ESTABLISHING THE FACTS ABOUT MASS ATROCITIES: ACCOUNTING FOR THE FAILURE OF THE ICTY TO PERSUADE TARGET AUDIENCES

MARKO MILANOVIĆ*

ABSTRACT

In an earlier piece, I discussed the findings of a series of public opinion surveys in the former Yugoslavia, probing the attitudes of the respondent populations regarding the mass atrocities committed during the Yugoslav wars of the 1990s, such as the Srebrenica genocide. That article concluded that the International Criminal Tribunal for the Former Yugoslavia (ICTY), the first modern, post-Nuremberg international criminal jurisdiction, failed to persuade the target audiences in the former Yugoslavia that the findings in its judgments are true. The surveys show that denialism is widespread and governed by ethnic bias. For example, only 10% of the Serbian population accept the facts about the Srebrenica genocide, the greatest crime committed in Europe since World War II, as they were established by the ICTY. While that companion piece addressed the empirical, “what” question, this one looks at the equally, if not even more important, “why” question: why has the ICTY proven to be so ineffectual in inducing attitude change? In answering this question I proceed primarily from the theoretical standpoint of social psychology, enabling a more sophisticated understanding of how the target audiences in the former Yugoslavia have so persistently resisted internalizing the ICTY’s factual findings. I argue that the causes of the ICTY’s ineffectiveness are complex, turning on an interplay between subjective and objective limitations on individuals’ processing of information about war crimes, limitations that are largely independent of the quality of the Tribunal’s own work. For example, average citizens normally lack any immediate experience of the event, which necessitates the mediation of information by third parties, e.g., the media and political and intellectual elites, while they similarly lack the time, expertise and resources to rigorously examine the information by themselves. Remoteness from the event also facilitates the avoidance of revising previously acquired beliefs about the event, for instance through discrediting certain sources of information, such as the ICTY. Crucially, ethnic

* Associate Professor, University of Nottingham School of Law; Vice-President, European Society of International Law; Associate, Belgrade Centre for Human Rights. E-mail: marko.milanovic@nottingham.ac.uk.

I would like to thank Jutta Brunée, Jacob Cogan, David Fraser, Monica Hakimi, Larry Helfer, Zarko Markovic, Sam Moyn, Roger O’Keefe, Christian Tams, Sandy Sivakumaran, Ed Swaine, Anne van Aaken, and Ingrid Wuerth for their comments. © 2016, Marko Milanović.
nationalism continues to play a central role in the politics of the region, providing key political actors with both the opportunity and the incentive to engage in the deliberate manipulation of the (already heavily mediated) information that citizens receive about specific atrocities and the ICTY. These objective limitations then feed into the numerous cognitive biases that shape the processing of any information about mass atrocities, essentially pushing individuals (at an unconscious level) to believe what they want to believe and reason about the ICTY and its work in a way that is most protective of their own sense of identity. The Article thus argues that even had the ICTY been run perfectly—and it was not—it would not have been able to overcome the many barriers insulating the peoples of the former Yugoslavia from the positive effects of its work. Operating in a bias-driven downward spiral, the more it challenged established nationalist narratives the more it generated distrust, and hence the less likely it was that it would be believed. In other words, as a mechanism of transitional justice, the Tribunal was from the outset doomed to fail. Valuable lessons can, however, be learned from that failure, and not every other international criminal court and tribunal will necessarily find itself in the same unenviable position.

I. INTRODUCTION ................................... 1322
II. ATTITUDES AND BELIEF SYSTEMS ....................... 1328
III. OBJECTIVE LIMITATIONS ............................. 1330
   A. Lack of Direct Sensory Observation and the Consequent Need for Mediators ............................. 1331
   B. Lack of Time and Resources ................................. 1333
   C. Remoteness Facilitates Avoiding Belief Revision ............................. 1334
   D. Political Relevance and Manipulation ............................. 1335
IV. COGNITIVE BIASES AND LIMITATIONS ............................. 1336
   A. Confirmation Bias and Motivated Reasoning ............................. 1338
   B. Ingroup and Outgroup Bias ................................. 1340
   C. Heuristic Reasoning, System 1 and System 2 ............................. 1342
V. DECONSTRUCTING THE ICTY’S FAILURE TO PERSUADE .... 1343
VI. WHITHER THE ICTY? ................................... 1353
   A. Transitional Justice and Divergent Realities ............................. 1353
   B. Patterns of Bias and Distrust ................................. 1359
   C. Can Anything Be Done? ................................. 1366
VII. CONCLUSION ..................................... 1374

I. INTRODUCTION

In an earlier article, I attempted to establish the extent of the impact of the International Criminal Tribunal for the Former Yugoslavia
THE FAILURE OF THE ICTY TO PERSUADE AUDIENCES

(ICTY) on the peoples of the former Yugoslavia, in particular with regard to whether the ICTY shaped their attitudes towards specific crimes addressed in its judgments.\(^1\) That article was based on a series of surveys conducted in Serbia, Croatia, Bosnia and Herzegovina, and Kosovo, which taken as a whole provide an unprecedented body of public opinion research in post-conflict societies.\(^2\) The surveys show that the ICTY failed to persuade the relevant target populations that the findings in its judgments are true. It manifestly did not succeed in "combatting denial and preventing attempts at revisionism," let alone in "mak[ing] it impossible for anyone to dispute the reality of the


horrors that took place” in the Yugoslav wars. Even with respect to the gravest of all crimes in Yugoslavia—the July 1995 Srebrenica genocide, in which over a few days, Bosnian Serb forces massacred over 7,000 Bosnian Muslim men and boys—only 10% of ethnic Serbs in Serbia accept that the crime happened as established by the ICTY, with the remainder of the survey respondents engaging in various forms of denial.

---

4. 2011 BCHR Serbia Survey, supra note 2, at 112.
5. Chart compiled by the author from the 2011 BCHR Serbia Survey, supra note 2, at 161 (third column over within the second table with the heading “Majority of the population”).
Despite hopes that the ICTY would contribute to a process of transitional justice, the reality of the horrors that took place very much remains in dispute, while revisionism is rampant. The surveys demonstrate that significant majorities of the different populations of the former Yugoslavia are ethnically biased: they are much more likely to acknowledge the existence of crimes when their own group was the victim of that crime, and much more likely to dispute it if the members of their group perpetrated the crime. The surveys moreover show that a majority or strong plurality of each of the ethnic groups believes that their own group was the greatest victim of mass atrocities committed in the Yugoslav wars, while some other (adversary) group was the greatest perpetrator of war crimes.

The surveys thus confirm the continued strength of ethnic nationalist narratives, in which a sense of group victimhood plays a central role. The different ethnic communities in the former Yugoslavia are

---

6. Similarly, in the 2012 survey of the (mainly Bosnian Serb) population of the Republika Srpska, 5.7% of the respondents believed that Serbian paramilitaries committed crimes in Bijeljina in 1992, 6.1% believed that Serb forces expelled the Muslim population of Zvornik, 6.5% believed that civilians were killed and mistreated in Serb-controlled camps around Prijedor, and 23.9% believed that thousands of civilians were killed or wounded in the siege of Sarajevo; see also Milanović, supra note 1, at 249 n. 92 (chart made on the basis of results depicted in the 2012 BCHR Serbia Survey, supra note 2, at 40, 46-47). These were some of the most serious crimes committed in the Bosnian conflict, and all of them were addressed in ICTY judgments. See Milanović, supra note 1, at 249–250 n. 93.

7. For example, 76.1% of Serbian respondents believed that crimes were committed against Croatian Serbs during the 1995 Operation Storm, in which Croatian armed forces defeated ethnic Serb separatists in Croatia, but only 23.4% of Croatian respondents believed so. Milanović, supra note 1, at 250–252 (citing to the 2011 BCHR Serbia Survey, supra note 2, at 169; 2011 BCHR Croatia Survey, supra note 2, at 35). Similarly, 77.3% of Croatian respondents stated that they did not hear of, or did not believe in, the mistreatment of civilians in Croat-run camps in Bosnia. Id. at 26 (citing to the BCHR 2011 Croatia Survey, supra note 2, at 35).

8. Id. at 14–18.

9. See Daniel Bar-Tal et al., Sociopsychological Analysis of Conflict-Supporting Narratives: A General Framework, 51 J. OF PEACE RES. 662, 666 (2014). For a discussion on the concepts of group and national narratives, see Carol Fleisher Feldman, Narratives of National Identity as Group Narratives: Patterns of Interpretative Cognition, in NARRATIVE AND IDENTITY: STUDIES IN AUTOBIOGRAPHY, SELF AND CULTURE 143 (Jens Brockmeier & Donal Carbaugh eds., 2001) (“Narratives of national identity can be approached by seeing them as a special case of the group-defining story. Group-defining stories can be highly patterned, having a distinctive genre and plot structure, with all group members able to tell their group’s story in much the same way. Narratives of national identity are a special case of the group-defining story by virtue of their particular exteriority and constraint, which is derivative from the police powers of nations . . . The way they function in cognition is as interpretative frameworks that tell what meaning can be attached to events. In general, group-defining narratives facilitate interpretation, or allow particular events to be given a meaning, by
engaged in competitive victimhood, which is a major impediment to mutual forgiveness and reconciliation. In such a state, “members of conflicting groups experience a strong wish—and thus also strive—to establish that their ingroup was subjected to more injustice and suffering at the hands of the outgroup than the other way around.” The negative effects of competitive victimhood on intercommunal reconciliation are evident from numerous other examples, such as the Israeli-Palestinian conflict. The surveys also show a strong relationship between the respondents’ ethnicity, their perception of the ICTY's bias against members of their own group, and their trust in the ICTY and in its findings. Ethnic Croats and ethnic Serbs, regardless of whether they live in Serbia, Croatia, or Bosnia, exhibited strong levels of disapproval of the ICTY, with the ratio of negative to positive ratings ranging from roughly 3 to 1, to 6 to 1. The two communities that were satisfied with the ICTY—Bosniaks (Bosnian Muslims) and Kosovo Albanians—were unsurprisingly the ones whose worldviews were largely validated by the ICTY's work.

While the prior piece addressed the empirical, “what” question, this Article looks at the equally, if not even more important, “why” question: why has the impact of the ICTY’s work in “shrinking the space for denial” been negligible at best, and polarizing at worst? Why has the ICTY proven to be so ineffectual in inducing attitude change? In answering these questions I will proceed primarily from the theoretical standpoint of social psychology. Doing so will allow us to develop a more sophisticated understanding of how the target audiences in the former Yugoslavia have so persistently resisted internalizing the ICTY's

supervising a particular shared context within and with which they take on a determinate meaning.”) (internal numbering omitted). See generally DAVID BRUCE MACDONALD, BALKAN HOLOCAUSTS? SERBIAN AND CROATIAN VICTIM-CENTRED PROPAGANDA AND THE WAR IN YUGOSLAVIA (2002) (on myths of victimhood generated within Serb and Croat nationalist movements).


11. See id. at 357–358.

12. See Milanović, supra note 1, at 239–242.


14. This is of course not the only possible analytical standpoint, and I will draw on insights from other disciplines as well. For a very different approach to some of the issues addressed in this Article, mainly arising from the psychoanalytical tradition, see generally STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING (2001).
factual findings. We will see that the causes of the ICTY’s ineffectiveness are complex, turning on an interplay between subjective and objective limitations on individuals’ processing of information about war crimes, limitations that are largely independent of the quality of the Tribunal’s own work. Understanding the root causes of the ICTY’s ineffectiveness will also allow us to better appreciate what—if anything—can be done to mitigate these problems, and what lessons can be learned for other international criminal courts and tribunals.

In Part II, I explain that individuals’ attitudes towards specific crimes do not exist in isolation, but are part of comprehensive belief systems that form the evaluative lens through which the information about specific crimes, coming from all sources, is processed. Part III explores a series of objective factors that limit individuals’ capacity to process information about atrocities. For example, the average citizen did not personally experience the event. Thus, the average citizen must rely on information from third parties, e.g., the media and political and intellectual elites. The average citizen similarly lacks the time, expertise, and resources to rigorously examine the information by himself. Remoteness from the event also facilitates the avoidance of revising previously acquired beliefs about the event, for example by discrediting certain new sources of information, such as the ICTY. Crucially, ethnic nationalism continues to play a central role in the politics of the region, which provides key political actors with both the opportunity and the incentive to engage in the deliberate manipulation of the (already heavily mediated) information that citizens receive about specific atrocities and the ICTY.

Part IV proceeds to outline the subjective, internal limitations on information processing, including confirmation bias and motivated reasoning, leading to primacy effects, belief perseverance and attitude polarization, ingroup/outgroup bias, and the resort to heuristics. Part V then applies this analytical framework to the former Yugoslavia, focusing inter alia on the pervasiveness of nationalist narratives in the media and public education, the central role that ethnicity continues to play in the formation of individual and group identity, the consequent cognitive and emotional need to defend that identity by engaging in forms of biased reasoning that will facilitate that defense, and the susceptibility of regular individuals to predatory political manipulation.

16. The psychological jargon will be explained more fully as the Article progresses.
In Part VI, I examine the divided realities experienced by the different groups in the former Yugoslavia with regard to their recent past, and I illustrate the operation of these psychological mechanisms by discussing public and political reactions to specific ICTY judgments and important events of 2015, including the twentieth anniversaries of the Srebrenica genocide and the Operation Storm in Croatia. Part VI also discusses possible ways of mitigating the ICTY’s ineffectiveness in persuading its target audiences, while Part VII concludes the Article.

II. ATTITUDES AND BELIEF SYSTEMS

Before discussing why the ICTY has not been able to significantly influence the attitudes of the populations of the former Yugoslavia towards specific crimes, as measured in the surveys, it is important to understand that we are dealing with attitudes and beliefs that form part of whole belief systems, which are themselves part of the respondents’ sense of identity, such as Serb, Croat, Bosniak, or Albanian nationalism. Such systems are made up of package deals of mutually sustaining beliefs: “a configuration of ideas and attitudes in which the elements are bound together by some form of constraint or functional interdependence.” For example, a nationalist would not only hold views on events in the wars of the dissolution of the former Yugoslavia, but would also hold views that form a general victimhood narrative extending back through crimes committed during the Second World War by one ethnic group against another, events in the First World War, and medieval or even ancient history. These views of history are coupled with those on the distinctiveness of language, culture, religion, and national identity.

In other words, even though the surveys asked questions about specific events in the relatively recent past, these events are processed

19. The instrumentalization of such historical memories played an important role in the surge of nationalism in the former Yugoslavia and the eventual ethnic violence. See Eric Gordy, Guilt, Responsibility, and Denial: The Past at Stake in Post-Milosević Serbia 4 (2013). For a glimpse into what other particular beliefs form part of the overarching narrative in Serbia, see generally Novosti iz Proslosti: Znanje, Neznanje, Upotreba i Zloupotreba Istoriije [News From The Past: Knowledge, Ignorance, Use and Abuse of History] (Vojin Dimitrijević, ed., 2010) (a collection of essays by five leading Serbian historians working under the auspices of the BCHR, dealing with the knowledge, ignorance, use and abuse of history in Serbia).
within a belief structure that has a longer historical and cultural pedigree. Thus, for example, those same large majorities of various ethnic groups that disbelieve crimes committed by members of their own group also believe that their own group has historically been the greatest victim. Though it is theoretically possible, for example, for a Serb nationalist to accept the full extent of the Srebrenica genocide or any of the other Serb-perpetrated crimes in the former Yugoslavia as established by the ICTY, while still retaining all his other beliefs that form the nationalist belief system or worldview, that is unlikely.20 Instead, the individual beliefs are mutually reinforcing; changing one has an effect on others, which is why belief systems are resistant to change and some structural beliefs can be particularly rigid and inflexible. Humans possess a remarkable ability to adjust their belief systems to protect such core beliefs, distorting or dismissing any evidence to the contrary.21

Think, for example, of creationists who reject the theory of evolution, or of people who believe that vaccinations cause autism in children, or of climate change deniers. Once a person who holds those beliefs reaches saturation of emotional investment in what has become a core personal belief, no amount of evidence can be deployed externally to change that person’s mind. An “anti-vaxxer” parent, for example, who genuinely believes that she is doing her best to protect her child, is not going to be swayed by yet another scientific study, which can all too easily be dismissed as a product of “Big Pharma.”22

The level of investment in the core belief can sometimes be such that only a personally traumatic event that creates an intolerable degree of cognitive dissonance23 can lead to a revision of the belief.24 In fact,
even belief systems that appear to outsiders as inherently fragile and prone to collapse, such as doomsday cults whose prophecies do not bear out, show a remarkable degree of resilience in the face of contrary evidence and outside criticism, especially if such belief systems possess sufficient internal space for rationalizing criticism and are hence “structurally self-validating.”

This brings us to the objective and subjective factors that enable beliefs to be formed and prevent them from being revised, and that in turn help us to explain the survey results. First, I will discuss the objective limitations that the respondents operate under in forming their attitudes and beliefs; and second, I will discuss the subjective cognitive limitations that bind human judgment and decision-making.

III. OBJECTIVE LIMITATIONS

Even if human judgment was not subject to severe internal limitations, which we will explore in Part IV, the survey respondents’ capacity to reach reliable conclusions about specific atrocities is subject to external, objective limitations over which they have little or no control. These in turn feed into and reinforce the inherent cognitive limitations. The objective limitations include the respondents’ lack of immediate experience with specific crimes and their consequent reliance on third parties for information; the respondents’ lack of time and resources to rigorously reason about the information they receive; the ease with which disconfirming information can be dismissed due to the respondents’ remoteness from the events; and the continued relevance of the wartime atrocities for the nationalist politics in the region, leading to the systematic manipulation of relevant information. I will address each limitation in turn.

—


THE FAILURE OF THE ICTY TO PERSUADE AUDIENCES

A. Lack of Direct Sensory Observation and the Consequent Need for Mediators

The first objective limitation is that most of the survey respondents have not obtained information about crimes committed during the Yugoslav wars through immediate sensory observation or personal experience. They have not witnessed the crimes themselves, nor have they directly investigated them, for instance by interviewing the actual witnesses, by digging up the mass graves, or by collecting and examining other forensic evidence. Obviously, even had they done so, they would have lacked the technical means and expertise to properly evaluate such evidence. Though direct sensory perception is far from infallible (let alone the memory of such perception), it is also true that we are more likely to believe something that we see or otherwise experience ourselves because our senses are the only window we have between our minds and reality.26 Seeing, as they say, is believing. And in this case there is very little seeing.

Because there is little to no direct sensory perception, this necessarily means that the vast majority of the population obtains information about war crimes only indirectly, through some kind of mediator or source, such as the media, politicians, intellectual and other elites, NGOs and other activists, educational institutions and so on. This, in turn, necessarily raises the question of the credibility or reliability of the mediator or source: whether the survey respondents will accept what the source says as true will depend on whether they trust that source.27 Importantly, the mediators provide not only information about events (which may or may not be selective or even plainly false), but also their own interpretation of that information.

The ICTY is obviously one such source or mediator and by design, one would think, the best placed, most expert, and most objective such source. However, the ICTY’s work product is itself rarely observed directly by the respondent population, but is rather seen through the lens of other mediators, above all the media. The Belgrade Centre for Human Rights (BCHR) surveys show, for example, that more than 90% of Croatian and Bosnian respondents never visited the ICTY webpage, while the overwhelming majority of the remainder did so only occasion-

26. See generally Teresa A. Myers et al., The Relationship Between Personal Experience and Belief in the Reality of Global Warming, 3 NATURE CLIMATE CHANGE 343 (2013) (demonstrating link between personal experience and the formation of belief in climate change in people without strong prior beliefs).

Similarly, 90% of Serbian respondents said that they never read an ICTY judgment, while 4% said that they read some parts only. Crucially, 73% of Bosnian respondents and 84% of Serbian respondents said that television and radio were their main media sources of information about the ICTY. The Serbian surveys further demonstrate how heavily mediated the attitudes towards the ICTY actually are. When the respondents were asked (on a scale of 1 to 5) who influenced them and whom they believed the most when forming their own attitudes towards the ICTY, they responded in accordance with Figure 2.

Note how the representatives of the ICTY are at the very bottom of the influence scale. Note also that this question was about who the respondents say influenced them the most, not who actually so influenced them. Influence works on both conscious and unconscious levels, and we are not necessarily always aware of, or prepared to openly admit who actually influenced us in forming a particular belief. The actual influence of politicians might, for instance, be significantly greater, and the influence of local lawyers significantly lower, than

![Table](image)

**FIGURE 2**: Metrics Based on the Question "Whom do You Believe the Most About the ICTY?".

---


29. 2011 BCHR Serbia Survey, supra note 2, at 112.

30. 2012 BCHR Bosnia Survey, supra note 2, at 24; 2011 BCHR Serbia Survey, supra note 2, at 124. Croatian respondents were asked whether the Croatian media reported on the work of the ICTY objectively and without bias: 57% of Croatian respondents believed that they did, whereas 27% thought they did not. 2011 BCHR Croatia Survey, supra note 2, at 16.

stated. In any event, it is clear that whatever information the ICTY produces on any given crime only reaches the majority of respondents after it passes through several filters, most of all through the media, that interpret the information before disseminating it to the respondents.

B. Lack of Time and Resources

Not only do the survey respondents have to rely on mediators and indirect sources in forming their beliefs about, say, the Srebrenica massacre or the siege of Sarajevo, they also have only a very limited amount of time and resources to absorb and critically evaluate information provided by mediators. They are otherwise far too busy making a living and actually doing that living. Moreover, if the average citizen does think about these issues, they do so outside any structured process (except for, perhaps, education, to the extent that war crimes and recent history are the subject of teaching in primary, secondary, and tertiary educational institutions). It is hence inevitable that the respondents will use cognitive shortcuts and only a very few sources when making up their minds on any given topic. Among those limited information sources will definitely not be the excessively long judgments of the ICTY, written in impenetrable legalese English or French after equally excessively long trial and appellate proceedings.

Contrast the average citizen’s position, with, for example, that of an actual ICTY judge. Just like a regular member of the public, the judge will not have had direct sensory experience of the events at issue before him or her. The judge will also have to rely on other people as sources, such as witnesses, crime scene investigators, technicians, experts, etc., and decide whether to trust them (or not). But the judge will do so subject to a long and rigorous adversarial process, during which each

32. In Bosnia, on the other hand, when asked who they trusted the most, 37% of respondents said that they trusted the media, while 39% said that they do not trust anyone. 2012 BCHR Bosnia Survey, supra note 2, at 33.

33. See discussion infra Parts V, VI on education.

34. For example, the trial level decision contained in Prosecutor v. Milutinović et al., Case No. IT-05-87-T, Judgment (Vols. 1-4) (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009), dealing with Serbian crimes in Kosovo, ran at almost 1500 pages, plus an annex of 300 pages, in a total of 4 volumes. The trial judgment in Prosecutor v. Popović et al., Case No. IT-05-88-T, Judgment (Vols. 1-2) (Int’l Crim. Trib. for the Former Yugoslavia June 10, 2010), dealing with the Srebrenica genocide, with its two annexes, Annex I: Glossary and Annex II: Procedural History, ran at almost 1000 pages. It is likely that the only people who have actually read the totality of these judgments were the lawyers involved in the two cases.
source or mediator’s credibility or reliability will be challenged and tested. The judge will have ample time to reflect, and within that time, because of his or her professional training, will keep an open mind to all arguments. These are all luxuries that the regular person simply does not have, yet even those rigorous processes are prone to error.

C. Remoteness Facilitates Avoiding Belief Revision

The remoteness of the vast majority of respondents from all or most specific crimes and the consequent dependence on mediators and other sources, coupled with the limited time and energy that most people can afford, enable all too easy methods of avoiding belief revision. For example, denying that a genocide or even any crime took place at Srebrenica only requires discrediting the source claiming that something happened: the ICTY is biased against Serbs, or is in Washington’s pocket, or the ICTY-supporting human rights NGOs are traitors doing propaganda paid for by the West, and so forth. The space available for such rationalization strategies that supports the internally plausible logic of self-validating belief systems that we looked at above is enormous and can be skillfully exploited by various actors who help shape public opinion.

That lack of immediacy of experience matters for how easily evidence contrary to one’s beliefs can be discounted is not only supported by psychological research, but is apparent from the BCHR surveys as well. A particularly instructive example is the graphic film of the killing of several Bosniak youths from Srebrenica by the Scorpions paramilitary unit in the village of Trnovo. That video was shown at Milošević’s trial at the ICTY and was widely publicized in the Serbian media in June 2005. While memories of the film inevitably faded somewhat by the


37. See Boudry & Braeckman, supra note 25 and accompanying text.

time of the 2011 BCHR survey, the survey nonetheless shows that it is significantly less likely for those respondents who heard of the Trnovo executions to deny that they happened, when compared to the Srebrenica genocide itself. 39 This denial-countering impact of the more immediate and visceral audio-visual experience is nothing new for international criminal justice—one need only recall the example of the Nazi concentration camps film that was shown during the main Nuremberg trial. 40 But even such evidence can be dismissed since it too ultimately boils down to questions of trust and credibility, i.e., whether the videos were doctored or manipulated in some way. 41

D. Political Relevance and Manipulation

Finally, we must at all times appreciate that the respondents form their views on crimes in the former Yugoslavia in a context in which these issues are of continued, daily political relevance. To this day, political elites in all of the countries of the former Yugoslavia still

---

39. Of those respondents who said they heard of the event, 44.3% did not believe that the Srebrenica massacre happened, whereas 24.5% said that they did not believe that the Trnovo executions happened. 2011 BCHR Serbia Survey, supra note 2, at 170. Moreover, of those respondents who both heard of the event and believed it happened, 92% believed that the Trnovo executions were a crime, while 83.7% believed that Srebrenica massacre was a crime. Id. at 184. However, fewer people in total heard of the Trnovo (56.1%) execution than of Srebrenica massacre (71.6%). Id. at 162; see also 2009 BCHR Serbia Survey, supra note 2, at 163, 171, 185 (68.4% of respondents had heard of the Trnovo executions, but still with significantly lower levels of denial when compared the 78.1% of respondents who had head of the Srebrenica massacre, which is consistent with the hypothesis that the memory of the video is gradually fading but still retains a particular impact for those who remember it). The disconnect between the Trnovo executions and Srebrenica in the perceptions of the Serbian public may be due at least partly to deliberate political and media manipulation. See Petrović, supra note 38, at 103–05; Gordy, supra note 19, at 144.

40. See, e.g., Stephan Landsman, Crimes of the Holocaust: The Law Confronts Hard Cases 25–28 (2005). “The concentration-camp film had an electric effect on those who viewed it in the Nuremberg courtroom. The judges were shocked by what they had seen. President Lawrence immediately adjourned the proceedings for the day and, in his dismay, forgot to make his accustomed arrangements for convening the next session. The defendants were overwhelmed. Several openly wept during the screening, and virtually all viewed it as a crushing blow to their prospects at trial.” Id. at 26; see also Video, Nazi Concentration Camps—Film shown at Nuremberg War Crimes Trials, YouTube (Mar. 23, 2013), https://www.youtube.com/watch?v=pQJ42ONPD0. One remarkable aspect of the film is how it shows German civilians being taken by US soldiers to the camps so that they could themselves directly witness the camps’ horrors. See Lawrence Douglas, The Memory of Judgment: Making Law and History in the Trials of the Holocaust 11–37 (2001).

41. See Gordy, note 19, at 133–34.
depend on nationalism as a source of their power and authority.\(^{42}\) They hence have a vested interest in using all instruments in their power—and these are many, and are much more influential than whatever outreach program the ICTY can concoct—to push their own agenda and distort any information coming out of the ICTY. This is especially true when it comes to control over the media, which remain subject to strong political influence in Bosnia, Croatia, Kosovo, and Serbia.\(^{43}\) It is almost trite to observe that mass atrocities do not tend to happen in liberal, open pluralist societies, but tend to occur in more or less authoritarian states where there is a strong tendency to see control over media (and hence influence over public opinion) as indispensable for maintaining power.\(^{44}\)

This now brings us to the cognitive biases and limitations operating on the survey respondents.

### IV. COGNITIVE BIASES AND LIMITATIONS

Decades of research in social psychology and neuroscience, much of it repeatedly experimentally verified, have convincingly proven that human rationality is bounded in multifaceted ways. Psychological mechanisms such as confirmation bias, motivated reasoning, ingroup-outgroup bias, and resort to heuristics are an inherent part of human mental processing and are present, to a greater or lesser extent, in all of us. These mechanisms are not dependent on intellectual capability, nor is their influence dispellable by logic alone. A classical study by Amos Tversky and Daniel Kahneman found, for example, that experts trained in statistics are prone to the same biases as lay persons when making intuitive judgments about the likelihood of uncertain events.\(^{45}\) Unintelligent and smart people can equally believe in things that

---

\(^{42}\) See Bar-Tal et al., supra note 20, at 247 (noting that “[p]oliticians often use collective victimization as a source of political power, and reminders of past and present victimization are a potent theme for recruitment and mobilization.”).

\(^{43}\) See, e.g., Freedom of the Press 2015, FREEDOM HOUSE 6–7, 15, 22–23 (2015), https://www.freedomhouse.org/sites/default/files/FreedomofthePress_2015_FINAL.pdf (reporting on the overall deterioration of press freedom in the Balkans, ranking Croatia and Serbia at a joint 80th place, Kosovo 97th, and Bosnia 107th, out of all states in terms of press freedom, indicating only “partly free” press. In fact, Serbia’s score is said to have declined “due to increased government harassment of journalists and restrictions on their work, as well as a decrease in the diversity of media after the cancellation of major political talk shows.”).

\(^{44}\) See Klarin, supra note 2, at 90.

\(^{45}\) See Amos Tversky & Daniel Kahneman, Judgment under Uncertainty: Heuristics and Biases, 185 SCIENCE 1124, 1130 (1974).
appear manifestly misguided or irrational to outside observers. In fact, in some contexts, intelligent and well-educated people can be more resistant to revising their core beliefs than those not so blessed, as anyone who has ever experienced an academic’s defensiveness once their words have been committed to paper can attest. As Michael Shermer put it: “Smart people believe weird things because they are skilled at defending beliefs they arrived at for non-smart reasons.”

The most likely explanation for these psychological mechanisms, especially in light of their pervasiveness, is that they are the product of human evolution. That is, these mechanisms were evolutionarily advantageous, and thus were selected for: very crudely, an individual who resorted to heuristics to jump to quick conclusions that were correct most of the time was more likely to survive until procreating (and hence passing on this trait to his or her offspring) than a deeply reflective individual who took the time to ponder the universe while hiking in the African savanna.

Before providing a brief outline of these mechanisms, it is necessary to make three preliminary points. First, the line between these mechanisms is at times blurry. In fact, they reinforce and sustain one another. Second, common to most of the mechanisms is that they frequently tie cognition to emotion or affect, even if the exact parame-

46. Michael Shermer, Why People Believe Weird Things: Pseudoscience, Superstition, and Other Confusions of Our Time 283 (2002) (“[M]ost of us most of the time come to our beliefs for a variety of reasons having little to do with empirical evidence and logical reasoning (that, presumably, smart people are better at employing). Rather, such variables as genetic predispositions, parental predilections, sibling influences, peer pressures, educational experiences, and life impressions all shape the personality preferences and emotional inclinations that, in conjunction with numerous social and cultural influences, lead us to make certain belief choices. Rarely do any of us sit down before a table of facts, weigh them pro and con, and choose the most logical and rational belief, regardless of what we previously believed. Instead, the facts of the world come to us through the colored filters of the theories, hypotheses, hunches, biases, and prejudices we have accumulated through our lifetime. We then sort through the body of data and select those most confirming what we already believe, and ignore or rationalize away those that are disconfirming. All of us do this, of course, but smart people are better at it through both talent and training.”).


48. See generally Hugo Mercier & Dan Sperber, Why Do Humans Reason? Arguments for an Argumentative Theory, 34 Behav. & Brain Sci. 57 (2011) (arguing that the basic purpose of human reasoning is not to arrive at correct conclusions but rather to persuade others that these conclusions are correct).

49. See id. at 63-68 (discussing confirmation bias and motivated reasoning as cognates); see also Dan Kahan, Is Cultural Cognition the Same Thing as (or Even a Form of) Confirmation Bias?, Cultural Cognition Blog (Nov. 15, 2012, 9:42 PM), http://www.culturalcognition.net/blog/
ters of the relationship are controversial in the psychological literature. The effects of confirmation bias, for example, are much stronger if we feel very intensely about the particular subject. This link between emotion and cognition is again apparently hard-wired in our brains and largely beyond our control, as recent research in neuroscience demonstrates. Finally, most of these mechanisms work on an unconscious level: we may in fact passionately believe that we are fully objective and rational while we are actually drowning in confirmation bias.

A. Confirmation Bias and Motivated Reasoning

Confirmation bias “connotes the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand.” As an important study put it:

[T]here is considerable evidence that people tend to interpret subsequent evidence so as to maintain their initial beliefs. The biased assimilation processes underlying this effect may include

2012/11/15/is-cultural-cognition-the-same-thing-as-or-even-a-form-of-co.html (distinguishing cultural cognition from confirmation bias).


51. Woo-Young Ahn et al., Nonpolitical Images Evoke Neural Predictors of Political Ideology, 24 CURRENT BIOLOGY 2693, 2695 (2014) (demonstrating the ability, through magnetic resonance imaging of the brain, to reliably predict a person’s political ideology by their response to a single disgusting stimulus (an image of a mutilated body) and making the argument that “Accumulating evidence suggests that cognition and emotion are deeply intertwined, and a view of segregating cognition and emotion is becoming obsolete. People tend to think that their political views are purely cognitive (i.e., rational). However, our results further support the notion that emotional processes are tightly coupled to complex and high-dimensional human belief systems, and such emotional processes might play a much larger role than we currently believe, possibly outside our awareness of its influence.”). See generally Xiaosi Gu et al., Cognition–Emotion Integration in the Anterior Insular Cortex, 23 CEREBRAL Cortex 20 (2013) (arguing, on the basis of magnetic resonance imaging, that cognitive and emotional processes at least partially share common brain networks); Luiz Pessoa, On the Relationship Between Emotion and Cognition, 9 NATURE REVIEWS NEUROSCIENCE 148 (2008) (arguing that complex cognitive–emotional behaviours have their basis in dynamic coalitions of networks of brain areas, none of which should be conceptualized as specifically affective or cognitive).

52. See Nickerson, supra note 50, at 175, 211.

53. Id. at 175.
a propensity to remember the strengths of confirming evidence but the weaknesses of disconfirming evidence, to judge confirming evidence as relevant and reliable but disconfirming evidence as irrelevant and unreliable, and to accept confirming evidence at face value while scrutinizing disconfirming evidence hypercritically.54

Confirmation bias is probably the most important of all cognitive biases generally, and for our purposes specifically. It pervades all aspects of human decision-making, at times with catastrophic consequences.55 Mitigation and debiasing strategies have accordingly been adopted in numerous contexts. For instance, scientific experiments generally include safeguards against confirmation bias and other possible biases, e.g., through randomized controlled trials.56

Confirmation bias is linked to a number of effects.57 First, the primacy effect: “[w]hen a person must draw a conclusion on the basis of information acquired and integrated over time, the information acquired early in the process is likely to carry more weight than that acquired later.”58 Second, belief perseverance: beliefs tend to be very resistant to change even in the face of compelling contrary evidence.59 Belief perseverance has been called “one of social psychology’s most reliable phenomena.”60 Third, attitude polarization: when the proponents of opposing viewpoints are exposed to mixed or inconclusive information or evidence, they will assimilate such evidence in a way that hardens their pre-existing beliefs, pushing the already opposed groups further apart.61 Such polarization appears to be particularly strong


57. See Ford, supra note 15, at 436.

58. Nickerson, supra note 50, at 187; see also supra note 20 and accompanying text.

59. Id.


61. See generally Lord et al., supra note 54 (demonstrating such effect in an experiment involving the proponents and opponents of capital punishment). But see Deanna Kuhn & Joseph Lao, Effects of Evidence on Attitudes: Is Polarization the Norm?, 7 Psychol. Sci. 115 (1996) (arguing that genuine attitude polarization is possible, but infrequent).
when the attitudes at issue provoke intense emotional reactions. When emotional reactions are at work, there is affect-driven motivated reasoning\(^62\) that carries people forward to conclusions they want to reach.\(^63\)

While errors are most likely when people are motivated to reach particular, directional conclusions, there are still some limits to such reasoning:

People do not seem to be at liberty to conclude whatever they want to conclude merely because they want to. Rather . . . people motivated to arrive at a particular conclusion attempt to be rational and to construct a justification of their desired conclusion that would persuade a dispassionate observer. They draw the desired conclusion only if they can muster up the evidence necessary to support it. In other words, they maintain an “illusion of objectivity.” To this end, they search memory for those beliefs and rules that could support their desired conclusion.\(^64\)

In other words, it is these very limits to motivated reasoning and the illusion of objectivity they create that prevents people from realizing that their reasoning is actually biased.\(^65\)

B. Ingroup and Outgroup Bias

Bias based on group membership has also been well documented in psychological and sociological research.\(^66\) It can take place in two basic forms: favoritism towards one’s own group (ingroup positivity) and

---

\(^{62}\) Motivated reasoning is the “unconscious tendency of individuals to process information in a manner that suits some end or goal extrinsic to the formation of accurate beliefs . . . [the goal] directs mental operations—in this case, sensory perceptions; in others, assessments of the weight and credibility of empirical evidence, or performance of mathematical or logical computation—that we expect to function independently of that goal.” Dan M. Kahan, Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law, 125 HARV. L. REV. 1, 19 (2011) (relying on Kunda, supra note 23).


\(^{64}\) Kunda, supra note 23, at 482–83 (internal citations omitted).

\(^{65}\) See Ford, supra note 15, at 422.

derogation or rejection of other groups (outgroup negativity). The two may, but need not be, combined. Psychologists have experimentally demonstrated that ingroup-outgroup bias exists even when assignment to a particular group is completely arbitrary. However, the bias is most intense, especially when it comes to outgroup derogation, when the group classification relates to status or identity and arouses strong emotions. In other words, there is a direct connection between group bias and the group members’ sense of self-worth or self-esteem. Criticism of the ingroup is perceived as criticism of oneself, albeit indirectly. This is perhaps most obviously the case when the ingroup-outgroup dichotomy is on the basis of perceived racial, ethnic, or religious differences.

Group biases are robust and persistent: they “occur even when people are striving to suppress their biases or when they claim that they are free of such tendencies.” For our purposes, group biases are obviously foundational for any intergroup conflict; atrocities in particular necessitate a level of moral exclusion or dehumanization of the intended victims. Even after the conflict, ingroup-outgroup biases will continue to affect the processing of any relevant information by individuals who strongly identify with a group, especially by causing the individual to discount information that is unfavorable for that individual’s ingroup. This is the link with confirmation bias and motivated reasoning: evidence confirming pre-existing beliefs and attitudes about ingroups and outgroups will be favored, while disconfirming evidence is more likely to be rejected. These biasing effects are particularly pronounced in the context of established ingroup narratives, which create peer pressure to conform to that narrative in order to maintain status and approval within the group.

67. See DONELSON R. FORSYTH, GROUP DYNAMICS 425 (5th ed. 2009); Dovidio & Gaertner, supra note 66, at 1087.


70. See Hewstone et al., supra note 66, at 579–80; Brewer, supra note 66, at 697.

71. See FORSYTH, supra note 67, at 430; Ford, supra note 15, at 423.


73. FORSYTH, supra note 67, at 423.

74. Id. at 428–29.

75. See Elizabeth Suhay, Explaining Group Influence: The Role of Identity and Emotion in Political Conformity and Polarization, 37 POL. BEHAV. 221, 222–223 (2015); Wendy Wood et al., Self-Definition,
C. Heuristic Reasoning, System 1 and System 2

Heuristics are “[c]ognitive short-cuts that provide adequately accurate inferences for most of us most of the time.”76 Heuristics have been experimentally proven, for example, with regard to how people make judgments about statistics, risk, averages, or probabilities.77 They allow us to reach conclusions quickly, without going through a long, reflective, and intellectually demanding process of evaluating complex information and evidence.78 In other words, they facilitate intuitive judgment. Building on the work of Keith Stanovich and Richard West, Daniel Kahneman has elaborated on a dual process theory of cognition, divided into two systems:

“The operations of System 1 are fast, automatic, effortless, associative, and often emotionally charged; they are also governed by habit, and are therefore difficult to control or modify. The operations of System 2 are slower, serial, effortful, and deliberately controlled; they are also relatively flexible and potentially rule-governed.”79

System 1, for example, allows us to recognize the emotions running through a person while looking at their face, while System 2 allows us to engage in complex computational tasks. Heuristics directly tie into System 1, “fast” type of thinking, and can lead to biased outcomes. Heuristics are more likely to be resorted to when the cognitive alternatives are effortful and there are insufficient incentives to use slower, but less prone to bias, System 2 reasoning.80

The relevance of this line of psychological research for our purposes is clear: an ordinary individual is not going to form her opinion on, say, the existence of anthropogenic climate change by carefully looking at thousands upon thousands of pages of existing research in climate science—an operation for which that individual normally lacks the time, resources and expertise. Rather, she will use a heuristic to form
her own opinion: what do the scientists (whom I trust) say? What do the political, religious and other social leaders (whom I trust) say? And what do other members of the group with which I identify and in which I wish to maintain my status say? Whether the individual trusts the intermediary source is largely determined by the wider cultural context within which the individual operates, coupled with dominant narratives propagated within their particular group, e.g., through the media. In a similar vein, ordinary individuals will not make up their mind on the ICTY, or on specific crimes addressed by the ICTY, by reading the many thousands of pages of the ICTY’s judgments. They will also rely on a heuristic: whom should I trust about the ICTY? That heuristic will inevitably have an emotional valence and potential for bias, and will tend to work in a way that best protects the individual’s sense of identity.

V. DECONSTRUCTING THE ICTY’S FAILURE TO PERSUADE

The cognitive and objective limitations explored above provide a near-complete explanation for the results of the surveys done in the former Yugoslavia. All of the mechanisms we examined operated on the respondents and impacted their reasoning. Moreover, the different mechanisms amplified one another and were mutually reinforcing in multiple ways.

First, we have seen how confirmation bias and motivated reasoning favor information that was obtained first or earlier in the cognitive process. We have also seen that once attitudes are formed about that information they tend to lead to belief perseverance, especially when they are emotionally charged. It is crucial to understand in that regard that nationalist narratives will of necessity always predate the work output of the ICTY or any other international tribunal dealing with an interethnic conflict. Without the entrenchment of such nationalist narratives, which form part of a great number of individuals’ social

81. See Kahan, supra note 35, at 1 (“Where positions on some risk or other policy relevant fact have come to assume a widely recognized social meaning as a marker of membership within identity-defining affinity groups, members of those groups can be expected to selectively credit or dismiss all manner of information—from persuasive advocacy to reports of expert opinion; from empirical data to their own brute sense impressions—based on its consistency with their groups’ respective positions. The beliefs generated by this form of reasoning predictably excite expression of attitudes and related affective states that convey a person’s group identity. Such a disposition helps to maintain her connection to and standing among persons with whom she shares important bonds.”).

82. See supra notes 51–63 and accompanying text.
identity with strong emotional attachment, an interethnic conflict could not have arisen in the first place and there would have been no crime for an international court to investigate.\footnote{For an overview of theoretical approaches to the causes of ethnic conflict, see Karl Cordell & Stefan Wolff, Ethnic Conflict: Causes, Consequences, and Responses 4–75 (2010) (discussing in particular the role of various elites at different levels of organization); The Oxford Handbook of Intergroup Conflict (Linda R. Tropp ed. 2012) (overview of psychological research on intergroup conflict); The Oxford Handbook of Intergroup Conflict (Linda R. Tropp ed. 2012) (overview of psychological research on intergroup conflict); see also Noor et al., supra note 10, at 358 (discussing how competitive victimhood promotes ingroup cohesiveness and justifies violence against others); id. at 361 (discussing the Israeli-Palestinian conflict and noting how a sense victimhood was associated with endorsement of strict anti-Palestinian policies (including land annexation) on the Israeli side, and with willingness to justify suicide bombings on the Palestinian side); Bar-Tal et al., supra note 20, at 241.}

By the time the ICTY was created the wars in Bosnia and Croatia were in full swing with some of the worst crimes already having been committed, the justification for the ICTY’s creation in the first place.\footnote{See S.C. Res. 827, preamble (May 25, 1993).} Whole belief systems were already in place on all sides of the conflict. The main drivers behind these nationalist narratives were the media, especially state-owned television stations that operated under strong political control and generally marginalized dissenting voices.\footnote{See, e.g., Judith Armatta, Milosevic’s Propaganda War, Global Pol’y F. (Feb. 27, 2003), https://www.globalpolicy.org/component/content/article/105/29237.html; Spyros A. Sofos, Culture, Media and the Politics of Disintegration and Ethnic Division in Former Yugoslavia, in The Media of Conflict 162, 164-173 (Tim Allen & Jean Seaton eds., 1999). For further discussion on the role of the media in driving the national narratives in the Balkans, see generally Mark Thompson, Forging War: The Media in Serbia, Croatia, Bosnia and Herzegovina (1999); Media Discourse and the Yugoslav Conflicts (Pal Kolsto ed., 2012).} And it was through the media and other information mediators, such as local political and intellectual elites, that the populations of the Balkan states already received biased and heavily interpreted information about specific events, be it Srebrenica or the siege of Sarajevo or whatever.\footnote{See Ford, supra note 15, at 431–32; Gordy, supra note 19, at 125.} All this came long before the ICTY could say anything on the matter, let alone do so in a final judgment. Inevitably, therefore, the ICTY’s work would be assessed through the lens of pre-existing and often very polarized attitudes, which had a privileged, primacy effect on the minds of the audience. Similarly, initial impressions about the ICTY’s broader legitimacy as an institution would likely have been formed using fast, emotionally charged System 1 types of reasoning, and these impressions would then themselves be protected from change by the effects of confirmation bias.

Second, the primacy effect on the peoples of the former Yugoslavia is all the stronger because nationalist narratives are continuously perpetu-
ated in systems of public education—and have been so perpetuated during and (long) after the Yugoslav conflicts. These narratives permeate virtually all aspects of history education, especially with regard to the history of the nineteenth and twentieth centuries; they continuously label the conduct of one’s own ethnic group (or members thereof) as justified, virtuous, or even heroic, while negatively portraying the conduct of other groups. For example, textbooks in the various countries of the former Yugoslavia today differ significantly in their interpretation of the causes of the First World War and in their appraisal of Gavrilo Princip, the Bosnian Serb assassin of Archduke Franz Ferdinand, as either a hero or a villain. Ethnically motivated crimes during the Second World War and revisionist interpretations of the merits or demerits of, for example, the Independent State of Croatia, the Chetnik movement, or the quisling government of Nazi-occupied Serbia have an even more important place in the collective mind, and are frequently used to reinforce the narrative of one’s own group as a perpetual victim.

When it comes to the events of the 1990s, the textbooks rarely dwell on instances of specific crimes, but rather focus on the big picture questions of what caused and who was to blame for the violent breakup of the former Yugoslavia, as well as the nature of the conflicts and the overall good guys/bad guys distribution. For instance, using exception-


89. See Šta o Srebrenici uče srpska, a šta bosanska, hrvatska i crnogorska decu? [What Do Serbian Children Learn About Srebrenica, and What Do the Bosnian, Croatian and Montenegrin Children?], BLIC

2016]
ally politicized and emotionally loaded language, Serbian wartime textbooks squarely laid the blame for Yugoslavia’s dissolution on Slovenian and Croatian separatists assisted by outside forces, including conspiracies by Germany, the Vatican, and the creators of the “New World Order.”90 Another good example was the reaction in Croatia to a revised edition of a primary school history textbook by Snježana Koren of the University of Zagreb, which discussed the 1995 Operation Storm. Koren was harshly criticized by the more nationalist members of the Croatian academic community and the general public for trying to portray how Operation Storm was seen from the ethnic Serb perspective, and for allegedly being insufficiently positive about that military operation, inter alia because she included two side-by-side photos showing the triumphant reception Croatian troops received in Zagreb upon their victory and the miserable flight of the ethnic Serb population.91

In sum, there is little doubt that nationalist attitudes are propagated in the Balkans through public education, with particularly strong effects on identity formation.92 Children are exposed to nationalist narratives conveyed through highly emotive language and imagery while they are still young, vulnerable, and impressionable93—in effect, while they are a blank slate but for the information and values they have

90. See Stojanovic, supra note 88, at 120–23.
been taught by their own families (which is more likely than not to have a nationalist imprint as well). Just like the flu, therefore, nationalism is particularly infectious in schools, resulting in many or most children coming to (strongly) believe that his or her own nation or ethnic group is always just, always the victim, and never the villain, while adopting negative stereotypes about other groups. This is, of course, not a phenomenon that is at all unique to the Balkans, but it is precisely the lessons that others can learn from the Balkans that make them such a valuable case study. And as we have seen, the early entrenchment of such worldviews will make it that much more difficult to dislodge them later, and will inevitably bias an individual’s processing of information about specific crimes that in some ways relate to these deep prior beliefs.

Third, this neatly brings us to ingroup-outgroup bias, which clouds the rational judgment of large majorities of all the peoples of the former Yugoslavia, particularly in individuals who strongly identify with their ingroup. The presence of ingroup-outgroup bias can be felt virtually everywhere in the surveys; they show that every ethnic group sees itself as the main victim of crimes during the conflicts, and some other group as the principal perpetrators. There is also a strong correlation between respondent ethnicity and their broader attitude towards specific crimes: respondents are much more likely to have

94. See id. at 146–47 (discussing Serbia); see also MacDonald, supra note 9, at 39. See generally Michaela Schäuble, Narrating Victimhood: Gender, Religion and the Making of Place in Post-War Croatia (2014) (discussing Croatian victimhood narratives from an ethnographic perspective); Marko Živković, The Wish to Be a Jew: The Power of the Jewish Trope in the Yugoslav Conflict, 6 Cahiers de l’Urmis 69 (2000) (discussing a particular type of victim narrative in Serbia, Croatia, Slovenia and Bosnia whereby nationalist intellectuals invoke the suffering of the Jewish people as the only adequate comparator to the suffering of their own ethnic group); Marko Živkovic, Serbian Dreambook: National Imaginary in the Time of Milošević (2011) (discussing various nationalist myths, themes and tropes in Serbia).


96. See Noor et al., supra note 10, at 353 (arguing that “group members who are highly identified with their groups are likely to show a stronger tendency toward [competitive victimhood] than group members with weaker in-group identification.”).

97. See Milanović, supra note 1, at 242-246.
heard of and believe in crimes committed against their own group, and much less likely to have heard of and believe in crimes committed by their own group. 98

Fourth, group-based identification with the different sides in the Yugoslav conflicts, coupled with political manipulation and the pervasiveness of nationalist worldviews in public discourse and education, facilitate the creation of more or less standard or official collective narratives on the breakup of the former Yugoslavia and the ensuing conflicts. 99 These narratives may be ethnically biased, but they are also relatively complete and comprehensive, as well as internally plausible, and provide interpretative frameworks for the evaluation of any new information. While they are much more focused on the “big picture” of war guilt or the overall justness of one’s own cause, they have to refer to specific events or crimes as well in order to maintain their internal consistency. In other words, in order to avoid intolerable cognitive dissonance, the narratives must offer their participants some plausible way of maintaining their belief in the overall justness of their cause while addressing specific events that may go against that general belief, for example the Srebrenica genocide.

I have elsewhere called this process the “Wikipedia approach to reality.” 100 Instructive analogies can be made between the social construction of standard narratives and how Wikipedia articles are created and edited. Recall how the whole point of Wikipedia is its openness; any reader can edit its content. As a result, as the Wikipedia article on Wikipedia puts it, “any article could contain inaccuracies such as errors, ideological biases, and nonsensical or irrelevant text.” 101 The primary way in which Wikipedia articles reach a level of accuracy and stability is through the evolution of consensus by the readers/editors with successive edits over time. 102 Occasionally, however, consensus is impossible to reach; particularly controversial topics can degenerate into so-called


“edit wars,” in which editors repeatedly override each other’s edits.\textsuperscript{103} Such edit wars may be resolved through several different methods of dispute resolution, but ultimately Wikipedia’s administrators can put protection measures on a page (e.g., prohibiting further editing),\textsuperscript{104} while Wikipedia’s Arbitration Committee can even ban particular editors.\textsuperscript{105} In the end, therefore, it is \textit{authority} that substitutes for the lack of consensus.

This process is similar to that of constructing standard collective narratives in a particular community, except that the latter is, to an extent, more top down: disputes about particular facts, events or entities can last a long time until a consensus builds or is imposed from above by authoritative institutions: political leaders, the media, intellectual elites, and so on. Dissenting views can be marginalized through formal or less formal means—for example, dissenting members of the intellectual elite might find it hard to obtain employment in state-run educational institutions, to advance in their existing employment, or to get space in the media for the expression of their ideas.\textsuperscript{106} Worse, dissenters might be exposed to outright censorship, abuse, or even physical violence, as has frequently been the case, for instance, for activists of human rights NGOs in the former Yugoslavia.\textsuperscript{107}

The Wikipedia analogy is even more helpful when we consider the fact that there is actually \textit{more than one} Wikipedia. The online encyclopedia exists in many different language versions. These are not simply translations of articles from the English Wikipedia (even if this happens regularly) but independent encyclopedias in their own right. A few of these are linguistically tied to the former Yugoslavia: there is one in

\begin{footnotesize}
\begin{enumerate}
\item[106.] See Bar-Tal et al., supra note 9, at 667–69.
\item[107.] See, e.g., Gordy, supra note 19, at 114–18. As I was finalizing this article on January 22, 2016, the offices of the Belgrade Centre for Human Rights and several other Serbian NGOs were vandalized the night before by unknown perpetrators. This is but one of many such examples over the years; the attack was preceded by a series of articles in \textit{Politika}, a newspaper of record, castigating NGOs for receiving funding from Western donors. See BG: \textit{Razbijeni izlozi na Kući za ljudska prava} [BG: Broken Windows at the House of Human Rights], B92 (Jan. 22, 2016, 2:31 PM), http://www.b92.net/info/vesti/index.php?yyyy=2016&nmm=01&dd=22&nav_category=16&nav_id=1088018.
\end{enumerate}
\end{footnotesize}
Bosnian;¹⁰⁸ there is one in Croatian;¹⁰⁹ there is one in Serbian;¹¹⁰ but (fascinatingly) there is also one in Serbo-Croatian.¹¹¹ This linguistic proliferation is reflective of regional nationalist politics: Serbo-Croatian (or Croato-Serbian) was the official language of the former Yugoslavia, but because a distinct language was seen by nationalists as a prerequisite for independence or separate nationhood, each new state borne out of the former Yugoslavia proclaimed its own separate language. While there are no clear boundaries in linguistics between distinct languages and different dialects of the same language,¹¹² the fact remains that the languages/dialects occupying the space of (the former? continuing?) Serbo-Croatian are almost perfectly mutually intelligible variants, much like American English, British English and Australian English.¹¹³ Indeed, in its practice the ICTY treats these variants as the same language, under the term Bosnian/Croatian/Serbian (BCS)¹¹⁴ not only because they are so similar, but also because treating them otherwise would have obvious resource implications.

That people have bothered setting up four different versions of Wikipedia,¹¹⁵ investing time and effort for what is in reality a dialectical

---

¹⁰⁹. WIKIPEDIJA, https://hr.wikipedia.org (last visited June 1, 2016) (Croatian version).
¹¹⁰. БИКИПЕДИЈА https://sr.wikipedia.org (last visited June 1, 2016) (Serbian version).
¹¹¹. WIKIPEDIJA/ВИКИПЕДИЈА https://sh.wikipedia.org (last visited June 1, 2016) (Serbo-Croatian version).
¹¹². As the linguist Max Weinreich famously quipped, “a language is often a dialect with an army and a navy.” See R.L.G., Of Dialects, Armies and Navies, ECONOMIST BLOG (Aug. 4, 2010, 1:05 PM), http://www.economist.com/blogs/johnson/2010/08/languages_and_dialects (the Economist article explains that he was quoting an unnamed friend).
¹¹⁵. Montenegrin is the most recent arrival to the Bosnian/Croatian/Serbian continuum, but it does not yet have its own version of Wikipedia. Five separate requests for a Montenegrin language edition have been rejected by the Wikimedia Foundation’s Language Committee, most recently in 2014. See Requests for New Languages/Wikipedia Montenegrin 5, WIKIMEDIA, https://meta.wikimedia.org/wiki/Requests_for_new_languages/Wikipedia_Montenegrin_5 (last visited May 5,
or linguistic continuum, means that they had to have a pretty good reason for doing so, and that reason can only be nationalism. In other words, the different language versions of Wikipedia reflect the different biases of their editors. These editorial biases are particularly apparent in articles concerning the shared past, recent or ancient, of the Yugoslav peoples. One could guess at the outset, for example, that the Bosnian, Croatian, and Serbian versions of Wikipedia would be more likely to reflect nationalist attitudes than the Serbo-Croatian edition. Indeed, as part of its mission statement, the Serbo-Croatian edition explicitly states that it seeks to promote linguistic inclusivity and diversity while presenting diverse viewpoints, particularly with regard to topics dealing with the Balkans.116 The other editions make no such claims.

Ethnic bias is precisely what one finds when comparing the same topics in the different language editions. For example, the Bosnian, Serbian and Serbo-Croatian editions each have entries on the “war in Croatia” (rat u Hrvatskoj), while the Croatian edition has an entry on the “Homeland War” (Domovinski rat). The opening sentence of the article in the Croatian edition states that the “Homeland War was a defensive-liberating war for the independence and [territorial] integrity of the Croatian state against the aggression by combined Greater-Serbian forces—extremists in Croatia, Bosnia (especially Republika Srpska (RS)), the Yugoslav National Army, and Serbia and Montenegro.”117 The Bosnian edition contains similar qualifications, while the

2016). The formal reason given in response to the last request is that Montenegrin still does not have an ISO 639 two-letter code. The discussion pages for all five requests are replete with nationalist politics, with the terms of the debate essentially being whether Montenegrin deserves to be emancipated from Serbian, as it were. Slovenian and Macedonian have significantly less mutual intelligibility with the variants of Serbo-Croatian, and have their own Wikipedias. WIKIPEDIJA, https://sl.wikipedia.org (last visited June 12, 2016) (Slovenian version); https://mk.wikipedia.org (last visited June 12, 2016) (Macedonian version). So does Albanian, which comes from a completely different language family. WIKIPEDIA, https://sq.wikipedia.org (last visited June 12, 2016) (Albanian version).


Serbian edition most certainly does not. However, while the Serbian edition ostensibly tries to maintain a neutral, factual tone, it continuously emphasizes crimes against Serb people in Croatia and does not even mention the ethnic cleansing of Croats by Serb forces in Krajina, which has been the subject of several cases before the ICTY. The Serbo-Croatian edition, on the other hand, refers to crimes committed by and against both ethnic groups, and extensively discusses ICTY indictments and judgments.

I could go on: ingroup-outgroup bias permeates the Bosnian, Croatian, and Serbian editions of Wikipedia (often with especially vehement discussions in the talk pages), while the Serbo-Croatian edition tries (not always successfully) to maintain a neutral and objective line. This is especially the case with articles concerning events from the Yugoslav wars (e.g., Srebrenica or Operation Storm), but also with less recent events that are of significance to overarching nationalist narratives, for example, crimes against Serbs in Croatia during the Second World War. With regard to each specific article, one can trace the evolution of consensus within each edition’s particular community of editors, including their authoritative administrators, as a sort of microcosm of how standard collective narratives evolved in each larger community. Each editorial group grows increasingly secure and safe in its own narrative, which solidifies in their own language edition of Wikipedia, even though they can frequently clash on the pages of the “main,” English Wikipedia, for the benefit of the wider reading public.

Fifth, it is important to recall the objective constraints on the survey respondents’ cognitive processes. The respondents are continuously exposed to standard narratives about the conflict through the media.
state institutions, and nationalist elites that, before disseminating information to the public, first filter out most of the information that the respondents can receive. These narratives are reinforced through group, bandwagon effects, which create peer pressure to conform to the majority view. For example, if you are a Serb and most of your friends and neighbors either disbelieve or minimize the genocide in Srebrenica, you are more likely to do the same. The respondents generally lack the time and the resources to meaningfully, carefully scrutinize information that they receive from likely already biased sources. They therefore resort to quick, heuristic reasoning, jumping to conclusions and forming attitudes about particular events in a way that minimizes their own cognitive effort while maximizing the effect of biases already at work.

Finally, this means that the vast majority of individuals, who are led astray by their biases to deny or minimize crimes committed by their own group, largely do so unconsciously, through identity-protecting motivated reasoning that leads them to the denialist outcome while maintaining an internal illusion of objectivity and a sense of self-worth. In other words, a lot of otherwise good, decent people have bought into nationalist narratives that lead them to deny or minimize crimes without evil intent—they in fact feel that they are doing the right thing. I would not go so far as to say that they have no moral culpability, but most are unable to resist the forces of their internal, unconscious processes. There are, of course, some cynical, fully aware, rational political manipulators who are exploiting these cognitive vulnerabilities to their own ends, mainly in order to gain or maintain power, money, and influence. But again, the predatory manipulators are comparatively few in number.

VI. WHITHER THE ICTY?

A. Transitional Justice and Divergent Realities

The basic assumption behind a process of transitional justice is that, over time, the ICTY-established truth about crimes committed in the conflicts will be accepted by the relevant targeted audiences, thus

122. See Petrović, supra note 38, at 107 (discussing the role of elite intermediaries in the reception of the Scorpions video).
125. See supra note 64 and accompanying text.
putting the formerly adversarial parties on the path towards reconciliation. Even accepting the validity of that assumption of a causal link between truth and reconciliation, each ethnic group in the former Yugoslavia is still firmly attached to its own version of reality. On that measure, the ICTY cannot be said to have been a successful mechanism of transitional justice—at least not yet.

The ICTY’s lack of success is borne out not only from the survey results, but also from a qualitative analysis of recent events. As I was writing the core of this article in the summer of 2015, the former Yugoslavia observed (and I use that word advisedly) several important milestones: twenty years since the end of the wars in Bosnia and Croatia, twenty years since Operation Storm and the mass exodus of the Croatian Serbs, and twenty years since the Srebrenica genocide. Appropriately enough, the various observances were ones of competitive nationalism and victimhood.126

In Croatia, for example, the twentieth anniversary of Operation Storm and the end of the war in Croatia was marked with a two-day celebration, including military parades in Zagreb and Knin. The current (right-wing) president of Croatia opened a museum dedicated to Operation Storm and unveiled a monumental statue of Franjo Tudjman, the wartime Croatian president, at the Knin fortress.127 The celebration in Knin in particular was marred by ultra-nationalist chanting (e.g., “we Croats don’t drink wine, but the blood of the Knin Chetniks”) and displays of the symbols of the fascist Second World War Ustaša movement, which were generally left undisturbed by the Croatian police.128 The whole thing was topped off with a concert by

---

126. See generally Noor et al., supra note 10, at 356, 359.
the nationalist singer Marko Perković Thompson before an 80,000-
strong crowd in Knin, which was singing Ustasha songs and chanting
“kill a Serb” and other extremist slogans.129 In attendance were the
mayor of Knin (who also spoke at the event), the husband of the
current Croatian president, and Tomislav Karamarko, the head of
the main nationalist party.130 While Croatian politicians of all stripes
continuously emphasized the “purity” of Operation Storm and men-
tioned Serb victims of the war only in passing, civil society organizations
and the Rijeka theatre set up an event at which five women of different
nationalities spoke of their experiences during the war. Right-wing groups
picketed the event and physically assaulted some of the attendees.131

In Serbia and the Republika Srpska, on the other hand, the authori-
ties declared a day of national mourning. Church bells and air-raid
sirens were sounded to commemorate the (Serb) victims of the war in
Croatia, while requiem masses and other memorial services were held
in numerous cities.132 The Patriarch of the Serbian Orthodox Church
called Operation Storm “a tragedy of Biblical proportions, akin to the
ones suffered before by Jews and Armenians, with us Serbs just behind
them.”133 Serbian Prime Minister Vučić stated that it is “hard to find [a]

129. The singer is nicknamed Thompson after the American submachine gun. See Sven
Milekic, Croats Chant Anti-Serb Slogans at Nationalist Concert, Balkan Insight (Aug. 6, 2015),
08-06-2015.
130. See “Ubij Srbina” i “Za dom spremni” na koncertu Tompso na (“Kill the Serb” and “Ready for the
Homeland” at Thompson’s Concert), N1 Srbija (Aug. 6, 2015), http://rs.n1info.com/a82644/Svet/
Region/Koncert-Tompsona-u-Kninu.html; Objavljeno, Thompsonov koncert u Kninu poceo pokličem
’Za dom’ [Thompson’s Concert in Knin Began with the “Ready for the Homeland” Salute], JUTARNJI LIST
(Aug. 5, 2015, 11:29 PM), http://www.jutarnji.hr/thompsonov-koncert-u-kninu-poceo-poklicem-
131. See Rijeka: Krivicˇne prijave zbog incidenta tokom performansa [Rijeka: Criminal Charges Over the
Incident During a Performance], Al-Jazeera Balkans (Aug. 6, 2015, 6:04 PM), http://balkans.aljazeera.
et/vijesti/rijeka-krivicne-prijave-zbog-incidenta-tokom-performansa; Ustaška stoka tukla novinare i
aktiviste u Rijeci [Ustasha Beasts Beat Journalists and Activists in Rijeka], Index (Aug. 6, 2015, 4:54 PM),
http://www.index.hr/vijesti/clanak/ustaska-stoka-tukla-novinare-i-aktiviste-u-rijeci/834836.aspx;
OSCE Representative Calls on Croatian Authorities to Protect Differing and Critical Voices and to Investigate
String of Attacks on Journalists, Org. for Security and Cooperation in Eur. [OSCE], (Aug. 14,
132. See Thousands Fain, supra note 127.
133. Ognjen Zoric´, Dve decenije od Oluje: Srbija obeležila Dan sec´anja [Two Decades After the Storm:
content/srbija-obelezila-dan-secanja-na-stradanje-i-progon–u-uljici/27170768.html (in the Serbian
original: “To je tragedija biblijskih razmera koju su nekada doživeli Jevreji i Jermeni i ni Srbi
dolazimo odmah iza njih.”) (translation by the author). A couple of weeks later the Patriarch
added (in another textbook example of competitive victimhood) that “evil was done to us by our
sadder day in recent Serbian history than this one,” and described the Croatian operation as “the biggest ethnic cleansing since World War II.”134 While Serb politicians emphasized Serb victimhood, they made no mention of the ethnic cleansing of Croats from Serb-held parts of Croatia or other similar crimes.135 For its part, the Serb minority community in Croatia was circumspect, because it felt directly threatened. According to Milorad Pupovac, the liberal leader of the Serb National Council in Croatia, Croatia is sliding to the right, and this can be seen “in everything from a campaign to have Serbian-Cyrillic writing removed from signposts in eastern Croatia to rising Catholic Church influence on social issues.”136 As he put it:

Fear is returning to our society. Fear that causes the majority not to react to incidents, and makes the minority scared . . . . At Srebrenica this year I learned a lot. I learned that we [in former Yugoslavia] are still at war, and still led by warlords. Now they are not necessarily fighting for territory, but for values and for minds.137

What then of Srebrenica? Twenty years on, it remains the battleground of competing Serb and Bosniak narratives of victimhood—and things seem to be getting worse, rather than better. On the one hand, Bosniak nationalist politicians have appropriated Srebrenica as the symbol of the whole conflict, as emblematic of a black-and-white dynamic in which Serbs were exclusively the perpetrators and Bosniaks exclusively the victims of genocidal crimes.138 In doing so, they try to

neighbors and by us to them, but we did so much less than they.” See “Zlo smo činili svi, ali Srbi u manjoj meri” [We Have All Done Evil, But the Serbs Less Than Others], B92 (Aug. 19, 2015, 5:43 PM), http://www.b92.net/info/vesti/index.php?yyyy=2015&mm=08&dd=19&nav_category=12&nav_id=1028947 (translation by the author); see also Živković, supra note 94 (discussing the role of the Jewish trope in Balkan nationalist narratives).

134.  Croatia Celebrates, supra note 127.


137.  Id.

138.  See Refik Hodžić, Twenty Years Since Srebrenica: No Reconciliation, We’re Still at War, BALKANIST (June 29, 2015), http://balkanist.net/twenty-years-since-srebrenica-no-reconciliation-were-still-at-war/ (“Srebrenica remains a gaping wound on the mangled, crushed body of Bosnia and Herzegovina. A wound wrapped in poisonous bandages of Serb politics of denial and dressed
maintain their standing and influence within the Bosniak community while delegitimizing the Republika Srpska as a “genocidal creation,” which needs to be abolished.139 On the other hand, Bosnian Serb nationalism has surged under the leadership of the RS president, Milorad Dodik, whose stated ultimate goal is the dissolution of Bosnia and Herzegovina. Dodik has been at the forefront of Srebrenica denial, at one point calling the Srebrenica genocide “the greatest fraud of the twentieth century.”140 His denialism is, however, normally relativist rather than absolute: he will acknowledge that there was a crime, but will dispute the magnitude of the crime or its legal qualification, or will emphasize the competing victimhood of ethnic Serbs in Eastern Bosnia, in the vicinity of Srebrenica—he thus once stated that he would not mind if Srebrenica was memorialized as a place of genocide against both Bosniaks and Serbs.141 This refers to the steady propagation within the Serb national narrative of the claim that thousands of Serb civilians with the toxic balm of mythologized victimhood used as political currency by Bosniak nationalists. There is hardly a single Bosniak politician in power or opposition who did not succumb to the temptation of profiting from what has become an orchestrated, macabre spectacle of mass burials on 11th July, where masses descend for the televised ceremony, pierced by columns of expensive cars carrying VIPs who must be seen to sympathize with the mothers of Srebrenica only to leave before the first shovels of earth are thrown into the graves. Speeches of “never again” are given, photos are taken, postures of defenders against Dodik’s denial are assumed, the holiness of victims is exalted. But only while the spectacle is televised. On the 12th of July, Potočari and Srebrenica are ghostly, except for the mothers in their empty homes and the customary unit of Serbian Radicals clad in black who parade through town to demonstrate the emptiness of promises given to Srebrenica by Bosniak leaders the day before. The families of Srebrenica’s murdered victims are stuck between these two seemingly opposing—but in reality mutually reinforcing—parasitical approaches to the facts, the enormous symbolic and emotional significance, and the devastating consequences of the Srebrenica genocide. Along with the rest of the paralyzed society, they are forced to endure a limbo with no acknowledgement and little justice, a limbo constructed by the constant manufacturing of fear and hatred.”).  


141. See Dodik: Srebrenica mesto genocida i nad Srbinima i nad Bošnjacima [Dodik: Srebrenica Genocide and City Against Serbs and Bosniaks], RADIO-TELEVIZija SRBIJE (June 16, 2015), http://www.rts.rs/page/stories/sr/story/11/Region/1950932/Dodik%3A+Srebrenica+mesto+genocida+i+nad+Srbima+i+nad+Bo%C5%A1njacima.html. For an overview of Dodik’s various (often inconsistent) statements on Srebrenica, see Izjave Milorada Dodika o Srebrenici: Od genocida do najvećeg udarca srpskom [The Statements by Milorad Dodik on Srebrenica : From Genocide to the Biggest Blow Against
were killed by Bosniaks in the vicinity of Srebrenica, a claim that, judged on the best available evidence, has little basis in fact but is meant to provide a rationalized explanation for the Srebrenica massacre as an (overly indulgent) act of vengeance.142

The corrosive potency of the word “genocide” has a place of pride in these competing victimhood narratives.143 For instance, as a prologue to the twentieth anniversary of Srebrenica, we had to witness the sorry spectacle of the inability of the UN Security Council to pass a resolution commemorating the Srebrenica genocide. A draft resolution was tabled by the United Kingdom and contained only objectively non-objectionable, purely symbolic, and legally non-binding language.144 This, in turn, provoked a firestorm of controversy in Serbia and the Republika Srpska, with the draft resolution seen as somehow existentially threatening the Serb people, especially because of its repeated use of the term genocide. The RS and Serbian presidents then appealed to Russian President Vladimir Putin to veto the resolution in the Council, which Russia finally did, after attempts to rework the text to make it acceptable to all parties failed.145 Of all the shameful P-5 vetoes out there, this one is all the more remarkable for both its callousness and the relative

142. The claim about the thousands of Serb civilians killed near Srebrenica was disproven by the work of the Research and Documentation Center (RDC) in Sarajevo on population losses in the Bosnian war, widely regarded (outside Serb and Bosniak nationalist circles) as the most rigorous and credible research on the subject. See The Myth of Bratunac: A Blatant Numbers Game, SREBRENICA GENOCIDE BLOG (May 15, 2006), http://srebrenica-genocide.blogspot.co.uk/2006/05/myth-about-serb-casualties-around.html; LARA J. NETTELFIELD & SARA H WAGNER, SREBRENICA IN THE AFTERMATH OF GENOCIDE 272–273 (2014); Vojin Dimitrijević & Marko Milanović, The Strange Story of the Bosnian Genocide Case, 21 LEIDEN J. INT’L L. 65, 71 n. 25 (2008); GORDY, supra note 18, at 136–37.

143. See Dimitrijević & Milanović, supra note 142, at 66–67.

144. See “British Draft Resolution Mentions Word [lsquo]Genocide[rsquo] 35 Times”, B92 (June 16, 2015, 1:03 PM), http://www.b92.net/eng/news/politics.php?yyyy=2015&mm=06&dd=16&nav_id=94450 (reporting on the draft resolution, including the text of an early draft, while obsessively counting the number of times the resolutions uses the term genocide.).

emptiness of the vetoed resolution, which had only symbolic importance. But that is precisely the point: such symbolism has a significant role in the perpetuation of the victimhood narratives in the Balkans. The whole Srebrenica anniversary episode was topped off by Serbian Prime Minister Vučić’s decision to go to the commemoration ceremony in Srebrenica, where, in an act that was as shameful at least as much as it was stupid, an angry mob pelted him with stones and other paraphernalia while the funeral ceremony itself was taking place, thus feeding into the grand Serb victimization narrative along the way.\textsuperscript{146}

In sum, the post-Yugoslav societies are today nowhere near a joint truth that could potentially lead to reconciliation. Nor are they nearer to simply accepting even the potential legitimacy of outgroup perspectives; each side has its own truth and is fighting to protect it.\textsuperscript{147} As noted by Refik Hodžić, the people of Bosnia (and, I would add, of the other countries of the former Yugoslavia) are still “living the war for the ‘truth’ about ethnic superiority, heroism and victimhood intended to shape the attitudes of the coming generations. And in war, there can be no acknowledgement of the enemy’s suffering, let alone reconciliation.”\textsuperscript{148} In this war for the truth, the ICTY is at best an annoyance, and at worst an instrument of that war.

B. Patterns of Bias and Distrust

We have seen that information about the ICTY as an institution is processed through a cognitive and emotional filter of prior attitudes and beliefs, and will be skewed to fit those pre-existing beliefs. When it comes to the ICTY’s own outputs—in particular, its decision to indict, convict, or acquit a particular accused—ethnic bias will be the primary determinant of how those outputs will be evaluated.\textsuperscript{149} An indictment or conviction of a member of one’s ingroup for crimes against outgroups, or an acquittal of an outgroup member for crimes against one’s

\textsuperscript{146.} See Marko Milanović, \textit{The Shameful Twenty Years of Srebrenica}, EJIL: Talk! (July 13, 2015), http://www.ejiltalk.org/the-shameful-twenty-years-of-srebrenica/.

\textsuperscript{147.} See, e.g., Julian Borger, \textit{War is Over—Now Serbs and Bosniaks Fight to Win Control of a Brutal History}, \textit{The Guardian} (Mar. 23, 2014, 9:43 EDT), http://www.theguardian.com/world/2014/mar/23-war-serbs-bosniaks-history-visegrad (reporting on the struggle over collective memory in the town of Višegrad, including the following words of a war crime-survivor: “Those who committed the war crimes against us are still winning. \textit{They are killing our truth.”} ) (emphasis added).

\textsuperscript{148.} Hodžić, \textit{supra} note 138.

\textsuperscript{149.} See Klarin, \textit{supra} note 2, at 92.
ingroup, will likely lead to disbelief in the facts as presented by the ICTY, and distrust in the ICTY as an institution.

The same goes for meta-information about the ICTY, such as the efficiency and procedural fairness of its work. For example, when an ethnic Serb is presented with the (factually accurate) information that the ICTY has indicted more Serbs than members of other ethnicities (by a ratio of about 2 to 1), that Serb could use that fact either (1) as evidence that Serbs committed more crimes than other groups and/or were involved in more conflicts than the other groups; or (2) as evidence that the ICTY is biased against Serbs. If the person in question strongly identifies with Serbs as a group and has absorbed more of the standard nationalist narrative, it is far more likely that he will pick option (2) than option (1). This is simply the easier cognitive option, which can be arrived at quickly with little effort, and with no adjustment of pre-existing views; on the contrary, it reinforces these views.  

The ICTY thus operates in a bias-driven downward spiral. The more it challenges established narratives, the more likely that it will generate distrust, and hence less likely that its decisions will be believed. This dynamic is reinforced by the fact that from the moment it appeared on stage, the ICTY has been the object of intense, vilifying propaganda by dominant nationalist elites, especially in the Croat and Serb ethnic communities, through nationalist controlled media that marginalized competing viewpoints. The elites included everything from the political leadership of the state, to opposition politicians who could be even more nationalist, to local legal academics and the media commentariat, to clergy, especially the Serbian Orthodox Church and the Roman Catholic Church in Croatia.

The standard nationalist narratives are so entrenched that the ICTY is simply incapable of fundamentally changing them. The reactions in Croatia and Serbia to the ICTY’s Gotovina judgments, dealing with Operation Storm show this clearly. A unanimous Trial Chamber found that, while it was in principle completely legitimate for Croatia to seek to re-establish control over its territory and to militarily defeat the Serb rebels, Croatian political and military leadership formed a joint criminal enterprise (JCE) with the purpose of displacing the ethnic Serb population from Croatia. While one of the three accused Croatian generals was acquitted, generals Gotovina and Markač were convicted.

---

151. Id. at 463–64.
152. See, e.g., Iavor Rangelov, Nationalism and the Rule of Law: Lessons from the Balkans and Beyond 172 (2014); Klarin, supra note 2, at 90; Orentlicher, supra note 13, at 27.
and sentenced to twenty-four and eighteen years in prison respectively. The judgment caused immediate public consternation in Croatia: thousands of people, who had assembled at the main Zagreb square to hear the live broadcast of the reading of the judgment, wept in shock and anger at the convictions. Not only the nationalist then-Prime Minister, Jadranka Kosor, but also the more liberal President, Ivo Josipović, and the leader of the opposition, Zoran Milanović, summarily rejected the Trial Chamber’s JCE findings, and pledged full state support to the generals’ appeal. A year or so later, after candle-lit vigils were held in Catholic churches across Croatia praying for the generals’ acquittal, the ICTY Appeals Chamber proceeded to do just that, in a divided 3 to 2 decision accompanied by exceptionally harsh dissent. Most importantly, the Appeals Chamber vacated the Trial Chamber’s findings on the JCE, which was, because of its collective label, always the main point of contention. This time the reactions were predictably reversed: Croatian President Josipović stated, “[t]he verdict confirms everything we believe in Croatia: that generals Gotovina and Markač are innocent and there was no joint criminal enterprise of the Croatian leadership and armed forces aimed at

157. See Gotovina et al., Case No. IT-06-90, Appeals Chamber Judgement (Agius, J., and Pocar, J., dissenting).
persecuting civilians, our citizens of Serb nationality,” and (now) Prime Minister Milanović sent the state plane to The Hague to (as he put it) “get the boys back home,” where they received a heroes’ welcome. Milanović also said that a huge weight was lifted off his soldiers, thanking the generals for “surviving so long for the sake of Croatia.” Serbian President Nikolić, on the other hand, dismissed the appeals judgment as a “scandalous, political decision,” which would “open old wounds,” with similar howls of outrage from other political leaders and commentators.

The Gotovina episode shows very clearly just how impervious nationalist narratives can be to outside influence. At no point were the reactions dictated by these standard narratives re-examined in light of what the ICTY said. On the contrary, what the ICTY said was seen almost exclusively through the evaluative prism of these narratives, which were so strong that they attracted total or near-total unanimity across the political spectrum. I have argued elsewhere that the main problem with the Gotovina appeals judgment is precisely that it was decided in such a way that it inevitably reinforced those narratives. As the Croatian philosopher Žarko Puhovski perceptively noted, in Croatia, the appeals judgment was seen as having “hardly won final absolution, an insuperable certificate of national innocence.” Milo-rad Pupovac similarly remarked that the judgment was perceived in Croatia as a “judicial Storm, which liberated Croatia from an imposed burden.” In Serbia, on the other hand, the judgment further en-

159. Id.
trenched the already mainstream view that the ICTY is a political court with an anti-Serb bias. Each side, therefore, could remain completely convinced of the righteousness of its own cause and experience little, if any, empathy for the suffering of the other.\textsuperscript{166}

The Gotovina judgment may present a vivid example of this phenomenon of attitude reinforcement, but it is far from being the only one. For example, the ICTY Appeals Chamber’s acquittal of Momčilo Perišić, the former chief of staff of the army of the rump Federal Republic of Yugoslavia (FRY), of aiding and abetting crimes by Bosnian and Croatian Serbs on the basis of a dubious “specific direction” standard reinforced the official Serbian narrative that the FRY/Serbia was not directly involved in the crimes of the Bosnian and Croatian conflicts, and alienated the people of Croatia.\textsuperscript{167} The acquittal of Kosovo Albanian military and political leader Ramush Haradinaj, after a trial plagued with evidentiary problems and a subsequent retrial, reinforced the Serbian victimhood narrative and was perceived by Kosovo Albanians as the vindication of the justness of their own cause.\textsuperscript{168} The same goes for the acquittal of Naser Orić, the wartime commander of Bosniak forces in Srebrenica.\textsuperscript{169} None of these cases dealt with the just war question, which is outside the scope of the ICTY’s mandate anyway, but the cases are presented and perceived as being about that question, which is ultimately all that matters for many of these audiences since it has the greatest bearing on their own sense of individual and group

\textsuperscript{166} See BBC, \textit{supra} note 156 (analysis by Tim Judah) (“The [Gotovina] acquittal has been universally welcomed in Croatia and, equally, almost universally condemned in Serbia. It means that no Croats from Croatia (as opposed to Croats from Bosnia-Hercegovina) have been convicted by the UN’s war crimes tribunal. For Croats, this vindicates their belief that their generals are heroes and not war criminals; and for Serbs it consolidates a deeply held belief that the tribunal is a kangaroo court, whose main aim was to vilify and convict Serbs.”).


\textsuperscript{168} See \textit{Prosecutor v. Haradinaj et al., Case No. IT-04-84, Retrial Judgment (Int’l Crim. Trib for the Former Yugoslavia November 29, 2012)}; \textit{see also} GORDY, \textit{supra} note 18, at 6; ORENTLICHER, \textit{supra} note 13, at 83–85.

\textsuperscript{169} See \textit{Prosecutor v. Orić, Case No. IT-03-68, Appeals Chamber Judgment (Int’l Crim. Trib. for the Former Yugoslavia July 3, 2008)}.
identity. Nor are the acquittals seen as evidence that the ICTY is scrupulously fair and sets free those defendants whose guilt is not proved beyond a reasonable doubt. With just a bit of political manipulation—and there is plenty of that to go around—the ICTY becomes an instrument for collectivizing innocence, rather than for individualizing guilt, while simultaneously reinforcing the other side’s narrative of victimhood without justice.

In conclusion, we can safely say that the patterns of biased reasoning and related distrust of the ICTY revolve almost entirely around ethnicity, identity, and the validation of pre-existing belief systems. This is equally true of those communities that notionally support the ICTY—chiefly Bosniaks and Kosovo Albanians—since they do so only because the ICTY’s work largely validates their own victimhood narrative; their distrust of the ICTY surges as soon as that narrative is challenged, and as with the Croats and Serbs, the narrative itself is not subject to critical reexamination in light of anything the ICTY does. This can also be seen from the enormous amount of resistance from various political actors in Kosovo—resistance that ultimately faltered under intense pressure from Europe and the United States—to the creation of a special, hybrid war crimes tribunal that would try crimes committed by members of the Kosovo Liberation Army because such a court chal-

170. See Florian Bieber, *Hague Verdicts Don’t ‘Justify’ Croatia’s, Kosovo’s, Wars*, Balkan Insight (Nov. 29, 2012), http://www.balkaninsight.com/en/article/hague-verdicts-don-t-justify-croatias-kosovo-s-wars. (“The acquittals compound the perception of an unjust court that is unable or unwilling to penalize non-Serbs. Thus, the narrative of victimhood receives convenient confirmation in the ruling and makes life more difficult for human rights activists who sought to change public perceptions over more than a decade. In Croatia and possibly in Kosovo even more so, the acquittals are wrongly seen as a vindication for supposedly just wars. Sentencing Gotovina or Haradinaj would have not meant that the wars fought by the Croatian army or by the KLA would have been per definition unjust, nor does the acquittal suggest the opposite... The verdicts in The Hague are a cautionary tale that establishing and reconstructing the causality of war and its crimes is a painstaking process that will leave scholars, human rights activists and local courts with much work to do. The court just made this job a whole lot harder.”).


172. See Ford, *supra* note 15, at 440 (arguing that “when an affected group identifies strongly with one of the sides in a conflict and has a dominant internal narrative that denies responsibility for the conflict and any ensuing crimes, then indicting members of that group will cause the group to view the court negatively. This negative perception will be the result of various motivational and cognitive biases acting together, including motivated reasoning, use of heuristics, cognitive dissonance, and confirmation bias.”).

lenges the narrative that the KLA fought a pure, clean war of liberation against Serbia in which the Kosovo Albanians were the only victims. 174 In the telling words of the ICTY-acquitted Ramush Haradinaj, “[b]y approving this court, we are turning ourselves into a monster . . . . During the war, we were not monsters; we were victims.”175

I hence completely agree with Stuart Ford’s argument that the ICTY has engaged in a negative-sum game: whatever it does will lead to a net decrease in the positive perceptions of the ICTY when measured across all of the communities in the former Yugoslavia because even if one community is pleased with a particular decision, others will reject it and blame the ICTY for the outcome.176 In other words, no matter what decision the ICTY makes, it cannot help but challenge at least one of the dominant nationalist narratives, resulting in increased distrust of the ICTY within that particular group (even if the trust baseline was fairly low to begin with).

I also agree with Ford that trust in the ICTY does not significantly depend on some of the factors referred to in the literature (for example, that with its seat in The Hague, the ICTY is geographically distant from the former Yugoslavia, or that it uses common law rather than civil law procedure), but depends almost exclusively on biased, motivated reasoning driven by entrenched, nationalist worldviews.177 For instance, the ICTY is equally distant from all of the communities in the former Yugoslavia, but the trust in the institution varies widely between these communities.178 The State Court of Bosnia and Herzegovina, which tries mid-to-low-level war criminals and is located in Sarajevo, is also hated by the Bosnian Serb community even though it is
geographically proximate\textsuperscript{179}—to such an extent that as of the time of writing, the RS President Dodik has scheduled a referendum in the RS at which the people could express their disapproval of the State Court.\textsuperscript{180} Similarly, the ordinary people of the former Yugoslavia could be more familiar with the common law notion of a criminal trial, which they have seen in countless Hollywood movies, as opposed to the inquisitorial civil law trial with which few of them have had any direct experience. Ford is right, therefore, to point to patterns of ethnic bias and distrust.\textsuperscript{181}

C. Can Anything Be Done?

I am aware that this article has struck a rather pessimistic tone, but I think that is reflective of the depressing reality and the magnitude of the problem. The question nonetheless remains whether anything can be done to enhance the ICTY’s ability to persuade target audiences. A full answer to that question is beyond the scope of this paper, even if such an answer were possible. Before offering some thoughts on this question, I would note that it can be asked from two different standpoints: that of the Tribunal itself, and that of other actors who wish to bring about meaningful change in the attitudes of the communities in the former Yugoslavia, such as civil society activists.

Let us deal with the more inward-looking perspective first. It is clear that the Tribunal is in an unenviable, Catch-22 situation: whatever it does will generate distrust in at least one ethnic community, while its work outputs seem to be incapable of penetrating the collective consciousness of these communities. One could be tempted to think, therefore, that we should simply discard the whole idea of an international criminal tribunal as a mechanism of transitional justice, and just stick with \textit{plain} justice—the role of the Tribunal should be to convict the guilty and acquit the innocent, and that is that.\textsuperscript{182} Let us just give up

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{179} See 2012 BCHR Bosnia Survey, \textit{supra} note 2, at 115 (61\% of RS respondents expressing a negative view of war crimes prosecutions within Bosnia, and only 5\% a positive view).
\item \textsuperscript{180} See Elvira M. Jukic, \textit{Bosnian Serbs to Hold Referendum on State Courts}, BALKAN INSIGHT (July 16, 2015), \url{http://www.balkaninsight.com/en/article/bosnian-serbs-to-hold-referendum-over-state-judiciary}.
\item \textsuperscript{181} See Ford, \textit{supra} note 15, at 418.
\item \textsuperscript{182} Hannah Arendt may have been the first advocate of such a narrow approach: “The purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes . . . can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.”\textit{Hannah Arendt, Eichmann in Jerusalem} 253 (Penguin Books rev. ed., 2006).
\end{enumerate}
\end{footnotesize}
on attempts to foster reconciliation, since these will not work anyway, especially in light of the continuous negative propaganda to which the ICTY’s work is subjected. Indeed, from my own anecdotal experience of interacting with numerous ICTY judges and other staff members over the years, this is in fact exactly the resigned attitude that most of them have adopted, for all that nice stuff about combatting denial on the ICTY website. One could even be harsh and say that the ICTY cannot give up because there never was anything to give up in the first place. Let me extensively quote from Refik Hodžić184 in that regard:

The ICTY has never truly made a commitment to the people of the former Yugoslavia to chart the course to fulfilling this broader mandate, because, simply, it has never seen them as its primary constituency. Instead, to the vast majority of judges and lawyers who shaped its development and jurisprudence, they remained merely the objects of [the] Tribunal’s cases, while the only people they saw themselves accountable to were the policymakers in New York, Washington, Berlin and other key capitals.

[T]he Tribunal’s judges have been and will always be more interested in what international law journals have to say about their judgments than the people to whose lasting peace they are supposed to be contributing. At best, they’d prefer to leave it to the Tribunal’s outreach program to ‘sell’ their decisions to the affected communities. However, outreach cannot compensate for the unwillingness to consider how judges’ work impacts [the] Tribunal’s ability to fulfill its broader mandate. Especially outreach as understood by the ICTY’s principals: a loose mix of public relations, decontextualised dissemination of information and endless series of conferences. And this for one simple reason: everything a court with such a mandate does is in fact outreach, whether active or passive.185

183. See supra note 3 and accompanying text.
184. Hodžić is currently the director of communications of the International Center for Transitional Justice. He has spent a decade working as a spokesperson and outreach coordinator for the ICTY and the State Court of Bosnia and Herzegovina. See Biography of Refik Hodžić, Int’l Ctr. for Transitional Just. [ICTJ], https://www.ictj.org/about/refik-hodzic (last visited Jun 9, 2016).
I am very sympathetic with Hodžić’s critique. That said, there are structural limitations on what an international court can do even if its judges and lawyers did see the people of the former Yugoslavia as their primary constituency. It could not, for example, answer propaganda coming from nationalist media with its own, counter propaganda. It could not—should not twist the law and the facts of any case to reach a result that a particular community would find popular.

But even if the Tribunal could not itself foster reconciliation, even if it was captured in a negative sum game, it should at least have actively attempted not to make matters worse than they needed to be, by reinforcing rather than challenging existing narratives, as for example happened in the Gotovina judgment. Similarly, deciding to prosecute a given defendant for the sake of achieving “balance” is only liable to be counterproductive in the long run: whatever the ICTY did would be perceived as imbalanced anyway, while the whole effort could spectacularly backfire if the prosecution ultimately failed. First, do no harm is a principle that any international judge or prosecutor should keep in mind.

If one thing is clear, it is that the hard work of changing attitudes of the peoples of the Balkans is not going to be done by the ICTY, but rather by local or regional actors embedded in the affected societies. That work may or may not bear fruit in the end. It cannot simply be assumed that over time the ICTY’s account of the facts will be vindicated and become widely accepted. Denialism’s defeat is not a given—it is not even likely. Those engaged in this process should, however, appreciate it for what it is—an exercise in persuasion—and would benefit from consulting the enormous amount of research that psychologists have done on persuasion and attitude change. Some (hopefully non-banal) conclusions in that regard can I think be drawn at this point.

First, people do change their beliefs and attitudes, and do so all the time. Yet this becomes exponentially harder the more they become

---

186. See Klarin, supra note 2, at 96.
187. See Ford, supra note 15, at 465 (arguing that “focusing on improving perceptions of legitimacy would often require catering to inaccurate internal narratives about victimhood and is likely to make post-conflict reconciliation more difficult, not easier.”).
188. See Klarin, supra note 2, at 96 (arguing that the least that the ICTY could have done was “to make it more difficult for the local elites to distort and manipulate its message.”).
190. See Ford, supra note 15, at 467.
personally invested in any particular belief or set of beliefs. When a belief is part of a belief system, in changing the belief, it is often necessary to adopt a holistic approach that would affect the system as a whole. Thus, it does not seem plausible that attitudes about specific events (e.g., the Srebrenica genocide) can be effectively and durably changed without simultaneously trying to change the overall nationalist worldviews into which attitudes about these specific events fit in.

That said, a clear need exists for rigorous, context-specific psychological research that could provide evidence-based guidelines on optimal strategies for pursuing attitude change in conflict and post-conflict situations.

Second, it can be said with confidence that more outreach and information simpliciter is definitely not the solution for the ICTY, and perhaps for any tribunal operating in a radically polarized environment akin to that of the former Yugoslavia. I must somewhat disagree in that respect with Ford, who, while accepting that outreach is likely to be ineffective, argues that the ICTY can contribute to creating some future tipping point of evidence, which when reached will gradually lead to attitude adjustment and the modification of dominant internal group narratives. It is true that there are limits to motivated reasoning, since people like to think of themselves as being rational and objective and need some basis in fact to maintain their pre-existing views. However, we also know that when exposed to mixed information (and the information will always be mixed, at least because of the political and media filter it has to go through) attitudes can harden and become more polarized.

For example, there are mountains of rigorously tested evidence showing there is no link between vaccinations and autism, or showing anthropogenic causes of climate change, yet that does not in any way dissuade the true believers to the contrary. They can very easily rationalize that information away because they have access to some other information (which they regard as credible, however factually inaccu-
rate) that allows them to reject the former while maintaining their illusion of objectivity. Communicating disconfirming information can all too easily backfire, producing boomerang effects that harden pre-existing attitudes.197 Psychological research has also told us (somewhat counterintuitively) that attitude polarization is more pronounced among individuals who are better informed, essentially because access to more information allows for more biased evaluation and better rationalization of pre-existing views.198 Put crudely, a person in the former Yugoslavia who accesses the ICTY’s website on a daily basis199 is likely to be either a human rights activist (who needs no persuading) or an unrepentant, highly invested nationalist (who will likely never be persuaded by information contrary to his prior views).

Outreach is not likely to have positive effects in situations in which those efforts, as well as the work of the criminal tribunal generally, are opposed by the elites in power in the affected societies and the machinery of power under their control, such as the media. This hypothesis seems to be supported by anecdotal evidence of successful examples of outreach, none of which operated in an environment similar to the one in the former Yugoslavia. For example, the work of the Cambodia tribunal as a whole did not threaten the general narrative of the Cambodian government, which is why the dissemination of information was possible and could perhaps bear some fruit, reinforcing the already existing positive attitudes towards the tribunal and the punishment of the Khmer Rouge perpetrators.200

Third, it must always be borne in mind that the processes of attitude formation and attitude change are not purely rational, but are often strongly emotional.201 Psychological research has shown that when attitudes are formed in a process strongly grounded in emotion, changing attitudes is much more likely to succeed if the attempt at

197. See generally P. Sol Hart & Erik C. Nisbet, Boomerang Effects in Science Communication: How Motivated Reasoning and Identity Cues Amplify Opinion Polarization About Climate Mitigation Policies, 39 COMM. RES. 701 (2012) (documenting such effects with regard to communications on climate change); Brendan Nyhan, The Hazards of Correcting Myths About Health Care Reform, 51 MED. CARE 127 (2013) (documenting backfire effects of fact-checking corrections to misperceptions of health care reform in the United States in the segment of the population which was both partisan and more politically knowledgeable).

198. See Taber & Lodge, supra note 62; see also Dan M. Kahan et al., The Polarizing Impact of Science Literacy and Numeracy on Perceived Climate Change Risks, 2 NATURE CLIMATE CHANGE 732, 732 (2012).

199. See supra note 28 and accompanying text.


201. See supra note 48 and accompanying text.
change is also made at an emotional level. Conversely, cold, hard facts as established in excruciatingly long, sterile, and plain boring trials and judgments are simply not going to cut it because by themselves they create no emotional experience. It is this visceral, emotional effect that explains, for example, the power of such events as the Scorpions executions video, even if they might fade in the long-term without adequate follow-up. Because most people have bought into overarching nationalist narratives and related beliefs about specific events at the emotional level, it is by confronting them with a raw, unmediated, emotional experience that their attitudes are most likely to change—for example, if they could see and hear the survivors of specific crimes. It is only through such an emotional appeal that the audience can experience empathy for the other side, humanize that other side, and break the cognitive chains of bounded rationality. Even here, however, the biggest problem is ingroup-outgroup bias, since evidence that is perceived as emanating solely from the rival group is likely to be discounted. To be successful, the attempt at

202. See Maio & Haddock, supra note 188, at 577 (finding that “an affective appeal is more effective in eliciting attitude change among individuals whose attitudes were affect based, whereas a cognitive appeal is slightly more effective in eliciting attitude change among individuals whose attitudes were cognition based”).

203. See supra note 36 and accompanying text; see also Gordy, supra note 19, at 47 (discussing the impact of a Srebrenica documentary shown on Serbian state TV); Orentlicher, supra note 13, at 70–71.

204. From my own anecdotal experience I have always found one testimony before the ICTY to be particularly effective—that of Witness O in the trial of Radislav Krstić for Srebrenica. The Witness was a survivor of a mass execution, which he was able to talk about in a very articulate and compelling way, especially when listened to in Bosnian/Croatian/Serbian (i.e. with his own emotional inflections, rather than through an interpreter). For a full transcript, see Prosecution v. Radislav Krstić, Case No. IT-93-33, Krstić Witness O Full Testimony (Int’l Crim. Trib. for the Former Yugoslavia Apr. 13, 2000), http://www.icty.org/x/file/Voice%20of%20Victims%2oS uppOrt%20Docs/Witness%20O/Krstic-Witness%20O-Full%20Testimony_EN.doc. For a summary, see Witness O, Int’l Crim. Trib. for the Former Yugoslavia, http://www.icty.org/sid/184 (last visited June 1, 2016). The video of the full testimony (tragically) does not seem to be available online.

205. See Herbert C. Kelman, Reconciliation From a Social-Psychological Perspective, in The Social Psychology of Intergroup Reconciliation 15, 27 (Arie Nadler et al. eds., 2008) (arguing that the mutual acknowledgment of the other’s nationhood and humanity is a necessary prerequisite for reconciliation); Noor et al., supra note 10, at 362–63; Bar-Tal et al., supra note 20, at 251–52.

206. See Ford, supra note 15, at 473–74; see also Noor et al., supra note 10, at 361 (arguing that “[w]hen group members are confronted, e.g., through exposure to media reports, with the negation of their narrative and identity by their outgroup, they experience psychological distress . . . . This hardship can lead to heightened motivation for [competitive victimhood] and,
persuasion through emotional appeal must accordingly come from within one's own group.

Fourth, while people in the former Yugoslavia are constantly exposed to propaganda, they can also be especially sensitive to it. Attempts at persuasion that are perceived as propagandist can provoke a tremendous counter-reaction and further polarize attitudes.207

Fifth, it must also be realized that some people’s existing attitudes will never be moved, even if exposed to the most sophisticated persuasion strategies. Failure is very much an option, when looking at both adversarial communities as a whole and at particular segments of those communities. For example, if we were to compare Croatia and Serbia, I would suggest that a fundamental change in attitudes is (somewhat) more likely in the latter than in the former. Why? Because Croatian nationalism is reinforced by the fact that its agenda was actually victorious, in the sense that Croatia did win the war militarily and successfully built its statehood upon that victory.208 That means that even more left-wing political parties and actors find themselves forced to cater to that nationalist narrative, as was the case with Prime Minister Milanović and President Josipović in the Gotovina affair,209 especially if they feel electoral pressure from the right.210 When it comes to ethnic Serbs, on the other hand, all they actually gained from the Greater Serbia project was an increasingly lesser and impoverished Serbia. The sense of cognitive dissonance they experience may consequently be greater, allowing for some more latitude for attitude change.211

in turn, reduced prospects for fostering positive attitudes toward inter-group forgiveness and reconciliation.”).

207. See generally Christina Steindl et al, Understanding Psychological Reactance: New Developments and Findings, 223 ZEITSCHRIFT FUR PSYCHOLOGIE 205 (2015), http://psycnet.apa.org/journals/zfp/223/4/205.pdf?productCode=pa (reviewing psychological research on the phenomenon of “reactance,” defined as an unpleasant motivation arousal experienced by people who feel that their freedom of action or thought is being threatened, leading to resistance to such threats).

208. The same point can be made regarding the Kosovo Albanians.

209. See supra note 153 and accompanying text.

210. We could similarly take note of the proposal recently made by the president of the Zagreb County Court that denying the righteous nature of Operation Storm should be criminalized, akin to laws on Holocaust denial. The proposal did not go far, but the very fact that it was even made by a judge tells us something about the level of defensiveness built into the Croatian nationalist narrative. See Sven Milekic, Croatian Law Should Penalise Attacks on War, Judge Says, Balkan Insight (Mar. 20, 2015), http://www.balkaninsight.com/en/article/croatian-judge-advocates-legal-definition-of-1990s-war.

211. See Dubravka Stojanović, Zašto se ne osećam dobro posle presude suda u Hagu? [Why do I Not Feel Well After the Judgment of the Court in the Hague?], Peščanik (Nov. 26, 2012), http://pescanik.net/zasto-se-ne-osecam-dobro-posle-presude-suda-u-hagu/ (“The triumphalism we could see in the
Finally, this means that efforts at persuasion should prioritize those parts of the population that are more likely to be amenable to it. The surveys show, for example, that in Croatia and in Serbia there is a correlation between the age and level of education of the respondents and their trust in the ICTY: the older the respondents, the less likely it was that they would trust the ICTY.212 (Both correlations were missing from the Bosnian surveys.) This makes intuitive sense: attitudes are more flexible and amenable to change before a significant level of psychological and emotional investment has been made. If, say, you believed all your life in the cause of Serb nationalism, how exactly are you going to be able to admit to yourself—let alone others—that it was all for naught?

This is why the question of public education, which we have already touched on above,213 is so fundamentally important. That is where students can learn to think critically, where they can learn to question authority, where they can learn about the perspectives others have on the same events.214 And that is where the short-term becomes the long-term, where the cycle of the intergenerational transmission of nationalist worldviews can be mitigated and even broken. Or that is where that cycle can be perpetuated.

last few days [in Croatia, after the Gotovina judgment] creates the concern that the image of Operation Storm as a military action free of any sin has been cemented in the Croatian public. This will make it significantly more difficult for anyone within the Croatian society who would wish to reopen this topic and pose the question of responsibility for the crimes. Without that there is no genuine confrontation with the past and with ourselves. And without that the road to more developed, reformed, democratic, European societies will be longer. In that case such an ending of the war could be more harmful for Croatia than for Serbia. Serbia may learn something from its defeat, if it wants to. Croatia is less likely to learn from its victory. Victories are generally not re-examined.”) (translation by the author).

212. See Milanović, supra note 1, at 241–242.
213. See supra notes 84–91 and accompanying text.
214. See Dubravka Stojanović, How to teach about Srebrenica?, PEŠČANIK (May 6, 2014), http://pescanik.net/how-to-teach-about-srebrenica/. Stojanović discusses inter alia the example of a book designed by Israeli and Palestinian history teachers which shows their respective narratives about the same events (literally) side by side, allowing for comparison on both how they differ and how they correspond. For the book itself and further writing on the subject by its author, see SIDE BY SIDE: PARALLEL HISTORIES OF ISRAEL–PALESTINE (Sami Adwan et al. eds., 2012); Sami Adwan et al., Portrayal of the Other in Palestinian and Israeli Schoolbooks: A Comparative Study, 32 POL. PSYCHOL. 201 (2016).
VII. CONCLUSION

This article attempted to unpack the causes of the ICTY’s inability to effect attitude change in the relevant target populations of the former Yugoslavia, i.e., to persuade them that the findings in its judgments are true. We have seen that these causes are complex and interrelated. From its inception, the ICTY was faced with the determined opposition of those in power in the affected societies, societies that remain (semi-)authoritarian and starkly polarized along group lines. It is precisely those levers of influence that allow the powerful to obtain and stay in power that also allow them to easily discredit international institutions that challenge their standard narratives. Coupled with all of the limitations to human rationality that we examined above, the cynical, manipulative few can all too easily prey on the susceptible many.

We have seen that information about the ICTY is processed through a cognitive and emotional filter of prior attitudes and beliefs, and will be skewed to fit those pre-existing beliefs. The psychological research on our flawed, bounded rationality allows us to recognize the malady for what it is: a self-validating, self-perpetuating vicious circle of metastasized confirmation bias. But while the diagnosis is easy, the cure is not. Persuading millions of Serbs, Croats, Bosniaks, and Albanians to stop with the endless retrenchment of competitive victimhood and to start believing that members of their own group, indeed frequently the leaders of their groups, committed crimes against other groups is nothing less than a Herculean task. It is akin in magnitude to persuading whole nations of anti-vaxxers, creationists, or climate change skeptics to revise their beliefs, and doing so while fighting contrary propaganda that overwhelms other messages in the public space.215 This is not something that ten ICTYs could have done. How could they? This is not something that ten ICTYs run perfectly could have done, let alone the one very fallible Tribunal that we have, a Tribunal that has in small ways and large constantly provided fodder for those who sought to discredit it.216

215. See generally Dan Kahan, Fixing the Communications Failure, 463 NATURE 296 (2010) (discussing the process of “cultural cognition” which leads to attitude polarization when people are exposed to counter-attitudinal scientific evidence).

216. To take just one recent example, consider the possible impact of the whole Harhoff affair, in which one sitting ICTY judge essentially accused the ICTY president of spearheading controversial acquittals in order to serve outside political interests. See, e.g., Marko Milanović, Danish Judge Blasts ICTY President [UPDATED], EJIL: TALK! (June 13, 2013), http://www.ejiltalk.org/danish-judge-blasts-icty-president/.
It also must be understood that this is not a disease that time alone can cure; it is not as if simply letting the decades go by will magically unwind the cycle of bias. Time by itself does nothing—except, perhaps, allow human mortality to run its course. To deploy a famously cynical quote by Max Planck: “A new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it.”217 And if we suppose this is true of science, that most rational of human endeavors, and of scientific truths, how more apt it would be for other truths, for the so very emotional questions of individual and social identity. We could hence say that time helps insofar that people whose attitudes have hardened so much that they become essentially unmoving die off, and are replaced by more pliable, less personally invested younger generations.

This is, I think, the only real promise that time can have. But it is only a promise, which rests on a premise: that nationalist worldviews are not going to be transmitted to the succeeding generations. But I am afraid that there is plenty of evidence of such transgenerational transmission in the former Yugoslavia and elsewhere. Think only, for instance, of attitudes towards crimes committed in the Second World War in today’s Japan. It has been seventy years since the end of that war, but the denial of Japanese war crimes, e.g., regarding so-called comfort women in Korea, is arguably on the increase, and significantly so, coupled with a general relativization of Japan’s role in the war.218 Why? Because claims about specific crimes play into larger nationalist narratives that are themselves of contemporary political impact, as they are, for example, in Turkey a century after the Armenian genocide (or “genocide”?). My point is simply that things can get worse over time, rather than...
inevitably get better. And there are good reasons to fear such long-term downward trends in the Balkans: Bosnia in particular is a case in point, where school-children learn their history (and a number of other subjects) from different Bosniak, Croat, and Serb textbooks, in ethnically segregated classrooms. This is a recipe for perpetuating ethnic divisions and victimhood narratives, rather than for their mitigation. Reconciliation might not require “writing a joint consensual history, but it does require admitting the other’s truth into one’s own narrative.” Today, however, the communities of the former Yugoslavia seem as far away from that point as they have ever been.

Nobody knows whether one day the school-children in the former Yugoslavia will study the conflicts of their past from textbooks prominently referring to the ICTY’s judgments. Nobody knows whether the different ethnic communities will one day reach the point where the negation of the other is no longer seen as a central component of their own identity, whether they will “eventually begin to see the contours of human beings on the other side of the fence, through the dark clouds of enmity that obscure them.” But even if that day comes, it will not have come because of anything the ICTY has directly said or done, but because of how the communities of the former Yugoslavia decided to use its legacy—or not. That process has not necessarily been made any easier by the ICTY, or at least there is no evidence that

219. See Milanović, supra note 1, at 245–246 (surveys showing the hardening of the attitudes of Kosovo Serbs over a period of 5 years); id. at 247 (surveys showing a downward trend over time in the awareness of Srebrenica and acceptance that it was a crime in the population of Serbia).


221. See Sabina čehajić & Rupert Brown, Silencing the Past: Effects of Intergroup Contact on Acknowledgment of In-Group Responsibility, 1 SOC. PSYCHOL. & PERSONALITY SCI. 190, 190 (2010) (arguing, on the basis of a study conducted on two groups of schoolchildren in the Republika Srpska, that meaningful, quality contact between different groups was important for a decrease in competitive perceived victimhood as a prerequisite for reconciliation); Luca Andrieghetto et al., Reducing Competitive Victimhood in Kosovo: The Role of Extended Contact and Common Ingroup Identity, 33 POL. PSYCHOL. 513, 523 (2012) (similar findings with respect to Kosovo).

222. Kelman, supra note 205, at 29.

223. See Vučić’s Initiative Equalizes the Responsibility for the War, RADIO FREE EUR. (Aug. 17, 2015), http://www.recom.link/most-rse-vuciceva-initijativa-izjednacava-odgovornost-za-rat/ (prominent human rights activist Nataša Kandić stating: “It’s been a long time since the state of inter-ethnic relations was as bad as it is now in 2015.”).

224. See Kelman, supra note 205, at 24, 26.

225. Bar-Tal et al., supra note 20, at 258.

this has been the case. That process will depend largely on wise political leadership, a commodity always in very short supply; on transforming the media’s role from escalators to de-escalators of conflict;\(^2\) and on the outcome of other routes to transitional justice, such as the ongoing civil society initiative to create a regional truth and reconciliation commission.\(^2\)

The final issue I want to address is that of the generalizability of this article’s findings. Assuming that my explanation of the root causes of the ICTY’s ineffectiveness in inducing attitude changes in target audiences makes sense, one could still question whether my analysis would be equally applicable to other international criminal courts and tribunals. One way of doing so would be to point to counter-examples of courts and tribunals that were more successful than the ICTY in persuading target audiences, say the Nuremberg International Military Tribunal, the Special Court for Sierra Leone, or the Extraordinary Chambers in the Courts of Cambodia. Another would be to dispute the explanatory power of the psychological research that I have employed in this piece by pointing to its own inherent bias, as most such research has been conducted using “WEIRD” participants from Western, educated, industrialized, rich, and democratic countries, like U.S. college students.\(^2\)

That research is not necessarily generalizable to other types of societies, for example in developing African countries that have been the main target audience of the International Criminal Court.

Both of these arguments have some force to them, and I cannot address them fully in this article. With regard to the latter I could say, for instance, that the explanatory power of psychological research does not seem to be diminished in the case of the populations of the former Yugoslavia, which are broadly speaking not really all that Western, educated, industrialized, rich or democratic. That said, without a proper empirical basis I cannot exclude the possibility that some qualifications would need to be made for other societies that are even more divergent from the WEIRD baseline. With respect to the former, I would say that while we should be cautious about drawing too many general conclusions from a single case study, this simply reflects the more general lesson that we should not too quickly infer causality where none might exist. For example, that a large majority of Germans

\(^2\) See Noor et al., supra note 10, at 365.
\(^2\) See COALITION FOR RECOM, http://www.recom.link/ (last visited June 1, 2016).
\(^2\) See Joseph Henrich et al., The Weirdest People in the World?, 33 BEHAV. & BRAIN SCI. 61, 63–64 (2010).
today broadly believe in the findings in the Nuremberg judgment about Nazi crimes does not mean that they so believe because of the Nuremberg judgment, i.e., that through its work the Nuremberg Tribunal persuaded them to believe so. The causes of both success and failure are multifactorial. The best lesson that the ICTY could teach us is precisely how to avoid those factors—at least those that can be feasibly avoided—that contributed to its failure. In other words, even if the ICTY’s failure to persuade Yugoslav audiences may well have been inevitable, that does not mean that all courts and tribunals are necessarily doomed to fail—even if failure, to my eyes at least, seems inherently more likely than success.