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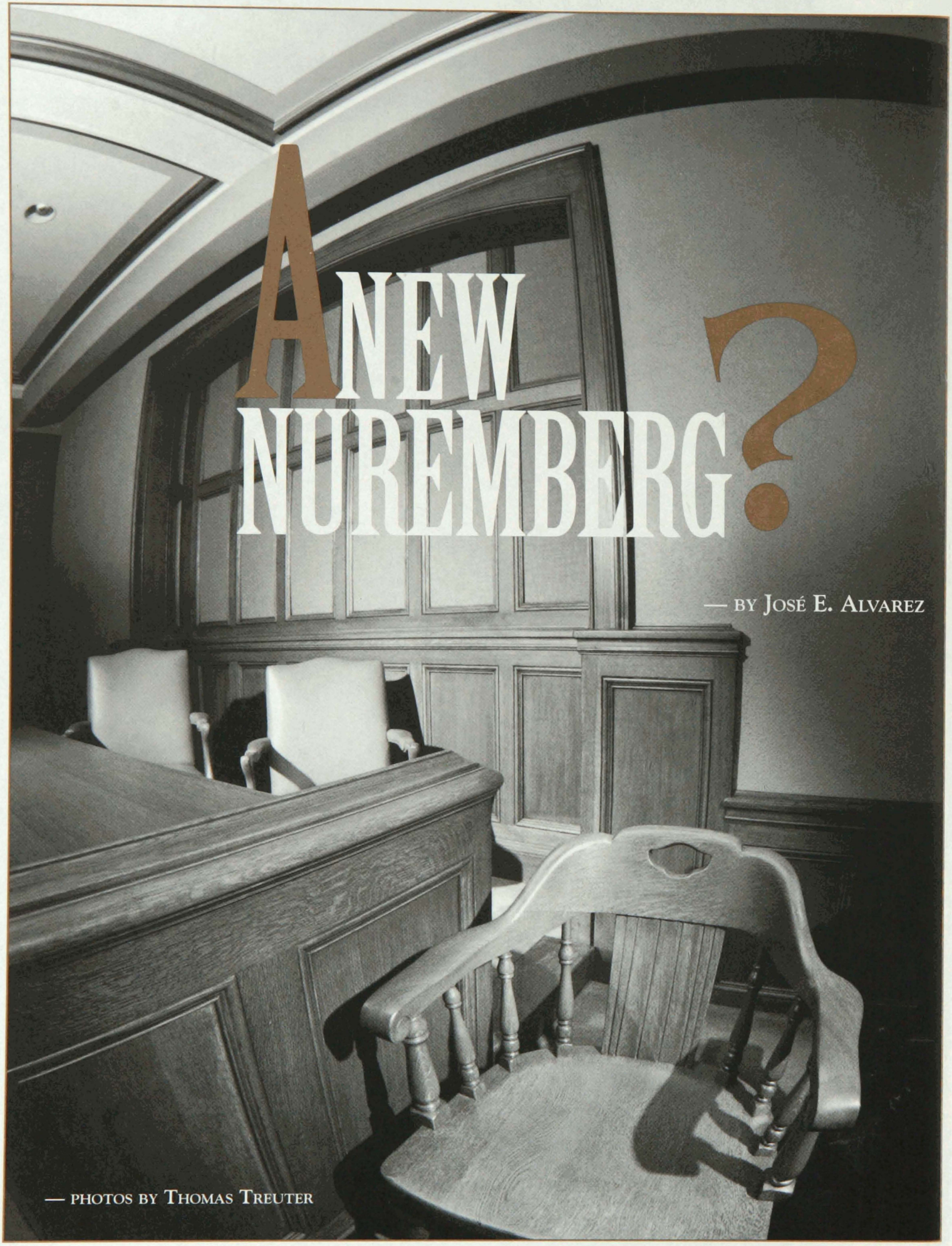


A NEW NUREMBERG?

— BY JOSÉ E. ALVAREZ

— PHOTOS BY THOMAS TREUTER

The following essay is based on presentations given recently at the University of Michigan, Harvard Law School and the Fletcher School of Law and Diplomacy. While most citations have been removed for publication here, the author gratefully acknowledges the work of Mark Osiel, whose article, "Ever Again: Legal Remembrance of Administrative Massacre," 144 University of Pennsylvania Law Review *463 (1995), inspired much of the analysis here.*

On May 25, 1993, acting under the same powers it had used to authorize the Gulf War, the United Nations Security Council established the first international war crimes tribunal since post-World War II trials at Nuremberg and Tokyo. This "independent" international tribunal, with jurisdiction to prosecute persons responsible for grave violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, was soon followed by a similar one for recent atrocities in Rwanda. In both cases the decision to bypass the arduous and probably inconclusive path of attempting to negotiate a multilateral treaty in favor of acting by Council fiat was taken on the ground of "necessity," namely, the fear that any other alternative would have taken such a long time that any hope of convicting the guilty would have perished along with the evidence of their crimes.

Although the setting up of the judicial, prosecutorial and secretariat organs for the Balkan tribunal took considerable time, today, in accordance with a 34-article "statute" proposed by the Secretary-General and adopted by the Security Council, two trial chambers and one appellate chamber consisting of a total of 11 judges are in session at The Hague. The judges, elected by the General Assembly from a list prepared by the Security Council, consist of nationals of Egypt, Italy, Canada, Nigeria, France, China, the United States, Costa Rica, Pakistan, Australia, and Malaysia. The judges approved rules of procedure and evidence in February 1994 and, by the spring of 1997, a three-judge trial chamber had successfully concluded the first international "war crimes" trial in 50 years. In *Prosecutor v. Dusko Tadic* (Case No. IT-94-1-T, Opinion and Judgment, May 7, 1997), the tribunal rendered a guilty verdict on 11 of 31 counts originally charged against a Bosnian Serb and former cafe owner. Portions of the Tadic trial were televised on Court TV (which billed it, with some justice, as the "real trial of the century").

While other trials are now going on at The Hague, at the time of Tadic's conviction fewer than 100 individuals had been indicted — compared to the thousands likely to have been involved in the massive "ethnic cleansing" in the Balkans. Moreover, of those indicted, only seven are in custody, while the most prominent, Milosevic and Karadzic, remain free. Nor are the prospects for improvements on these numbers great — given the continuing reluctance of relevant government authorities to cooperate with the tribunal. Nonetheless, there is now renewed hope that NATO-led forces will seek out and arrest at least some indicted individuals.

While it is too early to assess the likely legacy of the Balkan war crimes tribunal, it is clear that both its creation and its goals have been inspired by the perceived "lessons" of Nuremberg. My thesis is that the Nuremberg model, while instructive, is misleading and that an overly faithful attempt to replicate Nuremberg may be a mistake.

EMULATING Nuremberg's Goals

From the start, this tribunal has embodied the long-frustrated hopes of many international lawyers for the application of the rule of law to notorious crimes of state. For many of the disciples of Grotius, proceeding with these ad hoc courts in Rwanda and in the former Yugoslavia is but the first step toward an eventual permanent international criminal court (now under serious negotiation within the United Nations). The mythic goals for the Balkan tribunal, drawn from those that inspired the high profile trials of 22 major Nazi figures at Nuremberg, go far beyond the aims of the ordinary criminal prosecution. It is said that these trials, properly conducted, further the aims of:

General Deterrence — to threaten those in positions of power and make them stop the threat and deployment of violence to achieve national ends;

Punishment — to make atonement possible for the culprits and honor the dead;

Compensation and Rehabilitation — to provide mechanisms, along with the criminal proceedings, to enable victims and their families to receive needed

psychological counseling, identify remains, restore lost property, and otherwise help heal wounds;

The Restoration of Public Order — to channel the thirst for revenge to more peaceful dispute settlement;

The Reinvigoration of the International and National Rule of Law — to affirm the Nuremberg Principles at the international level while restoring faith in law generally;

The Preservation of Collective Memory — to preserve an accurate historical account of barbarism in the hopes of preventing its recurrence;

and, perhaps most important,

National Reconciliation — to restore the lost civility of torn societies.

Nuremberg has also inspired the vision of how the Balkan prosecutions would accomplish these aims. Advocates of Balkan war crimes prosecutions, in government and in academia, argue that the purpose of making war criminals answer for their crimes is, as Ted Meron wrote in *Foreign Affairs* ("Answering for War Crimes," Feb. 1997), to "assign guilt to individual perpetrators, rather than allowing blame to fall on entire groups and nations." By punishing the guilty (and only the guilty), all the Nuremberg-inspired goals are expected to come into place: those in positions of power will be deterred from further violence; the guilty will be given the chance to atone; the injured a way to be mollified; public order and respect for the rule of law will be restored.

The advocates of today's Balkan prosecutions argue that we need to emulate, as much as the differing conditions in the Balkans will allow, the forceful application of the "rule of law" of the victorious allies in war-torn postwar Germany. Our task, they argue, is to convince the peoples of the former Yugoslavia that the tribunal is as serious an enterprise as Nuremberg was. Thus, it is argued that we must get NATO-led forces to use force as necessary to arrest those who local authorities refuse to give up and that the tribunal's prosecutors must courageously indict the highest leaders responsible regardless of the political repercussions since the conviction of only inconsequential "small fry" delegitimizes the entire process. The foremost supporters of the tribunal argue that criminal prosecutions need to reach deeply into all levels of Balkan society to identify and punish all those who have been complicit with evil — even if such a thorough-going search for the truth requires interminable trials and expensive investigations. It is argued that only a serious, "even handed" effort which spares no expense and no individual can expect to live up to the expectations set by Nuremberg.

Like Nuremberg, the Balkan tribunal is built on the premise that criminal convictions help achieve national reconciliation because they exonerate those not in the dock; that is, because war crimes trials unite the population in collective revulsion against the barbarism of a few and encourage collective solidarity in support of the civilized nature of the process itself. Convictions are seen as providing "cathartic group therapy" to reestablish a lost national (and international) consensus: the contrast between the rules of law by which the defendants are judged and the barbarity of what they are shown to have done is said to encourage a unified sense of outrage against the guilty, with corresponding simultaneous satisfaction toward the civilized process that branded the criminals.

The Nuremberg model assumes that everyone will agree with the legitimacy of the tribunal and its verdicts; that social solidarity will be restored through invocation of shared values. The premise, in short, is that a forum issuing verdicts with universal legitimacy will restore lost civility — at least for the torn countries directly at issue and perhaps for the international community as a whole. It is assumed that war crimes tribunals achieve "closure" by convincing all those of good faith of the guilt of those convicted, by channelling communal anger solely at those individuals, and by keeping retribution safely inside the courtroom. In the words of a former prosecutor at the Balkan tribunal, Minna Schrag, by finding identifiable individuals accountable, the rest of the community is not "associated with collective guilt . . . ." As she puts it, the trials help prevent generations growing up saying "it's the Serbs or the Croats or any other group that did this to my father . . ." (*Columbia Law School Report*, at 25, Autumn 1996). Ted Meron of New York University agrees, asserting in *Foreign Affairs* (Feb. 1997) that the process will thereby diffuse "ethnic tensions and assist in peacemaking."

AVOIDING

At the same time, the creators of the Balkan tribunal have sought to avoid the perceived "flaws" of Nuremberg and Tokyo. Fifty years of revisionism have taken a toll on the perceptions of Nuremberg's "success" and the creators of today's tribunals were acutely aware of the critiques. Prominent critics, especially German lawyers but including the chief deputy prosecutor at Nuremberg, Telford Taylor, have complained that the Nuremberg process was tainted by "victor's justice" since its rules, bench and prosecution team were all dominated by lawyers from the United States and arrogant notions of "American exceptionalism." Those trials were said to be marred by the application of "double standards" since no charges were brought against the Allies despite evidence of violations of humanitarian war (including the fire bombing of Dresden, the destruction of Hiroshima and Nagasaki, and the Katyn Forest massacre of Polish POWs by the U.S.S.R.). Many have suggested that the noble goals of the Nuremberg tribunal were compromised from the outset by the "irony of August 8, 1945": the date that the allies signed the London Charter to establish the Nuremberg tribunal was also the date that the United States dropped its second nuclear bomb on Nagasaki.

Nuremberg's critics have also argued that those trials were otherwise unfair and biased since some defendants were convicted in absentia, while others encountered "trial by ambush" — i.e., an expedited criminal process on the basis of unfamiliar rules and based on documentary evidence primarily in the control of the prosecution with defense lawyers being accorded minimal time for preparation. There have been recriminations that these defendants were charged with "newly minted" international crimes, in violation of the universal principle against ex post facto imposition of criminal penalties. Nuremberg defendants were, after all, essentially the first individuals to be convicted on novel theories that international law prevails over domestic and

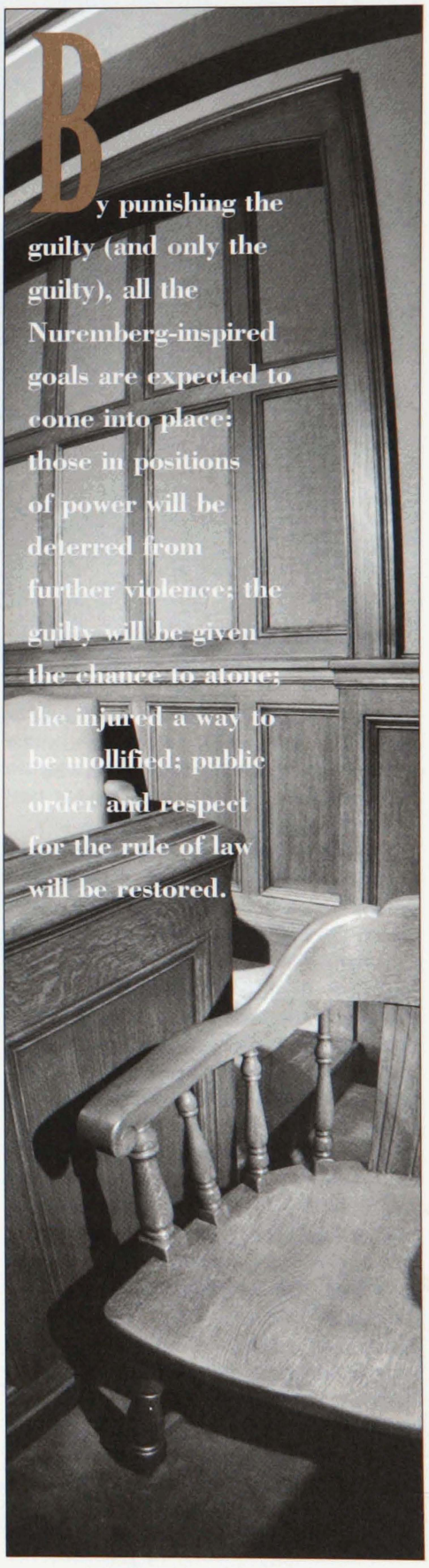
that individuals in the service of their government may nonetheless be subject to individual criminal liability. Moreover, critics complained that these defendants were the first to be charged with crimes of "aggression" (premised dubiously on violations of the Kellogg-Briand Pact), "crimes against humanity," and other "international" crimes that seemed particularly novel from a civil law perspective, such as "conspiracy." Even graver charges of overly hasty, and perhaps even racist, judgments have since been leveled against the Tokyo trials organized by General Douglas MacArthur.

Revisionists have even questioned the premise that the Nuremberg trials did much to preserve collective memory in the service of history. To at least some critics, the Nuremberg trial records make for a fundamentally flawed, even false, historical account that is grossly unfair to the victims of the Holocaust. Some attribute the problem to Chief Prosecutor Justice Robert H. Jackson's decision to make the waging of "aggressive" war the linchpin of all Nuremberg charges, a theory of the case that seemed to make the Holocaust merely "incidental" to the waging of World War II instead of making Nazi horrors the focus of attention. By, for example, arguing that Nazi concentration camps were effectively tools of the German war effort and by failing to bring charges or to present evidence of Nazi crimes committed before the official onset of interstate aggression (such as under the pre-1939 racial purity laws), the Nuremberg prosecution, it is argued, obscured the real scope and depth of the Holocaust. By focusing exclusively on the theory that Nazi war criminals were merely an especially evil collection of "gangsters" bent solely on aggressive conquest, Nuremberg, it is argued, glossed over the ethnic, religious, and racial underpinnings of the Holocaust. In part because the testimonies of victims were deemed unnecessary, the anti-Jewish, anti-gay, anti-gypsy aspects of German policies were rendered less visible. These have been only rediscovered by revisionist historians who have been aided by, among other things, more victim-oriented trial prosecutions (such as Israel's prosecution of Eichman).

For creators of the new Balkan tribunal, for whom Nuremberg loomed as an inescapable precedent, each one of these Nuremberg-inspired critiques — the problems of victor's justice, unfairness to defendants, and historical inaccuracy — needed to be remedied. They responded by creating a body that they believed would not be subject to the charge of "victor's justice" since it would be established by the "world community" and not merely the action of vengeful victors. To further deflect charges of "double standards," they attempted to ensure that *all* those who committed crimes in the former Yugoslavia, regardless of national origin, ethnicity or religion, would be subject to prosecution — and by an international bench and prosecution teams that could not be accused of national bias.

To prevent charges of unfairness, modern international human rights standards on behalf of criminal defendants were expressly incorporated into the tribunal's statute and into its rules of procedure and evidence. To further level the playing field between prosecution and defense, the Balkan tribunal borrowed considerably from the orality of common law proceedings (including its procedures for cross examination), incorporated the possibility of appeals, and anticipated the need for lawyers' training in the tribunal's novel procedures. In response to the illegitimacy of ex post facto imposition of criminal liability, they restricted the tribunal's jurisdiction to crimes based on "rules of international humanitarian law which are beyond any doubt part of customary law," thereby attempting to limit the tribunal's reach to international crimes that, while novel at Nuremberg and Tokyo, now have a fifty-year-old pedigree. Gone were the most criticized aspects of Nuremberg from a modern human rights perspective: the death penalty, liability for membership in a "criminal organization," and the possibility of trials in absentia. On the other hand, rules providing for the counselling of victims, the protection of witnesses, and the possibility for court ordered restoration of stolen property responded to modern sensitivities toward the rights of victims.

The Balkan tribunal's emphasis on victims also responds to the criticism that Nuremberg had "dishonored" the memory of Holocaust survivors. Perhaps with this critique in mind, the prosecutors in the Tadic case spent what seemed to some



courtroom observers an inordinate amount of time at the outset placing their case against the defendant within the broader context of the modern history of the former Yugoslavia. In addition to the usual "perpetrator"-driven story which prosecutors are required to present, the prosecutors in the Tadic case seemed aware of their debt to history: they began their "historic trial" with a six day-long history lesson presented through the testimony of learned academics.

Despite all the ostensible "improvements" vis-a-vis Nuremberg and Tokyo, the legitimacy of the Balkan tribunal remains very much in doubt. In one sense the shadow of Nuremberg still looms large — as each one of the criticisms faced by that earlier body finds a contemporary echo. Despite (or because of) the attention paid to the rights of defendants, the Balkan tribunal faces unresolved tensions with respect to the proper balancing between the rights of defendants and victims. Thus, an August 1995 preliminary ruling in the Tadic case that permitted the prosecutor to withhold from the accused or his lawyers the identity of some witnesses who would otherwise refuse to testify has led to considerable criticism, especially from common law lawyers for whom the right of confrontation is sacred. On the other hand, victims' groups anxious for the tribunal to effectively cope with mass rape charges (involving as many as 20,000 women) have found the tribunal's steps to protect potential witnesses and victims timid and inadequate. Some may also find troubling the relatively "light" prison sentences likely to be imposed on even the most serious offenders. (Tadic himself, though given a 20-year prison sentence, is likely to serve only 10 years.)

On the defense side, there are likely to be continuing fears that "ex post facto" problems persist despite the assurances given in the Balkan tribunal's statute. Already, in the course of the Tadic case, debates have emerged about the appropriateness of certain charges — especially if one sees the underlying conflict as an "internal" civil war and not an "international" conflict. Even in that first case, the tribunal has, in compliance with its statute, gone beyond Nuremberg precedents (strictly understood) to permit charges for "crimes against humanity" in the absence of charges for "aggression." The tribunal is also likely to make "new law" on other matters, including the degree of responsibility owed by "non-governmental" paramilitary units and the nature of international criminal responsibility incurred for mass rape. Should the latter be charged as crimes against humanity, grave breaches of the Geneva Conventions, violations of the laws and customs of war, or even "genocide," "conspiracy to commit genocide," an "attempt to commit genocide," or "complicity in genocide" (all possible charges under the tribunal's jurisdiction)? It seems difficult for the tribunal to avoid charges that it is making new law — and imposing "ex post facto" criminal liability.

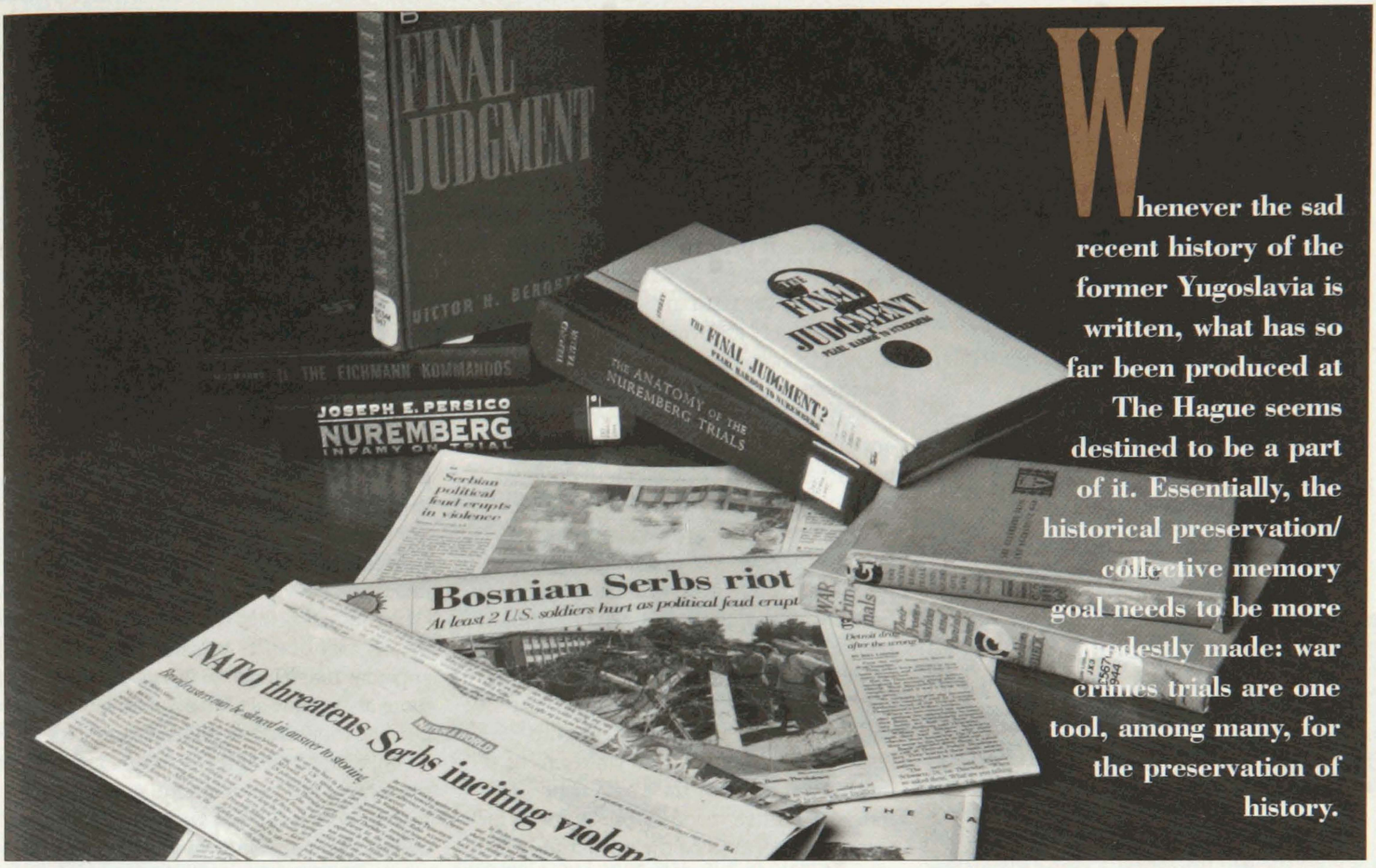
Nor is it clear that the creators of the Balkan tribunal have successfully mediated the treacherous divides between east and west or north and south any better than the Nuremberg or the Tokyo tribunals. Charges of "double standards," "American exceptionalism," and "victor's justice" have been deflected but not altogether avoided. After all, this tribunal was established through the innovative reinterpretation of the Chapter VII powers of the Security Council under the UN Charter, a decision taken by an organ dominated by the Permanent Five, and especially by the United States. Developing countries, not entitled to a Council veto, have expressed some discomfort with the resulting risks to national sovereignty and they have not been altogether placated by the assurances that the tribunal will remain "independent" from the Security Council. No one knows whether or to what extent a truly "independent" international criminal tribunal has been created. No one knows whether the Security Council retains residual authority over the tribunal; can the Council, for example, direct the tribunal not to prosecute someone among Serbia's current leadership "for the sake of international peace and security"? Can the tribunal tell the Council that such an interference with the tribunal's functions would be null and void? Further, no one, not even the tribunal, has given a satisfactory answer as to why the Security Council can, legally, displace prosecutions by national courts. No one knows whether the tribunal has the power to order governments to turn over witnesses, defendants, or documents — or what happens if it tries and fails. To date, the tribunal has given nearly as many answers to such fundamental jurisdictional issues as there are nationalities represented on its bench. Judicial unanimity has been understandably elusive given the novelties of the tribunal's creation and the yawning gaps in international criminal practice.

GETTING PAST

But the specter of Nuremberg is deceptive. While it is true that the Balkan tribunal faces many issues reminiscent of those faced by earlier war crimes prosecutions, its greatest challenge is unique: the Balkan tribunal is expected to fashion Nuremberg-styled justice in the absence of D-day.

Victor's justice had its merits. Whatever else might be said about Nuremberg, the trial of the major Nazi war criminals and the proceedings that followed were not solely directed at "small fry." Tadic, the Balkan tribunal's first defendant, is, however, no Hermann Goering. In contrast to Nuremberg's impressive line-up of defendants, the Balkan tribunal's list of indictments is likely to be distinguished by the number of high profile defendants that it will not be able to reach. Its "selective" prosecutions are already drawing complaints that the process "mocks justice."

This difference, more than any other, casts doubt on the Nuremberg-inspired hopes for this tribunal. Deterrence is rendered doubtful by doubts about the viability of the criminal law to cope with the sheer enormity of likely culprits and the absence of an effective police power to capture them. Even if a NATO "strike force" to capture war criminals were created, how would the rest of the Balkans be pacified without massive military occupation? Moreover, the detention of even prominent leaders will not always deter fanatical followers; a charismatic leader can just as easily inspire continued violence from



Whenever the sad recent history of the former Yugoslavia is written, what has so far been produced at The Hague seems destined to be a part of it. Essentially, the historical preservation/ collective memory goal needs to be more modestly made: war crimes trials are one tool, among many, for the preservation of history.

inside a jail cell. Is effective deterrence possible when whole societies have been complicit in genocide — in the absence of military occupation by an alien power? Even national governments, with considerably more effective control over their own territories than the UN now exercises over the Balkans, have often demurred in the face of such dilemmas and granted general amnesties. But if deterrence is unlikely, so are the prospects for effective punishment.

For the same reasons, the goals of compensation and rehabilitation seem scarcely attainable. Victims are not likely to get much relief from these criminal prosecutions since the tribunal does not now have and is not likely to ever have the resources to comfort, much less provide real psychological counseling for survivors. The few trials that do occur are not likely to do much to restore public order and sporadic prosecutions are not likely to forestall acts of vengeance or mob violence as victims come across their former torturers and rapists. Nor will many victims and witnesses willingly come forward if they live in areas where retaliation remains likely; significantly, none of the prosecution's witnesses in the Tadic case lived in areas under Serbian control. For these and other reasons, the conditions in the former Yugoslavia prompt skepticism about the likelihood that the tribunal will inspire renewed respect for the Nuremberg Principles or the rule of law.

Given the realities it faces, the prospect that the Balkan tribunal will secure national reconciliation through "closure" seems particularly farfetched. How can a process that is likely to convict only a handful of those culpable and that is not even likely to reach their superiors, "exonerate" anyone? Further, unlike Nuremberg's prosecutors, this tribunal's accusers need the cooperation of willing witnesses; relatively few documents attest to the atrocities committed. But such witnesses pose challenges that prosecutors did not face at Nuremberg. In the former Yugoslavia (and in Rwanda as well), live witnesses are likely to replicate, inside the courtroom, the religious or ethnic divisions that have characterized the underlying conflict. The Tadic case pitted Serb witnesses for the defense against Moslem witnesses for the prosecution. In this context — a trial judged in the absence of a jury and solely by learned judges — convictions or acquittals will be largely based on credibility findings rendered by a group that does not include a Serb, a Moslem or a Croat. Reactions to these verdicts are likely to fall along familiar ethnic/religious lines; they are not likely to generate unified societal consensus — at least not in all cases.

Worse still, the Balkan tribunal cannot rely on the universal legitimacy of its establishment or its procedures to overcome the doubts of the skeptical. It was created by a super-power-dominated UN organ viewed with some suspicion by the rest of the world. It adheres to novel procedures that constitute an untested melange of rules borrowed from both common law and civil law traditions whose interpretation divides the judges charged with their application. It should not surprise if verdicts in these cases fail to draw universal praise or inspire instant consensus.

Indeed the very notion of "closure" through judicially created legitimacy seems dated today, the product of rapidly vanishing legal romanticism. For many people in the United States the idea that courts and lawyers stand as a socially unifying bulwark to protect civilization seems a bit naive in a post-modern, post-Rodney King, post-O.J. world. Many see what goes on in courtrooms as only rarely praiseworthy attempts to secure neutral justice and more often as thoroughly calculated, cynical, preconstructed

maneuvers that reflect (and sometimes inflame) society's prejudices. Many doubt that all are really equal before the law; skeptics openly question the notion that race does not count in our courtrooms.

The prospect that the international community, with all *its* divisions, can render "neutral" justice en mass in instances involving thousands of possible defendants inflamed by religious or ethnic hatred seems, in this light, terribly quixotic. Trials, whether here or abroad, do not often generate instant social consensus.

THE HARD CASE

What then is the argument for war crimes trials in the Balkans under prevailing circumstances? What is the case that can be made to justify *sporadic* international war crimes trials, often of "small fry" like Dusko Tadic, while the majority of wrongdoers, including most of those who gave the orders, go free? Is there any justification, in law or policy, for such "selective" prosecutions?

The hard case for the Balkan war crimes tribunal needs to be made on the basis of redefined goals — not the mythic ones inspired by Nuremberg.

First, with respect to deterrence, it is necessary to remember that the starting point is not, before war crimes indictments are issued, an entirely blank slate. Long before the Balkan tribunal was established, the media, individual governments, and the UN Commission of Inquiry had already identified numerous crimes and likely culprits. The question is not whether war crimes will deter crimes that no one would otherwise know about but whether punishing some crimes and some individuals people already know about is at all important. If nothing is done about known or rumored crimes and culprits, does this not induce or encourage further violence by those who are not prosecuted as well as by those seeking vengeance? Whether or not war crimes trials can be said to "deter," the punishment of known crimes at least prevents them from being cited as an example of what one "can get away with." We need to ask whether, given what is already known, the *failure* to attempt to prosecute those we can reach encourages or induces violence.

Second, with respect to punishment, the question is whether those who are likely to be reached by the tribunal merit criminal sanction or whether the failure to reach those who are presumed to be "more culpable" renders the punishment of "small fry" illegitimate. Those who complain about "selectivity" in this context need to be more precise about the nature of their complaint.

Punishment for war crimes is undoubtedly "selective" at many levels. National courts have varied tremendously with respect to their reactions to violations of humanitarian law by their own nationals; indeed "selective" national prosecutions for war crimes seem to be the norm (see, for example, the United States and the treatment of alleged atrocities by its troops in Viet Nam). The international community is certainly not better. The Balkan tribunal's statute (like Nuremberg's Charter itself), is limited in scope: it only deals with acts which occurred after 1991. Does this temporal limitation — and the underlying failure to reach anyone guilty of comparable acts before that date — undermine the legitimacy of punishing those guilty of post-1991 acts? Further, the UN has seen fit to establish tribunals only for the former Yugoslavia and Rwanda but not for Haiti, Iraq, Cambodia or any of a number of other places; does its failure undermine the legitimacy of its efforts in the Balkans? More broadly, international humanitarian law seems to reach only some acts — such as indiscriminate targeting of civilians by scud missiles but apparently not, for example, aerial bombardment (as by the United States over Baghdad in 1991), nor, at least in the view of nuclear powers, the threat or use of nuclear weapons. Is all of humanitarian law therefore suspect because it is "selective" along north/south lines? The Balkan tribunal is likely to remain selective in that it may actually prosecute only some of those who committed the brutal acts and not many others, including politically well connected "higher ups" who gave the orders. Is the last kind of "selectivity" so much worse than the others? Is this kind of selectivity so fatal that the tribunal should close up shop?

I suspect that many do not find the conviction of actual torturers, murderers, and rapists (whatever the context) to be unfairly illegitimate. In fact, victims may derive considerably more satisfaction from seeing their actual torturer in the dock than from seeing that person's commander who gave the impersonal order. Some may even claim that there is *greater* merit to devoting scarce resources to punishing low level functionaries who actually inflict crimes on other human beings since exposing both the banality of such individuals and their apparent indifference to others' pain tells us more about how such barbarisms can become routinized or widespread.

Quite apart from these arguments, what precisely is the moral or legal argument that makes this last kind of selectivity more objectionable than any of the others? Why is it so illegitimate to punish the actual torturer simply because we do not reach his/her superior? Surely the reasons for selective prosecutions also matter. It is one thing to accuse the tribunal or its prosecutors of not fairly and evenly applying the law through the issuance of indictments in one case but not another; it is quite another matter where "selective" prosecutions result not from biased indictments or investigations but from the failure to secure arrests of some individuals or from the inability to collect evidence from unwilling government sources. Even within effective domestic legal systems such failures of "political will" occur frequently, without necessarily undermining the legitimacy of those prosecutions which do occur.

Third, the prominence of Nuremberg need not lull us into giving international criminal prosecutions greater significance than they deserve. Neither after World War II nor at any time before have nations relied exclusively or even primarily on international criminal trials to achieve the mythic but worthy goals that have been articulated for modern international tribunals. Even after World War II, the

number of such prosecutions have been dwarfed by a myriad of other efforts in pursuit of deterrence, punishment, national reconciliation, et al. It is self-defeating to rely on the Balkan trials alone to achieve what is being sought in a number of other fora and through a variety of other processes — from the diplomatic level (as through the Dayton peace process and beyond), to the World Court (as in Bosnia's case against Serbia and Montenegro and the latter's counterclaim); from other international organizations (including the Security Council, its sanctions committees, and numerous human rights bodies), to non-governmental organizations (such as the Red Cross). Attaining some of these goals may even be possible through national courts. Thus, some of the rape victims of the conflict in Bosnia are now seeking damages from Karadzic through a civil suit in New York district court (*Kadic v. Karadzic*, 70 F3d 232, 2nd Cir. 1996). While it is fair to ask whether all these goals are equally furthered by simultaneous actions in all of these fora, it is also reasonable to consider whether some of the mythic goals enumerated for the tribunal can be better achieved elsewhere.

Consider, for example, the prospect of securing compensation and rehabilitation for victims. The Balkan tribunal seems ill-equipped to provide victims much in the way of recompense, either in damages or lost property. The tribunal may not even provide victims with significant psychological relief since it is not clear that very many of its trials (even if "many" occur) will provide occasions for the large numbers of survivors of "ethnic cleansing" to unburden themselves and tell their stories. Whatever else might be said of it, the civil lawsuit in New York against Karadzic seems a more likely venue for such matters. Certainly the issue presented in that case — proving damages caused by Karadzic's alleged acts to a potentially large number of claimants — seems much more suited to the telling of victims' stories and the appropriate expression of judicial solicitude toward their plight. Such a proceeding, driven by a need to at least *pronounce* the amount of compensation which in justice is owed to victims (compared to a proceeding seeking primarily to identify the culprit), is less susceptible to judicial timidity for fear of imposing ex post facto criminal liability and is more receptive to airing at least some of the consequences of the gendered nature of "ethnic cleansing."

International criminal prosecutions need to be seen as only a part, perhaps not even a very significant part, of the spectrum of activities that have always been pursued to achieve the goals inspired by Nuremberg. WWII's tribunals cannot be credited with achieving all or even a significant part of the goals which were articulated for their creation — and this was not merely because those tribunals contained severe flaws. Within nation states, the judicial branch, traditionally the weakest, is not expected to carry the weight of governance; this is all the more true internationally. (See David P. Forsythe, "Politics and the International Tribunal for the Former Yugoslavia," 5 *Criminal Law Forum* 401, at 421 [1994]). International criminal tribunals should not be expected to carry as much freight as their advocates suggest. Attempts to make them do so — whatever the cost — may endanger alternative processes and undermine possibly competing goals for the international community and the United Nations.

Fourth, we need a more realistic account of what the ciminal process can be expected to achieve to preserve collective memory. Despite the attempts made at the Tadic trial to provide a history lesson during the course of a trial, a criminal trial is ill-suited for this purpose. As Mark Osiel has noted, the adversarial nature of the courtroom and the need to play to the public (if not to a jury) leads to the telling of diametrically opposed, over-simplified stories by both sides — tales told with an eye to the restricted nature of rules of evidence and the precise charges at issue. The whole purpose of the prosecution's case is to make it appear that the individual defendant in the dock is uniquely responsible; the defense attempts the opposite. The prosecutor certainly does not have a motive to indict the broader society, to truly examine the moral complexity involved in even horrific crimes, to tell more than one linear story at a time. And while the defense may try to mount a broader indictment, such a one-sided attempt is not likely to lead to balanced history. Criminal trials inevitably produce individualist/perpetrator accounts filled with the bright lines skilled historians try to avoid — indeed, that is their point.

It is true, nonetheless, that war crimes trials provide one way in which an accurate collective memory is rendered more likely. While Nuremberg presented a one-sided picture of the Holocaust, it presented, *and more important, preserved* an important record of some aspects of those years. Whether one agrees or disagrees with such revisionist accounts of the Holocaust as Daniel Goldhagen's — whose recent portrayal of *Hitler's Willing Executioners* is diametrically opposed to the perpetrator accounts portrayed at Nuremberg — the fact remains that Goldhagen's efforts might not have been possible but for the collection and preservation of documents necessitated by Nuremberg and post-Nuremberg trials. Goldhagen's and other historians' revisionist accounts are as much a product of Nuremberg as they are responses to it. It seems equally clear that the effort to bring indictments in the former Yugoslavia has led to the preservation of at least some evidence of barbarism that would otherwise have perished. Whenever the sad recent history of the former Yugoslavia is written, what has so far been produced at The Hague seems destined to be a part of it.

Essentially, the historical preservation/collective memory goal needs to be more modestly made: war crimes trials are one tool, among many, for the preservation of history.

Fifth, we need to reexamine our concept of how war crimes trials help bring about national reconciliation. As Mark Osiel again reminds us, trials are occasions that initiate conversations between otherwise unwilling antagonists. The value of trials *actually increases* the greater the pre-existing antagonism between the parties since the greater their mutual hatred the less likely such opponents are to seek occasions for dialogue *except* when forced to in a court of law. Trial confrontations may be, at least in

the short run, the only occasions for ongoing conversations between sworn enemies. Further, the constricted nature of trials, though not always conducive to accurate history, is better at channelling disputes into narrow, legalistic grooves. A criminal trial is necessarily about whether certain acts have or have not been committed; about whether particular evidence does or does not exist. It is not about, for example, finding the "truth" about ethnic or racial stereotypes. When convincingly reached, a conviction can help terminate debates about whether a defendant is guilty, but even a conviction does not close off other debates. A trial may instead *provoke* other disagreements totally at odds with notions of "closure."

For these reasons, as Osiel has noted, the prosecution of war criminals should not be portrayed as "group therapy" intended to secure instant closure or societal consensus. Especially when such trials involve ethnic or religious conflicts, the prospects for such broad "consensus" are slim to none. Such conflicts are complex events requiring a lengthy cooling off period, a thorough airing of grievances. Such grievances are not likely to be aired, much less satisfactorily resolved, in the course of a trial or even a lengthy series of trials. On the contrary, with respect to such complex societal problems, trials may usefully promote, not close off, thorough discussion between participants and government officials, and, if the trial is important enough and publicized enough, among the general public. Whether here or abroad, criminal (and some civil) trials may be better seen as discursive phenomena that provide an occasion for, and inspire, public debates.

The purpose of the Balkan tribunal may be precisely the opposite of what has been suggested by Minna Schrag or Ted Meron. What we achieve in prosecuting war criminals may not be to convince anyone that we have managed to capture the only culprits. Such trials may force continuing discussions of "collective guilt," they encourage, not discourage, questions about the comparative "group guilt" of Serbs and Croats. War crimes trials may keep alive difficult issues of the meaning and scope of complicity. They may encourage youngsters in the former Yugoslavia to ask their parents a few years hence, "what exactly were *you* doing in 1992 mom and dad? Did you support the people doing these terrible things?" Even the trial of one "low level" local torturer can be the start of a national conversation.

Trials and verdicts that rile people up, that prompt accusations and counter-accusations among neighbors and even within families may be justifiable. In societies as fractured as the former Yugoslavia they may even be necessary. The argument for Balkan tribunals based on the prospect for national reconciliation needs to be made not on simplistic assumptions that trials encourage "closure" but on Osiel's more counterintuitive premise that contentious courtrooms prompting outrage are preferable to sweeping issues under the rug where they simmer and ultimately explode in less controllable settings.

In this view, the actual verdicts, their number, who stands accused, and even the legitimacy of the forum may ultimately be less important than that some institutionalized process exists to assure public discussion of how such events happened and who might be responsible. In some cases, the resulting verdicts may even inspire attempts to retaliate on one side or another. As we have seen within the United States (fortunately at a much less bloody level) trials — and their verdicts — can inflame. They may even prompt riots. But the alternative — societies where racially divisive issues are not raised in the relatively safe confines of a courtroom — seems even less likely to achieve national reconciliation.

Finally, we should do well to remind ourselves who "small fry" are in this context. In most countries of the world someone charged with the acts Tadic has been convicted of would be on par with the worst serial killer. No, he is not Goering, but it is difficult to see an enduring society being built on impunity for such crimes. This last, the argument from morality, may be the most compelling reason for continuing to press for these prosecutions despite the evident difficulties.

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