6

Exoneration and Mitigation in Defense Histories

I don’t think you can get a grasp of what happened in Bosnia in this war in 1992 if you don’t grasp some background, some history, because what happened—you know, people act out of their past. They act out of what they know from the past. They act out of history.
– ICTY Defense Counsel John Ackerman

6.1. A SENSE OF GRIEVANCE

Many defense lawyers in international criminal trials have had recourse to historical arguments, believing that they provide the key to understanding the motivations for violations of international humanitarian law. As with prosecutors, however, a variety of views exist on the topic, and some defense attorneys recoil from using historical evidence in their cases. One prominent defense lawyer, Michael G. Karnavas, president of the Association of Defense Counsel of the ICTY, has maintained that it is “false and erroneous to assume that a court is there to find historical truth.”

As with previous chapters on the prosecution, this chapter explores the legal incentives for including historical arguments in defense cases. And yet one needs to acknowledge at the outset that there are compelling nonlegal reasons at play as well, because generally speaking, history matters more to the accused as an end in itself. It also carries weight with the audience back at home and with a majority of defense lawyers from the region. As observers note, international criminal tribunals have increasingly become venues in which the parties to an armed conflict seek to represent themselves as historical victims.

1 Brđanin Trial Transcript, 4 February 2004, T24275.
6.1. A Sense of Grievance

and their opponents as serial perpetrators. All communities of the former Yugoslavia have made structurally identical defense arguments based on past suffering. These debates constitute an extension into a new legal setting of historical disputes that have fueled violence in the region, and they influence the tenor of courtroom history as much as the internal dynamic of the legal proceedings.

Furthermore, any evenhanded account must mention the profound sense of disadvantage and grievance that defense lawyers frequently voice. Prosecutors have much to say about aspects of the legal proceedings, but they seldom phrase it in such stark and sweeping terms as defense lawyers, who are much more likely to level charges of bias against international criminal tribunals. Some have even filed formal submissions to the Trial Chamber to this effect. In the Brđanin trial, defense counsel filed a final brief claiming that the Tribunal may have been informed by an “unintentional bias against Serbs” drawn from the international press and as a result, Bosnian Serbs could not expect a fair hearing in The Hague. In addition, some defense lawyers find bias in the selection of cases coming to trial, seeing them as politically motivated. One defense lawyer stated:

The most important thing about the historical record before the ICTY lies in what was excluded, or presented and ignored. Of course, none of this excuses the crimes that clearly were committed, but it diminishes the legitimacy of the judgments ultimately rendered. There will always be a lingering, valid criticism that certain prosecutions were selected for reasons other than the facts, the law, or history.

Defense lawyers frequently insist that judges are negatively predisposed against the defense and favor prosecutors in the courtroom. Prosecutors often claim the reverse and say that the judges bend over backward to accommodate the other party, but defense complaints by the defense tend to be more vehement, as one survey respondent wrote: “Important information has been provided, but that information was not necessarily helpful, complete, or even accurate. The wider narrative was never really told in the ICTY because the chamber gave the prosecution considerable leeway in presenting its evidence, while being harder on the defense when it sought to meet the prosecution’s evidence.”

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4 Brđanin Trial Judgment, §§37–43. Trial Chamber judges dismissed this assertion as “misconceived and unfortunate” (§42).
Exoneration and Mitigation in Defense Histories

Table 6.1. Comparing judges’ receptivity to prosecution and defense expert witnesses

<table>
<thead>
<tr>
<th>A) How receptive are ICTY judges to the testimony of historians serving as expert witnesses called by the Defense?</th>
<th>Prosecution %</th>
<th>Defense %</th>
<th>Witness %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Highly Receptive</td>
<td>0</td>
<td>0</td>
<td>15</td>
</tr>
<tr>
<td>Somewhat Receptive</td>
<td>61</td>
<td>50</td>
<td>46</td>
</tr>
<tr>
<td>Unreceptive</td>
<td>6</td>
<td>21</td>
<td>8</td>
</tr>
<tr>
<td>Highly Unreceptive</td>
<td>0</td>
<td>21</td>
<td>0</td>
</tr>
<tr>
<td>No opinion</td>
<td>32</td>
<td>8</td>
<td>31</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>B) How receptive are ICTY judges to the testimony of historians serving as expert witnesses called by the Prosecution?</th>
<th>Prosecution %</th>
<th>Defense %</th>
<th>Witness %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Highly Receptive</td>
<td>10</td>
<td>33</td>
<td>23</td>
</tr>
<tr>
<td>Somewhat Receptive</td>
<td>71</td>
<td>50</td>
<td>54</td>
</tr>
<tr>
<td>Unreceptive</td>
<td>0</td>
<td>8</td>
<td>0</td>
</tr>
<tr>
<td>Highly Unreceptive</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>No opinion</td>
<td>19</td>
<td>8</td>
<td>23</td>
</tr>
</tbody>
</table>

Defense teams also perceive bias in the evidence that judges are willing to admit. For example, judges have in the main been disinterested in the international dimensions of the conflicts in the former Yugoslavia and in Rwanda. According to defense counsel interviewed for this book, when they apply to introduce expert evidence on the financial, material, and military support given to their opponents by powerful nations, judges have ruled that such information is irrelevant to trying the specific alleged crimes before them.\(^7\) Even when judges permit discussion of the international dimensions of the conflict, the evidence is seldom, if ever, included in Trial Chamber judgments.\(^8\) Our survey sought to ascertain whether a defense perception of bias extends to the topics examined in this book. In the results presented here, there is a variation in how prosecutors and defense counsel perceive judges’ receptiveness to historians serving as expert witnesses for the defense. Judges were considered more receptive to prosecution expert witness by a substantial margin among all three groups surveyed.

In interviews with defense counsel, one of the most common refrains is that there is an “inequality of arms” between the defense and the prosecution, as expressed by one defense attorney: “The defense generally was not given

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\(^7\) There are some obvious exceptions, such as during the trial of Slobodan Milošević, when the accused was given ample opportunity to discuss the international dimensions of the conflict.

\(^8\) See the discussion of the Badinter Commission in the Tadić Trial Judgment in Chapter 4. Note that the Badinter Commission was discussed in subsequent trials such as that of Radoslav Brđanin, where the prosecution witness Robert Donia and the defense witness Paul Shoup presented evidence on the commission in their expert reports and oral testimony (Brđanin Trial Judgment, §§63–4).
6.1. A Sense of Grievance

**Table 6.2. Comparing preparation of defense and prosecution expert witnesses**

<table>
<thead>
<tr>
<th></th>
<th>Prosecution</th>
<th>Defense</th>
<th>Witness</th>
</tr>
</thead>
<tbody>
<tr>
<td>A) The degree to which contextual expert witnesses called by the Defense have been appropriately prepared for testimony in the courtroom.</td>
<td>Appropriately prepared</td>
<td>6</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>Somewhat prepared</td>
<td>35</td>
<td>50</td>
</tr>
<tr>
<td></td>
<td>Not appropriately prepared</td>
<td>26</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>No opinion</td>
<td>32</td>
<td>25</td>
</tr>
<tr>
<td>B) The degree to which contextual expert witnesses called by the Prosecution have been appropriately prepared for testimony in the courtroom.</td>
<td>Appropriately prepared</td>
<td>55</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>Somewhat prepared</td>
<td>29</td>
<td>54</td>
</tr>
<tr>
<td></td>
<td>Not appropriately prepared</td>
<td>6</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>No opinion</td>
<td>10</td>
<td>25</td>
</tr>
</tbody>
</table>

the resources needed to appropriately respond to the prosecution factually, legally, or historically.\(^9\) Another respondent tied all the preceding prejudicial elements together: “Proceedings at the Tribunal are one sided. The Defense *de facto* has the burden of proof. There is no equality of arms or due process. The trials are patently unfair to the accused.”\(^10\) Defense lawyers are quick to observe that the financial and personnel resources of the Office of the Prosecutor dwarf their own. Although a defense team may incorporate fewer than a dozen individuals, there were 1,135 staff members at the ICTY in 2006, and the Office of the Prosecutor accounted for a substantial percentage of that figure.\(^11\) As a consequence, the defense regularly maintains that it is less well positioned to prepare its cases, and the survey revealed substantial disagreement on whether prosecution or defense expert witnesses were better prepared, as Table 6.2 indicates.

We need to be aware of the disadvantaged position in which many defense counsel see themselves, but the ensuing discussion does not adjudicate on whether or not their grievances are well founded or not. Instead, this chapter, like the previous chapters on the prosecution, concentrates on the legal

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Exoneration and Mitigation in Defense Histories

relevance of history for the defense; that is, how historical arguments are deployed to further certain legal objectives at the Tribunal. Historical evidence has been a cornerstone of two defense strategies; namely the chaos defense and the *tu quoque* defense.

In pursuit of recognizable legal goals, defense teams have expounded monumental histories of their own that encompass the grand sweep of Balkan history. These imposing histories across the ages run in parallel to prosecution histories of the sort advanced in the Milošević trial and are quite unlike the prosecution’s specific microhistories of towns or regions. Over time, defense histories became even broader and more ambitious in scope, whereas prosecution histories, as we saw in the previous chapter, became narrower and focused on more prosaic tasks such as introducing documents. This reflected the defense’s desire to articulate a nationalist position in the courtroom and to score legal points in the process.

6.2. FIGHTING TO A DRAW

When I became Prosecutor at the ICTY, I went to the region to meet with the governments. I didn’t want to meet with Milošević, Tuđman or Izetbegović since they were already under investigation for possible war crimes. So I met with the Ministers of Justice and Foreign Affairs. In Serbia, the Minister of Justice regaled me with a 45-minute lecture on the history of the region, starting with 1389 and the Battle of Kosovo. Like the Afrikaner nationalism I was familiar with, he started with a humiliating defeat. In Croatia, I was given another lecture on history. The two histories had similarities but they did not meet up.

– Richard J. Goldstone, former Prosecutor of the ICTY and ICTR

In the introduction to their book *How Law Knows* (2007:2–9), Austin Sarat et al. interrogate legal epistemology, noting that law’s ways of knowing can be radically unique and diverge from science and what passes for common

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12 Defense counsel use historian expert witnesses to contextualize documents just as prosecutors do. However, they seem less committed to this aspect and more concerned with wide-ranging historical narrative. For instance, on 12 November 2002 in the Simić trial, during the testimony of the expert witness Nenad Kecmanović, judges refused to allow the defense to introduce documents, as they had not been previously attached to the expert report. A simple procedural error perhaps, but one that indicated that Kecmanović’s overarching narrative was of greater consequence to the defense team than the documents he was meant to introduce.

13 Author interview, June 2007.
6.2. Fighting to a Draw

sense in any given society. Law’s distinctiveness any other form of human knowledge is in part explained by the genealogy of common law fact-finding, which Barbara Shapiro (2007:28–31) traces from the Roman rhetorical tradition through Judeo-Christian scriptural witness rules and medieval approaches to proof of facts. The legal axiom “consensus equals fact” illustrates the way in which law’s way of knowing can be utterly unique, and this applies to both national courts and international criminal trials. In his study of the French Conseil d’État, Bruno Latour (2004:75) found that an “incontrovertible” legal fact is really not a fact at all; it is merely a statement lodged in a file that has not been challenged by any party to the proceedings. Furthermore, for French administrative law, it does not matter whether there is any link between the unchallenged statement in the file and any reality outside the court.

When asked to define a legal fact during interviews for this book, Senior Trial Attorneys at the ICTY regularly replied, “That which is not contested by the defense.” Rule 69 of the International Criminal Court’s Rules of Procedure and Evidence explicitly endorses and codifies this principle: “The Prosecutor and the defense may agree that an alleged fact . . . is not contested and accordingly, a Chamber may consider such alleged fact as being proven.” To give one concrete instance, prosecutor Geoffrey Nice affirmed this principle during the trial of Slobodan Milošević. With one hour left in his cross-examination of historian Dr. Audrey Budding, Milošević was still debating issues in the eighteenth and nineteenth centuries and had not arrived at the main body of Budding’s expert report. Nice stood up to remind the Trial Chamber, “I make it clear that if the parts of this report . . . aren’t challenged in cross-examination, it will be open to the Prosecution in its closing address to this court to say that they stand unchallenged, and that will be what we will be obliged, and indeed happy, to do.”

What this means in daily courtroom practice is that where there is broad agreement between two background experts, the judges will normally accept the information contained in their testimony as fact. This occurs more often than might be expected given the adversarial nature of criminal proceedings. For instance, in the Tadić trial, the prosecution witness Dr. James Gow and the defense witness Dr. Robert Hayden agreed that the rise of nationalism in Yugoslavia was closely linked to the country’s economic crisis in the 1980s. In the Brdanin trial, sizable portions of the testimonies of

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14 They also acknowledge the converse: “law’s ways of knowing are insufficiently removed from prevailing assumptions” (2).
16 24 July 2003, T24915.
Dr. Paul Shoup (defense) and Dr. Robert Donia (prosecution) overlapped and were incorporated into the final trial judgment.

In contrast, when expert witnesses disagree and a war of experts develops, and when each expert is more or less credible, then neither side usually wins outright, and the dispute ends in stalemate. When asked how judges decide between two more or less equally competent experts with diverging views, one prosecutor replied acidly, “They don’t.” Where there is conceptual or factual uncertainty on a matter and there is not an imperative to resolve the matter to try the crimes, then judges oftentimes simply steer clear of taking a view. In the words of one expert witness: “Judges go to great pains to avoid ambiguity. They throw up their hands and say, ‘We don’t want to address those questions. Let’s not figure out why Bosnian Muslims sought national minority status in the 1960s and not before.’”

Given the judges’ aversion to contested matters not directly related to the alleged crimes, contextual and background expert witnesses of equal credibility tend to nullify one another.

Our survey participants were asked the following question on this issue: “When the historian expert witnesses of the Prosecution and Defense contradict one another, how do judges decide between their competing historical accounts?” The question elicited a conspicuous disparity between prosecution and expert respondents on the one hand and defense respondents on the other. By a wide margin, both prosecution and expert witness respondents felt that the judges’ decisions depended on the case. Half of the defense respondents (i.e., a majority of those who offered an opinion) believed that judges generally give the benefit of the doubt to the prosecution.

Even if we accept that the irate defense views expressed previously are strongly held, they are not exactly borne out in a reading of trial transcripts and judgments. One could just as easily make the contrary argument that, over time, arriving at a stalemate favors the accused. After all, the defense has to unravel and invalidate only as many parts of the prosecution case as it can rather than build an entirely independent case of its own. In pretrial conferences that include prosecutors, judges, and defense lawyers, prosecutors protest indignantly when the defense disputes each and every aspect of the prosecution’s case. Yet this is what any defense lawyer worth his or her salt ought to do, that is, thwart the prosecution’s case whenever possible, from the critical issues right down to the mundane and seemingly irrelevant ones. In an adversarial legal setting, stalemate is a kind of victory for the defense.

17 Author interview, May 2006.
6.2. Fighting to a Draw

That a clash of experts may end in stalemate is not peculiar to international criminal trials but is commonly found in domestic jurisdictions, and indeed wherever experts appear in legal settings. In one recent high-profile case in the United States, District of Columbia v. Heller (2008), the U.S. Supreme Court struck down parts of a District of Columbia gun-control law on the grounds that the Second Amendment protects the individual right to possess firearms. Both sides in Heller called historians as expert witnesses and gave them the task of defining the “original” meaning of the Second Amendment’s defense of “the right of the people to keep and bear arms” in the light of historical materials from the eighteenth century. Perhaps unsurprisingly, each side produced accounts of the historical backdrop to the Second Amendment that vindicated its reading of the text. Judge Harvie Wilkinson III (2009:267) writing in the Virginia Law Review noted that the upshot of all the historical argumentation in Heller was that “both sides fought into overtime to a draw.” Professional historians did not find the historical debate before the Supreme Court particularly illuminating, and Stanford University historian Jack Rakove pronounced, “Neither of the two main opinions in Heller would pass muster as serious historical writing.” As we can see, one of the main purposes of defense historical witnesses is to pull one plank out from under the prosecution case.

and in that way, international criminal trials are no different from domestic trials.

6.3. THE CHAOS DEFENSE

From the trial of Jadranko Prlić, 15 September 2008:

DEFENSE COUNSEL MICHAEL KARNAVAS: What was like in Mostar at or around that time that led the Assembly members to set up the Crisis Staff?

DEFENSE WITNESS BORISLAV PULJIĆ: By that time, there had been a lot of shooting around the town. The town was also being shelled and all the public utilities had trouble operating. There was poor supply of running water and electricity. The cleaning services hardly did their job. The undertakers could not carry out the burials. Many residents fled the town, and at the same time there was a large inflow of refugees. In a word, chaos reigned in the town.

DEFENSE COUNSEL: For how long did this chaos reign until the Assembly decided to set up the Crisis Staff?

WITNESS: Chaos started as soon as the reservists of the Yugoslav People’s Army came over from Serbia; these troops appeared in the streets of the town, chaos emerged, and this situation prevailed through to the time when the last session of the Assembly was held.20

Where there is compelling evidence that a crime has been committed, defense attorneys have only so many options available in constructing a viable defense case. One of the most common is the capacity defense, which is based on the defendant’s inability to be held accountable for an illegal act.21 In layperson’s terms, the defense declares that “indeed horrible crimes were committed, but my client cannot be held responsible for them.” The chaos defense is a subcategory of the time-honored capacity defense in criminal law. At the ICTY and other international tribunals, a chaos defense conventionally claims that owing to a general situation of confusion and uncertainty, the accused did not plan, instigate, order or command, or otherwise participate in the planning and executing of a crime and was not in a position of de jure or de facto authority, effective control, and/or substantial influence over those subordinates committing the crimes. Moreover, it is often contended that the accused was not even aware of the crimes being committed. Awareness is crucial when considering whether a political official or commanding officer is guilty of a crime of omission, as Article 7(3) of the ICTY Statute makes

20 Exchange in the trial of Jadranko Prlić and others, Trial transcript, 15 September 2008, T12091.
21 For an excellent legal-philosophical discussion of capacity in English criminal law, see Lacey (2007).
clear that “[t]he fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”

A chaos defense has been an integral part of the defense cases of senior and middle-ranking political leaders such as Radoslav Brđanin; Momčilo Krajišnik; and as we just saw, the Bosnian Croat leader Jadranko Prlić. It has been especially prevalent where the accused is a middle-class professional – a university professor or medical doctor such as Blagoje Simić, who held an official position in the crisis staffs and regional and municipal assemblies of Bosnia in 1991–2.

Leadership cases invariably hinge on elements of the chain of command and the degree of responsibility held by each individual in a political or military structure. Prosecutors seek to hold the accused criminally responsible on the grounds that she or he occupied a position of de facto and/or de jure power and substantial influence in an organization that orchestrated widespread and systematic crimes. Leaders created the policies and plans for war and exercised effective control over subordinates in a functional institutional or organizational apparatus such as a political party or regional assembly.

The chaos defense aims to disrupt a key element of the prosecution case by advancing a thesis of the “missing middle.” That is, during the 1991–5 conflict in Bosnia, a yawning chasm opened up between national political leaders such as Franjo Tuđman and Slobodan Milošević and senior Bosnian leaders such as Mate Boban and Radovan Karadžić on the one hand and local armies, paramilitaries, and the civilian military mobilization on the other hand. The missing-middle thesis disconnects regional authorities from their erstwhile bases and constituencies. As evidence, the defense points to the anarchic political situation on the ground in the early 1990s, characterized by mass movements of refugees and a hodgepodge of disorganized municipal and regional bodies.

The chaos defense seeks to distance regional political leaders such as Simić and Prlić from the official and informal militias operating in their areas. Defense lawyers note that relations between political parties and their armies were strained at various points; thus, there was no clear chain of command that reached from political and military authorities down to the official militaries and informal paramilitaries.22 As the defense expert witness in the Brđanin trial

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22 Paul Shoup stated in his testimony, for instance, that by the end of the war, SDS leader Karadžić and Bosnian Serb Army General Mladić had split and Mladić was “operating on his own.” Brđanin trial transcripts, 5 February 2004, T24394.
Dr. Paul Shoup (2004:29) wrote in his expert report: “Placing all the blame on the VRS [Bosnian Serb Army] for the ethnic cleansing in the late spring and summer of 1992 nevertheless seems to overlook the general confusion in the region at the time.” Political party leaders did not control their own ragtag armies or even know what they were doing. Defense teams have quoted military top brass, such as Yugoslav National Army (JNA) General Slavko Lisica, to characterize the belligerent parties in the Bosnian conflict thus: “not fighters but adventurers and the usual dregs that every war brings to the surface . . . [T]hey are disorganized, irresponsible.”

According to Brčanin’s defense counsel in his closing arguments, only those individuals holding the guns were in charge, as “weapons defined power and authority, calling into question the very existence of accountable government.”

Former Bosnian Serb President Radovan Karadžić adopted similar tactics to undermine charges of superior responsibility for the Bosnian Serb army’s forty-four-month siege of Sarajevo that left about twelve thousand people dead. While cross-examining the prosecution’s expert witness British Army Lieutenant Colonel Richard Philips, Karadžić presented documents outlining problems of drunkenness, inadequate training, and lack of discipline and claiming “ineffective command control at almost all levels.”

The chaos defense emphasizes the grassroots nature of the armed conflict by highlighting the extensive popular mobilization and portraying civilian participation as spontaneous, self-motivated, and directed. Rather than instigating and coordinating the conflict, the accused was a leader faced with a violent popular uprising he could not control, as much as he would have liked to. Such views were expressed at the ICTY on the day I wrote this sentence, when a former official of the Ministry of Internal Affairs (MUP) in Bosnia stated how the barricades “came about spontaneously” in Sarajevo in 1992 after a Serb bridegroom was shot: “It is hard to control reactions of ordinary people when something that big happens.”

Because the violence was organized from below and there was no structured and methodical policy or plan, culpability is not concentrated in a linear chain of command but is fragmented and diffused. Such an argument unmistakably counteracts the prosecution’s case for superior or command responsibility.

24 Defense closing arguments, Brčanin Trial Judgment, §44.
26 Velma Sarić, “Trial Hears Sarajevo Barricades Were Spontaneous,” IWPR ICTY Tribunal Update No. 635, 21 February 2010. The testimony of Nedjo Vlaski was heard in the Stanišić and Zupljanin trials.
6.3. The Chaos Defense

Certain historical arguments typify the chaos defense outlined here. To understand them more fully, it is instructive to scrutinize the report and testimony of one defense expert witness, Dr. Paul Shoup. Shoup is a retired professor of political science at University of Virginia and a former president of the American Association for East European Studies, whose coauthored book *The War in Bosnia-Herzegovina* (1999) won the prestigious Ralph J. Bunche award of the American Political Science Association. Shoup testified over four days in February 2004 as a background expert witness in the trial of Radoslav Brđanin.27 Shoup explained to me what he wished to convey to the judges in his courtroom testimony:

The break up of Yugoslavia was bound to unleash problems in Bosnia—it’s very nature and existence was at stake. I wanted to inform the judges that it was complicated and there was a different atmosphere in the Balkans where people settle things by fighting. All sides did this. It doesn’t exonerate anyone who committed an atrocity. The other camp thought that if Serbs hadn’t engaged in aggression then everything would be fine, but the court must look at the evidence very carefully. All sides were engaging in violence and committing excesses.28

Two elements from Shoup’s expert report and testimony were germane to the defense’s theory of the case: the historical lack of control of Bosnian authorities over their own destiny and a deeply entrenched Balkans culture of vengeance and feuding.

The chaos defense is premised on a lack of effective control on the part of political authorities, with all the complications that proving a negative implies. It benefits from being able to show that authorities have not been able to govern Bosnia over a long historical period. In Shoup’s report and testimony, Yugoslav history became a kind of Russian-doll tragedy, where each individual or political level was controlled by the one immediately outside or inside it. At the outermost level, Shoup’s (2004:3) report described how Yugoslavia was buffeted by overpowering external forces: "In both Yugoslavia (and Bosnia), the delicate balance between accommodation and conflict from 1918 to the present was at the mercy of the evolving international situation over which Yugoslavs themselves had little control." Bosnians themselves were unable to shape the country’s destiny, as “the key to the fate of Bosnia lay with Yugoslavia” (ibid.:5), an external power over which Bosnians themselves exercised little control. Without Yugoslavia’s authoritarian rule, Bosnia would have been torn apart much earlier by its ethnic, national, and religious differences, divisions.

28 Author interview, May 2009.
it had surmounted only by “submitting to foreign rule” (7). For those reasons, Yugoslavia’s dominion over Bosnia brought tangible benefits to the republic, as “the cohesiveness of Bosnia was a consequence of external pressures and constraints” (44).

An inexorable narrative ran through Shoup’s history of Bosnia, as modern-day events were overdetermined by their historical precursors, weighed down by a heavy chain of causality. As Shoup testified on the stand, “When Titoism collapsed, when communism collapsed...the past captured the present.”

The disintegration of Bosnia was the inevitable corollary of the lifting of authoritarian constraints and “Bosnia was overwhelmed by events for which she herself was not responsible” (44). That conflict would erupt out of the disintegrating Yugoslav state was a “grim inevitability” (44). Nationalism in the Balkans was a phenomenon that was “deeply rooted in the cultures, history and politics of the country” (3). Bosnian leaders themselves had little control over the nationalist fervor of their population, and as a historical parallel, Shoup cited accounts of eastern Bosnia in the 1940s, when civilian paramilitary irregulars were accompanied by peasants – including women and children – who pillaged the villages of their enemies. During World War II, “commanders...were not always able to stop this slaughter,” and Shoup notes identical modern-day complaints from JNA officers regarding Bosnian paramilitaries. For Shoup, the history of the region carried a bitter taste of fate and destiny.

The second historical dimension of Brdanin’s chaos defense portrayed a deeply ingrained culture of vengeance in the “Balkan character.” This could be seen as the defense counterpart of the Serbian “national mind-set” central to the prosecution’s monumental history during the Milosevic trial. In its closing arguments, Brdanin’s defense counsel invoked the “need to view events from a historical and cultural perspective” and to understand how modern events were shaped by “historical events and the individual and collective memories of World War II.”

Shoup’s expert report documents how the majority of Yugoslavs were deeply (if at times unconsciously) bound to their respective ethnic, national and religious communities. This applied especially in Bosnia, which had exhibited an incapacity to function as a viable state in modern times and was fundamentally unsuited to independent statehood. Serbs and Croats had a more “highly developed” national awareness, but in Bosnia a “more primitive” (5) ethnic identity prevailed that was fueled by vivid historical memories of the horrors of World War II.

29 5 February 2004, T24370.
30 Brdanin Trial Judgment, §§44–5.
Driving home these points, Defense Counsel Ackerman read aloud the following section of Shoup’s expert report in the courtroom: “The notion that the peoples of Bosnia were prisoners of their violent past enrages the critics of the ‘ancient hatreds’ theory. Yet the fact of the matter was that families remembered who had engaged in atrocities during World War II, and vengeance became the order of the day as regime collapse gathered speed” (44). Ackerman then asked Shoup a follow-up question: “What role does vengeance play in the Balkan character?” Shoup replied that it played a vital role in rural areas: “these are mountain men, you know.”

31 In detailing a culture of revenge in the Balkans, the expert witness proceeded to mention an anthropological account of a murderous feud between two Croat clans in Medugorje, Western Herzegovina, a Catholic pilgrimage site.

Shoup’s expert report did not only portray Bosnians as aggressive and cruel peasants; it also recognized a distinctly Bosnian tradition of coexistence. However, Shoup made clear that he thought Bosnian coexistence was precarious, “over-glamorized in the West,” and achieved only through authoritarian means (13). Shoup expanded on this aspect in our interview:

They co-existed with deep apprehension, a fear of Muslims. If a polarization begins then the natural tendency is for people to gather in their own communities for protection. The old animosities were incited by irresponsible people, this was true even on the Muslim side. When the national question erupted in Bosnia people coalesced with their own people. When you hear about violence, you want to get even. This is part of a deeply rooted sense of who you are. You can never tell me there’s another way.

33 What impact did the defense counsel’s historical line of argument, and Shoup’s testimony and report in particular, have on the outcome of the Brđanin trial? At first glance, it seemed that Shoup had undermined his own case in certain ways during the Trial Chamber. As did a number of other background expert witnesses, including, as the reader will recall, some from the prosecution side, he let his emotions get away from him. He appeared offended by the forceful manner of Senior Trial Attorney Joanna Korner’s cross-examination, and at one point he indignantly banged the table.

34 On the final tempestuous day

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31 5 February 2004, T24387.
32 It is important to recognize in summarizing Shoup’s report and testimony is that he is careful to give different accounts of each topic, and for each assertion, there is reasonable consideration of an alternative view. However, in my reading, the weight of Shoup’s evidence leans in the direction indicated in the text.
33 Author interview, May 2009.
34 See testimony at the end of the day on Thursday, 5 February 2004, and Friday, 6 February 2004.
of his courtroom testimony, Shoup and Korner exchanged barbed comments as the prosecutor disputed the statements contained in Shoup’s expert report, claiming that the filming of inmates at the Trnopolje camp was “staged” by British Independent Television News (ITN) journalists and that the camp was a “transit, not concentration camp” (52). A formidable presence in the courtroom, Joanna Korner seized on Shoup’s construal and referred to a prior British libel trial in which the court rejected the allegation that the ITN crew misrepresented the images of emaciated Bosnian Muslim men behind barbed wire at Trnopolje.35 Pointing out that this matter had been resolved in a court of law, Korner badgered the expert to change his evidence while on the stand, but Shoup would not budge. Korner charged him with bias, challenged his entire methodology, and suggested that “this whole report is full of errors because you have done . . . insufficient checking.”36

These heated exchanges notwithstanding, the defense succeeded in obtaining an acquittal on the genocide charge, and Shoup’s testimony strengthened the defense position on the central legal issue at stake in the trial. The defense had portrayed the Bosnian conflict as a dispute over territory between various groups rather than a program of extermination of any group in whole or in part. Shoup’s expert report fortified the defense’s theory by offering a comparison of ethnic cleansing in the 1940s and the 1990s. Ustaše Croat attacks on Serbs in the 1940s were “genocidal in intent” in that they had extermination of a group as their goal. In contrast, the ethnic cleansing and the massacres of 1990s committed by Serbs (including at Srebrenica) were not genocidal in intent according to Shoup, because their aim was to consolidate territory rather than physically liquidate Croats and Bosnian Muslims as groups. Judges were seemingly convinced by this interpretation, and in acquitting Radoslav Brđanin of genocide, the trial judgment endorsed the view that ethnic cleansing was part of an overall plan of Bosnian Serbs to secure territory rather than to exterminate a population (§§76–7).

Although the full exculpatory potential of the past was tapped in the Brđanin trial, other defense teams have not replayed the score exactly, as it contains an inherently hazardous element of foreseeability. Foreseeability is defined in law as “the quality of being reasonably anticipatable” and as a type of actual causation.37 For international crimes to be justiciable, certain acts must be a foreseeable consequence of other acts. As the trial of Radovan Karadžić illustrates, foreseeability is increasingly a feature of prosecution cases

35 Trial Transcript 24614 passim.
37 Garner 2006.
of political leaders in international criminal trials. As has been often noted, political leaders such as Karadžić seldom committed actual criminal acts such as murder or torture themselves. Instead, they drew up plans, proposed policies in assemblies and political party meetings, issued public statements and direct orders, and made public speeches to their constituencies. Drawing on the available documentary evidence, the prosecution usually alleges that the leader instigated and incited others to commit criminal acts in furtherance of an overall criminal policy or plan.

Some historical elements of the chaos defense might provide additional fodder for the prosecution in this way: if indeed there were simmering ancient hatreds and a culture of revenge, then it could be argued that criminal acts were a foreseeable consequence of an inflammatory speech or political statement. If there is overwhelming evidence of a history of interethnic hostility, then everyone, including the accused, should have reasonably anticipated the harmful consequences of a provocative, inciting, or instigating statement, order, or speech. If the prosecution can prove that the additional crimes were foreseeable to the accused, then according to the ICTY’s jurisprudence, this establishes mens rea under Article 7(1) of the ICTY Statute (“individual criminal responsibility”), as well as under the third “extended” type of joint criminal responsibility.38 Clearly, it is not in the interest of defense counsel or the accused to hand the prosecution grounds for intent, and this is what historical elements in the chaos defense can do. Because of this potential weakness, many defense lawyers have pulled back from calling expert witnesses to make ancient-hatreds background arguments.

6.4. Tu Quoque, the Imperfect Defense

If Doenitz and Rader deserved to hang for sinking ships without warning, so did [U.S. Admiral] Nimitz.


In international criminal trials, the defense has often contended that the accused is charged of crimes also committed by their adversaries. Because the opposing side initiated the conflict, they bear the burden of responsibility for any crimes that ensued. This is known as a tu quoque defense, defined at the ICTY thus: “The defense of tu quoque concerns the allegation that the opposing party to the conflict committed similar atrocities” and/or “the

38 Kvocka et al., Appeals Judgment, §83: “The third, ‘extended’ form of joint criminal enterprise entails responsibility for crimes committed beyond the common purpose, but which are nevertheless a natural and foreseeable consequence of the common purpose.”
allegation that that party was responsible for the commencement of the said conflict.” 39 The Kupreškić Trial Judgment notes that “Defense counsel have indirectly or implicitly relied upon the tu quoque principle, i.e. the argument whereby the fact that the adversary has also committed similar crimes offers a valid defense to the individuals accused” (§ 515). 40

Since its appearance in the Nuremberg trials, international criminal law has formally rejected the principle of tu quoque, declaring it an illegitimate defense against an indictment for war crimes or crimes against humanity. 41 The ICTY has also categorically rejected tu quoque as a legitimate defense:

This is an argument resting on the allegedly reciprocal nature of obligations created by the humanitarian law of armed conflict. This argument may amount to saying that breaches of international humanitarian law, being committed by the enemy, justify similar breaches by a belligerent. Or it may amount to saying that such breaches, having been perpetrated by the adversary, legitimize similar breaches by a belligerent in response to, or in retaliation for, such violations by the enemy. Clearly, this second approach to a large extent coincides with the doctrine of reprisals. . . . [T]he tu quoque argument is flawed in principle. It envisages humanitarian law as based upon a narrow bilateral exchange of rights and obligations. Instead, the bulk of this body of law lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity. 42

International criminal law textbooks give short shrift to the subject of tu quoque, and William Schabas’s (2009:397) definitive Genocide in International Law summarily dispatches the issue of tu quoque in less than half a page. International lawyers approach the tu quoque defense as international lawyers are wont to do: by citing the 1949 Geneva Conventions and the obligations

40 This also shares some elements of a justifiable-provocation defense, whereby even a reasonable person might commit a crime when prior offenses have been committed against him or her.
41 See Chief Prosecutor Telford Taylor (1992:409) on the issue of tu quoque in the Nuremberg trials. German naval judge advocate Otto Kranzbueker, representing Admiral Doenitz, extracted from U.S. Admiral Nimitz the admission that the U.S. Navy followed the same rules of engagement as the Germans for submarine attacks against merchant vessels.
42 Prosecutor v. Zoran Kupreškić et al., IT-95-16-T, Trial Chamber judgment, 14 January 2000. § 515 and § 517. The Trial Chamber had earlier ruled: “The tu quoque principle does not apply to international humanitarian law.” Section (iii) in Decision on Evidence of the Good Character of the Accused and the Defence of Tu Quoque, Prosecutor v. Zoran Kupreškić et al., IT-95-16-T, 17 February 1999. The judgment then goes on to describe how international law constitutes the translation into legal rules of the “categorical imperative” and the moral philosophy of Immanuel Kant (§ 518) that insists on fulfilling obligations regardless of whether others comply with them. Mark Osiel (2009) recently challenged the place of Kantian ethics in national and international law in The End of Reciprocity.
erga omnes to punish violations of international humanitarian law and then moving on. For their part, defense attorneys in our survey rejected by a margin of two to one the statement: “The Defense calls historians as expert witnesses in order to mount a tu quoque defense.” Prosecutors, in contrast, thought the statement was true by a margin of over three to one.\textsuperscript{43} And yet despite the cursory dismissals by international lawyers and defense denials, the principle of tu quoque remains a chief defense strategy in the living law, and as such, it deserves our full attention. Even a cursory exposure to actual trials at the ICTY and ICTR conveys how defense teams seldom resist the allure of tu quoque. These arguments appear time and again in international criminal trials, to the extent that one could fill the rest of this book documenting their many manifestations. Tu quoque assertions are even more pronounced in genocide trials and were a prominent feature of the Milošević trial,\textsuperscript{44} and they made yet another appearance in the opening stages of the trial of Radovan Karadžić.

In his comments on the Srebrenica massacre, confirmed as genocide in the earlier Krstić trial and appeal judgments, Karadžić stated that prior attacks on Serbs had been “very[,] very violent.” He claimed to possess evidence that Bosniak Muslim “fighters from the enclave returned with chains of Serb ears around their necks.” Presiding Judge Kwon interrupted him to remark: “It’s one thing to have a legitimate cause in waging war, but totally a separate matter on how it is waged.”\textsuperscript{45}

One of the most common manifestations of the tu quoque principle occurs during the defense’s cross-examination of prosecution expert witnesses, as we saw in Chapter 5, when John Ackerman sparred with Robert Donia in the Brđanin trial.\textsuperscript{46} Only a few months later, Donia faced a similar interrogation by the defense counsel John Ostojić in the trial of Milomir Stakić regarding the “reactive measures” taken by the Serbs of Prejidor against prior attacks by Muslim fighters.\textsuperscript{47} After having already asked the defense not to “touch upon the issue of tu quoque,”\textsuperscript{48} Judge Wolfgang Schomburg confronted Ostojić robustly: “Counsel, do you really want to make the point that the accused in this case,  

\textsuperscript{43} The full range of responses to the statement “The Defense calls historians as expert witnesses in order to mount a tu quoque defense” were as follows: prosecution – true, 48 percent; false, 15 percent; no opinion, 37 percent; defense – true, 17 percent; false, 42 percent; no opinion, 42 percent; expert witnesses – true, 23 percent; false, 23 percent; no opinion, 54 percent.

\textsuperscript{44} There were tu quoque qualities in much of the accused’s questioning of prosecution witnesses, but amicus curiae Tapusković also rehearsed tu quoque arguments (e.g., during cross-examination of prosecution expert witness Dr. Renaud de La Brosse) (T21277–8).


\textsuperscript{46} 31 January 2002.

\textsuperscript{47} 24 April 2002, T2131.

\textsuperscript{48} T2121.
Dr. Milomir Stakić, acted in defense against fighters from Afghanistan at that point in time?" Defense counsel backed down in the encounter but returned to theme of *tu quoque* time and time again in the Stakić trial. For instance, Ostojić’s questioning of prosecution expert witness James Mayhew focused not on the site of the accused’s alleged crimes in Prejidor but on massacres of Serbs by Muslim and Croat militias in other, often distant locales.

What does the defense hope to achieve when it cross-examines prosecution experts in this way? It wishes to demonstrate that the opposing side attacked first, thus creating a state of emergency. All subsequent actions by the accused’s party therefore constituted justifiable reprisals. It also pursues a more ordinary legal objective, to undermine the credibility of the expert witness by suggesting that their report is bowdlerized and has omitted major events in the armed conflict. *Tu quoque* is central to the defense’s contention that the prosecution expert witness is not neutral, and the expert report is tainted by an underlying prejudice and should be set aside. In suggesting partiality, often combined with the insinuation that the expert has been improperly steered by the prosecution, the defense hopes to provoke an emotional response from the witness or lure him or her into a prejudicial statement that will exhibit antipathy toward the accused and his or her ethnic, religious, or national group.

Some expressions of *tu quoque* sentiment in international criminal trials are simplistic, finger-pointing, “but you did it too” accusations that can be heard on any elementary school playground. However, more sophisticated versions also exist. At the ICTY, these formulate the defense theory of the case by constructing an argument for reprisals that combines the enemies’ extreme provocations in the early 1990s with a historical explanation for why certain acts or statements held special meaning. Insofar as *tu quoque* is a doctrine of justifiable reprisals, historical chronology is crucial. Political historians are one of the most effective kinds of expert witness for expounding on chronology and narrative, and defense attorneys have relied on them frequently in mounting a *tu quoque* defense.

We can learn more about how the *tu quoque* principle functions in practice at the ICTY by examining the trial of Blagoje Simić, president of the Serbian Democratic Party (SDS) in Bosanski Šamac in 1991–2 and president of the

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49 T2231.
50 Stakić trial transcripts, 1 August 2002, T1806–6114.
51 See, e.g., the testimony of defense expert witness historian Dr. Srdja Trifković in the 2003 trial of Milomir Stakić. After a day of Trifković’s testimony, Judge Schomburg commented that the expert witness had demonstrated a “clear lack of tolerance” and that his assertions relied on a “poor basis of facts,” making Schomburg “absolutely hesitant from the beginning of this case to go too much into details of so-called history” (19 March 2003, T13820).
Crisis Staff and War Presidency in 1992. The prosecution had previously called Dr. Robert Donia of the University of Michigan to produce an expert report and testify on the collapse of the former Yugoslavia and the nationalist policies of the SDS. Defense counsel countered by calling their own background expert witness, Dr. Nenad Kecmanović, a political scientist from Belgrade University who had been rector of University of Sarajevo and had served as a Serb represent-ative in the Bosnian presidency in July 1992 before moving to Belgrade.

In his testimony on November 12, 2002, Kecmanović gave classic *tu quoque* testimony designed to shape the judges’ views on the proportionality of Bosnian Serb actions. Leaders of the SDS responded in a manner commensurate with the level of threat they faced from Croatian political parties, and especially from the Bosniak Party of Democratic Action (SDA). In his expert-witness report, Kecmanović (2002:7, 16) stressed how the “cunning” and “manipu-lating” SDA leader Alija Izetbegović wanted to impose an Islamic society and Islamic state at odds with “general western values.” Kecmanović omits entirely from his report and testimony the role in the conflict of Serb parties such as the SDS and armies such as the JNA and Bosnian Serb Army (VRS). Instead, SDS-instigated crimes were spontaneous reactions to unwar-ranted SDA provocations; a view, if accepted by the judges, that would have weakened considerably the prosecution charge that Simić and his coaccused were acting in a joint criminal enterprise to commit crimes against humanity. Given the magnitude and immediacy of the threat, the actions of the accused were hasty responses to acute circumstances rather than premeditated crimes coordinated through a concerted policy or plan.

Kecmanović laid the blame for starting the conflict squarely at the door of Bosnian Croat and Muslim political leaders. Defense Counsel Igor Pantelić asked the expert witness about the withdrawal of Serb deputies from the Bosnian assembly on 14–15 October 1991, a protest seen by many observers as bringing Bosnia closer to the precipice of war. Kecmanović replied:

The constitutional status of people was violated. At that time, Bosnia and Herzegovina was defined as a republic which was neither Croat nor Serb nor Muslim, but all of these three together. This was a political principle that was very important for the functioning of all three peoples in Bosnia Herzegovina. And up until that moment, this principle was upheld, even in that assembly, regardless of numerous conflicts that existed between political parties . . . and it held the entire Bosnia-Herzegovina together. . . . [T]his caused a break up and the Serb part, upon facing the fact that it was ignored by the other two sides, left the joint administration and organs of Bosnia and Herzegovina.52

52 Simić trial transcript, T12072.
The expert witness then described how Croats began unilaterally establishing their own autonomous regions in Western Herzegovina. An armed conflict broke out between Croatian military units and the predominantly Muslim Bosnian Army, and this precipitated the breakup of Bosnia and Herzegovina. At this historical juncture, the three ethno-national groups set up their own state administrations “and naturally, they waged war against each other.” Meanwhile, Serb parties kept negotiating and seeking compromise, but in March 1992, the Muslim leader Izetbegović withdrew his signature from the Carrington-Cutileiro peace plan and plunged the region irrevocably into war.

Kecmanović’s account of the conflict is widely held among Serbs from a variety of political affiliations in the former Yugoslavia. In this view, Bosnia had been founded on a long-standing consociational compact among the three ethno-national groups, in which a “national key” distributed political offices among members of the three groups. By consistently voting against Serbs en bloc, Croats and Muslims had broken the contract and violated the minority rights of Serbs. This left Serbs with no choice but to withdraw from the political framework, at which point Croats and Muslims began fighting among themselves, with Serbs as the innocent and injured third party. Serbs were spurred on not by an ideology of Greater Serbia and aggressive territorial expansion but by “the preservation of Great Yugoslavia,” the political system and principles that had historically secured peaceful coexistence in Bosnia and Herzegovina.

Prosecutor Philip Weiner’s cross-examination of the defense expert witness was among the most uncompromising seen at the ICTY. He objected to Kecmanović’s statements that Serb atrocities were “exaggerated” and that Serbs were “demonized” in the Western media. The expert witness’s report had cited an article in the London Times newspaper alleging that Muslims themselves had shelled the Markale marketplace in central Sarajevo in 1994 to gain international sympathy. The Times article cited as its source a UN investigation into the massacre but mistakenly attributed to the UN report the finding that a Muslim artillery position had fired the shells. Weiner pulled up the UN report on the courtroom monitors and demonstrated that the UN investigation had made no such finding, and he referred to the earlier ICTY trial that convicted Serb General Galić of the shelling.

53 T12073.
55 Testimony by Kecmanović, T12108.
56 Statements reiterated in the courtroom testimony, T12094.
57 T12085–9.
Prosecutor Weiner also picked up on Kecmanović's assertion that the Western media had "flimsy evidence" on Serb camps at Omarska, Keraterm, and Tvrdošinje.58 Weiner cited ICTY cases in which camp guards had been convicted of committing atrocities in the three concentration camps. In one dramatic courtroom moment, Weiner, clearly bristling with enmity, showed a grisly photograph of an execution by camp guard Goran Jelisic and asked whether Kecmanović would change his testimony in relation to his remarks about "alleged atrocities" and "flimsy evidence."59 Kecmanović refused to change his testimony and instead replied in an unadulterated *tu quoque* vein: "I lived in Sarajevo during a portion of the war. There were crimes committed against Serb civilians there, and I did not need photographs to learn of this. I was there and I saw that directly. Those were crimes committed against Serb civilians."60 Weiner invited the expert witness another four times to amend his report in the light of the evidence presented. Kecmanović refused: "I cannot give you a yes or no answer. The question is much too complex for that."61 For outside observers, this was gripping courtroom drama, but judges watched the passionate exchanges with palpable boredom, displaying minimal interest in the expert witness's testimony. The bench limited the defense counsel Pantelić's redirect examination, with Presiding Judge Florence Mumba uttering, "I don’t think there is any more reason[] why we should spend more time with this witness."62

The Simić trial was one in which the prosecution and defense historical witnesses talked past one another and there did not exist any areas of intersecting testimony or evidence. Donia focused almost exclusively on the actions of the SDS, and Kecmanović made no mention of the prewar preparations of Bosnian Serbs. Although Donia is cited extensively in the final Simić judgment, the Trial Chamber did not cite either historical defense expert witness (Nenad Kecmanović or Pavle Nikolić) anywhere in the Trial Judgment. The exonerating political history proposed by the defense seemed to be entirely rejected by the Trial Chamber judges, at least as factual information about the alleged crimes. Nevertheless, prosecution staff interviewed for this book confirmed that, at the time, they felt that Kecmanović had damaged aspects

58 T12090–4.
59 T12095.
60 T12096.
61 T12096. Redirect by defense counsel Pantelić reinforced the theme that Bosnia’s very existence was based on the political principle of “consensus among the three constituent peoples” and referred to the massacre of Serbs at Sijekovac, returning again to the default *tu quoque* position (T12173).
62 T12170.
of the prosecution case. Blagoje Simić was eventually convicted by the Trial Chamber of persecutions on the basis of the unlawful detention of Bosnian Muslim and Bosnian Croat civilians, beatings, torture, forced labor, deportation, and forcible transfer. On appeal, the torture and beating charges were overturned and the conviction for persecutions was reduced to “aiding and abetting.” Simić was sentenced to fifteen years, which he presently is serving in a prison in the United Kingdom.

6.5. **TU QUOQUE, MITIGATION, AND THE DEFENSE EXPERT-WITNESS EFFECT**

The *tu quoque* defense contributes nothing to the question of individual criminal responsibility, and no accused has been acquitted of a crime on the basis of a *tu quoque* defense. Why, then, does the *tu quoque* defense strategy endure in international criminal tribunals, even after the tribunals confirmed its long-standing rejection by international criminal law and even when judges explicitly discourage it in the courtroom? The most obvious answer is that the accused (and, potentially, the accused’s defense team) may actually believe that moral and legal obligations are reciprocal and that the actions were legitimate because they were rational reactions to extreme provocation. For nationalists (i.e., for a substantial proportion of the Balkans’ population), *tu quoque* arguments provide the ideological and historical justification for their participation in the armed conflict. The reprisals, therefore, have moral legitimacy for the defense because it is held that victims of violent acts are not bound to exercise restraint.

Other reasons are related to lawyers’ courtroom strategies. The *tu quoque* principle has become the defense’s preferred rhetorical framing device, wherein background and contextual evidence lay a mantle of legitimacy across the defense theory of the case. This applies directly to the Simić trial we have just considered, and the accused Blagoje Simić testified the very next day after Kecmanović appeared. It is easy to understand why the defense would want to pause the procession of factual elements of the alleged crimes and introduce an expert witness. In the place of venal and squalid acts and widespread criminality, the court was treated to a refined and elevated discourse on the constitutional law elements of historic Yugoslavia, furnished by a respected academician and former rector of the University of Sarajevo. The appearance

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63 The Appeals Chamber found that Simić had not been properly informed by the prosecution that he was being accused of a joint criminal enterprise until the end of the trial, rendering aspects of the trial unfair.
of Kecmanović interrupted the grim procession of fact witnesses speaking about crimes and lent a veneer of respectability to the accused.

While such explanations make sense, the main reason the *tu quoque* defense is entrenched in international criminal trials is the role it plays in mitigation. To be clear, the strategy does not acquit or absolve the accused of the crimes, but that is not its objective. It is an imperfect defense that patently fails to meet the legal requirements of the trial, but that does not mean that it is a sham or frivolous defense, insofar as it is dedicated to a reduction in the sentence. Moreover, international trials are not especially unique in this aspect, and the role of expert witnesses in international criminal trials shares attributes with their role in domestic jurisdictions. Explaining the context in which crimes occurred does seem to favor the defense case for mitigation.

In Anglo-American domestic criminal trials, defense teams are more likely to adopt this tactic when the perpetrator’s responsibility for a crime is not being questioned. Perhaps the best recent example of this is in trials of battered women who have killed their abuser. A number of studies have examined the impact of defense expert-witness testimony in battered wife cases in Europe and North America, especially with regard to sentencing.\(^{64}\) One study by the Canadian psychologists Schuller and Hastings (1996:170) noted how expert witnesses in Canadian courts have developed a standard portrayal of battered-woman syndrome in which the behavior of the “reasonable battered woman” is not pathologized but represented in the overall social context and “a normal response to a traumatic situation.” The research the authors presented to respondents was a model version of an actual Canadian homicide trial (*Lavallee v. Regina*) in which a woman killed her abusive husband. In the psychological experiment conducted by the authors, a control group of participants was presented with twenty-three pages of trial testimony. A second group received the same trial transcripts but also received extensive expert testimony about battered-woman syndrome. Participants gave more lenient sentences where expert witness testimony was introduced and where such testimony focused on the woman’s social context and reality rather than on her psychological state. Respondents also tended toward more lenient sentences where the conceptual terminology of battered-woman syndrome was used. The more educated the respondent, the more susceptible he or she was to the conceptual arguments of expert witnesses speaking abstractly and conceptually about domestic violence as a social phenomenon.

In assessing whether such experiments in a domestic legal setting are applicable to the international criminal context, it needs to be acknowledged that

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\(^{64}\) See Romkens (2000) and Schuller and Hastings (1996).
there are two elements of international tribunals that are quite dissimilar. First, the respondents in the experiments were lay people, not professional judges, and international crimes are brought before a panel of judges, not juries of peers who are potentially unfamiliar with the law. This raises the question of whether judges are like other persons in their emotional and intellectual responses to narratives of crimes. The official response from the legal profession is that lawyers are trained to know and apply legal rules of procedure and evidence and to disregard emotive appeals and other forms of argumentation. This would seemingly militate against the influence of a tu quoque defense in international trials. However, there is a wealth of data from domestic justice systems indicating that “judicial decision-making conforms to the same social and cognitive mechanisms that govern ordinary citizens.” Furthermore, judges in international criminal courts might well be less like domestic criminal trial judges and more like the educated respondents of the behavioral studies cited previously, as only a minority of the first group of ICTY judges arrived with experience as a judge in a criminal courtroom before their appointment to the Tribunal. Perhaps, then, they are more vulnerable than their domestic counterparts to the defense’s overtures to understand how irrational actions might seem rational in extreme circumstances. To determine this conclusively either way would require further research on the nature of judicial decision making in the international setting.

Second, at the two ad hoc international criminal tribunals, judges simultaneously deliver the verdict and the sentence. Further, ICTY and ICTR Rule 86(C) obliges both the prosecution and the defense to “address matters of sentencing in their closing arguments.” The simultaneous rendering of trial and sentencing judgments represents the single most convincing explanation for the prevalence of the tu quoque defense in international criminal trials. In common law jurisdictions, the criminal trial verdict is conventionally made first – only if the defendant is found guilty are further arguments heard to

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65 Braman and Kahan (2007:108). These authors particularly cite the work of Richard L. Revesz on judicial decision making and political party affiliation.


67 Rule 87 of the ICTY and ICTR Rules of Procedure and Evidence.
determine the sentence. Sentencing hearings can be extensive and almost constitute a second trial in which the prosecution brings new witnesses to give victim impact testimony, with the objective being to assess the gravity of the crimes. Because in international criminal trials at the ICTY and ICTR the trial verdict and sentencing judgment are coterminous, judges have no choice but to tolerate *tu quoque* statements from defense lawyers and their expert witnesses. It is not a coincidence that Rule 92 bis of the ICTY and ICTR Rules of Procedure and Evidence governing the evidence of expert witnesses includes a clause admitting expert-witness evidence that “relates to factors to be taken into account in determining sentence.”

In international trials, then, defense teams are placed in the tenuous position of having to argue in mitigation before knowing what factual findings the Trial Chamber will make. Defense counsel must argue for the innocence of the accused while concurrently explaining the extenuating circumstances in which he or she acted, should the accused be found to have committed the alleged crimes. Cassese (2003:421) remarks (without much sympathy) that defense arguments can sound like “the old schoolboy plea, when charged with breaking the window in the headmaster’s study: (i) first, there is no witness in the headmaster’s study, (ii) if there is a window, it is not broken, (iii) if it is broken I did not do it, (iv) if I did it, it was an accident.” Not a very convincing defense to be sure, but the present system makes certain that *tu quoque* will remain a prominent feature of defense arguments in future international criminal trials. Cassese (2003:421) observes that, at the International Criminal Court, Article 76 and Rule 143 compel the ICC Trial Chamber to consider matters related to sentencing before the end of the trial.

Having established how mitigating arguments are folded into the process of judgment, the next question is, What impact have *tu quoque* arguments had on sentencing at international criminal trials? No clear data exist to show that sentences are lesser in trials in which a *tu quoque* defense was used. Further, the *tu quoque* defense is but one factor of many that influence sentencing. Yet overall, sentences at the ICTR and ICTY are significantly smaller than prosecutors have requested, and less than one might reasonably expect given the crimes that individuals have been convicted of. The next question then becomes, Compared to what? First, we must recognize that no guidelines exist for judges carrying out sentencing in international criminal cases. Cryer et al. (2007:396) observe that “the ICTY Appeals Chamber has repeatedly refused to set down a definite list of sentencing guidelines.” Justice ministries in many countries monitor and supervise criminal sentencing as a matter of course, and

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in the United States, the U.S. Sentencing Commission issues a manual incorporating guidelines and statutory provisions regulating sentencing. Any U.S. judge passing sentence on a conviction for, say, first-degree murder would be greatly constrained by the existing guidelines and the sentencing range would be fairly predictable (at the time of writing, forty-three years or more). The lack of an oversight body and clear guidelines makes it hard to assess sentencing in international tribunals. A comparison of sentencing with historical trials for mass atrocities is also problematic, as they invariably took place in a variety of international or national settings that were quite unlike modern international criminal tribunals. The International Military Tribunal at Nuremberg and the Israeli court sentencing Adolph Eichmann were able to issue the death penalty, but that sentence is unavailable to international tribunals.

Still, if we compare cases that are relatively similar, we might have some indication of how sentencing in international criminal tribunals compares with sentencing in a national court. In 1996, a South African court convicted the security policeman Eugene de Kock on eighty-nine charges, including six charges of murder and two of conspiracy to commit murder, and sentenced him to 212 years in prison. De Kock also had recourse to a *tu quoque* defense, explaining that his actions were part of an all-out war against communism and complaining that former police officers “who were just as guilty as him” were going free. At the ICTY, the camp guard Goran Jelisić was convicted of fifteen counts of crimes against humanity and sixteen counts of violations of laws of war and the murder of thirteen people. He was sentenced to forty years in prison (which he is presently serving in the United Kingdom), one of the greater sentences handed down at an international criminal tribunal thus far. Here we have a case in which multiple counts of crimes against humanity and murder carried a sentence that was a fraction of that in a comparable case in South Africa and markedly less than the minimum in the U.S. federal guidelines.

It might be objected that I have simply selected criminal cases to fit my argument, but many other commentators both inside and outside the two *ad hoc* tribunals agree that sentencing at the ICTR and ICTY has been arbitrary and erratic. Cryer et al. (2007:397) note that “the sentencing practice of the

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70 In South Africa, the death penalty had been abolished the year before in 1995.
72 The Appeals Chamber later found he had not committed two of the murders, but it did not reduce the sentence.
73 See Drumbl (2007:55-66, 154-166) for a thorough discussion of the various legal and ethical aspects of sentencing at the ICTY and ICTR.
ICTY and ICTR has not been consistent, neither within the same Tribunal nor between them." A number of former ICTY judges, such as Judge Patricia Wald, have also raised doubts about the unpredictability of sentencing for international crimes: "I am no fan of our federal sentencing guidelines, but I do think some form of presumptive range for certain categories of crimes would give a more uniform face to the process."74 The enduring nature of the *tu quoque* defense in international criminal trials can therefore be explained primarily by reference to its mitigating effect on sentencing and this goes a long way to clarifying why defense attorneys have continued to find historical experts useful in their cases.

6.6. “COOKED HISTORY” IN THE ADVERSARIAL COURTROOM

There is a serious danger that the record of the ICTY will be seen as a history of the Balkan conflicts. It is not. The conflicts continued in the courtrooms with each side to those conflicts fighting with words rather than weapons. False testimony is rampant and impossible to control. . . . Historians need to look for the truth about the Balkan conflicts in places other than the ICTY records. It did not need to be that way.  

– ICTY Defense Counsel75

At the beginning of the ICTY’s work, the prosecution was the party most invested in expert witnesses, but as time went on, defense teams became more and more committed to historical and political experts. We might have arrived at the point at which prosecutors are trying to anticipate and defuse what they expect defense expert witnesses will say rather than vice versa. Defense lawyers may be motivated by an ideological commitment to a history of victimhood and, in addition, may perceive compelling legal incentives to use historical evidence in a trial. The defense uses historical evidence to frame the crimes in a way that portrays the accused in the best possible light. History is used to cut the link with culpability in the chaos defense and to mitigate the sentence in the *tu quoque* defense. The utility of these defense strategies mean that historical arguments will continue to feature in international criminal trials for some time to come. The *tu quoque* principle has featured prominently and will continue to feature as long as the procedural arrangements that practically mandate it are still in place.


75 ICTY survey response, 2009.
However, it is not clear that the more partisan versions of history we have seen thus far at international tribunals are that illuminating, whether exculpatory or inculpatory. Overall, historical evidence led by the defense receives a fairly low rating when compared with that of the prosecution. When asked whether historical evidence led by the defense has provided important insights into violations of international humanitarian law in the former Yugoslavia, 50 percent of defense lawyers agreed or strongly agreed, whereas only 32 percent of prosecutors agreed and 31 percent of expert witnesses did so. This does not compare favorably with the responses regarding whether historical evidence led by the prosecution has provided important insights; there the combined “agree or strongly agree” figure rises to 61 percent for prosecutors, 62 percent for defense, and 77 percent for expert witnesses. The divergence in these figures might be interpreted in various ways. Defense lawyers could simply be more generous in their assessment than their prosecutorial counterparts. However, my inclination is to say that historical evidence led by the defense is less valued because it is used in a more tactical and therefore partial way, and because it is corrupted by elements of *tu quoque*.

The adversarial process of the courtroom has many benefits: one side exists to champion the rights of the accused at each step of the way, and any witness, document, or other item of evidence is subjected to rigorous testing by the parties. A capable defense is absolutely necessary for any semblance of due process and a fair trial. However, when it comes to considering how the past shaped the armed conflict, the picture is less rosy and may constitute an argument for a more civil law set of procedures. Instead, what we see are legally motivated strategies from both prosecution and defense that distort the record and that result, as vividly conveyed in the quote earlier in this chapter from Richard Goldstone, in polarized historical narratives that do not meet up. In extreme instances, this reproduces the sense of victimhood that, in part, fueled the conflict in the first place. One ICTY defense attorney acknowledged this in their final survey comment:

Testimony by “historians” in many, if not all, of these trials, has been used itself to manipulate and mold the view of which ethnic group is bad, according to which ethnic group has been the victim. There is no consistency. If the Muslims are the victims, then the history is manipulated to show that either the Serbs or the Croats are the bad guys from an historical perspective,

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76 Thirty-eight percent of defense participants were neutral, and 13 percent disagreed or strongly disagreed. Twenty-nine percent of prosecutors were neutral, 25 percent disagreed or strongly disagreed, and 16 percent expressed no opinion. Fifteen percent of expert witnesses were neutral, 23 percent disagreed or strongly disagreed, and 31 percent expressed no opinion.
and vice versa. This has especially been appalling when one sees how the prosecution has argued one thing in cases against Serbs, for example, for crimes against Croatians which occurred in Croatia, and then argue the exact opposite, with a straight ethical face, in cases against Croats, for crimes which occurred in Croatia. (Emphasis in original)\textsuperscript{77}

Prosecution respondents generally expressed their reservations less resolutely, but they still recognized that the adversarial process could degrade the quality of historical evidence introduced by the parties. One prosecution respondent wrote: "Under the adversarial system, trial lawyers prefer a version of history that supports their case (they are not looking for objective (?) truth). . . . There is a tendency to produce 'cooked history.'"\textsuperscript{78}

To end on a more optimistic note, there is also the sense in which the international tribunals are one of the few places in which opposing historical arguments actually interact and are tested rigorously, and in which a new generation seeking to make sense of the past might turn for information that has been tested in the courtroom, should they be so inclined. True, at times, the parties present extremely polarized versions of history in international criminal trials, but the patently unsatisfactory nature of revisionist accounts may engender a more measured and balanced reading of the historical record in the future. The historical points of view are all aired openly and are all challenged robustly, thus illustrating their strengths and weakness and leading the court to search for new material to make sense of the past. In the words of one expert witness for the prosecution, the road is a long one, and the Tribunal's work is only the beginning:

The process of international criminal justice at the ICTY, and the testimony and evidence that it has produced has added significantly to the available historical evidence concerning events in the former Yugoslavia during the final decades of the 20th century. The use made of this body of evidence by future historians may eventually lead to a fuller understanding of the critical questions about these events than one could reasonably expect from the expert presentations prepared within the context (and limitations) of specific cases before the court.\textsuperscript{79}

\begin{thebibliography}{99}
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