

Researching Law

American Bar Foundation

An ABF Update

Volume 17, Number 4, Fall 2006



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ABF SUMMER DIVERSITY FELLOWSHIP PROGRAM

Senior Research Fellow John Hagan conducted a pathbreaking study of the International Tribunal for the Former Yugoslavia (ICTY) and reported on it in a recent book, *Justice in the Balkans: Prosecuting War Criminals in The Hague Tribunal* (University of Chicago Press, 2003). Now, he and his collaborator, Professor Sanja Kutnjak Ivkovi, have taken a second look at this international court from another vantage point—through the eyes of the citizens of Sarajevo who endured years of relentless attacks that killed or injured thousands of the city’s residents. Drawing on surveys conducted in 2000 and 2003, Hagan and Ivkovi found that the citizens of Sarajevo have increasingly come to distrust the ICTY and have begun to embrace the idea of using local courts to mete out justice for those accused of crimes against humanity.

Even against the backdrop of the Nuremberg trials at the end of World War II, neither the Soviet Union nor the United States showed much enthusiasm for international criminal law during the Cold War. It was not until after the demise of the Soviet Union in the early 1990s that interest in international criminal justice was formally renewed, signaled by the creation of the International Tribunal for the Former Yugoslavia. Prompted by the war in the former Yugoslavia, including the drive to establish a Greater Serbia, the siege of Sarajevo, and the massacre in Srebrenica, the ICTY was established by the United Nations

Security Council in 1993. Although initially dismissed in the European press “as a fig leaf for military inaction,” this tribunal, which enjoyed periods of support from the Clinton Administration, became a flagship UN institution. At its peak it employed more than 1000 employees from 84 countries, with an annual budget of \$100 million, and had detained more than 40 suspects, including the late former head of state Slobodan Milosevic, on charges of crimes against humanity and genocide. Prodded by the Bush Administration, the ICTY has developed a “completion strategy” that will lead to its eventual closure. It ended investigations in 2004 and has indicated that trials will be finished by 2008, at which time remaining cases will be transferred to the jurisdiction of courts established in the newly independent states of the former Yugoslavia.

“Little is known about the impact on citizen perceptions of this historic institution of international law in the war crime settings—such as Bosnia and its besieged city of Sarajevo—where the ICTY seeks to restore a sense of justice for citizens,” the authors point out. The first three prosecutors of the ICTY are strong advocates for the primary jurisdiction of the ICTY over war crimes in the Balkans and for subsequent international criminal courts, insisting that a jurisdiction that supercedes the sovereignty of nation-states is often essential to assure security and independence in the quest for international criminal justice. The

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Bonnie Honig

DISCRETION AND DUE PROCESS

*Louis Post and
Alien Rights during
the First Red Scare*

Debates about how to ensure national security and protect individual rights figure prominently in the contemporary political milieu. But the conflicts that arise when pursuing these objectives are not unique to the current war on terrorism.

Senior Research Fellow Bonnie Honig has explored the tension between national security and due process during the First Red Scare. Her insightful analysis reveals how one, now largely forgotten, civil servant—Louis F. Post—used his administrative discretionary powers to secure crucial due process rights for noncitizens. To do so, Post had to interpret due process in very broad and controversial terms. Drawing on this chronicle, Honig argues that law is not in and of itself inclusive and progressive. It depends on human actions to reach its full potential.

During emergencies, governmental power and prerogative are typically expanded. “Emergency politics occasion the creation of new administrative powers and the redistribution of existing powers of government from proceduralized processes to discretionary decision, from the more proceduralized domains of courts to the more discretionary domains of administrative agency,” Honig observes. Critics of such expansion tend to appeal to courts to contest the broadening of executive power. In the United States since September 11, 2001, the strategy has been somewhat effective: courts have blocked initiatives of the Justice Department that elevated national security needs above individual rights to due process. “But more often than not, court interventions in times of emergency have little impact on the expanded exercise of state power,” Honig points out. Courts, especially the Supreme Court, often defer to the executive branch in times of crisis. This deference is unusual in the Ameri-

can context. Since courts do not normally defer, their willingness to do so in the grip of a national crisis has prompted liberal and legal theorists to brand emergency politics as exceptional, or “the state of exception.” “‘The state of exception’ is a condition in which ordinary law is legally suspended and sovereign power operates unfettered, by way of decision.”

Political theorists tend to associate this type of executive branch decision-making with the sort of powers exercised by a single unaccountable dictator. But the example of Louis Post suggests a different take on administrative decision-making. Highlighted here is the role played by discretion, a kind of decisionism that exceeds the rules in ways that might work on behalf of ordinary due process, not against it, and in ordinary times, not just in crisis. Once we see the affinities between emergency decisionism and more ordinary practice of discretion, emergency politics emerges from its exceptionalist setting and joins the context of larger struggles over governance that have marked liberal democracy in the U.S. setting for more than a century. Debates about security versus rights in emergencies actually are a subset of “larger debates about the risks and benefits to democracies, in emergency as well as nonemergency settings, of administrative versus judicial power, rule of man versus rule of law, efficiency versus fairness, speedy versus fully deliberative decision making, outcome versus process orientations, and secrecy versus transparency or publicity.” In short, fixating on the security versus rights dimension draws attention away from a more fundamental issue: “the (re)distribution of governing powers and the mechanisms by which they may and may not be held accountable.” While the jockeying between administrative and judicial governance is most

visible in times of crisis, such as those involving national security and immigration politics, the to and fro is not itself exceptional. It is part of an ongoing process in which bureaucrats, political administrators, judges, lawyers, and citizens vie for power.

Critics of administrative discretion and civil libertarians frequently respond to attempts by the executive branch to expand their power by rejudicializing the terrain. They may turn to courts to contest the transfer of decision sites from judicial settings to adminis-

In April of 1919, a homemade mail bomb arrived at the office of Seattle mayor, Ole Hanson, who had recently quashed a strike by shipyard workers, and another bomb arrived at the home of a former Senator and maimed the person who opened the package

trative arenas, and they may also “press for the expanded judicialization of nonjudicial sites by, for example, claiming that people have procedural rights of due process even in nonjudicial settings.” But history has shown that there are no guarantees these maneuvers will work, given the tendency of courts to defer to the executive branch in times of emergency. So merely participating in the “to and fro of judicialized

processes versus administrative discretion” will not unfailingly secure protection for human rights and the dissenting politics they are meant to protect. To illustrate this point and to identify another option, Honig chronicles the activities of Louis F. Post, assistant secretary of the Department of Labor during the First Red Scare. Because he fought for procedural rights and due process, he is often lauded as a principled proceduralist who foreshadowed later Court rulings on the rights of noncitizens. But Post was no mere proceduralist, Honig points out. “For Post, a champion of proceduralism in 1919–1920, proceduralism was not a good in itself—it was simply one of law’s many mechanisms, a mechanism whereby all sorts of political aims could be pursued.”

The First Red Scare

In April of 1919, a homemade mail bomb arrived at the office of Seattle mayor, Ole Hanson, who had recently quashed a strike by shipyard workers, and another bomb arrived at the home of a former Senator and maimed the person who opened the package. Postal authorities located thirty-two other bomb packages before they were delivered. (Several had been held back for insufficient postage, an oversight that stalled some of the 2001 anthrax mailings as well). Among the intended recipients were government officials and judges who opposed organized labor and favored restrictions on immigration but the targets also included officials with more liberal leanings.

Six weeks later a new series of bombs exploded in eight different cities at the same hour. Although there had been previous isolated bombings by self-proclaimed anarchists, this coordinated attack produced a “frenzy of fear” in the American populace. The Justice Dept. and the immigration bureau, under the leadership of Attorney

General A. Mitchell Palmer and a young J. Edgar Hoover (head of Palmer’s Intelligence Division,) among others, sprang into action. These and other powerful officials “sought in wholesale deportations a solution to the anarchist threat and the problem of dissident action in the United States.” From late 1919 to early 1920, in a series of maneuvers known as the Palmer raids, 5,000 to 10,000 aliens were apprehended and slated for deportation under the Sedition Act of

From late 1919 to early 1920, in a series of maneuvers known as the Palmer raids, 5,000 to 10,000 aliens were apprehended and slated for deportation under the Sedition Act of 1918

1918. Post was outraged by the arbitrariness of these actions and was poised to defend the rights of the foreign born when the opportunity arose.

Until 1920 John W. Abercrombie, solicitor general of the Department of Labor, and Anthony J. Caminetti, the Commissioner of Immigration, worked in tandem on deportation matters, “even going so far as to issue five thousand blank deportation warrants for use by Palmer’s agents.” When Abercrombie left the Labor Department to run for the Senate, Post, himself a Wilson appointee in the Labor Dept., halted the cooperative arrangement with the Immigration Bureau. “Taking

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Discretion and Due Process

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advantage of the language of the Sedition Act that created the Department of Labor, Post usurped, in accordance with the law, the de facto power of the Commissioner of Immigration to decide the fate of detained aliens," Honig reports.

As soon as he claimed jurisdiction and the power of decision, Post began to narrow the categories of deportability. He first persuaded Labor Secretary William B. Wilson to rule that membership in the Communist Labor Party was not a deportable offense. He pointed out that the Communist Labor Party was more moderate than the Communist Party of America, which was the only entity that did not disavow the use of violence. So it could only be membership in the

Post repeatedly asserted that protections traditionally thought of as attached to criminal investigations should apply also to administrative processes if not as a matter of law then simply as a matter of fairness

Communist Party of America that was a deportable offense. This position stood in sharp contrast to that of J. Edgar Hoover who saw both groups as dedicated to the overthrow of the U.S. government and whose members were therefore, Hoover had argued in a memo,

both subject to deportation.

Post's second step was to assert that what he called "automatic membership" was not grounds for deportation. Under the automatic membership guideline, a person was assumed to be a member of the Communist Party if his or her name appeared on their rolls. But the party was known to pad its rolls and include inactive or unpaid former members as well as members of related but nonidentical organizations. Post insisted that people could not be deported simply because their name was on a list. "Some evidence had to be shown that the person in question consented explicitly to membership in the outlawed party," a requirement that substantially raised the evidentiary bar.

His third step was the most radical departure. Post applied standards of evidence and due process, normally used at the time only in judicial settings, to administrative cases. Since deportation was not a criminal proceeding and the detainees were not citizens, the Attorney General and other officials claimed that such constitutional guarantees as the right to counsel, to confront one's accuser, and habeas corpus were not applicable. Post disagreed and repeatedly asserted that "protections traditionally thought of as attached to criminal investigations should apply also to administrative processes if not as a matter of law then simply as a matter of fairness." Administrative matters, including deportation, must be fairly administered, Post argued, and so it was logical to follow the existing rules and regulations that in other venues served as proxies for fairness. "In short, Post bound himself by law," Honig points out. He repeatedly used "his discretionary powers to limit his discretionary powers." Post ruled, for example, that aliens' self-incriminating statements could not be used against them if the statements had

been made without legal counsel.

Further, Post drew on his own powers of reasoning and all the resources offered by the law to find, whenever possible, in favor of aliens facing deportation. He distinguished between political and philosophical anarchism, finding only the former actionable under law. He was also inclined to second-guess the self-incriminating statements of detainees. In the case of one alien who stated that he was a communist anarchist, Post explained to the alien that his own line of reasoning (in which he conceded that government was necessary to care for the poor) meant that he was not an anarchist within the meaning of the law. Post pointed out that on further reading

By the spring of 1920 Post had canceled the warrants of almost all the apprehended aliens and released them

of the interview with the detainee: "I found...his meaning of the word did not tally with the definitions of anarchism as anyone who has investigated the subject knows; and because it did not tally, I came to the conclusion that he was a man in favor of government and not opposed to government and that determined the case.... I decided to cancel [the warrant] because he was not an anarchist within the meaning of the law."

"Post used the law and the rule of law's procedural requirements to create technicalities that would undo or counteract the Sedition Act's intended and unintended effects," Honig notes. In this way

Post and two assistants, working ten-hour days and deciding as many as 100 cases a day were able to free between 2,000 and 6,000 detainees (estimates vary.) By the spring of 1920 Post had canceled the warrants of almost all the apprehended aliens and released them. Palmer was livid, charging that Post was abusing his discretionary power and demanding that he be fired for his "tender solicitude for social revolution."

Post was not fired but he was called before the House Committee on Rules to respond to Palmer's charges. In the minds of the public and the members of the Committee, Post seemed to be freeing aliens who had been found guilty when he canceled a deportation warrant. Post offered a counter-argument. He pointed out that a warrant (which was all Palmer and Hoover could issue) was simply a charge, not a finding. It began the process of investigation, rather than signaling the end of one. The public seemed to accept this explanation. "The Committee was not so quickly won over, though, and moved to take issue with Post's most radical invention: the rules under which Post decided the cases of the charged aliens."

A Proxy for Fairness

Post's decision to exercise discretion in applying the more rigorous rules governing criminal proceedings to an administrative procedure was the central focus during his appearance before the Committee on Rules. During his testimony, Post defended the approach he had taken:

My contention is that when the executive department of the Government is the absolute judge of whether a man shall remain in this country or not, and the courts will not interfere, we should see to it that no injustice is done to that man.... And that is the reason...the protections of

In Post's hands, technicality was used to serve laudable objectives that coincided in this instance with the larger goals of the rule of law: the protection of vulnerable individuals from arbitrary state power

criminal law ought to be accorded; yet I know we cannot accord them as criminal law. But I can take from the criminal law its humane, its just, its American, its constitutional principles of protection to the liberty of the citizen and apply it when I am acting for the executive department of the Government.

Post further pointed out that the core issue was not whether those who violate the law will be deported because they would be, "but whether those who have not violated the law shall be deported." Deploying procedures used in criminal cases as a proxy for fairness would help insure that only the "guilty" would be deported.

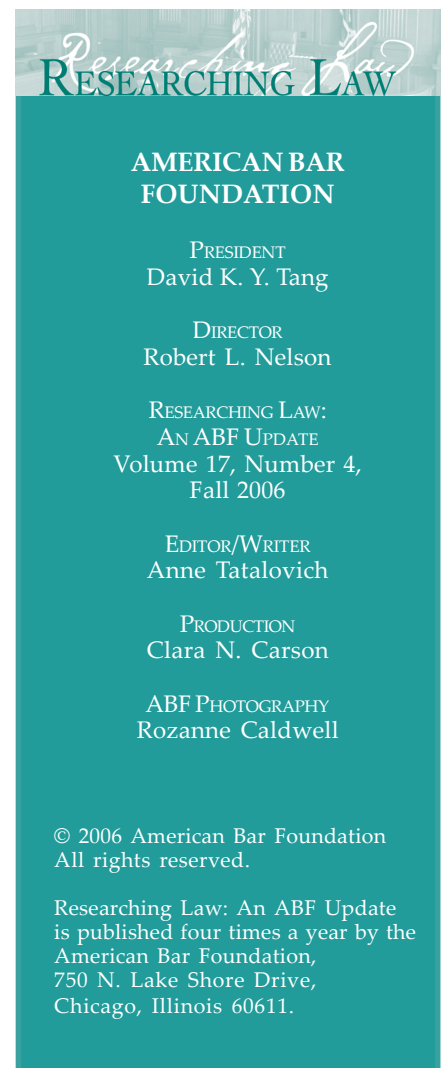
Palmer and Hoover had labeled Post "an arbitrary, untrustworthy administrator whose aim was to undo the law," while they portrayed themselves as servants of the law, "operating in adherence to the requirements of the Sedition Act and the will of the legislators who passed it". Post responded by

asserting that he was adhering strictly to the law but that his opponents were arbitrararians who operated under a cloak of pseudo-legality. His ultimate success would depend largely on "whether Post's use of technicality would persuade or enrage the public and members of the House Committee on Rules," Honig notes.

The Politics of Technicality

Law depends on interpretation, Honig points out. Without interpretation, law cannot be sensitive to particularity and nuance. "Such sensitivity, however, can lead to the creation of technicalities, which are

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RESEARCHING LAW:
AN ABF UPDATE
Volume 17, Number 4,
Fall 2006

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Researching Law: An ABF Update is published four times a year by the American Bar Foundation, 750 N. Lake Shore Drive, Chicago, Illinois 60611.

products of law's nuances." Yet technicalities seem to corrupt the basic premises of the rule of law because they are rarely public, tend to be discovered post hoc, and often apply only to an individual case. In popular discourse, and as played out in television dramas, the term technicality connotes a subversion of the law, as in "he got off on a technicality." But "technicality is really a neutral device by way of which many different agendas can be served," Honig argues. In Post's hands, technicality was used to serve laudable objectives that coincided in this instance "with the

The rule of law depends upon the very human agency (discretion) that many of the rule of law's proponents are committed to disabling

larger goals of the rule of law: the protection of vulnerable individuals from arbitrary state power."

Moreover, Honig points out, those broader objectives could not have been achieved by the rule of law per se. "It needed to be supplemented...by the humor, cleverness, idealism, humanism, prerogative, and administrative decision that Post...brought to the rule of law and on behalf of which he pressed the rule of law into service." Post used his administrative powers to grant rights to the aliens that they did not have juridically at that time. He then "acted as if these rights, which had no juridical

existence apart from his own contestable administrative rulings, bound him." On its own, the rule of law did not mandate that outcome. In the course of his appearance before the House Committee, Post was asked if he realized that the rules he had laid down made it more difficult to deport aliens. Post actually embraced the implied criticism in his response, Honig observes. As he stated, "Every rule in the interest of personal liberty makes it more difficult to take personal liberty away from a man who is entitled to his liberty." This entitlement, guaranteed here by one man's discretionary power and "further legitimated by the device of technicality, was the check used by one executive agency to force itself as well as other loci of executive power to pause and be humbled."

Post's assignment of rights to aliens undoubtedly garnered more support when it was disclosed that only four firearms and reams of propaganda pamphlets were found in the possession of the 4,000 supposedly violent anarchists who were arrested. The coordinated bombings of 1919 were real and induced genuine fear in most Americans. But concerns about networks of anarchists standing ready to attack the United States were diminishing "in the face of little evidence to support them and in the face of doubts, prompted and fed by Post and his supporters, regarding the arbitrary administrative powers used by the Justice Department to fight those specters."

Many historians suggest that, the First Red Scare ended when the country "chose hedonism over politics" with the advent of the Roaring Twenties. But, Honig points out, it could just as well be said that the era ended when the country and the Congressional Committee "chose democracy over despotism and fairness over

arbitrariness in the exercise of governmental power." The Committee on Rules supported Post. Palmer's ambitions to run for the Presidency were thwarted when he testified much less effectively than Post before the Committee a few weeks later. But J. Edgar Hoover "survived and went on to thrive." At the time Post was 71 years old and Hoover just 24. For the next half century Hoover would go on to perfect the policing and surveillance techniques he first developed as head of Attorney General Palmer's antiradical division. When he assumed the directorship of the FBI in 1924, Hoover was able to institutionalize his techniques "and the emergency perspective that animated them." In contrast, Post died just five years later and his initiatives were never institutionalized, Honig reports. They disappeared from the Department of Labor when President Wilson left office and Post departed just months after the hearings. It is ironic, Honig notes, that the man who stood up boldly for the rule of law never succeeded in institutionalizing his ideals so they could operate in his absence while the man who championed discretionary executive power was able to create an institution that would for many decades exercise power arbitrarily, "in ways consistent with his own personal, often paranoid, vision."

But casting Post as hero and Hoover as villain is not the entire story. What is significant about their roles is that they personify "twin impulses in American political culture that may be in conflict, but nonetheless together drive our national responses to emergencies (real or imagined.)" These impulses include elements that are in favor of both discretionary power and proceduralism and embrace both a centralized powerful executive and "fractured or divided and chastened sover-

eignty." The continuing problem is how to achieve a balance between these conflicting impulses. Yet the contemporary political scene is tilted toward the impulses associated with Hoover and not those exemplified by Post, Honig argues. "We are left, in short, with only the shadows of the rights for which Post fought." Admittedly, some of those rights are now "more firmly enshrined juridically," and this has been perceived as significant progress. "But these rights are not lodged in anything like what Post had—a visionary counter-politics that sought to stand up to executive power over-reachings in the settings of everyday as well as emergency politics."

Law and Human Agency

For those who champion the judicialization of procedure, "the rule of law, which is identified with law-disciplined judges, norm-bearing lawyers or legal elites, and rights-bearing clients, is juxtaposed to the rule of man, which represents arbitrary power exercised over rightless persons by unaccountable administrators with too much discretion and a focus on efficient outcomes, not justice." But the rule of law as a governance mechanism requires both judicial and administrative power, Honig points out. To draw a clear distinction between the two is misleading. It is true, she notes, that people have access to a broader menu of procedural rights and protections in judicial arenas than administrative ones but the tendency to idealize courts obscures the fact that "administrators can be nuanced, careful, and even self-limiting, while judges can be brutal, ambitious, and over-reaching..." In addition, public administrators (especially the Progressives), as well as judicial actors, can be guided by ideals and norms not just personal preferences or agendas.

More to the point, attempts to insulate law from administrative renderings may actually "contribute to law's undoing," Honig argues. "The rule of law depends upon...the very human agency (discretion) that many of the rule of law's proponents are committed to disabling...for the sake of the equity, regularity, and predictability that the rule of law is said to require and deliver." To recapture law's human-agency dimension, liberal democratic regimes need another way to think about the artificial demarcation, Honig argues. "Perhaps somewhere between the rule of law and the rule of man, or on the terrain of their jurisdictional struggle, we might, together with Louis Post, find or enact the rule of men or people: plural and riven, plainspoken and arcanelly technical, lawlike and lawless, all at the same time."

Honig reports on this research in "Bound by Law? Alien Rights, Administrative Discretion, and the Politics of Technicality: Lessons from Louis Post and the First Red Scare," in A. Sarat, L. Douglas, & M. Umphrey, eds., *The Limits of Law (Amherst Series in Law, Jurisprudence, and Social Thought)* (Stanford University Press, 2005).

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Sarajevo Surveys

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Bush Administration has expressed doubts about the wisdom of such a course, "insisting whenever and wherever possible that national courts, as in Iraq, retain jurisdiction."

The new International Criminal Court, as set out in the 1998 Rome Treaty that fashioned it, rejected primary jurisdiction in favor of complementary jurisdiction, which "cedes control over cases to domestic courts unless there is a clear failure or inability of national courts to prosecute their cases." This type of negotiated consensus presents challenges as the actual practice of international criminal law at the ICTY demonstrates, the authors point out. The institution had to deal with the recalcitrant states of the former Yugoslavia and the expectations of the victims of war crimes and concerned citizens in the new configuration of independent states. "It is easier to theorize a consensual foundation to international criminal justice when the focus is on negotiations between elite officials of legal institutions than when attention is given to the views of the civilian constituencies that these institutions and their elites are expected to serve." What played out in the ICTY in its "increasingly contested efforts" to bring justice to Sarajevo is more consistent with a conflict, rather than a consensus, theory of legal institutions, the authors observe. To provide a framework for their analysis of Sarajevans' evaluations of the ICTY, the authors consider the politics of punishing war crimes and the events surrounding the siege of Sarajevo.

The Politics of Punishing War Crimes

Liberal legalism is the school of thought and legal movement that supports the creation of international institutions of criminal law. It promotes the noncontroversial objectives of procedural fairness

and due process, but conflicts are nonetheless inherent in the process of creating an international forum. International legal liberalism is most provocative when it asserts primary jurisdiction in the protection of human rights and against war crimes, the authors observe. "Enforcement of this expansive jurisdiction often places international criminal law in conflict with norms and claims of sovereign immunity." Slobodan Milosevic often alluded to this violation of immunity, calling the ICTY a "false

The siege of Sarajevo lasted nearly four years, from spring 1992 to late fall 1995, and claimed the lives of thousands of soldiers and civilians, with countless others injured physically and/or psychologically

tribunal." Victims of human rights crimes may also invoke sovereignty rights when they demand that perpetrators of war crimes be tried in their own national courts.

Because war crimes are often ignited by ethnic and national hostility, legal attempts to address these disputes can be seen as prejudicial and discriminatory. The ICTY is viewed in some quarters as an Anglo-American legal justification for NATO's intervention in the former Yugoslavia and "therefore as inherently biased against the Serbs." Another source of conflict arises from the length of the

sentences imposed by international bodies on convicted offenders. The ICTY has often emphasized deterrence as the guiding factor in determining the duration of sentences. Yet the victims of the crimes may be more concerned with punishing the offenders and exacting retribution.

The liberal legalism of international criminal law is also intimately tied to the conflicts associated with its institutional politics. "The creation of the ICTY was itself criticized for its origin in the narrow membership of the UN Security Council rather than its more diverse and representative General Assembly," the authors note. Selection of the first ICTY chief prosecutor as well as its judges was "also a highly politicized process that required balancing a wide range of international interests and demands for representation." All these conflicts may well surface in Sarajevo now, "with its own recent history of atrocities, and where a new War Crimes Chamber of the State Court is beginning its work." To understand the impetus for this effort, "it is important to appreciate the essentials of the siege of Sarajevo and the ICTY's response to it," the authors point out.

The Siege of Sarajevo

The siege of Sarajevo lasted nearly four years, from spring 1992 to late fall 1995, and claimed the lives of thousands of soldiers and civilians, with countless others injured physically and/or psychologically," the authors observe. No place in the city was safe as the civilian population of Sarajevo endured a systematic campaign of sniping, artillery, and mortar attacks that threatened not only death but the basic necessities of life—food, water, hygiene, heat, health care, sleep. These attacks were ultimately deemed to be crimes against humanity by the ICTY, but some ten years elapsed between the first investigatory steps and a verdict against the Bosnian Serb general

held responsible for the infliction of inhumane acts.

In 1993 a Commission of Experts was appointed by the UN Security Council to collect evidence and make recommendations. Investigators were sent to Sarajevo to "assess the possibility of framing war crimes indictments around the law of armed conflict." The Commission ultimately concluded that a compelling case could be made that civilians had been systematically targeted. But when the Chief of the Commission of Experts, Cherif Bassiouni, proposed in 1994 to begin work immediately with the ICTY to prepare a case for the indictment of three Bosnian Serb generals for the siege of Sarajevo, he received no response. Bassiouni's subsequent failure to secure appointment as the first ICTY chief prosecutor was attributed in part to a perception that he would "move too quickly to charge Serb and possibly Croatian leaders with war crimes."

By 2003 support for the ICTY had declined significantly, with less than half the respondents selecting the international forum, both in general and in five specific cases

It was not until 1999 that the ICTY formally indicted Major General Stanislav Galic for "having conducted...a campaign of sniping and shelling attacks on the civilian population of Sarajevo, causing death and injury to civilians, with the primary purpose of spreading terror among the civilian population." Nine months later Galic was

arrested by British commandos and taken to The Hague to stand trial. In 2003 Galic was finally convicted of spreading terror and crimes against humanity and was sentenced to 20 years imprisonment. The majority of the judges on the ICTY Trial Chamber also concluded that General Galic was not simply kept informed of the crimes of his subordinates but “actually controlled the pace and scale of those crimes.” In the surveys conducted in Sarajevo, the residents revealed that they agreed with the gravity of Galic’s actions but questioned the leniency of a 20-year sentence. For its part, the tribunal emphasizes that its decisions reflect judgments about individual responsibility but the ICTY also wants its decisions to “carry a larger symbolic meaning to the community of victims and potential perpetrators beyond the immediate case, and in these ways they have important collective implications.”

In 2000 some 83% of respondents believed that the ICTY judges were independent; just 47% held this view in 2003

Surveying Sarajevans

To assess how the ICTY and its decisions are perceived, two surveys were conducted in Sarajevo in early summer 2000 and in December 2003. The surveys were timed to reflect the impact of significant events—the 2000 survey took place soon after the arrest of Galic and his transfer to the ICTY, and he was sentenced just before the 2003 survey. “Neither telephone nor household sources of information were sufficiently developed to establish unbiased

sampling frames” the authors report. So respondents were enlisted in coffee shops and stores in the central business district of Sarajevo. The same person conducted interviews with 299 respondents in 2000 and 473 respondents in 2003. In both surveys males comprised slightly more than half of the sample, and all age groups were represented. The percentage of respondents who had attended or graduated from college was similar in both surveys—about 50 percent—but this proportion was significantly higher than the educational distribution found in Sarajevo where 18.6% have a college degree and 7.2% have attended college. “Nonetheless, the results of our multivariate models show no effect of the respondents’ education on the opinions about the ICTY and its decisions,” the authors note.

The respondents in both surveys were predominantly Muslim, as is Sarajevo where Muslims constitute about 70% of the population. Croats were slightly overrepresented and Serbs were proportionate to their presence in the population. To gauge what effect victimization might have on perceptions of the ICTY, respondents were asked about their direct experience with war crimes. More than seven of every ten participants reported themselves to be victims of crimes against humanity. About seven of ten respondents also indicated that they had witnessed such crimes, and some nine of every ten respondents reported the victimization of a family member or close friend. Almost all respondents reported the victimization of acquaintances or neighbors.

The participants were asked a series of questions about the ICTY and its processes and decisions that ranged from the general—the fairness of the ICTY’s decisions in the abstract—to the specific—the fairness of the ICTY in a particular case. The specific questions focused on seven indictees/defendants,

including Milosevic and Galic. Respondents were also invited to respond to open-ended questions at the end of the 2003 survey, and 15% did so.

The surveys were designed to elicit the respondents’ views about the prospect of trying cases at the ICTY or in local courts. The option of a local court taking jurisdiction was more remote in 2000 than it

Rankings of fairness of procedures and decisions of the ICTY make it clear that it was the declining approval of decisions (from 88% to 30%) rather than of procedures (93% to 77%) that was most at issue

was in 2003, by which time planning had begun for construction of a new War Crimes Chamber of the State Court of Bosnia and Herzegovina to be located in Sarajevo. In 2000 more than three-quarters of the Sarajevo respondents favored the ICTY as the appropriate jurisdiction, both in general and for three specific cases. By 2003 support for the ICTY had declined significantly, with less than half the respondents selecting the international forum, both in general and in five specific cases. Just three years after the initial survey, “the Sarajevo respondents were about evenly split between choosing the ICTY and the local courts as the appropriate jurisdiction....”

The reduction in the Muslim composition of the sample from 80 percent in 2000 to about two-thirds in 2003 was considered as a pos-

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sible explanation for the decline in support of the ICTY, the authors note. But the analysis revealed that “Muslims, Croats, and Serbs did not significantly differ in their jurisdictional choices.” In addition, the experience of greater war crimes victimization was also unrelated to jurisdictional preferences.

Perceptions of Injustice

The survey data indicate that “the changing perception of the ICTY

Sarajevans’ perceptions of injustice at the ICTY were fueled by feelings that the sentencing of Galic was too lenient, that ICTY judges were politically biased, and that insufficient importance was attached to retribution in sentencing

relative to local courts was more specifically linked to the perceived capacity of these respective courts for judicial independence and fair outcomes,” the authors report. In 2000 some 83% of respondents believed that the ICTY judges were independent; just 47% held this view in 2003. There was a similar decline in perceived ability of ICTY judges to resist political pressures. At the same time, the perceptions of local court judges were improving.

The responses reveal that concerns about the ICTY’s judicial independence and fairness were

fueled by respondents’ beliefs about the goals that should be pursued in sentencing. While the ICTY was increasingly articulating an emphasis on deterrence in determining how cases would be disposed, the Sarajevo respondents did not agree with this objective. “[N]early three quarters ultimately saw retribution as the major purpose of punishing war criminals ... while deterrence was subsequently endorsed by about one-quarter....” The respondents also became more disillusioned with the fairness of the ICTY, but this discontent was directed at the outcomes. “Rankings of fairness of procedures and decisions of the ICTY...make it clear that it was the declining approval of decisions (from 88% to 30%) rather than of procedures (93% to 77%) that was most at issue.”

The Sarajevo respondents’ attention to fairness extended to a concern for defendants’ rights. Eight identified rights of defendants received scores of above five on a one-to-ten scale. Moreover, in the second survey, the following rights were scored as being of significantly greater importance than in the first survey: to have an attorney, remain silent, present a defense, propose witnesses, and have an impartial judge.

The ICTY’s Rules of Procedure and Evidence allow plea bargaining. But only 6% of the Sarajevans approved of the use of plea bargaining. Opposition to plea bargaining was strongly influenced by the defendant’s position in the military chain of command. One respondent wrote that “the higher the war criminal was in the hierarchy, the more limited the opportunity to plea bargain should be. Therefore, there should be no plea bargaining for Milosevic.” Plea bargaining was also seen as linked to lenient punishment, a consequence “that clearly disappointed the respondents.”

To better understand the relative role of the various factors driving

Sarajevans’ assessments of the ICTY, the authors conducted a multivariate analysis in which the perception of the ICTY’s overall fairness was the dependent variable. In sum, the analysis revealed that:

Sarajevans’ perceptions of injustice at the ICTY were fueled by feelings that the sentencing of Galic was too lenient, that ICTY judges were politically biased, and that insufficient importance was attached to retribution in sentencing. None of the remaining variables—including, most notably, ethnicity and victimization or concerns for victims’ rights—were statistically significant in their influence....

In the 2003 survey the respondents were asked why they believed either the ICTY or the local courts should be the venue for war crimes involving Bosnia. “Within the groups that chose each setting, politics and punishment were prominent,” the authors note. For those who selected the ICTY, the three top reasons were certainty of punishment (54%), unlikelihood of being influenced by politics (22%), and the likelihood of being removed from politics (16%). Among those who chose local courts, the top three reasons were being most familiar with local conditions (50%), understanding reasons for the war (19%), and certainty of punishment (21%). “While those who chose the ICTY saw an advantage in being removed from local political influence, those who selected the local courts saw an advantage in understanding the local context.” Regardless of the preferred venue, there was agreement that war crimes in Bosnia must be punished.

The Local Dimension of International Justice

The residents of Sarajevo came increasingly to resent what they saw as “international understandings imposed on locally experi-

enced problems.” This conflict with the tenets of international legal liberalism supercedes what had been classic expectations of cleavages along lines of age, gender, and ethnicity. Given that the war was fought across ethnic lines, this relative ethnic consensus might appear surprising, the authors point out. Yet it is also likely that this ethnic convergence is “a unique feature of the Sarajevan situation,” as it is a setting in which residents have expressed a desire to re-create a unified and diverse Bosnia. “[I]t is uncertain, if not doubtful, that this consensus extends beyond Sarajevo.”

The conflict over jurisdiction between the ICTY and the local courts was highly influenced by the case of command responsibility against Galic. Almost universally, Sarajevans believed that the 20-year sentence imposed by the ICTY was too lenient. Yet in the case of another defendant, Colonel Tihomir Blasic, Sarajevans favored greater leniency than the ICTY sentence provided. They have also expressed strong support for defendants’ rights and procedural fairness. “In these ways, Sarajevans are highly committed to the institutional goals of the liberal legal project.” As the authors point out, the ultimate lesson of the Galic case and the siege of Sarajevo “seems to be that the local dimension of international justice cannot be ignored, and it is important to note that ... international criminal law and a global jurisdiction should not seek to do so.”

The authors report on this research in “The Politics of Punishment and the Siege of Sarajevo: Toward a Conflict Theory of Perceived International (In)Justice,” 40 *Law & Society Review* 369 (2006).

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ABF Summer Diversity Fellowship Program

The American Bar Foundation was pleased to host four outstanding undergraduate students in the summer of 2006 who participated in the Summer Research Diversity Fellowship Program. The program offers students from across the country, who are selected in a highly competitive application process, the opportunity to explore the field of sociolegal research and observe law practice in the private and public sector.

The summer program is supported in part by the **Kenneth F. and Harle G. Montgomery Foundation**, the **Solon E. Summerfield Foundation**, and the **National Science Foundation**. In addition, the ABF gratefully acknowledges the participation of **ABF Board Member Graham Grady** and the support of the Chicago legal community. Special recognition is extended to two firms whose contributions merited a naming opportunity: the **Kirkland & Ellis Summer Research Fellow** and the **Jenner & Block Summer Research Fellow**. Additional sponsors of the 2006 program are:

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Zeh-Sheena Ekono, a rising senior at Harvard University, who worked with Senior Research Fellow **Robert Nelson** and Research Fellow **Laura Beth Nielsen**.

Deepa Thimmapaya, a rising junior at Northwestern University, who worked with Senior Research Fellow **John Hagan**.

Tiffanye Threadcraft, a rising senior at Harvard University, who worked with Senior Research Fellow **Victoria Saker Woeste**.

Danielle Toaltoan, a rising senior at Swarthmore College, who worked with Senior Research Fellow **Shari Diamond**.



Danielle Toaltoan, Tiffanye Threadcraft, Deepa Thimmapaya, Zeh-Sheena Ekono with Tim Watson, ABF Program Associate (Center)

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