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Povjesničari u potrazi za istinom o sukobima na prostoru bivše Jugoslavije u svojstvu vještaka pred ICTY- em

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U ovom članku razmatra se uloga povjesničara kao vještaka pred Međunarodnim kaznenim sudom za područje bivše Jugoslavije (International Criminal Tribunal for the former Yugoslavia – "ICTY" ili "Sud") u svjetlu ciljeva koje bi ovaj sud trebao ostvariti. Preispituje se u kojoj mjeri u sklopu postupka te načina prikupljanja dokaza pred ICTY-em vještaci-povjesničari mogu ostvariti ulogu koja im je namijenjena. Polazeći od ovih razmatranja nastoji se preporučiti u kojoj mjeri i u koju svrhu bi se povjesničari trebali koristiti kao vještaci pred ICTY-em.

Ključne riječi: povjesničari, vještaci, vještačenje, ICTY, ciljevi ICTY-a, pravila o postupku i dokazima, međunarodno kazneno pravo, utvrđivanje istine.

"La strade del guidice e quelle dello storico, coincidenti per un tratto, divergono poi inevitabilmente. Chi tenta di ridurre lo storico a giudice semplifica e impoverisce la conoscenza storiografica; ma chi tenta di ridurre il giudice a storico inquina irrimediabilmente l'esercizio della giustizia."[1]

1. Uvod

U ovom broju časopisa objavljeno je nekoliko nalaza i mišljenja povjesničara koji su vještačili u različitim slučajevima pred ICTY-em, bilo kao vještaci tužiteljstva ili vještaci obrane. Autorica ovog teksta zamoljena je da napiše uvodni članak o povjesničarima kao vještacima pred ICTY-em. Iscrpno pregledavanje i iščitavanje literature pokazalo je da o toj temi do sada nije gotovo ništa pisano.

[*] Dr. sc. Ksenija Turković bila je član odvjetničkog tima Hunton & Williams koji je zastupao gosp. Kordića pred ICTY-em.

Zahvaljujem se profesorima Mirjanu Damaški i Ivi Josipoviću te odvjetniku Turneru T. Smithu Jr. na njihovim korisnim savjetima i dopunama koji su znatno pridonijeli kvaliteti ovog članka

[1] "Putevi suca i povjesničara, poklapaju se jednim dijelom, a potom se neminovno razilaze. Onaj tko nastoji svesti povjesničara na suca pojednostavljuje i osiromašuje poznavanje povijesti,

Tradicionalno odnos između povijesti i prava je vrlo blizak – i suci kroz sudski postupak i povjesničari u svojim znanstvenim analizama teže k utvrđivanju istine o prošlim događajima uz pomoć dokaza.[2] Za potrebe ovog članka poći ćemo od pretpostavke da je i u sklopu sudskog postupka kao i znanstvenih povijesnih istraživanja u načelu moguće utvrditi istinu o prošlim događajima.[3] Povjesničari i suci utvrđuju istinu o nekom događaju iz prošlosti radi ostvarenja različitih ciljeva, u davanju mišljenja o nekom prošlom događaju nisu podložni jednakim ograničenjima te se u postupku utvrđivanja istine koriste različitim metodama.[4] Zbog ovih razlika i sličnosti u djelovanju sudaca i povjesničara posebno je zanimljivo presijecanje povijesti i prava do kojeg dolazi kad se povjesničari uključe u sudski postupak kao vještaci. Tu se rađa niz pitanja i problema. Primjerice, mogu li povjesničari utvrditi istinu o prošlim događajima u sklopu sudskog postupka koji njihovu radu nameće čitav niz ograničenja. Dovodi li organizacija postupka pred sudom do umanjenja nepristranosti povjesničara u ulozi vještaka kad analiziraju dokaze te iznose svoja mišljenja odnosno je li njihova vjernost povijesnoj istini ugrožena pritiscima kojima su izloženi tijekom kaznenog postupka. Jesu li i u kojoj mjeri njihova svjedočenja politički motivirana i prema tome iskrivljena. Imaju li ta svjedočenja pravni značaj za donošenje odluke u određenom slučaju ili se pak samo koriste (ponekad zlorabe) da bi se opravdala određena presuda.

Vještačenja povjesničara pred ICTY-em su česta. Izgleda da je ICTY odlučio uzeti povijest vrlo ozbiljno zbog utjecaja koji ona ima na budućnost. Ovaj članak nastoji objasniti ulogu povjesničara kao vještaka pred ICTY-em te pokrenuti raspravu o tome imaju li i u kojoj mjeri u sklopu sudskog postupka pred ICTY-em vještaci-povjesničari ostvariti ulogu koja im je namijenjena i u

no onaj tko nastoji svesti suca na povjesničara nepovratno prlja ostvarivanje pravde". Carlo GINZBURG, *Il guidice e lo storico: considerazioni in margine al processo Sofri*, Einaudi 1991., 109.-110.

[2] Još je jezuit Henri Griffet usporedio povjesničare sa sucima koji pažljivo procjenjuju dokaze i svjedoke. Vidjeti Henri GRIFFET, *Traité des différentes sortes de preuves qui servent à établier la vérité de l'histoire*, 1770., navedeno prema C. GINZBURG, "Checking the Evidence: The Judge and the Historian", *Question of Evidence – Proof, Practice and Persuasion across the Disciplines*, 1994., 290.-291.

[3] Danas postoji čitav niz teorija koje dovode u pitanje mogućnost otkrivanja istine i stjecanja objektivnog znanja o svijetu oko nas. Primjerice postmodernisti ili poststrukturalisti mišljenja su da stvarnost ne postoji izvan jezika, dok "konstrukcionisti" smatraju da je stvarnost zapravo društvena konstrukcija. Vidjeti Mirjan DAMAŠKA, *Truth in Adjudication*, 49.; Hastings L. J., 1998., 289.-290. Tri grupe pravnih znanstvenika dovode u pitanje mogućnost utvrđivanja objektivne istine putem sudskog postupka: critical legal scholars, critical race theorists i radikalni feministi. Vidjeti ukratko o tome Daniel A. FARBER, *Adjudication of Things Past: Reflection on History as Evidence*, 49.; HASTINGS L. J., 1009., 1020.-1023. I neki povjesničari odbacuju ideju o traženju povijesne istine. To je primijetio već Novick koji preispituje kako se uvjerenje američkih povjesničara o postojanju povijesne istine mijenjalo od kraja devetnaestog stoljeća pa sve do danas Peter NOVICK, *That Noble Dream: The Objectivity Question and the American Historical Profession*, 1988. No, takve filozofske rasprave prelaze okvire ovog članka.

[4] O razlikama i sličnostima između povijesne i sudske analize činjenica vidjeti William TWINING, "Some Scepticism about Some Scepticism", *Rethinking Evidence – Exploratory Esseys 92*, 1990., 103.-109.

kojoj mjeri prema tome korištenje povjesničara kao vještaka pred ICTY-em ima smisla.[5]

Prije negoli se upustim u razmatranje ovih pitanja dat ću samo nekoliko kratkih informativnih napomena o ICTY-u budući da istraživanja pokazuju relativno slab stupanj informiranosti javnosti u zemljama bivše Jugoslavije, uključujući i Hrvatsku, o organizaciji i radu ovog međunarodnog suda.[6]

ICTY je utemeljilo Vijeće sigurnosti Ujedinjenih naroda 1993. godine.[7] Ovaj sud nadležan je suditi fizičkim osobama optuženim za djela predviđena ICTY Statutom - ratne zločine, genocid te zločine protiv čovječnosti počinjene na području bivše Jugoslavije od 1. siječnja 1991. godine.[8] Maksimalna kazna koju može izreći je kazna doživotnog zatvora. To je *ad hoc* sud budući je njegova misija prostorno (područje bivše SFRJ) i vremenski (zločini počinjeni od 1. siječnja 1991. godine) ograničena. Očekuje se da će prestati djelovati 2008. godine.

ICTY se sastoji od tri tijela: sudbenih vijeća (*Chambers*), tužiteljstva (*Office of the Prosecutor*) i tajništva (*Registry*). Vijeća su sastavljena od 16 neovisnih sudaca koje bira Opća skupština UN-a na četiri godine i od kojih ni jedan nije državljanin iste države. Devet sudaca raspoređeno je u tri sudbena vijeća, po tri u svakom, a sedam sudaca je u žalbenom vijeću.[9] Suci ICTY-a sami donose pravila o postupku i dokazima (do sada su ova pravila mijenjana 26 puta).[10] Suci između sebe biraju predsjednika i potpredsjednika suda koji upravljaju

[5] Ovaj članak ne bavi se pravnim propisima koji reguliraju svjedočenje vještaka pred ICTY-em.

[6] Godine 2000. provedeno je istraživanje među 32 suca i državna odvjetnika u Bosni o njihovim stajalištima prema ICTY-u. Svi ispitanici su slabo poznavali postupak pred ICTY-em i rezultate rada tog suda te su se žalili na slabu dostupnost informacija o radu Suda ili koje bi dolazile od samog Suda. Vidjeti Human Rights Ctr. And the International Human Rights Law Clinic, Univ. of Cal., Berkley/Univ. of Sarajevo, *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 Berkley J. Intel L. 102 (2000). U međuvremenu je Sud otpočeo s posebnim *outreach* programom kako bi učinio svoj rad transparentnijim u zemljama bivše Jugoslavije.

[7] Vijeće sigurnosti Ujedinjenih naroda odlučilo je Rezolucijom 808 od 22. veljače 1993. (U.N.Doc. S/Res. 808 (1993)) osnovati Međunarodni sud "u svrhu sudskog gonjenja osoba koje su odgovorne za ozbiljne povrede međunarodnog humanitarnog prava, počinjene na području bivše Jugoslavije od 1991. godine" te je zatražilo od Glavnog tajnika da u roku od 60 dana od prihvaćanja ove rezolucije iznese konkretne prijedloge glede utemeljenja tog suda uzevši u obzir prijedloge koje s tim u vezi upute države članice. Glavni tajnik je u navedenom roku podnio izvještaj koji je u sebi sadržavao i prijedlog Statuta ICTY-a. Rezolucijom 827 Vijeća sigurnosti Ujedinjenih naroda prihvaćenom 25. svibnja 1993. godine osnovan je ICTY. V. U.N.SCOR 48th Sess. 3217th mtg, U.N. Doc. S/Res. 827 (1993).

[8] Vidjeti Statut Međunarodnog kaznenog suda za teška kršenja međunarodnog humanitarnog prava na području bivše Jugoslavije od godine 1991. (dalje: ICTY statut), čl. 1.-6., http://www.un.org/icty/legaldoc/index.htm (posljednji put gledano 26. svibnja 2003.).

[9] Isto, čl. 12.-13.

[10] Pravila o postupku i dokazima usvojena su 11. veljače 1994. godine, U.N. Doc. IT/32. Original zajedno s izmjenama dostupan na www.un.org/icty/legaldoc/index.htm. (dalje: "Pravila" ili "PPD"). Posljednje izmjene su od 23. prosinca 2002. godine stupile na snagu 30. prosinca 2002.

sudom. Zbog velikog broja slučajeva uz stalne suce ICTY-a uvedeni su *ad litem* suci koji sude samo u jednom ili više određenih slučajeva.[11]

Tužitelj djeluje neovisno kao posebno tijelo ICTY-a. Ured tužitelja (UT) sastoji se od tužitelja i drugog kvalificiranog osoblja. Zadatak mu je voditi istragu i kazneni postupak protiv osoba osumnjičenih odnosno optuženih za teška kršenja međunarodnog humanitarnog prava počinjenih na području bivše Jugoslavije od 1. siječnja 1991. godine.[12] UT je glavno političko tijelo suda budući da odlučuje koga valja optužiti i koliko snažno valja inzistirati na njegovu ili njezinu uhićenju i vođenju postupka protiv te osobe.

Tajništvo je zaduženo za administraciju i pomaganje Sudu, treba se brinuti o zaštiti svjedoka te o pritvoru optuženika.[13]

Sud je u nekoliko godina od nekoliko desetaka zaposlenika prerastao u pogon od preko 1000 zaposlenih, s budžetom od preko 200 milijuna dolara. Prvih nekoliko godina sud je optužio čitav niz osoba, ali je vodio mali broj postupaka budući da je mali broj optuženika bio uhićen, isporučen odnosno dobrovoljno se predao sudu. Sada je sud pretrpan. Javne optužnice podignute su trenutačno protiv 76 osoba, od čega je jedna optužena žena.[14] Od toga 24 optuženika su još uvijek na slobodi i za njima je izdan uhidbeni nalog, a protiv 52 se trenutačno vodi postupak (od toga 44 ih se nalazi u pritvoru, a 8 ih je privremeno pušteno na slobodu). Do sada je postupak vođen ili se vodi protiv 86 optuženika: 28 optuženika nalazi se u prethodnom postupku; protiv 9 se vodi prvostupanjski postupak; 3 čeka prvostupanjsku presudu ili izricanje sankcije; a protiv 37 optuženika završen je prvostupanjski postupak - za 12 od njih u tijeku je žalbeni postupak, za 20 je postupak okončan (od ovih dvadeset 9 izdržava kaznu zatvora, 5 ih je već izdržalo kazne, a 6 čeka premještaj iz pritvora na izdržavanje kazne); 5 optuženika je oslobođeno krivnje; 5 optužnica je povučeno; a 4 optuženika su umrla u tijeku postupka pa je postupak obustavljen.[15] Ukupno je povučena 21 optužnica i umrlo je 12 optuženika uključujući i 4 osobe koje su umrle u tijeku postupka.[16]

[11] *Ad litem* suci su regulirani u čl. 13ter i 13quater ICTY statuta.

[12] ICTY statut, čl. 16.

[13] Više podataka o djelovanju ovog suda može se naći primjerice u Patricia M. WALD, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court*, 5 Wash. U. J.L. & Poly 87, 2001.

[14] Prema mojoj procjeni od 76 postojećih javnih optužnica 59 je protiv Srba, 10 protiv Hrvata, a 7 protiv Muslimana.

[15] Prema mojoj procjeni od 86 optuženika protiv kojih je vođen ili se vodi postupak pred ICTY-em 55 je Srba, 18 Hrvata i 13 Muslimana.

[16] Vidjeti The ICTY at Glance, Fact Sheet on ICTY Proceedings, http://www.un.org/icty/glance/index.htm (posljednji put gledano 26. svibnja 2003.).

2. Uloga povjesničara kao vještaka pred ICTY-em

Uloga povjesničara kao vještaka pred ICTY-em u velikoj mjeri je određena ciljevima koje bi ovaj sud trebao ostvariti. Po mišljenju utemeljitelja ovog suda te njegovih članova i zagovornika sud bi trebao ostvariti sljedeće ciljeve:[17]

1) pridonijeti uspostavi i održanju mira u zemljama bivše Jugoslavije;[18]
2) utvrditi individualnu krivnju za počinjene zločine uz pomoć objektivne rekonstrukcije prošlih događaja;[19]
3) ostvariti sve one svrhe koje se inače u teoriji kaznenog prava smatraju svrhom kažnjavanja: (a) prevencija (generalna i specijalna),[20] b) retribucija[21] te c) ostvarenje pravde za žrtve;[22]

[17] Ponekad se ovi različiti ciljevi mogu naći u konfliktu. Zato je važno odrediti hijerarhiju ciljeva, vidjeti što je dominantni cilj Suda i koju bi težinu pojedini ciljevi trebali imati. Značaj pojedinih ciljeva koje ICTY nastoji ostvariti s vremenom se mijenjao.

[18] Vijeće sigurnosti je zaključilo da gruba kršenja ratnog i humanitarnog prava u sukobu odnosno sukobima na području bivše Jugoslavije predstavljaju opasnost za međunarodni mir i sigurnost. Stoga je osnovalo ICTY ponajprije kao mehanizam koji bi trebao pridonijeti uspostavi i održanju mira na tim prostorima i zaustaviti činjenje zločina kroz individualizaciju krivnje i suđenje osobama odgovornim za kršenje ratnog i humanitarnog prava. Vidjeti Rezoluciju 827 Vijeća sigurnosti, kao u bilj. 7., paragraf 10. Vidjeti također Prvi godišnji izvještaj Suda, First Annual Report of the 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, U.N. GAOR, 49th Sess., pt. 1, 11-14, U.N. Docs. A/49/342, S/1994/1007 (Nov. 14, 1994), www.un.org/icty/rappannu-e/1994/index.htm (dalje: „Prvi izvještaj ICTY"). Madelain Albright je prigodom posjete Prištini u srpnju 1999. g. to izrekla na sljedeći način: "Mi vjerujemo da je pravda roditelj mira". Gary Jonathan BASS, *Stay the Hand of Vengeance – The Politics of War Crimes Tribunals*, 2000., 284. Ukratko, vladavina prava ponudila se kao alternativa ratnom kaosu. Realisti pak ističu kako ostvarivanje pravde preko suda može ometati ili osujetiti mirovne pregovore i produljiti rat. G. J. BASS, n. dj., 285.-286.

[19] Osnivanjem ICTY-a i ICTR-a prevladalo je mišljenje da određena ponašanja valja kazniti kao kaznena djela, a ne samo shvaćati kao povrede međunarodnih konvencija i običajnog prava. Tako su ICTY i ICTR postale važne međunarodne institucije u tranziciji iz kulture nekažnjavanja u kulturu koja zahtijeva individualnu odgovornost. Ističe se da je individualizacija krivnje presudna kao sredstvo osujećivanja kolektivne odgovornosti i stoga nužna za trajno pomirenje zaraćenih strana. Madelain Albright je naglasila kako "odgovornost za ova kaznena djela nije na Srbima, Hrvatima ili Muslimanima kao *narodima*, već je na *ljudima* koji su naredili i počinili zločine. Rane otvorene ovim ratom zacijelit će puno prije ukoliko se napusti kolektivna odgovornost i odredi individualna odgovornost za zločine".Madelain ALBRIGHT, *Bosnia in Light of the Holocaust: War Crimes Trials*, April 12 1994. O potrebi suđenja i kažnjavanja individualnih počinitelja vidjeti izjavu Antonia Cassesea u Prvom izvještaju ICTY-a, paragraf 16. Vidjeti također Theodor MERON, *Is International Law Moving Towards Criminalization?* 9 Eur.J.Int.L.L., 1998., 18. Naravno da je nemoguće osuditi sve osobe koje su sudjelovale u počinjenju zločina (veliki broj slučajeva zagušio bi bilo koji pravni sustav). ICTY se stoga odlučio suditi samo onima koji su "najkrivlji" – ponajprije onima koji su osmislili i vodili politiku činjenja zločina. U tom smislu suđenja ICTY-a imaju simbolično značenje. Na samom početku svog djelovanja u nedostatku dostupnih visokopozicioniranih optuženika sudilo se i hijerarhijski beznačajnim optuženicima kao što su Tadić i Kupreškići.

[20] Generalna prevencija usmjerena je na odvraćanje potencijalnih budućih počinitelja od činjenja ovih kaznenih djela na prostoru bivše Jugoslavije i drugdje u svijetu, a specijalna na preodgajanje ili onemogućavanje konkretnog počinitelja od ponavljanja sličnih kaznenih djela (utilitarna teor-

4) osigurati pravedno suđenje počiniteljima zločina;[23]
5) pridonijeti preuzimanju moralne odgovornosti za prošlost, kolektivnoj katarzi i pomirenju među zaraćenim narodima;[24]

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ija kažnjavanja). Lawrence Eagleburger u svom pismu Antoniju Casseseu od 8. svibnja 1995. kaže: "Ova suđenja poslužit će kao upozorenje mogućim budućim ratnim zločincima da međunarodna zajednica neće tolerirati zločine protiv čovječnosti." Antonio CASSESE, "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court", *The Rome Statute of the International Criminal Court*, 2002., Vol. I, 3, 12, bilj. 26. Prevencija se često smatra najvažnijim ciljem međunarodnog kaznenog prava. Vidjeti Diane F. ORENTLICHER, *Settling Accounts: The Duty to Prosecute Human Rights Violations of Prior Regime*, 100 Yale L. J., 1991., 2537., 2542. Prevencija je čak i jedan od osnovnih principa na kojima je utemeljen Međunarodni kazneni sud. Vidjeti Rimski statut Međunarodnog kaznenog suda, preambula, paragraf 5. O preventivnom djelovanju međunarodnog kaznenog sudovanja vidjeti Payam AKHVAN, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities*, 95 Am. J. Int'l L., 2001., 7., 12.. Mnogi smatraju da preventivna uloga kažnjavanja u nacionalnim kaznenim sustavima nije dokazana. Vidjeti Dan M. KAHAN, *The Secret Ambition of Deterrance*, 113 Harv.L.Rev., 1996., 414., 416. Zbog male vjerojatnosti kaznenog progona preventivna funkcija kažnjavanja putem međunarodnog suda ili sudova još je upitnija, pa neki predlažu da je bolje sredstva usmjeriti ka rehabilitaciji žrtava nego ih trošiti na suđenje počiniteljima. Vidjeti Mark J. OSIEL, *Why Prosecut? Critics of Punishment of Mass Atrocities*, 22 Hum. Rts. Q., 2000., 118., 127.-128.

[21] Prema retributivnoj teoriji, kažnjavanja počinitelj zaslužuje kaznu za povredu koju je nanio društvu.

[22] Putem ostvarenja pravde za žrtve nastoji se dati zadovoljština žrtvama i osujetiti osveta i samopomoć. Vidjeti primjerice izjavu francuskog delegata prilikom osnivanja ICTY-a u Virginia MORRIS, Michael P. SCHARF, *An Insider's Guide to The International Criminal Tribunal for The Former Yugoslavia*, 1995., 163.-164. Prema bivšem tužitelju ICTY-a Richardu Goldstonu "nürnberška suđenja imala su važnu ulogu kao službeno priznavanje žrtavama holokausta onog što im se dogodilo", a takvo priznanje je djelomična odšteta za pretrpljenu patnju, a ima i funkciju katarze koja obeshrabruje osvetu. Richard J. GOLDSTONE, "Fifty Years after Nuremberg: A New International Criminal Tribunal for Human Rights Criminals", *Contemporary Genocides: Causes, Cases, Consequences*, 1996., 215. Prema Antoniju Casseseu, prvom predsjedniku ICTY-a "jedina civilizirana alternativa želji za osvetom je ostvarenje pravde putem suda" jer će inače "osjećaji mržnje i odbijanja koji se skrivaju ispod površine prije ili kasnije izbiti na površinu i dovesti do ponovnog nasilja". Prvi izvještaj ICTY-a, paragraf 15.

[23] Teško je u tijeku rata ili neposredno nakon završetka rata, dok su strasti još jake i rane svježe osigurati pravedno suđenje pred nacionalnim sudovima – suđenja su često ispolitizirana (primjere možemo naći i u samoj Hrvatskoj) ili se pak organiziraju tzv. "show trials" (takvih slučajeva je bilo u Republici Srpskoj i Srbiji) ili pak sam pravosudni sustav nije organizacijski u stanju procesuirati zločine (u Kosovu pravosudni sustav nakon odlaska Srba gotovo da nije postojao, ili pravosudni sustav jednostavno nije u stanju procesuirati golem broj slučajeva kao primjerice u Ruandi). Jedan američki diplomat u Beogradu podržao je ideju stvaranja međunarodnog *ad hoc* suda smatrajući da: "[i]zuzimanje progona počinitelja iz nacionalnog pravosudnog sustava – civilnog i vojnog – izgleda kao jedini održivi način da se izbjegne povećanje gorčine izazvane ratom s novom nepravdom koja će samo dalje odložiti pomirenje unutar bivše Jugoslavije". State Department 08249/101627Z, Rackmales to Christopher, July 1992, prema Bass, *supra* bilješka 18, str. 310. No zbog velikog broja počinjenih zločina ICTY nije u stanju procesuirati sve zločince, stoga je važno što prije osposobiti nacionalne sudove za pravedna suđenja i organizirati međunarodnu kontrolu tih suđenja. U tom smislu značajna su primjerice "Rules of the Road" koja je ustanovio ICTY i NATO kojim se osigurava kontrola lokalnih suđenja ratnih zločina u Bosni od ICTY-a.

[24] Po nekima pomirenje je najvažniji zadatak Suda budući da se jedino ukupnim pomirenjem može ostvariti politički, ekonomski i društveni napredak te sigurnost cijelog područja jugoisto-

6) prikupiti autentičnu dokumentaciju te nepristrano i istinito zabilježiti povijesne činjenice o ratnim događajima i zločinima;[25]
7) pridonijeti razvoju međunarodnog kaznenog prava.[26]

Dakle, smatra se da bi ICTY trebao biti više od pukog kaznenog suda. Iako ga se ponajprije doživljava kao sudbeno tijelo, od njega se istodobno očekuje da djeluje i kao povijesni institut i kao diplomatsko sredstvo. Stoga je odnos između prava i povijesti daleko složeniji pred ICTY-em nego drugim normalnim kaznenim sudovima.

Pred ICTY-em, kao i pred bilo kojim drugim kaznenim sudom, povijest može biti od pomoći pri utvrđivanju individualne odgovornosti. Pri tom je povijest u službi sudskog postupka. Stranke očekuju od vještaka povjesničara da im svojim znanjem iz povijesti pomognu dobiti slučaj – dokazati (tužiteljstvo) ili pak opovrgnuti (obrana) navode optužnice. Suci pak očekuju od vještaka povjesničara da im pomognu utvrditi istinu o prošlim događajima koji su obuhvaćeni optužnicom i odredbama materijalnog kaznenog prava na kojima se optužnica temelji. Pravo određuje, uglavnom vrlo precizno, što treba dokazati da bi se nešto smatralo istinitim za potrebe utvrđivanja osobne krivnje. Bilo što što je izvan toga smatra se irelevantnim. Ovu vrstu istine, čije parametre pravo precizno definira, zvat ću za potrebe ovog članka "pravnom istinom".

Zamišljeno je također da će ICTY djelovati kao tijelo koje će prikupljati povijesnu građu i dati nezavisno i istinito tumačenje događaja na prostorima bivše Jugoslavije. Povijest je u središtu ostvarenja ovog cilja ICTY-a. Pri tome je zapravo sudski postupak u službi povijesti. U tom okviru zadatak je vještaka povjesničara analizirati prikupljene dokaze te tumačiti uzroke i prirodu sukoba nezavisno od optužnice konkretnog slučaja kako bi Sud mogao dati "službenu", nepristranu i objektivnu verziju događaja na prostoru

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čne Europe. Vidjeti Aleksandar FATIĆ, *Reconciliation via the War Crimes Tribunal*, 2000. Drugi su pak mišljenja da je oprost važniji za ozdravljenje društva nego kazneni progon ratnih zločinaca. Vidjeti Joshua DRESSLER, *Hating Criminals: How can Something That Feels so Good be Wrong?,* 88 Mich. L. Rev., 1990., 1448. Čini mi se optimističnim očekivati ostvarenje pomirenja isključivo sudskim postupcima. Suđenja valja gledati kao sastavni dio ukupne poslijeratne socijalne rekonstrukcije društva. Ona su dio socijalnog inženjeringa koji ne smije biti samo nametnut izvana i odozgora, već se mora ostaviti prostor za njegov spori rast odozdo iz same zajednice. Potrebno je pažljivo uravnotežiti potrebu za suđenjem s potrebom za oprostom.

[25] Ovo je kao jedan od ciljeva ICTY-a istaknula još američka delegacija prigodom njegova osnivanja. Vidjeti izjavu Madeline Albright u V. MORRIS, M. P. SCHARF, n. dj., 165-166. Sam ICTY proglasio ga je svojim najznačajnijim zadatkom. Vidjeti *Fifth Annual Report of the 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*, U.N. GAOR, 53rd Sess., Agenda item 48, PP 297, 299, U.N. Doc. A/53/219-S/1998/737 (1998), www.un.org/icty/rappannu-e/1998/index.htm (dalje: "Peti izvještaj ICTY").

[26] Razvoj međunarodnog kaznenog prava se s vremenom prešutno nametnuo kao jedan od njegovih glavnih ciljeva. To je ujedno i najkontroverzniji cilj ovog suda. Često se inzistira na tome da sud primjenjuje samo postojeće pravo (na tome je inzistirao još i Glavni sekretar Ujedinjenih naroda u svom izvještaju. Kao u bilj. 7, paragraf 34.), no iz sudskih odluka jasno proizlazi želja da se kroz djelatnost ovog suda prošire granice međunarodnog kaznenog prava.

bivše Jugoslavije, tj. utvrditi povijesnu istinu o prirodi i širem kontekstu ovih sukoba. Stranke (obrana i tužiteljstvo) obično nisu zainteresirane utvrditi povijesnu istinu samu za sebe – njih zanima utvrditi povijesnu istinu samo ako i u mjeri u kojoj se ona poklapa s pravnom istinom.[27]

Ukratko, primarni je zadatak vještaka povjesničara pomoći Sudu ostvariti dva od niza njegovih ciljeva: i) utvrditi individualnu odgovornost za počinjene zločine koji prema odredbama Statuta predstavljaju kazneno djelo te ii) prikupiti autentičnu dokumentaciju i utvrditi povijesnu istinu o ratnim događajima i zločinima na prostoru bivše SFRJ.[28] U ispunjavanju oba ova zadatka od vještaka povjesničara se očekuje pomoć pri utvrđivanju istine o prošlim događajima - u prvom slučaju pravne istine, a u drugom povijesne istine. Raznorazne vrste pritisaka do kojih dolazi u sudskom postupku ugrožavaju mogućnost pronalaženja istine s gledišta povjesničara. U ovom radu polazim od pretpostavke da ovi pritisci različito utječu na mogućnost povjesničara da pomognu sudu u otkrivanju pravne odnosno povijesne istine.

3. Pritisci na vještake povjesničare u njihovom traganju za istinom do kojih dolaze tijekom sudskog postupka pred ICTY-em

Da bih mogla potvrditi navedenu pretpostavku, moram se prvo usredotočiti na to kako se organizacija vještačenja pred ICTY-em te organizacija sudskog postupka općenito odražava na traganje za istinom vještaka povjesničara.

3.1. Utjecaj organizacije postupka vještačenja pred ICTY-em na utvrđivanje istine vještaka povjesničara

ICTY je *sui generis* institucija sa svojim posebnim Pravilima o postupanju i dokazima[29] koja nisu odraz niti jednog određenog pravnog sustava, već predstavljaju hibrid načinjen od pojedinih elemenata iz anglo-američkog (akuzatornog) i kontinentalnog (inkvizitornog) sustava,[30] a osjeća se i utjecaj

[27] Iznimke su dakako moguće. Primjerice, čini se da Milošević doživljava svoje suđenje kao forum za izlaganje svog viđenja povijesne istine o događajima u bivšoj Jugoslaviji. Isto bi se moglo dogoditi i u Šešeljevu postupku.

[28] U konačnici se nada da će utvrđivanjem individualne odgovornosti i povijesne istine Sud pridonijeti katarzi i pomirenju među zaraćenim narodima te utjecati na održanje mira na tim prostorima.

[29] Kao u bilj. 10.

[30] Općenito se smatra da su originalna PPD bila pretežno napisana prema akuzatornom postupovnom modelu. Prvi izvještaj ICTY, paragraf 71.-74. Vidjeti također slučaj, Prosecutor v. Duško Tadić, slučaj br. IT-94-1-T, (dalje: "slučaj Tadić"), Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, August 10, 1995, paragraf 22, na www.un.org/icty/ind-e.htm, ili pak Prosecutor v. Zejnil Delalić et al., (slučaj br. IT-96-21) (dalje: "slučaj Delalić"), Decision on the Motion of the Joint Request of the Accused Persons Regarding the Presentation of Evidence, od 12. lipnja 1998, paragraf 31, www.un.org/icty/ind-e.htm. Vidjeti primjerice Richard MAY, Marike WIERDA, *Trends in International Criminal Evidence: Nuernberg, Tokyo, The Hague and Arusha*, 37 Colum. J. Transnat'l L. 1999., 725., 727.; Rod DIXON, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 Transnat'l L. & Contemp. Probs. 81, 1997.; Sean D. MURPHY, *Developments in International*

postupaka pred drugim međunarodnim sudovima, posebno Međunarodnim sudom pravde i Europskim sudom za ljudska prava. U nekim segmentima postupka dominiraju akuzatorni, a u drugim pak inkvizitorni utjecaji. Vještačenja su prvotno bila uglavnom strukturirana prema akuzatornom modelu postupanja, no s vremenom se uvodilo sve više inkvizitornih.[31]

Vještake pred ICTY-em ponajprije pozivaju stranke (pravilo 85 (A) PPD) - svaka stranka bira svog vještaka, određuje predmet njegova vještačenja, stavlja mu na raspolaganje materijal na temelju kojeg on ili ona izvodi svoje vještačenje, priprema ga za direktno i unakrsno ispitivanje (karakteristika akuzatornih postupaka).[32] U želji da se ubrzaju postupci sredinom 1998. godine dalo se pravo sucima tražiti od tužitelja odnosno obrane da smanje broj pozvanih svjedoka ako smatraju da je pozvan preveliki broj svjedoka za dokazivanje jedne te iste stvari,[33] a u prvoj polovici 2001. godine otišlo se još i dalje te je sucima dano pravo da odrede broj svjedoka koje tužiteljstvo odnosno obrana mogu pozvati.[34] Dakle, od polovice 2001. godine sudsko vijeće može odlučiti

Criminal law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, 93 Am. J. Int. L., 1999., 57., 80. Kad je počeo djelovati Sud je u postupak uvodio sve više inkvizitornih elemenata. Djelomično je to bio rezultat osjećaja da koristeći neke od metoda postupanja iz inkvizitornih sustava sud može lakše ostvariti svoje ciljeve, napose one koji idu preko cilja rješavanja konkretnog spora, kao što je primjerice implementacija određene kaznene politike prema određenim djelima iz međunarodnog kaznenog prava ili utvrđivanje povijesne istine odnosno ostvarenje i održavanje mira među sukobljenim stranama. Djelomično je to bila posljedica toga što veliki broj sudionika u postupku (kako sudaca, tako tužitelja i odvjetnika) dolazi iz zemalja s inkvizitornim pravnim sustavom pa su im rješenja iz tih sustava bila jednostavno bliska. O temeljnim karakteristikama akuzatornog i inkvizitornog modela postupanja vidjeti Mirjan DAMAŠKA, "Models of Criminal Procedure", *Zbornik Pravnog fakulteta u Zagrebu*, 51, 2001., 478.-494.

[31] Način izvođenja vještačenja određen je ponajprije odredbama PPD-a. No izvođenje vještačenja ovisi u određenoj mjeri i o sastavu svakog pojedinog sudbenog vijeća, dolaze li suci, a napose predsjednik vijeća, iz inkvizitornog ili akuzatronog sustava, imaju li suci praktično iskustvo u svojoj zemlji ili ne, kao i o tome iz kojih pravnih sustava dolaze drugi sudionici u postupku (tužitelji i odvjetnici). Primjerice, suci iz civilnih sustava obično mnogo slobodnije ispituju svjedoke negoli njihove kolege koji dolaze iz common-law sustava. Suci koji dolaze iz civilnih sustava dopuštaju izvođenje dokaza koje njihove kolege iz common-law sustava koji su naučeni raditi pod vrlo strogim odredbama o prihvatljivosti dokaza, često smatraju neprihvatljivima.

[32] Pri tome i obrana i tužiteljstvo nailaze na niz problema. Prvo, relativno je malo stručnjaka izvan prostora SFRJ koji se bave ovom problematikom, a za povjesničare koji dolaze s prostora bivše SFRJ postoji bojazan da će ih Sud već unaprijed doživjeti kao pristrane u većoj mjeri negoli stručnjake koji nisu s ovih prostora pa će stoga njihovu svjedočenju pridati manju dokaznu vrijednost. Drugo, većina najkvalificiranijih stručnjaka, pogotovo onih koji nisu s prostora bivše Jugoslavije, oklijeva svjedočiti budući da ne žele biti identificirani niti s tužiteljstvom niti s obranom ili jednostavno smatraju da sudski postupak stavlja prevelika ograničenja njihovoj istraživačkoj slobodi ili da još uvijek nema dovoljno dokaza za ozbiljnu povijesnu analizu o tome što se na tim prostorima događalo. Tako je iznimno teško doći do kvalitetnih vještaka povjesničara.

[33] Vidjeti izmjene Pravila od 9. i 10. lipnja 1998. (IT/32/Rev.13.), pravilo 73bis i 73ter, na www.un.org/icty/legaldoc/index.htm.

[34] Vidjeti izmjene Pravila od 12. travnja 2001. (IT/32/Rev.22), pravilo 73 bis (C) i 73ter (C), na www.un.org/icty/legaldoc/index.htm.

da nema potrebe za nekim ili svim vještačenjima koje su stranke predložile. Sudsko vijeće može i samo pozvati vještaka i to *proprio motu* ili pak tako da naredi strankama da izvedu vještačenje (pravilo 98 PPD), (karakteristika inkvizitornih postupaka).[35] Na stranci koja poziva vještaka je da ga ispita (direktno ispitivanje), a suprotstavljena stranka ima ga pravo unakrsno ispitati (karakteristika akuzatornih postupaka). Suci mogu u bilo kojoj fazi postupka vještaku postaviti bilo koje pitanje (pravilo 85 (B) PPD), (karakteristika inkvizitornih postupaka). Vještaci moraju sudskom vijeću dostaviti pismeni nalaz i mišljenje (pravilo 94bis, PPD), (karakteristika inkvizitornih postupaka).

Ovakva organizacija vještačenja nameće niz prepreka za utvrđivanje istine povijesnim vještačenjem.

3.1.1. Vještaci stranaka

U sustavima u kojima stranke biraju i pripremaju vještake za izlaganje vještačenja pred sudom (akuzatorni sustavi) oni često i nesvjesno prilagođuju svoje interpretacije potrebama stranke koja ih je angažirala, a nerijetko stranke na njih i vrše pritisak da pojednostave i promijene svoja tumačenja za potrebe sudskog postupka.[36] ICTY nije imun na ove probleme.

Stranke pažljivo čitaju objavljene matrijale te transkripte iz prethodnih svjedočenja pojedinih povjesničara i onda pristupaju onima čiji su pogledi bliski njihovu shvaćanju i "teoriji slučaja." Drugim riječima, stranke traže vještaka koji će dati najpovoljnije vještačenje, vještačenje koje će im biti od pomoći za dobivanje slučaja. Povjesničari ne žive u vakuumu, oni imaju svoje političke sklonosti, svjesne i podsvjesne pristranosti, a često i ciljeve. Stoga

[35] Ovo je posljedica utjecaja ne samo kaznenog postupka u inkvizitornim pravnim sustavima, već postupka pred drugim međunarodnim sudovima. Naime, pred međunarodnim sudovima suci redovito biraju vještake. Primjerice čl. 50. Statuta Međunarodnog suda pravde (dostupan na www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm) određuje da "[s]ud može u bilo koje vrijeme povjeriti bilo kojoj osobi, tijelu, bureau, komisiji ili drugoj organizaciji koju izabere zadatak da provede istragu ili da stručno mišljenje". Prema Pravilima Međunarodnog suda pravde iz 1978. godine (posljednje izmjene od 5. prosinca 2000., dostupnim na www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicrulesofcourt_20001205.html) i sud i stranke imaju pravo pozvati vještake (čl. 62. st. 2. i čl. 63. st. 1.). Slične ovlasti ima i Europski sud za ljudska prava, vidjeti Pravila suda od listopada 2002., pravilo 42 (1) i (2), www.echr.coe.int/Eng/Edocs/RulesofCourt2002.htm#fortytwou (u daljnjem tekstu "Pravila ESLJP"). Budući da je dužnost sudaca pred međunarodnim sudovima utvrditi istinu oni nisu samo ovlašteni, već i moraju sami aktivno sudjelovati u utvrđivanju činjenica. Gillian M. WHITE, *The Use of Experts by International Tribunals*, 1965., 7.-14.. ICTY se na početku ustručavao koristiti pravima koja su zadirala u slobodu stranaka glede izbora i izvođenja dokaza. No kako je sve više inkvizitornih elemenata ulazilo u kazneni postupak pred sudom, kako je sve izraženija postojala uloga sudaca kao jamaca utvrđivanja istine i kako je vrijeme postajalo sve dragocjenije zbog sve većeg broja optuženika i vremenske ograničenosti postojanja suda (trebao bi završiti svoju djelatnost 2008. godine) suci su postajali sve spremniji koristiti se ovim svojim pravom kako bi skratili trajanje postupaka i osigurali utvrđivanje istine. Tako je primjerice u slučaju Milomira Stakića sud naredio da se imenuje vještak za rukopis, kao neutralni vještak suda. V. Prosecutor v. Milomir Stakić, (slučaj br. IT-97-24) Order Pursuant to Rule 98 to Appoint a Forensic Handwriting Examiner, od 28. lipnja 2002, www.un.org/icty/ind-e.htm (dalje: "slučaj Stakić").

[36] Neki primjeri ovakvog ponašanja mogu se naći u D. A. FARBER, n. dj., 1012.-1013.

vještačenja vještaka suprotnih stranaka često polaze od posve drukčijih teoretskih osnova.

Već u prvom intervjuu potencijalnog vještaka oblikuje se neki zajednički pogled na stvar. Jednom kad pristane biti vještakom osoba postaje dijelom tima obrane odnosno tužiteljstva i neizbježno se, svjesno ili nesvjesno, poistovjećuje s timom za koji "nastupa". Vještaci redovito staju na stranu stranke koja ih je angažirala.

Kako svaka stranka vodi svoju paralelnu istragu i izrađuje svoju "teoriju slučaja" koja joj po njezinu sudu najviše povećava šanse za dobiti slučaj stranke su vrlo selektivne u prikupljanju materijala – uglavnom prikupljaju dokaze koji im idu u prilog.[37] Rezultat toga je da stranke svojim vještacima uglavnom daju materijal koji potvrđuje "teoriju slučaja" stranke koja ih je angažirala[38] pa su vještačenja o istoj stvari često utemeljena na vrlo različitim podacima.

Uz to tužitelj i obrana pažljivo pregledavaju nalaze i mišljenja svojih vještaka te je konačna verzija ovih nalaza rezultat njihove uske suradnje. Stvaranje zajedničke priče uključuje postupak odabira i prilagođavanja dokaza. Od vještaka se traži da njegovo vještačenje bude dovoljno široko da zadovolji potrebe stranke koja ga je angažirala, a opet dovoljno ograničeno da ostavi što manje prostora suprotnoj strani za napad u unakrsnom ispitivanju koji će umanjiti vrijednost vještakova iskaza.[39] Uz to stranke intenzivno pripremaju vještaka za direktno i unakrsno ispitivanje – uče ih da budu precizni, jasni, uvjerljivi, da izostave suvišne i odviše složene detalje. Na taj način svaka strana dodatno oblikuje svjedočenje vještaka i prilagođuje svojim potrebama kako bi poboljšala svoj položaj pred Sudom.

Napokon vještaci pred Sudom ne iskazuju slobodno, već odgovaraju na pitanja stranaka koje na taj način imaju znatnu kontrolu nad sadržajem usmenog iskaza vještaka. Vještaku se često ne daje prostora da izrekne ili objasni neku svoju misao ili izjavu pa njezin konačni efekt može biti drukčiji od onog kojeg je vještak imao na umu.[40] To daje mogućnost za daljnje manipuliranje iskazom vještaka.[41]

Zbog ovako snažne polarizacije stranaka sudnica ponekad izgleda kao bojište na kojem se sukobljuju vještaci suprotstavljenih stranaka iznoseći dva

[37] Postoji obveza tužiteljstva da prikuplja i ekskulpirajući materijal (pravilo 68 PPD), no često tužiteljstvo propušta to činiti.

[38] Dvije glavne iznimke od toga su: i) javni podaci odnosno podaci koji bi mogli postati javni prije negoli dođe do svjedočenja vještaka te ii) materijal koji nije javan, ali ga suprotna strana vjerojatno ima.

[39] Alice KESSLER-HARRIS, "Equal Employment Opportunity Commission v. Sears, Roebuck and Company: A Personal Account", *Radical History Review*, 35, 1986., 57., 63.

[40] Alice Kessler-Harris je primjerice pisala o svojoj velikoj frustraciji sa sudskim postupkom u kojem nije imala mogućnost objasniti svu složenost razvoja spolno uvjetovanog pogleda na posao. Kao u prethodnoj bilj.

[41] Budući da pred ICTY-em stranke moraju dostaviti sudbenom vijeću izvještaj vještaka prije njegova ili njezina samog usmenog svjedočenja, onda je i mogućnost ovakve manipulacije smanjena.

potpuno suprotna mišljenja ili se pak pretjeruje i pridaje prevelika važnost i malim razlikama u njihovu mišljenju. Sve to pridonosi jednostranom iskrivljavanju informacija koje iznose i objašnjavaju vještaci stranaka.

Da bi ovakav sustav vještačenja bio djelotvoran i doveo do utvrđivanja istine iznimno je važno uspostaviti približnu jednakost stranaka glede korištenja stručnjaka te je nužno vještake podvrgnuti intenzivnom unakrsnom ispitivanju. To omogućuje obrani odnosno tužiteljstvu da izloži vještačenje povjesničara ispitu koji otkriva pristranosti, nepouzdane podatke, neodrživa tumačenja te da spriječi zloupotrebu povijesti u interesu suprotstavljene stranke. Pred ICTY-em ovi sigurnosni mehanizmi donekle su slabiji nego u akuzatornim sustavima (narušena je ravnoteža između stranaka te poremećena funkcija direktnog i unakrsnog ispitivanja), a stupanj pristranosti vještaka nije ništa manji.

3.1.1.1. Jednakost stranaka

Nejednakost tužiteljstva i obrane pred ICTY-em je izrazita i kao takva predstavlja mogućnost izvora iskrivljenog predstavljanja stvarnosti. Optuženici raspolažu s manje financijskih sredstava nego OTP - većina ih je zapravo bez financijskih sredstava. Osobama bez financijskih sredstava jednog odvjetnika i pomagača odvjetniku financira Sud.[42] Tim od dva odvjetnika teško se može ravnopravno suprotstaviti tužiteljstvu koje ima veliki broj službenika različitog profila i raspolaže velikim novčanim sredstvima.[43] Gotovo svaki odvjetnički tim počinje iz početka – mora učiti Statut i Pravila Suda, praksu ICTY-a, međunarodno kazneno pravo, prikupljati dokaze koje će izložiti u svom dijelu slučaja (rijetko isti odvjetnik nastupa u više slučajeva),[44] dok tužitelji akumuliraju svoje znanje, međusobno izmjenjuju informacije,[45] pohađaju tečajeve koje organizira UT i slično. Ured tužiteljstva čak zapošljava i nekoliko povjesničara, specijalista za povijest zemalja bivše Jugoslavije, kojima je zadatak pomoći vještaku povjesničaru uobličiti pisano mišljenje i usmeni iskaz te pomoći tužitelju u pripremi u izvođenju unakrsnog ispitivanja vještaka povjesničara obrane. Stoga su i odabir i priprema vještaka obrane i tužiteljstva rijetko na istoj razini kvalitete.

Ovu nejednakost dodatno potencira ponašanje tužitelja koji je sklon u posljednjem trenutku zatrpati obranu golemom količinom dokumenata koje ona redovito nije u stanju u kratkom vremenu koje ima na raspolaganju svladati (primjerice, to ponekad otežava obrani pripremiti kvalitetno unakrsno

[42] Čl. 6. i čl. 16. (C), Directive on Assignment of Defence Counsel, Directive No. 1/94, IT/73/Rev.9, www.un.org/icty/legaldoc/index.htm .

[43] Budžet cijelog Suda za 2002/2003 godinu iznosi $223,169,800. Znatan dio ovih sredstava pripada uredu tužitelja. Vidjeti www.un.org/icty/glance/index.htm.

[44] S osnivanjem udruženja odvjetnika koji zastupaju pred ICTY-em (*Association of Defence Councel Practicing before ICTY [ADC-ICTY]*), situacija se nešto popravila.

[45] Godine 2002. godine instaliran je i univerzalni kompjutorski sustav (*universal information system*) s pomoću kojeg su sve informacije kojima raspolaže tužiteljstvo dostupne čitavom osoblju tužiteljstva.

ispitivanje tužiteljeva vještaka povjesničara). I na kraju, tužiteljstvo je to koje prvo izlaže svoje viđenje stvarnosti (često mjesecima) i time stvara određen doživljaj stvarnosti koji je kasnije, kad je na obrani red izložiti svoje viđenje stvarnosti, vrlo teško izmijeniti.

Ravnoteža među strankama dodatno je narušena nedavno izrečenim tumačenjem prava sudaca da ograniče broj svjedoka koje stranke predlažu. Naime, u slučaju Stakić sudsko vijeće je zauzelo stajalište da "obrana u načelu može pozvati svog vještaka koji će svjedočiti o istim stvarima kao i vještak tužiteljstva ukoliko može pokazati da ovaj ima bolje znanje, vještinu ili koristi bolje metode nego li vještak tužiteljstva".[46] Moje iskustvo u radu pred Sudom uvjerilo me da vještaci koje izabire tužiteljstvo često poprimaju ulogu borca za stvar tužiteljstva. Stoga se ovakvim ograničavanjem obrane u izvođenju svog vještačenja stvara opasnost od prezentiranja jednostrane slike o problemu koji bi vještaci trebali objasniti sudskom vijeću.[47] U cilju utvrđivanja istine vještačenju vještaka tužiteljstva nužno je suprotstaviti vještačenje vještaka obrane. Postojanje dvaju vještaka suprotstavljenih stranaka, od kojih svaki nastoji poduprijeti teoriju slučaja svoje stranke dovodi do iscrpnijeg i kritičnijeg preispitivanja različitih činjenica. No svjedočenje obaju vještaka, onog tužiteljstva i onog obrane, važno je i stoga što se izlaganjem različitih argumenata i kritiziranjem argumenata suprotstavljene strane daje sucima realnija mogućnost da ocijene iznesene dokaze, procijene uvjerljivost vještaka i na temelju toga donesu odluku. Tamo gdje postoji vještačenje samo jednog vještaka (bez obzira na to tko ga je imenovao - stranke ili suci) veća je vjerojatnost da će suci uzdajući se u stručnost vještaka, a u nedostatku znanja iz područja vještačenja, prihvatiti vještakovo stručno mišljenje bez kritičnog preispitivanja i tako u tom segmentu prenijeti svoju ovlast donošenja odluke na vještaka, za kojeg je malo vjerojatno.[48] Ovo je posebno problematično ako vještaka bira i priprema jedna stranka, a uglavnom je to tužitelj (kao što je i predloženo u slučaju Stakić), budući da je takav vještak rijetko nepristran.

3.1.1.2. Ispitivanje vještaka

U sustavima u kojima stranke odabiru i pripremaju svjedoke, zbog složenosti i važnosti samih vještačenja, velika važnost se pridaje vještini unakrsnog ispitivanja i općenito ispitivanju vještaka. Unakrsno ispitivanje trebalo bi razotkriti sve nedostatke u svjedočenju vještaka suprotne strane.

[46] Vidjeti Slučaj Stakić, Decision on Request for Approval of Defense Experts, od 8. listopada 2002.

[47] Čak i u inkvizitornim pravnim sustavima u kojima uz suce tužitelji i/ili policija mogu imenovati vještake, a da pri tome obrana nema takve ovlasti, ovakva praksa nailazi na sve učestaliju kritiku. Uviđa se da kad tužitelj ili pak policija imenuju vještaka, daju mu upute i materijale na kojima ovaj zasniva svoj nalaz i mišljenje, to dovodi do smanjenja neutralnosti vještaka te stvara podjelu između tužitelja i policije zajedno s vještakom s jedne strane i suda s druge strane. U tom smislu vidjeti Barbara HUBER, "Criminal Procedure in Germany", *Comparative Criminal Procedure*, 1996., 96., 150.-151.

[48] Slično M. DAMAŠKA, Evidence Law Adrift, 1997., 152.; B. HUBER, n. dj.

Pred ICTY-em cijela funkcija direktnog i unakrsnog ispitivanja vještaka je poremećena time što odvjetnici obrane često dolaze iz civilnih pravnih sustava i ne znaju se djelotvorno koristiti metodama ispitivanja svjedoka svojstvenim akuzatornom sustavu, kao i davanjem sucima mogućnosti direktnog uplitanja u postupak te nedovoljnom određenošću podataka koje jedna stranka mora otkriti drugoj stranci u vezi s vještačenjem vještaka.

Ponekad ni najvještijim odvjetnicima nije moguće unakrsnim ispitivanjem otkriti sva mjesta na kojima je vještačenje vještaka suprotne strane izmijenjeno tijekom priprema koje obavlja odvjetnik obrane odnosno tužiteljstvo, ili pak sva mjesta na kojima se njihovo vještačenje oslanja na netočne podatke koje su obrani ili tužiteljstvu dali lokalni svjedoci u strahu da sami ne budu optuženi ili pak mjesta na kojima se vještačenje zasniva na izmišljenim podacima koje su tužiteljstvu ili obrani dale neke od obavještajnih službi koje djeluju na tom području. Velik dio odvjetnika koji zastupaju optuženike pred Sudom školovani su i djeluju u inkvizitornim pravnim sustavima (većina ih dolazi iz zemalja bivše Jugoslavije) i obično nemaju iskustva s unakrsnim ispitivanjem. Ne znaju pripremiti svog vještaka za unakrsno ispitivanje tužitelja te ne znaju na pravi način unakrsno ispitati vještaka tužitelja. Nisu usredotočeni na to što žele unakrsnim ispitivanjem postići, nerijetko postavljaju pitanja o stvarima koje nisu relevantne za njihov slučaj. Ukratko, mogućnosti koje nudi unakrsno ispitivanje u potrazi za istinom odvjetnici obrane često ne uspijevaju iskoristiti.[49] Sve to odražava se i na mogućnost Suda da utvrdi objektivnu istinu.

Djelomično su i zbog toga sucima dane široke ovlasti glede ispitivanja vještaka i općenito svjedoka. No ispitujući svjedoke suci dovode u pitanje svoju neutralnost: prvo, oni su skloni vrlo rano stvoriti hipotezu o samom slučaju i tako postaju skloniji dokazima koji potvrđuju njihovu hipotezu; drugo, suci teže uzeti stranu one stranke čija je interpretacija događaja sličnija njihovoj hipotezi.[50] Nadalje, kada suci ispituju svjedoka to može poremetiti ritam ispitivanja vještaka koje je strukturirano sukladno akuzatornim metodama ispitivanja.[51] Tužitelj i obrana vrlo pažljivo grade direktno, unakrsno i dodatno ispitivanje, točno znajući koliko daleko trebaju ići u svojim pitanjima da bi ostvarili određen strateški cilj. Kad se sudac umiješa i postavi pitanje, odvjetnik koji provodi unakrsno ispitivanje može izgubiti kontrolu nad vještakom i time pogodan trenutak za otkrivanje nekog slabog mjesta u njegovu ili njezinu vještačenju može biti nepovratno izgubljen. Stoga već i samo sudačko ispitivanje vještaka u sustavu u kojem ispitivanje uglavnom provode stranke može ugroziti mogućnost otkrivanja istine. Poseban problem ovdje predstav-

[49] Slično svoje iskustvo opisuje i Patricia Wald, negdašnja sutkinja ICTY-a. P. M. WALD, n. dj., 104.

[50] O važnosti neutralnosti sudaca u sustavima u kojima stranke imaju primarnu obvezu prikupljati dokaze vidjeti M. DAMAŠKA, Evidence Law Adrift, 82., 89., 95.; Vidjeti također M. DAMAŠKA Two Faces of Justice and State Authority, 1986., 135.-140.

[51] Vidjeti u tom smislu P. M. WALD, n. dj., 90.

[52] Zato je pravilom 65ter PPD uvedeno da tužitelj najmanje 6 tjedana prije početka suđenja odnosno obrana prije početka izlaganja svog dijela slučaja mora dostaviti Sudu i suprotstav-

ljaju suci koji dolaze iz civilnih pravnih sustava. Suci iz common law sustava obično osjećaju što odvjetnik koji provodi unakrsno ispitivanje želi postići, dok suci iz civilnih sustava nemaju ni iskustva ni formalnog obrazovanja u tom smislu.

I unakrsno i dodatno ispitivanje zahtijeva prethodno znanje sadržaja vještačenja vještaka suprotne strane. Stoga je recipročna dostava dokaza o vještačenjima (identitet vještaka, radno iskustvo, objavljeni radovi, sadržaj njegova ili njezina svjedočenja) važna faza u postupku u kojem stranke biraju vještake.[52] Pravilo 94bis PPD nalaže da se cjelokupni nalaz vještaka kojeg stranka namjerava pozvati dostavi Sudu i suprotnoj stranci u vremenskom okviru koji odredi sudbeno vijeće ili sudac za prethodni postupak.[53] No nigdje nije definirano što sve nalaz i mišljenje vještaka mora sadržavati. U sustavu s liberalno postavljenim pravilom o odgovarajućim temeljima vještačenja, kao što je to slučaj pred ICTY-em,[54] vrlo je važno otkriti suprotnoj stranci ne samo nalaz i mišljenje vještaka, već i činjenice i podatke na kojima je to utemeljeno.[55] Stoga bi u pravilu 94bis PPD trebalo detaljnije propisati što sve nalaz i mišljenje vještaka mora sadržavati - u to bi svakako trebalo uključiti materijale (činjenice i podatke) na kojima je utemeljeno vještačenje.

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ljenoj stranci listu svjedoka, što se odnosi i na vještake, naznačujući njihov identitet, sažetak činjenica o kojima će svjedočiti, naznaku dijelova tužbe na koju se svjedočenje odnosi, hoće li svjedok osobno svjedočiti ili će se samo priložiti njegova pismena izjava, procjena trajanja svakog svjedočenja, popis svih priloga, a suprotstavljenoj stranci moraju se dostaviti kopije priloga koji se namjeravaju koristiti na raspravi (17. izmjena PPD od 17. studenog 1999., IT/32/Rev.17, www.un.org/icty/legaldoc/index.htm). I prije donošenja ove odredbe tražilo se od stranaka da suprotstavljenoj stranci dostave u određenom roku obavijest o vještačenju koja će sadržavati ime vještaka, njegov ili njezin životopis te nalaz i mišljenje vještaka. V. *Prosecutor v. Simo Drljaća & Milan Kovačević* (slučaj br. IT-97-24), Order to Provide Notice of Expert Witnesses, 11. studeni 1997, www.un.org/icty/ind-e.htm. Nadalje tužitelj sukladno pravilu 66 i 68 PPD mora obrani dati da pregleda sve relevantne dokumente i predmete koji su u njegovu posjedu ili pod njegovom kontrolom te dostaviti sve dokaze koji su u korist okrivljenika. Tužitelj mora obrani, na njezin zahtjev, dopustiti da pregleda svaku knjigu, dokument, fotografiju ili predmet koji on drži ili ima pod nadzorom, a koji su bitni za pripremu obrane ili ih tužitelj namjerava upotrijebiti kao dokaz pri suđenju, ili su pripadali okrivljeniku ili su od njega dobiveni.

[53] Odredba o vještacima uvedena je izmjenama Pravila o postupku i dokazima br. 13 (kao u bilj. 33.). Izmjenama br. 22 (kao u bilj. 34.) poprimila je sadašnji oblik.

[54] Dopušten je vrlo širok spektar dokaza. PPD ne stavlja neka specifična ograničenja glede prihvatljivosti dokaza – sudska vijeća ovlaštena su prihvatiti sve relevantne dokaze za koje smatraju da imaju dokaznu vrijednost (pravilo 89 (C), PPD). Prema tome nema niti ograničenja glede materijala na kojima je dopušteno temeljiti vještačenje. Naime, pretpostavlja se da će sudsko vijeće koje se sastoji od iskusnih sudaca znati ispravno procijeniti dokaznu vrijednost izloženih dokaza. Vidjeti svjedočenje Hanne Sophie Greve, dostupno na http://www.un.org/icty/trans1/960520.txt, str. 36. V. komentar ovog svjedočenja u Kellye L. FABIAN, Proof and Consequences: An Analysis of the Tadić and Akayesu Trials, 49 DEPAUL L. REV 981, 2000., 1023.-1030.

[55] Primjerice u SAD-u se suprotnoj stranci mora dostaviti opis temelja i razloga određenih zaključaka, popis podataka na temelju kojih je vještak došao do određenih zaključaka, opis metoda kojima se služio u oblikovanju svojih zaključaka, popis njegovih publikacija ili pak popis svih slučajeva u kojima je do tada nastupao kao vještak (Federal Rules of Civil Procedure Art. 26 (a) (2) D).

Također, u sustavima u kojima svaka stranka izvodi svoje dokaze u svom dijelu postupka često mogu proteći dani ili mjeseci između svjedočenja vještaka tužiteljstva i vještaka obrane. U svojim mišljenjima suprotstavljeni vještaci obično se ne slažu. No zbog proteka vremena i velike količine dokaza koji su izvedeni između ova dva vještačenja vrlo ih je teško usporediti, raščistiti razlike u mišljenjima ova dva vještaka, i direktno usporediti njihovu vjerodostojnost. Stoga vremenski odvojeno izlaganje dvaju suprotstavljenih vještaka često čini stvari samo nejasnijima i više izaziva konfuziju nego što pridonosi pronalaženju objektive istine.[56] Ovaj problem je posebno naglašen pred ICTY-em budući da tamo pojedini postupci traju i više godina pa između vještačenja vještaka suprotnih stranaka prođe i po nekoliko mjeseci, pa čak i čitava godina.

3.1.2. Vještaci koje imenuje Sud

Zabrinut da bi vještačenje dvaju suprotstavljenih vještaka moglo zbuniti suce i ozbiljno utjecati na njihovo razumijevanje dokaza, ICTY je ovlastio suce da imenuju neovisne vještake. Time se željelo postići da vještaci koji djeluju kao neutralni pomoćnici suda neutraliziraju negativne posljedice vještačenja s pomoći dva suprotstavljena vještaka koje biraju, instruiraju i pripremaju za nastup pred sudom zainteresirane stranke i da će u konačnici pomoći sucima otkriti istinu.

No postojanje triju vještaka (dva koje pozivaju stranke i jednog kojeg imenuju suci) komplicira izvođenje vještačenja pred Sudom. Nije jasno koja bi bila prava uloga sudski imenovanog vještaka kad vještači uz vještake stranaka – bi li trebao djelovati kao formalan svjedok ili neformalan savjetnik sudaca. Postoji opasnost da sudbeno vijeće prihvati mišljenje vještaka kojeg je imenovalo i pri tome prida vrlo malo pažnje mišljenjima vještaka stranaka – dakle postoji rizik da će suci prenijeti svoje sudske ovlasti za donošenje odluke glede povijesnih i drugih znanstvenih pitanja na vještake koje su imenovali. Uz to, koegzistencija sudskih vještaka s akuzatornim načelima prikupljanja i izvođenja dokaza (posebno onima koja se odnose na kontrolu dokaza koju obavljaju stranke te unakrsno ispitivanje) je problematično.[57]

Uz to Pravila o postupku i dokazima nisu razradila čitav niz važnih detalja koji se tiču uloge sudski imenovanih vještaka i njihove interakcije s vještacima stranaka kao što su primjerice: pravo stranaka da se usprotive sudskom imenovanju određenog vještaka,[58] mjera u kojoj se komunikacija između sudskog vještaka i Suda treba otkriti strankama,[59] zaštitni mehanizmi kojima stranke

[56] Slično vidjeti M. DAMAŠKA, Evidence Law Adrift, 91.-92., ili Sam GROSS, *Expert Evidence*, 1991 Wis. L. Rev., 1991., 113., 117.

[57] O teškoćama uklapanja sudski imenovanih vještaka u akuzatorni tip postupka vidjeti Neil Netanel WEINSTOCK, *Expert Opinion and Reform in Anglo-American, Continental, and Israeli Adjudication*, 10 Hastings Int'l & Comp. L. Rev., 1986., 9., 44.-52.

[58] Primjerice, Međuamerički sud za ljudska prava te Europski sud za ljudska prava dopuštaju strankama tražiti izuzeće određenog vještaka. Pravila prvog suda (čl. 49.) daju pravo strankama tražiti izuzeće u ograničenom točno određenom broju slučajeva (www.cidh.oas.org/Basics/basic18.htm), dok Pravila Europskog suda (kao u bilj. 35, pravilo 67) daju tom sudu punu diskreciju pri odlučivanju o zahtjevima stranaka glede izuzeća svjedoka i vještaka.

[59] U inkvizitornim pravnim sustavima redovita je praksa omogućiti strankama da razgledaju

mogu osigurati da sudski vještaci temelje svoje izvještaje na točnim informacijama i da Sudu daju dobro obrazložene zaključke, postupak za provjeravanje jakih i slabih strana vještačenja ovih vještaka.[60]

Zbog svega toga Sud se općenito suzdržava imenovati vještake i rađe se opredjeljuje za akuzatorni način provođenja vještačenja. Koliko je meni poznato Sud do sada nije imenovao niti jednog vještaka povjesničara.

3.2. Implikacije koje sudski postupak općenito ima na potragu za istinom od strane vještaka povjesničara

Suci u kaznenom postupku trebaju utvrditi individualnu odgovornost određenog optuženika. Odredbe materijalnog kaznenog prava određuju što je potrebno dokazati da bi se utvrdila individualna odgovornost u konkretnom slučaju. Sve ostalo što se u stvarnosti događalo je iz perspektive kaznenog postupka irelevantno. Rezultat toga je da se sudski postupci uvijek bave samo određenim fragmentima stvarnosti te da se od vještaka povjesničara traži da se u istraživanju činjenica usredotoče na te fragmente i zanemare sve ostalo koliko god im se to činilo važnim za utvrđivanje istine o nekom prošlom događaju.[61] Vještaci nemaju slobodu da provode svoja istraživanja u bilo kojem smjeru u kojem požele.

Mnoge dokaze koje povjesničari smatraju iznimno važnim za povijesno tumačenje događaju stranke i suci odbacuju kao pravno irelevantne ili pak štetne. Tako u sudskim postupcima redovito dolazi do reduciranja stvarnosti te pojednostavljenja odnosa između dokaza i stvarnosti.

U sklopu sudskog postupka prikupljanje i izvođenje dokaza podložno je nizu ograničenja koja otežavaju utvrđivanje istine o nekom prošlom događaju.[62] Jedno od takvih ograničenja su i pravila o isključenju dokaza.

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nalaz i mišljenje vještaka. No kako u ovim sustavima suci kad imenuju vještake ujedno određuju predmet njihova vještačenja odnosno točno definiraju problem ili pitanja koja vještak mora razjasniti, daju im materijale na temelju kojih vještaci izvode svoje vještačenje (vještaci uglavnom ne smiju samostalno prikupljati dokaze i provoditi istragu) te suci primarno ispituju vještake, mala se pažnja pridaje unakrsnom ispitivanju vještaka koje obavljaju stranke te dostavi strankama materijala na temelju kojih je vještačenje provedeno. Budući da je pred ICTY-em sloboda vještaka koje imenuje Sud u izvođenju njihova vještačenja daleko veća, a kontrola sudaca nad njihovim vještačenjem daleko manja negoli u inkvizitornim pravnim sustavima i unakrsnom ispitivanju ovih vještaka kao i otkrivanju njihova nalaza i mišljenja i svih ostalih podataka strankama, trebalo bi pristupiti na jednak način kao i u slučaju vještaka koje biraju same stranke. To je primjerice i praksa pred Međunarodnim sudom pravde gdje postoji obveza da se nalaz i mišljenje svakog vještaka dostavi strankama te se strankama mora dati mogućnost da komentiraju ove nalaze i mišljenja. ICJ Pravila, čl. 67. st. 2.

[60] Usporedi Peter KRUG, *Note & Comment: The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Application*, 94 A.J.I.L., 2000., 317., 326.-328.

[61] Odredbe materijalnog kaznenog prava određujući što treba dokazati u određenom slučaju da bi se utvrdila individualna odgovornost istovremeno isključuju mnoge poglede na stvarnost i tako smanjuju prostor za sukob između dvaju suprotstavljenih vještaka. O profilaktičkoj funkciji materijalnih pravnih normi vidjeti M. DAMAŠKA, Truth in Adjudication, 293.

[62] Ova ograničenja se u određenoj mjeri razlikuju u inkvizitornom i akuzatornom tipu kazne-

Primjerice pred ICTY-em suci moraju odbaciti relevantne i vjerodostojne dokaze ako su oni pribavljeni neetičnim sredstvima ili ako je njihova opasnost za pošteno suđenje veća od njihove dokazne vrijednosti.[63] Na taj način onemogućuje se dobivanje potpune slike o nekom događaju iz prošlosti.

Budući da sudskih postupaka (uključujući i onih pred ICTY-em) društvo redovito očekuje više od točnog utvrđivanja činjenica, spremni smo prihvatiti i epistemološki inferiornije metode utvrđivanja istine[64] te povremeno podređivanje točnog utvrđivanja činjenica nekom drugom cilju ili ciljevima koje sudovi nastoje ostvariti.[65]

Sudski postupci se nemaju vremena baviti svim nijansama često vrlo složenih povijesnih događaja. Od sudaca, čak i pred ICTY-em gdje postupci često traju po nekoliko godina, očekuje se brza odluka. Stoga su i povjesničari vještaci u izradi svojih vještačenja ograničeni vremenom. Ova vremenska ograničenost sudskog postupka utječe i na iscrpnost i na točnost njihovih analiza. Od vještaka povjesničara se traži da daju skraćenu i pojednostavljenu verziju često izrazito složenih povijesnih događaja.

Nadalje, suci moraju uvijek donijeti odluku pa čak i kad nemaju dostatne dokaze - oni moraju optuženika ili osloboditi ili osuditi.[66] Stoga se od povjesničara kao vještaka očekuje određeno mišljenje čak i kad dokazi nisu potpuni, traže se iscrpni i konačni odgovori i onda kad bi povjesničar radije odgovorio oprezno i s dozom sumnje.

Osim toga, u sudskim postupcima utvrđuje se društveno konstruirana realnost. U konfliktnim situacijama, kao što je ona na prostoru bivše Jugoslavije, nažalost ne postoji suglasnost o tome što čini stvarnost pa se javlja pitanje čija je konstrukcija realnosti relevantna. Suci obično nemaju posebno stručno znanje iz povijesti pa često imaju teškoća kad trebaju razriješiti sporna pitanja u kojima se mišljenja vještaka povjesničara obrane i tužiteljstva razilaze. Stoga je vjerojatnije da će sudske odluke o spornim povijesnim pitanjima odražavati kompromis negoli povijesnu istinu. U prvostupanjskoj presudi u slučaju Tadić sudsko vijeće je posebno naglasilo da je slučajeve u kojima su mišljenja

nog postupka. O nekim ograničenjima koja su svojstvena akuzatornom tipu postupka vidjeti M. DAMAŠKA, Models of Criminal Procedure.

[63] Pravilo 89 i 95 PPD. Specifičan problem pred ICTY-em je da suci odluku o vjerodostojnosti dokaza često ostavljaju za kraj postupka kad donose konačnu odluku. Dugotrajnost postupaka te golema količina svjedoka i dokaza koji se izvode pred Sudom dovodi u pitanje mogućnost sudaca da razluče vjerodostojne od nevjerodostojnih dokaza i daju pravu dokaznu težinu pojedinim činjenicama tek u donošenju konačne odluke. O posljedicama odredaba o isključenju dokaza u akuzatornom i inkvizitornom sustavu vidjeti M. DAMAŠKA, Evidence Law Adrift, 47.-52., 93.

[64] M. DAMAŠKA, Evidence Law Adrift, 103.

[65] O odnosu između istine i drugih vrijednosti koje se sudskim postupkom nastoje ostvariti, vidi priloge za simpozij održan pod nazivom "Istina i njezini rivali" u siječnju 1998, objavljenima u 49 HASTINGS L.J., 1998.

[66] Pravo anticipira problem nužnosti donošenja zaključaka u slučaju neadekvatnih dokaza propisujući sofisticirane upute o donošenju odluke u slučajevima nesigurnosti kao što su standard osnovane sumnje ili pak ravnoteže vjerojatnosti. V. TWINING, n. dj., 97.

vještaka povjesničara bila u konfliktu razriješilo tako da je upotrijebilo "odgovarajući neutralni jezik".[67] Zauzimanje neutralnog stajališta može biti poželjan politički potez, ali ono ne dovodi nužno i do utvrđivanja povijesne istine.

Odluka koju suci donesu je pred sudom posljednje instance konačna. Takva odluka je fiksna u većoj mjeri od zaključaka povjesničara. Stoga je u sudskom postupku i veća potreba za zaštitom od eventualnih novih dokaza negoli u znanstvenim povijesnim analizama koje je uvijek relativno lako moguće prilagoditi novim spoznajama.[68]

4. Povjesničari u sudnici – u kojoj mjeri njihova vještačenja pred ICTY-em imaju smisla

U prethodnom poglavlju upozorili smo na niz prepreka u utvrđivanju istine koje se javljaju u sudskim postupcima pred ICTY-em: sudski postupci se bave ograničenom, pojednostavljenom i modificiranom stvarnošću, kratkoća vremene u kojoj sud mora donijeti odluku, odluka Suda u zadnjoj instanci je konačna, nužnost donošenja odluke i u nedostatku dokaza, pravila o isključenju dokaza, pristranost stranaka u prikupljanju i izvođenju dokaza, identificiranje vještaka s timom stranke koja ga je angažirala čime gubi svoju neovisnost, realna nejednakost stranaka, povremeno podređivanje utvrđivanja istine nekim drugim ciljevima, itd.[69] U postupku pred ICTY-em postoji također i čitav niz mehanizama (kao što je korištenje vještaka koje imenuju stranke ili pak unakrsno ispitivanje) koji umanjuju negativne utjecaje ovdje navedenih prepreka. Ipak još uvijek postoje granice u stupnju objektivne istine koji možemo postići povijesnom ekspertizom u sudskim postupcima pred ICTY-em.[70] Ova ograničenja ne utječu jednako na utvrđivanje pravne i povijesne istine.

4.1. Povijest u službi sudskog postupka – pomoć pri utvrđivanju pravne istine

Kad pomažu u utvrđivanju pravne istine od vještaka povjesničara se očekuje da stave povijest u službu sudskog postupka. Zadatak im je istraživati i tumačiti povijesne dokaze koji se odnose na predmet optužnice u pojedinom slučaju pred ICTY-em. Norme materijalnog kaznenog prava određuju što je potrebno dokazati da bi se utvrdila pravna istina. One obično traže reducira-

[67] Prosecutor v. Duško Tadić, slučaj br. IT-94-1-T, Opinion and Judgment of May 1997, paragraf 54, www.un.org/icty/tadic/trailc2/judgement/index.htm (dalje: "presuda Tadić").

[68] Da bi se zaštitili od budućih mogućih iznenađenja suci traže povjesničare „da daju tumačenja koja imaju najveće šanse odgovarati dokazima koji bi se u budućnosti mogli otkriti". D. A. FARBER, n. dj., 1029.

[69] Na neke od ovih problema upozorio je još Jerome FRANK, *Law and the Modern Mind*, 1930.; ISTI, *Courts on Trial*, 1949. Vidjeti također W. Twining, n. dj., 106.-112.

[70] Od objavljivanja knjige Petera Novicka "That Noble Dream" (vidi bilj. 3) vodi se intenzivna diskusija o tome u kojoj mjeri je povijest i djelatnost samih povjesničara subjektivna. U kojoj mjeri su izvještaji vještaka povjesničara pred ICTY-em subjektivni prepuštam da to utvrde sami povjesničari.

nu verziju realnosti. Stoga kao i zbog vremenskih ograničenja kojima je izložen svaki sudski postupak i suci i stranke u potrazi za pravnom istinom često traže od vještaka povjesničara da daju pojednostavljena i kondenzirana povijesna tumačenja određenih događanja nerijetko na štetu točnog poznavanja različitih povijesnih činjenica. Budući da se zadatak otkrivanja pravne istine temelji na ideji izricanja pravedne kazne, vještačenje vještaka povjesničara smatara se važnim doprinosom utvrđivanju pravne istine i sudskom postupku općenito čak i kad nema za posljedicu detaljno i najtočnije interpretiranje prošlosti ako suci na temelju takvog vještačenja mogu odmjeriti pravedniju kaznu negoli bez njega.[71]

Unatoč tome što sudski postupak nije najbolje okruženje za izradu povijesnih analiza, ipak je poželjno angažirati povjesničare kao vještake ako njihovo vještačenje pomaže ostvarenju pravde u konkretnom slučaju, odnosno ako je pravno značajno. Što su više povijesne činjenice dio središnjih pitanja u nekom slučaju, to su povijesne činjenice značajnije za utvrđivanje pravne istine i to je pravno relevantnije vještačenje vještaka povjesničara.

4.2. Sudski postupak u službi povijesti – pokušaj utvrđivanja povijesne istine

ICTY, između ostalih stvari, je zamišljen kao instrument koji će utvrditi povijesnu istinu o dagađajima na prostoru bivše jugoslavije. No sudski postupak sa svojim pravilima i zakonitostima ne odgovara potrebama historiografije.

U većini slučajeva pred ICTY-em povijest ima sekundarno značenje. Stranke, koje su u postupku pred ICTY-em glavni izvor dokaza, uglavnom nisu voljne uložiti previše energije, sredstava i vremena u utvrđivanje povijesnih činjenica koje su pravno irelevantne za rezultat konkretnog slučaja. Stoga u većini slučajeva nema puno dokaza koji bi se odnosili na šira politička pitanja kao što su npr. upletenost pojedinih država u sukobe, izvori sukoba itd. Sucima su dana široka ovlaštenja u ispitivanju stranaka da bi mogli prikupiti dokaze za koje stranke nisu zainteresirane, ali koji mogu biti važni sucima u ostvarivanju ciljeva koji idu preko utvrđivanja individualne odgovornosti za počinjene zločine (kao što je primjerice utvrđivanje povijesne istine). No u strahu da bi korištenje tako širokih ovlasti moglo ugroziti ostvarivanje pravde, suci nisu pokazali previše entuzijazma da se koriste ovim ovlastima preko potrebe utvrđivanja individualne krivnje. Uz to, sudski postupak, kao što sam pokazala, kreira niz pritisaka i ograničenja za postupak otkrivanja istine. Kao rezultat toga određeni dijelovi dokaza često nedostaju, a neki su iskrivljeni. U takvim okolnostima gotovo je nemoguće dati makro sliku prošlih događaja koja bi mogla izdržati ispit vremena i kritičnih metoda.

Uz to, cilj utvrđivanja povijesne istine je točno zabilježiti prošle događaje. Stoga je u postupku otkrivanja povijesne istine, otkrivanje same istine konačni cilj. Rezultat toga je velika briga za točnošću utvrđivanja činjenica kao i vjerovanje da se istina ne može žrtvovati postizanju niti jednog drugog cilja. Stoga sudski postupci, koji ponekad imaju praksu podrediti točnost utvrđivanja

činjenica ostvarivanju pravednosti ili nekim drugim ciljevima, ne odgovaraju potrebama pisanja povijesti.

Suci nisu osposobljeni djelovati kao kvazipovjesničari. Njihovi napori u davanju povijesnih tumačenja prošlih događaja s jedne strane često rezultiraju pojednostavljenjem i osiromašivanjem historiografije, a s druge pak strane prečesto korumpiraju ostvarivanje pravde.

Očito, sudski postupak nije najbolji način za otkrivanje povjesne istine i pisanje povijesti. Stoga ni od sudaca ne treba očekivati da utvrde povijesnu istinu niti od vještaka povjesničara da u svojim vještačenjima daju detaljna povijesna tumačenja koja se ne odnose na predmet optužnice u konkretnom slučaju. No tužiteljstvo može zapravo nametnuti suđenje "povijesti" utužujući genocid ili progon na temelju vrlo široko postavljenih činjenica tako da ova djela uključuju i ponašanja država i sl. Ako sudbeno vijeće u takvom slučaju ne ograniči predmet optužnice, ono je prisiljeno presuditi o povijesnim pitanjima. U ovim slučajevima povijesna i pravna istina se preklapaju u velikoj mjeri i vještačenja povjesničara su u pravilu od velikog značenja.

5. Zaključak

Početno se, "od Suda tražilo da detaljno istraži društvene i političke izvore događaja koji su doveli do počinjenja zločina koji su predmet suđenja".[72] Smatralo se da će to predstavljati "protutežu revizionizmu povijesti time što će se sačuvati sudski nalazi o zbivanjima koja su prethodila sukobima"[73] na prostoru bivše Jugoslavije. To je rezultiralo dugačkim i iscrpnim usmenim svjedočenjima vještaka povjesničara koja su išla daleko preko onoga što je potrebno da bi se utvrdila krivnja optuženika u određenom slučaju. Uz to prve su presude posvećivale veliki broj stranica uzrocima i okolnostima izbijanja sukoba 1991. godine u zemljama bivše Jugoslavije.[74] S vremenom se ovakvo stajalište Suda sve više kritiziralo i Sud je sve više počeo inzistirati na podnošenju pismenih nalaza i mišljenja vještaka povjesničara umjesto njihovog usmena svjedočenja[75] te je počeo prihvaćati svjedočenja povjesničara iz ranijih slučajeva pred ICTY-em[76] i započeo ograničavati vještačenja vještaka povjesničara

[71] U potrazi za pravnom istinom sucima je važnije ostvarenje individualne pravednosti negoli točno utvrđivanje relevantnih činjenica.

[72] P. M. WALD, n. dj., 116.

[73] Isto.

[74] Prva presuda koju je ICTY donio, prvostupanjska presuda u slučaju Tadić, posvetila je općem povijesnom kontekstu čak 73 poglavlja, od kojih se 14 odnosi na dalju povijest Bosne i Hercegovine te Jugoslavije. Kao u bilj. 67, paragraf 53.-126.

[75] O odnosu između neposrednog ispitivanja svjedoka i izvanraspravnih pismenih izjava svjedoka pred ICTY-em vidjeti P. M. WALD, *To Establish Incredible Events with Credible Evidence*, 42 Harv. Int'l L. J., 2001., 535., 540.-552.

[76] Sredinom 1998. godine prošireni su slučajevi u kojima je moguće presumiranje opće poznatih činjenica (*judicial notice*). Prema ovoj izmjeni sudsko vijeće može na zahtjev stranaka ili *proprio moto* odlučiti da se određene činjenice presuđene u nekom drugom slučaju odnosno dokumenti koji su poslužili kao dokaz u nekom drugom slučaju, a koji se odnose na predmet rasprave u postojećem slučaju, smatraju utvrđenima. To je dovelo do toga da su sudska vijeća

na one povijesne činjenice koje omogućuju stavljanje događaja u odgovarajući kontekst i na one dokaze koji se odnose na predmet optužnice.[77]

No povjesničari bi se trebali kao vještaci koristiti pred ICTY-em još u puno manjoj mjeri nego što je to danas praksa. Često, pogotovo u postupcima protiv nižih časnika te običnih vojnika svjedočenja svjedoka su dostatna da bi se konkretan slučaj mogao staviti u kontekst događaja u određenom području (npr. Srebrenici, Brčkom, Prijedoru, Lašvanskoj dolini, itd.). Za utvrđivanje individualne krivnje u takvim slučajevima širi kontekst događaja uglavnom nije važan i detaljne povijesne analize sukoba te tumačenja njihovih izvora su nepotrebna i predstavljaju beskorisno gubljenje vremena i sredstava suda. Vještačenja povjesničara su u takvim slučajevima nepotrebna. Dapače ponekad se dobiva dojam da se svjedočenja povjesničara u takvim slučajevima koriste kao isprika za počinjene zločine[78] ili pak kao otegotna okolnost koja bi

počela prihvaćati pismene nalaze i mišljenja te transkripte svjedočenja vještaka iz drugih slučajeva. Primjerice u slučaju Aleksovski prihvaćen je transkript svjedočenja vještaka iz slučaja Blaškić zajedno s videosnimkom njegova svjedočenja te prilozima kojima se vještak koristio. V. *Prosecutor v. Aleksovski* (slučaj br. IT-95-14/1) Decision on Prosecutor's Appeal on Admissability of Evidence, od 6. veljače 1999., www.un.org/icty/ind-e.htm. Osim toga uvedeno je pravilo (pravilo 94bis, UN. Doc. IT/32/Rev. 13 (1998), www.un.org/icty/legaldoc/index.htm) po kojem ako suprotstavljena strana prihvaća nalaz vještaka, sudbeno vijeće može prihvatiti takav nalaz kao dokaz a da ne pozove vještaka da osobno svjedoči. Potom je sudsko vijeće u slučaju Kordić potvrdilo odluku žalbenog vijeća u slučaju Kupreškići prema kojem svjedočenja vještaka spadaju među četiri iznimke u općoj preferenciji suda za usmenim svjedočenjem. Prosecutor v. Kordić & Čerkez (slučaj br. IT-95-14/2), Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, od 18. rujna 2000 (Appeals Chamber) paragraf 24, www.un.org/icty/ind-e.htm. Ubrzo potom brisano je pravilo koje je davalo prednost neposrednom saslušavanju svjedoka (pravilo 90(A) PPD) te su propisani slučajevi u kojima je moguće usmeno svjedočenje svjedoka zamijeniti njegovom ili njezinom pismenom izjavom (pravilo 92bis PPD). Izmjene PPD od 13. prosinca 2000. godine, UN.Doc. IT/32/Rev.19 (2000), www.un.org/icty/legaldoc/index.htm. Posebno je naglašeno da je to poželjno u slučajevima kad se svjedočenje odnosi na opisivanje relevantne povijesne, političke ili vojne pozadine, (pravilo 92bis (A) (b) PPD). Ovim izmjenama mogućnost isključivanja usmenog svjedočenja vještaka šira je nego što je to uobičajeno u inkvizitornim pravnim sustavima. Primjerice, u njemačkom pravnom sustavu nalaz vještaka se može uz suglasnost stranaka pročitati ako je vještak umro ili je bolestan ili ako je vještačenje izvela neka poznata javna ili znanstvena ustanova ili je pak riječ o rutinskoj ekspertizi (stupanj alkohola u krvi, utvrđenju krvne grupe i sl.). Time se nastoji ubrzati postupak. B. HUBER, n. dj., 150. U Hrvatskoj se nalaz vještaka može pročitati ako je vještak umro ili duševno obolio ili je njegov dolazak pred sud nemoguć zbog starosti, bolesti ili nekih drugih važnih uzroka, odnosno ako vještak ne želi bez zakonskih razloga iskazivati na raspravi ili pak ako su stranke suglasne da se pročita zapisnik o njegovu prijašnjem ispitivanju (čl. 331. st. 1. ZKP).

[77] U slučaju Delalić sudsko vijeće je izreklo sljedeće: "The Trial Chamber does not consider it necessary to enter into a lengthy discussion of the political and historical background to these events, nor a general analysis of the conflict which blighted the whole of the former Yugoslavia around that time. The function of the Trial Chamber is to do justice on the case at hand and while this naturally involves presenting its findings in evaluation of the present case. For the purposes of this background, particular reliance is placed on the evidence presented through the historical, political and military expert witnesses of both the Prosecution and the Defense". Slučaj Delalić, Judgment from 16 November 1998, paragraf 88.-90., www.un.org/icty/celebici/trailc/judgement/index.htm.

[78] Počinitelji se prikazuju kao žrtve ponekad čak i u davnoj prošlosti ili pak kroz stoljeća i to

za posljedicu trebala imati teže kažnjavanje.[79] Povjesničare bi trebalo koristiti kao vještake samo onda kad su njihova vještačenja pravno značajna. PPD ne daje posebne upute o tome kad se vještačenje smatra relevantnim. To je ostavljeno na diskreciju sucima.[80] Puno ovisi o predmetu konkretne optužnice i činjenicama na kojima se temelji. Ja bih predložila da se vještaci koriste u slučajevima u kojima je povijest jedno od središnjih pitanja pri utvrđivanju elemenata kaznenog djela. Primjerice, povijesna tumačenja događaja mogu biti važna u slučajevima u kojima su osobe optužene za počinjenje genocida ili kaznenog djela progona. Po mom sudu nema potrebe koristiti povjesničare kao vještake u predmetima u kojima su povijesne okolnosti događaja tek od sporednog, kontekstualnog značenja.

Kad god je to moguće, sud bi se trebao susprezati od davanja autoritativnih tumačenja povijesti te bi se trebao ograničiti na utvrđivanje krivnje optuženika u određenom slučaju. To bi trebao učiniti zbog nekoliko razloga. Postupak pred Sudom i nalazi sudaca često ne daju točna tumačenja prošlosti. Suci nisu osposobljeni za davanje povijesnih tumačenja stoga njihovi pokušaji davanja takvih tumačenja često imaju za posljedicu pojednostavljenje i osiromašenje povijesnog znanja. Istovremeno njihovi pokušaji pisanja povijesti mogu dovesti u opasnost izvođenje pravednog sudovanja. Nema jednog autoritativnog mjesta, pa bio to i sud, koje bi jednom zauvijek moglo utvrditi povijesnu istinu o nekom događaju. No, tužitelj može nametnuti suđenje "povijesti" (npr. utužujući progon na vrlo širokoj i neodređenoj činjeničnoj osnovi). U takvim slučajevima sudsko vijeće može suziti predmet optužnice. Ako to ne učini mora donijeti odluku o svakom pitanju koje je predmet optužnice. Čini mi se da bi u takvim slučajevima bilo razumno za sudsko vijeće inzistirati da tužitelj treba suziti i precizirati optužnicu.

Tijekom godina ICTY se posebno trudio stvoriti pogodno okruženje za djelotvorno iznošenje znanstvenih (uključujući i povijesnih) podataka u sudnici. U velikoj mjeri odbacio je strogu kontrolu podataka koji se iznose pred utvrđivače činjenica (pred ICTY-em to su suci) svojstvenu common law sustavima. Negativan utjecaj pravila o isključenju dokaza na mogućnost otkrivanja istine umanjen je davanjem sucima relativno širokih ovlasti glede primjene

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se nudi kao izgovor za počinjena djela. Ili se pak žrtve prikazuju kao pripadnici grupe koja je stoljećima viktimizirala počinitelje i stoga zaslužuju ono što im se događalo.

[79] Počinitelji se prikazuju kao pripadnici grupe koja je stoljećima viktimizirala i stoga u interesu generalne prevencije zaslužuju težu kaznu.

[80] Pravila nemaju specifične odredbe o tome kad se vještačenje može smatrati relevantnim. Sukladno praksi ICTY-a i ICTR-a smatra se da je vještačenje relevantno i da ima dokaznu vrijednost ako je sucima od pomoći pri utvrđivanju postojanja neke činjenice (u slučaju Delalić sudsko vijeće je istaknulo: "Relevance is based on the nature of the issue before the trial chamber … A matter is relevant if taken by itself or in connection with other facts, it proves or renders probable the existence or non-existance of the issue". Kao u bilj. 30., odnosno ako "razjašnjava sucima određena pitanja tehničke naravi koja traže posebna znanja iz specifičnih područja". Vidjeti *Prosecutor v. Jean Paul Akayesu,* (case no. ICTR–96-4-T), Decision on the Defense Motion for the Appearance of an Accused as an Expert Witness, od 9. ožujka 1998., dostupna na www.ictr.org).

ovih pravila te mogućnosti odlučivanja i o prihvatljivosti dokaza i o njihovoj dokaznoj vrijednosti.[81] Sucima je dano pravo proučiti nalaze i mišljenja vještaka prije njihova usmenog saslušanja. Kontrola stranaka nad postupkom i izvođenjem vještačenja je ograničena – suci su ovlašteni imenovati vještake te saslušati vještake kako stranaka tako i one koje su sami imenovali. No mješavina akuzatornih i inkvizitornih elemenata u postupku pred ICTY-em do koje je došlo tijekom čestih izmjena PPD ne dovodi uvijek do željenih rezultata. Kao što smo pokazali neki inkvizitorni elementi umanjuju zaštitnu vrijednost akuzatornih mehanizama (npr. unakrsnog ispitivanja) koji između ostalog služe kao zaštita od zloupotrebe povijesne istine u interesu klijenta. S druge pak strane neki inkvizitorni elementi (npr. vještaci koje imenuju suci) teško mogu koegzistirati s akuzatornim principima prikupljanja i izvođenja dokaza. Da bi se osiguralo što točnije utvrđivanje činjenica, Sud mora poraditi na daljnjem usavršavanju odredaba Pravila koja uređuju organizaciju i izvođenje vještačenja.[82]

U jednom trenutku sam ICTY proglasio je svojim najznačajnijim zadatkom osigurati da povijest sluša ono što je Sud utvrdio kao sudsku činjenicu o sukobima na prostoru bivše Jugoslavije.[83] Arhiv ICTY-a sigurno će biti najbogatiji i najznačajniji izvor za povijesna izučavanja i analize događaja na prostoru bivše Jugoslavije u razdoblju od početka njezina raspadanja pa do završetka sukoba. ICTY je prikupio više dokaznog materijala nego što je to uobičajeno za klasičan kazneni sud budući da strateška vizija ICTY-a ide preko utvrđivanja individualne odgovornosti za počinjene zločine.[84] No u korištenju ovog arhiva povjesničati će se suočiti s dva glavna problema koja će morati razriješiti.

Prvo, postupci su često velikim dijelom tajni[85] i stoga veliki dio arhiva neće nikad biti dostupan javnosti, ako same vlade ne odluče učiniti javnima te

[81] Neprihvatljivi, ali uvjerljivi dokazi, jednom kad ih suci čuju, čak i ako ih isključe utječu na njihovo razmišljanje i na rezultat suđenja. Ipak, pravila o isključenju dokaza unatoč tome mogu otežati utvrđivanje istine pred ICTY-em budući da se dokazi koji su isključeni ne mogu upotrijebiti kao argument prigodom donošenja odluke ili u obrazloženju presude. Pravila o isključenju dokaza imaju veći stvarni potencijal u utjecaju na utvrđivanje istine pred ICTY-em ako do isključenja neprihvatljivih dokaza dođe prije glavne rasprave budući da u tom slučaju suci ne znaju za te dokaze. O posljedicama pravila o isključenju dokaza u inkvizitornim i akuzatornim pravnim sustavima M. DAMAŠKA, Evidence Law Adrift.

[82] Moj savjet bi bio da ICTY treba inzistirati na korištenju vještaka koje angažiraju stranke te da se vještaci koje imenuje Sud trebaju koristiti samo kao savjetnici sudaca pri čemu njihovi savjeti trebaju biti transparentni i strankama treba dati mogućnost da im se suprotstave i da ih kritiziraju.

[83] Vidjeti Peti izvještaj ICTY-a, paragraf 296.

[84] Između ostalog ICTY si je postavio kao cilj utvrditi povijesnu istinu o događajima na prostoru bivše SFRJ. Transkripti iskaza svjedoka (osim nekih zaštićenih svjedoka) već su dostupni javnosti. Vidjeti www.un.org/icty/ind-e.htm. Treba se nadati da će Sud u skoroj budućnosti i svoju dokumentaciju otvoriti barem stručnoj javnosti kako bi mogle otpočeti povijesne i druge znanstvene analize prikupljenog materijala.

[85] Zbog različitih razloga UT često nastoji onemogućiti dostavu materijala suprotnoj stranci i to ne samo izjava svjedoka, već i dokumenata. Prema PPD, u izvanrednim prilikama, sudac ili

podatke. Drugo, dokazi koji se prikupljaju tijekom kaznenih postupaka pred ICTY-em kao i interpretacije ICTY-a ne pružaju nam nužno uvijek objektivnu informaciju. Kao što je pokazano u ovom članku, tijekom sudskog postupka dokazi se često modificiraju pa čak i iskrivljuju. Nadalje, budući da su dokazi o događajima na prostoru bivše Jugoslavije pred Sud pritjecali sporo, Sud je vodio postupke i donosio odluke i kad mu veliki dio dokaznog materijala nije bio poznat.[86] To čini korištenje *res iudicata* pri pisanju povijesti posebno problematičnim. Uz toga u želji da ne ponovi pogreške nürnberških suđenja koja se često diskreditiraju kao suđenja pobjednika, Sud ponekad pretjerano inzistira na krivnji svih strana koje su sudjelovale u ratnim sukobima. Tendencija k izjednačavanju krivnje može dovesti do daljnjih iskrivljavanja u sudskim interpretacijama događaja na prostoru bivše Jugoslavije.

Zbog svega toga povjesničari će morati, da bi se mogli koristiti bogatim dokaznim materijalom koji je ICTY prikupio i proizveo te da bi mogli procijeniti njegovu vjerodostojnost i relevantnost, razviti „posebne tehnike tumačenja" polazeći od „posebnih kodova u skladu s kojima su dokazi oblikovani".[87] Morat će dešifrirati značenje pojedinih dokaza s obzirom na to kako su prikupljeni, pripremljeni i izvedeni[88] te će morati razviti tehnike za čitanje rupa u dokazima.[89] Da bi mogli to učiniti povjesničari koji se misle kompetentno baviti proučavanjem ovog materijala morat će se upoznati s karakteristikama kaznenog postupka pred ICTY-em. Jedino tako moći će razumjeti na koji način su dokazi kodirani u sudskom postupku i otkriti različite izvore i vrste iskrivljavanja dokaznog materijala svojstvenih sudskom postupku.[90] Bez toga "ozbiljna povijesna rekonstrukcija"[91] događaja na prostorima bivše Jugoslavije na temelju materijala koji je ICTY prikupio i stvorio je nemoguća.

Traženje istine o prošlim događajima vrlo je složeno i često uznemiravajuće. Ipak, treba imati „dovoljno povjerenja u snagu povijesnog razmišljanja i vjerovati da će samo poduzimanje povijesnog istraživanja, čak i kad je učinjeno

sudsko vijeće, u dogovoru s tužiteljstvom može narediti da se pojedini dokumenti ili informacije u cijelosti ili dijelom drže u tajnosti ako je to potrebno kako bi se postiglo pridržavanje Pravila, zaštitile povjerljive informacije do kojih je tužitelj došao, ili ako je to na drugi način u interesu pravde (pravilo 53 B PPD). Ni zapis zatvorene sjednice ne smije se objaviti javnosti, osim kada sudbeno vijeće uzevši u obzir sve okolnosti koje se odnose na zaštitu svjedoka odluči da više ne postoje razlozi za njegovo neobjavljivanje (pravilo 81 B PPD).

[86] Zbog toga se iskazi svjedoka, interpretacije stranaka i odluke Suda iz pojedinog slučaja uvijek moraju čitati u kontekstu dokaznog materijala koji je u tom trenutku bio poznat strankama i sucima.

[87] C. GINZBURG, Checking the Evidence, 295.

[88] S posebnom će pažnjom trebati postupati glede dokaza koje su prikupile različite obavještajne službe koje su djelovale ili još uvijek djeluju na ovim prostorima.

[89] Stranke redovito ne otkrivaju sve podatke koji su im poznati. Osim toga u vrijeme suđenja i strankama i Sudu bio je poznat i dostupan samo dio relevantnih dokaza.

[90] Ginzburgovo iskustvo čitanja i tumačenja sudskih spisa iz inkvizitornih suđenjaje u tom smislu je edukativno. Vidjeti C. GINZBURG, Checking the Evidence, 290.-303. i Arnold I. DAVIDSON, „Carlo Ginzburg and the Renewal of Historiography", *Question of Evidence – Proof, Practice and Persuasion Across the Disciplines*, 304.-320.

[91] Kao u bilj. 87.

isključivo s određenom političkom tezom u vidu, dovesti do povijesnih rezultata koji prelaze okvire te političke teze".[92] Zadatak povjesničara ne bi trebao biti samo otkriti što se zaista dogodilo u prošlosti, već i prosuditi te događaje sukladno vlastitim moralnim vrijednostima te podučiti buduće generacije jer kao što je Georg Santayana rekao "društvo je osuđeno ponavljati greške ukoliko nije naučilo lekcije iz svoje povijesti".[93]

[92] R. G. COLLINGWOOD, The Principles of History and Other Writtings, 1999., 213.

[93] Georg Santayana je parafraziran prema M. P. SCHARF, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslav Tribunal*, 49 DePAUL L. Rev., 2000, 925., 931.

God. 36., br. 1., 41.-67. Zagreb, 2003

Historians in Search for Truth about Conflicts in the Territory of Former Yugoslavia as Expert Witnesses in front of the ICTY

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The role of historians as expert witnesses at the International Criminal Tribunal for the former Yugoslavia (the "ICTY" or the "Tribunal") is reexamined in the light of the objectives, which the Tribunal is supposed to establish. This paper discusses whether or to what degree historians as expert witnesses can at all fulfill such a role within the framework of the ICTY procedural and evidentiary rules. Taking these findings into consideration the article seeks to determine the extent to which historians should be used as expert witnesses in front of the ICTY.

Key words: *historians, expert witnesses, expert testimony, ICTY, the objectives of the ICTY, the rules of procedure and evidence, international criminal law, truth discovery*

"La strade del guidice e quelle dello storico, coincidenti per un tratto, divergono poi inevitabilmente. Chi tenta di ridurre lo storico a giudice semplifica e impoverisce la conoscenza storiografica; ma chi tenta di ridurre il giudice a storico inquina irrimediabilmente l'esercizio della giustizia."[1]

1. Introduction

In this issue of the journal one can find a number of written statements by historians who acted as expert witnesses either for the Prosecution or the Defense before the ICTY. The author of this text has been asked to write an

• She was a member of the legal team of Hunton & Williams which represented Mr. Kordić before the ICTY.

I am grateful to Professor Mirjan Damaška, Professor Ivo Jospović and Turner T. Smith Jr., Esq., who read and commented on this Article. Any errors that remain are, of course, my own.

[1] *"The ways of the judge and those of the historian coinciding for a while than inevitably diverge. Whoever attempts to reduce the historian to a judge simplifies and impoverishes historiographical consciousness; but whoever attempts to reduce the judge to a historian irredeemably pollutes the exercise of justice."* Carlo Ginzburg, Il giudicie e lo storico: Considerazioni in margine al processo Sofri 109-110 (1991) the translation is taken from Arnold I. Davidson, *Carlo*

introductory article about the mission of the historians as expert witnesses before the ICTY. An exhaustive review of the literature has revealed that almost nothing has been written about this topic.

Traditionally the relationship between law and history has been very close – judges as well as historians attempt to establish truth about past events with the help of evidence.[2] For the purposes of this paper, I will assume that in adjudication as well as historical inquiries it is in principle possible to discover the truth about past events.[3] In their quest for truth, historians and judges often have different aims and use different methods and they are exposed to different constraints.[4] Due to similarities and distinctions between judges and historians the intersection between law and history that occurs when historians enter the legal process to testify as expert witnesses is especially interesting. This is frequently the source of a number of problems and queries, such as, to what extent is a historian's ability to establish the truth threatened by the pressures and constraints of a trial, if and to what extent are the testimonies of historians politically motivated and slanted, and, are the testimonies of historians legally significant or are they just used (sometimes misused) to justify a particular outcome.

Historians frequently testify as expert witnesses before the ICTY. It seems that the ICTY has decided to take the past seriously because of its influence on the future. This article attempts to explain the role historians have as expert witnesses within the ICTY framework. It also initiates discussion on whether and to what degree historians can fulfill such a role within the framework of the ICTY procedural and evidentiary rules. Taking these findings into consid-

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Ginzburg and the Renewal of Historiography, in Question of Evidence – Proof, Practice and Persuasion across the Disciplines 304 (J. Chandler et al. eds., 1994).

[2] The Jezuit Henri Griffet compared the historian to a judge who carefully evaluates proofs and witnesses. *See,* Henri Griffet, Traité des différentes sortes de preuves qui servent à établier la vérité de l'histoire (2nd ed. 1770) according to Carlo Ginzburg, *Checking the Evidence: The Judge and the Historian, in* Question of Evidence – Proof, Practice and Persuasion across the Disciplines 290, 291 (J. Chandler et al. eds., 1994).

[3] A number of theories doubt the possibility to ascertain the truth and acquire objective knowledge of the external world. For instance, versions of "post-modern" and "post-structuralist" thought recognize no reality beyond language and "constructionists" insist that the reality is socially constructed. *See*, Mirjan Damaška, *Truth in Adjudication*, 49 Hastings L.J. 289, 290 (1998). Members of three groups of legal scholars doubt that the acquisition of objective knowledge is possible through the process of adjudication: critical legal scholars, critical race theorists and radical feminists. *See*, Daniel A. Farber, *Adjudication of Things Past: Reflection on History as Evidence,* 49 Hastings L.J. 1009, 1020-23 (1998). Some scholars of history disparage the idea of searching for truths as well. This was already revealed by Novick who in his book *That Noble Dream* examines how American historians' beliefs about the existence of historical truths changed from the late nineteen century to the present. *See,* Peter Novick, That Noble Dream: the Objectivity Question and the American Historical Profession (1988). However, these philosophical issues are beyond the scope of this article.

[4] On the differences and the similarities between historical and adjudicative enquiries into issues of fact *see,* William Twining, *Some Scepticism about Some Scepticism, in* Rethinking Evidence – Exploratory Esseys 92, 103-109 (1990).

eration the article seeks to determine the extent to which historians should be used as expert witnesses in front of the ICTY.[5]

Before I begin an analysis of these issues, I will make a few short comments of an informative nature about the ICTY since research shows that the level of public awareness concerning the organization and work of this international court is on a low level in the territories of the former Yugoslavia, including Croatia.[6]

The United Nations Security Council established the ICTY in 1993.[7] The Tribunal exercises personal jurisdiction over persons indicted for the categories of war crimes set out in the ICTY Statute – war crimes, genocide, and crimes against humanity committed in the territory of the former Yugoslavia since 1 January 1991.[8] The maximum sentence that the Tribunal can impose is life imprisonment. This is a temporary (*ad hoc*) court because its mission is geographically (the lands of the former SFRJ) and temporally (crimes committed only since 1 January 1991) limited. It is expected that the Tribunal will cease its activities in 2008.

The ICTY has three organs: the Trial Chambers, the Office of the Prosecutor (the "Office" or the "OTP"), and the Registry. The Chambers consist of 16 independent judges elected for four-year terms by the General Assembly of the UN with no more than one from a single country. Nine judges are assigned to three Chambers of three trial judges each; seven to an Appeals Chamber.[9] The judges of the ICTY themselves make the Rules of Procedure and Evidence (the "Rules" or the "RPE"). These rules have to date been amended 26 times.[10] The judges choose a president and vice-president

[5] This is not a paper about the law pertaining to expert witnesses.

[6] In 2000, research was carried out amongst 32 judges and state prosecutors in Bosnia concerning their attitude toward the ICTY. All those interviewed knew little about the proceedings before the ICTY and the results of the work of that Tribunal. They complained that information about the Tribunal or from the Tribunal was hard to obtain. *See,* Human Rights Ctr. And the International Human Rights Law Clinic, Univ. of Cal., Berkley / Univ. of Sarajevo, *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 Berkley J. Intel L. 102 (2000). Since then the Tribunal has launched a special outreach program in order to make its work more transparent in the lands of the former Yugoslavia.

[7] The United Nations Security Council decided to establish the international court "for the prosecution of persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991" by Resolution 808 on 22 February 1993 (U.N. Doc. S/Res. 808 (1993)). The Resolution requested the Secretary General to, within a period of 60 days after the adoption of the present Resolution, submit a report including concrete proposals for the establishment of this court taking into account suggestions put forward in this regard by Member States. The Secretary General produced on time a report containing the proposed Statute of the ICTY. United Nations Security Council Resolution 827, passed on 25 May 1993, established the ICTY. *See*, U.N. SCOR 48th Sess. 3217th mtg, U.N. Doc. S/Res. 827 (1993).

[8] *See,* The Statute of the 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, art. 1-6, available at http://www.un.org/icty/legaldoc/index.htm (last viewed 5/26/2003) [hereinafter the "ICTY Statute"].

[9] *Id*. art. 12-13.

[10] The RPE were adopted on February 11, 1994, U.N. Doc. IT/32. The original and the amend-

from among their own numbers to govern the Tribunal. Because of the large case-load, the UN has appointed alongside the regular ICTY judges *ad litem* judges designated for particular cases only.[11]

The Prosecutor acts independently as a separate body of the ICTY. The OTP consists of the Prosecutor and other qualified staff. Its duty is to investigate and prosecute persons suspected i.e. indicted for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.[12] The OTP is the main policy maker of the Tribunal since it determines which indictments to bring and how strongly to pursue them.

The Registry is responsible to administer services to the Tribunal. It provides for protection of witnesses and detention of the accused.[13]

In a few years the Tribunal has grown from a few dozen employees to over 1000 with a budget of over $200 million. The first few years the Tribunal indicted a long list of persons, but it tried a small number of cases because only a small number of those indicted willingly surrendered themselves or were apprehended or extradited to the Tribunal. Currently, the Tribunal is over-loaded; there are 76 indictees, including one woman.[14] Of the 76 publicly indicted persons, 24 are still at large (arrest warrants have been issued for them). 52 are currently in proceedings before the Tribunal – 44 are in detention while 8 have been provisionally released. 86 accused have appeared in proceedings before the Tribunal up to now: 28 of them are at pre-trial stage; 9 are currently at trial; 3 are awaiting Trial Chamber judgment or sentencing; 37 have been tried of which 12 are at appeal, 20 received their final sentences (9 are serving sentences, 5 have already served sentences and 6 are waiting for transfer)[15] and 5 were found not guilty; 5 indictments were withdrawn and 4 proceedings were dropped due to the death of the accused. Altogether 21 indictments were withdrawn and 12 accused died including 4 after commencement of the proceedings.[16]

2. The Role of Historian Experts Before the ICTY

The objectives the ICTY seeks to accomplish determine to a great extent the role historian experts have before the ICTY. Founders of the Tribunal, its

ments that followed are available at www.un.org/icty/legaldoc/index.htm. The last amendments were made on 23 December 2002 and went into effect on 30 December 2002.

[11] Art. 13ter and 13quater of the ICTY Statute (*supra* note 8) regulate a*d litem* judges.

[12] *Id*. art.16.

[13] For more extensive information on the way the Tribunal works *see e.g,* Patricia M. Wald , *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court*, 5 Wash. U. J.L. & Pol'y 87 (2001).

[14] According to my estimate of the 76 indicted persons, 59 are Serbs, 10 are Croats, and 7 are Muslims.

[15] According to my estimate of the 86 accused who have appeared in proceedings before the Tribunal 55 are Serbs, 18 Croats and 13 Muslims.

[16] *See,* The ICTY at Glance, Fact Sheet on ICTY Proceedings, at http://www.un.org/icty/glance/index.htm (last viewed on 26 May 2003).

members and supporters articulated at various times the following objectives for the ICTY:[17]

1) Restoration and maintenance of peace in the territory of the former Yugoslavia;[18]

2) Imposing individual responsibility for the commission of atrocities through objective reconstruction of the past events;[19]

3) Achieving purposes justifying punishment according to modern theories of criminal justice: a) prevention (general and specific),[20] b) retribution,[21] and c) providing justice for victims;[22]

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[17] Sometimes these different goals may be in conflict. Thus it is important to determine the primary purpose of the trial, the weight certain goals should have and accordingly the hierarchy of goals. The importance of certain goals has varied over the time.

[18] The Security Council concluded that widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia constituted a threat to international peace and security. Thus it established the ICTY primarily as a mechanism that would put an end to such crimes and would contribute to the restoration and maintenance of peace in the region by prosecuting persons responsible for serious violations of international humanitarian law and ascertaining individual guilt. *See,* Resolution 827 of the Security Council, *supra* note 7, ¶ 10. *See also*, the First Annual Report of the 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, U.N. GAOR, 49th Sess., pt. 1, 11-14, U.N. Docs. A/49/342, S/1994/1007 (Nov. 14, 1994), available at www.un.org/icty/rappannu-e/1994/index.htm [hereinafter the "First Report of the ICTY"]. Madelain Albright articulated this in Pristina in July 1999, after the Kosovo war: "[W]e believe that justice is a parent to peace." Cited according to Gary Jonathan Bass, Stay the Hand of Vengeance – the Politics of War Crimes Tribunals 284 (2000). In short, the rule of law has been offered as an alternative to the chaos of war. Realists, on the other hand, emphasise that war crimes trials may frustrate the international peace negotiations and may perpetuate the war. More on the Realist argument *id*. at 285-86.

[19] With establishment of the ICTY and ICTR the opinion prevailed that certain behavior should be condemned as criminal and not simply as a breach of treaty or customary international law obligations. ICTY and ICTR became important international institutions in transition from a culture of impunity to one demanding individual accountability. It is considered that holding individuals responsible for the commission of atrocities is crucial to defeat notions of collective responsibility and thus necessary for reconciliation among the warring sides. In Albright's words, "responsibility for these crimes does not rest with the Serbs or Croats or Muslims as *peoples*; it rests with the *people* who ordered and committed the crimes. *The wounds opened by this war will heal much faster if collective guilt for atrocities is expunged and individual responsibility is assigned*." Madelain Albright, *Bosnia in Light of the Holocaust: War Crimes Trials*, 12 April 1994. Her italics. On the need to prosecute and punish individual perpetrators see the comments of Antonio Cassese in the First Report of the ICTY, *id.* ¶ 16. *See also*, Theodor Meron, *Is International Law Moving Towards Criminalization?* 9 Eur.J.Int.L.L. 18 (1998). Of course it is impossible to prosecute all those participating in commisison of crimes (the massive number of perpetrators overwhelms the capacity of any legal institution). Thus the ICTY decided to limit itself to punishing the 'most guilty' – primarily those who have designed and led policies of atrocities. In this regard the Tribunal justice is symbolic. In the begining of its existance the Tribunal was trying hierarhically insignificant persons, such as Tadić or Kupreškići because other indicted persons that were hierarchically higher were at large and unavailable.

[20] Under the theory of general deterrence the punishment is supposed to deter other potential perpetrators from committing future crimes of this nature either in the territory of the former

4) Securing due process of law for the perpetrators;[23]

Yugoslavia or elsewhere in the world while under the theory of specific deterrence the punishment is supposed to rehabilitate or incapacitate the offender himself or herself (utilitarian theory of punishment). Lawrence Eagleburger in his letter to Antonio Cassese of 8 May 1995 says: "[T]hese trials will serve to put potential future war criminals on notice that the international community will not tolerate crimes against humanity." Cited according to Antonio Cassese, *From Nuremberg to Rome: International Military Tribunals to the International Criminal Court, in* The Rome Statute of the International Criminal Court, Vol. I, 3, 12, b. 26 (Antonio Cassese et al. eds., 2002). Deterrence is often regarded as the most important purpose of international criminal law. *See,* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of Prior Regime*, 100 Yale L. J. 2537, 2542 (1991). Deterrence was even one of the foundational principles of the ICC establishment. *See*, Rome Statute of the International Criminal Court, preamble, art. 5. On international criminal justice as preventive mechanism *see,* Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities*, 95 Am. J. Int'l L. 7,12 (2001). Many argue that deterrence is unproven in domestic legal systems. *See,* Dan M. Kahan, *The Secret Ambition of Deterrance*, 113 Harv.L.Rev. 414, 416 (1996). Since probability of punishment in front of the international criminal courts is relatively low deterrent value of the international criminal justice system is even more questionable than that of domestic systems. Thus some suggest that it is better to establish mechanisms to comfort victims than to waste resources pursuing the offenders. *See*, Mark J. Osiel, *Why Prosecut? Critics of Punishment of Mass Atrocities*, 22 Hum. Rts. Q. 118, 127-28 (2000).

[21] According to the theory of retributive justice the perpetrator 'deserves' punishment for the injury (s)he has inflicted on society.

[22] By providing justice for the victims, one attempts to give victims satisfaction and prevent revenge and self-help impulses on their part. See for example the comments of the French delegate at the time of the creation of the ICTY in 2 Virginia Morris & Michael P. Scharf, An Insider's Guide to The International Criminal Tribunal for The Former Yugoslavia 163-4 (1995). According to the former ICTY prosecutor Richard Goldstone, "the Nuremberg trials had an important role in officially recognizing what happened to the victims of the holocaust," and this kind of recognition in part acts as compensation for suffering and can have a cathartic function in preventing revenge. Richard J. Goldstone, *Fifty Years after Nuremberg: A New International Criminal Tribunal for Human Rights Criminals, in* Contemporary Genocides: Causes, Cases, Consequences 215 (Albert J. Jongman ed., 1996). According to Antonio Cassese, the first president of the ICTY, "the only civilized alternative to this desire for revenge is to render justice" because otherwise "feelings of hatred and resentment seething below the surface will, sooner or later, erupt and lead to renewed violence." The First Report of the ICTY, *supra* note 18, ¶ 15.

[23] It is difficult to secure just trials in front of national courts during war-time or right after it while passions are still strong and wounds open – trials may be highly politicized (examples could be found in Croatia itself), or "show trials" may be put on (there were some cases in Republika Srpska and Serbia) or the judicial system may be incapable to try war criminals (for e.g. in Kosovo the judicial system practically did not exist once Serbs left; but even for an established judicial system the task may be overwhelming due to sheer number of cases as for e.g. in Rwanda). One American diplomat in 1992 endorsed international trials with the following words: "Removing prosecution of offenders from domestic judicial systems – civilian and military – seems to us the only viable way to avoid compounding the bitterness caused by the war with new injustice, which would further delay reconciliation within the former Yugoslavia." State Department 08249/101627Z, Rackmales to Christhoper, July 1992. Cited according to Bass, *supra* note18, at 310. Due to the large number of atrocities no international court would be able to process all the war criminals itself. Thus it is important to assist domestic courts in trying war criminals and to set up mechanism for reviewing the war crime cases of local authorities in order to cut down on local abuses. In this respect, a good example is provided by the "Rules of the Road" set up by The Hague and NATO that let the ICTY review local war crimes trials in Bosnia.

5) Confronting the past and taking moral responsibility for it, collective catharsis and reconciliation among nations torn apart by war;[24]

6) Assembling authentic documentation to develop a historic record of events and providing impartial and truthful account of war and atrocities;[25]

7) Development of international criminal law.[26]

Consequently, the ICTY is intended to be much more than a mere criminal court. Though primarily seen as a judicial body, it is at the same time expected to function as an instrument of history and a diplomatic tool. Thus an interaction between law and history is more complex before the ICTY than in regular criminal courts.

Before the ICTY, as before any other criminal court, history might play a role in ascertaining individual responsibility. Here history is in the service of a judicial process. The parties expect historian expert witnesses to help them with their expertise in history to win the case – to prove (the Prosecution) or refute (the Defense) the specific charges. The judges expect historian expert witnesses to help them establish the truth about those past events, which are related to the specific charges and substantive norms on which these charges are based. The law determines, mostly quite precisely, what needs to be proven to consider something true for the sake of ascertaining individual guilt. Anything outside of this universe is deemed irrelevant. This type of truth, whose parameters are precisely defined by law, I will call the "legal truth."

[24] According to some reconciliation is the most important task of the Tribunal because only through reconciliation one can accomplish political, economic and social development of war ravaged societies as well as maintain lasting peace and security in southeastern Europe. *See*, Aleksandar Fatić, Reconciliation via the War Crimes Tribunal (2000). Others suggest that forgiveness may be more important to healing a society than criminal trials of war criminals. *See,* Joshua Dressler, *Hating Criminals: How can Something That Feels so Good be Wrong?,* 88 Mich. L. Rev. 1448 (1990). I believe that it is to optimistic to expect reconciliation to result solely or predominantly through international and domestic judicial proceedings. Trials should be seen only as a part of the postwar reconstruction of the war torn societies. They are part of a social engineering that must not be imposed solely from outside and from above but should be given space to grow from below, from the community itself. Fine-tuning is needed to balance trials and forgiveness.

[25] The American delegation held out this as one of the objectives of the ICTY at the time of its creation. See the comments of Madeline Albright in MORRIS & SCHARF, *supra* note 22, at 165-66. The ICTY itself announced this as its most important objective. *See,* the Fifth Annual Report of the 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, U.N. GAOR, 53rd Sess., Agenda item 48, PP 297, 299, U.N. Doc. A/53/219-S/1998/737 (1998), www.un.org/icty/rappannu-e/1998/index.htm [hereinafter the "Fifth Report of the ICTY"].

[26] With time, the development of international criminal law was quietly added as one of its most important objectives. This is the most controversial of its objectives. Often it is insisted that the Tribunal should apply only existing international criminal law (the Secretary General of the UN insisted on this in his report, *see*, *supra* note 7, ¶ 34), but from the judgments of the Tribunal it is obvious that the ICTY is hoping to extend the boundaries of international criminal law through its work.

The ICTY is also meant to operate as a mechanism that would develop a historic record and provide an impartial and truthful account of events in former Yugoslavia. History is at the center of accomplishing this objective. Here, in fact, a judicial process is supposed to be in the service of history. Historian expert witnesses have the task of analyzing collected evidence and interpreting the causes and consequences of the conflicts which took place within the territory of former Yugoslavia in order to help judges render an "official" and objective version of the events, i.e., establish the historical truth about the nature and wider context of these conflicts. Parties usually have no interest in establishing the historical truth per se - they are interested in establishing historical truth only if and to the extent it is related to the specific charges in the case, i.e. to the extent it overlaps with the legal truth.[27]

In short, the primary function of historian expert witnesses in front of the ICTY is to assist the ICTY in accomplishing two of its objectives: a) in establishing individual responsibility for the commission of crimes covered by the ICTY Statute and b) in creating the historic record and providing an impartial and truthful account of war and atrocities in the former Yugoslavia.[28] In performing each of these two functions historians are expected to assist in discovery of truth about past events – in first instance the legal truth and in the second the historical truth. The pressures of trial threaten the historians search for truth. My assumption is that these pressures do not have the same repercussions for the historian's ability to assist the Tribunal in discovery of legal as opposed to historical truth.

3. Pressures the Trial Exhorts upon Historians in their Search for Truth as Expert Witnesses in Front of the ICTY

To confirm the above assumption I must first survey the implications the organization of expert testimony in front of the ICTY and the administration of justice in general have on the historian expert witness's pursuit of truth.

3.1. The Organization of the Expert Testimony in Front of the ICTY: Implications for Truth-Discovery

The ICTY is a *sui generis* institution with its own Rules of Procedure and Evidence (the "Rules" or "RPE"),[29] that were not adopted from any single national system, rather the Rules represent a hybrid composed of elements of the Anglo-American (adversarial) system and the continental (inquisitorial)

[27] Exceptions are of course possible. For example, it seems that Milošević perceives his trial primarily as a forum to present his perception of the historical truth about the events in the former Yugoslavia. The same might be true for Šešelj.

[28] The ultimate hope is that by establishing individual responsibility and historical truth the Tribunal would contribute to collective catharsis, reconciliation among warring parties and preservation of peace in the region.

[29] *Supra* note 10.

system.[30] The Rules were also influenced by solutions from the procedures of other international courts, in particular the International Court of Justice (ICJ) and the European Court for Human Rights (ECHR). Adversarial features are dominant in certain areas of procedure while inquisitorial features are dominant in others. The presentation of expert testimony was originally structured primarily along adversarial lines, but with time more and more features of the inquisitorial legal systems have been introduced.[31]

Expert witnesses are primarily called by the parties (rule 85 (A) RPE) – both parties choose their respective expert witnesses, determine the subject of their testimony, provide them with the documents and other materials on the basis of which they make their testimony, and prepare them for direct and cross-examination (adversarial feature).[32] Midway through 1998, in order to

[30] In their original form, the Rules were viewed by most commentators, as written predominantly according to adversarial modes of proceeding. So the First Report of the ICTY, *supra* note 18, ¶ 71-74. *See also, Prosecutor v. Duško Tadić*, case no. IT-94-1-T, [hereinafter the "Tadić case"], Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, August 10, 1995, ¶ 22, at www.un.org/icty/ind-e.htm or *Prosecutor v. Zejnil Delalić et al.*, (case no. IT-96-21) [hereinafter "*Delalić* case"], Decision on the Motion of the Joint Request of the Accused Persons Regarding the Presentation of Evidence, June 12, 1998, ¶ 31, at www.un.org/icty/ind-e.htm. *See e.g.* Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 Colum. J. Transnat'l L. 725, 727 (1999); Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 Transnat'l L. & Contemp. Probs. 81 (1997); Sean D. Murphy, *Developments in International Criminal law: Progress and Jurisprudence of the International Criminal Tribunal for the Foremr Yugoslavia*, 93 Am. J. Int. L. 57, 80 (1999). As the Tribunal began to operate, it introduced more and more elements of the inquisitorial model. On the one hand, this was a result of the feeling that some features of the inquisitorial system lend themselves better to a realization of the goals of the Tribunal, especially those that go above the resolution of dispute, such as for instance implementation of certain criminal policy towards particular international crimes or the establishment of historical truths and the maintenance of peace among the warring sides. On the other, it was due to the fact that the majority of the participants in the proceedings (judges, prosecutors, defense attorneys) came from countries with inquisitorial legal systems so solutions from these systems sounded more natural to them. On basic features of adversarial and inquisitorial procedure *see,* Mirjan Damaška, *Models of Criminal Procedure,* 51 Zbornik Pravnog fakulteta u Zagrebu 478, 478-494 (2001).

[31] The actual presentation of expert testimony in front of the ICTY is primarily determined by the RPE. However, the presentation of expert testimony also depends to some degree upon the composition of a particular Trial Chamber, whether judges, and in particular the presiding judge, are coming from an adversarial or inquisitorial legal system, how much practical experience judges have in their legal systems of origin as well as what legal systems the other participants in the trial (prosecutor and defense lawyers) are coming from. For instance, civil law judges often question witnesses much more freely than common law judges. Civil judges tend to let testimony into the case evidence that a common law judge, who is used to operating under much stricter rules on admissibility of evidence, might exclude as inadmissible.

[32] In doing this, the Defense as well as the Prosecution is faced with a range of problems. Firstly, relatively few specialists outside of the former SFRJ are concerned with this area of study, and parties are concerned that the Tribunal will see historians who stem from the former SFRJ a prejudiced to a greater extent than those who do not and thus discredit the value of their testimony. Second, many of the most qualified historians, especially those who do not come from the region, are reluctant to testify because they do not wish to be identified with either the Prosecution or the Defense or they believe the trials simply put too great a limitation on their

expedite proceedings before the ICTY, judges were given the right to limit the number of witnesses called by the parties if they consider that too many witnesses are being called to provide testimony about the same thing.[33] In the first half of 2001, judges were given yet the further right to determine the number of witnesses the prosecution or defense could call.[34] Consequently, the Trial Chamber has since the middle of 2001 had the power to decide whether there is a need for a particular or indeed all expert witnesses which the parties have proposed to call. The Trial Chamber may itself summon the expert witnesses – of its own motion (*proprio motu*) or may call upon parties to produce expert witnesses (rule 98 RPE) (inquisitorial feature).[35] The party calling an expert witness carries out the examination-in-chief, the opposing party has the right to cross-examine (adversarial feature). Judges may at any stage put any question to the expert (rule 85 (B) RPE) (inquisitorial feature). Experts must file a written statement with the Tribunal (rule 94 bis, RPE) (inquisitorial feature).

Such a procedural and evidentiary framework for expert testimony creates a number of obstacles to the discovery of truth through historical expertise.

3.1.1. Experts Called by the Parties

In legal systems in which parties select, instruct and prepare experts for court appearance (adversarial systems), experts often, whether consciously or subconsciously, adapt their interpretations to suit the needs of the party that retained

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freedom to research, or they feel that as of yet not enough evidence exists to undertake serious historical analysis of the events that took place in the region. Thus it is extremely difficult to obtain high quality historian experts.

[33] *See*, revision to the Rules from 9 and 10 June 1998, (IT/32/Rev.13.), rule 73bis and 73ter, at www.un.org/icty/legaldoc/index.htm.

[34] *See,* revision to the Rules from 12 April 2001, (IT/32/Rev.22), rule 73bis (C) and 73 ter (C), at www.un.org/icty/legaldoc/index.htm.

[35] This is a result of the influence not only of inquisitorial model of procedure, but also of practice before other international courts. Namely, in front of international courts judges normally appoint experts to serve as impartial advisers. For e.g. art. 50 of the Statute of the ICJ (www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm) stipulates that "[t]he Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion." According to the ICJ Rules of Court (1978, as amended on 5 December 2000), both the Court and the parties may call expert witnesses (art. 62 pg. 2 and art. 63 pg. 1), www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicrulesofcourt_20001205.html) [hereinafter the "ICJ Rules"]. Similar powers are enjoyed by the ECHR, *see,* the Rules of Court (October 2002), rule 42 (1) and (2), www.echr.coe.int/Eng/Edocs/RulesofCourt2002.htm#fortytwo [hereinafter the "ECHR Rules"]. Since it is the responsibility of judges before international courts to establish the truth they are not only empowered, but must actively take part in the determination of facts. Gillian M. White, The Use of Experts by International Tribunals 7-14 (4th ed. 1965). The ICTY was initially reluctant to use powers, which impinged on the freedom of parties as regards the selection and presentation of evidence. But as more and more features of the inquisitorial model of procedure were introduced, as the role of the judge as guarantor of the establishment of the truth strengthened, and as time became more precious because of the growing number

them. Besides, parties regularly exercise pressure on experts to simplify and recast their views for advocacy purposes.[36] The ICTY is not immune to these problems.

The parties carefully read the writings and transcripts of prior testimonies of individual experts and then they approach those whose views and findings are compatible with their position and "theory of the case." In other words they shop for favorable expert testimony, one that will be helpful to their case. Experts do not live in a vacuum; they have their own political leanings, conscious and subconscious biases and often their own aims. Thus the theoretical basis underlying the respective approaches of two opposing expert witnesses may differ radically.

Already at the initial interview of a potential expert some common views about a subject are formed. Once the expert has agreed to be a witness, that expert becomes a member of the Defense or Prosecution team and inevitably identifies himself or herself, consciously or subconsciously, with the party introducing him or her as a part of its case. As a rule the expert takes side of that party.

Since each party conducts its own inquiry and formulates its own "theory of the case" that most augments its chances to prevail, the parties are very selective in their search for evidentiary materials – for the most part each party is collecting only evidence favorable to its position.[37] As a result, each party gives to its expert almost exclusively the materials which confirm its "theory of the case."[38] Thus two opposing expert opinions on the same issue may relay on substantially different data. Moreover, lawyers carefully examine the expert witness statement and its final version is the product of their close collaboration. Creation of a joint narrative involves a process of selection and modification. The expert is required to frame his/her statement so that it is broad enough to meet the needs of the party that engaged him/her, and yet sufficiently restrained as to offer few loopholes that the opposing party could use to undermine his/her statement in cross-examination.[39] In addition, the parties intensively prepare the experts for direct and cross-examination - train them to be accurate, clear and persuasive, to simplify and edit out extraneous, ambiguous or complicating detail. In this way each party additionally molds

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of defendants and the limited time frame of the Tribunal (it should conclude its work by 2008), judges became ever more ready to use this right to limit the length of proceedings and guarantee the establishment of the truth. So for example, in the case of Milomir Stakić, the court decided to name a handwriting expert as an impartial expert witness for the Tribunal. *See, Prosecutor v. Milomir Stakić*, (case no. IT-97-24), [hereinafter the "Stakić case"], Order Pursuant to Rule 98 to Appoint a Forensic Handwriting Examiner, 28 June 2002, at www.un.org/icty/ind-e.htm.

[36] For some illustrations *see,* Farber, *supra* note 3, at 1012-13.

[37] The Prosecutor is required to collect the exculpatory evidence as well (rule 68 RPE), but often the Prosecutor fails in this duty.

[38] With two major exceptions: i) information that is public or may become so, or lawyers may be at risk that it will become so, before the testimony takes place and ii) the nonpublic material that the other side presumably has.

[39] *See,* Alice Kessler-Harris, *Equal Employment Opportunity Commission v. Sears, Roebuck and Company: A Personal Account*, 35 Radical Hist. Rev. 57, 63 (1986).

its respective expert witness' testimony to suit its own needs and advance its own position.

Finally, the experts do not give a coherent, uninterrupted narrative account in front of the judges. Instead they are exposed to rigid interrogation by the parties who in this way exercise a remarkable control over the content of the experts' courtroom testimony. The experts are usually not given enough latitude to relate and explain all that they think is relevant. As a consequence, their opinion might have a different effect from the one the expert originally intended.[40] This further opens the door for the parties to manipulate expert testimony.[41]

Due to the strong polarization between the parties the courtroom sometimes appears as a battleground in which each side presents experts with contradictory opinions or in which even slight differences in experts' opinions are exacerbated. All this contributes to one-sided distortions of information introduced and elucidated by experts retained by the respective parties.

In order for a system of expert witness testimony to work and be an effective tool in the discovery of truth it is important to establish a rough equality between the parties concerning the use of experts and it is also necessary to subject experts to impeaching cross-examination and rebuttal evidence submission. This would enable, for example, defense lawyers and prosecutors to put historian's testimony to a test that uncovers biases, flawed data and unsustainable interpretations and prevents the misuse of history in the interest of the opposing party. But in front of the ICTY these security mechanisms are somewhat weaker than in adversarial legal systems (the equality between parties, as well as the functioning of the direct and cross-examination are upset) while experts' partiality remains on the same level.

3.1.1.1. Equality of the Parties

Parties in front of the ICTY are far from being equal. This inequality is potentially a source for distorted presentation of reality. Accused have far less resources than the OTP – in fact, the majority of them are indigent. Suspects or accused who lack the means to remunerate counsel are entitled to assignment of lead counsel and co-counsel paid for by the Tribunal.[42] A defense team of two counsels could hardly parry the Prosecutor who has numerous staff of different profiles and abundant financial resources on equal terms.[43]

[40] Alice Kessler-Harris, for instance, wrote about her intense frustration with a trial process that did not allow her to explain the complexities of the evolution of gendered conception of work. *Id.*

[41] This danger is to a certain extent diminished in front of the ICTY since the experts are required to submit to the Trial Chamber their written reports in advance of their oral testimony.

[42] Art. 6. & 16. (C), Directive on Assignment of Defense Counsel, Directive No. 1/94, IT/73/Rev.9, at www.un.org/icty/legaldoc/index.htm.

[43] The budget for the whole Tribunal in 2002/2003 is $223,169,800. A considerable portion of this amount has been assigned to the OTP, *see at* www.un.org/icty/glance/index.htm.

Almost each defense team starts at the bottom of the learning curve - it has to learn the Statute and Rules of the Tribunal, ICTY practice, international criminal law, as well as collect all the evidence for its part of the case (it is rare for the same defense lawyer to appear in more than one case).[44] On the other hand, the Prosecution progressivly accumulates knowledge, shares information within the Office,[45] members of its staff attend various courses organized by the OTP, etc. The OTP even employs some historians, specialized in Yugoslav history, who have the task of assisting historian expert witnesses for the Prosecution in formulating their statements and oral testimony, as well as to assist the Prosecutor in its preparation for cross-examination of the expert witness for the Defense. Thus the selection and preparation of experts by the Defense and Prosecution are rearly on the same level of quality and preparedness.

Inequality between the parties is further magnified by the Prosecutor's conduct. Namely, the Prosecutor often swamps the Defense with literrally tonnes of documents which the Defense is not capable to process in the short period of time it has at its disposal (in this way, for example, the Prosecutor sometimes makes it difficult for the Defense to prepare a high-quality cross-examination of the historian expert for the Prosecution). Finally, the Prosecutor is first to present its part of the case in which it portrays its perception of reality (often this lasts for months). Thereby, the Prosecutor frames judges' and public sensitivity which later, when it is the Defense's turn to present its part of the case, may be difficult to change.

Equality between the parties has been recently further upset by the novel interpretation of the right of judges to set the number of witnesses the parties may call. Namely, in the Stakić case the Trial Chamber took the position that the Defense "should, in principle, have the opportunity to present expert evidence in relation to issues addressed by Prosecution expert witness," but however, "a second expert on an identical issue may only be called to testify where it can be shown that he or she possesses superior knowledge, expertise or methods of working."[46] My experience in working before the Tribunal convinced me that experts, who have been selected by the parties often take on the role of advocate for the cause of the party retaining them. Thus these kinds of limitations on the Defense in presenting its expert testimony create the danger of portraying a one-sided picture of the issues that the experts are supposed to clarify for the Trial Chamber.[47] In order to discover the truth one should

[44] With the creation of the Association of Defense Counsel Practicing before ICTY (ADC-ICTY) the situation has been somewhat improved.

[45] In 2002 the universal information system was installed through which all the information in the hands of the OTP is accessible to its personnel.

[46] *See, Stakić* case, *supra* note 35, Decision on the Request for Approval of Defense Experts, 8 October 2002.

[47] Even in inquisitorial legal systems in which, along with the judge, the prosecutor and/or the police may appoint experts, and the defense does not have this prerogative, such practice is coming under ever more frequent criticism. It has been observed that when the prosecutor

juxtapose the Defense expert witness testimony to the Prosecution expert witness testimony. The existence of two opposing experts, with each one attempting to prove the "theory of the case" of the party retaining him or her, leads to more exhaustive and critical examination of various facts. Moreover, the testimony by two dueling experts, one retained by the Prosecution and the other by the Defense, reveals the whole range of arguments and their critique gives judges a more realistic opportunity to evaluate the evidence presented and to bring a decision by engaging their ordinary judgments of witness's credibility. In situations where there is only one expert (regardless of who appoints or chooses him/her, court or parties), there is a greater possibility that the judges, trusting the special knowledge of the expert, and lacking knowledge themselves in the area of expertise, will rely on the single expert's opinion without critically evaluating it and thus in this segment of decision making shift the judicial powers to the expert.[48] This is particularly troublesome if the expert is selected and prepared by a single party, usually a prosecutor, (as it is proposed in the Stakić case) since such expert is seldom impartial.

3.1.1.2. The Examination of Expert Witnesses

In legal systems in which parties select and prepare experts, because of the complexity and importance of expert testimony, effective cross-examination, rebuttal and rejoinder are essential. Cross-examination should expose vulnerable spots in the expert testimony. In front of the ICTY the whole function of direct and cross-examination, rebuttal and rejoinder has been disturbed because: i) defense lawyers often come from inquisitorial legal systems and consequently rarely apply effective adversarial methods of questioning witnesses, ii) judges are granted relatively wide powers to intervene directly in the procedure before the Tribunal, and iii) there is a lack of guidance on what materials related to expert testimony should be disclosed to the opposing party.

Sometimes even the most skillful lawyers are unable to detect all the spots where the opposing expert-witness testimony was moulded by partisan lawyers' preparation, or where it relies on distorted accounts of certain events provided by local witnesses in fear that they themselves might be implicated or on fabricated evidence furnished to parties by various intelligence services operating in the region. The bulk of the defense counsels representing clients in front of the ICTY were trained and are practicing in inquisitorial legal systems (the most of them originating from the former Yugoslavia) and are typically not experienced at cross-examination. They do not know how to prepare

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or the police appoint experts, instruct them and give them materials on which these experts base their findings and opinions this leads to a reduction of experts' impartiality and creates a division between the prosecutor and the police together with the expert on one side and the court on the other. *See,* Barbara Huber, *Criminal Procedure in Germany in* Comparative Criminal Procedure 96, 150-51 (John Hatchard et al. eds., 1996).

[48] *Similar* Mirjan Damaška, Evidence Law Adrift 152 (1997) as well as Huber, *supra* note 47.

their own expert witnesses for the cross-examination by the Prosecutor, and they themselves do not know how to cross-examine experts for the Prosecution. They are unfocused on what they are trying to accomplish, and frequently ask questions not relevant to their case. In short the potential of cross-examination by defense counsel in the search for truth in most cases has not been realized in front of the ICTY,[49] which affects the ability of the Tribunal to arrive at the objective truth.

This is one of the reasons why judges have been given such broad powers in examining witnesses. However, by examining witnesses judges place their neutrality at risk: first, they incline to form early tentative hypotheses about the case and become more receptive to evidence that confirms such hypotheses; second, they incline to side with the party whose version of events corresponds closer to their hypotheses.[50] Moreover, questioning by judges may throw off the rhythm of the expert witness examination performed in adversarial mode.[51] The Prosecutor and the Defense carefully structure direct and cross-examination, rebuttal and rejoinder with the knowledge of how far to take the expert in questioning to accomplish certain strategic purpose. When the judge steps in and asks a question the cross-examining lawyer might lose control over the witness and the momentum required to reveal the expert's vulnerable spot or detect fabrication might be lost. Thus examination of a witness by judges in a system in which proof taking is primarily managed by parties might itself eventually squander the possibility to discover the truth. In front of the ICTY civil law judges in particular pose big problems, as a common law judge will be sensitive to what the cross-examining lawyer is doing, while the civil law judge has no training or experience in this regard.

Cross-examination as well as rebuttal and rejoinder require advance knowledge of the substance of the other side's expert testimony. Thus the pre-trial discovery of experts (their identity, work experience, writings and content of their testimony) is a critical stage of the litigation process in which parties call to the stand their own experts.[52] The rule 94bis of the RPE stipu-

[49] The same feeling is shared by the former ICTY judge, Patricia Wald, *supra* note 13, at 104.

[50] On the importance of judicial neutrality in a system in which parties have the primary burden to produce evidence *see,* Damaška, *supra* note 48, at 82, 89, 95; *see also,* Mirjan Damaška, Two Faces of Justice and State Authority 135-40 (1986).

[51] For insightful observations *see*, Wald, *supra* note 13, at 90.

[52] Thus the Rule 65ter RPE stipulates that the Prosecutor should not less than six weeks before the Pre-Trial Conference and the Defence not later than three weeks before the Pre-Trial Conference file the following: the list of witnesses the Prosecutor/Defense intends to call including the name of each expert witness; a summary of the facts on which each expert will testify; the points in the indictment as to which expert witness will testify, including specific references to counts and relevant paragraphs in the indictment; an indication of whether the expert witness will testify in person or the party only intends to give his or her written statement, the estimated length of time required for the oral presentation of the expert witness, the list of exhibits the expert witness intends to offer. The Prosecutor/Defense shall serve on the opposing party copies of the listed exhibits. (17th amendments of the RPE, 17 November 1999,

lates that the full statement of any expert witness to be called by a party shall be disclosed within the time limit prescribed by the Trial Chamber or by the pre-trial Judge.[53] Nowhere it is stipulated what the expert statement should contain. In systems with liberal rules concerning the permissible basis for expert testimony, as is the case with the ICTY,[54] it is crucial to discover to the opposing party the expert statement, but also the facts and the data he or she relied upon in formulating his or her opinion.[55] In this regard, the rule 94bis of the RPE should prescribe in more detail what the expert statement should contain – in any case the statement should include materials (facts and data) on which the expert's report is based.

Finally, in systems where each party presents evidence in its part of the case sometimes days or even weeks may elapse between the prosecutor's and the defendant's expert testimony. Dueling experts often give conflicting testimonies on the same issue. However, due to the passage of time and mass of evidence that has been adduced on the other issues in the mean time, it is very difficult to properly compare the two expert testimonies, or clarify the discrepancies and directly compare the experts' credibility. Such presentation of expert testimonies often makes matters murkier and leads to confusion rather than to discovery of the objective truth.[56] This problem is acute at the

IT/32/Rev.17, at www.un.org/icty/legaldoc/index.htm). Even before this amendment was made the respective parties were asked to present to opposing party a notice of an expert witness to be called that would include the expert's name, his or her *curriculum vitae* and the statement of the opinion the expert would render. *See*,*Prosecutor v. Simo Drljaća and Milan Kovačević* (case no. IT-97-24) Order to Provide Notice of Expert Witnesses, 11 November 1997, at www.un.org/icty/ind-e.htm. Furthermore, in conformity with the rules 66 and 68 of the RPE, the Prosecution shall make available to the Defense copies of the supporting materials which accompanied the indictment when confirmation was sought, prior statements obtained by the Prosecutor as well as all exculpatory evidence. Finally, the Prosecutor shall, on request, permit the Defense to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the Defense, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

[53] The provision on experts was introduced by revision no.13 of the RPE, (*supra* note 33). Under revisions no.22, (*supra* note 34) it acquired its present form.

[54] The admissibility of evidence is very broad. The Rules of Procedure and Evidence do not pose any explicit prospective barriers to the admissibility of evidence – the Trial Chambers are authorized to admit all relevant evidence deemed to have probative value (Rule 89 (C), RPE). In line with this, there are no limitations on the material on which expert testimony can be based. Namely, it is assumed that a Trial Chamber that consists of experienced judges, and not a jury, will know how to properly weigh presented evidence. See the testimony of Hanne Sophie Greve at http://www.un.org/icty/trans1/960520.txt, pg. 36. See the commentary on this testimony in KELLYE L. FABIAN, *Proof and Consequences: An Analysis of the Tadić and Akayesu Trials*, 49 DEPAUL L. REV 981, 1023-30 (2000).

[55] In the USA for example, opposing party must disclose a description of the bases and reasons for specific conclusions, a list of the facts used by the expert to reach the specific conclusions he or she made, a description of the methods which were used to formulate conclusions, a list of the expert's publications or at least a list of all the cases in which the expert had theretofore been called as an expert witness (Federal Rules of Civil Procedure Art. 26 (a) (2) D).

[56] For similar observations *see,* Damaška, *supra* note 48, at 91/92 or Sam Gross, *Expert Evidence*, 1991 Wis. L. Rev. 113, 1175 (1991).

ICTY since individual proceedings there often last for a couple of years and sometimes a period of months or even a full year may pass between the expert testimonies of the two opposing parties.

3.1.2. Court-Appointed Experts

Concerned that expert testimony of two dueling expert witnesses might confuse the judges and seriously impair their understanding of evidence, the ICTY empowered judges to appoint impartial expert witnesses. It is hoped that experts acting as neutral court assistants will neutralize the negative effects of expert testimony presented through partisan experts selected, instructed and prepared for court appearance by interested parties and will ultimately help judges to arrive at the truth.

However, the possibility of having three experts (two called by the parties and one impartial appointed by the Trial Chamber) complicates the bringing of expert opinion before the Tribunal. It is not clear what the proper role of the court appointed expert acting alongside experts retained by the parties should be – whether they should act as formal testimonial witnesses or informal judicial consultants or advisors. There is a danger that the Trial Chamber may accept the court expert's statement and give little credence to the parties' experts' opinions. There is a risk that judges may delegate their judicial functions to court appointed experts. Moreover, "co-existence" of impartial court experts with adversarial principles of production and presentation of evidence (in particular those related to party control of evidence and cross-examination) is troublesome.[57]

On top of these, the RPE fail to address many important issues concerning the role of court-appointed experts and the interaction of court appointed experts with experts retained by the parties, including, for instance, the parties' right to challenge an appointment by the Tribunal,[58] the extent of the disclosure to the parties of the appointed expert's communication with the Tribunal,[59] safeguards available to the parties for the purpose of ensuring that

[57] On the difficulty of fitting the court appointed experts into an adversary trial *see,* Neil Netanel Weinstock, *Expert Opinion and Reform in Anglo-American, Continental, and Israeli Adjudication*, 10 Hastings Int'l & Comp. L. Rev. 9, 44-52 (1986);

[58] For example the Intra-American Court of Human Rights and the ECHR allow parties to object to appointment of an expert. The rules of the former court (art. 49) give parties the right to request expert's disqualification in a precisely limited specific number of cases (www.cidh.oas.org/Basics/basic18.htm), while the Rules of the ECHR (*supra* note 35, rule 67) do not specify any grounds for disqualification of either a witness or an expert and give this Court full discretion in decisions concerning objections.

[59] In inquisitorial legal systems the usual practice is to allow the respective parties to look over the findings and opinions of the court-appointed experts. But because judges in these systems determine the subject of inquiry or precisely define the problem or questions that the experts must clarify, provide them with the materials on the basis of which they must make their testimony (experts for the most part are not allowed to independently collect data and carry out an investigation), and the judges are primarily responsible for questioning experts, little attention is paid to cross-examination of expert witnesses by the respective parties and the submission to the parties of the material on which their testimony is based. Since the freedom of expert wit-

the appointed expert relied on accurate information and provided well-reasoned conclusions to the Tribunal, the procedures for testing the strengths and weaknesses of the testimony of the court-appointed expert.[60]

Due to all these reasons, the Tribunal generally has refrained from appointing impartial experts preferring instead the principle of adversarial responsibility for presenting evidence. As far as I know, the Tribunal has not as of yet appointed a single historian expert witness.

3.2. Administration of Justice: the Implications for Historian's Quest for Truth

In criminal proceedings the judges have to establish individual responsibility of an accused. Charges and substantive legal norms determine what needs to be proved to establish individual responsibility in a particular case. All the rest of what transpired from the perspective of the criminal proceedings is irrelevant. As a result, the judicial process always deals only with certain fragments of reality and historian expert witnesses must focus their factual inquiries just on these fragments and disregard everything else regardless how important that might seem to them for establishing the truth about the past.[61] They are not free to pursue their inquiries in whichever direction they find it appropriate.

Many pieces of evidence that appear fruitful to a historian's eye the judges and parties dismiss as juridically insignificant or irrelevant or too prejudicial, after a balancing test. Thus in the course of judicial process reality is regularly reduced and the relationship between evidence and reality is simplified.

Moreover, in judicial process, the collection and presentation of evidence is subject to a number of limitations, which might hinder the establishment of the truth of past events.[62] Among them are exclusionary rules of evidence. For example, judges have to exclude relevant and reliable pieces of evidence in

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nesses in presenting their testimony at the ICTY is much greater, and the control of judges over the court appointed experts far less than is usual in inquisitorial legal systems, the cross-examination of these expert witnesses as well as the discovery of their findings and opinions and all other information they use should be approached in the same fashion as is the case with experts retained by the respective parties. This is the practice at the ICJ, where the findings and opinions of each expert must be presented to the respective parties and the parties must be given the opportunity to comment on these findings and opinions. ICJ Rules, *supra* note 35, art. 67, ¶ 2.

[60] *Compare*, Peter Krug, *Note & Comment: The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Application*, 94 A.J.I.L. 317, 326-28 (2000).

[61] However, at the same time, by determining what needs to be proved to establish individual responsibility in a particular case substantive legal norms exclude many perspectives on reality and thus reduce the potential for controversy between dueling expert witnesses. On prophylactic function of substantive legal norms *see*, Damaška, *supra* note 3, at 293. Unfortunatelly, substantive legal norms in the ICTY Statute are rather vague and thus do not prevent the clash of divergent viewpoints very effectively.

[62] To some extent, these limitations vary between the inquisitorial and adversarial modes of proceeding. Concerning some limitations, which are particular to the adversarial procedure, *see,* Damaška, *supra* note 30.

so far as they were obtained by unethical means or if their probative value is substantially outweighed by the need to ensure a fair trial.[63]

Since typically society expects more than accurate-fact finding from the administration of justice, courts (including the ICTY) sometimes concede epistemically inferior methods of establishing truth[64] and sometimes subsume accuracy to some other goal or goals they seek to accomplish.[65]

The trial does not afford the time to deal with the subtleties of frequently profoundly complex historical events. Judges, even at the ICTY where procedures often last for several years, are expected to reach their conclusions relatively quickly. Historian expert witnesses are thus also constrained by time in rendering their expert opinions. These temporal limitations have a bearing on the comprehensiveness and precision of their enquires.

Furthermore, judges always have to reach a conclusion, even though the evidence may be inadequate – they have to sentence or free an accused.[66] Thus historians acting as expert witnesses are expected to give an opinion however incomplete the evidence. The trial asks for definitive answers when historian may prefer to give cautious, conditional answers.

Besides, in adjudication judges and parties seek to establish socially constructed reality. In conflicts, such as those in former Yugoslavia, the viewpoints on reality diverge considerably. Thus uncertainty arises as to whose perspective on reality should count. Judges, who are not trained in history, often have difficulties in evaluating and sorting out conflicting testimonies by opposing historian experts. Their decision regarding disputed historical issues is more likely to reflect some compromise than the historical truth. In the trail judgment in the Tadić case, the Trial Chamber specifically stated that wherever the opinions of expert historians conflicted it resolved the issue by "adopting appropriate neutral language."[67] The taking up of a neutral stance can be a desirable political move, but it does not necessarily lead to the establishment of truth.

[63] Rule 89 i 95 RPE. The specific problem in front of the ICTY is that judges often postpone to rule on the credibility of evidence until the end of the trial when they are delivering their final judgment. The length of proceedings and the large number of witnesses and evidence, which is presented before the Trial Chamber brings into question the ability of judges to determine the credibility and proper probative value of the particular piece of evidence only at the time of final judgment. On the significance of exclusionary rules in adversarial and inquisitorial procedure *see*, Damaška, *supra* note 48, at 47-52, 93.

[64] *Id*, at 103.

[65] On the relationship between truth and other values that a judicial process strives to accomplish see various contributions to the symposium on "Truth and its Rivals" held in January 1998, published in 49 Hastings L.J. (1998).

[66] The law anticipates the problem of the necessity to reach the conclusion in the case of inadequate evidence by providing sophisticated guides to decisions in situations of uncertainty such as the standard of proof beyond reasonable doubt or on the balance of probabilities. *See,* Twining, *supra* note 4, at 97.

[67] *Prosecutor v. Duško Tadić*, case no. IT-94-1-T, Opinion and Judgment of May 1997, ¶ 54, www.un.org/icty/tadic/trailc2/judgement/index.htm [hereinafter the "Tadić judgment"].

The decision reached by judges is in the court of last resort final. Such decision acquires greater fixity than conclusions by historians. Thus the need to guard against new evidence is more pressing in judicial than in an academic setting, where conclusions can relatively easily be revised on the basis of new findings.[68]

4. Historians in the Courtroom – To What Extent Their Testimonies in front of the ICTY Make Sense

The previous chapters described a number of obstacles historians might encounter in their search for the truth in judicial processes before the ICTY: proceedings are dealing with narrow, simplified and modified reality; the decision has to be reached quickly and after the appeal it is final; the conclusion has to be reached even though the evidence might be inadequate; the exclusionary rules of evidence; evidence is produced and presented for the great part by interested parties; the expert identifies himself or herself with the party that retained him or her and thus surrenders his or her impartiality; the *de facto* inequality of the parties; occasional subordination of accuracy to some other considerations, etc.[69] The judicial process before the ICTY also encompasses a number of mechanisms (such as use of rival experts or impeaching cross-examination) to reduce the negative effects of the above listed obstacles. Yet, there are still limits to the degree of objective truth we can expect to attain through historical expertise in a judicial process before the ICTY.[70] These limits do not effect the establishment of legal as opposed to historical truth equally.

4.1. History in Service of Judicial Process – Assistance in Establishing Legal Truth

Assisting in establishing the legal truth historian expert witnesses are expected to put history in service of judicial process. Their task is to investigate and interpret historical evidence related to the specific charges alleged in a particular case before the Tribunal. Substantive legal norms determine what needs to be proved to establish legal truth. They usually ask for a reduced version of reality. Therefore, due to time constrains in their search for the legal truth as well, the parties and the judges frequently require historian expert witnesses to produce simplified and condensed historical interpretations

[68] To guard against future surprises judges urge experts "to produce interpretations that have the best chance of corresponding to any new evidence that might arise." Farber, *supra* note 3, at 1029.

[69] Some of these issues have been raised already by Jerome Frank, Law and the Modern Mind (1930); Jerome Frank, Courts on Trial (1949). *See also,* Twining, *supra* note 4, at 106-112.

[70] Ever since Novick's book (*supra* note 3) was published there has been much talk among historians about how historical scholarship is subjective. To what extent this is the case with historical expert statements and testimonies before the ICTY, I leave it to historians to determine.

often at the expense of loosing accurate knowledge about various historical facts. Since the task of the discovery of the legal truth revolves around an ideal of rendering just sentence the historian expert witness testimony is considered as making a valuable contribution to the establishment of legal truth and the trial in general even when it does not produce detailed and the most accurate interpretation of the past if on the basis of such testimony judges could determine a more just sentence than without it.[71]

Thus in spite of the fact that a trial does not provide the best environment for doing historical analysis it makes sense to retain historians as expert witnesses if their testimony helps to do justice in a particular case, i.e. if it is legally significant. The more historical facts are part of the core or central issues in the case, the more historical facts are relevant for establishing the legal truth and thus the more legally significant is the testimony by historian expert witnesses.

4.2. Judicial Process in the Service of History – Attempting Establish Historical Truth

The ICTY, among other things, was envisaged as an instrument that would establish the historical truth about events in former Yugoslavia. However, the judicial process does not suit well the needs of historiography.

In most cases before the ICTY history is a secondary fact. The parties, who are the main source of evidence in front of the ICTY, are by and large not willing to invest much energy, resources and time in establishing historical facts, which are legally irrelevant or of little significance in a particular case. Thus, in most of the cases, there is not much evidence or discussion related to broader political issues such as for instance the involvement of certain states in the conflict, the sources of conflicts and etc. The judges have been in part given broad powers in examining witnesses to be able to collect evidence for which parties do not have an interest but which might be necessary for judges to accomplish goals that go beyond the establishment of individual responsibility for committed crimes (such as for example the establishment of historical truth). However, in fear that exercise of such broad powers might jeopardize the exercise of justice, the judges have not express much enthusiasm to use these powers. In addition, a trial, as I have demonstrated, creates numerous pressures and constrains for truth discovery. As result certain portions of evidence are often missing and others are distorted. In such circumstances it is practically impossible to render a macro picture of past events that could stand the test of time and critical methods.

Moreover, the task of the discovery of the historical truth revolves around an ideal of providing truthful account about past events. Thus in the process of discovering the historical truth the truth discovery in itself is the ultimate goal and it is believed that truth-values cannot be traded off with any other

[71] In search for the legal truth the judges are more concerned with achieving individual justice than with the accuracy of fact finding.

consideration. Thus a judicial process with its practice of occasionally subordinating the accuracy of fact finding to the goal of providing justice, or some other goals, does not suit the needs of writing history well.

Judges are not trained to act as quasi historians. Their efforts to render historical interpretations of past events, on the one hand, too often result in simplification and impoverishment of historiography and, on the other, too often corrupt the exercise of justice.

Obviously a trial is not the best way to discover the historical truth and to do the writing of history. Thus neither judges should be expected to establish historical truth, nor historian expert witnesses to provide extensive historical interpretations unrelated to charges in a particular case. However, the Prosecution can effectively force the trial of "history" by charging persecution or genocide and then pleading it on the facts alleged in Indictment very broadly to include State behavior, etc. If a Trial Chamber decides not to narrow the case, the judges must ultimately decide upon historical issues. In such cases the legal and historical truth overlap to a considerable extent and a historian expert testimony is as a rule of a great legal significance.

5. Conclusion

Initially "the Tribunal was urged to make detailed findings about the social and political etiology of events leading up to the atrocities on trial."[72] It was suggested that this would provide "an antidote to revisionist history by preserving adjudicated accounts of what actually happened in the foreplay to the [Yugoslav] conflicts."[73] This resulted in long oral testimonies by historian expert witnesses that went well beyond what is necessary to ascertain guilt of the accused in a specific case. Also the early judgments devoted a large number of pages to explain the causes and circumstances that led to the outbreak of hostilities in 1991.[74] With time, this attitude of the Tribunal was ever more criticized and the Tribunal increasingly began to insist on the submission of written statements by historian expert witnesses in preference to their oral testimony,[75] began to admit the testimonies of historians from an earlier case before the Tribunal[76] and started to limit the testimony of historian expert

[72] WALD, *supra* note 13, at 116.

[73] *Id.*

[74] The first judgment delivered at the ICTY, a trial judgment in the Tadić case, devoted 73 chapters to the general historical context, of which 14 deal with the remote history of Bosnia and Hercegovina and Yugoslavia. *Supra* note 67, ¶ 53-126.

[75] On the relationship between oral examination of witnesses and the use of affidavits and depositions at the ICTY *see generally,* PATRICIA WALD, *To Establish Incredible Events with Credible Evidence*, 42 HARV. INT'L L. J. 535, 540-552 (2001).

[76] In the middle of 1998 the scope of facts as to which the Trial Chamber could take judicial notice was increased. In accordance with this change, the Trial Chamber may decide at the request of a party or *proprio motu* to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current pro-

witnesses to those historical facts enabling to place in the proper context the events and evidence relating to the counts of the specific Indictment.[77]

Yet, historians should be used as expert witnesses in front of the ICTY to an even lesser degree than is the practice at present. A witness testimony is often sufficient for the actual charges to be placed in the context of developments in a certain area (e.g., Srebrenica, Brčko, Prijedor, Lašvanska Dolina, etc.), particularly in the proceedings against lesser officials and ordinary soldiers. In order to establish individual culpability for crimes in such cases, the wider context of events is by and large unimportant and the relatively detailed historical analysis of the conflict and explanations of its origins are superfluous and represent a useless waist of the time and resources of the Tribunal. Testimony of historians is here unnecessary. Indeed, sometimes it seems that historian expert testimony is offered simply as a vague excuse for the committed crimes[78] or the circumstance, which should result in a more serious punishment for the perpetrator

ceedings. This led to the Trail Chambers admitting written statements and transcripts of expert witness testimony from other cases. For example in the Aleksovski case the Trial Chamber admitted the transcript of the evidence given by the expert witness in the Blaškć trial together with video/recording of his testimony and accompanying exhibits. *See, Prosecutor v. Aleksovski* (case no. IT-95-14/1), Decision on Prosecutor's Appeal on Admissibility of Evidence, from 6 February 1999, at www.un.org/icty/ind-e.htm. Besides this, in 1998 a rule was introduced (UN.Doc. IT/32/Rev.13), by which, if the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person (Rule 94bis, RPE). Then Trial Chamber in the Kordić case confirmed the Appeals Chamber finding in Kupreškići according to which the expert witness statement provides one of four exceptions to general preference for live in-court testimony. *Prosecutor v. Kordić & Čerkez* (case no. IT-95-14/2), Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, 18 September 2000 (Appeals Chamber) ¶ 24, at www.un.org/icty/ind-e.htm. Soon thereafter the rule giving preference to the oral examination of witnesses (rule 90(A) RPE) was removed and a new rule prescribing circumstances under which a Trial Chamber may admit the evidence of a witness in the form of a written statement in lieu of oral testimony was introduced (Rule 92bis RPE). Amendments to RPE of 13 December 2000, UN.Doc. IT/32/Rev.19 (2000), at www.un.org/icty/legaldoc/index.htm. Among the factors in favor of admitting evidence listed were the circumstances in which the evidence in question relates to relevant historical, political or military background (rule 92bis (A) (b) RPE). With this revision the possibility of excluding oral testimony of experts is wider than is common in inquisitorial legal systems. For example, in the German legal system the opinion of an expert can be read out in his absence only in exceptional circumstances. A record of a judicial examination which has been carried out in the correct form may be read in court when the expert's absence is unavoidable (death, illness or similar circumstances). Other non judicial depositions or documents can be read if the participants consent to this or if an examination is impossible because the expert has died or cannot be examined for some other reason within the reasonable time or if the expert opinion was given by some well known public or academic institution or if routine expertise is in question (such as the level of alcohol in the blood, blood groups, etc.). The goal with this is to speed up the process. *See*, HUBER, *supra* note 47, at 150. In Croatia, the opinion of an expert can be read out in his or her absence if the expert is dead or has become mentally ill or if the expert can not appear in court due to age, illness or other exceptional circumstances, or if the expert does not wish to appear for legal reasons or indeed if the parties agree that the notes from the expert's previous examination can be read in court (art. 331, ¶ 1 Criminal Procedure Code).

[77] In the Delalić case the Trial Chamber stipulated in its trial judgment the following: "The Trial Chamber does not consider it necessary to enter into a lengthy discussion of the political

of the particular crime.[79] A historian expert testimony should be used only in cases in which their expertise is legally significant. Rules do not provide specific guidance as to when the expert testimony should be considered relevant. They leave this to the discretion of the judges.[80] A lot depends upon the specific charges alleged and facts pleaded. I would suggest that historians should be used as expert witnesses only in cases where history is not tangential but more central to the core facts relating to the elements of the crime, as it may be in some genocide or persecution case theories.

Whenever possible the Tribunal should refrain from rendering authoritative interpretations of history and should limit itself to ascertaining the guilt of the accused in the specific case. It should do so for several reasons. The proceedings before the Tribunal and the findings of the judges often do not produce the accurate account of the past. Judges are not trained to render historical interpretations and in doing so they often simplify and impoverish historical knowledge. At the same time their efforts in history writing might jeopardize the exercise of justice. There is no authority, even a court, which can once and for all determine the historical truth on some event. Yet, the Prosecution can effectively force the "trial" of history (for e.g. by charging persecution and than pleading it on the facts alleged in the indictment very broadly). Then, the Tribunal must either narrow the case, or decide the issues. In my opinion, in such circumstances it would be more prudent for the Trial Chamber to narrow the case.

Over the years the ICTY has made a special effort to create a favorable environment in the courtroom for effective presentation of the scientific (including historical) information. For example, it rejected to a large extent the common law's emphasis on the screening of information to be submitted to

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and historical background to these events, nor a general analysis of the conflict which blighted the whole of the former Yugoslavia around that time. The function of the Trial Chamber is to do justice on the case at hand and while this naturally involves presenting its findings in evaluation of the present case. For the purposes of this background, particular reliance is placed on the evidence presented through the historical, political and military expert witnesses of both the Prosecution and the Defense." *Delalić* case, supra note 30, Judgment from 16 November 1998, ¶ 88-90, www.un.org/icty/celebici/trailc/judgement/index.htm.

[78] Perpetrators are portrayed as victims sometimes even in a very distant past or through the centuries and this is offered as an excuse for the crimes committed. Or victims are portrayed as belonging to class of victimizers and thus of deserving what has been inflicted upon them.

[79] Perpetrators are portrayed as belonging to class of victimizers through centuries and thus in the interest of general prevention deserving harsher punishment.

[80] ICTY Rules do not have specific provision defining what constitutes relevant evidence. According to the practice of the ICTY and ICTR the expert testimony is considered relevant and probative so long as it is useful to judges in establishing the existence of a particular fact (e.g. in *Delalić* case the Trial Chamber emphasized: "Relevance is based on the nature of the issue before the trial chamber … A matter is relevant if taken by itself or in connection with other facts, it proves or renders probable the existence or non-existence of the issue," *supra* note 30), *i.e.* if it is "intended to enlighten judges on specific issues of a technical nature, requiring special knowledge in a specific field" (*Prosecutor v. Jean Paul Akayesu,* (case no. ICTR–96-4-T), Decision on the Defense Motion for the Appearance of an Accused as an Expert Witness, March 9, 1998, at www.ictr.org).

triers of fact. The negative effect of exclusionary rules on truth discovery has been reduced by granting judges a rather great latitude in deciding upon the application of exclusionary rules and by empowering them to decide both on the admissibility of evidence and its probative value.[81] The judges have been permitted to study the experts' written statements in advance of dispositive hearing. Party control over procedural action and expert testimony has been contained - judges have been empowered to appoint expert witnesses and question experts, regardless of who appointed or retained them. Yet, the mixture of adversarial and inquisitorial features created through frequent amendments of the RPE does not always produce the preferred results. As has been demonstrated, some inquisitorial features undermine the protective value of the adversarial mechanisms (for example, cross-examination) that serve as a buffer against those who would abuse historical truths in the interest of the client. On the other hand, it is difficult for some inquisitorial mechanisms (for example, court-appointed experts) to co-exist with adversarial principles of production and presentation of evidence. Thus, in order to insure the accuracy of fact-finding, the Tribunal should attempt to improve further the rules regulating organization and production of expert testimony.[82]

In one instance the ICTY proclaimed that its most important function is to ensure that history listens to what the Court has established as judicial fact about the conflicts in former Yugoslavia.[83] The archive of the ICTY will certainly be the richest and most important source for the historical analysis of events in the former Yugoslavia from the period beginning with its collapse to the end of the conflict. The ICTY collected much more evidence than criminal courts usually do because the strategic vision of the ICTY goes beyond dispute resolution of the particular case.[84] However, in using this archive historians will face and have to resolve two major problems.

First, -- much of the proceedings are secret[85] and thus much of the archives will never be made public, unless the relevant governments decide to do so

[81] Inadmissible but persuasive evidence, once heard by judges, even if excluded, affects their thinking and influences the outcome. Yet, the exclusionary rules still might have some effect on establishing truth before the ICTY since such evidence cannot be used as an argument in the course of deliberation or in justifying the judgment. The exclusionary rules have greater actual potential to affect the truth finding in front of the ICTY if the elimination of inadmissible evidence occurs prior to the trial. For the insightful remarks related to the effect of exclusionary rules in adversarial and inquisitorial legal systems *see*, Damaška, *supra* note 48.

[82] My advice would be to insist on using experts called by the parties and to use court-appointed experts only as advisers, but their advice should be transparent and the parties should be given opportunity to comment on them.

[83] *See,* the Fifth Report of the ICTY, *supra* note 25, ¶ 296.

[84] Among other things, the ICTY has as an objective to establish historical truth about the events in the former Yugoslavia. Transcripts of witness testimony (except for a few protected witnesses) are already available to the public. *See*, www.un.org/icty/ind-e.htm. It can be hoped that the Tribunal will in the near future also make its documentation available to at least the scholarly public in order to begin historical and other scholarly analysis of the material collected.

[85] For various reasons OTP strives to prevent disclosure of discovery materials by parties,

themselves. Second, the evidence gathered from the ICTY trials as well as the Tribunal's interpretations do not necessarily always convey the objective information. As has been discussed, the evidence produced through adjudication is often modified and even distorted. Furthermore, since the trickled into the Tribunal slowly, the Tribunal has been conducting judicial proceedings and rendering decisions even when a large part of the evidence has not yet been available to it.[86] This makes any use of res judicata in the writing of history particularly problematic. Moreover, since the Tribunal strives not to repeat mistakes of the Nuremberg trials, which are often discredited as "victors' justice," it sometimes excessively insists upon the guilt of all the warring sides. The tendency to equalize the guilt may produce further distortions in judicial interpretations of events in the former Yugoslavia.

Hence, in order to interpret the evidence contained in the Tribunal's records, assess its reliability and understand its relevancy, the historians will have to develop a "specific interpretative framework" on the basis of "the specific code according to which the evidence has been constructed."[87] Historians will have to decipher skewed sources of evidence taking into consideration how the evidence was collected, prepared and presented[88] as well as develop procedures of reading the gaps in evidence.[89] Thus any historian who would like to adeptly use the Tribunal's materials will have to get acquainted with the character of the criminal procedure before the ICTY because only in this way will (s)he be able to understand the procedures according to which the evidence was encoded in judicial process and to detect different sources and types of inherent evidential distortions.[90] Without this "a sound historical reconstruction"[91] of the events in the former Yugoslavia on the basis of the Tribunal's rich records is impossible.

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even when those materials are documents not witness statements. According to RPE, in exceptional circumstances, a Judge or Trial Chamber, in consultation with the Prosecutor, may order that there be no disclosure to the public of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice (Rule 53 RPE). The record of closed proceedings should not be disclosed to public as well unless the Trial Chamber, after giving due consideration to any matters relating to witness protection, decides that the reasons for ordering non-disclosure of all or part of the record of closed proceedings no longer exist (Rule 81 RPE).

[86] Thus witness testimonies, interpretations by the parties and decisions of the Tribunal should be always read in the light of the evidence that was available at that time to the parties and judges.

[87] Ginzburg, *supra* note 2, at 295.

[88] They will have to use special care as to fabricated evidence, particularly by the various intelligence services operating both then and now in the region.

[89] Partisan litigants regularly do not present all of their available information. Besides, at the time of the trials only part of the evidence was available to the parties and the Tribunal.

[90] In this respect we could learn a useful lesson from Ginzburg's historical practice in reading and interpreting the records of inquisitorial trials. *See,* Ginzburg, *supra* note 2, at 290-303 and Davidson, *supra* note 1, at 304-320.

[91] *Supra* note 87.

Seeking the truth about the past is complex and frequently disturbing. Still, it is important to have "sufficient faith in the power of historical thinking to believe that the mere embarking upon a course of historical research, even if done with no aim in view except to support a certain political thesis, will lead to historical results far transcending that thesis itself."[92] The task of historians should be not only to discover what actually happened in the past, but to evaluate those events in conformity with their own moral values and teach a lesson because as Georg Santayana said, "a society is fated to repeat the mistakes of its past if it does not learn the lessons of its history."[93]

[92] R.G. Coollingwood, The Principles of History and Other Writtings 213 (W.H. Dray and W.J. van der Dussen eds., 1999).

[93] Georg Santayana is paraphrased here from Michael P. Scharf, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslav Tribunal*, 49 DePaul L. Rev. 925, 931 (2000).