

**[Redacted]: Writing and Reconciling in the Shadow of Secrecy at a War Crimes Tribunal**

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**Synopsis**

*International criminal law claims to generate definitive narratives that contribute to reconciliation, nowhere more so than in deliberations on the former Yugoslavia, the crucible of a discipline which has constructed itself on claims about individual victimization and responsibility precisely in order to combat alternative narratives of collective responsibility and thereby promote reconciliation between conflicting communities. This implies a particular orientation towards history and the role of individual actors, expressed in a narrative of transition.*

*Yet curiously, one of the essential procedural devices of contemporary trials is the disabling of narrative through redaction of evidence and testimony. Redaction reconfigures the decisive narrative of trial. Behind a veil ostensibly drawn for pragmatic reasons, the international adjudicator claims a mysterious authority, out of which consequential judgment comes, but at the price of reducing that authority’s ultimate efficacy and transformative power.*

*This essay first describes the broad outlines of the transformational narrative logic of the International Criminal Tribunal for the Former Yugoslavia, and then turns to the problem which redaction introduces into that logic. The consequences for the construction of shared history in the Balkans are considerable: What claims can be made with confidence, knowing that juridically consequential material is unavailable?*

**I.**

Problems of intransparency and redaction abound in the trial process. Trials are privileged linear narratives *nonpareil*: Facts about the past – and canonically approved legal theories – are marshaled to make claims about cause and effect, to assign blame, and to provide authoritative accounts of events to which present consequences are assigned with Weberian authority.

In the course of doing this, all juridical systems make authoritative, if ultimately arbitrary decisions about what information will be admitted into the process. Common law systems have elaborate, often bewildering rules of evidence and an adversary framework that, if we are candid, is premised on arriving at a verdict by having each side present as biased a picture as possible. Meanwhile civil law systems deploy the gatekeeping *juge d’instruction* as well as the dictated summary record in ways that radically narrow the information that enters or exits the adjudicative process. The trial process produces a record that conceals as much as it reveals. All this is unavoidable – true comprehensiveness is impossible – and the most one can hope for is that this process is clear, though history, literature and experience tell us this is rarely so.

International criminal law has absorbed this approach and extended it with marked enthusiasm, making explicit claims that it generates purposive narratives about mass violence. As the discipline and its advocates see it, trial and judgment creates a definitive account of a conflict’s course and even origins, establishing an authoritative foundation for rejecting alternative histories and thereby contributing to reconciliation between conflicting communities.

Nowhere has this theory been advanced more than at the International Criminal Tribunal for the Former Yugoslavia, the crucible of a discipline which has constructed itself on claims about individual victimization and individual responsibility to combat alternative narratives of collective responsibility. As the Tribunal itself puts it

By trying individuals on the basis of their personal responsibility. . .the ICTY personalizes guilt. It accordingly shields entire communities from being labeled as collectively responsible for others’ suffering. . . . This paves the way for the reconciliation process within the war-torn societies of the former Yugoslavia.

It continues

As the work of the ICTY progresses, important elements of a historical record of the conflicts in the former Yugoslavia in the 1990s have emerged. Facts once subject to dispute have been established beyond a reasonable doubt by Judgments. . . . The determination beyond reasonable doubt of certain facts is crucial in combating denial and preventing attempts at revisionism.<sup>1</sup>

This vision of transformation through law is perhaps in no small part owing to the fact that this Tribunal has sat in judgment of events occurring in Europe at the close of the Cold War, and to its institutional origins in the heady, end-of-history atmosphere of the early 1990s. The Tribunal’s asserted role in transitional justice and reconciliation reflects broader understandings of the transition from the Cold War. Thus international criminal law’s claimed liberation of the self from the collective and the social – of individual Yugoslavs from their own recent, bloody history – reads as the juridical exemplar of a broader narrative about the transit from Communism to the modern, liberal, rights-respecting, individualistic, democratic and market state: the transit of peoples, once united in a single system, through chaos and violence, and their ultimate return to a shared European community through law.

## II.

This is of course a story, one which relies upon and invokes the devices of narrative to organize complex events. I am not suggesting that the narrative about Yugoslavia created at the Tribunal is implausible or untrue simply because it is (also) strategic. It may indeed better describe Yugoslavia before the wars than the alternatives proffered by many defendants. But it is strategic nonetheless, just as the counter-narratives that defendants advance are equally strategic, however sincerely felt they may also be.

All of this implies a set of juridical strategies consciously or unconsciously reflecting broader narratives of post-Communist eschatology, fitted to the particular problematic of Yugoslavia. This is perhaps most visible in the significant share of the trials spent on matters of history. Many expert witnesses have been introduced at trial by the prosecution to discuss the 1990s and the late Titoist period but also the era of Royal Yugoslavia, the Habsburg and Ottoman eras, and even Kosovo Polje and the obscure origins of the groups antecedent to

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<sup>1</sup> “Bringing Justice to the Former Yugoslavia – The Tribunal’s Core Achievements,” (ICTY website), <http://www.un.org/icty/glance/index.htm> (describing accomplishments of the Tribunal, and noting also that “[b]y holding individuals accountable regardless of their position, the ICTY’s work has dismantled the tradition of impunity. . . particularly by individuals who held the most senior positions. . .”).

today’s ethno-national communities. Discussions of history occupies only a small fraction of the testimony in these trials. Yet viewed another way, the amount of time spent on events outside the jurisdiction of the Tribunal has been surprisingly large, the more so as much of the ‘contemporary’ evidence is read in light of its ‘historical’ context. This includes explicit prosecutorial efforts to explain the authority wielded by Franjo Tuđman in western Bosnia in light of Croatian nationalists’ understanding of the interwar *Sporazum*, or the assertion of a joint criminal enterprise to advance the goal of creating a Greater Serbia as the common transaction joining the three indictments of Slobodan Milošević.

Observers have taken different views of the prosecution’s resort to a ‘historical’ strategy. Some have criticized it as playing into the hands of grandstanding defendants, who after all are intimately familiar with their own history and aware of how other former Yugoslavs will perceive outsiders’ clumsy attempts to interpret it. Others defend a historical approach as necessary for a full appreciation of the truth of the conflict, which was not, after all, a set of disconnected, deracinated misdeeds, but a patterned evil that itself distorted claims about the past to incite present horrors – and precisely because of which a robust judicial strategy of truth-telling is required.<sup>2</sup>

But whatever one might think about the wisdom of such a strategy, the prosecution has adopted it, and the court accepted it. Even many defendants accept its general logic: They defend themselves less by contesting the evidence than the court’s authority and legitimacy, emphasizing alternative political and historical narratives. They are engaged in a form of asymmetric legal warfare, and their chosen terrain is politics and history. They too believe in the trial as narrative with its presumed power to affect our common recollection and understanding of events.

And yet: one of the essential devices of the modern international criminal trial is the *disabling* of linear narrative – its elision, distortion, shortening, or masking, and masking of the disabling act itself. Redaction of testimony, protection of witnesses, secret hearings, and restriction of access to documents are frequent devices in international criminal trials. Moreover, the logic and goals of trial management may be making resort to secrecy increasingly frequent. Inasmuch as the trial

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<sup>2</sup> Ruti Teitel, “Bringing the Messiah,” at 185 (“Insofar as the ICTY merely counterposes a portrait of ahistorical atrocities, committed by atomized individuals within a political vacuum, it risks confirming the notion that those atrocities were inevitable, a fate foretold. But this representation undermines the project of individual accountability. . . .”)

process at the Tribunal has been decisively linked to projects of reconciliatory narrative, this suggests that the trials arising are developing an inadequate history, in part because of the very act of secrecy which is thought to make these trials possible.

### III.

Before considering the implications of redaction, it is useful to examine the scope of these processes and how they operate on the texts from which claims about history must be constructed.

Redaction – or what we might call ‘strategic intransparency’ – takes many sophisticated forms well beyond crude excision of the final text. Much material is simply never entered into the public record at all: documents at the ICTY, including the internal work-product of the prosecution and chambers and the enormous documentary archives, are completely unavailable unless presented in trial. This is supposed to change with the closing of the Tribunal, but will not result in a comprehensive opening; individual documents in the ICTY archives will be restricted for years or even indefinitely.<sup>3</sup>

Even when materials have entered the record, there is no guarantee that they will be public. Witnesses may testify under a variety of protective measures, ranging from voice distortion and testimony from behind a screen to testimony in closed session or even in a hearing from which the defendant is excluded. Documents may be filed as a confidential *inter partes* document.<sup>4</sup> At the far end of the spectrum, when *ex parte* filings are made, even the other party to the case may be unaware that a document has been filed. The judges, of course, see everything.

Secrecy does not necessarily mean that the process is unfair. In a ruling involved in the *Milošević* trial, the chamber explained that it approves requests for confidential restrictions if “done for a specific purpose, . . . such as . . . non-disclosure of the identity of a victim or witness who may be in danger or at risk” and must not affect the fairness of the proceedings.<sup>5</sup> But while the Chamber ultimately decides, the choice of

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<sup>3</sup> See Robert Donia and Edina Becirevic, “ICTY Archive Must be Open to All,” IWPR, [http://www.iwpr.net/?p=tri&s=f&o=343812&apc\\_state=henh](http://www.iwpr.net/?p=tri&s=f&o=343812&apc_state=henh).

<sup>4</sup> For example, in the *Milošević* case, in its Decision on the Motion of Acquittal, the chamber declares that there is sufficient evidence of guilt to allow the trial to continue on a specific count on the basis of redacted evidence; the court mentions closed session testimony (as well as public testimony) and cites it for its legal determination, but does not say what it was. *Prosecutor v. Milošević*, Case No. IT-02-54, Decision on Motion for Judgment of Acquittal, June 16, 2004.

<sup>5</sup> *Prosecutor v. Vlastimir Ćorović*, Case No. IT-05-87/1-PT & IT-02-54, Decision on Vlastimir Ćorović’s Motion for Access to Transcripts, Exhibits and Documents in *Prosecutor v. Slobodan Milošević*, IT-02-54, 6 February 2008 (*Ćorović Motion*), para.

whether to apply for secrecy is discretionary, and therefore an element of strategic calculation is unavoidable.

Intransparency is also temporally embedded, replicating itself and restraining publicity long after the initial determination is made. It may surprise some people to find that documents continue to be filed under the case number assigned to the trial of Slobodan Milošević, who died in March 2006 and against whom proceedings were terminated a few days later. But in fact they do, because defendants in other cases are interested in finding out what was said. When parties in another case seek access to confidential information, the prosecution’s original strategic calculations and the chamber’s original fairness concerns are at a remove, but they have continuing, knock-on effects. Because the materials are secret, even sophisticated parties in closely related cases will not know what it is they are seeking to have disclosed, or even, often, that it exists. Thus the decision to withhold information in one case ripples through subsequent cases.

Nor is it only the chamber that determines the extent of intransparency. Materials submitted by a state in accordance with Rule 70 have some measure of control over the manner in which the material is revealed – an issue that arose with regard to the Yugoslav Supreme Defense Council minutes supplied to the Tribunal, but which were not released to the International Court of Justice for its deliberations in the genocide case of *Bosnia v. Serbia*.<sup>6</sup> Unsurprisingly, states are inclined to negotiate highly restrictive conditions.

So a wide range of documents and forms of testimony are restricted *ab initio* or redacted as they enter the record. Who exactly is constrained from seeing such material? In a typical instance, the *Oršević* court decided that “the public” is prohibited from seeing them and

“the public means and includes all persons, governments, organizations, entities, clients, associations, and groups, other than the Judges of the Tribunal, the staff of the Registry, the Prosecutor and his representatives, and the Accused, his counsel, and any employees who have been instructed or authorized by the Accused’s counsel to have access to the confidential material. ‘The public’ also includes, without limitation, families, friends, and associates of the

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11. Any one of dozens, really hundreds, of documents would demonstrate the same point.

<sup>6</sup> Marlise Simons, “Genocide Court Ruled for Serbia without Seeing Full War Archive,” *New York Times*, 9 April 2007; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, Gen. List 91 (26 February 2007).

Accused; accused and defence counsel in other cases or proceedings before the Tribunal; the media; and journalists.”<sup>7</sup>

Thus those restricted from seeing these materials includes, in effect, everyone not directly connected with the trial’s official processes. And this was a case in which the court has actually allowed some documents from one trial to be released for use in another trial.<sup>8</sup>

What quantum of material is redacted or withheld? We cannot know, and neither can the quality of this material – its probative value – be accurately judged. Indications as to both are possible: Confidential documents are frequently alluded to, even though their contents are not discussed. But these are, obviously, extremely limited indications, and none of this partial information can yield a complete picture of what, exactly, it is that we are not seeing. For documents whose very existence is secret, we simply have cannot have any idea, nor even know that we ought to.

#### IV.

There are entirely plausible reasons for all this secrecy, as a moment’s reflection suggests. Some witnesses will die sudden, violent, and juridically inconvenient deaths if their participation in trial becomes known. Others will simply refuse to cooperate if their safety is not assured or are compelled to take the stand publicly, just as states will stop cooperating and refuse to open their archives if their interests are threatened. In turn, a court which does not have all the facts risks rendering incomplete and inaccurate judgment, or even paralyzing the institution. And so on – the point is that there are solid grounds for adopting cautious, close-to-the-vest strategies for managing information as it flows into the institution and as it comes out.

Still we need have no quarrel with the processes themselves, or their rationales, to observe their effects. The excision of text quite literally reconfigures the narrative of the trial. The absences – caesurae in the record marked in transcripts by “[REDACTED]” – simultaneously deny access to knowledge and indicates its undeniable existence. This ‘undeniable denial’ is consequential, as courts sit in judgment and mete out penalties according to evidence that cannot be viewed by any but themselves.

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<sup>7</sup> *Oršević Motion*, para. 19(f).

<sup>8</sup> *Oršević* was a senior lieutenant of Milošević’s and the charges in his trial overlap with the Kosovo phase of *Milošević*; thus the overlap of witnesses and documents.

The problem is not merely undigested documents but utterly inaccessible documents, non-documents and empty spaces. Redacted materials are not merely unavailable in some practical sense – like the bones of a speculative fossil, posited by theory but as yet undiscovered, or an extant record that is so enormous that no one could plausibly read it all (a very real problem at the tribunal); they are juridically unavailable.

The absence of a record is qualitatively different from the presence of a redacted record. If one held no trials at all, then the truth, as a trial conveys it, would not come out. But this would also be known to be the case; the evident absence of the truth would speak for itself. A redacted record does not indicate the extent of its own absences, whose intrinsic content is unknown and indeterminate. In the most extreme cases, as we have seen, it is not even knowable if the absences exist.

Obviously, much of this is the usual practice and discipline of any judicial enterprise, which expects intransparency under defined conditions. So what is the particular effect here? To what degree does this problem – which, partly, is generic in nature – affect in particular the working out of historical claims involving Yugoslavia?

## **V.**

The special effect of redaction at the tribunal pertains to its particular mission to achieve reconciliation through definitive judgment, in two ways: first, redaction inhibits the reception of the court’s judgments and documents as a legitimate source that might displace alternatives; and second, the strategic aspects of redaction create incentives to harness arguments about history to agendas of prosecution and power that are unresponsive to local sensibilities.

Redaction directly limits the efficacy one of the core claims of the international criminal law project, namely its ability to craft authoritative reconciliatory narratives. The practical consequences of redaction for research and shared history are considerable. Historiography is hobbled by lack of access: No claims can be made with confidence knowing that precise, juridically consequential material is available, but not to the researcher. Projects of shared understanding require a shared body of reference. Efforts to construct histories that incorporate an internationally sanctioned judicial narrative are difficult enough, confronting hurdles of idiom, cultural fit, and the resistance of the defeated. To add to these hurdles the additional obstacle of narrative incompleteness – and knowledge that such incompleteness is willfully crafted – introduces a radical uncertainty about the source.

In practice, it is unlikely to be the overtly historical or political claims that have been directly redacted. Redaction affects the testimony of

particular kinds of witnesses: those who fear for their own safety; individuals who themselves risk criminal liability; or individuals whose experiences carry social stigma, such as victims of sexual violence. Such testimony most frequently pertains to the underlying crime base, which is, in political terms, the least contested aspect: Often the underlying crimes are notorious, and the question is what relationship a high-level accused had to them.

But this does not mean that interpretation of history is unaffected. Uncertainty anywhere in the proceedings can affect, infect, the entire text. That readers who are already skeptical might disregard the whole because of the incompleteness of the part, is almost inevitable, and redaction increases the availability of such arguments.

Thus proposals to make evidentiary and documentary archives available to researchers are inadequate if the materials in those archives, and the judgments themselves, retain significant redactions. There must come a point beyond which redaction so utterly undercuts the public aspects of the juridical process that the trial acquires the patina of a Star Chamber, and with it the taint of an indefeasible and morally defective intransparency – mysterious, but without mystery’s majesty, only its terror and unpredictability and apparent arbitrariness.

Most theories of transitional justice suppose that it is the authoritative truth-record established by international trials that makes denial impossible and paves the way for reconciliation – but essential to that process is undeniable truth. Even if one accepts the claims of international criminal law about its own efficacy – and there is reason to be skeptical – the procedures of redaction risk damaging the legitimacy on which, it is claimed, the efficacy of court processes rests. Without this, social goals such as reconciliation are deferred, because no one is compelled to believe by a text they cannot see.

The potential implications are greater still: The narratives that result are not only incomplete; they also likely have a problematic valence. Decisions about redaction are almost entirely in the hands of international prosecutors and judges. To be sure, the adversarial input of defense attorneys is present, but the overwhelming bulk of requests for protection and redaction come from the prosecution. Because of this, and the strategic calculations that inform even the most technocratic or pragmatic decisions about when to invoke confidentiality, redactions are keyed to the perspectives of an international *adjudicati*.<sup>9</sup> When

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<sup>9</sup> Cf. Ruti Teitel, *Bringing the Messiah*, at 185 (“The ICTY. . . stands entirely apart from national institutions, and it seeks to enforce a strange deracinated form of individual responsibility that is answerable to a global order. . . .”).

prosecutors propose confidentiality or a closed session, and the chamber accepts it, they do so for their own strategic reasons, and the effect is to advance and entrench the tribunal’s progress narrative of transition through the assignment of individual criminal responsibility via strategic silences. Redaction – strategically controlled by international judges and prosecutors – inflects the Tribunal’s work further away from narratives that reflect the perspectives of those parties most affected and most concerned with generating a history of what is, after all, their own transit from Yugoslavia to something else.