

Michigan Law Review

Volume 96 | Issue 7

1998

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Recommended Citation

Jose E. Alvarez, *Rush to Closure: Lessons of the Tadić Judgment*, 96 MICH. L. REV. 2031 (1998).

Available at: <https://repository.law.umich.edu/mlr/vol96/iss7/3>

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RUSH TO CLOSURE: LESSONS OF THE TADIĆ JUDGMENT

Jose E. Alvarez*

“Courts try cases, but cases also try courts.”

— Justice Robert Jackson¹

In 1993 and 1994, following allegations of mass atrocities, including systematic killings, rapes, and other horrific forms of violence in Rwanda and the territories of the former Yugoslavia, two ad hoc international war crimes tribunals were established to prosecute individuals for grave violations of international humanitarian law, including genocide.² As might be expected, advocates for the creation of these entities — the first international courts to prosecute individuals under international law since the trials at Nuremberg and Tokyo after World War II — aspired to grand goals inspired by, but extending far beyond, the pedestrian aims of ordinary criminal prosecutions. Those who pushed for the creation of these tribunals argued that, as with earlier trials of major Nazi and Japanese wartime leaders, properly conducted international criminal trials, brought by and on behalf of the international community, would: threaten those in positions of power to deter further violence; make possible atonement for the perpetrators and honor the

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1. Quoted in TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 45 (1992).

2. The war crimes tribunals for both the former Yugoslavia and Rwanda were established by the United Nations (U.N.) Security Council under its Chapter VII powers. See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) [hereinafter *ICTY Statute*]; *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993) [hereinafter *Report of the Secretary-General*] (establishing the tribunal for the former Yugoslavia and containing that tribunal's statute); 3 S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994) [hereinafter *ICTR Statute*] (establishing the tribunal for Rwanda and containing that tribunal's statute). The tribunal for the former Yugoslavia was established in The Hague, the Netherlands, and the tribunal for Rwanda in Arusha, Tanzania.

This author uses “war crimes” to describe the offenses involved in the Rwandan and Balkan prosecutions even though, as is clear from the statutes of these tribunals, the jurisdiction of each extends beyond violations of the laws and customs of war.

dead; provide a mechanism to enable victims and their families to receive needed psychological relief, identify remains, restore lost property, and otherwise help heal wounds; channel victims' thirst for revenge toward peaceful dispute settlement; affirm the Nuremberg Principles at the international level while restoring faith in the rule of law generally; tell the truth of what occurred, thereby preserving an accurate historical account of barbarism that would help prevent its recurrence; and, perhaps most important, restore the lost civility of torn societies to achieve national reconciliation.³

This article reexamines these goals in light of the judgment issued after the first full trial at the Yugoslav tribunal, the case against the Serb former cafe owner, Dušan "Dusko" Tadić.⁴ In my view, the form, structure and content of this historic judgment suggest adherence to what Mark Osiel has characterized, in other contexts, as a model of closure.⁵ Under this model, inspired by the Nuremberg trials and subsequent criminal prosecutions for "admin-

3. This is a distillation of the goals most frequently articulated by the diplomats who established these tribunals and the relevant epistemic community of international lawyers. For various views, see, for example, *Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting*, U.N. SCOR, 48th Sess., 3217th mtg. at 12-14, U.N. Doc. S/PV.3217 (1993) (statement of Mrs. Albright, United States); *Provisional Verbatim Record of the Three Thousand One Hundred and Seventy-Fifth Meeting*, U.N. SCOR, 48th Sess., 3175th mtg. at 8, 27, U.N. Doc. S/PV.3175 (1993) (statement of Mr. Méric, France); STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 135-36 (1997); MICHAEL P. SCHARF, BALKAN JUSTICE 214-28 (1997); Payam Akhavan, *Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda*, 7 DUKE J. COMP. & INT'L L. 325, 336-43 (1997); Payam Akhavan, *Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order*, 15 HUM. RTS. Q. 262 (1993); Richard J. Goldstone, Conference Luncheon Address, Address Before the Minnesota Advocates for Human Rights (Mar. 23, 1996), in 7 TRANSNAT'L L. & CONTEMP. PROBS. 1 (1997); Theodor Meron, *Answering for War Crimes*, FOREIGN AFF., Jan.-Feb. 1997, at 2, 6-7 [hereinafter Meron, *Answering for War Crimes*]; Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFF., Summer 1993, at 122 [hereinafter Meron, *The Case for War Crimes Trials*]; *Prosecuting and Defending Violations of Genocide and Humanitarian Law: The International Tribunal for the Former Yugoslavia*, 88 ASIL PROC. 239 (1994) [hereinafter *Prosecuting and Defending Violations*]; Naomi Roht-Arriaza, *Punishment, Redress, and Pardon: Theoretical and Psychological Approaches*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 13, 13-21 (Naomi Roht-Arriaza ed., 1995) [hereinafter IMPUNITY AND HUMAN RIGHTS]; Minna Schrag, *The Yugoslav War Crimes Tribunal: An Interim Assessment*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 16, 19-20 (1997); Daphna Shraga & Ralph Zacklin, *The International Criminal Tribunal for Rwanda*, 7 EUR. J. INT'L L. 501, 502-04 (1996); see also W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT'L L. 175 (1995) (discussing seven fundamental goals of legal systems designed to restore and maintain public order).

4. Opinion and Judgment, Prosecutor v. Tadić, Case No. IT-94-1-T (Trial Chamber, Intl. Trib. for the Prosecution of Persons Responsible for Serious Violations of Intl. Humanitarian Law Committed in the Territory of Former Yugo. since 1991, May 7, 1997) <<http://www.un.org/icty/970507jt.htm>> [hereinafter *Tadić Judgment*].

5. Mark Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 486-88 (1995).

istrative massacre[s]" in national courts, it is assumed that such proceedings will draw upon "an already-existing consensus" regarding "first principles" and evoke in participants and observers a sense of social solidarity premised on the "common values" of Emile Durkheim's "collective conscience."⁶

With respect to the Balkans and Rwanda, advocates of these prosecutions start from the premise that such trials "assign guilt for war crimes to the individual perpetrators . . . rather than allowing blame to fall on entire groups and nations."⁷ Tribunal advocates, commonly members of the "invisible college" of international lawyers,⁸ generally assume that only individual, not collective, attribution of responsibility can terminate historical cycles of inter-group bloodletting; that only by bringing individuals to the dock will victims and survivors cease to "cry out for justice against the group" and find closure.⁹ In the words of a former prosecutor at the Yugoslav tribunal, Minna Schrag, by finding identifiable individuals accountable, the rest of the community is not "associated with collective guilt . . .," and generations do not grow up saying "it's the Serbs or the Croats or any other group that did this to my father . . ."¹⁰ It is also assumed that, by punishing the guilty — *and only* the guilty — all of the other Nuremberg-inspired goals enumerated above will thereby be advanced.

The recipe for emotionally cathartic closure as the mechanism by which all these diverse goals are achieved is commonly grounded in a victim-centered approach that blurs the lines between criminal

6. MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* 22, 24 (1997) (citing EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (George Simpson trans., 1964)). This is an extended version of Osiel's article, *Ever Again*. See Osiel, *supra* note 5. Osiel defines "administrative massacre[s]" as "large-scale violation[s] of basic human rights to life and liberty by the central state in a systematic and organized fashion, often against its own citizens, generally in a climate of war — civil or international, real or imagined." OSIEL, *supra*, at 9. In both book and article, Osiel limits his discussion of closure to the role of judges in evoking collective memory in such cases. Osiel does not address the significance of closure with respect to the other goals of such trials, and he does not apply his insights to the ongoing international prosecutions involving the Balkans and Rwanda.

7. Meron, *Answering for War Crimes*, *supra* note 3, at 2-3; accord Kenneth Roth, *Why Justice Needs NATO*, *THE NATION*, Sept. 22, 1997, at 21.

8. Oscar Schachter, *The Invisible College of International Lawyers*, 72 *Nw. U. L. REV.* 217 (1977).

9. Mary Ann Tétreault, *Justice for All: Wartime Rape and Women's Human Rights*, 3 *GLOBAL GOVERNANCE* 197 (1997) (quoting former Chief Prosecutor in the Balkan Tribunal Richard Goldstone); see also Walter Gary Sharp, Sr., *International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia?*, 7 *DUKE J. COMP. & INT'L. L.* 411, 454 (1997) (quoting John Shattuck, then the top human rights officer at the U.S. Department of State).

10. James Vescovi, *The Search for Justice in the Former Yugoslavia and Beyond: An Interview with Minna Schrag* '75, *COLUM. L. SCH. REP.*, Autumn 1996, at 27.

punishment and civil redress and between utilitarian and retributivist rationales for punishment.¹¹ It is argued that international investigations and criminal prosecutions will permit victims' families and survivors to put the past to rest; that victims will channel their anger and vent their frustrations through their testimony at trial because, through participation as witnesses, they will be able to "reassert their sense of control and autonomy," enhance their dignity, "lessen their isolation, and increase their feeling of belonging to a community," and even "find some meaning in their victimization."¹² The goal of using such trials to preserve an accurate collective memory is also based on the model of closure. It is said that war crimes trials permit entire societies to "draw[] a clear line between past and future, allowing the beginning of a healing process."¹³

In this article, I argue that the trial of Dusko Tadić was conducted on the premise that Nuremberg-inspired goals would be furthered through the invocation of shared values in four distinct areas: (1) preservation of "common history judged by common standards";¹⁴ (2) application of "objective," "apolitical" rules of law; (3) adherence to a "level playing field" for the defendant; and (4) respect for the needs of victims. I show that Tadić's judges sought, first, to render a verdict containing a definitive and enduring historical account that would be accepted as accurate, balanced, complete and fair by all sides, including Serbs, thereby helping to produce closure with respect to collective memory. Second, the judges sought to remain above politics, in the mold of judges in liberal states who purportedly act as mere interpreters of politically neutral rules of law evenhandedly and objectively applied, regardless of the political aspirations or the ethno-religious status of the parties involved, thereby eliciting a satisfactory consensus based on the application of the rule of law. Third, they attempted scrupulously to adhere to fair approaches to the admission of evidence

11. See Roht-Arriaza, *supra* note 3, at 16-21.

12. See *id.* at 19-21 (noting also how the mere verbalization of victimization serves cathartic psychological and therapeutic ends).

13. Naomi Roht-Arriaza, *Introduction to IMPUNITY AND HUMAN RIGHTS*, *supra* note 3, at 3, 7. Professor Roht-Arriaza thus argues, for example, that investigations and trials, because they reveal the extent of repression, restore the reputation of innocent victims, constitute an official condemnation of state-sanctioned abuses, make repetition of past mistakes less likely, and permit societies to redefine themselves in light of real and not falsified history. See *id.* at 7-8 (noting how war crimes frequently demonstrate a "struggle for the control of history" and arguing that criminal investigations "play[] a central role in a society's redefinition of itself" and do not allow a former dictatorship's version of history "to be perpetuated in the military academies or in textbooks").

14. See OSIEL, *supra* note 6, at 22.

and its careful weighing under the presumption of innocence in order to elicit universal confidence in the procedural fairness accorded the defendant. Finally, they sought to provide closure to Tadić's victims by according them a prominent role in the proceedings.

Thereafter, I examine whether the judges' efforts succeeded in these respects, using the conclusion of the first international war crimes trial in fifty years as an occasion to reexamine the didactic functions of such trials. I contend that the model of closure, and certainly the version suggested by the Tadić judgment, is flawed and may even undermine the grand aims articulated for the Yugoslav and Rwanda tribunals. Yet I do not conclude that international war crimes trials ought not be attempted generally or that the establishment of these two ad hoc tribunals was necessarily a mistake. Rather, this article advances a different set of justifications for these prosecutions, or at least a different set of criteria by which to judge their "success." I propose here that these prosecutions not be judged on the unattainable premises of closure, but on Mark Osiel's alternative concept of "civil dissensus" wherein trials stimulate further dialogue regarding the issues on which they focus.¹⁵

Part I identifies how the model of closure has influenced the establishment, structure, and operation of these tribunals. Part II indicates how the Tadić judgment reflects that model. Part III shows how Tadić's trial and conviction fall short of meeting closure's demands in four vital respects, and concludes with more general reasons for skepticism about the likelihood of reaching closure through ad hoc international tribunals for Rwanda and the former Yugoslavia. Part IV argues for a discursive justification for these tribunals and indicates, preliminarily, some of the implications of this alternative approach.¹⁶

I. CLOSURE AND THE NEW AD HOC TRIBUNALS

International lawyers have advanced many reasons why the international polity, or at least its most reputable representative, the United Nations, should punish basic affronts to human dignity.¹⁷ They claim that the legal, political, and even moral choices have been, to a considerable degree, settled by international law as

15. See OSIEL, *supra* note 6, at 41-48.

16. Readers who have little interest in the Tadić judgment as such or who have, from the outset, grave doubts about the viability of "closure" may wish to proceed directly to Part IV.

17. These are further considered *infra* notes 238-45 and accompanying text.

"shaped by the requirements of the international community."¹⁸ They argue that such a result is anticipated by the U.N. Charter and its provisions for handling threats to and breaches of the international peace, and that the U.N., or at least its post-cold war Security Council, now seems politically willing to establish such judicial fora when the failure to prosecute presents a sufficient threat to the international order.¹⁹ These arguments have been premised on the goal of generating "closure" for victims, defendants, and observers both inside and outside the regions affected. The model of closure, considered as a kind of Weberian "ideal type,"²⁰ has provided the single, coherent rubric to justify ad hoc international tribunals.

The policy justifications offered for international war crimes tribunals build from the premise, discussed above, that public criminal trials absolve those who are not in the dock. Given the imprac-

18. Roht-Arriaza, *supra* note 13, at 5 (arguing that 50 years after Nuremberg, treaty and case law developments in humanitarian law have shaped the minimum requirements for compliance and have helped to settle questions regarding investigation, prosecution, and compensation); see also KARINE LESCURE & FLORENCE TRINTIGNAC, INTERNATIONAL JUSTICE FOR THE FORMER YUGOSLAVIA: THE WORKING OF THE INTERNATIONAL CRIMINAL TRIBUNAL OF THE HAGUE 17-31 (1996); Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INTL. L.J. 665, 707-10 (1996). There is, however, an unresolved tension between the arguments for primacy of international fora — when these are available — and other arguments that national authorities have a duty to prosecute some international crimes under international law. See, e.g., Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991) (arguing that an international legal duty to prosecute ought to constrain governments' resort to immunity); Naomi Roht-Arriaza, *Sources in International Treaties of an Obligation to Investigate, Prosecute and Provide Redress*, in IMPUNITY AND HUMAN RIGHTS, *supra* note 3, at 24, 24-38 (discussing sources of international law that suggest an obligation to investigate, prosecute, or provide redress). It seems that a national authority's ostensible duty to prosecute does not result in any ostensible right to retain exclusive or primary jurisdiction over such prosecutions, at least not in the case of the former Yugoslavia or Rwanda.

19. After all, if Iraq's unwillingness to permit weapons inspections, Libya's failure to transfer alleged terrorists to national courts, or the Haitian coup leaders' failure to abide by the results of a U.N.-supervised election each justified a forceful Security Council response, why not the continued impunity of alleged war criminals in the Balkans or Rwanda which has, at a minimum, prompted destabilizing waves of refugees across international borders? For the Yugoslav tribunal's response to a challenge to its establishment, see Decision on the Defence Motion on Jurisdiction, Prosecutor v. Tadić, Case No. IT-94-I-T (Trial Chamber, Intl. Trib. for the Prosecution of Persons Responsible for Serious Violations of Intl. Humanitarian Law Committed in the Territory of Former Yugo. since 1991, Aug. 10, 1995) <<http://www.un.org/icty/970507jt.htm>> [hereinafter *Decision on Defence Motion on Jurisdiction*]; Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadić, Case No. IT-94-I-AR72 (App. Chamber, Intl. Trib. for the Prosecution of Persons Responsible for Serious Violations of Intl. Humanitarian Law Committed in the Territory of Former Yugo. since 1991, Oct. 2, 1995) <<http://www.un.org/icty/tadic/appeal/decision-elace1.htm>> [hereinafter *Decision on Defence Motion for Interlocutory Appeal*].

20. See generally MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (A.M. Henderson & Talcott Parsons trans., Free Press 1964) (1947). As Talcott Parsons notes in his famous introduction to this work, Weber's concept of an "ideal type" consists of an "abstract" and "generalized rubric within which an indefinite number of particular cases may be classified." Talcott Parsons, *Introduction to id.* at 13.

ticality of national venues for such trials as well as the comparative merits of U.N. fora, advocates for these tribunals conclude that *international* criminal proceedings are best able to unite spectators — whether or not involved in the conflict — in collective revulsion against the barbarism of a few and in support of the civilized nature of the trials themselves. International convictions, in short, are viewed as *best* able to provide the cathartic group therapy necessary to reestablish lost national *and* international consensus and, therefore, peace.²¹ It is assumed that everyone will find the judgments and verdicts of an international bench legitimate and that such universal forums, issuing verdicts with universal legitimacy, will restore lost civility — at least for the war-torn countries directly at issue and, over the longer term, for the entire international community.

Yet to be successful, the model of closure requires fulfilling the promise of the Nuremberg Principles while avoiding those characteristics of the Nuremberg and Tokyo trials that have been the target of fifty years of criticism. These critiques, adequately surveyed elsewhere,²² require only short summary here.

Prominent critics complain that the Nuremberg and Tokyo processes were tainted by “victor’s justice,”²³ including procedures and verdicts that were unfair to the defendants.²⁴ Critics also ques-

21. For a characteristic attempt to link justice and peace, see, for example, Richard J. Goldstone, *Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals*, 28 N.Y.U. J. INTL. L. & POL. 485, 486-90 (1996). The presumed link between war crimes prosecutions and securing international peace goes back, of course, to the Nuremberg trials themselves. See, e.g., DAVID LUBAN, *LEGAL MODERNISM* 336 (1994) (discussing how Nuremberg was seen as “the trial to end all wars”).

22. See, e.g., DAVID LUBAN, *supra* note 21, at 335-91; SCHARF, *supra* note 3, at 3-17; TAYLOR, *supra* note 1; Kevin R. Chaney, *Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials*, 14 DICK. J. INTL. L. 57 (1995); Symposium, *1945-1995: Critical Perspectives on the Nuremberg Trials and State Accountability*, 12 N.Y.L. SCH. J. HUM. RTS. 453, 453-544 (1996).

23. These include complaints that these tribunals’ rules and bench and prosecution teams were dominated by lawyers from the United States and arrogant notions of “American exceptionalism,” that trials were marred by the application of double standards since no charges were brought against the allies despite evidence that they also had violated international humanitarian law; and that the Allies’ noble goals were compromised from the outset since the very day that they signed the London Charter to establish the Nuremberg tribunal the United States dropped its second nuclear bomb on Nagasaki. See, e.g., Gerry J. Simpson, *War Crimes: A Critical Introduction*, in *THE LAW OF WAR CRIMES* 1, 4 (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997).

24. These include accusations that defendants were convicted in absentia, while others encountered trial by ambush — i.e., an expedited criminal process using unfamiliar rules and based on documentary evidence primarily within the control of the prosecution with defense lawyers accorded minimal time for preparation. Others have questioned the imposition of ex post facto criminal liability, arguing that defendants were charged with newly minted international crimes, including “aggression” — premised dubiously on violations of the Kellogg-Briand Pact — “crimes against humanity,” and other novel offenses having little basis in many domestic legal systems, such as conspiracy. See, e.g., *id.* at 11-16; LUBAN, *supra* note 21, at 349-52, 360-62.

tion the premise that World War II trials did much to preserve collective memory in the service of history. To at least some, the Nuremberg and Tokyo trial records make for a fundamentally flawed, even false, historical account that is grossly unfair to the victims of the Holocaust and to the actual conduct of World War II. With respect to Nuremberg's treatment of the Holocaust, some attribute the problem to the Allies' decision to make the waging of "aggressive" war the linchpin of all the major trials at Nuremberg, an approach that made the Holocaust incidental to the war instead of making its horrors at least the equal focus of attention. By, for example, arguing that Nazi concentration camps were effectively tools of the German war effort and by failing to bring charges or present evidence of Nazi crimes committed before the official onset of interstate aggression, such as under German pre-1939 racial purity laws, the trials of the major Nuremberg defendants obscured the real scope and depth of the Holocaust while providing a fundamentally misconceived account of German military strategy.²⁵ By encouraging the theory that Nazi war criminals were merely an especially evil collection of gangsters bent solely on aggressive conquest, the major Nuremberg trials glossed over the ethnic, religious, and racial underpinnings of the Holocaust. In part because the testimonies of victims were deemed unnecessary, these proceedings obscured the discriminatory animus that motivated the Nazis, rendering their anti-Semitism and homophobia, for example, less prominent.²⁶ By contrast, the Tokyo proceedings, along with the more notorious proceeding against General Tomoyuki Yamashita that reached the U.S. Supreme Court, have been criticized for

Even graver charges of overly hasty, and perhaps even racist, judgments have been leveled against the Tokyo trials. See, e.g., Dissenting Opinion of J. Pal, in 21 *THE TOKYO WAR CRIMES TRIAL* 1-21 (R. Pritchard & S. Zaide eds., 1981); Ann Marie Prévost, *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita*, 14 *HUM. RTS. Q.* 303 (1992) (arguing that Yamashita's trial, conducted in the immediate wake of Japanese aggression, was thoroughly riddled with violations of fair process and tainted by racism); see also Elizabeth S. Kopelman, *Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial*, 23 *N.Y.U. J. INT'L. L. & POL.* 373 (1991).

25. See, e.g., Osiel, *supra* note 5, at 533-36. But later trials by the Allies under the more expansive terms of Law No. 10 of the Control Council for Germany went further. See RATNER & ABRAMS, *supra* note 3, at 47, 50.

26. For an argument that it also rendered less evident how the Nazis were able to bureaucratize their final solution, see, for example, LUBAN, *supra* note 21, at 365-74. A more balanced portrayal of the Holocaust, it is said, has only emerged thanks to the work of later historians and the trial records of proceedings more sensitive to the needs of victims, such as Israel's prosecution of Eichmann. Attorney General v. Eichmann, 36 *I.L.R.* 5 (Isr. D.C. (Jm.) 1961), 36 *I.L.R.* 277 (Isr. S. Ct. 1962). These later accounts, in turn, have altered modern-day recollections of the Nuremberg trials such that today those proceedings are often cited as an affirmation of the horrors of crimes against humanity and not aggressive war.

presenting a racially charged, unnuanced account of atrocities committed by Japanese troops in the Pacific theater.²⁷

For the creators of the new ad hoc international tribunals, the flaws suggested by these criticisms needed to be avoided if the grand goals along the model of closure were to be achieved.²⁸ To avoid the accusation of "victor's justice," they took a number of steps. They created denationalized entities established by the world community, namely the U.N. Security Council, its General Assembly, and Secretary-General.²⁹ To deflect charges of double standards, they attempted to ensure that *all* those who committed crimes in the former Yugoslavia and in Rwanda, regardless of national origin, ethnicity, or religion, would be subject to prosecution — and by an international bench and prosecution teams that would not include persons from the region — presumptively tainted by national bias — but would reflect, as does the International Court of Justice, the full diversity of the world's legal systems.

To avoid related accusations of unfairness, they incorporated modern international human rights standards on behalf of criminal defendants into the tribunals' respective statutes and rules of procedure and evidence.³⁰ To level the playing field between prosecution and defense, the tribunals borrowed considerably from the adversarial, oral nature of common law courtroom proceedings — including its procedures for cross examination — incorporated the possibility of appeals, and even anticipated the need to train lawyers in this novel synthesis of common law and continental procedures.³¹ In response to the perceived illegitimacy of *ex post facto*

27. See *In re Yamashita*, 327 U.S. 1 (1946); Prévost, *supra* note 24, at 305; see also M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 36-37 (1997). For a defense of the Yamashita case, see Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 22-38 (1973).

28. See generally SCHARF, *supra* note 3, at 69-73; Meron, *The Case for War Crimes Trials*, *supra* note 3.

29. See *Decision on Defence Motion for Interlocutory Appeal*, *supra* note 19, ¶ 44. As noted by the judges in the Tadić case, by securing the cooperation of the U.N. Secretariat as well as the General Assembly, the tribunals' creators drew from the legitimacy of the independent international civil service as well as the representativeness of the world's foremost deliberative body.

30. See, e.g., *ICTR Statute*, *supra* note 2, art. 20 (providing for "rights of the accused" comparable to those in article 14 of the International Covenant on Civil and Political Rights); *ICTY Statute*, *supra* note 2, art. 21 (same).

31. But note that the tribunals also borrowed from the civil law's tradition and permitted appeals by the prosecution, a concept that has drawn criticism from those within the common law tradition. See Michael P. Scharf, *A Critique of the Yugoslavia War Crimes Tribunal*, 25 DENV. J. INTL. L. & POLY. 305, 307 (1997) (suggesting that this "infringe[s] the accused's interest in finality which underlies the double jeopardy principle"). The drafters of the rules also departed significantly from common law traditions by permitting the use of hearsay evi-

imposition of criminal liability, the creators of the Yugoslav tribunal restricted that body's jurisdiction to crimes based on "rules of international humanitarian law which are beyond any doubt part of customary law,"³² thereby limiting the tribunal's reach to international crimes that, while arguably novel at the time of Nuremberg or Tokyo, now have a fifty-year-old pedigree.

Gone from both tribunals were the aspects of the World War II prosecutions most criticized from a modern human rights perspective: the death penalty, liability for membership in a criminal organization, and the possibility of trials in absentia.³³ On the other hand, measures for the counseling of victims, the protection of witnesses and court-ordered restoration of stolen property responded to modern sensitivities favoring the rights of victims.³⁴ Presumably this new sensitivity to victims also responded to the criticism that Nuremberg had dishonored the memory of victims of the Holocaust.³⁵

But closure demands not merely a demonstrable commitment to impartiality and procedural and substantive fairness: it requires certainty of results, such that the tribunals' orders are enforced no less than those of any court, and all perpetrators face a realistic

dence, by granting the tribunal the power to order the production of evidence, and by banning plea bargaining and prosecutorial grants of immunity. See SCHARF, *supra* note 3, at 67.

32. *ICTY Statute*, *supra* note 2, ¶ 34. For the approach taken by the Rwanda tribunal, see *infra* notes 171-75 and accompanying text.

33. *But see* Intl. Trib. for the Prosecution of Persons Responsible for Serious Violations of Intl. Humanitarian Law Committed in the Territory of the Former Yugo. since 1991, RULES OF PROCEDURE AND EVIDENCE, rule 61, U.N. Doc. IT/32 (1994), amended by U.N. Doc. IT/32/Rev. 1 (1994), U.N. Doc. IT/32/Rev. 2 (1994), U.N. Doc. IT/32/Rev. 3 (1995), U.N. Doc. IT/32/Rev. 4 (1995), U.N. Doc. IT/32/Rev. 5 (1995), U.N. Doc. IT/32/Rev. 6 (1995), U.N. Doc. IT/32/Rev. 7 (1996), U.N. Doc. IT/32/Rev. 8 (1996), U.N. Doc. IT/32/Rev. 9 (1996), U.N. Doc. IT/32/Rev. 10 (1996), U.N. Doc. IT/32/Rev. 11 (1997), U.N. Doc. IT/32/Rev. 12 (1997) (providing for public indictments in cases where arrest warrants are not executed) <<http://www.un.org/icty/basic/rpe/rev13e.htm>> [hereinafter *ICTY Rules*]. This article is based on the 1995 revision, U.N. Doc. IT/32/Rev. 3.

34. For rules requiring the restitution of property and compensation to victims within the Rwanda Tribunal, see *ICTR Statute*, *supra* note 2, art. 23; and Intl. Crim. Trib. for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Intl. Humanitarian Law Committed in the Territory of Rwanda, RULES OF PROCEDURE AND EVIDENCE, rules 88(B), 105-06, U.N. Doc. ITR/3/Rev. 1 (1995).

35. Perhaps with the critique of Nuremberg's flawed history in mind, the prosecutors in the first trial at the Yugoslav tribunal spent what seemed to some courtroom observers an inordinate amount of time at the outset of the proceedings placing their case against Tadić within the broader context of the recent history of the former Yugoslavia through testimony on nationalist attitudes and their consequences, presented through an academic historian and fourteen policy witnesses, none of whom had been eyewitnesses to any of the crimes alleged in the indictment. See SCHARF, *supra* note 3, at 120-37. As Scharf notes, for the first five weeks of the Tadić trial, the prosecutors focused on proving the systematic and widespread nature of ethnic cleansing without presenting any testimony as to the alleged crimes committed by the defendant. See *id.* at 137.

prospect of becoming defendants. Accordingly, those who established the new ad hoc tribunals tried to replicate, despite the absence of victor's justice, conditions prevailing among national criminal courts in liberal states.³⁶ While, ideally, closure demands an Austinian sovereign authority capable of enforcing the law against all,³⁷ a precondition that is of course impossible to duplicate within the present international system, tribunal creators achieved the next best thing: tribunals backed by the power and resources of the Security Council, with jurisdictional primacy over national courts.

Consistent with the needs of closure, it is also argued — with some success — that multilateral forces need to use force as necessary to arrest those whom local authorities refuse to give up,³⁸ that prosecutors courageously must indict at least the highest leaders responsible regardless of the political repercussions, since the conviction of only inconsequential small fry will delegitimize the entire process, and that tribunal orders need to be enforced directly on recalcitrant government officials through renewed Security Council sanctions if necessary.³⁹ Proponents of closure argue further that international criminal prosecutions need to reach deeply into all regions of Rwanda and the Balkans to identify and punish all those who have been complicit with evil — even if such a thoroughgoing search for the truth requires expensive trials far into the future, po-

36. Indeed, some hope that international criminal proceedings will help promote democratic transitions. See CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* 127-34 (1996); OSIEL, *supra* note 6, at 1.

The achievement of closure for victims, for defendants, and for society as a whole is, of course, commonly associated with ordinary criminal trials in the United States. Cf. Frank Rich, *Rush to Closure*, N.Y. TIMES, June 5, 1997, at A21 (ridiculing the notion that the trial of Timothy McVeigh, convicted of bombing the Murrah Federal Building in Oklahoma City in 1995, brings closure to concerns with respect to "right-wing fringe groups"). The headline for Mr. Rich's column inspired the title of this article.

37. See Simpson, *supra* note 23, at 16-17.

38. In July 1997, in a change from its preexisting policy, NATO forces in Bosnia actively began to seek out for arrest indicted war crimes suspects. This change in policy yielded some arrests but also retaliatory attacks and threats by angered Bosnian Serb authorities. See Mike O'Connor, *Arrests by NATO Worry Bosnian Serb Leaders*, N.Y. TIMES, July 14, 1997, at A4; Mike O'Connor, *Serbs Threaten Retaliation for War Crime Arrests*, U.N. SAYS, N.Y. TIMES, July 17, 1997, at A6; see also Payam-Roman Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia?*, 20 HUM. RTS. Q. (forthcoming Nov. 1998) (manuscript at 82-87, on file with author). For a description of NATO's earlier "monitor, but don't touch" policy, see SCHARF, *supra* note 3, at 89.

39. See, e.g., CENTER FOR INTL. PROGRAMS, UNIV. OF DAYTON, *BRINGING WAR CRIMINALS TO JUSTICE* (1997) [hereinafter *BRINGING WAR CRIMINALS TO JUSTICE*]; MERON, *The Case for War Crimes Trials*, *supra* note 3, at 134; Roth, *supra* note 7.

litically treacherous manhunts by international forces, and innovative adaptations to established extradition practices.⁴⁰

Today, many international lawyers argue that the two ad hoc international war crimes tribunals now in place "have genuinely addressed many of the problems associated with their Nuremberg and Tokyo predecessors."⁴¹

II. CLOSURE APPLIED: THE TADIĆ JUDGMENT

After a trial that lasted nearly seven months, on May 7, 1997, a trial chamber of the Yugoslav tribunal found Dusko Tadić guilty on eleven of thirty-one counts charged in the original indictment.⁴²

40. See Akhavan, *supra* note 38 (manuscript at 94). Thus, an ad, placed in *The New York Times* by the "Coalition for International Justice" shortly after NATO troops arrested one of those indicted by the Balkan tribunal, urged that U.S.-led NATO forces meet their "moral obligations" to bring the rest of those indicted to justice.

[S]o long as war criminals are at large and justice is not done, the wounds of war cannot heal, refugees cannot return to their homes, and reconciliation, lasting peace, and a civil society cannot be achieved in Bosnia. A successful exit for U.S. troops will not be possible, and their many good works will have been wasted, if they leave behind a country in which persons indicted for war crimes continue to wield significant power and make a mockery of the rule of law.

Coalition for Intl. Justice, Advertisement, *Mr. President: Order the Arrest of War Criminals in Bosnia Now!*, N.Y. TIMES, July 15, 1997, at A8. The ad concludes:

Mr. President, at the dedication of the Holocaust Museum you reiterated the pledge "never again" to permit genocide. If the War Crimes Tribunal and the quest for peace in Bosnia should fail because U.S.-led NATO troops are unwilling to apprehend indicted perpetrators of crimes against humanity, the civilized world will have lost the opportunity to restore some credence to this tarnished pledge. We appeal to you not to allow this to happen.

Id. Among the groups in this coalition were Amnesty International, USA, and Human Rights Watch. See also Roth, *supra* note 7 (arguing for the use of NATO troops to arrest indicted war criminals). Indeed, some international lawyers contend that U.S. troops are legally obligated to arrest war criminals in the Balkans. See, e.g., John F. Hector, *Why US Troops Must Arrest War Criminals*, A.B.A. NATL. SEC. L. REP., Summer 1997, at 7. But see David P. Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 401 (1994); Robert M. Hayden, *Schindler's Fate: Genocide, Ethnic Cleansing, and Population Transfers*, 55 SLAVIC REV. 727, 742-43 (1996) [hereinafter Hayden, *Schindler's Fate*]; Robert M. Hayden, *Hayden's Reply*, 55 SLAVIC REV. 767, 771-72 (1996); [hereinafter Hayden, *Reply*]; Alfred P. Rubin, *Dayton, Bosnia, and the Limits of Law*, NATL. INTEREST, Winter 1996-97, at 41.

For a survey of the necessary adaptations to extradition, see, for example, Kenneth S. Gallant, *Securing the Presence of Defendants before the International Tribunal for the Former Yugoslavia: Breaking with Extradition*, 5 CRIM. L.F. 557 (1994).

41. RATNER & ABRAMS, *supra* note 3, at 185.

42. Although Tadić was acquitted of 20 counts, including all nine charges of murder, 11 of these acquittals stemmed from the decision by two of the three judges that "grave breaches" under Article 2 of the Fourth Geneva Convention had not been shown because the prosecution had failed to prove to the tribunal's satisfaction that the conflict in Bosnia was, after May 19, 1992, when all of Tadić's alleged offenses had occurred, an "international conflict." *Tadić Judgment*, *supra* note 4, ¶¶ 607-08. The majority found that the withdrawal of the Yugoslav National Army at that time put the onus on the prosecution to prove Serbian "effective control" over any offenses committed thereafter by forces of the Republic of Srpska (VRS). *Tadić Judgment*, *supra* note 4, ¶¶ 584-608. They concluded that the VRS needed to be shown to be essentially agents of the Serbian army in order for their victims to be "protected per-

Tadić, who had not been charged with genocide, was convicted of "persecution" and fourteen beatings, designated as six crimes against humanity and five violations of the laws or customs of war.⁴³ On July 14, 1997, Tadić was sentenced to twenty years in prison.⁴⁴ Observers predict that Tadić will probably serve at most ten years.⁴⁵

As the following sections demonstrate, in judging and sentencing Tadić, the judges attempt to provide an account of the history of the region, the facts in the case, and the application of the law to these facts in a way that closely adheres to the model of closure's

sons" under the Fourth Geneva Convention and that the prosecution had not met this evidentiary burden. *Tadić Judgment*, *supra* note 4, ¶¶ 607-08. Judge McDonald, from the United States, dissented, indicating that she doubted whether "effective control" needed to be shown and finding that even if that needed to be shown, the prosecution had met this burden. Opinion and Judgment, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Art. 2 of the Statute, Prosecutor v. Tadić, Case No. IT-94-1-T, ¶ 4 (Trial Chamber, Intl. Trib. for the Prosecution of Persons Responsible for Serious Violations of Intl. Humanitarian Law Committed in the Territory of Former Yugo. since 1991, May 7, 1997) <<http://www.un.org/icty/970507jt.htm>> [hereinafter *McDonald Dissent*].

As this suggests, the relatively large number of acquittals on the formal charges filed against Tadić is deceptive. In most instances the original indictment had assigned three counts to each separate act or series of acts by the accused: "grave breaches" of the Geneva Conventions, "crimes against humanity" (namely persecution), and violations of the laws and customs of war. Thus, most of the acquittals were based on rulings of law, not fact. Although Tadić was acquitted by the majority of all charges of "grave breaches," many of the same alleged actions led to successful convictions as violations of the laws of war and crimes against humanity. Further, even though Tadić was cleared of all murder charges, the counts under which he was convicted include involvement in the deaths of two Muslim policemen.

43. A charge involving forcible sexual intercourse against a female prisoner, designated as a grave breach of the Geneva Convention, a violation of the laws or customs of war, and a crime against humanity, was withdrawn before trial because the victim was unwilling to testify.

44. Tadić was sentenced to a total of 97 years for the 11 separate convictions, but each of these sentences was to be served concurrently, and the longest is for 20 years. See *Sentencing Judgment*, Prosecutor v. Tadić, Case No. IT-94-1-T (Intl. Trib. for the Prosecution of Persons Responsible for Serious Violations of Intl. Humanitarian Law Committed in the Territory of Former Yugo. since 1991, July 14, 1997) <<http://www.un.org/icty/summary/tadic.htm>>. Although in theory Tadić had faced the possibility of life imprisonment under the tribunal's rules, see *ICTY Rules*, *supra* note 33, rule 101, this probably was not a realistic outcome given the requirements in the tribunal's Statute that it "have recourse" to the "general practice" regarding prison sentences in the courts of the former Yugoslavia, see *ICTY Statute*, *supra* note 2, art. 24(1). While the issue of what "general practice" is in the former Yugoslavia is not free from doubt, generally the maximum allowable sentence in the region is 20 years imprisonment. See Dylan Cors & Siobhán K. Fisher, *National Law in International Criminal Punishment: Yugoslavia's Maximum Prison Sentences and the United Nations War Crimes Tribunal*, 3 PARKER SCH. J.E. EUR. L. 637, 660-62 & n.110 (1996).

45. Both the defendant and the prosecutor have filed appeals to the judgment. See *Notice of Appeal of Judgment of May 7, 1997 by the Defence*, Prosecutor v. Tadić, Case No. IT-94-1-T (App. Chamber, Intl. Trib. for the Prosecution of Persons Responsible for Serious Violations on Intl. Humanitarian Law Committed in the Territory of Former Yugo. since 1991, June 3, 1997) <<http://www.un.org/icty/p210-e.htm>> [hereinafter *Defence Notice of Appeal*]; *Notice of Appeal of Judgment of May 7, 1997 by the Prosecutor*, Prosecutor v. Tadić, Case No. IT-94-1-T (App. Chamber, Intl. Trib. for the Prosecution of Persons Responsible for Serious Violations on Intl. Humanitarian Law Committed in the Territory of Former Yugo. since 1991, June 6, 1997) <<http://www.un.org/icty/p210-e.htm>>.

demands in four critical respects. First, they try to fulfill the demand for a definitive historical account that preserves the history of barbarism. Second, they resort to the law's apolitical neutrality and rely on its objectivity to make both factual and legal determinations, the better to highlight the contrast between the court's politically neutral treatment of the defendant as compared to the defendant's actions of persecution. Third, they repeatedly rely on concepts like the presumption of innocence to illustrate how closely and scrupulously they respect the defendant's rights to a "level playing field." Finally, the judges acknowledge the innocence of victims in both their historical accounts as well as in their application of the rules of humanitarian law.

A. *Preserving Collective Memory*

The judgment's initial background and preliminary findings chronicle the historical and geographic background of Bosnia's multi-ethnic milieu, the disintegration of the Socialist Federal Republic of Yugoslavia, political developments in Bosnia and Herzegovina and the rise of a propaganda campaign in favor of ethnic cleansing for the good of "Greater Serbia," the formation of Serb autonomous regions, the transformation of the Yugoslav National Army (JNA) into the instrument of Serbia and Montenegro, the rise of the army of the Republika Srpska (VRS) in the face of the JNA's withdrawal from Bosnia and Herzegovina, and the effects within Bosnia, along ethnic lines, of the JNA's incursion into Croatia.⁴⁶ These sections present an equally detailed account of the immediate history of the region in which Tadić's actions occurred, Opština Prijedor, including the breakdown in ethnic relations there in the face of the "polarizing effect" of "propaganda and political manoeuvres" intended "to shift the balance of power in the former Yugoslavia to Serbia."⁴⁷ The judgment also provides an account of the Serbian takeover of the town of Prijedor and its grim consequences.⁴⁸

This historical account, common to judgments involving administrative massacres, aspires to be the common history judged by common standards that the model of closure demands with respect to the preservation of "collective memory."⁴⁹ It is a painstaking

46. See *Tadić Judgment*, *supra* note 4, ¶¶ 53-126.

47. *Tadić Judgment*, *supra* note 4, ¶¶ 130-92.

48. *Tadić Judgment*, *supra* note 4, ¶¶ 137-41.

49. Osiel defines the term as collections of historical stories that permit societies to draw common lessons for the future, namely, tales that "a society tells [itself] about momentous

attempt to provide a definitive, historically accurate account not merely of Tadić's actions but of the immediate context in which these occurred. This historical section of the judgment appears to be intended to stand on its own, as a testament to how hate was permitted to consume a particular region. While it does not directly relate to the crimes charged, it seems intended to be a chronicle of the past that seeks to put the past to rest. The judges assume that their unflinching account of Serbian aggression against non-Serbs, replete with graphic descriptions of the severe torture, executions, sexual assaults, and beatings endemic to camps holding mostly Muslim and Croat civilians, along with the nearly ceaseless ethnic and religious epithets that encouraged and accompanied these horrific conditions, will repel ordinary readers.⁵⁰

The judges' historical chronicle is also intended to lend credibility to their subsequent findings with respect to the defendant. After all, if Serbs in this region were being encouraged to treat non-Serbs as sub-human and were in fact doing so, would it be particularly surprising if Tadić, a vitriolic supporter of "Greater Serbia," engaged in the same? At the same time, these preliminary findings imply that Serbian actions in 1991–92 and, by inference, Tadić's as well, were extreme in both cruelty and motivation, especially within the context of the formerly harmonious interethnic relations in the former Yugoslavia. The judges contrast the state of affairs in 1991–92 in Prijedor before the Serbian takeover — portrayed as a town where various ethnic groups lived in apparent harmony amidst significant intermarriages and friendships across ethnic lines with limited signs of division⁵¹ — with its post-invasion state in stark terms, drawing sharp black-and-white distinctions between good and evil, aggressor and victim. Readers are discouraged from seeing the underlying events as in any sense a continuation or exacerbation of older conflicts, but, at the same time, no one except the defendant is assigned specific blame.

The judges' findings, only nominally preliminary, are presented in a matter-of-fact tone that acknowledges little self-doubt or possi-

events in its history, the events that most profoundly affect the lives of its members and most arouse their passions for long periods." OSIEL, *supra* note 6, at 18–19.

50. Thus, the judgment includes the statement of an elected Serb official who indicated in the media that he would no longer allow non-Serb women to give birth at the local hospital, that all mixed marriage couples should be divorced or face annulment, and that children of such marriages "were good only for making soap." *Tadić Judgment*, *supra* note 4, ¶ 147.

51. See *Tadić Judgment*, *supra* note 4, ¶ 129. The judgment also quotes one witness who describes Prijedor as the symbol of the "brotherhood unity of the former Yugoslavia at large." *Tadić Judgment*, *supra* note 4, ¶ 129.

bility of partiality. The judges tell a simple, linear story, presented as if it were an objective press account that would presumably be found credible by anyone, regardless of ethnicity or political sympathies. Their account relies on only those adverse inferences about Serbian motivations that, in the Chamber's view, any reasonable observer would draw. The judges do not render any outwardly evaluative judgments with respect to Serbian nationalist goals, and they are careful to avoid any suggestion that all Serbs, even in Prijedor, are complicit in the mass atrocities they describe. This is strongly confirmed by the rest of the judgment which is devoted to showing, in elaborate detail, why Tadić, as an individual, is guilty of certain specific offenses.

B. *The Factual Case Against the Defendant*

From broad historical context, the judgment proceeds to a detailed enumeration of the accusations against Tadić, the evidence bearing on these, and the judges' findings with respect to all thirty-one counts charged in the indictment.⁵² The judges describe Tadić's ever more prominent nationalistic sentiments, use of ethnic epithets, and political activities, both as a reserve police officer and, most crucially, at the Omarska, Keraterm, and Trnopolje prison camps.⁵³ They find that Tadić: (1) participated in the attack on Kozarac;⁵⁴ (2) beat non-Serb civilians there, at the Prijedor military barracks, and in the Omarska and Keraterm prison camps;⁵⁵ and (3) assisted in the seizure, selection, and transportation of individuals for detention.⁵⁶ As in the historical section of the judgment, this section does not flinch from describing, in graphic detail, what Tadić is alleged to have done. All trial observers, Serb and non-Serb alike, are invited to join in the judges' horror, the better to join the societal consensus in favor of the ultimate verdict.

In one respect, however, this portion of the judgment differs sharply from the judges' preliminary findings. Although that historical overview adopts an authoritative tone, with little reference to the evidence that led its authors to their conclusions, in this section the judges enumerate in detail each witness and document introduced, connecting these to each of the charges against the de-

52. See *Tadić Judgment*, *supra* note 4, ¶¶ 193-556. For the tribunal's disposition of each count charged, see *Tadić Judgment*, *supra* note 4, ¶¶ 203-04.

53. See, e.g., *Tadić Judgment*, *supra* note 4, ¶¶ 207-28.

54. See *Tadić Judgment*, *supra* note 4, ¶¶ 396-97.

55. See *Tadić Judgment*, *supra* note 4, ¶¶ 397, 426-35, 444-48.

56. See, e.g., *Tadić Judgment*, *supra* note 4, ¶¶ 453-59.

fendant. They indicate, through detailed findings, precisely why they find one version of the facts more credible than another. The testimonies of individual prosecution and defense witnesses are canvassed, and the judges identify which witness put the defendant on the scene — despite the defense's denial that, for example, Tadić was ever present in the Omarska prison camp — as well as which witness claims to have seen Tadić commit the alleged acts. Repeatedly, the judges indicate that the presumption of innocence means that evidence that Tadić was present at the scene of particular assaults or other crimes is, by itself, insufficient to convict.⁵⁷

The differences between the historical and defendant-centered sections of the judgment are readily understandable. The historical portions of the judgment are largely drawn from the prosecution's academic/policy witnesses, whom the defense, for its own reasons, decided not to rebut and barely to cross-examine.⁵⁸ Under a system that largely relies on the parties and not the judges to contest evidence, uncontested evidence is much more likely to emerge unscathed in the subsequent judgment.⁵⁹ On the other hand, once the judges reach what both prosecution and defense consider to be the heart of the case — the specific charges against Tadić — on which there is conflicting evidence, they clearly believe that a careful accounting of the evidence is necessary to legitimize their conclusions.

With respect to every charge, Tadić relied on what his defense team characterized — misleadingly — as an alibi defense. Defense witnesses testified that Tadić was living in Banja Luka, some forty-five kilometers from Kozarac and further from Prijedor, from May 23 through June 15, 1992; that he made only four trips from Banja Luka; and that, thereafter, he lived in Prijedor while working as a reserve traffic policeman.⁶⁰ According to the defense, Tadić was

57. See, e.g., *Tadić Judgment*, *supra* note 4, ¶ 237 (finding insufficient evidence that Tadić took an active part in the assault and mutilation of Fikret Harambasic); *Tadić Judgment*, *supra* note 4, ¶ 241 (finding insufficient evidence that prisoners died of the injuries alleged). The Chamber rejected, however, the defense claim that, as a matter of law, a finding of guilt cannot rest on the testimony of a single witness. See *Tadić Judgment*, *supra* note 4, ¶¶ 256, 535-39.

58. Defense cross-examination of these witnesses was largely restricted to contesting the description of the underlying conflict as international. See SCHARF, *supra* note 3, at 120-37.

59. The Tadić defense team's relatively nonconfrontational approach to the prosecution's presentation of relevant history, was, for example, very different from the approach taken by lawyers for Klaus Barbie who attempted to put modern French history itself on trial. See, e.g., OSIEL, *supra* note 6, at 52-53.

60. See *Tadić Judgment*, *supra* note 4, ¶ 481. For an overview of the defense's case, see SCHARF, *supra* note 3, at 175-206.

simply not present at Kozarac or in the relevant prison camps at the time of each of the alleged offenses.⁶¹

To the extent the judges reject this defense with respect to specific charges, they do not indicate that they find defense witnesses untruthful. Instead, the judges respectfully and cautiously conclude that defense witnesses merely failed to provide a conclusive alibi, since even if what they said was true, their testimony did not preclude Tadić's presence elsewhere.⁶² Even with respect to the weighing of competing testimony, the judges strive to cast their findings as the inevitable result of the application of coolly unemotional, rational, and objective logical inference and not subjective — and presumably more challengeable — credibility determinations.⁶³ The search for societal consensus with respect to their verdict also leads the judges to tiptoe gingerly around the question of the potential ethnic or religious bias of all witnesses, an issue that emerged repeatedly during cross-examination of the Serbian defense witnesses and the non-Serb prosecution witnesses — most of whom were Muslim victims.⁶⁴

The Chamber's sensitive handling of evidence seeks to elicit confidence that the judges are being apolitical and are not being

61. See, e.g., *Tadić Judgment*, *supra* note 4, ¶ 443 (relating to Tadić's claim that he was not present at the Keraterm camp).

62. Even with respect to events at the Omarska camp on June 18, 1992, the Chamber simply states that "no other Defence witness could assign 18 June as a date when the accused was in his or her company." *Tadić Judgment*, *supra* note 4, ¶ 230; see also *Tadić Judgment*, *supra* note 4, ¶¶ 312-13. Of course, as the judgment readily acknowledges, an alibi defense in this case became nearly impossible given the need to account for Tadić's whereabouts over an extended period. See *Tadić Judgment*, *supra* note 4, ¶ 533. Pointing to the many prosecution witnesses who put Tadić on the scene in Omarska on June 18, the Chamber appealed to logical inference, indicating that "it is satisfied beyond reasonable doubt of the guilt of the accused." *Tadić Judgment*, *supra* note 4, ¶ 234. With respect to other charges, the chamber counters the "general" testimony of defense alibi witnesses, who testify of the accused's "constant" presence elsewhere, with the "very specific and precise evidence" of certain prosecution witnesses who testify to Tadić's actions on particular occasions. *Tadić Judgment*, *supra* note 4, ¶ 278 (relating to events of July 10, 1992); see also *Tadić Judgment*, *supra* note 4, ¶¶ 434-35 (relating to Tadić's presence at the Omarska camp).

63. Presumably not to offend Serbian sensibilities and to find common ground in support of the judgment, the judges avoid saying that many defense witnesses, including the accused's wife, Mira Tadić, are not credible. Indeed, at various points, the judges go out of their way to rely on Mira Tadić's testimony, thereby suggesting that they find at least portions of it credible. See, e.g., *Tadić Judgment*, *supra* note 4, ¶ 428. Thus, the judges do not accuse the defense's four alibi witnesses, all of whom testify that Tadić was present in Kozarac in May 1992, of lying; the judges simply state that their testimony "does not afford an alibi to the accused except to indicate that they did not happen to see the accused in Kozarac on that day while they were there." *Tadić Judgment*, *supra* note 4, ¶ 337.

64. The judges deemphasize the possible significance of ethnic or religious bias by any witness. They dismiss defense contentions that Muslim victims are inherently biased and avoid similar contentions with respect to the veracity of defense witnesses. See *Tadić Judgment*, *supra* note 4, ¶¶ 540-41.

drawn into local ethnic or religious tensions. At the same time, the judges emphasize that, under the applicable law, they are obliged to find evidence that Tadić was personally motivated by and acted upon the systematic nationalist ethno-religious hatreds canvassed in the judges' preliminary findings. The tribunal links Tadić's intent to those of the Serbian society at large in three steps. First, the judges cite their preliminary findings, along with other evidence, to conclude that Tadić's acts were taken within a "general context of discrimination."⁶⁵ Second, they rely on specific examples of victimization of non-Serbs to conclude that "[a] policy to terrorize the non-Serb civilian population of opstina Prijedor on discriminatory grounds is evident[,] . . . that its implementation was widespread and systematic throughout," and that this was apparent "at the minimum" in Opstina Prijedor.⁶⁶ Finally, the Chamber links these general policies to Tadić's own actions to conclude that Tadić was "aware of the policy of . . . discrimination against non-Serbs, and acted on the basis of religious and political grounds."⁶⁷

C. *The Legal Case Against the Defendant*

In the final section of the judgment, the Chamber applies the applicable humanitarian law to its factual findings. The judges confirm that, as a matter of law, a showing of discriminatory animus on the part of Tadić individually and by advocates of "Greater Serbia" generally is needed to convict Tadić of either persecution as a crime against humanity or violations of the laws and customs of war. Affirming that convictions for violations of the laws or customs of war

65. See *Tadić Judgment*, *supra* note 4, ¶ 465.

The abuses against non-Serbs were motivated by religious and political reasons. The curse directed at Muslims most often was the derogatory term, "bališa," as well as "Fuck your Alija," referring to the SDA leader Alija Izetbegovic. These indicate the motivations of the perpetrators. Abuse was also directed towards Croats for political reasons. There was repeated testimony that men were forced to hold their hands in the three-finger Serb salute, which is a traditional Serb greeting and has meaning within the Serbian Orthodox Church, and several witnesses testified that crosses were carved on men's bodies. Numerous witnesses testified to hearing discriminatory curses such as "bališa mother," "Ustasa mother," and "Alija mother," usually in association with a beating. Many were required to sing Serb nationalistic songs and some of the camp guards wore the "Chetnik kokarda," the two-headed eagle described as equivalent to wearing a Nazi swastika.

Tadić Judgment, *supra* note 4, ¶ 467.

66. *Tadić Judgment*, *supra* note 4, ¶ 472.

67. *Tadić Judgment*, *supra* note 4, ¶ 477. For the Chamber, this evidence includes Tadić's active involvement in political affairs on behalf of a "Greater Serbia," including Tadić's reputed desire to name his child after Slobodan Milošević, his many actions and statements directed against Muslims and his evincing a desire to "disturb relations between ethnic groups." *Tadić Judgment*, *supra* note 4, ¶ 475 (internal quotation marks omitted); see also *Tadić Judgment*, *supra* note 4, ¶ 185.

and for crimes against humanity require, apart from a demonstration that the acts allegedly committed are within those enumerated under those laws, that they be committed within the context of "armed conflict,"⁶⁸ the judges find that these requisites are met since Tadić's actions relating to the take-over of Kozarac and other villages were directly connected to this "ethnic war and the strategic aims of the *Republika Srpska* to create a purely Serbian State."⁶⁹ Similarly, they conclude that Tadić's actions in the prison camps were also directly connected to the ongoing armed conflict, since they "clearly occurred with the connivance or permission of the authorities running these camps" and "effected the objective of the *Republika Srpska* to ethnically cleanse, by means of terror, killings or otherwise, the areas of the Republic of Bosnia and Herzegovina controlled by Bosnian Serb forces."⁷⁰

In the tribunal's view, discriminatory animus is also a significant component with respect to each of the additional requirements needed under the law for a "crime against humanity."⁷¹ They confirm that discriminatory intent is, as would be expected, crucial to determining that the accused committed the specific type of crime against humanity charged under article 5(h) of its statute, "persecution." Though the chamber candidly admits that persecution "has

68. *Tadić Judgment*, *supra* note 4, ¶¶ 572-76.

69. *Tadić Judgment*, *supra* note 4, ¶ 574.

70. *Tadić Judgment*, *supra* note 4, ¶ 575.

71. According to the chamber's interpretation of article 5's reference to "crimes against humanity," these crimes require, in addition, a showing: (1) that at the time of the commission of the acts or omissions there was an ongoing widespread or systematic attack directed against a civilian population; (2) that the defendants' acts were undertaken on a widespread or systematic basis and in furtherance of such a policy; (3) that all relevant acts be undertaken on discriminatory grounds; and (4) that the perpetrator have knowledge of the wider context of his actions. See *Tadić Judgment*, *supra* note 4, ¶ 626. The judges determined that the need to have actions "directed against a civilian 'population'" requires a widespread course of conduct, suggesting a large number of victims, or systematic mass action, suggesting a pattern or methodical plan, and not "isolated or random" acts. *Tadić Judgment*, *supra* note 4, ¶ 646. In addition, persons must be "victimised not because of [their] individual attributes but rather because of [their] membership [within] a targeted civilian population." *Tadić Judgment*, *supra* note 4, ¶ 644. In deference to the Report of the Secretary-General that recommended that the Security Council establish the Yugoslavia tribunal, the judges affirm that "discrimination" is required and must rest on "national, political, ethnic, racial or religious grounds." *Tadić Judgment*, *supra* note 4, ¶ 652. They also agree that the acts must be part of a formally adopted, or at least consciously pursued, policy directed against particular groups of people, whether or not pursued by a state. See *Tadić Judgment*, *supra* note 4, ¶ 653. As for the defendant's intent, they require a showing that

the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely unrelated to the attack on the civilian population 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.

Tadić Judgment, *supra* note 4, ¶ 659.

never been clearly defined in international criminal law nor . . . in the world's major criminal justice systems,"⁷² it indicates "that what is necessary is some form of discrimination that is intended to be and results in an infringement of an individual's fundamental rights" based on the specific grounds of "race, religion or politics."⁷³ The judges contend that "it is not necessary to have a separate act of an inhumane nature to constitute persecution" since discrimination, the "violation of the right to equality in some serious fashion," "itself makes the act inhumane."⁷⁴

The Chamber's reliance on discriminatory animus as a critical part of both its factual and legal arguments in favor of conviction serves a multitude of didactic purposes. First, it is an affirmation of and an appeal to universal values in defense of fundamental human dignity. The judges are relying on the closure model's premise that such a judicial affirmation will demonstrate, to everyone's satisfaction, that it is appropriate — and perhaps necessary — to have an international tribunal pronounce on crimes that constitute universal threats.⁷⁵ Second, their emphasis on irrational prejudice as the motivator encourages condemnation of Tadić as an individual culprit and mollifies the victims of his irrational, but calculated, behavior. Third, as in the Chamber's factual findings, it heightens the sharp break between the defendant's treatment of his victims and the judges' treatment of him. Fourth, by stressing the ethnic and religious underpinnings of the conflict in the Balkans in a way that the Nuremberg trials largely failed to do, the judges attempt to strengthen the accuracy of their historical account and thereby preserve a record that does not dishonor the memory of the Balkan

72. *Tadić Judgment*, *supra* note 4, ¶ 694.

73. *Tadić Judgment*, *supra* note 4, ¶ 697; *see also Tadić Judgment*, *supra* note 4, ¶ 707 (noting that forms of persecution vary, but the prerequisite for all is discrimination with respect to a "fundamental right").

74. *Tadić Judgment*, *supra* note 4, ¶ 697. Although the chamber does not attempt a definitive list of acts that would constitute persecution, it surveys the wide variety of acts that have been included in the literature or in prior practice, including Nuremberg itself — from killing to limitation of the type of professions open to the targeted group, from restrictions on family life to inflammatory writings inciting a population to anti-Semitic persecution — and concludes that the crime encompasses "a variety of acts, including, *inter alia*, those of a physical, economic or judicial nature, that violate an individual's right to the equal enjoyment of his basic rights." *Tadić Judgment*, *supra* note 4, ¶ 710; *see also Tadić Judgment*, *supra* note 4, ¶¶ 707-09.

75. *Cf. supra* text accompanying notes 17-21 (discussing need for international fora). Thus, for example, the requirement that crimes against humanity be directed at "any civilian population . . . gives the crime the requisite international dimension and . . . permits extraterritorial prosecution, thus distinguishing it from an 'ordinary crime' that the state is expected to prosecute." *The Queen v. Finta* [1994] S.C.R. 701, 752 (Can.) (La Forest, J., dissenting) (internal quotation marks omitted).

conflict's victims. Finally, the judges' unstinting account of the ethnic and religious stereotyping engaged in by Tadić and the society around him seeks to promote revulsion against such tactics and encourages societal consensus in favor of national reconciliation along integrationist lines.

As the foregoing example illustrates, the Tadić judgment as well as his sentencing⁷⁶ wholeheartedly embrace the closure model. The purportedly authoritative and lengthy⁷⁷ historical account that the judges supply in their preliminary factual findings, extending to facts and situations far removed from the charges directly at issue, presents a wealth of detail intended to evoke shared revulsion in court observers — the better to prevent barbarism's recurrence, to promote sympathy and solidarity with victims, and to strengthen the court's moral and legal legitimacy vis-à-vis Tadić and defendants generally. Those findings are also intended to lend credibility to the court's later factual and legal conclusions, and not merely because the court's version of history helps it to determine that the law's demand for a demonstration of discriminatory animus has been fulfilled. The black-and-white lines drawn by the court between perpetrator and victim and between the region's harmonious past and its recent decline into ethnic cleansing are intended to buttress the court's findings of guilt, to strengthen social solidarity on behalf of the universal values reflected in humanitarian law, and to support as well Tadić's sentence. At the same time, the apolitical tone adopted in those preliminary factual findings — as in the court's scrupulous attempt to avoid explicit condemnation of Serbian political goals, Serbian political or cultural institutions or Serbs generally — keeps the focus on Tadić's individual culpability,

76. Tadić's sentencing, as reported in the press, included an oral statement by Chief Judge Gabrielle Kirk McDonald. As quoted in news accounts, Judge McDonald noted that Tadić beat his Muslim and Croat victims "intentionally and with sadistic brutality, using knives, weapons, iron bars, the butt of a pistol, sticks and by kicking . . . tightening a noose around the neck of one of them until he lost consciousness. Why?" *War Criminal Sentenced to 20-Year Term*, CHARLESTON DAILY MAIL (W. Va.), July 14, 1997, at A8, available in 1997 WL 7110580. Judge McDonald also alluded to political leaders' encouragement of ethnic hatred and indicated to Tadić, "[y]ou responded to this campaign and you must bear responsibility for your criminal conduct." *Id.* She concluded that "[t]o condone your actions even when committed in this context is to give effect to a base view of morality and invite anarchy." *Id.* Judge McDonald's statements, including her presumably rhetorical question to the defendant, were obviously intended to enhance collective revulsion against Tadić's acts and encourage unanimity in favor of the severity of the chamber's sentence. See also *Sentencing Judgment, Prosecutor v. Tadić*, Case No. IT-94-1-T (Trial Chamber, Intl. Trib. For the Prosecution of Persons Responsible for Serious Violations of Intl. Humanitarian Law Committed in the Territory of Former Yugo. since 1991, July 14, 1997) <<http://www.un.org/icty/70714se2.htm>> (hereinafter *Sentencing Judgment*).

77. The preliminary factual findings extend from paragraph 193 of the judgment to paragraph 477 in an opinion that has 765 paragraphs total.

the better to avoid destabilizing implications of collective guilt. Finally, the court's careful delineation of evidence relative to particular charges, along with its effort to reduce reliance on credibility or other comparable "subjective" findings, seeks to promote closure with respect to the judges' adherence to the neutral application of law. In all these respects, Tadić's trial and judgment seem, as intended, at least the equal of the Nuremberg trials that inspired them.

III. CRACKS IN THE EDIFICE

To date, the reaction to Tadić's conviction and sentence does not resemble anything remotely approaching closure. Despite the meticulous case presented by the prosecution, the relatively strong defense mounted by Tadić's attorneys, the more than 120 witnesses and hundreds of exhibits, the 7000 pages of trial transcripts, and the painstaking and lengthy written judgment, the Tadić verdict has generated, at least in Serbian circles, chilly indifference or worse.⁷⁸ The official Serbian reaction has been that the Tadić proceedings and verdict constitute further evidence that the tribunal is a fraud perpetrated by hostile foreign interests pursuing political show trials to undermine the Serbian nationalist cause.⁷⁹ This reaction, while extreme, is likely to find an echo even among some commentators in the West.⁸⁰ And, while most international lawyers con-

78. See, e.g., Marlise Simons, *A War-Crimes Trial, but of Muslims, Not Serbs*, N.Y. TIMES, Apr. 3, 1997, at A3. See generally Dušan Cotić, *Introduction*, 5 CRIM. L.F. 223 (1994). The reaction to Tadić's conviction and sentence was, within the Balkans, strongly divided along Serb/non-Serb lines. The deputy justice minister of the Bosnian Serb republic at Pale, Goran Neskovic, expressed the view of many Serbian observers when he pronounced that the Tadić sentence proved the tribunal's "bias against Serbs." Mike Corder, *Tribunal Sentences Bosnian Serb to Serve 20 Years for Terror Campaign*, WASH. POST, July 15, 1997, at A13. According to Neskovic, "Tadić[c] was convicted only because he lived in Prijedor That man is not guilty, and not a single witness could confirm that he was responsible." *Id.* Indeed, the absence of Serbian support for the Yugoslav tribunal, long apparent given the lack of cooperation, indeed obstruction, by government officials and others to the tribunal's ongoing investigations, only seemed to deepen after the verdict was rendered and NATO forces undertook two modest raids to arrest other indicted individuals. Instead of closure, bomb and other threats emerged as a result of the verdict and the NATO actions, and Serbian media reports lambasted both the verdict and the NATO actions as biased attacks on the Serbian cause. See Jovana Gec, *Serb Anger Grows due to NATO Raid, Tribunal Sentencing*, ASSOCIATED PRESS, July 14, 1997, available in 1997 WL 4874854; see also Jovana Gec, *Serbs Bury War Crimes Suspect, Accuse NATO of Murder*, ASSOCIATED PRESS, July 13, 1997, available in 1997 WL 4874729.

79. Indeed, Serbian anti-tribunal propaganda has been so vitriolic that it prompted NATO attempts to disrupt television transmissions within Bosnia. See, e.g., Chris Hedges, *NATO Troops in Bosnia Silence Karadzic's [sic] Television Station*, N.Y. TIMES, Oct. 2, 1997, at A3.

80. See, e.g., Hayden, *Schindler's Fate*, *supra* note 40, at 743; Hayden, *Reply*, *supra* note 40, at 767; Rubin, *supra* note 40, at 41-42.

tinue to applaud the tribunal's efforts, its proceedings are generating considerable and contentious debates and reviving Nuremberg-era issues even among its foremost advocates.⁸¹ There is little evidence that either the principal intended audience of the closure model — the diverse peoples living within the former Yugoslavia — or the international community as a whole are reaching consensus in or through the tribunal's efforts. On the contrary, as with Nuremberg and national war crimes prosecutions since, it seems likely that many revisionists are now waiting in the wings and will soon emerge to challenge the tribunal's legitimacy and its capacity to fulfill its goals.

While it remains possible that closure will yet emerge as a result of the Yugoslav prosecutions, we need to consider the possibility that, at least in the context of present conditions in the former Yugoslavia, the model of closure needs reconsideration. In this section, I will address how, despite the *Tadić* judges' best efforts, *Tadić's* trial fell short with respect to the four critical aspects of the model of closure: the presentation and preservation of collective memory, the application of "apolitical" rules of law, and fairness to both defendants and victims. At the end of the section, I will suggest why the difficulties in applying the model of closure are not limited to either the *Tadić* case or the Yugoslav tribunal but extend, possibly with even greater force, to the international tribunal for Rwanda. Finally, I will suggest why the failures of the closure approach suggest a need to get beyond the purported "lessons" of Nuremberg.

A. *Flawed History*

Consider first the contrast between the demands for a definitive and enduring historic account acceptable to all sides and what *Tadić's* judges actually produced: a simple story of Serbian aggression and its horrific consequences. The judges' account, containing scarcely a mention of the possibility of competing versions of events or shades of gray, lacks the complexities, nuances and cross-disciplinary insights of contemporaneous scholarly accounts of the same events. As might be expected, scholars' versions of the

81. See, e.g., SCHARF, *supra* note 3, at 207-28; Chaney, *supra* note 22, at 60; Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AM. J. INTL. L. 235 (1996); Scharf, *supra* note 31; Michael Scharf & Valerie Epps, *The International Trial of the Century? A "Cross-Fire" Exchange on the First Case Before the Yugoslavia War Crimes Tribunal*, 29 CORNELL INTL. L.J. 635, 643-63 (1996); Sienho Yee, *The Erdemovic Sentencing Judgement: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia*, 26 GA. J. INTL. & COMP. L. 263 (1997).

Balkans' descent into violence are much more nuanced. Even while finding the Serbs primarily at fault, they give the conflict a much longer and more complex pedigree, highlighting the ways that economic and other forms of discontent, for example, were channeled first under Tito and then Milošević and other politicians. The best of these accounts tells a story quite distinct from the Tadić judges' simplistic tale of an ethnically harmonious region that, nearly overnight, exploded into ethnic cleansing. Academic histories, such as Sabrina Ramet's and Noel Malcolm's, bring to bear a rich texture of cultural, psychological, sociological, and political facts, along with their historical precedents, to explain how the social fabric of the former Yugoslavia frayed over time.⁸² Unlike the tale told in the Tadić case, these accounts: (1) distinguish among cultural, religious, and political phenomena instead of relying on an undifferentiated mantra of race, religion, or politics; (2) scrutinize and challenge the numerous claims to historical victimization contained in regional nationalisms; and (3) attribute blame to a large number of specific persons and groups, including churches and political associations.⁸³

In these and many other ways, Tadić's judges are demonstrably poor historians. It seems inconceivable that anyone, even those favorably disposed to the judges' version of the facts, can read the judges' historical account as a convincing or definitive history. Despite the Yugoslav tribunal's and its prosecutor's able attempts to exceed the level of historical accuracy achieved at the Nuremberg trials, their effort to seek closure with respect to the preservation of collective memory seems both a Sisyphean effort and a pale and woefully inadequate version of a story better told elsewhere.

Some of the reasons for this lie with the traditional demands of the criminal law. As scholars like Osiel have noted, the perpetrator-driven nature of the rules of evidence, the require-

82. See SABRINA PETRA RAMET, *BALKAN BABEL: THE DISINTEGRATION OF YUGOSLAVIA FROM THE DEATH OF TITO TO ETHNIC WAR* (2d ed. 1996); NOEL MALCOLM, *BOSNIA: A SHORT HISTORY* (1996).

83. See MALCOLM, *supra* note 82; RAMET *supra* note 82. Although Ramet does not rely on atavistic ethnic hatreds to explain recent massacres, she describes the various ways institutions, such as the Serbian Orthodox Church, and individuals, such as Milošević, journalists, and rock stars, revived and exploited nationalist sentiments that go back at least to 1918. Separate chapters in Ramet's book are devoted to "distinct spheres of influence" — culture and society, religion, and politics — and she chronicles, for example, the forms of "victim complex" that became manifest within each sphere. See RAMET, *supra* note 82, at 91-112, 198-200; see also *id.* at 275-98 (discussing the "[r]epercussions of the War in religion, gender relations, and culture"). Malcolm's is a more traditional historical account which begins with the origins of racial myths in Bosnia in 1180 and takes readers through distinct historical periods until modern times. See generally MALCOLM, *supra* note 82.

ments of the substantive law, and the respective roles, as traditionally conceived, of prosecutor, defense attorney, and judge, suggest the need to draw bright lines that are often — perhaps usually — inconsistent with the rendering of a nuanced history.⁸⁴ From the perspective of Tadić's judges, to emphasize, as some scholars have, the personal culpability of Milošević or the impact of certain cultural or religious institutions⁸⁵ would be of questionable relevance to the narrow legal issues presented. A canvassing of the role of the Serbian Orthodox Church in encouraging ethnic cleansing, even if grounded in expert testimony, would, in addition, have raised objections as to unfair prejudice as well as legal relevance, irrespective of its unquestioned historical relevance.⁸⁶ The judges' flawed historical account simply responds to what the bench heard and what both sides introduced into evidence under the relevant rules and the substantive law.

Additional problems arise because of the political circumstances faced by the tribunal. Prosecutors in the Yugoslav tribunal are very much aware that their decisions as to whom to indict are being closely scrutinized for evidence of bias.⁸⁷ Their efforts to follow a trial of a Serbian defendant, Tadić, with trials against Croats and Muslims, as well as their efforts to achieve greater balance among the ethnicities in indictments announced to date, show the lengths to which they will go to show the tribunal's evenhandedness and legitimize its efforts before suspicious or incredulous audiences.⁸⁸ These efforts, while understandable, are not necessarily consistent

84. See OSIEL, *supra* note 6; see also Alan M. Dershowitz, *Life Is Not a Dramatic Narrative*, in LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 99 (Peter Brooks & Paul Gewirtz eds., 1996) [hereinafter LAW'S STORIES]; David N. Rosen, *Rhetoric and Result in the Bobby Seale Trial*, in LAW'S STORIES, *supra*, at 110.

85. Ramet states, for example, that it is precisely in "macho" Serbia that patriarchal backlash was strongest The entire Milošević phenomenon is, in fact, rooted in *fear*: fear of Albanians, Croats, and even, eventually, Slovenes; fear of new political movements; fear of randomness, freedom, chaos; and fear of women. The primordial linkage of these fears is the explanation as to why Slobodan Milošević's support comes overwhelmingly from males — middle-aged peasant males being the core and largest part of his support — while his opposition draws women as well as men to its ranks and to its rallies.

RAMET, *supra* note 82, at 122. It is difficult to see how a comparable passage could have appeared in the Tadić judgment — at least without drawing a severe objection complaining of the judges' partiality or incompetence.

86. Cf. ICTY Rules, *supra* note 33, rule 89 (requiring the admission only of "relevant evidence" with "probative value" and requiring the exclusion of any evidence whose probative value "is substantially outweighed by the need to ensure a fair trial").

87. Cf. Hayden, *Schindler's Fate*, *supra* note 40; Hayden, *Reply*, *supra* note 40, at 771; Rubin, *supra* note 40, at 42-43.

88. See, e.g., Akhavan, *supra* note 38 (manuscript at 64-66) (discussing the efforts to achieve, and the risks of, "ethnic parity" in the context of the tribunal for the former Yugoslavia).

with the production of faithful history. If it is true, as historians like Malcolm assert,⁸⁹ that the vast majority of the most serious crimes — and certainly genocidal actions — were committed on the Serbian side, a series of evenhanded trials among the diverse ethnicities in the Balkan region is more likely to contribute to prevailing myths that all sides were equally guilty than it is to preserve an accurate collective memory. For similar reasons, Tadić's judges were understandably leery about rendering a historical account that attributes blame to persons not in the dock, including Milošević. Quite apart from limits imposed by evidentiary or procedural rules, it would be impolitic for the tribunal to give as frank an assessment of the historical facts as would an academic. In the context of the Balkans, where it is said that at least one group is waging a war against history itself,⁹⁰ the telling of accurate history is as much a political act as is a decision to indict.

Finally, some of the tribunals' problems rendering collective memory are attributable to the closure model's internal contradictions. As noted, closure demands not merely a definitive historical account *but also a trial record that is the equal of any liberal court's*. It requires that judges render a credible history in the midst of conducting proceedings that are as fully convincing as any conducted by a national court. Judged from the perspective of this second goal, the judges' preliminary findings in this case are all that they should be. They provide what lawyers expect — only so much history as is needed to support a plausible finding of guilt.

The need for closure as to the verdict implies that the defendant's guilt or innocence should be the focus of attention. Closure itself demands that no one in court have the overriding goal of indicting or examining the broader society of which the defendant is only a part or of truly analyzing the moral complexity of these horrific crimes, including an examination of competing perceptions of victimhood. It demands that the court tell a linear story that a his-

89. See MALCOLM, *supra* note 82, at 234-52.

90. See *id.* at xxiv (describing the Serbian "war against the history of their country"); see also MICHAEL A. SELLS, *THE BRIDGE BETRAYED* (1996) (discussing how "ethnoreligious militants" waged a campaign of "cultural eradication" by targeting architectural, literary, and other monuments as well as people); Chris Hedges, *In Bosnia's Schools, 3 Ways Never to Learn from History*, N.Y. TIMES, Nov. 25, 1997, at A1 (reporting on separate history, art, and language classes now in place in schools throughout Bosnia for the various ethnicities in that country). This facet of the Balkan conflict, is not, of course, unique to it but is a characteristic of many, if not all, situations involving administrative massacres. See generally IMPUNITY AND HUMAN RIGHTS, *supra* note 3, at 73-280 (detailing case studies involving battles over national history).

torian might disparage.⁹¹ If Tadić's judges spent little time on the pre-1990 history of the region, if they failed to convey in depth the underlying motivation of the aggressors or omitted considerable developments that probably contributed to the violence, they were merely responding to the need to judge the accused and not the former Yugoslavia.

Further, Tadić's judges can hardly be blamed if they avoided the equivocal statements of cause and effect and subjective judgments incapable of straightforward empirical verification that characterize historical accounts by academics.⁹² Because Tadić's judges took seriously closure's needs for the rendering of a plausible verdict, they usually avoided subjective conclusions, confining them to those narrow pockets expressly sanctioned by the law, such as determinations as to witnesses' credibility.⁹³

B. *The Taint of Politics*

As is suggested by the tribunal's problems with the presentation of history, a second crack in the model of closure appears with respect to the demand that the judges remain above politics. As was suggested above, problems begin simply because of the political ramifications of the factual findings the judges render. When the judges themselves disagree — as they did — with respect to whether the JNA exercised effective control over the VRS after May 19, 1992, it strains credulity to believe that the tribunal will generate a settled consensus as to this attempt to render a legal judgment about a political state of affairs.⁹⁴ More significantly, even Tadić's judges found that they could not ignore the clear

91. See generally Robert A. Ferguson, *Untold Stories in the Law*, in *LAW'S STORIES*, *supra* note 84, at 84, 85 (describing similar issues for domestic courts). Of course, had Tadić's attorneys chosen to contest the prosecution's account of the rise and goals of ethnic cleansing in Prijedor, it is possible that the Tadić trial would have taken a different turn. Cf. Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 *YALE L.J.* 1321 (1989) (discussing how Barbie's defense team attempted to put recent French history on trial). Nonetheless, as the Barbie case itself demonstrates, even then prosecutors and judges are likely to seek to avoid being mired in such extraneous arguments, the better to build a convincing verdict. Further, to the extent they fail, the prospects for closure as to the verdict seem especially remote.

92. See, e.g., *supra* note 85 (Ramet quote).

93. As discussed, the Tadić bench was even circumspect with respect to indicating the extent to which it relied on witness credibility. See *supra* notes 62-64 and accompanying text.

94. Compare *Tadić Judgment*, *supra* note 4, ¶ 603-08 with *McDonald Dissent*, *supra* note 42, ¶ 6-10, 33. As the differences between the judges suggest, the lack of consensus is partly due to the lack of clarity in the applicable legal standards. For one example of the political implications of this finding, see Marlise Simons, *Defining a War to Determine the Crime*, *N.Y. TIMES*, May 18, 1997, at E4 (suggesting that the tribunal's finding strengthened Milošević's political position).

political dimensions of the defendant's crimes. Under the relevant law as interpreted by the judges, the defendant's actions in the course of a general political operation such as the Serbian take-over of Kozarac or his activities in prison camps run by the Republika Srpska were crimes precisely *because* they were committed as part of a broad political campaign to commit ethnic cleansing.

All of Tadić's convictions are premised on the proposition that persecution on the grounds of political beliefs is, at least in this case, legally and factually indistinguishable from persecution on the grounds of race, ethnicity, or religion. The Tadić judgment, particularly in its reliance on the nexus between Tadić's intent and that of the broader society, suggests that Serbian nationalism, and by extension political activity on behalf of a "Greater Serbia," depending on the specific act committed, constitutes criminal activity and even perhaps complicity in genocide. At the very least, the Tadić judgment concludes that being motivated by Serbian nationalism is a relevant factor leading to convictions for crimes against humanity — as both inhumane acts and persecution are — and violations of the laws and customs of war. When the tribunal cites, in support of its determination that Tadić was aware of the policy of discrimination against non-Serbs, evidence of the defendant's reputed desire to name his child after Slobodan Milošević, or his political associations with prominent Serbian groups, or his statements in defense of a "Greater Serbia," is it any surprise that politically active Serbs should regard his conviction as an attack on their political cause? Are these determinations, however apolitically rendered, any the less a condemnation of the political goal of creating by force an ethnically and religiously homogeneous state?

Throughout the opinion, from its preliminary findings through the specific factual and legal findings against Tadić, it is hard to escape the conclusion that the judges' target is not merely Tadić, but Serbian nationalism, and that the judges' tacit endorsement of community values in favor of an integrationist ethic is also incidentally an endorsement of the Dayton formula for peace. Because of this, the tribunal's solid legal case for criminal liability under international humanitarian law itself poses risks that the tribunal will continue to be perceived as the political tool of those states who were most instrumental in establishing it.

Further, these political dimensions threaten the Yugoslav tribunal's claim that it is a truly denationalized body independent of national interests and distinguishable from Nuremberg's victor's justice. The judges' criminalization of the goals for a "Greater

Serbia" taints governments and leaders who have engaged or are engaging in forced expulsions to create ethnically or religiously pure — or purer — states.⁹⁵ The judgment tacitly delegitimizes those nations that define themselves in ethnic or religious terms.⁹⁶ The judges seem to be saying that such nations, if established by force, entail criminal liability for their begetters. But since a number of modern nations share such origins, the tribunal's judgment risks revisionist critiques of ex post facto imposition of liability, hypocritical double standards, and political bias.⁹⁷ The judges' faith that their verdict will find ready acceptance among all people of good faith appears misplaced. To the extent that those engaged in such nationalist struggles believe themselves to be politically and otherwise justified, there may be little shame attached to a tribunal conviction that finds an individual guilty of such "patriotic" acts.

As this implies, a basic flaw in the model of closure as applied to the Balkan conflict is that such cases of mass atrocities in fact arise, as Osiel has argued, because there are few *shared* community sentiments and therefore little on which tribunals can draw — at least to elicit a shared emotional response.⁹⁸ There is also the problem that the prospects for the restoration of some shared values may depend, at least when the effort involves international tribunals, on a broad consensus that if political acts are condemned as crimes because they violate fundamental values, international efforts to convict should apply to *all* members of the international community.⁹⁹ To the extent this is true, reliance on ad hoc tribunals, instead of a permanent international court with worldwide jurisdiction over at least some crimes, is incompatible with the closure model's expectations and demands from the outset.¹⁰⁰

95. See generally Hayden, *Schindler's Fate*, *supra* note 40, at 732-33 (citing, among other examples, Pakistan in 1946-47, the partition of Cyprus by Turkey in the aftermath of the Ottoman Empire, and Croatia in 1941-44).

96. Cf. Thomas M. Franck, *Clan and Superclan: Loyalty, Identity, and Community in Law and Practice*, 90 AM. J. INTL. L. 359, 360-68 (1996) (discussing differences between concepts of "state" and ethnic "nation").

97. See generally Hayden, *Schindler's Fate*, *supra* note 40; Rubin, *supra* note 40.

98. But see *infra* Part IV as to other useful functions of such prosecutions.

99. See, e.g., Simpson, *supra* note 23, at 24-26. To this extent, bringing international prosecutions may pose greater difficulties than national attempts.

100. For an argument that the United States' policies to encourage Haitian officials not to prosecute criminally those involved in earlier atrocities, as well as the United Nations' efforts to pursue immunity for peace in other places, threaten the legitimacy of current international criminal prosecutions, see Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEXAS INTL. L.J. 1 (1996) (noting recent U.N. attempts to encourage amnesty for peace in El Salvador, Cambodia, and South Africa as well as in Haiti); see also SCHARF, *supra* note 3, at 87 (noting U.N. amnesty efforts in Somalia).

C. Unfairness to the Defendant

The third crack in the model of closure relates to its insistence on evoking a shared consensus that defendants have been fairly tried, in accordance with all due process.¹⁰¹

Despite the strenuous efforts to improve on the Nuremberg model in these respects, the Balkan tribunal continues to labor under Nuremberg's shadow with respect to basic principles of fairness, including *nullum crimen sine lege*.¹⁰² There is widespread agreement among both international and domestic lawyers the world over that the rule against *ex post facto* criminal liability, codified in a number of international instruments,¹⁰³ seeks to provide fair notice and protects against the "unbridled abuse of power," including the risk that selective prosecutions amount to revenge disguised as justice.¹⁰⁴ The requirement that criminal liability be based on preexisting law, at least in a democratic polity subject to checks and balances, is also seen as providing further assurance that criminal laws do not depart from community sentiments.¹⁰⁵

Although the creators of the tribunal recognized the need to apply only those "rules of international humanitarian law which are beyond any doubt part of customary law,"¹⁰⁶ the legal decisions rendered in the Tadić case are not likely to quell doubts that the judges were legislating from the bench.

101. *But see* Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Prosecutor v. Tadić, Case No. IT-94-1-T, ¶ 28 (Trial Chamber, Intl. Trib. for the Prosecution of Persons Responsible for Serious Violations of Intl. Humanitarian Law Committed in the Territory of Former Yugo. since 1991, Aug. 10, 1995) <<http://www.un.org/cty/tadic/trialc2/decision-e/100895pm.htm>> [hereinafter *Decision on the Prosecutor's Motion*] (stating that the tribunal is "in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence").

102. *See generally* RATNER & ABRAMS, *supra* note 3, at 19-22. As these authors note, this principle comes into play in a variety of contexts, including in "constitutional prohibitions on *ex post facto* laws, judicial rules of construction limiting the use of analogy in interpreting criminal laws, doctrines prohibiting ambiguous criminal laws, and provisions in international human rights instruments barring prosecutions for acts not criminal at the time of their commission." *Id.* at 19.

103. *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 15, 999 U.N.T.S. 171, 177 (providing in relevant part: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.").

104. M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INTL. L. 235, 290 (1993).

105. *See, e.g.*, ANNE SA'ADAH, GERMANY'S SECOND CHANCE: TRUST, JUSTICE, AND DEMOCRATIZATION (forthcoming Fall 1998, manuscript at 192, on file with author).

106. *Report of the Secretary-General*, *supra* note 2, ¶ 34.

Consider, for example, the tribunal's convictions for the crime against humanity known as persecution. The Chamber's candid admission that this crime has "never been clearly defined" in either international or national law¹⁰⁷ suggests that, despite closure's demands that the tribunal remain within the confines of established and precisely defined international crimes, reliance on this crime with a fifty-year-old pedigree may not be sufficient. Closure's demands do not seem satisfied by the Chamber's numerous convictions for something that it can only define as some form of discrimination infringing on an individual's fundamental rights.¹⁰⁸ Ultimately, the Chamber convicts Tadić of a crime that it can only vaguely define.¹⁰⁹

This is not to suggest that Tadić's judges did anything unexpected or unusual in this respect. As Cherif Bassiouni has noted, the criticism that prosecutions for crimes against humanity violate principles of legality because these crimes are not as precisely defined as some domestic criminal laws is as old as Nuremberg.¹¹⁰ Bassiouni attributes this endemic problem to the fact that international humanitarian law develops without "legislation" but through "common law" developments in national and international tribunals, the practice of states, and the patchwork fabric of overlapping conventions.¹¹¹ While admitting that this is a weakness that needs

107. *Tadić Judgment*, *supra* note 4, ¶ 694.

108. See *Tadić Judgment*, *supra* note 4, ¶ 696-97. The tribunal even suggests that no act "separate" from the violation of the right to equality "in some serious fashion" needs to be shown, and refuses to give any definite shape to the types of "fundamental rights" it has in mind. *Tadić Judgment*, *supra* note 4, ¶ 697. To the extent that the Chamber provides examples of "persecution," the wide gamut of examples it provides — from violent acts that are already illegal under all states' laws, such as killing, to hate speech, which only some states would find criminally liable under domestic law — and the Chamber's refusal to say anything definitive about these examples add to the likelihood of confusion in future cases. See *Tadić Judgment*, *supra* note 4, ¶¶ 703-10.

109. Even the tribunal's defenders recognize the vagueness of a charge for "persecution." See, e.g., RATNER & ABRAMS, *supra* note 3, at 72-73.

110. See M. Cherif Bassiouni, "Crimes Against Humanity": The Need for a Specialized Convention, 31 COLUM. J. TRANSNAT'L L. 457, 461-71 (1994); see also Pavel Dolenc, A Slovenian Perspective on the Statute and Rules of the International Tribunal for the Former Yugoslavia, 5 CRIM. L.F. 451, 457-59 (1994) (criticizing articles 3 & 5 of the Statute of the tribunal for, among other things, failing to define precisely its targeted offenses); Edward M. Wise, General Rules of Criminal Law, DENV. J. INT'L L. & POLY. 313, 315-16 (1997) (criticizing international crimes as currently defined).

111. See Bassiouni, *supra* note 110, at 469-72; see also Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238 (1996). But Christopher L. Blakesley attributes vagueness difficulties to the problem that the international lawyers who have tried to define international crimes are insufficiently practiced in the needs of the criminal law. He contends that the requirements of "actus reus" and "mens rea" must be included in future definitions of specific international crimes and notes that "[i]t is debatable whether customary international law or general principles derived from the clarification of national law suffice." Christopher L. Blakesley, *Atrocity and Its*

to be remedied, he argues that the requirements of this system "are necessarily different from those of a codified system, and [that] the same legal standards of specificity cannot be expected of it."¹¹²

The model of closure, however, demands such specificity, especially given the specificity of today's human rights entitlements for criminal defendants.¹¹³ The lack of guidance provided by the Tadić bench suggests why. In the wake of the Tadić case, criminal defendants before the Yugoslav tribunal now have no clear notice about whether acts such as advocacy on behalf of Serbian nationalism, the discriminatory firing of non-Serb employees, or the refusal to treat a Muslim patient at a hospital constitute the crime of persecution under crimes against humanity.¹¹⁴ Prospective defendants, of any ethnic or religious group, have no firm guarantee that international prosecutors, under pressure to bring evenhanded charges against all groups in the Balkans, will not be tempted to respond to such pressures by inventing novel interpretations of persecution. Moreover, the prospect that a chamber of an ad hoc international tribunal created by the Security Council may be defining new forms of international liability in the course of deciding the fate of individual defendants can hardly be comforting to those concerned about keeping international lawmaking processes accountable to representative processes.

While the violent acts encompassed by Tadić's convictions for persecution would appear to be securely within the types of actions that all states would punish under their domestic laws, the Chamber's readiness to impose the stigma of a conviction for persecution as a crime against humanity¹¹⁵ raises questions about the precise scope of this international crime and the fairness of leaving its definition to the discretion of a court in the course of an ongoing trial.¹¹⁶ This is all the more likely to become an issue given the

Prosecution: The Ad Hoc Tribunal for the Former Yugoslavia and Rwanda, in THE LAW OF WAR CRIMES, supra note 23, at 189, 204.

112. Bassiouni, *supra* note 110, at 471.

113. As Bassiouni himself concedes elsewhere, there are ever higher expectations that international criminal law will meet the standards of national law in this regard. See Bassiouni, *supra* note 104, at 241.

114. These possibilities are not farfetched if we take seriously the Tadić judgment's conclusion that persecution requires no inhumane act other than a serious violation of the right to equality. See *supra* note 108 and accompanying text.

115. Cf. *supra* note 75 (discussing how crimes against humanity are different from "ordinary crimes").

116. Cf. Bassiouni, *supra* note 110, at 471 ("The observance of the 'rule of law' is far more important than the ad hoc prosecution or punishment of any offender or group of offenders.").

probable popularity of this charge for acts that do not clearly fall within other, less vaguely defined offenses within the tribunal's statute.

And the Tadić Chamber's conclusions as to persecution are just the tip of the iceberg. As critics of prosecutions for low-level perpetrators have noted, a common problem with respect to such prosecutions relates to uncertainties with respect to the requisite intent, as well as defenses like self-defense, necessity, and mistake of fact or law.¹¹⁷ None of these basic elements of a criminal prosecution are defined within the tribunal's statute.¹¹⁸ The Tadić judgment provides little reason for optimism that fifty years of post-Nuremberg developments have now settled most of the uncertainties in the scope or interpretation of international humanitarian law that prompted the initial criticism of those World War II trials on *ex post facto* grounds. Attempts to give shape and content to the crimes now contained in the tribunal's statute will inevitably give rise to debates over judicial legislation and novel criminal liability, including the liability of juveniles and the scope of the tribunal's restitution of property remedies, as well as the interpretation of intent requirements for the crime of genocide.¹¹⁹

Other fairness issues loom large. For some continental system lawyers, it seems inappropriate that the very judges charged with their application and interpretation are, under the tribunal's statute, delegated the authority to devise their own rules of evidence and procedure.¹²⁰ Others are troubled by the provision in the tribunal's statute permitting retrials of those previously tried in national courts if the tribunal decides such proceedings involved convictions or acquittals for ordinary crimes, or finds that such trials were not impartial or independent, were designed to shield the defendant from international liability, or were not diligently prosecuted.¹²¹ Some common law lawyers, on the other hand, question the ability

117. See generally Suzanne Walther, *Problems in Blaming and Punishing Individuals for Human Rights Violations: The Examples of the Berlin Wall Shootings*, in *IMPUNITY AND HUMAN RIGHTS*, *supra* note 3, at 99.

118. See Dolenc, *supra* note 110, at 457.

119. See generally *id.*; Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INTL. L. 554 (1995).

120. See *ICTY Statute*, *supra* note 2, art. 15; Dolenc, *supra* note 110, at 459-60.

121. See *ICTY Statute*, *supra* note 2, art. 10(2). This provision raises concerns as to its relationship with constitutional provisions against double jeopardy, despite arguments, as under U.S. constitutional law, that a second prosecution by the Yugoslav tribunal is analogous to a prosecution by a different sovereign and therefore is not constitutionally barred. See, e.g., Dolenc, *supra* note 110, at 460-61.

of the prosecutor to request appellate review of a judgment.¹²² Troubling open-ended issues remain concerning the scope of remedies for the accused, including whether individuals will have a right to seek compensation from the tribunal for unlawful arrest, imprisonment, or perhaps harm to their reputations as a result of a public indictment.¹²³ Objections concerning unequal treatment from those ultimately convicted by the tribunal but sent to serve time in prisons in different states are also likely to emerge.¹²⁴

Tadić's trial also raises issues under the tribunal's evidentiary rules. Among the most discussed has been the evidentiary ruling by the Tadić chamber to permit the use of anonymous witnesses. That ruling, premised on article 22 of the tribunal's statute,¹²⁵ was issued over the stinging partial dissent of the Australian judge, who feared that this would violate Tadić's rights under a different provision of the tribunal's Statute "to examine, or have examined, the witnesses against him."¹²⁶ The trial chamber's majority decision has since prompted considerable criticism, particularly among common law attorneys, and led a former Legal Advisor of the U.S. State Department, who had been prominently involved in the tribunal's creation, to lead a charge within the American Bar Association and elsewhere to reverse this decision or to seek amendment of the U.N. Charter by attaching a "Bill of Rights."¹²⁷ Others have questioned even the more moderate provisions within the tribunal's rules permitting in camera proceedings or other measures to pro-

122. See, e.g., Michael P. Scharf, *Trial and Error: An American Jurisprudential Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 N.Y.U. J. INT'L. L. & POL. (forthcoming 1998) (manuscript on file with author).

123. On the tribunal's right to conduct public indictments, see *ICTY Rules*, *supra* note 33, rule 61(B)-(C).

124. For now it appears that the rules within the distinct national systems will govern issues involving the enforcement of sentences, including early release, rights to visitation, and type of confinement. See *ICTY Statute*, *supra* note 2, art. 27. For a discussion of other uncertainties with respect to the Yugoslav Tribunal's approach to sentencing, see Cors & Fisher, *supra* note 44; Yee, *supra* note 81.

125. Article 22 provides: "The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity." *ICTY Statute*, *supra* note 2, art. 22; see also *ICTY Rules*, *supra* note 33, Rules 70, 75.

126. *Decision on the Prosecutor's Motion*, *supra* note 101 (separate opinion of Stephen, J.) (relying on article 21(4)(e) of the tribunal's statute). In the end, two anonymous witnesses, L and H, were permitted to testify against Tadić and one of these witnesses' testimony (L's) was later withdrawn.

127. See Leigh, *supra* note 81, at 238. But see Christine Chinkin, Amicus Curiae Brief on Protective Measures for Victims and Witnesses, Submitted by Dean and Professor of Law Christine Chinkin, in 7 CRIM. L.F. 179 (1996).

tect victims' and witnesses' identities, as well as the tribunal's apparent willingness to admit hearsay.¹²⁸

Other fairness issues emerge because of circumstances within the Balkans. In the Tadić case, the vast bulk of the evidence to convict came not in the form of irrebuttable physical evidence of atrocities — including contemporaneous and meticulously documented written records of atrocities, as at Nuremberg¹²⁹ — but through the oral testimony of self-interested live eyewitnesses — in all cases, Serbian witnesses for the defense and non-Serbs — mostly Muslim victims — for the prosecution.¹³⁰ For the judges, this situation posed considerable difficulties. How does a tribunal generate confidence in its conclusions regarding a body of conflicting testimony in the face of the charge that Muslim witnesses will say anything against those who they believe are at war with them and that Serbian witnesses will do the same against non-Serbs? How does the tribunal's treatment of the inevitable conflict between the biases of Serb and non-Serb witnesses avoid replicating amongst trial observers in the region the prevalent ethnic and religious strains that gave rise to the conflict in the first place?¹³¹ How does a court generate credibility about its findings as to credibility?

As noted, the Tadić bench reached for the kind of solution familiar to any court in a liberal state — it dismissed the relevance of witnesses' ethnic or religious affiliations and deftly avoided nearly all reference to such affiliations when stating its reasons for deter-

128. See, e.g., Dolenc, *supra* note 110, at 463 (noting article 22 of the Statute and rules 75 and 79); *Prosecuting and Defending Violations of Genocide and Humanitarian Law: The International Tribunal for the Former Yugoslavia*, 88 ASIL PROC. 239, 247-51 (1994) [hereinafter *Prosecuting and Defending Violations*] (remarks of Steven J. Lepper) (discussing the development of the Balkan tribunal's rules). For a survey of the lacunae in the tribunals' rules, see, for example, Daniel D. Ntanda Nsereko, *Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 507 (1994); *Prosecuting and Defending Violations*, *supra*, at 243-45 (remarks of Christopher L. Blakesley); Scharf, *supra* note 122 (manuscript at 11-22). As Ratner and Abrams indicate, international lawyers have attempted to fill these lacunae through resort to evidentiary rules used in international commercial tribunals, including arbitrations, with mixed results. See RATNER & ABRAMS, *supra* note 3, at 216-17. There are obvious uncertainties for defendants and their attorneys posed by the wide-open license given to the tribunal to apply "rules of evidence which will best favour a fair determination of the matter" and "are consonant with the spirit of the Statute and the general principles of law." ICTY Rules, *supra* note 33, § 3, rule 89. Defense attorneys are likely to argue that fairness dictates that they have notice, in advance of trial, whether, for example, common law rules of privilege apply.

129. At Nuremberg, the prosecution submitted some seven million pages of meticulously kept Nazi documents. See SCHARF, *supra* note 3, at 117.

130. See *id.* at 212.

131. For a summary of the difficulties such oral testimony produced, see *id.* at 111-205, 212-13. See also *id.* at 64 (discussing the credibility problems presented by both the absence of a Muslim member of the bench and the fact that four of the eleven judges of the tribunal came from predominately Muslim countries).

mining credibility.¹³² Yet, in this context, arguments that such affiliations matter make a great deal of sense. Ordinary trials, even those at Nuremberg, are not conducted in the midst of ongoing hostilities between the parties where witnesses, after giving their testimony, return to separate enclaves to continue their verbal — and sometimes physical — combat.¹³³ In such contexts a Serb or Muslim witness, only temporarily in The Hague, faces enormous pressure to give testimony favorable to his or her side.¹³⁴ Although, as indicated, the tribunal attempted to avoid any accusations that any witness, Serb or non-Serb, was lying,¹³⁵ in most cases it found credible the testimony of victims in the face of an incomplete alibi testimony by defense witnesses, including Tadić's wife. Regardless of what the judges chose to acknowledge, they decided that certain defense testimony, as by those who adamantly testified that Tadić could not have been physically present in Kozarac or in certain camps, was not credible because it was self-serving.¹³⁶ But they refused, in most cases, to accept comparable defense claims with respect to the testimony of Muslims.¹³⁷

Quite apart from significant questions about whether parties in such situations truly enjoy equality of arms, the Tadić bench's credi-

132. See *supra* notes 62-64 and accompanying text.

133. See generally Michael J. Keegan, *The Preparation of Cases for the ICTY*, 7 TRANSNATL. L. & CONTEMP. PROBS. 120 (1997).

134. This fact also raises a problem that the tribunal only briefly addresses: the lack of equal access to evidence given the locations of defense and prosecution witnesses. The tribunal notes the number of steps taken to alleviate the "inherent difficulties" of this "difficulty encountered by both parties," including video-conferencing links and the grant of safe conduct to testify at The Hague. *Tadić Judgment*, *supra* note 4, ¶¶ 530-31. Of course, defense lawyers would argue that lack of equal access to evidence should not be presented as a problem of equal weight to both sides: lack of access to Muslim-held areas may crucially disadvantage a defendant who is unable to rebut prosecution testimony. Further, the prosecution has available tools, such as the possibility of U.N. sanctions, that the defense does not have. For a discussion of these and other disadvantages suffered by defense counsel before the Balkan tribunal, see Mark S. Ellis, Comment, *Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel*, 7 DUKE J. COMP. & INTL. L. 519 (1997). See also Keegan, *supra* note 133 (discussing similar issues from the prosecutor's perspective).

135. See *supra* notes 62-64 and accompanying text.

136. The testimony of at least some of those witnesses was on some issues so unequivocal that it appears that the tribunal found them *sub silentio* not credible. For example, the judges apparently simply chose not to believe one defense witness who testified that the Serbian-run checkpoints in which Tadić served were established not to confirm ethnic identity but merely to check for stolen cars. See SCHARF, *supra* note 3, at 184.

137. Indeed, it was unusual when the judges chose to disregard the testimony of any Muslim witness in this case — as they did some of the testimony of witness Hakija Elezovic. See *Tadić Judgment*, *supra* note 4, ¶ 296 (citing the witness's "confused" state). Far more commonly, the judges disregarded "minor" discrepancies in oral testimony and gave credence to victims' testimony. See, e.g., *Tadić Judgment*, *supra* note 4, ¶ 275 (finding the testimony of Hase Ičić credible).

bility determinations, grounded in subjective factors such as demeanor, routine in ordinary trials, assume problematic proportions. Given ongoing hostilities on the ground and the suspicion among at least some that the tribunal serves the interests of only some ethnic groups,¹³⁸ the judges have little reservoir of good will upon which to draw. Closure as to their factual conclusions would seem to require a great deal more smoking-gun physical evidence than was presented at trial.

In these respects, the Tadić trial raises significant doubts about the prospects for generating settled consensus with respect to the treatment of defendants. These concerns also raise doubts about whether such trials truly will provide the international community the opportunity to endorse in solidarity liberal values or the rule of law.

D. *Unfairness to Victims*

Closure demands that victims be mollified and, if possible, compensated — at least through the return of lost property. At a minimum, the international criminal process is supposed to afford opportunities for victims to tell their stories, to find psychological comfort through their participation at trial, to rehabilitate their reputations, and to draw comfort from the defendant's shame, punishment, and acts of contrition.¹³⁹

Tadić's trial satisfied few of these goals. His victims were not compensated for lost property, for injuries suffered, or for emotional distress caused. Nor were they able to tell their full stories at trial, during sentencing, or in the bench's record of their testimony. Despite the parade of Muslim victims at trial, their testimony was circumscribed by the needs of this litigation and by the formal rules of the relevant criminal law. Prosecution witnesses were encouraged only to present "fragmented narratives"¹⁴⁰ — to identify whether they actually saw Tadić engaged in the acts charged and, briefly, to describe what happened to them at a specific date and

138. See, e.g., Cotić, *supra* note 78; Cedric Thornberry, *Saving the War Crimes Tribunal*, FOREIGN POLY., Fall 1996, at 72.

139. See, e.g., Roht-Arriaza, *supra* note 3, at 19-21 (identifying the elements of a "victim-centered approach" as involving "public recognition" of the wrongs done to victims and, where possible, compensation); see also ICTY Statute *supra* note 2, at 2 (authorizing restitution as a possible remedy).

140. Cf. Paul Gewirtz, *Narrative and Rhetoric in the Law*, in LAW'S STORIES, *supra* note 84, at 2, 8.

time relevant to the precise charges.¹⁴¹ Though often identified by name in the judgment, victims became essentially faceless placeholders for dates, times, and acts connected to specific counts in the indictment. Beyond giving brief identifications, they were not encouraged to tell their life stories, to indicate their political views, or to unburden themselves and give voice to fears or hopes. Witnesses were not asked to describe in detail the psychological or physical anguish they suffered after being detained at the various detention camps. Muslim victims were not encouraged to tell the judges the emotional scars incurred as a result of being treated as subhuman by their tormentors or whether this treatment, along with the pervasive ethnic and religious slurs they endured, had an impact on their perceptions of self-worth, their relationship with family members, or their views of Serbs generally. Family members of the Muslim policemen who were killed were not asked to testify what the absence of these men had meant to them. Victims were not encouraged to put a price on their injuries.¹⁴²

On the contrary, the encouragement of emotional testimony by victims, however presented, would probably have been seen as "unfairly prejudicial," "insufficiently probative," or even "irrelevant" by the tribunal's judges, at least during trial.¹⁴³ Here, as elsewhere, the closure model's demands point in contradictory directions: it seeks to provide closure for victims while requiring that judges uphold the "dignity and decorum of the proceedings."¹⁴⁴ The latter seeks to elicit societal consensus on the premise that tribunal decisions are based on the application of rules of law, not raw emotion.¹⁴⁵

141. For a summary of eyewitnesses' testimonies at trial, see SCHARF, *supra* note 3, at 139-73.

142. See Akhavan, *supra* note 38 (manuscript at 42) (approving of the fact that proceedings before the Yugoslav tribunal focus on the perpetrator, not the victim). For arguments that the tensions between the needs of victims and the traditional needs of the criminal law may be endemic, see, for example, Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial*, in LAW'S STORIES, *supra* note 84, at 135.

143. Cf. ICTY Rules, *supra* note 33, rule 89 (weighing probative value of evidence against its prejudicial effect). At Tadić's pre-sentencing hearing, the prosecutor did present, however, "victim input statements." See Sentencing Judgment, *supra* note 76, at para. 4. Still, the Tadić judges refused to consider the amount of victims' alleged economic loss for purposes of sentencing. *Id.*

144. See, e.g., ICTY Rules, *supra* note 33, rule 80.

145. See Anthony Kronman, *Leontius' Tale*, in LAW'S STORIES, *supra* note 84, at 54, 56 (arguing that, to the extent such rules suppress emotional stories that ought to be told, the judicial account can be rendered less persuasive). But see Robert Weisberg, *Proclaiming Trials as Narratives: Premises and Pretenses*, in LAW'S STORIES, *supra* note 84, at 61, 82 (arguing that imposition of constraints is "designed to vindicate the communal majesty of the law"). As these conflicting arguments imply, the tribunal's rules concerning decorum suggest, in microcosm, inherent tensions within the model of closure.

Under the circumstances, it seems doubtful that Tadić's victims, whether or not they testified, were really able to assert "their sense of control and autonomy," enhance their dignity, "lessen their isolation . . . increase their feeling of belonging to a community, [and] . . . find some meaning in their victimization."¹⁴⁶ While some of Tadić's victims may indeed have experienced some catharsis in pointing a finger at their torturer at trial and may have derived some satisfaction from Tadić's conviction and penalty, some may have found a penalty of effectively ten years in prison equivalent to a slap on the wrist given the brutality they endured at his hands. Certainly no victim received, as the closure model would imply, any acknowledgment of shame or any other act of expiation from Tadić or any of the Serbian officials that he served.¹⁴⁷

Least mollified at the end of the Tadić trial was, presumably, witness *F*, the unnamed female prisoner whose charges of rape against Tadić were ultimately withdrawn because of her refusal to be a witness at trial. As part of its evidentiary decision regarding anonymous witnesses, the trial chamber had decided to delay disclosure of witness *F*'s identity to the defense until shortly before trial, to withhold her identity from the public and the media, and to withhold her and her family's address and present whereabouts from both defense and public.¹⁴⁸ While the trial chamber's decision was not reversed,¹⁴⁹ witness *F* nonetheless declined to testify.¹⁵⁰ Irrespective of the trial chamber's evidentiary edict, the rape accusations were never aired. Indeed, continued opposition to the prospect of secret witnesses is likely to put pressure on prosecutors in future cases to insist that most if not all witnesses be identified regardless of the trial chamber's evidentiary decision in this case.

The dismissal of the rape charge in the Tadić case raises more general concerns that the tribunal may not be able to cope with the needs of the many women in the Balkan region who were victims of systematic rapes; including those Bosnian women who, it is alleged, were systematically raped while in detention in order to be impreg-

146. Roht-Arriaza, *supra* note 3, at 19.

147. For a discussion of how some forms of expiation or apology can be adapted to theories of "reintegrative shaming," see Stanley Cohen, *State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past*, 20 L. & SOC. INQUIRY 7, 40 (1995).

148. See *Decision on the Prosecutor's Motion*, *supra* note 101, ¶ 53, 90; see also Chinkin, *supra* note 127, at 186 n.2.

149. Indeed, as a procedural decision, it was not subject to interlocutory appeal under the tribunal's rules. See *ICTY Statute*, *supra* note 2, art. 25; *ICTY Rules*, *supra* note 33, rule 73.

150. See Chinkin, *supra* note 127, at 186 n.2.

nated with *chetnik* children as part of a policy of ethnic cleansing.¹⁵¹ Some victim groups have charged that the procedures and modest witness protection capabilities of both the ICTR and the ICTY are inadequate to the enormous task of prosecuting such claims.¹⁵² The dismissal of the rape charge in the Tadić case is likely to prompt fears of similar dismissals in other cases, along with complaints that victims of gender-specific crimes will never be heard, especially if the defendant can be prosecuted on other charges.¹⁵³

More generally, worries exist that, despite the tribunal's recognition that rape is indeed a cognizable crime under international humanitarian law, its bench and prosecutors remain constrained by the U.N.'s¹⁵⁴ and international law's¹⁵⁵ gendered nature. There is concern that the gender-specific tactics deployed in the Balkan conflict, including the alleged use of rape as a tool of genocide directed specifically at women *because they are women*, will go unrecognized not merely in the Tadić case where rape charges were deemed irrelevant, but in future prosecutions — to the detriment of the needs and rights of victims, the credibility of the tribunal, and the preservation of collective memory.¹⁵⁶ For these reasons, at least absent amendments to the tribunal's definition of covered offenses to give explicit recognition to the many forms of gender-specific violence, it is possible that the record of the tribunal's prosecutions will, in the end, be as unjust to the memory of women victimized by the Balkan conflict as Nuremberg arguably was with respect to the victims of the Holocaust.¹⁵⁷

151. See Letter from the Secretary-General to the President of the Security Council (May 24, 1997) (transmitting *Final Report of the Commission of Experts Established Pursuant to S.C. Res. 780* (1992), U.N. SCOR, 49th Sess., at IV(F)(3), U.N. Doc. S/1994/674 (1994) [hereinafter *Final Report*]).

152. Cf. HUMAN RIGHTS WATCH, *SHELTERED LIVES* 9-10 (1996) (outlining specific steps needed to reform prosecutions and investigations before the ICTR to enable it to pursue permutations of gender-specific violence); *id.* at 24-26 (noting specific ways that the ICTR's methods and procedures fall short).

153. See generally Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 EUR. J. INTL. L. 326 (1994). For one set of recommendations intended to respond to the needs of victims of gender-specific violence, see Mission of the Women in the Law Project, *No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia*, 5 HASTINGS WOMEN'S L.J. 91 (1994).

154. See generally Hilary Charlesworth, *Transforming the United Men's Club: Feminist Futures for the United Nations*, 4 TRANSNATL. L. & CONTEMP. PROBS. 421 (1994).

155. See generally Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INTL. L. 613 (1991).

156. See generally Simon Chesterman, *Never Again . . . and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond*, 22 YALE J. INTL. L. 299, 324-42 (1997).

157. See *supra* text accompanying notes 25-27. For a survey of the many ways international humanitarian law, as recorded in the tribunal's statutory jurisdiction, fails to take sufficient account of the Balkan's "gender-based" terrorism, see Amy E. Ray, *The Shame of It:*

Despite the best intentions of Tadić's judges, their judgment perpetuates the inadequacies of international humanitarian law with respect to the treatment of women. The judges' preliminary findings and their account of the Serbian policies in which Tadić joined focus only on issues of ethnicity, race, religion, or politics, but not gender. The judges invite revulsion against particular kinds of offenses committed against fundamental human dignity while ignoring other indignities that were equally a part of the Balkan landscape. The stories of how mass rape and its threat have been used in the Balkans¹⁵⁸ — as a tool of expulsion; of how forced impregnation became a weapon of genocide and territorial and emotional conquest; of how sexual invasion has been employed as a device to undermine the honor of both victim and her family and as symbolic castration of her spouse¹⁵⁹ — were not addressed in the tribunal's account of the rise of "ethnic conflict" in the region and it may never be part of the Yugoslav tribunal's accounts of relevant history.¹⁶⁰ Guided by the gender-neutral definitions of relevant crimes, which fail to recognize explicitly these acts as cognizable crimes,¹⁶¹ the narrow confines of the specific charges against Tadić and the dismissal of the sole charge of rape, the Tadić bench sup-

Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries, 46 AM. U. L. REV. 793 (1997). For an enumeration of proposed changes to the definitions of international crimes that would encompass changes to the definition of "grave breaches" of the Geneva Convention, the laws or customs of war, genocide, and crimes against humanity, see KELLY DAWN ASKIN, *WAR CRIMES AGAINST WOMEN* 380-403 (1997). See also Chinkin, *supra* note 153; Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN'S L.J. 59 (1993).

158. See *Final Report*, *supra* note 151, at 55-60.

159. See generally M. CHERIF BASSIOUNI & MARCIA MCCORMICK, *SEXUAL VIOLENCE: AN INVISIBLE WEAPON OF WAR IN THE FORMER YUGOSLAVIA* (Intl. Hum. Rts. L. Inst. Occasional Paper No. 1, 1996). In fact, allegations of genocidal rape go back at least to Soviet actions in World War II. See, e.g., Colloquy, *Comparative Analysis of International and National Tribunals*, 12 N.Y.L. SCH. J. HUM. RTS. 545, 629 (comments of Professor Istvan Deak). For a historical survey of war crimes against women and humanitarian law's equivocal attempts to confront these prior to the creation of the Yugoslav and Rwanda tribunals, see ASKIN, *supra* note 157, at 1-203, 243-60.

160. Cf. RAMEY, *supra* note 82, at 117-29 (discussing the role of "gender culture" in the Balkans); Ray, *supra* note 157, at 801-21 (describing the many ways women have been terrorized in the former Yugoslavia). For consideration of what "neutral" terms like "ethnic conflict" conceal, see generally MacKinnon, *supra* note 157.

161. Ray argues that the gender-neutral definitions of "grave breaches," the "laws and customs of war," "persecution," or "crimes against humanity" generally, fail to give a name to gendered forms of victimization, including explicit recognition for the crimes of forced prostitution, pregnancy, and maternity under both "grave breaches" and "crimes against humanity." She also argues that "persecution" ought to extend to persecution on the basis of gender. Ray, *supra* note 157, at 826. From the perspective of the Tadić judgment, Ray's proposals would also imply that the judges should reconsider their insistence that "grave breaches" require interstate conflict. See generally *id.* at 830-35 (critiquing the "public/private dichotomy" as applied to recent events in the Balkans).

pressed the stories of many victims in its preliminary findings. It rendered gender-specific violence and its many forms of victimization nearly invisible.¹⁶²

Absent modification of the tribunal's statute to include the crimes — and recognize the harms — identified by its feminist critics, it seems quite likely that prosecutorial arguments that particular defendants were driven by the express intent to, for example, demean women as women or demean men because of the treatment of their wives and daughters, will not be made. After all, none of the crimes within the tribunal's jurisdiction, including persecution, require a specific showing of intent to force pregnancy or to castrate men symbolically through the rape of their spouses. Yet if no one asks about these injuries and indignities, victims of gender-specific violence will be revictimized to the extent that their crimes go unnamed.

On the other hand, meeting these and other demands of the closure model on behalf of victims and for the sake of collective memory could conflict with the model's competing requisite: fair notice to defendants and avoidance of *ex post facto* criminal liability.¹⁶³ Proposals to modify existing definitions of war crimes explicitly to recognize gender-specific violence run into probable objections that such legal innovations, especially if undertaken by a tribunal in the course of pending trials, would replicate one of Nuremberg's principal flaws.¹⁶⁴ Whether or not this is the case, the tensions between the retributive demands of victims and demands for due process for defendants is likely to lead to protracted debates, not closure.

162. For a suggestion that comparable failures may turn the tribunal into an "agent of persecution," see Chinkin, *supra* note 127, at 182 (citing AUSTRALIAN LAW REFORM COMM. REP. NO. 69, PART I, EQUALITY BEFORE THE LAW: JUSTICE FOR WOMEN 250 (1994)) (discussing what may happen should the tribunal fail to protect victims' identities).

163. See *supra* text accompanying notes 30-33.

164. Cf. *supra* note 32 and accompanying text. Even without going to the lengths demanded by critics like Ray and Askin, the tribunal is still likely to run into criticism that it is making new law and imposing *ex post facto* criminal liability, as is suggested by the prior discussion on persecution. See *supra* notes 106-09 and accompanying text. Moreover, should it pursue, as expected, prosecutions for mass rape, the tribunal will face a number of novel questions, including the liability of nongovernmental paramilitary units and the classification of mass rape. Should mass rape be considered as a crime against humanity, grave breach of the Geneva Conventions, violation of the laws and customs of war, or genocide, conspiracy to commit genocide, an attempt to commit genocide, or complicity in genocide?

As noted, trials for human rights violations often invite litigation of such issues over retroactive legislation. See, e.g., SA'ADAH, *supra* note 105 (manuscript at 190-91); Walther, *supra* note 117.

E. *Lessons from Rwanda*

The problems enumerated above are not unique to the Tadić case nor to the Yugoslav tribunal. Although the Rwanda tribunal, whose jurisdiction extends to a somewhat different set of international crimes, faces differing political conditions on the ground and within the U.N., it faces comparable challenges. That international tribunal faces possibly greater obstacles in balancing the rights of criminal defendants — mostly Hutu — with the rights and expectations of victims — mostly Tutsi. It seems clear that most of the nearly 90,000 detainees in Rwanda now awaiting trial will not receive the full-scale speedy trial to which each is entitled under international human rights standards before either Rwandan courts or the international tribunal.¹⁶⁵ On the other hand, even if hundreds are ultimately convicted before the international tribunal in Arusha, there are strong indications that many victims will not be mollified by a process that, over the opposition of the present Tutsi government in Rwanda, will refuse to apply the death penalty.¹⁶⁶

There is an understandable thirst for revenge within Rwanda.¹⁶⁷ Many there see the recent horrific slaughters in their country — in which anywhere from 500,000 to 1,000,000 people were killed — as even more ignominious than the ethnic cleansing of the Balkans, at least in the number of victims and arguably in the clearer genocidal intent evidenced by the culprits.¹⁶⁸ The sheer scale of the Hutu kill-

165. What is worse, as Blakesley points out, those detained in Rwanda's prisons are there solely because of denunciations by persons who could have been motivated by any number of personal grudges and there are estimates that anywhere from 20 to 40% percent of those now jailed may be innocent. See Blakesley, *supra* note 111, at 198.

166. For a description of the response of the U.N. and human rights advocates to Rwanda's demands for application of the death penalty, see Shrager & Zacklin, *supra* note 3, at 510-11.

167. There are ongoing reports of "hundreds, perhaps thousands" of Tutsi revenge killings amidst periodic waves of civil strife and a "government in exile" periodically threatening to seize power, again in part to grant "amnesty" for Hutus and charge Tutsis with genocide. See, e.g., Blakesley, *supra* note 111, at 197.

168. Alain Destexhe, the Secretary-General of *Médecins Sans Frontières*, argues that the Hutu killings, motivated by the attempt to destroy Tutsis as a group and not merely by the desire to seize territory or possessions, compose one of only three real genocides of the twentieth century. See ALAIN DESTEXHE, *RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY 20* (Alison Marschner trans., 1995). He contends that the incomparable stigma of the term "genocide" ought to be confined, consistent with international law and Nuremberg's legacy, to killings seeking the destruction of ethnic, national, or religious groups as such because "[k]illing someone simply because he or she exists . . . is a crime against the very essence of what it is to be human." *Id.* at 4. He argues that politically motivated murders or those motivated by forcing a particular group from certain territory, such as Serbian killings of Muslims, that fall short of seeking the total elimination of the targeted group should not be considered "genocide." See *id.* at 18-19. Of course, since the creators of Yugoslav tribunal specifically included "genocide" within that tribunal's jurisdictional mandate, they took a broader view of that crime.

ings — as well as some of the Tutsi reprisals — only increases the challenge for those trying to channel the quest for revenge into the peaceful confines of a courtroom.

As with the Yugoslav tribunal, proceedings in Arusha are drawing objections from those who see political motivations behind that tribunal's establishment and ongoing prosecutorial and judicial decisions. While the Rwanda international prosecutions will draw fewer complaints from human rights advocates than will domestic prosecutions in Rwanda that are far more likely to be tainted by charges of bias and victor's justice, the Rwanda tribunal's jurisdiction is not free from controversy. That body's jurisdiction extends to the crimes of genocide, crimes against humanity, and a larger number of crimes against the laws of war than are included in the Yugoslav tribunal's statute.¹⁶⁹ But it is limited to acts committed during calendar year 1994, a compromise between the desires of the current Tutsi government in Rwanda, which was instrumental in the tribunal's creation — though it ultimately voted against its establishment — and members of the U.N.¹⁷⁰ Though the Rwanda tribunal's temporal and subject-matter jurisdictional limitations permit trials against some Tutsis who are known to have committed lesser crimes in the second half of 1994, they do not reach all crimes by all sides as closure demands. Further, the limitations on the tribunal's jurisdictional reach and the resources available to it¹⁷¹ dim the prospects that its proceedings will preserve an accurate or definitive account of the Rwanda genocide and its aftermath. On the contrary, the tribunal's reliance on the continued cooperation of the current Rwanda government is likely to compromise its ability to present a complete rendering of the Tutsis' role in acts of violence.

International proceedings in Arusha, no less than those in The Hague, are also likely to draw complaints from defense attorneys

169. Compare *ICTY Statute*, *supra* note 2, at 2 with *ICTR Statute*, *supra* note 2, at 3-5.

170. See Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INTL. L. 349, 353-57 (1997). The Rwanda government would have limited the tribunal's jurisdiction solely to genocide. It would also have limited its jurisdiction to cover only the period from October 1, 1990, when they considered the foundations of the genocide to have been laid by the then-Hutu government, to July 17, 1994, by which time the present Tutsi government had taken control. Effectively this would have meant that the international tribunal would try only Hutus. For a description of the temporal and subject-matter jurisdiction of the Rwanda tribunal, discussing the relevant compromises and drawing comparisons with the Yugoslav tribunal, see Shrager & Zacklin, *supra* note 3, at 506-10.

171. The ICTR's financial difficulties have been the subject of considerable media attention. See, e.g., Steven Lee Myers, *In East Africa, Panel Tackles War Crimes, and Its Own Misdemeanors*, N.Y. TIMES, Sept. 14, 1997, § 1, at A8.

and scholars about lack of fairness for defendants.¹⁷² For the Rwanda tribunal, the charge of *ex post facto* liability is likely to prove particularly troublesome. In creating the Rwanda tribunal, the Security Council departed from its prior attempt — in the course of creating the Yugoslav tribunal — to include only well-established international crimes. It extended the Rwanda tribunal's jurisdiction to violations of Common Article Three of the Geneva Conventions¹⁷³ and Article Four of Additional Protocol II to the Geneva Conventions.¹⁷⁴ Many do not believe that the latter constitutes established customary international law, and this effort marks the first time Common Article Three has been read as a basis for criminal responsibility.¹⁷⁵ Even if it is assumed that culprits in Rwanda were under fair notice that their violent acts would subject them to criminal liability — at least under national law — the scarcity of applicable precedents under international humanitarian law means that the Rwanda tribunal's judges, when they lay out the requisites of proof with respect to the wide variety of acts now covered, will be developing and not merely applying the law. As noted with respect to the Tadić judgment, this prospect will surely lead to challenges on the basis of violation of the principle of *nullem crimen sine lege*.¹⁷⁶ Nor is it yet clear how this tribunal will manage the treacherous problems of defining defenses such as mistake of fact or superior orders in a way that does not, for example, view the anti-Tutsi radio broadcasts of Radio Mille Collines as giving such defenses an air of reality.¹⁷⁷

172. For discussions of the problematic areas, including diverse interpretations of the standard of proof, the presumption of innocence, the right to legal counsel, *non-bis-in-idem*/double jeopardy, the interpretation of evidentiary rules, and uncertainties with respect to enforcement of sentences and incarceration, see, for example, Blakesley, *supra* note 111, at 209-18; Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 TRANSNATL. L. & CONTEMP. PROBS. 81 (1997).

173. See *ICTR Statute*, *supra* note 2, art. 4.

174. See *ICTR Statute*, *supra* note 2, art. 4.

175. See Shraga & Zacklin, *supra* note 3, at 510. For a defense of the Rwanda tribunal's statute on this point, see Meron, *supra* note 119, at 565-68.

176. Cf. *supra* notes 107-09 and accompanying text (on persecution); *supra* note 111 (discussing Blakesley's views on inadequacies of international criminal law). Article 4 of the Statute of the Rwanda Tribunal includes as cognizable crimes violence to life, health, or physical or mental well-being of persons, and, in particular, murder; cruel treatment; collective punishment; taking of hostages; acts of terrorism; outrages against personal dignity; rape and enforced prostitution; pillage; the passing of sentences and the carrying out of execution without previous judgment pronounced by a regularly constituted court; and threats to commit any of the foregoing acts. See *ICTR Statute*, *supra* note 2, art. 4. For one response to the *ex post facto* challenge, see Meron, *supra* note 119, at 567 (arguing that "[m]urder is murder all over the world").

177. See *The Queen v. Finta*, [1994] 1 S.C.R. 701, 848 (Can.).

It also remains unlikely that the Rwanda tribunal will be able to go much farther than the Yugoslav tribunal in assisting victims. The financial and personnel problems with respect to the Rwanda tribunal, which to date have proven even more difficult than with its Balkan cousin,¹⁷⁸ dim the prospects for such amenities as psychological counseling and effective witness protection. Further, although the Rwanda tribunal's specific recognition of some gender-specific crimes, such as enforced prostitution, has won applause from victims' groups in comparison with the Yugoslav tribunal, the tribunal's listing of cognizable crimes still falls short of according full recognition to the many faces of gender-specific victimization.¹⁷⁹

F. *Getting Past Nuremberg*

On the basis of the preceding discussion, it would be tempting to conclude that both ad hoc tribunals have failed to correct Nuremberg's flaws, and that their ongoing trials — like those at the end of World War II and many national trials for human rights violations since — fail to resolve inherent contradictions between the foundational, political, and epic goals of their creators.¹⁸⁰ It is tempting to conclude that the model of closure fails simply because it demands that judges, from Nuremberg to Arusha, reconcile the irreconcilable: that is, because it demands that they must render a definitive history but convict only identifiable perpetrators; provide an edifying public spectacle to buttress the national and international rule of law while providing defendants scrupulously fair trials; and accomplish all of these while mollifying victims.¹⁸¹

Moreover, it appears that neither the Rwanda nor Yugoslav tribunal has managed to mediate successfully the political divides between east and west, north and south any better than the Nuremberg or the Tokyo tribunals did. Charges of double standards, American exceptionalism, victor's justice, or judicial neo-colonialism have been deflected but not altogether avoided in each

178. For a survey of some of the financial dilemmas which these tribunals have posed within the U.N., see, for example, SCHARF, *supra* note 3, at 44-49, 79-84; Shraga & Zacklin, *supra* note 3, at 512; Myers, *supra* note 171, § 1, at 6. Indeed, the Tadić trial itself, initially "scheduled to begin in November 1995, was postponed until May 7, 1996, for want of \$78,000 for expenses for defense counsel and investigators." See SCHARF, *supra* note 3, at 83.

179. Cf. *supra* notes 151-62 and accompanying text. "Forced pregnancy" was given explicit recognition only in later drafts of the Rwanda tribunal's statute. See Blakesley, *supra* note 111, at 211.

180. See generally LUBAN, *supra* note 21, at 335-78, 379-91 (discussing the "foundational," "political" and "epic" aspects of Nuremberg and other trials).

181. See generally *id.*; OSIEL, *supra* note 6, *passim*; Simpson, *supra* note 23, at 20.

case.¹⁸² Despite the attempt to create denationalized entities, these tribunals remain tainted by the national interests that dominate the organ that created them: the Security Council. Some countries, both on and off the Security Council, have expressed qualms about the expansive reinterpretations of the Security Council's powers that permitted establishment of these ad hoc bodies.¹⁸³ The Security Council's assumptions of power are not merely perceived by some as a threat to sovereignty.¹⁸⁴ Some U.N. members and scholars have lingering concerns about the actual judicial independence these tribunals enjoy.¹⁸⁵ The Yugoslav tribunal, the first to be confronted squarely with some of these issues in the course of the Tadić case, has given nearly as many answers as there are nationalities

182. See LESCURE & TRINTIGNAC, *supra* note 18, at 96; Cotić, *supra* note 78, at 233-35; Hayden, *Schindler's Fate*, *supra* note 40, at 742; Thornberry, *supra* note 138. See also ALFRED P. RUBIN, *ETHICS AND AUTHORITY IN INTERNATIONAL LAW* 170-206 (1997). As one commentator has noted, the Tadić trial had an "unmistakable 'American flavor'" since its presiding judge was from the United States, along with three out of four persons on the prosecution team. See Scharf, *supra* note 122 (manuscript at 8). Further, since the United States has provided 22 lawyers and investigators to the Yugoslav tribunal, far more than any other Security Council member state, this may be true of other trials at The Hague as well. *Id.* at 8, n. 23.

183. See, e.g., Barbara Crossette, *China Refuses to Go Along With Creation of Pol Pot Tribunal*, N.Y. TIMES, June 25, 1997, at A6 (reporting on China's objections to a proposed ad hoc tribunal for Cambodia). After all, the Security Council's decisions in these instances are unprecedented: it has determined the precise scope of individual criminal liability; codified — and probably progressively developed — international criminal law by giving Council sanction to two lists of cognizable international crimes contained in the tribunals' respective statutes; boosted the prospects for a permanent international criminal court; and lent its considerable enforcement powers to all these efforts at the expense of national courts and the hitherto exclusive rights of each state to determine for itself whether to cooperate with another's criminal investigation or whether to extradite a criminal suspect upon request. For examples of the resulting qualms among some member states, see *Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization*, U.N. GAOR, 49th Sess., Supp. No. 33, U.N. Doc. A/49/33 (1994).

184. See, e.g., Dolenc, *supra* note 110.

185. Since independent criminal courts created by U.N. executive action are unprecedented, no one knows whether the Security Council retains residual authority over these tribunals to amend either tribunal's statute or to terminate either tribunal before its cases are concluded based, for example, on a determination that a threat to the international peace no longer exists. No one knows whether the Council can direct either tribunal not to indict or not to prosecute particular high government officials whose prosecution might be detrimental to the maintenance of the international peace. No one knows whether either tribunal is legally entitled — or willing — to tell the Council that such attempts to interfere are null and void — or what would happen if either tribunal tried. Thus far, only hints of answers to many such fundamental questions about the relative independence and powers of these tribunals have come in earlier trial and appellate chamber decisions in response to jurisdictional challenges brought by Tadić's attorneys. See *Decision on Defence Motion on Jurisdiction*, *supra* note 19; *Decision on Defence Motion for Interlocutory Appeal*, *supra* note 19; see also Jose E. Alvarez, *Nuremberg Revisited: The Tadic [sic] Case*, 7 EUR. J. INTL. L. 245, 249-60 (1996); Christian Tomuschat, *International Criminal Prosecution: The Precedent of Nuremberg Confirmed*, 5 CRIM. L.F. 237, 244-46 (1994); Geoffrey R. Watson, *The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in Prosecutor v. Tadic [sic]*, 36 VA. J. INTL. L. 687 (1996).

represented on its bench. Judicial unanimity has been understandably elusive given the novelties of that tribunal's creation and the wide gaps in international criminal practice.

Yet the specter of Nuremberg misleads. Merely correcting Nuremberg's flaws would not necessarily lead to closure. The Yugoslav and Rwanda tribunals face many issues reminiscent of those faced by earlier war crimes prosecutions. But their greatest challenges are unique: both tribunals are expected to fashion Nuremberg-styled justice in the absence of D-Day. Each of today's ad hoc tribunals faces challenges unknown to those who organized and conducted World War II's trials.

The Yugoslav tribunal has issued approximately seventy-five indictments but has only a handful of people in custody — none of whom is a key member of the relevant political or military leadership. Absent further arrests by NATO forces or other forceful action by the Council on recalcitrant governments in the region, the Yugoslav tribunal's list of indictments is likely to continue to be distinguished by the lack of high profile defendants. The selective prosecutions of small fry like Tadić are likely to draw complaints that the process mocks justice.¹⁸⁶ While the Rwanda tribunal may encounter fewer difficulties in bringing indictments against some high-level former government officials, its actual number of indictments has been low.¹⁸⁷ Despite the thousands being detained in Rwanda prisons, it is not yet clear whether most of the major leaders, planners, and organizers of the Rwanda genocide will face prosecution or remain "shielded by States or non-State entities."¹⁸⁸

In neither region do likely perpetrators truly face a certainty of international prosecution. In both cases, effective prevention of future mass atrocities is rendered dubious by the sheer numerosity of probable culprits and by the international community's equivocations as to their capture and as to committing the necessary financial and other resources to try them.¹⁸⁹ Moreover, advocates of increasing the number of arrests and trials lose sight of a trouble-

186. See, e.g., Kenneth Anderson, *Nuremberg Sensibility: Telford Taylor's Memoir of the Nuremberg Trials*, 7 HARV. HUM. RTS. J. 281, 292-94 (1994) (reviewing TAYLOR, *supra* note 1).

187. See Myers, *supra* note 171. As of September 1997, of the 21 suspects in custody at Arusha, many were high-ranking officials in the former Hutu-dominated regime, including the former Prime Minister and the Minister of Defense. See *id.*

188. Shrager & Zacklin, *supra* note 3, at 517.

189. While NATO seems, at this writing, to be assuming, tentatively, greater responsibility for arrests in the Balkans, the likelihood that it will continue to do so remains in doubt — as does the effectiveness of any such efforts absent a much more massive military presence.

some reality: the detention of even prominent leaders does not always deter fanatical followers. A charismatic leader can just as easily inspire continued violence from inside a jail cell. In the Balkans, and even more so in Rwanda, the sheer number of people likely to have been involved in mass atrocities poses considerable difficulties for the prospects of deterrence through the criminal process. Is effective deterrence even possible when such large numbers have been complicit?¹⁹⁰ Even far more stable national governments than are now found in the Balkans or in Rwanda, with considerably more effective control over their own territories and with a longer history of national institutions committed to the rule of law, have often demurred from conducting criminal trials in the face of such dilemmas.¹⁹¹

But if deterrence is unlikely, so are the prospects for effective punishment of culprits or for the rehabilitation for victims. The vindication of victims seems scarcely attainable given prevailing political conditions in the Balkans or Rwanda. Even under the best of circumstances, only a tiny percentage of the survivors of the massacres in Rwanda and the Balkans are likely to have an opportunity to confront their tormentors in court, and those who do are likely to have to settle for the opportunity to present fragmented narratives before defiant perpetrators unlikely to express remorse.

Similarly, the prospects for restoration of public order, anticipated by the model of closure, seem meager. In both Rwanda and the Balkans it seems more probable that former victims and tormentors will encounter each other on the street than in an international courtroom. The small number of international prosecutions is not likely to forestall acts of vengeance or mob violence as victims come across former torturers and rapists, particularly if unstable conditions continue in either region. Further, sparse international prosecutions are not merely the products of scarce international resources. The difficulty of bringing cases to trial in either region owes a great deal to the absence of victor's justice. Thus far in both Rwanda and the Balkans, many survivors and witnesses have not been willing to come forward because they continue to live in areas where retaliation remains likely.¹⁹² For much

190. Cf. Cohen, *supra* note 147, at 37 (arguing that the deterrent value of individual punishment in cases involving these politicized crimes remains more uncertain and may be a great deal less than with respect to conventional crimes).

191. See generally IMPUNITY AND HUMAN RIGHTS, *supra* note 3 (presenting case studies from around the world).

192. See, e.g., *supra* notes 133-34 and accompanying text.

the same reason there has to be profound skepticism that these tribunals will be able to generate the other goals sought by the model of closure, including renewed respect for the rule of law and national reconciliation.

These doubts suggest that the closure model makes erroneous factual assumptions about the solidarity-enhancing effects of prosecutions under prevailing conditions in Rwanda and the Balkans. They imply that closure's advocates were wrong to assume that a model that is presumed to work domestically for ordinary crimes can be successfully adapted for international use in cases of mass atrocity.

But is closure a valid model even within national courts? Post-modern challenges to law's ability to fashion objective solutions or to tell anything other than politically predetermined stories pose challenges not known at the time of the Nuremberg trials. To many people today, the notion of closure through judicial processes seems the product of an antiquated legal romanticism long subject to "cognitively relativist, morally nihilistic, and politically anarchistic" critiques.¹⁹³

And the new skepticism about law's prospects is not limited to academe. Even outside the legal academy and its "crits," for perhaps the majority of people in the United States the idea that courts and lawyers stand as a socially unifying bulwark to protect civilization seems naïve.¹⁹⁴ Many, perhaps most, only rarely view what occurs inside of courtrooms as praiseworthy attempts to secure neutral justice and often as thoroughly calculated maneuvers that reflect — and sometimes inflame — society's prejudices. Particularly in cases involving race or ethnicity, there is pervasive doubt that all are really equal before the law or that the status of persons or the ethnic or other affiliations of witnesses, judges, or juries is irrelevant. There is profound skepticism that a societal consensus exists with respect to issues of race in the United States, or that our judicial judgments can either rely on objectivity in the face of it or generate confidence in neutrally applied justice.

These doubts would seem to apply all the more in the context of societies as fractured as those in the Balkans and Rwanda. Despite the premises of the model of closure, confidence in judges and the law were among the first casualties of mass atrocities in both re-

193. OSIEL, *supra* note 6, at 294. See generally MARY ANN GLENDON, *A NATION UNDER LAWYERS* 199-229 (1994) (surveying developments in the "new" legal academy).

194. For one assessment of the reasons underlying the "crisis" in the U.S. legal profession, see GLENDON, *supra* note 193.

gions, and the absence of a shared faith in the shared values of the law hinders pursuit of closure's goals — at least under the closure model's terms.

IV. THE HARD CASE FOR THE YUGOSLAV AND RWANDA TRIBUNALS

In the wake of the difficulties with the model of closure, are we to conclude that the Rwanda and Yugoslav tribunals should cease operations?¹⁹⁵ If not closure, what is the argument for sporadic international war crimes trials, often of small fry like Dusko Tadić, while the majority of wrongdoers in both Rwanda and the Balkans, including perhaps the majority of those who gave the orders, avoid international accountability? What justification is there for the issuance of judgments in future cases that are likely to be as flawed as the one in Tadić?

As Part III indicates, the Tadić judgment, indeed the very existence of the Yugoslav tribunal, constitutes a provocation. As the reaction to the Tadić verdict and sentence suggests, the judges did not succeed in applying a soothing emotional balm; instead, their judgment inspires unsettling and difficult questions among trial observers and participants on all sides and both within and outside the region — and not merely among those who are skeptical about judicial claims to apolitical neutrality.

The failure of the model of closure need not lead to the conclusion that the Tadić trial or international prosecutions generally may not advance at least some of the mythic goals of their proponents. For one year, during the Tadić trial, Serb and non-Serb met in the relative peace of a courtroom. During this time, both sides were forced, by the substantive law, to address only issues licensed by that law. Because of the constraints of the rules of evidence and procedure — including rules of relevance and decorum — both sides, including Tadić's Serbian legal defense team, were required to address relatively narrow factual and valiative inquiries. Both sides were forced to ask whether events at particular times and places occurred as described, whether certain witnesses were mistaken or lying, and whether particular evidence was relevant to these questions.

195. For an argument that the proper response may indeed be to "[d]o nothing," see RUBIN, *supra* note 182, at 183-85.

Because of the high stakes for the defendant, all trial participants took seriously the need to address Tadić's guilt or innocence solely through the rhetoric and the tools sanctioned by the law.

The way issues have been channeled at trial also has had effects outside the courtroom. To be credible, even the trial's critics have needed to rebut the specific evidence presented. Responsible critics have been made to feel that they need to give their own answers to questions about Tadić's whereabouts on particular dates and times. Critics have been invited to give an account of Tadić's disposition toward non-Serbs and to describe his motivations when he accepted certain political positions. To be credible, competing conclusions that contradict the judges' factual findings have required support from a chain of inferences comparable to those on which the judges relied. If people disagree with the judges' specific conclusions, they are expected to say why — was it due to witnesses' composure on the stand, the inadequacies of the paper record, or some flaw in the bench's logic? They are invited to point to witnesses or documents that prove Tadić's alibi or at least to indicate why, given the prosecution's case, it is unfair to put the burden on the defendant to prove an alibi at all.

Both the conduct of the trial and the way the judgment was rendered discourage, but do not wholly preclude, arguments that all Muslims lie or that all the Muslim witnesses at this trial did so. Further, the judges' findings affirmatively discourage as outside the terms of civil discourse irredentist claims that the beatings, torture, and executions were justified because the victims deserved it. There is an attempt to channel even the most vitriolic accusations of the judgment's Serbian critics into arguments over the political nature of the case and the tribunal, the bias of prosecution witnesses, and the inadequacies of particular trial procedures.

While the judges' admittedly flawed attempts to keep their own inquiries within relatively less politicized channels do not prompt closure in the Durkheimian sense of emotional release — as anticipated by the model of closure — their efforts still invite *reasoned* responses about the law and the application of the law to facts. Critics are encouraged to indicate where the judges misapplied or misread the law. But they are discouraged from giving an emotional response to what, at least in substantial part, is a decidedly unemotional, sober — and sobering — account. Irredentist responses that rape or torture is "perfectly consistent with the law of nations," or that "the law of nations does not exist and is a pack of lies," are discouraged. Such contentions are not within the judges'

views of tolerable discourse. The judges' preliminary findings, while hardly definitive as demanded by closure, invite heated but reasoned responses that "comparable" atrocities were committed by non-Serbs. These findings affirmatively discourage, as not within the judges' terms of civil discourse, emotional or righteous responses, such as a claim that ethnic cleansing is an affirmative good because "Muslims are unfit to live."

Both in the Balkan region and outside it, the attention given to the public spectacle that the media billed as the "trial of the century"¹⁹⁶ and its historic judgment tend to ensure continued discourse among a variety of observers. The Tadić judgment will inevitably be read critically, even by those generally favorable to the tribunal and its goals — as was Nuremberg's. Feminists and victims' groups will scrutinize the judgment, as will human rights advocates generally and the criminal defense bar. Scholars and practitioners of international humanitarian law will look to see if the judges got the law right, historians will examine judicial findings of fact, and advocates of a permanent international criminal court will be looking for precedents and lessons.

If these international criminal proceedings ultimately assist in the principal goal of helping to promote social solidarity — both inside the region and outside it — they will do so because the criminal process — including the rules of evidence and procedure, the application of the substantive law, and the professional ethics of bar and bench — enables and facilitates civil discourse in all its respects and among all these audiences.¹⁹⁷ Consistent with Osiel's concept of "civil dissensus," trials such as Tadić's might better be seen not as occasions for generating closure but as discursive phenomena that, if conducted as "effective public spectacle, stimulate public discussion in ways that foster the liberal virtues of toleration, moderation, and civil respect."¹⁹⁸ If so, the value of such trials *actually increases* the greater the preexisting hostility or suspicions between the parties, since the greater these are, the less apt the parties are to seek other occasions for dialogue *except* when forced to in a court of law. Particularly in instances like Rwanda and the Balkans, where the conflicts that gave rise to mass atrocities are far from over, trial

196. See, e.g., SCHARF, *supra* note 3, at xii.

197. Cf. Osiel, *supra* note 5, at 486-97 (arguing that criminal trials foster "social solidarity" by encouraging discourse "with an initially unwilling interlocutor").

198. OSIEL, *supra* note 6, at 2.

confrontations may provide rare occasions for "public deliberation over continuing *disagreement*."¹⁹⁹

Further, the nature of legal narratives matters: legal storytelling is, after all, constructed within a "culture of argument" whose goal is to persuade.²⁰⁰ Accordingly, trials may elicit a kind of solidarity premised on

civil engagement in disagreements by way of procedures entailing display of respect for one's adversary, respect that may be entirely procedural (and a matter of rule following) at the outset but that often tends to grow into something more substantive — if not between the most unreconstructed of antagonists, then among the larger numbers of their more moderate sympathizers. There is a kind of solidarity, in other words, in continuing exchanges that result in the mutual recognition that agreement on a question of common concern is strongly desirable and ultimately possible, even if only at some uncertain point in the future.²⁰¹

The premise is that legal deliberation, by forcing parties to inhabit a common legal culture, can help to reconstruct social solidarity within nonlethal bounds and generate a measure of trust.²⁰²

International war crimes prosecutions should not be portrayed as group therapy designed to generate societal consensus on established community values. Especially when such trials involve inflamed ethnic passions that have degenerated into mass violence, the prospects for such consensus are slim. But the efforts of the Tadić judges to apply the conscience of the international community, to affirm what they claim are universal values, at a minimum forces observers to address whether there is consensus with respect to any such fundamentals. Perhaps the international community as a whole does not agree that leaders who seek "ethnically pure" nations are guilty of criminal acts. Still, there may be emerging areas of agreement that certain violent acts directed at the creation of ethnically homogeneous nations are indeed criminal — or ought to be. International trials may help facilitate a search for agreement

199. *Id.* at 17 n.22.

200. See Gewirtz, *supra* note 140, at 2, 5.

201. Osiel, *supra* note 5, at 499.

202. See Osiel, *supra* note 6, at 17 n.22, 38-39. Those who examine law as a rhetorical process reach similar conclusions. See generally JAMES BOYD WHITE, *HERACLES' BOW* xi, 115-18, 130-31 (1985) (examining the effects of the common language of the law, including the effects of judicial opinions as "socially constitutive literature"). But see Jennifer J. Llewellyn & Robert Howse, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission as a Model for Dealing with Conflicts of the Past 2* (Jan. 20, 1998) (unpublished manuscript, on file with author) (arguing that the retributivist aspects of punishment undermine the goal of restoring social equality and recommending the use of truth commissions as an alternative application of "restorative justice").

as to these acts; perhaps they can even present "moments of transformative opportunity" for international and national communities.²⁰³ Such trials, if publicized enough, may provide opportunities for "social deliberation" and "collective examination of the moral values underlying public institutions."²⁰⁴

These tribunals' roles with respect to the question of collective complicity is a great deal more complex than advocates of closure seem ready to acknowledge. It is understandable that tribunal advocates want to eradicate the concept of collective complicity root and branch. Particularly with respect to the Balkans, it seems clear that at least Serbs and Croats have become adept at using each group's prior victimhood status — of either Serb victims of "fascist Croatia" or Croat victims of "communist persecution" — as an excuse to wage unrestricted war against all who bear the stain of collective and hereditary guilt for such crimes.²⁰⁵ Concepts of collective guilt made it easier to justify a war that targeted civilians, most of whom were not alive at the time of earlier alleged atrocities. Tribunal advocates are correct when they argue that the international criminal process, like the criminal process in any liberal state, rejects such pre-Enlightenment notions of hereditary guilt. They are right that the Tadić trial, by convicting only Tadić and not members of Tadić's ethno-religious community or his political associates, recognizes that individuals are responsible and accountable only for what they themselves have done of their own free will and not for the sins of their fathers.

But tribunal advocates are wrong when they go on to suggest that the Tadić trial or similar trials produce closure with respect to collective complicity. The findings at Tadić's trial affirm that there indeed were victims and aggressors, and not merely feuding neighbors in a brawl in which all sides were equally guilty.²⁰⁶ In doing so,

203. See OSIEL, *supra* note 6, at 2.

204. NINO, *supra* note 36, at 131 (comparing trials for human rights violations to Ackerman's "constitutional moments"); see also *id.* at 132-34 (discussing effects of these collective debates); Gewirtz, *supra* note 142, at 151 (discussing trials as constituting "a central moral arena for society"); cf. WHITE, *supra* note 202, at 174 (discussing the "openness" of the language of the law to new points of view).

205. See, e.g., Tom Gallagher, *My Neighbour, My Enemy: The Manipulation of Ethnic Identity and the Origins and Conduct of War in Yugoslavia*, in *WAR AND ETHNICITY: GLOBAL CONNECTIONS AND LOCAL VIOLENCE* 47, 60-64 (David Turton ed., 1997). Indeed, according to Amnesty International, some victims have been seen as complicit by affiliation. Thus, Balkan perpetrators have singled out Muslim women allegedly "as a form of retribution because of the perpetrators' presumptions of the actions or intentions of the women's male relatives." *Id.* at 62.

206. See generally GENOCIDE AFTER EMOTION: THE POSTEMOTIONAL BALKAN WAR (Stjepan G. Meštrović ed., 1996).

Tadić's trial perpetuates certain types of questions about the culpability of the collective.²⁰⁷ Rather than convincing anyone that we have managed to capture the only culprits, trials like Tadić's encourage reasonable questions about the comparative guilt of groups, including Serbs, Croats, and Muslims.

Some believe the resulting debates are detrimental to national reconciliation. Robert M. Hayden argues, for example, that an accusation of genocide, even when directed against an individual, assumes the larger guilt of that individual's society and "works to establish the collective guilt of those in whose name it is said to have been carried out."²⁰⁸ Hayden contends that bringing criminal charges in such contexts, far from individuating guilt, perpetuates the idea of collective vengeance and self-defense into the next generation.²⁰⁹ Further, attempts to pin the blame on individuals, even leaders such as Karadžić, only prompts broader inquiries (such as Hayden's) into likely causes, thereby extending blame to those Western countries that prevented Bosnia's partition and prematurely recognized a state that had been rejected by the Bosnian Serbs and Herzegovinian Croats.²¹⁰

The argument from civil dissensus starts from the premise that such questions can only be ducked for so long and need to be raised if there is to be any real prospect for national reconciliation. It is based on the proposition that youngsters in the former Yugoslavia *ought* to be encouraged to ask their parents a few years hence, "What exactly were *you* doing in 1992, Mom and Dad? Did you support the people doing these terrible things?"²¹¹ Like Hayden, I assume that war crimes trials keep alive difficult issues of the meaning and scope of complicity and that even the conviction of one low-level local torturer implicates, for example, bystanders who chose to remain silent.²¹² Like Hayden, I acknowledge that even such tri-

207. Compare Schrag, *supra* note 3, at 19 with Diane Johnstone, *Selective Justice in The Hague*, THE NATION, Sept. 22, 1997, at 16.

208. Hayden, *Schindler's Fate*, *supra* note 40, at 743.

209. See *id.* at 743; see also Susan L. Woodward, *Genocide or Partition: Two Faces of the Same Coin?* 55 SLAVIC REV. 755, 756 (1996).

210. See Hayden, *Reply*, *supra* note 40, at 774, 777.

211. See NINO, *supra* note 36, at 147 (arguing that such questions need to be part of "daily discourse" in the context of Argentina).

212. Notions of complicity tend to evolve, as seems clear given ongoing debates about complicity in Nazi war crimes. See, e.g., Detlev F. Vagts, *Switzerland, International Law and World War II*, 91 AM. J. INTL. L. 466 (1997) (arguing that Swiss behavior during and after World War II was consistent with contemporaneous legal rules governing neutrals); William H. Honan, *Curators as Partners In War Crimes*, N.Y. TIMES, July 27, 1997, at E5 (suggesting museum curators who "fenced" Nazi trinkets were parties to war crimes); see also *Swiss Federal Banking Commission-Independent Committee of Eminent Persons-Swiss Bankers Asso-*

als can be the start of national debates with respect to what complicity means.²¹³ I differ from Hayden, however, in believing that the ways these issues are addressed matter and that trials can help channel these debates along legalistic lines. When trials effectively promote civil dissensus, they encourage discussions about “collective complicity” that focus on what people may have done or failed to do under the law — and away from hereditary notions of guilt.²¹⁴

We begin to make the hard case for international war crimes prosecutions when we reject the premise that the continued discussion of unresolved issues is necessarily destructive because it is detrimental to closure. The argument for the Balkan and Rwanda prosecutions’ prospects for generating national reconciliation may need to be made on the premise that contentious courtrooms and ensuing debates are preferable to situations where antagonists inflamed to kill lack opportunities for civil discourse. Trials and verdicts that elicit passionately felt accusations and counter-accusations among neighbors and even within families may be not only justifiable but necessary in societies as fractured as the former Yugoslavia or Rwanda. As we have seen already in the Balkans — and, at a much less bloody level, even within the United States²¹⁵ — judicial verdicts or attempts to prosecute may prompt sporadic violence outside the courtroom. The case for arguing that despite such risks, trials ought to be attempted is, under civil dissensus, that societies in which such divisive issues are not raised *at least in a court-*

ciation: Statement on Comprehensive Claims Resolution Process for Dormant Accounts in Swiss Banks Dating From Prior to the End of World War II and Announcement on Claims Resolution Process, reprinted in 36 I.L.M. 1379 (1997); Switzerland: Decree on the Legal Investigation of the Assets Deposited in Switzerland After the Advent of the National-Socialist Regime and Decree on the Special Fund for Needy Victims of the Holocaust, reprinted in 36 I.L.M. 1272 (1997).

213. Continuing a dialogue about the prevalence of collective complicity may also be useful to understanding the urge for continued violence in the Balkans, since encouraging notions of complicity was itself a conscious tool of, for example, Serbian aggression. See GENOCIDE AFTER EMOTION: THE POSTEMOTIONAL BALKAN WAR, *supra* note 206, at 21-22 (describing how Serbian propaganda drew on the alleged collective complicity of Croats during World War II); MALCOLM, *supra* note 82, at 217, 252 (arguing that Serbian leaders consciously implicated larger numbers in atrocities in order to align their interests with those of Greater Serbia).

214. This is suggested by the surge in interest in international humanitarian law that the tribunals have helped to engender, along with a rise in the number of countries that have adopted statutes under the principle of universal jurisdiction to permit national war-crimes trials. See *Living History Interview with Judge Richard Goldstone*, 5 TRANSNATL. L. & CONTEMP. PROBS. 373, 377 (1995); Meron, *Answering for War Crimes*, *supra* note 3, at 7.

215. The bloody aftermath of the Rodney King case, see, e.g., Richard C. Paddock & Jenifer Warren, *King Case Aftermath: A City in Crisis*, L.A. TIMES, May 2, 1992, at A4, is only the most well-known recent example within the United States.

room face a greater danger of having these questions vetted in renewed mass atrocities instead of in more controlled settings.

But if civil dissensus and not closure should be the justificatory approach, what follows?

(1) *Under civil dissensus, what matters is that an institutionalized process exists to promote discussion of how such events happened and who should be accountable, not the number of verdicts or indictments issued, the number of trials conducted, or even who — lowly local torturer or high-level government official — stands accused.*

As noted, for advocates of closure, the prospect that only trials of small fry may occur within the Rwanda and Yugoslav tribunals is a problem that needs to be corrected as quickly as possible lest closure be undermined.²¹⁶ Various Nuremberg-inspired arguments, both philosophical and practical, are used to justify this conclusion. It is argued that jurisprudential needs for consistency demand that those who are equally culpable should also face criminal liability. It is said that the rule of law requires punishing all those who are equally culpable, regardless of social rank or level of responsibility. Others, of a more instrumentalist persuasion, contend that the law requires devoting its scarce resources to those who, because of the greater numbers of persons they put at risk, their higher social rank, or their greater degree of education, have greater culpability.²¹⁷ It is also argued that punishing the superior official who gave the genocidal orders or instituted them as policy is more useful for purposes of deterrence, retribution, or affirmation of the rule of law.²¹⁸

While many of these arguments have considerable force and merit, it is not yet clear which of these, if any, generate widespread consensus. From Rwanda to the Balkans, from Argentina to El Salvador and South Africa, we have considerable evidence that the peoples and governments of the world, when faced with mass atrocities, equivocate not only about whether to impose criminal liability but also about whom to indict.²¹⁹ Punishment for mass atrocities is

216. See, e.g., Scharf & Epps, *supra* note 81, at 659 ("The ultimate test of the Tribunal's success . . . will turn on whether the Tribunal gains custody of the major planners, strategists, and commanders in the war and successfully prosecutes a fair number of them.")

217. See RATNER & ABRAMS, *supra* note 3, at 172-73, 176-77, 296-97.

218. See *id.* at 297.

219. See sources cited *supra* note 100 (noting U.N. encouragement of amnesties elsewhere). For a critical history of such efforts, concluding that criminal prosecutions remain "rare" and that "[i]naction, amnesties, and pardons" remain the norm, see NINO, *supra* note 36, at 5-40. See also *id.* at 118-27 (explaining why this is the case). For more detailed accounts involving particular countries' attempts to deal with war crimes, see, for example, Suzanne Daley, *South African Court Approves Amnesty for Apartheid Crimes*, N.Y. TIMES, July 26, 1996, at A3 (reporting on the South African Constitutional Court's approval of am-

and has always been undoubtedly selective at both the international and national levels. National courts have varied tremendously with respect to their reactions to violations of humanitarian law by their own nationals. Selective national prosecutions for such crimes appear to be the norm.²²⁰ Indeed, it is arguable that selective prosecutions that target, perhaps unfairly, small fry instead of higher-ups is, as is suggested by the number of small-time drug couriers who are convicted as compared with drug kingpins within the United States, endemic to much of the criminal law.

The lack of consensus on such issues should hardly surprise. We ought to expect debates about whether the failures of political will that render difficult the arrests of suspects or make impossible the imposition of sanctions on states who fail to cooperate with the tribunals make those trials that do proceed illegitimate. Insofar as we have a choice as to whether to prosecute large or small fish, we can expect disagreements over the types of collective memory that are best to preserve as well as the kind of national reconciliation that is envisioned as a result. The lack of consensus on whom to prosecute reflects the lack of agreement on these other issues as well. As Robert Jackson recognized in the course of the Nuremberg trials, the decision there to spotlight men who played important roles in politics, the economy, and the military was in part intended to send a message that these leaders, and not the average German, bore decisive responsibility.²²¹ It was a strategy that was intended to absolve the general population on the theory that such absolution, whether or not grounded in fact, facilitates national reconciliation.²²² Those who decide to cast a broader net, whether in the course of trials or truth commissions, send a different message about who was implicated in barbarism, and presumably act on the premise that a more truthful collective memory is a more promising starting point for national reconciliation.

nesty for apartheid crimes); Axel Marschik, *The Politics of Prosecution: European National Approaches to War Crimes*, in *THE LAW OF WAR CRIMES*, *supra* note 23, at 65 (European efforts); Gillian Triggs, *Australia's War Crimes Trials: All Pity Choked*, in *THE LAW OF WAR CRIMES*, *supra* note 23, at 123 (Australia); Sharon A. Williams, *Laudable Principles Lacking Application: The Prosecution of War Criminals in Canada*, in *THE LAW OF WAR CRIMES*, *supra* note 23, at 151 (Canada). *But see* Roht-Arriaza, *supra* note 3, at 22-23 (distinguishing individualized pardons from generalized amnesties); Naomi Roht-Arriaza, *Conclusion: Combatting Impunity*, in *IMPUNITY AND HUMAN RIGHTS*, *supra* note 3, at 281, 299 (arguing that despite the practices of states, there is an "emerging" international legal norm that requires states "to investigate, prosecute, and provide redress" for war crimes).

220. *See generally* IMPUNITY AND HUMAN RIGHTS, *supra* note 3, at 73-280 (discussing case studies).

221. *See, e.g.*, SA'ADAH, *supra* note 105, at 201.

222. *See id.* at 200-01.

Under civil dissensus, it is not assumed that in the international community as a whole, or within societies where mass atrocities have recently taken place, there is yet consensus on any of these issues. Under civil dissensus, we expect further debates concerning the meaning and significance of selectivity. War crimes prosecutions continue to be selective at any of a number of levels. The Yugoslav tribunal's statute — like Nuremberg's Charter itself — is limited in scope: it only deals with acts that occurred after 1991 and only with certain crimes. The Rwanda tribunal reaches a somewhat longer list of crimes but only insofar as these were committed during 1994. Do these limitations — and the underlying failure to reach anyone guilty of comparable acts at different times — undermine the legitimacy of punishing those who were guilty in the relevant time periods? Does it matter if, as in the Rwanda case, the temporal jurisdictional limit may be at least partly explained by the need to prevent prosecution of Tutsis in order to secure the continued cooperation of the current government of Rwanda? Moreover, the U.N. has seen fit to establish tribunals only for the former Yugoslavia and Rwanda but not for Haiti, Iraq, Cambodia, or a number of other places. Do these failures undermine the legitimacy of its former efforts, or do we accept the proposition that we must start somewhere? International humanitarian law reaches only some acts, such as indiscriminate targeting of civilians by low-tech scud missiles, but apparently not, for example, high-tech aerial bombardment — as by the United States over Baghdad in 1991 — nor, at least in the view of nuclear powers, the threat or use of nuclear weapons.²²³ Are all of humanitarian law and all prosecutions thereunder thus suspect because they are selective at least along North/South lines?²²⁴

Under civil dissensus we expect further debates concerning whether the goals of the international criminal process are best furthered through high profile trials of major political figures as compared to proceedings against more ordinary culprits. While some of the arguments from the standpoint of deterrence, retribution, and the rule of law favor the Nuremberg precedent emphasizing trials of major figures, there are competing arguments emphasizing the goals of, for example, the vindication of victims or the preservation of an accurate collective memory.

223. See, e.g., *Legality of the Threat or Use of Nuclear Weapons* 1996 Op. I.C.J., reprinted in 35 I.L.M. 809 (1996).

224. Cf. Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INTL. L.J. 49 (1994).

Some might contend that victims and survivors would derive more satisfaction from participation in trials leading to convictions of their actual torturers and rapists; that both groups might find greater catharsis from seeing such persons in the dock than from seeing their commanders — usually strangers to those victimized — who gave impersonal orders or encouraged such crimes generally.²²⁵ From the perspective of collective memory, some may claim that there is *greater* merit to devoting scarce resources to punishing low-level functionaries who actually inflict crimes on other human beings, since exposing both the banality of such individuals and their apparent indifference to the pain they directly inflict tells us more about how such barbarity can become routinized or widespread.²²⁶ Emphasis on such persons tends to produce accounts of mass atrocities that provide more satisfactory explanations of their bureaucratization.²²⁷

Whatever else might be said for and against the selective prosecutions of small fry, there are some practical reasons, from the standpoint of civil dissensus, in favor of starting with such trials. First, it may be that civil dissensus works best if deliberations start small — or at least where both sides do not perceive the political stakes to be as great. With the political temperature reduced, there is a greater likelihood that civil discourse will proceed, notwithstanding controversial verdicts or other tensions, as reactions by even vehement opponents are less likely to be violent or prone to totally irredentist arguments.²²⁸ Trials such as Tadić's permit participants, including those within the defense bar, to gain confidence in the procedures and the deliberative process itself. And, under civil dissensus, it may be that as more trials proceed, as repeated

225. See SCHARF, *supra* note 3, at 223.

226. Such arguments presume, as Carlos Santiago Nino has suggested, a utilitarian theory of punishment in which trials are deemed a means to prevent crimes or to achieve other collective societal goals, and are shaped in terms of efficacy in attaining these goals. Under a more retributivist approach, society as a whole and victims in particular might be regarded as having a right to punish and to punish all those guilty of commensurate crimes equally. Nino defends a utilitarian approach under which "nobody has a right that certain persons be punished and, consequently, nobody has a right not to be punished because others are not." NINO, *supra* note 36, at 184-85. He defends selective punishment aimed at "efficiently achieving legitimate goals." *Id.*

227. Cf. DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1997); LUBAN, *supra* note 21, at 362-74 (critically examining Nuremberg's handling of "bureaucratic" Nazi crimes).

228. Consider, for example, the likely Serbian reaction if the first defendant before the Balkan tribunal had been Milošević or Karadžić instead of Tadić. Indeed, one tribunal insider has suggested that the tribunal's prosecutors have consciously avoided issuing an indictment against Milošević precisely because of the political risks. See SCHARF, *supra* note 3, at 89-90.

encounters in civil engagement occur, participants and observers will have greater opportunities to generate more substantive commitments and may have more of a personal stake in the tribunal.

Second, such trials provide the bench and bar an opportunity to test the scope of the substantive rules of humanitarian law, along with the tribunal's rules of procedure and evidence, and, based on reaction, work out kinks while the stakes are not perceived to be as high.²²⁹ It is arguably better, certainly from the perspective of likely political reaction, that the Yugoslav tribunal work out an approach to secret witnesses in a case like Tadić rather than in a higher-profile proceeding.²³⁰ With respect to the substantive law, it may be easier to legitimize international prosecutions directed at the lowly torturer whose acts would undoubtedly justify criminal liability under any state's law than to bring charges of persecution against, for example, the infamous operators of Radio Mille Collines in Rwanda whose acts, though undoubtedly responsible for many deaths, might be dismissed as "hate speech."²³¹

Third, the pragmatic concerns of litigation may suggest the bringing of smaller cases, at least initially. Starting with cases like Tadić's permits prosecutors to build a pyramid of factual evidence that ultimately leads upward to higher-level officials.²³² In addition, the prosecution gains experience in developing the historical account needed to try small fry in the context of a smaller geographical region — for example, Prijedor in the case of Tadić — and these accounts can later be used and improved upon when the history of the entire region proves to be at issue, as it would be in the trial of Karadžić. From the perspective of civil dissensus, this can only improve the credibility of the later judgments issued, as well as the judges' historical accounts.

Finally, we need to consider the conviction of someone like Tadić from the perspective of the goal of deterrence. In cases like

229. See *id.* at 223. While working out particular problems can benefit either the defense or the prosecution, the removal of ambiguities with respect to procedures and evidentiary rules tends to be especially crucial to the defense over time.

230. See *supra* notes 125-28 and accompanying text (discussing controversy about anonymous witnesses).

231. See generally Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L. L. 1 (1996). For a survey of the problems involved in ascribing legal responsibility to those who plan or oversee mass atrocities but do not themselves directly participate in them, see generally NINO, *supra* note 36.

232. See SCHARF, *supra* note 3, at 223; Scharf & Epps, *supra* note 81, at 662-63. But see Akhavan, *supra* note 38 (manuscript at 60-62) (suggesting that it might be easier to bring cases against higher-level perpetrators in some instances).

Tadić's, prosecutors do not begin, before war crimes indictments are issued, with an entirely blank slate. Long before the Yugoslav tribunal was established, the media, individual governments, and the U.N. Commission of Inquiry had already identified numerous crimes and likely culprits.²³³ The question is not whether war crimes trials will bring to the attention of the public crimes they would otherwise never hear about; the question is whether punishing some crimes and some individuals that are known and that chance brings to the attention of the public may be important. If nothing is done about known or rumored crimes or culprits like Tadić when they are caught, does this not induce or encourage further violence among those who are not prosecuted as well as among those seeking vengeance? Whether or not war crimes trials can be said to deter, the punishment of the publicized crimes of those who are caught at least prevents their crimes from being cited as an example of what one can get away with, and, at least for the term of imprisonment, prevents those convicted from themselves committing more offenses. We need to ask whether, given what is already known about particular individuals and particular crimes, whether or not they are small fry, the *failure* to attempt to prosecute those whom we can reach encourages or induces violence.²³⁴

(2) *The civil dissensus model emphasizes deliberation, not a particular kind of forum, national or international.*

The international lawyers who successfully lobbied for the creation of these ad hoc tribunals and who are now devoting substantial energy to the establishment of a permanent international criminal court generally accept the proposition that such international fora are only one tool among many for dealing with such offenses, and that other possible methods include national criminal investigations and prosecutions and truth commissions.²³⁵ They accept the proposition that sanctions on perpetrators vary from imprisonment to fines and duties to compensate victims, from purges from government employment to other civil sanctions such as bans from political office or de facto travel restrictions such that those under

233. For a description of efforts to identify cronies and perpetrators prior to the establishment of the ICTY, see, e.g., M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L.F. 279 (1994); see also *Final Report of the U.N. Commission of Experts Established Pursuant to Security Council Resolution 780*, SI 1994/674 (1994) (also available at <<http://www.cij.org/cij/commission.html>>).

234. See generally SCHARF, *supra* note 3, at 207-28; Scharf & Epps, *supra* note 81, at 638-40.

235. See, e.g., BRINGING WAR CRIMINALS TO JUSTICE, *supra* note 39, at 28-33; RATNER & ABRAMS, *supra* note 3, at 139-287; Roht-Arriaza, *supra* note 219, at 281-304.

suspicion are not free to leave their home base. Further, they accept that remedies for victims vary as well, and include government reparations and commemorative measures. At the same time, international lawyers, especially those within human rights advocacy organizations, see their role as serving to nudge reluctant governments to accept their duty to prosecute.²³⁶

The many reasons advanced for establishing international, as opposed to national, fora to adjudicate crimes in Rwanda and the former Yugoslavia are consistent with the Nuremberg-inspired goals for these tribunals, as well as the premises of the model of closure. First and foremost, advocates of these international prosecutions argue that there is scarcely any real prospect that such crimes will be fairly, evenhandedly, or promptly prosecuted within national courts within the regions affected.²³⁷ Especially with respect to the Balkans, international lawyers have argued that the choice is simple: for the foreseeable future, it is either international trials under U.N. auspices or no trials at all.²³⁸ In addition, they have argued that even if national prosecutions emerge, international fora are preferable and require jurisdictional primacy because international tribunals are more legitimate — that is, less susceptible to accusations of bias or vengeance.²³⁹

Further, since most war crimes charges involve at least the indirect attribution of state responsibility, international fora are seen as more appropriate since they are better positioned to get around the

236. See, e.g., BRINGING WAR CRIMINALS TO JUSTICE, *supra* note 39, *passim*; RATNER & ABRAMS, *supra* note 3, at 134; Roht-Arriaza, *supra* note 13, at 5.

237. It is argued that ongoing ethnic or religious tensions continue to make the prospects of anything other than one-sided show trials untenable. In addition, courts outside these regions remain unlikely fora for criminal proceedings in the absence of a tangible national connection. See RATNER & ABRAMS, *supra* note 3, at 159-61, 176-77. With respect to Rwanda especially, there are also doubts about that nation's capacity to undertake evenhanded prosecutions that respect defendants' rights to speedy but full-fledged trials while relieving victims' fears that the evidence of crimes is rapidly vanishing. See, e.g., DESTEXHE, *supra* note 168, at 68-71; RATNER & ABRAMS, *supra* note 3 at 154-56; William A. Schabas, *Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 CRIM. L.F. 523 (1996).

238. Similar arguments have been used to justify the creation of a permanent international criminal court. See, e.g., Wexler, *supra* note 18, at 707-13.

239. See ICTR Statute, *supra* note 2, art. 8, § 2 (requiring primacy with respect to jurisdiction over national courts); ICTY Statute, *supra* note 2, art. 9, § 2 (same); see also DESTEXHE, *supra* note 168, at 69; BARBARA HARFF, GENOCIDE AND HUMAN RIGHTS: INTERNATIONAL LEGAL AND POLITICAL ISSUES (1984); Roht-Arriaza, *supra* note 13, at 5; Shraga & Zacklin, *supra* note 3, at 505 (outlining arguments that proved persuasive for the creation of the Rwanda tribunal). For views that appear to be representative of the human rights NGO community, see, for example, LESCURE & TRINTIGNAC, *supra* note 18, at 3-9. Indeed, according to some of the tribunals' advocates, these tribunals must be accorded primacy even if, for example, the present government in Rwanda were to ask that international prosecutions in Arusha be discontinued. See, e.g., Goldstone, *supra* note 21, at 497-98.

long-standing — if discredited — rule of international law that ostensibly prohibits one state from sitting in judgment of another.²⁴⁰ Moreover, international fora, when available, avoid the main argument against providing criminal accountability for war criminals, namely, that trials “may destabilize a still-fragile transitional government past the breaking point.”²⁴¹ If the international community is responsible for prosecutions, there is less danger that the authority of a new civilian government will be undermined by that government’s own attempt to subject former rulers to legal process.²⁴²

In addition, international trials more credibly advance the goal of denouncing these crimes as an affront to universal values or to preemptory norms of international law.²⁴³ International lawyers argue that it is only appropriate that these, the most grievous injuries done to individuals as human beings, should be both judged and condemned not by any national order or court system but by the international community on behalf of all humanity.²⁴⁴ For all of these reasons, the international lawyers involved in the establishment of the Yugoslav and Rwanda tribunals successfully argued that, whatever was the response by the relevant national authorities, the international criminal process, when triggered, should be accorded primacy.²⁴⁵

That many international lawyers should tend to prefer international processes should scarcely surprise. Solutions are often predetermined by one’s definition of the problem. If the problem is defined as the lack of closure, it is easier to arrive at the conclusion

240. See Simpson, *supra* note 23, at 15.

241. Roht-Arriaza, *supra* note 13, at 9; accord Reisman, *supra* note 3, at 185-86.

242. Cf. Roht-Arriaza, *supra* note 13, at 9 (discussing the destabilizing dangers presented when fragile, transitional governments attempt to prosecute former rulers and others complicit with the former regime).

243. See, e.g., *id.* at 5-6.

244. To the extent most of the ad hoc tribunals’ advocates accept the continued significance of war crimes prosecutions in national courts, they appear to do so out of deference to political realities — that is, because few alternatives to such courts appear to exist — and not because they articulate particular reasons in favor of such proceedings. See Meron, *supra* note 119, at 555. But see RATNER & ABRAMS, *supra* note 3, at 159 (acknowledging that while national war crimes trials lack the “aura” of international proceedings they are “likely to have a stronger psychological and deterrent effect on the population,” and also are likely to be less expensive and easier to institute).

245. Cf. ICTY Statute, *supra* note 2, art. 10(2) (setting forth standards for trying person in international court even after national court verdict); ICTR Statute, *supra* note 2, art. 9(2) (same). It is not entirely clear, however, how the ostensible international legal duty to prosecute at the national level ought to be reconciled with the duty, under both ad hoc tribunals, to accord jurisdictional primacy to these international bodies. Cf. Meron, *supra* note 119, at 576 & n.120.

that we need to give primacy to processes that invoke universal values and supply definitive results based on the invocation of such values by the international community. Civil dissensus, by contrast, because it defines the problem as the need for opportunities for reasoned discourse, does not insist that an international criminal forum be accorded primacy over other alternatives.²⁴⁶

On the contrary, the flaws of the Tadić judgment, and of ad hoc tribunals generally, from the perspective of the model of closure raise doubts about whether international fora for war crimes prosecutions should always be preferred, especially where alternative fora for criminal prosecutions exist.²⁴⁷ The arguments, canvassed above,²⁴⁸ for the primacy of international prosecutions over national fora, are quite tenuous. First, as the analysis of the Tadić judgment here suggests, international proceedings are not apolitical in terms of the discretion of whom to indict or to prosecute; judges' decisions as to how to render their verdicts — or even whether one unanimous judgment ought to be issued as opposed to individual judicial opinions — reflect political calculations. Although international judges and prosecutors may hold different political agendas than those involved in national proceedings, both sets of individuals have them. Nor, for the reasons noted, can international proceedings be regarded as denationalized.²⁴⁹ Second, the premise that international judges have a legal expertise or competence that national judges lack, dubious to begin with, fails to address concerns about international humanitarian law's imprecision (relative to domestic criminal law) and its origins. It fails to consider how the application of international criminal law imposes costs on the credibility and arguable fairness of international verdicts, for victims as well as defendants. Third, the contention that states can more credibly judge each other before international tribunals, while perhaps significant with respect to the interstate dimensions of the underlying conflicts in Rwanda and the Balkans, is less relevant when addressing their significant intrastate dimensions — as from the perspective of victims. Fourth, the assumption that greater internationalism readily translates into greater success in applying universal values presumes that international law has been demonstrably better at overcoming such problems as gender bias. As fem-

246. See generally OSIEL, *supra* note 6, at 8 n.22 (recognizing the possible role of other legal fora for civil dissensus).

247. As discussed, this is true at least in the case of Rwanda. See *supra* section III.E.

248. See *supra* notes 237-45 and accompanying text.

249. See *supra* section III.B.

inist critics have noted, it is not clear that international humanitarian law is better at protecting the rights of half of the world's population than at least some states' laws and some national fora.²⁵⁰ Finally, arguments premised on the Security Council's expansive precedents under chapter VII of the U.N. Charter fail to address skepticism about the representative nature of the Council or about its ability to create truly independent courts.²⁵¹

While the lack of realistic alternatives for criminal prosecutions in the Balkans and doubts about the viability or fairness of Rwanda's national proceedings suggest that the present international fora may be the best hope in those places for the encouragement of some forms of civil discourse, the existence of these ad hoc tribunals should not serve as a substitute for considering the virtues of complementary venues. Freed from Nuremberg as the single inescapable model, we are better able to put those World War II trials in context. We need not give international criminal prosecutions greater significance than they deserve.²⁵² Neither after World War II nor at any time before have nations relied exclusively, or even primarily, on international criminal trials to achieve the mythic but worthy goals that have been articulated for today's ad hoc international tribunals. Even since World War II, the number of such war crimes prosecutions has been dwarfed by myriad efforts, not involving the use of the criminal law, in pursuit of deterrence, punishment, national reconciliation, et al.²⁵³

If we see the accomplishments of the Rwanda and Yugoslav tribunals from the perspective of civil dissensus, it becomes easier to accept the possibility that other fora may encourage deliberation equally well, and that it may be unwise to rely on the international criminal process to achieve goals that would be more quickly or better fulfilled through other means. With respect to the Balkans, a number of legalistic deliberative processes exist, from the diplomatic level — as through the Dayton peace process and beyond — to the World Court — as in Bosnia's case against Serbia and Montenegro and the latter's counterclaim; from other international

250. See *supra* notes 148-62 and accompanying text.

251. See *supra* notes 182-85 and accompanying text. For related doubts about the need for international tribunal "primacy," see also Morris, *supra* note 170.

252. For an early plea urging that American lawyers not get "sucked into this infatuation with — or addiction to — criminal punishment," see Frank Newman, *Commentary*, 88 ASIL PROC. 253 (1994).

253. See, e.g., RATNER & ABRAMS, *supra* note 3, at 193-215; Terence S. Coonan, *Rescuing History: Legal and Theological Reflections on the Task of Making Former Torturers Accountable*, 20 FORDHAM INTL. L.J. 512 (1996); Roht-Arriaza, *supra* note 219, at 281-92.

organizations — including the Security Council, its sanctions committees, and numerous human rights bodies — to nongovernmental organizations — such as the Red Cross — and even to national courts — as with respect to suits seeking the release of documents or civil actions for damages. Seeing these existing fora, as well as potential new ones we could devise — such as a U.N. compensation commission along the lines of the entity now resolving claims against Iraq — as options along a spectrum of deliberative opportunities helps identify tensions among our sometimes conflicting goals and emphasizes the need to coordinate efforts across venues. It also helps us to match our goals with appropriate fora.

Some of these other approaches might achieve some of the goals we now seek to accomplish better than the international criminal process. The goal of expressing community outrage against the actions of states qua states, for example, might be better suited to ongoing proceedings before the International Court of Justice (ICJ) between Serbia and Bosnia or other possible proceedings before that court. Particularly since the Yugoslav tribunal can only hear cases directed against individuals and has no jurisdiction over the crime of aggression, the ICJ remains the only judicial forum for making the case that, for example, Serbia, as a government, engaged in a conspiracy to wage aggressive war.²⁵⁴ If, as many believe, it is important, for its symbolic value if nothing else, to establish that states as such can be criminally liable,²⁵⁵ the ICJ may be the proper forum in which at least to begin to make that case.²⁵⁶ In addition, to the extent that the international community has a legitimate interest in conflicts such as those within the Balkans and Rwanda because of the threats they pose to international peace,²⁵⁷ these issues might be more appropriately addressed in the ICJ, either through contentious cases between states or through requests for advisory opinions, as by the Security Council or the General

254. See generally FRANCIS A. BOYLE, *THE BOSNIAN PEOPLE CHARGE GENOCIDE* at xi-xxi (1996). But see Kenneth Anderson, *Illiberal Tolerance: An Essay on the Fall of Yugoslavia and the Rise of Multiculturalism in the United States*, 13 VA. J. INT'L L. 385, 394-95 (1993) (arguing that the ICJ is an inappropriate forum to conduct the necessary factual inquiry to make out the charge of intent to commit genocide).

255. See, e.g., Joseph H.H. Weiler, *On Prophets and Judges: Some Personal Reflections on State Responsibility and Crimes of State*, in INTERNATIONAL CRIMES OF STATE 319, 322-29 (Joseph H.H. Weiler et al. eds., 1989).

256. See generally Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1, 28-36 (1996) (describing the role of the ICJ in promoting the international community's expressive values).

257. See *ICTR Statute*, *supra* note 2, at 1 (stating that "the situation in Rwanda . . . constitute[s] a threat to international peace and security"); *ICTY Statute*, *supra* note 2, at 1 (labeling the situation in former Yugoslavia "a threat to international peace and security").

Assembly. Whatever one thinks of the Tadić chamber's determination of the nature of the conflict in the Balkans, rendered in the course of that tribunal's determination of whether Tadić can be convicted of grave breaches of the Geneva Convention,²⁵⁸ it seems odd to suggest that the best forum for judicial consideration of this vital legal issue should be a criminal suit against a low-level perpetrator before a body with a limited jurisdiction and mandate and not in the World Court.

The goal of establishing an accurate historical record of barbarism that is untainted by the needs of the criminal law to render a convincing perpetrator-driven account,²⁵⁹ or by the needs of the international community to undertake evenhanded prosecutions,²⁶⁰ may be better suited to truth commissions, to take another example. Despite the many variations among truth commissions established throughout the world, they are usually designed not to inflict legal punishment but as "a kind of non-adversarial process of re-establishing democratic justice by exposing the truth of what happened under the dictatorship."²⁶¹ As commentators have noted, such procedures are constructed precisely to provide an accounting of what has occurred, both because victims demand it and because recording what has occurred is one way to respond to perpetrators' assertions of anonymity and immunity.²⁶² Because the process is putatively nonadversarial, truth commissions can avoid at least some of the problems that undermine the accuracy of judicial histories. While it might be true that only the crucible of a trial renders a convincing verdict with respect to the guilt or innocence of an individual,²⁶³ such criminal proceedings may not, for reasons discussed, facilitate the rendering of an accurate account of the scope and nature of a massacre as a whole.²⁶⁴ There is certainly little basis for any assertion that a criminal trial will invariably draw more public attention, encourage greater public deliberations, or produce

258. See *supra* note 42.

259. See, e.g., Osiel, *supra* note 5, at 520-67.

260. See *supra* notes 87-89 and accompanying text.

261. SA'ADAH, *supra* note 105 (manuscript at 232).

262. See, e.g., RATNER & ABRAMS, *supra* note 3, at 193-204; Coonan, *supra* note 253, at 512-13.

263. See, e.g., Akhavan, *supra* note 38 (manuscript at 3, 95); Scharf & Epps, *supra* note 81, at 641.

264. See *supra* section III.A.

more significant political — or moral — consequences than truth commissions.²⁶⁵

Given doubts that the Rwanda and Yugoslav tribunals will provide victims much in the way of recompense — psychological or otherwise — certain goals relating to the vindication of victims might need to be pursued elsewhere — as through civil suits like the ones brought by a number of Balkan rape victims against Karadžić in federal district court in New York.²⁶⁶ Whatever else might be said of such lawsuits,²⁶⁷ the civil cases against Karadžić are, in some respects, more inviting vehicles for some of the victims of gender-specific violence in the Balkans. Certainly the plaintiffs' need to prove damages caused by Karadžić's alleged acts seems likely to permit a more thorough airing of victims' stories than was possible in the Tadić case, along with an expression of judicial solicitude.²⁶⁸ Such a proceeding — or comparable attempts to provide

265. See, e.g., Suzanne Daley, *Winnie Mandela is Defiant, Calling Accusations 'Lunacy'*, N.Y. TIMES, Dec. 5, 1997, at A1; Suzanne Daley, *Winnie Mandela Killed Youth, Apartheid Inquiry Is Told*, N.Y. TIMES, Nov. 26, 1997, at A3 (discussing the worldwide publicity generated by truth commission inquiries into alleged acts by Winnie Mandela). Even some of the principal defenders of the Yugoslav tribunal acknowledge that criminal proceedings can be expected neither to establish the "official" truth nor to "substitute for a commission of truth based on popular participation." Akhavan, *supra* note 38 (manuscript at 95).

266. See *Doe v. Karadžić*, 866 F. Supp. 734 (S.D.N.Y. 1994), *revd. sub. nom. Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995), *cert. denied* 518 U.S. 1005 (1996); see also *Mushikiwabo v. Barayagwiza*, No. 94 Civ. 3627 (JSM), 1996 WL 164496, at *1 (S.D.N.Y. Apr. 9, 1996) (default judgment for over \$105 million on behalf of five plaintiffs against Rwanda political leader who "played an instrumental role in the torture and massacre of thousands of Rwanda's Tutsi minority"). For a brief survey of the requisites of such suits within U.S. courts, see RATNER & ABRAMS, *supra* note 3, at 204-11. See also Ralph G. Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 YALE J. INTL. L. 65 (1995) (surveying some of the legal issues raised by these attempts to supply a civil component to Nuremberg).

267. See, e.g., William Aceves, *Affirming the Law of Nations in U.S. Courts: The Karadzic [sic] Litigation and the Yugoslav Conflict*, 14 BERKELEY J. INTL. L. 137 (1996); David S. Bloch, *Dangers of Righteousness: Unintended Consequences of Kadic v. Karadzic [sic]*, 4 TULSA J. COMP. & INTL. L. 35 (1996); Jordan J. Paust, *Suing Karadzic*, 10 LEIDEN J. INTL. L. 91 (1997); Peter Schuyler Black, *Recent Development, Kadic v. Karadzic [sic]: Misinterpreting the Alien Tort Claims Act*, 31 GA. L. REV. 281 (1996); Amy E. Eckert, *Recent Development, Kadic v. Karadzic [sic]: Whose International Law?*, 25 DENV. J. INTL. L. & POLY. 173 (1996).

Of course, other civil suits, such as suits for libel threatened by Winnie Mandela against her accusers before the South African Truth Commission, can also present opportunities for airing these issues and for public deliberation.

268. As suggested by commentative gestures offered by governments, such as Switzerland's decision to offer token payments to Holocaust survivors, such expressions of solicitude mean a great deal to victims. See, e.g., Michael Specter, *In Latvia, the First Token of Swiss Remorse: \$400*, N.Y. TIMES, Nov. 19, 1997, at A4 (reporting victims' reactions to Swiss payments); see also Coonan, *supra* note 253, at 545 (arguing for forms of government acknowledgment of atrocities and not for mere dissemination of information).

victims with compensation²⁶⁹ — are driven by a need at least to *pronounce* on the amount of compensation that in justice is owed to victims — as opposed to a proceeding seeking primarily to punish the culprit. Whether or not such civil judgments prove enforceable, civil suits are less susceptible to judicial timidity for fear of imposing *ex post facto* criminal liability. For that reason, such suits are more likely to address the many forms of gendered victimization imposed by ethnic cleansing.²⁷⁰

For these reasons, civil suits, controlled by plaintiff/victims and their chosen attorneys, and not prosecutors responsive to other agendas, may also be more effective in preserving a collective memory that is more sensitive to victims than some judicial accounts rendered in the course of criminal trials.²⁷¹ Indeed, if studies about litigants' relative satisfactions with adversarial versus inquisitorial methods of criminal procedure are an accurate guide,²⁷² it may be that having greater control of the process, including the selection of attorneys and the ability to discover and present one's own evidence and develop one's own strategy, is itself a value for victims, and one that is better met through civil suits such as those now occurring in United States courts.²⁷³

For similar reasons, victims, including those of gender-specific violence, may sometimes find truth commissions or similar processes more attractive than international criminal prosecutions. As with civil suits, truth commissions do not need to be as concerned about preexisting limits on definitions of international crimes, may be better able to expose gender-specific crimes to public scrutiny, and may provide victims with greater opportunities to

269. See, e.g., Roht-Arriaza, *supra* note 219, at 290-91 (discussing attempts at civil redress); Tétreault, *supra* note 9, at 204-06 (discussing U.N. Compensation Commission and its handling of claims by Kuwaiti rape victims).

270. Cf. *supra* notes 148-62 and accompanying text.

271. Although Karadžić's decision not to appear in the pending civil suit in New York has deprived the plaintiffs in that suit of the opportunity to confront him personally during trial, this need not be the outcome in all such suits. At least some civil suits may provide plaintiff/victims with the psychological and other relief that has been associated with such courtroom confrontations.

272. See, e.g., JOHN W. THIBAUT & LAURENS WALTER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 67-116 (1975).

273. Perhaps this factor should, in addition, lead creators of future international criminal courts to use less inquisitorial proceedings than the ones now in place for the *ad hoc* tribunals for Rwanda and Yugoslavia. Compare, e.g., GENEVA (SWITZ.) CRIM. PROC. CODE art. 7 (permitting civil action for damages caused by crime to be brought at the same time and before the same court as a criminal action) with *ICTY Rules*, *supra* note 33, rule 105 (leaving matters of restitution of property to the initiative of the prosecutor but according third parties the right to be "summoned" to "justify their claim to the property or its proceeds").

vindicate themselves and tell their stories.²⁷⁴ In addition, it is not clear that truth commissions have no deterrent effects. At least those truth commission reports that identify culprits by name mobilize shame against offenders and warn future perpetrators not to bank on anonymity.²⁷⁵

It may also be that an emphasis on the need to provide opportunities for civil deliberation can help us to modify our list of goals, or at least refine them to include, for example, the promotion of civil society. As is suggested by the progress of the *Nunca Más* movement throughout much of South America,²⁷⁶ such truth-telling endeavors, whatever their flaws, are often bottom-up grass-roots movements rather than top-down undertakings by either national governments or the U.N. Such instances of self-help from below may reawaken individuals' sense of rights and help the governed to demand the restoration of the authority of *their own* institutions, including their judiciary.²⁷⁷ It may be that certain deliberative processes are better at assisting the reconstruction of civil society because they empower those engaged in them and *do not* rely on international pressure.²⁷⁸

(3) *As is implied by (2) above, the model of civil dissensus helps refine what it is that we expect the international criminal process to accomplish.*

Once we see international criminal prosecutions as only a part, perhaps not even the most significant part, of the spectrum of activities that have always been pursued to achieve the many goals inspired by Nuremberg, it becomes easier to prioritize among the goals that we now insist must be achieved through proceedings before the Rwanda and Yugoslav tribunals. At the same time, the model of civil dissensus helps redirect attention to the potential virtues of international criminal prosecutions.

274. See Llewellyn & Howse, *supra* note 202, at 10-11, 39-40 (making these arguments in support of the South African Truth and Reconciliation Commission).

275. See generally Coonan, *supra* note 253; Margaret Popkin, *El Salvador: A Negotiated End to Impunity?*, in *IMPUNITY AND HUMAN RIGHTS*, *supra* note 3, at 198.

276. See generally Coonan, *supra* note 253.

277. Cf. Jamie Malamud-Goti, *Punishing Human Rights Abuses in Fledgling Democracies: The Case of Argentina*, in *IMPUNITY AND HUMAN RIGHTS*, *supra* note 3, at 160, 163 (arguing in favor of punishing human rights abuses on the basis that punishment "contribute[s] to establishing democracy by reasserting the authority of institutions").

278. For suggestions along these lines, see Colloquy, *supra* note 159, at 545, 610-11 (comments of Paul Hoffman); *id.* at 614 (comments of Neil Kritz); SA'ADAH, *supra* note 105, at 233-34. If there is, as some assert, an emerging international obligation to defend, protect, and promote democratic governance, see, e.g., Roht-Arriaza, *supra* note 219, at 299, international lawyers themselves should be the first to give priority to such grass-roots efforts.

World War II's tribunals cannot be credited with achieving all, or even a significant part of, the goals that were articulated on behalf of their creation;²⁷⁹ and this was not merely because those tribunals were flawed. Within nation-states, the judicial branch, traditionally the weakest, is not expected to carry the weight of governance; this is all the more true internationally.²⁸⁰ Attempts to make international criminal tribunals carry as much freight as some of their advocates recommend — whatever the cost — may endanger alternative processes and possibly undermine competing goals for the international community and the United Nations.

As is evident from the discussion above, many of the *Tadić* bench's problems with respect to collective history, politicization, and fairness to defendants and victims, originate in closure's contradictory demands. International judges might do better if they were expected to accomplish fewer things and if they were given clearer priorities among these.

Professor Osiel argues that judges would better accomplish the pedagogical purposes of war crimes trials, in terms of preserving collective memory, if they were urged to give this goal a higher priority over the more common purposes of the criminal law, such as deterrence and retribution. He argues that judges need to make their historical accounts, for the sake of collective memory, "resonate more with the public debate beyond the courthouse walls."²⁸¹ To this end, he recommends, for example, that judges do more to "contextualize" historical arguments by admitting more evidence than would be regarded as legally relevant and that they tell a more "circuitous" story less likely to portray defendants as "radical evil" incarnate."²⁸² He argues that the resulting historical accounts not only would be more accurate and nuanced, but also would prove less likely "to shut off the very dialogue that most needs to be initiated among fiercely hostile opposing camps of political partisans."²⁸³

While Professor Osiel insists that the traditional goals of the criminal law, including supplying a plausible verdict against the defendant, are reconcilable with his recommendations, this appears doubtful. In the *Tadić* case at least, where the prosecutors' historical evidence was not contested by the defense, producing a more

279. See *supra* note 3 and accompanying text.

280. See Forsythe, *supra* note 40, at 421.

281. OSIEL, *supra* note 6, at 296.

282. *Id.* at 296-97.

283. *Id.* at 297.

nuanced historical account would have required considerable judicial activism, including a demand to the parties that they produce additional historians or other policy witnesses. Quite apart from the potential impact on the length of Tadić's trial and its costs, such activism is likely to be particularly dangerous for judges with such tenuous legitimacy and is likely to be seen as embroiling the tribunal even more deeply in the politics of the region.²⁸⁴

We need to consider which tasks are better suited to the judicial role, given the context in which the Rwanda and Yugoslav tribunals are operating, and adjust our expectations of the goals of international criminal trials accordingly. At its best, a trial like Tadić's produces a plausible verdict as to the guilt or innocence of one particular individual. Contrary to Professor Osiel's recommendations, we may choose to place a higher value on achieving such a plausible verdict than on the production of a judicialized history that more closely approximates scholarly standards, particularly if trying to achieve the latter threatens the success of the former. But if so, we need to consider what alternative fora we will rely upon to preserve collective memory or whether we are content with flawed judicial histories such as that rendered in the Tadić case. *Pace* Osiel, we might opt for flawed historical accounts in the course of criminal judgments on the assumption that the process of civil dissensus will correct bad history but is incapable of truly rectifying a mistaken verdict against a defendant, at least from the perspective of an individual who unjustly serves prison time.²⁸⁵

This does not mean that war crimes trials have no role in the preservation of collective memory. As the preceding description of the beneficial effects of the Tadić judgment suggests, even the flawed historical account contained in that judgment is likely to contribute to collective memory in at least two respects. First, contrary to the assumptions of the model of closure, an authoritative account for purposes of collective memory, if it ever emerges, may take considerable time and will come about through a variety of actors and sources, including courtroom-generated accounts. Whether one agrees with such revisionist accounts of the Holocaust as Daniel Goldhagen's — whose recent portrayal of "Hitler's will-

284. See *supra* note 90 and accompanying text.

285. For a view that at least some historic judicial opinions have proven effective *because* they have not attempted consciously to educate — or accuse — see Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in *LAW'S STORIES*, *supra* note 84, at 187, 197-200 (discussing the absence of historical context in *Brown v. Board of Education*). See also Roht-Arriaza, *supra* note 3, at 21 (quoting Henry Rousso on victim's need for justice over the needs to teach history or raise consciousness).

ing executioners" is sharply different from the story conveyed by the Nuremberg trials²⁸⁶ — the fact remains that Goldhagen's and other revisionist accounts are as much a product of Nuremberg as they are responses to it. Today's collective memory of the Holocaust owes a great deal to the historical account provided at Nuremberg, though it is not limited to it. The same is likely to be true of the Tadić judgment's preliminary findings, a partial rendering of historic truth that, given its prominence and its source, will undoubtedly emerge as a point of reference for further histories of the Balkans and especially of the Prijedor region.

Second, trials such as Tadić's are one way in which accurate historical accounts by others are rendered more likely. While the proceedings at Nuremberg presented a one-dimensional and misleading picture of the Holocaust, they preserved documentary and other factual evidence, including eyewitness accounts, that could otherwise have been lost. It is equally clear that the effort to bring indictments in the former Yugoslavia and in Rwanda, and the Tadić proceeding itself, has led to the preservation of considerable evidence, especially oral testimony by survivors. The evidence produced at The Hague and in Arusha seems destined to be part of subsequent accounts of recent history in Rwanda and the Balkans.²⁸⁷

Freed from the need to attempt closure with respect to the full panoply of Nuremberg-inspired goals, we might articulate other achievable goals for international criminal processes. Along with the rendering of plausible verdicts, such trials, if competently done, might be expected to establish the truth of certain facts that are put directly at issue in the course of particular trials — such as the number of beatings, tortures, killings, or rapes committed in certain detention camps over a certain period — with greater certainty

286. See GOLDHAGEN, *supra* note 227.

287. The significance of preserving such evidence, particularly corroborated physical evidence of atrocities and sworn eyewitness accounts that have been subjected to cross-examination, can scarcely be exaggerated. From the Holocaust to the killing fields of Cambodia, the first defense of the guilty has been to deny what happened. See, e.g., Seth Mydans, *In an Interview, Pol Pot Declares His Conscience is Clear*, N.Y. TIMES, Oct. 23, 1997, at A12 (reporting Pol Pot's denial that "millions" died as victims of the Khmer Rouge). See generally Cohen, *supra* note 147, at 12-22 (discussing the "truth phase" of state crimes). Establishing reliable facts as to the number of victims, the types of crimes committed, and the motives of perpetrators — the kind of evidence presented in the Tadić case — helps to prevent plausible denials and seems even more vital where the prospects of renewed violence continue to exist. For example, despite the numerous reports of human rights organizations, U.N. bodies, and the media, there is today considerable debate about whether 20,000 to 50,000 Bosnian women were indeed raped since 1991 or a few thousand. See, e.g., Johnstone, *supra* note 207, at 18.

than is possible within truth commissions or within national courts that do not have the requisite resources. For families of victims, establishing, in the crucible of a criminal trial, the fate of a particular individual and the circumstances of his or her death has obvious significance. Most obviously, international criminal trials, like domestic ones, help to ensure that some perpetrators are made accountable to governmental authority, if not victims as such, and are punished. Further, once the international criminal process is seen as part of a spectrum of deliberative venues, it becomes easier to appreciate that investigations done in anticipation of indictments, as well as the indictments themselves, have consequences for other deliberative fora; that merely indicting someone like Karadžić, for example, because it serves to delegitimize him as a negotiator, may have an effect on the outcomes of diplomatic negotiations and may, therefore, itself be worth doing even without the certainty of an arrest or a conviction.

(4) *Civil dissensus demands an examination of a continuing series of exchanges across time. Success or failure is not determined by examination of one judgment at one moment in time.*

Unlike the model of closure, which focuses attention on the judgment,²⁸⁸ civil dissensus suggests that we evaluate the international criminal process—that is, that we view the Tadić proceedings as part of a continuing series of events that include, but are not limited to, the issuance of the judgment and reactions through 1997. As J.B. White has noted, the language of a judicial verdict is not self-validating, and its acceptance turns on its appeal to the values of the community from which it seeks acceptance. As he notes, such a legal text “does not conclude the difficulties of the real world, but begins a process, a process of its own interpretation.”²⁸⁹

The alternative to the model of closure discourages evaluative closure. It implies that we continually reevaluate the Yugoslav and Rwanda tribunals as trials progress and as conditions in the affected regions change. This suggests that evaluators need to remain modest and accept that at least some of our judgments regarding how well Tadić’s judges did their job remain historically contingent — and that even our perceptions of what the judges ought to be doing may change.²⁹⁰

288. See, e.g., Marlies Simons, *U.N. Panel Convicts Bosnian Serb of War Crimes*, N.Y. TIMES, May 8, 1997, at A1 (suggesting that the judgment and reactions to it would determine the future of the tribunal).

289. WHITE, *supra* note 202, at 185.

290. Thus, perceptions of the Balkan tribunal’s “anti-Serb” bias may yet change, as trials against non-Serbs progress. See, e.g., Mike Corder, *Stop-and-go trial adds to U.N. war crime*

At the same time,⁴ as Osiel implies, civil dissensus is not premised on moral relativism by either judges, participants, or observers. Civil dissensus assumes that judges will continue to attempt to articulate community values — but that others will respond and that these values will evolve as a result.

CONCLUSION

For the reasons suggested, the *Tadić* judgment is not likely to generate closure with respect to collective memory, the fairness or political neutrality of the existing rules of humanitarian law as applied to the recent Yugoslav conflict, or the fairness accorded either Tadić or his victims. For the foreseeable future, it seems likely that court observers will differ, perhaps vociferously, on such questions as the accuracy of the judges' version of history (either for Yugoslavia as a whole or the Opština Prijedor region in particular), on whether the law condemns all attempts to secure ethnically pure nations, on whether the judges were equally fair to prosecution and defense, or on whether victims, particularly women, were given short shrift during the trial. The prospects for closure with respect to broader issues raised in the course of Tadić's trial — such as the degree of "collective complicity" by others — seem even more remote. Upon reflection, it is not difficult to see why existing realities within Rwanda and the former Yugoslavia greatly diminish the prospects for closure on such issues. International processes that will probably convict only small numbers of low-level functionaries and leave many of their superiors untouched do not seem likely to absolve the collective. Further, as in the Tadić case, other Yugoslav and Rwanda prosecutions will continue to rely primarily on the testimony of live witnesses — persons who will replicate, inside the courtroom, the religious and ethnic divisions that characterize the underlying conflicts in these regions. Again and again, Serb will be pitted against non-Serb, Hutu against Tutsi. In both tribunals, convictions or acquittals will be based, at least in substantial part, on credibility findings rendered not by the peers of anyone who was involved in the underlying conflicts, but by panels of learned judges who do not include a Serb, a Muslim, or a Croat, a Hutu or a Tutsi. As suggested by reactions to the Tadić case, perceptions of the resulting international verdicts are likely to fall along predictable eth-

tribunal's woes, ASSOCIATED PRESS, June 10, 1997, available in 1997 WL 4870020 (discussing new trial against one Croat and three Muslims).

nic or religious lines. In relatively few instances are convictions or acquittals likely to generate unified societal consensus.

Nor are skeptics of these proceedings likely to be placated by these tribunals' procedures or the circumstances of their establishment. Both tribunals adhere to a novel, untested synthesis of procedural and evidentiary rules borrowed from both common law and civil law traditions. The interpretation of these rules divides the very judges charged with their application.²⁹¹ And the Security Council origins of these tribunals continue to prompt suspicions, and not merely among the local governments involved in mass atrocities, that the international criminal process remains the creature of, and subject to the political agendas of, the superpowers. There are doubts that these tribunals are enforcing universal values, evenhandedly applied. The view that both tribunals, created in the wake of preventable massacres in both regions, are intended merely to "salvage some scrap of dignity from what remains of Western prestige,"²⁹² stems from suspicion that these efforts are driven by, and are certainly not above, politics.²⁹³ Under these circumstances it would be surprising if resulting verdicts drew universal praise or inspired societal consensus, especially among those who perceive themselves as targets of these prosecutions, such as the Serbs or the Hutu.

Both proponents and critics of ad hoc international tribunals have it too easy. So far proponents have been content to enumerate objectives for these tribunals largely without acknowledging the tensions among their lofty goals. They have been content to stress the need for international criminal prosecutions only where most practical; that is, where both the U.N. seems inclined to act and alternatives to ad hoc international tribunals seem even more difficult. Proponents have generally assumed that when international tribunals become available, they need to take precedence over alternatives, including prosecutions in national courts. They have mistakenly relied on a model of closure that seeks to replicate the strengths of domestic criminal processes while correcting the flaws of Nuremberg, and have not tried to provide a coherent account of how international prosecutions are supposed to work in unison with

291. See, e.g., *supra* notes 125-28 and accompanying text.

292. Simpson, *supra* note 23, at 24.

293. See, e.g., Cotić, *supra* note 78; Forsythe, *supra* note 40; Hayden, *Reply*, *supra* note 40; Rubin, *supra* note 40. Even the effort to internationalize the Balkan tribunal's bench has drawn complaints about some of the nations involved in the judging. See, e.g., Chaney, *supra* note 22, at 82 (noting the irony of a Chinese judge rendering verdicts on human rights violations); *supra* note 131 (noting absence of Muslims on bench).

other fora, including simultaneous attempts at national prosecutions or truth commissions. In response, critics have needed only to point to how many of Nuremberg's flaws are shared by these tribunals and how little agreement truly exists concerning values that are solemnly touted, but routinely ignored, under international humanitarian law. In short, tribunal advocates have been permitted to postulate mythical criminal processes and opponents have needed only to recycle revisionist critiques of the Nuremberg and Tokyo trials.

It is time to get off the merry-go-round. Both the proponents and critics of international criminal prosecutions need to address seriously the possibility that from Nuremberg to The Hague and Arusha, war crimes prosecutions do not produce closure but, at least when effectively conducted, lead to civil dissensus. This implies that both proponents and opponents of international criminal prosecutions need to address difficult questions, including whether international judges should give priority to the goal of preserving collective memory or whether at least some of the goals we now seek to pursue through international ad hoc tribunals are better accomplished through, for example, national prosecutions, truth commissions, civil suits, or other processes. A frank appraisal of what we can realistically expect international criminal prosecutions to achieve also appears necessary to respond effectively to complaints about financial and other costs. Tadić's trial cost the international community some twenty million dollars.²⁹⁴ Without knowing whether we ought to be comparing this effort to the astronomical costs of a full-scale military occupation of Bosnia or to the relatively modest costs of organizing a truth commission, it is difficult to say whether such expenditures were worthwhile and ought to continue.

At this juncture, the definitive case for the Yugoslav and Rwanda tribunals — and for international trials elsewhere — remains to be made. It may be that, over time, neither tribunal will successfully promote civil dissensus; if, for example, judgments stifle rather than encourage reasoned debates or if future trials or indictments receive dwindling public notice.²⁹⁵ It may be that

294. See SCHARF, *supra* note 3, at 224.

295. It is not clear that extensive publicity will be accorded to other trials in the Rwanda or Yugoslav tribunals. While "[t]hroughout the summer of 1996 . . . live television coverage of the Tadić trial was carried throughout Bosnia," only a limited Serbian audience with access to private cable TV transmission had access to it. See *id.*, at 218. While initially the Tadić trial drew extensive worldwide media attention, such interest dwindled by its end. See *id.* at xii, 221; see also Akhavan, *supra* note 38 (manuscript at 67-73) (discussing the denial of

alternative approaches, including truth commissions or adjudications in national courts, might be better at promoting civil dissensus, at least with respect to some issues, especially if the internalization of norms is best pursued through forums with democratic participation and legitimacy and not through authoritarian norms imposed from without. Contrary to what is argued here, some might contend that civil dissensus reflects a misguided or naïve trust in the virtues of discourse and is an inappropriate construct except with respect to societies that are already committed to discursive democratic pluralism.²⁹⁶ Or perhaps we may ultimately decide that the models of closure and civil dissensus need not be seen as wholly incompatible and that aspects of both can be usefully adapted, depending on the circumstances in the societies most directly affected, to promote all or most of the goals we have in mind. It may be that aspects of both visions need to be pursued through a multi-pronged strategy, involving legal and nonlegal fora, that assigns particular goals to the most suitable entity or set of procedures.

The question of how we justify these or other ad hoc criminal tribunals is not purely of academic interest. We have, as yet, no consistent vision of when, if ever, it is appropriate to pursue international criminal trials as opposed to national prosecutions, truth commissions, general amnesties, pardons, or other measures.²⁹⁷ While some have suggested that international criminal trials *must* be pursued once offenses in a region cross a certain threshold of gravity,²⁹⁸ the argument seems to be premised, tenuously, on unex-

media access for Yugoslav tribunal trials and concluding that its trials are "primarily an elitist exercise").

296. Some have argued, for example, that a nation defined on ethnic, as opposed to liberal terms, does not "take part in intellectual debate" but "enters the political arena and advances the claim of one nation, its own, against others. It is interested in ethnological, historical or philological scholarship only to the extent to which these sciences can substantiate its ideological assertions and further its political aims." Jakob Rösel, *Nationalism and Ethnicity: Ethnic Nationalism and the Regulation of Ethnic Conflict, in WAR AND ETHNICITY*, *supra* note 205, at 145, 152. Others, such as Anne Sa'adah, have argued that even liberal states do not always encourage open discussions on all issues. On the contrary, she contends that reconciliation efforts in successful democratic transitions involve processes that permit a "negotiated memory," including efforts to "forgive and forget" that "often stand in tension with values central to the liberal project." SA'ADAH, *supra* note 105 (manuscript at 1) (drawing from the experiences of postwar Germany and post-Revolutionary War United States); see also Cohen, *supra* note 147, at 47 (arguing that social control can be achieved by eradicating memory).

297. See generally Morris, *supra* note 170; Sheila O'Shea, *Interaction Between International Criminal Tribunals and National Legal Systems*, 28 N.Y.U. J. INTL. L. & POL. 367 (1996) (noting variety of state statutes to implement anticipated tribunal orders).

298. See, e.g., Goldstone, *supra* note 21, at 492-501 (contrasting the South African truth commission with the Yugoslav and Rwanda tribunals).

amined assumptions about the superiority of international fora and does not contain reliable criteria for choosing among options. And even if we had such criteria, difficult issues of consistency arise given the distinct audiences to which we seek to appeal. From a victim's perspective, for example, it is not clear why a person who tortures civilian prisoners in the Balkans merits an international criminal trial while someone who does the same in South Africa does not.²⁹⁹

Proponents of international criminal prosecutions need a justificatory model other than closure. This is especially the case since, under the premises of closure, international criminal proceedings that fail to meet the preconditions for generating societal consensus do not just fail, they *undermine* the goals that have been used to justify the creation of international criminal tribunals. The apostle of closure argues that unless the present ad hoc tribunals are given the resources to accomplish closure on all fronts — with respect to the societies affected, the international community, possible defendants, and victims — they should be shut down, as they only undermine the rule of law, along with all the other goals, from deterrence to national reconciliation.³⁰⁰ There is, therefore, considerable risk that those who live by the model of closure may force ad hoc tribunals to perish by it.

299. Cf. *id.* (arguing that the “human rights abuses” in South Africa should be the subject of Nuremberg-style trials, while the serious crimes within the former Yugoslavia and Rwanda warrant criminal liability). As Tadić’s trial suggests, many of the trials at The Hague are likely to involve charges of violations of the laws and customs of war and not genocide; many are likely to involve offenses that are arguably no worse than many now being revealed to the South African Truth Commission.

300. These concerns appear repeatedly among advocacy pieces on behalf of the tribunals, both in academe and in the popular press, and are evident even among the tribunals’ judges and prosecutors. See Richard J. Goldstone, *No Justice in Bosnia*, N.Y. TIMES, Mar. 3, 1997, at A17; Meron, *Answering for War Crimes*, *supra* note 3, at 2-3. In the summer of 1997, Chief Judge Cassese suggested that the Balkan tribunal’s judges should resign en masse in protest unless there were attempts to bring Karadžić and Mladić to The Hague. See SCHARF, *supra* note 3, at 225.