men in bus convoy): murder; inhumane acts	police unit “Intervention Squad”	
IT-02-60	“Srebrenica” a+a murder and persecution	Vidoje Blagojević (BS) Dragan Jokić (BS)	Trial (1/17/2005) -Vidoje Blagojević: 18 years -Dragan Jokić: 9 years Appeal (5/9/2007) -Vidoje Blagojević: 15 years -Dragan Jokić: 9 years
IT-02-60/1	“Srebrenica”	Momir Nikolić (BS)	Sentencing judgment (12/2/2003) (plea bargain): 27 years Sentencing Appeal (3/8/2006): 20 years (reduced)
IT-02-60/2	“Srebrenica” Indictment: 5 counts including complicity in genocide, murder, etc. PB to Count 5, persecutions.	Dragan Obrenović (BS) - VRS officer Zvornik Brigade	Sentencing judgment (12/10/2003) (plea bargain): 17 years - Early release 9/2011
IT-02-61	“Glogova” village of Glogova razed	Miroslav Deronjić (BS) - leader of SDS	Sentencing judgment (3/30/2004) (plea bargain): 10 years Sentencing Appeal (7/20/2005): affirmed Died 2007 in prison
IT-02-62	“Medak Pocket”	Janko Bobetko (C) - chief of HV	Initial indictment 8/23/2002; died and proceedings terminated.
IT-02-63	“Srebrenica”	Drago Nikolić	See IT-05-88
IT-02-64		Ljubomir Borovčanin	See IT-05-88
IT-02-65		Željko Mejakić, Momčilo Gruban, Dusan Knežević & Dušan Fuštar	Referred to BiH under 11 bis Mejakić: 21 years Gruban: 11 years, 7 on appeal. Knežević: 31 years Fuštar: 9 years (guilty plea)
IT-02-65/1	“Omarska & Keraterm Camps” 7(1) crimes against humanity (persecutions)	Predrag Banović (BS) - guard at Keraterm camp	Trial Chamber (10/28/2003) (plea bargain): 8 years -Early release 11/2008
IT-03-66	7(1) JCE murder Lapusnik prison camp (9 deaths)	Fatmir Limaj (KLA) - leader in KLA Isak Musliu (KLA) - leader in KLA Haradin Bala - prison guard [charges withdrawn: Agim Murtezi]	Trial (11/30/2005) -Limaj: Acquitted -Musliu: Acquitted -Bala: 13 years Appeal (9/27/2007): TC affirmed
IT-03-67	“Vukovar” “Zvornik” “Sarajevo” 7(1) JCE: crimes against humanity; violations of the laws of war	Vojislav Šešelj (S)	Currently on trial (closing arguments March 2012, currently waiting for Trial Chamber Judgment)
IT-03-68	7(1) wanton destruction (destroyed 50 BS villages) specifically Jezestica 7(3) murder (victims murdered and beaten in Srebrenica police station September 1992 – March	Naser Orić (B) - senior commander Bosniak forces in eastern BiH 1992- 1995	Trial (6/30/2006): 2 years Appeal (7/3/2008): Acquitted (reduced)

	1993) a+a		
IT-03-69	Military training throughout Krajina; directed "Scorpions" paramilitary unit 7(1) JCE: crimes against humanity; violations of laws of war	Jovica Stanišić (S) Franko Simatović (S) - defendants held senior positions in Serbian State Security Service.	<i>Currently on trial</i>
IT-03-70	"Srebrenica"	Vujadin Pavković	<i>See IT-05-87 (joined)</i>
IT-03-72	"RSK" 7(1) JCE	Milan Babić (CS) - president of RSK	Trial Chamber (6/29/2004) (plea bargain): 13 years Sentencing Appeal (7/18/2005) sentence affirmed. Committed suicide in ICTY cell March 2006.
IT-03-73		Ivan Čermak Mladen Markač	<i>See IT-06-90</i>
IT-04-74	HVO in Herzegovina 7(1) JCE: grave breaches of GC; violations of laws of war; crimes against humanity	Jadranko Prlić (BC) Bruno Stojić (BC) Slobodan Praljak (BC) Milivoj Petković (BC) Valentin Čorić (BC) Berislav Pušić (BC) - all political & military leaders in HVO	Trial (5/29/2013) -Prlić: 25 years -Stojić: 20 years -Praljak: 20 years -Petković: 20 years -Čorić: 16 years -Pušić: 10 years Currently on appeal
IT-04-75	"Krajina" 7(1) JCE 7(3) CR	Goran Hadžić (CS) -president of RSK	<i>Currently on trial</i>
IT-04-76		Mirko Norac	<i>See IT-04-78</i>
IT-04-78	"Medak Pocket"	Rahim Ademi (C) Mirko Norac (C)	Referred to Croatia under 11 bis; appeals judgment by Croatian Supreme Court November 2009 acquitting Ademi and 6 year sentence for Norac.
IT-04-79		Mičo Stanišić	<i>See IT-08-91</i>
IT-04-80		Zdravko Tolimir Milan Gvero Radivoje Miletić	<i>See IT-05-88</i>
IT-04-81	Sarajevo, Srebrenica, Zagreb 7(1)A+A: crimes against humanity; violations of laws of war 7(3) CR: crimes against humanity; violations of laws of war	Momčilo Perišić (S) -JNA officer who made weapons provisions to VRS & SVK possible	Trial (9/6/2011): 27 years Appeal (3/2013): <b>acquitted</b>
IT-04-82	Macedonia 7(1) JCE: violations of laws of war (murder) 7(3)	Ljube Boškoski (M) - minister of the interior Johan Tarčulovski (M) - police officer, presidential security unit	Trial (7/10/2008) <b>-Boškoski: acquitted</b> -Tarčulovski: 12 years Appeal (5/19/2010) Sentences affirmed
IT-04-83	Violations of laws of war (cruel treatment)	Rasim Delić (B) - commander of ABiH	Trial (9/15/2008): 3 years Appeal (6/29/2010) (accused died on 4/16/2010 while on provisional release; Appeals Chamber terminated proceedings and ruled the Trial Chamber judgment should be considered






			final).
IT-04-84	“Kosovo” 7(1) JCE: crimes against humanity; violations of laws of war	Ramush Haradinaj (KA) - commander in KLA Idriz Balaj (KA) - member of KLA Lahi Brahimaj (KA) - member of KLA General Staff	Trial (4/3/2008) - Haradinaj: Acquitted - Balaj: Acquitted - Brahimaj: 6 years Appeal (7/21/2010) Partial retrial ordered for all. Brahimaj's sentence of 6 years affirmed. Retrial (11/29/2012) All three acquitted.
IT-05-86		Vinko Pandurević (BS) Milorad Trbić (BS)	Pandurević: see IT-05-88 Trbić: referred to BiH under Rule 11 bis
IT/05/87	“Kosovo” “Šainović et al.” 7(1) JCE: crimes against humanity; violations of laws of war	Milan Milutinović (S) - president of Serbia 1997 - 2002 Nikola Šainović (S) - deputy prime minister of Serbia 1994 - 2000 Dragoljub Ojdanić (S) - VJ chief of staff; minister of defense Nebojša Pavković (S) - VJ commander Vladimir Lazarević (S) - leader VJ Pristina Sreten Lukić (S) - head of Serbian internal affairs 1998- 1999	Trial (2/29/2009) - Milutinović: acquitted [final] - Šainović: 22 years - Ojdanić: 15 years [final] - Pavković: 22 years - Lazarević: 15 years - Lukić: 22 years Currently on appeal
IT-05-87/1	“Kosovo” 7(1) JCE: crimes against humanity; violations of laws of war	Vlastimir Đorđević (S) - assistant minister of Serbian ministry of internal affairs	Trial (2/23/2011): 27 years Currently on appeal
IT-05-88	Popović et al. “Srebrenica” 7(1) JCE: genocide; crimes against humanity; violations of the laws of war	Vujadin Popović (BS) Ljubiša Beara (BS) Drago Nikolić (BS) Ljubomir Borovčanin (BS) Radivoje Miletić (BS) Milan Gvero (BS) Vinko Pandurević - all VRS leaders	Trial (6/10/2010) - Popović: Life imprisonment - Beara: Life imprisonment - Nikolić: (plea bargain) 35 years - Borovčanin: 17 years only defendant not to appeal sentence - Miletić: 19 years - Gvero: 5 years (early release 6/2010) - Pandurević: 13 years
IT-05-88/1		Milorad Trbić	Referred to BiH under 11 bis; 30 year sentence
IT-05-88/2	“Srebrenica” 7(1) JCE: genocide; conspiracy to commit genocide; crimes against humanity; violations of the laws of war	Zdravko Tolimir (BS) - assistant commander of VRS, reported directly to Mladić	Trial (12/12/2012): Life imprisonment (genocide) Currently on appeal
IT-06-90	“Operation Storm” 7(1) JCE	Ante Gotovina (C) - HV commander Mladen Markač (C) - commander of special police of Croatian ministry of interior Ivan Čermak (C) - commander of Knin	Trial (4/15/11) - Gotovina: 24 years - Markač: 18 years - Čermak: acquitted [final] Appeal (11/16/2012) - Gotovina: acquitted - Markač: acquitted

		Garrison, Croatian assistant minister of defense 1991-1993	
-IT-08-91	“Bosnia & Herzegovina” 7(1) JCE: crimes against humanity; violations of laws of war	Mičo Stanišić (BS) - minister of internal affairs in RS Stojan Župljanin (BS) - chief of security services in Banja Luka	Trial (3/27/2013) - Stanišić: 22 years - Župljanin: 22 years <i>Currently on appeal</i>
IT-09-92	“Bosnia & Herzegovina”	Ratko Mladić (BS) - general in VRS, oversaw Srebrenica massacre	<i>Currently on trial</i>

**Abbreviations:**

a+a: Aiding and abetting  
 ABiH: Army of Bosnia-Herzegovina (Bosniak)  
 ARK: Autonomous Region of Krajina (BiH)  
 CR: Command Responsibility  
 HV: Croatian Army  
 JCE: Joint Criminal Enterprise  
 JNA: Yugoslav National Army (defacto Serbian)  
 KLA: Kosovo Liberation Army (Kosovar Albanian)  
 RSK: Republic of Srpska Krajina (Bosnian Serb)  
 SAO Krajina: Serbian Autonomous District Krajina  
 SDS: Serbian Democratic Party (Bosnian Serb)  
 SVK: Army of Srpska Krajina (Bosnian Serb)  
 TD: Territorial Defense  
 VRS: Republika Srpska Army (Bosnian Serb)

**Color Coding:**



 = proceedings not yet finalized (as of June 2013)  
 = plea bargain/guilty pleas  
 = life imprisonment  
 = acquitted  
 = referred to a national jurisdiction under 11 bis  
 [TEXT] = proceedings halted due to death of defendant



**Of note:**

161 individuals indicted  
 69 individuals sentenced  
 20 guilty pleas  
 18 acquittals  
 5 life sentences: Galić [IT-98-29] (final)  
 Lukić [IT-98-32/1] (currently on appeal)  
 Popović & Beara [IT-05-88] (currently on appeal)  
 Tolimir [IT-05-88/2] (currently on appeal)





## Appendix B: Example of “Wanted by ICTY” Flyer

  
  
**PERSONS INDICTED BY  
THE ICTY FOR WAR CRIMES**  
Warrants of Arrest are issued on behalf of the  
International Criminal Tribunal for the former Yugoslavia

**HADŽIĆ, Goran (Son of Branka)**  
Born: 07.09.58  
Vukovar, Croatia  
Warrant date: 06/06/04  
No known alias

**MLADIĆ, Ratko (Son of Nedjo)**  
Born: 12.05.42  
Boravac, Bosnia & Herzegovina  
Warrant date: 21.07.95  
No known alias

Updated as of: **30 JULY 2006**  
ICTY Case No. IT-04-83-AR-17-PT-1  
ICTY Case No. IT-05-88-AR-17-PT-1

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Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), Aug. 12, 1949, 6 *U.S.T.* 3217, 75 U.N.T.S. 85

Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III), Aug. 12, 1949, 6 *U.S.T.* 3316, 75 U.N.T.S. 135

Convention Relative to the Protection of Civilian Persons in Times of War (Geneva Convention No. IV), Aug. 12, 1949, 6 *U.S.T.* 3516, 75 U.N.T.S. 28.

Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) S/25704, May 3, 1993 (“Secretary General Report”)

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### ***Babić***

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*Prosecutor v. Milan Babić, Appeal Judgment*, Case No. IT-03-72 (July 18, 2005) (“*Babić Appeal Judgment*”)

### ***Blagojević & Jokić***

*Prosecutor v. Vidoje Blagojević & Dragan Jokić*, Case No. IT-02-60 (January 17, 2005)

### ***Blaškić***

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### **Krnojelac**

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