A Kind of Judgment: Searching for Judicial Narratives after Death

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Abstract

This Article interrogates the relationship between international criminal law and post-conflict reconciliation. Much of international criminal law’s attraction rests on the claim that authoritative judgment creates incontestable narratives as the foundation for reconciliation – so what happens when there is no judgment? What can be salvaged from a terminated trial? This is the situation that confronted the International Criminal Tribunal for the Former Yugoslavia when its most prominent defendant, Slobodan Milošević, died. One candidate for ersatz judgment was the Decision on the Motion for Acquittal brought under the Tribunal’s Rule 98bis: Halfway through the Milošević trial, when the Prosecution rested, the Trial Chamber had to decide whether there was a case to answer. The Chamber declared that the trial should go forward, though what the judges actually decided was necessarily ambiguous: The Prosecution had presented enough evidence that a court could find Milošević guilty – but they didn’t say that this court would. Since there never was a final verdict, the Decision has become a site of contestation and ambiguous value. This Article examines how the Prosecution, Defense, Chambers and outsiders have deployed the Rule 98bis Decision to tell a story about Milošević’s guilt or innocence and craft a final judgment in the eyes of the world, if not in the law. The doctrinal constraints on this exercise suggest real limits on international criminal law’s ability to craft authoritative and transformative narratives – even, it turns out, in completed trials.

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Introduction: A Narrative of Transformation, Terminated

One of the most common, if also most contested, claims for the efficacy of international criminal tribunals is that they produce authoritative narratives that in turn contribute to reconciliation.¹

The key element in this claim is a court’s final judgment: While many parts of a trial contribute to the production of narratives – the giving of testimony, introduction of documents, creation of archives – only the decisions of the court carry the imprimatur of official, consequential authority. This is especially true given the largely adversarial nature of the principal international tribunals:² Evidence submitted by one party and critiqued by the other is, by its nature, subject to and indeed the product of partisan interpretation, and it is the role of the judge to determine its

¹ See, e.g., International Criminal Tribunal for the Former Yugoslavia, Website, About the ICTY, http://www.icty.org/sections/AbouttheICTY (“The Tribunal has contributed to an indisputable historical record, combating denial and helping communities come to terms with their recent history. Crimes across the region can no longer be denied.”); The Hague Tribunal and Balkan Reconciliation, IWPR, February 15, 2010, http://www.iwpr.net/report-news/hague-tribunal-and-balkan-reconciliation (“The website of the ICTY boasts that in the light of the court’s work, ‘It is now not tenable for anyone to dispute the reality of the crimes that were committed in and around Bratunac, Brcko, Celebici, Dubrovnik, Foca, Prijedor, Sarajevo, Srebrenica, and Zvornik to name but a few.’ . . . But the fact is that across the region, many people continue to do just that.”). See also DIANE F. ORENTLICHER, THAT SOMEONE GUILTY BE PUNISHED: THE IMPACT OF THE ICTY IN BOSNIA 39-42 (Open Society Justice Initiative, 2010)(hereinafter ORENTLICHER, THAT SOMEONE GUILTY BE PUNISHED); ROBERT CYER, HAKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 24, 26-28 (Cambridge University Press ed., 2007)(discussing this claim and contestations of it).

² See GEERT-JAN ALEXANDER KNOOPS, THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS 6-9 (European & International Law Series ed., 2005) (describing the principally adversarial nature of international tribunals but identifying a shift toward inquisitorial traits).
ultimate value. It is judgment – grounded in the procedural integrity of the trial and sitting at the apex of the process – that produces the dispositive, displacing authority claimed for international criminal law’s interpretations of violent conflict.

A contested claim, to be sure, but assuming one finds it plausible, what happens when there is no final judgment? Assuming one believes in the authoritative, transformative power of international criminal law (ICL) and its judgments, what can be salvaged from a terminated trial?

This is precisely the situation that confronted the International Criminal Tribunal for the Former Yugoslavia (ICTY) – its Chamber, Prosecution, Defense, and indeed all actors with an interest in either the general project of ICL or its particular effects in the former Yugoslavia – when Slobodan Milošević died.

The trial of Slobodan Milošević was supposed to be the “history-making” flagship case for the ICTY, the “capstone of the tribunal’s somewhat improbably rise from the margins of the international arena to that of a serious international institution.” To some the “Butcher of the Balkans,” to others the “Savior of the Serbs,” Milošević, as Serbia’s leader from the late 1980s

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3 Prosecutor v. Slobodan Milošević, Case No. IT-02-54-T [hereinafter, Milošević case. NB: Not all documents filed in Milošević bear the same identifying case number; only those with this exact number are abbreviated “Milošević case;” all others retain the full title.]


5 David Tolbert, The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings, 26 FLETCHER F. WORLD AFF. 7, 8 (2002). See also Carla Del Ponte, Opening Statements, Pros. v. Milošević, Trial Tr., 7:25-8:4 (Feb. 12, 2002) (“With the trial of this particular accused, we reach a turning point of this institution. The proceeding upon which the Chamber embarks today is clearly the most important trial to be conducted in the Tribunal to date. Indeed, it may prove to be the most significant trial that this institution will ever undertake.”); Milan Markovic, In the Interests of Justice?: A Critique of the ICTY Trial Court’s Decision to Assign Counsel to Slobodan Milosevic, 18 GEO. J. LEGAL ETHICS 947, 947 (2005) (“The Milosevic trial was hailed as a momentous event for both the [ICTY] and international justice as a whole”); Michael P. Scharf, The Legacy of the Milosevic Trial, 37 NEW ENG. L. REV. 915, 916 (2003) (“Prosecutor v. Slobodan Milosevic is clearly the trial for which the Ad Hoc Court was created.”).

to 2000, was a critical player in the collapse of Yugoslavia and the violent wars of its dissolution. But exactly his role in and responsibility for those conflicts were – as well as the role of the Serbian state apparatus he headed – were contested questions, which his trial promised to finally answer.

It was clear, too, when Milošević was transferred to The Hague in 2001, that the transformative potential of ICL had not yet wrought a miracle of reconciliation in the former Yugoslavia. The various communities in the successor states to Yugoslavia held radically different visions of the wars’ origins, of who was victim and who perpetrator, and what constituted justice. Milošević’s trial therefore promised to be the single greatest test of the Tribunal’s and ICL’s ability to forge an efficacious and transformative narrative. It was all the more disappointing, therefore, when Milošević died four years into the trial, before judgment could be rendered.

The sudden termination of trials by death is no hypothetical problem, nor is Milošević the only instance: a surprisingly large share of international war crimes defendants die before their trials


8 See, e.g., ROLAND KOSTIĆ, AMBIVALENT PEACE: EXTERNAL PEACEBUILDING, THREATENED IDENTITY AND RECONCILIATION IN BOSNIA AND HERZEGOVINA (2007) (reporting data from 2005 survey in Bosnia that found, inter alia, the following definitions of the war by ethnicity: “Civil war” – 3.7 percent of Bosniaks, 16.7 percent of Croats, and 83.6 percent of Serbs; “Aggression” – 95.1 percent of Bosniaks, 73.2 percent of Croats, and nine percent of Serbs); Dan Saxon, Exporting Justice: Perceptions of the ICTY among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia, 4 HUM. RTS. J. 559, 563-567 (describing different perceptions of the fairness of the ICTY between Bosnian Muslims, Croats and Serbs). But see Sanja Kutnjak Ivkovic, The Politics of Punishment and the Siege of Sarajevo: Toward a Conflict Theory of Perceived International (In)Justice, 40 L. & SOC’Y REV. 369, 393 (2006) (noting that in surveys conducted in 2000 and 2003 in Bosnia: “perceptions of the ICTY’s fairness were little influenced by the respondents’ ethnicity . . .”).

9 Scharf, supra note 5, at 916 (2003) (“. . .the answer to these questions [concerning Milošević] may dictate the ultimate success or failure of the Tribunal itself as a mechanism for restoring peace in the Balkans.”).
can be finished – nearly ten percent at the ICTY\textsuperscript{10} – and given the nature of the conflicts that international criminal tribunals adjudicate and the continuing problems of enforcing indictments,\textsuperscript{11} we can expect that the problem of defendants dying before judgment will continue to arise with regularity at the International Criminal Court and \textit{ad hoc} tribunals. If, therefore, judgment is indeed essential to the ICL’s transformative potential, there will be a significant number of cases in which that potential will be unrealized.

This Article considers how different actors have sought to characterize the meaning of the terminated Milošević trial in relation to this idea that courts produce consequential authoritative narratives. In particular, it examines their efforts to deploy and interpret the one document that, more than any other, might be thought to represent a kind of ersatz judgment – the Trial Chamber’s Rule 98\textit{bis} Decision on the Motion to Acquit.\textsuperscript{12}

Halfway through the trial, when the Prosecution rested, the Chamber had to decide if there was a case to answer. In their Decision in June 2004, the judges declared the trial should go forward, though what they decided was necessarily ambiguous: The Prosecution had presented enough evidence that a court could find Milošević guilty – but the judges didn’t say that this court would. The Decision therefore had an essentially interim quality, but because Milošević later

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\textsuperscript{10} See discussion at notes 38-40, infra.
\textsuperscript{11} Mary Margaret Penrose, \textit{Lest We Fail: The Importance of Enforcement in International Criminal Law}, 15 AM. U. INT’L L. REV. 321, 358-364 (2000) (describing the lack of enforcement as one of the greatest weaknesses of ICL); James Blount Griffin, \textit{A Predictive Framework for the Effectiveness of International Criminal Tribunals}, 34 VAND. J. TRANSNAT’L L. 405, 406-407 (2001) (“The enforcement of international criminal law, however, depends upon the unified political will and military power of the alliance that supports the international tribunal. Without the power of coercion, there is little or no enforcement.” (citations omitted)); Lilian A. Barria & Steven D. Roper, \textit{How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR}, 9 INT’L J. HUM. RTS. 349 (2005) (problems with apprehending suspects has reduced deterrent effect).
}
died before a final verdict, the Decision has become a site of contestation – “the only pre-Judgement determinative ruling of the Chamber on the case.”¹³

This Article examines how the accused, *amici curiae*, Prosecution, Chambers and outsiders have deployed the Decision to tell a story about Milošević’s guilt or innocence and craft a final judgment in the eyes of the world, if not in law. It proceeds as follows: **Part I** surveys claims that ICL judgments function as authoritative narratives that contribute to post-conflict transformation in unique ways. Next, after reviewing the history of the *Milošević* trial, **Part II** examines the Decision itself – in particular its standard of review, which is nearly identical to the common law ‘no case to answer.’ **Part III** then shows how the divergent strategic interests of the various parties in the trial created asymmetrical expectations about the purposes of the Decision and its content. **Part IV** examines contemporary responses to the Decision when it was issued – when, in other words, it was assumed to be an interim step, rather than the last pronouncement the Chamber would make – and finds, already then, critical elisions that give the Decision the qualities of a judgment. **Part V** continues this line, showing the ways in which, after Milošević’s death, different actors tried to use the Decision as a quasi-judgment. In particular, the International Court of Justice’s *Bosnian Genocide* case shows both the possibilities and the limitations of deploying the Decision as an ersatz judgment. **Part VI** concludes that the Decision’s constraints actually show how limited the potential of even final judgments is in the project of post-conflict transformation.

I. The Concept of Judgment as Authoritative Narrative

A. The Authoritative Narrative Theory: Many justifications are advanced for the project of international criminal law. One of the principal rationales is based on ICL’s capacity to cut through endemic partisan contestation and render incontestable, authoritative judgment about the events of divisive conflict; this authority drives out alternative claims and histories, thus creating space for shared understanding as a prerequisite for reconciliation. This rationale – appearing in many forms – is controversial and contested, but it is deeply entrenched in both practice and theory; we may call it the authoritative narrative theory of ICL.

The authoritative narrative theory begins with an uncontroversial observation: In societies which have suffered violent conflict and horrendous war crimes, often along ethnic or sectarian lines, shared understandings about history and identity will often have been comprehensively


15 See, e.g., About the ICTY, supra note 1 (“For example, it has been proven beyond reasonable doubt that the mass murder at Srebrenica was genocide.”). See also International Criminal Tribunal for Rwanda, Website, General Information, http://liveunictr.altmansolutions.com/tabid/101/default.aspx (“The purpose of this measure is to contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region.”). Reconciliation was mentioned as a goal in the resolution establishing the Rwanda Tribunal. S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (“Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law...would contribute to the process of national reconciliation and to the restoration and maintenance of peace.”). See also, Payam Akhavan, Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal, 20 HUM. RTS. Q. 737 (1998) (“[B]y exposing the truth before an official and impartial public forum, the ICTY can contribute significantly to altering power realities that are vestiges of indoctrination and misinformation to ethnic hatred and violence. But the ICTY can only be effective if it can establish facts, hard and inescapable facts, with a moral or interpretive narrative based on elementary humanitarian values, which can become part of a shared truth for all peoples in the former Yugoslavia. Even if it were possible, it is not necessary to establish an official and exhaustive historical record for all times in order to bring about reconciliation. With the world community as witness, the unifying power of truth telling can help heal the wounds, exorcise the specters of the past, and build a solid moral foundation for future generations.”).
Theorists and practitioners of post-conflict reconstruction commonly suggest that repairing these points of social connection is as important as restoring infrastructure,\(^1\) and that some form of post-conflict justice – or even formal criminal trials – is essential to the restoration and maintenance of peace.\(^2\)

The authoritative narrative theory follows this line, arguing that formal criminal justice is not only an essential part of restoration, but a particularly efficacious one: The problem in post-conflict societies is that shared, generally respected understandings have been destroyed, and these are precisely what court judgments provide. The formal legal authority that attaches to a court judgment is different from mere opinion: it has the power of the state (or of the

\(^1\) See, e.g., Sanela Basic, *Bosnian Society on the Path to Justice, Truth and Reconciliation, in Peace Building and Civil Society in Bosnia-Herzegovina Ten Years After Dayton* 357, 367 (Martina Fischer ed., 2006), available at http://www.berghof-conflictresearch.org/documents/publications/daytone_basic_rec.pdf (comparing how Bosnian textbooks treat the war, “one can only conclude that there is a sharp and profound disagreement with regard to this issue that both reflects and cements former ethnic divisions. . . . [R]egarding the nature of the conflict three explanatory models are being used: in textbooks for Serb pupils there was a civil war, in history books for Bosniaks the same event is described as aggression, whereas in the textbooks for Croat pupils it was a defensive war.”).


\(^3\) Cryer, supra note 1, at 24-25; see also Jane E. Stromseth, *Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law?*, 38 Geo. J. Int’l L. 251, 251-256 (2007) (“[E]nsuring that perpetrators of atrocities face some reckoning can be critical to moving forward on both an individual and community level in societies recovering from violent conflict. Ensuring some measure of accountability may help victims come to terms with the past . . . ”); OHR Press Releases, Senior Deputy High Representative, Peter Bas-Backer, *Bas-Backer: Reconciliation Indispensable for Post-War Recovery* (Oct. 27, 2006), available at http://www.ohr.int/print/?content_id=38368 (“Justice, Truth, Peace and Forgiveness are four elements in a reconciliation process that is indispensable for post-war recovery.”).
international community) behind it, but also the legitimacy of a neutral, professional judiciary; its pronouncements follow trials that accord different views the opportunity to be weighed in a procedurally balanced forum; the court’s powers of subpoena and contempt assure that information is made available. Thus, when judgment is rendered after a procedurally fair trial, the judgment exercises a special effect, displacing other merely partisan views, and as more and more discursive space is occupied by views which more and more members of the society can accept, the shared understandings essential to peaceful co-existence are restored. It is a claim about a causal chain, and the chain originates in the trial and its judgment.

This theory has functional and genealogical roots in the common law and its adversarial process. While one might suppose that the civil law would be more amenable to the construction of authoritative narratives – after all, the civil law traditionally aspires to establish the truth, where the common law is content with the more pragmatic goal of a verdict – the historical fact of the common law’s dominance in constructing ICL means that the authoritative narrative theory

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19 This is similar to what Stanley Hoffman called law’s “distinct solemnity of effects[,]” Stanley Hoffmann, The Study of International Law and the Theory of International Relations, 57 PROC. AM. SOC. INT’L. L. 26 (1963).
20 Cf. IWPR, supra note 1 (citing Pierre Hazan that in the Balkans it is possible to “narrow the scope of permissible lies. . . . If you can do that, maybe you can have different memories which can coexist peacefully, . . . And if you reach that point, even before reaching some kind of long-term common narrative, that’s something significant.”).
21 See Mirjan Damška, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, 121 U. PA. L. REV. 506, 581 (1972-1973) (“It is openly stated by some common law lawyers that the aim of criminal procedure is not so much the ascertainment of the real truth as the just settlement of a dispute. . . . In talking about ends of the criminal process continental lawyers place a primary emphasis on the discovery of the truth as a prerequisite to a just decision.”).
22 See e.g., Mark A. Drumbl, Toward a Criminology of International Crime, 19 OHIO ST. J. ON DISP. RESOL. 263, 272-273 (2003) (“. . . Anglo-American common law approaches exert a somewhat disproportionate influence in the structure and functioning of international criminal law and adjudication”); CRYER, supra at 1 (“in fact. . . the ICTY procedures were mainly adversarial in nature,” but also that “many of the amendments have been in an inquisitorial direction, inter alia increasing the judges’ controlling powers”). But see Daryl Mundis, From “Common Law” Towards “Civil Law”: The Evolution of the ICTY Rules of Procedure and Evidence, 14 LEIDEN J. INT’L. L. 367 (“While the first few trials at the Tribunal closely resembled common law criminal trials, the level of control being exercised by the Trial Chambers in recent cases is moving more in the direction of the civil law approach.”).
relies implicitly on the adversarial process, with its expectation of partisan clashes mediated, and ultimately resolved, by a neutral judge. We will return to this feature in Part III.

For many scholars and practitioners who accept the authoritative narrative theory in some form, the creation of definitive narratives is a central purpose of having trials;\(^{23}\) this understanding of intersects with claims about a ‘right to truth.’\(^{24}\) From this perspective, the expansive strategy of the Milošević Prosecution was a laudable effort to tell the story of the entire Yugoslav crisis through the prism of Milošević’s plan for a Greater Serbia.\(^{25}\) These narratives are not identical to the writing of history, nor to a search for the truth, but contribute to it, creating a social consensus in which history-writing and shared understanding is possible.\(^{26}\)

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\(^{23}\) See, e.g., Yasmin Naqvi, *The right to the truth in international law: fact or fiction?*, 88 INT’L REV. RED CROSS 245 (2006) (discussing the traditionally limited role of the truth in domestic criminal law and its far broader purpose in ICL; noting at 246 that “the unique objectives that international criminal law is supposed to fulfill. . . . range from such lofty goals as contributing to ‘the restoration and maintenance of peace’ and ‘the process of national reconciliation’ [citing to the Preambles of the ICTY and ICTR respectively] . . . reconstructing national identities from interpretations of the past through criminal legal analysis and process, and setting down a historical record with a legal imprint.”). See also Richard Ashby Wilson, *Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia*, 27 HUM. RTS. Q. 908 (2005); Daniel Joyce, *The Historical Function of International Criminal Trials: Re-thinking International Criminal Law*, 73 NORDIC J. INT’L L. 461 (2004).

\(^{24}\) Naqvi, supra note 23, at 248 ff (discussing the UN Commission on Human Rights Resolution 2005/66 which “[r]ecognizes the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights”).

\(^{25}\) See, e.g., Wilson, supra note 23, at 918 (noting the larger historical questions in the Milošević trial that “the ICTY had no choice but to decide”). See generally ARMATTA, supra note 4.

\(^{26}\) See Lawrence Douglas, *History and Memory in the Courtroom: Reflections on Perpetrator Trials, in NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945*, at 96 (Herbert R. Reginbogin & Christoph J.M. Safferling eds., 2006) (“Trials, too, particularly those burdened with the legacy of traumatic history, often succeed at shaping the terms of collective memory precisely by demonstrating – intentionally or not – a relaxed fidelity to the historical record.”). This perspective has been applied to ICTY trials as well. See Wilson, supra note 23, at 922-942 (describing Tadić and Krstić as extensive narratives of the Yugoslav conflict); MICHAEL P. SCHARF, BALKAN JUSTICE – THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 215 (1997) (“The record of the [Tadić] trial provides an authoritative and impartial account to which future historians may turn for the truth, and future leaders for warning. While there are various means to achieve an historic record of abuses after a war, the most authoritative rendering is possible only through the crucible of a trial that accords full due process.”).
The hard, optimistic edge of this view – that trials are or should be principally about generating transformative narratives – has receded in recent years. But to retrench is not to abandon, and even as scholars and practitioners sophisticate their claims, they have preserved an important part for narrative. Individual trials may not create undeniable truths about conflicts, but they establish facts and contexts necessary to a broader narrative. For example, adjudicating the mental state of defendants or deploying certain theories, like joint criminal enterprise (JCE), implicitly require the court to say something about broader social context and war aims. Moreover, the Tribunal’s jurisprudence as a whole provides broader narrative authority than any one trial. From this perspective, the Milošević Prosecution’s broad framing might not have produced a dispositive narrative on its own, but it could have contributed to one.

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27 See, e.g., Jenia Iontcheva Turner, Defense Perspectives on Law and Politics in International Criminal Trials, 48 VA. J. INT’L L. 529, 566-573 (2008) (“[T]he recent drive of the ICTY and ICTR toward completion of their proceedings has pushed the proceedings further away from some of their original political purposes and toward the adjudicative model.”). Cf. ARMATTA, supra note 4, at 1 (“The [Milošević] trial was about one person. It did not and could not provide a complete historical record or a full accounting of all people who perpetrated war crimes” but also criticizing the ICTY, at xi, for allowing the Accused to “further the ‘myth of Milosevic’” concerning Serb victimhood).

28 See Wilson, supra note 23; also Joyce, supra note 23 (assessing the narrative role of trials and their limits through a study of Philip Allott, Hannah Arendt and Martha Minow’s works, and proposing further recognition of the historical function of these trials).

29 See, e.g., SCHARF, BALKAN JUSTICE, supra note 26, at 215 (1997). Joint criminal enterprise or JCE is a theory of liability describing participation in a common plan or purpose that is itself criminal, or includes criminal acts. There are three types: type I, in which individuals share a specific criminal intent, like a murder; type II “systems of ill-treatment,” such as concentration camps; and type III or ‘theater JCE,’ in which individuals are liable for the “natural and foreseeable consequence of effecting [the] common purpose” such as ethnically cleansing a region. Types II and III require evidence of the scale and consequences of the system or campaign. See Prosecutor v. Tadic, Judgment, ICTY Appeals Chamber, Case No. IT-94-1-A ¶195-204 (July 15, 1999); Alison Marston Danner and Jenny S. Martinez, Guilty Association: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law, 93 CAL. L. REV. 75, 102-10 (2005).

B. Skepticism – The Theory’s Critics: Equally, other observers question the claim that judgments catalyze the creation of authoritative, transformative narratives. Courts’ technical procedures and focus on specific legal questions make them ill-equipped to write histories, while true justice requires a neutral position in the contestation of histories and nationalist perspectives. Apart from theoretical or court-centric concerns, there is also an empirical challenge: In the former Yugoslavia, there is little evidence that 15 years of judgments from the ICTY have changed the minds of people divided by violent conflict or demonstrably moved individuals in the different successor states towards a common vision of the conflict or even a shared understanding of who was victim and who perpetrator. In the Balkans and elsewhere, it is simply not true that single narratives win out after conflict.  

31 See, e.g., Helena Cobban, *Think Again: International Courts*, FOREIGN POLICY, February 17, 2006 (questioning the contribution of ICL to peace and human rights or the demand for criminal process from victims). These views have a considerable pedigree, including HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 19 (1964) (arguing that courts should not try to undertake historical interpretations of conflicts’ origins) and CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETATIVE ANTHROPOLOGY 173 (1983) (“Whatever it is the law is after, it’s not the whole story.”). See also LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST (2001).  


33 Wilson notes Arendt’s argument that “overbearing pressures to construct a nationalist narrative in the courtroom had detracted from the pursuit of justice and violated principles of due process[,]” Wilson, supra note 23, at 911.  

34 See John B. Allcock, *The International Criminal Tribunal for the Former Yugoslavia, in CONFRONTING THE YUGOSLAV CONTROVERSIES* 346, 380 (Charles Ingrao & Thomas Emmert eds., 2009) (investigating perceptions of the Tribunal in the region and concluding: “it has been possible to identify some uniformities in local responses to the ICTY. Aspirations that it might provide anything like a complete account of the experience of war have not been met – and for pragmatic reasons, cannot be. The hope that it might promote reconciliation between the peoples of the regions does not appear to have been realized. Reconciliation, if it is to be achieved, is an immense task that will clearly require more than judicial intervention and will extend well beyond the lifetime of the ICTY.”); Marko Attila Hoare, Bosnia-Hercegovina and International Justice: Past Failures and Future Solutions, 24 EAST EUROPEAN POLITICS & SOC’Y 191, 203 (2010) (“[T]here is no evidence to suggest that the ICTY – with no prior allocation of guilt to one side in the war, by treating war crimes on a purely individual basis, and by lumping together war criminals from all sides – has made any contribution to reconciliation between the former Yugoslavs. On the contrary. Unlike after World War II, the international community has failed to impose a narrative of who was to blame for the War of Yugoslav Succession and to force each side to accept it. Consequently, each side continues to
For these skeptics, the Milošević Prosecution’s strategy was a sprawling overreach that lost sight of the core purposes of having a trial, succumbing to the lure of a broader narrative of victimhood.\(^3\) They would prefer a narrower forensic trial paradigm in which such aspirations are rigorously excluded from consideration in designing and managing trials.\(^3\) At most, a forensic trial might contribute indirectly to historian’s construction of narratives, but the court’s own judgment will have little value even in this indirect way if its process has not rigorously excluded the ambitious goals that proponents of the authoritative narrative theory advocate for trials.

\section*{C. The Special Problem of Death:} We need not decide between these two general views just yet, however, because from either perspective, there will be a problem with a terminated trial’s contribution to the construction of narratives. The latter view is skeptical about any judgment’s ability to transform societies, but even though the former is considerably more enthusiastic, the weakest link in its argument turns out to be the first one: the existence of an authoritative judgment. For, at rates that would constitute a national scandal in a domestic jurisdiction, defendants in international criminal processes die. Out of the 161 individuals indicted at the
ICTY, 16 have died before completion or even initiation of their trials\(^{38}\) – a mortality rate just under ten percent. Two of the Special Court for Sierra Leone’s thirteen indictments were withdrawn due to death.\(^{39}\) Other international tribunals have had less dramatic rates, but still confront the problem.\(^{40}\)

When defendants die, trials stop. Because there are no mechanisms available for rendering judgment *post mortem* or *contra mortuum*,\(^{41}\) the trial simply stops, no outcome issues, and therefore – by the selfsame logic of the authoritative narrative theory – since the first critical link in the chain is never forged, the subsequent links never are either.\(^{42}\)

This is not to say that trials are only about narrative; many other goals have been advanced and even preferred for holding international trials.\(^{43}\) But the creation of narrative has assuredly been


\(^{41}\) Systems that tolerate trial *in absentia* should, in theory, have no objection to the idea, but this is not an option at the tribunals.

\(^{42}\) Cf. ORENTLICHER, *SHRINKING THE SPACE*, * supra* note 30, at 80, (Pollster Srdan Bogosavljević captured the implications of Milošević’s death this way: “Because of Milošević’s death, his trial did not have a ‘wow effect’. He’s dead, and he was not guilty. Had he been found guilty, we’d be able to get rid of this bad stuff and move toward cooperation with the European Union.”).

\(^{43}\) *See, e.g.*, CRYER, * supra* note 1, at 7-26 (defining the aims of ICL to include goals of punishment, such as retribution, deterrence, denunciation, education, incapacitation and rehabilitation, but also justice for victims, recording history and post-conflict reconciliation); BASSIOUNI, *INTRODUCTION TO INTERNATIONAL
one of the principal goals for many advocates and theorists, and whatever else trials may do, here we consider how that goal is affected by premature termination.

Nor does this suggest that only the final judgment has any value, or that no other effects manifest themselves through the trial process. Certainly the residuum of a terminated trial has uses: the accumulated transcripts, exhibits, briefs, orders and interim decisions constitute an archive with a meticulously documented provenance that any historian would value. The process itself – hearings, procedures, evidence-taking and testimony, indeed the very fact of a trial – may have an influence on people in post-conflict societies who see the rule of law and an alternative approach to social division taking shape. As Richard Holbrooke declared following Milošević’s death, “the trial was the verdict. . . . The Serb people came to understand the truth that he was not a nationalist, but an opportunist. A kind of rough and imperfect justice was served.”

Criminal Law 737-740 (2003) (listing prevention, enhancement of peace, providing victims with redress and remembrance). Pursuit of justice – whether for its own sake or for instrumental purposes – is surely the most commonly proffered rationale. See, e.g., Bogdan Ivanisević, The Milosevic Trial is Doing Its Job, Human Rights Watch, August 30, 2004, http://www.hrw.org/en/news/2004/08/30/milosevic-trial-doing-its-job (“The Hague tribunal has not altered this mentality of collective denial [among Serbs about the crimes committed in the conflict]. Nor can it be expected to; that change must come from Serbia itself. In the meantime, the tribunal’s main task is to provide justice for the victims and their families in the former Yugoslavia . . . ultimately its success will be judged by whether it can deliver justice, not by how long that process takes or whether it affects Serbia’s politics.”).

See Human Rights Watch, The Balkans, Weighing the Evidence: Lessons from the Slobodan Milosevic Trial 14 (2006) (“Even though the lengthy trial process did not lead to a verdict, the information introduced at trial was itself important. Future generations will use the evidence to understand the region’s history and how the conflicts came to pass.”).

44 See, e.g., Transitional Justice Forum, The Death of Slobodan Milosevic, March 11, 2006, http://tj-forum.org/archives/001780.html (“Even without a final verdict against Milosevic, the ICTY has contributed to transitional justice in Bosnia. . . . [T]he Tribunal was able to secure the transfer of Milosevic and others to its custody for trial, thus piercing these former leaders’ aura of invulnerability and permitting positive political change to begin in Serbia & Montenegro.”).

45 See, e.g., Chandra Lekha Sriram, Justice for Whom? Assessing Hybrid Approaches to Accountability in Sierra Leone, in Security, Reconstruction, and Reconciliation: When the Wars End 145, 147 (Muna Ndulo ed., 2007) (“[P]unishment may serve to restore or install democracy, the rule of law and respect for human rights by making it clear that law proscribes certain actions and these actions are subject to punishment.”) (footnote omitted); but see Jane Stromseth, Justice on the Ground: Can international Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?, 1 Hague Journal on the Rule of Law 87 (2009) (noting the limited impact of international criminal tribunals on the rule of law in post conflict societies).

Yet valuable as these elements may be, they are secondary and second-best. Judgment has a hierarchically superior role to these ancillary effects – most of whose purpose, really, is to contribute to and demonstrate the integrity of judgment – and it is hard to imagine a robust argument for holding criminal trials if one knew in advance that they would end without judgment. What Holbrooke calls ‘rough and imperfect justice’ is really the absence of authority and its effect – indeed, he calls it that precisely to make up for the evident fact that it is deficient. Thus the particular problem posed by Milošević is the lack of final authority, and the consequent search – at least by those convinced that judgment matters – for an alternative. For some, that search lighted upon the nearest thing: the Trial Chamber’s 2004 Decision on the Motion to Acquit.

II. The Decision

A. The ICTY and the Milošević Trial. The ICTY was found in 1993 by the United Nations Security Council, acting under its Chapter VII authority to take measures to ensure “international peace and security.” From the beginning, some observers have understood this to mean that the Tribunal, though a juridical institution, also had an implicitly political function, a mandate to

48 On the trial generally, see Boas, supra note 13; Armatta, supra note 4; Michael Scharf & William Schabas, Slobodan Milošević on Trial: A Companion (2002).


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contribute both to ending the ongoing wars in Bosnia and Croatia, and to eventual post-war reconciliation.\textsuperscript{50}

Even so, it was first and foremost a court, charged with trying individuals accused of committing violations of recognized international law in connection with the conflicts in the former Yugoslavia.\textsuperscript{51} The first international tribunal since Nuremberg, the ICTY’s Statute and the Rules of Procedure and Evidence are hybrids, but demonstrate considerable influence from the common law, adversarial model.\textsuperscript{52} The ICTY Prosecutor issued his first indictments in 1994; the first trial began in 1995, and soon many more followed.\textsuperscript{53}

When the Tribunal was formed, Milošević was already an established political leader, and he and his government the focus of war crimes accusations.\textsuperscript{54} An apparatchik in the Serbian Communist

\textsuperscript{50} See Michael Humphrey, \textit{International intervention, justice and national reconciliation: the role of the ICTY and ICTR in Bosnia and Rwanda}, 2 J. HUM. RTS. 495, 496 (Dec. 2003) (“The fact that the life span of the ICTY is explicitly linked to the restoration of peace reflects this wider role of international prosecutions. . . . They are part of the institutionalizing strategies, along with peace negotiations, democratic elections and truth commissions to promote national reconstruction after mass atrocity.”). See also, IWPR, supra note 1 (“[I]t has been widely hoped that the ICTY had a role to play beyond simply dispensing criminal justice. . . . over the years, an expectation has persisted that the ICTY’s work would or should help to reconcile the peoples of the Balkans with their violent recent history, even if only as a by-product of its central, specifically judicial aims”); ORENTLICHER, \textsc{That Someone Guilty Be Punished}, supra note 1, at 39-42 (“The word ‘reconciliation’ is not used in the Security Council resolution establishing the ICTY, nor is it included in the goals of the Tribunal on its own Web site. Even so, many have assumed that the Security Council’s determination that creating the ICTY would contribute to peace includes the notion of reconciliation – a view that has at times been reflected in ICTY judgments and reports.”)(footnotes omitted). See also Press Release, the ICTY, \textit{The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina} (May 17, 2001) http://www.icty.org/sid/7985 (referring to the Tribunal’s “mission of reconciliation”).


\textsuperscript{54} See RACHEL KERR, \textit{THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS AND DIPLOMACY} (2004) (“in December 1992 [US Secretary of State] Lawrence Eagleburger made what has become known as his ‘naming names speech’ in which he announced that the United States had identified
Party in Tito’s Yugoslavia, Milošević rose to the prominence in the late 1980s amid economic crisis, rising nationalist sentiment and political paralysis. Depending on one’s view, Milošević was the political beneficiary of this process, its principal instigator, or both. By the time Slovenia withdrew from Yugoslavia in mid-1991, Milošević was President of Serbia, the most powerful actor in Yugoslavia, and a recognized leader of Serbs throughout the country. Violent conflict broke out later that year over the withdrawal of Croatia, whose large Serb minority resisted with support from Belgrade. Bosnia’s withdrawal, in early 1992, initiated another conflict, this time with three-way fighting between Bosniaks, Serbs and Croats.55

As the most powerful figure in the remainder of Yugoslavia, Milošević had considerable military and political resources at his disposal to intervene in these conflicts, and his influence was widely acknowledged,56 throughout this period there were calls for his indictment.57 However, the ICTY Prosecutor only issued an indictment in May 1999, and at first only for events in Kosovo, where hundreds of thousands of ethnic Albanians were expelled and NATO forces had intervened.58 Milošević stayed in power until late 2000, when he was forced to concede defeat in an election, and was transferred in mid-2001 to The Hague. Indictments for crimes in Croatia and Bosnia were added. In all, Milošević was charged with 66 counts of war crimes, crimes against humanity, and – for Bosnia – genocide, and underlying these counts were thousands of

\[\text{ten suspected war criminals who should be prosecuted, including Milošević.}]\). See also \textit{Path to the Hague: Selected Documents on the Origins of the ICTY 55-57} (Cassese ed., 1996) (text of Eagleburger’s speech).

55 On the conflicts, see \textit{Misha Glenny, The Fall of Yugoslavia: The Third Balkan War} (1996); \textit{Laura Silber and Alan Little, Yugoslavia: Death of a Nation} (1997).


individual allegations. He was charged on theories of direct and command responsibility, each of which required proving his relationship to chains of command for the armed forces, police and paramilitaries doing the actual killing.

Shortly before trial began, the three indictments were joined. The theory by which the Prosecution successfully argued for joinder – of alleged crimes in three conflicts and three countries spanning eight years – was that Milošević and others were involved in a single “transaction”, an overarching joint criminal enterprise whose members sought to create a “Greater Serbia” through the violent expulsion of non-Serbs. The Prosecution therefore promised not only to demonstrate Milošević’s guilt, but to do so in way that showed the complicity of the senior leadership of Serbia, the Republika Srpska in Bosnia, and the Serbian Republic of the Krajina in Croatia. It was a theory that, implicitly, sought to explain the origins and course of the entire conflict – an ambitious goal, but one perfectly fit to the creation of a powerful, comprehensive narrative that might, in turn, be used to transform whole societies.

Trial began in 2002. Over the next four years, an enormous documentary record was produced – over 1.2 million pages of documentation, hundreds of witnesses, tens of thousands of pages of transcripts. Throughout the trial, Milošević denied the legitimacy of the Tribunal and refused counsel, though in fact he took an active role in the proceedings, cross-examining witnesses and

59 See, e.g., Prosecutor v. Slobodan Milošević, Case No. IT-01-50-I, Initial Indictment “Croatia” (Sept. 27 2001) (mentioning Milošević’s responsibility under articles 7(1) at ¶¶ 5-28 and under article 7(3) at ¶¶ 29-33), available at http://www.icty.org/x/cases/slobodan_milosevic/ind/en/ind_cro010927.pdf (last visited August 2, 2010).
61 Id. ¶ 16. Rule 49 stipulates that “[t]wo or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.” See ICTY R. P. Evid. 49 (1994).
62 BOAS, supra note 13, at xii-xiii.
arguing points. Despite this participation, however, his decision to represent himself became one of the defining features of the trial, providing him with a very public platform to advance his own interpretation of Yugoslavia’s conflicts, provoking several showdowns with the Chamber, and adding considerably to the length of a trial that was already sprawling. Because he was not represented by counsel – despite the enormous burdens of case preparation – the Chamber appointed amici curiae to assist; their tasks included raising certain motions – including filing a motion of acquittal at the end of the Prosecution phase. In late 2004, when the defense phase began (shortly after the Decision this Article discusses was issued), the Chamber imposed counsel on Milošević, appointing the same lawyers who had previously served as amici.

B. The Decision: The Prosecution rested in February 2004 and in early March the amici filed a motion under Rule 98bis, requesting acquittal on a number of counts and allegations; the Prosecution filed a confidential response. (Milošević himself, still not recognizing the ICTY’s authority, filed no motion.) The Chamber issued the Decision on 16 June 2004, allowing each

63 See PATRICIA M. WALD, TYRANTS ON TRIAL: KEEPING ORDER IN THE COURTROOM 51-54 (Open Society Justice Initiative, 2009) (discussing the obstacles raised by Milošević’s self-representation); David Scheffer, The Hague War Crimes Tribunal: Enough of Milosevic’s antics, N.Y. TIMES, July 13, 2004. But see Milošević case, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel (Apr. 4, 2003) (rejecting the Prosecution motion to impose defence counsel because of the adversarial character of the proceedings and the existence of a right to defense oneself, and noting Milošević’s competence, health and conduct did not preclude a fair and expeditious trial). The Prosecution made further requests that the Chamber impose counsel. See, e.g., Milošević case, Prosecution Motion for a Hearing to Discuss the Implications of the Accused’s Recurring Ill Health (September 23, 2003). In part this was out of fair trial concerns, but it was also because Milošević’s self-representation provided him with a highly effective public platform.
65 Following a request for clarification by the amici – in essence, a request from them – the Chamber ruled that the amici could pursue the motion. Milošević case, Order on Amici Curiae Request concerning the Manner of their Future Engagement and Procedural Direction under Rule 98 bis (June 27, 2003).
67 The amici’s motion also included confidential annexes.
count to stand but throwing out some elements of individual charges. Judge Robinson wrote a separate opinion, and Judge Kwon wrote a partial dissent.

The Decision is over 140 pages long and goes into considerable detail about both the legal standard applied and the individual allegations challenged by the amici – much more than Rule 98bis decisions in other cases, which were often “brief rejections without much reasoning or analysis.” This may be because of the exceptionally large number of allegations on which the Chamber decided to acquit, and because of the “important legal questions. . . concerning the existence of an armed conflict in Kosovo, the legal tests for deportation and forcible transfer and existence of Statehood for Croatia” upon which several counts relied.

The immediate consequence of the Decision was that trial continued. Since the Chamber had not acquitted, the defense phase began; the Accused and the amici – rechristened as assigned counsel – had to defend against each count, although not against every element the Prosecution had originally advanced in the final indictment. Instead, the Chamber ordered the Prosecution to prepare a redlined version of the indictments, and it was against this version that Milošević and the assigned counsel defended. Indirectly, the continuation of the trial led to the climax and drawn-out dénouement of the self-representation crisis in Milošević, as his role in the defense

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68 Decision, supra note 12, at ¶ 316-30.
69 BOAS, supra note 13, at 122. The earliest decisions from before 2000 (often brought under Rule 54, before Rule 98bis was promulgated, or with reference to both) are only two or three pages – as in Delalić, Blaškić and Kupreskić – but since then the decisions have been getting longer: Kordić/Čerkez (2000) – nine pages; Galić, 2002 – 11 pages; Blagojević/Jokić (2004) – 21 pages. Jelisić (1999) and Sikirica (2001) are considerably longer – 44 and 60 pages respectively – but then these deal with successful motions to acquit on genocide charges (and, in Sikirica, with multiple Accused); even these are less than half as long as the Decision in Milošević.
70 BOAS, supra note 13, at 122-3. Boas was Senior Legal Officer in Trial Chamber III, which heard Milošević, and therefore has good reason to know.
phase became even more central and his denialist strategy and poor health even more disruptive of the trial process the Chamber and Prosecution had envisioned.\textsuperscript{71}

\textbf{C. Standard of Review}: Defeating a motion to acquit requires an extremely low threshold – more than is required for an initial indictment, but not by much.\textsuperscript{72} At the time the Decision was issued,\textsuperscript{73} Rule 98bis provided for acquittal before the defense phase if the Trial Chamber “finds that the evidence is insufficient to sustain a conviction on that or those charges.”\textsuperscript{74} Within the Tribunal’s jurisprudence, the test for insufficiency derives, as so much does, from the Tadić case, through subsequent refinements in other cases\textsuperscript{75} and confirmation by the Appeals Chamber in \textit{Jelisić}:

\begin{quote}
“Whether there is evidence (if accepted) upon which a tribunal of fact \textit{could} be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question. . .; the true test is not whether the trier of fact would in fact arrive at a conviction beyond reasonable doubt on the Prosecution evidence if accepted, but whether they could’ or to put it as the Appeals Chamber later did in the same case, a Trial chamber should only uphold a Rule 98bis Motion if it is ‘entitled to conclude that no reasonable trier of fact could find the evidence sufficient to sustain a conviction beyond reasonable doubt. . .’.”\textsuperscript{76}
\end{quote}

\begin{footnotesize}
\textsuperscript{72} See Karel de Meester, Commentary, \textit{in ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 2003-2004}, at 455 (André Klip & Göran Sluiter eds., 2010) (“The standard of proof required in Rule 98bis proceedings is lower than the standard of proof normally required in criminal proceedings”); Steven Freeland, Commentary, \textit{in ANNOTATED LEADING CASES, supra}, at 131 (comparing the test of Rule 98bis with the \textit{prima facie} requirement of an indictment, and noting that “Given that the [Rule 98bis motion] arises after the prosecution has had the opportunity to present its evidence-in-chief before the tribunal, as opposed to simply relying on the evidence contained in the indictment, this may explain why. . .the standard applied by the tribunal appears to be of a higher threshold than with the confirmation of an indictment.”).
\textsuperscript{73} The Rule was amended shortly after the Decision was issued, and probably in consequence of it; see below.
\textsuperscript{74} Rule 98 bis (B).
\textsuperscript{75} The Decision notes the contributions from Delalić and Kordić. Decision, supra note 12, at ¶ 9-10.
\textsuperscript{76} Decision, supra note 12, at ¶ 9 (emphasis and ellipsis in the Decision). \textit{Cf.} Prosecutor v. Jelisic, Case No. IT-95-10-A, Judgement, ¶ 37 (July 5, 2001).
\end{footnotesize}
Having identified a definitive test, the Milošević Chamber immediately clarifies how it will apply it. The Chamber will acquit:

- “Where there is no evidence to sustain a charge”\(^{77}\)
- “Where there is some evidence, but it is such that, taken at its highest, a Trial Chamber could not convict on it...even if the weakness in evidence derives from the weight to be attached to it, for example the credibility of a witness”\(^{78}\)
- But if the strength or weakness of evidence depends on a witness’ credibility or reliability and “on one possible view of the facts a Trial Chamber could convict on it” the trial should continue.\(^{79}\)

Sufficiency should be determined “on the basis of the evidence as a whole[,]”\(^{80}\) but the Chamber also considers “the sufficiency of the evidence [for a given charge] as it pertains to elements of [the] charge”\(^{81}\) – i.e. not as an all-or-nothing evaluation of the whole charge. (It was on this basis that the Chamber was ultimately able to acquit Milošević on hundreds of specific allegations while preserving each overall count.)

Throughout its deliberation on a motion to acquit, the Chamber is obliged to take the Prosecution evidence at its highest – to assume its credibility unless it is utterly incapable of belief.\(^{82}\) This is true of all the factual evidence: in discussing the question of Milošević’s guilt under a so-called JCE III theory,\(^{83}\) the Chamber notes that it

\(^{77}\) Decision, supra note 12, at ¶ 13 (2).
\(^{78}\) Id. ¶ 13 (2).
\(^{79}\) Id. ¶ 13 (3).
\(^{80}\) Id. ¶ 13 (4).
\(^{81}\) Decision, supra note 12, at ¶ 13 (2).
\(^{82}\) Id. ¶ 13 (3) (obliging the Chamber to uphold the Prosecution evidence if “on one possible view of the facts a Trial Chamber could convict on it...’’); and id. ¶ 13 (6) (citing Prosecutor v. Jelisic, IT-95-10-A, Judgement ¶ 55 (July 5, 2001): “the Trial Chamber was required to assume that the prosecution’s evidence was entitled to credence unless incapable of belief. That is, it was required to take the evidence at its highest and could not pick and choose among parts of that evidence.’’).
\(^{83}\) This is the broadest form of JCE, contemplating liability for all members of the JCE for any reasonably foreseeable crimes committed by any members, even if the others did not share the requisite mens rea for those crimes. See discussion of JCE supra note 29. For example, genocide – which is a special intent crime – could be charged against a member of a JCE of type III, even if that member himself did not intend to commit genocide. This
“will not make a final determination as to the one or the other basis at this stage, that is, whether to acquit the Accused at this stage of one or the other basis of liability. The reason is that a determination as to the Accused’s liability depends to a certain extent on issues of fact and the weight to be attached to certain items of evidence, which calls for an assessment of the credibility and reliability of that evidence. These issues do not arise for determination until the judgement phase.”

Much of this will sound familiar to lawyers in the common law tradition, since it is, almost verbatim, the motion for ‘no case to answer.’ Indeed, the Chamber’s application of the Jelisić test follows point for point the logic of the classic formulation from R v. Galbraith, which the Decision quotes at length.

Consistently, the Decision distinguishes between “the Trial Chamber” deciding this case and “a Trial Chamber” when considering the standard of review. It is therefore advancing something rather like the typical appellate standard: An appellate court normally reverses the court below only if no reasonable trier of fact could find otherwise, just as, in this case, the Chamber will acquit only if no reasonable trier of fact could convict – even if this particular trier of fact, the Trial Chamber sitting in this case, already knows it wouldn’t. Indeed, the Chamber reiterates that “a ruling that there is sufficient evidence to sustain a conviction on a particular charge does not necessarily mean that the Trial Chamber will, at the end of the case, return a conviction on that

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84 Decision, supra note 12, at ¶ 293.
85 Id. ¶ 12 -13. We will return to the Chamber’s treatment of the common law analogy in the next section.
86 See, e.g., Decision, supra note 12, at ¶ 13 (7) (“When, in reviewing the evidence, the Trial Chamber makes a finding that there is sufficient evidence, that is taken to mean that there is evidence on which a Trial chamber could be satisfied beyond reasonable doubt of the guilt of the accused.”).
charge[;]” it even notes that it would be possible to acquit even if the accused called no
evidence.\textsuperscript{87}

The standard of review, and the position of the Decision at the mid-point of trial, suggest its
interim quality. If a Chamber accepts a motion to acquit, this terminates proceedings – a decisive
and consequential step that logically has the same effect as final judgment does within the
authoritative narrative model. But if the Chamber denies the motion, trial continues without
prejudice to the final evaluation of the sufficiency and meaning of the evidence, testimony, briefs
and other elements of the trial, apart from the minimal gloss that they were not, considered as in
the most positive light, impossibly, objectively inadequate.

But as to the effect on final judgment, there is no valence, or almost none, from the fact of
denying a Rule 98\textit{bis} motion, as the \textit{Miloševi\'c} Chamber did. The effect is to continue the trial –
and at the time, as their behavior suggests, this was the expectation of all parties, which means
they too understood the Decision as interim step, as nothing final.\textsuperscript{88} How then did they react to
the prospect, and then the fact, of the Decision? Did those reactions change when what was
supposed to be interim became terminal?

\textsuperscript{87} Decision, \textit{supra} note 12, at ¶ 13 (6). This is a feature of the rule that has caused considerable consternation: “It is
apparent that the rationale behind the \textit{sui generis} ‘no case to answer’ mechanism at the ICTY, whereby, following a
ruling that there is sufficient evidence to sustain a conviction on particular charge at the end of the prosecution case,
it is nonetheless possible for the same trial chamber to acquit the accused at the end of the case (even where she or
he calls no evidence) has left many at loss.” Idi Gaparayi, \textit{The Miloševi\'c Trial at the Halfway Stage: Judgement on
the Motion for Acquittal}, 17 LEIDEN J. INT’L L. 737 (2004). As we shall see, this is not the part of the rule that
should leave people confused.

\textsuperscript{88} Carla Del Ponte’s address to the Security Council on 30 June 2004, just after the Decision, did not mention the
\textit{Miloševi\'c} case in particular. Press Release, the ICTY, \textit{Address by Carla del Ponte, Chief Prosecutor of the
International Criminal Tribunal for the Former Yugoslavia, to the United Nations Security Council} (June 30, 2004),
http://www.icty.org/sid/8404.
III. Asymmetrical Strategic Interests surrounding the Decision

The different parties had very different interests in the Decision. Obviously the Prosecution, Milošević and the amici desired different outcomes, but they also had different institutional relationships to the Decision – as did the judges – that created, not merely opposing or divergent interests, but asymmetries that affect how we may interpret the Decision.

A. The Accused: Milošević, who had consistently denied the legitimacy of the Tribunal,89 did not need to take any position on the Decision; since to him the Tribunal was illegitimate ab initio, its pronouncements had no authority. But despite this delegitimizing strategy, Milošević took an increasingly active part in the trial90 and certainly had a strategic interest in the Decision: full acquittal would have been a triumphant vindication for him, and even acquittal on some counts would have brought the Prosecution’s case into question.

Milošević may have been genuinely concerned the Decision could be interpreted as a vindication of the Prosecution’s basic claims – or he may not have perceived its potential for undermining the Prosecution case – but either way, his rejectionist strategy led him not to fully exploit

89 See, e.g., SCHARF & SCHABAS, supra note 48, at 97-100 (2002).
90 See BOAS, supra note 13, at 12 (“Milosevic himself had no intention of playing into the prosecution’s hands and remaining mute while the case against him was laid out and determined. Despite his belligerence towards the court, he engaged in a robust and, at times, competent forensic defence . . .”); Joanne Williams, Slobodan Milosevic and the Guarantee of Self-Representation, 32 BROOKLYN J. INT’L L. 553, 587 (2007) (“Milosevic ‘fully engaged in the cross-examination of Prosecution witnesses’ and presented consecutive witnesses in his defense, thereby actively partaking in trial proceedings.’”). Williams is citing Prosecutor v. Milosevic, Case No. IT-02-54-AR73.7, Prosecution Response to “Assigned Counsel Appeal Against the Trial Chamber's Decision on Assignment of Defence Counsel” and to “Defence Reply to ‘Prosecution Motion to Strike Ground of Appeal (3) from Assigned Counsel ‘Appeal Against the Trial Chamber's Decision on Assignment of Defence Counsel,’” para. 90 n.144 (Oct. 11, 2004).
opportunities presented to him by the Decision, such as stressing the large number of specific allegations that were dropped.\textsuperscript{91} To do so would have required him to change the different public strategy than he had consistently followed throughout the trial. Exploiting the Decision would have meant engaging with it, not only pragmatically\textsuperscript{92} but in a way that would legitimate it: emphasizing that it had acquitted him on some allegations would not only have begged the question about all the others, but also conceded the Chamber’s authority to acquit him. Milošević’s grand strategy of radical rejectionism encouraged him to a judicious silence: After all, Milošević had not even filed his own motion for acquittal; he was not asking the court for any judgment.

\textsuperscript{91} The transcripts for the defense phase do not show Milošević discussing the Decision, although the assigned counsel and Prosecution do on various occasions. Once, after it is first invoked by Judge Robinson, Milošević makes an oblique reference to the Decision in a discussion of municipalities in Bosnia in which genocide was charged – some of which had been removed by the Decision:

\begin{quote}
Transcript 5 September 2005 (Page 43693)
6 JUDGE ROBINSON: You are finished reading that list. Let me remind you, Mr. Milosevic, that the Rule 98 bis decision found that there was not enough evidence to support the allegation in paragraph 32 [of the indictment] in relation to some of the villages or municipalities mentioned. In fact, as far as paragraph 32 is concerned, you need only concern yourself with Brcko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Kotor Varos, Kljuc, Bosanski Novi. And I am checking to see whether the decision affected paragraph 33.
7 THE ACCUSED: [Interpretation] Mr. Robinson, could you please let me know what evidence, as you say there was no evidence for these places, but what was the evidence that Mr. Nice presented here about the other places linking me –
8 JUDGE ROBINSON: Mr. Milosevic. Mr. Milosevic, the Rule 98 bis decision was published and was available to you. But I bring that to your attention so we don't waste time. And I'll ask the legal officer to give me the information in relation to paragraph 33.
9 Go ahead, Mr. Milosevic.”
\end{quote}

This exchange shows that, in effect, Milošević has accepted the benefit the Decision conferred – its removal of certain municipalities from the list of allegations – but persisted in denying that any evidence has been submitted, and, apparently, refuses to actually read the Decision (or to admit that he has).

\textsuperscript{92} See \textit{BOAS, supra} note 13, at 12 (noting that Milošević “all the time maintain[ed] at least the façade that he was interested only in telling the ‘truth’ to the world, a political and social truth, that placed NATO and its member States, as well as the Vatican, on trial. Yet although the rhetoric gradually subsided and Milošević cooperated superficially with the trial process and the institution he had vowed to bring down, his conduct and manipulative talents continued to have an extraordinary impact on the viability of the proceedings.”).
But for the *amici curiae*, Prosecution, and Chamber, the calculus was different: their roles in the trial process assumed, accepted and depended upon the Tribunal’s legitimacy; in consequence they needed to engage with the Decision substantively and procedurally, and had incentives to characterize it in particular ways to the other parties and the world.

**B. The Amici Curiae:** The *amici* could hardly ignore or ultimately undermine the Decision; after all, they had filed the original motion of acquittal – a power they had evidently actively sought.\(^93\)

Thus the *amici’s* strategic position in relation to the Decision is perhaps most conventionally contrasted with that of the Prosecution: seeking diametrically opposed outcomes, but in a structurally homonymous position vis-à-vis the institution. In filing the motion for acquittal, they appeared to be standing in for the Accused.

But to suppose that the *amici curiae* occupied the structural position normally filled by a cooperative defendant is not entirely right, because as their name and the history of their appointment implies, the *amici* were formally mandated to aid the court, not the Accused. The Chamber first appointed the *amici* when it became clear that Milošević was going to refuse counsel and represent himself; their mandate was “not to represent the accused but to assist in the proper determination of the case” and specifically to

“assist the Trial Chamber by: (a) making any submissions properly open to the accused by way of preliminary or other pre-trial motion; (b) making any submissions or objections to evidence properly open to the accused during the trial proceedings and cross-examining witnesses as appropriate; (c) drawing to the attention of the Trial Chamber any exculpatory or mitigating evidence; and (d)

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\(^93\) *Milošević case*, Order on Amici Curiae Request concerning the Manner of Their Future Engagement and Procedural Directions under Rule 98 *bis* (June 27, 2003) (noting the *amici*’s request for clarification of their role in relation to Rule 98*bis* and authorizing the absence of one of the *amici* from July on to prepare the motion).
acting in any other way which designated counsel considers appropriate in order
to secure a fair trial..." 94

Thus although the *amici* indeed were empowered to represent certain interests of the Accused, they were also circumscribed in that power, and had other, clearly distinct obligations running to the Chamber. 95 They were far from being true substitutes for the Accused, with whom they shared only an imperfect identity of interest.

Consistent with the *amici’s* role as advisors to the Chamber rather than substitute defense counsel, their motion to acquit was restrained and neutral. In particular, the *amici* did not challenge the Prosecution’s core theory of Milošević’s liability, and they did not actually move for acquittal on all charges. Instead, they challenged a narrower range of counts and allegations for which the Prosecution had led no evidence whatsoever, or which relied on a particular legal test or interpretation the *amici* contested. In the first group were, for example, most allegations of shelling and sniping at Sarajevo; those in the second concerned disagreement about the points at which armed conflict in Kosovo had begun and Croatia had become a state – issues affecting the jurisdiction of the Tribunal and that concerned a choice of legal theories as much as factual claims. 96 They also challenged certain allegations that had been charged under multiple

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95 This role was consistent with the evolving understanding of *amicus’* purpose. See Boas, supra note 13, at 251-256 (describing how the role of the *amicus curiae* in the Milošević trial differs from their tradition functions); Samuel Krislov, *Amicus Curiae Brief: From Friendship to Advocacy*, 72 Yale L.J. 694 (1962-1963) (describing the historical definition of the amicus curiae in Common Law and the shift of its role from neutrality to advocacy in the USA; explaining at 720-721 that “[o]n occasion, the amicus curiae has been an agent of the court acting as champion of the court's point of view, vigorously pursuing and defending a legal position at the request of the bench itself. In the main, however, the amicus curiae has been a means of fostering partisan third party involvement through the encouragement of group representation by a self-conscious bench.”).

96 These claims, had they been accepted, would have led to acquittal on counts under Articles 3 and 5 of the Statute.
theories. Only on Bosnia did the amici challenge more directly the Prosecution’s evidentiary basis, arguing that there was no evidence that Milošević committed or was complicit in genocide; they also disputed the Prosecution’s theory concerning the proper mens rea for joint criminal enterprise of the broad, JCE III type. However, apart from genocide, the amici did not challenge entire counts for Bosnia, only specific allegations in the Schedules.

As for the other allegations and counts not directly challenged, the amici’s brief “does not comment upon the sufficiency of the evidence called by the Prosecution on those counts upon which no submission to acquit has been made under Rule 98bis.” Perhaps the amici thought this was a form of steely, professional resolve, a refusal to concede other matters; but of course, they were the ones who decided what to request acquittal for, and what not to. By the very act of not commenting, they all but ensured – unless their friends, the judges took it up proprio motu – that everything else would be passed through to the defense phase. Concerning the amici’s failure to challenge the core theory of liability, Boas notes that

“[t]his reticence is curious, given the relative success achieved in respect of the crime base evidence challenged and the dissent of Judge Kwon in respect of the accused’s lack of genocidal intent. Perhaps the amici curiae were concerned

97 For example, the amici moved for dismissal of some allegations concerning forced removals from the village of Nogavac, which had formed part of Kosovo Counts 1 and 2. Count 1 referred to deportation, which involves forced transfer over an international frontier; Count 2 referred to forcible transfer, which involves forced transfer inside a state. The Prosecution incorporated by reference the same paragraphs for both counts (para. 59-61, which discuss forced transfers and the climate of terror). The amici objected that for removals from the village of Nogavac, there was no evidence of removal across a frontier, and therefore they challenged that allegation as part of Count 1, but they did not challenge the same evidence for Count 2 (as three of the five witnesses gave sufficient evidence of forcible transfer). See generally Milošević case, Amici Curiae Motion for Judgement of Acquittal Pursuant to Rule 98bis ¶¶ 39-51 (March 3, 2004) [hereinafter, Amici Curiae Motion].
98 Amici Curiae Motion, supra note 97, at ¶ 161-2; see also Decision, supra note 12, at ¶ 5 (summarizing the amici’s Motion).
99 Id., ¶ 155-63 (noting the various charges but then only discussing the genocide counts and noting, at 163, that “schedules A-F [which follow] contain only those alleged crimes upon which it is submitted that there is either no evidence or insufficient evidence to sustain the retention of the allegation within the Indictment at this stage”).
100 Id. ¶ 2.
101 See discussion below.
that unsuccessful challenges on the accused’s actual responsibility might create an undesirable expectation or impression. Perhaps the prosecution can consider itself fortunate this avenue was not pursued further.”

Of course, neither an amicus nor a defense attorney should necessarily challenge everything. The question is not ‘will the evidence suffice’ but ‘might it suffice if uncontradicted.’ An actor playing by the rules, as the amici were, might not challenge evidence that, on its face, seems to require a defense – and, as Boas has just noted, it might be unstrategic to do so. But playing by the rules doesn’t preclude pressing one’s advantage: even a cooperative defendant would challenge any evidence that is vulnerable. It is not clear the amici conceived of their role this way: For charges concerning the siege of Sarajevo, the amici challenged all but one sniping and one shelling allegation; leaving those single allegations in placed ensured that, even if the Chamber accepted the amici’s arguments – as in fact it did – the count would survive. It is also questionable whether the amici’s decision to focus on the legal standards for armed conflict and international conflict in Kosovo and Croatia were truly the weak points in the Prosecution case.

This restraint and neutrality, while a professional response to the amici’s ambiguous structural position between Accused and Chamber, undermines the potential value of the Decision. If the amici were in any way constrained by their role – by their lack of an identity of interest with Milošević – then it is less clear to what degree the Decision even represents a robust adjudication of the evidence, at least in the way the Tribunal’s adversarial process requires. Indeed, the consequences of amici’s imperfect identity with the Accused are all the more acute precisely because of the adversarial process, for which an identity between defendant and zealous attorney is assumed and essential. A less adversarial process might make the disjuncture between

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102 Boas, supra note 13, at 127-8.
103 See discussion of the Sarajevo counts, below.
defendant and ‘friend of the court’ less disruptive of the narrative goals of ICL, but that possibility was not available at the ICTY.

C. The Prosecution: The Prosecution approached the impending conclusion of its case and a Rule 98bis motion in an atmosphere of doubt; many observers were suggesting it had failed to assemble a coherent and compelling case, and was likely to secure conviction on some counts, but not, critically, on genocide. For the Prosecution, acquittal on even a few counts would have been catastrophic. But, given the structural position of the Prosecution as an integral element of the ICTY, it could not openly contest the legitimacy of the process; its options would have been restricted to procedural maneuvers and questioning the wisdom of this particular Chamber’s reasoning, but within a framework of institutional buy-in that compelled public obedience. Milošević’s strategy of defiant nonchalance was simply not available to the Prosecution.

Initially, the Prosecution placed its hopes on a Rule 98bis motion not being filed at all. Prosecutors could reasonably expect that Milošević would not file, and so their strategy focused on the amici. The Prosecution objected to letting the amici file a Rule 98bis motion, on the theory that they were not “parties to the proceeding,” as the Rule requires, either the

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104 See, e.g., AP, U.N. failed in Milosevic genocide case, experts say, ST. PETERSBURG TIMES, February 29, 2004 (“When U.N. prosecutors opened their case against Slobodan Milosevic two years ago, they set out to get him convicted of genocide. The consensus today is, they failed. . . . ‘The prosecution was underwhelming,’ said Michael Scharf. . . . ‘But bit by bit, piece by piece, they proved their case, at least for many of the charges. It will at least be enough to put him in jail for the rest of his life,’ Scharf said.”); Milosevic Likely to be Acquitted on Genocide Charges, FOXNEWS, February 28, 2004, available at http://www.foxnews.com/story/0,2933,112820,00.html (“Trial-watchers believe the prosecutors built an impregnable case that Milosevic was involved in war crimes in Croatia, Bosnia and Kosovo during the wars of the 1990s that tore apart the Yugoslav federation. But they failed to show an intent to commit genocide, experts said.”).

105 Milošević case, Prosecution Motion under Rule 73(A) for a Ruling on the Competence of the Amici Curiae to Present a Motion for Judgement of Acquittal under Rule 98 bis (February 4, 2004).
Accused should file, or no one should. The Chamber rejected that argument.107 When its preemptive strategy failed, the Prosecution turned to a conventional defense of its case.108 Its approach was technical and correct, but far less conflicted than the amici’s; in its briefs, the Prosecution readily conceded the absence or insufficiency of evidence on numerous allegations while nonetheless arguing to maintain all counts.109 After the Decision came down, the Prosecution undertook a rearguard action to preserve the overall scope of the case Milošević would have to defend against.110

D. The Chamber: For the Chamber, of course, the Decision’s legitimacy was not in question and the judges – Robinson, Bonomy, and Kwon111 – had no interest in minimizing its effects; they wrote it. Their concern, rather, would have been with its consequent effect on the remainder of the trial and on the ICTY’s jurisprudence and legacy; in particular, they would have an interest in how the Decision affected other Rule 98bis proceedings. Like the other actors in the trial, the judges were aware of the Decision’s interim function, and were not planning that it would turn out to be the most definitive statement they were allowed to make. In fact, the evidence suggests they were appalled at the length and comprehensiveness of the document they had produced, and took steps to avoid a repetition.

109 See, e.g., id. For example, for Croatia, the Prosecution agreed that 1) detention camps listed in ¶ 64(b) (Kumbor) and ¶ 64(f) (Zrenjanin) should be excised from the indictment (part of counts 6 to 13) (¶¶ 195-198), and 2) and Ćelija should be excised from ¶ 71 of the indictment (part of counts 17 to 20) (¶¶ 213-214).
110 I discuss this at length in Section IV.
111 Judge May had withdrawn from the case the previous month and died shortly thereafter. See Press Release, the ICTY, Sir Richard May (1 July 2004), http://www.icty.org/sid/8402.
The most significant tension that arises in connection with the Decision involves the role of judges at the ICTY as the ultimate trier of fact. As we have seen, the Decision discusses at some length the relationship of Rule 98bis to the claim of ‘no case to answer,’ and indeed this is yet another example of extensive common law influence on the Rules. Although the Decision is at pains to assert that domestic rules are not to be imported wholesale, this is precisely what it does with the standard from R v. Galbraith. Yet the Chamber’s rule – though it is directly derived from the common law – produces a very different dynamic and set of implications in the context of a trial at the ICTY.

The Chamber discusses the ways in which the Rule 98bis procedure derives but also differs from the common law motion. Presumably the reason the judges felt it important to distinguish Rule 98bis from its common law antecedent arises from one of the key structural differences between the ICTY and the common law: namely, the lack of a jury. In the common law, criminal cases are almost always heard before a jury, which is the ‘trier of fact,’ while the judge acts as a supervisory ‘trier of law.’ The Chamber notes that “an essential function of the procedure [at common law] is to ensure that at the end of the Prosecution’s case the jury is not left with evidence which cannot lawfully support a conviction; otherwise it may bring in an unjust conviction.” At the ICTY, both these roles are vested in the Chamber, and the traditional purpose of ‘no case to answer’ is, in a sense, a solution without a problem.

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112 See, e.g., Gaparayi, supra note 87, at 750.
114 Decision, supra note 12, at ¶ 11.
115 One former ICTY prosecutor notes that “the motion has served more as a tool of trial management allowing the Chamber to ‘prune’ the historically large cases by identifying those portions of the indictment that are not sufficiently supported. . . .”. Dermot Groome, Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?, 31 FORDHAM INT’L L.J. 911, 963 (2008).
Thus it is curious that, in describing a circumstance in which the Milošević case should continue (namely if there is evidence which could be sufficient for conviction), the Chamber asserts that “[t]his accords with the general principle in common law jurisdictions that a judge must not allow a submission of no case to answer because he considers the prosecution’s evidence to be unreliable, since by doing so he would usurp the function of the jury as the tribunal of fact.”\(^\text{116}\) As the Chamber is the trier of fact, it would only be usurping itself.

Still, well thought out or not, having put this gloss on their own logic, the judges signal that they are not signaling their own view about the Prosecution evidence’s ultimate sufficiency. Unless its express wording indicates something else – unless, in effect, the Chamber has arrogated to itself more than it is supposed to – the Decision primarily stands for the proposition that the Prosecution has not been irremediably incompetent, that it delivered some of what it promised in the initial indictment, at least enough of it to continue.\(^\text{117}\)

### i. The Pointlessness of Rule 98bis – Robinson’s Separate Opinion

Interestingly, even though the Decision discourses at length on the common law rule’s importance in protecting the jury’s role, it does not mention the obvious disjunction that there are no juries at the ICTY; instead it proceeds immediately to formulate its own rule along the same, common law lines.\(^\text{118}\) Only in his separate opinion does Judge Robinson note that “[t]hus, in principle, there is far less danger of an unjust conviction at the Tribunal than in criminal proceedings in common law

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\(^{116}\) Decision, \textit{supra} note 12, at ¶ 13 (3).

\(^{117}\) Cf. Prosecutor v. Strugar, Case No. IT-01-42-T, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98 bis ¶ 16 (June 21, 2004) (“rarely, a case will arise where the only evidence in support of a conviction is so inherently incredible that no Trial Chamber could accept its truth”), \textit{cited in} Gaparayi, \textit{supra} note 87.

\(^{118}\) The Decision does mention the principle that domestic procedures do not govern the Tribunal and must be modified to fit its Statute and purposes.
jurisdictions; there is certainly less need to insulate judges of a Trial Chamber from evidence which can not lawfully sustain a conviction.”¹¹⁹ Robinson suggests that this difference should provide the basis for modifying the rules “in the transition from their domestic berth to the Tribunal.”¹²⁰ He adduces a different rule from the ICTY’s different structure: “surely the fact that a Trial Chamber is composed of professional judges, whose need to be insulated from weak evidence is not as great as a lay jury, must make a difference to the application of the no case to answer procedure. . .”¹²¹

As it turns out, Robinson’s agenda is to cut back the Rule 98bis proceeding, and leave more to the judgment phase:

Charges at the Tribunal are multilayered to a degree that is generally not present in indictments at the domestic level. Thus, a charge could have as many as a hundred or more separate allegations. . . . Is it useful to devote the Tribunal’s resources to an exercise which may result in the elimination of a dozen of these hundred or more individual allegations or details. . . .while the charge or count remains intact? Is there any prejudice to an accused in leaving those dozen individual allegations for consideration. . .at the judgment phase?

Robinson therefore suggests constricting Rule 98bis to submissions

- “that are designed to eliminate a charge or count rather than individual allegations of fact relating thereto; in most cases such submissions will relate to a missing legal ingredient of a charge, e.g. mens rea . . . [and]
- “that allege that there is no evidence, as distinct from insufficient evidence, to sustain a charge. . .”¹²²

Thus, on Robinson’s view, the ‘no case to answer’ process would be radically reduced as a measure of judicial economy and a consequence of judges’ greater professional perspective.¹²³

¹¹⁹ Decision, supra note 12, Separate Opinion of Judge Patrick Robinson ¶ 11.
¹²⁰ Id. Separate Opinion of Judge Patrick Robinson ¶ 12.
¹²¹ Id. Separate Opinion of Judge Patrick Robinson ¶ 13.
¹²² Id. Separate Opinion of Judge Patrick Robinson ¶ 17 (emphasis original).
One might question whether the claim of economy is accurate: although much effort would be saved at the mid-point of the trial, not deciding on specific allegations would mean the Defense would feel compelled, strategically, to address them, since it could not know with certainty whether the Prosecution case had been strong or not. Perhaps Robinson’s view is a function of his frustration at having just waded through the entire set of claims and counterclaims for the Rule 98bis process. The Decision took months to write – but then, he never actually got to the final judgment, when, if his preferred approach had been in place, all those claims would have reappeared.¹²⁴

Robinson focuses on the difference judges’ professionalism makes, but surely the more relevant fact is that the Trial Chamber – professional or not¹²⁵ – is also the ultimate trier of fact. Concern with usurpation of the jury’s function is irrelevant in the unitary model of the ICTY – but not, as Robinson supposes, because of judges’ professional skill, rather because of the total identity between judge and jury. It is not the judges’ professionalism, but their position, that makes the Rule 98bis process pointless.¹²⁶

¹²³ Judge Robinson published an article the following year that argued, among other things, for revision of Rule 98bis. Patrick L. Robinson, *Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY*, 3 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1037-1058 (2005). In the meantime, his view had prevailed: Rule 98bis was amended in December 2004, shortly after the Decision in Milošević, and now allows the Chamber “by oral decision and after hearing the oral submissions of the parties, [to acquit] on any count if there is no evidence capable of supporting a conviction.” This is Robinson’s ‘whole-count’ approach, without the 140-page document.

¹²⁴ The judgment in the MOS trial, involving other members of the JCE for the Kosovo phase, ran to four volumes. Prosecutor v. Milan Milutinović et al., Case No. IT-05-87-T, Judgement (Feb. 26, 2009).

¹²⁵ Some ICTY judges have had little prior trial experience – and less in criminal trials – being diplomatic appointments. See The ICTY Website, *The judges, available at http://www.icty.org/sid/151.*

¹²⁶ In his Partial Dissenting Opinion in Jelisić, Judge Fausto Pocar draws this point: since the judges are the “final arbiters. . .there is no point in leaving open the possibility that another trier of fact could come to a different conclusion” and “therefore, if at the close of the Prosecution case, the judges themselves are convinced that the evidence is insufficient, then the Chamber must acquit. . .what is the point in continuing the proceedings if the same judges have already reached the conclusion that they will ultimately adopt at a later stage?” Prosecutor v. Jelisić, Case No. IT-95-10-A, Partial Dissenting Opinion of Judge Pocar ¶ 6 (July 5, 2001), *cited in Gaparayi, supra* note 87, at 752 (2004). It is ironic that it took a judge from the civil law tradition to point this out.
ii. Predictive Asymmetry in the Decision – Kwon’s Dissent: The Decision preserved all the counts against Milošević, but Judge Kwon appended a short dissenting opinion concerning the charge of genocide under a JCE I theory. Genocide under JCE I requires a showing that an accused himself actually possessed the special intent necessary to commit genocide, rather than having it imputing it or finding that he had ‘taken’ the intent of his co-perpetrators. The Decision accepted that the Prosecution had supplied sufficient evidence of Milošević’s own intent to allow the trial to continue on that charge, but Kwon dissented: “I do not agree with the majority that there is sufficient evidence upon which a Trial Chamber could find beyond reasonable doubt that the Accused had the dolus specialis required for genocide. . .”\(^{127}\) Kwon did not dissent on other theories – JCE III, aiding and abetting or complicity, or genocide as a superior under Article 7(3) – which contemplate liability even if an accused merely knows about or foresees genocidal harm, but he did not believe it was reasonable to infer Milošević’s own intent from that evidence.\(^{128}\)

Kwon’s dissent does not affect the material outcome of the Decision – no counts were dropped – but it does delimit some elements of a putative final judgment because of the asymmetrical information in the possible outcomes of a Rule 98bis decision: denial of a motion continues the trial without prejudice, but acquittal has a clear, incontrovertible meaning. We cannot know what the other two judges would ultimately have ruled on the question of JCE I liability – it is possible they were convinced of Milošević’s guilt or of his innocence yet were determined to follow the correct procedure – but unless there were new evidence introduced in the Defense phase, we can be certain about Kwon. Commenting on the dissent, Boas says “a considerable question mark was left hanging over this crucial and emotive aspect of the prosecution’s case in respect of

\(^{127}\) Decision, supra note 12, Dissenting Opinion of Judge O-Gon Kwon ¶ 1.

\(^{128}\) Id. Kwon Dissent ¶ 2.
Bosnia – that Milošević has the specified intent to commit Srebrenica and elsewhere."129 This is diplomatically phrased; under the logic of Rule 98bis, it is difficult to see how Kwon could not have acquitted for genocide on any theory requiring the defendant himself to have actual genocidal intent instead of mere knowledge or foreseeability of the risk. On any count depending on the JCE I theory, at least, we could have expected either acquittal or a dissent by Kwon.

Though neither they nor anyone else could know it then, the Decision was – or rather turned out to be – the last major statement by the judges on the evidence. In time, and with the turn of events, this made the Decision into something more than originally anticipated by its authors. The Decision’s appeal as a source for narrating the events of the Yugoslav wars was as considerable as it was doctrinally implausible, for the very thing which is so poorly thought through in the Decision, the very feature that makes the Rule 98bis procedure pointless, is the same feature that later made it seemingly attractive for the authoritative narrative theory.

It is precisely the identity of interest – the total identity – between the trier of fact and the trier of law at the ICTY that makes the Decision potentially appealing. Because the trier of law and fact are one and the same, a decision to continue the case at the ICTY might be thought to signal the likely final outcome with marginally greater confidence than does a similar decision in the common law. It is entirely possible for a juror to think, ‘well, the judge says let the case continue, but I already know how I’ll rule;’ because the common law judge is a separate actor, there is simply no information in his decision about the jury’s view. By contrast, because the judges hearing a Rule 98bis motion are the same ones who will decide the case, then, depending on what exactly their decision says, it might indicate a great deal about their ultimate view.

129 BOAS, supra note 13, at 126.
After, all, we can be certain Kwon would have opposed conviction on a specific count – so why not look for similar indications elsewhere? It was – and is – tempting to suppose one could read a great deal about the meaning of a terminated trial into what was, initially and structurally, an interim pronouncement. But as we shall see, this seeming value is defective and deceptive.

IV. A Potential for Ambiguity: Contemporary Responses to the Decision

This role was two years in the future, however. First, and more pressing, were the strategic responses to the Decision as the interim declaration it was designed to be. The immediate outcome of the Decision was what one observer calls a “zero effect[:]”\(^1\)\(^{130}\) All counts still in place, but hundreds of allegations dropped. Immediately after the Decision issued, the parties had to busy themselves with preparations for continued trial. As we have seen, the Chamber appointed the \textit{amici} as assigned counsel, a move Milošević contested; they each, in part, continued the defense. The Prosecution’s response was more complex.

A. Denying Effect – The Prosecution’s Redline Indictments: The Prosecution, having failed to prevent the motion and Decision, made efforts within the framework of the trial to contextualize the damage to its case. The Chamber instructed the Prosecution to produce red-line indictments that indicated which allegations were no longer part of the case.\(^1\)\(^{131}\) New versions for Bosnia and Croatia were produced (but not for Kosovo, since no allegations were affected). The new versions are mostly sober, technical realizations of the Chamber’s instructions, but the

\(^{130}\) Gaparayi, \textit{supra} note 87, at 766.

\(^{131}\) \textit{Milošević case}, Order to Prosecution on Indictments following Rule 98bis Decision (July 20, 2004).
Prosecution has also added comments that explain or justify marginal calls, calls which inevitably preserve allegations.

The Prosecution defends certain allegations against removal on the grounds that the amici did not specifically challenge them, even though they were plausibly covered by the Chamber’s findings. The amici had challenged many allegations in the large Schedules attached to the indictment, but generally did not challenge the general allegations in the main text itself, and the Prosecution deploys this fact to preserve mention of specific municipalities in the main text for several counts. In terms of interpreting the Decision, the fact that the amici did not challenge certain items of evidence with adequate specificity – and this on the Prosecution’s reading – ultimately tells us little about what the Chamber did or did not think about those items. Moreover, it returns us to the question of the amici’s role and their imperfect identity of interest with the accused.

Similarly, for a persecutions count from Bosnia, the Chamber ruled that allegations for three named municipalities in the Schedules lacked evidence. Nonetheless, the Prosecution did not line them out in the main text, arguing that “[i]n the Prosecution’s opinion findings of insufficient evidence in relation to the Schedules of the Bosnia Indictment do not necessitate the deletion of [those] municipalities. . .as the allegations contained in paragraphs 33-35 are broader than the specific allegations contained in the Schedules.”

132 See, e.g., Milošević case, Submission of Red-Lined Versions of Indictments Pursuant to Trial Chamber “Order to Prosecution on Indictments following Rule 98 bis Decision ¶ 7(b-d) (August 11, 2004) [hereinafter, Redline Indictment]. On the locations in which genocide was alleged, Boas has a succinct discussion of the complicated transit from the original fourteen pleaded to seven, with the court acquitting in one. BOAS, supra note 13, at 124-6.
133 Count 3.
134 Redline Indictment, supra note 132, at ¶ 7(b) (in accompanying note 4: “The Prosecution did not lead all of its evidence regarding. . .persecutions in this municipality because of limitations on time. The Prosecution relies primarily on the expert reports of [three named experts] to meet their burden of proof.”). Prior indications of this strategy appear in the pre-Decision brief. Prosecution Response to Amici Curiae Motion, supra note 108, at ¶ 5.
The most striking changes are to the Sarajevo sniping and shelling counts. For both of these, the Chamber ordered acquittal on all specific incidents alleged except one each: the shooting of Seid Solak, a 13-year old boy wounded in the abdomen, and the notorious Markale incident that killed 66 people. These were also the only incidents not challenged by the amici;\textsuperscript{135} the other 43 sniping incidents and 26 shelling incidents alleged were, and the Prosecution, conceding that these incidents were not supported by specific evidence, had submitted, unsuccessfully, that “overview evidence” of a shelling and sniping campaign in Sarajevo...is sufficient” for a conviction.\textsuperscript{136}

Still, although it had to line out all these incidents, the Prosecution was able to preserve the entire chapeau describing the “killing and wounding [of] thousands of civilians of all ages and both sexes. ... an extensive, four-month shelling and sniping attack. ... a protracted campaign of shelling and sniping. ... [against] civilians who were, amongst other things, tending vegetable plots, queuing for bread or water, attending funerals, shopping in markets, riding on trams, gathering wood.”\textsuperscript{137} The chapeau even continues to note that “[s]pecific instances of sniping are described in Schedule E attached to this indictment. Specific instances of shelling are set forth in

\textsuperscript{135} It is not clear why only these two incidents were not challenged. The amici’s brief does not discuss any evidence for them (unless it is in the confidential annexes), nor does the Prosecution’s (since they were not challenged). However, the Markale shelling killed many more people than any other incident and had been subjected to extensive review concerning the direction from which the shell had been fired.

\textsuperscript{136} Decision, supra note 12, at ¶¶ 310, 313. See also Prosecution Response to Amici Curiae Motion, supra note 108, at ¶ 493.

\textsuperscript{137} Redline Indictment, supra note 132, at ¶¶ 43-45.
Schedule F. When one reads these schedules now, these instances are still set forth, but with lines through them. No changes are made to the text of the indictment itself, however, and anyone reading the Indictment would not notice anything.

The Prosecution also preserved the seven overlapping counts – characterizing the sniping and shelling as murder (a crime against humanity and a violation of the laws or customs of war); inhumane acts (a crime against humanity); willful killing (a grave breach); willfully causing great suffering (a grave breach); cruel treatment (a violation of the laws or customs of war); and attacks on civilians (a violation of the laws or customs of war) – all above an allegation set that now consisted of just one incident each of sniping and shelling. This is entirely correct – it is possible to characterize even a single incident in multiple ways, and to base a count on allegations in the main text rather than the schedules. But it is also extraordinarily hollowed out: Since the Chamber did not consider the Prosecution’s ‘overview evidence’ sufficient to preserve the other 43 sniping and 26 shelling allegations, what exactly remained apart from the single pleaded instance of each? Yet the formal outcome – the preservation of all counts, and of the original text – masks this, leaving the impression that nothing of substance has changed, that no doubt has entered the juridical calculus.

The Prosecution encourages this impression by suggesting that the redline indictments are not amended indictments at all but only

“working documents of value to clarify the case that the Defense has to meet. It may be thought that the Croatia and Bosnia Indictments should remain unchanged from the moment that the Prosecution case closed in order to best assist the parties

138 Id. ¶ 45.
139 Id. ¶ 45.
and the public to be able to assess what was alleged, what was the subject of acquittal by the Trial Chamber and what (if any) counts are the subject of convictions in due course.”

This is unobjectionable in a technical sense but also asserts a mystifying continuity between the original indictment, containing allegations on which Milošević has been acquitted, and the subsequent revision. More generally, the mere presence of the Prosecution’s explanatory notes, when a simple redaction without comment could have been done, suggests an effort to frame the outcome to advantage. The effect is not so much to delegitimize the Decision – this is hardly a plausible public strategy for the Prosecution – as to contextualize it, seeking to preserve and insulate as much of its case as possible. At the time, this was done in order to preserve options for trial, but later, this would serve a different purpose.

B. The Effect of Summarizing – Contemporary Reactions to the Decision: Apart from the parties’ strategic responses in the courtroom, outsiders had to consider how to present the Decision. One understandable tendency was to compress the enormous and tedious ruling into a shorter and simpler text, but with an unfortunate effect: the special meaning the Decision attaches to the phrase ‘sufficient evidence’ drops out, leaving the impression that the Chamber has carefully reviewed and accepted the Prosecution’s claims of guilt, full stop.

Recall that, in applying the Rule 98bis standard, the judges are asking whether any reasonable court could find the evidence, if taken at its highest, sufficient for conviction. They note this standard early in the Decision, indicating that it applies throughout the 140 pages that follow:

\[140\] Id. ¶ 4.
\[141\] Large sections of the Decision consist of charts summarizing particular allegations challenged by the amici, the Prosecution’s response, and the Chamber’s disposition. Without the underlying briefs and evidence for reference, these anodyne recitations convey the analytical depth of an ‘am not/are so’ dispute.
“When, in reviewing the evidence, the Trial Chamber makes a finding that there is sufficient evidence, that is to be taken to mean that there is evidence on which a Trial Chamber could be satisfied beyond reasonable doubt of the guilt of the accused.”¹⁴² This qualifier applies to every conclusion upholding a count or allegation. The judges, understandably, didn’t write it out each time, but the consequence was that many contemporary reports of the Decision cite its findings in ways that suggest that this Trial Chamber found the Prosecution case plausible or persuasive.

These elisions do not appear willful or egregious – and in many instances, observers get it about right, in part. A UN press release from 17 June 2004, for example, refers to the Chamber’s “dismiss[ing] a legal motion. . .after finding there is enough evidence for him to answer.”¹⁴³ Later, though, the text starts to cut corners – much as the judges themselves did in the Decision’s disposition: it notes that “[i]n dismissing the motion. . .the ICTY rejected several submissions regarding Bosnia. The judges found that there is enough evidence to show that there was a joint criminal enterprise. . .to destroy part of Bosnia’s Muslims as a group; that Mr. Milošević was part of the enterprise; and that the enterprise committed genocide.”¹⁴⁴ Anyone copying text from the Decision’s disposition could reach this misleading conclusion, because the judges’ qualifier for ‘sufficient evidence’ appears over 300 paragraphs earlier.

Other examples extend this shortcut analysis. A summary in International Legal Materials (derivative of the Trial Chamber’s own summary) characterizes the Decision in words that suggest the Chamber actually made factual findings of guilt against Milošević:

¹⁴² Decision, supra note 12, at ¶ 13 (7).
¹⁴⁴ Id.
“with respect to the Amici Curiae submissions concerning genocide in Bosnia, the Trial Chamber dismissed the motion. Consequently, the Trial Chamber held: (1) there was sufficient evidence of a joint criminal enterprise, which included members of the Bosnian Serb leadership, the aim and intention of which was to destroy a part of the Bosnian Muslims as a group; (2) Slobodan Milosevic was a participant in that joint criminal enterprise; (3) Slobodan Milosevic was a participant in a joint criminal enterprise, which included members of the Bosnian Serb leadership, to commit crimes other than genocide and it was reasonably foreseeable to him that, as a consequence of the commission of those crimes, genocide would be committed by other participants in the joint criminal enterprise, and it was committed; (4) Slobodan Milosevic aided and abetted or was complicit in the commission of the crime of genocide in that he had knowledge of the joint criminal enterprise, and that he gave its participants substantial assistance, being aware that its aim was the destruction of a part of the Bosnian Muslims as a group; and (5) Slobodan Milosevic was a superior to certain persons whom he knew or had reason to know were about to commit or had committed genocide of a part of the Bosnian Muslims as a group, and he failed to take the necessary measures to prevent the commission of genocide, or punish the perpetrators thereof.”

A plain reading of the ASIL note suggests the Chamber actually held that Milošević was a participant in two joint criminal enterprises, and aided and abetted or was complicit in genocide. The Chamber held nothing of the kind: although the Decision uses almost identical language in its disposition, it does so with implicit reference back to the qualifying language, which drops out of the ASIL summary.

No one with legal training or even good sense reading these reports would be confused in some absolute way – after all, these reports also make clear that the trial continues. Nor is it likely that this represents aggressive spin, because at the time – a mere week or so after the Decision – the author surely expected that the trial would continue to conclusion. Still, the language is there – or


146 Critically, the Decision places ‘sufficient evidence’ outside the first point, where it modifies all five tentative findings. The ILM summary moves it inside, where it modifies only the first. “[T]he Trial Chamber . . . holds that there is sufficient evidence that (1) there existed a joint criminal enterprise. . . .”, Decision, supra note 12, at ¶ 323.
rather, not there – at the very least we recognize bad drafting and laziness, in the otherwise cautious, dry language of an ILM summary, and perhaps a kind of conceptual heuristic. At the time, the Decision predictably receded into the background, as its most consequential element – the continuation of the trial on all counts – took clear precedence. But this linguistic and conceptual shortcut – rendering ‘sufficient evidence’ without the Chamber’s own more cautious definitional qualifier, and thus allowing a reading vindicating the Prosecution’s case – would reappear in the discourse after the Decision re-emerged.

V. The Potential of Ambiguity: Invoking the Decision after Milošević’s Death

On 11 March 2006, Milošević died, and within days proceedings were terminated. With his death what had been the interim Decision, whose formal function had already been perfected in the redefined, redlined contours of the defense stage, unexpectedly became the Chamber’s last significant utterance on the evidence. A document whose continuing significance, apart from defining the scope of other Rule 98bis hearings, would ordinarily be superseded by the final judgment, suddenly regained a potential prominence in the vacuum of frustrating indecision and inarticulation. For some, it became a kind of judgment.

Different actors have deployed a variety of strategies for exploiting the Decision’s potential for meaning and authority. In general, these strategies treat the discussion in the Decision as

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147 There was certainly no reason descriptions had to be skewed this way. Human Rights Watch’s review of the terminated case produced an admirably accurate summary of the Decision, noting that it preserved each count based on evidence that “if accepted, and in the absence of a defense case, a reasonable trier of fact could find sufficient to sustain a conviction,” but also that there was not enough evidence to sustain “all of the factual allegations relating to all of the crime scenes included in the indictments.” HUMAN RIGHTS WATCH, supra note 44, at 13.

dispositive of some question, though they do so in very different ways. In some, this involves
careful mining of dicta, for example by citing the Chamber’s discussion of a legal standard it
uses to assess the evidence. Elsewhere – following the approach seen when the Decision was
first issued – the cautionary qualifier to the phrase ‘sufficient evidence’ is read out, implying that
the evidence was sufficient, rather than that it might have turned out to be. These approaches, to
which we first turn, either advance a claim of quasi-judgment or make arguments for redeploying
Milošević’s ‘sufficient evidence’ in other legal contexts.

Logic and doctrine tell us that, except where it acquits, the Decision has no dispositive or
authoritative value whatsoever. Not all who read and write are logical or exacting about doctrine,
however, and a realist, or realistic, assessment of the Decision’s effects must take into account
uses which are compelling, even if not up to code.149 The uses to which the Decision has been
put suggest there is marginally more scope for deploying its characterizations of the state of the
law than its descriptions of factual evidence, but even the latter is available: the Decision’s
deployment in other cases, and by other courts, however doctrinally suspect, is its own proof of
influence. Still, as we shall see, the evident doctrinal weakness of these uses exercises its own
constraint on the Decision’s utility as an ersatz judgment. Normally realism makes us suspicious
of doctrine and ‘correct’ answers, but here we see how doctrine constrains the uses for which the
Decision can be plausibly deployed. Not just any argument will do.

149 Richard A. Matasar, *IV. Practice And Procedure: Treatise Writing And Federal Jurisdiction Scholarship: Does
recognizes multiple possible answers to legal problems. From deciding what a case means, to understanding the
factual content of either a dispute or the precedents that might govern that dispute . . . legal analysts must exercise
judgment . . . realists seek to explain the development of law through many external factors – political, cultural,
ideological.”).
A. Characterizing the Decision as Judgment – Del Ponte’s Press Conference: In her press statement following Milošević’s death, Chief Prosecutor Carla Del Ponte expressly invoked the Decision in the context of a mountain of evidence and a nearly completed trial:

“I deeply regret the death of Slobodan Milosevic. It deprives the victims of the justice they need and deserve. . .

. . .

During the prosecution case, 295 witnesses testified and 5000 exhibits were presented to the court. This represents a wealth of evidence that is on the record. After the presentation of the prosecution case, the Trial Chamber, on 16 June 2004, rejected a defense motion to dismiss the charges for lack of evidence, thereby confirming, in accordance with Rule 98bis, that the prosecution case contains sufficient evidence capable of supporting a conviction on all 66 counts. The Defense was given the same amount of time as the prosecution to present its case. There were in total 466 hearing days. 4 hours a day. Only 40 hours were left in the Defense case, and the trial was likely to be completed by the end of the spring.”

Almost everything here is accurate;\footnote{Press Conference of the ICTY Prosecutor, March 12, 2006 (emphasis original).} the fact of the trial’s termination is not hidden.\footnote{It was not the Defense, but the amici, who brought the motion; nor did they press for acquittal on “the charges,” but only certain counts. This may be simply a slip – and an understandable one, in light of the subsequent appointment of the amici as defense counsel – though the Prosecution’s opposition to Milošević’s self-representation was endemic, and there is at least inadvertent advantage in suggesting that Milošević had brought the motion and been rejected. With this slip or elision, the imperfect identity of the amici and Milošević – with all it implies for the value of the Decision in an adversarial system – disappears.} The statement is also presented from a perspective and for a purpose, and in that context the Decision acquires an aura of considerably greater finality on 12 March 2006 than presumably even Del Ponte would have assigned it just the morning before, let alone when it was issued. The claim that the trial was nearly over – besides heightening the poignancy and sense of waste – also asserts a finality near to final judgment: everything needed was available – just a few hours were missing. This is a half-truth: ‘40 hours’ did not count time for cross-examination or

\footnote{Press Conference of the ICTY Prosecutor, March 12, 2006. \textit{Cf.} Marlise Simons & Gregory Crouch, \textit{supra} note 47 (“Ms. Hartmann, Ms. Del Ponte’s spokeswoman, expressed frustration that at least in a legal sense, Mr. Milosevic would not go down in history as a convicted war criminal. ‘This is bad for proving the real responsibility of Mr. Milosevic,’ she said. ‘There is a presumption of innocence, and now we will not get a conviction.’”).}
administration, let alone delays, and at the rate hours were being consumed the trial would have continued for a few months, and then a delay of six months to a year for the final judgment to be issued, at any point during which his death would have terminated proceedings; and, of course, presumably both sides would have appealed. But what is interesting is the implication: we were near to conclusion, and to judgment, and it is possible for observers to draw their own opinion from the trial process. Del Ponte simultaneously acknowledges what she must – that technically there will be no verdict – and claims that nonetheless there can be.

Considering the Prosecution’s earlier, assiduous efforts to render the Decision as invisible and inconsequential as possible, its invocation by the Chief Prosecutor in the wake of the trial’s termination is ironic. More, however, it suggests the Prosecution understood the strategic possibilities inherent in the document – its practical potential to serve as a source for constructing narratives about the trial and the events the trial examined, whatever its doctrinal limitations.

153 BOAS, supra note 13, at 1 (“[D]espite ex post facto statements by the prosecution that its ends was only weeks away, in reality it was some months away from being concluded, and yet many more months from a judgement being rendered”).

154 Cf. Naqvi, supra note 23, at 247 (“This was presumably to make the point that the lack of a judgment has not deprived the four-year trial from achieving [sic] some of its objectives, in particular that of satisfying to some extent the right to the truth or setting down a historical record. The question that remains is whether a legal judgment is necessary to accord such evidence the status of representing ‘the truth.’”).

155 The Tribunal, by contrast, was cautious in its response to Milošević’s death, neither mentioning the Decision nor advancing it as substantive alternative to judgment. Yet it too sought to place the termination of the case in a broader context that implicitly emphasized its continuing availability as a venue for an accounting of the broader conflict:

“I would like to restate that the Tribunal regrets Slobodan Milosevic’s death and the fact that the case against him will not be brought to judgement. We recognize that this case was an important one. However, it is not the only important case that the Tribunal’s judges have before them. We continue to try the highest-level persons accused of perpetrating the most serious crimes against Serb, Croat, Bosnian Muslim, Albanian and other victims in the former Yugoslavia.”

Press Release, The ICTY. Update from the President on the Death of Slobodan Milosevic, March 17, 2006. The President at the time was Judge Pocar.
B. Treating the Decision like a Judgment – the ICJ’s Bosnian Genocide Case: Just under a year after the death of Milošević, the International Court of Justice rendered its judgment in the genocide case brought by Bosnia against Serbia and Montenegro. In part because of Milošević’s demise, this case had acquired an even greater emotional and political salience as an implicit second chance to demonstrate Milošević’s responsibility. Thus when the ICJ ruled that Serbia had not committed genocide, its failure to acquire and consider all the evidence from Milošević – in particular the minutes of the FRY’s Supreme Defense Council, thought to be a potential smoking gun for proving the senior Belgrade leadership’s special intent and knowledge – became a focus for frustration. Although an independent court, the ICJ acknowledged the “unusual feature” that “[m]any of the allegations before this Court have already been the subject of the processes and decisions of the ICTY.” But what, if anything, could it have done with the Milošević Chamber’s review of evidence in the Decision?

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157 Cf. Bosnian Genocide, supra note 156, at ¶ 204-6. The ICJ did find that Serbia had violated its obligations under the Genocide Convention by failing to prevent the genocide in Srebrenica in July 1995, having failed to transfer Ratko Mladić for trial by the ICTY, and having failed fully to co-operate with the Tribunal. See id. ¶ 471. The ICJ identifies the perpetrators of genocide at Srebrenica as “members of the VRS [Vojска Repублике Српске, the Bosnian Serb Army.]” Id. ¶ 297; this is consistent with the ICTY’s jurisprudence.
158 See, e.g., Marlise Simons, Genocide Court Ruled for Serbia Without Seeing Full War Archive, N.Y.TIMES, Apr. 9, 2007 (“Lawyers interviewed in The Hague and Belgrade said that the outcome might well have been different had the International Court of Justice pressed for access to the full archives, and legal scholars and human rights groups said it was deeply troubling that the judges did not subpoena the documents directly from Serbia.”); Ruth Wedgwood, Slobodan Milosevic’s Last Waltz, N.Y. TIMES, Mar. 12, 2007, (“[I]n trying to meet [its evidentiary] standard, the court declines to draw any adverse inference against Belgrade, even though the documents it turned over to the court were heavily redacted.”); Jens David Ohlin, A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law, 14 UCLA J. INT’L L. & FOREIGN AFF. 77, 98 (2009) (“The story [concerning the SDC documents] highlights perfectly the complex tensions between the collective truth of history and the individual truth of a single defendant's culpability.”).
159 Bosnian Genocide, supra note 156, at ¶ 212.
Although not a criminal jurisdiction, the ICJ applied a standard of proof of similar seriousness: “claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive[.]”\footnote{Id. ¶ 209 (comparing Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 244). The ICJ’s standard was controversial. See Berglind Halldorsdottir Birkland, Reining In Non-State Actors: State Responsibility And Attribution In Cases Of Genocide, 84 N.Y.U.L. REV. 1623,1641-1642 (2009) (“While the Court’s imposition of this onerous standard of proof was driven by the commendable desire not to take genocide lightly, it is important to remember that state responsibility under the Genocide Convention...is civil, not criminal, in nature...This onerous standard – when combined with a strict attribution test and a refusal to consider circumstantial evidence of intent – raised the threshold high enough effectively to shut the door on most complaints under the Genocide Convention.”); Theodor Meron, Major Developments in International Law: A Conversation on the ICJ’s Opinion in Bosnia and Herzegovina v. Serbia and Montenegro, 101 AM. SOC’Y INT’L L. PROC. 215, 216 (2007) (“This sounds a lot to me like the reasonable doubt standard and the requirement that guilt be the only reasonable inference from the facts...The ICJ’s decision to apply such a high standard of proof is noteworthy. Because of the egregious criminality of genocide and the serious implications of a determination that the state is responsible for genocide, it is perhaps reasonable for the court to apply standards of proof that are rather higher than the normal standard of balance of probabilities. But should the court apply standards as high as in a criminal case?...One of the problems here is that the court has no provision in the Statute or Rules on the burden of proof and its shaping of evidential rules as it goes along with a particular case does not give parties advance notice as to what is expected of them.”).}

In its judgment, the ICJ considers at length the value of evidence from ICTY cases, as well as the jurisprudence of the ICTY itself. It considers the ICTY’s “fact-finding process” to be of the kind that “falls within [its preferred] formulation, as ‘evidence obtained by examination of persons directly involved’, tested by cross-examination, the credibility of which has not been challenged subsequently.”\footnote{Bosnian Genocide, supra note 156, at ¶ 214.}

The parties to Bosnian Genocide were in broad, if strategic, agreement on the value of the ICTY. The Applicant, Bosnia, had relied on ICTY material throughout, introducing evidence from a variety of documents, including indictments – a strategy consistent with a broader view of probative value than the ICJ seemed prepared to accept.\footnote{Id. ¶ 217.} The Respondent, Serbia, had at first “challenged the reliability of the Tribunal’s findings, the adequacy of the legal framework under which it operates, the adequacy of its procedures and its neutrality”\footnote{Id. ¶ 215.} – a view rather like Milošević’s. But by the time oral proceedings were held, Serbia had adopted an approach closer...
to that of a cooperating defense attorney or *amicus*: it accepted the jurisprudence of the ICTY, but noted that “[W]e do not regard all the material of the [ICTY] as having the same relevance or probative value. We have primarily based ourselves upon the judgments of the Tribunal’s Trial and Appeals Chambers, given that only the judgments can be regarded as establishing the facts about the crimes in a credible way.” ¹⁶⁴

The ICJ then expressly discusses the evidentiary value of Rule 98bis decisions.¹⁶⁵ The ICJ accurately paraphrases the Jelisić (and *R. v. Galbraith*) standard that such decisions only means a court could convict, not that it would, and notes that, in *Krajišnik*, the Chamber ultimately acquitted on genocide after having dismissed a Rule 98bis motion.¹⁶⁶ The ICJ then draws the critical conclusion, equally valid for indictments and Rule 98bis decisions: “Because the judge or the Chamber does not make definitive findings. . . , the Court does not consider that it can give weight to those rulings. The standard of proof which the Court requires in this case would not be met.”¹⁶⁷ The ICJ accepted Serbia’s position, rather than Bosnia’s: evidence from the ICTY is not enough, and interim evaluations are not enough; only final judgments are definitive.

Having set this high bar, the ICJ proceeds to limbo under it, citing the Decision several times. Here is what the ICJ says about the Luka Camp in deciding if members of a group protected under the Genocide Convention were killed:

¹⁶⁴ *Id.* ¶ 215 (quoting the Agent for Respondent without citation). The ICJ implies that Serbia’s shift was strategic, taken because the ICTY had yielded only limited convictions for genocide – and had not convicted any Belgrade officials.

¹⁶⁵ *Id.* ¶ 219 (calling them “motions for acquittal made by the defence. . . after the defence has had the opportunity to cross-examine the prosecution’s witnesses. . .”). Note the reference to motions brought by “the defence,” rather than, as in *Milošević*, an *amicus*.

¹⁶⁶ *Id.* ¶ 219.

¹⁶⁷ *Id.* ¶ 219. Groome suggests that a final judgment in *Milošević* would have been dispositive, Groome, *supra* note 115, at 964, though the ICJ itself never adopts this view, calling such a judgment only persuasive.
273. In the Milošević Decision on Motion for Judgment of Acquittal, the Trial Chamber found that many Muslims were detained in Luka camp in May and June 1992 and that many killings were observed by witnesses ([Decision] paras. 159, 160-168), it held that “[t]he conditions and treatment to which the detainees at Luka Camp were subjected were terrible and included regular beatings, rapes, and killings” (ibid., para. 159). “At Luka Camp . . . The witness personally moved about 12 to 15 bodies and saw approximately 100 bodies stacked up like firewood at Luka Camp; each day a refrigerated meat truck from the local Bimeks Company in Brčko would come to take away the dead bodies.” (Ibid., para. 161.)

Three paragraphs later, they reach their finding:

276. On the basis of the facts set out above, the Court finds that it is established by overwhelming evidence that massive killings in specific areas and detention camps throughout the territory of Bosnia. . . were perpetrated during the conflict. . . . The Court thus finds that it has been established by conclusive evidence that massive killings of members of the protected group occurred and that therefore the requirements of the material element. . . are fulfilled.”

Similarly, the ICJ invokes the Decision to discuss the Manjača Camp in deciding if Serbia “caus[ed] bodily or mental harm within the meaning of the Convention.”

These two camps was hardly the only evidence the ICJ considered, and even for them other evidence was adduced that did not rely on any ‘non-definitive finding.’ But it is the fact that the ICJ’s judges used the Decision’s reference to these camps at all, and precisely in this pedestrian way, that is of note. Surrounding the ICJ’s citation of the Decision’s Luka Camp review are citations to judgments in Brđanin, Krnojelac, Stakić, Nikolić, Sikirica, and Jelisić, as well as the report of the Commission of Experts and General Assembly and Security Council resolutions. The ICJ treats the evidence in the Decision exactly as it does final judgments, acting as if the Milošević Chamber had accepted the truth of testimony it cited, whereas the Chamber had

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168 Id. ¶ 276.
169 Id. ¶¶ 304, 315-9.
170 Id. respectively ¶ 274, ¶ 254, ¶¶ 258, 261, 263, 266 and 268, ¶ 252, ¶ 266, ¶ 272, ¶ 271 and ¶¶ 274-275.
specifically refused to evaluate evidence with the finality upon which another court might rely. To the degree the ICJ’s finding “by overwhelming evidence” is built upon the Decision, it misreads and overreaches, but also grants a retrospective authority to the Decision.

Moreover, the ICJ was perfectly capable of reaching back into the Milošević case itself, to evaluate evidence on their own merits when it wished – its concerns about conclusiveness notwithstanding. In the most decisive such instance, the ICJ reaches directly back for testimony from the trial:

437. The Applicant has drawn attention to certain evidence given by General Wesley Clark before the ICTY in the Milošević case. General Clark referred to a conversation that he had had with Milošević during the negotiation of the Dayton Agreement. He stated that

“‘I went to Milošević and I asked him. I said, ‘If you have so much influence over these [Bosnian] Serbs, how could you have allowed General Mladić to have killed all those people at Srebrenica?’ And he looked to me – at me. His expression was very grave. He paused before he answered, and he said, ‘Well, General Clark, I warned him not to do this, but he didn’t listen to me.’ And it was in the context of all of the publicity at the time about the Srebrenica massacre.’” (Milošević, IT-02-54-T, Transcript, 16 December 2003, pp. 30494-30495).

General Clark gave it as his opinion, in his evidence before the ICTY, that the circumstances indicated that Milošević had foreknowledge of what was to be “a military operation combined with a massacre” (ibid., p. 30497). The ICTY record shows that Milošević denied ever making the statement to which General Clark referred, but the Trial Chamber nevertheless relied on General Clark’s testimony in its Decision of 16 June 2004 when rejecting the Motion for Judgment of Acquittal (Milošević, IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 280).”

The ICTY ‘relied on General Clark’s testimony’ only in the technical sense that it did in fact discuss it in the Decision, but it is a clear misreading of the Decision and the Rule 98bis process

\[171\] Id. ¶ 437.
to say that the Chamber ‘relied’ on Clark’s testimony in any definitive sense; the judges were obliged to assume the Prosecution evidence’s credibility and reliability, whether or not they themselves actually believed it. Yet here the ICJ is assuming that testimony from Milošević has probative value because it has been laundered through the Decision.  

The ICJ first announces a strict and skeptical standard forbidding reliance on any but final judgments, but then proceeds to rely quite heavily on Rule 98bis decisions as well as underlying evidence that fails to meet its own standards. In a way, it is a formalistic game: the ICJ could cure the defects in its discussion of the Decision simply by considering the underlying evidence as its own, rather than as a derivative product of another court; it could have simply asked itself what it thought Clark’s statement meant. But this merely returns us to the theme that evidence has intrinsic value, if it does, but acquires none through the trial process unless and until that process characterizes it in some definitive way. The ICJ standard confirms precisely that logic, whether it then follows it itself or not.

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172 *Bosnian Genocide* also considers expert reports and other testimony from Milošević. These include a report by András Riedlmayer on the destruction of cultural heritage, *Id.* ¶¶ 339-43 (“Mr. Riedlmayer’s findings do constitute persuasive evidence as to the destruction of historical, cultural and religious heritage in Bosnia. . .”); Robert Donia, on Serbian geopolitical aims (*Id.* ¶ 371, discussing the Report of Expert Witness Donia, Exhibit 537, translation of a document entitled “Decision on the Strategic Goals of the Serbian People in Bosnia and Herzegovina.”); as well as testimony by Lord Owen and the Deputy Commander of Dutchbat proffered by the Respondent, Serbia (*Id.* ¶ 412, noting that the testimony “does not establish a factual basis for finding the Respondent responsible on a basis of direction or control.”).

173 The ICJ also discusses the test for the motion of acquittal from Jelisić and the Rule 98bis decision in Krajinić, *id.* ¶ 219.

174 In turn, *Bosnian Genocide* itself was followed: the International Criminal Court relied on the ICJ case in rejecting genocide charges for President Omar Al Bashir of Sudan, “[observing] that a similar approach has recently been taken by the ICJ in its Judgment on Genocide” and listing several examples from *Bosnian Genocide*, citing to the same conclusions that rely in part on the Decision’s discussion of Luka Camp. Prosecutor v. Omar Hassan Ahmad Al Bashir, Public Redacted Version, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3 (4 March 2009) at 74 and n. 221 (overturned on other grounds, “Judgment on the Appeal of the Prosecutor against the ‘Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’,” ICC-02/05-01/09-73 (3 February 2010).
C. The Obligation of Possibility – Academic Critique of the ICJ Judgment: The ICJ judgment was widely criticized, in part for its failure to consider more rigorously the evidence from ICTY trials and, in particular, the Supreme Defense Council transcripts. In a recent article, a former ICTY prosecutor, Dermot Groome, offers a searching critique of the ICJ’s use of evidence from Milošević. Yet rather than criticizing the ICJ’s doctrinally deviance, Groome’s critique is premised on the ersatz significance of the Decision, and demonstrates the creative use to which the Decision’s ‘sufficient evidence’ standard can be put.

“[G]iven the parity between the central issues of [Milošević and Bosnian Genocide],” Groome argues that “the [Decision] merits close attention for what it says about the evidence of genocide and the relationship of Serbia to the crimes committed in Bosnia.” He reviews the evidence considered in the Decision: evidence of Milošević’s role as the pivotal figure in Serbian politics; Milošević’s own statements showing his control; his consequential negotiations with foreign interlocutors; his control of armed forces in the various theaters; the logistical support provided by Serbia to Serbs in Bosnia and Croatia; evidence that Bosnian Serb officers were paid by Belgrade until 2002; evidence of joint planning between the various Serb armies; and evidence

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175 See, e.g., Susana SáCouto, Reflections on the Judgment of the International Court of justice in Bosnia’s Genocide Case Against Serbia and Montenegro, 15 HUM. RTS. BRIEF 2, 4 (2007) (“The Court's failure to consider the evidence in a holistic or collective manner is disconcerting, particularly in light of the fact that, as mentioned earlier, the Court also refused to draw any conclusions from Serbia's failure to turn over unedited copies of the Supreme Defence Council documents. As Judge al-Khasawneh observed, '[i]t would normally be expected that the consequences of [the Court's noting such a refusal] would be to shift the onus probandi or to allow a more liberal recourse to inference.’”); Marko Milanovic, State Responsibility for Genocide: A Follow-Up, 18 EUR. J. INT’L L. 669, 678 (“If the Court had indeed ordered Serbia to produce the documents, Serbia would likely have complied, as there were no objective reasons for making them available to the ICTY and not to the ICJ. Even though the ICJ, unlike the ICTY, possesses no subpoena power, if Serbia had failed to abide by the Court's order it would have had to suffer the consequences, since the Court would have been able to have much greater recourse to inferences in order to establish Serbia's knowledge of the genocide.”)(footnotes omitted). But see Birkland, supra note 160 (giving a positive reading of Bosnian Genocide’s broad interpretation of the obligation to prevent genocide); C. F. Amerasinghe, The Bosnia Genocide Case, 21 LEIDEN J. INT’L L. 411, 428 (2008) (calling the ICJ’s approach to evidence “liberal” and describing the case’s significant contribution to international law).

176 Groome, supra note 115.

177 Id. at 965.
that Milošević made assiduous demands to be kept informed of events in Bosnia.\textsuperscript{178} Completing his survey, Groome concludes that

\begin{quote}
\textbf{“[w]hile this determination by the trial chamber carries none of the weight of a final judgment regarding the evidence, it does indicate that there was sufficient evidence for a reasonable trial chamber to potentially convict Milošević of genocide. Given the similarity between the issues in the Milošević case and Bosnia's claim of genocide before the ICJ, this body of evidence had similar potential for the ICJ case.”}\textsuperscript{179}
\end{quote}

This is technically accurate – evidence was available which the ICTY Trial Chamber had not deemed obviously insufficient. The Decision indicates, in other words, that some other reasonable court – like the ICJ – could find the evidence sufficient for conviction. As we have seen, the ICJ chose to examine some evidence, though only a small amount and that haphazardly. For Groome, this is not enough; the ‘reasonable possibility’ of review implies an imperative:

\begin{quote}
\textbf{“the ICJ decided to place no reliance on the findings of the Milošević trial chamber in its [Decision]. However, given the Milošević trial chamber’s finding that there was sufficient evidence upon which a court could find Milošević guilty of the crime of genocide, and given the parity between the Milošević case and the ICJ case, a thorough inquiry into Bosnia's claims before the ICJ required the ICJ to examine the evidence referred to in the [Decision] to adjudicate the case before it.”}\textsuperscript{180}
\end{quote}

This is a possibilitative argument – that a thing is necessary merely because it is possible. Note the use of the word ‘required’: because some court could find this evidence sufficient, this court must review it.\textsuperscript{181} We see, in other words, an attempt to make the interim Decision – in light of the subsequent lack of final judgment – into a mandatory writ for another review. It is true that a full acquittal at the Rule 98\textit{bis} phase would have been an authoritative moment of interpretation:

\textsuperscript{178} Id. at 967-974.
\textsuperscript{179} Id. at 974-975.
\textsuperscript{180} Groome, supra note 115, at 975.
\textsuperscript{181} See also id. (noting that the possibility of a broader JCE finding in the Decision makes such a review “all the more compulsory.”)
Its own denials notwithstanding, the ICJ would have been hard-pressed to find Serbia at fault in the face of a preemptory acquittal of Serbia’s leader. But the opposite outcome – continuation of the trial – does not yield an equal obligation in the opposite direction, nor an equally authoritative interpretation.

D. Extracting (Limited) Authority from the Decision – The Rio Conference Report: As we have seen, the judges who wrote the Decision were concerned not only with the consequences for Milošević, but with the broader institutional effects of the Rule 98bis process. One way of reading the Decision, and one use for it, is as an influence on ICL’s developing jurisprudence. A conference of the International Law Association (ILA) illustrates how one can extract authoritative text from the Decision to advance claims about the law – but equally, the ILA’s efforts suggest important limits on how much one might do with a terminated trial.

The ILA conference Report, which examines the use of force, relies on the Decision in formulating its definition of armed conflict. The Report notes that the Decision favors the broader approach taken in Tadić to the more restrictive view in the ICRC Official Commentary to Common Article 3, while also declaring that the two are not inconsistent – a consequential difference for how broadly or narrowly the scope of international humanitarian law is applied.

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182 *Id.* at 964. To the degree the ICJ’s standard of proof actually is lower than for criminal trials, it would still be possible for it to find against Serbia after criminal acquittal, just as a civil trial’s ‘balance of probabilities’ is not precluded by prior criminal acquittal. *Peter Murphy, Murphy on Evidence* 101-116 (2007) (common law); *Juliane Kokott, The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems* 18-21 (1998) (comparing German and American standards of proof in civil and criminal law); Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 Am. J. Comp. L. 243 (2002) (comparing civilian and common law standards in civil trials).


184 *Id.* at 14.
The point is that the Report builds its case with citation to the Decision, without any need to mention its interim nature.

Where the Milošević judges are discussing legal tests, they often speak in their own voice, and the strictures of Rule 98bis evidently relax. Thus in the Decision’s discussion of the test for armed conflict, after initially noting the amici’s contention that there was no evidence of armed conflict in Kosovo before 24 March 1999, the Chamber proceeds to a discussion of the existing law and the Tribunal’s jurisprudence for seven paragraphs, during which a single mention is made of views advanced by the Prosecution and the amici, and none of any evidence led or challenged.\textsuperscript{185} The language is not couched in the hypothetical, tentative language of what a Trial Chamber might decide; instead: “It is settled in the International Tribunal’s jurisprudence. . . The Trial Chamber makes the following observations on the Tadić test. . . .” and so forth.\textsuperscript{186} This is the most confident language in the Decision; other Rule 98bis decisions display a similar confidence when deciding legal tests, as opposed to weighing evidence.\textsuperscript{187}

Other sections of the Decision demonstrate a similar pattern. In the discussion of deportation and forcible transfer,\textsuperscript{188} there are more mentions of the Prosecution and amici positions, in part because they substantively disagree about the correct legal characterization of the crimes, but the

\textsuperscript{185} But see Decision, supra note 12, at ¶ 15 (“Both the Prosecution and the Amici Curiae agree as to the requirement of an armed conflict for Articles 3 and 5 of the Statute.”). This is a profoundly uncontroversial point, and this may be just a convenient way for the Chamber to note that.

\textsuperscript{186} Id. ¶¶ 15, 18.

\textsuperscript{187} See, e.g., Prosecutor v. Stakic, Case No. IT-97-24-T, Decision on Rule 98bis Motion for Judgment of Acquittal, ¶107 (Oct. 31, 2002) (“Moreover, the Trial Chamber observes that it derives from the very nature of the act of instigation and the fundamental requirement of causation, that a concrete person or group of persons prompted has not already, and independently from the instigator, formed an intent to commit the crime in question (omnimodo facturus). Therefore, it would have been part of the Prosecutor’s burden of proof to demonstrate that the principal perpetrator of the crime was not already dedicated to its commission, and, as such should have been pleaded in the Indictment.”).

\textsuperscript{188} Decision, supra note 12, at ¶¶ 45-79.
The overall tenor is the same: the Chamber is speaking in its own voice.\textsuperscript{189} Likewise, in discussing the proper \textit{mens rea} for genocide, the Decision notes the \textit{amici}'s contention that the \textit{mens rea} for genocide cannot be reconciled with the \textit{mens rea} for command responsibility, but then says that “[o]n the basis of the Decision of the Appeals Chamber in \textit{Prosecutor v. Brdanin}, this submission is unmeritorious.”\textsuperscript{190} Here the Chamber is not simply considering the possibility that the Prosecution’s preferred rule could be applied by a reasonable judge; instead the Chamber is decisively dismissing the \textit{amici}'s view as a matter of law – a clear decision ‘on the merits.’

Consequently, this is also the most authoritative form of reliance on the Decision. The ILA’s reliance on the Decision as an expression of the law seems supportable, because in fact the Chamber is expressing its own view.\textsuperscript{191} Of course, where the Decision is most authoritative is also where it is most anodyne, regurgitating legal standards with long pedigrees in other cases. In its discussion of \textit{mens rea}, for example, the Chamber dismisses the \textit{amici} by citing \textit{Brdanin},\textsuperscript{192} and this is typical.\textsuperscript{193} The Decision’s discussion of the Rule 98\textit{bis} standard of review is itself derivative of \textit{Jelisić, Tadić}, and ultimately \textit{R. v. Galbraith}.

\textsuperscript{189} And at much greater length: the Chamber discusses the cross-border element of deportation for over twenty paragraphs. \textit{Id.} ¶¶ 47-69.
\textsuperscript{190} \textit{Id.} ¶ 300. There are many examples throughout the Decision.
\textsuperscript{191} See also Grant Dawson, \textit{Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations Ad Hoc Tribunals}, 21 \textit{Harv. Hum. RTS. J.} 241, 267-274 (describing the impact of Rule 98\textit{bis} decisions in \textit{Stakić} and \textit{Milošević} on the distinction between complicity in and aiding and abetting genocide).
\textsuperscript{192} Decision, supra note 12, at ¶ 300.
\textsuperscript{193} See, e.g., \textit{id.}, ¶ 25 (“On the basis of this evidence, the Trial Chamber is satisfied that the conflict in Kosovo meets the first element of the Tadić test.”); \textit{Id.}, ¶ 291 (“The Appeals Chamber in \textit{Prosecutor v. Brdanin} held that there is no incompatibility between the requirement of genocide and the \textit{mens rea} requirement for a conviction pursuant to the third category of joint criminal enterprise; it is therefore not necessary for the Prosecution to prove that the Accused possessed the required intent for genocide before a conviction can be entered on this basis of liability.”); \textit{Id.}, ¶ 295 (“The Trial Chamber observes that the Appeal Chamber’s conclusion that the proper characterization of Krstic’s liability is aiding and abetting is confined to the facts of that case.”).
It is not necessarily, nor always, so: we have seen how the Chamber ‘clarified’ the bases for applying Jelisić’s Rule 98bis sufficiency test, and, logically, Rule 98bis decisions are the best place to affect the law on how Rule 98bis decisions are made. Certainly an assertive court could use a Rule 98bis decision to advance a judicially constructed rule as well as it could any other document, in which case scholars and practitioners would be well-advised to consider their actual impact, whatever the formal, doctrinal constraints. Yet even with this caveat, the Decision’s authority is greatest where it is least engaged with the evidence – which is to say, with the putative purpose of the entire exercise. The Chamber’s authoritative capacity to advance the law is, arguably, as great here in the Decision as in any document – including a final judgment – but only on a circumscribed set of legal and procedural issues that, structurally, do not reach to the question of individual guilt or innocence, let alone to questions of shared narrative.

VI. Conclusion: The Limits of Judgment

The post mortem deployments of the Decision have been limited and cautious. There are few extravagant or tendentious claims for its probative value or for its authority. Some actors have tried to mobilize the Decision as a kind of ersatz judgment, but even these efforts are seriously limited by the doctrinal straitjacket Rule 98bis creates – even the most ambitious advocates are compelled to acknowledge that the Decision is not a verdict. The very fact of this restraint, this non-use – especially by actors with evident convictions about Milošević’s guilt – suggests the limited utility of anything other than final judgment in constructing authoritative claims.

194 The value of the Decision may have been increased by a temporary circumstance: The ILA report, produced in 2008, could not rely on the still ongoing MOS trial; it is possible that the final judgment in that case would have exercised a displacing effect.
In particular, there is a notable absence of claims that the Decision – or really, the Milošević trial in general – has contributed to the construction of an authoritative narrative. The fact that advocates of the authoritative narrative school did not pick up the judgment and make more of it suggests that they did not think it would advance their advocacy goals. Either they were uncomfortable with its specifics (concerned, in other words, that it might indicate acquittal\textsuperscript{195}) or they recognized that this less-than-judgment was structurally inadequate.

If a trial reaches final judgment, no one is terribly concerned with earlier interim decisions. It is only when a trial is subsequently terminated that an interim decision potentially assumes greater importance. This suggests a mismatch between the interim judgment’s initial design and its deployment after a case, as in Milošević. The Decision was designed to serve a specific purpose in the middle of the trial; it was not designed to bear the load of final judgment, and deploying it for that purpose would stress the unfinished edifice. Formal, legal authority may or may not do what its advocates claim; in terminated trials, it surely cannot.

For what does rejection of a claim under Rule 98bis mean? What does it indicate about the shape of the law? We know that accepting a motion to acquit is consequential: If the Chamber had sided with the amici on a point of law – for example, finding that no international armed conflict existed prior to 24 March 1999 and therefore a suite of charges would have to be dropped – this would have an undeniably impact on the development of the law and provide confident guides to

\textsuperscript{195} As noted, commentators supposed that the Prosecution case was not going well. This suggests a curious feature of the authoritative narrative theory, and indeed of claims that ICL promotes reconciliation more broadly – the implicit assumption that the narrative will and should be one of guilt and conviction. Acquittal is not the point of ICL-as-reconciliation, even though, in theory, that should be equally efficacious.
the contours of jurisprudence. Points on which evidence was deemed insufficient can be profitably studied to determine what constitutes an obviously insufficient argument.

But rejecting a motion to acquit does not have an equally unambiguous impact. Perhaps, if a Chamber were to reject an amicus position in particularly emphatic terms – saying, in effect, that no reasonable trier could not convict, or that no one could accept the amicus interpretation – that might constitute a clear indicium. Anything less, however – anything that merely proceeds along the doctrinally established path for Rule 98bis review – tells us nothing about the law. Apart from its discussions of legal standards, not a single piece of factual evidence deployed in the Decision can be confidently assigned a definitive value, except those the Chamber expressly rejects as insufficient – those we know, but of the rest, nothing.

But if the Decision cannot bear the weight of judgment, cannot perform the authoritative functions of judgment, how can the raw evidence itself? One can review the Decision’s review of the evidence, but what can one say at the end? That one finds it persuasive? That one agrees or disagrees with the Chamber’s gloss? Perhaps, but nothing more. All we can say about this evidence – as an element of the Decision – is that it was not so insufficient as to compel the Chamber to order acquittal. It has no more juridical value, and no more interpretative value, apart from being a kind of summary. If it is to contribute to a transformative narrative and to reconciliation, that evidence will have to be deployed in other ways, according to other theories about how post-conflict communities reach consensus about divisive issues.
A. Authority after Death – Non-Legal Narratives: The radically limited utility of the Decision does not mean there are no other ways to achieve these goals. Independent legal analysis and history-writing provide alternative ways of producing narratives that can do at least as much informational and persuasive work as a legal judgment.

The Human Rights Watch report *Weighing the Evidence* represents a strong example of the claim that the trial process and materials have considerable value on their own. *Weighing the Evidence* cites extensively from the trial evidence, principally from the Prosecution phase, to build an argument about what happened during the Yugoslav wars and who was responsible. The report describes its own standard of review: it “did not attempt an exhaustive review of the evidence introduced a [sic] trial. Human Rights Watch did consider Milosevic’s cross-examination and defense and we did not include evidence where we felt Milosevic had raised valid questions in rebuttal as to the value of the evidence.”

The report reviews the evidence *de novo*, not filtering it through the Decision, although it often could have. This asserts the autonomous value of the evidence, which can be evaluated without reference to the Chamber’s formalistic review. Indeed, in theory an outside observer like Human Rights Watch could disagree with the Decision about the evidence: Even if the Chamber threw out a particular allegation, Human Rights Watch could in effect ‘reinstate’ it in its own analysis; equally, it could ‘acquit’ Milošević on a count that the Chamber upheld.

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196 HUMAN RIGHTS WATCH, *supra* note 44, at 16. This is a filter that the Trial Chamber, taking the Prosecution evidence at its highest, did not apply.
197 For example, on Belgrade’s financial and material assistance to the Croatian and Bosnian Serb armies, both the Decision and the HRW report mention statements by Ratko Mladić (HRW p.16; Decision ¶ 261), testimony from General Végh (HRW p.16; Decision ¶ 273), the plan of supply codenamed “Izvor” (HRW p. 36, Decision ¶ 271) and testimony by Dr. Williams (HRW p. 37, Decision ¶ 258).
198 I have not found that they actually do this.
Likewise, the enormous Milošević archive is, or will be, a rich source for historians; from it they can construct accounts that, through their coherence and persuasiveness, can acquire a kind of authority. But either of these forms will, of necessity, belong to an entirely different genus of authority than that specific kind afforded by judgment. A report like *Weighing the Evidence* or archival work by scholars demonstrates both what can be achieved through private evaluation of evidence and its limits, which are defined by the lack of authoritative imprimatur. Anyone can review evidence; it is not the facts produced at trial but their legal imprimatur that matters to the particular kind of authoritative narrative ICL is supposed to produce. Historians and legal scholars can contest a court’s findings, reinterpret evidence, and even contest authoritative rulings; as cases like *Yamashita* demonstrate, the aggregated opinion of scholars and historians may outweigh a technically authoritative legal judgment. Yet claiming too broad a scope for reinterpretation undercuts the original argument for trials, which is that legal determinations contribute specially to reconciliation. Any outcome arrived at without going through the forensic processes of formal trial does not, by definition, create the desired effect. In this sense, other approaches simply recapitulate the problem of authority.

**B. Neither in Death Nor in Life – Justice without Transformation:** Whether or not there is a proper and plausible role for courts in creating shared narratives – or even a right to truth – there are serious limits on the ability of the trial process to achieve anything like it. This Article has

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199 ORENTLICHER, SHRINKING THE SPACE, supra note 30, at 73 (“In time, evidence introduced in the Milošević case may go some way toward vindicating these hopes [for recognition of crimes in Serbia]. Scholars and non-governmental organizations have begun what will likely be a long process of reclaiming that evidence and establishing non-judicial processes of learning from it.”).

explicated the implications of the Milošević Decision for the theory that justify ICL as a source of transformative, authoritative narrative. It has focused on the specific problem of terminated trials, but the real problems that the defective Decision exposes are with the authoritative narrative theory itself, and its structurally insupportable aspirations. For it is not only in terminated trials that the legitimating authority of final pronouncement is lacking, but in final judgments and in trials as well.

The fiction of a combat between competing narratives balanced by a neutral judge who then arrives at a fuller truth strains credulity. The extraordinary imbalance in resources between any given international prosecution and any given defense team is well known;¹ for self-representing defendants such as Milošević, it evidently can reach to the limits of physical endurance.² The neutrality of the court and its officers is often purchased through an almost total abstraction from and ignorance of the local communities whose conflicts the court must adjudicate.³ These imbalances and defects undermine the very idea that courts produce sufficiently balanced and deliberate outcomes to merit authoritative respect in the first place.

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¹ See BOAS, supra note 13, at 32-43, 263-265 (“[I]t is obvious that the resources at the disposal of the prosecution in any proceedings before the ICTY is substantially greater than that available to the accused . . . the quantity of defence funding to service trials of high-level officials, when compared with the resources expended on those cases by the Office of the Prosecutor, may be considerably unbalanced.”); James Cockayne, The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals, 28 FORDHAM INT’L L.J. 616, 669-674 (2005) (stressing that the recurrent problem of inequality of arms persists in the Special Court for Sierra Leone because of disproportionate allocation of resources and structural design flaws). See also Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement ¶ 29-56 (July 15, 1999) (addressing the issue of imbalance but concluding that “the Appellant has failed to show that the protection offered by the principle of equality of arms was not extended to him by the Trial Chamber”); but see Prosecutor v. Delalić, Case No. IT-96-21, Decision on the Prosecution’s Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence ¶¶ 44-49 (Feb. 4, 1999) (ordering the Defense to supply the Prosecution with a list of witnesses on a theory of equality of arms).

² See Michael P. Scharf, Self-Representation versus Assignment of Defence Counsel before International Criminal Tribunals, 4 J. INT’L CRIM. JUST. 31, 38-40 (2006) (arguing for the imposition of a counsel because of the complexity of international crimes cases); see also generally BOAS, supra note 13, at 265-270; WALD, supra note 63, at 40-42.

³ See, e.g., Elena Baylis, Tribunal-Hopping with the Post-Conflict Justice Junkies, 10 OREGON REV. INT’L L. 361 (2008); IWPR, supra note 1 (“it is clear that whatever chance the ICTY had to contribute to the complex process of reconciliation was for a long time compromised by its failure to engage with people in the region”).
Beyond the dynamics of the courtroom, the authoritative narrative theory face challenges in its application – and not only the particular theory, but its broader category of post-conflict transformation through legal justice. Early enthusiasms for international tribunals as agents of reconciliation have become subdued in the absence of any evidence that reconciliation is occurring in the former Yugoslavia, let alone that the ICTY has contributed to it.\textsuperscript{204} The recent turn to expressive theories to justify ICL is, in part, a recognition that deterrence and reconciliation rest on an empirically weak base.\textsuperscript{205}

The questions most critical to those for whom an authoritative narrative is most needed – the citizens of the former conflict zone – are often of a nature and complexity that will escape a neutral outsider. In its domestic incarnations, the trial system – and particularly the adversarial

\textsuperscript{204} See, e.g., Janine Natalya Clark, \textit{Judging the ICTY: has it achieved its objectives?}, 9 SOUTHEAST EUROPEAN & BLACK SEA STUDIES 123, 134-136 (March–June 2009) (acknowledging the lack of ICTY’s contribution to reconciliation); ICTY, REPORT OF THE PRESIDENT ON THE CONFERENCE ASSESSING THE LEGACY OF THE ICTY (April 27, 2010), www.icty.org/x/file/Press/.../100427_legacyconference_pdt_report.pdf (“It was widely agreed upon that the ICTY had made a tremendous contribution to bringing justice to the affected populations in the former Yugoslavia, but the communities have not yet reconciled and this is not something that could be achieved by the Tribunal alone.”); IWPR, supra note 1 (discussing lack of reconciliation in Bosnia and finding an “incredibly complex state of affairs in which convenient assumptions about justice, truth and reconciliation quickly dissolve. ¶

system – has been conceptually content with verdicts rather than truth; the ambitious grafting of
the further, higher goal of truth – incontestable, undeniable and displacing truth – onto the
mechanics of adversarial trials overreaches. The Decision – that imperfect, interim document –
by its very imperfection demonstrates the insufficiency, not of its own transformative potential,
but of the idea itself.