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Fairness and Politics at the ICTY: Evidence from the Indictments, 39 N.C. J. Int'l L. & Com. Reg. 45 (2013)

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Fairness and Politics at the ICTY: Evidence from the Indictments

Stuart Ford†

I.	Introduction	46
II.	Of Show Trials, Political Trials, and Legal Trials.....	51
	A. Show Trials	51
	B. Political vs. Legal Trials	55
	C. Politics at Other Stages of the ICTY’s Work.....	59
III.	Demographics of the Accused.....	63
	A. Sex and Age	63
	B. Role	66
	C. Ethnicity	68
	D. Seniority	71
IV.	The Contents of the Indictments.....	74
	A. Charges	74
	B. Modes of Liability	80
	C. The Scope and Gravity of the Alleged Crimes	84
	1. Gravity	84
	2. Scope	85
V.	Disposition of the Cases	87
	A. Conviction Rate	90
	B. Acquittals	92
	C. Sentences.....	95
	D. Guilty Pleas.....	101
	E. Appeals	103
	F. The Typical ICTY Accused.....	104
VI.	Conclusion	105
VII.	Appendix: The Database	111

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I. Introduction

Professor Jenia Iontcheva Turner has written that “[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.”¹ Professor Hayden has accused the International Criminal Tribunal for the Former Yugoslavia (ICTY) of being a scam designed to punish those that the United States viewed as its enemies.² Professor Mandel has described the ICTY as a “hoax,”³ and anti-ICTY sentiment is prevalent in Serbia. Surveys conducted throughout the 2000s suggested that somewhere between 80–90% of ethnic Serbs thought the ICTY was biased and untrustworthy.⁴ Ethnic Croats are similarly suspicious of the court and a significant minority believes the court is fundamentally unjust.⁵ In 2005, Carla Del

¹ Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 531 (2008); see also *id.* at 576-77; Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 1, 1 (2002) (noting that Milošević's trial risked “becoming a show trial”); Jeremy Peterson, Note, *Unpacking Show Trials: Situating the Trial of Saddam Hussein*, 48 HARV. INT'L L.J. 257, 259-60 (2007) (collecting sources referring to Saddam Hussein's trial as a show trial); see *infra* notes 28-29 and accompanying text (collecting sources referring to ICTY trials as show trials).

² See R. Hayden, *Biased “Justice”: Humanrightsism and the International Criminal Tribunal for the Former Yugoslavia*, 47 CLEV. ST. L. REV. 549, 551-52 (1999) (“[P]ut bluntly, the [ICTY] prosecutes only those whom the Americans want prosecuted, and the United States government threatens prosecution by the supposedly independent ICTY in order to obtain compliance from political actors in the Balkans.”).

³ See Michael Mandel, *NATO's Bombing of Kosovo Under International Law Politics and Human Rights in International Criminal Law*, 25 FORDHAM INT'L L.J. 95, 95 (2001) (describing the ICTY as a “hoax” because of its failure to indict members of the North Atlantic Treaty Organization (NATO) for their intervention in Kosovo).

⁴ Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, 45 VAND. J. TRANSNAT'L L. 405, 416 (2012); see also Mirko Klarin, *The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia*, 7 J. INT'L CRIM. JUST. 89, 92 (2009) (indicating that only 7% of Serbian citizens in a 2007 survey thought that the ICTY was unbiased).

⁵ See Janine Natalya Clark, *The ICTY and Reconciliation in Croatia: A Case Study of Vukovar*, 10 J. INT'L CRIM. JUST. 397, 405-09 (2012); see also *id.* at 407 (noting that many ethnic Croats who had fought in the conflict maintained that the ICTY was

Ponte, the chief prosecutor of the ICTY, was forced to acknowledge that “[t]he debate on war crimes in the former Yugoslavia is not subsiding. It is present in the daily life and media, and always politicised. . . . [T]he public is only interested . . . in politically, not judicially, defined truth.”⁶

Even some of the participants question the court’s motives. A small number of defense attorneys at the ICTY view the entire process as fundamentally political in nature,⁷ and a much larger proportion of them think that particular practices at the ICTY are unfair, even if the whole enterprise is not just a “show trial.”⁸ There also have been academic criticisms of the fairness of the proceedings, although academics have generally not concluded that the trials are shams.⁹ On the other hand, many maintain that the ICTY has been fundamentally fair, impartial, and just.¹⁰

The question of whether ICTY trials are legal or political has recently returned to the spotlight with a controversial series of decisions. On November 16, 2012, the Appeals Chamber acquitted and released Ante Gotovina and Mladen Markač, overturning convictions against both accused.¹¹ Gotovina had

unjust).

⁶ Press Release, Office of the Prosecutor, Address of the Prosecutor at the Inauguration of the War Crimes Chamber of the Court of BH, U.N. Press Release CDP/P.I.S./944 (Mar. 9, 2005), <http://www.icty.org/sid/8633/en> (emphasis omitted).

⁷ See Turner, *supra* note 1, at 591 (discussing the views of the few defense attorneys who believed the trials were primarily political events).

⁸ See *id.* at 550, 560-66 (explaining that a majority of defense attorneys have expressed concerns regarding certain ICTY practices, such as the expansive use and lack of clarity in indictments that charge joint criminal enterprise).

⁹ See James Meernik, *Justice and Peace?: How the International Criminal Tribunal Affects Societal Peace in Bosnia*, 42 J. PEACE RES. 271, 277-78 (2005) (discussing academic criticisms of the ICTY). *But see supra* notes 2-3.

¹⁰ See Jane E. Stromseth, *Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT’L L. 251, 319-20 (2007) (“The ICTY . . . [has] accomplished a great deal in terms of bringing to justice, in fair legal proceedings, individuals accused of major atrocities.”); Patricia M. Wald, *ICTY Judicial Proceedings: An Appraisal from Within*, 2 J. INT’L CRIM. JUST. 466, 466 (2004) (“I believe it would be almost impossible to find an impartial commentator in 2003 in Europe, Africa, Asia or the United States who would contend that ICTY trials are not fair and in accordance with internationally accepted criminal-law [sic] standards.”).

¹¹ See Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgment (Int’l Crim. Trib. for Former Yugoslavia Nov. 16, 2012), http://www.icty.org/x/cases/gotovina/acjug/en/121116_judgement.pdf.

been a general in the Croatian army, and Markač had been Assistant Minister of the Interior for Croatia.¹² Both were alleged to have been part of a criminal plan to permanently remove the Serbian civilian population from a region in Croatia called Krajina.¹³ The release of Gotovina and Markač was treated by Serbian politicians as evidence that the ICTY's trials are political.¹⁴

Then, less than two weeks later, one of the Trial Chambers acquitted Ramush Haradinaj, the former Prime Minister of Kosovo.¹⁵ Haradinaj and his co-accused were alleged to have been responsible for the mistreatment of ethnic Serbs at the hands of the Kosovo Liberation Army.¹⁶ Their acquittal was treated by ethnic Serbs as further evidence that ICTY trials are political.¹⁷ In short, the question of the nature of ICTY trials is as salient today as it was in the late 1990s. As a result, the principal goal of this Article is to use evidence from ICTY indictments to draw some conclusions about the nature of the trials and the process as a whole.

After twenty years in operation, most of the ICTY's cases have been completed, and the ICTY itself is beginning to wind down.¹⁸

¹² *Id.* ¶¶ 3-4.

¹³ *Id.*

¹⁴ See Marko Milanovic, *The Gotovina Omnishambles*, BLOG OF THE EUROPEAN J. OF INT'L L. (Nov. 18, 2012), <http://www.ejiltalk.org/the-gotovina-omnishambles/#more-6975> ("In Serbia, the judgment only confirms the perpetual victim narrative[:] the ICTY and the international community never really cared about crimes against Serbs, and the Tribunal has shown itself to be nothing more than a political court."); see also *Hague War Court Acquits Croat Generals Gotovina and Markac*, BBC NEWS EUROPE, Nov. 16, 2012, <http://www.bbc.co.uk/news/world-europe-20352187>; Marlise Simons, *Hague Court Overturns Convictions of 2 Croatian Generals Over a 1995 Offensive*, N.Y. TIMES, Nov. 16, 2012, available at http://www.nytimes.com/2012/11/17/world/europe/hague-court-overturns-convictions-of-2-croatian-generals.html?_r=0.

¹⁵ See *Prosecutor v. Ramush Haradinaj et al.*, Public Judgment with Confidential Annex, Case No. IT-04-84bis-T (Nov. 29, 2012), http://www.icty.org/x/cases/haradinaj/tjug/en/121129_judgement_en.pdf.

¹⁶ *Id.* ¶ 1.

¹⁷ See Marlise Simons, *War Crimes Court Frees Former Leader of Kosovo*, N.Y. TIMES, Nov. 29, 2012, http://www.nytimes.com/2012/11/30/world/europe/un-court-frees-former-leader-of-kosovo.html?_r=0 ("Inevitably, the acquittals have provoked criticism beyond Serbia that the verdicts were politically inspired, because the militaries were backed by the West.").

¹⁸ As recently as two years ago, the ICTY was predicting that it would complete its

While there were some attempts to study the ICTY empirically during its early years,¹⁹ the field has expanded rapidly as the court nears its end.²⁰ Most authors, however, have focused on ICTY judgments. This Article seeks to fill a gap in the literature by analyzing the contents of the indictments. Unless otherwise stated, all the data presented is drawn from a database²¹ created by the author that contains information on indictments and sentences or acquittals issued up until May 3, 2012.²² More information about the database is contained in the Appendix.²³

The analysis of the indictments indicates that ICTY trials have not been show trials. There are no strong correlations between the allegations in the indictments and either conviction or the resulting sentence length. One factor, a charge of genocide, does have a moderate correlation with sentence length, but that is best explained by the longer sentences that generally result from genocide convictions. Moreover, conviction rates at the ICTY are generally lower than equivalent rates in domestic criminal justice systems. In short, there is little evidence that the allegations in the

work in 2014. See Stuart Ford, *How Leadership in International Criminal Law is Shifting from the United States to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts*, 55 ST. LOUIS U. L.J. 953, 989 n.158 (2011). In its most recent Completion Strategy, the ICTY predicts the appeals may not be completed until 2017. See Letter from the President 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, to the President of the Security Council, UN Doc. No. S/2013/308, Annex I ¶ 51 (May 12, 2013) (noting that appeals, if any, in the *Prlić et al.* case would be unlikely to be completed until mid-2017).

¹⁹ See, e.g., James Meernik, *Victor's Justice or the Law?: Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia*, 47 J. CONFLICT RESOL. 140 (2003) (assessing whether the ICTY's trials are fair using data from early cases).

²⁰ See Barbora Holá et al., *International Sentencing Facts and Figures*, 9 J. INT'L CRIM. JUST. 411, 413 n.5 (2011) (listing other articles that have empirically studied ICTY convictions and sentences).

²¹ ICTY Trial Dataset (May 03, 2012) (on file with author).

²² This means that all of the indictments that have been issued by the ICTY were coded as available by the cut-off date. Not all of the outcomes were included, however. On the date that data collection was completed, the trials of eight individuals were either underway or about to begin. The database does not contain information on the outcomes of those trials.

²³ See *infra* Appendix: The Database.

indictments effectively control the outcomes of the trials.

There are, however, some problems with the indictments. For example, in a small number of indictments, it is hard to tell whether the accused is alleged to have caused unlawful deaths or whether the discussion of unlawful deaths is intended simply as background information. This is problematic, although it occurs relatively infrequently. Another concern relates to the use of certain modes of liability. Aiding and abetting, planning, and instigating appear to have been alleged somewhat indiscriminately by the prosecution. On the other hand, the modes of liability that are most often criticized, superior responsibility and joint criminal enterprise, do not appear to have been used indiscriminately or functioned as forms of strict liability.

An area that looks troubling at first glance is the ethnic composition of the accused and their sentences. More ethnic Serbs were charged than any other ethnic group, and Serbs received sentences that were significantly longer than those received by ethnic Bosniaks.²⁴ Certainly, many ethnic Serbs take this disparity as evidence of bias and unfairness by the court.²⁵ However, an assumption of equivalence amongst the accused is not warranted.²⁶ The ethnic distribution of the charges and the sentences is consistent with Serbs having committed the most crimes and the most serious crimes; the evidence suggests that this latter explanation is the better one.²⁷ Ultimately, one of this

²⁴ For purposes of this Article, the term “Bosniak” refers to those people who identify themselves as either Bosniak or Bosnian Muslim. Although the term “Bosnian Muslim” is often used both by the ICTY and in the writings of academics, not all of those who fall into the group are followers of Islam. Accordingly, this Article will refer to such people as Bosniak or ethnically Bosniak. See *Prosecutor v. Naletilic & Martinovic*, Case No. IT-98-34-T, Judgment, ¶ 1 n.2 (Int’l Crim. Trib. For the Former Yugoslavia Mar. 31, 2003), http://www.icty.org/x/cases/naletilic_martinovic/tjug/en/nal-tj030331-e.pdf (noting that “not all persons included in this group[, Bosnian Muslims,] may have Islamic faith.”); Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUMAN RIGHTS Q. 573, 588 n.48 (2002) (“The three largest national groups in Bosnia are Bosnia Croats (Roman Catholic), Bosnian Serbs (Orthodox), and Bosnia Muslims. . . . [T]he Bosnian Muslim community self-identified their national origin as ‘Bosniak,’ to emphasize the cultural and de-emphasize the religious character of their community.”).

²⁵ See Klarin, *supra* note 4, at 92.

²⁶ See *infra* Section III.C.

²⁷ See *id.*

Article's central findings is that the trials appear to have been fundamentally fair and thus predominantly legal, even if some political goals were pursued.

If one looks beyond the trials, however, some problems exist. Most importantly, the Prosecutor appears to have been influenced by political considerations in deciding whom to charge and whom not to charge. There is evidence that the Prosecutor was successfully pressured not to open investigations into the actions of the North Atlantic Treaty Organization (NATO) militaries following NATO's intervention in Kosovo. In addition, political pressures appear to have led to the initiation of weak cases against ethnic Bosniaks and Kosovar Albanians, with the result that they were convicted at significantly lower rates than ethnic Serbs or Croats. Thus, there is evidence that political considerations have affected the Prosecutor's charging decisions in ways that call into question the Prosecutor's independence, judgment, and compliance with prosecutorial standards.

Section II discusses some of the concepts used in this Article, including what it means to be a show trial, a political trial, or a legal trial. Section III discusses the demographics of the indictees, including their sex, age, ethnicity, role, and seniority within their respective political and military organizations. The content of the indictments, including the charges against the accused, the modes of liability alleged, and the scope and gravity of the crimes is addressed in Section IV. The disposition of the cases, including guilt or acquittal, the sentences, and the role of guilty pleas, is discussed in Section V. Section VI summarizes the Article's conclusions. The Appendix contains information on how the database used in this Article was created.

II. Of Show Trials, Political Trials, and Legal Trials

A. *Show Trials*

One term that has often been used in connection with the ICTY is "show trial." It has been used frequently by academics,²⁸

²⁸ See Koskenniemi, *supra* note 1, at 1 (arguing that the Milošević trial runs the risk "of becoming a show trial"); Michael P. Scharf, *The Legacy of the Milosevic Trial*, 37 NEW ENGL. L. REV. 915, 915 (2003) (asking whether "history [will] remember Milošević as a victim of victor's justice, a scapegoat tried in a show trial before a one-sided court"); Peterson, *supra* note 1, at 272 (suggesting that "Milošević's trial probably

and a search on Westlaw of newspaper articles about the Milošević trial has revealed 245 articles containing the phrase “show trial.”²⁹ But what is a show trial? According to Professor Turner, a show trial is one that “simply provides the appearance of a legal proceeding before inevitable conviction”³⁰ The term has its origins in the trials conducted in Moscow in the late 1930s by the prosecutor Andrei Vyshinsky.³¹ These public trials had the trappings of legality, but the reality was that the accused were coerced into providing confessions; the trials were a sham with conviction being the only possible result.³² As a result, the most common way to use the phrase today is to describe proceedings where the accused’s guilt is assured and the trial itself is for show.³³

This definition has two components. First, the trial must be

could have been made less of a show trial had he been forced to accept counsel”); David Sloss, *Hard-Nosed Realism and U.S. Human Rights Policy*, 46 ST. LOUIS U. L.J. 431, 437-38 (2002) (suggesting that selective trials of low-level perpetrators risked turning the ICTY trials into show trials); José E. Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365, 445 n.400 (1999) (noting that Serbians branded the ICTY trials as show trials attempting to undermine the Serbian nationalist cause). See generally Turner, *supra* note 1 (exploring whether the ICTY engages in show trials).

²⁹ The search was conducted on January 11, 2013, in the Westlaw database “allnews”. The exact search was for (“‘milosevic’ /p ‘show trial’”).

³⁰ Turner, *supra* note 1, at 534.

³¹ See Peterson, *supra* note 1, at 263; Awol K. Allo, *The ‘Show’ in Show Trial: Contextualizing the Politicization of the Courtroom*, 15 BARRY L. REV. 41, 43 (2010).

³² See generally Robert Conquest, *THE GREAT TERROR: A REASSESSMENT* (1990 Oxford University Press) (describing Stalin’s “Great Purge” of the 1930s, a campaign of political oppression, and detailing Soviet leaders’ use of torture to coerce the accused to confess publically to imaginary crimes). See also Peter H. Solomon, Jr., *Soviet Criminal Justice and the Great Terror*, 46 SLAVIC REV. 391 (1987); Allo, *supra* note 31, at 52-54.

³³ See Peterson, *supra* note 1, at 260 (“A quick review of the literature turns up an abundance of uses of the term ‘show trial’ to describe trials involving certain or near-certain conviction of defendants.”); Show Trial Definition, OED.COM, available at Oxford English Dictionary (last visited Sept. 1, 2013) (noting that show trial is “usu[ally] used with specific reference to a prejudged trial of political dissidents by a Communist government”); Koskenniemi, *supra* note 1, at 18 (“A trial that ‘automatically’ vindicates the position of the Prosecutor is a show trial in the precise Stalinist sense of that expression.”). Not everyone agrees that this is the best way to define show trial. See generally Peterson, *supra* note 1 (arguing that trials that have only minor deviations from norms of fairness can also be considered show trials if they also have some public or educative function).

public, for a trial conducted in secrecy cannot be a show trial.³⁴ Second, conviction must be either certain or nearly certain, such that the trial itself is simply a show.³⁵ Defined this way, show trials are always undesirable because they contravene fundamental rules of fairness.³⁶

All of the ICTY's trials have been public; therefore they all meet the first element of being a show trial, although this tells us relatively little. Put another way, lots of trials are public, but few of them are show trials. Thus, the second criterion does far more work in narrowing down that class of cases that meet the definition of a show trial.

How do we decide whether the outcomes of ICTY trials are assured? There are two possible models for show trials. In the Stalinist model,³⁷ there is a mastermind telling the judges how to vote on particular issues. This mastermind directly controls the outcome of the cases. The other model for a show trial does not need a mastermind. Rather, if the procedural and evidentiary rules favor the prosecution too heavily, or the judges are simply too deferential to the theories and evidence presented by the prosecution, one could have a trial where conviction was effectively assured. This would be a "structural" show trial because it is the structure of the proceeding that assures conviction, rather than direct control over the judges. The U.S. military commissions at Guantánamo Bay, Cuba (at least as they were originally envisioned), might be structural show trials, given concerns that the rules and procedures were slanted in favor of the Prosecutor so as to ensure convictions.³⁸

The author is unaware of anybody who has seriously argued

³⁴ See Peterson, *supra* note 1, at 263 ("Consider an entirely rigged trial kept completely secret. Such a trial is not an attempt to teach a lesson. It involves no 'show' at all.").

³⁵ See *supra* notes 30-33 and accompanying text.

³⁶ See International Covenant on Civil and Political Rights, art. 14(2) (stating that those accused of a crime are entitled to a presumption of innocence); see also Universal Declaration of Human Rights, art. 11(1).

³⁷ See Koskenniemi, *supra* note 1, at 18 (describing the Stalinist model as a trial "that 'automatically' vindicates the position of the Prosecutor").

³⁸ See, e.g., Mary Cheh, *Should Lawyers Participate in Rigged Systems? The Case of the Military Commissions*, 1 J. NAT'L SEC. L. & POL'Y 375 (2005) (describing the allegedly biased process of U.S. military commissions at Guantánamo Bay, Cuba).

ICTY trials were show trials in the Stalinist sense, with a behind-the-scenes mastermind directing the judges to enter particular verdicts in particular cases. Moreover, it would be hard to take such claims seriously. The ICTY has employed thousands of people from all over the world over the course of more than twenty years of operations. The judges alone have come from forty-nine different countries and include judges from North America, South America, Europe, Africa, and Asia.³⁹ Among them have been some of the world's preeminent judges, including figures like Patricia Wald, Theodor Meron, Antonio Cassese, Fausto Pocar, and Mohamed Shahabuddeen. It is hard to imagine that these judges all agreed to blindly follow the directions of a behind-the-scenes mastermind. It is even harder to believe that such a plan could have remained secret over the last twenty years. If ICTY trials were show trials, they were structural show trials, not Stalinist ones.

If one eliminates the possibility of Stalinist show trials, then it becomes possible to test for the presence of structural show trials. If the ICTY was conducting structural show trials, one would expect the outcomes of the trials to match closely with the indictments because the judgments would largely rubber-stamp the prosecution's allegations. In fair trials, on the other hand, one would expect the evidence presented at trial to determine the result, and one would not expect the prosecution to win on every single disputed issue. One would expect the accused to succeed (i.e., create a reasonable doubt) with respect to at least some parts of the indictments most of the time, resulting in a partial acquittal, and secure complete acquittals some of the time. Of course, even when the outcome is decided by the evidence presented at trial, one would expect similarities between the indictments and the outcomes, because conviction rates for those accused of violent crimes generally exceed 90%.⁴⁰

Thus, this Article will look for statistically significant correlations⁴¹ between the components of the indictments and the

³⁹ See *Current Permanent Judges*, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/151> (last visited Sept. 11, 2013); see also *Former Permanent Judges*, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/10572> (last visited Sept. 11, 2013).

⁴⁰ See *infra* notes 187-197 and accompanying text.

⁴¹ See *infra* note 86 and accompanying text (discussing correlations and explaining

results of the trials. If the outcomes are driven exclusively or almost exclusively by the contents of the indictments, then there should be strong correlations between certain aspects of the indictments and the outcomes. For example, one might expect that charging an individual with more counts, with crimes committed at more locations, or with having killed more people would result in longer sentences or a higher rate of conviction at a structural show trial. Such correlations, if they existed, would be evidence that the deck was stacked too heavily in favor of the prosecution and that the trials were structural show trials.

On the other hand, if the hypothesized correlations do not exist, then this suggests that the results are being driven by the evidence presented at trial and not by the contents of the indictments.⁴² Of course, in a strict sense, proving that the indictments do not control the outcomes is not the same as proving that the evidence presented at trial does. But as a practical matter, if the trials are not show trials, then it is more likely that they are being driven by the evidence, because there are few competing hypotheses to explain the outcomes if one rules out both show trials and evidence-based trials.

B. Political vs. Legal Trials

While it is important to know whether ICTY trials are show trials, demonstrating that they are not show trials fails to show that they are “good,” “just,” or “fair.” Thus, this Article will look at other ways to evaluate the nature of the trials. Professor Turner suggests that one way of viewing ICTY trials is to situate them on a continuum that runs from the “legal” to the “political.” A purely legal trial would be one where the trial would be “limited to the determination of guilt and the assessment of blame through fair

how they are used in this Article).

⁴² If the ICTY trials were show trials in the Stalinist sense, then the mastermind might permit the defendants to win some points and even permit the occasional acquittal so as to preserve the appearance of fairness. As a consequence, the absence of correlations between indictments and judgments might demonstrate only the deviousness and foresight of the mastermind. This may be true, but there is no evidence that ICTY trials are show trials in the Stalinist sense. *See supra* note 39 and accompanying text. Therefore, this argument does not undermine the use of correlations to test whether ICTY trials are structural show trials.

procedures.”⁴³ Hannah Arendt, famously and controversially, argued that this was the only role that courts should play in her commentary on the trial of Adolf Eichmann.⁴⁴ In a purely political trial, on the other hand, the parties view the fair determination of guilt as irrelevant and are “concerned above all with the consequences [of the trial].”⁴⁵ In this framework, a show trial is a particular form of the purely political trial.⁴⁶

The purely legal trial is most likely a platonic ideal that cannot be achieved in the real world. Even run-of-the-mill criminal prosecutions in domestic criminal justice systems are not concerned only with the determination of guilt. Criminal justice systems must be perceived as legitimate to be effective,⁴⁷ and the actors within them must concern themselves with how their actions will be perceived by society. Ultimately, it is hard to imagine a public process where the participants did not concern themselves at all with what effect their actions would have. Yet, it seems likely that most domestic criminal cases are driven by fewer consequentialist considerations than international criminal trials.⁴⁸

The question, as Professor Turner frames it, is whether the legal or the political concerns⁴⁹ dominate the trials. In other words, are the trials predominantly legal or predominantly political? Having some political or consequentialist purposes may not be inherently undesirable. In fact, many scholars have argued

⁴³ See Turner, *supra* note 1, at 533-34.

⁴⁴ See Koskenniemi, *supra* note 1, at 7 (“The purpose of the trial is to render justice, and nothing else; even the noblest ulterior purposes . . . can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgment and to mete out due punishment.”) (quoting HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 251 (1963)).

⁴⁵ Turner, *supra* note 1, at 534.

⁴⁶ See Peterson, *supra* note 1, at 268-69; Turner, *supra* note 1, at 534.

⁴⁷ See Ford, *supra* note 4, at 455-56; Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 376-79 (2006).

⁴⁸ See Turner, *supra* note 1, at 536 (“Domestic trials also serve some of these ‘political’ purposes, but the emphasis on them in international trials is more pronounced.”).

⁴⁹ The way this Article uses these terms, a political or consequentialist consideration is any consideration that is not strictly necessary to determine the guilt of the accused or the appropriate punishment. Not all political considerations are necessarily detrimental. See *infra* note 50. Some, however, are more troubling than others. See *infra* notes 64-73 and accompanying text.

that international criminal tribunals should try to affect post-conflict societies through their trials.⁵⁰ These might be viewed as desirable political considerations that judges may include in their decision-making. For example, judges may, under certain circumstances, properly concern themselves with issues like promoting peace and reconciliation or establishing a historical record, even though those are consequentialist concerns.⁵¹ Such concerns might lead the judges to permit evidence about more crime sites than are strictly necessary for the prosecution to achieve a conviction or weigh guilty pleas heavily when determining a sentence, if they believed doing so would foster peace and reconciliation or establish the historical record. Indeed, the Security Council expressly found that creating the ICTY would “contribute to the restoration and maintenance of peace” in the former Yugoslavia.⁵² Thus, it is clear that the Security Council intended for the court to achieve some consequentialist goals through its trials. But, as trials become more and more political, they inevitably become less fair, because the focus shifts from a determination of guilt through fair procedures to concerns about the consequences of the trial.⁵³

Thus, the dividing line between trials that are predominantly legal and those that are predominantly political is whether the underlying process remains one that is principally concerned with determining guilt through fair procedures. In other words, fairness is the tipping point. This framework is presented in Figure 1. Once consequentialist or political considerations render the underlying trial unfair, then the court has crossed the boundary from a predominantly legal process into a predominantly political process. This is clearly both impermissible and undesirable. Fair trials are required by international law.⁵⁴ Moreover, fairness is

⁵⁰ See, e.g., Turner, *supra* note 1, at 537-43 (summarizing the arguments in favor of having courts pursue political purposes). *But see supra* note 44.

⁵¹ See, e.g., Ford, *supra* note 4 (arguing that establishing a historical record is the most significant contribution many international courts can make to the goal of peace and reconciliation).

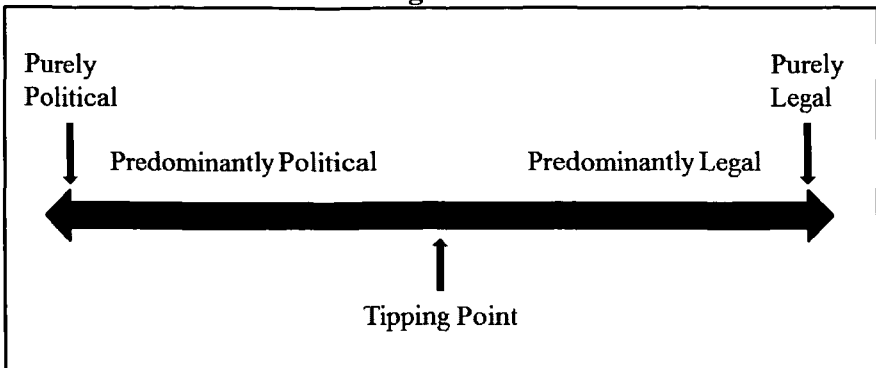
⁵² S.C. Res. 827, ¶ 6, U.N. Doc. S/RES/827 (May 25, 1993).

⁵³ See Turner, *supra* note 1, at 537, 543.

⁵⁴ See, e.g., International Covenant on Civil and Political Rights, art. 14(1), <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> (“In the determination of any criminal charge against him, . . . everyone shall

thought to be crucial to the perceived legitimacy, and thus effectiveness, of judicial institutions.⁵⁵

Figure 1



So, the goal is to achieve a process that is fundamentally fair and thus predominantly legal, even as it simultaneously serves some desirable consequentialist purposes. Has the ICTY achieved this goal? It is harder to place ICTY trials on the continuum between legal and political by looking only at the content of the indictments than it is to evaluate whether the trials are show trials. Nevertheless, this Article will try to evaluate whether the charges in the indictments are being used in a way that one would expect from a court that was principally interested in determining guilt through fair procedures. If the evidence suggests that the trials are fundamentally fair, then this supports the conclusion that they are predominantly legal in nature, even though they pursue some consequentialist goals.

This evaluation will proceed in several different ways. First, the general content of the indictments will be considered to see whether they are internally consistent, provide sufficient information to the accused, and comply with the requirements of international criminal law and our understanding of how

be entitled to a fair and public hearing by a competent, independent[,] and impartial tribunal established by law.”).

⁵⁵ See Ford, *supra* note 4, at 455-56 (discussing the “fair process effect” and its relationship to the perceived legitimacy of judicial institutions). While it has been argued that the fair process effect cannot explain the perceived legitimacy of the ICTY in the Balkans, it may well be very important to how the ICTY is perceived outside of the Balkans. *See id.* at 456-58.

international crimes are usually committed. Second, the charging practices at the ICTY will be compared with charging practices in domestic criminal justice systems. If they are similar to the practice in domestic systems that are generally considered fair, this is further evidence that the ICTY's practices are fair. Third, particular attention will be paid to a number of practices that have been criticized, like the use of joint criminal enterprise (JCE) as a mode of liability and the fact that a large number of the accused were ethnically Serb.

C. Politics at Other Stages of the ICTY's Work

Professor Turner's framework is a useful way of thinking about the ICTY's work, but it is limited by its exclusive focus on the trials. While the question of whether the trials are fundamentally fair is clearly an important one, political influence and political considerations can adversely affect the court's work at other stages of the proceedings. To be thorough, one must evaluate the effect of political considerations during at least three stages of the court's work: (1) the founding of the court, (2) the Prosecutor's decisions about who to charge and what to charge them with, and (3) the trials and subsequent appeals. Professor Turner's focus on fair trials addresses only the third stage of the process, albeit arguably the most important one.

The role of politics in the founding of the ICTY is largely beyond the scope of this Article, which focuses on the indictments, but it is undisputed that the ICTY was created by an inherently political body—the Security Council—to pursue goals that were both legal and political.⁵⁶ Some of those political purposes, such as promoting peace and reconciliation, compiling an accurate historical record, and providing closure to victims, may be desirable,⁵⁷ but there also has been criticism of the selectivity of the Security Council's decisions to create the ICTY and the International Criminal Tribunal for Rwanda (ICTR). Why did the former Yugoslavia and Rwanda receive tribunals, while other locations that had suffered serious violations of international

⁵⁶ See Turner, *supra* note 1, at 532-33; Koskenniemi, *supra* note 1, at 18. See generally WILLIAM SCHABAS, UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNALS 73-97 (2012) (describing the role of politics at international tribunals).

⁵⁷ See Turner, *supra* note 1, at 537-43.

criminal law did not receive equal treatment?

Duško Tadić raised this question during the first case to come before the ICTY.⁵⁸ In response, the Appeals Chamber noted that the Security Council has broad discretion to decide when to take measures not involving the use of force, including the creation of criminal tribunals, to maintain or restore international peace and security.⁵⁹ In effect, the ICTY conceded that the Security Council could base its decision on purely political considerations, so long as it complied with Chapter VII of the United Nations Charter. This reasoning is legally sound, but unsatisfying. The selectivity of the establishment of the ICTY and ICTR is symbolic of the influence of politics in the founding of many international justice institutions.

For example, the International Military Tribunal at Nuremberg (IMT) has been accused of being “victor’s justice”⁶⁰ because of the way its Charter was limited so the IMT had jurisdiction only over individuals who belonged to the Axis powers, thus exempting Allied forces from the court’s jurisdiction despite claims that Allied officers had done some of the same things as the accused Axis officers.⁶¹ Fortunately, the ICTY did not have this sort of victor’s justice built into its founding document.⁶² In that sense,

⁵⁸ See *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 27 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (noting that Tadić had argued that “the Security Council had been inconsistent in creating this Tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred”).

⁵⁹ *Id.* ¶¶ 28-40.

⁶⁰ See generally HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 122-25 (2d ed. 2000) (discussing several commentators who have labeled the trials as “victor’s justice”); see, e.g., Gerry J. Simpson, *Didactic and Dissident Histories in War Crimes Trials*, 60 *ALB. L. REV.* 801, 805-06 (1997) (suggesting that “[t]he phrase ‘victor’s justice’ as applied to [Nuremberg] is by now a truism”).

⁶¹ See IMT Charter art. 1 (limiting the court’s jurisdiction to “major war criminals of the European Axis” and excluding members of the Allied armed forces); see also SCHABAS, *supra* note 56, at 74-76 (discussing conscious selectivity of the accused at the IMT).

⁶² Instead, its charter granted the ICTY “the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991” ICTY Charter art. 1. Jurisdiction is not limited to individuals from particular nationalities or sides in the conflict, but

the ICTY was less affected by overtly political considerations in its founding than the IMT, but that founding was still fundamentally a political process.

The next stage at which one might be worried about the influence of political considerations is when the Prosecutor decides who to charge. Despite some public denial, it is an open secret that the Office of the Prosecutor (OTP) at the ICTY has both been subject to political pressures and has taken into account political considerations in its charging decisions.⁶³ There are two distinct risks here. First, there is a risk that the Prosecutor will be influenced by political considerations not to charge or investigate some people who should be charged or investigated. The second concern is that the Prosecutor will be influenced by political considerations to charge some people who should not have been charged.

Evidence of the first kind of political influence will not show up in the dataset because it is limited to indictments that were issued. Nonetheless, there is good reason to worry about this kind of political influence. In the aftermath of NATO's intervention in Kosovo, the Prosecutor stated that NATO's use of force in Kosovo subjected members of their militaries to the jurisdiction of the ICTY.⁶⁴ She then appointed a committee to review allegations that certain acts by NATO forces constituted violations within the jurisdiction of the ICTY. The committee recommended that the Prosecutor not proceed with a formal investigation of any acts by NATO, and the Prosecutor deferred to that recommendation.⁶⁵

encompasses all "persons" responsible for serious crimes. *Id.* The court, nevertheless, seemed to achieve something akin to victor's justice in practice. *See infra* notes 64-71 and accompanying text.

⁶³ *See* Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT'L CRIM. JUST. 162, 169-71 (2005) (criticizing the ICTY for first prosecuting "small fries," like Tadić, "primarily on the basis of the urgent need to prove to the international community that these first attempts at international justice after Nuremberg could work, rather than the relative importance of holding [these small fries] accountable for committing crimes"); *see also* Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 538-40, 543 (2003) (discussing ICTY's failure to investigate NATO forces).

⁶⁴ Côté, *supra* note 63, at 179-80.

⁶⁵ *See* Danner, *supra* note 63, at 538-39. (discussing the committee's final report, in which it recommended that the Prosecutor decline to investigate NATO).

The details of this episode are troubling. There is evidence that NATO members pressured the Prosecutor not to open an investigation.⁶⁶ More importantly, the reasoning of the committee's report has been sharply criticized.⁶⁷ The committee recommended that no investigation begin, in part, because an investigation would be "unlikely to result in the acquisition of sufficient evidence to substantiate charges . . ."⁶⁸ Numerous commentators have pointed out that the difficulty of obtaining evidence is not sufficient justification for failing to open an investigation.⁶⁹ Luc Côté, who at that time was the Chief of Prosecutions at the Special Court for Sierra Leone, admitted that he was "stunned" by the work of the committee.⁷⁰ Professor Benvenuti concluded that "the Prosecutor's intent has been, on the whole, to prevent investigation against NATO officials, and to hide herself behind the 'technical opinion' of the Review Committee."⁷¹ Thus, there is evidence that political considerations contributed to the decision by the Prosecutor not to pursue an investigation against individuals who may have committed violations of international law within the jurisdiction of the court.

The second concern is that the Prosecutor will be influenced by political considerations to charge some people who should not be charged, based purely on a legal evaluation of the evidence. If one assumes that the trials are fundamentally fair,⁷² then one

⁶⁶ See Mandel, *supra* note 3, at 115; Côté, *supra* note 63, at 183; Danner, *supra* note 63, at 538-39.

⁶⁷ See, e.g., Paolo Benvenuti, *The ICTY Prosecutor and the Review of the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 12 EUR. J. INT'L L. 503 (2001) (critically analyzing the ICTY Review Committee's report); see also Mandel, *supra* note 3, at 95 (describing the ICTY as a hoax for its refusal to investigate NATO); Côté, *supra* note 63, at 179-83 (criticizing the two main reasons for the committee's decision).

⁶⁸ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 I.L.M. 1257 ¶ 90, at 1282-83 (June 8, 2000).

⁶⁹ See, e.g., Côté, *supra* note 63, at 182 ("The second reason – anticipating difficulties to obtain evidence while no investigative means have yet been deployed by the Prosecutor – is even more worrisome and raises serious questions of credibility.").

⁷⁰ *Id.* at 182 ("These explanations, given by members of the Office of the Prosecutor, leave us stunned.").

⁷¹ See Benvenuti, *supra* note 67, at 505.

⁷² See *infra* Section VI (concluding that the trials are fundamentally fair).

would expect cases that are legally weak, but pursued for political reasons, to result in acquittals at higher rates than average. Thus, this Article will look at acquittal rates for evidence of classes of cases with disproportionately high rates of acquittals. If such cases exist, they may be evidence that the Prosecutor was swayed by consequentialist considerations to prosecute some people for whom the evidence was lacking. This would be undesirable, because prosecutors should not initiate or continue prosecutions unless an impartial investigation demonstrates that there is sufficient evidence to justify a conviction.⁷³

III. Demographics of the Accused

A. Sex and Age

The ICTY has indicted 161 people. Of the indictees, only Biljana Plavšić was female. This is broadly consistent with the composition of offenders in domestic criminal justice systems. In the United States, 87% of those accused of violent offenses are male;⁷⁴ 97% of those accused of murder are male.⁷⁵ The proportion of male-to-female offenders appears to be quite similar in Europe.⁷⁶ More generally, it appears that men represent the vast majority of offenders across all crimes in all criminal justice

⁷³ See Eighth United Nations Cong. on the Prevention Of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, *United Nations Guidelines on the Role of Prosecutors*, art. 14, U.N. Doc. A/CONF.144/28/Rev.1, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>. [hereinafter *U.N. Guidelines on the Role of Prosecutors*] (“Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.”).

⁷⁴ THOMAS H. COHEN & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 228944, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006 app. tbl.3, at 20 (May 2010) [hereinafter BUREAU OF JUSTICE STATISTICS].

⁷⁵ *Id.*

⁷⁶ See UNITED NATIONS OFFICE ON DRUGS AND CRIME, GLOBAL STUDY ON HOMICIDE 71 (Vienna, 2011) (indicating that 88% of those charged with homicide in Europe are male); MARCEL F. AEBI ET AL., EUROPEAN SOURCEBOOK OF CRIME AND CRIMINAL JUSTICE STATISTICS tbl.1.2.3.6, at 91 (4th ed. 2010) (indicating that on average 91% of those accused of homicide in Europe were male). The slightly higher rate at which women are charged with murder in Europe may result from the relatively smaller proportion of murders in Europe that are the result of gang or organized crime violence versus family violence. See GLOBAL STUDY ON HOMICIDE, *supra* note 76, at 70-73 (discussing the differences in violent crime in the United States and Europe).

systems.⁷⁷ Put another way, “[c]rime, especially violent crime, is typically a male activity”⁷⁸ This is particularly true in situations where the violence is organized, such as with gangs and organized crime.⁷⁹ Thus it is hardly surprising that such an overwhelming percentage of the accused at international criminal tribunals are male, given that serious violations of international criminal law tend to involve systematic acts of violence by hierarchically-organized groups.⁸⁰

ICTY indictees span a broad range of ages.⁸¹ The youngest was 21; the oldest was 76. Their average age was 40. In contrast, the average defendant accused of a violent offense in the United States is 31,⁸² and the average age of those accused of murder is 28.⁸³ The pattern in the U.S. appears to be replicated elsewhere, as those charged as perpetrators of violence in other domestic criminal justice systems also tend to be in their 20s or early 30s.⁸⁴ Thus, those indicted by the ICTY have generally been older than those accused of violent crimes in domestic systems. On the other hand, the average age of those charged as direct perpetrators of physical violence⁸⁵ at the ICTY was 34, which is much closer to

⁷⁷ See INTERNATIONAL STATISTICS ON CRIME AND JUSTICE 89 (Stefan Harrendorf et al. eds., 2010) (noting that the proportion of all those charged with a crime across all criminal justice systems that were female was typically 10%-15%).

⁷⁸ GLOBAL STUDY ON HOMICIDE, *supra* note 76, at 63.

⁷⁹ *Id.* at 70-73.

⁸⁰ See *infra* note 91 and accompanying text (noting the organized political nature of war crimes).

⁸¹ Age here means age in the year 1995, so as to approximately measure the age of the accused at the time of the commission of the alleged crimes.

⁸² BUREAU OF JUSTICE STATISTICS, *supra* note 74, app. tbl.2, at 4.

⁸³ *Id.*

⁸⁴ Cf. MARIE VIRUEDA & JASON PAYNE, HOMICIDE IN AUSTRALIA: 2007-2008 NATIONAL HOMICIDE MONITORING PROGRAM ANNUAL REPORT 27 (Australian Institute of Criminology, 2010) (noting that the average age of homicide offenders in Australia was 31.8 years); Katie Willis, *Armed Robbery: Who Commits It and Why?*, TRENDS & ISSUES IN CRIME AND CRIMINAL JUSTICE 2, NO. 328 (Australian Institute of Criminology, Nov. 2006) (noting that most convicted armed robbers in Australia are under the age of 30).

⁸⁵ In international criminal law, a distinction is sometimes made between direct perpetrators of physical violence (the people responsible for carrying out crimes like murder, torture, and inhumane treatment) and those who have not engaged in any physical violence but are nonetheless criminally liable for that violence (e.g., those who order that murders be carried out). These indirect perpetrators are often political or military leaders who can be quite far from the scene of the violence in both geographical

the norm for direct perpetrators in the United States and elsewhere.

There was a moderate correlation⁸⁶ ($r = .47$) between age and the seniority of the accused in the political and military hierarchy. In other words, the older defendants were likely to be more senior. Age also correlated with some, but not all, of the modes of liability. There was a moderate negative correlation between age and an accusation of direct participation in violence ($r = -.50$) and a weak positive correlation between age and the use of superior responsibility ($r = .25$). Thus those accused as direct perpetrators were generally younger, while those charged as superiors tended to be older. There was neither a correlation between an accused's

and organizational terms. They can nevertheless be criminally liable for the violence. This liability is established through the use of "modes of liability," such as co-perpetration, joint criminal enterprise, and superior responsibility, which play a pivotal role in international criminal law but are usually used less often in domestic criminal law where the majority of accused are direct perpetrators of violence. See Robert Cryer et al., *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE*, 361-74 (Cambridge University Press 2d ed. 2010).

⁸⁶ This Article will often report the correlation between two variables. Correlation is described in terms of an r value. The r value can vary between -1 and 1 and indicates the extent to which the values of two variables are related to one another. A negative r value indicates that the variables move in opposite directions (i.e., an increase in one is associated with a decrease in the other). A positive r indicates that the variables move in the same direction. An r of 0 indicates that there is no relationship between the variables (i.e., they move randomly). The absolute value of r (shown as $|r|$) indicates the strength of the relationship between the two variables. In describing such correlations, this Article adopts the following approach: an $|r|$ between 0 and .2 shows no correlation, an $|r|$ between .2 and .4 shows a weak correlation, an $|r|$ value between .4 and .6 shows a moderate correlation, an $|r|$ between .6 and .8 shows a strong correlation, and an $|r|$ between .8 and 1 shows a very strong correlation. For $|r|$ values greater than .2, the cutoffs for the use of particular terms are somewhat arbitrary, but it is helpful to describe the strength of correlations consistently. However, the lower bound of .2 as evidence of a correlation is driven by the statistical significance of the relationship between the two variables. For all variables in this article, the number of observations lies between 97 and 161. Given a two-tailed probability test, a required significance of $p = .05$, and at least 95 degrees of freedom, an $|r|$ of .2 or greater is necessary for the results to be significant. In other words, an $|r|$ greater than .2 indicates a greater than 95% chance that there is a relationship between the variables, and a less than 5% chance that the observed correlation is simply a product of random chance. As $|r|$ increases above .2, the chance that the correlation is the product of random chance grows smaller and smaller. See generally DAVID FREEDMAN ET AL., *STATISTICS: FOURTH EDITION* 119-57 (W.W. Norton & Co. New York, 2007) (discussing statistical principles regarding correlations between multiple variables).

age and the number of charged counts ($r = -.07$) nor a correlation between an accused's age and the sentence length received ($r = .07$).

These results are consistent with what we understand about the commission of violations of international criminal law. Direct perpetrators of violence were young, male, and not very high in the hierarchy. In fact, they look quite a bit like direct perpetrators of violence in the United States and in other domestic criminal justice systems. Older accused are more likely to have held senior positions within the hierarchy, and thus be more distant from the direct commission of crimes. Older accused were also more likely to be charged with superior responsibility as a mode of liability, which is consistent with their positions of authority over others.⁸⁷

B. Role

The indictees fall into one of four categories: prison camp personnel (38), military personnel (89), politicians (29), and indictees that held both military and political positions (5).⁸⁸ For example, Milan Martić was, at various times, alleged to be Chief of Police in Knin, Deputy Commander of the Territorial Defense Forces of the Serbian Autonomous Oblast of Krajina (SAO Krajina), Minister of Defense of the SAO Krajina, and eventually President of the Republic of Serbian Krajina.⁸⁹ He was classified as having held both military and political positions. Duško Tadić, on the other hand, was alleged to have beaten and killed detainees while working as a guard at the Omarska, Keraterm, and Trnopolje camps.⁹⁰ He was put in the prison camp personnel category. The composition of the indictees by type is shown below in Table 1.

⁸⁷ See *infra* note 163 and accompanying text (explaining that one of the elements of superior responsibility is the existence of a superior/subordinate relationship).

⁸⁸ The accused were placed into one of the categories based on the title and positions they were alleged to have held in the indictment. See ICTY Trial Dataset, *supra* note 21.

⁸⁹ Prosecutor v. Milan Martić, Case No. IT-95-11, Amended Indictment, ¶¶ 10-16 (Int'l Crim. Trib. for the Former Yugoslavia July 14, 2003), www.icty.org/x/cases/martic/ind/en/mar-2ai051209e.pdf.

⁹⁰ See generally Prosecutor v. Tadić & Borovnica, Case No. IT-94-1-I, Second Amended Indictment, ¶¶ 4-4.5 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1995), www.icty.org/x/cases/tadic/ind/en/tad-2ai951214e.pdf (describing the allegations against Tadić).

Prison camp personnel	24%
Military personnel	55%
Politicians	18%
Both military and political	3%

There was a stronger correlation between type of indictee and seniority ($r = .68$) than between age and seniority. Prison camp personnel were the least senior, military personnel had the most range in their seniority and included both relatively junior and relatively senior personnel, while politicians and those that held both military and political positions were the most senior indictees. The majority of the accused at the ICTY were military personnel. Politicians (and those who were both military officers and politicians) comprised a smaller percentage of the accused, but represented the most senior accused.

Not surprisingly, the prison camp personnel were the group most likely to be charged as direct perpetrators of physical violence (95% of them were so charged), followed by the military personnel (40%). There was a strong negative correlation ($r = -.63$) between seniority and a charge of direct perpetration among the military personnel, indicating that most of the direct perpetrators among this group were low ranking. Politicians and those that had both military and political functions were rarely accused of directly committing physical violence. This is consistent with a hierarchical system wherein the vast majority of physical violence is committed by those lowest in the hierarchy.⁹¹ In contrast, the majority of physical violence in domestic criminal

⁹¹ See Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT'L CRIM. JUST. 159, 159-60 (2007) (noting that international criminal violations are usually the result of the collective actions of many individuals working towards the same ends); see Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 109, 110 (2007) (noting that violations of international criminal law share the common thread of being "expression[s] of collective criminality," perpetrated by "groups of individuals, military details, paramilitary units[,] or government officials acting in unison or in pursuance of a policy").

justice systems is carried out by individuals acting alone.⁹²

Role had no measurable impact on the legal process. There was no correlation between role and the sentence received ($r = .01$) and the average sentences for indictees in each role were similar.⁹³ Similarly, role did not have a significant association with the number of counts alleged against the accused.⁹⁴ There is no evidence that particular groups of accused, like the military officers or the politicians, were charged with significantly more crimes or received stiffer sentences.

C. Ethnicity

Ethnicity is a sensitive topic in the former Yugoslavia. Most ethnic Serbs believe the ICTY is biased and anti-Serb.⁹⁵ Observers have generally rejected such assertions,⁹⁶ but it is true that the largest number of accused have been ethnically Serbian (109) and a much smaller number of accused have been either ethnically Croatian (33) or Bosniak (7). The indictees' ethnic composition is shown below in Table 2. It is also true that, if convicted, ethnic Serbs received slightly longer average prison sentences (19 years) than ethnic Croats (17 years) and much longer average sentences than ethnic Bosniaks (3 years).

⁹² For example, in Australia, 87% of homicides were carried out by an individual acting alone. See HOMICIDE IN AUSTRALIA, *supra* note 84, at 5 (noting that only 13% of homicides involved more than one offender). Only one homicide in all of Australia during 2007-2008 involved both multiple victims and multiple offenders. *Id.*

⁹³ If convicted, the prison camp guards received an average sentence of 14.1 years, the military personnel received an average sentence of 15.8 years, and the politicians received an average sentence of 16.2 years.

⁹⁴ The average number of counts alleged against each of the different roles fell between 8 and 12 counts per indictment. The average for the indictments as a whole was 10.5.

⁹⁵ See Ford, *supra* note 4, at 412-18 (describing how each ethnicity's internal narrative determined its view of the ICTY).

⁹⁶ See *supra* note 10 and accompanying text (discussing the fairness of the ICTY proceedings).

Serb	68%
Croat	21%
Bosniak	4%
Kosovar Albanian	4%
Macedonians	1%
Unknown	2%

If one assumed that each ethnic group committed an equal number of crimes of equal gravity, one would probably predict that the Prosecutor would indict equal numbers of accused from each ethnic group, and that the judges would impose equivalent sentences. Given this assumption of equivalence, the ethnic distribution of the accused and the sentences would suggest anti-Serb bias at the ICTY. There is little support, however, for such an assumption of equivalence. The indictments allege that Serbs are responsible for more serious and widespread crimes. For example, the average number of deaths for which the accused Serb is allegedly responsible exceeds 1,000, while that number is less than 100 for the accused Croat or Bosniak.⁹⁷ Serbs were also accused of committing crimes at a larger number of crime sites than Croats or Bosniaks, although the differences are not as striking. Finally, only ethnic Serbs were charged with genocide, and genocide convictions generally carry longer sentences than war crimes or crimes against humanity convictions.⁹⁸ Thus the longer sentences for ethnic Serbs are consistent with allegations of committing a larger number of more serious crimes.

Of course, if one begins with the assumption that the ICTY was biased against Serbs, one would probably attribute the

⁹⁷ These figures come with a caveat as it was sometimes difficult to determine how many deaths the accused was alleged to be responsible for because of the wording of the indictments. *See infra* notes 167-168 and accompanying text. These averages are based on only those accused for whom a precise number of deaths was recorded in the database (n = 45).

⁹⁸ *See infra* note 131 (comparing the sentences for crimes against humanity and genocide).

consistency between indictments and sentences to anti-Serb bias as well. While it is possible that the indictments were systematically biased against ethnic Serbs by the OTP, there is little evidence to support such a finding. If anything, the evidence suggests that the OTP tried too hard to find non-Serbs to prosecute in a misguided attempt to appear impartial.⁹⁹ Rather, the ethnic distribution of the accused and the sentences is consistent with another explanation: ethnic Serbs were responsible for the largest number of crimes and the most serious crimes committed during the conflict in the former Yugoslavia.

Extensive evidence, including contemporaneous documents, photographic and video evidence, forensic evidence, and numerous confessions, supports the conclusion that ethnic Serbs were responsible for some of the worst atrocities committed during the conflict, including the massacre at Srebrenica.¹⁰⁰ Moreover, demographic studies of deaths caused by the conflict demonstrate that Bosniaks represented by far the largest group of victims, including the most civilian deaths.¹⁰¹ Finally, multiple assessments have concluded that Serb forces were responsible for approximately 90% of the crimes committed in Bosnia and Herzegovina during the conflict.¹⁰² In short, it appears that the larger number of Serbian accused and the longer sentences of Serbian accused are justified by the fact that Serbs committed both

⁹⁹ See *infra* Section V.B (discussing the relatively weak cases pursued against non-Serbs).

¹⁰⁰ See Ford, *supra* note 4, at 415, 473-75 (discussing the massacre at Srebrenica and objective evidence supporting the theory that the Serbs were responsible); see also Liam McDowall, Bridging the Gap between the ICTY and Communities in Bosnia and Herzegovina, Conference Series (Communications Service of the Registry of the ICTY, May 21, 2005), http://www.icty.org/x/file/Outreach/Bridging_the_Gap/srebrenica_en.pdf (last visited Sept. 1, 2013) (summarizing the forensic and photographic evidence of what happened at Srebrenica).

¹⁰¹ See, e.g., J. Zwierchowski & E. Tabeau, *Census-Based Multiple System Estimation as an Unbiased Method of Estimation of Casualties' Undercount* tbl.4, fig.2, tbl.6, at 14-17 (Conference Paper for the European Population Conference, Vienna, Sep. 2010), available at <http://epc2010.princeton.edu/download.aspx?submissionId=100880> (discussing the ethnicity of civilian victims).

¹⁰² See Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583, 647 n.200 (2007) (explaining that the Central Intelligence Agency and a U.N. Commission of Experts both separately concluded that about 90% of the crimes in Bosnia were committed by Serbs).

the largest number of crimes and the most serious crimes.

Rather than being driven by actual ICTY bias, Serb perceptions of bias can be explained by the conflict between a common Serb narrative of victimhood and the ICTY's attribution to Serbs of both the responsibility for the conflict and for the majority of the crimes committed during the conflict.¹⁰³ Serbs identified much more strongly with their own social group than they did with the court.¹⁰⁴ Thus, they were motivated to retain a positive view of their group and reject the ICTY's indictments and judgments, which cast them as the principal aggressors in the conflict. They did this by concluding that the ICTY was biased and unjust. This permitted them to preserve their positive self-view and dismiss the work of the court.¹⁰⁵ But Serbs' perceptions of bias at the ICTY were not based upon an honest appraisal of the responsibility of ethnic Serbs for serious violations of international law committed during the conflict.

D. Seniority

To evaluate the role of seniority in the indictments, the accused were ranked on a scale of 1 to 9 for their overall seniority in the political and military hierarchies in the former Yugoslavia.¹⁰⁶ Initially, the ICTY indicted 37 individuals with a seniority rating of 1, all of whom were prison camp guards or low-ranking soldiers. There have been suggestions that these indictments were driven by political considerations.¹⁰⁷ They were indicted early in the life of the ICTY and only 15 of them were actually tried. The indictments against the rest were either

¹⁰³ See generally Ford, *supra* note 4 (discussing the role ethnicity plays in views of ICTY legitimacy).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ For accused in the military, this was determined by examining their rank in their respective armed forces and the size of the unit of which they were alleged to be in charge. For accused with political positions, it was determined by their title and the size of the political unit of which they were alleged to be part of the leadership. The military and political rankings were then combined, while trying to preserve the reality that the military officers reported to the politicians. *Cf.* Meernik, *supra* note 19, at 151 (describing a methodology for ranking the seniority of the accused).

¹⁰⁷ See Côté, *supra* note 63, at 169-70 (suggesting that these indictments were driven by the Prosecutor's need to show to the court's backers that it was functioning).

withdrawn for insufficient evidence, withdrawn on the basis that the indictee was insufficiently important, or the case was transferred to a domestic court in the former Yugoslavia. This was done, in part, in response to a recognition that the early cases focused too heavily on prison guards and low-level soldiers, rather than those leaders believed to be responsible for orchestrating the violence.¹⁰⁸

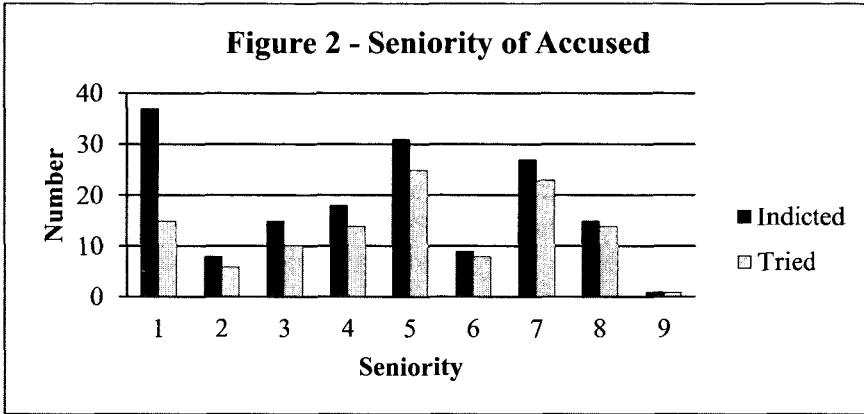
The picture is somewhat different if we look at those who have been, or will actually be, tried at the ICTY.¹⁰⁹ Figure 2 below compares the seniority of those indicted to the seniority of those tried. After initially indicting a large number of low-level perpetrators, the ICTY eventually focused its efforts on trying higher-ranking indictees. This change in policy was formalized in the Completion Strategy,¹¹⁰ which emphasized trying “the most senior leaders suspected of being most responsible for crimes”¹¹¹

¹⁰⁸ See Heikelina Verrijn Stuart & Marlise Simons, *THE PROSECUTOR AND THE JUDGE: BENJAMIN FERENCZ AND ANTONIO CASSESE – INTERVIEWS AND WRITINGS* 53-54 (Amsterdam University Press, 2009) (explaining that Judge Antonio Cassese pushed the ICTY judges to avoid trying low-level alleged criminals, stating that “[w]e have been set up at the expense of the international community, we have an important task, and so we have to go after the leaders”).

¹⁰⁹ This group includes those whose trials have been completed, those who died during a trial, those currently at trial, and those awaiting trial.

¹¹⁰ Completion Strategy, ICTY, <http://www.icty.org/sid/10016> (last visited Sept. 1, 2013) (explaining that the “Completion Strategy” refers to a series of proposals by the Tribunal’s judges to guide and ensure that the ICTY concluded its mission successfully).

¹¹¹ S.C. Res. 1534 ¶ 5, U.N. Doc. S/RES/1534 (Mar. 26, 2004). See also Dominic Raab, *Evaluating the ICTY and its Completion Strategy*, 3 J. INT’L CRIM. JUST. 82, 87 (2005); Fausto Pocar, *Completion or Continuation Strategy?*, 6 J. INT’L CRIM. JUST. 655, 656-58 (2008) (describing how the ICTY embraced the Completion Strategy as a way to ensure continued international support for the tribunal’s work).



As Figure 2 shows, the ICTY complied with the Completion Strategy largely by dropping cases against the least senior indictees, most of whom were prison camp guards. It maintained the cases against both the senior accused and the mid-level accused. This practice seems inconsistent with that portion of the mandate that urged the trial of the “most senior leaders.”¹¹² This inconsistency appears to have been the result of a tug of war between the Security Council and the judges on one side, and the Prosecutor on the other side, over how many people to indict and try.¹¹³ The Prosecutor has principal responsibility for deciding who should be charged¹¹⁴ and was able to go ahead with plans to try most of the mid-level accused despite the Security Council pushing for fewer trials of higher-ranking accused.¹¹⁵ In the Prosecutor’s defense, mid-level accused have been found to be responsible for some of the most serious crimes.¹¹⁶ Thus, the Prosecutor’s approach does seem to be consistent with the part of the Completion Strategy’s mandate that urges trials of those “most responsible for crimes.”¹¹⁷

There were no correlations between seniority and the total

¹¹² S.C. Res. 1534, *supra* note 111, ¶ 5.

¹¹³ See Raab, *supra* note 111, at 84-88. (describing the formation of the Completion Strategy).

¹¹⁴ See generally Côté, *supra* note 63.

¹¹⁵ See Wald, *supra* note 10, at 468-69.

¹¹⁶ See *infra* notes 219-220 and accompanying text.

¹¹⁷ S.C. Res. 1534, *supra* note 111, ¶ 5.

number of counts that the indictees were charged with ($r = .19$)¹¹⁸ or the sentence that the indictees eventually received ($r = .03$).¹¹⁹ In other words, more senior indictees were not charged with more crimes and did not tend to receive higher sentences than less senior indictees. This finding is inconsistent with allegations that the ICTY trials were shams designed to punish the political enemies of the United States and its allies.¹²⁰

IV. The Contents of the Indictments

A. Charges

The indictments were coded to capture the charges included in them. Each separate count was recorded as either an alleged war crime, crime against humanity, or act of genocide. No attempt was made to differentiate between the various underlying acts that could have given rise to these charges (e.g., murder as a crime against humanity and torture as a crime against humanity were both coded the same way).

Commission of war crimes is by far the most common charge at the ICTY. Of the 161 indictees, only 2 were not charged with any war crimes. This is not surprising, as the ICTY was set up principally to prosecute violations of international humanitarian law.¹²¹ The median¹²² ICTY accused was charged with 4 war

¹¹⁸ This result is, however, close to being significant.

¹¹⁹ This is mildly surprising as earlier studies did find a connection between seniority and the resulting sentences. See Meernik, *supra* note 19, at 157; see also Barbora Holá et al., *Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice*, 22 LEIDEN J. INT'L L. 79, 90 (2009) (“[T]he highest-ranking individuals have been sentenced to substantially longer terms than their subordinates.”). The court itself, however, is ambivalent about whether there should be a link between seniority and the sentence. See *Prosecutor v. Krstic*, Case No. IT-98-33-T, Trial Chamber Judgment, ¶ 709 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf> (“A high rank in the military or political field does not, in itself, lead to a harsher sentence. But a person who abuses or wrongly exercises power deserves a harsher sentence than an individual acting on his or her own.”).

¹²⁰ See, e.g., Hayden *supra* note 2.

¹²¹ S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993).

¹²² The median of a data series is the value that lies in the middle of the series once they are ordered from smallest to largest. Half of the values will lie above the median and half will lie below the median. The mean or average, on the other hand, is calculated by summing the values in the series and dividing the sum by the number of values. Both

crimes. The most common approach (the mode), however, was to charge the accused with a single war crime, which happened 44 times. Only 6 individuals were charged with 20 or more war crimes. The individual charged with the largest number of war crimes, 40, was Slobodan Milošević, the former President of Serbia.

Crimes against humanity was the next most common charge at the ICTY. All but 19 of the accused were charged with a crime against humanity. The median ICTY accused was charged with 4 crimes against humanity. This was also the most common result, as 32 individuals were charged with 4 crimes against humanity, followed by 23 individuals who were charged with 5 crimes against humanity. In contrast to war crimes where single charges were common, an accused was charged with a single crime against humanity only 13 times. On the other hand, 10 accused were charged with 10 or more crimes against humanity. Slobodan Milošević was charged with crimes against humanity 24 times, the most of anyone charged.

A genocide charge was comparatively rare, in keeping with its status as the “crime of crimes” and the difficulty of establishing the requisite specific intent.¹²³ Only 22 of the 161 accused were charged with genocide, including Slobodan Milošević. All of those accused of genocide were ethnic Serbs.

All told, the ICTY charged 161 individuals with 902 counts of war crimes, 664 counts of crimes against humanity, and 40 counts of genocide. The median ICTY accused was charged with 4 war crimes, 4 crimes against humanity, and 0 counts of genocide.¹²⁴ While there have been concerns about over-charging by the

averages and medians can provide useful information about the data series, but for some purposes medians are more useful. In particular, if one is interested in where the center of the distribution lies, the median value is better than the average because medians, unlike averages, are not as influenced by values that lie at the extreme ends of the distribution.

¹²³ See Robert Petit et al., *Exploring Critical Issues in Religious Genocide: Case Studies of Violence in Tibet, Iraq and Gujarat*, 40 CASE W. RES. J. INT’L L. 163, 213 (2008).

¹²⁴ The average ICTY accused was charged with 10.5 counts. However, this average was strongly affected by a few outliers who were charged with large numbers of counts. In fact, less than 30% of the accused were charged with more than the average number of counts.

Prosecutor,¹²⁵ the charges against the accused appear to have been relatively modest given the seriousness of the allegations in the indictments. Indeed, these indictments often included allegations against accuseds of causing hundreds or thousands of unlawful deaths, as well as charges of widespread torture; unlawful imprisonment; inhumane treatment; and forcible transfer.¹²⁶ The most extensive charges were against Slobodan Milošević, who was accused of 40 counts of war crimes, 24 counts of crimes against humanity, and 2 counts of genocide. However, the charges against Milošević were also extremely serious—he was essentially charged with being responsible for the entire conflict in the Balkans.¹²⁷

Contrary to some suggestions,¹²⁸ there was no correlation between the total number of counts and sentence length ($r = .17$). On the other hand, there was a moderate correlation ($r = .45$) between charging genocide and sentence length. This correlation does not mean, however, that charging genocide causes an increased sentence length.¹²⁹ Rather, it seems likely that the correlation between an allegation of genocide and a longer sentence is actually a correlation between genocide convictions and longer sentences, and that the genocide charge is acting as a proxy for that underlying relationship.¹³⁰ For example, a genocide charge did not correlate with an increased likelihood of conviction,¹³¹ even though it did correlate with a longer sentence.

The correlation between the number of crimes against

¹²⁵ See Wald, *supra* note 10, at 469.

¹²⁶ See *infra* Section IV.C (describing the gravity of the crimes alleged to have been committed).

¹²⁷ See Ford, *supra* note 4, at 415 (“[T]he ICTY essentially accused Slobodan Milošević and the Serb political leadership of masterminding the whole conflict.”).

¹²⁸ See Gillian Higgins, *The Impact of the Size, Scope and Scale of the Milošević Trial and the Development of Rule 73bis before the ICTY*, 7 NW J. INT'L HUM. RTS. 239, 258 (2009) (quoting Judge Kwon as saying “by charging the accused with more crimes through more modes of responsibility, the Prosecutor apparently believes that she stands a greater chance of convicting the accused on at least one charge”).

¹²⁹ See FREEDMAN ET AL., *supra* note 86, at 150-52 (noting that correlations measure the association between two variables and do not measure causation).

¹³⁰ See, e.g., Holá et al., *supra* note 20, tbl.1, at 421, 422-23 (concluding that “[t]he sentences for genocide are substantially longer[]” than the sentences for war crimes or crimes against humanity).

¹³¹ See *infra* Section V.B.

humanity charged and the sentence was very weak ($r = .24$), while there was no correlation between the number of war crimes charged ($r = .04$) and the sentence. Ultimately, apart from a genocide charge, the number and type of charges had little correlation with the end result. This is consistent with a court that makes decisions based on the evidence presented at trial rather than slavishly following the allegations in the indictment.

A comparison of ICTY charging practices to domestic practices in the United States suggests that ICTY practices are not unreasonable. Of defendants accused of murder in the United States, 65% are also charged with one or more additional felonies.¹³² It seems reasonable to assume that the vast majority of these individuals were charged with a single murder,¹³³ yet the majority of them were charged with more than one crime stemming from that murder. Given that the allegations in the ICTY often involved the deaths of hundreds or thousands of people, a median of 8 counts does not seem excessive.

Moreover, when mass killings have been charged in the United States, the accused has often been charged with one or more counts per victim. For example, Timothy McVeigh, one of the Oklahoma City bombers, was charged in federal court with 8 counts of murder,¹³⁴ 1 for each of the 8 federal officials who died in the blast¹³⁵ that ultimately killed 168 people.¹³⁶ He was subsequently convicted and executed.¹³⁷ Had he not been executed, he would have been charged in state court with additional counts arising out of the other deaths caused by the bombing.¹³⁸ His accomplice, Terry Nichols, was charged in

¹³² See BUREAU OF JUSTICE STATISTICS, *supra* note 74, app. tbl.1, at 18.

¹³³ For example, in Australia only 4% of homicides involve the death of more than one victim. See VIRUEDA & PAYNE, *supra* note 84, at 5.

¹³⁴ See Mark Eddy et al., *Guilty on Every Count*, DENVER POST, June 3, 1997, available at <http://extras.denverpost.com/bomb/bombv1.htm>.

¹³⁵ *Id.*

¹³⁶ See Lois Romano & Tom Kenworthy, *Prosecutor Paints McVeigh as 'Twisted' U.S. Terrorist*, WASHINGTON POST, Apr. 25, 1997, at A01.

¹³⁷ See Christopher S. Wren, *McVeigh is Executed for Oklahoma City Bombing*, N.Y. TIMES, June 11, 2001, available at <http://www.nytimes.com/2001/06/11/national/11CND-EXECUTE.html>.

¹³⁸ See *Oklahoma to Try Terry Nichols on Murder and Bomb Charges*, N.Y. TIMES, Mar. 30, 1999, at A20.

federal court with conspiracy to use a weapon of mass destruction, for which he received a life sentence.¹³⁹ He was subsequently charged in state court with 160 counts of first-degree murder.¹⁴⁰

Other similar cases follow this pattern. John Allen Muhammed, the “Beltway Sniper,” was convicted of 6 counts of first-degree murder in Maryland and 2 counts of capital murder in Virginia stemming from shooting 16 people and causing 10 deaths.¹⁴¹ John E. Holmes, accused of opening fire in a crowded theater and killing 12 people and injuring dozens more, was charged with more than 160 counts of first-degree murder and attempted murder.¹⁴² In short, in the United States, it appears that people who commit mass murder are usually charged with 1 count per victim, and sometimes more. At the ICTY, the practice is to generally charge 1 count per incident, even if the incident in question involved a substantial number of victims. In comparison to domestic practice in the United States, ICTY charging practices do not look overly aggressive.

On the other hand, the U.S. system may not be the best comparator. There is evidence that the U.S. system encourages prosecutors to strategically over-charge crimes so as to be able to affect the minimum sentences that accused receive and to have leverage during guilty pleas.¹⁴³ By comparison, most European systems do not have these structural incentives to over-charge.¹⁴⁴ Thus, it is likely that charging practices in Europe tend to involve fewer and lesser charges, as well as shorter sentences.¹⁴⁵ Unfortunately, statistical data on charging practices in Europe

¹³⁹ See Jo Thomas, *Terry Nichols Gets Life Term in Bombing Plot*, N.Y. TIMES, June 5, 1998, at A1.

¹⁴⁰ See *Oklahoma to Try Terry Nichols on Murder and Bomb Charges*, *supra* note 138, at A20.

¹⁴¹ See Ian Urbina, *Washington-Area Sniper Convicted of 6 More Killings*, N.Y. TIMES, May 31, 2006, at A14; Adam Liptak, *Virginia Justices Set Death Sentence in Washington Sniper Case*, N.Y. TIMES, Apr. 23, 2005, at A9.

¹⁴² See Jack Healy & Dan Frosch, *At Hearing, Police Recall Details of Horror at Colorado Movie Theater*, N.Y. TIMES, Jan. 7, 2013, at A11.

¹⁴³ See Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 CRIME & JUST. 1, 21-23 (2012).

¹⁴⁴ *Id.*

¹⁴⁵ Sentencing practices in Europe are discussed later. See *infra* notes 235-237 and accompanying text.

were unavailable at the time of this writing. Looking at practices in some recent mass killings, however, it appears that charging practices in Europe may differ by country.

For example, Anders Breivik was accused of killing 77 people and seriously wounding 42 more in Norway in July 2011. He was charged with 3 crimes, 2 arising out of a bombing in downtown Oslo, and 1 arising out of shootings that took place on the island of Utøya.¹⁴⁶ In contrast, the individuals behind the Madrid train bombings in March 2004 that killed 192 people and wounded more than 1,400¹⁴⁷ were charged quite differently. They were collectively charged with 192 counts of murder; 1,773 counts of attempted murder; 5 counts of terrorist attacks; several counts of membership in and support of terrorist organizations; and several counts related to possession of explosives, as well as forgery of official documents.¹⁴⁸

In effect, the Madrid train bombers were charged with a separate count arising out of each death and serious injury, whereas Breivik was charged with a small number of counts, each of which incorporated numerous deaths or injuries that took place at the same time and place. The charging practice in the Breivik case looks more like that at international criminal courts, which rarely charge the accused with separate counts arising out of each death or serious injury, while the charging practice in the Madrid train bombings is more similar to the practice in the United States. In any event, the ICTY's charging practices seem to fall within the

¹⁴⁶ More specifically, he was charged with 1 count of premeditated murder with aggravating circumstances and 1 count of using an explosion to cause loss of life or extensive property damage for the Oslo bombing. He was charged with 1 count of premeditated murder with aggravating circumstances for the shootings at Utøya. See *Anders Behring Breivik: The Indictment*, THE GUARDIAN, Apr. 16, 2012, <http://www.guardian.co.uk/world/2012/apr/16/anders-behring-breivik-indictment> (last visited Sept. 1, 2013) (providing an English translation of the indictment).

¹⁴⁷ See Elaine Sciolino, *Spain Struggles to Cope as the Equation of Terror Changes in an Instant*, N.Y. TIMES, Mar. 12, 2004, at A8.

¹⁴⁸ It appears that the dossier from the investigating judge, which includes the confirmation of charges, is available only in Spanish. See *Atentados Terroristas del Día 11 de Marzo de 2004 en Madrid*, Sumario No. 20/2004, <http://estaticos.elmundo.es/documentos/2006/04/11/auto11m/01.pdf> (last visited Sept. 1, 2013). The legal qualification of the charges comes at pages 1445 and 1446 (pages 305-06 of PDF) in the fourth part of the document. See *id.* at 305-06, available at <http://estaticos.elmundo.es/documentos/2006/04/11/auto11m/04.pdf>.

range of charging practices found in countries with legal systems that are generally recognized as fair.

B. Modes of Liability

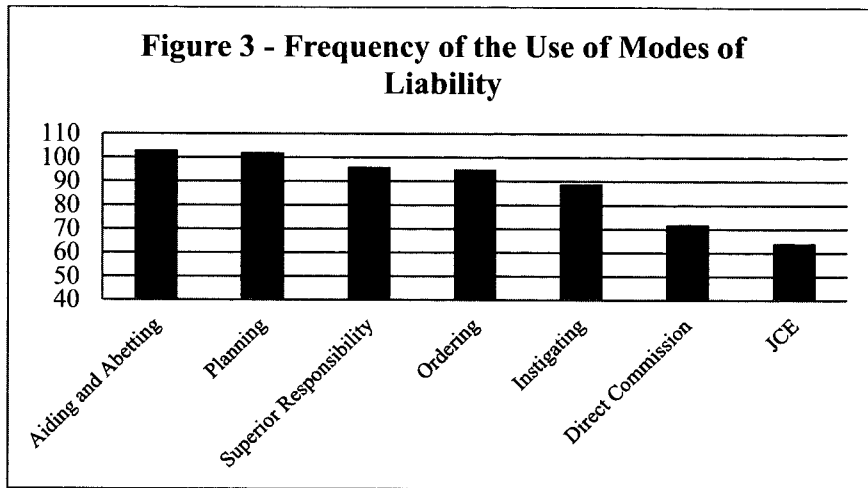
The indictments were coded for the modes of liability under which the accused were charged. Modes of liability are principles of liability that “apply across the various [substantive] offences and provide for the doctrines by which a person may commit, participate in, or otherwise be found responsible for those crimes.”¹⁴⁹ The possible modes of liability were aiding and abetting, planning, ordering, instigating, direct commission, superior responsibility, and JCE. One thing that was immediately apparent was the use of boilerplate language that appeared in a large number of ICTY indictments. For example, it is common to see indictments that charge the accused with having “planned, instigated, ordered, committed or in whose planning, preparation, or execution he otherwise aided and abetted” all of the alleged crimes in the indictment.¹⁵⁰ To quantify this, there were strong correlations between the use of aiding and abetting as a mode of liability on the one hand, and planning ($r = .71$), instigating ($r = .61$), and ordering ($r = .54$) on the other hand, indicating that these modes of liability were frequently used together. This “kitchen sink” approach suggests that the prosecution used these modes of liability somewhat indiscriminately.

As a mode of liability, aiding and abetting was alleged 103 times, planning 102 times, ordering 95 times, instigating 89 times, and direct commission 72 times. The results are shown below in Figure 3. There was no correlation between the use of these modes of liability and the sentence.¹⁵¹

¹⁴⁹ See Cryer, *supra* note 85, at 361. See also *id.* at 361-401 (summarizing how modes of liability are used in international criminal law).

¹⁵⁰ See, e.g., Milan Martić, *supra* note 89, ¶ 3.

¹⁵¹ The r values for the correlations between sentence length and aiding and abetting, ordering, planning, instigating, and direct perpetration were all between $-.2$ and $.2$.



Despite a focus on the use and alleged overuse of JCE in academic literature,¹⁵² it was alleged only 64 times, the least of all the modes of liability. Less than half of the ICTY's accused were charged as part of a JCE. The largest JCE, composed of 61 individuals or organizations, was alleged in the cases against Ratko Mladić and Slobodan Milošević. These were also some of the most serious allegations made by the ICTY, against some of the most senior accused, and they involved allegedly illegal acts committed at hundreds of crime sites,¹⁵³ so it is perhaps not surprising that they allegedly involved large JCEs. The most frequently charged JCE, however, involved just 7 individuals, and the median JCE involved 14 individuals. In practice, JCEs do not appear to have been as broad as some have suggested.¹⁵⁴ Given the seriousness of the allegations¹⁵⁵ and the organized and

¹⁵² See Cassese, *supra* note 91, at 114-23 (describing several different criticisms of using JCE as a mode of liability in the international criminal law context); see generally Steven Powles, *Joint Criminal Liability: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 J. INT'L CRIM. JUST. 606 (2004) (criticizing the use of JCE as a mode of liability within the ICTY); Turner, *supra* note 1, at 560-63.

¹⁵³ For example, Slobodan Milošević was charged with crimes occurring at 435 crime sites in Croatia, Bosnia and Herzegovina, and Kosovo.

¹⁵⁴ One ICTY defense counsel said that JCE was "too broad and ambiguous so that [a] vast number of people may be included in it." Turner, *supra* note 1, at 553. It is true that a vast number of people can be named as part of the JCE, but it is not what usually happened.

¹⁵⁵ See *infra* Section III.C.

hierarchical nature of the crimes,¹⁵⁶ the frequency of the use of JCE and the size of the alleged JCEs seem reasonable.

JCE was used more often against senior accused ($r = .45$). There were also moderate correlations between the number of people alleged to have been killed ($r = .40$) and the total number of crime sites listed in the indictment ($r = .41$) and the use of JCE. In other words, JCE appears to have been used in situations where senior accused were charged with a large number of deaths that occurred at a number of different crime sites, which is what one would expect if JCE were being used to capture the criminality of groups of individuals who act in concert to accomplish a criminal plan or purpose.¹⁵⁷ This is what one would expect from a court that was conducting predominantly legal trials.

There were weak correlations between the number of counts of genocide and crimes against humanity and the use of JCE ($r = .30$ for both). There was no correlation between either the total number of counts charged ($r = .09$) or the number of war crimes charged ($r = -.07$) and the use of JCE. There was also no correlation between the use of JCE and the sentence received ($r = .06$). In other words, the allegation that an accused participated in a JCE does not appear to have lengthened the resulting sentence. In that sense, there is little support for the claim that JCE effectively acts as a form of strict liability.¹⁵⁸ Indeed, it actually decreased the likelihood of conviction.¹⁵⁹ Unfortunately, the data does not permit an evaluation of claims that the prosecution often alleges JCE without sufficient clarity.¹⁶⁰

Superior responsibility was alleged 96 times at the ICTY. While superior responsibility has its origins in international

¹⁵⁶ See *supra* note 91.

¹⁵⁷ See Prosecutor v. Vasiljević, Case No. IT-98-32-A, Appeals Chamber Judgment, ¶¶ 94-101 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 25, 2004), <http://www.icty.org/x/cases/vasiljevic/acjug/en/val-aj040225e.pdf>. See also *supra* note 91. But see Turner, *supra* note 1, at 562 (raising concerns about the use of JCE in situations where the crimes that were allegedly committed are geographically remote from the accused).

¹⁵⁸ Turner, *supra* note 1, at 562-63; Ambos, *supra* note 91, at 174.

¹⁵⁹ See *infra* note 199 and accompanying text.

¹⁶⁰ See, e.g., Powles, *supra* note 152, at 618 (arguing that the prosecution on several occasions failed to plead JCE properly due to lack of sufficient clarity); Turner, *supra* note 1, at 563.

humanitarian law and was historically applied against military commanders,¹⁶¹ at the ICTY it was used more often against politicians (81% of the time) than against military personnel (69%). This is probably a function of the seniority structure of the accused.¹⁶² There was a strong correlation ($r = .59$) between seniority and the use of superior responsibility. Consistent with its legal requirements,¹⁶³ superior responsibility was used primarily against those who were alleged to be in positions of authority that permitted them to control the actions of subordinates.

Alleging superior responsibility had a weak correlation with the total number of crime sites listed in the indictment ($r = .30$). It had a barely significant correlation with the total number of counts alleged ($r = .20$), and no correlation with the number of people alleged to have been killed ($r = .04$) or the sentence ($r = -.01$). Alleging superior responsibility as a mode of liability does not appear to have affected the outcome of the cases, and there is little support for the claim that superior responsibility functions as a form of strict liability.¹⁶⁴

Finally, there was only a weak correlation between the use of superior responsibility and JCE ($r = .32$) and, as noted above, JCE was used the least of all the forms of liability. Despite the fact that both superior responsibility and JCE had fairly strong correlations with seniority, they were nonetheless only weakly correlated with each other. This is evidence that the Prosecutor did not use them indiscriminately. If the Prosecutor had been using them indiscriminately, one would expect them to have both been used against nearly all of the senior indictees. On the other hand, planning and aiding and abetting do appear to have been used

¹⁶¹ Prosecutor v. Halilović, Case No. IT-01-48-T, Trial Judgment, ¶¶ 42-49 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005), <http://www.icty.org/x/cases/halilovic/tjug/en/tcj051116e.pdf> (discussing examples of, and providing background information on, the concept of superior responsibility).

¹⁶² The military indictees included a number of low-ranking soldiers, while the politicians tended to be higher ranking. See *supra* Section II.B. Thus, it follows that superior responsibility would be used more frequently against the political figures.

¹⁶³ See Prosecutor v. Orić, Case No. IT-03-68-A, Appeals Chamber Judgment, ¶ 18 (Int'l Crim. Trib. for the Former Yugoslavia July 3, 2008), <http://www.icty.org/x/cases/oric/acjug/en/080703.pdf> (listing the elements of superior responsibility as a mode of liability).

¹⁶⁴ See Turner, *supra* note 1, at 564-65 (explaining defense attorneys' concerns that superior responsibility functions as a form of strict liability).

somewhat indiscriminately. This practice does not, however, appear to have been the subject of much criticism.

C. The Scope and Gravity of the Alleged Crimes

1. Gravity

The indictments were coded for the gravity of the alleged crimes. Gravity was measured by three variables: (1) the number of individuals alleged to have been unlawfully killed, (2) the number of individuals alleged to have been unlawfully imprisoned, and (3) the number of individuals alleged to have been forcibly transferred or deported.¹⁶⁵ These three variables do not perfectly measure the concept of gravity.¹⁶⁶ Yet they do serve as a useful, if somewhat imprecise, way of quantifying the seriousness of the crimes that were alleged.

Of the 161 indictees, at least 120 were specifically alleged to have committed crimes that involved the deaths of one or more people. Due to ambiguities in the language of the indictments, the actual number of accused who have been charged with committing crimes that involved unlawful deaths may be significantly higher.¹⁶⁷ The number of unlawful deaths alleged varied considerably. The accused were alleged to have killed a single individual 6 times. In contrast, 61 indictments specifically alleged that the accused were responsible for the deaths of more than 100 people. Of those, 20 cases involved charges of causing more than 1,000 deaths. The median number of people alleged to have been killed by an accused is 141. These figures almost certainly underrepresent the actual number of people the prosecution intended to prove had been killed by the accused.¹⁶⁸

¹⁶⁵ *Id.*

¹⁶⁶ See generally Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT'L L.J. 1400 (2009) (discussing extensively the concept of gravity within international criminal law).

¹⁶⁷ Only 12 indictments clearly did not involve the death of a human being. The remaining 29 indictments were too vague to be certain whether the prosecution intended to try to prove at trial that the accused was criminally responsible for causing the death of another. Although almost all of the indictments reference unlawful killings, it is sometimes hard to tell whether the reference is intended as background material or a specific allegation against the accused.

¹⁶⁸ This is partly the result of a tendency on the part of the prosecution not to provide specific numbers. Thus many indictments say things like "many people were

Of the accused, 71 were charged with the forcible transfer or deportation of civilians. While there were some cases that involved a relatively small number of individuals, the majority (53) involved the forcible transfer of thousands of civilians. Unlawful imprisonment was also a hallmark of the conflict in the Balkans, and 55 of the accused were charged with unlawfully imprisoning people. Of these, 28 were charged with unlawfully imprisoning more than 1,000 people. Thus, it seems that individual killings could result in an indictment before the ICTY, but that individuals were not usually indicted for forcible transfer or unlawful imprisonment unless there were a large number of victims. This suggests that the prosecutors believed there is a hierarchy among the physical acts, with killings being of more concern than forcible transfer or unlawful imprisonment. It appears that this implicit hierarchy is shared by the judges, as the sentences also reflect it.¹⁶⁹

There was a barely significant correlation between the number of people alleged to have been killed and the sentence ($r = .2$) and no correlations between the sentence and the number allegedly forcibly transported ($r = .11$) or imprisoned ($r = .0$). Again, it does not appear that the trial outcome is predetermined by the allegations in the indictment.

2. Scope

The indictments were coded to record two variables related to scope: (1) the geographic scope of the alleged crimes and (2) the number of distinct crime sites alleged in the indictment. The geographic scope of the alleged crimes varied considerably among the indictments and was measured on a six-point scale that ran from a single location at one end, to crimes that took place across multiple countries at the other. For the number of crime sites, each separate location described in the indictment at which a crime

killed” or “a large number of detainees died as a result of the conditions.” It was impossible to code this language as a specific number of people killed. The problem was made worse by documents filed under seal. In a number of indictments, the exact number of dead being alleged is contained in a separate “Schedule” that is not public. As a result, the data collected for the number of people alleged to have been killed appears systematically to undercount the number of victims.

¹⁶⁹ See Holá et al., *supra* note 20, at 424-27 (noting that ICTY sentencing practices exhibit a hierarchy among the crimes).

was alleged to have been committed was treated as a crime site.

Geographic scope will be addressed first. There were 21 accused charged with crimes that occurred at a single location, such as a house or factory. Some of the indictments that involved a single location were, nevertheless, very serious. For example, Darko Mrđa was accused of the systematic murder of more than 200 military age non-Serb men at a single location.¹⁷⁰ There were 28 charged with crimes that took place within a single village or town, 35 charged with crimes that took place across an entire municipality, and 53 charged with crimes that took place in more than one municipality but not across an entire country.¹⁷¹ Finally, 9 accused were charged with crimes that took place across an entire country, and 4 accused, including Slobodan Milošević, were charged with crimes that took place in more than one country. These results are summarized below in Table 3.

Single location	14%
Village or town	19%
Municipality	23%
More than one municipality	35%
Country	6%
More than one country	3%

Unsurprisingly, there was a strong correlation between the seniority of the accused and the geographic extent of the crime sites ($r = .68$). There was also a moderate, negative correlation ($r = -.48$) between the geographic scope of the crime sites in the indictment and whether the accused was charged as a direct perpetrator. In other words, direct perpetrators were charged with

¹⁷⁰ See Prosecutor v. Darko Mrđa, Case No. IT-02-59-I, Indictment, ¶ 16 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 16, 2002), <http://www.icty.org/x/cases/mrda/ind/en/mrd-ii020416.pdf>.

¹⁷¹ For purposes of this variable, Bosnia-Herzegovina, Croatia, Serbia, and Kosovo were considered to be separate countries, but the ethnic enclaves, like Serbian Krajina, were not.

crimes that occurred over smaller areas, while more senior accused were charged with crimes that occurred over larger areas.¹⁷² There was no correlation between the geographic scope of the crime sites and the sentence ($r = .16$).

The number of sites at which crimes were alleged to have occurred varied greatly across indictments. The median charged included crimes at 5 crime sites,¹⁷³ but 13 accused were charged with crimes that occurred at more than 100 crime sites. For example, Momčilo Krajišnik and Biljana Plavšić, both senior Bosnian Serb politicians, were charged in connection with 499 crime sites across 37 municipalities in Bosnia and Herzegovina. Slobodan Milošević was charged with crimes occurring at 435 crime sites in Croatia, Bosnia and Herzegovina, and Kosovo. There was a moderate correlation ($r = .42$) between the number of crime sites and the geographic scope of the crimes, demonstrating that the accused charged with crimes at the largest number of crimes sites tended to be charged with crimes of broad geographic scope.

There was no correlation between the number of crime sites listed in the indictment and the eventual sentence ($r = .13$). Just as including many counts in the indictment did not affect the sentence, neither did alleging that crimes took place at many different places. Once again, these findings are consistent with ICTY trials being predominantly legal trials rather than structural show trials.

V. Disposition of the Cases

Indictments against 21 of the 161 accused were subsequently withdrawn—15 because the indictees were deemed not important enough to warrant prosecution by the ICTY and 6 because the OTP conceded there was insufficient evidence to maintain the

¹⁷² There were similar, albeit weaker, correlations between seniority and the number of crimes sites ($r = .45$) and between direct perpetrators and the number of crime sites ($r = -.34$).

¹⁷³ The median is used here rather than the average because the average is strongly influenced by a few outliers, including the 499 crime sites alleged in the indictment of Momčilo Krajišnik and Biljana Plavšić. The average number of crime sites was almost 31, even though less than 25% of the indictees were charged with crimes occurring at 31 or more crime sites.

indictment.¹⁷⁴ This leaves 140 people for whom the indictments were not withdrawn. Of these 140 accused, 7 died before they could be transferred to the ICTY, and 13 were subsequently transferred back to domestic courts in the former Yugoslavia for prosecution.¹⁷⁵ Another 4 individuals died after appearing at the ICTY but before their trials began. That leaves 116 individuals who have been tried or will be tried. Of those 116 people, 4 died during their trials, including Slobodan Milošević.

Guilty pleas were entered by 20 accused, and 5 of them were given after a partial trial. The most significant guilty pleas came from Biljana Plavšić,¹⁷⁶ who had been the Co-President of the Bosnian Serb Republic (later the Republika Srpska) and Milan Babić, the President of the Republic of Serbian Krajina. Guilty pleas at the ICTY are far less common than they are in prosecutions in the United States. So far, 19% of those who have had a trial (20 of 104) have pled guilty at the ICTY. By comparison, 94% of domestic prosecutions that reach the trial stage at the state level in the United States are resolved with a guilty plea.¹⁷⁷ At the federal level, 97% of accused plead guilty.¹⁷⁸ On the other hand, plea bargains and guilty pleas are virtually unknown in Europe, particularly in countries that use an inquisitorial system.¹⁷⁹ There is an ongoing debate about the wisdom of permitting guilty pleas at international criminal

¹⁷⁴ In addition, 17 investigative dossiers, involving 43 individuals believed to have committed violations of international criminal law, were transferred to national courts before an indictment was filed. See U.N. Secretary-General, Budget for 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, for the Biennium 2012-2013 ¶ 14, U.N. Doc. A/66/386 (Sept. 29, 2011), http://www.un.org/ga/search/view_doc.asp?symbol=A/66/386. These dossiers contained the results of investigations by the OTP that produced evidence of crimes but for which an ICTY indictment was never confirmed. *Id.*

¹⁷⁵ These transfers resulted in 11 convictions with sentences ranging from 7 to 34 years, 1 acquittal, and 1 trial that has not yet been completed.

¹⁷⁶ Ford, *supra* note 4, at 473-74 (discussing Plavšić's "dramatic courtroom confession").

¹⁷⁷ See BUREAU OF JUSTICE STATISTICS, *supra* note 74, fig. 1, at 1.

¹⁷⁸ See U.S. SENTENCING COMMISSION, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig. C, available at http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2011/FigureC.pdf (last visited Sept. 1, 2013).

¹⁷⁹ See Tonry, *supra* note 143, at 21.

courts.¹⁸⁰

While 84 individuals pled not guilty and received full trials, there were not 84 separate trials. Many of the accused were tried together. As a result, there have been only 38 full trials before the ICTY. At the time that work on the database was completed (May 3, 2012), 56 individuals had completely exhausted their appeals, 1 had died after entry of a trial judgment but before completion of the appeal, 17 individuals were in the midst of an appeal, 7 individuals had completed their trials but were awaiting a trial judgment,¹⁸¹ and 3 individuals, who were being tried together in Case No. IT-04-84 (Haradinaj et al.),¹⁸² were in the midst of a retrial ordered by the Appeals Chamber.

In addition, 2 individuals, Ratko Mladić, Commander of the Bosnian Serb Army (VRS), and Goran Hadžić, former President of the Republic of the Serbian Krajina, had appeared before the tribunal, but their trials had not yet begun. Lastly, 6 individuals were in the midst of their trials, including Radovan Karadžić, the former President of the Republika Srpska. The results are summarized below in Table 4.

Prosecution withdrawn	13%
Died before transfer to the ICTY	4%
Transferred back to domestic courts	8%
Died before trial began	2%

¹⁸⁰ See Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUST. 683, 702-03 (2007) (arguing that guilty pleas are consistent with the purposes of international tribunals, including promoting efficiency and reconciliation). *But see* Ford, *supra* note 4, at 473 (arguing that most confessions lack sufficient detail and a clear acceptance of responsibility and are therefore of limited use in fostering reconciliation).

¹⁸¹ This includes the six individuals charged together in Case No. IT-04-74-T. See *Prosecutor v. Prlić*, Case No. IT-04-74-T, Judgment, ¶1 (Int'l Crim. Trib. for the Former Yugoslavia May 29, 2013), http://www.icty.org/x/cases/prlic/tjug/en/130529_summary_en.pdf.

¹⁸² That retrial has now finished, see *supra* note 15, but the results are not included in the analysis because they occurred after the database was completed.

Died during trial	2%
Trial completed	65%
Trial underway	4%
Awaiting trial	1%

The numbers in Table 4 are generally consistent with global trends. In the United States, approximately 30% of felony defendants never reach an adjudication, and the remaining 70% receive a judgment, although the vast majority of these judgments are the result of plea bargains rather than trials.¹⁸³ Overall, 71% of those charged with murder across all criminal justice systems are eventually convicted.¹⁸⁴ While some of these individuals are acquitted, many of the charges are dropped before trial for reasons other than an acquittal, including technical, evidentiary, or policy reasons.¹⁸⁵ In short, the rate accused go to trial appears to be roughly equivalent at the ICTY, in the U.S., and within other domestic jurisdictions. On the other hand, there is some evidence that the rate at which accused go to trial in Europe is higher than at the ICTY or in the United States.¹⁸⁶

A. Conviction Rate

Of the 97 individuals for whom a first trial judgment had been issued (as of May 3, 2012), 11 were acquitted at the trial stage, yielding a conviction rate of 89%.¹⁸⁷ In addition, although data was not collected on partial acquittals (i.e., where the defendant succeeds in defeating some, but not all, of the charges), it appears that they are quite common.¹⁸⁸ This conviction rate is lower than

¹⁸³ BUREAU OF JUSTICE STATISTICS, *supra* note 74, fig.1, at 1.

¹⁸⁴ See INTERNATIONAL STATISTICS ON CRIME AND JUSTICE, *supra* note 77, at 92.

¹⁸⁵ *Id.* at 91.

¹⁸⁶ *Id.* at 92. See also AEBI ET AL., *supra* note 76, tpls. 2.2.1.6, 2.2.1.7, at 139-40 (showing rates at which criminal cases in Europe are dismissed for legal, factual, policy, or efficiency reasons).

¹⁸⁷ Of the 11 initial acquittals, 2 were subsequently overturned on appeal and remanded for a retrial. At the same time, 4 individuals were acquitted on appeal who had been convicted at trial. The ultimate conviction rate cannot be known until all of the trials and appeals are exhausted.

¹⁸⁸ Turner, *supra* note 1, at 586-87 ("At the ICTY, as of April 12, 2005, defendants

the conviction rate for felony defendants in the United States.¹⁸⁹ It is also lower than comparable rates in France or Germany.¹⁹⁰ The relatively low conviction rate at the ICTY relative to domestic systems undermines the arguments of a minority of defense attorneys who believe that obtaining acquittals is “practically impossible.”¹⁹¹ Rather, it appears that defense attorneys have a greater likelihood of securing an acquittal at the ICTY than in domestic jurisdictions.¹⁹² The higher acquittal rate at the ICTY may reflect the fact that the ICTY’s cases are more legally and factually complex than the average domestic case, because they include more crimes, more victims, more crime sites, more participants, and more complicated theories about criminal responsibility. The additional complexity of trials at the ICTY presumably produces more places where the accused can try to introduce a reasonable doubt about the prosecution’s case. Particularly in the case of accuseds identified as Kosovar Albanians, the low conviction rates may also be the result of politically-motivated charging decisions by the Prosecutor.¹⁹³

Those who have been acquitted include prominent Serbs like Milan Milutinović,¹⁹⁴ the former President of Serbia; prominent Croatians, like Ivan Čermak,¹⁹⁵ a former Assistant Minister of Defence in the Croatian government; and prominent Bosniaks, like Sefer Halilović,¹⁹⁶ the Chief of the Command Staff of the Army of Bosnia and Herzegovina. The relatively high acquittal rate compared to domestic jurisdictions is inconsistent with the theory that conviction is assured and that the trials themselves are simply

were acquitted of 206 counts out of a total of 475 counts confirmed by the trial chambers.”).

¹⁸⁹ See BUREAU OF JUSTICE STATISTICS, *supra* note 74, fig.1, at 1 (showing that of 69 felony defendants who get to the trial stage, on average 68 (98%) are convicted).

¹⁹⁰ Turner, *supra* note 1, at 585-86.

¹⁹¹ *Id.* at 550.

¹⁹² *Id.* at 551.

¹⁹³ See *infra* Section V.B.

¹⁹⁴ See Press Release, The Hague, Five Senior Serb Officials Convicted of Kosovo Crimes, One Acquitted (Feb. 26, 2009), <http://www.icty.org/sid/10070> (Milutinović).

¹⁹⁵ See Press Release, The Hague, Appeals Chamber affirms acquittal of Sefer Halilović (Oct. 16, 2007), <http://www.icty.org/sid/8830> (Halilović).

¹⁹⁶ See Press Release, The Hague, Tribunal Convicts Gotovina and Markač, Acquits Čermak (Apr. 15, 2011), <http://www.icty.org/sid/10633> (Čermak).

for show.¹⁹⁷ Similarly, the fact that senior individuals from each of the ethnic groups have been acquitted is also inconsistent with claims that the trials are predominantly political in nature.

B. Acquittals

While this Article has generally explored the connection between sentence length and various characteristics of the indictments, this is not the only way to test for structural show trials. Another way to look at whether the content of the indictments control the outcomes is to look at correlations between the characteristics of the indictments and conviction or acquittal. There was no significant correlation (i.e., $|r| < .2$)¹⁹⁸ between conviction and the age, role, or seniority of the accused. Similarly, there was no significant correlation between conviction and the number of counts, the number of crime sites, or the geographic extent of the crime sites alleged in the indictment. Finally, neither alleging genocide, nor using superior responsibility as a mode of liability, had a statistically significant correlation with conviction or acquittal.

One factor that has a significant association with conviction is the use of JCE as a mode of liability. The correlation, however, is both weak and negative ($r = -.22$). In other words, alleging the existence of a JCE in the indictment did correlate with convictions, if only weakly, but it made conviction less likely, not more likely. This may be because proving the existence of a JCE is factually and legally complex¹⁹⁹ and is thus more difficult to establish than other modes of liability, like direct commission,

¹⁹⁷ See Peterson, *supra* note 1, at 260-61 (noting that the near certainty of conviction is the hallmark of a show trial, while non-show trials are marked by the possibility that the accused can secure his or her freedom).

¹⁹⁸ See *supra* note 86 (explaining the determination of statistical correlation).

¹⁹⁹ For example, one of the requirements of JCE is that the prosecution must show that all of the alleged members of the JCE shared the intent to pursue some course of action that was either itself a crime or necessarily involved the commission of one or more crimes. See Vasiljević, *supra* note 157 (stating the elements of JCE, including the requirement that there be proof of a common criminal purpose amongst a plurality of people); Prosecutor v. Brdanin, Case No. IT-99-36-T, Trial Chamber Judgment, ¶ 262 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004), <http://www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf> ("A common plan amounting to or involving an understanding or an agreement between two or more persons that they will commit a crime must be proved.").

ordering, or instigating. In any event, the negative correlation between the use of JCE and convictions is inconsistent with claims that JCE acts as a form of strict liability.²⁰⁰

Ethnicity, on the other hand, was once again an area where there were significant differences. As noted above in Section III.C, ethnic Serbs make up the largest number of indictees at the ICTY. They also had a higher conviction rate than other ethnicities. Table 5 below summarizes the results. One possible explanation is that the notably lower conviction rates for Bosniaks and Kosovar Albanians are due to, the fact that charges against these two groups were, on the whole, weaker than the charges against the Croats and Serbs. Weaker cases presumably would lead to higher acquittal rates if the trials were fundamentally legal in nature.²⁰¹

Ethnicity	Convicted	Conviction Rate
Serb	60 of 62	97%
Croat	16 of 18	89%
Bosniak	4 of 6	67%
Kosovar Albanian	2 of 6	33%

There is some support for this in the extrinsic evidence. The ICTY was acutely aware of the criticism it faced among ethnic Serbs for being allegedly anti-Serb.²⁰² Yet, at the same time, the vast majority of crimes were committed by ethnic Serbs.²⁰³ As

²⁰⁰ See *supra* note 158 and accompanying text.

²⁰¹ See *supra* notes 72-73 and accompanying text (offering an explanation of how the trials were fair).

²⁰² See The Human Rights Center et al., *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT'L L. 102, 110-11 (2000) (noting that, by at least 1997, the ICTY was aware of its negative perception within the Balkans and took purposeful steps, including creating an official outreach program, to improve this perception); Côté, *supra* note 63, at 176 (noting that indictments of senior ethnic Croats were publicized prior to the Dayton Accords as a means to try to defuse accusations of anti-Serb bias).

²⁰³ See *supra* notes 100-102 and accompanying text.

Professor Greenawalt has suggested, if the Prosecutor had made choices solely based on the gravity of the crimes, the ICTY might well have prosecuted only Serbs.²⁰⁴ But the Prosecutor was under immense pressure to indict at least some people from all of the sides.²⁰⁵

The result was that politically-motivated but arguably weak cases were pursued against Bosniaks and Kosovar Albanians, in an attempt to appear impartial.²⁰⁶ A disproportionate percentage of these cases ended with acquittals. If this is true, then the lower conviction rates for Bosniaks and Kosovar Albanians are evidence that the Prosecutor engaged in politically-motivated indictments.²⁰⁷ While lawyers might normally be expected to argue that politically-motivated indictments are a bad idea, Professor Greenawalt argues that the Prosecutor was correct to launch cases against members of all sides in the conflict, even if not all of the cases were of the same caliber.²⁰⁸ He claims that charging only ethnic Serbs would have been “deeply unfortunate, however fair-minded the principles that produced”²⁰⁹ such a strategy, because it

²⁰⁴ Greenawalt, *supra* note 102, at 648.

²⁰⁵ See Côté, *supra* note 63, at 176 (“[I]t has become an open secret that international Prosecutors, in selecting a potential indictee, may take into account criteria related to their belonging to or affiliation with a certain group in order to present in court more balanced cases involving all parties to the conflict . . .”). See also SCHABAS, *supra* note 56, at 78 (“The Serbs complained that they were bearing the brunt of the prosecutions, while the others [Croats, Bosniaks and Kosovars] grumbled that they were victims of a misguided attempt to make the institution look balanced.”).

²⁰⁶ See Greenawalt, *supra* note 102, at 649 (noting that the OTP’s prosecution strategy was “designed to achieve the greatest amount of public legitimacy”). See also Jean Galbraith, *The Pace of International Criminal Justice*, 31 MICH. J. INT’L L. 79, 92 (2009) (noting “efforts by the ICTY . . . to pursue indictments against members of virtually all sides of the conflicts. This is true despite the gravity of the crimes charged varying notably between individuals of different sides”); Côté, *supra* note 63, at 173 (noting Esad Landžo’s challenge that the Prosecutor’s office targeted him because he was the only one they could find to “represent” his ethnicity). Cf. *id.* at 176 (noting that indictments of senior ethnic Croats were rushed out as a way to defuse accusations of anti-Serb bias); Danner, *supra* note 63, at 543-44 (noting allegations that the Prosecutor indicted a Croatian general simply to “bring a high-ranking Croat to The Hague”) (quoting Daniel Simpson, *Croatia Protects a General Charged with War Crimes: In Rubble of Village Serb Calls for Vengeance*, N.Y. TIMES, Dec. 3, 2002, at A10.).

²⁰⁷ See Greenawalt, *supra* note 102, at 649 (concluding that the Prosecutor’s indictment decisions were driven in part by political considerations).

²⁰⁸ *Id.* at 648-49.

²⁰⁹ *Id.*

would have encouraged Croats and Bosniaks to “sweep their own crimes under the rug.”²¹⁰

Perhaps prosecutors may be permitted to take some political considerations into account when determining who to charge, but they should not allow such considerations to override their duty to ensure that charges are only brought when there is sufficient evidence to support a conviction.²¹¹ The fact that the cases against the Bosniaks and Kosovars have failed at disproportionately high rates suggests that the Prosecutors permitted political considerations to take precedence over their legal duty.

The Prosecutor, not surprisingly, views things somewhat differently. For example, after the acquittal of Ramush Haradinaj and his Kosovar Albanian co-accused, the Prosecutor argued that the acquittals stemmed from the failure of the court to hear from two key witnesses who were allegedly afraid to testify because of intimidation.²¹² The Prosecutor ultimately secured a retrial of Haradinaj et al., on the grounds that greater efforts should have been made to secure the testimony of the witnesses.²¹³ In the retrial, the two witnesses who had not testified in the first trial did testify.²¹⁴ The result was another acquittal.²¹⁵ This suggests that a weak case, not witness intimidation, was the basis for the acquittals.

C. Sentences

For those convicted of a crime, the trial sentences ranged from

²¹⁰ *Id.* at 649. See also Côté, *supra* note 63, at 175 (suggesting that “the credibility of [the ICTY] could not afford to be further weakened by a poor prosecutorial selection policy of accused that would reflect only one side of the conflict in situations where crimes were committed by all parties”).

²¹¹ See *U.N. Guidelines on the Role of Prosecutors*, *supra* note 73, ¶ 14 (“Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.”).

²¹² Prosecutor v. Haradinaj, Case No. IT-04-84-A, Appeals Chamber Judgment, ¶¶ 14-33 (Int’l Crim. Trib. for the Former Yugoslavia July 19, 2010), <http://www.icty.org/x/cases/haradinaj/acjug/en/100721.pdf>.

²¹³ *Id.* ¶¶ 48-50.

²¹⁴ Prosecutor v. Haradinaj et al., Case No. IT-04-84bis-T, Trial Chamber II Judgment, ¶ 4 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 2012), http://www.icty.org/x/cases/haradinaj/tjug/en/121129_judgement_en.pdf.

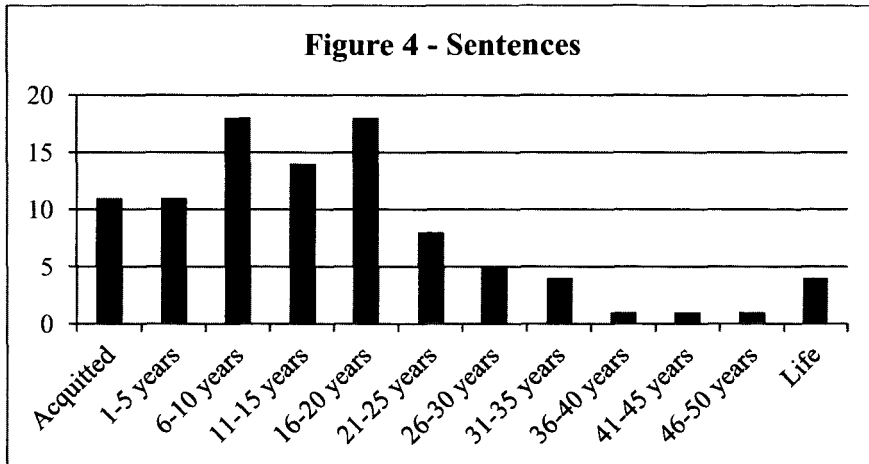
²¹⁵ See *id.* ¶¶ 683-85.

2 years (for Naser Orić) to 46 years (for Radislav Krstić).²¹⁶ The average trial sentence was 17.4 years, and the median sentence was 16 years.²¹⁷ The most commonly occurring sentence was 20 years, which was given 9 times. Figure 4 presents a histogram of the sentences. It appears that sentences are getting longer over time at the ICTY.²¹⁸

²¹⁶ Krstić was found guilty of genocide, persecution, and murder for his involvement in the systematic murder of at least 7,000 Bosniak men and boys following the fall of Srebrenica. See Harmon & Gaynor, *supra* note 180, at 687.

²¹⁷ For purposes of this calculation, it was necessary to either assign a value to a life sentence or exclude the life sentences from the calculation. It was important to include the life sentences; otherwise, the “average” sentence is lower than the reality of ICTY sentencing practices. A value of 40 years was chosen. This appears to be generally consistent with sentencing practices at international criminal courts and courts in the United States. In Article 110(3), the Rome Statute provides that individuals who have served two-thirds of their sentence are entitled to a review hearing. Rome Statute of the International Criminal Court, art. 110, ¶ 3, *opened for signature* July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute]. The Rome Statute also specifies that this will occur after 25 years for those sentenced to life imprisonment. *Id.* This implies that a life sentence at the ICC is worth 37.5 years. Other internationalized courts have come to similar conclusions. See Prosecutor v. Kaing Guek Eav, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment, ¶¶ 28-29, at 335-36 (Extraordinary Chambers in the Courts of Cambodia Feb. 03, 2012) (Klonowiecka-Milart, A. & Nihal Jayasinghe, C., partially dissenting joint opinion) <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf>; Prosecutor v. Aloys Ntabakuze, Case No. ICTR-98-41A-A, Appeals Chamber Judgment, ¶¶ 315-16 (May 8, 2012). The U.S. Sentencing Commission, in compiling its statistics on federal sentences, was faced with the same problem and elected to treat life sentences as a sentence of 470 months, or almost 40 years. See U.S. SENTENCING COMMISSION, *supra* note 178, at app. A. Finally, the average age of the indictees at the time of commission of the crimes was 40. According to the World Health Organization, the average life expectancy for men in Bosnia and Herzegovina is 74. WORLD HEALTH ORGANIZATION, BOSNIA AND HERZEGOVINA, <http://www.who.int/countries/bih/en/> (last visited Sept. 1, 2013). Thus, a 40 year sentence is indeed a “life sentence” for the majority of ICTY indictees. *But see* Holá et al., *supra* note 119, at 89; Holá et al., *supra* note 20, at 414 (arguing that a value of 55 years for life sentences “arguably expresses the specific quality of a life sentence as the severest sentence”).

²¹⁸ Holá et al., *supra* note 119, at 89 (noting, based on data through August 2008, that the average trial sentence was 15.9 years and the median sentence was 15 years). While it is possible that the calculus of sentencing is changing over time at the ICTY, it is also possible that the later cases are simply of more gravity than earlier cases, and that this explains the apparent lengthening of the sentences.



Life sentences from the trial chamber were given to 4 accused. These have not been the most senior accused, as one might expect, if the trials were political rather than legal. In fact, as noted above in Section III.D, there is no correlation between seniority and the length of sentence. Rather, all 4 are mid-level accused, specifically a Lieutenant Colonel and a Colonel in the Bosnian Serb Army; a municipal leader in Prijedor; and the leader of a Bosnian Serb paramilitary group. While seniority cannot explain these lengthy sentences, they can be explained by the gravity of the crimes. These cases are marked by the particular brutality of the alleged crimes. For example, Trial Chamber III found that on two separate occasions, Milan Lukić locked large numbers of people inside a building and then deliberately set it on fire.²¹⁹ The Trial Chamber found that his crimes were notable:

[F]or the viciousness of the incendiary attack, for the obvious premeditation and calculation that defined it, for the sheer callousness, monstrosity and brutality of herding, trapping and locking the victims in the two houses, thereby rendering them helpless in the ensuing inferno and for the degree of pain and suffering inflicted on the victims as they were burnt alive.²²⁰

The only variable that has a moderate correlation with

²¹⁹ Prosecutor v. Milan Lukić, Case No. IT-98-32/1-T, Trial Chamber III Judgment, 115-239 (Int'l Crim. Trib. For the Former Yugoslavia July 20, 2009), http://www.icty.org/x/cases/milan_lukic_sredoje_lukic/tjug/en/090720_j.pdf.

²²⁰ *Id.* ¶ 740, at 239.

sentence length is the number of genocide counts alleged against the accused.²²¹ The number of crimes against humanity alleged has a very weak correlation with the eventual sentence ($r = .24$). There was no correlation (i.e., $|r| < .2$) between sentence length and the role of the accused, the seniority of the accused, the age of the accused, the number of counts of war crimes alleged in the indictment, the number of crime sites in the indictment, the number of people alleged to have been killed, the number of people alleged to have been deported, the number of people alleged to have been unlawfully imprisoned, or the mode of liability alleged. In short, there is little evidence the content of the indictment dictates the outcomes of cases at the ICTY.²²²

Some have argued that ICTY sentences are not commensurate with the crimes.²²³ The average ICTY indictment alleged the unlawful killing of more than 100 hundred people, yet resulted in an average sentence of only 17.4 years. As Harmon and Gaynor point out, Radislav Krstić was sentenced to just 1.825 days in prison for each of the 7,000-8,000 deaths he was found criminally responsible for having caused, a situation they describe as “inconsistent with any serious notion of human dignity.”²²⁴ While there is little theoretical agreement on how to determine an appropriate sentence, which would depend on what purposes one assigned to international criminal justice and how those purposes were weighted,²²⁵ ICTY sentencing practices are significantly less punitive than practices in the United States. They may, however, be closer to sentencing practices in Europe.

More than 50% of those convicted of murder in state courts in the United States receive life sentences, and almost everyone else receives a prison sentence longer than 10 years.²²⁶ At the federal level, murder sentences averaged almost exactly 20 years in 2011.²²⁷ The vast majority of these sentences are presumably for

²²¹ See *supra* note 130.

²²² See also Holá et al., *supra* note 119, at 95-97 (concluding there is little correlation between the content of an indictment and the outcome of an ICTY case).

²²³ Harmon & Gaynor, *supra* note 180, at 684-87.

²²⁴ *Id.* at 692.

²²⁵ See Cryer, *supra* note 85, at 496-98 (noting that the purposes of punishment and sentencing in international criminal law are relatively undeveloped).

²²⁶ BUREAU OF JUSTICE STATISTICS, *supra* note 75, app. tbl.10, at 27.

²²⁷ U.S. SENTENCING COMMISSION, *supra* note 180, tbl.13.

single murders.²²⁸ Those accused of multiple murders in the United States receive much harsher sentences than the statistics on average murder sentences suggest.

For example, John Allen Muhammad, the “Beltway Sniper,” was convicted of having shot and killed 10 people and seriously wounding 3 others during the course of a shooting spree that took place in Maryland and Virginia. He was tried in Maryland for crimes committed in Maryland, where he was sentenced to 6 consecutive life terms without parole.²²⁹ He was also tried in Virginia for crimes committed in Virginia, where he was convicted of murder and sentenced to death.²³⁰ He was eventually executed in Virginia.²³¹ Timothy McVeigh, the key figure in the Oklahoma City bombing, was executed.²³² Terry Nichols, an accomplice in the Oklahoma City bombing, received a life sentence in his federal trial and 161 consecutive life sentences in his subsequent state trial.²³³ Other similar domestic crimes have received equally long sentences.²³⁴ ICTY sentences are significantly lower than sentences for comparable crimes in the United States.

ICTY sentences may be more in line, however, with sentencing practices in Europe. For one thing Europe, like the

²²⁸ See *supra* note 133.

²²⁹ See Urbina, *supra* note 141, at A14 (discussing the sentencing of John Muhammad).

²³⁰ See Liptak, *supra* note 141, at A9 (reporting on the sentencing of John Muhammad).

²³¹ See *Muhammad v. Com.*, 269 Va. 451, 451 (2005) (discussing John Muhammad’s crimes in Virginia); Ian Urbina, *Sniper Who Killed 10 Is Executed in Virginia*, N.Y. TIMES, Nov. 10, 2009, <http://www.nytimes.com/2009/11/11/us/11sniper.html> (describing the execution at Greensville Correctional Center, a Virginia state prison).

²³² See Wren, *supra* note 137 (reporting on the prosecution’s strategy in prosecuting Timothy McVeigh).

²³³ See *United States v. Nichols*, 169 F.3d 1255 (10th Cir. 1999) (sentencing Nichols to life in prison); *Apologetic Nichols Is Sentenced to Life for Oklahoma Bombing*, N.Y. TIMES, Aug. 10, 2004, <http://www.nytimes.com/2004/08/10/us/apologetic-nichols-is-sentenced-to-life-for-oklahoma-bombing.html> (reporting on Nichols sentencing).

²³⁴ See Harmon & Gaynor, *supra* note 180, at 686-87 (discussing the differences in guilty pleas in terms of sentencing); F. Santos, *Tucson Case Comes to End With Plea by Gunman*, N.Y. TIMES, Aug. 8, 2012, at A9.

ICTY, does not permit the death penalty.²³⁵ In addition, sentences for very serious crimes are shorter in Europe than in the United States. The average sentence for an intentional homicide in Europe is 90 months,²³⁶ or slightly more than 7.5 years. This is significantly lower than the average murder sentences handed down in the United States. In general, European criminal justice systems appear to be among the least punitive in the world.²³⁷

These differences persist in some countries when one looks at mass killings. For example, one of the most serious crimes to occur in Europe in recent years took place in Norway, where extremist Anders Behring Breivik killed 77 people and wounded many more.²³⁸ He ultimately ended up being sentenced to 21 years imprisonment.²³⁹ On the other hand, some of those convicted of participating in the Madrid train bombings in March 2004 received sentences as high as 43,000 years.²⁴⁰

Extremely long prison sentences are, of course, symbolic. Terry Nichols is not actually going to spend 161 consecutive life terms in prison any more than the Madrid train bombers are going to spend the next 43,000 years in prison. Yet, some countries, like the United States and Spain, clearly believe that such symbolic sentencing is necessary to adequately express society's condemnation of the crimes. Not all countries adopt this practice, however, and Norway limits sentences to 21 years.²⁴¹ The ICTY has eschewed symbolic sentencing in favor of a practice that looks

²³⁵ See Protocol No. 13 to the Convention for the Protection of Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in All Circumstances, Feb. 21 2002, 41 I.L.M. 515 (2002) (banning the death penalty in all European states).

²³⁶ See AEBI ET AL., *supra* note 76, tbl.3.2.5.3, at 257 (indicating that the average sentence for intentional homicide in Europe is 90.5 months and the median sentence is 85.5 months).

²³⁷ See Harrendorf et al., *supra* note 77, at 132 (discussing details of European criminal sentencing).

²³⁸ Mark Lewis & Sarah Lyall, *Norwegian Mass Killer Gets Maximum Sentence: 21 Years*, N.Y. TIMES, Aug. 25, 2012, at A3.

²³⁹ See *id.*

²⁴⁰ See Victoria Burnett, *Convictions and Key Acquittals End Madrid Bomb Trial*, N.Y. TIMES, Nov. 1, 2007 (reporting on the varied convictions decided by the National Court of suspects in the 2004 Madrid train bombings).

²⁴¹ See Lewis & Lyall, *supra* note 238, at A3 (discussing the sentencing of Anders Behring Breivik, who received the maximum sentence in Norway of 21 years).

much more like the model used in Norway than that used in the United States. As with charging practices,²⁴² ICTY sentencing practices fall within the range of sentencing practices found in domestic criminal justice systems.

D. Guilty Pleas

The use of guilty pleas has had a modest effect on the average sentences. The average sentence of those who pled guilty is 14.3 years; the average sentence of those who did not plead guilty is 18.3 years. In other words, those who have pled guilty have, on average, received sentences four years shorter than those who went to trial and were found guilty.²⁴³ This apparently contradicts earlier findings that guilty pleas did not significantly affect the sentence.²⁴⁴ This leniency towards those who pled guilty is probably partly because a guilty plea is considered a mitigating factor at sentencing.²⁴⁵ But it may also be partly because the charges against those who pled guilty were different from the charges against those who did not plead guilty. The results of a comparison of those who pled guilty compared to those who were found guilty after a trial are presented below in Table 6.²⁴⁶

²⁴² See *supra* notes 143-149 and accompanying text.

²⁴³ Guilty pleas occurred infrequently, however, and the effect was to reduce the overall average sentence by slightly less than one year to 17.4 years.

²⁴⁴ See Holá et al., *supra* note 119, at 91 (“However, the difference between the sentence of those pleading guilty and those not doing so is minimal.”).

²⁴⁵ See, e.g., Prosecutor v. Milan Babić, Case No. IT-03-72-S, Sentencing Judgment, ¶ 68 (Int’l Crim. Trib. for the Former Yugoslavia June 29, 2004) (“The Trial Chamber accepts the parties’ arguments that the case-law of the Tribunal has consistently considered a guilty plea as a mitigating factor.”).

²⁴⁶ The values reported for sentence, seniority, age, number of deaths, and total counts are averages. The result reported for number of crime sites is the median because a single outlier dominated the average result.

	Guilty Plea	Trial Conviction
Sentence	14.3 years	18.3 years
Seniority	3.9	4.9
Age	35.9	41.3
Prison Camp Personnel	35%	15%
No. of Crime Sites (median)	3	10
Number of Deaths	1,012	1,556
Total Counts	10.7	11.6
Charged using JCE	25%	45%
Charged as Direct Perpetrator	60%	39%
Geographic Scope of Charges	Town	Municipal

Those who pled guilty were indeed different from those who were tried. For one thing, they were younger, less senior in the hierarchy, and more of them were prison camp personnel. More importantly, they were charged with fewer counts, at fewer sites, within a smaller geographic area. They were also alleged to be responsible for fewer deaths.²⁴⁷ In addition, they were less likely to have been charged under a theory of JCE and more likely to have been charged as direct perpetrators of violence. In short, it appears that those who pled guilty were largely the “small fish,” with Biljana Plavšić’s guilty plea²⁴⁸ being the obvious exception to that conclusion. The comparison above suggests that at least part of the reason that people who pled guilty received lighter sentences is because they were generally charged with fewer, less serious offenses.

²⁴⁷ As noted above, this conclusion should be treated carefully because data on the number of deaths was not available for all of the accused. See *supra* note 167 and accompanying text.

²⁴⁸ See *supra* note 176 and accompanying text (discussing Plavšić’s “confession”).

E. Appeals

The ICTY Appeals Chamber has the power to change the sentence of the accused.²⁴⁹ Thus, the numbers look a little different on appeal. The Appeals Chamber reduced the sentence 20 times, affirmed the trial sentence 28 times, and only increased the sentence 4 times. The average result was a decrease in the trial sentence of 1.6 years. This suggests that, all other things being equal, appealing the trial chamber judgment is usually a good idea.²⁵⁰ Of those who were convicted of crimes by the court, 44 have completed their sentences and have been released already.²⁵¹

The actions of the Appeals Chamber also suggest that the ICTY's trials are not structural show trials. If they were, one would not expect the trial decision to be overturned on appeal. Yet on 4 occasions in the dataset, the Appeals Chamber has acquitted an accused convicted by the Trial Chamber. In addition, in a recent decision that is not part of the dataset, the Appeals Chamber acquitted Croatians Ante Gotovina and Mladen Markač.²⁵² The Appeals Chamber in *Gotovina & Markač* was deeply divided, with 2 of the 5 judges filing strongly worded dissents, and 2 of those in the majority feeling compelled to file separate opinions.²⁵³ This level of division within the Appeals Chamber is inconsistent with the idea that the trials are show trials that rubber-stamp the allegations in the indictments.

²⁴⁹ See, e.g., Prosecutor v. Krstić, Case No. IT-98-33-A, Appeals Chamber Judgment, ¶¶ 266-75 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004), <http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf> (reducing Krstić's sentence from 46 years to 35 years).

²⁵⁰ See also Holá et al., *supra* note 119, at 89 (noting that "[i]n the majority of cases sentences issued by the trial chambers are either confirmed or reduced on appeal").

²⁵¹ See ICTY, KEY FIGURES, available at http://icty.org/x/file/Cases/keyfigures/key_figures_en.pdf (last visited Sept. 1, 2013) (providing figures on the current status of those serving their sentences, including 44 who have completed their sentences).

²⁵² See Prosecutor v. Ante Gotovina & Mladen Markač, Case No. IT-06-90-A, Appeals Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012), http://www.icty.org/x/cases/gotovina/acjug/en/121116_judgement.pdf (issuing acquittals on certain grounds of appeal).

²⁵³ See *id.* at sect. VIII, ¶ 1 (Dissenting Opinion of Judge Carmel Agius) (Judge Agius wrote that he "strongly disagree[d] with almost all of the conclusions reached by the Majority . . ."); see also *id.* at sect. X, ¶ 39 (Judge Pocar described the majority opinion as "contradict[ing] any sense of justice.").

F. The Typical ICTY Accused

The typical ICTY accused was a 40-year old male. He was a soldier, ethnically Serb, and worked in the command staff of a brigade or battalion sized unit. He was charged with 4 war crimes and 4 crimes against humanity, but not genocide. The indictment alleges a variety of modes of liability, including planning, instigating, ordering, and superior responsibility. He was also charged in the alternative as an aider and abettor. He was alleged to have participated in the unlawful killing of more than 100 people that took place in multiple locations within a single municipality. It is possible, although not probable, that he was also charged with having forcibly transported or deported more than a 1,000 people. His case went to trial, and he was convicted. He was sentenced to 20 years in prison by the Trial Chamber and that sentence was affirmed on appeal by the Appeals Chamber. Perhaps surprisingly, given the seriousness of the charges, he is due to be released soon.

It is worth noting that the average prosecution at the ICTY alleged crimes roughly on par with some of the worst crimes prosecuted in domestic systems. For example, Timothy McVeigh was accused of killing 168 people when he blew up the Alfred P. Murrah Federal Building in Oklahoma City.²⁵⁴ The recent trial of Anders Breivik in Norway involved allegations of having killed 77 people.²⁵⁵ The Madrid train bombings alleged the deaths of 192 people.²⁵⁶ These trials were viewed as landmarks in their respective countries that dealt with crimes far beyond those normally handled by the domestic criminal justice system.²⁵⁷ Yet they would have been average cases at the ICTY. None of them is comparable to the gravity of what occurred at Srebrenica, where more than 7,000 young men and boys were systematically murdered in the space of a few days.²⁵⁸

²⁵⁴ See Romano & Kenworthy, *supra* note 136 (reporting on the prosecutor's case against Timothy McVeigh, including the subsequent sentencing).

²⁵⁵ See Lewis & Lyall, *supra* note 238 (reporting on the sentencing of Anders Breivik).

²⁵⁶ See Sciolino, *supra* note 147 (detailing the Madrid train bombings in 2004).

²⁵⁷ See *supra* note 133 and accompanying text (arguing that the vast majority of murder trials in domestic systems involve a single victim).

²⁵⁸ See Prosecutor v. Radislav Krstic, Case No. IT-98-33-T, Judgment ¶¶ 53-84 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001) (describing the execution of

VI. Conclusion

ICTY trials are not structural show trials. There are no strong correlations between the contents of the indictments and the convictions or sentences. Age, seniority, the number of counts in the indictment, the modes of liability alleged, the number of crime sites in the indictment, and the accused's role do not appear to have significantly affected the sentence. The only factor that has a moderate correlation with the sentence is a charge of genocide, but that can be best explained by the effect of being found guilty of genocide.²⁵⁹

Moreover, many of the common criticisms of ICTY trials are not supported by the evidence. Neither the use of JCE nor superior responsibility was positively correlated with sentence length or conviction. In fact, JCE was weakly correlated with being acquitted, not convicted. Thus, there is little evidence that these modes of liability act as forms of strict liability. Further, conviction rates at the ICTY are lower than for comparable crimes in domestic criminal justice systems, undermining claims that it is disproportionately difficult to obtain an acquittal at the ICTY.

One issue that deserves further consideration is the ethnic composition of the accused. Ethnic Serbs were more likely to be indicted by the ICTY and received longer average sentences than ethnic Bosniaks. While this seems troubling at first glance, there is no reason to assume that members of different groups should be charged equally or sentenced to similar terms. Rather, the evidence suggests that it was appropriate to charge more ethnic Serbs than any other group and give them longer sentences because ethnic Serbs were responsible for more numerous and more serious crimes.

In general, the indictments appear to be consistent with what one would expect from a court principally concerned with adjudicating guilt through fair procedures. The indictments largely comply with the requirements of international criminal law, are internally consistent, and match what we know about the ways in which serious violations of international criminal law are committed. More generally, ICTY charging and sentencing

more than 7,000 Bosniak men and boys by Serbian forces under the control of Radislav Krstic).

²⁵⁹ See *supra* notes 130-132 and accompanying text.

practices fall within the range of practices found in domestic criminal justice systems that are widely considered to be fair.

There are a few problems, including that certain modes of liability are used somewhat indiscriminately and that a number of indictments were vague about the number of victims. Some uncertainty is to be expected and does not necessarily indicate a problem.²⁶⁰ But, in a few cases it was hard to tell whether the prosecution believed the accused was responsible for any deaths.²⁶¹ This is problematic. The accused is entitled to know the charges against him or her.²⁶² These problems were not pervasive, however. On the whole, there is little evidence of systematic unfairness in the indictments.

For these reasons, this articles' central finding is that the evidence from the indictments and trials supports the conclusion that ICTY trials are fundamentally fair. In essence, the ICTY has successfully threaded the needle of pursuing consequentialist goals, like settling the historical record and promoting peace and reconciliation, while retaining predominantly legal trials. Ultimately, this finding largely agrees with Professor Turner's conclusions in her article, which were based on qualitative interviews with defense attorneys.²⁶³ Conclusions in this Article are the result of an empirical analysis of the indictments, and the fact that these two different methodologies reach similar conclusions provides some reassurance about the robustness of the

²⁶⁰ See Chile Eboe-Osuji, "Vague" Indictments and Justice at the International Criminal Tribunals: Learning from the World of Common Law, in BRITISH AND CANADIAN PERSPECTIVES ON INTERNATIONAL LAW 105, 109 (Christopher P.M. Waters ed. 2006).

²⁶¹ See, e.g., *id.* at 108 (noting the judge's confusion over the prosecution's argument).

²⁶² International Covenant on Civil and Political Rights, art. 14(3)(a), Mar. 23, 1976, 999 U.N.T.S. 171 (stating that any person charged with a crime has the right to be "informed promptly and in detail . . . of the nature and cause of the charge against him").

²⁶³ See Turner, *supra* note 1, at 582-93 (stating that many defense attorneys consider "international criminal trials as genuine factual and legal contests . . ."). See also David Wippman, *The Cost of International Justice*, 100 AM. J. INT'L L. 861, 878-80 (2006) ("For the most part, the ICTY seems to have succeeded in conducting credible trials while simultaneously developing a large body of case law of generally high quality."); Stromseth, *supra* note 10, at 267-68 (stating that the ICTY has "brought to justice, in fair trials, at least some of the individuals most responsible for egregious atrocities").

finding.

If we expand our focus to look beyond the trials, however, the picture is less clear. It is undisputed that the ICTY was created to pursue political goals in addition to legal ones. More troubling is the selectivity of the Security Council's decisions. Why did Rwanda and the former Yugoslavia receive international tribunals while other countries that had experienced serious violations of international criminal law did not receive any judicial body? This selectivity may be legally defensible, as the Security Council is an inherently political body, but it is also an unfortunate feature of many international criminal justice mechanisms. It would be preferable if the availability of a forum for adjudicating serious violations of international criminal law did not rely on the political decisions of the Security Council, particularly as the Security Council is often hamstrung by the permanent member veto.

To some extent, this concern has been ameliorated by the establishment of the International Criminal Court (ICC).²⁶⁴ The ICC has 121 members,²⁶⁵ which means that the majority of the world's countries are now parties. At least in theory, then, the majority of violations of international criminal law should now be subject to adjudication before a permanent international court²⁶⁶ with an independent prosecutor.²⁶⁷ On its face, justice should be less sporadic and dependent on politics than it was in the decades before the ICC.

On the other hand, there are still concerns about selectivity and the role of politics at the ICC. All of the ICC's investigation and prosecutions have occurred in African countries.²⁶⁸ There is a

²⁶⁴ See Rome Statute, *supra* note 217.

²⁶⁵ See *Ratification of Rome Statute*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, www.iccnw.org/?mod=reomeratifications (last visited Sept. 10, 2013).

²⁶⁶ See generally Rome Statute, *supra* note 217, art. 1 (establishing a permanent international criminal court with jurisdiction over "the most serious crimes of international concern").

²⁶⁷ See *id.* art. 15 (giving the Prosecutor the independent authority to initiate investigations); *id.* art. 42 (establishing an independent Office of the Prosecutor and stating that members of the Office "shall not seek or act on instructions from any external source").

²⁶⁸ At this time, the ICC has opened formal investigations into the situations in Uganda, the Democratic Republic of the Congo, Darfur in Sudan, the Central African Republic, Libya, Côte d'Ivoire, Kenya, and Mali. See I.C.C., *Situations and Cases*, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations

feeling in Africa that the ICC's selectivity is being driven by political considerations and anti-African bias.²⁶⁹ Still, we have come a long way from the "victor's justice" of the IMT, with its explicit exclusion of members of the Allied armed forces from the court's jurisdiction.²⁷⁰

More troubling than the role of politics in the founding of the ICTY is the evidence that decisions about whom to charge (and to not charge) were driven in some cases by political considerations. For example, commentators have noted that the Prosecutor appeared to create an advisory committee regarding NATO actions in Kosovo largely to provide cover for a decision not to investigate seriously any potential crimes. It certainly seems undesirable for powerful states to be able to pressure the Prosecutor into not investigating potential crimes committed by their nationals. Moreover, this problem is not limited to the ICTY. For example, many commentators view the ICC Prosecutor's decision not to initiate an investigation into alleged crimes committed on the territory of Palestine as a largely political decision taken to avoid antagonizing powerful opponents of the court.²⁷¹ Similar criticisms have been made about the Prosecutor of the ICTR.²⁷²

[cases.aspx](#) (last visited Sept. 1, 2013) (listing current descriptions of current and past cases).

²⁶⁹ See Charles Chernor Jalloh, *Regionalizing International Criminal Law?*, 9 INT'L CRIM. L. REV. 445, 462-65 (2009) (providing quotes from prominent African leaders claiming that the ICC unfairly pursues cases in Africa); Ifeonu Eberochi, "Rounding Up the Usual Suspects:" *Exclusion, Selectivity, and Impunity in the Enforcement of International Criminal Justice and the African Union's Emerging Resistance*, 4 AFRICAN J. OF LEGAL STUDIES 51, 52 (2011) ("[T]his article argues that despite the establishment of the ICC, the enforcement of international criminal justice has been selective, targeting only 'uncivilized' nations.").

²⁷⁰ See IMT Charter, *supra* note 61, art. 1 (limiting jurisdiction to "major war criminals of the European Axis").

²⁷¹ See, e.g., John Cerone, *Legal Implications of the UN General Assembly Vote to Accord Palestine the Status of Observer State*, 16 ASIL INSIGHTS 37, Dec. 7, 2012 (describing the Prosecutor as having "punt[ed]" on the question of whether to open an investigation into alleged crimes committed in Palestine and expressing hope that the Prosecutor's future practice on the issue would be guided by "legal analysis" rather than "political choices").

²⁷² See, e.g., SCHABAS, *supra* note 56, at 79 (noting that the ICTR has been criticized for its failure to investigate crimes committed by members of the Rwandan government, allegedly because of concerns that such investigations would cause the Rwandan government to refuse to cooperate with the ICTR and thereby prevent it from functioning).

Just as troubling are the low conviction rates for ethnic Bosniaks and Kosovar Albanians at the ICTY. There is some evidence that the decision to prosecute members from these groups was driven by a desire to indict non-Serbs as a way to counter claims that the ICTY was biased against ethnic Serbs. If true, the low conviction rates represent a breach of the Prosecutor's duty to ensure that only solid cases be pursued and highlight the danger of placing too much emphasis on political considerations. This class of cases looks the most unfair of all the cases at the ICTY, but not because these accused were more likely to be convicted. Rather, these cases look unfair because some of them arguably should not have been brought in the first place, despite the fact that they often resulted in acquittals.

This Article's central conclusion is that ICTY trials were predominantly legal, but that largely positive conclusion is tempered by the finding that political considerations effected both the establishment of the court and, more importantly, questions about who to charge. Is it enough that the trials are fair if political considerations adversely affect other aspects of the process? The simplistic solution is to demand that the Prosecutor not succumb to political considerations when deciding who to investigate and charge. But how practical is that? Had the Prosecutor opened an investigation into NATO forces and actually charged any NATO personnel, it might well have led to the closing of the ICTY.²⁷³

Just as the purely legal trial is likely a platonic ideal,²⁷⁴ the purely legal prosecutorial decision is also likely an ideal that cannot be reached. Imagine a Prosecutor who is faced with the unpalatable choice of: (1) investigating a small number of NATO personnel for relatively minor (in the context of the atrocities committed during the conflict in the former Yugoslavia) potential crimes and risking the dissolution of the ICTY; or (2) declining to investigate possible crimes by NATO and instead concentrating on those responsible for the most serious crimes committed during the conflict. It is hard to imagine a Prosecutor who, faced with

²⁷³ See *id.* at 77 ("Privately, many at the Tribunal said the Prosecutor had little choice because the Security Council would have shut down the entire operation if even serious consideration was given to prosecuting Americans, or other NATO nationals.").

²⁷⁴ See *supra* notes 47-48 and accompanying text.

this choice, would not forego the investigation of NATO.²⁷⁵ Framed this way, the decision is understandable, though also overtly political.²⁷⁶

It appears axiomatic that states will try to influence the decisions of international courts. Moreover, they will try to exert influence at the earliest possible stage because trials against their nationals are embarrassing, particularly where they implicitly impugn the policies of the state. For example, any indictments against NATO personnel at the ICTY would surely have been viewed as an indictment more generally of the policies of those states that intervened in Kosovo, even if technically indictments of individuals. Thus, the states that founded the IMT simply excluded their nationals from the court's jurisdiction. When that option was unavailable at the ICTY, NATO states exerted pressure to prevent the Prosecutor from opening a formal investigation. If the Prosecutor had been able to resist political pressure and had charged a national of a NATO state, then those states would likely have continued to exert political pressure on the court during the trials. In other words, the fact that the trials appear to have been predominantly legal in nature may partly be a result of the susceptibility of the Prosecutor to political pressures. In that sense, consideration of political pressures at the investigation and charging stages by the Prosecutor may help to insulate the trials from those same pressures.²⁷⁷ For example, the government of Cambodia seems willing to permit basically fair trials at the Extraordinary Chambers in the Courts of Cambodia, but only if it

²⁷⁵ While Carla Del Ponte claims that she was not pressured by NATO to refrain from investigating the bombing campaign, she argues in her memoir that it would have been "impossible" for her to continue with a prosecution of NATO personnel "without undermining the rest of the tribunal's work." See CARLA DEL PONTE, MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS AND THE CULTURE OF IMPUNITY 60-61 (Feltrinelli Ed. 2008). She appears to regret the decision but also considers it the correct one under the circumstances. *Id.*

²⁷⁶ See Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225, 267-68 (2012) (arguing that the Prosecutor's decision was "defensible" given the circumstances and the court's goals and limitations).

²⁷⁷ *But see* Marlise Simons, *Hague Judge Faults Acquittals of Serb and Croat Commanders*, N.Y. TIMES (June 14, 2013), http://www.nytimes.com/2013/06/14/world/europe/hague-judge-faults-acquittals-of-serb-and-croat-commanders.html?page-wanted=all&_r=0 (detailing allegations of attempts to influence judges at the ICTY for political purposes).

can control who is charged and brought to trial.²⁷⁸

This state of affairs is far from desirable, but seems to be deeply embedded in the world. There have been attempts by states to influence the work of just about every international criminal court.²⁷⁹ When high-profile international prosecutions will affect a state's national interest, those states will try to exert pressure on the court. First, they will try to prevent investigations from occurring and charges from being brought. But if that fails, they will probably continue to try to influence the trial proceedings. Simply declaring that the prosecutors and judges are independent²⁸⁰ is not likely to change this result. States have too many levers that can be used against international courts, which are generally much weaker than states. Moreover, there is little downside to trying to influence the court's work. States, particularly powerful states, seem to pay little price internationally for their attempted interference. In short, attempts by states to influence the work of international courts are likely to remain a feature of international criminal justice for the foreseeable future.

VII. Appendix: The Database

Unless otherwise noted, the statistics in this article come from a database of ICTY cases created by the author. Initially, information about the ICTY's cases was collected from the ICTY website. For most of the ICTY's cases, it has produced what it calls a "Case Information Sheet."²⁸¹ These Case Information Sheets contain summaries of the proceedings in each case. Each Case Information Sheet was reviewed and the following information entered into a database: case name, case number, case nickname (if any), number of accused in case, the names of the

²⁷⁸ See Ford, *supra* note 4, at 450-51.

²⁷⁹ See *supra* notes 61, 63-70, 271-272, 278.

²⁸⁰ See, e.g., Rome Statute, *supra* note 217, art. 42(1) ("The Office of the Prosecutor shall act independently as a separate organ of the Court.").

²⁸¹ See, e.g., Case Information Sheet for Radovan Karadžić (IT-95-5/18), available at http://icty.org/x/cases/karadzic/cis/en/cis_karadzic_en.pdf (last visited Sept. 1, 2013). Case Information Sheets are not available for a number of cases where indictments were issued, for instance where the accused died prior to transfer to the ICTY or where the indictment was withdrawn prior to the arrest of the accused. For cases where an Information Sheet was not available, the relevant information was extracted from the indictment.

accused, the ethnicity of the accused,²⁸² the accused's year of birth, at what stage of the proceedings the accused died (if death occurred prior to completion of case), whether a guilty plea was entered, the total number of trial days, the number of witnesses presented by the prosecution, the number of witnesses presented by the defense, the number of witnesses presented by the chamber, the number of exhibits entered by the prosecution, the number of exhibits entered by the defense, the number of exhibits entered by the chamber, the number of lawyers listed for the prosecution, the number of lawyers listed for the defense, whether the accused was self-represented, whether there was a full trial,²⁸³ the trial sentence (or acquittal), whether an appeal was made, the resulting sentence following appeal, and the current status of the case. In addition, information was added to the database about the lengths of the final indictment²⁸⁴ and the first trial judgment.

Subsequently, all of the final indictments were read and then coded for a number of variables, including: the accused's alleged role or position within the political or military hierarchy, the total number of counts, the number of war crimes counts, the number of crimes against humanity counts, the number of genocide counts, the modes of liability alleged against the accused, the number of crime sites in the indictment, the extent of the crime sites, the number of people alleged to have been killed, the number of people alleged to have been wounded, the number of people alleged to have been forcibly transported or deported, the number of people alleged to have been unlawfully imprisoned, and the extent of the destruction of physical property. The work of coding the indictments was done by research assistants according to

²⁸² This is not explicitly listed in the Case Information Sheets but can usually be deduced from the affiliation of the accused with one of the sides to the conflict.

²⁸³ Guilty pleas were not treated as full trials even though they resulted in judgments. In many cases, the "trials" were highly abbreviated and did not accurately represent the evidence that the prosecution would have presented in an adversarial proceeding.

²⁸⁴ While in most cases, the latest indictment in time was used because it represented the most complete outline of the case the prosecution intended to present at trial, the next to last indictments were used in cases that involved guilty pleas because of the tendency to enter an amended indictment that removed many of the counts in the previous indictments as part of a plea deal. Thus the final indictments in cases that involved a plea deal often did not represent the case the prosecution would have presented if the case had gone to trial.

instructions contained in a codebook that is available upon request from the author. The data was collected in an Excel spreadsheet and then converted to a STATA database. Analysis was done in STATA. The database contains information about the ICTY's work up until May 03, 2012.

