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Author(s): Richard Ashby Wilson

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Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia

Richard Ashby Wilson*

ABSTRACT

Scholars and legal officials have argued that courts should not attempt to write definitive historical accounts of mass human rights violations. Even if a court seeks to reconstruct a comprehensive history of a conflict, law and history use such different modes of thinking and inquiry that legal accounts are likely to be partial, deeply flawed, or just plain boring. These criticisms have appeared prominently in discussions of Holocaust trials in the domestic courts of Israel and France. Yet the Tadić and Krstić judgments written by the International Criminal Tribunal for the Former Yugoslavia (ICTY) are characterized by detailed contextualization of criminal acts and extensive historical interpretation. This Article asserts that the Tribunal's historical record represents a departure from previous courtroom accounts of mass atrocities for two reasons. First, because it is an *international* tribunal it has been less influenced by distorted narratives on national identity. Second, the ICTY has applied legal categories such as genocide which emphasize the collective nature of crimes against humanity, and this compels the court to situate individual acts within long-term, systematic policies.

* *Richard Ashby Wilson* is Gladstein Chair of Human Rights and Director of the Human Rights Institute at the University of Connecticut. He is the author of *Maya Resurgence in Guatemala* (1995, Oklahoma University Press) and *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-apartheid State* (2001, Cambridge University Press). He has edited or co-edited a number of collections on human rights; *Human Rights, Culture and Context* (1997, Pluto Press), *Culture and Rights* (2001, Cambridge University Press) and *Human Rights in Global Perspective* (2003, Routledge) and *Human Rights and the War on Terror* (2005, Cambridge University Press). Presently he is working on a long-term historical study of humanitarianism and international humanitarian law in the nineteenth and early twentieth centuries. He is on the editorial boards of *Critique of Anthropology*, *Journal of the Royal Anthropological Institute*, *Journal of Transitional Justice*, and the *Journal of Human Rights*.

I. GIVE US JUSTICE, NOT HISTORY

Now, in a country of laws, the whole law and nothing but the law must prevail.

Tzvetan Todorov¹

[L]aw is likely to discredit itself when it presumes to impose any answer to an interpretive question over which reasonable historians differ.

Mark Osiel²

This Article reevaluates the established view that administering justice is incompatible with the project of writing adequate historical accounts of mass human rights violations.³ Judgments handed down by the International Criminal Tribunal for the Former Yugoslavia⁴ (ICTY or Tribunal) challenge the long-held assumption in socio-legal scholarship that courts are inappropriate venues to construct wide-ranging historical explanations of past conflicts. The view that courts cannot generate acceptable histories of mass atrocities has two aspects that can be separate or linked in any given instance. First, there is the view expressed by legal positivists and some liberals that courts *should not* take it as their avowed responsibility to write or interpret history. Second, there is the outlook inspired by the Critical Legal Studies tradition that the law, even if it tries, *cannot* produce a comprehensive historical account of a period. This Article deals with each of these positions in turn.

One of the most influential advocates of the view that courts ought not to assume the responsibility of elaborating a comprehensive history of mass atrocities is Hannah Arendt. In *Eichmann in Jerusalem: A Report on the Banality of Evil* (*Eichmann in Jerusalem*), Arendt insists that the main functions of courts are to administer justice, understood as determining the guilt or innocence of an individual, and to punish the guilty.⁵ The law

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1. Tzvetan Todorov, *The Touvier Affair, in MEMORY, THE HOLOCAUST AND FRENCH JUSTICE: THE BOUSQUET AND TOUVIER AFFAIRS* 114, 115 (Richard J. Golsan ed., 1996).
 2. MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* 119 (1997).
 3. In writing this Article, I benefitted from discussions with Nina Bang-Jensen, Thomas Brudholm, Kamari Clarke, Tom Cushman, Robert Donia, Saul Dubow, James Gow and Zdenek Kavan, Maximo Langer, and the participants at talks and seminars at the City University of New York, the 2004 Law and Society Association Meeting, New School University, Yale University, and University College London. Special thanks are due to Paul Betts for his attentive reading. Research assistant Matt Dickhoff undertook valuable groundwork on the Tadić case and thanks to Joshua Jackson for his efforts in the final copy editing stages. All errors of fact or interpretation are my own.
 4. The full name of the Tribunal is the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991.
 5. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 253 (Rev. & Enlarged ed., 1964). For a useful discussion of Arendt's thinking on the nature human rights specifically, see Serena Parekh, *A Meaningful Place in the World: Hannah Arendt on the Nature of Human Rights*, 3 J. HUM. RTS. 41 (2004).

should not attempt to answer the broader questions of why a conflict occurred in a particular place and time and between certain peoples, nor should courts pass judgment on competing historical interpretations. To do so is self-defeating and undermines fair procedure and the right of the accused to due process—and with it the credibility of the law.

In 1961, the Israeli government sought to appropriate the trial of Nazi bureaucrat Adolph Eichmann for the purposes of Israeli nation building. The trial presented itself as an opportunity to theatrically reinforce the narrative of Zionism by situating the Holocaust within a two thousand year old history of Jewish suffering, and by signifying the collective guilt of all Germans. Arendt observes that “it was history that, as far as the prosecution was concerned, stood in the center of the trial,” and she quotes Prime Minister David Ben-Gurion, stating, “It is not an individual that is in the dock at this historic trial, and not the Nazi regime alone, but anti-Semitism through history.”⁶ Ben-Gurion’s declarations were echoed in the opening address of prosecuting attorney Gideon Hausner, who sought to dramatize Eichmann’s acts within a sweeping historical narrative of anti-Semitism through the ages, from the pharaohs of Egypt to modern Germany.⁷

Arendt famously objects to the prosecution’s subordination of justice to nationalist mythologizing, calling it “bad history and cheap rhetoric.”⁸ The fact that Hausner construed Eichmann’s crimes as crimes “against the Jewish people” detracted from seeing them as crimes “against humanity” at large. By portraying the Holocaust as the latest manifestation of a long history of anti-Semitism, the prosecutor neglected the distinctiveness of the Holocaust, its unprecedented industrial annihilation of Jews in Western Europe, and the new kind of criminal it produced—one who commits administrative genocide with the stroke of a pen.⁹ Arendt applauds the efforts of Presiding Judge Moshe Landau to steer the trial away from moments of dramatization and back to normal criminal court proceedings. Arendt reasons that the weight of atrocities revealed in the course of the trial undermined any obligations to dramatize the events further. Questions of history, conscience, and morality, she insists, were not “legally relevant.”¹⁰ Further, the requirement to administer justice foreclosed any efforts to answer wider historical questions by reference to Eichmann’s actions,

Justice demands that the accused be prosecuted, defended, and judged, and that all other questions of seemingly greater import—of “How could it happen?” and “Why did it happen?,” of “Why the Jews?” and “Why the Germans?,” of “What was the role of other nations?” . . . —be left in abeyance.¹¹

6. ARENDT, *supra* note 5, at 19.

7. *Id.*

8. *Id.*

9. *Id.* at 276–77.

10. *See id.* at 91.

11. *Id.* at 5.

The point of the trial was none other than to judge the guilt or innocence of one middle-aged man, Adolph Eichmann, with his scraggy neck, receding hair, nervous tic, poor eyesight, and bad teeth. Eichmann was not a towering figure of profound evil, rather he was a diligent, unreflective functionary driven only by the low motive of personal self-advancement within the Nazi bureaucracy. Despite his banality, “[j]ustice insists on the importance of Adolph Eichmann.”¹² The court must dispense justice for this one mediocre individual, and not attempt to write a definitive history of the Holocaust, however tempting that may be:

The purpose of the trial is to render justice and nothing else; even the noblest of ulterior purposes—“the making of a record of the Hitler regime which would withstand the test of history” . . . can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.¹³

At the end of her account, Arendt concludes that the overbearing pressures to construct a nationalist narrative in the courtroom had detracted from the pursuit of justice and violated principles of due process: the defense had been obstructed from calling witnesses, could not cross examine certain prosecution witnesses, and could not rely upon trained research assistants.¹⁴ The inequalities between the defense and prosecution were even more conspicuous than at the Nuremberg trials fifteen years earlier.

Since the early 1960s, Arendt’s “justice, not history” approach has resurfaced repeatedly in scholarly and media analyses of Holocaust trials. Its advocates have come from a number of different ideological positions, although liberals have been the most likely to urge courts to adopt a minimalist approach to moralizing commentary and historical interpretation. The Holocaust trials of Klaus Barbie, Paul Touvier, and Maurice Papon¹⁵ prompted many intellectuals and historians in France to oppose the trials’ (re)writing of history. Tzvetan Todorov, for example, is an outspoken critic of how the trials were overwhelmed by deliberations on French World War II history, the Resistance, collaboration, and national identity. Todorov argued that the successive trials of Paul Touvier in the 1980s and 1990s sacrificed justice for political concerns, and he balked at the judges’ opinion

12. *Id.*

13. Arendt here was quoting Nuremberg executive trial counsel Robert Storey. *Id.* at 253.

14. *Id.* at 221 *passim*.

15. On the Holocaust trials in France, see LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 185–96*, 207–10 (2001); *THE PAPON AFFAIR: MEMORY AND JUSTICE ON TRIAL* (Richard J. Golsan ed., 2000); Richard J. Golsan, *History and the “Duty to Memory” in Postwar France: The Pitfalls of an Ethics of Remembrance*, in *WHAT HAPPENS TO HISTORY: THE RENEWAL OF ETHICS IN CONTEMPORARY THOUGHT* 23 (Howard Marchitello ed., 2001); NANCY WOOD, *VECTORS OF MEMORY: LEGACIES OF TRAUMA IN POSTWAR EUROPE* 113–42 (1999).

in the Klaus Barbie trial: "what is especially worth criticizing . . . is not that they wrote bad history, it's that they wrote history at all, instead of being content to apply the law equitably and universally."¹⁶

II. THE POVERTY OF LEGAL HISTORIES

[T]he logic of law can never make sense of the illogic of extermination.

Lawrence L. Langer¹⁷

Whereas commentators such as Arendt and Todorov have asserted that dispensing justice requires courts to disavow the writing of history, there is a parallel position that even if history writing were desirable, the courts could not fulfill this task anyway, since law and history involve different modes of reasoning altogether.¹⁸ This view has been inspired less by the austere liberalism of early Arendt, and more by the Critical Legal Studies tradition.

A number of intertwined threads exist in the general critique of legal histories. Some are compatible and overlapping, and others are opposed and contradictory. The first, which this author shall term the "Incompatibility Theory," lays emphasis on the distinct *modus operandi* of law and history.¹⁹ Incompatibility Theory is advanced by a series of contrasts: legal thinking, at least ideally, is logical, whereas mass violence is irrational. Anglo-American law is adversarial, whereas historical analysis proceeds through academic discussion, and at least in principle, through cooperation between scholars. Law's epistemology is positivist and realist and it requires falsifiable and verifiable evidence, and typically relies upon a scientific, forensic approach to evidence.

History, on the other hand, is more pluralistic, open, and interpretative in both its methods and conclusions. Courts ultimately must embrace one entire account to the exclusion of all others, whereas historians often accept aspects of competing accounts. Historians live more comfortably with difference of opinion, and they often recognize that their evidence and conclusions are not always falsifiable or verifiable. Law is concerned with context only insofar as it impinges on the guilt or innocence of one individual. In trials, context is heavily circumscribed and is confined to

16. Todorov, *supra* note 1, at 120.

17. LAWRENCE L. LANGER, *ADMITTING THE HOLOCAUST* 171 (1995).

18. Although these two views are compatible and may be combined in the same analysis.

19. Aspects of this approach can be found in the writings of OSIEL, *supra* note 2; MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998). See also JOHN BORNEMAN, *SETTLING ACCOUNTS: VIOLENCE, JUSTICE, AND ACCOUNTABILITY IN POSTSOCIALIST EUROPE* 103 (1997) on the conflicting roles of historians and the justice system.

specific persons and their related criminal acts, whereas historians generally look for cultural context, social patterns, and shared public practices and beliefs. Historians often locate individual agency within a wider context, thus diffusing guilt throughout the social fabric.

In sum, courts seek the certitude which allows them to convict or acquit whereas historians, released from such imperatives, can often be found reveling in ambiguity, irony, and contingency. For these reasons, many historians are wary of becoming embroiled in trials of mass atrocities. Henry Rousso, Director of the Institute for Contemporary History, pleaded with the president of the Bordeaux Assizes Court when he was called as an expert witness in the 1997 trial of Maurice Papon:

In my soul and conscience, I believe that an historian cannot serve as a "witness," and that his expertise is poorly suited to the rules and objectives of a judicial proceedings. . . . The discourse and argumentation of the trial . . . are certainly not of the same nature as those of the university.²⁰

The Incompatibility Theory is closely aligned with a perspective captured in the old adage "Law is an Ass." In this view, law's unique conventions, special categories, and exceptional rules impel courts to write history on law's own, often counter-intuitive, terms rather than with regard to a more balanced or accurate approach to history. This can lead to all kinds of unintended consequences and occasionally absurd positions with regard to past events. For example, Richard J. Golsan derides the "*reducto ad absurdum* of the law itself" in the Holocaust trials in France and he claims that the trials of Paul Touvier were not just inadequate in their historical approach, but positively distorting.²¹ Because of the statute of limitations in French law, for Touvier's crimes to be tried the prosecution had to prove that they were crimes against humanity. In the earlier Klaus Barbie trial, the highest French judicial authority, the Cour de Cassation had ruled that the agents of war crimes had to act in the name of a State practicing a policy of ideological political hegemony.²²

In 1992, the Paris Court of Appeals concluded that Touvier was an agent of the wartime Vichy regime, but that Vichy did not exercise a "politics of ideological hegemony." Instead, Vichy was an inchoate puppet regime of "political animosities" and "good intentions." It was not a properly totalitarian regime, but was ideologically reliant upon the National Socialist government in Germany.²³ And yet many historians of France have argued

20. See, *Letter to the President of the Bordeaux Assizes Court*, in *THE PAPON AFFAIR*, *supra* note 15, at 193, 194.

21. Golsan, *History and the "Duty to Memory," supra* note 15, at 28.

22. *Id.* at 29.

23. *Id.* at 31.

just the opposite;²⁴ that the Vichy regime had a coherent anti-Semitic ideological project of its own, that Vichy participated energetically in the systematic extermination of Jews, and that its agents did in fact participate in a “politics of ideological hegemony,” and therefore that they could be tried for war crimes.

Yet since the earlier Barbie trial had declared that the Vichy regime was not autonomously totalitarian, Touvier’s crimes could not be considered “crimes against humanity.” The Court of Appeals made a “non-lieu” dismissal and Touvier was released. In order to secure a conviction in the subsequent 1994 trial, the prosecution was forced to distort the historical record and claim that Touvier was a German agent rather than a Vichy operative, so that his crimes could be linked to a regime that did wield “ideological hegemony.” Golsen comments ironically on this state of affairs that “[n]ow the duty to memory where *Vichy’s* crimes were concerned resulted in encouraging the court to do violence to the very historical realities that the duty to memory was intended to preserve and foreground in the first place.”²⁵ In sum, because law follows its own exceptional principles rather than those of historical enquiry, it often ends up reducing complex histories to a defective legal template for social reality, thereby producing distorted or even incorrect versions of history.

The third related thread in this critical tradition is the “Partiality Thesis” which contends that courts are too selective and limited in scope to reveal the “whole story,”²⁶ and they inevitably overlook the central elements of a conflict. What is law’s greatest asset according to Arendt is its greatest shortcoming according to these commentators. The Partiality Thesis is well known from critiques of the Nuremberg trials by historians such as Michael Marrus, who maintains that the trials did not adequately address the most important Nazi crime of all—the mass extermination of European Jews.²⁷

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24. See MICHAEL R. MARRUS & ROBERT O. PAXTON, *VICHY FRANCE AND THE JEWS* (reprint ed., 1995); Todorov argues that the Vichy leader Marshall Henri-Philippe Pétain was independently anti-Semitic and “signed some of the harshest racial laws of his time.” Todorov asserts that the Court’s exoneration of the Vichy regime was a feeble attempt to salvage a battered and threatened French national identity. Todorov, *supra* note 1, at 120.
25. Golsen, *History and the “Duty to Memory,” supra* note 15, at 32.
26. This approach is emblematic of legal anthropology, especially since Clifford Geertz’s pronouncement that, “Whatever it is the law is after, it’s not the whole story.” Clifford Geertz, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETATIVE ANTHROPOLOGY* 173 (1983). In the context of trials of mass atrocities, Alexandra Barahona de Brito, Carmen González-Enriquez and Paloma Aguilar write, “Trial ‘truths’ can be partial and can get lost in the morass of juridical and evidentiary detail.” *Introduction, in THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES* 26 (Alexandra Barahona de Brito, et al. eds., 2001).
27. DOUGLAS, *THE MEMORY OF JUDGMENT, supra* note 15, at 4 (citing Michael Marrus, *History and the Holocaust in the Courtroom, in VOM PROZESS ZUR GESCHICHTE: DIE JURISTISCHE UND HISTORISCHE AUFARBEITUNG DER SHOAH IN FRANKREICH UND DEUTSCHLAND* 28–29 (Gary Smith &

The trials left an incomplete and impoverished historical record because crimes against humanity were treated as secondary to crimes against peace and conspiracy to wage an aggressive war. Since there was little legal precedent for convicting the German defendants of "crimes against humanity," Nuremberg prosecutors played it safe and argued in such a way that crimes against humanity drew their legal sustenance from war crimes and the crime against peace.²⁸ This meant that the trial chamber paid much more attention to the German war of aggression than the planning and carrying out of a systematic program to eradicate European Jews.

The explanation of the Holocaust that did emerge was by many accounts incomplete and unsatisfying. In place of an explanation built upon German nationalism and anti-Semitism, the court identified war and "renegade militarism" as the motivating factors for the Holocaust.²⁹ Justice Robert H. Jackson did not consider the extermination of the Jews to be a primary Nazi objective in and of itself, but as a function of other war aims of the German High Command. Lawrence Douglas asserts that because the prosecution treated crimes against humanity as secondary to crimes against peace, it was forced to accept the Nazi portrayal of Jews as potential fifth columnists and saboteurs who had to be eliminated in the pursuit of a war of conquest.³⁰ A number of historians have concluded that the Nuremberg trials did not present us with an authoritative historical account of the massive atrocities committed by the high-ranking officials of Nazi Germany and the trials even distorted the record for future generations.³¹

Finally, the Article considers the critique that law produces *Boring History*. Trials and judgments are usually overly complex in plot and character, and excessively technical and detailed. After the first flush of press interest, trials for mass human rights abuses soon lose their popular appeal and are ignored by the public. In his book *Mass Atrocity, Collective*

Florent Rayard eds., 2001)). On the limits of representing the Holocaust in history, law and literature, see *PROBING THE LIMITS OF REPRESENTATION: NAZISM AND THE "FINAL SOLUTION"* (Saul Friedlander ed., 1992).

28. See KRIANGSAK KITTICHAISAREE, *INTERNATIONAL CRIMINAL LAW* 19 (2001).

Crimes against humanity were novel. . . . The Nuremberg Charter linked the prosecution of this genus of crimes to the "execution of or in connection with any crime within the jurisdiction of the Tribunal." In effect, the crimes [against humanity] had to be committed in execution of or in connection with war crimes or the crime against peace.

29. See Lawrence Douglas, *Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal*, 105 *YALE L.J.* 449 (1995).

30. *Id.* This is where the Partiality Thesis can overlap with the "Law is an Ass" critique.

31. See, e.g., MICHAEL R. MARRUS, *THE HOLOCAUST IN HISTORY* 4 (1987). Donald Bloxham argues that the Holocaust was largely absent in the Nuremberg trials. DONALD BLOXHAM, *GENOCIDE ON TRIAL: WAR CRIMES TRIALS AND THE FORMATION OF HOLOCAUST HISTORY AND MEMORY* vii *passim* (2001). For a defense of the Nuremberg trials' historical contribution, see DOUGLAS, *THE MEMORY OF JUDGMENT*, *supra* note 15, at 65–94.

Memory, and the Law, Mark Osiel sets out how meticulous procedure, albeit necessary to deliver a fair trial, often produces mind-numbingly monotonous stories.³² Although the Nuremberg trials now tower over all later discussions of international accountability, at the time they were seen as dreary and “failed to mesmerize a distracted world.”³³ This was not any garden variety boredom, but a “water torture of boredom” and “boredom on a huge historic scale.”³⁴

Law’s tiresome proceduralism is unfortunate not only in terms of the meager historical record it leaves behind, but also by virtue of the fact that it can leave courts vulnerable to unscrupulous defense lawyers and delegitimize the case in the eyes of the media and public. In French law, the accused does not have to swear an oath to speak the truth, and this creates a situation where “[o]nly the accused has the right to lie,” as sardonically noted by the presiding judge in the Touvier trial.³⁵ In the Klaus Barbie trial in France in the 1980s, the prosecution proceeded methodically and soberly to the point of tedium, whereas Barbie’s flamboyant defense counsel Jacques Vergès could engage in high rhetoric and scurrilous tactics, such as favorably comparing Barbie’s acts with those of military officials in the Algerian War of Independence.³⁶

Although this Article presents these critiques of law together, it is important to recognize that not all of them are compatible with one another. While the Partiality Thesis declares that law over simplifies, this clashes with the “Law is Boring” assertion that courts are excessively embedded in detail and minutiae. Both cannot be true simultaneously, so one must be careful to distinguish between the various threads of the critiques. More often than not, however, elements of these critiques reinforce one another; for instance, the Partiality Thesis and the “Law is an Ass” stance both emphasize how law’s unique methods of inquiry can lead to a distorted and myopic picture of events.

32. OSIEL, *supra* note 2, at 84–94.

33. Alex Ross, *Watching for a Judgment of Real Evil*, N.Y. TIMES, 12 NOV. 1995, at 37.

34. DOUGLAS, *THE MEMORY OF JUDGMENT*, *supra* note 15, at 11 (citing REBECCA WEST, *A TRAIN OF POWDER* 11 (1955), 15).

35. Henry Rouss, *What Historians Will Retain from the Last Trial of the Purge*, in *MEMORY, THE HOLOCAUST AND FRENCH JUSTICE*, *supra* note 1, at 163, 165.

36. See WOOD, *supra* note 15, at 117. A comparable incident in the Hague tribunal would be Radoslav Brdjanin’s defense lawyer John Ackerman asking a prosecution witness if the Serb’s detention of suspects “was any worse than the United States’ incarceration of al-Qaeda suspects in [Guantanamo Bay,] Cuba.” See Vjera Bogati, *Brdjanin Trial*, TRIBUNAL UPDATE, No. 298 (Institute for War & Peace Reporting, London) 27–31 Jan. 2003, available at www.iwpr.net/archive/tri/tri_298_7_eng.txt.

III. LAW AS NARRATIVE

Some scholars have come to challenge the long-standing view in socio-legal scholarship that courts leave an impoverished historical record of mass atrocities. Douglas re-examines these debates in his study of Holocaust trials, and he questions Marrus' criticisms of Nuremberg. Douglas accepts that although crimes against Jews did not constitute the central edifice of the Nuremberg trials, "[s]till, the extermination of the Jews was importantly explored and condemned at Nuremberg, especially as it was filtered through the freshly minted legal category of crimes against humanity."³⁷

Furthermore, according to Douglas, there were moments of high drama which served the ends of collective memory and pedagogy, including Jackson's opening statement, Jackson's cross-examination of Hermann Göring, testimonies from witnesses to the "Final Solution," the screening of the film *Nazi Concentration Camps*, and the exhibition of the gruesome shrunken head from Buchenwald.³⁸ Law's twin duties to both judge and represent mass atrocities are not irreconcilable according to Douglas, who argues that the need to reach a verdict incites and drives forward collective historical inquiry.³⁹

One could extend Douglas' observations by pointing out how law and history are inextricably linked and share similar methods and aims. Both weigh evidence and assess its facticity. Both utilize eyewitness testimony and search for corroborating evidence. Ideally, both show sensitivity to the context of individual actions and the individual's social environment. Expressed in the broadest terms, both explore the details of the particular while keeping their eye on the general implications of the case in question. Like it or not, critics of law must accept that there has been a global trend for ensuring greater accountability for mass crimes, and national and international courts and commissions are increasingly the places of choice for victims, perpetrators, and bystanders to tell their stories about past atrocities.

This line of argument is further reinforced by entertaining the theory that legal argument does not simply rely upon the presentation of facts, but always expresses the facts in a chronological and narrative form.⁴⁰ In the

37. DOUGLAS, *THE MEMORY OF JUDGMENT*, *supra* note 15, at 6.

38. *Id.* at 19–21.

39. *Id.* at 4–7; 260–61.

40. On law and narrative see LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds., 1996); JOHN M. CONLEY, & WILLIAM O'BARR, *JUST WORDS: LAW, LANGUAGE, AND POWER* (1998); Brenda Danet, *Language in the Legal Process*, 14 L. & Soc'y Rev. 445 (1980); RONALD DWORKIN, *LAW'S EMPIRE* (1986); Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 LAW & Soc'y Rev. 197 (1995); Bernard S. Jackson, *Narrative Theories and Legal Discourse*, in *NARRATIVE IN*

courtroom, the parties arrange facts sequentially in order to construct a plausible narrative, and in so doing assert a causality between acts, facts, and events. The “narrative coherence” of a legal argument—defined as “a test of truth or probability in questions of fact and evidence upon which direct proof by immediate observation is unavailable”⁴¹—is crucial in the formulation of a truthful account and its ability to persuade the court. Ronald Dworkin has made such social constructionist and “narrative theories” of law widely accepted, arguing that legal reasoning is not unique but involves semiotic practices found in literary criticism. In hard cases, legal thought is a holistic exercise, as based in social norms as it is facts, which reveal “facts of narrative consistency.”⁴²

There is significant evidence to support this theory, since even a cursory examination of judgments reveals that courts, especially when dealing with human rights violations committed on a massive scale, cannot escape interpreting history. Whether in a domestic trial or an international criminal courtroom hearing a genocide case, legal officials are regularly placed in the position of having to pronounce upon questions of historical import and to choose between competing historical explanations. In a recent example from the Milošević trial, the ICTY has no choice but to decide whether Milošević is justified in his assertion that he was only President of Serbia and therefore bears no responsibility for war crimes and crimes against humanity committed in Bosnia-Herzegovina (Bosnia), Kosovo, and Croatia. This general decision is likely to be based on more concrete questions such as whether the Bosnian Serb army was truly independent from Belgrade and even more specific questions, such as whether Franko Simatović’s “Red Berets,” who committed a number of mass violations in Bosnia in 1992, were a random collection of independent paramilitaries, or an integrated unit within the Serbian military command structure headed by none other than President Slobodan Milošević.⁴³

CULTURE: THE USES OF STORYTELLING IN THE SCIENCES, PHILOSOPHY, AND LITERATURE 23 (Christopher Nash ed., 1990); Laura Beth Nielsen, *Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment*, 34 L. & Soc’y Rev. 1055 (2000); NARRATIVE AND THE LEGAL DISCOURSE (David Ray Papke ed., 1991); Scott Phillips & Ryken Grattet, *Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law*, 34 L. & Soc’y Rev. 567 (2000).

41. Jackson, *supra* note 40, at 27 (citing Neil MacCormick, *Coherence in Legal Justification*, in *THEORIE DER NORMEN, FESTGABE FÜR OTA WEINBERGER ZUM 65 GEBURTSTAG* (W. Krawietz et al. eds., 1984)).
42. Ronald Dworkin, *No Right Answer?*, in *LAW, MORALITY, AND SOCIETY* 58, 78 (P.M.S. Hacker & J. Raz eds., 1977). See also DWORKIN, *LAW’S EMPIRE*, *supra* note 40, at 228–38.
43. Mirko Klarin, *Milosevic and the Red Berets*, TRIBUNAL UPDATE, No. 295 (Institute for War & Peace Reporting, London) 6–10 Jan. 2003, available at www.ivpr.net/index.pl?archive/tri/tri_295_1_eng.txt.

IV. TRIALS AS INSTRUMENTS OF NATION BUILDING

While Arendt and Todorov seem justified in questioning whether courts should indulge in historical forays on the grounds that doing so might undermine due process, neither reflected sufficiently on why domestic courts deliberating on mass crimes often degenerate into spectacle, and not only in Israel or France. In the most general terms, justice is compromised because history occupies a central place in nationalist myth-making and because domestic trials become a battlefield over the official history and future identity of a country.⁴⁴ In historical and political controversies, domestic courts are manifestly swayed by the governments and elites that direct, supervise, administer, and fund them.⁴⁵ One need only think of the French Holocaust trials taking place during the tenure of President François Mitterrand, with his contentious record as a Vichy bureaucrat. The interests and prerogatives of these elites, of which the judiciary can usually be considered a part, encroach upon the courts' independence, and this often results in impoverished representations of past atrocities. In the Holocaust trials, French courts have blown with the political winds rather than holding fast to legal procedure and principle. Political pressures led the Court of Appeal in the 1985 Barbie trial to retroactively redefine crimes against humanity to fit the crime, and the criminal.⁴⁶

The politicization of history becomes more comprehensible if one views domestic courts as an extension of a post-authoritarian government's nation-building project. Post-conflict governments selectively filter the past to invent a new official history and to construct a new vision of the nation. These regimes manufacture legitimacy internally to defuse and delegitimize political opponents, and externally to assert the government's human rights credentials to the international community. They attempt to create a new shared "collective memory" (as in Israel), or to salvage the reputation of state institutions and officials tarnished by their authoritarian past (as in France). The quest for legitimacy which subordinates justice and history to nation building applies not only, as has been shown, to trials in "new

44. In a further nuance to this argument, a number of articles in a special edition of the *Journal of Modern Italian Studies* Vol. 9, Issue 3 (2004) argued that the national mythology of the "good Italian" (*Italiani brava gente*) has positively prevented significant trials against Italians involved in the Holocaust and the fascist war. See, e.g., Filippo Focardi & Lutz Klinkhammer, *The Question of Fascist Italy's War Crimes: The Construction of a Self-Acquitting Myth (1943–1948)*, 9 *J. OF MOD. ITALIAN STUD.* 330 (2004).

45. Nor are truth commissions exempt from such pressures and influences. See RICHARD A. WILSON, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* 13–30 (2001) on the nation-building role of the South African Truth and Reconciliation Commission.

46. Golsan, *History and the "Duty to Memory," supra* note 15, at 29–30.

nations," but is also relevant to understanding the place of trials in long-established and democratic regimes, such as France. For Golsan, the French government manipulated the courts as an effort to shore up its authority in a context of diminishing state power, globalization,⁴⁷ and one might add, the political and economic consolidation of the European Union.

At the end of *Eichmann in Jerusalem*, Arendt noted the considerable pressures on the Jerusalem court to succumb to a nation-building rhetoric, and she concluded that Israel was not the best place to try the Nazi war criminal. Instead, Israel should have lobbied for an international criminal court that could adhere assiduously to due process and dispense justice neutrally.⁴⁸ This is a prescient conclusion, given that it took more than forty years to set up the first truly "international" courts to try individuals for crimes against humanity. Despite the frequency of mass atrocities against internal civilian populations committed during the Cold War,⁴⁹ it was not until after the fall of the Berlin Wall that the UN Security Council could muster the political will to invoke Chapter VII of the UN Charter⁵⁰ and establish international courts to hold officials accountable for mass violations occurring within sovereign states.

The first of these courts was the ICTY, established in 1993.⁵¹ The International Criminal Tribunal for Rwanda (ICTR) was created shortly thereafter in 1994,⁵² and it shared a prosecutor with the ICTY until 2003. These are *ad hoc* courts set up for a temporary period and for crimes committed within a confined geographic area.⁵³ A permanent International Criminal Court with jurisdiction over war crimes, crimes against humanity, genocide, and aggression was inaugurated in 2003.

One obvious dissimilarity between the war crimes trials of Eichmann, Barbie, and Papon considered above and those conducted by the United Nations-administered ICTY, is that the former are constituted within the institutional framework of the nation-state, and the latter are not. Although

47. *Id.* at 36–37.

48. ARENDT, *supra* note 5, at 270–72.

49. On genocides during the Cold War, see SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 87–245 (2002); MARTIN SHAW, WAR AND GENOCIDE: ORGANIZED KILLING IN MODERN SOCIETY (2003); ERVIN STAUB, THE ROOTS OF EVIL: THE ORIGINS OF GENOCIDE AND OTHER GROUP VIOLENCE 188–231 (1989).

50. U.N. CHARTER arts. 39–51, signed 26 June 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (entered into force 24 Oct. 1945).

51. The ICTY was established pursuant to UN Security Council Resolutions 808 and 827 in 1993. See S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993); S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993).

52. S.C. Res. 955, U.N. SCOR, 3453rd mtg., U.N. Doc. S/RES/1994.

53. Since 1999, three "hybrid courts" which are part domestic and part international (United Nations), have been set up in Kosovo, Sierra Leone, and East Timor. See Laura A. Dickinson, *Notes and Comments: The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003).

international courts and commissions are administered by a bureaucracy and certainly subjected to political pressures (the subject of another Article altogether), their bureaucracy is not beholden to a specific nation-state. Several things follow from this observation. The state is not placed in a situation of a conflict of interest. It is not being asked to judge itself and thus make itself vulnerable to law suits or claims for reparation from victims. Next, international prosecutors have significantly more discretion in their priorities and in the direction of their cases than their national counterparts. International tribunals are not bound by the laws or legal conventions of nation-states and have been granted primacy and concurrent jurisdiction with the courts of states. International tribunal staff have to develop rules of procedure, for instance relating to the legality of arrest methods and a witness protection program, independent of the traditions of national criminal jurisdictions.⁵⁴ This can be debilitating as well as invigorating: for instance, the ICTY prosecution did not have access in early cases to state power for arrest of suspects and search and seizure of evidence. The might of the state is not behind prosecutions against former state officials; indeed in the trials of Duško Tadić and Radislav Krstić, the Yugoslav state in Belgrade was solidly behind the defense.

As a result of its autonomy from nation-states, the ICTY has resisted being drawn into constructing facile collective representations (the suffering of all Bosnian Muslims, the guilt of all Serbs, etc.) necessary for nationalist mythology. In contrast to defense counsel, tribunal prosecutors have studiously avoided asserting collective guilt or innocence. Transnational courts of justice are not as easily subordinated to *national* political interests as domestic criminal justice systems, although of course this is not to say that they are free of pressure from political interests. This has partly to do with their transnational constitution—they are administered and funded by the United Nations, their staff are made up of citizens of many countries with no stake in the conflict, and, in the case of the ICTY and ICTR, they are situated outside of the countries where the crimes took place. It also results partly from their more restricted mandate to do justice—they do not seek to create and image of the past which can reconcile divisions or heal the wounds of the nation. The Statutes of the ICTY and the ICTR do not contain any mention of a mandate to reconcile a nation or to build a national identity.⁵⁵ Unlike the Eichmann and French Holocaust trials, these courts

54. See Gideon Boas, *Developments in the Law of Procedure and Evidence at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court*, 12 CRIMINAL LAW FORUM 167 (2001).

55. See *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827

have been separated from the wider project of nation building in the aftermath of authoritarianism.

Since the state is distant and therefore less able to influence or even interfere in trials, one might expect the historical perspectives of international tribunals to differ from the patchy and impoverished documentary record of national trials. One might also hope that international tribunals would have the impartiality and freedom to explore in greater depth the genocidal policies of past regimes. The rest of the Article examines these expectations with regard to the Tadić and Krstić judgments of the ICTY in the Hague.

This Article maintains that the historical forays of the ICTY are qualitatively distinct from their national counterparts in that the Tribunal has undertaken historical documentation without being lured into futile debates about national identity.⁵⁶ These ICTY judgments contain extensive historical interpretation of the causes of the conflict and they exhibit a heightened concern with the intentions of perpetrators of crimes against humanity and the place of discrete acts within a systematic policy of persecution and genocide against Muslims in Bosnia. The Tadić and Krstić Judgments,⁵⁷ as will be shown, occupy the middle ground between minimalism on the one hand and nationalist dramaturgy on the other. Their approach to historical interpretation forces a reconsideration of the long-standing view that the pursuit of justice and the writing of history are inherently irreconcilable.⁵⁸

(1993); *Statute of International Tribunal for Rwanda*, S.C. Res. 955, U.N. SCOR, 3453rd meeting, U.N. Doc. S/RES/955 at 3, annex (1994).

56. This argument also applies to the judgments of the International Criminal Tribunal for Rwanda. Space does not allow me here to develop this point, but I would point the interested reader to two early and pivotal ICTR cases: *Prosecutor v. Akayesu* (Case No. ICTR-96-4-T), Judgment of Trial Chamber, 2 Sept. 1998; *Prosecutor v. Kambanda* (Case No. ICTR 97-23-S), Judgment of Trial Chamber, 4 Sept. 1998 [hereinafter *Akayesu Judgment*].
57. *Prosecutor v. Tadić* (Case No. IT-94-1-T), Judgment of Trial Chamber, 7 May 1997 [hereinafter *Tadić Judgment*]; *Prosecutor v. Krstić* (Case No. IT-98-33-T), Judgment of Trial Chamber, 2 Aug. 2001 [hereinafter *Krstić Judgment*].
58. Nevertheless, they do exhibit some of the traditional flaws indicated by some critics of law, particularly with regard to victims' testimony. See Marie-Bénédicte Dembour & Emily Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 *EUR. J. INT'L L.* 151 (2004); Rosalind Dixon, *Rape as a Crime in International Humanitarian Law: Where to from Here*, 13 *EUR. J. INT'L L.* 697, 705 (2002); MINOW, *supra* note 19.

V. DOCUMENTING CRIMES AGAINST HUMANITY AT THE ICTY

A trial at the ICTY is usually more akin to documenting an episode or even an era of national or ethnic conflict rather than proving a single discrete incident.

ICTY Judge Patricia Wald⁵⁹

The ICTY was established by the UN Security Council in 1993, two years after the Balkans conflict started, and at the height of the war in Bosnia.⁶⁰ It was seen by many observers as too little too late, and as an attempt by the United States and European countries to assuage their guilt for standing by while genocide occurred once again in Europe. Although Europeans had previously declared “Never Again” after the Holocaust, initially at least the powerful countries of Europe were profoundly unmoved to intervene militarily to end the bloodshed in Bosnia.⁶¹ Even after the Tribunal was established, there was little to provide the necessary coercive backing to arrest those indicted. One North Atlantic Treaty Organisation (NATO) official was widely quoted as saying that, “[a]rresting Karadžić was not worth the blood of one NATO soldier.”⁶² For these reasons, the ICTY was received initially as a face-saving device, an ad hoc measure which would not fundamentally alter the balance of power in the region away from the nationalists, nor bring a large measure of accountability to the war-torn Balkans.⁶³

The Tribunal’s critics seemed to be proved correct during the first years of the ICTY’s work. The Tribunal proceeded at the glacial pace characteristic

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59. Patricia M. Wald, *To “Establish Incredible Events by Credible Evidence”: The Use of Affidavit Testimony in Yugoslav War Crimes Tribunal Proceedings*, 42 HARVARD INT’L L.J. 535, 536–37 (2001) [hereinafter Wald, *To “Establish Incredible Events”*].
 60. Generally on the ICTY see Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia?*, 20 HUM. RTS. Q. 737 (1998); GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 206–75 (2000); Boas, *Developments in the Law of Procedure and Evidence*, *supra* note 51; Daryl A. Mundis, *From “Common Law” Towards “Civil Law”: The Evolution of the ICTY Rules of Procedure and Evidence*, 14 LEIDEN J. INT’L L. 367 (2001); Wald, *To “Establish Incredible Events,” supra* note 59; Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL’Y 87 (2001); JOHN HAGAN, *JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL* (2003) (providing an excellent view of the day-to-day operations of the Tribunal).
 61. *On Bosnia*, see POWER, *supra* note 49, at 247–327.
 62. GEOFFREY ROBERTSON, Q.C., *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 286 (1999).
 63. On social science accounts of the origins of the war in the former Yugoslavia see Ivo Banac, *The Fearful Asymmetry of War: the Causes and Consequences of Yugoslavia’s Demise*, 121 DAEDALUS 141 (1992); Tone Bringa, *Averted Gaze: Genocide in Bosnia-Herzegovina, 1992–1995*, in ANNIHILATING DIFFERENCE: THE ANTHROPOLOGY OF GENOCIDE 194 (Alexander Laban Hinton ed., 2002); Thomas Cushman, *Anthropology and Genocide in the Balkans*, 4 ANTHROPOLOGICAL THEORY 5 (2004).

of legal institutions, with few indictments and arrests. The first convictions were four years in coming, and these concerned low- or middle-order operatives. By early 2000, only three senior officials were in custody in the Hague. The arrest and trial of higher level authors of the conflict such as Milošević seemed as far away as ever, and some skeptical commentators predicted that they would never be tried.⁶⁴ Yet once the indictments and convictions started accumulating, the ICTY proved more assertive and successful than early signs suggested, and a number of high-level perpetrators were indicted, arrested and put on trial.

A. The Tadić Judgment

Day 1 of Tadić Trial, 7 May 1996.

PRESIDING JUDGE [MCDONALD]: Is it possible for you . . . to tell us, starting from the beginning and taking us to the end, the changes in terms of the ethnic composition in different areas, but beginning from the 14th Century? Is that possible for you to do? Maybe you do not even understand my question because I am not much of an historian, although I actually majored in history . . . but American history.

[DR. JAMES GOW, EXPERT WITNESS]: Overall I think the purpose of the evidence that I am attempting to give is to set the events of 1991 and afterwards in their military-political context. In order to do that I have been reviewing some of the factors which went to create the Yugoslav states which dissolved in 1991, and that has meant making reference to not only the 14th Century but the 4th Century . . . to give a sense of the way in which the territories which went to make up the federation which dissolved came to be.⁶⁵

The ICTY's first judgment was handed down on 7 May 1997, firmly establishing the jurisdiction of the Tribunal and precedents of both a legal and historical nature. The Duško Tadić case represented the first conviction for crimes against humanity by a truly international tribunal⁶⁶ and it established the important legal precedent that a single act could be considered a crime against humanity if it is linked to a systematic program of persecution of a population.

In addition, the Tribunal wrote an authoritative account of the origins of

64. *E.g.*, Michael E. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 510–11 (1999).

65. *Prosecutor v. Tadic* (Case No. IT-94-1-T), Transcript [hereinafter *Tadic Transcript*], 7 May 1996, at 123, lines 23–25; *id.* at 124, lines 1–16.

66. The Nuremberg trials were multinational in formation and composition and were established by the victors in World War II.

the conflict in the Balkans and it detailed the systematic policy of persecution of Bosnian Muslims by Serb political and military authorities in Bosnia. This account was much more comprehensive in scope than anything seen the domestic trials of mass atrocities considered thus far. Given the broad purview of the Tadić judgment, historian and ICTY expert witness Robert Donia comments, “[t]hese chambers have produced histories that are not only credible and readable, but *indispensable* to understand the origins and course of the 1990s conflicts in the former Yugoslavia.”⁶⁷

The forty-year-old Duško Tadić was convicted on eleven counts of crimes against humanity, and acquitted for lack of evidence on a further twenty counts, which included mass executions of Muslims and violations of the Geneva Conventions.⁶⁸ Since it was the Tribunal’s first judgment, the court had to deliver a convincing and comprehensive account of the conflict in Bosnia which could provide the foundations for subsequent trials.

Yet the historical emphasis in the Judgment also resulted from reasons specific to the Tadić case. In some ways, it was fortunate that the Tribunal had not initially apprehended and tried a high ranking politician or military official with command responsibility. Tadić was not even a soldier in the Yugoslav National Army (JNA). When Prosecutor Richard Goldstone requested a hearing to extradite Tadić from Germany, the Tribunal judges questioned whether Tadić was too minor a figure to warrant the tribunal’s attention, given that he did not hold a position of “command and control” of Bosnian Serb soldiers.⁶⁹ Tadić was a low-ranking thug, a part-time traffic policeman in Prijedor district and a freelance torturer at the Omarska camp where mass violations had taken place against the local Muslim population in 1992. He was ordinary, like many of the Bosnian Serb men who participated in a program of ethnic cleansing out of a sense of nationalist duty.

Another potential weakness in the prosecution case against Tadić concerned the extent of his crimes. His criminal acts against local Muslims and Croats occurred in a localized area over the period of a few months from May to August 1992, and defense counsel argued that they were not widespread or systematic in and of themselves. The category of crimes against humanity rejects random and individual acts for private gain. All of the legal conventions and precedents, from the Nuremberg trials to statements of the International Law Commission, agree that the violations

67. Robert Donia, *Encountering the Past: History at the Yugoslav War Crimes Tribunal*, 11 J. INT’L INSTITUTE 2 (2004).

68. Tadić Judgment, *supra* note 57, ¶ 693–765.

69. HAGAN, *supra* note 60, at 72.

must be “widespread,” or “systematic” and part of a concerted “policy.”⁷⁰ In the absence of participation in a widespread or systematic policy of persecution or extermination, the crimes were common crimes, to be tried in Yugoslav domestic courts and not at the Hague.

For Tadić’s crimes to be considered crimes against humanity, the court had to be convinced that his individual crimes were a) part of a wider program or policy of “persecution on political, racial and/or religious grounds”;⁷¹ and b) that he committed these acts with *mens rea* or criminal intent, in full knowledge and awareness that the acts were part of a wider program of persecution.⁷² This required the prosecution to prove *mens rea*, or an awareness of a wider policy of persecution or extermination. If this intention is not demonstrated, the criminal acts, heinous though they may be, remain disconnected from the wider policy. They are individual crimes that do not add up to persecution. The Tadić Judgment refined this matter in the following way:

Thus if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his acts for purely personal motives completely unrelated to the attack on the civilian population, that is sufficient to hold him liable for crimes against humanity. Therefore the perpetrator must know that there is an attack on the civilian population, know that his act fits in with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict.⁷³

The role of context is therefore crucial in trials of crimes against humanity, and the Tadić’s marginal position in a wider policy of persecution of Bosnian Muslims amplified further the need for contextualization. These legal motivations impelled the Tribunal to place contextual and historical interpretation at the center of the trial and the subsequent written judgment. While there was a compelling need to grasp the historical complexities of the region, none of the judges were knowledgeable about the Balkans before they arrived at the Hague. As Balkans historian and ICTY expert witness Donia writes: “When the trials began, most judges were wholly unfamiliar with the history and culture of the region in which the alleged crimes were committed.”⁷⁴ The ICTY’s judges, each appointed by the UN

70. See Tadić Judgment, *supra* note 57, ¶ 645–49 (quoting *Report of the I.L.C. on the Work of Its Forty-Ninth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, at 76, U.N. Doc A/49/10 (1994); *Report of the International Law Commission on the Work of Its Forty-Third Session*, U.N. GAOR, 46th Sess., Supp. No. 10, at 265, U.N. Doc. A/46/10 (1991)) for a discussion of the widespread and/or systematic nature of crimes against humanity.

71. *Id.* ¶ 44.

72. See ROBERTSON, *supra* note 62, at 315.

73. Tadić Judgment, *supra* note 57, ¶ 659.

74. Donia, *supra* note 67, at 1.

Secretary General, come from over thirty countries, and none from the former Yugoslavia.⁷⁵ The judges in the Tadić trial were from the United States (Presiding Judge McDonald), Australia (Judge Stephen) and Malaysia (Judge Vohrah), and in the eyes of the prosecution they desperately needed an introduction to the history of the region.

On the first day of the proceedings, the prosecution called as their first witness British political scientist and military historian Professor James Gow who testified for nearly two days and was cross-examined for another one and a half days. Although his later testimony became detailed and very complex, his initial testimony began in the most introductory and straight-forward fashion imaginable. As a bored Duško Tadić removed the headphones bringing him a simultaneous Serbian translation, Gow carefully explained to the judges that the Socialist Federal Republic of Yugoslavia comprised six republics and two autonomous provinces, and he produced a number of maps showing the ethnic composition of provinces in the 1981 and 1991 censuses. He described the topography of the country, the languages spoken and Latin and Cyrillic scripts used, and he outlined the different histories of Catholicism and Islam and the Greek and Russian Orthodox Churches over the centuries.⁷⁶ Tadić was not the only one bored by the prosecution's extended history lesson. Court Television, which had a negotiated a contract to show the entire Tadić proceedings, ended their live coverage after only a month of the trial.

Defense Counsel also produced expert witnesses, such as American cultural anthropologist Robert Hayden, who asserted that former Yugoslav President Tito's 1974 Yugoslav Constitution⁷⁷ did not refer to separate sovereign nations, but instead denoted separate ethnic groups and thus the Yugoslav conflict was an internal conflict rather than an international one.⁷⁸ This view, if adopted, would have utterly undermined the basis for an international court. In this way, the very jurisdiction of the Tribunal hinged on a question of historical interpretation; whether the 1974 Constitution, in granting the right to self-determination of peoples (*narod*) referred to "ethnic groups" [the Titoist, Belgrade version] or to sovereign "nations." In the end, Gow's account prevailed as it was held by the court to be the most supported by the evidence.⁷⁹ The history up to World War I is taken entirely from Gow's testimony and significant elements of subsequent history as

75. See *id.* For further information on the ICTY, see International Criminal Tribunal for the Former Yugoslavia, ICTY at a Glance, General Information, available at www.un.org/icty/glance/index.htm.

76. See Tadić Transcript, *supra* note 65, 7 May 1996, at 80–89.

77. S.F.R.Y. CONST. (1994).

78. See Tadić Transcript, *supra* note 65, 10 Sept. 1996, at 5594–97.

79. Tadić Judgment, *supra* note 57, ¶ 65.

well, including the role of President Tito in suppressing nationalist tensions, the significance of the 1974 Yugoslav Constitution, and finally the organization and ethnic composition of the Yugoslav People's Army in the 1980s and early 1990s.⁸⁰

The prominent role of expert witnesses in the Tadić case and in the early years of the Tribunal resulted not only from the particular needs of the case, but was also an outcome of the Rules of Procedure and Evidence of the ICTY. Although the Tribunal was not as strictly tied to oral evidence as at the Nuremberg Trials, ICTY Rule 90(A) stated a clear preference for oral testimony in the Trial Chamber rather than written testimony.⁸¹ Further, the Rules did not establish criteria of admissibility of pre-trial written dossier evidence.⁸² In the Tadić Judgment, the Tribunal makes clear that the section on historical background relied (as at Nuremberg) "exclusively upon the evidence presented [orally] before this Trial Chamber . . . and no reference has been made to other sources or to material not led in evidence."⁸³

The emphasis on extended oral testimony on historical matters by expert witnesses was central to the construction of the Tribunal's history, and this stands in contrast to the established practices of domestic courts. Historian Donia, commenting on his experience as ICTY expert witness at the 1997 Blaškić trial, remarks: "My presentation was more an extended lecture on regional history than court testimony as it might take place in an American court, where a judge would neither need nor welcome such an extensive background portrayal."⁸⁴

What follows below is an outline of the historical section of the Tribunal's Judgment in the Tadić case, providing a sense of the range and character of the Judgment while recognizing that to do it full justice requires more space than is available. It is worth observing that the Judgment only turns to the actual indictment against Tadić after sixty-nine pages of

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80. See *id.* at ¶¶ 56–79, 108–14; See also, Tadic Transcript, *supra* note 65, 7 May 1996, at 92–135; *id.*, 8 May 1996, at 138–278; *id.*, 9 May 1996, at 281–92.
81. Rules of Procedure and Evidence, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991, Rule 90, UN Doc IT/32, *adopted* 11 Feb. 1994, *revised* 30 Jan. 1995, *amended* 25 Jul. 1997, *amended* 17 Nov. 1999, *amended* 1 Dec. 2000 and 13 Dec. 2000 [hereinafter ICTY Rules of Procedure]. See ICTY, Basic Legal Documents, Rules of Procedure and Evidence, *available at* www.un.org/icty/legal/doc/index.htm. Rule 92 *bis*, adopted on 1 Dec. 2000, made it easier for the Trial Chamber to admit written evidence of expert witnesses, but by then the Tribunal's view of history was well established. See *id.*, Rule 92 *bis*. The author thanks Maximino Langer for pointing this out.
82. *Id.*; Office of Military Government (U.S.), Uniform Rules of Procedure, Military Tribunals Nuremberg (24 Jan. 1948) (final iteration of rules), *available at* www.yale.edu/lawweb/avalon/imt/rules5.htm.
83. Tadić Judgment, *supra* note 57, ¶ 54.
84. Donia, *supra* note 67, at 1.

historical review of the origins and causes of the conflict in Yugoslavia, Croatia, and Bosnia (including the Prijedor district in which Tadić committed his crimes).⁸⁵

The first section on the "Historical and Geographical Background" asserts that Bosnia has been multi-ethnic for centuries with no single dominant ethnic group, in part because it has been the shifting frontier of the Ottoman Empire and the Austro-Hungarian Empire and its predecessors. Drawing upon maps made under the direction of prosecution expert witness Gow, the Background noted that a Serb population was concentrated along its northern and western borders to protect Hapsburg lands from the Ottoman Turks, whose occupation created a large Muslim population.⁸⁶ The Judgment is at pains in a number of sections to point out that Serbs, Croats, and Muslims are all "Slavs" who speak the same language and therefore it is "inaccurate to speak of three different ethnic groups."⁸⁷

During the course of the nineteenth century, the idea of a single state of Southern Slavs was promoted by Croat intellectuals, while Serb nationalists sought a Greater Serbia. After World War I and the disintegration of the Ottoman and Austro-Hungarian Empires, these incompatible ideas were fused to create the Kingdom of Yugoslavia in 1929.⁸⁸ Yugoslavia, however, was the result of "an uneasy marriage of two ill-matched concepts and in the inter-war years the nation experienced acute tensions of an ethno-national character."⁸⁹ During World War II, there was a brutal armed conflict in Bosnia, large parts of which were annexed by the pro-Nazi Croatian puppet state. Prijedor was one such district which saw prolonged fighting between Croat Ustasha forces, Serb nationalist Chetniks, and Serb Partisans led by Marshal Tito. Croatian government officials pursued strategies comparable to twentieth century "ethnic cleansing" through deportation and murder, and in 1941 the Ustasha killed up to 250,000 Serbs. At the end of the war, the Ustasha army was handed over to Marshal Tito's Partisans, who summarily executed 100,000 captive soldiers.⁹⁰

This, then, was the "legacy"⁹¹ of the war, but relations between Croats, Muslims, and Serbs were remarkably harmonious in its aftermath, with friendships and marriages crossing the divides. That there were no ethnic

85. The judgment makes clear at the beginning where its information for this history comes from. The account is solely based upon the evidence from expert witnesses presented to the Trial Chamber by the prosecution and defense. See *supra* note 81 and accompanying text.

86. Tadić Judgment, *supra* note 57, ¶ 56.

87. *Id.*

88. *Id.* ¶ 59.

89. *Id.*

90. *Id.* ¶¶ 61–63.

91. *Id.* ¶ 64.

atrocities between 1945 and 1990 was due in part to the suppression of nationalist tendencies and religious observance by Tito's socialist regime. The beginning of the modern resurgence in nationalism began in 1974 with a new Yugoslav constitution that devolved powers to the governments of the republics which adopted nationalist platforms.⁹² President Tito died in 1980 and was not replaced by a leadership that could hold the country together. From the testimony of defense witness Hayden, the Judgment drew the conclusion that economic crisis generated more appeal for nationalist policies, and led to the abolition in 1988 of the socialist system of self-management as entrenched in the federal constitution.⁹³ Communism, the ideology which had suppressed nationalist political organization for four decades in Eastern Europe, came crashing down in 1989.

Up until 1988, the Judgment's history serves as a kind of background, a setting which allows us to understand the conflict in Bosnia more profoundly. It projects a legacy, but not a deterministic one, and not a set of conditions which *caused* the genocide in Bosnia. Nowhere in this section of the Judgment does the language suggest causal relations or instigating events or factors. Threats are identified, but they remain only threats. The Judgment's historical account does not lead inexorably towards ethnic cleansing and war, since other outcomes were possible. This is not a tractor narrative which Bosnians could not escape, but more the backdrop to a tragic play.

According to the Tribunal, the first precipitating factors or triggers to the Bosnian conflict came in 1989. At the fourteenth Congress of the League of Communists, Serb delegates sought to tilt the voting mechanism in favor of Serb majority, leading to a walkout by delegates from Croatia and Bosnia and Herzegovina. This year was also the 600th anniversary of the 1389 Battle of Kosovo, a pivotal point in Serb nationalist mythology. A vision of a Greater Serbia was articulated at commemorative mass rallies, perhaps most forcefully at the battle site itself by the former communist politician Slobodan Milošević.⁹⁴

In 1990, nationalists took power in the multiparty elections, heralding the breakup of the Yugoslav federation. Plebiscites for independence received overwhelming majorities in Slovenia in 1990 and Croatia in 1991, leading to declarations of independence on the 25 June 1991, followed by Macedonia in September of that year. This independence was recognized by the European Union and the United States in early 1992. Meanwhile, Serb nationalists began to declare Serb Autonomous Regions in Croatia and

92. *Id.* ¶ 68.

93. *Id.* ¶¶ 70–71.

94. *Id.* ¶ 72.

Bosnia; in Bosnia this region became known as the *Republika Srpska*. By April 1992, when Serbia and Montenegro formally established a new federal state, the collapse of the Socialist Federal Republic of Yugoslavia was complete.⁹⁵ This section of the Judgment concludes that “[w]hat had in effect taken the place of state socialism in Yugoslavia were the separate nationalisms of each of the Republics of the former Yugoslavia other than Bosnia and Herzegovina, which alone possessed no single national majority.”⁹⁶

The Judgment then turns to Bosnia and deals with the rise of ethnically-constituted parties in 1990 and the efforts of the Serb Democratic Party (SDS) to achieve a Greater Serbia by annexing parts of Bosnia and Croatia where there were Serb populations.⁹⁷ There is a thorough discussion of how the Yugoslav National Army (JNA), which up to that point had been multi-ethnic, became 90 percent Serb. In 1991 it had become an army without a state to defend, and thus turned into an instrument of a militaristic Serb nationalism.⁹⁸ War raged between the newly independent Croatia and Serb forces in late 1991, and this greatly increased tensions in Bosnia. The JNA withdrew from Croatia in early 1992 and brought 100,000 troops, airplanes, helicopters, and heavy weapons into Bosnia which further exacerbated anxiety and hostility among the population.⁹⁹

The Judgment dedicates a great deal of space to the propaganda campaign in Bosnia. By the spring of 1992, all of the media in Bosnia was Serb controlled, and was pounding out the same unrelenting message that Serbs were about to be overwhelmed by Ustasha Croats and fundamentalist Muslims, and had no choice but to join with the JNA in an all-out war to save the Serbs from genocide. Broadcasts from Belgrade featured Serb politicians such as Zeljko “Arkan” Raznatović who declared that the Second World War was not over and “news” reports with fictitious stories about a Croat doctor sterilizing Serb women and castrating Serb boys.¹⁰⁰

The SDS in Bosnia capitalized on the fear created by such propaganda, and began proclaiming Serb Autonomous Regions as part of creating a Greater Serbia. Crisis staffs set up in these regions carried out local government and military functions. Combining elements of the JNA, paramilitary organizations, and police units, the SDS established physical control over these areas. Since the JNA had expelled non-Serbs and was short of manpower, it relied increasingly on paramilitaries such as “Arkan’s

95. *Id.* ¶¶ 73–79. The country now known as Serbia and Montenegro was still called the Socialist Federal Republic of Yugoslavia until 2003.

96. *Id.* ¶ 79.

97. *Id.* ¶¶ 80–96.

98. *Id.* ¶¶ 104–09.

99. *Id.* ¶¶ 123–24.

100. *Id.* ¶¶ 88–93.

Tigers.”¹⁰¹ Even though the JNA was withdrawn from Bosnia in May 1992, apparently in compliance with UN Security Council Resolution 752 calling for an end to outside interference,¹⁰² the Bosnian Serb army (VRS) inherited personnel and weapons from the JNA and could still count on air support from the JNA.¹⁰³ Both of the last two points were essential for connecting the actions of Duško Tadić, one small cog in the Bosnian Serb security apparatus, to the wider policies of ethnic cleansing.

Eighteen pages of the Judgment deal with the local situation in Prijedor, which was unfortunately located in a corridor that linked Serbia to the Serb-dominated area in Croatian Krajina. Muslims were the largest group and again, ethnic relations had been relatively harmonious, but they were poisoned by Serb propaganda which reported that the “fascist Croats” were coming to make wreaths from the fingers of Serb children. The local SDS, led by the infamous figure of Radovan Karadžić, was a minority party in municipal politics. The SDS established separate governmental structures in 1991 in furtherance of the *Republika Srpska* and the idea of a Greater Serbia, and took over the municipality on 30 April 1992. The new Serb authorities, with the participation of the former JNA military command, then began a policy of “ethnic cleansing” in the area; killing non-Serbs, destroying non-Serb houses and mosques, looting, raping, and pillaging. Surviving Muslims and Croats were forced to wear white armbands and thousands were herded into the Omarska, Keraterm, and Trnopolje camps where Tadić committed crimes against prisoners.¹⁰⁴

The Judgment goes on to document the abject conditions and violations in the camps, however this is largely where the broader history of the Bosnian conflict ends. Several observations are thus necessary. Firstly, it is clear that the Tadić Judgment is an account of the conflict in Bosnia that most historians of the Balkans would recognize as a reputable version of the conflict. It does not, for instance, omit major structural issues such as economic crisis and the collapse of the Soviet bloc, or long-term historical factors such as the Ottoman and Austro-Hungarian Empires. Of course, reasonable people will disagree, but they will probably disagree about the weight given to certain factors, rather than protest at the complete omission of crucial features of the conflict.¹⁰⁵

101. *Id.* ¶¶ 97–103, 110.

102. S.C. Res. 752, U.N. SCOR, 3075th mtg., ¶ 3, U.N. Doc. S/RES/752 (1992).

103. Tadić Judgment, *supra* note 57, ¶¶ 118–21. The JNA was renamed the VJ in mid-1992.

104. *Id.* ¶¶ 127–53.

105. One could note, however, that the judgment does not pay enough attention to the international dimensions of the Balkans conflict, and the role played by the European Union. The judgment mentions the official recognition by the European Union of the Republic of Bosnia-Herzegovina in April 1992. *Id.* ¶ 78. However, it does not assess

Who will this history not satisfy? It will not satisfy those who put the conflict down to age-old and inevitable animosities between Serbs, Croats, and Muslims. The Judgment presents centuries of conflict in the region but does not represent them as predestined causes of the 1991 war.¹⁰⁶ The Tribunal rejected the view held by the Tadić defense and defense expert witnesses that lingering ethnic hatreds from World War II by themselves explain 1990s violence. Instead, such grievances required a relentless and inflammatory propaganda campaign to ignite the violence. Causality only comes into the historical analysis in 1989. Only at this point did the Tribunal consider that a nationalist conflagration in the Balkans was unavoidable.

The Tribunal's historical account will also not satisfy nationalists since it refuses to adopt the same historical periodizations. If, before 1989, there were no deterministic triggers to the conflict, then this contradicts nationalist explanations which lay heavy emphasis on events in 1941, or even 1389, and see them as iron-clad determinants of the present. The Tribunal openly critiques nationalist periodizations of history which it sees as manipulating the "remote history of Serbs."¹⁰⁷ For Serb nationalists, of course, the World War II is not remote history—it is still being fought. Indeed, in most Serb nationalist histories, there is a constant and unbroken line from the Battle of Kosovo in 1389, to the Ottoman Empire to World War II to the present day. The Tribunal's official history abjures such nationalist mythologizing.

The Tadić Judgment is at odds with relativist accounts produced by some scholars and commentators during and after the conflict.¹⁰⁸ For instance, General Charles Boyd wrote in *Foreign Affairs* in 1995 about how Serb and Croat forces were equally responsible for ethnic cleansing, and that Bosnian Muslims, while maintaining "the image of hapless victim," were aggressors who had picked a fight with Serb forces and thereby

the impact of Germany's recognition of Croatia and Slovenia on 15 Jan. 1992. Some have argued that this recognition was precipitous and preempted and undermined the European Union's Badinter Advisory Commission set up to consider applications for recognition of independence. See, e.g. Christian Hillgruber, *The Admission of New States to the International Community*, 9 *EUR. J. INT'L L.* 508 (1998). The Federal Republic of Germany granted its endorsement prematurely at a time of extreme tension and instability, and thus, it is argued, fanned the flames of Serb nationalism and contributed to the descent into political violence. This may or may not have been a significant factor, but the court should have at least asked the question.

106. An approach also adopted by MARK MAZOWER, *THE BALKANS* (2002).

107. Tadić Judgment, *supra* note 57, ¶ 91.

108. For a discussion of relativist intellectuals in conflicts, see Cushman, *supra* note 63; Rhoda E. Howard, *Occidentalism, Human Rights, and the Obligations of Western Scholars*, 29 *CANADIAN J. AFRICAN STUD.* 110 (1995). See STANLEY COHEN, *STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING* 280–96 (2001) on intellectuals' denials of atrocities.

brought calamity on themselves.¹⁰⁹ There is little equality of responsibility in the Tadić Judgment. Serb nationalists were clearly the aggressors in this instance, responsible for a large number of violations in this region of Bosnia at this time, as a result of a systematic policy of “ethnic cleansing” in pursuit of an ethnically pure “Greater Serbia.”

B. The Krstić Judgment

[T]he judges have produced several detailed, nuanced, carefully vetted micro-histories of towns and regions where crimes were committed. . . . As a result, we now have painstakingly constructed historical accounts of the towns of Prijedor [and] Srebrenica . . . in the period of the war and before.

Robert Donia¹¹⁰

General Radislav Krstić was one of the first high level perpetrators to be arrested by NATO in 1998 and brought to the Hague.¹¹¹ In August 2001, Krstić was convicted of leading the VRS as it committed genocide against the Bosnian Muslim male population of Srebrenica during nine days from 10–19 July 1995, when the Drina Corps surrounded the town and methodically slaughtered 7,000 men and boys.¹¹²

In the account of the events in Srebrenica contained in the Krstić Judgment, the ICTY denied that it was writing an historical interpretation or identifying underlying causes of the violence:

The Trial Chamber leaves it to historians and social psychologists to plumb the depths of this episode of the Balkan conflict and to probe for deep-seated causes. The task at hand is a more modest one: to find, from the evidence presented during the trial, what happened during that period of about nine days and, ultimately, whether the defendant in this case, General Krstic, was criminally responsible, under the tenets of international law. . . . The Trial Chamber cannot permit itself the indulgence of expressing how it feels about what happened in Srebrenica. . . . This defendant, like all others, deserves individualised consideration and can be convicted only if the evidence presented in court shows, beyond a reasonable doubt, that he is guilty of acts that constitute crimes covered by the Statute of the Tribunal.¹¹³

109. Charles G. Boyd, *Making Peace with the Guilty: The Truth About Bosnia*, 74 FOR. AFF. 22, 29–31 (1995). For a critique of Body’s relativizing of the Bosnian conflict, see Norman Cigar, *Responses, Appease with Dishonor: The Truth about the Balkans, False Relativism*, 74 FOREIGN AFF. 148, 150–51 (1995).

110. Donia, *supra* note 67, at 2.

111. For a detailed account of the Krstić trial, see HAGAN, *supra* note 60, at 156–74.

112. Krstić Judgment, *supra* note 57.

113. *Id.* ¶ 2.

Despite this qualification, the Krstić Judgment goes on to write a comprehensive account of the conflict in the Srebrenica area from 1991–1995, not as out-and-out history, but under the neutral heading “findings of fact.”¹¹⁴ It begins with the breakup of the Socialist Federal Republic of Yugoslavia and relies on the historical explanations contained in the earlier Tadić Judgment: Marshall Tito discouraged nationalism but then died just before communist rule ended, when a rising nationalist movement preyed upon economic woes and filled the ideological gap left by communism.¹¹⁵

The Krstić Judgment differs from the Tadić Judgment in that it is a micro-history of a town, Srebrenica, and is less concerned with the entire country or region. The narrative moves briskly to the strategic importance of the enclave of Srebrenica, and how it was “never linked to the main area of Bosnian-held land in the west and remained a vulnerable island amid Serb-controlled territory.”¹¹⁶ An army of Bosnian Muslim fighters, created under the leadership of Naser Orić, recaptured Srebrenica in 1992 and pressed outwards to create an enclave of 900 square kilometers. This enclave was reduced to 150 square kilometers by Serb counter-offensives in 1993 and Bosnian Muslims began converging on Srebrenica for safety.¹¹⁷

In March 1993, the Commander of the UN Protection Force (UNPROFOR), General Philippe Morillon of France visited the town and declared it to be under UN protection. Morillon told the population that the UN would never abandon them and on 16 April 1993, the UN Security Council passed a resolution declaring Srebrenica a “safe area.”¹¹⁸ On the ground, the General’s declarations and UN resolution amounted to very little. UNPROFOR commanders did not have the resources they needed to protect the town and UNPROFOR soldiers numbered no more than 600 lightly armed men. In January 1995, the town was being protected by only 400 soldiers of Dutch Battalion (DutchBat).¹¹⁹

The situation continued to deteriorate and the enclave was surrounded by three heavily armed brigades of the Bosnian Serb “Drina Corps.” The Drina Corps had a clear command structure and communications system that the Bosnian Muslim Army (ABiH) lacked, and in March 1995, Radovan Karadžić, the President of the *Republika Srpska*, issued a directive to tighten

114. It did not, however, deal adequately with victim testimony. Dembour & Haslam, *supra* note 58, at 158–60, argue that the ICTY courtroom silenced victims’ voices in the Krstić trial.

115. Krstić Judgment, *supra* note 57, ¶¶ 6–9.

116. *Id.* ¶ 13.

117. *Id.* ¶¶ 13–14.

118. *Id.* ¶¶ 15–18; S.C. Res. 819, U.N. SCOR, 3199th mtg., ¶ 1, U.N. Doc. S/RES/819 (1993).

119. Krstić Judgment, *supra* note 57, ¶ 20, ¶ 26.

the noose on the city. Food, water, and fuel supplies became more scarce. After he signed the UN "safe area" agreement, General Halilovic of the ABiH ordered his troops to demilitarize the safe area but did not require them to hand over weapons to the United Nations, as required. Indeed, the ABiH continued skirmishing with the surrounding Serb forces, who thought the Muslim forces were using the safe area to rearm and launch offensives against the VRS.¹²⁰

The VRS offensive against Srebrenica began on 6 July 1995 and met with no opposition from UNPROFOR. NATO air support did not commence until 11 July, but this ended rapidly when the VRS threatened to kill the Dutch troops. On 11 July Generals Mladić (Commander of the Drina Corps) and Krstić (Chief of Staff) entered the city victorious and Serb soldiers began to wage an active campaign of terror, burning houses and attacking civilians; 20–25,000 Muslim refugees, the vast majority women and children, fled to the UN compound at Potočari, outside Srebrenica.¹²¹ Up to this point, the Judgment's narrative is fairly singular and coherent, but it starts to fragment at the point at which it includes witness accounts to describe the conditions and events at Potočari. On 12 July, Serb soldiers entered the compound, executed hundreds of men behind the Zinc Factory, and raped a number of women. On 12 and 13 July, the VRS removed all Muslim refugees from Potočari by bus and by 14 July not one Muslim was left in the UN refugee compound. DutchBat soldiers who tried to escort the refugee buses had their vehicles stolen.¹²²

Meanwhile, a column of 10–15,000 Bosnian Muslim men and boys, about one third of whom were soldiers of the twenty-eighth Division of the ABiH, tried to break through Serb lines. The majority were caught on 12 July and held by Serb forces, which began a program of mass executions which followed a formulaic pattern. The men were detained on football pitches, in schools and warehouses. They were bused to execution sites in isolated fields where they were blindfolded and their wrists bound with ligatures.¹²³ They were lined up, shot, and buried in mass graves using bulldozers:

Almost to a man, the thousands of Bosnian Muslim prisoners captured, following the takeover of Srebrenica, were executed. . . . Most . . . were slaughtered in carefully orchestrated mass executions, commencing on 13 July, 1995, in the region just north of Srebrenica.¹²⁴

120. *Id.* ¶¶ 21–24, 28 (citing Prosecution Exhibit no. 425: Radovan Karadžić, Directive 7, at 10).

121. Krstić Judgment, *supra* note 57, ¶¶ 31–37.

122. *Id.* ¶¶ 38–51.

123. *Id.* ¶¶ 60–68.

124. *Id.* ¶ 67.

Despite its earlier eschewal of the “indulgence” of moral comment, the Judgment cannot help but refer to these executions as “an unspeakable human evil.”¹²⁵

On what kind of evidence was this account of genocide based? The Krstić Judgment makes clear that it relied upon a variety of different forms of evidence: “The Trial Chamber draws upon a mosaic of evidence the combines to paint a picture of what happened during those few days in July 1995.”¹²⁶ This approach encompassed testimony from witnesses from Srebrenica, survivors of execution sites, forensic evidence of exhumed graves, aerial photos, testimony of United Nations personnel, intercepted communications of the VRS, records seized from the VRS, and finally the testimony of General Krstić himself.

The case against Krstić was built upon extensive forensic evidence of the mass executions of Bosnian Muslim men. This included aerial reconnaissance photos of the thousands of captured Bosnian Muslim men held on the Nova Kasaba soccer field from 12 July onwards, and intercepted VRS communications. The Office of the Prosecutor contracted forensic scientist Dean Manning to carry out twenty-one exhumations of grave sites around Srebrenica, and these sites yielded a great deal of forensic information about the men and how they were killed. Identity documents and other personal belongings demonstrated that the victims were Bosnian Muslims from Srebrenica. Skeletal remains showed that all victims bar one were men. The majority of victims were not killed in combat, since 423 ligatures and 448 blindfolds were found on corpses at thirteen separate sites.¹²⁷ This, and the fact that some victims were either too young or physically handicapped to be combatants, suggests that Bosnian Serb soldiers did not distinguish between civilians and combatants, and that the vast majority of men were not engaged in combat at the time of their death, although the Trial Chamber did not rule out the possibility that some may have died in fighting.¹²⁸

Defense counsel called expert witness Dr. Zoran Stanković who contested the methodology and conclusions of the prosecution’s forensic research. He argued that the bodies were killed in combat, but this was rejected by the Chamber on the grounds that the prosecution’s forensic information was more scientifically credible.¹²⁹ The prosecution’s case was supported by further evidence that Bosnian Serb soldiers exhumed and reburied bodies in an attempt to hide them, and by survivor testimony

125. *Id.* ¶ 70.

126. *Id.* ¶ 4.

127. *Id.* ¶¶ 64, 71–75.

128. *Id.* ¶¶ 75–77.

129. *Id.* ¶ 76.

which corroborated the forensic evidence. Forensic information was vital to the prosecutions charge of genocide against Krstić, and without it the trial would have collapsed. For Krstić's crimes to have been war crimes, rather than random killings in the conduct of battle (which is legal according to the laws of war), the Trial Chamber had to be convinced beyond reasonable doubt that the men and boys were systemically murdered after being captured, according to a genocidal plan coordinated by Krstić and others in the VRS leadership. Without shared intention to carry out a joint criminal project "to destroy, in whole or in part, a national, ethnical, racial or religious group,"¹³⁰ the mass killing would not amount to genocide.

This question of shared intention brings us to the second main body of evidence in the Trial Chambers "mosaic of evidence" and which could be termed "historical interpretation." Forensic evidence was not sufficient in itself to fulfill the requirements of an indictment of genocide. Even defining the term itself requires a more open approach to history and context. The Krstić Judgment notes the longstanding debate about what constitutes "a group" and asserts that any attempt to differentiate:

On the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the [Genocide] Convention. . . . A group's cultural, religious, ethnical or national characteristics must be identified within the socio-historical context which it inhabits.¹³¹

What the court also needed was an account of motivation and intention that demonstrated that genocide was the outcome of a long-term political strategy by Bosnian Serbs to "ethnically cleanse" and control the Srebrenica area. Genocide is only proven when the prosecution can demonstrate *dolus specialis*, or special intention, which involves a higher form of premeditation over a longer period of time to commit genocidal crimes. It is defined as "a particular state of mind or a specific intent with respect to the overall consequence of the prohibited act."¹³² For an act of murder to be genocidal, there needs to be a shared plan beyond the act itself, an "ulterior motive"¹³³ and an awareness of the genocidal consequences of the act. Genocide is a crime with a pronounced collective dimension—it requires a policy and

130. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* 9 Dec. 1948, art. 2, 78 U.N.T.S. 277 (*entered into force* 12 Jan. 1951) (*entered into force for U.S.* 23 Feb. 1989).

131. Krstić Judgment, *supra* note 57, ¶¶ 556–57.

132. *Id.* ¶ 571 (quoting *Report of the International Law Commission on the Work of its Forty-eighth session, 6 May–26 July 1996*, U.N. GAOR., 51st Sess., Supp. No. 10, at 88, U.N. Doc. A/51/10 (1996)).

133. The Krstić Judgment cites the earlier Akayesu judgment at the ICTR in its discussion of "ulterior motive." Krstić Judgment, *supra* note 57, ¶ 552, n.1225 (citing Akayesu Judgment, *supra* note 53, ¶ 552).

organized method that cannot be carried out by one person alone. Forensic investigations are essential in linking individuals to particular acts, but they cannot delineate a general program of extermination and expulsion, which requires historical analysis and contextualization. Proving special intention to destroy a group, in whole or in part, requires a resilient historical account of the wider context of individual actions and intentions.

What was that wider plan that made the Srebrenica mass executions genocidal? When asked why he thought the mass executions of Bosnian Muslims had taken place, General Halilović stated "It was cleansed . . . and [it was] an area which was between two Serb states."¹³⁴ This location between two Serb territories (Serbia proper and *Republika Srpska*) became the basis of the courts historical interpretation of the events of the nine days in July 1995. At the end of the Judgment, the discussion notes that in 1992 the UN General Assembly defined ethnic cleansing as "genocide" and it asserts that ethnic cleansing had been going on in Srebrenica since 1993.¹³⁵ The genocidal events in Srebrenica in 1995 were the culmination of a longer strategic plan by Serb politicians, such as Radovan Karadžić, and military commanders such as Generals Mladić and Krstić to unite two Serb regions and create a unified Serb Republic of Greater Serbia.¹³⁶

In a final coda to this case, Counsel for Krstić filed a notice of appeal and the ICTY's Appeals Chamber rendered its judgment on 19 April 2004. With Judge Shahabuddeen dissenting, the Appeals Chamber set aside Krstić's conviction as a participant in a joint criminal enterprise to commit genocide, and instead found Krstić guilty of the lesser count of aiding and abetting genocide. The Appeals Chamber ruled that the Trial Chamber was correct to find that genocide had in fact occurred in Srebrenica and that General Krstić had been aware of the intention of some members of the Main Staff of the VRS to commit genocide, and that he had done nothing to prevent the use of men and resources under his command to facilitate the genocidal killings.¹³⁷ However, the Appeal Chamber found that the Trial Chamber did not fully establish that General Krstić had actually learned from General Mladić his intention to execute the captive Bosnian men of Srebrenica. The Appeals Chamber unanimously sentenced Radislav Krstić to thirty-five years imprisonment.¹³⁸

134. Krstić Judgment, *supra* note 57, ¶ 94 (quoting Transcript, 5 Apr. 2001, at 9501, lines 20–21).

135. *Id.* ¶ 578 (citing G.A. Res. 121, U.N. GAOR, 47th Sess., 91st plen. mtg., U.N. Doc. A/RES/47/121); *Id.* ¶ 612.

136. Krstić Judgment, *supra* note 57, ¶¶ 564–68.

137. Prosecutor v. Krstić (Case No. IT-98-33-A), Judgment of Appeals Chamber, 19 Apr. 2004, ¶¶ 135–39; Dissenting Opinion of J. Shahabuddeen, ¶ 69; Disposition, at 87.

138. *Id.* ¶¶ 87, 275.

VI. CONCLUSIONS: NEW LEGAL NORMS AND NEW HISTORICAL PERSPECTIVES

This article has sought to demonstrate that the ICTY has left us with a qualitatively distinctive historical record of the origins and contours of mass atrocities compared with national, domestic legal counterparts in France and Israel. Whereas extensive narrative and the law have been held to be incompatible, international criminal law now appears to rely upon historical consideration and contextualization to secure convictions. The questions remain, however, why this international tribunal and why now, rather than earlier?

Two aspects underscore the answer: the first draws attention to the international character of the ICTY which liberated it from nationalist mythologies and the second points to the probative requirements of the categories of genocide and crimes against humanity. The first point has been addressed earlier, but the second point requires more elucidation. Implementing relatively novel legal norms can transform the historical reasoning of courts in such a way that the demands of justice and history reinforce one another. As the Krstić Judgment shows, genocide is a collective policy of extermination sustained over a period of time by an organized grouping against a number of individuals because of their membership in another group. It cannot be random or ad hoc. Its systematic nature must be proved through documentation and analysis and by a novel combination of forensic evidence and historical narrative. Demonstrating that genocide has in fact taken place requires linking different sites at different times under the same long-term policy of extermination. The category of genocide impels a court to consider evidence that encompasses a broader context and a longer duration than in most conventional criminal cases.

The same argument applies to persecution against a civilian population as in the Tadić case. Disparate individual facts about the events in the camps in the Prijedor district of Bosnia may be known, but they only make sense within a narrative which integrates the facts into a coherent story of ethnic cleansing and genocide carried out by Serb nationalists, with the military, financial, and ideological support of the Yugoslav government in Belgrade.¹³⁹ For Tadić to bear responsibility for a crime against humanity, the Prosecutor needed to prove a centrally organized, wider plan of persecution existed, and was extensive across a region or country. Doing so required a deep historical approach which delineated the main origins,

139. To demonstrate *mens rea*, "each act or omission must be evaluated in the context of what would happen to the rest of the group in question." KITTICHAISAREE, *supra* note 28, at 73 (citing Prosecutor v. Jelisić (Case No. IT-95-10-T), Judgment of Trial Chamber, 14 Dec. 1999, ¶ 82).

patterns, and methodical plans of a policy of persecution of a civilian population and placed Tadić's acts squarely within a joint criminal enterprise¹⁴⁰ that sought to fulfill a long-standing ideological project, in this case the century-old goal of creating a "Greater Serbia."

The definition and application of crimes against humanity such as persecution and genocide have elevated the place of history and context in the decisions, reports, and judgments of international courts. No longer held back by domestic political imperatives and the foibles of national identity, and pushed forward by the collective nature of the categories of crime which individuals are accused, international tribunals such as the ICTY are altering the relationship between law and history.

As a final note, it is important to recognize the uneven public support in the former Yugoslavia for the judgments and accounts produced by the ICTY. According to the South East Europe (SEE) Public Agenda Survey involving 10,000 face-to-face interviews in early 2002, trust ratings of the ICTY are relatively high in Kosovo (83 percent) and the Bosnian Federation (51 percent), but low in Serbia (8 percent) and the Republika Srpska (4 percent).¹⁴¹ It is also important to recognize that SEE Survey trust ratings are also fairly low for national institutions in Serbia, including the police (24 percent) and government (29 percent).¹⁴² Analyzing why national and international institutions have such low legitimacy in Serbia is beyond the scope of this article, but one can speculate that the ICTY might have garnered more support if it had engaged in a broader public education campaign, or held some courtroom hearings in the territory of the former Yugoslavia.

Yet all the blame cannot be placed at the door of the Tribunal:¹⁴³ any historical account which punctures nationalist mythologies is likely to be

140. As noted earlier, Tadić's acts were short-term and limited to one small area, and this forced the Tribunal to contextualize his individual actions in order to demonstrate their involvement in a wider program of "ethnic cleansing":

Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable.

Tadić Judgment, *supra* note 57, ¶ 649.

141. Press Release, International Institute for Democracy and Electoral Assistance, New Regional Opinion Survey Shows the Public in South East Europe Care More About Domestic Than International Issues (4 Apr. 2002), available at archive.idea.int/press/pr20020404.htm.

142. *Id.*

143. Mark Thompson writes, "the ICTY's task is not to be popular, but to deliver justice. . . . The ICTY cannot substitute for efforts by politicians, NGOs, and a range of opinion-makers in each entity to reckon with their responsibility for the events of the past decade." MARK THOMPSON, SOUTH EASTERN EUROPE: NEW MEANS FOR REGIONAL ANALYSIS 10 (Institute for Democracy and Electoral Assistance, Policy Brief No. 2, 2002).

rejected as long as a region is dominated by nationalist politicians who have regularly denied responsibility for mass atrocities. For instance, in September 2002, the Republika Srpska government office for the investigation of war crimes issued a report claiming that only 1,200 Muslim soldiers had been killed in Srebrenica while engaging in armed conflict (i.e., not as part of a genocidal plan).¹⁴⁴ Yet more recently, it seems that the regime of denial is slowly crumbling, in part as a result of the Hague trials, backed by political pressure from the European Union, to which Serbia-Montenegro hopes to accede in 2014. Only a minority of Bosnian Serb politicians still deny that the VRS was responsible for the massacre of more than 7,000 Muslim men and boys at Srebrenica in 1995. In November 2004, the Republika Srpska government's Srebrenica Commission officially recognized that 7,800 Bosnian Serb men were killed at Srebrenica and the Republika Srpska government apologized to the relatives and accepted that "a war crime of enormous proportions took place."¹⁴⁵ The trials at the Hague have been part of a gradual program of both pursuing accountability and challenging self-serving lies about the past in the Balkans. If sufficient political will exists to construct democratic polities that seek to transcend ethno-nationalism in the Balkans, then the ICTY's judgments could become an indispensable part of the process of writing a common, credible history of political violence in the 1990s.

144. Reuters, *Bosnian Serb Report Denies Massacre at Srebrenica* (2 Sept. 2002), available at www.b92.net/english/news/index.php?start=0&dd=02&mm=9&yyyy=2002.

145. Dragan Stanimirovic, *Republika Srpska: Apology for Srebrenica*, TRANSITIONS ONLINE (18 Nov. 2004), available at listserv.acsu.buffalo.edu/cgi-bin/wa?A2=ind0411&L=jstwatch-l&D=1&O=D&F=&S=&P=52813.