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FROM INDIFFERENCE TO ENGAGEMENT

BYSTANDERS AND INTERNATIONAL CRIMINAL JUSTICE

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## I. Introduction

One of the asserted goals of the International Criminal Tribunal for the Former Yugoslavia (ICTY) is to promote peace in the region and reconciliation within the countries torn apart by the violence and bloodshed.<sup>1</sup> International criminal trials—

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1. Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., annex, U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute]. Punishment of offenders, deterrence of violations, and promotion of peace are the goals enshrined in the preamble to the Statute, which states in relevant part that "prosecution of persons responsible for serious violations of international humanitarian law would enable [the aims of cessation of violations and bringing violators to justice] to be achieved and would contribute to the restoration and maintenance of peace . . . ." *Id.* The term "reconciliation" does not appear as a stated goal but is implied in context. The statute for the International Criminal Tribunal for Rwanda, adopted a year and a half after the ICTY Statute, explicitly links prosecutions to reconciliation. S.C. Res. 955, U.N. SCOR, 49th Sess., preamble, U.N. Doc. S/RES/955 (1994), amended by S.C. Res. 1165, U.N. SCOR, 53d Sess., U.N. Doc. S/RES/1165 (1998) ("Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would . . . contribute to the process of national reconciliation and to the restoration and maintenance of peace..."). The Special Court for Sierra Leone, a hybrid tribunal created by the UN and the government of Sierra Leone, also links prosecutions to reconciliation. The preamble to this statute notes that "a credible system of justice and accountability for the very serious crimes committed . . . [in Sierra Leone] would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace." S.C. Res. 1315, U.N. SCOR, 55th Sess., U.N. Doc. S/RES/1315 (2000). The preamble to the statute for the International Criminal Court states that

trials conducted by a tribunal established through the exercise of UN authority and applying international standards of justice—inaugurate a process of acknowledgment and confrontation of mass violence.<sup>2</sup> The Security Council's vote in 1993 to create the ICTY ushered in a new stage in the development of international legalism. With the establishment of the International Criminal Court (ICC), the international community has created a permanent tribunal poised to displace the cynical presumption of impunity for mass atrocities with the legal demand for accountability. One assumption that undergirds these institutions is that there is a connection between holding individual perpetrators of violence criminally liable for their actions and the willingness of members of communities pitted against each other to reconcile—a term used here to refer to the willingness of those formerly divided to leave off violent struggle and to embrace a collective future.<sup>3</sup> For some, trials may engender a willingness to reunite with their enemies. However, the processes of international justice are not in and of themselves sufficient to secure these ambitious goals. Under particular circumstances, studies have found that international criminal trials contribute to individual willingness to reconcile.<sup>4</sup> Yet this Article argues

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the most serious crimes shock the "conscience of humanity" and justifies the new institution as a means to end impunity for these atrocities and deter their commission; like the ICTY statute, the link between prosecution and reconciliation is implied. Rome Statute of the International Criminal Court, July 17, 1998, A/CONF.183/9.

2. The Special Court for Sierra Leone has articulated criteria for determining whether an adjudicative mechanism is an international court. Prosecutor Against Charles Ghankay Taylor, Case No. SCSL-2003-01-I, Appeals Chamber (May 31, 2004). It held that international courts may be established through a variety of mechanisms including Security Council resolutions adopted pursuant to its Chapter VII powers of the UN Charter, as well as agreements between the UN and national governments, like Sierra Leone. *Id.* para. 37. The Special Court held that the Security Council may act pursuant to articles 39 (enabling determinations of threats to peace) and 41 (empowering the Security Council to decide measures to give effect to its decisions) of the Charter to establish a court. *Id.* para. 38. The court observed that the Special Court was created by Security Council acting on behalf of the international community to "fulfill an international mandate and is part of the machinery of international justice." *Id.*, para. 39.

3. The term "reconciliation" is used variously by those writing about mass violence but commonly connotes forgiveness of past abuses and crimes coupled with renewed cooperation or reunion at the individual and group levels. See Harvey M. Weinstein and Eric Stover, *Introduction: Conflict, Justice and Reclamation, in My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* 4-5, 13 (Eric Stover et al. eds., 2004) [hereinafter *My Neighbor, My Enemy*]; Miklos Biro et al., *Attitudes Toward Justice and Social Reconstruction in Bosnia and Herzegovina and Croatia, in My Neighbor, My Enemy, supra* at 195 [hereinafter *Attitudes Toward Justice and Social Reconstruction*] (research in South Africa finding that the word "reconciliation" is most frequently associated with "forgiveness").

4. In a survey conducted in three war-torn cities in Croatia and Bosnia and Herzegovina—Vukovar, Mostar, and Prijedor—researchers found that for those who had prior interethnic relationships, believed in war crimes trials, and had a positive opinion of the ICTY, trials contributed to their readiness to reconcile. *Attitudes Toward Justice and Social Reconstruction, supra* note 3, at 198; see also Timothy

that international criminal trials are encumbered by juridical entailments that work counter to the project of reconciliation.

International criminal adjudication applies the normative rules established by the particular tribunal within the accepted conventions of legal due process. A bedrock principle of this legal framework is punishing individuals who have violated specific behavioral norms of a magnitude that warrants punishment and loss of liberty. Consequently, international criminal justice mechanisms take up as subjects those accused of responsibility for grave violations of international law. And individual accountability serves to organize discussion of the past—and plans for the future—around the legal (as opposed to moral) concepts of guilt and innocence. Left outside of the legal definition of international crimes are bystanders to these egregious acts; the vast majority of individuals who are members of communities impacted by war but who are neither victims nor perpetrators of crimes. Yet bystanders are a critical segment that must engage in the social and political processes of reclaiming and rebuilding communities after the bloodshed, and as such are one of the audiences to which the enterprise of international justice is directed. International humanitarian law cannot and should not criminalize the conduct of bystanders. Neither subjects nor objects of criminal trials, bystanders illustrate a challenge to law as a vehicle to establish the roles (victim/perpetrator) in and responsibilities (guilt/innocence) for serious violations of international criminal law.

A prior examination of the contribution of international accountability to promoting reconciliation, conducted by myself and Harvey Weinstein<sup>5</sup> led us to conclude that trials are only one

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Longman et al., Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconstruction in Rwanda, in **My Neighbor, My Enemy**, *supra* note 3, at 219-24 (finding more positive than negative attitudes toward trials, but only a limited relationship between attitudes toward trials and willingness to reconcile) [hereinafter Connecting Justice to Human Experience].

5. This work began with a study of the attitudes of legal professionals in Bosnia and Herzegovina toward the International Criminal Tribunal for the Former Yugoslavia. Human Rights Center, International Human Rights Law Clinic, and Center for Human Rights, Justice, Accountability, and Social Reconstruction: An Interview Study of Judges and Prosecutors, 18 **Berk. J. Int'l L.** 102 (2002) [hereinafter Judges Study]. Drawing on the empirical data, we developed a model to explain the relationship of criminal trials to other programs and activities necessary to rebuild communities after mass violence. Laurel E. Fletcher & Harvey M. Weinstein, Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation, 24 **Hum. Rts. Q.** 573 (2002) [hereinafter Violence and Social Repair]. We also examined the relationship between the political and social dimensions of the ICTY and the ability of its work to contribute to reconciliation and its relationship to the prosecution of war criminals in the national judicial system. Laurel E. Fletcher and Harvey M. Weinstein, A World Unto Itself? The Application of International Justice in the former

component of an appropriate and necessary response to mass violence. We proposed a model of the components needed at multiple levels of society to achieve social reconstruction—a term that refers to “a process that reaffirms and develops a society and its institutions based on shared values and human rights”<sup>6</sup>—and this framework was further elaborated and informed by additional empirical studies in the former Yugoslavia and Rwanda.<sup>7</sup> This Article extends our previous analysis of the role international tribunals play to help communities reckon with a violent period in order to scrutinize how law and courts relate to bystanders. This Article contributes to the scholarship on transitional justice by examining how the legal architecture and operation of international criminal law constricts bystanders as subjects of jurisprudence, considering the effects of this limitation on the ability of international tribunals to promote their social and political goals, and proposing institutional reforms needed to address this limitation.

Part II of this Article provides the theoretic and analytic framework for examining the legal relationship of bystanders to mass atrocity. This part begins by explaining why, given the ambitions for international justice, bystanders pose a problem for legal institutions that attribute guilt and mete out punishment for mass atrocities. Conventional legal approaches

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Yugoslavia, in *My Neighbor, My Enemy*, supra note 3, at 29–48 [hereinafter *A World Unto Itself?*].

6. Weinstein & Stover, *Introduction*, in *My Neighbor, My Enemy*, supra note 3, at 5. Critically, social reconstruction does not require that individuals forgive those who have wronged them for peace and social stability to be restored. The author subscribes to the conceptual framework developed by researchers engaged in the study undertaken by U.C. Berkeley’s Human Rights Center that emphasizes an expanded list of activities beyond justice (largely defined as trials or truth commissions) that may promote social adhesion after ethnic conflict: “[Social reconstruction] is a process that includes a broad range of programmatic interventions, such as security, freedom of movement, access to accurate and unbiased information, the rule of law, justice, education for democracy, economic development, cross-ethnic engagement, that work together and at multiple levels of society—the individual, neighborhood, community, and state—to address the factors that led to the conflict.” *Id.*

7. Urusaro Alice Karekezi et al., *Localizing Justice: Gacaca Courts in Post-Genocide Rwanda*, in *My Neighbor, My Enemy*, supra note 3, at 69–84; Eric Stover, *Witnesses and the Promise of Justice in The Hague*, in *My Neighbor, My Enemy*, supra note 3, at 104–120; Dinka Corkalo et al., *Neighbors Again? Intercommunity Relations After Ethnic Cleansing*, in *My Neighbor, My Enemy*, supra note 3, at 143–61; Timothy Longman & Théoneste Rutagengwa, *Memory, Identity, and Community in Rwanda*, in *My Neighbor, My Enemy*, supra note 3, at 162–82; *Attitudes Toward Justice and Social Reconstruction*, supra note 3, at 183–205; *Connecting Justice to Human Experience*, supra note 4, at 206–25; Sarah Warshauer Freedman et al., *Public Education and Social Reconstruction in Bosnia and Herzegovina and Croatia*, in *My Neighbor, My Enemy*, supra note 3, at 226–47; Sarah Warshauer Freedman et al., *Confronting the Past in Rwandan Schools*, in *My Neighbor, My Enemy*, supra note 3, at 248–66; Dean Ajdukovic & Dinka Corkalo, *Trust and Betrayal in War*, in *My Neighbor, My Enemy*, supra note 3, at 287–302.

of the international community to address mass violence are also reviewed. In establishing the context for this inquiry, this section discusses why the charge of crimes against humanity provides an appropriate framework for examining the bystander problem in law. Part III is a case analysis of Prosecutor v. Simić et al.,<sup>8</sup> the trial of the highest-ranking civilian convicted of crimes against humanity committed during the conflict in Bosnia and Herzegovina. This section explores how and to what extent international criminal trials produce a record that frames the role of bystanders in a way that promotes social reconstruction among this group. It concludes that liberal law principles structure trials so as to render these proceedings equivocal interventions, capable of assisting certain types of bystanders (the silent bystanders who turned away or who morally opposed the criminal leadership but did not act) and not others (the complicit bystanders who supported passively the leaders now in the dock). Part IV proposes that international justice mechanisms implement a model of operating as a judicial body while simultaneously attending to the social impact of their work. By adopting "institutional dualism," tribunals may address their negative impacts on social reconstruction. Two specific reforms should be considered. First, tribunal judges should draft their opinions in a manner that explicitly leaves open the question of bystander contribution for atrocities. Second, tribunals should act outside the courtroom—through outreach programs and in conjunction with other institutions—to engage bystanders directly as a target audience. International tribunals currently are under-connected to other initiatives to promote social reconstruction. To maximize their impact, tribunals must attend to the social and political impacts with which legalism's response to mass atrocity is freighted.

## II. Bystanders, Atrocities, and the Law

### A. *International Justice and Social Reconstruction*

In 1993, while conflict raged in Bosnia and Herzegovina, the UN Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY) to prosecute those responsible for serious violations of international humanitarian law committed during the war. The Statute for the Tribunal reflected the determination of UN diplomats that trials were a

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8. Prosecutor v. Simić et al., Case No. IT-95-9-T, Judgment, Judge Florence Ndepele Mwachande Mumba, Presiding, Judge Sharon A. Williams, and Judge Per-Johan Lindholm (Oct. 17, 2003) [hereinafter Simić].

necessary response to the bloodshed<sup>9</sup> and marked the first time the international community had acted to hold individuals accountable for mass violence since the end of the Second World War. The Statute's preamble justifies the creation of the Tribunal by citing the need to punish offenders and to deter future criminal acts,<sup>10</sup> themes that figure prominently in the debates leading to the vote to establish the ICTY.<sup>11</sup> The Statute, established under Chapter VII of the UN Charter, also justifies international prosecutions as necessary contributions to the restoration and maintenance of peace.<sup>12</sup> The link between trials and peace has been interpreted by many, notably the first president of the ICTY, Antonio Cassese, as more than simply the cessation of hostilities: justice will contribute to reconciliation.<sup>13</sup>

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9. While the record of the UN Security Council discussion when it voted to create the Tribunal emphasizes the moral imperative to bring perpetrators to justice, it cannot be overlooked that this same body directed what may be described as anemic military engagement to end the fighting and the decision to conduct trials has been criticized as a "figleaf" to avoid direct intervention in the conflict. See **Gary Jonathan Bass, Stay the Hand of Vengeance: The Politics of War Crimes Tribunals** 206-08 (2000).

10. ICTY Statute, supra note 1, preamble.

11. Diplomats spoke forcefully for the need of the international community to punish perpetrators of the atrocities committed in the ongoing Balkan war. Brazil's representative to the UN Security Council, the first to speak, voted in favor of the Tribunal because "prosecution and punishment of the perpetrators of these crimes is a matter of high moral duty." 2 **Virginia Morris & Michael P. Scharf, An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis** 161 (1995). The French representative echoed this sentiment: "Prosecuting the guilty is necessary if we are to do justice to the victims and the international community. Prosecuting the guilty will also send a clear message to those who continue to commit these crimes that they will be held responsible for their acts." Id. at 163. The U.S. ambassador, Madeline Albright, observed that adoption of the statute for the Tribunal affirmed the Nuremberg Principles: "The lesson that we are all accountable to international law may have finally taken hold . . ." Id. at 165. The British representative intoned that "perpetrators must be called to account, whoever is responsible . . . Those who have perpetrated these shocking breaches of international humanitarian law should be left in no doubt that they will be held individually responsible for their actions." Id. at 167. From the Russian Federation representative came the observation that: "Murder, rape and 'ethnic cleansing' must cease immediately, and the guilty . . . must be duly punished." Id. at 168.

12. ICTY Statute, supra note 1, preamble.

13. Cassese enumerates four justifications for war crimes trials: (1) trials "establish individual responsibility over collective assignation of guilt;" (2) "justice dissipates the call for revenge" on the part of victims; (3) "by dint of dispensation of justice, victims are prepared to be reconciled with their erstwhile tormentors, because they know the latter have now paid for their crimes; and (4) trials establish a "fully reliable record" of the violence to enshrine the truth about the past for future generations." Antonio Cassese, Reflections on International Criminal Justice, 61 **Mod. L. Rev.** 1, 6 (1998) (emphasis added). Legal scholar Rudi Teitel observed that the "essential mission of the ICTY is to transform the conflict in the Balkans to one of individual crimes answerable to the rule of law, and so to achieve peace and reconciliation" (a goal that she argues is undermined by the lack of national development of rule of law). Rudi Teitel, Bringing the Messiah Through the Law, in Human Rights in Political Transitions: Gettyburg to Bosnia 177 (Carla Hesse et al. eds., 1999); see also **Bass, supra** note 9, at 6 ("The treatment of humbled or

Much of the literature on international courts supports these institutions on similar grounds, though with varying emphases.<sup>14</sup> For some, like Aryeh Neier, a founder and former executive director of the nongovernmental organization Human Rights Watch, the ability of the ICTY to exact punishment constitutes its primary contribution.<sup>15</sup> Others argue that trials promote deterrence; would-be violators will curb their brutal tactics to avoid indictment before an international tribunal.<sup>16</sup>

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defeated enemy leaders and war criminals can make the difference between war and peace"). A recent article proposes that accountability mechanisms should be implemented only in the context of political bargaining to better ensure acceptance of the norms, strengthen justice institutions, and contain perpetrators. Jack Snyder & Leslie Vinjamuri, Trials and Errors: Principle and Pragmatism in Strategies of International Justice, 28 *Int'l Sec.* 5 (2004); **Michael Ignatieff, The Warrior's Honor: Ethnic War and the Modern Conscience 170** (1997) ("Justice in itself is not a problematic objective, but whether that attainment of justice always contributes to reconciliation is anything but evident.").

14. A former ICTY prosecutor and scholar assessed the literature regarding the ICC and international criminal law as "celebratory" in tone and focused on "reaffirmation of the assumptions and principles" of international criminal justice or emerging procedural issues; lacking is investigation of how prosecutions impact deterrence and post-conflict peace building. Payam Akhavan, The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability, 97 *Am. J. Int'l L.* 712, 720 (2003) (review essay). In the introduction to a volume devoted to the topic of accountability for international crimes and serious violations of human rights published in 1996, legal scholar M. Cherif Bassiouni argues against impunity for these violations and captures the moral justification for accountability simply: "if you want peace, you must work for justice." M. Cherif Bassiouni, Introduction, 59 *Law. & Contemp. Probs.* 5 (1996); see also Benedict Kingsbury, Foreword: Is The Proliferation of International Courts and Tribunals A Systemic Problem?, 31 *N.Y.U. J. Int'l L. & Pol.* 679, 688 (1999) ("[I]t is an article of faith among most international lawyers that the growing availability and use of international tribunals advances the rule of law in international relations.") (citing John Bolton, Reject and Oppose the International Criminal Court, in **Toward an International Criminal Court?** 37-8 (Alton Frye ed., 1999)); Bartam S. Brown, U.S. Objections to the Statute of the International Criminal Court: A Brief Response, 31 *N.Y.U. J. Int'l L. & Pol.* 855 (1999). However, some scholars have questioned the appropriateness of international trials as a response to mass violence. See Jose Alvarez, Crimes of State/Crimes of Hate: Lessons from Rwanda, 24 *Yale J. Int'l L.* 365, 458-68, 481-82 (1999) (questioning whether international justice is appropriate for building rule of law in Rwanda); Mark A. Drumbl, Collective Violence and Individual Punishment: The Criminality of Mass Atrocity, 99 *Nw. U. L. Rev.* 539 (2005) (arguing that the qualitative difference of mass atrocities requires distinct theory of punishment for these crimes).

15. **Aryeh Neier, War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice xii-xiii** (1998); Aryeh Neier, Rethinking Truth, Justice and Guilt after Bosnia and Rwanda, in **Human Rights in Political Transitions: Gettysburg to Bosnia**, *supra* note 13, at 42.

16. In adopting the ICTY statute, UN Security Council members expressed their belief that prosecutions would deter perpetrators from committing further atrocities. U.S. Ambassador Madeline Albright stated the Tribunal would promote justice "and deter further atrocities in the former Yugoslavia." **Morris & Scharf**, *supra* note 11, at 165. The Spanish ambassador remarked that accountability would "deter the repetition of similar acts in the future." *Id.* at 172. The first prosecutor for the ICTY, Justice Richard Goldstone, states that "the only deterrent against war crimes . . . is . . . a probability that [potential war criminals will] be brought to account." Richard Goldstone, 1998 Otto L. Walter Lecture, International Human Rights at Century's End, 15 *N.Y.L. Sch. J. Hum. Rts.* 241, 254 (1999). Writing eight years after the Tribunal was created, Payam Akhavan argued that prosecutions by the ad hoc tribunals

The success of the ICTY and other international mechanisms of accountability in achieving these objectives depends in part on their ability to arrest defendants, obtain evidence, and secure convictions.<sup>17</sup> To observe that the ICTY and international accountability mechanisms may achieve limited success in pursuing these objectives does not necessarily detract from the normative aspirations of these institutions. The relative success in and value of pursuing these goals is beyond the scope of this Article. Rather the focus of this analysis is the claim that international justice can and should promote social reconstruction. To lay the framework for this inquiry, a few concepts and background data are introduced below.

### 1. Data on Justice and Reconciliation

Assertions that ICTY prosecutions promote reconciliation within the Balkans rest on several assumptions. One is the theory that criminal trials of individuals will isolate and stigmatize the defendants as criminals separate and apart from the national group to which they belong—Bosnian Serb, Bosnian Croat, or Bosniak (Bosnian Muslims).<sup>18</sup> Differentiating the “bad”

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stigmatized the political leaders responsible for the violence and contributed to the long-term development of a political climate that would prevent recurrence of bloodshed. Payam Akhavan, Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?, 95 *Am. J. Int'l L.* 7, 10 (2001). Other scholars have cautioned that political leaders determined to pursue criminal policies are unlikely to be thrown off course by the threat of prosecution. Bass, supra note 9, at 290-95; Carlos Nino, Radical Evil On Trial (1996).

17. A former judge at the ICTY, Patricia Wald, cautioned that the efficacy of ad hoc tribunals has been hampered by the length of trials, high administrative costs, and insufficient outreach efforts to communities, which is made more difficult by the remote location of the tribunals. Patricia M. Wald, Accountability for War Crimes: What Roles for National, International and Hybrid Tribunals?, *ABI/INFORM Global*, 181, 192-93 (2004). Justice Goldstone chronicled the problems he confronted when establishing the first functioning international criminal tribunal, including the challenge to navigate the UN bureaucracy to establish a working office, inadequate funding for the enterprise, and the lack of cooperation from NATO countries to arrest accused war criminals. Richard J. Goldstone, For Humanity: Reflections of a War Crimes Investigator 85-88, 104-06, 116-17 (2000); see also Susan W. Tiefenbrun, The Paradox of International Adjudication: Developments in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the World Court, and the International Criminal Court, 25 *N.C.J. Int'l L. & Com. Reg.* 551, 582-83 (2000) (arguing that the failure to extradite indicted war criminals undermines the efficacy of the Tribunal).

18. Cassese, supra note 13, at 6; Justice Goldstone also subscribed to this theory, stating that trials would break the cycle of violence in former Yugoslavia and Rwanda by holding individuals accountable: “Specific individuals bear the major share of the responsibility, and it is they, not the group as a whole, who need to be held to account . . . so that the next time around none will be able to claim that all Serbs did this, or all Croats . . . so that people are able to see how . . . specific individuals in their communities . . . are continually endeavoring to manipulate them . . . .” Eric Stover & Gilles Peress, The Graves: Srebrenica and Vukovar 138 (1998) (reference omitted); Ignatieff, supra note 13, at 178 (“The most important task of



perpetrators from the “innocent” members of the same nationality is thought to prevent public attribution of collective guilt and permit individuals to rebuild communal ties. Through adjudication, judicial proceedings differentiate between wrongdoers and collectives, acknowledge crimes committed, and produce a record that lays the foundation for a national consensus as to what happened and who is responsible for the criminal suffering so that communities may rebuild.<sup>19</sup>

Unfortunately, these assumptions remain largely untested. The relationship between international court opinions that articulate international criminal law norms and produce a judicial record of the past on the one hand, and the social and political impact of these rulings in the communities directly affected by mass violence on the other hand, has not been adequately documented or theorized.<sup>20</sup> Scholars have devoted relatively little attention to the fundamental principles or assumptions upon which this faith in the ascendance of accountability for gross human rights violations is based.<sup>21</sup> This shortcoming has been compounded by a dearth of empirical work regarding the ability of international justice mechanisms to promote peace and stability in the regions affected by the violence. In fact, the lack of critical inspection of the redemptive assumptions of international criminal tribunals has obscured the need for a model of transitional justice that can live up to the aspirations of these institutions.

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war crimes trials is to ‘individualize’ guilt, to relocate it from the collectivity to the individuals responsible.”); Payam Akhavan, Justice in the Hague, Peace in the Former Yugoslavia?, 20 **Hum. Rts. Q.** 737, 741-42 (1998) (arguing that the ICTY can “demonstrat[e] that individuals—primarily leaders—bear liability for crimes, and that there is no justification for the collective attribution of guilt to entire ethnic groups”). For a summary of how diplomats have applied this argument for individual accountability to mass violence in the 20th Century, see **Bass**, supra note 9, at 297-301.

19. Cassese, supra note 13, at 6; Akhavan, Justice in the Hague, Peace in the Former Yugoslavia?, supra note 18, at 741-42, 770 (arguing that the ICTY can help generate a national consensus about what occurred during the war, but for the factual record to contribute to reconciliation, it will have to be accepted by those living within the region); **Bass**, supra note 9, at 304 (“The absence of a well-established historical record facilitates denial that atrocities ever happened. . . . The Hague can fight that.”); Teitel, supra note 13, at 182 (explaining how ICTY indictments create a “historical truth” about the atrocities that has ambiguous impact on bringing about peace). Michael Ignatieff argues that trials may can produce a truth that will aid public reckoning, but only when there is the political will to support a discussion about a shameful past. **Ignatieff**, supra note 13, at 179-89.

20. Akhavan, The International Criminal Court in Context, supra note 14, at 720.

21. Id.; see Weinstein & Stover, Introduction, in My Neighbor, My Enemy, supra note 3, at 4 (“A primary weakness of writings on justice in the aftermath of war and political violence is the paucity of objective evidence to substantiate claims about how well criminal trials or other accountability mechanisms achieve the goals ascribed to them.”); Violence and Social Repair, supra note 5, at 584-85.

A recent study by the Human Rights Center at the University of California, Berkeley contributes important empirical data to this endeavor. During a five-year, multi-disciplinary study in Bosnia and Rwanda, researchers found that within communities emerging from the breakdown in social order that accompanies atrocity, "there is no direct link between criminal trials (international, national, and local/traditional) and reconciliation," but allowed that attitudes may change over time.<sup>22</sup> Community members did not associate criminal sanctions with their willingness to reconcile with members of the national group in whose name violations were committed.<sup>23</sup> Rather, reconciliation was a private process that occurred between individuals.<sup>24</sup> Most did not equate justice simply with punishment of wrongdoers but defined the term more broadly to include return of property, reparations, and the need for economic development. Their ideas about punishment were expansive. They thought it should include all wrongdoers—the big fish as well as the local small fry.<sup>25</sup> The study also suggested that priorities for social reconstruction differ among individuals and communities and that trials comprise only one component of a multi-dimensional strategy necessary to bring about conditions under which divided communities may re-adhere.

## 2. Ecological Model of Social Reconstruction

Drawing from the data of the study and utilizing research of community and developmental psychologists, Professor Harvey Weinstein and I have developed an ecological model for social reconstruction to explain the importance and interrelation of multiple activities and institutions in restoring stability and strength to a social fabric damaged by interethnic conflict.<sup>26</sup> Mass atrocity causes damage in many dimensions of human experience: loss of loved ones, jobs, political institutions and arrangements, and social networks. Each of these losses needs to be addressed. Thus, social reconstruction includes programs that promote justice, establish democracy, bring about economic prosperity and transformation, and enable reconciliation to

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22. Eric Stover & Harvey M. Weinstein, Conclusion: A Common Objective, A Universe of Alternatives, in My Neighbor, My Enemy, supra note 3, at 323 [hereinafter A Common Objective, A Universe of Alternatives]. One empirical study of attitudes of Bosnian Serbs toward criminal accountability and social reconstruction indicates that most see themselves and their community as victimized by the conflict and unfairly singled out for approbation by the ICTY. Attitudes Toward Justice and Social Reconstruction, supra note 3, at 183, 192-95, 200.

23. A Common Objective, A Universe of Alternatives, supra note 22, at 323.

24. Id.

25. Id. at 323-34.

26. See Violence and Social Repair, supra note 5.

occur at the individual level.<sup>27</sup> The components of the social system are linked and changes to any one part will reverberate throughout. Those engaged in fixing one dimension must be aware that their actions will have impacts—intended and unintended—in other dimensions. For example, as we have seen, initiating war crimes prosecutions during a war will impact peace negotiations.<sup>28</sup> It is important that those engaged in social reconstruction understand their work does not take place in isolation, but rather is part of a larger, dynamic framework of activities.

The ecological model does not prescribe a one-size-fits-all set of policies or interventions. Rather, it requires a contextual approach to social repair that incorporates common features of the individual's experience of mass violence:

[B]ecause each individual is uniquely situated vis-à-vis each component [of social reconstruction] and further, the needs for repair vary based on experience, no single intervention can aspire to address the needs of a diverse population. Thus, the process of social reconstruction must attend to restoration of basic security while at the same time building a consensus about historical record, punishing perpetrators, honoring the memory of the missing or dead, rebuilding infrastructure so as to enable commerce, and allowing communities to resurrect or build a framework for cooperation among the difference groups. Any single [objective] . . . must respond to the individual's relationship to the

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27. *Id.* at 623. In Sierra Leone, the simultaneous operation of a truth and reconciliation commission alongside a criminal tribunal appears to have proceeded successfully, and many anticipated procedural and institutional conflicts did not transpire. William A. Schabas, A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone, 15 *Crim. L. Forum* 3, 5-6 (2004) (arguing that despite tension between the two, the "real lesson" of the parallel existence of the accountability mechanisms is that courts and truth commission "can work productively together . . ."). Indeed contrary to expectations, perpetrators testified before the commission in spite of the risk they could be subject to prosecution by the court, suggesting that truth commissions do not necessarily thwart prosecutions. *Id.* at 30.

28. The indictments of Bosnian Serb leaders Radovan Karadzic and Ratko Mladic for genocide and crimes against humanity on July 25, 1995, fundamentally altered the manner in which political negotiations could occur as countries shied from meeting openly with indicted war criminals. Bass, *supra* note 9, at 229-31. Tribunals may also engender a backlash against international justice. For example, nationalist politicians in Croatia exploited the ICTY for political gain by portraying cooperation with the Tribunal as selling out national war heroes. Victor Peskin & Mieczysław P. Boduszyński, International Justice and Domestic Politics: Post-Tudjman Croatia and the International Criminal Tribunal for the Former Yugoslavia, 55 *Euro.-Asia Stud.* 1117 (2003).

violence, whether as victim, perpetrator, bystander, or rescuer.<sup>29</sup>

International criminal trials are one option among the variety of accountability mechanisms that may be employed to advance one component—justice—of social reconstruction. Domestic or hybrid tribunals, truth commissions, lustration programs, and reparations are additional options to be considered, perhaps in conjunction with international trials.<sup>30</sup>

Social reconstruction is a process and an outcome that takes place at multiple sites and under particular conditions. Human Rights Center researchers Eric Stover and Harvey Weinstein have elaborated the ecological model based on their complete study data. They suggest that social reconstruction should take into account the opinions and priorities of the affected population; takes place at varying rates across social sectors; should be implemented by authorities perceived as legitimate by the target audience; will be influenced by the political nature of past regimes (Communist, post-colonial, etc.); requires that all components of social reconstruction work in synergy; and must engage all levels of society—individual, community, society, and state.<sup>31</sup> In addition, the potential for and nature of social reconstruction will be impacted by the nature of the violence. For example, the challenges for social reconstruction are different in Rwanda, where Hutu and Tutsi continue to live side-by-side, than they are in Bosnia or Germany, where the targeted ethnic or national groups largely have been segregated or eliminated.

Moreover, the experience of the individual in mass atrocity must also guide the implementation of social reconstruction programs. In addition to the above features and conditions, Weinstein and I argued that comprehensive intervention to promote social reconstruction must address the individual's relation to social breakdown. We asserted that not only must the processes that led to mass violence be reversed, but the individual's experience of social breakdown also should be addressed. Thus, activities and programs to promote social

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29. Violence and Social Repair, *supra* note 5, at 625. The components of social reconstruction have been more recently articulated, with the benefit of all the research data, as comprising eight components: (1) security; (2) freedom of movement; (3) the rule of law; (4) access to accurate and unbiased information; (5) justice; (6) education for democracy; (7) economic development; and (8) cross-ethnic engagements. A Common Objective, A Universe of Alternatives, *supra* note 22, at 327-39.

30. For a recent review of the development and trends in accountability mechanisms, see Ivan Šimonović, Comment, Attitudes and Types of Reaction Toward Past War Crimes and Human Rights Abuses, 29 *Yale J. Int'l L.* 343 (2004).

31. A Common Objective, A Universe of Alternatives, *supra* note 22, at 325-27.

reconstruction should address three aspects of the relationship of the individual to mass violence. First, interventions must acknowledge the loss the individual experienced. Second, interventions should seek to restore a sense of mastery and control over one's life. Finally, efforts to promote social reconstruction should encourage acknowledgement by the individual of his or her relationship to the horrors.<sup>32</sup> The ability of any particular intervention to address the three features of an individual's experience of mass violence will vary. For example, economic development and restoration of livelihoods are components of social reconstruction, but these activities operate more to directly return to individuals a measure of control over their lives than to confront them with their relationship to mass violence—as perpetrators, victims, or bystanders. Criminal convictions punish wrongdoers, but do not seek to directly restore control to victims over their lives (though retribution may provide them a measure of relief). Each program will have particular objectives and emphases.

What the ecological model requires is that each initiative—whether to advance justice or another component—takes into account the panoply of programs operating at different levels to address social reconstruction and responds to the relationship of the individual to social breakdown. The primary contribution of trials is that they provide a measure of accountability for the violations committed. However, they are not equipped to accomplish all the work of social reconstruction. As this article suggests, international criminal trials are not designed to address the relationship of bystanders to mass violence, which raises important concerns for their ability to promote social reconstruction. Thus, accountability mechanisms must understand their limitations and work in tandem with other programs to further these broader social goals.<sup>33</sup> Scholars and researchers have begun to temper, or clarify, the expectations of the contribution of international trials to social reconstruction in light of concerns raised by the experiences of

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32. Violence and Social Repair, *supra* note 5, at 623.

33. For example, special measures to promote community level reconciliation are part of the Commission for Reception, Truth and Reconciliation in East Timor. Section 22-23, United Nations Transitional Administration in East Timor, Regulation No. 20001/10, UNTAET/Reg/2001/10 (July 13, 2001). Wrongdoers of non-serious crimes may submit a statement of their acts and will be required to perform "community reconciliation acts". *Id.* For a discussion of this program, see Fausto Belo Ximenes, The Unique Contribution of the Community-Based Reconciliation Process in East Timor, May 28, 2004, at <http://www.easttimor-reconciliation.org/jsmpReport-prk-summary.html>.

tribunals.<sup>34</sup> Yet the question remains: what can trials do—within their limits—to promote social repair?

### 3. Bystanders

The protagonists of international criminal trials are the accused and victims. Punishment and justice acknowledge the relationship of perpetrators and victims to the processes that lead to mass violence. Yet in the case of mass violence, there is another category implicated in the events, even if it is not an explicit focus of proceedings: bystanders. Mass violence relies on a social apparatus to execute its bloody aims. Political leaders count on a measure of popular support to achieve power (and even military dictatorships depend on a degree of cooperation from segments of civil society). Once mass killing starts, one scholar reviewing the literature on bystanders has concluded, "the majority will either willingly join the violence, or they will comply, submit, and remain passive when faced with brutality."<sup>35</sup> In other words, those who orchestrate mass violence are aided by the failure of spectators to intervene. In this context, "doing nothing" is "doing something"—bystanders are thus an integral part of the killing apparatus.

The Oxford English dictionary defines a bystander as: "a person who is present at an event or incident but does not take part."<sup>36</sup> In the context of mass violence, bystanders are those who did not participate in crimes, but neither did they intervene to stop the carnage. They may have been silent supporters or opponents of the political and military forces

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34. Commission on Human Rights, Promotion and Protection of Human Rights: Impunity, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher, 61st Sess., Agenda Item 17, para. 6, U.N. Doc. E/CN.4/2005/102 (2005) ("recent developments have strongly affirmed a central premise of the Principles—the need for a comprehensive approach towards combating impunity."); Commission on Human Rights, Promotion and Protection of Human Rights: Impunity, 60th Sess., Agenda Item 17, para. 10, U.N. Doc. E/CN.4/2004/88 (Feb. 27, 2004) ("An effective [anti-impunity] policy requires a multifaceted strategy, with each component playing a necessary but only partial role."); A Common Objective, A Universe of Alternatives, supra note 22, at 335. See Drumbl, supra note 14; Patricia M. Wald, supra note 17; Diane Amann, Assessing International Criminal Adjudication of Human Rights Atrocities, Third World Legal Stud. 169 (2000–2003); Payam Akhavan, The International Criminal Court in Context, supra note 14, at 721 (**book review IS IT NECESSARY TO INCLUDE "BOOK REVIEW" IN A SHORT FORM??**). Researchers have not yet developed a method to measure the various components of social reconstruction that we have identified (justice, democracy, economic prosperity and transformation). Further research in this area is needed to define these components sufficiently so that they may be measured and their relative contributions assessed.

35. Steven James Bartlett, The Pathology of Man: A Study of Human Evil 177 (2005).

36. Oxford English Dictionary.

that waged the war, but their role in the events is defined by their inaction and passivity.<sup>37</sup> As their country and community became engulfed in war, regardless of their private opinions about the political fissures, they remained onlookers, quiescent or acquiescent witnesses to the social breakdown of their communities. And when the political battles turned violent, they remained spectators who, by virtue of living in the country during the war, played a role in the terror and have a stake in their country's future.<sup>38</sup>

Bystanders play a role in the descent of their communities into violence. And they will inform the way their children, friends, and colleagues perceive the past. The choices bystanders make about how to remember what happened will shape the future of their communities. Bystanders can become guardians against a return to violence or they can throw their support behind efforts to destabilize peace. Bystanders are therefore a critical target of efforts to promote social reconstruction. Their relationship to trials—along with their engagement with the other components of social reconstruction—will facilitate or obstruct the goal of restoring social stability. Thus, a goal of rebuilding communities after conflict should be to promote bystanders as active participants in reforming social, economic, and political networks that support human rights and the rule of law.

#### 4. Bystanders and Trials

The ICTY experience illustrates how an international tribunal, the first president of which understood that part of its work was to advance broader social goals, shaped the institution and its rhetoric to meet these objectives. The history of the Tribunal also alerts us to the potential pitfalls of such efforts. The international community has adapted international accountability mechanisms to address some of these

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37. Bartlett summarized the bystander phenomenon as follows: "There exist two distinct and complementary ways in which most human beings react to mass killing once it starts: to join in the fray, or turn their heads the other way. Relatively few . . . resist mass killing. The majority will either willingly join in the violence, or they will comply, submit, and remain passive when faced by brutality. . . . It is often difficult to distinguish between simple passivity and silent complicity, since the behavioral manifestations of both attitudes are the same: inaction and absence of protest." Bartlett, supra note Error! Bookmark not defined., at 177.

38. The primary distinction between bystanders defined for this article and narrower, and perhaps more ambiguous categories of marginal participants who might be thought of as "bystanders" under tort law (i.e., those who are present when another is in distress)—war profiteers, low level public servants, informants—is that bystanders to mass violence did not play an active role in enabling or profiting from the violence and, equally important, did not oppose the wrongdoers.

pitfalls, which have emerged as these institutions seek to make their work relevant in the countries where the violence occurred. The development of hybrid tribunals in Cambodia, Sierra Leone, and East Timor addresses the perceptions of those in former Yugoslavia and Rwanda that the tribunals located in The Hague have little relevance to their struggle to rebuild communities.<sup>39</sup> And the new International Criminal Court provides for greater involvement by victims and witnesses to address popular perceptions that international tribunals have failed to prioritize the needs of these groups in the pursuit of justice. While these innovations are important and history will judge their success, less attention has been paid to how trials of international crimes respond to the relationship of bystanders to mass violence and how such trials can promote social reconstruction among this critical group.

Weinstein and I have argued that international criminal trials address the dimensions of an individual's relation to social breakdown. Violators are punished for their actions and those harmed receive acknowledgement of their loss and status as victims.<sup>40</sup> Trials may remove criminal leaders from power, thus enabling communities to reestablish control.<sup>41</sup> International criminal trials are powerful symbols that convey moral, social, as well as legal approbation of the guilty and the political objectives that drove them to commit their misdeeds.<sup>42</sup> These accountability mechanisms produce a record about the past that can generate acknowledgement among victims, perpetrators, and bystanders about their respective relationships to the violence. For bystanders, such self-reflection may be the first step toward reaching out to victims and apologizing privately or

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39. The Human Rights Center surveys in Bosnia and Herzegovina and Rwanda indicated that residents in those countries supported the idea of justice, but held negative views of the ad hoc tribunals. Attitudes Toward Justice and Social Reconstruction, *supra* note 3, at 193 (Serb and Croat respondents felt that the ICTY was biased against their national group); Connecting Justice to Human Experience, *supra* note 4, at 213 (showing 87% of those surveyed were not informed of the work of the tribunal). However, both ad hoc tribunals were created when security conditions in each country were thought to prevent safe operation of the tribunals and therefore required a location outside the region. For an assessment of the hybrid tribunals in Cambodia, Sierra Leone, and East Timor, see Suzannah Linton, Cambodia, East Timor and Sierra Leone: Experiments in International Justice, 12 *Crim. L. Forum* 185 (2001).

40. Violence and Social Repair, *supra* note 5, at 628.

41. *Id.* Akhavan reviews the effect of the arrest of indicted Croatian and Serbian war criminals on domestic politics and cautiously concludes that general public acceptance of the arrests supports the proposition that international trials are contributing to shifting cultural norms toward respect for rule of law. Akhavan, Beyond Impunity, *supra* note 16, at 13-22.

42. Legal scholar Diane Amann has argued that the expressive function of the law—to articulate societal values—justifies a preference for international over domestic prosecution of crimes against humanity and genocide. Diane Marie Amann, Group Mentality, Expressivism, and Genocide, 2 *Int'l Crim. L. Rev.* 93, 117-24 (2002).



publicly for the harm survivors suffered. Bystander acknowledgment may also generate support for collective forms of acknowledgment, such as public apologies, and buttress political will for systemic reforms that strengthen human rights protections and the rule of law. Yet this last assertion—that trials enable bystander acknowledgment—deserves closer investigation. Certainly the nature of the conflict will determine the number of bystanders and their relationship to the violence.<sup>43</sup> Taking into consideration the particular context of the violations and understanding that international accountability plays a limited role in achieving social reconstruction, this analysis focuses on how trials can enable bystander acknowledgment of their role in mass violence and how we can maximize their efficacy in this regard. Unfortunately, the law itself may unintentionally interfere with realizing this ambition. Why?

International criminal trials constrict the subject of the law's focus such as to render bystanders virtually invisible. The absence of bystanders as legal subjects has particular consequences for the impact of trials. One consequence is that trials create a paradox: trials of individuals are justified as debunking popular calls for collective accountability.<sup>44</sup> Yet the absence of bystanders in the jurisprudence may mean that individuals identify with the member of their national group who is a legal subject of the court—either victim or perpetrator. Where that person is the convicted wrongdoer, bystanders may understand perpetrators as the symbolic placeholder for “their” member group. Thus trials may inadvertently promote group thinking rather than reduce it.<sup>45</sup> If one aim of social reconstruction is to encourage bystanders to acknowledge their relationship to mass violence, how do trials help or hurt this process? Or, better stated, how do trials help and hurt? Because trials are an important component of a comprehensive response to mass violence, their limitations—in particular their potential to impede social reconstruction—should be identified so these questions may be addressed. The following section lays out the limits of law in addressing bystanders in order to frame

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43. Organized interethnic conflict in an integrated community produces a different dynamic than conflict between segregated populations. For example, the war in Bosnia and Herzegovina generated bystanders who watched or silently bore witness to the suffering of members of the targeted group living in their midst. In contrast, the Darfur conflict is prosecuted by Arab Janjaweed militia which attack African villages. In this situation, the entire village is under attack and the distinction between victim and bystander more likely is due to accident than inclination.

44. Cassese, supra note 13, at 6; Akhavan, Justice in the Hague, Peace in the Former Yugoslavia?, supra note 18, at 741-42; **Bass**, supra note 9, at 297-301.

45. See Judges Study, supra note 5, at 149.

further discussion of the symbolic implications of the enforcement of international criminal law.

### B. *The Law as an Incomplete Response to Bystanders*

Implicated in the violence by their passivity, it is not unreasonable to ask whether bystanders should pay a price for their inaction.<sup>46</sup> The conventional response is that it would violate fundamental principles of fairness to impose criminal liability on a group that is morally but not legally complicit. Legal philosophers and international criminal courts have advanced this approach and legal and procedural challenges to change this paradigm have not gained traction. The law's conception and application of culpability for war crimes is reviewed here to evaluate its potential to address bystanders. Next, the concern for institutional legitimacy and its impact on the ability for international accountability mechanisms to address bystanders are discussed. This section concludes with a review of the charge of crimes against humanity as a prelude to the case analysis.

#### 1. Liberal Legalism

Philosophers writing about mass violence have provided an influential theoretical lens through which to understand the legal relationship between bystanders and war crimes. Bystanders have "done" nothing and therefore fall outside the ambit of criminal sanctions. The law does not impose a duty to intervene to rescue or to prevent harm where doing so poses a risk to oneself. A duty of altruism does not require sacrifice of one's own welfare.<sup>47</sup> Similarly, German philosopher Karl Jaspers's

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46. Hannah Arendt observed in the context of Nazi Germany that the boundaries between categories of guilt, responsibility, and innocence are blurred: "There are many who share responsibility without any visible proof of guilt. There are many more who have become guilty without being in the least responsible. Among the responsible in a broader sense must be included all those who continued to be sympathetic to Hitler as long as it was possible, who aided his rise to power, and who applauded him in Germany . . . ." **Hannah Arendt, *Organized Guilt and Collective Responsibility, in Essays In Understanding, 1930-1954*, at 125 (1994).**

47. In general, Anglo-American common law jurisdictions do not sanction the failure of a Good Samaritan to aid another in danger, while continental systems criminalize such failures. **Joseph W. Glannon, *The Law of Torts: Examples and Explanations* 189 (1995).** The duty to rescue does not arise when intervention risks danger or serious injury to the rescuer; thus, this principle would not apply to mass violence. See *id.*; see also **Restatement (Second) of Torts** § 314 (1977) (no liability lies for failure to exercise reasonable care in aiding another where the intervener had no duty to act). In fact, Shklar points out that in Nazi Germany, "the absence of any moral leadership or guidance from the 'respectable' sections of society [made] it . . . perhaps, unreasonable to expect average persons to do anything but 'go along' with a political movement as all-pervasive and well-established as Nazism was in Germany." **Arendt, *supra* note 46, at 192.** Writing closer to the defeat of National Socialism, Hannah Arendt concluded that the nature of the administration of mass

categorical rejection of criminal liability for the collective guilt of the German people for the crimes of Nazis has been carried forward largely unquestioned by contemporary scholars and international lawyers who have accepted his basic assumption that legal sanction of bystanders or collectives is antithetical to liberal legalism.<sup>48</sup>

The principles of criminal law confine sanctions to individuals, based on evidence presented according to rules designed to ensure a fair process.<sup>49</sup> Philosopher Judith Shklar wrote: "The principle of legality—that there shall be no crime without law, and no punishment without a crime—is criminal justice."<sup>50</sup> Criminal trials are an expression of legalism, a term defined by Shklar to mean "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules."<sup>51</sup> In liberal states, this attitude assumes legal form through rules that locate the individual as the central unit of analysis for purposes of sanctioning violation of social norms. For purposes of this discussion, these concepts are conveyed through the term liberal legalism, which refers to the legal principles and values that privilege individual autonomy, individuate responsibility, and that are reflected in the criminal law of common law legal systems.

Jaspers assumed that any catalytic potential of trials to awaken a feeling of co-responsibility or contrition among bystanders for the crimes carried out in their name, while a desirable consequence of international criminal trials, is not a

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murder implicated everyone, rendering intervention suicidal: "[T]he only way in which we can identify an anti-Nazi is when the Nazis have hanged him. There is no other reliable token." *Id.* at 124.

48. While the ad hoc tribunals have utilized legal doctrines that sanction leaders and key actors for their role in mass atrocities—under theories such as joint criminal enterprise, command responsibility and conspiracy—these theories are a far cry from holding bystanders criminally liable for their role. See Drumbly, *supra* note 14. The need for a more direct legal response to bystanders is raised by historian Daniel Goldhagen's examination of the organization and conduct of military personnel involved in the Holocaust. He offers a sharp rebuke to explanations of the Nazi extermination of the Jews as having been driven by political elites deeply loyal to Hitler's anti-Semitic vision. See **Daniel Jonah Goldhagen, Hitler's Willing Executioners: Ordinary Germans and the Holocaust** (1996). Based on review of historical documents, Goldhagen argues that non-politicized, ordinary, soldiers willingly slaughtered and terrorized Jews. *Id.* at 450–54. His work raises the question of whether the symbolism of prosecuting the Nazi leadership made it easier for "ordinary Germans" to avoid introspection of the consequences of their own anti-Semitism.

49. Allison Marston Danner & Jenny S. Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 93 **Cal. L. Rev.** 75, 82–85 (2005).

50. Judith Shklar, **Legalism** 152 (1964).

51. *Id.* at 1.

goal that should be taken into consideration in the judicial process. Jaspers strove to keep the two spheres of bystander and perpetrator guilt separate, distinguishing them legally, politically, and morally. Jaspers argued that although German bystanders during the Nazi era did not have criminal guilt, they did have moral and metaphysical guilt. Moral guilt attaches to those who, during the Nazi terror, "went right on with their activities, undisturbed in their social life and amusements, as if nothing had happened."<sup>52</sup> Metaphysical guilt springs from the intangible interconnection of all human beings that makes "each co-responsible for every wrong and every injustice in the world, especially for crimes committed in his presence or with his knowledge."<sup>53</sup>

Jaspers asserted that criminal trials of the few did not relieve the metaphysical guilt of the many, but that the individual must wrestle with his or her conscience about the individual's actions during the conflict. He saw it as an advantage that the Nuremberg trials addressed the Nazi leadership and did not put the German people on trial.<sup>54</sup> He believed that acknowledgment by individuals of the role that he or she played in enabling atrocities was an ongoing process, one which was essentially separate and isolated from public trials of political and military leaders.<sup>55</sup> Jaspers argued that internal reflection could lead to social reconstruction through a collective project of "renewing human existence," which the German people faced as a consequence of having been brought "face to face with nothingness" through the monstrous atrocities perpetrated in their name.<sup>56</sup>

Early advocates of the ICTY echoed Jaspers's sentiments and thereby framed the public vision for what that body should accomplish. Antonio Cassese, as president of the Tribunal, argued that among the advantages of international criminal trials in the context of the Balkan conflict was that they

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52. **Karl Jaspers, The Question of German Guilt** 73-74 (E.B. Ashton trans., Dial Press 1947).

53. Id. at 32.

54. Id. at 51-52.

55. Id. at 43-45.

56. Id. at 81, 120. Arendt and Jaspers corresponded in the post-war years about the nature of co-responsibility in the German context. Arendt argued that co-responsibility of the German people for the Holocaust should take the form of a political response, such as the right to German nationality for all Jews, wherever born. Jaspers rejected this idea, emphasizing that co-responsibility is primarily a moral orientation. He believed co-responsibility might lead to political action, but that was analytically a separate category. He lamented that postwar Germany lacked sufficient moral movement to produce political support for such proposals. **Hannah Arendt-Karl Jaspers: Correspondence** 1926-1969, at 53, 62 (Lotte Kohler et al. eds., Robert Kimber et al. trans., 1992).

establish "individual responsibility over collective assignation of guilt" and provide a record to educate future generations about the past.<sup>57</sup> In general, commentators writing about the potential contribution of the ICTY in the first several years after it was established assume that those living in the region will understand the formal legal distinction between individual criminal liability and collective guilt as Judge Cassese and other advocates intend. Through a simplified understanding of attitude formation, Cassese assumes that once relieved of collective sanction and freed of criminal leaders, bystanders will undergo internal reflection, reject the political goals that led to violence, and embrace a future with their former enemies. Though not made as explicit as Jaspers's, Cassese's theory of the self-reflection bystanders would undertake in response to trials is consistent with the justifications tribunal supporters offer for the ICTY and international criminal justice mechanisms.<sup>58</sup>

On the other hand, Cassese did not address Jaspers's insight that trials also trigger a defensive rejection of accountability. Jaspers theorized that because the Nuremberg trials aimed at the Nazi leadership, the German public understood that the moral legitimacy of the German state was on trial: "A criminal state is charged against its whole population. Thus the citizen feels the treatment of his leaders as his own, even if they are criminals. In their persons the people are also condemned. Thus the indignity and mortification experienced by the leaders of the state are felt by the people as their own indignity and mortification."<sup>59</sup> Although Jaspers's assertions were largely based on theory, the recent Human Rights Center study lends support to his claim that the association of leaders and civil society creates resistances to trials from bystanders that hinder the political project of social regeneration. Human Rights Center data suggest that the role international criminal trials can play to promote bystander acknowledgment of the atrocities committed in their name is limited by a number of factors, including the dominance of nationalist political parties in postwar Bosnia and Herzegovina. A study of Bosnian judges and prosecutors carried out by the Human Rights Center found that individuals from all national groups define their national group, and by extension themselves, as victims in the conflict, and dismiss trial records that

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57. Cassese, supra note 13, at 6 (emphasis in original).

58. **Stover & Peress**, supra note 18, at 138; **Ignatieff**, supra note 13, at 178; Akhavan, Justice in the Hague, Peace in the Former Yugoslavia?, supra note 18, at 741-42; **Bass**, supra note 9, at 297-301.

59. **Jaspers**, supra note 52, at 52.

contradict this "truth."<sup>60</sup> However, the possibility of attitudes changing over time highlights the importance of monitoring popular perceptions of accountability proceedings.<sup>61</sup>

Legal philosophy and empirical data on popular perceptions of the ICTY suggest that the link between individual retribution and social reconstruction presents a challenge to legalism's response to mass violence. The paradox of international criminal trials for mass violence is that the purported benefit of excluding bystanders from legal liability takes away a potent tool for encouraging social regeneration. There is no organized mechanism for bystanders to confront and acknowledge the ways in which their inaction or passive participation contributed to the atrocities conducted in their name. And international justice tribunals are not well suited to directly address bystander responsibility. This limitation indicates the importance of other mechanisms, such as truth commissions, to promote social reconstruction, but also draws attention to the need to question whether tribunals themselves can do more to mitigate the effects of this paradox.

One problem tribunals face in this regard is that justice institutions are constrained from greater legal engagement with these issues. The insights of Judith Shklar are apt here. She observed that a shortcoming of the ability of the Nuremberg trials to promote social values was the ideology of legalism that guided the political decision to put the Nazi leadership on trial:

The great paradox revealed here is that legalism as an ideology is too inflexible to recognize the enormous potentialities of legalism as a creative policy, but exhausts itself in intoning traditional pieties and principles which are incapable of realization. This is, of course, the perennial character of ideologies. It should not, however, in this case, lead one to forget the greatness of legalism as an ethos when it expresses itself in the characteristic institutions of the law.<sup>62</sup>

While Shklar thought the trials made a political contribution to postwar German reconstruction, this effect was

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60. Judges Study, supra note 5, at 147-49.

61. See Attitudes Toward Justice and Social Reconstruction, supra note 3, at 187-91 (social distance between ethnic groups showed some change over two year period of 2000-2002).

62. shklar, supra note 50, at 112.

fairly narrow, if significant—i.e. to “reinforce dormant legal consciousness” among the country’s political and bureaucratic classes.<sup>63</sup> Yet this Article argues that bystanders, not just those elite members of communities, deserve attention and are already an undefined target of the broader benefits that international criminal trials are thought to bestow. However, to the extent that ICTY judges and former judges have expressed their support for the contribution that trials can make to promoting broader goals, their motivations have not resulted in a change within the courtroom.<sup>64</sup> They have adhered to the conventional operation of legalism as an ideology.

And reform of the way judges conduct proceedings to more directly address the role of bystanders is unlikely to succeed. One proposed solution to counteract the narrow focus of accountability proceedings is offered by legal scholar Mark Osiel. Osiel extends Shklar’s insights about legalism and suggests that judges should exploit the dramatic potential of trials to produce a collective memory about the past and forge a new national consensus. His proposal requires judges to act with this goal in mind in admitting evidence, adjudicating rules of procedure, and applying the rules of professional responsibility.<sup>65</sup> As Osiel notes, his approach requires judges to act in ways generally thought of as beyond their professional capacities.<sup>66</sup> And, while his proposal is directed to national judges, there is even greater reason to assume that international law judges would greet a similar call with great suspicion and reluctance. Undermined in the early years by lack of resources, and dependent on regional cooperation and NATO forces to arrest indicted defendants and collect evidence, the ICTY has struggled to establish its institutional legitimacy. The Tribunal’s authority—particularly within the international community—depends on its ability to justify its role as acting as a court with respect to traditional understandings of the role of courts in enforcing rules.<sup>67</sup> The more expansive use of

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63. Id. at 156. “The Trial, addressing itself to the political and legal elite, gave that elite a demonstration of the meaning and value of legalistic politics, not only by offering a decent model of a trial, a great legalistic drama, but by presenting evidence in a way that the political elite could not shrug off.” Id. at 169.

64. The ICTY and other international accountability mechanisms have sought to extend the influence of their proceedings into the impacted communities through outreach programs. The limits of this model are taken up infra Part IV.B.3.

65. **Mark Osiel, Mass Atrocity, Collective Memory, and the Law** 3 (2000).

66. Id. at 3–4.

67. A World Unto Itself, supra note 6, at 55; **Goldstone**, supra note 17, at 123 (noting that the greatest success of the ad hoc tribunals has been “the acceptance today that an international court is able to dispense justice—that a fair trial before such a tribunal is possible.”)

the courtroom to tell a drama does not fit well within this traditional conception of its mandate. Perhaps as tribunals increase their institutional capacity, they will produce a cadre of trained international judges with the expertise in managing lengthy, complex trials necessary for increasing the dramaturgic quality of their proceedings. However, given the demands on judges to apply international criminal law with diligent attention to procedural fairness, in the near future we should look elsewhere to overcome the limits of liberal legalism.

## 2. Theories of Legal Liability

Procedural reforms are unlikely to increase juridical attention to bystanders, therefore a review of the options under international criminal law to hold bystanders accountable is in order. International criminal law offers some possibilities for sanctioning individuals for mass violence in situations in which they did not commit the offence. However, these doctrines prove inapplicable to punish the behavior of bystanders.

The ICTY has interpreted Article 7(1)<sup>68</sup> of its Statute, which establishes individual liability for the substantive offenses, to encompass a theory of joint criminal enterprise. An individual may be held liable under the theory of joint criminal enterprise for all substantive crimes covered in the Statute committed as part of a common plan, so long as the defendant participated in the common plan.<sup>69</sup> Individuals also may be held liable under accessorial theories of aiding and abetting in which the defendant is secondarily liable; someone other than the defendant was the principal who committed the act.<sup>70</sup> The distinction between liability for joint criminal enterprise and accessory liability is that joint criminal enterprise is a theory of liability, while aiding and abetting a

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68. ICTY Statute, *supra* note 1, art. 7(1).

69. The ICTY first recognized this theory in the *Tadic* case. Through subsequent application the joint criminal enterprise theory has assumed a more defined shape. The ICTY has developed three "types" or theories of this doctrine. The first type requires that perpetrators act according to a common plan and share a common criminal intent. The second type developed to respond to liability of concentration camp guards in World War II and requires not that defendants have a formal agreement, but that they act to further a system of repression. The third category imposes liability for acts outside the common plan where the defendant intended to participate in the plan and the consequence was foreseeable. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶¶ 196-204 (July 15, 1999). For a fuller explication of this theory and its drawbacks see Danner & Martinez, *supra* note 49; Shane Darcy, *An Effective Measure of Bringing Justice?: The Joint Criminal Enterprise Doctrine of the International Criminal Tribunal for the Former Yugoslavia*, 20 *Am. U. Int'l L. Rev.* 153 (2004); E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* 41-114 (2003).

70. *See* *Prosecutor v. Kordić*, Case No. IT-95-14/2, Judgment, ¶ 373 (Feb. 26, 2001).



crime is considered contribution to the principal crime and therefore is punishable as a substantive crime.<sup>71</sup> However, assuming that criminal sanction of bystanders is desirable (e.g. as a symbol to underscore the ways in which bystanders support mass violence), these theories of liability do not extend to them. Aiders and abettors must have participated in the offense to a degree such that their actions had "substantial effect" on the commission of the crime.<sup>72</sup> Those who witnessed or lived through mass violence may have had the requisite mens rea-intending for the killing to occur or knowing that the atrocities would take place—but they did not commit the requisite actus reus for joint criminal enterprise liability to attach or to be considered an aider or abettor.<sup>73</sup> Bystanders are defined in part by their distance from the violence. And bystanders, unlike military commanders, had no duty to take reasonable steps to prevent violations.<sup>74</sup> International criminal law does not sanction those who are neither leaders nor followers who carry out mass atrocities, yet who by virtue of their membership in communities convulsed by violence are implicated in the past and invested in the future.<sup>75</sup>

Legal scholar Mark Drumbl responds to the juridical limits of international criminal law by proposing a new form of legal sanction to punish bystander complicity. Drumbl accepts Jaspers's conclusions that moral and metaphysical guilt should not be criminalized, but rejects the idea that "such individuals are blameless, or that they ought to be considered as blameless, or that they are entitled to the law's intervening in a manner that pronounces their innocence. Trying the most notorious should not ineluctably lead to absolving the rest."<sup>76</sup> If law

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71. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 296 (Dec. 10, 1998); **van Sliedregt**, supra note 69, at 64.

72. **Guénaël Mettraux, International Crimes and the Ad Hoc Tribunals** 284 (2005).

73. For example, the ICTY case law has defined the mens rea required for commission of crimes against humanity, a crime that implicates bystanders, as knowledge by the defendant that his or her act is part of a widespread or systematic attack on a civilian population. **van Sliedregt**, supra note 69, at 49. As will be discussed in Part III, infra, community members living through the attack and its aftermath did not commit "acts" that would fall within the legal ambit of furtherance of the attack, but were merely going about their lives.

74. Under the doctrine of command responsibility, military or civilian leaders may be held criminally liable for the criminal acts of their subordinates. For a recent discussion of the development and current ad hoc jurisprudence on this doctrine, see Danner & Martinez, supra note 49, at 120-31.

75. Furthermore, imposing criminal liability on bystanders in the Bosnian war would be a new crime not contemplated by the Statute and therefore would violate the principle of nullum crimen sine lege.

76. Drumbl, supra note 14, at 573. Drumbl argues: "[There is] a middle ground between collective guilt and collective innocence. I call this middle ground collective responsibility. . . . But this does not mean that collective responsibility is incapable of sanction. Trials focus on guilt, innocence, blame, and

sanctions behavior and passes over that of bystanders, the law implicitly confers on them legal, if not moral innocence. Drumbl proposes a form of collective sanction on communities which generated the leadership for mass violence as a way to transform bystanders from passive spectators to a potential social force for restraining conflict in the first instance.<sup>77</sup> Sanctions could assume many forms, including economic sanctions or trade restrictions against the state or group that initiated the violence, embargoes, taxes, travel restrictions, and imposition of restorative, commemorative, or reparative measures on the guilty collective in favor of the victims.<sup>78</sup>

Drumbl makes the important point that even if bystanders are not criminally liable, law should not be enforced in ways that promote a myth of collective innocence. This leads to the question of what is possible within the existing legal and institutional parameters. Drumbl's proposal, like Osiel's, requires expansion of the operation of law. Despite the unprecedented growth in international criminal law since the early 1990s, there is no clearly enforceable norm that contemplates the legal innovations Drumbl proposes. Nor is it clear whether sanctions or other direct forms of action that stigmatize or shame collectives will promote trust and build communities of former enemies.<sup>79</sup> This article proposes a more modest approach of evaluating whether the ICTY and other international criminal tribunals, operating within their current mandates, can act in ways that will, at a minimum, not promote a myth of collective innocence, and maximally, will provide a legal legacy that enables interventions to engage bystanders.

### *C. Adjudication of Atrocities*

Research in the Balkans suggests that the capability of accountability mechanisms to contribute to the public education

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desert. Law and politics, however, also offer other mechanisms to collectivize accountability on all members of perpetrator groups for the benefit of all members of victim groups. These include disgorging the benefits of group violence, compelling community service, redistributing wealth, lustration, subjecting conflict groups to international administration, and traditional forms of state responsibility such as embargoes and trade restrictions. These types of sanctions might also serve a preventative role." *Id.* at 576-77. He continues: "Since the criminal law does not reach acquiescent group members, they have little incentive to cabin the behavior of conflict entrepreneurs or their reactions thereto. Group members therefore become unaccountable beneficiaries of the violence instead of potential gatekeepers." *Id.* at 577.

77. *Id.* at 577.

78. Mark A. Drumbl, *Pluralizing International Criminal Justice*, 103 *Mich. L. Rev.* (forthcoming) (book review).

79. Weinstein & Stover, *Introduction*, in *My Neighbor, My Enemy*, *supra* note 3, at 10-20.

of bystanders about the past will depend in part on the perceived legitimacy of the institution among the targeted populace.<sup>80</sup> This draws our attention to what legal scholar Robert Post refers to as "questions of legitimation and identity" for these judicial edifices.<sup>81</sup> Legal philosophers and theorists have addressed the question of the legitimacy of international law from several perspectives. The analytic positivists like John Austin assumed that there was no such thing as international law because law depended on "an edict of a sovereign with power to enforce that law."<sup>82</sup> Other legal philosophers, like H.L.A. Hart, found international law did not require an enforcement mechanism to justify its existence.<sup>83</sup> International legal scholar Louis Henkin similarly adopts a functional view and asserts that international law exists despite the lack of formal governmental structures because it is generally complied with, disputes are resolved, and through this process law is developed.<sup>84</sup>

Yet Henkin's reliance on international politics to produce the normative values that guide the development and application of international law<sup>85</sup> raises questions about transparency,

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80. A Common Objective, A Universe of Alternatives, *supra* note 22, at 326.

81. Post considers the ability of international accountability mechanisms like the ad hoc tribunals for former Yugoslavia and Rwanda and the ICC to enforce legal norms that are not generated by an identifiable legislative process that reflects the normative will of the people. Consequently, Post observes: "Without democratic warrant, it is almost as if the law and its institutions are expected to rest on their own formal authority. But exactly what is the nature of that authority?" Robert Post, The Challenge of Globalization to American Public Law Scholarship, 2 Theoretical Inquiries L. 323, 329 (2001).

82. Louis Henkin, International Law: Politics and Values 3 (1995) (citing John Austin, The Province of Jurisprudence Determined 1-33 (Legal Classics Library 1985)).

83. H.L.A. Hart, The Concept of Law 6-13 (1961). Hart accepted the Austinian principle that law was "a system of order backed up by threats"—the paradigmatic conception of criminal law—but introduced the concept that substantive norms were integral to a legal system. He observed that rules among states serve to regulate conduct, provide for standards which states may invoke to demand compliance and justify countermeasures and reprisals. He defended the existence of international law by pointing to the evidence of state behavior invoking and utilizing the system of rules despite the absence of a centralized authority capable of imposing sanctions. Id. at 219, 235, 334-35.

84. Henkin, *supra* note 82, at 3-4.

85. Henkin unapologetically embraces the political character of international law, acknowledging that it is the product of "political actors, through political procedures, for political ends." Id. at 4. He resolves the question of the legitimacy of this system by analogy to domestic political systems, reasoning that just as domestic legal systems are the products of domestic societies, international law is the product of the international political system. Id. Fair enough. But then he proceeds to answer the question of what values the system is designed to promote by grafting the principles of legitimation of domestic legal systems onto the international legal order. He assumes the values of domestic democracies are the same as those expressed by the international legal system: "to establish and maintain order and enhance the reliability of expectations; to protect 'persons,' their property and

majoritarianism, and cultural relativism, to say the least.<sup>86</sup> In the case of the ICTY, the Tribunal derives its authority from a Security Council-approved statute. The genesis of the Tribunal contributes to how it is perceived by those in the Balkans. Research regarding attitudes among Bosnian legal professionals indicates that this important constituency views the Tribunal as the creation and imposition of the political will of the international community.<sup>87</sup> While some welcomed such intervention—primarily members of national groups victimized in the conflict—members of national groups in whose name armed forces committed mass atrocities pointed to the political process that created the Tribunal to delegitimize its legal judgments.<sup>88</sup> Although the Tribunal may defend its authority by reference to its statute, its critics within the countries of the former Yugoslavia likely will not be quieted completely by a formalist defense. And the political distance between the ICC

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other interests.” Id. However, his argument does not address the question of the values that should guide the policy choices inherent in protecting these interests, the issue that Robert Post raises. See supra note 81.

86. As Benedict Kingsbury observed with regard to the argument that the existing international legal system is preferable to other options, presumably unrestrained international politics, less attention is paid to the question of whose interests are served by the present system: “[T]here is no neutral international legal system: its structure, its functioning, and its conceptions are for the benefit of some groups and interests in preference to others, and what is needed is an international politics of international law in which these struggles are explicit.” Kingsbury, supra note 14, at 692.

87. Judges Study, supra note 5; Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, U.N. GAOR, 54th Sess., Agenda Items 142-43, para. 9, U.N. Doc. A/54/634 (1999); First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia Since 1991, U.N. GAOR, 49th Sess., Agenda Item 152, paras. 44-49, U.N. Doc. A/49/342-S/1994/1007 (1994) [hereinafter First Annual Report].

88. Judges Study, supra note 5, at 136-40. Political polarization in the aftermath of mass violence may make international accountability mechanisms an easy target for attack. A qualitative study of attitudes toward intercommunity relations carried out in Vukovar, Croatia and Mostar and Prijedor, Bosnia and Herzegovina over two years found that many felt that criticism of the Tribunal was the “most socially acceptable option.” Participants personalized international trials of members of their national group and felt “their group” was being adjudicated in the Hague. To support such trials meant rejecting their national group identity or accepting at least some social or political form of collective responsibility. Thus, criticizing the Tribunal became the safe alternative. Corkalo et al., Neighbors Again? Intercommunity Relations After Ethnic Cleansing, in My Neighbor, My Enemy, supra 7, at 148. The quantitative study in the three cities also found that Croats and Serbs strongly believed that the Tribunal was biased against them. Attitudes Toward Justice and Social Reconstruction, supra note 3, at 193. See also Connecting Justice to Human Experience, supra note 4, at 222-23 (survey data in Rwanda show stronger support for domestic and gacaca trials than for trials conducted by the ICTR).

and bystander communities impacted by its judgments likely will also present challenges for the legitimacy of this court.<sup>89</sup>

The debate regarding the legitimacy of international justice institutions like the ICTY should not necessarily lead to an uncritical defense of positivism<sup>90</sup> as a means of bolstering the credibility of these tribunals. We should take note of the ways in which the contested nature of this inquiry impacts the efficacy of these mechanisms. For example, we may accept that the norm prohibiting crimes against humanity is the expression of an "ethos of humanity"<sup>91</sup>—a universal condemnation of grave violations of human dignity. This reaction finds an emotional, moral, and legal expression in a criminal tribunal adjudicating individuals responsible for such crimes. Thus, while individuals may accept the norm in the abstract, in the aftermath of violence there will not be consensus about whether a particular incident is or is not a crime against humanity. Certainly the armed forces committing atrocities do not accept they are violating norms, but instead commonly deny their actions or defend them on grounds of self-defense or other justifications. Thus we inevitably confront the challenges to the legality of international institutions that enforce these norms. Where there are bound to be disagreements about who should be held accountable for mass suffering, what makes the court's determination legitimate?

The ICTY has grappled with negative public opinion in the Balkans. In 1999, the Tribunal's president, Gabrielle Kirk McDonald, took initiative to confront concerns regarding how the court was perceived in the region by creating the Outreach Programme.<sup>92</sup> She acted on a report from the ICTY that many residents in the Balkans viewed the court as politically biased, found its work unrelated to their concerns, and knew very little

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89. Locating accountability mechanisms in the international arena introduces a "foreign" institution, and regardless of whether a tribunal is created by the U.N. Security Council or a multilateral treaty, these tribunals face enormous challenges to address the priorities of local communities.

90. Such a defense is consistent with strict legal positivism that holds that states are bound to uphold the international norms to which they have given explicit consent. For a discussion of the various strands of legal positivism and their relationship to international criminal law see **M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW** 103-18 (2d ed. 1999).

91. David Luban, *A Theory of Crimes Against Humanity*, 29 **Yale J. Int'l L.** 85, 90 (2004).

92. Sixth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, U.N. GAOR, 54th Sess., Agenda Item 53, paras. 146-50, U.N. Doc. A/54/187-S/1999/846 (1999) [hereinafter Sixth Annual Report].

of its operations.<sup>93</sup> Research conducted at the same time supported these observations and found that among legal professionals in Bosnia and Herzegovina, views of the ICTY divided largely along national lines, with Bosnian Serbs viewing the court most negatively and perceiving it as irrelevant to processes of social repair.<sup>94</sup> The Tribunal's diagnosis of the lack of support relied on its assumption that holding perpetrators accountable would promote reconciliation in the region.<sup>95</sup> Consequently, the Tribunal interpreted the lack of

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93. Id. para. 148.

94. See Judges Study, supra note 5.

95. See First Annual Report, supra note 87, paras. 11-15 (ICTY will contribute to peace because "[t]he only civilised alternative to this desire for revenge is to render justice: to conduct a fair trial by a truly independent and impartial tribunal and to punish those found guilty."); Second Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, U.N. GAOR, 50th Sess., para. 199, U.N. Doc. A/50/365-S/1995/728 (1995) ("If the Tribunal can prove to the world that it is possible to administer international criminal justice, that it is imperative for legal and moral reasons and practical to do so, it will have performed a great service for the development of international law. It will also send a message to the victims of appalling crimes that humanity will not turn its back on them.") [hereinafter Second Annual Report]; Third Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, U.N. GAOR, 51st Sess., Agenda Item 50, para. 5, U.N. Doc. A/51/292-S/1996/665 (1996) ("The Tribunal was established by the Security Council to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia and thus, by bringing an end to impunity, to contribute to the restoration of peace and security.") [hereinafter Third Annual Report]; Fourth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, U.N. GAOR, 52d Sess., Agenda Item 49, para. 4, U.N. Doc. A/52/375-S/1997/729 (1997) (In creating the Tribunal the UN Security counsel was "convinced that its creation would contribute to the restoration and maintenance of peace.") [hereinafter Fourth Annual Report]; Fifth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, U.N. GAOR, 53d Sess., Agenda Item 48, para. 5, U.N. Doc. A/53/219-S/1998/737 (1998) (ICTY mandate is to prosecute persons responsible for serious violations of international humanitarian law . . . with a view that . . . their perpetrators be brought to justice and that peace be restored and maintained.) [hereinafter Fifth Annual Report]; Sixth Annual Report, supra note 92, para. 212 ("[T]he Tribunal plays an important role in maintaining international peace and security in the former Yugoslavia, by assisting with the establishment of civil society, under the rule of law, which is necessary to bring about lasting peace."); Seventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, U.N. GAOR, 55th Sess., Agenda Item 52, para. 201, U.N. Doc. A/55/273-S/2000/777 (2000) (The "Tribunal's overall credibility as a mature legal body whose prosecutorial activities, judicial achievements and moral impact are in line with its mandate and historic mission.") [hereinafter Seventh Annual Report]; Eighth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, U.N. GAOR, 56th Sess., Agenda Item 61, para. 280, U.N. Doc. A/56/352-S/2001/865 (2001) (Tribunal reforms "will enable the International Tribunal to make a more effective contribution to the restoration and maintenance of peace in

support among residents primarily as a problem of a lack of information about the court.<sup>96</sup>

Popular support for the work of the Tribunal is necessary to consolidate the opportunity for social transformation that trials offer.<sup>97</sup> The ICTY response was to disseminate information about the Tribunal to domestic audiences, including legal

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the Balkans.") [hereinafter Eighth Annual Report]; Ninth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, U.N. GAOR 57th Sess., Agenda Item 45, para. 327, U.N. Doc. A/57/379-S/2002/985 (2002) ("The International Tribunal cannot perform alone the work of justice and memory required for rebuilding a national identity.") [hereinafter Ninth Annual Report]; Tenth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, U.N. GAOR, 58th Sess., Agenda Item 55, para. 348, U.N. Doc. A/58/297-S/2003/829 (2003) ("[T]rials have sent a powerful message that only through justice can all the peoples of former Yugoslavia achieve reconciliation and create thriving societies.") [hereinafter Tenth Annual Report]; Eleventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, U.N. GAOR, 59th Sess., Agenda Item 52, para. 320, U.N. Doc. A/59/215-S/2004/627 (2004) (A conference sponsored by Outreach Programme in the region "highlighted the need for the Tribunal better to explain at a grass-roots level its method of operations, its decisions and what facts have been proved beyond a reasonable doubt in order to promote local visibility of justice served, prevent revisionism and foster reconciliation.") [hereinafter Eleventh Annual Report].

96. The ICTR adopted a similar model of outreach which primarily aims to inform the public about how the tribunal functions as a legal institution of individual accountability. The outreach program for the Rwandan tribunal is first mentioned in its sixth annual report and its activities are described as disseminating information about the Tribunal's proceedings through radio programming, an information center in Kigali, and training for Rwandan judges. Sixth Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1991, U.N. GAOR, 56th Sess., Agenda Item 62, paras. 142-47, U.N. Doc. A/56/351-S/2001/863 (2001). The outreach program for the Special Court for Sierra Leone appears to aim for deeper engagement with the public than the ad hoc tribunals. The program began as a part of the Office of the Prosecutor but in 2003 became an independent office with a mission to "foster[] an environment of two-way communication between Sierra Leoneans and the Special Court, which is has implemented through town hall meetings with various sectors, including the army." First Annual Report of the President of the Special Court for Sierra Leone: for the Period 2 December 2002-1 December 2003, 26, at <http://www.sc-sl.org/specialcourtannualreport2002-2003.pdf>; see also **Lawyers Comm. for Human Rights, Effective Public Outreach for the International Criminal Court**, (Jan. 2004), at [http://www.humanrightsfirst.org/international\\_justice/icc/outreach\\_brief\\_paper\\_011404.pdf](http://www.humanrightsfirst.org/international_justice/icc/outreach_brief_paper_011404.pdf) (noting that the Special Court sought to avoid the mistakes of the ad hoc tribunals and made "public outreach a priority"); see discussion *infra* § IV.B.3(a).

97. Former ICTY President Judge Gabrielle Kirk McDonald expressed the importance of outreach to the success of the Tribunal: "If judgments issued hundreds of miles from the scene of the conflict by an international court are to have an effect on the community, that community must understand and appreciate the work of the Tribunal." Judge Gabrielle Kirk McDonald, The 2000 Goodwin Seminar Article & Essay: The International Criminal Tribunals: Crime and Punishment in the International Arena, 7 **ILSA J. Int'l & Comp. L.** 667, 684 (2001).

professionals.<sup>98</sup> Accordingly, the model for the Outreach Programme expressed Shklar's "ideology of legalism:" the program assumed that citizens would be more supportive of the court if they understood how the court worked as an adjudicative body. Education about the structure and operation of the court might respond to criticism that the Tribunal was a political rather than legal institution. But this type of outreach does not directly answer concerns that the Tribunal is irrelevant to the rebuilding of communities. The Tribunal's response did not counter the defensive rejection among bystanders of trials of "their" national group. Individual accountability does not automatically lead to rejection of perpetrators by bystanders. The challenges that trials may pose for social reconstruction should not cause us to abandon accountability as a partial response to mass violence, but instead should make us attentive to the need for tribunals applying international criminal law to act in ways that contribute to the social and political acceptance of these accountability mechanisms within bystander communities. The next section lays the foundation for exploring proposals to do so by reviewing an international crime that implicates bystanders: crimes against humanity.

*D. The Crime Against Humanity as a Framework for  
Adjudicating the Role of the Bystanders*

Crimes against humanity, as the name implies, purport to reflect universal norms sanctioning severe forms of abuse. While the concept predated World War II, allied drafters of the Nuremberg Charter included crimes of humanity as a substantive offense in the document and Nazi leaders were the first ever to stand trial for this offense.<sup>99</sup> As legal philosopher David Luban writes, crimes against humanity reflect two distinct normative claims:

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98. Sixth Annual Report, *supra* note 92, para. 150 ("The Tribunal is now establishing a program dedicated to explaining its work and addressing the effects of misperceptions and misinformation"). For the next two years, the program reported that its primary activities were to provide copies of key documents and judgments of the court in the local languages, as well as to develop a website targeted to local audiences with broadcasts of court sessions. Seventh Annual Report, *supra* note 95, paras. 214-15. In 2002, the Court reported that a group of ICTY judges traveled to the region and met with "prominent political and judicial figures" to "improve [the ICTY judges'] knowledge of the national legal systems and to indicate their support for the Tribunal's Outreach Programme.") Ninth Annual Report, *supra* note 95, para. 46.

99. Crimes against humanity were first codified in Article (c) of the Nuremberg Charter as: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country were perpetrated." Nuremberg Trial Proceedings, Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. See generally Bassiouni, *supra* note 95.



First, the phrase 'crimes against humanity' suggests offenses that aggrieve not only the victims and their own communities, but all human beings, regardless of their community. Second, the phrase suggests that these offenses cut deep, violating the core humanity that we all share and that distinguishes us from other natural beings.<sup>100</sup>

In addition to the universal value enshrined in the norm, the legal elements of the crime—notably the requirement that the violations be of a widespread or systematic nature—infuse a collective dimension to the offense which makes it suitable for an examination of the potential for trials to address bystanders.<sup>101</sup>

As the case study in the next section is drawn from the ICTY, the definition of crimes against humanity provided in that statute serves as the basis for this discussion. Article 5 of the ICTY Statute defines crimes against humanity and establishes that the Tribunal will have the power to prosecute:

persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;

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100. Luban, *supra* note 91, at 86. "[T]he acts constituting crimes against humanity will generally be those characterized by the directness and gravity of their assault upon the human person, both corporeal and spiritual." **Steven R. Ratner & Jason S. Abrams, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy** 69 (2001).

101. Genocide, defined as the commission of particular act(s) "with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such," is also an international crime that addresses collective violence. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. II, 78 U.N.T.S. 277. The offense has been referred to as "the crime of crimes." Diane Marie Amann, *Identification, in Encyclopedia of Genocide and Crimes Against Humanity* 483 (Dinah L. Shelton ed., 2005). However its legal requirements render it less favorable to engage bystanders regarding their relationship to the violence than crimes against humanity. To convict an accused of genocide, the acts must be capable of destroying a collective in whole or in part, while destruction of a group is not required for acts to constitute crimes against humanity. Thus, for purposes of exploring the relationship of bystanders to mass violence, crimes against humanity encompasses more types of criminal behavior and, coupled with the wide or systematic element, presents relatively greater opportunities for international judges to address the role of bystanders.

- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.<sup>102</sup>

The general requirements, or chapeau elements, of the crime are: (1) an "attack," (2) which is linked to the acts of the accused, (3) directed against a civilian population, (4) widespread or systematic, (5) and which the accused committed with the requisite intent.<sup>103</sup> In addition to satisfying the general requirements, the acts must fit into one of the specific crimes listed in article 5(a-i).<sup>104</sup>

Thus, crimes against humanity implicate collectives in ways that are important for bystanders. The general requirements demand that the acts be directed toward a civilian population. For this offense, a population is defined by common social or other characteristics that render it a target.<sup>105</sup> Further, the criminal behavior must be part of a "widespread or systematic" attack. Widespread connotes the scale of the crime and may mean

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102. ICTY Statute, supra note 1, art. 5.

103. For a fuller discussion of the elements of crimes against humanity of the ad hoc tribunals and their development, see Mettraux, supra note 72.

104. There is a rich literature on international crimes and crimes against humanity that will not be plumbed here. See Bassiouni, supra note 90; Geoffrey Robertson Q.C., Crimes Against Humanity: The Struggle for Global Justice (1999) (A comprehensive survey of the development of crimes against humanity); Luban, supra note 91 (explaining that crimes against humanity represent an affront to humans as political animals who need to live in groups); James Bohman, Punishment as a Political Obligation: Crimes Against Humanity and the Enforceable Right to Membership, 5 Buff. Crim. L. Rev. 551 (2002) (describing how enforcing crimes against humanity establishes the political basis for citizens to influence political terms of cooperation and redress wrongs); Darryl Robinson, Developments in International Criminal Law: Defining "Crimes Against Humanity" at the Rome Conference, 93 Am. J. Int'l L. 43 (1999) (arguing that the policy element added to the definition of crime against humanity in Article 7 of the ICC Statute); Beth Van Schaack, The Definition of Crimes Against Humanity: Resolving the Incoherence, 37 Colum. J. Transnat'l L. 787 (1999) (tracing the evolution of crimes against humanity with particular focus on the war nexus requirement).

105. Prosecutor v. Kunarac, Case No. IT-96-23, Judgment, ¶ 423 (Feb. 22, 2001); see also Mettraux, supra note 72, at 166. A small group that is attacked may be considered a "population" if the particular incident is related to the widespread or systematic nature of the overall attack. For example, where the inmates of a detention center are targeted for abuse as part of a larger campaign, they may be considered a "population." See Prosecutor v. Kunarac, supra.

a perpetrator acted against a large number of victims in a single incident, or the attack was widespread because of the cumulative effects of a number of incidents.<sup>106</sup> The systematic nature of the attack refers to an attack that occurs as part of an organized plan to commit violence on a collective. As one international lawyer has commented, the "widespread" and "systematic" aspects of crimes against humanity overlap: "A widespread attack targeting a large number of victims generally reflects patterns of similar abuses and often relies on some form of planning or organization. A systematic attack frequently has the potential, purpose, or effect of reaching many people."<sup>107</sup>

This element therefore captures the descriptive similarity and violent distinctions between perpetrators, bystanders, and victims. Bystanders and victims are both "innocent" civilians legally protected from abuse and but for the criminal attack, would be—juridically-speaking—part of a collective. An attack by perpetrators cleaves this collective into bystanders and victims.<sup>108</sup> Attacks of perpetrators, widespread or systematic, are of a severe nature against a targeted collective. Wrongdoers target their victims based on shared characteristics rather than on any unique attributes; conversely, perpetrators spare bystanders because they do not share the characteristic that marks victims. Particularly when the substantive offense is persecution, crimes against humanity legally instantiate the division of the community along the ethnic, political, or national group lines defined by the perpetrators' criminal motives.<sup>109</sup>

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106. Prosecutor v. Blaskic, Case No. IT-95-14, Judgment, ¶ 206 (Mar. 3, 2000); see **Mettraux**, *supra* note 72, at 171.

107. **Mettraux**, *supra* note 72, at 171 (citations omitted).

108. The distinction between bystanders and victims may have greater relevance for social reconstruction depending on the local conditions of the attack. For example bystanders and victims may not necessarily reside in the same community for purposes of a legal analysis. Where an entire village is targeted, all residents may be considered victims. Nevertheless, within the larger collective—a region or nation—the differentiation may hold true and thus efforts at social reconstruction should be directed toward engaging bystanders, even where the bystanders did not live in a targeted community. And perhaps under these conditions such engagement will be more important since residents may have fewer ties to the victim group, yet their ability to empathize with those who suffered will be critical to their support for new social arrangements to promote tolerance and respect for human rights. See generally Jodi Halpern & Harvey M. Weinstein, Empathy & Rehumanization After Mass Violence, in My Neighbor, My Enemy *supra* note 3, 303, at 303–22.

109. The legal distinction between targeted groups and those who were 'safe' may distort the reality. In an ethnically integrated community, attacks singling out a particular ethnic group may affect entire families formed through mixed marriages. Similarly, a member of the same ethnic group as the perpetrators may be singled out for attack where that person is suspected of protecting the targeted group. **Mettraux**, *supra* note 72, at 167.

Of relevance to this discussion is the definition of the substantive crime of persecution as a crime against humanity. The ICTY has defined persecution as "the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in article 5."<sup>110</sup> Thus, persecution may consist of crimes listed in article 5 (murder, torture, rape, etc.), or may include unlawful arrest and detention, interrogations, beatings, and forced labor.<sup>111</sup> These persecution-type crimes include a discriminatory intent element; prosecutors have to prove that perpetrators target their victims based on their group membership—political, racial, or religious in the case of the former Yugoslavia. One ICTY Trial Chamber has held that the persecution mens rea requirement constitutes a heightened standard, "which consists of removing individuals from the society in which they live alongside the perpetrators, or eventually from humanity itself."<sup>112</sup>

Crimes against humanity represent some of the worst aspects of social breakdown. Bystanders live through and are affected by the disintegration of communal ties that generate crimes against humanity and yet are not a subject of the law's response to the horrors. The question is whether international tribunals can support or initiate a process through which bystanders confront and acknowledge their role in the atrocities that were committed in their name.<sup>113</sup>

The following Part analyzes Prosecutor v. Simić et al., a case from the ICTY, to explore how the law may help and hurt this process of acknowledgment. Prosecutor v. Simić et al., the prosecution of the highest ranking civilian leader for crimes against humanity, is selected for scrutiny for several reasons. First, trials of civilians rather than military and paramilitary personnel appear to offer a better vehicle to measure the law's ability to further the aims of social reconstruction among

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110. Prosecutor v. Kupreskic et al., Case No. IT-95-16, Judgment, ¶ 621 (Jan. 14, 2000). Persecutory acts may take many forms and include not only physical deprivations, but economic or judicial deprivations that violate an individual's fundamental human rights. Prosecutor v. Tadic, Case No. IT-94-1, Opinion and Judgment, ¶ 710 (May 7, 1997).

111. Simić, supra note 8, ¶ 48.

112. Guénaél Mettraux, Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, 43 Harv. Int'l L.J. 237, 295 (citing Prosecutor v. Kordić, Case No. IT-95-14/2, Judgment, ¶¶ 211-20 (Feb. 26, 2001)).

113. Ironically, Antonio Cassese, the former president of the ICTY, noted that one of the disadvantages of international criminal trials was that they are often protracted because elements of the crime, like crimes against humanity, require that courts consider "the historical or social context of the crime." Antonio Cassese, International Law 270 (2001).

bystanders. Combatants have taken up arms and are prepared to engage in violence. Formal control over armed fighters lies outside civil lines of authority. Military operations are not necessarily witnessed by civilians. Thus, the social and political distance between civilians and combatants renders it easier for bystanders to distinguish "them" from "us." In theory, the more direct association between civilian leaders and the civilian population offers the possibility that bystanders may draw more direct analogies from these defendants to their own behavior and relationship to the violence.<sup>114</sup> Second, and similarly, criminal charges of crimes against humanity—that include elements that implicate evidence of violence beyond the acts of the accused—may present bystanders with a glimpse of themselves through the rubric of international criminal law.

This article focuses on a single judgment from the ICTY. Certainly, the judgment and its factual discussion are specific to the defendants and events in a particular area of Bosnia and Herzegovina. And the nature of the conflict in the Balkans may limit the application of conclusions drawn from this case to other conflicts, in which perpetrators attack entire communities and there are no meaningful divisions between bystanders and victims. The Trial Chamber's treatment of bystanders is not necessarily representative of the jurisprudence of the ICTY. However, because international criminal law does not sanction bystanders, the ability of judgments to address their role is circumscribed in ways that are unlikely, in the aggregate, to generate substantial variation in how the case law treats this group. This analysis of a case—selected for its potential relevance to bystanders—alerts us to some of the limits of the application of international criminal law to promote social reconstruction to which international justice institutions—as well as other institutions involved in social reconstruction—need to attend.

### III. The *SIMIĆ* Case

#### A. *Simić's Serb Crisis Staff Takes Over in Bosanski Šamac*

The events in Bosanski Šamac, Bosnia and Herzegovina, depict in many important ways the unfolding of the 1992–1995 war in that country. Bosnian Serb armed forces, supported by

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114. Empirical research is needed to further differentiate the reactions of bystanders—silent and complicit—to trials. One challenge for conducting this work would be to design a study that would minimize possible selection bias (participation of those who identify as silent rather than complicit bystanders) and the possibility that informants who supported forces that committed atrocities would not be candid in their views.

paramilitary groups, conducted violent cleansing operations to implement the political goals of Bosnian Serb leaders to create a Greater Serbia, populated by ethnic Serbs. At the end of 1994, Serb forces controlled 70% of the territory of the Bosnian Republic.<sup>115</sup> Through the negotiations at the end of the war, the Bosnian Serbs received 49% of the territory.<sup>116</sup> Carrying out its mandate to prosecute individuals responsible for "serious violations of international humanitarian law committed in the territory of former Yugoslavia,"<sup>117</sup> the ICTY Prosecutor primarily has convicted ethnic Serb defendants of crimes against humanity and genocide.<sup>118</sup>

The Simić case concerns the takeover of and subsequent events in and around the municipality of Bosanski Šamac, in northeastern Bosnia and Herzegovina.<sup>119</sup> The town lies on the banks of the Bosna and Sava Rivers, on the border with Croatia, and is an important transport center for goods between the two republics.<sup>120</sup> Before the conflict, those identifying as Serbs (41.3%) and Croats (44.7%) comprised the two major national groups in the municipality, with a small number identifying as Muslim (6.8%) and Other (7.2%).<sup>121</sup> The area was also one of strategic importance, as it was part of the "Posavina Corridor"—a narrow strip of land that connected the Serb-controlled areas within Croatia to those controlled by Bosnian Serb forces in the east and the Republic of Serbia.<sup>122</sup>

The social breakdown in Bosanski Šamac mirrored on a smaller scale the political and social disintegration throughout the country. National elections in Bosnia and Herzegovina in 1990 saw the three dominant political parties, organized around national group identity, winning most of the seats: the Croatian Democratic Party (HDZ) representing Croats, the Serbian Democratic Party (SDS) promoting Serb interests, and Party of Democratic Action (SDA) associated with Bosnian Muslims.<sup>123</sup> The SDS established a separate national assembly to represent Serb

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115. U.S. Dep't of State, *Bosnia and Herzegovina Country Report on Human Rights Practices for 1994* (1995).

116. U.S. Dep't of State, *Bosnia and Herzegovina Country Report on Human Rights Practices for 1996* (1997).

117. ICTY Statute, *supra* note 1, art. 2.

118. Based on a review of Tribunal Annual Reports, *supra* notes 87, 92, and 95, and case reports on the website of the Tribunal, <http://www.icty.org> (last visited Apr. 9, 2005), the Prosecutor has secured convictions for crimes against humanity against 56 individuals, of which 44 are ethnic Serbs (from either Bosnia or Serbia) and 12 are ethnic Croats (from Bosnia or Croatia).

119. Simić, *supra* note 8, ¶ 178.

120. Id. ¶ 174

121. Id. ¶ 175

122. Id.

123. Id. ¶ 166.

interests, and worked to organize separate political, and eventually military, institutions to advocate for Bosnian Serbs.<sup>124</sup> The SDS boycotted a government referendum on independence held on February 29, 1992.<sup>125</sup> The Bosnian government ratified the affirmative vote by declaring independence on March 3, 1992.<sup>126</sup> Fighting broke out in Sarajevo on the heels of international recognition of the new state in early April.<sup>127</sup>

In Bosanski Šamac, the Trial Chamber described a similar centripetal momentum toward political polarization that led inexorably to the takeover of the town.<sup>128</sup> At the local level, the three national parties won a plurality of seats in the municipal assembly in the 1990 elections.<sup>129</sup> Prior to the takeover, Bosnian Serb leaders had established political institutions "for the purpose of assuming power and consolidating Serb authority" in Bosanski Šamac.<sup>130</sup> The local SDS initiative led to the establishment of a parallel civil administration for Bosnian Serbs in the area.<sup>131</sup> The regional body was directed by Blagoje Simić, a 32-year old physician and president of the local SDS. Simić formed the "Serb Crisis Staff"<sup>132</sup> that assumed political control of the area after the takeover.<sup>133</sup>

Simić served in this capacity after the end of the conflict. UN police stationed in the area were well aware that Simić remained in charge. In an interview with a foreign journalist in November 1996, from his town hall office, Simić remarked that he was "not uncatchable" and attributed his freedom to the fact that President Bill Clinton had not yet

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124. Id. ¶¶ 168–72. The opinion traces the devolution of national unity through a referendum organized by the Serbian Democratic Party (SDS) asking Serbs whether they wanted an independent Bosnian state. The Bosnian Serb participants voted against the referendum. Based on the voting results, the SDS established a self-proclaimed "Serbian Republic of Bosnia and Herzegovina" which later became Republika Srpska.

125. Id. ¶ 171.

126. Id.

127. Id. The European Community formally recognized Bosnian independence on April 6, 1992, followed the next day by recognition from the United States.

128. The court explicitly inscribes events in the municipality as a recapitulation of the national drama: "The political situation in Bosanski Šamac in the period of 1990 to 1992 was a reflection, at the local level, of the general political situation in Bosnia and Herzegovina." Id. ¶ 176.

129. Id. ¶ 176.

130. Id. ¶ 379.

131. Id. ¶ 177.

132. This body was later renamed "War Presidency of the Serbian Municipality of Bosanski Samac."

133. Id. ¶ 385.

ordered him arrested.<sup>134</sup> Later Simić went to Serbia and, although born a Bosnian Serb, acquired Yugoslav citizenship. On March 12, 2001, Simić was the first Yugoslav citizen indicted by the ICTY to voluntarily surrender to the Tribunal.<sup>135</sup> His surrender came on the heels of increased pressure on the recently elected Serb prime minister, Zoran Djindjic, to cooperate with the ICTY.<sup>136</sup> Simić faced trial with two co-defendants, subordinates of his within the civil authority.<sup>137</sup>

Social breakdown among national groups in the area began in earnest in the fall of 1991.<sup>138</sup> The level and frequency of the violent events (which the Trial Chamber describes as "tensions") increased and included sabotage of public and private property, bombings, and shootings.<sup>139</sup> Defense witnesses explained that "a gradual separation and segregation started to set in where, for example, Muslims and Croats would each group together according to ethnic or national affiliations in cafes, schools, enterprises, sporting events and each group increasingly supported its own national party."<sup>140</sup> Against this backdrop of the entrenchment of social and political life along national lines, the court traces the organization of armed forces which cast Croats and Muslims on one side<sup>141</sup> against Serbs on the other. The national military—the Yugoslav Peoples' Army—under the control of the President of rump Yugoslavia, Slobodan

134. Elizabeth Neuffer, Indicted Serb Town Official 'Not Uncatchable', **Boston Globe**, Nov. 1, 1996, at A1.

135. Vesna Peric Zimonjic & Stephen Castle, Mayor Accused of Bosnian War Crimes Surrenders to Hague Tribunal, **The Indep.**, Mar. 13, 2001, at 12.

136. Steven Erlanger, Bosnian Serb Surrenders to Hague Tribunal, **N.Y. Times**, Mar. 13, 2001, at A8. Serb officials denied they had intervened in the matter. Id. However, the Serbian government had to meet a March 31st deadline for certification by the United States that it was cooperating with the ICTY in order to prevent a cut-off of U.S. financial assistance. Id.

137. The Tribunal indicted Simić, with five others, for events that occurred in the municipality. At the time of his surrender, his co-defendants already were in the Hague (one defendant, Slobodan Miljokvic, had been killed in Serbia). Law of War & Victims, Int'l Enforcement L. Rep. (May 2001). Three co-defendants - Milan Simic, Miroslav Tadic, and Simo Zaric - had surrendered to the Tribunal in February 1998. Inst. for War & Peace Reporting, Tribunal Update No. 213 (2001), at [http://www.iwpr.net/index.pl?archive/tri/tri\\_213\\_4\\_eng.txt](http://www.iwpr.net/index.pl?archive/tri/tri_213_4_eng.txt). A fourth, the police chief, Stevan Todorovic, had already pled guilty in December 2000 for his role in the ethnic cleansing operations, and was awaiting sentencing. Zimonjic & Castle, supra note 135.

138. Simić, supra note 8, ¶¶ 182-83.

139. Id. ¶ 183.

140. Id. ¶ 190.

141. Beginning in 1992, armed groups organized along national groups became visible with the municipality. National soldiers, the remnants of the Yugoslavian army (JNA) primarily Serbs, patrolled areas inhabited by Serbs, while Croat and Bosnian Muslim residents formed separate defense units. Id. ¶¶ 243-46. Following international recognition of an independent state, the municipal assembly—with the participation of all three national parties—formed a local Territorial Defense (TO) to protect the town. Id. ¶¶ 260-65.



Milosevic, prepared to defend Bosanski Šamac by organizing local military forces into a group known as the 4<sup>th</sup> Detachment.<sup>142</sup> The purpose of the unit, comprised predominantly—but not exclusively—of Serbs, was to defend the area against attack, should the war in neighboring Croatia spill over the border.<sup>143</sup> Paramilitary forces from Serbia entered the area days before the takeover, joined with Serb police on the morning of April 17, and through force asserted control of the city.<sup>144</sup>

The attack by Serb paramilitaries began in the early hours of April 17.<sup>145</sup> Guided by members of local Bosnian Serb defense forces, paramilitaries easily seized control of key buildings including the post office, police station, and radio station.<sup>146</sup> The day of the takeover, Simić was appointed President of the Crisis Staff and became the highest-ranking civilian in the municipality.<sup>147</sup> Within a few days the Serb forces established control over most of the area.<sup>148</sup>

Within a month of the takeover, the Crisis Staff issued a series of orders restricting the rights of civilians. The civilian authority banned all political parties and activities,<sup>149</sup> imposed a curfew,<sup>150</sup> required that civilians obtain a permit to enter or leave Bosanski Šamac, and enforced this system at checkpoints established throughout the area.<sup>151</sup> In addition, the Crisis Staff restricted the consumption of alcohol and use of fuel.<sup>152</sup>

The Trial Chamber judges acknowledged that life during the war became harder for Serbs and non-Serbs in Bosanski Šamac;

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142. Id. ¶¶ 194, 201.

143. Id. ¶ 203. In fact, in the days leading up to the takeover, Bosnian Serb authorities believed that an attack from Croatia was imminent. Id. ¶ 444.

144. Id. ¶¶ 442–43.

145. Id. ¶¶ 398–99.

146. Id. ¶ 442.

147. Id. ¶¶ 386, 390.

148. Id. ¶ 455.

149. Id. ¶¶ 465, 507.

150. Id. ¶ 471.

151. Id. ¶¶ 474–75.

152. Id. ¶ 512. The prosecution offered evidence of orders to hold Croats in “vital facilities” in the town and villages and mandates that Muslims and Croats wear white armbands. Id. ¶¶ 461, 478. Witnesses also testified that phone lines to non-Serbs had been cut. Id. ¶ 487. Despite this evidence, the Trial Chamber judges found that most of the restrictions applied equally to Bosnian Serb and non-Serb civilians. They found the evidence inconclusive regarding some of the more egregious allegations, including that the Crisis Staff ordered civilians of Croatian nationality to be “isolated and taken to vital facilities.” Id. ¶¶ 461, 505. The Trial Chamber determined that the Crisis Staff violated the rights of non-Serbs to their heritage and discriminated against them by declaring the date of the takeover a holiday and changing the symbols of the town and street names, but found that none of these order were sufficiently serious to constitute persecution. Id. ¶ 516.

shelling of the town damaged infrastructure and basic necessities like water and electricity were in short supply.<sup>153</sup> But if life for bystanders was difficult, life for scores of non-Serbs became a living hell. Serb members of the local police and Serb paramilitaries conducted large scale arrests of hundreds of non-Serbs after the takeover and continuing through December 1992.<sup>154</sup> In response to the escape of non-Serb men from the area, Serb police and military went house to house in late June and arrested the families of those who had fled.<sup>155</sup> Women, children and the elderly were forced onto military trucks and taken to the neighboring town of Crkvina.<sup>156</sup>

Those arrested were held in various municipal buildings that were converted to detention facilities. Detainees were held in the municipal police station (Secretariat of the Interior, or SUP), the Territorial Defense building headquarters (TO) as well as elementary and high schools.<sup>157</sup> Non-Serb victims testified—for the prosecution and for defendants—they did not know the reason for their arrest.<sup>158</sup> The length of detention varied. Some were held for a day and released, although authorities required them to report to SUP multiple times a day.<sup>159</sup> Others fared much worse. Paramilitary guards stripped prisoners of their personal possessions and valuables<sup>160</sup> and threatened relatives of those detained that they would kill their loved ones if the family did not pay the guards large sums of money.<sup>161</sup> Authorities kept prisoners in overcrowded conditions and deprived them of food, water, and medical attention.<sup>162</sup> Guards tormented prisoners verbally by forcing detainees to sing “Chetnik” songs, and Serb jailors called prisoners “ustasha” or “balija”—derogatory terms for Croats and Muslims.<sup>163</sup>

Members of Serb paramilitary groups and local police frequently beat detainees with a variety of crude instruments including metal bars, baseball bats, metal chains, and chair legs.<sup>164</sup> One victim testified that a guard directed three other guards to beat him, each taking turns striking his head. The opinion described his testimony: “He fell down and tried to

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153. Id. ¶ 513.

154. Id. ¶¶ 654–55.

155. Id. ¶ 656.

156. Id.

157. Id. ¶ 661.

158. Id. ¶ 526.

159. Id. ¶ 535.

160. Id. ¶ 847.

161. Id. ¶ 848.

162. Id. ¶ 774.

163. Id. ¶ 773.

164. Id. ¶ 770.

protect his head. As he crouched down, he received a blow to his spine from the kick of an army boot. This caused his hands to open up from covering his face, and he was then kicked in the face.”<sup>165</sup> As he lay prostrate from the blows, the guard directing the attack jumped on his left hand and broke some of his fingers.<sup>166</sup>

The Crisis Staff established a forced labor system in the aftermath of the takeover. Non-Serbs who managed to avoid arrest or detention were not exempt from deprivation. Several prominent non-Serbs received work assignments designed to publicly humiliate them.<sup>167</sup> For example, the non-Serb former chief of police was taken prisoner and forced in detention “to clean a room in front of two detained Bosnian women.”<sup>168</sup> The former heads of large commercial institutions were forced publicly to perform menial labor at the sites of the establishments they formerly directed.<sup>169</sup> Private industry benefited from forced labor, though not all businesses accepted such assistance. A representative of a refinery outside the area turned down an offer of forced laborers from defendant Zarić with a reprimand to the Bosnian Serb official that he “should be ‘careful of what he was doing so that he would not be ashamed of himself later.’”<sup>170</sup>

Testimony from witnesses evoked scenes of Bosnian Serb civilians, military, and civil officials looting and plundering from non-Serbs willy-nilly. Victims testified that they were evicted from their homes and all their personal property—cars, appliances, jewelry—was taken.<sup>171</sup> Authorities rounded up and arrested a group of Croat women and children from the town market.<sup>172</sup> Prosecution witnesses described how authorities ordered them to loot the homes of Croats and Muslims.<sup>173</sup> Witnesses testified that non-Serb business owners had their

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165. Id. ¶ 704.

166. Id.

167. Shortly after the takeover, the Crisis Staff instituted a forced labor program that continued into the fall of 1992. Id. ¶ 778. Civil authorities assigned male and female civilians to perform a variety of tasks from harvesting crops, chopping wood, and other agricultural assignments, to repairing and maintaining the public water and power supplies. Id. ¶¶ 785-86. Non-Serbs were forced to work on the front lines, digging trenches and providing logistical support. Id. ¶¶ 779-84.

168. Id. ¶ 790.

169. The former managing director of the local office of Jugobank and a director of the textile factory—both Bosniaks— were forced to sweep the streets around the bank and the ground of the factory, respectively. Id. ¶ 790.

170. Id. ¶ 828.

171. Id. ¶ 843.

172. See id. ¶ 556.

173. Id. ¶ 791. Witnesses described their feeling of humiliation at being forced to loot the home of former mentors and neighbors. Id. ¶¶ 791-92.

businesses stripped from them and given to new Serb owners.<sup>174</sup> Paramilitaries, members of the Bosnian Serb defense forces, police, and Serb civilians plundered non-Serb property, carting off furniture, appliances, farm equipment, and commercial goods.<sup>175</sup> Some looting was organized through civilian authorities, and victims worked alongside Serb soldiers and private citizens to load goods onto Bosnian Serb army trucks and trucks bearing logos of state-owned businesses.<sup>176</sup>

Authorities in Bosanski Šamac organized "exchanges" of non-Serb civilians and detainees held in the municipality to Croatia and other parts of Bosnia and Herzegovina. A dozen exchanges occurred between July 1992 and December 1993.<sup>177</sup> The non-Serbs who left the area as a result of this process included prisoners and civilians who were not detained but subjected to forced labor and other restrictions.<sup>178</sup> Victims testified that they did not want to leave their homes, but felt that they had no choice. Ibrahim Salkić, held at a detention center in Bosanski Šamac,<sup>179</sup> explained that being exchanged was not "voluntary"—it was his only hope to save his life: "[I]t would not be fitting to ask somebody whether they wanted [to be exchanged] or not. It was the only way to save my head.<sup>180</sup> Hundreds of non-Serbs were deported or forcibly transferred in this manner.<sup>181</sup>

#### B. *Judgment Convicting Simić*

Simić and his co-defendants, Miroslav Tadić (responsible for prisoner exchanges) and Simo Zarić (in charge of security and a local commander in the Bosnian Serb army), were charged with crimes against humanity for persecution on political, racial or religious grounds against non-Serb civilians. Specifically, the indictment charged defendants with crimes against humanity for the forcible takeover of cities; unlawful arrest and detention of civilians; cruel and inhumane treatment including beatings and torture; forced labor; deportation and forcible transfer; and plundering and looting in the Municipality of Bosanski Šamac, neighboring Odžak, and elsewhere.<sup>182</sup> The indictment additionally charged Simić, as the

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174. Id. ¶ 846.

175. Id. ¶¶ 873, 874.

176. Id. ¶ 851.

177. Id. ¶¶ 878–900.

178. Id. ¶¶ 887–91.

179. Id. ¶ 552.

180. Id. ¶ 888.

181. Id. ¶ 980.

182. Id. ¶ 8.

highest-ranking civilian authority, with committing crimes against humanity by issuing orders that violated fundamental rights of non-Serb civilians.<sup>183</sup>

The Trial Chamber found that the general requirements of the crime against humanity had been met. The Trial Chamber found that the civilian population of Bosanski Šamac was under attack from the April 17 takeover through December 31, 1993.<sup>184</sup> The attack occurred during a state of armed conflict within the country and there was the requisite relationship between the armed conflict and the acts of defendants.<sup>185</sup> The attack was both widespread and systematic, and followed with persecution of non-Serbs.<sup>186</sup> Further, the court held that the defendants were aware of and their actions were part of the armed attack against non-Serbs.<sup>187</sup>

Turning to the individual defendants and the specific charges against them, the Trial Chamber found that Simić was a participant along with members of the Serb police, paramilitaries, and the JNA contingent in a "basic form" of joint criminal enterprise to persecute non-Serbs in Bosanski Šamac municipality.<sup>188</sup> The judges found sufficient evidence that Blagoje Simić was "at the apex" of the joint criminal enterprise in the municipality. The Trial Chamber singled out Simić for approbation as the highest civilian authority who used his power to discriminate against non-Serbs living in his jurisdiction.<sup>189</sup> In addition, the Trial Chamber found Simić individually criminally responsible as a member of the enterprise for the crimes against humanity that were carried out through persecutory acts against non-Serbs, specifically their unlawful arrest and detention;<sup>190</sup> cruel and inhumane treatment in detention facilities;<sup>191</sup> forced labor assignments;<sup>192</sup> and deportation and forcible transfer.<sup>193</sup> The Trial Chamber

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183. Id. ¶ 9.

184. Id. ¶ 978.

185. Id.

186. Id. ¶ 979.

187. Id. ¶¶ 981-82.

188. Id. ¶ 983-84. The court only considered the "basic" joint criminal enterprise theory, finding that the prosecution did not plead sufficiently detailed facts to put defendants on notice of any other theory of joint criminal liability.

189. Id. ¶ 992.

190. Id. ¶ 997.

191. Id. ¶ 1010.

192. Id. ¶ 1022.

193. Id. ¶ 1038. The court dismissed some charges, finding that forcible takeover was not, standing alone, a crime against humanity. Id. ¶ 456. The judges also found insufficient evidence of criminal intent to find Simić or his co-accused liable for plunder. Id. ¶ 1027.

sentenced him to seventeen years.<sup>194</sup> Simić has appealed the judgment, which is pending.

Simić's co-defendants played lesser roles in the administration of the persecutory plan, and the Trial Chamber found them liable as aiders and abettors for a narrower number of the specific types of persecution utilized by the common plan. Judges convicted Mirolsav Tadić of crimes against humanity for persecution for his role in organizing the deportation and forcible transfers of non-Serbs from the area and sentenced him to eight years.<sup>195</sup> Judges convicted Simo Zarić, a commander in the local Bosnian Serb armed forces responsible for intelligence, of persecution as a crime against humanity based on cruel and inhumane treatment of non-Serb prisoners in detention facilities<sup>196</sup> and imposed a six year sentence.<sup>197</sup>

*C. Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm*

Judge Per-Johan Lindholm issued a separate opinion, in which he dissents in part. His views are relevant to the case analysis in two ways. First, he offered an ambiguous reference to the role of bystanders. Second, his interpretation of the varying levels of responsibility of Simić's co-defendants is a good example of the type of individual differentiation among defendants that courts are able to provide, but which accountability and other mechanisms of social reconstruction are unable to issue to individual bystanders.

Lindholm agreed with the majority that the defendants "acted in concert together" to further a plan to takeover the town.<sup>198</sup> However, Lindholm disagreed that defendants carried out this plan with persecutory intent against non-Serbs. He cited the evidence of increasing tension among the primary national groups in the area beginning in the fall of 1991, which escalated with the mobilization of Croatian forces across the river and Bosniak (Bosnian Muslim) forces within the town.<sup>199</sup> Lindholm viewed Serbs in the area as having had a reasonable fear of attack from forces in Croatia which justified the launch

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194. Id. ¶ 1118.

195. Id. ¶¶ 1119-22.

196. Id. ¶ 1123.

197. Id. ¶ 1126.

198. Prosecutor v. Simić et al., Case No. IT-95-9-T, Judgment, Separate Opinion of Judge Per-Johan Lindholm, ¶¶ 4, 7 (Oct. 17, 2003) [hereinafter Separate Simić Opinion].

199. Id. ¶ 8.

of a preemptive strike to "avoid[. . . inter-ethnic bloodshed or even bloodbath."<sup>200</sup> Persecution against non-Serbs did occur, but Lindholm found this was not a result of defendants' plan, but was the result of events going "out of control due to the activities of a number of criminals who opened the sluice-gate to evil, which thereafter was willingly accepted and used by maliciously and easily-led people."<sup>201</sup>

Turning to the individual defendants, Lindholm found that Simić was aware of but did not participate in the persecutory acts committed against non-Serbs—unlawful arrests and detention, cruel and inhumane treatment, forced labor, and deportation and forcible transfer. The judge found that with the exception of deportation and forcible transfer, Simić did not share the criminal intent of the perpetrators to commit these acts.<sup>202</sup> Lindholm found the defendant criminally liable for these acts because he failed his duty "as the highest-ranking civilian official" in the area to protect the non-Serbs living in his jurisdiction.<sup>203</sup> Lindholm disagreed with the seventeen year sentence imposed by the majority, finding instead that principles of proportionality militated in favor of a lesser sentence. The judge pointed out that a former codefendant, Stevan Todorović, the Chief of Police of the municipality during the events, was perhaps "the main architect of the terror regime," pled guilty for his role, and only received a ten year sentence.<sup>204</sup> Accordingly, Lindholm recommended a seven year sentence for Simić.

With regard to Miroslav Tadić, Lindholm agreed with the majority in deciding to convict the defendant due to his substantial contribution to the deportation of non-Serbs.<sup>205</sup> However, Lindholm found that the defendant carried out the deportations in a situation of duress<sup>206</sup>—his transfer of non-Serbs out of town saved these victims from worse treatment in detention centers<sup>207</sup>—and therefore Lindholm reasoned that Tadić was not guilty. As for Simo Zarić, Lindholm joins with the

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200. Id. ¶ 9.

201. Id.

202. Id. ¶ 11. With regard to deportation and forced transfer, Lindholm found that the Bosnian Serb leader shared the persecutory intent of those who carried out these acts, and his failure to prevent these acts made him guilty as a co-perpetrator of deportations as a crime against humanity. Id. ¶ 12

203. Id. ¶10.

204. Id. ¶ 39 (emphasis in original). Todorović pleaded guilty to persecutions including beatings and murder, sexual assaults, ordering of torture, interrogation and forced confessions of detained persons, and deportations. Id.

205. Id. ¶¶ 14-16.

206. Id. ¶¶ 17-20.

207. Id. ¶¶ 21-28.

majority in convicting the defendant as an aider and abettor of the joint criminal enterprise of persecution as a crime against humanity for his role in mistreatment of detainees.<sup>208</sup> However, the judge disagreed with the majority's finding that Zarić's acts had a substantial effect on the persecutions, citing Zarić's subordinate position of status and authority to portray him as being unable to influence the conduct of police chief Todorović and his "paramilitary henchmen."<sup>209</sup> Therefore, Lindholm found the prosecution had not met its burden of proof and found Zarić not guilty of article 7(1) of the Statute.<sup>210</sup>

Lindholm's separate opinion places Simić's subordinates in the context of the many perpetrators—some who had been convicted by the ICTY and others unnamed and unindicted—who committed persecutory acts against non-Serbs in the region. Lindholm depicts the two co-defendants as conflicted (Zarić was aware of the prisoner beatings and complained to the Chief of Police), if not sympathetic (Tadić's leadership in prisoner exchanges served humanitarian aims). His close parsing of contribution and responsibility of these subordinates is an example of law as a powerful tool used to calibrate individual responsibility for war crimes. The question is whether non-accountability mechanisms can be created that will enable bystanders to confront and acknowledge their own roles in crimes committed in their communities with similar subtlety.

#### IV. Reforming the Role of Bystanders in Adjudication of Atrocities

The Trial Chamber identifies the Simić case as unique among prosecutions before the ICTY and ICTR. Simić required the judges to consider the criminal responsibility of a civilian leader who did not directly engage in the crimes but who was integrally involved and invested in maintaining control of the town and its non-Serb residents.<sup>211</sup> Discussion of criminal responsibility for this category of defendant would seem relevant to an examination of how court opinions do and could address the related category of bystanders to crimes against humanity. The opinion is useful for exploring the ways in which bystanders figure in the Trial Chamber's adjudication in order to evaluate the claim advanced here that mechanisms for social reconstruction should engage bystanders in ways that motivate them to acknowledge their relationship to the violence.

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208. Id. ¶¶ 29–30.

209. Id. ¶¶ 32–34.

210. Id. ¶ 35.

211. Simić, supra note 8, ¶ 1092.



Individual attribution of criminal liability by international criminal justice mechanisms assists and challenges this process.

One might suppose that bystanders would not appear at all in the judgment. After all, the process of criminal adjudication is to determine whether the individual accused committed specific acts with the requisite criminal intent. Liberalism divides the subjects of adjudication into perpetrators and victims, and generally these are mutually exclusive categories.<sup>212</sup> Evidence introduced must be relevant to the charges against the accused. Yet how narrowly must the spotlight's focus be trained on the defendant?

As a formal matter, the court adjudicates those suspected of committing particular international crimes. Family members providing succor to prison guards, employees of businesses using forced labor, and low-level civil servants and administrators just "doing their jobs" in public offices overseen by the Crisis Staff did not directly commit a persecutory act of a crime against humanity. In order to subject these bystander/contributors to normative scrutiny, they would need to be considered aiders or abettors of the crimes of humanity committed by Simić and the others accused. The legal threshold for aiding and abetting requires suspects to assist, support or encourage a specific offense that constitutes an act of persecution in a way that has a substantial effect on the commission of the offense.<sup>213</sup> Unlawful arrest, detention, or confinement is considered sufficiently grave as to constitute persecution.<sup>214</sup> Implementing orders restricting the rights of

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212. This discussion has been expounded in a series of published articles between Robert Meister and Catherine Lu regarding human rights and its use in political discourse. See Robert Meister, Human Rights and the Politics of Victimhood, 16 **Ethics & Int'l Aff.** 91 (2002); Catherine Lu, Human Wrongs and the Tragedy of Victimhood (Response to Human Rights and the Politics of Victimhood), 16 **Ethics & Int'l Aff.** 109 (2002); Robert Meister, The Liberalism of Fear and the Counterrevolutionary Project (Reply to Catherine Lu), 16 **Ethics & Int'l Aff.** 118 (2002); Catherine Lu, Liberals, Revolutionaries, and Responsibility (Final Rejoinder), 16 **Ethics & Int'l Aff.** 124 (2002). In criminal law, the doctrine of duress is an example where the categories of perpetrator and victim merge. What otherwise is considered criminal behavior is mitigated—and perhaps excused—by virtue of the fact that the perpetrator performed the act in order to protect another from "significantly greater evil than inflicted; [where] there [was] no adequate alternative; and the harm inflicted [was not] disproportionate to the harm." Geert-Jan Knoops, Defenses in Contemporary International Criminal Law 97 (2001); see also Prosecutor v. Erdemović, IT-96-22-T, Sentencing Judgment, ¶ 17 (Mar. 5, 1998). Under international criminal law principles, the experience of victimhood does not technically wipe away the stain of criminal acts, but rather goes to mitigate punishment for the crime, thus preserving the categories of good/evil as the dominant framework for evaluating human behavior.

213. Simić, supra note 8, ¶ 161.

214. Id. ¶¶ 59-65.

non-Serbs may not necessarily run afoul of the law,<sup>215</sup> and remaining a silent witness to persecution is virtually sure to miss the mark. Physical presence at the scene of the crime is not sufficient. The complicit bystander/contributor must be a person of sufficient authority, and prosecutors must show that the individual's presence has "a significant legitimizing or encouraging effect" on those performing the offense.<sup>216</sup> Bystanders are defined by their inaction; they are "uninvolved" witnesses and thus fall outside international criminal law, which implies a degree of action and involvement in the criminal acts for liability to attach. The Trial Chamber, acting consistent with principles of legal liberalism, has drawn the normative parameters of its jurisprudence tightly to criminalize only conduct that immediately and directly violates the liberty of victims. The various and attenuated support offered by bystanders falls outside the Tribunal's mandate.

In light of the legal constraints, can the jurisprudence advance the social goals for international criminal trials by addressing bystanders directly? Law's dilemma is that courts evaluate individual behavior and non-involvement in the commission of a crime transgresses no norm for which sanction may be imposed. The power of law to address bystanders is indirect. To examine what law might do within its present contours, the Simić opinion first will be examined to see how the spotlight of the courtroom aims through the lens of the charges at the accused and leaves bystanders in its penumbra. How are bystanders figured in this partial shadow of the law? Second, the opinion's treatment of bystanders is evaluated from the perspective of the opinion as a jurisprudential intervention supporting social reconstruction. Using this social reconstruction "scorecard," the opinion offers an account of the events in ways that may help and hurt efforts to have bystanders confront their relationship to the persecution of non-Serbs in Bosanski Šamac. In drawing out these possibilities, attention is directed at the opinion as a document that memorializes particular events during the war. The document suggests various interpretations that bystanders—both "silent" as well as "complicit"—and other intermediaries such as politicians and the media might infer from the record. There is no direct data to

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215. The court found that discriminatory orders needed to infringe on the basic rights of the targeted group on the same level of gravity as other acts in article 5 of the Statute. Id. ¶ 58. The decision by the Crisis Staff to change the name of the town was not of a sufficiently grave nature to be considered persecution. Id. ¶ 516.

216. Id. ¶ 165. The court reasoned: "It is necessary to consider the relevant facts to assess the impact of the accused's presence at the scene to determine whether it had a substantial effect on the perpetration of the crime." Id.

suggest that bystander willingness to reconcile is influenced by the language in Tribunal judgments. However, the following analysis suggests that the enforcement of international criminal law frames discussions of the war and those responsible for it in ways that obscure the relationship of bystanders to the violence. The ways in which this shadowing occurs should not lead to an abandonment of accountability. Rather it should focus our attention on the need to intervene primarily outside the courtroom to avoid perceptions among bystanders that trials relieve them of acknowledging their moral complicity in mass crimes.

A. *How Simić's Treatment of Bystanders Underscores General Problem of Liberal Law Adjudication*

1. Construction of Bystanders in the Opinion

Reading the opinion as a text that narrates a story about the past, one that puts facts in a particular order and context to provide coherence and meaning to events,<sup>217</sup> the Trial Chamber demarcates time into two periods: before and after the takeover of the town. The former period frames the Trial Chamber's discussion and analysis of the atrocities and criminal conduct that occurred after the takeover in the town.<sup>218</sup> The Trial Chamber largely considers bystanders—before and after the takeover—as passive objects of the events orchestrated by defendants and a small group of leaders. Only in the separate opinion of Judge Lindholm do bystanders play a critical, if subsidiary, role. The legal framework drives the Trial Chambers' reasoning, which also emphasizes individual responsibility for events subject to adjudication and implicitly reinforces a conception of the conflict as one that was driven by leaders and in which bystanders played no role.

a. Bystanders Prior to the Takeover

The opinion describes events leading to the forcible takeover in terms of increasing polarization among ethnic groups within the country and within Bosanski Šamac. The Trial Chamber largely recounts the developments in the region in terms of the machinations of political leaders which appear to reflect as

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217. H. Porter Abbott, *The Cambridge Introduction to Narrative* 12–13 (2002).

218. Sections VIII of the Judgment: "Background on Events Leading to the 'Forcible Takeover on 17 April 1992'" and IX: "Establishment of the Serbian Municipality of Bosanski Šamac and of Its Crisis Staff" discuss the background to the alleged crimes of the accused and are treated relatively briefly. *Simić*, *supra* note 8, ¶¶ 166–397. The facts and findings related to the charges are taken up in Sections X–X. *Id.* ¶¶ 398–1114.

well as create divisions among national groups. Bystanders are present only indirectly, as the voters who voted their national identities, setting into motion political division that erupted into war. The opinion cites defense witnesses who describe a general climate of fear by late 1991 among "ordinary people" in the area.<sup>219</sup> According to these witnesses, extremist provocateurs from all national groups exacerbated tensions by "provocative displays of nationalist flags, symbols and songs."<sup>220</sup> An unspecified number of residents from all national groups moved out of town to escape the climate.<sup>221</sup> There is no evidence of popular resistance to the logic of division along national group identity.<sup>222</sup> Bystanders are critical to the town's future; their failure to object to national group polarization paved the way for its bloody triumph. The opinion does not consider the possible contribution of bystander passivity to the eventual crimes. What we see through the opinion is an increasingly polarized, segregated community in which political life becomes dominated by politicians and military personnel organized around national group interests. To what extent the political processes that occurred among the nationalist parties and public institutions they controlled seeped down to the level of neighbor-to-neighbor, the judgment does not illuminate. We are left watching the political and military protagonists shape and reshape material conditions in the municipality after the takeover.

b. Bystanders After the Takeover as a Backdrop to the Main Events

Once the takeover occurs—lasting only a matter of hours—the facts on the ground, literally, have shifted. With military and political control over the municipality secured, Bosnian Serb civil and military structures initiate a widespread campaign of ethnic cleansing—with support by Serb paramilitaries—that isolates and persecutes non-Serbs. We read the names of the accused and others who are involved in carrying out the acts of

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219. Id. ¶ 189.

220. Id. ¶ 192.

221. Id. ¶ 193. The court heard somewhat conflicting evidence about the breakdown, by national group, of those leaving. Prosecution witnesses testified that Croats and Serbs evacuated, while defense witnesses testified that members of all ethnic groups left. Id.

222. One ambiguous exception is mention of a "rally for peace" that took place just before the takeover. Id. ¶ 181. Witnesses stated that defendant Simo Zarić assured the crowd that the 4th Detachment would protect the town from Serb and Croat attack and asked residents to stay and avert civil war. Id. It is not clear who or how many attended the rally and whether the event was designed to assuage non-Serb residents' fears of external attack or to assure local Serbs that the JNA army would protect them.

persecution, but with few exceptions, we are left to imagine how those not actively participating in persecution reacted or related to the unfolding events. In the Trial Chamber's discussion of the criminal charges of which Simić and his codefendants stand accused, bystanders occupy four primary roles. First, the Trial Chamber casts bystanders as a collective that experiences the general deprivations of war and so neutralizes any special claim to suffering that non-Serbs might assert. Second, bystanders are a silent chorus who receive knowledge and information about the suffering of others but who do not intervene to stop it. Third, bystanders comprise a fearful, compliant mob lacking moral or political consciousness and will to oppose external forces of evil which are the cause of the misery and suffering. Finally, we catch a glimpse of bystanders as moral opponents of the persecution and suffering unleashed on non-Serbs. However, the overwhelming references to bystanders in the opinion use this nameless populace as a neutral tool to illustrate the war crimes individuals committed.

The Trial Chamber uses the baseline deprivations affecting all civilians in the municipality to measure whether civil and military authorities targeted non-Serbs for particular mistreatment. In the aftermath of the takeover, the Bosnian Serb Crisis Staff promulgated a series of regulations the prosecution asserted were designed to persecute non-Serbs including the prohibition on all political activities,<sup>223</sup> a ban on gatherings of three or more Muslims or Croats in a public place,<sup>224</sup> a curfew on non-Serb civilians,<sup>225</sup> an order that required civilians to obtain a permit to enter and leave the area,<sup>226</sup> and a mandate that Muslims and Croats wear white armbands.<sup>227</sup> Witnesses also testified that phone lines to non-Serbs had been cut.<sup>228</sup>

However, the Trial Chamber rejected the prosecution's argument that the restrictions imposed by the Crisis Staff amounted to discrimination. The judges determined that many of the orders, such as the ban on political parties, the requirement of travel permits, the imposition of a curfew, and the regulation of alcohol and fuel, applied equally to Serb and non-Serb civilians.<sup>229</sup> The judges accepted evidence that general

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223. Id. ¶ 465.

224. Id. ¶ 468.

225. Id. ¶ 471.

226. Id. ¶ 475.

227. Id. ¶ 478.

228. Id. ¶ 487.

229. Id. ¶¶ 505-12.

deprivations caused by the fighting—shortages of food, electricity, water, medical supplies—afflicted all residents within the area and that the Crisis Staff did not target for exclusion or withhold basic life necessities from non-Serbs.<sup>230</sup> Here we see how war destroys the infrastructure that supports communal life. Bombs that strike “enemy” power lines or water supplies leave Serb and non-Serb thirsty and in the dark. Bystanders serve as a measuring stick for the sinking standard of living, brought about by the conflict, that affects civilian friend and foe alike.

Bystanders also serve as witnesses to the forced labor of targeted non-Serbs and elevate the coerced work into a criminal spectacle. The Crisis Staff established a forced labor system after the takeover and placed several prominent non-Serbs in work assignments designed publicly to humiliate them.<sup>231</sup> Civilian authorities ordered a former bank director and the manager of the local textile factory to perform menial labor at the sites of the establishments they formerly ran. The Trial Chamber considered these assignments as rising to the level of cruel and inhumane treatment because the public spectacle the non-Serb victims were forced to perform “debas[ed] them and the group to which they belonged.”<sup>232</sup> Without an audience, the Trial Chamber implies that the labor itself would not rise to the level of criminal persecution.

Thus, bystanders are necessary for the forced labor of these citizens to offend the law. Yet the bystanders are silent and invisible. The Trial Chamber does not indicate if any spectator testified about the impact of witnessing these events. Yet we may assume, as the judges do, they are there: unnamed civilians who walk by the bank and see the former director with broom in hand cleaning the streets. We are left to imagine textile workers who walk past the former director while he cleans the dirt underneath their feet. And we may speculate that the bystanders understood, as the judges did, that these high-status individuals were reduced to menial laborers as “part of a pattern targeting the Bosnian Muslim and Bosnian Croat political and economic leadership.”<sup>233</sup>

Similarly, bystanders serve as necessary but inert recipients of news of deprivations visited upon non-Serbs. Tadić and witnesses testified that the widespread arrest,

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230. Id. ¶¶ 512–14.

231. Id. ¶¶ 778–86.

232. Id. ¶ 837.

233. Id.

detention, and mistreatment of prisoners were common knowledge in the area.<sup>234</sup> Authorities targeted non-Serb civilian women and children and rounded up and arrested a group of Croat women and children from the town market,<sup>235</sup> an event likely to be witnessed and much discussed by local residents. The Trial Chamber used the oral circulation of news about beatings and torture of non-Serb prisoners throughout the small community to attribute to Simić knowledge of the mistreatment. The judgment notes that:

Bosanski Šamac is a small town and that the cruel and the inhumane treatment of non-Serb prisoners was extensive and took place over a period of several months. The cries and moans of prisoners in the detention centres in Bosanski Šamac and their forced singing of Serb nationalistic songs could be heard outside these premises. . . . The Trial Chamber does not accept Blagoje Simić's testimony that he did not know about such mistreatment.<sup>236</sup>

Bystanders function as a saturated sponge of circumstantial evidence attesting to the on-going torture of former neighbors in their midst. Civil and military personnel arrested non-Serbs over such a long period of time, snatched so many civilians from their homes and off the streets, and so brutally treated prisoners that news of their suffering overflowed the walls of the prisons and filled the ears of passersby. Those bystanders, like Simić, could not ignore that the cries of prisoners meant Serb authorities were breaking the bodies and spirits of the non-Serbs who had, only months before, been equal participants in the civil life of Bosanski Šamac.

The Trial Chamber's exception to the role of bystanders as passive receptacles of knowledge—if not approving voyeurs—about the horrors unfolding is its mention of a witness who overheard a representative of a refinery from another town rebuff defendant Simo Zarić's offer to supply the industrialist with forced laborers. As mentioned above, the businessman rebuked Zarić and warned him that he "should be 'careful of what he was doing so that he would not be ashamed of himself later.'"<sup>237</sup> Of the 657 paragraphs devoted to the alleged offenses and the liability of defendants, this was the only voice of a bystander verbalizing

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234. Id. ¶¶ 518, 613. Codefendant Tadić "testified that the mass arrest of non-Serbs was common knowledge." Id. ¶ 518. He also explained that he learned of arrests from "well- or ill-intentioned citizens" as well as members of the Crisis Staff. Id. ¶ 613.

235. Id. ¶ 556.

236. Id. ¶ 1008.

237. Id. ¶ 828.

opposition to defendants for the persecution of non-Serbs.<sup>238</sup> Yet his words punctuate the opinion as a reminder that not all who witnessed the events approved of them.

c. Bystanders After the Takeover as Participants in Atrocities

Only the dissenting opinion of Judge Per-Johan Lindholm puts a decidedly negative cast on the bystanders of Bosanski Šamac. Lindholm rejects the prosecution's argument that Simić shared the criminal intent of a joint criminal enterprise to perpetrate the majority of the substantive forms of persecution as crimes against humanity on the non-Serb population. Rather, he opines:

The tragedy that followed the takeover was . . . not a result of any previous plan amongst certain individuals. The situation went out of control due to the activities of a number of criminals who opened the sluice-gate to evil, which thereafter was willingly accepted and used by malicious and easily-led people.<sup>239</sup>

Although he does not name the "criminals"—presumably he means the paramilitaries—he also does not include Simić among them. He finds that Simić was aware of but did not intend for military and paramilitary forces to arbitrarily arrest, detain, beat, and torture non-Serbs. By virtue of his responsibility as the president of the Crisis Group, Lindholm finds that Simić had a duty to protect civilians under his charge and that his failure to do so had a substantial effect on the perpetration of the acts; on that basis, he finds the accused guilty.<sup>240</sup>

Lindholm does not further specify who comprised the "malicious and easily-led people" who took advantage of the opportunity to do evil. These may include the civilian looters who worked alongside soldiers and the non-Serb civilians the Crisis Group ordered to fleece the homes and businesses of non-Serbs. They may also be employers who eagerly used the forced laborers offered by accused Zarić. And potentially Lindholm's description encompasses bystanders who did not intervene to prevent or mitigate the arrest, detention, and deportation of their former neighbors. In fact, Lindholm intimates that those who stood by were complicit bystanders—those who silently

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238. Id. ¶¶ 398–1055. These paragraphs of the judgment address the substantive offenses and the role of the accused.

239. Separate Simić Opinion, supra note 198, ¶ 9 (emphasis added).

240. Id. ¶ 11.



cheered the evil visited upon the non-Serbs in their midst, celebrating the expulsion of their enemies/neighbors.

2. Simić as Bystander Intervention: Acknowledgment of Loss, Restoration of Control, and Acknowledgment of Role

The way bystanders figure in the judgment should not surprise us, as they are not the focus of the law. However, the legal framing of bystanders has particular implications for the ability of trial records to shape public discussion in ways that will help strengthen a culture of respect for human rights and thus promote social reconstruction. Revisiting the argument that Weinstein and I advanced, outlined earlier,<sup>241</sup> that interventions to promote social reconstruction should acknowledge the loss experienced by the bystander due to the violence, restore a sense of mastery and control over one's life, and acknowledge the relationship of the bystander to horrors, how does the Simić judgment measure up? The opinion narrates a history of events leading to the takeover of Bosanski Šamac that emphasizes political developments—primarily voting patterns—at the national and regional levels.<sup>242</sup> Political life and later social life becomes segregated and antagonized along national group boundaries.<sup>243</sup> After the takeover, the brutal treatment of non-Serbs is carried out by the Serb civil administration backed by paramilitary and Serb armed forces. It is a bloody campaign to contain and remove non-Serbs from the region which Simić and the other members of the Crisis Staff conduct in the name of the Serbs of Bosanski Šamac. Serb bystanders are relegated to spectators who suffer passively the deprivations of food, water, shelter, and security caused by the war. The animating actors of the conflict are nationalist political parties, the politicians who populate them, and their armed forces, not the collective will of citizens who voted the politicians into office. The opinion is consistent with the argument that trials stigmatize the "bad" members of the national group that carried out the violence and free the "good"

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241. See supra Part II.A.3.

242. Nationalist propaganda of Bosnian Serb and Bosnian Croat parties prior to the war contributed to increasing political radicalization, helped to create a climate of fear, and fractured group formation along national group lines among voters in Bosnia and Herzegovina. See **Susan L. Woodward, *Balkan Tragedy: Chaos and Dissolution After the Cold War*** 225–36 (1995); **Noel Malcolm, *Bosnia: A Short History*** 213–33 (1994). Fear of those belonging to "other" national groups contributes to passivity among bystanders who fail to intervene to halt the polarization within their communities.

243. Simić, supra note 8, ¶¶ 176–93.

bystanders from the same national group to reconcile with victims.<sup>244</sup>

The physical losses of Serb bystanders are acknowledged explicitly through the Trial Chamber's taking stock of general war-time measures imposed on civilians and the effects of damaged infrastructure on their quality of life. The opinion also documents through the destruction of the integrated Bosanski Šamac—the widespread and systematic persecution of its non-Serb population—the loss of control of the “good” (as opposed to the complicit) Serb bystanders over their town. The opinion affirms the perspective that the persecution directed by particular individuals destroyed the community and made the silent bystanders victims of Simić's criminal leadership.

The opinion condemns the accused for their roles in persecuting the non-Serbs of Bosanski Šamac. Their arrest, subsequent conviction, and imprisonment stigmatize Simić, Tadić, and Zarić, and remove the defendants from power. Freed from the clutches of criminal leaders, silent Serb bystanders can recover control over local government and install leaders who can work to mend frayed communal ties. Consistent with the assertion that international trials promote reconciliation by differentiating the “bad” Simić from the “good” citizens, the opinion reinforces the conception that Simić's conviction helps restore a sense of mastery and control to the lives of “innocent” Serb bystanders.

The opinion depicts Serb citizens as silent bystanders to the mass persecution of non-Serbs in Bosanski Šamac and does not provide any explicit normative evaluation of their behavior. The judges present Serb bystanders as impotent witnesses to the public humiliation of non-Serb leaders, the mass arrest of non-Serb women and children, and the cries of tortured prisoners. The liberal legal judgment identifies individual civil leaders as the culpable protagonists who effected the destruction of communal ties through mass arrests and brutal treatment of civilians. Bystanders are at an uncomfortable distance from the atrocities: close enough to see and hear, but unable (and perhaps unwilling) to intervene. Consistent with the application of criminal law, the judgment interprets the atrocities as the product of individual acts and omissions by the accused and other military actors. Thus the opinion understands bystanders as essentially irrelevant—factually and

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244. Casese, supra note 13; **Stover & Peress**, supra note 18, at 138; **Ignatieff**, supra note 13, at 178; Akhavan, Justice in the Hague, Peace in the Former Yugoslavia?, supra note 18, at 741-42; **Bass**, supra note 9, at 297-301.

legally—to its account of the destruction of pre-war life in Bosanski Šamac.

a. Simić Promotes Social Reconstruction

Beyond adjudicating the guilt or innocence of the accused, a judgment of an international tribunal is a document that can frame public discussion about the events that formed the basis for the charges. As a potential catalyst for debate at the national and community level, it is important to examine how the opinion's treatment of bystanders configures their role and how it may help or hurt the process of social reconstruction. The Trial Chamber constructs a particular vision of the conflict and downplays other possibilities about the experiences and orientation of Serb bystanders to the events in Bosanski Šamac. The charges of individual culpability for crimes against humanity and liability for the suffering of non-Serbs—arbitrary arrest, detention, torture, humiliating and degrading treatment, forced transfer—focuses judicial attention on the decisions and actions of Blagoje Simić. The prosecution of the highest civilian official in Bosanski Šamac locates the genesis of persecution in the choices Simić made in organizing and exercising his authority. And the majority opinion unflinchingly condemns Simić for the choices he made: he chose to become head of the Crisis Staff;<sup>245</sup> he failed to use opportunities available to him to “distance himself” from the persecutory activities of authorities;<sup>246</sup> he chose to associate himself with members of the military, paramilitaries, and police known to be brutalizing civilians.<sup>247</sup> The Trial Chamber convicts Simić of crimes against humanity because he breached his duty to “prevent non-Serb citizens from being persecuted.”<sup>248</sup> The

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245. Simić, supra note 8, ¶ 1079.

246. Id.

247. Id. ¶ 1080. The Trial Chamber did not note that Simić also betrayed his Hippocratic Oath as a physician by enabling the paramilitaries and his defense force to brutalize civilians in and outside detention facilities. His involvement in the repression and control of non-Serb civilians raises provocative questions about the role of doctors in war. See **Michael H. Kater, Doctors under Hitler** (1989) (examining the impact of Nazi doctrines on the medical community and suggesting that their violation of the Hippocratic oath continues to impact medicine today); **Robert Jay Lifton, The Nazi Doctors: Medical Killing and the Psychology of Genocide** (1986) (discussing the social and ideological shifts that enabled the Nazification of the medical profession). The debate surrounding the role of physicians in conflict continues; for recent examples, see Steven Miles, Abu Graib: Its legacy for Military Medicine, 364 **The Lancet** 725 (2004) (describing the complicity of military medical personnel in the abuse of detainees in Iraq, Afghanistan, and Guantanamo Bay); M. Gregg Bloche & Jonathan H. Marks, Doctors and Interrogators at Guantanamo Bay, **New Eng. J. Med.** (June 22, 2005) (indicating that medical information was used in interrogation techniques employed at Guantanamo Bay in violation of clinical confidentiality).

248. Simić, supra note 8, ¶ 994.

opinion identifies the cause of the mass and systematic persecution in the choices made by individual criminals. Simić and his identified cronies are liable and not the collective Serb population: bystanders witness the evil "innocently" from the sidelines. The opinion implicitly relieves bystanders in whose name authorities perpetrated the violence of guilt associated with those crimes. Those who argue that international criminal law supports reconciliation by differentiating the culpable leaders from the masses<sup>249</sup> find support in the opinion.

The legal framing of the trial endorses a conception of the mass violence as orchestrated by individual leaders. The court is asked to determine the individual culpability of the accused—the centerpiece of which is the criminal mental state of the accused. Individuals must act with the requisite state of mind in transgressing normative bounds in order to satisfy fundamental notions of fairness. The international law of crimes against humanity enshrines this same principle. With respect to persecution as a crime against humanity, the ICTY judges evaluate through direct or inferred evidence whether the accused "consciously intend[ed] to discriminate."<sup>250</sup> The judges castigate Simić for his failure to resign or mitigate the harm of Crisis Group policies. One assumption of liberalism played out here is that war criminals ultimately act on their own volition—the quiescence of bystanders and their impact on the decisions of leaders stands outside the ambit of judicial review. The court reasons that leaders acted on their own accord and must accept the consequences of their actions. This focus on responsibility at the highest levels may facilitate social reconstruction in the region by assuaging fears of bystanders that the ICTY judgments condemn the national group of the accused along with the defendant.

Yet trial records are capable of divergent interpretations, and so may not help Serb residents of Bosanski Šamac to embrace their non-Serb former neighbors. The opinion acknowledges a particular type of loss bystanders experience, relies on the assumption that bystanders approve of the political dimensions of trials, and understands the relationship of bystanders to the violence as silent witnesses who are passive victims. This perspective may not correspond with opinions among the bystander audience or may not sufficiently capture the complexity of

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249. See sources cited *supra* note 246.

250. *Simić*, *supra* note 8, ¶ 51. Presumably the actions and behaviors of others may influence individual choice, but the defendant is in the dock and the judges are tasked with determining the accused's actions and choices.

bystander experiences of the war. In fact, the opinion may frustrate use of the record to impel bystanders to acknowledge their role in mass violence. Therefore it is critical that mechanisms of individual accountability be one part of a larger range of programs that together encourage all residents—whether victims, perpetrators, or bystanders—to participate in social reconstruction. To understand how international criminal trials may hinder bystander acknowledgment, consider the following contrary set of assumptions regarding bystanders and how these intersect with the goals of interventions to promote social reconstruction.

#### b. Simić Challenges Social Reconstruction

The legal framework of individual accountability works to limit the extent to which judges might expound on the experience of bystanders during mass violence, but the moral truth (or truths, since bystanders do not necessarily share similar perceptions of the war) of their experiences to which both silent and complicit bystanders cling will influence their willingness to forge a shared future. Looking at how the opinion's account of events in the region conceptualizes bystanders' roles in ways that downplay or distort their experiences alerts us to some shortcomings of trials as an intervention to promote social reconstruction with bystanders.

The Trial Chamber acknowledges the disruption of daily life of residents in Bosanski Šamac caused by the destruction of basic infrastructure. Yet the opinion does not examine the social and political losses resulting from the war, each of which poses different challenges for rebuilding communities. The opinion does not acknowledge the silent bystander's loss of community and trust—between Serb and non-Serb or between bystander and Serb civilian leader—as a result of being a passive audience to the rising violence. Bystanders witness the persecution unleashed on their non-Serb brethren, but the opinion does not explore the meaning of these experiences for the Serb bystander audience. Was there a yearning for an integrated community of Serbs and non-Serbs among the “well-intentioned” citizens that the Trial Chamber did not voice? Acknowledgment of the hopes and desires of silent Serb bystanders contemporaneous with the persecution campaign that the unleashed evil could be stanching might assist these “good” Serbs in reaching out to victims in the aftermath of violence.

Shifting focus from the text of the opinion to the political context in which judgments operate, trials may fail to

restore a sense of mastery or control among complicit bystanders. Judge Lindholm opines that "malicious" Serbs and their "easily led" followers pressed their advantage after the takeover to unleash a macabre bacchanal of violence against non-Serbs.<sup>251</sup> Presumably, within the majority of Serbs of Bosanski Šamac who supported the SDS there were those who approved of the Crisis Staff takeover and understood the mass arrests of non-Serbs as necessary to protect the town from attack. Supporters of the SDS and the Bosnian Serb armed forces may experience the Dayton Peace Accords as a "loss." After all, the agreement left them short of their goal of a separate state and the end of fighting ushered in an era of increased pressure on their political leaders and war heroes to defend against criminal charges in The Hague. Trials of Bosnian Serb accused war criminals are not intended as a salve on the wounded pride of SDS supporters. To the contrary, complicit bystanders are expected to repudiate their now-discredited leaders and join hands with the victims. Theorists and empirical studies have pointed out that this is not a reasonable expectation.<sup>252</sup>

The political climate of post-war Bosnia and Herzegovina has colored local views of the Tribunal. Studies have found that criticism of the ICTY by Croat and Serb nationalist parties in particular have distorted how bystanders from those national groups view the court.<sup>253</sup> Contrary to the liberal legal project of the Tribunal, Bosnian Serbs understood the court as a political institution that unfairly stigmatized their national group.<sup>254</sup> Political life remains segregated along national group lines, and the SDS, the dominant Bosnian Serb party, promotes itself as the defender of Bosnian Serb interests and identity against the efforts of the ICTY to cast Bosnian Serb war heroes as criminals. The studies by the Human Rights Center suggest that this nationalist rhetoric has considerable traction. The premise of international trials is that the legal process of removing the criminal leaders helps silent bystanders rebuild their formerly integrated communities. However, the logic of nationalism continues to hold sway over political life in the country, and Bosnian Serb bystanders are unable or unwilling to admit that members of "their" group committed war crimes.<sup>255</sup> The goals of transitional justice are thwarted because Serb complicit bystanders identify with past leaders—now war

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251. See Separate Simić Opinion, *supra* note 198, ¶ 9.

252. Meister, Human Rights and the Politics of Victimhood, *supra* note 212, 38-47; Attitudes Toward Justice and Social Reconstruction, *supra* note 3, at 193.

253. Attitudes Toward Justice and Social Reconstruction, *supra* note 3, at 195-96; Judges Study, *supra* note 5, at 147-49.

254. Attitudes Toward Justice and Social Reconstruction, *supra* note 3, at 193.

255. Id. at 195.

criminals—rather than with their victims.<sup>256</sup> Thus, the efficacy of trials to promote social reconstruction will be limited by the larger domestic political context of the countries in which the violations occurred.

Finally, trials are not able to address adequately the relationship of bystanders to the violence. Prosecutions do not offer complete, differentiated pictures of bystander involvement in mass violence. The court in Simić depicts bystanders as neutral observers of the persecution. Yet there is a wide spectrum of involvement in the violence short of criminal behavior, and it stands to reason that many Serb residents of the area were anything but “neutral” regarding the treatment of non-Serbs. Some opposed the persecution and tried to intervene. They alerted officials like Tadić to incidents in the hope of stopping the arrests and beatings. Or like the industrialist who refused Tadić’s offer of forced laborers, they voiced their disapproval of the Serb administration. However, the ways in which bystanders resisted—however passively and ineffectively—are barely hinted at in the opinion. The jurisprudence of the international tribunals is valorized as a necessary monument to the “truth” of part of what transpired in the conflict. Yet the deeds of the “good Serbs” are omitted from the record—they are not the focus of the proceedings—and their absence may have troubling consequences for using the opinion to support the goal of community rebuilding imbedded in the statute of the court.

And what of the relationship of the “bad Serbs” who stood by and allowed the floodgates of evil to unleash crimes against humanity on their neighbors?<sup>257</sup> Complicit bystanders are not legally culpable, yet victims may consider “justice” to require a direct response from accountability institutions (or other

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256. Meister questions the theoretical assumption of transitional justice that “beneficiaries of past injustice are expected . . . to identify with individual victims . . . now that they know the ‘truth’ about the regime they condoned. . . . The objective of Human Rights Discourse will be achieved when those who happened to come out ahead in the old order acknowledge as evil the practices that produced their continuing advantage.” Meister points out that this theory assumes that victims of atrocities will forego distributive claims and accept acknowledgment of the former evil as sufficient “compensation” to abandon armed struggle and “get on with their lives.” Meister, Human Rights and the Politics of Victimhood, *supra* note 212, at 17. The empirical case of Bosnia and Herzegovina suggests a different critique of the conventional conception of transitional justice, focusing on its failure to account for distortions among the beneficiaries—or bystanders from the aggressor group—when the new regime is installed as result of only partial victory/defeat. In Bosnia and Herzegovina, the international community brokered a negotiated resolution that left intact the national Serb party, the SDA, as a potent political force.

257. The use of examples of Serb bystanders and perpetrators is intended to be consistent with the example of the Simić case and serves as the vehicle for exploring broader relationships between jurisprudence and social reconstruction. It is not intended to convey that only Serb nationals committed war crimes or were bystanders.

mechanisms) that sanctions or stigmatizes these individuals for their passivity. The Simić opinion takes no notice of this group. The argument advanced here is not to extend theories of legal liability to include members of this group, but to examine the consequences of the law's failure to sanction these "culpable" bystanders. One can imagine a range of bystander actions that contributed to the widespread and systematic persecution unleashed against the non-Serb population of Bosanski Šamac but which fall below the radar screen of the international criminal law of crimes against humanity. For example, the family members and friends who may have soothed the conscience of guards who beat and tortured prisoners, reassuring the executioners that their cause was just and that non-Serb civilian prisoners were a danger to communal safety, enabling the killers to return to their jobs day after day, are not subject to legal scrutiny. Leaving aside questions of conservation of judicial resources, why do these individuals escape judicial review? The jurisprudential answer is that these individuals do not occupy positions of sufficient authority to pierce the legal membrane between bystanders and aider/abettor. Falling through the legal lacunae, these marginal participants escape legal attention or condemnation.<sup>258</sup>

The problem for the project of social reconstruction is that trials are not able to consider the relationship of bystanders to mass violence in anything other than a partial, reductive manner. However, just because bystanders did not do anything criminal in the eyes of the law does not mean they did not do anything wrong in the eyes of victims. Bystanders need to be pressed to acknowledge and confront the distance between, on the one hand, their implied innocence in ICTY opinions and, on the other hand, their condemnation as betrayers by their non-Serb former neighbors. Court opinions obscure the relationship of bystanders to the violence and so inadvertently make it harder rather than easier for communities to engage in this important but treacherous conversation.

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258. There is a range of complicity in the administration of mass violence. Those who offer emotional support may be at one end. A more ambiguous category are members of the Crisis Staff who administered the persecutory campaign against non-Serbs. Some would have drawn up and executed plans to plunder Bosniak homes and businesses. Simić and the other members of the executive committee of the Crisis Staff relied on subordinates who populated the lower echelons of the administrative apparatus to implement their crimes against humanity. Depending on the level of authority and degree of action, some of these civil servants could be held liable for their participation.



B. *Proposals for Proper Treatment of Bystanders Within International Criminal Justice*

This section reconsiders the goal of international trials to promote social reconstruction in light of the Simić judgment. The treatment of bystanders in Simić is emblematic of the limits of liberal law adjudication of mass violence and raises questions about the role of criminal trials to promote this normative goal. Simić points to more general problems for international criminal justice to tackle from the perspective of promoting social reconstruction among bystanders. In light of these concerns, two proposals are offered to reform these international tribunals. The first focuses on juridical reform consistent with the current case law and conceptions of legal reasoning. The second looks at institutional reforms that require international criminal tribunals like the ICTY to expand their vision and ambitions for the outreach activities of these justice institutions.

1. Three Problems International Criminal Justice Needs to Address

The Simić opinion suggests three general observations regarding the way in which the principles of international criminal justice are in tension with, if not working against, the objective of acknowledgment by bystanders of their relationship to mass violence. These observations are descriptive in nature and emerge from the foregoing analysis. They alert us to some limits of accountability mechanisms of which we should be aware and address, either through the activities of these tribunals or through other institutions. First, international criminal law adjudications are not able to parse out the variety of roles and relationships that bystanders may have to the atrocities, and therefore judgments condemning perpetrators are unlikely to change the opinion of the unreconciled or complicit bystanders—those who continue supporting the political project for which the perpetrator committed the atrocities. Second, international criminal convictions single out and stigmatize the accused, normalizing the behavior of bystanders and potentially creating a false moral innocence for the unindicted and their bystander supporters. Finally, international criminal law constrains the doctrinal ability of international justice mechanism to address more directly the role of bystanders in atrocities. The principles of fundamental fairness and due process which strengthen the credibility of these institutions also limit their ability to promote role acknowledgment among bystanders.

This section addresses the contribution of judicial opinions—as documents that record the evidence and reasoning of the judges—to this process. It is unlikely that any sizeable number of individuals in the region will read the opinions of the Tribunal. Popular reactions will be filtered through other media. Nevertheless, the trial judgments are the official records of the ICTY and as such will frame subsequent interpretation and discussion of the cases. Thus, accountability mechanisms should act within their institutional capabilities to prompt bystanders to reckon with the past.

a. Liberal Law Cannot Sufficiently Differentiate Bystanders

First, criminal trials are ill-suited to acknowledging the range and complexity of bystander relationships to the violence. Trials may work best as an intervention to promote processes of social renewal—among bystanders and between bystanders and victims—for those in agreement with the normative assumptions upon which trials as a form of transitional justice are based: the silent bystanders who disagreed with the leaders who perpetrated atrocities in their name but who were unable to liberate themselves from the yoke of the criminal regime. Those bystanders who are willing to reject their leaders and their political projects can find acknowledgement of their loss and victimization in criminal trials. Court opinions confer legitimacy on their experience as suffering at the hands of criminal authorities. And, as a testament to this perspective, this article suggests that the publicization of the truth about past crimes in trials may aid bystanders in forging new links with victims based on a politics of tolerance and respect and rejecting divisions based on a politics of nationalism and fear.<sup>259</sup>

At the same time that convictions may aid some in their willingness to reconcile, other victims may find that justice measures do not meet their needs. Definitions of and priorities for justice vary among survivors. Some find justice in economic growth and opportunity; for others it means returning home; still others wanted to forget the past and move on; some victims want revenge.<sup>260</sup> Trials are unlikely to convince supporters of

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259. As one Croat woman in Mostar commented on the extent that trials facilitated reconciliation: "We all know what happened, but it is easier when you hear a criminal confessing his crimes. . . . [I]t means a lot to you when you hear a confession." Corkalo et al., *Neighbors Again? Intercommunity Relations After Ethnic Cleansing, in My Neighbor, My Enemy*, *supra* note 7, at 149.

260. Weinstein & Stover, *Introduction, in My Neighbor, My Enemy*, *supra* note 3, at 4; Corkalo et al., *Neighbors Again? Intercommunity Relations After Ethnic Cleansing, in My Neighbor, My Enemy*, *supra* note 7, at 150-58 (research in Bosnia and Croatia found that rebuilding the physical environment, social environment, and the

the accused to reject their former leaders and forge new ties with former enemies. Those who identify with the goals of their leaders may ignore the liberal intention of trials to differentiate between bad leaders and good citizens and understand a judicial inquiry into the actions of a leader of their national group as an indictment of the collective. And the liberal principles of adjudication that single out an individual for approbation also make the accused into a symbol that complicit bystanders defend. The record becomes distorted to preserve national pride, instead of stigmatizing and shaming the defendant in the eyes of the collective.<sup>261</sup> In the example of the Simić case, the opinion is unlikely to assist the “unreconciled” bystanders—those who continue to see their former leaders as defending their collective interests—to change their views.<sup>262</sup>

Why is this so? One purpose of the court may be to promote reconciliation, but its legal mandate is to decide the criminal guilt or innocence of individuals charged with specific

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formation of collective memory in manner that promotes ethnic perspective on the past were elements of social reconstruction for divided cities); Attitudes Toward Justice and Social Reconstruction, supra note 3, at 195–99 (explaining how multiple factors contribute to a readiness to reconcile with members of other national groups). See also Connecting Justice to Human Experience, supra note 4, at 219 (Rwanda survey data finding little relationship between attitudes toward justice mechanisms and a willingness to reconcile). Research suggests that for some victims of mass violence, trials of political and military leaders do not necessarily satisfy their demands for justice. What is important to them is that the individual who they understand as immediately responsible for their victimization—the guard who beat them, the soldier who shot their loved ones, the informant who pointed out their hiding place to authorities, the neighbor who failed to warn them that their arrest was imminent—are condemned for their actions. Stover, Witnesses and the Promise of Justice in The Hague, in My Neighbor, My Enemy, supra note 7, at 104–120; Wald, supra note 17, at 195 (questioning the effect of prosecuting political leaders because “for many victims it is just as important to face down the local village executor of those nefarious schemes and strategies”).

261. Attitudes Toward Justice and Social Reconstruction, supra note 3, at 194–5.

262. In fact, there is little evidence to suggest that international courts will convince these unreconciled bystanders to conform their opinions about convicted war criminals to align with court judgments. For example, a recent opinion survey in the Serb-dominated region of Bosnia and Herzegovina found that approximately 60% believed that Radovan Karadzic, the former president of the self-styled Republika Srpska, was a hero and not a war criminal. Srđan Puhalo, Radovan Karadzic, Novi Reporter, June 9, 2004 (Andrej Milivojevic, trans.). Almost half the Serbs surveyed in Prijedor and Croats surveyed in Mostar—areas in which Serb and Croat armed forces, respectively, committed atrocities—did not accept the fact that their national group committed war crimes. Attitudes Toward Justice and Social Reconstruction, supra note 3, at 194. Support for prosecuting war criminals varied by ethnicity in a Rwandan survey. A majority of Tutsi, the victims of genocide, strongly agreed that trials should punish the guilty; a majority of Hutu merely agreed with this statement. Connecting Justice to Human Experience, supra note 4, at 212.

crimes.<sup>263</sup> Legal subjects of trials are the accused and therefore the court addresses itself to measuring the behavior of the defendant against the relevant legal norms. This process works to obscure the relationship of bystanders to the criminal conduct of the accused. Simić and his co-defendants are judged against the legal standards of crimes against humanity: the court is not examining their behavior against that of the non-accused—whether bystanders, or other perpetrators. In other words, the court is not examining the actions of the “good” or “bad” Serbs of Bosanski Šamac to confer judicial admiration or condemnation on these groups. The “good” Serbs who attempted to intervene on behalf of their neighbors are not subject to the court’s jurisdiction and neither are the “bad” Serbs who supported the Crisis Staff. Liberal justice stymies the ability of courts directly to take up the question of the relationship of bystanders to the violence and reduces bystanders to inert props in the drama of the events at bar. But these props are sentient human beings. Particularly in a climate of nationalism, bystanders are free to reject the intended moral condemnation of war criminals and instead direct their ire at the Tribunal itself. Outside of the Tribunal’s control, nationalist Serb and Croat politicians, particularly from the SDS and HDZ parties, have benefited from the law’s lack of direct engagement with bystanders and criticized the Tribunal as being biased against their national group. That these parties continue to enjoy a virtual monopoly on political support among Serb and Croat voters, respectively, poses significant obstacles to building political support for strengthening human rights and the rule of law. The threat that continued political extremism poses to regional peace may overwhelm the potential positive contribution of the ICTY to this process and points to the need for criminal prosecutions to work in tandem with other measures to strengthen regional security.

b. Criminal Trials Encourage False Moral Innocence

A second observation is that liberal law adjudication implies a false moral innocence among bystanders. Bystanders by definition are exempt from criminal culpability. Criminal trials essentially ignore bystanders as moral actors and, more importantly, moral judgment of their conduct or conscience lies outside the legal mandate of international criminal courts.

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263. Strict adherence to the principles of legality may be more important for international tribunals to bolster their credibility than for domestic judicial institutions which are integrated into national governance structures. See *supra* n. 67 and accompanying text. Hersch Lauterpacht, Some Observations on the Prohibition of “Non Liquet” and the Completeness of the Law, in **Sources of International Law** 196, 217 (Martti Koskenniemi ed., 2000).

Trials provide no direct acknowledgment that bystanders—silent and complicit—also are beneficiaries of the violence carried out in their name. The judges in Simić refer to bystanders as points of reference against which to measure persecution directed at non-Serbs. But the Trial Chamber does not comment on the benefits to Serbs of their not being persecuted (and indeed such a discussion is irrelevant to the adjudication of the accused). Serbs of Bosanski Šamac benefited most immediately by not being subjected to the arrests, beatings, forced labor, and deportation. The Crisis Staff acted to protect their interests. Throughout the war, the Serb armed forces defended the area and left Serb residents with their property and community intact at the conclusion of hostilities relative to their non-Serb neighbors.

Karl Jaspers observed that war inflicts harm on victims and bystanders alike, but their:

suffering differs in kind, and most people have sense only for their kind. Everyone tends to interpret great losses and trials as a sacrifice. But the possible interpretations of this sacrifice are so abysmally different that [in the immediate aftermath of war] . . . they divide people.<sup>264</sup>

Trials inscribe the difference between victims and perpetrators. Yet the differences in the deprivations of victims and bystanders are not sufficiently excavated by criminal trials even though these distinctions may be critical post-conflict. The Simić Trial Chamber may acknowledge that food and fuel shortages left Serb residents hungry and stranded, but it does not consider the quality of such losses in contrast to, say, the loss of dignity of Ahmet Hadžialijagić through being forced to sweep the streets in front of his former bank;<sup>265</sup> how the hundreds of non-Serb residents fared after the Crisis Staff forced them to abandon their homes; or how the families of non-Serb detainees grieved for their husbands, brothers, sons, and fathers confined and beaten in Crisis Staff-maintained detention facilities. Court opinions are not tasked with sorting out the relative benefits enjoyed or harms suffered by bystanders as compared to victims. Indeed, the focus on individual guilt may persuade bystander beneficiaries to understand the convictions of Simić and the like as proof that the leaders are the guilty ones and that they, the unindicted, are innocent of wrongdoing.

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264. Jaspers, supra note 52, at 21.

265. Simić, supra note 8, ¶ 790.

Research in Bosnia and Herzegovina found that bystanders who were members of national groups which committed mass atrocities advocated for accountability for war crimes, but largely did not admit that "their" forces committed crimes.<sup>266</sup> Instead, they typically identified their group as victims of the war and diffused responsibility for atrocities like genocide by claiming that all sides committed such acts.<sup>267</sup> Claiming victimhood status for their group and casting a general accusation that "everyone" committed atrocities is another formulation of the proposition that if everyone is guilty than no one is. By individualizing guilt, trials offer the opportunity for complicit bystanders to deny or evade their role in mass violence.<sup>268</sup> It is possible that reactions to trials reinforce a myth of "collective innocence" and make it more difficult for bystanders to confront the ways in which they enjoyed the war's privileges.<sup>269</sup> Further research needs to be conducted to test this hypothesis, but the decidedly mixed review of the ICTY by the local population warrants deeper investigation. For communities struggling to rebuild, differences in wartime suffering may be overwhelming. The victims' need for acknowledgment of their suffering threatens to turn to a hardened sense of betrayal when former neighbors are unable to offer victims their condolences and acknowledge the ways in which they benefited from belonging to the "victimizer" national group. Truth commissions may be better suited to the task of attributing the role and contribution of bystanders to mass violence. Yet attention must be paid to the ways that individual accountability may send a mixed message in this regard so that the potential for trials to obscure the role of bystanders may be minimized.

c. Bystanders Remain Outside International Criminal Adjudication

Finally, liberal law principles constrain what international tribunals may offer by way of a more direct jurisprudential engagement of bystanders. Subjecting individual bystanders to criminal adjudication as aiders and abettors violates fundamental notions of individual conduct and intent that offend liberal principles. The alternative of creating a duty of bystanders to intervene to prevent crimes against humanity raises similar concerns. Liberalism's primacy of maximizing individual freedom, combined with its specific

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266. Judges Study, *supra* note 5, at 147; Biro et al., *supra* note 3, at 194.

267. Judges Study, *supra* note 5, at 147.

268. Violence and Social Repair, *supra* note 5, at 601.

269. See id. at 600-01; Judges Study, *supra* note 5, at 148-49.

hostility to imposing a norm that individuals put the welfare of others above risk of harm to themselves, poses significant theoretical (not to mention political and practical) obstacles to bringing bystanders to account for their conduct in a criminal proceeding. Whether bystanders might be subject to civil sanction or some other form of public castigation is beyond the scope of this article. However, any process in which an individual would be subject to investigation for his or her (non-criminal) conduct during the violence raises similar concerns of violating fundamental principles of legality.

Paradoxically, the principles that restrain the scope of criminal law also bolster tribunals as a response to crimes against humanity and gross violations of international law. In addition to offending foundational principles of liberalism, expanding liability principles to extend to bystanders may diminish the potential impact of criminal trials for social reconstruction. Select prosecutions of intellectual authors and primary architects underscore the severity of the crimes and conserve judicial and investigative resources.<sup>270</sup> Trials focus on the role that criminal principals played to unleash a torrent of horrors on a civilian population. The Trial Chamber is able to link Simić's exercise of authority as head of the regional civil authority to specific widespread and systematic persecutory acts against non-Serbs. Pinning responsibility for the catastrophe that befell the non-Serb residents of Bosanski Šamac on the highest ranking civilian forcefully makes the point that someone—an identifiable official rather than an unspecified, or diffuse collective—is liable for the "floodgate of evil" that opened onto the area. The due process guarantees enshrined in the criminal process promote confidence in the institution and serve as a basis for the Tribunal to defend and explain its convictions to critics. To the extent those in Bosnia and Herzegovina perceive the ICTY as a legitimate judicial institution, the Tribunal succeeds in attributing the war and its consequences to individual choice and action.<sup>271</sup>

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270. Should international criminal law extend liability for crimes to bystanders, concerns about selective prosecution and its perception within the conflict area and the relative amount of resources to devote to pursuing this broad, new category of culprits would complicate the administration of international accountability mechanisms. Mechanisms other than criminal adjudication should be considered for confronting bystanders. This Article focuses on the role that outreach programs of such justice institutions could play in this effort. See infra Part IV.B.2-3.

271. The ability of judges to make calibrated determinations of degrees of responsibility for crimes committed helps to differentiate perpetrators. Thus, trials may build a more textured understanding of the roles played by various actors, even if the definition of the crimes excludes bystanders from accountability. For example, the Trial Chamber differentiated among and between Simić and his co-defendants. Tadić and Zarić received lighter sentences than their former boss (eight and six years,

Solidifying acceptance of the ICTY among bystanders counters the perception that the conflict was the result of a confluence of factors so diffuse that no individual may be judged guilty.<sup>272</sup> In other words, the Tribunal needs to be understood and respected as a judicial institution capable of meting out justice impartially and in accordance with principles of fundamental fairness.

## 2. (Re)writing Judicial Opinions

The legal imperatives of adjudicating criminal trials leave little opportunity to expand judicial review of the relationship of bystanders to the acts and omissions of war criminals in the dock. One aspiration for promoting juridical engagement with bystanders would be for judges to adopt in their opinions the logical expression, consistent with current techniques of judicial reasoning, of an understanding that their adjudication of criminal acts will assume a political meaning within the communities of the former Yugoslavia. This awareness could direct judges addressing crimes with a collective dimension to craft opinions that do not insulate, but leave open, the roles and responsibilities of bystanders. Articulating degrees of responsibility—not liability—for crimes of mass violence, tribunals could use their judgments to address a broader range of actors who contributed to the political and social context in which criminals committed atrocities. In this way, judges might pierce the moral wall that Jaspers sought to erect between criminals and bystanders and increase the likelihood of public discussion about the murky, messy, and often contradictory roles that bystanders play in enabling mass violence. Social regeneration is necessary after wholesale destruction of communities, but there is no moral justification for this process to occur at the level of individuals, unaided or unremarked by legal processes. Bystanders are not centerstage in trials of crimes against humanity, but their presence is more than an abstraction or shadow.

If the principles that bind the scope of liberal justice also bolster its efficacy, what if anything can tribunals do within the confines of their mandate to counter the reductivist tendency of law to edit out the role of bystanders in mass

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respectively compared with seventeen for Simić); and the judges found Tadić and Zarić played different roles in the persecution against non-Serbs, as Tadić was liable only for his role in prisoner exchanges while the judges convicted Zarić for his involvement in the unlawful treatment of detainees and other substantive offenses. Simić, *supra* note 8, ¶¶ 1118, 1122, 1126, 1093, 1103, 1105.

272. *Violence and Social Repair*, *supra* note 5, at 598–99; *Judges Study*, *supra* note 5, at 147–51.



violence? One modest proposal is that the judges could caution in their opinions that their findings are limited to those accused and their opinions should not be considered to exonerate those who are not before the court. Liberal law is unable to adjudicate collective responsibility but it can resist the implication that judgments confer collective innocence.<sup>273</sup> For example, in its discussion of liability principles that govern the Simić defendants or other accused, the court could observe in dicta that its verdict applies only to the specific individuals before the court and should not be read to imply the exoneration of any others. Such an observation is no more than an explicit restatement of basic principles of adjudication and would not run afoul of principles of liberal law adjudication.

A more ambitious approach, but still within the canons of traditional legal reasoning, would be to have the judges observe that beyond the accused there are those who support the individuals and institutions that conducted the crimes against humanity which the Tribunal's mandate does not reach. For example, in the Simić verdict the judges could have noted that there are individuals who populated civil administration positions, or otherwise provided information or support to military and civil authorities, who may be innocent of criminal conduct but nonetheless are implicated in the web of violence.

Judges could write these caveats into the judgments of individual defendants. In addition, the Tribunal could include a general statement in its annual report to frame interpretations of its work for the public in affected areas. Such a statement would indicate that the ICTY Statute created the institution to determine individual accountability for specified crimes within the temporal and geographic jurisdiction for the Tribunal. The nature and scope of the judges' inquiry is to determine the culpability of the individuals accused of the charges issued by the Prosecutor. The judges do not select

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273. Group behavior and its influence on individual volition and participation in harmful acts or crime is a subject of research and debate, as is the failure for individuals to intervene to rescue others from harm. See **Leon Sheleff, The Bystander: Behavior, Law, Ethics** (1978) (discussing research that proposes that it is the indifference to suffering of strangers at the immediate, personal level that provides the basic conditions within which wholesale victimization of genocidal dimensions may be committed). Data suggest that under certain conditions, individuals in groups will act contrary to social and behavioral norms, which is illustrated starkly by the deception experiments conducted by Professor Stanley Milgram in which participants continued to administer electronic shocks even when warnings signs of distress were posted. **Stanley Milgram, Obedience to Authority: An Experimental View** (1997). This research prompts the question of whether collective innocence is a valid construct in the context of mass violence. For a fuller discussion of this literature and its application to bystanders and collective violence, see Violence and Social Repair, supra note 5, at 606-17.

the defendants nor are they at liberty to draft the charges. Similarly, the cases forwarded by the Office of the Prosecutor are the result of an evaluation by that office of the most appropriate cases to pursue, as well as external factors such as the availability of evidence, securing the arrest of the accused, and decisions regarding allocation of resources. Therefore, the judgments and trial record produced by the Tribunal are not a complete record of all the events and violations that occurred during the conflict. The ICTY will only prosecute a fraction of all those responsible for serious violations of international humanitarian law. Accountability for the full spectrum of perpetrators of war crimes will be left to national mechanisms. However, criminal sanctions—whether international or domestic—will not address the relationship of bystanders (understood broadly) to the violations. While the primary work to promote bystander acknowledgment lies outside the Tribunal, residents of the former Yugoslavia and those working to promote social reconstruction are well-advised not to interpret the silence of the judges regarding how bystanders are implicated in the processes of social breakdown that result in mass violence as “proof” of their “innocence.” The Tribunal should use its annual report to encourage all those of the region—whether perpetrators, victims, or bystanders—to use the judgments as an opportunity to examine the past, a vehicle to examine one’s actions, and an exhortation to build a future where human rights are respected and peace is secured.<sup>274</sup>

These judicial expressions could clarify the boundaries of criminal adjudication for bystanders, victims, and perpetrators. Bystanders would be reminded that individual guilt by some, even at the highest levels, does not hold them free of blame for the crimes that occurred. Similarly, a statement like this would serve as an acknowledgement of the loss of victims whose perpetrators are not in the dock. The court would convey the sentiment that its verdict in any particular case is not intended to serve as the record for all crimes committed in the course of the conflict. This statement would acknowledge the inevitable frustrations of victims whose ache for justice will not be satisfied in The Hague due to selective prosecution, lack of evidence, or any number of reasons unrelated to the substantive harm they endured.

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274. Recent ICTY reports have indicated that the Tribunal accepts that its work plays a part in a broader range of activities to promote peace and stability. However, the institution’s efforts in this regard have been too modest. See infra Part IV.B.3.

A risk of including explicit acknowledgement of the moral relationship of bystanders to crimes against humanity is that nationalist politicians might use this type of dicta to bolster their arguments that the ICTY unfairly attacks "good Serbs" who were doing their jobs or acting patriotically to defend against attack by enemy forces. True enough; but the court would also be acknowledging gradations of involvement in criminal regimes. Greater differentiation among Serb bystanders could help counter collective thinking and thereby help promote a collective identity that crosses national lines.

The possible corrective actions international courts may initiate within the strictures of liberal law adjudication are fairly modest. Given the ways in which trials may be distorted by complicit bystanders and nationalist politicians, one must consider other actions the court may take to counter the unintended consequences for social reconstruction of its operation, as well as the justifications for such initiatives. If courts are courts, that is to say, if they serve as institutions that hold individuals accountable according to prescribed norms, international criminal courts are courts, but also sites where the concept of an "ethos of humanity" is articulated, its values expressed, and the activities needed to reconstitute it in post-conflict communities are voiced. In other words, the work of international justice is broader than developing and applying specific legal norms to pass on the guilt or innocence of the accused. It also extends to responding to the social and political dimensions of its work. Mass violence damages social networks and patterns that form the foundation for communal life. If justice in the aftermath of such carnage is to promote the rekindling of these networks, tribunals need to address how their work impacts communities.

The trouble is that trials do not, and cannot, in and of themselves, "close the circuit" linking legal accountability to social reconstruction. Trials must work in concert with a range of programs to support this goal. To maximize the ICTY's contribution to the promotion of peace, we need to understand the Tribunal as a court as well as an institution advancing social reconstruction. These projects are complementary but distinct, each with a different institutional expression. The ICTY as adjudicator may be limited in how it can address bystanders, but the Tribunal as an institution to promote social reconstruction is freer to act to counter the limitations or negative impact of the court as adjudicator. The following section offers a proposal for how international accountability mechanisms should engage bystander communities.

### 3. (Re)forming International Criminal Justice Institutions

International criminal courts of justice should adopt a dual identity and programmatic expression to realize fully their ambitions to promote social reconstruction. As a first step, tribunals should temper their own and the public's expectations about the potential of trials to transform post-conflict societies. With a better understanding of the tensions, and acknowledging that there are unforeseen consequences of prosecutions, tribunals could actively engage in or support interventions to overcome these limitations. Thus, understanding the mandates of international justice institutions to include addressing the social dimensions of trials on impacted communities requires these tribunals to view their work through bifocals: one lens being the liberal conception of justice and the other lens focusing on the distortions that result from looking at mass violence from the perspective of international criminal law.

The ICTY embraces the reconciliation objective of its statute, to which the court renews its commitment and toward which the judges celebrate their progress annually in the Tribunal reports.<sup>275</sup> The court variously articulates the connection between criminal trials and reconciliation, but rests on the assumption that victims of the conflict will be able to put down arms and set aside their desires for revenge if they see that individuals are held accountable for their crimes. Initially, the Tribunal asserted its primacy as the linchpin to reconciliation.<sup>276</sup> Over time, however, the ICTY has toned down its rhetoric and framed trials as critical, yet playing a limited role in promoting peace in the region. In its Eighth Annual Report, the Tribunal noted that it could not try all perpetrators, nor was it the court's role to "analyse all the historical, political, sociological and economic causes of the war, or to perform alone all the work of memory required for the reconstruction of a national identity."<sup>277</sup> The following year, acting on directives from the Security Council, the Tribunal announced that it would wind down its work by 2008.<sup>278</sup> Acknowledging that it would not be able to prosecute all perpetrators, the court openly encouraged the countries of the

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275. See *supra* notes 87, 92, 95, and sources cited therein.

276. "The role of the Tribunal cannot be overemphasized. . . . [I]t is a tool for promoting reconciliation and restoring true peace. If responsibility for appalling crimes perpetrated in the former Yugoslavia is not attributed to individuals, then whole ethnic and religious groups will be held accountable for these crimes and branded as criminal." *First Annual Report*, *supra* note 87, ¶ 16.

277. *Eighth Annual Report*, *supra* note 95, ¶ 285.

278. *Ninth Annual Report*, *supra* note 95, ¶ 326.

former Yugoslavia to contribute to the work of reconciliation by undertaking domestic trials and outlined a proposal to regional governments to develop their domestic judicial structures to conduct prosecutions consistent with international standards.<sup>279</sup>

Although the ICTY may be tempering the rhetoric of its contribution to reconciliation as its tenure draws to a close, the Tribunal is far from embracing the dual identity proposed here. The court has acknowledged some of its limits as a judicial institution; significantly (1) that the Tribunal cannot memorialize the diverse contributing causes of the conflict and (2) that it does not have the resources to bring all perpetrators to justice. The first acknowledgment represents a promising opening for the court as an institution to articulate more explicitly the limits of its ability to achieve its peace and justice mandate. It also suggests that the ICTY can use its annual reports to communicate about what it sees through the "second lens" of its work, that of the impact of trials on bystanders. The second observation seems to undercut the impact of the first by implying that more trials will produce greater progress toward social reconstruction. Yet as this analysis suggests, prosecutions in fact may inhibit the willingness of complicit bystanders to invest in a shared future.

#### a. Annual Reports

One response is for the Tribunal to offer more extensive observations through its annual reports about how trials help, and make more difficult, the process of acknowledgment of one's role in the war. Addressing the structural limits of trials as a response to bystanders would be an important step towards reframing expectations of the contribution of international justice to peace. Offering that trials are not able to address the various types or complexity of relationships that bystanders inhabit vis-à-vis the violence, and that trials may imply a false moral innocence which principles of justice applied through trials are unable to dispel, would seem no different in character than the Tribunal's previously published observation about its limited role in casting a new national identity. At a minimum, it seems reasonable for the Tribunal to articulate more thoroughly that justice is one aspect of a comprehensive response to mass violence. Official acknowledgment of the ways in which the project of justice may work counter to its goals may be unpalatable to Tribunal staff and supporters who view such publication as a sign of institutional weakness. Some may view such statements as not part of the role of courts, but

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279. Id. ¶¶ 326-27.

belonging to commissions of historical record or other non-adjudicative bodies. Yet critical self reflection is necessary in order to move toward appropriate policy interventions.

Unrealizable goals for international criminal tribunals pose the risk of loss of legitimacy and support when the achievements of trials fall short of the mark. It is understandable that at the time the UN established the ICTY, the Tribunal and its supporters would justify its creation by arguing that criminal accountability was the cornerstone mechanism to reconcile former enemies.<sup>280</sup> However, in the intervening years, international justice institutions have proliferated. While still criticized, trials conducted under international auspices have secured a sufficient measure of permanency in the repertoire of transitional justice mechanisms that their limits may be scrutinized without risk that the international community will abandon justice as a response to mass atrocity.

Indeed, a critical evaluation is overdue. The ICTY has been in operation over a decade and its achievements have been adequately chronicled. At the same time, its capacity for public self-reflection appears relatively modest.<sup>281</sup> The Tribunal and other international accountability mechanisms should do more than acknowledge that trials are limited interventions;<sup>282</sup> they need to address the data that suggest tribunals may work against their objectives. Clarifying that prosecutions may work in tension with or counter to efforts to promote reestablishment of inter-ethnic ties would enable these justice institutions to move forward with intentionality to address the shortcomings of their responses. Thus, the dualism proposed here requires the institutional capacity of international tribunals to work within and against their

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280. At the time the UN Security Council created the ICTY, the Tribunal was the first court to conduct international criminal prosecutions since the conclusion of the Second World War. The institution was new and its support was tenuous.

281. In its Fourth Annual Report, the Tribunal observed that the ICTY "remains a partial failure—through no fault of its own" and attributed the "growing dissatisfaction" with the Tribunal to the failure of states to arrest those indicted. Fourth Annual Report, supra note 95, ¶ 175. See also Fifth Annual Report, supra note 95, (calling on states to provide greater assistance to the ICTY so the Tribunal can achieve its mandate); Seventh Annual Report, supra note 95, ¶ 4. A notable exception to these themes was the Tribunal's reflection that it was misperceived in the countries of the former Yugoslavia. As a result, the court created an outreach program to establish an ongoing presence on the ground. Sixth Annual Report, supra note 92, ¶¶ 146-50.

282. Eighth Annual Report, supra note 95, ¶ 285 ("[I]t is not for the Tribunal to analyse all the historical, political, sociological and economic causes of the war, or to perform all the work of memory required for the reconstruction of a national identity."); see also Ninth Annual Report, supra note 95, ¶ 327.

structural limits. The ICTY created an institutional expression to address the social impact of its work, the Outreach Programme. This is an important beginning; it is the first institutional gesture acknowledging the need to act on the view through the second-social impact-lens of international justice. A quick review of its work and mandate indicate that the program holds promise but has functioned primarily as a public relations operation and requires a more ambitious programmatic agenda to address adequately the counter-justice that trials produce.

b. Outreach Programme

In its recent annual reports, the Tribunal announced expansion of its Outreach Programme, yet the activities of this initiative in the region remain directed toward explaining and promoting a liberal legal response to the war, with insufficient attention paid to addressing the shortcomings inherent in its justice work.<sup>283</sup> The Tribunal states it is expanding its capacity to distribute documents in the local languages<sup>284</sup> and has increased support to local media to promote greater and more accurate press coverage.<sup>285</sup> To advance the application of the rule of law within the Balkans to perpetrators of war crimes, the Tribunal follows domestic legal reforms, plans to train local judges in international criminal law and so transfer its expertise to national judges who will conduct domestic war crimes trials,<sup>286</sup> continues to educate targeted professional groups (including judges as well as political leaders) about the work of the court,<sup>287</sup> and provided important support to Bosnia and Herzegovina in its establishment of a national War Crimes Chamber<sup>288</sup> of the State Court.

The publicized expansion of the program indicates an increase in the number of outreach activities, but suggests that the difference is more of degree than kind. The passage regarding initiatives to counter "negative perceptions" in the region describes these interventions simply as "symposiums, roundtables and workshops" engaging "local legal communities and nongovernmental organizations, victims' associations, truth and reconciliation bodies, and educational institutions."<sup>289</sup> This view suggests that the problem is one of a failure of bystanders

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283. Lean budgets for the program also limit the scope of its activities.

284. Tenth Annual Report, supra note 95, ¶ 281.

285. Id. ¶ 284.

286. Id. ¶ 285.

287. Id. ¶ 286.

288. Eleventh Annual Report, supra note 95, ¶ 319.

289. Tenth Annual Report, supra note 95, ¶ 283; see also Eleventh Annual Report, supra note 95, ¶¶ 320, 323.

to comprehend how liberal law operates—and certainly there is a lack of information about the ICTY, even among legal professionals. We are not given a further description of the content of these programs other than that the goal of many of these events is to “mak[e] the work of the Tribunal relevant to the national justice systems . . . .”<sup>290</sup> In 2004, the ICTY reported that its Outreach Programme held a conference in the northern Bosnian town of Brcko that brought together ICTY staff, including prosecutors and investigators with representatives of victims’ associations and local leaders to explain “its methods of operation” and to encourage local authorities to pick up the mantel of criminal justice after the Tribunal winds up its investigatory work at the end of 2004.<sup>291</sup> Thus, the ICTY implies that the content of the exchange addresses international legal norms and their application in ways that emphasize the continuity of international criminal law with domestic prosecutions.<sup>292</sup> However, the research data suggest that Serb and Croat bystanders do not wish to acknowledge that their side committed crimes and the Outreach Programme activities do not indicate the Tribunal is probing alternative strategies to address this larger problem.

What appears missing is an understanding on the part of the Tribunal that the lack of support for the institution may have as much to do with limits of prosecutions as with any lack of understanding among bystanders about how the ICTY applies relevant law and procedure. Institutions of international accountability and domestic civil society should acknowledge and clarify the benefits and risks of trials as a tool to enable divided communities to work together. Only by understanding how prosecutions may promote a myth of collective innocence can justice mechanisms attempt to identify and disrupt such beliefs. It is critical that institutions of international justice engage local partners in frank discussion of the ways to develop local interventions that can work to counter the ways in which trials obscure the role of bystanders and the need for them to address their relationship to the violence. The Outreach Programme should continue to educate local communities about the methods of international justice. However, unless the ICTY addresses the resistance of bystanders to trials of “their” leaders, the

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290. Tenth Annual Report, *supra* note 95, ¶ 283.

291. Eleventh Annual Report, *supra* note 95, ¶ 320.

292. Educating national audiences about the ICTY is a necessary step, but development of the rule of law and national judicial institutions is also needed in order to ensure the successful transfer of justice work from The Hague to the courts in the Balkans. For a more detailed discussion of the need and challenges for greater continuity between the ICTY and national courts in Bosnia and Herzegovina see A World Unto Itself?, *supra* note 5, at 29–48.



Outreach Programme's achievements will necessarily fall short of the mark. Stimulating bystander acknowledgment is part of attending to the damage caused by mass violence so that communities may unite behind a shared conception of community in which neighbor need not fear neighbor.

c. Looking Forward

The ICTY and its Outreach Programme offer important sites for investigation about the potential and limits of international justice institutions to promote social reconstruction. Although the Tribunal is winding down its work, a review of its record allows us to draw lessons to improve international criminal law's response to mass atrocities that may inform the work of the ICC and similar tribunals. The Outreach Programme grew out of a crisis in confidence of the work of the Tribunal within the Balkans. Query whether this crisis could have been averted or its impact diminished had the ICTY initiated this program at the same time it began its investigative work. International justice mechanisms should accept from the outset that their work operates simultaneously at the level of an adjudicative body and as a mechanism to promote reflection and new thinking among bystanders, survivors, and perpetrators about the meaning of the violence for themselves and their communities. At the same time that tribunals work to promote confidence in their capacity to apply the rule of law to the accused, they must act through an outreach program or other institutional expression to counter the inevitable distortions that come with liberal justice as a form of reckoning with the past.<sup>293</sup>

The outreach arm of any mechanism of international accountability must work to explain the legal operation of the court to domestic audiences. But it must also engage in public education of and dialogue with bystanders to correct any misperceptions that tribunal opinions exonerate the unindicted or that only those who committed criminal acts contributed to the cataclysm. Tribunal staff and targeted sectors of Balkan civil society would improve the potential of trials to promote peace if they considered how to design parallel interventions among bystanders who currently are hostile to the Tribunal that could stimulate discussion about their experiences and roles in the war. The outreach work should seek to collaborate with various sectors of civil society—not only with groups that are organized according to the categories which framed the conflict

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293. A positive sign in this regard is the extensive engagement with local actors from relevant countries that the ICC Prosecutor has undertaken.

(e.g. ethnic, national, or political groups), but also groups organized around identities that transcend these categories (e.g. professional associations, economic sectors, etc.). Individual bystanders have multiple identities—national group, gender, profession, etc.—and outreach activities should be organized around various social formations. The goal is to stimulate discussion of the past in multiple fora—in boardrooms, shop floors, parks, schools, dinner tables, and bedrooms. And a tribunal should incorporate research and evaluative functions into its work so that it may identify bystander perceptions of its efforts, address areas of concern, and assess the efficacy of its interventions.

The Outreach section of the Special Court for Sierra Leone provides an example of a broader approach to public engagement by an international tribunal. Initially part of the Office of the Prosecutor, the program became an independent agency and defined its role as serving to link the population to the Special Court.<sup>294</sup> In serving this function, the Outreach section has extended its activities beyond legal professionals and conducted training for national court personnel, members of the Sierra Leone Armed Forces, and police about how the operation of the court could improve domestic justice administration.<sup>295</sup> It has also conducted programs in schools and colleges. In addition, the section has initiated dialogue about the meaning and relevance of the Special Court with a broad spectrum of society. Through a series of Victim Commemoration Conferences, the Outreach section brought together members of government and civil society from the local, national, and international level to discuss and address concerns about the court.<sup>296</sup> From these conferences emerged particular initiatives to address the issues identified. Thus, the Outreach section demonstrated the flexibility to design activities that facilitated involvement from civil society with the Special Court and promoted its relevance to local struggles to rebuild communities.

As the Sierra Leone example suggests, comprehensive outreach about the contribution of justice to peace requires multiple activities. Some of these initiatives may be undertaken by justice institutions, while others may be

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294. War Crimes Studies Center, University of California, Berkeley, Interim Report on the Special Court for Sierra Leone 33 (2005).

295. *Id.*

296. Participants engaged in discussions on a range of topics: "perceptions of justice as presented by the Special Court; the perceptions of justice and accountability in Sierra Leone; the perceived legacy of the Special Court and the Truth and Reconciliation Commission; and how communities and civil society actors . . . can complement the work" of those transitional justice institutions. *Id.*

implemented by other multilateral institutions or nongovernmental organizations. For example, films, commemorations, and oral history projects could help generate discussion about what transpired in particular communities and the respective contributions of bystanders and perpetrators to social breakdown and war. These interventions should be studied and supported by accountability mechanisms so that the work of justice is not confined to chambers. In other words, the institution must pay adequate attention to both frames—the legal as well as the social—to keep its work in proper perspective.

## V. Conclusion

We have imbued the concept of international criminal justice for mass atrocities with exceedingly high expectations. Criminal trials are to go beyond exacting punishment from the wrongdoer; they are to help communities wracked by bloody conflict forgo violence and embrace a new, collective future. Drawing on empirical data and a model for social reconstruction that emerged from a recent study from U.C. Berkeley's Human Rights Center, this Article examines how the ICTY operates to further this social goal of international justice. In particular, the Article considers how the application of international criminal law contributes to and detracts from the potential willingness of bystanders to the violence to reconcile with victims and perpetrators.

Early supporters of international justice for war crimes committed in the former Yugoslavia argued that justice would promote peace. Criminal accountability of high-ranking officials is also instrumental—to remove criminal leadership from power—as well as serves as a powerful symbol to repudiate the wrongdoers and their political platforms. With criminal leaders removed from power, the predictions are that victims and “innocent bystanders” in whose name the crimes were committed are able to reconcile. Over the last decade, we have seen an increase in the number and configuration of accountability mechanisms that enforce international criminal law. The experience and track record of these institutions have led to a more tempered understanding of the contribution of trials to social reconstruction. New thinking and research is emerging within these tribunals, as well as academic circles, that understands justice as only one (albeit critical) component needed to secure democracy, rule of law, and respect for human rights in countries emerging from mass violence. While it is important to reconceptualize trials as part of a larger panoply

of interventions, attention must be paid to the ways that trials may make it more difficult for some to reconcile.

Harvey Weinstein and I have argued based on prior research that interventions to promote social reconstruction should stimulate individual acknowledgement of one's relationship to the breakdown of society. Trials produce an ambiguous record from the perspective of how judgments may frame understanding and discussion among bystanders about their role in conflict. The research data and the case study of Prosecutor v. Simić et al. raise doubts about the prediction that individual accountability debunks the myth of collective guilt and allows the "innocent" bystanders and victims to reconcile. Some who watched their communities descend into violence silently approved of the violence, while others may have condemned what transpired but remained passive and did not speak out. The submissiveness of bystanders enables mass violence, but trials are not well-suited to confront bystanders with the consequences of their behavior. For those who turned away, individual trials may confirm their sense of powerlessness—a criminal leader and not they are responsible—but the record does not challenge them to consider the harm of their inaction. Trials pose additional challenges for bystanders who supported the perpetrators. The research in divided communities in the former Yugoslavia indicates that residents view those standing trial in The Hague as representing "their" national group. Thus a conviction of an individual is interpreted as an affront to group identity, engendering criticism of the ICTY rather than stigmatizing the war criminal. These unintended consequences of enforcing international criminal law deserve close and careful consideration.

This Article relies on empirical data regarding perceptions of the ICTY and ICTR among residents of those countries and a case study of a single conviction of the highest-ranking civilian in Bosnia and Herzegovina for crimes against humanity. This methodology is limited and provides no definitive conclusions about the effects of trials on bystanders. Rather, the data and the legal framework of criminal trials alert us to concerns about the way in which criminal proceedings may frustrate as well as facilitate the goals of social reconstruction. What is clear is that the doctrinal requirements and principles underpinning criminal trials constrain their ability to excavate adequately the contribution of bystanders to mass violence. In the absence of more direct engagement with complicit bystanders, the danger is that trials do not counter the ability of those who supported the

perpetrators to defend their former leaders rather than to reflect on their own contribution to the destruction of their communities. In addition, the lack of acknowledgment of the anguish of those opposed to the violence but were too fearful to speak leaves those silent bystanders without a judicial record of their perspective.

More research should be conducted regarding the impact of accountability mechanisms on bystanders. The focus of this Article is on the ICTY, but the analysis concludes that the concerns highlighted here are the result, in large part, of the limits of the law to address bystanders. These shortcomings need to be addressed not only by the Tribunal, but other international mechanisms of accountability. This Article argues that in order to respond to the ways in which trials work counter to the project of social reconstruction, international criminal justice mechanisms need to adopt a dual perspective on their work. These institutions need to operate as adjudicative bodies adhering scrupulously to the highest standards of professionalism in performing their investigative, prosecutorial, and adjudicative functions. Particularly when adjudicating crimes against humanity, which implicate collective action, judges explicitly should limit their findings of guilt and innocence to those before the bench, and caution that their determination should not be interpreted to exonerate (or condemn) any other individuals. Opinions should leave open the possibility that other members of a group are responsible for mass violence. Thus, trial records should stimulate discussion among victims, perpetrators, and bystanders beyond the courtroom about the events that formed the basis of the proceedings.

At the same time, such tribunals need to acknowledge and attend to the social impact of their work. To date, the ICTY has made spectacular success as a court but minimal progress toward making its work relevant to social reconstruction. The failure, this Article argues, is due in part to a failure of the institution to accept the limits of the paradigm of justice to produce a willingness in bystanders aligned with accused war criminals to embrace a collective future with their former enemies. A robust outreach program is essential for international justice institutions to address the shortcomings of trials. A few suggestions for deeper and more varied engagement by outreach programs across a broad spectrum of social segments have been offered. Greater creative thinking is needed to design activities that will link the justice work of tribunals to processes of social regeneration. Some activities may be conducted by an outreach program, but others, for example

memorials (or counter memorials),<sup>297</sup> may be more appropriately carried out by other governmental or nongovernmental entities. What is important is that the social impact of justice is addressed through the particular accountability mechanism as well as through other relevant institutions engaged in social reconstruction.

To admit the limits to justice is not to discard it as a component of a response to mass violence. We know very little about the processes that facilitate the willingness of communities cleaved apart by violence to reunite and set upon a shared path toward the future. Criminal trials help establish social stability by removing wrongdoers from positions of authority and neutralizing their capacity to incite violence. Whether justice for a few—as is likely inevitable in the aftermath of mass violence—will help the many residents who remain outside the courtroom engage each other to rebuild relationships of trust remains an open question. What is needed is a better understanding of the ways in which international accountability influences perceptions of bystanders—particularly complicit ones—about their criminal leaders. Legal accountability sidesteps bystanders, leaving their complicity unremonstrated and thus allowing them to interpret judgments in ways that evade or exonerate their contribution. Thus international criminal trials will forever underachieve their potential to transform communities unless the institutions of justice directly address the ways in which they fail to account for the complexity of bystanders' relationship to the past. International tribunals aspire to help remake communities struggling in the aftermath of violence. To do so they must see clearly and act decisively to capitalize on their success and counter their vulnerabilities.

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297. James Young has termed a class of memorials in post-war Germany "countermonuments" because they "seek to challenge the very premise of the monument." He describes how the artists who create these works intend to combat the tendency of memorials to enable us to forget the past. "They believe, in effect, that the initial impulse to memorialize events like the Holocaust may actually spring from an opposite and equal desire to forget them." **James E. Young, *At Memory's Edge: After-Images of the Holocaust in Contemporary Art and Architecture*** 96 (2000).

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