



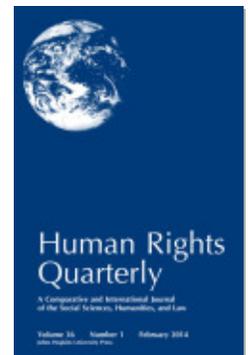
PROJECT MUSE®

Expression of Justice or Political Trial?: Discursive Battles in the Karadžić Case

Tim Meijers, Marlies Glasius

Human Rights Quarterly, Volume 35, Number 3, August 2013, pp. 720-752
(Article)

Published by The Johns Hopkins University Press
DOI: [10.1353/hrq.2013.0048](https://doi.org/10.1353/hrq.2013.0048)



➔ For additional information about this article
<http://muse.jhu.edu/journals/hrq/summary/v035/35.3.meijers.html>

Expression of Justice or Political Trial? Discursive Battles in the Karadžić Case

Tim Meijers* & Marlies Glasius**

ABSTRACT

This article examines the discourses of prosecution and defense in the case of Radovan Karadžić before the International Criminal Tribunal for the former Yugoslavia. It focuses on what happens in the courtroom—a site mostly neglected in the literature on transitional justice—and the consequences courtroom discourses may have for societies in transition. Our theoretical point of departure is the concept of “expressivism,” which is an attempt to theorize courts’ potential to send messages as a key feature in thinking about the relationship between normative legitimacy, support,

* *Tim Meijers* is a Ph.D. student (Fonds pour la Recherche en Sciences Humaines, Belgium) in Political Philosophy at the Hoover Chair of economic and social ethics, Université Catholique de Louvain (Louvain-la-Neuve). Earlier he worked as a research-assistant at the University of Amsterdam. Among his research interests are international (criminal) justice, intergenerational justice, population ethics and the implications of political philosophy for public policy. His MSc-thesis *Legitimacy, Citizenship and International Criminal Courts* (2009) was awarded the J.C. Baakprize (Royal Holland Society of Sciences and Humanities). He has recently published a paper in *The International Journal of Transitional Justice* and is currently working on his thesis, focusing on the relation between theories of justice and population ethics.

** *Marlies Glasius* is a Professor in International Relations at the Department of Politics, University of Amsterdam and IKV Special Chair in Citizen Action in Conflict and Post-Conflict Situations, Free University, Amsterdam. In 2012 she was a Fellow at the Netherlands Institute of Advanced Studies (NIAS) in Wassenaar and Visiting Professor at the Université Catholique de Louvain. Her research interests include the theory and practice of global civil society, international criminal justice, human security and authoritarian rule. She is the author of *The International Criminal Court: A Global Civil Society Achievement* (2006) and recent articles on international criminal justice in *African Affairs*, *European Journal of International Law* and *International Journal of Transitional Justice*.

We wish to thank the Dutch Science Foundation NWO for its financial support to the ‘Constructions of Justice’ project. Tim Meijers acknowledges the support of FRESH (Fonds pour la Recherche en Sciences Humaines) and the ARC (French-speaking community of Belgium, project 09/14-018). Marlies Glasius acknowledges the support of the Netherlands Institute of Advanced Studies (NIAS). We thank our colleagues at the UvA and at NIAS for their comments on an earlier draft of this article.

and utility of international trials. We conclude that the defense by Karadžić disrupts and thwarts the pedagogical messaging intended by expressivism to a considerable extent, and reflect on the generalizability of our findings by considering the elements of the actors, audiences, and the stage in the posited “courtroom drama.”

I. INTRODUCTION

On one reading, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has triumphed in its closing days. In 2011, it completed its most high-profile Croatian trial, against General Ante Gotovina, caught Bosnian Serb General Ratko Mladić, and soon afterwards Goran Hadžić, the tribunal’s final indictee at large. The ICTY itself subscribes to such an optimistic reading. In a brochure and on its website, it lists “strengthening the rule of law,” “establishing the facts,” “giving victims a voice,” and “bringing justice to the victims,” not among its aims but among its achievements.¹ The \$300 million² per annum budget of the ICTY is justified by the claim that it “is an investment in the peace and future of south-eastern Europe.” Former president of the court Antonio Cassese has asserted that:

Justice is an indispensable ingredient of the process of national reconciliation. It is essential to the restoration of peaceful and normal relations between people who have lived under a reign of terror. It breaks the cycle of violence, hatred and extra-judicial retribution. Thus peace and justice go hand in hand.³

Social scientists who have set out to test such claims have come to rather different conclusions. Public opinion surveys and qualitative research in the former Yugoslavia consistently show either outright hostility or disappointment as the dominant attitudes towards the tribunal.⁴ Scholars have argued that the ICTY has not done enough to reach out to the societies for which it adjudicates,⁵ that it did not do enough to counter negative propaganda in

-
1. See Marlies Glasius & Francesco Colona, *The Yugoslavia Tribunal: The Moving Targets of a Legal Theatre*, in OTHERHOOD AND DISUNITY: SOCIAL AND POLITICAL STRUGGLES IN SOUTHEASTERN EUROPE (Dino Abazovic & Mitya Velikonya eds., 2013) for a discussion of these “achievements.”
 2. See ITCY, Budget 2010–2011, available at <http://www.icty.org/sid/325>.
 3. Antonio Cassese, cited in the banner of the ICTY website, available at <http://www.icty.org/sid/3>.
 4. For a discussion of local support for the ICTY see SANJA KUTNJAK IVKOVIĆ & JOHN HAGAN, RECLAIMING JUSTICE: THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND LOCAL COURTS, at Ch. 2 (2011). See also Dan Saxon, *Exporting Justice, Perceptions of the ICTY Among the Serbian, Croatian and Muslim Communities in the Former Yugoslavia*, 4 J. HUM. RTS. 559 (2005).
 5. See Donna E. Arzt, *Views on the Ground, The Local Perception of the International Criminal Tribunals in the Former Yugoslavia and Sierra Leone*, 603 ANNALS OF THE AAPPS 226 (2007); Michael P. Scharf & Ahran Kang, *Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR and SCSL*, 38 CORNELL INT’L L. J. 911 (2005); Gabrielle Kirk McDonald, *Problems, Obstacles and Achievements of the ICTY*, 2 J. INT’L CRIM. JUSTICE 558 (2004).

the local press,⁶ and that it may have distorted an otherwise smooth political transition.⁷ Other international criminal tribunals such as the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the International Criminal Court have encountered very similar criticisms.⁸

When one takes a step back from these debates, a prior question arises. The question pursued here is not: "How well have international criminal tribunals succeeded in fulfilling socio-political aims such as providing a historical record, restoring the rule of law, giving justice to victims, or reconciling communities?" Instead, it is: "How are international criminal tribunals supposed to fulfill such aims?" In other words, through what kind of mechanisms are international criminal courts supposed to reach such goals? The mechanisms through which international criminal courts can disseminate certain values and contribute to a better society have largely been neglected in the literature on transitional justice. And, as seen above, international criminal courts assert that they realize certain sociopolitical objectives through trial justice without a clear explanation of how they are realizing these effects. This article aims to address a part of this important question.⁹

Moreover, while the legal literature on international criminal courts neglects political context, the social science literature curiously neglects detailed analysis of what happens *inside* the courtroom.¹⁰ More particularly, it has failed to attribute effects to the role of the defendant in the courtroom, despite the fact that the trials of high-profile defendants like Slobodan Milosevic, Charles Taylor, Radovan Karadžić, and now Kenyan presidential candidates Kenyatta and Ruto have been very much in the media spotlights. The (lack of) sociopolitical effectiveness of international criminal courts cannot be explained without also considering what happens in court during the trial.

In an attempt to theoretically link what happens inside the courtroom in international criminal trials to their potential effects outside, this article utilizes the theory of legal expressivism, which Amann and Drumbl have applied to international criminal courts.¹¹ Drumbl holds that international

-
6. Mirko Klarin, *The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia*, 7 J. INT'L CRIM. JUSTICE 89, 96 (2009).
 7. Marlene Spoerri & Annette Freyberg-Inan, *From Persecution to Prosecution: Perceptions of the ICTY in Serbian Domestic Politics*, 11 J. INT'L RELATIONS & DEV. 350 (2008).
 8. See Scharf & Kang, *supra* note 5; Marlies Glasius, *Do International Criminal Courts Require Democratic Legitimacy?*, 23 EUR. J. INT'L L. 1 (2012).
 9. See Marlies Glasius & Tim Meijers, *Constructions of Legitimacy: The Charles Taylor Trial*, 6 INT'L J. TRANS'L JUST. 229 (2012), for a very different case study addressing the same question.
 10. Significant exceptions are TIM KELSALL, *CULTURE UNDER CROSS-EXAMINATION: INTERNATIONAL JUSTICE AND THE SPECIAL COURT FOR SIERRA LEONE* (2009); GERRY J. SIMPSON, *LAW, WAR AND CRIME: WAR CRIMES TRIALS AND THE REINVENTION OF INTERNATIONAL LAW* 54–78 (2007); NANCY A. COMBS, *GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH* (2007).
 11. MARC DRUMBL, *ATROCITY, PUNISHMENT AND INTERNATIONAL LAW* (2007), Diane Marie Amann, *Assessing International Criminal Adjudication of Human Rights Atrocities*, 16 THIRD WORLD LEGAL STUD. 169, 176 (2003).

criminal trials can be seen as educational dramas, which disseminate norms and values to audiences.

Subsequently, a discourse analysis is undertaken of court transcripts in the trial of Radovan Karadžić, as a point of departure for investigating the expressivist claims. The aim is to arrive at a more elaborate and nuanced theory of the expressivist potential of international criminal trials.

The Karadžić trial lends itself particularly well to this purpose: he is arguably the highest profile defendant after Milosevic, who died in detention before a sentence could be reached. And, like Milosevic, he is conducting his own defense. His trial, along with that of Ratko Mladić, is also one of the last before the ICTY will close its doors. At the time of writing, the trial is still ongoing. On the one hand, this provides a challenge, as the discourses examined could be considered incomplete until the end of the trial. On the other hand, that can be considered an advantage, because it focuses attention on the dynamic nature of the discursive battles in court. These court battles typically take many years before the verdict, on which legal scholars almost exclusively focus, is reached. This article's contention is that international criminal trials begin to express messages to audiences long before the verdict is out.

In the next section, the theoretical framework will be discussed at greater length, and the article will delineate how a discourse analysis of prosecutor and defense speeches can contribute to formulating a more sophisticated version of the expressivist theory. In section three, the type of discourse analysis, and the manner in which it was undertaken, is outlined. In section four the discourses of Karadžić, himself, and the prosecution on the nature of the Bosnian war and Karadžić's role in it are discussed and compared. Section five examines the discourses on the purposes and legitimacy of the trial itself. Section six revisits the extent to which expressivism can help specify whether or how international criminal trials are supposed to achieve sociopolitical aims.

II. THEORETICAL POINTS OF DEPARTURE

A previous project comparing the Special Court for Sierra Leone to the ICTY has applied Buchanan and Keohane's distinction between normative and sociological legitimacy to international criminal courts.¹² Whilst normative legitimacy relies on purposes that the courts have, including backward-looking ones such as retribution, accountability and truth-telling, or forward-looking ones including preventive or reconciliation effects, sociological legitimacy

12. Tim Meijers, *Legitimacy, International Courts and Citizenship* (MA-Thesis, University of Amsterdam, 2010)

relies on consent. Whose consent is considered the primary referent of sociological legitimacy depends on theoretical points of departure: powerful actors in international politics, global publics, affected communities and victims have all been studied as such.

While many acknowledge the interconnection between normative and sociological legitimacy of international criminal courts, the “expressivist” doctrine provides a rare tool to theorize this connection. Expressivism is a theory originating from normative legal theory, concerned with the function of law.¹³ It is, however, not a uniform approach. One branch of expressivism, following Durkheim, holds that the law simply is an expression of dominant moral attitudes in society. This conception of expressivism is not used in this article.¹⁴ Another group of theorists hold that the law can be used to transform these moral attitudes,¹⁵ as a sociological claim, and a third group argues that this should be the function of the law,¹⁶ which is a normative claim. As Sunstein points out, expressivists are interested in “how legal ‘statements’ might be designed to change social norms.”¹⁷ This article is interested in applying the second, empirical application of expressivism, but with an eye to the third, normative claim: the research is informed by the conviction that international criminal tribunals should attempt to have beneficial effects on societies in transition.

Many theorists working on expressivism are mainly concerned with the expressive value of the law,¹⁸ or of punishment;¹⁹ instead, this article focuses on the expressivist potential of the trial itself, which according to one classic account can be seen as a “status degradation ceremon[y]” to express “moral indignation.”²⁰ This seems to be a particularly appropriate

-
13. For a recent overview of debates in Expressivism see: Matthew A. Edwards, *Legal Expressivism: A Primer*, (2009) (unpublished working paper, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1361101) For a defense see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 UNIV. PA. L. REV. 1503 (2000) .
 14. This division of expressivism follows, loosely, Edwards’ distinction between “instrumental” (use laws to change norms) and “revelatory” (laws express most fundamental normative commitments) Expressivism. See Edwards, *supra* note 13. He does not, however, distinguish between the sociological and normative claim underlying instrumental expressivism.
 15. See Anderson & Pildes, *supra* note 13.
 16. Cass Sunstein, *The Expressive Function of the Law*, 144 UNIV. PA. L. REV. 2021, 2028 (1995) advocates this view. He says that his “principle aim is to defend laws that attempt to alter norms, rather than laws that merely ‘speak.’”
 17. *Id.* at 2025.
 18. Patricia Funk, *Is There an Expressive Function of Law? An Empirical Analysis of Voting Laws With Symbolic Fines*, 9 AM. L. & ECON. REV. 135 (2007); Sunstein, *supra* note 16.
 19. See Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 38 STAN. J. INT’L L. 39 (2007); Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397(1965).
 20. Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOCIO’Y 420, 421 (1956).

approach to international criminal trials, which typically take many years, may involve defendants who already have notoriety, and are often televised.

Two legal scholars, Amann²¹ and Drumbl,²² have elaborated the claim that international criminal justice, while not very good at delivering deterrence or retribution, can be justified in terms of expressivist functions. According to Amann, “[t]heories of expressivism analyse the message of a governmental act, such as a prosecution or a sentence to punishment.”²³ She shows how the judges at Nuremberg as well as the ICTY have often understood their own work in expressivist terms. Drumbl’s account is even more compelling and appropriate, because he specifies what is the missing link, identified above, between normative and sociological legitimacy—with an account of how trials disseminate messages to audiences:

Trials can educate the public through the spectacle of theatre—there is, after all, pedagogical value to performance and communicative value to dramaturgy. This performance is made all the more weighty by the reality that, coincident with the closing act, comes the infliction of shame, sanction and stigma upon the antagonists.²⁴

Drumbl describes a mechanism through which, according to his assertion, international criminal trials are achieving sociopolitical aims. Amann, Drumbl and other expressivists give similar accounts of the typical content of the messages that can be conveyed by international criminal trials.

First and foremost, trials are “a forum for making a historical record;”²⁵ “a central goal [is] the crafting of historical narratives, their authentication as truths, and their pedagogical dissemination to the public.”²⁶ Second, they “individuate guilt. They name identifiable individuals as criminals, rather than all members of a group. That individuation may help reconstruction by removing guilt from others.”²⁷ This is also a function the ICTY has claimed to achieve.²⁸ Third, the trial provides “a forum for enunciating societal condemnation of atrocities,”²⁹ or more harshly, in the language of Drumbl quoted above, for inflicting shame and stigma on the perpetrators of massive crimes. Between them, establishment of the truth, individuation of guilt, and disapproval and stigmatization contribute to the general expressivist aim of

21. Amann, *supra* note 11, at 169.

22. DRUMBL, *supra* note 11.

23. Amann, *supra* note 11, at 176.

24. DRUMBL, *supra* note 11, at 175.

25. Amann, *supra* note 11, at 175.

26. DRUMBL, *supra* note 11, at 173.

27. Amann, *supra* note 11, at 178; see also Martha Minow, *The Work of Re-Membering: After Genocide and Mass Atrocity*, 23 *FORDHAM INT’L L. J.* 205 (1999). This function has been critiqued, however, by Drumbl, p. 36 and others.

28. ICTY website, *supra* note 3.

29. Amann, *supra* note 11, at 175.

norm-dissemination, strengthening the rule of law by invoking it. Finally, through the restoration of the rule of law, international criminal trials could conceivably contribute to reconciliation between communities. As seen above, Cassese has made this claim for the ICTY.³⁰

Drumbl's theatrical metaphor can be a useful one for understanding how international criminal trials may achieve social aims. The comparison of important trials to theatrical spectacle—courtroom drama—is a common one, and particularly appropriate to high-profile cases like that of Radovan Karadžić, Slobodan Milosevic, Charles Taylor, Jean-Pierre Bemba, and Laurent Gbagbo. But Drumbl's metaphor needs further elaboration in at least three respects. First, it overlooks one of the main ingredients of a drama: actors. More particularly, the role of the defendant is treated as a passive one. Our expectation, on the contrary, is that defendants may use the stage to destabilize the authentication of historical narratives, the individuation of guilt, and the infliction of shame and stigma that are supposed to follow. Second, there is the matter of audiences. Drumbl recognizes that the "didactic value of international proceedings is not preordained," yet asserts that the expressivist function can and must be simultaneously achieved across different audiences, including "a global audience" as well as "the audience that matters more than any other—namely, directly afflicted populations."³¹ Finally, in the transposition of expressivism from domestic to international criminal law, one important aspect may be missed: the extent to which, due to the new and precarious nature of international criminal institutions, and the political nature of the crimes themselves, the courts and their trials are themselves contentious, or to stretch a metaphor, on trial, and the role this contention plays within the trial discourses.

The intention of the remainder of this article is not to test current support for the ICTY or the Karadžić case with all, or indeed any, of its potential audiences. Instead, the article examines how legitimacy is constructed and challenged in the discourses of the prosecution and the defense in the Karadžić trial. In doing so, the article seeks to establish to what extent what is said and done in the Karadžić trial confirms or disrupts the potential expressivist functions of international criminal justice put forward above. The aim is to provide an assessment of the promises and pitfalls of the expressivist account of the functions of international criminal law that draws on, but goes beyond, the Karadžić case.

30. *Id.* Amann, on the other hand finds this claim "somewhat breathtaking, and belied by the prolongation of conflict in the Balkans."

31. DRUMBL, *supra* note 11, at 175.

III. DISCOURSE ANALYSIS

The approach to discourse analysis proposed here draws on critical linguistics and post-structuralism, but has a more functional orientation, focusing on what discourses are designed to accomplish.³² This approach is less concerned with ways in which social actors are themselves constituted by discourse, but instead concentrates on the constructive use of language,³³ treating texts as organized rhetorically, establishing a particular version of social reality in competition with others.³⁴

The main method of discourse analysis has been close textual analysis of court transcripts.³⁵ Court transcripts covering the period from Karadžić's first appearance in July 2008 through July 2011 were studied, covering approximately 15,000 pages. Given that only the discourses of the prosecution and the defendant were of interest, transcripts that dealt primarily with witness statements were excluded, except in cases where the prosecution or defense used these as occasions for more extensive, or in Harris' term "narrative,"³⁶ statements of their own.³⁷ This left approximately 30 percent of the transcripts, which were subjected to a close reading.³⁸ On the basis of this analysis, two master coding frames³⁹—one for the prosecution and one for the defense—were created and continually adjusted until theoretical saturation was reached. Additionally, the entire 15,000 pages of transcripts were subjected to certain word searches that emerged from the manual coding as particularly salient. Interviews with Karadžić and press conferences by the chief prosecutor were also analyzed, and visits were made to the Court in order to directly observe the "courtroom drama."⁴⁰

The ICTY's chief prosecutor, Serge Brammertz, has only appeared in court once in the Karadžić case, when the defendant had just been ar-

-
32. Rosalind Gill, *Discourse Analysis, in* QUALITATIVE RESEARCHING WITH TEXT, IMAGE AND SOUND 172, 173–74 (Martin Bauer & George Gaskell eds., 2000).
 33. Jonathan Potter, et al., *Discourse: Noun, Verb or Social Practice?*, 3 PHIL. PSYCH. 205 (1990).
 34. MICHAEL BILLIG, *IDEOLOGY AND OPINIONS: STUDIES IN RHETORICAL PSYCHOLOGY* (1991).
 35. See Glasius & Meijers, *supra* note 9, for our application of the same method to the Charles Taylor trial before the Special Court for Sierra Leone.
 36. Sandra Harris, *Fragmented Narratives and Multiple Tellers: Witness and Defendant Accounts in Trials*, 3 DISCOURSE STUD. 53, 54 (2001).
 37. Since there was a substantial amount of material to analyse from the "direct speech" of the prosecution on the one hand and the defendant and his lawyer on the other hand, we did not analyse whether or to what extent both sides tried to or succeeded in making points indirectly through the questioning of witnesses.
 38. About one-third of this material, or 10 percent of the total pages, were read by both authors for intersubjective validation of the analysis and coding.
 39. The master frames, too long to reproduce, will be available on our personal website. Marlies Glasius: <http://www.uva.nl/over-de-uva/organisatie/medewerkers/content/g//m.e.glasius/m.e.glasius.html>; Tim Meijers: <https://www.uclouvain.be/373611.html>
 40. On 20 January 2011, 21 March 2011, and 11 July 2011.

rested and made his first appearance. Since then, two prosecutors, Alan Tieger and Hildegard Uertz-Retzlaff, have led the case and speak in court with more or less equal frequency. Their discourse can be considered as a collective effort without clear distinctions between the two speakers. Both make frequent use of Karadžić's own public and private statements during the war to make their case.

Karadžić represents himself in court, supported by his lawyer Peter Robinson. Robinson, however, plays his role mainly off stage and talks in court only sporadically, and only on legal issues. In analyzing the discourse for the defense, the sole focus is what Karadžić has to say and ask in Court. Like the prosecution, he draws heavily on his own statements and statements made by people who played a part in the peace negotiations to construct a narrative of the conflict that is almost linearly opposed to that of the prosecution.

IV. DISCOURSES CONCERNING THE WAR AND THE CRIMES

In their case before the tribunal, the prosecutors devote particular discursive attention to Karadžić's rhetorical preparation of the Bosnian Serb population for the crimes that were to be committed; his complete and utter control over all Bosnian Serb political and military activity during the war years; his motivations; the terror unleashed on Sarajevo; the brutality of the camps in which Muslims were held as prisoners; and the paradigmatic crime of the Yugoslav conflict, the Srebrenica massacre. Karadžić, on the other hand, gives a historic account in which Serbs are structurally under threat from other groups. He emphasizes the numerical superiority and aggressive intent of the Muslim side, interprets his actions in the light of a collective Serb self-preservation effort, and attributes much of the evidence to Muslim trickery designed to deceive the international community. The section below demonstrates the way the discourses mirror each other by structuring the material according to Burke's five key terms in dramatism, applied to case construction in criminal trials by Bennett and Feldmann.⁴¹

A. Scene: Bosnia in the Lead-Up to War

In his opening statement, prosecutor Alan Tieger describes prewar Bosnia in general, and Sarajevo in particular, as an idyll of multi-ethnic integration:

41. Kenneth Burke, *A GRAMMAR OF MOTIVES*, at xv–xxiii (1945); W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGEMENT IN AMERICAN CULTURE* 62–63, 96–98 (1981). Naturally we recognize that this particular organization of the material is not inevitable, but constitutes an interpretive choice on our part.

Before the war, Sarajevo had a population of approximately half a million inhabitants, a rich cosmopolitan mixture of Serbs, Croats, and Muslims as well as people who chose to identify themselves simply as Yugoslavs . . . its people shared a genuine sense of community which transcended ethnic lines and which was reflected in their everyday lives. Citizens of different ethnicities intermingled freely. They intermarried at an unusually high rate. They visited on each other's holidays, regarded each other as simply neighbours. In short, Sarajevo was the embodiment of a multi-ethnic Bosnia and the embodiment of its ethnic diversity.⁴²

Radovan Karadžić is responsible for the destruction of this idyll. Against this sketch of Bosnia before the war, Karadžić paints a grimmer picture against the background of the conflict, as he understands it, in Bosnia Herzegovina. Because the Serbian people in Bosnia have lived on the borders of Europe for centuries, they were the ones protecting Europe from Muslim invasion. For a long time, the Serbs of Bosnia had to live on under Ottoman rule.⁴³ Serbian culture was oppressed: in "Turkish times we were a docile people, suffering and trying to preserve their culture through 500 years of unbearable conditions."⁴⁴ The peoples living in Bosnia today are all Serbs, but many were "converted to Islam against their own will."⁴⁵

According to Karadžić, the fascist Croatian Usthas committed genocide against the Serbian people of Bosnia During World War II. ⁴⁶ It is only because of this genocide that the Bosnian Serbs are no longer a majority in Bosnia: "they were reduced because of the genocide during World War II. Otherwise, they were always a majority population before."⁴⁷ The Usthas, "according to the [Simon] Wiesenthal centre, killed 500,000 Serbs, expelled 250,000 and the others were converted."⁴⁸ But not only the Croats were associated with Nazi regime: the Grand Mufti of Jerusalem, "Hitler's friend,"⁴⁹ was Muslim leader Izetbegović, the "guest of honor" during World War II. Their meetings "resulted [sic] the creation of one and then another

-
42. Prosecutor v. Karadžić, Case No. IT-95-5/18-I, Transcript at 591, Line 6–17 (27 Oct. 2009) [hereinafter Transcript]; see also *id.* at 515, Line 12–13 (27 Oct. 2009); *id.* at 526, Line 7–8; *id.* at 526, Line 21–22; Transcript at 3094, Line 8 (31 May 2010); Transcript at 9799, Line 15 (14 Dec. 2010) for references to the ethnic diversity and intermingling in Bosnia in general or Sarajevo in particular. The full transcripts of the Karadžić trial are available at <http://www.icty.org/case/karadzic/4#trans>.
 43. Transcript at 810, Line 6–8 (1 Mar. 2010); *id.* at 861, Line 11–12, 21–22; Transcript at 965, Line 23 (2 Mar. 2010); Transcript at 3677, Line 18–19 (10 June 2010).
 44. Transcript at 828, Line 19–22 (1 Mar. 2010).
 45. Transcript at 1774, Line 16–17 (28 Apr. 2010).
 46. Transcript at 881, Line 1 (1 Mar. 2010); *id.* at 881, Line 5; Transcript at 913, Line 8 (2 Mar. 2010); Transcript at 3200, Line 12 (2 June 2010).
 47. Transcript at 881, Line 5–7 (1 Mar. 2010).
 48. Transcript at 859, Line 3–6 (1 Mar. 2010).
 49. Transcript at 882, Line 9 (1 Mar. 2010); for more remarks on the Mufti's relation with Hitler see Transcript at 1577, Line 19 (26 Apr. 2010); Transcript at 2920, Line 16–17 (28 May 2010); Transcript at 3210, Line 18–19 (2 June 2010).

. . . SS Waffen and Handzar Division, composed of Bosnian Muslims."⁵⁰ They were "the most cruel troops in Hitler's army."⁵¹ Karadžić places all of his opponents in the camp of the Nazi's: both during World War II and—via Izetbegović—during the war in Bosnia.

Karadžić argues that under Tito the borders of the constituent republics of Yugoslavia were drawn "totally arbitrarily . . . Tito said it doesn't matter."⁵² Izetbegović plays a central role in Karadžić's discourse on this period too. Izetbegović's manifesto, *Islamic Declaration*, published in 1969, is cited extensively: "there can be neither peace nor co-existence between the Islamic religion and non-Islamic social and political institutions,"⁵³ and "Muslims must be superior to all others, and every effort should be made to create an environment in which everyone will be of pure Muslim blood."⁵⁴ Karadžić asks a witness: "Do you agree that that is hate speech, even speech based on racism?"⁵⁵

Bosnia, in Karadžić's competing narrative, was not an idyllic multi-ethnic country but a historic battleground with ever-lingering tensions between ethnic groups and with an ever-lingering danger of Serb oppression by radical Muslims. Karadžić, in his view, cannot be held responsible for the destruction of the Bosnian multi-ethnic idyll because there never was such a Bosnia.

In the prosecution's version, Karadžić made discursive preparations for ethnic cleansing with speeches in which he used various metaphors to demonstrate that Serbs could not live together with Muslims in particular, or at least not without losing their own identity: they were like "dogs and cats" or "incompatible plants."⁵⁶ The prosecutor's version of Karadžić's speeches in the early 1990s is largely consistent with Karadžić's own account of the history of ethnic relations in court: both Muslims and Croats were historic enemies. Muslims were "Turks"⁵⁷ and fundamentalists⁵⁸ seeking to overwhelm Serbs through their birthrate,⁵⁹ whereas Croats were Ustasha, World War II fascists.⁶⁰ The dissemination of these views by Karadžić is not just inferred

50. Transcript at 1577–78 (26 Apr. 2010).

51. Transcript at 3676, Line 8–9 (10 June 2010).

52. Transcript at 898, Line 17–19 (1 Mar. 2010).

53. Transcript at 892, Line 17–20 (1 Mar. 2010). Karadžić refers to the *Islamic Declaration* thirty-five times up till May 2011.

54. Transcript at 1586, Line 18–20 (26 Apr. 2010).

55. Transcript at 1586, at Line 21–22 (26 Apr. 2010).

56. Transcript at 546, Line 12–13 and 24–25 (27 Oct. 2009); also "cats and dogs" at Transcript at 1845, line 17 (28 Apr. 2010).

57. Transcript at 547, Line 4, Line 7–8 (27 Oct. 2009).

58. Transcript at 547, Line 14, 18 (27 Oct. 2009).

59. Transcript at 547, Line 11–12, 15 (27 Oct. 2009); Transcript at 1464, Line 20 (22 Apr. 2010); *Id.* At 1489, Line 21 (23 Apr. 2010); *id.* at 2668, Line 11 (21 May 2010).

60. Transcript at 547, Line 9 (27 October 2009). On the characterization of Muslims and Croats and the impossibility of living together as attributed by the prosecution to Karadžić See also *id.* at 550, Line 22; *id.* at 558 Line 14, 18; *id.* at 565, Line 16 (27 Oct. 2009);

by the prosecutors, but peppered with quotations from Karadžić's speeches before and during the war.⁶¹ The prosecution gives far more extensive attention to Karadžić's characterization of, and relation to, the Muslim population and leadership than to the Croats.

Karadžić, however, points not to his own activities, but to the Bosnian Muslim leadership as the aggressor and the criminal group in the Bosnian conflict. When Yugoslavia collapsed, the Muslim leadership, headed still by Alija Izetbegović, saw this as an opportunity to realize the old dream of a Muslim dominated Bosnia: "100 percent power, just as it was in the days of the Ottoman empire."⁶² Karadžić presents an enemy driven by religious extremism and lust for power, who "sought an Islamic state."⁶³ The Muslim leadership, Karadžić posits, found its inspiration in the Iranian revolution.⁶⁴ These fundamentalist Muslims identified "Serbs as the enemies"⁶⁵ or at best as "guests"⁶⁶ who did not belong in Bosnia. They embarked on a holy war to gain control of Bosnia: "This is a new mentality, the mentality of Jihad."⁶⁷ The accomplishment of the Muslim goal of dominating Bosnia, in "[a] community which is religiously and politically so profoundly mixed," according to Karadžić, can be based only "on terror or possibly foreign intervention."⁶⁸ Karadžić avoids blaming all Muslims: "[w]e don't believe that that's what the Muslim masses wanted."⁶⁹ But unfortunately "that group chose to manipulate the SDA [Stranka Demokratske Akcije, the Bosniak Party] and the entire Muslim community."⁷⁰

But the Muslims were not the only enemy. According to Karadžić, Izetbegović managed before the war, in 1991, to make a "secret agreement"⁷¹ with Croatian president Franco Tuđman. The Croats started using symbols and names of fascist units that participated in the genocide against

Transcript at 1464, Line 18–21 (22 Apr. 2010); *id.* at 1489, Line 20–24; Transcript at 1496, Line 1–2 (23 Apr. 2010); *id.* at 1497, Line 3–6; *id.* at 1498, Line 1–2; Transcript at 2668, Line 2–7 (21 May 2010); *id.* at 2668, Line 11–12; see below for Karadžić's rhetoric on these issues *during* the trial.

61. See for instance Transcript at 550, Line 19–23; 558, Line 14–16; 565, line 15–17 (27 Oct. 2009); Transcript 2668, Line 2–7 (21 May 2010).
62. Transcript at 810, Line 7–8 (1 Mar. 2010). In his opening statement alone Karadžić refers to "100 per cent power" eleven times, see master frame.
63. Transcript at 884, Line 8–10 (1 Mar. 2010).
64. Transcript at 886, Line, 7–8 (1 Mar. 2010).
65. Transcript at 886, Line 14 (1 Mar. 2010).
66. Transcript at 811, Line 1–2 (1 Mar. 2010).
67. Transcript at 2278, Line 3–4 (10 May 2010).
68. Transcript at 888, Line 19–22 (1 Mar. 2010).
69. Transcript at 889, Line 14–19 (1 Mar. 2010).
70. Transcript at 889, Line 20–21 (1 Mar. 2010).
71. Transcript at 14412, Line 22–24 (8 June 2011). See also Transcript at 921, Line 8–13 (2 Mar. 2010); *id.* at 906, Line 21–25; *id.* at 942, 14–21; Transcript at 2745, Line 3–6 (26 May 2010); *id.* at 2745, Line 20–21; Transcript at 2913, Line 3–7 (28 May 2010).

the Serbs in World War II, like the name “Ustasas,” the checker-boarded flag, and insignias. This “was terrifying, both for the Serbs and the Jews.”⁷²

Moreover, Germany supported Croatian independence and derailed peace in Bosnia by stimulating Izetbegović not to accept any agreement with the Serbs. This made the historic alliance of Muslims and Croats, backed by Germans against the Serbian people of Bosnia, complete. Karadžić cites the Croatian-Jewish writer Goldstein: “1941, the year that is returning.”⁷³ Karadžić points out that the Serbs “faced the same plans, the same villains, and the same victims as in World War II.”⁷⁴ Serbs, with such enemies, had every reason to be afraid and take precautions: “[w]ell, if our neighbours are preparing a programme of this kind and life of this kind, of course we’re going to separate from them.”⁷⁵

B. Actor and Agency: Architect or Victim

Prosecutor Alan Tieger sketches the “receptive audience” Karadžić had for his speeches. He even quotes from two other Bosnian Serb politicians, whose utterances appear considerably more radical than those of Karadžić: Muslims are “foul non-Christians who have befouled this soil of ours”⁷⁶ who “had in mind . . . to gouge out our eyes and carve us up, hack our bodies to pieces, rape women and girls in front of their dearest, to circumcise, to destroy our religion, to crush us.”⁷⁷ Nonetheless, Tieger portrays Karadžić as the ultimate driver of this propagandistic discourse rather than just one of its mouthpieces. Karadžić himself is not actually driven by ethnic hatred towards Muslims or Croats himself, but by a strategic vision. “This case, Your Honours,” Tieger tells the judges and the global community, “is about that supreme commander, a man who harnessed the forces of nationalism, hatred, and fear to implement his vision of an ethnically separated Bosnia: Radovan Karadžić.”⁷⁸

As in other high-profile trials of political leaders, one of the challenges for the prosecution is to prove that the suspect had individual criminal responsibility for crimes that were physically perpetrated much lower down the chain of command. Although Karadžić is charged with a set of joint criminal enterprises (JCEs) committed in concert with others, the prosecution portrays him as the grand mastermind behind each plan, with Milosevic as

72. Transcript at 863, Line 5–6 (1 Mar. 2010).

73. Transcript at 863, Line 6–8 (1 Mar. 2010).

74. Transcript at 884, Line 7–9 (1 Mar. 2010).

75. Transcript at 889, Line 13–14 (1 Mar. 2010).

76. Transcript at 548, Line 19–20 (27 Oct. 2009).

77. Transcript at 549, Line 4–6 (27 Oct. 2009).

78. Transcript at 515, Line 8–10 (27 Oct. 2009).

a background aider and abettor and other Bosnian Serbs as implementers. Based on a phrase used in an intercepted telephone conversation with Milosevic in October 1991, Karadžić is described as having undertaken a series of “calculated steps”⁷⁹ to implement six “strategic objectives,”⁸⁰ the first and foremost of which was ethnic separation.⁸¹

In implementing these objectives, Karadžić’s control over Bosnian Serbs is said to have been absolute. Other bodies of the Bosnian Serb polity are described in mechanical terms. The Serbian Democratic Party (SDS) was “a powerful machine with President Karadžić at its helm,”⁸² the Bosnian Serb Assembly was a “valuable instrument,”⁸³ and the “Council of Ministers[,] . . . the precursor to the government, was another vehicle for implementing Karadžić’s policies and calculated steps.”⁸⁴ Moreover, he “did not merely step into a position of power; he . . . created and then he led the bodies and forces necessary to implement his objectives.”⁸⁵

In his opening statement, the prosecutor stresses thirty-two times Karadžić’s role as the supreme commander of the army,⁸⁶ which put him in charge of Ratko Mladić. He was also president of everything: president of the party SDS,⁸⁷ president of the National Security Council,⁸⁸ president of the three-person presidency that ran the unrecognized republic for a while,⁸⁹

79. Transcript at 533, Line 14–18 (27 Oct. 2009); *id.* at 535, Line 18.

80. Transcript at 558, Line 21, 25 (27 Oct. 2009); *id.* at 559, Line 4, 6, 9; *id.* at 562, Line 20; *id.* at 563, Line 2, 12, 14; *id.* at 563, Line 20–23; *id.* at 564, Line 3, 8; *id.* at 567, Line 7–8; *id.* at 568, Line 3–4, 7, 21–22; *id.* at 569, Line 6, 14, 19; *id.* at 570, Line 4; *id.* at 573, Line 19–20, 25; *id.* at 575, Line 2; *id.* at 592, Line 17, 19; *id.* at 593, Line 24–25; *id.* at 594, Line 2; *id.* at 607, Line 24; *id.* at 608, Line 8.

81. Transcript at 525, Line 4 (27 Oct. 2009); *id.* at 529, Line 18–24; *id.* at 533, Line 4–6, 19–20; *id.* at 534, Line 3–4; *id.* at 538, Line 22; *id.* at 539, Line 13; *id.* at 547, Line 2, 13; *id.* at 550, Line 25; *id.* at 555, Line 12; *id.* at 558, Line 11–13, 19–20, 21–24; *id.* at 563, Line 17, 19–21; *id.* at 565, Line 20; *id.* at 567, Line 7–8; *id.* at 520, Line 12.

82. Transcript, at 527, Line 3 (27 Oct. 2009).

83. Transcript at 534, Line 12 (27 Oct. 2009).

84. Transcript at 535, Line 16–18 (27 Oct. 2009).

85. Transcript at 525, Line 18–20 (27 Oct. 2009).

86. Transcript at 513, Line 23 (27 Oct. 2009); *id.* at 514, Line 8, 13, 22; *id.* at 515, Line 8; *id.* at 521, Line 6–7; *id.* at 521, Line 22; *id.* at 560, Line 21; *id.* at 561, Line 6–7; *id.* at 562, Line 15; *id.* at 604, Line 3, 4–5; *id.* at 607, Line 17; *id.* at 607, Line 22; *id.* at 608, Line 8; *id.* at 619, Line 3; Transcript at 627, Line 18 (2 Nov. 2009); *id.* at 628, Line 10; *id.* at 639, Line 8; *id.* at 640, Line 3; *id.* at 648, Line 2; *id.* at 650, Line 13; *id.* at 651, Line 12; *id.* at 652, Line 5; *id.* at 652, Line 6; *id.* at 655, Line 9; *id.* at 656, Line 2; *id.* at 659, Line 21; *id.* at 664, Line 23; *id.* at 665, Line 23; *id.* at 672, Line 13.

87. Transcript at 515, Line 13–14 (27 Oct. 2009); *id.* at 527, Line 4; *id.* at 528, Line 11; *id.* at 534, Line 25; *id.* at 536, Line 16–17; *id.* at 539, Line 18–19; Transcript at 672, Line 13 (2 Nov. 2009).

88. Transcript at 520, Line 24–25 (27 Oct. 2009); *id.* at 536, Line 18; *id.* at 582, Line 22–23.

89. Transcript at 521, Line 2–3, 11 (27 Oct. 2009); *id.* at 536, Line 20; *id.* at 560, Line 12–16, 19; *id.* at 604, Line 4, 6; Transcript at 627, Line 19 (2 Nov. 2009); Transcript at 12976, Line 18–22 (8 Mar. 2011).

and finally president of Republika Srpska.⁹⁰ Party organs were “hierarchical” and “centralized,”⁹¹ “able to reach the most remote village in two hours.”⁹² Thus, “[i]n either capacity, indeed in any of his capacities . . . whether as president of the Presidency in charge of military affairs or as sole president, he was the de jure and de facto military leader, the supreme commander”⁹³ and “in those dual roles with that absolute authority, he effectively planned, directed, controlled, and oversaw his military subordinates.”⁹⁴

Again, Karadžić paints a different picture of the period leading up to the war. He maintains that he was not planning the war, that he was not an architect, but that he and the Bosnian Serb leadership did all it could to cooperate with, and make concessions to the Muslim leadership: “Thanks to the Serb’s flexibility and numerous concessions that they made, there were several solutions that could have provided the avoidance of war and the price of war.”⁹⁵ Karadžić “always advocated peace and peaceful solutions, never, ever advocating war.”⁹⁶ The Serbs wanted to live with Muslims, but they “didn’t want to live under Muslims.”⁹⁷

Time after time the Serbs were, in Karadžić’s version of what happened, betrayed because “[t]hey, [the Muslims] falsely negotiated, and they left traces that they engaged in false negotiation, whereas bona fides they were preparing for war.”⁹⁸ He rhetorically asks witness for the prosecution, Aernout van Lynden, “Who avoided peace conferences and peaceful solutions? The Serbs or the Muslims? It’s a simple answer.”⁹⁹

-
90. Transcript at 521, Line 3–4, 22 (27 Oct. 2009); *id.* at 535, Line 10; *id.* at 536, Line 1; *id.* at 536, Line 7, 21; *id.* at 560, Line 17, 20; *id.* at 561, Line 1, 2, 7, 12, 16, 21; *id.* at 583, Line 4; *id.* at 584, Line 5, 7; *id.* at 609, Line 17; Transcript at 639, Line 11, 16 (2 Nov. 2009); *id.* at 640, Line 16; *id.* at 654, Line 21; Transcript at 12976, Line 18–22 (8 Mar. 2011).
91. Transcript at 527, Line 17 (27 Oct. 2009); *id.* at 527, Line 23; *id.* at 528, Line 7, 9; *id.* at 606, Line 16; Transcript at 4216, Line 5–8 (28 June 2010); *id.* at 4218, Line 4–9; Transcript at 12935, Line 9 (3 Mar. 2011); Transcript at 12963, Line 1–3 (8 Mar. 2011); *id.* at 12977, Line 19; Transcript at 14212, Line 17 (6 June 2011); *id.* at 14214, Line 25; Transcript at 12935, Line 9 (3 Mar. 2011); *id.* at 12936, Line 14, 12937, Line 23; *id.* at 12938, Line 2–3; *id.* at 12938, Line 16–17; *id.* at 12938, Line 24–12939, Line 6; *id.* at 12942, Line 19–22.
92. Transcript at 527, Line 14–15 (27 Oct. 2009).
93. Transcript at 560, Line 18–21 (27 Oct. 2009).
94. Transcript at 607, Line 18–20 (27 Oct. 2009).
95. Transcript at 827, Line 14–17 (1 Mar. 2010). See also *id.* at 822, Line 21–24; *id.* at 837, Line 14; Transcript at 911, Line 9–10 (2 Mar. 2010); *id.* at 932, Line 19–20; *id.* at 958, Line 15–16; Transcript at 2865, Line 10–11 (27 May 2010).
96. Transcript at 14442, Line 22–23 (8 June 2011).
97. Transcript at 848, Line 22–24 (1 Mar. 2010).
98. Transcript at 969, Line 5–7 (2 Mar. 2010). See also Transcript at 848, Line 23–849, Line 1 (1 Mar. 2010); *id.* at 883, Line 18–20; *id.* at 884, Line 3–5; Transcript at 968, Line 9–11 (2 Mar. 2010); Transcript at 2688, Line 15–21 (21 May 2010); Transcript at 2700, Line 5–11 (26 Mar. 2010).
99. Transcript at 2612, Line 16–17 (21 Mar. 2010).

According to Karadžić, the Muslims had been preparing for war for months by transforming the police into a criminal partisan army, organizing religious paramilitary groupings called “Mosque Doves” and a “Mujahedin” division led by clergymen,¹⁰⁰ acquiring arms, and calling for general “mobilization.”¹⁰¹ By undermining peace and by refusing to compromise their goal of “100% in 100% of Bosnia” the Muslims provoked war because that was the only option “Serbs do not accept.”¹⁰² This “was the main cause of the war.”¹⁰³

As a result, the Muslim forces were more dangerous and stronger than the Serbs. The Serbs where “dealing with a raging bull, but the OTP [Office of the Prosecutor] claim that they were dealing with lambs and causing lambs irreparable harm.”¹⁰⁴ There was a “vast disproportion in manpower[:]”¹⁰⁵ the Serbs were “outnumbered”¹⁰⁶ by the Muslim army, which was “three times stronger.”¹⁰⁷ The Muslim army was well armed and well prepared because they inherited arms from the Yugoslav National Army (JNA),¹⁰⁸ and because everybody had weapons at home, due to Tito’s doctrine of the “armed people.”¹⁰⁹ Moreover, “they received weapons from Iran (with the knowledge of the United States) continuously through Croatian territory.”¹¹⁰ The accusation of backing from Iran is especially significant given that Karadžić alleges Izetbegović wanted to model Bosnia on theocratic Iran and because Iran, as part of the “axis of evil,” has often been accused of supporting Islamist organizations abroad.

Finally, the outbreak of conflict in Yugoslavia, and the brutality of it, had long been considered inevitable by western observers: “even while Joseph Broz Tito was still alive, had they foreseen the outbreak of war and the brutality of war. . . . If you’re going to have war in the Balkans . . .

100. Transcript at 1332, Line 4–8 (21 Apr. 2010).

101. Transcript at 3985, Line 21–22 (21 June 2010).

102. Transcript at 861, Line 21–22 (1 March 2010).

103. Transcript at 7324, Line 24–25 (6 Oct. 2010).

104. Transcript at 870, Line 24–25 (1 Mar. 2010).

105. Transcript at 2466, Line 19–22 (19 May 2010).

106. Transcript at 6880, Line 7 (15 Sept. 2010).

107. Transcript at 870, Line 16 (1 Mar. 2010).

108. Transcript at 2740, Line 10 (26 May 2010); Transcript at 8350, Line 12 (26 Oct. 2010). Karadžić also says that the JNA is the “Mother of all armies”; Transcript at 2739, Line 19–20 (26 May 2010); *id.* at 2740, Line 12; *id.* at 2973, Line 6.

109. Transcript at 932, Line 3 (2 Mar. 2010); *id.* at 936, Line 17; Transcript at 1056, Line 14 (13 Apr. 2010); Transcript at 2456, Line 11 (19 Mar. 2010); Transcript at 2741, Line 21 (26 May 2010); Transcript at 2849, Line 4 (27 May 2010); Transcript at 3620, Line 8 (9 June 2010); Transcript at 3783, Line 12 (15 June 2010); *id.* at 3796, Line 9, 24; *id.* at 3797, Line 5,8,10; Transcript at 3896, Line 6 (16 June 2010); Transcript at 8455, Line 15 (27 Oct. 2010); Transcript at 12019, Line 8 (16 Feb. 2011).

110. Transcript at 2744, Line 18–21 (26 Mar. 2010); Support from Iran is also mentioned, see Transcript at 1677, Line 11 (27 Apr. 2010); Transcript at 2739, Line 17–25 (26 May 2010); Transcript at 3670, Line 25 (10 June 2010); Transcript at 5785, Line 17 (22 July 2010).

you're going to have brother killing brother. How then can the Prosecution place the responsibilities for the outbreak of a civil war which the Western governments and the western services envisaged in this almost clairvoyant way, far before they had ever heard of Karadžić and the SDS, how can they link it to this accused here, and burden him and accuse him of being responsible for that?"¹¹¹

Karadžić portrays himself not so much a political leader but as a Christ-like figure for the Serbian people: "They said Karadžić was the ultimate leader. If they knew the Serbian people properly, they would have said that Karadžić was the ultimate servant of his people, and this is what you can find in—in the Gospels."¹¹²

C. Purpose: Living Space or Self-Protection

As suggested above, and somewhat in contradiction to his representation in the international media, the prosecution does not describe Karadžić as having been driven by ethnic hatred per se. His motivation is to provide "living space"¹¹³ for the Serbian people in Bosnia by "carving out"¹¹⁴ and "conquering"¹¹⁵ "vast"¹¹⁶ and "huge"¹¹⁷ territories. Directed by Karadžić, officials of the party, the police, remnants of the Yugoslav national army, and paramilitary groups were all involved in "liberating the space"¹¹⁸ for the Serb people. Liberation entailed making the territory "pure"¹¹⁹ through "ethnic cleansing,"¹²⁰ the signature phrase of the Bosnian conflict.

111. Transcript at 834, Line 5–17 (1 Mar. 2010).

112. Transcript at 853, Line 21–24 (1 Mar. 2010).

113. This term is reminiscent of Nazi ideology of course, and actually used by Karadžić. Transcript at 525, Line 5 (27 Oct. 2010); *id.* at 545, Line 24; *id.* at 568, Line 10, 25; Transcript at 4483, Line 19 (1 July 2010); *id.* at 4485, Line 6–7; Transcript at 13338, Line 16 (15 Mar. 2011).

114. Transcript at 514, Line 9 (27 Oct. 2009).

115. Transcript at 515, Line 17, 23 (27 Oct. 2009); *id.* at 516, Line 25; *id.* at 517, Line 6; *id.* at 518, Line 20; *id.* at 520, Line 18; *id.* at 549, Line 25; *id.* at 550, Line 15; *id.* at 552, Line 6; *id.* at 560, Line 1; *id.* at 585, Line 2; *id.* at 587, Line 12, 16, 19, 22; *id.* at 590, Line 10; Transcript at 640, Line 8 (2 Nov. 2010); *id.* at 662, Line 4; Transcript at 3600, Line 21 (9 June 2010); Transcript at 7238, Line 8, 10 (5 Oct. 2010).

116. Transcript at 514, Line 11 (27 Oct. 2009); *id.* at 518, Line 11; *id.* at 546, Line 5; *id.* at 590, Line 10.

117. Transcript at 544, Line 24 (27 Oct. 2009); *id.* at 545, Line 12–13.

118. Transcript at 544, Line 9–10, 12 (27 Oct. 2009); *id.* at 544, Line 21–22; *id.* at 553, Line 3; *id.* at 556, Line 17–18; *id.* at 575, Line 5.

119. Transcript at 549, Line 23 (27 Oct. 2009); *id.* at 550, Line 10; *id.* at 550, Line 20; *id.* at 571, Line 17; *id.* at 572, Line 5; *id.* at 572, Line 13; *id.* at 573, Line 3; *id.* at 581, Line 25, 582, Line 1; *id.* at 588, Line 2; Transcript at 2419, Line 4–7 (19 May 2010); Transcript at 2666, Line 8–12 (21 May 2010).

120. The term is used by the prosecution at least sixty-five times: see master frame.

Karadžić's own account paints him as a thorough cosmopolitan:

all my business contacts in Sarajevo were mostly with Muslims? I don't want to enumerate them all, not to waste time. The professor who taught me clinical psychiatry was a Muslim, and I chose him. My internal medicine professor was a Croat, Ivan. My dentist, according to my own choice, is Faruk, a Muslim. My lawyers, once again due to my personal choice, are Ekrem and—I know the surname but I'll remember his name too. He was also a Muslim, and I think he originated from Kosovo. That my hairdresser is a Muslim, or barber, and that everything I did in Sarajevo was mostly linked to the Muslims.¹²¹

Karadžić further counters the "living space" sketch of his motivation for the war by, again, placing all agency with his enemies in the conflict. According to Karadžić, the moves of the Muslim leadership forced all the moves of the Serb leadership in Bosnia: "Serb behaviour is a response. It's a reaction. It is impermissible, it is impossible to say that that is intention rather than reaction. The SDA decides what the Serbs are going to do."¹²² In Karadžić's view, first there was the establishment of political parties based on ethnicity.¹²³ Then, the Muslims declared independence without the support of the Serbian minority. As a response, the Serbs declared independence to protect against radical Islamic rule. The only thing the Republika Srpska set out to do was to "protect the Serbian people from their own state, from the police, from the state-sponsored terror of their own country."¹²⁴

Sarajevo was not a peaceful city but "a fortress and fulcrum, a military stronghold"¹²⁵ that was well armed and full of legitimate targets.¹²⁶ Srebrenica

-
121. Transcript at 3282, Line 14–22 (3 June 2010). His good relations with Muslims are also emphasized, see Transcript at 1608, Line 1–2 (26 Apr. 2010); Transcript at 2924, Line 10–15 (28 May 2010).
 122. Transcript at 941, Line 14–17 (2 Mar. 2010). For other similar examples see Transcript at 813, Line 8–9 (1 Mar. 2010); *id.* at 870, Line 2–3; *id.* at 881, Line 12–13; Transcript at 941, Line 15 (2 Mar. 2010); *id.* at 946, Line 17–20.
 123. Transcript at 869, Line 14–18 (1 Mar. 2010).
 124. Transcript at 933, Line 11–13 (2 Mar. 2010).
 125. Transcript at 1906, Line 22–24 (5 May 2010).
 126. For some examples, see Transcript at 954, Line 19–25 (2 Mar. 2010); *id.* at 955, Line 3; *id.* at 955, Line 5–8; *id.* at 957, Line 18–958, Line 4; Transcript at 1930, Line 4–7 (5 May 2010); Transcript at 2351, Line 2–10 (11 May 2010); Transcript at 2470, Line 1 (19 May 2010); *id.* at 2472, Line 7–8; *id.* at 2472, Line 13–14; *id.* at 2473, Line 6–8; *id.* at 2474, Line 1; Transcript at 2496, Line 1–6 (20 Mar. 2010); *id.* at 2510–2511; *id.* at 2517, Line 13–16; Transcript at 2589, Line 9–17 (21 May 2010); Transcript at 2727, Line 6–21 (26 May 2010); Transcript at 2911, Line 20–22 (28 May 2010); Transcript at 1906, Line 22–24 (5 May 2010); *id.* at 1916, Line 12–18; *id.* at 1921, Line 22–24; *id.* at 1922, Line 3–4; *id.* at 1923, Line 3–6; *id.* at 1925, Line 7–12; *id.* at 1929, Line 18–19; Transcript at 1967, Line 5–6 (6 May 2010); *id.* at 1968, Line 17–22; Transcript at 2075, Line 15–17 (7 May 2010); Transcript at 2277, Line 14–18 (10 May 2010); Transcript at 2338–39; Transcript at 2454, Line 12–22 (19 May 2010); *id.* at 2455, Line 8–16; Transcript at 2551, Line 8–12 (20 May 2010); *id.* at 2554, Line 2–8; Transcript at 2599, Line 8–13 (21 May 2010).

was attacked because, as Karadžić emphasizes on several occasions, it was a “military stronghold.”¹²⁷ The Serbs could not wait in a “deep state of anaesthesia . . . to be butchered like the Serbs before us.”¹²⁸

D. Act: Terror and Lies

In its indictment, the prosecution constructs a complex web of Karadžić’s crimes and their purposes: he is accused of having taken part in four JCEs, the first of which overarches the other three, and which together constitute two counts of genocide, five counts of crimes against humanity, and four counts or war crimes, based on factual incidents summarized and categorized in seven schedules. Even after the Judges ordered a substantial reduction in the number of these incidents put forward in evidence, the case remains vast. However, the bulk of the accusations belong to one of four categories: the shelling and sniping of Sarajevo, the forced expulsion and detention of Muslims and Croats from various parts of Bosnia, the Srebrenica massacre, and the taking hostage of United Nations personnel. The last of these four points had been given little attention by the prosecutors during the period under investigation, and will not be discussed here.

The characterization of the Sarajevo campaign by the prosecution is particularly intriguing, as it focuses on a concept that has been center stage in the international political discourse of the last decade, but has not traditionally belonged to the vocabulary of humanitarian or criminal law: terror.¹²⁹ According to count nine of the indictment, Karadžić’s men committed “crimes of terror,” “the primary purpose of which was to spread terror among the civilian population” by means of “shelling and sniping.”¹³⁰ While also covering some actual incidents of sniping and shelling, the prosecutors devote much attention to describing the “atmosphere of terror”¹³¹ that engulfed the city: “[t]error was the only constant in the otherwise uncertain daily life of these besieged Sarajevans.”¹³² “Simple daily acts like crossing the street terrified people.”¹³³ “For 44 months, the civilian population lived

127. Transcript at 981, Line 23 (2 Mar. 2010); Transcript at 1419, Line 1–2 (22 Apr. 2010); Transcript at 2220, Line 16 (10 May 2010); Transcript at 7403, Line 4–56 Oct. 2010); Transcript at 10277, Line 13 (14 Jan. 2010); Transcript at 11625, Line 10 (11 Feb. 2011).

128. Transcript at 866, Line 7–8 (1 Mar. 2010).

129. See Marlies Glasius, *Terror, Terrorizing, Terrorism: Instilling Fear as a Crime in the Case of Radovan Karadzic and Charles Taylor*, SLAVIC REV. (forthcoming 2014) for a more extensive discussion.

130. The International Criminal Tribunal for the Former Yugoslavia, The Prosecutor of the Tribunal against Radovan Karadzic, Third Amended Indictment, 27 February 2009, at 34.

131. Transcript at 602, Line 13–14 (27 Oct. 2009).

132. Transcript at 599, Line 12–13(27 Oct. 2009).

133. Transcript at 599, Line 18 (27 Oct. 2009).

under a pervasive sense of terror; exactly what was intended."¹³⁴ "This terror attack, Your Honours, virtually killed a living city."¹³⁵

Although unlawful killings are also separately charged, making the people of Sarajevo afraid for their lives constitutes a war crime in itself. Even Karadžić's ally Milosevic is said to have "described the earliest bombardments as 'bloody criminal.'"¹³⁶ However, instilling fear appears to be just an intermediate purpose. The ultimate aims were "to secure concessions from the Bosnian government and the international community, the interest in exacting revenge, the interest in securing concessions in negotiations to cement gains and to obtain a resolution consistent with the objectives of the Bosnian Serbs."¹³⁷ Perhaps surprisingly, the allegation of terror is exclusively reserved for the siege of Sarajevo. The forced expulsion, internment in camps, and other crimes against the non-Serb population are not categorized as terrorizing civilians.

Karadžić also imputes the use of terror to Muslims, but with a twist: the Muslims did not only sow terror, they were also terrorists. The Muslim leadership tried to realize "the implementation of [their] ideology ... with both terror and foreign intervention."¹³⁸ Serbs were "terrorized"¹³⁹ by Muslim forces who undertook "terrorist . . . activities."¹⁴⁰ The Muslims were "organising and preparing terrorist organisations against prominent Serbs."¹⁴¹

At the beginning of the war "there was terror exercised by the Muslims against the Serbs. There were rapes of young girls on an ethnic basis, and there were killings."¹⁴² Later, it was "terror in Sarajevo . . . it was terrible to be a Serb that night in Sarajevo."¹⁴³ Also, in Srebrenica, "there was terrible terror exercised by the Muslims of the area."¹⁴⁴ According to Karadžić, unlike the Muslims: "we [Serbs] do not have a tradition of terrorism, and we are against killing."¹⁴⁵

134. Transcript at 597, Line 17–18 (27 Oct. 2009).

135. Transcript at 601–602 (27 Oct. 2009). The words "terror," "terrorize," "terrorization" are used at least sixty-one times by the prosecutors: see master frame.

136. Transcript at 615, Line 5–6 (2 Nov. 2009).

137. Transcript at 198, Line 16–19 (6 May 2009).

138. Transcript at 889, Line 3–4 (1 Mar. 2010).

139. Transcript at 5449, Line 1 (19 July 2010); *id.* at 5445, Line 1–3; Other references to terror/terrorism by Muslims, see Transcript at 928, Line 17 (2 Mar. 2010); *id.* at 958, Line 25; *id.* at 965, Line 8; *id.* at 972, Line 4; *id.* at 973, Line 13; Transcript at 1932, Line 13 (5 May 2010); Transcript at 1968, Line 20 (6 May 2010); Transcript at 4354, Line 19 (30 June 2010); Transcript at 4804, Line 10 (7 July 2010); Transcript at 4926, Line 13 (8 July 2010); Transcript at 7970, Line 7 (15 Oct. 2010); Transcript at 11425, Line 7 (9 Feb. 2011); Transcript at 11692, Line 1 (11 Feb. 2011); Transcript at 11944, Line 20 (26 Feb. 2011); *id.* at 11945, Line 12; *id.* at 11983, Line 13; Transcript at 12101, Line 16 (17 Feb. 2011); Transcript at 15154, Line 24 (22 June 2011); Transcript at 15644, Line 18 (29 June 2011).

140. Transcript at 11692, Line 1 (11 Feb. 2011).

141. Transcript at 11945, Line 12 (26 Feb. 2011); *id.* at 11983, Line 13.

142. Transcript at 972, Line 4–7 (2 Mar. 2010).

143. Transcript at 928, Line 17 (2 Mar. 2010).

144. Transcript at 978, Line 14 (2 Mar 2010).

145. Transcript at 2860, Line 17–18 (27 May 2010).

The prosecutors bring forward a host of incidents involving beatings, sexual assaults and other abuse, and instances of killings that happened in the camps where especially male, but sometimes also female, Muslims and Croats were held. Food, water, and sanitary facilities were insufficient or lacking. The prosecutors acknowledge that conditions varied between camps, but they were generally “squalid”,¹⁴⁶ “degrading”,¹⁴⁷ and “wretched”.¹⁴⁸ In short, they dehumanized their inmates: non-Serbs [were] “sent to camps where detainees lived like animals and were abused, raped, and killed.”¹⁴⁹ These camps “were degrading and typically brutal places situated in such locations as old mines, abandoned factories, old concrete buildings, and the like. In the best of circumstances, detainees existed in dehumanising conditions.”¹⁵⁰

However, the purpose of these “concentration camps”¹⁵¹ was not death: “[t]he ultimate solution . . . would be to exchange the prisoners, that is, send them to Muslim-held areas in exchange for Serbs held by Muslims.”¹⁵² The separation process, according to the prosecution, would be completed with the removal of Bosnian Muslims and Croats from Serb territory altogether. Hence, the inhumanity of the camps was not a purpose in itself, but a means to cleanse territories for the Serbs.

The prosecutors’ description of Karadžić’s responsibility for the massacres at Srebrenica relies on detailed, factual descriptions of killing operations at various sites and construction of Karadžić’s knowledge of these based on telephone intercepts. The prosecutors do not require hyperbolic statements to describe an event that already has the status of “one of humanity’s dark chapters.”¹⁵³ “Srebrenica was once simply the name of a small town and municipality in Eastern Bosnia . . . In July 1995, however, Srebrenica achieved worldwide infamy.”¹⁵⁴ Instead, more indignation is reserved for Karadžić’s partial denial of the massacre and lack of regret¹⁵⁵ than for the act itself. Karadžić is not one of those

who out of nationalist fervour may stubbornly or naively claim that Srebrenica never happened . . . when that man [Karadžić] denies what happened, it is because he knows that the truth condemns him. But the living victims, the survivors, the women, elderly, those who were children in Potocari in July 1995, for them there is no question of what happened, only the lasting pain of loss. . . . Their

146. Transcript at 515, Line 19 (27 Oct. 2009).

147. Transcript at 576, Line 25 (27 Oct. 2009).

148. Transcript at 586, Line 9 (27 Oct. 2009).

149. Transcript at 524, Line 1–2 (27 Oct. 2009).

150. Transcript at 576–77 (27 Oct. 2009).

151. Transcript at 4562, Line 25 (5 July 2010); *id.* at 4563, Line 21; *id.* at 4588, Line 5.

152. Transcript at 581, Line 7–12 (27 Oct. 2009).

153. Transcript at 623, Line 14–15 (2 Nov. 2010).

154. Transcript at 624, Line 4–5, 9 (2 Nov. 2010).

155. Transcript at 624, Line 1 (2 Nov. 2010); *id.* at 665, Line 15.

ongoing tragedy, Your Honours, is part of the lasting legacy of the accused's crime and part of the overwhelming evidence that belies his efforts at denial.¹⁵⁶

Thus, Karadžić is emphatically separated from other nationalistic Serbs: his motives for denial are different, instrumental, and altogether more blameworthy.

Karadžić, while not specifically denying that deaths occurred in Srebrenica, accuses the SDA of using “tricks”¹⁵⁷ to provoke foreign intervention: they did terrible things to “their own people”¹⁵⁸ and then blamed Serbs. They could do this because their actions were “deeply founded on a belief, on a philosophy, political philosophy, that the people should suffer a great deal in order to return to Islam.”¹⁵⁹ The examples that Karadžić gives range from Muslims firing from hospitals in order to provoke Serb retaliatory fire on the hospital,¹⁶⁰ the Bosniak government storing humanitarian supplies to create scarcity and blame Serbs for not letting through supplies,¹⁶¹ and shutting down utilities to accuse Serbian forces of cutting them off.¹⁶² They also “fired at their own people”¹⁶³ and “staged various dramatic incidents around the city”¹⁶⁴ of Sarajevo. They also planted false evidence against the

156. Transcript at 665–666, (2 Nov. 2010).

157. Transcript Karadžić refers to Muslims using a “trick” or “tricks” explicitly sixty-four times, see master frame.

158. Karadžić refers to what the Muslims did to “their own people” literally more than thirty times. See Transcript at 2872, Line 5 (27 May 2010); Transcript at 3041, Line 16 (31 May 2010); Transcript at 4229, Line 13 (28 June 2010); Transcript at 4289, Line 3, 21 (29 June 2010); *id.* at 4318, Line 7; Transcript at 5549, Line 16 (20 July 2010); Transcript at 5889, Line 7 (18 Aug. 2010); Transcript at 6815, Line 10, 16 (15 Sept. 2010); *id.* at 6816, Line 18; Transcript at 7305, Line 24 (5 Oct. 2010); Transcript at 7326, Line 22 (6 Oct. 2010); *id.* at 7328, Line 19; *id.* at 7330, Line 10; *id.* at 7359, Line 21; Transcript at 8051, Line 12 (18 Oct. 2010); *id.* at 8054, Line 6; *id.* at 8059, Line 24; Transcript at 8457, Line 9 (27 Oct. 2010); Transcript at 10164, Line 16 (13 Jan. 2011); *id.* at 10165, Line 4; Transcript at 10196, Line 9 (14 Jan. 2011); *id.* at 10202, Line 4; Transcript at 10515, Line 14 (18 Jan. 2011); Transcript at 11527, Line 18 (10 Feb. 2011); *id.* at 11556, Line 1; Transcript at 13119, Line 7 (10 Mar. 2011); Transcript at 13501, Line 23 (16 Mar. 2011).

159. Transcript at 1640, Line 1–3 (26 Apr. 2010).

160. Transcript at 843, Line 12 (1 March 2010); Transcript at 953, line 10–11; Transcript at 955, Line 9–12 (2 March 2010); Transcript at 1641, Line 24 to 1642, Line 2 (26 April 2010); Transcript at 1925, Line 7–12 (5 May 2010); Transcript at 2050, Line 21–23 (7 May 2010); Transcript at 3947, Line 13–14; Transcript at 3956, Line 3–5 (21 June 2010); Transcript at 5439, Line 18–19 (19 July 2010); Transcript at 5553, Line 7–19; Transcript at 5555, Line 9–10 (20 July 2010); Transcript at 7387, line 15–17 (6 October 2010); Transcript at 8060, Line 8–9, 18–19 (18 October 2010).

161. Transcript at 1797, Line 1–2 (28 Apr. 2010); Transcript at 11629, Line 16–18; Line 24 to 11630, line 1; Transcript at 11630, Line 16–17 (11 February 2011); Transcript at 13108, line 20–23; Transcript at 13109, Line 4–6, Line 11–12 (10 March 2011).

162. Transcript at 1319, Line 9–13 (21 April 2010); Transcript at 1807, Line 24 to 1808, Line 3 (28 April 2010).

163. Transcript at 3041, Line 16 (31 May 2010); Transcript at 4229, Line 13 (28 June 2010).

164. Karadžić refers to “staged” incidents at Transcript at 843, Line 9–11 (1 Mar. 2010); Transcript at 967, Line 3 (13 Apr. 2010); Transcript at 1687, Line 16 (27 Apr. 2010);

Serbs—an act Karadžić claims happened twice at the central market in Sarajevo, known as Markale, and in Srebrenica. In Markale “the whole scene was rigged, with dead bodies—already dead bodies planted there.”¹⁶⁵ The same effect was reached by accusing the Serbs of killing civilians, whilst “for the entire first year of the war, there were no uniforms, and if the person was killed wearing civilian clothing did not mean that it—he was a civilian.”¹⁶⁶

V. DISCOURSES ON THE TRIAL AND THE TRIBUNAL

Despite the unremittingly contentious status of the ICTY in the Balkans, and the particularly high profile nature of the Karadžić case, the prosecution does not explicitly explain the purpose of the Karadžić case. The unspoken assumption appear to be that the purpose is to establish the facts about the guilt or innocence of Radovan Karadžić with regard to the crimes of which he is accused, and nothing more. The prosecution throughout assumes the legitimacy of the ICTY, and of this particular case. It never engages in defending this legitimacy—neither in court nor in public. In sharp contrast to how well the details of the case are mirrored in both versions of the conflict, there is a discontinuity between the extensive reflections by Karadžić on the nature of the ICTY and the case, and the prosecution’s relative silence in this respect. Noting the silence of the prosecution, this article presents and analyzes Karadžić’s discourse on the trial’s legitimacy.

Initially, Karadžić challenged the legitimacy of the ICTY itself, stating that he is “deeply convinced that this court is representing itself falsely as a court of the international community, whereas it is in fact a court of NATO whose aim is to liquidate me.”¹⁶⁷ He points out that: “I will defend myself before this institution as I would defend myself before any natural catastrophe, to which I also deny the right to attack me.”¹⁶⁸ However, he quickly stopped questioning the legitimacy of the entire Court, even before the opening speeches were delivered. He did go on to question the ICTY’s jurisdiction in his particular case, in the light of an alleged agreement between him and Richard Holbrook, to the effect that he, Karadžić, would disappear from public life and would not be prosecuted for his role in the conflict.¹⁶⁹

Transcript at 2571, Line 18 (20 May 2010); Transcript at 4229, Line 18–19 (28 June 2010); *id.* at 4318, Line 6–7; Transcript at 5580, Line 7–9 (20 July 2010); Transcript at 6207, Line 20–21 (6 Sept. 2010); Transcript at 9095, Line 7 (4 Nov. 2010); *id.* at 9099, Line 10; Transcript at 9580, Line 16 (10 Dec. 2010); Transcript at 9920, Line 12 (15 Dec. 2010); Transcript at 10011, Line 24 (16 Dec. 2010); Transcript at 10623, Line 9 (20 Jan. 2011); Transcript at 11517, Line 6 (10 Feb. 2011).

165. Transcript at 9921, Line 9–10 (15 Dec. 2011).

166. Transcript at 971, Line 9–11 (2 Mar. 2010).

167. Transcript at 507, Line 18–20 (26 Oct. 2009).

168. Transcript at 20, Line 16–18 (31 July 2008).

169. Karadžić points to the Holbrook agreement fifty times in the transcript, master frame, and mentions it in all interviews he gives.

He also repeatedly complains about the inequality of arms between himself and the prosecution. His requests and demands for more time and more support are generally granted by the judges or by the appeals chamber, which makes the complaint that the trial is unfair on procedural grounds harder to sustain.

In the early stages of the trial, the prosecution initially displayed considerable irritation with Karadžić's delay tactics, which included first insisting on representing himself, and then refusing to attend court hearings because he did not feel fully prepared:

The accused, while all the way opposing today's start of trial, has used all the legal remedies he had available. . . . In other words, the trial can only start if the accused says it should. . . . Preventing the commencement of trial in this manner would substantially and persistently obstruct the proper and expeditious conduct of this trial.¹⁷⁰

Even though Karadžić came around and took up his role as his own defense lawyer, the prosecution occasionally berates him for the manner in which he approaches witnesses,¹⁷¹ but more often leaves this to the Judges. The occasions on which either the Judges or the prosecution intervene in Karadžić's line of questioning more often pertain to wasting time than to inappropriate behavior, and have diminished over time. Instead, there is more of a sense of the defense, the prosecution, and the Judges engaging in the common enterprise of getting through the trial. By spring 2010, the two parties engaged in out of court talks to agree a full list of documents,¹⁷² a prosecutor thanked Karadžić for his help in locating the appropriate passage in a document,¹⁷³ and Karadžić apologized profusely for failing to give notice to the prosecution about the use of a particular document.¹⁷⁴

After the initial skirmishes concerning jurisdiction and equality of arms, Karadžić pointed his arrows no longer at the judges, but exclusively at the prosecutors. In Karadžić's view, the prosecutors are "one-sided"¹⁷⁵ and "biased."¹⁷⁶ They are "trying to turn this Tribunal into a disciplinary commission of NATO."¹⁷⁷ The prosecution portrays Karadžić as a "barbarian"¹⁷⁸

170. Transcript at 504, Line 17–19 (26 Oct. 2009); *id.* at 505, Line 4–5; *id.* at 507, Line 15–17.

171. Although the prosecution mostly waits for the Bench to intervene. Some examples of the prosecution labeling Karadžić's manners inappropriate are Transcript at 10255, Line 24 (14 Jan. 2011); Transcript at 11141, Line 5 (2 Feb. 2011); Transcript at 11517, Line 10–11 (10 Feb. 2011); Transcript at 13011, Line 3 (8 Mar. 2011).

172. Transcript at 4256, Line 10–13 (29 June 2010).

173. Transcript at 2101, Line 1–10 (7 May 2010).

174. Transcript at 5082, Line 18–19 (14 July 2010).

175. Transcript at 722, Line 12–13 (28 January 2010); Transcript at 1148, Line 20 (14 April 2010).

176. Transcript at 926, Line 5–7 (2 March 2010); Transcript at 1148, Line 22 (14 April 2010).

177. Transcript at 813, Line 17–19 (1 Mar. 2010).

178. Transcript at 885, Line 19–20 (1 Mar. 2010).

and “as a monster . . . due to the fact that they [the prosecution] don’t have any evidence, and it’s going to be easier for them to prove their case if they portray the accused as a monster rather than if they portray him as a real live person.”¹⁷⁹ They try to “to link up this accused person and the chaos and tragedy of civil war.”¹⁸⁰

For Karadžić, the prosecution represents the continuation of the conflict, not against Karadžić personally, but against the Serbs of Bosnia:

[W]hat I’m being accused of by the Prosecution in their false indictment I would like to turn round and create into a truthful indictment, where everything stays the same but the actors change. Instead of the Serb leaders, the Croatian and Muslim leaders would stand accused. . . . And let’s see what that would look like. Genuine indictment.¹⁸¹

About Muslim and Croat leaders, he asks “why aren’t these perpetrators of enormous major crimes, with blood up to their shoulders, not being tried here?”¹⁸²

Karadžić asserts that the prosecution criminalizes the legitimate self-defense of the Serbian people against their aggressor: “[E]verything that Serbs did as part of their own legitimate defence, all of that is being treated as a crime.”¹⁸³ They have “excellent people” and “wonderful men” convicted “as if they were attacking an innocent population and not an army that was three times stronger than their own and that was committing such bestial acts.”¹⁸⁴ The prosecution uses the Muslim “war tricks” and thus becomes a “participant in the war” trying “to draw this Chamber and this Tribunal into a war that seems to be ongoing in that way.”¹⁸⁵ Further,

They say that all is fair in love and war. I don’t think that all is fair either in love or in war, but it is certain that in war these kind of things happen, but is this permissible in a courtroom, in a court of law? How does the Prosecution dare to proffer this to you as if it were the truth?¹⁸⁶

Karadžić directly addresses some of the functions expressivism attributes to international criminal law, such as the truth, faith in the rule of law, and even reconciliation. In his opening statement, he says that: “it is with great enthusiasm that I am preparing for these proceedings.”¹⁸⁷ He has been “acting in good faith in order to create a process, a trial that is going to be

179. Transcript at 871, Line 8–11 (1 Mar. 2010).

180. Transcript at 814, Line 18–19 (1 Mar. 2010).

181. Transcript at 860, Line 3–8 (1 Mar. 2010). *See also* Transcript at 866, Line 10–18 (1 Mar. 2010).

182. Transcript at 813, Line 3–5 (1 Mar. 2010).

183. Transcript at 815, Line 14–15 (1 Mar. 2010).

184. Transcript at 870, Line 15–17 (1 Mar. 2010).

185. Transcript at 841, Line 1–5 (1 Mar. 2010).

186. Transcript at 839–40 (4 Mar. 2010).

187. Transcript at 990, Line 23–24 (2 Mar. 2010).

important for us, the peoples back there, and also for international justice and international law.”¹⁸⁸

Karadžić is motivated “first of all, to determine the truth, the truth about our conflict, to determine the truth as I say, and then to defend myself in the second place. I’m not defending myself in actual fact. What I am defending are the people over there who suffered.”¹⁸⁹ The trial can be a “vehicle for the truth.”¹⁹⁰ This is also the reason why Karadžić emphasizes so vigorously during his first weeks in Court, and later in motions, the importance that everything that happens in Court happens in public, and why he attaches great importance to communication with the press.¹⁹¹

Moreover, “if I can have a fair trial and bring out the truth, it will be a step towards reconciliation.”¹⁹² The “lies” and the “false indictment” are a threat to peace and reconciliation: “how can one hope for reconciliation between the Serbs and Muslims if the Muslims are to believe that the Serbs did this to them?”¹⁹³ The truth about Srebrenica is particularly important in this respect:

We have to see what this is going to do to the future and what kind of seed of future hatred and suffering has been sown in this way for our children and grandchildren, . . . saying that Serbs did something that they never did, whoever does that ensures the continuation of further conflict and slaughter.¹⁹⁴

According to Karadžić, his trial is the “last ever opportunity”¹⁹⁵ to discover the truth about events in Srebrenica. In this respect, Karadžić depicts himself as being, once again, on the front line of Bosnia’s future: “this trial is my shift on the front lines.”¹⁹⁶

VI. DISCOURSES AND EXPRESSIVIST EFFECTS

Legal expressivism as applied to international criminal trials provides a fruitful way of theorizing the potential sociopolitical effects of such trials,

188. Transcript at 119, Line 11–14 (20 Feb. 2009).

189. In the initial appearance and the defense opening statement alone Karadžić emphasizes the importance of the truth fifty-two times. See Master Frame.

190. Denis Dzidic, *Interview with Karadžić*, BALKAN INSIGHT (20 Dec. 2010), available at <http://www.balkaninsight.com/en/article/interview-radovan-karadzic-vehicle-for-establishment-of-truth>.

191. Karadžić requests for open communication with the press: “[M]otion for equality of Arms in contact with news media.” For Karadžić arguments with regard to publicity see especially Status Conference. Transcript at 228, Line 4–7 (6 May 2009).

192. Transcript at 840, Line 19–21 (1 Mar. 2010).

193. Transcript at 840, Line 20–24 (1 Mar. 2010).

194. Dzidic, *supra* note 195.

195. Transcript at 352, Line 15 (23 July 2009).

196. Marcus Papadopoulos, *Interview with Radovan Karadžić: The Other Side of the Bosnian Story*, SERBIANNA.COM (14 May 2011), available at <http://serbianna.com/analysis/archives/896>.

because it actually gives an account of the mechanism—messaging and play-staging—through which such effects can be reached. But in order to work not just as a normative, but also as an empirical theory, it requires further development. We have attempted to further the theory by pushing the theatrical metaphor. This article focuses on the actors, particularly on the neglected part of the defendant. What does comparing these two narratives say about the expressivist potential of the trial against Radovan Karadžić, in particular, and of international criminal courts in general? As stated in the introduction, expressivists suggest several different ways in which messages expressed in court can affect society: truth telling, individualizing guilt, inflicting shame and stigma, norm-dissemination, and finally, reconciliation.

A. Truth Telling

The problems truth telling and historical narrative creation present are quite obvious from the discourse analysis. In terms of the theatrical metaphor: classic Hollywood villains often reveal their evil plans to the captured hero—and to the public—before they are arrested or killed, making the truth, and the moral of the story, very clear. However, no such moment is expected in court, where not one, but two elaborate, detailed, and internally coherent historical narratives are presented. Karadžić is telling a story of himself as the defender of the Serbs as a historical victim, whereas the prosecution tells a story about how Karadžić bears the primary responsibility for the ethnic crimes in Bosnia. At the end of the trial, judges will come with the version of the story they consider true beyond reasonable doubt, and most likely closer to the story of the prosecution than to that Karadžić. But, observers cannot expect a single strike of the hammer to undo literally years of well-publicized trial discourses.

What matters most for expressivist messages to have their desired effect is which narrative catches on with relevant audiences, not which narrative is considered true beyond reasonable doubt by the Bench. It is not unlikely that the different narratives presented in court will catch on with different audiences. Although Karadžić never explicitly addresses the Serbian people while on trial, his narrative will certainly resonate better in the Republika Srpska and Serbia. On the other side, the case made by the prosecution, in which Bosniaks figure mostly as victims of Karadžić crimes, will resonate with this group much better.

The ICTY likely will not be able to convince all concerned to support one official version of what happened during the war and proclaim the victory of one narrative over all others. Nonetheless, more modest ways may exist in which the Court might have an impact on truth telling. Fifteen years of ICTY trials may contribute to narrowing down the range of plausible inter-

pretations of the conflict. Due to the massive amounts of evidence presented in court over and over again, certain events and atrocities become close to undeniable.¹⁹⁷ To paraphrase Orentlicher, the trials before the ICTY are “shrinking the space for denial.”¹⁹⁸ For example, denying that people were killed at Srebrenica is very difficult for anyone to do. Indeed, Karadžić does not deny it, but resorts instead to blurring the distinction between fighters and civilians and turning around the accusation.

B. Individualizing Guilt

The prosecution takes a clear position: the person on trial is Radovan Karadžić and nobody else. The trial is about establishing his role in the conflict. The prosecution presents a powerful case that Karadžić, if not solely responsible, is at least among those most responsible for the crimes that took place in Bosnia. The ICTY lists this as one of its achievements, perhaps more properly understood as one of its aims:

By trying individuals on the basis of their *personal* responsibility, the ICTY *individualises* guilt. Leaders and other individuals can no longer hide behind the “nation” or any other group. They have to take responsibility and answer for their own actions. Accordingly, communities are shielded from being labeled as collectively responsible for others’ suffering. This can greatly contribute to preventing mutual hatred and promoting the reconciliation process within the war-torn societies of the former Yugoslavia.¹⁹⁹

The prosecution presses this point, and it seems to be the only subject on which it appears to be consciously engaged in expressivist messaging. By emphasizing that “this case . . . is about that supreme commander”²⁰⁰ before listing his crimes, and by singling Karadžić out as one of the few who can only deny Srebrenica “because he knows that the truth condemns him,”²⁰¹ the prosecution very clearly sets Karadžić apart from other Serbs.

Karadžić, however, challenges the fact that the trial is about him on several occasions. The trial, in his view, is an attack on the legitimate battle of the Serbs. He does not discuss his personal role and history very elaborately, but focuses on the history and the role of “his people.”²⁰² This is consistent

197. Although never completely undeniable, given that fact that there are still people who do not believe the Holocaust happened.

198. Diane F. Orentlicher, *Shrinking the Space for Denial*, OPEN SOCIETY JUSTICE INITIATIVE, (May 2008), available at http://www.opensocietyfoundations.org/sites/default/files/serbia_20080501.pdf.

199. *The Tribunals Accomplishments in Justice and Law*, ICTY OUTREACH (2006), available at http://www.icty.org/x/file/Outreach/view_from_hague/jit_accomplishments_en.pdf.

200. Transcript at 515, Line 8 (27 Oct. 2009).

201. Transcript at 666, Line 1 (2 Nov. 2009).

202. Transcript at 853, Line 23 (1 Mar. 2009).

with how he presents himself in court: ascribing little agency to himself and presenting all of his decisions as forced by necessity to protect his people.

C. Stigmatization

Another mechanism is stigmatization or the infliction of shame: making a war criminal for all out of a war hero for some. Karadžić is the “man who harnessed the forces of nationalism, hatred, and fear to implement his vision of an ethnically separated Bosnia.”²⁰³ Karadžić presents himself as a martyr for his people, hoping to find the truth and working hard for reconciliation in Bosnia Herzegovina. Moreover, because Karadžić is doing his own defense, the interaction between the prosecution and Karadžić becomes lawyerlike. Seen from the public gallery, Karadžić—who is supposed to be stigmatized as a war criminal—turns into a lawyer.²⁰⁴ In Court, he is mostly polite and obviously an intelligent human being incomparable to the Nazi leadership at Nuremberg who inculcated themselves through spine shivering statements in court.²⁰⁵

The prosecution is not the only party who can use the stage offered by the ICTY to stigmatize defendants; defendants are offered the same chances. Karadžić denounces the Bosnian leadership as fundamentalist radicals and the prosecution as a party to the conflict, siding with the Muslims, and initially portrays the ICTY itself as a disciplinary court for NATO. The judges give Karadžić considerable leeway in arguing against the ICTY and the prosecution. As we have argued elsewhere, the Judges find themselves in a *Catch-22* situation.²⁰⁶ When they give the defendant considerable space, he may successfully attack the legitimacy of the trial. If they do not offer him that space, they risk giving the appearance that the defendant is not receiving a fair trial, which also undermines the legitimacy of the court. A case in point of how far the Appeals Bench has gone to prevent any doubt about the rights of the accused is Karadžić’s successful request for the removal of judge Alphons Orié, whom Karadžić accused of being biased, from the Appeals Chamber.²⁰⁷ Removing him might send the message that Karadžić was right to complain to at least a certain extent, whereas leaving him on the bench could also have undermined the perceived impartiality of the Court.

203. Transcript at 515, Line 8–10 (27 Oct. 2009).

204. See Transcript at 8679, Line 13 (1 Nov. 2010), and Transcript at 7320, line 9–10 (6 Oct. 2010).

205. See, e.g., *Rudolph Hess Statements, Nuremberg Proceedings, Day 216*, THE AVALON PROJECT (1946), available at <http://avalon.law.yale.edu/imt/08-31-46.asp>.

206. Glasius & Meijers, *supra* note 9.

207. *Pros. v. Karadžić*, IT-95-5/18-I, Decision on Disqualification of Judges (21 Aug. 2008).

D. Norm-Dissemination

This supposed effect of international criminal courts is perhaps best seen as resulting from the combination of the of the other expressivist effects. The trial, by (1) getting at the truth and (2) stigmatizing and punishing those who committed crimes through (3) a fair trial sends some clear moral signals. The trial sends the message that crimes of this nature cannot and will neither go unpunished, nor be resolved through revenge. In this way, the trial presents an alternative modus of conflict resolution. However, for this expressivist potential to be realized, the different elements of the message have to be unambiguously broadcast. As discussed under preceding headings, this is clearly not the case when the defendant rhetorically opposes all three elements.

E. Reconciliation

Perhaps the most ambitious claim made by expressivism is that trials can offer reconciliation to war-torn societies, ending tension and conflict. The first step toward reconciliation is that the different parties agree on a certain version of the conflict and stop blaming each other. Interestingly enough, Karadžić makes this point in the trial, hoping that Bosnian Muslims will stop blaming Serbs for non-existent crimes, demonstrating precisely that having a trial does not necessarily lead to a common understanding of the conflict. If the defendant succeeds, at least to a certain extent, in strengthening the convictions of a substantial part of his own faction that they are being persecuted, that they were the victims of the conflict, and that the court is biased against them, reconciliation cannot be expected. In a polarized society, if the version of the conflict presented by the prosecution is accepted by one group but the other group or groups buy into another version of the conflict and the Court, and feel that they have been delegitimized, stigmatized, and wrongfully punished, tensions might rise rather than drop.

However, a trial could contribute to reconciliation in a more modest way strongly connected to norm-dissemination: by considering the legal spectacle as a public lesson in conflict resolution. Karadžić is forced by the nature of criminal proceedings to tone down and deal with arguments in a certain way. Although Karadžić at first tries to attack the ICTY itself, in the end he is forced to meet the charges in a reasonable, argued way, using legally permissible arguments and evidence. Histrionic diatribes are curtailed and physical violence is unthinkable in the courtroom context. By conducting his own defense, Karadžić actually contributes to the impression that this is a civil, deliberative debate about the past. He helps observers forget that his presence in court is involuntary and ultimately based on force.

VIII. CONCLUSION: THE THEATRE OF JUSTICE?

A. The Actors

Expressivism sees courts as theatrical spectacles, but it has yet to develop a better theory on the role of the actors, the audience, and the stage in this theatre. The actors here fundamentally disagree on what story and what moral they want to convey to the public. Defendants are not always content with the part implicitly assigned to them by the expressivists, bowing their head in shame and silently awaiting judgment for several years. Instead, Karadžić's trial shows how they may disturb and contest the presentation of what happened during the war, the individualization of guilt, and the legitimacy of the proceeding itself.

Moreover, Karadžić's complaints about the legitimacy of the Court and the anti-Serb nature of the case largely go unchallenged by the prosecution, both inside and outside the courtroom. The prosecution only plays the antagonistic game on one of the levels Karadžić challenges them: the matter of his legal responsibility for the crimes. A defendant like Karadžić, on the other hand, paints on a larger canvass: he is concerned with the history of his people and his own place in it. In order for courts to realize their expressivist potential, a more public relations oriented approach by prosecutors as well as judges might be desirable, defending their existence to the public outside the courtroom and making clear what they wish the trial to express. This does not, as one of our commentators put it, entail "hiring George Clooney,"²⁰⁸ but rather recognizing that explaining oneself to an audience beyond fellow jurists is part of the job.²⁰⁹

B. The Audience

As crucial as the authors sending the message are those who are the subject of the expressivist potential of trials: the audience. The most important audience is the population of the society affected by the conflict, although one might hope that other societies get the messages expressed as well. They are the ones who are to be transformed by the proceedings. However, the audience is not a uniform group, but rather consists of different groups with their own backgrounds, experiences, and allegiances. And because there

208. We wish to thank Daniele Archibugi for this provocative remark, which helped us to better formulate our intent.

209. See Glasius, *Do International Criminal Courts Require Democratic Legitimacy?*, *supra* note 8, at 61–62, 65.

is no single message sent out of a court, different stories will resonate with different groups. In Karadžić's case, many Serbs will see their worries and ideas confirmed in what Karadžić says in court, whereas more Croats or Bosniaks might hear the story of the prosecution. In combination with polarized post-conflict politics, the antagonistic nature of criminal trials poses a substantial challenge to realizing expressivist goals.

C. The Stage

International criminal courts are not institutions that can take their legitimacy for granted. The manner of their establishment always leaves space, although to different degrees, for an argument that they were imposed on a people, and hence lack democratic legitimacy. The requirement for democratic legitimacy of international criminal courts may be contested on many grounds in legal theory,²¹⁰ but such rhetoric may nonetheless be persuasive to broader audiences. Beyond this, for ad hoc courts in particular, further delegitimizing arguments may relate to the relationship between of the establishment of a court and the conflict in question, and may imply bias. Prominent defendants can, and will, use the stage the court offers not only to advance their own case, but also to advance a case against the court itself. If the defendant succeeds in delegitimizing the court in the eyes of some audiences, the entire expressivist potential toward those audiences will be undermined. If the court is not taken seriously, reconciling effects, norm-dissemination, and truth telling cannot succeed.

Although the competition of different narratives is to be expected, and is perhaps essential, in a criminal trial, competing narratives do pose a threat to expressivism. Expressivism is likely to be hindered by the capacity of the defendant to provide an internally coherent alternative narrative about the crimes committed, about his role in it, and about the legitimacy of the proceeding itself. Actors play to different audiences. The prosecution plays first and foremost to the Bench, whereas the defendant may primarily address his compatriots. Two other elements require further research: audiences and their reception of the narratives, and the stage, which unlike in domestic trials cannot be assumed to be uncontested, and which becomes part of the subject matter of the play.

Further research on the elements of actors, audiences, and stage in high profile international criminal trials can provide further guidance on

210. See *id.*; Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23 *EUR. J. INT'L L.* 7 (2011); Aaron Fichtelberg, *Democratic Legitimacy and the International Criminal Court: A Liberal Defence*, 4 *J. INT'L CRIM. JUSTICE* 778 (2006).

whether the obstacles to expressivism identified above can, under certain circumstances, be overcome, or whether they are structural features. One thing is clear: the messages that the play called "Karadžić at the Yugoslavia Tribunal" is conveying are far from unambiguous, and their expressivist effects cannot be taken for granted.