Denver Journal of International Law & Policy

Volume 44
Number 2 *Winter*

Article 5

January 2016

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Keywords

Judgments, Criminal Law, Law and Society, International Criminal Law, International Law: History

RECONCILIATION THROUGH A JUDICIAL LENS: COMPETING LEGITIMATION FRAMEWORKS IN THE ICTY'S PLAVŠIĆ AND BABIĆ JUDGMENTS

KERSTIN BREE CARLSON*

> I came [before the ICTY] for two reasons: To confront these charges and to spare my people, for it was clear that they would pay the price of any refusal to come. . . . I have now come to the belief and accept the fact that many thousands of innocent people were the victims of an organized, systematic effort to remove Muslims and Croats from the territory claimed by Serbs.
>
> Biljana Plavšić addressing Tribunal at her Sentencing Hearing[1]

> I come before this Tribunal with a deep sense of shame and remorse. I have allowed myself to take part in the worst kind of persecution of people simply because they were Croats and not Serbs. Innocent people were persecuted; innocent people were evicted forcibly from their houses; and innocent people were killed. Even when I learned what had happened, I kept silent. Even worse, I continued in my office, and I became personally responsible for the inhumane treatment of innocent people.
>
> Milan Babić addressing Tribunal while entering his plea of guilty[2]

> With respect to [Plavšić's and Babić's] role, various degrees of responsibility, in paragraph 1 of the Plavšić judgment, the Court found that she embraced and supported the objective of ethnic cleansing. I guess Mr. Babić did, but not in exactly the same way and under the

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1. Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, Transcript of Sentencing Hearing 609 (Int'l Crim. Trib. For the Former Yugoslavia Dec. 17, 2002), http://www.icty.org/x/cases/plavsic/trans/en/021217IT.htm [hereinafter Plavšić Dec. 17 Sentencing Hearing Transcript].

2. Prosecutor v. Babić, Case No. IT-03-72, Transcript of Plea Hearing 57 (Int'l Crim. Trib. For the Former Yugoslavia Jan. 27, 2004), http://www.icty.org/x/cases/babic/trans/en/040127IA.htm [hereinafter Babić Jan. 27 Plea Hearing Transcript].

> same circumstances. And I don't know how to articulate that any better, but I think that the Tribunal ought to have a sense of that at this point.
>
> Counsel for Milan Babić addressing Tribunal in Sentencing Hearing[3]

I. INTRODUCTION

In 2002, Biljana Plavšić, former Bosnian Serb president, held her nose and pled guilty to the "persecutions" of tens of thousands of Bosnian Muslims before the UN ad hoc tribunal constructed to adjudicate crimes resulting from Yugoslavia's violent dissolution ("ICTY").[4] International luminaries including Madeleine Albright and Elie Weisel testified at her sentencing hearing on the importance of her gesture for "the victims" and "for humanity"[5] as well as its significance for reconciliation and peace.[6] The *Plavšić* indictment described more than a hundred criminal incidents, which claimed more than 50,000 lives and destroyed at least 830 villages;[7] Plavšić's address to the Tribunal, however, contained no specific acknowledgment of the scale of this suffering or her role in perpetrating it, and instead reiterated the nationalist arguments that underwrote the violence her plea acknowledged.[8] Regardless, the Tribunal noted the "courage" that Plavšić's acknowledgement of violence represented,[9] accepted her statement as "an expression of remorse"[10] with the possibility to "promote reconciliation in Bosnia and Herzegovina and the region as a whole"[11] and sentenced her to 11 years' imprisonment.[12]

One year later, Milan Babić, former president of the Serb "break-away" republic that controlled vast tracts of Croatian territory between 1991-1995, pled guilty to persecutions that claimed the lives of 230 people.[13] Although not under

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3. Prosecutor v. Babić, Case No. IT-03-72, Transcript of Sentencing Hearing 242 (Int'l Crim. Trib. For the Former Yugoslavia Apr. 2, 2004), http://www.icty.org/x/cases/babic/trans/en/040402SE.htm [hereinafter Babić Apr. 2 Sentencing Hearing Transcript].

4. Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, Amended Consolidated Indictment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 7, 2002), http://www.icty.org/x/cases/plavsic/ind/en/kra-cai020307e.pdf [hereinafter Plavšić Indictment]; *see also* Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, Sentencing Judgment ¶ 5 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003), http://www.icty.org/x/cases/plavsic/tjug/en/pla-tj030227e.pdf [hereinafter Plavšić Judgment].

5. Plavšić Dec. 17 Sentencing Hearing Transcript, *supra* note 1, at 497.

6. *See id.*

7. *See* Plavšić Indictment, *supra* note 4; *see also id.* at Schedule A-Schedule B.

8. Plavšić Dec. 17 Sentencing Hearing Transcript, *supra* note 1, at 609 l. 4, 612 l. 21. Notwithstanding its content, her intervention and plea of guilty was globally received as a sincere expression of remorse.

9. *See* Plavšić Judgment, *supra* note 4, ¶ 73.

10. *Id.* ¶ 77 (quoting the language of prosecution witness Mirsad Tokača.)

11. *Id.* ¶ 80.

12. This sentence is significantly lower than the fifteen to twenty-five years recommended by the Prosecutor's Office ("OTP"), especially when considered in light of how long she actually served (six years, because convicted defendants come up for early release after serving 2/3 of their sentences in European jails). *See* Plavšić Judgment, *supra* note 4, ¶ 128.

13. Prosecutor v. Babić, Case No. IT-03-72, Sentencing Judgment ¶¶ 14-19 (Int'l Crim. Trib. for

investigation by the ICTY, Babić surrendered himself to the Tribunal when he learned his name had been mentioned within the Milošević indictment.[14] Securing no immunity,[15] Babić cooperated "extensively" with the Prosecutor's Office ("OTP")[16] "at great danger to his family and his own personal safety;"[17] the material he provided would later form the basis of his own indictment and conviction. Yet the *Babić* Sentencing Chamber, unique among all plea bargain cases, issued a sentence *in excess* of that requested by the OTP (in Babić's case, thirteen years instead of the less than eleven recommended by the OTP); and in its judgment, the Tribunal chastised Babić for "[h]is lack of moral strength [which] prevented him from standing against injustice" and for insufficiently acknowledging "the full significance of the role he played in Croatia in that period."[18]

The issue presented is how to make sense of these two judgments. At one level, they are relatively congruent: two senior (although politically marginalized)[19] ethnic Serb leaders, both pleading guilty, both receiving similar sentences. The facts of the cases, the profiles of the two defendants, and the

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the Former Yugoslavia June 29, 2004), http://www.icty.org/x/cases/babic/tjug/en/bab-sj040629e.pdf [hereinafter Babić Sentencing Judgment];

Babić Jan. 27 Plea Hearing Transcript *supra* note 2, ¶ 54–55; Prosecutor v. Babić, Case No. IT-03-72, Joint Motion for Consideration of a Plea Agreement between Milan Babić and the Office of the Prosecutor ¶¶ 1-4 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 22, 2004).

14. Babić Sentencing Judgment, *supra* note 13, ¶ 2.

15. Other defendants have secured significant immunity at the Tribunal. For example, Miroslav Deronjić worked extensively with OTP in exchange for a limited indictment that only referenced his participation in the destruction of one village in eastern Bosnia, and omitted other instances of participation, including in the planning and perpetration of the massacre at Srebrenica. Judge Schomburg wrote a blistering dissent vigorously protested promises in this regard made by the Prosecutor. Prosecutor v. Deronjić, Case No. IT-02-61, Dissenting Opinion of Judge Wolfgang Schomburg ¶¶ 6–16 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 30, 2004), http://www.icty.org/x/cases/deronjic/tjug/en/sj-040330e.pdf.

16. Babić Sentencing Judgment, *supra* note 13, ¶ 74.

17. *Id.* (quoting the Prosecution Sentencing Brief ¶ 39).

18. *Id.* ¶ 98.

19. Although both Plavšić and Babić were public figures occupying leadership positions, both of them were largely figureheads. Plavšić endorsed and encouraged the brutal nationalist measures of her government, but the actual planners and architects of Bosnian violence were carried out by other leaders, centrally Plavšić's co-president Radovan Karadzić, implementing policies generated by a circle of leaders in Belgrade. *See* Marko Attila Hoare, *Vindication or travesty ? Operation Storm's Ante Gotovina and Mladen Markac acquitted*, THE GREATER SURBITION (November 19, 2012), https://greatersurbiton.wordpress.com/2012/11/19/vindication-or-travesty-operation-storms-ante-gotovina-and-mladen-markac-acquitted/ (arguing that there is a flawed construction of responsibility by ICTY prosecutions, which insufficiently addressed how Bosnian violence was a Serbian brainchild). Babić was *de jure* commander of Krajina's armed forces, but it is undisputed that actual control of armed forces (some of whom went on to commit serious crimes against civilian populations) remained throughout this time with Milan Martić and others. Martić was convicted of war crimes in connection with the shelling of Zagreb and events in Krajina and sentenced to thirty-five years in prison, which was upheld on appeal. Prosecutor v. Martić, Case No. IT-95-11 Appeals Chamber Judgment ¶ 322 (Int'l Crim. Trib. for the Former Yugoslavia October 8, 2008); Prosecutor v. Martić, Case No. IT-95-11, Judgment ¶ 519 (Int'l Crim. Trib. for the Former Yugoslavia, June 12, 2007).

Tribunal's construction of these profiles in juridical terms, however, reveal important inconsistencies between the two cases. Biljana Plavšić, an ardent and unrepentant nationalist, pled guilty to the destruction wrought by the politics she advocated while vigorously reasserting nationalist rationales for such policies. Unsurprisingly, she did not cooperate in any way with the OTP following her sentencing, and she eventually recanted her admissions.[20] Milan Babić, on the other hand, broke with Milošević early in the war *because of* the latter's use of violence and attempted, albeit unsuccessfully, to work towards a political solution for Krajina even as the war was waged. Following the war, he refused requests to speak about his experiences designed to contribute to nationalist discourse.[21] In public testimony and unreservedly before the ICTY Prosecutor, Babić repented his support for the politics of nationalism which had so disastrously impacted his country. He cooperated extensively in five other cases before the ICTY before committing suicide in his cell in 2005[22], the image of a man consumed.

These individual distinctions might be little more than colorful personal histories but for the Tribunal's divergent treatment of the cases *precisely as regards their potential as reconciliatory instruments*. In the Tribunal's treatment, Plavšić's case epitomizes, "the most important sentencing hearing that is likely to be conducted or has ever been conducted"[23] because of the significance of her admission in terms of "peace" and "reconciliation" in the former Yugoslavia.[24] For the *Plavšić* Chamber, no recitation of fact proved capable of refuting the narrative of Plavšić as an exemplary convert to liberalism, and the ICTY continued to treat Plavšić as if she were performing this role even after she very publicly stopped.[25] Babić's actual transformation from nationalist to committed liberal,

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20. Margaretha Nordgren, *Mötet Med Bijana Plavsic* [*Meeting with Biljana Plavsic*], 2009 VI (Swed.) http://vitidningen.episerverhotell.net/templates/PrintPage.aspx?id=10784 (accessed Sept. 1, 2015) ("Jag offrade mig själv. Jag har inte gjort något fel, men min advokat rådde mig att erkänna punkten brott mot mänskligheten för att kunna kohandla om de andra åtalspunkterna. Annars hade rättegången pågått i tre, tre och ett halvt år. Det var för lång tid med tanke på hur gammal jag är!" ["I sacrificed myself. I did nothing wrong, but my attorney advised me to recognize a crime against manity to avoid the other charges. Otherwise the trial might have taken three, three and a half years. That was too long given how old I am." (translation by author)].

21. Babić Apr. 2 Sentencing Hearing Transcript, *supra* note 3, at 188 (answering Judge Orie's question regarding why he waited until 2001 to come forward, and not directly following the war. Babić explained that he had been in too tenuous a situation as a refugee in Serbia to make public statements, cited an example of declining to speak publicly in favor of a Serbian nationalist cause.).

22. Prosecutor v. Babić, Case No. IT-03-72, Report to the President Death of Milan Babić, (Int'l Crim. Trib. for the Form Yugoslavia June 8, 2006), http://www.icty.org/x/cases/babic/custom2/en/p1087-babicreport.pdf.

23. Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, Transcript of Sentencing Hearing 639 ll. 23-34 (Int'l Crim. Trib. For the Former Yugoslavia Dec. 18, 2002), http://www.icty.org/x/cases/plavsic/trans/en/021218IT.htm [hereinafter Plavšić Dec. 18 Sentencing Hearing Transcript] (quoting Mr. Pavich, counsel for the defense).

24. *Id.* at 369–78 (quoting Mrs. Del Ponte, Office of the Prosecutor).

25. Prosecutor v. Plavšić, Case No. IT-OO-39 & 40/1-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs. Biljana Plavšić, (Sept. 14, 2009), http://www.icty.org/x/cases/plavsic/presdec/en/090914.pdf [hereinafter Plavšić Early Release Decision] (describing Plavšić's rehabilitation).

meanwhile, is discounted by a Chamber focused on his personal flaws (specifically, the "ethno-egoism" and "vanity" which Babić explained kept him in office even after he realized that the politics of nationalism would harm civilians).[26] For the *Babić* Chamber, no contextual explanation or action taken on Babić's part could inhibit the Tribunal from punishing him. In other words, Plavšić's case is construed as *political* by the Tribunal, whereas Babić's case remains *personal*. Yet the content of Plavšić and Babić's two statements, as well as their interactions with the Tribunal, suggest precisely the opposite: Plavšić's remorse is always personally motivated, whereas Babić actively seeks a larger, politically meaningful role for his interventions.

This article argues that the distinctions between the argument and outcomes in the *Plavšić* and *Babić* judgments illustrate an unresolved theoretical problem regarding the foundational legitimacy of trying individuals for collective crimes, which is the enterprise of the expanding field of international criminal law ("ICL"). The article compares the *Plavšić* and *Babić* cases to illustrate that ICL has not yet balanced its roots in international humanitarian law (where law is non-derrogable, and legitimacy is based in natural law)[27] with its rationale borrowed from domestic criminal law[28] (where law is social control, and legitimacy derives from its service to a sovereign).[29] This imbalance, which can be demonstrated by contrasting the diverging rationales expressed in the *Plavšić* and *Babić* judgments, forms the basis for the current crisis in ICL, which may have ramifications for the recognition and protection of human rights more globally.

The article proceeds in four parts. Following the Introduction, Part II offers a brief overview of the growth of ICL and contrasting arguments for its legitimacy. Part III discusses the *Plavšić* and *Babić* cases in greater detail, particularly with regard to the practice of plea bargaining before the ICTY and the reception their guilty pleas enjoyed before the two ICTY Sentencing Chambers. Part IV analyses the incongruities in the *Plavšić* and *Babić* processes, tying the analytical diverges

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26. Babić Sentencing Judgment, *supra* note 13, ¶ 61.

27. *See generally*, JUDITH SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 64–88 (1964); *see* Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L. J. 423, 423–57 (1996). *See also* Günther Teubner, *Exogenous self-binding: How national and international courts contribute to transnational constitutionalization*, *in* TRANSCONSTITUTIONALISM 1, 1–20 (Giancarlo Corsi, Elena Esposito and Alberto Febbrajo eds., forthcoming 2015); discussion in following sections.

28. *See* DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 4 (1990); *see also* Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2, 2 (1998) [hereinafter Cassese 1998] (arguing that international criminal law represents domestic criminal expectations on an international level); discussion in following sections.

29. *See, e.g.*, Paul Rock, *Sociological Theories of Crime*, *in* THE OXFORD HANDBOOK OF CRIMINOLOGY 51–77 (Mike Maguire, et al. eds., 2012) (discussing historical and contemporary theories of crime and punishment); *see also* NIGEL WALKER, WHY PUNISH 7 (1991) (linking moral philosophers' ideas regarding punishment to modern practices); GARLAND, *supra* note 28; DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001) (discussing theories and assumptions that structured criminal justice systems in U.S. and UK, and contrasting with contemporary reality); discussion in following sections.

and incongruities in the *Plavšić* and *Babić* cases to two competing rationales for ICL legitimacy: Judith Sklar's narrative argument regarding the value of political trials and its bases in natural law theory, and social control (namely deterrence/ retribution) rationales culled from criminal law theory. .

II. CONSTRUCTING INTERNATIONAL CRIMINAL LAW

International criminal law ("ICL") is a product of World War II, where the Allied powers began discussing what to do with their vanquished foes well before the war's end. As early as 1942, the Soviets had raised the need to try "the Hitlerite invaders and their accomplices for the crimes committed by them in the occupied countries of Europe."[30] The possibility of trying Nazi leaders as war criminals enjoyed a sort of precedent: the Treaty of Versailles that concluded World War I had condemned Germany for waging aggressive war and made provisions for Allied war crimes trials.[31] The alternative, of course, was execution; Stalin reputedly estimated that executions of between 10-50,000 Germans would be necessary.[32] Though Churchill was said to be horrified by the scale of Stalin's suggestion, the British also favored executing Nazi leaders, whose guilt was seen as "simply too obvious" for a trial.[33] Of course, execution did not rule out a trial apparatus. When the Russians, Americans, and British met at Yalta in 1944 to discuss the coming peace, Stalin reputedly told Churchill, "In the Soviet Union, we never execute anyone without a trial" to which Churchill replied, "Of course, of course. We should give them a trial first."[34] Even after agreeing to the trials suggested by the U.S., the Russians wished for such trials to exist as an exceptional law against the defeated. It was the U.S. that championed, "an episode that would leave an enduring judicial monument, to mark a giant step in the growth of international law."[35] Thus from its earliest formulations, the International Military Tribunal at Nuremberg ("IMT") and the legal field it birthed were designed to promote a political and ideological position, and situate the Allied powers as progenitors and practitioners of this set of beliefs.

During the summer of 1945, a team of Allied jurists, led by U.S. Supreme Court Justice Jackson, (who would go on to head up the Allied Prosecution) drafted the Charter for the IMT, defining charges and proscribing defenses.[36] In response to concerns that retroactive application of newly minted laws contravened rule-of-law maxims, Jackson assured U.S. President Truman that the tribunal

30. GEOFFREY ROBERTS, STALIN'S WARS: FROM WORLD WAR TO COLD WAR, 1939-1953 at 141 (2006).

31. GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE 104 (2000).

32. PRIT BUTTAR, BATTLEGROUND PRUSSIA: THE ASSAULT ON GERMANY'S EASTERN FRONT 1944-45 at 240 (2012).

33. DONALD BLOXHAM, GENOCIDE ON TRIAL 9 (2001).

34. *See* Doug Linder, *The Nuremberg Trials* (2000) http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/nurembergaccount.html.

35. TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 80 (1970).

36. Robert H. Jackson, *The Avalon Project: Justice Jackson's Report to the President on Atrocities and War Crimes, June 7, 1945*, YALE LAW SCHOOL LAW LIBRARY, http://avalon.law.yale.edu/imt/imt_jack01.asp (last visited Aug. 28, 2015).

would "punish acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code."[37] Under established principles of international law, which had placed state sovereignty at its center, states' treatment of their own citizens was not a topic for international law to address. The central revolution of the IMT was challenging this formulation and making individuals criminally liable for acts performed in service to their state.

The IMT defined four charges: 1) waging an aggressive war; 2) crimes against humanity; 3) war crimes; and 4) conspiracy to commit the preceding three crimes.[38] Of these, however, only "war crimes" existed in any defined manner prior to the Nuremberg trials; the other three were all without precedent in international law.[39] The Charter also addressed the question of possible defenses. Defendants were not permitted to challenge "the Tribunal, its members [. . .] or their alternates;"[40] defendants did not enjoy immunity based on their official position;[41] and following orders was not a complete defense (though it might be considered in mitigation of punishment).[42] In its judgment, the Tribunal also rejected attempts at using obedience to national law and *tu quoque* ("you too," which uses the examples of similar crimes committed by the other side to defend the legitimacy of defendant's actions) by defendants.[43]

As an *ad hoc* tribunal, limited in time and scope, the IMT was distinguishable from domestic criminal institutions in a number of ways, from its novel procedure to its international staff. Most significantly, the IMT was not charged with punishing *all crime* or *all crime of a particular character* within a geographic or temporal period, but rather with locating some – sometimes the worst, sometimes not – perpetrators and establishing their guilt. At the IMT, the question of whom would be indicted – whether (and which) politicians, military leaders, prominent business people, cultural figures, and from which countries such defendants should be drawn, was debated for months.[44] The final list of entirely German indictees represented a series of political compromises between the British, American, French and Soviet powers behind the trials and was devised as representative of German aggression and the evils of the Nazi regime, with a nod to political practicality, namely who the Allied powers had in prison.[45] In addition to the

37. *Id.*

38. U.N. Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, Aug. 8, 1945, 82 U.N.T.S. 280 *reprinted in The Avalon Project: Charter of the International Military Tribunal,* YALE LAW SCHOOL LAW LIBRARY, http://avalon.law.yale.edu/imt/imtconst.asp [hereinafter IMT Charter].

39. LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT:MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 14–16 (2001).

40. IMT Charter, *supra* note 38, at art. 3.

41. *Id.* at art. 7.

42. *Id.* at art. 8.

43. *See* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945-1 OCTOBER 1946, 171–341 (Int'l Military Tribunal 1947) [hereinafter TRIAL OF THE MAJOR WAR CRIMINALS].

44. DOUGLAS, *supra* note 39, at 11–2.

45. For example, Admiral Erich Rader (sentenced to life in prison by the IMT, released after nine

twenty-four individuals indicted by the IMT, six Nazi *organizations* were arraigned as well.[46] This action, novel in the extreme, opened the possibility for finding participants guilty by association and was developed in order to facilitate later prosecutions, but was ultimately rejected in the Tribunal judgment.[47]

The Cold War interrupted the ICL project, and western triumph at the Cold War's end re-energized the institutionalization of ICL.[48] Violence in the former Yugoslavia and Rwanda was answered by *ad hoc* tribunals constituted by the United Nations in 1993 and 1994.[49] The two decades that followed saw the construction of several other *ad hoc* or hybrid tribunals.[50] The Rome Statute, a treaty defining a permanent international criminal court ("the ICC"), was concluded in 1998[51] and the quorum necessary to institute the Court was speedily achieved in only four years, astounding most observers.[52] With the ICC's founding in 2002, and its first verdict in 2012,[53] ICL cannot be presented as an *ad hoc* fad. Regardless of whether history judges it a success, the concept of individual liability for breaches of ICL is an idea persisting throughout the 20th century and positioned to try to define the 21st century.

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years) and one of Goebbels's propaganda officials, Hans Fritsche (acquitted by the IMT), were included in the indictment because they were in Soviet custody.

46. Die Reichsregierung (Reich Cabinet); Das Korps der Politischen Leiter der Nationalsozialistischen Deutschen Arbeiterpartei (Leadership Corps of the Nazi Party); Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (commonly known as the "SS") and including Der Sicherheitsdienst (commonly known as the "SD"); Die Geheime Staatspolizei (Secret State Police, commonly known as the "Gestapo"); Die Sturmabteilungen der NSDAP (commonly known as the "SA"); and the General Staff and High Command of the German Armed Forces; *see The Avalon Project: Charter of the International Military Tribunal,* Minutes of the Opening Session of the Tribunal, at Berlin, 18 October 1945, YALE LAW SCHOOL LAW LIBRARY, http://avalon.law.yale.edu/imt/imtconst.asp (last visited Nov. 1, 2012) (The question as regards to these organizations was whether they were criminal or not).

47. TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 43, at 365–66 (describing the sentences of the trial: twelve defendants, death; seven defendants, prison terms; three defendants, acquitted).

48. *See* Mark Goodale, *Locating Rights, Envisioning Law Between the Global and the Local, in* THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL 22 (Mark Goodale & Sally Engle Merry, eds., 2007) (arguing that human rights emerged as a dominant ideology in this interstitial period). *See also* KATHRYN SIKKINK, JUSTICE CASCADE (2011); SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA IN AN AGE OF GENOCIDE (2002).

49. S.C. Res. 955 (Nov. 8, 1994) (establishing ICTR); S.C. Res. 827 (May 25, 1993) (establishing ICTY).

50. Padraig McAuliffe, *Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child Became an Orphan*, 7 J. INT'L L. & INT'L RELATIONS 1, 7 (2001) (explaining the establishment of The Ad Hoc Tribunal for East Timor, Indonesia (2001), The Special Court for Sierra Leone (2002), The Extraordinary Cambers in the Courts of Cambodia (2003), the Special Tribunal for Lebanon (2007) and several international/local hybrids in Bosnia, Serbia, and Senegal).

51. *See* U.N. General Assembly, Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9, 37 I.L.M. 1002, 2187 U.N.T.S 90 [hereinafter Rome Statute].

52. WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, ix (2003).

53. *See* Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, ¶ 1358 (Mar. 14, 2012).

A. What Function Does, or Should, ICL Serve?

The IMT at Nuremberg heralded a resurgence in natural (non-positive) law[54] as a means to ensure against the totalitarian excesses that led to the war.[55] This emerged from a two-tiered challenge faced by the Allied powers seeking to use law at the close of war to define the coming peace. First, as discussed, the crimes articulated by the IMT were largely novel, and thus faced a deep intellectual challenge in the opprobrium *nullem crimen sine lege*.[56] Second, the crimes committed by Nazi actors which the Allies sought to prosecute emerged not from brute law*less*ness but rather from a strict and terrible law*ful*ness: the positive law, i.e. written, textual law of the Nazi regime had made many of the atrocities perpetrated before and during the war "legal" in Germany.[57]

To circumvent these challenges, the IMT drew on natural law arguments regarding a universally recognizable "human good"[58] to legitimize its practice.[59] In its Judgment, the IMT argued that in "circumstances [where the defendant] must know that he is doing wrong, [. . .] so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished."[60] In this way, the IMT, facing a significant positive law challenge, positioned itself not only within the law, but as the definer of what is and is not within the law.

With this law-defining function, the IMT at Nuremberg established the principle that trials can perform a didactic function by modeling, and thereby instilling, liberal values for a targeted audience. *Ad hoc* tribunals are neither able nor interested in bringing the same *kind* of justice as a national court system, the justice that comes from objectively applying the laws of a given province equally across every situation. *Ad hoc* courts are rather 'message' courts, or 'teaching courts', designed to show by example that (some) crimes will not be met with impunity (statistically speaking, *most* crimes arising from a situation an *ad hoc* court is addressing are in fact met by impunity.) Judith Shklar's *Legalism* (1964) argued that regardless of the substantive and procedural challenges levied against the IMTs at Nuremberg and Tokyo, these trials, as well as other "political trials," provide value by instilling the "right kind" of ideals and political goals for the targeted nations.[61] Others have similarly argued that the type of lesson being taught (i.e. political liberalism) can justify the methods used to impart the lesson,

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54. SHKLAR, *supra* note 27, at 67.

55. PRIMUS, *supra* note 27, at 430.

56. Lawrence Douglas, *From IMT to NMT: The Emergence of a Jurisprudence of Atrocity*, *in* REASSESSING THE NUREMBERG MILITARY TRIBUNALS: TRANSITIONAL JUSTICE, TRIAL 277–92 (2012).

57. Lon L. Fuller, *Positivism and Fidelity to the Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 641 (1958).

58. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 2 (1980); RAYMOND WACKS, PHILOSOPHY OF LAW: A VERY SHORT INTRODUCTION 1–3 (2006).

59. Rodger Citron, *The Nuremberg Trials and American Jurisprudence: The Decline of Legal Realism and the Revival of Natural Law*, *in* THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945 (Herbert Reginbogin & Christoph Safferling, eds., 2006).

60. TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 43, at 219.

61. SHKLAR *supra* note 27, at 143–90.

even if those methods do not meet the neutral or impartial standards typically assigned to courts.[62]

As western liberalism emerged triumphant from the Cold War, many theorists, legal scholar-practitioners, and policy makers highlighted the central role that courts and rule of law processes might play in imparting and strengthening liberal values in emerging democracies.[63] Transitional justice, a normative and theoretical discourse rooted in law and political science[64] emerged from constructivist theories regarding state building, and the particularized experiments in social and political rebuilding in South America following decades of repressive dictatorships.[65] Transitional justice theorizes that failure to address past violence threatens future peace.[66]

Although transitional justice was operationalized through both judicial (ad hoc tribunals) and administrative (truth commissions, political lustration) mechanisms, judicial mechanisms came to be preferred for their simultaneous capacity to produce truth and impart justice.[67] Antonio Cassese, a central figure in the development of international criminal law, represents the arguments in favor of trials (over truth commissions) as transitional justice mechanisms thus:

> [T]rials establish individual responsibility over collective assignation of guilt, i.e., they establish that not all Germans were responsible for the Holocaust, nor all Turks for the Armenian genocide, nor all Serbs, Muslims, Croats or Hutus, but individual perpetrators – although, of course, there may be a great number of perpetrators; justice dissipates the call for revenge, because when the Court metes out to the perpetrator his just desserts, then the victims' calls for retribution are met; by dint of dispensation of justice, victims are prepared to be reconciled with their erstwhile tormentors, because they know that the latter have now paid for their crimes; a fully reliable record is established of atrocities so that future generations can remember and be made fully cognizant of what happened.[68]

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62. MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW (1997); *see* BASS, *supra* note 31.

63. NEIL KRITZ ED., TRANSITIONAL JUSTICE (1995); RUTI TEITEL, TRANSITIONAL JUSTICE 12 (2000).

64. Liora Israël and Guillaume Mouralis, *General Introduction*, *in* DEALING WITH WARS AND DICTATORSHIPS 1–20 (Liora Israël & Guillaume Mouralis, eds., 2014).

65. Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L. J. 2619 (1991); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537 (1991); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. R. 449 (1990); Ruti G. Teitel, TRANSITIONAL JUSTICE (2000); Jose Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L. J. 1425 (1991)

66. *See generally*, BRONWYN LEEBAW, JUDGING STATE-SPONSORED VIOLENCE (2011).

67. *Id.* at 178.

68. ERIC STOVER, THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE

Cassese argued that a truth commission would be a less ideal mechanism for transitional justice in the former Yugoslavia because: "(a) they have been the scene of appalling atrocities which are beyond amnesty, (b) they are still riven by the violent nationalisms or ethnic hatred over which the wars were fought, and (c) they are not yet willing to be reconciled."[69] International criminal tribunals are designed to make the "clean break" necessary in a post conflict situation.[70] Following the transitional justice rationale, prosecuting crimes "clearly separates a newly democratic government from the abuses of its predecessor".[71]

Finally, ICL seeks to "criminalize" violations of international human rights law. Lacking its own penology, ICL builds instead on the rationales used for applying criminal sanctions at the domestic level.[72] ICL thus borrows the retribution, deterrence, and to some degree rehabilitation rubrics which underwrite criminal law in domestic jurisdictions.[73]

The ICTY draws on all these ideas as legitimizing mandates. Constructed in 1993 under the U.N.'s "peace and security" mandate, the ICTY is charged with promoting peace in the Balkans and thereby further security.[74] These ideas borrow from the IMT at Nuremberg's received role as a didactic actor for post-war Germany, where the ICTY "sends a message that the cost of ethnic hatred and violence as an instrument of power [increasingly] outweighs its benefits."[75] In its judgments, ICTY judges have opined that the purpose of the Tribunal is to "make plain . . . that the international community [is] not ready to tolerate serious violations of international humanitarian law and human rights"[76] or to express the outrage by the international community.[77] In this regard, the ICTY articulates its mandate and contribution thus:

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11 (2005).

69. Antonio Cassese, *Reflections on International Criminal Justice*, 61 MODERN L. REV. 1, 5 (1998).

70. Teitel, *supra* note 63, at 56.

71. Carla Hesse & Robert Post, *Introduction*, *in* HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 15 (Carla Hesse & Robert Post, eds., 1999).

72. M. Cherif Bassiouni, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 588 (2003); Cassese, *supra* note 69; Mark Drumbl, *A Hard Look at the Soft Theory of International Criminal Law*, *in* THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW: ESSAYS IN HONOR OF M CHERIF BASSOUNI (Leila Nadya Sadat and Michael P. Scharf eds. 2008).

73. Rock, *supra* note 29, at 28.

74. S.C. Res. 808, ¶ 9 (Feb. 22, 1993).

75. Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities*?, 95 AM. J. INT'L L. 7, 8 (2001).

76. Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Chamber Judgment, ¶ 185 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000) http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf.

77. Prosecutor v. Simić, Tadić and Zarić, Case No. IT-95-9-T, Trial Chamber Judgment, ¶ 1059 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 2003) http://www.icty.org/x/cases/simic/tjug/en/sim-tj031017e.pdf.

> The Tribunal has laid the foundations for what is now the accepted norm for conflict resolution and post-conflict development across the globe, specifically that leaders suspected of mass crimes will face justice. The Tribunal has proved that efficient and transparent international justice is possible. The Tribunal has contributed to an indisputable historical record, combating denial and helping communities come to terms with their recent history. Crimes across the region can no longer be denied. For example, it has been proven beyond reasonable doubt that the mass murder at Srebrenica was genocide.[78]

This description aptly comports with the value that Shklar finds for political trials.[79]

At the same time, ICTY judgments have uniformly invoked deterrence and retribution rationales borrowed from domestic criminal law.[80] Deterrence is usually characterized as general, not specific, since the Tribunal has recognized "the likelihood of persons convicted here ever again being faced with an opportunity to commit war crimes, crimes against humanity, genocide or grave breaches is so remote as to render its consideration in this way unreasonable and unfair."[81]

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78. ABOUT THE ICTY, http://www.icty.org/en/about (last visited Nov. 11, 2015).

79. SHKLAR, *supra* note 27, at 145–46.

80. *See, e.g.*, ICTY Prosecutorial statements:

> The publication of the evidence before the Tribunal and the issue of the international warrant of arrest have important deterrent effects. I dare say that no sane or rational person would wish to render himself or herself subject to such proceedings. In the future, would-be violators of international humanitarian law will know that such a fate may be in store for him or her and that knowledge may well stop or at least curb [such criminal] conduct.

Prosecutor v. Nikolić, Case No. IT-94-2-R61, Trial Transcript 58 ll. 21-25, 59 ll. 1-4 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 9, 1995) (Goldstone Opening Statement). *See also* ICTY judgments: "The jurisprudence of the Tribunal emphasises deterrence and retribution as the main general sentencing factors." Simić, *supra* note 77, ¶ 1059. "It is universally accepted and reflected in judgments of [ICTY & ICTR] . . . that deterrence and retribution are general factors to be taken into account when imposing sentence." Prosecutor v. Stakić, Case No. IT-97-24-T, Trial Chamber, ¶ 900 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 31, 2003). *See also* Prosecutor v. Nikolić, Case No. IT-94-2-S, Sentencing Judgment, ¶¶ 59, 85, 93 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 18, 2003) [hereafter "Nikolić Sentencing Judgment"] (identifying retribution as a "primary objective," with deterrence a "further hope," and stating rehabilitation as a guiding principle, particularly as regards plea bargains); Prosecutor v. Simic, *supra* note 77, ¶ 1059 ("The jurisprudence of the Tribunal emphasizes deterrence and retribution as the main general sentencing factors."); Prosecutor v. Kunarac, Kovač, and Vuković, Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 385 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002) (rejecting alleged trend away from retribution in international law); Prosecutor v. Krnojelac, Case No. IT-97-25-T, Trial Chamber Judgment, ¶ 508 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002); Prosecutor v. Todorović, Case No. IT-95-9/1-S, Sentencing Judgment, ¶¶ 28–29 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2001); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶ 288 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Prosecutor v. Delalić, Mucic, Delić, Zdravko Mucić, and Landžo, Case No. IT-96-21-T, Trial Chamber Judgment, ¶ 1234 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) ("deterrence is probably the most important factor in the assessment of appropriate sentences.").

81. Kunarac, *supra* note 80, ¶ 840. *But see*, Babić Sentencing Judgment, *supra* note 13, ¶ 45 (pointing out specific deterrence is the main aim/effect of punishment, and there is also a general

The ICTY has freely invoked a transitional justice rubric regarding its messaging capacity, as well as relying on standard criminal justice rationales regarding the value and purpose of punishment. These legitimizing discourses do not co-exist flawlessly, however. As Shklar notes in her assessment of the IMT at Nuremberg, "all analogies drawn from municipal law, for all their tempting familiarity, are unconvincing" because "the acts themselves were . . . novel in the extreme."[82] More fundamentally, the didactic, modeling, regime re-defining role imposed by ICL as a political trial or transitional justice mechanism is distinct from the criminal justice model of international criminal tribunals ("ICTs") as deterrent, retributive institutions. This is not necessarily so domestically: domestic judicial institutions enjoy a socially constitutive role as administrative representations of governing rules applicable to, and generated by, a particular society.[83] However, ICTs are importantly quite distinct from domestic courts. First, they do not prosecute all crimes of a particular sort but rather select crimes (this is the nature of *ad hoc* courts, discussed above).[84] Second, they draw their legitimacy from natural law.[85] In practice, this generates operationalization problems at the intersection of law and politics. Domestic criminal law is necessarily a political agent, responding to political calculi and politically defined priorities (and changing in form and substance to reflect political changes).[86] Because ICL, on the other hand, draws its legitimacy from natural law (which is universal and eternal), it must exist above politics. Natural law supplies a non-derogable standard, which explicitly rejects political categories or categorization.[87] Yet when operationalized, ICL encounters what Jan Klabbers identifies as the standard problems of accountability faced by all international organizations, wherein the founders' interest will not always align with the organization's mandate.[88] This disconnect is magnified in the case of international organizations with a judicial function, as objectivity is necessarily a central element both of function and legitimacy of such institutions.[89]

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deterrence effect); Prosecutor v. Mrđa, , Case No. IT- 02-59-S, Sentencing Judgment, ¶ 16 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2004) (noting that the main deterrent effect is to turn perpetrator away from future wrongdoing).

82. SHKLAR, *supra* note 27, at 162, 167.

83. MICHEL FOUCAULT, DISCIPLINE AND PUNISH (TRANS. ALAN SHERIDAN, 1977); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (1974); MARTIN SHAPIRO, COURTS (1981); DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY (1990).

84. *See supra* text accompanying note 80.

85. *See* FOUCAULT, *supra* note 83.

86. *See* Anne Sa'adah, *Regime Change: Lessons from Germany on Justice, Institution Building, and Democracy*, 50 J. CONFLICT RES. 303 (2006) (discussing how "justice" is defined by governing regimes, and thus constitutes a political category).

87. FINNIS, *supra* note 58, at 18.

88. JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 201 (3rd ed. 2015) (defining this conflict of interest as a problem of accountability).

89. *See* Kerstin Carlson, *International Criminal Law and Its Paradoxes: Structural Failures in the Use of International Criminal Law as a Transitional Justice Mechanism* (forthcoming Journal of Law and Courts 2016) (arguing that ICTs are structurally unable to perform their socially constitutive mandates because of their construction as international organizations).

In the following sections, this article demonstrates how the *Plavšić* and *Babić* Judgments represent conflicting, and unresolved, sources of legitimation for ICL. In *Plavšić,* an international community eager to assert its own singular rule-making capacity used the willingness of one (albeit non-ideal) defendant to shore up the entire ICL process as a means of communicating "liberal" values. Thus the *Plavšić* case follows Shklar's calculus regarding the value of political trials as didactic actors. This didactic capacity is evidenced in the transitional justice-based insistence on the value of Plavšić's plea "for reconciliation" in the former Yugoslavia. Although Plavšić never abandons her nationalist beliefs, she does abandon nationalist politics in favor of solutions championed by western powers; this "path," which is synonymous with moral rectitude and reminiscent of the self-congratulatory rhetoric associated with the foundation of the IMT discussed above, is thus presented as the reconciliatory path she must model for her countrymen.

In contrast, while Milan Babić actually makes a personal journey from nationalist to liberal beliefs, this journey is undertaken outside the confines of western institutions or policy makers and therefore is without the capacity to demonstrate the morality of western paradigms and practices. Thus it is not received or recognized by the Tribunal, which instead assesses Babić's criminal liability through a criminal justice calculus. Under a criminal justice rubric, neither the content of the crimes before the Tribunal nor the legitimacy of the Tribunal itself is in question or at stake.[90] Discounted as a didactic example, the only service Babić can render the Tribunal is as an object of punishment.[91] Taken together, this incongruent jurisprudence reveals the unresolved legitimation crisis at the heart of ICL.

III. PLEADING GUILTY TO ATROCITY: CONTRASTING THE *PLAVŠIĆ* AND *BABIĆ* PROCESSES

When the Rules of Procedure of the ICTY[92] were drafted in 1994 by the first ICTY judges, the particular make-up of the court staff, as well as the influence over the Tribunal exerted behind the scenes by the United States, dictated that the 'hybrid' procedure of the Tribunal, which had been intended to represent a mixture of the dominant global legal systems of common and civil law,[93] leaned decidedly

90. U.S. Dep't of State, Int'l Crim. Justice, Remarks of Harold Hongju Koh, Legal Advisor, Dep't of State 2 (2012), http://www.state.gov/s/l/releases/remarks/200957.htm.

91. Punishment under a criminal justice rubric can be said to serve a "didactic" purpose only to the extent it teaches its objects to recognize the power of the state over their bodies and minds. FOUCAULT, *supra* note 83, at 303; GARLAND *supra* note 83. This is distinct from the didacticism imagined by advocates of transitional justice, who imagine that institutions can model behavior. This is a dichotomy between preach (convince) versus punish (subjugate).

92. The rules have now been revised fifty times; the latest revision dates from July 2015. *See* RULES OF PROCEDURE AND EVIDENCE, Int'l Criminal Trib. for the former Yugoslavia, U.N. Doc. IT/32/Rev. 48 [hereinafter ICTY Rules of Procedure and Evidence], http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev43_en.pdf.

93. There is an extensive comparative law consideration of whether, and how, world legal systems should be classified, some of which would contest the common law/civil law divide. *See, e.g.*, OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmermann, eds., 2006);

toward an adversarial (common law) procedure.[94] The adversarial legal tradition practiced in the United States imagines that court judgments are spaces of debate.[95] This marketplace of ideas model explains not only the use of adversarial processes to advance legal argumentation, but also the form that judgments take, where decisions include both the reasoned opinion in favor of the judicial determination as well as relevant dissenting opinions.[96]

Regardless of the strong U.S. influence, plea bargaining, a central element of U.S. criminal law practice,[97] was not initially permitted by the ICTY rules.[98] The self-interested barter at the center of plea bargaining is in many ways an affront to jurists trained in a civil law tradition, and was further considered possibly inappropriate given the gravity of crimes the ICTY was construed to try.[99] It was only after Dražen Erdemović[100] came forward to admit responsibility for dozens of murders in conjunction with the Srebrenica massacre of July 1995 that the ICTY initiated plea bargains.

A. Introducing Plea Bargaining to International Criminal Law

As practiced in U.S. law, plea bargaining can consist of 'charge bargaining' and/or 'sentence bargaining' wherein a mitigation of charges and/or sentence length is traded with the defendant in exchange for her admission of guilt.[101] Following the *Erdemović* case, the ICTY has engaged in variations of both forms. Under a charge bargaining rubric, the OTP revises the indictment against the accused, dropping certain charges in exchange for the accused's plea of guilt.[102] Sentence bargaining, on the other hand, is more complex and much less assured.

Mariana Pargendler, *The Rise and Decline of Legal Families*, 60 AM. J. COMP. L. 1043 (2012).

94. VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1995); *see also*, Megan Fairlie, *The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit*, 4 INT'L CRIM. L. REV. 243 (2004); BASS, *supra* note 31; JOHN HAGAN, JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL (2003).

95. *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001).

96. In the U.S. tradition, there are many famous dissents that have gone on to become the law of the land. Contrast this with the civil law tradition, where dissents are typically swallowed. *See* MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (1986).

97. George Fisher, *Plea Bargaining's Triumph*, 109 YALE L. J. 857, 1012–13 (2000) (90-95% of criminal cases resolved through guilty pleas in the U.S.).

98. ICTY Rules of Procedure and Evidence, *supra* note 92.

99. VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (1997); ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2013).

100. Prosecutor v. Erdemović, Case No. IT-96-22-T , Sentencing Judgment, (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996) [hereinafter Erdemović Sentencing Judgment]; Prosecutor v. Erdemović, Case No. IT-96-22-A, Appeals Judgment, (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997) [hereafter Erdemović Appeals Judgment].

101. Malcolm M. Feeley, *Plea Bargaining and the Structure of the Criminal Process*, 7 JUST. SYS. J. 338, 346–47 (1982).

102. Amended indictments must be submitted to the Trial Chamber for approval, but thus far, no indictment has been refused amendment for the purpose of securing a guilty plea. ICTY Rules of Procedure and Evidence, *supra* note 92, at Rule 50.

In exchange for a plea of guilty, the OTP will recommend a shortened sentence for the accused, sometimes joining with defendant's counsel to agree on a proposed sentence length.[103] ICTY Chambers are not bound by this suggestion.[104] ICTY case law has found the defendant's guilty plea and/or statement of remorse as a mitigating factor to be considered in sentencing, ostensibly resulting in shortened sentences.[105] The bottom line, however, is that after confirming the OTPs charges,[106] the Trial Chamber is free to pronounce the sentence it deems fit regardless of what the OTP, defense, or previously decided cases might suggest.

The *Erdemović* case coincided with pressure from the U.N. to increase ICTY efficiency[107] as well as the concern that the ICTY violated defendants' rights through the length of its proceedings,[108] and instituting a practice of plea bargaining carried the promise of addressing both institutional challenges. Hybridizing plea bargains by maintaining the complete judicial independence of the Trial Chamber regarding sentence length assuaged concerns, most often iterated by civil law jurists, related to justice. And insistence that plea bargains and statements of remorse increased Tribunal legitimacy and social reconstruction (borrowing heavily from the *Erdemović* experience) seemed to address concerns that plea bargains might threaten ICTY legitimacy, not bolster it.

Following *Erdemović* there have been twenty guilty pleas before the ICTY.[109] These pleas comprise one-third of all convictions before the Tribunal,[110] have been cited repeatedly as important reconciliatory mechanisms by expert witnesses appearing before the Tribunal, and in Tribunal judgments themselves.[111] Guilty

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103. View From the Hague, *Debates on Guilty Pleas*, http://www.icty.org/x/file/Outreach/view_from_hague/balkan_031203_en.pdf.

104. *But see*, NANCY AMOURY COMBS, GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH 57–114 (2007) (arguing that because Chambers nearly always take the OTP's recommendation into account, with Babić the one exception, it should be represented that sentence bargaining is possible before the Tribunal).

105. Dixon & Demirdjian, *Advising Defendants about Guilty Pleas before International Courts*, 3 J. INT'L CRIM. JUST. 680, 681 (2005) (arguing guilty pleas reduce sentences by 1/3). Due to the discretionary and highly non-uniform nature of ICTY sentences, however, estimating the impact of plea bargaining on sentence length can only ever be speculative.

106. The Trial Chamber is permitted to enquire into the terms of the plea agreement, and has discretion regarding acceptance of a guilty plea. *See* Nikolić Sentencing Judgment, *supra* note 80, ¶ 54.

107. "Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda" A/54/634, Nov. 22, 1999.

108. Patricia Wald, *ICTY Judicial Proceedings: An Appraisal From Within*, 2 J. INT'L CRIM. JUST. ICJ 466, 468 (2004).

109. U.N. Int'l Crim. Tribunal for the former Yugoslavia, *Guilty Pleas*, http://www.icty.org/en/cases/guilty-pleas (last visited Feb. 29, 2016).

110. Ralph Henham & Mark Drumbl, *Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia*, 16 CRIM. L. FORUM 49, 53 (2005).

111. Although "reconciliation" is not formally part of the ICTY's mandate, reconciliation among the former warring peoples in the Balkans is an oft-cited goal of the ICTY. *See, e.g.*, President of the Int'l Crim. Tribunal for the former Yugoslavia, *First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humitarian Law Committed in the Territory of the Former Yugoslavia*, ¶ 16, U.N. Doc. A/49/342 (Aug. 17, 1994),

pleas are argued to advance the cause of reconciliation in a variety of ways, among them access to information in the possession of the accused,[112] bringing relief to victims,[113] as well as increasing Tribunal legitimacy through the specter of defendant cooperation[114] Centrally, nearly all guilty pleas are accompanied by a statement of remorse from the defendant at the sentencing hearing. Such tidy soundbites, articulated in Bosnian/Croatian/Serbian, are highlighted by the ICTY as important reconciliatory mechanisms for the peoples of the former Yugoslavia.

The two plea bargains considered herein were the 8th and 17th, respectively, to be entered before the ICTY. Coming only one year apart, they both occurred as the ICTY was experiencing its political ascent. The challenges of the Tribunal's early years, with a tiny budget and no international cooperation on the ground to make arrests, had been triumphantly overcome: on the eve of Plavšić's trial, when she changed her plea to guilty, the ICTY had Slobodan Milošević in custody, the

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http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1994_en.pdf

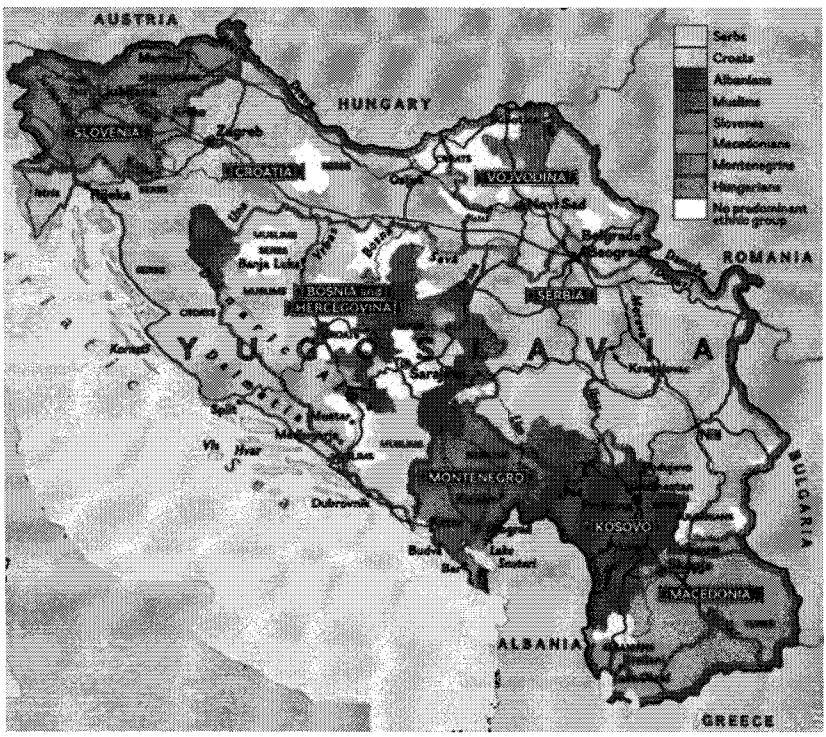
(Chief Judge Antonio Cassese named reconciliation as central to the Tribunal's work in his 1994 report to the U.N.); Plavšić Judgment, *supra* note 4, ¶ 80 ("The Trial Chamber accepts that acknowledgement and full disclosure of serious crimes are very important when establishing the truth in relation to such crimes. This, together with acceptance of responsibility for the committed wrongs, will promote reconciliation."); "Truth is the cornerstone of the rule of law, and it will point towards individuals, not people, as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process." Nikolić Sentencing Judgment, *supra* note 80, ¶ 60 (citing a statement by the Representative of the United States at the 3217th Security Council Meeting). *See also* Prosecutor v. Sikirica, Dosen, and Kolundzija, Case No. IT-95-8-S, Trial Chamber Sentencing Judgment, ¶ 149 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 13, 2001) [hereinafter Sikirica Sentencing Judgment]; Janine Natalya Clark, *Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation*, 20 EUR. J. INT'L L. 415 (2009). Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737 (1998) (arguing that the truth of the Balkan wars is principally a truth of elite politicians fomenting nationalism to serve their own power interests and that by prosecuting those most responsible for the wars of the Former Yugoslavia and individualizing their guilt, the ICTY could free citizens of the Former Yugoslavia from the weight of collective responsibility and recast nationalist arguments in the light of political realism). *See, e.g.*, Nikolić Sentencing Judgment, *supra* note 80, ¶ 145 (identifying the Tribunal's mandate as restoring peace and promoting reconciliation). On the other hand, reconciliation is absent from the ICTY founding documents, in contrast to its sister court, the ICTR. Moreover, proponents of the Tribunal's work often bristle at the suggestion that the ICTY should be judged against a standard as wide and undefined as 'reconciliation.' One senior ICTY employee exploded when I asked a question about reconciliation in a semi-structured interview in 2005: "Where do you get this idea about reconciliation! There is no mandate for reconciliation! Look in the Security Council documents, the court documents, it's not there. This idea of reconciliation has been projected onto the ICTY by diplomats. But it's ridiculous to charge the court with reconciliation!" Interview, The Hague, (May 2005) (notes on file with author.)

112. "[A] guilty plea contributes directly to one of the fundamental objectives of the international tribunal: namely, its truth-finding function." *See*, Sikirica Sentencing Judgment, *supra* note 111, ¶ 149 "[A] guilty plea is always important for the purpose of establishing the truth in relation to a crime." Todorović, *supra* note 80, ¶ 81. "Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation." *See* Erdemović Sentencing Judgment, *supra* note 100, ¶ 21.

113. *See* Nikolić Sentencing Judgment, *supra* note 80.

114. Plavšić Judgment, *supra* note 4, ¶¶ 66–81.

first sitting political leader to face indictment and trial before an international court.[115] This is not to say that the Tribunal did not still face significant challenges, most notably the intransigence of nationalist politics in the Balkans bent on defying the Tribunal, and the accompanying threat to peace and security represented by such politics.[116] The *Plavšić* and *Babić* cases, concluded in 2003 and 2004,[117] should therefore be read against these two backdrops: the institutional ascent of the Tribunal, which had an annual budget of more than $200 million at this time,[118] as well as the ongoing success of hardline nationalist politicians in Bosnia, Croatia, and Serbia.[119]



Map of Yugoslavia from National Geographic, August 1990.[120]

115. ICTY PUBLICATIONS, *The Trial of Slobodan Milosevic*, https://www.globalpolicy.org/component/content/article/163-general/28696-the-trial-of-slobodan-milosevic.html (last visited Nov. 14, 2015).

116. For example, the Serbian pro-democracy president Zoran Đinđić was assassinated in March 2003.

117. *See* Babić Sentencing Judgment, *supra* note 13; Plavšić Judgment, *supra* note 4.

118. Geoffrey R. Watson, *The Changing Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENGL. L. REV. 871, 871 (2003).

119. LARA J. NETTELFIELD & SARAH E. WAGNER, SREBRENICA IN THE AFTERMATH OF THE GENOCIDE 128 (2014).

120. Photo: National Geographic Society Cartopraphic Division, *Yugoslavia, A House Much Divided*, 178 NATIONAL GEOGRAPHIC, no. 2 (Aug. 1990), at 105, http://www.srpska-

B. Plavšić and Babić Before the ICTY

Biljana Plavšić was a biologist on the faculty of the University of Sarajevo before entering politics and rising to a leadership position in the Bosnian Serb nationalist party[121] As Bosnia descended into war, and throughout the war's most brutal episodes, she served as one member of the tri-partite Bosnian-Serb presidency.[122] In the push to "cleanse" territory to create a Greater Serbia, the war in Bosnia claimed 100,000 lives[123] and created an estimated 2.7 million refugees.[124] Plavšić became infamous for her inflammatory, nationalist rhetoric.[125] In 1992, following a massacre by Serb paramilitaries in Bijelina, a photograph circulated showing her stepping over the body of a dead civilian to kiss the notorious paramilitary leader 'Arkan', whom she called "a real Serb hero."[126] She is reported to have claimed, "There are 12 million Serbs and even if six million perish on the field of battle, there will still be six million to reap the fruits of the struggle."[127] Touring scenes of destruction in eastern Bosnia in 1992 she remarked "I'd like to see Eastern Bosnia completely cleansed of Muslims,"[128] whom she referred to as "genetically deformed material."[129] In her 2005 memoirs, she continued to advocate the benefits of an ethnically-cleansed Bosnia, "[O]ne next to another, but not together, so that we can save our lives and they can save their souls."[130] Serbian Radical Party President Vojislav Šešelj, himself "a declared Serb nationalist"[131] categorized her as "insufferably extremist."[132]

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mreza.com/library/facts/map-NatGeogr-1990.html (Colors represent areas where an ethnic nationality constitutes 50% or more of the population.").

121. *See* Plavšić Judgment *supra* note 4, ¶ 10.

122. *Id.*

123. Research and Documentation Center, BOSNIAN BOOK OF THE DEAD (2013). The ICTY puts the figure higher, at 140,000. Joe Sterling, *Karadzic calls himself 'tolerant,' says foes plotted massacre*, CNN (Oct. 16, 2012), http://www.cnn.com/2012/10/16/world/europe/netherlands-karadzic-trial/.

124. *See* U.N. Refugee Agency, Looking back at the siege of Sarajevo-20 years after (Apr. 3, 2012), http://www.unhcr.org/4f7acfb5c7.html.

125. SLAVENKA DRAKULIC, THEY WOULD NEVER HURT A FLY: WAR CRIMINALS ON TRIAL IN THE HAGUE (2004).

126. *See, e.g.*, Slavenka Drakulic, *The False Repentance of Biljana Plavšić*, EUROZINE, Oct. 23, 2009.

127. BBC NEWS, *Biljana Plavšić: Serbian Iron Lady* (Feb. 27, 2003), http://news.bbc.co.uk/2/hi/europe/1108604.stm.

128. JANINE DI GIOVANNI, MADNESS VISIBLE: A MEMOIR OF WAR (2003).

129. *Id.*

130. Jelena Subotić, *The Cruelty of False Remorse: Biljana Plavšić at The Hague*, 36 SOUTHEASTERN EUROPE 39, 57 (2012), https://www.academia.edu/2578509/The_Cruelty_of_False_Remorse_Biljana_Plavsic_at_The_Hague (quoting Plavšić).

131. Prosecutor v. Milošević, Case No. IT-98-29, Hearing, 43373, ll.1-2 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 30, 2005).

132. *Id.* at 43371, l. 25, 43373, l. 1.

In 1995 the Dayton Accords ended the war and split Bosnia into two entities: the Federation (51% of the territory, comprised of Bosnian Muslims and Bosnian Croats) and Republika Srpska ("RS") (49% of the territory, and nearly entirely ethnically cleansed of non-ethnic Serbs).[133] Plavšić's war time co-president Radovan Karadžić, the most powerful member of the RS tri-partite presidency and a central architect of the murder and terror that characterized the war in Bosnia, was banned from public office.[134] Karadžić nominated Plavšić to run for president of RS and she won the 1996 election.[135] Plavšić eventually broke with Karadžić and the other hardline nationalists over implementation of the unpopular Dayton Accords.[136] With the international community's assistance and even, on one occasion, military intervention,[137] Plavšić remained in power to serve her two-year mandate. In exchange, she oversaw a program more moderate than that advocated by her former colleagues. By the end of 1997 Plavšić had begun to cooperate with international actors, removing Ratko Mladić as Commander of Bosnian Serb forces, for example.[138] In 1998, she lost her bid for re-election and quit the political scene.[139]

After leaving power, Plavšić was indicted by the ICTY on charges which included genocide.[140] She did not defy the Tribunal as other of her countrymen had done, and was thus able to negotiate significant concessions regarding her physical presence in The Hague.[141] Still, she rejected the charges against her until the last minute, when on the eve of her trial and facing a possible life sentence, Plavšić pled guilty to "persecutions."[142] In exchange the OTP dropped all other charges against her and recommended a fifteen to twenty-five year sentence;[143] Plavšić eventually received eleven years.

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133. General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.–Croat.–Serb., Dec. 14, 1995, http://www.nato.int/ifor/gfa/gfa-frm.htm [hereinafter Dayton Peace Accords].

134. Jane Perlez, *U.S. Presses Effort to Remove Indicted Bosnian Serb Leader*, N.Y. TIMES (July 19, 1996), http://www.nytimes.com/1996/07/19/world/us-presses-effort-to-remove-indicted-bosnian-serb-leader.html.

135. *Karadzic Won't Run in Nationwide Elections*, CNN (July 3, 1996), http://www.cnn.com/WORLD/9607/03/karadzic.wont.run/.

136. Plavšić Judgment, *supra* note 4, ¶¶ 91–92.

137. Dec. 17 Sentencing Hearing Transcript, *supra* note 1, at 538, 584.

138. *Id.* at 559. After more than a decade on the run, Mladić was apprehended by the ICTY. Anna Holligan, *Ratko Mladic War Crime Defence Begins*, BBC NEWS (May, 19, 2014), http://www.bbc.com/news/world-europe-27464998. He is now standing trial for charges which include genocide in relation to the massacre of more than 7000 Bosnian Muslims at Srebrenica. *Id.*

139. Plavšić Judgment, *supra* note 4, ¶ 86.

140. *Id.* ¶ 17.

141. Plavšić received very special handling by the OTP from the beginning of her case: she negotiated her arrival in The Hague to follow Orthodox Christmas, and was released provisionally before her trial date. *Id.* ¶ 83. Provisional release is almost never awarded by the Tribunal. *See* Wolfgang Schomburg, *The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights*, 8 NW. J. INT'L HUM. RTS. 1, 22–23, 25 (2009).

142. Prosecutor v. Krajinik, Case No. IT-00-39 & 40-PT, Plea Agreement, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 30, 2002) [hereinafter Plavšić Plea Agreement].

143. Plavšić Judgment, *supra* note 4, ¶ 128; *see id.* at Schedules A-D; *see also id.* ¶¶41–43 (describing criminal acts that happened during and after expulsion).

It was while serving her sentence in a comfortable Swedish prison[144] that Plavšić first recanted her statement of remorse;[145] she affirmed this position in other interviews and in her memoirs.[146] Although the OTP had entered the plea agreement "without prejudice,"[147] which would allow the revisitation of the dropped charges in the event of changed events, the ICTY Trial Chamber did not permit this.[148] Plavšić came up for parole six years into her eleven year sentence,[149] and she was released in 2009, without mention that she had retracted the admissions underlying her sentence.[150] At the time of this writing she lives comfortably in Belgrade.[151]

Like Biljana Plavšić, Milan Babić was a part-time politician rocketed to power during, and by, events connected with the dissolution of the former Yugoslavia. A dentist by training, Babić became a central figure in the Serbian nationalist party in Croatia in February 1990.[152] Following Croatia's secession from Yugoslavia in February 1991, Babić's party advocated the creation of an independent Serb state in the territory known as Krajina,[153] and realized this through the so-called "log revolution" where Croatian Serbs barred access to the Krajina territory by blockading all major thoroughfares with logs.[154] In April 1991, Babić became President of this territory.[155] In the following months, Croatian Serbs ethnically cleansed Krajina of non-Serbs through force and violence: 230 people were killed

144. Plavšić Early Release Decision, *supra* note 25, ¶ 1. European countries cooperate with the ICTY by jailing convicted defendants. Not all European jails are created equal, however, and Scandinavian prisons are generally the most comfortable. Plavšić's stationment in a Swedish prison likely reflects another aspect of her negotiation with the Tribunal. *Id.* ¶ 2. Plavšić's Swedish prison offered horseback riding as a prisoner activity. *Luxury prison for Bosnia's Iron Lady*, THE TELEGRAPH (June 07, 2003), http://www.telegraphindia.com/1030607/asp/foreign/story_2044806.asp. Because Plavšić was of retirement age, she was not required to work in prison, and the prison report stated that she passed her time "cooking and baking." Plavšić Early Release Decision, *supra* note 25 ¶ 9.

145. Nordegren, *supra* note 20.

146. Plavšić Early Release Decision, *supra* note 25, ¶ 8; Plavšić's Memoirs, *supra* note 20.

147. Plavšić Plea Agreement, *supra* note 141, ¶¶ 3, 9(a).

148. Plavšić Early Release Decision, *supra* note 25, ¶ 5.

149. *Id.* ¶¶ 2, 6. Parole guidelines are determined by the states housing ICTY convicts; serving in Sweden, Plavšić was subject to Swedish regulations about the timing and criteria for parole, which she met. *Id.* ¶ 1.

150. *Id.* ¶ 14. The Tribunal stopped at the phrase "sufficient reconciliation," and did not explicate further. *Id.* ¶¶ 13–14.

151. *Plavsic's Triumphant Return to Belgrade*, EURONEWS (Oct. 27, 2009), http://www.euronews.com/2009/10/27/plavsic-s-triumphant-return-to-belgrade/.

152. Babić Sentencing Judgment, *supra* note 13, ¶ 18.

153. *Id.* ¶ 20. Krajina, which means "the end" is a territory settled by Serbs in the 17th and 18th centuries, and designed as a buffer zone between the Ottoman and Austro-Hungarian empires. LAURA SILBER & ALLEN LITTLE, YUGOSLAVIA: DEATH OF A NATION 102 (TV Books, Inc. ed., Penguin Books 1996). The territory is located in the "elbow" of Croatia, on the Bosnian border. *See* Figure 1, *Yugoslavia, A House Much Divided*, SRPSKA MREZA (May 3, 1998), http://www.srpska-mreza.com/library/facts/map-NatGeogr-1990.html (citing to *Yugoslavia, A House Much Divided*, NATIONAL GEOGRAPHIC, Vol. 178, No. 2, at 105 (1990)) (showing ethnicity of populations in Yugoslavia in 1991).

154. SILBER & LITTLE, *supra* note 153, at 102.

155. Babić Sentencing Judgment, *supra* note 13, ¶ 21.

in this campaign and tens of thousands fled the violence.[156] Although Milan Babić was the *de jure* leader of this entity, Milan Martić, operating a shadow government taking its instructions from Belgrade, organized and enacted the violence.[157] In early 1992, Babić broke with Milošević over the question of targeting civilians.[158] Babić spent the remainder of the war politically sidelined, although still officially occupying minor political positions, and fled Krajina in the path of Operation Storm[159] in 1995 along with 200,000 ethnic Serbs in one of the war's most massive ethnic cleansing incidents.[160]

Babić's story intersected with that of the ICTY in October 2001, after Babić learned that he had been named as member of a joint criminal enterprise in the Milošević indictment.[161] From his home in Belgrade, Babić reported to representatives of the ICTY and made himself available for questioning.[162] By the Prosecutor's own admission, Babić's availability was "extensive[]"[163] and he cooperated with the OTP over a period of several months. In interviews with Babić the OTP amassed a documentary trove of more than 1,200 interview

156. SILBER & LITTLE, *supra* note 153, at 358.

157. *See* Martić Judgment, *supra* note 19, ¶¶ 140, 343.

158. *Id.* ¶ 467. In the relevant literature there is a mixed assessment of Babić's role in the war, his relationship with Milošević, and his character. The so-called "log revolution" in Knin represents the commencement of violence in the dissolution of Yugoslavia, and Babić played a central role in this event. MISHA GLENNY, THE FALL OF YUGOSLAVIA: THE THIRD BALKAN WAR 17 (Penguin Books 1994). Journalist Misha Glenny thus puts Babić's "badness" on par with Milošević's. *Id.* Journalists Laura Silber and Allen Little are more agnostic on the subject of Babić's character and motivation, and present him as manipulated, bullied, and finally discarded, by his patron Milošević. *See generally* SILBER & LITTLE, *supra* note 153 (discussing Babić's character and motivation). The ICTY's sentencing judgment of Babić does not shed light on how to interpret Babić's actions, although non-contested evidence was offered demonstrating that Babić worked towards a political solution in Krajina because he was opposed to violence and its cost for civilians. *See* Babić Sentencing Judgment, *supra* note 13, ¶¶ 23, 28.

159. Prosecutor v. Babić, Case No. IT-03-72-I, Factual Statement, ¶ 5 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 22, 2004), http://www.icty.org/x/cases/babic/custom4/en/plea_fact.pdf [hereinafter Babić Factual Statement]; Gabriel Partos, *Milan Babic: Croatian Serb leader*, BBC NEWS (Mar. 6, 2006), http://news.bbc.co.uk/2/hi/europe/4779362.stm [hereinafter Partros]. The Krajina question was eventually resolved militarily. "Operation Storm" which retook Krajina has itself become the subject of ICTY prosecution. Prosecutor v.Gotovina, Case No. IT-06-90-PT, Judgment, ¶¶ 1, 3, 13 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011) [hereinafter Gotovina Judgment].

160. The numbers are disputed. The BBC reports that 200,000 fled. *Id.* Croatia has put the number at 90,000, the United Nations at between 150-200,000, and Serbian sources at 250,000. Carl Bildt, the European Union Special Envoy to the Former Yugoslavia, called it "the most efficient ethnic cleansing we've seen in the Balkans." Daniel Pearl, *Few Serbs Chased from Croatia in 1995 Have Made it Back Home*, WALL ST. J. (Apr. 22, 1999), http://online.wsj.com/public/resources/documents/pearl042299.htm (quoting Carl Bildt's statement); Marko Hoare notes that the Serbs organized the flight themselves, thus differentiating this incident from other instances of ethnic cleansing during the war. Hoare, *supra* note 19. *See also* Partos, *supra* note 159; Matt Prodger, *Evicted Serbs Remember Storm*, BBC NEWS (Aug. 5, 2005), http://news.bbc.co.uk/2/hi/europe/4747379.stm [hereinafter Prodger].

161. Babić Sentencing Judgment, *supra* note 13, ¶ 2.

162. *Id.*

163. Prosecutor v. Babić, Case No. IT-03-72, Sentencing Hearing, 78 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 1, 2004) [hereinafter Apr. 1 Babić Sentencing Hearing].

transcript pages containing descriptions of the events, players, and actions surrounding the Croatian Serb take-over of the Krajina territory in Croatia, as well as specific information as to the ways in which such a take-over was effectuated, included details about the support of both Milošević and the Yugoslav army.[164] Babić made such statements while fully admitting his own role and his own guilt, and without bartering for any form of immunity. In 2003, Babić was indicted based on information he provided.[165] Although the OTP called for a sentence of less than eleven years, Babić received thirteen. He committed suicide in The Hague in 2005, while testifying for the OTP in the *Martić* case.[166] At the time of his death, Babić had testified against Milošević,[167] Krajišnik,[168] and Martić,[169] and was due to testify against Simatović,[170] Stanisić,[171] and Šešelj.[172] Martić's defense counsel described Babić as the trial's "most important prosecution witness."[173]

IV. CONSTRUCTING GUILT, CRIMINALITY AND PUNISHMENT IN *PLAVŠIĆ* AND *BABIĆ*

When a defendant pleads guilty before the ICTY, the Trial Chamber must determine that the plea was "voluntary, informed, and unequivocal, and that there was a sufficient factual basis for the crime and the accused's participation in it" before finding guilt.[174] Sentencing is a separate phase, wherein evidence (largely testimony) is produced to support the parties' arguments regarding sentence length. Both Plavšić and Babić negotiated pleas of guilt with the OTP, which in both cases produced an amended indictment as well as a "factual statement" signed by each

164. *Id.* at 78-80. Babić's testimony implicated Serbs from Serbia in the highest echelons of power for responsibility for the violence in Croatia. The ICTY has found it difficult to judicially establish the link between Serbian power brokers (in the government and the military) with war in the former Yugoslavia. *See* Prosecutor v. Perisić, Case No. IT-04-81-A, Judgment, ¶¶ 119–20, 122 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013) (for an example of an acquittal of a Serbian general by the ICTY, although this link is widely recognized). Thus, Babić's testimony was singular and critical for the prosecution.

165. Prosecutor v. Babić, Case No. IT-03-72, Indictment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 6, 2003) [hereinafter Babić Indictment].

166. Martić Judgment, *supra* note 19, ¶ 33; Ian Traynor, *Serbian War Criminal Kills Himself in Hague Prison*, THE GUARDIAN (Mar. 6, 2006), http://www.theguardian.com/world/2006/mar/07/warcrimes.iantraynor.

167. Prosecutor v. Milošević, Case No IT-02-54, Witness List for the Prosecution Case - Croatia and Bosnia (Int'l Crim. Trib. for the Former Yugoslavia Sept. 26, 2002), http://www.icty.org/x/cases/slobodan_milosevic/pros/en/CroatiaBosniaphase020926.htm.

168. Prosecutor v. Krajišnik, Case No IT-00-39, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006).

169. Martić Judgment, *supra* note 19, ¶ 33.

170. Prosecutor v. Stanišić, Case No. IT-03-69-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia May 30, 2013); Janet Anderson, *Babić Suicide a Blow for Prosecutors*, IWPR (Mar. 10, 2006), https://iwpr.net/global-voices/babic-suicide-blow-prosecutors.

171. Stanišić, *supra* note 169; Anderson, *supra* note 170.

172. Prosecutor v. Šešelj, Case No IT-03-67, Transcript of Status Conference 418 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 26, 2005), http://www.icty.org/x/cases/seselj/trans/en/050926SC.htm; Anderson, *supra* note 170.

173. *Id.*

174. Plavšić Judgment, *supra* note 4, at 5.

defendant accompanying the plea.[175] Both then faced a public hearing to determine sentencing, where witnesses for the OTP and the defense (and some witnesses who were jointly submitted) testified regarding elements, which the Tribunal should consider when awarding the sentence.[176]

During Plavšić's two-and-a-half-day hearing, witnesses spoke to two themes: the brutal trauma of the war experience (three witnesses) and Plavšić's central post-war role in implementing the Dayton Accords (five witnesses).[177] The reconciliatory potential of Plavšić's plea of guilt effectively took center stage, as the prosecution and defense worked together to create a story of a leader on the path to liberalism, and an institution (the ICTY) making such a path possible. In this narrative, Plavšić's post war conduct emerged as more important, and more noteworthy, than her wartime conduct. Babić's two-day hearing was a markedly different affair. No international names or figures spoke on his behalf. Instead, two witnesses presented information to the Tribunal; Mladen Lončar, a Croatian psychiatrist speaking to the trauma of ethnic cleansing as lived by the Croatians driven out of Krajina, and Drago Kovačević, a Croatian Serb working as a social worker in Belgrade, but who had been a local politician in a multi-ethnic party in Krajina and who had worked with Babić in that capacity.[178] The joint narrative of the Prosecution and defense, while less seamlessly imagined than in the Plavšić hearing, was the story of a man overcome by events, taken in by nationalism and fear before recognizing, and then rejecting, these political outcomes.

The following discussion focuses on the three most divergent areas of the *Plavšić* and *Babić* judgments: 1) the Chambers' constructions of criminality (more specifically, the role and construction of "intent" in each judgment); 2) the Chambers' construction of factors to be considered for sentencing (mitigating and aggravating elements of the cases); and 3) the narrative arcs of each case (which players impacted them, and how). Finally, this section demonstrates how these constructions support, and are supported by, two diverging rationales for ICL

175. Prosecutor v. Babić, Case No. IT-03-72-I, Plea Agreement (Int'l Crim. Trib. for the Former Yugoslavia Jan. 22, 2004), http://www.icty.org/x/cases/babic/custom4/en/040122a.pdf [hereinafter Babić Plea Agreement]; *see* Plavšić Plea Agreement, *supra* note 142; *see* Babić Factual Statement, *supra* note 159; Prosecutor v. Babić, Case No. IT-03-72-I, Amendment to the Joint Motion for Consideration of Plea Agreement Between Milan Babić and the Office of the Prosecutor Pursuant to Rule 62 *ter* (Int'l Crim. Trib. for the Former Yugoslavia Jan. 22, 2004), http://www.icty.org/x/cases/babic/custom4/en/plea_annexA.pdf [hereinafter Babić Amendment to the Joint Motion for Consideration of Plea Agreement]; Prosecutor v. Krajinik, Case No. IT-00-39 & 40-PT, Factual Basis for Plea of Guilt (Int'l Crim. Trib. for the Former Yugoslavia Sept. 30, 2002), http://www.icty.org/x/cases/plavsic/custom4/en/plea.pdf [hereinafter Plavšić Factual Basis for Plea of Guilt]; Plavšić Indictment, *supra* note 4.

176. *See* Apr. 1 Babić Sentencing Hearing, *supra* note 163; Babić Apr. 2 Sentencing Hearing Transcript, *supra* note 3; Prosecutor v. Plavšić, Case No. IT-00-39 & 40/1-S, Sentencing Hearing (Int'l Crim. Trib. for the Former Yugoslavia Dec. 16, 2002), http://www.icty.org/x/cases/plavsic/trans/en/021216IT.htm [hereinafter Plavšić Dec. 16 Sentencing Hearing Transcript]; Dec. 17 Sentencing Hearing Transcript, *supra* note 1; Plavšić Dec. 18 Sentencing Hearing Transcript, *supra* note 23.

177. Dec. 16 Sentencing Hearing Transcript, *supra* note 176; Dec. 17 Sentencing Hearing Transcript, *supra* note 1; Dec. 18 Sentencing Hearing Transcript, *supra* note 23.

178. *See* Apr. 1 Babić Sentencing Hearing, *supra* note 163; *see also* Babić Apr. 2 Sentencing Hearing Transcript, *supra* note 3.

legitimacy, preaching (Shklar's didactic liberalism) verses punishment (the criminal justice rubric of control).

A. *Intent and Questions of Criminality in Plavšić and Babić*

Both Plavšić and Babić were charged with "persecutions"[179] and convicted of committing these acts under a theory of liability called "joint criminal enterprise" ("JCE"). Article 7.1 of the ICTY statute defines "commission" of crimes.[180] JCE, constructed by ICTY judges as an interpretation of Article 7.1, makes it possible to attribute liability for violence to defendants who are physically separated from the violence. It does this by making "intent" (motivation) synonymous with "knowledge" (awareness).[181] In its most exaggerated form (called JCE III), it decreases the motivation of the perpetrator to "foreseeability" (at domestic law, this is a negligence standard, which is not generally applicable to grave crimes).[182] Thus, in the *Tadić* case, Tadić was found liable for murders in a location the Tribunal could not demonstrate he had been.[183] The *Tadić* Chamber reasoned that because Tadić had been engaged in the types of crimes against humanity (persecutions, ethnic cleansing) that can *foreseeably* lead to death, he was liable for murders committed in conjunction with these types of activities *in other locations*.[184] Using this rationale, both Plavšić and Babić were found to have "committed" crimes furthering "joint criminal enterprises" although neither of them personally committed, nor arguably were even aware of specifics pertaining to, the violations of international humanitarian law substantiating their persecutions charges.

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179. Babić Amendment to the Joint Motion for Consideration of Plea Agreement, *supra* note 175, ¶¶ 1–2; Plavšić Indictment, *supra* note 4, ¶ 23. In Plavšić's Plea Agreement, "persecutions" are articulated as follows:

> a. the existence of an armed conflict; b. the existence of a widespread or systematic attack directed against a civilian population; c. the accused's conduct was related to the widespread or systematic attack directed against a civilian population; d. the accused had knowledge of the wider context in which her conduct occurred; e. the accused committed acts or omissions against a victim or victim population violating a basic or fundamental human right; f. the accused intended to commit the violation; g. the accused's conduct was committed on political, racial or religious grounds; and h. the accused's conduct was committed with a deliberate intent to discriminate.

Plavšić Plea Agreement, *supra* note 142, ¶ 5. In signing the plea agreement, Plavšić acknowledged that she understood that the prosecutor was required to show these elements in order to prove the charge against her to which she was pleading guilty. *Id.* ¶¶ 5, 11.

180. S.C. Res. 827, art. 7 (1), Statute of the Int'l Crim. Trib. for the Former Yugoslavia (Sept. 2009), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [hereinafter ICTY Statute]. "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime." *Id.*

181. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 189-93 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf [hereinafter Tadić Jugement].

182. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 91 (1968).

183. Tadić Judgment, *supra* note 181, ¶¶ 230–33, 237.

184. *Id.*

The intent to commit a crime, "mens rea" or the guilty mind, is a global standard.[185] There are some crimes that bypass intent in favor of "strict liability":[186] the crime of statutory rape is an oft-quoted example. Yet strict liability in criminal law remains the exception, not the rule, and for most crimes, questions of the intention of the perpetrator remain central to determining the perpetrator's guilt. In principle, this is the same at international criminal law.[187] The statute of the ICC, for example, specifically requires that the "mental element" be present in order to commit a crime.[188] While the ICTY statute does not address the question of intent, prominent ICL scholar William Schabas argues that "the judges of the ICTY have treated *mens rea* as an element of all of the offenses within the Tribunal's subject matter jurisdiction.[189] Schabas finds that some exceptions to the *mens rea* standard have served to dilute it, and lists JCE as a prime example.[190] Following the Judgment of the IMT at Nuremberg, guilt by association is not criminalizable at international law and is specifically prohibited by the ICTY.[191] However, JCE arguably comes close to obviating the distinction between *doing* crime (commission, under which JCE was articulated) and *being criminal* (guilt by association).

JCE has evoked reams of criticism[192] and has been formally passed over by the ICC.[193] Yet JCE has historically enjoyed prominence at the ICTY[194] because it

185. HART, *supra* note 182, at 90.

186. *Id.* Strict liability assigns culpability regardless of fault or responsibility: it is often applied to situations found to be inherently dangerous. *Id.*

187. Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offenses*, 12 CRIM. L.F. 291 (2001); William Schabas, *Mens Rea and The International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1015, 1015 (2003).

188. Rome Statute, *supra* note 51, at art. 30.1.

189. Schabas, *supra* note 187, at 1025.

190. *Id.* at 1033.

191. Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 82–83, 85 (Jan., 2005). In fact, it is specifically addressed as impermissible in the ICTY's Statute. Rep. of the Secretary-General Pursuant to S.C. Res. 800, ¶ 2, S/25704, and ¶¶ 50–51 (May 3, 1993) .This was reaffirmed in Prosecutor v. Stakić, Case No. IT-97-24, Judgement, 386 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006).

192. *See e.g.*, Danner, supra note 191, at 137-38; Van der Wilt "Joint Criminal Enterprise and Functional Perpetration" in Andre Nollkaemper and Harmen van der Wilt (eds) SYSTEM CRIMINALITY IN INTERNATIONAL LAW (2009).

193. Jens David Ohlin, *Joint Criminal Confusion*, 12 NEW CRIM. L. REV. 406, 407–08 (2009). However, the ICC's Art. 25 standard of "co-perpetration" is arguably the functional equivalent of JCE. *See id.* at 414.

194. *Id.* at 407. As of this writing, there are strong indications that JCE's power as an irrefutable instrument for the OTP may be waning. Beginning in 2012 with the Gotovina acquittal, several high-ranking defendants have been acquitted under JCE charges. The high-ranking officials are Croatian General Ante Gotovina, Commander of Croatian Special Police Mladen Markač, and Croatian assistant minister of defense Ivan Čermak; Serbian Generals Jovica Stanišić and Franko Simatović; and Serbian General Momčilo Perišić. Gotovina Judgment, *supra* note 159; Prosecutor v. Gotovina, Case No. IT-06-90-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012); Stanišić Judgement, *supra* note 170; Prosecutor v. Perišić, Case No. IT-04-81, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Sept. 6, 2011); Prosecutor v. Perišić, Case No. IT-04-81, Appeals

addresses a central ICL problem regarding how to link bad actors to bad actions, especially where formal hierarchies of command are absent. One dogged critique of JCE is that it amounts to strict liability for which, once charged, there is no defense.[195] Strict liability, though not prevalent in domestic criminal law, is foundationally present at ICL, which defines crime in part based on the characteristics of the victims. Unlawful killing which might be categorized as murder or manslaughter in domestic criminal law, at ICL turns into a war crime, or a crime against humanity, depending on the circumstances in which perpetrator and victim find themselves, as well as certain immutable characteristics of the victim.[196] Thus, for the perpetrator of international crime, committing crime assumes certain features of strict liability (where the crime is defined by the identity or circumstance of the victim, and thereby outside of the particular malice of the perpetrator).

For both Plavšić and Babić, charged with committing persecutions under the theory that they *knew of persecutions* committed by their colleagues ("JCE I") or that *persecutions were reasonably foreseeable* ("JCE III") based on their activities, their intent is discerned either from their actual or reasonable knowledge. In juridical terms, neither Chamber needs to speak to "intent" beyond "knowledge" or "foreseeability," the elements required to substantiate JCE. In both cases, evidence was offered that spoke to both defendants' actual or reasonable knowledge.[197] The *Plavšić* Judgment, however, does not discuss Plavšić's intent qua motivation or knowledge.[198] The Judgment references "intent" only once, in relation to the gravity of the persecutions charge.[199] In this way, the *Plavšić* Chamber subsumes any and all discussions of intent into the "gravity of the crime" of persecutions.[200] The *Babić* Chamber, however, entitles an entire section of its judgment "Babić's intent".[201] Moreover, the silence in Plavšić and focus in Babić lead directly to

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Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013); Prosecutor v. Šešelj, Trial Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia March 31, 2016). In 2013, Judge Harhoff of the ICTY circulated a semi-open letter accusing the ICTY Chief Judge Theodor Meron of applying "tenacious pressure" on judges to tighten the standards required to convict military leaders under JCE. *ICTY Judge Frederik Harhoff's Email to 56 Contacts*, BT.DK (June 6, 2013), http://www.bt.dk/sites/default/files-dk/node-files/511/6/6511917-letter-english.pdf (on file with BT.DK). Judge Harhoff was fired in response. Andy Wilcoxson, *Lipstick on a Pig: Corrupt "Justice" at the ICTY*, SERBIANNA (Oct. 22, 2013), http://serbianna.com/analysis/archives/2437. *See also* Mia Swart, *Tadić Revisited: Some Critical Comments on the Legacy and the Legitimacy of the ICTY*, 3 GOETTINGEN INT'L L. J. 985, 1009 (2011); Jelena Subotic, *Legitimacy, Scope and Conflicting Claims on the ICTY: In the Aftermath of Gotovina, Haradinaj and Perisic*, 13:2 HUM. RTS. J. 170, 175 (May 28, 2014).

195. *See* Prosecutor v. Gotovina, Case No. IT-06-90-PT, Defense Final Trial Brief, ¶¶ 148-152 (Int'l Crim. Trib. for the Former Yugoslavia July 27, 2010); *see also* Gotovina Judgment, *supra* note 159.

196. *See* George Fletcher, *Collective Guilt and Collective Punishment*, 5 THEORETICAL INQUIRIES IN L. 163 (2004) (discussing issues of collectivity at international criminal law).

197. Dec. 17 Sentencing Hearing Transcript, *supra* note 1; Babić Sentencing Hearing, *supra* note 13.

198. Plavšić Judgment, *supra* note 4.

199. *Id.* ¶ 52.

200. *Id.*(finding it to be a "crime of utmost gravity").

201. Babić Sentencing Judgment, *supra* note 13, ¶¶ 25–28.

jurisprudential divergences in the two cases. In *Plavšić*, ducking the question of Plavšić's intent (her evil intention) allowed the Chamber to focus on what it characterizes as Plavšić's *benevolent intention* following the war, i.e. her role in supporting the Dayton Accords. In *Babić*, a juridically unnecessary focus on motivation allows the Chamber to morally condemn Babić, thereby depriving his case of didactic, political potential.

We begin in *Plavšić*, using the Judgment's characterization of Plavšić's criminality as an example. In its submissions, through its witnesses, and in its closing statement at Plavšić's hearing, the OTP described the horrific violence of the war in Bosnia. The OTP positioned Plavšić as "one of the beacons" of that violence, a politician who "imbued [others] with a mission to use criminal means to achieve her vision of an ethnically separated Bosnia" i.e. to beat, rape, and kill civilians.[202] The OTP spoke to the "efficiency and ruthlessness of the campaign of persecutions" as well as its scale.[203] The OTP also noted that Plavšić "was one of the leaders of the [ethnic cleansing] effort, and she embraced its goal and supported it in various ways."[204] This description makes it clear that Plavšić had real-time knowledge of crimes committed, and that she shared the evil intent of those who perpetrated the crimes. The OTP's indictment (to which, again, Plavšić plead guilty) goes farther, defining her participation as including the planning, instigating, and ordering of persecutions.[205]

The *Plavšić* Judgment, however, subtly but importantly rewrites Plavšić's participation. The Judgment lists the grave crimes as laid out in the Indictment, but tweaks Plavšić's role. After reviewing the crimes as included in the Indictment, the Judgment characterizes Plavšić as having "participated in the cover up of these crimes by making public statements of denial for which she had no support. When she subsequently had reason to know that these denials were in fact untrue, she did not recant or correct them."[206] The Judgment culls this information from the "Factual Basis" filed together with Plavšić's Plea Agreement.[207] Unlike the Indictment, which is a public document articulating legal charges, the Factual Basis is a confidential, *ex parte* document reciting facts, and it was first made public on the date of Plavšić's hearing.[208] The significance of these distinctions is that the indictment comprises the official record of Plavšić's crime which effectively becomes an official record of her condemnation (together with the Tribunal's judgment) once she pleads guilty. When the Indictment and the Factual Basis cannot be reconciled, this presents a problem: first and foremost, a legal problem for the Chamber, but ultimately also a historical and social problem for those who would use ICTY judgments for larger societal purposes.

This is the case in *Plavšić*, where the Judgment's characterization of Plavšić's role, drawn from the Factual Basis, contravenes what the Judgment recognizes as

202. Dec. 18 Sentencing Hearing Transcript, *supra* note 23, at 630.

203. *Id.* at 623.

204. *Id.* at 630.

205. Plavšić Indictment, *supra* note 4, ¶ 18.

206. Plavšić Judgment, *supra* note 4, ¶ 17.

207. Plavšić Factual Basis for Plea of Guilt, *supra* note 174, ¶ 20.

208. *Id.*; Prosecutor v. Plavšić, Case No. IT-00-39 & 40/1S, Order for Release of Confidential Document, 2 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 16, 2002), http://icr.icty.org/.

Plavšić's crime, which is having "planned, instigated, ordered and aided and abetted persecutions of the Bosnian Muslim, Bosnian Croat and other non-Serb populations of 37 municipalities in Bosnia and Herzegovina."[209] Intent is problematically absent from the Judgment's descriptions of Plavšić's role, because such descriptions call into question Plavšić's knowledge. Plavšić could hardly plan, instigate, or order without knowledge. The *Plavšić* Judgment suggests that Plavšić did not have real-time knowledge of the violence: consider the quote above ("[w]hen she *subsequently had reason to know*")[210] as well as a later description: "as a leader and *later an accused, she learned a great deal about the gravity and nature of the crimes* committed by the forces which she led and inspired during the war; and she recognizes her obligation to accept responsibility *for acts committed by others*."[211] Here the Chamber follows Plavšić's own iteration; in her statement addressing the Tribunal, Plavšić states that through the indictment and with the help of her lawyers, conducting "our own investigation and evaluation" she has "*now come to the belief* and accept the fact that many thousands of innocent people were the victims of an organised, systemic effort to remove Muslims and Croats from the territory claimed by Serbs."[212] These statements place Plavšić's knowledge after the fact, which would challenge the Indictment's charge of "planning, instigating, ordering" and thereby, arguably, the criminal charges themselves.

The upswing of these machinations is that in *Plavšić*, the question of intent with regard to *her crimes* is re-characterized as a question of intent regarding *her plea of guilt*. This sleight-of-hand permits the *Plavšić* Chamber to consider the possible power of Plavšić's *admission of guilt* under the category of intent, i.e. it allows her admission of guilt, instead of remaining only a possible mitigating factor at sentencing (discussed below), to wriggle into the construction of her criminality itself. This thus permits the *Plavšić* Chamber to turn its consideration of her post-war conduct, which juridically can only exist as a mitigating circumstance, into a consideration of Plavšić's motivation (which speaks to her intent, and thereby, her criminality itself).

In its Sentencing Judgment, the *Plavšić* Chamber devotes fifteen paragraphs to considering the value of Plavšić's remorse as a reconciliatory mechanism, and nine paragraphs to the significance of her post-war conduct.[213] Both of these categories are properly understood as "mitigating" factors, where mitigation refers to the length of the sentence. The *Plavšić* Judgment tips its hand, however, when it begins its consideration of the "substantial" mitigating circumstances in the Plavšić case by discussing, "Mrs. Plavšić's . . . unprecedented steps *to mitigate the crime against humanity* for which she is responsible."[214] The problem here is that crimes cannot be mitigated. Mitigating *circumstances* can alter the classification of a crime: a murder charge (requiring premeditation) may be reduced to a lesser

209. Plavšić Judgment, *supra* note 4, ¶ 8.
210. *Id.* ¶ 17 (emphasis added).
211. *Id.* ¶ 19 (emphasis added).
212. Dec. 17 Sentencing Hearing Transcript, *supra* note 1, at 609 (emphasis added).
213. Plavšić Judgment, *supra* note 4, ¶¶ 66–81, 85–94.
214. *Id.* ¶ 61 (emphasis added).

charge,[215] such as manslaughter, for example. In domestic criminal law, an affirmative defense can defeat a charge even where true (where the crime is still murder, but the justification of self-defense removes the punishment. Note that affirmative defenses are not available at ICL due to the non-derogable nature of the rights infringed by violations of international humanitarian law).[216] One does not mitigate the crime: rather, one mitigates punishment for a given crime or, depending on the elements of the crime in question and the facts collected regarding it, one reassigns criminal definition, sometimes through mitigating circumstances. The *Plavšić* Judgment problematically conflates the categories of criminality (intent, pertaining to crime's definition) and context (mitigation or aggravation, pertaining to eventual sentence).

By contrast, the *Babić* Chamber pens an entire portion of its sentence under the heading "Babić's intent."[217] Because Babić cooperated so extensively with the OTP, giving informational interviews as well as testifying in several other cases, questions of Babić's intent (both his motivation and his knowledge) are well documented. The *Babić* Judgment notes that "Babić explained that as of August 1991 he shared the intent of others with whom he participated in planning the campaign of persecutions to forcibly resettle the Croat and non-Serb populations from the targeted areas."[218] Babić admitted he knew of the mistreatment, deportations, and destruction of property connected to the ethnic cleansing of Krajina, and that he knew there was a possibility that murders might result, though he was unaware at the time of the 200 killings that took place during this period.[219] The *Babić* Chamber had so much information regarding Babić's intent that it rejected Babić's initial plea of guilt as an aider and abettor of a JCE as inadequate.[220] Babić revised his plea to participating as a "co-perpetrator" of a JCE, a more serious charge, which was in turn accepted by the Tribunal.[221]

In its Judgment, the *Babić* Chamber resists what it characterizes as the parties' assessment that Babić's liability is "lessened by the fact that he did not intend the commission of the murders as such but was merely aware that murders were being committed as part of the JCE."[222] This reaction on the part of the *Babić* Chamber is in line with JCE liability, which requires, in its most extreme form, mere "knowledge of the foreseeability" of a crime.[223] Moreover, and distinguished from *Plavšić*, the Chamber pushed back at attempts to allow factual elements only considerable as mitigating (in terms of sentence) to encroach on questions of

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215. *See, e.g.*, People v. Morrin, 187 N.W.2d 434, 446, 453 (Mich. Ct. App. 1971) (where the mitigating circumstances of heat of passion reversed a first degree murder charge).

216. *See* Adam B. Shniderman and Charles A. Smith, *Towards Justice: Neuroscience and Affirmative Defenses at The ICC*, STUDIES IN LAW, POLITICS, AND SOCIETY, http://papers.ssrn.com/sol3/papers.cfm?abstract_ id=2275098&download=yes.

217. Babić Sentencing Judgment, *supra* note 13, ¶¶ 25–28.

218. *Id.* ¶ 26.

219. *Id.* ¶¶ 26–27.

220. *Id.* ¶¶ 6–8.

221. *Id.* ¶ 8.

222. *Id.* ¶ 38.

223. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Judgment, ¶ 220 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

criminality themselves.[224] Thus the *Babić* Judgment applied a standard criminal justice rubric, fitting the facts of the case solidly into the doctrinal rubric established by JCE case law.

The *Babić* Chamber was substantially aided by the OTP, which itself pushed back against imprecise queries with curt, doctrinal summaries. In one example, Judge Orie investigated facts from the factual statement, trying to ascertain what sort of unlawful killings occurred against civilians:

> Is this to be understood, that Mr. Babic was aware that civilians were killed as collateral damage to justified military action? Or was—I mean, you can kill—it sounds very horrible. But you can kill civilians in two different ways; either by using wrong military equipment for an attack not targeting precisely, and thus killing civilians as—not as collateral damage but more or less as a consequence of improper military action; and of course, you can also save the lives of the civilians during the attack, and then kill them afterwards.[225]

The OTP responded not to the question asked but instead placed Babić's admissions into a doctrinal framework: "Mr. Babic was very clear saying it was not legitimate military actions, but ethnic cleansing campaign in an attack that was actually illegal. And in the course of this attack, civilians were killed."[226] Here the OTP neatly reformulated Judge Orie's factual question into a legal category, and then made this legal categorization synonymous with Babić factual submissions, thereby making Babić the originator of the legal formulation.[227]

In summary, the two cases offer several contradictions. While the *Babić* Chamber applied JCE relentlessly, it supported this application of the legal standard with a (juridically unnecessary) discussion of Babić's intent, which reads like an insistence on his bad character. Meanwhile, the *Plavšić* Chamber connected Plavšić's intent to the gravity of the crime, which gravity it then distanced from Plavšić by repeatedly considering her "lesser role" in the JCE. The transformation of intent in the *Plavšić* Judgment from what is required under JCE (knowledge or foreseeability) into what is characterized by the Judgment as Plavšić's after the fact realization, allowed the Judgment to make Plavšić's plea of guilt itself legally commensurate with furthering the work and purpose of the

224. Babić Apr. 2 Sentencing Hearing Transcript, *supra* note 3, at 179–180.

225. *Id.* at 179 ll. 17-25.

226. *Id.* at 180 ll. 1-9.

227. *Id.* There is a storied history of asking defendants to provide not just facts but also law: the *Erdemović* chamber required Erdemović to categorize his crimes as either crimes against humanity or war crimes, explaining to him that had there been a trial the OTP would have done this, but since he was pleading guilty, he should do it himself. Prosecutor v. Erdemović, Case No. IT-96-22-PT, Transcript, (Int'l Crim. Trib. for the Former Yugoslavia May 31, 1996). The Appeals Chamber later reversed the Trial Chamber in part because Erdemović, in choosing "crimes against humanity" which was the more severe of the two charges, demonstrated he was not adequately informed. Prosecutor v. Erdemović, Appeals Judgment, Case No. IT-96-22-A (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

ICTY.[228] This is a central piece of the juridical puzzle that transforms the *Plavšić* case into a didactic example modeling liberal values.

B. *The Jurisprudence of Punishment: Distinct Formulations of 'Aggravation' and 'Mitigation' in Plavšić and Babić*

As demonstrated above, in the *Plavšić* Judgment, elements of what juridically should have been considered as contextual (going to mitigating circumstances which might impact sentence length) were blurred by considerations of Plavšić's criminality as attached to her intent. The *Babić* Judgment, meanwhile, applied the facts doctrinally. This section considers important distinctions in the two Chambers' constructions of context, i.e. of mitigating and aggravating factors to be considered in formulating the sentence.

Sentencing itself is only very broadly defined by the ICTY Statute,[229] and sentencing is notoriously irregular at the ICTY; each Trial Chambers is permitted to largely construct its own rationale for the sentence it awards.[230] In cases of plea agreements, the OTP and the defense make sentencing recommendations, which may or may not correspond. Such recommendations, agreed or not, do not bind the Trial Chamber in any way; it remains entirely free to assign the sentence it determines.[231] The ICTY Rules note that aggravating and mitigating circumstances may be taken under consideration during sentencing.[232] The Rules themselves define only one "mitigating" circumstance: "substantial cooperation" with the Prosecution.[233] ICTY practice has developed other aggravating and mitigating factors that are often reiterated in later case law, though such reiterations do not bind the ICTY as regards the specifics of sentence length.

The *Plavšić* Chamber engaged in a brief (eight-paragraph) consideration of possible aggravating circumstances.[234] This followed a lengthy summarization (twenty-five paragraphs) of details from the prosecution witnesses called at the hearing in order to conclude that the crime at issue was "of utmost gravity" and occurred on a "massive scope".[235] Following other ICTY cases, the Judgment

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228. Prosecutor v. Plavšić, Case No. IT-00-39&40/1-S, Sentencing Judgment, ¶ 73 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003).

> [I]t may be argued that by her guilty plea, Mrs. Plavšić had already demonstrated remorse . . . [T]here is a further and significant circumstance to be considered, namely the role of the guilty plea of the accused in establishing the truth in relation to the crimes and furthering reconciliation in the former Yugoslavia.

Id.

229. U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Resolution 808 (1993)*, art. 24, U.N. Doc. S/25704 (May 3, 1993).

230. *Id.*; Uwe Ewald, *'Predictably Irrational': International Sentencing and its Discourse against the Backdrop of Preliminary Empirical Findings on ICTY Sentencing Practices*, 10 INT'L CRIM. L. REV. 365,(2010).

231. ICTY Rules of Procedure and Evidence, *supra* note 92, at Rule 24; Cassese 1998, *supra* note 28, at 11.

232. ICTY Rules of Procedure and Evidence, *supra* note 92, at Rule 101 (B) (i) - (ii).

233. *Id.* at Rule 101 (B) (ii).

234. Plavšić Judgment, *supra* note 4, ¶¶ 53–60.

235. *Id.* ¶¶ 27–52.

necessarily noted that Plavšić's leadership position was an aggravating circumstance, which it immediately mitigated by asserting that Plavšić was not "in the very first rank of leadership."[236] The tone and language, deferential and apologetic, is in marked contrast to the Babić Chamber's construction of his leadership as an aggravating circumstance.

The *Plavšić* Chamber next turned to mitigating circumstances, where it recognized four: her guilty plea (in conjunction with what it said regarding her remorse and what it offered in terms of reconciliation); her voluntary surrender; her post-conflict conduct (specifically her assistance in implementing the Dayton Accords) and her age.[237] The Chamber attached "great weight" to Plavšić's guilty plea and post-conflict conduct, which it found to be "a formidable body of mitigation."[238] It ignored testimony regarding Plavšić's ongoing nationalist beliefs and exhortations, and dismissed discussion of her refusal to cooperate (finding that a refusal to cooperation with the OTP could not constitute an "aggravating" circumstance, but simply that her refusal to cooperate obviated the possibility that "cooperation with the OTP" might count in mitigation towards her sentence.)[239] This is significant because either of these elements might have influenced the Tribunal's consideration of Plavšić's post-conflict conduct.

The *Babić* Judgment determined that Babić's crime was of "extreme gravity" and was "characterized by ruthlessness and savagery".[240] It determined his leadership role was an aggravating factor, because his participation was "substantial".[241] The Judgment specified two main reasons for this finding: first, as a leader Babić "enlisted the resources" at his disposal to further the JCE and second, Babić's involvement "gained momentum over time" which "amplified its consequences."[242] The Judgment thus rejected the parties' contentions that Babić's role in the JCE was limited, and that this should be considered in mitigation.[243] The Judgment accepted the parties other submissions regarding mitigation: Babić's admission of guilt, his cooperation (for which the Judgement affords "substantial mitigating weight"), his show of remorse, voluntary surrender, and personal and family circumstances.[244]

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236. *Id.* ¶ 57. The entire argument reads:

> The Trial Chamber accepts that the superior position of the accused is an aggravating factor in the case. The accused was not in the very first rank of the leadership: others occupied that position. She did not conceive the plan which led to this crime and had a lesser role in its execution than others. Nonetheless, Mrs. Plavšić was in the Presidency, the highest civilian body, during the campaign and encouraged and supported it by her participation in the Presidency and her pronouncements.

Id.

237. *Id.* ¶¶ 66–106.
238. *Id.* ¶ 110.
239. Plavšić Judgment, *supra* note 4, ¶ 110.
240. Babić Sentencing Judgment, *supra* note 13, ¶ 53.
241. *Id.* ¶ 57.
242. *Id.* ¶ 61.
243. *Id.* ¶ 80.
244. *Id.* ¶¶ 63–89.

Finally, and significantly, the *Babić* Judgment rejected the parties' contention that Babić's post-war conduct should count as mitigating.[245] The *Babić* Chamber offered the example of Plavšić's post-war conduct as a standard against which to consider Babić:[246] such conduct included support for Dayton and the removal of obstructionist officials from office. This presupposes, of course, that one is in a political position capable of performing such acts: the standard would thus fail as any kind of doctrinal gage. At the same time, the standard as articulated by the *Babić* Chamber ignored the motivation for these acts which, as argued above, in Plavšić's case were as easily construed as personal self-interest (remaining in power) as ideological commitment. Finally, the *Babić* Judgment's conclusion on this score ignored factual evidence presented at the Sentencing Hearing, which evidence spoke to Babić's attempts to thwart violent objectives, often at grave bodily risk to himself,[247] as well as his work towards a political solution for Krajina within Croatia as early as 1992, and again in 1995.[248]

In summary, the two cases diverge significantly in terms of how they structure and weigh the construed aggravating and mitigating factors. In terms of aggravation, Babić's leadership position was construed as a destructive force due to its "power of inertia" while the destructive capacity of Plavšić's infamous nationalist rhetoric was unaddressed. Plavšić's leadership role was downplayed whereas Babić's was amped up. But it is in the constructions of meaningful mitigation that the two cases most importantly diverge, where the reconciliatory capacity of Plavšić's plea of guilt, in a category invented by the Tribunal, through witnesses sympathetic to the socially constitutive aims of the Tribunal,[249] took on a mitigating capacity large enough to mitigate her crime itself. Babić, on the other hand, had only a Tribunal functionary, the erstwhile Prosecutor Ms. Uertz-Retzlaff, to speak for him regarding the importance of his cooperation.

C. *Comparing & Contrasting Reconciliation Narratives in Plavšić and Babić*

One of the values of the ICTY is to perform liberalism in the Balkans, to offer an antidote to the dead-end of nationalist politics that tore Yugoslavia apart, and which continues to threaten peace in its successor states. By this account, rule of law processes are substituted for primordial, essentialist collectives as a means of national organization. This is one of the "truths" the Tribunal is meant to

245. *Id.* ¶ 96.

246. *Id.* ¶ICTY Rules of Procedure and Evidence, *supra* note 92, at 94.

247. Two instances of personal harm to Babić were detailed in the Sentencing Hearing, both of which were petulantly dismissed by Judge Orie. In a further irony, the risks that Plavšić took when she defied her hardline colleagues in favor of the international community (risks for which she received police and military protection from the international community) are described at length at the Plavšić Sentencing Hearing, and elicit praise for her "courage." Id. ¶¶ 67, 78, 85, 92-93, 124-25.

248. Babić Sentencing Judgment, *supra* note 13, ¶ 24 (Factual Statement of U.S. Ambassador Peter Galbraith in Milosevic case).

249. Madeleine Albright was the U.S.'s representative to the UN when the ICTY was created, and her views on the possibility of the Tribunal acting to promote liberal values are well documented; Alex Borraine, who spoke about reconciliation at Plavšić's hearing, founded The International Center for Transitional Justice; Elie Weisel, a Holocaust survivor, has written extensively regarding recognition and victimhood.

pronounce,[250] a truth which might have, in the words of the *Erdemović* Sentencing Judgment, the potential to "cleanse the ethnic and religious hatreds and begin the healing process."[251] This is a role that the Tribunal has often imagined for itself, which role is referenced expressly in the *Plavšić* hearing by the OTP in terms of the "linked" concepts of accountability and reconciliation served by the Tribunal,[252] and noted by the *Babić* Chamber, in passing, as a benefit of his statement of remorse.[253]

Both the *Plavšić* and *Babić* hearings and judgments speak to questions of nationalism, liberalism, and reconciliation. As noted above, the judgments turn common sense readings on their heads in this regard, turning an unapologetic Serbian nationalist (Plavšić) into a forward marching democratic liberal (and thereby insisting that she remain a public figure, and perform as an example), and condemning a *bona fide* repentant, reformed nationalist (Babić) into a petty attention-seeker (and thereby denying Babić a public role). In this vein, this section closes by briefly contrasting the narrative arcs—the stories told—through the *Plavšić* and *Babić* processes.

In her closing statement, Prosecutor Carla Del Ponte characterized Plavšić as on a "path" or "trajectory" towards rule of law liberalism.[254] Prosecutor Del Ponte made this argument in spite of what she named as a stubborn refusal on Plavšić's part to cooperate in other cases before the Tribunal: Del Ponte refers to such (non-existent) cooperation as "the last step of [Biljana Plavšić's] journey."[255] Some

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250. *See* Akhavan, *supra* note 111.

251. MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY, 1 (Eric Stover and Harvey M. Weinstein eds., 2004) (quoting Madeleine Albright).

252. Plavšić Dec. 18 Sentencing Hearing Transcript, *supra* note 23, at 620; *see also* Plavšić Dec. 16 Sentencing Hearing Transcript, *supra* note 176, at 376.

> The parties to this litigation share the view that it is only through the establishment of truth about what occurred in Bosnia and Herzegovina that the fragile and vital process of reconciliation can begin. Furthermore, we agree that it is only through the establishment of truth that the unhealthy shackles of revision that debilitate the former Yugoslavia and that foster suspicion, ethnic hatred, and civil unrest can be broken.

Plavšić Dec. 16 Sentencing Hearing Transcript, *supra* note 176, at 376 ll. 14-21.

253. Babić Sentencing Judgment, *supra* note 13, ¶ 53. The value of articulating remorse is standard fare in plea bargain judgments; *See* Kerstin Carlson, Constructing Remorse as a Legal Category: Plea Bargains at the ICTY, Presentation at the Law and Society Association Conference (June 2015) (on file with author).

254. *See* Plavšić Dec. 18 Sentencing Hearing Transcript, *supra* note 23, at 636-37. Prosecutor Carla Del Ponte further stated:

> I have followed this file step by step. Mrs. Plavsic's guilty plea did not take us by surprise, since it was nothing but a further step in her development since 1995, basically starting with the Dayton Accords. During these days we have heard testimony dating back to this period. It made it possible for us to understand that Dayton was, for her, the starting point of a new development, of a new trajectory. . . . [S]ince Madam Plavsic started a new path by her guilty plea, by admitting her personal criminal responsibility, and above all by accepting to pay the price for her crimes before justice, in our submission the accused Plavsic should not only enjoy mitigating factors but she should also have a reduced sentence.

Id. at 636 ll. 18-23, 637 ll. 9-13.

255. *Id.* at 637 ll. 23-24.

have speculated that Plavšić "fooled" the ICTY with her "false repentance."[256] While this may be true, the trial transcript does not support such an interpretation. Indeed, there were many instances where the *Plavšić* Chamber was invited to consider Plavšić's actual beliefs and motivations beyond Plavšić's lukewarm statement of remorse (which referenced Serb victims as often as Muslim and Croat victims) and which, as noted above, in its very form reiterated the kinds of nationalist rationalizations that underwrote Bosnian brutality (largely, the "people" as a collective body capable of honorable actions, and being shamed). Rather it seems more likely that the Chamber decided to accept the Defense's injunction "to consider the positive effects of [Plavšić's] guilty plea as the only political leader willing to step forward and act responsibly for wrongs committed during the war."[257] The more pressing question then concerns Babić: why couldn't, or wouldn't, the *Babić* Chamber, after receiving the narrative of a one-time political leader stepping forward and actually claiming responsibility, accept the narrative of liberal rehabilitation when it was presented?

In the *Babić* process, both the OTP and the Defense presented Babić's story as that of a rehabilitated nationalist. In calling the witness Kovačević to testify regarding the political environment of fear and propaganda under which Serbs in Croatia lived and the ways in which this made all information suspect for them, the parties were iterating that Babić:

> Only became radicalised through moves of the political leaderships both in Belgrade and Zagreb and a large-scale and sophisticated Serbian media campaign to revive peoples' old fears and insecurities, leading to separation of communities along ethnic lines and resulting in violence of the dominant ethnic group against the others.[258]

Over two days of testimony, the witness, Kovačević—who was himself a former politician from Krajina, although he had worked in a multiethnic party—tried to provide detailed information regarding the political and cultural climate of fear and intimidation that prevailed in Krajina during the time Babić served in office.[259] He recounted details of Babić's personal experiences of violence, including the murder of Babić's father-in-law by Croatian soldiers, who set fire to houses in the village of Vrlika in 1991 (Babić's house was burned down, and his own mother narrowly escaped);[260] he described an attempt on Babić's life by troops loyal to ethnic Serb interests. This considered and articulate testimony did not reach the bench, however.

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256. Mark B. Harmon and Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUST. 683, 704 (2007); Julian A. Cook III, *Plea Bargaining at The Hague*, 30 YALE J. INT'L L. 473, 483 (2005);*see also* Drakulic, *surpa* note 126.

257. Plavšić Dec. 16 Sentencing Hearing Transcript, *supra* note 176, at 380 ll.8-10.

258. Babić Sentencing Judgment, *supra* note 13, ¶ 90. This is significant because it is quoting the Prosecution's Sentencing Brief ¶ 57 (arguing that Babić's prior character should be a mitigating factor in judgment).

259. Prosecutor v. Babić, Case No. IT-03-72, Sentencing Hearing, at 130-58 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 1, 2004), http://www.icty.org/x/cases/babic/trans/en/040401SE.htm [hereinafter Babić Apr. 1 Sentencing Hearing Transcript].

260. *Id.* at 144.

One particular example of a determined witness and a deaf chamber is illustrative: in 1992, after Babić had broken with Milošević, he was attacked in his home by Krajina police while meeting with SDS party members, and was badly beaten and hospitalized as a result.[261] Kovačević testified that the pro- Milošević attackers "shouted insults at [Babić]," and made specific mention of one particular insult, a word which was initially translated as "prefect."[262] Distracted by Kovačević's "hearsay"[263] testimony, Judge Orie shut down this line of questioning as "really entering the realm of speculation."[264] What was nearly lost in the fracas was the actual meaning of the insult shouted at Babić. The word in question was originally translated as "prefect," which an overwhelmed translator later replaced with the original Bosnian/Croatian/Serbian word, "župan," and which was finally paraphrased by Defense counsel, in an aside, as "traitor."[265] It was only the following day, when Kovačević was invited by the bench to revisit the term, that he was permitted to explain its significance.[266] "Župan" refers to the head of an administrative territory in Croatia.[267] Thus this insult, when directed at Babić, implied that Babić was a stooge, a Croatian stand-in, and a traitor to the Serbian cause. Kovačević went on to testify that this term was used in pamphlets distributed criticizing Babić, and that Kovačević had personally heard it used, both during negotiations between political factions, as well as, incidentally, by Biljana Plavšić in public addresses.[268]

Throughout his testimony, Kovačević tried to give accounts regarding which officials (and from which entities) were present at which meetings, to show the complexity of loyalties, and to give voice to the overwhelming atmosphere of fear and uncertainty during the period.[269] Yet Kovačević, whose account reads as reasoned and articulate, failed to reach his audience as a witness: he was repeatedly interrupted, scolded, redirected, told to go faster or roughly instructed only to answer the immediate question either by counsel or by the presiding judge.[270] At one point, Defense counsel began "cross-examining" him like a hostile witness

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261. *Id.* at 149–50; *see also* SILBER & LITTLE, *supra* note 153.

262. Babić Apr. 1 Sentencing Hearing Transcript, *supra* note 259, at 150.

263. Kovačević was testifying to exchanges he had not personally witnessed, which are inadmissible as hearsay in some national jurisdictions. *See generally* FED. R. EVID. 801. However, U.S. rules of evidence do not apply at the ICTY, and hearsay is admissible, as Judge Orie noted in the very same breath: "[W]hat words were exactly used by the attackers if the witness has not been there, of course, is hearsay. I'm not saying hearsay is not admissible in the Tribunal[.]" *Id.* at 151 ll. 5-7 (J. Orie).

264. *Id.* at 148.

265. *Id.* at 150–52.

266. Babić Apr. 2 Sentencing Hearing Transcript, *supra* note 3, at 181–82.

267. *Id.*

> The word Zupan, [sic] under the circumstances, meant traitor, a traitor of national interest because its meaning derives from the fact that the Republic of Croatia determined its territorial organisations by establishing counties as administrative units. And a Zupan [sic] or a prefect is somebody who is the head of this administrative unit in Croatia.

Id. at 181 ll. 24-35, 172 ll, 1-4.

268. Babić Apr. 1 Sentencing Hearing Transcript, *supra* note 259, at 152–53.

269. *Id.* at 130–58.

270. *Id.* at 152.

(regarding the precision of a date he'd given) until the presiding judge asked counsel to stop.[271] Kovačević's testimony was repeatedly subjected to a rigorous evidentiary standard inappropriate to the proceedings,[272] where both witnesses were appearing for the OTP and the defense, and where facts were "stipulated," meaning they were not in contention. This also set Kovačević's testimony apart from the other witness, Dr. Lončar, who testified to "facts" outside his realm of expertise and for which, by his own admission, there was no scientific support.[273] Furthermore, there is a very stark contrast between the reception and treatment of Kovačević's testimony and testimony made by witnesses at Plavšić's sentencing hearing, where, for example, Elie Wiesel "testified" by video link, read a prepared statement, and took no questions.[274]

More significantly, in terms of the capacity of the process to perform a socially constitutive role, Kovačević's testimony spoke to the formulation and consequences of nationalist politics, and in this way followed the argument offered by transitional justice advocates in terms of 'truths' the ICTY might promote.[275] The *Babić* Chamber was evidently interested in the social implications of Babić's admission of guilt in other contexts, and the bench peppered Dr. Lončar with questions about how Babić's "individualization of guilt" might impact other Serbs who felt guilty (or whether Babić was being "scapegoated");[276] whether taking statements from victims was actually therapeutic;[277] and what factors, external or internal, might have "changed" Babić (into someone with extreme, nationalist views).[278] Yet with regard to Mr. Kovačević's testimony concerning

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271. *Id.* at 167.

272. *See, e.g.*, Judge Orie's discount of "speculation" regarding the attack on Babić:

> I mean, this witness has testified that he heard from others, including Mr. Babic, that Mr. Babic was attacked in his apartment, and I do not think that on the basis of his knowledge, unless there is a good foundation for it, we could hear any further evidence in that respect. Please proceed.

Id. at 148 ll. 14-18.

273. Dr. Lončar, who was qualified to speak to his experience treating trauma victims in Croatia, also testified to the reception of Babić's admission of guilt:

> I've talked mostly to Serbs from urban areas, but I also had contacts with Serbs who have returned to their homes. This work was done in mixed villages, mostly in Banovina area. I went to those villages. I talked to people of Serb ethnicity there. What I can say, and let me repeat once again that no official statistics was done. There was no official record-taking or research, so this is all a result of the exchanges in these interviews, but what I can say is that I have not met any Serbs who had a negative attitude towards the admission of guilt of Mr. Babic. What I also noticed among Serbs in Croatia is that there was a certain feeling of relief among them. The admission of guilt of Mr. Babic and the message that it sent was that we should focus on universal human emotions and treat it as such. This led to the fact that the Serbs do not feel a collective guilt now but, rather, this guilt has been individualised and attributed to a person.

Babić Apr. 1 Sentencing Hearing Transcript, *supra* note 259, at 112.

274. Plavšić Dec. 16 Sentencing Hearing Transcript, *supra* note 176, at 455–61.

275. *See* Akhavan, supra note 111.

276. Babić Apr. 1 Sentencing Hearing Transcript, *supra* note 259, at 116 (Judge El Mahdi).

277. *Id.* at 118 (Judge Orie requesting a reading list on the topic).

278. *Id.* at 121–25 (Judge Orie). This exchange is perhaps the most problematic, as the witness is asked to opine on what impacted Babić, even though the witness does not know Babić. Dr. Lončar

circumstantial pressures and contexts, the Trial Chamber's dismissal of this line of argument was complete: it did not reference Kovačević's testimony even once in its judgment.[279]

In closing arguments, the *Babić* defense counsel specifically invited the Tribunal to contrast Babić and Plavšić.[280] Babić's defense counsel was seemingly trying to consider the nationalist motivations, and later redemptions, of both defendants, as a way of addressing the Tribunal's larger, to some extent unofficial, reconciliation mandate. To this end, Babić's Defense reminded the Chamber to consider public statements regarding nationalist rhetoric and "the fuel [they] fed to the fire," and invited comparison with Plavšić, saying, "She said horrible, horrible things, racist things, ugly things."[281] Counsel continued, "You ask the Prosecution to provide you with the worst of what Mr. Babić said . . . So that if that is a legitimate mitigating factor . . . it should weigh more heavily in his favour, the nature of what was said."[282] Despite floundering through the legal categories, Babić's Counsel nevertheless tried to hold the substance of the comparison:

> With respect to [Plavšić's and Babić's] role, various degrees of responsibility, in paragraph 1 of the Plavsic [sic] judgment, the Court found that she embraced and supported the objective of ethnic cleansing. I guess Mr. Babic did, but not in exactly the same way and under the same circumstances. *And I don't [know] how to articulate that any better, but I think that the Tribunal ought to have a sense of that at this point.*[283]

Defense counsel's plea for the Tribunal to "have a sense" is precisely what was lost (a loss that is clearly felt), in these judgments.

D. *Tying Plavšić and Babić to ICL's Legitimizing Discourse*

This article has argued that the *Plavšić* and *Babić* cases are meaningfully divergent and cannot be reconciled, particularly as regards the role the ICTY is meant to play in social reconstruction, and the significance of defendant cooperation with respect to that role. Does the article get it right? There are many distinctions between the *Plavšić* and *Babić* cases, any of which undoubtedly influenced the Chambers' deliberations and judgments. Biljana Plavšić came first in time and was a *bona fide* public figure whose plea represented a change of heart (as regards fighting the charges) after nearly two years of defying the Tribunal; Milan Babić was an unemployed refugee in Serbia who prostrated himself before the Tribunal before even being indicted. The *Plavšić* Sentencing Hearing was an international event, attended by some of the top names and key players in the

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nevertheless, albeit cautiously, opined that propaganda turned Babić into an extremist.

279. The only reference the Judgment makes to Kovačević is descriptive, noting he testified "about Babić's personality and positions at the time of the commission of the crimes." Babić Sentencing Judgment, *supra* note 13, ¶ 13 n.15.

280. Babić Apr. 2 Sentencing Hearing Transcript, *supra* note 3, at 192

281. *Id.* at 242 ll. 13-14.

282. *Id.* at 242 ll. 14-19.

283. *Id.* at 242 ll. 3-8 (emphasis added).

rarified world of transitional justice and public diplomacy,[284] and this would have added glamour and historical import to the proceedings; Babić's sentencing hearing featured only two witnesses, both private individuals from the former Yugoslavia decidedly devoid of glitz. Defense counsel, and even the bench, in the *Plavšić* hearing appeared more organized, thoughtful, and attentive than their counterparts in the *Babić* Chamber.[285] In the *Babić* process, Babić's strongest proponent at all times was the prosecutor, whose strongest loyalty, in turn, was to Tribunal doctrine.

Realists like Jeremy Rabkin[286] might argue that the *Plavšić* and *Babić* cases prove nothing further than the political impetus fueling ICL: Plavšić was useful to the international community as a model, Babić was not, and there is little more explanation required. Under this account, one might also note that the ICTY needed to justify itself and its practice in relation to Plavšić precisely *because* she was an infamous public figure and much was at stake. Yet if ICL (and law generally) should be read as politics (i.e. interest) by another name, this does not answer the query as to why the rationales offered through the two judgments are so divergent. Why the distinctions in terms of their criminal charges (intent), and the varied applications of aggravating and mitigating circumstances? Law's legitimacy derives from its distinction from politics: why risk muting that distinction through a muted doctrinal consideration? Realist explanations cannot adequately respond to diverging rationales, offered by careful and invested doctrinal professionals, in the *Plavšić* and *Babić* cases.

In another vein, in a recent article, Saira Mohamed tries to marry the conflicting rationales of ICL through a theory she terms "aspirational expressivism."[287] Mohamed argues that because international criminal tribunals are sites of storytelling (the narrative value espoused by Shklar, and adopted by proponents of transitional justice), they provide ideal sites to set forth aspirations for human behavior, which is, she argues, what legitimizes criminal law.[288] Mohamed sets out to answer the paradox that domestic criminal law addresses deviance, but that international criminal law often adjudicates acts that are not deviant, because they represent a new social norm, or because they are represent responses that any normal person would have if subjected to the same

284. Plavšić Dec. 17 Sentencing Hearing Transcript, *supra* note 1 (including Elie Wiesel, Madeleine Albright, Richard Goldstone).

285. For example, Plavšić's counsel seems to have succeeded, in his opening and closing addresses, in constructing the intellectual approach the bench followed in its sentencing judgment. One of Babić's lawyers, by contrast, made his closing statement extemporaneously: "Your Honour, I have not written a speech. I'm more used to working from notes and speaking rather extemporaneously, so that I cannot tell you [how long the intervention will be]. I have not timed it." *Id.* at 189 ll. 2-4. This rambling, disjointed intervention addressed the question of "how crimes against humanity can occur," *Id.* at 234, and likely damaged Babić's case by attempting to compare him to the "sham" of remorse offered by Biljana Plavšić. *Id.* at 241–44.

286. Jeremy Rabkin, *No Substitute for Sovereignty: Why International Criminal Justice has a Bleak Future - and Deserves It*, *in* ATROCITIES AND INTERNATIONAL ACCOUNTABILITY: BEYOND TRANSNATIONAL JUSTICE (William A. Schabas et al. eds., 2007).

287. Saira Mohamed, *Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal*, 124 YALE L. J. 1628, 1674–76 (2015).

288. *Id.* at 1633.

circumstances.[289] Thus for Mohamed, the diverging rationales offered in the *Plavšić* and *Babić* are not irreconcilable, but rather meet as criminal justice processes are put in service to didactic aims (her 'aspirational expressionism').

As with realist explanations, however, Mohamed's theory fits *Plavšić,* but cannot explain *Babić.* Babić seems to have made the journey ICL aspires to express: from nationalist mouthpiece to remorseful humanitarian, Babić's trajectory is an example of the very truths that transitional justice theory advocates as advantageous and essential. Where Plavšić's story tells none of the abstract truths 'judicial romanticism' presages for international criminal tribunals,[290] Babić's story illustrates many of them.

Proponents of international criminal tribunals as transitional justice mechanisms argue that trying individual criminal cases can have wide social benefits.[291] Such benefits arguably extend to teaching respect for the rule of law, reconstructing divided societies, and enabling peace. Although this school is contemporaneously referred to as "judicial romanticism" it has deep theoretical roots reaching at least as far back as the work of Hart, Raz, and Dworkin, all of whom advocated law's capacity to articulate, and construct, social and moral norms.[292] Moreover, given the steep price tag that international criminal tribunals carry, and their fragile existence outside the power structure of any particular state, there is pressure to justify such tribunals' efficacy in sweeping terms. Here we find the *Plavšić* case, where Biljana Plavšić is a vehicle for demonstrating western liberalisms triumph over nationalism, a didactic "preaching" in the tradition of Shklar's argument for the value of political trials.

Other defenders of ICL, however, insist that ICL cannot and should not be assessed outside of its own careful application and articulation of recognized legal norms.[293] This positivist school assesses ICL jurisprudence in terms of its own substance, and rejects any wider social measurement to evaluate ICL legitimacy.[294] Here morality is protected through consistent, constant application of norms. Here we find Babić, a vehicle for punishment through a strict criminal justice formulation to his process.

V. CONCLUSION: SOUNDING A WARNING THROUGH *PLAVŠIĆ* AND *BABIĆ*

This article has argued that distinctions in judicial reasoning and outcome in the *Plavšić* and *Babić* cases illustrate diverging, and conflicting, rationales for the legitimacy of international criminal law. But we might query, do these differences matter? If two Balkan leaders were incongruously handled, or sentenced, what impact does that ultimately have on the practice of ICL? The ICTY is universally

289. *Id. See also* Drumbl, *supra* note 72; Alette Smeulers, *Punishing the Enemies of All Mankind,* 21 LEIDEN J. INT'L L. 971, 973–74, 976–81 (2008); Immi Tallgren, *The Sensibility and Sense of International Criminal Law,* 13 EUR. J. INT'L L. 561, 573–75 (2002).

290. *See* Akhavan, supra note 111.

291. *See, e.g.,* Cassese 1998, *supra* note 28, at 9–10.

292. HLA HART, THE CONCEPT OF LAW (1961) JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY [1979] 2009; RONALD DWORKIN LAW'S EMPIRE 1988.

293. *See* Megret

294. *See* Fuller, *supra* note 57; HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1964).

unpopular among its Balkan audiences, and there is no data that indicates that Babić's heartfelt plea for tolerance in the face of nationalism mattered one whit more, or less, than Plavšić's lukewarm endorsement of Western liberal policies. The process of plea bargaining itself would appear to be confusing and foreign to a Balkan audience, which audience already overwhelmingly ignores material produced by the ICTY, gleaning its information regarding war crimes prosecutions largely from local media.[295] What import, then, a close reading of the two cases? There are few social spaces where words are asked to "do" more than at law.[296] Thus although one can formulate distinctions between the Plavšić and Babić cases in political or circumstantial terms (the vastly different political fortunes of the two defendants; the benefits Plavšić enjoyed by 'coming first'; the influx of guilty pleas just before Babić; the make-up of the two trial chambers), this article takes as its focus the language employed in resolving the two cases. It is this article's contention that the language of the judgments, when considered in conjunction with the language and arguments offered during the sentencing hearings, opens a space to consider how ICL's articulations regarding the centrality of intention impacts international criminal tribunals' socially constitutive capacity. Thus this article takes as its starting point that the actual, precise discourse emerging from the ICTY, in this case hearing transcripts and judgments, is representative of institutional deliberation, and meaningful.

More centrally, the article has closely contrasted two similar cases to demonstrate a generalizable divergence in ICL. ICL is simultaneously legitimized as absolute protection for non-derrogable rights and as a means of social control via criminal justice. This article argues that *Plavšić* and *Babić* demonstrate unresolved challenges to the legitimacy of ICL which, if left unaddressed, threaten the enterprise more fundamentally. Can the legitimacy of a court be separated from its objective findings? Can a non-respected court produce meaningful narratives? ICL remains susceptible to the challenge identified by Koskenniemi in his now classic article,[297] where he notes the thin line between punishing violations of law, versus punishing what can come to be seen, retroactively, as bad political decisions. Proponents of liberalism hold rule of law as a method or a process for producing rights-respecting state institutions. In the divergences between the *Plavšić* and *Babić* Judgments, we see the juxtaposition of rule-of-law processes with rule-of-law outcomes. Only the first is a meaningful category capable of delivering on law's socially constitutive potential.

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295. *See, e.g.*, OSCE, SURVEY ON MEDIA, MEDIA FREEDOMS AND DEMOCRACY IN MONTENEGRO (2011).

296 J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1955).

297. Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. U.N. L. 1 (2002) (critiquing criminalization of what might also be called political mistakes wherein victors imposing a dominant narrative).

Denver Journal
of International Law and Policy

VOLUME 44 NUMBER 3 SPRING-2016

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