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## Defense Perspectives on Law and Politics in International Criminal Trials

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# Defense Perspectives on Law and Politics in International Criminal Trials

JENIA IONTCHEVA TURNER\*

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## INTRODUCTION

As international criminal trials continue to attract the world's attention, a fundamental question persists about their purposes. Are the goals of international criminal trials primarily legal, similar to the objectives of domestic criminal trials, or are they primarily political, designed for purposes such as helping communities heal and compiling an accurate record of the past? Court opinions and scholarly commentaries acknowledge both the legal and political purposes of international criminal trials, but do not typically prioritize between them. These fundamental questions arise in each successive international criminal trial.

This Article examines the purpose of international criminal trials through the perspective of an often overlooked, but important, participant: the defense attorney. Through personal interviews and question-

nairés, press reports, scholarly articles, and case law, I examine defense attorneys' motivations, concerns, and strategies in representing those accused of war crimes. I focus on what the attorneys perceive to be the primary purposes of the trials. Do defense attorneys believe that these trials serve primarily adjudicative purposes, such as determining guilt and apportioning blame, or do they think that international trials are primarily political proceedings—largely staged events designed to accomplish a political purpose? The perceptions and actions of defense counsel are important not only because they may offer additional insight into the purposes of international criminal trials, but also because, as major participants, defense counsel themselves influence the nature of the proceedings.

A perception exists, perhaps fueled by the politicized nature of the recent high-profile trials of Saddam Hussein and Slobodan Milošević, that international criminal trials are essentially political events cloaked as judicial proceedings.<sup>1</sup> Yet these two trials do not appear to represent accurately the majority of international criminal trials today, as perceived by defense attorneys. The survey conducted here finds that, in the great majority of recent or ongoing trials at international criminal tribunals, defense attorneys believe that the trials serve primarily adjudicative purposes—separating the innocent from the guilty, following fair procedures, and apportioning just punishment to those who are convicted.<sup>2</sup> In other words, international trials today serve purposes very similar to those that exist in ordinary domestic proceedings. The attorneys generally believe that a good number of their clients are factually or legally innocent, that trial outcomes are not predetermined, and that acquittals are possible. The survey did reveal a minority of defense attorneys who expressed a view that international criminal trials are heavily political. The percentage of attorneys that held such views was higher among ICTR than ICTY attorneys. But among practitioners at both tribunals, this was a minority view.

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1. Although Saddam Hussein's trial occurred in a domestic court, its international visibility and its reliance on international law may have influenced public perceptions of international criminal trials.

2. As discussed further in Part II, my definition of political trials draws on Judith Shklar's discussion of the differences between "legalist" and political trials. See JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 149–151, 168–70 (1964). For related discussion on the difference between legal and political trials, see, for example, OTTO KIRCHHEIMER, *POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS* 46, 49 (1961); Jeremy Peterson, Note, *Unpacking Show Trials: Situating the Trial of Saddam Hussein*, 48 HARV. INT'L L.J. 257, 260–79 (2007); Eric A. Posner, *Political Trials in Domestic and International Law*, 55 DUKE L.J. 75, 76, 82 (2005).

The survey further revealed that the attorneys themselves are not inclined to seek to politicize the proceedings. They generally respect the legal authority of the court and do not tend to treat the trial as a political event, even if that is what their client wishes. Contrary to some public perceptions, most international criminal defense attorneys are not likely to levy political arguments against the court. The tactics used by several defendants in the media spotlight—Milošević and Hussein and their defense teams, for example—are the exception, rather than the rule, in international criminal trials.

Several reasons help explain why defense attorneys may see international trials today as genuinely contested on the facts and the law and not as show trials. The first is the expanding and at times uncertain scope of international criminal law itself. The second is the persistent difficulty that the prosecution has in gathering and interpreting evidence for international trials. The third is the adversarial nature of the proceedings and the broad respect for defense rights at the existing international tribunals. Defense lawyers respond to these realities and conduct themselves accordingly. These factors may also help explain why acquittal rates at international criminal trials so far tend to be somewhat higher than acquittal rates in domestic proceedings.<sup>3</sup>

International criminal trials today are adjudicative and nonpolitical in another sense as well. At least at the International Criminal Tribunals for the former Yugoslavia and for Rwanda (ICTY and ICTR), ongoing trials are not particularly devoted to goals of reconciliation, healing, or providing a historical record. Instead, the interviews show that these trials are devoted to the narrower, more ordinary goals of punishing the guilty, acquitting the innocent, and doing so efficiently. As the Article will suggest, the recent drive of the ICTY and ICTR toward completion of their proceedings has pushed the proceedings further away from some of their original political purposes and toward the adjudicative model.

This Article examines the purposes of trial proceedings. It does not dwell on the politics surrounding the establishment of the tribunals, the definition of the tribunals' jurisdiction, and prosecutorial charging decisions. The UN Security Council, a fundamentally political body, created the Yugoslavia and Rwanda tribunals for purposes that most would describe as political in nature: to reestablish peace and reconciliation in these regions, and, some have argued, to atone for the international

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3. For a discussion of acquittal rates, see *infra* notes 259–265 and accompanying text.

community's failure to intervene in the conflicts.<sup>4</sup> The jurisdiction of these tribunals was also much contested and was ultimately the result of a political compromise.<sup>5</sup> Similarly, some commentators have observed that prosecutorial charging decisions were to some degree influenced by the political reality of the tribunals' dependence on states for enforcement.<sup>6</sup> But while politics may have dominated some of these preliminary decisions, according to most defense attorneys, its influence was not lasting, and it plays a subsidiary role at trials today.

Finally, the Article focuses on the purposes of the international criminal trial and not directly on the purposes of international criminal law more generally. There is a distinction. One can believe that war crimes and other crimes against humanity must be punished—for reasons of deterrence and retribution, among others—without taking a position as to precisely how this is to be accomplished in every situation. The debate about how to handle the Nazi leadership after World War II is a good example. Many believed that cursory, non-public court-martial proceedings, followed by execution of those judged responsible, was the proper course. Others argued for more comprehensive trials. The latter view ultimately prevailed and resulted in the Nuremberg trials. This decision had many consequences, including acquittal of three of the defendants. But the question remains to what degree trials were conducted primarily with the aim of determining the possible innocence of some defendants, as opposed to being conducted for larger political purposes, such as providing a historical record of the horrors of the Nazi regime, bringing a sense of closure to the era, and establishing a precedent for the future rule of law in Germany. International criminal trials today confront the same questions.

## I. PURPOSES OF INTERNATIONAL CRIMINAL TRIALS

One of the fundamental questions about international criminal trials is whether they serve primarily legal or political purposes. To understand the distinction, it is useful to imagine that there were such things

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4. *E.g.*, PIERRE HAZAN, *JUSTICE IN A TIME OF WAR: THE TRUE STORY BEHIND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 40–42 (James Thomas Snyder, trans., Texas A&M Univ. Press 2004) (2000); RACHEL KERR, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS, AND DIPLOMACY* 1–2 (2004); GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 283 (2000).

5. KERR, *supra* note 4, at 90–91.

6. *Id.* at 179; KINGSLEY CHIEDU MOGHALU, *GLOBAL JUSTICE: THE POLITICS OF WAR CRIMES TRIALS* 61 (2006).

as purely “legal” trials and purely “political” trials, and to examine the characteristics of each. The purposes of the purely legal trial would be limited to the determination of guilt and the assessment of blame through fair procedures. In the purely legal trial, the political consequences of that determination are irrelevant. The purely political trial, on the other hand, is concerned above all with consequences. A political trial may be a show trial, which simply provides the appearance of a legal proceeding before inevitable conviction, and which typically serves the purpose of silencing political enemies.<sup>7</sup> Or it may serve more liberal purposes, such as showing a society’s break with a totalitarian past, compiling an accurate historical record of atrocities and victims’ suffering, or providing a form of catharsis for victimized individuals and communities.<sup>8</sup> Most international criminal trials serve both political and legal purposes, but the real question is which purpose takes priority when a tension between the two emerges. Before turning to that question, it is helpful to examine the two types of purposes in greater detail.

#### A. *The Legal Model of International Criminal Trials*

Those who emphasize the legal aspect of trials argue that the main function of trials is to determine individual culpability and to assess appropriate punishment through a fair process.<sup>9</sup> In this view, justice demands that the trial focus on the evidence bearing on the accused’s guilt or innocence of the crime charged. Questions not directly relevant to these issues, such as the establishment of a thorough historical record, or full public reckoning with the actions of a previous regime, are to be left in the background.<sup>10</sup>

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7. In a recent article, Jeremy Peterson defines “show trials” (which he views as a subset of political trials) in the following way:

[A] show trial can be defined by the presence of two elements. The first element is increased probability of the defendant’s conviction resulting from the planning and control of the trial. The second element is a focus on the audience outside of the courtroom rather than on the accused—the extent to which the trial is designed or managed for the benefit of external observers rather than for securing justice for the defendant.

Peterson, *supra* note 2, at 260.

8. Cf. MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* 65–72 (1997) (discussing the use of show trials to break with the legacy of an abusive government and to allow victims to mourn); SHKLAR, *supra* note 2, at 158, 168–70 (discussing the importance of using international criminal trials to compile an accurate historical record).

9. See, e.g., Steven Kay & Bert Swart, *The Role of the Defence*, in 2 *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1421, 1421–22 (Cassese et al. eds., 2002).

10. See HANNAH ARENDT, *EICHMANN IN JERUSALEM* 5 (Penguin Books 1994) (1963).

Determining individual guilt and apportioning due punishment are the typical functions that trials serve in a domestic system of criminal procedure. Modern understandings demand fair procedures to ensure that retribution remains separate from private vengeance and that punishment is determined by law, not by private passions.<sup>11</sup> The person accused of crimes is tried and punished not simply on behalf of victims, but on behalf of the community whose laws he is alleged to have breached: “[I]t is the general public order that has been thrown out of gear and must be restored, as it were.”<sup>12</sup> Criminal punishment as a whole serves additional goals—including deterrence, incapacitation, and rehabilitation. But these other purposes of criminal justice are not, strictly speaking, the focus of the criminal trial. They are only incidentally served by trials focused on individual culpability and fair procedures. For example, deterrence might be greater if we followed principles of mass culpability and punished a whole community for the crimes of one of its members. But such actions would be contrary to the adjudicative principles embodied in the criminal trial: protection of the innocent and conviction and just punishment of the guilty.<sup>13</sup>

Some believe that the adjudicative model is as applicable to international criminal trials as it is to domestic proceedings. Even the Nuremberg proceedings were expected to comply with notions of fairness and individual criminal responsibility. President Truman, for instance, “was very anxious that the four powers should co-operate in this new and complex undertaking, and that the world should be impressed by the fairness of the trial. These German murderers must be punished, but only upon proof of individual guilt at a trial.”<sup>14</sup>

Yet to others, a focus on individual culpability and fair procedures may seem too narrow, especially in the context of international criminal law.<sup>15</sup> The legalist conception of trials emphasizes the importance of applying rules equally to all and of treating every defendant in proportion to his blameworthiness. But it does not address the larger goals that

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11. See ERNEST VAN DEN HAAG, *PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION* 10–11 (1975); Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT’L L. 801, 830–31 (2006).

12. ARENDT, *supra* note 10, at 261.

13. Of course, a large body of legal thought addresses the balance to be struck between ensuring conviction of the guilty and acquittal of the innocent. An example is the familiar maxim, “Better that ten guilty persons escape, than that one innocent suffer.” 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*353.

14. FRANCIS BIDDLE, *IN BRIEF AUTHORITY* 372 (1962).

15. See SHKLAR, *supra* note 2, at 112.



many see in the international criminal trials. For that reason, many find that a narrow focus on the legal purposes of trials is inappropriate in international criminal law.

### *B. The Political Model of International Criminal Trials*

Under the political view of international criminal trials, the process of a trial would be important even if it could be known with certainty, in advance, that the defendant is guilty. In cases where public information overwhelmingly establishes guilt, some have doubted the need for trials at all. After World War II, for example, Winston Churchill thought that Nazi top commanders should be given a brief court-martial proceeding and then should be executed.<sup>16</sup> Still, as the designers of the Nuremberg trial understood, trials may be important for political reasons even where guilt is not at issue. Three key political reasons to have international criminal trials include: 1) replacing private vengeance with the rule of law and thereby promoting long-term peace and stability; 2) creating a historical record as a means to educate future generations; and 3) providing a sense of closure for the injured individuals and communities.

Domestic trials also serve some of these “political” purposes, but the emphasis on them in international trials is more pronounced. These purposes have long been considered to provide a central justification for international criminal trials. International trials are, to a much greater degree, addressed to audiences outside the courtroom.<sup>17</sup>

This difference in emphasis may have consequences for procedures applied within the courtroom. Whereas a pure legalist may insist on acquittal on technical or procedural grounds, someone concerned with the political effect of trials may favor overlooking some technical issues if the trials ultimately serve the goals of peace and reconciliation or of compiling a fuller historical record.<sup>18</sup> At the extreme end of this spec-

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16. See ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* 64–65 (1983).

17. See Peterson, *supra* note 2, at 263.

18. Eric Stover describes a similar tension between what he calls the “legal purists” and “legal moralists”:

On one side are those who argue that law, in its most general sense, is a “system of rules and procedures” that should never be bent or altered to satisfy wider social or political goals. On the other side are those who believe criminal trials “must be seen not simply as a procedural device whose legitimacy is governed by rules generated within the system of legality itself, but as complex ritual which produces and suppresses narrative and clarifies and obscures history.” A pedagogic trial, [they] argue, can help people who have survived a period of traumatic history “reassess their foundational beliefs and constitutive commitments,” as well as create “transformative opportunities” for both in-

trum, however, is the show trial, in which the proceeding is a staged event, and the outcome is predetermined.

Although many political trials are not show trials, and they arguably serve commendable liberal purposes, political aims do at times clash with the goal of adjudicating individual culpability. The further a trial strays from its focus on the adjudicative function, the more likely it is to disregard the defendant's rights in pursuit of non-legal purposes.<sup>19</sup> It is therefore worth examining in greater detail what non-legal purposes an international criminal trial might pursue and what tensions between these purposes and the classic goals of adjudication might arise.

### 1. *Promoting Peace and Reconciliation*

A long-standing political theory of international criminal trials suggests they can help put an end to violence by providing a regularized, peaceful way of settling accounts.<sup>20</sup> Writing about the Nuremberg trial, Judith Shklar observed that the trial's immediate function, and one of its greatest social contributions, was that it "replaced private, uncontrolled vengeance with a measured process of fixing guilt in each case, and taking the power to punish out of the hands of those directly injured."<sup>21</sup> In its first annual report to the General Assembly and the Security Council, the International Criminal Tribunal for the Former Yugoslavia (ICTY) also embraced this rationale. The ICTY stated that its work will contribute to peace and reconciliation because "[t]he only civilised alternative to this desire for revenge is to render justice";<sup>22</sup> by contrast, "impunity

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dividuals and societies.

ERIC STOVER, *THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE* 23 (2005) (quoting LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT* 112–13 (2001) and OSIEL, *supra* note 8, at 2).

19. See Peterson, *supra* note 2, at 266.

20. Prosecutor v. Blaškić, Case No. IT-95-14-PT, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum, ¶ 154 (July 18, 1997) ("The International Tribunal was established to aid in the restoration and maintenance of peace in the former Yugoslavia. As a criminal court, its primary obligation is to provide a fair and expeditious trial and to guarantee the rights of the accused. This adjudicatory process strengthens the rule of law, a fundamental principle shared by all members of the international community. If effective, this may contribute to reconciliation, which is a precondition for lasting peace."); see also Ruti Teitel, *Bringing the Messiah Through the Law*, in *HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA* 177, 177 (Carla Hesse & Robert Post eds., 1999) (noting that the "essential mission of the ICTY is to transform the conflict in the Balkans to one of individual crimes answerable to the rule of law, and so to achieve peace and reconciliation").

21. SHKLAR, *supra* note 2, at 158.

22. The President of the International Tribunal, First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, ¶¶ 11–15, U.N.

of the guilty only would fuel the desire for vengeance in the former Yugoslavia, jeopardising the return to the 'rule of law', 'reconciliation' and the restoration of 'true peace.'"<sup>23</sup>

In another version of this argument, scholars have argued that trials advance peace and reconciliation by laying the blame on a few specific individuals and deflecting it from the larger community that might also have been complicit in some of the crimes.<sup>24</sup> As Antonio Cassese, a former judge and President of the International Criminal Tribunal for the former Yugoslavia, explains, international criminal trials "establish individual responsibility over collective assignation of guilt" and in this way counteract calls for vengeance against a whole community.<sup>25</sup> The trials show victims that the perpetrators of international crimes will be made to pay for their crimes in a court of law, and this assurance of punishment opens up the possibility for reconciliation among the remaining members of the community. Reconciliation can advance as trials establish an authoritative record of the conflict.<sup>26</sup>

The ICTY's judgment in *Prosecutor v. Nikolić* summarizes the argument that trials contribute to peace and reconciliation:

The tribunal was further to contribute to the restoration and maintenance of peace through criminal proceedings. The immediate consequence of such proceedings was the removal of those persons most responsible for the commission of crimes in the course of—and even in furtherance of—the armed conflict. Additionally, by holding individuals responsible for the crimes committed, it was hoped that a particular ethnic or religious group (or even political organisation) would not be held responsible for such crimes by members of other ethnic or religious groups, and that the guilt of the few would not be shifted to the innocent.<sup>27</sup>

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Doc. S/1994/1007, A/49/342 (Aug. 29, 1994) [hereinafter First Annual Report].

23. *Prosecutor v. Erdemović*, Case No. IT-96-22, Judgment, ¶ 58 & n.17 (Nov. 29, 1996); see also First Annual Report, *supra* note 22, ¶¶ 11–16.

24. Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1, 5–6 (1998); see also M. Cherif Bassiouni, *Introduction*, 59 LAW & CONTEMP. PROBS. 5 (1996) (asserting that "if you want peace, you must work for justice").

25. Cassese, *supra* note 24, at 6.

26. For a more skeptical view, see Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, INT'L SECURITY, Winter 2003/04, at 5.

27. *Prosecutor v. Nikolić*, Case No. IT-02-60/1-S, Judgment, ¶ 60 (Dec. 2, 2003).

A trial may therefore be fully consistent with both the legal purpose of apportioning individual guilt and the political purpose of promoting peace and reconciliation. But if peace and reconciliation become the primary purposes of trials, rather than incidental consequences, this could give rise to tensions with the legal model. Such tensions could occur, for example, where the court makes sentencing decisions based on the effect such decisions would have on peace and reconciliation and not based on the charged individuals' relative blameworthiness for international crimes.<sup>28</sup> It is at such points of tension that we can see whether trials serve primarily political or legal aims.

## 2. *Compiling an Accurate Historical Record*

Another goal of international criminal trials is to help create an accurate historical record. Justice Robert Jackson, who served as the chief prosecutor for the United States at the Nuremberg Tribunal, thought that one of the most important contributions of the trial was to establish "undeniable proofs of incredible events."<sup>29</sup> Similarly, Judith Shklar argued that the Nuremberg trial was an effective medium for educating German elites about the crimes committed by their predecessors and for preventing revisionist accounts of the past.<sup>30</sup>

The international criminal tribunals for the former Yugoslavia and for Rwanda have also been viewed as means to establishing accurate historical records of the atrocities committed during the conflicts in these countries.<sup>31</sup> The establishment of an authoritative record is seen as a

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28. An example of this tension is the plea agreement between ICTY prosecutors and Biljana Plavšić, the former co-President of the Serbian Republic of Bosnia and Herzegovina, who helped implement the Bosnian Serbs' ethnic-cleansing campaign against Bosnian Muslims and Croats. As part of the plea agreement, the prosecution withdrew genocide charges against Plavšić and argued that Plavšić's guilty plea was "an unprecedented contribution to the establishment of truth and a significant effort toward the advancement of reconciliation." On the basis of this recommendation and related evidence, the court sentenced Plavšić to only eleven years in prison. Bosnian victims of ethnic cleansing were outraged by the low sentence. Nancy Amoury Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts*, 59 VAND. L. REV. 92-93 (2006).

29. International Military Tribunal, Nov. 21, 1945, Morning Session, in 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 November 1945-1 October 1946, at 95, 99 (1947).

30. SHKLAR, *supra* note 2, at 155-56 ("[The trial was] a legalistic means of eliminating the Nazi leaders in such a way that their contemporaries, on whom the immediate future of Germany depended, might learn exactly what had occurred in recent history.").

31. *Nikolić*, Case No. IT-02-60/1-S, Judgment, ¶ 60 (noting that one of the founding goals of the ICTY was that "through public proceedings, the truth about the possible commission of war crimes, crimes against humanity and genocide was to be determined, thereby establishing an accurate, accessible historical record"); U.N. SCOR, 55th Sess., 4161st mtg. at 3, U.N. Doc.

valuable goal in its own right, but also as a means to discouraging historical revisionism,<sup>32</sup> restoring peace in the region,<sup>33</sup> and preventing future acts of aggression.<sup>34</sup> Because of the value of presenting and preserving important testimonial and documentary evidence at trial, some judges at the tribunals have been somewhat reluctant to accept guilty pleas, "which may only establish the bare factual allegations in an indictment or may be supplemented by a statement of facts and acceptance of responsibility by the accused."<sup>35</sup>

At the same time, some ICTY officials and judges have noted the limitations of trials in establishing historical truth.<sup>36</sup> Scholars have also expressed doubts about the notion of using trials to produce historical narrative.<sup>37</sup> In particular, there is a concern that the focus on producing a complete historical record may be in tension with the principle of individual culpability.<sup>38</sup> Under traditional notions of criminal law, the trial must focus on the specific charges against the defendant. Evidence of mass complicity, foreign involvement, or even the true origins of the conflict may not be relevant to these charges and may even be prejudicial.<sup>39</sup>

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S/PV.4161 (June 20, 2000) (statement of Judge Claude Jorda); Interview with Judge Richard Goldstone, Chief Prosecutor for the ICTY and the ICTR (Dec. 13, 1995), in 5 *TRANSNAT'L L. & CONTEMP. PROBS.* 373, 377-78 (1995).

32. U.N. SCOR, 55th Sess., 4161st mtg. at 3, U.N. Doc. S/PV.4161 (June 20, 2000) (statement of Judge Claude Jorda).

33. *Nikolić*, Case No. IT-02-60/1-S, Judgment, ¶ 60.

34. *Id.*

35. *Id.* ¶ 61.

36. *Id.* ¶ 60; U.N. SCOR, 54th Sess., 4063d mtg. at 4, U.N. Doc. S/PV.4063 (Nov. 10, 1999) (statement of ICTY and ICTR Prosecutor Carla Del Ponte) ("[O]ur task is not to prepare a complete list of war casualties. Our primary task is to gather evidence relevant to criminal charges."); Gabrielle Kirk McDonald, *The Eleventh Annual Waldemar A. Solf Lecture: The Changing Nature of the Laws of War*, 156 *MIL. L. REV.* 30, 44 (1998) (observing that trial records may not reflect the role of foreign actors), cited in *Developments in the Law - The Promises of International Prosecution*, 114 *HARV. L. REV.* 1957, 1973 n.101 (2001) [hereinafter *The Promises of International Prosecution*].

37. Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 *U. PA. L. REV.* 463, 524 (1995) ("[J]udges—when faithful to liberal law and professional ethics—may make poor historians...."); see also Leila Sadat Wexler, *Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France*, 20 *L. & SOC. INQUIRY* 191, 215-18 (1995) (discussing the difficulty of using the Touvier trial as a means of establishing a historical record of Nazi crimes in France).

38. 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, 95 (2005).

39. *The Promises of International Prosecution*, *supra* note 36, at 1973 (noting this tension and citing a number of sources who have acknowledged it); Osiel, *supra* note 37, at 560-63 (pointing out the constraining effects of temporal jurisdiction); McDonald, *supra* note 36, at 44

When the prosecution introduces evidence to establish other historical facts, beyond those that prove the charges against the defendant, “the temptation is great to hold any given defendant responsible for as wide a swath of destruction as possible.”<sup>40</sup> The prosecution’s attempt to build a historical record may also delay trials and present the defense with an overwhelming amount of documents to review.<sup>41</sup>

This tension between broad contextual evidence and a focus on the defendant has marked war crimes proceedings since Nuremberg. At Nuremberg, prosecutors introduced into evidence a documentary film called *Nazi Concentration Camps*, which graphically illustrated the results of the horrifying crimes with which the defendants were charged.<sup>42</sup> The film stirred the judges and the audience in the courtroom and hardened feelings against the defendants.<sup>43</sup> Telford Taylor, a member of the prosecution team, noted that “it contributed little to the determination of the individual guilt.”<sup>44</sup> Yet it undoubtedly helped create a fuller record of the unspeakable atrocities committed by the Nazis.

Similarly, at the trial of Adolf Eichmann for crimes against humanity, the prosecutor introduced a great deal of testimony that was not addressed to Eichmann’s individual culpability. The reason for this was that the Israeli government and the prosecutor himself aimed to use the legal proceedings to establish a record of the Nazi atrocities for the world to see and to provide a public venue for survivors to tell their stories. Hannah Arendt was one of the outspoken critics of this strategy. She commented that the prosecutor “went as far as to put witness after witness on the stand who testified to things that, while gruesome and true enough, had no or only the slightest connection with the deeds of the accused.”<sup>45</sup> Tensions of this kind continue to arise in today’s international criminal trials.<sup>46</sup>

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(observing that trial records may not reflect the role of foreign actors).

40. Danner & Martinez, *supra* note 38, at 95.

41. See, e.g., Telephone Interview # 4, Defense Attorney, ICTY and ICTR (Aug. 8, 2006).

42. STOVER, *supra* note 18, at 20 (citing LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT* 23–64 (2001)).

43. *Id.*

44. *Id.* (citing TELFORD TAYLOR, *ANATOMY OF THE NUREMBERG TRIALS* 187 (1992)).

45. ARENDT, *supra* note 10, at 18. Arendt added that, by doing so, the prosecutor turned the proceedings into a show trial. *Id.* at 6, 9.

46. For a debate on this question among commentators, see, for example, OSIEL, *supra* note 8, at 59–78; STOVER, *supra* note 18, at 10, 127; Marie-Bénédicte Dembour & Emily Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 EUR. J. INT’L L. 151, 151–52 (2004).

### 3. *Providing Closure for Victims*

International criminal trials are also said to serve survivors of the crimes by helping them and their communities achieve a sense of closure. One author has called these trials "an enormous national psychodrama, psychotherapy on a nationwide scale."<sup>47</sup> Trials serve this function by providing a forum for victims to tell their stories and to have the wrongs done to them formally acknowledged.<sup>48</sup> Although some commentators doubt the cathartic effects of trials and suggest that some victims may be re-traumatized as a result of their testimony,<sup>49</sup> international tribunals accept the notion that trials can serve victims' need for healing and closure. As the ICTY reported in 1997, "[W]itnesses who have come to The Hague have commented afterwards that the opportunity to testify before a duly constituted court has brought them great relief. Justice's cathartic effects may therefore promise hope for recovery and reconciliation...."<sup>50</sup> Both international courts and commentators have also stated that trials may serve as a "ritualized event to channel the grieving process" of the larger community, not just of individual victims.<sup>51</sup> In *Prosecutor v. Erdemović*, ICTY judges opined that international trials are valuable for allowing the "sorely afflicted to mourn those among them who had been unjustly killed."<sup>52</sup>

Yet these functions of trials may also be in tension with the legal model. For example, protective measures for witnesses may interfere to some degree with the defendant's right to confront and examine his accusers.<sup>53</sup> Similarly, allowing hundreds of witnesses to tell their full story

47. Osiel, *supra* note 37, at 471 (quoting French historian Emmanuel Le Roy Ladurie).

48. *The Promises of International Prosecution*, *supra* note 36, at 1970-71; Minna Schrag, *The Yugoslav War Crimes Tribunal: An Interim Assessment*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 15, 19 (1997).

49. E.g., Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, Paper for a Symposium on the Mental Health Needs of Crime Victims, Office for Victims of Crime and National Institute of Justice, U.S. Dep't of Justice, June 2000, at 1-2, cited in STOVER, *supra* note 18, at 81-82; cf. Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 HARV. INT'L L.J. 295 (2005) (identifying different trial dynamics, some of which help, while others injure, victims who testify).

50. The Secretary-General, Fourth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, ¶ 192, delivered to the General Assembly, U.N. Doc. A/52/375, S/1997/729 (Sept. 18, 1997).

51. *The Promises of International Prosecution*, *supra* note 36, at 1971; see also *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, ¶ 65 (Nov. 29, 1996); Osiel, *supra* note 37, at 471.

52. *Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, ¶ 65.

53. See Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 AM. J. INT'L L. 235 (1996).

may interfere with the defendant's right to a speedy trial and potentially overwhelm the defense with extraneous information.<sup>54</sup>

### C. *Relevance of the Distinction Between Politics and Law*

The "legal" and "political" conceptions of international criminal trials are ideal types. To some degree, all law is political. What I describe here as the legal or adjudicative model reflects a liberal ideology of a fair trial. Yet even if the adjudicative model itself is bound up with a particular ideological conception of criminal trials, this does not mean that the distinction between the political and the legal is irrelevant. As mentioned earlier, when trials move further along the political spectrum, defendants' rights often suffer. To the extent that we are concerned about preserving space for individual rights in the face of larger political social goals, we should be careful to distinguish between political and legal elements in criminal trials. The frequent use of show trials by oppressive regimes reminds us of this very real and relevant distinction.

Even at trials which are not exclusively political, there are instances in which political and adjudicative purposes clash, and one must be prioritized above the other. Before one can make this choice, it is important to understand first which element—the political or the legal—in fact predominates at international criminal trials today. Are we moving toward a more legalistic conception of international criminal trials, such that these trials increasingly resemble ordinary domestic proceedings? Or are international criminal trials still idiosyncratic proceedings with a disproportionately heavy political component?

## II. DEFENSE PERSPECTIVES ON THE PURPOSES OF INTERNATIONAL CRIMINAL TRIALS

One way to determine whether international criminal trials today are primarily adjudicative or primarily political is to examine the views and actions of defense attorneys. Although the academic literature has largely overlooked the experiences of the defense in international criminal trials,<sup>55</sup> defense attorneys can be an important source of information

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54. More broadly, a focus on the victims at trial has been criticized by Hannah Arendt and others as deflecting from the main purpose of the trial—judging the accused and his deeds. ARENDT, *supra* note 10, at 5, 18; MILNER S. BALL, *THE PROMISE OF AMERICAN LAW* 56 (1981), cited in OSIEL, *supra* note 8, at 65.

55. The few works that address international criminal defense focus above all on the rules governing the conduct of attorneys and not on the perspectives of attorneys themselves. See MICHAEL BOHLANDER ET AL., *DEFENSE IN INTERNATIONAL CRIMINAL PROCEEDINGS* (2006);



about the trials' purposes. For example, if these attorneys perceive their own role as actively pursuing acquittals and believe they have a chance of obtaining such acquittals, this could be evidence that trials are becoming increasingly adjudicative in nature, as opposed to being primarily political events. If defense attorneys generally pursue their factual and legal cases (as opposed to extra-legal political arguments) with great zeal, this may also indicate a strong belief in the contested nature of the proceedings.<sup>56</sup> By contrast, if defense attorneys are resigned to the conviction of their clients, and they use the trial primarily to advance an ideology or as a platform for political statements, then this might suggest that trials are, at least in the minds of these attorneys, staged above all for political purposes.

As mentioned earlier, the political and legal purposes are not always in conflict. Without question, defense attorneys believe that trials serve both purposes. But as described below, their litigation strategies as well as their interview responses suggest that they believe that the primary goal is to adjudicate guilt and innocence through fair procedures.

### A. Methodology

To study the views of defense attorneys at international criminal tribunals, I surveyed attorneys who are currently working or have worked at the ICTY, ICTR, and the Special Court for Sierra Leone (SCSL). The number of active international criminal defense attorneys at these tribunals is somewhere in the low 200s.<sup>57</sup> The study consists of responses

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Mark S. Ellis, *The Evolution of Defense Counsel Appearing Before the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 949 (2003) [hereinafter *Evolution of Defense Counsel*]; Mark S. Ellis, *Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel*, 7 DUKE J. COMP. & INT'L L. 519, 528 (1997); Kenneth S. Gallant, *The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court*, 34 INT'L LAW. 21 (2000); Judith A. McMorrow, *Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY*, 30 B.C. INT'L & COMP. L. REV. 139 (2007); David Tolbert, *The ICTY and Defense Counsel: A Troubled Relationship*, 37 NEW ENG. L. REV. 975 (2003); Developments in the Law, *Fair Trials and the Role of International Criminal Defense*, 114 HARV. L. REV. 1982 (2001) [hereinafter *Fair Trials*].

56. Cf. David Luban, *Twenty Theses on the Adversarial System*, in BEYOND THE ADVERSARIAL SYSTEM 134, 139–40 (Helen Stacy & Michael Lavarch eds., 1999) (discussing the link between zealous advocacy and adversarial proceedings). To some degree, as I discuss later, this may also be a function of previous training and professional experience.

57. There are about 110 attorneys currently handling cases at the ICTY, and about a 100 before the ICTR, though a few of the attorneys practice at both. Hirondelle News, *New Board for the ICTR Defence Attorneys' Association*, May 30, 2006, <http://www.hirondelle.org/arusha.nsf> (noting that about 100 defense attorneys are currently working at the ICTR). The ICTY numbers are based on an ICTY Chambers list of defense attorneys assigned to ongoing and closed cases, which is on file with the author. There are at most fifteen lawyers on the roster of the Special

from forty-four attorneys. Twenty-five interviews were conducted in person or by phone, and nineteen questionnaires were completed in writing.

To gather this data sample, I emailed or called attorneys practicing at the ICTY, ICTR, and SCSL, describing the goals of the project in brief, requesting the attorneys' participation in the project, and offering anonymity for their responses.<sup>58</sup> I first sent emails to all defense attorneys listed as full-time members of the Association of Defence Counsel practicing before the ICTY (ADC-ICTY). The ADC-ICTY list is representative because an attorney has to be a member of the association in order to be admitted to practice before the tribunal. At the ICTR, I contacted attorneys based on a list provided to me by the ICTR Registry.<sup>59</sup> I also used personal contacts to solicit interviews, and I relied on the interviewees themselves to refer me to other attorneys in the field. Some of these other attorneys were not listed as current members of the ADC-ICTY or were not on the ICTR Registry list, but they were part of the relevant sample because they had at some point practiced before the ICTY or ICTR.

Twenty-six of my interviewees have represented defendants at the ICTY, twenty-four have represented defendants at the ICTR, and five have represented defendants at the SCSL.<sup>60</sup> Twenty-four of the respondents are native English speakers with a common-law background (though some are French Canadians who are at least bilingual and are trained in the mixed legal system of French Canada). The remaining twenty are from a civil-law background, and ten of them are from the former Yugoslavia. Four of the ICTR respondents are from African countries, but none are from Rwanda itself. This is because no Rwandans practice as defense attorneys before the ICTR, and defendants there have to rely on counsel from foreign countries. Finally, two of the

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Court for Sierra Leone who are not also included in the ICTY or ICTR numbers. Special Court for Sierra Leone, Defence, Roster of Assigned Counsel, <http://www.sc-sl.org/defence-assignedcounsel.html>.

58. To preserve the anonymity of all those who requested it, I cite to interview or questionnaire responses by number, even for the seventeen attorneys who did not request anonymity. For brevity, I sometimes use the masculine pronoun in referring to certain attorneys' responses, but this does not necessarily mean that the respondent was male. Because of the low number of female defense attorneys at the tribunals, keeping secret the gender of the respondent is part of the effort to preserve anonymity.

59. This was necessary because there is no publicly available list of the emails of ICTR counsel, as there is of the members of the ADC-ICTY.

60. As the numbers suggest, some of the attorneys have represented defendants in more than one court.

ICTR interviewees served on the defense legal team as legal assistants, even though they had been practicing lawyers in their home jurisdictions; their responsibilities and contacts with the defendants at the tribunals were therefore different from those of the main defense counsel.

While the personal interviews formed the basis for my conclusions on defense views of international criminal trials, I also relied on interviews that the attorneys had given to other scholars and reporters and on the attorneys' own speeches and writings. To obtain a broader view of the defense role at the international tribunals, I also discussed these issues with several ICTY and ICTR prosecutors, ICTY Registry officials, and legal associates at the ICTY Chambers.<sup>61</sup> Finally, to examine whether the defense attorneys' views corresponded to their actions in court, I researched ICTY and ICTR rulings and transcripts, as well as scholarly writings, for the motions, arguments, and tactics used by defense attorneys at the international criminal tribunals.

### *B. Motivations of Defense Attorneys*

Because professional and life experiences are likely to influence the views of defense attorneys, it is important to review first how the attorneys made the choice to represent defendants charged with international crimes. If the attorneys had taken on politically controversial cases at home, for example, this may indicate that their interest in international criminal law work has a political component to it.<sup>62</sup> Similarly, the attorneys' explanation of why they took on international criminal cases can provide additional clues as to whether they are pursuing primarily political or primarily legal goals in their representation.

The interview responses suggest that the typical international criminal defense attorney is not a lawyer with a political agenda, but rather an experienced defense attorney interested in taking on a new professional challenge. Despite concerns among some commentators that defense attorneys lack adequate qualifications to perform the complex work re-

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61. I conducted two interviews with ICTY prosecutors, two with ICTY Registry officials, and had two informal conversations with ICTY Chambers legal associates. I also received one completed questionnaire from an ICTR prosecutor.

62. See Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L.J. 1321, 1356, 1360-61 (1989) (describing how Jacques Vergès, representing Klaus Barbie at his trial for crimes against humanity in France, had developed a practice of taking on politically charged cases); Lonnie T. Brown, Jr., *Representing Saddam Hussein: The Importance of Being Ramsey Clark*, 42 GA. L. REV. 47 (noting the same pattern with respect to Ramsey Clark).

quired by international criminal trials,<sup>63</sup> the interviews suggest that the average defense attorney at the ICTY and ICTR is in fact very experienced in criminal law. The majority of my respondents have practiced for at least fifteen years in their home jurisdiction, and their practice area has been predominantly criminal law.<sup>64</sup> This is not surprising in light of the qualification requirements for counsel at the tribunals. At the ICTY, counsel assigned to indigent accused must have at least seven years of relevant experience in criminal proceedings and must establish competence in criminal law, international criminal law, humanitarian law, or human rights law.<sup>65</sup> The ICTR, in turn, requires that counsel assigned to an indigent suspect or accused have at least ten years of "relevant experience."<sup>66</sup> Because over ninety percent of defendants at the ICTY and ICTR are represented by assigned counsel, these requirements apply to the vast majority of defense attorneys practicing at the international tribunals.<sup>67</sup>

On the other hand, because of the length of trials at the tribunals, stretching to several years from pretrial to appeal, defense attorneys have relatively little experience in *international* criminal law. Very few of the respondents have represented more than three defendants charged with international crimes, which is typical of international criminal defense attorneys generally.<sup>68</sup> The attorneys' ability to gather experience at the international tribunals is hampered by the tribunals' policy against representation of more than one defendant at a time.<sup>69</sup> These findings suggest that the identity of lawyers at the ICTY and ICTR is likely to be shaped a great deal more by their work as defense attorneys in their home jurisdictions than by their experience in the international criminal justice system.

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63. Tolbert, *supra* note 55, at 977.

64. Of the total forty-four respondents, fifteen had more than twenty years of experience in criminal law, and another twenty had at least sixteen years of experience practicing in a number of areas, including criminal or international law.

65. Int'l Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence*, Rule 45, U.N. Doc. IT/32/Rev.37 (2006), available at <http://www.un.org/icty/legaldoc-e/index.htm>.

66. Int'l Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence*, Rule 45, U.N. Doc. ITR/3/REV.1 (2005), available at <http://www.ictt.org>.

67. Ellis, *Evolution of Defense Counsel*, *supra* note 55, at 951 & n.14; Christian Rohde, *Legal Aid & Defence Counsel Matters*, in ARCHBOLD INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE AND EVIDENCE 543, 561 (Rodney Dixon & Karim A. A. Khan eds., 2003).

68. Rohde, *supra* note 67, at 564.

69. Directive on the Assignment of Defence Counsel, ICT/73/REV.11, as amended July 11, 2006, art. 16(G), available at <http://www.un.org/icty/legaldoc-e/index-t.html>; see also Interview # 9, ICTY Registry Official, The Hague, Netherlands (July 20, 2006).

The respondents' self-professed motivations for taking on international criminal cases rarely have anything to do with the politics of the attorney or the client. Most respondents described the primary reason for taking up such cases as professional curiosity.<sup>70</sup> They took the cases because of the intellectual challenge of practicing in a new and rapidly changing area of criminal and international law. Some added that what attracted them to the field was the possibility of influencing the development of international criminal law.<sup>71</sup> A few also saw an opportunity for advancing their legal career at home as a result of representing high-profile defendants at the international tribunals.<sup>72</sup> Finally, many were motivated by an interest in the subject-matter—whether because they had enjoyed international law classes in law school or because they had become involved in transnational legal practice later and found the work intellectually stimulating.<sup>73</sup>

None of the attorneys from Western countries saw financial remuneration as a sufficient incentive for them to take on international cases. In fact, many pointed to low pay as a discouraging factor, particularly because international work interfered with their ability to maintain an established practice at home.<sup>74</sup> By contrast, for some of the Yugoslav attorneys, the expected compensation was an independent motivation to accept cases.<sup>75</sup> This is consistent with previous observations about the incentives for lawyers from the former Yugoslavia or from Africa who choose to practice before international criminal courts.<sup>76</sup> These lawyers perceive the compensation at the tribunals more favorably than their Western colleagues because it is higher than what they can earn at home.

If money is not a driving factor for many of the attorneys, it might seem that there must be an ideological element to their decision to leave

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70. Thirty-one of the respondents identified professional interest as their primary motivation for taking on international criminal cases.

71. *E.g.*, Telephone Interview # 10, Defense Attorney, ICTY and ICTR (Oct. 11, 2006).

72. At least five respondents noted this as their primary motivation. Telephone Interview # 12, Defense Attorney, ICTY (Sept. 24, 2006); Questionnaire # 1, Defense Attorney, ICTY (Aug. 2, 2006); Questionnaire # 2, Defense Attorney, ICTY (July 21, 2006); Questionnaire # 3, Defense Attorney, ICTR (Aug. 4, 2006); Questionnaire # 10, Defense Attorney, ICTR (July 15, 2007).

73. *E.g.*, Interview # 1, Defense Attorney, ICTY, The Hague, Netherlands (July 13, 2006); Questionnaire # 1, *supra* note 72.

74. *E.g.*, Interview # 1, *supra* note 73; Questionnaire # 7, Defense Attorney, ICTR (Oct. 27, 2007).

75. Questionnaire # 1, *supra* note 72; Questionnaire # 15, Defense Attorney, ICTY (Aug. 12, 2007); Telephone Interview # 18, Defense Attorney, ICTY (Oct. 5, 2006).

76. Ellis, *Evolution of Defense Counsel*, *supra* note 55, at 954; *Fair Trials*, *supra* note 55, at 1997.

an established practice at home to represent defendants charged with international crimes. But the attorneys' responses to interview questions suggest that most lawyers are not driven by political or ideological motivations in their representation of international criminal defendants.<sup>77</sup> To the extent that attorneys admit that ideology shapes their decisions to work on international criminal cases, it is usually the same broad ideology that drives many domestic defense attorneys: a belief in the importance of fair trial<sup>78</sup> and in the right to representation for even the most unpopular defendants.<sup>79</sup>

As the next Section discusses in greater detail, another factor motivating some attorneys may be the belief in the innocence of their clients. A few attorneys pointed out that their motivation strengthened as they learned more about their clients and their cases. One attorney cited as a motive for pursuing the case that "it was nice to know that [his] client was on the right side";<sup>80</sup> another similarly suggested that "to [his] surprise, [he] found someone who was not guilty of the crimes with which he was charged."<sup>81</sup>

### C. *Belief in Acquittals and Clients' Innocence*

To test whether defense attorneys believe that international criminal trials are more political than adjudicative in nature, I inquired into the attorneys' views on the possibility of acquittals and on the innocence of their clients. If lawyers thought that these trials had a predetermined outcome and were staged for political reasons, they would be less likely to express a belief that acquittals were a realistic possibility. But in fact, the survey of defense perceptions shows that most lawyers actively pur-

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77. *But see, e.g.*, Questionnaire # 11, Defense Attorney, ICTR (July 22, 2007) ("My primary motivation was the fact that the conflicts that led to the war [in Rwanda] and crimes in the respective countries were a result of foreign interference, neocolonialism, lack of democracy, poverty and economic exploitation. Also, some of the courts like ICTR were set up by foreign powers that were complicit in the conflict and intended to be victor's courts. In that regard, I felt the need to be by the side of persons standing trial in such circumstances because in a sense I perceived the system as inherently unfair.").

78. *E.g.*, Interview # 3, Defense Attorney, ICTY and ICTR, The Hague, Netherlands (July 18, 2006); Questionnaire # 2, *supra* note 72; Questionnaire # 4, Defense Attorney, ICTY and ICTR (Aug. 12, 2006).

79. *E.g.*, Interview # 4, *supra* note 41; Questionnaire # 6, Defense Attorney, ICTY and ICTR (Aug. 22, 2006).

80. Interview # 2, Defense Attorney, SCSL (July 17, 2006).

81. Questionnaire # 3, *supra* note 72.

sue acquittals in their cases,<sup>82</sup> and, more importantly, the majority perceive that acquittals are possible in at least some of their cases.<sup>83</sup>

Only ten of my forty-four respondents believed that acquittals were not a realistic possibility for the defendants they represented. Eight of these ten attorneys further stated a belief that their clients were not guilty<sup>84</sup> and blamed the politics of the tribunals for the impossibility of acquittal. For example, two ICTY lawyers stated that acquittals were “practically impossible”<sup>85</sup> or “highly unlikely”<sup>86</sup> because of the politics in their particular, high-profile cases. Another ICTY lawyer similarly thought that acquittals are “quite tough, quite unrealistic” and added that “[a]cquittals are done on political considerations. If [the defendants] are Serbs, they might be acquitted if the tribunal decides—we’ve acquitted some Muslims and some Croats, so maybe we should acquit a Serb.”<sup>87</sup> Three attorneys who practice at the ICTR also believed that political pressure on that tribunal effectively eliminated the possibility of acquittals there.<sup>88</sup> One who practices at both the ICTY and ICTR stated that both of his clients “would be found innocent in any other court in an ordinary jurisdiction, but both tribunals are political organizations and justice is not their goal.”<sup>89</sup>

Politicized views of this kind are commonly ascribed to international criminal defense lawyers, perhaps because attorneys for high-profile de-

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82. Thirty-two interviewees stated without qualification that they actively pursued acquittals. Six stated that they pursued acquittals in only some of their cases or on only some counts. Another six stated that they did not actively pursue acquittals, and four of these elaborated that this was because their clients pleaded guilty.

83. Thirteen respondents stated that they believed acquittals were possible in all of their cases. Seventeen stated that they believed acquittals were possible in some of the cases or on some of the counts.

84. Two of them stated that their clients were “presumed innocent” or “legally innocent.” Questionnaire # 17, Defense Attorney, ICTR (Aug. 21, 2007); Telephone Interview # 22, Defense Attorney, ICTY (Oct. 11, 2006).

85. Interview # 12, *supra* note 72.

86. Telephone Interview # 15, Defense Attorney, ICTY (Oct. 2, 2006) (stating that acquittal was “possible, but highly unlikely”).

87. Telephone Interview # 21, Defense Attorney, ICTY (Oct. 9, 2006).

88. Interview # 10, *supra* note 71 (noting that because ICTR was heavily politicized, it was very difficult to get an acquittal there even where an acquittal may be possible before a jury in the United States); Telephone Interview # 26, Defense Attorney, ICTR (Oct. 30, 2006) (“These tribunals are creatures of the UN, and there is political pressure from Rwanda and from all kinds of levels. The government of Rwanda has a special representative to the court. When he sees things that he does not like, they put pressure on the tribunal.”); Telephone Interview # 28, Defense Attorney, ICTY and ICTR (Nov. 7, 2006); *see also* Questionnaire # 7, *supra* note 74 (stating that, because of politics, there are few chances of acquittal at the ICTR, but still expressing belief that acquittal is possible in one of his two cases).

89. Interview # 28, *supra* note 88.

fendants like Slobodan Milošević and Saddam Hussein have taken a more political stance towards war crimes trials.<sup>90</sup> But the survey suggests that such views are held by only a minority of defense attorneys. Most lawyers appearing before the international criminal tribunals believe that the tribunals offer a possibility of acquittal and that trial outcomes are not predetermined.

This offers an interesting point of comparison to attorneys practicing in domestic systems. In studies of U.S. defense attorneys in federal court, for example, respondents assert that they work to achieve the best possible result for their clients, but they add that their odds are not great because prosecutors “hold [all] the cards,” acquittals are exceedingly rare, and, at least in federal court, sentencing guidelines limit how much they can achieve for their clients in terms of sentencing.<sup>91</sup> When compared to ordinary domestic proceedings, international criminal trials may in fact be somewhat more contested, offering defendants a greater chance of challenging the factual allegations and legal theories put forth by the prosecution.<sup>92</sup> As Section IV.A discusses, the data on dispositions of cases at the ICTY and ICTR tend to support these perceptions of the international defense attorneys.

Many international criminal defense attorneys further believe that at least some of their clients are innocent of the crimes with which they were charged (or as two of my respondents clarified, “the prosecution cannot prove they are guilty”).<sup>93</sup> Several responded that they believed more than a quarter of their clients were innocent,<sup>94</sup> and one thought as many as four out of his five clients were innocent.<sup>95</sup> To some of them,

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90. *E.g.*, Brown, *supra* note 62, at 111–13 (making this point with respect to Ramsey Clark, one of Saddam Hussein’s attorneys). Milošević technically represented himself at trial, but he was assisted by a group of lawyers who seem to have agreed with Milošević’s tactics of politicizing the trial. *E.g.*, Interview # 28, *supra* note 88.

91. Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1210 n.38 (2005).

92. International criminal trials may be more similar to prosecutions of white-collar crime in the United States, where the evidence is more complex, the law is still developing, and lawyers are more likely to expect acquittals.

93. Fifteen expressed such belief without qualifications. Eighteen others answered yes, but only in some cases, or only on some counts, or added some other qualification. Only one respondent stated that he or she did not believe his or her clients were innocent. Ten refused to respond.

94. *E.g.*, Telephone Interview # 23, Defense Attorney, ICTY (Oct. 11, 2006) (stating his belief that 25-50% of them were innocent); Telephone Interview # 14, Defense Attorney, ICTY (Oct. 2, 2006) (stating a belief that at least 50% of his clients were not guilty); Telephone Interview # 20, Defense Attorney, ICTY & ICTR (Oct. 6, 2006) (same); Interview # 10, *supra* note 71 (stating a belief that two-thirds of his clients were innocent); Telephone Interview # 25, Defense Attorney, ICTR (Oct. 26, 2006) (same).

95. Telephone Interview # 11, Defense Attorney, ICTY (Aug. 28, 2006) (noting that he be-



this belief came unexpectedly, after they became more familiar with the facts of the case.<sup>96</sup> Others said they believed in their clients' "legal innocence." For example, several pointed out that their clients, who were charged under joint criminal enterprise (a mode of liability akin to conspiracy), were innocent because of the novelty and unacceptable breadth of that charge.<sup>97</sup> These and other similar explanations suggest that the lawyers' professed belief in their clients' innocence was genuine. In public statements and writings, other defense attorneys have reported similar belief in their clients' innocence.<sup>98</sup> Their views stand in contrast to the views of criminal defense attorneys in domestic systems.<sup>99</sup>

It should be noted that not all international criminal defense attorneys express this belief. Ten respondents refused to answer the question of guilt or innocence on the ground that it was irrelevant,<sup>100</sup> and one attorney did not believe his or her client was innocent.<sup>101</sup> As one of these respondents remarked, he proceeds with his clients at international criminal tribunals in the same fashion as he would with his clients at home: He thinks that 95% of them will be found guilty, but he still represents them because he believes in the presumption of innocence and in the importance of a fair legal process.<sup>102</sup>

These few responses aside, a great number of defense attorneys believe both that some or all of their clients are innocent and that acquittal is possible. There are at least two ways to interpret these findings. First,

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lieved four out of the five clients he represented were innocent of the crimes with which they were charged).

96. E.g., Questionnaire # 3, *supra* note 72 ("To my surprise I found someone who was not guilty of the crimes he was charged with.").

97. E.g., Questionnaire # 1, *supra* note 72; Interview # 11, *supra* note 95.

98. E.g., Anthony D'Amato, *Defending a Person Charged with Genocide*, 1 CHI. J. INT'L L. 459, 462-63 (2000) (noting that he had no intention of going to trial with his ICTY client if "there was evidence beyond a reasonable doubt that [the client] was complicitous in the commission of genocide" and concluding that the prosecution did not seem to have such evidence).

99. There is no survey directly on point, but anecdotal evidence suggests that defense attorneys in ordinary domestic cases are unlikely to believe that a significant number of their clients are innocent. See ALAN DERSHOWITZ, *THE BEST DEFENSE* xiv (Sweet & Maxwell 2003) (1982) (arguing that defense attorneys know that almost all of their clients are guilty); Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 182 (1983-84); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations To Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1248-50 (1993); Jay Sterling Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339, 380-81 (1994).

100. Interview # 1, *supra* note 73 (but also noting that he operates under a tactical assumption that 95% of his clients are guilty, as he does in his domestic cases); Interview # 2, *supra* note 80 (refusing to answer question of whether his client was innocent, but later stating that when deciding whether to take the case, "it was nice to know that my client was on the right side").

101. Telephone Interview # 16, Defense Attorney, ICTY (Oct. 3, 2006).

102. Interview # 1, *supra* note 73.

it is quite possible that many of these defense attorneys believe that their clients did something wrong—perhaps even criminal—but that the specific charges against the defendants are not substantiated or are grounded in overly expansive legal doctrine. As noted earlier, one attorney explained that he thought one of his clients was innocent “from the point of domestic law,” and several believed that the doctrine of “joint criminal enterprise” under which their clients were indicted was “too broad and ambiguous so that [a] vast number of people may be included in it.”<sup>103</sup> As I discuss later, two doctrines of liability that are now commonly used in international criminal law—command responsibility and joint criminal enterprise—have been criticized by defense attorneys and scholars alike for casting too wide a net. The prosecution’s growing use of these relatively novel doctrines may explain why so many lawyers thought that their clients were innocent of the crimes with which they were charged and that acquittals were possible. In addition, the difficulty for the prosecution of gathering evidence abroad, often from reluctant witnesses, could be another reason why many international criminal cases appear unsubstantiated to the defense attorneys. For example, a number of defense attorneys believed that the prosecution had not mustered the evidence to prove that their clients had acted with the requisite knowledge or intent.<sup>104</sup>

It may also be that some of the defense attorneys—particularly those from the former Yugoslavia—believe that the acts their clients committed were not really crimes, but simply unfortunate elements of fighting a war. Certainly some outside observers have pointed to defense attorneys using such arguments on behalf of their clients.<sup>105</sup> But if this were the case, professions of belief in the clients’ innocence might be expected to be limited to lawyers from the country involved in the war. In fact, they were not.<sup>106</sup> Of lawyers who responded to the question about the guilt or innocence of their clients, all but one of the non-Yugoslav and non-Rwandan lawyers believed that they had some clients who were not

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103. Questionnaire # 1, *supra* note 72; see also Interview # 11, *supra* note 95; Interview # 14, *supra* note 94; Questionnaire # 11, *supra* note 77.

104. E.g., Interview # 10, *supra* note 71; Interview # 21, *supra* note 87.

105. Tina Rosenberg, *Defending the Indefensible*, N.Y. TIMES, Apr. 19, 1998, § 6, at 4; Interview # 6, Prosecutor, ICTY, The Hague, Netherlands (July 19, 2006) (“Defense attorneys, particularly from the former Yugoslavia, often find it hard to distance themselves from their clients and from the events. They find it hard to be objective and to be balanced. They don’t admit that there were crimes, but [that] ‘My guy is not responsible or he is less responsible....’ Instead, their starting point is that there were no crimes, all the crimes were committed by the other side....”).

106. See, e.g., Interview # 4, *supra* note 41; Questionnaire # 3, *supra* note 72; Questionnaire # 6, *supra* note 79.

guilty.<sup>107</sup> One was not certain, but thought one or two of his clients might have been innocent; and one refused to answer the question, but later pointed out in passing that he thought his client had been “on the right side.”<sup>108</sup>

Certainly, a belief in the client’s innocence is not sufficient to prove that a trial is not political. Plenty of defense attorneys who represent defendants at show trials may believe that their clients are innocent, but that they might be convicted anyway. But in this survey, the attorneys’ belief in the possibility of acquittal suggests that most of them think that international criminal trials are essentially contested on the facts and the law and are not conducted solely or even primarily for political purposes.

#### *D. Challenging the Prosecution’s Facts*

International criminal defense attorneys generally believe it is essential to probe into the factual allegations of the prosecution, by conducting on-site investigations, reviewing closely and promptly documents disclosed by the prosecution, and conducting cross-examinations of witnesses. As Michael Karnavas, an experienced international criminal defense attorney, advises, “during the pre-trial phase, the defence lawyer should be preparing both an attack and defence: preparing to attack, discredit, and impeach every possible prosecution witness, while also identifying evidence from the disclosure material and gathering evidence in the field to be introduced through prosecution witnesses.”<sup>109</sup> The focus on a thorough inquiry into the prosecution’s case suggests that defense attorneys believe that acquittals based on weakness in the evidence are possible at international tribunals and that a primary function of the defense lawyer is to uncover such weaknesses.

##### *1. Investigating at the Scene of the Crime*

The interviews suggest that virtually all defense teams conduct investigations on the territory where the crimes were committed, and that defense attorneys usually consider this to be an essential aspect of their representation. It seems to occur in nearly all cases. Defense attorneys

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107. This number does not include those attorneys who refused to answer the question. See *supra* note 100 and accompanying text.

108. Questionnaire # 6, *supra* note 79 (selecting this as a factor that he found “most discouraging” in his initial decision to become an international criminal defense attorney).

109. Michael G. Karnavas, *Gathering Evidence in International Criminal Trials—The View of the Defence Lawyer* 26 (Apr. 7, 2006) (manuscript, on file with author).

also typically hire one or more expert witnesses in each of their cases. The ICTY and ICTR provide the defense with financial support for at least one investigator and approximately 150 hours of expert pay per case.<sup>110</sup> This greatly facilitates more in-depth investigations than one finds in ordinary domestic cases.<sup>111</sup> The interviews also suggest that some international criminal defense attorneys continue with their investigations even after exhausting the resources provided by the tribunals, which affirms their belief in the importance of an inquiry into the facts.<sup>112</sup>

In public statements, defense attorneys regularly emphasize the centrality of in-depth factual investigation. As Steven Kay, a prominent international criminal defense attorney, writes, visits to the crime scene are “necessary to familiarize the lawyer with the areas that feature in the evidence of the case, to check the accuracy of evidence relied upon by the prosecution and to search for evidence that is relevant to the defence.”<sup>113</sup> Another veteran defense attorney, John R.W.D. Jones, confirms that investigation is “an extremely important issue, for cases are won and lost on facts, and those facts, or at least the evidence relating to those facts, are uncovered in the pre-trial, investigative phase of the proceedings.”<sup>114</sup>

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110. See John E. Ackerman, *Assignment of Defence Counsel at the ICTY*, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD 167, 174 (Richard May et al. eds., 2001) (observing that defense teams typically have one legal assistant and one investigator); Sylvia de Bertodano, *What Price Defence? Resourcing the Defence at the ICTY*, 2 J. INT'L CRIM. JUST. 503, 504 (2004) (observing that the ICTY now provides, as a matter of course, for up to three legal assistants and investigators); Karnavas, *supra* note 109, at 19 n.64 (commenting that expert pay is limited to about 150 hours per case); Rohde, *supra* note 67, at 592 (noting that an individual expert's working hours, not including court testimony, will typically be limited to between five and thirty hours); *id.* at 566 (noting that defense teams have hired a wide variety of experts, most notably military and medical experts).

111. For example, data on New York City defense attorneys suggests that they hire experts or interview witnesses in roughly 20% of their cases. Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1602–03 (2005). A study of Phoenix attorneys found that only 55% of them visited the crime scene before a felony trial. David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1734–35 (1992–93).

112. Karnavas, *supra* note 109, at 22; Interview # 3, *supra* note 78; Telephone Interview # 13, Legal Assistant, Defense Team, ICTR (Sept. 26, 2006); Interview # 14, *supra* note 94.

113. Kay & Swart, *supra* note 9, at 1423–24; see also Caroline Buisman et al., *Trial and Error—How Effective Is Legal Representation in International Criminal Proceedings?*, 5 INT'L CRIM. L. REV. 1, 6 (2005) (“Routinely the cases are so complex and factually diverse that counsel is required to take the initiative and go in search of evidence that casts doubt on the prosecution's case.”).

114. John R.W.D. Jones, *The Gamekeeper-Turned-Poacher's Tale*, 2 J. INT'L CRIM. JUST. 486, 488 (2004); cf. ...*And Serious Reform*, WALL ST. J. EUR., Apr. 16, 1997, at 6 (citing Michail

In the interviews for this study, defense attorneys similarly pointed to the importance of allowing for the time and resources necessary to investigate the facts.<sup>115</sup> Consistent with a belief that factual investigation is a critical part of their work, a few defense attorneys even placed their own safety in peril in order to obtain testimony in support of their clients' factual claims.<sup>116</sup> Further, the attorneys cited two aspects of pre-trial investigation as among their most serious concerns with international criminal practice: 1) the difficulty of obtaining cooperation from governments and witnesses in gathering evidence;<sup>117</sup> and 2) the frequent failure by tribunals to reimburse attorneys for necessary investigation into the facts (which has lead a number of attorneys to spend their own money to provide an adequate defense).<sup>118</sup> Along the same lines, the interviewees expressed concern that the "Completion Strategy" of the tribunals has limited the time and resources that they have to investigate the facts and prepare a defense.<sup>119</sup>

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Wladimiroff, counsel for Duško Tadić at the ICTY); Tim Cuprisin, *Area Lawyer Defending Serbian at UN Tribunal Accuses His Client of War Crimes Against Muslims*, MILWAUKEE J. SENTINEL, Aug. 20, 1995, at B3; *Elizaphan Ntakirutimana* (Interview with Ramsey Clark), INT'L JUST. TRIB., June 22, 2004 (pointing to the importance of gathering witness testimony in Rwanda and lamenting the obstruction of evidence collection by the Rwandan government).

115. The majority of respondents thought that lack of resources interfered with either their or their colleagues' representation of clients. This was the view of nine of the attorneys who practice at the ICTR, twelve of the attorneys who practice at the ICTY, and six of the attorneys who practice at both ICTY and ICTR. By contrast, four ICTR and seven ICTY attorneys did not believe that lack of resources was a serious problem in their work.

116. Interview # 5, Legal Assistant, Defense Team, ICTR (July 12, 2006); *cf.* Questionnaire # 11, *supra* note 77 (noting that the defense makes "all sacrifices to ensure under very difficult and sometimes risky circumstances that the trials and verdicts attain a certain degree of legitimacy").

117. *See, e.g.*, Karnavas, *supra* note 109, at 20 (reporting difficulties that defense attorneys have experienced in locating witnesses to testify for the defense and in obtaining cooperation from government authorities); Questionnaire # 11, *supra* note 77 (noting that defense counsel "confronts all forms of obstacles in having access to witnesses or even granted missions to travel to locate witnesses"); *see also* Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Decision on Juvenal Kajelijeli's Motion for Protective Measures for Defense Witnesses, ¶ 3 (Apr. 3, 2001) (reporting intimidation and murder of defense witnesses); Press Release, Int'l Crim. Trib. for Rwanda, Defence in 'Military I' Trial Begins Today (Apr. 11, 2005) (reporting defense witnesses' reluctance to testify out of fear).

118. Eight ICTR attorneys, three ICTY attorneys, and two attorneys working at both tribunals mentioned instances in which they thought the Registry had refused to reimburse legitimate expenses they had incurred in the course of their work. *Cf.* Karnavas, *supra* note 109, at 22 (noting that because of inadequate funding for pretrial investigations, "defence teams before the *ad hoc* International Tribunals are invariably faced with either working for free for several months in order to be ready for trial or to stop working and go to trial unprepared"); Prosecutor v. Milutinović, Case No. IT-99-37-AR73.2, Decision on Interlocutory Appeal on Motion for Additional Funds (Nov. 13, 2003).

119. The "Completion Strategy" includes the measures the Tribunals have adopted, under pressure from the UN and other donors, to finish their work by 2010. S.C. Res. 1503, U.N. Doc.

## 2. *Reviewing Documents Disclosed by the Prosecution*

Defense attorneys also emphasized the importance of reviewing documents disclosed by the prosecution for gaps, inconsistencies, and other potentially exculpatory evidence. Some of the interviewees complained that the prosecution was reluctant to reveal exculpatory evidence<sup>120</sup> and that when such evidence was revealed, this occurred just before or during trial, leaving the defense little time to review it adequately.<sup>121</sup> One defense attorney writes that the ICTY prosecution “takes a rather disdainful attitude towards its obligation to collect evidence that may be exculpatory for the defence, even if aware of the existence of such information.”<sup>122</sup> Some attorneys noted, however, that more recently, prosecutors have fulfilled their obligation to reveal exculpatory evidence more scrupulously.<sup>123</sup>

Even when the prosecution does disclose evidence, defense attorneys protest that the prosecution reveals thousands of pages of documents at once, letting the defense sort out on its own which documents might be relevant or exculpatory.<sup>124</sup> They argue that such disclosure often occurs too close to trial, leaving them without the time and resources to investigate the facts adequately. As one attorney remarks, in such situations, “requests to the Registrar for additional funds are likely to be met with skepticism, followed by a bureaucratic memo-writing obstacles

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S/RES/1503 (Aug. 28, 2003). A number of defense attorneys are very concerned that judges have curtailed defendants’ rights in an attempt to fulfill the deadlines set by the Completion Strategy. *E.g.*, Interview # 4, *supra* note 41. The Association of Defence Counsel has raised this issue repeatedly; in its latest report, it noted that “[t]he Completion Strategy also places undue burden on the Tribunal, with a real danger of impacting on the fairness of the trials.... An example of such pressure is that cases that in the circumstances require more time for preparation and presentation are not awarded such time.” ASSOCIATION OF DEFENCE COUNSEL AT THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, 2005 ANNUAL REPORT, *available at* <http://www.adcicty.org/documents/defenceannualreport.pdf> [hereinafter 2005 ANNUAL REPORT].

120. *E.g.*, Interview # 11, *supra* note 95; Interview # 23, *supra* note 94; Interview # 28, *supra* note 88.

121. *E.g.*, Interview # 11, *supra* note 95.

122. Karnavas, *supra* note 109, at 13.

123. *E.g.*, Interview # 10, *supra* note 71.

124. Karnavas, *supra* note 109, at 13 (“Just imagine being served with hundreds or even thousands of pages of new disclosure material, in the form of witness statements or documents, right before trial, or in the middle of the trial, or just before closing argument, or even while the appeal is pending after the submissions of the briefs.... [M]ore often than not, the defence does not have the funds to react to the situation completely.”); *id.* at 14 n.44 (reporting similar responses to a questionnaire sent to defense attorneys at the ICTY and ICTR on the topic of prosecutorial disclosure); *see also* Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, ¶ 197 (Apr. 19, 2004) (ordering the ICTY Prosecutor to investigate complaints that the prosecution had failed to comply with its disclosure obligations).

course.”<sup>125</sup> Some attorneys believe that delayed disclosure is an intentional tactic by the prosecution, designed to overwhelm them and exhaust their resources.<sup>126</sup> With the recent introduction of an electronic disclosure system, this issue should diminish somewhat.<sup>127</sup> Regardless of how the disputes over prosecution disclosure are ultimately settled, the concern that defense attorneys express over this issue shows their commitment to a thorough inquiry into the prosecution’s evidence.

### 3. *Challenging Hearsay Evidence and Insisting on Cross-Examination*

Defense attorneys at the international tribunals—even if they come from civil-law countries—also stress the importance of cross-examining prosecution witnesses at trial. The typical international criminal defense attorney pictures the ideal role for himself as being “in court doing a devastating cross-examination, impeaching witness after witness with document after document, incrementally obliterating the prosecution’s case.”<sup>128</sup> In reality, defense attorneys are constrained from implementing this ideal, and this is a source of frustration for many of them.

Hearsay evidence is generally admissible at the ICTY and ICTR, as long as the out-of-court statements are relevant, probative, and reliable.<sup>129</sup> The inability to cross-examine the person who made the statements, and “whether the hearsay is first-hand or more removed,” may affect the trial chamber’s view of the probity of the evidence.<sup>130</sup> But hearsay evidence “is not inadmissible per se”; rather, it must be considered “with caution.”<sup>131</sup> As part of their “Completion Strategies,” the ICTY and ICTR have amended their rules and begun allowing written witness statements even more liberally.<sup>132</sup>

Defense attorneys see the increased use of witness statements without the opportunity for cross-examination as a major source of unfairness in current trials before the ICTY. One interviewee opined that this new ap-

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125. Karnavas, *supra* note 109, at 13.

126. *Id.* at 21–22.

127. Under this disclosure system, the prosecution places relevant disclosure material in electronic form, and the defense may search the material by keyword. *Id.* at 22 (noting the promise and the limits of the electronic disclosure system).

128. *Id.* at 1.

129. *E.g.*, Prosecutor v. Kordić, Case No. IT-95-14/2, Decision Regarding Statement of a Deceased Witness, ¶ 23 (July 21, 2000).

130. *Id.*

131. Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A, Judgment, ¶ 25 (June 8, 2000).

132. Ari S. Bassin, Note, “Dead Men Tell No Tales”: Rule 92 Bis—How the *Ad Hoc International Criminal Tribunals Unnecessarily Silence the Dead*, 81 N.Y.U. L. REV. 1766, 1777 (2006).

proach by the tribunal will leave a stain on its legacy.<sup>133</sup> Putting words into actions, attorneys have filed numerous motions challenging the admissibility of out-of-court statements.<sup>134</sup> In its publications, the Association of Defense Counsel for the International Criminal Tribunal for Former Yugoslavia (ADC-ICTY) has expressed its disagreement with the broader admissibility of written witness statements, noting that this practice prevents both defense attorneys and judges from questioning the witness making the statement and evaluating the witness's credibility.<sup>135</sup>

There is more than one explanation for why defense attorneys are so concerned about pre-trial investigation opportunities and cross-examination. For one, defense attorneys may be used to conducting extensive investigations and cross-examination at home, and they may simply be conditioned to expect the same at the international level. This is unlikely to provide a full explanation, however, since around 60% of the attorneys at the ICTY come from the former Yugoslavia, which has an inquisitorial procedural system, where defense attorneys neither conduct their own investigations, nor cross-examine witnesses. Among the remaining attorneys, many come from other civil-law countries with similar traditions.

Another possible explanation is that defense attorneys are paid more if they spend more time investigating facts and then cross-examining witnesses in court. But this is unlikely as well. The ICTY has switched to a lump-sum payment system under which the Registry decides in advance each case's category of complexity and apportions remuneration for attorneys accordingly.<sup>136</sup> How strenuously defense attorneys investigate or cross-examine afterwards is not likely to induce the Registrar to change the category of a case. Even at the ICTR, where attorneys are still paid per hour, it is unlikely that defense attorneys have a financial incentive to engage in more thorough investigations. First, much of the investigatory work is done by an investigator, not by the attorney. More importantly, there is a monthly cap on both the investigators' and the

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133. Interview # 4, *supra* note 41.

134. *E.g.*, Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 36 (Mar. 3, 2000); Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on Defence Motion on Hearsay (Aug. 5, 1996).

135. 2005 ANNUAL REPORT, *supra* note 119.

136. International Criminal Court, Report to the Assembly of States Parties on Options for Ensuring Adequate Defence Counsel for Accused Persons 6–7 (2004), available at [http://www.icc-cpi.int/library/asp/ICC-ASP-3-16-\\_defence\\_counsel\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-3-16-_defence_counsel_English.pdf) [hereinafter ICC Report].



attorneys' working hours.<sup>137</sup> Another reason to believe defense lawyers reap no financial gain from this practice is that many of the respondents complained that the Registrar refused to reimburse them for legitimate work-related expenses, and some noted that they had to spend their own money to pursue the investigation adequately.<sup>138</sup>

The most likely explanation for the concern with thorough investigations and cross-examinations, then, is that defense attorneys believe that international criminal trials are, and should be, vigorously contested on the facts. If defense attorneys thought their clients had no good factual defenses, they would probably focus their energy on other ways to gain victory—relying more heavily on procedural tactics to obtain charge dismissals, bargaining to get lower sentences for their clients, or challenging proceedings on purely legal or political grounds. The fact that attorneys continue to insist on having greater resources for investigation and more opportunity for cross-examination is at least some indication that they believe that in a good percentage of cases, there are facts they could successfully contest.

### *E. Challenging Expansive Liability Doctrines*

Defense attorneys believe that they have an important role to play in limiting overly expansive interpretations of international criminal law, especially to the extent that these interpretations conflict with the principle of individual culpability. In interviews, defense attorneys have expressed concerns about the expansive use of command responsibility<sup>139</sup> and joint criminal enterprise<sup>140</sup> by the international criminal tribunals, and, in their pleadings, they have regularly challenged the application of these doctrines to their clients.<sup>141</sup> The Association of Defense Counsel practicing before the ICTY submitted an amicus brief on the issue of joint criminal enterprise, contesting its broad use by the tribunal.<sup>142</sup>

Under the doctrine of joint criminal enterprise (JCE), an individual may be held responsible for all crimes committed pursuant to a common

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137. *Id.* at 8.

138. *See supra* notes 116–18.

139. *See, e.g.*, Rosenberg, *supra* note 105, § 6, at 4 (noting concerns about command responsibility by Anthony D'Amato, law professor and lawyer for an ICTY defendant).

140. *E.g.*, Interview # 11, *supra* note 95.

141. *See infra* notes 153–59 and accompanying text; *see also* Steven Powles, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 J. INT'L CRIM. JUST. 606, 614–15 (2004).

142. Amicus Brief of Association of Defence Counsel-ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A (July 5, 2005) [hereinafter *Brđanin Amicus Brief*] (on file with author).

plan or design that involves the commission of an international crime, if the individual participates with others in the common design.<sup>143</sup> The most controversial version of this doctrine is the so-called “Category III,” or “extended,” joint criminal enterprise. Under this doctrine, if the prosecution shows that the defendant intended to participate in the common plan, the defendant will be liable for crimes committed by others that he did not intend, as long as those crimes were foreseeable.<sup>144</sup> Some chambers have interpreted foreseeable to mean “objectively foreseeable,” meaning that the defendant could be convicted even for crimes he did not himself foresee.<sup>145</sup> As commentators and defense attorneys have noted, these interpretations lower the mental state required for culpability to recklessness, or in the case of the “objective foreseeability” test, to negligence.<sup>146</sup> The Association of Defence Attorneys at the ICTY has criticized the doctrine as too broad and “susceptible to over-reaching and abuse.”<sup>147</sup> Many national systems have also rejected such extended application of criminal liability; even in the few countries that accept liability for crimes that fall outside the scope of the common plan, such liability has often been criticized as guilt by association.<sup>148</sup>

Despite the controversy surrounding joint criminal enterprise, it has been used extensively by the prosecution at international criminal tribunals. At the ICTY, 64% of the indictments filed between June 25, 2001, and January 1, 2004, relied explicitly on joint criminal enterprise and about 81% can be read to rely on it implicitly.<sup>149</sup> As of December 2007, 63 out of 130 ICTY indictments, or 48%, explicitly relied on joint criminal enterprise.<sup>150</sup> At the ICTR, the number is much lower—as of December 2007, only thirteen out of eighty-five indictments were based on JCE.<sup>151</sup> But the ICTR prosecution makes up for this by instead bas-

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143. Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgment, ¶¶ 94–101 (Feb. 25, 2004).

144. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 195 et seq. (July 15, 1999).

145. Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶¶ 203–04 (May 21, 1999).

146. E.g., Danner & Martinez, *supra* note 38, at 108–09; Interview # 11, *supra* note 95.

147. Brđanin Amicus Brief, *supra* note 142, at 3.

148. Danner & Martinez, *supra* note 38, at 109.

149. *Id.* at 107–08.

150. This figure does not include indictments withdrawn before or after transfer to the Tribunal or the indictments of persons reported deceased before trial. The calculations are based on the ICTY Fact Sheet listing the status of the accused and on a review of indictments on the ICTY website. For the ICTY Fact Sheet, see ICTY at a Glance: Key Figures, <http://www.un.org/icty/glance-e/index-t.htm> (last visited Dec. 6, 2007).

151. This figure does not include ICTR indictments that were withdrawn or the indictments of persons reported deceased before trial. It also does not include information about two accused who are at large and whose indictments are not available on the ICTR website. The calculations are based on an ICTR Status of Cases list and on a review of indictments available on the ICTR

ing indictments on conspiracy to commit genocide—fifty-five out of eighty-five indictments at the ICTR, or 65%, included a conspiracy count.<sup>152</sup>

Not surprisingly, the extensive use of JCE, particularly at the ICTY, has drawn numerous challenges by defense counsel. Originally, defense attorneys mounted a broad attack on joint criminal enterprise, on the basis that there is no provision for it in the ICTY or ICTR statutes. They argued that, because the drafters of these statutes made no mention of this mode of liability, it did not come within the tribunals' respective jurisdictions, and its use violated the prohibition on retroactive criminal laws.<sup>153</sup>

Since the ICTY rejected this broad challenge, defense attorneys have focused on limiting the application of joint criminal enterprise.<sup>154</sup> Some have argued that while joint criminal enterprise may be generally available to ICTY and ICTR prosecutors, if applied to their client, it would violate the principle of individual criminal liability.<sup>155</sup> For example, defense attorneys have opposed charges of joint criminal enterprise in cases where the crimes were committed “structurally or geographically” remotely from the accused.<sup>156</sup> In interviews, defense attorneys similarly argued that extending JCE to cover crimes committed over a large geo-

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website. See International Criminal Tribunal for Rwanda, Cases: Status of Cases, <http://69.94.11.53/ENGLISH/cases/status.htm> (last visited Dec. 7, 2007).

152. *Id.* By contrast, at the ICTY, where genocide indictments are few in number, counts of conspiracy to commit genocide (the only conspiracy charge available at the international criminal tribunals) are also few—they appear in only eight out of 130, or in about 6%, of the indictments. The calculations are based on the ICTY Fact Sheet listing the status of accused and on a review of indictments on the ICTY website. See ICTY at a Glance: Key Figures, <http://www.un.org/icty/glance-e/index-t.htm> (last visited Dec. 6, 2007).

153. *E.g.*, Prosecutor v. Milutinović, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise, ¶ 34 (May 21, 2003).

154. *E.g.*, Brđanin Amicus Brief, *supra* note 142, at 3 (“The ADC-ICTY has viewed with alarm the Appeals Chamber's creation and expansion of the doctrine of joint criminal enterprise (“JCE”). The ADC-ICTY disagrees with, but accepts as binding precedent, the decision in *Tadić* that JCE was part of customary international law, and the decision in *Ojdanić* that JCE is included in Article 7(1) despite its omission from the language of the Statute.”). In that brief, the ADC argued that the Appeals Chamber should uphold the Trial Chamber's holding that the physical perpetrator of a crime must be a member of the joint criminal enterprise in order for other members of the JCE to be held liable for the crime.

155. *E.g.*, Prosecutor v. Čermak, Case No. IT-03-73-PT, Decision on Prosecution Motion Seeking Leave To Amend the Indictment, ¶ 50 (Oct. 19, 2005); Prosecutor v. Prlić, Case No. IT-04-74-PT, Decision To Dismiss the Preliminary Objections Against the Tribunal's Jurisdiction, ¶ 8 (Sept. 26, 2005).

156. *Karemera v. Prosecutor*, Case Nos. ICTR-98-44-AR72.5, ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, ¶¶ 2, 11 (Apr. 12, 2006).

graphical area would amount to strict liability and be unfair to the defendant.<sup>157</sup>

Defense attorneys have also repeatedly contested the lack of clarity in indictments that charge joint criminal enterprise. They have argued that indictments are ambiguous about the scope and nature of the alleged joint criminal enterprise and about which part of the joint criminal enterprise is attributable to their client.<sup>158</sup> In response to these challenges, the Trial Chambers occasionally have made the prosecution amend the indictments,<sup>159</sup> but defense counsel maintain that these changes occur too late in the proceedings to allow them to respond adequately.

Similarly, defense attorneys actively have contested prosecutorial reliance on command responsibility, another form of “imputed liability or criminal negligence.”<sup>160</sup> Command responsibility (also known as superior responsibility) is alleged in the vast majority of indictments at the international criminal tribunals—64% of ICTY and 73% of ICTR in-

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157. Interview # 25, *supra* note 94 (observing that JCE started as a common purpose doctrine which held that people who were acting jointly in a mob or lynching group could be convicted for actions by others in the group, but that it is now applied very broadly so people who are in government are held responsible for actions by people whom they do not know and who are geographically distant from them); see also *Karemera*, Case Nos. ICTR-98-44-AR72.5, ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, ¶ 17 (addressing this concern by the defense by noting that “[t]hird category JCE liability can be imposed only for crimes that were foreseeable to an accused. In certain circumstances, crimes committed by other participants in a large-scale enterprise will not be foreseeable to an accused. Thus, to the extent that structural or geographic distance affects foreseeability, scale will matter, as the Appellant suggests it should”).

158. *E.g.*, Prosecutor v. Stanisic, Case No. IT-03-69-PT, Decision on Defence Motions Regarding Defects in the Form of the Second Amended Indictment (Apr. 12, 2006); Prosecutor v. Rasevic, Case No. IT-97-25/1-PT, Decision on Todovic Defence Motion on the Form of the Joint Amended Indictment (Mar. 21, 2006); Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-T, Decision on Tharcisse Muvunyi’s Motion for Judgement of Acquittal Pursuant to Rule 98 bis, ¶ 8 (Oct. 13, 2005) (arguing that no evidence was presented as to the defendant’s joint criminal enterprise liability under Article 6(1); by pleading “everything but the kitchen sink,” the Prosecution has failed to inform the accused of the exact nature and cause of the allegations against him); Prosecutor v. Zigiranyirazo, Case No. ICTR-2001-73-I, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment, ¶ 5 (July 15, 2004) (arguing that the indictment does not contain sufficiently precise factual allegations relating to joint criminal enterprise and therefore the accused has not received due notice of the details imputed to him).

159. *E.g.*, Prosecutor v. Čermak, Case No. IT-03-73-PT, Decision on Prosecution Motion Seeking Leave To Amend the Indictment (Oct. 19, 2005); Prosecutor v. Zigiranyirazo, Case No. ICTR-2001-73-I, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment (July 15, 2004); Prosecutor v. Sagahutu, Case No. ICTR-00-56-T, Decision on Sagahutu’s Preliminary, Provisional Release and Severance Motions (Sept. 25, 2002).

160. The Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, ¶ 56, U.N. Doc. S/25704/ADD.1 (May 19, 1993).

dictments.<sup>161</sup> The doctrine allows the finding of individual liability where the following four elements are met:

(i) an act or omission incurring criminal responsibility...has been committed by other(s) than the accused...; (ii) there existed a superior-subordinate-relationship between the accused and the principal perpetrator(s)...; (iii) the accused as a superior knew or had reason to know that the subordinate was about to commit such crimes or had done so...; and (iv) the accused as a superior failed to take the necessary and reasonable measures to prevent such crimes or punish the perpetrator(s) thereof....<sup>162</sup>

Command responsibility does not require that the superior share the intent of the principal perpetrators of the crime; rather, what is important is that the superior knew or had reason to know that such crimes were being or were about to be committed. One of the most controversial elements of this doctrine has been the definition of “reason to know,” and in particular, whether it introduces a form of strict liability or ordinary negligence.<sup>163</sup> Commentators and drafters of the international criminal tribunal statutes have debated this issue at length,<sup>164</sup> and even Trial Chambers from the ICTR and the ICTY have disagreed on this point.<sup>165</sup>

During oral argument, one ICTY defense attorney called command responsibility “one of the most contested issues in proceedings before this Tribunal.”<sup>166</sup> In fact, defense attorneys have actively challenged the

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161. See *supra* notes 150–51 for a discussion of the sources for these figures.

162. Prosecutor v. Orić, Case No. IT-03-68-T, Judgment, ¶ 294 (June 30, 2006).

163. See Danner & Martinez, *supra* note 38, at 127.

164. See *id.* at 128–30; see also Mirjan Damaska, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455 (2001); WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 106–07 (2004).

165. Compare Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 489 (Sept. 2, 1998) (requiring that negligence be so serious as to amount to “malicious intent”), with Orić, Case No. IT-03-68-T, Judgment, ¶ 294 (noting disagreement with this position by ICTY Trial and Appeals Chambers), and Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A, Judgment, ¶ 27 & n.31 (pointing to the use by the Trial Chamber of “gross negligence” as one of the bases for command responsibility), and Prosecutor v. Blaškić, IT-95-14-T, Judgment, ¶ 562 (Mar. 3, 2000) (concluding that the accused was responsible “on the basis of his negligence, in other words for having ordered acts which he could only reasonably have anticipated would lead to crimes”).

166. Prosecutor v. Kunarac, Case No. IT-96-23, Transcript, at 4337 (July 4, 2000); see also John R.W.D. Jones et al., *The Special Court for Sierra Leone: A Defence Perspective*, 2 J. INT’L CRIM. JUST. 211, 223 (2004) (noting that the doctrine remains a “controversial one” and that it “allows a person to be held guilty of an intentional crime...where his mens rea may have been no more than merely negligent”).

use of this mode of liability.<sup>167</sup> Some defense attacks on command responsibility have been broad-based, arguing that the doctrine was not part of international law when the alleged crimes were committed.<sup>168</sup> Defense attorneys practicing at the Special Court for Sierra Leone also have argued that the doctrine is controversial because it allows the conviction of a person for an intentional crime “where his mens rea may have been no more than merely negligent.”<sup>169</sup> These attorneys have therefore suggested that it would be “greatly preferable if a separate crime of ‘failure to prevent or punish’ were criminalized at the international level, rather than holding a commander responsible for a grave crime, such as crimes against humanity, when he has perhaps done nothing more than non-intentionally fail to punish crimes.”<sup>170</sup> Since broad challenges to command responsibility have failed at the ICTY and ICTR, more recently defense counsel have focused on limiting the application of the doctrine in particular cases.<sup>171</sup>

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167. *But see, e.g.*, Interview # 11, *supra* note 95 (noting that he does not consider command responsibility to be problematic, or at least not as problematic as joint criminal enterprise). Scholars have generally concurred that the ICTY’s interpretation of command responsibility is less expansive and troublesome than its interpretation of joint criminal enterprise. *See* Danner & Martinez, *supra* note 38, at 146–47.

168. *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction (Nov. 12, 2002); *Prosecutor v. Krajišnik & Plavšić*, Case No. IT-00-39 & 40-PT, Transcript, at 20 (July 19, 2000); *Prosecutor v. Blaškić*, Case No. IT-95-14, Decision on the Defence Motion To Strike Portions of the Amended Indictment Alleging “Failure to Punish” Liability (Apr. 4, 1997).

169. Jones et al., *supra* note 166, at 223.

170. *Id.* at 224.

171. *E.g.*, *Prosecutor v. Orić*, Case No. IT-03-68-T, Judgment, ¶¶ 297–99 (June 30, 2006) (rejecting the defense’s argument that a superior is responsible “only if [his] subordinates ‘committed’ the crimes themselves, and not if they merely aided and abetted the crimes of others”); *Prosecutor v. Perišić*, Case No. IT-04-81-PT, Decision on Preliminary Motions, ¶¶ 27, 31 (Aug. 29, 2005) (rejecting the defense’s argument that “Article 7(3) requires a subordinate to have ‘committed’ criminal acts and that ‘committing’ means physically perpetrating the crime”); *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Decision on Kajelijeli’s Motion for Partial Acquittal Pursuant to Rule 98 bis (Sept. 13, 2002) (rejecting defense argument that the defendant was not responsible as a superior because he lacked *de jure* authority over the Interhamwe militia); *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Transcript, ¶ 4303 (Mar. 23, 1999) (“[T]he Defence allows for the possibility of a civilian individual also coming under the notion of command responsibility. But, Your Honours, only in exceptional cases and only with regard to that civilian who is ranked sufficiently high up on the hierarchy of power and authority so that through the force of his position he is able to issue binding orders to military personnel.”); *Prosecutor v. Kordić*, Case No. IT-95-14/2, Decision on the Joint Defence Motion To Strike Paragraphs 20 and 22 and All References to Article 7(3) as Providing a Separate or an Alternative Basis for Imputing Criminal Responsibility, ¶ B (Mar. 2, 1999) (rejecting the defense’s argument that “even if Article 7, paragraph 3, provides for command responsibility, it cannot be pleaded in the alternative to a charge under Article 7, paragraph 1”).

Defense attorneys are probably wise to direct their attention to challenging these expansive theories of liability under international criminal law. At the ICTR, conspiracy and complicity have been two of the most common grounds for charge dismissals and acquittals.<sup>172</sup> At the Nuremberg Tribunal and during negotiations of the International Criminal Court Statute, too, conspiracy was a very contested issue.<sup>173</sup> At the ICTY, five of the nine full acquittals so far have been based on the failure of the prosecution to establish the defendant's responsibility as a superior;<sup>174</sup> four of these defendants had also been charged—but their guilt was ultimately not proven—under the joint criminal enterprise doctrine.<sup>175</sup> Indictments relying on command responsibility and joint criminal responsibility have fared poorly at the ICTR as well, leading to dismissals or acquittals on these charges in about half of the cases.<sup>176</sup>

#### *F. Pursuing a Fair Trial*

When asked to select from a list the most important goals of international criminal trials,<sup>177</sup> defense attorneys most commonly chose “providing a fair trial to the defendant.”<sup>178</sup> This answer was even more frequently chosen when the question was which goals of international criminal trials the defense has a role in promoting.<sup>179</sup> The next-most

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172. See *infra* notes 268–69 and accompanying text.

173. Patricia M. Wald, *Running the Trial of the Century: The Nuremberg Legacy*, 27 CARDOZO L. REV. 1559, 1592 (2006).

174. The five are Zejnil Delalić, Sefer Halilović, Fatmir Limaj, Isak Musliu, and Miroslav Radić.

175. The four are Sefer Halilović, Fatmir Limaj, Isak Musliu, and Miroslav Radić.

176. This number is not very reliable when it comes to joint criminal enterprise, however, because only two cases charging JCE were completed at the ICTR as of December 2007. Compare *Prosecutor v. Simba*, Case No. ICTR-2001-76-T, Judgment (Dec. 13, 2005) (finding the defendant guilty of participating in a joint criminal enterprise to commit genocide and extermination), with *Prosecutor v. Mpambara*, Case No. ICTR-01-65, Judgment (Sept. 12, 2006) (finding that the prosecution failed to prove beyond a reasonable doubt that the defendant participated in a joint criminal enterprise to commit genocide and extermination). By contrast, ten out of the eighteen completed ICTR cases relying on command responsibility led to dismissals or acquittals on that charge.

177. The interviewees were asked to select the goals from a list that contained the following possibilities: a) providing a fair trial to the defendant; b) promoting the rule of law in communities affected by the conflict that is subject of the trial; c) promoting peace and reconciliation in communities affected by the conflict that is subject of the trial; d) creating an accurate historical record; e) deterring future violations of international criminal law; f) incapacitating the defendant; g) rehabilitating the defendant; h) providing retribution to the victims; i) helping victims heal; j) other.

178. Twenty-five of the forty-four respondents stated that this is an important goal of international criminal trials.

179. Respondents were nearly unanimous in stating that the defense has an important role in

commonly chosen answers to this second question were: “creating an accurate historical record,”<sup>180</sup> “promoting the rule of law in the affected communities,”<sup>181</sup> and “detering future violations.”<sup>182</sup>

Overall, the attorneys consistently emphasized that their foremost duty was to provide a fair trial to their client and that any other goal was incidental.<sup>183</sup> Some stated that defense attorneys who intentionally pursued other goals might hurt their own clients.<sup>184</sup> In the end, most of the respondents would probably agree with the description by Mark Drumbl (himself formerly a defense attorney in Rwanda) of the role for the defense in genocide trials in Rwanda: to “promote the objective interests of justice by ensuring that the accused be fairly judged as an individual for the crimes he or she actually committed”<sup>185</sup> and to reduce the influence of “[q]uestions of collective redemption and political retribution” in the courtroom.<sup>186</sup> As one attorney noted, “[W]ithout the defense, [an international criminal tribunal] is going to be political, it will not be based on evidence.”<sup>187</sup>

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promoting the goal of a fair trial for the defendant. *But see* Interview # 2, *supra* note 80 (noting that defendant has the right to a fair trial, but that it is not his duty to ensure that; his duty is to get his client acquitted).

180. Seventeen respondents stated that this was an important goal for the defense to promote. Three specifically disagreed with this proposition.

181. Twelve respondents stated that this was an important goal for the defense to promote. Two specifically disagreed with this proposition.

182. Thirteen respondents stated that this was an important goal for the defense to promote. One specifically disagreed with this proposition.

183. *E.g.*, Interview # 18, *supra* note 75 (“The role of the defense is not to promote reconciliation or such things, but to promote justice for the indicted person.... Of course, indirectly you support all the other goals.”); Interview # 23, *supra* note 94 (“Defense counsel should still have primary duty to the client. By advancing the client’s rights, you should advance the system. [But you are also] obliged not to mislead the court and to bring international justice into disrepute.”); Telephone Interview # 27, Defense Attorney, ICTR (Nov. 2, 2006) (“The defense has one main goal—to do anything legally possible to defend the interests of his client. You have to do it within the law and within the rules, but you don’t have any obligation either towards the victim or whoever. The system is built that way.”); Questionnaire # 7, *supra* note 74 (“Promoting a fair trial for the defendant is the essential role for the defense attorney, because he is the only one that plays such a role [at the trial]. As for [promoting the rule of law and promoting peace and reconciliation], the defense can play a role as a counterweight to the court and the prosecution.”).

184. *E.g.*, Interview # 26, *supra* note 88 (“The role of the defense lawyer is to have primary loyalty to the client.... Can’t have a dual loyalty—promote truth and reconciliation and promote the client’s interests at the same time. It’s not possible.”).

185. Mark Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda’s Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545, 547 (1998).

186. *Id.* at 547.

187. The interviewee added: “If it was not for the defense at the ICTY, they would be saying Bosnia was a genocide. And it wasn’t.” Telephone Interview # 17, Defense Attorney, ICTY (Oct. 5, 2006).



Many attorneys also chose promoting the rule of law in the affected communities and creating an accurate historical record as important goals that the defense can promote. When providing an explanation of their answers, the attorneys who chose these goals stated that a contested trial may produce a more accurate historical record because it puts the prosecution's case to the test and presents facts from the defendant's perspective as well.<sup>188</sup> Similarly, they thought that a trial that is fair to the defendant is more likely to leave a positive legacy for the rule of law in the affected communities; it is in this sense, they explained, that the defense could play an important role in promoting the rule of law.<sup>189</sup> In other words, many defense attorneys believe that a contested trial is consistent with two of the arguably political purposes of trial—promoting the rule of law and building an accurate historical record.

But when promoting a fair trial for their client and some of these broader political goals conflict, attorneys focus on the goal of fair trial. A couple of examples illustrate this point. The first example comes from the way defense attorneys treat victim-witnesses on the stand. They generally opt for aggressive cross-examination, even where this may interfere with the healing process of the victim. As discussed earlier, a key purpose of international criminal trials is to provide a forum for victims to tell their stories and achieve a sense of closure in the process. With this in mind, prosecutors and judges at times allow victims to go beyond the testimony that is strictly relevant to the charges against the defendant so as to give victims the opportunity to tell their stories.<sup>190</sup> Defense attorneys, unsurprisingly, are less sympathetic to the victims' needs to testify at length, particularly when such testimony is likely to be damaging to the defendant.

Most attorneys interviewed for this study stated that they would not refrain from aggressive cross-examination simply to facilitate the heal-

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188. See Interview # 11, *supra* note 95 (noting that the defense can ensure trial is not a one-sided story); Interview # 14, *supra* note 94 (stating that the clash of adversaries promotes the truth); Telephone Interview # 19, Defense Attorney, ICTY, Oct. 6, 2006 (arguing that the defense can help set the record straight); Interview # 20, *supra* note 94 (noting that the defense can ensure certain evidence is considered). But see Interview # 4, *supra* note 41 (pointing out that this may be a side result of defense role, but, in general, expressing skepticism of the notion that adversarial trials produce the truth).

189. E.g., Interview # 4, *supra* note 41; Interview # 11, *supra* note 95; Interview # 13, *supra* note 112; Interview # 15, *supra* note 86.

190. At the same time, victim-witnesses and some commentators have criticized the ICTY for not allowing more such testimony and thus silencing witnesses. Dembour & Haslam, *supra* note 46, at 158–65; see also STOVER, *supra* note 18, at 10.

ing process of the victim or to prevent further trauma to the victim.<sup>191</sup> As one pointed out, “You can’t think of whether you’re going to hurt that person’s feelings; you should represent your client in the best way.”<sup>192</sup> Another explained that he might hesitate to impeach or aggressively cross-examine a victim only because of the effect that such tactics might have on the judges:

The decision would be a strategic one...whether impeachment of that particular witness would be weighed against the rest of the trial with credibility of the judge. I would not lay back simply because I know they were telling the truth or because they might be traumatized. It’s not a consideration. But the effect on judges of a witness being traumatized—that’s a case-by-case strategic decision.<sup>193</sup>

Like the attorney quoted above, many of the respondents further stated that, if this helped their client, they would impeach the credibility of a witness whom they believed to be testifying truthfully.<sup>194</sup> The majority of these respondents emphasized that their belief as to the witness’s

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191. See, e.g., Interview # 27, *supra* note 183 (“You can have a person testifying truthfully, but badly. My role is not to protect the victim, but to protect my client. So if I can make [the witness] look like a liar, even if he’s telling the truth, I will do it, as long as I am within the legal boundaries. I would not introduce a false document, but if the person is simply testifying badly, yes.”). But see Interview # 20, *supra* note 94 (noting that if there is something that is not necessarily accurate and must be highlighted, the attorney will do that, but will approach it in a careful manner. The last thing I want to do is re-traumatize a traumatized victim”); Interview # 28, *supra* note 88 (“I would not try to discredit the witness, but I might try to bring out points in my favor, but if [for example] my client said it happened, I would not try to discredit [the witness]. [That’s] totally unethical.”).

192. Telephone Interview # 24, Defense Attorney, ICTY (Oct. 16, 2006).

193. Interview # 16, *supra* note 101. Many defense attorneys stated that they are careful not to alienate the court by needlessly attacking a testifying victim. E.g., Interview # 10, *supra* note 71 (“A good lawyer would never cause distress to a prosecution witness unnecessarily. This would alienate the finders of fact.”); Interview # 17, *supra* note 187 (“[Y]ou don’t do that in these courts; you don’t get to be aggressive with these witnesses and everything is through interpreters.... Judges are incredibly protective of the witnesses.”); Interview # 21, *supra* note 87 (“I will not [cross-examine aggressively] a victim who may be retraumatized or whom I know to be testifying truthfully. It’s a question of strategy.”). The Association of Defence Attorneys at the ICTY has even held training sessions on the topic of cross-examining victim-witnesses in a sensitive way. Interview # 20, *supra* note 94.

194. E.g., Interview # 1, *supra* note 73; Interview # 2, *supra* note 80; Interview # 4, *supra* note 41; Interview # 10, *supra* note 71; Questionnaire # 3, *supra* note 72; Questionnaire # 4, *supra* note 78; Questionnaire # 6, *supra* note 79. Almost all of the attorneys who answered yes to this question either practiced or had received extensive training in the common-law tradition. Civil-law attorneys were less likely to say they would impeach a witness whom they believed to be testifying truthfully.

credibility was irrelevant; what mattered were the instructions from the client on this issue.<sup>195</sup>

Studies of witness testimony at the international criminal tribunals confirm that attorneys regularly try to impeach the credibility of victim-witnesses. Eric Stover documents such defense attempts in a number of cases at the ICTY.<sup>196</sup> A 2002 report on the treatment of witnesses at the ICTR also notes with concern the aggressive cross-examination to which the witnesses were subjected.<sup>197</sup>

[T]hey had been treated with scorn, considered to be liars, cheats, mentally disturbed or fools, and feeling that they, in turn, had been accused. A number of witnesses had been asked if they had been paid to testify, whether Ibuka, Avega,<sup>198</sup> or the government had asked them to say one thing or another, or were criticized for

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195. The following response is representative:

[T]hat question makes my blood boil. It is just not a question of my belief. It really isn't; it's just a question of instructions from my client.... [M]y belief as to whether that someone is lying is completely irrelevant.... They may be the victim of the worst, the most horrific rape, but if my client is running some defense that they consented to this horrific rape, and that is the issue in the case, I am going to have to suggest to this poor unfortunate person that they are lying, that they consented to it, that they were happy to engage in this activity. That is what I get paid to do; it is not a very nice aspect of the job, but what I think about it is irrelevant, completely irrelevant.

Interview # 1, *supra* note 73; *see also* Interview # 2, *supra* note 80 (“[Y]ou never know if someone is speaking the truth or not.... I am just taking a position, a position of my client. Basically, if he thinks [the witness] is lying, it doesn't matter what I think is true.”); Interview # 4, *supra* note 41 (“It would be a horrible disservice to my client if I substituted my judgment for that of the judges. It is not my job to judge [the credibility of the witness]; it's the judge's job.”); Questionnaire # 3, *supra* note 72 (“[W]hat I believe is neither here nor there—I am there to advance a client's case. I am not permitted to mislead the court, of course.”).

196. *E.g.*, STOVER, *supra* note 18, at 57 (“In his cross-examination of Emil Čakalić and Dragutin Berghofer, [defense attorney] Fila questioned whether the two men—Čakalić with his blood-smeared face and Berghofer with his poor vision—could under the circumstances really have recognized his client in the dimly lit building.”); *id.* at 67 (In the *Čelebići* trial, “[d]efense attorneys harangued witnesses, claiming that they had been coached and exposed to the testimony of prior witnesses by Serbian victims rights groups.”); *id.* at 89 (noting that the testimony of Benazija Kolesar, a head nurse at Vukovar hospital, “passed without incident, and she left the stand feeling proud of what she had accomplished. Then, unexpectedly, the presiding judge called her back to view a video that the defense claimed would disprove her earlier statements. Although the defense's attempt to discredit her failed, this time she left the room feeling angry and confused”); *id.* at 10, 129–30; *see also* Dembour & Haslam, *supra* note 46, at 166 (giving example of a defense attempt to destroy credibility of a victim-witness). *But cf. id.* at 168 (observing that “in the Krstić trial, most of the evidence offered by the victim-witnesses was not contested under cross-examination”).

197. INT'L FED'N FOR HUM RTS., VICTIMS IN THE BALANCE: CHALLENGES AHEAD FOR THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 14–15 (2002), *available at* <http://www.fidh.org/afriq/rapport/2002/rw343a.pdf> [hereinafter VICTIMS IN THE BALANCE].

198. Ibuka and Avega are Rwandan organizations of genocide survivors.

not being present at the scene when the events occurred.<sup>199</sup>

The examination of victim-witnesses is one clear example of the tension between political and adjudicative elements of international criminal trials. Vigorous cross-examination can easily re-traumatize victim-witnesses, but at the same time, it is an essential tool for defense attorneys to contest the facts presented by the prosecution. While it is in tension with the goal of providing closure and healing for victims, this defense tactic brings trials closer to their adjudicative function.

The second example of defense actions moving trials away from the political and closer to the legal model is when defense attorneys contest the admissibility of evidence they consider irrelevant to the charges against their clients. In an effort to provide a more complete historical record and to allow victims to tell their stories in court, the prosecution frequently files overly long indictments and then also attempts to introduce evidence beyond that necessary to support the charges.<sup>200</sup> But as discussed earlier, the admission of such evidence is often contrary to the adjudicative model of war crimes trials, which demands a focus on the specific charges leveled against the defendant.<sup>201</sup>

The defense attorneys interviewed for this study were nearly unanimous that they would object to the introduction of any evidence that is not directly relevant to the charges against their clients. Most would do so even if they did not perceive any direct threat to their client's case from the introduction of the evidence and even if the evidence might aid the compilation of a historical record or the healing of victim-witnesses. As one attorney succinctly explained, "My job is not helping build a historical record, it's defending the accused."<sup>202</sup> Another added that it would be "a dereliction of duty" not to challenge evidence that is not di-

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199. VICTIMS IN THE BALANCE, *supra* note 197, at 8. A study of witnesses at the ICTY also found that many of the witnesses "worried about how they would respond under cross-examination. Most of all, they dreaded being questioned about the truthfulness of their presentation. They feared that the defense would try to "trick" them, especially over dates and times of events that took place years earlier." STOVER, *supra* note 18, at 85.

200. See Assessment and Report of Judge Fausto Pocar, U.N. Doc. S/2006/353, Annex I (2006) (observing that trials at the ICTY have been long because indictments have been complex and indictments have been complex because of the prosecution's obligations to victims); O-Gon Kwon, *The Challenge of an International Criminal Trial as Seen from the Bench*, 5 J. INT'L CRIM. JUST. 360, 373 (2007) (noting that the prosecution has been unwilling to reduce the charges in indictments, in part because of its obligations to victims and in part because of its belief that it is the Tribunal's duty to compile an accurate historical record); see also Prosecutor v. Simba, Case No. ICTR-2001-76-T, Judgment, ¶¶ 38-39 (Dec. 13, 2005) (finding that the prosecution's evidence relating to one of the charges was "unnecessarily cumulative").

201. E.g., ARENDT, *supra* note 10, at 5, 18; Dembour & Haslam, *supra* note 46, at 151-52.

202. Interview # 15, *supra* note 86.

rectly relevant to the charges against the client, but may help build the historical record.<sup>203</sup>

Almost all respondents protested that prosecutors regularly try to introduce testimony and documents that go beyond the scope of the indictment.<sup>204</sup> On the other hand, studies of ICTY witnesses show that these witnesses believe prosecutors and judges do not do enough to help them to give a full account of the crimes they suffered and of the historical and political context in which the atrocities occurred.<sup>205</sup> What is clear is that defense attorneys regularly object to the introduction of evidence that goes beyond what is strictly necessary to prove the specific charges against the accused.<sup>206</sup> Although a fuller examination of transcripts is necessary to evaluate more precisely how often this oc-

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203. Interview # 14, *supra* note 94. The following response is representative:

I have to challenge everything.... Somehow they lost sight what the original purpose of the tribunal was—to determine individual guilt. You indict certain people that were individually involved. Who started the war is not at issue. You could have been on the defense and still have committed war crimes. Tribunals are not a forum to find historical truth. If you don't challenge something in the indictment, you will read it in the judgment as if it's the gospel truth. They will be using it to establish joint criminal enterprise, which may put your client in a very unfavorable light and may augment the sentence.

Interview # 20, *supra* note 94.

204. See, e.g., Interview # 21, *supra* note 87 (“I [object to such evidence] almost every day.... Most of the evidence is context evidence, very often not accurate, not directly relevant to my client.”); Interview # 22, *supra* note 84 (“The prosecution tactic is ‘let’s put as much evidence as possible, so the Trial Chamber will find whatever suits it.’ The time frame and the geographical frame of the indictment—they are starting with the first day of creation of Earth, and they are ending with the Dayton agreement. They should concentrate on a couple of critical weeks or months.”); Interview # 24, *supra* note 192; Interview # 25, *supra* note 94 (“[This happens] every day in trial in Arusha. I think they are introducing it because the indictment is not very good, so they want to go beyond the indictment.... The court is not at all sympathetic to these [our] challenges. They feel that they will weigh everything at the end of the case, so they want to admit everything and decide at the end.”); Interview # 26, *supra* note 88 (“They [the prosecutors] try to bury you in background evidence.”); Interview # 28, *supra* note 88. But see Interview # 18, *supra* note 75 (respondent did not find he had to make such objections, but this was probably because at that point in the ICTY’s operations, most background evidence had already been introduced).

205. STOVER, *supra* note 18, at 87, 129–31; Dembour & Haslam, *supra* note 46, at 158–59, 163–64.

206. For examples of motions contesting the introduction of such evidence, see Prosecutor v. Ndayambaje, Case No. ICTR-98-42-0622, Requete d’Elie Ndayambaje aux Fins de Certification d’Appel de la Decision Intitulée: Decision on Ndayambaje’s Motion for Exclusion of Evidence, du 1 Septembre 2006 (Sept. 6, 2006); Prosecutor v. Simba, Case No. ICTR-01-76-T, Decision on the Admission of Prosecution Exhibits 27 and 28 (Jan. 31, 2005); Nyiramasuhuko v. Prosecutor, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko’s Appeal on Admissibility of Evidence (Oct. 4, 2004); Prosecutor v. Simba, Case No. ICTR-01-76-I, Decision on Defence Motion To Disqualify Expert Witness, Alison des Forges, and To Exclude Her Report (July 14, 2004).

curs, it seems clear that defense attorneys have reduced the extent to which the trials serve the goals of helping victims and building a historical record and have instead shifted the focus more directly to the question of individual guilt.

### *G. Refusing To Make Political Arguments*

The trial can be used for demonstrative purposes not only by the prosecution and judges, but also by the defense. This might be an attorney's own decision, or it might be based on a request by the defendant. If either the defendant or his attorney believes that the prosecution or the judges have politicized the trial, it would not be surprising for the defense itself to launch into political arguments. Similarly, if defendants foresee little chance of acquittal or mitigated sentence—whether because the trial is a show or because the evidence against them is irrefutable—they would seem more likely to resort to political speeches and attacks because legal arguments would be of no avail. As the trial of Saddam Hussein most recently showed, this defense strategy receives much media attention and is therefore commonly associated with war crimes trials. Yet the interviews and a review of pleadings suggest that defense attorneys at the ICTY and ICTR turn to political arguments relatively rarely. With the exception of a few high-level defendants, such as Slobodan Milošević and Vojislav Šešelj, defendants and their attorneys generally refrain from seeking to turn trials into political events.

Before examining the extent to which the defense chooses to make political arguments, it is important to distinguish between a political attack and a legal challenge to the tribunal's legitimacy. Although the line between the two is often rather thin, I am using the term "political argument" to mean an argument that not only lacks reasonable objective legal merit, but which is addressed to an audience outside the courtroom—either for purposes that have nothing to do with the trial itself (for example, to buttress the electoral chances of supporters of the defendant), or for the purpose of bringing outside political pressure on the tribunal itself. By contrast, some legal challenges to the authority of the tribunal have greater legal merit, and cannot be viewed as entirely political in nature.

An example of a non-frivolous challenge to the tribunal's legality is that made by Duško Tadić, the first defendant at the ICTY. Tadić and his attorneys challenged the ICTY's establishment as inconsistent with the Security Council's powers under the UN Charter and with certain

requirements of the International Covenant on Civil and Political Rights.<sup>207</sup> The Appeals Chamber rejected this challenge in a thorough, reasoned opinion.<sup>208</sup> It would be reasonable to expect subsequent defendants to lodge the same objection for purposes of protecting the record. But highly vocal and strenuous challenges to the tribunal on the exact same grounds that the Appeals Chamber has rejected, such as those made by Vojislav Šešelj and Slobodan Milošević, have acquired the tone of relatively more political, and relatively less legal, attacks.<sup>209</sup> It appears that their primary aim is to obstruct the proceedings and to influence public opinion in Serbia.<sup>210</sup>

Both the interviews and the research of trial transcripts and motions reveal, however, that such political challenges to the international criminal tribunals are rare. To some degree, the decision not to politicize trials is one made by the defendants themselves. But it is also a result of defense counsel's deliberate strategy of relying on the facts and the law to present their cases. The attorneys I interviewed overwhelmingly stated that, even if their clients asked them to make a political argument, they would refuse to do so.<sup>211</sup> Many also said they would coun-

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207. *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995).

208. *Id.*

209. *E.g.*, *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Assigned Counsel's Motion To Lift Confidentiality Status of Certain Pleadings and Medical Reports, Tab 4, ¶¶ 29–30 (June 1, 2006) (citing to some of Milošević's statements against the Tribunal, such as "I consider this Tribunal of yours to be illegal because it is not based on the Charter of the United Nations.... I consider this so-called Tribunal to be a means of war against my country, which is still going on," as well as a reference to the Trial Chamber as a "joint criminal enterprise"); *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on the Request of the Accused for an Opinion of Trial Chamber II on Professional Arguments Challenging the Legitimacy of the International Tribunal (May 13, 2005) (noting "that the Accused has already challenged the lawfulness of the establishment of the Tribunal by the Security Council on exactly the same grounds" and that "the Appeals Chamber has already ruled upon the lawfulness of the establishment of the Tribunal by the Security Council in the *Tadić* Jurisdiction Decision").

210. The language used by these defendants also suggests a fundamental disrespect for the legal process and the tribunal as an institution. *E.g.*, *Milošević*, Case No. IT-02-54-T, Decision on Assigned Counsel Motion To Lift the Confidential Status of Certain Pleadings and Medical Reports, Tab 4, ¶¶ 29–30 (noting that the defendant referred to the Trial Chamber as a "joint criminal enterprise"). And as Milošević himself freely admitted, his main goal at trial was to influence an audience outside the courtroom. See Marlise Simons, *The Hand That Feeds Milosevic's Defense*, N.Y. TIMES, Nov. 10, 2002, § 1, at 10 (quoting Milošević as saying: "[T]he only reason I agreed to participate in this case of yours is because I want to be able to address the public.>").

211. Of the twenty-two interviewees who responded directly to this question, eighteen said they would not make a political argument, even if their client asks them to do it. The answers of a number of attorneys responding to this question were ambiguous, but some of them implied that it would be strategically unwise to make political arguments, and others simply stated that they could not respond to the hypothetical (they added that the question did not arise in their case, be-

sel clients not to try to make such arguments themselves on the witness stand,<sup>212</sup> and a few asserted they would refuse to represent a defendant who plans to politicize the trial.<sup>213</sup> Indeed, a review of transcripts and decisions available in the ICTY and ICTR databases on Westlaw reveals few cases in which defense attorneys made a political argument or accused the tribunal of being biased.

It is likely that, when defense attorneys refrain from political arguments, they are simply making a strategic decision.<sup>214</sup> Once they see that courts are not receptive to political arguments and that these arguments may in fact hurt their clients' cause, defense attorneys may simply choose the wiser strategy of adhering to the law and the facts of the case. Indeed, some interviewees—defense attorneys as well as prosecutors—suggested that defendants had resorted to political arguments more frequently in the early days of the ICTY. The attorneys may therefore have adapted to the court's preferences over time.

There may be other explanations for the relatively non-political nature of the proceedings at the international tribunals. In particular, the distance of the international tribunals—and more importantly, of their judges and lawyers—from the communities that were involved in the conflict being adjudicated may be the critical factor that allows these lawyers to stay out of politics.<sup>215</sup>

Whatever the explanation, the fact is that defense attorneys generally do not perceive international tribunals as a pulpit from which to launch political tirades. Instead, they use the law and the facts to make their points and win cases.

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cause the client had not asked them to make political arguments).

212. Of the sixteen interviewees who responded directly to this question, only two would always let their client make the argument; ten would advise the client against it; and four would not let the client make such an argument.

213. Interview # 10, *supra* note 71; Interview # 17, *supra* note 187; Interview # 24, *supra* note 192.

214. *E.g.*, Interview # 10, *supra* note 71 (noting that judges do not like political arguments); Interview # 13, *supra* note 112 (noting that such arguments are generally useless).

215. In this sense, defense attorneys interviewed for this study are different from Bosnian judges and prosecutors interviewed by a team of researchers at the Berkeley War Crimes Center. The views of those judges and prosecutors toward the ICTY correlated with their ethnicity—Bosnian Muslims typically found the Tribunal to be fair, while Bosnian Serbs typically thought the ICTY to be political and biased. But as the researchers observed, most respondents, who were still practicing in their home country, were generally not familiar with the procedures and rulings of the Tribunal. The researchers found that those who had interacted with the Tribunal had overcome their initial skepticism toward it. Harvey Weinstein & Laurel Fletcher, *Justice, Accountability, and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT'L L. 102 (2000).



#### *H. Recognizing Political Elements of International Criminal Trials*

As the previous Sections discussed, defense attorneys do not generally view trials at the ICTY and ICTR as political events, and they do not themselves try to politicize the proceedings. Yet some of the respondents did point to elements of ICTY and ICTR trials that they thought were unduly political and unfair to defendants.

Of the forty-four interviewees, nine believed that trials in at least one of the tribunals were significantly politicized and slanted in favor of the prosecution.<sup>216</sup> Of these nine, seven practiced predominantly at the ICTR or aimed their comments specifically at the ICTR. This means that the percentage of ICTR defense attorneys who believed that trials were politicized was higher than the percentage of ICTY practitioners who held such beliefs.<sup>217</sup>

Four other respondents made comments that indicated a belief that politics intervened on some occasions, but as a whole, their responses did not reveal a clear view that politics played a decisive role.<sup>218</sup> Finally, isolated comments from a number of other respondents suggested a belief that, in various ways, the prosecution received better treatment than the defense at the tribunals. But because these comments did not indicate that this was a result of political considerations, I did not consider them to be evidence for the view that the trials are political. Finally, even among the minority of defense attorneys who viewed the trials as political, only a few believed political arguments by the defense to be a proper reaction.<sup>219</sup>

When defense attorneys talked about the political aspects of international criminal trials, they typically attributed this politicization to one or more of the following features: 1) the tribunals were created by the Security Council for political reasons; 2) their jurisdiction was defined in a biased manner, and/or the process of appointing the judges was po-

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216. Interview # 4, *supra* note 41; Interview # 10, *supra* note 71; Interview # 12, *supra* note 72; Interview # 28, *supra* note 88; Interview # 29, Defense Attorney, ICTR (Aug. 9, 2007); Questionnaire # 7, *supra* note 74; Questionnaire # 11, *supra* note 77; Questionnaire # 17, *supra* note 84; Questionnaire # 19, Defense Attorney, ICTR (Nov. 15, 2006).

217. Twenty-six of the total forty-four interviewees have represented defendants at the ICTY, while twenty-four have represented defendants at the ICTR.

218. Interview # 15, *supra* note 86; Interview # 21, *supra* note 87; Interview # 25, *supra* note 94; Questionnaire # 9, Defense Attorney, ICTR (July 11, 2007).

219. Of the nine respondents who saw the trials as essentially political, only three viewed political arguments as a proper defense tactic. Interview # 28, *supra* note 88; Questionnaire # 7, *supra* note 74; Questionnaire # 19, *supra* note 216. Of the four respondents who pointed to certain political elements in the trials, only one would make political arguments in response. Questionnaire # 9, *supra* note 218.

litical; 3) prosecutors preferred charges selectively, targeting certain ethnicities for political reasons, and at times engaged in objectionable tactics that rendered the proceedings unfair; 4) the Registry treated the defense unfairly and did not provide it with adequate resources; and 5) individual governments prevented the attorneys from providing effective defense, and the tribunals did not do enough to counter these governments' improper influence on the process.

The establishment of the ICTY and ICTR by the Security Council was seen by some as a feature that impaired the legitimacy of international trials.<sup>220</sup> An attorney working at the ICTR noted that the "tribunals are creatures of the UN, and there is political pressure from Rwanda and from all kinds of levels."<sup>221</sup> Another ICTR attorney further argued that "courts like ICTR were set up by foreign powers that were complicit in the conflict and [were] intended to be victor's courts."<sup>222</sup> Yet a third had an even more poignant critique about how politics at the establishment still affected the functioning of the ICTY and ICTR:

[B]oth tribunals are political organizations and justice is not their goal. The Security Council created them to put out a false history of what happened in those wars; to cover up the role of [the] US, Great Britain and allies in those wars, and to justify the present regimes in those countries. [They were] set up really for propaganda purposes and not for judicial purposes. If you study their financing, who controls them, who staffs them, you would come to the conclusion that they are not independent.<sup>223</sup>

Indeed, a review of ICTY and ICTR pleadings suggests that in several cases, the defense objected to the validity of the tribunals' establishment by the Security Council, even after the Appeals Chamber had resolved this issue in *Prosecutor v. Tadić*<sup>224</sup> and *Prosecutor v. Kanya-*

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220. Interview # 10, *supra* note 71.

221. Interview # 26, *supra* note 88; see also Interview # 10, *supra* note 71 ("There was a definite sense that the UN had hurried through by going to the Security Council, rather than the UN as a whole....[It was] making up for failing to respond to desperate cries for help.").

222. Questionnaire # 11, *supra* note 77.

223. Interview # 28, *supra* note 88. He explained further what he thought were the political motivations behind the establishment of the ICTY and ICTR:

In the case of Yugoslavia, it was the last socialist country in Europe, and there were other reasons—[such as access to] oil supply routes. Rwanda was also a socialist country; not important in itself, but it is a doorway to the Congo, which is hugely important in terms of resources. [It was about the] ability to control Congo; getting an access point to invade the Congo and that was Rwanda and Uganda.

224. *Prosecutor v. Tadić*, Case No. IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995).

*bashi*.<sup>225</sup> Defense attorneys have challenged the tribunals' establishment on the same grounds in about ten cases since then.<sup>226</sup>

On a related point, a couple of respondents worried that the process of electing the judges may interfere with the judges' impartiality during trial. As one respondent explained:

[Because judges are elected by the UN General Assembly, they are] subject to political pressure. When their term is up, they [the General Assembly] can get rid of them.... In the UN everything is done with diplomacy, so [the judges] can't offend anybody.... A defendant like my client...there would be tremendous pressure on the tribunal if he is acquitted.<sup>227</sup>

Finally, two attorneys pointed out that the political nature of the courts' creation influenced the definition of their jurisdiction and the goals of those working for the tribunals, making acquittals almost impossible. One attorney believed that the temporal and subject-matter jurisdiction at the ICTR had been defined in a way that placed the burden of proof on the accused.<sup>228</sup> Another spoke of the "born-again prosecutorial ethos" that came out of the definition of the tribunals as entities to "prosecute" rather than "adjudicate" international crimes.<sup>229</sup>

Several attorneys also pointed to specific examples of what they regarded as bias in the prosecution. For example, a few attorneys complained that no members of the Tutsi Rwandan Patriotic Front (RPF) were indicted at the ICTR. Tutsis were the main victims of the genocide in Rwanda, and the current members of the government are predominantly Tutsi and supporters of the RPF. Several attorneys argued that ICTR prosecutors should have charged the RPF with crimes against

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225. *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, Decision on the Defence Motion for Jurisdiction (June 18, 1997).

226. *See, e.g., Prosecutor v. Ntakirutimana*, Case Nos. ICTR 96-10, ICTR 96-17-T, Judgment and Sentence (Feb. 21, 2003). Two defendants, Šešelj and Milošević, brought up this issue more than twice, suggesting a political motive. *E.g., Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on the Request of the Accused for an Opinion of Trial Chamber II on Professional Arguments Challenging the Legitimacy of the International Tribunal (May 13, 2005).

227. Interview # 26, *supra* note 88; *see also* Questionnaire # 11, *supra* note 77 (observing that "[t]he entire process of appointment of judges is political").

228. Questionnaire # 8, Defense Attorney, ICTR (June 29, 2007).

229. Interview # 10, *supra* note 71 ("The ICTY and ICTR have always been in my view prosecutorial entities. You can see that in their founding documents... 'Tribunals to prosecute persons responsible....' They should instead be described as courts to try the accused. It is not merely semantics. You do get a more born-again prosecutorial ethos at the tribunals than you do in domestic courts.").

humanity and not focused solely on crimes committed by Hutus.<sup>230</sup> These arguments echoed a number of public statements by ICTR detainees.<sup>231</sup> At the ICTY, too, some alleged selective prosecution and complained that prosecutors were not as strict with their charges against Bosnian and Kosovar Muslims as they were with Serbs.<sup>232</sup> One attorney also complained that former ICTY Prosecutor Louise Arbour had refused to charge NATO with war crimes for the bombing of Serbia, while issuing a political indictment against Milošević.<sup>233</sup>

At the ICTR, several defense attorneys also accused the prosecution of putting on the stand perjurious witnesses. One stated that he was absolutely convinced in the innocence of his client, as well as in the innocence of certain other defendants at the ICTR.<sup>234</sup> He argued that most of the witnesses testifying for the prosecution were convicted or about to be convicted in Rwanda and were ready to say anything on the stand to avoid a death sentence or life imprisonment in Rwanda.<sup>235</sup> A few attorneys also accused the Rwandan government and certain Rwandan victims' organizations of encouraging witnesses to testify falsely.<sup>236</sup>

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230. Questionnaire # 11, *supra* note 77 ("Note that not a single Rwandan of Tutsi ethnic group has been indicted before that court [the ICTR] despite admissions by the Rwandan authorities [of] crimes against humanity and war crimes and overwhelming evidence implicating senior members of the RPF (Rwandan Patriotic Front)"); *see also* Interview # 26, *supra* note 88 ("Alleged victims who were the Tutsis, and they now run the country, and then they killed four to five million of people in the Congo, allegedly to kill Interahamwe. If it's not a genocide, but it's crime against humanity.").

231. In April 2004, ICTR detainees sent a letter to the United Nations, arguing that the ICTR was "conducting political trials where victor's justice reigns over the principles of justice and fairness" because it had failed to investigate crimes committed by Tutsi government officials. *10 Years After the Genocide, Detainees Make Negative Assessment of the ICTR*, HIRONDELLE NEWS AGENCY, Apr. 7, 2004, <http://www.hirondelle.org/hirondelle.nsf/caefd9edd48f5826c12564cf004f793d/925b4cfad00a68c0c1256820007a56b7?OpenDocument>.

232. *E.g.*, Interview # 21, *supra* note 87; Interview # 28, *supra* note 88.

233. Interview # 28, *supra* note 88 ("[Milošević's] indictment was clearly political. It was nonsense, [they were] mainly designed to be propaganda pieces. [They] don't read like indictments in the US; they read like a story. [There was] no evidence against him; if you follow transcripts, in fact, there was a lot of evidence in his favor; really what happened was different from what the media presented.").

234. Questionnaire # 10, *supra* note 72.

235. *Id.*

236. *Id.*; Interview # 26, *supra* note 88 ("We see a lot of lying and perjuries. Witnesses come, brought by victims' organizations like Ibuka. The witnesses don't answer questions of counsel, and even when you catch them lying, judges don't intervene. You have all these secret witnesses testifying under pseudonyms. Supposedly for the protection of witnesses, but that's hogwash. If they testified publicly, I could get exculpatory information—people telling me the witness was not where he said he was, etc.").

Perhaps the most common complaint among respondents was that the lack of resources given to the defense and the lack of cooperation from certain governments and witnesses prevented attorneys from providing effective representation.<sup>237</sup> This, in the eyes of several attorneys, produced injustice at the tribunals.<sup>238</sup>

[At the ICTY] the problem is that defense counsel is in opposition to the tribunal, we are almost considered criminal by the tribunal.... The main way in which we are in opposition is the Registry. It pays for the defense, so it is in complete control on defense counsel action. They consider that they have the right to make our choice of assistant and so on, to impose one way of working.<sup>239</sup>

At the ICTR, defense attorneys went on a strike to protest, among other things, the Registry's refusal to pay certain defense expenses.<sup>240</sup> As one attorney explained, "There is not sufficient budget to pay the lawyers. That contributed to the strike, too. The cutting of our bills...telling us: 'You can't charge for this or that. You've spent two hours reading documents and you should have spent only thirty-five minutes.'"<sup>241</sup> But this attorney, as well as a few others who complained about lack of resources, added that "this has changed, because people at the Registry have changed."<sup>242</sup> Several also acknowledged that abuses by some defense attorneys were partly to blame for the excessive scrutiny of defense expenses by the Registry.<sup>243</sup>

Several ICTR attorneys further complained that the Rwandan government interfered both with their efforts to collect evidence and with the court's operations. As one attorney explained:

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237. *E.g.*, Interview # 10, *supra* note 71; Interview # 15, *supra* note 86; Questionnaire # 12, Defense Attorney, ICTR (Aug. 6, 2007).

238. *See, e.g.*, Questionnaire # 11, *supra* note 77 ("There is no equality of arms between the prosecution and the defense in terms of resources allocated to prepare a fair and equitable process.... Also, defense counsel is seen often as an intruder in the system. He is underpaid and goes for several months without remuneration.... [I]n many circumstances the Registry has cited lack of resources as a reason for not paying or for reducing to ridiculous amounts the remuneration due to me. Also, many fee assessment and finance officials who are responsible for fee assessment and payment are lay men.... Yet they assess legal work and at times demand details which violate the confidentiality of the client's case....").

239. Interview # 21, *supra* note 87. The same attorney added that the Registry had a negative attitude towards the defense.

240. Press Statement, ICTR, Registry's Response to the Allegations of Serious and Repeated Violations of the Rights of the Defence, ICTR/INFO-9-3-15.EN (Jan. 29, 2004).

241. Interview # 26, *supra* note 88.

242. *Id.*; *see also* Interview # 10, *supra* note 71.

243. *E.g.*, Interview # 10, *supra* note 71; *see also* ICC REPORT, *supra* note 136, at 9.

[T]here is political pressure from Rwanda and from all kinds of levels. The government of Rwanda has a special representative to the court. When he sees things that he does not like, they put pressure on the tribunal. You are familiar with the case of Barayagwiza. Rwanda put pressure on the prosecution and on the tribunal.... In 2004, lawyers made a strike over pressure from Rwanda to transfer the accused to Rwanda.”<sup>244</sup>

Again, this echoes criticism by ICTR defendants themselves. In 2001, twenty-eight ICTR detainees went on a hunger strike, arguing that the Rwandan government’s interference rendered trials “increasingly politicised” and unfair.<sup>245</sup>

Many ICTR lawyers also stated that the Rwandan government hindered the defense’s efforts to gather witness testimony. According to several respondents, potential witnesses refused to speak to the defense because they were afraid that the Rwandan government would retaliate against them if they were to testify for the defense at the ICTR.<sup>246</sup> The following type of accusation against the Rwandan government was made by more than one attorney: “People were assassinated because they disagreed with the Kagame administration. There was a lot of retaliation. So the witnesses are afraid they would be killed or would be put on a genocide list by the Rwandan government.”<sup>247</sup>

Some attorneys also complained that the Rwandan government interfered with their work more directly, by accusing the defense or their investigators of having committed crimes, and in some cases, actually jailing the investigators.<sup>248</sup> One attorney concluded that “[t]he lack of

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244. Interview # 26, *supra* note 88.

245. *UN Detainees on Hunger Strike Over Defence Rights*, HIRONDELLE NEWS AGENCY, May 30, 2001, <http://www.hirondelle.org/hirondelle.nsf/caefd9edd48f5826c12564cf004f793d/925b4cfad00a68c0c1256820007a56b7?OpenDocument>.

246. *E.g.*, Questionnaire # 8, *supra* note 228; Questionnaire # 10, *supra* note 72.

247. Interview # 26, *supra* note 88.

248. Questionnaire # 10, *supra* note 72 (“[J]’ai été accusé par ces mêmes autorités d’avoir suborné un témoin du procureur pour obtenir une déclaration en faveur de mon client. Beaucoup d’autres Avocats ont fait l’objet de cette accusation avant moi. Actuellement un Avocat Rwandais, qui était Enquêteur dans une équipe de défense, croupit dans une prison au Rwanda, inculpé de la même accusation. La vérité est que ces autorités craignent que la défense utilise les mêmes méthodes déloyales qu’elles pour obtenir des témoignages mensongers contre des innocents.”) (“I was accused by these same authorities to have suborned prosecution witnesses to give false testimony favorable to my client. Many other attorneys had been similarly accused before me. Currently, a Rwandan lawyer, who was an investigator for one of the defense teams, is rotting in a Rwandan prison, charged with the same crime. The truth is that the [Rwandan] authorities are afraid that the defense is using the same unfair methods that they [the Rwandan authorities] have

cooperation from the Rwandan government and interference in the judicial process has eroded the credibility of the ICTR. This has reinforced the perception that the ICTR is a victor's court."<sup>249</sup>

The issues raised above are serious and could threaten the legitimacy of trials at the ICTY and ICTR. They help explain why several respondents thought that acquittals were impossible for political reasons. But with the exception of the complaints about lack of resources and lack of cooperation from the Rwandan government, the defense views discussed in this Section belong to a minority of the respondents. Most attorneys interviewed for this study regard the proceedings at the ICTR and ICTY as generally fair and apolitical, and genuinely contested. The next Part explains why this might be the case and then discusses why a minority of defense attorneys might think otherwise.

### III. EXPLAINING DEFENSE VIEWS

#### A. *Explaining the Predominant Belief That Trials Follow the Adjudicative Model*

##### 1. *Role-Bound Attitudes*

The fact that a large majority of defense attorneys regards international criminal trials as genuine factual and legal contests suggests that these trials do, in fact, serve primarily the legal purpose of assessing individual responsibility. Still, it is possible that the attitudes of defense attorneys simply reflect the attorneys' understanding of their professional role—to win a victory for their clients by challenging prosecutorial factual assertions and legal theories.

Defense attorneys everywhere work on behalf of clients and owe a duty to these clients to advance the best argument possible on their behalf. Different systems attach different weight to that duty relative to the attorneys' duties to the court and the law.<sup>250</sup> But in all systems, a criminal defense attorney is hired to advance the client's case vigorously and to rebut prosecutorial legal theories and factual assertions, if possible.

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been using to obtain false testimony against innocent defendants.") (author's translation); *see also* Questionnaire # 9, *supra* note 218.

249. Questionnaire # 11, *supra* note 77.

250. *See* JOHN LEUBSDORF, MAN IN HIS ORIGINAL DIGNITY: LEGAL ETHICS IN FRANCE 15–26 (2001); David Luban, *The Sources of Legal Ethics: A German-American Comparison of Lawyers' Professional Duties*, 48 RABELSZEITSCHRIFT 245, 266–67 (1984).

These expectations may provide at least a partial explanation of why defense lawyers perceive the international criminal trial as a contested event, in which acquittals are possible and some defendants are in fact not guilty. As attorneys internalize their role of faithful representatives of their clients' interests, it may be easier for them to serve that function if they believe in and profess the innocence of their clients. It may also be easier for them to justify their decision to leave a comfortable practice at home and represent widely abhorred defendants if they believe that they are likely to win some of their cases.

If the attorneys are part of a tight-knit community of professional peers, they are especially likely to internalize these professional norms. While international attorneys are much more dispersed than their domestic counterparts, in recent years they have become a closer legal community. A good number of the attorneys are now repeat players. At least at the ICTY, the Association of Defense Counsel has served as an important social network and a representative of defense interests. These peer ties have probably reinforced the self-identification of defense attorneys as zealous advocates. For most attorneys, this identification is also based on long experience with representing criminal defendants at home.<sup>251</sup>

There is another way in which the legal training of defense attorneys influences their attitudes. Their education and work experience in an adjudicative model of criminal trials has instilled in them a respect for the rule of law and a reluctance to resort to political arguments. A number of respondents thus explained that they would not make political arguments during trial because this is not behavior befitting a good lawyer.<sup>252</sup> And in fact, the most virulent political attacks on the international criminal tribunals have come from two self-represented defendants—Slobodan Milošević and Vojislav Šešelj—who did not feel as constrained by professional norms as their advocates might have been.

While the professional identity of defense attorneys undoubtedly shapes their attitudes, it is unlikely that they entirely misperceive the nature of international criminal trials. After all, many domestic defense attorneys continue to fulfill their duty of zealous advocacy without believing that acquittals are likely or that many of their clients are innocent. As discussed below, other factors may influence the attitudes of international criminal defense attorneys.

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251. See *supra* note 64 and accompanying text.

252. E.g., Questionnaire # 12, *supra* note 237.



## 2. *Effect of Participating in International Criminal Trials*

Participation in international criminal trials likely influences the views of defense attorneys in at least two ways. First, defense attorneys' views undergo a transformation when the attorneys begin to perceive themselves as players in the international criminal tribunals. Second, the particular procedural rules used by the tribunals further shape defense beliefs and actions at trial.

As defense attorneys begin to work at the tribunals and to see themselves as key players in the proceedings, some evidence suggests that skepticism toward those proceedings is likely to decrease. A 1999 study of Bosnian lawyers and judges reported a transformative effect in a case where the participants' interaction with the ICTY was in fact much more limited. While the study showed that ethnicity influenced the respondents' views on the presence of politics at ICTY trials, it also found that those respondents who had had personal exposure to the ICTY tended to overcome their initial skepticism and develop respect for the tribunal and its lawyers.<sup>253</sup>

A similar transformation may occur among defense attorneys at the ICTY and ICTR. As they learn first-hand about the operation of the tribunals and become involved in the proceedings, preexisting beliefs that they may have of the tribunals as political entities are likely to dissipate. One interpretation is that defense attorneys are simply "co-opted" by the tribunals as their pay and case assignment become at least somewhat dependent on tribunal officials. A more charitable view would be that the attorneys' participation in the proceedings teaches them about the different ways in which they can influence the trial proceedings and convinces them that they are in fact engaged in an adjudicative enterprise.

This effect is likely to be strengthened by the largely adversarial procedures at the international tribunals. Under the adversarial system, defense attorneys have greater procedural powers and responsibilities than they do in an inquisitorial setting.<sup>254</sup> They cannot rely on the state to seek out exculpatory evidence<sup>255</sup> and must instead conduct their own pre-trial investigation.<sup>256</sup> At trial, the prosecutor and the defense, rather than the court, take charge of presenting evidence and examining wit-

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253. Weinstein & Fletcher, *supra* note 215, at 147.

254. Luban, *supra* note 56, at 139.

255. Brady v. Maryland, 373 U.S. 83, 87 (1963).

256. Maximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835, 851 (2005).

nesses.<sup>257</sup> The rules thus set up the trial as a battle between the defense attorney and prosecutor. Under this framework, both the prosecution and the defense may naturally view their role as “mak[ing] one’s own case as strong as possible and...weaken[ing] the case of the other party.”<sup>258</sup> Defense attorneys operating under this framework naturally internalize the ideal of vigorous adversarial defense, under which they have both the ability and the duty to challenge factual and legal claims by the prosecution. The procedural framework therefore shifts the practice of defense attorneys toward more aggressive advocacy. At the same time, the very possibility of aggressive advocacy likely helps convince attorneys that the trials are primarily adjudicative.

### 3. *Acquittal and Dismissal Rates*

Although the professional identity of defense attorneys and the influence of the tribunals’ procedural framework may provide a partial explanation for the lawyers’ views, other factors further help explain why defense lawyers believe that international criminal trials serve to separate the guilty from the innocent. Data from ICTY and ICTR judgments suggest that defense attorneys are not mistaken in their perceptions. Trials at these tribunals are in fact contested, and their outcomes are not predetermined.<sup>259</sup> The rates of acquittals and charge dismissals at the ICTY and ICTR do not appear to be lower than the same rates in domestic settings. As of November 19, 2007, the ICTY trial chambers had found sixty-two defendants guilty.<sup>260</sup> The court had fully acquitted nine defendants, or 14.5%,<sup>261</sup> and the prosecution withdrew five indictments after the accused had been transferred to the tribunal.<sup>262</sup> As of November 28, 2007, the ICTR trial chambers had handed down judgments in-

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257. ABRAHAM S. GOLDSTEIN, *THE PASSIVE JUDICIARY* 4 (1981); Luban, *supra* note 56, at 139.

258. Langer, *supra* note 256, at 861.

259. As mentioned earlier, this element of risk in the outcome is what distinguishes a “show trial” from a regular trial. Peterson, *supra* note 2, at 263.

260. International Criminal Tribunal for the Former Yugoslavia, ICTY at a Glance: Key Figures, <http://www.un.org/icty/glance-e/index-t.htm> (last visited Dec. 2, 2007).

261. *Id.* This percentage is roughly the same as the percentage of acquittals at Nuremberg. There, three out of twenty-two defendants (almost 14%) were acquitted, and a number of conspiracy charges were dismissed, as were charges against so-called criminal organizations.

262. The charges against Marinko Katava, Ivan Santić, and Pero Skopljak were withdrawn on December 19, 1997. The charges against Nenad Banović were withdrawn on April 10, 2002, and those against Agim Murtezi on February 28, 2003. Twenty other indictments were withdrawn before the commencement of proceedings. *Id.*

volving thirty-five accused.<sup>263</sup> The cases of two defendants are currently on appeal, and one defendant died less than two months after the trial chamber judgment was rendered, without the possibility of an appeal.<sup>264</sup> Of the remaining thirty-two, five were acquitted.<sup>265</sup> This represents an acquittal rate of 15.6%, which is similar to the acquittal rate of the ICTY and is higher than the rate of acquittals in either U.S. federal court or French or German criminal courts.<sup>266</sup>

There were also many more charge dismissals and partial acquittals at both the ICTY and ICTR. At the ICTY, as of April 12, 2005, defendants were acquitted of 206 counts out of a total of 475 counts confirmed by the trial chambers.<sup>267</sup> At the ICTR, if dismissals of complicity in genocide charges are excluded (because a person cannot be charged as both a principal and an accomplice, and the prosecution routinely charges both, there is a 95% rate of dismissals of such complicity charges), the rate of other genocide charges resulting in dismissals or partial acquittals is roughly one-third.<sup>268</sup> Of these, the ones that result most frequently in acquittals or dismissals are conspiracy charges (roughly 63%), followed by command responsibility and joint criminal

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263. International Criminal Tribunal for Rwanda, Cases: Status of Cases, <http://69.94.11.53/ENGLISH/cases/status.htm> (last visited Dec. 6, 2007).

264. *Id.*

265. *Id.*

266. In 2002, 89% of all defendants whose cases were concluded in U.S. district court were convicted. The 11% that were not convicted can be broken down as follows—10% had their charges dismissed, and only 1% were acquitted. BUREAU OF JUSTICE STATISTICS, FEDERAL CRIMINAL CASE PROCESSING, 2002, at 11 (2005), <http://www.ojp.usdoj.gov/bjs/abstract/fccp02.htm>. Because over 90% of convictions in the United States result from guilty pleas, it is difficult to compare the outcomes of international criminal trials to those of American trials. Still, the numbers show that trials in the United States are not significantly more contested, and in fact appear to be somewhat less contested, than those at the ICTY and ICTR. Data from Germany in 1992 show that of willful homicide complaints filed that year, 2% were dismissed after filing, and 4% resulted in acquittals. Of the 94% convicted, 46% were convicted of willful homicide, while 48% were convicted on other charges. The acquittal rates for robbery and rape are 3% and 5%, respectively. BUREAU OF JUSTICE STATISTICS, GERMAN AND AMERICAN PROSECUTIONS: AN APPROACH TO STATISTICAL COMPARISON 18–20 (1998), <http://www.ojp.usdoj.gov/bjs/pub/pdf/gap.pdf>. In France, a study from 1995 reports a 7.3% acquittal rate for jury trials in Paris. Roderick Munday, *What Do the French Think of Their Jury? Views from Poitiers and Paris*, 15 LEGAL STUD. 65, 73 (1995). Another author mentions a conviction rate “approaching ninety-five percent.” LEUBSDORF, *supra* note 250, at 83.

267. James Meernik, The International Criminal Tribunals Database Website: ICTY Count, <http://www.psci.unt.edu/~meernik/InternationalCriminalTribunalsWebsite.htm>.

268. These figures are based on a November 2006 review of completed cases. The rate of acquittals and dismissals for charges of war crimes and crimes against humanity is even higher. Fourteen out of fifteen defendants were acquitted of war crimes charges against them. Eight of twenty-six defendants were acquitted of crimes against humanity, and fourteen more defendants were acquitted of some crimes against humanity counts.

enterprise charges (roughly 56% and 50%, respectively), charges for genocide as a principal perpetrator (24%), and charges for incitement of genocide (12.5%).<sup>269</sup>

#### 4. *The Expanding Reach of International Criminal Law*

One possible explanation for the relatively high acquittal and dismissal rates is that a number of the charges at international criminal tribunals concern offenses for which it is difficult to prove the defendant's knowledge or intent. An obvious example is genocide, which requires proof of a specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group. But other factors also help explain dismissals and acquittals across offense categories at the ICTY and ICTR. These include the tribunals' charging practices and evolving jurisprudence.

Since the establishment of the ICTR and ICTY, substantive international criminal law has experienced unprecedented growth. Provisions in existing treaties, like the Geneva Conventions and the Genocide Convention, have been interpreted and applied liberally. The jurisprudence of the Nuremberg and Tokyo Tribunals—particularly on crimes against humanity—has also been revived and extended to new situations. Critically, prosecutors have used principles of command responsibility, complicity, and joint criminal enterprise to reach a number of persons who did not directly commit crimes.

The active use of some of these principles by prosecutors has given rise to serious tensions with the notion of individual criminal liability.<sup>270</sup> Joint criminal enterprise poses a special problem in this respect, similar to difficulties that have arisen with extensive use of conspiracy in U.S. criminal prosecutions. As the U.S. Supreme Court has noted,

[conspiracy] is perhaps not greatly different from other [crimes] when the scheme charged is tight and the number involved small. But as it is broadened to include more and more, in varying degrees of attachment to the confederation, the possibilities for miscarriage of justice to particular individuals become greater and greater.<sup>271</sup>

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269. See *supra* note 267.

270. See Danner & Martinez, *supra* note 38, at 144–46.

271. *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). In one respect, however, joint criminal enterprise is less problematic than conspiracy. It “is a species of liability for the substantive offense (akin to aiding and abetting), not a crime on its own.” *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2785 n.40 (2006).

Similar misgivings over the law of conspiracy brought judges at the Nuremberg Tribunal to limit conspiracy charges considerably.<sup>272</sup> It should not be surprising, then, that judges at the ICTY and ICTR have also resisted some of the broader readings of joint criminal enterprise and command responsibility urged by the prosecution.<sup>273</sup>

Separately, the rapid growth of international criminal law has created unpredictability for both the defense and the prosecution. One of the responses to this uncertainty by the prosecution has been to pile cumulative charges for the same conduct,<sup>274</sup> but this has also given the defense more legitimate grounds to ask for dismissal of charges and for judges to grant such dismissals.

In addition to this remarkable growth in substantive international criminal law, a broader prosecutorial strategy has increased the chances that cases would be based on weak evidence. The ICTY and ICTR have conducted a number of prosecutions that is unprecedented for international tribunals, and they have prosecuted both military and civilian defendants, all along the chain of command. At the same time, the tribunals are located away from the crime scene, and they lack reliable enforcement mechanisms. For reasons of both politics and geography, access to the crime scene and to supporting evidence has proven a challenge for the prosecution. Investigators and prosecutors are typically foreign, so they often find it difficult to understand the context of the crimes—the command structures, ethnic loyalties, and political rivalries—and to apportion responsibility accordingly. At the ICTY, the prosecution has already withdrawn twenty indictments before commencement of proceedings, and five after the accused had been transferred to the tribunal, meaning that about 15% of the public indictments have been withdrawn.

### 5. *Judicial Independence*

Even if it is true that international prosecutors have difficulty gathering evidence for their cases and that they resort to overbroad legal theories in their indictments, trials could still be largely political if judges sided with the prosecution in the face of flimsy evidence and unsup-

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272. Wald, *supra* note 173, at 1592.

273. On command responsibility, see Danner & Martinez, *supra* note 38, at 127–29. On joint criminal enterprise, see, for example, Harmen van der Wilt, *Joint Criminal Enterprise: Possibilities and Limitations*, 5 J. INT'L CRIM. JUST. 91, 92 (2007).

274. See Patricia Wald, *ICTY Judicial Proceedings: An Appraisal from Within*, 2 J. INT'L CRIM. JUST. 466, 469 (2004). This is confirmed by the dismissal statistics cited in note 268.

ported legal theories. But the responses of most attorneys suggest that this is not the case and that judges are generally impartial. Only a minority of the attorneys interviewed for this study complained about judges' inability to maintain independence from outside pressures or about their attitude toward the accused.<sup>275</sup> Objective factors, such as the acquittal and dismissal statistics discussed earlier, further tend to confirm the impartiality of ICTY and ICTR judges. Finally, the results of a 2003 empirical study of ICTY verdicts and sentences also indicate that judges at the tribunal are generally not influenced by political factors.<sup>276</sup> The study suggests, for example, that judges do not appear to be biased in favor of NATO, or Western, interests, as some critics have alleged. In fact, the more NATO judges sit on a panel, the less likely is a defendant to be found guilty.<sup>277</sup> Moreover, the presence of NATO judges on the panel does not result in a longer sentence.<sup>278</sup> Significantly, the results also indicate that judges are not biased against Serb defendants in their verdicts and sentences, again refuting criticisms that the ICTY is a victor's court.<sup>279</sup>

Structural factors help explain these results. For example, the distance of judges from the cultural and political environment in which the crimes took place allows judges to maintain independence. Furthermore, because judges are elected by the UN General Assembly as a whole,<sup>280</sup> it is difficult for one interested state (such as Rwanda), or even a group of states (such as NATO states), to have a determining effect on the vote and, by extension, on judicial decision-making.

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275. Sixteen respondents indicated that a particular judge or judges in general at times displayed a bias in favor of the prosecution or otherwise had a problematic attitude toward the defense. *E.g.*, Interview # 19, *supra* note 188 (“[I]t’s clear that you have an attitude from the tribunals...more inclined to listen more attentively to what the prosecutor says.”); Questionnaire # 3, *supra* note 72 (“The first chamber to try the case was rather anti me or the case! Those judges were removed for appearance of bias (on another matter) and we had a new and different tribunal of judges who were excellent”); Questionnaire # 9, *supra* note 218 (noting that the court allowed inappropriate and discourteous remarks the prosecutor made against defense counsel). Twenty respondents, on the other hand, indicated that judges’ attitude was not problematic, and a few emphasized that the court was very respectful toward the defense. Interview # 11, *supra* note 95; Interview # 16, *supra* note 101.

276. James Mcernik, *Victor’s Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia*, 47 J. CONFL. RES. 140, 153 (2003).

277. *Id.*

278. *Id.* at 156.

279. *Id.* at 153, 154.

280. Statute of the International Criminal Tribunal for the Former Yugoslavia arts. 13bis., 13ter, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/Res/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda arts. 12bis, 12ter, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994).

Perhaps the greatest recent challenge to the perception of judicial independence has been the so-called “Completion Strategy”—the mandate that the tribunals complete their work in the next several years.<sup>281</sup> To fulfill this mandate, judges have been limiting both parties’ time to examine witnesses and present evidence, and have been making greater use of affidavits while relying less on oral testimony.<sup>282</sup> They have also been more willing to demand that prosecutors trim the indictments and to take judicial notice of certain historical facts of common knowledge.<sup>283</sup> A number of commentators, including defense attorneys and former tribunal judges, have argued that in the aim to fulfill the completion mandate, judges have unduly prioritized efficiency over fairness.<sup>284</sup> These commentators have criticized the Completion Strategy for undermining the rights of the defense, most notably, the rights to confront witnesses and to have adequate time to prepare a defense.

To the extent that efficiency is pursued at the expense of fairness and accuracy, possibly leading to unjustified convictions, the tribunals may in fact be moving toward a political model, one devoted above all to efficiency.<sup>285</sup> It is beyond the scope of this Article to examine the full effects of the Completion Strategy, but it is clear that it has reduced the perceived fairness of the tribunals among some defense attorneys and outside observers. At the same time, the Completion Strategy has led to some positive developments for the defense. It has ensured that trials proceed more quickly, thus protecting the defendants’ right to a speedy trial. It has also forced courts to focus more on the specific charges against the accused and has led judges to trim overbroad indictments and rein in prosecutors’ attempts to introduce cumulative evidence. In this way, it has moved the trials away from some of the broad political goals which animated the work of the prosecution and the court at the outset of the tribunals’ work—the goals of pursuing a fuller historical record and giving victims the opportunity to achieve closure by testify-

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281. *See supra* note 119.

282. Kwon, *supra* note 200, at 363–68.

283. *Id.* at 368–75. The decision to take judicial notice of the genocide in Rwanda has been especially controversial. On the one hand, it obviates the need for the prosecution to introduce evidence related to well-known historical facts related to the Rwandan conflict; on the other hand, the decision to take judicial notice of “genocide” could compromise defendants’ rights, because in many cases, the defense has disputed the argument that a genocide took place, or that there was a conspiracy to commit genocide. Nina H.B. Jorgensen, *Genocide as a Fact of Common Knowledge*, 56 INT’L COMP. L.Q. 885 (2007).

284. Langer, *supra* note 256.

285. *Id.*

ing in court, among others. From the defense's point of view, this aspect of the Completion Strategy should be a welcome development.

*B. Explaining the Views of Defense Attorneys Who Believe Trials Follow the Political Model*

Although the great majority of respondents did not believe that trials at the ICTR and ICTY were primarily political events, a few thought otherwise. There are several possible explanations for the views of the attorneys who viewed the trials as politicized, and these explanations take into account the higher percentage of such views among ICTR practitioners.

First, as discussed earlier, the government of Rwanda has tried to interfere with the work of the ICTR more substantially than governments in the former Yugoslavia have done with the ICTY.<sup>286</sup> Importantly, evidence suggests that at times the Rwandan government may have been successful in interfering. The most poignant example is that of defendant Barayagwiza, accused of committing genocide in Rwanda. After finding that the ninety-six-day delay between Barayagwiza's transfer to the ICTR's detention unit and his initial appearance before a judge violated his fundamental rights, the ICTR Appeals Chamber ordered his release.<sup>287</sup> In response, the Rwandan government threatened it would cease all cooperation with the tribunal.<sup>288</sup> Soon thereafter, the Appeals Chamber reversed its own decision, citing new evidence presented by the prosecution,<sup>289</sup> but some commentators argued the decision was rendered to appease the Rwandan government without the support of which the tribunal could not function.<sup>290</sup>

This was perhaps the most overt act of pressure by the Rwandan government on the ICTR, but the government also has criticized the tribunal's slowness and its treatment of Rwandan victims and suggested it may suspend cooperation on those grounds as well.<sup>291</sup> Furthermore, the Rwandan government has repeatedly made it very difficult for defense

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286. See *supra* Section II.H.

287. Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, Decision (Nov. 2, 1999).

288. *Kigali Protest Against UN Tribunal*, BBC NEWS, Nov. 15, 1999, <http://news.bbc.co.uk/2/hi/africa/521807.stm>.

289. Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, Decision on Prosecutor's Request for Review or Reconsideration (Mar. 31, 2000).

290. Mercedeh Momeni, *Why Barayagwiza Is Boycotting His Trial at the ICTR: Lessons in Balancing Due Process Rights and Politics*, 7 ILSA J. INT'L & COMP. L. 315 (2001); William A. Schabas, Case Report, *Barayagwiza v. Prosecutor*, 94 AM. J. INT'L L. 563 (2000).

291. See Victor Peskin, *Rwandan Ghosts*, LEGAL AFF., Sept/Oct. 2002, available at [http://www.legalaffairs.org/issues/September-October-2002/feature\\_peskin\\_septoct2002.msp](http://www.legalaffairs.org/issues/September-October-2002/feature_peskin_septoct2002.msp).



attorneys to conduct investigations on Rwandan territory. It has threatened to arrest and has in fact arrested ICTR defense investigators and has accused ICTR lawyers of attempting to bribe witnesses in Rwanda.<sup>292</sup> Rwandan authorities also have directly interfered with defense witnesses.<sup>293</sup> It is therefore not surprising that several defense attorneys argued that Rwandan pressure on the ICTR politicized the tribunal and the trial proceedings.

Although both ICTR and ICTY lawyers expressed some dissatisfaction with the way the Registry handled their pay and reimbursements, such complaints were somewhat more common at the ICTR.<sup>294</sup> There are a couple of possible explanations for this difference. First, the ICTY has switched from an hourly compensation to lump-sum payments to the defense. The ICTR still pays lawyers by the hour. But because the hourly payment is subject to greater abuse, it also requires more extensive paperwork and occasions greater scrutiny by the Registry. The hourly pay structure is more likely to give rise to disagreements between defense teams and the Registry as to whether particular expenses are warranted. By contrast, the lump-sum structure places responsibility for managing the budget largely within the defense's hands.

Relations between the ICTR Registry and defense are also particularly tense because of the Registry's inability to intervene on the attorneys' behalf to end the obstruction of defense investigations by the Rwandan government. Although governments in the former Yugoslavia have also at times refused to cooperate with ICTY defense attorneys, as noted earlier, this has been a greater problem in Rwanda. The Rwandan government's obstructionist tactics have provoked resentment among defense lawyers, and this resentment has been directed in part toward the Registry, whom the lawyers blame for failing to come to their aid.

Finally, ICTR defense attorneys are more likely than their ICTY counterparts to claim that the tribunals' prosecutors are bringing charges selectively. While the ICTY did prosecute some members of all groups involved in the conflicts in the former Yugoslavia, the ICTR only

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292. African News Analysis Blog, *ICTR Clears a Lawyer Accused of Bribing a Witness*, Mar. 23, 2007, [http://africannewsanalysis.blogspot.com/2007\\_03\\_25\\_archive.html](http://africannewsanalysis.blogspot.com/2007_03_25_archive.html); Questionnaire # 9, *supra* note 218; Interview # 29, *supra* note 216.

293. *Prosecutor v. Simba*, Case No. ICTR-2001-76-T, Judgment, ¶ 49 (Dec. 13, 2005) (finding interference by Rwandan authorities with a defense witness, but holding that the error was harmless).

294. Seven respondents directly complained that the ICTR had refused to reimburse what they thought were legitimate expenses, while only three ICTY attorneys made the same complaint.

prosecuted Rwandan Hutus and not the Tutsis who are currently in power in Rwanda. The Prosecutor justified this decision on the grounds that the vast majority of crimes—and the most serious crimes—committed during the genocide in Rwanda were in fact committed by Rwandan Hutus.<sup>295</sup> While the focus on the most serious crimes and on Hutu suspects may be legitimate, the survey here shows that this exclusive focus has hurt the tribunal's legitimacy among a number of defense attorneys.

The complaints voiced by defense attorneys suggest that while the actual trial proceedings are less likely to be seen as politicized, decisions preceding or surrounding these proceedings may influence the way trials are perceived. Such decisions concern jurisdiction and charging, the level of administrative support for the defense, and the relationship between the tribunals and the governments on whose territory the evidence for the crimes is located. As the International Criminal Court begins its first trials, these are lessons it ought to consider in arranging its relations with the defense.

### CONCLUSION

In the long-running debate about the purpose of international criminal trials, the perspective of practicing defense lawyers has not traditionally received a great deal of attention. This Article has argued that a sampling of the opinions of defense lawyers suggests that these trials are much farther from being constructed primarily to satisfy important political purposes and much nearer to being truly adjudicative proceedings whose difficult but crucial function is to separate those who are truly blameworthy from those who are not. The views of defense lawyers in international criminal trials today appear to reflect a belief in the innocence of many defendants, on both factual and legal grounds, as well as a belief in the possibility of acquittals for these defendants. This Article has further suggested that defense lawyers' perceptions are not merely inevitable products of their role, but are supported by an increasing number of acquittals, dismissals, and vigorous debates about liability doctrines and rules of procedure and evidence at these tribunals. Finally, and contrary to popular perceptions, most defense attorneys do not view political statements or attacks as appropriate tactics in international criminal trials.

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295. Hassan B. Jallow, *Prosecutorial Discretion and International Criminal Justice*, 3 J. INT'L CRIM. JUST. 145, 156–58 (2005).

The perceptions of those who participate in the trials say something about what kind of proceedings these are. Even as international trials retain their unique political importance, the attitudes of those actually engaged in them reflect their character as increasingly adjudicative proceedings, with separation of the guilty from the innocent as a central purpose. Importantly, as key players in the trials, defense attorneys not only reflect, but also influence the proceedings, shifting them further toward the adjudicative model.

Of course, fully contested, adversarial trials serve both legal and political purposes. But to the extent that these purposes occasionally come into conflict—where, for example, political purposes such as efficient closure and establishment of a historical record might recommend one set of procedures, and classic legal principles might recommend another—the debate becomes important. If international criminal trials increasingly serve the same fundamental adjudicative purposes as domestic trials, then the procedures of the tribunal and the duties and actions of the participants will adjust accordingly. The actions and perceptions of international defense lawyers provide a significant signal that international criminal trials are moving in this direction.