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In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered

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Something of a consensus has emerged within the international community and among commentators that war crimes tribunals have been too slow to investigate, charge, and prosecute war crimes. While acknowledging the importance of expediency in international criminal prosecution, particularly for victims, this Article challenges the feasibility, and even the desirability, of quick investigations and prosecutions of war crimes. Relying on examples from the International Criminal Tribunal for the Former Yugoslavia and other tribunals, as well as literature about the processes by which societies and individuals descend into mass atrocity, this Article contends that time is often essential to the attainment of justice in this area. War crimes cases pose particular challenges in both the investigation and prosecution phases that distinguish them from even the most complex domestic cases. In addition, war crimes cases are born of significant societal disruption that can impede, on both the societal and the individual level, the emergence of evidence in the short-term. Often, a true picture of crimes will be available only after time has passed and distance has increased from the conflict. If prosecutors rush or excessively narrow the scope of cases, they risk undermining the goals of the prosecutions. In developing expectations for future war crimes tribunals, therefore, the international community must balance the desire for expediency against stubborn but necessary processes that may cause delay.

I. INTRODUCTION

After nearly half a century of inactivity following the Nuremberg and Tokyo war crimes trials, international and semi-international (or hybrid) war crimes tribunals have proliferated around the world in the past fifteen years. These various courts have engendered numerous debates about the goals, structures, procedures, successes, and failures of international war crimes prosecutions. Although a permanent International Criminal Court (“ICC”) has now been established, there is still little agreement on many of these issues. On at least one point, however, something of a consensus has emerged. The conventional wisdom among policymakers, practitioners, and commentators (both academic and popular) is that war crimes prosecutions, particularly those at the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and its counterpart for Rwanda (“ICTR”), have fre-

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quently been too slow, and that it is essential for the future success of the ICC (and other ad hoc tribunals) that accused war criminals be charged, arrested, and tried more expeditiously.¹ This view is considered so unexceptional that those who express it rarely examine it, focusing instead on the problems caused by the delays and the need to expedite cases in the future.²

There are certainly good reasons to conclude that international criminal prosecutions are too slow. Once established, the ICTY and ICTR took years to begin sustained prosecutions,³ and some commentators have already grumbled about the amount of time it has taken for the ICC to seek arrest

1. See, e.g., Richard J. Goldstone & Gary Jonathan Bass, *Lessons from the International Criminal Tribunals*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 51, 53 (Sarah B. Sewall & Carl Kaysen eds., 2000) (“[D]elays are not just undignified; they are damaging”); Antonio Cassese, *Is the ICC Still Having Teething Problems?*, 4 J. INT’L CRIM. JUST. 434, 438, 440–41 (2006) (“It is high time—I respectfully submit—for the ICC to become more alert to the current and pressing demands of international justice.”); Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 92 (2002) (“The considerable length and cost of Tribunal trials has generated much criticism and consequently spurred reform.”); Megan Fairlie, *The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit*, 4 INT’L CRIM. L. REV. 243, 298 (2004) (“[I]t is perhaps not surprising that the ‘expeditious conclusion of trials . . . has become an obsession of the ICTY.’” (quoting Gideon Boas, *Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility*, 12 CRIM. L. FORUM 41, 45 (2001))); Mark B. Harmon, *The Pre-Trial Process at the ICTY as a Means of Ensuring Expeditious Trials*, 5 J. INT’L CRIM. JUST. 377, 377–78 (2007) (“[A]t a time when the Tribunal is most able to realize the aspirations of those who created it, frustration about the length of its trials and impatience with its progress has resulted in efforts to finish the Tribunal’s trial work by 2008 and appellate work by 2010.”); Gillian Higgins, *Fair and Expeditious Pre-Trial Proceedings*, 5 J. INT’L CRIM. JUST. 394, 394 (2007) (“In the past decade, the length of time taken by international tribunals to try those accused of war crimes has been the subject of fierce criticism.”); Eric Husketh, *Pole Pole: Hastening Justice at UNICTR*, 3 NW. U. J. INT’L HUM. RTS. 8 (2005) (proposing ways to expedite cases at the ICTR); Sanja Kutnjak Ivković, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 STAN. J. INT’L L. 255, 329 (2001) (“One of the most frequent objections to the ICTY was the slow pace of its operation and proceedings.”); Theodor Meron, *Answering for War Crimes, Lessons from the Balkans*, FOREIGN AFFAIRS, Jan.–Feb. 1997, at 2, 8 (noting few achievements of ad hoc tribunals to date and a need for more action); Dominic Raab, *Evaluating the ICTY and its Completion Strategy*, 3 J. INT’L CRIM. JUST. 82, 84–85 (2005) (noting the development of completion strategy for the ICTY by judges and the U.N. Security Council); Ivan Šimonović, *Dealing with the Legacy of Past War Crimes and Human Rights Abuses*, 2 J. INT’L CRIM. JUST. 701, 707 (2004) (“[The work of the ICTY and ICTR] was also quite slow, violating the principle of expeditious dispensation of justice”); Ralph Zacklin, *The Failings of Ad Hoc Tribunals*, 2 J. INT’L CRIM. JUST. 541, 543–44 (2004) (“The delays in bringing detainees to trial—and the trials themselves—have generally been so lengthy that questions have been raised as to the violation by the tribunals of the basic human rights guarantees set out in the International Covenant on Civil and Political Rights (ICCPR) [sic]. Justice delayed is justice denied, which also raises the question of whether justice has been done to the victims.”); Massimo Calabresi, *Karadzic’s Arrest Comes Too Late*, TIME, July 22, 2008, <http://www.time.com/time/world/article/0,8599,1825366,00.html> (“The lesson of the slow response to Karadzic and the Bosnian Serbs is that inaction can breed greater disorder.”); David Rohde and Marc Lacey, *Arrest Helps Tribunals Prosecuting War Crimes*, N.Y. TIMES, July 23, 2008, at A10 (“The International Criminal Tribunal for Rwanda has been criticized as being hugely expensive, exceedingly slow and largely detached from the country itself.”). The architects of the Nuremberg Tribunal also shared the view that expeditious justice was essential. GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 157, 163 (2000).

2. See sources cited *supra* note 1 (indicating either problems caused by delayed prosecutions or the need to proceed more quickly). Commentators who do look at the causes focus on the logistical challenges of prosecuting war crimes cases. See *infra* note 63 and accompanying text.

3. BASS, *supra* note 1, at 207–19.

warrants in its pending investigations.⁴ There have also been delays in beginning and completing the trials of arrested defendants. The signature case at the ICTY, the prosecution of Slobodan Milošević, lasted for four years before the Accused died without a verdict.⁵ The first trial at the ICC, the *Lubanga* case, began in early 2009 after numerous postponements.⁶

Two broad solutions have emerged to address these delays. First, some hope that the establishment of the ICC will institutionalize the will of the international community to react quickly and decisively to atrocities and allow for speedier investigations and prosecutions of crimes. The lengthy process of setting up an ad hoc tribunal will no longer delay prosecutions. Rather, proponents of international justice hope that since the ICC will be established and permanent, and will develop an expertise in the investigation and prosecution of war crimes cases, it will be able to act quickly to address crimes, even as conflicts are still ongoing.⁷

Second, there have been efforts to expedite trials themselves. In the face of what has become known as the “completion strategy,” the ICTY and the ICTR have streamlined indictments, adopted procedures to try cases more quickly, and placed time constraints on trials.⁸ Other tribunals, such as the Iraq High Tribunal (“IHT”), have sought to learn the lessons of the ICTY and ICTR and have pursued narrower, more expeditious cases.⁹

Two premises underlie these efforts to expedite international criminal prosecutions: prompt investigations and trials are *achievable*, and they are *desirable* (because justice delayed is justice denied). While there may be some skepticism about the first premise, the hope remains that the right combination of international will and well-designed procedures could produce efficient justice.¹⁰ The second premise, that expeditious prosecutions are a good

4. Cassese, *supra* note 1, at 438, 440–41.

5. HUMAN RIGHTS WATCH, *WEIGHING THE EVIDENCE: LESSONS FROM THE SLOBODAN MILOŠEVIĆ TRIAL 1* (2006).

6. Lisa Clifford & Katy Glassborow, *Lubanga Trial Delay Concerns*, ICC - AFRICA UPDATE (Inst. for War & Peace Reporting, London, U.K.), Feb. 29, 2008, http://iwpr.net/?apc_state=henfacr343028; Marlise Simons, *Congo: Former Warlord's Trial Halted*, N.Y. TIMES, June 25, 2008, at A8.

7. Goldstone & Bass, *supra* note 1, at 52–53 (“A permanent court, by definition, only has to be created once.”); *id.* at 58 (“By having a court already set up, the world can make the timely delivery of justice more likely.”); Leila Nadya Sadat, *The Evolution of the ICC*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT*, *supra* note 1, at 31, 38 (“Rather, they underlined the urgent need for a stable, new, permanent institution that would be ready for any situation.”); ADAM M. SMITH, *AFTER GENOCIDE: BRINGING THE DEVIL TO JUSTICE* 33 (2009) (“In contrast [to the ad hoc tribunals], the ICC is a standing court charged with the prosecution of a litany of crimes It does not spring from a particular war or battle. Rather, it is designed to be a permanent feature of the global landscape, deterring and punishing crimes.”).

8. Combs, *supra* note 1, at 92–94; Erik Møse, *Main Achievements of the ICTR*, 3 J. INT’L CRIM. JUST. 920, 929–32 (2005); Raab, *supra* note 1, at 84–85.

9. Michael P. Scharf, *Has the Iraqi Tribunal Learned the Lessons of the Milošević Trial?*, in *SADDAM ON TRIAL* 151, 151–54 (Michael P. Scharf & Gregory S. McNeal eds., 2006); Marlise Simons, *The Milošević Lessons: Faster and More Efficient Trials*, N.Y. TIMES, Apr. 2, 2006, § 1, at 4.

10. See sources cited *supra* note 7; Ian Black, *International Criminal Court Comes to Life*, THE GUARDIAN, Mar. 11, 2003, at 14 (“But the ICC will be a new and, crucially, a permanent feature of the geopolitical landscape.”).

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thing, seems indisputable. Delays in bringing perpetrators to justice can diminish the deterrent value of such prosecutions, undermine the quality of the evidence in the case, allow perpetrators to continue living in impunity (and continue committing crimes), discourage and marginalize victims, and lead to a squandering of the world's interest and attention which will, in time, be diverted to other crises. Prolonged proceedings can also compromise the rights of defendants, particularly if they are detained.

In this Article, I want to challenge both of these premises. In international war crimes investigations and prosecutions, delay is frequently inescapable, and can even be essential and *beneficial* to the pursuit of justice. That is not to say that all delay is necessary or helpful. The delays that I focus on here are not those resulting from inadequate investigative and prosecutorial efforts, inefficiencies in international legal practice, or cumbersome judicial procedures. These kinds of delays are generally avoidable and are an appropriate target of reforms.¹¹ Moreover, there are certainly times when expeditious prosecution is both possible and desirable, particularly when the crimes are narrow or when there are functioning societal mechanisms to address them.¹²

Certain other delays, however, inhere in the very nature of the crimes themselves, particularly where mass atrocity is concerned, as well as in the societal breakdown that occurs before, during, and after the commission of these crimes. Such delays may be difficult if not impossible to avoid. Further, in war crimes cases delay can often be essential for allowing the truth to emerge, which means that a rush to prosecute may result in incomplete justice. Thus, delays may or may not be avoidable, just as they may or may not be helpful to establishing the truth. In evaluating war crimes prosecutions, the goal should be to determine whether justice requires expediency, some degree of delay, or some balance of the two. The recent arrest of Radovan Karadžić illustrates the potential dual nature of delay. On the one hand, the thirteen-year delay in arresting Karadžić has been an insult to victims and international criminal justice.¹³ On the other hand, while Karadžić was a fugitive, prosecutors developed a much clearer and stronger case against him (though nobody would argue that they required such a long delay to do so).¹⁴

11. See *supra* note 8 and accompanying text.

12. See *infra* note 63 and accompanying text.

13. See Dan Bilefsky, *Serb Leader's Capture Brings Little Solace at Site of Killings in Bosnia*, N.Y. TIMES, July 25, 2008, at A6 ("I am bitter because it took so long to find Karadžić." (quoting Fadila Efendik, who lost her only son in the Srebrenica massacre)); Calabresi, *supra* note 1.

14. Göran Sluiter, *Karadžić on Trial: Two Procedural Problems*, 6 J. INT'L CRIM. JUST. 617, 622 (2008) ("Far more problematic in my view is the fact that we are at the end of the ICTY's mandate. This has clearly [sic] advantages for the Prosecutor: there is a significant amount of evidence available for both the crimes committed in the *Karadžić* indictment as well as the accused's personal role, and this evidence has been tested in other cases.").

What kind of delay might be unavoidable? Delay can result first from the nature of the cases themselves. This kind of delay occurs both in the investigation and trial phases. War crimes cases, particularly of high-level Accused, are often extraordinarily complex affairs, requiring significant time to investigate and prosecute. Proving mass crimes—particularly when the very existence of the crimes is denied by the Accused—and then establishing the link between those crimes and the perpetrators can be an enormous undertaking. Of course the time required to investigate and prosecute complex crimes can be reduced somewhat through the commitment of additional resources, but only somewhat. Even complex domestic criminal cases, which generally do not face the full array of challenges faced by war crimes cases, can take years to prosecute.¹⁵

But it is not just because these cases are hard and complicated that they require time. Delay also results from the circumstances under which these crimes occur, which affect both the investigative phase as well as later attempts to obtain the surrender of defendants. In this respect in particular, war crimes investigations and prosecutions are distinct from even the most complex domestic criminal cases.

By definition, war crimes are born out of conflict. This conflict can, in the short-term, limit the evidence that is available and have a distorting effect on the evidence that is initially obtained. Moreover, the short-term impediments to war crimes investigations and prosecutions that arise from the circumstances under which these crimes occur will often be resistant to even the strongest efforts of the international community. Even when international actors provide incentives for states to cooperate (either in the form of sanctions or rewards), or when prosecutors offer incentives for individual witnesses to testify (in the form of reduced charges or immunity for their own culpability), the ideological fervor of the conflict can, in the short-term, prove to be an obstacle to cooperation.

But as states, non-state groups (such as rebel organizations), and individuals move beyond the conflict, they may be more inclined to provide information and evidence for war crimes prosecutions, either because they in time recognize that it is in their self-interest to do so, or because passions have sufficiently cooled to make cooperation possible. Accordingly, the passage of time can result in a more complete and truer picture of the circumstances of the alleged crime. It is for this reason that war crimes investigations can in many ways improve over time, and delay can in fact be a necessary component of achieving justice.

Finally, when war crimes cases are rushed, justice can be incomplete. International criminal cases that are excessively expedited or narrowed can lose

15. The investigation and prosecution of Ken Lay and Jeff Skilling in the Enron case and of Zacarias Moussaoui in the 9/11 case both took nearly five years. Alexei Barrionuevo, Vikas Bajaj & Kyle Whitmire, 2 *Enron Chiefs are Convicted in Fraud and Conspiracy Trial*, N.Y. TIMES, May 26, 2006, at A1; Neil A. Lewis, *Moussaoui Given Life Term by Jury Over Link to 9/11*, N.Y. TIMES, May 4, 2006, at A1.

credibility and can be perceived as failures, thus undercutting the very goals that they are trying to serve (as well as undermining the institutions prosecuting the cases).

For all of these reasons, expediency in war crimes prosecutions is not always possible, or even desirable. What are the implications of this perspective? In constructing prosecutorial responses to mass atrocity, the international community should seriously consider *both* the time that may be required to achieve justice and the interests in expediency. Needless to say, delay should never be accepted as a matter of course. There will always be significant costs to delay, and in some cases quick and complete justice may be attainable. Even just initiating an investigation of alleged war criminals can serve important short-term goals, such as beginning to identify and stigmatize accused war criminals, focusing the international community on atrocities, and validating the suffering of victims.¹⁶

But understanding why war crimes cases may require time to develop nonetheless offers an important counterbalance to the pressures to expedite these cases and may influence the expectations for—and the approaches of—future war crimes prosecution efforts. The expectations of the international community when constructing war crimes tribunals are critically important, especially since the prosecution of war crimes is still a project in its infancy. Expectations determine resources, dictate whether other steps should be taken to address the mass atrocity, and are ultimately part of the measure of success or failure. A more complete appreciation for the time required to investigate and prosecute war crimes should stimulate the international community to provide longer-term support for investigations and prosecutions, even as it seeks expeditious justice. The experience of the ICTY and ICTR has shown both how more can be done to investigate and prosecute cases expeditiously,¹⁷ and how time can be required for evidence of crimes to

16. Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 7 (2001) ("Stigmatizing delinquent leaders through indictment, as well as apprehension and prosecution, undermines their influence."); Meron, *supra* note 1, at 7 ("[T]hose indicted by the tribunal are now branded with a mark of Cain that serves as some measure of retribution, preventing them from traveling abroad and instilling in them the fear of arrest by an adversary or foreign government."); Patricia M. Wald, *Foreword: War Tales and War Trials*, 106 MICH. L. REV. 901, 915 (2008) ("Even their indictments have political ramifications" (citing the stigmatizing effect of indictments of Radovan Karadžić, Charles Taylor, Slobodan Milošević, and the former Prime Minister of Rwanda)); Richard Goldstone, *Catching a War Criminal in the Act*, N.Y. TIMES, July 15, 2008, at A19 ("In the meantime, the indictments may delegitimize the government in the eyes of the Sudanese people."); Samantha Power, *Karadzic a Big Win for Hague Cops*, TIME, July 22, 2008, <http://www.time.com/time/world/article/0,8599,1825725,00.html> ("But the most crucial functions of international indictments and arrest warrants are ones that are rarely heralded: stigmatization and incapacitation of really bad people."). Stigmatization, however, is likely to be more valued by the international community than by victims, who seek not just stigmatization but apprehension and prosecution.

17. Kevin Sullivan & Peter Finn, *Karadžić Case Offers Court Chance to Repair its Image*, WASH. POST, July 24, 2008 at A12 (suggesting that the ICTY will seek to learn from its mistakes in the Milošević case when it hears the Karadžić case).

emerge from mass atrocity.¹⁸ Now that the ICC has been established, there is the hope and expectation that the court will be able to respond quickly and intervene with investigations and indictments as conflicts unfold.¹⁹ But the ability to react immediately will not necessarily lead to quick or successful outcomes. Mass atrocities may be resistant to quick prosecutions, and it is important that the international community recognize why that may be so as it seeks accountability and justice.

In addition, understanding the ways in which war crimes cases require time will assist prosecutors in adopting strategies of investigation and prosecution that take into account both the short-term and long-term needs and realities of these cases. Further, with respect to rules of procedure and evidence, mechanisms should be adopted to ensure that evidence can be preserved for long-term use in future trials, consistent with the rights of the Accused.

Finally, recognizing the frequent need for time in war crimes cases provides another perspective on the relationship between international criminal justice and reconciliation. Since the establishment of the ICTY in 1993, a stated aspiration for war crimes prosecutions has been reconciliation.²⁰ The hope is that the process of individualizing guilt will promote long-term peace by reducing the prospect of future ethnic hatreds.²¹ But perhaps the relationship between justice and reconciliation is more dynamic: some initial stability is an essential precondition to successful prosecutions, which in turn promote long-term stability and peace.

Part II of this Article reviews the reasons why expeditious justice in war crimes prosecutions is important. Part III then explores in greater detail how delay can be both necessary and beneficial to war crimes prosecutions, focusing on how the specific evidentiary needs of war crimes cases often take time to be addressed. This section draws largely on examples from the ICTY, but also on examples from other conflicts and tribunals. Part IV discusses the consequences of this alternative view.

18. Helene Cooper, *Waiting for Justice*, N.Y. TIMES, July 27, 2008, at WK1 (describing extended processes required to obtain the arrests of Milošević and Karadžić).

19. See sources cited *supra* note 10; Steven C. Roach, *Humanitarian Emergencies and the International Criminal Court (ICC): Toward a Cooperative Arrangement between the ICC and UN Security Council*, 6 INT'L STUD. PERSP. 431, 432, 434, 439–40 (2005) (arguing that the ICC could be poised to act quickly as conflicts unfold and thereby induce the U.N. Security Council to act); Martti Ahtisaari, President of Finland, Lecture at the International Institute for Strategic Studies: Diplomacy and Conflict Resolution 7 (Mar. 23, 2000) (“The permanent International Criminal Court, once set up, should be able to act more quickly than ad hoc bodies and serve as a stronger deterrent.”).

20. MICHAEL P. SCHARF & WILLIAM A. SCHABAS, SLOBODAN MILOŠEVIĆ ON TRIAL, A COMPANION, 51–54 (2002); see also *Prosecutor v. Plavšić*, Case No. IT-00-39&40/I-S, Sentencing Judgement, ¶¶ 73–81 (Feb. 27, 2003) (discussing reconciliation aims of the ICTY).

21. Susan W. Tiefenbrun, *The Paradox of International Adjudication: Developments in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the World Court, and the International Criminal Court*, 25 N.C. J. INT'L L. & COM. REG. 551, 565–66 (2000).

II. THE IMPORTANCE OF SPEEDY JUSTICE

It is perhaps self-evident that speedy and efficient justice is desirable in war crimes prosecutions. Nonetheless, since this Article seeks to make the alternative case that time and even delay are often essential to successful prosecutions, it is worth briefly reviewing why speedy justice is important, and what it is about war crimes cases in particular that makes efficiency imperative.

First, to the extent war crimes prosecutions promote deterrence, rapid and efficient prosecutions will be more effective than slow ones. If present and future leaders and commanders see that war criminals are brought to justice quickly (and of course effectively), they will be more likely to conform their behavior to the laws of war and to adopt policies and promote training to ensure that these rules are followed.²² In other words, swift justice is more certain justice.²³ Moreover, in principle, *specific* deterrence may be promoted through rapid criminal prosecutions.²⁴ War crimes can sometimes be one-time events, but more often they are part of a long-term plan or campaign.

For example, prosecutors at the ICTY ultimately charged Slobodan Milošević with committing war crimes and crimes against humanity from 1991 through 1999 in three successive wars.²⁵ Charles Taylor is currently on trial charged with committing numerous crimes from November 30, 1996 through January 18, 2002.²⁶ Saddam Hussein was convicted of committing crimes against humanity in 1982 (Dujail), but was alleged to have committed further crimes against humanity in 1988 (Halabja), during the 1980s (Anfal), and in 1991 (Marsh Arabs).²⁷ The Extraordinary Chambers in the Courts of Cambodia have charged various Accused with committing war crimes and crimes against humanity during a nearly four-year period between 1975 and 1979.²⁸ In all of these cases, had the international commu-

22. BASS, *supra* note 1, at 294–95.

23. Fairlie, *supra* note 1, at 297 (“Timely judgments are more likely to bolster the public’s faith in its legal system whilst delayed proceedings would cause the same to appear ineffective and unreliable.”).

24. Cassese, *supra* note 1, at 440 (“It can be argued that these steps or similar ones might have contributed to the settlement of the Darfur crisis.”); Meron, *supra* note 1, at 3 (“Because the Hague tribunal was established while the war was still raging—in contrast to the Nuremberg war crimes trials, which began only after World War II had been fought and won—there was even a chance that it would have a deterrent effect for the remainder of the conflict.”).

25. See Prosecutor v. Milošević, Case Nos. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder (Feb. 1, 2002) (allowing Prosecution’s motion to join three cases against Milošević covering wars in Croatia, Bosnia, and Kosovo). Although there was no verdict in the Milošević case, a judgment in the case of Milan Martić, a Serb leader in Croatia, found that Milošević was a member of a joint criminal enterprise that committed widespread crimes against Croat civilians from 1991 through 1995. Prosecutor v. Martić, Case No. IT-95-11-T, Judgement, ¶ 446 (June 12, 2007).

26. Prosecutor v. Taylor, Case No. SCSL-03-01-PT, Prosecution’s Second Amended Indictment (May 29, 2007).

27. SADDAM ON TRIAL, *supra* note 9, at 58–59.

28. Case No. 002/19-09-2007-ECCC/OCIJ (PTC02), Decision on Appeal Against Provisional Detention Order of Ieng Thirith, ¶ 22 (July 9, 2008); Case No. 001/18-07-2007-ECCC-OCIJ (PTC01), Deci-

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nity acted quickly to charge the defendants with war crimes at the very start of their criminal campaigns, it could have impeded or even prevented the ability of these actors to continue committing crimes.²⁹ For many, one of the ICC's central purposes is to be able act quickly to intervene in conflicts to stop ongoing atrocities.³⁰

Second, rapid and efficient justice can be critical for the victims and survivors of mass atrocities.³¹ Delays in bringing perpetrators to justice can prolong the suffering of victims, particularly when the alleged perpetrators are living freely with impunity.³² For some victims and survivors, seeing justice done is essential to their ability to heal and move on with their lives.³³ And so the slow pace of justice at the tribunals has caused some

sion on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias "Duch", ¶ 29 (Dec. 3, 2007).

29. Goldstone & Bass, *supra* note 1, at 53 ("It is more difficult for a tribunal to have a deterrent effect if that tribunal is being created in the middle of a conflict.")

30. Letter from Human Rights First to Condoleezza Rice, Sec'y of State (Feb. 11, 2005), *available at* <http://www.humanrightsfirst.org/defenders/pdf/ricedarfur-021105.pdf> ("And time is of the essence here, if a new justice mechanism is to have a prophylactic effect in preventing future violence . . . because the ICC is now staffed and operating, it could rapidly begin investigating and prosecuting those who bear the greatest responsibility for the serious crimes committed in Darfur.")

31. Goldstone & Bass, *supra* note 1, at 53 ("[S]uch delays are deeply unfair to the victims of war crimes: the world promises some kind of redress and then loses attention.")

32. Calabresi, *supra* note 1 ("If Karadzic's timely arrest stood a chance of blunting the legacy of the victims of Srebrenica and Sarajevo, his belated capture surely doesn't."); Sylvia Poggioli, *Karadzic's Arrest Brings Mixed Feelings in Sarajevo* (National Public Radio broadcast July 25, 2008) (transcript available at <http://www.npr.org/templates/story/story.php?storyId=92881599>) ("[M]any citizens of Sarajevo are bitter that [Karadžić] was able to live on the lam for 13 years before he was detained.")

33. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 12 (1998) ("Through retribution, the community corrects the wrongdoer's false message that the victim was less worthy or valuable than the wrongdoer; through retribution, the community reasserts the truth of the victim's value by inflicting a publicly visible defeat on the wrongdoer."); Paul van Zyl, *Promoting Transitional Justice in Post-Conflict Societies*, in *SECURITY GOVERNANCE IN POST-CONFLICT PEACEBUILDING* 209, 213 (Alan Bryden & Heiner Hanggi eds., 2005) ("Nevertheless, justice claims should not be deferred indefinitely, not just because of the likely corrosive effect on efforts to build a sustainable peace, but because to do so would be to compound a grave injustice that victims have already suffered."); Aurélian J. Colson, *The Logic of Peace and the Logic of Justice*, 15 *INT'L REL.* 51, 58-61 (2000) (arguing that the process of bringing war criminals to justice is empowering and cathartic for victims and survivors). While acknowledging that the act of testifying can be cathartic, some have demonstrated that it is not always so. *See, e.g.*, ERIC STOVER, *THE WITNESSES* 87-90 (2005) ("These accounts suggest that, at least for this group of witnesses, the act of giving testimony is more a multifaceted experience, fraught with unexpected challenges and emotional swings, than one that is wholly cathartic, let alone restorative or therapeutic."). On this point, see also Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 *HUMAN RTS. Q.* 573, 584 (2002), stating:

We suggest that it is critical to acknowledge the contribution that individual trials can make while recognizing the limitations of the law to address the collective nature of the legacy of mass violence or gross human rights violations. While some scholars have suggested that these forms of legal redress have therapeutic results both for individuals and for societies, we will argue that the reasoning and evidence for such an assertion is flawed.

The authors continue:

The assumption that holding individuals accountable for atrocities alleviates despair, provides closure, assists in creating and strengthening democratic institutions and promotes community rebuilding overstates the results that trials can achieve. However, a singular focus on trials as

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victims to become disillusioned.³⁴ Bosnian women who survived rape by Serbian soldiers and paramilitaries succeeded, after the war, in organizing themselves, publicizing their plight, and providing evidence to the ICTY.³⁵ But when years passed at the ICTY without accountability for the perpetrators, many of the women became increasingly frustrated, and some even withdrew from the process.³⁶ And worse, in some cases, alleged perpetrators have exploited delays in prosecution to enhance their own status, potentially adding to the injury of victims. For example, Vojislav Šešelj, a Serbian nationalist leader, used the lengthy pre-trial detention in his case at the ICTY to paint himself as a Serb hero being victimized by the court.³⁷ For all of these reasons it is no surprise that a principal complaint about the ICTY voiced by victims in the former Yugoslavia is the length of time that it has taken to charge perpetrators, get them to The Hague, and complete their trials.³⁸

Third, delays can lead to the degradation of evidence.³⁹ Victims and witnesses can die or become unavailable.⁴⁰ More frequently, years of delay will cause memories to fade and become uncertain. Some judges at the ICTY have specifically found that the passage of time has compromised the evidence of witnesses.⁴¹ The loss of evidence can be particularly significant in the context of war crimes investigations where the Prosecution already faces

the agent that drives social repair ignores the necessity to attend to and support concomitant social processes that can act in synthesis to effect social change.

Id. at 601.

34. MINOW, *supra* note 33, at 6.

35. *Id.*

36. *Id.*; see also CARLA DEL PONTE & CHUCK SUDETIĆ, MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS AND THE CULTURE OF IMPUNITY 364–65 (2009) (describing the anger and frustration of the Mothers of Srebrenica and relatives of victims killed at Srebrenica in July 1995, when after years the main alleged perpetrators were still not captured).

37. DIANE ORENTLICHER, SHRINKING THE SPACE FOR DENIAL: THE IMPACT OF THE ICTY IN SERBIA 131 (2008) (noting journalist Filip Svarm “believes that the fact that Serbian nationalist Vojislav Šešelj spent over four years in pre-trial detention ‘enabled the Serbian Radical Party to claim he’s a hero, a victim of a pro-American court.’”).

38. Ivković, *supra* note 1, at 329.

39. Goldstone & Bass, *supra* note 1, at 53 (“[T]he formidable operational challenge of finding witnesses and gathering forensic evidence only gets harder as time goes by.”); M. Cherif Bassiouni, *The ICC — Quo Vadis?*, 4 J. INT’L CRIM. JUST. 421, 423 (2006) (“[E]vidence not secured in a timely fashion jeopardizes the prospects for effective prosecution.”).

40. In 2006, the ICTY adopted Rule 92 *quater* which permits, under certain circumstances, the admission into evidence of testimony of deceased witnesses. However, admission is within the discretion of the Trial Chamber. In the case of Prosecutor v. Šešelj, the Trial Chamber recently rejected the Prosecution’s application to admit into evidence, pursuant to Rule 92 *quater*, the evidence of several important deceased witnesses. See Prosecutor v. Šešelj, Case No. IT-03-67-T, Version Expurgée de la “Décision Relative à La Requête Consolidée de L’Accusation en Vertu des Articles 89(F), 92Bis, 92Ter, et 92 Quater du Règlement de Procédure et Preuve” Enregistrée à Titre Confidentiel le 7 Janvier 2008 (Feb. 21, 2008).

41. Prosecutor v. Limaj, Bala & Musliu, Case No. IT-03-66-T, Judgement, ¶ 12 (Nov. 30, 2005) (“The Chamber further observes that the seven years that have passed since the events in the Indictment have, in all likelihood, affected the accuracy and reliability of the memories of witnesses, understandably so.”).

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so many obstacles to obtaining evidence.⁴² Moreover, when evidence becomes unavailable to the Prosecution or the Defense, confidence in the accuracy of the court's judgment may ultimately be undermined.

Fourth, delays can compromise the rights of defendants. Once charged, defendants have a right to be tried expeditiously, particularly if they are detained before trial.⁴³ Although the ICTY and the ICTR have been inclined to detain defendants pending trial,⁴⁴ it is difficult to believe that tribunals will continue to detain defendants for years before their trials start, particularly if the defendants are seeking a speedy trial (which is not always the case).⁴⁵

Finally, delays carry a risk that the international community will lose interest and move on to other crises.⁴⁶ After the ICTY and the ICTR were established, the attention of the world was eventually pulled away by the events of 9/11 and the War on Terror, as well as the crises in Darfur, the Democratic Republic of the Congo ("DRC"), and elsewhere.⁴⁷ The danger is that, as the international community loses interest, it reduces cooperation and support. It may also begin to apply pressure to wind up investigations and prosecutions, which is in part what has happened with the ICTY and the ICTR.⁴⁸ Although the permanence of the ICC diminishes this risk—the institution will continue to exist regardless of the attention of the world

42. Mark B. Harmon & Fergal Gaynor, *Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings*, 2 J. INT'L CRIM. JUST. 403, 405–08 (2004).

43. International Covenant on Civil and Political Rights art. 9, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (providing for prompt justice for accused persons); Rome Statute of the International Criminal Court art. 67(1)(c), July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (guaranteeing right of the Accused "to be tried without undue delay"); Statute of the International Tribunal for the Persons Responsible for the Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 21(4)(c), May 25, 1993, 32 I.L.M. 1203. These provisions only require expeditious proceedings once an Accused is charged. They do not require expeditious investigations. See also Hafida Lahiouel, *The Right of the Accused to an Expeditious Trial*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD* 197 (Richard May ed., 2001); SALVATORE ZAPPALÀ, *HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS* 109–19 (2003) (exploring right of expeditious trial at tribunals).

44. Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT'L L. 635, 691–92 (2007); Sonja B. Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 720 & n.137 (2008).

45. The recent trend at the ICTY has been toward the pre-trial release of defendants. See, e.g., Simon Jennings, *Stanišić, Simatović Granted Provisional Release*, ICTY - TRIBUNAL UPDATE (Inst. for War & Peace Reporting, London, U.K.), June 27, 2008, http://www.iwpr.net/?p=tri&s=f&o=345437&pc_state=hemptri.

46. Goldstone & Bass, *supra* note 1, at 53; ORENTLICHER, *supra* note 37, at 130–31 ("[T]he passage of years before even a notorious war criminal like Bosnian Serb leader Momčilo Krajišnik comes to trial undermines the ICTY's educative role: 'The public has forgotten' who he was by the time his case comes to trial." (citing journalist Filip Svarm)).

47. Raab, *supra* note 1, at 84 ("It may have been inevitable that political enthusiasm for the ICTY would wane over time. By 2000, the memories of Srebrenica and other atrocities had grown fainter, the international community was facing new challenges and the ICTY's results had not been spectacular, at least in terms of the numbers of accused tried.")

48. *Id.*

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community—delays may nonetheless affect the support that nations offer in connection with specific investigations.

However, while it is important to acknowledge the value of speedy justice, it is also possible to overstate its significance. The premise of many of the stated benefits is that war crimes prosecutions can achieve short-term goals. In fact, many of the benefits seem to accrue in the long-term, regardless of how efficiently cases are prosecuted. If prosecutions promote deterrence, it will probably not be with respect to the conflict at hand but rather for future conflicts, either in the same region or in other parts of the world. In particular, deterrence will likely be achieved primarily through the eventual shaping of norms and institutions, which will occur over time even if prosecutions are delayed.⁴⁹

There is also skepticism that reconciliation can be fostered in the short-term through prosecutions. Rather, reconciliation is a long-term process, and the contribution from war crimes prosecutions may not be felt for generations.⁵⁰ The interests of victims are of course central, but war crimes prosecutions are also meant, like all criminal prosecutions, to serve broader societal interests, and there may be other ways to address (at least partially) the needs of victims in the short-term.⁵¹ Although defendants indisputably have a right to speedy justice,⁵² delays and lengthy pre-trial detentions are not uncommon in complicated domestic criminal cases,⁵³ and in some cases steps could be taken to ameliorate the burdens of delay on defendants (such as monitored pre-trial release). In addition, some costs of delay can be self-fulfilling; while it is always challenging to sustain long-term international

49. BASS, *supra* note 1, at 295; Akhavan, *supra* note 16, at 10 (“Yet the potential impact of the ICTY and the ICTR on political behavior is subtle and long-term, profound and lasting. Publicly vindicating human rights norms and ostracizing criminal leaders may help to prevent future atrocities through the power of moral example to transform behavior.”); Wald, *supra* note 16, at 910 (“I tend to believe that over the longer haul, if the tribunals survive and compile a strong record of prosecutions, they will have a deterrent effect.”); David Wippman, *Atrocities, Deterrence and the Limits of International Justice*, 23 *FORDHAM INT’L L.J.* 473, 488 (1999) (“[International criminal prosecutions may] strengthen whatever internal bulwarks help individuals obey the rules of war, but the general deterrent effect of such prosecutions seems likely to be modest and incremental, rather than dramatic and transformative.”).

50. BASS, *supra* note 1, at 297–301 (skepticism about reconciliation); STOVER, *supra* note 33, at 119 (discussing how reconciliation is achieved by breaking long-term cycles of violence).

51. Victims of mass atrocity often have immediate social and economic needs that can be addressed in the short-term. STOVER, *supra* note 33, at 97 (“Across national groups, witnesses said job security and money—not the arrest of war criminals, justice, or better relations between national groups—were their primary needs.”). In addition, there are other ways aside from war crimes prosecutions to validate the injuries that victims have suffered. See generally MINOW, *supra* note 33 (discussing other options to war crimes prosecutions, such as truth commissions and reparations); Fletcher & Weinstein, *supra* note 33, at 625 (discussing alternative interventions, such as truth commissions, individual and family support, and community interventions). Finally, although there may be delays in the prosecutions of war criminals, other steps such as dismissal or ostracization of accused perpetrators can be taken in the short-term.

52. See sources cited *supra* note 43.

53. See, e.g., *United States v. Casas*, 425 F.3d 23, 30–36 (1st Cir. 2005) (finding that forty-one month pretrial detention did not violate Speedy Trial Act or constitutional due process guarantees), *cert. denied*, 546 U.S. 1199 (2006); *United States v. Millan*, 4 F.3d 1038, 1040 (2d Cir. 1993) (finding that twenty-one month pretrial detention did not violate constitutional due process guarantees).

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commitments under even the best of circumstances, the international community is more likely to lose interest quickly if it begins with short-term expectations.

Nonetheless, there is no denying that the costs of delay can be significant, particularly for the victims, and there will always be an imperative to expedite the investigation and prosecution of war criminals to avoid needless delays. Therefore it will continue to be essential to find ways to charge, bring to trial, and try accused perpetrators as quickly as possible. On the other hand, these interests have to be balanced by pressures that push in the other direction. As set forth below, some delay can be essential to successful war crimes prosecutions, where “success” is defined as holding war criminals accountable for the full gravity of their crimes (though not necessarily prosecuting them for *all* of their crimes) and determining the truth about their most serious acts.

III. JUSTICE DELAYED

Sometimes war crimes occur in isolation, but generally they occur systematically or on a mass scale, either in the context of armed conflict or the disintegration of society.⁵⁴ The nature of these crimes, and the circumstances under which they are committed, can require time to prosecute.

A. *Challenges of War Crimes Cases*

The logistical challenges of investigating and prosecuting war crimes are staggering, even when there is a tribunal already in place that can assert jurisdiction, such as the ICC. To the extent that commentators do examine the causes of delays in war crimes prosecutions, these are often the kinds of challenges on which they focus.⁵⁵

First, investigators often lack immediate access to crime scenes or even to victims.⁵⁶ Even though the ICTY was already functioning in the summer of 1995, and the international community knew of the massacres at Srebrenica as they were occurring or shortly thereafter, ICTY investigators only obtained access to the killing sites months after the events and did not begin

54. The existence of an armed conflict is an element of war crimes. *See* Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (defining war crimes, including armed conflict requirement). Although crimes against humanity and genocide can occur absent an armed conflict, they both entail crimes on a large scale. *See id.* arts. 6, 7 (defining genocide and crimes against humanity).

55. *See, e.g.,* Combs, *supra* note 1, at 101–02 (noting that even with reforms to speed up prosecutions, war crimes cases are complex and will require time).

56. Harmon & Gaynor, *supra* note 42, at 406–07 (“Access to crime scenes may only be possible years after the crime has been committed.”); Meron, *supra* note 1, at 3 (“Access to sites where atrocities were committed has been obstructed, hindering the collection of perishable evidence.”).

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to exhume bodies from mass graves until a year later.⁵⁷ Investigators did not even learn about one massacre site—the Cultural Center in Pilica where 500 Bosnian Muslim men and boys were summarily executed by Bosnian Serb forces—until Dražen Erdemović, a participant in the massacre, told the ICTY about it nearly a year later in April 1996.⁵⁸ Likewise, when refugees began streaming out of Kosovo in 1998 and 1999 with tales of atrocities being committed by Serbian forces, investigators could not get access to the province until after the war, and they were initially forced to interview victims and witnesses in Macedonia and Albania instead of Kosovo itself.⁵⁹ Accordingly, mass graves were not uncovered in Kosovo until late 1999.⁶⁰ In both Srebrenica and Kosovo, the perpetrators took advantage of the restricted access of outsiders to hide bodies and cover up evidence, further complicating the work of investigators later on.⁶¹ Similarly, while investigating crimes in Darfur, ICC investigators have had limited access to Sudan, and have had to rely largely on witnesses outside of the country.⁶²

Access to crime sites and witnesses is just the beginning. International tribunals lack effective compulsory process and a police force, and thus rely on state cooperation to gather evidence.⁶³ Even if witnesses are found and

57. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgement, ¶ 71 (Aug. 2, 2001) (noting four exhumations took place in 1996, eight in 1998, five in 1999, and four in 2000); BASS, *supra* note 1, at 231 (noting on Aug. 10, 1995, Albright presented evidence of massacres at Srebrenica to the U.N. Security Council); *id.* at 253–54 (noting exhumations began in July 1996).

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58. Harmon & Gaynor, *supra* note 42, at 406 n.6.

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59. BASS, *supra* note 1, at 272. In January 1999, the ICTY Prosecutor herself, Louise Arbour, tried unsuccessfully to enter Kosovo. *Id.*; see also HUMAN RIGHTS WATCH, UNDER ORDERS: WAR CRIMES IN KOSOVO xxii (2001) (noting HRW investigators were denied access to Kosovo until after the war).

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60. SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE 470 (2002).

61. Harmon & Gaynor, *supra* note 42, at 407 & n.8 (Srebrenica); POWER, *supra* note 60, at 472 (Kosovo); HUMAN RIGHTS WATCH, *supra* note 59, at 121–25 (documenting various steps taken by Serb forces to hide bodies in Kosovo).

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62. Elizabeth Rubin, *If Not Peace, Then Justice*, N.Y. TIMES, Apr. 2, 2006, § 6 (Magazine), at 44–45 (“His investigators must work against the will of the Sudanese government. They cannot gather any forensic evidence from schools where collective rapes occurred. They cannot gather samples from wells that were poisoned. They cannot even gather shrapnel from bombs dropped on civilians by the government.”); Human Rights Watch, ICC Prosecutor Identifies Suspects in First Darfur Case, Questions and Answers (Feb. 27, 2007), <http://hrw.org/english/docs/2007/02/25/darfur15404.htm> (“The Darfur investigations were further complicated by the prosecutor’s assessment that direct investigations in Darfur were impossible because of the difficulty in protecting witnesses and the limited cooperation the prosecutor received from the Sudanese government. Security concerns in Darfur also made investigations more difficult.”).

63. DEL PONTE & SUDETIĆ, *supra* note 36, at 41–42 (“If the leaders of these states do not want the Tribunal to discover critical evidence, recruit significant witnesses, or arrest individuals in their jurisdictions, they can simply choose not to cooperate. Evidence can be concealed, witnesses hounded, and fugitives hidden. The Office of the Prosecutor has not judicial police to carry out searches and arrests, and the Tribunal lacks the authority to impose penalties if a state fails to cooperate.”); Carla Del Ponte, *Investigation and Prosecution of Large-Scale Crimes at the International Level*, 4 J. INT’L CRIM. JUST. 539, 555 (2006) (“As the ICTY does not generally enjoy the prosecutorial powers of domestic jurisdictions, the successful investigation and prosecution of cases depend on the cooperation of states.”); Harmon & Gaynor, *supra* note 42, at 405 (“Tools available to prosecutors at the ICTY to arrest perpetrators and to acquire evidence are non-existent, underdeveloped or (where they exist) often ineffective . . .”).

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agree to be interviewed, there is no guarantee that they will later make themselves available for trial. And when witnesses refuse to come to court because they are afraid or because they do not want to speak against the Accused, there is often little that the court can do.⁶⁴

The complexity of war crimes cases can also present significant challenges. Sometimes, war crimes cases are straightforward. For example, the prosecution of a direct perpetrator for acts that he committed himself can be narrow in scope.⁶⁵ Similarly, the prosecution of commanders where there exists extensive, incriminating documentation—as was the case with Nuremberg and the Saddam Hussein prosecutions—can prove manageable (though even the Saddam Hussein case took more than a year to complete from opening to judgment).⁶⁶ More often, however, war crimes prosecutions are more complex.

The ultimate goal of most war crimes prosecutors is to bring to justice the highest-level commanders responsible for the commission of crimes,

64. For an example of witness fear, see *Prosecutor v. Hardinaj*, Case No. IT-04-84-T, Judgement, ¶ 6 (Apr. 3, 2008) (“[T]hroughout the trial the Trial Chamber encountered significant difficulties in securing the testimony of a large number of witnesses. Many witnesses cited fear as a prominent reason for not wishing to appear before the Trial Chamber to give evidence. The Trial Chamber gained a strong impression that the trial was being held in an atmosphere where witnesses felt unsafe.”); *id.* ¶¶ 22–28 (detailing the difficulties of obtaining witnesses). For an example of witness unwillingness to speak against the Accused, see *Prosecutor v. Limaj, Musliu & Bala*, Case No. IT-03-66-T, Judgement, ¶ 13 (Nov. 30, 2005), stating:

At times, it became apparent to the Chamber, in particular taking into account the demeanour of the witness and the explanation offered for the differences, that the oral evidence of some of these witnesses was deliberately contrived to render it much less favourable to the Prosecution than the prior statement. The evidence of some of these former KLA members left the Chamber with a distinct impression that it was materially influenced by a strong sense of association with the KLA in general, and one or more of the Accused in particular. It appeared that overriding loyalties had a bearing upon the willingness of some witnesses to speak the truth in court about some issues. It is not disputed that notions of honour and other group values have a particular relevance to the cultural background of witnesses with Albanian roots in Kosovo.

See also Meron, *supra* note 1, at 3 (“Witnesses, even victims, have withheld their testimony from the tribunal’s investigators.”). While domestic prosecutors also face the challenge of recalcitrant witnesses, they generally have more tools to compel them to appear and testify.

65. One example is the Zlatko Aleksovski prosecution at the ICTY. Aleksovski was charged in three counts with the mistreatment of prisoners during a five month period in 1993. His trial started on January 6, 1998 and was completed by March 23, 1999. *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgement (June 25, 1999). Another example is the prosecution of Mitar Vašiljević, who was prosecuted for crimes stemming from his direct participation in two separate incidents that took place in June 1992. His trial lasted approximately four months. *Prosecutor v. Vašiljević*, Case No. IT-98-32-T, Judgement (Nov. 29, 2002).

66. In the first Nuremberg trial against 24 defendants, the Prosecution only called 33 witnesses. *The Nuremberg Trial*, 6 F.R.D. 69, 76–77 (1946). In the Saddam Hussein trial, the Prosecution offered into evidence an order signed by Hussein himself ordering the execution of the victims in the case. *See* Michael P. Scharf & Gregory S. McNeal, *Show Trial or Real Trial?—A Digest of the Evidence Submitted During the Prosecution’s Case-in-Chief*, in *SADDAM ON TRIAL*, *supra* note 9, at 188–92 (summarizing the Prosecution’s evidence in the case).

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even if the prosecutors begin by charging lower-level perpetrators.⁶⁷ In cases against commanders, the focus will generally be less on the crimes themselves than on the linkage between the crimes and the Accused, particularly since high-level Accused are generally not direct participants in the crimes.⁶⁸ But the Accused often dispute the crimes, or at least the Prosecution's characterization of those crimes, and the Prosecution therefore bears the burden of proving all elements of the crimes before even reaching the question of linkage or responsibility. For example, in the prosecution of Dragomir Milošević, the Serb General responsible for the siege of Sarajevo from August 1994 through November 1995, the Defense claimed that the continual shelling and sniping of Bosnian Muslim civilians in Sarajevo was either staged or inflicted by Bosnian Muslim fighters.⁶⁹ Accordingly, the Prosecution had to prove that the individual shellings and snipings had in fact occurred, and that they were inflicted by Serb forces, which required the testimony of victims, eyewitnesses, and experts.⁷⁰ Slobodan Milošević also refused to concede that crimes had been committed by Serb forces and demanded that many victims be called to testify live so that he could cross-examine them.⁷¹

With respect to linkage, the accused commander is often far removed from the crimes and there are generally no documents directly connecting him to the commission of those crimes.⁷² Therefore, the Prosecution must rely on witnesses and inferences drawn from circumstantial evidence. In some cases, the Accused—particularly if he is a high-level political figure—may not be directly responsible for crimes (through ordering or planning for

67. Del Ponte, *supra* note 63, at 543 (focus on senior perpetrators); Wald, *supra* note 16, at 914 (focus of the war crimes tribunals for former Yugoslavia, Rwanda, Sierra Leone, and for the ICC is to target senior perpetrators). R

68. DEL PONTE & SUDETIĆ, *supra* note 36, at 139 (“Foremost among the legal challenges was proving the link between Milošević and a multitude of criminal acts committed hundreds of miles from his office, including the act of genocide committed at Srebrenica and crimes associated with the siege of Sarajevo.”). R

69. Prosecutor v. Milošević, Case No. IT-98-29/1-T, Judgement, ¶¶ 448, 471–72, 590, 607, 671, 795–96 (Dec. 12, 2007); *see also* Prosecutor v. Galić, Case No. IT-98-29-A, Judgement, ¶¶ 216–24 (Nov. 30, 2006) (setting forth how Prosecution proved campaign of terror by proving specific scheduled incidents as well as offering evidence of campaign).

70. Prosecutor v. Milošević, Case No. IT-98-29/1-T, Judgement, ¶¶ 244–724 (Dec. 12, 2007) (describing evidence of scheduled sniper and shelling incidents).

71. *See* Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted under Rule 92 Bis, ¶¶ 22, 24–25 (Mar. 21, 2002) (noting that witnesses testifying about crimes must be cross-examined because evidence relates to critical issue contested by Accused).

72. DEL PONTE & SUDETIĆ, *supra* note 36, at 7 (“Dispensing victor's justice at Nuremberg and Tokyo was a relatively simple job compared with the work the U.N. Security Council expected the Yugoslavia Tribunal and, in certain cases, the Rwanda Tribunal to accomplish. Victorious armies gave the prosecutors at Nuremberg and Tokyo the authority to gain access to witnesses, to obtain documentary evidence, and to apprehend accused war criminals”); Harmon & Gaynor, *supra* note 42, at 404 (“Justice Jackson and his colleagues at the Tokyo tribunal were in an enviable position.”); Wald, *supra* note 16, at 917 (“The lessons of Nuremberg have been well learned by those [modern] leaders. The document-rich troves of Nuremberg have not been replicated in modern-day trials; no current State leader is now likely to sign orders to execute POWs, tyrannize civilians, subject prisoners to inhumane conditions, or ethnically cleanse territories.”). R
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example), but may nonetheless be responsible through his participation in a larger plan whose purpose included the commission of the crimes in question.⁷³ Momčilo Krajišnik, for example, was a high-level Serb political figure who was successfully prosecuted at the ICTY for participating in a joint criminal enterprise to remove permanently and forcibly non-Serbs from Serb areas in Bosnia and Herzegovina (“BiH”) through the commission of war crimes and crimes against humanity.⁷⁴ Although Krajišnik did not directly order the commission of any crimes (and did not directly commit any of the crimes himself), he was a critical participant in this criminal enterprise.⁷⁵ To prove Krajišnik’s role in the larger criminal enterprise, however, it was necessary to prove the campaign of ethnic cleansing in thirty-five municipalities in BiH over an eighteen-month period.⁷⁶ It would have been impossible for the Prosecution to select just a few crimes from the overall campaign, because the Accused could have easily denied any involvement in specific crimes; it was the proof of a widespread and systematic campaign of crimes, and Krajišnik’s role in this campaign, that undergirded his conviction.⁷⁷

When the case involves non-state actors, the task of proving linkage becomes even more complex. If the rebel group is operating at the edges of legality (from the perspective of domestic law), then there will be a premium on keeping the structure of the organization, if not its very existence, secret.⁷⁸ Moreover, if the group in question is a nascent organization, the lines of authority may be poorly defined or fluid.⁷⁹ Such organizations will rely little on written documentation and will take steps to avoid leaving other traces of its operations.⁸⁰ In addition, these groups may be more successful at enforcing loyalty and discouraging insiders from cooperating with

73. Wald, *supra* note 16, at 917 (“Doctrines of command responsibility and common purpose or criminal enterprise have had to be developed and expanded to take individual criminal responsibility as high up the military and civilian hierarchy as possible in the absence of direct incriminating evidence as to their involvement in the crimes on the ground.”).

74. Prosecutor v. Krajišnik, Case No. IT-00-39-T, Judgement, ¶¶ 1089–90 (Sept. 27, 2006) (objective of criminal campaign); *id.* ¶¶ 1181–84 (disposition).

75. *Id.* ¶ 1158 (“As described in part 6 of this judgement, the evidence in this case shows that his role was crucial. As President of the Bosnian-Serb Assembly, member of the SDS Main Board, member of the SNB, and member of the Presidency, Momčilo Krajišnik played a vital role in implementing the objective to permanently remove Muslims and Croats from parts of Bosnia-Herzegovina.”).

76. *Id.* ¶¶ 289–91.

77. The same challenge existed in the Slobodan Milošević case. Although the three cases against Milošević (Croatia, Bosnia, and Kosovo) that were joined together could have been tried separately, and each could have been narrowed, each nonetheless required proof of a *pattern* of crimes in order to demonstrate Milošević’s role. Despite the fervent wishes of many (including the judges), it was simply impossible to isolate one or two crimes committed by Milošević because there was no single crime that prosecutors could prove he ordered; rather, as with Krajišnik, it was his role in the larger campaign that established his criminality.

78. Prosecutor v. Limaj, Case No. IT-03-66-T, Judgement, ¶ 45 (Nov. 30, 2005) (“[The Kosovo Liberation Army (KLA)] was prohibited by the official authorities and operated underground.”).

79. *Id.* ¶ 56 (“The forming of the KLA structure appears to have been a slow process which was affected by factors independent of the local leaders.”).

80. *Id.* ¶ 46 (“Due to the difficult security situation and the fact that they had to operate underground, the General Staff [of the KLA] did not meet regularly.”).

war crimes investigators. As a result, investigators may face considerable challenges in simply penetrating the workings of the rebel organization or militia, let alone finding evidence establishing criminality. In light of the increased application of international humanitarian law to internal armed conflicts and the rise in wars involving non-state actors, there will likely be more war crimes investigations and prosecutions involving such rebel groups and militias.⁸¹ Already, all four situations being prosecuted by the ICC—Uganda, DRC, Central African Republic, and Sudan—involve, at least in part, the investigation of non-state actors.⁸²

Once a case comes to court, there can also be a new round of delays while the Defense investigates the allegations that the Prosecution has, in some cases, been developing for years. These delays can be exacerbated if the Defense is underfunded or understaffed, or if the Defense adopts a deliberate strategy of delay.⁸³

For all of these reasons, no matter what steps are taken to be more efficient in the investigation and prosecution of war crimes cases, these cases by their very nature require significant time to bring perpetrators to justice.

B. Delay Can Be Essential to Success

Apart from the complexity and challenges of the cases themselves, the circumstances under which these crimes occur mean that time, and even delay, can be essential to successful war crimes prosecutions. War crimes are born out of armed conflict or significant societal disruptions, which are themselves years in the making. In order to prosecute crimes that occur during such periods of intense unrest, some stabilization, reconstruction, and distance from the events is often required. This settling process occurs at both the state and individual levels, and in time, allows evidence to emerge regarding crimes that occurred during the period of conflict.

81. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 119 (Oct. 2, 1995) (“What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.”); LINDSEY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 192 (2002) (“[T]he traditional distinction in legal regulation between international and internal armed conflict is becoming ever more blurred.”); Andrew Clapham, *Human rights obligations of non-state actors in conflict situations*, 88 INT’L REV. RED CROSS 491 (2006).

82. Situation en République Centrafricaine Affaire le Procureur c. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Mandat D’Arrêt à L’Encontre de Jean-Pierre Bemba Gombo Remplaçant Le Mandat D’Arrêt Décerné le 23 Mai 2008 (June 10, 2008) (Central African Republic); Situation in Darfur, Sudan in the Case of the Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) & Ali Muhammad Al Abd-al-Rahman (“Ali Kushayb”), Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun (Apr. 27, 2007) (Sudan); Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04/-01/06, Warrant of Arrest (Feb. 10, 2006) (Democratic Republic of the Congo); Situation in Uganda, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005 (Sept. 27, 2005) (Uganda).

83. See, e.g., Marlise Simons, *Trial of Liberia’s Ex-Leader Languishes Amid Delays, Bureaucracy and Costs*, N.Y. TIMES, Aug. 27, 2007, at A6.

The contrast with the investigation of domestic crimes makes the point clear. In the domestic context, crimes are aberrational events and society, assuming it is functioning properly, has mechanisms in place to address these deviations from the norm. In the war crimes context, however, the reverse is generally true. Crimes become the norm and mechanisms to address these crimes are absent.⁸⁴ Often it is only when society starts functioning again, and the crimes are reframed as aberrational and contrary to norms, that full accountability can occur.⁸⁵ In the former Yugoslavia, even as pressure has mounted to wrap up the work of the ICTY, significant evidence of criminal responsibility is still emerging, many years after the conflict.⁸⁶

1. *Developments in conflict and post-conflict states*

Many commentators have noted that, although the ICTY was formally established in 1993, it only became fully operational years later.⁸⁷ Part of this delay was a result of bureaucratic foot-dragging and political in-fighting among the U.N. Security Council states.⁸⁸ However, it is also the case that the ICTY was established as the conflict was still unfolding in the region, and it was not until there was some resolution to the conflict, and transition away from the personalities and policies of the war, that the Tribunal could function successfully.⁸⁹ Much of the discussion today about the timing of war crimes prosecutions occurs within the context of the peace versus justice debate: if there is a risk that prosecutions will prolong fighting or societal breakdown, some argue that they should be deferred until there is a peaceful resolution of the conflict, while others disagree.⁹⁰ But here I do not want to focus on the question of whether prosecutions should

84. Akhavan, *supra* note 16, at 11 (“In this delusional context, criminal conduct that is normally characterized as ‘deviance’ is transformed into acceptable, even desirable, behavior.”); Stephen J. Rapp, *Achieving Accountability for the Greatest Crimes – The Legacy of the International Tribunals*, 55 *DRAKE L. REV.* 259, 278 (2007) (“Clearly witnesses have to admit what they did if they are going to be credible, but this is not easy if the acts committed were so horrible and when the crimes were committed at a time when the whole society seemed to have reversed the concepts of right and wrong.”).

85. War crimes tribunals are often located outside the country where the crimes occurred because of this disruption. But even when the courts are removed from the site of crimes, evidence is still constrained by the disruption that a society has experienced.

86. Harmon, *supra* note 1, at 377–78.

87. Goldstone & Bass, *supra* note 1, at 52–53; Wald, *supra* note 16, at 907.

88. Bass, *supra* note 1, at 210–19.

89. Del Ponte, *supra* note 63, at 551–52 (“Though the ICTY was established prior to the end of the conflicts in the former Yugoslavia, the ongoing nature of the conflict and the fact that Prosecution investigators were not welcome in many areas meant that much of the gathering of evidence took place some time after the crimes were committed.”).

90. Compare TIM ALLEN, *TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD’S RESISTANCE ARMY* 104 (2006) (“No, but I can give my view. The ICC is going to make the war continue because those commanders who will be willing to come back will be discouraged and continue fighting. The ICC should first wait for the war to end and later they can come in and take the person who started it. He should be prosecuted . . .”), and Cooper, *supra* note 18 (“There is a strand of those within the human rights community who say that war-crimes indictments should be used only after a conflict is resolved, because such indictments, they say, can extend the length of a conflict.”), with Alex K. Kriksciun, *Uganda’s Response to International Criminal Court Arrest Warrants: A Misguided Approach?*, 16 *TUL. J.*

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be delayed for the sake of peace; rather I want to look at the other side of the equation: how conflict or instability can impede justice.

Frequently, societies that have suffered mass atrocity become closed to the international community and immune, at least in the short-term, to international pressures seeking accountability.⁹¹ The leaders of such societies choose to adhere to their ideological stances long after it is in their self-interest or the interest of their countries to do so, and will even use their resistance to international pressure to boost their domestic political standing.⁹² For many years in the former Yugoslavia, various authorities viewed the ICTY “with contempt.”⁹³ This attitude did not change until many years after the conflict was nominally settled, and then only partially. Until October 2000, while Milošević remained President of Serbia, there was essentially no cooperation with the ICTY, no access to witnesses or documents, and virtually no surrender of indictees.⁹⁴ Moreover, during these first seven years of the ICTY’s existence, there was a torrent of anti-Tribunal propaganda from the Serbian and Croatian governments, further complicating the efforts of investigators to develop cooperative witnesses.⁹⁵ The Serbian government’s hostility continued despite international sanctions at the time, demonstrating that the power of the international community to obtain cooperation from states where mass atrocity has occurred can be limited.⁹⁶

Moreover, in the short-term, the international community is generally risk-averse and does *not* press for accountability, focusing instead on achieving stability.⁹⁷ Gary Bass and Samantha Power, among others, have carefully

INT’L & COMP. L. 213, 214–15 (2007) (criticizing proposal of amnesty for rebels charged with war crimes in Uganda in order to achieve peace).

91. Graham Bowley, *How to Show a Dictator the Door*, N.Y. TIMES, Apr. 27, 2008, at WK5.

92. ORENTLICHER, *supra* note 37, at 32–33 (“Many Serbian citizens, as we note later, do not blame the ICTY but instead government leaders for stoking the anti-Hague sentiments of ultra-nationalists in the hope of securing their votes and, more generally, for keeping Serbia mired in unproductive battles rather than advancing its progress.”); Jeffrey Gettleman, *As Charges Loom, Sudan Chief Mounts Charm Offensive*, N.Y. TIMES, July 24, 2008, at A6; Lydia Polgreen & Jeffrey Gettleman, *Sudan Rallies Behind Leader Reviled Abroad*, N.Y. TIMES, July 28, 2008, at A1.

93. BASS, *supra* note 1, at 223; DEL PONTE & SUDETIĆ, *supra* note 36, at 50 (“I also knew that Bosnian Serb and Bosnian Croat leaders were working to undermine the Tribunal and disrupt its work.”); Del Ponte, *supra* note 63, at 556 (“Still, serious flaws were reported in the cooperation of most states of the former Yugoslavia until late 2005 . . .”).

94. ORENTLICHER, *supra* note 37, at 33–34.

95. *Id.* at 34 (“From the outset of the Tribunal’s existence and for the next seven years, Serbian citizens were served a steady diet of anti-ICTY propaganda by their government.”); *see also* DEL PONTE & SUDETIĆ, *supra* note 36, at 50 (“Both the Serbian and Croatian media were indulging in Tribunal-bashing: misrepresenting facts and painting the institution as if it were evil incarnate.”); Steven Erlanger, *U.S. Makes Arrest of Milosevic a Condition of Aid to Belgrade*, N.Y. TIMES, Mar. 10, 2001, at A1 (noting Yugoslav President Vojislav Kostunica accused the Tribunal of being biased). After Milošević’s surrender, he continued to accuse the Tribunal of illegality, bias, and of seeking the genocide of Serbs. *See* Roger Cohen, *Milosevic to Represent Himself at his Arraignment Today*, N.Y. TIMES, July 3, 2001, at A3; Marlise Simons, *Milosevic Calls Tribunal Unfair, Infantile and ‘a Farce’*, N.Y. TIMES, Oct. 31, 2001, at A6; Marlise Simons, *Milosevic Says Srebrenica was a Plot to Frame the Serbs*, N.Y. TIMES, Sept. 28, 2002, at A6.

96. Steven Erlanger, *Serbs Reject U.S. Plan Linking End of Sanctions to Free Vote*, N.Y. TIMES, Nov. 6, 1999, at A4.

97. Harmon & Gaynor, *supra* note 42, at 409–10 nn.20–22.

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documented the reluctance of the international community to intervene when atrocities have occurred, or to act in their immediate aftermath to further the agenda of war crimes tribunals.⁹⁸ For example, when the various parties to the conflict in the former Yugoslavia met in Dayton in the autumn of 1995 to negotiate peace, there was considerable anxiety that the international community would grant amnesties from prosecution in exchange for an agreement.⁹⁹ Although the ICTY was not ultimately bargained away at Dayton, its work was secondary to achieving a settlement of the conflict.¹⁰⁰ Moreover, the focus of the multinational forces then deployed in Bosnia was to advance stability, and they had little interest in assisting the work of the ICTY. In Bosnia, the multinational forces did not begin making arrests of war crimes suspects until July 1997, some four years after the ICTY was established, and even then they arrested only low-level fugitives.¹⁰¹

One could argue that governments in these circumstances should make the pursuit of justice a greater priority, and that if they did, justice could be achieved more expeditiously. But such governments can be constrained by domestic political considerations when acting to further humanitarian goals. The leaders of the multinational forces in Bosnia, for example, believed that domestic political support for military engagement in the Balkans was already thin, and that the public would have little appetite for the loss of life in service of the work of the ICTY.¹⁰² The reality is that in times of conflict, achieving some degree of stability is going to take priority over the pursuit of justice, particularly where there are costs imposed on the international community (as there are when troops become involved). Moreover, the evidence suggests that even if the international community gave earlier and greater priority to the pursuit of justice, it would not always achieve immediate results. As noted above, the Serbian government resisted international sanctions for years, and the government of Sudan is doing the same today.

Over time, however, post-conflict societies will become more responsive to international demands, particularly if the pressure remains constant. Thus in Serbia in April 2001, once Milošević was out of office, the lure of American aid—which was at that time conditioned on arresting Milošević and cooperating with the ICTY—was so great that Zoran Đjindić, the Prime Minister of Serbia, engineered Milošević's arrest and surrender to The Hague.¹⁰³ Even then, Đjindić's move was controversial, but by this time the public had turned against Milošević and for the first time a majority of Serbs

98. BASS, *supra* note 1; POWER, *supra* note 60.

99. BASS, *supra* note 1, at 242–46.

100. *Id.* at 245.

101. *Id.* at 208.

102. *Id.* at 239; Harmon & Gaynor, *supra* note 42, at 410 n.22.

103. ORENTLICHER, *supra* note 37, at 36–38; R. Jeffrey Smith, *Serb Leaders Hand over Milošević for Trial by War Crimes Tribunal*, WASH. POST, June 29, 2001, at A1.

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said that they would not object to Milošević's surrender to The Hague.¹⁰⁴ The Serbian public and its leaders, after years of isolation, finally decided to reintegrate with the West. As Đjindić said, "our country's place is in the international community."¹⁰⁵

Although the public mostly backed Đjindić, his support was far from universal and Serbia's cooperation in the following years advanced in fits and starts.¹⁰⁶ Following the surrender of Milošević, there was not much further cooperation until April 2002 when the federal Yugoslav parliament passed the law on cooperation with the Tribunal, again in response to financial pressure from the United States, and six indictees surrendered to The Hague.¹⁰⁷ This pattern continued throughout the following years: cooperation brought on by pressure from the United States followed by retrenchment, followed by more pressure by the United States (and more recently by Europe).¹⁰⁸ The recent arrest and surrender of Radovan Karadžić represents just the latest chapter in this slow, unfolding story of cooperation.¹⁰⁹ Although Serbian cooperation has largely come in response to U.S. and European pressure, this pressure only became effective in time after the public in Serbia itself supported such cooperation.¹¹⁰ Thus it is not simply a matter of sufficient will on the part of the international community; there must also be a certain degree of stability and willingness to engage on the part of the state in question.

Serbia was not the only government in the former Yugoslavia that was slow to cooperate. Tuđman's government in Croatia also only began to cooperate under pressure, and even after his death in 1999, there was for some time continued resistance to providing assistance to the ICTY.¹¹¹ Croatia's belated cooperation enormously complicated the Tribunal's case against Tihomir Blaškić, and added to delays at the Tribunal. Blaškić was indicted by the ICTY on November 10, 1995, and charged with grave breaches, war crimes, and crimes against humanity for his role in attacks on Bosnian Muslim civilians between May 1992 and January 1994. His trial ran from June 24, 1997 until July 30, 1999. Before and during the trial, the prosecutors repeatedly sought relevant documents from the Croatian government, and

104. ORENTLICHER, *supra* note 37, at 40; Erlanger, *supra* note 95.

105. Smith, *supra* note 103, at A6; *see also* Dan Bilefsky, *Karadžić Arrest is Big Step for a Land Tired of Being Europe's Pariah*, N.Y. TIMES, July 23, 2008, at A10 ("What changed in Serbia in half a year, say analysts, is that hard-headed economic interests trumped emotions, accompanied by the realization among a majority of Serbs that nationalism and the painful grip of the past were taking them nowhere.").

106. ORENTLICHER, *supra* note 37, at 39–40; Ian Fisher, *Opinion is Divided in Serbia Over Handover of Milošević*, N.Y. TIMES, Jan. 30, 2001, at A1.

107. ORENTLICHER, *supra* note 37, at 39.

108. STEVEN WOEHREL, *CONDITIONS ON U.S. AID TO SERBIA*, CRS REPORT FOR CONGRESS (2005).

109. Bilefsky, *supra* note 105, at A10; *see also* Rohde & Lacey, *supra* note 1, at A10.

110. DEL PONTE & SUDETIĆ, *supra* note 36, at 116 ("For the first time, Milošević appeared before the eyes of the Serbs as a war criminal. For the first time, public opinion was being prepared to accept his transfer to The Hague."); ORENTLICHER, *supra* note 37, at 40.

111. BASS, *supra* note 1, at 269–70.

pursued various means to obtain them, such as a subpoena *duces tecum*.¹¹² The Croatian government successfully resisted these legal and political pressures for the duration of Tuđman's presidency. After Tuđman died on December 10, 1999 and Stjepan Mesić became president on February 7, 2000, the attitude of the Croatian government slowly changed and in time it opened up its archives of documents to the parties. The documents were not, however, made available before Blaškić was convicted by the Trial Chamber on March 3, 2000.¹¹³

Had the documents been made available earlier, the trial could have been significantly shorter.¹¹⁴ Moreover, the tardy provision of the documents made for a long and complicated appeal. Based on the documents from the archives, the Defense filed four new evidence motions with the Appeals Chamber and submitted 8000 new documents. As the Appeals Chamber ultimately put it:

This long appeal has, in part, been characterized by the filing of an enormous amount of additional evidence. This was *inter alia* due to the lack of cooperation of the Republic of Croatia at the trial stage and to the delay in the opening of its archives, which only occurred following the death of former President Franjo Tuđman on 10 December 1999, thus preventing the parties from availing themselves of the materials contained therein at trial.¹¹⁵

Ultimately, the late provision of the new evidence contributed both to the reversal by the Appeals Chamber of certain Blaškić convictions and the dramatic reduction of his sentence.¹¹⁶ Regardless of one's views of the merits of the Appeals Chamber decision, it was plainly sub-optimal to have Blaškić's trial proceed without the documents in question.¹¹⁷

In both Serbia and Croatia, then, cooperation was not forthcoming until leaders who had an interest in thwarting such cooperation were out of power. Moreover, in both cases, those leaders stayed in power long after the conflict was over and exited the scene not because of, but rather in spite of, international condemnation and pressure. That is not to say that international pressure in the short-term will never produce cooperation, but frequently leaders that lead their countries into mass atrocity will also be resistant to such pressures.

112. Harmon & Gaynor, *supra* note 42, at 413–18.

113. *Id.* at 418.

114. *Id.*

115. Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement, ¶ 4 (July 29, 2004).

116. *Id.*

117. Again, one could argue that the international community should have put more pressure on Croatia to provide the documents before trial. But it is doubtful that additional pressure would have changed anything. The Croatian government resisted providing access to the documents in part because it was afraid that they could implicate government officials in crimes committed in Bosnia and Herzegovina. See Harmon & Gaynor, *supra* note 42, at 415.

When Serbia and Croatia finally did cooperate with the Tribunal years after it was established, critical evidence emerged. Not only did both governments surrender indictees, but they also gave access to significant government and military document archives, provided specific requested documents, and made witnesses available—though even then the cooperation was not total.¹¹⁸ In addition, their new stance made it easier for individual witnesses to cooperate with the Tribunal.¹¹⁹

The pattern seen in Serbia and Croatia is now being repeated in other countries, such as Sudan and Uganda. The U.N. Security Council referred the situation in Sudan to the ICC on March 31, 2005.¹²⁰ More than two years later, on April 27, 2007, the ICC indicted former Minister of State for the Interior Ahmed Haroun and Janjaweed leader Ali Kosheib for war crimes and crimes against humanity committed in 2003 and 2004.¹²¹ The government in Sudan has refused to surrender the two Accused and has halted even its minimal cooperation with the ICC.¹²² In fact, the Sudanese government is actively protecting the Accused. In September 2007, the Sudanese government appointed Haroun to be co-chair of a committee to hear complaints from victims of human rights abuses in Sudan, and in October 2007 the government released Kosheib from jail where he was being held on unrelated charges.¹²³ On July 14, 2008, the Prosecutor of the ICC filed a request with the court for an arrest warrant—which the court issued on March 4, 2009—for the President of Sudan, Omar Hassan al-Bashir, for crimes against humanity and war crimes.¹²⁴ The Sudan President's response

118. President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Ninth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, ¶¶ 226–28, delivered to the General Assembly and the Security Council, U.N. Doc. A/57/379-S/2002/985 (Sept. 4, 2002); President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Eighth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, ¶¶ 196–97, delivered to the General Assembly and the Security Council, U.N. Doc. A/56/352-S/2001/865 (Sept. 17, 2001); ORENTLICHER, *supra* note 37, at 39, 45, 50; Del Ponte, *supra* note 63, at 556–57; Harmon & Gaynor, *supra* note 42, at 418.

119. ORENTLICHER, *supra* note 37, at 113 (“Until Milošević was out of power, Ambassador Williamson explained, insider witnesses who could help the OTP meet this challenge were for the most part unwilling to provide evidence against him.”).

120. S.C. Res. 1593, ¶¶ 1–2, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

121. Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Al Abd-Al-Rahman (“Ali Kushayb”), Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun (Apr. 27, 2007).

122. INTERNATIONAL CRIMINAL COURT, SEVENTH REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE UN SECURITY COUNCIL PURSUANT TO UNSCR 1593, ¶¶ 5, 26, 30–42 (2005).

123. *Id.* ¶¶ 30–42; Warren Hoge, *Official Urges Arrest of 2 Darfur Suspects*, N.Y. TIMES, Dec. 6, 2007, at A12; Neil MacFarquhar, *Security Council Members Push to Condemn Sudan*, N.Y. TIMES, June 6, 2008, at A10.

124. Marlise Simons, Lydia Polgreen, Jeffrey Gettleman, *Arrest is Sought of Sudan Leader in Genocide Case*, N.Y. TIMES, July 15, 2008, at A1.

has been to defy openly the ICC and to seek to generate support for a resolution by the U.N. Security Council suspending the request for a warrant for one year or more.¹²⁵ Although the Security Council referred the case to the ICC in the first place, some members now seem to favor acting to suspend the case.¹²⁶

Uganda was the first of three governments so far (the others being the DRC and the Central African Republic) to self-refer, that is to refer cases in their own countries to the ICC. Following the referral on December 16, 2003, the ICC began investigating potential crimes in Uganda and focused first on the Lords Resistance Army.¹²⁷ On July 8, 2005, the ICC prosecutors obtained sealed indictments against five members of the LRA, including its leader Joseph Kony.¹²⁸ These indictments were unsealed on October 14, 2005, but to date no arrests have been made. In fact, despite the self-referral by Uganda, that government now seems to be protecting Kony and the other Accused.¹²⁹ On February 19, 2008, the government signed an agreement with the LRA to set up national courts to try war crimes cases, and there have been indications that the government will agree to have the cases against the remaining ICC Accused steered to those national courts.¹³⁰ Thus, although the government initiated the process that led to the LRA indictments by the ICC, it is now impeding the work of the ICC and refusing to surrender the Accused. In this case justice is delayed because the Ugandan government is manipulating the process for its own short-term ends: first, it sought to use the ICC to prosecute the rebels, and now it may be seeking to push aside the ICC in pursuit of stability.

These examples suggest that following mass atrocity, societies will sometimes go through a period of recovery and stabilization during which cooperation with war crimes prosecutions may be limited. Time may be required to dislocate governments or individual actors who are either complicit in the crimes or sympathetic with the perpetrators, and who have the ability to block critical evidence from coming forward. While international pressure can play an important role in this process, despotic governments will often be immune to such pressure in the short-term. At the same time, it would be a mistake to conclude from these examples that international criminal justice is either unattainable or should be pursued only after the conflict is over.¹³¹ First, there is no *one* approach that will work for all cases. In each

125. Gettleman, *supra* note 92; Elissa Gootman, *UN Debates Court Efforts to Prosecute Sudan Chief*, N.Y. TIMES, July 26, 2008 at A8.

126. Gootman, *supra* note 125, at A8.

127. See Situation in Uganda, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005 (Sept. 27, 2005).

128. *Id.* Two of the five Accused have died, and so three warrants are now outstanding.

129. Jeffrey Gettleman, Alexis Okeowo, *Rebels Delay Landmark Peace Deal in Uganda*, N.Y. TIMES, Apr. 11, 2008, at A10.

130. Manisuli Ssenyonjo, *How Joseph Kony is Keeping his Options Open*, THE GUARDIAN, Mar. 26, 2008, <http://www.guardian.co.uk/katine/2008/mar/26/lra.background>.

131. Cooper, *supra* note 18.

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instance, the international community must strike the right balance, depending on all of the circumstances, between the desire for expediency and the need for time. Second, even when time is required to pursue international justice, investigative efforts in the short-term will be required to identify and frame the crimes, and to gather evidence that could be lost. Finally, the experiences of the ad hoc tribunals to date show that, with time, international criminal justice efforts can achieve significant, even if narrow, successes.¹³²

2. Individual Developments

A similar process of stabilization also occurs at the level of individual witnesses. Societies that experience mass atrocities also experience dramatic polarizations within the population that can make it difficult, in the short-term, for essential witnesses to cooperate with war crimes prosecutions.

This polarization is particularly important because of the critical role of the insider witness in most war crime prosecutions, in particular those cases against high-level Accused not directly involved in the commission of the crimes.¹³³ Unlike the German perpetrators in World War II, most war criminals today take steps to ensure that no documentation or outside witnesses exist which would link the war criminals directly to the commission of crimes.¹³⁴ For example, Slobodan Milošević took care to keep hidden the support that his government was giving to Serb forces in Croatia and Bosnia and Herzegovina.¹³⁵ As noted above, in Srebrenica and in Kosovo, Serb forces covered up their criminal actions by hiding and reburial bodies.¹³⁶

Moreover, coded, euphemistic language is often central to the commission of mass crimes: perpetrators speak of “special treatment” for the victims or describe killing as “work.”¹³⁷ Thus, insider witnesses become critical to es-

132. See Wald, *supra* note 16, at 912; see also HUMAN RIGHTS WATCH, *supra* note 5, at 1–4; Møse, *supra* note 8.

133. DEL PONTE & SUDETIĆ, *supra* note 36, at 139, 146, 151; ORENTLICHER, *supra* note 37, at 113; Del Ponte, *supra* note 63, at 544–47; Alan Tieger and Milbert Shin, *Plea Agreements in the ICTY, Purpose, Effects and Propriety*, 3 J. INT'L CRIM. JUST. 666, 668–69 (2005).

134. See *supra* note 72 and accompanying text.

135. HUMAN RIGHTS WATCH, *supra* note 5, at 15.

136. See *supra* note 61 and accompanying text; see also ADAM JONES, GENOCIDE, A COMPREHENSIVE INTRODUCTION 351 (2006) (“Denial is viewed increasingly as a final stage of genocide, and an indispensable one from the view point of the *génocidaires*. ‘The perpetrators of genocide dig up the mass graves, burn the bodies, try to cover up the evidence and intimidate the witnesses. They deny that they committed any crimes, and often blame what happened on the victims.’” (quoting Gregory H. Stanton, *The 8 Stages of Genocide*, <http://www.genocidewatch.org/8stages.htm>)).

137. Prosecutor v. Krajišnik, Case No. IT-00-39-T, Judgement, ¶ 293 (Sept. 27, 2006) (“Documents like SJB [public security] reports often contain euphemistic language . . . For example, the expression ‘voluntary departure’ was used for what was often a forced removal of persons. Another example is the expression ‘to leave property in custody’ which in fact often meant the forced hand-over of property.”); Frank Neubacher, *How Can it Happen that Horrendous State Crimes are Perpetrated?*, 4 J. INT'L CRIM. JUST. 787, 795 (2006) (“Analyses of decision-making processes in politics have shown the degree to which even political protagonists are subjected to the dynamics of social conformity. They consequently develop euphemisms to avoid any kind of direct reference to human suffering.”); Tom Zwaan, *On the Aetiology*

tablishing the perpetrators' knowledge, participation, and intent. As more cases focus on rebel groups or militias, which can be expected to engage in less documentation of their activities and even more secrecy, insider witnesses will become even more essential in establishing the internal functioning of the organization, as well as identifying those responsible for the crimes.¹³⁸

There are generally two routes to developing an insider witness, and both usually require time and patience. First, insiders may agree to testify purely out of self-interest, in order to avoid charges or reduce their own sentences for criminality. Second, insiders may become witnesses for moral reasons, because they condemn the actions of those responsible and feel a duty to testify.

With respect to the first route, prosecutors must usually work their way up the chain of command, initially by confronting or charging lower-level actors, and then getting them to implicate those above them.¹³⁹ Even in a domestic context, this process takes time, as it requires that prosecutors proceed first through some lower-level cases before reaching the senior Accused. In the war crimes context, this process can be even more complicated.¹⁴⁰ First, not all countries have an established practice of allowing criminals to testify against others in exchange for leniency.¹⁴¹ Second, even insiders who cooperate out of self-interest must overcome the ideological affinities that they often have for those they are asked to testify against, particularly in war crimes cases. This feature is more fully explored in the following discussion.

The second route to the insider witness also frequently requires a protracted process. The term "insider witness" captures a broad range of potential sources of information. The term includes individuals at the same level or one rank below the Accused, who may be equally culpable, as well as more minor players such as ordinary soldiers or staff, who were in a position to have knowledge but who did not participate in the crimes. Regardless of where they fall in this range, many insider witnesses are individuals who at one time shared the beliefs, if not the goals, of the perpetrators.¹⁴² They are insiders *precisely because* they were, at one time, trusted by those who com-

and Genesis of Genocides and Other Mass Crimes Targeting Specific Groups ¶¶ 34–35 (2003) (report prepared by the Centre for Holocaust and Genocide Studies, University of Amsterdam / Royal Netherlands Academy of Arts and Sciences, at the request of the Prosecution in the trial of Slobodan Milošević) (on file with Harvard Law School Library).

138. JONES, *supra* note 136, at 313 ("New wars feature a profusion of actors and agents, often making it difficult to determine who is doing what to whom. The most destructive war of recent times, in the DRC, has killed perhaps four million people. But with a mosaic of local and outside forces, apportioning responsibility for genocide and other atrocities—and bringing effective pressure to bear on perpetrators—are tasks even more daunting than usual.")

139. Del Ponte, *supra* note 63, at 543; *see, e.g.*, Tieger and Shin, *supra* note 133, at 669.

140. *See* Tieger and Shin, *supra* note 133, at 669.

141. Del Ponte, *supra* note 63, at 545. *See generally* NANCY COMBS, GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW 60 (2007).

142. COMBS, *supra* note 141, at 145 ("At the time, [Plavšić] said, she had convinced herself that the ethnic-cleansing plan was a matter of survival and self-defense.")

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mitted the crimes.¹⁴³ In a highly-polarized environment, time is often required for potential insider witnesses to detach themselves from the ideology of the criminal group.¹⁴⁴

Since World War II, much has been written about how ordinary people can be drawn into participating in mass crimes.¹⁴⁵ Since these “ordinary people” constitute the pool of potential insider witnesses, the process by which a society descends into mass atrocity provides some insight into the challenges that prosecutors face when trying to identify and develop cooperating witnesses.

Mass atrocities occur under conditions that necessarily have profound effects on all potential witnesses, including potential insider witnesses. These events do not occur out of the blue, suddenly and without warning.¹⁴⁶ While mass atrocities can be propelled by various motivations, such as ideology or greed, they are generally preceded by a pattern of societal steps: serious and increasing destabilization of the state and society;¹⁴⁷ increased authoritarian rule;¹⁴⁸ increased polarization of groups within the state;¹⁴⁹ increased tensions, insecurity, and fear;¹⁵⁰ propaganda furthering fear and hatred;¹⁵¹ the presence of ideologies or beliefs legitimizing the atrocities;¹⁵² a

143. Del Ponte, *supra* note 63, at 544.

144. Tieger and Shin, *supra* note 133, at 669 (“The usual difficulties of obtaining such information in domestic jurisdictions are greatly exacerbated in the post-war Balkans, where ethnic loyalties are reinforced by threats of ostracism and physical violence that continue to this day.”).

145. See, e.g., CHRISTOPHER BROWNING, ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND (1992); DANIEL JONAH GOLDHAGEN, HITLER’S WILLING EXECUTIONERS (1997); ERVIN STAUB, THE ROOTS OF EVIL: THE ORIGINS OF GENOCIDE AND OTHER GROUP VIOLENCE (1989); Neubacher, *supra* note 137; Zwaan, *supra* note 137, ¶¶ 3–4 (summarizing literature).

146. STAUB, *supra* note 145, at 5 (“Genocide does not result directly. There is usually a progression of actions. Earlier, less harmful acts cause changes in individual perpetrators, bystanders, and the whole group that make more harmful acts possible.”); see, e.g., Jean Mukimbi, *The Seven Stages of the Rwandan Genocide*, 3 INT’L CRIM. JUST. 823 (2005) (describing how steps leading to the Rwandan genocide began in the 1950s); Zwaan, *supra* note 137, ¶¶ 28, 34.

147. STAUB, *supra* note 145, at 14 (“By themselves, difficult life conditions will not lead to genocide. They carry the potential, the motive force; culture and social organization determine whether the potential is realized by giving rise to devaluation and hostility towards a subgroup”); Zwaan, *supra* note 137, ¶¶ 18–21.

148. STAUB, *supra* note 145, at 18 (“Deeply ingrained, socially developed feelings of responsibility for others’ welfare and inhibitions against killing are gradually lost. Often the leaders assume responsibility, and accountability is further diminished by compartmentalization of functions and the denial of reality.”); *id.* at 24 (“[C]onditions conducive to genocide and mass killing are likely to give rise to the kind of leadership that plans and promotes these acts.”); Neubacher, *supra* note 137, at 789; Zwaan, *supra* note 137, ¶¶ 25–29.

149. STAUB, *supra* note 145, at 19 (“But even in societies that do value human welfare, an outgroup may be excluded from the moral domain Negative stereotypes and negative images of a group can become deeply ingrained in a culture.”); Mukimbi, *supra* note 146, at 823 (observing the first stage of genocide is “definition of the target group”); Zwaan, *supra* note 137, ¶ 21.

150. STAUB, *supra* note 145, at 14 (“[T]he threat may be to life, to security, to well-being, to self-concept, or to world view.”); Zwaan, *supra* note 137, ¶ 22.

151. Neubacher, *supra* note 137, at 797; Zwaan, *supra* note 137, ¶¶ 46–47.

152. STAUB, *supra* note 145, at 25 (“Perpetrators of evil often intend to make people suffer but see their actions as necessary or serving a higher good. In addition, people tend to hide their negative intentions from others and justify negative actions by higher ideals or the victims’ evil nature.”); *id.* at 82

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steady and progressive legitimizing of violence against victim groups;¹⁵³ and the absence of sanctions against violence.¹⁵⁴

As a result of these steps, the crimes that are committed become justified in the minds of the perpetrating group members.¹⁵⁵ Through small, progressive steps, individuals are drawn in and become participants in mass crimes. The Prosecution at the ICTY alleged in many of the Serb perpetrator cases that the crimes against non-Serbs started with work and travel restrictions, and progressed to more grave crimes such as detention, mistreatment, torture, deportation, and murder.¹⁵⁶ One commentator accounted for General Radoslav Krstić's involvement in the crimes of Srebrenica this way:

I do not believe that Krstić is a pathological case, an evil man who hated Muslims and wanted to destroy them. But he does strike me as somebody who struggles with himself. He is a weak man, a man who is afraid to say no to a higher authority. This happened to thousands of others, too. This policy of small steps, of everyday decisions and concessions, of a collaboration on a much smaller scale, brought men like Krstić into situations where they had to either obey or oppose the orders issued by men like Ratko Mladić.¹⁵⁷

Individuals can also be more deliberately recruited and indoctrinated. Ishmael Beah writes of being pressed into service by government forces in Sierra Leone at age thirteen, after his family had been killed by RUF rebels.¹⁵⁸ He was conditioned with violence and drugs, and soon became a ruthless

("We devalue them, justify their suffering by their evil nature or by higher ideals."); Zwaan, *supra* note 137, ¶ 44.

153. STAUB, *supra* note 145, at 17–18; Mukimbiri, *supra* note 146, at 829–35; Zwaan, *supra* note 137, ¶¶ 37–38.

154. STAUB, *supra* note 145, at 18 ("Even bystanders who do not become perpetrators, if they passively observe as innocent people are victimized, will come to devalue the victims and justify their own passivity.")

155. JONES, *supra* note 136, at 353–54 (listing justifications that perpetrators cite for mass atrocities); STAUB, *supra* note 137, at 18 ("Often there is a reversal of morality, and killing them becomes to be seen as good, right, and desirable."); *id.* at 84 ("As the destruction process evolves, harming victims can become 'normal' behavior. Inhibitions against harming or killing diminish, and extraneous motives can enter: greed, the enjoyment of power, the desire for sex or excitement. This is helped along by the belief that the victims do not matter and deserve to suffer, and even that any form of their suffering furthers the cause the perpetrators serve."); Neubacher, *supra* note 137, at 789 ("The perpetrators of state crime are often not considered criminal by those in their own society, since their behaviour conforms with the expectations of others in that society."); Zwaan, *supra* note 137, ¶¶ 50–53.

156. Prosecutor v. Martić, Case No. IT-95-11-T, Judgement, ¶¶ 323–28, 443 (June 12, 2007); Prosecutor v. Stakić, Case No. IT-97-24-T, Judgement, ¶¶ 102–28 (July 31, 2003).

157. SLAVENKA DRAKULIĆ, *THEY WOULD NEVER HURT A FLY* 95 (2004); *see also id.* at 97 ("By 1995 the Muslims had become a nonpeople, much like the Jews during the Second World War. The extermination of Jews also began with small steps. Little things, such as not being allowed to buy flowers in a local shop, have your hair cut at the hairdresser, or ride a streetcar, eventually led them to the gas chamber.")

158. ISHMAEL BEAH, *A LONG WAY HOME: MEMOIRS OF A BOY SOLDIER* 107–10, 126 (2007).

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fighter himself.¹⁵⁹ When at age fifteen he was turned over to UNICEF, he required months of rehabilitation.¹⁶⁰ He says that “[i]t hadn’t crossed . . . [the UNICEF representatives’] minds that a change of environment wouldn’t immediately make us normal boys; we were dangerous, and brain-washed to kill.”¹⁶¹

Propaganda that spreads fear can be particularly virulent and effective and can profoundly affect potential witnesses. In Croatia and Bosnia, for example, Serb leaders whipped up fear that Croats and Bosnian Muslims were going to commit genocide against the Serb population, and in Croatia this propaganda was particularly resonant because of the atrocities that had in fact been committed by the Croat Ustaša forces against Serbs in World War II.¹⁶² In Rwanda, Hutus were told that the Tutsis were going to murder them in a particularly brutal fashion.¹⁶³ One Hutu perpetrator who confessed and was given a life sentence explained how they were told that the Tutsis cut Hutus open and made roadblocks with their intestines.¹⁶⁴ Another perpetrator told how he heard that the Tutsis killed Hutus by cutting “pockets” in their bodies and forcing people to put their hands inside the pockets.¹⁶⁵

This is the context in which war crimes are investigated and prosecuted. Potential witnesses, and in particular insider witnesses, are not immune to these forces. On the contrary, insider witnesses are particularly susceptible to these forces since they are within or close to the inner circle of the perpetrating group. The insider witnesses will naturally be caught up in the passions of the crisis, persuaded by the propaganda, and frightened by perceived threats and insecurity. In the moment, the crimes will appear justified—even necessary. Frequently, insiders will be able to come forward only after the crisis is resolved.¹⁶⁶ Moreover, many insider witnesses will not be per-

159. *Id.* at 119, 121–23.

160. *Id.* at 126–32, 149, 179.

161. *Id.* at 135.

162. Prosecutor v. Krajišnik, Case No. IT-00-39-T, Judgement, ¶¶ 43–47, 921–23 (Sept. 27, 2006); Prosecutor v. Martić, Case No. IT-95-11-T, Judgement, ¶¶ 331–34, 450 (June 12, 2007); BASS, *supra* note 1, at 208–09; DRAKULIĆ, *supra* note 157, at 97 (“Still, we must ask ourselves: how does our neighbor become our enemy? How do we internalize the enemy, and how long does it take to do so? By the time the enclave of Srebrenica fell, the Serbian propaganda machine, especially television, had been demonizing the enemy—Croats, Bosnian Muslims, and Albanians—for almost ten years. Srebrenica’s fall and the mass executions that followed were made possible only by long psychological preparation.”); JONES, *supra* note 136, at 266.

163. JONES, *supra* note 136, at 266.

164. SCOTT STRAUS, *INTIMATE ENEMY: IMAGES AND VOICES OF THE RWANDAN GENOCIDE* 75 (2006).

165. *Id.* at 91.

166. In addition, the passage of time may allow more accused perpetrators to recognize their culpability, leading more to agree to plead guilty. COMBS, *supra* note 141, at 201 (quoting guilty plea of Ranko Češić before the ICTY in which he said: “Looking back in time after so much time has elapsed since I committed those crimes, there is an enormous difference between my state of mind now and then. Now I would never do the things I did then, the things that took place in a time of euphoria, a time when all human dignity was abolished.”). Guilty pleas are an important way that war crimes tribunals could address a larger number of cases more expeditiously. *Id.* at 130 (“Plea bargaining, then, has the valuable

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sueded to provide testimony until they believe that the Prosecution already knows the truth, or until they are confronted by documents. Therefore, before the Prosecution can even begin to develop insider witnesses, it must establish a body of knowledge with which it can confront potential insiders.

Even insiders who condemned the crimes at the time they occurred are often unable to come forward immediately. First, insiders are likely to fear for their personal security.¹⁶⁷ As witnesses to the criminality of their compatriots, they can easily imagine the consequences that might befall them if they turn against the perpetrators, and many potential witnesses are pressured or threatened not to testify.¹⁶⁸ Witnesses may worry that their security cannot be addressed until the state has achieved stability, and until the war crimes tribunal has established its credibility in addressing the crimes and protecting witnesses.

Second, as insiders, their livelihoods and lives are often closely intertwined with those of the perpetrators.¹⁶⁹ Insiders may have jobs that depend on the perpetrators; they may share friends or live in the same neighborhood. In the polarized society that generally accompanies war crimes and mass atrocity, these connections will loom large. Insiders may thus feel they face a choice between remaining silent and speaking up (with the likely result of ostracism).¹⁷⁰ Third, although they may condemn the criminal acts of their compatriots, they may nonetheless feel allegiance and loyalty toward the perpetrators, particularly in comparison to the other side of the conflict.¹⁷¹ As a result, insiders may be more likely to understand, justify, or excuse the actions of the perpetrators. Insiders may also be unwilling to turn

potential to enhance what limited criminal accountability can currently be imposed in the context of international crimes.”); *see, e.g.*, Tieger and Shin, *supra* note 133, at 668.

167. Del Ponte, *supra* note 63, at 546.

168. DEL PONTE & SUDETIĆ, *supra* note 36, at 151 (“Recruiting insiders, and especially political, military, intelligence, and police insiders, required the approval of the Belgrade authorities, who were adamant that such witnesses not reveal information they deemed to be ‘state secrets.’ Belgrade sat down with our prospective insider witnesses before their interviews with the Tribunal and reminded them that divulging state secrets was a crime punishable by law.”); *see also supra* note 64 and accompanying text.

169. STAUB, *supra* note 145, at 82 (“Ideological movements and totalitarian systems induce members to participate. Members must follow special rituals and rules; they must join in educational or work activities for building the new society. The more they participate, the more difficult it becomes for them to distance themselves from the system’s goals and deviate from its norms of conduct, not only overtly but also internally.”).

170. Rapp, *supra* note 84, at 279 (“This raises another issue: What will happen to such a witness when he is released from prison after the Tribunal no longer exists? Is there a country that will accept the witness? The dangers to such an individual will be even greater than for other witnesses, for he will be perceived as both a traitor to his ethnic group and as the betrayer of former friends and colleagues.”).

171. COMBS, *supra* note 141, at 150 (“An international defendant who pleads guilty to persecution as a crime against humanity must call into question, at least nominally, a host of deeply held beliefs that the defendant may prefer to leave unscrutinized.”); Geoffrey Nice & Philippe Vallières-Roland, *Procedural Innovations in War Crimes Trials*, 3 J. INT’L CRIM. JUST. 354, 363–64 (2005) (“War crimes Prosecutors quickly realize that the most interesting witnesses for the Judges in political leadership cases are the so-called ‘insider’ witnesses. This category of witnesses presents its own problems. In the *Milošević* case, some of these witnesses were themselves named in the *Milošević* indictments as coperpetrators of the accused. They were to be, inevitably, at least partly favourable to the accused and certainly protective of their own interests.”).

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on the perpetrators if in doing so the insiders feel that they are aligning themselves with the enemy. For all these reasons, such insiders do not generally come forward of their own accord. Usually they will cooperate only after they are located by investigators, and even then only reluctantly. While developing insider or cooperating witnesses is challenging even in domestic criminal cases, the ideological polarization and instability that attends mass atrocity makes this task exponentially more difficult in war crimes cases.

Several examples from the ICTY demonstrate how witnesses can emerge many years after the crimes in question. Milan Babić was an extremist Serb leader in Croatia and, during the war in 1991, a close ally of Milošević's. The development through which Babić came to be one of the most significant insiders to testify against Milošević demonstrates the process by which insiders can become witnesses. When Milošević was indicted in 2001 for crimes in Croatia, Babić was named as a member of the joint criminal enterprise.¹⁷² Alarmed by this news and afraid that he might himself be indicted, Babić reached out to speak with the Tribunal to defend himself. As he stated in the first of many interviews with prosecutors, “[f]irst and foremost, I wanted . . . to remove any suspicion of the Tribunal concerning any possible dishonourable acts on my side. I am perfectly sure that I never committed such acts or actions”¹⁷³ Instead, Babić blamed the crimes on Croatian leader Franjo Tuđman and Slobodan Milošević.¹⁷⁴ To the extent he blamed Tuđman, he merely reprised the stance of Serb leaders before and during the war, as well as the propaganda that they spread about the threat of genocide from Croatia. At the same time, Babić had come to see that Milošević also bore responsibility for the events in Croatia. Of course, as long as Milošević remained in power in Serbia, Babić—who was himself living in Serbia at the time—never could have cooperated with the Tribunal in this fashion.¹⁷⁵ Even when Babić began to speak to the Tribunal, it is unlikely that he expected ever to testify against anyone.

Through the process of being interviewed by the ICTY over many sessions, Babić also came to acknowledge his own responsibility for the crimes in Croatia.¹⁷⁶ To some extent, this followed from his desire to defend himself. While he continued to insist that a majority of the blame fell on Milošević and others, he came to recognize that because of his central role in

172. Del Ponte, *supra* note 63, at 544.

173. Suspect interview by the OTP of the ICTY of Milan Babić 29–30 (Nov. 27, 2001) (transcript on file with Harvard Law School Library).

174. *Id.* at 30–31.

175. Babić described how even at the time he came forward it was considered treasonous in Serbia to cooperate with the ICTY. *Id.* at 28–29.

176. DEL PONTE & SUDETIĆ, *supra* note 36, at 330–31 (crediting the “relentless efforts” of prosecutor who interviewed Babić). Babić was interviewed for twenty days spread out over a five month period. In the current debate over interrogation techniques of suspected terrorists, opponents of harsh tactics say that building a rapport with suspects over time yields better results. See JANE MAYER, *THE DARK SIDE* 117 (2008) (quoting former FBI agent Daniel Coleman that “you need to talk to people for weeks. Years.”).

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the events, it became impossible to maintain this position without implicating himself.

But Babić's own admission of responsibility also reflected the effect of the passage of time. Babić was an extreme nationalist during the war, and both his propaganda and participation in events contributed to the crimes against Croat civilians. In a letter to an international peace conference convened in The Hague to address the crisis in Yugoslavia in September 1991, Babić wrote that the Serbs in Croatia had "irrevocably decided not to live in any Croatian state" and that "[t]he new Croatia attacked with arms our right and our decisions with the intention of forcing by way of aggression the Serb people to live in [an] independent neo-fascist Croat state, a state which is so reminiscent of that genocidal time from 1941 to 1945."¹⁷⁷ Given this state of mind, he could not have admitted, during the war or even in the years immediately following, that in fact he had led Serbs in the commission of crimes.

Eventually, Babić agreed to testify against Milošević and others. He also pled guilty to the crime against humanity of persecutions and was sentenced to thirteen years in prison.¹⁷⁸ In contrast to his initial statement to ICTY prosecutors, he admitted at the time he testified to a "certain responsibility for everything that took place during that period of time in the territory of the former Yugoslavia."¹⁷⁹ And in contrast to his extremist statements during the war, when he pled guilty he told the court how he had come to see things differently:

I come before this Tribunal with a deep sense of shame and remorse. I have allowed myself to take part in the worst kind of persecution of people simply because they were Croats and not Serbs These crimes and my participation therein can never be justified. . . . I can only hope that by expressing the truth, by admitting to my guilt and expressing the remorse, can serve [sic] as an example to those who still mistakenly believe that such inhumane acts can ever be justified. . . . I have come to understand that enmity and division can never make it easier for us live together. I have come to understand . . . the fact that we all belong to the same human race and that it is more important than any differences, and I have come to understand that only through friendship and confidence can we live together in peace and

177. Transcript of Cross-Examination at 1838–40, Prosecutor v. Martić, Case No. IT-95-11-T (Mar. 2, 2006); Prosecutor v. Martić, Case No. IT-95-11, Exhibit 236 (on file with Harvard Law School Library).

178. Del Ponte, *supra* note 63, at 544; Prosecutor v. Babić, Case No. IT-03-72-S, Sentencing Judgment, ¶¶ 10–11, 102 (June 29, 2004).

179. Transcript of Witness Testimony at 12861, Prosecutor v. Milošević, Case No. IT-02-54 (Nov. 18, 2002).

friendship and thus make it possible for our children to live in a better world.¹⁸⁰

Babić's new perspective on the war put him at odds with former colleagues in Belgrade. When Babić wanted to speak to the ICTY after the Milošević indictment, he turned to Savo Štrbac, who led an organization that investigated crimes committed against Serbs during the war.¹⁸¹ Štrbac helped Babić because he thought that Babić would testify against the Croats and defend the Serbs.¹⁸² When Babić testified against Milošević and pled guilty, however, Štrbac declared that Babić had become "a walkover, a rag."¹⁸³

The process by which Babić came to a new perspective on the war demonstrates how the passage of time allows for evidence to become available and the truth to be known.¹⁸⁴ His cooperation was only possible because the Prosecution had: (1) gathered significant evidence of crimes, which put the Prosecution in a position to charge commanders and confront insiders; (2) indicted Milošević and obtained his arrest and surrender, which gave Babić the motive and the space—i.e. security—to cooperate; and (3) patiently spent hours and days interviewing Babić, which in time allowed him to acknowledge his responsibility. While not every insider witness will be developed in this way, Babić's story shows some of the factors that may require time when obtaining the testimony of insider witnesses in war crimes cases.

Another witness who came forward years after the crimes in question was Goran Stoparić, a member of a Serbian paramilitary group called the Scorpions. Stoparić was present when members of the Scorpions executed nineteen Albanian civilians, including twelve children under the age of fourteen, in the village of Podujevo in Kosovo on March 28, 1999. Three years later, in 2002, Stoparić was called as a defense witness in the trial of one of the participants in the execution, Saša Cvjetan. After the Scorpions threatened him, however, Stoparić lied about what happened. Stoparić later felt remorse and sought out Nataša Kandić, a prominent human rights advocate in Belgrade, for guidance.¹⁸⁵ Kandić arranged to have Stoparić called as a prosecution witness at a retrial in 2003 and provided him with police protection. During this second testimony, Stoparić recanted his previous testimony and told the truth.¹⁸⁶

180. Transcript at 57–58, *Prosecutor v. Babić*, Case No. IT-03-72 (Jan. 27, 2004).

181. Transcript at 1607–08, *Prosecutor v. Martić*, Case No. IT-95-11 (Feb. 20, 2006).

182. *Id.* at 1608.

183. *Id.*

184. At her guilty plea, Biljana Plavšić told of a similar process of gaining perspective over time. She said that at the time of the crimes, "she [had] convinced herself that [the ethnic-cleansing plan] was a matter of survival and defense," but when she pled guilty in 2002 (more than 7 years after the crimes) she acknowledged that she and others had "led an effort which victimized countless innocent people . . ." *Prosecutor v. Plavšić*, Case No. IT-00-39&40/I-S, Sentencing Judgement, ¶ 72 (Feb. 27, 2003); COMBS, *supra* note 141, at 145.

185. Interview by Carol Off with Goran Stoparić, CBC News Online (Apr. 2, 2004), <http://www.cbc.ca/news/background/balkans/stoparic.html>.

186. *Id.*

In 2006, Stoparić also testified at the ICTY at the trial of Milan Milutinović and five other Serbian leaders. He explained that during the war he “fell for this nationalistic ideology as thousands of other Serbs did.”¹⁸⁷ He said that he decided to come forward with the truth in 2003 because he had security and because he felt for the innocent children who had been killed.¹⁸⁸ In Stoparić’s case, it seems that it was a combination of factors that allowed him to testify. In particular, the passage of time appears to have contributed to his ability to escape the influence of the nationalist propaganda of the war and willingness to come forward and tell the truth.

Stoparić’s cooperation also led to the emergence of one of the most significant and dramatic pieces of evidence to be presented at the ICTY: the so-called Scorpions video.¹⁸⁹ It graphically depicted members of the Scorpions executing six Muslim men and boys from Srebrenica in 1995, but only became available nearly ten years later.¹⁹⁰ Most of the copies of the tape had been destroyed under orders of the Scorpions commander, but after being moved by the testimony in the Podujevo case, Stoparić told Kandić about the existence of the tape in June 2003 and that one copy still existed somewhere.¹⁹¹ After searching for more than a year, Kandić was finally able to locate the video in late 2004, at which point she arranged to have it provided to the ICTY and the Serbian War Crimes Prosecutor.¹⁹² It was soon used by the ICTY Prosecution in the Milošević trial.¹⁹³ More significantly, it had a dramatic effect on public opinion in Serbia and was used by the Serbian government to prosecute four Serbs for the executions.¹⁹⁴

This episode demonstrates how accountability can be a gradual, step-by-step process that occurs over time. Years after the event in question, a participant in the perpetrating group was moved by testimony in a war crimes prosecution both to testify and to reveal the existence of the Scorpions video, which then led to further prosecutions and accountability.¹⁹⁵ And while this video was the most dramatic to emerge, it was not the only video of atrocities to surface many years after the crimes.¹⁹⁶ In 2006, the head of the Helsinki Committee for Human Rights in Banja Luka in Bosnia and

187. Transcript at 691, Prosecutor v. Milutinović et al., Case No. IT-05-87 (July 12, 2006).

188. *Id.*

189. HUMAN RIGHTS WATCH, *supra* note 5, at 14.

190. *Id.*; Daniel Williams, *Srebrenica Video Vindicates Long Pursuit by Serb Activist*, WASH. POST, June 25, 2005, at A15.

191. E-mail from Nataša Kandić, head of Humanitarian Law Centre, Belgrade to author (Oct. 7, 2008, 11:48 EST) (on file with Harvard Law School Library) [hereinafter Kandić E-mail]; see also Alissa J. Rubin, *Video Alters Serbs’ View of Bosnian War*, L.A. TIMES, June 13, 2005, at A6.

192. Kandić E-mail, *supra* note 191.

193. HUMAN RIGHTS WATCH, *supra* note 5, at 14.

194. Nicholas Wood, *4 Serbs Guilty in Execution of 6 Bosnians*, N.Y. TIMES, Apr. 11, 2007, at A11.

195. Rubin, *supra* note 191, at A6 (“The story of how the video came to light seems to reflect a crack in the Serb code of silence about Bosnian war crimes.”).

196. Merdijana Sadović, *War, Crimes and Videotapes*, ICTY - TRIBUNAL UPDATE (Inst. for War and Peace Reporting, London U.K.), Aug. 11, 2006, http://www.iwpr.net/?p=tri&s=f&o=322894&apc_state=henh.

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Herzegovina stated that “over the next several years, we will be seeing more and more evidence of war crimes committed during the wars in the 1990s, and it will often be shocking.”¹⁹⁷ Nataša Kandić herself said that many of the videos had been kept hidden by participants in the atrocities, but that over time they would surface.¹⁹⁸

All of these examples show that time can allow for witnesses to gain perspective on events in which they participated and to come forward to provide testimony and evidence. The passage of time, then, can allow for a more complete and truer accounting of events to emerge.

C. *Quick and Narrow is Not Always Better*

Not only can war crime prosecutions benefit from the passage of time, but in particular, they can also suffer if they are rushed or too narrowly drawn. As a reaction to complaints about long, drawn-out war crimes prosecutions, some prosecutors have now opted to bring narrower, more focused cases.¹⁹⁹ While there is no guarantee that narrower cases can be concluded more quickly, the chances of an expeditious result are certainly greater. And there is no doubt that, in some cases, the goals of prosecution can be better accomplished with a smaller case, particularly if the principal aim is to punish the perpetrator (as opposed to establishing a complete historical record or giving victims a voice). If the perpetrator is likely to be convicted and receive a significant sentence for a narrow case, then such a case may be preferable to the broader option. Moreover, broad cases can become unmanageable—particularly in an international forum—and can get sidetracked into historical and tangential detours.²⁰⁰ However, the quick and narrow approach can also have significant costs, and may not always be the better approach.

The prosecutors in the Saddam Hussein case understandably sought to avoid the perceived weaknesses of the Slobodan Milošević case, which dragged on for years and ended ultimately without a verdict.²⁰¹ However, in fashioning an alternative strategy, the Saddam Hussein prosecutors may have veered too far in the other direction. Given the extensive and broad allegations of criminality that existed against Saddam Hussein, the Prosecution ultimately tried, convicted, and executed him on an exceedingly narrow case. The Dujail case involved serious crimes to be sure—including murder, torture, and unlawful detention—but ultimately the case involved no more than 148 murders.²⁰² The other cases against Saddam Hussein involved hundreds of thousands of deaths and charges of genocide, which were not pre-

197. *Id.*

198. *Id.*

199. Simons, *supra* note 9, at 4.

200. HUMAN RIGHTS WATCH, *supra* note 5, at 50–57; ORENTLICHER, *supra* note 37, at 114–18.

201. Scharf, *supra* note 9, at 151.

202. SADDAM ON TRIAL, *supra* note 9, at 63–66.

sent in the Dujail case.²⁰³ Had Hussein not been executed shortly after the Dujail conviction, it might have made sense to start with this narrow case and then proceed with the larger cases afterwards. However, it was entirely predictable that Hussein would receive the death sentence for the Dujail crimes and that Iraqi law would require imposition of the penalty within thirty days. Under these circumstances, proceeding with the narrow Dujail case meant foregoing prosecutions of Hussein's broader crimes.

In addition, observers criticized the Dujail case for both procedural and evidentiary shortcomings,²⁰⁴ and at least some of the case's deficiencies could be tied to an effort to complete the case quickly. For example, the trial was held while the situation in Iraq remained highly polarized and unstable. As a result, there was inadequate security for witnesses and the parties to the proceedings.²⁰⁵ In addition, observers criticized the court for giving the Defense inadequate time to prepare²⁰⁶ and the Prosecution for failing to develop and offer sufficient evidence linking the defendants to the crimes.²⁰⁷ As Human Rights Watch concluded, "[s]ome of the evidentiary gaps may also be explained by the intense pressure placed on the IHT by the Iraqi government to move forward with a trial of Saddam Hussein as early as possible."²⁰⁸

Particularly given the perceived involvement of the United States behind the scenes,²⁰⁹ and the novelty of the proceedings in Iraq, the rush to conviction and the quick execution of Hussein may ultimately be viewed as having less legitimacy than if the case had rested on broader foundations. Even if the overriding goal was to convict Hussein and impose the ultimate penalty, a broader case against Hussein might have accomplished additional goals, such as holding him accountable for the larger crimes that he committed. It is debatable whether, under the circumstances, it was the right decision to proceed with the Dujail case, but it is clear that there are costs to taking a narrower approach.²¹⁰

203. See *supra* text accompanying note 27.

204. HUMAN RIGHTS WATCH, THE POISONED CHALICE: A HUMAN RIGHTS WATCH BRIEFING PAPER ON THE DECISION OF THE IRAQI HIGH TRIBUNAL IN THE DUJAIL CASE (2007) [hereinafter HUMAN RIGHTS WATCH, POISONED CHALICE]; HUMAN RIGHTS WATCH, JUDGING DUJAIL, THE FIRST TRIAL BEFORE THE IRAQI HIGH TRIBUNAL 36 (2006) [hereinafter HUMAN RIGHTS WATCH, JUDGING DUJAIL] ("Based on its extensive monitoring of trial sessions, and its interviews with key actors in the trial process, Human Rights Watch has identified a number of serious procedural concerns that, cumulatively, significantly diminished the fairness of the Dujail trial."); *id.* at 74 ("Based on our review of the dossier of evidence in the Dujail case, and our observation of proceedings, Human Rights Watch is concerned that neither the investigative judge nor the prosecution in the Dujail case paid sufficient attention to gathering evidence that would prove the required kinds of knowledge and intention on the part of the defendants in the Dujail case to commit the crimes alleged.")

205. HUMAN RIGHTS WATCH, JUDGING DUJAIL, *supra* note 204, at 14, 20.

206. *Id.* at 48.

207. *Id.* at 74, 78, 83.

208. *Id.* at 83.

209. Michael P. Scharf, *Lessons from the Saddam Trial*, in SADDAM ON TRIAL, *supra* note 9, at 232, 233.

210. DEL PONTE & SUDETIĆ, *supra* note 36, at 374 ("Leadership indictments, almost without exception, will be complex instruments. But they must, within the bounds of the law, be kept as simple as

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ICC prosecutors have also brought a very narrow case against Thomas Lubanga for crimes in the DRC, charging him only with conscripting and enlisting child soldiers. It is not clear whether the ICC proceeded on this narrow case for strategic reasons, or if at the time of indictment it did not have in its possession sufficient evidence for a broader case. Nonetheless, there are certainly strong allegations that Lubanga and his forces were involved in other massive and widespread crimes including murder, torture, and sexual violence.²¹¹ Although the case as it stands may be more efficient, it is apparently not representative of the broad range of crimes committed by the Accused.

Moreover, the difficulty with the narrow case is that it does not leave much margin for error. The case has encountered some legal hurdles and some difficulties with witness security, and the commencement of the trial was delayed.²¹² Because the case is so narrowly charged, it is possible that these difficulties could jeopardize the outcome of the case. If the prosecutors were proceeding on a broader case, they might have more options and fallback positions as difficulties arise.

In addition, will the prosecutors bring new, broader charges against Lubanga once this case is completed, or will they move on to other cases? Given the costs of these war crimes cases, is it realistic to think that prosecutors will bring successive cases against one individual, or is it rather the case that they have only one shot to bring their charges? These questions must be considered as prosecutors move toward smaller, narrower cases.

IV. CONSEQUENCES OF THE NEED FOR TIME

What are the consequences of the view that war crimes cases can require time to develop? One need not conclude that war crimes cases are infeasible, nor surrender to discouragement and despair. Although time may be required to investigate and prosecute war crimes cases, the situation is not hopeless. As noted above, with time the international criminal tribunals have recorded many successes.

Nonetheless, in articulating the goals of international criminal prosecutions, it is important that the international community have realistic expectations and understand the value of certain delays. While the community is right to hope that prosecutions will further reconciliation, some reconciliation or stability may itself be necessary in the short-term before prosecutions

possible even as the charges reflect the most serious crimes alleged; 'Al-Capone-style' tax-evasion indictments are ineffective in breaking the culture of impunity.").

211. See Letter from various human rights groups to Luis Moreno Ocampo, Chief Prosecutor of the ICC (July 31, 2006), available at <http://www.vrwg.org/Publications/02/DRC%20joint%20letter%20english%201-8-2006.pdf>.

212. Clifford & Glassborow, *supra* note 6. Subsequently the trial was suspended because of disclosure issues. See Simons, *supra* note 6, at A8.

can succeed. Certainly, international criminal prosecutions are fragile exercises requiring the sustained support of the international community. The experience of the ICTY already shows that war crimes tribunals can be saddled with impracticable goals that are beyond what can be accomplished by criminal prosecutions.²¹³

When the U.N. Security Council referred the Darfur case to the ICC, various states and NGOs indicated an expectation of quick action. The Australian government stated that the referral was “an essential step to ending the atrocities in Darfur.”²¹⁴ The Canadian government said that “this referral represents the best and most realistic option for ensuring timely accountability for these serious international crimes and deterring further atrocities in Darfur.”²¹⁵ Human Rights First stated that “time is of the essence here, if a new justice mechanism is to have a prophylactic effect in preventing further violence.”²¹⁶ The organization went on to say that the “ICC referral would be the most expedient means to ensure the grave crimes committed in Darfur are investigated and prosecuted expeditiously.”²¹⁷ A year after the referral, the Nation reported that some NGOs were impatient:

NGOs and human rights organizations in Sudan have suggested that the public is losing faith in the ICC as they can't see any progress. International officials are already starting to get restless. Louise Arbour, the former UN High Commissioner for Human Rights, recently called upon the ICC to 'move more robustly and visibly discharge its mandate and the referral by the Security Council.'²¹⁸

More broadly, the President of the International Crisis Group, Gareth Evans, stated in September 2006 that

certainly there is an urgent need now, after three years, to get some successful prosecutions under its belt. These reinforce the ICC's credibility—making clear to the international community

213. MINOW, *supra* note 33, at 49 (“Thus, I do not think it wise to claim that international and domestic prosecutions for war crimes and other horrors themselves create an international moral and legal order, prevent genocides, or forge the political transformation of previously oppressive regimes. Expansive claims may be tempting in order to convince international and national audiences to fund and support trial efforts, but exaggerated assertions are bound to yield critical and even hostile disappointment.”).

214. Media Release, Alexander Downer, Minister for Foreign Affairs for Australia, Australia Supports Security Council Decision to Refer Darfur to International Criminal Court (Apr. 6, 2005), *available at* <http://www.iccnw.org/documents/AustraliaPRDarfurRef06Apr05.pdf>.

215. Press Release, Paul Martin, Prime Minister of Canada, Statement by the Prime Minister (Apr. 1, 2005), *available at* http://www.iccnw.org/documents/Canada_onDarfurReferral_1April05_e.pdf.

216. Letter from Michael Posner, Executive Dir., Human Rights First, to Sec'y of State Condoleezza Rice, U.S. Dep't of State (Feb. 11, 2005), *available at* <http://www.humanrightsfirst.org/defenders/pdf/rice-darfur-021105.pdf>.

217. *Id.*

218. Anja Tranovich, *Seeking Justice Where There Is No Peace*, THE NATION, May 24, 2006, <http://www.thenation.com/doc/20060605/tranovich>.

that it is getting value for its money—and are crucial for the Court's deterrent effectiveness. The best way of getting the impunity message out is through successful trials. . . . The Prosecutor's job is to prosecute and he should get on with it, with bulldog intensity.²¹⁹

Notwithstanding this eagerness, the ICC prosecutor cautioned all along that the investigation would take years.²²⁰

The international community's desire for quick action is understandable. There are, as we have seen, strong reasons for acting expeditiously. At the same time, however, the international community has to develop patience and a long-term view. Success cannot be measured in the short-term, but only after many years. The desire for short-term action must be balanced by the understanding that war crimes prosecutions can take time to develop. How the balance will be struck between the imperative for quick action and the need for time will, of course, depend on the particularities of each specific case. The point here is to recognize that frequently there are deep aspects of war crimes cases, or the circumstances under which they are born that will make quick prosecution impossible—regardless of the will of the international community.

In addition, once the long-term view is accepted, it then becomes necessary to think about substitutes for criminal prosecutions in the short-term. For example, what steps might be taken on behalf of victims and survivors in the short-term given that justice through prosecutions may take years to achieve? What can be done about suspected perpetrators in the short-term short of prosecution? Are there ways to remove them from power or limit their participation in society? The goal should be to make prosecutions just one part of a larger system for addressing mass atrocities.²²¹

Furthermore, the long-term view is important as a matter of strategy. War crimes prosecutors, particularly those at the ICC, must plan their investigations and prosecutions both in the short-term and in the long-term. As the ICC takes on more cases, it will be tempting to fall into a pattern of prosecuting a few individuals from one crisis and then moving on to the next. Thus far, the ICC has issued indictments in Uganda, the DRC, and the Sudan. New cases are pressing on the docket, from the Central African Republic to Colombia. Of course it will not be possible for the ICC to prosecute cases from any one conflict the way that the ICTY or the ICTR did for the former Yugoslavia and Rwanda. However, it will be critical for the ICC to maintain a long-term view of the situations it investigates. It is encouraging that the Prosecutor has continued to investigate crimes in Darfur and

219. Gareth Evans, President of International Crisis Group, Presentation to the Second Public Hearing of the Office of the Prosecutor: Justice, Peace and the International Criminal Court (Sept. 25, 2006), available at <http://www.crisisgroup.org/home/index.cfm?id=4431&l=1>.

220. Rubin, *supra* note 62, at 43.

221. MINOW, *supra* note 33 (discussing alternatives to prosecutions).

recently obtained an arrest warrant against the President of Sudan. In addition, understanding how cases develop over the long-term may affect the way in which the Prosecution investigates particular cases. Even if the Prosecution seeks to bring a narrow and quick case in the short-term, it will be in the Prosecution's interest to investigate broadly with an eye toward possible future cases.

This mixed short-term and long-term approach may also require new methods of gathering and preserving evidence. The difficulty in these cases is that with time, more evidence may emerge, but at the same time more evidence is lost. We should think about ways to preserve short-term evidence so that it remains available in the long-term. Preserving documents, photographs, and crime scene evidence for the long-term is not difficult—it requires only careful handling, storage, and care.

Preserving witness testimony, however, is more complicated. At present, the investigations at the ad hoc tribunals (with the exception of Cambodia) have largely followed a common law model. Even at the ICC, which has more civil law features than the ad hoc tribunals, the Office of the Prosecution conducts the investigation.²²² As a result, if witnesses become unavailable or unwilling to testify by the time of trial, the Prosecution's ability to admit the evidence becomes limited because the Defense does not have an opportunity to test the evidence. If, however, critical witness statements were taken under oath by a neutral investigative judge, there would be less reason to exclude the statements at a later trial if the witnesses became unavailable. The ICC might want to consider such a procedure to preserve crucial evidence.

V. CONCLUSION

Those who support international criminal justice aspire to move it from the extraordinary to the ordinary, to make it as regular a feature of the international fabric as it is of any stable domestic setting. Broadly speaking, they have sought to transpose the structures of criminal justice from the domestic context to the international realm. As we are just fifteen years into this renewed project, we are still learning about the particular and special features of international prosecutions, and must therefore continue to adjust how we approach this work. One such feature is the way in which time and delay can be essential to successful prosecutions. But this aspect bumps up against the imperatives to proceed with these cases expeditiously, and therefore some balance between speed and delay must be found in how we approach and prosecute war crimes. At a minimum, this balance requires an

222. Although the Prosecution is required under Article 54 of the Rome Statute to "investigate incriminating and exonerating circumstances equally," it is still the responsibility of the Prosecutor to conduct the investigation. *See* Rome Statute of the International Criminal Court arts. 53, 54, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002.

understanding that these cases will require a sustained and long-term commitment from the international community, which has recently shown signs of impatience and an increased preference for shorter, quicker, and narrower cases.