

## TRUTH, HISTORY, AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA

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Like all organizations, the International Criminal Tribunal for Yugoslavia (ICTY) has a history and a culture. Its close ties to the United Nations (UN) and members of the North Atlantic Treaty Organization (NATO) suggest that it is something more than a criminal court, and its broad interpretation of customary law, in particular its formulation of the concept of joint criminal enterprise (JCE), appear to mark it as a court of transitional justice. The proliferation of similar courts over the past two decades, including the International Criminal Tribunal for Rwanda (ICTR), which shares an Appeals Chamber with the ICTY, and the International Criminal Court (ICC), which differs from the ICTY in having been established by treaty, appear to make it, if not a model for, at least a harbinger of future developments in international law. It has also sought to influence the politics of the successor states to Yugoslavia and the opinions of those who have commented on the Yugoslav wars. Nonetheless, most people, including a majority of scholars, would be hard-pressed to define the concept of JCE or describe the culture of the ICTY. This essay argues that the ICTY has slipped the moorings of its Statute and embarked on a course that has led it to create new legal doctrines that undermine international law and that scholars who cite the materials assembled by its prosecutors and consult the decisions handed down by its judges should do so with caution, bearing in mind that the goals and the functions of a transitional court are radically different from those of a criminal court.

**Key words:** International Criminal Tribunal for Yugoslavia (ICTY), ad hoc court, Truth, legal doctrine, Joint criminal enterprise (JCE)

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## Ad Hoc Courts and Legal Norms

Describing the ICTY is deceptively simple: it is an ad hoc criminal court that was created by the United Nations Security Council (UNSC) in 1993 to prosecute “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991” as part of an effort to assure peace and stability in the region. Its statute lists the violations over which it has jurisdiction under the headings of “grave breaches of the Geneva Conventions of 1949,” “violations of the laws or customs of war,” “genocide,” and “crimes against humanity.”<sup>1</sup> The relative seriousness of these crimes is debatable, but most would agree that those who committed them should be held responsible for their actions during the wars that accompanied the dissolution of Yugoslavia.<sup>2</sup> However, like previous international criminal tribunals, the ICTY confronted two problems—it could not try all those accused of having committed crimes without indicting thousands of people,<sup>3</sup> and it had to render final judgments on the basis of incomplete evidence.<sup>4</sup>

<sup>1</sup> ICTY Statute, Articles 2, 3, 4, 5, at <http://www.un.org/icty/basic/statut/statute.htm>, consulted 8/16/99. Also see James C. O'Brien, “The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia,” *The American Journal of International Law*, 87 (4) (1993): 639-659; Frédéric Mégret, “The Politics of International Criminal Justice,” *European Journal of International Law* 13 (2002), pp. 1261-1284; and Pierre Hazan, *Justice in a Time of War. The True Story behind the International Criminal Tribunal for the Former Yugoslavia* (College Station: Texas A&M University Press, 2004).

<sup>2</sup> Micaela Frulli, “Are Crimes against Humanity More Serious than War Crimes?” *European Journal of International Law* 12(2) (2001): 329-350, concludes that crimes against humanity appear to be worse than war crimes. James Meernik, “Victor’s Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia,” *Journal of Conflict Resolution* 47 (2) (2003): 151, “weighted” genocide a 3, crimes against humanity a 2, and war crimes a 1. Such weighting is arbitrary; and while Eric D. Weitz, “Comment: On the Meaning of Genocide and Genocide Denial,” *Slavic Review* 67 (2) (2008): 415-421, argues that the mass murder at Srebrenica was genocide, he laments the “wild, inflationary use of the term” and notes that the 1948 UN General Assembly Convention was a “political compromise” that narrowed Raphael Lemkin’s original definition. Even Antonio Cassese, “The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise,” *Journal of International Criminal Justice* 5 (1) (2007): 130, thinks the Appeals Chamber that heard *Tadić* was wrong “to consider the same offense as more grave if regarded as a crime against humanity than as a war crime.”

<sup>3</sup> William A. Schabas, “Victor’s Justice: Selecting ‘Situations’ at the International Criminal Court,” *John Marshall Law Review* 43 (3) (2010), p. 542, notes that the international system is not “a functional system displaying the attributes of the rule of law” in which “all serious crimes against the person will be prosecuted.”

<sup>4</sup> Theodor Meron, “Reflections on the Prosecution of War Crimes by International Tribunals,” *American Journal of International Law* 100 (3) (2006): 551-579, notes that the judgments of such tribunals are final but based on “incomplete” evidence and notes that in 1919 the victors initially contemplated the indictment of 20,000 Germans for war crimes, and that in 1945 the United States suggested criminalizing entire organizations, thereby inculcating millions of Germans. But in 1919, only 12 were tried, of whom 6 were convicted, an “experiment in retributive justice” that Meron considers “a dismal failure.” In 1946, the International Military Tribunal at Nurem-

Prosecutors therefore had to select whom to indict, and because the majority of those indicted during the 1990s were Serbs, it initially came under fire for bias against Serbs. As it indicted more Croats, it came to be seen as having a bias against Croats as well. Muslims, who many see as the only real victims of the wars, are unhappy that their leaders also have been indicted and that their former enemies and allies have not been sentenced to longer terms in prison.<sup>5</sup>

Whether these perceptions were accurate, the American judge Patricia Wald considered the Tribunal to be an unrepresentative institution because it had “no public constituency,” a reality that “often” led her to ask herself “how accountable” she and her fellow judges were and “to whom?”<sup>6</sup> The answer to her question is that the ICTY is responsible to the UN Security Council (UNSC), which created and continues to fund the Tribunal, to nominate its judges, and to advise them on procedural matters.<sup>7</sup> The ICTY is thus an “exogenous” court which was established and functions outside the states whose citizens

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berg (IMT/N) indicted 22 Nazi leaders, of whom 12 were hanged, 7 sentenced to prison, and 3 acquitted. The IMT in the Far East (IMT/FE) indicted and convicted 25 Japanese leaders, and sentenced 7 to death. In addition to these leaders, the Allies tried 980 Japanese and 177 Germans for war crimes. National judicial systems faced similar problems in 1995. For example, following a successful military offensive in Western Slavonia that May, Croatian leaders, who were being pressed by the US ambassador to amnesty alleged war criminals, discussed how many of 252 Serbs suspected of having committed crimes to prosecute. Given the difficulties of obtaining “legitimate evidence” and “strong witnesses,” Nikica Valentić suggested that only the most serious cases be prosecuted and everyone else be amnestied, a suggestion adopted by Franjo Tuđman and the other Croatian leaders present. See ICTY, Presidential Transcript, 13 May 1995, (Hard Copy, English Translation).

<sup>5</sup> Croatian forces (the HV and HVO) both fought with and against the largely Muslim Army of Bosnia and Herzegovina, depending on the period and area. For perceptions of bias, see Dan Saxon, “Exporting Justice: Perceptions of the ICTY among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia,” *Journal of Human Rights*, 4 (2005): 559-67; Victor Peskin and Mieczysław P. Boduszynski, “International Justice and Domestic Politics: Post-Tudjman Croatia and the International Criminal Tribunal for the Former Yugoslavia,” *Europe-Asia Studies* 55 (7) (2003): 1117B42, noted the resistance of many Croats to the Tribunal even under a “democratic” coalition, but attributed it to the persistence of “nationalist” politics and “authoritarian forces [that] still posed a threat.” However, they present no compelling empirical data to support their assertion.

<sup>6</sup> See Patricia Wald, “International Criminal Courts: Some Kudos and Concerns,” *Proceedings of the American Philosophical Society*, 150 (2) (June 2006): 245.

<sup>7</sup> The ICTY was created by the Security Council, the executive body of the United Nations, not by the General Assembly, the UN’s representative body. It is not a constitutional entity and does not exist within a state structure; its legitimacy ultimately derives from the permanent members of the Security Council, which funds the Tribunal and has advised it on case management. Gregory P. Lombardi, “Legitimacy and the Expanding Power of the ICTY,” *New England Law Review* 37 (4) (2002-2003): 899-901, concludes that the UNSC’s “collusion” with the ICTY and its efforts to interfere in the ICC reinforce doubts that such tribunals are independent. For the UNSC’s role in international justice, also see Karima Bennouna, “Sovereignty vs. Suffering? Re-examining Sovereignty and Human Rights through the Lens of Iraq,” *European Journal of International Law* 13 (1) (2002): 243-262.

it prosecutes. According to Kaminski, Nalepa, and O'Neill, such courts are legitimate if administered "under the auspices of an ongoing institution" and "by agents who were not engaged in the conflict." However, if "retribution is administered externally without regard to the wishes of the citizens of the state in transition (e.g., some war crimes trials)," the justice meted out is "victor's justice" and lacks "legitimacy."<sup>8</sup>

Unlike the criminal courts in the states formed from Yugoslavia, the ICTY is not part of a judicial system created by a constitution endorsed by a state's citizens.<sup>9</sup> Like its predecessors, it is an *ad hoc* court, and like them, it derives its legitimacy from a body foreign to the states over which it has jurisdiction, in its case the Security Council, the executive organ of the UN.<sup>10</sup> But it is not the permanent court of the UN, a distinction that belongs to the ICJ, which hears cases involving states, not individuals.<sup>11</sup> Nor is the Tribunal administered by agents who were not involved in the conflicts over which it has jurisdiction. The UN, the EU, and the United States were all involved in the Yugoslav wars from their inception. The UN and the EU sent mediators and observers to the region; NATO enforced no-fly zones and conducted air strikes on Serb positions; the United States advised both the Croatian and Bosnian armed forces; and troops operating under the UN's flag protected both Serb-occupied

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<sup>8</sup> Marck M. Kaminski, Monika Nalepa, and Barry O'Neill, "Normative and Strategic Aspects of Transitional Justice," *The Journal of Conflict Resolution* 50 (3) (2006): 295-302. Lilian A. Barria and Steven D. Roper, "How Effective Are International Criminal Tribunals? An Analysis of the ICTY and the ICTR," *International Journal of Human Rights* 9 (3) (2005): 360, 364, argue that "systems of justice can only be effective when all parties recognize the legitimacy of the judicial process." The signatories to the Dayton Accords accepted the ICTY but they did not create it, and a significant number of the people of these states have considered its indictments and rulings less than fair.

<sup>9</sup> Patricia M. Wald "Punishment of War Crimes by International Tribunals," *Social Research* 69(4) (2002): 1121, 1126, and 247, 258, argued that the ICTY was "an accepted part of the settlement of the conflict" and subsequently "earned" its legitimacy by prosecuting military and political leaders from the successor states. But to focus on leaders cannot confer legitimacy; at most, doing so confirms that it has fulfilled its mandate to prosecute those responsible for certain crimes. Minna Schrag, "The Yugoslav Crimes Tribunal: A Prosecutor's View," *Duke Journal of Comparative and International Law* 6 (1) (1995): 192-3, argued that while the Tribunal's "primary focus" was on "the leaders who were responsible for instigating and directing the crimes," it could not "hope to persuade the victims that justice has been done" unless it prosecuted individuals "at all levels of responsibility."

<sup>10</sup> For discussion, see Kenneth W. Abbott, "International Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts," *American Journal of International Law* 93 (2) (1999): 361-379.

<sup>11</sup> Wald, "International Criminal Courts," p. 1128, notes that among the ICJ decision rejected by the ICTY is how to ascertain whether a states exercises "control" over military organizations operating in another country.

territories in Croatia and “safe zones” in Bosnia and Herzegovina.<sup>12</sup> Since the ICTY was created by the UNSC and has been dependent on the UN, the EU and the US, and since most citizens of the successor states to Yugoslavia are excluded from participation except as defendants and many oppose its broad indictments, it seem difficult not to conclude that, like its predecessors in Nuremberg and Tokyo, the Tribunal administers a form of “victor’s justice.”<sup>13</sup>

The judges at the ICTY wrote and have repeatedly revised its rules and procedures, which are an amalgam of common law and civil law as practiced in Western states.<sup>14</sup> The Tribunal therefore mixes the adversarial practices of common law with the inquisitorial practices of civil law.<sup>15</sup> It is a difficult marriage at best and one that David Wippman believes has resulted in “inconsistency and significant misunderstandings, both internationally and externally,” and has “at times” “jeopardized the rights of the accused.”<sup>16</sup> The need to finish its work led the Tribunal’s judges to revise its rules to allow plea bargaining, suspension of indictments, and the use of written statements in place of oral

<sup>12</sup> The literature on the involvement of the major powers is voluminous and includes memoirs, document collections, popular histories, and scholarly studies. Nonetheless, many scholars and commentators have tended to treat this involvement as if it were peripheral to the wars and had little or no influence on their conduct and outcome.

<sup>13</sup> Schabas, “Victor’s Justice,” pp. 537, 543, argues that the “political agenda” of the ICTY was “set by . . . the ‘permanent’ five” on the Security Council, so the reasons for creating the ICTY and ICTR were “inscrutable to the extent that they represent compromises by government negotiators acting on the basis of national interests.” Meron, “Reflections,” p. 562, concludes that the Japanese people tacitly repudiated the International Military Tribunal for the Far East because three of those it convicted later held ministerial posts. If so, the success of politicians involved in the wars and popular protests against the ICTY’s indictments and decisions suggest that many Serbs and Croats have repudiated the ICTY. Gabrielle Kirk McDonald, ICTY, Press Release, “The International Criminal Tribunal for the Former Yugoslavia: Making a Difference or Making Excuses?” The Hague, 13 May 1999, told the US Council on Foreign Relations that even before NATO began to bomb Serbia in 1999, “the Tribunal was viewed negatively by a large segment of the population of the region,” supposedly due to “virulent anti-Tribunal propaganda.” David Talbert, “The ICTY and Defense Counsel: A Troubled Relationship,” *New England Law Review* 37 (4) (2002-2003): 976, thought that the ICTY had “failed to engage the region’s justice systems generally,” and Patricia Wald, “International Criminal Courts,” p. 252, that “one of [the] greatest failures” of the ICTY was “an inability to reach the ‘hearts and minds of the populaces who suffered as victims of the leaders and of their subordinates who committed the war crimes.”

<sup>14</sup> Judges from two other legal systems, the Islamic and the Communist, sit on the ICTY. For a comparison of Islamic with civil and common law, see Emilia Justyna Powell and Sara McLaughlin Mitchell, “The International Court of Justice and the World’s Three Legal Systems,” *The Journal of Politics* 69 (2) (2007): 397-415.

<sup>15</sup> Wald “Punishment of War Crimes,” p. 1128. Sandra Fullerton Joireman, “Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy,” *Journal of Modern African Studies* 39 (4) (2001): 571-596, found that former colonies that inherited common law systems have been “better at assuring rule of law” than those that inherited civil law systems.

<sup>16</sup> David Wippman, “The Costs of International Justice,” *American Journal of International Law* 100 (2006): 879.

testimony, measures which were not in its Statute and do not reflect universally recognized practices.<sup>17</sup> They are also measures that undermine the rights of the accused. The Tribunal's supporters acknowledge that in some cases the accused might not get his "fair share of due process," but they tend to blame defense counsel for flawed trials, not the rules and procedures of the Tribunal, nor its prosecutors or judges.<sup>18</sup> The ICTY's supporters also reject suggestions that its expansive rulings are detrimental to due process. They argue that "loose" definitions of the law are needed to assure conviction of those "responsible" for atrocities and to obtain "justice" for "victims," and that whatever inequities might occur between indictment and conviction can be remedied at sentencing.<sup>19</sup>

However, Patricia Wald was "not entirely happy with the sentencing procedures at the ICTY," and she was "bothered" by the practice of rendering the verdict at the same time as handing down the sentence, which she viewed as "prejudicial" to the defense because materials relevant to sentencing were submitted before the verdict. She also worried that the lack of guidance in the Statute—which only bars capital punishment and urges judges to "look to the practices" of Yugoslav courts before 1991—and the consequent lack of sentencing norms for particular crimes could "undermine confidence inside and between international courts," especially since judges "varied widely in their background, energy, and particular competencies." But she considered them competent enough and willing to apply an "expansive definition of the test for command responsibility" that she doubted local judges would accept.<sup>20</sup> What is certain is that while a majority of judges have come from civil and common law systems in democratic states with civil and political liberties, many have come from states that Freedom House ranks as "not free" and few prosecutors or judges knew much about the former Yugoslav state and its peoples before arriving in The Hague. (See Table 1)

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<sup>17</sup> Lombardi, "Legitimacy," pp. 895-99, sees the use of written statements that "do not implicate the accused in a 'critical way'" as "nonsense" because evidence that is not "probative" must be "prejudicial" and should be barred from consideration.

<sup>18</sup> Wippman, "The Costs of Justice," p. 880, considered the "caliber" of defense counsel low. But they are subject to review; as UN employees, prosecutors are not. Talbert, "The ICTY and Defense Counsel," pp. 975-986.

<sup>19</sup> Cassese, "The Proper Limits," p. 122, sees sentencing as correcting flaws inherent in JCE. Meron, "Reflections," p. 578, thinks the ICTY has "educated" and brought "justice" to the peoples of former Yugoslavia.

<sup>20</sup> Wald, "Punishment of War Crimes," pp. 1128-33.

**Table 1. Countries of Origin and Freedom House Ratings for “Permanent” Judges sitting at the ICTY, 1993-2003, with 2002 Freedom House Rankings (Political Freedoms, Civil Liberties, Degree of “Freedom”).**

Country of Origin	Years on ICTY	Political Ranking	Civil Liberties	Free/Partly/ Not
Australia	1993-1997	1	1	Free
<b>Bosnia and Herzegovina</b>	<b>No judges</b>	<b>5</b>	<b>4</b>	<b>Partly Free</b>
Canada	1993-1997	1	1	Free
Costa Rica	1993-1998	1	2	Free
Croatia	No judges	2	2	Free
<i><b>Egypt</b></i>	<i><b>1993-1995</b></i>	<i><b>6</b></i>	<i><b>6</b></i>	<i><b>Not Free</b></i>
Italy	1993-2000	1	1	Free
<b>Malaysia</b>	<b>1993-2001</b>	<b>5</b>	<b>5</b>	<b>Partly Free</b>
<b>Nigeria</b>	<b>1993-1998</b>	<b>4</b>	<b>5</b>	<b>Partly Free</b>
Pakistan	1993-1996	6	5	<i>Not Free</i>
United States	1993-1999	1	1	Free
France	1994-2003	1	2	Free
<i><b>Egypt</b></i>	<i><b>1995-2001</b></i>	<i><b>6</b></i>	<i><b>6</b></i>	<i><b>Not Free</b></i>
<i><b>Pakistan</b></i>	<i><b>1996-1998</b></i>	<i><b>6</b></i>	<i><b>5</b></i>	<i><b>Not Free</b></i>
<i><b>China</b></i>	<i><b>1997-2000</b></i>	<i><b>7</b></i>	<i><b>6</b></i>	<i><b>Not Free</b></i>
<b>Columbia</b>	<b>1997-2001</b>	<b>4</b>	<b>4</b>	<b>Partly Free</b>
Guyana	1997-2009	2	2	Free
Portugal	1997-2001	1	1	Free
<b>Zambia</b>	<b>1997-2001</b>	<b>5</b>	<b>4</b>	<b>Partly Free</b>
Australia	1998-2003	1	1	Free
Jamaica	1998-2011	2	3	Free
<b>Morocco</b>	<b>1998-2001</b>	<b>5</b>	<b>5</b>	<b>Partly Free</b>
South Korea	1999-2011	2	2	Free
United States	1999-2001	1	1	Free
<i><b>China</b></i>	<i><b>2000-2011</b></i>	<i><b>7</b></i>	<i><b>6</b></i>	<i><b>Not Free</b></i>
<i><b>Egypt</b></i>	<i><b>2001-2005</b></i>	<i><b>6</b></i>	<i><b>6</b></i>	<i><b>Not Free</b></i>
Germany	2001-2008	1	2	Free
Italy	2001-2011	1	1	Free
<b>Morocco</b>	<b>2001-2002</b>	<b>5</b>	<b>5</b>	<b>Partly Free</b>
Netherlands	2001-2011	1	1	Free
<b>Sri Lanka</b>	<b>2001-2003</b>	<b>3</b>	<b>4</b>	<b>Partly Free</b>
<b>Turkey</b>	<b>2001-2011</b>	<b>4</b>	<b>5</b>	<b>Partly Free</b>
United States	2001-2011	1	1	Free
<b>Yugoslavia/Serbia</b>	<b>No judges</b>	<b>3</b>	<b>3</b>	<b>Partly Free</b>

Sources: ICTY website, [icty.org/sid/149](http://icty.org/sid/149); Freedom House website, [freedomhouse.org/template.cfm?page=21+year=2000](http://freedomhouse.org/template.cfm?page=21+year=2000)



Minna Schrag recalled that “few” members of the Tribunal’s first prosecutorial staff arrived with “any knowledge, let also expertise, in matters of criminal law” and that most had “scant authority” for “most of the legal issues we confront[ed].” They had “no precedent” to follow because the Office of the Prosecutor at the ICTY was different from those of the post-World War II tribunals, so they created their own “operating procedures” and “conceptual framework” for such questions as whether to use “an objective or subjective standard” to indict and what constituted an exhibit. “Most” were “happy” simply “to create something sensible.” But even this could be difficult; when two of her colleagues warned her that preparing witnesses for cross-examination was “unethical” and perhaps “criminal,” Schrag responded that not to do so in her country could entail a “malpractice” suit.<sup>21</sup> Patricia Wald recalls that she was recruited in the “usual Washington way,” by “a phone call from an old acquaintance at the State Department,” and that she arrived at the ICTY with no experience in international law, not even a law course at Yale, and with proficiency only in English, one of the Tribunal’s three official languages.<sup>22</sup> In effect, both prosecutors and judges created rules and procedures as they went.<sup>23</sup>

They have also created new legal doctrines. As Gregory Lombardi has noted, the Tribunal has “expanded its powers and jurisdiction beyond the bounds of its Statute” by claiming “inherent authority” from sources outside the Statute, asserting that it can ignore the Statute to achieve “fairness,” and insisting that it was acting with the “tacit approval” of the Security Council. Lombardi argues that in some instances this has also denied the accused due process and undermined the Tribunal’s legitimacy.<sup>24</sup> Its chambers have selected cases from customary and national law in order to justify their formulation of new legal doctrines, but they have ignored treaty law that conflicts with human rights law, a practice that suggests that the judges sitting on the Tribunal view

<sup>21</sup> Schrag, “The Yugoslav Crimes Tribunal,” pp. 187-3.

<sup>22</sup> English, French and Bošnjak/Croatian/Serbian are the official languages of the ICTY. Most judges speak English or French. Wald, “International Criminal Courts,” p. 242-3, also noted the inadequacy of the ICTY’s library and the difficulty she had accommodating to the hybrid system at the ICTY and communicating with Francophone judges and staff. She could not understand either her French colleagues or the “Balkan dialect” of the defendants and many of their counsel. Wippman, “The Costs of Justice,” p. 877, notes that in 2005, the cost of “verbatim reporting” during trials was \$3,029,000, almost as much as the cost of judges, which was \$4,162,100. The Language Section absorbed 10 percent of the Registry’s budget and the need for translations created bottlenecks.

<sup>23</sup> The ICJ appears to suffer from similar problems; see Yehuda Z. Blum, “Consistently Inconsistent: The International Court of Justice and the Former Yugoslavia (Croatia v. Serbia),” *American Journal of International Law* (April 2009): 264-271.

<sup>24</sup> Lombardi, “Legitimacy and the Expanding Power of the ICTY,” pp. 887-901, argues that the Appeals Chamber has both exceeded the Statute and adopted measures contrary to it, and so underscored its “collusion” with the UNSC. Cassese, “The Proper Limits,” p. 132, claims that an “expansive interpretation of Article 25 (3) (d) would be justified by the need to punish criminal conduct that otherwise would not be regard as culpable.”



international law as malleable and raises questions regarding whether their decisions constitute binding precedents for other courts.<sup>25</sup>

Some commentators have argued that the ICTY's expansive jurisprudence should be viewed as idiosyncratic rather than as a codification of universally accepted norms, and that the *ad hoc* nature of the Tribunal raises questions as to whether its decisions constitute binding precedent and rise to the level of international legal norms, particularly given its use of national case law to justify the formulation of the doctrine of "joint criminal enterprise" (JCE). David Ohlin notes that the notion of JCE is not codified in the ICTY Statute and he argues that it is not likely to become part of international practice because it lacks state practice and *opinion juris*. Two harbingers of how the international legal community will treat the Tribunal's rulings have come from the Extraordinary Chambers in the Courts of Cambodia (ECCC), which ruled that *Tadić*, the case for which JCE was formulated, was "wrongly decided" by the ICTY, and from the ICC, whose Statute includes the doctrines of "control" and "co-perpetration" rather than JCE,<sup>26</sup> suggesting that the latter's "consolidation" has occurred primarily within the ICTY.<sup>27</sup>

<sup>25</sup> Wald, "Punishment of War Crimes," p. 1128. Meron, "Reflections," p. 576-7, argues that the ICTY has ignored treaty law, owing to "doubts" regarding treaties, as well as their "binding character and reservations," which constrict legal interpretation, and because they have been concluded "between belligerents." The only treaties cited have been those that are "wholly or imply declaratory of customary law," whose "generality" has given the ICTY's judges "comfort."

<sup>26</sup> The ICC's doctrine presents its own problems. Kevin John Heller, "Retreat from Nuremberg. The Leadership Requirement in the Crime of Aggression," *European Journal of International Law* 18 (3) (2007): 477-497, argues that the "control" or "direct" standard adopted by the ICC effectively excludes private economic actors, political leaders, and military officials complicit in another state's aggression, all of whom the IMT at Nuremberg and Tokyo included. Cedric Ryngaert, "Litigating Abuses Committed by Private Military Companies," *European Journal of International Law* 19 (5) (2008): 1035-1053, notes that while JCE may be a way to hold PMCs (Private Military Contractors) accountable for war crimes, doing so is difficult because by privatizing war, power is no longer "exercised top-down, but rather horizontally and through social influence." But domestic laws can do so as well, e.g., "Blackwater Guards Indicted for 2007 Baghdad Civilian Killings," *American Journal of International Law* 103 (2) (April 2009): 360-362.

<sup>27</sup> Jens David Ohlin, "Joint Intentions to Commit International Crimes," *Chicago Journal of International Law* 11 (2) (2011): 693-754, esp. pp. 712-713, 748-9, notes that the ICTY is an *ad hoc* court and not linked to a specific state. Cassese, "The Proper Limits," pp. argues 110, 114-115, 122-3, 133, argues that JCE "has passed the test of judicial scrutiny" and is a "consolidated (though in some respects still controversial) concept of international criminal law" because it has been used by the ICTY and "other international criminal courts," which he does not name. While "legal commentators have looked . . . askance" at this "darling notion" of the Prosecution," he argues that it is rooted in customary international law and has been "routinely applied" at the ICTY and that case law has "upheld" its lower threshold of proof, as proven by decision in *Tadić*, *Krstić*, and *Stakić*. In effect, while Ohlin has noted the rejection of JCE by courts other than the ICTY, Cassese argues that its use at the Tribunal has effectively "consolidated" it as a principle of international law.

The tenuous nature of the ICTY's jurisprudence is to some degree the fault of the UNSC. The Security Council has effectively prevented the formulation of legal norms by using *ad hoc* tribunals to prosecute war crimes and crimes against humanity rather than creating a permanent international criminal court to do so. Mariano Aznar-Gómez suggests that the lack of such norms is in the interest of the UNSC's permanent members, who prefer *ad hoc* arrangements because they set no precedents. But he argues that "case-by-case" determinations undermine the rule of law by giving the most powerful states *carte blanche* to do as they please, thanks to the repeated appearance of the phrase "all means necessary" in UNSC resolutions.<sup>28</sup> Andrea Bianchi notes that while the UNSC exercises "quasi-judicial functions," it is not a judicial body but rather a "political organ" that is "heavily influenced by political contingencies" and "dependent on the . . . will of the [Security Council's] permanent members." She argues that using *ad hoc* tribunals "makes it difficult to exercise scrutiny over the conduct of international actors."<sup>29</sup> The ICTY thus seems to be a criminal court created for political reasons, given that it derives its legitimacy from an executive council whose permanent members can veto resolutions which they do not approve.

The ICTY also appears to be a court that administers transitional justice. Its supporters view both the Tribunal and its jurisprudence as models for future courts, in particular for the International Criminal Court (ICC), because they believe that its chambers have furthered the development of international law by rendering important decisions and by crafting new legal doctrines like JCE and resurrecting older ones like command responsibility. They claim that it has rendered justice to victims of the wars and that it has had a significant impact on the international system in general and on the successor states in particular, where it has supposedly contributed to the consolidation of the rule of law, helped to reconcile former enemies, and furthered the development of civil society. Some even claim that the Tribunal has contributed to the creation

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<sup>28</sup> The phrase was most recently used in UNSC Resolution 1973, which has allowed NATO to argue that providing close air support for one side in a civil war, including the bombing of cities, was "necessary" to protect civilians from air and artillery bombardment. Mariano J. Aznar-Gómez, "A Decade of Human Rights Protection by the UN Security Council: A Sketch of De-regulation?" *European Journal of International Law* 13 (1) (2002): 223-241, esp. pp. 224, 233, 235. The UNSC has authorized the use of force in the successor states to Yugoslavia, Somalia, Haiti, Rwanda, Guinea-Bissau, and East Timor, but not in Iraq, Liberia, Sierra Leone, and Kosovo. It has created *ad hoc* tribunals for the successor states to Yugoslavia, Rwanda, and Sierra Leone.

<sup>29</sup> Andrea Bianchi, "Ad-hocism and the Rule of Law," *European Journal of International Law* 13 (1) (2002): 264-272, concludes that the UNSC can become "the ultimate guarantor of certain fundamental interests of the international community," but only "if the cases are treated alike, if clear objectives are set and their achievement pursued consistently. . . ." Adam Roberts, "Implementation of the Laws of War in Late 20<sup>th</sup>-Century Conflicts. Part I," *Security Dialogue* 29 (2) (1998): 141-2, notes that "states prefer . . . ad hoc arrangements" to treaty obligations because they are not legally binding.

of “permanent peace” in the region and that it has been able to tell the “truth” about the Yugoslav wars.<sup>30</sup> These are all, of course, activities that are essentially political and diplomatic, marking the Tribunal as a court of transitional justice.

They are also results that are more often asserted than demonstrated, and Jonathan Charney has questioned whether international criminal tribunals can have a positive impact on “peaceful” transitions, particularly since the ICTY has ruled out the use of “immunities,” which are among the tools that have been used to ease “national reconciliation.” He wonders whose interests are served by replacing “immunities” and “truth and reconciliation commissions” with international criminal tribunals. The answer seems to be those of the UNSC, which has determined that criminal courts are better choices than truth and reconciliation commissions. But reconciliation is difficult following a conflict, and Kaminsky, Nalepa, and O’Neill argue that both criminal tribunals and truth commissions have undermined reconciliation and transitions to democratic regimes, a conclusion reinforced by studies of both in Sierra Leone.<sup>31</sup> The ICTY may thus actually have subverted the transition in the former Yugoslav republics, especially given that while its verdicts have satisfied its judges, its prosecutors, and members of the “international community,” they have not reassured everyone in the successor states. For two decades the ICTY has kept open wounds caused by the wars of secession and the antagonisms

<sup>30</sup> McDonald, “The International Criminal Tribunal,” claimed that “the Tribunal is essential for peace, real peace, both in the former Yugoslavia and beyond.” Barria and Roper, “How Effective Are International Criminal Tribunals?” pp. 349, 350, 354, note that international tribunals exist in order to “deter future atrocities”; “reintegrate societies” through reconciliation; and “provide for international peace and security.” Saxon, “Exporting Justice,” p. 563, thinks the ICTY “has played an important role” in healing wounds and “forcing entire communities . . . to confront the worst parts of their histories” and “may prevent history from repeating itself.” James Upcher, “Politics and Justice at the ICTY,” *Deakin Law Review* 10 (2) (2005): 804-814, argued that the ICTY must play a “political role” and provide “justice for the victims” of war crimes in order to restore confidence in the rule of law because “the foremost, essential function of criminal prosecution [is] to restore confidence in the rule of law.” By trying and convicting the accused, he believes that the ICTY also helps to “demystify history’s claim to be the authentic motor of conflict” [sic!] and to “unravel the historical narratives spun by cynical elites for political gain.” He therefore applauds the use of the ICTY for political purposes, even though it is formally “a judicial tool.” Like Geoffrey Robertson, he thinks that the creation of the ICTY marked a “seismic shift from diplomacy to legality in the conduct of international affairs,” and he approves Lawrence Eagleburger’s observation that the ICTY is “an example of the way in which law was used for political ends to disrupt the attempt [by diplomats] to find a negotiated peace” in Bosnia and Herzegovina, a disruption that resulted in two more years of killing in that country.

<sup>31</sup> Jonathan I. Charney, “Progress in International Law?” *American Journal of International Law*, 93 (2) (1999): 458-9; Kaminski, Nalepa, and O’Neill, “Normative and Strategic Aspects of Transitional Justice,” pp. 295-6, 298-9; Nancy Amoury Combs, “Testimonial Deficiencies and Evidentiary Uncertainties in International Criminal Trials,” *UCLA Journal of International Law and Foreign Affairs* 14 (1) (2009): 235-274; and Chandra Lekha Sriram, “Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone,” *Fordham International Law Journal* 29 (3) (2006): 472-506. Also Roberts, “Implementation,” pp. 144-6.

occasioned by them, a result Gregory Lombardi believes has severely eroded the “social legitimacy” of the Tribunal.<sup>32</sup>

The political, diplomatic, and public relations activities carried out by the Tribunal’s prosecutors and judges also mark it as a transitional court. Those who view these tribunals as a force for good do so as well, but they downplay the non-judicial functions of the tribunals and argue that they are anchored in liberal theory and embody “legal” rather than “political” models. Such arguments confuse legality with morality and treat liberalism as a determinate variable.<sup>33</sup> But Frédéric Mégret argues that liberalism is determinate only if “it affected the decision to create the tribunal *per se*.” However, he argues that it did not do so. Rather, once the war in Bosnia and Herzegovina had been recast as an “ethical” question following reports of Serb concentration camps, public opinion in the West had to be given the “impression” that something was being done, and the Commission of Experts on the Former Yugoslavia was that something. Leaders then raised the “moral stakes” regarding the war and found themselves pushed to create the ICTY as “liberal ingenuity” and “realist interest” led to a “diplomatic discourse” that was “gradually distorted by the rhetoric of morality” and then “by that of international criminal law.” Mégret dismisses arguments that liberal states create international criminal tribunals because they are prone to do so as circular and concludes that states create such courts “to legitimize their goals and because they think or know they can control them.” It is therefore not norms that constrain power, but rather power that establishes norms that it finds useful.<sup>34</sup>

<sup>32</sup> Lombardi, “Legitimacy,” pp. 899-900, notes that the claim by Slobodan Milošević that the Tribunal is merely a “political tool” appeals to “a number of people, many of whom reside in the former Yugoslavia where it is arguably most important for the Tribunal to be seen as legitimate.” But while the “glacial” pace of the trials have undermined the ICTY’s social legitimacy, new rules to expedite them have further undercut its legitimacy.

<sup>33</sup> Christopher Rudolf, “Constructing an Atrocities Regime: The Politics of War Crimes Tribunals,” *International Organization* 55 (3) (2001): 655-691, esp. p. 656, 660, 665, notes that advocates of international tribunals see each as “a mechanism of peace, of establishing justice and promoting reconciliation in war-torn regions.” But he argues that if “liberal humanitarian ideas have created the demand for political action, the process of dealing with brutality in war has been dominated by *realpolitik* [sic], that is, furthering the strategic interests of the most powerful states,” and that the ICTY was “politically inexpensive” and “illustrates the strategic interests of powerful states” acting through the UNSC, which effectively controlled the Tribunal.

<sup>34</sup> Mégret, “The Politics of International Criminal Tribunals,” pp. 1267-74, 1283-4, discerns “a form of realist interest” in the formation of the ICTY and concedes liberalism a place “in an overall theory of interest formation” because liberal “political culture” might shape the self-interest that “dictates whether states support international criminal tribunals.” But he notes that liberal politics constrain “what can and cannot be said publicly” and that “a theory that says that only liberal states are likely to create rule-of-law war crimes trials is not exactly norm-free.” Mégret did not see the ICC as a “remedy to the selectivity associated with ad hoc tribunals,” and speculated that the reluctance of major powers to join it might “displace the problem of selectivity, transferring it from the ‘external’ one of tribunal creation to the ‘internal’ one of caseload selection.” Schabas, “Victor’s Justice,” *passim*, argues that this has indeed occurred at the ICC.

José Alvarez also questions the link between liberal theory and international law, noting that there is little basis for viewing either as universal, especially since liberal theorists and politicians brand some states as “illegitimate” and beyond the “zone of law.” He argues that liberal theory is actually illiberal because liberal states are intolerant of non-“democratic” states, define an “ideal society” narrowly, and resist “real progressive reforms.”<sup>35</sup> Martti Koskenniemi accepts a link between liberalism and international law, but he argues that international law is essentially a judicial “tradition” peculiar to the “West,” much like wearing a tie on formal occasions, and so best understood as “kitsch”—a “lie to curtain off death.” Europe has “often” made the mistake of thinking that its particular traditions are universal, but Koskenniemi thinks that when “a particular tradition” pretends to “speak in the name of humanity” that is “the stuff of colonialism.” NATO may have claimed to be acting on behalf of the “international community” when it bombed Serbia in 1999, but India was not convinced, and Koskenniemi finds the realist critique useful because it “reminds us that, in law, political struggle is waged on what legal words such as ‘aggression,’ ‘self-determination,’ ‘self-defense,’ ‘terrorist,’ or ‘*jus cogens*’ mean, whose policy they will include, and whose they will exclude.” To set the law against “the barbarism of politics” is therefore to ignore the reality that the real choice is “not between law and politics, but between one politics of law and another.”<sup>36</sup>

If so, then to view the ICTY as following either a legal or a political model is misleading because it does both.<sup>37</sup> If the Tribunal is so independent that no influence can be brought to bear on it, then it is a legal bureaucracy that will pursue its own interests. That its sentences are consistent with the indictments brought by its prosecutors and that its rules and procedures are typical of independent judiciaries mean little except that it functions like a court of law. As Kenneth Abbott notes, it is typical for judges and prosecutors to “view courts and other legal institutions—even in politically charged areas like human rights—as apolitical.” But judges and prosecutors pursue various interests, including “pure self-interest, such as professional prestige and power,” and “[s]upranational judges” can “select cases and interpret agreements in ways that develop doctrine in desired directions and by doing so gain allies at the national level” and “reshape politics as well as law.” Judges at the ICTY also

<sup>35</sup> José E. Alvarez, “Do Liberal States Behave Better? A Critique of Slaughter’s Liberal Theory,” *European Journal of International Law* 12 (2) (2001): 183-246.

<sup>36</sup> Martti Koskenniemi, “International Law in Europe: Between Tradition and Renewal,” *European Journal of International Law* 16 (1) (2005): 114-119, 122-3, likens “US attitudes to law” to those of “early twentieth-century Germany” and discerns a “hegemonic” element in Europe’s support of international law.

<sup>37</sup> Meernik, “Victor’s Justice,” pp. 144-50, argues that the congruity of sentences and indictments suggests that legally “relevant” variables determines the outcome, but the Office of Prosecution determines the gravity of the indictments, so that is the first place a historian would look for political influence.

can do so, and both its judges and its prosecutors “have worked tirelessly to create an international ‘community of law’” to support the Tribunal. “Customary law” is one of the “strongest political tools” in their tool chest, especially when wed to selected cases from domestic law.<sup>38</sup> Realists therefore reject arguments that draw a clear line between the legal and the political as untenable and argue that the ICTY is a political institution as much as it is a judicial one. Dan Saxon, who worked for the Prosecution, embraces the political nature of the Tribunal and argues that “[t]he suggestion . . . that the law is somehow divorced from politics is naïve. Law is only an extension of politics, and if well-reasoned legal decisions can create more favorable condition for the respect of human rights, there seems nothing inappropriate for using the law as such a benevolent tool.”<sup>39</sup>

It thus seems reasonable to assume that the Tribunal’s decisions are to some extent political, given its provenance and its mandate; the problem is to determine to what extent. One measure is to examine the “situations” in which the UNSC has intervened in order to protect human rights, because while human rights have been codified in treaties, their application has been haphazard and the choice of “situations” in which to intervene appears to be political.<sup>40</sup> The ICTY was ostensibly created by the UNSC in 1993 to render justice to all victims of the wars of secession, but in practice it initially indicted more Serbs and Croats for crimes committed against Muslims in Bosnia and Herzegovina than Muslims for crimes committed against Serbs and Croats, or Serbs for crimes committed against Croats, or Croats for crimes committed against Serbs. Initially, it did not indict for crimes committed by Serbs against Croats in Croatia, even though the war in Croatia preceded the one in Bosnia and Herzegovina. In James Meernik’s sample of the first thirty-two sentences handed down by the Tribunal, there are only four Muslims, and they were accused of war crimes, not of the “more serious” crimes against humanity and genocide. The Trial Chambers convicted three of the four Muslims indicted, a rate of 75 percent, but ten of the eleven Croats, a little over 90 percent, and all of the seventeen Serbs.<sup>41</sup> This early pattern of indictments and convictions appears to have reflected the claim that Muslims were the only “bona fide” victims of the wars in Yugoslavia,<sup>42</sup> and Patricia Wald’s belief that the Tribunal

<sup>38</sup> Abbott, “International Theory, International Law,” pp. 376-8. John Hagan and Ron Levi, “Crimes of War and the Force of Law,” *Social Forces* 83(4) (2005): 1499-1534, note that judges and prosecutors “drive” the ICTY, where defendants and their counsel are “outsiders,” and speculate that her colleagues supported Louise Arbour’s policy of “sealed” (secret) indictments because it “promised to generate arrests and therefore trials.”

<sup>39</sup> Saxon, “Exporting Justice,” p. 569.

<sup>40</sup> Schabas, “Victor’s Justice,” pp. 535-552; Adams, “Implementation,” pp. 137-46.

<sup>41</sup> Meernik, “Victor’s Justice or the Law?” 150, 154-5, 157, does not examine the “subjective” factors in how judges evaluate evidence and excuses plea bargains as necessary for “judicial efficiency.”

<sup>42</sup> James Gow, *The Serbian Project and Its Adversaries: A Strategy of War Crimes* (Montreal: Mc-



had been created to render justice to the Muslim victims of atrocities in Bosnia and Herzegovina.<sup>43</sup> She also believed that judges needed to guard against “unconscious assumptions of guilt.”<sup>44</sup> Whether they harbor such assumptions, at least one judge appears to have considered a Muslim witness who had served in the Bosnian military to be a victim rather than a participant in the wars,<sup>45</sup> a view that is reflected in concerns that witnesses be protected and in the decision to keep the identity of some witnesses from both the defendant and his counsel.<sup>46</sup> Judges also tend to be active, given that in the cases examined by Meernik, the more witnesses summoned by the judges in the Trial Chambers, the more likely a conviction.<sup>47</sup>

Nonetheless, the Tribunal’s prosecutors view themselves as even-handed because they have indicted members of all sides.<sup>48</sup> Even so, as noted above, the ratio of Muslims indicted and convicted relative to Serbs and Croats was skewed during the first six years of the Tribunal’s history, and it was not until 1999 that it began to indict Serbs for crimes committed in Croatia. Even if prosecutors have been even-handed in issuing indictments, this only would suggest that they accept the theory of “moral equivalence,” which posits that all sides bore equal responsibility for what occurred during the wars, a theory viewed by many as a way to avoid assigning responsibility for having initiated the conflicts and for what occurred afterward. However, while prosecutors and judges can adjudicate responsibility for specific crimes, they cannot examine

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Gill-Queens University Press, 2003), pp. 242-5, argued that “Bosnians were bona fide victims” who had “fought bravely,” unlike Croats, who merely implemented a strategy of victimhood and tricked Serb forces into attacking them, then joined the Serbs to victimize Bosnian Muslims. Gow claims that the Army of Bosnia and Herzegovina was “always outgunned” by Serb and Croat forces; Charles R. Shrader, *The Muslim-Croat Civil War in Central Bosnia: A Military History, 1992-1994* (College Station: Texas A&M University Press, 2003), *passim*, disagrees.

<sup>43</sup> Wald, “International Criminal Courts,” p. 242, believed that the Tribunal was created to right wrongs done to Muslims in Bosnia and Herzegovina because its Statute gave it jurisdiction over crimes committed on the territory of former Yugoslavia “on or after 1 Jan. 1991 (the beginning of the Bosnian conflict)” [Sic—the “war” in Bosnia and Herzegovina began is generally considered to have begun in the spring of 1992.]

<sup>44</sup> Wald, “Punishment of War Crimes,” p. 1131.

<sup>45</sup> Judge Antonetti interrupted defense counsel to remind him that “[t]his woman . . . is a victim.” ICTY, Trial Transcripts, Prlić, et al., 6 and 9 May 2006, p. 1189.

<sup>46</sup> See discussion in Monroe Leigh, “The Yugoslav Tribunal: Use of Unnamed Witnesses against Accused,” *American Journal of International Law* 90 (2) (1996): 235-238, and “Witness Anonymity is Inconsistent with Due Process,” *American Journal of International Law* 91 (1) (1997): 80-83, his response to Christine M. Chinkin, “Due Process and Witness Anonymity,” *American Journal of International Law* 91 (1) (1997): 75-79, who argued that anonymity is necessary to “protect” witnesses from those in the docket.

<sup>47</sup> Meernik, “Victor’s Justice or the Law?” p. 153.

<sup>48</sup> The lead prosecutor in *Prlić, et al.*, argued that the ICTY could not be accused of being anti-Croat because it had indicted leaders from “all sides.” ICTY, Trial Transcript, *Prlić, et al.*, 26 April 2006, pp. 902-904.



the causes of the wars because the ICTY's mandate limits them to examining the period after 1 January 1991 and its Statute excludes crimes against peace, which James O'Brien thought were "appropriately omitted from the Yugoslav statute" because "[t]heir inclusion would almost inevitably require the tribunal to investigate the causes of the conflict itself (and the justifications issued by the combatants), which would involve the tribunal squarely in the political issues surrounding the conflict."<sup>49</sup>

However, the Office of the Prosecution (OTP) appears to have gone beyond the limits of the Statute because it has used the doctrine of JCE to attribute "intention" to specific leaders and argue that they were responsible for both the wars and the crimes that accompanied them. At the same time, its refusal to apply the doctrine of JCE to NATO leaders for the deaths of civilians during its bombing of Kosovo and Serbia in 1999 has encouraged some to view the Tribunal as a political court.<sup>50</sup> Other indications that the ICTY is a court of transitional justice are its use of broad indictments, its expansive judicial decisions, and its formulation of novel legal doctrines that facilitate conviction. The Appeals Chamber has employed broad interpretations of customary law to overturn convictions by Trial Chambers, the Office of the Prosecutor has brought broad indictments, and its judges have favored broad interpretations of existing law, in particular the doctrine of joint criminal enterprise, which makes individuals liable for the actions of other members of a group, rather than for crimes which they themselves committed.<sup>51</sup>

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<sup>49</sup> O'Brien, "The International Tribunal," pp. 639, 645,

<sup>50</sup> Michael Mandel, "Politics and Human Rights in International Criminal Law: Our Case against NATO and the Lessons to Learned from It," *Fordham International Law Journal* 25 (5) (2002): 95-128, concluded that the ICTY's failure to indict NATO showed it to be "corrupt"; Tarcisio Gazzini, "NATO Coercive Military Activities in the Yugoslav Crisis (1992-1999)," *European Journal of International Law* 12 (3) (2001), pp. 391-436, argues that NATO repudiated UNSC control in 1999; and Anthony J. Colangelo, "Manipulating International Criminal Procedure: The Decision of the ICTY Office of the Independent Prosecutor not to Investigate NATO Bombing in the Former Yugoslavia," *Northwestern University Law Review* 97 (3) (2003):1393-1436, was persuaded that NATO could have been indicted for the deaths of civilians during the coalition's bombing of Kosovo and Serbia in 1999, and while he reluctantly approved Carla Del Ponte's decision not to do so, he argued that it suggested "that ulterior motives" were in play and that the decision "erodes the sense of justice basic to any independent prosecutorial decision." Danner and Martinez, "Guilty Associations," pp. 24-6, note that it is possible to indict for simple negligence under JCE category 3, which means that Del Ponte could have indicted both the pilots who flew the missions and the members of NATO's command. David Wippman, "Kosovo and the Limits of International Law," *Fordham International Law Journal* 25 (5) (2002):129-151, acknowledges the illegality of NATO's intervention but argues that a "breach" of international law by NATO is "acceptable" if done for "humanitarian reasons," and if several countries support it, even if the UNSC does not do so.

<sup>51</sup> Lee A. Casey, "The Case against the International Criminal Court," *Fordham International Law Journal* 25 (3) (March 2002): 847-50, 858-60, 865-6. Casey worked at the ICTY and sees the ICC as similarly prone to expansive interpretations of international law. He cited Louise Arbour's comment that "there is more to fear from an impotent than from an overreaching

The ICTY's transitional nature explains in part its effort to write the history of the wars of secession.<sup>52</sup> To punish specific individuals for specific crimes would satisfy retributive notions of justice, but it would not confirm the rule of law, save in a narrow sense, and it would not discredit the governments and militaries that fought those wars, merely the individuals found guilty. But the ICTY aspires to do more than render justice; it intends to reshape the political cultures and civil societies of the region by writing the history of the wars.<sup>53</sup> To do so, it has indicted and convicted military and civilian leaders who were not directly tied to specific crimes, and it has embraced an increasingly expansive reading of the law. Its broad indictments have effectively inculcated whole governments and militaries, not merely individuals.<sup>54</sup> The ICTY thus functions as much like a transitional court as it does a criminal court, and transitional courts are by definition political.<sup>55</sup>

## Telling the Truth

The ICTY has electronically archived its indictments, decisions, and judgments, as well as documents and testimony, and these are available on line.<sup>56</sup>

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Prosecutor" at the ICTY, and he concluded that similar tribunals cannot be trusted to "control" themselves.

<sup>52</sup> Wippman, "The Costs of Justice," p. 875, argues that the trials are complex, owing to the nature of the crimes, but it is the doctrines of JCE and persecution that render the crimes complex and entail discussion of the conflict's nature. Wippman acknowledges indirectly this by noting that broad investigations and indictments result from the ICTY's "mandate" and its "goals," which "include fostering accountability, deterring future atrocities, providing acknowledgement to victims, and *building a historical record of the conflict*." [Emphasis added]

<sup>53</sup> ICTY Press Release, "ICTY President McDonald Addresses the Security Council, 20 Oct. 1998. McDonald appeared to argue that international law has precedent over domestic ("... it is a recognized principle of international law that States may not rely on their domestic law to thwart their international obligations.") and that the ICTY was writing history ("We must learn from the lessons of the past, lest they be repeated."). Also "The International Criminal Tribunal," 13 May 1999, for her declaration that "the Tribunal is essential for peace, real peace, both in the former Yugoslavia and beyond."

<sup>54</sup> Allison M. Danner and Jenny S. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law," *International Law Workshop*, University of California, Berkeley, 2004, Paper 3, pp. 56-7, note that "when faced with decisions about how to limit the potential scope of JCE, international judges have most frequently elected the most expansive interpretation of the doctrine." They argue that judges at the ICTY have not "seriously grappled with the question of how to define limits on the scope of JCEs," because they "have permitted prosecutors to argue for conviction based on a JCE theory even where it was not alleged in the indictment" and "allowed even the most extended forms of JCE to be used for the specific intent crimes of genocide and persecution."

<sup>55</sup> Kaminski, Nalepa, and O'Neill, "Normative and Strategic Aspects," p. 295.

<sup>56</sup> For a discussion of expert testimony and the difficulties in using the records at the ICTY, see Ksenija Turković, "Historians in Search for Truth about Conflicts in the Territory of Former

Such an abundance of information so easily available is clearly of interest to those seeking to understand the events that occurred during the 1990s on the territories of the successor states to Yugoslavia. Dermot Groome, a former prosecutor at the Tribunal, believes that the ICTY is engaged in a “truth-seeking,” and others insist that it is fulfilling a “truth-telling” role similar to that of the South African Truth and Reconciliation Commission, even if Carla del Ponte is aware that the ICTY cannot tell the whole truth about the wars, and the Trial Chamber in *Nikolić* considered the historian to be the “the final arbiter of historical fact.” Nonetheless, the Trial Chamber, like Ms. Ponte and many of the ICTY’s former officials and supporters believed that it was helping to establish “the truth about the conflict in the former Yugoslavia.”<sup>57</sup> “Truth-telling” has a historical function because it establishes what happened and who did what to whom, so if the Tribunal can tell the truth, then its decisions and transcripts should be a reliable source of information for historians.<sup>58</sup>

However, there are reasons to question the selection and quality of information amassed by the Prosecution and the “truth” that it and the judges sitting on the Tribunal’s chambers have told. Although Security Council created a criminal tribunal because it was persuaded that an *ad hoc* court is better able to tell the truth than a truth commission, in Sierra Leone some of those asked to testify at the truth commission demurred because they were worried that their testimony might be used to prosecute them at the Special Court for Sierra Leone (SCSL), a criminal tribunal.<sup>59</sup> Truth-telling is not a straightforward activity, especially if criminal sanctions are attached to doing so. It tends to be a Platonic ideal more than a practical achievement, and the ICTY’s website includes caveats regarding the truth contained in the documents archived on it.<sup>60</sup>

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Yugoslavia as Expert Witnesses in front of the ICTY, *Časopis za suvremenu povijest* 36 (1) (2004): 41-67. I limit my comments to the website, which can be accessed easily by the reader and by historians unable to do research in The Hague. See <http://www.icty.org/>. Confidential records are not included, but the website contains between 150,000 and 190,000 public records, including arrest warrants, exhibits, and final judgments.

<sup>57</sup> Dermot Groome, “The Right to Truth in the Fight against Impunity,” *Berkeley Journal of International Law* 29 (1) (2011): 175-199, esp. p. 186; Caroline Tosh, “Del Ponte: Serious Challenges in Search for Truth,” TU No. 490, 23 February 2007, reported that Carla Del Ponte acknowledged that tribunals like the ICTY “cannot establish all truth and all facts.”

<sup>58</sup> Ralph Henham, “Plea Bargaining and the Legitimacy of International Trial Justice: Some Observations on the Dragan Nikolic Sentencing Judgment of the ICTY,” *International Criminal Law Review* (2005): 603-604.

<sup>59</sup> Abbott, “International Theory,” p. 373; Groome, “The Right to Truth,” p. 186; Combs, “Testimonial Deficiencies and Evidentiary Uncertainties,” pp. 235-274.

<sup>60</sup> See <http://www.icty.org/>. Some materials are available on the site without registering, but those wishing to access the court records are required to register and electronically sign a user’s agreement which includes “conditions” and “restrictions” regarding the use of the materials archived on line, e.g., the site is only for the user’s “personal, non-commercial use,” and users cannot “resell,” “redistribute,” or “compile” the documents on the site, nor “create derivative works” from them. The “UN-ICTY” which administers the site, makes no “warranties or

Those who tell the truth also can be intolerant of those who question the truth they tell. For example, in 2005 Carla Del Ponte defined the massacre of Muslim men and boys in Srebrenica a decade earlier as “genocide” and insisted that anyone who disagreed with her was engaged in a “denial of the truth.” She also claimed that during and immediately after Operation Storm “[o]ver 100.000 Serb civilians were forced to leave [Croatia] and several hundreds were killed,” and that “the lootings [sic] and destructions [sic] of property . . . made the return of refugees almost impossible.” She therefore dismissed Croatian celebrations of the tenth anniversary of the military offensive that had ended a long war and liberated Croatian territory that had been occupied by Serb rebels for four years as an “example of how to create a selective memory.” She also accused the Catholic Church of “adding legitimacy to visions of history which are twisted in accordance with nationalist biases,” and she lamented the tendency of political leaders to create “myths.” She then recommended that the truths that the Tribunal’s judges and prosecutors tell should be integrated into future textbooks in Croatia, Serbia, and Bosnia and Herzegovina because “[t]he process of creating collective memories must not be left to those forces that deny the truth and create myths and heroes.”<sup>61</sup> In effect, she was claiming that prosecutors and judges not only tell the truth, but that there is no other truth to tell.

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representations as to the accuracy or completeness” of the materials on the site, and “periodically adds, changes, improves or updates” them “without notice.” The UN-ICTY does not “represent or endorse the accuracy or reliability of any advice, opinion, statement or other information provided by any information provider, any User of this Site or any other person or entity.” The UN-ICTY exempts itself from any liability regarding use of the site. If users are dissatisfied in any way, their “sole and exclusive remedy is to discontinue using the Site.” The UN-ICTY also reserves the right “in its sole discretion to alter, limit or discontinue the Site or any Materials in any respect,” and rejects any “obligation to take the needs of any User into consideration in connection therewith.” It also “reserves the right to deny in its sole discretion any user access to this Site or any portion thereof without notice.”

<sup>61</sup> Carla Del Ponte, Keynote Speech, Annual Conference of Political Affairs Division IV, “Civilian Peace Building and Human Rights in South-East Europe” Bern, 1 September 2005. Del Ponte suggested that the ICTY can provide the raw data for future histories and that prosecutors, judges, and NGOs are better able to tell the truth about the past than political or religious leaders and historians. There are echoes of Ranke in her remarks and the implication that unelected entities (NGOs) should have precedence over elected entities (governments).

“Truth is at the core of justice. Judgments are based on proven facts, and it is the task of the prosecutor to provide solid evidence proving the responsibility of an accused in the crimes for which he is indicted. Therefore, in the course of its existence, the Tribunal has accumulated a formidable wealth of documentary evidence. *It must serve to generate an accurate perception of what really happened* during that dark decade in the former Yugoslavia. But truth cannot be accepted if imposed from outside. *Governments and NGOs should for once join forces and use the millions of pages presented in court to write history as it really happened. NGOs in Belgrade, Sarajevo and Zagreb are working on this. Their efforts must be supported, also by the respective governments.*” (Emphasis added.)

If she was correct and all the truths worth knowing have been told by the ICTY's judges and prosecutors, then the arguments presented by the defense, like those offered by others who interpret the events of the wars of secession differently, must be something other than the truth.<sup>62</sup> If the only truth is the Tribunal's truth, then William Schabas, President of the International Association of Genocide Scholars, would have to be counted among those who deny the truth because while he has no doubts that the murder of Bosnian Muslims at Srebrenica was mass murder, he does not agree that it genocide.<sup>63</sup> Nikica Barić, a Croatian historian who has written a carefully documented history of the RSK (Republika Srpska Krajina), would also be counted among those who deny Del Ponte's truth because he concludes, based on his reading of captured RSK documents, that the Serb rebel leaders in Knin, not the Croatian government in Zagreb, were responsible for the exodus of Serbs from Croatia in August 1995.<sup>64</sup> Like Barić, James Gow, who worked for the Prosecution, has argued that Operation Storm was not a Croat victory but rather a Serb withdrawal organized from Belgrade, which "mobilized" both civilians and military units "to flee" the "Krajina" in August 1995.<sup>65</sup> Even Alan Tieger, the lead prosecutor in *Gotovina, et al.*, noted that the RSK had ordered the evacuation of civilians before the Croatian Army attacked and that most were on their way before Croat troops entered Knin. But the Prosecution still argues that their flight was the result of a joint criminal enterprise.<sup>66</sup>

<sup>62</sup> The wars that occurred on the territories of the component states of Yugoslavia between 1990 and 1999 were wars of secession and of succession. Two republics (Serbia and Montenegro) aspired to "succeed" the Yugoslav state, while three others (Slovenia, Croatia, and Macedonia) sought to "secede" from the federation. Bosnia and Herzegovina was a special case because its Muslim leaders sought to keep it within Yugoslavia, while its Croatian leaders tended to follow Zagreb's lead and its Serbian leaders that of Belgrade. The wars in Yugoslavia are hard to categorize because they were civil wars (between nationalities), international wars (between states), revolutionary wars (to alter the internal political, economic, and social systems of the republics), and ideological wars (to determine the internal organization and ideologies of the successor and secessionist states). They were thus both wars of succession (to the Yugoslav state) and of secession (from the Yugoslav state). For typology, see Stanley G. Payne, *Civil War in Europe, 1905-1949* (New York: Cambridge University Press, 2011), pp. 1-12.

<sup>63</sup> William A. Schabas, "Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia," *Fordham International Law Journal* 25 (3) (2002): 23-53.

<sup>64</sup> Nikica Barić, *Srpska pobuna u Hrvatskoj 1990.B1995*. (Zagreb: Golden marketing-Tehnička knjiga, 2005), pp. 514-528, 533-551, 558, 562-563, notes that Serb leaders discussed large-scale evacuations in 1993 and made the decision to evacuate the RSK's Serbs on 4 August 1995, a day before the Croatian Army entered Knin and two days before Franjo Tuđman visited the city. Also Davor Marijan, "Hrvatsko ratište 1990.-1995.," and Dražen Živić, "Demografski okvir," in Zdenko Radelić, Davor Marijan, Nikica Barić, Albert Bing, and Dražen Živić, *Stvaranje hrvatske drave i Domovinski rat* (Zagreb: Školska knjiga, 2006), esp. pp. 97-129, 458-80.

<sup>65</sup> Gow, *The Serbian Project and Its Adversaries*, pp. 169-70.

<sup>66</sup> Alan Tieger, Opening Statement, 10 March 2008, pp. 3, 26, began his opening argument by noting that the trial of Gotovina and two other Croatian generals "arises from the forcible elimination of Krajina's Serbs and the destruction of their community in August 1995." He later

Mr. Tieger's truth, like that of Ms. del Ponte, is not Platonic Truth, nor is it the complex truth of a historian; it is the narrow "legal" truth of a particular international court whose broad interpretations of the law have been under fire from legal scholars for several years because they have significantly extended the jurisdiction of the Tribunal beyond its Statute and drastically diluted the requirements for *mens rea* in criminal trials. To assume that the ICTY's prosecutors tell the truth and that its judges establish the truth is to assume that prosecutors and judges are better able to evaluate evidence than any other professionals, an assumption that most historians and more than a few lawyers would question.<sup>67</sup> It is also to imply that they should enjoy primacy over all others in "truth-telling," including not only defense attorneys but also historians and social scientists, an assumption not even all courts would support.<sup>68</sup>

### The Magic Bullet

Since 1999, prosecutors have disposed of the legal doctrine of "joint criminal enterprise" (JCE), which enables them to finesse the fallibility of witnesses and a lack of written documentation because defendants can be convicted for crimes that they neither committed nor intended. Within five years, JCE became the dominant prosecutorial strategy at the Tribunal, confirming the ICTY as a court of transitional justice.<sup>69</sup> To convict, two of the three judges

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claimed that RSK authorities had planned the evacuation of Serb civilians but did not order it until twelve hours after the first shells hit Knin on 4 August, at about 4 p.m.

<sup>67</sup> Ultimately, teasing the truth from the evidence is a subjective exercise, even if the person doing it seeks to maintain his objectivity. Meernik, "Victor's Justice," 150, notes that "[t]he truthfulness of a witness, the significance of a document, and the credibility of an intercepted communication are ultimately subjective."

<sup>68</sup> Judges hearing defamation cases brought against historians usually avoid discussing "the truth value of the offending statement" because "they are particularly sensitive to the argument that historical truth should be settled by historians . . . [and] not by judges. . . ." They seek only to determine whether historians "acted in good faith, took reasonable care, displayed intellectual honesty, applied professional methods carefully and objectively . . . and their statements were part of a serious historical debate." See Antoon de Baets, "Defamation Cases against Historians," *History and Theory* 41 (3) (2002): 346-366, esp. p. 356.

<sup>69</sup> Danner and Martinez, "Guilty Associations," p. 58, note that as of 2004 the dominant doctrine in the prosecutorial armory at the ICTY was "joint criminal enterprise," which is a tool of transitional justice because a "focus on prosecuting the senior political leadership is a distinguishing hallmark of the transitional trial" and this doctrine allows prosecutors to inculcate leaders in the actions of subordinates over whom they have no control. According to the Prosecution, the Appeals Chamber formulated the doctrine in order "to extend responsibility as co-perpetrators of a crime to those who, situated at the highest echelons of power, were removed from the actual perpetration of the offence, but had been deeply involved in its organisation and execution." Danner and Martinez speculate that the "desire to describe political or military leaders as perpetrators of joint criminal enterprises owes much to the didactic and political functions of the Tribunals described in the transitional justice literature." In other words, the doctrine of JCE was formulated to assure that "big fish" would be both indicted and convicted,



on a Trial Chamber must be persuaded that a reasonable person could have foreseen that crimes might occur as a result of a “common plan,” even if the defendant had not done so. The new doctrine replaced the “subjective” standard (“actually foresaw”) usually used in criminal cases with an “objective” one (“ought to have foreseen”). By doing so, it lowered the evidentiary bar for the prosecution but raised it for the defense because the objective standard implies “a form of strict liability” that divorces culpability from causation and all but guarantees convictions. This is a departure from the jurisprudence of the postwar tribunals in Germany, which applied subjective standards to establish *mens rea*, taking into account the defendant’s state of mind at the time of the crime. Antonio Cassese, President of the Tribunal until 1997, recognizes that the “foreseeability standard” establishes a lower threshold to prove intent and that it is neither precise nor reliable because it is “somewhat loose as a penal law category of culpability and causation.” He also acknowledges that it “may not be admissible” when a crime committed outside the common purpose requires special intent, e.g., crimes against humanity, persecution, genocide, and aggression. However, he rejects “most criticism” of the doctrine and claims that it only “needs some qualification or precision.” He argues that while the need to link *mens rea* to the crime is important, it not necessary to demand more than a “possible” “causal link” between intent and the crime because the “extreme gravity” and “massive” nature of the crimes in question allow judges to “legitimately expect” that participants were “particularly alert to the possible consequences of their actions.” He also thinks that a lower standard is justified for “considerations of public policy,” which he defines as the “need to protect society against persons” formally involved in the JCE who are aware that crimes may be committed by others not in the JCE or who “do not oppose or prevent” such crimes.<sup>70</sup>

Cassese’s reading of liability is very broad and his standard of *mens rea* very low. “Considerations of public policy” also seems an odd rationale for a legal doctrine because such considerations are essentially political. To establish a court might be a question of public policy, but the court is then expected to work impartially and observe the constitution, or statute, that created it. To assume that society needs to be protected from a person simply because he has been indicted appears to assume guilt rather than innocence. However, his argument is congruent with practice at the ICTY ever since the Appeals Chamber accepted the notion of JCE offered by prosecutors who lacked sufficient evidence to convict in a Trial Chamber. Guilt no longer needs to be proven beyond a doubt; simple negligence suffices to establish liability. Verena Haan, a legal reporter, views the Appeal Chamber’s formulation of the doctrine as confirmation that the Tribunal is “a political instrument,” and she concludes

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and so validate claims by the Prosecution that it is telling the true history of the wars of succession.

<sup>70</sup> Cassese, “The Proper Limits,” pp. 109-114, 122-3.



that it is “difficult to suppose that the tribunal is primarily about justice” even though in order “to respond to its political vocation, the tribunal has to give an impression of justice.”<sup>71</sup> Whether this is true, the concept of JCE certainly lacks explanatory value in a historical sense, since the evidence adduced to convict is both incomplete and inconclusive.<sup>72</sup> It seems reasonable to ask whether the Prosecution’s use of evidence and the decisions of the Tribunal might be less than impartial and whether the doctrine of JCE might not be an attempt to guarantee convictions.

Even those who support the Tribunal and seek to save parts of the doctrine of JCE are critical of the doctrine as overly expansive. Allison Danner and Jenny Martinez, both of whom worked at the ICTY, have warned that the broad reach of the doctrine of joint criminal enterprise could undermine international law.<sup>73</sup> Jens Ohlin thinks there is “value to branding a defendant a co-perpetrator of a joint criminal enterprise rather than a co-perpetrator *simpliciter*,” but he does not believe that JCE has a firm foundation in international law, even if it is regularly used at the ICTY.<sup>74</sup> William Schabas notes that the doctrine of “absolute” or “strict” liability is rare and that the UN Secretary General’s report recommending establishment of the ICTY specifically rejected guilt by association. The Tribunal’s Statute requires that to be convicted the accused must be found guilty of “willful” killing and have had “reason to know” about the crime; it does not include “negligent or irresponsible command” and limits the Tribunal’s jurisdiction “to natural persons” who have committed crimes. Because proving *mens rea* is necessary to demonstrate guilt for crimes within the ICTY’s jurisdiction, Schabas argues that JCE is a problematic legal doctrine “devised” by the ICTY’s judges. He views their “expansion of *mens rea*” as “an easy but dangerous, approach” because “stretching notions of individual *mens rea* too thin may lead to the importation of criminal liability on individuals for what is actually guilt by association, a result that is

<sup>71</sup> Verena Haan, “The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia,” *International Criminal Law Review* 5 (2) (2005): 167-202.

<sup>72</sup> To be credible, evidence must meet the tests of “human knowledge” and “reasonableness.” Historians disagree regarding which methodologies yield the best explanations but agree that a historical study is explanatory if its conclusions are based on credible and sufficient evidence, which appears not to be the case with category 3 JCE; if the questions being answered are clearly conceived, which again appears not to be the case with JCE; and if it is related to the current state of historical research, which the indictments are to the extent that they deal with crimes committed during wartime. Nicholas Rescher and Carey B. Joynt, “Evidence in History and the Law,” *The Journal of Philosophy* 56 (13) (June 1959), p. 566, and R. F. Atkinson, *Knowledge and Explanation in History. An Introduction to the Philosophy of History* (Ithaca, NY: Cornell UP, 1978), pp. 116, 134-7.

<sup>73</sup> Danner and Martinez, “Guilty Associations,” pp. 1-70.

<sup>74</sup> Ohlin, “Joint Intentions,” pp. 695-720. The ICC uses the doctrine of “co-perpetration” rather than JCE.

at odds with the driving principles behind the creation of this International Tribunal.”<sup>75</sup>

In practice, the doctrine of JCE has been a magic bullet that enables the Prosecutor to indict at will and be confident that convictions will follow because the crimes of which the defendant is accused do not even have to be part of a JCE.<sup>76</sup> The use of the doctrine consequently raises questions not only for lawyers like William Schabas, but also for historians, because such a broad reading of *mens rea* suggest that prosecutors and judges are more interested in convicting those indicted than in “telling the truth” about the wars that accompanied the dissolution of Yugoslavia. By lowering the threshold for conviction, prosecutors and judges also lowered the quality of evidence and the decisions based on it. They also appear to have transformed the ICTY from a criminal court that follows the “culpability paradigm,” which demands conviction only if *mens rea* has been firmly established, into a court of transitional justice that sees itself as playing a political role in the successor states to Yugoslavia and a diplomatic role on the world stage. It is thus worth recounting briefly why the Tribunal adopted such a controversial doctrine.

The concept of “joint criminal enterprise”—which is also referred to as a “common purpose” or a “common plan”—is the result of an appellate judgment which upheld the Prosecution’s appeal of the acquittal of Duško Tadić on a charge of murder in July 1999. The Trial Chamber had found that it could not, “on the evidence before it, be satisfied beyond reasonable doubt that the accused had any part in the killing of . . . five men.” The Prosecutor appealed the verdict to the Appeals Chamber, which interpreted the language of Article 7(1) of the ICTY’s Statute to mean that the crimes falling within the jurisdiction of the Tribunal “might also occur through participation in the realisation of a common design or purpose.” It argued that Tadić was guilty of the murders, even though his guilt could not be proven beyond a reasonable doubt, because all participants in the common design are liable for crimes that were the “predictable consequence of [the design’s] execution” if they were “reckless or indifferent” to that risk. The Appeals Chamber established three categories of “collective criminality,” with the third so broad that it encompasses crimes that fall outside the common design if they are a “natural and foreseeable consequence of the effecting of that common purpose.”<sup>77</sup>

<sup>75</sup> Schabas, “*Mens Rea*,” p. 1035.

<sup>76</sup> Schabas, “*Mens Rea*,” pp. 1032-33, refers to JCE as the OTP’s “the magic bullet.” Danner and Martinez, “Guilty Associations,” pp. 18-19, argue that by formulating and routinely applying the concept of joint criminal enterprise, the OTP and the Trial and Appeals Chambers have exacerbated the arbitrary nature of international law and given the Prosecution “significant discretion” to lay crimes against individuals and groups of individuals for actions committed over a period of years. Also Cassese, “Reflections,” p. 122.

<sup>77</sup> Article 7(1) of the ICTY Statute holds individuals “responsible” if they “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime . . . .” JCE is broader. The first category requires that the defendant entered into an

The Appeals Chamber justified its interpretation of the Statute by citing cases from both customary international law and domestic law, but most domestic law codes do not include liabilities comparable to joint criminal enterprise, and even countries that do, like Canada and Great Britain, recognize liability only for foreseeable crimes. The doctrine is not in the ICTY's Statute, it was not invoked by the Prosecution at the International Military Tribunals after World War II, and it is not in the UN Charter or that of the International Court of Justice.<sup>78</sup> The Tribunal at Nuremberg and those created by the Control Council were wary of charging Germans for their participation in a "common plan" or for "crimes against peace," preferring instead to prosecute for war crimes and crimes against humanity, the latter category created to include civilians. The tribunal that tried Ernst von Weizsaecker found that rank, knowledge, and official declarations were insufficient to establish liability for a common plan without "substantial" participation. As Deputy Foreign Minister, he knew of Nazi plans, but he did not participate in an affirmative manner, he opposed them. Consequently, the judges separated his "formal" declarations from his personal beliefs and his efforts to oppose those plans. Despite his prominence and his high position, "he was an implementor and not an originator," so he "could oppose and object," but "not override." The tribunal sought "to ascertain what he did and whether he did all that lay in his power to frustrate a policy which outwardly he appeared to support." If so, they were "not interested in his formal, official declarations, instructions, or interviews with foreign diplomats."<sup>79</sup>

In this judgment intent appears to override actions and the requirement to establish *mens rea* is certainly more stringent than in Category 3 JCE, for which prosecutors need demonstrate only that the defendant participated in a common design in order to hold him liable for crimes that he did not intend, so long as those crimes were foreseeable by a "reasonable" person. This objective standard of evidence lowers the relevant mental state of the accused from intention to commit or aid and abet a crime to recklessness for crimes committed within the design and to simple negligence for those committed outside it. A defendant can therefore be held liable for crimes that he did not

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agreement with others to commit crimes. The second refers to "systems of ill-treatment," and prosecutors need demonstrate only the existence of such a system and the defendant's active participation in it, his knowledge of its nature, and his intent to further it. To illustrate the third category, the Appeals Chamber restated the case against Tadić as a hypothetical situation. See Danner and Martinez, "Guilty Associations," pp. 24-26.

<sup>78</sup> Danner and Martinez, "Guilty Associations," pp. 22-23, 27.

<sup>79</sup> Sanford Levinson, "Responsibility for Crimes of War," in Marshall Cohen, Thomas Nagel, and Thomas Scanlon, eds., *War and Moral Responsibility* (Princeton: Princeton University Press, 1974), pp. 103-133. Von Weizsaecker was indicted for "crimes against peace; participation in a common plan or conspiracy to wage aggressive war; two counts of war crimes and crimes against humanity; plunder and spoliation; slave labor; and membership in criminal organizations." He was convicted of war crimes and crimes against humanity.

actually foresee but purportedly would have foreseen had he been reasonable. William Schabas notes that an objective criterion is “well-accepted in criminal justice system in the case of negligence-based offenses,” but such offenses are “not treated as the most serious crimes and they do not attract the most serious penalties.” They usually fall into the category of “anti-social behaviour” and do not involve “malice and premeditation.” However, at the ICTY, defendants are indicted for the most serious crimes and sentenced to long terms in prison “on the basis of what can amount to a negligence-like standard of guilt.” The widespread use of JCE by the Prosecution thus dilutes *mens rea* and raises “policy” questions regarding the Tribunal. Schabas argues that specific proof of guilt is essential because “[t]he right to know is also a collective right, drawing upon history to prevent violations from recurring in the future.” He thinks that the law is badly served if a court can convict a defendant because he “ought to have known” and wonders whether history is “served if we say . . . that we may not be able to prove that Hitler was personally involved in the final solution or even had knowledge of it, but this doesn’t matter because he ought to have known about it, and he was derelict in his duty as a superior or commander [for not knowing]?”<sup>80</sup> The answer is obvious, even if the question is rhetorical, as are the ramifications of such jurisprudence. The ICTY may have satisfied “victims” in the short run, but in the long run it has served history badly.

Although the Appeals Chamber in *Tadić* argued that it derived the concept of joint criminal enterprise from international customary law, the doctrine is distinct from conspiracy and organizational liability, the doctrines that were used by Nuremberg Tribunal. This is peculiar, because, as Danner and Martinez note, the doctrine of joint criminal enterprise “is historically and conceptually related both to conspiracy and to the prosecution of criminal organizations.” However, their review of case law suggests that post-World War II cases provide “almost no support for the most controversial aspects of contemporary joint criminal enterprise doctrine.” They were “struck by the lack of precedent for the current form of JCE” in the cases adduced by the Appeals Chamber in support of its interpretation of the ICTY Statute. For example, they note one set of cases offered as precedents for JCE in which the defendants were all “present or in the immediate vicinity of the murders.” Consequently, no one was charged with participation in a “larger plan,” and it is difficult to see how such cases can constitute precedents for alleged designs that “span several years and extend throughout entire regions and even countries.”<sup>81</sup>

<sup>80</sup> Schabas, “*Mens Rea*,” pp. 1033-35.

<sup>81</sup> Danner and Martinez, “Guilty Associations,” pp. 29-31; Schabas, “*Mens Rea*,” *passim*. Ohlin, “Joint Intentions,” pp. 708-713, found “not a single international case cited in the *Tadić* opinion that includes the language of liability for actions that were reasonably foreseeable.” Crimes like genocide require specific intent, and even the conviction of camp guards at Dachau was for aiding and abetting, not participating in a joint criminal enterprise. He suggests abandoning the category, since it is “well-settled law” only in the ICTY’s Appeals Chamber.

The failure of the ICTY to cite the judgments by the IMT at Nuremberg and the tribunals established by the Control Council is not as surprising as it seems, because both of the latter applied stringent standards of evidence that would undermine the doctrine of JCE. The military tribunal that tried Ernst von Weizsaecker was not only “reluctant to convict without overwhelming evidence of both knowledge and participation,” it was “willing to accept counter-evidence” of his innocence. As Sanford Levinson noted, while a decent man might have resigned his post once he knew of what his government was doing, indecency is not a crime. Indeed, Michael Walzer suggests that having “dirty hands” is an inevitable side-effect of engaging in politics.<sup>82</sup> What mattered to the tribunal was whether the German diplomat was complicit in the crimes committed by others, and it convicted him only for his failure to object to the treatment of the Jews when queried by the SS regarding the Foreign Ministry’s opinion on the matter, a crime for which he received a sentence of seven years. He was not convicted for the deportation of Hungarian Jews because his link to the event was “slight and insignificant,” a judgment that suggests “some kind of *de minimis* test.” Nor was he convicted for failing to subvert the German government or harboring “nationalist” sentiments. Unlike the Prosecution, the tribunal’s judges approved of loyalty to one’s country, even one run by the Nazi Party, and they sought to put themselves in the defendant’s shoes, not force the defendant into those of a “reasonable,” and imaginary, man.<sup>83</sup>

“The prosecution insists, however, that there is criminality in his assertion that he did not desire the defeat of his own country. The answer is: Who does? One may quarrel with, and oppose to the point of violence and assassination, a tyrant whose programs mean the ruin of one’s country. But the time has not yet arrived when any man would view with satisfaction the ruin of his own people and the loss of its young manhood. To apply any other standard of conduct is to set up a test that has never yet been suggested as proper, and which, assuredly, we are not prepared to accept as either wise or good.”

Such a judgment is unlikely today, given the current ill-repute of sovereignty and loyalty to one’s country, but it is hardly a convincing precedent for JCE. By embracing this doctrine, the ICTY has effectively rejected both state sovereignty and Article 51 of the UN Charter, which guarantees states the right to defend themselves, because it criminalizes military operations as such, given

<sup>82</sup> Michael Walzer, “Political Action: The Problem of Dirty Hands,” in Marshall Cohen, Thomas Nagel, and Thomas Scanlon, eds., *War and Moral Responsibility* (Princeton: Princeton University Press, 1974), pp. 62-82.

<sup>83</sup> Levinson, “Responsibility for Crimes of War, pp. 122-5. Although von Weizsaecker’s remarks to the Belgian ambassador were “deceptive” and suggested “that he was consciously, even though unwillingly, participating in the plans” to wage aggressive war, the tribunal argued that “in determining matters of this kind *we may not substitute the calm, undisturbed judgment derived from after knowledge, wholly divorced from the strain and emotions of the event, for that of the man who was in the midst of things, distracted by the impact of the conflagration and torn by conflicting emotions and his traditional feelings of nationality.*” [Emphasis added.]

that crimes inevitably occur during wartime and every commander must be assumed to foresee that bad things will occur, even if he does not order them. Even wars undertaken in self-defense and operations whose goal is to reclaim national territory seized and occupied by another state are therefore fraught with the risk of indictment.<sup>84</sup> The doctrine of JCE has lowered the bar for the prosecution to simple negligence, which means that the Tribunal has jettisoned the “beyond a reasonable doubt” component of criminal courts and appears to be functioning like a transitional court in which justice takes a back seat to politics broadly defined.<sup>85</sup> And to invoke transitional justice as a rationale for action is to invite all sorts of mischief.<sup>86</sup>

## Witnesses and Journalists

Unlike post-World War tribunals, the ICTY relies heavily on oral testimony. In its first decade, it heard more than a thousand witnesses, among them EU monitors, UNPROFOR personnel, diplomats, journalists, members of the opposing sides, and those who had concluded plea bargains.<sup>87</sup> The impact of a given witness can be cumulative because testimony is “recycled” and used in other trials.<sup>88</sup> Given its reliance on oral testimony, one would expect its prosecutors and judges to be particularly careful with witnesses, especially since there is no jury and the three-judge panels of the Trial Chambers convict by a majority opinion, not by consensus, and the decisions of the Appeals Chamber are considered precedent.<sup>89</sup> However, Patricia Wald notes that there are “strong restraints on evidence about a victim’s past or allegations of consent in

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<sup>84</sup> Joseph C. Sweeney, “The Just War Ethic in International Law,” *Fordham International Law Journal* 27 (6) (June 2004): 1865-1903, notes that because the UNSC issues ambiguous instructions and “is not a court,” it is difficult to say whether states that employ force while acting with its approval are waging “just” wars.

<sup>85</sup> Schabas, “*Mens Rea*,” pp. 1029-34, cites Glanville Williams, who narrowly defined “willful blindness” as having “suspected the fact,” “realized its probability,” and then “refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge.” Schabas argues that “any wider definition would make the doctrine of willful blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge.” He concludes that “it is impossible to reconcile” a narrow definition of intent “with the lower threshold established for superior responsibility in the Statute as interpreted by the ICTY’s Appeals Chamber in *Delalic*.”

<sup>86</sup> See Csilla Kiss, “The Misuses of Manipulation: The Failure of Transitional Justice in Post-Communist Hungary,” *Europe-Asia Studies* 58 (6) (Sept. 2006): 925-940.

<sup>87</sup> Meron, “Reflections,” p. 560. Barria and Roper, “How Effective Are International Criminal Tribunals?” p. 360.

<sup>88</sup> Wald, “Punishment of War Crimes,” p. 1130.

<sup>89</sup> Wald, “Punishment of War Crimes,” p. 1128, notes the binding nature of the Appeals Chamber’s rulings.



sexual crimes,<sup>90</sup> and the ruling by the Appeals Chamber in *Brdanin* suggests that some judges assume that all war correspondents tell the truth, i.e., that a person's profession confers credibility.<sup>91</sup> The reversal of three convictions in *Kupreškić* suggests that judges cannot always assess whether a witness is credible and that the uncorroborated evidence of a single witness is not trustworthy.<sup>92</sup> The Tribunal has also obtained discrete, and often anonymous, support from states, a practice that Theodor Meron, President of the Tribunal from 2003 to 2005, considered to be "clearly in tension with the defendant's right to challenge the evidence against him."<sup>93</sup>

The ICTY's supporters argue that granting anonymity reassures victims who might otherwise feel too intimidated to testify, but critics view the practice as a serious violation of due process that erodes the rights of the accused.<sup>94</sup> Historians deal cautiously with evidence that is gathered anonymously and testimony that is given without identifying the witness. While few historians believe that the credibility of evidence can be firmly established, all historians cite their sources so that the reader can check them if he chooses to do so.<sup>95</sup> Most historians would also agree that the credibility of evidence depends in part on context and that if the source of the evidence is anonymous, the evidence is suspect because it is necessary to know something about its source to know whether it can be trusted. In the case of a witness, without knowing something about him, it is difficult to determine whether he can tell the truth and has reason to do so.<sup>96</sup>

<sup>90</sup> Wald, "International Criminal Courts," p. 244.

<sup>91</sup> Megan A. Fairlie, "Prosecutor v. Brđanin and Talić. Case No. IT-99-36-AR739," *American Journal of International Law*, 98 (4) (2004): 807.

<sup>92</sup> Diane Marie Amann, "Prosecutor v. Kupreskic, No. IT-95-16-A," *American Journal of International Law* 96 (2) (April 2002): 440-1. The indictment in *Kupreškić* covered a seven-month period but the trial focused on a single incident in a single house reported by a single witness.

<sup>93</sup> Rule 70 of the ICTY's Rules and Procedures allows the use of confidential material in the investigative and pretrial phases. Such materials are opened if used at trial, unless the state supplying them elects to block their use. Meron, "Reflections," pp. 560-1, thinks this practice creates a problematic "balance between fairness (*or at least confidence in accuracy*) . . . and finality [of the verdict] at the Tribunal." (Emphasis added)

<sup>94</sup> Leigh, "The Yugoslav Tribunal," pp. 235-238, and "Witness Anonymity," pp. 80-83, opposed the practice, but Chinkin, "Due Process and Witness Anonymity," pp. 75-79, defended it. Wald, "International Criminal Courts," p. 245, noted that "nearly half of all victim-witnesses who testified demanded protective conditions."

<sup>95</sup> Rescher and Joynt, "Evidence in History and the Law," p. 562-3, and *passim*, note the difficulty of providing "demonstrative proof" and argue that human action "is governed by probable evidence, and not by proof." So it "can, and frequently must, be based on evidence that supplies merely a comparative likelihood, and not likelihood *per se*." Also Rolf Torstendahl, "Fact, Truth, and Text: The Quest for a Firm Basis for Historical Knowledge around 1900," *History and Theory* 42 (3) (Oct. 2003): 305-331.

<sup>96</sup> Linda Shopes, "Oral History and the Study of Communities: Problems, Paradoxes, and Possibilities," *Journal of American History* 89 (2) (Sept. 2002): 590, considers it crucial to



The increasing use of “witness statements” by the ICTY is also cause for concern because it erodes due process by precluding cross-examination of the witness by defense counsel and so deprives the accused of the right to confront his accuser.<sup>97</sup> The use of plea bargains is also questionable, despite the argument by the Trial Chamber in *Nikolić* that “the mitigating effect of a guilty plea in this Tribunal is much broader” than in domestic courts because “the accused contributes to establishing the truth about the conflict in the former Yugoslavia and contributes to reconciliation in the affected communities.” However, Ralph Henham argues that neither assertion has been empirically proven, and Chandra Sriram’s study of Sierra Leone suggests that special tribunals obstruct reconciliation, contribute little to establishing the rule of law, keep old wounds open, and are viewed by many as a “political tool” because not all “big men” are indicted. James Meernik argued that the disparity in “status” between the accused and the prosecution and judges at the ICTY makes it mandatory to use “impartial criteria for judging,” but Nancy Combs found that judges on the Trial Chambers in Sierra Leone “take a cavalier approach to testimonial deficiencies” and “are often content to base their convictions on deeply flawed testimony.”<sup>98</sup> Henham concluded that plea agreements are “popular” at the ICTY because they assure “certainty [of conviction] and expediency [of trial],” even though they “accentuate the relative weakness of the accused’s negotiating position as citizen of a subjugated state” and contribute to a “lack of transparency” regarding process and sentencing.<sup>99</sup>

An eyewitness to events can be a valuable source, but only if her testimony is credible and she can convey it accurately. But confidence is not the same as credibility, and an eyewitness can never be assumed to be credible, a confession reliable, or a prosecutor trustworthy, which is why common law systems employ an adversarial process at trial. As Patricia Wald has observed, “[m]emories fade, key witnesses often will not come forward . . . and the witnesses who do come forward often tell stories that differ from earlier statements made

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establish the provenance of evidence because interviews, like oral testimony, make more sense once placed “in the intellectual and social contexts of their generation.” Doing so also helps the interviewer “to understand how the context unavoidably shaped the inquiry.” Mark Feldstein, “Kissing Cousins: Journalism and Oral History,” *The Oral History Review* 31 (1) (2004): 10-17, a journalist turned oral historian, notes the difficulty in conducting interviews and how “empathy” for a subject can destroy “objectivity.” Rescher and Joynt, “Evidence in History,” pp. 563-5, argue that determining what constitutes “*sufficient evidence*” to convict or to inform an historical interpretation is “*a complex and subtle matter which cannot be appropriately taken up in the abstract but requires consideration of the particular characteristics of specific evidential contexts*. It is a fundamentally pragmatic and expedient matter.” (Emphasis added.)

<sup>97</sup> Wippman, “The Costs of Justice,” p. 880.

<sup>98</sup> Combs, “Testimonial Deficiencies,” pp. 240, 261, 264; Sriram, “Wrong-Sizing International Justice?” pp. 472-506, concluded that the Trial Chambers in Sierra Leone “are often content to base their convictions on deeply flawed testimony.”

<sup>99</sup> Henham, “Plea Bargaining,” pp. 604-606; Meernik, “Victor’s Justice,” p. 140.

to investigators in the field.”<sup>100</sup> Witnesses may also deliberately lie or testify to seek revenge on former enemies.<sup>101</sup> Both accusations and confessions can be credible but untrue or unverifiable,<sup>102</sup> an observation especially true of testimony and reports regarding revolutions and civil wars.<sup>103</sup> These are formidable problems that make oral testimony problematic, particularly given that the decision as to whether a witness is truthful, a document significant, or an intercept credible is subjective. James Meernik therefore based his study of the ICTY on an examination of verdicts and sentences, not on “the factors that weigh into these decisions,” which are “more intangible and thus difficult to measure.”<sup>104</sup> Yet from the investigative phase through the sentencing, it is precisely such “intangible” and “difficult to measure” factors that drive the process at the ICTY.

To determine the credibility of a witness, a historian poses a variety of questions. Can the witness tell the truth? Was he present at the event? Is he a witness with competence or expertise regarding the event he witnessed? Was he paying attention at the time the event occurred? Are the questions posed to him designed to solicit a particular answer? Is his testimony objective or subjective? Is his reasoning logical or circular? A historian would want to know whether the witness is willing to tell the truth and whether his testimony is distorted owing to self-interest, perspective, bias, a desire to cooperate or obstruct, or any other reason. He would be attentive to style and language, which can distort meaning in written testimony and documents, and to convention, which can do so in both oral and written testimony. Should a witness pass all these tests, a historian would still not assume that her testimony is accurate unless it could be corroborated, either by other witnesses or, ideally, by archival sources.<sup>105</sup> Even then, he would achieve only a degree of certainty, not

<sup>100</sup> Wald, “Punishment of War Crimes,” p. 1131.

<sup>101</sup> Combs, “Testimonial Deficiencies,” pp. 240, 261, 264, found that witnesses regularly lie; Sri-ram, “Wrong-sizing International Justice?” *passim*, notes that revenge is a factor in testimony in Sierra Leone.

<sup>102</sup> *The New York Times*, 1 December 2002, for confessions obtained under duress, and “District Attorney Asks Judge to Drop Strauss-Kahn Case,” *The New York Times*, 23 August 2011, for the decision to drop rape charges against Dominique Strauss-Kahn, at <http://www.nytimes.com/2011/08/23/nyregion/strauss-kahn-case-should-be-dropped-prosecutors-say.html>, accessed 23 August 2011. In both cases, police and prosecutors were certain of their evidence, which subsequently proved too unreliable to bring to trial in a common law system.

<sup>103</sup> Richard Cobb, *The Police and the People. French Popular Protest, 1789-1820* (New York: Oxford University Press, 1972), pp. xvi-xvi; Jacob Mundy, “Deconstructing Civil Wars: Beyond the New Wars Debate,” *Security Dialogue* 42 (279) (2011): 279-295, discusses the difficulty of establishing the accuracy of reports during and after civil wars, including how people died and who died.

<sup>104</sup> Meernik, “Victor’s Justice,” pp. 145, 150.

<sup>105</sup> Louis Gottschalk, *Understanding History: A Primer of Historical Method* (New York, 1951), pp. 53-4, 139-69.

complete certainty, because historians retain a degree of doubt regarding their sources, even those that appear to be credible.<sup>106</sup>

The ICTY has called witnesses who not only participated in the wars, but who have an interest in how the wars and their particular roles in them are viewed by the Tribunal, the public, and posterity. Among those who have testified are Peter Galbraith, a diplomat who served as US ambassador to Croatia from 1993 to 1997 and who was viewed by Croats as hostile to their sovereignty interests in 1994 and 1995<sup>107</sup>; Stipe Mesić, a Croatian politician who participated in events as a member of the Croatian government and the HDZ until he broke with Franjo Tuđman and his government in 1994<sup>108</sup>; Stjepan Kljuić, a Croatian politician from Bosnia and Herzegovina, who was president of the HDZ there until forced out by members of the party who believed that he had put Muslim interests above Croat interests<sup>109</sup>; Ed Vulliamy, a British

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<sup>106</sup> Carlo Ginzburg, *Clues, Myths, and the Historical Method* (Baltimore: Johns Hopkins, 1992), pp. 157-60, discusses the problems inherent in “suggestive questioning” and the “monologic” nature of apparently “dialogic” testimony in which defendants echo inquisitors, and for the “codes” contained in such dialogues. Ginzburg was discussing the courts of the Inquisition, but his comments apply as well to testimony at the ICTY, where witnesses often echo the lawyers or are frequently asked only for “yes” and “no” answers and, of course, testify anonymously.

<sup>107</sup> Mr. Galbraith could only “tell the truth” as he knew it. He was in Croatia in 1994 and 1995, but he was not present at many of the events noted in his testimony and relied on reports by others. He is not competent to assess some of the events he described, e.g., the shelling of Knin, for which he used a UN report that was itself second-hand because UN personnel were not in the city when the shelling occurred. One can assume that Mr. Galbraith was paying attention at the time that the events he testified about occurred, since that was his job, but the questions posed to him by lawyers for the Prosecution and the Defense were designed to solicit particular answers, and it seems reasonable to assume that he was concerned with how others would view his role in the events of 1994-1995, so his testimony is probably less objective than it is subjective. Whether Mr. Galbraith’s “reasoning” is logical, circular, or self-serving requires a separate essay, but it seems reasonable to assume that he had some “self-interest” in showing both himself and the United States in the best light possible, and that his perspective and bias reflected his nationality and position. Given that he was a witness for the Prosecution, it also seems reasonable to assume that he sought to reinforce the Prosecution’s case and to obstruct the Defense’s efforts to discredit it. Certainly Croatian leaders considered him less than reliable. Hrvoje Šarinić, *Svi moji tajni pregovori sa Slobodanom Miloševićem* (Zagreb: Globus, 1999), p. 16, noted that the US Ambassadors and his associates did not understand the situation in Croatia. “*Autori toga plana,*” he wrote, “*pokazali su potpuno nepoznavanje situacije, povijesti, odnosa snaga, uvjerenja i vrštine našeg naroda i našeg vodstva. Jednostavno ništa nisu shvatili preslikavali su rješenja iz svojih zemalja u ove prostore. . . .*” Like Franjo Tuđman, Šarinić was convinced that the Croatian people would not accept such a solution.

<sup>108</sup> For a critique of Mesić’s testimony, see Miroslav Tuđman, *Vrijeme krivokletnika* (Zagreb: Detecta, 2006).

<sup>109</sup> Kljuić’s role is particularly interesting, given that he helped to formulate HDZ policy in June 1991, as he noted during a meeting of the HDZ on policy in December of that year. See Predrag Lucić, ed., *Stenogrami o podjeli Bosne* (Split and Sarajevo: Kultura & Rasvjeta, 2005), vol. I, pp. 75-128.

journalist whose reporting appeared to be biased in favor of Muslims<sup>110</sup>; John Allcock, a British academic<sup>111</sup>; Robert Donia, co-author of a book which depicted Bosnia and Herzegovina as a multicultural paradise prior to 1991<sup>112</sup>; Hrvoj Šarinić, who maintained discrete contact with Slobodan Milošević for Franjo Tuđman between 1991 and 1995 in an effort to find a negotiated resolution to the conflict in Croatia<sup>113</sup>; Robert Stewart, a commander of UNPROFOR whose published memoirs need to be compared to the entries in his diary<sup>114</sup>; and Davor Marijan, a Croatian scholar whose publications on the war in Croatia are based on archival material captured from the RSK.<sup>115</sup> It is, at best, a mixed group, and it is not obvious which are credible. To determine that, it would be necessary to know something of the background of each, which anonymity would make impossible.

Once a witness' background is known, it is possible to challenge their testimony, but the ICTY has increasingly resorted to witness statements, which preclude cross-examination. Commenting on a decision by the Appeals Chambers to accept as evidence what a journalist for *The Washington Post* without requiring him to testify, Megan Fairlie argued that by defining a "war correspondent" as all "individuals who, for any period of time, report (or investigate for the purposes of reporting) from a conflict zone on issues relating to the conflict," the judges had unduly expanded the definition to include people who were not even journalists. By ruling that war correspondents "serve a public interest in providing accurate information from a conflict-torn area," the Appeals Chamber had also prejudged evidence and "circumvented the Tribunal's rule-making process." Given that the ICTY is "more dependent on the testimony of journalists than any national judicial system," the ruling was had far-reaching ramifications. It also fails to take into account that reports by journalists who reported on the wars were based in the capitals of the

<sup>110</sup> Ed Vulliamy began work as a journalist with *The Guardian* in 1986 and wrote *Seasons in Hell: Understanding Bosnia's War* (London: Simon & Schuster, 1994), so he would be accepted as a war correspondent under the *Brđanin* decision discussed by Fairlie. During cross-examination in May 2006, he said that he was "not a war correspondent," nor "a political reporter," and that he had not "spen[t] very much time with political leaders" in Herzegovina. Unable to answer questions about HOS, the HVO, and Bosnia and Herzegovina, he noted that, "I do, did, . . . certainly did have, what could be called the layman on the ground on a fast learning curve idea of what it is that Mr. Boban was talking about." See ICTY transcripts, *Prlić*, pp. 1494-1526, 1538-87, esp. pp. 1671-88.

<sup>111</sup> John B. Allcock, "Rhetoric of Nationalism in Yugoslav Politics," in John B. Allcock, John J. Horton, and Marko Milivojevic, eds., *Yugoslavia in Transition. Choice and Constraints. Essays in Honor of Fred Singleton* (New York: Berg, 1992).

<sup>112</sup> Robert J. Donia and John V. A. Fine, *Bosnia and Hercegovina: A Tradition Betrayed* (New York: Columbia UP, 1994).

<sup>113</sup> Šarinić, *Svi moji tajni pregovori sa Slobodanom Miloševićem, passim*.

<sup>114</sup> Robert Stewart, *Broken Lives* (London: Harper Collins, 1993), and "Diary," (photocopy).

<sup>115</sup> Davor Marijan, "Expert Opinion: On the War Connections of Croatia and Bosnia and Herzegovina (1991-1995)," *Časopis za suvremenu povijest* (2004) 36 (1): 249-292.

belligerents and appear to have been influenced by the local political culture.<sup>116</sup> Fairlie considered the ruling “troubling for several reasons”—it is “thinly and poorly reasoned,” it “establishes a relatively generous privilege of potentially broad application,” and it “undermines the right of an accused to confront his or her accuser.”<sup>117</sup> Mark Feldstein, who worked as a journalist, would add that such a ruler suggests that the judges know little about the business of journalism, which “cannot be divorced from the fact that it is ultimately a commercial vehicle for selling advertisements,” and so “the business dictates of increasingly corporate journalism alter what truths journalists are allowed to present and how they are presented.”<sup>118</sup>

Historians also use reports by war correspondents, but they are aware that, as the cliché runs, the first casualty of war is the truth, and they would not assume that reports by war correspondents are always accurate. Just as Fairlie was troubled by the legal problems resulting from the Appeals Chamber’s ruling, a historian should be concerned at the naïve and credulous nature of the decision, particularly given that at least one war correspondent who testified at the ICTY was not well versed in Bosnia and Herzegovina’s history, its politics, its ethnic make-up, or in military affairs, and that reporting by others varied greatly.<sup>119</sup>

The reversal of the Trial Chamber’s findings in *Kupreškić* raises at least three questions. Which is more trustworthy, the Trial Chamber or the Appeals Chamber? What does the reversal say about the rules and procedures of the Tribunal? And what shall we make of scholarly studies that drew on judgments by the Trial Chambers before their decisions were reversed. The last is the easiest to address. James Meernik used a sample of 32 people convicted for various crimes to reach his conclusion that the ICTY conformed to a “legal” rather than a “political” model, i.e., that legal rather than political factors influenced its verdicts and sentences. However, his sample included only four Muslims, which is odd if we are dealing with a civil war in which all sides behaved badly.<sup>120</sup> Sixteen Serbs were convicted of crimes against humanity and one for genocide, apparent confirmation that Serbs were the aggressors. One of four

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<sup>116</sup> For discussion, see James J. Sadkovich, *The U.S. Media and Yugoslavia, 1991-1995* (Westport CT: Greenwood, 1998), *passim*. Chuck Sudetic was based in Zagreb, David Rieff in Sarajevo, and Laura Silber and Alan Little in Belgrade. “Parachute” journalists knew little about the country, its history, or its political culture.

<sup>117</sup> Fairlie, “Prosecutor v. Brdjanin and Talić,” pp. 805-809.

<sup>118</sup> Feldstein, “Kissing Cousins,” p. 9.

<sup>119</sup> Compare David Rieff, “Letter from Bosnia, Original Virtue, Original Sin,” *New Yorker*, 23 November 1992 to Misha Glenny, “The Revenger’s Tragedy,” *New York Review of Books*, 13 August 1992.

<sup>120</sup> Or randomly, as suggested in Harry Eckstein, “On the Etiology of Internal Wars,” *History and Theory* 4 (2) (1965): 133-63. For an application of Eckstein’s model to the wars in Croatia and Bosnia and Herzegovina, see James J. Sadkovich, “Internal War and the Conflict in Yugoslavia,” in Igor Graovac, ed., *Dijalog povjениčara-istoričara. Osijek 22.-25. rujna 2005* (Zagreb: Zaklada Friedrich Naumann Stiftung, 2008), pp. 101-118.

Muslims was acquitted and three convicted of “lesser” offenses (war crimes), seeming confirmation of their status as “bona fide” victims (assuming James Gow is correct). But what is one to make of the conviction of eight Croats for crimes against humanity and two for war crimes? Should we agree with James Gow that they were aggressors who manipulated their “victimhood” to gain sympathy abroad?<sup>121</sup>

Meernik argues that all of the sentences were appropriate to the indictments and that leaders should have received harsher sentences. Such a conclusion assumes that leaders were responsible for all crimes committed by those in lesser positions, an assumption that would not have been shared by the IMT at Nuremberg nor the tribunals created by the Control Council, and it begs the question of why these individuals were indicted for these particular crimes.<sup>122</sup> His conclusion is not only debatable, it became untenable after the Appeals Chambers reversed the sentences of four Croats by acquitting the three Kupreškić brothers and throwing out most of the charges against Tihomir Blaškić.<sup>123</sup>

<sup>121</sup> Gow, *The Serbian Project*, pp. 242-5.

<sup>122</sup> Levinson, “Responsibility for Crimes of War,” pp. 114-117, noted that although German officials could not invoke “obedience to superior orders or the act-of-state doctrine” in their defense, “mere participation,” even in the Nazi regime, was “not enough to label one a ‘war criminal.’ Direct evidence of participation in the criminal acts themselves is necessary.” The post-World War II tribunals in Germany required both *mens rea* and *actus reus* to convict. General Yamashita was convicted using “what can fairly be described as strict liability for the acts of his subordinates,” but Levinson doubted that the result could be “defended” because “General Yamashita was convicted for failing to take measures to prevent commission of war crimes even though no direct proof was offered that he ordered or even consented to the crimes or that he had the actual power to prevent their commission.” Levinson argued that “anyone who does defend the justice of *Yamashita* must accept a concomitantly broad imputation of criminality vis-à-vis our own leadership in the Vietnam episode.” He also saw the failure to prosecute the “ordinary soldier” who actually performed the criminal acts as a significant problem, particularly given that it was difficult to link government officials to the rank and file. Both von Erdsmandorff, Deputy Chief of the Political Division of the Foreign Ministry, and Karl von Ritter, liaison officer between Foreign Ministry and High Command, were acquitted because “[k]nowledge that a crime has been or is about to be committed is not sufficient to warrant a conviction except in those instances where an affirmative duty exists to prevent or object to a course of action.” Levinson commented that “duty” here referred to a “legal obligation and not fidelity to moral imperatives.” The tribunal did not establish a “requirement of supererogatory heroism; criminal responsibility ensued only if one were directly and knowingly linked with the commission of criminal acts.” Nor was rank sufficient to convict, unless “a defendant came into possession of knowledge that the invasions and wars to be waged were aggressive and unlawful” and he was “on the policy level [and] could have influenced such policy and failed to do so.” However, “as long as a member of the armed forces does not participate in the preparation, planning, initiating, or waging of aggressive war on a policy level, his war activities do not fall under the definition of crimes against peace. *It is not a person’s rank or status, but his power to shape or influence the policy of his state, which is the relevant issue for determining his criminality under the charge of crimes against peace.*” [Emphasis by Levinson]

<sup>123</sup> Meernik, “Victor’s Justice,” pp. 153-5. Wippman, “The Costs of Justice,” p. 861, reports that by 2006, of 161 people indicted, 51 had been tried and 46 convicted, but he does not discuss nationality or indictments.



The Trial Chamber in *Kupreškić* had found a single witness whose testimony was crucial to the conviction of the brothers to be both “truthful and accurate.” In response to protests by the defense that a single witness to a single incident in which two people were killed and a house burned were “material facts” to be “pleaded, the judges responded that while allegations of an offense like murder might require a detailed examination of “material facts,” those of “persecution” required an examination only of “acts the Prosecution considered to amount to persecution.” The Trial Chamber subsequently sentenced the three brothers to 10, 8 and 6 years in prison for crimes against humanity based on the testimony of a single witness concerning a single incident, sentences comparable to that of von Weizsaecker. The Appeals Chamber did not contest the fact that the conviction was based on the testimony of a single witness because this is allowed at the ICTY, but it noted that to do so the court must exercise “extreme caution,” especially if the “circumstances” of the crime were “difficult.” At the appeal, an “experimental psychologist” testified that confidence was a “personality trait,” not proof of truthfulness, and that witnesses often reconstruct events, which seems to have occurred in this case because the witness did not identify one of the brothers until a week after the event and five other witnesses contradicted her story, as did her own initial interview. The Appeals Chamber consequently found her evidence to be “wholly erroneous” and “that a miscarriage of justice has occurred.” They concluded that “no reasonable tribunal of fact could find Vlatko Kupreškić guilty as an aider and abettor of persecution based on the remaining evidence,” and they cautioned that owing to its “nebulous character,” the doctrine of persecution “cannot . . . be used as a catch-all phrase.” The judges also noted that vagueness in pleading “goes to the heart of the substantial safeguards that an indictment is intended to furnish to an accused, namely to inform him of the case he has to meet.”<sup>124</sup>

Patricia Wald recalled that by reversing three of five convictions for the massacre of Muslim villagers in Ahmići owing to “insufficiency of evidence and procedural errors” by the Trials Chamber, she and the other judges on the Appeals Chamber “incur[ed] the extreme displeasure of many in the prosecutor’s office and many victims’ groups as well.” She herself “like[d] to think” that the reversals proved “that we were indeed a court dedicated to fair and impartial justice, not to victors’ revenge.”<sup>125</sup> A historian, who is used to ‘singular’ truths, might be tempted to note that all that the reversal proved was that the Trial Chamber had seriously erred and the Appeals Chamber had done what should have been done by the lower chamber.<sup>126</sup> It earned the “extreme

<sup>124</sup> Amann, “Prosecutor v. Kupreskic,” pp. 439-43. The members of the Appeals Chamber were Patricia Wald (US), Lal Chand Vohrah (Malaysia), Rafael Nieto-Navia (Columbia), Fausto Pocar (Italy), and Liu Daqun (China).

<sup>125</sup> Wald, “International Criminal Courts,” p. 245.

<sup>126</sup> Atkinson, *Knowledge and Explanation in History*, pp. 5-6, notes that history’s truths are singular rather than plural, and so preclude the formulation of laws, just as its analytic



displeasure” of prosecutors and victims’ groups because it had found that a witness, no matter how confident, could be mistaken, and that “being there,” to borrow the title of a novel by Jerzy Kozinski, was not enough to warrant conviction for crimes against humanity.

The *Kupreškić* reversal suggests problems with the Tribunal’s rules and procedures, and with legal doctrines that seek to establish patterns and designs rather than individual guilt. Finding such patterns in the wars that wracked Yugoslavia is easy because each side was identified not only by its nationality, but also by its religion and its ‘ethnicity.’ In effect, to fight the enemy was to risk a charge of persecution. Jonathan Charney has argued that crimes like genocide are “usually committed under conditions in which powerful political forces are at work,” supported by propaganda “vilifying the enemy.”<sup>127</sup> Such situations are complex, not simple, as Dianne Amann has observed.

“International criminal cases typically arise out of large-scale attacks on whole communities, and the ensuing chaos makes adjudication difficult. Witnesses may be confused, traumatized, or reluctant to testify. Physical evidence may be lacking or may become available late in the litigation. Suspects may be hard to locate or impossible to arrest. Those who do come into custody face infamous charges, for crimes sometimes described imprecisely. The notoriety of the offenses redoubles the burden of ensuring that a defendant receives a fair trial. Criticism of practices by the International Military Tribunals at Nuremberg and Tokyo, whose judgments of conviction could not be appealed, is long-standing. The ICTY and ICTR likewise have drawn criticism for their handling of the rights of the accused.”<sup>128</sup>

We can now tentatively answer the three questions posed earlier. The judgments of both the Trial Chambers and the Appeals Chamber need to be treated with some skepticism because while the latter reversed the former in *Kupreškić*, it also formed formulated the doctrine of joint criminal enterprise during the *Tadić* appeal. Any given chamber in any given case that is both thorough and impartial is thus probably the most credible chamber. However, the rules and procedures of the Tribunal appear designed to favor convictions, given that defendants can be convicted of capital crimes on the basis of the testimony of a single witness, that witnesses can testify anonymously, that a witness is considered credible owing to his profession, that written statements

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methodology eschews normative judgments. Historians use evidence to understand; lawyers and judges to convict or acquit.

<sup>127</sup> Charney, “Progress in International Law?” pp. 461-2, thinks that leaders manipulate “ethnic, religious, territorial, and other passions” but that behavior is the product of genetics and “deeply ingrained historical events or myths.”

<sup>128</sup> Amann, “Prosecutor v. Kupreskic,” pp. 443-4, noted that because the ICTY has no juries, judges are probably “more active and inquisitorial” than those presiding over common law trials, acting as both fact-finders and legal decision-makers. She suggested that the only safeguard for the accused is “the reasoned-opinion requirement.”

are admitted in place of oral testimony, and that the doctrines of persecution, command responsibility, and joint criminal enterprise allow the prosecution to build cases that dilute *mens rea* and do not require an *actus reus* on the part of the accused. As for studies based on material presented at the ICTY, it seems clear that they should be taken with a grain of salt because they appear to be no more settled than a historian's working hypotheses. There is one more observation worth making here—that many of these 'errors' and the use of expansive legal doctrines can be traced to the intention to render justice to victims rather than to protect the rights of the accused, and thus to assume guilt rather than innocence, and to accept *Yamashita* rather than the rulings of the German tribunals.

The ICTY appears to have a bias in favor of the victim similar to that discerned in the ICTR (International Criminal Tribunal for Rwanda) and the SCSL (Special Court for Sierra Leone) by Chandra Sriram and Nancy Combs. Combs believes that this bias and an article in the Nuremberg Charter that inculpates an individual for belonging to certain organizations helps to explain the "cavalier" treatment of evidence and the high conviction rates by such tribunals.<sup>129</sup> As an example of the tendency to infer guilt from a defendant's position within an organization, she cites Carla Del Ponte, former Chief Prosecutor at the ICTY, who argued that "[w]hen large-scale crimes are carried out systematically with military, police, or quasi military organs requiring communication and coordination it is logical to infer that criminal activity must have been the result of orders." In effect, she argued that if a defendant was in a command position, he was culpable for crimes committed by his subordinates, a gloss on the *Yamashita* decision of the IMT/FE.<sup>130</sup> However, this is an assumption that was not shared by the judges who sat on the IMT at Nuremberg IMT, whose jurisprudence was less controversial than that of its Asian cousin.<sup>131</sup>

The doctrine of command responsibility equates position with guilt, just as JCE defines membership in a joint undertaking as criminal and persecution

<sup>129</sup> Combs, "Testimonial Deficiencies," pp. 261-8, discerns "a pro-conviction bias" among judges who tend to give the benefit of the doubt not to defendants but to the witnesses, whom they view as victims. Sriram, "Wrong-Sizing International Justice," pp. 489-92, note that many view the SCSL as imposed by the UN and a "kangaroo" court that has indicted a popular leader as a "scapegoat," an observation that could be made regarding Croatian reactions to the indictment of Ante Gotovina. Sriram also notes that indicting leaders lets perpetrators go free.

<sup>130</sup> Combs, "Testimonial Deficiencies," pp. 268-9, concludes that judges draw inferences based on the position of the accused that lead them to ignore evidentiary deficiencies because they see position in an organization as "an indicator" of guilt. She cites Carla Del Ponte, "Investigation and Prosecution of Large-Scale Crimes at the International Level: The Experience of the ICTY," *Journal of International Criminal Justice* (2006).

<sup>131</sup> See Levinson's remarks, note 119. Also see Richard L. Lael, *The Yamashita Precedent. War Crimes and Command Responsibility* (Wilmington: Scholarly Resources, 1982), for a historical assessment, and A. S. Comyns-Carr, "The Tokyo War Crimes Trial," *Far Eastern Survey* 18 (10) (18 May 1949): 109-114, whose contemporary assessment of the IMT/FE reads much like those of officials of the ICTY who write on the Tribunal.

makes it easy to define conflicts involving nationality, religion or race as criminal. Nancy Combs concludes that there is a theoretical argument for the use of “controversial liability doctrines, such as joint criminal enterprise,” to help “to create a better alignment between the evidence that is received and the convictions that are entered.” However, she argues that prosecutors must “focus less on an individual defendant’s particular actions and more on the defendant’s role in the group criminality that characterized the atrocity as a whole.” In practice, this would effectively mean trying individuals not for the crimes they actually committed but for their membership in a group, and Combs appears to step back away from such a position by arguing that while “a reduction in the standard of proof . . . can be defended as a theoretical matter,” it “should not be undertaken.”<sup>132</sup>

Indeed. But JCE has already codified the concept of collective responsibility and makes imputation of collective guilt easy because it is an “overinclusive” legal doctrine that makes no effort to distinguish levels of responsibility, or even whether a person intended that a crime occur, given its dilution of *mens rea* and its dismissal of *actus reus*. Almost four decades ago, Sanford Levinson cautioned that “to adopt collective responsibility is either to commit an injustice or to undermine the community condemnation on which the criminal law rests and which especially should be the basis for the punishment of war crimes. If one wants to preserve the force of the notion of war *criminality*, he must find discrete criminals or else argue that in fact everyone is guilty and deserving of punishment.” (Emphasis in original)<sup>133</sup>

## Courts and Historians

Whatever the historical truth might be regarding the Yugoslav wars, the reality is that it cannot be determined by judges or by lawyers because judges and lawyers pursue different goals and work differently than historians. Legal

<sup>132</sup> Combs, “Testimonial Deficiencies, pp. 272-3, adopts a somewhat ambiguous position, noting that some “recent legal and empirical scholarship . . . views the beyond-a-reasonable-doubt standard as a variable standard that signifies (and that should signify) different levels of certainty in different cases.”

<sup>133</sup> Levinson, “Responsibility for War Crimes,” pp. 109-111, argued that collective punishment “violates fundamental standards of fairness by being ‘overinclusive’” because not everyone can assumed to be unable to defend themselves successfully, a judgment shared by the Nuremberg Tribunal, which noted that , because “the declaration with respect to the organizations and groups, will . . . fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal . . . . *Membership alone is not enough to come within the scope of these declarations.*” [Emphasis added.] Even if one accepts the notion of collective guilt, not everyone can be equally guilty and a torts (civil law) analogy “could scarcely support collective reparation without proof of fault” in order to confirm liability.

arguments and judicial decisions are not historical analysis.<sup>134</sup> An argument by a prosecutor is not the equivalent of a historical analysis.<sup>135</sup> If lawyers were able to tell the truth about the past writ large, we could do away with historians and encourage lawyers, judges, and law professors to tell us the truth about what happened in history, although I suspect that few law schools or courts would welcome the burdens that such a mandate would entail, and I am fairly certain that their analyses would be as “unhistorical” as those of the ICTY’s prosecutors and judges.<sup>136</sup> Competing narratives are normal to a court, not to history, where the narratives are, or should be, complementary. If history were a criminal trial, then the reader would be the judge and historians the advocates for different interpretations of what historical actors have done. Historians can be advocates, particularly if they are defending a state or an institution or are constrained by an ideology or their role as an expert witness, but normally they are not engaged in a partisan struggle to appropriate truth but in a non-partisan effort to discover it.<sup>137</sup>

Like her colleagues, Carla Del Ponte is a lawyer, not a historian. She read the law, not history, and her concept of truth is therefore different from that of a historian.<sup>138</sup> Nonetheless, history is critical to establishing the context

<sup>134</sup> For some of the differences, see Rescher and Joynt, “Evidence in History and the Law,” pp. 561-578.

<sup>135</sup> For example, the lead prosecutor in *Prlić, et al.* cited passages from the transcript of a conversation in 1993 during which Franjo Tudman had said that, “It is time that we take the opportunity to gather the Croatian people inside the widest possible borders.” One of his interlocutors commented that, “Today, there is not a single Muslim in Stolac.” Tudman responded, “I know all that.” The prosecutor then announced that, “In those few sentences, in those short statements, Your Honours, you have it all, cause, effect, and knowledge. It is time that we take the opportunity; that’s the cause and intent. Today there is not a single Muslim in Stolac; that’s the effect. Tudjman’s statement: ‘I know all that,’ that’s the knowledge.” He accused the six defendants of being “responsible for unimaginable harm to countless victims” and evoked Robert Jackson, the Chief Prosecutor at Nuremberg by declaring that “the real complaining party . . . is civilization itself.” See ICTY Transcript, *Prlić et al.*, 26 April 2006, pp. 874, 906. This, of course, is rhetoric using isolated phrases and sentences to establish a JCE; it is not thoughtful or objective analysis, but an emotional appeal based on evidence carefully selected to support the prosecution’s case.

<sup>136</sup> Legal arguments and decisions are unhistorical because they are intended for unhistorical purposes, like the use of history to teach ‘lessons’ at staff colleges; Atkinson, *Knowledge and Explanation in History*, p. 123.

<sup>137</sup> Atkinson, *Knowledge and Explanation in History*, p. 136-7, notes three conditions for a historical analysis to have explanatory value—its assertions must be properly evidenced, its questions must be clearly conceived, and it must be related to current historical studies. Marc Bloch, *The Historian’s Craft* (New York: Vintage, [1953]), p. 10, taught that history must explain and guide by promoting “a rational classification and progressive intelligibility.” Fernand Braudel, *On History* (Chicago: University of Chicago Press, 1980), p. 177, put it more simply—history’s function is to understand what is lasting and what is provisional.

<sup>138</sup> Carla Del Ponte was born in Lugano, Switzerland in 1947. She earned an LL.M. in 1972 and then worked as a notary in Lugano. She began to practice law in 1975, became an investigating magistrate in 1981, and then a public prosecutor who focused on financial and white-collar crime. She worked with an Italian judge (Giovanni Falcone) to link those in the Italian drug

for the evidence that the prosecution presents, particularly in indictments in which the charges are persecution or joint criminal enterprise because these are not criminal acts but patterns of behavior and assumptions about foresight. The judgment by the Trial Chamber in *Tadić* noted that “[i]n order to place in context the evidence relating to the counts of the Indictment, especially Count 1, persecution, it is necessary to say something in a preliminary way about the relevant historical, geographic, administrative and military setting about which evidence was received.” (Emphasis added.) However, the judges sitting on the Trial Chamber could rely only on expert testimony, which tends to be skewed toward either the Defense or the Prosecution,<sup>139</sup> and they lacked a thorough knowledge of the historical literature, so they offered a naïve account of the history of Yugoslavia.<sup>140</sup> “For centuries,” they wrote, “the population of Bosnia and Herzegovina . . . has been multi-ethnic,” and until 1991 “the multi-ethnic population of Bosnia and Herzegovina apparently lived *happily enough together*,” if “*separately*.”<sup>141</sup> (Emphasis added.) Robert Donia, who has testified in numerous cases as an expert witness would certainly approve of this interpretation, but not all historians would do so.<sup>142</sup> Under the impression that the Partisans were “a largely communist and Serb group,” the Trial Chamber interpreted the massacre of “up to 100,000 Croat soldiers” by Partisans as the “revenge of the Serbs for Ustaša atrocities.”<sup>143</sup> According to the Trial Chamber, Yugoslavia’s dissolution was accompanied by civil war because the JNA, which it considered “a truly multi-ethnic national army” prior to 1991, had “intended to safeguard the integrity of the Serb people by protecting Serbs in predominantly Serb areas of Croatia.” War therefore “ensued between the JNA and the Croatian Serbs on the one hand and, on the other, the forces that

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trade to Swiss money launderers and was appointed Attorney General of Switzerland in 1994. She was appointed Chief Prosecutor for the ICTY and ICTR in August 1999 and reappointed in September 2003. Since 2008, she has been Swiss ambassador to Argentina. See “Former Prosecutors,” at <http://www.icty.org/sid/101>, consulted 18 Sept. 2011.

<sup>139</sup> Turković, “Historians in Search for Truth,” pp. 50-67, notes that expert testimony is often skewed, that defense and prosecution ‘shop’ for experts who will reinforce their case, and that the opinions of historians are often tentative. However, judges must render decisions, which makes the use of expert testimony problematic and the materials archives at the ICTY not always reliable.

<sup>140</sup> Gottschalk, *Understanding History*, p. 116, considered a thorough knowledge of the secondary literature crucial because it provides the historian with context, bibliography, data, and interpretations and hypotheses. He believed that ignorance of the secondary literature would result in ill-informed and impoverished history.

<sup>141</sup> ICTY *Tadić* judgment, Case No. IT-94-1-T, 7 May 1997, pp. 20-56.

<sup>142</sup> Compare Donia and Fine, *Bosnia and Hercegovina: A Tradition Betrayed*, to Mitja Velikonja, *Religious Separation and Political Intolerance in Bosnia-Herzegovina* (College Station: Texas A&M University Press, 2003) and the authors in Mark Pinson, ed., *The Muslims of Bosnia-Herzegovina. Their Historic Development from the Middle Ages to the Dissolution of Yugoslavia* (Cambridge, Mass.: Harvard University Press, 1996).

<sup>143</sup> ICTY *Tadić* judgment, Case No. IT-94-1-T, 7 May 1997, pp. 20-56.

the Croatian government could rally.”<sup>144</sup> (Emphasis added to both citations.) These are “facts” that some historians would certainly “contest,” making them somewhat unreliable guides to historical analysis. Among those the Trial Chamber cited as authoritative sources regarding Bosnia and Herzegovina’s most recent history was Ed Vulliamy, who nine years later told a different Trial Chamber that he was neither a “political” reporter nor a “war correspondent.” By then the judgment of the Appeals Chamber in *Tadić* was set in stone, JCE was an accepted legal doctrine, and the “facts” of the case had been recycled to provide historical background for other cases.

These excerpts suggest that judges occasionally prefer to use the passive voice than to hazard an opinion as to who initiated the Yugoslav wars and that the Tribunal is not a history faculty and its trials are not history seminars. It is an ad hoc court established by the UN Security Council, and its original mandate was to prosecute certain individuals for certain categories of international crimes, not to write history. However, as the Trial Chamber in *Tadić* noted, the ICTY needs historical analysis in order to set the context needed to demonstrate patterns of discrimination, without which it is difficult to prove the charge of persecution, and even more difficult to demonstrate the existence of joint criminal enterprises that span years and to establish, however imperfectly, the *mens rea* of their members.<sup>145</sup> Prosecutors have therefore called expert witnesses to inform the judges regarding pertinent historical events and their investigative teams have ferreted out historical evidence, including isolated excerpts from books written fifteen years before the crimes they supposedly explain took place. Much of this evidence has been contested by defense teams. Other evidence has also been contested and some remains sealed, including the identity of states and individuals that have discreetly aided the tribunal’s investigations.<sup>146</sup> The Appeals Chamber may have truncated the process of investigating the past by rendering its decisions, but its judgments, like the arguments by prosecution and defense lawyers and the judgments of the Trial Chambers, remain open to interpretation by historians, particularly given the disagreements between the Trial and Appeals Chambers.<sup>147</sup>

<sup>144</sup> ICTY *Tadić* judgment, Case No. IT-94-1-T, 7 May 1997, pp. 20-56. The judges apparently depended for their information on the JNA on a translation of Veljko Kadijević’s book (Exhibit 30). For Vulliamy, see ICTY transcripts, *Prlić*, pp. 1494-1526, 1538-87, esp. pp. 1671-88.

<sup>145</sup> Mundy, “Deconstructing Civil Wars,” p. 288, notes the difficulty of establishing a situational identity during a civil war because “identities can be one of the most ambiguous aspects of mass violence.”

<sup>146</sup> Meron, “Reflections,” p. 561; Leigh, “The Yugoslav Tribunal,” pp. 235-8, supported the ICTY but not the 10 August 1995 decision by the Trial Chamber trying Dušan Tadić to deny both the accused and his counsel the identity of certain witnesses. Leigh thought the ruling could undermine ICTY’s “credibility” because it was not consistent with either its Statute or international law and seriously harmed the defendant’s right to a “fair trial.” Mundy, “Deconstructing Civil Wars,” p. 288, notes the difficulty of establishing a situational identity during a civil war because “identities can be one of the most ambiguous aspects of mass violence.”

<sup>147</sup> The Appeals Chamber overturned judgments by Trial Chambers in *Blaškić*, *Kupreškić*, *Tadić*,



Despite having collected “millions of pages” of evidence, the Prosecution at the ICTY has not collected enough to satisfy every research question a historian might ask, nor even some of the obvious ones, such as the role that Slovenia played by insisting on independence in June 1991, before solid diplomatic support had been established for such a move,<sup>148</sup> or the responsibility borne by the European Community, the United States and the United Nations for not preventing the wars and then prolonging them through policies that seem to have been as *ad hoc* as the ICTY.<sup>149</sup> However, while the Tribunal’s judges have interpreted the law broadly and regularly rely on expert witnesses to explain the historical context of the indictments, they seem to be quite narrow regarding what they will allow defendants to discuss. For example, among the topics not discussed at the trial of Radovan Karadžić were the events surrounding the massacre at Srebrenica. Judge Kwon reminded the Serb leader that “the purpose of this trial is to judge whether you are guilty of charges as alleged in the indictment . . . not an opportunity for you to introduce a white book of all the events that took place at the time.”<sup>150</sup> Similarly, Judge Antonetti interrupted

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*Simić*, and *Stakić*, and revised them in *Krstić*. See Cassese, “The Proper Limits, pp. 111-115, 123, and Amann, “Prosecutor v. Kupreskic,” pp. 439-445.

<sup>148</sup> During a meeting with Croatia’s VDV (High State Council) on June 8, Franjo Tuđman proposed creating a working group to slow down the Slovenes, whose push for “disassociation” (*razdruživanje*) was creating “very serious problems” for Croatia. On June 15, he told Milan Kučan that Croatia was not ready to declare independence, and he repeated his warning to Kučan a week later. Nonetheless, on June 25, Slovenia declared its independence, and Croatia followed suit. See Lucić, *Stenogrami o podjeli Bosna*, vol. I, pp. 28-30; Viktor Meier, *Yugoslavia: A History of Its Demise* (London: Routledge, 1999), pp. 176-8; and Milan Kučan, Testimony, ICTY, Milošević Trial, 21 May 2003, consulted August 2006. Zdravko Tomac, *Predsjednik. Protiv krivotvorina i zaborava* (Zagreb: Slovo, 2004), pp. 82-5, notes that Tuđman and Kučan cooperated closely until June 25, 1991, but parted ways after meeting with EC mediators on Brioni. Franjo Tuđman, *Hrvatska riječ svijetu: Razgovori sa stranim predstavnicima* (Zagreb: Hrvatska sveučilišna naklada/Hrvatski institut za povijest, 1999), p. 327, said that in early 1991 when Slobodan Milošević had said that Slovenia was free to leave Yugoslavia, Milan Kučan had replied that he believed all Serbs should have the right to live in a single state.

<sup>149</sup> Borisav Jović, *The Last Days of the Socialist Federal Republic of Yugoslavia*. (October 22, 1996), [FBIS translation of *Poslednji dani SFRJ: izvodi iz dnevnika* (Beograd: Politika, Izdavačka delatnost, 1995)], 29 May 1991, wrote that he had told Jacques Santer and Jacques Delors, whom the EC had sent to mediate a solution to the crisis, that Serbs were frightened of both Kučan’s government in Slovenia and Tuđman’s government in Croatia, where Serbs had a “permanent memory” of the slaughter of “a million” Serbs during World War II. Jović said Stipe Mesić was unacceptable to head Yugoslavia’s collective presidency because he was supposedly an “advocate” of “the violent separation” of Croatia from Yugoslavia. Should Mesić be elected, the Serb leader warned that war was likely. Should Slovenia secede, he believed war was certain. “Under no circumstances,” he said, would Serbia accept a “loose confederation” because Serbian leaders could not “allow the Serb nation to be divided among several states” or become “a national minority” in a successor state. Delors reassured Jović that “from the very outset” the EC had supported a unified Yugoslavia in order to avoid “civil war.”

<sup>150</sup> Groome, “The Right to Truth,” p. 186. Nataša Kandić, “The ICTY Trials and Transitional Justice in Former Yugoslavia,” *Cornell International Law Journal* 38 (3) (2005): 789-792, esp. pp. 790-1, was distressed that Slobodan Milošević was using his trial to tell the truth as he saw it,

a line of questioning during the cross-examination of Edward Vulliamy to remind the defense counsel that the court was not a history seminar. “We are not here to investigate history,” he said, “no. We are here to decide on criminal responsibility.”<sup>151</sup>

Unlike Judges Kwon and Antonetti, a historian would be interested in the events surrounding the massacre, as were the members of Dutchbat, who bore part of the onus for the massacre,<sup>152</sup> and he might even argue that one cannot properly understand Karadžić’s actions without examining the larger context in which they occurred. He certainly would be curious to know if a journalist called as an expert witness to describe the situation in Bosnia and Herzegovina in the early 1990s knew anything about multi-national and multi-ethnic states. If he did not, then the historian might be tempted to view his testimony as at best well intentioned but poorly informed. He might still render a “moral” judgment, but not until he had as much data as he could realistically assemble and evaluate.

As Judge Antonetti noted, “to decide on criminal liability” is not “to investigate history” even though in some instances it seems very much the same thing.<sup>153</sup> What are obvious and important questions to a historian are often

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thus “. . . harming all efforts to have the truth and the need for justice accepted in Serbia as the principles of successful transition.” Kandić suggested that the court put “limits on Milošević’s attempts to propagandize his version of the truth.”

<sup>151</sup> ICTY Transcript, *Prlić et al.*, 9 May 2006, p. 1688.

<sup>152</sup> See C. Wiebes, *Intelligence en de oorlog in Bosnië 1992-1995. De rol van de inlichtingen veiligheidsdiensten*. (Amsterdam: Boom/ Nederlands Instituut voor Oorlogsdocumentatie, 2002).

<sup>153</sup> ICTY Transcript, *Milošević*, 11 Nov. 2003, pp. 28710-28833, esp. p. 28731, [http://www.icty.org/x/cases/slobodan\\_milosevic/trans/en/031111ED.htm](http://www.icty.org/x/cases/slobodan_milosevic/trans/en/031111ED.htm), pp. 28713-28714, for this exchange involving Mr. Milošević, Dr. Donia, and Judge May. (Emphasis added.)

Milošević [to Donia]: “So for you, Tadic is the most important case, where it was establish[ed] that what was happening in Yugoslavia at the time was an international armed conflict. Now, you as an historian, do you really and truly consider that what was going on within Yugoslavia was caused by the forceful secession of an international armed conflict, the forcible secession?”

Judge May: “*May I interrupt. This is really for the Court to determine.* That should be said first. But the witness can, of course, answer as to his interview. And perhaps the best way to deal with it, to say, if you would, Dr. Donia, first of all whether what’s been put to you is direct, that that is what you said, and then perhaps you’d like to amplify and clarify what you said.”

Dr. Donia: “Yes, Mr. President. I think I did indeed give an interview, and the essence of at least part of it was just conveyed by Mr. Milosevic. At that time, the Appeals Chamber decision in the Tadic case was relatively recent, and I viewed that as probably the most important conclusion to have come out of the Tribunal and accepted and accept its conclusions, again as an historian and not rendering a legal opinion, but that was my conclusion at the time and would still be the case, that that was an important step and one with which raw judgement [sic] I concur from a historical standpoint.”

Mr. Milošević: “Mr. Donia, I’m asking you as an historian precisely. *Don’t you feel that historical facts are being restructured here, for example, in the Tadic case?* And I don’t think that

obscure or irrelevant to someone focused on human rights,<sup>154</sup> to a prosecutor whose job is to prove that certain individuals committed certain atrocities,<sup>155</sup> or to a judge bound by a court's rules and procedures, circumscribed by prior decisions, and required to consider only the evidence presented at trial in order to decide whether the accused is guilty or innocent of the specific points of an indictment. Nor are the questions a historian might ask obvious to a judge who believes that the ICTY was established to bring justice to Muslim victims of Serb and Croat aggression in Bosnia and Herzegovina or that the Tribunal facilitates "peace through justice" and contributes "to the emergence of civil society as the anchor of real peace" by "fostering trust among the population and faith in the institutions of the State's government."<sup>156</sup>

These are political functions, not historical questions, and the evidence that Carla Del Ponte thinks so overwhelming that there can be no dissent regarding her concept of what constitutes truth is incomplete because it was gathered to convict certain people of certain types of crime, not to answer questions

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anybody knows about him in Yugoslavia, that the facts are being established by way of the fact that Serbia and Yugoslavia was involved in an international armed conflict."

Dr. Donia: "No, I do not believe that."

Mr. Milošević: "Tell me, please, Mr. Donia, do you know that this conflict emerged through the armed secession -- was caused by the armed secession of certain parts of what was once Yugoslavia and that it took place exclusively within Yugoslavia?"

Dr. Donia: "In my view, this conflict was caused by a determination on the part of you and others in the Belgrade leadership to prevent the peaceful secession of those republics from Yugoslavia as independent countries."

<sup>154</sup> Kandić, "The ICTY Trials and Transitional Justice," 789-90, applauds the High Representative for forcing the government of the Republika Srpska to withdraw its 2005 report concerning events in and around Srebrenica between 1992 and 1995 and appoint a new commission that included "Bosnian Muslim members nominated by the High Representative" which wrote what Kandić sees as "the first official truth brought out by a government in the region of the former Yugoslavia."

<sup>155</sup> Minna Schrag, "The Yugoslav Crimes Tribunal," pp. 192-3, argued that, "Only by prosecuting particular individuals, at all levels of responsibility, can we hope to persuade the victims that justice has been done." Since the ICTY could not prosecute all perpetrators, its "primary focus is on the leaders who were responsible for instigating and directing the crimes." Groome, "The Right to Truth," pp. 186-7, does not believe that the accused should be free to discuss what they consider relevant to their defense and sees the ICTY as a "forum" to be used by "victims" "to have their voices heard and to live on in history." He claims that the ICTY "has made an important contribution to both the right to the truth held by the families of victims and the broader societal truth about the conflict, and that "[a]ll aspects of the war have been examined in careful detail."

<sup>156</sup> McDonald, "The International Criminal Tribunal for the Former Yugoslavia," was the President of the Tribunal at the time she made these comments. Talbert, "The ICTY and Defense Counsel," pp. 975-986, notes that the focus of international criminal justice is "on the identification and punishment of the guilty," so the focus at the ICTY is on the Prosecutor, not the defense. The 1997 Code of Conduct applies only to defense counsel, not the UN employees on the prosecutorial staff.

regarding what happened in and around the successor states during the 1990s. Given the rules of procedure that protect states and witnesses cooperating with the ICTY, her truth can also be difficult to verify.<sup>157</sup> Judges are bound to consider only evidence admitted during the trial, including evidence related to the history of Croatia, Bosnia and Herzegovina, Slovenia, Serbia, Kosovo, and the defunct Yugoslav state, and most of this evidence comes from the testimony of witnesses, not from documents or disinterested historical research based on a thorough reading of the secondary literature. Indeed, a great deal comes from diplomats, EU monitors, UN officials, journalists, local politicians, “victims,” and members of UNPROFOR and UNCRO, all of whom were intimately involved in the wars about which they are testifying and none of whom runs even a minimal risk of being charged with anything more than a faulty memory.<sup>158</sup> The Tribunal’s judgments therefore may be final but they are not definitive, and

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<sup>157</sup> Leigh, “The Yugoslav Tribunal,” pp. 235-8, and “Witness Anonymity is Inconsistent with Due Process,” pp. 80-3, refined his argument regarding the damage done to defendants by the ruling in the *Tadić* case that the identity of certain witnesses could be withheld from the accused and his counsel in reply to Chinkin, “Due Process and Witness Anonymity,” pp. 75-9, who argued that “the accused’s right to know and confront prosecution witnesses is not absolute but may have to be balanced against other important interests.” Chinkin approved the Trial Chamber’s conclusion that if the victim had a real fear for her safety, which the alleged crime effectively confirmed, and if the witness was important to “proving” the terms of the indictment, then, should the judges decide that the witness was “trustworthy” and there was no evidence to the contrary, that the defense should be able to question the witness regarding “issues unrelated to identity and current whereabouts.” Leigh countered that without knowing the identity, including the witness’s whereabouts at the time the alleged crime was committed, the defense could not mount an effective cross-examination. Chinkin seemed most concerned to protect victims of “sexual abuse” while Leigh worried that if “generally adopted,” her position would “equate the hard-won constitutional rights of the accused, which are embodied in the International Covenant and derived from national judicial experience over many centuries, with victims’ rights, which are in the process of being defined.” He implied that this was too important a question to leave to “an international court of limited tenure.”

<sup>158</sup> Schrag, “The Yugoslav Crimes Tribunal,” p. 194, notes that in the first years of its existence, the members of the OTP agreed that “prosecutors be, and be perceived to be, fair” and so rejected suggestions by those outside the OTP that they “simply rely on hearsay” and “journalists’ reports” and “assume” that “because a particular person was in a position of authority” he “must have been responsible for atrocities.” Schrag’s view, and that of her associates, was that they “must be exemplary in our respect for the rights of the accused” and conduct trials “according to the highest standards of due process.” Precisely because prosecutors have “enormous power” to “affect peoples’ lives,” simply by indicting, she believed they act “wisely and fairly.” But with the introduction of the concept of joint criminal conspiracy in the 1999 *Tadić* appeal, the OTP appears to have become more interested in convicting defendants than in appearing to act “wisely and fairly.” Wald, “International Criminal Courts,” pp. 241-260, esp. pp. 244, noted that the OTP could appeal an acquittal and that there was “no ban against hearsay.” Wald “Punishment of War Crimes,” pp. 1119-1136, esp. pp. 1128-33, was bothered by the rejection of “certain rulings of the International Court of Justice”; disagreements with the ICTR; the practice of sentencing at the same session the verdict is delivered; recycling witness testimony; differences between testimony at trial and “earlier statements to investigators in the field”; the “UN bureaucracy”; and the apparently random selection of judges.

historians need to approach the materials that it has archived as he would any other historical archive—with both interest and skepticism.<sup>159</sup>

## **Wahrheit, Geschichte und der Internationale Strafgerichtshof für das ehemalige Jugoslawien**

### **Zusammenfassung**

Wie alle anderen Organisationen hat auch der Internationale Strafgerichtshof für das ehemalige Jugoslawien (ICTY) seine Geschichte und Kultur. Seine enge Verbundenheit mit den Vereinten Nationen und mit NATO-Mitgliedstaaten suggeriert, dass er mehr als ein Strafgerichtshof ist und dass seine ausgedehnte Interpretation des Gewohnheitsrechtes und besonders die Bildung des Konzeptes der kriminellen Vereinigung die Interpretation zulassen, ihn als einen Gerichtshof des Übergangsrechtes zu bezeichnen. Es scheint, dass die Vermehrung ähnlicher Gerichtshöfe in den letzten zwei Jahrzehnten auf die Bildung eines Modells schließen lässt, oder dass man diese Erscheinung mindestens als einen Vorgänger der zukünftigen Entwicklung innerhalb des internationalen Rechtes betrachten kann. Dieser Gerichtshof neigte auch dazu, die Politik der jugoslawischen Nachfolgestaaten und die Meinung derjenigen zu beeinflussen, die die Kriege im ehemaligen Jugoslawien kommentierten. Die meisten Leute, einschließlich der meisten Wissenschaftler könnten aber kaum das Konzept der kriminellen Vereinigung definieren oder die Zukunft dieses Gerichtshofes beschreiben. In diesem Artikel wird bewiesen, dass das Tribunal zu Haag seinen im Statut definierten Ankerplatz verlassen hatte und einen neuen Weg eingeschlagen hatte, der ihn zur Formulierung neuer rechtlichen Doktrinen führte, die das internationale Recht untergraben. Jene Wissenschaftler, die die von Anklägern gesammelten Materialien zitieren und

<sup>159</sup> Turković, "Historians in Search for Truth," p. 66, reaches similar, but not identical conclusions, and recommends that historians who wish to use the ICTY's records "develop a 'specific interpretative framework' on the basis of 'the specific code according to which the evidence has been constructed'" in order to be able "to decipher skewed sources of evidence" and "understand the procedures according to which the evidence was encoded in the judicial process and to detect different sources and types of inherent evidential distortions."

die vom Tribunal zu Haag getroffenen Urteile konsultieren, sollten das sehr vorsichtig machen, beziehungsweise sollten sich dessen bewusst sein, dass sich die Ziele und Funktionen der Übergangsgerichtshöfe von jenen der Strafgerichtshöfe wesentlich unterscheiden.