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# Precedent and Chinese Judges: An Experiment

Zhuang Liu, Lars Klöhn, and Holger Spamann\*

Abstract: We experimentally study the decision-making process of judges in China, where judges are specifically prohibited to cite prior decisions as the basis for their judgments, and where, in past surveys, most judges explicitly stated that precedent played at most a marginal role in their decisions. In an experiment resembling real-world judicial decision making, we find, however, that precedent seems to have a significant influence on the decisions of the participating Chinese judges. Indeed, judges spend more time reading prior cases than statutes, and they typically read precedents before they access the statutes. On the other hand, judges rarely mention the precedent in their reasons. Our findings suggest that the Chinese judiciary operates much more similarly to its homologues in the U.S. and elsewhere than their written opinions and much folklore would suggest.

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## 1 Introduction

A distinguishing yet perplexing feature of the judicial system in China is its aversion toward case law. To prevent the creation of case law, the Supreme People’s Court of China (SPC) specifically forbids courts of all levels to cite prior judicial decisions, even decisions of the SPC itself.<sup>1</sup> This prohibition goes far beyond the pious pretense—prevalent even in the common law world through the 19<sup>th</sup> century—that judges do not “make” law and that their decisions are merely authoritative but not binding. The modern Chinese attitude approaches the French revolutionary attitude of the late 18<sup>th</sup> century, which sought to suppress any role for individual judge-made precedent in the development of the law.<sup>2</sup> The Chinese aversion toward precedent is probably due to China’s political design as a highly centralized country with a strong bureaucratic government.<sup>3</sup> Moreover, judicial policy makers believe case law excessively empowers judges, granting them a degree of judicial independence towards the Chinese Communist Party (CCP) that is incompatible with the CCP’s leadership over the judiciary.<sup>4</sup> In surveys, most Chinese judges state that precedent plays at most a marginal role in their decisions.<sup>5</sup>

At the same time, Chinese courts make millions of cases available online, and practitioners report that precedent is increasingly important in the Chinese legal system.<sup>6</sup> Indeed, American researchers predicted even a decade ago that the large-scale online publication of prior decisions would profoundly transform the Chinese legal system, referring in part to interviews with judges who acknowledged resorting to prior decisions for guidance.<sup>7</sup> We have great sympathy for these positions. But we also acknowledge that a prediction is just a prediction, interviewees may tell the interviewer what they want, and the practitioners may in part just be referring to precedent as a statistical predictor without normative force; they may also be wrong. The actual role of precedent in China is thus an empirical question that awaits more rigorous investigation. We take first steps in this direction in this paper.

We show that at least in a randomized experiment with international law, Chinese judges do use precedent, even if they do not cite it in their written opinions. In our experiment, forty-eight real Chinese judges decided a fictitious appeals case based on a real case from the International Criminal Tribunal for the Former Yugoslavia (ICTY). On a computer, the judges reviewed a full set of legal briefs and materials for up to one hour before rendering a decision with brief written reasons. The use of an ICTY case allowed us to control the legal materials that the judges could have knowledge of. In particular, we randomly assigned one of three precedents to each judge: One weakly disfavored the defendant’s position, one weakly favored it, and one strongly favored it. We find that the judges assigned to the strong defendant-friendly precedent were much more likely to reverse the defendant’s conviction (60%) than the judges

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<sup>1</sup> The exception are the Guiding Cases, which we discuss in section 2, along with numerous references backing up our claim here.

<sup>2</sup> For the avoidance of doubt, the French quickly abandoned this attitude—while clinging to the pious pretense—and contemporary French law is suffused with “jurisprudence,” which has been widely reported and commented upon since the early 19<sup>th</sup> century. French courts are allowed to cite precedent, even though they are not allowed to cite it as the sole authority without referring to, and appropriating, its reasons, and rarely do so. See, e.g., Lyette Condé, *La Prohibition des Arrêts de Règlement*, in JURISCLASSEUR CODE CIVILE Art. 5 ¶ 18 (2014).

<sup>3</sup> See *infra* notes 11-13 and accompanying text.

<sup>4</sup> *Id.*

<sup>5</sup> See *infra* note 34.

<sup>6</sup> See *infra* notes 38-39 and accompanying text.

<sup>7</sup> Benjamin Liebman & Tim Wu, *China’s Network Justice*, 8 CHI. J. INT’L L. 257, 260–91 (2007) (noting that the emergence of “an informal system of precedent may significantly change the Chinese legal system”).

assigned to the other two precedents (14% and 18%, respectively); these differences are highly statistically significant. The judges also spent more time reading the precedent than reading statutes (13% vs. 4% of total time), and typically (68% of judges) consulted the precedent before they consulted the statute. Nevertheless, only 29% judges mentioned the precedent in their opinion. In short, our Chinese judges seem to confirm H.L.A. Hart's assertion that, when available, prior cases will inevitably be used as authoritative precedents, official denials notwithstanding.<sup>8</sup> Our results suggest that Chinese judges behave much more similarly than their homologues in other jurisdictions, such as the United States or France, than their written reason and some folklore would make one believe.

Our findings have particular practical relevance because a recent judicial reform has made available online vast bodies of cases from all levels of courts across all Chinese provinces.<sup>9</sup> Based on our findings and other evidence, we expect Chinese judges to make extensive use of this resource as precedent without acknowledging this in their opinions. In the final part of the paper, we discuss if the resulting lack of transparency could be detrimental for the Chinese justice system, and if any reforms might be advisable.

The paper is structured as follows. Section 2 describes China's institutional background and the prior literature on precedent in China. Section 3 introduces the experimental design. Section 4 presents the results of the experiment. Section 5 discusses possible weaknesses of our design. Section 6 discusses possible policy implications. Section 7 concludes. The main materials used in the experiment are reproduced in the online appendix.

## 2 Institutional Background and Prior Literature

In the legal system of China, the only valid legal documents that judges should apply and cite in deciding cases are statutory laws—including the vast body of regulatory law<sup>10</sup>—and the following pronouncements of the Supreme People's Court (SPC), which we discuss in more detail below: judicial interpretations (i.e., resolutions adopted by the SPC upon delegation by the National People's Congress Standing Committee [NPCSC]) and, since 2010, so-called Guiding Cases, which are about a dozen cases a year specifically selected and edited by the SPC. On several occasions from the 1980s through the 2010s, the SPC specifically stated that other prior cases should not be cited in any judicial decision. The judiciary, residing on the periphery of China's centralized political system, is supposed to confine itself strictly to the role of applying laws.

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<sup>8</sup> Cf. H.L.A. HART, *THE CONCEPT OF LAW* 97 (3d ed. 2012) ("This is so because, if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are.").

<sup>9</sup> Cf. Benjamin Liebman, Margaret Roberts, Rachel Stern & Alice Wang, *Mass Digitization of Chinese Court Decisions: How to Use Text as Data in the Field of Chinese Law* (21st Century China Center Research Paper No. 2017-01; Columbia Public Law Research Paper No. 14-551, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2985861](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2985861).

<sup>10</sup> To elaborate, we use the term statutory law in a broad sense compared to case law. It includes laws and legal interpretations made by the National People's Congress and its standing committee, regulations issued by the State Council, and, in administrative litigations, local regulations, regulations on the exercise of autonomy, separate regulations, and interpretations of administrative regulations or administrative rules promulgated by the State Council or departments authorized by the State Council. See Zuigao Renmin Fayuan Guanyu Caipan Wenshu Yinyong Falü Fagui Deng Guifanxing Falü Wenjian de Guiding (最高人民法院关于裁判文书引用法律、法规等规范性文件的规定) [The Provisions of the Supreme People's Court on the Citation of Such Normative Legal Documents as Laws and Regulations in Judgments], art. 3–5 (2009).

This aversion toward precedent (and the accompanying strong judicial power) is attributable to China's special political context. China is a highly centralized country with a strong bureaucratic government. Chinese legal scholars and practitioners widely accept that statutes and regulations made by the (centralized) legislature and executive, rather than case law made by (decentralized) judges, help to ensure and even strengthen the unitary power of the State and avoid any possible conflicts of authority among different branches of government.<sup>11</sup> What further underlies this formalist rhetoric is the role of the CCP. Case law is seen by those responsible for judicial policy as being closely related to the concept of judicial independence from the CCP, which is incompatible with the CCP's all-round leadership, including its leadership over the judiciary.<sup>12</sup> The reason is straightforward. If judges have the power to make law, they may develop gradually into a device of checks and balances against the government (and the CCP). In this regard, even the power to interpret laws has never been formally delegated to the judiciary.<sup>13</sup> Instead, this power has been accorded to the NPCSC under Article 67(4) of the Constitution. To be sure, in 1981, the NPCSC delegated the power of "judicial interpretations" (sifa jieshi 司法解释) to the SPC, and judges are supposed to cite "judicial interpretations" in their opinions.<sup>14</sup> However, "judicial

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<sup>11</sup> Gao Yan (高岩), *Woguo Buyi Caiyong Panlifa Zhidu* (我国不宜采用判例法制度) [Our Country Should Not Adopt the Case Law System], 3 ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCIENCE] 43 (1991); Wu Wei (吴伟) & Chen Qi (陈启), *Panli zai Woguo Buyi Juyou Jushuli* (判例在我国不宜具有拘束力) [We Should Not Have Binding Precedents in Our Country], 1 FALÜ KEXUE (法律科学) [LAW SCIENCE] 14 (1990). The relation between statutory law and case law was a heated topic that evoked scholarly discussion in the late 1980s and the early 1990s. More recently, scholars generally took the conclusion of the previous discussion as an implicit premise when writing about case guidance and the Guiding Cases system in China. See, for example, Liu Zuoxiang (刘作翔) and Xu Jinghe (徐景和), *Anli Zhidao Zhidu de Lilun Jichu* (案例指导制度的理论基础) [The Theoretical Basis for the Case Guidance System], 3 FAXUE YANJIU (法学研究) [CHINESE JOURNAL OF LAW] (2006) (noting that case guidance should only supplement statutory law, and should not influence the status of statutory law as the main source of law); He Ran (何然), *Sifa Panli Zhidu Lunyao* (司法判例制度论要) [A General Discussion of Judicial Precedent System], 1 ZHONGWAI FAXUE (中外法学) [PEKING UNIVERSITY LAW JOURNAL] (2014) (noting that case guidance can be a supplement to statutory law); Lei Lei (雷磊), *Zhidaoxing Anli Fayuan Diwei Zai Fansi* (指导性案例法源地位再反思) [Reflection on the Guiding Cases as a Source of Law], 1 ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCIENCE] (2015) (noting that the Guiding Cases can be a secondary source of law). Analytically, to the extent the executive controls the creation of case law at the central level (i.e., at the SPC), case law would help the central executive to control decentralized judges throughout the country. Against this, however, may weigh the difficulty of controlling the creation of even centralized precedent and, most importantly, the difficulty of preventing the creation of precedent in a decentralized fashion once the genie is out of the bottle at the central level.

<sup>12</sup> E.g., Gao, supra note 11 (Gao was an official of the Supreme People's Procuratorate. He notes that a case system "will negate the nature of our state and our fundamental political system (将根本否定我国的国家性质根本政治制度.)"); Fu Hualing, *Building Judicial Integrity in China*, 3 HASTINGS INT'L & COMP. L. REV. 167 (2016) that "rule of law and judicial professionalism are possible to the extent they may strengthen and legitimize the rule."; Mark Jia, *Chinese Common Law? Guiding Cases and Judicial Reform*, 128 HARV. L. REV. 2213 (2016) (stating that a SPC official lamented the Guiding Cases issued so far have been fairly "safe," and noting that "[T]he toward 'safe' cases likely reflects ... the Party's historic skepticism of over-empowering judicial actors" and cases have been billed as a means of standardizing judicial decisionmaking, a goal that the Party has endorsed; if the new system entails a marked expansion of judicial authority, it will likely meet resistance.").

<sup>13</sup> Liu Fengjing (刘风景), *Sifa Jieshi Quanxian de Jieding yu Xingshi* (司法解释权限的界定与行使) [Definition and Application of Judicial Interpretation Power] 3 ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCIENCE] 207 (2016).

<sup>14</sup> Cf. Liu, supra note 13.

interpretations” are not precedents but usually abstract interpretations adopted by the SPC following a formal procedure outside a particular dispute, and they should be registered at the NPCSC.<sup>15</sup>

To implement the political design and (perhaps) signal its loyalty to the Party, the SPC intentionally distances itself from case law. To begin, the SPC makes it very clear that cases other than Guiding Cases (see below) are not binding precedents in the sense that judges are not required to follow them.<sup>16</sup> But the SPC goes much further than this, and specifically forbids courts of all levels to cite prior judicial decisions as the basis of their judgments. When the SPC started to publish some decided cases in its Gazette in 1985 (see below), it immediately followed up with a guidance document in 1986 stating that it was not appropriate to cite legal documents (such as opinions “yijian 意见” and replies “pifu 批复”) issued by the SPC on the application of laws directly.<sup>17</sup> Similarly, the SPC’s 2009 regulations on citations in judgments stipulate that “a judgment made by a people’s court shall cite relevant laws, regulations, and other normative legal documents in accordance with law as a ruling basis” — precedent being conspicuous by its absence.<sup>18</sup> To be sure, the word “cite” (yinyong 引用) in Chinese is ambivalent and might merely mean that the SPC forbids courts to cite prior decisions as *the basis for* their judgment, while allowing references in their reasoning.<sup>19</sup> But a more expansive reading—as a prohibition of mentions of prior cases—fits better with the broader Chinese atmosphere described above and below, and with the SPC’s general instructions on the writing of judgments. In particular, in 2016, the SPC issued a notice to regulate and unify the standards for preparing civil judgment documents. The notice explains how law, regulation, and judicial interpretation can form the *basis* of a judgment (caipan yiju 裁判依据), and how the judgment’s *reasoning* (liyong 理由) should cite law, regulation, judicial interpretation, Guiding Cases (see immediately below), and even the principles and spirit embodied in a judicial guidance document (sifa zhidaoxing wenjian 司法指导性文件, such as notices (tongzhi 通知)).<sup>20</sup> Precedent is again absent, in this case clearly including the judgment’s reasons. In any event, to our knowledge, Chinese courts never mention other decisions.

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<sup>15</sup> Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Jiaqiang Falü Jieshi Gongzuo de Jueyi (全国人民代表大会常务委员会关于加强法律解释工作的决议) [Resolution of the Standing Committee of the National People’s Congress Providing an Improved Interpretation of the Law] (1981); Lifa Fa (立法法) [Legislation Law], art. 104 (2015) (further formalized the status of judicial interpretation).

<sup>16</sup> See, e.g., Zuigao Renmin Fayuan (2014) Min Shen Zi Di 441 Hao, (最高人民法院 (2014) 民申字第 441 号) [The Supreme People’s Court 2014 Civil Petition Case No. 441].

<sup>17</sup> Zuigao Renmin Fayuan Guanyu Renmin Fayuan Zhizuo Falü Wenshu Ruhe Yinyong Falü Guifanxing Wenjian de Pifu, (最高人民法院关于人民法院制作法律文书如何引用法律规范性文件的批复) [Reply of the Supreme People’s Court on How People’s Courts Should Utilize Normative Legal Documents When Providing Legal Documentation], Fa Yan Fu 1986, Di 31 Hao (法研复 1986 第 31 号) [Law Research Department Reply, No.31] (1986). For the avoidance of doubt, we note that internal documents issued by the SPC, such as opinions (yijian 意见) and notice (tongzhi 通知), are different from judicial interpretations (sifa jieshi 司法解释).

<sup>18</sup> Zuigao Renmin Fayuan Guanyu Caipan Wenshu Yinyong Falü Fagui Deng Guifanxing Falü Wenjian de Guiding, (最高人民法院关于裁判文书引用法律、法规等规范性法律文件的规定) [The Provisions of the Supreme People’s Court on the Citation of Such Normative Legal Documents as Laws and Regulations in Judgments] (2009).

<sup>19</sup> If so, the Chinese position would be identical to that of contemporary France, see *supra* note 2.

<sup>20</sup> Zuigao Renmin Fayuan Guanyu Yinfa “Renmin Fayuan Minshi Caipan Wenshu Zhizuo Guifan” “Minshi Susong Susong Wenshu Yangshi” de Tongzhi, (最高人民法院关于印发《人民法院民事裁判文书制作规范》《民事诉讼文书样式》的通知) [Notice by the Supreme People’s Court on Issuing “Specifications for Preparing Civil Judgments by the People’s Courts” and “Style of Civil Litigation Documents”] (2016). The notice also states: “A judgment should not cite the Constitution, guiding documents and minutes of meeting of the people’s courts at

The SPC's institution of its Guiding Case system in November 2010 is the exception that literally proves the rule. Under this system, the SPC issues batches of Guiding Cases on a regular basis, with the lower courts being obliged to follow these cases.<sup>21</sup> Article 7 of the Notice of the Supreme People's Court on Issuing the Provisions on Case Guidance stipulates that "when trying similar cases, people's courts at all levels should use the Guiding Cases issued by the Supreme People's Court as a reference."<sup>22</sup> This does not mean, however, that China is coming any nearer to a case law system. First, the number of Guiding Cases is extremely small: As of December 2017, only 92 Guiding Cases had been promulgated, meaning that, on average, only about 14 cases have been issued per year. Second, the Guiding Cases are heavily edited by the SPC, and judges are supposed to follow the summary of the rules distilled from the case by the SPC rather than look at the full case and the reasoning behind it. Third, when a court refers to a Guiding Case, "it shall quote the Guiding Case as the judgment's reasoning, instead of citing it as the basis for the judgment," per the Supreme People's Court's direction.<sup>23</sup> Last but not least, when announcing the Guiding Cases system, the SPC spokesman reiterated that "any cases other than the Guiding Cases do not have the specific and authoritative function of guiding decision making, and they should not be cited in any judicial decision."<sup>24</sup> Tellingly, the SPC spokesman avoided the word "binding" (有法律约束力) even for the Guiding Cases themselves, speaking instead of "authoritative" and "guiding," presumably to avoid any impression that the SPC is "making law."

At first glance, the SPC's rejection of precedent outside the Guiding Case system—and its reluctance to call it that even within the Guiding Case system—might seem in tension with the SPC's decision to make many more of its own cases and those of lower courts publicly available, as well as parallel efforts at the provincial level.<sup>25</sup> The SPC's efforts in this direction began in 1985 and culminated in 2014 in the launch of its own online database that includes cases from courts at all levels of the judicial hierarchy in different provinces, resulting in the accumulation of vast bodies of cases available for consultation. As of December 2017, the volume of published legal documents on this online database, which is accessible to the public,

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various levels, the reply opinions of all tribunals, nor documents jointly issued by the people's courts and relevant departments as the basis for rendering a judgment; however, the principles and spirit embodied in the aforesaid documents may be elaborated in the reasoning." *Id.* at art. 7(4).

<sup>21</sup> Björn Ahl, *Retaining Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People's* 217 CHINA QUARTERLY 121-139 (2014); See Jia, *supra* note 12.

<sup>22</sup> Zuigao Renmin Fayuan Yinfa "Guanyu Anli Zhidao Gongzuo de Guiding" de Tongzhi, (最高人民法院印发《关于案例指导工作的规定》的通知) [Notice by the Supreme People's Court on Issuing the "Provisions on Case Guidance Work"] (2010).

<sup>23</sup> "Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo de Guiding" Shishi Xize, (《最高人民法院关于案例指导工作的规定》实施细则) [Rules of the Supreme People's Court on Case Guidance Work Implementation Regulations] art.10 (2015).

<sup>24</sup> "其他任何形式的案例均无此明确、权威的裁判指导作用，更不能在裁判文书中加以引用。" Zuigao Renmin Fayuan Yanjiushi Zhuren Jiu Anli Zhidao Zhidu Da Jizhewen (最高人民法院研究室主任就案例指导制度答记者问) [News Conference Regarding the Guiding Case System by the Director of the Research Department of the Supreme People's Court] (2011), <http://www.court.gov.cn/zixun-xiangqing-3538.html> (last visited Sep. 11, 2018). Cf. generally Susan Finder, *China's Evolving Case Law System in Practice*, 9 TSINGHUA CHINA L. REV. 1 (2017) (describing the many initiatives for case publication and guidance). For example, in 2002, the Tianjin High People's Court issued its 2002 "Opinion on the Implementation of the Use of Court Cases as Guidance in the Adjudication of Civil and Commercial Cases" (关于在民商事审判中实行判例指导的若干意见), establishing a case guidance system for civil and commercial cases. The high court selects and publishes representative judicial opinions from the basic courts, the intermediate courts, and the high court within Tianjin on a regular basis. Judges in Tianjin can then refer to these judicial opinions when they decide similar cases.

exceeds 40 million.<sup>26</sup> (In addition, several private data companies have established legal databases that include decided cases.) When the SPC first started to publish some decided cases in the Gazette of the Supreme People's Court in 1985, a spokesman for the SPC said the purpose of publishing the Gazette was to "provide better guidance to local courts for correctly applying laws and decrees."<sup>27</sup> However, this goal seems to have been particular to this time period, when statutory rules were sparse. More recently, the motivation for the publication of judicial decisions seems to be to promote transparency to the outside and to strengthen the SPC's control over lower courts, rather than internal use within the judiciary.<sup>28</sup> In 2013, SPC president Zhou Qiang stressed in a white paper that "people's courts at all levels shall constantly update their concepts on judicial transparency and take it as granted to make disclosure, with exceptions only in a very few cases; and shall make efforts in changing the passive disclosure into active disclosure, internal disclosure to external disclosure, optional disclosure to full disclosure and disclosure in disguised form to substantial disclosure."<sup>29</sup>

The rejection of precedent has broad support among Chinese scholars and practitioners. The prevailing attitude is that although the SPC should find a way to increase consistency in decision making by providing more guidance to lower courts, the influence of prior cases should be confined.<sup>30</sup> Many policy makers and legal scholars in China believe that Chinese judges are not trained to the task of finding and interpreting prior judicial opinions.<sup>31</sup> Moreover, many fear that consulting prior cases rather than enacted statutes will

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<sup>26</sup> The SPC and private databases do not collect all cases heard by the judiciary, and the courts may have published published cases selectively. See Liebman et al., *supra* note 9.

<sup>27</sup> Liu Nanping, *Legal Precedents with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court*, 5 JOURNAL OF CHINESE LAW 107 (1991).

<sup>28</sup> See Liebman et al., *supra* note 9, at 7-8.

<sup>29</sup> THE SUPREME PEOPLE'S COURT, JUDICIAL TRANSPARENCY OF CHINESE COURTS (2015), [http://english.court.gov.cn/2015-07/20/content\\_21332354\\_2.htm](http://english.court.gov.cn/2015-07/20/content_21332354_2.htm).

<sup>30</sup> E.g., Song Xiao (宋晓), *Panli Shengcheng yu Zhongguo Anli Zhidao Zhidu* (判例生成与中国案例指导制度) [*Precedent Generation and China's Case Guidance System*], 4 FAXUE YANJIU [CHINESE JOURNAL OF LAW] 58 (2011); Zhang Zhiming (张志铭), *Sifa Panli Zhidu Goujian de Fali Jichu* (司法判例制度构建的法理基础) [*Theoretical Basis for the Construction of a Judicial Precedent System*], 6 QINGHUA FAXUE [TSINGHUA LAW JOURNAL] 91 (2013); He Jiahong, *Wanshan Sifa Panli Zhidu Shi Fazhi Guojia Jianshe de Xuyao* (完善司法判例制度是法治国家建设的需要) [*Perfecting the Judicial Precedent System is the Need of Building A Country Ruled by Law*], 1 FAZHI YU SHEHUI FAZHAN (法制与社会发展) [LAW AND SOCIAL DEVELOPMENT] 20 (2015).

<sup>31</sup> In the past, some of this skepticism might have been justified by the limited training of Chinese judges. China's court system was mostly presided over by former military officers for the first 30 years of Communist rule. Many of these judges had little formal education and received no legal training before they entered the judiciary, although they did almost always receive significant training on the job and through various other programs. However, the Chinese government recognized long ago the need for a professional judiciary to resolve the increasingly complex social and economic disputes accompanying the reform and opening up in the early 1980s, 1980s, resulting in booming foreign and private investment and rapid economic growth. The quality and efficiency of the judicial system have improved significantly after decades of effort in improving judicial professionalism. The vast majority of the new generation of Chinese judges have received higher education and proper legal training, and usually started their careers and acquired professional experience within the judiciary. Article 9 of Faguan Fa, (法官法) [Law of Judges] (promulgated by the Standing Committee of the National People's Congress, Feb. 28, 1995, rev'd in 2001 and 2017, effective Jan. 1, 2018), explicitly requires that judges should have college-level legal education, and should have at least two years' experience practicing law. See, e.g., Gao, *supra* note 11; Shen, Zongling (沈宗灵), *Dangdai Zhongguo de Panli—Yige Bijiaofa Yanjiu* (当代中国的判例——一个比较法研究) [*Precedents in Contemporary China—A Comparative Study*], 3 ZHONGGUO FAXUE [CHINA LEGAL LEGAL SCIENCE] 32 (1992); Liang Yingxiu (梁迎修), *Panlifa de Luoji: Jianlun Woguo Anli Zhidao Zhidu de Goujian* (判例



jeopardize the authority of statutory law and the supremacy of the people.<sup>32</sup> Comparatists will recognize parallels to revolutionary France in the 18<sup>th</sup> century and perhaps Latin America today.<sup>33</sup>

Against this background, it is not surprising that, to our knowledge, judges never mention prior cases even in the reasoning part of their decisions. The more interesting question is, however, if precedent nevertheless influences the outcome of the case. Here the answer is considerably more complicated because such influence is not directly observable (judicial opinions reveal true reasons selectively), and what indirect evidence we have is mixed. In surveys, most Chinese judges claim that precedent plays at most a marginal role, but many disagree.<sup>34</sup> Moreover, there is an obvious problem in a direct question about things the respondents may feel they are not supposed to do and/or that they may not be conscious of.

It is noteworthy in this context that Chinese judges seemed much more receptive to precedent in interviews with Western scholars.<sup>35</sup> In 2005/2006, Liebman and Wu conducted extensive interviews of judges and other participants in China's legal system. Liebman and Wu found that judges used prior cases for guidance, direction, and lessons as early as the early 2000s, even if they could not cite them in their written opinions. Such use was facilitated by the increasing use of the internet.<sup>36</sup>

A recent survey experiment by Chen and Li circumvented the problem of strategic survey responses altogether. Rather than asking respondents directly, Chen and Li test whether mention of a sister court's decision changes judges' answers regarding a three-sentence vignette of a criminal case. Concretely, Chen and Li asked judges if a certain leniency provision applies to the case, and what sentence did the judge

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例法的逻辑——兼论我国案例指导制度的构建) [*The Logic of Case Law: The Establishment of the Case System*], 4 FALÜ FANGFA YU FALÜ SIWEI (法律方法与法律思维) [LEGAL METHODOLOGY AND LEGAL THINKING] 141 (2007).

<sup>32</sup> E.g., Shen, *supra* note 31; Luo Jun, *Zhongguo Minshi Panli Zhidu Goujian de Jiazhi Fansi yu Chonggou* (中国事判例制度构建的价值反思与重构) [*Reconsidering and Reconstructing Chinese Civil Precedent System*] 1 XINAN MINZU DAXUE XUEBAO (西南民族大学学报) [JOURNAL OF SOUTHWEST UNIVERSITY FOR NATIONALITIES] 74 (2012); Zhou Guangquan (周光权), *Xingshi Anli Zhidao Zhidu: Nanti yu Qianjing* (刑事案例指导制度: 难题与前景) [*Guidance System for Criminal Cases: Problems and Prospects*], 3 ZHONGWAI FAXUE (中外法学) [PEKING UNIVERSITY LAW JOURNAL] 481 (2013).

<sup>33</sup> Cf., e.g., Jorge Esquirol, *The Fictions of Latin American Law (Part I)*, 1997 UTAH L. REV. 425, 426 (1997) ("Latin America's tradition of legalism[']s ... hold, however, lies largely in maintaining its own political valence off the table. Law's programmatic dimension is denied for the sake of preserving claims to independence, neutrality, and legitimacy.").

<sup>34</sup> In a study carried out in 2004 surveying 130 judges from courts at various levels in Guangdong Province, 52.3% of respondents perceived cases as "barely influenc[ing] their decisions" and 9.8% reported that cases had absolutely no influence on their decision making; 25% of the respondents indicated that "prior judgments have a relatively large influence" only in the sense that "before making final decisions, [t]hey will check whether their decisions are consistent with prior decisions." DONG HAO (董皞) et al., PANLI JIESHI ZHI BIANQIAN YU CHONGGOU: ZHONGGUO PANLI JIESHI FAZHAN YU GOUJIAN ZHI LU (判例解释之变迁与重构: 中国判例解释发展与构建之路) [THE CHANGE AND RECONSTRUCTION OF PRECEDENT INTERPRETATION: THE ROAD OF DEVELOPMENT AND CONSTRUCTION OF CHINESE PRECEDENT INTERPRETATION] 169–70 (2015). None of the judges indicated that prior decisions "have absolute influence, and [t]hey always follow prior decisions." In another study, of 663 judges surveyed in Sichuan, 48.5% agreed that "China is not a case law country. Judges need not and should not resort to prior cases." ZHONGGUO TESE ANLI ZHIDAO ZHIDU YANJIU (中国特色案例指导制度研究) [RESEARCH ON THE CASE GUIDANCE SYSTEM IN CHINA] 124 (Zuo Weimin (左卫民) and Chen Mingguo (陈明国) eds., 2014).

<sup>35</sup> Liebman & Wu, *supra* note 7.

<sup>36</sup> *Id.*

think is appropriate. Chen and Li find that mention of the sister court's decision has a statistically significant effect on the legal evaluation but not the recommended sentence.<sup>37</sup>

Lastly, practicing lawyers in China report that precedents influence judicial decision making. Many lawyers look extensively at prior cases and prepare legal arguments based on those cases when they prepare to go to court. To be sure, such use of prior cases might be explained simply by the fact that prior decisions tend to be a good statistical predictor of future decisions even if they do not have normative force. Lawyers also report instances of use, however, that imply that prior cases have normative force, i.e., that they operate as true precedents in the legal sense. For example, a lawyer published a short comment in a newspaper, *Western Law News* (Xibu Fazhi Bao 西部法制报), describing how she changed a judge's mind by providing five prior judicial opinions to the sitting judge. She also summarized her experience as: 1) lawyers should submit relevant precedents to the court within a week after trial, because judges can best remember legal issues and arguments within this period of time; 2) it is best to provide Guiding Cases or Gazette cases published by the SPC, and then cases decided by superior courts within the same province, and lastly cases from other provinces; 3) lawyers should search for and analyze relevant precedents when drafting civil complaints and presenting them in court so as to improve their chance of success (Ma 2018).<sup>38</sup> This lawyer is not alone. Many other lawyers in China have shared publicly their experience about how to search for, analyze, and present precedents.<sup>39</sup>

In our view, it would be surprising if precedent played no role in the Chinese judicial system, now that cases are so widely and easily accessible. We tend to agree with H.L.A. Hart and others that "[t]his is so because, if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are."<sup>40</sup> Whether such "authoritative determinations" are officially classified as "law" or merely some indication thereof seems to us a largely irrelevant ontological question. We are interested in the operation of precedent in practice. This is an empirical question that we address in our study that, like Chen and Li<sup>41</sup>, takes an experimental approach but that, unlike Chen and Li, does so in a rich setting resembling actual judicial decision-making.

### 3 Study Design<sup>42</sup>

In the spring of 2016, we had real Chinese judges decide a full case with briefs and legal materials for up to one hour under conditions that preserve many of the key features of judicial decision making in the real world. To observe participants' use of precedent, we employed two methods. First, to observe the judges' thought process, we had participants access all materials on a computer, and tracked the time

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<sup>37</sup> Benjamin Chen & Li Zhiyu, *The Foundations of Judicial Diffusion in China: Evidence from an Experiment*, REV. OF L. & ECON. (Forthcoming).

<sup>38</sup> Ma Chunli (马春丽), *Qiantan Panli zai Fayuan Panjuezhong de Zuoyong* (浅析判例在法院判决中的作用) [*Brief Analysis of the Role of Cases in Court Decisions*], 7 XIBU FAZHI BAO [WESTERN LEGAL REPORT] (2018).

<sup>39</sup> Zhang Qian (张倩), *Lüshi zai Zhidaoxing Anli Shiyongzhong Nengzuoxiesha* (律师在指导性案例适用中能做些啥) [*What Can a Lawyer Do in Applying Guiding Cases?*], 2 RENMIN FAYUAN BAO [PEOPLE'S COURT DAILY] (2016); Li Yan (李岩), *Panli Jiansuo zhi Shu* (判例检索之"术") [*The Search Method of Legal Precedent*], 1 ZHONGGUO LÜSHI [CHINESE LAWYER] (2018).

<sup>40</sup> Hart, *supra* note 8 at 97; see also Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571–72 (1987).

<sup>41</sup> Chen & Li, *supra* note 37.

<sup>42</sup> Much of the description of the design borrows heavily from Holger Spamann & Lars Klöhn, *Justice Is Less Blind, and Less Legalistic, Than We Thought: Evidence from an Experiment with Real Judges*, 45 J. LEGAL STUD. 255 (2016).

and sequence of their engagement with them. Second, to observe precedent's effect on judges' ultimate decisions, if any, we randomly assigned different participants to different precedents.

We now explain in detail the case (3.1), the recruitment of participants (3.2), the study materials and their implementation on the computer (3.3), and the experimental variation of the precedent (3.4). In subsection 3.4.2, we also briefly mention another experimental variation—the defendant's affect—that was not our focus in China but was included for an ongoing multi-country study.

### 3.1 The Case

To study the effect of legal materials – statutes and precedents – we needed to be able to vary these materials without arousing the suspicion of knowledgeable judges. Moreover, we did not want judges' prior legal knowledge to influence their behavior patterns. (For example, judges who are particularly familiar with a certain area of law may spend far less time reading relevant materials than their peers.) For these reasons, we chose the international criminal case described below on the assumption – borne out by an exit questionnaire – that the Chinese judges would be unfamiliar with the applicable law. (In fact, only one of the participating judges indicated that he/she had previous knowledge of international criminal law.) At the same time, the legal question was familiar enough for the judges to easily understand it. We chose an appeals case because appeals cases are limited to legal questions, which are the focus of our study. To be sure, this choice of an international appeals case comes at a certain cost to ecological validity, which we discuss in subsection 5.2 below.

Concretely, we derived our case from a real ICTY case, *Prosecutor v. Perišić*. The main question in *Perišić* – in our setup, the only question – was whether a conviction for aiding and abetting under Article 7(1) of the ICTY Statute requires that the aid be “specifically directed” at the war crime, or whether any substantial contribution is sufficient. Defendant Momčilo Perišić had been the highest ranking general of Yugoslavia for much of the Bosnian War. In this capacity, he had been responsible for organizing various types of Yugoslavian support for the Army of the Republika Srpska (VRS). The VRS was the main armed group of ethnic Serbs in the Bosnian War and committed various war crimes in Bosnia, including the notorious Srebrenica massacre. Yugoslavian support for the VRS included personnel and arms. In 2011, the Trial chamber convicted Perišić as an aider and abettor to the VRS crimes.<sup>43</sup> In a controversial decision from 2013, the ICTY Appeals Chamber reversed, holding that aiding and abetting required the aid to be “specifically directed” at the crimes.<sup>44</sup> Perišić had had knowledge of the VRS war crimes when providing substantial support to the VRS. But the ICTY found that his support was directed merely towards the general war effort of the VRS, not specifically towards its war crimes.

We provided the original *Perišić* trial judgment of the ICTY Trial chamber in the materials, except that we changed the date to January 2014 (to make it a live issue), changed the names and some biographical information as described below in subsection 3.4, and omitted the parts relating to Zagreb. We omitted Zagreb because it proved too difficult to find a credible mirror city targeted by ethnic Croats. We also provided the original ICTY statute and one redacted original precedent from the ICTY Appeals Chamber, as described below in subsection 3.3.

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<sup>43</sup> *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Trial Judgment (Int'l Crim. Trib. For the Former Yugoslavia Sept. 6, 2011).

<sup>44</sup> *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-A, Appeals Chamber Judgement (Int'l Crim. Trib. For the Former Yugoslavia Feb. 28, 2013).

We wrote the statement of facts and the briefs from scratch (see Online Appendix) with the goal of focusing the judges on only one legal issue, namely the reach of aiding and abetting liability under Article 7(1), as explained above. Towards this goal, the statement of facts was entitled “Agreed Facts” and began with the sentence: “The parties have agreed that the following key facts are not in dispute.” Similarly, the brief for the appellant began with the words: “This appeal concerns a single point of law: whether or not aiding and abetting under Article 7(1) of the Statute governing this Tribunal requires that the assistance be specifically directed to the commission of a crime.” Both briefs focused on this issue alone. They discussed the precedent and the policy issues. They cited specific passages of the precedent that could be accessed directly using hyperlinks.

The original materials were in English; they were professionally translated into simplified Chinese by legal translators, overseen by one of the authors (Zhuang Liu).

### 3.2 Setting and Recruitment

We recruited judges from local, intermediate, and high courts in Zhejiang Province attending academic writing classes at Judges College in Hangzhou in April 2016.<sup>45</sup> We sent a letter to registered attendees inviting them to participate in a study on “judicial decision-making” at the event. We noted that participation was strictly voluntary and anonymous. The letter explicitly stated that attendance would not be recorded.

By way of background, the Chinese judiciary attaches some importance to academic writing and encourages judges to write academic articles. Every court above the intermediate level publishes its own journal with academic work of judges. Most articles are closely related to judicial practice, such as new problems or hard cases that the judges encountered in their practice. But the journals also publish more theoretical and sometimes even descriptively statistical work. Judges write in these journals for fame and reputation, which can relate to promotion. Some courts even take academic publications as an indicator to evaluate individual judges’ performance.<sup>46</sup> For a court, the quality of academic papers published by its judges is also often seen as an indicator of its capability. The Judges College offers two-day courses in such writing. Journal editors and judges with good publication records lecture about their writing technique and research experience. Applicants for the courses are judges from all divisions (criminal, civil, administrative) of the local and intermediate courts within Zhejiang province; they tend to be sitting judges, not members of the courts’ research departments. The College admits applicants based on court-specific quotas. Participants tend to be relatively junior but already experienced judges. We do not have the exact number of what percentage of judges in Zhejiang actually write academic articles. But given the incentives introduced above, most judges in the early stage of their careers should be willing to improve their skills of academic writing and attend such training, and anecdotally, they do.

We conducted our experiment during two sessions in the spring of 2016. In the first session, we invited judges to participate in our experiment during five separate classes, with permission of the instructors. These classes would otherwise have been used for small group discussions with about 10 judges each. 38

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<sup>45</sup> We had previously attempted to recruit judges by email invitation forwarded by chief judges of certain courts. This proved unsuccessful, however, as only 24 judges completed the experiment and gave us permission to use the data.

<sup>46</sup> Zuo Weimin (左卫民), *Faguan de Xueshu* (法官的学术) [*Judges’ Scholarship*], 11 FAZHI ZIXUN (法制资讯) [LEGAL INFORMATION] 10 (2012).

judges chose to participate, and all of them completed the study. 4 judges finished the study but withdrew their data after learning about our exact research questions and methods in debriefing. We had to give participants this withdrawal option because the Harvard IRB considered incomplete disclosure our pre-study description of our research goal as “to learn about the process of legal reasoning and the role of various legal materials therein.” In the second session, we invited judges to participate in our experiment after two lectures. About 50 judges attended each lecture. We asked the judges to stay in their seats after the lecture if they were interested in participating the experiment. 19 judges chose to participate, and 14 of them finished the study. No one withdrew their data.

### 3.3 Computer implementation

We provided participants with a laptop or an iPad for the duration of the study. Using a standard browser, participants accessed the study online, which we ran from a dedicated server. The server recorded all of the passages of the various documents viewed by the participants, in 10-second increments.

Upon clicking start, participants were shown a standard consent. After confirming that they had read the form, and agreed to participate, the judges were shown an instruction page that described their task to them. The instructions invited them to imagine themselves as a judge on the ICTY’s Appeals Chamber judging a defendant’s appeal of his conviction by the ICTY’s Trial Chamber. The judges were told they had 50 minutes to reach a decision and submit a brief summary of their reasoning.

When the judges clicked on a button to continue, they were taken to an overview page listing all of the documents available to them (including the instructions), and a clock on the screen started counting down 50 minutes. Besides the instructions, the available documents were an agreed statement of facts, briefs for the defendant (appellant) and the prosecution (appellee), the ICTY statute, the judgment from the ICTY’s Trial Chamber below, and one precedent from the ICTY’s Appeals chamber that was handed down after the trial judgment in our case. The briefs linked to the most relevant passages in the statute and the precedent. All materials were accessible from a menu on the left of the screen. The long documents had hyperlinked tables of contents.

The instructions recommended reading the briefs and statement of facts in full, and consulting the other documents (trial judgment, precedent, statute) as necessary. The briefs and statement of facts each ran under 1,500 Chinese characters (2 pages) and were thus easy reads. By contrast, the trial judgment ran roughly 21,000 Chinese characters, and the precedent up to 34,000 (depending on which precedent we provided, *cf. infra* subsection 3.4.1). These latter documents were obviously much too long to read in 50 minutes. This was intentional, as real-world judges do not have the time to read all the documents in a case either. However, the most relevant passages of these long documents were referenced and linked from the briefs and could easily be read in this time. Importantly, the legal question in the case was ultimately simple and fully discussed in the short briefs, such that the task was manageable.

A clock on the judges’ screen counted down the 50 minutes available, but the judges could choose when to move on to registering their judgment. When the judges hit the “proceed to judgment” button and confirmed this choice in a pop-up, they were taken to a page that asked them for a tick-the-box answer affirm/reverse and, in a text field below, brief bullet point reasons for their decisions. After the judges submitted and confirmed their judgment, they were taken to a brief exit questionnaire. After 55 minutes, the experiment asked the judges to conclude.

## 3.4 Randomized Experiment

### 3.4.1 Precedents: *Bešić*, *Šainović*, or *Vasiljević*

To test how precedent affects judges' ultimate decisions, we randomly assigned each judge to only one of three precedents of the ICTY Appeals Chamber: *Perišić (Bešić)*, *Vasiljević*, or *Šainović*. The briefs and the statement of facts were adjusted accordingly, as documented in the online appendix to this article. We disguised *Perišić* as *Bešić* by changing the names in the opinion, most importantly of the defendant.

Two of our precedents, *Vasiljević* and *Šainović*, were weak precedents. In *Prosecutor v. Mitar Vasiljević*, the ICTY Appeals Chamber had defined aiding and abetting as “specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime..., and this support has a substantial effect upon the perpetration of the crime.”<sup>47</sup> This was favorable to our defendant because even the prosecution agreed that our defendant had not “specifically directed” his support at crimes. By contrast, in *Prosecutor v. Nikola Šainović et al.*, the ICTY Appeals Chamber had held “[t]hat ‘specific direction’ is not an element of aiding and abetting liability under customary international law” and upheld the defendant’s conviction for aiding and abetting even in the absence of “specific direction.”<sup>48</sup> We made some minor modifications to the precedents to fit them into our case, as described in Spamann & Klöhn (2016).<sup>49</sup> As vigorously argued in the briefs and described in more detail in Spamann & Klöhn (2016), however, these two precedents were suggestive but not determinative. *Vasiljević*’s definition of aiding and abetting was *obiter dictum*, while *Šainović* was distinguishable (it concerned an officer in the same organization as the ultimate perpetrators).

By contrast, *Bešić* was a strong precedent favorable to the defendant. After all, *Bešić* was the *Perišić* decision itself, i.e., the appeals decision overturning the defendant’s conviction in the very case that we asked our participants to judge. We only changed the defendant’s name to a fictitious Emir Besić instead of Momčilo Perišić and made him the deputy chief of staff of the Army of the Republic of Bosnia and Herzegovina (ArBiH) instead of Yugoslavia. We slightly rewrote the rest of the facts to fit this setup. In particular, our fictitious facts described *Bešić* as responsible for coordinating the ArBiH’s activities with those of the (fictitious) Zeleni Sokoli (“ZS”), a paramilitary group consisting of Bosniak and foreign fighters. In that role, however, our fictitious *Bešić* did exactly the same for the ZS as the real *Perišić* did for the VRS, and the fictitious ZS committed the same crimes as the real VRS. Consequently, the *Bešić* precedent was right on point for the case our participants were asked to judge, and, if they followed precedent, should have led to acquittal. We did not mark *Bešić* as fictitious or otherwise different from the other precedents.

In light of *Bešić*’s strength as a precedent, we expected the residual variance to be lower under *Bešić*. We therefore randomized only 1/5 of participants into *Bešić* to maximize our statistical power.<sup>50</sup> We split the remaining 4/5 evenly between *Šainović* and *Vasiljević*.

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<sup>47</sup> *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeals Chamber Judgement, ¶ 102 (Int’l Crim. Trib. For the Former Yugoslavia Feb. 28, 2013) (emphasis added).

<sup>48</sup> Case No. IT-05-87-A, Appeals Chamber Judgement, ¶ 1649 (Int’l Crim. Trib. For the Former Yugoslavia Jan. 23, 2014).

<sup>49</sup> Spamann & Klöhn, *supra* note 42.

<sup>50</sup> In hindsight, this was a mistake because residual variance was actually lower under the other two precedents, where almost all judges affirmed the conviction, than under *Bešić*, where judges split almost evenly between affirmance and overturning. Fortunately, we obtained significant results anyway.

### 3.4.2 Defendants: Horvat (Croat) or Vuković (Serb)

While influences other than precedent are not the focus of this article, we briefly report a second experimental variation that we included because the present study is part of a larger multi-country study where other influences are a major focus. The second variation was blocked and cross-randomized with the first, i.e., it was designed to be statistically completely uncorrelated with the first, allowing each to be analyzed independently.

The second experimental variation concerns the defendant. We created two fictitious defendants that differed in their nationality, biography, and attitude. We chose these attributes and their depiction to be clearly irrelevant from a strictly legal perspective. We named these defendants Borislav Vuković (a fictitious unsympathetic Serb) and Ante Horvat (a fictitious sympathetic Croat). For further details, we refer the interested reader to Spamann & Klöhn (2016).

## 4 Results

Table 1 shows judges' decisions by treatment condition. The precedent treatment varies along the horizontal axis, and the defendant treatment along the vertical axis. (To repeat, we show the defendant variation only to dispel any concerns about interference from this second variation; it is not the focus of our analysis here.) For each of the six defendant-precedent combinations, the table shows the fraction of the judges that upheld the conviction. (Recall that each judge only received one of the three precedents and judged only one of the two defendants.)

**Table 1: Fraction Affirmed (Guilty) ( $N = 48$ )**

	Precedent			Total
	<i>Šainović</i> (weakly unfavorable to defendant)	<i>Vasiljević</i> (weakly favorable to defendant)	<i>Bešić</i> (strongly favorable to defendant)	
<b>Defendant</b> Vuković (Serbian: unsympathetic)	0.90 (9/10)	0.89 (8/9)	0.75 (3/4)	0.87 (20/23)
Horvat (Croatian: sympathetic)	0.82 (9/11)	0.75 (6/8)	0.17 (1/6)	0.64 (16/25)
Total	0.86 (18/21)	0.82 (14/17)	0.40 (4/10)	0.75 (36/48)

Fisher's exact tests (two-sided):

Vuković – Horvat = 0.23;  $p = 0.098$

*Šainović* – *Vasiljević* = -0.04;  $p = 1.000$

*Šainović* – *Bešić* = 0.46;  $p = 0.015$

*Vasiljević* – *Bešić* = 0.42;  $p = 0.039$

(all precedents equal)  $p = 0.020$

The table shows that the Chinese judges treated the unsympathetic defendant more harshly, as did the U.S. judges in a parallel study<sup>51</sup>: The affirmance rate is 23% higher for Vuković, the unsympathetic defendant, and the difference is statistically significant at the 10% level.

But our focus here is on the precedent. The strong precedent seems to have influenced judges' decisions significantly. Affirmance rates were 86% and 82% for judges deciding the case under *Šainović* and *Vasiljević*, respectively, but only 40% for judges deciding the case under *Bešić*, the precedent strongly favorable to the defendant. In other words, the affirmance rate under *Bešić* was about 44% lower than under the other two precedents. The difference between these rates is not only substantively but also statistically very significant, the small sample size notwithstanding. If the true affirmance probabilities were equal (null hypothesis) between (1) all precedents, (2) *Šainović* and *Bešić*, or (3) *Vasiljević* and *Bešić*, we would observe such an extreme sampling difference with only 2.0%, 1.5%, or 3.9% probability, respectively. To avoid relying on large-sample approximations, we calculate these *p*-values using exact methods (the Fisher exact test).

Table 2 summarizes the average time judges spent with the various documents. The middle column of the table shows the time per document as a fraction of the total time the judge worked with the materials (i.e., before proceeding to judgment). The right column shows the number of minutes spent. The lower part of the table shows the result from a Wilcoxon matched-pairs signed-ranks test comparing time spent on precedent and statute.

The table shows that the judges spent more time on reading prior cases than statutes. On average, they spent 4% of the time, or 0.81 minutes, on the statute, but 13%, or 2.93 minutes, on the precedents. The difference is statistically significant at less than 1% level, i.e., there is less than a 1% chance that so large a difference would arise merely by unrepresentative sampling if the population median judge would on average spend equal time with the two documents. To be sure, the precedents are longer than the statute. The statute is 8,562 Chinese characters, whereas the precedents are 24,958 characters on average. But judges did not have nearly enough time to read either in full, so their reading times reveal choices, and are not a mere mechanical reflection of document lengths.

**Table 2: Average time spent, by document**

	Fraction of time spent	Minutes spent
brief	0.29	5.98
facts	0.22	4.27
statute	0.04	0.81
trial judgment	0.27	6.55
precedent	0.13	2.93
other (e.g., instruction)	0.05	0.99
total	1.00	21.52
Observations		48
precedent minutes – statute minutes = 2.12, $p = 0.000$ <sup>52</sup>		

<sup>51</sup> Spamann & Klöhn, *supra* note 42.

<sup>52</sup> We get the same very low *p*-value regardless of whether we are testing the null hypotheses (a) that the mean time judges spend with both documents is equal (a *t*-test), or (b) that the median judge spends equal time with both documents (a Wilcoxon matched-pairs signed-ranks test); the latter test does not use a large-sample approximation.



The analysis of the clickstream data provides further evidence. The judges typically read precedents before they read statutes (one read neither). Only 15 judges (32%) accessed the statute before they accessed the precedent.

The judges' written reasons reveal an interesting phenomenon. Although the judges clearly paid attention to precedent (as witnessed by the time they spent with it) and appear to have been influenced by it (as witnessed by the difference in affirmance rates between *Bešić* and the other two precedents), only 14 of them (29%) mentioned the precedent in their written reasons.<sup>53</sup> This is the exact opposite of the result for a parallel study with U.S. judges, who were found not to be influenced by the precedent but who generally did refer to it in their reasons, often claiming to follow it.<sup>54</sup> Notice in this regard that the differences in affirmance rates between precedents are basically unchanged if we exclude from our sample those fourteen judges who mention the precedent in their reasoning: the Fisher-exact  $p$  values for the differences between all precedents, *Šainović* and *Bešić*, and *Vasiljević* and *Bešić* are then 0.02, 0.03, and 0.04, respectively.

Random assignment of our treatment variables ensures that they are uncorrelated with other possible explanators – in expectation. To the extent possible, we checked that our randomization succeeded to achieve such absence of correlation in actuality (so-called covariate balance). We verified that all of the five participant characteristics that we collected in the exit survey did not differ meaningfully between judges assigned to different defendants or precedents: age, court level (whether a judge was from local, intermediate, or high court), division (whether a judge was from civil, criminal, or administrative division of a court), prior knowledge of international criminal law (a judge's self-report about whether he/she had any prior knowledge of international criminal law), and recognizing names or places (whether a judge recognized any of the names or places in the group). We further linearly regressed affirmance on our treatment variables (precedent and defendant) while controlling for all five of these covariates (Table 3). We enter the controls one at a time first (models 1-7) because we are concerned that the small sample size and resulting low degrees of freedom might mask an effect when we enter all controls together (model 8). In all models, the *Bešić v. Šainović* coefficient is stable between -0.39 and -0.47, and the  $p$ -value is always below 5%. The results suggest that the *Bešić* precedent reduces the affirmance rate by about 39% to 47% compared to *Šainović*, almost exactly the same as we found in our univariate tests above (Table 1). Also as in the univariate tests, the difference between *Bešić* and *Vasiljević* is almost identical to the difference between *Bešić* and *Šainović*, as witnessed by the approximately zero coefficient estimates on *Vasiljević*.<sup>55</sup> Also as in the univariate tests, we find some evidence for defendant nationality influencing the conviction rate.<sup>56</sup> We find no meaningful evidence for an effect of any of the control variables.<sup>57</sup>

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<sup>53</sup> Among the fourteen judges who quoted the precedents, eight (judges No. 7, 8, 18, 20, 30, 37, 38, and 44) specifically stated that they followed the precedent in deciding the case, and six of them (judges No. 11, 17, 29, 32, 36, and 45) explicitly refused to follow it.

<sup>54</sup> Spamann & Klöhn, *supra* note 42.

<sup>55</sup> Wald tests reject equality of the *Vasiljević* and *Bešić* coefficients at the 5% level in all models.

<sup>56</sup> The *Vuković v. Horvat* coefficient is marginally statistically significant at the 10% level in models 2, 3, 5, and 7. The  $p$ -values are 0.10, 0.16, and 0.16 in models 4, 6, and 8.

<sup>57</sup> The only "significant" coefficients are those on "High Court" and, in model 8, on "Age 30-40." But there is only one High Court judge in the sample, so this estimate is meaningless (the large sample approximation for the  $p$ -value is inaccurate). And the "Age 30-40" estimate does not hold in model 3.

**Table 3: Linear Regression of Affirmance on Precedent and Controls**

VARIABLES	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
	Affirmance (uphold conviction)							
<b>Precedent</b> (baseline = Šainović)								
<i>Bešić</i>	-0.46** (0.18)	-0.44** (0.17)	-0.47*** (0.17)	-0.44** (0.17)	-0.43** (0.17)	-0.47*** (0.17)	-0.39** (0.17)	-0.40** (0.17)
<i>Vasiljević</i>	-0.03 (0.12)	-0.04 (0.13)	-0.03 (0.14)	-0.05 (0.13)	-0.03 (0.12)	0.03 (0.12)	0.02 (0.13)	0.05 (0.12)
<b>Defendant</b> (baseline = Horvat)								
Vuković		0.20* (0.12)	0.23* (0.13)	0.20 (0.12)	0.21* (0.12)	0.17 (0.12)	0.21* (0.12)	0.18 (0.12)
<b>Participant characteristics</b>								
Age (baseline = unreported)								
<30			-0.19 (0.22)					-0.15 (0.12)
30-40			-0.29 (0.22)					-0.39** (0.17)
Prior knowledge of ICL				0.09 (0.11)				0.24 (0.22)
Recognition, names or places					-0.06 (0.11)			-0.12 (0.15)
Court level (baseline = unreported)								
Basic Court						-0.18 (0.24)		0.06 (0.20)
Intermediate Court						-0.26 (0.31)		0.12 (0.27)
High Court						-0.97*** (0.24)		-0.83*** (0.23)
Division (baseline = unreported)								
Civil							-0.33 (0.23)	-0.19 (0.14)
Criminal							-0.01 (0.20)	0.29** (0.12)
Administrative							-0.19 (0.22)	
Constant	0.86*** (0.08)	0.56*** (0.20)	0.71*** (0.20)	0.56*** (0.20)	0.56*** (0.21)	0.77*** (0.24)	0.71*** (0.19)	0.76*** (0.23)
Observations	48	48	48	48	48	48	48	48
R-squared	0.17	0.23	0.26	0.23	0.23	0.30	0.32	0.46

Notes: 1. Robust standard errors in parentheses: \*\*\*  $p < 0.01$ , \*\*  $p < 0.05$ , \*  $p < 0.1$ ; 2. The baselines for Age, Court level, and Division are the participants who did not report their relevant information.

## 5 Internal and External Validity

Our results suggest that, at least in our experiment, Chinese judges paid close attention to precedent and changed their decision in reaction to the precedent. Before discussing the implications of this finding in the next section, we pause for a moment to discuss the validity of our findings: do we really show that Chinese judges judged according to precedent even within our experiment (internal validity, subsection 5.1), and if so, can one infer that they do so also outside the experiment in their actual professional roles as judges in China (external validity, subsection 5.2)? In particular, we address the concerns that the experimental results are random chance events, in particular because the judges did not know what they were doing (subsection 5.1); and that international law is different, or that being in an artificial experiment is different (subsection 5.2).

### 5.1 Internal Validity

Randomized experiments are generally considered to be the gold standard for internal validity. Since the experimental treatment is by design orthogonal to any other aspect of the environment, the difference in outcomes between treatment groups must be due to the difference in treatment, up to an element of random chance as calculated by statistical tests of the sort we presented above.<sup>58</sup>

Nevertheless, we discuss the internal validity of our results for two reasons. First, our sample (48 observations) was relatively small, and we want to dispel concerns that this diminishes our results. Second, and without going into statistical details, classical statistical tests are only part of the story, and plausibility of results also needs to be assessed in different ways.

To begin with concerns about sample size, the first thing to repeat and emphasize is that in spite of the small sample, our experimental results would have obtained by random chance only with a very small probability. That is, the statistical tests reported above already account for the small sample size. Put differently, the effect sizes we estimated were very large. Had we had a bigger sample, then the probability of estimating such large effect sizes merely by chance (i.e., if the true effect size were zero) would have been vanishingly small. With our small sample, the probability is not vanishingly small but still very small. Intuitively, if almost all judges were predisposed to affirm the conviction under *Bešić* like they were under the other two precedents, then it would be extremely unlikely to draw a sample of 10 judges of whom 6 do *not* affirm under *Bešić*, as we did.

A question then is whether such a large effect size as we estimated is plausible. Without going into technical details, it is intuitive that if a statistical test seems to support an a priori very implausible—at the limit, impossible—theory, then it is probably a freak chance result even if the usual  $p$ -value indicates that such a freak chance result is very rare.<sup>59</sup> But we think that a 45% shift by a strong precedent is entirely plausible and in fact less than we would have expected (we expected closer to 100%). We note in this regard that even smaller samples than 48 are common in disciplines such as certain branches of cancer research or industrial engineering that, like us, deal with strong expected effects and difficulties in recruiting large samples.

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<sup>58</sup> Above all, see Paul W. Holland, *Statistics and Causal Inference*, 81(396) J. AM. STATISTICAL ASS'N 945 (1986).

<sup>59</sup> Cf. generally Andrew Gelman & John Carlin, *Beyond Power Calculations: Assessing Type S (Sign) and Type M (Magnitude) Errors*, 9 PERSP. PSYCHOL' L SCI. 641 (2014).

Plausibility can also be assessed with the help of other information generated in the experiment – does it fit the postulated theory? Here, the time spent with the precedent and the written reasons can shed further light on the plausibility of the causal effect of the precedent. The fact that the judges spend considerable time looking at the precedent makes it plausible that the precedent ultimately influenced their decision. The absence of precedent in most judges’ written reasons might undermine this conclusion, but we think not in a context where mention of precedent is prohibited, as in China.

The only aspect of the reasons that could undermine the internal validity of our experiment is if they showed the judges to be confused about the task, and in particular the law they were supposed to apply. We do not think that that is the case, but we invite readers to read the judges’ reasons and decide for themselves (keeping in mind that translating the documents and the reasons presumably makes for less sharp use of terminology than one might expect in a domestic context). It is true that half of the participants do not use the term “specific direction” (Tedingxing 特定性) in their reasons. But many address the issue without using the term, such as—focusing on the critical group of judges assigned to *Bešić*—judges 41, 42, and 48 (even judge 40’s cryptic one-liner about individual responsibility could implicitly refer to it). And the precedent could have played a role not only for narrow doctrinal questions but for the general question whether it is acceptable to acquit someone in the accused’s position under the ICTY treaty.

Ultimately, we cannot definitively exclude the possibility that our experiment produced a chance result. But we believe there are good reasons to think our experiment is not more likely to have done so than others.

## 5.2 External Validity

The trickier part is external validity: assuming that judges did look at the precedent (about which there is no question) and were influenced by it (see the preceding discussion) *in the experiment*, can we infer that they and their colleagues behave in the same way *in real life*? We break this question down into several parts.

First, were our judges representative for Chinese judges in general? We believe that our participants were, if not exactly representative of Chinese judges generally, at least not outliers. We already mentioned that our participants were normal judges from normal courts, and that it was usual for judges to participate in the seminar where we conducted our study. As to location, Zhejiang, where our judges are from, is an eastern province that is neither geographically nor ethnically on the margins of the country. Its per capita GDP of US\$ 12,635 in 2016 (the year we did our experiment) is the fifth-highest among China’s 31 provinces. This means our judges are from a wealthy and developed province, but not the wealthiest or most developed. Moreover, even if the level of development or other regional factors differentiate judicial training, as they surely do,<sup>60</sup> the extent of this differentiation is limited by the fact that all judges in China

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<sup>60</sup> See KWAI HANG NG & XIN HE, EMBEDDED COURTS: JUDICIAL DECISION-MAKING IN CHINA 1-6 (2017).

have to pass the National Judicial Examination,<sup>61</sup> a unified exam that served as a prerequisite for judges and lawyers to practice law.<sup>62</sup>

Second, was the task representative of what judges do in court every day? In a limited abstract sense, the answer is yes. We had real judges review a real case including briefs on both sides, a live legal question, and legal materials to consult. We gave the judges enough time to absorb the materials, reflect on them, and reach a decision. We also asked the judges to provide the reasons for their decisions in writing.<sup>63</sup> Our case is an appeal case, but trial and appeal are not as different in China as they are in, e.g., the U.S., as Chinese first and second instance judges both need to decide factual and legal issues. In this limited abstract sense, our setting thus resembled the real-world judicial decision-making process.

One way in which our experiment was clearly not realistic is that we gave domestic Chinese judges an international case from the ICTY. This means, first, that the judges were not familiar with the legal materials<sup>64</sup>, and, second, that the judges might have behaved differently because of what they knew or assumed about international law in variance from Chinese law. In particular, judges might have assumed that they were supposed to pay attention to precedent under international criminal law, even though they would not do so under domestic law. We believe the latter point is contradicted by the fact that overwhelming large majority of the participants did not cite the precedent, which they presumably would have if they thought that international law required attention to precedent in a way that Chinese law did not. Paying attention to precedent (as witnessed by time and outcomes) yet not mentioning it in the reasons is much more compatible with the view that participants did what they always do. And as reported in section 4 above, our results remain the same if we exclude participants who did cite the precedent and who thus might have tried to mimic an international judge.

The lack of familiarity with the legal materials might increase precedent's importance because judges feel insecure making up their own mind, or it might reduce its importance because judges are confused and unable to assess its significance. We believe neither is the case. First, the legal question in the case was sufficiently simple and common for any lawyer to understand quickly. The available materials were ultimately very few and, as far as the relevant passages are concerned, manageable. It is true that they were new to the judges, but given the complexity of contemporary legal systems, this will be a common occurrence in any court. Second, the participants' written reasons demonstrate that most of them understood the legal issue in the case and answered it with standard legal terminologies and techniques.

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<sup>61</sup> Article 2 of the Guojia Sifa Kaoshi Shishi Banfa (国家司法考试实施办法) [Measures for the Implementation of National Judicial Examination] (promulgated by the Supreme People's Court, Supreme People's Procuratorate, and the Ministry of Justice, Oct. 31, 2001, effective Jan. 1, 2002; rev'd by the Supreme People's Court, Supreme People's Procuratorate, and the Ministry of Justice, Aug. 8, 2008) stipulates that all newly appointed judges should pass the national judicial examination. The National Judicial Examination (Guojia Sifa Kaoshi 国家司法考试) has been replaced by the National Uniform Legal Profession Qualification Examination (Guojia Tongyi Falü Zhiye Zige Kaoshi 国家统一法律职业资格考试) since 2018.

<sup>62</sup> This examination is widely acknowledged as arguably the most difficult examination in China, with pass rates of about 20% every year. *Xinhua Insight: National Judicial Exam Upgraded Amid Judicial Reforms*, XINHUA, Sept. 23, 2016, [http://www.xinhuanet.com/english/2016-09/23/c\\_135709063.htm](http://www.xinhuanet.com/english/2016-09/23/c_135709063.htm). The exam questions and the pass requirements are the same across all provinces, except in a couple of western provinces and some ethnic minority regions.

<sup>63</sup> For an empirical demonstration of the importance of requiring a written decision, see Zhuang Liu, *Does Reason Writing Reduce Decision Bias? Experimental Evidence from Judges in China*, 47 J. LEGAL STUD. 83 (2018).

<sup>64</sup> Recall that only one of them indicated he/she had prior knowledge of international criminal law.

Only seven judges' reasons seemed unresponsive to the law or the facts of the case, and even that might have been a deliberate strategy to push through a desired result.<sup>65</sup> In any event, our results get weaker but do not disappear if we exclude these seven judges.<sup>66</sup>

Finally, it is possible that judges simply behave differently in an experiment than in real life. Besides the usual concern about any laboratory experiment's artificiality, there are additional concerns peculiar to judges in general and Chinese judges in particular. Judges in general need to give reasons to the public, whereas our judges remained anonymous. Chinese judges in particular need to be aware of oversight by the CCP, which was not part of our experiment. But if judges had felt truly unconstrained, they could have cited the precedent. Or they could have written nonsense reasons. Or they could have refused to participate altogether. That they did not do any of this gives us some confidence that they took the experiment seriously and treated it like a normal decision in their professional life.

Clearly, the question of the experiment's external validity involves judgment. But we think there is a strong argument that the effect and behavior we identified in the experiment is informative about Chinese judges' professional behavior.

## 6 Policy: Transparency about the Use of Precedent?

If theoretical reflection, prior researchers' interviews with judges, practitioners' lore, and now our experiment and Chen & Li's (*supra* section 2) all suggest that Chinese judges will be guided by precedent anyway, would it be better to abandon the official policy prohibiting them from saying so openly? This question is particularly pressing now that the recent judicial reform has made available online vast bodies of cases from all levels of courts across all Chinese provinces.<sup>67</sup>

On the one hand, quoting prior cases will help judges to give more thorough and convincing reasons, which is consistent with the policy goal of the SPC that judicial opinions should be more thorough and elaborate.<sup>68</sup> As many legal scholars in China have already noted, Chinese statutes—like statutes

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<sup>65</sup> Judges 2, 25, 34, 40, and 41 disregard the applicable law. Judge 34 simply declares that “the issue of specific direction need not to be considered.” Judges 2, 40, and 41 seem to deny the ICTY's very purpose of holding individuals responsible for state acts. Judge 25 seems to go to the other extreme of declaring the individual general responsible for civilians regardless of the ICTY statute's structure.

Judges 14 and 21 are unresponsive to the facts of the case. Counter to the explicit stipulation in our statement of agreed facts, judge 21 denies that the defendant knew aid had a substantial effect on the crime, and judge 14 claims that aid was specifically directed at the crime.

<sup>66</sup> Excluding these seven judges, the affirmance rates under *Šainović*, *Vasiljević*, and *Bešić* are 89%, 80%, and 50%, respectively, and the *p*-values for the differences between all precedents, *Šainović* and *Bešić*, and *Vasiljević*, and *Bešić* are then 0.10, 0.05, and 0.18, respectively.

<sup>67</sup> Liebman et al., *supra* note 9.

<sup>68</sup> For example, in 2016, when the SPC issued *Renmin Fayuan Minshi Caipan Wenshu Zhizuo Guifan* (人民法院民事裁判文书制作规范) [Specifications for Preparing Civil Judgments by the People's Courts] and *Minshi Susong Wenshu Yangshi* (民事诉讼文书样式) [Style of Civil Litigation Documents] (promulgated by the Supreme People's Court, June 28, 2016, effective Aug. 1, 2016), it stressed that “[judges should] strengthen reasoning in complex, difficult, novel, typical, controversial, demonstrative cases, but simplify judicial opinions in simple, small-value, non-controversial cases.” *Woguo Fayuan 8 Yue 1 Ri Qi Shishi Xinminshi Susong Wenshu Yangshi* (我国法院 8 月 1 日起实施新民事诉讼文书样式), XINHUA, July 5, 2016, [http://www.xinhuanet.com/legal/2016-07/05/c\\_1119167633.htm](http://www.xinhuanet.com/legal/2016-07/05/c_1119167633.htm). (“说理应当做到繁简得当，加强对复杂、疑难、新型、典型、有争议、有示范价值等案件的说理，简化简易、小额、无争议案件裁判文书的制作。”).

anywhere—are incomplete, and a full account of the judicial reasons, and consistent application of the law, therefore requires more than a citation of the statute.<sup>69</sup> If judges are not allowed to cite prior cases, they can still appropriate the prior court’s reasoning, but this will inevitably conceal part of their reasoning from litigants and the world. This also increases the costs for both the public and appellate bodies to ascertain the rule a court applies in actuality, which is detrimental to the predictability and consistency of the legal system.

On the other hand, France demonstrates that a legal system can thrive even without open acknowledgment of precedent in judicial opinions. Beyond the litigants in individual cases, judiciaries also need to be concerned about overall judicial effectiveness and image, and the omission of precedent may help that goal in certain societies.<sup>70</sup> This is especially true when judges are unfamiliar with a case law system and have difficulties articulating their precedential reasoning. The balance of precedent and other sources of law is subtle, and judges’ portrayals of this balance could easily be misunderstood. In the worst case, Chinese judges would come to be seen to usurp power from other institutions. At the very least, writing thoughtful reasonings in a novel style would slow down procedures, a major concern in a judiciary that is facing an increasingly high caseload.<sup>71</sup>

Perhaps the best argument for open acknowledgment of use of precedent is its potential to make the playing field more even for less well represented litigants. As mentioned at the beginning, Chinese lawyers already make use of precedents to influence judges. But as long as precedent operates tacitly, it takes specialized counsel to recognize its pattern and use it for their clients’ needs. This puts less well represented litigants—usually, poorer litigants—at a disadvantage. Then again, this disadvantage can never be fully eliminated. Moreover, commercial data bases may eventually provide good information on precedent cheaply to anyone. Perhaps the most important policy question is therefore to foster a competitive market between data base providers such that their services will remain affordable for all litigants.

## 7 Conclusion

In this study, we experimentally investigated the decision-making process of judges in China in a setup closely resembling real-world judicial decision making. We found that strong precedents significantly influenced the decisions of the participating Chinese judges, that the judges spent more time reading prior cases than statutes, and that they typically read precedents before they accessed the statutes. All of this very strongly suggests that Chinese judges do take into account precedent. But we also found that in their written reasons, the majority of judges did not mention the precedents that actually influenced their decisions. In other words, they concealed the fact that the precedents influenced them.

We hesitate to draw policy suggestions from our findings given the complexity of the issue. On the one hand, allowing or encouraging judges to quote precedent can improve the transparency of judicial opinions. On the other hand, we do not have evidence on whether judges in China can identify precedent

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<sup>69</sup> Cf., e.g., Shen, *supra* note 31; He, *supra* note 30.

<sup>70</sup> Cf. MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF TRANSPARENCY AND LEGITIMACY (2004); Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483 (2015).

<sup>71</sup> Fu Hualing, *Putting China’s Judiciary into Perspective: Is It Independent, Competent, and Fair?* in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 193, 199 (Erik G. Jensen and Thomas C. Heller eds., 2003).

correctly from the many prior cases in actuality. Nor do we have enough evidence on the overall costs and benefits, in particular with respect to the public perception of judicial legitimacy, for any policy change regarding quoting precedent. We believe this will be a pressing area for future research and policy thinking.



## Appendix

**Table A1: Judges' Written Reasons**

Note: This table reproduces the judge-participants' reasons verbatim, sorted by precedent (*Šainović/Vasiljević/Bešić*), defendant (*Horvat/Vuković*), and affirmance. We conducted our experiment during two sessions in the spring of 2016. The "Session" column indicates which session a judge attended. The original reasons were in Chinese; they were professionally translated into English by legal translators, overseen by one of the authors (Zhuang Liu). The table also indicates whether the reasons mention the precedent, and if so, whether they followed it.

No.	Session	Precedent	Defendant	Prec. Mentioned?	Prec. Followed?	Affirmed?	Reasons
1	1	S	H	0		1	<p>1. Although the accused's assistances were not directed towards a specific crime, he has used his authority to help a specific army. The interpretation of the meaning of specific direction can be extended accordingly. 2. In subjective and objective terms: subjectively, the accused was aware of the army's violent activities against the civilians; and, objectively, he provided logistical and technical assistance with the hope of, or being indifferent to the occurrence of, the criminal result. And such assistance played a substantial role in actuality. 3. In terms of the consequence, the accused's assistance substantially contributed to the commission of the crime. When determining whether an act constitutes a crime, the distance between the act and the consequence should not be taken into account as an essential factor. Rather, the standard should be whether the assistance has a material influence on the implementation of the crime.</p> <p>1、虽然被告帮助行为并没有针对特定的某个犯罪，但是被告通过其权力有针对性的帮助了特定的军队，而没有普遍性的针对其他军队，对特定性可做扩大解释。2、从主客观上分析，主观上被告明确知道该军队对平民进行暴力犯罪，在客观上依然提供后勤、技术帮助，对犯罪的实现，是希望或者放任犯罪结果发生的，事实上也产生了实质作用。3、从结果上来说，因为被告提供的实质性帮助，对犯罪的发生产生了实质性的贡献。对是否构成犯罪而言，不是看实施犯罪的距离远近，而是是否产生了实质性的帮助和影响。</p>
2	1	S	H	0		1	<p>A state behavior shall be distinguished from an individual behavior when deciding whether a person shall be convicted of war crimes. The accused is found guilty because he played an active role in committing the crimes against humanity; he organized and led the war crimes.</p> <p>对战犯的判定应区分国家行为和个人行为，有罪是因其行为在反人类罪等罪行中发挥了积极作用，组织、领导了战争罪行。</p>
3	1	S	H	0		1	<p>A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparing or executing a crime provided in articles 2 to 5 of the Statute shall be individually liable of the crime. Any official position held by the accused, either head of state or chief of government or government official does not exempt the person from individual criminal liability or lessen the punishment. For any act provided in articles 2 to 5 of the Statute, if a superior knows or has reason to</p>

know his/her subordinate is to commit or has committed such act and does not take any necessary and reasonable action to prevent such act or punish the actor, the fact that the act was committed by the subordinate shall not relieve the superior of criminal liability.

策划、鼓动、命令、实施或以其他方式帮助和教唆他人策划、准备或执行本规约第 2 条至第 5 条提及的一项犯罪的人，对该犯罪负个人责任。任何被告人的官职，不论是国家元首或政府首脑或主管政府官员，均不构成免除本人的刑事责任或减轻惩罚的理由。对于本规约第 2 条至第 5 条提及的任何一种行为，如果上级知道或有理由知道其下级即将实施或已经实施此种行为，而上级不采取必要的合理措施防止此种行为或惩罚此种行为的行为人，则行为由下级所实施的事实，并不免除该上级的刑事责任。

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4	1	S	H	0	1	<p>Specific direction shall not be an element for establishing the accused's aiding and abetting liability to the HVO's murder, persecution and inhuman acts against the residents in town. The HVO was not subordinated to the accused and did not need to obey his command. Horvat has supplied weapons, training and technical support to the HVO after becoming aware of HVO's discriminating killing of the civilian population. He should have known what would happen in the event of war, and he had inescapable liability for the occurrence of the killing. Including specific direction as an element of the crime will allow those behind the scenes to escape justice. The court represents the common conscience and universal values of human. Mass execution and killing of civilians are crimes against humanity and gross violations of human rights. Hence, the accused shall be punished severely to embody the consensus of mankind. I hold that the accused is guilty!</p> <p>帮助，教唆哥波士那共和国军队对小镇军民实施谋杀，迫害及不人道的行为不应该以特定性为定罪要件，被告与哥波士那共和国军队非隶属关系，后者不需听从前者军事命令。霍瓦特在明知后者军队实施了对平民的无差别杀害后还继续向后者提供必要的兵器，培训及技术支持，其应当知晓在战争状态下会出现的局面，被告为此对这些杀害需要负不可推卸的责任。如果以特定性为定罪要件则那些幕后实施者将以此逃脱法律的制裁。国际法庭代表人类共同点良知和普适的价值观，对大规模的杀害和针对平民的杀戮是反人类的具体表现，是对人权的严重践踏，因此对被告的严惩体现出人类的共识。我认为被告有罪！</p>
5	1	S	H	0	1	<p>The facts found show that the accused was provided with information of the army's commission of acts against humanity but still offered his assistance. The elements of the mens rea and the actus reus are consistent with each other. Therefore, the accused is guilty of the crime.</p> <p>根据已查明的案件事实，被告人通过相关信息可以得知军队在实施反人类的行为还坚持给予援助，主客观相统一。故作出有罪判决。</p>
6	1	S	H	0	1	<p>Decision of the trial court is made based on the appellant's inactions on a specific behavior. It can be concluded from existing evidence and facts that the appellant did not take any action to prevent the criminal acts after becoming aware of the crime. During a continuous bombarding of Mostar which lasted for three years, the accused did not take any affirmative action to deal with civilian casualties. No encouragement or support specifically directed towards a specific crime can be found. However, since the appellant, with the awareness of such crimes, had never taken any action to deal with the specific crimes occurred during the military attack, it can be established that the appellant has acquiesced to such behavior.</p>

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一审法院作出判决的依据是上诉人对特定行为的放纵，从现有证据和事实不难看出，上诉人在知晓相关罪行之后并没有采取任何行动来防止此类行为的发生。对莫斯塔镇的炮击持续三年，期间上诉人没有采取积极行动来应对产生的平民伤亡。确实无法看出对于特定犯罪的鼓励和支持。但是，对于军事攻击中的特定犯罪行为，上诉人在明知的情形下从未进行处理，可以认为上诉人默许此类行为的发生。

7	2	S	H	1	1	1	<p>The precedent is relatively clear. The reasons the defense provide are not sufficient to acquit him. Furthermore, according to the Statutes, a person who committed such acts shall be convicted of aiding and abetting.</p> <p>先例比较明确，被告理由不足以说明其无罪。另外根据规约，帮助犯罪应当被定罪。</p>
8	2	S	H	1	1	1	<p>The trial court judgment is correct in applying the law. The accused should be found guilty according to the Statute and the Sainovic decision.</p> <p>一审判决适用法律正确，根据规约和沙案，应当判处被告有罪。</p>
9	2	S	H	0		1	<p>As the accused has facilitate the provision of assistance to the army, the HV was provided with adequate logistical support for carrying out military operations, including inhuman forcible migration and massacre. As a senior officer of the army, the accused should be able to know that those acts are likely to occur during military operations. Although the accused's assistance was not specifically given to promote inhumane acts, his actual assistance to the army and his ability to anticipate the army's conduct falls within the scope of "specific direction". Therefore, the accused is found guilty.</p> <p>被告人对军队的支持的督促，使得克罗地亚军能够有充足的后勤保障进行军事活动，包括进行非人道的强制迁徙、屠杀等行为，被告人作为军队的高级将领，应当能认识到这支军队在军事活动中会有该类行为。虽然被告人没有特定针对此次反人类行为进行支持，但是其对该支军队的支持，对该支军队行为的预见，应当涵盖在“特定”的概念中。因此被告人有罪。</p>
10	1	S	H	0		0	<p>First, the accused provided military assistance to the HVO. The act was to implement the decision made by the government and what the accused did was to perform his duties. Second, the existing evidence is insufficient to prove that the accused has aided or abetted the HVO in commission of the charged crime. Thus, the accused is not guilty.</p> <p>一、被告人执行国家决定对哥波士那军队进行军事援助，其是履行职务行为；二、现有证据不足以证明被告人教唆或明知哥波士那军队从事指控罪行。因此，被告人无罪。</p>
11	2	S	H	1	0	0	<p>1. Precedent. 2. It is the duty of logistics officers to ensure the sufficiency of supply to the frontline, while the usage of the supply is determined by the frontline force. We should not expect the accused to control the usage of the supply. 3. If the accused was convicted of the crime, how many similar cases will exist throughout the world?</p> <p>1.案例。2.对于部队后勤部门官员、保障前线供给是职责所在，至于将补给做什么用途这是前线部队所决定的。我们不能苛责其对补给的使用做要求。3.如果此案做有罪判决，世界范围内有多少相同的情况？</p>
12	1	S	V	0		1	<p>The accused does not challenge the fact finding of the trial court. Therefore, the Appeals Chamber will not discuss the factual issues here. The issue of the appeal thus focuses on whether "aiding and abetting" under Article 7(1) of the Statute requires</p>

“specific direction”. In my view, this article requires “specific direction” provided that “specific direction” is construed as “providing material assistance with the knowledge that some specific crime is committed by the principal.” This means that (1) the actus reus of “aiding and abetting” does not require the aider or abettor to directly aim at assisting a particular crime, but should look into whether “material assistance” is provided; (2) the mens rea element requires ‘knowingly’. Thus, the elements of “specific direction” is similar to those of dolus eventualis, i.e. “the accused knew a specific crime could probably occur yet aided or abetted the crime”, and specific direction shall be determined based on a definite subjective requirement in combination with relatively broad objective requirements. According to this standard, the accused obviously has met the specific direction requirement.

本案中，被告对于初审判决事实认定并不持异议，上诉法庭对事实部分再在论述。本案争议的焦点，集中在适用的规约 7 条（1）的“帮助，教唆”是否须具备“特定性”。我认为，应该具备“特定性”，但需要对“特定性”进行解释，应当将其理解为“明知主犯的特定犯罪行为，仍提供实质性帮助”。也就是说，在“帮助，教唆”的客观方面上，其要件不要求直接针对并援助特定犯罪，而应该判断其行为是否提供了“实质性”的帮助；而在主观方面，应强调被告“明知”要素。因而，“特定性”的要件构造应与间接故意的构造相似，“明知可能发生一定特定犯罪结果，仍然予以帮助，教唆”，以明确的主观方面与相对宽泛的客观方面相结合，以确认其特定性。显然，以此标准，被告已满足特定性的要求。

13	1	S	V	0	1	<p>The court reached a conclusion based on the facts of the case and the rules of the International Criminal Tribunal for the former Yugoslavia and applicable international statutes.</p> <p>根据南斯拉夫前南法庭的裁判规则以及国际相关规约，依据本案事实内容，依法作出公正裁判。</p>
14	1	S	V	0	1	<p>It is true that the accused has aided and abetted the crime in violation of the Statute with the awareness of a war against a country. Although no explicit intent was found that the assistance was aiming at attacking this country, the accused’s knowledge and the specific circumstances suggest that such aiding and abetting conducts was specifically provided for the commission of the crime.</p> <p>被告确实违反规约提供了教唆帮助行为，且是在明知该有针对该国家的战争的情况下。虽然没明确的意思表示其针对该国家，但从其明知的内容及特定环境看，这种帮助教唆已具有针对性。</p>
15	1	S	V	0	1	
16	1	S	V	0	1	<p>First, the accused satisfies the subjective and objective elements of aiding and abetting liability under the Statute. In fact, the army he aided actually committed criminal acts. Second, the central issue of the case is whether specific direction is an essential element of the crime. I contend that although specific direction is not explicitly provided in the Statute, the legislative purpose is to punish persons who aids or abets a war crime. The accused provided assistance and support in full knowledge that the army intended to commit unlawful acts of war and this action has clearly departed from the legislative intent of the Statute. From a practical sense, if specific direction is considered as an element of crime, as noted by the prosecution, it’s very unlikely to establish specific direction in its narrow sense in a real-world scenario. Including specific direction as an element of crime will make Article 7 of the Statute ineffective and meaningless in practice.</p>

首先，被告人的主客观上已经符合规约中教唆、援助的构成要件，实际上其援助的军队也确实实施了相关犯罪行为。其次，本案争议焦点无非是犯罪构成以不以特定性为要件，本人认为，规约中虽未对特定性进行明确约定，但是从立法目的可以看出惩治教唆、援助的战争犯是立法者原有之意，被告人本身在主观上已经知晓军队欲施行违法战争行为的情况下予以支援帮助，可见已经违反规约立法的宗旨。再者，从现实意义来说，若将特定性做为顶罪条件，如公诉人所说，这种狭义的特定性很难在现实中实现，若将特定性作为定罪条件，其实就是将规约第7条视为了无效条款，使之失去现实意义。

17	1	S	V	1	0	1	<p>1. "Specific direction" is not a requisite element of aiding and abetting crime. 2. The accused knew of the violent conducts of this organization but still provided logistics and technology assistance to this organization, i.e. knowingly provided the assistance. 3. The facts pattern of the present case are different from those in the precedents, so the precedents are not applicable. 4. Therefore, the accused should be held guilty.</p> <p>1. “特定性”不是构成该罪的必要构成要件。2.被告人明知该组织从事残暴行动等，仍对其提供后勤、技术等援助，主观上为明知而继续提供。3.本案与前例案件存在案件事实实体的不同，不能引用。4.故判有罪。</p>
18	1	S	V	1	1	1	<p>The precedents show clearly that specific direction is not an element of aiding and abetting liability. The defense of the accused cannot stand. The accused shall be convicted of the crime pursuant to the related statutes and the precedents.</p> <p>先例明确指向特定性不是构成帮助罪的构成要件。被告辩护理由不能成立。应当依据法规和先例判定被告罪名成立。</p>
19	2	S	V	0		1	
20	2	S	V	1	1	1	<p>The prior precedent (Sainovic) clearly suggests that specific direction is not a requisite element of aiding and abetting liability. The facts and nature of the present case are not very different from Sainovic. The accused is thus found guilty.</p> <p>以前的判例（沙案）比较明确的说明了特定性不是帮助、教唆罪成立的要件。本案事实性质和沙案并无明显不同。因而判决有罪。</p>
21	1	S	V	0		0	<p>According to Article 7 of the Statute, to find aiding and abetting liability, the specific direction requirement shall be satisfied and the aider shall be able to foresee the practical effect of his assistance on the occurrence of crime. An aider who is not able to foresee that his assistance will facilitate the commission of a crime shall not be found guilty of aiding and abetting of that crime. In the present case, the Prosecution had no evidence showing that the accused has provided assistance with the awareness that his act would facilitate the commission of the crime. Hence, the accused is not guilty.</p> <p>根据公约第七条的规定，教唆和帮助犯罪应该具有特定性，且对自己的援助行为对犯罪的发生具有实际影响具有预见性，如果提供援助的人，无法预见自己的援助行为会用于犯罪，就不应对此犯罪行为承担教唆和帮助的刑事责任。本案中，公诉方并没有证据证明被告明知自己的援助用于犯罪而仍然提供援助，所以无罪。</p>
22	1	V	H	0		1	<p>Horvat provided material assistance to HVO, which substantially facilitated the war. The grounds for the prosecution are established and Horvat shall be found guilty.</p> <p>霍瓦特对克罗地亚军提供了实质性帮助，对战争发展起了实质性促进作用，公诉机关的公诉理由成立，霍瓦特应该被认定为有罪。</p>

23	1	V	H	0	1	Specific direction cannot be considered as a requisite element of aiding and abetting crime. 特定性不能作为帮助和教唆犯的构成要件。
24	1	V	H	0	1	My decision is consistent with the trial court decision. 与一审判决一致。
25	1	V	H	0	1	As an army member, besides obeying orders and providing supplies, Horvat was also definitely responsible for safeguarding the national security and protecting people's interests, even for protecting the interests of citizens of other countries. Since Horvat knew that the provision of ammunition would probably wound the civilians yet he still did it, he is deemed to have knowingly connived the harmful result. Furthermore, Horvat did not lack alternatives or opportunities. Given that the army and the civilian have completely incomparable forces, he certainly could have reduced or even prevented further casualties by taking actions such as giving warnings or reducing the quantity of ammunition supplied. Based on the foregoing reasoning, the Prosecution did not err in issuing the indictment and all charges to the accused are established. 霍作为军事人员，在明确服从命令及提供补给的同时，更应当明确维护国家安全和保障人民利益的责任，即使是他国公民的利益。因此，霍在明知提供弹药会造成人员损伤的情况下，仍继续予以供给，已对损伤结果的实害持放任的故意主观。并且，霍并非没有选择的权利和机会，在军、民武装力量悬殊的前提下，其完全可以通过适当提示弹药可能给人民造成的损伤、减少弹药供给等手段减少甚至防止更大的人员伤亡。综上，检方控诉无误，所有罪名均成立。
26	2	V	H	0	1	Specific direction is not a requisite element of the crime and the conducts of the accused have fulfilled the elements required for aider and abettor's liability. The alleged specific direction requirement is a too stringent element and shall not be established in the present case. Also, one shall not question or amend the content of statutes in individual cases. For all the crimes against humanity, the punishment to the conduct is far more important than the legal analysis of such a conduct. And there is a direct and certain causal relation between the acts committed by the accused and the consequence. Therefore, the accused is held guilty. 特定性不构成犯罪要件，被告人的行为构成帮助犯。所谓特定性的约束过于严苛，不应在本次案件中予以认定，且在个案判决中也不应当涉及对法规条文的修改质疑。对于一切反人类的罪行，对于行为的惩罚要远高于对其行为的法律定性。对于被告人的所犯下的事实行为，其因果关系是直接既定的并且毋庸置疑的。因此，判定被告人有罪。
27	2	V	H	0	1	Subjectively, the accused knew the criminal acts committed by the army as well as the potentially dangerous consequences of his assistance. Objectively, the accused helped the army conduct killings of civilians by providing financial and other assistance. There is an inevitable connection between the crime committed by the army and the assistance provided by the accused. I so decided based on zero tolerance to the crimes against humanity. 主观上知晓军队的恶行，了解其所实施的帮助行为可能产生的危害后果。客观上其行为通过资助等形式帮助军队实施了虐杀平民等种。军队的罪行与被告人的帮助行为有必然的联系；基于对反人类罪行的零容忍。
28	2	V	H	0	0	Substantial effect on the crime committed is a required element of aiding and abetting liability. Whether there is a substantial effect shall be determined on the condition of establishing specific direction. Since neither specific direction nor

substantial effect was established in the trial court, the accused should not be convicted of the crime based on the existing evidence.

对犯罪行为产生实质性影响是教唆犯罪的法定要素，判断是否产生实质性影响应以特定性为条件，一审中并未认同特定性，也未证明这种实质性影响，故依靠现有证据，无法定罪。

29	2	V	H	1	0	0	<p>The precedent of this case is not very clear. However, as alleged by the accused, all persons who assume the general leadership responsibility will be found guilty of waging war if specific direction is not required. This will unnecessarily enlarge the scope of the crime. Moreover, the International Court of Justice shall restrain its power rather than expanding the scope of law enforcement through improper application of precedents and therefore interfering with the internal affairs of other countries.</p> <p>本案判例并不十分明确，但如被告上诉所言，如果不要求特定性，将使所有负有一般性领导责任的人都承担帮助发动战争罪的罪名，这将不必要的扩大犯罪的范围。另外，国际法院应当限制自己的权力，不应当用判例的方法扩大自己的执法范围，干涉别国内政。</p>
30	1	V	V	1	1	1	<p>The central issue is whether “specific direction” is a required element to hold the appellant criminally liable. Based on the precedents and the statutes provided, “specific direction” is not required by law and therefore the legal ground proposed by the appellant is not sustained.</p> <p>双方的争议焦点为“特定性”是否是上诉人构成犯罪的构成要件之一。阅读提供的案例及法律，“特定性”没有被要求，所以上诉人的理由不成立。</p>
31	1	V	V	0		1	<p>The accused directly participated in the decision-making process in the war against Serbia. He coordinated the provision of logistical assistance and showed a clear intention to provide assistance in the statement report to the SDC during his tenure as Chief of the VJ General Staff. I think Vuković is guilty taking into account the finding that “the legal standard does not require that the accused be the exclusive source of assistance</p> <p>被告在前南斯拉夫军队中任总参谋长直接参与对塞战争的决策，提供后勤援助协调，并在向最高国防委员会的陈述报告中提供了具有明显的帮助意思。结合“法律标准不要求原告是唯一援助来源”的裁定。我认为武科维奇有罪。</p>
32	1	V	V	1	0	1	<p>1. Vuković’s acts of assistance objectively facilitated the wounding of civilians in the war; subjectively, the accused knew the harmful result of his acts, which satisfies the requirement of Article 7(1) of the Statute; 2. With regard to the controversial issue in the appeal, namely whether aiding and abetting liability requires specific direction, the court believes that specific direction is not required by Article 7(1) of the Statute. For aiding and abetting liability to arise in criminal law theory, the aider or abettor is only required to have some general knowledge of basic elements of the crime which was alleged to be assisted. In fact, the specific direction standard stated by the appellant and set out in precedents does not require the aider or abettor to have knowledge about a specific crime he is aiding or abetting, but only require the aider or abettor to understand the basic elements of a crime. In the present case, as the facts show, Vuković’s acts of assistance with personnel and weapons, in combination with the element of the mens rea such as his knowledge that his assistance might facilitate war crimes, are adequate to convict him of criminal liability.</p> <p>1，本案被告人武科维奇所实施的帮助行为在客观上实现了战争对平民的伤害，主观上被告人也知晓其行为将会发生的危害结果，符合南斯拉夫刑事规约</p>

第 7 条第 1 项的规定；2，关于本案上诉过程中的争议焦点，即帮助，教唆行为是否需要特定性的问题，承办人认为，南斯拉夫刑事规约第 7 条第 1 项并未要求特定性标准，帮助，教唆行为在刑法理论上只要求帮助人或教唆人对直接实施的犯罪行为有刑法层面构成要件的基本要素有所认识，因此，事实上上诉人所提出的特定性标准及所涉及案例中提出的特定性，亦不是要求帮助人对特定犯罪有所认识，而是对犯罪构成有基本要素的认识。本案中，武科维奇实施的人事，武器等方面的援助行为，以及事实查明中显示的对其提供援助行为可能促进战争罪行有所知悉等主观因素相结合，都足以认定被告人所犯的罪行。

33	1	V	V	0	1	<p>1. Regarding the actus reus, the accused provided personnel and weaponry assistance to the VRS, which in fact substantially facilitated the crime committed by the VRS. 2. Regarding the mens rea, the accused knew that the VRS would commit a series of crimes in the territory of Bosnia and knew that his assistance could substantially facilitate the commission of those crimes. 3. Specific direction is not a requisite element of the crime. It is sufficient to constitute the crime when the accused is aware that his assistance could substantially facilitate the commission of crimes committed by the VRS, while which specific crimes are committed by the VRS were not within the control of the accused. Further, the VRS did use the personnel and weaponry assistance provided by the accused to perpetrate the crimes, which has caused seriously harmful consequences for Bosnia.</p> <p>1、客观方面，被告向塞族共和国提供了军事人员援助、武器援助等，客观上对塞族的罪行提供了具有实质影响力的帮助；2、主观方面，被告明知塞族会在波斯尼亚境内实施系列罪行，且明知自己的帮助行为会为塞族犯罪行为的实施提供实质性的便利；3、特定性并非被告构成犯罪的必要构成要件，被告只需要主观上明确自己的帮助行为会给塞族的犯罪行为提供实质性便利，而塞族具体实施何种罪行则不是被告所能掌控的，且客观上塞族确实已经利用被告提供的军事人员援助、武器援助等便利实施了犯罪行为，对波斯尼亚造成了严重后果。</p>	
34	1	V	V	0	1	<p>In cases of remoteness, the accused can be convicted of aiding and abetting crime as long as his assistance has in fact facilitated the commission of the crime in term of the result. Therefore, the issue of specific direction need not to be considered.</p> <p>远距离的情况下，只要其帮助在结果上的确为犯罪提供了帮助，那么就可不考虑特定性的问题，认定为有罪。</p>	
35	1	V	V	0	1	<p>Regarding actus reus, the accused has provided logistical and personnel assistance; and regarding mens rea, he has acquiesced to the act of war and continued to facilitate the acts of assistance.</p> <p>客观上提供了后勤及人事帮助，主观上默认实施的战争行为，继续促成援助行为。</p>	
36	1	V	V	1	0	1	<p>Specific direction is not an element of the crime pursuant to Article 7 of the Statute. However, the precedents of the Appeal Chamber interpreted this article in a different way. The material shows that the Tribunal determined that a crime should consist of four elements, i.e. subjective side, objective side, the subject of the crime, and the object of the crime. This theory was adopted by countries that were under the influence of the USSR. Therefore, the precedents of the superior court shall be only seen as reference or guidance, rather than binding interpretations of the law. Hence, we should find the meaning of the statute from the statute itself. Thus,</p>



specific direction is not a required element of this crime. The accused has satisfies all four elements of the crime charged and is therefore found guilty.

从规约第七条来看，不能认定特定性是该罪名构成要件之一，但上诉法院的判例对该条重新作出了解释。从材料来看，该国际法庭对犯罪构成要件判断为主观-客观-主体-客体四要件模式，此为前苏联影响下的地区适用模式。因此，上级法院的判例仅供参考或指导，并非等同于司法解释或者立法解释。故还是应该从法律本身去理解规约含义，故特定性不是该罪名构成要件之一，因此该被告被控罪名符合四要件，有罪。

37	2	V	V	1	1	1	The trial judgment is correct. Previous precedents do not set out clear rules that govern the current case. But more recent precedents indicate that the decision ought to be so. 本案一审判决正确。判例并不明确，但最近的判例指出应如此判决。
38	1	V	V	1	1	0	I agree with Judge Moloto's opinion. 同意 moloto 法官意见。
39	1	B	H	0		1	Aiding and abetting does not require specific object and shall not be interpreted narrowly, especially when a crime against humanity is in question. 教唆无需特定的具体的对象，尤其在涉及反人类罪行方面，不能做狭隘解释。
40	1	B	H	0		0	There is no substantial evidence finding that this is an individual conduct. 没有实质证据表明是个人行为。
41	1	B	H	0		0	War is a continuation of politics and rulers represent the interests of the ruling class. As an officer of the party who organized the war, the accused was making specific decisions to implement the goal of his supervisors and to achieve the strategic objectives; his issuance of order to providing supports shall not be regarded as his personal and subjective support to the massacre, even though he had knowledge of a few killing incidents. The law and the state impose more restrictions on the army members within the army management system than on regular citizens. Failure to obey a military order may result in death penalty. Therefore, we cannot force him to risk his life and career and expect him not to provide assistance to the army in violation of his superior's order and strategic plan. The accused's order of providing assistance to the massacre was to fulfill his duties and the consequences shall not be attributed to the person who signed and issued the assistance order. Hence, the accused is not guilty. 战争是政治的延续，统治者是统治阶级利益的代表。被告作为组织战争的一方工作人员，为贯彻上级意图、实现战略目标而做出的具体决策，其对被支援军队的个别屠杀行为的知晓，不足以将其对支援命令的签发视为对屠杀行为持主观支持态度。作为军队管理体系中的军人，法律和国家对其主观意愿方面的限制较社会一般公民更为严格，违反军令者最高可处以生命刑。我们不能强迫其冒生命危险、贬斥风险而要求其违反上级命令和战略意图放弃支援屠杀军队。对发生屠杀行为的支援是职务行为，不应由签署、决策的被告个人承担。故判决无罪。
42	1	B	H	0		0	1. Entering into military assistance treaties between countries with regard to providing weaponry, equipment, logistical and material support is a normal international activity. Such decision is made by the government of a state, rather than an individual. Therefore, an individual should not be held personally responsible for this decision; 2. The accused provided weapons and equipment even after becoming aware that such weapons and equipment were used in killing of civilians.

But such acts do not constitute aiding or abetting crime. First of all, his provision of weapons and equipment did not violate any international law. Secondly, the accused did not explicitly or implicitly cause another person to commit unlawful acts, but only provided tools to others who then used them to commit unlawful acts. Finally, the way the weapons and equipment were used did not depend on the will of the accused.

一、国与国之间，签订军事援助条款，提供武器装备和后勤物资的帮助，是正常的国际行为，是一个国家政府的决策，并不是一个人决策，不当由个人来承担责任；二、被告人虽然在知道对方使用其所提供的武器装备在对平民进行屠杀后任然继续为其提供武器装备，这一行为不能被认定帮助、教唆他人犯罪。首先，其向对方提供武器装备的行为没有违法国际法；其次，其主观上并未明确或暗示他人去进行违法行为，只是向他人提供了进行违法行为的工具；最后，他人如何使用其所提供的武器装备并不因其的意志所决定。

43	2	B	H	0	0	0	Although the conducts of the accused have in fact facilitated the occurrence of war, the act does not satisfy the strict element under the law. 事实上虽然推动了战争，但不符合该法条的严格构成要件。
44	2	B	H	1	1	0	The precedents clearly show that specific direction is a required element of aiding and abetting war crimes. The trial court is correct in applying the law. The accused should be found not guilty. 此前案件非常明确的指明了特定性是构成帮助战争罪的要件，一审法院适用法律正确，应判处被告无罪。
45	1	B	V	1	0	1	1. "Specific direction" is not a requisite element of the crime. The court believes that a person is liable for aiding and abetting so long as his aiding and abetting conducts facilitate the crime committed by the principal, even if the accused was not personally present at the scene of the crime. At least, a large number of defendants would escape from punishment and the purpose of international treaty and principles will be defeated, if specific direction is a requisite element of this crime. 2. During the war, Vuković, the most senior officer in the VJ, had great discretion in making decisions and implementing them. And certainly he also had the authority to oppose or even prevent an action. In the present case, Vuković provided extensive logistical and personnel assistance. Although he was not a member of the SDC, Vuković, with a good knowledge of the ongoing war, still participated in the meetings of the BDC and explicitly urged the SDC to continue providing assistance, and aided the VRS. The accused has spoken arrogantly and did not take any action to prevent the war. Moreover, the VRS had in fact benefited from such assistance during the war and had actually committed the crime. 3. The Bešić decision is not exclusively directed towards the present case and Vuković, the most senior officer in the VJ, shall not be exempted from individual criminal liability. Analysis shall be made based on the facts of the case. Therefore, it is appropriate to uphold the trial judgment. 1、“特定性”并非构成此罪的必须标准之一，因为笔者认为只需要其帮助、教唆的行为促使了主犯构成某一犯罪，而从犯即教唆者、帮助者若没有实质性的在犯罪现场，也能够使从犯构成此罪。退一步说，若特定性是构成此罪的特定要件，则大量的被告人将免于处罚，国际条约、原则的目的将不能实现。 2、在战争期间，武科维奇担任南斯拉夫人民军的最高军官，具有较大的决策和执行权力，当然也有表示反对、甚至阻拦的权利。在此案中，他实施了大量的后勤援助、人事援助，虽然不是最高委员但仍然参加最高会议并且明确敦促

提供援助行为的进程，也对发生的战事较为了解，在此种情况下仍然对 VRS 提供帮助行为，并不阻挠，且言论嚣张，并且 VRS 也的确因此在战事中“受益”，犯下罪行。3、贝一案的判例并不能唯一指向本案，作为最高军官的武科维奇也不能因此豁免，因根据本案认定的事实具体问题具体分析，维持原判较为妥当。

46	1	B	V	0	1	<p>Vuković used his powers to provide assistance to the VRS with knowledge that VRS has committed multiple crimes, which has satisfied the elements of crime under Article 7 of the Statute. “Specific direction” alleged by the appellant is not a requisite element of the crime under Article 7 of the Statute.</p> <p>武科维奇在明知塞族共和国军的各种犯罪行为的情况下，仍然利用其职权向其提供帮助，符合规约第七条的犯罪构成要件。被告方上诉所称“特定性”并非规约第七条规定犯罪的必要犯罪构成要件。</p>
47	2	B	V	0	1	
48	1	B	V	0	0	<p>The assistance provided to the army had no direct and substantial effect on the commission of crime by the army. Even if the accused knew the practical effect of his assistance, he could not do anything to control the effect. Taking into account of both subjective and objective elements, the accused shall not be held criminally liable.</p> <p>向军队提供帮助与军队实际实施的犯罪行为并无直接实质性影响，即使被告主观明知对实际战争的结果也不具有控制性。综合主客观因素，被告个人不应承担刑事责任。</p>